

**IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED IN
ACCORDANCE WITH ARTICLE 5 OF THE ARBITRATION AGREEMENT BETWEEN
THE GOVERNMENT OF SUDAN AND THE
SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY
ON DELIMITING ABYEI AREA**

- and -

**THE PERMANENT COURT OF ARBITRATION OPTIONAL RULES
FOR ARBITRATING DISPUTES BETWEEN TWO PARTIES
OF WHICH ONLY ONE IS A STATE**

- between -

THE GOVERNMENT OF SUDAN

- and -

THE SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY

FINAL AWARD

The Arbitral Tribunal:

Professor Pierre-Marie Dupuy (Presiding Arbitrator)

H.E. Judge Awn Al-Khasawneh

Professor Dr. Gerhard Hafner

Professor W. Michael Reisman

Judge Stephen M. Schwebel

Registry:

Permanent Court of Arbitration

The Peace Palace, The Hague

July 22, 2009

**AGENTS, COUNSEL, AND
OTHER REPRESENTATIVES OF THE PARTIES**

GOVERNMENT OF SUDAN	SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY
<ul style="list-style-type: none"> ▪ Ambassador Dirdeiry Mohamed Ahmed, Dirdeiry & Co., Khartoum, Sudan, as Agent ▪ Dr. Faisal Abdel Rahman Ali Taha, Permanent Boundaries Committee, Abu Dhabi, United Arab Emirates, as Co-Agent ▪ Dr. Abdelrahman Ibrahim Elkhalfa, Khartoum, Sudan, as Co-Agent ▪ Professor James Crawford, Q.C., SC, F.B.A., Whewell Professor of International Law, University of Cambridge, member of the Institut de droit international, as Counsel and Advocate ▪ Dr. Nabil Elaraby, former Judge of the International Court of Justice, Director of the Cairo Regional Centre for International Commercial Arbitration, as Counsel and Advocate ▪ Professor Alain Pellet, University of Paris Ouest, Nanterre-La Défense, member and former Chairman of the International Law Commission, associate member of the Institut de droit International, as Counsel and Advocate ▪ Mr. Rodman Bundy, avocat à la Cour d'appel de Paris, Member of the New York Bar, Eversheds LLP, Paris, as Counsel and Advocate ▪ Ms. Loretta Malintoppi, avocat à la Cour d'appel de Paris, Member of the Rome Bar, Eversheds LLP, Paris, as Counsel and Advocate ▪ Ms. Angelynn Meya, avocat à la Cour d'appel de Paris, Member of the New York and Connecticut Bars, Eversheds LLP, Paris, as Legal Advisor ▪ Mr. Jacques Hartmann, Research Associate, Lauterpacht Centre for International Law, University of Cambridge, as Legal Advisor ▪ Ms. Céline Folsché, Member of the New York Bar, Researcher at the Centre de Droit International (University of Paris 	<ul style="list-style-type: none"> ▪ Dr. Riek Machar Teny, Vice President, Government of Southern Sudan and Deputy Chairman, Sudan People's Liberation Movement, Juba, Sudan, as Agent ▪ Dr. Luka Biong Deng, Minister of Presidential Affairs, Government of Southern Sudan, Juba, Sudan, as Agent ▪ Mr. Gary Born, Wilmer Cutler Pickering Hale and Dorr LLP, London, United Kingdom, as Counsel ▪ Ms. Wendy Miles, Wilmer Cutler Pickering Hale and Dorr LLP, London, United Kingdom, as Counsel ▪ Professor Paul R. Williams, Public International Law & Policy Group, Arlington, Virginia, USA, as Counsel ▪ Ms. Vanessa Jiménez, Public International Law & Policy Group, Arlington, Virginia, USA, as Counsel ▪ Mr. Charlie Caher, Wilmer Cutler Pickering Hale and Dorr LLP, London, United Kingdom, as Counsel ▪ Ms. Kate Davies, Wilmer Cutler Pickering Hale and Dorr LLP, London, United Kingdom, as Counsel ▪ Ms. Anna Holloway, Wilmer Cutler Pickering Hale and Dorr LLP, London, United Kingdom, as Counsel ▪ Ms. Daisy Joye, Wilmer Cutler Pickering Hale and Dorr LLP, London, United Kingdom, as Counsel ▪ Ms. Inken Knief, Wilmer Cutler Pickering Hale and Dorr LLP, London, United Kingdom, as Counsel ▪ Mr. Timothy Lindsay, Wilmer Cutler Pickering Hale and Dorr LLP, London, United Kingdom, as Counsel ▪ Mr. Oliver Spackman, Wilmer Cutler Pickering Hale and Dorr LLP, London, United Kingdom, as Counsel ▪ Ms. Anna-Maria Tamminen, Wilmer Cutler Pickering Hale and Dorr LLP, London, United Kingdom, as Counsel ▪ Ms. Lisa Tomas, Wilmer Cutler

<p>Ouest, Nanterre-La Défense), as Legal Advisor</p> <ul style="list-style-type: none"> ▪ Mr. Paul Baker, Trainee Solicitor, Eversheds LLP, Paris, as Legal Advisor ▪ Mr. Charles Alexander, Research Assistant, Lauterpacht Centre for International Law, University of Cambridge, as Legal Advisor ▪ Mr. Alastair Macdonald, former Director of Surveys and Production, former acting Director General at the Ordnance Survey of Great Britain, former Member of Council of the Royal Geographical Society and former President of Commission IV of the International Society of Photogrammetry and Remote Sensing, as Expert ▪ Mr. Martin Pratt, Director of Research, International Boundaries Research Unit, Durham University, UK, as Technical Advisor ▪ Ms. Eleanor Scudder, Research Associate, International Boundaries Research Unit, Durham University, UK, as Technical Advisor ▪ Mr. Abdel-Rasul El-Nour, Former Governor of Kordofan ▪ Professor Yousif Fadl Hasan, Professor of Arab and Islamic History, Former Vice Chancellor, University of Khartoum ▪ Dr. Hasan Abdin, Associate Professor of African History, University of Khartoum, Former Under-Secretary, Ministry of Foreign Affairs ▪ Dr. Mohamed Osman El-Sammani, Associate Professor of Geography and Environmental Studies, University of Khartoum ▪ Dr. Suliman El-Debailo, Associate Professor, Gezira University ▪ Mr. Mohamed Nimir Babu Nimir, Advocate and Commissioner, Sudan Bar ▪ Mr. El-Amin Mohamed Bannaga, Surveyor 	<p>Pickering Hale and Dorr LLP, London, United Kingdom, as Counsel</p> <ul style="list-style-type: none"> ▪ Mr. Jason Fisher, Wilmer Cutler Pickering Hale and Dorr LLP, London, United Kingdom, as Counsel ▪ Ms. Bridget Rutherford, Public International Law & Policy Group, Arlington, Virginia, USA, as Counsel ▪ Ms. Meghan Stewart, Public International Law & Policy Group, Arlington, Virginia, USA, as Counsel ▪ Ms. Courtney Nicolaisen, Public International Law & Policy Group, Arlington, Virginia, USA, as Assistant Counsel ▪ Mr. Anand Shah, Public International Law & Policy Group, Arlington, Virginia, USA, as Assistant Counsel ▪ Professor Martin Daly, Maine, USA ▪ Dr. Peter Poole, Quebec, Canada ▪ Professor John Anthony Allan, Professor of Geography at King's College, London, United Kingdom ▪ Mr. Richard Schofield, Senior Lecturer in Boundary Studies, Department of Geography, King's College, London, United Kingdom and Director of Menas Borders Limited ▪ Mr. Scott Edmonds, President, International Mapping ▪ Mr. Alex Tait, Vice-President, International Mapping
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GLOSSARY OF NAMES

This Glossary contains key terms used in the Award. Some place names, geographic features, and locations have varied spellings; these are also identified below.

1898 Gleichen Handbook	“Handbook of the Sudan” compiled in the Intelligence Division, War Office by Captain Count Gleichen (1898)
1905 Gleichen Handbook	“The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government” edited by Lieutenant-Colonel Gleichen (1905)
ABC	Abyei Boundaries Commission
ABC Experts or Experts	The five experts nominated by the United Kingdom, the United States of America and the IGAD to the ABC (Ambassador Donald Patterson, Dr. Kassahun Berhanu, Prof. Shadrack B.O. Gutto, Dr. Douglas H. Johnson, Prof. Godfrey Muriuki)
ABC Experts’ Report or Report	Report presented by the ABC Experts to the Sudanese Presidency on July 14, 2005
Abyei Appendix or Abyei Annex	Appendix to the Abyei Protocol relating to the Parties’ “Understanding on Abyei Boundaries Commission”
Abyei Area or Formula	the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905
Abyei Protocol	Protocol on “The Resolution of Abyei Conflict” signed by the Parties on May 26, 2004
Abyei Referendum	A referendum to be held among the residents of Abyei (simultaneously with the referendum of Southern Sudan) allowing them to vote on whether Abyei shall retain its special administrative status in the north or become part of Bahr el Ghazal
Abyei Road Map	“Road Map for the Return of IDPs and Implementation of Abyei Protocol” signed by the Parties on June 8, 2008
Abyei Town	Town of Abyei located north of the Bahr el Arab river
Anglo-Egyptian Condominium (or Condominium)	Joint British and Egyptian government of Sudan (1899-1956)
Arbitration Agreement	Arbitration Agreement between the GoS and the SPLM/A on delimiting the Abyei Area signed on July 7, 2008
Babanusa	Sandy area in southern Kordofan, north of Muglad
Baggara	Arab nomadic tribes of Western Sudan (southern Kordofan and Darfur) and Eastern Chad

Bahr el Arab	Also referred to as Kir in Dinka, Bahr ed Deynka, Bahr el Homr, Bahr el Jange, Chonyan or Gurf; river that runs from Southern Darfur through Southern Kordofan, and flows into the Bahr el-Ghazal river in the Upper Nile Province
Bahr el Ghazal	Also known as Bahr el Gazal or Nam; river that runs through the Upper Nile Province; Province of Sudan bordering the southwest corner of Kordofan
Bahr el Ghazal Annual Reports	Any of the “Reports on the Finances, Administration, and Condition of the Sudan, Annual Report Bahr El Ghazal Province,” including those published from 1902 to 1905
Bahr el Homr	A reference to either the Bahr el Arab or the Ragaba ez Zarga in the early 20 th century
Bayldon, Sub-Lieutenant R.N.	Military officer who explored a portion of the Bahr el Arab in early 1905
Boulnois, W.A.	Governor of Bahr el Ghazal Province (1904-1905)
CivSec or Civsec	A reference to the Sudan Civil Secretary’s files in Khartoum during the period of the Anglo-Egyptian Condominium
Community Mapping Project	Community mapping project conducted in a portion of the Abyei region with the involvement of a professional community mapping expert, Dr. Peter Toole, and members of the Ngok Dinka community
CPA	Comprehensive Peace Agreement signed by the Parties on January 9, 2005
Cunnison, Professor Ian	Professor of social anthropology who lived with and wrote about the Baggara Humr in the 1950s
Dar	Arabic word for homeland or tribal region
Darfur	Province of Sudan bordering the west of Kordofan
Dinka	Also known as Jange; a collection of tribes of Nilotic origin including, <i>inter alia</i> , the Ngok, the Rueng and the Twic
Dupuis, Inspector C.J.	District Commissioner of West Kordofan in 1921
GoS	Government of Sudan
Goz	Sandy area of transit south of Muglad
Henderson., K.K.D. (1903-1988)	Governor of Darfur Province from 1949-1953
Howell, P.P.	Anthropologist and District Commissioner at Nahud (Kordofan) in 1948
Humr	Also known as Homr; cattle-owning nomadic Arab tribe of southern Kordofan, subgroup of the Messiriya

Humr omodiya	Administrative term referring to a sub-group of Humr under a tribal headman (<i>omda</i>)
Inter-Governmental Authority on Development or IGAD	Regional African organization comprised by the seven countries in the Horn of Africa (Djibouti, Ethiopia, Kenya, Somalia, Sudan, Uganda, and Eritrea)
Interim National Constitution	Interim National Constitution of the Republic of Sudan adopted on July 6, 2005
Khartoum	Capital of Sudan, located in the north of Sudan
Kordofan	Also referred to as Kurdufan; Western Province of Sudan bordering Darfur in the west, Bahr el Ghazal in the southwest and Upper Nile in the southeast
Kordofan Annual Reports	Any of the “Reports on the Finances, Administration, and Condition of the Sudan, Annual Report Kordofan Province,” including those published from 1902 to 1905
Lloyd, Captain H.D.W. (1872-1915)	Governor of Kordofan Province (1908)
Mahdiyya	Time of Mahdist rule of the Sudan (1885-1898)
Mahon, B.T. (1862-1930)	Governor of Kordofan Province (1901-1906)
March 1905 SIR	The Sudan Intelligence Report, No. 128 (March 1905)
Mardon, H.W.	author and cartographer who wrote “A Geography of Egypt and the Anglo-Egyptian Sudan” (1906)
MENAS Expert Report	“The Boundaries and Hydrology of the Abyei Area, Sudan” by Menas Borders Ltd. (February 2009; expert report commissioned by the SPLM/A for this arbitration)
Misseriya	also known as Messeria or Messiria; nomadic tribe of Baggara Arabs
Muglad	Home and cultivation area of the Humr, south of the Babanusa and north of the goz
Nine Ngok Dinka Chiefdoms	Abyior, Achaak, Achueng, Alei, Anyiel, Bongo, Diil, Manyuar, Mareng
Nuers	a nilotic tribe
O’Connell, J.R.	Governor of Kordofan in 1906
Parties	GoS and the SPLMA, collectively
PCA	Permanent Court of Arbitration
PCA Financial Assistance Fund	a fund established by PCA Member States that helps developing countries meet part of the costs involved in international arbitration or other means of dispute settlement offered by the PCA.
Percival, Captain C.	British officer who traveled to the Abyei region in 1904 and 1905
Ragaba	also spelled regaba or regeba; seasonal watercourse

Ragaba ez Zarga	also known as Ragaba ez-Zarga, Ngol, Ragaba Zarga; also referred to, in the early 20 th century, as Bahr el Arab due to geographic confusion; watercourse located north of the Bahr el Arab and the Ragaba Umm Biero
Ragaba Umm Biero	also known as Nyamora, Yamoi, Umm Rebeiro, Umm Bieiro, Umbieiro, Umm Biero; watercourse located north of, and flowing into, the Bahr el Arab
Rizeigat	Also referred to as Rezeigat; Baggara tribe located mostly in the Province of Darfur
Robertson, J.W. (1899-1983)	District Commissioner of Western Kordofan (1933-1936); Civil Secretary (1945-1953)
Rules of Procedure	Rules of procedure prepared by the ABC Experts pursuant to Section 4 of the Abyei Appendix and agreed to by the Parties on April 11, 2005
Sheikh Rihan Gorkwei	also known as Sultan Rihan; chief of the Twic Dinka in 1905
SPLM/A	Sudan People's Liberation Movement/Army
Sultan Rob	Paramount Chief Arop Biong; chief of the Ngok Dinka of southwest Kordofan in 1905
Terms of Reference	Terms of reference adopted by the Parties on March 12, 2005
Territorial Interpretation	the GoS interpretation of the Formula (see paras. 232 <i>et seq.</i>)
Tibbs, Michael	Assistant District Commissioner of the Western Kordofan District (1952-1953); District Commissioner of the Dar Messeria District (1953-1954)
Tribal Interpretation	the SPLM/A interpretation of the Formula (see paras. 232 <i>et seq.</i>)
Turkiyya	period of Turkish-Egyptian rule of Sudan (1821-1881)
Upper Nile	Province of Sudan bordering Kordofan in the east and the southeast
Wilkinson, Major E.B.(1864-1946)	Governor of Gezira Province (1903); Governor of Kassala Province (1903-1908); Governor of Berber Province (1908-1910)
Wingate, Sir. R. (1861-1953)	Governor-General of Sudan (1899-1916)
Wingate's 1904 Memorandum	Report entitled "Reports on the Finances, Administration, and Condition of the Sudan, Memorandum by Major General Sir R. Wingate" published in 1904
Wingate's 1905 Memorandum	Report entitled "Reports on the Finances, Administration, and Condition of the Sudan, Memorandum by Major General Sir R. Wingate" published in 1905

CHAPTER I – PROCEDURAL HISTORY

A. THE ARBITRATION AGREEMENT

1. On July 7, 2008, the Government of Sudan (“**GoS**”) and the Sudan People’s Liberation Movement/Army (“**SPLM/A**,” and together with the GoS, the “**Parties**”) signed the “Arbitration Agreement between The Government of Sudan and The Sudan People’s Liberation Movement/Army on Delimiting Abyei Area” (“**Arbitration Agreement**”).
2. As stated in the Arbitration Agreement, a dispute has arisen between the Parties regarding whether or not the experts (“**ABC Experts**” or “**Experts**”) of the Abyei Boundaries Commission (“**ABC**”), established pursuant to the Comprehensive Peace Agreement signed by the Parties on January 9, 2005 (“**CPA**”), exceeded their mandate as per the provisions of the CPA, the Protocol signed by the Parties on May 26, 2004 on the Resolution of Abyei Conflict (“**Abyei Protocol**”), the appendix to the Abyei Protocol (“**Abyei Appendix**” or “**Abyei Annex**”)¹, and the ABC’s terms of reference (“**Terms of Reference**”) and rules of procedure (“**Rules of Procedure**”).
3. Under Article 1.1 of the Arbitration Agreement, the Parties agreed to refer their dispute to final and binding arbitration under the Arbitration Agreement and the PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State (“**PCA Rules**”), subject to such modifications as the Parties agreed in the Arbitration Agreement or may agree in writing. Under Article 1.2, the Parties agreed to form an arbitration tribunal (“**Tribunal**”) to arbitrate their dispute.
4. In accordance with Article 12.1 of the Arbitration Agreement, on July 11, 2008, the Parties deposited the Arbitration Agreement with the Secretary-General of the Permanent Court of Arbitration (“**PCA**”).
5. Under Article 1.3 of the Arbitration Agreement, the Parties agreed that the International Bureau of the PCA is to act as registry and provide administrative support in accordance with the Arbitration Agreement and the PCA Rules. Pursuant to Article 1.4, the Parties designated the Secretary-General of the PCA as the appointing authority for the proceedings.

¹ The Parties use the terms interchangeably to refer to the same instrument.

6. Under Article 2 of the Arbitration Agreement, the issues to be determined by the Tribunal are the following:
 - (a) Whether or not the ABC Experts had, on the basis of the agreement of the Parties as per the CPA, exceeded their mandate which is ‘to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905’ as stated in the Abyei Protocol, and reiterated in the Abyei Appendix and the ABC Terms of Reference and Rules of Procedure.
 - (b) If the Tribunal determines, pursuant to Sub-article (a) herein, that the ABC Experts did not exceed their mandate, it shall make a declaration to that effect and issue an award for the full and immediate implementation of the ABC Report.
 - (c) If the Tribunal determines, pursuant to Sub-article (a) herein, that the ABC Experts exceeded their mandate, it shall make a declaration to that effect, and shall proceed to define (i.e. delimit) on map the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, based on the submissions of the Parties.

B. CONSTITUTION OF THE ARBITRAL TRIBUNAL

7. Under Article 5 of the Arbitration Agreement, the Parties agreed that the Tribunal shall be composed of five arbitrators, that each Party shall appoint two arbitrators, and that the four Party-appointed arbitrators shall appoint the fifth arbitrator. The Parties agreed not to designate persons other than current or former members of the PCA or members of tribunals for which the PCA acted as registry. Party-appointed arbitrators were to be independent, impartial, highly qualified, and experienced in similar disputes.
8. On July 16, 2008, in accordance with Article 5.3 of the Arbitration Agreement, the Secretary-General of the PCA provided the Parties with a full list of current or former members of the PCA or members of tribunals for which the PCA acted as registry (“**PCA Arbitrators List**”).
9. On August 14, 2008, in accordance with Articles 5.2 and 5.4 of the Arbitration Agreement, the GoS appointed as arbitrators His Excellency Judge Awn Al-Khasawneh and Professor Dr. Gerhard Hafner.
10. On August 15, 2008, in accordance with Articles 5.2 and 5.4 of the Arbitration Agreement, the SPLM/A appointed as arbitrators Professor W. Michael Reisman and Judge Stephen M. Schwebel.

11. Before August 22, 2008, in accordance with Article 5.6 of the Arbitration Agreement, each of the four Party-appointed arbitrators signed declarations of independence, impartiality, and commitment, and such declarations were immediately communicated by the PCA to the Parties.
12. On September 6, 2008, in accordance with Article 5.7 of the Arbitration Agreement, the four Party-appointed arbitrators met in The Hague, The Netherlands to consider candidates for the fifth arbitrator. Article 5.8 of the Arbitration Agreement provides that the fifth arbitrator might be selected from or outside the PCA Arbitrators List, and shall be a “renowned lawyer of high professional qualifications, personal integrity, and moral reputation” with experience in similar disputes.
13. On September 24, 2008, in accordance with Article 5.9 of the Arbitration Agreement, the four Party-appointed arbitrators communicated to the Parties, through the Secretary-General of the PCA, an identical list of five candidates for the fifth arbitrator, attaching full curricula vitae of the candidates.
14. On October 12, 2008, in accordance with Article 5.10 of the Arbitration Agreement, the Parties returned the candidates list after having deleted the name or names to which they objected and numbered the remaining candidates in order of preference. All the candidates on the list were objected to by either Party or by both Parties. Article 5.12 was then triggered, requiring the Secretary-General of the PCA to appoint, in consultation with the four arbitrators, within fifteen days of receiving the objections, the fifth arbitrator from outside the candidates’ list, having due regard to Article 5.8 of the Arbitration Agreement.
15. The Secretary-General of the PCA consulted with the four Party-appointed arbitrators in accordance with Articles 5.8 and 5.12 of the Arbitration Agreement and, on October 27, 2008, the Secretary-General appointed Professor Pierre-Marie Dupuy as the fifth and presiding arbitrator (“**Presiding Arbitrator**”).
16. On October 30, 2008, in accordance with Article 5.13 of the Arbitration Agreement, the Presiding Arbitrator signed a declaration of independence, impartiality, and commitment which was then immediately communicated by the PCA to the Parties.

C. COMMENCEMENT AND TIMING OF ARBITRATION PROCEEDINGS

17. Pursuant to Article 4.1 of the Arbitration Agreement, the arbitration process was deemed to have commenced on June 8, 2008.
18. Article 4.2 of the Arbitration Agreement provides that the arbitration proceedings “shall commence on the date of the formation of the Tribunal which shall start its work as soon as it is constituted.” For purposes of Article 4.2, the date of the formation of the Tribunal was October 30, 2008, the date on which the declaration of the fifth and presiding arbitrator was signed and communicated to the Parties.
19. According to Article 4.3 of the Arbitration Agreement, the Tribunal “shall endeavor to complete the arbitration proceedings including the issuance of the final award within a period of six months from the date of the commencement of arbitration proceedings subject to three months extension.” Article 9.1 refers specifically to the award, stating: “Subject to Article 8(7) ... the final award shall be rendered by the Tribunal within a maximum of ninety days from the closure of submissions.”
20. Article 8.7 of the Arbitration Agreement provides that notwithstanding Article 4.3, the Tribunal shall be empowered to extend for good cause the periods established for the arbitration proceedings on its own motion or at the request of either Party. The total cumulative extension of the periods granted by the Tribunal at the request of either Party could not exceed thirty days for each Party.

D. PRELIMINARY PROCEDURAL MEETING

21. On November 24, 2008, the Tribunal held a preliminary procedural meeting with the Parties at the Peace Palace in The Hague.
22. Present at the Preliminary Procedural Meeting were:

Tribunal: Professor Pierre-Marie Dupuy
 Judge Awn Al-Khasawneh
 Professor Dr. Gerhard Hafner
 Judge Stephen M. Schwebel
 Professor W. Michael Reisman

For the GoS: Professor James Crawford SC

For the SPLM: Mr. Gary Born
 Ms. Wendy Miles
 Professor Paul R. Williams
 Ms. Vanessa Jiménez
 Dr. Luka Biong Deng
 Hon. Deng Arop Kuol
 Mr. Kuol Dueim Kuol
 Mr. Mathew Otoromoi Martinson

Registry: Ms. Judith Levine
 Mr. Aloysius Llamzon

23. The Parties and Members of the Tribunal signed the Terms of Appointment at the Procedural Meeting.
24. Pursuant to the Terms of Appointment, the Parties confirmed, among other things, that the members of the Tribunal had been validly appointed in accordance with the Arbitration Agreement and the PCA Rules, and that the Parties had no objection to the appointment of each member of the Tribunal on the grounds of conflict of interest or lack of independence or impartiality.
25. The Parties further confirmed that the PCA would serve as Registry and that the Tribunal may appoint a member of the PCA International Bureau to act as Registrar for the proceedings, and for this purpose the Tribunal appointed Ms. Judith Levine, PCA Legal Counsel, as Registrar. From March 13, 2009, Mr. Aloysius Llamzon, PCA Legal Counsel, was designated as Acting Registrar.
26. At the Preliminary Procedural Meeting, the Tribunal (in consultation with the Parties) set a schedule for the written and oral phases of the proceedings consistent with the timelines set by Article 8 of the Arbitration Agreement. At the request of the GoS, an extension of 14 days for the submission of Counter-Memorials was granted pursuant to Article 8.7 of the Arbitration Agreement.
27. In accordance with Article 8.6 of the Arbitration Agreement, shortly after the Preliminary Procedural Meeting, copies of the Terms of Appointment, Transcript of Proceedings, and the schedule for the written and oral phases of the proceedings were published on the PCA's website (www.pca-cpa.org).

E. DEPOSITS AND THE PCA FINANCIAL ASSISTANCE FUND

28. Article 11 of the Arbitration Agreement provides:
1. The Presidency of the Republic of Sudan shall direct for the payment of the cost of the arbitration from the Unity Fund regardless of the outcome of the arbitration.
 2. The Government of the Sudan shall apply to the PCA Financial Assistance Fund and the Parties may solicit additional assistance from the international community.
29. On July 11, 2008, the Presidency of the Republic of Sudan submitted a request to the PCA Secretary-General for financial assistance from the PCA Financial Assistance Fund.
30. A preliminary deposit of EUR 40,000 was requested from the Parties on August 28, 2008 for purposes of covering the expenses associated with the meeting in The Hague pursuant to Article 5.7 of the Arbitration Agreement. The Presidency of the Republic of Sudan duly paid this amount on September 6, 2008.
31. On November 24, 2008, in accordance with Article 41 of the PCA Rules and pursuant to paragraph 7.1 of the Terms of Appointment, the Tribunal requested that the Presidency of the Republic of Sudan establish an initial deposit of EUR 1,000,000.00 (equivalent to EUR 500,000 for each Party) as an advance on costs of the arbitration.
32. Shortly thereafter, on December 4, 2008, the PCA transmitted the request for financial assistance from the Presidency of the Republic of Sudan to the Board of Trustees of the PCA Financial Assistance Fund. On December 18, 2008, the Board of Trustees approved an allocation of EUR 400,000 to be made from the PCA Financial Assistance Fund towards the deposit in this case. The remaining portion of the initial deposit, EUR 600,000, was received by the PCA from the Presidency of the Republic of Sudan on January 15, 2009.
33. In accordance with Article 41(2) of the PCA Rules and Paragraph 7.3 of the Terms of Appointment, the Tribunal requested a supplementary deposit of EUR 750,000 on March 10, 2009. By letter dated April 13, 2009 addressed to the PCA, the GoS confirmed that the requested supplementary deposit had been transferred to the PCA to meet the expenses of the Tribunal. The PCA acknowledged receipt of EUR 750,000 on April 17, 2009.
34. On May 8, 2009, the Tribunal, in further reliance on Article 41(2) of the PCA Rules and Paragraph 7.3 of the Terms of Appointment, and in view of the work already completed and

currently anticipated in relation to the proceedings, requested a supplementary deposit of EUR 500,000. By letter dated June 3, 2009 addressed to the PCA, the GoS confirmed that the requested supplementary deposit was transferred by wire on that date. The PCA acknowledged receipt of EUR 500,000 on June 9, 2009.

35. As of the date of this Award, Norway, The Netherlands, and France have made Financial Assistance Fund contributions towards the financing of part of the costs of these proceedings.

F. WRITTEN PLEADINGS PHASE OF THE PROCEEDINGS

36. In accordance with Article 8.3(i) of the Arbitration Agreement and the schedule set by the Tribunal, the Parties filed written Memorials on December 18, 2008, accompanied by witness statements, expert reports, maps, documentary evidence and legal authorities.

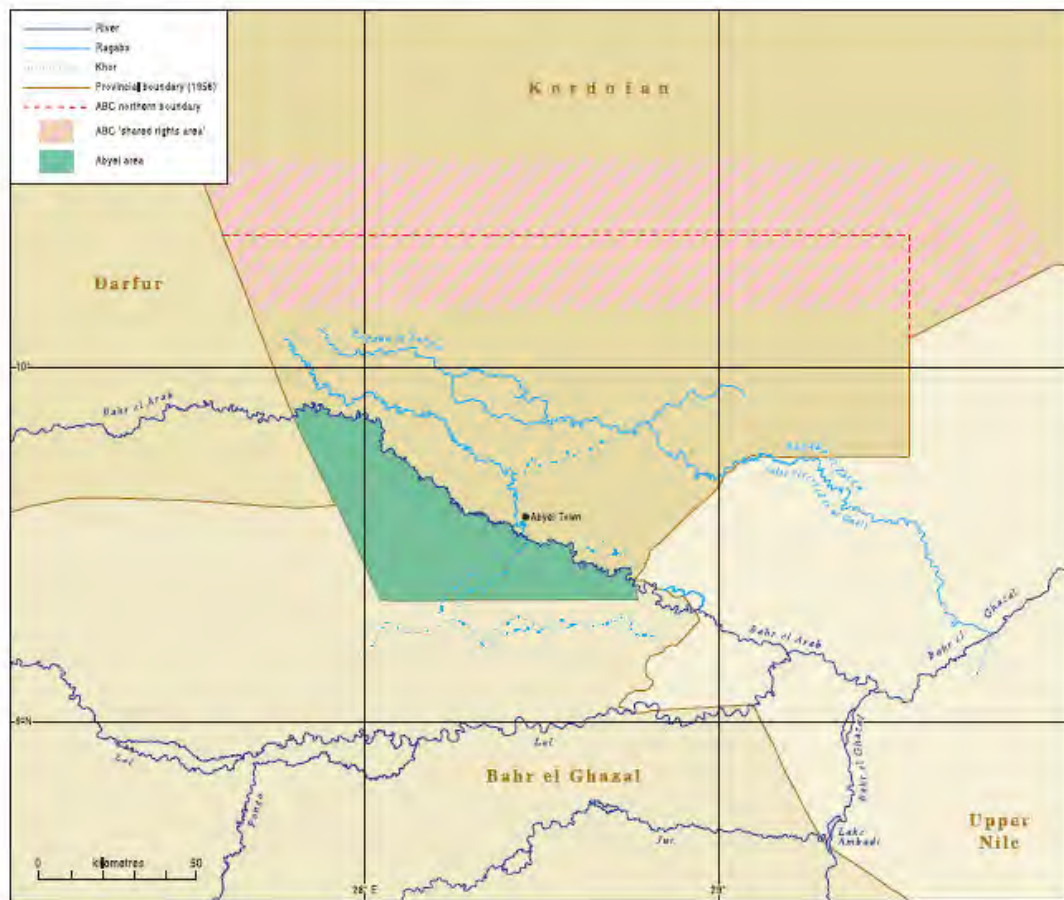
37. The GoS made the following formal submissions in its Memorial:

For the reasons set out in this Memorial, the Government of Sudan respectfully requests the Tribunal to adjudge and declare:

- (a) pursuant to Article 2(a) of the Arbitration Agreement, that the ABC Experts exceeded their mandate as stated in the Abyei Protocol, and reiterated in the Abyei Appendix and the ABC Terms of Reference and Rules of Procedure;
- (b) pursuant to Article 2(c) of the Arbitration Agreement, that the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 are as shown on Figure 17 (page 159), being the area bounded on the north by the Bahr el-Arab and otherwise by the boundaries of Kordofan as at independence.

38. The map referenced in paragraph (b) of the GoS Submission is:

Figure 17 The Transferred Area



39. The SPLM/A made the following formal submissions in its Memorial:

For the reasons set forth in this Memorial, the SPLM/A respectfully requests that the Arbitral Tribunal make an Award granting the following relief:

- (a) A declaration that the ABC Experts did not, on the basis of the agreement of the Parties as per the CPA, exceed their mandate which is “to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905” as stated in the Abyei Protocol, and reiterated in the Abyei Annex and the ABC Terms of Reference and Rules of Procedure;”
- (b) On the basis of relief in the terms of sub-paragraph (a) above, a declaration that the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 are as defined and delimited by the ABC Experts in the ABC Report, and that definition and delimitation, and the ABC Report shall be fully and immediately implemented by the Parties;
- (c) In the alternative, if the Tribunal determines that the ABC Experts exceeded their mandate and makes a declaration to that effect, a declaration that the boundaries of the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905 are the current boundary of Kordofan and Bahr el-Ghazal to the south extending to 10°35’N latitude to the north and the current boundary of Kordofan and Darfur to the west extending to 32°15’E longitude to the east;

- (d) A declaration that the Tribunal's Award is final and binding on the Parties;
 - (e) Costs, including the direct costs of the arbitration, as well as fees and other expenses incurred in participating in the arbitration, including but not limited to, the fees and/or expenses incurred in relation to the Tribunal, solicitors and counsel, and any ABC Experts, consultants and witnesses, internal legal costs, the costs of translations, archival research and travel; and
 - (f) Such additional or other relief as may be just.
40. In accordance with Article 8.3(ii) of the Arbitration Agreement and the schedule set by the Tribunal, the Parties filed their respective Counter-Memorials on February 13, 2009, accompanied by witness statements, expert reports, maps, documentary evidence and legal authorities.
41. In its Counter-Memorial, the GoS, for the reasons set out in its Counter-Memorial, "and rejecting the arguments contained in the Memorial of the SPLM/A [...] reaffirm[ed] the Submissions appearing in its Memorial." Similarly, the SPLM/A reaffirmed the formal submissions and request for relief made in its Memorial.²
42. In accordance with Article 8.3(iii) of the Arbitration Agreement and the schedule set by the Tribunal, the Parties filed their respective Rejoinders on February 28, 2009.
43. The GoS, for the reasons set out in its Rejoinder, "and rejecting the arguments contained in the Memorial and Counter-Memorial of the SPLM/A [...] reaffirm[ed] its previous Submissions." On its part, the SPLM/A similarly reaffirmed the formal submissions and request for relief made by it in its Memorial.³
44. In accordance with Article 8.6 of the Arbitration Agreement, copies of the Parties' pleadings were published on the PCA's website (www.pca-cpa.org).
45. Summaries of the Parties' written pleadings are found infra in Chapter III.

² Notably, the SPLM/A modified submission (c) of its Memorial. In both its Counter-Memorial and Rejoinder, SPLM/A's submission (c) reads: "In the alternative, if the Tribunal determines that the ABC Experts exceeded their mandate and makes a declaration to that effect, a declaration that the boundaries of the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905 are the current boundary of Kordofan and Bahr el-Ghazal to the south extending to 10°35'N latitude to the north and the current boundary of Kordofan and Darfur to the west extending to 29°32'15'E longitude to the east."

³ See note 2 above.

G. TRIBUNAL'S REQUEST FOR CERTAIN DOCUMENTS; ACCESS TO THE ARCHIVES OF SUDAN

46. On March 17, 2009, the following communication from the Tribunal was conveyed by the PCA to the Parties:

The Tribunal notes the statements made by the Sudan People's Liberation Movement/Army ("SPLM/A") in its Rejoinder of February 28, 2009 ("Rejoinder") that the Government of Sudan ("Government") has had full access to archives containing the sketch maps and cartographic records prepared by or for Messrs. Wilkinson, Percival, Hallam, and Whittingham, while the SPLM/A has not, in its view, been fully provided with or given access to these documents. (*see, for example*, paragraphs 432(g), 458, 460, 485, 564, 569, 571-72, and 574-76 of the Rejoinder).

The Tribunal appreciates that the Government has disclosed portions of the aforementioned maps in its written pleadings. The Tribunal also acknowledges that the Parties were entitled to submit extracts of documents in the exhibits to their written pleadings (*see* Transcript of the Nov. 24, 2008 Procedural Hearing, pp. 34-35).

However, in light of the potential importance of these contemporaneous documents, and recalling the need for a final and peaceful settlement of this dispute and the principle of equality that the Tribunal has a duty to accord to the Parties (as reflected in Article 15(1) of the PCA Rules):

1. The Tribunal requests, pursuant to Article 24(3) of the PCA Rules, that the Government of Sudan provide the Tribunal and the SPLM/A, by **March 30, 2009**, with copies of the full sketch maps/records prepared by or for Messrs. Wilkinson, Percival, Whittingham, and Hallam that are within the Government's possession or control, including specifically the full sketch maps and cartographic records relating to the following maps found in Volume III of the Government's Counter-Memorial:
 - a. Map 13b (Wilkinson's Sketch Map);
 - b. Map 14a (Percival 1904 Route Map – Lake Leilak to Wau)
 - c. Map 14b (Percival's Sketch Map – River Kir to Wau);
 - d. Map 16b (Hallam's Sketch Map); and
 - e. Map 18b (Whittingham's Sketch Map).
2. The Tribunal is prepared to hear from both Parties as to the necessity of granting the SPLM/A full access to relevant archival documents within the Government's control (including access to the Sudan Survey Department), through the following process:
 - a. the SPLM/A may, by **March 27, 2009**, send a written request ("Request") to the Government, with a copy to the Tribunal, containing a reasonably specific description of documents, maps and/or cartographic records sought.
 - b. The Government may either: (i) facilitate full and timely access to the archival documents sought in the Request, or (ii) file before the Tribunal, with a copy to the SPLM/A, by **April 6, 2009**, a written objection to the Request ("Objection"), containing its specific grounds for objection.
 - c. The Tribunal will then consider the Request and Objection, and may issue the appropriate order.

47. By letter to the PCA on the same date, the SPLM/A stated that it had previously made requests for access to both the Sudan Survey Department (“**Survey Department**”) and the Sudan National Records Office (“**NRO**”) and was granted access to the NRO on March 2, 2009. The SPLM/A reiterated its request for “full and unhindered access to the SPLM/A and [its] counsel to the relevant archival documents at the Survey Department, including those specified in the [correspondence enclosed with this letter] to the Survey Department and the NRO.”
48. On March 19, 2009, Mr. Bakri Hasan Salih, the Minister of the Presidency of the Republic of Sudan, by letter addressed to the PCA, explained that the Presidency and the Government of National Unity of the Republic of Sudan are composed of both the National Congress Party and the SPLM/A as main partner-parties, and both are responsible for all Government Departments in the Sudan, including the NRO and the Survey Department. He further explained that “the archives in Sudan, be they in the NRO, the Survey Department or any other Department, are open to the public. There is no requirement of obtaining prior access to any of them.” He rejected the allegation that the SPLM/A was denied access to the NRO and the Survey Department and maintained that the SPLM/A’s counsel were welcome to visit the NRO, the Survey Department and any other archive unit in the country.
49. By letter dated March 19, 2009 addressed to the PCA, the SPLM/A explained that although the NRO itself may be open to the public (subject to first obtaining necessary permits and passes), access to the documents within those archives is not straightforward. The SPLM/A remained deeply concerned that its representatives would not be granted full or proper access to the materials it required. It also requested “written confirmation from the [GoS] that [it] will make the necessary arrangements to ensure the security of [the SPLM/A’s] legal team [during] their visit to Khartoum.” The SPLM/A further requested the GoS to provide complete copies of: (1) the 1903 Wilkinson sketch map; (2) the 1904 Percival sketch map segment from the Bahr el Arab/Kir to Keilak; (3) the 1905 Percival sketch map segment from “Golo” to Taufikia; (4) the 1910 Whittingham sketch maps and route notes; and (5) the 1907 Hallam sketch map and route notes.
50. In reply to the Tribunal’s communication dated March 17, 2009, the GoS, by letter dated March 19, 2009, stated that “the [GoS] has always sought to cooperate with the SPLM/A fully in the conduct of this arbitration. This is evidenced by the fact that it provided a number of documents promptly in spite of the additional burden this represented at the time of finalization of the Rejoinder. If some documents and maps were not supplied following

the SPLM/A's requests, this was simply because they had not been found." The GoS noted that when the SPLM/A formally applied for access to the Survey Department and the NRO by two letters dated February 19, 2009, it was already after the February 13, 2009 exchange of Counter-Memorials and nine days before the filing of the Rejoinders. According to the GoS, "it was no longer appropriate at [that] point for any of the Parties to file any new documents without the specific leave of [this] Tribunal." The GoS also alleged that representatives of the SPLM/A were expected to visit the NRO on February 28, 2009 but failed to appear, and that "it is significant that the date coincides with the filing date of the Rejoinder, in which the SPLM/A complained of not having had access to the Sudan Archives, while it had only sought access on February 19, 2009 and had not thereafter followed up on its request."

51. Noting that the GoS would be providing access to the Survey Department archives, the SPLM/A stated through its letter dated March 20, 2009 that it did not consider it necessary for the Tribunal to hear the Parties any further on point two of the Tribunal's communication dated March 17, 2009, but requested the opportunity to make further submissions on the issue following its inspection of the NRO and Survey Department archives. The SPLM/A also expressed surprise that the GoS had been unable to locate complete copies of certain records and thus reiterated its request for an order from the Tribunal instructing the GoS to produce the full and complete sketch maps, cartographic records and route reports relating to the requested maps and records, or to procure that the Sudan Survey Department produce them. Further, it sought an order from the Tribunal instructing the GoS to provide complete copies of the full sketch maps, cartographic records and route reports prepared by or for Mr. Percival in relation to his 1905 trek from River Pongo to Taufilia, or to arrange for the Sudan Survey Department to produce them.
52. On March 23, 2009, the GoS accused the SPLM/A of "attempt[ing] to seek leave to embark on an unfettered fishing expedition" and noted that "SPLM/A's own failure to exercise due diligence is no justification for a late request to seek access to such a potentially wide array of documents."
53. On March 24, 2009, the Tribunal sent the following communication to the Parties through the PCA:

The Tribunal thanks the Parties for the following letters in response to its communication of March 17, 2009 ("Communication"):

From the Government of Sudan (“GoS”)

1. Letter dated March 19, 2009 from the Minister of the Presidency of the GoS
2. Letter dated March 19, 2009 from the Agent of the GoS
3. Letter dated March 23, 2009 from the Agent of the GoS

From the Sudan People’s Liberation Movement/Army (“SPLM/A”)

1. Letter dated March 17, 2009
2. Letter dated March 19, 2009
3. Letter dated March 20, 2009

The Tribunal expresses its appreciation at the GoS’ assurances that the SPLM/A continues to enjoy full access to the Archives of Sudan (last paragraph, p. 3, letter of the Agent of the GoS dated March 19, 2009; first paragraph, p. 5, letter of the Agent of the GoS dated March 23, 2009). The Tribunal also takes note of the SPLM/A’s statement that, “[a]t the present, the SPLM/A does not consider it necessary for the Tribunal to hear the Parties any further on point two of the PCA’s letter dated 17 March 2009.” (third paragraph, p.1, letter of the SPLM/A dated March 20, 2009). In view of the positions expressed by the Parties, the Tribunal shall take no further action at this time in relation to Point 2 of its Communication.

On Point 1 of its Communication, where the Tribunal requested that the GoS provide it and the SPLM/A with copies of the full sketch maps/records listed therein, the Tribunal notes that “the Government of Sudan will respond further by 30 March 2009.” (last paragraph, p.4, letter of the Agent of the GoS dated March 23, 2009) The Tribunal requests that the additional documents sought by the SPLM/A in the penultimate paragraph of its March 20, 2009 letter (i.e., the “full sketch map(s), cartographic records and route reports prepared by or for Mr. Percival in relation to his 1905 trek from River Pongo to Taufikia.”) be considered a further document to be provided by March 30, 2009 under Point 1 of the Tribunal’s Communication.

The Tribunal looks forward to the GoS’ response to Point 1, and expects that the GoS will provide these maps/records or, if necessary, provide satisfactory reasons for the unavailability of those documents not produced. The Tribunal is thankful for the spirit of cooperation the GoS has demonstrated in this matter.

54. On March 26, 2009, the SPLM/A sent a letter to the GoS (with copies to the Tribunal and the PCA) noting that “the statements in your letters regarding the past accessibility of the NRO and Sudan Survey Department archives are inaccurate. In fact, both the SPLM/A and its expert have prior experience in the NRO of being denied access to documents. [...] As for the Sudan Survey Department archive, as soon as the SPLM/A legal representatives became aware that there existed a separate archive of documents outside of the NRO that contained additional (and previously unseen) historic records directly relevant to the issues in dispute in this arbitration, to which the [GoS’s] expert has been granted apparent unfettered access, the SPLM/A directly requested the same. The SPLM/A’s requests in February 2009 were simply ignored.” The SPLM/A also alleged that its legal representatives sent to the Survey Department in Khartoum have been “wholly obstructed from viewing a single relevant document” and have been “prohibited from carrying out any of their own independent research.” It further alleged that these documents have been

removed and deliberately withheld from them. In a letter dated March 27, 2009 addressed to the Agent for the GoS (copying the Tribunal and the PCA), the SPLM/A requested confirmation that its legal team would be granted free access to the Survey Department archive, including to those documents allegedly removed by the GoS from the archive.

55. In a letter dated March 30, 2009 addressed to the PCA, the GoS, with reference to the Tribunal's requests dated March 17, 2000 and March 24, 2009 for complete copies of certain sketch maps/records that are within the GoS's possession or control, provided certain sketch maps requested by the Tribunal, noted that full sketch maps of certain journeys had already been provided, and explained that certain other sketch maps could not be located.
56. In a letter dated April 1, 2009 addressed to the PCA, the GoS denied the allegations made by the SPLM/A that it did not enjoy free access to the archives and was not afforded full assistance and cooperation by the staff of the NRO and the Survey Department. The GoS explained that all documents requested by SPLM/A's legal team at the Survey Department archives were made available to them as soon as possible and that no documents were removed from the archives.
57. The SPLM/A, by letter dated April 3, 2009 addressed to the PCA, alleged the denial of access to a significant number of documents held by the Survey Department that fall squarely within the relevant geographic area and time period central to these proceedings. It further stated that "it is impossible to determine the extent to which other materials, also directly relevant to the issues in these proceedings, continue to be withheld." The SPLM/A then stated that it will be inviting the Tribunal to infer from the GoS's failure to make available this allegedly relevant evidence and to provide satisfactory explanation for such failure, that such evidence would be adverse to the interests of the GoS in these proceedings.
58. On April 4, 2009, through a letter from the PCA, the Presiding Arbitrator requested that the GoS respond to each point contained in the April 3, 2009 SPLM/A letter no later than 1:00PM (The Hague time), April 7, 2009.
59. On April 7, 2009, the GoS, by letter addressed to the PCA, stated that "there has been no denial of access to the SPLM/A to the archives and nothing has been withheld. Requests could and would have been handled in time had the SPLM/A acted in a timely fashion and

not made unreasonable, last-minute demands on archive staff.” It emphasized that “no fact has come to light in the sketches that the SPLM/A has supplied that would justify [inferring that] the [GoS] deliberately suppress[ed] such evidence.” In addition, the GoS noted that as to the introduction of new documentary evidence, “[t]he proper way under the agreed procedure for the SPLM/A to produce the new sketch maps attached to their letter would have been first to seek the leave of the Tribunal to do so. The [GoS] has no objection to the introduction of these materials which in no way advance the SPLM/A’s case. The [GoS] will respond as necessary to the substance of the materials filed during the oral hearings. However, the [GoS] would hope that the agreed procedure for introducing late documents will be respected.”

60. In a letter dated April 8, 2009 addressed to the PCA, the SPLM/A alleged that the GoS’s account of the factual occurrences between March 25 and 31, 2009 in its letter dated April 7, 2009 was inaccurate. It claimed that the GoS’s conduct gave rise to certain inferences, and that “the SPLM/A will indicate in the course of its oral presentations where such inferences should be drawn.”
61. On April 11, 2009, the Tribunal issued the following communication to the Parties through the PCA:

The Tribunal thanks the Government of Sudan ("GoS") for its letter dated April 7, 2009 pursuant to the Presiding Arbitrator's request for comment (contained in the PCA's letter dated April 4, 2009), and acknowledges with thanks the letter dated April 8, 2009 from the Sudan People's Liberation Movement/Army ("SPLM/A"). Both these letters relate to allegations that the SPLM/A continues to be denied full access to the Archives of Sudan, that “it is impossible to determine the extent to which other materials, also directly relevant to the issues in these proceedings, continue to be withheld,” and that the SPLM/A “will be” inviting the Tribunal to draw certain adverse inferences from the GoS' alleged conduct (pp. 2-3, SPLM/A letter dated April 3, 2009; see also p. 2, SPLM/A letter dated April 8, 2009).

The Tribunal notes that the SPLM/A is not asking the Tribunal to issue a ruling now and to draw any adverse inferences on account of the GoS' alleged conduct. In effect, the SPLM/A has put the GoS on notice about the adverse inferences that the former will seek from the Tribunal over the course of their argument during the oral pleadings. Accordingly, at this juncture in the proceedings, the Tribunal will take all the arguments made thus far by the Parties under advisement and has decided to remain seized of the issue. In light of the arguments presented at the oral pleadings, the Tribunal will decide, in the fullness of these proceedings, whether any adverse inferences or other appropriate conclusions should be drawn.

62. At the oral pleadings, the GoS reiterated its commitment to ensuring that the Tribunal is given access to all the documentary records the Tribunal may require. It repeated its assertion that it did not fail in disclosing relevant documents.⁴

H. ALLEGATIONS OF WITNESS INTIMIDATION

63. The GoS, by letter dated March 30, 2009 addressed to the PCA, informed the Tribunal that a news item on March 29, 2009 in the Sudanese daily newspaper *Al-Ayam* alleged that one of the Ngok Dinka witnesses for the GoS, Mr. Majid Yak, Secretary of Local Administration of Abyei, was threatened with being “physically eliminated” by members of the SPLM/A if he were to leave for The Hague to testify at the hearings. In addition to Mr. Yak, the GoS further claimed that, upon inquiry, its other Ngok Dinka witnesses, Messrs. Zakaria Atem, Majak Matit and Ayom Matit admitted to being repeatedly harassed by SPLM/A members either to deter them from testifying at the hearings or to convince them to change their testimony.
64. The SPLM/A, by a letter of the same date addressed to the PCA, denied such allegations but nevertheless endeavored to investigate the allegations further and to inform the Tribunal as soon as relevant information became available.
65. On April 14, 2009, the SPLM/A issued a letter to the PCA stating that it had investigated the allegations reported by the Sudanese press and found these to be without basis. To substantiate its claim, the SPLM/A attached to its letter a report from Lt. Col. Mayen Tap Mayen, the Chief Executive Officer of the National Security and Intelligence Organ of the Abyei Security Unit who investigated the incident, and a letter from Nyol Pagout Deng Ayei, Chief of the Bongo Chiefdom.
66. At the oral pleadings, a member of the Tribunal, H.E. Judge Awn Al-Khasawneh, asked four witnesses of the GoS to testify whether they were intimidated by agents of the SPLM/A. The witnesses Mr. Zakaria Atem Diyin Thibek Deng Kiir,⁵ Mr. Majid Yak Kur,⁶ Mr. Ayom Matit Ayom,⁷ and Mr. Majak Matet Ayom⁸ gave varying answers.

⁴ See GoS Oral Pleadings, April 18, 2009, Transcr. 19/04-21/05.

⁵ The pertinent portion of Mr. Zakaria’s testimony is as follows:

JUDGE AL-KHASAWNEH: [...] First, there have been allegations that you had been intimidated and threatened. Those allegations have been denied. Could you briefly tell us the truth or otherwise of those allegations?

I. REQUEST FOR FUNDING

67. By letter to the PCA dated April 7, 2009, the SPLM/A informed the Tribunal that the

A: When I came here I was pretty sure for the fact that anyone who is not giving testimony in favour of the [SPLM/A], that person is not a good one.

JUDGE AL-KHASAWNEH: Please translate correctly. What he said was, "I'm threatened with [my] life." This is very important. Can you ask him again to repeat. The translation has to be correct and precise.

THE INTERPRETER: Repeat the question, please.

JUDGE AL-KHASAWNEH: It's not my question. I asked a question. You did not translate the answer as fully as you should have. Could you translate it as he said: a person who does not give evidence in support of the SPLM/A is thought of as a bad person, and would be threatened in his life. That is literally the translation. So, please, be careful with the next.

THE INTERPRETER: Okay.

JUDGE AL-KHASAWNEH: Thank you very much. ...

(See GoS Oral Pleadings, April 21, 2009, Transcr. 43/04 – 44/05)

⁶ The pertinent portion of Mr. Majid's testimony is as follows:

JUDGE AL-KHASAWNEH: [...] First of all I should like to ask you, as I asked other witnesses before you, whether you have been intimidated in any way or put under pressure not to testify before us, or to modify your testimony?

A. Yes, I've been threatened.

JUDGE AL-KHASAWNEH: Would you kindly elaborate a little bit on it?

A. Well, after this change of the testimony records, two came to me in my house, namely Nyol Pagout and Deng Monyluak, and they came to me as representatives of [SPLM/A], and they came and told me, "Majid, your statement is a clear manifest of a sellout of Dinka land to Government of Sudan. We are coming here for two main purposes: one, either you change the course of your statements and testimony, or create, by a way or another, some means to disable you not to go The Hague. Otherwise you will face consequences.

JUDGE AL-KHASAWNEH: Thank you very much. ...

(See GoS Oral Pleadings, April 21, 2009, Transcr. 54/13 – 55/09)

⁷ The pertinent portion of Mr. Ayom's testimony is as follows:

JUDGE AL-KHASAWNEH: Mr Ayom Matit Ayom, thank you very much for agreeing to testify before us. Thank you for testifying before us. I would be grateful if you could answer only one question that I would like to put to you, and that question is: have you been intimidated with regard to your testimony or asked not to appear before us or to modify it? Thank you.

A. Actually it is not me who has been actually threatened, but my brother who is coming after me. He was told: if you go to The Hague you will do one of the two things, either change your statements or refuse to go; otherwise you will bear the consequences. And don't ask us, you will be responsible for that.

JUDGE AL-KHASAWNEH: If that's all, that's the only thing that I wanted to ask about.

(See GoS Oral Pleadings, April 21, 2009, Transcr. 51/04 – 51/19)

⁸ The pertinent portion of Mr. Majak's testimony is as follows:

JUDGE AL-KHASAWNEH: Mr Majak Matet Ayom, I would like to thank you for agreeing to answer my questions. I would like first to ask you whether you were in any way intimidated or threatened in an attempt to cause you not to testify before us, or to change your testimony. We heard something to this effect from your brother, but I would like to hear it from you.

A. For me, I don't find myself subject to threat by any person. I only can feel threatened by God. But any person, I don't see that there is room for any person to threaten me. Please go ahead. If you have anything to ask me, ask me.

(See GoS Oral Pleadings, April 21, 2009, Transcr. 51/25 – 52/12)

Presidency of the Republic of Sudan had allegedly not yet provided any portion of a US\$1,000,000 sum previously requested as funding for the SPLM/A's costs. Further, the SPLM/A stated that on March 24, 2009, it was informed by the Presidency of the Republic of Sudan that only US\$200,000 of the requested US\$1,000,000 would be allocated to it, and to date, it had not received any portion of this allocated amount. In view of the impending hearings, the SPLM/A requested that the Tribunal order, pursuant to the Arbitration Agreement, that the GoS "direct the Presidency [of the Republic of Sudan] to approve and transfer the funding required by the SPLM/A as a matter of urgency."

68. Through the PCA's letter of April 8, 2009, the Presiding Arbitrator requested that the GoS comment on the allegations contained in the SPLM/A letter dated April 7, 2009 by April 9, 2009.
69. Replying to the Presiding Arbitrator's request, the GoS, by letter addressed to the PCA on April 9, 2009, explained that the Parties had previously agreed on the procedure to be used for the allocation of funds, i.e., "joint requests [had to be made by] the Parties to the Presidency [of the Republic of Sudan.]" The GoS maintained that this procedure should be followed by both the SPLM/A and the GoS for any further requests for disbursements. The GoS also asserted that it had already provided a \$200,000 allocation to the SPLM/A.
70. On April 11, 2009, the Tribunal issued the following communication:

The Tribunal thanks the Government of Sudan ("GoS") for its letter dated April 9, 2009 pursuant to the Presiding Arbitrator's request for comment (contained in the PCA's letter dated April 8, 2009) on the Sudan People's Liberation Movement/Army's ("SPLM") request "that the Tribunal order pursuant to the Abyei Arbitration Agreement that the Government of Sudan [] direct the Presidency to approve and transfer the funding required by the SPLM/A as a matter of urgency (p. 2, SPLM/A letter dated April 7, 2009).

The Tribunal recalls the obligation of the Presidency of Sudan to fund the "cost of arbitration from the Unity Fund" on behalf of both Parties (Article 11(1), Abyei Arbitration Agreement) and is conscious of its own obligation to ensure that the parties are treated with equality and that at any stage of the proceedings, each party must be given a full opportunity to present its case (Art. 15, PCA Rules). To realize this, and to ensure the integrity of this arbitral process, the Tribunal believes that adequate funding on the part of both Parties is critical. Considering the complexity of this case, its compressed schedule and lengthy submissions, and the critical stage that these proceedings are currently in (among other factors), the Tribunal believes that the amount of US\$1,000,000 requested by the SPLM/A is reasonable and should immediately be released. The Tribunal therefore expects that the GoS will facilitate and ensure the immediate release by the Presidency of the Republic of Sudan of the US\$1,000,000 in funding sought by the SPLM/A on or before April 14, 2009, and to

confirm to the Tribunal no later than April 13, 2009 that the process of transmitting the funds has begun.

71. By letter dated April 13, 2009 addressed to the PCA, the GoS confirmed that the requested US\$800,000 had been transferred to the account of SPLM/A while reiterating that US\$200,000 had previously been transferred.
72. On April 14, 2009, the SPLM/A wrote to the GoS, claiming that it had not received any part of the US\$1,000,000 allocated to them, and that such funds were needed “as a matter of urgency.”
73. On April 15, 2009, the GoS wrote the SPLM/A, attaching the bank transfer note for US\$800,000 dated April 13, 2009. The GoS explained that the US\$200,000 was also previously transferred, and the bank transfer note “is being currently traced.”

J. APPOINTMENT OF EXPERTS

74. By letter dated March 10, 2009, the PCA informed the Parties that:

Mindful of the stringent time limitations established by Article 4.3 and Article 9.1 of the Arbitration Agreement, the Tribunal has requested, without prejudice of any kind, that the PCA make enquiries as to the availability of possible cartographers and geographers in the event that their assistance might be required for preparation of the Award. Arranging beforehand for the possibility of such assistance (which is envisaged under Article 27 of the PCA Rules) would enable the Tribunal to operate within the prescribed time limits, were it to make a determination under Article 2(c) of the Arbitration Agreement. Such an outcome can in no way be predicted at this stage of proceedings, but such enquiries are being made only out of prudent caution in light of the time restrictions imposed by the Parties' Arbitration Agreement.

75. On April 2, 2009, the PCA sent the following communication to both Parties:

As indicated in [...] the PCA's letter dated March 10, 2009, the PCA has, at the Tribunal's request, made enquiries as to the availability of experts in the event and to the extent that their assistance might be required for the preparation of the Award (which can in no way be predicted at this stage). Having reviewed a number of potential candidates, the Tribunal has decided to appoint Messrs Bill Robertson and Douglas Vincent Belgrave to serve as experts in this arbitration. The CVs of Messrs Belgrave and Robertson are attached for your information.

The experts were appointed at this stage in the proceedings to enable the Tribunal to operate within the time limits prescribed by the Parties' Arbitration Agreement.

The Tribunal has instructed the PCA to circulate to the Parties the attached draft Terms of Reference, which articulates the role the Tribunal envisages for the experts within this Arbitration. The Tribunal invites the Parties to submit any comments they may have on the draft Terms of Reference no later than April 8, 2009.

76. After receiving responses from both Parties, on April 9, 2009, the PCA communicated to both Parties that it had received no comments on the draft terms of reference.
77. On April 16, 2009, the Tribunal issued Procedural Order No. 2, the operative part of which provides:

THE TRIBUNAL UNANIMOUSLY ORDERS:

That Messrs. Douglas Vincent Belgrave and Bill Robertson be appointed to serve as experts and provide assistance to the Arbitral Tribunal in this arbitration;

That the attached Terms of Reference for the experts be adopted.

EXPERTS' TERMS OF REFERENCE

...

THE EXPERTS

2.1 Messrs Bill Robertson and Douglas Vincent Belgrave (the "Experts") shall serve as experts to assist the Tribunal in accordance with these Terms of Reference.

2.2 The Experts hereby declare that they will, as directed by the Tribunal, perform their duties honorably and faithfully, impartially and conscientiously, and will refrain from divulging or using, outside the context of the tasks to be performed by them in this arbitration, any confidential documents, files and information, including the deliberations of the Tribunal, which may come to their knowledge in the course of the performance of their task.

SCOPE

3.1 The Experts shall assist the Tribunal, should it determine that the ABC experts exceeded their mandate pursuant to Article 2(a) of the Arbitration Agreement, in defining (i.e. delimiting) on a map the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, in accordance with Article 2(c) of the Arbitration Agreement.

3.2 The Experts will also make themselves available to assist the Tribunal as required by it in the preparation of the Award.

3.3 The Experts shall perform their duties according to best international practices in their fields of expertise.

...

K. ORAL PLEADINGS PHASE OF THE PROCEEDINGS

78. On April 7, 2009, the Tribunal issued Procedural Order No. 1, setting forth the time and place of oral pleadings, the procedure to be followed, the witnesses to be examined, and the daily agenda. The schedule allocated equal time as between the issues specified in Article 2 of the Arbitration Agreement and allocated equal time as between the Parties.
79. On the matter of Arabic/English and Dinka/English translation, on April 8, 2009, the Tribunal issued the following communication following consultation with the Parties:

The Permanent Court of Arbitration (“PCA”) acknowledges electronic receipt of letters dated April 6 and April 7, 2009 from the Government of Sudan (“GoS”), and a letter dated April 7, 2009 from the Sudan People’s Liberation Movement/Army (“SPLM/A”), all relating to the Parties’ commitment to determine the appointment of Dinka and Arabic interpreters for the oral pleadings.

On Arabic-English and English-Arabic interpretation, the PCA notes that the Parties have agreed to the appointment of Mr. Yahia Mo’lla Mofarrah as interpreter. The PCA would appreciate being furnished with a copy of Mr. Mofarrah’s CV and contact details.

On Dinka-English and English-Dinka interpretation, the PCA notes that the Parties have not agreed to any appointment. The GoS proposes Mr. Abingo Akok Kshwal, while the SPLM/A proposes Messrs. Charles Deng Majok and Kwaja Yai Kuol Arop.

After consultations with the Presiding Arbitrator, the PCA has determined that each Party may employ its own Dinka-English/English-Dinka interpreter(s) for the examination of its witnesses (for example, Dinka interpretation for each of the relevant GoS witnesses’ direct, cross, re-direct, and re-cross examinations shall be conducted by Mr. Abingo Akok Kshwal). Any corrections to the Court Reporter’s transcription arising from a perceived error in translation may be brought to the Tribunal’s attention no later than one week from the conclusion of the oral pleadings, i.e., April 30, 2009.

80. On April 16, 2009, the PCA issued the following press release concerning the availability of a live webcast of the oral pleadings for interested members of the public:

In the matter of an arbitration pursuant to the Arbitration Agreement between the Government of Sudan and the Sudan People’s Liberation Movement/Army on Delimiting Abyei Area, oral pleadings will be held at the Peace Palace in The Hague from April 18 to April 23, 2009. The oral pleadings will be open to the public and the media, and will be **webstreamed live** on the Permanent Court of Arbitration (“PCA”) website beginning at 9:30 am (CET) on April 18, 2009 (http://www.pca-cpa.org/showpage.asp?pag_id=1306).

The PCA International Bureau is acting as Registry and providing administrative support to the Arbitral Tribunal, which is composed of the following members:

Professor Pierre-Marie Dupuy (Presiding Arbitrator)
H.E. Judge Awn Al-Khasawneh
Professor Gerhard Hafner
Professor W. Michael Reisman
Judge Stephen Schwebel

The Parties have agreed to make the pleadings, transcripts, decisions and certain other documents public. These are available at the PCA website.

The PCA was established by treaty in 1899 and is the oldest intergovernmental organization devoted to the peaceful resolution of disputes through arbitration in the world. Its seat is at the Peace Palace, The Hague, The Netherlands. Further information on the PCA is available at <http://www.pca-cpa.org>.

81. Pursuant to Article 8.4 of the Arbitration Agreement, public hearings were held from Saturday, April 18, 2009 until Thursday, April 23, 2009 at the Great Hall of Justice, the Peace Palace, The Hague. The attendees were:

The Tribunal:

1. Professor Pierre-Marie Dupuy
2. Judge Awn Al-Khasawneh
3. Professor Dr. Gerhard Hafner
4. Judge Stephen M. Schwebel
5. Professor W. Michael Reisman

For the Registry:

1. Mr. Aloysius Llamzon
2. Mr. Paul-Jean Le Cannu
3. Mr. Dirk Pulkowski
4. Ms. Catherine Quinn
5. Ms. Genevieve Reyes
6. Ms. Evelien Pasma
7. Ms. Gaëlle Chevalier
8. Ms. Willemijn van Banning
9. Mr. Paulo Perassi
10. Mr. Thomas Levi

For the GoS:

Agent:

1. Ambassador Dirdeiry Mohamed Ahmed

Co-Agents:

2. Dr. Faisal Abdel Rahamn Ali Taha
3. Dr. Abdelrahman Ibrahim Elkhalfifa

Counsel and Advocates:

4. Professor James Crawford SC
5. Professor Alain Pellet
6. Mr. Rodman R. Bundy
7. Ms. Loretta Malintoppi

8. Prof. Nabil Elaraby

Legal Advisors:

9. Ms. Angelynn Meya
10. Mr. Jacques Hartmann
11. Ms. Céline Folsché
12. Mr. Paul Baker
13. Mr. Charles Alexander

Witnesses & Expert:

14. Ayom Matet Ayom
15. Zakaria Atem Diyin Thibek Deng Klir
16. Mukhtar Babu Nimir
17. Majak Matit Ayom
18. Majid Yak Kur
19. Mr. Alastair MacDonald

Technical Advisors:

20. Mr. Martin Pratt
21. Ms. Eleanor Scudder

Other:

Representatives of the Government of Sudan

22. General [Rtd] Mahdi Babo Nimir Ali, Former Chief of Staff
23. Fathi Khalil Mohamed, Chairman Sudan Bar Association
24. Abd Elgadir Monim Mansour Mohamed, MP, Hamar Paramount Chief
25. Mohamed Aldoreek Bakht, Commissioner
26. Fadlalla Burma Nasir, Deputy Chairman, Umma Party
27. Elkheir Elfahim Elmaki Hamid, Chairman,
Kordofan Reconciliation Committee
28. Mariam Elsadig Elsiddig Almahdi, Political Secretary, Umma Party
29. Safiieldin Galaleldin Gibreil Omer, Member, CPA Evaluation Commission
30. Siddig El Hindi, Secretary General UDP
31. Hasan Kantabai, Political Bureau, East Sudan Front
32. El Bagir Ahmed Abdalla, Political Bureau, UDP
33. Dr. El Tayeb Haj Atia, All Sudan Initiative
34. Hussein Braima Elnour Algozuli
35. Azhari Mohamed Summo Shaaeldin
36. Sami Eldai Bushara Goda

Interested Persons And Non-Testifying Witnesses

37. Herika Iz-Aldin Humeda Khamis, Former Governor
38. Ahmed Assalih Sallouha, Former Governor
39. Rahma Abdel Rahman El-Nour, Abyei D/Chief Administrator
40. Yahia Hussain Babiker, Director, Unity Fund
41. Salman Suliman El-Safi, State Minister
42. Prof Abdalla El Sadig, Director Survey
43. Kabbashi Eltom Kabbashi
44. Ashahab Elsadig Daif Allah
45. Mohammed Mahmoud Rajab Elradi
46. Deng Balaiel Bahar Hamadean
47. Mohamed Basheir Adam Elmoalim
48. Saeed Mohammed Bakkar Degais
49. Khalid Ibrahim Ali Ibrahim
50. Maria Mayut Ayoak Gweing
51. Ahmed Abdalla Adam

52. Abdelrahman Mukhtar Hassab Alla
53. Hamadi Ad'dood Ismael Hammad
54. Abd Elgaleel Bakkar Ismail Elsakin
55. Shummo Hurgas Marida
56. Ali Hmdan Kir
57. Alsadig Ibrahim Ahmed Ibrahim
58. Hamid Bushra Godat Mohamed
59. Mohamed Elnil Mohamed
60. Hassan Mohamed Ibrahim
61. Daoud Mohamed Abdalla
62. Bashtana Mohammed Salem Suliman
63. Yagoub Abuelgasim Touri Yagoub
64. Adil Hassan Abdelrahman Mohamed
65. Abdelmonm Musa Elshiwien Aldaif
66. Ismail Hamdean Humaidan
67. Elnazir Gebreil Elgouni Abdelaziz
68. Ogeil Godtalla Abdelhamid Khamis
69. Gadim Mohamed Azaz Gamaella
70. Abdelrahman Hasan Omer
71. Abdulrahman Salih El Tahir
72. Dr. Hassan Abdin
73. Prof. Yousuf Fadl
74. Mr. Abdel Rasoul Elnour
75. Mr. Mahdi Babo Nimir
76. Dr. Suliman Eldabalo

Members of the Media

77. Hassan Makki Mohamed Ahmed, Political Analyst
78. Elhindi Omer, Columnist
79. Ishag Ahmed Fadl Allah Elfahal, Columnist
80. Sarra Taha Mohi Aldin Mohamed, TV Crew
81. Mahgoub Mohamed Salah, Editor in Chief
82. Awad Elkarim Ahmed Mustafa, TV Crew
83. Tarig Eltegany Ballal, Journalist
84. Asma El-Suhaili, Political Analyst
85. El Tayeb Zainalabdin, Editor-in-Chief
86. Khalid El Tigani, Editor-in-Chief
87. Adil El Baz, Journalist
88. El Sir Sidahmed, Journalist
89. Adil El Biali, Journalist
90. El Sadig El Rizaigi, Journalist
91. Khalid El Mubarak, Journalist

Staff from the Embassy of the Sudan

92. H.E. Ambassador A .A. Shikh Idris
93. Minister plenipotentiary Sayed. A. Ahmed
94. Mr Chol Ajongo, Counselor
95. Mr Baha Aldien Mohamed Khamis, Agricultural Counselor
96. Mr. Abbas Mohamed Alhaj, Counselor
97. Mr Abd Alrahman Abdalla Abd Alrahman, Second Secretary
98. Miss Nada Awad Omer, Administrative Attaché
99. Mrs Awatif Osman, Financial Attaché

For the SPLM/A:

Agents

1. Dr. Riek Machar Teny

2. Dr. Luka Biong Deng

Counsel and Advocates

3. Mr. Gary Born
4. Ms. Wendy Miles
5. Dr. Paul Williams
6. Ms. Vanessa Jiménez

Legal Advisers

7. Hon. Deng Arop Kuol
8. Maj. Gen. Kuol Deim Koul
9. Hon. Arop Madut Arop
10. Ms. Bridget Rutherford
11. Mr. Anand Shah
12. Ms. Courtney Nicolaisen
13. Mr. Charlie Caher
14. Ms. Kate Davies
15. Ms. Anna Holloway
16. Ms. Daisy Joye
17. Ms. Inken Knief
18. Mr. Timothy Lindsay
19. Mr. Oliver Spackman
20. Ms. Anna-Maria Tamminen
21. Ms. Lisa Tomas
22. Mr. Kevin Mottram
23. Mr. Daniel Harris

Technical Advisors and Assistants

24. Mr. Alex Tait
25. Mr. Scott Edmonds
26. Ms. Joanne Gilpin
27. Ms. Kathleen Kundt
28. Mr. Shakeel Sameja

Witnesses & Experts:

29. Mr. Deng Chier Agoth
30. Mr. Ring Makuac Dhel Yak
31. Professor J. A. Allan
32. Dr. Peter Poole
33. Professor Martin Daly
34. Mr. Richard Schofield

Observers

35. Mr. Paul Mayom Akec, Observer
36. Mr. Deng Alor Kuol
37. Mr. Michael Makuei Lueth
38. Mr. Ambrose Riny Thiik
39. Mr. Kuol Deng Mijok Kuol
40. Mr. Nyol Pagout Deng
41. Mr. Kuol Alor Makuac
42. Mr. Ajak Malual Beliu
43. Mr. Akonon Ajuong Deng
44. Mr. Arop Kuol Kon
45. Mr. Bagat Makuac Abiem
46. Mr. Mijok Kuol Lual
47. Mr. Belbel Chol Akuei

48. Mr. Chol Por Chol
49. Mr. Jacob Madhol Lang
50. Hon. Benjamin Majak Dau
51. Hon. Peter Beshir Gbandi
52. Hon. James Lual Deng Kuel
53. Hon. Zakaria Bol Deng
54. Hon. Mary Nyaulang
55. Hon. Kom Kom
56. Mr. Victor Akok Anei Magar
57. Mr. Juac Agok Anyaar
58. Mr. Edward Abyei Lino
59. Mr. Chol Changath Chol
60. Hon. Charles Abyei Jok
61. Hon. Nyankuac Ngor
62. Hon. Nyianawut Miyan
63. Ms. Asha Abbas Akwai
64. Dr. Zakaria Bol Deng
65. Hon. Bol Gatkuoth
66. Hon. Charles Abyei Kon
67. Mr. Michael Majak Abiem
68. Mr. Mathew Oturomoi Martinson
69. Mr. Biong Deng Kuol
70. Mr. Mangok Atem Piyin
71. Mr. Luka Chen Chen Atem
72. Mr. Ezekiel Lol
73. Ms. Apuk Ayuel
74. Mr. Daniel Jok
75. Mr. Victor Bullen Baba
76. Mr. Gordon Morris
77. Mr. Alfred Taban
78. Dr. Francis G. Nazario
79. Mr. Wilson Deng Peter
80. Mr. Akoc Wol Akoc
81. Mrs. Florence A. Andrew
82. Mr. Arkanjelo Ngoth
83. Mr. William Vito Akwar
84. Mr. Thomas Wako
85. Mr. Christopher Brale
86. Mr. Salvatore Ali
87. Mr. Majok Mading
88. Mr. Deng Biong Mijak
89. Mr. Stephen Kang Elario
90. Mr. Jeremiah Swaka Moses
91. Mr. Bella Kodi
92. Mr. Peter Makoi
93. Mr. Ali Alfred
94. Mr. Ater Andrew
95. Mr. Robert Lenny
96. Ms. Pani Lado
97. Mr. Nicknora Gongich
98. Nyanyol Mathiang
99. Mr. Miyong G. Kuon
100. Ms. Elizabeth Carlo

82. As notified by the PCA on March 20, 2009 and March 30, 2009, and as revised in accordance with the Tribunal's instructions that "[...] all the witnesses of the GoS that have not been identified for cross-examination by the SPLM/A or inquiry by the Tribunal [...] may be excused,"⁹ the GoS presented the following expert and witnesses for cross-examination by the SPLM/A:

Mr. Alastair MacDonald
Mr. Zakaria Atem Diyin Thibek Deng Klir
Mr. Mukhtar Babu Nimir

83. Pursuant to Procedural Order No. 1,¹⁰ the GoS presented the following witnesses to answer questions propounded by the Tribunal:

Mr. Ayom Matet Ayom
Mr. Majak Matit Ayom
Mr. Majid Yak Kur

84. As notified on March 20, 2009 and March 30, 2009, the SPLM/A presented the following experts and witnesses for direct examination and for cross-examination by the GoS:¹¹

Mr. Deng Chier Agoth
Professor J. A. Allan
Dr. Peter Poole
Professor Martin Daly
Mr. Richard Schofield

85. In addition to the Parties' representatives, members of the public, diplomatic corps and media were in attendance at the hearings in accordance with Article 8.6 of the Arbitration Agreement. A live webcast of the oral pleadings was made available at the PCA website. Along with the webcast of the oral pleadings, transcripts of the hearing were made publicly available on the PCA's website immediately after each day of the hearing.¹²

⁹ Procedural Order No. 1, para. 3.8

¹⁰ Procedural Order No. 1, para. 3.7 stated :

The GoS intends to cross-examine each of the six witnesses and experts to be presented by the SPLM/A. The SPLM/A intends to cross-examine Zakaria Atem Diyin Thibek Deng Kiir, Mukhtar Babu Nimir, and Alastair Macdonald. In addition, the Tribunal wishes to propound questions to Ayom Matet Ayom, Majak Matit Ayom, and Majid Yak Kur.

¹¹ In its March 20 and March 30, 2009 communications, the SPLM/A notified the Tribunal that Mr. Ring Makuac Dhel Yak would be presented as a witness at the hearings. However, Mr. Ring was not called upon to testify at the hearings.

¹² The webcasts and pleadings continue to be available at <http://www.pca-cpa.org>.

86. At the conclusion of the oral pleadings on April 23, 2009, the Tribunal declared closure of submissions in accordance with Article 8.9 of the Arbitration Agreement.

L. RENDERING OF THE FINAL AWARD

87. Under Article 9(1) of the Arbitration Agreement, the Tribunal is required to render its final award “within ninety days from the closure of submissions,” i.e., on July 22, 2009. The Tribunal is also required, under Article 9(3) of the Arbitration Agreement, to “communicate the final award to the [agents] of the Parties on the day of its rendering,” and to “make public the award as of the same day.”
88. By a letter dated June 30, 2009 addressed to the PCA, the SPLM/A requested that “the [T]ribunal consider providing the [P]arties with at least one week notice of the date that the [T]ribunal intends to communicate the Award to the [P]arties” in order to allow the Parties “to put in place arrangements for communication of the Award in Abyei and wider Sudan,” to “immediately implement the award,” and to “educate the people of the Abyei area prior to the award, facilitate dissemination of the award, and take steps to prevent violence, enhance security, and consolidate peace in and around Abyei area at the time the award is communicated.”
89. On July 1, 2009, the Tribunal requested that the GoS provide any comments it may have on the SPLM/A’s letter. The GoS, by letter dated July 7, 2009 addressed to the PCA, was “of the view that, as is normal practice, the Tribunal or the PCA [should] provide appropriate notification of the rendering of the award to the Agents of the Parties so as to enable the actual communication of the award to be made to the [Parties] in The Hague on the day of its rendering.” The GoS also stated that it does not subscribe to the views expressed in the SPLM/A’s letter, as the “implementation of the award is not contingent on the Parties receiving advance notice of its rendering,” and that neither Party is authorized to take unilateral steps in connection with the security situation in the Abyei area. It noted that one of the points of agreement between the Parties at their recent talks in Washington, D.C. was that “the Parties agree[d] to develop a plan with assistance from [the United States of America] to facilitate dissemination of the arbitration decision at the local level in anticipation of the decision,” and it was of the opinion that “it would be appropriate for such a plan to be developed and agreed, and for the agreed substantiation of [the United Nations Mission in Sudan] to be effected, with the view [of paving] the way for rendering the award in these proceedings in a conducive atmosphere.”

90. On July 9, 2009, the SPLM/A, by letter addressed to the PCA, stated that “[i]n the present context the SPLM/A does not consider it appropriate to respond to the majority of the matters raised by the [GoS] in its letter,” as the purpose of its letter was “merely to propose that advance notification of the award would be helpful to the [P]arties.” It explained that “the SPLM/A would be agreeable to the Tribunal convening a small meeting in the Hague at which the Award would be communicated to the [Parties] if such a meeting [would not] delay the communication of the Award.”

91. On July 10, 2009, the Presiding Arbitrator, through the PCA, issued the following communication to the Parties:

Having considered the SPLM/A’s letter of June 30, 2009, the Government of Sudan’s (“GoS”) comments of July 7, 2009, and the SPLM/A’s reply of July 9, 2009, the Presiding Arbitrator has instructed the PCA to inform the Parties of the following:

- Pursuant to Article 9(1) of the Arbitration Agreement, the final award “shall be rendered within a maximum of ninety days from the closure of submissions,” i.e., no later than July 22, 2009. While Article 8(7) of the Arbitration Agreement empowers the Tribunal to extend this period for good cause, the Tribunal has not done so at present.
- The Arbitration Agreement does not explicitly provide for any ceremony or meeting at the rendering of the final award. Nevertheless, after receiving comments from the Agents of both Parties, the Tribunal finds it appropriate to conduct a formal event at the Peace Palace in The Hague on the day the award is rendered.
- Consistent with Paragraph 10.3 of the Terms of Appointment, the Tribunal invites the Parties to confer and jointly propose a date for the ceremony, together with any other particulars they may deem appropriate. The Parties are requested to report to the Tribunal on the outcome of their discussions no later than **8:00 PM (CET) on Monday, July 13, 2009**. In the absence of an agreement, the Tribunal will decide the matter in due course.

92. On July 13, 2009, both Parties informed the Tribunal that they were unable to reach agreement on this matter. The GoS, by letter dated July 13, 2009 addressed to the PCA, proposed that “the award rendering ceremony be held on [August 21,] 2009, after a reconciliation ceremony that the Government of Sudan has asked the Government of the Netherlands to organize in conjunction with the reading of the award on [August 19-20, 2009].” It explained that it is essential that the chiefs of both the Misseriya and Ngok Dinka communities be invited and be given an opportunity “to listen to the award in person,” and that logistical constraints would render it impracticable to have an award ceremony before

August 10, 2009. The SPLM/A, on the other hand, by letter dated July 13, 2009 addressed to the PCA, stated that “it does not wish for the communication of the Award to be delayed in any way,” and that “if any delay was to result from convening a meeting in the Hague then the SPLM/A would strongly prefer that the Award simply be communicated to the Agents and their legal counsel by email.”

93. On July 14, 2009, the following communication from the Tribunal was sent by the PCA to the Parties:

Having considered the Parties’ positions, the Presiding Arbitrator has instructed the PCA to inform the Parties of the following on behalf of the Tribunal:

- Due to the inability of the Parties to agree on a new date for the rendering of the award, the Tribunal considers that it must adhere to the 90-day period provided under Article 9(1) of the Arbitration Agreement. The Tribunal will therefore render its Award in a short ceremony on July 22, 2009, 10:00a.m., at the Great Hall of Justice, The Peace Palace, The Hague. The Tribunal has instructed the PCA to issue a press release today to inform members of the public accordingly.
- Consistent with Article 9(3) of the Arbitration Agreement, the Tribunal invites the Agents and counsel of the Parties to be present at the award-rendering ceremony, along with any number of party representatives they deem appropriate. While the Parties are free to compose their respective delegations as they see fit, the Tribunal extends a particular invitation to the chiefs of the Misseriya and Ngok Dinka communities to be present at the ceremony. The Parties are requested to inform the PCA of the composition of their respective delegations no later than **1:00PM (CET), Monday, July 20, 2009**.
- Consistent with Article 9(4) of the Arbitration Agreement, the Tribunal has also instructed the PCA to invite representatives of the States and other entities who witnessed the signing of the Comprehensive Peace Agreement, and a representative of the Assessment and Evaluation Commission, to attend the ceremony.
- Consistent with Article 8(6) of the Arbitration Agreement and the practice followed in these proceedings, the award-rendering ceremony will be made open to the public and will be webstreamed live at the PCA website. The Tribunal authorizes the Parties to invite members of the Sudanese and international media to be present at the ceremony. The Tribunal has also instructed the PCA to prepare a press release, in both English and Arabic, designed to provide a short summary of the most critical aspects of the Tribunal’s award. The Press Release will be issued immediately after the ceremony.
- The Tribunal will be represented at the ceremony by the Presiding Arbitrator, who will give a brief statement summarizing the Award.

94. On July 14, 2009, the PCA issued a press release concerning the rendering of the final award, which provides in part:

In the matter of an arbitration pursuant to the Arbitration Agreement Between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting the Abyei Area, the arbitral Tribunal will render its final award ("Award") on July 22, 2009, 10:00a.m. (CET; GMT +2), at the Peace Palace, The Hague.

During this ceremony, the Presiding Arbitrator will personally deliver the Award to representatives from both Parties and deliver a brief statement summarizing the Award. The ceremony will be webstreamed live on the Permanent Court of Arbitration ("PCA") website beginning at approximately 10:00 am (CET; GMT +2) on July 22, 2009 (http://www.pca-cpa.org/showpage.asp?pag_id=1306). Representatives of the States and other entities who witnessed the signing of the Parties' Comprehensive Peace Agreement have been invited to attend the ceremony. Members of the Sudanese and international media are also invited to be present.

Immediately after the ceremony, the Award will be made public through the PCA website. The PCA will also issue a press release (in both English and Arabic), which will provide a short summary of the most critical aspects of the Award.

The PCA emphasizes that until the Award is rendered at the ceremony on July 22, 2009, its contents will continue to be absolutely confidential. No person or entity has or will be given advanced notice of the Tribunal's decision.

* * * *

CHAPTER II – INTRODUCTION

95. The GoS and the SPLM/A agreed in 2004 to define the “**Abyei Area**” in the following terms: “The territory [of the Abyei Area] is defined as the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.”¹³ (In appropriate instances, this phrase is also referred to in this Award as the “**Formula**”) However, the Parties do not agree on the boundaries of the Abyei Area that the application of that Formula should produce. It is this disagreement that constitutes the essence of the dispute submitted for arbitration to the Tribunal.

A. GEOGRAPHY

1. The Republic of Sudan

96. The Republic of Sudan (“**Sudan**”) is located in north-east Africa, situated between latitudes 3°53'N and 21°55'N and longitudes 21°54' E and 37°30'E.¹⁴ It borders Egypt to the north, Chad, Libya and the Central African Republic to the west, the Democratic Republic of the Congo, Uganda and Kenya to the south, and Ethiopia and Eritrea to the east.¹⁵ The largest country in Africa, it comprises 2,376,000 square kilometers of land and 129,810 square kilometers of water. Below is a map of Sudan and its international boundaries:¹⁶

¹³ Abyei Protocol, section 1.1.2

¹⁴ SPLM/A Memorial, para. 69.

¹⁵ *Id.*

¹⁶ *Source:* United Nations Cartographic Section.



97. Sudan is divided into twenty-five states, of which fifteen are located in northern Sudan (“Northern Sudan”) and ten in southern Sudan (“Southern Sudan”). Northern Sudan comprises the states of Blue Nile, Gezira, Gadarif, Kassala, Khartoum, Northern, North Darfur, North Kordofan, Red Sea, Nile, Sinnar, South Darfur, South Kordofan, West Darfur

and White Nile.¹⁷ Southern Sudan comprises Central Equatoria, Eastern Equatoria, Jonglei, Lakes, Northern Bahr el Ghazal, Unity, Upper Nile, Warab, Western Bahr el Ghazal and Western Equatoria.¹⁸

98. Sudan has some 40 million inhabitants with an average population density of approximately 14 persons per square kilometer.¹⁹ There are 19 major ethnic groups and almost 600 subgroups, amounting to more than 100 languages and dialects spoken.²⁰ In a census on ethnicity in 1956, it was reported that Arabs constituted 39 percent and Africans 61 percent of the population. Generally, the Arabs are located in Northern Sudan while the Africans are located in the South. At 12 percent of the national population, the Dinka was at that time the largest single group from Southern Sudan. 70 percent of the population reportedly follow Islam while the remainder, predominantly in Southern Sudan, follow local faiths (25 percent) or Christianity (5 percent).²¹
99. The climate is arid in the north, whereas the south-west is characterized by tropical wet and dry seasons. Temperatures do not vary greatly throughout the year. However, the length of the dry season differs in various regions, dependent upon the flows of the dry, north-easterly winds from the Arabian Peninsula and moist south-westerly winds from the Congo River basin.²²

2. Northern Sudan

100. North Sudan constitutes three-quarters of the surface area of Sudan and is inhabited by the same proportion of its population, approximately 31 million people.²³ The majority are Muslim, and Arabic is the dominant language. As much of North Sudan is desert, the majority of its population lives in just over 15 percent of the land.²⁴ Some Arab tribes such

¹⁷ See United Nations Mission in Sudan website, at <http://www.unmis.org>.

¹⁸ SPLM/A Memorial, para. 77.

¹⁹ SPLM/A Memorial, para. 70.

²⁰ SPLM/A Memorial, para. 72.

²¹ *Id.*

²² SPLM/A Memorial, para. 71.

²³ SPLM/A Memorial, para. 83.

²⁴ SPLM/A Memorial, paras. 81-82.

as the Baggara are nomadic while others, including Ja'aliyyin and Danagla, farm along the Nile and further south.²⁵

3. Southern Sudan

101. Southern Sudan has an estimated population of 8.99 million and a surface area of 640,000 square kilometers.²⁶ It is a predominantly rural, subsistence economy and is fertile throughout the year. It is served by a number of major river systems and dense tropical evergreen forests, which sustain a wide range of cereals, vegetables and tree crops.²⁷ The largest group in South Sudan is the Dinka, comprising 12 percent of the national population, followed by the Azande and Nuer.²⁸ The most widely-spoken languages are Dinka, Juba Arabic, Nuer and English. The SPLM/A political party holds a distinct majority in the Southern Sudan Legislative Assembly.

4. The Abyei Location, the Ngok Dinka, and the Misseriya

102. The Abyei location is located between the north and the south of Sudan. It has been referred to by the Parties as “a bridge between the north and the south, linking the people of Sudan.”²⁹

103. The township of Abyei (“Abyei Town”) is located north of the river Bahr el Arab/Kir.³⁰ This river runs through the adjoining provinces of Bahr el Ghazal, Darfur and Kordofan.³¹ The Bahr el Arab is known by other names, attributable to the different tribes living along its course.³² Thus, the Ngok Dinka refer to the Bahr el Arab as the Kir³³ or the Gurf,³⁴

²⁵ SPLM/A Memorial, para. 83.

²⁶ SPLM/A Memorial, para. 77.

²⁷ SPLM/A Memorial, para. 76.

²⁸ SPLM/A Memorial, para. 78.

²⁹ Abyei Protocol, section 1.1.1.

³⁰ GoS Memorial, para. 6.

³¹ GoS Memorial, para. 2.

³² GoS Memorial, para. 3.

³³ SPLM/A Memorial, para. 91.

³⁴ GoS Memorial, para. 3.

while other references (including by Arabic speakers) identified the same river as “the Bar el Jange” or the “Bahr ed Deynka.”³⁵

104. The Bahr river basin contains the Bahr el Arab/Kir, the Ngol/Ragaba ez Zarga, the Nyamora/Umm Rebeiro, and the Nam/Bahr el Gazal.³⁶ To the south of this is the Sudd, one of the world’s largest swamps.³⁷ The clay plains of the Abyei region are characterized by thick forest, bushes, and vegetation, which combined with the extreme wet and dry seasons support the many fruits and plants which can be found there.³⁸ There are three major oilfields in the area, whose 2005 to 2007 revenues were estimated in the region of US\$1.8 billion.³⁹
105. As described by the SPLM/A, Abyei Town is the ancestral homeland of the Ngok Dinka.⁴⁰ However, the GoS alleges that there is no documentary evidence that Abyei existed as a settlement in 1905, and claims that the earliest map that shows Abyei in its present location dates from 1916.⁴¹
106. The Ngok Dinka, one of the 25 tribes which comprise the Dinka people,⁴² are reportedly a highly cohesive tribal unit of an estimated 300,000 people, with a well-defined, centralized political structure. They are divided into nine Chiefdoms, under a single “Paramount Chief”.⁴³ Abyior, Achaak, Achueng, Alei, Anyiel, Bongo, Diil, Mareng and Manyuar.⁴⁴ Each Chiefdom has an area of permanent habitation and seasonal grazing areas.⁴⁵ They cultivate the land⁴⁶ and, through tribal law and custom, grant individuals and families exclusive right to use certain lands.⁴⁷ The Ngok are said to have a spiritual connection with

³⁵ SPLM/A Memorial, para. 91.

³⁶ SPLM/A Memorial, para. 89.

³⁷ SPLM/A Memorial, para. 96.

³⁸ SPLM/A Memorial, para. 98.

³⁹ SPLM/A Memorial, paras. 109-110.

⁴⁰ SPLM/A Memorial, para. 85.

⁴¹ GoS Oral Pleadings, April 18, 2009, Transcr. 40/15-23.

⁴² SPLM/A Memorial, para. 115.

⁴³ SPLM/A Memorial, paras. 111-112.

⁴⁴ SPLM/A Memorial, para. 150.

⁴⁵ SPLM/A Memorial, para. 152.

⁴⁶ SPLM/A Memorial, paras. 176.

⁴⁷ SPLM/A Memorial, paras. 171-172.

the land through their tribes' ancestors.⁴⁸ The present-day Abyei Town is the centre of their political and commercial affairs.

107. Living to the north of the Ngok Dinka are the Misseriya, Arab nomads who have their base in the region of Muglad.⁴⁹ The Misseriya are said to be cattle-herders whose nomadic existence takes them across a wide territory, ranging from the area around Muglad in the north, where they spend much of each year, to the Bahr river system of the Abyei region during parts of the dry season.⁵⁰

B. HISTORICAL CONTEXT

1. First and Second Civil Wars

108. Sudan obtained independence on January 1, 1956. Soon thereafter civil war erupted between Northern Sudan and Southern Sudan. By 1965, the Misseriya and the Ngok Dinka were said to be participating in the civil war, with the former allied with Northern Sudan and the latter with Southern Sudan. In 1972, the civil war was ended by the Addis Ababa Agreement, which provided for a referendum to allow “any other areas that were culturally and geographically a part of the Southern Complex” to choose to remain in Northern Sudan or to join a new autonomous Southern Sudan.⁵¹
109. However, subsequent disputes over power, resources, religion, and self-determination led in 1983 to a second civil war.⁵² The Abyei Area is said to be at the geographical center of this civil war, which is the longest running conflict in Africa and has caused some two million deaths, significant economic destruction and untold suffering, particularly for the people of Southern Sudan.⁵³

⁴⁸ SPLM/A Memorial, para. 168.

⁴⁹ SPLM/A Memorial, para. 217.

⁵⁰ SPLM/A Memorial, para. 218.

⁵¹ SPLM/A Memorial, paras. 381-405.

⁵² SPLM/A Memorial, paras. 424.

⁵³ CPA, Preamble, p. xi, para. 2.

2. Negotiations for Peace

(a) Machakos Protocol 2002

110. On July 20, 2002 the Parties signed the Machakos Protocol (“**Machakos Protocol**”). The Machakos Protocol provided that a peace agreement was to be implemented in accordance with the sequence, time periods, and processes set out therein.⁵⁴ It also provided for an internationally monitored referendum, organized jointly by the GoS and the SPLM/A, entitling the people of Southern Sudan to vote on whether to secede from Sudan.⁵⁵
111. The referendum was to be preceded by two transition phases. The first phase, the “Pre-Interim Period”⁵⁶, would last for six months and would establish, among others: (i) a constitutional framework for the peace agreement; (ii) mechanisms to implement and monitor the Peace Agreement; (iii) if not already in force, a cessation of hostilities with appropriate monitoring mechanisms; and (iv) preparations for the implementation of a comprehensive ceasefire.⁵⁷
112. The next phase, the “Interim Period,” would commence at the end of the Pre-Interim Period and last for six years.⁵⁸ During this time, the institutions and mechanisms established during the Pre-Interim Period were to operate in accordance with the arrangements and principles set out in the peace agreement, and if not already accomplished, the negotiated ceasefire was to be fully implemented and put into operation.⁵⁹

(b) The Abyei Protocol

113. The Abyei Protocol (“**Abyei Protocol**”) was signed on May 26, 2004 and provided for agreed principles in administering the Abyei Area upon signing of the peace agreement. Notably, Section 1.1.2 of the Abyei Protocol defined the territory as “the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.” The Abyei Area was to be accorded special administrative status and was to be administered by a local executive

⁵⁴ Machakos Protocol, Part B.

⁵⁵ Machakos Protocol, Article 2.5.

⁵⁶ The Pre-Interim Period commenced on January 9, 2005, the day the Comprehensive Peace Agreement was signed.

⁵⁷ Machakos Protocol, Article 2.1.

⁵⁸ Machakos Protocol, Article 2.2.

⁵⁹ Machakos Protocol, Article 2.3.

council elected by the residents of the Abyei Area.⁶⁰ These residents were to be dual citizens of Western Kordofan and Bahr el Ghazal, with representation in the two legislatures.⁶¹ Residents were defined as members of the Ngok Dinka community and other Sudanese residing in the Abyei Area.⁶²

114. The Abyei Protocol also provided for the establishment of the ABC, which was given the task of “defin[ing] and demarcat[ing]” the Abyei Area.⁶³

(c) The Abyei Appendix

115. On December 17, 2004, the Parties signed an “Understanding on Abyei Boundaries Commission” (“**Abyei Appendix**”), which determined the composition of the ABC as follows:

- (a) one representative from each of the GoS and the SPLM/A;
- (b) “five impartial experts knowledgeable in history, geography and any other relevant expertise” nominated by the United States, the United Kingdom and the Inter-Governmental Authority on Development (“**IGAD**”);
- (c) two nominees of the GoS and two nominees of the SPLM/A “from the present two administrations of the Abyei Area;”
- (d) two nominees of the GoS from the Messiriya; and
- (e) two nominees of the SPLM/A from the “neighboring Dinka tribes to the South of the Abyei Area.”⁶⁴

116. In determining the Abyei Area, the ABC was required “to listen to representatives of the people of Abyei Area and their neighbours, [as well as to] listen to presentations of the two Parties”⁶⁵ and to “consult the British Archives and other relevant sources on Sudan wherever they may be available, with a view to arriving at a decision that shall be based on scientific analysis and research.”⁶⁶ The ABC Experts were also required to determine the rules of procedure of the ABC.⁶⁷

⁶⁰ Abyei Protocol, sections 2.1-2.2.

⁶¹ Abyei Protocol, section 1.2.1.

⁶² Abyei Protocol, section 6.1(a).

⁶³ Abyei Protocol, section 5.1.

⁶⁴ See Abyei Appendix, section 2.

⁶⁵ Abyei Appendix, section 3.

⁶⁶ Abyei Appendix, section 4.

⁶⁷ *Id.*

117. The Abyei Appendix further prescribed that the ABC should present its report to the Presidency before the end of the Pre-Interim Period, and that the “report of the [ABC Experts], arrived at as prescribed in the ABC rules of procedure” would be “final and binding on the Parties.”⁶⁸

(d) Comprehensive Peace Agreement

118. On January 9, 2005, the Parties signed the Peace Agreement (the “**Comprehensive Peace Agreement**” or “**CPA**”) that initiated the Pre-Interim Period.⁶⁹ They reconfirmed their commitment to the following instruments previously agreed upon, which were integrated into the CPA: the Machakos Protocol, the Protocol on Security Arrangements of September 25, 2003, the Protocol on Wealth-Sharing of September 25, 2003, the Protocol on Power-Sharing of May 26, 2004, the Protocol on the Resolution of Conflict in Southern Kordofan and the Blue Nile States of May 26, 2004 and the Abyei Protocol (with its annex, the Abyei Appendix).⁷⁰

(e) Interim National Constitution

119. Subsequently, on July 6, 2005, the Sudanese National Assembly adopted the Interim National Constitution of the Republic of Sudan (“**Interim National Constitution**”). This Constitution recognized the commitment of Sudan to comply with the CPA⁷¹ and to give constitutional support to the Abyei Protocol.⁷²

3. ABC Terms of Reference and Rules of Procedure

120. The Parties met in Nairobi between March 10-12, 2005 to draw up the Terms of Reference, which documented a “joint understanding [of] all the issues” by the Parties.⁷³ The Terms of Reference contain the Parties understanding of the “Mandate,” the “Structure” of the ABC, the “Functioning of the ABC,” the “Program of work” and “Funding.”

⁶⁸ Abyei Appendix, section 5.

⁶⁹ CPA, Chapeau, p. xii., para. 1.

⁷⁰ CPA, Preamble, p. xi., para. 6.

⁷¹ See Interim National Constitution, Preamble.

⁷² Article 183(1) of the Interim National Constitution provides:

Without prejudice to any of the provisions of this Constitution and the Comprehensive Peace Agreement, the Protocol on the Resolution of the Conflict in Abyei Area shall apply with respect to Abyei Area.

⁷³ See Terms of Reference, Preamble.

121. The Rules of Procedure were drawn up by the ABC Experts⁷⁴ and approved by the Parties on April 11, 2005. The Rules of Procedure set forth, among other matters, the schedule to be followed by the ABC Experts and the method to be followed for public meetings and field visits. The Rules of Procedure also provided that the ABC Experts would “examine and evaluate all the material they have gathered and will prepare the final report.”⁷⁵ They also state that “[the] Commission will endeavour to reach a decision by consensus,” but if “an agreed position by the two sides is not achieved, the [ABC Experts] will have the final say.”⁷⁶

4. ABC Experts’ Report

122. The ABC Experts officially presented their report (“**ABC Experts’ Report**” or “**Report**”) to the Sudanese Presidency on July 14, 2005. The ABC Experts’ Report was signed by the ABC Experts, namely, Ambassador Donald Petterson (as Chair), Professor Kassahun Berhanu, Professor Shadrack B. O. Gutto, Dr. Douglas H. Johnson and Professor Godfrey Muriuki.

123. The ABC Experts’ Report notes that the ABC Experts listened to presentations from the GoS and the SPLM/A and heard testimony from “Sudanese in Abyei Town, areas to the northeast and northwest of there, Agok and Muglad” as well as to “a group of Ngok Dinka living in Khartoum and a group of Twich Dinka residing there.”⁷⁷ The formal testimonies of 104 persons (47 Dinka and 57 Misseriya) were given under oath in public meetings. Witnesses and a large non-witness audience were reportedly able to listen to the testimony as they were being given.⁷⁸

124. In the Preface to the ABC Experts’ Report, the ABC Experts explained their process of research:

No map exists showing the area inhabited by the Ngok Dinka in 1905. Nor is there sufficient documentation produced in that year by the Anglo-Egyptian Condominium government authorities that adequately spell out the administrative situation that existed in that area at that time. Therefore, it was necessary for the [ABC Experts] to

⁷⁴ See Abyei Appendix, para. 4.

⁷⁵ Rules of Procedure, para. 13.

⁷⁶ Rules of Procedure, para. 14.

⁷⁷ ABC Experts’ Report, Part 1, pp. 3-4.

⁷⁸ ABC Experts’ Report, Part 1, p. 9.

avail themselves of relevant historical material produced both before and after 1905, as well as during that year, to determine as accurately as possible the area of the nine Ngok Dinka chiefdoms as it was in 1905.⁷⁹

125. Further noting that the GoS and SPLM/A presentations and oral testimony “largely contradicted each other and did not conclusively prove either side’s position,” the ABC Experts sought to obtain as much evidence as they could from archives and sources in Sudan, the United Kingdom, South Africa and Ethiopia, concentrating on records contemporaneous with or referring to the period of the Anglo-Egyptian Condominium (*i.e.* 1899-1956).⁸⁰ Thus, the ABC Experts reviewed historic documents at the Sudan National Records Office, maps at the Sudan National Service Authority, and additional documents at the University of Khartoum library.⁸¹ Three of the ABC Experts traveled to England to examine additional maps and documents at the Rhodes House Library and the Bodleian Library at Oxford University, as well as at the Sudan Archive of the University of Durham. They also met former District Commissioner Michael Tibbs in Sussex and anthropologist Ian Cunnison in Hull.⁸² The two other ABC Experts undertook additional research in Addis Ababa and Pretoria.⁸³
126. The ABC Experts state that they analyzed the material applying “the generally accepted historical method of comparing oral with written material,” as well as “established legal principles in determining land rights in former British-administered African territories, including the Sudan.”⁸⁴
127. In conducting their research, the ABC Experts were mindful of what the official United States Government proponents of the Formula for the “Abyei Area” stated: “[I]t was clearly our view when we submitted our proposal that the area transferred in 1905 was roughly equivalent to the area of Abyei that was demarcated in later [years].”⁸⁵ They maintain that

⁷⁹ ABC Experts’ Report, Part 1, p. 4.

⁸⁰ ABC Experts’ Report, Part 1, p. 11.

⁸¹ ABC Experts’ Report, Part 1, p. 4.

⁸² *Id.*

⁸³ ABC Experts’ Report, Part 1, p. 5.

⁸⁴ ABC Experts’ Report, Part 1, p. 12; *see also* ABC Experts’ Report, Appendix 2.

⁸⁵ ABC Experts’ Report, Part 1, p. 4.

“[t]his position was, according to the American participants, conveyed to the two sides at the Naivasha talks.”⁸⁶

128. The GoS and the SPLM/A representatives made final presentations to the ABC on June 16-17, 2005. The ABC Experts’ Report states:

The Government of Sudan’s position is that the only area transferred from Bahr el-Ghazal to Kordofan in 1905 was a strip of land south of the Bahr el-Arab/Kir; that the Ngok Dinka lived south of the Bahr el-Arab/Kir prior to 1905, and migrated to the territory north of the river only after coming under the direct administration of Kordofan. Therefore the Abyei Area should be defined as lying south of the Bahr el-Arab/Kir, and excluding all territory to the north of the river, including Abyei Town itself. This is opposed by the SPLM/A position which is that the Ngok Dinka have established historical claims to an area extending from the existing Kordofan/Bahr el-Ghazal boundary to north of the Ragaba ez-Zarga/Ngol, and that the boundary should run in a straight line along latitude 10°35’N⁸⁷

129. The ABC Experts completed their deliberations on June 20, 2005.⁸⁸ The ABC Experts’ Report was presented to the Sudanese Presidency on July 14, 2005.

130. The ABC Experts made the following determinations in the “Conclusions” section of the ABC Experts’ Report:

- In 1905 there was no clearly demarcated boundary of the area transferred from Bahr el-Ghazal to Kordofan;
- The GOS belief that the area of the nine Ngok Dinka chiefdoms placed under the authority of Kordofan in 1905 lay entirely south of the Bahr el-Arab is mistaken. It is based largely on a report by a British official who incorrectly concluded that he had reached the Bahr el-Arab when in fact he had only come to the Ragaba ez-Zarga/Ngol. For several years afterwards maps, some of which were cited by the GOS in its presentation to the ABC Experts, manifested this error;
- The Ngok claim that their boundary with the Misseriya should run from Lake Keilak to Muglad has no foundation;
- The historical record and environmental factors refute the Misseriya contention that their territory extended well to the south of the Bahr el-Arab, an area to which they never made a formal claim during the Condominium period;
- Although the Misseriya have clear “secondary” (seasonal) grazing rights to specific locations north and south of Abyei Town, their allegation that they have ‘dominant’ (permanent) rights to these places is not supported by documentary or material evidence;

⁸⁶ *Id.*

⁸⁷ ABC Experts’ Report, Part 1, p. 11.

⁸⁸ ABC Experts’ Report, Part 1, p. 5.

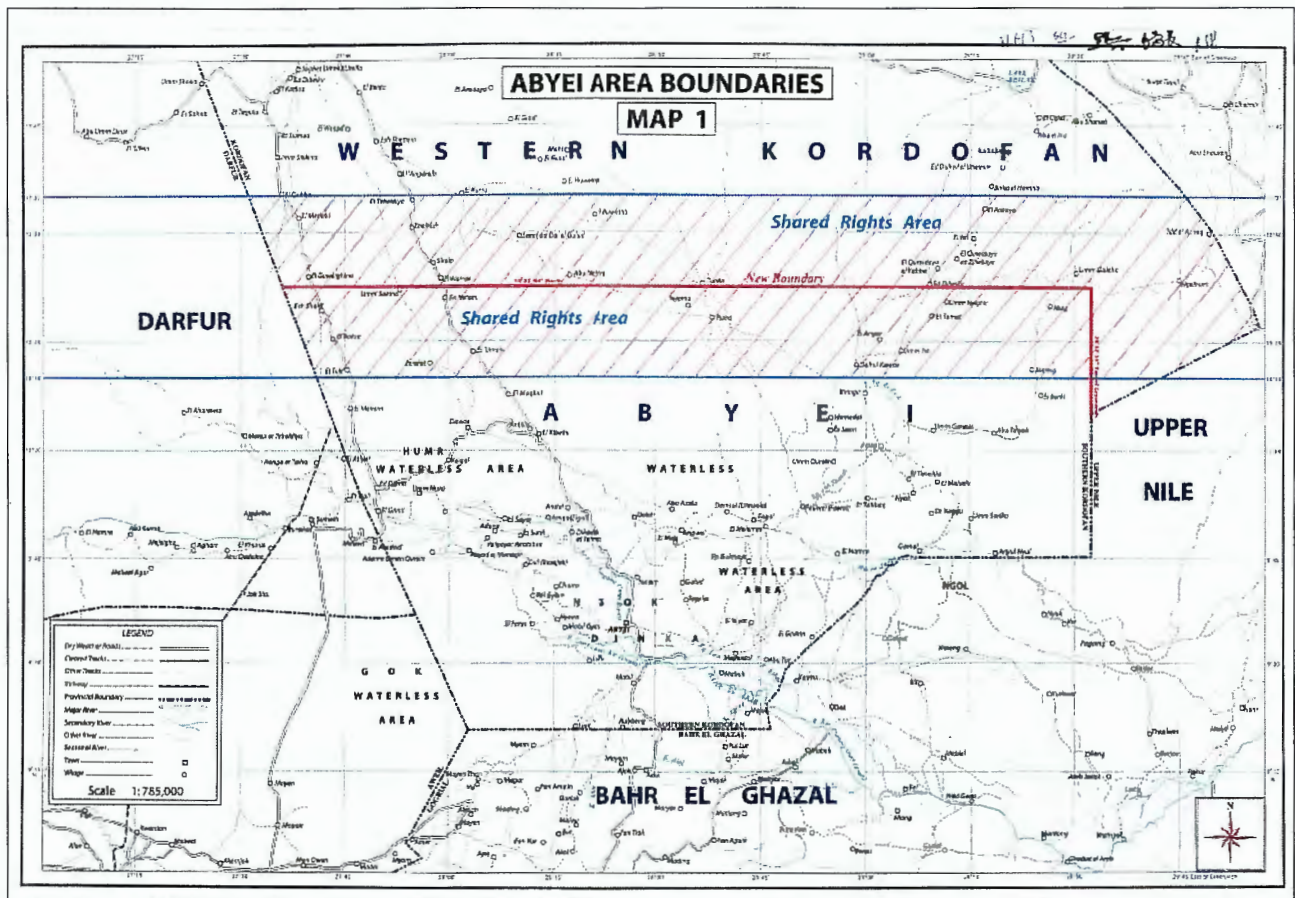
- There is compelling evidence to support the Ngok claims to having dominant rights to areas along the Bahr el-Arab and Ragaba ez-Zarga and that these are long-standing claims that predated 1905;
- There is no substance to the Misseriya claim that because the Abyei Area was included in 'Dar Messeria' District, it belongs to the Misseriya people. The Ngok and the Humr were put under the authority of the same governor solely for reasons of administrative expediency in 1905. After that action, the Ngok retained their identity and control over their local affairs and maintained a separate court system and hierarchy of chiefs;
- The administrative record of the Condominium period and testimony of persons familiar with the area attest to the continuity of Ngok Dinka settlements in, and use of, places north of the Bahr el-Arab between 1905 and 1965, as claimed by the Ngok and the SPLM/A;
- The ABC Experts considered the presentation by the SPLM/A that their dominant claim lies at latitude 10°35' N, but found the evidence in support of this to be inconclusive; and
- The border zone between the Ngok and Misseriya falls in the middle of the Goz, roughly between latitudes 10°10' N and 10°35' N.⁸⁹

131. The "Final and Binding Decision" of the ABC Experts' Report is as follows:

- 1) The Ngok have a legitimate dominant claim to the territory from the Kordofan-Bahr el-Ghazal boundary north to latitude 10°10' N, stretching from the boundary with Darfur to the boundary with Upper Nile, as they were in 1956;
- 2) North of latitude 10°10' N, through the Goz up to and including Tebeldia (north of latitude 10°35'N) the Ngok and Misseriya share isolated occupation and use rights, dating from at least the Condominium period. This gave rise to the shared secondary rights for both the Ngok and Misseriya;
- 3) The two Parties lay equal claim to the shared area and accordingly it is reasonable and equitable to divide the Goz between them and locate the northern boundary in a straight line at approximately latitude 10°22'30" N. The western boundary shall be the Kordofan-Darfur boundary as it was defined on 1 January 1956. The southern boundary shall be the Kordofan- Bahr el-Ghazal-Upper Nile boundary as it was defined on 1 January 1956. The eastern boundary shall extend the line of the Kordofan-Upper Nile boundary at approximately longitude 29°32'15" E northwards until it meets latitude 10°22'30" N;
- 4) The northern and eastern boundaries will be identified and demarcated by a survey team comprising three professional surveyors: one nominated by the National Government of the Sudan, one nominated by the Government of the Southern Sudan, and one international surveyor nominated by IGAD. The survey team will be assisted by one representative each from the Ngok and Misseriya, and two representatives of the Presidency. The Presidency shall send the nominations for this team to IGAD for final approval by the international ABC Experts;
- 5) The Ngok and Misseriya shall retain their established secondary rights to the use of land north and south of this boundary.⁹⁰

⁸⁹ ABC Experts' Report, Part 1, pp. 20-21.

132. A map of the Abyei Area, as delimited by the ABC Experts,⁹¹ is reprinted below:



5. Abyei Road Map and Arbitration Agreement

133. Upon the delivery of the ABC Experts' Report, disagreements arose between the Parties as to whether the ABC Experts exceeded their mandate.

134. On June 8, 2008, the Parties signed "The Road Map for Return of IDPs and Implementation of Abyei Protocol" (the "**Abyei Road Map**") in Khartoum. Through the Abyei Road Map, the Parties committed, among other matters, to refer this dispute to arbitration, and to "abide by and implement the award of the arbitration tribunal."⁹² They also agreed, without

⁹⁰ ABC Experts' Report, Part 1, pp. 21-22.

⁹¹ ABC Experts' Report, Part I, Map 1.

⁹² Abyei Road Map, Section 4.

prejudice the outcome of the arbitration, on interim boundaries for the Abyei Area for administrative purposes.⁹³

135. The Abyei Road Map's agreement to arbitrate was implemented shortly thereafter through the Arbitration Agreement, which was signed on July 7, 2008.

⁹³ See Abyei Road Map, Section 3 and SPLM/A Map Atlas vol. 1, Map 58 (Abyei Area: Area Calculations).

CHAPTER III – SUMMARY OF THE PARTIES’ ARGUMENTS

136. Consistent with Article 2 of the Arbitration Agreement and the Parties’ presentations at the oral pleadings, this chapter is organized into two sections: (1) the Parties’ arguments on whether the ABC Experts exceeded their mandate, and (2) the Parties’ arguments concerning the delimitation of the Abyei Area.

A. EXCESS OF MANDATE

137. This section summarizes the Parties’ arguments relating to whether the ABC Experts had “exceeded their mandate.” As the GoS claims such excess of mandate and the SPLM/A’s arguments on this matter are mostly cast in response to the GoS’s contentions, the summary will be primarily organized using the framework contained in the GoS Memorial.⁹⁴

1. “Excess of Mandate” Conceptions

138. Article 2(a) of the Arbitration Agreement provides that the Tribunal is to determine, at the outset:

[w]hether or not the ABC Experts had, on the basis of the agreement of the Parties as per the CPA, exceeded their mandate which is “to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905” as stated in the Abyei Protocol, and reiterated in the Abyei Appendix and the ABC Terms of Reference and Rules of Procedure. (emphasis added)

139. There is disagreement between the Parties on the content and meaning of “excess of mandate” within the context of these proceedings. The GoS contends that the phrase should be interpreted in its ordinary meaning, given that the Parties did not agree on any special meaning.⁹⁵ The GoS would liken the phrase to the concepts of “excess of jurisdiction,” decisions taken *ultra vires* or decisions involving an excess of power (*excès de pouvoir*).⁹⁶ The GoS maintains that *excès de pouvoir* has always been interpreted as including all

⁹⁴ GoS Memorial, paras. 192-276. While this summary is arranged in accordance with arguments as presented in the GoS Memorial, the GoS later re-classified its arguments, and as per the Rejoinder, the headline arguments for Excess of Mandate were (a) Gross Breaches of Applicable Procedural Rules and (b) Misinterpretation and Misapplication of the Substantial Mandate. The GoS explains that it “deemed it clearer to group together [the] grounds in a more systematic way in [its] counter-memorial and in [its] rejoinder, if only not to have to repeat the same explanations when they apply to several grounds.” GoS Oral Pleadings, April 18, 2009, Transcr. 70/16 - 71/02.

⁹⁵ GoS Oral Pleadings, April 18, 2009, Transcr. 73/21-25.

⁹⁶ GoS Memorial, para. 135.

serious misuses of jurisdiction as well as gross violations of procedural rules.⁹⁷ The GoS thus asserts that “if the ABC Experts exceeded their mandate *in any respect*, this is sufficient to trigger Article 2(c) of the Arbitration Agreement.”⁹⁸

140. The SPLM/A, on the other hand, contends that an “excess of mandate” is a specific, identifiable type of defect,⁹⁹ which is already particularly defined by Article 2(a) of the Arbitration Agreement by reference to that category of disputes which the Parties submitted to the ABC (“*their mandate WHICH IS...*”).¹⁰⁰ Taking this definition into consideration, an “excess of mandate” would be narrower than the GoS’s conception (which includes an *excès de pouvoir*)¹⁰¹ and would be confined to a decision *ultra petita*¹⁰², i.e., a decision that went beyond the ambit of the issues argued by the parties. The SPLM/A also believes that this reading would be in line with the more contemporary understanding of “excess of mandate.”¹⁰³

2. Procedural Excess of Mandate Arguments

(a) Preliminary Argument: Procedural Excesses as a Basis for Claiming Excess of Mandate

(i) *GoS Arguments*

141. The GoS places emphasis on the fact that the Parties took care in drafting Terms of Reference according to which the ABC Experts were obliged to carry out their mandate. The ABC Experts also drew up Rules of Procedure to guide their proceedings. If the ABC Experts materially deviated from the Terms of Reference and Rules of Procedure in carrying out the task conferred on them, the GoS maintains that this would be inconsistent with the conditions laid down for the exercise of their mandate.¹⁰⁴ The specific inclusion by the Parties of the Terms of Reference and Rules of Procedure in Article 2(a) of the

⁹⁷ GoS Oral Pleadings, April 18, 2009, Transcr. 74/10-13.

⁹⁸ GoS Memorial, para. 95.

⁹⁹ SPLM/A Counter-Memorial, para. 165.

¹⁰⁰ SPLM/A Counter-Memorial, para. 100.

¹⁰¹ SPLM/A Oral Pleadings, April 19, 2009, Transcr. 43/10.

¹⁰² SPLM/A Oral Pleadings, April 19, 2009, Transcr. 37/12-20.

¹⁰³ SPLM/A Oral Pleadings, April 19, 2009, Transcr. 43/10-44/16.

¹⁰⁴ GoS Rejoinder, para. 100.

Arbitration Agreement¹⁰⁵ is said to be evidence of the importance the Parties placed on these instruments, and confirms their intention to incorporate any serious procedural violation within the Tribunal's mandate.¹⁰⁶

142. The GoS also contends that the ABC Experts were not endowed with broad procedural discretion. Citing Section 5 of the Abyei Appendix,¹⁰⁷ the GoS maintains that the Parties premised the final and binding character of the ABC Experts' Report on the proper application of the Rules of Procedure.¹⁰⁸ The GoS also emphasizes that the procedural rules apply to the ABC as a whole, not to the ABC Experts in isolation. The fact that the essential tasks were assigned to the Commission as a whole and not to the ABC Experts alone was a guarantee of transparency and of equality in the Parties' treatment. Insofar as the ABC Experts worked separately without notice to the Parties, these guarantees have been ignored and a fundamental rule of procedure has been violated.¹⁰⁹ Such serious procedural irregularities are grounds for an excess of mandate, as recognized by numerous international conventions and instruments.¹¹⁰

(ii) *SPLM/A Arguments*

143. The SPLM/A rejects any reading of Article 2(a) of the Arbitration Agreement¹¹¹ that would permit the ABC Experts' Report to be challenged based on purported violations of

¹⁰⁵ Article 2(a) of the Arbitration Agreement provides:

...

The issues that shall be determined by the **Tribunal** are the following:

Whether or not the ABC Experts had, on the basis of the agreement of the Parties as per the CPA, exceeded their mandate which is "to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905" as stated in the Abyei Protocol, and reiterated in the Abyei Appendix and the ABC Terms of Reference and Rules of Procedure.

...

¹⁰⁶ GoS Oral Pleadings, April 18, 2009, Transcr. 87/07-18.

¹⁰⁷ Section 5 of the Abyei Appendix provides :

The ABC shall present its final report to the Presidency before the end of the Pre-Interim Period. The report of the [ABC Experts], arrived at as prescribed in the ABC rules of procedure, shall be final and binding on the Parties.

¹⁰⁸ GoS Rejoinder, para. 104.

¹⁰⁹ GoS Rejoinder, para. 106.

¹¹⁰ See GoS Memorial, paras. 180-84, *citing* the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article V(1)(d); ICSID Arbitration Rules, Article 50(1)(c)(iii); UNCITRAL Model Law, Article 36(1)(a)(iv).

¹¹¹ *Supra* note 105.

“procedural conditions” or procedural rights, as the scope of the Tribunal’s review pursuant to Article 2(a) is narrowly defined;¹¹² the “mandate” of the ABC, which the Tribunal must analyze for purported excess, is “to define (*i.e.* delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.” Further, the formulation makes no reference to violations of the ABC Rules of Procedure or any other arbitration procedures and reading these into the provision would be impermissible.¹¹³

144. Moreover, the SPLM/A asserts that the ABC was a *sui generis* body with a unique set of procedures intended to give the ABC Experts the freedom to conduct the proceedings as they thought fit;¹¹⁴ there were very few mandatory procedural restrictions on the ABC Experts.¹¹⁵ The ABC Experts were recognized by both Parties as experts in history, geography, culture, and African law and were called upon to apply the procedures of “scientific analysis and research.”¹¹⁶ They were not international arbitration practitioners and were not subject to rules of procedural conduct based on arbitral principles.¹¹⁷
145. Citing a number of authorities, the SPLM/A also contends that a dispute regarding “jurisdiction” or excess of mandate does not extend to procedural complaints.¹¹⁸ The SPLM/A further emphasizes that a party seeking to invalidate an arbitral award or other adjudicative decision on procedural grounds must show serious prejudice, such that the Tribunal would have decided otherwise had the Tribunal not made the particular mistake.¹¹⁹ It contends that the GoS has not satisfied its burden of proof in this respect.¹²⁰

¹¹² See SPLM/A Counter-Memorial, paras. 162-71.

¹¹³ SPLM/A Counter-Memorial, paras. 167-68.

¹¹⁴ SPLM/A Counter-Memorial, para. 234.

¹¹⁵ These were listed in the SPLM/A Counter-Memorial, para. 239-40 (“The foregoing provisions of the Parties’ agreements imposed very few, and very limited, constraints on the ABC Experts’ procedural discretion. In particular, the Parties’ procedural agreements provide only for: (a) the constitution of a tribunal of ABC Experts with specified expertise; (b) a time limit for submission of the ABC’s final report; (c) presentations by the Parties of their respective positions; (d) hearing representatives of the people of the Abyei Area; and (e) consultation of the British Archives and other relevant sources wherever available.”).

¹¹⁶ SPLM/A Counter-Memorial, paras. 236-37.

¹¹⁷ SPLM/A Counter-Memorial, para. 234.

¹¹⁸ SPLM/A Rejoinder, para. 146, citing *Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University v. Czechoslovakia)* Ser. a/B 61, 208,222 (P.C.I.J 1933), SPLM/A Exhibit-LE 24/6. Nonetheless, the SPLM/A states in its Counter-Memorial that for an allowable procedural excess of mandate to have occurred, there must be a serious departure from a fundamental rule of procedure. See SPLM/A Counter-Memorial, paras. 287-88, citing ICSID Convention, Article 52(1)(d).

¹¹⁹ SPLM/A Oral Pleadings, April 19, 2009 Transcr. 86/02-11.

¹²⁰ SPLM/A Counter-Memorial, paras. 309-10.

(b) The ABC Experts Allegedly Took Evidence from Ngok Dinka Informants without Procedural Safeguards and without Informing the GoS(i) *GoS Arguments*

146. The GoS maintains that the ABC Experts arranged three unscheduled meetings with Ngok Dinka informants at the Hilton Hotel, Khartoum without informing it.¹²¹ Because the Terms of Reference were said to be unusually detailed and specific with respect to the ABC Experts' conduct in relation to oral testimony,¹²² and carefully distinguished between acts of the ABC as a whole and that of the ABC Experts, those terms must be taken seriously.¹²³
147. The GoS points out that a meeting could have been arranged in Khartoum either with or without the Parties (*i.e.*, by the ABC Experts alone), provided that the Parties consented and appropriate safeguards were instituted. However, instead of approaching the Parties prior to holding meetings in Khartoum, the ABC Experts allegedly took it upon themselves to convene meetings without the knowledge of the GoS. On April 21, 2005, the ABC Experts had a "secret meeting" with Ngok Dinka informants at the Hilton Hotel, Khartoum. This meeting was followed by two additional unscheduled meetings on May 6 and 8, 2005.¹²⁴ At these meetings, the GoS alleges that the ABC Experts obtained maps and other documents that were never shown to the Parties, even though some of these materials were used in the preparation of the ABC Experts' Report.¹²⁵

¹²¹ GoS Memorial, paras. 71-79.

¹²² Section 3 of the Terms of Reference provides in part:

Functioning of the ABC

...

3.2 The ABC shall thereafter travel to the Sudan to listen to the representatives of the people of Abyei Area and the neighbors as indicated hereunto:

- A. The ABC shall conduct one meeting in Abyei Town with 54 representatives of the Nine Ngok Dinka Chiefdoms (five from each plus nine chiefs)
- B. One meeting in Muglad Town with 45 Messiriya representatives (25 from Muglad sub tribes, 15 from Fulla and five from Lagawa, however the ABC shall make field visits to (Dambaloya/Dak Jur), (Pawol/Fawol), (Abugazala/Mabec) etc.
- C. One meeting to be held in Agok with 30 representatives of the neighbors of Abyei to the South (Twich, Goral West, Aweil East, Biemnhum and Panaraou), which shall be represented by six each.

¹²³ GoS Memorial, para. 199.

¹²⁴ These meetings are mentioned in Appendix 4.2 of the ABC Experts' Report, but not in their summary of their work. GoS Memorial, para. 201.

¹²⁵ GoS Memorial, para. 73.

148. The GoS also claimed that on April 25, 2005, the ABC Experts issued a note to the Commission detailing the testimony they obtained during their field visits and informed the Commission of their decision to stop collecting oral testimony and to resort to archival research. The GoS found it disturbing that the note did not mention the Hilton meeting on April 21, 2005, nor did their alleged decision deter them from scheduling the subsequent May 6 and May 8 meetings.¹²⁶
149. By arranging interviews without the knowledge of the Parties, the GoS argues that the ABC Experts not only deliberately circumvented the agreed work program, they also demonstrated a propensity to side with the SPLM/A and thus deprived the GoS of the right to a fair procedure. This is especially so since no information of these meetings was provided to the GoS until the final presentation of the ABC Experts' Report. Because a serious departure from a fundamental rule of procedure constitutes, in the view of the GoS, a ground for finding an excess of mandate, the taking of evidence by the ABC Experts without procedural safeguards and without informing the GoS constitutes an excess of mandate.¹²⁷

(ii) *SPLM/A Arguments*

150. The SPLM/A asserts that the agreed framework regarding the ABC proceedings imposed no prohibition on meetings between the ABC Experts and additional members of the public.¹²⁸ On the contrary, Section 7 of the ABC Rules of Procedure is said to expressly ensure that the ABC members – and not just the entire Commission - would be able to conduct such meetings if they chose¹²⁹ without any prior notice requirement.¹³⁰ The Parties' express contemplation was to allow the ABC Experts to conduct their own independent investigations, and to consult "other relevant sources,"¹³¹ rather than being dependent on the

¹²⁶ GoS Memorial, paras. 74-76.

¹²⁷ GoS Memorial, para. 208.

¹²⁸ SPLM/A Counter-Memorial, para. 315.

¹²⁹ Section 7 of the Rules of Procedure provides :

As occasions warrant, Commission members should have free access to members of the public other than those in the official delegations at the locations to be visited. The Commission will accept written submissions.

¹³⁰ SPLM/A Counter-Memorial, para. 316.

¹³¹ The SPLM/A relies on Section 4 of Abyei Appendix which provides :

In determining their findings, the [ABC Experts] in the Commission shall consult the British Archives and other relevant sources on Sudan wherever they may be available, with a view to arriving at a decision that shall be based on specific analysis and research. The [ABC Experts] shall also determine the rules of procedure of the ABC.

Parties to present testimony or information to them.¹³² The SPLM/A also maintains that, in fact, the GoS was informed about the ABC Experts' meetings with both Ngok Dinka and Twic Dinka members¹³³ in Khartoum, that no objections were raised,¹³⁴ and that this objection should be thus considered waived.¹³⁵

151. Even assuming that a violation of procedural rules did occur, the SPLM/A maintains that any such breach does not rise to the level of a "serious departure from a fundamental rule of procedure."¹³⁶ In their view, any breach of procedure needs to be considered within the context of the ABC Experts' broad, independent investigative authority and the ABC Experts' wide procedural discretion, and the deliberately informal and non-technical nature of the ABC proceedings.¹³⁷ At most, any violation would have been an unintentional omission inconsistent with implied provisions of the ABC Experts' own procedural rules, which they were free to alter or amend.¹³⁸
152. Finally, the SPLM/A believes that these meetings caused no prejudice to the GoS because they did not alter the outcome of the ABC Experts' decision. Quoting the GoS's acknowledgment that procedural breaches must be material, both in themselves and as to the result reached,¹³⁹ the SPLM/A maintains that the person who arranged the meeting and the witnesses interviewed in Khartoum were likely to be supporters of the GoS's position on the Abyei Area or to testify on Dinka matters that had little to do with the question at hand.¹⁴⁰ Moreover, the only map that was recorded as being given to the ABC Experts during the meetings (described as a copy of a sketch map) was not relied upon in the final decision.¹⁴¹ Finally, the SPLM/A sought to clarify that the April 25, 2005 note on testimony

¹³² SPLM/A Counter-Memorial, para. 317.

¹³³ The SPLM/A further claims that the meeting held on May 8, 2005 was with the Twic Dinka, and not the Ngok Dinka. *See* SPLM/A Oral Pleadings, April 19, 2009, Transcr. 122/24-123/02.

¹³⁴ SPLM/A Counter-Memorial, para. 342.

¹³⁵ SPLM/A Counter-Memorial, para. 353.

¹³⁶ SPLM/A Counter-Memorial, para. 330.

¹³⁷ SPLM/A Counter-Memorial, para. 332.

¹³⁸ SPLM/A Counter-Memorial, para. 333.

¹³⁹ SPLM/A Counter-Memorial, para. 364, *citing* GoS Memorial, para. 193.

¹⁴⁰ *See* SPLM/A Counter-Memorial, paras. 368-73.

¹⁴¹ SPLM/A Counter-Memorial, para. 377.

issued by the ABC Experts related to field visits between April 14 and April 20, 2005, before the contentious meetings took place.¹⁴²

(c) The ABC Experts Allegedly Unilaterally Sought and Relied on the Millington E-mail, without Notice to the GoS, to Establish Their Interpretation of the Formula

(i) *GoS Arguments*

153. The GoS alleges that, to establish their interpretation of the Formula, the ABC Experts unilaterally sought and then relied on an e-mail from an official at the Embassy of the United States of America in Nairobi, Mr. Jeffrey Millington. The response in question from Mr. Millington, which purportedly set out the US Government's understanding of the Formula, was:

It was clearly our view when we submitted our proposal [that] the area transferred in 1905 was roughly equivalent to the area of Abyei that was demarcated in later years.¹⁴³

154. The GoS argues that such unilateral actions involved a serious departure from a fundamental rule of procedure in three distinct ways:

- (a) The ABC Experts were not authorized to consult the US Government nor any other third party.¹⁴⁴ Mr. Millington's e-mail allegedly had nothing to do with the "independent investigations and scientific research" that the ABC Experts were supposed to conduct.¹⁴⁵
- (b) The Parties were given no notice of the request or the response and thus had no opportunity to comment. This was, in the GoS's view, a clear failure of due process and a patent breach of Section 14 of the Rules of Procedure.¹⁴⁶
- (c) The ABC Experts failed to see that Mr. Millington's response raised more questions than it resolved. The GoS sees no relation between "the area of the nine Ngok Dinka

¹⁴² SPLM/A Oral Pleadings, April 20, 2009, Transcr. 64/16- 65/05.

¹⁴³ ABC Experts' Report, Part I, p. 4.

¹⁴⁴ GoS Memorial, para. 210.

¹⁴⁵ GoS Rejoinder, para. 127.

¹⁴⁶ GoS Memorial, para. 211. Section 14 of the Rules of Procedure provides:

The Commission will endeavour to reach a decision by consensus. If, however, an agreed position by the two sides is not achieved, the [ABC Experts] will have the final say.

Chiefdoms transferred to Kordofan in 1905” and “the area of Abyei that was demarcated in later years.”¹⁴⁷

155. The GoS contends that Mr. Millington’s e-mail affected the outcome of the ABC decision, as it strengthened the ABC Experts’ manifestly wrong interpretation of the substance of their mandate: in the ABC Experts’ Report, mention of the disputed e-mail immediately succeeds the interpretation of the Formula by the ABC Experts, from which the word “transferred” had been carefully deleted.¹⁴⁸

(ii) *SPLM/A Arguments*

156. In the SPLM/A’s view, the Parties’ procedural agreements and the Rules of Procedure granted the ABC Experts broad procedural discretion and investigatory powers, including the power independently to conduct such research as they deemed appropriate, without imposing any prohibitions against interviews with third parties such as Mr. Millington.¹⁴⁹ In fact, there are other third parties who assisted the ABC Experts and who are acknowledged at the beginning of the ABC Experts’ Report, but their participation was not objected to by the GoS in any way.¹⁵⁰

157. Further, even if one assumed that the Millington e-mail was inconsistent with the Parties’ procedural agreements, the SPLM/A argues that this breach was not a serious violation of a fundamental procedural guarantee. Any such violation would at most have been an inadvertent misunderstanding of the limits of the ABC Experts’ investigative authority, no different in character than contacts with other third parties against which the GoS has not protested.¹⁵¹ In any event, the SPLM/A believes that the GoS does not identify any procedural injury arising from the Millington e-mail, much less the sort of grave prejudice

¹⁴⁷ GoS Memorial, para. 213. The GoS observes that no such later demarcation ever took place.

¹⁴⁸ GoS Rejoinder, para. 129. The GoS refers to a statement in the Preface of the ABC Experts’ Report which provides in relevant part :

...Therefore, it was necessary for the [ABC Experts] to avail themselves of relevant historical material produced before and after 1905, as well as during that year, to determine as accurately as possible the area of the nine Ngok Dinka chiefdoms as it was in 1905. In doing this the [ABC Experts] are mindful that the drafters of the American proposal which was incorporated into the Abyei Protocol have stated: “It was clearly our view when we submitted our proposal that the area transferred in 1905 was roughly equivalent to the area of Abyei that was demarcated in later [years]. ...”

¹⁴⁹ See SPLM/A Counter-Memorial, paras. 394-403.

¹⁵⁰ SPLM/A Counter-Memorial, para. 398.

¹⁵¹ See SPLM/A Counter-Memorial, paras. 404-407.

required to set aside an adjudicative decision. The Millington e-mail, in SPLM/A's view, was a single communication, barely a line long, which, at most, did nothing but conform to the interpretation that the ABC Experts had previously reached.¹⁵²

(d) The ABC Experts Allegedly Failed to Act through the Commission, and to Seek Consensus, in Reaching Their Decision.

(i) *GoS Arguments*

158. The GoS claims that Section 14 of the Rules of Procedure¹⁵³ was violated when the ABC Experts did not endeavor to reach a decision by consensus. Instead, the ABC Experts purportedly made no attempt to reach a consensus among the members of the ABC as a whole.¹⁵⁴ While the ABC Experts were to prepare the ABC Experts' Report and had the "final say," the ABC Experts' Report was to be the report of the entire Commission and not just the ABC Experts.¹⁵⁵ In the GoS's view, the proper procedure set out in the Parties' procedural agreements was first to submit the (draft) Report to the ABC, after which the ABC as a whole would present the Report to the Presidency.
159. Further, the GoS argues that it was neither informed nor consulted on the final outcome of the ABC Experts' Report despite the clear language and intent of the Abyei Protocol and the Rules of Procedure. No meeting was ever called to try to reconcile the views of the Parties. By excluding other ABC members from the decision-making process and by presenting the ABC Experts' Report to the Presidency without any consultation, the GoS asserts that the ABC Experts changed the very spirit of the special mechanism of dispute resolution that the ABC was supposed to embody.¹⁵⁶ The GoS also emphasizes that it had consistently expressed its objection to this way of proceeding; in fact, following the presentation of the Report to the Presidency, the head of the GoS delegation immediately

¹⁵² See SPLM/A Counter-Memorial, paras. 408-418.

¹⁵³ Section 14 of the Rules of Procedure, text *supra* at note 146.

¹⁵⁴ GoS Counter-Memorial, para. 198.

¹⁵⁵ Section 5.3 of the Abyei Protocol states that:

[t]he Abyei Boundaries Commission (ABC) shall present its final report to the Presidency as soon as it is ready. Upon presentation of the final report, the Presidency shall take necessary action to put the special administrative status of Abyei Area into immediate effect.

¹⁵⁶ GoS Rejoinder, para. 134.

made clear its protest against the manifest violation of the ABC's mandate by the ABC Experts. Hence, the GoS argues that no waiver can be implied from their conduct.¹⁵⁷

160. In response to the SPLM/A's allegations that the GoS itself thwarted attempts at achieving a consensus by not agreeing to compromise during the ABC proceedings, the GoS contends such refusal to "compromise" did not entail a principled objection to achieving a "consensus," to which it was not opposed. According to the GoS, refusing a negotiated political "compromise" is clearly different from achieving a "consensus" on reasonable scientific findings.¹⁵⁸

(ii) *SPLM/A Arguments*

161. The SPLM/A maintains that the Parties' procedural agreements specifically provided that the ABC Experts were to prepare the final ABC Experts' Report, without restricting the ABC Experts' discretion as to when and how they might seek to achieve consensus. In its view, Section 14 of the Rules of Procedure merely contemplates that the ABC Experts shall make reasonable efforts to that effect ("will endeavor"), and does not prescribe any particular mandatory procedural steps. The SPLM/A claims that the Rules of Procedure left no room, as a practical matter, for the various procedural steps that the GoS suggests should have occurred.¹⁵⁹
162. The SPLM/A also maintains that the Parties repeatedly discussed the presentation of the ABC Experts' Report to the Presidency during the weeks before that presentation occurred. Throughout those discussions, the GoS purportedly did not object or state that the course being adopted by the ABC Experts was improper (or that the GoS preferred a different approach). On the contrary, the SPLM/A argues that the GoS made it clear that it expected no further efforts to achieve a consensus and that such efforts would have been futile.¹⁶⁰ Thus, the SPLM/A believes that the GoS waived any possible objection to the ABC Experts' approach towards achieving consensus and manner of presenting the final ABC Experts' Report to the Presidency, as it had not raised any objections at any point when it

¹⁵⁷ GoS Rejoinder, para. 150.

¹⁵⁸ GoS Rejoinder, paras. 144-145.

¹⁵⁹ SPLM/A Counter-Memorial, paras. 423-438.

¹⁶⁰ See SPLM/A Counter-Memorial, paras. 439-54.

could have done so.¹⁶¹ Moreover, the SPLM/A argues that any distinction made by the GoS between “compromise” and “consensus” is “empty and desperate” semantics.¹⁶²

163. Assuming however that the ABC Experts’ efforts to achieve a consensus (or any lack of such efforts) was inconsistent with the Parties’ procedural agreements, any failure was not, in the SPLM/A’s view, a “serious violation of a fundamental procedural guarantee” that would allow the ABC Experts’ Report to be set aside. In its reading of Section 14 of the Rules of Procedure, only reasonable efforts by the ABC Experts to achieve consensus were contemplated; further, the requirement in Section 14 to endeavor to reach consensus was prescribed by the ABC Experts themselves. Any violation of such a provision would thus at most be an inadvertent misunderstanding of the ABC Experts’ own Rules of Procedure.¹⁶³

3. Substantive Excess of Mandate Arguments

(a) Introduction

(i) *GoS Argument*

164. Broadly, the GoS submits that the ABC Experts misinterpreted and misapplied their mandate by (i) using manifestly inadmissible justifications,¹⁶⁴ (ii) deciding *ultra petita*, and (iii) deciding *infra petita*.¹⁶⁵

165. Specifically, the GoS argues that an excess of mandate under Article 2(a) of the Arbitration Agreement¹⁶⁶ occurred when the ABC Experts acted *ultra petita*, by deciding on matters outside the scope of the dispute submitted by the Parties.¹⁶⁷ The ABC Experts were also said to have substantively exceeded their mandate when they decided *infra petita*, by not

¹⁶¹ See SPLM/A Counter-Memorial, paras. 472-75.

¹⁶² SPLM/A Oral Pleadings, April 19, 2005, Transcr. 152/11-17.

¹⁶³ See SPLM/A Counter-Memorial, paras. 455-71.

¹⁶⁴ While this this ground (“using manifestly inadmissible justifications”) appears in the GoS Rejoinder, it was later merged with discussions on decisions *ultra petita*. See GoS Oral Pleadings, April 18, 2009, Transcr. 136/25 *et seq.* This will be discussed in the next Section 4 ‘Violation of Mandatory Criteria’ in keeping with the original structure of the GoS’s Arguments.

¹⁶⁵ See GoS Rejoinder, paras. 151-152.

¹⁶⁶ See *supra* note 105.

¹⁶⁷ See GoS Oral Pleadings, April 18, 2009, Transcr. 137/04-09.

answering the questions asked to it by the Parties.¹⁶⁸ The GoS claims that the ABC Experts decided *ultra petita* by purporting to confer rights on the Ngok Dinka outside the Abyei Area and by limiting the Misseriya's traditional rights,¹⁶⁹ and they decided *infra petita* by: (i) refusing to decide the question asked, (ii) answering a different question than that asked, and (iii) ignoring the stipulated date of 1905.¹⁷⁰

(ii) *SPLM/A Arguments*

166. The SPLM/A does not agree with the GoS's claims that the ABC Experts acted *ultra petita* by purporting to confer rights on the Ngok Dinka outside the Abyei Area and by limiting the Misseriya's traditional rights. It asserts that the GoS's claim that the ABC Experts acted outside their mandate rests on implausible and distorted readings of the ABC Experts' Report; the SPLM/A claims that the ABC Experts were merely making explicit that they had delimited the Abyei Area's territorial boundaries without purporting to affect the retained rights of usage of the Ngok or the Messiriya.¹⁷¹ Further, assuming *arguendo* that the ABC Experts did indeed confer or limit such rights, they still would not have exceeded their mandate.¹⁷²
167. The SPLM/A further asserts that the grounds put forward by the GoS to support its *infra petita* claims are in truth substantive disagreements with the ABC Experts' interpretation of the Abyei Area definition in Section 1.1.2 of the Abyei Protocol¹⁷³. As such, these are not grounds for challenging the ABC Experts' Report as an excess of mandate.¹⁷⁴ While consistently asserting that the ABC Experts' interpretation of the Abyei Area is correct, the SPLM/A contends that errors of law or interpretation do not give rise to an excess of mandate,¹⁷⁵ nor are factual and evidentiary disagreements with the ABC Experts' conclusions valid grounds for claiming an excess of mandate.¹⁷⁶ The SPLM/A also submits

¹⁶⁸ GoS Rejoinder, paras. 209, 211.

¹⁶⁹ See GoS Rejoinder, para. 195.

¹⁷⁰ See GoS Rejoinder, paras. 209-227.

¹⁷¹ See SPLM/A Oral Pleadings, April 19, 2009, Transcr. 197/20-198/03.

¹⁷² See SPLM/A Oral Pleadings, April 19, 2009, Transcr. 185/18-186/13.

¹⁷³ Section 1.1.2 of the Abyei Protocol provides: "The territory is defined as the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905."

¹⁷⁴ SPLM/A Counter-Memorial, para. 488.

¹⁷⁵ See SPLM/A Counter-Memorial, paras. 577-586.

¹⁷⁶ See SPLM/A Counter-Memorial, paras. 599-608.

that the ABC Experts' interpretation of their mandate is entitled to a substantial presumption of correctness and accordingly could only be invalidated in a rare and exceptional case.¹⁷⁷ Moreover, even assuming that the ABC Experts incorrectly interpreted their definition of the Abyei Area, the SPLM/A argues that an excess of mandate can only be sustained where the adjudicatory authority purported to act beyond its authority in a glaring, manifest, or flagrant manner.¹⁷⁸

(b) The ABC Experts Allegedly Refused to Decide the Question Asked

(i) *GoS Arguments*

168. The premise of this GoS argument is its rejection of the ABC Experts' interpretation of the Formula: instead of interpreting the definition of the Abyei Area as referring to the area of the nine Ngok Dinka chieftains *transferred* to Kordofan in 1905 (which it calls the "territorial interpretation"), the GoS believes that the ABC Experts interpreted the Formula as referring only to the area the nine Ngok Dinka chieftains used and occupied in 1905 (which it calls the "tribal interpretation").¹⁷⁹
169. The GoS contends that the mandate of the ABC Experts was clear, *i.e.*, to define an area transferred in 1905. However, the ABC Experts, according to the GoS, allegedly declined to answer the question they were charged with answering.¹⁸⁰ Instead, they "sought to determine as accurately as possible the area of the nine Ngok Dinka Chiefdoms as it was in 1905."¹⁸¹ By deviating from the question of defining "the area of the nine Ngok Dinka Chiefdoms *transferred to Kordofan* in 1905" to that of "the area of the nine Ngok Dinka Chiefdoms as it was in 1905" – the transfer being left aside – the ABC Experts allegedly decided in excess of their mandate. Put differently, the ABC was tasked to find the "lines" constituting the boundary of the area transferred to Kordofan in 1905, and not to define the territory that the Ngok Dinka used and occupied in 1905.¹⁸² The GoS submits that the question of an area *transferred* at a given date is different from that of an area *occupied* by

¹⁷⁷ SPLM/A Counter-Memorial, para. 613.

¹⁷⁸ SPLM/A Counter-Memorial, para. 622.

¹⁷⁹ See GoS Oral Pleadings, April 18, 2009, Transcr. 25/07-17. For a more expansive treatment of these respective interpretations of the mandate, see *infra* at para. 232 *et seq.*

¹⁸⁰ GoS Memorial, para. 230.

¹⁸¹ GoS Rejoinder, para. 212, citing ABC Experts' Report, Part I, p. 4.

¹⁸² GoS Rejoinder, para. 223.

particular peoples or chiefdoms at the same date. The ABC Experts thus effectively substituted their question for that agreed and asked by the Parties.¹⁸³

(ii) *SPLM/A Arguments*

170. In the SPLM/A's view, the ABC Experts clearly defined and demarcated the Abyei Area, doing so both with specific latitudinal and longitudinal coordinates, and by delimiting the same coordinates on Map 1 of the ABC Experts' Report, thus showing the Abyei Area boundaries. The SPLM/A asserts that this was precisely the task that the ABC Experts were mandated to perform.¹⁸⁴ Moreover, the SPLM/A submits that the definition of the Abyei Area as interpreted by the ABC Experts, (*i.e.*, by reference to the entire historic territory of the Ngok Dinka people in 1905), was consistent with the ABC Experts' explanations during the ABC's proceedings which had been received without objection by the Parties.¹⁸⁵ It further asserts that the ABC Experts' interpretation of the Abyei Area is the natural, grammatically correct meaning.¹⁸⁶

171. The SPLM/A repeatedly states that the ABC Experts' interpretation of the Abyei Area definition was a matter of substantive interpretation of the Abyei Protocol, which cannot form the basis of an excess of mandate claim.¹⁸⁷ It submits that the real complaint of the GoS is with the substance of the answer, rather than a failure to provide an answer.¹⁸⁸

(c) The ABC Experts Allegedly Answered a Different Question Than That Asked

(i) *GoS Arguments*

172. Instead of determining "the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905" (which the GoS posits to be a question of fact), the GoS submits that the ABC Experts reformulated the question in terms of dominant and secondary rights by the Ngok

¹⁸³ GoS Rejoinder, para. 215.

¹⁸⁴ SPLM/A Counter-Memorial, para. 504.

¹⁸⁵ SPLM/A Counter-Memorial, para. 497.

¹⁸⁶ SPLM/A Oral Pleadings, April 20, 2009, Transcr. 70/03-18.

¹⁸⁷ SPLM/A Rejoinder, para. 285.

¹⁸⁸ SPLM/A Counter-Memorial, para. 506.

Dinka and the Misseriya over the territory.¹⁸⁹ For this reason, the GoS criticizes the ABC Experts' consideration of "territorial occupation and/or use rights" and "population dynamics" in determining the Abyei Area.¹⁹⁰

173. In the GoS's view, it was not necessary to determine the nature of the established land or territorial occupation and/or use rights by all nine Ngok Dinka chiefdoms in order to delimit and demarcate the boundaries of the transferred area.¹⁹¹ The ABC Experts had at their disposal official documents that would have allowed them to determine the transferred area, but they allegedly set these aside in favor of the disputed methodology.¹⁹²
174. Further, even assuming that the ABC Experts were entitled to consider land use rights, the failure of the ABC Experts to consider the land use rights of any of the Humr omodiyas is for the GoS an indication of the partisan nature of their inquiry.¹⁹³

(ii) *SPLM/A Arguments*

175. For the SPLM/A, this line of argumentation is simply the converse or mirror image of the previous argument that the ABC Experts refused to answer the question that was addressed to them.¹⁹⁴ It reiterates that the argument does not actually point to an excess of mandate, but rather to a substantive disagreement with the ABC Experts' reasoning and factual appreciation of the evidence.¹⁹⁵
176. In the SPLM/A's view, the ABC Experts could hardly determine what the boundaries of the Abyei Area were without determining what was included in the 'area of the nine Ngok

¹⁸⁹ The GoS claims that this reformulation of the question is evident from the primary conclusion of the ABC Experts:

1) The Ngok have a legitimate dominant claim to the territory from the Kordofan-Bahr el-Ghazal boundary north to latitude 10°10'N, stretching from the boundary with Darfur to the boundary with the Upper Nile, as they were in 1956. (ABC Experts' Report, Part I, p. 21, SM Annex 81)

The GoS also claims that it is evident from the reasoning of the ABC Experts:

It is therefore incumbent upon the [ABC Experts] to determine the nature of established land or territorial occupation and/or use rights by all the nine Ngok Dinka chiefdoms, with particular focus on those in that northernmost areas the formed the transferred territory. (ABC Experts' Report, Appendix 2, p. 21 (SM Annex 81)

See GoS Memorial, paras. 235-237.

¹⁹⁰ GoS Memorial, para. 241.

¹⁹¹ GoS Rejoinder, para. 217.

¹⁹² GoS Rejoinder, paras. 222-223.

¹⁹³ GoS Memorial, para. 238.

¹⁹⁴ SPLM/A Counter-Memorial, para. 516.

¹⁹⁵ SPLM/A Rejoinder, para. 278.

Dinka Chiefdoms.’¹⁹⁶ Thus, in order for them to determine the boundaries of the Ngok Dinka that were transferred for administrative reasons in 1905, they needed to determine the nature of the established land or territorial occupation and/or use rights by all the nine Ngok Dinka chiefdoms.¹⁹⁷

177. The SPLM/A also contests the assertion that the ABC Experts did not consider “any of the Humr omodiyas,”¹⁹⁸ arguing that the ABC Experts considered “with great care and diligence the land use of the Misseriya.”¹⁹⁹

(d) The ABC Experts Allegedly Ignored the Stipulated Date of 1905

(i) *GoS Arguments*

178. The GoS maintains that the ABC Experts virtually ignored the agreed date for determining the transferred area (*i.e.*, 1905). In particular, they allegedly did not provide any information as to the position of tribes in 1905 which would warrant a line anywhere north of the Bahr el Arab, still less one as far north as latitude 10°22’30”N. Instead, they purportedly made reference to other wholly irrelevant dates, ignoring that their mandate was restricted to determining what area was transferred in 1905.²⁰⁰ The GoS points out that despite repeated references to “1905” in the ABC Experts’ Report, the critical date does not appear once in the “Final and Binding Decision.”²⁰¹

179. The GoS takes specific exception to the ABC Experts’ reliance on the 1965 Peace Agreement between the Messiriya Humr and the Ngok Dinka.²⁰² The GoS notes that the 1965 agreement was superseded by the Abyei Agreement of 1966, and that the ABC Experts were not empowered to refer to the 1966 agreement at all “except as [it] may have shed light on the position in 1905.” The GoS contends that the 1966 Agreement does not do this.²⁰³ Further, the GoS claims that the 1965 agreement was only used to provide absolute evidence of “the continuity of Ngok Dinka settlements in, and use of, places north

¹⁹⁶ SPLM/A Counter-Memorial, para. 518.

¹⁹⁷ SPLM/A Counter-Memorial, para. 522.

¹⁹⁸ SPLM/A Counter-Memorial, para. 534, referring to GoS Memorial, para. 238(d).

¹⁹⁹ SPLM/A Counter-Memorial, paras. 534-537, citing ABC Experts’ Report, Part I, at pp. 10-20.

²⁰⁰ See GoS Memorial, paras. 242-243.

²⁰¹ GoS Rejoinder, para. 224.

²⁰² GoS Memorial, para. 244, quoting ABC Experts’ Report, Part I, p. 19.

²⁰³ GoS Memorial, para. 246.

of the Bahr el-Arab between 1905 and 1965” which, even if it were true, would still not be relevant to the question which the ABC Experts were mandated to answer.²⁰⁴

(ii) *SPLM/A Arguments*

180. According to the SPLM/A, the ABC Experts’ Report makes perfectly clear that the ABC Experts in no way ignored the 1905 date; instead, they based their determination of the Abyei Area’s boundaries precisely on their assessment of the extent of the area of the nine Ngok Dinka Chiefdoms in 1905.²⁰⁵ Counting 48 separate references to the 1905 date in the 45-page ABC Experts’ Report, it asserts that “[i]t is impossible to read the ABC Experts’ Report and conclude that the ABC Experts somehow ‘ignored’ or ‘virtually ignored’ the 1905 date.”²⁰⁶
181. In the SPLM/A’s view, there were evidentiary difficulties in determining the extent of the Ngok Dinka territory in 1905. It was thus necessary for the ABC Experts to avail themselves of materials produced both before and after 1905, as well as during that year. The materials from earlier and later periods were considered only to determine circumstantially and indirectly what the territory of the Ngok Dinka had been in 1905.²⁰⁷
182. The SPLM/A also notes that the GoS itself cited and relied on events occurring after 1905 as evidence of the location of the Ngok Dinka and Misseriya in 1905,²⁰⁸ and that the GoS used these in its presentations before the ABC as well.²⁰⁹

²⁰⁴ GoS Rejoinder, para. 225.

²⁰⁵ SPLM/A Counter-Memorial, para. 546.

²⁰⁶ SPLM/A Counter-Memorial, para. 556.

²⁰⁷ SPLM/A Counter-Memorial, paras. 548-550.

²⁰⁸ SPLM/A Counter-Memorial, para. 567, referring to GoS Memorial, paras. 385-396.

²⁰⁹ SPLM/A Counter-Memorial, para. 568, citing GoS First Presentation, dated April 10, 2005, at p. 24 (citing Dupuis’ Report, “Note on the Ngok Dinka of Western Kordofan” (1922): “in 1922, Dupuis was able to locate them at Khor Alal, north of Lol River...”), and at p. 36 *et seq.* (citing post 1905 maps), SPLM/A Exhibit-FE 14/2; GoS Final Presentation, dated June 16, 2005, at p. 27 (citing Cunnison (1954)), at p. 28 (citing excerpts from Willis, “Notes on Western Kordofan Dinkas” (1909), SPLM/A Exhibit-FE 14/18); GoS Additional Presentation, dated June 17, 2005, at p. 16 (citing a letter from the Governor of Bahr el-Ghazal dated July 21, 1927), at p. 14 (citing a report of the District Commissioner of Western Kordofan from 1950), p. 20 (citing Kordofan Province Monthly Diary, 1951), SPLM/A Exhibit-FE 14/17; Transcript of Ambassador Dirdeiry, Taped Recording GoS Final Presentation, File 1, at p. 2, (“the second area of focus is how the contemporary maps since 1908 and up to 1936 had reflected the 1905 transfer”), at p. 5 (“maybe you recall Mr Chairman that during our first presentation we had made a presentation of a report written in 1922 indicating the nine Ngok Dinka chieftains”), SPLM/A Exhibit-FE 19/15; Ambassador Dirdeiry, transcript of Oral Evidence Submitted to the ABC April 14 to 21, 2005, at p. 21, SPLM/A Exhibit-FE 14/5a.

(e) The ABC Experts Allegedly Allocated Grazing Rights

(i) *GoS Arguments*

183. The GoS submits that the ABC Experts exceeded their mandate by purporting to allocate secondary grazing rights to the Ngok Dinka and the Misseriya. In the GoS's view, the ABC's mandate was strictly limited to drawing the line constituting the border of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, and this task cannot be interpreted as encompassing any findings regarding allocation or limitation of grazing rights.²¹⁰ By making a pronouncement regarding grazing or other secondary rights, the decision clearly exceeded the ABC Experts' mandate.²¹¹
184. The GoS asserts that the recognition of such secondary rights is a clear "decision" on the part of the ABC Experts, and could not have been a mere "rationale" for the ABC Experts' boundary delimitation. The GoS contends that if the allocation had been mere rationale, it would not have been included in the "Final and Binding Decision" featured at the end of the Report.²¹² Moreover, even if the allocation were mere rationale, it would confirm that the ABC Experts' decision was based not on the territorial transfer that occurred in 1905, but on the "arbitrary or equitable division of tribal rights."²¹³
185. The GoS rejects the argument that the allocation was a justifiable exercise of incidental or ancillary authority derived from the ABC Experts' primary mandate.²¹⁴ It asserts that while "the purpose of incidental or ancillary powers is to provide for the full and orderly settlement of disputes submitted by the parties," the allocation of secondary rights was not part of the dispute submitted to the ABC, and a pronouncement on this matter was not necessary to provide for the "orderly settlement of all matters in dispute."²¹⁵
186. The GoS also argues that this pronouncement cannot simply be brushed aside as an unintentional or minor excess that does not affect the remainder of the Report. As an

²¹⁰ GoS Counter-Memorial, para. 144.

²¹¹ GoS Oral Pleadings, April 18, 2009, Transcr. 145/04-14.

²¹² GoS Rejoinder, para. 198.

²¹³ GoS Oral Pleadings, April 20, 2009, Transcr. 21/08-15.

²¹⁴ GoS Rejoinder, para. 199.

²¹⁵ GoS Rejoinder, paras. 199-201.

alleged excess of mandate, the allocation supposedly triggers the operation of Article 2(c) of the Arbitration Agreement.²¹⁶

187. In addition, the GoS argues that the ABC Experts exceeded the geographical scope of their mandate by conferring on the Ngok secondary rights to land outside the Abyei Area and by limiting the Misseriya's traditional grazing rights to the southern part of the shared area.²¹⁷ The GoS submits that there is no trace in the applicable instruments – whether the Abyei Protocol, the Abyei Appendix or the Terms of Reference of the ABC – of any mandate given to the Commission or to its ABC Experts to ascertain, attribute, regulate or share grazing rights on both sides of the alleged boundary.²¹⁸

(ii) *SPLM/A Arguments*

188. In response, the SPLM/A contends that the ABC Experts did not commit an excess of mandate by purporting to confer rights on the Ngok Dinka outside the Abyei Area.²¹⁹ For the SPLM/A, the ABC Experts' Report merely set forth in summary form the ABC Experts' historical conclusions, which in turn provided the rationale for their subsequent boundary delimitation. The SPLM/A believes that the ABC Experts simply sought to make clear, for the avoidance of any doubt, that their decision only defined the Abyei Area's territorial boundaries and did not affect other pre-existing rights which either the Ngok or the Messiriya already possessed and retained.²²⁰ The SPLM/A claims that the ABC Experts, during their public meetings, encountered popular misconceptions about the effect that setting a boundary would have. This supposedly led the ABC Experts to emphasize the limited scope of their territorial decision in order to assuage popular misconceptions about traditional rights.²²¹

²¹⁶ See GoS Rejoinder, paras. 202-208. Article 2(c) of the Arbitration Agreement provides:

c. If the **Tribunal** determines, pursuant to Sub-article (a) herein, that the [ABC Experts] exceeded their mandate, it shall make a declaration to that effect, and shall proceed to define (i.e. delimit) on map the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, based on the submissions of the **Parties**. (emphasis in original)

²¹⁷ GoS Memorial, paras. 249-253.

²¹⁸ GoS Rejoinder, para. 196.

²¹⁹ SPLM/A Counter-Memorial, para. 626.

²²⁰ SPLM/A Oral Pleadings, April 19, 2009, Transcr. 187/03-10.

²²¹ SPLM/A Oral Pleadings, April 19, 2009, Transcr. 196/15-198/03

189. In the alternative, the SPLM/A argues that even if there were some ambiguity as to the meaning of the ABC Experts' Report or in its treatment of the issue of grazing rights, the ABC Experts' statements regarding the Ngok Dinka's retention of their rights are to be interpreted consistently with the ABC Experts' mandate, and not as overstepping that mandate. Accordingly, if there is some doubt, the ABC Experts' decision should be read in a manner that does not purport to alter or affect the rights of the Ngok Dinka or Misseriya outside the boundaries of the Abyei Area.²²² Also, even if the ABC Experts were considered to have attempted to confer rights on the Ngok Dinka outside Abyei Area proper, the SPLM/A submits that this would merely be a valid "exercise of incidental or ancillary authority, which was included in the ABC Experts' primary mandate."²²³
190. The SPLM/A also maintains that an excess of mandate only exists where the adjudicatory authority purported to act beyond its authority in a glaring, manifest or flagrant manner.²²⁴ It submits that any findings by the ABC Experts in relation to Ngok Dinka grazing rights would not have been such an egregious excess of mandate, and that the rights would have affected "only a very specific and limited right of usage" due to the seasonal conditions there.²²⁵
191. Finally, even assuming the ABC Experts did exceed their mandate by purporting to confer grazing rights they were not permitted to grant, the SPLM/A contends that this portion of the Report would be severable from the remainder of the ABC Experts' Report.²²⁶

4. Violation of Mandatory Criteria in carrying out the Mandate

(a) Introduction

192. In its Memorial, the GoS submits that as a general principle of law, the failure of a panel charged with deciding a dispute to state any reasons on the basis of which its decision can be supported, constitutes an excess of mandate.²²⁷ It identified four acts by the ABC Experts which allegedly violated "mandatory criteria" in carrying out their mandate: (i)

²²² SPLM/A Counter-Memorial, para. 644.

²²³ SPLM/A Counter-Memorial, para. 645.

²²⁴ SPLM/A Counter-Memorial, para. 654.

²²⁵ SPLM/A Counter-Memorial, paras. 655-656.

²²⁶ SPLM/A Counter-Memorial, para. 661.

²²⁷ GoS Memorial, para. 254.

failure to give reasons; (ii) rendering a decision based on “equitable division” or taken *ex aequo et bono*, (iii) applying unspecified “legal principles in determining land rights,” and (iv) attempting to allocate oil resources under the guise of the transferred area.

193. In its Counter-Memorial, the SPLM/A responds that none of the violations of supposed “mandatory criteria” alleged by the GoS fall within the definition of an excess of mandate. It argues that the GoS derives its “mandatory criteria” from sources external to the Parties’ agreements,²²⁸ including the ICSID Convention, UNCITRAL Model Law, and various institutional arbitration rules.²²⁹

194. In its later pleadings, the GoS merged its discussion of the four alleged violations with its substantive excess of mandate arguments, arguing that the ABC Experts decided *ultra petita*.²³⁰ The SPLM/A continues to assert that there is nothing in the Parties’ agreements forbidding the four alleged violations; as such, there is, in its view, no conceivable way to characterize these as “*ultra petita*” of what was agreed between the Parties.²³¹

(b) The ABC Experts Allegedly Failed to Provide Reasons Capable of Forming the Basis of a Valid Decision

(i) *GoS Arguments*

195. For the GoS, it is a general principle in modern systems of law that an adjudicative decision be motivated (that is, supported by reasons). In its view, a decision can be provided without disclosing the reasons behind it only when the parties to a dispute have expressly waived this requirement.²³² Thus, the GoS does not request that the Tribunal determine whether the

²²⁸ SPLM/A Counter-Memorial, para. 678.

²²⁹ SPLM/A Counter-Memorial, para. 680.

²³⁰ The GoS Rejoinder divided its substantive excess of mandate arguments into three categories, (i) use of manifestly inadmissible justifications, (ii) decisions *ultra petita* and (iii) decisions *infra petita*. The four acts originally alleged as “violations of mandatory criteria” were discussed under the category “use of manifestly inadmissible justifications.” At the oral hearings, however, this specific category was not discussed separately and distinctly, but was instead discussed with the GoS arguments relating to decisions *ultra petita*. See GoS Oral Pleadings, April 18, 2009, Transcr. 135/01 *et. seq.* and *supra* note 94.

²³¹ SPLM/A Rejoinder, para. 121.

²³² GoS Rejoinder, para. 154. At the oral pleadings, the GoS further explains:

The Experts’ Report had mandatorily to be reasoned “because it was an adjudicative body, because the object of the dispute was of a nature that it is simply unthinkable that it could have been otherwise, and it had mandatorily also to be established on the basis agreed by the parties, mandatorily too, not at the good will of the [ABC Experts].”

GoS Oral Pleadings, April 18, 2009, Transcr. 80/24 – 81/05.

ABC Experts were right or wrong, but only whether they had given any reasons in support of their decision.²³³

196. The GoS cites decisions by the ABC Experts that purportedly lacked justification: (a) the rejection of the Bahr el Arab as the southern boundary of Kordofan; (b) the assertion that latitude 10°10'N constitutes the southern boundary of Misseriya rights/northern boundary of Ngok rights,²³⁴ and (c), following from (b), the assertion that latitude 10°35'N constitutes the northern boundary of Ngok Dinka rights.²³⁵ The GoS asserts that these were three absolutely crucial decisions of the ABC Experts that were unsupported by reasoning.²³⁶
197. With respect to decision (a) above, the GoS notes the ABC Experts found that the “Ragaba ez-Zarga/Ngol, rather than the river Kir, which is now that Bahr el-Arab, was treated as the province boundary [between the provinces of Kordofan and Bahr el Ghazal], and that the Ngok people were regarded as part of the Bahr el Ghazal Province until their transfer in 1905.”²³⁷ The GoS argues that *assuming arguendo this is true* (it later argues that it is not), the transferred area should have been south of the Ragaba ez Zarga. Instead, the GoS alleges, the ABC Experts fixed the northern boundary of the Abyei area further north (and not south) of the Ragaba ez Zarga without providing any reason.²³⁸
198. With respect to decision (b) above, the GoS observes that the ABC Experts fixed “Ngok claims to permanent rights southwards roughly from 10°10'N [latitude] and of Ngok secondary rights extending north of that line.”²³⁹ However, while this latitude is mentioned several times in the ABC Experts’ Report, the GoS contends there is nothing in the Report explaining how this latitude was arrived at and why Ngok Dinka dominant rights were fixed here.²⁴⁰

²³³ GoS Rejoinder, para. 156.

²³⁴ GoS Memorial, para. 255.

²³⁵ The GoS Memorial initially referred only to items (a) and (b), but item (c) was cited as a third example of an unmotivated decision during later pleadings. *See* GoS Oral Pleadings, April 18, 2009, Transcr. 149/03 *et seq.*

²³⁶ GoS Oral Pleadings, April 18, 2009, Transcr. 149/09-12.

²³⁷ ABC Experts’ Report, Part I, p. 39.

²³⁸ *See* GoS Memorial, paras. 256-259 and GoS Rejoinder, para. 158.

²³⁹ GoS Memorial, para. 260.

²⁴⁰ *See* GoS Oral Pleadings, April 18, 2009, Transcr. 149/13 – 151/12.

199. With respect to decision (c) above, the GoS notes that the ABC Experts fixed the 10°35'N latitude as the northern limit of the Misseriya rights. Again, the GoS argues that other than noting that the line corresponds more or less with Dinka names on certain maps, there is no justification as to how this latitude was fixed.²⁴¹

(ii) *SPLM/A Arguments*

200. In response, the SPLM/A submits that the GoS arguments ignore the following: (i) nothing in the Parties' agreements or applicable law required the ABC Experts to give reasons;²⁴² (ii) even where reasons are required, international and national arbitration instruments permit arbitral awards to be invalidated only in rare and exceptional cases;²⁴³ (iii) the ABC Experts' Report provided extensive, well-considered, and erudite analysis which fully satisfy any conceivable requirement for reasons;²⁴⁴ (iv) the GoS's two "illustrations" of inadequate reasoning are misconceived and irrelevant;²⁴⁵ and (v) the GoS's complaints about the ABC Experts' reasons are nothing more than objections to the substance of the ABC Experts' Report.²⁴⁶

201. For decision (a), the SPLM/A argues that: for the ABC Experts, the decisive issue was determining the territory of the nine Ngok Dinka chiefdoms as they stood in 1905, and not the location of the putative provincial boundary. They thus defined the Abyei Area as "the area of the nine Ngok Dinka chiefdoms as it was in 1905," and the location of the Kordofan/Bahr el Ghazal boundary (whether at the Bahr el Arab or the Ragaba ez Zarga) was not determinative of the question of the territory of the nine Ngok Dinka chiefdoms.²⁴⁷

202. For decisions (b) and (c), the SPLM/A argues that the ABC Experts found evidence showing that Ngok villages were located widely throughout the Bahr river basin, extending up to the southern boundary of the goz at 10°10'N. The GoS claim that there is no reference to this latitude (other than as a decision) is said to ignore the fact that the ABC Experts' Report expressly equates latitude 10°10'N with the southern boundary of the goz, while the

²⁴¹ See GoS Oral Pleadings, April 18, 2009, Transcr. 152/01-12.

²⁴² SPLM/A Counter-Memorial, paras. 707-730.

²⁴³ SPLM/A Counter-Memorial, paras. 731-743.

²⁴⁴ SPLM/A Counter-Memorial, paras. 744-754.

²⁴⁵ SPLM/A Counter-Memorial, paras. 755-759.

²⁴⁶ SPLM/A Counter-Memorial, para. 760.

²⁴⁷ SPLM/A Oral Pleadings, April 19, 2009, Transcr. 232/09-234/22.

northern boundary was found to be at 10°35'N. The ABC Experts' Report accepted the existence of both Ngok and Misseriya secondary rights to the area between 10°10'N and 10°35'N and explained why the character of the goz, not being occupied by either tribe, made it an appropriate boundary strip. Reasoning that this gave the Parties' equal secondary rights in the goz, the ABC Experts found it appropriate to divide that area equally between the Parties with the boundary drawn at 10°22'30"N.²⁴⁸

(c) The ABC Experts Allegedly Decided Based On "Equitable Division"/Taken *Ex Aequo Et Bono*

(i) *GoS Arguments*

203. The ABC Experts found that in the goz (the area between the latitudes 10°10'N and 10°35'N) the Misseriya and the Ngok Dinka communities exercised equal secondary rights to use of the land on a seasonal basis. They concluded that "[t]he two Parties lay equal claim to the shared areas and accordingly it is reasonable and equitable to divide the Goz between them,"²⁴⁹ and bisected equally the band between latitudes 10°10'N and 10°35'N at latitude 10°22'30"N. The GoS submits that the ABC Experts completely disregarded and thereby exceeded their mandate by dividing the goz on an "equitable" basis in this way.²⁵⁰ It claims that the ABC Experts were not mandated to establish shared areas and, moreover, they were not mandated to divide the shared area by way of a decision taken *ex aequo et bono*.²⁵¹ Because of this determination (and in particular, the choice of the 10°22'30"N latitude), the GoS argues that the conclusion of the ABC Experts on the delimitation of the Abyei Area is illegitimately based on pure equity.²⁵² The GoS asserts that an adjudicative body can only decide *ex aequo et bono* when it is expressly authorized to do so, and this requirement is particularly cogent when a sovereign state is involved.²⁵³

204. The GoS also refutes the allegation that the ABC Experts acted upon the "legal principle of the equitable division of shared secondary rights," as this legal principle does not appear to

²⁴⁸ SPLM/A Oral Pleadings, April 19, 2009, Transcr. 239/01-241/07.

²⁴⁹ ABC Experts' Report, Part I, p. 22.

²⁵⁰ GoS Memorial, para. 265.

²⁵¹ *Id.*

²⁵² GoS Rejoinder, para. 185.

²⁵³ GoS Oral Pleadings, April 18, 2009, Transcr. 161/10-13.

exist.²⁵⁴ Further, should such a principle exist, the GoS contends that the ABC Experts were instructed to decide based on “scientific analysis and research,” which excludes reliance on the alleged legal principle.²⁵⁵

(ii) *SPLM/A Arguments*

205. The SPLM/A rejects the argument that the ABC Experts decided *ex aequo et bono*. According to the SPLM/A, where two parties enjoy “equal” rights to the same territory, it is not a decision *ex aequo et bono* to divide the territory “equally” between them. Rather, it is said to simply be a decision made on the basis of the two parties’ respective, and equal, historical use of and rights to the same territory.²⁵⁶
206. The SPLM/A emphasizes that the ABC Experts relied on “the legal principle of the equitable division of shared secondary rights” in mandating this equal division. Thus, even if they erred in their understanding or application of those legal principles, the SPLM/A argues that the ABC Experts plainly did not render a decision *ex aequo et bono*. Instead, they applied what they took to be the law to a very carefully defined circumstance of shared and equal secondary rights in a specific territory.²⁵⁷
207. In the alternative, the SPLM/A asserts that even if the decision was based on principles of equity, it would not amount to a decision *ex aequo et bono*. For the SPLM/A, equity is a general principle of law, distinguishable from a decision *ex aequo et bono*, which may properly be applied by an international tribunal even without express or specific consent by the Parties.²⁵⁸ Further, even assuming that the decision was taken *ex aequo et bono*, it argues that there is nothing in the Parties’ agreements or in any general principles of law that forbids a decision *ex aequo et bono*.²⁵⁹ Nor is there a need for the Parties to consent before a decision *ex aequo et bono* can be made.²⁶⁰

²⁵⁴ GoS Rejoinder, para. 167.

²⁵⁵ GoS Rejoinder, para. 169.

²⁵⁶ SPLM/A Counter-Memorial, para. 795.

²⁵⁷ SPLM/A Counter-Memorial, para. 797.

²⁵⁸ SPLM/A Counter-Memorial, para. 803.

²⁵⁹ SPLM/A Counter-Memorial, para. 814.

²⁶⁰ See SPLM/A Oral Pleadings, April 19, 2009, Transcr. 248/17-249/12.

(d) The ABC Experts Allegedly Applied Unspecified Legal Principles In Determining Land Rights

(i) *GoS Arguments*

208. In dividing the goz between the latitudes 10°10'N and 10°35'N," the ABC Experts based their decision on the "legal principle of the equitable division of shared secondary rights."²⁶¹ The GoS alleges that despite such reliance, the ABC Experts failed to identify with precision what this principle was or where it came from.²⁶²

209. Moreover, the GoS submits, the ABC Experts were supposed to base their decision on "scientific analysis and research," and not on legal principles for determining land rights in former British-administered African territories, as they purported to have done.²⁶³

(ii) *SPLM/A Arguments*

210. Preliminarily, according to the SPLM/A, the GoS makes no effort to reconcile its claim that the ABC Experts rendered their decision *ex aequo et bono* with its complaint that the ABC Experts' decision wrongly relied on legal principles; nor does the GoS cite any legal authority that might establish the mandatory principles on which it relies.²⁶⁴ In the SPLM/A's view, there was nothing in the Parties' agreements that forbade the ABC Experts from considering legal principles – indeed, the logical predicate for the GoS *ex aequo et bono* argument is that the ABC Experts were required to consider legal principles. Moreover, nothing in the Parties' agreements required the ABC Experts to specify the source of the legal principles they applied or to write a lengthy description of what those alleged legal principles were.²⁶⁵

211. In any event, the SPLM/A submits that the ABC Experts identified the legal principles that they referred to as applicable in "former British colonies and protectorates, including Sudan (a Condominium)" and "Sudan" at the "time of the Condominium" and moreover cited a number of secondary sources about Sudanese and British colonial law. For the SPLM/A, the GoS's objections to the accuracy of the legal analysis is not relevant to the excess of

²⁶¹ GoS Memorial, para. 268. *See also* discussion at paras. 204 and 206.

²⁶² GoS Memorial, para. 268.

²⁶³ GoS Counter-Memorial, para. 159.

²⁶⁴ SPLM/A Oral Pleadings, April 19, 2009, Transcr. 251/19-24.

²⁶⁵ SPLM/A Counter-Memorial, para. 839.

mandate question, while its objections to supposedly undefined legal principles are unfounded because the terms of the ABC Experts' Report identified the sources of the legal principles the ABC Experts relied upon.²⁶⁶

(e) The ABC Experts Allegedly Took into Account the Location of Oil Fields in Deciding on the Transferred Area

(i) *GoS Arguments*

212. The GoS observes that the northern boundary determined by the ABC Experts makes a perfect straight line, and the eastern boundary runs southwards in a perfect 90° angle to that northern boundary. As a consequence, all the major oilfields of Sudan are “conveniently” included in the Abyei Area.²⁶⁷ The GoS alleges that the ABC Experts took into full consideration the “Wealth Sharing” provisions in the CPA and Section 3 of the Abyei Protocol, which they strictly had no competence to take into account.²⁶⁸ According to the GoS, this constituted an obvious excess of mandate.²⁶⁹ The GoS also claims that, as admitted by the SPLM/A, the eastern boundary of the Abyei Area was “created” by the 90° southern turn, and the “created” eastern boundary was an excess of the ABC Experts' mandate, which was merely to define the boundary resulting from an executed transfer.²⁷⁰
213. The GoS also argues that evidence of partiality on the part of the ABC Experts is found in an interview given by Dr. Douglas Johnson, one of the ABC Experts, to the *Sudan Tribune* on May 29, 2006,²⁷¹ as well as in the fact that Dr. Johnson was later engaged as an expert

²⁶⁶ SPLM/A Counter-Memorial, para. 840.

²⁶⁷ See GoS Oral Pleadings April 18, 2009, Transcr. 163/24-164/11 and GoS Rejoinder, para. 189.

²⁶⁸ See GoS Counter-Memorial, paras. 155-156.

²⁶⁹ GoS Memorial, paras. 270-271.

²⁷⁰ GoS Oral Pleadings, April 20, 2009, Transcr. 18/06-16.

²⁷¹ The quoted text reads:

The other aspect is that the Abyei area is contained within one of the oil blocks, and there has been quite a lot of exploration and drilling of oil wells in the area. Now, we were not shown a map of where these oil wells were. We were told our mandate was to define the area in 1905 – of course there were no oil wells in 1905. There was no mechanised farming; there was no railway; there were no towns. If we had taken into consideration these developments since 1905, we would have been violating our mandate.

But there is a lot of oil there – the Abyei Protocol stipulates that the oil revenues that come from the sale of oil in the Abyei area be divided between the Misseriya and the Ngok Dinka, the government and the SPLM. If the boundary is defined one way, it puts quite a lot of oil in the Abyei area, and therefore more of that oil revenue has to be shared. If we had accepted the government's claim that the boundary was the river, there would have been no oil revenue to share.

consultant by the Government of South Sudan.²⁷² The ABC Experts allegedly knew about the location of the oil fields in Abyei at the time they wrote the report, as such information was already available in 2005.²⁷³ Because of such purported lack of impartiality, the GoS argues that its fundamental right to equal and impartial treatment was violated.²⁷⁴ Further, such considerations are also allegedly indicative of the fact that the ABC Experts did not decide on the basis of “scientific analysis and research.”²⁷⁵

(ii) *SPLM/A Arguments*

214. For the SPLM/A, the ABC Experts’ Report explains in detail the reason for the choice of borders, and the suggestion that the north-east turning point was motivated by partiality cannot be sustained.²⁷⁶ While the ABC Experts accepted the specific co-ordinates of the eastern boundary proposed by the SPLM/A,²⁷⁷ the SPLM/A notes that these co-ordinates were not challenged by the GoS, which offered no evidence and made no claims regarding where the eastern boundary of the Abyei Area should lie if the ABC Experts concluded that the northern boundary was above the River Kir.²⁷⁸
215. The SPLM/A also attempts to show how, in its view, the ABC Experts selected the eastern boundary (and the north eastern turning point): as a result of the Abyei Protocol, the southern and western boundaries of the Abyei Area were expected to follow existing boundaries, and only the northern and eastern boundaries remained to be identified, defined and demarcated by the ABC. After determining the northern boundary at approximately the 10°22’30”N latitude, the ABC Experts were purportedly faced with the situation in which no natural “cut-off line” existed to create an eastern boundary, as this latitude continues

The other thing is that if the boundary defines a certain area and that area contains oil and active oil wells, [and] if the people of Abyei vote in a referendum to join the south and the south votes to become independent, then that oil becomes southern oil and is not northern oil.”¹⁵²

¹⁵² Interview with Douglas Johnson, expert on the Abyei Boundary Commission, *Sudan Tribune*, Monday 29 May 2006. Source: <http://www.sudantribune.com/spip.php?article15913> (SM Annex 85)

As quoted in GoS Memorial, para. 274.

²⁷² GoS Oral Pleadings, April 18, 2009, Transcr. 98/02.

²⁷³ GoS Rejoinder, para. 191.

²⁷⁴ GoS Rejoinder, para. 190.

²⁷⁵ GoS Rejoinder, para. 193.

²⁷⁶ See SPLM/A Counter-Memorial, paras. 843-847.

²⁷⁷ SPLM/A Counter-Memorial, para. 848.

²⁷⁸ SPLM/A Oral Pleadings, April 19, 2009, Transcr. 254/15-21.

uninterrupted by other internal boundaries all the way to the Kordofan-Upper Nile boundary (approximately 260 kilometers further east than the point at which the north-east corner of the boundary as determined by the ABC Experts lies). According to the SPLM/A, the ABC Experts had little alternative but to draw a “dog-leg” extending south from the northern boundary to some appropriate place in order to complete the Abyei Area. The “dog-leg” chosen extended the existing line of the Kordofan-Upper Nile boundary at 29°32’15”N longitude (where the boundary makes an approximate 60° turn east) due northwards to meet latitude 10°22’30”N (this appears as a perpendicular line). Further, the SPLM/A asserts that the ABC Experts had been presented with evidence that the Ngok Dinka were located in 1905 in areas very close to 29°32’15”N.²⁷⁹

216. Finally, the SPLM/A submits that Dr. Johnson’s interview could not be evidence that the ABC Experts acted partially. On the contrary, as he explained in the interview, the ABC Experts were not shown a map of where the oil wells were.²⁸⁰

5. Admissibility of Excess of Mandate Claims

217. As a counter to the GoS’s claims that the ABC Experts exceeded their mandate, the SPLM/A raises a number of claims of its own, contending that: (a) that the GoS excluded or waived any rights to claim that the ABC exceeded their mandate, and (b) the ABC Experts’ Report is entitled to presumptive finality.

(a) The GoS Allegedly Waived its Objections to the ABC Experts’ Report

(i) SPLM/A Arguments

218. The SPLM/A submits that the GoS waived its objections to the ABC Experts’ Report by agreeing that the Report would be final and binding and would be given immediate effect without any possibility for appeal or other challenge.²⁸¹ The SPLM/A notes that this agreement was recorded specifically in the Abyei Appendix, the Abyei Protocol, the Terms of Reference and the Rules of Procedure; none of these instruments provides that the ABC

²⁷⁹ SPLM/A Counter-Memorial, paras. 848-854.

²⁸⁰ SPLM/A Counter-Memorial, paras. 855 and 856.

²⁸¹ SPLM/A Rejoinder, para. 322. See e.g. Section 5 of the Abyei Appendix, text *supra* at note 107.

Experts' Report would be subject to any sort of review or possible delay in implementation by either Party.²⁸²

219. Furthermore, the SPLM/A believes it well-settled that jurisdictional and procedural objections must be raised at the earliest opportunity; otherwise they are waived. For the SPLM/A, the GoS raised no objections at any time during the ABC's work (instead, it actively participated); moreover, the GoS repeatedly and explicitly affirmed that the ABC's decision would be final and binding.²⁸³

220. The SPLM/A also posits that it cannot be prevented (or estopped) from claiming that GoS waived its rights to claim an excess of mandate, as the choice of law clause in the Arbitration Agreement allowed the application of general principles of law and practice, such as the rules of waiver and exclusion, to govern this dispute.²⁸⁴

(ii) *GoS Arguments*

221. In response, the GoS argues that it was precisely because there were serious doubts about respect for their mandate by the ABC Experts that both Parties agreed, pursuant to the Arbitration Agreement, to submit the present dispute to the Tribunal. Since it has agreed to these proceedings, it is the SPLM/A that is now estopped from raising objections against the jurisdiction of the Tribunal.²⁸⁵

222. The GoS also asserts that it had fully and completely complied with the requirement that jurisdictional objections must be raised at the earliest opportunity. It immediately objected to the ABC Experts' Report when it was presented to the Presidency on the ground that the ABC Experts failed to respect their mandate. As for other procedural violations, the GoS claims that it protested as soon as such violations were brought to its knowledge.²⁸⁶ A

²⁸² SPLM/A Memorial, para. 798.

²⁸³ SPLM/A Rejoinder, para. 323. The SPLM/A quotes the GoS's Ambassador Dirdeiry:

When a decision is agreed and accepted before hand to be final and binding, it is not acceptable by anybody to deny the right of that committee or body to issue that decision. And, its unmanly of any person not to accept that decision and respect it.

(See Ambassador Dirdeiry, Taped Recording of GoS Final Presentation, dated June 16, 2005, File 2 as quoted in SPLM/A Memorial, para. 59)

²⁸⁴ SPLM/A Rejoinder, para. 329.

²⁸⁵ GoS Rejoinder, para. 73. See also GoS Oral Pleadings, April 18, 2009, Transcr. 54/13 – 56/07.

²⁸⁶ GoS Rejoinder, para. 74.

waiver of rights by a State cannot be presumed lightly, and the GoS argues that it expressly and vigorously protested as soon as it came to know of violations of its rights.²⁸⁷

(b) The GoS is Allegedly Bound by the Principles of Presumptive Finality

(i) *SPLM/A Arguments*

223. For the SPLM/A, the ABC conducted itself in the manner of an adjudicative body and rendered an adjudicative decision, leaving no doubt that the principles of finality and *res judicata* were applicable to the ABC Experts' Report.²⁸⁸ Moreover, the presumptive finality and validity of international adjudicatory decisions is especially compelling where boundary determinations are at issue.²⁸⁹ The principle of presumptive finality and validity means that an adjudicative decision or an award can be set aside solely in rare, narrow and exceptional circumstances,²⁹⁰ such as when the relevant parties agree.²⁹¹ Here, SPLM/A submits that the Arbitration Agreement has not set aside the ABC Experts' Report and the principle of presumptive finality and validity still applies.²⁹²

(ii) *GoS Arguments*

224. The GoS agrees that, in principle, boundary settlements enjoy a particular stability and permanence. However, the GoS maintains that the boundary has not been definitely settled in this case. According to it, the Tribunal has been charged by the Parties with determining whether there has been an excess of mandate, and, if the answer is in the affirmative, with defining the boundaries of the Abyei Area. It is only after the Tribunal has performed its duty that principles of *res judicata* and finality will apply.²⁹³

B. DELIMITATION OF THE ABYEI AREA

225. If, as a result of its "excess of mandate" inquiry under Article 2(a) of the Arbitration Agreement, the Tribunal were to decide that the ABC Experts did exceed their mandate, then it would "proceed to define (i.e. delimit) on map the area of the nine Ngok Dinka

²⁸⁷ GoS Rejoinder, paras. 75-76.

²⁸⁸ SPLM/A Memorial, para. 729.

²⁸⁹ SPLM/A Counter-Memorial, para. 132.

²⁹⁰ See SPLM/A Oral Pleadings, April 19, 2009, Transcr. 63/22.

²⁹¹ See SPLM/A Oral Pleadings, April 19, 2009 Transcr. 66/05-16.

²⁹² *Id.*

²⁹³ GoS Counter-Memorial, paras. 122-123.

Chiefdoms transferred to Kordofan in 1905” in accordance with Article 2(c) of the Arbitration Agreement. Within the ambit of Article 2(c) inquiry, the GoS submits that “the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 are as shown on Figure 17 on page 159 of the GoS Memorial, being the area bounded on the north by the Bahr el-Arab and otherwise by the boundaries of Kordofan as at independence.”²⁹⁴

226. According to the GoS, the question of delimiting the Abyei Area must first be answered by determining what the provincial boundary between Bahr el Ghazal and Kordofan was before the 1905 transfer, as the transfer to Kordofan could not have included any areas previously located in Kordofan. Second, delimitation must include an identification of the area of the nine Ngok Dinka chiefdoms which previously fell within the province of Bahr el Ghazal and which was transferred to Kordofan in 1905.²⁹⁵
227. By contrast, the SPLM/A submits that the putative boundary between Kordofan and Bahr el Ghazal, which it claims was indefinite and indeterminate, does not define the Abyei Area. In the SPLM/A’s view, if the Tribunal were to decide that the ABC Experts exceeded their mandate, then it “should go on to define the Abyei Area to encompass all of the territory occupied and used by the Ngok Dinka in 1905”²⁹⁶ and declare that “the boundaries of the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905 are the current boundary of Kordofan and Bahr el-Ghazal to the south extending to 10°35’N latitude to the north and the current boundary of Kordofan and Darfur to the west extending to 29°32’15’E longitude to the east.”²⁹⁷

1. The scope of the Tribunal’s mandate under Article 2(c) of the Arbitration Agreement

(a) GoS Arguments

228. According to the GoS, if the Tribunal determines pursuant to Article 2(a) of the Arbitration Agreement that the ABC Experts exceeded their mandate, then it must, under Article 2(c), decide *de novo* and reach its own conclusion on the delimitation of the Abyei Area based on

²⁹⁴ GoS Memorial, p. 160 (“Submissions”). See also GoS Counter-Memorial, last page and GoS Rejoinder, p. 162. A reproduction of that map is found *supra* at para. 37.

²⁹⁵ GoS Counter-Memorial, para. 383.

²⁹⁶ SPLM/A Memorial, para. 869.

²⁹⁷ SPLM/A Rejoinder, para. 885; SPLM/A Counter-Memorial, para. 1601.

the Parties' submissions.²⁹⁸ The GoS insists that the triggering of Article 2(c) should occur once the Tribunal finds an excess of mandate "in any respect."²⁹⁹

229. Accordingly, as to the probative value of the ABC Experts' Report under Article 2(c) inquiry, the GoS maintains that the Tribunal may take information contained in the Report into account, but only as mere evidence.³⁰⁰

(b) SPLM/A Arguments

230. By contrast, the SPLM/A submits that in the event that elements of the ABC Experts' Report are found to be in excess of mandate, any portions of the ABC Experts' Report that are not so vitiated must, under general principles of law, remain final and binding on the Tribunal.³⁰¹

231. Moreover, the SPLM/A maintains that the Tribunal is not a *de novo* decision-maker under Article 2(c) of the Arbitration Agreement. Consequently, if the Tribunal were to hold that the ABC Experts exceeded their mandate under Article 2(a), then "it would be appropriate for the Tribunal to rely upon the Commission's determinations concerning the scope of the Abyei Area."³⁰²

2. The interpretation of the definition of the Abyei Area as set out in the Abyei Protocol and the Arbitration Agreement

232. The GoS argues that the definition of the Abyei Area contained in Section 1.1.2 of the Abyei Protocol and Article 2(c) of the Arbitration Agreement should be interpreted as referring to the 1905 administrative transfer of a specific, territorially-defined area that previously formed part of the province of Bahr el Ghazal to the province of Kordofan (the "**Territorial Interpretation**").³⁰³ In contrast, the SPLM/A contends that these provisions should be understood as referring to the transfer of the Ngok Dinka people as a whole, *i.e.* not merely some of the nine Ngok Dinka Chiefdoms or some of their territory (the "**Tribal**

²⁹⁸ See GoS Rejoinder, para. 4. See also GoS Oral Pleadings, April 23, 2009, Transcr. 29/15-30/01.

²⁹⁹ See GoS Oral Pleadings, April 20, 2009 Transcr. 104/13-25.

³⁰⁰ See GoS Oral Pleadings, April 20, 2009, Transcr. 104/02-08, 105/12-13. See also GoS Memorial, para. 278.

³⁰¹ See SPLM/A Oral Pleadings, April 21, 2009, Transcr. 133/08-21.

³⁰² See SPLM/A Memorial, para. 1198. See also SPLM/A Memorial, para. 1201.

³⁰³ See GoS Counter Memorial, para. 90. Notably, in the GoS's view, the issue of interpretation of the mandate should be addressed under both Article 2(a) and Article 2(c) of the Arbitration Agreement. See GoS Oral Pleadings, April 18, 2009, Transcr. 24/13-16.

Interpretation”).³⁰⁴ To support their respective positions, both Parties rely on (a) the plain language and grammatical meaning of the Formula, (b) the purposes underlying the definition chosen by the Parties, and (c) the drafting history of the Abyei Protocol.

(a) The plain language and grammatical interpretation of the Formula set out in Section 1.1.2 of the Abyei Protocol and Article 2(c) of the Arbitration Agreement

(i) *GoS Arguments*

233. For the GoS, the plain meaning of the Formula is clear and does not require recourse to any supplementary sources of interpretation.³⁰⁵ The Formula has a temporal dimension: it refers to a “documented historical event” that took place in 1905,³⁰⁶ the “critical date [...] as of which the facts relating to the transfer fall to be assessed.”³⁰⁷ It also has an obvious territorial dimension: it refers to “an area transferred at a defined time and not an area populated or used at some other, undefined time.”³⁰⁸ The GoS thus contends that “the only reasonable and defensible interpretation of the text is that it mandates [this] Tribunal to ‘confirm’ on map the boundaries of the area of the [*sic*] transferred in 1905.”³⁰⁹

234. Examining the grammatical structure of the Formula, the GoS argues that in ordinary English, the word “transferred” is equally capable of qualifying the noun “area” as the phrase “nine Ngok Dinka chiefdoms.”³¹⁰ Read in context – a transfer between two provinces – the phrase “transferred to Kordofan” is in fact more likely to refer to “the area” rather than “the nine Ngok Dinka chiefdoms.”³¹¹ The SPLM/A’s application of a self-serving grammatical rule of proximity, instead of relying on euphony,³¹² is in the GoS’s view utterly artificial.³¹³ More importantly, the SPLM/A’s interpretation allegedly ignores

³⁰⁴ See SPLM/A Memorial, para. 1095. Notably, the SPLM/A considers the ABC Experts’ and the Tribunal’s interpretation of the mandate as a “matter of substance.” Thus, under the SPLM/A’s theory, the Tribunal only address this issue as part of its Article 2(c) inquiry (see SPLM/A Oral Pleadings, April 19, 2009 Transcr. 175/10 *et seq.*).

³⁰⁵ See GoS Memorial, para. 23; GoS Counter-Memorial, para. 115.

³⁰⁶ GoS Rejoinder, para. 10.

³⁰⁷ GoS Counter-Memorial, para. 100.

³⁰⁸ GoS Memorial, para. 24.

³⁰⁹ GoS Memorial, para. 25. See also GoS Memorial, para. 29.

³¹⁰ GoS Rejoinder, para. 32.

³¹¹ GoS Rejoinder, para. 32.

³¹² GoS Oral Pleadings, April 18, 2009, Transcr. 31/14-17.

³¹³ GoS Counter Memorial, para. 106. See also GoS Oral Pleadings, April 18, 2009, Transcr. 31/08 *et seq.*

the preposition “to” after the verb “transferred.” Even if the SPLM/A’s grammatical construction were correct and “transferred” could only relate to “chiefdoms,” the GoS maintains that the Formula could not possibly be interpreted as referring to *all* of the territory of the nine Ngok Dinka chiefdoms, including the territory of chiefdoms *already in* Kordofan in 1905.³¹⁴

235. In addition, the SPLM/A purportedly adds words that do not appear in the Formula when it argues that Section 1.1.2 of the Abyei Protocol “referred to all of the area of the nine Ngok Dinka Chiefdoms that were transferred in 1905”³¹⁵ or “the area inhabited and used by the nine Ngok Dinka Chiefdoms.”³¹⁶ The words “all” and “that were” are *ex post facto* additions to the Formula that alter its plain meaning. For the GoS, the words “inhabited” and “used” introduce a demographic dimension otherwise absent from the Formula.³¹⁷
236. The GoS further submits that the SPLM/A misconstrues the language appearing in the 1905 transfer documents in order to corroborate its grammatical analysis and to conclude that all of the territory occupied and used by the Ngok Dinka was transferred to Kordofan in 1905.³¹⁸
237. Contrary to the SPLM/A’s assertions, the GoS emphasizes that none of the relevant transfer documents refer to a transfer of the Ngok Dinka “people.”³¹⁹ Nor do they employ the words “inhabited and used” in referring to the transfer.³²⁰ Instead, they refer to “the country”³²¹ or “the territories”³²² of Sultan Rob, or the “districts”³²³ of Sultan Rob and Sheikh Rihan.³²⁴ The GoS relies in particular on Governor-General Wingate’s statement that:

³¹⁴ GoS Counter-Memorial, para. 108.

³¹⁵ GoS Rejoinder, para. 28 quoting SPLM/A Counter-Memorial, para. 1512.

³¹⁶ GoS Rejoinder, para. 21 quoting SPLM/A Counter-Memorial, para. 76.

³¹⁷ GoS Rejoinder, para. 23.

³¹⁸ GoS Counter Memorial, para. 513 *et seq.*

³¹⁹ GoS Rejoinder, para. 16.

³²⁰ GoS Rejoinder, para. 24.

³²¹ Sudan Intelligence Reports, No. 128 (March 1905), p. 3 (SM Annex 9).

³²² Reports on the Finances, Administration, and Condition of the Sudan, Annual Report (1905) Report for Bahr el-Ghazal Province, p. 3 (SM Annex 24).

³²³ Reports on the Finances, Administration, and Condition of the Sudan, Annual Report (1905) Wingate Memorandum, p. 24 (SM Annex 24).

³²⁴ GoS Rejoinder, paras. 16, 24.

The districts of Sultan Rob and Okwai, to the south of the Bahr el-Arab and formerly a portion of the Bahr el-Ghazal Province, have been incorporated into Kordofan.³²⁵

238. For the GoS, Wingate's Memorandum does not contain any reference to the Ngok Dinka "people" or the area "inhabited and used" by them, and clearly locates the "districts of Sultan Rob and Sheikh Rihan" "to the south of the Bahr el-Arab," purportedly the then provincial boundary, thus establishing a "specific geographic limitation to the districts that were transferred."³²⁶
239. Finally, the GoS contends that the SPLM/A's own submissions before the ABC show that prior to adopting its new tribal reading of the Formula, the SPLM/A considered that the "area" or "territory" was the key criterion to the understanding of Section 1.1.2 and the 1905 transfer documents.³²⁷ Referring to the passage of the March 1905 SIR) concerning the transfer, the GoS points to the SPLM/A's argument before the ABC that

[...] the reasons for the transfer of the two areas and not the people are explicitly stated – the occasional raids by the Southern Kordofan Arabs.³²⁸

240. The GoS concludes that the focus of the Formula in Section 1.1.2 of the Abyei Protocol is on the area transferred to Kordofan, not the people, as contended by the SPLM/A in its declarations before the ABC.³²⁹ In its view, this was also the focus of the Condominium officials in the 1905 transfer documents.³³⁰ The GoS thus submits that the Tribunal should conform to the terms of the Arbitration Agreement by giving full effect to the plain and ordinary language of the Formula,³³¹ which refers to the transfer of a specific area.³³²

³²⁵ GoS Rejoinder, para. 16 quoting Reports on the Finances, Administration, and Condition of the Sudan, Annual Report (1905) Wingate Memorandum, p. 24 (SM Annex 24).

³²⁶ GoS Rejoinder, para. 25.

³²⁷ GoS Rejoinder, para. 34 quoting SPLM/A Preliminary Presentation on the Boundaries of the Abyei Area (First SPLM/A Presentation) p. 2, SPLM/A Exhibit-FE 14/1, and para. 36 quoting SPLM/A Preliminary Presentation on the Boundaries of the Abyei Area (First SPLM/A Presentation) p. 4, SPLM/A Exhibit-FE 14/1.

³²⁸ GoS Rejoinder, para. 37 quoting SPLM/A Final Presentation on the Boundaries of the Abyei Area, p. 27, SPLM/A Exhibit-FE 14/13.

³²⁹ GoS Rejoinder, paras. 38-39.

³³⁰ GoS Rejoinder, para. 39.

³³¹ GoS Rejoinder, paras. 40-41 referring to the following cases: *Arbitral Award of July 31, 1989*, Judgment, ICJ Reports, 1991, p. 70, para. 49, citing *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, ICJ Reports 1984, p. 266, para. 23, and *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, ICJ Reports 1950, p. 8.

³³² GoS Rejoinder, para. 59.

(ii) *SPLM/A Arguments*

241. The SPLM/A's reading of the Formula differs. It argues that the phrase "the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905" should be read in light of the "grammatical rule of proximity" whereby a "post-modifying construction in a noun phrase [relates] to the immediately previous noun."³³³ The SPLM/A contends that the grammatically correct reading of Section 1.1.2 is to relate the phrase 'transferred to Kordofan' to the noun of 'chiefdoms.'³³⁴ The latter, and not the "area," must be understood to have been transferred to Kordofan.
242. For the SPLM/A, the use of the phrase "area" in turn "serves to describe quantitatively the nine Ngok Dinka Chiefdoms being transferred, indicating that the nine Ngok Dinka Chiefdoms are capable of being properly defined and demarcated."³³⁵ Otherwise, the draftsmen of the Abyei Protocol would have opted for the phrase "that part of the area ... that was transferred..."³³⁶ In addition, it is clear for the SPLM/A that Section 1.1.2 refers to *all* of the area in question, since the Formula includes the terms "*nine* Ngok Dinka chiefdoms."³³⁷ Submitting that *three* of the nine Ngok Dinka Chiefdoms are located entirely to the north of the Kir River,³³⁸ the SPLM/A argues that interpreting Section 1.1.2 in such a way as to exclude certain chiefdoms from the Abyei Area would contradict the plain language of the Section.³³⁹
243. The SPLM/A goes on to argue that Section 1.1.2 refers to "a transfer of the Ngok Dinka from the administration of Bahr el-Ghazal to the administration of Kordofan."³⁴⁰ Therefore, contrary to the GoS's allegation, the SPLM/A's interpretation does take into account the phrase "transferred to Kordofan."³⁴¹

³³³ SPLM/A Memorial, para. 1105.

³³⁴ SPLM/A Memorial, para. 1107. *See also* SPLM/A Counter-Memorial, paras. 1505-1509 and Professor David Crystal Expert Report, Appendix A to SPLM/A Counter-Memorial.

³³⁵ SPLM/A Counter-Memorial, para. 1510. *See also* SPLM/A Memorial, at p. 263, para. 1108.

³³⁶ *See* SPLM/A Counter-Memorial, para. 1511.

³³⁷ *See* SPLM/A Memorial, para. 1110; SPLM/A Counter-Memorial, para. 1512.

³³⁸ *See* SPLM/A Map Atlas vol. 1, Maps 15 (Achaak Chiefdom, 1905), 17 (Alei Chiefdom, 1905) and 19 (Bongo Chiefdom, 1905).

³³⁹ *See* SPLM/A Counter-Memorial, paras. 1513-1514.

³⁴⁰ SPLM/A Rejoinder, para. 835.

³⁴¹ *Id.*

244. The SPLM/A also contends that its interpretation finds further support in the language of the 1905 transfer documents, which refer to a transfer of the Ngok Dinka Paramount Chief and/or his territories, not merely some sub-chief or some portion of his territories.³⁴²
245. The 1905 Wingate Memorandum, which the GoS sees as a crucial document, merely describes the “general location of the Ngok and the Twic”³⁴³ in “an *ex post facto* and general summary of the earlier 1905 transfer decision (as he understood it).”³⁴⁴ Much more significant for the SPLM/A is the March 1905 SIR, whose plain language shows that the Condominium intended to transfer Sultan Rob, Sheikh Rihan and their people.³⁴⁵

It has been decided that Sultan Rob, whose country is on the Kir river, and Sheikh Rihan of Toj ... are to belong to Kordofan Province. These people have, on certain occasions, complained of raids made on them by southern Kordofan Arabs, and it has therefore been considered advisable to place them under the same Governor as the Arabs of whose conduct they complain.”³⁴⁶

246. In the SPLM/A’s view, the words “these people” obviously refer to the Ngok Dinka and the Twic people in their entirety, and not merely to two individuals (Sultan Rob and Sheikh Rihan).³⁴⁷ According to the ABC Experts, this document also provided “[...] the official principal reason for the transfer of the nine Ngok Dinka chiefdoms [...]”.³⁴⁸ It is the same document that the GoS clearly interpreted as registering a transfer of people when it referred before the ABC to “The Decision to Transfer the Ngok and Twij to Kordofan,” and “The Reason [for] Transferring the Ngok and the Twij to Kordofan.”³⁴⁹ The SPLM/A also

³⁴² See SPLM/A Memorial, para. 1112 and SPLM/A Counter-Memorial, at pp. 375-376, para. 1545 both quoting Annual Report of the Sudan, 1905, Province of Kordofan, p. 111, SPLM/A Exhibit-FE 2/13, Annual Report of the Sudan, 1905, Province of Bahr el-Ghazal, p. 3, SPLM/A Exhibit-FE 2/13, and Sudan Intelligence Report, No. 128, March 1905, p. 3, SPLM/A Exhibit-FE 2/8. See also SPLM/A Rejoinder, para. 857; SPLM/A Oral Pleadings, April 22, 2009, Transcr. 212/20-24.

³⁴³ SPLM/A Oral Pleadings, April 22, 2009, Transcr. 229/22-24.

³⁴⁴ SPLM/A Rejoinder, para. 860.

³⁴⁵ SPLM/A Oral Pleadings, April 22, 2009, Transcr. 212/25 *et seq.*

³⁴⁶ Sudan Intelligence Report, No. 128, March 1905, p. 3, SPLM/A Exhibit-FE 2/8.

³⁴⁷ SPLM/A Oral Pleadings, April 22, 2009, Transcr. 213/05 *et seq.*

³⁴⁸ SPLM/A Oral Pleadings, April 22, 2009, Transcr. 219/19-22 quoting the ABC Experts’ Report, Part II, App. 2, at pp. 22-23, Appendix B to SPLM/A Memorial.

³⁴⁹ SPLM/A Oral Pleadings, April 22, 2009, Transcr. 216/16 *et seq.* quoting GoS First Presentation to the ABC, Slide 31, SPLM/A Exhibit-FE 14/2. See also the GoS reference to “The Decision to Transfer the Ngok and the Twij To Kordofan” in GoS first Presentation to the ABC, Slide 32, SPLM/A Exhibit-FE 14/2.

notes that the GoS acknowledged in its Memorial that the transfer recorded in the March 1905 SIR was a transfer of “groups,” “the Ngok and the Twic.”³⁵⁰

247. Lastly, the SPLM/A emphasizes the fact that during the ABC proceedings, the GoS never objected to the ABC Experts’ unanimous interpretation of the definition of the Abyei Area, which reflects the natural meaning and purposes of Section 1.1.2. of the Abyei Protocol.³⁵¹

248. The SPLM/A thus concludes that the natural meaning and structure of the text in Section 1.1.2 of the Abyei Protocol can only be interpreted as referring to the transfer of the entire Ngok Dinka people.

(b) The purposes underlying the definition of the Abyei Area set out in Section 1.1.2 of the Abyei Protocol and Article 2(c) of the Arbitration Agreement

(i) *GoS Arguments*

249. Having stated that “the context and object and purpose of the arbitration agreement provide the guideline for the interpretation,”³⁵² the GoS focuses on the object and purpose of the 1905 transfer, which is also clear: “[i]t was an administrative decision to transfer an area from one province to another to enable better administrative control over tensions between Baggara Arab and Dinka tribes.”³⁵³ The SPLM/A’s reliance for its interpretation on other factors that are alien to the way the Condominium officials viewed the situation in 1905 is ill-founded.³⁵⁴

250. Thus, the SPLM/A’s argument that the GoS’s reading of the Formula would arbitrarily divide the territory of the Ngok Dinka Chiefdoms is misplaced. The GoS insists that “[t]here was no intent by Sudanese Government officials at the time to ‘arbitrarily divide’ the Ngok Dinka.”³⁵⁵ To the extent that there were any Ngok Dinka north of the Bahr el

³⁵⁰ SPLM/A Counter-Memorial, para. 1549 quoting GoS Memorial, paras. 357, 359. See also SPLM/A Rejoinder, para. 805.

³⁵¹ See SPLM/A Memorial, para. 1142-1146 and Counter-Memorial, paras. 1560-1564, referring to the ABC Experts’ Report, Part II, App. 4, at pp. 41, 53, 58 and 79, Exhibit 15/1.

³⁵² GoS Memorial, para. 34.

³⁵³ GoS Counter-Memorial, para. 115.

³⁵⁴ GoS Rejoinder, paras. 41-42.

³⁵⁵ GoS Rejoinder, para. 46.

Arab, the provincial boundary in 1905, they were already in Kordofan and did not need to be transferred.³⁵⁶

251. Similarly, the SPLM/A's complaint that the GoS's interpretation would exclude three of the nine Chiefdoms (the Alei, the Achaak and the Bongo) from the Abyei Area finds no support in the contemporary documents.³⁵⁷
252. Further, the SPLM/A's contention that the GoS's interpretation would also exclude Abyei from the Abyei Area is at odds with both the contemporary evidence and the intention of the Anglo-Egyptian administrators at the time.³⁵⁸ The GoS points out that Abyei Town did not exist in 1905 and "played no role whatsoever in the thinking of Sudanese officials in 1905 when they decided the transfer [...],"³⁵⁹ pointing further to Section 7 of the Abyei Appendix which contemplates that Abyei Town may not be located in the Abyei Area.³⁶⁰
253. Lastly, the GoS dismisses as being "based on present day demographics" the SPLM/A's argument that the purpose of the Abyei Area's definition is to uphold the Ngok Dinka's right to self-determination, a concept that was not referred to in the Formula or taken into account in transferring the Ngok Dinka districts to Kordofan in 1905.³⁶¹ Invoking the principle of self-determination now "is in effect to re-open the negotiated settlement of the Abyei Protocol for the benefit of one of the parties and to the detriment of the other."³⁶²
254. In sum, "it is by reference to the events that took place in 1905 relating to the area that was transferred that the resolution of the present dispute should be based," not by reference to other factors irrelevant in 1905.³⁶³

³⁵⁶ GoS Rejoinder, para. 46.

³⁵⁷ GoS Rejoinder, para. 48.

³⁵⁸ GoS Rejoinder, paras. 52-53.

³⁵⁹ GoS Rejoinder, para. 53. *See also* GoS Oral Pleadings, April 18, 2009, Transcr. 40/15 *et seq.*

³⁶⁰ GoS Rejoinder, para. 55 referring to Abyei Appendix, attached to the ABC Experts' Report, paragraph 7 (SM Annex 81).

³⁶¹ GoS Rejoinder, para. 57.

³⁶² GoS Oral Pleadings, April 18, 2009, Transcr. 39/11-16. *See also* GoS Counter-Memorial, para. 89.

³⁶³ GoS Rejoinder, para. 59.

(ii) *SPLM/A Arguments*

255. The SPLM/A argues that its Tribal Interpretation of the Formula is in accordance with “the central purpose of the definition of the Abyei Area [which] was to specify that region whose residents would be entitled to participate in the Abyei Referendum.”³⁶⁴ The Abyei Referendum being designed to permit the Ngok Dinka to vote on whether or not to be included in the South, the SPLM/A contends that it would be absurd to define the Abyei Area as including only some of the Ngok Dinka territory or some of the nine Chiefdoms.³⁶⁵ Such a definition would be contrary to the “basic principles of self-determination underlying the Abyei Protocol.”³⁶⁶
256. The SPLM/A maintains that, instead of addressing this issue, the GoS addresses the dissimilar question of the purpose of the 1905 transfer, which is “completely irrelevant to the purposes of the GoS and the SPLM/A in concluding the 2005 Abyei Protocol.”³⁶⁷ The GoS’s interpretation of Section 1.1.2 of the Abyei Protocol, which reduces the Abyei Area to a 14-mile wide strip of swamp land along the Bahr el Arab’s southern bank, runs counter to the fundamental purpose of the Abyei Protocol and the CPA -- resulting in the exclusion of the majority of territory occupied and used by the nine Ngok Dinka Chiefdoms, including three chiefdoms in their entirety,³⁶⁸ and arbitrarily dividing Ngok Dinka lands on the basis of what was an uncertain, provisional and approximate boundary in 1905.³⁶⁹ Similarly, if the Abyei Area were to be limited to territory south of the Bahr el Arab/Kir, it would not be the “bridge” between the north and the south, as contemplated by Section 1.1.1 of the Abyei Protocol.³⁷⁰
257. Further, the GoS’s interpretation of the Formula excludes Abyei Town, which has been “the undisputed center of Ngok Dinka political, cultural and commercial life for more than a century,” from the Abyei Area.³⁷¹ The SPLM/A further argues that this inconceivable result

³⁶⁴ SPLM/A Memorial, para. 1124. The SPLM/A refers to Section 8 of the Abyei Protocol.

³⁶⁵ SPLM/A Oral Pleadings, April 22, 2009, Transcr. 202/22 *et seq.*

³⁶⁶ SPLM/A Memorial, para. 1125; *see also* paras. 111-113, paras. 133-136 and paras. 206-216. *See also* SPLM/A Counter-Memorial, para. 1519.

³⁶⁷ SPLM/A Rejoinder, para. 849.

³⁶⁸ SPLM/A Counter-Memorial, paras. 1523, 1530-1531.

³⁶⁹ SPLM/A Counter-Memorial, paras. 81, 1538, 1543-1544.

³⁷⁰ SPLM/A Memorial, para. 1129.

³⁷¹ SPLM/A Memorial, para. 1126.

would be incompatible with Section 7 of the Abyei Appendix. The GoS's argument that Abyei town did not exist in 1905 misses the point;³⁷² it is a fact that the Ngok Dinka Paramount Chief resided in Burakol at the time, near present day Abyei Town.³⁷³

258. The SPLM/A goes on to argue that the witness testimony of the individuals involved in the drafting of the Abyei Protocol (Lieutenant General Lazaro Sumbeiywo, Mr. Jeffrey Millington and Minister Deng Alor Kuol) confirms that the purpose behind the definition of the Abyei Area was to encompass the entirety of Ngok Dinka territory and all of the nine Chiefdoms.³⁷⁴
259. Lastly, the SPLM/A stresses that the composition of the ABC, as contemplated in the Abyei Annex, included specialists "with complementary expertise precisely tailored to the task before them – defining the area used and occupied by the Ngok Dinka in 1905".³⁷⁵ In the same way, the Parties "provided a set of procedures that were equally well-tailored to the same task."³⁷⁶
260. The SPLM/A concludes that "the obvious purposes of Section 1.1.2 and the other provisions of the Abyei Protocol and Abyei Appendix require defining the Abyei Area to include all of the territory of the nine Ngok Dinka Chiefdoms in 1905."³⁷⁷

(c) The drafting history of the Abyei Protocol

(i) *GoS Arguments*

261. According to the GoS, the negotiating history of the Formula confirms that the 1905 transfer was not a transfer of people and thus supports the GoS's Territorial Interpretation.³⁷⁸

³⁷² SPLM/A Rejoinder, paras. 851-853. *See also* SPLM/A Counter-Memorial, para. 1521.

³⁷³ SPLM/A Rejoinder, para. 853.

³⁷⁴ *See* SPLM/A Memorial, at paras. 1140-1141, SPLM/A Memorial, at para. 1140(a) quoting Witness Statement of Lt. Gen. Sumbeiywo, para. 53 (SPLM/A Memorial, Witness Statements, Tab 4); SPLM/A Memorial, at para. 1140(b) quoting Witness Statement of Mr. Millington, para. 9 (SPLM/A Memorial, Witness Statements, Tab 3); *See* SPLM/A Memorial, at para. 1140(c) and (d) quoting Witness Statement of Minister Deng Alor Kuol, paras. 54 and 56 (SPLM/A Memorial, Witness Statements, Tab 1). *See also* SPLM/A Counter-Memorial, at paras. 1556-1559.;

³⁷⁵ SPLM/A Counter-Memorial, para. 1572.

³⁷⁶ *Id.*

³⁷⁷ SPLM/A Memorial, para. 61. *See also* SPLM/A Memorial, para. 1147.

³⁷⁸ *See* GoS Memorial, paras. 39-40. *See also* GoS Oral Pleadings, April 18, 2009, Transcr. 35/17 *et seq.*

262. During the 1999-2005 peace talks, Southern Sudan was granted the right to self-determination and, in January 2000, the SPLM/A requested that this right be exercised in a referendum that would include, *inter alia*, “the District of Abyei whose population is of Ngok Dinka.”³⁷⁹ The GoS rejected the SPLM/A’s request, arguing that Abyei was not part of the South³⁸⁰ and that the 1956 boundaries were “sacrosanct.”³⁸¹ The SPLM/A maintained that the boundary should be drawn further north to include “all the land allegedly inhabited by Ngok Dinka before the Abyei Agreement of 1966.”³⁸²
263. The GoS goes on to observe that it was the SPLM/A that introduced the concept of an area “annexed to the north for administrative purposes” for the first time in 2000.³⁸³ The GoS then notes that Dr. Douglas Johnson presented a paper at a workshop organized by IGAD in 2003 in which he explicitly referred to the passage of the March 1905 SIR concerning the transfer of Sultan Rob to the province of Kordofan.³⁸⁴ The GoS insists that “it was precisely this passage which led to the formulation of the ABC’s mandate and that of the Tribunal [...]”³⁸⁵ Indeed, on March 19, 2004, the US Special Envoy to Sudan, Senator Danforth, broke the deadlock with a proposal entitled “Principles of Agreement for Abyei” containing the agreed Formula.³⁸⁶ All attempts by the SPLM/A to qualify the Formula by reference to later dates so as to recuperate Ngok territorial gains subsequent to 1905 were rejected.³⁸⁷ The Formula was eventually enshrined in the Abyei Protocol³⁸⁸ and regarded as “self-explanatory” by the Parties.³⁸⁹

³⁷⁹ GoS Memorial, para. 44 quoting SPLM/SPLA Position for the Political Committee on Sudan Peace Talks: 15th-20th January 2000, available at www.vigilsd.org/adoc01.htm (SM Annex 64).

³⁸⁰ GoS Memorial, paras. 45-49 referring to First Meeting of the Political Committee between Government of Sudan and the Sudanese People’s Liberation Movement/Army, Nairobi, 15th-20th January, 2000, p. 3. *See also* Second Meeting of the Political Committee between Government of Sudan and the Sudanese People’s Liberation Movement/Army, Nairobi, 26th February, 2000, p. 7.

³⁸¹ SPLM/A Oral Pleadings, April 18, 2009, Transcr. 36/01-03.

³⁸² GoS Memorial, para. 52 referring to the Abyei Agreement between Tribes of Messeria and Mareg Dinka, March 22, 1966 (SM Annex 62) which replaced an interim Agreement of March 3, 1965.

³⁸³ GoS Memorial, para. 50 referring to Second Meeting of the Political Committee between Government of Sudan and the Sudanese People’s Liberation Movement/Army, Nairobi, 26th February, 2000, p. 8.

³⁸⁴ GoS Memorial, para. 51 referring to Sudan Intelligence Report, No. 128 (March 1905), p. 3 (SM Annex 9).

³⁸⁵ GoS Memorial, para. 359.

³⁸⁶ GoS Memorial, para. 53.

³⁸⁷ GoS Oral Pleadings, April 23, 2009, Transcr. 23/13 et seq. *See also* Witness Statement, para. 23 (SCM WS 2).

³⁸⁸ GoS Memorial, para. 53.

³⁸⁹ GoS Memorial, para. 54.

264. The GoS concludes that the drafting history of the Formula warrants a Territorial Interpretation on at least three grounds:

1. The Abyei Protocol constituted an exception to the territorial principle of the *uti possidetis* of 1956, repeatedly affirmed in the CPA.
2. The territorial integrity of Kordofan was upheld against a claim to an extensive tribal boundary of 1966.
3. But an exception was made for an area administratively added to Kordofan in 1905. That area, once identified, could in principle be returned to Bahr el-Ghazal if the inhabitants preferred that course of action.³⁹⁰

(ii) *SPLM/A Arguments*

265. The SPLM/A contends that its Tribal Interpretation of Section 1.1.2 of the Abyei Protocol is fully corroborated by the drafting history of the Abyei Protocol.³⁹¹

266. When the peace negotiations resumed between the Parties, the SPLM/A consistently emphasized in a number of papers that the Ngok Dinka had a right to self-determination³⁹² and constituted a “single cultural unit,” which “up to 1905 [...] was administratively and politically a part of the South,”³⁹³ before its annexing to Kordofan.³⁹⁴ The GoS was for its part primarily concerned by the alleged Ngok Dinka northern expansion following 1905.³⁹⁵ It argued that the Abyei Area should only include the “traditional Abyei,”³⁹⁶ without putting forward an actual definition of the Area.³⁹⁷

³⁹⁰ GoS Oral Pleadings, April 18, 2009, Transcr. 36/24-37/08. *See also* GoS Oral Pleadings, April 23, 2009, Transcr. 22/15 *et seq.*

³⁹¹ *See* SPLM/A Counter-Memorial, at para. 1565.

³⁹² SPLM/A Memorial, para. 1161; *see also* paras. 1156-1160.

³⁹³ SPLM/A Memorial, para. 1163 quoting Minutes of IGAD Peace Talks, Naivasha, dated 10 October 2003, at p. 2, SPLM/A Exhibit-FE 10/38.

³⁹⁴ *See* SPLM/A Memorial, para. 1167 quoting Draft Agreement between the Government of Sudan (GoS) and The Sudan People’s Liberation Movement/Army (SPLM/SPLA) on the Three Areas of Abyei, The Nuba Mountains and Southern Blue Nile (FUNJ Region), dated 21 October 2003, at p. 1, SPLM/A Exhibit-FE 10/40; *See also* SPLM/A Memorial, para. 1168 quoting Witness Statement of Minister Deng Alor Kuol, para. 41 (SPLM/A Memorial, Witness Statements, Tab 1).

³⁹⁵ *See* SPLM/A Memorial, para. 1149.

³⁹⁶ SPLM/A Memorial, para. 1164 quoting Minutes of IGAD Peace Talks, Naivasha, dated 10 October 2003, at p. 2, SPLM/A Exhibit-FE 10/38.

³⁹⁷ SPLM/A Memorial, para. 1172 referring to *GOS Elaborated Position on Abyei*, dated 24 January 2004, at p. 1, SPLM/A Exhibit-FE 11/10. *See also* SPLM/A Memorial, para. 1175 referring to GoS, Draft Framework for Resolution of Outstanding Issues, pp. 3 *et seq.*, SPLM/A Exhibit-FE 12/3.

267. In its written submissions and at the hearings, the SPLM/A agreed however with the GoS that while the key passage from the March 1905 SIR – a document which clearly demonstrates that the 1905 transfer was the transfer of the Ngok Dinka people – was examined by the negotiators in 2003 and “led to the formulation of the ABC’s mandate,”³⁹⁸ the Wingate Memorandum was not considered.³⁹⁹
268. The SPLM/A goes on to note that, in March 2004, U.S. Senator Danforth presented to the Parties a U.S. proposal entitled “Principles on Agreement on Abyei,” which defined Abyei as the “area of the nine Ngoc [sic] Dinka Chiefdoms transferred to Kordofan in 1905,” thereby reproducing an important aspect of the SPLM/A’s proposed formulation in its previous draft agreements.⁴⁰⁰ Further discussions eventually led to the production of a joint draft which mirrored the Danforth proposal and became Section 1.1.2 of the Abyei Protocol.⁴⁰¹
269. In the SPLM/A’s analysis, it is clear that the final text was tailored to give effect to the unity of the Ngok Dinka people and its aspiration to self-determination,⁴⁰² and not to truncate the Ngok Dinka traditional homeland by reference to the 1905 provincial boundaries of Sudan.⁴⁰³

³⁹⁸ GoS Memorial, para. 359; SPLM/A Counter-Memorial, para. 1547; SPLM/A Rejoinder, para. 804. *See also* SPLM/A Oral Pleadings, April 22, 2009, Transcr. 208/11 *et seq.*

³⁹⁹ SPLM/A Oral Pleadings, April 22, 2009, Transcr. 208/11 *et seq.*

⁴⁰⁰ SPLM/A Memorial, para. 1176 quoting Principles of Agreement on Abyei (undated) presented on March 19, 2004, at p. 1, SPLM/A Exhibit-FE 12/4.

⁴⁰¹ *See* SPLM/A Memorial, paras. 1180-1183. *See in particular* para. 1182 referring to Draft Protocol between the Government of the Sudan and the Sudan People’s Liberation Movement/Army on the Resolution of the Abyei Conflict, dated May 20, 2004, (Section 1.1.2) SPLM/A Exhibit-FE 12/11; Joint Draft Protocol Between the Government of the Sudan and the Sudan People’s Liberation Movement/Army on the resolution of the Abyei Conflict, dated May 20, 2004, (Section 1.1.2) SPLM/A Exhibit-FE 12/12; Joint Draft Protocol Between the Government of the Sudan and the Sudan People’s Liberation Movement/Army on the Resolution of the Abyei Conflict, dated May 21, 2004, (Section 1.1.2) SPLM/A Exhibit-FE 12/13; Joint Draft Protocol between the Government of the Sudan and the Sudan People’s Liberation Movement/Army on the Resolution of the Abyei Conflict, dated May 21, 2004, (Section 1.1.2) SPLM/A Exhibit-FE 12/14.

⁴⁰² SPLM/A Memorial, para. 1184.

⁴⁰³ SPLM/A Memorial, para. 1189.

3. The relevance of the Kordofan/Bahr el Ghazal boundary to the delimitation of the area transferred in 1905

- (a) Did the Bahr el Arab constitute a precise and proclaimed provincial boundary between Kordofan and Bahr el Ghazal and the northern limit of the area transferred in 1905?

270. The GoS argues that the Condominium administration was present in the Abyei region and explored it prior to and in 1905. Despite limited and short-lived uncertainty surrounding the location of the Bahr el Arab, it is clear that there was a precise boundary between Kordofan and Bahr el Ghazal on that river prior to the transfer and that the highest-ranking official, who knew where the Bahr el Arab was, considered it to be both the provincial boundary and the northern limit of the transferred area in 1905.⁴⁰⁴

271. In contrast, the SPLM/A contends that, in 1905, at a time when there was virtually no administration in Southern Kordofan and Bahr el Ghazal, there was widespread and prolonged confusion as to the location of the Bahr el Arab. Contrary to the GoS's position, the provincial boundary between Kordofan and Bahr el Ghazal was indeterminate in 1905 and irrelevant to a transfer that concerned a people as opposed to a specific area.

- (i) *The state of Condominium knowledge and administration of the Abyei region in 1905*

(x) GoS Arguments

272. The GoS submits, relying on the writings of Francis Deng, that the remoteness of the Abyei region, and its inaccessibility to government officials in the early twentieth century, is greatly exaggerated.⁴⁰⁵ As indicated in the report of one of the GoS's experts for these proceedings, Mr. Alistair Macdonald, the early 20th century was, on the contrary, a period of exploration designed to give the Condominium a better understanding of the Abyei area.⁴⁰⁶ Bayldon was expressly sent by Wingate⁴⁰⁷ to the region with the instructions to explore the Bahr el Arab, and his progress was monitored closely by Governmental officials.⁴⁰⁸ It is

⁴⁰⁴ GoS Counter-Memorial, paras. 468, 471, 479, GoS Rejoinder, paras. 341, 387.

⁴⁰⁵ GoS Counter-Memorial, para. 362, quoting DENG, F., WHITE NILE, BLACK BLOOD (2000), p. 136.

⁴⁰⁶ GoS Counter-Memorial, para. 363; *See* Macdonald Report, paras. 3.2-3.28, discussing the exploratory journeys in the first decade of the 20th century, and referring to Saunders, Wilkinson, Percival, Bayldon, Lloyd, Lyons, Comyn, Huntley-Walsh (Appendix to GoS Memorial).

⁴⁰⁷ GoS Memorial, para. 313 referring to Reports on the Finances, Administration and Condition of the Sudan, Annual Report (1904), p. 8 (SM Annex 23); GoS Oral Pleadings, April 21, 2009 Transcr. 9/20 *et seq.*

⁴⁰⁸ GoS Rejoinder, para. 323; GoS Oral Pleadings, April 22, 2009, Transcr. 189/15-20 *et seq.*

obvious that the authorities wanted to elucidate the “river situation.”⁴⁰⁹ In opposition to the view of Professor Martin Daly, one of the SPLM/A’s experts for these proceedings, that “British knowledge of the Ngok was based on a few hours’ path crossing,”⁴¹⁰ the GoS notes that between 1901 and 1904, Sultan Rob was visited at least once a year by British officials who even bestowed on him a Second Class Robe of Honor.⁴¹¹ Other important evidence of administration is the fact that the 1905 transfer itself was officially recorded in the Annual Reports for both the provinces of Kordofan and Bahr el Ghazal.⁴¹²

(y) SPLM/A Arguments

273. The SPLM/A submits that there was no effective administration of the regions of northern Bahr el Ghazal and southwestern Kordofan before the transfer in 1905.⁴¹³
274. In the early twentieth century, the region of southwestern Kordofan and northern Bahr el Ghazal was extremely remote and difficult to access, especially in the rainy season.⁴¹⁴ Even in 1908, after the transfer, Condominium officials reported that the “whole Dinka country is difficult to traverse at any time.”⁴¹⁵ As stated by Professor Daly in his Report, the Sudan Government at that time was under-staffed and devoted most of its resources to more populous and accessible areas, such as Khartoum and the Nile Valley.⁴¹⁶ The local tribes, including the Ngok Dinka, were under some form of self-governance, and “were in effect sovereign”⁴¹⁷ and “left on their own.”⁴¹⁸ The British made no effort to effectively administer them.⁴¹⁹ The officials did not establish any permanent post, schools or health

⁴⁰⁹ GoS Oral Pleadings, April 22, 2009, Transcr. 190/13-19; *See also* April 21, 2009, Transcr. 10/10-20.

⁴¹⁰ Daly Expert Report, p. 43, Appendix to SPLM/A Memorial.

⁴¹¹ GoS Counter-Memorial, para. 250. The GoS refers to visits by Mahon, Wilkinson and Bayldon.

⁴¹² *See* Reports on the Finances, Administration, and Condition of the Sudan, Annual Report (1905) Report for Bahr el-Ghazal Province (GoS Annex 24); Reports on the Finances, Administration, and Condition of the Sudan, Annual Report (1905) Report for Kordofan Province (GoS Annex 24).

⁴¹³ SPLM/A Memorial, paras. 280-296, SPLM/A Counter-Memorial, para. 1463, quoting the MENAS Report, para. 76 (Appendix to Counter-Memorial).

⁴¹⁴ Daly Expert Report, p. 4, Appendix to SPLM/A Memorial.

⁴¹⁵ Sudan Intelligence Report 171, October 1908, at Appendix D, at p. 60, SPLM/A Exhibit-FE 3/5 (emphasis added). *See also* Notes on the Military Situation in the Southern Sudan and British East Africa, War Office 5 (1905) SPLM/A Exhibit-FE 2/10.

⁴¹⁶ *See* Daly Expert Report, p. 5, Appendix to SPLM/A Memorial.

⁴¹⁷ SPLM/A Oral Pleadings, April 22, 2009, Transcr. 99/02-03.

⁴¹⁸ *Id.* at 103/8-9.

⁴¹⁹ *See* SPLM/A Oral Pleadings, April 22, 2009, Transcr. 101/18-102/24.

clinics in the Abyei area.⁴²⁰ Their role was limited to “pacification” and maintaining order between the tribes.⁴²¹ Therefore, “there was [...] no point in delimiting a boundary”⁴²² since “provincial boundaries simply did not matter.”⁴²³ Even if some British officials were sent on expeditions in this area, the goal was not to explore or establish administrative control but to inform the local population that the British were now in charge of Sudan.⁴²⁴

(ii) *The extent of the confusion regarding the location of the Bahr el Arab*

(x) GoS Arguments

275. The GoS acknowledges that Wilkinson, who traveled from El Obeid to Sultan Rob’s in 1902, mistook the Ragaba ez Zarga for the Bahr el Arab.⁴²⁵ His mistake was reflected on the 1904 Sudan Intelligence Office Map⁴²⁶ and repeated by Percival.⁴²⁷

276. The GoS further notes that the ABC Experts extensively relied upon Wilkinson’s account to reject the Bahr el Arab as the northern boundary of Bahr el Ghazal⁴²⁸ and conclude that the Ragaba ez Zarga was treated as the provincial boundary in 1905.⁴²⁹ However, the GoS submits that the confusion was short-lived⁴³⁰ and ended before the transfer in February 1905 with Bayldon’s report.⁴³¹ The GoS cites to other contemporaneous reports⁴³² and maps that

⁴²⁰ SPLM/A Oral Pleadings, April 22, 2009, Transcr. 101/12-16, 103/5-7.

⁴²¹ SPLM/A Oral Pleadings, April 22, 2009, Transcr. 99/24-100/7, 103/10-13. *See also* Daly Expert Report, pp. 33-34, Appendix to SPLM/A Memorial.

⁴²² SPLM/A Oral Pleadings, April 22, 2009, Transcr. 102/02-03.

⁴²³ SPLM/A Oral Pleadings, April 22, 2009, Transcr. 102/24. *See* Daly Expert Report, p. 33 (Appendix to SPLM/A Memorial); *See also* Second Daly Expert Report, pp. 17, 59, Appendix to SPLM/A Counter-Memorial.

⁴²⁴ *Id.* at 104/4-10. *See also* Second Daly Expert Report, p. 18, Appendix to SPLM/A Counter-Memorial.

⁴²⁵ *See* GoS Memorial, para. 317 and Macdonald Report, paras. 3.7-3.9 (Appendix to GoS Memorial).

⁴²⁶ *See* GoS Memorial, para. 317; Macdonald Report, para. 3.9 (Appendix to GoS Memorial); GoS Memorial Map Atlas, Map 7 (The Anglo-Egyptian Sudan, 1904). *See also* GoS Oral Pleadings, April 20, 2009, Transcr. 110/20 *et seq.* (Macdonald presentation).

⁴²⁷ *See* GoS Counter-Memorial, para. 272 and Macdonald Report, paras. 3.8-4.4 (Appendix to GoS Memorial) and Percival, A., Route Report: Keilak to Wau, December 1904 (SCM Annex 26).

⁴²⁸ GoS Memorial, para. 314 *et seq.*

⁴²⁹ ABC Experts’ Report, Part I, p. 38.

⁴³⁰ *See* GoS Memorial, para. 318 referring to Macdonald Report, paras. 3.20-3.28 (Appendix to GoS Memorial).

⁴³¹ GoS Memorial, para. 313, 321 referring to Gleichen, Handbook of the Sudan (1905), Vol. I, p. 168 (SM Annex 38).

⁴³² *See* GoS Memorial, para. 318. referring to Comyn, D, *The Western Sources of the Nile* (1907) 30 THE GEOGRAPHICAL JOURNAL, p. 524 (GoS Memorial, Annex 50) and Comyn’s map (Map 9 in GoS Memorial Map Atlas); GoS Memorial, para. 319 referring to Walsh’s report in the Sudan Intelligence Reports, No. 1605 (november 1907) Appendix B., p. 5 (SM Annex 15) and Sudan Intelligence Reports, No. 140, (March 1906),

promptly corrected Wilkinson's mistakes and showed the Bahr el Arab at the right location.⁴³³ The GoS therefore agrees with Mr. Macdonald's conclusion that: "a true understanding of which river was the Bahr el-Arab had been reached in published form in 1907, although men such as Comyn had determined this a year or two earlier."⁴³⁴

277. The GoS further insists that the very document on which the ABC Experts relied to demonstrate the confusion between the Ragaba ez Zarga and the Bahr el Arab, the 1905 Gleichen Handbook, contains a reference to Bayldon's correction of Wilkinson's mistake.⁴³⁵
278. In addition, while much was known about the Bahr el Arab, the Ragaba ez Zarga was unknown both before and in 1905 and did not appear on a map before 1907.⁴³⁶ Given its indeterminate and seasonal nature, it could not have formed the boundary between Kordofan and Bahr el Ghazal up to the boundary with Darfur. Indeed, maps and travel accounts of the period all indicate that there was a tripoint on the Bahr el Arab between the provinces of Darfur, Bahr el Ghazal and Kordofan.⁴³⁷

Appendix D, p. 14 (SM Annex 12); GoS Memorial, para. 313 and Macdonald Report, paras. 3.18-3.19 (Appendix to GoS Memorial) referring to Lloyd, W., (Percival, C.) *Correspondence : The Dar Homr* (1907) 30 THE GEOGRAPHICAL JOURNAL p. 219 (SM Annex 55); GoS Memorial, para. 320 referring to Garstin, W., *Fifty Years of Nile Exploration, and Some of its Results*, (1909) 33 THE GEOGRAPHICAL JOURNAL 117, 142 (SM Annex 51).

⁴³³ See GoS Memorial, paras. 327-329. They include a 1907 map prepared by the Sudan Survey Office, (Map 10 in GoS Memorial Map Atlas; See also GoS Oral Pleadings, April 20, 2009, Transcr. 134/16-22 (Macdonald presentation), a 1910 map on the province of Kordofan based on papers by Captain Lloyd, then Governor of Kordofan (Map 11 in GoS Memorial Map Atlas), and another 1910 map on the Anglo-Egyptian Sudan prepared by the Sudan Survey Office (Map 12 in GoS Memorial Map Atlas).

⁴³⁴ Macdonald Report, para. 4.3 (Appendix to GoS Memorial); See also GoS Oral Pleadings, April 20, 2009, Transcr. 134/06 *et seq.* (Macdonald presentation).

⁴³⁵ See GoS Memorial, para. 321; Gleichen, *Handbook of the Sudan* (London, 1905), Vol. I, p. 168 (SM Annex 38); See also GoS Memorial Map Atlas, Map 8 (*The Anglo-Egyptian Sudan*, War Office, 1903 in 1905 Gleichen Handbook).

⁴³⁶ See GoS Memorial, para. 327-329; GoS Oral Pleadings, April 20, 2009, Transcr. 111/19-22, 118/01-10 (Macdonald presentation); GoS Memorial, para. 328; GoS Oral Pleadings, April 20, 2009; Map 10 in GoS Memorial Map Atlas (*Northern Bahr el Ghazal Sheet-65*, Survey Office (Khartoum), 1907).

⁴³⁷ See GoS Memorial, para. 327-329; See GoS Memorial Map Atlas, Map 17 (*Anglo-Egyptian Sudan*, War Office, 1914 rev. 1920); See GoS Memorial paras. 302 and 303, referring to Condition of the Sudan, Annual Report (1904) Annual Report for Kordofan Province, p. 101 (SM Annex 23); See GoS Memorial paras. 305 and 328, referring to Slatin Pasha's accounts in Sudan Intelligence Reports, No. 114, January 1904, Appendix A, p. 5 (SM Annex 6); See GoS Memorial paras. 328 and 368 referring to MACMICHAEL, H.A., *THE TRIBES OF NORTHERN AND CENTRAL KORDOFAN* (1912), p. 21, fn 1 (SM Annex 42) and the Reports on the Finances, Administration, and Condition of the Sudan, Annual Report (1904) Annual Report for Kordofan Province, p. 101 (SM Annex 23); See GoS Memorial Map 5 (*The Anglo-Egyptian Sudan*, drawn by H.W. Mardon, 1901 rev. 1903, in 1905 Gleichen Handbook).

279. Finally, the GoS suggests that even if the ABC Experts were correct in determining that the Ragaba ez Zarga was the provincial boundary between Kordofan and Bahr el Ghazal before 1905, this would mean that the areas located north of the Ragaba ez Zarga were already part of Kordofan at the moment of the transfer, and as such could not have formed part of the area transferred. Therefore, the ABC erred in allocating areas to the Ngok Dinka that were north of the Ragaba ez Zarga.⁴³⁸

(y) SPLM/A Arguments

280. The SPLM/A first points out that the Ragaba ez Zarga and the Bahr el Arab, which shared many of the same features and characteristics,⁴³⁹ were easily confused with each other.⁴⁴⁰ These similarities are confirmed by the historical record, and in particular the observations of Percival,⁴⁴¹ Wilkinson⁴⁴² and Lloyd⁴⁴³, Cunnison,⁴⁴⁴ witness evidence⁴⁴⁵ and modern expertise.⁴⁴⁶

281. In addition, the SPLM/A argues that, contrary to the GoS's assertions, the confusion regarding the location of the Bahr el Arab was neither isolated, nor quickly resolved. Indeed, even though certain Condominium officials may have known where the real Bahr el Arab was, there was no general agreement as to its location.⁴⁴⁷ The confusion created by

⁴³⁸ GoS Counter-Memorial, para. 388.

⁴³⁹ See SPLM/A Counter-Memorial, paras. 1400 *et seq.*

⁴⁴⁰ See SPLM/A Counter-Memorial, para. 1410.

⁴⁴¹ See SPLM/A Counter-Memorial, para. 1402 quoting Percival, Keilak to Wau (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government Vol. II, 25 (1905)*, SPLM/A Exhibit-FE 17/13.

⁴⁴² See SPLM/A Counter-Memorial, para. 1402 quoting Wilkinson, El Obeid to Dar El Jange (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government Vol. II, 155 (1905)*, SPLM/A Exhibit-FE 2/15.

⁴⁴³ See SPLM/A Counter-Memorial, para. 1402 quoting Sudan Intelligence Reports, No. 160, dated November 1907, Appendix B, at p. 5, SPLM/A Exhibit-FE 17/29. See also Map 38 of SPLM/A Map Atlas, vol. 1 (*Kordofan: Map of Dar Homr*, Watkiss Lloyd, 1907).

⁴⁴⁴ See SPLM/A Counter-Memorial, para. 1403 quoting I. CUNNISON, BAGGARA ARABS – POWER AND THE LINEAGE IN A SUDANESE NOMAD TRIBE 18 (1966), SPLM/A Exhibit-FE 4/16.

⁴⁴⁵ See SPLM/A Counter-Memorial, para. 1407 quoting Witness Statement Weiu Dau Nouth (Mareng elder), at p. 3, ¶14.

⁴⁴⁶ See SPLM/A Counter-Memorial, para. 1408 quoting the MENAS Expert Report, para. 122, Appendix to SPLM/A Counter-Memorial; SPLM/A Counter-Memorial, para. 1409 quoting the MENAS Expert Report, para. 125, Appendix to SPLM/A Counter-Memorial; see also SPLM/A Rejoinder, para. 758. See also SPLM/A Rejoinder, paras. 757, 759, 773-775.

⁴⁴⁷ SPLM/A Rejoinder, para. 777.

Wilkinson, who mistook the Ragaba ez Zarga for the Bahr el Arab,⁴⁴⁸ was shared by other officials such as Mahon,⁴⁴⁹ Percival,⁴⁵⁰ Boulnois,⁴⁵¹ O'Connell,⁴⁵² and Lloyd⁴⁵³ and reflected on maps, including the 1904 official Anglo-Egyptian Sudan Intelligence Office map reproduced in the 1905 Gleichen Handbook.⁴⁵⁴ It was also included in the 1906 Annual Report for Kordofan.⁴⁵⁵

282. The SPLM/A further argues that the confusion was “in full force exactly at the time of the 1905 transfer of the Ngok Dinka.”⁴⁵⁶ Contrary to the GoS's claim that Bayldon's correction of Wilkinson's mistake occurred in February 1905, the SPLM/A maintains that the documentary record clearly shows that the error “was not corrected until 1907 or 1908, two or three years after the 1905 transfer of the Ngok Dinka.”⁴⁵⁷ The SPLM/A notes that the Bayldon report was not available in February 1905 as it was clearly dated 20 March 1905,⁴⁵⁸ and that Wingate's 1905 Memorandum indicates that “much of the course of these

⁴⁴⁸ See SPLM/A Memorial, para. 919; Wilkinson, El Obeid to Dar El Jange (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government Vol. II*, 155 (1905), SPLM/A Exhibit-FE 2/15. See also Map 29 of SPLM/A Map Atlas, vol. 1 (Wilkinson's Route, 1902) and SPLM/A Counter-Memorial, para. 955.

⁴⁴⁹ See SPLM/A Counter-Memorial, para. 945 quoting Sudan Intelligence Report, No. 92, dated 31 March 1902, Appendix F, at p. 19, SPLM/A Exhibit-FE 1/16. See also *Id.*, para. 980 and Sudan Intelligence Report, No. 104, dated March 1903, Appendix E, at p. 19, SPLM/A Exhibit-FE 1/21.

⁴⁵⁰ See SPLM/A Counter-Memorial, para. 988 quoting Percival, Keilak to Wau (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government Vol. II*, 25, 26 (1905), SPLM/A Exhibit-FE 17/13. See also SPLM/A Counter-Memorial, para. 1018 and Sudan Intelligence Report, No. 130, dated May 1905, Appendix A, at p. 4-6, SPLM/A Exhibit-FE 17/16.

⁴⁵¹ See SPLM/A Counter-Memorial, para. 1012 quoting Letter from W.A. Boulnois, Governor Bahr el-Ghazal province, to Governor-General Wingate, dated December 23, 1904, SPLM/A Exhibit-FE 17/10. See also SPLM/A Counter-Memorial, para. 1415.

⁴⁵² See SPLM/A Rejoinder, para. 755 quoting Annual Report on the Sudan, 1906, Province of Kordofan, at p. 689, SPLM/A Exhibit-FE 2/19.

⁴⁵³ See SPLM/A Counter-Memorial, para. 1037 quoting Lloyd, *Some Notes on Dar Homr*, THE GEOGRAPHICAL JOURNAL, 29 (January to June 1907), at p. 649, SPLM/A Exhibit-FE 3/4.

⁴⁵⁴ See SPLM/A Counter-Memorial, para. 1416 and Map 36 of SPLM/A Map Atlas, vol. 1 (*The Anglo-Egyptian Sudan*, Intelligence Office Khartoum, 1904).

⁴⁵⁵ SPLM/A Rejoinder, para. 763, referring to Annual Report on the Sudan, 1906, Province of Kordofan, at p. 689, SPLM/A Exhibit-FE 2/19.

⁴⁵⁶ See SPLM/A Counter-Memorial, para. 1419.

⁴⁵⁷ SPLM/A Counter-Memorial, para. 1419, 1425; SPLM/A Rejoinder, para. 761, 762 (referring to Lloyd, *Some Notes on Dar Homr*, THE GEOGRAPHICAL JOURNAL, 29 (January to June 1907), at p. 649, SPLM/A Exhibit-FE 3/4) and 763 (referring to Annual Report on the Sudan, 1906, Province of Kordofan, at p. 689, SPLM/A Exhibit-FE 2/19). See Macdonald Report, para. 3.13 (Appendix to GoS Memorial).

⁴⁵⁸ SPLM/A Rejoinder, para. 766; Sudan Intelligence Reports, No. 128 (March 1905), Appendix C, p. 10-11 (SM Annex 9).

rivers is still unknown [...] and doubt still exists as to the correct names of the intricate waterways which intersect this part of the Sudan.”⁴⁵⁹

283. The SPLM/A thus argues that the conclusion of the ABC Experts as to when the confusion about the Bahr el Arab was resolved (i.e. 1908) “is not materially different from the GoS’s view that ‘a true understanding of which river was the Bahr el-Arab had been reached in published form in 1907.’”⁴⁶⁰
284. The SPLM/A further notes that the GoS misinterprets the conclusions that the ABC drew from the confusion surrounding the Bahr el Arab. The GoS indeed contends that the ABC Experts concluded that “the southern boundary of Kordofan before 1905 was the Ragaba ez-Zarga”⁴⁶¹ when, in reality, the ABC Experts considered, on the basis of the administration’s understanding, that the Ragaba ez Zarga “was treated” as the provincial boundary.⁴⁶²
285. The SPLM/A also dismisses the GoS’s criticism of the ABC Experts’ decision to include in the Abyei Area a large area north of the Ragaba ez Zarga.⁴⁶³ This criticism is in fact based on the wrong premise that the Abyei Area’s northern boundary should necessarily be the Kordofan/Bahr el Ghazal boundary.⁴⁶⁴ Instead of attempting to infer what the Condominium authorities transferred to Kordofan by reference to this putative border, the GoS should have examined what the authorities considered they had transferred.⁴⁶⁵

(iii) *The Bahr el Arab as the alleged definitive boundary between Kordofan and Bahr el Ghazal prior to 1905*

(x) GoS Arguments

286. The GoS submits that a number of pre-1905 documents describe the Bahr el Arab as the provincial boundary between Bahr el Ghazal and Kordofan, including: Frank Lupton’s 1884

⁴⁵⁹ Reports on Finances, Administration, and Condition of the Sudan in 1905; Memorandum of Major General Sir R. Wingate; Province of Bahr el-Ghazal, Province of Kordofan, p. 10, SPLM/A Memorial, SPLM/A Exhibit-FE 2/13.

⁴⁶⁰ SPLM/A Counter-Memorial, para. 1435 quoting GoS Memorial, at para. 329 (itself quoting the Macdonald Report, at para. 4.3). *See also* Second Daly Expert Report, pp. 19-22, Appendix to SPLM/A Counter-Memorial.

⁴⁶¹ SPLM/A Counter-Memorial, para. 1466 quoting GoS Memorial, at para. 324(b).

⁴⁶² SPLM/A Counter-Memorial, para. 1474 quoting ABC Experts’ Report, Part I, at p. 39, Appendix B to SPLM/A Memorial. *See also* Second Daly Expert Report, p. 22, Appendix to SPLM/A Counter-Memorial.

⁴⁶³ *See* SPLM/A Counter-Memorial, para. 1477.

⁴⁶⁴ *See* SPLM/A Counter-Memorial, paras. 1481-1482.

⁴⁶⁵ *See* SPLM/A Counter-Memorial, para. 1484.

writings;⁴⁶⁶ an 1884 report by the Intelligence Branch of the War Office;⁴⁶⁷ the 1898 first edition of the 1898 Gleichen Handbook;⁴⁶⁸ Mardon's 1903 revised map (first issued in 1901);⁴⁶⁹ the 1902 to 1904 Bahr el Ghazal Annual Reports;⁴⁷⁰ the 1904 Kordofan Annual Report (which states that "the Darfur Frontier [...] runs southwards, west of Dar Homr to the Bahr el-Arab which is the northern boundary of the Bahr el-Ghazal Province");⁴⁷¹ the 1905 Bahr el Ghazal Annual Report (which no longer refers to the provincial boundaries as being "vaguely defined");⁴⁷² and the 1905 Gleichen Handbook⁴⁷³ which includes two maps showing the Bahr el Arab as the northern border of the Bahr el Ghazal.⁴⁷⁴

287. According to the GoS, it is clear from the contemporary record that the boundary between Kordofan and Bahr el Ghazal before the 1905 transfer was the Bahr el Arab.⁴⁷⁵ The fact that the provincial boundaries were not prescribed in any kind of constitutional, legislative or executive document is immaterial, as no such legal requirement existed.⁴⁷⁶ Contrary to

⁴⁶⁶ See GoS Memorial, para. 292, referring to "Mr. Frank Lupton's (Lupton Bey) Geographical Observations in the Bahr-el-Ghazal Region: With Introductory Remarks by Malcolm Lupton. Read at the Royal Geographical Society 10 March 1884," (1884) 6 PROCEEDINGS OF THE ROYAL GEOGRAPHICAL SOCIETY 245, p. 245 (SM Annex 57). See also Lupton's 1884 Map which shows the Bahr el Arab (called "Bakara el Homr") (GoS Memorial, Figure 7, p. 105; GoS Memorial Map Atlas, Map 2, *The Province of Bahr el Ghazal*, The Royal Geographic Society, 1884). The GoS also refers to the writings of Naum Shoucair, an historian who served as Chef-de-bureau of the Sudan Agent General in Cairo: see GoS Counter-Memorial, paras. 21-22, 440-442, 446 SHOUCAIR, N., HISTORY AND GEOGRAPHY OF THE SUDAN, (1903), p. 71 (SCM Annex 1).

⁴⁶⁷ See GoS Memorial, para. 293; Report of the Egyptian Province of the Sudan, Red Sea, and Equator (1884), p. 91 (SM Annex 28).

⁴⁶⁸ See GoS Memorial, paras. 296-297 referring to Gleichen, *Handbook of the Sudan* (HMSO, London, 1898), p. 35-36 (SM Annex 37).

⁴⁶⁹ See GoS Memorial, para. 304; GoS Memorial Map Atlas, Map 5 (*The Anglo-Egyptian Sudan*, drawn by H.W. Mardon, 1901 rev. 1903, in 1905 Gleichen Handbook); Figure 9 on p. 111 of GoS Memorial. The GoS also refers to the 1898 Carte du Bahr el Ghazal by Marchand; see GoS Memorial, para. 295 and GoS Memorial Map Atlas, Map 4 (*Carte du Bahr el Ghazal*, Bulletin du Comité de l'Afrique française, 1898).

⁴⁷⁰ GoS Memorial, paras. 299-302; Reports on the Finances, Administration, and Condition of the Sudan, Annual Report Bahr el-Ghazal Province (1902), p. 230 (SM Annex 21); Finances, Administration, and Condition of the Sudan, Annual Report Bahr el-Ghazal Province (1902), p. 315 (SM Annex 21); Reports on the Finances, Administration, and Condition of the Sudan, Annual Report Bahr el-Ghazal Province (1903), p. 71 (SM Annex 22); Reports on the Finances, Administration, and Condition of the Sudan, Annual Report Bahr el-Ghazal Province (1904), p. 3 (SM Annex 23).

⁴⁷¹ GoS Memorial, para. 302 quoting Reports on the Finances, Administration, and Condition of the Sudan, Annual Report Kordofan Province (1904), p. 101 (SM Annex 23) (Emphasis added by the GoS).

⁴⁷² See GoS Memorial, para. 299, GoS Counter-Memorial, para. 436; Reports on the Finances, Administration, and Condition of the Sudan, Annual Report Bahr el-Ghazal Province (1902), 230 (emphasis added) (SM Annex 21).

⁴⁷³ See GoS Memorial, para. 307, referring to Gleichen, *Handbook of the Sudan* (1905), Vol. II, pp. 153 (SM Annex 38).

⁴⁷⁴ See GoS Memorial, para. 321 referring to one map (Map 8 of the GoS Memorial Map Atlas, *The Anglo-Egyptian Sudan*, Intelligence Division, War Office, 1905).

⁴⁷⁵ GoS Counter-Memorial, para. 452.

⁴⁷⁶ GoS Counter-Memorial, paras. 450-451. See also GoS Oral Pleadings, April 21, 2009, Transcr. 30/05 *et seq.*

Professor Schofield's position, what mattered was that Condominium officials, including Governor-General Wingate, considered the Bahr el Arab to be the boundary.⁴⁷⁷

(y) SPLM/A Arguments

288. According to the SPLM/A, when the Bahr el Arab was referred to in the documentary record as the provincial boundary prior to and during 1905, "the Anglo-Egyptian administrators simply did not have a clear or common understanding of where that boundary was in fact located."⁴⁷⁸
289. The GoS itself acknowledges "that the location and course of the Bahr el-Arab was 'ill-defined,' 'vaguely-defined,' 'uncertain,' and 'bewildering.'"⁴⁷⁹ More generally, the GoS concedes that "'provincial boundaries at this period [1902-1922] were not laid down or recorded in any very formal way, and they were often stated to be approximate'"⁴⁸⁰ and fails, for want of adequate documentary support, in its attempt retrospectively to "create" a clear or official boundary between Bahr el Ghazal and Kordofan prior to 1905.⁴⁸¹
290. The SPLM/A also relies on Professor Schofield to argue that the three requirements for boundary delimitation, namely allocation, delimitation and demarcation, were never fulfilled.⁴⁸² Since the references to the Bahr el Arab in 1905 were only approximate, there cannot have been any definitive identification of a boundary.⁴⁸³ There was never any governmental act identifying geographically a specific boundary line capable of being demarcated and mapped.⁴⁸⁴ Even references in official documents to the general term "Bahr el-Arab," the specific location of which was unclear, could not have constituted "a

⁴⁷⁷ GoS Oral Pleadings, April 22, 2009, Transcr. 128/22 *et seq.* (Cross-examination of Professor Schofield)

⁴⁷⁸ SPLM/A Counter-Memorial, para. 1448. *See also* MENAS Expert Report, at paras. 50-51, Appendix to SPLM/A Counter-Memorial.

⁴⁷⁹ SPLM/A Counter-Memorial, para. 1442.

⁴⁸⁰ SPLM/A Counter-Memorial, para. 1440 quoting GoS Memorial, at para. 368. *See also* Second Daly Expert Report, pp. 33-37, Appendix to SPLM/A Counter-Memorial, for the proposition that Darfur's and Kordofan's pre-1905 southern boundaries were similar, as the GoS alleges, but only in so far as they did not exist (Appendix to SPLM/A Counter-Memorial).

⁴⁸¹ Second Daly Expert Report, p. 12, Appendix to SPLM/A Counter-Memorial. *See also Id.* pp. 9-12, pp. 13-24, pp. 54-57, p. 59 (Appendix to SPLM/A Counter-Memorial).

⁴⁸² SPLM/A Oral Pleadings, April 22, 2009, Transcr. 121/07 *et seq.*

⁴⁸³ *Id.* at 122/12-22.

⁴⁸⁴ SPLM/A Memorial, para. 322.; *See also* SPLM/A Oral Pleadings, April 22, 2009, Transcr. 122/07-11.

central defining action by the Condominium government allocating or establishing a boundary.”⁴⁸⁵

291. The SPLM/A goes on to contend that the cartographic evidence confirms that the boundary was indefinite and indeterminate in 1905. The SPLM/A contends that there “was no official Sudan Government map as of 1905 that delimited a provincial boundary between Kordofan and Bahr el-Ghazal; on the contrary, the only official map that existed (i.e., the 1904 Anglo-Egyptian Sudan map prepared by the Intelligence Office in Khartoum)⁴⁸⁶ “conspicuously omitted any such boundary, while identifying the boundaries of other Sudanese provinces.”⁴⁸⁷ The 1901 Mardon map⁴⁸⁸ relied upon by the GoS does not purport to show the boundary.⁴⁸⁹ Mardon himself noted in 1906 that “[t]he exact limits of the provinces, especially those in the south, are not yet definitely fixed.”⁴⁹⁰

(iv) *The alleged description in the 1905 transfer documents of the provincial boundary as the northern limit of the transferred area*

(x) GoS Arguments

292. The GoS places great emphasis on the 1905 transfer documents, namely the March 1905 SIR and the 1905 Annual Reports of the Kordofan and Bahr el-Ghazal provinces,⁴⁹¹ both of which no longer mention the Bahr el Arab as the boundary of the two provinces,⁴⁹² and the 1905 Memorandum by Governor-General Wingate, the senior government official in Sudan at the time.⁴⁹³

⁴⁸⁵ SPLM/A Oral Pleadings, April 22, 2009, Transcr. 122/19-123/7.

⁴⁸⁶ See Map 36 of SPLM/A Map Atlas vol. 1 (*The Anglo-Egyptian Sudan*, Intelligence Office Khartoum, 1904, in 1905 Gleichen Handbook).

⁴⁸⁷ SPLM/A Counter-Memorial, para. 1452. See also Appendix B to SPLM/A Counter-Memorial.

⁴⁸⁸ GoS Memorial Map Atlas, Map 5 (*The Anglo-Egyptian Sudan*, drawn by H. W. Mardon, 1901 rev. 1903, in 1905 Gleichen Handbook).

⁴⁸⁹ See SPLM/A Oral Pleadings, April 20, 2009, Transcr. 166/14 *et seq.* See also SPLM/A Counter-Memorial, para. 1454; Second Daly Expert Report, pp. 14-15, Appendix to SPLM/A Counter-Memorial.

⁴⁹⁰ See SPLM/A Memorial, para. 308 and SPLM/A Counter-Memorial, para. 1455 quoting H. MARDON, A GEOGRAPHY OF EGYPT AND THE ANGLO-EGYPTIAN SUDAN 174 (1906), SPLM/A Exhibit-FE 2/20.

⁴⁹¹ GoS Memorial, paras. 361-362 referring to Sudan Intelligence Report, No. 128, dated March 1905, Appendix C, at p. 3 (SM Annex 9), Reports on the Finance, Administration and Condition of the Sudan, Annual Reports, Bahr el-Ghazal Province (1905), p. 3 (SM, Annex 24) and Reports on the Finance, Administration and Condition of the Sudan, Annual Reports, Kordofan Province (1905), p. 113 (SM, Annex 24).

⁴⁹² See GoS Counter-Memorial, paras. 461-463.

⁴⁹³ See GoS Counter-Memorial, para. 466; Reports on the Finances, Administration, and Condition of the Sudan, Memorandum by Major General Sir R. Wingate (1905), p. 24 (SM Annex 24).

293. According to the GoS, the relevant passage of the Wingate Memorandum⁴⁹⁴ indicates that the northern limit of the transferred area was the Bahr el Arab. Wingate, who the GoS maintains knew the exact location of the river,⁴⁹⁵ unequivocally states that the tribal districts that were incorporated in Kordofan were located south of the Bahr el Arab and had been formerly part of Bahr el Ghazal.⁴⁹⁶ There is no reference in his report to an area north of the Bahr el Arab being transferred.⁴⁹⁷
294. The GoS also stresses that the reference to the transfer in the Wingate Memorandum is under a section entitled “Changes in Provincial Boundaries and Nomenclature”⁴⁹⁸ while in the 1905 Annual Reports of both Bahr el Ghazal and Kordofan, the transfer is discussed under the sections entitled “Provinces Boundaries.”⁴⁹⁹
295. The GoS concludes that the four transfer documents make it clear that Condominium officials transferred a territory from one province to another, bounded to the north by the Bahr el Arab.⁵⁰⁰

(y) SPLM/A Arguments

296. According to the SPLM/A, the analysis of the transfer documents demonstrates that Governor-General Wingate himself considered that there was still uncertainty surrounding the course of the Bahr el Arab in 1905.⁵⁰¹ He did not state that it was the provincial boundary⁵⁰² and he “certainly did not purport to fix ‘the northern limit of the area that was transferred in 1905.’”⁵⁰³ His reference to the “Bahr el-Arab” was “merely a general geographic description, and not the delimitation or definition of a boundary.”⁵⁰⁴ Indeed, the

⁴⁹⁴ See *supra* para. 237 et seq.

⁴⁹⁵ See GoS Oral Pleadings, April 20, 2009, Transcr. 206/17 et seq. and April 21, 2009, Transcr. 1/18 et seq.

⁴⁹⁶ GoS Counter-Memorial, para. 468; Rejoinder, para. 342.

⁴⁹⁷ See GoS Counter-Memorial, para. 416.

⁴⁹⁸ See GoS Counter-Memorial, para. 467 quoting Reports on the Finances, Administration, and Condition of the Sudan, Memorandum by Major General Sir R. Wingate (1905), p. 24 (SM Annex 24).

⁴⁹⁹ GoS Counter-Memorial, para. 464; See Reports on the Finances, Administration, and Condition of the Sudan, Annual Report, Bahr el Ghazal Province, (1905), p. 3 (SM Annex 24); Reports on the Finances, Administration, and Condition of the Sudan, Annual Report, Kordofan Province (1905), p. 113 (SM Annex 24).

⁵⁰⁰ GoS Oral Pleadings, April 20, 2009, Transcr. 175/03-20, 188/19-190/22.

⁵⁰¹ See *supra* para. 282. See also SPLM/A Oral Pleadings, April 22, 2009, Transcr. 126/04 et seq.

⁵⁰² See *supra* para. 244.

⁵⁰³ SPLM/A Rejoinder, para. 861.

⁵⁰⁴ SPLM/A Rejoinder, para. 861.

provincial boundary was irrelevant to the delimitation of the northern limit of the transferred area. What occurred was a transfer of people, not territory, from the Bahr el Ghazal administration to the Kordofan administration.⁵⁰⁵ This is evidenced, in particular, by the March 1905 SIR.⁵⁰⁶

297. It is obvious that the transfer of the Ngok and Twic people entailed territorial consequences.⁵⁰⁷ However, the boundaries of Kordofan were not extended in the years following the transfer precisely because the Condominium officials, who did not know what territory the Ngok Dinka inhabited, transferred the administration of a people rather than a specific area.⁵⁰⁸
298. The SPLM/A therefore agrees with the ABC Experts' conclusion that "the Ngok people were regarded [by the Anglo-Egyptian administration] as part of the Bahr el-Ghazal Province until their transfer in 1905"⁵⁰⁹ and that "the government's claim that only the Ngok Dinka territory south of the Bahr el-Arab was transferred to Kordofan in 1905 is therefore found to be mistaken."⁵¹⁰

(b) Post-1905 depictions of the alleged boundary and transferred area

(i) *GoS Arguments*

299. The GoS points to the first description of the post-1905 boundary in a 1908 report issued by Captain Lloyd, then Governor of the province of Kordofan.⁵¹¹ While this report still identifies the Bahr el Arab as the southern boundary of Kordofan, a map published by

⁵⁰⁵ See *supra* para. 243. See also SPLM/A Oral Pleadings, April 22, 2009, Transcr. 247/12 *et seq.*

⁵⁰⁶ See *supra* para 245.

⁵⁰⁷ SPLM/A Oral Pleadings, April 22, 2009, Transcr. 221/15 *et seq.*; See also SPLM/A Rejoinder, paras. 807-811.

⁵⁰⁸ See SPLM/A Oral Pleadings, April 22, 2009, Transcr. 222/17 *et seq.* See also *supra* para. 243.

⁵⁰⁹ ABC Experts' Report, Part I, at p. 39, Appendix B to SPLM/A Memorial.

⁵¹⁰ SPLM/A Counter-Memorial, para. 1486 quoting ABC Experts' Report, Part I, at p. 39, Appendix B to SPLM/A Memorial.

⁵¹¹ See GoS Memorial, para. 372; Sudan Intelligence Reports, No. 171, October 1908, Appendix D, pp. 32-35 (SM Annex 18).

Lloyd in 1910⁵¹² shows the border between the Kordofan and Bahr el Ghazal provinces to be south of the Bahr el Arab.⁵¹³

300. Between 1905 and 1909, no other changes were recorded regarding the location of the boundaries in the Annual Reports for the provinces of Bahr el Ghazal and Kordofan, except a minor change in the Darfur/Kordofan boundary in 1908. Only the 1905 transfer can therefore justify the curved line in Lloyd's 1910 map.⁵¹⁴ The only reason this map (and the whole series of Sheet-65 maps) labels the boundary as "approximate" is that the "southern limits of the transferred areas were not defined in 1905, either in Wingate's Memorandum or elsewhere."⁵¹⁵
301. The GoS also relies on the 1911 and 1912 editions of the *Anglo-Egyptian Handbook*.⁵¹⁶ The former notes that the northern boundary of the Bahr el Ghazal province was not yet delimited, but indicates that "the boundary divides certain tribal districts to Lake No,"⁵¹⁷ instead of following the Bahr el Arab. The latter describes the southern border of Kordofan, "somewhat indefinitely,"⁵¹⁸ as following a watercourse ten miles to the east of Ghabat el Arab, as shown on the 1914 Ghabat el Arab Office Map.⁵¹⁹ The GoS submits that subsequent maps produced either by Sudan's War or Survey Office all show the transferred area in the same way.⁵²⁰ The boundary is shown as a curved line, never more than 25 km

⁵¹² See GoS Memorial, para. 372 referring to Map 11 in GoS Memorial Map Atlas (*The Sudan Province of Kordofan*, The Sudan Survey Department, Khartoum, 1910).

⁵¹³ See GoS Memorial, para. 373; Figure 13, p. 143, GoS Memorial; Map 11 in GoS Memorial, Map Atlas *The Sudan Province of Kordofan*, The Sudan Survey Department, Khartoum, 1910).

⁵¹⁴ See GoS Counter-Memorial, paras. 283-288.

⁵¹⁵ GoS Oral Pleadings, April 21, 2009 Transcr. 33/11 *et seq.*

⁵¹⁶ GoS Memorial, paras. 376-379 referring to The Anglo-Egyptian Handbook Series – The Bahr el-Ghazal Province (1911), p. 5 (SM Annex 26) and The Anglo-Egyptian Handbook Series – Kordofan and the Region to the West of the Nile (1912), p. 7 (SM Annex 27).

⁵¹⁷ GoS Memorial, para. 377; The Anglo-Egyptian Handbook Series – The Bahr el-Ghazal Province (1911), p. 5 (SM Annex 26).

⁵¹⁸ GoS Memorial, para. 378.

⁵¹⁹ See GoS Memorial, para. 379 and GoS Memorial Map 13 (*Ghabat el Arab Sheet 65-L*, Survey Office Khartoum, 1914).

⁵²⁰ See GoS Memorial, para. 380 and Figure 14, p. 146. See also GoS Memorial Map Atlas, Map 13 (*Ghabat el Arab Sheet 65-L*, Survey Office (Khartoum) 1914); Map 14 (*Anglo-Egyptian Sudan*, Geographical Section (Intelligence Division) War Office, 1914); Map 15 (*Achwang Sheet 65-K*, Survey Office (Khartoum) 1916); Map 16 (*Darfur*, Geographical Section (Intelligence Division), War Office, 1916); Map 17 (*Anglo-Egyptian Sudan*, Geographical Section (Intelligence Division), War Office, 1920); Map 18 (*Abyor Sheet 65-K*, Survey Office (Khartoum) 1922); Map 19 (*Ghabat el Arab Sheet 65-L*, Survey Office (Khartoum) 1922); Map 20 (*Twic Dinka Sheet 65-K*, Survey Office (Khartoum) 1925); Map 21 (*Ghabat el Arab Sheet 65-L*, Survey Office (Khartoum) 1925); Map 22 (*Ghabat el Arab Sheet 65-L*, Survey Office (Khartoum) 1929); Map 23 (*Abyei Sheet 65-K*, Survey Office (Khartoum)

from the Bahr el Arab, following the course of the river until it is depicted as a straight-line in 1925 to account for, *inter alia*, the modification of the Darfur boundary in 1924 and the re-transfer of the Twic Dinka to Bahr el Ghazal.⁵²¹

(ii) *SPLM/A Arguments*

302. The SPLM/A contends that Sudan Government maps did not identify any definite provincial boundary between Kordofan and Bahr el Ghazal until well after 1905.⁵²² The Survey Office's 1907 map of northern Bahr el Ghazal⁵²³ thus omits the depiction of the boundary between the two provinces.⁵²⁴ Further, Lloyd's 1910 map, an unofficial map relied on by the GoS, clearly describes the boundary between Bahr el Ghazal and Kordofan to be approximate.⁵²⁵ It is not until 1913 that the Sudan Government itself attempted to identify the boundary in a map of Kordofan which still contained a number of inaccuracies.⁵²⁶
303. The SPLM/A refers the Tribunal to Figure 14 in the GoS Memorial and Map 60 in the SPLM/A Map Atlas vol. 2, which both show the wide and continuing variations in the boundary in the first decades of the 20th century and illustrate its indeterminate nature. The SPLM/A finally argues that "even when a Kordofan/Bahr el-Ghazal boundary was depicted between 1914 and 1930, the boundary was consistently labeled 'Approx. Province Bdy.'"⁵²⁷

1931); Map 24 (*Ghabat el Arab Sheet 65-L*, Survey Office (Khartoum) 1935); Map 25 (*Abyei Sheet 65-K*, Survey Office (Khartoum) 1936); Map 26 (*Ghabat el Arab Sheet 65-L*, Survey Office (Khartoum) 1936).

⁵²¹ GoS Memorial, para. 381; *See also* Figure 14 on p. 146 of GoS Memorial; GoS Counter-Memorial para. 499.

⁵²² *See* SPLM/A Counter-Memorial, para. 1459-1460 *See also* Appendix B to SPLM/A Counter-Memorial. The SPLM/A thus observes that both the Survey Department's 1907 map of "The White Nile and Kordofan" (Map 42 of SPLM/A Map Atlas vol. 1) and the Survey Office's 1907 map of northern Bahr el-Ghazal (Map 40 of SPLM/A Map Atlas vol. 1) omit the depiction of the boundary between the two provinces.

⁵²³ Map 40 of SPLM/A Map Atlas vol. 1 (*Northern Bahr el-Ghazal: Sheet 65*, Survey Office Khartoum, 1907).

⁵²⁴ *See* SPLM/A Counter-Memorial, para. 1460 and Appendix B, para. 50. *See also* Map 42 of SPLM/A Map Atlas vol. 1 (White Nile and Kordofan, Survey Department Cairo, 1907).

⁵²⁵ *See* SPLM/A Counter-Memorial, Appendix B, p. 399. *See also* Second Daly Expert Report, pp. 37-43, Appendix to SPLM/A Counter-Memorial, for a critical review of the material relied upon by the GoS in depicting the allegedly transferred area.

⁵²⁶ Map 48 of SPLM/A Map Atlas vol. 1 (*Kordofan Province*, Survey Office Khartoum, 1913). The SPLM/A notes that it labels the Regaba ez Zarga as the "Bahr el Homr," the Regaba Umm Bieiro is marked as the Bahr el Arab later in its course, and the Bahr el Arab is named the "Lol" for part of its course. *See* SPLM/A Counter-Memorial, Appendix B, p.400.

⁵²⁷ SPLM/A Counter-Memorial, para. 1462, Appendix B to SPLM/A Counter-Memorial, pp. 401-402; SPLM/A Rejoinder, para. 791.

4. The location of the nine Ngok Dinka Chiefdoms in 1905

304. The GoS's position remains that the Abyei Area must be delimited by determining the area of the nine Ngok Dinka chiefdoms that previously fell within the province of Bahr el Ghazal and that were transferred to Kordofan in 1905. However, assuming for the sake of argument that the SPLM/A's Tribal Interpretation is right, the GoS warns that determining the area occupied and used by the nine Ngok Dinka Chiefdoms in 1905 is a very complicated question of anthropological fact.⁵²⁸ In any event, the SPLM/A fails in its attempt to prove any significant Ngok Dinka presence north of the Bahr el Arab/Kir in 1905.⁵²⁹
305. For its part, SPLM/A maintains that the "area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905" is proved to encompass all of the territory occupied and used by the Ngok Dinka people in 1905 extending north to 10°35'N.⁵³⁰ Both Parties examine the location of the Ngok Dinka prior to, and after, the 1905 transfer.

(a) The location of the Ngok Dinka prior to 1905

(i) *The migration to, and settlement in, the Abyei region of the Ngok Dinka in the 18th and 19th century*

(x) GoS Arguments

306. The GoS acknowledges that there might have been a limited presence of Ngok Dinka ancestors north of the Bahr el Arab before the 1905 transfer, but insists that this situation was short-lived.⁵³¹ In this regard, the GoS relies, *inter alia*, on the research of scholar Stephanie Beswick⁵³² and submits that there was never any permanent Ngok presence around the Ragaba ez Zarga, since the Dinka tribes who migrated north of the Bahr el Arab in the 18th century were pushed back south by the Baggara before the end of that century.⁵³³

⁵²⁸ GoS Oral Pleadings, April 21, 2009, Transcr. 63/09 *et seq.*

⁵²⁹ GoS Oral Pleadings, April 21, 2009, Transcr. 95/10 *et seq.*

⁵³⁰ SPLM/A Rejoinder, para. 345.

⁵³¹ GoS Counter-Memorial, para. 218.

⁵³² GoS Counter-Memorial, paras. 217-220; BESWICK, S., SUDAN'S BLOOD MEMORY (2006) pp. 51-52, 154-156 (SPLM/A Memorial, SPLM/A Exhibit-FE 12/18).

⁵³³ GoS Counter-Memorial, para. 221.

307. The SPLM/A's reliance on Henderson and Deng to defend its claim to a pre-1905 permanent Ngok Dinka settlement around the Ragaba ez Zarga and to a boundary at 10°35'N is misplaced and fails to quote Henderson's and Deng's relevant passages regarding the Ngok Dinka's movement southwards.⁵³⁴

(y) SPLM/A Arguments

308. The SPLM/A stresses that Beswick, contrary to the GoS's claim, confirms that the Ngok Dinka were present well to the north of the Bahr el Arab and the Ragaba ez Zarga.⁵³⁵ Beswick's indication that, after their mid-1800s alliance with the Misseriya, the Ngok Dinka "returned with their herds to the Kir/Bahr el Arab River region for grazing"⁵³⁶ in no way suggests that the Ngok Dinka abandoned the territories north of the Bahr el Arab/Kir, but corroborates the "undisputed locations of the Ngok Dinka's dry season activities."⁵³⁷

309. Further, while Deng did write that the Alei were pushed southwards under Arab pressure,⁵³⁸ the GoS fails to mention Deng's indication that "most of the Ngok settled on the Ngol River" and that the Alei, who remained further north, were therefore moving south from Muglad towards the Ngol/Ragaba ez Zarga.⁵³⁹

(ii) *The effects of the Mahdiyya on the Ngok Dinka and Misseriya*

(x) GoS Arguments

310. The GoS dismisses as purely speculative the SPLM/A's claim that "...the asymmetric effects of the Mahdiyya⁵⁴⁰ on the Ngok and the Misseriya enabled the Ngok to expand their

⁵³⁴ See Henderson, K.D.D., *A Note on the Migration of the Messiria Tribe into South West Kordofan* (1939) 22(1) SUDAN NOTES AND RECORDS 49, p. 58 (SM Annex 52); quoted in SPLM/A Memorial, para. 885; DENG, F., *WAR OF VISIONS: CONFLICTS OF IDENTITIES IN THE SUDAN* (1995), p. 254, SPLM/A Exhibit-FE 8/13.

⁵³⁵ SPLM/A Rejoinder, at para. 375. SPLM/A refers to S. BESWICK, *SUDAN'S BLOOD MEMORY: THE LEGACY OF WAR, ETHNICITY, AND SLAVERY IN EARLY SOUTH SUDAN*, p. 52 (2004), SPLM/A Exhibit-FE 12/18.

⁵³⁶ SPLM/A Rejoinder, at para. 376 quoting S. BESWICK, *SUDAN'S BLOOD MEMORY: THE LEGACY OF WAR, ETHNICITY, AND SLAVERY IN EARLY SOUTH SUDAN* p. 156 (2004), SPLM/A Exhibit-FE 12/18.

⁵³⁷ SPLM/A Rejoinder, at para. 376.

⁵³⁸ SPLM/A Rejoinder, at para. 393 quoting F. DENG, *WAR OF VISIONS: CONFLICT OF IDENTITIES IN THE SUDAN* 254 (1995), SPLM/A Exhibit-FE 8/13.

⁵³⁹ SPLM/A Rejoinder, at para. 394 quoting F. DENG, *WAR OF VISIONS: CONFLICT OF IDENTITIES IN THE SUDAN* 254 (1995), SPLM/A Exhibit-FE 8/13. See also SPLM/A Memorial, Witness Statement of Belbel Chol Akuei Deng, Tab 15 at p. 2.

⁵⁴⁰ The Mahdiyya is the time of the Mahdist rule of the Sudan (1885-1898) (See GoS Memorial, p. vii).

historic territories at the end of the 19th century.”⁵⁴¹ Contrary to Professor Daly’s position,⁵⁴² Collins and Peel show that the slave and cattle raids that had started during the Turkiyya continued during the Mahdiyya.⁵⁴³

311. In addition, the GoS notes that during this period, the Baggara were not the only ones threatening the territory of the Ngok Dinkas. Indeed, there were inter-Dinkas wars and repeated raiding by the Nuers to the East.⁵⁴⁴ The GoS therefore submits that the claim that the relatively small impact of the Mahdiyya on the Ngok Dinka allowed them to migrate north has no substance.

(y) SPLM/A Arguments

312. The SPLM/A submits that Ngok Dinka demography and occupation of the Abyei region were little affected by the Mahdiyya, while the Misseriya suffered heavy casualties in the conflict with the Anglo-Egyptian forces,⁵⁴⁵ in part because the Misseriya sided with the Mahdists.⁵⁴⁶ The SPLM/A cites Henderson⁵⁴⁷ and Deng who, relying on Henderson’s conclusions, explained that “[a]lthough the Mahdiya was one of the most violent chapters in southern history, it was a relatively peaceful period for the Ngok.”⁵⁴⁸ The SPLM/A infers from this that the “the Ngok would not have retreated from prior settlements in the Bahr region and that the Misseriya would have been in no position to expand at the expense of the Ngok” in the years preceding the transfer of the Abyei Area.⁵⁴⁹

⁵⁴¹ SPLM/A Memorial, para. 898.

⁵⁴² Daly Expert Report, pp. 48-49, Appendix to SPLM/A Memorial.

⁵⁴³ GoS Counter-Memorial, paras. 241-242, 246-274; COLLINS, R., *THE SOUTHERN SUDAN, 1883-1898: A STRUGGLE FOR CONTROL* (1962), p. 42, (SPLM/A Memorial, SPLM/A Exhibit-FE 4/12) AND PEEL, S., *THE BINDING OF THE NILE AND THE NEW SOUDAN* (1904), p. 194 (SM Annex 44). *See also* a map prepared by Collins showing the location of the tribal districts on page 93 of the GoS Counter-Memorial, Figure 2.

⁵⁴⁴ GoS Memorial, para. 246, referring to COLLINS, R., *THE SOUTHERN SUDAN, 1883-1898: A STRUGGLE FOR CONTROL* (1962), p. 42, (SPLM/A Memorial, SPLM/A Exhibit-FE 4/12).

⁵⁴⁵ *See* SPLM/A Memorial, at paras. 897-903. *See also* SPLM/A Memorial, at paras. 128-132.

⁵⁴⁶ SPLM/A Oral Pleadings, April 21, 2009, Transcr. 180/06-07.

⁵⁴⁷ *See* SPLM/A Rejoinder, at para. 411 quoting Henderson, “A Note on The Migration of the Messiria Tribe into South West Kordofan,” 22 (1) SNR 69, 71 (1939), SPLM/A Exhibit-FE 3/15. *See also* SPLM/A Memorial, at para. 231.

⁵⁴⁸ SPLM/A Rejoinder, at para. 404 quoting F. DENG, *THE MAN CALLED DENG MAJOK: A BIOGRAPHY OF POWER, POLYGYNY AND CHANGE*, p. 47, n. 20 (1986), SPLM/A Exhibit-FE 7/4; *See also* SPLM/A Oral Pleadings, April 21, 2009, Transcr. 180/18-181/03. *See also* Daly Expert Report, p. 26, Appendix to SPLM/A Memorial.

⁵⁴⁹ SPLM/A Counter-Memorial, at para. 915; *See also* SPLM/A Oral Pleadings, April 21, 2009, Transcr. 180/10-17.

313. The SPLM/A submits that the GoS's reliance on Peel and Collins is misplaced.⁵⁵⁰ In fact, Collins even contradicts the GoS's position.⁵⁵¹

(iii) *The location of the Ngok Dinka from the late 19th century through 1905*

(x) Alleged limitations affecting the pre-1905 documentary record

(1) *GoS Arguments*

314. The GoS disagrees with the SPLM/A's claim that the pre-1905 documentary record is limited by such factors as the lack of British knowledge in the region, the limited expeditions in the area and the remoteness of the zone.⁵⁵²

315. In response to the SPLM/A's claim that no negative inferences can be drawn from the fact that certain British explorers did not observe any Ngok Dinka when they went to the region, the GoS argues that although it is fair not to draw negative inference based on a single visit, "the comprehensive absence of evidence" in this case becomes "evidence of absence."⁵⁵³ According to the GoS, "[t]here are parts of the [region] that remain, even today, permanently uninhabited. That doesn't mean they're terra nullius."⁵⁵⁴

(2) *SPLM/A Arguments*

316. The SPLM/A submits that the pre-1905 documentary record is affected by many limitations and shortcomings.⁵⁵⁵ Firstly, the record is meager and sparse⁵⁵⁶ and while it does attest to Ngok Dinka presence extending north from the Bahr el Arab to, and beyond, the Ragaba ez Zarga,⁵⁵⁷ its reliability and comprehensiveness should not be exaggerated.⁵⁵⁸

⁵⁵⁰ See SPLM/A Rejoinder, at para. 413 quoting GoS Counter-Memorial, at para. 242 (citing S. PEEL, *THE BINDING OF THE NILE AND THE NEW SUDAN*, p. 194 (2004)); SPLM/A Rejoinder, at para. 417-418 quoting R. COLLINS, *LAND BEYOND THE RIVERS: THE SOUTHERN SUDAN 1898-1918*, p.189, 190 (1971), SCM Annex 24.

⁵⁵¹ See SPLM/A Rejoinder, para. 415.

⁵⁵² GoS Counter-Memorial, para. 250.

⁵⁵³ GoS Oral Pleadings, April 21, 2009, Transcr. 89/11-17; See also GoS Oral Pleadings, April 22, 2009, Transcr. 169/14-23; See also GoS Rejoinder, paras. 271-281.

⁵⁵⁴ GoS Oral Pleadings, April 21, 2009, Transcr. 118/24-119/01.

⁵⁵⁵ See SPLM/A Counter-Memorial, para. 920.

⁵⁵⁶ SPLM/A Oral Pleadings, April 21, 2009, Transcr. 181/19-24.

⁵⁵⁷ SPLM/A Memorial, paras. 908-912.

⁵⁵⁸ See SPLM/A Memorial, at paras. 908-912; SPLM/A Counter-Memorial, at para. 919; SPLM/A Rejoinder, at para. 432(c).

317. The SPLM/A thus points out that, at the beginning of the twentieth century, the contacts of the few Anglo-Egyptian administrators with the region “were in the nature of exploratory treks,”⁵⁵⁹ all made during the dry season, when the Ngok Dinka would move to the south of the region to graze their cattle herds. They were therefore unable to observe the Ngok Dinka’s occupation and use of land in the wet season.⁵⁶⁰ The officials followed very limited routes and “virtually never ventured to the north of the Ngol/Ragaba ez-Zarga, save along a single corridor extending from Fauwel to Keilak covered by Mahon’s, Wilkinson’s, and Percival’s treks.”⁵⁶¹ The SPLM/A also emphasizes the Anglo-Egyptian officials’ lack of personnel,⁵⁶² the language barrier,⁵⁶³ and inaccessibility of the region.⁵⁶⁴
318. The SPLM/A identifies other factors accounting for this lack of knowledge, such as the efforts of the Ngok Dinka to conceal the location of their villages for fear of slave-raiding.⁵⁶⁵
319. Therefore, one should not infer from the reports of the Anglo-Egyptian officials that the Ngok Dinka were located only in the places where they were observed,⁵⁶⁶ particularly when the GoS fails to provide complete copies of potentially relevant maps.⁵⁶⁷

⁵⁵⁹ SPLM/A Counter-Memorial, at para. 921. *See also* SPLM/A Rejoinder, at para. 432(a); SPLM/A Oral Pleadings, April 21, 2009, Transcr. 182/10-18.

⁵⁶⁰ *See* SPLM/A Counter-Memorial, at para. 922; *See also* SPLM/A Oral Pleadings, April 21, 2009, Transcr. 185/15-186/13.

⁵⁶¹ *See* SPLM/A Counter-Memorial, para. 923-924. The SPLM/A refers to Map 28 which depicts the excursions of British authorities at the beginning of the 20th century, Map 29 describing Wilkinson’s route in 1902 and Map 71 detailing the excursions of Saunders (1900) and Percival (1904) and Figure 5 attached to the Macdonald Report. (Appendix to GoS Memorial); *See also* SPLM/A Counter-Memorial, at para. 956 (concerning Wilkinson’s route); *See also* SPLM/A Oral Pleadings, April 21, 2009, Transcr. 185/07-14.

⁵⁶² *See* SPLM/A Rejoinder, para. 432(b).

⁵⁶³ *See* SPLM/A Rejoinder, para. 432(f).

⁵⁶⁴ *See* SPLM/A Counter-Memorial, para. 926; SPLM/A Rejoinder, para. 432(a); SPLM/A Oral Pleadings, April 21, 2009, Transcr. 184/21-185/06.

⁵⁶⁵ *See* SPLM/A Counter-Memorial, para. 931. *See also* SPLM/A Rejoinder, at para. 432(e).

⁵⁶⁶ SPLM/A Counter-Memorial, para. 924.

⁵⁶⁷ SPLM/A Rejoinder, paras. 434-437; *See also* SPLM/A Oral Pleadings, April 21, 2009, Transcr. 189/15-191/18.

(y) Location of the nine Ngok Dinka chiefdoms in the documentary record from the late 19th century through 1905(1) *GoS Arguments*

320. The GoS submits that the Ngok Dinka were considered to be living around and south of the Bahr el Arab before and in 1905.⁵⁶⁸ The GoS refers in particular to the reports of Mahon, Wilkinson, and Percival.⁵⁶⁹ In those reports, there is no indication of Ngok Dinka permanent presence around and north of the Ragaba ez Zarga.⁵⁷⁰ They only refer to the existence of Arab settlements in this otherwise uninhabited area⁵⁷¹ and contend that it was the Baggara Arabs who were using the area to the north of the Bahr el Arab on a seasonal basis.⁵⁷² This is also consistent with the seasonal grazing patterns of the Ngok Dinka, who were observed by Percival (on his way south from the Ragaba ez Zarga) driving their cattle in a southerly direction.⁵⁷³
321. In addition, the northernmost areas where officials reported on the presence of Ngok Dinka were at Etai (9°29'N 28°44'E), located around five kilometers north of the Bahr el Arab, and at Bongo/Bombo (9°32'N 28°49'E), both uninhabited during the dry season.⁵⁷⁴
322. Further, the GoS asserts that the evidence indicates that Sultan Rob's country was on and south of the Bahr el Arab before and in 1905.⁵⁷⁵ Sultan Rob, the Paramount Chief of the

⁵⁶⁸ GoS Counter-Memorial, para. 281.

⁵⁶⁹ GoS Memorial at paras 312-321; GoS Counter-Memorial, paras. 252-277; GoS Rejoinder, paras. 412-418

⁵⁷⁰ GoS Memorial, para. 315; GoS Counter-Memorial, paras. 253-262; Wilkinson's report in Gleichen, Handbook of the Sudan (1905), Vol. II, pp. 154-156 (SM Annex 38). GoS Memorial, para. 348; GoS Counter-Memorial, paras. 263-268; GoS Rejoinder, para. 414; Mahon's 1903 report in Sudan Intelligence Reports, No. 104 (March 1903), p. 19 (SM Annex 5); GoS Oral Pleadings, April 22, 2009, Transcr. 185/10-17; *See also* GoS Oral Pleadings, April 22, 2009, Transcr. 117/11-20 (Prof. Daly's cross-examination). GoS Counter-Memorial paras. 271-277; GoS Rejoinder paras. 415-418, referring to Percival's report in Sudan Intelligence Reports, No. 126 (January 1905), pp. 3, 4 (SCM Annex 25) and Percival, A., *Route Report: Keilak to Wau*, December 1904, p. 2 (SCM Annex 26).

⁵⁷¹ GoS Counter-Memorial at para. 273; GoS Rejoinder para. 415, referring to Percival, A., *Route Report: Keilak to Wau*, December 1904, p. 2. (SCM Annex 26); *See also* GoS Oral Pleadings, April 21, 2009, Transcr. 91/02-12

⁵⁷² GoS Memorial, para. 355.

⁵⁷³ GoS Counter-Memorial at para. 275, referring to Percival, A., *Route Report: Keilak to Wau*, December 1904, p. 2 (SCM Annex 26); *See also* GoS Counter-Memorial para. 257, referring to Gleichen, Handbook of the Sudan, Vol. I (1905), p. 155 (SM Annex 38)

⁵⁷⁴ GoS Memorial, para. 316, GoS Counter-Memorial para. 257; Gleichen, Handbook of the Sudan, Vol. I (1905), p. 155 (SM Annex 38); GoS Oral Pleadings, April 21, 2009, Transcr. 88/14-90/05 and April 22, 2009, Transcr. 184/16-25; GoS Counter-Memorial para. 281, referring to *Index Gazetteer of the Anglo-Egyptian Sudan* (Sudan Survey Department, Khartoum. 1931) p. 102 (SCM, Annex 28) and Percival's Sketch Map, Figure 5, p. 105 and Map 14(b) in GoS Counter-Memorial Map Atlas (Percival Sketch Map, River Kir to Wau, 1904).

Ngok Dinka, was observed residing south of the Bahr el Arab, at his old village of Mithiang, in 1902⁵⁷⁶ and in 1903,⁵⁷⁷ and in Burakol (located two miles north of the Bahr el Arab/Kir⁵⁷⁸) in 1904.⁵⁷⁹ The GoS notes that Sultan Rob's presence in Burakol does not mean that he had abandoned his old village. In any event, Burakol is not in the same location as modern day Abyei town and cannot be equated with it.⁵⁸⁰

323. In addition, the GoS insists that according to Sultan Rob himself, there were only Arabs west of his country⁵⁸¹ which was bounded by the Shilluks to the east, the Chak Chak to the west and to the north by the Bahr el Arab, Sultan Rob's "Arab frontier."⁵⁸²

(2) *SPLM/A Arguments*

324. The SPLM/A preliminarily notes that the GoS fundamentally changed its case.⁵⁸³ While the GoS originally claimed that the Ngok Dinka were located entirely to the south of the Bahr el Arab/Kir, it now concedes that "they were instead indisputably located in villages extending at least as far north [...] as 'Bombo,' 'Etaï,' 'Burakol,' 'Achak,' an unidentified location near the Ngol/Ragaba ez-Zarga, and 'Bongo ... at 9.32'N."⁵⁸⁴

⁵⁷⁵ GoS Counter-Memorial, para. 276-277 referring to Percival, A., *Route Report: Keilak to Wau*, December 1904, p. 3 (SCM Annex 26) and Percival, A., *Route Report: Pongo River to Taufikia*, March/April 1905, p. 2, SCM Annex 27); Percival's Sketch Map (1904), Figure 5 in GoS Counter-Memorial on p. 105 and Map 14a in GoS Counter-Memorial Map Atlas. See also GoS Memorial, para. 352 referring to Comyn D., *The Western Sources of the Nile* (1907) 30 THE GEOGRAPHICAL JOURNAL 1524 at 529 (SM, Annex 50) and GoS Counter-Memorial, para. 290, referring to Comyn's Sketch Map of 1906 (Figure 6 on p. 110 of GoS Counter-Memorial); GoS Memorial, para. 353 and GoS Rejoinder, para. 425, referring to Lloyd, W., *Some Notes on Dar Homr* (1907) 29 THE GEOGRAPHICAL JOURNAL pp. 649-654 (SM Annex 54).

⁵⁷⁶ GoS Memorial, para. 316; referring to Percival in Gleichen, *Handbook of the Sudan* (1905), Vol. II, pp. 154-156 (SM Annex 38).

⁵⁷⁷ GoS Counter-Memorial, para. 265-267, quoting Mahon in Sudan Intelligence Reports, No. 104 (March 1903), p. 19 (SM Annex 5); Macdonald Report, para. 25 (Appendix to GoS Memorial); Third Macdonald Report, para. 70 (GoS Rejoinder, Appendix I).

⁵⁷⁸ GoS Counter-Memorial, para. 276; referring to Percival, A., *Route Report: Keilak to Wau*, December 1904, p. 3 (SCM Annex 26); See also Percival's Sketch Map (1904), Figure 5 in GoS Counter-Memorial on p. 105 and Map 14a in GoS Counter-Memorial Map Atlas.

⁵⁷⁹ GoS Counter-Memorial at para. 275, referring to Percival, A., *Route Report: Keilak to Wau*, December 1904, p. 3-4 (SCM Annex 26).

⁵⁸⁰ GoS Counter-Memorial, para. 276; cf. SPLM/A Memorial, para. 997.

⁵⁸¹ GoS Counter-Memorial at para. 275, referring to Percival, A., *Route Report: Keilak to Wau*, December 1904, p. 3 (SCM Annex 26); GoS Oral Pleadings, April 21, 2009, Transcr. 90/17-91/02.

⁵⁸² GoS Memorial, paras. 349-350 and GoS Counter-Memorial at para. 421, referring to Percival's report in Sudan Intelligence Reports, No. 130 (May 1905), Appendix A, p. 4 (SM Annex 10).

⁵⁸³ SPLM/A Oral Pleadings, April 21, 2009, Transcr. 191/23-192/07.

⁵⁸⁴ SPLM/A Rejoinder, at para. 426. See also SPLM/A Rejoinder, at para. 428.

325. In spite of the above-noted reservations regarding the pre-1905 Condominium record, the SPLM/A argues, relying on the pre-1905 trek reports of Mahon, Wilkinson and Percival, that “the Ngok Dinka were located well above the Bahr el-Arab/Kiir, with permanent villages extending north up to the Ngol/Ragaba ez Zarga and further north.”⁵⁸⁵
326. According to the SPLM/A, the evidence suggests that there was Ngok Dinka presence between the Ngol/Ragaba ez Zarga and the Bahr el Arab/Kir⁵⁸⁶ in the form of villages and permanent settlements, in places such as Achak,⁵⁸⁷ Bombo (uninhabited during the dry season) and Etai, as well as dura cultivation,⁵⁸⁸ (consistent with the Ngok Dinka’s agricultural practices⁵⁸⁹).
327. There are also indications of Ngok Dinka presence on the Ragaba ez Zarga in the dry season.⁵⁹⁰ While Percival may have found no trace of inhabitants on the river, the SPLM/A noted that he traveled with the Arab Mounted Infantry who would certainly have frightened

⁵⁸⁵ SPLM/A Counter-Memorial, at para. 932.

⁵⁸⁶ See SPLM/A Counter-Memorial 1029; SPLM/A Oral Pleadings, April 22, 2009, Transcr. 25/03-11; SPLM/A Counter-Memorial, para. 1201, see Map 72 of SPLM/A Map Atlas vol. 2 (*Map of Darfur*, Browne, 1799); SPLM/A Counter-Memorial, paras. 1202-1203, see Maps 73 and 73a of SPLM/A Map Atlas vol. 2 (*Sources du Nil*, Speke and Grant, 1863; *Sources du Nil*, Speke and Grant, 1863 – Overlay); SPLM/A Counter-Memorial, paras. 1204-1205, see Maps 77 and 77a of SPLM/A Map Atlas vol. 2 (*Eastern Equatorial Africa*, Ravenstein, 1883; *Eastern Equatorial Africa*, Ravenstein, 1883 - Overlay); SPLM/A Counter-Memorial, paras. 1206-1207 and SPLM/A Memorial, paras. 979-980, referring to Map 30, Map 30a and Map 31 (*The Egyptian Sudan*, War Office, 1883; *The Egyptian Sudan*, War Office, 1883 – Detail; *The Egyptian Sudan*, War Office, 1883 – Overlay); SPLM/A Counter-Memorial, para. 1208, citing GoS Memorial, para. 292; GoS Memorial Map 2 (*The Province of Bahr el Ghazal*, The Royal Geographic Society, 1884); SPLM/A Counter-Memorial, para. 1209, referring to Map 78a of SPLM/A Map Atlas vol. 2 (*Carte du Bahr el Ghazal*, Marchand, 1898 –Overlay); SPLM/A Counter-Memorial, para. 1210, see Maps 79 and 79a of SPLM/A Map Atlas vol. 2 (*Mission Marchand de 1896 à 1899*; *Mission Marchand de 1896 à 1899* - Overlay).

⁵⁸⁷ SPLM/A Counter-Memorial, at para. 999 quoting Percival, Keilak to Wau (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government Vol. II*, 25 (1905), SPLM/A Exhibit-FE 17/13.); The SPLM/A further observes that Percival’s own Sketch Map, only partially produced by the GoS, identifies “many more Ngok settlements above the Kiir/ Bahr el-Arab than below.” See SPLM/A Rejoinder, para. 459; Percival Sketch Map (GoS Counter-Memorial Map Atlas, Map 14b); SPLM/A Oral Pleadings, April 22, 2009, Transcr. 04/19-23, 17/08-19/12.

⁵⁸⁸ SPLM/A Memorial, paras. 917-928; SPLM/A Counter-Memorial, paras. 953-972, (paras. 964-965 in particular); SPLM/A Rejoinder, paras. 442-446; Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government Vol. II*, 151-157 (1905) (SPLM/A Exhibit-FE 2/15). The SPLM/A notes that, bearing in mind the Ngok’s seasonal grazing movements, the Ngok presence would have been even more obvious in the rainy season: see SPLM/A Counter-Memorial, para. 959.

⁵⁸⁹ SPLM/A Memorial, para. 926.

⁵⁹⁰ The SPLM/A refers to Mahon’s 1902 and 1903 trek reports. See SPLM/A Memorial, at para. 913 and SPLM/A Counter-Memorial, at para. 945, referring to Sudan Intelligence Report, No. 92, dated March 31, 1902, Appendix F, at p. 19 (SPLM/A Exhibit-FE 1/16). Mahon puts Sultan Rob’s country on the Bahr el Homr, approximately two days from Lake Ambady. The SPLM/A maintains that this is certainly a reference to the Ragaba ez Zarga. See SPLM/A Counter-Memorial, at para. 945; SPLM/A Oral Pleadings, April 21, 2009, Transcr. 195/13-22.

the Ngok Dinka villagers who feared Arab slave raiders.⁵⁹¹ In addition, when Sultan Rob stated that the river was uninhabited, he probably referred to the dry season desertion of the Ngol/Ragaba ez Zarga or tried to conceal the location of Ngok villages to protect them from potential danger.⁵⁹² The conclusion that Sultan Rob's "Arab frontier" was on the Bahr el-Arab should be understood, given the confusion with the Ragaba ez-Zarga at the time, as merely referring to "the southern extent of dry season grazing by the Misseriya."⁵⁹³

328. There is also strong, albeit indirect, evidence of Ngok Dinka presence north of the Ragaba ez Zarga in the form of small villages made up of three or four huts at El Jaart and Um Geren, which the SPLM/A contrasts with the "badly built" tukls used by the Homr Arabs in this area.⁵⁹⁴ Similarly, the description of grass fires and cattle tracks near the Ragaba ez Zarga and that of the Ngok Dinka driving cattle south as hard as they could in Amokok is consistent with the Ngok's seasonal movements and suggests that the Ngok Dinka's permanent villages were located to the north of that river.⁵⁹⁵

⁵⁹¹ SPLM/A Counter-Memorial, at paras. 989-992, referring to Percival, Keilak to Wau (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government Vol. II*, 25 (1905), SPLM/A Exhibit-FE 17/13; SPLM/A Oral Pleadings, April 22, 2009, Transcr. 06/16-07/24.

⁵⁹² SPLM/A Counter-Memorial, at paras. 1004-1005, referring to Percival, Keilak to Wau (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government Vol. II*, 25 (1905), SPLM/A Exhibit-FE 17/13; SPLM/A Oral Pleadings, April 22, 2009, Transcr. 14/21-17/07. The SPLM/A refers to Huntley Walsh's complaints that Sultan Rob had deliberately and repeatedly sought to mislead expeditions sent to explore the region: *See* SPLM/A Counter-Memorial, at paras. 1006-1007; Sudan Intelligence Report, No. 140, dated March 1906, at p. 14, SPLM/A Exhibit-FE 17/22; SPLM/A Oral Pleadings, April 22, 2009, Transcr. 15/12-16/08.

⁵⁹³ SPLM/A Rejoinder, para. 467 ; *See also* SPLM/A Counter-Memorial, at paras. 1014-1018, referring to quoting Sudan Intelligence Report, No. 130, dated May 1905, Appendix A, at p. 4, SPLM/A Exhibit-FE 17/16 and to GoS Memorial, at para. 349.

⁵⁹⁴ SPLM/A Counter-Memorial, paras. 968-969, referring to Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government Vol. II*, 151-157 (1905) (SPLM/A Exhibit-FE 2/15); *See also* Map 29 of SPLM/A Map Atlas vol. 1 (Wilkinson's Route 1902) and GoS Counter-Memorial Map 13b (Wilkinson's Sketch Map 1902); *See also* SPLM/A Oral Pleadings, April 21, 2009, Transcr. 200/08-203/08. The SPLM/A further notes that Wilkinson's dry season descriptions are also consistent with the Ngok's seasonal migrations and the centralized character of their political structure: *See* SPLM/A Memorial, at paras. 206-212, 917-918 and SPLM/A Counter-Memorial, at para. 953. *See* SPLM/A Rejoinder, at paras. 442-3 and SPLM/A Counter-Memorial, at para. 959 quoting Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government Vol. II*, 155 (1905) (SPLM/A Exhibit-FE 2/15); SPLM/A Oral Pleadings, April 21, 2009, Transcr. 197/07-198/19.

⁵⁹⁵ *See* SPLM/A Counter-Memorial, paras. 993, 994 (quoting Percival, Keilak to Wau (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government Vol. II*, 25 (1905), SPLM/A Exhibit-FE 17/13), para. 995; SPLM/A Rejoinder, para. 461; SPLM/A Oral Pleadings, April 22, 2009, Transcr. 04/19-23, 08/24-12/09. *See also* SPLM/A Counter-Memorial, para. 1027 referring to Bayldon's report in Sudan Intelligence Report, No. 128, dated March 1905, Appendix C, at p. 11, SPLM/A Exhibit-FE 2/8. *See also* SPLM/A Counter-Memorial, para. 949 and Mahon's report in Sudan Intelligence Report (No. 92), dated March 31, 1902, Appendix F, SPLM/A Exhibit-FE 1/16.

329. Finally, the pre-1905 Condominium record demonstrates that there was Ngok Dinka presence on both sides of the Bahr el Arab/Kir. Sultan Rob's old village was located on the southern bank at Mithiang as noted by Wilkinson in 1902,⁵⁹⁶ and his new village north of the river at Burakol as noted by Mahon in 1903,⁵⁹⁷ Percival in 1904,⁵⁹⁸ and Bayldon in 1905.⁵⁹⁹ There were also Ngok Dinka settlements west of Burakol, as shown by the location of the Abyior and Achueng Chiefdoms.⁶⁰⁰ When Sultan Rob told Percival that there were no Dinkas west of Burakol, he clearly meant that "there were Humr Arabs directly to the west."⁶⁰¹

(iv) *Alleged Centrality of Abyei Town Prior to the 1905 Transfer*

(x) GoS Arguments

330. The GoS argues that modern-day Abyei town did not become the centre of Ngok Dinka until well after 1905.⁶⁰² The sources relied upon by the SPLM/A in no way establish the centrality of the Abyei town as a political, cultural or administrative Ngok Dinka centre before the 1920s.⁶⁰³ Similarly, the SPLM/A's witness Kuol Deng Kuol Arop concedes that Abyei did not exist, nor did it have a central role in 1905 when it refers to a settlement

⁵⁹⁶ SPLM/A Counter-Memorial, para. 960 quoting Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 156 (1905) (SPLM/A Exhibit-FE 2/15); See also SPLM/A Counter-Memorial, at para. 963 and SPLM/A Oral Pleadings, April 21, 2009, Transcr. 198/20-199/23. SPLM/A refers to the following maps at footnote 1126 of its Counter-Memorial to indicate that the location is sometimes identified on maps as "Sultan Rob's Old Village": Map 36 of SPLM/A Map Atlas vol. 1 (*The Anglo-Egyptian Sudan*, Intelligence Office Khartoum, 1904 (in 1905 Gleichen Handbook)); Map 36a (*The Anglo-Egyptian Sudan*, Intelligence Office Khartoum, 1904 (in 1905 Gleichen Handbook) – Detail), Map 37 (*The Anglo-Egyptian Sudan*, Intelligence Office Khartoum, 1904 (in 1905 Gleichen Handbook) – Overlay); Map 40 (*Northern Bahr El Ghazal: Sheet 65*, Survey Office Khartoum, 1907); Map 46 (*Hasoba: Sheet 65-L*, Survey Office Khartoum, 1910); Map 46a (*Hasoba: Sheet 65-L*, Survey Office Khartoum, 1910 – Detail); Map 48 (*Kordofan Province*, Survey Office Khartoum, 1913).

⁵⁹⁷ See SPLM/A Counter-Memorial, at paras. 977-979; MENAS Expert Report, paras. 27-29, Appendix to SPLM/A Counter-Memorial; SPLM/A Rejoinder, para. 449; Map 40 of SPLM/A Map Atlas, Vol. 1 (*Northern Bahr el Ghazal: Sheet 65*, Survey Office, Khartoum, 1907); SPLM/A Oral Pleadings, April 22, 2009, Transcr. 02/11-03/18.

⁵⁹⁸ SPLM/A Counter-Memorial, paras. 999, 1008, quoting Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25-26 (1905), SPLM/A Exhibit-FE 17/13); SPLM/A Rejoinder, at paras. 453-455.

⁵⁹⁹ SPLM/A Counter-Memorial, at para. 1026. See also Sudan Intelligence Report, No. 128, dated March 1905, Appendix C, at p. 11, SPLM/A Exhibit-FE 2/8.

⁶⁰⁰ See Map 13 of SPLM/A Map Atlas vol. 1 (Ngok Dinka Chiefdoms, 1905).

⁶⁰¹ SPLM/A Counter-Memorial, para. 1003; See also SPLM/A Counter-Memorial, paras. 1002-1004, referring to Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25 (1905), SPLM/A Exhibit-FE 17/13).

⁶⁰² GoS Rejoinder, paras. 487-488.

⁶⁰³ GoS Rejoinder, para. 487.

“*known now as Abyei town*” which became the seat of government “*after the wars,*” thus later in the 20th century.⁶⁰⁴

331. According to the GoS, Whittingham’s route map of 1910 is the first document that refers to “Abyia” but locates it in a different place than Burakol and modern-day Abyei Town.⁶⁰⁵ It is only in 1920 that Abyei was shown on an official map for the first time.⁶⁰⁶ G.W. Thitherington’s sketch map of 1924 also indicates that Sultan Kwai Arob moved to Abyei in 1918.⁶⁰⁷ However, as late as 1933, the Paramount Chief was located in Naam, 15 km north of Abyei.⁶⁰⁸ Abyei only became the centre of a Native Administration Unit in 1938, the event which provided a basis for its subsequent political history.⁶⁰⁹
332. Having observed that Wilkinson, Percival and Whittingham each located the Ngok Paramount Chief in a different place,⁶¹⁰ the GoS concludes that there was movement in this area before and after 1905 and that Abyei Town was not the centre of anything in 1905.⁶¹¹

(y) SPLM/A Arguments

333. The SPLM/A argues that Abyei Town has been “the center of Ngok Dinka political, commercial and cultural life for nearly two centuries.”⁶¹² Abyei Town became the home of the Paramount Chief, the location of the burial sites of the Chiefs⁶¹³ and the seat of the “central government” by the middle to late 1800s.⁶¹⁴ A wide range of historical evidence⁶¹⁵

⁶⁰⁴ GoS Rejoinder, para. 490 referring to Witness Statement of Kuol Deng Kuol Arop, para. 30 (SPLM/A Memorial, Witness Statements, Tab 5).

⁶⁰⁵ See GoS Counter-Memorial, paras. 299-306; GoS Oral Pleadings, April 21, 2009, Transcr. 93/17 *et seq.* See also Map 18a of GoS Counter-Memorial Map Atlas and Figure 9 of GoS Counter-Memorial, p. 116 (Whittingham 1910 Route Map).

⁶⁰⁶ See GoS Rejoinder, para. 493; GoS Memorial Map 17 (*Anglo-Egyptian Sudan*, War Office, 1914 rev. 1920).

⁶⁰⁷ GoS Rejoinder, para. 493; See GoS Counter-Memorial, para. 313 and Map 38 of GoS Counter-Memorial Map Atlas (Additions and Corrections to Sketch of Dinka Country, 1924); See also Figure 13 of GoS Counter-Memorial, p. 125.

⁶⁰⁸ See GoS Rejoinder, para. 493; See also GoS Counter-Memorial, para. 314.

⁶⁰⁹ GoS Rejoinder, para. 493; See also GoS Memorial Map 27 (*Native Administrations of Kordofan Province*, Sudan Survey Department, 1941).

⁶¹⁰ GoS Counter-Memorial, para. 303.

⁶¹¹ See GoS Oral Pleadings, April 21, 2009, Transcr. 94/12 *et seq.*

⁶¹² SPLM/A Memorial, para. 961. See also SPLM/A Memorial, paras. 951, 961-967, Counter-Memorial, paras. 1000, 1137, 1184-1193, Rejoinder paras. 456, 549.

⁶¹³ SPLM/A Memorial, paras. 894-895.

⁶¹⁴ SPLM/A Memorial, para. 904, 962; Counteremorial, para. 1190.

describes Abyei town as the “capital” of the Ngok.⁶¹⁶ As Mahon made clear as early as 1902, Abyei (“Rob’s place”) was also considered a great commercial centre for Bahr el Ghazal, especially famous for its ivory trade.⁶¹⁷ In fact, it is uncontested that Paramount Chief Kuol Arop, and his predecessor Sultan Rob, resided in the vicinity of modern-day Abyei Town, whether in Sultan Rob’s old village or in the new village of Burakol.⁶¹⁸

334. The fact that the British administration formally recognized Abyei town only in 1914 “suggests nothing about the historic importance of the location to the Ngok Dinka.”⁶¹⁹ On the contrary, the historic location of the Ngok Dinka Paramount Chief justified the 1914 decision of the British administration.⁶²⁰

(b) The location of the Ngok Dinka after 1905

(i) *GoS Arguments*

335. Assuming, arguendo, that the Tribal Interpretation is correct, the GoS accepts that post-1905 evidence may be relevant to determining the location of the Ngok Dinka in 1905, “if and to the extent that it can reasonably be inferred that [this later material] would be or might be equally valid for 1905.”⁶²¹

336. The GoS notes that, according to the SPLM/A, the Baggara and Ngok use and occupation of land in the region has not changed at all from 1905 through the inter-war period.⁶²² While the GoS agrees with this proposition, it goes on to argue that post-1905 maps and trek

⁶¹⁵ SPLM/A Memorial, paras. 962-963 referring to A. SABAH, TRIBAL STRUCTURE OF THE NGOK DINKA OF SOUTHERN KORDOFAN PROVINCE 4-5 (1978), SPLM/A Exhibit-FE 6/7, S. SANTANDREA, THE LUO OF THE BAHR EL-GHAZAL 192 (1968), SPLM/A Exhibit-FE 4/18, C. TREATT, OUT OF THE BEATEN TRACK 55 (1931), SPLM/A Exhibit-FE 3/13, I. Cunnison, *The Humr and their Land* 35(2) SNR 50, 61 (1954), SPLM/A Exhibit-FE 4/5, Howell, *Notes on the Ngok Dinka of West Kordofan* 32/2 SNR 239, 243 (1951), SPLM/A Exhibit-FE 4/3.

⁶¹⁶ SPLM/A Memorial, para. 953; Transcr., April 20, 2009, 82/25 *et seq.* See especially S. SANTANDREA, THE LUO OF THE BAHR EL-GHAZAL 192 (1968), SPLM/A Exhibit-FE 4/18.

⁶¹⁷ SPLM/A Memorial, paras. 915 referring to Sudan Intelligence Report, No. 92, dated 31 March 1902, Appendix F, at p. 20, SPLM/A Exhibit-FE 1/16), 964-965; SPLM/A Counter-Memorial, para. 951.

⁶¹⁸ SPLM/A Counter-Memorial, paras. 1188-1189; SPLM/A Rejoinder, para. 512. See also SPLM/A Oral Pleadings, Transcr. April 22, 2009, 13/17 *et seq.*

⁶¹⁹ SPLM/A Counter-Memorial, para. 1187.

⁶²⁰ SPLM/A Counter-Memorial, para. 1190.

⁶²¹ GoS Oral Pleadings, April 21, 2009, Transcr. 70/08 *et seq.*

⁶²² See GoS Counter-Memorial, para. 307.

reports of officials who traveled through the region demonstrate that the Ngok continued to live “on or near the Bahr el-Arab” after 1905.⁶²³

337. The GoS thus contends as follows:

- “There is a tendency, documented in the reports themselves, for the Ngok villages to move north over time – thus Naam (Dupuis, 1921) and Lukji (Henderson, 1933).”⁶²⁴
- “But not very far north: Naam and Lukji are both on the Umbieiro.”⁶²⁵
- The Ngok Dinka remain confined to a small sector of south-eastern Kordofan, well south of latitude 10°N;⁶²⁶ when they leave the Bahr el Arab, they migrate south of the river.⁶²⁷
- There is ample evidence of Humr presence along the Ngol/Ragaba ez Zarga and further south towards the Bahr el Arab/Kir.⁶²⁸

⁶²³ GoS Rejoinder, para. 433. *See also* GoS Counter-Memorial, para. 308. *See also* GoS Oral Pleadings, April 21, 2009, Transcr. 95/06 *et seq.*

⁶²⁴ GoS Rejoinder, para. 432. *See also* GoS Counter-Memorial, para. 311 and Maps 39a (Dupuis 1921 Route Map) and 39b (Dupuis’ 1921 Sketch) of GoS Counter-Memorial Map Atlas; GoS Counter-Memorial, paras. 314-315 and Henderson, K.D.D., Route Report: Muglad to Abyei, March 1933 (emphasis added) (SCM Annex 38).

⁶²⁵ GoS Rejoinder, para. 432. *See also* Figure 3 of GoS Rejoinder.

⁶²⁶ *See* GoS Counter-Memorial, para. 295; *See, inter alia*, GoS Counter-Memorial, para. 290 and Comyn’s 1906 Sketch Map (Figure 6 of GoS Counter-Memorial, p. 110); GoS Counter-Memorial, para. 294 and Hallam, H., Route Report: Dawas to Dar Jange, December 1907, (SM Annex 31); GoS Counter-Memorial, para. 298 and Willis’ 1909 report in Sudan Intelligence Reports, No. 178 (May 1909), Appendix C, p. 17 (SCM Annex 19); GoS Counter-Memorial at para. 305 and GoS Counter-Memorial Map Atlas, Map 18b (Whittingham 1910 Route Map); GoS Counter-Memorial, para. 310 and Heinekey, G.A., Route Report: Gerinti to Mek Kwal’s Village, March 1918 (SCM Annex 36); *See* GoS Counter-Memorial, para. 311 and Dupuis’ 1921 Sketch, Figure 12 on p. 123 of GoS Counter-Memorial, Map 39a; GoS Counter-Memorial, para. 317 and GoS Memorial Map Atlas, Map 27 (*Native Administrations of Kordofan Province*, Sudan Survey Department, 1941); GoS Counter-Memorial, para. 322 and Figure 16 of GoS Counter-Memorial, p. 131 (Cunnison’s 1966 Map of Humr migration routes); GoS Counter-Memorial, para. 324 and GoS Rejoinder, para. 434 and Howell, P.P., “Notes on the Ngok Dinka of Western Kordofan,” (1950) 32 SUDAN NOTES AND RECORDS 239, pp. 241-242 (SM Annex 53); GoS Rejoinder, para. 443 and Figure 16 of GoS Memorial, p. 155 (Lienhardt’s 1961 Map of Dinka tribal groups); GoS Oral Pleadings, April 21, 2009, Transcr. 103/19-20 and Figure 5 of GoS Rejoinder (Lebon’s 1965 Map) and Figure 2 of GoS Counter-Memorial, p. 93 (Collins’ 1971 Tribal Districts Map).

⁶²⁷ *See, inter alia*, GoS Rejoinder, para. 437 quoting MACMICHAEL, H.A., A HISTORY OF THE ARABS IN THE SUDAN (1922), pp. 272, 273, and 287, SPLM/A Exhibit-FE 18/6; *Id.*, para. 438 quoting TREATT, C., OUT OF THE BEATEN TRACK, A NARRATIVE OF TRAVEL IN LITTLE KNOWN AFRICA (1931), p. 52, SPLM/A Exhibit-FE 3/13; *Id.*, para. 435 quoting DAVIES, R., THE CAMEL’S BACK (1957), p. 130 (SM Annex 35); GoS Oral Pleadings, April 21, 2009, Transcr. 124/13 *et seq.*

⁶²⁸ *See, inter alia*, GoS Counter-Memorial, para. 293 and Hallam, H., Route Report: Dawas to Dar Jange, December 1907, (SCM Annex 31); GoS Counter-Memorial, at para. 296, and Lloyd’s 1908 report in Sudan Intelligence

- By contrast, “[t]here is no contemporary report of permanent Ngok villages on the Ragaba ez-Zarga or north of it;”⁶²⁹ the mention of the word “cult”⁶³⁰ and the description of a few solitary dugdugs⁶³¹ on certain maps cannot prove Ngok presence in that area.
- “Nor is there any record of permanent Ngok villages to the west, in the vicinity of the Darfur boundary – another point specifically confirmed in the reports.”⁶³²

338. The GoS places great emphasis on the 1933 Civil Secretary colored sketch map (“**CivSec map**”),⁶³³ the “original document in the record from the Condominium office depicting the nine Ngok Dinka tribes.”⁶³⁴ It shows that Ngok Dinka presence was limited to the basin of the Bahr el Arab, between the Ragaba Umm Biero and the southern boundary of Kordofan, an area of approximately 500 square miles, twenty times smaller than the area claimed by the SPLM/A.⁶³⁵ The northernmost part of the territory occupied by the Ngok reaches only 9°30’N, nowhere near the Ragaba ez Zarga.⁶³⁶

339. The GoS also emphasizes that, in his second Witness Statement, Professor Ian Cunnison indicates with respect to the Ngok northern migration that “there was never, as suggested in the SPLM/A Memorial, any significant collective presence north of the Bahr el-Arab.”⁶³⁷ Nor was there ever “any collective presence north of the area [he] refer[s] to as the Bahr,

Report, No. 171 (October 1908), p. 53 (SPLM/A Memorial, SPLM/A Exhibit-FE 3/5); GoS Counter-Memorial, paras. 309-310 and Heinekey, G.A., Route Report: Mek Kwal's Village to Jebel Shat Safia, March 1918 (SCM Annex 37); GoS Counter-Memorial, para. 322 and CUNNINGSON, I., BAGGARA ARABS: POWER AND THE LINEAGE IN A SUDANESE NOMAD TRIBE (1966), p. 152 (SM Annex 33) Figure 16 of GoS Counter-Memorial, p. 131; GoS Rejoinder, para. 439 and BARBOUR, K.M., THE REPUBLIC OF THE SUDAN (1961), p. 165, SPLM/A Exhibit-FE 18/24 and Barbour's 1961 map (Figure 4 of GoS Rejoinder).

⁶²⁹ GoS Rejoinder, para. 432.

⁶³⁰ See GoS Oral Pleadings, April 23, 2009, Transcr. 30/21 *et seq.* referring to Whittingham's 1910 Sketch Map.

⁶³¹ See *Id.* and GoS Oral Pleadings, April 23, 2009, Transcr. 31/12 *et seq.* referring to Dupuis' 1921 sketch.

⁶³² GoS Rejoinder, para. 432. See also GoS Counter-Memorial, para. 310 and Heinekey, G.A., Route Report: Gerinti to Mek Kwal's Village, March 1918 (SCM Annex 36).

⁶³³ See GoS Counter-Memorial, para. 316; Civsec 66/4/35, “Minutes of Meeting,” October 28, 1933, pp. 92-95 (SCM Annex 39); Figure 14 of GoS Counter-Memorial, p. 127, Map 22a in GoS Counter-Memorial, Map Atlas.

⁶³⁴ GoS Oral Pleadings, April 21, 2009, Transcr. 78/10-12.

⁶³⁵ See GoS Counter-Memorial, para. 316; GoS Oral Pleadings, April 21, 2009, Transcr. 83/04 *et seq.*

⁶³⁶ See GoS Oral Pleadings, April 21, 2009, Transcr. 81/15 *et seq.*

⁶³⁷ GoS Counter-Memorial, para. 323 quoting second Witness Statement of Ian Cunnison, paras. 3, 5 (SCM WS 1). See also GoS Rejoinder, para. 436 quoting CUNNINGSON, I., BAGGARA ARABS: POWER AND THE LINEAGE IN A SUDANESE NOMAD TRIBE (1966), p. 25 (SM Annex 33).

viz. the area centered on the Bahr el-Arab and the Regaba ez Zarga.”⁶³⁸ The GoS further notes Professor Cunnison’s comment that “the Humr spent most of the year, from early January to late May, by the Bahr,”⁶³⁹ while “the Dinka [were] with their cattle south of the Bahr el-Arab.”⁶⁴⁰

340. The GoS also insists that, contrary to the SPLM/A’s allegation, Professor Cunnison does not agree with the SPLM/A’s analysis concerning the shared rights area. First, he explains that he was informed that “the effect of the ABC’s decision would be to exclude the Humr from their summer grazing and living areas in the Bahr,” which would be “fundamentally unjust.”⁶⁴¹ Secondly, he makes it very clear that he did not observe the goz as an area of shared rights. In reality, the true shared rights area was further south in the Bahr.⁶⁴²
341. In the GoS’s view, “when *no authority* on the area [...] shows the Ngok on the Ragaba ez-Zarga (let alone at 10°35N), then the only conclusion to be drawn is that they were not there.”⁶⁴³ The GoS further emphasizes that, because of the alleged limitations of the documentary evidence, the SPLM/A relies extensively on Ngok oral evidence,⁶⁴⁴ its only evidentiary source to prove Ngok presence north of the Ragaba ez Zarga.⁶⁴⁵ However, the oral evidence produced by the SPLM/A is inaccurate and unreliable⁶⁴⁶ and even according to Professor Daly, the SPLM/A’s own expert, “there is no way precisely to delimit the northern border of the Ngok territory in the goz.”⁶⁴⁷
342. Assuming *arguendo* that there is enough information in the file to draw tribal boundaries, the GoS concludes that these boundaries would roughly correspond to the limits of the

⁶³⁸ GoS Rejoinder, para. 442 quoting second Witness Statement of Ian Cunnison, para. 3 (SCM WS 1).

⁶³⁹ GoS Counter-Memorial, para. 323 quoting second Witness Statement of Ian Cunnison, para. 5 (SCM WS 1).

⁶⁴⁰ GoS Rejoinder, para. 440 quoting CUNNISON, I., BAGGARA ARABS. POWER AND LINEAGE IN A SUDANESE NOMAD TRIBE (1966), p. 18 (SM Annex 33).

⁶⁴¹ Witness Statement of Ian Cunnison, para. 11 (Appendix to GoS Memorial).

⁶⁴² See GoS Oral Pleadings, April 22, 2009, Transcr. 178/08 *et seq.* See also Witness Statement of Ian Cunnison, para. 9 (Appendix to GoS Memorial); second Witness Statement of Ian Cunnison, para. 3 (SCM WS 1).

⁶⁴³ GoS Rejoinder, para. 444.

⁶⁴⁴ GoS Counter-Memorial, para. 33.

⁶⁴⁵ GoS Oral Pleadings, April 21, 2009, Transcr. 109/13 *et seq.*

⁶⁴⁶ GoS Counter-Memorial, paras. 34 *et seq.*, 326 *et seq.* See also the GoS’s arguments on the probative value of oral evidence in the next section.

⁶⁴⁷ GoS Oral Pleadings, April 21, 2009, Transcr. 110/18-20 referring to Professor Daly’s Expert Report, p. 50, Appendix to SPLM/A Memorial.

CivSec map purple area.⁶⁴⁸ In contrast to the GoS's description, the boundaries claimed by the SPLM/A are "incomplete"⁶⁴⁹ and "hybrid," tribal in the north and the east, and administrative in the south and the west.⁶⁵⁰ Although the burden of proof weighs on the SPLM/A to establish Ngok Dinka presence in the area claimed and the corresponding tribal boundaries,⁶⁵¹ the SPLM/A does not even attempt to prove Ngok presence south of the Bahr el Arab⁶⁵² and has not been able to do so with respect to any area significantly to the north of the river.⁶⁵³

(ii) *SPLM/A Arguments*

343. The SPLM/A contends that the post-1905 record, particularly that from the years nearest to 1905, is particularly helpful in determining the location of the Ngok Dinka that year,⁶⁵⁴ because "there was a substantial continuity in the historic territories of the Ngok Dinka and the Misseriya, and that the post-1905 locations of the two peoples are highly probative of their pre-1905 locations," subject to the effects of the civil war and certain government-sponsored agricultural projects.⁶⁵⁵
344. This is precisely the conclusion that the ABC Experts had reached⁶⁵⁶ on the basis of a number of sources, including Mr. Tibbs and Professor Cunnison.⁶⁵⁷ In particular, the SPLM/A underscores the latter's comment that "the area of the Bahr to the south of the goz 'is the traditional land of Dinka.'"⁶⁵⁸ Having noted that the GoS initially argued that the Ngok tended to move north of the Bahr el Arab after 1905,⁶⁵⁹ the SPLM/A concludes that

⁶⁴⁸ GoS Oral Pleadings, April 21, 2009, Transcr. 108/06-09. See also GoS Oral Pleadings, April 21, 2009, Transcr. 104/10 *et seq.* for the GoS's description of the approximate tribal boundaries of the Ngok Dinka.

⁶⁴⁹ GoS Oral Pleadings, April 20, 2009, Transcr. 107/04 *et seq.* The GoS also notes repeated typographical errors in the *dispositif* of the SPLM/A memorials (see GoS Oral Pleadings, April 20, 2009, Transcr. 106/07 *et seq.*).

⁶⁵⁰ See also GoS Oral Pleadings, April 20, 2009, Transcr. 107/10 *et seq.*; April 22, 2009, Transcr. 193/04 *et seq.*

⁶⁵¹ See GoS Counter-Memorial, paras. 68 *et seq.*, 380; GoS Oral Pleadings, April 23, 2009, Transcr. 29/08 *et seq.*

⁶⁵² See GoS Oral Pleadings, April 22, 2009, Transcr. 193/18 *et seq.*

⁶⁵³ See GoS Counter-Memorial, para. 325 ; GoS Rejoinder, para. 444.

⁶⁵⁴ See SPLM/A Memorial, para. 945.

⁶⁵⁵ SPLM/A Counter-Memorial, at para. 1070. See also SPLM/A Counter-Memorial, at paras. 1079-1080.

⁶⁵⁶ SPLM/A Counter-Memorial, at para. 1071 quoting ABC Experts' Report, Part I, at p. 21.

⁶⁵⁷ SPLM/A Counter-Memorial, at para. 1072 quoting ABC Experts' Report, Part I, at p. 19, Appendix B to SPLM/A Memorial.

⁶⁵⁸ SPLM/A Counter-Memorial, at para. 1125 quoting Cunnison, *The Social Role of Cattle*, 1(1) SUDAN J. VETERINARY SCIENCE AND ANIMAL HUSBANDRY 10 (1960), SPLM/A Exhibit-FE 4/8.

⁶⁵⁹ See SPLM/A Counter-Memorial, at para. 1069 quoting GoS Memorial, at para. 366.

the GoS has now abandoned its claim and accepts that there is historical continuity in the locations of the Ngok Dinka and Misseriya, in line with the SPLM/A's position.⁶⁶⁰

345. Arguing that the documentary record should be read in light of the environmental evidence, "profoundly important in the context of this case,"⁶⁶¹ the SPLM/A contends that post-1905 maps and official reports confirm:

- the presence of the Ngok Dinka north of the Bahr el Arab/Kir⁶⁶² and throughout the Bahr⁶⁶³, including around and north of the Ngol/Ragaba ez Zarga⁶⁶⁴ up to the goz,⁶⁶⁵ in the form of villages, dugdugs and cultivations;⁶⁶⁶

⁶⁶⁰ See SPLM/A Rejoinder, para. 499 quoting GoS Counter-Memorial, at para. 308 ; SPLM/A Rejoinder, para. 501.

⁶⁶¹ See SPLM/A Oral Pleadings, April 21, 2009, Transcr. 142/19 *et seq.* See *infra* paras. 357 to 371 on environmental evidence.

⁶⁶² See, *inter alia*, SPLM/A Rejoinder, paras. 482 and Hallam, Kordofan Routes: Dawas to Dar Jange, December 1907, pp. 1-2. (GoS Counter-Memorial Annex 31); SPLM/A Counter-Memorial, paras. 1228-1230, referring to Map 46 (*Hasoba: Sheet 65-L*, Survey Office Khartoum, 1910) and SPLM/A Oral Pleadings, April 22, 2009, Transcr. 52/08-09; SPLM/A Counter-Memorial, para. 1218, referring to SPLM/A Map 40 (*Northern Bahr el Ghazal: Sheet 65*, Survey Office Khartoum, 1907); SPLM/A Memorial, paras. 996-997, referring to Map 50 (Achwang: Sheet 65-K, Survey Office Khartoum, 1916); SPLM/A Rejoinder, para. 504 referring to Heinekey's 1918 Route Reports; SPLM/A Rejoinder, para. 507 and Dupuis' 1921 Sketch; SPLM/A Counter-Memorial, para. 1252, referring to GoS Memorial Map Atlas, Map 21 (*Ghabat el Arab Sheet 65-L*, Survey Office (Khartoum), 1925); SPLM/A Counter-Memorial, para. 1266 referring to the 1938 Map of Native Administrations of Kordofan Province; SPLM/A Counter-Memorial, paras. 1105-1109 and Howell, "Notes on the Ngork Dinka of West Kordofan," 32(2) SNR 239, 243 (1951), SPLM/A Exhibit-FE 4/3 and SPLM/A Oral Pleadings, April 22, 2009, Transcr. 34/23 *et seq.*

⁶⁶³ See, *inter alia*, SPLM/A Counter-Memorial, para. 1092 quoting Kordofan Province Handbook 73 (1912), SPLM/A Exhibit-FE 3/8a and Kordofan Province Map, Survey Office Khartoum, 1913 (Map 48 of SPLM/A Map Atlas vol. 1); SPLM/A Counter-Memorial, para. 1234, referring Map 14 of GoS Memorial Map Atlas (*Map of Anglo-Egyptian Sudan*, Geographical Section of the War Office, 1914); SPLM/A Counter-Memorial, para. 1175 and Witness Statement of G. Michael Tibbs, Appendix to SPLM/A Counter-Memorial, para. 22.

⁶⁶⁴ See, *inter alia*, SPLM/A Counter-Memorial, para. 1104 quoting J. ROBERTSON, TRANSITION IN AFRICA: FROM DIRECT RULE TO INDEPENDENCE 51 (1954), SPLM/A Exhibit-FE 18/28; SPLM/A Counter-Memorial, para. 1181 quoting "The First Peace Agreement Between The Misiriyya Humur And The Ngok Dinka, Concluded At Abyei, March 3, 1965," Appendix 12 to A. D Saeed, *The State And Socioeconomic Transformation In The Sudan: The Case Of Social Conflict In Southwest Kurdufan* (January 1, 1982). ETD Collection for University of Connecticut. Paper AAI8213913, SPLM/A Exhibit-FE 18/30. See also SPLM/A Oral Pleadings, April 22, 2009, Transcr. 35/07 *et seq.*

⁶⁶⁵ See, *inter alia*, SPLM/A Counter-Memorial, para. 1174 quoting Witness Statement of G. Michael Tibbs, Appendix to SPLM/A Counter-Memorial, para. 23; SPLM/A Counter-Memorial, para. 1327 quoting D. COLE & R. HUNTINGTON, BETWEEN A SWAMP AND A HARD PLACE 92, 96 (1997), SPLM/A Exhibit-FE 8/14 and SPLM/A Oral Pleadings, April 22, 2009, Transcr. 51/07-09.

⁶⁶⁶ See, *inter alia*, SPLM/A Oral Pleadings, April 22, 2009, Transcr. 30/15 *et seq.* referring to a portion of Whittingham's 1910 map regarding his trek from Turda to Koak and Bara to Mellum that the GoS failed to disclose; SPLM/A Counter-Memorial, paras. 1243-1244, referring to Map 85 of SPLM/A Map Atlas, vol. 2 (*Lake Keilak: Sheet 65-H*, Survey Office (Khartoum) 1911, corr. Dec 1922); SPLM/A Counter-Memorial, paras. 1255-1256, referring to SPLM/A Map 92 (1929 Ghabat el Arab Sheet 65-L Map); SPLM/A Memorial, para. 1001 and SPLM/A Counter-Memorial, para. 1264, referring to Map 54 of SPLM/A Map Atlas, vol. 1 (*Ghabat el Arab: Sheet 65-L*, Survey Office (Khartoum), 1936).

- the location of the Ngok western frontier “all the way to the boundary with Darfur”⁶⁶⁷ and the northern border between the Ngok and the Misseriya at Tebeldiya on 10°35’N,⁶⁶⁸
- the existence of seasonal Arab “camps,” and not “settlements,” north of the Bahr el Arab, in line with the seasonal cattle grazing patterns of the Misseriya and the Ngok Dinka,⁶⁶⁹ the latter moving north to the goz in the rainy season.⁶⁷⁰

346. The SPLM/A further argues that a number of maps and trek reports relied upon by the GoS provide little evidence on the actual location of the Ngok Dinka, either on the ground that they are inaccurate,⁶⁷¹ or because they were based on limited, dry season routes and designed merely to record topographical information.⁶⁷² The GoS therefore cannot rely on these documents to draw negative inferences from a supposed absence of Ngok Dinka in particular places.⁶⁷³

347. More specifically, the 1933 CivSec map relied upon by the GoS is wrong in its depictions of various “waterless areas.”⁶⁷⁴ In addition, its purpose was to “indicate claims of the ‘Malwal,’ ‘Rizeigat’ and Humr *south of the Bahr al-Arab*,”⁶⁷⁵ and not to identify the alleged northernmost limit of the area occupied by the Ngok Dinka. Further, the sketch places the Ngok dry season grazing to the north-west of Abyei and describes the Ngok as

⁶⁶⁷ SPLM/A Counter-Memorial, at para. 1175 quoting Witness Statement of G. Michael Tibbs, Appendix to SPLM/A Counter-Memorial, para. 22.

⁶⁶⁸ See, *inter alia*, SPLM/A Memorial, paras. 1002-1003, referring to Map 56 of SPLM/A Map Atlas, vol. 1 (*Dar El Humr: Sheet NC-35-G*, Sudan Survey, 1936 (rev. 1976); SPLM/A Counter-Memorial, at para. 1175 quoting Witness Statement of Michael Tibbs, Appendix to SPLM/A Counter-Memorial, para. 23.

⁶⁶⁹ See SPLM/A Rejoinder, paras. 481-483 quoting Hallam, *Kordofan Routes: Dawas to Dar Jange*, December 1907, pp. 1-2. (GoS Counter-Memorial Annex 31)

⁶⁷⁰ See SPLM/A Counter-Memorial, para. 1327 quoting D. COLE & R. HUNTINGTON, *BETWEEN A SWAMP AND A HARD PLACE* 92, 96 (1997), SPLM/A Exhibit-FE 8/14.

⁶⁷¹ See SPLM/A Counter-Memorial, para. 1213 referring to Comyn’s 1907 map (Map 9 in GoS Memorial Map Atlas (*Sketch Map of the Western Sources of the Nile*, The Royal Geographical Society, 1907).

⁶⁷² See, *inter alia*, SPLM/A Rejoinder, para. 482 referring to Hallam 1907 Route Report; SPLM/A Rejoinder, para. 493 referring to Whittingham’s 1910 route (see GoS Counter-Memorial Map Atlas, Maps 18a and 18b); SPLM/A Rejoinder, para. 502 referring to Heinekey’s 1918 Route Reports; SPLM/A Rejoinder, paras. 508, 510 referring to Dupuis’ 1921 route (see GoS Counter-Memorial Map Atlas, Map 39a).

⁶⁷³ See, *inter alia*, SPLM/A Rejoinder, para. 509; SPLM/A Rejoinder, para. 521 referring to Henderson’s 1933 Route Report; SPLM/A Counter-Memorial, para. 1176 quoting Witness Statement of G. Michael Tibbs, Appendix to SPLM/A Counter-Memorial, para. 24.

⁶⁷⁴ See SPLM/A Rejoinder, para. 526; GoS Counter-Memorial Map Atlas, Map 22a.

⁶⁷⁵ SPLM/A Rejoinder, para. 526. (Emphasis in original.)

having significant cattle, twice as much as the Homr.⁶⁷⁶ The SPLM/A concludes that only vast permanent settled lands, greater than all of the colored areas on the map, would accommodate all of the Ngok's cattle.⁶⁷⁷

348. Among the various scholarly works it invokes, the SPLM/A places strong emphasis on the writings of Professor Cunnison, the GoS's witness, who, like Mr. Tibbs, spent a long time in the region with the people.⁶⁷⁸ The SPLM/A thus relies on Professor Cunnison to confirm that "[m]uch of the Bahr has permanent Dinka settlements [...] the Nuer and Dinka have permanent homes from which they move for part of the year."⁶⁷⁹ Similarly, when asked by the Sudanese Government whether it makes sense to encourage the Misseriya to cultivate in the Bahr, Professor Cunnison responded that the region was the traditional agricultural land of the Dinka during the rains.⁶⁸⁰ This is consistent with Whittingham's 1910 map showing cultivation.⁶⁸¹
349. On the basis of Professor Cunnison's 1954 statistics, the SPLM/A calculates that the Misseriya spent less time inside the Bahr region (142 days) than outside (223 days) in the Muglad ("their home"),⁶⁸² Babanusa and the goz.⁶⁸³ Having noted Cunnison's comment that "most of the Dinka," but not all, would migrate south to their dry season areas,⁶⁸⁴ the SPLM/A concludes that this is consistent both with pre-1905 reports of uninhabited villages

⁶⁷⁶ See SPLM/A Rejoinder, paras. 527-529. The SPLM/A quotes a figure of 50,000 to 60,000.

⁶⁷⁷ SPLM/A Rejoinder, para. 529.

⁶⁷⁸ See SPLM/A Oral Pleadings, April 21, 2009, Transcr. 184/17 *et seq.*

⁶⁷⁹ SPLM/A Counter-Memorial, at para. 1128 quoting Cunnison, *Some Social Aspects of Nomadism in a Baggara Tribe* in *The Effect of Nomadism on the Economic and Social Development of the People of the Sudan*, Proceedings of the Tenth Annual Conference 11th-12th January 1962, 112, SPLM/A Exhibit-FE 4/11. See also SPLM/A Counter-Memorial, at paras. 1129-1131 and SPLM/A Counter-Memorial, at para. 1132 quoting Witness Statement of Ian Cunnison, at p. 1, at para. 6. More generally, see *infra* in paras. 357 to 371 on environmental evidence, Cunnison's definitions of the "Bahr" and the "Bahr el-Arab" relied on by the SPLM/A to confirm that a reference to the Ngok living "on the Bahr el-Arab" should be understood as a reference to inhabitation of the area encompassing the Bahr el Arab and the Ragaba ez Zarga.

⁶⁸⁰ See SPLM/A Counter-Memorial, para. 1129 quoting Cunnison, *The Social Role of Cattle*, 1(1) SUDAN J. VETERINARY SCIENCE AND ANIMAL HUSBANDRY 10 (1960), SPLM/A Exhibit-FE 4/8; See also SPLM/A Counter-Memorial, paras. 1130-1131 quoting Cunnison, Hill & Asad, "Settlement of Nomads in the Sudan: A critique of Present Plans," in *Agricultural Development in the Sudan*, Proceedings of the Thirteenth Annual Conference 3-6 December 1966, 102, 112-113, SPLM/A Exhibit-FE 18/27; SPLM/A Oral Pleadings, April 22, 2009, Transcr. 42/12 *et seq.*

⁶⁸¹ See SPLM/A Oral Pleadings, April 22, 2009, Transcr. 41/18 *et seq.*

⁶⁸² SPLM/A Counter-Memorial, at para. 1144 quoting Cunnison, *The Humr and their Land* 35(2) SNR 54-55 (1954), SPLM/A Exhibit-FE 4/5.

⁶⁸³ See SPLM/A Counter-Memorial, at paras. 1149-1150; Witness Statement of Ian Cunnison, at p. 2, para. 9.

⁶⁸⁴ SPLM/A Counter-Memorial, at para. 1134; Witness Statement of Ian Cunnison, at p. 1, para. 6.

in the north and Cunnison's observation of the Misseriya making "brotherhood" and even leaving some of their possessions with those among the Ngok who maintained a presence in the north during the dry season.⁶⁸⁵

350. The SPLM/A goes on to remark that the ABC Experts and Professor Cunnison agree on the definition and extent of the goz, on its role as an area of transit rather than occupation, and on the location and scope of the Misseriya and the Ngok Dinka's traditional homes.⁶⁸⁶ In addition, while Cunnison indicates "there was never any *collective presence* [of the Ngok] north of the area I refer to as the Bahr," and that the Ngok did not occupy the goz "in any relevant sense"⁶⁸⁷, he "does not state that there were *no* Ngok north of the Bahr"⁶⁸⁸ and that the Ngok, like the Humr, did not use the goz for transit.⁶⁸⁹
351. The SPLM/A notes, however, that the GoS has created a point of disagreement between Professor Cunnison and the ABC Experts concerning the "shared rights area."⁶⁹⁰ Professor Cunnison indeed states that he was "informed that the effect of the ABC's decision would be to exclude the Humr from their summer grazing and living areas in the Bahr."⁶⁹¹ The SPLM/A agrees that this would be unjust but points out that, in accordance with Section 1.1.3 of the Abyei Protocol, the ABC Experts stressed that "their decision would have no practical effect on the traditional grazing patterns and the two communities."⁶⁹² Professor Cunnison was in fact misinformed as to the effects of the ABC Experts' Report.⁶⁹³

⁶⁸⁵ SPLM/A Counter-Memorial, at para. 1135 quoting Cunnison, *The Humr and their Land* 35(2) SNR 62 (1954), SPLM/A Exhibit-FE 4/5; *see also* SPLM/A Counter-Memorial, at para. 1136 referring *inter alia* to I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 29 (1966), SPLM/A Exhibit-FE 4/16.

⁶⁸⁶ SPLM/A Counter-Memorial, at para. 1157-1160.

⁶⁸⁷ SPLM/A Rejoinder, para. 538(d) quoting Supplementary Witness Statement of Ian Cunnison, at p. 1, ¶7.

⁶⁸⁸ SPLM/A Rejoinder, para. 538(c) quoting Supplementary Witness Statement of Ian Cunnison, at p. 1, ¶3. (emphasis added by the SPLM/A)

⁶⁸⁹ SPLM/A Rejoinder, para. 538(d). *See also* SPLM/A Counter-Memorial, at para. 1174 quoting Witness Statement of G. Michael Tibbs, Appendix to SPLM/A Counter-Memorial, para. 23.

⁶⁹⁰ *See* SPLM/A Oral Pleadings, April 22, 2009, Transcr. 47/03 *et seq.*

⁶⁹¹ SPLM/A Oral Pleadings, April 22, 2009, Transcr. 47/06 *et seq.* quoting Witness Statement of Ian Cunnison, at p. 3, para. 11. *See also* SPLM/A Counter-Memorial, para. 1155.

⁶⁹² SPLM/A Oral Pleadings, April 22, 2009, Transcr. 48/02-04 quoting ABC Experts' Report, Part I, at p. 9, Appendix B to SPLM/A Memorial. *See also* SPLM/A Counter-Memorial, para. 1166.

⁶⁹³ *See* SPLM/A Counter-Memorial, para. 1166.

352. Similarly, when Professor Cunnison states that the “real area of sharing was further south, in the Bahr,”⁶⁹⁴ his analysis is in reality not different from that of the ABC Experts.⁶⁹⁵ The latter not only referred to “shared secondary rights” in the goz,⁶⁹⁶ but also to sharing in the Bahr, in specific locations north and south of Abyei town.⁶⁹⁷
353. The SPLM/A concludes that Cunnison’s writings, which describe the presence of Ngok Dinka permanent homes throughout the Bahr, seriously undermine the GoS’s case.⁶⁹⁸
354. Due to the limitations of the documentary record, the SPLM/A, like the ABC, also relies on witness evidence in order to obtain a more detailed and comprehensive description of the locations of the Ngok Dinka in 1905. Having noted that the GoS itself insisted on the relevance of specific witness evidence before the ABC,⁶⁹⁹ the SPLM/A argues that the Ngok Dinka witnesses⁷⁰⁰ have described with consistency:

[...] permanent settlements with associated agricultural lands throughout the Abyei Area, including:

- a. to the north west of Abyei town, inhabiting permanent settlements in the areas between the Ngol/Ragaba ez-Zarga and Kiir/Bahr el-Arab river systems up to the border with Darfur;
- b. further to the north-west, inhabiting permanent settlements at Rumthil [Arabic: Antilla], Dhony Dhoul and Wun Deng Awak, with their border at Tebeldiya;
- c. due north from Abyei town, inhabiting permanent settlements between the Ngol/Ragaba ez-Zarga and Kiir/Bahr el-Arab river systems, and further north to Thuba, Nyama and Thur [Arabic: Turda];
- d. to the east and beyond the Ngol/Ragaba ez-Zarga, inhabiting permanent settlements in the upper Ngol region such as Pariang and Ajaj, extending to Miding [Arabic: Heglig]; and

⁶⁹⁴ SPLM/A Counter-Memorial, para. 1161 quoting Witness Statement of Ian Cunnison, at p. 2, para. 9.

⁶⁹⁵ See SPLM/A Counter-Memorial, para. 1162.

⁶⁹⁶ SPLM/A Counter-Memorial, para. 1163 quoting ABC Experts’ Report, Part I, at pp. 16, 19, 20, Appendix B to SPLM/A Memorial.

⁶⁹⁷ SPLM/A Counter-Memorial, at para. 1164 quoting ABC Experts’ Report, Part I, at p. 21, Appendix B to SPLM/A Memorial.

⁶⁹⁸ See SPLM/A Oral Pleadings, April 22, 2009, Transcr. 48/12 *et seq.*; SPLM/A Counter-Memorial, at paras. 1168-1170.

⁶⁹⁹ SPLM/A Counter-Memorial, at paras. 1283-1286 and Ambassador Dirdeiry, Taped Recording of GoS Final Presentation, dated June 16, 2005, File 1, at pp. 2-3, SPLM/A Exhibit-FE 19/15.

⁷⁰⁰ The SPLM/A refers to the 26 witnesses who submitted statements in these proceedings and the nearly 70 witnesses who testified during the ABC proceedings (See SPLM/A Memorial, para. 46).

- e. north of Miding, inhabiting permanent settlements at Nyadak Ayueng, Michoor and Niag.⁷⁰¹

355. The witness evidence coincides with the Community Mapping Project and the Map it produced. The SPLM/A highlights that the Community Map⁷⁰² shows approximately 150 permanent settlements, 56 burial sites, 74 cattle grazing sites, 35 cultivation sites, 45 community meeting and court locations, and 11 sacred sites, dating back to 1905 or earlier,⁷⁰³ in the region centered on the Ngok/Ragaba ez Zarga and Bahr el Arab/Kir.⁷⁰⁴

356. While the pre- and post-1905 evidence establishes the location of the nine Ngok Dinka Chiefdoms in the area claimed, the SPLM/A does not deny that it is difficult to draw precise lines.⁷⁰⁵ Given the practical, political and time constraints, the SPLM/A elected “to try to use manageable and practical straight-line boundaries” that provide “a fair representation of the extent of the Ngok Dinka territories in all directions” on the basis of the evidence.⁷⁰⁶

(c) The relevance of post-1905 demographic, cultural and environmental evidence to the location of the Ngok Dinka in 1905

(i) *GoS Arguments*

357. Having stated that the cultural evidence that the SPLM/A purports to rely on is in fact absent from its submissions,⁷⁰⁷ the GoS first points out that environmental considerations were not in the minds of Condominium officials who made the transfer in 1905, as acknowledged by the SPLM/A’s expert, Mr. Allan.⁷⁰⁸

358. The GoS further agrees with Mr. Allan that “environmental determinism does not work.”⁷⁰⁹ Yet, the SPLM/A took precisely the opposite approach by determining that the Bahr and half the goz belonged to the Ngok Dinka on environmental grounds.⁷¹⁰ While the GoS does

⁷⁰¹ SPLM/A Memorial, para. 46.

⁷⁰² See Poole Expert Report, Annex H. See SPLM/A Counter-Memorial, at para. 1382.

⁷⁰³ See SPLM/A Counter-Memorial, at para. 1383.

⁷⁰⁴ SPLM/A Counter-Memorial, at para. 1376. See also SPLM/A Counter-Memorial, at paras. 1387-1388.

⁷⁰⁵ See SPLM/A Oral Pleadings, April 22, 2009, Transcr. 134/06 *et seq.*

⁷⁰⁶ SPLM/A Oral Pleadings, April 22, 2009, Transcr. 134/22 – 135/16.

⁷⁰⁷ GoS Rejoinder, para. 505.

⁷⁰⁸ GoS Oral Pleadings, April 21, 2009, Transcr. 155/08 *et seq.* (Mr. Allan – cross-examination).

⁷⁰⁹ GoS Oral Pleadings, April 22, 2009, Transcr. 173/03-09.

⁷¹⁰ GoS Oral Pleadings, April 22, 2009, Transcr. 173/14 *et seq.*

accept that the environment may have an influence on the cattle grazing patterns or agricultural practices of the tribes living in the region, an ability to adapt to local conditions does not entail that the Ngok Dinka were located in any place where they could grow dura (sorghum) or graze their cattle.⁷¹¹

359. In addition, the SPLM/A does not establish the influence of the environment in 1905. In the GoS's view, there are many factors, such as the effects of the Madhiyya, which would explain why the Ngok Dinka were further to the south in 1905 than the environmental capacity of their crop and cattle could have allowed them to be.⁷¹²
360. While the MENAS Report takes the same deterministic approach as the SPLM/A in its description of the Bahr and the goz, the MENAS Report turns out to show that the geographic dividing line between the Bahr and the goz "does not resemble the ABC Experts' delimitation or the SPLM/A's submission,"⁷¹³ with the Bahr extending to 10°0'N on the west and beyond 10°35'N on the east.⁷¹⁴ In addition, the evidence shows that "tribal habitation patterns did not follow geographical features at all."⁷¹⁵
361. The GoS also relies on the MENAS Report's concession that neither the goz nor the Bahr could have supported permanent habitation in 1905⁷¹⁶ to conclude that the SPLM/A's claim to the 10°35'N line utterly lacks credibility.⁷¹⁷
362. The SPLM/A's criticism of the other environment-related arguments put forward by the GoS are, in the latter's view, equally misguided. The GoS thus asserts that it never argued that the Bahr el Arab/Kir was "impassable,"⁷¹⁸ but maintains that it is a traditional dividing line, "ideological and physical."⁷¹⁹ Having contended in its Memorial that the Ngok Dinka

⁷¹¹ *Id.* See also GoS Rejoinder, para. 506.

⁷¹² GoS Oral Pleadings, April 22, 2009, Transcr. 174/08 *et seq.*

⁷¹³ GoS Rejoinder, para. 508 referring to the MENAS Report, pp. 37-38, 140, 145, Appendix to SPLM/A Counter-Memorial.

⁷¹⁴ GoS Rejoinder, para. 512.

⁷¹⁵ GoS Rejoinder, para. 512 and Barbour's and Lebon's Maps (Figure 4 and 5 of GoS Rejoinder, respectively).

⁷¹⁶ GoS Rejoinder, para. 515 quoting MENAS Report, para. 149, Appendix to SPLM/A Counter-Memorial.

⁷¹⁷ GoS Oral Pleadings, April 22, 2009, Transcr. 176/03 *et seq.*

⁷¹⁸ GoS Rejoinder, para. 499.

⁷¹⁹ GoS Rejoinder, para. 503 quoting BESWICK, S., SUDAN'S BLOOD MEMORY 156 (2006), SPLM/A Exhibit-FE 12/18. See also GoS Rejoinder, paras. 500-504 quoting WILLS, J.T., *Between the Nile and the Congo* (1887) 9/5 Proceedings of the Royal Geographical Society and Monthly Record of Geography 285, p. 294 (SM Annex 61); WARBURG, G., THE SUDAN UNDER WINGATE, ADMINISTRATION IN THE ANGLO-EGYPTIAN SUDAN 1890-1916

moved south in the wet season,⁷²⁰ the GoS relies on Willis and Wilkinson to maintain that the Ngok “were more congregated together” than the SPLM/A claims and where they went in the wet season at the time of the transfer was “very much in the south.”⁷²¹

363. Turning to the demographic evidence and the size of the Ngok Dinka population in 1905, the GoS argues that the SPLM/A’s figure of 50,000 is a “hopeless overestimate.”⁷²² The GoS’s approximate figure of 5,000 Ngok Dinka is much more consistent with the area shown on the CivSec Map⁷²³ and later estimates, including the Governor of Kordofan’s estimates of 15,000 in 1934⁷²⁴ and 30,000 in 1951,⁷²⁵ and the 1955 Sudan census which mentions a figure of 31,135 Ngok.⁷²⁶ The SPLM/A’s figure is based on questionable estimates⁷²⁷ and would indicate a sharp and implausible decrease in Ngok Dinka population between 1905 and 1934, a period during which the Ngok’s living conditions improved.⁷²⁸

(ii) *SPLM/A Arguments*

364. The SPLM/A argues that environmental, climatic and cultural data regarding the Abyei region further corroborate the evidence drawn from Ngok Dinka and Misseriya oral traditions and the documentary record on the location of these tribes.⁷²⁹

(1971) p. 137, SPLM/A Exhibit-FE 5/1; COLLINS, R.O., *THE NILE* (2002) pp. 63-64, SPLM/A Exhibit-FE 10/6; HOLT, P.M., & DALY, M.W., *A HISTORY OF THE SUDAN* (5th ed., 2000), p. 62, SPLM/A Exhibit-FE 9/3.

⁷²⁰ See GoS Memorial, para. 359.

⁷²¹ GoS Oral Pleadings, April 22, 2009, Transcr. 181/22 *et seq.*

⁷²² GoS Rejoinder, para. 454.

⁷²³ GoS Oral Pleadings, April 21, 2009, Transcr. 82/23 *et seq.*, 85/14 *et seq.*

⁷²⁴ See GoS Rejoinder, para. 454 referring to Letter from Newbold to the Civil Secretary, 8 May 1934, Civsec 1/36/97 (SM Annex 89). See also GoS Memorial, para. 339.

⁷²⁵ See GoS Rejoinder, para. 454 referring Letter from G. Hawkesworth (Governor Kordofan) to Editor Kordofan Magazine, dated April 3, 1951, SPLM/A Exhibit-FE 18/17. See also GoS Rejoinder, para. 454 referring to the Upper Nile’s District Commissioner’s figure of 20,000-25,000 in 1948 and the Dar Misseriya’s Assistant District Commissioner’s figure of 30,000 in 1952.

⁷²⁶ GoS Rejoinder, para. 454.

⁷²⁷ See Marchand’s estimate of 4 to 5 million Dinka in 1898, against Lienhardt’s estimate of about one million in 1952 (GoS Rejoinder, para. 456); Bey’s estimate of 2 million in 1906 (GoS Rejoinder, para. 457 quoting Letter from Cook to Bayliss (January 30, 1906), SPLM/A Exhibit-FE 17/20); Governor’s Lloyd’s estimate of 500,000 which does not expressly refer to the Ngok (See GoS Rejoinder, para. 459 quoting Sudan Intelligence Reports, No. 171 (October 1908), Appendix D, p. 52, SPLM/A Exhibit-FE 17/31).

⁷²⁸ GoS Rejoinder, para. 454. See also GoS Oral Pleadings, April 21, 2009, Transcr. 86/13 *et seq.*

⁷²⁹ See SPLM/A Memorial, at para. 1005; SPLM/A Counter-Memorial, at paras. 1307-1308.

365. The SPLM/A relies on Professor Cunnison's definition of the Bahr, described as "[t]he southern part of the country," "characterized by dark, deeply cracking clays and numerous winding watercourses,"⁷³⁰ which include:

- a. the Kiir/Bahr el-Arab, being 'all river beds between the Regeba ez Zerga' and the Kiir/Bahr el-Arab;
- b. the river system of the Ngol/Ragaba ez-Zarga to its border with the northeastern regabas in the neighborhood of Kwak and Keilak;
- c. the river system of the Nyamora/Ragaba Umm Biero to its border with the goz; and
- d. Lakes Keylak [Keilak] and Lake Abyad.⁷³¹

366. Professor Cunnison further explains that "[t]he Bahr is the name which the Humr give to the whole of this dry season watering country" and "the Goz" is the area "to the north [of the Bahr]."⁷³² In light of Cunnison's definitions, the SPLM/A emphasizes the importance of the following factors:

- a. the Ngok Dinka agro-pastoral way of life was well-adapted to the fertile soil and the extreme climatic conditions of the Bahr region and the goz;
- b. the Ngok sorghum is well-suited to the Bahr region, and parts of the goz, because it is 'drought resistant' – a distinct advantage given the region's climatic conditions;
- c. the Ngok Dinka cattle were well-suited physically to the conditions and diseases of the region, particularly during the rainy season;
- d. the Ngok Dinka animal husbandry practices (e.g., constructing substantial cattle byres (luaks or dugdugs)) were adapted to protecting their livestock from the region's climate;

⁷³⁰ SPLM/A Counter-Memorial, para. 1113 quoting I. CUNNISON, BAGGARA ARABS – POWER AND THE LINEAGE IN A SUDANESE NOMAD TRIBE 18 (1966), SPLM/A Exhibit-FE 4/16.

⁷³¹ SPLM/A Counter-Memorial, para. 1114 quoting I. CUNNISON, THE HUMR AND THEIR LAND 51, SPLM/A Exhibit-FE 4/5. *See also* SPLM/A Oral Pleadings, April 22, 2009, Transcr. 37/12 *et seq.*

⁷³² SPLM/A 1113-1114 quoting I. CUNNISON, BAGGARA ARABS – POWER AND THE LINEAGE IN A SUDANESE NOMAD TRIBE 18-19 (1966), SPLM/A Exhibit-FE 4/16. *See also* SPLM/A Oral Pleadings, April 21, 2009, Transcr. 141/16 *et seq.*

- e. the soil in the area of Muglad is a non-cracking red clay intersected by numerous sand ridges (described as the “Baggara Repeating Pattern”), ill-suited for agriculture;⁷³³
- f. the Misseriya engaged in little agriculture (thus having no reason to avail themselves of the fertile soil of the Bahr region), with their only crop being millet, which was best grown in the sandier, drier soil near Muglad, rather than in the damper conditions of the Bahr region;
- g. the Misseriya’s nomadic lifestyle included living in temporary shelters, without protection from rainy conditions for either themselves or their cattle, which “do not have the faculty for moving in the mud that Dinka cattle possess;” and
- h. the nomadic Misseriya herders and their lifestyle were best (and only) suited to the dry, sandy regions to the north of the goz.⁷³⁴

367. Importantly, as pointed out by a wide range of authorities,⁷³⁵ including Professor Cunnison,⁷³⁶ the Ngok Dinka moved south of the Bahr river system with their cattle in the dry season, and north of it during the wet season.⁷³⁷ Similarly, while the Misseriya lived in settled camps to the north of Babanusa in the wet season, they then “moved south through the extensive sandy Goz to the area called the Bahr” and “lived in scattered camps across this region during the summer months.”⁷³⁸

368. Although the MENAS Report does not identify contemporary satellite evidence showing perennial water sources in the goz in the dry season, the SPLM/A points to early 20th

⁷³³ By contrast, the black clay soil which, according to Governor Lloyd, predominates south of latitude 10°30’, is fertile (*see* SPLM/A Oral Pleadings, April 21, 2009, Transcr. 145/13 *et seq.*).

⁷³⁴ SPLM/A Counter-Memorial, para. 1308. *See also* similar list of factors in SPLM/A Rejoinder, para. 612; SPLM/A Oral Pleadings, April 21, 2009, Transcr. 162/08 *et seq.*

⁷³⁵ *See* SPLM/A Counter-Memorial, at para. 1089 quoting H. MACMICHAEL, A HISTORY OF THE ARABS IN SUDAN, Vol. I, 286 (1922), SPLM/A Exhibit-FE 18/6; *see also* SPLM/A Counter-Memorial, at para. 1091; *See* SPLM/A Counter-Memorial, at para. 1324 quoting R. DAVIES, THE CAMEL’S BACK 130 (1957), SPLM/A Exhibit-FE 18/21; *See* SPLM/A Counter-Memorial, at para. 1325 quoting Howell, “Notes on the Ngork Dinka of West Kordofan,” 32/2 SNR 239, 243-244 (1951), SPLM/A Exhibit-FE 4/3; *See* SPLM/A Counter-Memorial, at para. 1327 quoting M. NIAMIR, R. HUNTINGTON & D. COLE, NGOK DINKA CATTLE MIGRATIONS AND MARKETING 1, 13 (1983), SPLM/A Exhibit-FE 7/1, and D. COLE & R. HUNTINGTON, BETWEEN A SWAMP AND A HARD PLACE 92, 96 (1997), SPLM/A Exhibit-FE 8/14. *See also* SPLM/A Oral Pleadings, April 22, 2009, Transcr. 50/24 *et seq.*; *See* SPLM/A Counter-Memorial, at para. 1328 quoting A. EL TAYAB, AGRICULTURAL AND NATURAL RESOURCES ABYEI DISTRICT, WEST REGION SOUTHERN KORDOFAN PROVINCE 6, 8 (1978), SPLM/A Exhibit-FE 6/5.

⁷³⁶ *See* SPLM/A Counter-Memorial, at para. 1326 quoting I. CUNNISON, BAGGARA ARABS – POWER AND THE LINEAGE IN A SUDANESE NOMAD TRIBE 18-19, 25 n. 24 (1966), SPLM/A Exhibit-FE 4/16.

⁷³⁷ SPLM/A Counter-Memorial, paras. 1324-1329.

⁷³⁸ SPLM/A Counter-Memorial, para. 1132 quoting Witness Statement of Ian Cunnison, at p. 1, para. 6.

century maps, including Lloyd's 1907 map,⁷³⁹ which indicate the existence of water in the area.⁷⁴⁰

369. The SPLM/A goes on to argue that the GoS's few comments relating to environmental and demographic evidence are all demonstrably wrong, to the point that most of them have been abandoned.⁷⁴¹
370. Thus, contrary to the GoS's contention, the Bahr el Arab/Kir has never been a "physical barrier," and was easily forded.⁷⁴² Similarly, the GoS's claim that "in the wet season [Sultan Rob and the Ngok Dinka] went south to the River Lol, not north"⁷⁴³ is clearly disproved by a wide range of authorities.⁷⁴⁴
371. Lastly, the SPLM/A dismisses as mere conjecture the GoS's contention that the Ngok Dinka in 1905 "might" have "numbered less than 5,000 in total."⁷⁴⁵ The SPLM/A draws the Tribunal's attention to Marchand, Bey and Lloyd's higher, more contemporaneous figures⁷⁴⁶ on the basis of which the SPLM/A concludes that there would have been around 50,000 Ngok Dinka in 1905. It recognizes that they have "no inherently more or less credibility than the figures cited by GoS, except that they were published much closer to 1905."⁷⁴⁷ The SPLM/A contends that the 1955 national census, which counted 31,135 Ngok Dinka, used a much criticized sample probability method⁷⁴⁸ likely to produce huge

⁷³⁹ Map 38 of SPLM/A Map Atlas, vol. 1 (*Kordofan: Map of Dar Homr*, Watkiss Lloyd, 1907).

⁷⁴⁰ SPLM/A Counter-Memorial, para. 1319.

⁷⁴¹ SPLM/A Rejoinder, paras. 610, 620 *et seq.* See also SPLM/A Counter-Memorial, paras. 1321 *et seq.*

⁷⁴² See SPLM/A Counter-Memorial, at para. 1359 quoting Second Daly Expert Report, at p. 25, Appendix to SPLM/A Counter-Memorial. SPLM/A also refers to MENAS Expert Report, at para. 110, Appendix to SPLM/A Counter-Memorial. See also SPLM/A Oral Pleadings, April 21, 2009, Transcr. 149/13-20 (Mr Allan characterizing the Kiir/Bahr el Arab as a "discontinuous river").

⁷⁴³ See SPLM/A Counter-Memorial, at para. 1322 quoting GoS Memorial, at para. 359.

⁷⁴⁴ See also SPLM/A Oral Pleadings, April 21, 2009, Transcr. 167/16 *et seq.*

⁷⁴⁵ SPLM/A Counter-Memorial, para. 1368 quoting GoS Memorial, para. 339.

⁷⁴⁶ SPLM/A refers to Bulletin du Comité de l'Afrique Française "De L'Oubangui au Nil : Les missions Liotard et Marchand, Octobre 1898, at p. 329, SPLM/A Exhibit-FE 17/20 ; Letter dated 30 January 1906 from Albert Cook to Mr Baylis, a representative of the Church Missionary Society resident in Bor, Sudan, Church Missionary Society Archives, SPLM/A Exhibit-FE 17/20; Sudan Intelligence Report No. 171, October 1908, Appendix D, at p. 52, SPLM/A Exhibit-FE 17/31. On the basis of the 1908 Sudan Intelligence Report, SPLM/A obtains a figure in the region of 50,000.

⁷⁴⁷ SPLM/A Counter-Memorial, at para. 1371.

⁷⁴⁸ See SPLM/A Counter-Memorial, at paras. 1371-1373.

discrepancies between estimated and actual population figures and to over-represent nomadic groups.⁷⁴⁹

(d) The probative value of post-1905 witness evidence based on oral tradition in relation to early 20th century events

(i) *GoS Arguments*

372. The GoS generally questions the probative value of the witness evidence based on oral tradition presented by the SPLM/A. It argues that these have been contradicted by the documentary and map evidence to the point of being “demonstrably untrue.”⁷⁵⁰

373. The GoS insists that the goal of oral evidence, which depends upon repetition,⁷⁵¹ is not “to tell a history of events,” but rather “to construct a present tribal identity and to connect that to an indefinite past.”⁷⁵² The goal is certainly not to help a commission or a tribunal delimit a boundary, since “[s]tate boundaries are created by state means, not by oral tradition.”⁷⁵³ It recalls that the ABC Experts, considering that the oral testimony did not conclusively prove either side’s position, sought to find “as much evidence from contemporary records” as possible.⁷⁵⁴ The GoS also insists that the SPLM/A has not disclosed the methodology used in gathering the oral evidence.⁷⁵⁵

374. The GoS goes on to identify five specific grounds upon which the SPLM/A’s witness evidence should not be given any weight.

375. First, the witness statements put forward by the SPLM/A refer to past events to which the witnesses cannot personally testify.⁷⁵⁶ This constitutes hearsay evidence and should be excluded.⁷⁵⁷

⁷⁴⁹ See SPLM/A Counter-Memorial, at paras. 1373-1374.

⁷⁵⁰ GoS Counter-Memorial, para. 327.

⁷⁵¹ GoS Counter-Memorial, para. 333.

⁷⁵² GoS Oral Pleadings, April 21, 2009, Transcr. 72/09-16. See also GoS Counter-Memorial, para. 331.

⁷⁵³ GoS Oral Pleadings, April 21, 2009, Transcr. 73/01-02.

⁷⁵⁴ GoS Counter-Memorial, paras. 328-329.

⁷⁵⁵ See GoS Oral Pleadings, April 21, 2009, Transcr. 75/09-77/06.

⁷⁵⁶ See GoS Counter-Memorial, paras. 48-53.

⁷⁵⁷ See GoS Counter-Memorial, para. 52.

376. Second, the GoS submits that the witness statements provided by the SPLM/A concern time periods which are not relevant to the year 1905.⁷⁵⁸ They refer to events that might have happened in the 1940s or later on.⁷⁵⁹ The GoS asserts that in previous boundary disputes in which the need arose to have recourse to oral tradition, “no weight was given to allegations regarding a different period than that relevant to the dispute.”⁷⁶⁰
377. Third, the GoS asserts that the SPLM/A witness statements are too vague to give any clear indication as to what territory was considered to be the Abyei area in 1905.⁷⁶¹
378. Fourth, the GoS submits that the SPLM/A has relied heavily on witness statements taken directly from persons interested in the outcome of the Abyei dispute.⁷⁶² The GoS warns that “any relationship between the witness and the party on behalf of which it testifies should be taken into account by a court or tribunal.”⁷⁶³
379. Finally, the GoS insists that the oral evidence presented is not corroborated by the contemporary documentary and cartographic record.⁷⁶⁴ Relying on the writings of Vansina, the GoS argues that oral tradition should be used “in conjunction with writings, archaeology, linguistic or even ethnographic evidence.”⁷⁶⁵
380. The GoS mentions, among other examples, the rest house at Tebeldiya (at 10°35'N), which six of the nine Ngok Dinka tribes describe as the actual border between the Ngok and the

⁷⁵⁸ GoS Counter-Memorial, paras. 54-56.

⁷⁵⁹ GoS Counter-Memorial, para. 54. *See* SPLM/A Memorial, Witness Statement of Arop Deng Kuol Arop, (SPLM/A Memorial, Witness Statements, Tab 9); Witness Statement of Mijok Bol Atem, para. 15 (SPLM/A Memorial, Witness Statements, Tab 23); Witness Statement of Ring Makuac Dhel Yak, para. 17 (SPLM/A Memorial, Witness Statements, Tab 11); Witness Statement of Mijak Kuot Kur, , paras. 13-17 (SPLM/A Memorial, Witness Statements, Tab 12); Witness Statement of Ajak Malual Beliu, para. 7 (SPLM/A Memorial, Witness Statements, Tab 13); Witness Statement of Jok Deng Kek, paras 13-15 (SPLM/A Memorial, Witness Statements, Tab 14); Witness Statement of Belbel Chol Akuei Deng, paras. 15-16 (SPLM/A Memorial, Witness Statements, Tab 15).

⁷⁶⁰ GoS Counter-Memorial, paras. 55-56; *See Island of Palmas* (1928) 4 UNRIAA 831 at 851 and 865.

⁷⁶¹ GoS Counter-Memorial, paras. 57-58.

⁷⁶² GoS Counter-Memorial, paras 63-65, 326.

⁷⁶³ GoS Counter-Memorial, para. 65, referring to, *inter alia*, the *Walfish Bay Case*, 11 UNRIAA, p. 302, cited in AMERASINGHE, C. F., EVIDENCE IN INTERNATIONAL LITIGATION (2005) p. 202 (SCM Annex 8); *See also Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 1986, para. 70.

⁷⁶⁴ GoS Counter-Memorial, paras. 60-62, referring, *inter alia*, to *United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports 1980, para. 13; *See also* GoS Counter-Memorial, paras. 37-38, 45-46, 357; *See also* GoS Oral Pleadings, April 21, 2009, 74/07-75/08.

⁷⁶⁵ GoS Counter-Memorial, para. 355, quoting VANSINA, J., ORAL TRADITION AS HISTORY (University of Wisconsin Press, Madison, 1985), pp. 159-160.

Misseriya.⁷⁶⁶ It points out that this proposition is in blatant contradiction with the relevant Condominium trek reports and scholarly writings.⁷⁶⁷

(ii) *SPLM/A Arguments*

381. The SPLM/A argues that, contrary to the GoS's position, oral tradition is considered a valuable source of information by historians, especially in oral or part-oral societies.⁷⁶⁸ In addition, courts and tribunals confer a "crucial role" to oral tradition.⁷⁶⁹ SPLM/A cites to the Supreme Court of Canada and the Inter-American Court of Human Rights⁷⁷⁰ to show that oral tradition of tribal peoples is admitted and relied upon by the courts, "and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents."⁷⁷¹
382. The SPLM/A goes on to address the GoS's five objections to its witness evidence.
383. The SPLM/A first denies that the Ngok witness statements have no value on the ground that they refer to events to which they cannot personally testify. Contrary to the GoS's assertion, hearsay evidence may be admitted in arbitration and tribal knowledge provides "the most reliable proof of the existence of property rights entitled to protection under a state's legal system."⁷⁷²
384. Second, the SPLM/A argues that the GoS's claim that the witness statements relate to time periods which have no bearing on the year 1905 is wrong as a matter of fact.⁷⁷³ The SPLM/A insists that it has presented statements by chiefs and elders who described the occupation of the region by "their fathers, grandfathers and great-grandfathers – before and

⁷⁶⁶ GoS Counter-Memorial, paras. 344-353 and refers to witness statements of tribesmen of the Alei, Abyior, Achaak, Anyiel, Bongo and Diil chiefdoms.

⁷⁶⁷ See GoS Counter-Memorial, para. 354 referring to the reports of Wilkinson, Mahon, Comyn, Willis, Hallam, Heinekey, Dupuis and Henderson and the writings of Cunnison, Santandrea, Sabah and Beswick. For other examples, see GoS Counter-Memorial, paras. 331-354.

⁷⁶⁸ SPLM/A Rejoinder, para. 643.

⁷⁶⁹ SPLM/A Rejoinder, para. 644.

⁷⁷⁰ SPLM/A Rejoinder, para. 651.

⁷⁷¹ SPLM/A Rejoinder, para. 644 quoting *Delgamuukw v. British Columbia* (1997) 3 S.C.R. 1010, ¶87 (Supreme Court of Canada) (1997), SPLM/A Exhibit-LE 40/7.

⁷⁷² SPLM/A Rejoinder, para. 658 quoting Anaya & Williams Jr., *The Protection of Indigenous People's Rights over Lands and Natural Resources Under the Inter-American Human Rights System* 14 HARV. HUM. RTS. J. 33, 47 (2001), SPLM/A Exhibit-LE 41/8.

⁷⁷³ SPLM/A Rejoinder, para. 670.

around 1905”⁷⁷⁴ on the basis of first hand accounts passed down through one or two generations.⁷⁷⁵

385. Third, the SPLM/A rejects the GoS’s argument that its witness evidence has no value because it is vague as to the specific territory to which it refers.⁷⁷⁶ In contrast to the GoS’s unreliable witness statements,⁷⁷⁷ the SPLM/A points out that the testimony provided by its witnesses is very detailed and descriptive⁷⁷⁸, as well as remarkably consistent.⁷⁷⁹ While they do not provide geographical coordinates, the Community Mapping Project achieves this degree of precision.⁷⁸⁰
386. Fourth, the GoS argument that the SPLM/A Ngok Dinka witnesses are interested parties and that this should be taken into account in assessing the probative value of their testimony, is unacceptable. While international arbitration does not prevent a party being a witness, it will be in any event for the Tribunal to determine the value of the evidence.⁷⁸¹
387. Fifth, the SPLM/A also denies the GoS allegation that oral evidence is deprived of its probative weight if it is contradicted by documentary evidence⁷⁸² and the SPLM/A points to a leading author’s comment that “[a]t times, oral tradition may prompt significant revisions to the written record that have falsely misconstrued a past occurrence.”⁷⁸³
388. More generally, the SPLM/A denies the GoS’s contention that any of the statements contained in the testimony have been shown to be untrue in light of contemporaneous evidence.⁷⁸⁴

⁷⁷⁴ SPLM/A Rejoinder, para. 671; *See* para. 672 for examples of witness statements that relate to the Ngok Dinka’s occupation of the Abyei area during the times of the witnesses’ fathers, grandfathers and great-grandfathers.

⁷⁷⁵ SPLM/A Rejoinder, para. 671.

⁷⁷⁶ SPLM/A Rejoinder, para. 685.

⁷⁷⁷ *See inter alia* SPLM/A Rejoinder, paras. 729-739.

⁷⁷⁸ SPLM/A Rejoinder, para. 687.

⁷⁷⁹ SPLM/A Rejoinder, para. 700.

⁷⁸⁰ SPLM/A Rejoinder, para. 689.

⁷⁸¹ SPLM/A Rejoinder, para. 703.

⁷⁸² SPLM/A Rejoinder, para. 675.

⁷⁸³ SPLM/A Rejoinder, para. 684 quoting Borrows, *Listening for Change: the Courts and Oral Tradition*, 39 OSGOODE HALL LAW JOURNAL 1, 19 (2001), SPLM/A-LE 41/10.

⁷⁸⁴ SPLM/A Rejoinder, para. 705.

389. The SPLM/A thus maintains, on the basis of the witness statements, that the Ngok were responsible for clearing the road from Abyei Town to Tebeldiya, the border with the Misseriya.⁷⁸⁵ Although these statements relate to events that occurred in the mid-20th century, the SPLM/A insists that “there is no reason to conclude that materially different circumstances existed at the beginning of the 20th century [...]”⁷⁸⁶
390. The SPLM/A agrees that evidence provided on the basis of oral tradition must be examined with care.⁷⁸⁷ However, it insists that oral history, which is very specific in this case,⁷⁸⁸ is the way in which the Ngok Dinka record their past, and must be respected as such.⁷⁸⁹

(e) Probative Value of the SPLM/A “Tribal Maps” and Community Map

(i) *GoS Arguments*

391. The GoS also questions the probative value of the SPLM/A’s “tribal maps,” the sources of which are unidentified.⁷⁹⁰ In particular, the area of each of the nine Ngok Dinka Chiefdoms shown on Maps 13-22 are in most cases “grossly distended in a northerly direction”⁷⁹¹ and utterly inconsistent with the tribal references gathered from all of the historical maps produced with the Parties’ memorials.⁷⁹²
392. The GoS also submits that the Community Mapping Expert Report should be given no weight. Most importantly, the study area did not include Abyei Town⁷⁹³, and did not go up to 10°35’N. In addition, the Mapping Team was made up of interested parties⁷⁹⁴ who hastily produced a map⁷⁹⁵ on the basis of leading questionnaires,⁷⁹⁶ without establishing how features located in 2009 correlated with their locations in 1905.⁷⁹⁷

⁷⁸⁵ SPLM/A Rejoinder, para. 517, footnote 645.

⁷⁸⁶ SPLM/A Rejoinder, para. 722.

⁷⁸⁷ SPLM/A Oral Pleadings, April 22, 2009, Transcr. 67/16-17.

⁷⁸⁸ SPLM/A Oral Pleadings, April 22, 2009, Transcr. 64/12-15.

⁷⁸⁹ SPLM/A Oral Pleadings, April 22, 2009, Transcr. 67/02-25.

⁷⁹⁰ See GoS Counter-Memorial, para. 374.

⁷⁹¹ See GoS Counter-Memorial, para. 377. See also GoS Oral Pleadings, April 21, 2009, Transcr. 119/04 *et seq.*

⁷⁹² See GoS Counter-Memorial, para. 377; Figure 20, p. 153; Figure 21, p. 154, and Figure 22, p. 155; GoS Maps 1-12 of GoS Counter-Memorial Map Atlas.

⁷⁹³ GoS Oral Pleadings, April 22, 2009, Transcr. 95/08-09. (Dr. Poole’s cross-examination).

⁷⁹⁴ GoS Rejoinder, Appendix II, The Community Mapping Expert Report, paras. 9-13.

⁷⁹⁵ *Id.* at paras. 14-16; See GoS Oral Pleadings, April 22, 2009, Transcr. 90/15-91/25 (Dr. Poole’s cross-examination).

(ii) *SPLM/A Arguments*

393. The SPLM/A maintains that the validity of its maps of the nine Ngok Dinka Chiefdoms remains unaffected by the GoS's purported criticism.⁷⁹⁸ The GoS's overlaid labels in Maps 20, 21 and 22 of its Counter-Memorial Map Atlas are based on the inaccurate coordinates of the historical maps, founded on limited and dry season observations, and do not align the tribal labels with the river system.⁷⁹⁹
394. The SPLM/A contends that community mapping is a recognized method of determining the historical location of people and tribes who do not have written records and has been accepted by the Supreme Court of Canada and the Inter-American Court of Human Rights.⁸⁰⁰ The SPLM/A emphasizes that, although the project was limited in scope due to time constraints and other obstacles, the Mapping Team "drew on the resources of some 200 Ngok Dinka to identify specific sites in the Study Area, [...] "tagging" each with a GPS coordinate."⁸⁰¹ One may criticize the method but it is a way "to harness modern technology with pre-modern knowledge of an area" in order to identify, in the absence of written records, where people live.⁸⁰²

⁷⁹⁶ GoS Rejoinder, Appendix II, The Community Mapping Expert Report, paras. 20-27.

⁷⁹⁷ *Id.* at paras. 28-29.

⁷⁹⁸ See SPLM/A Rejoinder, para. 608, *et seq.*

⁷⁹⁹ SPLM/A Rejoinder, para. 609.

⁸⁰⁰ See SPLM/A Oral Pleadings, April 22, 2009, Transcr. 72/23-73/08. See also SPLM/A Oral Pleadings, April 22, 2009, Transcr. 72/04-07.

⁸⁰¹ SPLM/A Counter-Memorial, at para. 1378. See also SPLM/A Counter-Memorial, at para. 1379.

⁸⁰² SPLM/A Oral Pleadings, April 22, 2009, Transcr. 73/03 *et seq.*

CHAPTER IV – ANALYSIS OF THE TRIBUNAL

A. THE TRIBUNAL’S TASK PURSUANT TO THE ARBITRATION AGREEMENT

1. The Two Stages of Review Under the Arbitration Agreement

395. At the outset, a few preliminary observations regarding the Tribunal’s own mandate are in order. The tasks and competence of the Tribunal are based on the Parties’ consent, as expressed in the Arbitration Agreement. The critical passage is Article 2, which, as will be recalled, defines the “Scope of Dispute” in the following manner:

The issues that shall be determined by the Tribunal are the following:

a. Whether or not the ABC [E]xperts had, on the basis of the agreement of the Parties as per the CPA, exceeded their mandate which is “to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905” as stated in the Abyei Protocol, and reiterated in the Abyei Appendix and the ABC Terms of Reference and Rules of Procedure.

b. If the Tribunal determines, pursuant to Sub-article (a) herein, that the ABC [E]xperts did not exceed their mandate, it shall make a declaration to that effect and issue an award for the full and immediate implementation of the ABC Report.

c. If the Tribunal determines, pursuant to Sub-article (a) herein, that the ABC [E]xperts exceeded their mandate, it shall make a declaration to that effect, and shall proceed to define (i.e. delimit) on map the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, based on the submissions of the Parties.

396. In addition, the preamble of the Arbitration Agreement explains, in its penultimate recital, that “the Parties differed over whether or not the ABC Experts exceeded their mandate as per the provisions of the CPA, the Abyei Protocol, the Abyei Appendix, and the ABC Terms of Reference and Rules of Procedure.” It is this dispute that the Parties have “agreed to refer ... to final and binding arbitration.”⁸⁰³ Given these provisions, the Tribunal’s initial function is to determine whether, in light of its *lex specialis* (Article 3 of the Arbitration Agreement, which, among others, refers to the CPA, the Abyei Protocol and the Abyei Appendix), the ABC Experts’ conduct and findings “exceeded their mandate.”

397. In accordance with Article 2 of the Arbitration Agreement, the Tribunal is to proceed in two distinct and contingent stages, comprising two distinct juridical tasks. The first enterprise under Article 2(a) is for the Tribunal to determine whether the ABC Experts exceeded their

⁸⁰³ Arbitration Agreement, preamble, last paragraph.

mandate. The second task, which is to be undertaken under Article 2(c) only if it determines “that the ABC Experts exceeded their mandate,” requires the Tribunal to reach its own findings on the specific question that had been submitted to the ABC. The contingent nature of Article 2(c) is somewhat obscured by the consolidated nature of these proceedings,⁸⁰⁴ such that the Parties have adduced evidence and presented arguments with respect to an Article 2(c) determination before the Tribunal had made its Article 2(a) determination. Nevertheless, the Tribunal is mindful of the need to maintain the separation between the distinct modes of inquiry called for with respect to Article 2(a) and Article 2(c). It will now turn, as it must, to an examination of the scope and limitations of its Article 2(a) mandate.

2. The Tribunal’s Task pursuant to Article 2(a) of the Arbitration Agreement is Limited

(a) The Sequence of Article 2 Prohibits a *de novo* Review of the ABC’s Findings under Article 2(a)

398. The contingent sequence and distinct inquiries required by Article 2’s partition of the Tribunal’s jurisdiction provide an important indication of the levels of scrutiny that the Parties intended the Tribunal to undertake with respect to subparagraphs (a) and (c) of Article 2. A *de novo* review of all relevant evidence is sought by the Parties only under Article 2(c), that is, in the event that the Tribunal has found that the ABC Experts exceeded their mandate. Conversely, it appears that the Parties did not expect or authorize the Tribunal to make any definitive substantive determination – for the purpose of its analysis under Article 2(a) of the Arbitration Agreement – as to the ABC Experts’ correctness of fact or law with respect to its delimitation of the Abyei Area in 1905.

399. Had the Parties, when drafting the Arbitration Agreement, inverted the sequence of Article 2, thereby charging the Tribunal with first determining the “correct” extension of the Abyei Area and necessarily confirming or correcting the ABC Experts’ decision as appropriate, the Tribunal may well have arrived at a different determination from that of the ABC Experts’ Report (not least because the Tribunal’s composition and fields of expertise are so different from those of the ABC Experts as to virtually ensure a different result). Yet the Parties did not invert the sequence. As Article 2 of the Arbitration Agreement stands, the

⁸⁰⁴ Typically, international courts and tribunals would “bifurcate” proceedings to isolate unrelated substantive points (such as liability and quantum). That option was precluded by the Arbitration Agreement.

Tribunal must conclude that the Parties contemplated the possibility that the Tribunal (or some of its Members) might incline to the view that one or more of the ABC Experts' findings were erroneous as a matter of law or fact, without however concluding that the ABC Experts had for that reason exceeded their mandate.

400. The sequence of Article 2 of the Arbitration Agreement therefore indicates that the extent of permissible "excess of mandate" analysis pursuant to Article 2(a) is limited: regardless of whether the Tribunal, in 2009 and with the benefit of the Parties' submissions (including factual evidence and expert opinion not submitted to the ABC in 2005), would have reached similar conclusions, the Tribunal must limit itself to considering whether the ABC Experts' definition of the Abyei Area in their 2005 Experts' Report can be understood as a reasonable, or at least a not unreasonable, discharge of their mandate. By contrast, the question of the correct location of the boundaries of the Abyei Area as the Tribunal sees it is outside the scope of permissible Article 2(a) review and will only be addressed should the Tribunal conclude that the ABC committed an excess of mandate.

(b) Legal Principles of Institutional Review Suggest that the "Correctness" of a Decision Is Beyond Review

401. The foregoing conclusion, which is based principally on the wording and sequence of Article 2 of the Arbitration Agreement, is confirmed by general principles of international law. In their discussions of "excesses of mandate," both Parties drew upon these general principles in analogizing and comparing the Tribunal's function with that of a court or tribunal reviewing a prior decision of a different and independent institution for *excès de pouvoir* (or excess of jurisdiction). Given the paucity of authority on what "excess of mandate" concretely represents in law, the Tribunal agrees that principles of review applicable in public international law and national legal systems, insofar as the latter's practices are commonly shared, may be relevant as "general principles of law and practices" to its Article 2(a) inquiry.⁸⁰⁵
402. National courts' process of judicial review in relation to administrative bodies (specifically, regulatory bodies imbued with quasi-judicial and rule-making powers) commonly involves an assessment of whether the original decision-maker exceeded its powers. In situations involving review of the findings of expert groups and specialized bodies, many jurisdictions

⁸⁰⁵ Arbitration Agreement, Article 3(1).

permit courts to defer to the expertise of those groups and bodies. In the United States of America, for example, the review of agency decision-making and rule-making is marked by a high degree of deference.⁸⁰⁶ the judiciary defers to the agency's presumed expertise, instead of conducting a *de novo* review.⁸⁰⁷ Such judicial restraint is also practiced in the United Kingdom, provided that an issue is within the particular expertise of the prior decision-maker.⁸⁰⁸ Certain continental European legal systems, including Germany, accord a more limited degree of deference to the original decision-maker, extending only to the decision-maker's appreciation of the facts and its choice among various permissible decision options.⁸⁰⁹ However, this more limited deference presumably results from the fact that in these jurisdictions, the review is conducted by specialized administrative courts which themselves have both substantive expertise and superior knowledge of the legal rules applicable to pertinent areas of activity. The Tribunal notes this national practice only to indicate the extent to which patterns of deference to the decisions of expert bodies are widespread and general.

403. In public international law, it is an established principle of arbitral and, more generally, institutional review that the original decision-maker's findings will be subject to limited review only. The relevant case law draws a clear distinction between an appeal on the merits – to determine whether the original decision was legally and factually “right or wrong” – and a review of whether the decision-maker that rendered a decision exceeded its powers. A reviewing body that is seized of the issue of putative excess of powers will not “pronounce on whether the [original] decision was right or wrong,” as this question is legally irrelevant within an excess of powers inquiry.⁸¹⁰

⁸⁰⁶ *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), 843-44 (if Congress has expressly given the agency authority to elucidate a statutory provision through regulations, then such legislative regulations are given controlling weight “unless ...arbitrary, capricious, or manifestly contrary to the statute.” If Congress' statute is silent or ambiguous with respect to the issue in question, then the court must simply ask whether the agency's interpretation is based on a “permissible construction of the statute.”)

⁸⁰⁷ *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944), noting that agencies formulate policy “based upon more specialized experience and broader investigation and information than is likely to come to a judge.”

⁸⁰⁸ *R v. Social Fund Inspector, ex p Ali* (1994) 6 ADMIN LR 205, 210E (Brooke, J). The English courts have been reluctant to interfere when Parliament has entrusted an expert body, whether the expert body be tribunals or civil servants, or a combination of civil servants and independent inspectors, with the task of fulfilling the intentions of Parliament in a specialist sphere.

⁸⁰⁹ *See Judgment of the Federal Supreme Court in Administrative Matters of May 28, 1965*, BVerwGE 21, 184.

⁸¹⁰ *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906*, Judgment, ICJ Reports 1960, p. 192, 214. Cited with approval in *Case concerning the Arbitral Award of July 31, 1989 (Guinea-Bissau v. Senegal)*, ICJ Reports 1991, p. 62, para. 25.

404. Legal authorities on arbitral review do not directly apply to the present proceedings, because (as will be discussed further *infra*) the ABC was not an adjudicatory body *strictu sensu*, such that it would be inapposite to transpose, without appropriate qualification, the legal principles governing excesses of jurisdiction of powers to the ABC. That said, the established case law regarding *excès de pouvoir* of arbitral tribunals, which was relied on by both Parties in their submissions, may *mutatis mutandis* inform the interpretation of “excess of mandate” pursuant to the Arbitration Agreement.
405. There is no dearth of international case law confirming that the remedy of annulment of arbitral awards is granted only under exceptional circumstances. Reviewing bodies have noted that only “weighty” or “exceptional circumstances” will justify a finding of invalidity and that the party seeking to impugn an arbitral award bears a “very great” burden of proof.⁸¹¹ In addition, reviewing bodies have limited their review to “*clear*” cases⁸¹² and have noted that the reviewing body must “not intrude into the legal and factual decision-making of the [original decision-making body].”⁸¹³ This body of case law suggests that the scope of review in international proceedings leading to the annulment of a prior decision is generally very limited.
406. It is clear that a reviewing body’s task cannot take the form of an appeal with respect to the *correctness* of the findings of the original decision-maker when the reviewing body’s methodology differs from that of the original decision-maker. Otherwise, the reviewing body would be prone to strike down the findings of the original decision-maker. The fact that the original decision-making body (the ABC Experts) and the reviewing body (this Tribunal) are each programmed to assess the facts using quite different methodologies (i.e. the methodology of science vis-à-vis the methodology of law) distinguishes these proceedings from proceedings in which the annulment of arbitral awards is sought – the classic field of application of the doctrine of *excès de pouvoir*. This unusual feature further underscores the inappropriateness of applying a standard of correctness in these proceedings.

⁸¹¹ See the compilation of case law in the SPLM/A Counter-Memorial, paras. 613-621.

⁸¹² See *Vivendi v. Argentina*, Decision on Annulment, July 3, 2002, Case No. ARB/97/3, paras. 64-65.

⁸¹³ *CDC Group plc v Republic of the Seychelles*, Decision on the Application by the Republic of the Seychelles for Annulment of the Award dated December 17, 2003, June 29, 2005, Case No. ARB/02/14, para. 70.

407. The Tribunal's task under the Arbitration Agreement is essentially a legal one. This is made clear in the "applicable law" clause of Article 3 of the Arbitration Agreement (*see* discussion *infra*), which requires the Tribunal to apply a variety of legal instruments as well as "general principles of law." The Tribunal's proceedings were to be conducted within the framework of the Permanent Court of Arbitration (PCA), using a set of Rules prepared for "Arbitrating Disputes Between Two Parties of Which Only One Is a State." While the Arbitration Agreement does not specify, in terms, that the arbitrators were to be international lawyers, it was agreed that only persons on the PCA's list of arbitrators or persons who had served as arbitrators in PCA proceedings would be eligible for nomination to the Tribunal. Moreover, in the appointment of the Presiding Arbitrator, Article 5(8) of the Arbitration Agreement provides that "he/she shall be a renowned lawyer of high professional qualifications, personal integrity and moral reputation." Consistent with these provisions, the Parties selected jurists and scholars of international law as arbitrators. The clear implication was that a Tribunal composed of international lawyers will adjudge, using legal standards, whether the ABC Experts exceeded their mandate and, if this is found to be the case, delimit "on map" the Abyei Area by applying the Parties' *lex specialis*.
408. Now plainly, this methodology is not, and was not meant to be, the same as that of the ABC Experts. Section 2.2 of the Abyei Appendix provided for the nomination of "five impartial experts knowledgeable in history, geography and any other relevant experience." No mention was made of lawyers or international lawyers. Section 4 of the Abyei Appendix provided, in relevant part, that "[i]n determining their findings, the Experts in the Commission shall consult the British Archives and other relevant sources on Sudan wherever they may be available, with a view to arriving at a decision that shall be based on scientific analysis and research" (emphasis added). The Experts' decision was intended to be guided by scientific, rather than legal, principles. As such, like this Tribunal, the ABC Experts were subjected to methodological constraints – only different ones. The ABC Experts were intended to apply the methodologies of their respective fields of expertise – particularly history and geography.
409. The difference in methodology between the ABC Experts and the Tribunal confirms that, in addressing the question in Article 2(a) of the Arbitration Agreement, this Tribunal cannot have been expected or authorized to determine whether the ABC Experts' findings were "correct." Had the Parties intended to have the correctness of the ABC Experts' findings reviewed, they would have presumably selected a panel of scientists with relevant

methodological expertise to review the ABC Experts' Report in the light of scientific principles. If this Tribunal were to determine the "correct" answer in addressing the question in Article 2(a) by application of the applicable law in Article 3 of the Arbitration Agreement, it would almost certainly reach a different conclusion from that of the ABC Experts, for it would be "retro-applying" a method different from that applied by the ABC. That would render the exercise under Article 2(a) the same as Article 2(c) and would fail to give meaning to an arrangement that the Parties had deliberately established.

(c) Conclusion

410. In all instances of institutional review, a delicate balance must be struck between the desire of one Party to decide all matters anew and the interest of the other Party in the finality of litigation. In the present case, the Tribunal has not been authorized to determine where that balance lies. The Parties themselves calibrated the scales for this question through Article 2 of the Arbitration Agreement. The two-stage sequence of Article 2 and the use of the terms "whether the ABC Experts exceeded their mandate" (rather than "whether the ABC Experts' decision was correct") are unequivocal. Thus, the Tribunal's task cannot credibly be interpreted as having required, from the outset, an analysis of the substantive correctness of the ABC Experts' conclusions.
411. Tellingly, *neither Party* has asked the Tribunal to assume a review function akin to a "court of appeals," a clear demonstration of their continued wish to circumscribe this Tribunal's jurisdiction. If the Tribunal were to engage at the outset in an omnibus re-opening of the ABC Experts' appreciation of evidence and their substantive conclusions, then the Tribunal would itself be committing an *excès de pouvoir*. As a creature of the Parties' consent, the Tribunal cannot and must not allow itself to stray down this path. Indeed, the Parties' agreement that this Award be final and binding is explicitly presaged on the Tribunal's "determining the issues of the dispute as stated in Article 2 of this Agreement."⁸¹⁴ In fealty to the Parties' limited allocation of authority, the Tribunal must adhere to the strict limits and sequence of Article 2.

⁸¹⁴ Under Article 9(2) of the Arbitration Agreement, "[t]he Parties agree that the arbitration award delimiting the "Abyei Area" through determining the issues of the dispute as stated in Article 2 of this Agreement shall be final and binding."

3. The Scope of the Tribunal's Authority under Article 2 to Declare an Excess of Mandate Respecting Certain Parts of the ABC Experts' Report, while Retaining the ABC Experts' Core Conclusions

412. One further clarification of the scope and limits of the Tribunal's mandate under Article 2 of the Arbitration Agreement is in order. Because the ABC Experts' Report is a substantial document in itself, being composed of over 250 pages (including a number of substantive annexes) with a number of distinct substantive conclusions, the Tribunal must consider whether Article 2 requires it, if it were to find a discrete excess of mandate in the ABC Experts' Report, to set aside the entire Report, including those findings and conclusions that were within the ABC Experts' mandate, or, in such a case, whether the Arbitration Agreement empowers it to annul only the excessive portions of the ABC Experts' Report without annulling those discrete parts of the Report which did not exceed the mandate. (For convenience, the Tribunal will refer to this latter possibility as "**partial nullity**" or "**severability**").

(a) The Arbitration Agreement, Properly Interpreted, Permits Partial Nullity Under Appropriate Circumstances

413. In its Memorial, the GoS states that "if the ABC Experts exceeded their mandate *in any respect*," the Report must be "set aside entirely and the task of determining the boundaries ... becomes one for the Tribunal."⁸¹⁵ In contrast, the SPLM/A would have the Tribunal annul those parts of the award which are in excess of mandate but "to leave the remainder of the [ABC Experts'] Report intact."⁸¹⁶ It submits that the nullified parts could be "disregarded as void *ab initio* and the remainder of the [ABC Experts' Report] treated as valid and within the ABC Experts' mandate."⁸¹⁷

414. These arguments rest on two divergent approaches to the interpretation of the Arbitration Agreement. One view of Article 2 would find dispositive the phrase "whether or not" in Article 2(a) and would highlight the wording of Articles 2(b) and 2(c) to conclude that the Tribunal can only provide a binary answer to its Article 2(a) inquiry (i.e., if "no" to whether there was an excess of mandate, then Article 2(b); if "yes," then Article 2(c)). In contrast, a teleological view of the Arbitration Agreement would affirm the Tribunal's authority to

⁸¹⁵ GoS Memorial, para. 95 (emphasis in original).

⁸¹⁶ SPLM/A Counter-Memorial, para. 661.

⁸¹⁷ *Id.*

determine, on an issue by issue basis, whether the ABC Experts have exceeded their mandate under Article 2(a), and then to apply Articles 2(b) and 2(c) to each instance accordingly. This teleological interpretation would lead to the severance of those parts of the decision which were in excess of the mandate while retaining those parts found to be within the ABC Experts' mandate.

415. The Tribunal believes that the teleological interpretation allows for the proper fulfillment of its task in that it allows for partial severance of discrete findings found to be in excess of mandate, insofar as the most significant findings of the ABC Experts are found to be within the mandate. Unlike a finding of fraudulent conduct which would taint an entire decision, it would be contrary to the object and purpose of the Arbitration Agreement itself (read as a whole) if a discrete excess of mandate on a particular issue were to result in setting aside all those parts of the ABC Experts' decision which were within their mandate. This would involve the Tribunal's reconsideration of all of the evidence pertaining to the borders of the Abyei Area and the displacement of the Experts' prescribed methodology, which had been reasonably and plausibly applied with the different methodology and, most likely, different conclusions of the Tribunal. The sequence of Article 2 makes clear that the ABC Experts – not the Tribunal – were the preferred “arbiters of fact” as to the 1905 boundaries of the Abyei Area. The Tribunal is only secondarily entrusted with this task, if the original decision cannot stand due to an excess of mandate. Moreover, the Tribunal's skills relate more to the legal task involved in the discharge of Article 2(a) than to the task of Article 2(c), for which the skills of the Experts were specifically selected. It would be difficult to reconcile this preference for the ABC Experts' decision, built into the structure of the Arbitration Agreement, with an obligation to annul even those sections of the ABC Experts' Report that were discrete and were plausibly within their mandate.

(b) Relevant General Principles of Law and Practices Permit Partial Nullity Under Appropriate Circumstances

416. The “general principles of law and practices” that the Tribunal must apply to these proceedings pursuant to Article 3 of the Arbitration Agreement also require the annulment of only those parts of the ABC Experts' Report that are in excess of mandate without setting aside those discrete parts of the Report which were within the mandate. Partial annulment of a decision or award has long been recognized by international jurisprudence as within the authority of a court or arbitral tribunal seized with a review function. In *The Orinoco Steamship Company Case*, a PCA-administered arbitration, the arbitral tribunal was asked,

in a *compromis* framed in similar terms to that in the present dispute, to determine “whether the decision of Umpire Barge ... is not void, and whether it must be considered so conclusive as to preclude a re-examination of the case on its merits. If the [a]rbitral [t]ribunal decides that said decision must be considered final, the case will be considered ... as closed; but on the other hand, if the [a]rbitral [t]ribunal decides that said decision ... should not be considered as final, said [t]ribunal shall then hear, examine and determine the case and render its decision on the merits.”⁸¹⁸ The tribunal considered that:

following the principles of equity in accordance with law, when an arbitral award embraces several independent claims, and consequently several decisions, the nullity of one is without influence on any of the others, more especially when, as in the present case, the integrity and the good faith of the Arbitrator are not questioned; this being ground for pronouncing separately on each of the points at issue.⁸¹⁹

417. The principle of severability was judicially considered in the *Case Concerning the Arbitral Award of 31 July 1989* before the International Court of Justice (“ICJ”). The minority judges considered that the arbitral tribunal’s failure to demarcate the exclusive economic and fishery zones was an *excès de pouvoir infra petita*. Judge Weeramantry (dissenting) emphasized that “a duty lies upon the court making the declaration of nullity to keep to a minimum the scope of that nullity.”⁸²⁰ He recognized the existence of “cases, including boundary disputes, where different segments of the total matter in dispute can be decided as separate and discrete problems, the answers to which can stand independently of each other. In such cases the segments of the dispute that have been properly determined can maintain their integrity though the findings on other segments are assailed or do not exist.”⁸²¹ Severability was inappropriate on the facts of that case, as the issues were so intrinsically connected that it was clear the Parties had intended that the circumstances be determined in a “composite process.”⁸²² However, the principle enunciated was unchallenged.

418. Similarly, in *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, an ad hoc annulment committee, in interpreting Article 52 of the ICSID

⁸¹⁸ *The Orinoco Steamship Company Case* (United States/Venezuela), October 25, 1910, XI RIAA 227, 234.

⁸¹⁹ *Id.* at 238.

⁸²⁰ *Arbitral Award of July 31, 1989*, ICJ Reports 1991, p. 53, 167.

⁸²¹ *Id.* at 168.

⁸²² *Id.* at 169.

Convention,⁸²³ found that the extent to which an award can be annulled is a matter to be determined by the deciding body itself. The committee wrote:

Thus where a ground for annulment is established, it is for the *ad hoc* committee, and not the requesting party, to determine the extent of the annulment. In making this determination, the committee is not bound by the applicant's characterization of the request, whether in the original application or otherwise, as requiring either complete or partial annulment of the award. This is reflected in the difference in language between Articles 52(1) and 52(3), and it is further supported by the *travaux* of the ICSID Convention. Indeed, Claimants in the present case eventually accepted this view.⁸²⁴ (emphasis added)

419. The Vienna Convention on the Law of Treaties (the “**Vienna Convention**”), which provides for the severability of treaty provisions that comply with certain criteria, is indicative of a general international policy favoring the severance of offending portions of legal instruments from their non-offending portions. These criteria are:

If the ground solely relates to particular causes, it may be invoked with respect to those clauses where:

- (a) the said clauses are separable from the remainder of the treaty with regard to their application;
- (b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and
- (c) continued performance of the treaty would not be unjust.⁸²⁵

420. The same economic approach is found in investment and commercial arbitrations. The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides that recognition of an award may be refused where:

The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which

⁸²³ See Article 52 of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

⁸²⁴ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3 (2002), paras. 68-69.

⁸²⁵ Vienna Convention on the Law of Treaties, Article 44(3).

contains decisions on matters submitted to arbitration may be recognized and enforced.⁸²⁶ (emphasis added)

The 1961 European Convention on International Commercial Arbitration,⁸²⁷ the 1975 Inter-American Convention on International Commercial Arbitration,⁸²⁸ the 1985 UNCITRAL Model Law on International Commercial Arbitration,⁸²⁹ the 1966 European Convention providing a Uniform Law of Arbitration,⁸³⁰ and the 1987 Convention *Arabe d'Amman sur l'Arbitrage Commercial*,⁸³¹ to which Sudan is a party, contain provisions to similar effect.

421. The rationale for such an approach is clear. As summarized succinctly in the *travaux préparatoires* of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “**1958 New York Convention**”), there is a possibility that “the extraneous matter introduced by the arbitrator into the award might be of a very incidental nature. If the enforcing court was not authorized to sever that matter from the remainder of the award and was obliged to refuse enforcement altogether merely because a small detail fell outside the scope of the Arbitration Agreement, the applicant might suffer unjustified hardship.”⁸³² Thus, there is a presumption that bodies of review are both authorized and expected to sever “deficient” parts from “non-deficient” parts of a decision, provided that this exercise does not lead to the separation of “fundamentally interrelated elements.”⁸³³
422. The terms of the Arbitration Agreement (and, in particular, the stringent timeframe to which the Parties have subjected these proceedings) also coincide with the general principle of *economy* applied in appellate adjudicatory proceedings, in which a reviewing authority declines to disrupt the *reasonable* factual and legal findings of the initial decision-maker in

⁸²⁶ 1958 New York Convention, Article V(1)(c).

⁸²⁷ See Article IX(1)(c).

⁸²⁸ See Article 5(1)(c).

⁸²⁹ Revision 2006. See Model Law, Article 34(2)(iii).

⁸³⁰ See Uniform Law, Article 26; Explanatory Note to Article 26.

⁸³¹ See Article 34(4).

⁸³² UN ECOSOC, Conference on International Commercial Arbitration, Summary Record of the Seventeenth Meeting, E/CONF.26/SR.17 (June 3, 1958), p. 9.

⁸³³ UN ECOSOC, Report of the Committee on the Enforcement of International Arbitral Awards, E/2704, E/AC.42/4/Rev.1 (28 March 1955), p. 10.

order to promote efficiency in the conduct of adjudicatory proceedings.⁸³⁴ Delimiting an entirely new boundary is a complex task that cannot be vested upon the Tribunal lightly, especially in these proceedings, where the Parties have agreed that the Tribunal's first and potentially only mode of inquiry is Article 2(a)'s "excess of mandate" review. Accordingly, if and to the extent that the ABC did not exceed its mandate in substantial parts of its decision, it would not be proper for the Tribunal to reconsider the entire boundary of the Abyei Area *ab initio* because of a possible excess of mandate in a discrete part of the ABC Experts' Report.

423. Now it is entirely possible for parties to contract out of the applicability of the general principle of law allowing for severability and partial nullity. But given international law's general approach to this matter, such a limitation on the Tribunal's powers would have to be evidenced by a clear and unequivocal expression of intention of the Parties. That is certainly not the case here. Quite to the contrary. The Arbitration Agreement itself, and in particular, the framework of inquiry provided under Article 2, indicate that the Parties intended to allow for the possibility of a finding of partial excess of mandate.
424. For all these reasons, the Tribunal will comply with its duty under general principles of law to keep to a minimum the scope of nullity, subjecting only those parts of the ABC Experts' findings which are discrete and severable to an independent and separate analysis. In accordance with Judge Weeramantry's opinion (quoted above) that "boundary disputes, where different segments of the total matter in dispute can be decided as separate and distinct problems, the answers to which can stand independently of each other," if an excess of mandate is found to have occurred with respect to a particular finding or conclusion of the ABC Experts, "the segments of the dispute that have been properly determined can maintain their integrity though the findings on other segments are assailed

⁸³⁴ For a recent application of the principle of economy, see *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, ICJ Judgment, 18 November 2008, para. 89, where the ICJ held that "judicial economy" was "an element of the requirements of the sound administration of justice" and provided a justification for disregarding jurisdictional defects, if they could be easily cured by the subsequent action of the applicant or respondent. See also the use of the principle of economy to determine the order in which a court or tribunal considers the various issues before it: *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* ICJ Reports 2002, p. 3. paras 45-46; and Dissenting Opinion of Judge Morelli, *Case Concerning the Barcelona Traction, Light and Power Company Ltd (Belgium v. Spain)*, Preliminary Objections, ICJ Reports 1964, p.6, at p.97, cited with approval in Iran-US Claims Tribunal Case No. 823, Award No. 595-823-3 of 16 Nov. 1999, para. 37. See also the use of the principle of judicial economy in the jurisprudence of the WTO Appellate Body, where it stands for the proposition that the Appellate Body does not need to rule on every single claim made by complaining parties, but only on those required to settle the dispute in question: Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, 3 March 2005, para. 510.

or do not exist.” If the Tribunal should find that certain discrete and severable findings or conclusions of the ABC Experts are rendered in excess of mandate but which are not fundamentally related to other findings or conclusions, it will set aside only those conclusions, while confirming those parts of the ABC Experts’ Report which prove to have been within their mandate.

4. The Applicable Law Governing these Proceedings

425. Article 3 of the Arbitration Agreement prescribes the law and instruments that must be applied by the Tribunal in the exercise of its mandate:

1. The Tribunal shall apply and resolve the disputes before it in accordance with the provisions of the CPA, particularly the Abyei Protocol and the Abyei Appendix, the Interim National Constitution of the Republic of Sudan, 2005, and general principles of law and practices as the Tribunal may determine to be relevant.
2. This Agreement, which consolidates the Abyei Road Map signed on June 8th 2008 and the Memorandum of Understanding signed on June 21st 2008 by the Parties with the view of referring their dispute to arbitration, shall also be applied by the Tribunal as binding on the Parties.

426. In contrast with the ABC Experts (who were required to arrive at their decision “based on scientific analysis and research”), Article 3 makes clear that the Tribunal shall decide, by applying legal methods, whether the ABC Experts exceeded their mandate under Article 2(a) of the Arbitration Agreement and, if and to the extent that it finds that there were such excesses, the delimitation of the boundary of the Abyei Area under Article 2(c).

427. In addition to the provisions of the CPA (particularly the Abyei Protocol and the Abyei Appendix) and the Interim National Constitution, the Tribunal must also apply “general principles of law and practices” which it determines to be relevant. Neither the CPA nor the Arbitration Agreement is a treaty. They are, rather, agreements between the government of a sovereign state, on the one hand, and, on the other, a political party/movement, albeit one which those agreements recognize may – or may not – govern over a sovereign state in the near future. But, in addition to the reference to “general principles of law and practice,” there are a number of other indications that the Parties intended that international law play a crucial role in the resolution of this dispute.

428. First, the essential purpose of the ABC Experts’ delimitation exercise (and of the Tribunal’s should it have to proceed to an Article 2(c) inquiry) was to determine a boundary that could

potentially become an international boundary. If, during the 2011 referendum prescribed by the CPA, the residents of the Abyei Area were to choose to join Southern Sudan, and further, if the people of Southern Sudan were to elect to exercise their right to self-determination so as to become independent, the boundaries of the Abyei Area would form part of the northern boundary of a new, independent, separate, and sovereign State. Thus the Parties appreciated that the determination of the boundaries of the Abyei Area was, *in posse*, an international legal exercise.

429. Second, the Parties' chosen method and forum for settling the dispute also manifests their intention to have international law apply. The Parties opted for arbitration administered under the auspices of the PCA, an international dispute resolution organization, and in accordance with the PCA Rules.⁸³⁵ Moreover, the Parties insisted that the four party-appointed arbitrators be "current or former members of the PCA or members of tribunals for which the PCA acted as registry."⁸³⁶ Each of the Parties was entitled to designate two arbitrators and each designated well-known international lawyers and scholars.

⁸³⁵ Article 1 of the Arbitration Agreement provides:

Rules, Tribunal, Registry and Appointing Authority

1. The **Parties** agree to refer their dispute to final and binding arbitration under this Arbitration Agreement (Agreement) and the Permanent Court of Arbitration (PCA) Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State (PCA Rules), subject to such modifications as the **Parties** agreed herein or may agree in writing.
2. The **Parties** shall form an arbitration tribunal (**Tribunal**) to arbitrate their dispute in accordance with this Agreement and the PCA Rules; provided that the PCA Rules shall not apply when excluded or modified by this Agreement.
3. The **Parties** agree on the International Bureau of the (PCA) to act as the registry and provide administrative support in accordance with this Agreement and the PCA Rules.
4. The **Parties** designate the Secretary General of the PCA as the appointing authority to act in accordance with this Agreement and the PCA Rules. (emphasis in original)

⁸³⁶ Article 5 paragraphs (1) to (5) of the Arbitration Agreement provide:

1. The **Parties** agree that the **Tribunal** shall be composed of five arbitrators. Each **Party** shall appoint two arbitrators, and the four Party-appointed arbitrators shall appoint the fifth.
2. The **Parties** shall not designate as Party-appointed arbitrators persons other than current or former members of the PCA or members of tribunals for which the PCA acted as registry who shall be independent, impartial, highly qualified and experienced in similar disputes.
3. The Secretary General of the PCA shall provide the two **Parties**, within five days of depositing this Agreement with him, with a full list of members and arbitrators (PCA Arbitrators List) as stated in section 2 herein. The PCA Arbitrators List shall also include information on qualifications and experience.
4. Each **Party** shall appoint, within thirty days of receiving the PCA arbitrators list, two arbitrators from the list by written notice to the Secretary General of the PCA.

430. Third, and particularly important, there is a widely shared understanding that reference to “general principles of law” within the context of boundary disputes includes general principles of international law. This is especially true in the case of intra-State disputes, where municipal law does not typically make provision for such matters. The tribunal in the *Dubai-Sharjah Arbitration*, for example, held that “in a question concerning the boundaries between members of a Federal State, the applicable law must be Federal law, and, if such does not exist or is incomplete, then recourse must be made to international law.”⁸³⁷ It elaborated:

... it is scarcely surprising that the constitution of the United Arab Emirates contains no provisions that relate to the law applicable to territorial disputes between the member Emirates; this would be true of the constitutional documents of the majority of Federations. Such territorial disputes are almost always resolved by reference to international law, even though certain tribunals have made such reference by analogy and not directly.⁸³⁸

431. Notably, the *Dubai-Sharjah* tribunal relied upon Swiss Federal Court jurisprudence, which confirmed its practice of analogous application of international law in the relations between the Swiss Cantons in the 1980 *Nufenenpass* judgment:

Finally, [the Court] designates the principles of public international law as applicable in a subsidiary manner. According to the unanimous view in Swiss doctrine and jurisprudence, public international law comes into play in the relationships among Cantons when both federal law and inter-Cantonal contract and customary law are exhausted on a particular disputed issue. In this respect, however, one will appropriately speak of a merely analogous application of international law, not an original one.⁸³⁹

432. Fourth, not only did neither Party object to the use of international law but, in fact, both advocated its use and cited to it extensively in their written and oral pleadings.

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5. In the event that a **Party** fails to name one or both Party appointed arbitrators within the specified time, the Secretary General of the PCA shall make, within ten days, such appointment from the PCA arbitrators list. (emphasis in original)

⁸³⁷ *Dubai-Sharjah Border Arbitration*, October 19, 1981, 91 ILR 543, 586.

⁸³⁸ *Id.* at 586-87.

⁸³⁹ *Kanton Wallis v. Kanton Tessin*, Judgment of July 2, 1980, BGE 106 Ib 154 at 159-160, MN 29 (references omitted from English translation): "Schliesslich bezeichnet es die Grundsätze des Völkerrechts als subsidiär anwendbar (BGE 26 I 450; ferner 54 I 202 E. 3; vgl. auch 96 I 648 E. 4 c; BIRCHMEIER, a.a.O. S. 288). Nach unbestrittener Auffassung in der schweizerischen Lehre und Rechtsprechung kommt das Völkerrecht im interkantonalen Verhältnis somit zum Zug, wenn in der betreffenden Streitfrage sowohl das Bundesrecht als auch das interkantonale Vertrags- und Gewohnheitsrecht ausgeschöpft sind (ALEXANDER WEBER, *Die interkantonale Vereinbarung, eine Alternative zur Bundesgesetzgebung?*, Bern 1976, S. 54 f.; AUBERT, Band II, S. 588 N. 1637). Dabei kann allerdings nicht von einer originären, sondern nur von einer analogen Anwendung des Völkerrechts die Rede sein (vgl. VERDROSS/SIMMA, *Universelles Völkerrecht*, Berlin 1976, S. 474 mit Verweisen).

433. Finally, the Parties selected arbitrators with expertise and experience in public international law. The Parties have similarly appointed counsel expert in international law and dispute resolution.
434. But international law is only one part of the applicable law. The Tribunal is mindful of the entire *lex specialis* prescribed by the Parties and the interrelations between its component parts. Article 3(1) prescribes a functional hierarchy among the applicable sources of law that reflects the specific concerns of the Parties: the CPA (particularly those components of the CPA that directly bear upon Abyei within the North-South peace process) takes precedence in application, followed by the Interim National Constitution, followed by “general principles of law and practices.” It should also be emphasized that Article 3(2) explicitly calls for the Tribunal to apply the Arbitration Agreement, and Article 2 of the Arbitration Agreement plays a central role in clarifying the scope and limits of the Tribunal’s juridical inquiry.
435. The Tribunal is sensitive to the extent to which principles and practices of international law, insofar as they prove applicable, must be adapted to the specific context of this dispute. As the following sections will demonstrate, the special character of the ABC Experts and the specific object and purpose of the ABC’s constitutive instruments within the broader Sudan peace process, and a particular source’s place in the hierarchy of applicable law sources, will affect the role which legal principles and precedent from other areas of law are to play. Although it is permissible to apply relevant international law where appropriate, the Tribunal will be particularly attentive to the wording, context, object and purpose of the Abyei Protocol, the Abyei Appendix, the Interim National Constitution and the Arbitration Agreement.

B. INITIAL MATTERS: ALLEGED PROCEDURAL VIOLATIONS; WAIVER, ESTOPPEL, RES JUDICATA ISSUES

1. Alleged Procedural Violations by the ABC Experts

436. Before proceeding to the key aspects of the Tribunal’s analysis, a number of issues raised by the Parties may be dealt with in short order. The first of these relates to the alleged procedural violations which one of the Parties claims the ABC Experts committed.
437. The GoS argues that certain acts and omissions of the ABC Experts violated the procedures specified by the Parties in the Abyei Appendix, Terms of Reference, and Rules of

Procedure, to wit: (1) they allegedly took evidence from Ngok Dinka informants without procedural safeguards and without informing the GoS; (2) they allegedly unilaterally sought and relied on an e-mail from an official of the United States Government to establish their interpretation of the mandate; and (3) they allegedly failed to act through the ABC (*i.e.* the Commission as a whole) in reaching their decision and failed to seek a consensus before rendering their Report (collectively, the “**alleged acts and omissions**”).⁸⁴⁰ Emphasizing that the Parties specifically defined the issues to be addressed by the Tribunal with reference to the Abyei Appendix, Terms of Reference, and Rules of Procedure,⁸⁴¹ the GoS asserts that the Tribunal should interpret a violation of procedures specified in these instruments as an excess of mandate.

438. The SPLM/A rejects this view, contending that a dispute regarding an excess of mandate does not extend to procedural complaints and that, alternatively, a party seeking to invalidate an arbitral award on procedural grounds must demonstrate serious prejudice.
439. Having considered the Parties’ arguments, the Tribunal finds, as explained below, that the alleged acts and omissions do not individually or collectively fall within the scope of “excess of mandate” review under Article 2(a) of the Arbitration Agreement, which does not permit the review of alleged procedural violations.
440. Article 2(a) restates the ABC Experts’ mandate in clear terms: “to define (*i.e.*, delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.” To aid in the “Functioning”⁸⁴² of their mandate, the ABC Experts were guided by procedural rules expressed in the Abyei Appendix, Terms of Reference, and Rules of Procedure. These rules are not intrinsic components of the mandate itself; rather, they provided for a

⁸⁴⁰ See discussion on “Procedural Excess of Mandate” in the summary of the Parties’ arguments, *supra* paras. 141 to 163.

⁸⁴¹ See Article 2(a) of the Arbitration Agreement at para. 395 *supra*.

⁸⁴² Notably, a clear distinction between “Mandate” and “Functioning” exists within the text of the Terms of Reference (an instrument drawn up and agreed upon by both Parties). The ABC’s “Mandate” as provided in the Terms of Reference is:

1.1 The Abyei area is defined in the Abyei Protocol in article 1.1.2 as “The area of the Nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.” The ABC shall confirm this definition.

1.2 The ABC shall demarcate the area, specified above and on land.

A subsequent section in the Terms of Reference, captioned “Functioning of the ABC,” defines the principal procedures to be followed by the ABC Experts. See Section 3 of the Terms of Reference, with the caption “Functioning of the ABC.” Among others, the listed procedures pertain to public hearings, consulting third-party sources, and the preparation of the final report.

flexible⁸⁴³ process to aid in the implementation of the ABC's mandate. By its plain terms, Article 2(a)'s inquiry as to whether the ABC Experts had "exceeded their mandate, *which is to define (i.e., and delimit) and demarcate*" the Abyei Area, concentrates the Tribunal's scope of review to decisions made by the ABC Experts *ultra petita*, i.e., purporting to decide matters outside the scope of the dispute submitted by the Parties. That is evident from the Parties' use of the words "*exceeded* their mandate," which referred to situations where the ABC Experts might have gone beyond the scope of the *substantive* issues submitted to them.

441. Thus, Article 2(a) does not recognize putative violations of procedural rights within the concept of "excess of mandate." Nor does Article 2(a) refer more generally to concepts of nullity or invalidity of arbitral awards, or incorporate the well-known grounds for invalidity or nullity based on procedural or due process violations included in instruments such as the 1958 New York Convention, the ICSID Convention, or the International Law Commission's ("ILC") Draft Convention on Arbitral Procedure/ILC Model Rules on Arbitral Procedure 1958. Any of these approaches could have been adopted, but none of these were. There is no basis for expanding this single ground for invalidity to include other grounds that were not specified.
442. As the alleged acts and omissions fall outside the category of permissible review under Article 2(a) of the Arbitration Agreement, the Tribunal need not proceed further on this line of inquiry.
443. The Tribunal further emphasizes that for a majority of its members, even assuming *arguendo* that the alleged acts and omissions occurred and were departures from rigidly-enforceable procedural rules, such improprieties did not amount to an excess of mandate, not having individually or collectively resulted in a violation of the fundamental rights of either Party. A procedural irregularity alone cannot invalidate a decision; a *significant injustice* must have also have occurred as a result of the irregularity.⁸⁴⁴ For the majority,

⁸⁴³ See Terms of Reference, Sections 3.3 and 3.4; Rules of Procedure, Sections 2, 4, 7, 8, 10, and 11. See further *infra* at paras. 468.

⁸⁴⁴ See SPLM/A Counter Memorial, p. 76, para. 298, citing J. LEW, L. MISTELIS & S. KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* ¶25-37 (2003) ("**The prevailing view is that a procedural irregularity or defect alone will not invalidate an award. The test is that of a significant injustice so that the tribunal would have decided otherwise had the tribunal not made a mistake.**"); C. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* Art. 52 ¶230 (2001) ("In order to be serious, the departure must be more than minimal. It must be substantial. In addition, this departure must have had a material effect on the affected party. It must have deprived that party of the benefit of the rule in question. ... if it is clear from the circumstances that the

this “prejudice” requirement has not been met, as the GoS has not demonstrated that any of the alleged procedural violations would have affected the decision outcome. Thus, the GoS’s submissions on this point cannot be sustained, not having met the “significant injustice” standard.

2. Waiver, Estoppel, and Res Judicata Arguments

444. The Tribunal also considers it convenient to discuss, at this early stage, two specific objections which the SPLM/A raised in connection with the Tribunal’s ability to review the ABC Experts’ Report.

(a) Waiver/Estoppel

445. The SPLM/A argues that the GoS effectively waived its objections to the ABC Experts’ Report because it agreed, as provided in the ABC’s constitutive instruments, that the Report would be “final and binding.”⁸⁴⁵ The GoS counters that the entire point of these proceedings is to allow the Tribunal to determine whether or not the ABC Experts committed an excess of mandate; hence, in the GoS’s view, the Arbitration Agreement precludes the SPLM/A from raising this waiver argument.

446. The claim of a waiver of the GoS’s right to seek a review of the ABC Experts’ Report is hardly consonant with the GoS’s subsequent recourse to this arbitration, to which the SPLM/A has also consented. Moreover, from the initial presentation of the ABC Experts’ Report, the GoS has been clear in expressing its disagreement with the ABC Experts, and no evidence of waiver can be found or implied by the course of its conduct.

447. Insofar as there is any ground for a claim of estoppel (which is doubtful), the Tribunal would agree with the GoS that the SPLM/A, as a party to the Arbitration Agreement and, in particular, its Article 2, is estopped from objecting to the Tribunal’s review of the ABC

party had not intended to exercise the right [said to be breached], **there would be no material effect and the departure would not be “serious”** under this analysis.”); D. SUTTON, J. GILL & M. GEARING (EDS.), *RUSSELL ON ARBITRATION* ¶8.106 (2007) (“If ... correcting or avoiding the serious irregularity would make **no difference to the outcome**, substantial injustice will not be shown.”); R. MERKIN, *ARBITRATION LAW* ¶20.8 (update 2008) (“there is substantial injustice if it can be shown that the irregularity in the procedure caused the arbitrators **to reach a conclusion which, but for the irregularity, they might not have reached ...**”).

⁸⁴⁵ Section 5 of the Abyei Appendix, text at *supra* note 107.

Experts' Report. As provided in the Arbitration Agreement, the scope of the dispute submitted to arbitration is covered by Article 2.⁸⁴⁶

448. The language of Article 2 makes clear that both the GoS and the SPLM/A have submitted to the Tribunal the question of whether or not the ABC Experts had exceeded their mandate. To the extent that the Tribunal finds that this is not the case, the Tribunal will make a declaration that no excess of mandate was committed. To the extent that the Tribunal does find that an excess of mandate occurred, it will proceed to the delimitation of the Abyei Area. The mandate of the Tribunal, as agreed by both Parties in the Arbitration Agreement, necessarily requires a review and (if necessary) an annulment and revision of parts of the ABC Experts' decision. This thus estops the SPLM/A from arguing that the ABC Experts' Report was final and binding. Indeed, by agreeing to Article 2 of the Arbitration Agreement, the SPLM/A has specifically accepted the authority of the Tribunal to review the Report, and if necessary, to declare an excess of mandate and proceed with a revision of the findings of the ABC Experts.

(b) Res Judicata

449. The SPLM/A further contends that the ABC Experts' Report enjoys *res judicata* status and hence, cannot be impugned by the GoS. It asserts that inasmuch as the ABC conducted itself in the manner of an adjudicative body and rendered an adjudicative decision, the Report's findings are *res judicata* for both Parties. The GoS disagrees, arguing that by agreeing to the Arbitration Agreement, the Parties understood that there was still the possibility that the border was not definitely settled, and that issue is to be finally determined by the Tribunal.

450. The Tribunal sees no need to enter into an extended discourse on whether, as a matter of legal theory, the ABC Experts' Report is of such a juridical nature that *res judicata* can attach to it. The critical question is whether the fact that the Parties agreed to the finality of the Report in 2005 precluded them from consenting to submit questions about it to another Tribunal. Whatever the status of the ABC Experts' Report, the Arbitration Agreement concluded by the Parties in 2008 had the effect of reopening questions that had been accepted as "final and binding," thus novating the issues for decision in accordance with the contingencies in Article 2.

⁸⁴⁶ See text at para. 395 *supra*.

451. When both Parties consented to this arbitration, that consent extended to all the matters provided under Article 2 of the Arbitration Agreement, and had the effect of re-opening the ABC Experts' Report to "excess of mandate" review under Article 2(a) and a potential new delimitation exercise under Article 2(c).

C. CHARACTERIZATION OF THE ABC

452. Through the Arbitration Agreement, the Parties have asked that the Tribunal determine whether another body (the ABC Experts) exceeded its mandate. As the ABC is quite singular in character, there is no neatly established standard against which to assess the ABC Experts' conduct. Instead, the ABC's nature must be ascertained from its constitutive instruments, its composition, the conduct of the Parties, and the function to be performed by the ABC in the larger peace process. These factors will form the basis for ascertaining the normative framework and proper conduct of the ABC Experts in fulfillment of their mandate.
453. In international law, the spectrum of entities designed to engage in dispute settlement varies widely in terms of institutional permanence, composition, and the procedural regimes according to which these entities operate. Some, such as the ICJ, are composed of legal professionals and have a highly articulated procedural regime. At the other end of the spectrum, entities (often established on an *ad hoc* basis) include non-lawyers and follow very informal procedures, which may not be fully articulated in writing. What is procedurally permissible in some of the decision entities is prohibited in others. Thus, for example, mediators are expected to meet each of the disputing parties separately and to respect, in full confidence, what one party may say, while an arbitral or judicial body would be prohibited from entertaining such *ex parte* communications. International law is creative and innovative in these matters and may sometimes graft some of these procedures onto others in combinations that may appear anomalous to those unfamiliar with international law. For example, in the *Taba* arbitration (discussed in further detail below), three of the five arbitrators were also to function as mediators and to seek a compromise settlement while serving as arbitrators.
454. It is clear from its constitutive instruments that the ABC was designed by the GoS and the SPLM/A, along with others who participated in the process of conceiving and establishing it, to make a specified decision according to criteria specified in the texts. Although the Parties committed themselves to accept the Report as "final and binding," a formulation

often found in arbitration agreements, the ABC was plainly not an “arbitration tribunal” and certainly not an international arbitration tribunal. None of the constitutive texts referred to it in those terms. Yet, along with the criteria for making a final and binding decision, the ABC also had a quasi-mediatory role, for its expert members were authorized to try to seek a consensus between the disputing parties in parallel; mediators, as noted above, operate according to procedures very different from those of arbitrators.

455. Taking account of the ABC’s constitutive instruments as well as contextual factors, a majority of the members of the Tribunal has no difficulty to conclude that the ABC Experts’ essential function was to reach a final decision with regard to the boundaries of the Abyei Area, even in the face of scarce factual evidence. In ascertaining the nature of the ABC, one of the Tribunal’s members, Professor Hafner, did not share the view of the other members, preferring to see the ABC as a fact-finding body with a more limited nature (his views are explained in some detail *infra*). Nevertheless, these different views on this matter do not affect the substance of the Tribunal’s conclusions.

1. The Non-uniform Nature of Boundary Commissions

456. The mere fact that the ABC was termed a “boundary commission” does not by itself clarify the scope and nature of the ABC’s mandate. Historically, many bodies, with many different titles, have been endowed with the specific task of delineating and/or demarcating boundaries. The role and mandate of such bodies differ as a function of the parties’ agreement on what each particular “boundary commission,” “boundary committee,” “mixed commission,” *etc.* was designed to do.

457. Thus, the *Ethiopia-Eritrea Boundary Commission*, though charged with delimitation and demarcation, was clearly in the nature of an international arbitral tribunal; it was composed of international lawyers and jurists and its mandate, functions, and procedures meticulously followed those of a formal arbitral proceeding.⁸⁴⁷

458. By contrast, a chamber of the ICJ in the *Frontier Dispute, Burkina Faso v. Mali*⁸⁴⁸ constituted a commission of three experts for the specific purpose of demarcating the

⁸⁴⁷ See *Decision Regarding Delimitation of the Border between The State of Eritrea and The Federal Democratic Republic of Ethiopia*; 41 ILM 1057 (2002).

⁸⁴⁸ See *Frontier Dispute, Burkina Faso v. Mali*, Nomination of Experts, Order of April 9, 1987 ICJ Reports 1985, p. 7.

boundary delimited by the ICJ chamber itself; the commission did not undertake any adjudicatory or arbitral functions.

459. Uniquely, in the *Taba Arbitration*⁸⁴⁹ (referred to above), before the tribunal constituted to determine the boundary dispute rendered a decision, some of the arbitrators were required to “explore the possibilities of a settlement of a dispute,” and the “boundary commission” thus undertook a parallel conciliation function.
460. The Cameroon-Nigeria Mixed Commission, constituted to implement the ICJ ruling in *Land and Maritime Boundary between Cameroon and Nigeria (Equatorial Guinea intervening)*⁸⁵⁰ had as part of its mandate (in addition to demarcating the land boundary) the development of projects to promote joint economic ventures, troop withdrawal from relevant areas along the land boundary, and the reactivation of the Lake Chad Basin Commission.⁸⁵¹
461. Finally, despite its name, the Iraq-Kuwait Boundary Demarcation Commission arguably performed delimitation functions as well.⁸⁵²
462. These examples demonstrate that the term “boundary commission” has encompassed bodies with a wide spectrum of functions, their mandates, with varying degrees of formality, ranging from pure fact-finding to full adjudication (and many with facets of both). Like other boundary commissions, the ABC is best considered a singular entity whose nature is to be derived from its own, specific features.

2. The ABC’s Singular Characteristics

(a) The Positions of the Parties

463. While both Parties have characterized the ABC as a *sui generis* body,⁸⁵³ each Party has sought to emphasize different aspects of its *genus*.

⁸⁴⁹ See Egypt–Israel Arbitration Tribunal: *Award in Boundary Dispute Concerning the Taba Area*, 27 ILM 1421 (1988).

⁸⁵⁰ *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment ICJ Reports (2002), p. 203.

⁸⁵¹ See Meeting between the Secretary-General and President Biya and President Obasanjo on the October 10, 2002 ruling of the ICJ, Geneva, November 15, 2002, available at <http://www.un.org/unowa/cnmc/preleas/sgstmts.htm#3>.

⁸⁵² See Letter From the Secretary-General Transmitting to the Security Council the Final Report on the Demarcation of the International Boundary Between Iraq and Kuwait, 32 ILM 1425 (1993).

464. The GoS agrees that “the ABC was composed in an unusual manner, was governed by special rules of procedure, and was supposed to base its decision on factual findings precisely described by its constitutive instruments.”⁸⁵⁴ However, in the GoS’s view, the outcome of the ABC’s work was similar to that of an arbitral award, and the decision given by the ABC could therefore be challenged on the same grounds as those which may be invoked against arbitral awards.⁸⁵⁵ For the GoS, the general principles concerning the validity and annulment of arbitral awards should therefore apply.⁸⁵⁶
465. The SPLM/A also believes that the ABC had adjudicatory characteristics.⁸⁵⁷ However, it submits that the ABC was a boundary commission and not an arbitral tribunal or court, and was therefore not expected to follow either a specific set of arbitration rules or some hybrid blend of “general” arbitral practice.⁸⁵⁸ It asserts that the only competence granted to the Tribunal is specified in the Arbitration Agreement,⁸⁵⁹ and the GoS cannot attempt to import particular rules from specialized legal regimes applicable to other institutional arbitral frameworks.⁸⁶⁰
466. Before analyzing the Parties’ arguments in detail, it is appropriate to first recall some of the ABC’s defining characteristics.

(b) The ABC’s Composition

467. The Abyei Appendix prescribes the ABC’s distinct composition,⁸⁶¹ including five GoS representatives, five SPLM/A representatives, and five independent experts collectively

⁸⁵³ See GoS Oral Pleadings, April 23, 2009, Transcr. 41/06 and SPLM/A Rejoinder, para. 163.

⁸⁵⁴ GoS Oral Pleadings, April 18, 2009, Transcr. 59/07-12.

⁸⁵⁵ GoS Counter-Memorial, para. 129.

⁸⁵⁶ GoS Oral Pleadings, April 18, 2009, Transcr. 59/07-19.

⁸⁵⁷ SPLM/A Counter-Memorial, para. 118.

⁸⁵⁸ SPLM/A Counter-Memorial, para. 125.

⁸⁵⁹ SPLM/A Counter-Memorial, para. 127.

⁸⁶⁰ SPLM/A Counter-Memorial, para. 115.

⁸⁶¹ Abyei Appendix, Section 2. See also para. 115 *supra*. The Tribunal takes note of the important fact that neither Party voiced any objection concerning the composition of the ABC Experts prior to the ABC Experts’ Report being presented to the Sudanese Presidency. Both Parties fully participated in the proceedings before the ABC Experts, and neither sought to impugn the credibility or competence of any of the individual [ABC Experts] nor the integrity of the proceedings at any time while the ABC Experts were conducting their work. Given the absence of any directed objection towards the ABC’s composition, it can be safely inferred that both Parties accepted the ABC Experts’ membership and believed that the ABC Experts collectively had the expertise required to carry out their mandate.

nominated by the United Kingdom, and the United States, and the IGAD (*i.e.*, the ABC Experts). The ABC Experts were individuals known and recognized in the fields of Sudanese and African history, geography, politics, public affairs, ethnography, and culture.⁸⁶²

(c) The ABC's Procedural Framework

468. The skill set of the Experts appointed to the ABC is also an important indicator of the procedural expectations of the Parties. Had international lawyers been appointed, the absence of any reference to institutional arbitration rules would not necessarily have imported a desire to give the ABC broad procedural freedom; international jurists could be expected to carry with them a model of international legal procedures, for in *ossibus inhaerent*. But the Parties deliberately selected a group of historical, geographical, ethnographical and cultural experts along with a professor of African land law. Those experts were, moreover, to apply the procedures of "scientific analysis and research." There was no reference to the application of international law, whether substantive or procedural.
469. Unlike traditional judicial or arbitral proceedings, the ABC's procedures were markedly informal ("informal yet businesslike"),⁸⁶³ the proceedings were not conducted in a confrontational fashion, and an atmosphere of cooperation was sought.⁸⁶⁴
470. The ABC's constitutive instruments imposed only a few mandatory procedural obligations on the ABC Experts. In particular, these were the constitution of a tribunal of experts with

⁸⁶² The ABC Experts were: (1) Mr. Donald Petterson, the former U.S. Ambassador to Sudan from 1992 to 1995, with decades of experience working for the U.S. Foreign Service in Sudan and other countries in Africa; (2) Professor Douglas Johnson, a professor of History at Oxford University who has some 40 years of research experience on Sudan; (3) Professor Godfrey Muriuki, a pre-eminent African historian and professor of African History at the University of Nairobi; (4) Professor Kassahun Berhanu, one of Africa's leading political scientists and a professor of Political Science at the Addis Ababa University; and (5) Professor Shadrack Gutto, who has published widely on "subjects of regional and international, legal and political economy" and has been, as of 2008, Professor and Chair of African Renaissance Studies and Directors of the postgraduate Centre for African Renaissance Studies at the University of South Africa. *See* SPLM/A Memorial, paras. 596-601.

⁸⁶³ *See* Rules of Procedure, Section 2.

⁸⁶⁴ *See e.g.* Section 8 of the Rules of Procedure which provides:

At each meeting with the public, the Chairman will explain the purpose of the Commission noting that the said purpose is limited to defining and demarcating the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905. The Commission will, of course, pay deference to the members of the public and not try to sharply limit the topics brought up by the public.

See also Section 3 of the Abyei Appendix which provides:

The ABC shall listen to representatives of the people of Abyei Area and the neighbours, and shall also listen to the presentations of the two Parties.

specified expertise;⁸⁶⁵ a time limit for submission of the ABC's final report;⁸⁶⁶ presentations by the Parties of their respective positions;⁸⁶⁷ hearing representatives of the peoples of the Abyei Area;⁸⁶⁸ and consultation of the British Archives and other relevant sources wherever available.⁸⁶⁹ The ABC Experts themselves were to and did prepare the Rules of Procedure, which set out a limited number of additional, more specific procedural provisions, principally of a logistical nature.⁸⁷⁰

471. None of the foregoing provisions of the Parties' agreements or the Rules of Procedure imposed prohibitions or limitations on the ABC Experts' procedural, investigatory, or fact-finding actions. Although the constitutive instruments set forth a variety of provisions to grant the ABC Experts affirmative access to different types of information – people, sites, documents, archives – nothing in any of the instruments forbade the ABC Experts from taking further or additional actions insofar as they were, in their reasonable view, necessary for the fulfillment of their tasks. The ABC Experts were not restricted to evaluating the evidence offered by the Parties; they were explicitly authorized to investigate the matters they thought relevant in determining the boundary⁸⁷¹ and, without the necessary participation of the entire ABC,⁸⁷² to draft the final report⁸⁷³ and to present it to the Sudanese Presidency.⁸⁷⁴
472. While many of the ABC's defining characteristics are markedly different from most arbitral tribunals or adjudicatory bodies, certain other aspects of the ABC proceedings were akin to those associated with adjudicatory bodies. The constitutive instruments of the ABC

⁸⁶⁵ See Abyei Appendix, Section 2.

⁸⁶⁶ See Abyei Appendix, Section 5.

⁸⁶⁷ See Abyei Appendix, Section 3 and Terms of Reference, Section 3.1.

⁸⁶⁸ See Abyei Appendix, Section 3 and Terms of Reference, Section 3.2.

⁸⁶⁹ See Abyei Appendix, Section 4 and Terms of Reference, Section 3.4.

⁸⁷⁰ Abyei Appendix, Section 4. See also the "Program of Work" in the Terms of Reference.

⁸⁷¹ Section 3.4 of the Terms of Reference provides:

The [ABC Experts] shall consult the British archives and other relevant sources on the Sudan wherever they may be available, with a view to arriving at a decision that shall be based on research and scientific analysis.

⁸⁷² Section 4 of the Abyei Appendix, text *supra* at note 131.

⁸⁷³ Section 5 of the Abyei Appendix, text *supra* at note 107. See also the "Program of Work" in the Terms of Reference.

⁸⁷⁴ The "Program of Work" in the Terms of Reference provides that "the [ABC Experts] present in the presence of the whole membership of the ABC their final report to the Presidency" on May 29, 2005.

incorporated a number of due process-related principles such as equality of treatment,⁸⁷⁵ contradiction,⁸⁷⁶ and neutrality/impartiality⁸⁷⁷ of the ABC Experts in both their fact-finding and decision-making functions.

(d) The ABC's Function within the Sudanese Peace Process

473. Finally, the ABC's function cannot be dissociated from the Sudanese peace process as a whole. Pursuant to the Comprehensive Peace Agreement, as implemented through the specific terms of the Abyei Protocol and the Abyei Appendix, the ABC was created with the specific purpose of establishing a necessary "missing link" in the framework of the CPA. While the CPA prescribed numerous specific steps towards peace, including guarantees of the right to self-determination for the people of South Sudan, the Parties were unable to reach agreement on the precise location of the border between the north and the south of the country in the Abyei Area. In the absence of such agreement, the Parties tasked the ABC to determine the geographic boundaries of the Abyei Area.
474. The ABC's decision was a necessary step within the sequence of the implementation of the CPA. As provided in the Abyei Protocol, it was only after the ABC Experts had come to a decision as to the definition and demarcation of the Abyei Area that the Presidency of Sudan could "take necessary action to put the special administrative status of Abyei Area

⁸⁷⁵ See Section 3 of the Abyei Appendix, text *supra* at note 864. Likewise, Section 4 of the Rules of Procedure provides:

Beginning at 9.00 a.m. 12th April, the parties, in the order they agree upon will make their presentations. After each presentation the [ABC Experts] will ask questions or make comments as they deem appropriate. Subsequently, a general discussion can take place.

Section 10 of the Rules of Procedure also states:

In addition to talking with the public, the Commission shall visit sites in the field based on the recommendation of the two sides and any other information that becomes available to the Commission.

⁸⁷⁶ This is apparent in Section 3.5 of the Terms of Reference which state:

The ABC shall thereafter reconvene in Nairobi to listen to the final presentations of the two parties, examine and evaluate evidence received[,] and prepare their final report that shall be presented to the Presidency in Khartoum[.]

Similarly, Section 13 of the Rules of Procedure provides:

[T]he [ABC Experts] will examine and evaluate all the material they have gathered and will prepare the final report.

⁸⁷⁷ As opposed to the other members of the ABC, who were representatives of either the GoS and the SPLM/A and were necessarily partisan, the ABC Experts were "impartial experts knowledgeable in history, geography and other relevant expertise" appointed by the United States, the United Kingdom and the IGAD. See Section 2 of the Abyei Appendix.

into immediate effect.”⁸⁷⁸ No alternative method for putting the special administrative status of the Abyei Area into effect was agreed upon.

3. Fact-Finding Powers and the Decision-Making Powers

475. In the Tribunal’s view, the ABC’s role is best assessed in relation to its two essential features: the ABC’s fact-finding powers and the ABC’s powers to reach a final and binding decision.

(a) The ABC’s Function Went Beyond That of Historical Fact-Finding Bodies

476. A considerable part of the ABC’s mandate was undoubtedly to determine facts. Bodies mandated to ascertain facts are common; such “fact-finding commissions” establish particular facts that are unclear, unknown, or disputed. Examples of such fact-finding commissions are the “International Commissions of Inquiry” created under Title III of the 1907 Convention for the Pacific Settlement of International Disputes (the “1907 Hague Convention”)⁸⁷⁹ and the PCA Optional Rules for Fact-Finding Commissions of Inquiry (the “Optional Rules”).⁸⁸⁰ Commissions of Inquiry constituted under the auspices of the PCA include those relating to *Loss of the Dutch Steamer Tubantia*⁸⁸¹ and *The Red Crusader* (1961).⁸⁸² The Commissions in these cases were mandated to ascertain particular facts and did not adjudicate, arbitrate, or make any sort of final judgment as to the legal consequences that would follow from these facts.⁸⁸³

⁸⁷⁸ See Abyei Protocol, Section 5.3.

⁸⁷⁹ Article 9 of the 1907 Hague Convention provides:

In disputes of an international nature involving neither honour nor vital interests, and arising from a difference of opinion on points of fact, the Contracting Powers deem it expedient and desirable that the parties who have not been able to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute an International Commission of Inquiry, to facilitate a solution of these disputes by elucidating the facts by means of impartial and conscientious investigation. (emphasis added)

⁸⁸⁰ Article 1 of the Optional Rules provides:

These Rules shall apply when the parties have agreed to have recourse to a Fact-finding Commission of Inquiry (‘Commission’) pursuant to the Permanent Court of Arbitration (‘PCA’) Optional Rules for Fact-finding Commissions of Inquiry, to establish, by means of an impartial and independent investigation, facts with respect to which there is a difference of opinion between them. (emphasis added)

⁸⁸¹ *Report concerning the Loss of the Dutch Steamer “Tubantia” by the International Commission of Inquiry at The Hague*, Permanent Court of Arbitration, 16 AM J. INT’L L. 1922, p. 480 at 485-492 (French language original).

⁸⁸² *Investigation of Certain Incidents Affecting the British trawler “Red Crusader,”* Permanent Court of Arbitration, March 23, 1962.

⁸⁸³ In *Loss of the Dutch Steamer Tubantia*, a Commission of Inquiry was asked to ascertain whether a German submarine launched a torpedo which sank a Dutch steamship. The Commission limited its determination to finding

477. The ABC Experts were not tasked to merely ascertain the facts surrounding a particular incident. Rather, a complex constellation of historical, anthropological and geographic facts (many of which remain obscure to this day) could potentially impact the extension of the “area of the Nine Ngok Dinka chiefdoms transferred in 1905.” The Experts were tasked to scientifically research, select and weigh such facts on the basis of a Formula that was susceptible to several, contradictory interpretations, with a view to arriving at a “final and binding” decision⁸⁸⁴ that “defined (i.e., delimited) and demarcated”⁸⁸⁵ the Abyei Area.
478. Thus, the ABC Experts’ role went beyond that of historical Commissions of Inquiry in two ways. First, the selection, weighing and processing of substantial, often inconclusive factual evidence required the ABC Experts to exercise a higher degree of judgment in the performance of their duties than is customary with fact-finders. Second, the ABC Experts’ decision extended to the consequences of their factual findings; the ABC Experts’ decision was intended to be constitutive of the boundaries of the Abyei Area, rather than merely declaratory of certain historical facts occurring in 1905.

(b) The ABC’s Role in the Peace Process Required a Final and Binding Decision

479. In addition, the ABC’s founding instruments as well as the comportment of the Parties during the ABC proceedings demonstrates that the ABC Experts were commissioned to arrive at a conclusive decision that would resolve a specific dispute between the Parties. This implies that the ABC Experts were precluded from returning a factual non-liquet based on the paucity of evidence.
480. The inadmissibility of such a non liquet becomes particularly clear when the ABC’s role in the larger Sudan peace process is taken into account. Not only was the ABC Experts’ decision a necessary step for putting the special administrative status of the Abyei Area into

that the German submarine indeed launched the torpedo, and it did not attempt to answer the question of whether or not this was done intentionally. In *The Red Crusader*, a Commission of Inquiry was instituted to investigate the facts leading up to the arrest by Denmark of a British trawler off the Faroe Islands. After the Commission had made certain factual findings, the two Parties decided on a mutual waiver of all claims and charges arising out of the incident.

⁸⁸⁴ See Section 5 of the Abyei Appendix.

⁸⁸⁵ As explained by Professor Schofield, there are three stages in a boundary’s evolution: allocation, delimitation and demarcation. Allocation deals with allocating territory and not the actual boundary, while demarcation simply physically marks out the boundary on the ground. Delimitation, quite differently, is when the line is established and specified. It requires “an executive act” of determining where the actual boundary line should be, and calls for a detailed description of the location of a boundary line. See SPLM/A Oral Pleadings, April 22, 2009, Transcr. 121/03-122/02.

effect. The need for the ABC proceedings to result in a final and binding decision is also underscored by the ultimate political objective of delimiting the boundaries of the Abyei Area – to determine the residents of the Abyei Area who would be entitled to vote in the 2011 plebiscite on whether the Abyei Area should retain its special administrative status in the north, or whether it should instead be part of the province of Bahr el Ghazal in the south.⁸⁸⁶ No “back-up plan” was contemplated in the event that the ABC Experts found themselves unable to complete their assigned mandate. Considering this important objective, it was imperative that clear boundaries would be drawn by the ABC Experts as a result of the proceedings.

(c) The ABC’s Composition Does Not Exclude a Decision-Making Function

481. The Tribunal notes that the composition of the ABC does not preclude the attribution of a conclusive decision-making role to the ABC. In the *Treaty of Lausanne Advisory Opinion*,⁸⁸⁷ the Permanent Court of International Justice (“PCIJ”) was asked to determine whether a decision by the Council of the League of Nations drawing the boundary line between Turkey and Iraq would be in the nature of an arbitral award, a recommendation, or simple mediation. The PCIJ explained that even if the Council of the League of Nations was a political body and not an arbitral tribunal, it could still be called upon to give a definitive and binding decision in a particular dispute, especially as the agreement of the parties (*i.e.*, the Treaty of Lausanne of July 24, 1923) sought “to insure a definitive and binding solution of the dispute” which was “the final determination of the frontier” between Turkey and Iraq.
482. Parallels with the ABC Experts can be drawn here. The ABC Experts, though not a tribunal composed of legal experts or arbitral practitioners, were called upon by the Parties to *define* and demarcate the boundary of the Abyei Area. In so doing, the Parties agreed that the decision of the ABC Experts would be “final and binding” upon them. Consequently, by being given the task of defining and demarcating a definite boundary line, the ABC Experts, in addition to their fact-finding function, also had to reach a decision on the basis of these facts. The term “define” clearly laid out the Parties’ intention that the ABC Experts delimit the Abyei Area regardless of the strength or weakness of the evidence they uncovered. As

⁸⁸⁶ See Abyei Protocol, Section 1.3.

⁸⁸⁷ *Article 3, Paragraph 2 of the Treaty of Lausanne (Frontier between Turkey and Iraq)* (Advisory Opinion), PCIJ Rep Series B No. 12 (1925).

discussed *infra*, this task was essentially a new task, as the borders of the Abyei Area had not been defined and demarcated previously.

4. Conclusion

483. Given the ABC's singular characteristics, a majority of the Tribunal has no difficulty in concluding that the ABC possessed important decision-making powers in addition to its fact-finding functions. While the ABC Experts were not lawyers but persons recognized in the fields of "history, geography and other relevant expertise," they were required to arrive at a final and binding decision. Although the Parties did not require the ABC Experts to apply international law or legal reasoning to the delimitation of the boundaries of the Abyei Area but scientific methods, they did require the ABC Experts to arrive at a decision that would resolve the dispute with final and binding consequences. It is this essential decision-making function that, in the view of the Majority, is a defining characteristic of the ABC.
484. Having said this, the Tribunal wishes to record that one of its Members, Professor Hafner, does not wholly share the Majority's conclusions on the nature of the ABC. In Professor Hafner's view, the ABC is not a "boundary commission" within the contemplation of the *Treaty of Lausanne Advisory Opinion*. Rather, the ABC's nature is more akin to that of a pure fact-finding body, as its mandate was limited to ascertaining a set of historical facts and arriving at a final and binding judgment based solely on those facts. For Professor Hafner, the fact that the ABC Experts' decision was binding is not sufficient evidence that they possessed any powers beyond those vested in a fact-finding body (Article 35 of the 1907 Hague Convention and Article 24(2) of the PCA Optional Rules for Fact-finding Commissions of Inquiry both provide for the possibility that the decisions of fact-finding bodies can be made binding).
485. Thus, according to Professor Hafner, the ABC Experts were not empowered to make any decision having an *ex nunc*, constitutive effect. In his view, the final and binding effect of the ABC Experts' Report resulted directly from Article 5 of the Abyei Appendix; it did not result from the mandate of the ABC itself. Furthermore, he does not share the view that the ABC Experts were obliged to delimit the Abyei Area even in the absence of sufficient evidence; a factual *non-liquet* was one possible decision the ABC Experts could have taken, and they would not have acted *infra petita* had they chosen to do so. Nevertheless, as Professor Hafner agrees, none of the foregoing observations affects the substance of the conclusions drawn by the Tribunal.

D. REASONABLENESS IS THE APPLICABLE STANDARD FOR REVIEWING THE INTERPRETATION AND IMPLEMENTATION OF THE ABC EXPERTS' MANDATE

486. Recalling the limited scope of the Tribunal's review authority over the ABC Experts' Report under Article 2(a) of the Arbitration Agreement, a consideration of what such a limited review entails in relation to the GoS's alleged grounds for finding an "excess of mandate" is in order. This section will therefore discuss the standard of review that the Tribunal must apply with respect to the ABC Experts' *interpretation* and *implementation* of their mandate. These two aspects – interpretation and implementation – raise slightly different issues, and will be discussed in turn.

1. Standard of Review Regarding the ABC's Interpretation of Its Mandate

487. The Tribunal has no doubt that a fundamental misinterpretation by the ABC Experts of the instruments establishing the ABC's competence could in principle qualify as an excess of mandate. This view is consistent with the position taken in international arbitral awards such as the *Orinoco Steamship Company* arbitration, where the tribunal found that an excessive exercise of powers could arise from "misinterpreting the express provisions of the relevant agreement in respect of the way in which [the arbitrators] are to reach their decisions."⁸⁸⁸

488. While the Parties seem to agree in principle that a misinterpretation of the ABC Experts' mandate can amount to an excess of mandate, the Parties have put forward different conceptions of the standard of review that the Tribunal should apply in determining whether the ABC Experts in fact "misinterpreted" their mandate.

(a) The Parties' Positions

489. A first indication of the Parties' respective positions follows from the way that they chose to structure their arguments: The GoS discussed the interpretation of the "Formula" as a preliminary matter before addressing whether the ABC Experts exceeded their mandate (thus implying that this Tribunal must first determine the "correct" meaning of the Formula before examining whether the Experts complied with it), whereas the SPLM/A presented its views on the interpretation of the Formula under the heading of delimitation (thus implying

⁸⁸⁸ *The Orinoco Steamship Company Case (United States/Venezuela)* XI UNRIAA 227, 239 (1910).

that the correct meaning of the Formula is irrelevant for this Tribunal's task pursuant to Article 2(a) of the Arbitration Agreement).

490. In its Counter-Memorial, the SPLM/A argued that the ABC Experts' interpretation of their mandate "would at a minimum be entitled to a substantial presumption of correctness and could only be invalidated in rare and exceptional cases."⁸⁸⁹ In support of its position, the SPLM/A relied heavily on judgments by national courts and scholarly commentary concerning the setting aside of arbitral awards pursuant to Article V(1) of the 1958 New York Convention. In response, the GoS argued that, in its view, "this is not a case where one party has unilaterally applied to annul or oppose the enforcement of a prior decision of an adjudicating body." Therefore, in the GoS's view, precedents allocating the burden of proof regarding annulment for excess of powers to the applicant "are completely inapposite" in these proceedings.⁸⁹⁰
491. In addition, the SPLM/A argued that the standard of "glaring," "manifest" or "flagrant" excess must also apply to the ABC Experts' interpretation of their mandate (as opposed to its execution).⁸⁹¹ In oral argument, the GoS presented the contrary view, contending that this Tribunal must assess the ABC Experts' findings against what it determines to be "their real mandate," not their "self-assigned" or "imaginary, self-given mandate."⁸⁹² According to the GoS this Tribunal is "under a strict duty to ensure that the ABC Experts' mandate has been complied with in all and every respect" and that, since "the mandate was a condition for the whole peace settlement," "[t]here cannot be any question that it could be left erroneously interpreted. Its interpretation must have been correct."⁸⁹³ The GoS further argued, with regard to the particular issue of the interpretation of the ABC's mandate, "that the standard for appreciating whether or not they have complied with their mandate is the same standard as the one you would have to apply on the appeal."⁸⁹⁴
492. Hence, according to the GoS, the Tribunal should determine, first, what the ABC's mandate meant and, second, whether the ABC Experts, in implementing these instructions, exceeded

⁸⁸⁹ SPLM/A Counter-Memorial, para. 613.

⁸⁹⁰ GoS Counter-Memorial, para. 74.

⁸⁹¹ SPLM/A Counter-Memorial, para. 622.

⁸⁹² GoS Oral Pleadings, April 18, 2009, 2009, Transcr. 170/16-17 and 170/24.

⁸⁹³ GoS Oral Pleadings, April 23, 2009, 2009, Transcr. 2/12-14 and 3/09-12.

⁸⁹⁴ GoS Oral Pleadings, April 23, 2009, 2009, Transcr. 21/11-14.

their mandate. The SPLM/A, by contrast, asks the Tribunal to determine whether the ABC Experts' findings as a whole, from the initial appreciation of the Experts' task to the concrete boundary lines proposed, can be considered a discharge of the ABC Experts' mandate. According to both approaches, the question whether the Experts' *implementation* of their task exceeded their mandate is subject to a reasonableness test. However, with regard to the *interpretation* of the mandate, the GoS's approach would require this Tribunal to hold the Experts' understanding of their task against what this Tribunal considers the "real" (or "correct") meaning of the mandate, whereas the SPLM/A's approach would merely authorize this Tribunal to verify that the Experts' understanding of their task was reasonable.

(b) The Tribunal's Interpretation of Article 2(a) of the Arbitration Agreement

493. In the Tribunal's view, the structure of Article 2 and the object and purpose of the Tribunal's review of the ABC Experts' findings require the application of the same reasonableness standard both to the ABC Experts' interpretation and the ABC Experts' implementation of their mandate.

(i) *The Wording and Structure of Article 2*

494. The phrase "[w]hether or not the ABC Experts had, on the basis of the agreement of the Parties as per the CPA, exceeded their mandate" is ambiguous, allowing the Parties to argue, respectively, that the ABC Experts' interpretation of their mandate "must have been *correct*" or need only be *reasonable*. The Arbitration Agreement could have resolved the ambiguity by explicitly instructing the Tribunal to determine "what the ABC Experts' mandate means in light of the ABC's constitutive instruments and whether the ABC Experts have exceeded that mandate" (implementing the GoS's proposed approach) or, alternatively, instructing it to determine "whether the ABC Experts reasonably interpreted and applied their mandate" (implementing the SPLM/A's proposed approach). As it stands, however, the specific wording of Article 2(a) does not, of itself, provide a conclusive answer.

495. But text must be read in context and the Arbitration Agreement, taken as a whole, throws considerable light on the matter. As discussed earlier, the overall structure of Article 2 indicates that two distinct and different modes of inquiry were intended for the Tribunal: Article 2(c), which calls for a *de novo* analysis of all the evidence adduced by the Parties and a new delimitation exercise, is deliberately placed after Article 2(a), which confines the

Tribunal, at that phase, to the question of whether the ABC Experts exceeded their mandate. Thus, Article 2 indicates that the Tribunal can only make a positive determination of what the mandate's correct interpretation is within the context of an Article 2(c) inquiry; to interpret Article 2(a) as requiring the Tribunal to already decide what the correct interpretation of the mandate is would eliminate the distinction between Article 2(a) and 2(c).

496. The proper reading of Article 2(a) in, and consistent with the context of Article 2 as a whole, is that, at that phase, the Tribunal must confine itself to determining whether the ABC Experts' interpretation of their mandate was reasonable. However, the Tribunal must stop short of deciding whether one or the other interpretation proffered by the Parties is more correct; the question of which interpretation the Tribunal deems correct is not a question of "excess of mandate" but rather a component of the Tribunal's contingent delimitation inquiry under Article 2(c).

(ii) *The ABC Experts Had the Authority to Interpret Their Mandate*

497. Contextual as well as teleological analyses support the conclusion of the confined inquiry required by Article 2(a). The ABC Experts possessed the authority to interpret their mandate and, thus, the limits of their "jurisdiction," and the Tribunal is required to defer to that interpretation within the context of its Article 2(a) analysis.
498. In an arbitral context, a tribunal's power to interpret the instrument on which its jurisdiction is founded is typically discussed under the heading of *Kompetenz-Kompetenz*. Pursuant to this doctrine, which is accepted with certain variations in most national arbitration laws and is a postulate in international arbitration, an arbitral tribunal must be deemed competent to determine the limits of its own jurisdiction. Allocating decision-making authority to the party-selected arbitrator rather than the courts is more respectful of the parties' intention to have specially-appointed arbitrators (often possessing specific expertise in a particular area) decide disputes over their relationships.
499. In international arbitral proceedings, *Kompetenz-Kompetenz* is even a necessity, as no higher court of law with compulsory jurisdiction exists to adjudge the limits of a tribunal's competence when one of the parties disputes it. Without a principle of *Kompetenz-Kompetenz*, any form of third party decision in international law could be paralyzed by a party which challenged jurisdiction.

500. The authority of international tribunals to declare their own competence and, to that end, interpret the *compromis* and other relevant documents was already enshrined in the 1899 and 1907 Hague Conventions.⁸⁹⁵ In its first judgment in the *Nottebohm* case dealing with Guatemala's jurisdictional objections, the ICJ affirmed the *Kompetenz-Kompetenz* principle as accepted in international law:

Since the *Alabama* case, it has been generally recognized, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction.⁸⁹⁶

501. Other notable expressions of the *Kompetenz-Kompetenz* principle subsequent to the ICJ's pronouncement can be found in the 1953 Draft Convention on Arbitral Procedure of the International Law Commission (ILC),⁸⁹⁷ the 1958 ILC Model Rules on Arbitral Procedure,⁸⁹⁸ the PCA Optional Rules for Arbitrating Disputes between Two States,⁸⁹⁹ the PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State,⁹⁰⁰ the 1965 ICSID Convention,⁹⁰¹ the UNCITRAL Arbitration Rules⁹⁰² and the UNCITRAL Model Law.⁹⁰³

502. As noted, because international law lacks a hierarchy of courts endowed with compulsory jurisdiction, the operation of any of the range of decision institutions could be paralyzed by an objection to its competence, if it, too, did not have some form of *Kompetenz-Kompetenz*. Thus, the fact that the ABC was not an adjudicatory body *strictu sensu* does not mean that it lacked *Kompetenz-Kompetenz*. Moreover, a number of features of the ABC proceedings

⁸⁹⁵ Article 48 of the Hague Convention for the Pacific Settlement of International Disputes of 1899, 1 BEVANS 230; 1 AJIL (1907) 103; Article 73 of the Hague Convention for the Pacific Settlement of International Disputes of 1907, 1 Bevens 577; 2 AJIL SUPP. (1908) 43.

⁸⁹⁶ *Nottebohm Case* (Preliminary Objection), Judgment, ICJ Reports 1953, p. 111, 119.

⁸⁹⁷ Article 11, Report of the International Law Commission Covering the Work of its Fifth Session, 1 June - 14 August 1953, Official Records of the General Assembly, Eighth Session, Supplement No. 9 (A/2456), A/CN.4/76.

⁸⁹⁸ Article 9, Yearbook of the International Law Commission, 1958, vol. II.

⁸⁹⁹ See Article 21. These rules are available at <http://www.pca-cpa.org>.

⁹⁰⁰ See Article 21. These rules are available at <http://www.pca-cpa.org>; see also the 1962 Optional Rules, reprinted in J.G. Wetter, THE INTERNATIONAL ARBITRAL PROCESS, PUBLIC AND PRIVATE, Vol. V, p. 54 (1979).

⁹⁰¹ Article 41, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 575 UNTS 159.

⁹⁰² Article 21, UN Doc. A/RES/31/98; 15 ILM 701 (1976).

⁹⁰³ Article 16, 24 ILM 1302 (1985).

suggest that the ABC was intentionally endowed with the authority to interpret the provisions of its constitutive instruments, which define the scope of its own competence:

- The Parties, faced with a daunting evidentiary situation and unable to resolve the issue themselves, agreed on a specialized – and singularly composed – expert body to delimit the Abyei Area based on a difficult evidentiary situation that they were evidently incapable of doing themselves. In so doing, the Parties knew that neither established case law nor institutional control mechanisms would assist the ABC throughout the proceedings in determining what its mandate meant.
- The ABC was not subjected to the guidance of an institution that could pass judgment on the meaning of its mandate in the event of controversy between the Parties' representatives. In this respect, the ABC's position was comparable to that of an international tribunal, and the presumption established by the ICJ in *Nottebohm* is germane.
- Without the authority to determine its own competence, the ABC could have been paralyzed by argument over its powers. Such paralysis would be incompatible with the Parties' desire to have the dispute definitively settled, following long and difficult negotiations during the peace process. Indeed, arguments ostensibly over competence were really arguments over the essential questions posed in Article 2.

503. For the reasons above, the Tribunal concludes that the ABC was vested with the competence to interpret, and thus necessarily determine the bounds of, its own mandate.

(iii) The Tribunal Must Defer to the Interpretation of the ABC Experts, as Long as that Interpretation Is Reasonable

504. To what extent, if any, is the Tribunal, in the exercise of its own review mandate, obliged to defer and accord special weight to the ABC Experts' interpretation of their mandate? As is clear from the discussion above, the sequential character of Article 2 precludes a *de novo* examination under Article 2(a) but it does not explain, in terms, how much deference is to be accorded to the ABC Experts' determination of their own mandate. Some guidance is available from the cognate situation of a court seized with the request to set aside an arbitral award on the grounds that the arbitrator exceeded his or her jurisdiction. In an arbitral context, the decisive question in such cases is whether the doctrine of *Kompetenz-Kompetenz* encompasses an obligation upon the reviewing court to accord deference to the

original decision-maker's interpretation of the instrument establishing that decision-maker's jurisdiction.

505. The practice of courts and tribunals in public international law is broadly supportive of the proposition that an instance of review must defer, and give special weight, to the interpretation of a jurisdictional instrument by the decision-making body designated under that instrument. The ICJ's judgment in the *Case concerning the Arbitral Award of 31 July 1989* is particularly instructive.⁹⁰⁴ In that case, the Republic of Guinea-Bissau requested the Court to declare an arbitral award null and void because the original arbitral tribunal allegedly "did not comply with the provisions of the Arbitration Agreement."⁹⁰⁵ The Court reaffirmed its previous distinction between appellate review – that the Court is "called upon to pronounce on whether the arbitrator's decision was right or wrong"⁹⁰⁶ – and the requested review of the validity of the award. On this basis, the Court noted that, in the context of a *recours en nullité*, it

has simply to ascertain whether by rendering the disputed Award the Tribunal acted in manifest breach of the competence conferred on it by the Arbitration Agreement, either by deciding in excess of, or by failing to exercise, its jurisdiction.⁹⁰⁷ (emphasis added)

506. In addition to confirming the applicability of the "manifest breach" standard to decisions on jurisdiction, the Court specifically noted that the reviewing body must accord deference to the original decision-maker in its interpretation of its own competence. The Court noted that "[b]y its argument set out above, Guinea-Bissau is in fact criticizing the interpretation in the Award of the provisions of the Arbitration Agreement which determine the Tribunal's jurisdiction, and proposing another interpretation." The Court rejected Guinea-Bissau's argument and ruled that it was not competent to determine which of several plausible interpretations of the original arbitration agreement was the correct one, explaining that "the Court does not have to enquire whether or not the Arbitration Agreement could, with regard to the Tribunal's competence, be interpreted in a number of ways, and if so to consider which would have been preferable."⁹⁰⁸

⁹⁰⁴ The Tribunal notes that both Parties repeatedly relied on this judgment in their submissions, thus making the judgment an appropriate consensual reference point.

⁹⁰⁵ *Arbitral Award of July 31, 1989*, ICJ Reports 1991, p. 56, para. 10.

⁹⁰⁶ *Arbitral Award Made by the King of Spain*, ICJ Reports (1960), p. 214.

⁹⁰⁷ *Arbitral Award of July 31, 1989*, ICJ Reports 1991, p. 69, para. 47.

⁹⁰⁸ *Arbitral Award of July 31, 1989*, ICJ Reports 1991, p. 56, para. 47.

507. In the Tribunal's view, the ICJ's analysis in the *Case concerning the Arbitral Award of 31 July 1989*, which is based on explicitly reasoned legal principles that apply by analogy to these proceedings, provides the best method for establishing the appropriate standard of review. The review of arbitral awards on grounds of excess of powers serves to protect the parties from the rendering of binding third-party decisions to which they have not consented. Consistent with this fundamental principle of consent, third-party jurisdictional determinations against the will of the parties cannot stand.⁹⁰⁹ But as long as a decision can still be reconciled with the parties' consent, the arbitrators who were appointed by the parties constitute the preferred forum for settling the substantive disagreement between the parties, as it is they who were specifically entrusted with this task on the basis of their specific expertise.
508. In this case, the purpose of the review conducted by the Tribunal pursuant to Article 2(a) of the Arbitration Agreement is to determine whether the ABC Experts' conduct and decision are within the range of what the Parties could have expected when consenting to the delimitation and demarcation of the Abyei Area by the ABC. To the extent that the ABC Experts' findings can still be squared with the Parties' consent, the ABC – not the Tribunal – should remain the preferred forum for the delimitation of the Abyei Area. As noted above, the ABC Experts were carefully chosen by the Parties for this task. The ABC Experts also had detailed knowledge of the context in which they would operate (the peace process) and were expected to understand their mandate in light of the Parties' expectations. Moreover, the Parties, too, were members of the ABC and were thus able to bring to the attention of the ABC Experts their own understanding of the ABC mission. In sum, the ABC Experts were indeed considered best placed to interpret the mandate that was entrusted to them.
509. In reaching this conclusion, the Tribunal is mindful that Parties may, by consent, agree to override the principles of strict review laid out in the *Arbitral Award* judgment and require the Tribunal to adopt another standard in its Article 2(a) inquiry instead. Such consent cannot be lightly inferred, however, and must be demonstrated through explicit evidence of such an agreement. Nothing in the "excess of mandate" language of Article 2(a) or in the Arbitration Agreement read as a whole suggests that this is the case.

⁹⁰⁹ See, for example, *CDC Group plc*, Case ARB/02/14, para. 40. For the overriding importance of the Parties' consent in the interpretation of jurisdictional instruments more generally, see also *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, ICJ Reports 1985, p. 13, 23 and *Arbitral Award of July 31, 1989*, ICJ Reports 1991, p. 53, 70.

510. For these reasons, the Tribunal sees no justification for departing from the standard of review established by the ICJ in the *Case concerning the Arbitral Award of 31 July 1989*. Under Article 2(a) of the Arbitration Agreement, the Tribunal must limit itself to assessing whether the ABC Experts' findings can be understood as a not unreasonable discharge of their mandate, that is, as an exercise that does not amount to a manifest breach of the competence assigned to them. To that end, the Tribunal will not inquire into whether another interpretation of the ABC's constitutive instruments would have been preferable. Rather, the Tribunal must assess whether the ABC Experts' interpretation of its mandate remained within the range of not unreasonable and defensible interpretations.

2. Standard of Review Regarding the ABC's Implementation of Its Mandate

511. The question of the ABC Experts' interpretation of its mandate must be distinguished from the question of execution or implementation of that mandate. The implementation by the ABC Experts of their mandate, in turn, is potentially subject to review from various angles, including with regard to the question whether the ABC Experts' decision was manifestly incorrect and the question whether the ABC Experts stated appropriate reasons for their decision. The Tribunal finds that only the latter type of review is within the Tribunal's competence pursuant to Article 2(a) of the Arbitration Agreement.

(a) Review for "Substantive Errors" is Outside the Tribunal's Competence

512. With regard to substantive error as a potential ground for annulment, the "general principles of law and practices" applied by international tribunals undertaking a review function do not appear to be entirely consistent. On the one hand, relevant international treaties (including the 1958 New York Convention and the 1965 ICSID Convention) and the UNCITRAL Model Law on International Commercial Arbitration do not recognize "manifest error" as a ground for setting aside an award. Recent arbitral decisions within the context of ICSID annulment proceedings confirm the irrelevance of substantive errors at the review stage.⁹¹⁰ On the other hand, the relevance of "essential errors" or "manifest error[s]"

⁹¹⁰ *Maritime International Nominees Establishment (MINE) v. Government of Guinea (Guinea)*, ICSID Case ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award dated January 6, 1988, see especially para. 4.04 and para. 5.08; *AMCO Asia Corp. v. The Republic of Indonesia*, ICSID Case ARB/81/1, Decision on the Application by Indonesia for Annulment of the Arbitral Award dated November 20, 1984, May 16, 1986, para. 23.

of law or fact was acknowledged in several, especially older, decisions, including the *Trail Smelter* case⁹¹¹ and the *Drier* case.⁹¹²

513. For purposes of the present proceedings, however, the question of whether substantive errors are altogether outside the scope of its review or subject to review in “manifest” cases is academic and without relevance for the Tribunal’s decision. The Tribunal notes that while the GoS believes the ABC Experts’ findings to be substantively incorrect, these perceived errors are not as such the basis for GoS’s excess of mandate claim. The GoS does not ground its claim on “essential error” or “manifest error” but on the proposition that the ABC’s findings – whether substantively right or wrong – went beyond or failed to accomplish what the Parties agreed to.⁹¹³

514. This characterization of the GoS’s claims was again confirmed during the oral hearings, when the GoS explained that:

while an essential error of law or fact of an arbitral tribunal is a ground for nullity of the award, this Tribunal has probably no jurisdiction to that effect... In other words, the [ABC Experts] have made an essential error of interpretation, but this error ... bears upon the mandate itself, not on its implementation, not on the answer to the question.⁹¹⁴

515. Thus, leaving aside other, distinct grounds for excess of mandate (such as alleged procedural violations and failure to state reasons) and criticism of its substance, the GoS’s disagreement with the ABC Experts’ Report is in essence a disagreement concerning the ABC Experts’ *interpretation* of the mandate, not with its *implementation*. Similarly, the SPLM/A has consistently argued during these proceedings that substantive errors are beyond the Tribunal’s jurisdiction of review.⁹¹⁵

516. The Tribunal sees no reason for departing from this understanding of its mandate, which is consensual between the Parties. As noted above, the Parties have defined the Tribunal’s mandate as comprising two distinct juridical and intellectual tasks, and the first of these tasks, pursuant to Article 2(a), does not authorize the Tribunal to ascertain the correctness

⁹¹¹ *Canada v. U.S.*, Final Award of March 11, 1941, III UNRIAA 1905, 1957.

⁹¹² *Katharine M. Drier (United States) v. Germany*, Award of July 29, 1935, VIII UNRIAA 127, 157.

⁹¹³ In its Rejoinder, the GoS groups these allegations under the headings of “Decisions *Ultra Petita*” and “*Infra Petita*.”

⁹¹⁴ GoS Oral Pleadings, April 18, 2009, Transcr. 165/20-23 and 166/16-20.

⁹¹⁵ SPLM/A Counter-Memorial, para. 44.

of the ABC Experts' findings. The interpretation of the scope of a decision-making body's competence is analytically distinct from the use of that competence, and the Parties authorized the Tribunal, for purposes of the present proceedings, to review only the former but not the latter.

517. The Tribunal's review of the ABC Experts' findings, under Article 2(a), will thus extend neither to the appreciation of evidence by the ABC Experts nor to the ABC Experts' substantive conclusions (except for the determination of an excess of mandate). Consistent with its mandate, the Tribunal will not engage in an academic excursus into the ABC Experts' reading of the evidence or their conclusions.

(b) Failure to State Reasons for a Decision May Lead to an "Excess of Mandate"

518. A final consideration relates to the GoS's contention that the ABC Experts' committed an excess of mandate by allegedly failing to state reasons for some of their findings. As with the other alleged grounds for excess of mandate, the Tribunal will discuss, as a preliminary matter, to what extent it is authorized to review the cogency of the reasons advanced by the ABC Experts under Article 2(a). To that end, the Tribunal must address two questions: first, were the ABC Experts under a duty to state the reasons for their decisions in the first place? If so, then what is the threshold that determines when deficient reasoning amounts to an excess of mandate?

(i) *The ABC's Mandate Included the Duty to State Reasons*

519. Both Parties, relying on arbitral precedent as, presumably, an expression of "general principles of law and practices," disagree as to whether the ABC Experts were under an obligation to state reasons. The GoS averred a requirement incumbent upon arbitrators to explain the basis for their decision. The SPLM/A adduced evidence of legal systems that stipulate no reasoning requirement.

520. In the Tribunal's view, the primary and secondary authorities adduced by the Parties are not dispositive of the question of whether reasons were required, nor do they establish a presumption that, absent an express agreement by the Parties to the contrary, the ABC Experts were under such an obligation. Whether reasons had to be presented is not conclusively resolved by "general principles of law and practices" but by evidence of the Parties' expectations, which may be inferred from the context in which the ABC was intended to operate and from the function it had been assigned within the peace process.

The ABC was created as part of an extraordinarily complex political process, which is not comparable to ordinary commercial or investment arbitrations. Whether reasons are required is therefore a question of proper interpretation of the ABC's constitutive instruments in light of their ordinary meaning and object and purpose.

521. An initial, textual argument (reiterated by the GoS throughout the proceedings) relates to the instructions by the Parties that the decision taken in the ABC Experts' Report be "based on scientific analysis and research."⁹¹⁶ The preference for a scientific methodology suggests that the Parties expected the ABC Experts to disclose the fruits of their research in some manner appropriate to their respective fields of scientific research. While there is nothing in the relevant instruments requiring a comprehensive analytic discussion of all the evidence found, an exposition of the key evidence in support of the ABC Experts' "final and binding decision" was clearly imported in the words "based on scientific analysis and research."
522. The clear purport of the text is confirmed by the object and purpose of the ABC's constitutive instruments. The principal consideration in these instruments is the important role played by the ABC in the context of the Sudan peace process; after years of uncertainty as to the location and boundaries of the Abyei Area, which in turn contributed to the untold hardship of millions of victims in the Civil War, the ABC was to definitively determine the boundaries of the Abyei Area. It was obvious that the ABC Experts' Report, whatever its conclusions, would have a major political impact on the country and especially on the life of Misseriya and Ngok Dinka in and around the Abyei Area. Stakeholders were entitled to know on what grounds the ABC Experts' decision was made. Indeed, such knowledge could be critical to the legitimacy and acceptability of the decision.
523. An additional indication of the expectation of a reasoned decision is found in the contradictory nature of the ABC proceedings.⁹¹⁷ It would be unusual to invite the Parties to make extensive presentations to the ABC and then take a decision that in no way assesses the Parties' respective presentations.
524. Finally, in the absence of a standing and compulsory body in which an appeal may be lodged (which is the normal situation in international law), the requirement to state the reasons on which a decision is based also functions as an informal control mechanism.

⁹¹⁶ Section 4 of the Abyei Appendix.

⁹¹⁷ See Section 3.1 of the Terms of Reference.

Since the ABC Experts' findings were not subject to appeal, an explanation of the rationale for the decision would dispel any hint of arbitrariness and ensure the presence of fairness which is indisputably necessary for the acceptability and successful conclusion of the peace process.

525. It follows that a failure to state reasons on the part of the ABC Experts would amount to the contravention of an obligation that was integral to their mandate and, as explained immediately below, could constitute an excess of mandate.

(ii) *Lack of Any Reasons or Obviously Contradictory or Frivolous Reasons Would Amount to an Excess of Mandate*

526. This does not yet answer the question as to the appropriate minimum standard that applies to the ABC Experts' reasoning. In their submissions, the Parties were in agreement that, assuming that the ABC Experts were required to provide reasons, the Tribunal's review of the "quality" of the ABC Experts' reasons would be constrained. Both Parties quoted (with approval) the standard of review endorsed by the *Vivendi v. Argentina* annulment committee,⁹¹⁸ and the GoS explained:

[T]he GoS maintains the absolute relevance of the *Vivendi v. Argentina* annulment decision according to which the failure to state reasons will only constitute grounds for the annulment of a decision if – but only if – it leaves “the decision on a particular point essentially lacking in any expressed rationale” and if that point itself is necessary to the decision.⁹¹⁹

527. Under general international law, the number of relevant precedents dealing with the minimum standard of “motivation” of arbitral awards is limited. The most authoritative decision in this respect is the ICJ's judgment in the *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906*. In that case, Nicaragua challenged the award handed down by the King of Spain, *inter alia*, for the alleged lack or inadequacy of reasons. The Court flatly rejected Nicaragua's argument, noting that

an examination of the Award shows that it deals in logical order and in some detail with all relevant considerations and that it contains ample reasoning and explanation in support of the conclusions arrived at by the arbitrator. In the opinion of the Court, this ground is without foundation.⁹²⁰

⁹¹⁸ GoS Memorial, para. 164; GoS Rejoinder, para. 156; SPLM/A Counter-Memorial, para. 740.

⁹¹⁹ GoS Rejoinder, para. 156.

⁹²⁰ *Arbitral Award made by the King of Spain*, Judgment of November 18, 1960, ICJ Reports 1960, p. 216.

528. The most extensive international judicial treatment to date on the scope of the reasons requirement can be found in a series of decisions by ICSID annulment committees pursuant to Article 52 of the 1965 ICSID Convention. While the level of scrutiny applied by different annulment committees has varied, some important points of agreement may provide the beginning of a *jurisprudence constante* in international investment law.

- First, annulment committees are not authorized to compare the original tribunal's reasons with what the committee considers the "correct" or "ideal" argumentation. "It is not for the Committee to imagine what might or should have been the arbitrators' reasons, any more than it should substitute 'correct' reasons for possibly 'incorrect' reasons."⁹²¹ Rather, annulment committees must ascertain whether the award is sufficiently reasoned – a standard considerably lower than "fully reasoned."
- Second, there seems to be consensus that ICSID tribunals are not required to deal in a reasoned manner with each and every argument raised by a party. Rather, reasons should "be the basis of the Tribunal's decision, and in this sense 'sufficient.'"⁹²²
- Third, annulment committees have tended to assess the adequacy of the reasons in support of each decision made in an award, rather than judging the adequacy of the argumentation in an award as a whole.⁹²³
- Fourth, it is common ground that, in assessing whether the decisions contained in an award are based on reasons, annulment committees must be particularly mindful not to turn annulment proceedings into appeal proceedings.⁹²⁴

529. In applying these consensual principles, the annulment committee in *Klöckner* conducted a very strict review, verifying in essence whether the tribunal came to legally defensible conclusions. Subsequent committees declined to follow the *Klöckner* example. The *MINE* annulment committee suggested that:

⁹²¹ *Klöckner Industrie-Anlagen GmbH and Others v. Republic of Cameroon*, ICSID Case No. ARB/81/2 (1983), para. 151.

⁹²² *Id.* at para. 118. See also *Lucchetti v. Peru*, Decision on Annulment, ICSID Case No. ARB/03/4 (2007), para. 127.

⁹²³ *Klöckner*, ICSID Case No. ARB/81/2 (1983), para. 130.

⁹²⁴ *Id.* at para. 118; *Mr. Patrick Mitchell v. Democratic Republic of Congo*, Decision on Annulment, ICSID Case No. ARB/99/7 (2006), para. 19.

the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.⁹²⁵

530. The *MINE* standard was later confirmed by the *Mitchell* committee, which added that “a failure to state reasons exists whenever reasons are purely and simply not given, or are so inadequate that the coherence of the reasoning is seriously affected.”⁹²⁶ In relation to the danger of conflating annulment with appeal, the committee noted that contradictions in the reasoning of a tribunal would have to be obvious – “to a point that the *ad hoc* Committee cannot be reproached for engaging in an analysis of the merits.”⁹²⁷ Similar standards were enunciated by the annulment committees in *Amco* and *Vivendi*.⁹²⁸
531. As the standards endorsed by the ICJ and the more recent ICSID annulment committees significantly converge, it is possible to draw a tentative conclusion regarding the “general principles of law and practices” applicable to the setting aside of arbitral awards on the ground of failure to state reasons. To meet the minimum requirement, an award should contain sufficient ratiocination to allow the reader to understand how the tribunal reached its binding conclusions (regardless of whether the ratiocination might persuade a disengaged third party that the award is substantively correct). As to the substantive issue, awards may be set aside for failure to state reasons where conclusions are not supported by any reasons at all, where the reasoning is incoherent or where the reasons provided are obviously contradictory or frivolous.
532. Given the very specific context of these proceedings, which do not easily analogize to annulment proceedings in the area of investment arbitration, the Tribunal considers it appropriate to examine the standard it has derived from practice in light of the object and purpose of the ABC’s constitutive instruments.
533. The Parties subjected the ABC Experts to significant time constraints. Both Parties clearly expected the ABC Experts to be able to complete their Report within the allotted short time frame of three months (from the beginning of their fact-finding procedure until the

⁹²⁵ *MINE*, ICSID Case ARB 84/4 (1989), para. 5.09.

⁹²⁶ *Mitchell*, November 1, 2006, Case No. ARB/99/7, para. 21.

⁹²⁷ *Id.*

⁹²⁸ *Amco Asia Corp*, ICSID Case ARB/81/1, (1986) paras. 41-44; *CAA & Vivendi Universal v. Republic of Argentina*, Decision on Annulment, 6 ICSID Rep (2002), paras. 61-65.

rendering of the Report).⁹²⁹ This suggests that the Parties could only have expected a short and concise Report that would be limited to elucidating the key reasons on which the conclusions were based. Even under time constraints, however, the Parties were entitled to expect that the Experts' reasons would be clear, coherent, and free from contradiction.⁹³⁰

534. Whatever the constraints the ABC Experts may have experienced in terms of methodology or timing, the Parties reasonably expected and were entitled, as a matter of fairness, that each of the Report's essential rulings be supported by sufficient reasons. The degree of reasoning provided in the Report for each of its conclusions had to be commensurate with the importance of those conclusions, as the articulation of reasons is the principal way by which reviewing bodies such as this Tribunal may ascertain reasonableness. A standard that liberally permits derogation from the obligation to state reasons due to external constraints could not have been expected in the absence of truly unforeseen and compelling reasons (or the Parties' explicit consent that the decision not be reasoned, which is not the case here). The Tribunal realizes, of course, that much of the evidence in this case is marked, in varying degrees, by some imprecision and is often circumstantial, and to that extent, the subjective assessment necessary when evaluating such evidence can be taken into account. This does not dilute the necessity of articulating reasons in itself, however.
535. For these reasons, the Tribunal considers that the foregoing standard, quite similar to the one endorsed by both Parties, is appropriate for the present proceedings. The Tribunal must verify whether the ABC Experts' Report contains sufficient explication to allow the reader to understand how the ABC Experts reached each conclusion of their "final and binding decision" (regardless of whether these explanations are persuasive or the decision was right). The ABC Experts will have exceeded their mandate if some or all of their conclusions are unsupported by any reasons at all, if the reasoning is incoherent, or if the reasons provided are obviously contradictory or frivolous.

⁹²⁹ The Abyei Protocol initially provided that the ABC should complete its work "within the first two years of the Interim Period." (Abyei Protocol, Section 5.2). This schedule was subsequently revised by the Parties, who required that the ABC instead present its final report to the Sudanese Presidency "before the end of the Pre-Interim Period." (Abyei Appendix, Section 5) The Parties gave their preliminary presentations on April 12, 2005, and the report was presented to the Sudanese Presidency approximately three months later, on July 14, 2005. The Terms of Reference, drawn up by the Parties, also prescribe this three month schedule, though the actual schedule followed was delayed by approximately fifteen days. (See "Program of Work" in the Terms of Reference).

⁹³⁰ Indeed, despite similar time constraints, the Parties have obliged this Tribunal to "comprehensively state the reasons upon which the [A]ward is based." Arbitration Agreement, Article 9(2).

3. Conclusion

536. Review proceedings such as the present arbitration are unusual, and the setting aside of all or part of a decision must remain an exceptional remedy which can be applied only in instances in which the decision simply cannot reasonably be squared with the Parties' consent. This standard of reasonableness applies to the review of the ABC Experts' interpretation of their mandate. It is against this standard of reasonableness that the Tribunal will examine in the following sections "whether or not the ABC Experts had, on the basis of the agreement of the Parties as per the CPA, exceeded their mandate."

E. ASSESSING THE REASONABLENESS OF THE ABC EXPERTS' INTERPRETATION OF THE FORMULA

537. Having established that *reasonableness* is the proper standard by which the Tribunal should review the ABC Experts' Report, the Tribunal must now determine whether the ABC Experts' interpretation of their mandate can be considered a reasonable one. The Tribunal stresses that its assessment of the ABC Experts' construction of the Formula must remain within the confines of the reasonableness standard, and cannot amount to a *de novo* decision on the correct meaning of the Formula.

538. Mindful of the limits of its Article 2(a) inquiry, it also bears mentioning that the Tribunal has had the benefit of a full discussion of all issues relating to both Article 2(a) (excess of mandate) and Article 2(c) (delimitation), which overlap to some extent when one addresses the issue of interpretation of the Formula. The Tribunal also has received considerable factual and opinion evidence submitted to it over the course of these proceedings, some of which were not presented before the ABC. While the Tribunal does not believe that any new evidence that has come to light is outcome-determinative, it is aware that certain evidence adduced in these proceedings could not have been part of the ABC's reasonableness calculus and hence, would (while not being relevant in an Article 2(a) inquiry) become relevant if the Tribunal were to advance to an Article 2(c) inquiry.

539. In order to ascertain whether the ABC Experts interpreted their mandate ("to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905") in a reasonable manner, the Tribunal considers it useful to first highlight the Parties' divergent interpretations of the ABC Experts' mandate as they were submitted to the ABC.

540. Secondly, the Tribunal will consider what the ABC Experts themselves understood the mandate to mean. The ABC Experts did not spell out in a separate section of their Report what they considered to be the meaning of the mandate, but they made specific comments on what they conceived the mandate to be and, of course, drew conclusions from the analysis of the Parties' various propositions and the evidence they submitted. These elements reveal quite clearly what their interpretation of the mandate was.
541. The Tribunal will then move on to assess the reasonableness of the Expert's construction of the mandate, having regard not only to the text, context, object and purpose of the ABC's mandate as it was set out in the 2004 Abyei Protocol, but also to other means of interpretation such as the historical context of the transfer (abundantly discussed by the Parties), the travaux préparatoires (also relied upon by the GoS and the SPLM/A), and the further agreements between the Parties that led to the Arbitration Agreement. The reasonableness of a predominantly territorial interpretation will also be examined in a subsequent section.
542. The Tribunal will present both possible interpretations of the mandate to demonstrate that a reasonableness calculus can lead to more than one reasonable interpretation of the Formula, especially in view of the paucity of available factual evidence, much of which is also imprecise. That imprecision leaves some considerable margin for interpretation, which in turn, has allowed for a diversity of views on the part of the Tribunal as to what the "correct" interpretation of the Formula would be had the Tribunal been empowered to conduct that form of inquiry under Article 2(a) (which it is not). As will be discussed in some detail, Professor Hafner, in particular, is of the opinion that the predominantly territorial interpretation is a more "correct" appraisal. The other members of the Tribunal do not share that view but believe that such substantive assessments are not relevant to an Article 2(a) inquiry. In any event, divergences of opinion in this regard do not change the Tribunal's conclusions on this matter.
543. To begin the analysis, the Tribunal will first revisit the interpretations of the Formula put forward by the Parties in their submissions to the ABC, as well as the ABC Experts' own construction of the mandate in their Report.

1. The ABC Experts' Interpretation of the Formula

(a) The Parties' Interpretation of the Mandate Before the ABC in its Proceedings

544. Counsel for the GoS coined the phrases “territorial” and “tribal” to characterize the GoS’s and the SPLM/A’s respective interpretations of the mandate in these proceedings, the former referring to the 1905 transfer of a specific area and the latter to the transfer of a people that same year.⁹³¹
545. This nomenclature is certainly convenient and helpful, but it may obscure the fact that these interpretations are not entirely mutually exclusive. Whatever the interpretation, the application of that interpretation necessarily results in the definition of an Abyei “Area” – a spatially defined territory. A transfer of people has territorial effects; a transfer of territory has an effect on the people who inhabit it. This applies to the Parties’ submissions to the ABC, and may explain why their respective interpretations do not fall squarely within the “tribal” and the “territorial” categories and why each party’s interpretation drew from both aspects of the transfer. This being said, the GoS’s submissions can still be reasonably understood as supporting a predominantly territorial interpretation of the Formula, and the SPLM/A’s as placing the emphasis on the Ngok Dinka people.

(b) The SPLM/A’s Interpretation Before the ABC

546. The SPLM/A’s submissions to the ABC show quite clearly that the SPLM/A placed great emphasis on the Ngok Dinka people and the territory occupied and used by the nine Ngok Dinka chiefdoms transferred in 1905. The SPLM/A thus stated in its preliminary presentation to the ABC that the “Abyei area as stipulated in the [Abyei Protocol] is the homeland of the Ngok Dinka, comprising the nine sections of Abior, Achaak, Achueng, Alei, Anyiel, Bongo, Diil, Mareng and Manyuar”⁹³² and “was administered as part of the Bahr el Ghazal province” prior to the 1905 transfer.⁹³³

⁹³¹ See, e.g., GoS Oral Pleadings, April 18, 2009, Transcr. 25/07 *et seq.*

⁹³² The SPLM/A Preliminary Presentation on the Boundaries of the Abyei Area (First SPLM/A Presentation), April 10, 2005, p. 3, SPLM/A Exhibit-FE 14/1; the SPLM/A Final Presentation on the Boundaries of the Abyei Area, May 14 - 16, 2005, p. 18, SPLM/A Exhibit-FE 14/13.

⁹³³ The SPLM/A Preliminary Presentation on the Boundaries of the Abyei Area (First SPLM/A Presentation), April 10, 2005, p. 4, SPLM/A Exhibit-FE 14/1. See also the SPLM/A Final Presentation on the Boundaries of the Abyei Area, May 14 - 16, 2005, p. 3 (“[...] the Ngok Dinka were administratively carved into Kordofan from Bahr el Ghazal in March, 1905, and continued to be part of Kordofan till the present time.”) SPLM/A Exhibit-FE 14/13.

547. In the section of its final presentation to the ABC concerning “[t]he Inclusion and the Retention of the Ngok Dinka in Kordofan,”⁹³⁴ the SPLM/A again expressed its understanding of the transfer as concerning the Ngok Dinka people as a whole, while only “*part of the Twic Dinka*” were transferred at the same time.⁹³⁵ More specifically, the SPLM/A argued with reference to the March 1905 SIR that “[a]s a result of complaints received from the Dinka, it was decided to transfer the Ngok and part of the Twic Dinka from the administration of Bahr el Ghazal to Kordofan, so that they would be placed under the same governor with the Arabs of whose conduct they complained.”⁹³⁶
548. Referring to the traditional boundaries of the Ngok Dinka, the SPLM/A defined them repeatedly by reference to neighboring tribes, thereby evincing a predominantly tribal reading of the Formula.⁹³⁷ Having contrasted the Ngok Dinka’s traditional boundaries with the provincial boundaries,⁹³⁸ which “were not surveyed” at the time of the transfer, and underscored the “lack of accuracy” in the location of the “Bahr el Arab” river,⁹³⁹ the SPLM/A invited the ABC to examine the true location of “the Ngok Dinka people of Abyei,” who were part of Bahr el Ghazal before the transfer,⁹⁴⁰ and whose presence extended not only south but also north of the river Kir⁹⁴¹ and beyond the river Ngol.⁹⁴²
549. In the section of its final presentation entitled “Land use in Abyei Area,” the SPLM/A further explained that both the Misseriya and the Ngok Dinka moved and used the land in accordance with the seasons. It also emphasized that “each tribe has its own area of

⁹³⁴ The SPLM/A Final Presentation on the Boundaries of the Abyei Area, May 14 - 16, 2005, p. 6, SPLM/A Exhibit-FE 14/13.

⁹³⁵ *Id.* at p. 7. (Emphasis added.)

⁹³⁶ *Id.*

⁹³⁷ The SPLM/A Preliminary Presentation on the Boundaries of the Abyei Area (First SPLM/A Presentation), April 10, 2005, p. 5, 7 (Conclusion), SPLM/A Exhibit-FE 14/1. *See also* Transcript of discussion between ABC Members during meeting at La Mada Hotel, Nairobi, Kenya, April 12, 2005, p. 10 (Minister Deng Alor stating that “[s]ince 1905, we have been in Kordofan, but, we have distinct boundaries between us and the Misseriya.”); p. 14 (Mr. James Lual stating that “[o]ur mission is actually to demarcate the boundaries between the Dinka Ngok and the Misseriya”); p. 33 (Mr. James Ajing stating that “[...] we and the Misseriya were neighbours”) SPLM/A Exhibit-FE 14/5a; The SPLM/A Final Presentation on the Boundaries of the Abyei Area, May 14 – 16, 2005, p. 19, SPLM/A Exhibit-FE 14/13.

⁹³⁸ *See also* The SPLM/A Final Presentation on the Boundaries of the Abyei Area, May 14 – 16, 2005, pp. 16, 20, SPLM/A Exhibit-FE 14/13.

⁹³⁹ *Id.* at p. 13.

⁹⁴⁰ *Id.* at p.12.

⁹⁴¹ *Id.* at p. 13.

⁹⁴² *See id.* at 15. *See also id.* at p. 14-17 for a list of the authorities relied upon by the SPLM/A to argue that the Ngok Dinka people were located throughout the Bahr, in an area extending to the north of the Ngol.

permanent habitation,” distinct from grazing land, and that “the ownership is to the permanent dwellers.”⁹⁴³ The SPLM/A concluded on the basis of Dinka oral history and testimony that “Ngok ownership of the land extends up to latitude 10 degree 35 minutes.”⁹⁴⁴

(c) The GoS’s Interpretation Before the ABC

550. The review of the GoS’s submissions to the ABC reveals that their primary focus was on the territory of the nine Ngok Dinka chiefdoms and the provincial boundary between Kordofan and Bahr el Ghazal in 1905, the Bahr el Arab/Kir, considered as the northern limit of the transferred area.
551. Referring to the mandate, the GoS argues that the ABC has to “[d]efine the nine Ngok Dinka Chiefdoms territory transferred to Kordofan in 1905.”⁹⁴⁵ The “pivotal part of this definition is that the concerned area was a southern area transferred to the north in 1905; i.e. it is not any area that was in Kordofan before 1905.”⁹⁴⁶
552. The GoS insists that it was clear that the Bahr el Arab was the provincial boundary between Kordofan and Bahr el Ghazal⁹⁴⁷ and that its “exact nature and location” had been determined “immediately before the transfer.”⁹⁴⁸ Similarly, “the alteration of boundaries [after the transfer] in 1905 was very, very specific and clear.”⁹⁴⁹ In fact, according to the GoS, “both the people and the natural boundary were *accurately* defined before the decision to transfer,” each being identically bounded in the north by the Bahr el Arab.⁹⁵⁰ The GoS submits that the Ngok Dinka settled in areas north of the river Bahr el Arab only after 1905.⁹⁵¹ The GoS concludes that “the territory of the nine Ngok Dinka chiefdoms

⁹⁴³ *Id.* at p. 18.

⁹⁴⁴ *Id.* at p. 19.

⁹⁴⁵ GoS First Presentation to the Abyei Boundaries Commission, April 11, 2005, Slide 52, SPLM/A Exhibit-FE 14/2.

⁹⁴⁶ *Id.* at Slide 7.

⁹⁴⁷ *See id.* at Slides 12-20.

⁹⁴⁸ GoS Final Presentation to the ABC, June 16, 2005, Slide 21, SPLM/A Exhibit-FE 14/18.

⁹⁴⁹ Transcript of discussion between ABC Members during meeting at La Mada Hotel, Nairobi, Kenya, April 12, 2005, p. 20, SPLM/A Exhibit-FE 14/5a. *See also* GoS First Presentation to the Abyei Boundaries Commission, April 11, 2005, Slides 33-40, SPLM/A Exhibit-FE 14/2.

⁹⁵⁰ GoS Final Presentation to the ABC, June 16, 2005, Slide 18, SPLM/A Exhibit-FE 14/18. *See also Id.* at Slide 20 and GoS First Presentation to the Abyei Boundaries Commission, April 11, 2005, Slide 29, SPLM/A Exhibit-FE 14/2.

⁹⁵¹ GoS Additional Presentation Abyei: A History of Coexistence, June 17, 2005, Slide 15, SPLM/A Exhibit-FE 14/17.

transferred to Kordofan in 1905” is the triangle that now lies to the South of Bahr-el-Arab.”⁹⁵²

553. The GoS also stresses that the ABC “shall not invent a new parameter other than the yardstick of the year 1905.”⁹⁵³ In the GoS’s view, the “ingenuity of the USA Proposal” was to have chosen “the year 1905, as the date where land rights were vested.”⁹⁵⁴ As a consequence of the ABC Experts’ scientifically based decision, “[t]he local communities shall know their boundaries as they stood in 1905, i.e. before they moved into each other territories.”⁹⁵⁵

(d) The Parties’ Criticism of the Other Side’s Interpretation of the Mandate Presented to the ABC Experts

554. Each Party maintains that the other side had in fact adopted the interpretation which it thinks is the correct one in the ABC proceedings. The GoS thus argued before this Tribunal that the SPLM/A was focusing on the area of the Ngok Dinka, rather than the Ngok Dinka people, and relied on the SPLM/A’s statement in its preliminary presentation that the “[t]he Protocol [...] defines [the] Abyei area as an area of the nine Ngok Dinka chiefdoms that was transferred to Kordofan in 1905,”⁹⁵⁶ insisting that the use of the phrase “that was transferred” evinced a territorial approach.⁹⁵⁷ The GoS also points to references to “specific Dinka lands” being shifted to Kordofan and “Dinka areas” being moved administratively.⁹⁵⁸

555. The Tribunal would note that this particular argument is not persuasive. Suffice it to note that, when the agent of the GoS commented on the SPLM/A’s preliminary presentation, he

⁹⁵² The Abyei Boundaries Commission: Basic Documents of the Government of the Sudan, First Presentation, April 11, 2005, last page (IX Conclusion).

⁹⁵³ GoS First Presentation to the Abyei Boundaries Commission, April 11, 2005, Slide 51, SPLM/A Exhibit-FE 14/2. *See also* Notes on the Mandate of the Abyei Boundaries Commission, April 12, 2005, p. 2, SPLM/A Exhibit-FE 14/5.

⁹⁵⁴ GoS First Presentation to the Abyei Boundaries Commission, April 11, 2005, Slide 47, SM Annex 77, SPLM/A Exhibit-FE 14/2. *See also* Notes on the Mandate of the Abyei Boundaries Commission, April 12, 2005, p. 1, SPLM/A Exhibit-FE 14/5.

⁹⁵⁵ GoS First Presentation to the Abyei Boundaries Commission, 11 April 2005, Slide 50, SM Annex 77. SPLM/A Exhibit-FE 14/2. *See also* Notes on the Mandate of the Abyei Boundaries Commission, April 12, 2005, p. 1, SPLM/A Exhibit-FE 14/5.

⁹⁵⁶ The SPLM/A Preliminary Presentation on the Boundaries of the Abyei Area (First SPLM/A Presentation), April 10, 2005, p. 2, SPLM/A Exhibit-FE 14/1.

⁹⁵⁷ GoS Oral Pleadings, April 18, 2009, Transcr. 32/17 *et seq.*

⁹⁵⁸ GoS Rejoinder, para. 36 quoting SPLM/A Preliminary Presentation on the Boundaries of the Abyei Area (First SPLM/A Presentation) p. 4, SPLM/A Exhibit-FE 14/1.

was pleased to see that “the Abyei Protocol that was signed defined the Abyei area as the area of the nine Ngok Dinka chiefdoms *that were transferred* to Kordofan in 1905.”⁹⁵⁹ In the informal context of the ABC proceedings, these statements cannot be taken in isolation to conclude that either party changed its approach to the mandate. In the same way, the SPLM/A’s comment that “the reasons for the transfer of the two areas and not the people are explicitly stated”⁹⁶⁰ in the March 1905 SIR derives not from a newly adopted “territorial” approach,⁹⁶¹ but from a rather unconvincing attempt to criticize the GoS’s position, in contradiction with the SPLM/A’s own interpretation of the same document, clearly set forth a few pages earlier in its presentation.⁹⁶²

556. Equally unpersuasive are the SPLM/A’s efforts to show that the GoS’s presentations proved that it understood the Formula to focus on the people and not on the area transferred. The fact that the GoS repeatedly referred before the ABC to “[t]he Decision to Transfer the ngok dinka [sic] and twij [sic] to Kordofan,”⁹⁶³ or to the transfer of “groups,” “the Ngok and the Twic”⁹⁶⁴ in its Memorial, may well amount to acknowledging that the March 1905 SIR was couched in tribal terms, but does not allow the inference that the GoS’s own conception of its interpretation of the mandate was not primarily territorial. It does illustrate, however, that the so-called “territorial” interpretation has implications for the people.
557. To conclude, there is little doubt that the GoS’s interpretation was to be understood as focusing on the transfer of a clearly delimited area with an impact on the Ngok Dinka tribe, and the SPLM/A’s as centered on the transfer of a tribe with territorial consequences. The

⁹⁵⁹ Transcript of discussion between ABC Members during meeting at La Mada Hotel, Nairobi, Kenya, April 12, 2005, p. 6, SPLM/A Exhibit-FE 14/5a. (Emphasis added)

⁹⁶⁰ The SPLM/A Final Presentation on the Boundaries of the Abyei Area, May 14 – 16, 2005, p. 27, SPLM/A Exhibit-FE 14/13. *See also* GoS Rejoinder, para. 37.

⁹⁶¹ *See* GoS Rejoinder, paras. 37-38.

⁹⁶² *See supra* para. 547.

⁹⁶³ SPLM/A Oral Pleadings, April 22, 2009, Transcr. 216/16 *et seq.* quoting GoS First Presentation to the ABC, Slide 31, SPLM/A Exhibit-FE 14/2, CB-113. *See also* the GoS reference to “The Decision to Transfer the Ngok and the Twij To Kordofan” in GoS first Presentation to the ABC, Slides 31-32, SPLM/A Exhibit-FE 14/2 and GoS Final Presentation to the ABC, Slide 24, SPLM/A Exhibit-FE 14/18.

⁹⁶⁴ SPLM/A Counter-Memorial, para. 1549 quoting GoS Memorial, paras. 357, 359. *See also* SPLM/A Rejoinder, para. 805.

GoS's and the SPLM/A's interpretations were therefore not dissimilar to those expounded before this Tribunal.⁹⁶⁵

2. The ABC Experts' Interpretation of the Mandate

558. While acknowledging the strengths of the GoS's construction of the Formula, the ABC Experts ultimately did not consider that territorial considerations alone were sufficiently dispositive in the interpretation of their mandate.⁹⁶⁶ Given the lack of any precise administrative boundary, the ABC Experts focused on the tribal dimension of the transfer and relied on the Ngok Dinka's occupation of land to determine what had been transferred in 1905.

(a) The Provincial Boundary Was Not the Determining Factor in the Experts' Analysis of the Formula

559. The ABC Experts pointed out that “[a]t first glance, the evidence adduced by the government in support of its interpretation of the 1905 boundary is persuasive⁹⁶⁷ and “strong.”⁹⁶⁸ However, when the ABC Experts confronted the evidence of “what the local administrative understanding and practice of the day was on the ground,”⁹⁶⁹ it discovered in contemporary reports that there was “considerable geographical confusion” about the location of the real Bahr el Arab river in 1905, and more generally “about the Bahr el Arab and Bahr el Ghazal regions for the first two decades of Anglo-Egyptian Condominium rule.”⁹⁷⁰ The administrative record and its full context reveal that the Ragaba ez Zarga, and not the Bahr el Arab, was treated as the province boundary.⁹⁷¹ In addition, the boundary was not shown on the map after the transfer, which suggests that “the area had not yet been surveyed.”⁹⁷²

⁹⁶⁵ See *supra* the summary of Parties' arguments on the interpretation of the Formula before this Tribunal, paras. 223 *et seq.*

⁹⁶⁶ ABC Experts' Report, Part I, pp. 17-18, 35-41.

⁹⁶⁷ *Id.* at Part I, p. 17.

⁹⁶⁸ *Id.* at Part I, p. 36.

⁹⁶⁹ *Id.* at Part I, p. 37.

⁹⁷⁰ *Id.* at Part I, pp. 18, 37.

⁹⁷¹ *Id.* at Part I, p. 39.

⁹⁷² *Id.*

560. The ABC Experts concluded that the GoS position, though “understandable,” was “incorrect.”⁹⁷³ Because of its inaccurate and approximate nature,⁹⁷⁴ the provincial boundary was not considered by the ABC Experts as having the decisive role that the GoS sought to confer upon it; it was not seen as the decisive factor in delimiting the transferred area.

(b) The ABC Experts’ Emphasis on the Tribal Dimension of the Transfer

561. The ABC Experts considered, in addition to the evidence supporting the territorial interpretation, other evidence highlighting the tribal dimension of the transfer and its territorial consequences, and adopted an interpretation focusing on land occupation and “land rights of the people constituting the nine Ngok Dinka chiefdoms as at 1905.”⁹⁷⁵

562. At the very beginning of their Report, the ABC Experts observed that there existed no document from the year 1905 describing or showing the area of the nine Ngok Dinka chiefdoms transferred to Kordofan at that time:

No map exists showing the area inhabited by the Ngok Dinka in 1905. Nor is there sufficient documentation produced in that year by Anglo-Egyptian Condominium government authorities that adequately spell out the administrative situation that existed in that area at that time.⁹⁷⁶

563. The ABC Experts therefore had no choice but to “avail themselves of relevant historical material produced both before and after 1905, as well as during that year, to determine as accurately as possible the area of the nine Ngok Dinka chiefdoms as it was in 1905.”⁹⁷⁷

564. Having made those remarks regarding their research methods, which manifested their intention to ensure that 1905 was maintained as the year of reference, the ABC Experts offered their analysis of what occurred in 1905 and emphasized that the transfer concerned the Ngok people:

What occurred in 1905 was that because of Dinka complaints about Humr raids, the British authorities decided to transfer the Ngok and part of the Twich Dinka from the administrative control of Bahr el-Ghazal Province to Kordofan Province. This action

⁹⁷³ *Id.* at Part I, p. 18.

⁹⁷⁴ *Id.* at Part II, App. 2, p. 21.

⁹⁷⁵ *Id.* at Part II, pp. 21, 22.

⁹⁷⁶ *Id.* at Part I, p. 4.

⁹⁷⁷ *Id.*

put the Ngok and the Humr under the authority of the same governor (a fact cited in both the GOS and SPLM/A presentations).⁹⁷⁸

565. In the course of the proceedings, the ABC Experts paused to “focus again on what our mandate is”⁹⁷⁹ and emphasized that:

The Peace Agreement, that was mentioned, speaks specifically about the nine sections of the Ngok Dinka. The Peace Agreement refers to the Abyei area that was occupied by the nine sections of the Ngok Dinka. [...] When the British came, a decision was made to make this area part of Kordofan. But we are also looking at the area of the nine sections of the Ngok Dinka. [...] We want to find out where people lived, where they took their cattle, and where they shared grazing and water with other people.⁹⁸⁰

The area to be defined is described in the protocol as the area of the 9 Ngok Dinka chiefdoms – no one else. And we are supposed to discover what territory was being used and claimed by those 9 chiefdoms when the administrative decision was made to place them in Kordofan.⁹⁸¹

566. These statements, along with the above reference to the March 1905 SIR, clearly confirm that the Formula’s focus, in the ABC Experts’ view, was more on a transfer of people with territorial implications, rather than on a transfer of an area south of the approximate provincial boundary.
567. The ABC Experts then considered evidence of Ngok presence north of the Bahr el Arab before the transfer, and concluded that the Ngok Dinka occupied not merely the area south of the Bahr el Arab described by the GoS, but also the area that extended from the Kir/Bahr el Arab north to at least the Ngol/Ragaba ez Zarga.⁹⁸² The ABC Experts also examined post-1905 evidence and came to the conclusion that it could be used to establish the location of the Ngok Dinka in 1905, since “[t]he administrative record of the Condominium period and testimony of persons familiar with the area attest to the continuity of Ngok Dinka settlements in, and use of, places north of the Bahr el-Arab between 1905 and 1965.”⁹⁸³ They relied, *inter alia*, on the testimony and writings of Mr. Tibbs and Professor Cunnison, the latter being “definite in stating that the general area in which the Ngok maintained their

⁹⁷⁸ *Id.* at Part I, p. 15. *See also id.*, p. 21.

⁹⁷⁹ *Id.* at Part II, App. 4, p. 129.

⁹⁸⁰ *Id.* at Part II, pp. 129-130 (emphasis added).

⁹⁸¹ *Id.* at Part II, pp. 155-156 (emphasis added).

⁹⁸² *See id.* at Part I, p. 18, pp. 39-40. *See also id.* at Part II, App. 4, pp. 167-173 and App. 5, pp. 196-203.

⁹⁸³ *Id.* at Part I, p. 21. *See also id.*, pp. 18-19, 35, 41-44. *See also id.* at Part II, App. 5, pp. 200-203.

permanent settlements remained the same over the years.”⁹⁸⁴ The ABC Experts further referred to Professor Cunnison for the propositions that “the Bahr, or the Bahr al ‘Arab” should not be regarded as a single and separate river but as a region encompassing “all river beds between the Regeba ez Zerga and the main river [i.e. the Kir/Bahr el Arab],”⁹⁸⁵ and that “much of the Bahr has permanent Dinka settlements [...]”⁹⁸⁶

568. The ABC Experts then analyzed the evidence in terms of “land rights of the people constituting the nine Ngok Dinka chiefdoms as at 1905,”⁹⁸⁷ so that the boundaries between the Ngok and the Misseriya may reflect “the two communities’ effective connection to land.”⁹⁸⁸ The reasons offered to take an approach based on occupation and land rights included the following “sociological and historical facts as well as the terms of the CPA:”

- the provincial boundary was not precisely delimited⁹⁸⁹ and an uncertain administrative boundary “did not (and could not have) coincided exactly with the boundaries of land use rights of sedentary or pastoral peasant communities whose tenure rights and obligations overlap in the absence of concrete walls separating the communities;”⁹⁹⁰
- The land used by the communities was “always affected by and responded to variable seasonal rain patterns and climatic changes;”⁹⁹¹
- The Kordofan and Bahr el Ghazal Annual Reports immediately before and after 1905 may draw lines but “hardly ever demarcate actual boundaries in terms of land rights and population dynamics on the ground;”⁹⁹²
- The armed raids on the Ngok Dinka, “the official principal reason for the transfer of the 9 Ngok Dinka chiefdoms to Kordofan” (recorded in the March 1905 SIR), “must have greatly destabilized the Ngok Dinka and thus affected the land use patterns of the two communities prior to the announcement of the transfer;”⁹⁹³

⁹⁸⁴ *Id.* at Part I, p. 19. *See also id.* at Part II, App. 4, p. 162.

⁹⁸⁵ *Id.* at Part II, App. 5, p. 172.

⁹⁸⁶ *Id.* at Part II, App. 4, p. 161, and App. 5, p. 172.

⁹⁸⁷ *Id.* at Part II, App. 2, p. 22.

⁹⁸⁸ *Id.* at Part II, p. 21.

⁹⁸⁹ *Id.* at Part I, p. 39, and Part II, App. 2, p. 21.

⁹⁹⁰ *Id.* at Part II, App. 2, p. 22.

⁹⁹¹ *Id.*

⁹⁹² *Id.*

⁹⁹³ *Id.* at Part II, App. 2, p. 23.

- Section 1.1.3 of the Abyei Protocol recognizes “‘secondary rights’ of access and use of land by one community in the territory of another community that enjoys ‘dominant rights;’”⁹⁹⁴
- The Notes on the Mandate of the Abyei Boundaries Commission, which record the Government’s concern that 1905 was chosen as the year when land rights were vested, “also refers to the issue of co-existing land rights and land use [...]”⁹⁹⁵

569. Considering that the notion of “land rights” is better adapted to the communities’ “multiple forms of occupation and use rights” than the colonial concept of “land ownership,”⁹⁹⁶ the ABC Experts stressed the importance of the “sociological fact that by 1905 there existed three main categories of [...] occupation, land rights and land use.”⁹⁹⁷ They were the following:

- Dominant occupation that was exclusive;
- Dominant occupation that allowed non-members of the community to acquire seasonal rights;
- Shared secondary occupation, in the so-called no man’s land (the goz).⁹⁹⁸

570. On the basis of the evidence before them, the ABC Experts concluded that the territory where the Ngok Dinka had established dominant occupation “fell squarely within the boundaries that were transferred in 1905” and extended to the 10°10’N line.⁹⁹⁹ They also divided the zone between 10°10’N and 10°35’N, which they defined as a shared secondary occupation area and placed the northern boundary of the Abyei Area at 10°22’30’N.¹⁰⁰⁰

3. The Tribunal’s Appreciation of the Reasonableness of the ABC Experts’ Interpretation

571. The Tribunal must now assess the reasonableness of the ABC Experts’ interpretation of their mandate, “which [was] ‘to define (i.e. delimit) and demarcate the area of the nine

⁹⁹⁴ *Id.*

⁹⁹⁵ *Id.*

⁹⁹⁶ *Id.* at Part II, App. 2, pp. 23-24.

⁹⁹⁷ *Id.* at Part II, App. 2, p. 24.

⁹⁹⁸ *See id.* at Part II, App. 2, pp. 24-25.

⁹⁹⁹ *Id.* at Part II, App. 2, p. 25.

¹⁰⁰⁰ *Id.*

Ngok Dinka chiefdoms transferred to Kordofan in 1905’ as stated in the Abyei Protocol, and reiterated in the Abyei Appendix and the ABC Terms of Reference and Rules of Procedure.” In a subsequent section, the Tribunal will also assess the reasonableness of the primarily territorial interpretation of the mandate.¹⁰⁰¹ Again, it should be emphasized that the Tribunal’s task at this stage (an Article 2(a) inquiry) is limited to the assessment of the reasonableness of the mandate’s interpretation. Its correctness, a matter over which the Tribunal is not of one view, falls outside the Tribunal’s Article 2(a) mandate.

572. Both Parties agree, and the Tribunal considers it appropriate, to use the rules of interpretation of the Vienna Convention as part of the general principles referred to in Article 3 of the Arbitration Agreement.¹⁰⁰² The Tribunal will thus seek to establish the ordinary meaning of the text of the mandate in its context, in particular the Abyei Protocol, and in light of its object and purpose.

573. The Parties also extensively explored the historical context in 1905 in order to shed light on the natural meaning of the mandate. In addition, they relied on the drafting history of the Abyei Protocol to determine what the mandate was intended to mean. For the sake of completeness, the Tribunal will therefore examine the meaning of the mandate in its broader context.

4. “Chiefdoms” as the Appropriate Object of the Transfer

574. As a first question, the Tribunal will discuss whether the ABC Experts could reasonably interpret the Formula as relating to the transfer in 1905 of the nine Ngok Dinka chiefdoms (as opposed to a defined area of land).

(a) Textual Interpretation of the Formula

575. In accordance with the Article 31 of the Vienna Convention, the Tribunal must interpret the text of the Formula by initially looking at the ordinary meaning of the terms used. The Tribunal recalls that the Parties have diverging opinions as to the grammatical meaning of the text. While the GoS acknowledges that the word “transferred” is equally capable of

¹⁰⁰¹ See *infra* paras. 665 *et seq.*

¹⁰⁰² See GoS Oral Pleadings, April 18, 2009, Transcr. 24/17 *et seq.*; SPLM/A Oral Pleadings, April 20, 2009, Transcr. 80/17 *et seq.*

qualifying the noun “area” as the phrase “nine Ngok Dinka chiefdoms”¹⁰⁰³, the SPLM/A insists that “transferred to Kordofan” relates to the noun “chiefdoms.”¹⁰⁰⁴ The Tribunal is of the opinion that both interpretations are tenable.

576. The Tribunal notes that the ICJ was faced with a similar situation in the *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*. In that case, the Court had to interpret the text of a Declaration made by the Imperial Government of Iran regarding the jurisdiction of the Court in accordance with Article 36(2) of its Statute. The relevant text, in the original French version, read as follows:

Le Gouvernement impérial de Perse déclare reconnaître comme obligatoire, de plein droit et sans convention spéciale, vis-à-vis de tout autre État acceptant la même obligation, c’est-à-dire sous condition de réciprocité, la juridiction de la Cour permanente de Justice internationale, conformément à l’article 36, paragraphe 2 du Statut de la Cour, sur tous les différends qui s’élèveraient après la ratification de la présente déclaration, au sujet de situations ou de faits ayant directement ou indirectement trait à l’application des traités ou conventions acceptés par la Perse et postérieurs à la ratification de cette déclaration...¹⁰⁰⁵

577. Both Parties agreed that the Declaration applied to conventions or treaties accepted by Iran. However, the Parties had opposing views as to whether, based on the grammatical interpretation of the Declaration, the jurisdiction of the Court extended to treaties or conventions accepted by Iran only after the ratification of the Declaration or accepted by Iran at any time. While the Government of Iran claimed that the words “et postérieurs à la ratification de cette déclaration” (“and subsequent to the ratification of this declaration”) applied to the immediately preceding words “traités ou conventions acceptés par la Perse” (“treaties or conventions accepted by Persia”), the Government of the United Kingdom argued that the expression “et postérieurs à la ratification de cette déclaration” rather referred to the words “au sujet de situations ou de faits” (“with regard to situations or facts”).¹⁰⁰⁶

¹⁰⁰³ GoS Rejoinder, para. 32. *See also supra* the summary of the GoS’s arguments, para. 225.

¹⁰⁰⁴ SPLM/A Memorial, para. 1107. *See also supra* the summary of the SPLM/A’s arguments, paras. 232-233.

¹⁰⁰⁵ *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)* (Preliminary Objections) Judgment of July 22, 1952, ICJ Reports 1952, p. 93, 103. The translated English version reads: “The Imperial Government of Persia recognizes as compulsory *ipso facto* and without special agreement in relation to any other State accepting the same obligation, that is to say, on condition of reciprocity, the jurisdiction of the Permanent Court of International Justice, in accordance with Article 36, paragraph 2, of the Statute of the Court, in any dispute arising after the ratification of the present declaration with regard to situations or facts relating directly or indirectly to the application of treaties or conventions accepted by Persia and subsequent to the ratification of this declaration...”

¹⁰⁰⁶ *Id.* at 104.

578. The Court observed:

If the Declaration is considered from a purely grammatical point of view, both contentions might be regarded as compatible with the text. The words “et postérieurs à la ratification de cette déclaration” may, strictly speaking, be considered as referring either to the expression “traités ou conventions acceptés par la Perse,” or to the expression “au sujet de situations ou de faits.”

But the Court cannot base itself on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text, having due regard to the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court.¹⁰⁰⁷ (emphasis added)

579. After a careful analysis of the natural reading of the text and the circumstances in which it was adopted by the Government of Iran, including the reasons behind Iran’s adoption of a rather restrictive formula, the Court accepted the interpretation proposed by the Government of Iran as reflective of its manifest intention to limit the jurisdiction of the Court to treaties or conventions accepted by Iran after the ratification of the Declaration.¹⁰⁰⁸

580. With respect to the Formula establishing the ABC Experts’ mandate, the Tribunal notes that a purely grammatical approach to the interpretation of these terms, using for example the rule of proximity or simple euphony, does not yield any determinative conclusion as to their ordinary meaning. There is no conclusive method for determining, by recourse to the text alone, whether “transferred” relates to “area,” suggesting a territorial dimension, or whether it relates to “the nine Ngok Dinka chiefdoms,” suggesting a more tribal dimension. Both propositions are equally tenable.

581. The Tribunal notes that the Arabic version of the Formula as found in Section 1.1.2 of the Abyei Protocol¹⁰⁰⁹ is identical to the English text and does not provide further support for either of the two grammatical interpretations.

582. Given the possible interpretations of the Formula, and the textual support for each of them, the Tribunal concludes that the ABC Experts’ own construction was not unreasonable and accordingly did not constitute an excess of mandate.

¹⁰⁰⁷ *Id.*

¹⁰⁰⁸ *Id.* at 104-107.

¹⁰⁰⁹ The Arabic version of the Comprehensive Peace Agreement, of which the Protocol forms an integral part, can be accessed at: <http://www.unmis.org/english/documents/cpa-ar.pdf>.

(b) The Object and Purpose of the Formula Within the Meaning of Article 31(1) of the Vienna Convention

583. In accordance with Article 31 of the Vienna Convention, the Formula must also be interpreted in the context of the relevant instruments in which it was set out and in the light of their object and purposes.

584. As a preliminary matter, the Tribunal notes that the GoS has taken a somewhat restrictive approach to the interpretation of the Formula. The GoS insists that the Tribunal should confine itself to examining the historical event that occurred in 1905 – the administrative transfer of an area – and the clear intention of the Anglo-Egyptian officials at the time, as evidenced by the contemporaneous transfer documents.¹⁰¹⁰ Any detailed discussion of the provisions of the Abyei Protocol, including those relating to the Abyei Referendum, is dismissed on the ground that “[...] the mandate of the [ABC Experts], as of the Tribunal, is not to consider areas according to their demographics, but rather to delimit an area that was transferred from the Bahr el Ghazal to Kordofan in 1905.”¹⁰¹¹ The GoS goes on to argue that:

[...] the very issue that the Parties could not agree in the Abyei Protocol – the limits of the disputed area – should [not] be influenced by other factors, not mentioned in the relevant provisions of the Protocol and having nothing to do with the way in which the resolution of the definition of the “Abyei Area” was agreed to be determined. If the intention of the Parties had been to include all Ngok Dinka, regardless of where they live, in the “Abyei Area” and thus subject to the referendum, the Parties would have said so and drafted the Formula accordingly. They did not.¹⁰¹²

585. By contrast, the SPLM/A argues that instead of focusing on the purpose of the transfer in 1905, one should examine the Parties’ purposes in 2004, when they concluded the Abyei Protocol.¹⁰¹³ The SPLM/A emphasizes, in particular, that:

[...] the central purpose of the definition of the Abyei Area was to specify that region whose residents would be entitled to participate in the Abyei Referendum [...] on the question whether or not they would be included in the South or the North, simultaneous to the main Southern Referendum.¹⁰¹⁴

¹⁰¹⁰ See GoS Rejoinder, paras. 10-19; paras. 41-59.

¹⁰¹¹ GoS Counter-Memorial, para. 110. See also GoS Rejoinder, para. 57.

¹⁰¹² GoS Rejoinder, para. 58. See also *supra* the summary of the GoS’s arguments, paras. 249 *et seq.*

¹⁰¹³ See SPLM/A Rejoinder, para. 849.

¹⁰¹⁴ SPLM/A Memorial, para. 1124. See also *supra* the summary of the SPLM/A’s arguments, paras. 255 *et seq.*

586. The Tribunal agrees with the GoS that the Formula invited the ABC Experts to determine what was transferred in 1905, and not at any other date. It also agrees that the 1905 transfer documents and “the object and purpose of the transfer”¹⁰¹⁵ are relevant to the interpretation of the Formula and these will be examined in due course.¹⁰¹⁶ However, the Tribunal cannot ignore the fact that the ABC Experts’ mandate was agreed upon by the Parties and enshrined in the Abyei Protocol in 2004, and subsequently reiterated in the Abyei Appendix, the Terms of Reference and the Rules of Procedure, as recalled in Article 2(a) of the Arbitration Agreement.¹⁰¹⁷ The CPA, which incorporates the Abyei Protocol,¹⁰¹⁸ and the Interim National Constitution, which echoes its main provisions,¹⁰¹⁹ should also be taken into account. This context also informs the meaning of the Formula. The Abyei Protocol, and more generally the CPA, whose aim is to achieve durable peace in Sudan, require the Tribunal to interpret the mandate in light of the object and purpose of these contextual instruments.
587. The ABC’s task of defining and demarcating the Abyei Area, as provided for in the Abyei Protocol,¹⁰²⁰ was an important step towards achieving the resolution of the conflict and, ultimately, the goals of the broader peace process contemplated in the CPA. Indeed, the Abyei Protocol - the agreement where the Formula first appeared - is one of the six fundamental texts recorded and reconfirmed in the CPA.¹⁰²¹ The Chapeau of the CPA states that the Parties, the GoS and the SPLM/A, “MINDFUL of the urgent need to bring peace and security to the people of the Sudan [...],” reached agreement on these texts...

[...] IN PURSUANCE OF [their] commitment [...] to a negotiated settlement on the basis of a democratic system of governance which, on the one hand, recognizes the right of the people of Southern Sudan to self-determination and seeks to make unity

¹⁰¹⁵ GoS Counter-Memorial, para. 115.

¹⁰¹⁶ See *infra* paras. 616 *et seq.*

¹⁰¹⁷ See Abyei Protocol, Section 1.1.2 and Section 5.1; Abyei Appendix, Section 1; Terms of Reference, Section 1.1; and Rules of Procedure, Section 1.

¹⁰¹⁸ See CPA, Chapter IV.

¹⁰¹⁹ See Interim National Constitution, Article 183.

¹⁰²⁰ See in particular Section 1.1.2 and Section 5.1 of the Abyei Protocol. The ABC was one of the four “priority joint task teams” that the Parties agreed to establish for the implementation of the CPA (See Chapeau of the CPA, p. (xiii), para. (6)).

¹⁰²¹ See Chapeau of the CPA, p. (xi). The Abyei Protocol is the fourth Chapter of the CPA. The five other chapters include the Machakos Protocol dated July 20, 2002 (Chapter I); the Agreement on Security Arrangements dated September 25, 2003 (Chapter VI of the CPA); the Agreement on Wealth Sharing dated January 7, 2004 (Chapter III of the CPA); the Protocol on Power Sharing dated May 26, 2004 (Chapter II); the Protocol on the Resolution of the Conflict In Southern Kordofan and Blue Nile States dated May 26, 2004 (Chapter V).

attractive during the Interim Period, while at the same time is founded on the values of justice, democracy, good governance, respect for fundamental rights and freedoms of the individual, mutual understanding and tolerance of diversity within the realities of the Sudan.¹⁰²²

588. The Interim National Constitution confirms the duty of the Government of National Unity to implement

[...] the Comprehensive Peace Agreement in a manner that makes the unity of the Sudan an attractive option especially to the people of Southern Sudan, and pave the way for the exercise of the right of self-determination according to Part Sixteen of this Constitution.¹⁰²³

589. In furtherance of these objectives and commitments, the Abyei Protocol lays down, at the very beginning of its first section, the following three general principles of agreement on Abyei:

- 1.1.1 Abyei is a bridge between the north and the south, linking the people of Sudan;
- 1.1.2 The territory is defined as the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905;
- 1.1.3. The Misseriya and other nomadic peoples retain their traditional rights to graze cattle and move across the territory of Abyei.

590. Thus, the Abyei Protocol first specifies the nature and function that the Parties ascribe to the Abyei Area (serving as a bridge to link the people of Sudan and fostering reconciliation), and only then provides the definition of the Abyei Area itself (“the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905”). The text finally recognizes the “traditional rights” of the Misseriya and other nomadic tribes to graze cattle and move across the Abyei Area.

591. The Abyei Protocol, in combination with the Abyei Appendix,¹⁰²⁴ divides the peaceful resolution process of the Abyei conflict into three phases. The first phase culminates in the

¹⁰²² See Chapeau of the CPA, p. (xi).

¹⁰²³ See Interim National Constitution, Article 82(c). The Preamble of the Interim National Constitution also recalls, *inter alia*, that the people of Sudan are committed to the CPA and “to establish a decentralized multi-party democratic system of governance in which power shall be peacefully transferred and to uphold values of justice, equality, human dignity and equal rights and duties of men and women.”

¹⁰²⁴ The Abyei Appendix is also referred to as the Abyei Annex (*see* ABC Experts’ Report, Part II, App. 1, p. 12). Section 1 of the Abyei Appendix reiterates the mandate of the ABC Experts.

presentation of the ABC Experts' Report to the Presidency, the Commission being tasked "to define and demarcate the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905, referred to herein as Abyei Area."¹⁰²⁵ Originally, the ABC was to complete its task within two years of the "Interim Period,"¹⁰²⁶ which commenced on July 9, 2005.¹⁰²⁷ However, the Parties agreed to move the deadline to an earlier date, the end of the "Pre-Interim Period,"¹⁰²⁸ a six-month phase directly preceding the six-year long Interim Period.¹⁰²⁹ The tightening of the original timetable confirms both the urgency and the importance of delimiting the Abyei Area for the purposes of the peace process.

592. The second phase starts when the Presidency establishes "the administration of Abyei simultaneously with the Government of South Sudan and the Governments of Southern Kordofan and Blue Nile States by the beginning of the Interim Period."¹⁰³⁰ During that period, the residents of the Abyei Area will be citizens of both Western Kordofan and Bahr el Ghazal¹⁰³¹ and elect a local Executive Council in charge of administering the Area.¹⁰³² Abyei's special administrative status also provides, *inter alia*, that net oil revenues from the Area will be shared between six different groups and entities, in accordance with a specific formula.¹⁰³³
593. The third phase corresponds to the "End of Interim Period."¹⁰³⁴ At this stage, the residents of the Abyei Area will be offered the opportunity to vote in a referendum to decide whether "Abyei retains its special administrative status in the north" or becomes part of Bahr el Ghazal.¹⁰³⁵ The "residents of Abyei Area" are defined, in Section 6.1. of the Abyei

¹⁰²⁵ See Abyei Protocol, Section 5.1.

¹⁰²⁶ See Abyei Protocol, Section 5.2.

¹⁰²⁷ See Interim National Constitution, Article 226(4).

¹⁰²⁸ See Abyei Appendix, Section 5.

¹⁰²⁹ The Machakos Protocol (Chapter 1 of the CPA) distinguishes two periods in the transition process: a Pre-Interim Period during which "[t]he institutions and mechanisms provided for in the Peace Agreement shall be established" (Machakos Protocol, Part B, Article 2.1) and an Interim Period during which "[t]he institutions and mechanisms established during the Pre-Interim Period shall be operating in accordance with the arrangements and principles set out in the Peace Agreement." (Machakos Protocol, Part B, Article 2.3)

¹⁰³⁰ Abyei Appendix, Section 6.

¹⁰³¹ See Abyei Protocol, Section 1.2.1. See also Interim National Constitution, Article 183(2).

¹⁰³² See Abyei Protocol, Section 1.2.2. See also *id.*, Section 2.2.

¹⁰³³ See Abyei Protocol, Section 1.2.3. See also *id.*, Section 3.1.

¹⁰³⁴ Abyei Protocol, Section 1.3.

¹⁰³⁵ Abyei Protocol, Section 1.3. See also *id.*, Section 8.2; Interim National Constitution, Article 183(3).

Protocol, as “the Members of Ngok Dinka community and other Sudanese residing in the area.” Section 6.1 significantly singles out “the members of Ngok Dinka community,” and merely makes a general reference to “other Sudanese,” without mentioning any other specific community, such as the Misseriya (referred to in other provisions of the Abyei Protocol).¹⁰³⁶

594. The Abyei Referendum will be conducted simultaneously with the referendum of Southern Sudan.¹⁰³⁷ At the end of the Interim Period, the people of South Sudan will be asked either “to confirm the unity of the Sudan by voting to adopt the system of government established under the Peace Agreement” or “to vote for secession.”¹⁰³⁸ While the residents of the Abyei Area will be called upon to cast their separate ballot irrespective of the results of the Southern Referendum,¹⁰³⁹ these results will be highly relevant to the consequences of the choice made by the residents of the Abyei Area. Indeed, they may find themselves north or south of an international boundary if South Sudan secedes. The stakes are therefore considerable and should be born in mind when examining the meaning of the Formula laid down in Section 1.1.2. of the Abyei Protocol.
595. According to a predominantly territorial approach, it would be acceptable and within the logic of this line of interpretation to define the area regardless of the actual proportion of the people of the nine Ngok Dinka sections located in that area, the 1905 provincial boundary (assuming that it could be precisely identified) being the determining criterion. The people would follow the territory only in so far as they reside in that territory. While such a territorial interpretation is entirely plausible as a textual matter, its rigid application could result in splitting the Ngok Dinka community depending on the outcome of the envisaged referendum. A predominantly territorial approach could thus lead to a definition of the Abyei Area that potentially risks defeating the main purpose of the referendum, to empower “[t]he Members of the Ngok Dinka community and other Sudanese residing in the area”¹⁰⁴⁰

¹⁰³⁶ The Abyei Protocol does not establish the criteria of residence. These criteria will be determined by the Abyei Referendum Commission. (See Abyei Protocol, Section 6.1)

¹⁰³⁷ Abyei Protocol, Section 1.3. and Section 8.1.

¹⁰³⁸ Machakos Protocol (Chapter 1 of the CPA), Part B, Article 2.5. See also Interim National Constitution, Part Sixteen.

¹⁰³⁹ Abyei Protocol, Section 1.3. and Section 8.1.

¹⁰⁴⁰ Abyei Protocol, Section 6.1(a).

to choose whether the Abyei Area should retain its special administrative status in the north or be part of Bahr el Ghazal in the south.¹⁰⁴¹

596. In light of the structure and purpose of the Abyei Protocol's key provisions, it was not unreasonable to interpret the Formula in a predominantly tribal manner, that interpretation being more likely to encompass the whole of the Ngok Dinka people. The Tribunal recognizes and holds that the object and purpose of the CPA can reasonably be taken to counsel in favor of a tribal perspective.¹⁰⁴²

(c) The Context of the Formula

597. In addition, other provisions of the relevant instruments, which are pertinent to the interpretation of the Formula as context pursuant to Article 31(1) of the Vienna Convention, equally confirm that the predominantly tribal interpretation proposed by the ABC Experts is not unreasonable.

598. Most importantly, the fact that the Parties agreed that the "ABC shall listen to representatives of the people of Abyei Area and the neighbours"¹⁰⁴³ and "should have free access to the members of the public [...] at the location to be visited"¹⁰⁴⁴ can reasonably be interpreted as an invitation to explore fully the tribal dimension of the Formula, rather than to discern where the uncertain provincial boundary was located in 1905. As the ABC Experts themselves put it, they conceived these interviews with the people of the region as an instrument "to find out where people lived, where they took their cattle, and where they shared grazing and water with other people."¹⁰⁴⁵

599. Thus, having examined the Formula in its context and in light of the relevant instruments' purposes, the Tribunal concludes that the ABC Experts' interpretation of the Formula was reasonable.

¹⁰⁴¹ For an examination of the reasonableness of the predominantly territorial interpretation, *see infra* at paras. 665 to 672.

¹⁰⁴² The Tribunal would note that taking this risk into account does not substitute present-day demographical considerations to the actual text of the mandate. Rather, it acknowledges the connection between the purpose of the Abyei Protocol in 2004 and the Formula's reference to the 1905 transfer.

¹⁰⁴³ Abyei Appendix, Section 3. *See also* Terms of Reference, Section 3.2.

¹⁰⁴⁴ Rules of Procedure, Section 7. *See also id.*, Section 8.

¹⁰⁴⁵ ABC Experts' Report, Part II, App. 4, p. 130.

(d) The Drafting History of the Abyei Protocol

600. That the ABC's interpretation of the Formula was a reasonable one is further confirmed by the drafting history of the Abyei Protocol.
601. It is clear from the record and the Parties' submissions that when the peace negotiations resumed in the late 1990s¹⁰⁴⁶ and developed in the following years, the GoS's and the SPLM/A's views as to how the Abyei Area should be defined differed sharply. While the GoS insisted that "Abyei, homeland of the Ngok Dinka, Misseria and other people is not part of the South,"¹⁰⁴⁷ the SPLM/A requested a referendum "for the people of Abyei" to choose "whether to be part of Southern Sudan or remain in the North," claiming that "[t]he Dinka Ngok people and the territory of Abyei shall therefore be administered as part of Southern Sudan"¹⁰⁴⁸ which had been granted the right of self-determination.
602. Significantly, however, the Parties do agree on the origin of the mandate. Both the GoS and the SPLM/A refer to Dr. Johnson's presentation to the negotiating Parties at a symposium in January 2003 (the "**Johnson Presentation**").¹⁰⁴⁹ This presentation elaborated, among other things, on the key passage of the March 1905 SIR, which, according to both Parties, led to the formulation of the mandate.¹⁰⁵⁰ Although the Parties did not agree immediately on a formula for the Abyei Area, it is very useful to dwell on the actual content of the Johnson Presentation to understand in what context the Parties were introduced to the March 1905 SIR.

¹⁰⁴⁶ See GoS Memorial, para. 43; SPLM/A Memorial, para. 451. For a summary of the Parties' arguments on the drafting history of the Abyei Protocol, see *supra* paras. 261 *et seq.*

¹⁰⁴⁷ See GoS Memorial, para. 49 quoting Second Meeting of the Political Committee between Government of Sudan and the Sudanese People's Liberation Movement/Army, Nairobi, 26th February, 2000, p. 7.

¹⁰⁴⁸ See GoS Memorial, para. 48 quoting First Meeting of the Political Committee between Government of Sudan and the Sudanese People's Liberation Movement/Army, Nairobi, 15th-20th January, 2000, p. 4. See also, for example, the Abyei Peace Committee's submission that "Ngok-Dinka of Abyei area are indisputably part of the Dinka people of southern Sudan and present a natural extension of their shared land, tradition and culture. (APC Paper, The Popular Demand of Ngok-Dinka on Abyei Question, dated October 10, 2002, at p. 4, SPLM/A Exhibit-FE 9/18.)

¹⁰⁴⁹ See GoS Memorial, para. 51; SPLM/A Memorial, para. 461 referring to D. Johnson, Conflict Areas: Abyei - A summary and elaboration of points raised in the presentation and discussion on Abyei, January 18, 2003, at the KCB Management Center, Karen, Nairobi, pp. 1-12, SPLM/A Exhibit-FE 10/13.

¹⁰⁵⁰ See GoS Memorial, para. 359; SPLM/A Counter-Memorial, para. 1547. The March 1905 SIR and its relevant extract have already been discussed in the previous section and will not be repeated here. Suffice it to recall that the terms of this document could reasonably be interpreted in its historical context as referring to the transfer of tribes, rather than a fixed territory.

603. The Tribunal notes that Dr. Johnson spoke of the transfer in clearly tribal terms. Having stated that “[t]he Ngok and the whole of the Bahr al-Arab system were initially administered under Bahr al-Ghazal,” Dr. Johnson explains that:

In 1905 it was decided to transfer both the Ngok and the Twic to the jurisdiction of Kordofan, the better to deal with their complaints against the Humr.¹⁰⁵¹

604. Dr. Johnson quotes the key passage from the 1905 March SIR and further points out that:

Altogether three different Dinka groups have been administered by Kordofan at different times: the Ngok, the Twic and the Ruweng.

[...] The Ngok remained an anomaly as the only Dinka group outside the boundaries of the southern provinces.¹⁰⁵²

605. It is significant that Dr. Johnson also told the Parties where the Ngok Dinka and the Humr were located and what had been their traditional dividing line. The tribes were described as occupying and using the region’s territory as follows:

The northern part of the region, Dar Humr is composed of four main zones: Babanusa in the north, which is the rainy season pasturage of the Humr; the Muglad is the main cultivation area; the Qoz, or central sandy area, is crossed as a means of getting from one set of pastures to another; and clay plains of the Bahr, or river area, which is used for dry season grazing.

It is the Bahr which is also the area of permanent habitation for the Ngok. It is composed of a network of khors, streams and rivers between the Bahr al-Arab, or Kiir, and the Raqaba al-Zarqa, or Ngol. Along the banks and between these streams are numerous sandy ridges on which permanent villages and cultivations are sited. The Ngok make use of dry season pastures further south, between the Kiir and the Lol.¹⁰⁵³

606. Dr. Johnson further indicated that the “dividing line” between Humr and Ngok territory “has usually been taken to be the line where the sand of the Qoz meets the clay plains,” this division of territory being “of such long duration that it is even reflected in the breeds of cattle” of these two people.¹⁰⁵⁴

607. According to Vice-President Taha, it is after this presentation – which unambiguously explains that the Ngok people, who occupied the Bahr and were administered by Bahr el

¹⁰⁵¹ Johnson Presentation, p. 9, SPLM/A Exhibit-FE 10/13.

¹⁰⁵² *Id.*, p. 10.

¹⁰⁵³ *Id.*, p. 7.

¹⁰⁵⁴ *Id.*, p. 7.

Ghazal, were transferred to Kordofan in 1905 – that the SPLM/A began to refer to 1905.¹⁰⁵⁵ However, after a further round of talks in October 2003, the Parties were still unable to agree on key issues. They still disagreed on “[t]he definition of the [Abyei] area, the nature of its social complex and its administrative history” and “[w]hether the area shall remain in Western Kordofan or be annexed to Bahr-el-Ghazal.”¹⁰⁵⁶ The question as to “[w]hether to guarantee full rights for all the citizens or to guarantee *only* grazing rights for *non-indigenous* pastoral communities” remained a “grey” area.¹⁰⁵⁷

608. Both Parties agree that US Special Envoy Senator Danforth broke the deadlock with the presentation on March 19, 2004 of “Principles of Agreement on Abyei”¹⁰⁵⁸ (the “**Danforth Proposal**”). Section 1 of the Abyei Protocol reproduces word for word the Danforth Proposal.
609. Before the Principles of Agreement on Abyei were finally adopted, four additional proposals were exchanged by the Parties in March and May 2004. They contained the following definitions for the Abyei Area:

[...] Abyei Area shall be understood as the land owned and inhabited by the nine sections of the Ngok Dinka (Abyor, Achaak, Achueng, Alei, Anyiel, Bongo, Dill, Mannyuar, Mareng) and which was administratively carved out of Bahr el Ghazal Province and annexed to Kordofan Province in 1905 for security and administrative reasons. It is the Area referred to in the 1972 Addis Ababa Agreement and which was administered from 1974 to 1978 under the President's Office during the currency of the said Agreement.¹⁰⁵⁹

For the purposes of this agreement Abyei Area is defined as the land owned and inhabited by the nine Ngok Dinka sections of Abyor, Alei, Achaak, Anyiel, Achueng, Bongo, Diil, Mannyuar, Mareng. It is the Area referred to in the 1972 Addis Ababa Agreement and which was administered from 1974 to 1978 under the President's Office.¹⁰⁶⁰

¹⁰⁵⁵ See Witness Statement of Vice-President Taha, para. 10 (SCM WS 2).

¹⁰⁵⁶ See The Three Conflict Areas: Points of Agreement and Disagreement, dated 20 October 2003, p. 2, SPLM/A Exhibit-FE 10/39.

¹⁰⁵⁷ See *Id.*, p. 2. (Emphasis in original)

¹⁰⁵⁸ See GoS Memorial, para. 53; Witness Statement of Vice-President Taha, paras. 16-17 (SCM WS 2); SPLM/A Memorial, paras. 479-480, 1175-1176.

¹⁰⁵⁹ Draft Agreement Between the Government of the Sudan (GoS) and the Sudan People's Liberation Movement on The Outstanding Issues of the Three Conflict Areas and Power Sharing, dated March 21, 2004, p. 3, SPLM/A Exhibit-FE 12/7a.

¹⁰⁶⁰ Draft 1 Agreement between The Government of Sudan (GoS) and the Sudan People's Liberation Movement/Army on The Resolution of Abyei Conflict, Based on the USA Principles of Agreement on Abyei dated March 2004, p. 3, SPLM/A Exhibit-FE 12/8. The same definition was included in Draft Agreement

For the purposes of this agreement Abyei Area is defined as the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905. It is the Area referred to in the 1972 Addis Ababa Agreement and which was administered from 1974 to 1978 under the President's Office.¹⁰⁶¹

610. Vice-President Taha observes that both before and after the Danforth Proposal was submitted, the SPLM/A referred to later dates in its own draft proposals and suggests that the SPLM/A was uncomfortable with the reference to the year 1905 and faced with a dilemma:

If [the SPLM/A] were to accept the boundary of the annexed area as in 1905, they knew that it would exclude the area in Kordofan into which the Ngok Dinka had expanded after the 1905 transfer. Conversely, they were also finding it difficult to ignore the 1905 transfer and insist on the whole territory covered by the Ngok Dinka up to 1965, the year which witnessed the maximum expansion of the Ngok, and later years, if they want to claim to an exemption from the 1.1.1956 north/south boundary rule in the new context of self-determination.¹⁰⁶²

611. The declarations of Minister Deng and General Sumbeiywo point to a different conclusion. Minister Deng indeed stated that:

[w]e understood [the definition of Abyei in Article I (b) of the Danforth Proposal] to define Abyei as encompassing all of the land and people over which the Paramount Chief Arop Biong and then Kuol Arop exercised their tribal authority and jurisdiction, no matter where his people and his lands were located.¹⁰⁶³

612. General Sumbeiywo confirms Minister Deng's understanding of Article I (b) in the Danforth Proposal:

1905 was selected because that was when the historical record indicated and the parties understood that the nine Ngok chiefdoms and the entirety of the Ngok people had been transferred to Kordofan.¹⁰⁶⁴

613. In addition, this understanding of the Formula is very much in line with the Johnson Presentation, the content of which does not remotely suggest that the reference to the 1905 transfer would be detrimental to the Ngok Dinka.

Between The Government of Sudan (GoS) and The Sudan People's Liberation Movement/Army on the Resolution of Abyei Conflict, Based on the USA Principles of Agreement on Abyei, dated May 2004, p. 3, SPLM/A Exhibit-FE 12/9.

¹⁰⁶¹ Draft Agreement Between The Government of Sudan (GoS) and The Sudan People's Liberation Movement/Army on Abyei Area, p. 2, SPLM/A Exhibit-FE 12/10.

¹⁰⁶² Witness Statement of Vice-President Taha, para. 13 (SCM WS 2).

¹⁰⁶³ Witness Statement of Minister Deng Alor Kuol, para. 57 (SPLM/A Memorial, Witness Statements, Tab 1).

¹⁰⁶⁴ Witness Statement of Lt. Gen. Sumbeiywo, para. 53 (SPLM/A Memorial, Witness Statements, Tab 4).

614. It appears that the reason for repeatedly mentioning the area “referred to in the 1972 Addis Ababa Agreement and which was administered from 1974 to 1978 under the President's Office” derives from different concerns than those advanced by Vice-President Taha. As he himself rightly pointed out, “the Addis Ababa Agreement did not designate Abyei or any other area outside the three southern provinces by name.”¹⁰⁶⁵ Nor did the Agreement “determine any boundary for Abyei.”¹⁰⁶⁶ The inclusion of a reference to the Addis Ababa Agreement did not have any practical significance for the delimitation of an area. However, it did have a symbolic meaning. Not only was it an undefined reference to the Ngok Dinka people and their strong cultural ties with the “Southern complex,” but it also recalls 1972’s missed opportunity of a referendum that never took place. The preambles of SPLM/A’s four draft proposals and the Johnson Presentation itself corroborate this analysis.¹⁰⁶⁷
615. There is no indication in the record that these draft proposals, or indeed any other draft agreements on Abyei, were submitted to the ABC Experts. The ABC Experts’ Report merely states that “[d]uring the negotiations, there was a disagreement between the [GoS] side and the [SPLM/A] side, on what was meant by the Abyei area.”¹⁰⁶⁸ In any event, the drafting history of the Abyei Protocol does not show that the SPLM/A was dissatisfied with the Danforth Proposal as it was drafted. The SPLM/A was the first to suggest the reference to 1905 on the basis of the Johnson Presentation and eventually did accept the Danforth Formula. What the drafting history reveals, rather, is that despite Dr. Johnson’s description of a tribal transfer, each side, including the GoS, seemed to be convinced that it knew the true meaning of the Formula and that it was in line with their views and interests. This does not alter, and in fact confirms, the Tribunal’s conclusion that the ABC Experts’ own interpretation of the Formula was reasonable. The analysis of the historical context of the 1905 transfer itself, to which the Tribunal now turns, sustains this conclusion.

¹⁰⁶⁵ Witness Statement of Vice-President Taha, para. 11 (SCM WS 2).

¹⁰⁶⁶ *Id.*

¹⁰⁶⁷ See Johnson Presentation, pp. 5-6, SPLM/A Exhibit-FE 10/13.

¹⁰⁶⁸ ABC Experts’ Report, Part II, App. 4, p. 129.

5. The Predominantly Tribal Interpretation of the Formula is Reasonable in Light of the Historic Facts of 1905

616. This Tribunal agrees with the Parties that the historical context in which the 1905 transfer took place,¹⁰⁶⁹ and the objective of the Condominium officials at the time, shed light on the interpretation of the formula.¹⁰⁷⁰ It is appropriate at this juncture to recall the key passage of the March 1905 SIR, relied upon by the ABC Experts and the Parties (both before the ABC and this Tribunal), which describes the transfer:

[i]t has been decided that Sultan Rob, whose country is on the Kir river, and Sheikh Rijan of Toj, mentioned in the last Intelligence Report, are to belong to Kordofan Province. These people have, on certain occasions, complained of raids made on them by southern Kordofan Arabs, and it has therefore been considered advisable to place them under the same Governor as the Arabs of whose conduct they complain.

617. As stated above, the ABC Experts interpreted the above text as referring to a transfer of administrative control over a people from one province to another. Several important factors, in particular the confusion surrounding the location and course of the Bahr el Arab and the uncertainty of the provincial boundary, the lack of effective administration and governmental knowledge regarding the extent of territory occupied and used by the nine Ngok Dinka Chiefdoms, as well as the stated object and purpose of the 1905 transfer, converge to confirm that it was reasonable for the ABC Experts to adopt this interpretation.

(a) The Uncertainty of the Provincial Boundary

618. As indicated earlier, the GoS had argued before the Commission that the northern limit of the area transferred was the Kordofan - Bahr el Ghazal provincial boundary which ran along the Bahr el Arab.¹⁰⁷¹ The examination of the evidence led the ABC Experts to find that there was confusion as to the identity and location of the Bahr el Arab, a fact which both Parties recalled before this Tribunal (although they disagreed as to the actual extent of the confusion). The ABC Experts thus observed that Wilkinson and Percival mistook the Ragaba ez Zarga for the Bahr el Arab, the latter being distinguished from the Kir.¹⁰⁷² They

¹⁰⁶⁹ In accordance with Article 2(a) of the Arbitration Agreement, the review of the historical context of the 1905 transfer is carried out at this stage in the analysis for the sole purpose of assessing the reasonableness of the ABC Experts' interpretation.

¹⁰⁷⁰ For a summary of the arguments of the Parties on this point, *see supra* paras. 223 *et seq.*

¹⁰⁷¹ *See* summary of the GoS's position before the ABC *supra* paras. 538 *et seq.*; *see also* ABC Experts' Report, Part I, p. 36.

¹⁰⁷² ABC Experts' Report, Part I, p. 18.

did note that “Lt. R.C. Bayldon, R.N. first correctly identified the Kir as the Bahr el-Arab in his survey in March 1905.”¹⁰⁷³ However, “local administrators continued to confuse the two waterways” after 1905 and “it was not until 1908 that they consistently described the Ragaba ez Zarga/Ngol as the Bahr el Homr in their official reports.”¹⁰⁷⁴ As pointed out to this Tribunal, Governor-General Wingate himself recognized in 1905 that there was still uncertainty surrounding the Bahr el Arab and other rivers of the region, despite Bayldon’s discoveries:

In the Northern portion of this Province [Bahr el Ghazal] some light has been thrown on the much-vexed question of the Bahr el Arab and Bahr el Homr by the march of Captain Percival (to which I referred in my last Report as well as to the reconnaissances of Lieut. Bayldon R. N.) but much of the course of these rivers is still unknown and a doubt still exists as to the correct names of the intricate waterways which intersect this part of the Sudan.¹⁰⁷⁵

619. Wingate’s reference in the same Memorandum to “the Arab, the Lol, [and] the Kir”¹⁰⁷⁶ indicates that he still thought that the Bahr el Arab and the Kir were two separate rivers, thus suggesting that the confusion surrounding the Bahr el Arab was yet to be cleared. This is in line with ABC Experts’ reference to evidence from 1912 warning that “[t]he course of the Bahr el-Arab is entirely unsurveyed.”¹⁰⁷⁷
620. The ABC Experts went on to observe that this uncertainty was echoed by the provincial boundary’s own indefiniteness. Indeed, they emphasized that “the boundaries of the Ngok Dinka that were transferred to Kordofan for administrative reasons in 1905 were, like most boundaries in the Sudan at the time, not precisely delimited [...]”¹⁰⁷⁸ and maps before and after 1905 did not show the provincial boundary.¹⁰⁷⁹
621. Again, the Parties have made submissions to this Tribunal confirming the reasonableness of the Experts’ approach. The GoS points out in its Memorial that “provincial boundaries at

¹⁰⁷³ ABC Experts’ Report, Part I, p. 38.

¹⁰⁷⁴ ABC Experts’ Report, Part I, p. 39.

¹⁰⁷⁵ Reports on the Finances, Administration and Condition of the Sudan, Annual Report (1905), Memorandum by Major General Sir R. Wingate, p.10 (SM Annex 24, SPLM/A Exhibit-FE 2/13). For the view that Bayldon’s findings could be reasonably understood as putting an end to the confusion surrounding the location of the Bahr el Arab, *see infra* paras. 665 to 672.

¹⁰⁷⁶ *Id.* at 11.

¹⁰⁷⁷ ABC Experts’ Report, Part I, p. 38.

¹⁰⁷⁸ ABC Experts’ Report, Part II, App. 2, p. 21.

¹⁰⁷⁹ ABC Experts’ Report, Part I, p. 39.

this period [before and after 1905] were not laid down or recorded in any formal way, and they were often stated to be approximate.”¹⁰⁸⁰ Similarly, Professor Daly notes in his First Report that “[m]ost of the internal and external boundaries of Sudan at the beginning of the twentieth century were poorly defined.”¹⁰⁸¹ This leading historian of the Anglo-Egyptian Condominium further states that “[s]outhern district boundaries hardly existed”¹⁰⁸² and adds that “[i]t is indeed arguable that prior to 1905 the boundary between Kordofan and Bahr al-Ghazal was the *least* definite provincial boundary in the Sudan.”¹⁰⁸³

622. In addition, both Parties also agree that provincial boundaries continued to be uncertain even after the 1905 transfer.¹⁰⁸⁴ Having explained that “the southern limits of the transferred areas were not defined in 1905, either in Wingate’s Memorandum or elsewhere,”¹⁰⁸⁵ the Government itself observed that the 1911 edition of the *Anglo-Egyptian Handbook* clearly states that the northern boundary of Bahr el Ghazal is not yet delimited,¹⁰⁸⁶ while the southern boundary of Kordofan in the 1912 edition is described “somewhat indefinitely.”¹⁰⁸⁷ The post-1905 indeterminacy of the boundary is further reflected at Figure 14 of the GoS Memorial. The Tribunal notes that these continued changes to the provincial boundary are consistent with the fate of other boundaries in Sudan at that time, given the “general geographic confusion” which existed in “the whole of Sudan [...] for the first two decades of Condominium rule.”¹⁰⁸⁸ Professor Daly remarked that many new provinces were created or divided until 1917, classifications of provinces as first-class or second-class were changed and later abolished, and districts were frequently transferred from one province to another.¹⁰⁸⁹ The Tribunal refers to the example of the Khartoum Province, which was first subdivided into the provinces of Khartoum City and Khartoum Gezira in

¹⁰⁸⁰ GoS Memorial, para. 368.

¹⁰⁸¹ Daly Expert Report, p. 28, Appendix to SPLM/A Memorial.

¹⁰⁸² *Id.* at 31.

¹⁰⁸³ Second Daly Expert Report, p. 6, Appendix to SPLM/A Counter-Memorial.

¹⁰⁸⁴ GoS Memorial, paras. 372-383; GoS Oral Pleadings, April 21, 2009, Transcr. 33/11 et seq.; SPLM/A Counter-Memorial, paras. 1459-1463.

¹⁰⁸⁵ GoS Oral Pleadings, April 21, 2009, Transcr. 33/11 et seq.

¹⁰⁸⁶ See *supra* summary of the Parties’ arguments, paras. 290 et seq. and The Anglo-Egyptian Handbook Series – The Bahr el Ghazal Province (1911), p. 5 (SM Annex 26, SPLM/A Exhibit-FE 3/8, FE 18/4).

¹⁰⁸⁷ See GoS Memorial, para. 378; See also Kordofan and the Region to the West of the White Nile, Anglo-Egyptian Series (1912) p.7 (SM Annex 27, SPLM/A Exhibit-FE 3/8a), which qualifies the northern boundary of Kordofan as approximate.

¹⁰⁸⁸ ABC Experts’ Report, Part I, p. 37.

¹⁰⁸⁹ Daly Expert Report, pp. 31-32, Appendix to SPLM/A Memorial.

1902. In 1903, the borders of Khartoum City were again modified to account for the re-transfer of some parts of the Gezira Province. Its borders were again changed in 1914 and 1915, to be finally settled in 1917.¹⁰⁹⁰

623. Accordingly, it was not unreasonable for the ABC Experts to assume that, despite the progress made by Bayldon in the identification of the true Bahr el Arab before the transfer, the lack of precise knowledge as to the location and course of the different rivers and streams persisted in this area and made the existence of a well-established boundary on the Bahr el Arab appear unlikely. The ABC Experts' conclusion that the administrative officials "treated" the Ragaba ez Zarga as the provincial boundary was tantamount to recognizing the existence of a mere working boundary, which they did not see as a decisive factor in the 1905 context. This Tribunal sees no ground for concluding that the ABC Experts' interpretation of this aspect of the transfer was unreasonable.

(b) The lack of effective administration

624. Evidence of a very limited administration in this area in 1905 further confirms that it was not unreasonable for the ABC Experts to assume that British officials were not primarily concerned with the definition of internal borders. As pointed out by the ABC Experts, "no British official ever visited the Ngok in the rainy season."¹⁰⁹¹ The remoteness and isolation of the region surrounding Abyei town, especially during the rainy season floods, made any attempt at effective administration difficult and ineffectual in the early years of the Condominium. The reclusiveness of the provinces of Kordofan and Bahr el Ghazal is further highlighted in the documentary record submitted by the Parties. Kordofan is described as a "wild and remote province" by the authors of the 1904 Report on the Finances, Administration, and Condition of Sudan,¹⁰⁹² while Wingate in his 1904 Memorandum states in reference to Bahr el Ghazal that: "[u]nless this region is visited, it is almost impossible to convey an impression of its utter desolation..."¹⁰⁹³ Even in the 1950s, access to the region was considered difficult by Condominium officials. In his witness statement, Michael Tibbs, who was the last British District Commissioner for Dar Misseriya, remarks that:

¹⁰⁹⁰ *Id.*

¹⁰⁹¹ ABC Experts' Report, Part I, p. 18.

¹⁰⁹² Reports on the Finances, Administration, and Condition of Sudan, Annual Report (1904) 142 (SM, Annex 23, SPLM/A Exhibit-FE 2/3 and FE 2/4).

¹⁰⁹³ *Id.* at 113.

Movement around the district was difficult. Its size was vast and there were no made up roads though we still moved around the district by lorry for the most part. In the southern part of the district, the seasonal change in weather was extreme. The dry season was parching and, in the rainy season, the roads quickly became impassable, the vast and complex river system flooded and much of the land was water logged.¹⁰⁹⁴

625. This is in line with Professor Daly's comment that "[u]ntil long after 1905 there was no British administrative process or presence of any kind in southwestern Kordofan,"¹⁰⁹⁵ with only three visits by officials in the Abyei region before 1905.¹⁰⁹⁶ In addition, as the ABC remarked, the Ngok Dinka never paid any taxes to the Bahr el Ghazal Province.¹⁰⁹⁷ Relying on Mahon, the ABC further noted that "[t]he administration made a conscious decision not to collect tribute before closer administration could be established."¹⁰⁹⁸

626. The lack of effective administration was also recognized by Wingate himself, who stated in his 1905 Memorandum under the section on "Population and Labour":

I have already remarked that for many reasons I do not think the time opportune for making a census of the Sudan. The absence of an entirely reliable administrative system, and the incomplete Government still existing in the out-lying districts of Kordofan, the Bahr el Ghazal, Upper Nile and other Provinces, would make it practically impossible to arrive at any really accurate results.¹⁰⁹⁹

627. The evidence also provides indications that the Condominium administration's role was limited to the maintenance of law and order, and to repeat Professor Daly's words, "[a]s long as the colonial government heard no reports of tribal fighting, the British stayed away."¹¹⁰⁰ It appears indeed that the British government's attempts at pacification consisted mostly in the dispatch of punitive patrols in the different provinces in response to

¹⁰⁹⁴ Witness Statement of G. Michael Tibbs, para. 10 (SPLM/A Counter-Memorial, Witness Statements, Tab 3).

¹⁰⁹⁵ SPLM/A Oral Pleadings, April 22, 2009, Transcr. 101/12-17. *See also* Reports on the Finances, Administration and Condition of the Sudan, Annual Report (1905), Annual Report, Bahr-el-Ghazal Province, p.10 (SM Annex 24, SPLM/A Exhibit-FE 2/13), which clearly states that there are no civil hospitals in Bahr el Ghazal and the note by the Senior Medical Officer of Bahr el Ghazal that he did not consider the time was ripe for the construction of such a hospital.

¹⁰⁹⁶ SPLM/A Oral Pleadings, April 22, 2009, Transcr. 103/20 *et seq.*

¹⁰⁹⁷ ABC Experts' Report, Part I, p. 33.

¹⁰⁹⁸ ABC Experts' Report, Part 1, p. 33. *See also* ABC Experts' Report, Part 2, Appendix 5, p. 182; *See also* Sudan Intelligence Reports, No. 104 (March 1903), p. 19 (SM Annex 5 and SPLM/A Memorial FE 1/21) in Mahon notes: "It would not be the slightest use trying to collect tribute from them until there is a Mamur and a post in that direction."

¹⁰⁹⁹ Reports on the Finances, Administration and Condition of the Sudan, Annual Report (1905), Memorandum by Major General Sir R. Wingate, p. 24. (SM Annex 24, SPLM/A Exhibit-FE 2/13).

¹¹⁰⁰ SPLM/A Pleadings, April 22, 2009, Transcr. 103/10-11.

recalcitrant or disobeying tribes who sought to defy governmental authority.¹¹⁰¹ For example, Wingate notes in his 1904 Memorandum that a punitive patrol was sent in Kordofan against the Nubas at Jebel Daier after the chief had refused to pay tribute and had subsequently fled.¹¹⁰² Wingate also observed that Sir R. von Slatin had commented that:

Further similar trouble in Southern Kordofan is always possible, but I think the motives which give rise to it may be attributed rather to ignorance than to deliberate hostility to Government, as these districts are not yet fully subject to Government control.¹¹⁰³

628. In addition, the different reports produced by British officials at the time suggest that they were still in the process of developing and exploring the country in an attempt to establish the infrastructure necessary for effective administration. However, it is quite clear that by 1905, they were still trying to attain that goal. The sudd cutting expeditions on the Bahr el Arab and the explorations by survey parties carried out around 1905 are a good illustration. In spite of the progress made by Lieutenants Bayldon and Walsh, the Report explains that:

To thoroughly open up and deepen the river, a further expedition will be necessary, but before undertaking this it has been decided to despatch a small exploring party under Lieutenant Walsh to penetrate as far as possible along the various waterways known locally as the Arab, the Lul, the Kir, and an unnamed river which the natives state leads to Wau [...] On the return of this expedition the Government will be in a better position to decide on the steps to be taken to open up these apparently important rivers, with a view to establishing navigable waterways to the North-Western districts of the Bahr el Ghazal and Southern Kordofan Province.¹¹⁰⁴

629. The Tribunal further notes the February 1906 Sudan Intelligence Report's revelation that Walsh's sudd cutting operations on the Bahr el Arab made little headway.¹¹⁰⁵ This entry, read in conjunction with Professor Daly's conclusion that "[e]xpeditions and patrols up the tributaries of the Bahr al-Ghazal (river) and Bahr al-Arab had not reached the Ngok from the south before 1905, mainly because *sudd* blocked the channels,"¹¹⁰⁶ confirms the

¹¹⁰¹ See Daly Expert Report, p. 34, Appendix to SPLM/A Memorial.

¹¹⁰² Reports on the Finances, Administration, and Condition of Sudan, Annual Report (1904) 10 (SM, Annex 23, SPLM/A Exhibit-FE 2/3 and FE 2/4).

¹¹⁰³ *Id.*

¹¹⁰⁴ Reports on the Finances, Administration and Condition of the Sudan, Annual Report (1905), Memorandum by Major General Sir R. Wingate, p.11 (SM, Annex 24, SPLM/A Exhibit-FE 2/13).

¹¹⁰⁵ Sudan Intelligence Report No. 139, February 1906, Appendix F (Progress Reports – Bahr-el-Arab Reconnaissance, by Bimb. Huntley Walsh, 11.1.06) (SM, Annex 11, SPLM/A Exhibit-FE 17/21, SPLM/A MD Exhibit 61).

¹¹⁰⁶ Daly Expert Report, p. 34, Appendix to SPLM/A Memorial.

Tribunal's view that as of 1905, even the minimal infrastructure required for effective administration (such as transport and communication channels) was yet to be put into place.

630. In light of this administrative context, it is indeed reasonable to infer that the importance of internal boundaries in Sudan, including the Kordofan-Bahr el Ghazal boundary, was secondary, at least during the early years of the Condominium period. In line with the ABC Experts' finding, the indication of boundaries in official documents, such as annual reports, was reasonably understood as a mere reference to a working boundary easily modified or replaced, and not to a boundary in the traditional sense.

(c) Limited Knowledge of the Extent of Territory Used and Occupied by the Ngok Dinka

631. A consequence of the region's remoteness and of limited administrative presence is the lack of knowledge of the full extent of the territory occupied by the Ngok Dinka. Hence, the official reports' imprecise references to "Sultan Rob" or Sultan Rob's "country," or Sultan Rob's "people" in the record.¹¹⁰⁷ The few trek reports that were available to, and examined by, the ABC Experts¹¹⁰⁸ and the Parties in the present proceedings provide only snapshots of what was actually occurring in the region. These treks were conducted during the dry season, when the area was most easily accessible to the officials.¹¹⁰⁹ As further noted in the Sudan Intelligence Report, No. 178 (October 1908), "[t]he whole country is difficult to traverse at any time, as during the rains it is swampy and covered with high grass, and in the dry season the surface soil shrinks, and, as a result, traveling with horses or other animals is rendered dangerous by the large cracks that have appeared."¹¹¹⁰

¹¹⁰⁷ See for example Sudan Intelligence Reports, No. 128, p.3 (March 1905) (SM Annex 9, SPLM/A Exhibit-FE 2/8; Reports on the Finances, Administration, and Condition of the Sudan, Annual Report (1905) Report for Kordofan, p. 113 (SM Annex 24, SPLM/A Exhibit-FE 2/13).

¹¹⁰⁸ See ABC Experts' Report, Part I, p. 18 (last paragraph), p. 43.

¹¹⁰⁹ See Wilkinson's trek from January to February 1902 in Gleichen, *Handbook of the Sudan*, Vol. I (HMSO, London, 1905) 153. (SM, Annex 38, SPLM/A Exhibit-FE 2/14 and 2/15); Percival, Keilak to Wau (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government Vol. II* (SPLM/A Exhibit-FE 17/13); Percival, A., Route Report: Keilak to Wau, December 1904 (SM Annex 26, SPLM/A Exhibit-FE 3/8 and 18/4); Percival, Pongo River to Taufikia (1905) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government Vol. II*, p.27 (SPLM/A Exhibit-FE 17/13).

¹¹¹⁰ Sudan Intelligence Reports, No. 171 (October 1908), p. 60 (SM Annex 18, SPLM/A Exhibit-FE 3/5; See also Kordofan and the Region to the West of the White Nile, Anglo-Egyptian Series (1912) p.74 (SM Annex 27, SPLM/A Exhibit-FE 3/8a); Even later sources describe the isolation and inaccessibility of the region during the rainy season: see D. COLE & R. HUNTINGTON, *BETWEEN A SWAMP AND A HARD PLACE: DEVELOPMENTAL CHALLENGES IN REMOTE RURAL AFRICA*, pp. 94-95 (1997), which qualifies the rainy season as the "period when Abyei is cut off from the outside" and further adds that "[f]or many town folk the rainy season is an ordeal. Civil

632. Given the limited nature of the information gathered during these dry-season treks, the British officials around 1905 do not seem to have been fully aware of the seasonal character of the Ngok Dinka's movements and land use patterns and therefore did not have a comprehensive understanding of the extent of Ngok Dinka territory. In that sense, the ABC reasonably concluded that:

We do not have a detailed and systematic description of Ngok settlement and land use patterns throughout the Condominium period, because of the seasonality of administrative visits to Ngok territory. Since officials came only in the dry season (between December and April: Tibbs in Appendices 5.7 and 5.13), what few descriptions we do have are of Ngok dry season activities, which were concentrated around the rivers.¹¹¹¹

633. The ABC Experts' Report went on to note that:

But there are suggestions from the beginning of the twentieth century that administrators were aware that Ngok Dinka territory extended further north (Mahon 1903, Willis 1909 in Appendix 5.13), and this seems to have been the basis on which settlement and grazing patterns were condoned and managed by subsequent generations of administrators throughout the Condominium period, following the general principle of reviving tribal homelands.¹¹¹²

634. In the Tribunal's view, this additional factor which the ABC Experts took into account when examining the meaning of the formula also indicates that their interpretation was reasonable.

(d) The Reasons for the 1905 Transfer Effectuated by the Condominium Administration

635. The uncertainty of the provincial boundary and its secondary role in the transfer, the existence of a limited administration and knowledge of the Ngok Dinka people's exact location, help in turn to understand the object and purpose underlying the transfer. It appears that the transfer was essentially motivated by three considerations: (i) *pacification* – to protect the Ngok Dinka in order to pacify the area and end the Humr attacks on the Ngok Dinka; (ii) *display of authority* – to demonstrate to the inhabitants of the area that a new sovereign was exerting control over them; and (iii) *administrative rationalization* – to bring feuding tribes under the same administration.

servants from the north serving their time in this outpost despise the rains as a period of intense isolation and boredom amidst an alien cultural and physical setting.”

¹¹¹¹ ABC Experts' Report, Part I, p. 43.

¹¹¹² *Id.*

636. The Tribunal first notes that the ABC (like the Parties in these proceedings)¹¹¹³ understood the transfer to be a response to Ngok and Twic Dinka complaints of Humr raiding:

What occurred in 1905 was that because of Dinka complaints about Humr raids, the British authorities decided to transfer the Ngok and part of the Twich Dinka from the administrative control of Bahr el-Ghazal Province to Kordofan Province. This action put the Ngok and the Humr under the authority of the same governor (a fact cited in both the GOS and SPLM/A presentations).¹¹¹⁴

[...]

The reasons for considering the land rights of the people constituting the nine Ngok Dinka chiefdoms as at 1905 include, amongst others, sociological and historical facts as well as elements of the terms within the CPA. In particular, the following are relevant:

[...]

(iv) armed raids on the Ngok Dinka by the Misseriya that were the official principal reason for the transfer of the 9 Ngok Dinka chiefdoms to Kordofan must have greatly destabilized the Ngok Dinka and thus affected the land use patterns of the two communities prior to the announcement of the transfer...¹¹¹⁵

637. The Tribunal further notes that Condominium officials had recorded Humr attacks on the Ngok Dinka as early as 1903. Sudan Intelligence Report No. 110 (September 1903) notes:

Two runners who arrived at Fashoda on 13th September, from the Dinka district of Gnak (Sheik Rob Wad Rung), reported that some Homr under one Mohammed Khada had raided their district about a month previously, and had killed two men and carried off 30 men and 1,000 head of cattle. The Mudir of Kordofan investigated and settled this case. The Dinkas received back their men and cattle. One of the Homr was killed in the fighting.¹¹¹⁶

638. Sudan Intelligence Report No. 127 of February 1905, which is the last Intelligence Report published prior to SIR No. 128, indicates the following:

Sheik Rihan Gorkwei, of the district of Tweit or Toj, which he says is situated between the Kir and Lol Rivers, reported to Bimbashi Bayldon on the 29th January that a party of Homr Arabs, under Sheikh Ali Gula, armed with some 15 rifles and many spears, had come and raided his district, saying they were sent to collect cattle for Government. Sheikh Rihan, after a journey of 23 days to Taufikia, came into Kodok to see a representative of the Government. The Governor sent him on to Khartoum, where

¹¹¹³ See GoS Memorial, paras. 356-358 and SPLM/A Memorial, paras. 346-351.

¹¹¹⁴ ABC Experts' Report, Part 1, p.15.

¹¹¹⁵ ABC Experts' Report, Part 2, Appendix 2, p. 23.

¹¹¹⁶ Sudan Intelligence Reports, No. 110 (September 1903) , p. 1 (SPLM/A Annex FE 1/24).

he arrived on the 26th February. He repeated his story of the raids by the Homr, who he says captured some 16 boys of the Toj Dinkas whilst the latter were out fishing. The Camel Corps Company, now in the Bahr el Ghazal, will investigate the case on their return to Kordofan.¹¹¹⁷

639. The Tribunal observes that the administrative desire to pacify the relations between the Ngok Dinka and the Misseriya is consistent with the limited presence of governmental control in the area and with the Condominium's circumscribed role of maintaining law and order identified above.¹¹¹⁸

640. The Tribunal notes that the second purpose of the 1905 transfer – the display of British governmental authority – is interconnected with the goal of pacification, as during the early years of the Condominium, many punitive patrols were sent to isolated or troublesome regions in order to show the locals who was in charge. In connection with the punitive patrol sent against the Nubas at Jebel Daier alluded to above, Wingate quotes Slatin Pasha who stated:

I consider that the primary cause of the punitive measures taken against Jebel Daier in October was their disobedience and open defiance of Government Authority. *It is most important to show these Nuba mountaineers that we intend to have our orders obeyed, and that in case of necessity, we are able to enforce our authority.*¹¹¹⁹

641. In his 1905 Memorandum, Wingate also refers to disturbances caused by semi-independent tribes in the southern Kordofan. He notes that the military officer responsible for punitive patrols in the region had reported on:

several other small affairs in which the semi-independent Meks of the Southern Districts have been guilty of raiding on each other, of occasionally defying Government authority, and of generally disturbing the peace, but he [did] not advocate a succession of punitive measures though he rightly consider[ed] that a population so wild and ignorant as those in Southern Kordofan can only be impressed with a sense of their comparative insignificance by a display of force and that they should, when necessary, be given a tangible proof of the power of Government to asserts its authority.¹¹²⁰

¹¹¹⁷ Sudan Intelligence Report, No. 127 (February 1905), p. 2 (SM, Annex 8, SPLM/A Exhibit-FE 2/6).

¹¹¹⁸ See *supra*, paras. 623 *et seq.*

¹¹¹⁹ Reports on the Finances, Administration and Condition of the Sudan, Annual Report (1904), Memorandum by Major General Sir R. Wingate, p. 10 (SM Annex 23, SPLM/A Exhibit-FE 2/3 and 2/4) (emphasis added).

¹¹²⁰ Reports on the Finances, Administration and Condition of the Sudan, Annual Report (1905), Memorandum by Major General Sir R. Wingate, p. 15 (SM Annex 24, SPLM/A Exhibit-FE 2/13) (emphasis added).

642. As noted by Professor Daly in his First Report, British officials were sent on expeditions to the Bahr el Ghazal Province as early as 1900 with an express mission: to display governmental authority. For example, Sudan Intelligence Report No. 76 (November 9 – December 1900)¹¹²¹ describes the composition of the expedition party and clearly states that: “[t]he object of the Expedition is to demonstrate practically, by its presence, the right of the Sudan Government to re-occupy the Bahr el Ghazal Province.” Professor Daly further observed that: “[t]his demonstration was for the benefit not only of local people encountered along the way, but also for the Belgians, whose established interest in the Upper Nile and the regions of the Congo-Nile watershed Wingate viewed as dangerous.”¹¹²² Professor Daly’s analysis is confirmed by the March 1905 SIR, in which the British concerns over the incursion of Belgian troops in the territory of Bahr el Ghazal are discussed.¹¹²³
643. Finally, the ABC Experts reasonably interpreted the transfer as designed to achieve administrative rationalization, the transfer being made, in the ABC Experts’ words, “for reasons of administrative expediency.”¹¹²⁴ Given the tribal tensions between the Ngok Dinka and the Misseriya, it made more sense to the British officials to manage these inter-tribal quarrels through a single provincial administration. This is consistent with what Professor Daly terms the “hallmark of British imperialism all over the world, dealing with local peoples from whichever post or barracks was closest or most convenient when the need arose.”¹¹²⁵
644. The Tribunal notes that the British government’s practice of transferring a tribe for reasons of administrative expediency was not limited to the 1905 transfer of the nine Ngok Dinka chiefdoms. In 1914, the jurisdiction over the Hawawir tribe of Kordofan was transferred to the province of Dongola “to bring them under more effective control,” in response to their “lawless behaviour on and across the western frontier.”¹¹²⁶ The Hawawir had been observed wandering and grazing outside the borders of Kordofan. This is consistent with Professor

¹¹²¹ Sudan Intelligence Report No. 76 (9 November – 9 December 1900) (SPLM/A Memorial, MD Exhibit 53).

¹¹²² Daly Expert Report, p. 33, Appendix to SPLM/A Memorial.

¹¹²³ March 1905 SIR, p. 3

¹¹²⁴ ABC Experts’ Report, Part I, p. 21.

¹¹²⁵ SPLM/A Oral Pleadings, April 22, 2009, Transcr. 102/08-12).

¹¹²⁶ Letter from F.T.C. Young, Inspector, Southern District to Governor, Merowe, 9 January 1914, SGA, INTEL 2/46/393, and other correspondence in the same file, (SPLM/A Memorial, Exhibit MD-45).

Daly's statement to the effect that "whole tribes were handed off from one British inspector to another as local habits and administrative convenience dictated."¹¹²⁷

645. As illustrated above, transfers of tribes from the control of a given province to another, based on concerns of administrative rationalization, were not infrequent. The practical approach of the Condominium government is further reflected in its practice of administering the Sudanese through tribal chiefs, as opposed to relying solely on territorial districts. Indeed, the review of the documentary record suggests that the British administrators had few contacts with the majority of the locals and preferred to deal only with the ruling chiefs. For example, in the 1904 Annual Report on the Finances, Administration and Conditions of Sudan, Major Boulnois (the Moudir of the Bahr el Ghazal Province) described the attitude of the chiefs toward the British government and stated: "[t]he Chiefs, *through whom the Government administers*, are beginning to grasp their responsibilities..."¹¹²⁸ In a similar fashion, the March 1905 SIR suggests that Sultan Rob, the Ngok Dinka's Paramount Chief, was the administration's contact and the authority through which government control was exercised. The Tribunal notes that Professor Daly shares this analysis of the government's administration techniques:

Although the administration was technically "direct," legally empowering only its own officials, in practice it was almost everywhere indirect, *with Sudanese tribal shaykhs responsible to British provincial authorities for the governance of their tribes*.¹¹²⁹

The Anglo-Egyptian regime, like other colonial governments, looked for local notables through whom it could govern. (This would eventually form the basis of Indirect Rule or Native Administration.)¹¹³⁰

646. Mr. Tibbs' Witness Statement also confirms that the Ngok Dinka were administered through their chiefs until at least 1944:

Although there was a small police presence in Abyei, until the Ngok joined the Dar Messeria Rural Council in January 1944, the Ngok's administration was carried out by Chief Deng Majok Kwal. Disputes within the tribe would be dealt with by him and

¹¹²⁷ Daly Expert Report, p. 31, Appendix to SPLM/A Memorial.

¹¹²⁸ Reports on the Finances, Administration and Condition of the Sudan, Annual Report (1904), p. 142 (SM Annex 23, SPLM/A Exhibit-FE 2/4) (emphasis added).

¹¹²⁹ Daly Expert Report, p. 28, Appendix to SPLM/A Memorial (emphasis added).

¹¹³⁰ Daly Supplement Expert Report, p. 7.

any disagreements between the Ngok and Messeria were sorted between Deng Majok and Babu Nimr, the Nazir Umun of the Messeria...¹¹³¹

647. The Tribunal further observes that the very notion of “Indirect Rule,” a British governmental policy which “relied on local and traditional tribal and other mechanisms for most aspects of administration”¹¹³² and which started with *The Power of Nomad Sheikhs Ordinance 1922*,¹¹³³ is additional evidence that the British officials considered it more expedient to exercise their administration through tribal mediation. This policy was in line with the approach that had been previously adopted by the government by which, for example, “tribal *shaykhs* were left in place but held responsible for collecting taxes levied by the government.”¹¹³⁴
648. In light of the above-noted observations, the language of the March 1905 SIR and its references to Sultan Rob, Sheikh Rihan of Toj and “these people” can reasonably be interpreted not as reflecting the officials’ intent to transfer a clearly delimited, fixed area, as there was none in 1905, but rather, as evincing the British administration’s intention to place the *totality* of a semi-nomadic tribe, who moved between two provinces according to the seasons, under a single jurisdiction, in order to protect the whole of the Ngok Dinka people at *all* times, regardless of where they might have been located in each season of the year.
649. The foregoing suggests that it was entirely plausible for the ABC Experts to choose the tribal view as a reasonable and, indeed, the more probable interpretation of what the officials intended when they engaged in the 1905 transfer. Obviously, the Tribunal recognizes that ascertaining the intent of the Condominium officials in 1905 introduces an element of subjectivity in the interpretation of SIR 128 and related texts (especially since there are so few records to parse through). However, a full appreciation of the context of the transfer suggests that the ABC Experts’ ultimate interpretation of what occurred in 1905 – a tribal transfer – is not unreasonable.

¹¹³¹ Witness Statement of G. Michael Tibbs, Appendix to SPLM/A Counter-Memorial, para. 13.

¹¹³² SPLM/A Memorial, para. 358.

¹¹³³ Daly Expert Report, p. 45, Appendix to SPLM/A Memorial.

¹¹³⁴ Daly Expert Report, p. 13, Appendix to SPLM/A Memorial.

6. The Interpretation of the Formula in Light of the 2008 Negotiation and Signing of the Arbitration Agreement

650. A full analysis of the contextual interpretation of the Formula must include a final and important element not considered by the ABC: the 2008 negotiations, as reflected in The Road Map for Return of IDPs and Implementation of Abyei Protocol, Khartoum, June 8, 2008 (hereinafter, the “Abyei Road Map”), the Joint NCP-SPLM Understanding on Main Issues of the Abyei Arbitration Agreement, June 21, 2008 (hereinafter, the “Abyei Memorandum of Understanding”) and the Arbitration Agreement (collectively, the “2008 Agreements”).
651. The 2008 Agreements were designed to bring a final settlement to the Parties’ dispute over the Abyei Area, thus reaffirming the Parties’ pledge to achieve peace as contemplated in the CPA. The Abyei Road Map provides for security arrangements, the return of IDPs to their “former homesteads,” interim arrangements for the administration of the Abyei Area, and arrangements for the final settlement of the Parties’ disputes over the findings of the ABC. The Abyei Memorandum basically sets out the procedures for the arbitration and the mandate of the Tribunal, while the Arbitration Agreement is a further elaboration of the Abyei Memorandum and consolidates the Parties’ agreement to arbitrate, as expressed in the Abyei Road Map and Abyei Memorandum of Understanding.
652. The Tribunal is permitted to take account of these 2008 Agreements in order to determine the reasonableness of the ABC Expert’s interpretation of their mandate by virtue of Article 3 of the Arbitration Agreement. As indicated above, Article 3 of the Arbitration Agreement defines the law applicable to these proceedings, which includes, *inter alia*, the CPA, particularly the Abyei Protocol and the Abyei Appendix, the Interim National Constitution and, most relevant for this part of the discussion, the Abyei Road Map and the Abyei Memorandum of Understanding. The 2008 Agreements are also relevant for the interpretation of the CPA by virtue of Article 31(3)(b) or, in any event 31(3)(c), of the Vienna Convention.
653. Article 31(3) of the Vienna Convention states:
3. There shall be taken into account, together with the context:
 - ...
 - b. Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - c. Any relevant rules of international law applicable in the relations between the parties.

654. In the Tribunal's view, the 2008 Agreements serve to clarify the meaning of provisions of the CPA as "subsequent practice" pursuant to Article 31(3)(b). The phrase "subsequent practice" has been widely interpreted and is not restricted to specific, interpretative treaties.¹¹³⁵ The 2008 Agreements constitute relevant subsequent practice, since the Agreements make specific reference to sections of the CPA: the full title of the Abyei Road Map refers to the "Implementation of the Abyei Protocol," while both the Abyei Memorandum of Understanding and the Arbitration Agreement emphasize the applicability of the CPA, the Abyei Protocol and the Abyei Appendix. As such, these 2008 Agreements reaffirm the relevant provisions of these elements of the CPA and must be taken into account in interpreting the CPA. The 2008 Agreements are thus admissible and relevant for purposes of assessing the reasonableness of the ABC Experts' interpretation of the Formula as expressed in the Abyei Protocol.
655. Even if one were to consider that the 2008 Agreements do not constitute relevant "subsequent practice," the 2008 Agreements would still inform the interpretation of the CPA as "relevant rules ... applicable in the relations between the parties" pursuant to Article 31(3)(c) of the Vienna Convention.
656. It follows that the above discussion regarding the reasonableness of the ABC Experts' interpretation in light of the CPA and associated instruments (see *supra* paras. 517 *et seq.*) is equally applicable to these 2008 Agreements. Indeed, the 2008 Agreements lend further support to the Tribunal's conclusion that it was not unreasonable for the ABC Experts to adopt a predominantly tribal interpretation of the Formula. As stated above, an approach that primarily focuses on the transfer of all the nine Ngok Dinka chiefdoms as opposed to a specific territory can reasonably be interpreted as furthering a key objective of the CPA, which is to submit, through a referendum, to the whole Ngok Dinka community the choice of either retaining the Abyei Area's special administrative status in the north or joining the South in the event that the South were to secede. The purpose of the 2008 Agreements thus further supports the reasonableness of incorporating in the Abyei Area the entirety of the community that is expressly mentioned in the definition of the Abyei Area as found in Section 1.1.2 of the Abyei Protocol and specifically referred to in Section 8 of the Abyei Protocol (which describes the process of the Abyei Referendum).

¹¹³⁵ CORTEN, O. & KLEIN, P., LES CONVENTIONS DE VIENNE SUR LE DROIT DES TRAITES, Vol. II, (2006), §43, p. 1320.

657. In addition, the 2008 Agreements (especially the Abyei Road Map) demonstrate an additional commitment by the Parties to the objectives of peace and reconciliation as primarily expressed in the CPA. Indeed, Section 9 of the Abyei Protocol reads:

Upon signing the Comprehensive Peace Agreement, the Presidency shall, as a matter of urgency, start peace and reconciliation process for Abyei that shall work for harmony and peaceful co-existence in the area.

658. Similarly, Sections 3.7 and 3.8 of the Abyei Road Map state:

3.7 The Presidency shall initiate the peace and reconciliation in the area in collaboration with the administration of the area and the surrounding communities.

3.8 The Presidency shall work at making Abyei area a model of national reconciliation and peace building.

659. In light of these objectives, the adoption by the ABC Experts of a predominantly tribal approach, which would result in the inclusion and the participation in the 2011 referendum of most members of the targeted community, the Ngok Dinka, can plausibly be regarded as furthering the stated goals of peace and reconciliation.

7. Respect for the Date of 1905

660. As a final question, the Tribunal will consider whether the ABC Experts took sufficient account of the temporal dimension of their mandate, which was tied to a historical event that had occurred in 1905. The Tribunal understands that both Parties accept that, under a predominantly tribal interpretation, in order to determine the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, the location of the Ngok Dinka in 1905 must be established. The ABC Experts consistently repeated that their analysis of the evidence was solely based on the attempt to determine the area predominantly occupied by the nine Ngok Dinka chiefdoms transferred in 1905:

- In assessing the territorial boundaries between the Ngok (who were in Bahr el-Ghazal) and the Misseriya (who were in Kordofan) in 1905, the two communities' effective connection to land, evidenced by established land use patterns, must be taken into consideration.¹¹³⁶

¹¹³⁶ ABC Experts' Report, Part 2, Appendix 2, p. 21 (emphasis added).

- The reasons for considering the land rights of the people constituting the nine Ngok Dinka chiefdoms as at 1905 include [...] ¹¹³⁷
- It is critical in interpreting the established occupation, land rights and land use of the two communities to appreciate the sociological fact that by 1905 there existed three main categories of such occupation, land rights and land use. ¹¹³⁸
- After evaluating the evidence gathered from the maps, the historical records, published studies and the testimonies, the [ABC Experts] have drawn the conclusion that where the territory of the Ngok Dinka had established occupation, land rights and land use of the first and second categories, such areas fell squarely within the boundaries that were transferred in 1905. ¹¹³⁹

661. Therefore, the ABC Experts had ample legal basis (or what might be referred to figuratively here as the necessary “margin of appreciation”) to consider other elements to fulfill their mandate, such as post-1905 evidence and patterns of dominant occupation and land use. The ABC Experts’ reasons for examining post-1905 evidence to determine the continuity of the Ngok Dinka historical title are clearly stated at the beginning of the Report: after noting that there was no 1905 map showing the location of the Ngok Dinka in 1905 and no sufficient official documentation, they stated that “it was necessary for the [ABC Experts] to avail themselves of relevant historical material produced both before and after 1905, *as well as during that year*, to determine as accurately as possible the area of the nine Ngok Dinka chiefdoms *as it was in 1905*.”¹¹⁴⁰ Moreover, for purposes of admissibility of evidence, it was reasonable to assume continuities in practices in a traditional society operating in an unchanged ecology in the absence of indications to the contrary.

662. Similarly, the ABC Experts took careful note of the variations in the seasonal grazing territories of both the Ngok Dinka and Misseriya that occurred in the Condominium period after 1905. The ABC therefore rejected the subsequent southern expansion of both tribes as evidence of their occupation in 1905. For example, the ABC Experts observed:

The Ragaba Lau is unquestionably a Ngok Dinka primary settlement area; it was not visited by the Humr at the beginning of the century; the Humr were able to expand their seasonal use of the area only later in the Condominium period, as a result of the

¹¹³⁷ *Id.* at 22 (emphasis added).

¹¹³⁸ *Id.* at 24 (emphasis added).

¹¹³⁹ *Id.* at 25 (emphasis added).

¹¹⁴⁰ ABC Experts’ Report, Part 1, p. 4 (emphasis added).

stability fostered by the government of the day and the good relations between the ruling families of the Ngok and the Humr.¹¹⁴¹

663. Finally, when conducting interviews with residents of the Abyei and surrounding areas, as well as in Khartoum, the ABC clearly explained to the speakers and the attendees of the meetings that their purpose was to ascertain the location of the Ngok Dinka in 1905:

- Ambassador Petterson, Abyei Interviews, April 14, 2005: “We would like to remind you that the mandate of the Abyei Boundary Commission is simply to define and demarcate the area of the nine Ngok Dinka chiefdoms transferred to the Kordofan Province in 1905 from Bahr el-Ghazal province. As we told the other groups we met yesterday and today, that you can confine what you say as much as possible to that topic. And again, what areas were the permanent areas for the Ngok Dinka people a hundred years ago?”¹¹⁴²
- Ambassador Petterson, Muglad Interviews, April 17, 2005: “I want to emphasize that our job is solely to define and demarcate the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan province from Bahr el Ghazal in the year 1905.”¹¹⁴³
- Ambassador Petterson, Muglad Interviews, April 17, 2005: “My question is that we have heard today and we have heard from other Misseriya before coming here that the Ngok Dinka were never in Bahr el-Ghazal province and yet the language of the peace treaty, a part called Protocol states that the authority over the nine Ngok Dinka Chiefdoms was transferred to Kordofan Province from Bahr el Ghazal Province in 1905. So that is my question, how do we reconcile this?”¹¹⁴⁴
- Professor Godfrey Muriuki, Umm Bilael Interviews, April 17, 2005: “Our purpose is to decide on the boundaries that existed in 1905 between the Misseriya and Ngok Dinka.”¹¹⁴⁵
- Ambassador Petterson, Agok Interviews, April 18, 2005: “Our job is to define and demarcate the area of the Nine Ngok Dinka Chiefdoms, which were transferred to Kordofan Province from Bahr el Ghazal Province in 1905.”¹¹⁴⁶

¹¹⁴¹ *Id.* at 35 (referring to Appendix 5.9); *see also* pp. 27-28, where the ABC Experts examine the southern expansion of both tribes in the 1920s and 1930s.

¹¹⁴² ABC Experts’ Report, Part 2, Appendix 4, p. 142. Throughout the course of these interviews, Ambassador Petterson reminds the audience twice to answer the question posed in their mandate, and not to provide information regarding other aspects of the dispute (*see* p. 145-146).

¹¹⁴³ *Id.* at 79.

¹¹⁴⁴ *Id.* at 94.

¹¹⁴⁵ *Id.* at 53.

¹¹⁴⁶ *Id.* at 58.

664. Hence, far from losing sight of the critical date of 1905, the ABC Experts faithfully focused on what was transferred that particular year. In so doing, they respected the temporal dimension of the mandate and thus acted reasonably.

8. Reasonableness of the Predominantly “Territorial” Interpretation of the Formula

665. In the Tribunal’s view, the foregoing discussion establishes that the ABC Experts’ recourse to an interpretation of the Formula that focused on tribal elements, rather than on what the Condominium administrators considered to be the province boundaries, was reasonable in light of the wording, object and purpose and context of the Formula. The Tribunal is not bound to go any further, as its Article 2(a) mandate does not authorize a review beyond the threshold of “reasonableness.” Having said that, the Tribunal considers it important to state that the ABC Experts could also have reasonably understood the Formula as expressing a predominantly “territorial” meaning.

666. Indeed, one member of the majority of this Tribunal, Professor Hafner, believes that, while the decision of the ABC Experts in this regard was not unreasonable as a substantive matter, the predominantly territorial interpretation which they eschewed was more “correct.” Clearly, a territorial appreciation of the Formula would not lead to any of the conclusions made by the ABC in respect of the Abyei Area’s northern boundary. Nevertheless, Professor Hafner considers the Tribunal bound strictly by the limits of its Article 2(a) mandate, which in his opinion requires that the Tribunal not review the ABC Experts’ findings to the extent that they are not unreasonable, and go no further in matters of substance.

667. As an initial matter, the Tribunal notes the ABC Experts’ express recognition that “[t]he evidence presented supporting the [GoS’s] interpretation of the 1905 boundary [between the provinces of Bahr el Ghazal and Kordofan having ran along the Bahr el Arab] is strong.”¹¹⁴⁷

668. However, due to the considerable confusion surrounding the location of the Bahr el Arab at the relevant period of time, the ABC further considered that “administrative officials mistook the Ragaba ez-Zarga/Ngol for the Bahr el-Arab, and treated it as the boundary between Kordofan and Bahr el-Ghazal.”¹¹⁴⁸ Based on this reasoning, the ABC Experts

¹¹⁴⁷ ABC Experts’ Report, Part I, p. 36.

¹¹⁴⁸ ABC Experts’ Report, Part I, p. 38.

concluded that “[t]he government’s claim that only the Ngok Dinka territory south of the Bahr el-Arab was transferred to Kordofan in 1905 is therefore found to be mistaken” and went on to consider “[e]vidence of the Ngok presence north of the Bahr el-Arab before 1905” in order to define the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905.¹¹⁴⁹

669. As the Tribunal has noted above, uncertainty as to the frontier between the provinces of Bahr el Ghazal and Kordofan undeniably remained in 1905, and it was therefore not unreasonable for the ABC Experts to take such an approach. At the same time, the Tribunal would also note that the March 1905 SIR can be interpreted as evidence in favor of a “working boundary” situated along the Bahr el Arab, despite the uncertainty surrounding the exact location of the river. This official document can be seen as endowed with a certain probative value since it was signed both by the Assistant Director of Intelligence as well as the Director of Intelligence and can therefore arguably qualify as an official document by a state organ. The Report makes reference to the transfer by noting:

It has been decided that Sultan Rob, whose country is on the Kir river, and Sheikh Rihan of Toj, mentioned in the last Intelligence Report, are to belong to Kordofan Province.¹¹⁵⁰

670. Annex C of the March 1905 SIR contains a report by Bimbashi Bayldon, who was tasked by Governor General Wingate to reconnoiter the course of the Bahr el Arab.¹¹⁵¹ Bayldon’s observations annexed to the official description of the transfer identify the true Bahr el Arab as being the Kir river:

The River Kir is the real Bahr el Arab. It being called Kir by the Nuers and El Gurf by the Riseigat Arabs, who live close to it, on its higher reaches.¹¹⁵²

and:

The river usually spoken of as the Bahr el Arab (I do not refer to the mouth at its junction with the Bahr el Ghazal, but up country) is really the Bahr el Homr. Running

¹¹⁴⁹ ABC Experts’ Report, Part I, p. 39.

¹¹⁵⁰ Sudan Intelligence Report No. 128 (March 1905), p. 3 (*submitted as FE 2/8 by SPLM/A, SM, Annex 9*).

¹¹⁵¹ Reports on the Finances, Administration, and Condition of the Sudan, Memorandum by Major General Sir R. Wingate (1904), p. 8 (SM, Annex 23, SPLM/A Exhibit-FE 2/3 and 2/4).

¹¹⁵² Summary of Bimbashi Bayldon’s Report on the Bahr el-Arab Sudd, Sudan Intelligence Report No. 128 (March 1905) Appendix C, p. 11 (SM, Annex 9, SPLM/A Exhibit-FE 2/8).

through practically uninhabited country but to which in dry weather the Homr Arabs used to come down with their cattle.¹¹⁵³

671. Although the documentary record shows that “local administrators continued to confuse the two waterways” after 1905,¹¹⁵⁴ Bayldon’s report could be reasonably understood as having ended the uncertainty pertaining to the Bahr el Arab’s course by the time the transfer occurred. Further, Governor General Wingate’s observation that “[t]he districts of Sultan Rob and Okwai, to the South of the Bahr el Arab and formerly a portion of the Bahr el Ghazal province, have been incorporated into Kordofan” could likewise be interpreted as indicating that Wingate knew where the Bahr el Arab was, and considered it to be both the provincial boundary and the northern limit of “Sultan Rob’s district.”¹¹⁵⁵ In view of the uncertainty, the Tribunal acknowledges that a “territorial interpretation” of the Formula, pursuant to which more significance would have been conferred to the provincial boundary (albeit approximate and uncertain), could also have been reasonably justified. However, although the probative value of the March 1905 SIR was not contested during the proceedings, it cannot be established that the transfer of the territory in question was performed in full knowledge of Bayldon’s report.
672. The fact that the ABC Experts chose one reasonable interpretation of the Formula “the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905” over another reasonable one cannot be considered an excess of mandate. Even if equally persuasive or even better arguments were to favor a predominantly territorial interpretation according to which the Bahr el Arab would be the northern frontier of territory transferred in 1905 (a conclusion that the Tribunal does not, and is not required to, draw in these proceedings), an error in the evaluation of contemporary documents would not amount to an excess of mandate but to a mere substantive error. As such, it is not within the limits of this Tribunal's authority, pursuant to Article 2(a) of the Arbitration Agreement, to set aside the decision of the ABC Experts relating to the definition of the northern boundary of the Abyei Area as running along latitude 10°10’N.

¹¹⁵³ Summary of Bimbashi Bayldon’s Report on the Bahr el-Arab Sudd, Sudan Intelligence Report No. 128 (March 1905) Appendix C, p. 10 (SM, Annex 9, SPLM/A Exhibit-FE 2/8).

¹¹⁵⁴ ABC Experts’ Report, Part I, p. 39. *See also supra* paras. 606-607.

¹¹⁵⁵ Reports on the Finances, Administration, and Condition of the Sudan, Memorandum by Major General Sir R. Wingate (1905), p. 24 (SM Annex 24, SPLM/A Exhibit-FE 2/13).

F. FAILURE TO STATE REASONS IN THE IMPLEMENTATION OF THE MANDATE

673. As discussed earlier, the Tribunal's Article 2(a) mandate does not permit the Tribunal to subject the ABC Experts' reasoning to a "test of correctness." It is not for the Tribunal to confirm (or reject) the substantive conclusions of the ABC Experts on the basis of a full review of the evidence, and it is certainly not the Tribunal's task under Article 2(a) to substitute its own judgment for the ABC Experts. Nor will the Tribunal consider whether the reasons provided by the ABC Experts are scientifically sound, sensible, or even just adequate; the Tribunal's review role is carefully circumscribed. One of the limited criteria of permissible review for the Tribunal is whether each of the binding decisions by the ABC Experts is supported by sufficient reasoning to allow the reader of the ABC Experts' Report to appreciate the key elements of the ABC Experts' justification. Thus, the Tribunal will now turn to examining whether the ABC Experts, when implementing their mandate on the basis of a tribal interpretation, stated reasons in support of their definition of the northern, southern, western and eastern boundaries of the Abyei Area and remained within their mandate.

1. The Northern Boundary of the Abyei Area

674. While the ABC Experts provided sufficient reasons for their decision to adopt latitude 10°10'N as the northern limit of the Area of permanent Ngok Dinka habitation, the motivation for drawing the northernmost limit of a "shared rights' area" at latitude 10°35'N (and, by implication, the northern limit of the Abyei Area at latitude 10°22'N) is deficient.

(a) The ABC Has Provided Sufficient Reasons for Its Determination of the Area of Permanent Ngok Dinka Habitation

(i) *The Rejection of the Bahr el Arab and the Ragaba ez Zarga*

675. As an example of the ABC Experts' alleged failure to state reasons, the GoS argues that the ABC Experts first established that the Ragaba ez Zarga (which historically was often confused with the Bahr el Arab)¹¹⁵⁶ was treated as the provincial boundary and then, as its succeeding step, abandoned their own conclusion without motivation and drew the northern boundary line of the Abyei Area further north. The GoS's argument points to an instance of allegedly contradictory reasons, which would be within the Tribunal's scope of review.

¹¹⁵⁶ See *supra* paras. 618 *et seq.*

676. In the Tribunal's view, however, no internal contradiction follows from the fact that the ABC Experts did not consider the line that was treated as the provincial boundary by the Condominium officials to be the boundary of the Abyei area. According to the ABC Experts' interpretation of their mandate (*see supra*. Chapter IV Section E), knowledge of where the Condominium officials may have thought the boundary of Kordofan was located was not sufficient or dispositive of their mission. As the ABC Experts conceived of their mandate, they were to determine the extension of the Ngok Dinka's territory (meaning the area where the Ngok had permanent settlements), and the provincial boundary as it was conceived of by the Condominium officials was only one of many indicators (and not necessarily the determinative one). Consistent with that understanding, the ABC Experts proceeded in Propositions 8 and 9 to examine patterns of population settlements and concluded that Ngok Dinka settlements were also located north of the Ragaba ez Zarga ("along the Ragaba ez-Zarga and the area to its north").¹¹⁵⁷
677. One may agree or disagree with the ABC Experts as to whether such geographical evidence should prevail over historical evidence of the Condominium officials' conception of the Kordofan boundary. However, a disagreement on this point would be a disagreement of substance and not a failure to state reasons. The reasons for the rejection of the Ragaba ez Zarga as the relevant boundary line between the Ngok Dinka and the Misseriya are evident in the ABC Experts' Report and in a sufficiently clear manner.

(ii) The Adoption of 10°10'N as the Limit of Ngok Dinka Permanent Settlements

678. In addition, the GoS argued that "[t]here is simply no justification for latitude 10°10'N in [the ABC Experts'] Report."¹¹⁵⁸ In the Tribunal's view, however, the ABC Experts' reasoning on this point is clear enough. As a first step, the ABC Experts observed that above a particular, still unspecified line, the dominant use of land by the Ngok Dinka gives way to shared land use. In the summary discussion of Proposition 8, the ABC Experts noted:

From the above evidence it stands to reason that the Ngok had established dominant rights of occupation along the Ragaba ez-Zarga and the area to its north, while the Misseriya enjoyed established secondary rights of use in the same region. Further to

¹¹⁵⁷ ABC Experts' Report, Part I, p. 19.

¹¹⁵⁸ GoS Memorial, para. 260.

the north, however, the two communities exercised equal secondary rights to use of the land on a seasonal basis.¹¹⁵⁹

679. Where exactly the line between the two types of areas should be drawn is then explained in the summary discussion of Proposition 9:

The [ABC Experts], having examined the evidence presented in the preceding propositions, are confident that the area south of latitude 10°10' N contains the territory in which the Ngok have dominant rights, based on permanent settlements and land use.¹¹⁶⁰

680. The more extensive discussion of Proposition 8 later in the Report adds some additional detail as to the evidentiary basis for the ABC Experts' findings. The Experts concede that there is "no clear independent evidence establishing the northern-most boundary of the area either settled or seasonally used by the Ngok."¹¹⁶¹ In the absence of such evidence, the ABC Experts explain that they sought indicators and clues in administrative records as well as human geography – the fact that the goz was not settled by anybody – to draw what seemed the best defensible line under the circumstances.
681. In the Tribunal's view, the Expert's reasoning regarding the selection of latitude 10°10'N is comprehensible and complete. Where the line between Ngok Dinka "dominant rights" and Misseriya and Ngok Dinka "shared rights" runs is a factual question, which the ABC Experts determined based on permanent settlements and land use, as it appeared from administrative records and clues from human geography. The GoS's argument that, on the basis of this evidence, the ABC Experts were not entitled to reach the conclusion that that line should run at latitude 10°10'N, is in reality a disagreement with the ABC Experts' appreciation of the evidence. It is not related to a failure by the ABC Experts to state reasons.
682. The additional considerations presented by the GoS under the same heading also relate to alleged errors of substance. For example, the GoS's argument that the summary overview of the evidence contained in the appendices to the ABC Experts' Report does not contain any reference to latitude 10°10'N goes right to the heart of the ABC Experts' substantive decision function: the connection between evidence and binding conclusions. Similarly, the

¹¹⁵⁹ ABC Experts' Report, Part I, p. 19.

¹¹⁶⁰ *Id.*

¹¹⁶¹ ABC Experts' Report, Part I, p. 43.

observation that the ABC Experts may not have taken account of the fact that some of the villages referred to may have moved relates to the ABC Experts' scientific methodology.¹¹⁶² The Tribunal is not prepared to review these findings under the heading of an alleged "failure to state reasons."

(b) The Line Along Latitude 10°35'N Is Unsupported By Sufficient Reasons

683. In contrast to the ABC Experts' adequately explained reasoning up to latitude 10°10'N, aspects of the motivation provided in support of the ABC Experts' definition of the shared-rights area, stretching from latitude 10°10'N to latitude 10°35'N, are deficient.
684. The problematic issue under the heading of "failure to state reasons" is not the ABC Experts' use of the concept of "secondary rights" or "shared rights" as such. The relevant sections of the ABC Experts' decision on this point are cogently reasoned. In the section of the ABC Experts' Report relating to Proposition 9, the Experts concluded that dominant rights by the Ngok existed only up to latitude 10°10'N and that the area north of that line "therefore represents the area of secondary rights shared between the Ngok and the Misseriya." Reasons for the Experts' recourse to the category of "shared rights" can in turn be found in Points 4 to 6 of Appendix 2. In this section, the ABC Experts set out their understanding of secondary rights as a category of land rights requiring a less intensive connection with the land, based on principles of African land law. Hence, as far as the use of the concept of shared rights is concerned, it cannot be said that the ABC Experts' decision came "out of the blue."¹¹⁶³
685. What is problematic, however, is the ABC Experts' reliance on latitude 10°35'N as the northernmost area of Ngok Dinka and Misseriya "shared rights." While not initially part of the GoS's submissions, the GoS later adduced the ABC Experts' reliance on latitude 10°35'N as a further example of the perceived lack of reasons. In the GoS's words:

The same [that a finding made without any scientific analysis of the available documentation constitutes an excess of the Experts' mandate] holds true mutatis mutandis concerning the 10 degrees 35 minutes north line which corresponds to nothing but to the extreme claim to the north of the SPLM/A...¹¹⁶⁴

¹¹⁶² GoS Memorial, para. 261.

¹¹⁶³ GoS Oral Pleadings, April 18, 2009, Transcr. 149/11.

¹¹⁶⁴ GoS Oral Pleadings, April 18, 2009, Transcr. 152/01-04; *see also* the discussion in the GoS Rejoinder, para. 161.

686. This northern-most point is crucial to the ABC Experts' decision, as the limit of the "shared-rights area" directly and the location of the Abyei area boundary indirectly depend on it. In this respect, it should be recalled that the ABC Experts "calculated" the boundary line of the Abyei Area by bisecting equally the band between latitude 10°10'N and the northernmost point.¹¹⁶⁵ Given the importance of the location of the northern-most point for the definition of the shared rights area and the boundary itself, an exposition of the ABC Experts' reasons similar to the justification of latitude 10°10'N could be expected.
687. As the GoS concedes,¹¹⁶⁶ the ABC Experts do point out that the line drawn at latitude 10°35'N coincides to some extent with Dinka names on certain maps reviewed by the ABC Experts, and in particular with the settlement of Tebeldia.¹¹⁶⁷ Given the permissive standard of review to be applied by the Tribunal, this statement in the ABC Experts' Report, read in isolation, could potentially be considered sufficient for satisfying the reasons requirement. However, in the following paragraph of the Report, the ABC Experts themselves noted that they did *not* consider the fact that several Dinka names appeared on maps close to latitude 10°35'N to constitute sufficient evidence for any boundary line:

In the absence of a copy of the presidential decree, or verbatim quotation from the text, and a more precise location of the sites mentioned, it is impossible to accept this definition as conclusive.¹¹⁶⁸

688. Similarly, in the section entitled "Conclusion," the ABC Experts noted:

The [ABC Experts] considered the presentation by the SPLM/A that their dominant claim lies at latitude 10°35'N, but found the evidence in support of this to be inconclusive.¹¹⁶⁹

Hence, the strongest reason for the selection of latitude 10°35'N was expressly disqualified by the ABC Experts themselves, and it cannot serve as a justification for that line.

689. The only remaining justification that the Tribunal is able to find for latitude 10°35'N in the Report is contained in the following short sentence:

¹¹⁶⁵ ABC Experts' Report, Part I, pp. 44-5.

¹¹⁶⁶ GoS Oral Pleadings, April 18, 2009, Transcr. 152/04-07.

¹¹⁶⁷ ABC Experts' Report, Part I, p. 44.

¹¹⁶⁸ *Id.*

¹¹⁶⁹ *Id.* at p. 21.

Taking latitude 10°35'N as the northern limit to the Ngok Dinka claims, and noting that the Goz belt is roughly contained within these limits, it is reasonable to treat the Goz as a transitional zone where there are shared secondary rights...¹¹⁷⁰ (emphasis added)

690. The statement just quoted must be read in conjunction with the observation that “the band of Goz intervening between Humr permanent territory and the Ngok permanent settlements is settled by nobody;...and that there is regular seasonal use of the Goz by both peoples.”¹¹⁷¹
691. Hence, the only reason offered in support of the northern limit of the shared rights area and, by implication, of the Abyei Area boundary calculated on the basis of that limit, is the northern extension of the goz. In the Tribunal’s view, this single reference to the goz does not amount to a reasoned justification.
692. The Tribunal would not want to exclude as a general matter that the location of geographical phenomena can be part of a rational justification for a boundary marker or even an entire boundary line. By their very nature, boundary delimitation decisions must be capable of practical implementation, requiring on occasion deference to geographical necessities. However, if a decision-maker wishes to base its decision on geographical features, some additional explanation is in order as to why that geographical feature should be determinative for the location of the boundary, thereby overriding other evidence that may have been presented by the parties.
693. The ABC Experts’ Report provides no indication why the northern extension of the goz should be relevant for the limits of the Abyei Area. In fact, the Experts’ own method of enquiry regarding the extension of the “area of the nine Ngok Dinka chiefdoms” required them to determine the northernmost limit of permanent Ngok Dinka settlements. In the Experts’ view, if there was no conclusive evidence of such permanent settlements north of latitude 10°10’N, it is difficult to understand why the Abyei Area was nonetheless extended further north, beyond that line up to latitude 10°22’30”N.
694. The ABC Experts do not provide any reasons for shifting from a “permanent settlement” perspective to a geographical perspective. Nor can it be said that the relevance of the northern limit of the goz would be self-explanatory. To the contrary, if the ABC Experts

¹¹⁷⁰ *Id.*, at p. 44.

¹¹⁷¹ *Id.*, at p. 43.

were satisfied that permanent settlements existed (only) up to latitude 10°10'N, and that latitude line presents the southern limit of the goz, the most intuitive conclusion to draw from these observations is that latitude 10°10'N then represents the northern limit of the Abyei Area.

695. Thus, the ABC Experts' justification of latitude 10°35'N (and, by implication, the northern limit of the Abyei Area at latitude 10°22'30"N) rests on the mere observation that the SPLM/A's northernmost claim happens to coincide in an approximate manner with the northernmost limit of the goz.¹¹⁷² Such coincidence, however, cannot replace a searching inquiry and principled decision as to the northernmost area of the nine Ngok Dinka chiefdoms transferred in 1905, as was the ABC Experts' task.

(c) Conclusion

696. In conclusion, the Tribunal is satisfied that the ABC Experts' principal finding that

[t]he Ngok have a legitimate dominant claim to the territory from the Kordofan-Bahr el Ghazal boundary north to latitude 10°10'N [...]

is supported by sufficient reasons. Insofar as this finding is concerned, the GoS's arguments must therefore be rejected. However, it has to be recalled that according to one member of the Tribunal, Professor Hafner, the applicability of latitude 10°10'N as the northern boundary of the transferred territory follows exclusively from the fact that the Tribunal is precluded by its mandate from reviewing it.

697. As far as the ABC Experts' selection of latitude 10°35'N and 10°22'30"N is concerned, their decision is not supported by sufficient reasons.

2. The Southern Boundary of the Abyei Area

698. The ABC Experts' Report provides that "[t]he southern boundary shall be the Kordofan-Bahr el-Ghazal-Upper Nile boundary as it was defined on 1 January 1956."¹¹⁷³ The southern boundary of the Abyei Area was clearly not the focus of dispute between the

¹¹⁷² In light of the Tribunal's limited scope of review in the present proceedings, the Tribunal is not called upon to ascertain the correctness of this conclusion. The Tribunal would note, however, that the cartographic evidence adduced by the SPLM/A during these proceedings does not seem to show the northern limit of the goz at latitude 10°35'N (see the satellite images of the "Abyei Area" and the Bahr region in SPLM/A Map Atlas vol. 2, Maps 66 to 70).

¹¹⁷³ ABC Experts' Report, Part 1, p. 22.

Parties over the course of the ABC proceedings.¹¹⁷⁴ Having reviewed the evidence, the ABC Experts adopted this boundary as the southern limit of the area of the nine Ngok Dinka chiefdoms transferred in 1905.¹¹⁷⁵ There is no submission that this conclusion exceeded the mandate and indeed, it does not.

699. The Tribunal recalls that the southern boundary of the Abyei Area remained uncontroversial in these proceedings. As provided in the GoS Counter-Memorial:

Both Parties accept that the 1956 provincial boundary, which continues to be the boundary today, constitutes the southern limit of the area transferred in 1905. There is accordingly no dispute on this aspect of the case.¹¹⁷⁶

700. The GoS further confirmed in the course of the hearings that:

[...] there's no dispute between the parties in this case as to what those southern limits are. They are identical in each of our submissions.¹¹⁷⁷

701. Thus, irrespective of the Parties' concurrence on the manner by which the Formula is interpreted, the Tribunal sees no need to examine the matter any further, and agrees that, to the extent that the 1956 Kordofan southern boundary meets the eastern and western boundaries delimited by this Tribunal below, the southern boundary of the Abyei Area was defined in compliance with the ABC Experts' mandate.

3. The Eastern and Western Boundaries of the Abyei Area

702. The ABC Experts' Report and the Parties' pleadings both present arguments and evidence relating to the northern and southern boundary lines of the Abyei Area. In stark contrast, the Tribunal observes that the eastern and western boundaries of the "area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905" were barely discussed. This is surprising, given the fact that the delimitation of these western and eastern lines were just as integral to the ABC's mandate as other components of the Abyei Area. Having carefully

¹¹⁷⁴ See SPLM/A Final Presentation, p. 18, second paragraph (SPLM/A Exhibit-FE 14/13) referring to latitude 9°21'N, which corresponds in part to the 1956 Kordofan southern boundary, as the southern limit of the area claimed; GoS First Presentation, slide 46 (SPLM/A Exhibit-FE 14/2) referring to the "current triangle to the south of the Bahr el-Arab [representing] the 'area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905'"; GoS Memorial, Figure 5, p. 17. The Parties did disagree, however, as to the definition of the western, eastern, and northern boundaries, as well as the location of the Ngok Dinka north of the Bahr el Arab.

¹¹⁷⁵ See, *inter alia*, ABC Experts' Report, Part 2, pp. 18, 22, 36, 45.

¹¹⁷⁶ GoS Counter-Memorial, para. 505. See also, for example, SPLM/A Rejoinder, para. 885(c).

¹¹⁷⁷ GoS Oral Pleadings, April 20, 2009, Transcr. 197/13-16. See also GoS Oral Pleadings, April 20, 2009, Transcr. 206/06-10; April 21, 2009, Transcr. 61/23-25.

considered the evidence presented relating to these boundaries, the Tribunal finds that the ABC Experts' decision regarding the eastern and western boundary lines is insufficiently motivated; this absence of sufficient reasoning constitutes, in turn, an excess of mandate concerning those parts of the ABC Experts' findings. This insufficiency on the part of the ABC Experts may be traced, to an extent, to the scarcity of the evidence, but that of itself does not suffice to validate the findings of the ABC Experts in respect of the eastern and western boundaries.

703. Proposition 9 of the ABC Experts' Report states:

The Abyei Area is defined as the territory of Kordofan encompassed by latitude 10°35'N in the north to longitude 29°32'E in the east, and the Upper Nile, Bahr el-Ghazal and Darfur provincial boundaries as they were at the time of independence in 1956. (SPLM/A Presentation, Appendix 3.2)¹¹⁷⁸

704. The ABC Experts attempted to explain the eastern boundary line by indicating that it was reasonable to adopt longitude 29°32'E since neither "the Ngok nor the SPLM/A had presented claims to the territory east of longitude 29°32'15."¹¹⁷⁹ This terse statement does not constitute a sufficiently reasoned justification of the eastern boundary; rather, it is a mere summary of one of the Parties' positions (the SPLM/A's). The Report remains silent on the GoS's arguments concerning this point, and the ABC Experts do not indicate any independent conclusions that they would have drawn as a result of their analysis.

705. The only other possible justification of the eastern boundary that the Tribunal can discern from the Report stems from the ABC Experts' analysis of a sketch map produced by the SPLM/A. The ABC Experts briefly refer to the sketch map produced by the SPLM/A during their final presentation to the ABC before proceeding to state that this evidence is "inconclusive" (given the absence of a copy of a 1974 presidential decree). However, although the ABC Experts themselves do not ascribe much probative value to the sketch map, they nevertheless seem to rely on this very map to determine that the villages presented by the SPLM/A as Ngok villages were mostly "contained within the area of latitude 10°35'N and longitude 29°32'15"E..."¹¹⁸⁰ While the appreciation of evidence by the ABC Experts is beyond the Tribunal's review mandate under Article 2(a), it is

¹¹⁷⁸ ABC Experts' Report, Part 1, p. 44.

¹¹⁷⁹ *Id.* at 45.

¹¹⁸⁰ *Id.* at 44.

contradictory (not to mention inappropriate in its failure to articulate reasons based on the best available evidence) for the ABC Experts to base their decision exclusively on evidence which they themselves have qualified as inconclusive. Beyond these contradictory reasons, the Tribunal finds no further explanation from the ABC Experts relating to the eastern boundary.

706. With respect to the determination of the western boundary line, this Tribunal notes that the selection of the 1956 Kordofan–Darfur boundary is entirely unreasoned. Indeed, it is noteworthy that the ABC Experts did not make any specific pronouncement as to the location of the western boundary line of the Abyei Area; instead, the ABC Experts stated that: “[a]ll other boundaries of the area that coincide with the provincial boundaries as they were at independence on 1 January 1956 shall remain as they are.”¹¹⁸¹ No supporting evidence is presented, and no analysis is provided which would expose the line of reasoning adopted by the ABC Experts to reach the conclusion that the 1956 boundary between the provinces of Kordofan and Darfur also represents the westernmost limits of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905. While the Tribunal understands the importance of the 1956 boundaries in the broader context of the peace process and the possible secession of South Sudan (should it choose to do so in the exercise of self-determination), as indicated by Sections 1 and 8 of the Abyei Protocol,¹¹⁸² reliance

¹¹⁸¹ *Id.* at 45.

¹¹⁸² Sections 1.3 and 8 of the Abyei Protocol read:

1.3 End of Interim Period;

Simultaneously with the referendum for southern Sudan, the residents of Abyei will cast a separate ballot. The proposition voted on in the separate ballot will present the residents of Abyei with the following choices, irrespective of the results of the southern referendum:

- a. That Abyei retain its special administrative status in the north;
- b. That Abyei be part of Bahr el Ghazal.

1.4 The January 1, 1956 line between north and south will be inviolate, except as agreed above.

8. ABYEI REFERENDUM COMMISSION

8.1 There shall be established by the Presidency an Abyei Referendum Commission to conduct Abyei referendum simultaneously with the referendum of Southern Sudan. The composition of the Commission shall be determined by the Presidency.

8.2 The residents of Abyei shall cast a separate ballot. The proposition voted on in the separate ballot shall present residents of Abyei with the following choices; irrespective of the results of the Southern referendum:

- a. That Abyei retain its special administrative status in the north;
- b. That Abyei be part of Bahr el Ghazal.

8.3 The January 1, 1956 line between north and south shall be inviolate, except as agreed above.

on the Darfur-Kordofan boundary without any supporting analysis does not allow the Tribunal and the readers of the Report to understand how the Experts arrived at this conclusion.

707. The Tribunal takes note of the ABC Experts' reference in Proposition 9 to the SPLM/A Presentation before the ABC (Appendix 3 of ABC Experts' Report, Part 2). However, Appendix 3 sheds no light on how the ABC Experts arrived at their conclusions regarding the eastern and western longitudes up to 10°10'N. Rather, the SPLM/A Presentation as reproduced in the Report exposes the SPLM/A's claims regarding the presence of the Ngok Dinka north of the river Kir, and makes no attempt at identifying the 1905 location of the nine Ngok Dinka chiefdoms on the east and the west.

708. Thus, the ABC Experts did not provide sufficient reasoning with respect to essential elements of the decision, namely the determination of the eastern and western boundary lines of the Abyei Area. As indicated above in Section D 2.(b)(ii), a failure to state reasons constitutes an excess of mandate when it relates to a point "necessary to the tribunal's decision."¹¹⁸³ The ABC was expressly tasked with the responsibility of delimiting the Abyei area and the requirement to provide sufficient reasoning with respect to the delimitation of its eastern and western components was an integral part of that responsibility. This Tribunal recalls that the "target audience" of the ABC Experts' Report were the multiple stakeholders of the Sudanese peace process, ranging from the Presidency to the local residents of Abyei. As such, the failure to state sufficient reasons or indeed, to state any reasons at all, as in the case of the western boundary, does not allow the reader to understand the basis on which the ABC Experts decided on the western and eastern boundaries of the Abyei Area.

709. The Tribunal further observes that the whole section comprising Proposition 9 is rather short given that it raises the most central aspect in this case, i.e. the identification and delimitation of the Abyei Area.

G. THE TRIBUNAL'S DETERMINATION OF THE ABYEI AREA'S EASTERN AND WESTERN BOUNDARIES PURSUANT TO ARTICLE 2(C) OF THE ARBITRATION AGREEMENT

710. Having upheld the reasonableness of the ABC Experts' predominantly tribal interpretation of the Formula, this Tribunal considers itself obliged to proceed with the delimitation phase

¹¹⁸³ *Vivendi Universal v. Republic of Argentina*, Decision on Annulment, July 3, 2002, 6 ICSID Rep (2002) 358.

of the mandate without departing from the same predominately tribal approach. This conclusion applies *a fortiori* given the Tribunal's determination that the northern limit of the area of permanent habitation of the nine Ngok Chiefdoms transferred in 1905 (i.e., the ABC Experts' findings and delimitation at latitude 10°10'N) was reasoned and within the ABC Experts' mandate. As discussed above, the retained northern boundary of the Abyei Area was drawn by the ABC Experts on the basis of a predominantly tribal interpretation as opposed to a predominantly territorial interpretation.

711. While the Tribunal finds itself bound to sustain the ABC Experts' interpretation of the Formula, it did find an excess of mandate on a different ground, the Experts having failed to adequately state reasons in support of some of their findings in the implementation of their mandate. By invalidating the 10°35'N and 10°22'30"N lines while upholding the 10°10'N line, the Tribunal has fulfilled its mandate with respect to the northern limit of the Abyei Area and will not address the issue any further.
712. By contrast, the western and eastern boundaries of the Abyei Area were not drawn by the ABC Experts in compliance with their mandate. Thus, in fulfillment of its own mandate, the Tribunal must now proceed to "define (i.e. delimit) on map" the eastern and western boundaries in accordance with Article 2(c) of the Arbitration Agreement.
713. A careful review of the Parties' submissions reveals that the evidence remains scanty. There is no map from 1905, or indeed later years, which provides the specific coordinates of the western and eastern limits of the area occupied by the nine Ngok Dinka Chiefdoms transferred in 1905. As both Parties recognize, drawing these limits is not an easy task.¹¹⁸⁴

1. Preliminary Remarks on the Appreciation of the Evidentiary Record

714. The Tribunal wishes to emphasize at this stage that it has a duty to render its decision on the basis of what it considers, after careful review and within the confines of the predominantly tribal interpretation of the mandate, as the best available evidence. There is no *general presumption* privileging evidence emanating from Condominium officials or witness evidence (or indeed any other source). In this Tribunal's view, what constitutes the best

¹¹⁸⁴ GoS Oral Pleadings, April 21, 2009, Transcr. 63/21 ("It's a very complicated question of fact."); SPLM/A Oral Pleadings, April 22, 2009, Transcr. 134/09-114 ("The truth of the matter is [...]if the Tribunal were to address the question under 2(c) of identifying the precise territory of the Ngok Dinka chiefdoms, that's difficult. It's hard to draw precise lines, we don't deny that."); See also *supra* para. 304 and 356.

available evidence on a particular point of fact must be determined in light of all circumstances, and not whether it is in written or oral form.

715. The Tribunal notes that both Parties have looked at the evidence with a critical eye. The SPLM/A has convincingly explained the limits of the Condominium record, especially around the crucial date of 1905, highlighting the fact that the Condominium was still undertaking initial explorations of the region at the time. These exploratory treks followed limited routes and were not necessarily conducted for the purpose of collecting information on the people but rather on the topography or the river system. These expeditions were made in the dry season, at a time when the Humr go down to the Bahr in search of water and pastures and the Ngok Dinka move to the south of the Bahr. The nascent state of the administration and, more generally, a persistent difficulty in accessing the area during the rainy season also account for the lack of clarity and comprehensiveness of the information recorded in their reports or on maps.¹¹⁸⁵
716. One cannot conclude from the foregoing, however, that evidence emanating from Condominium officials has no probative value. Rather, these reports should be examined taking into account their limits and other sources of evidence.
717. One other potential source of evidence is witness testimony. For its part, the GoS has criticized the reliability of witness evidence.¹¹⁸⁶ This Tribunal agrees that where the witnesses rely on knowledge passed down through one or two generations, the precise dating of the evidence which they supply may sometimes be difficult. Nevertheless, depriving witness evidence *per se* of all probative value would be unjustifiable. When defining the historic area of a tribe, an inherently difficult exercise, it is reasonable, and indeed quite logical, to seek information from the tribe members themselves. The ABC was explicitly structured by the Parties to hear such evidence. The Terms of Reference of the ABC, which were agreed upon by the Parties, provided that “[t]he ABC shall thereafter travel to the Sudan to listen to representatives of the people of Abyei Area and their neighbors”¹¹⁸⁷ and both Parties did rely on witness evidence before the Commission. The

¹¹⁸⁵ See *supra* the SPLM/A arguments at paras. 273 *et seq.*

¹¹⁸⁶ See *supra* the GoS’s arguments at paras. 372 *et seq.*

¹¹⁸⁷ Terms of Reference, Section 3.2.

ABC Experts themselves, as specialists, felt they had to consider this type of evidence.¹¹⁸⁸ In these proceedings, the Parties again presented and relied on witness statements in support of their arguments. The balanced approach of the Supreme Court of Canada provides useful guidance on the evidentiary value of oral tradition:

Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. This is a long-standing practice in the interpretation of treaties between the Crown and aboriginal peoples.¹¹⁸⁹

718. The Tribunal will accordingly admit oral evidence and will assign it the weight proper to it in each instance. It will be duly taken into account, in particular, in so far as it corroborates other sources of evidence.
719. The Tribunal notes, finally, that in contrast to Condominium records and witness statements, the evidence provided by anthropological experts, in particular Howell and Professor Cunnison, has not been questioned by either Party. Because of this unanimity and for additional reasons explained below, their evidence is central to this Tribunal's decision.

2. Howell's Western and Eastern Limits of the Area Occupied by the Ngok Dinka

720. One document in the record, Paul P. Howell's "Notes on the Ngork Dinka [sic] of Western Kordofan," provides specific longitudes for this area. Significantly, the relevant extract of this document was not only submitted to the ABC¹¹⁹⁰ and included in the Report,¹¹⁹¹ but it was also relied upon by both Parties before this Tribunal.¹¹⁹²
721. Howell, a British District Commissioner and anthropologist,¹¹⁹³ located the Ngok Dinka people as follows:

¹¹⁸⁸ See Transcript of discussion between ABC Members during meeting at La Mada Hotel, Nairobi, Kenya, p. 34, SPLM/A Exhibit-FE 14/5a.

¹¹⁸⁹ *Delgamuukw v. British Columbia* (1997) 3 S.C.R. 1010, para. 87, SPLM/A Exhibit-LE 40/7.

¹¹⁹⁰ SPLM/A Final Presentation on the Boundaries of the Abyei Area, p. 17 (SPLM/A Exhibit-FE 14/13)

¹¹⁹¹ ABC Experts' Report, Part 2, Appendix 5, p. 202.

¹¹⁹² See GoS Rejoinder, paras. 419, 434, 444, 454, 484 and SPLM/A Rejoinder, paras. 364, 368, 507, 557 (h) 592; See also GoS Oral Pleadings, April 23, 2009, Transcr. 33/03-12 and SPLM/A Oral Pleadings, April 22, 2009 Transcr. 34/23-35/06, 52/20-23.

¹¹⁹³ See ABC Experts' Report, Part I, pp. 16, 26.

The Ngork Dinka occupy the area between approximately Long. 27°50' and Long. 29° on the Bahr el Arab, extending northwards along the main watercourses of which the largest is the Ragaba Um Biero.¹¹⁹⁴

722. While Howell does not mention any specific latitude for the northern limit of the Ngok Dinka and refers to “the main watercourses” north of the Bahr el Arab (i.e. the Ragaba ez Zarga and the Ragaba Umm Biero), he does provide specific indications of where the Ngok Dinka’s western and eastern limits lie.

3. Continuity of Ngok Dinka Settlements

723. The Tribunal is well aware of the fact that Howell’s notes are not contemporaneous to the 1905 transfer. Nonetheless, they provide the best and most specific available data, especially in light of the continuity, within a largely unchanged ecology, of the Ngok Dinka’s historic settlements and Humr’s migrating patterns, which the GoS’s witness, Professor Ian Cunnison, convincingly describes. Indeed, on the basis of observations made in the early 1950s, Professor Cunnison explains that the Humr’s locations and migratory “pattern of life is of long-standing”¹¹⁹⁵ and that “[t]he way in which tribal sections move seems not to have varied much since the Reoccupation.”¹¹⁹⁶ In addition, Muglad is considered by the Humr as “their home” and that is “where they cultivate and store their grain as their forefathers did.”¹¹⁹⁷ Professor Cunnison further observes that when the Humr migrated in the dry season, they would go to the Bahr, “the traditional land of Dinka who return there and cultivate during the rains.”¹¹⁹⁸ In his view, “[t]he substantial nature of Dinka houses means that their settlements have remained similar for a long period – probably from the beginning of the 20th century, or the end of the Mahdiya.”¹¹⁹⁹

¹¹⁹⁴ P.P. Howell, “Notes on the Ngork Dinka of Western Kordofan” (1951) 32 SUDAN NOTES AND RECORDS 239, p. 242. (emphasis added.) (SM Annex 53, SPLM/A Exhibit-FE 4/3).

¹¹⁹⁵ Witness Statement of Ian Cunnison, para. 6. See also para. 12: “I believed - and still believe – that the position I describe was of long-standing” (GoS Memorial, pp. 189, 191).

¹¹⁹⁶ CUNNISON, BAGGARA ARABS – POWER AND THE LINEAGE IN A SUDANESE NOMAD TRIBE 26 (1966), SPLM/A Exhibit-FE 4/16.

¹¹⁹⁷ Cunnison, *The Humr and their Land*, 35(2) SNR 54 (1954), SPLM/A Exhibit-FE 4/5.

¹¹⁹⁸ Cunnison, *The Social Role of Cattle*, 1(1) SUDAN J. VETERINARY SCIENCE AND ANIMAL HUSBANDRY 10 (1960), Exhibit-FE 4/8.

¹¹⁹⁹ Cunnison interview, ABC Experts’ Report, Part II, App. IV, p. 162.

724. It bears recalling that Professor Cunnison, a specialist of social anthropology,¹²⁰⁰ lived for more than two years in a Humr camp, which “moved to about sixty fresh sites in the course of each year”¹²⁰¹ and thus extensively explored the region.¹²⁰² He also “knew the Dinka leader, Deng Majok,” the Ngok Dinka Paramount Chief, “who was an impressive man.”¹²⁰³ The Tribunal is therefore inclined to place more reliance on his understanding of the situation on the ground, of how the Humr and the Ngok lived, moved and interacted, than on reports based on more limited dry-season treks. In addition, his analysis has not been challenged by the Parties. Rather, the GoS itself presented Professor Cunnison as a witness and relied on his writings and statements, thereby clearly indicating that his observations, made in the 1950s, could be transposed and were highly relevant to the year 1905.¹²⁰⁴
725. Cunnison’s analysis has also been confirmed by Michael Tibbs, who “[...] responded affirmatively when asked if there was continuity in the Ngok Dinka permanent settlements.”¹²⁰⁵ Mr. Tibbs maintained this position in his witness statement: “I believe the descriptions I give of the Humr and Ngok Dinka areas within the province to have existed for some considerable time prior to my arrival in Kordofan, with the obvious exception of the increased Humr cultivation of cotton particularly at Nyama and Subu.”¹²⁰⁶

4. Evidence Corroborating the Extent of the “Bahr” Region

726. The reliability of Howell’s western and eastern limits of the nine Ngok Dinka Chiefdoms is however not solely based on the continuity of Ngok settlements. His calculations are also confirmed both by earlier sources as well as contemporaries of Howell. While less specific than Howell, all authors have in common the fact that they define the location of the Ngok Dinka by reference to the Bahr region, which they describe in a similar fashion.

¹²⁰⁰ See Witness Statement of Ian Cunnison, para. 1.

¹²⁰¹ Cunnison, *Some Social Aspects of Nomadism in a Baggara Tribe* in *The Effect of Nomadism on the Economic and Social Development of the People of the Sudan*, Proceedings of the Tenth Annual Conference January 11-12, 1962, p. 105, SPLM/A Exhibit-FE 4/11.

¹²⁰² Professor Cunnison lived among the Misseriya Humr, the Ngok Dinka’s northern neighbouring tribe, between August 1952 and January 1955 (see First Witness Statement of Professor Ian Cunnison, GoS Memorial, para. 3, p. 189).

¹²⁰³ Professor Cunnison’s Witness Statement, para. 6.

¹²⁰⁴ The SPLM/A endorses Professor Cunnison’s (and Mr Tibbs’s) analysis on the continuity of Ngok Dinka settlements (see *supra* paras. 343-344). The Government’s criticism focuses on the Experts’ reliance on a 1965 peace agreement to establish continuity (see *supra* para. 179).

¹²⁰⁵ Tibbs interview, ABC Experts’ Report, Part II, App. IV, p. 159.

¹²⁰⁶ Witness Statement of G. Michael Tibbs, Appendix to SPLM/A Counter-Memorial, para. 27.

727. Robertson thus depicted the Bahr as “the great semi-circle from Grinti to Keilak on the Bahr el Arab, and its system of tributary wadis (regebas).”¹²⁰⁷ Howell offers a comparable definition, explaining that the name is taken from “the main perennial river of that region, the Bahr el Arab,” and “used loosely to describe a vast tract of country where many variations of topography and vegetation are found,” extending to Lake Keilak and Lake Abiad.¹²⁰⁸ As noted by the ABC Experts, Professor Cunnison provides an analogous description of the Bahr:

[t]he southern part of the country, [i]t is the area in which the Humr spend the latter half of the dry-season. It is characterized by dark, deeply crackling clays and numerous winding watercourses all connected eventually with the Bahr el Arab, a tributary of the White Nile. It contains also two almost permanent lakes, Keylak (which lies slightly to the south of east from the Muglad) and Abyad, in the south-east corner of the country. The Bahr is the name which the Humr give to the whole of this dry-season watering country. Within it they recognize different districts: ‘the Regeba’ is the northern part of the Bahr, where the Humr make their earliest dry-season camps [...] The ‘Bahr’ proper is the region where the camps are made towards the end of the dry season, mainly around the largest watercourses, the Regeba Umm Bioro and Regeba Zerga.¹²⁰⁹

The Humr recognize the following components in [the Bahr]: (i) the watercourses; (ii) higher, non-cracking clay areas, on which Dinka build permanent homestead...¹²¹⁰

728. In a previous article, “The Humr and their Land,” also examined by the ABC Experts, Professor Cunnison had commented on the Bahr el Arab as follows:

The river system is known to the Arabs as the Bahr, although they subdivide the area into the Regaba (consisting of Regeba ez Zarga and the Regeba Umm Bioro); and the Bahr, or the Bahr el ‘Arab, which consists of all river beds between the Regeba ez Zerga and the main river. [Fn 3: The nomenclature is confusing. The river which is generally shown on maps as the Bahr el ‘Arab – and in one section as the Jurf – always known by the Arabs as the Jurf. They point out that it is not the Bahr el ‘Arab, for the Arabs do not normally settle by it at this part, but the Bahr ed Deynka.]¹²¹¹

¹²⁰⁷ ABC Experts’ Report, Part II, Appendix 5 at p. 171, *quoting* J.W. Robertson, *Handing over Notes on Western Kordofan District, 1936, Chapter IV The Humr Administration.*

¹²⁰⁸ *Id.*, *quoting* P.P. HOWELL, *SOME OBSERVATIONS ON THE BAQQARAH* (1948), p. 11.

¹²⁰⁹ CUNNISON, I., *BAGGARA ARABS: POWER AND LINEAGE IN A SUDANESE NOMAD TRIBE* (1966). *See also Id.* at p. 172.

¹²¹⁰ *Id.* at p. 18.

¹²¹¹ I. Cunnison, “*Humr and their Land*” (1954) 35 *SUDAN NOTES AND RECORDS* 50, 51 (SPLM/A Exhibit-FE 4/5).

729. The Tribunal notes that these descriptions correspond to the satellite photographs of the Bahr region submitted in the file.¹²¹² They are also consistent with Professor Allan's statement that:

The Bahr region is hospitable to and consistent with the agro-pastoral lifestyle, and it does extend not only in the area between the two major rivers that we've been talking about [the Kir and the Ragaba ez Zarga], but also in the area to the north and the east.¹²¹³

730. According to Professor Cunnison, "[...] [m]uch of the Bahr has permanent Dinka settlements, although during most of the time that the Humr occupy it the Dinka are with their cattle south of the Bahr el Arab."¹²¹⁴ He further observes that

Dinka have permanent housing on the Bahr, but Humr do not. Dinka settlements are largely unoccupied during the Humr stay in the south, except for caretakers. The bulk of the Dinka and their cattle move over the Bahr -el-Arab. Arabs, during the dry season, camp by the regebas. By contrast Dinka erect their houses back from the regebas to avoid the flooding during their residence there in the rains.¹²¹⁵

731. The permanent nature of Dinka settlements in the Bahr region is also highlighted in the following extracts from the ABC Expert's interview with Professor Cunnison in May 2005:

The Humr had no land claims, no permanent settlements, no houses, unlike the Dinka.¹²¹⁶

732. It should be emphasized at this stage that resorting to a criterion of permanent housing on the Bahr in determining the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905 by no stretch implies that other tribes cannot, or will not be able to, use the Bahr and its pastures. Quite the contrary. Article 1.1.3 of the Abyei Protocol provides that "[t]he Misseriya and other nomadic peoples retain their traditional rights to graze cattle and move across the territory of Abyei." Consistent with Professor Cunnison's comment that he "never observed the Humr asking permission from Dinka to come to the Bahr,"¹²¹⁷

¹²¹² See Maps 68 (Bahr Region (on Dry Season Satellite Image)) and 69 (Abyei Area: Wet Season Vegetation (Satellite Image)) of SPLM/A Map Atlas, vol. 2.

¹²¹³ SPLM/A Oral Pleadings, April 21, 2009, Transcr. 153/02-07 (Professor Allan's presentation).

¹²¹⁴ I. Cunnison, BAGGARA ARABS: POWER AND THE LINEAGE IN A SUDANESE NOMAD TRIBE, (1966), p. 19 cited in ABC Experts' Report, Part II, App. 5, p. 172.

¹²¹⁵ ABC Experts, ABC Experts' Report, Part II, App. 4, p. 161 (Ian Cunnison Interview, Hedon, 22 May 2005).

¹²¹⁶ ABC Experts' Report, Part 2, Appendix 5, p. 161 (Ian Cunnison Interview, Hedon, 22 May 2005).

¹²¹⁷ Witness Statement of Professor Cunnison, para. 6.

Article 1.1.3 enshrines the right of the Misseriya and other nomadic tribes (not subject to “permission”) to move freely and graze cattle in the Abyei Area.¹²¹⁸

733. Earlier sources closer to 1905 confirm the presence of Ngok Dinka in this area. The 1912 Kordofan Handbook provides a full description of the area occupied by the Ngok Dinka, which encompasses at least the Bahr in Cunnison’s terminology:

Country.- To the south of Dar Nuba and living in the open plains (locally called fawa) which extend to the Bahr el Arab there is a considerable Dinka population. In the rains the tribesmen collect for the most part in the neighbourhood of Lake Abiad and near Doleiba, where they have semi-permanent villages and a little cultivation. As the country dries up and the mosquitoes disappear they move slowly south, watering at the various rain pools, to the Arab or Gurf River, along the banks of which they form innumerable small settlements of two or three huts each.¹²¹⁹

734. The 1913 Anglo-Egyptian Kordofan Province Map reflects this description and places the labels “Dinka” and “Dar Jange” on a territory encompassing approximately Sultan Rob, the Bahr el Arab and the Ragaba ez Zarga (“Bahr el Homr”), up to Lake Abiad.¹²²⁰ Similarly, other maps such as the 1914 Anglo-Egyptian Sudan War Office Map¹²²¹ or the 1916 Darfur War Office Map¹²²² mark “Dinka” on an area extending from beneath the Bahr el Arab to the northwest beyond the Ragaba ez Zarga up to approximately latitude 10°20’N, past Lake Abiad. The description of the area again roughly corresponds to the arc described above by Robertson.
735. However, a close reading of the evidence shows that an expansive view of the area occupied by the Ngok Dinka, such as to encompass the whole of the Bahr up to, and as far east as, Lake Keilak and Lake Abiad, is not warranted. Rather, the evidence indicates that Ngok territory occupation was concentrated approximately between the longitudes provided by Howell, up to latitude 10°10’N.

¹²¹⁸ See also *infra* paras. 748 *et seq.* the section of this Award addressing the issue of traditional rights.

¹²¹⁹ Anglo-Egyptian Sudan Handbook Series: Kordofan and the Region to the West of the White Nile, December 1912, p. 73 (SM Annex 27, SPLM/A Exhibit-FE 3/8a).

¹²²⁰ See Map 49 of SPLM/A Map Atlas, vol. 1; GoS Memorial Map 12 (*Kordofan Province*, Survey Office Khartoum, 1913).

¹²²¹ Map 84 of SPLM/A Map Atlas, vol. 2 (*The Anglo-Egyptian Sudan*, War Office, 1914, rev. 1920); GoS Memorial Map 17 (*The Anglo-Egyptian Sudan*, War Office, 1914, rev. 1920).

¹²²² GoS Memorial Map 16 (*Darfur*, War Office, 1916).

736. In Cunnison's analysis, the Ngok Dinka permanent settlements are in fact mostly located around the Bahr river system, which includes the Bahr el Arab, the Ragaba Umm Biero, and the Ragaba ez Zarga, and "numerous winding watercourses all connected eventually with the Bahr el Arab."¹²²³ While this area does not go beyond latitude 10°10'N – where, as noted by Professor Cunnison, there is no significant collective presence of the Ngok Dinka (in the northwest, in the goz, in the northeast, in the upper Bahr region (towards lake Keilak and Abiad) – Howell's lines of latitude do encompass and coincide roughly with much of the three main rivers and intricate network of smaller waterways of this portion of the Bahr, as shown on the Tribunal's Award Map.

737. This is confirmed by earlier evidence, including the 1912 Kordofan Handbook, which locates the Ngok Dinka in the center and the west of the area extending from the Bahr el Arab to Lake Abiad:

The three main divisions are: - On the east, the Ruweng section under Sultan Anot; in the centre, the followers of the late Sultan Rob, who are now under his son, Kanoni; and to the west a number of Rob's ex-followers, under another of his sons, named Kwal.¹²²⁴

5. Evidence Corroborating Howell's Western and Eastern Limits

738. Taken individually, the western and eastern latitudes indicated by Howell are equally corroborated by additional evidence.

739. Howell's location of the western boundary is corroborated by Michael Tibbs' 1954 observation that the area around Grinti, very close to longitude 27°50'E, is "Ngok territory, although the Arabs used to graze in it in the spring." Mr. Tibbs also notes that "while the Dinka tolerated the Messeria, neither of them wanted the Rezigat from Darfur there."¹²²⁵

740. These statements are unambiguous and do contribute to confirming the location of the Ngok people transferred in 1905. The Tribunal notes, similarly, that the 1913 Anglo-Egyptian Kordofan Province Map places the label "Dar Rizeigat" to the west of "Dar Jange,"

¹²²³ See *supra* para. 727 *et seq.* See also the rivers and drainage on the Tribunal's Award Map (**Appendix 1**).

¹²²⁴ Anglo-Egyptian Sudan Handbook Series: Kordofan and the Region to the West of the White Nile, December 1912, pp. 73 – 74 (SM Annex 27, SPLM/A Exhibit-FE 3/8a).

¹²²⁵ ABC Experts' Report, Part II, App. 5, p. 203 quoting Michael and Anne Tibbs.

approximately along longitude 27°10'E.¹²²⁶ By contrast, Heinekey, who began a trek in Gerinti in March 1918, merely notes the absence of tracks and the necessity to be accompanied by a guide to travel to Mek Kwal's village.¹²²⁷ Unfortunately, he does not offer, in this very brief report, any information regarding the population inhabiting the area around Gerinti or the relations between the different tribes there. Similarly, Sultan Rob's indication that there are only Humr "west of him"¹²²⁸ is equally unhelpful. The statement is vague *per se* and leaves unresolved the task of determining coordinates of the western limit of the area. In light of Mr. Tibbs' observations, Sultan Rob's statement is best understood as referring to the presence of Misseriya (and Rizeigat) Arabs west of the Ngok Dinka people as a whole, Sultan Rob being their Paramount Chief.

741. Turning to the eastern boundary, Howell's longitude of 29°00'E is corroborated by evidence provided by Robertson's study of Western Kordofan from 1933 to 1936. Robertson reports that in June one year after the rains had begun, the people of the Western Nuer District in Upper Nile Province "had crossed the Ragaba and built their big cattle luarks – thatched huts – on the Kordofan side of the river, thereby trespassing on the Ngok Dinka lands."¹²²⁹ Robertson further states that he gave orders to burn the Nuer's huts and "make [them] go back to their own tribal lands."¹²³⁰ These comments clearly indicate that the tribal boundary between the Nuer and the Ngok Dinka is crossed at the border between Upper Nile and Kordofan around the Ragaba ez Zarga. Again, Robertson's specific meeting point between the two tribes closely coincides with Howell's longitude of 29°00'E, west of which one enters Ngok territory. This description is more useful to this Tribunal than Dupuis' sketch, which merely suggests that the Ngok Dinka's southeastern border is with the Rueng,¹²³¹ a border in any event confirmed by Howell.¹²³² It is also a more reliable

¹²²⁶ See Map 49 of SPLM/A Map Atlas, vol. 1; Map 12 in GoS Memorial Map Atlas (*Kordofan Province*, Survey Office Khartoum, 1913).

¹²²⁷ G.A. Heinekey, Route Report: Gerinti to Mek Kwal's village, March 1918, SCM Annex 35.

¹²²⁸ GoS Oral Pleadings, April 21, 2009, Transcr. 91/01.

¹²²⁹ ROBERTSON, J., *TRANSITION IN AFRICA*, 1974, p. 51, SM Annex 45, SPLM/A Exhibit-FE 5/10.

¹²³⁰ *Id.*

¹²³¹ See GoS Oral Pleadings, April 21, 2009, Transcr. 106/11 *et seq.*; Dupuis' 1921 Sketch (see GoS Maps 39b and 39c). As in the case of a number of other maps, Dupuis provides a mere snapshot of the traveler's perception during a single trip in some parts of the region; it does not reflect, among other things, the fact that the Ngok Dinka's occupation and use of land is affected by the very significant changes to the topography of the region brought about by its seasonal ecology. The Tribunal further notes that Dupuis' 1922 brief Note on Dinka of Western Kordofan unfortunately does not provide any useful information or coordinates locating the area occupied and used by the Ngok Dinka (see Dupuis 1922 Report: Note on Dinka of Western Kordofan, SCM Annex 52). The same analysis applies to the 1927 Tribal Distribution Map. The Tribunal observes, however, that the map

and better indication than the village of Etai, which the GoS claims is evidence of the Abyei area's eastern limit.¹²³³ In fact, Wilkinson, who located Etai, never described it as forming or indicating the Ngok Dinka's eastern boundary.¹²³⁴ The Tribunal is similarly very reluctant to equate the eastern and western limits of the area occupied by the Ngok Dinka transferred in 1905 with the 1933 pencil depiction of Ngok Dinka's dry season grazing area on a sketch map, especially when more comprehensive and specific evidence is available.¹²³⁵

742. In addition, the Tribunal notes that the written evidence is corroborated by oral evidence. Naturally, the Tribunal is aware that, like other pieces of evidence submitted in these proceedings, some witness statements lack precision. But this does not mean that they lack all probative value. Indeed, both Parties relied on witness evidence before the ABC and before this Tribunal, knowing that the history of the Ngok Dinka and the Misseriya is largely based on oral tradition.¹²³⁶ Given the paucity of the evidence, the oral testimony of the Ngok Dinka regarding their location in 1905 will be taken into account, especially insofar as it confirms scholarly and documentary evidence, such as that provided by Howell or Cunnison.
743. In the west, for example, several witnesses have identified Maper Amaal, a village near the 27°50'E line, around the northern portion Ragaba ez Zarga, as both an Abyior settlement¹²³⁷

confirms the Ngok Dinka's southeastern border with the Rueng at approximately latitude 29°00'E and shows no tribe between the Ngok Dinka and Kordfan's western boundary (*See* Map 21 in GoS Counter-Memorial Map Atlas (*Kordofan Tribal Distribution Map*, Sudan Survey Department, 1927)).

¹²³² *See* P.P. Howell, "Notes on the Ngork Dinka of Western Kordofan" (1951) 32 SUDAN NOTES AND RECORDS 239, p. 241 ("They [The Ngok Dinka] border the Rueng Alor Dinka in the south-east [...]") (SM Annex 53, SPLM/A Exhibit-FE 4/3).

¹²³³ *See* GoS Oral Pleadings, April 21, 2009, Transcr. 106/20 *et seq.*

¹²³⁴ *See* Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government Vol. II*, p. 155, SM, Annex 38, SPLM/A Exhibit-FE 2/15.

¹²³⁵ *See* GoS Oral Pleadings, April 21, 2009, Transcr. 108/06 *et seq.*; 1933 Grazing Areas Map (GoS Counter-Memorial Map Atlas, Maps 22a and 22b). The minutes of the meeting to which the Grazing Areas Sketch Map is attached do not provide any relevant information on the area inhabited by the Ngok Dinka (*see* Civsec 66/4/35, "Minutes of Meeting," October 28, 1933, pp. 92-95, SCM Annex 39).

¹²³⁶ The SPLM/A filed twenty-six witness statements from members of all of the nine chiefdoms, including the Ngok Dinka paramount chief, with its Memorial. The GoS also submitted with its Counter-Memorial a substantial number of witness statements, including four witness statements from Ngok Dinka tribe members. As one of the Government's witnesses indicates, the source of the Ngok Dinka's history is found in "oral traditions and Ngok Dinka songs." (Witness Statement of Majid Yak Kur, member of the Bongo Chiefdom, p. 1)

¹²³⁷ *See*, for example, Witness Statement of Deng Chier Agoth, Abyior Elder, para. 16 (SPLM/A Memorial, Witness Statements, Tab 7). Deng Chier Agoth was born in 1930. *See also* Witness Statement of Kuol Alor Makuac Biong, Abyior Chief, para. 13 (SPLM/A Memorial, Witness Statements, Tab 6). Kuol Alor Makuac Biong was born in 1963.

and a cattle grazing area for members of the Mareng Chiefdom¹²³⁸ around 1905. Witnesses appearing before the ABC, including members of other Dinka tribes, also indicated that Maper Amaal was considered as a Ngok settlement and place for grazing.¹²³⁹ Similarly, in the east, oral evidence points to Panyang, a one-day walk west of Pariang, and Pariang itself, being Achaak settlements in 1905.¹²⁴⁰

744. Although there is witness evidence suggesting that there were Ngok settlements west of longitude 27°50'E in such places as Thigei,¹²⁴¹ Grinti,¹²⁴² Meiram¹²⁴³, and east of longitude 29°00'E in such places as well as Ajaj,¹²⁴⁴ Mardhok,¹²⁴⁵ or Miding,¹²⁴⁶ Map 62 of the SPLM/A Map Atlas (vol. 2) confirms that the vast majority of Ngok traditional sites and settlements were concentrated in the portion of the Bahr region located between longitudes 27°50'E and 29°00'E.

¹²³⁸ See Witness Statement of Kuol Lual Deng Akonon, Former Chief of the Mareng and Mareng Elder, para. 9 (SPLM/A Memorial, Witness Statements, Tab 27). Kuol Lual Deng Akonon was born in 1914.

¹²³⁹ See ABC Experts' Report, Part II, App. 4, p. 69 (Akol Maywin Kuol, Executive Chief from the Rek Dinka tribe), p. 75 (Naim Manyang, Abiem Dinka Chief), p. 115 (Koul Mithiang Amiyok, Diil Chiefdom).

¹²⁴⁰ See Witness Statement of Ring Makuac Dhel Yak, Executive Chief of the Achaak, paras. 5, 11 (SPLM/A Memorial, Witness Statements, Tab 11).

¹²⁴¹ See, for example, Witness Statement of Kuol Alor Makuac Biong, Chief of Abior, para. 13 (SPLM/A Memorial, Witness Statements, Tab 5); Witness Statement of Deng Chier Agoth, Abyior Elder, para. 16 (SPLM/A Memorial, Witness Statements, Tab 7); See also ABC Experts' Report, Part II, App. 4, pp. 115, 154.

¹²⁴² See, for example, Witness Statement of Deng Chier Agoth, Abyior Elder, para. 21(b) (SPLM/A Memorial, Witness Statements, Tab 7); See also ABC Experts' Report, Part II, App. 4, p. 154.

¹²⁴³ See, for example, Witness Statement of Deng Chier Agoth, Abyior Elder, para. 11 (SPLM/A Memorial, Witness Statements, Tab 7); Witness Statement of Alor Kuol Arop, Abyior Elder, para. 10 (SPLM/A Memorial, Witness Statements, Tab 8); Witness Statement of Jok Deng Kek, Achueng Elder, para. 11 (SPLM/A Memorial, Witness Statements, Tab 14); See also ABC Experts' Report, Part II, App. 4, pp. 48, 148.

¹²⁴⁴ See, for example, Witness Statement of Ring Makuac Dhel Yak, Executive Chief of the Achaak Chiefdom, para. 14 (SPLM/A Memorial, Witness Statements, Tab 11); Witness Statement of Mijak Kuot Kur, Achaak Elder, para. 11 (SPLM/A Memorial, Witness Statements, Tab 12); Witness Statement of Nyol Pagout Deng Ayei, Bongo Chief, para. 10 (SPLM/A Memorial, Witness Statements, Tab 20); See also ABC Experts' Report, Part II, App. 4, pp. 124, 133, 149, 150.

¹²⁴⁵ See, for example, Witness Statement of Ring Makuac Dhel Yak, Executive Chief of the Achaak Chiefdom, para. 11 (SPLM/A Memorial, Witness Statements, Tab 11); Witness Statement of Mijak Kuot Kur, Achaak Elder, para. 11 (SPLM/A Memorial, Witness Statements, Tab 12); See also ABC Experts' Report, Part II, App. 4, p. 150.

¹²⁴⁶ See, for example, Witness Statement of Ring Makuac Dhel Yak, Executive Chief of the Achaak Chiefdom, paras. 8, 9 (SPLM/A Memorial, Witness Statements, Tab 11); Witness Statement of Mijak Kuot Kur, Achaak Elder, para. 11 (SPLM/A Memorial, Witness Statements, Tab 12); Witness Statement of Mijok Bol Atem, Diil Elder, para. 10 (SPLM/A Memorial, Witness Statements, Tab 23); See also ABC Experts' Report, Part II, App. 4, pp. 124, 125, 150, 153, 155.

6. Conclusion

745. In view of the above, the Tribunal defines the western and eastern boundaries of the Abyei Area as indicated on the Tribunal's Award Map (**Appendix 1**).¹²⁴⁷ The western boundary runs along longitude 27°50'E from latitude 10°10'N south until it intersects with the 1956 Kordofan-Darfur boundary. In order to take into account the fact that the Abyei Area's southern boundary, as confirmed by this Tribunal, is the prolongation of the 1956 Kordofan-Darfur boundary, the Abyei Area's western boundary then follows the latter until it meets the former. The eastern boundary of the Abyei Area runs along longitude 29°00'E, from latitude 10°10'N south until it intersects with the Abyei Area's southern boundary.
746. By delimiting the eastern and western boundaries of the Abyei Area in the foregoing manner, the Tribunal adopts the ABC Experts' use of lines of longitude in its delimitation of tribal boundaries, as the Tribunal finds that it was reasonable for the Experts to do so for both logical and practical reasons. In cases where a tribunal is required to delimit boundaries based on a meager evidentiary record, the "fewer the points (or points of reference) involved in its definition, the greater the court's 'degrees of freedom' (in the statistical sense)."¹²⁴⁸ And indeed, lines of longitude and latitude when delimiting boundaries have been used in appropriate circumstances by international courts and tribunals and is recognized in public international law.
747. The same reasoning applies in this case, as it has proven impossible for the Tribunal to determine every relevant historical and geographical feature in the area, and then proceed to draw authoritative boundaries, from the sparse amount of decisive evidence and the temporal constraint of 1905. As there are few non-topographic circa-1905 features that survive intact today to aid in delimitation, the Tribunal deems it proper to delimit the eastern and western boundaries based on lines of longitude, as the ABC did.

¹²⁴⁷ See also **Appendix 2**, a map comparing the boundary and area delimited by the Tribunal with that of the ABC Experts.

¹²⁴⁸ Separate Opinion by Judge *ad hoc* Abi-Saab, *Frontier Dispute, Judgment*, ICJ Reports 1986, p. 554, 662.

H. THE BOUNDARY DELIMITED BY THE TRIBUNAL IS WITHOUT PREJUDICE TO TRADITIONAL GRAZING RIGHTS

1. The Scope of the Tribunal's Mandate with Respect to Traditional Rights

748. Through the Arbitration Agreement, the Parties gave expression to their expectation that the Tribunal will bring final resolution to the dispute over the Abyei Area, with all its attendant territorial consequences. As mandated, this Tribunal's Article 2(c) focus has been the delimitation "on map" of the boundaries of the Abyei Area. The Tribunal's attention to territorial boundaries should not, however, be taken to imply that the Parties are entitled to disregard other territorial relationships that people living in and in the vicinity of the Abyei Area have historically maintained. Sovereign rights over territory are not, after all, the only relevant considerations in areas in which traditional land-use patterns prevail. As the ICJ noted in the *Western Sahara* case, there are other "ties which kn[o]w no frontier between the territories" and which are "vital to the very maintenance of the life in the region."¹²⁴⁹
749. The Tribunal's limited mandate forestalls consideration of the traditional rights applying within or along the boundaries of the Abyei Area in any comprehensive manner. Nonetheless, the Tribunal must address such traditional rights to the extent that the ABC Experts have decided in Point 5 of the Report's "Final and Binding Decision" that "[t]he Ngok and Misseriya shall retain their established secondary rights to the use of land north and south of this boundary"¹²⁵⁰ The GoS alleges that the ABC Experts' pronouncement was rendered in excess of the ABC Experts' mandate. As explained in the following sections, the Tribunal finds no such excess of mandate with regard to Point 5 of the Final and Binding Decision.

2. The CPA Guarantees Misseriya Grazing Rights and Other Traditional Rights

750. At the outset, the Tribunal notes that the CPA (including the Abyei Protocol), which is part of the Tribunal's applicable law pursuant to Article 3 of the Arbitration Agreement, confirms the Parties' intention to accord special protection to the traditional rights of the people settling within and in the vicinity of the Abyei Area.

¹²⁴⁹ *Western Sahara*, Advisory Opinion, ICJ Reports 1975, p. 12, 65.

¹²⁵⁰ ABC Experts' Report, Part I, p. 22.

751. Most importantly, the Abyei Protocol specifically recognizes the need to safeguard the grazing rights of the Misseriya and other nomadic peoples. Pursuant to Section 1.1.3 of the Abyei Protocol, “[t]he Misseriya and other nomadic peoples retain their traditional rights to graze cattle and move across the territory of Abyei.” Some other provisions of the CPA equally reaffirm the Parties’ intention to protect the exercise of traditional rights.¹²⁵¹
752. Hence, the CPA explicitly guarantees traditional rights acquired by populations within the Abyei Area; these rights will not be affected by the Tribunal’s boundary delimitation.

3. According to General Principles of Law, Traditional Rights Are Not Extinguished by Boundary Delimitations

753. The jurisprudence of international courts and tribunals as well as international treaty practice lend additional support to the principle that, in the absence of an explicit prohibition to the contrary, the transfer of sovereignty in the context of boundary delimitation should not be construed to extinguish traditional rights to the use of land (or maritime resources).

(a) Case law by international courts and tribunals

754. While international courts and tribunals have been reluctant to derive direct territorial title from traditional rights,¹²⁵² the ICJ has confirmed that pre-existing traditional rights may

¹²⁵¹ Section 1.6 of the CPA affirms the application of the African Charter on Human and People’s Rights, which (among other things) guarantees the right of every individual to leave any country including his own, and to return to his country (Article 12(2)) and the right of all peoples to freely pursue their economic and social development according to the policy they have freely chosen. (Article 21(1)). The legal principles of the continuation of traditional rights enabling lifestyles that necessitate transboundary migration are consistent with these principles. In Section 2.5 of the CPA, the Parties agree that “a process be instituted to progressively develop and amend the relevant laws to incorporate customary laws and practices, local heritage and international trends and practices.” Similarly, Section 2.6.6.2 of the CPA requires the National Land Commission to “accept references on request from the relevant government, or in the process of resolving claims, and make recommendations to the appropriate levels of government concerning: ... Recognition of customary land rights and/or law.” The references to “customary laws and practices” and “customary land rights” in the CPA would seem to include the exercise of traditional rights. Pursuant to Section 3.1.5 of the PCA, land rights are a relevant factor in the allocation and exploitation of natural resources: “Persons enjoying rights in land shall be consulted and their views shall duly be taken into account in respect of decisions to develop subterranean natural resources from the area in which they have rights, and shall share in the benefits of that development.”

¹²⁵² In a number of cases, the ICJ considered traditional fishing rights and land rights, without however finding them sufficient to allocate title to territory based on the notion of better established *effectivités*. See recently, *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, ICJ Reports 2002, p. 625; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment, ICJ Reports 2001, 40. See also *The Barbados/Trinidad and Tobago Arbitration Award of 2006* (Permanent Court of Arbitration Award Series, TMC Asser Press, forthcoming 2009), also available at www.pca-cpa.org.

result in spatial adjustments when delimiting boundaries.¹²⁵³ In addition, it is an established principle of boundary adjudication that the transfer of territorial sovereignty resulting from the delimitation of a new international boundary does not, in the absence of an explicit intention to the contrary, extinguish traditional rights to the use of transferred territory. An early doctrinal foundation of the principle that customary rights “survive” the transfer of territorial title was provided in the *Right of Passage* case, where the ICJ recognized that Portugal continued to enjoy certain rights of passage over Indian territory that used to be Portuguese.¹²⁵⁴ Customary rights “run with the land,” and whichever party in international adjudication is assigned title to a particular territory is bound to give effect to these rights as a matter of international law; customary rights are, so to speak, *servitutes jure gentium* or “*servitutes internationales*.”¹²⁵⁵

755. With regard to land rights, the PCIJ confirmed that the transfer of sovereignty over a particular territory does not extinguish private rights pertaining to the use of that territory: “Private rights acquired under existing law do not cease on a change of sovereignty,” the PCIJ held, adding that it was unreasonable to assume that “private rights acquired from the State as the owner of the property are invalid as against a successor in sovereignty.”¹²⁵⁶ In the *Frontier Dispute between Burkina-Faso and Mali*, the ICJ Chamber gave attention to the historical reality that administrative lines drawn by colonial powers often bisected organic living spaces. As a consequence, inhabitants moved across administrative or even colonial boundaries in their daily living:

While under the colonial system a village may, for certain administrative purposes, have comprised all the land depending on it, the Chamber is by no means persuaded that when a village was a feature used to define the composition – and therefore the geographical extent – of a wider administrative entity, the farming hamlets had always to be taken into consideration in drawing the boundary of that entity. In the colonial

¹²⁵³ In the *Gulf of Maine case*, which concerned a maritime boundary for the continental shelf and fishery zones, the ICJ recognised that boundary delimitations may have “catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned” and noted that, in the event of such consequences, adjustments to the median line should be made (*Gulf of Maine (Canada v. US)*, ICJ Reports 1984 p. 246 at 342). Similarly, the ICJ considered in the *Maritime Delimitation (Denmark v. Norway)* “whether any shifting or adjustment of the median line as fishery zone boundary would be required to ensure equitable access to the capelin fishery resources for the vulnerable fishing communities concerned.” In this respect, the Court’s principal concern was whether there existed any delimitation that would “guarantee to each Party the presence in every year of fishable quantities of capelin in the zone allotted to it by the line” (*Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, ICJ Reports 1993p. 38, paras. 72-78).

¹²⁵⁴ *Right of Passage over Indian Territory (Portugal v. India)*, ICJ Reports 1960, p. 6, 35-43.

¹²⁵⁵ *Eritrea-Yemen*, Arbitral Award, First Stage of the Proceedings, at para. 126 (Permanent Court of Arbitration, available at <http://www.pca-cpa.org>).

¹²⁵⁶ *Questions relating to Settlers of German Origin in Poland*, Advisory Opinion, PCIJ Series B, No. 6 at 36.

period, the fact that the inhabitants of one village in a French colony left in order to cultivate land lying on the territory of another neighbouring French colony, or *a fortiori* on the territory of another *cercle* belonging to the same colony, did not contradict the notion of a clearly-defined boundary between the various colonies or *cercles*.¹²⁵⁷

756. The Chamber also ruled that it was not precluded from defining a clear boundary notwithstanding any transboundary rights that may have been acquired by the inhabitants of the border region:

The Parties have not requested the Chamber to decide what should become of the land rights and other rights which, on the eve of the independence of both States, were being exercised across the boundary between the two pre-existing colonies. If such rights had no impact on the position of that boundary, then they do not affect the line of the frontier, and it is this line alone which the Parties have requested the Chamber to indicate.¹²⁵⁸

757. However, such judicial restraint was not exercised due to the Chamber's belief that traditional transboundary rights were of lesser importance. Rather, the Chamber did not consider itself compelled to address the question of preexisting transboundary rights because these rights were already safeguarded by bilateral agreements:

From a practical point of view, the existence of such rights has posed no major problems, as is shown by the agreements which [the parties] have concluded to resolve the administrative problems which arise in the frontier districts of the two States. For example, an agreement of 25 February 1964 deals, among other matters, with the "Problems of land and the maintenance of rights of use on either side of the frontier," and it provides that "Rights of use of the nationals of the two States pertaining to farmland, pasturage, fisheries and waterpoints will be preserved in accordance with regional custom."¹²⁵⁹

758. The Tribunal would note that the existence of "side agreements" regarding traditional rights in the *Burkina-Faso v. Mali* case bears close resemblance to the situation in the present proceedings, in which the Parties committed prior to the arbitration to the safeguard of certain traditional rights in the CPA.

759. The principle of the continuity of traditional rights has also been invoked, with considerable frequency, in maritime delimitations in relation to traditional fishing rights. In the 1893 *Behring Sea Arbitration*, the arbitral tribunal was concerned with traditional "rights of the

¹²⁵⁷ *Frontier Dispute (Burkina-Faso v. Mali)*, Judgment, ICJ Reports 1986 p. 554 at 616-7, para. 116.

¹²⁵⁸ *Id.*

¹²⁵⁹ *Id.*

citizens and subjects of either country as regards the taking of fur-seals in or habitually resorting to the said waters...¹²⁶⁰ The tribunal specifically exempted “Indians dwelling on the coasts of the territory of the United States or of Great Britain” from the legal regimes that otherwise applied, so as to guarantee the continuation of traditional fishing techniques.

760. In *Eritrea-Yemen*, a PCA-administered arbitration, the Tribunal, in determining claims of territorial sovereignty over islands in the Red Sea and the maritime boundary delimitation between Eritrea and Yemen, held that the traditionally prevailing situation of *res communis*, which permitted African and Yemeni fishermen to operate with no limitation throughout the entire area and to sell their catch at local markets on either side of the Red Sea, was compatible with and would remain unaffected by the findings of sovereignty over various of the islands.¹²⁶¹ The “traditional fishing regimes,” operating both within and beyond the parties’ territorial waters, “does not depend, either for its existence or for its protection, upon the drawing of an international boundary by this Tribunal.”¹²⁶²

(b) International treaties

761. Traditional rights are also recognized in a multitude of international agreements. Early bilateral treaties defining international boundaries have routinely included perpetual guarantees of traditional rights, the exercise of which might otherwise be obstructed by the introduction of an international boundary.¹²⁶³

762. Modern treaties governing the delimitation of boundaries contain similar provisions. The 1978 treaty between Australia and Papua New Guinea, for example, sets out a special legal

¹²⁶⁰ *Behring Sea Arbitration, Great Britain v. United States*, August 15, 1893, 179 *CTS*, No. 8, 97 at 98.

¹²⁶¹ *Eritrea-Yemen*, Arbitral Award, First Stage of the Proceedings, at paras. 128 and 526 (Permanent Court of Arbitration, available at <http://www.pca-cpa.org>).

¹²⁶² *Eritrea-Yemen*, Arbitral Awards, Second Stage of the Proceedings, at para. 110 (Permanent Court of Arbitration, available at <http://www.pca-cpa.org>).

¹²⁶³ See Article 1 of the 1888 Agreement between Great Britain and France, respecting the Somali Coast, signed at London, February, 1888, Hertslet's, Vol. XIX, 204, at 204-205; Article V of the Arrangement between Great Britain and France, fixing the Boundary between the British and French Possessions on the Gold Coast, signed in the French language at Paris, July 12, 1893, Hertslet's, Vol. XIX, 228, at 229-230; Article I of the Treaty between Great Britain and Ethiopia, signed by the Emperor Menelek II, and by Her Majesty's Envoy, at Adis Abbaba [*sic*], May 14, 1897, Hertslet's, Vol. XX, 1 at 2; Article III of the Exchange of Notes between Great Britain and France relative to the Boundary between the Gold Coast and the French Soudan, March 18, 1904, to July 19, 1906, Hertslet's, Vol. XXV, 267, at 271; Convention between Great Britain and France supplementary to the Declaration of March 21, 1899, and the Convention of June 14, 1898, respecting Boundaries West and East of the Niger signed at Paris, September 8, 1919; Convention Supplementary to the Declaration signed at London on March 21, 1899, as an addition to the Convention of June 14, 1898, which regulated the Boundaries between the British and French Colonial Possessions and Spheres of Influence to the West and East of the Niger, Hertslet's, Vol. XXX, 213, 8th para., at 214.

regime for citizens who “maintain traditional customary associations with areas of features in or in the vicinity of the Protected Zone in relation to their subsistence or livelihood or social, cultural or religious activities,” which includes traditional fishing rights.¹²⁶⁴ Similarly, in a 1982 agreement between Indonesia and Malaysia, Malaysia recognized the legal regime of the archipelagic state established by Indonesia, while Indonesia accepted the continuation of the existing rights of Malaysian nationals in Indonesia’s territorial sea and archipelagic waters, including traditional fishing rights.¹²⁶⁵

763. Although the underlying principle applies to all populations, guarantees of traditional rights are of particular significance for indigenous populations. Convention No. 169 of the International Labour Organisation (ILO) concerning Indigenous and Tribal Peoples in Independent Countries enshrines a positive duty on the part of states to safeguard the rights of peoples to their traditional land use.¹²⁶⁶ According to Article 13(1),

governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

764. To further this purpose, pursuant to Article 14(1), governments shall take measures

to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

765. Finally, to facilitate the protection of traditional rights to land use, including non-exclusive land use, Article 14(2) requires governments to “take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.”

¹²⁶⁴ Treaty on Sovereignty and Maritime Boundaries in the Area between the Countries, December 18, 1978, XVIII ILM (1979) 291 at 293.

¹²⁶⁵ Treaty relating to the Legal Regime of Archipelagic State and the Rights of Malaysia in the Territorial Sea, Archipelagic Waters and the Territory of the Republic of Indonesia lying between East and West Malaysia, cited in R.R. CHURCHILL, A.V. LOWE, *THE LAW OF THE SEA* (revised ed., 1988) 109, note 10.

¹²⁶⁶ Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 72 *ILO Official Bull.* 59; 28 *ILM* (1989) 1382. This Tribunal takes note of the fact that the Sudan has not ratified Convention No. 169. In the Tribunal’s view, however, the non-ratification of the Convention does not preclude this Tribunal from taking account of the Convention as one piece of evidence among many of relevant “general principles of law and practices.”

4. Conclusion

766. As a matter of “general principles of law and practices” within the meaning of Article 3 of the Arbitration Agreement, traditional rights, in the absence of an explicit agreement to the contrary, have usually been deemed to remain unaffected by any territorial delimitation. Section 1.1.3 of the Abyei Protocol confirms the continued application of the principle with respect to traditional rights to graze cattle and move across the Abyei Area. For these reasons, the Tribunal finds that the ABC Experts decision that “[t]he Ngok and Misseriya shall retain their established secondary rights to the use of land north and south of this boundary” was reasonable and, thus, within the Experts’ mandate.

I. FINAL OBSERVATIONS

767. By constituting these proceedings, the Parties have accorded to this Tribunal a crucial role within the greater Sudanese peace process – a process that seeks to end the long conflict between North and South that has affected all of Sudan. Conscious of its paramount obligation to the people within and around the Abyei Area (particularly the needs of the Misseriya and the Ngok Dinka) and to the Sudanese people themselves, this Tribunal has done its utmost to contribute, through the task assigned to it, to a peaceful resolution of the bitter conflict over the Abyei Area within the time limits prescribed by the Arbitration Agreement and strictly within the confines of its mandate. The Tribunal is confident that no objective claim can be made from any quarter that the Tribunal acted in excess of its mandate.

768. Under the Abyei Road Map, “[t]he parties commit themselves to abide by and implement the award of the arbitration tribunal.”¹²⁶⁷ The Arbitration Agreement reiterates: “[t]he Parties agree that the arbitration award delimiting the “Abyei Area” through determining the issues of the dispute as stated in Article 2 of this Agreement shall be final and binding.”¹²⁶⁸ Thus, with this Award, a distinct stage in the peace process comes to an end.

769. It is now for the Parties to take the next steps. Pursuant to the Arbitration Agreement, “the Presidency of the Republic of Sudan shall ensure the immediate execution of the final arbitration award.”¹²⁶⁹ This involves, among other modalities of implementation, the

¹²⁶⁷ Abyei Road Map, Section 4.3.

¹²⁶⁸ Arbitration Agreement, Article 9(2).

¹²⁶⁹ Arbitration Agreement, Article 9(5).

prompt appointment of a survey team to demarcate the Abyei Area as delimited by this Award. The Tribunal's limited mandate to "define (i.e. delimit) on map" the Abyei Area does not extend to demarcation, but the Tribunal hopes that the spirit of reconciliation and cooperation visible throughout these proceedings, particularly during the oral pleadings last April, will continue to animate the Parties on this matter.

CHAPTER V - DISPOSITIF

A. DECISION

770. Having considered all relevant arguments, the Tribunal concludes that:

(a) Northern Boundary

1. In respect of the ABC Experts' decision that "[t]he Ngok have a legitimate dominant claim to the territory from the Kordofan – Bahr el-Ghazal boundary north to latitude 10°10'N," the ABC Experts did not exceed their mandate.
2. In respect of the ABC Experts' decision relating to the "shared secondary rights" area between latitude 10°10'N and latitude 10°35'N, the ABC Experts exceeded their mandate.
3. The northern boundary of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 runs along latitude 10°10'00"N, from longitude 27°50'00"E to longitude 29°00'00"E.

(b) Southern Boundary

1. In respect of the ABC Experts' decision that "[t]he southern boundary shall be the Kordofan – Bahr el-Ghazal – Upper Nile boundary as it was defined on 1 January 1956," the ABC Experts did not exceed their mandate.
2. The southern boundary as established by the ABC Experts is therefore confirmed, subject to paragraph (c) below.

(c) Eastern Boundary

1. In respect of the ABC Experts' decision that "the eastern boundary shall extend the line of the Kordofan – Upper Nile boundary at approximately longitude 29°32'15"E northwards until it meets latitude 10°22'30"N", the ABC Experts exceeded their mandate.
2. The eastern boundary of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 runs in a straight line along longitude

29°00'00"E, from latitude 10°10'00"N south to the Kordofan – Upper Nile boundary as it was defined on 1 January 1956.

(d) Western Boundary

1. In respect of the ABC Experts' decision that "[t]he western boundary shall be the Kordofan – Darfur boundary as it was defined on 1 January 1956," the ABC Experts exceeded their mandate.
2. The western boundary of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 runs in a straight line along longitude 27°50'00"E, from latitude 10°10'00"N south to the Kordofan – Darfur boundary as it was defined on 1 January 1956, and continuing on the Kordofan – Darfur boundary until it meets the southern boundary confirmed in paragraph (b) above.

(e) Grazing and other Traditional Rights

1. In respect of the ABC Experts' decision that "[t]he Ngok and Misseriya shall retain their established secondary rights to the use of land north and south of this boundary," the ABC Experts did not exceed their mandate.
2. The exercise of established traditional rights within or in the vicinity of the Abyei Area, particularly the right (guaranteed by Section 1.1.3 of the Abyei Protocol) of the Misseriya and other nomadic peoples to graze cattle and move across the Abyei Area (as defined in this Award), remains unaffected.

B. MAP ILLUSTRATING THE DELIMITATION LINE

771. The boundary as defined above is illustrated on the map appended to this award on a scale of 1:750,000 and based on the WGS84 datum (*see Appendix 1*).

C. REFERENCE POINTS

772. The coordinates, in terms of WGS84 datum, of selected reference points mentioned in this Award are specified in the following table:

<i>Point</i>	<i>Latitude (N)</i>	<i>Longitude (E)</i>	<i>Description</i>
1	9°47' N*	27°50'00" E	Intersection of the Kordofan-Darfur boundary, as it was defined on 1 January 1956, with the line of longitude
2	10°10'00" N	27°50'00" E	Intersection of the lines of latitude and longitude as determined by the Tribunal
3	10°10'00" N	29°00'00" E	Intersection of the lines of latitude and longitude as determined by the Tribunal
4	9°40' N*	29°00'00" E	Intersection of the Kordofan-Upper Nile boundary, as it was defined on 1 January 1956, with the line of longitude

** Note: these latitude values are approximate only and have been derived graphically from maps submitted by the Parties.*

D. COSTS

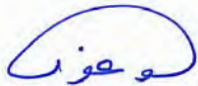
773. Recalling Article 11 of the Arbitration Agreement, the Tribunal finds no need to issue a ruling on costs.

Done at the Peace Palace, The Hague

Dated: July 22, 2009

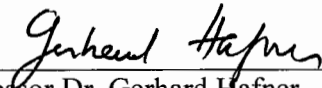


Professor Pierre-Marie Dupuy
Presiding Arbitrator

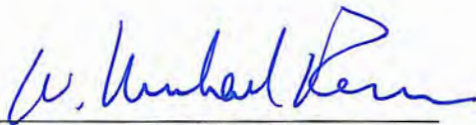


H.E. Judge Awn Al-Khasawneh

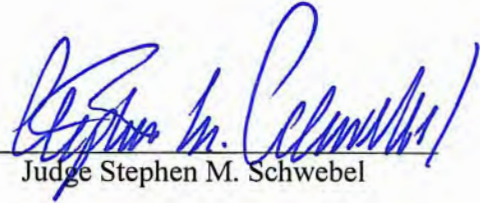
Adissat



Professor Dr. Gerhard Hafner



Professor W. Michael Reisman



Judge Stephen M. Schwebel



Mr. Aloysius Llamzon
Acting Registrar

DISSENTING OPINION

**of His Excellency Judge Awn Shawkat Al-Khasawneh
Member of the International Court of Justice**

Introduction

I regret that I am unable to concur with the conclusions of the Tribunal contained in the *Dispositif* of the Award or to agree, in general, with the reasoning deployed by the majority to arrive at those conclusions. Indeed, and I say this with great respect to my learned colleagues, I find the underlying logic of the Award singularly unpersuasive (let alone convincing), self-contradicting, result-oriented, in many respects cavalier, insufficiently critical and unsupported by evidence, and indeed flying in the face of overwhelming contrary evidence. In other words very similar to the ABC Experts' Report itself and like it as far in excess of mandate as it is removed from historical (and contemporary) reality. I must therefore dissent.

I also feel duty-bound to explain my dissent comprehensively not only because the litany of negative observations I have just enumerated would of itself warrant a full exposé but equally because this is no ordinary arbitration. Its outcome will, in all likelihood, have a profound impact on the future of the Sudan as a State and the peace and well-being of all its long-suffering citizens regardless of their ethnicity or creed.

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1. The Experts Went on a Frolic of their own

1. The ABC Experts were tasked with a straightforward and specific mandate. It was not to ascertain where the Ngok people lived in 1905 nor to pronounce on land uses in southern Kordofan. Their mandate was simply to ascertain the spatial implications with reference to a single defining date (1905) and a single defining event (the transfer to Kordofan of [the area of] [the nine Ngok Dinka Chiefdoms]). To be sure, the provincial boundary between Kordofan and Bahr el Ghazal was not as clear as the provincial boundaries of a late 20th-century, highly centralised State would be, but they were, by the standards of their time and place, clear enough to effect a delimitation, and the mandate itself assumed the existence of such a boundary. At any rate it was the job of the Experts to clarify any confusion or doubts – an achievable task by reference to, and close reading of, Condominium documents and other available evidence. Ironically it was this very confusion that caused the Experts to abandon their mandate and to embark on a frolic of their own¹ with no apparent justification.
2. The Report in which the different episodes of this frolic are recounted is a remarkable 250-page interdisciplinary document. The thought process contained in it meanders (like the Bahr el Arab) from that initial fundamental misinterpretation of the Experts' mandate to their ultimate delimitation of the area, which placed the boundaries of the nine Ngok Chiefdoms in areas where they never had any presence in 1905 nor at any other time after that, and where other people, the Misseriya tribe and others, lived.
3. The Report is remarkable also as a *mélange* containing clues from human geography and administrative records; sociological theories about dominant versus secondary rights and uses; and ecological and anthropological evidence, all interspersed with fragmentary quotations from near-contemporaneous official evidence. Also remarkably, despite its varied sources and exotic reasoning (by the dim standard of lawyers), or perhaps because of them, the ultimate delimitation exercise is the least defended part of the Report. One is left with the impression that the Experts were more concerned with testing and putting into use their theories about dominant rights and the clues one can glean from geography, etc., than in the tedious exercise of delimitation itself and the meticulousness it requires. Thus they expressed their findings in the form of straight lines, unperturbed by the obvious fact that tribal territories are never straight. By contrast, Condominium officials, who knew more about local conditions and tribal locations than the Experts or my learned colleagues, never drew straight lines on the same scale to represent tribal boundaries.
4. Equally ominously, the Experts included by their delimitation method, which can only be described as cavalier, vast tracts of territory (the size of Belgium), despite overwhelming contrary evidence. And, not being able to deny that this was

¹ This phrase is borrowed from the English law of vicarious liability, as stated in *Joel v Morison* [1834] EWHC KB J39 (Court of Exchequer, 3 July 1834), *per* Parke, B: “The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable.”

also the land of Misseriya and others, they reduced them to holders of secondary rights in their own land on the basis of their life style which was not significantly different from the Ngok.

5. The Tribunal has now, for reasons that have more to do with compromise than principle, impugned the northern line which stood at 10° 22' N where the Experts had bisected the Goz area on the basis of one of their theories relating to the “equal division of shared natural resources”, a concept with which I am not familiar. The Tribunal replaced that line with a shortened line at 10° 10' N, which was not the Experts’ northern boundary line of the area, but only where the Experts concluded that the Ngok Dinka “dominant rights” stopped. In addition to impugning the northern line, the Tribunal has also impugned the eastern and western lines. But at this point, the Tribunal has not drawn what is the only possible conclusion, namely, that nothing is now left of the Experts’ Report except sociological theories and clues from human geography, and that therefore the Report must be set aside. Only after drawing that conclusion should the Tribunal have embarked on its own delimitation on the basis of the submissions of the Parties and the benefit it derived from guidance by learned counsel. Instead, it has opted, without sanction from its own mandate permitting partial nullity, (for this reason it is in excess of mandate), to effect new straight lines. These are unsupported by any “conclusive evidence”, the standard the Tribunal has applied in impugning the northern line, or by “adequate reasoning”, the standard it has applied to the impugning of the eastern and western boundaries. This is another reason why by drawing boundary lines without the reasoning it required of the Experts, the Tribunal is by the same standards in excess of mandate. To substantiate these assertions, this Dissenting Opinion will begin by examining the evidence for the new boundary lines.

2. The Supporting Evidence and Reasoning for the Eastern and Western Boundaries and their Intersection with the Northern Boundary at 10° 10' N

6. “The house of hope is built on sand,” as Hafiz of Shiraz² once wrote, and indeed if we are to look in the Award for a “*fondation solide*” on which to delimit the tribal boundaries of the Ngok Chiefdoms we will seek in vain. The Tribunal cannot, with all the hopes that the hearts of my learned colleagues may contain, erect its reasoning for allotting such a vast area on such meagre factual evidence. The only source for the 29° E and 27° 50' E lines are the imprecise, non-contemporaneous remarks made in 1951 by Howell³ which the majority quoted out of context and misinterpreted. The ABC Experts were aware of Howell’s writings and quoted them at length in their own Report,⁴ however they did not base their delimitations of the boundary on those remarks – whether out of recognition of their generality or because they would not have included enough territory especially to the east is a matter of speculation.

² Shams-ud-din Mohammed, better known as Hafiz of Shiraz (born circa 1320 AD) is one the greatest poets not only of Iran and Islam but of humanity at large. The full quotation is:

“The house of hope is built on sand,
And life’s foundations rest on air”.

³ P.P. Howell, “Notes on the Ngork Dinka of Western Kordofan”, (1951) 32 Sudan Notes and Records 239, p. 242, cited in Award at paras. 701 *et seq.*

⁴ See, e.g., ABC Experts’ Report, Appendix 5.13, at p. 201.

7. The relevant extract from Howell's "Notes on the Ngork Dinka of Western Kordofan" reads:

"The Ngok Dinka occupy the area between approximately long 27° 50' and long 29° on the Bahr el Arab, extending northwards along the main watercourse of which the largest is the Ragaba Um Biero."⁵

8. First, Howell's use of the word "approximately" suggests that he was trying to give a general and approximate appreciation of the area. Surely – for the meticulous at least – that is no basis on which to draw a vertical line stretching due north some 50 kilometres from the Bahr el Arab where it meets the Upper Nile border at around 9° 40' N to the 10° 10' N line, and to allot the enclosed area to the Ngok. This is simply an affront to the science of delimitation.

9. Secondly, the Ngok do extend northwards, but not *ad infinitum* and Howell, who reminded the reader that the longitudes are approximate (as befits a tribe and not a regimented army) indicated that the area of occupation was "along the middle reaches of the Bahr el Arab" and its tributaries.⁶ Neither the Bahr el Arab nor its Ragabas in their middle reaches are anywhere near 10° 10' N. Moreover, neither the Bahr el Arab nor the Ragabas are horizontal or latitudinal, let alone forming straight lines: they follow a north-westerly direction from 9° 20' 5" N at the eastern border of Kordofan to approximately 9° 50' 5" N at the Kordofan/Darfur border. The Ragaba Um Biero meets the Bahr el Arab and is filled by it at Chweng approximately at 9° 30' 3" N; it reaches beyond the 10° N line near the Darfur border (although no one is sure as to where its upper reaches end). The Ragaba ez Zarga, the most northerly of the Ragabas, enters Kordofan at approximately 9° 40' 5" N, goes up in a north-westerly direction, meanders at a more or less straight line around 9° 50' N and then starts to climb at about 28° 30' E to somewhere on or above latitude 10° N (although, again, no one knows whether it reaches the 10° 10' N line or above). Thus "along their middle reaches", where Howell placed the Ngok, is nowhere near the 10° 10' N line. It would follow, by necessary implication, that in 1951 when the Ngok may have reached, in their northward expansion, the Ragaba ez Zarga/Ngol, there is no evidence, even by then, that the vast area north and north-east of the Ragaba ez Zarga, ascribed to the Ngok by the Experts, ever had any collective Ngok Dinka presence in it, and the same applies to the reduced area ascribed by the Award without a shred of evidence let alone "conclusive evidence" to the Ngok, that is, the area north of the Ragaba ez Zarga and to the east of it until the 10° 10' N line meets, arbitrarily, longitude 29° E and the areas bordering Darfur which have always been traditional Homr lands.

10. Howell, an anthropologist and a British official⁷ – who was by all accounts a distinguished civil servant in an exceptionally meticulous civil service – would have been appalled at how his words were twisted by my learned colleagues. He would

⁵ P.P. Howell, *supra*, note 3. Emphasis added.

⁶ P.P. Howell, *supra*, note 3, at p. 241: "The Ngork Dinka . . . occupy an area along the middle reaches of the Bahr el Arab"; ABC Experts' Report, Appendix 5.13, p. 201, citing P.P. Howell, 1948, in P.P. Howell Papers, Sudan Archive, University of Durham ("SAD") 768/2/15 "The Ngork Dinka of Western Kordofan live along the middle reaches of the Bahr el Arab and its tributaries. During the dry season the Homr Messiria mingle freely with them in pastures and they have a long history of contact with the Arab world – probably for at least a century." Emphasis added.

⁷ ABC Experts' Report, Part 1, p. 16.

have been equally appalled by how he was quoted out of context by a Tribunal that has, elsewhere in the Award, stressed the importance of context, such as for example the fact that the Experts were social scientists, if only in that other instance, to prove doubtful propositions or to infuse doubt into clear ones – something to which I shall return later in my Dissenting Opinion – but I shall revert first to Howell and try to put his opinion in context.

11. In his 1951 publication, Howell says about the Ngok:

“Permanent villages, and cultivations are set along the higher ground north of Bahr el Arab, while dry season grazing grounds are for the most part in the open grassland (*toich*) south of the river. Villages are usually built close to the river or to one of the main watercourses, since water is more easily available during the early part of the dry season, either in pools or in shallow wells dug in the river bed. Clusters of homesteads each consisting of several living-huts (*ghot*) and one or more cattle byres (*luak*) are built in an almost continuous line along these rivers.”⁸

12. And still if any doubt remains as to where the Ngok were located when Howell wrote his Notes, he supplies a general answer at the outset, by way of introduction:

“The Ngork Dinka . . . occupy an area along the middle reaches of the Bahr el Arab. They border the Rueng Alor Dinka in the south-east and the Twij Dinka to the south, and with both of these peoples have close cultural affinities. To the south-west are the Malwal Dinka. North of the Ngok are the Baggara Arabs of the Messeria Humr, with whom they have direct and seasonal contact . . .”⁹

13. Yet again Howell makes the observation that the Ngok were along “the middle reaches of the Bahr el Arab”. As already noted, Howell had observed in 1948 that the area of occupation of the Ngok lies “along the middle reaches of the Bahr el Arab and its tributaries” and that “[d]uring the dry season the Homr Messiria mingle freely with them in pastures”.¹⁰ A simple exercise in logic would show that the Ngok were in the “middle reaches”, not the upper reaches, of the Bahr el Arab, the Ragaba Zarga and the Ragaba Um Biero, and this tallies completely with all contemporaneous cartographic and written evidence and with the evidence of Cunnison on whom the Award rightly heaps justified praise. The idea that they had moved even further north and east beyond the Ragaba ez Zarga, where the Award wishes to place them is, to put it mildly, quite remarkable.

14. I shall deal in Parts 6 and 7 of this Dissenting Opinion with the Experts’ “Proposition 8” on continuity of Ngok presence from 1905 until the mid-1950s, and with the evidence that both the Report and the Award chose to neglect, as to where the Ngok were from 1905 to 1965, but for the time being I shall concentrate on the evidence relied on by the Tribunal.

⁸ Howell, *supra*, note 3, at p. 243. Emphasis added.

⁹ Howell, *ibid.*, p. 241. Emphasis added.

¹⁰ P.P. Howell, 1948, *supra* note 6. Emphasis added.

15. Not content with leaving Howell appalled, the majority in the Tribunal goes further in harnessing what looks like a hastily arranged *ex post facto* ensemble of authorities to buttress the misquoted Howell. Thus the reader is told that “[h]is calculations are also confirmed both by earlier sources as well as contemporaries of Howell”,¹¹ with the important caveat that these are “less specific than Howell”.¹² According to the Award “all authors have in common the fact that they define the location of the Ngok Dinka by reference to the Bahr region, which they describe in a similar fashion”.¹³ However those authors describe the location of the Ngok by reference to the Bahr region in the mid-20th century and it is not in dispute that, in the 1950s, the Ngok were in the Bahr region, namely, along the middle reaches of the Ragabas and the river itself. Nothing, even when all allowance is made for the non-specificity of those authors, can be inferred from their writings.
16. Thus Robertson depicts the Bahr as “the great semi-circle from Grinti to Keilak on the Bahr Al Arab and its system of tributary (wadis) regebas”.¹⁴ But even if Keilak falls within some expansive definition of the Bahr (Keilak is above 10° 50' N, well above the Goz), as documented by Wilkinson, it was a permanent Arab settlement in 1902¹⁵ and not even the ABC Experts were ready to assign it to the Ngok Dinka. Apart from that, it is quite perplexing how this expansive definition of the Bahr supports the Tribunal’s 29° E and 27° 50' E longitudinal lines. Howell, the ever so careful official, has already indicated in unmistakable terms where the Ngok were in his time. He is being used, in what can only be called a desperate attempt to distil from dead men things they never said. In contrast to this expansive definition of the Bahr (which definition Cunnison also makes), the Bahr in the proper sense, where the Humr intermingled with the Ngok (the relevant area of the Bahr, so to speak) is a more restricted area between the Ragaba ez Zarga and the Bahr el Arab, and that is the sense in which Cunnison understood the shared-rights area to be.¹⁶ In his expert testimony he states:
- “The real area of shared grazing was further south, in the Bahr. There, the two groups co-existed for a fairly short season – but this was not a ‘host-guest’ relationship. At this season it was the Dinka who, apart from a few caretakers, left to go south as part of a transhumance pattern rather than one of nomadism.”¹⁷
17. Thus the area of contention was not the Bahr in its expansive definition but an area in the Bahr where the two tribes co-existed for a season and where the Ngok had a presence.

¹¹ Award, para. 726.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Award, para. 727, citing J. Robertson, “Handing over Notes on Western Kordofan District”, 1936, Chapter IV “The Humr Administration”.

¹⁵ Gleichen Handbook, 1905, p. 157.

¹⁶ *Supra*, note 24.

¹⁷ Witness Statement of Professor Ian Cunnison, GoS Memorial, p. 190.

18. Moreover, the earlier sources cited by the Award,¹⁸ namely, the 1912 Kordofan Handbook; the 1913 Anglo-Egyptian Kordofan Province Map; the 1914 Anglo-Egyptian Sudan War Office Map; and the 1916 Darfur War Office Map all suffer from the fatal flaw that they never refer to the Ngok Dinka but only to “Dinka” or “Dar Jange”, and it should not be forgotten that the Dinka is a great tribe of which the Ngok, sometimes referred to as the western Dinka, are but one branch.

19. It is perhaps on account of the uncertainty inherent in these earlier descriptions, and the plain impossibility in realistic terms of the Ngok Dinka being at Keilak in 1905 when they were demonstrably at most on the middle reaches of the Ragabas in the 1950s, that the Award acknowledges this incongruity in the following terms:

“However, a close reading of the evidence shows that an expansive view of the area occupied by the Ngok Dinka, such as to encompass the Bahr up to, and as far east as, Lake Keilak and Lake Abiad, is not warranted. Rather, the evidence indicates that Ngok territory occupation was concentrated approximately between the longitudes provided by Howell, up to latitude 10° 10' N.”¹⁹

20. But why at latitude 10° 10' N? There is no logical link between the premise and the conclusion and not a shred of factual evidence supports the finding for either the eastern or the western “lines”, allegedly Howell’s,²⁰ nor their intersection with the northern line at 10° 10' N. The leap in reasoning is totally unexplained. There is still no justification for the 10° 10' N line.

21. At this point the Tribunal, having exhausted the readily-exhaustible supporting sources, should, in my respectful opinion, have paused and reflected, self-doubt being preferable when we are dispensing justice to doctrinal certainty. Instead the insistence on making Howell’s imaginary lines reach 10° 10' N has prompted the Tribunal to try another strand of justification in the hope that by repetition its arguments, no matter how weary and unconvincing, will somehow reach 10° 10' N.²¹ Thus the Award reads:

“In Cunnison’s analysis, the Ngok Dinka permanent settlements are in fact mostly located around the Bahr river system, which includes the Bahr el Arab, the Ragaba Umm Biero, and the Ragaba ez Zarga, and ‘numerous winding watercourses all connected eventually with the Bahr el Arab’. While this area does not go beyond latitude 10° 10' N – where as noted by Professor Cunnison there is no significant collective presence of the Ngok Dinka (in the north west, in the goz, in north east, in the upper Bahr region towards lake Keilak and Abiad) – Howell’s lines of latitude do encompass and

¹⁸ Award, paras. 733-734.

¹⁹ Award, para. 735.

²⁰ The Tribunal speaks of “Howell’s lines of longitude” and proceeds as if Howell had drawn lines at these longitudes to indicate the area. For example at para. 741 it refers to “Howell’s longitude of 29° E, west of which one enters Ngok territory”. I would emphasize that Howell never drew lines and had he done so he would have in all probability come up with a differently shaped boundary as close to the reality of his times as it is removed from the wild flight of fancy of 10° 10' N, 29° E and 27° 50' E.

²¹ As Algernon Swinburne once put it, “even the weariest river winds somewhere safely to the sea”.

coincide roughly with much of the three main rivers and intricate network of smaller waterways of this portion of the Bahr, as shown on the Tribunal's Award Map."²²

Here, the majority rely on Cunnison's reference to "numerous winding watercourses, all connected eventually with the Bahr el Arab".²³ Remarkably, when Cunnison was describing the Bahr using this phrase, he was doing so in the context of depicting where Homr presence was. Furthermore, within that area under its expansive definition, Cunnison distinguished between the "Regeba" and the "Bahr proper". Cunnison noted that the part of the Homr dry-season watering country known as "[t]he 'Bahr' proper" was located "mainly around the largest watercourses, the Regeba Umm Bioro and Regeba Zerga".²⁴

22. The Award continues: "[t]his is confirmed by earlier evidence including the 1912 Kordofan Handbook which locates the Ngok Dinka in the centre and west of the area extending from the Bahr el Arab to Lake Keilak."²⁵ This exotic reasoning calls for a number of comments.

a. The area of the Bahr in its upper reaches certainly does not go beyond 10° 10' N (the Bahr el Arab enters Kordofan from Darfur at 9° 52' N, the Ragaba Um Biero's upper reach and the Ragaba ez Zarga's upper reach are not free of controversy)²⁶ but in any event they do not go to 10° 10' N.²⁷

b. Even if they did, there is no evidence or suggestion by either Cunnison or Howell that the Ngok had reached the upper reaches of these watercourses even in the mid-20th century, let alone in 1905.

c. Howell expressly maintains that the Ngok Dinka are along the "middle reaches" of the Bahr and the two Ragabas.

d. Assuming there were Ngok Dinka settlements on the upper reaches of the Ragaba Um Biero, the distance from there to the eastern Howell "line" where it intersects 10° 10' N would be roughly 150 kilometres. It would be roughly the same from the upper reaches of the Ragaba ez Zarga and even greater from the Bahr el Arab. What is the special quality of Ngok dug dugs that can generate so much entitlement to territory?

e. Howell's longitudinal references are expressly stated to be approximate. He never described them as extending to 10° 10' N. On top of this considerable uncertainty, the defence for the 29° E and 27° 50' E lines is that the area coincides

²² Award, para. 736, citing Cunnison, *infra* note 23. Emphasis added.

²³ Award, para. 727, citing I. Cunnison, *Baggara Arabs: Power and Lineage in a Sudanese Nomad Tribe* (1966), at p. 172.

²⁴ *Ibid.*

²⁵ Award, para. 737.

²⁶ The GoS maps show the start of the Ragaba ez Zarga north of Maper Apaal. The SPLM/A maps show the Ragaba ez Zarga starting to the south east of Rumthil (Antilla) just below 10° N latitude. The Ragaba Um Biero finishes on most maps in south Darfur but Map 62 of the SPLM/A Reply Memorial shows it extending into a network extending some way to the north. There is no evidence that these points have been determined definitively in the field.

²⁷ *Supra*, para. 9.

roughly with Howell's limit. Thus an approximate description of an area along the middle reaches of the river and the Ragabas is mysteriously understood to reach 10° 10' N in the face of contrary evidence from the quoted authority, and, as if this is not enough, an area described by Cunnison is interpreted without reason as roughly corresponding to Howell's eastern and western limits, and, by being quoted out of context, is superimposed on the Howell "lines" to produce the eastern and western borders. If this is not frivolous reasoning, nothing is. I do not think the whole history of delimitation has attested a more vague criterion on which to effect territorial delimitation.

f. The habit of quoting out of context and misinterpreting is repeated. The 1912 Kordofan Handbook is misquoted: according to the Award it "locates the Ngok Dinka in the centre and the west of the area extending from the Bahr el Arab to Lake Abiad".²⁸ The statement in the 1912 Kordofan Handbook locating the Ngok Dinka is worth quoting in full:

"The three main divisions are: -- On the east, the Ruweng section under *Sultan Anot*; in the centre, the followers of the late *Sultan Rob*, who are now under his son, Kanoni; and to the west, a number of Rob's ex-followers, under another of his sons named Kwal."²⁹

It is plain that these words mean that the Rueng, a Dinka but not a Ngok Dinka tribe were to the east, and to the west of them were two Ngok groups: in the centre the followers of Kanoni, son of Sultan Rob (whose presence on the Kiir in 1905 is beyond dispute) and yet to the west of that were the followers of another of his sons. How this is transformed into "additional evidence" to confirm the western and eastern "lines" attributed to Howell³⁰ is based on anything but contradictory reasoning is beyond my comprehension.

23. The Award goes on to quote what it calls: "Evidence Corroborating Howell's Western and Eastern Limits".³¹ These are:

a. A remark recorded in 1954 by Michael Tibbs that the area around Gerinti very close to longitude 27° 50' E is "Ngok territory, although the Arabs used to graze in it in the spring".³² This clearly means that the area was a shared grazing rights area and described the position around his time. It is difficult to see how it can be transposed back to 1905 when more contemporaneous evidence, such as that of Willis,³³ points to a much more limited presence of the Ngok being the case. To fit, at any cost, the 1905 reality with the position around Howell's times, the earlier and

²⁸ Award, para. 737.

²⁹ Kordofan and the Region to the West of the White Nile, Anglo-Egyptian Handbook Series (London: Her Majesty's Stationery Office 1912), p. 73. See also C.A. Willis, "Notes on the Western Kordofan Dinkas", 10 April 1909, Sudan Intelligence Report No. 178 (May 1909), Appendix C, p. 16: "The Western Kordofan Dinkas seem to be divided into three main heads: on the east the Ruweng, under Sultan Qot; in the middle the followers of the late Sultan Lar, under his son Kanoni, and to the west the followers of the late Sultan Rob, under his son Kwal."

³⁰ See *supra*, note 20.

³¹ Award, paras. 738 *et seq.*

³² Award, para. 739, citing M. and A. Tibbs, *A Sudan Sunset*, pp. 247-8, as cited in ABC Experts' Report, Part 2, p. 203.

³³ Willis, 1909, Sudan Intelligence Report No. 178 (May 1909), Appendix C, p. 16.

naturally more pertinent evidence is either ignored or misinterpreted. Sultan Rob's statement that there "are only Humr" west of him is dismissed as "equally unhelpful" or in the SPLM/A pleadings as "dissembled",³⁴ words which in themselves reveal how result-driven the exercise is. Of course it is unhelpful because Sultan Rob, the Paramount Chief of the Ngok Dinka, was reflecting the simple truth. He was not interested in being helpful to the Tribunal in trying to build its house of hope by drawing unreasoned straight lines in the sands and ascribing them to Howell.

b. Tibbs's remark that "while the Dinka tolerated the Misseria, neither of them wanted the Rizeigat from Darfur there".³⁵ This means only that two pastoralist tribes from the same "dar" did not want an "intruder" from a different dar (*dar-fur*). This statement relating to the 1940s or 1950s should be read in context. The exact relationship between the Misseriya and the Dinka was explained more thoroughly by Cunnison than anyone else. His explanation merits reproduction in full:

"The real area of sharing was further south, in the Bahr. There the two groups co-existed for a fairly short season – but this was not a 'host-guest' relationship. At this season it was the Dinka who, apart from a few caretakers, left to go south as part of a transhumance pattern rather than one of nomadism. As I noted in my book (p. 19) 'much of the Bahr has permanent Dinka settlements, although during most of the time that the Humr occupy it the Dinka are with their cattle south of the Bahr al-Arab'. I never observed the Humr asking permission from Dinka to come to the Bahr, and they did not consider themselves as visitors there. The whole region was regarded by the Humr as their 'dar' or country."³⁶

24. In a similar vein, Howell, concerning the upper reaches of the Bahr el Arab watercourses during the period from November to February, states that "water supplies dry out early and the Baggara herds from the north begin to enter the area about this time, occupying the remaining water points which they regard as theirs".³⁷

25. By contrast, earlier evidence that does not support the 27° 50' E line is dismissed. Heinekey trek report of 1918, which showed no Ngok Dinka in the same area is dismissed by the words: "[b]y contrast Heinekey who began a trek in Gerinti in March 1918 merely notes the absence of tracks and the necessity to be accompanied by a guide".³⁸ That is exactly the point: Heinekey did not find Ngok in Gerinti in 1918 but Tibbs did find them, along with the Homr Arabs, in the mid-

³⁴ Transcript, 22 April 2009, 16/23 (Born).

³⁵ *Supra*, note 32. Emphasis added.

³⁶ GoS Memorial, Witness Statement of Professor Ian Cunnison, 3 December 2008, para. 6. Emphasis added. In para. 731 of the Award, my learned colleagues refer to Professor Cunnison's statement that he "never observed the Humr asking permission from Dinka to come to the Bahr", a statement that I had myself quoted in support of the proposition that the Homr thought of the Bahr area not in terms of "dominant" Ngok versus "secondary" Homr rights, but in the sense that the area was a shared rights area. In an exotic interpretation, my learned colleagues cite that observation by Cunnison in support of the fact that the rights of the Misseriya are confined to the right to graze cattle and to move in the Abyei area. In fact the purport of Cunnison's remark could only have been that the Homr considered the Bahr area as theirs, as confirmed by Cunnison himself, who in the same Witness Statement also observed that "the whole region was regarded by the Humr as their 'dar' or country". This is yet another example of tendentious and result-driven interpretation of evidence.

³⁷ P.P. Howell, *supra* note 3, at p. 244, fn. 2. Emphasis added.

³⁸ Award, para. 740.

20th century. To real reasoning (as opposed to frivolous or contradictory reasoning), the implication is clear: the Ngok moved to Gerinti in the intervening period between 1918 and when Tibbs made his remark. When Heinekey saw Dinka he did make a note, thus he mentions Ngok villages along the Bahr el Arab, which is exactly where Willis in 1909 (close to the crucial date of 1905) also confirms their presence, and Heinekey refers to Homr camps and Homr cattle on the way to Gerinti, and north of Mek Kwal's village.

26. I shall revert to this at the appropriate place to indicate where the Ngok were located around 1905. I have cited these examples to show that the evidence harnessed by the Tribunal is inconclusive, tendentious and misinterpreted and so vague that even if we accept it, i.e., even if we accept that Gerinti had a Ngok Dinka presence in 1905, there is no motivation for a line at longitude 27° 50' E or extending all the way up to 10° 10' N and I would suggest, with respect, that drawing boundaries requires more precision and meticulousness than this.

27. However, before leaving the issue of the boundaries drawn by the Tribunal I should turn, as the Award does to the eastern boundary.³⁹ And here four remarks are called for.

a. The Award quotes Robertson's study of Kordofan in 1933-1936 in which Robertson describes a tribal incident that occurred in that period when the people of the Western Nuer District in Upper Nile Province "had crossed the Ragaba and built their big cattle luarks – thatched huts – on the Kordofan side of the river, thereby trespassing on the Ngok Dinka lands" and he gave orders to burn the huts and make the intruders "go back to their own tribal lands".⁴⁰ The facts are undisputed but they do not support the conclusion drawn. The Nuer, or to be more precise those who came from the western Nuer district, in Upper Nile must have crossed the Ragaba ez Zarga around 29° E, Howell's alleged "line", but they must have crossed around 9° 45' N (unless they went up to 10° 10' N and then down again to 9° 45' N in order to be more helpful to the Tribunal and only then crossed the Ragaba), and by this time there is no disagreement that the Ngok Dinka were (at these locations) on the Ragaba ez Zarga. This is confirmed also by the map bearing the title "Native Administrations of Kordofan Province" and dated 1941.⁴¹ But it is clear that official action was taken only after the intruders from Upper Nile crossed the Ragaba. However, the Ragaba ez Zarga does not go at this longitude up to 10° 10' N, which is 50 kilometres due north, but flows in a westerly, then slightly north-westerly direction. Moreover the fact that the Nuer crossed the Ragaba confirms clearly that the Ngok, even at this location, were on the southern side of the Ragaba. The use of this evidence is not only ill-advised; it is contradictory with the result sought.

b. The second remark I wish to make relates to another inference drawn from this tribal incident. In the same place, the Award goes on to state:

³⁹ Award, para. 741.

⁴⁰ J. Robertson, *Transition in Africa* (London: C. Hurst, 1974), p. 51, GoS Memorial Annex 45, SPLM/A Exhibit FE 5/10, cited in Award, para. 741. Emphasis added.

⁴¹ "Native Administrations of Kordofan Province" (Khartoum: The Sudan Survey Department, 1941), GoS Memorial Map Atlas, Map 27.

“This description (of 29° E) is more useful to this Tribunal than Dupuis’ sketch which merely suggests that the Ngok Dinka’s southeastern border is with the Rueng, a border in any event confirmed by Howell. It is also a more reliable and better indication than the village of Etai, which the GoS claims is evidence of the Abyei area’s eastern limit.”⁴²

28. Contrary to this assertion – and forgetting, for a second time, the Freudian “more useful to this Tribunal”, the Award rather than denigrating contemporaneous evidence that does not agree with the result it seeks to achieve, should have appreciated the earlier evidence more objectively. Dupuis wrote in 1921, when the most northerly Dinka presence that he indicated was a dug dug, i.e., a Dinka cattle camp, north of Lukji on the Ragaba Um Biero.⁴³ The only inference to be drawn from those dates is that the Ngok, if indeed the dug dug in question belonged to Ngok Dinka, were slowly extending northward and westward, taking advantage of better conditions under the Condominium and of the good relations existing between their Paramount Chief and the Nazir Omom of the Misseriya. Again if we go back in time we will find that in 1902 the area occupied and used by the Ngok above the Bahr el Arab was even smaller. Wilkinson says that the first Dinka village he encountered was Bongo, which was however empty, and then Etai.⁴⁴ Of course Wilkinson never said that this was the Ngok Dinka boundary, but his description does confirm that this is where they were sighted in 1902. At any rate in 1909 Willis, who gave a very detailed depiction of Ngok Dinka locations, had the following to say: “Just after the rains they [the Ngok] go as far North as they think safe from the Arabs (Bongo or El Myat)”.⁴⁵ El Myat, according to the Government⁴⁶ is a swamp near Bongo. Just to give an idea of the scale of the discrepancy between contemporaneous depictions of where the Ngok were around 1905 and where the Tribunal put them, the following distances should be considered. Bongo is about 150 kilometres to the south-east of the 10° 10' N line where it intersects the western line of the delimited area at 27° 50' E. It is about 90 kilometres to the south-west of 10° 10' N where it intersects the eastern boundary at 29° E.
29. There are, scattered throughout the record, statements corroborating the obvious fact that the Ngok were slowly expanding to the North. They were going to places where they had not dared to go the previous year, for example, Mahon Pasha, in 1903 states: “I met several herds of Dinka cattle grazing right in the Arab country, where they were afraid to go last year.”⁴⁷ To quote another example, there is evidence that they were encouraged by Chief Kwal Arop “to build houses among the Humr in the winter”.⁴⁸

⁴² Award, para. 741.

⁴³ See GoS Counter Memorial, Maps 39b and 39c: Dupuis Sketch, 1921 (Sudan Survey Department archives) and Extract. It is not certain that the dug dug sighted was in fact a Ngok dug dug rather than that of another tribe of the Dinka.

⁴⁴ Major E.B. Wilkinson, Itinerary, “El Obeid to Dar El Jange” (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government*, Vol. II (1905). SPLM/A FE 2/15.

⁴⁵ Willis, *supra* note 33.

⁴⁶ Transcript, 21 April 2009, 108/6 (Crawford).

⁴⁷ Appendix E to the Sudan Intelligence Report No. 104 of March 1903, p. 19.

⁴⁸ Kordofan Monthly Diary, 1940, p. 2, cited in ABC Report Appendix 5.13, p. 201 as follows: “Summary of Information: Kwal Arop is suspected of encouraging the Dinka to build houses among the Homr in the winter.”

30. The job of demolishing the construct the Tribunal seeks to erect is relatively easy, for that construct is a weak one, as weak as a spider's web, and this is so, not because of my learned colleagues' lack of legal imagination but rather despite it. The contemporaneous and near-contemporaneous support for the eastern, northern, and western boundaries is not only utterly lacking, but also contradicted by overwhelming evidence to the contrary, both cartographic evidence and accounts written by disinterested parties, usually State officials, regarding an area under their Condominium in circumstances where international law would be normally satisfied by minimum evidence, a standard surpassed in this case.⁴⁹ The question therefore, and it is a disquieting one, is why does a Tribunal, provided with all the available evidence and guided through it by learned counsel on both sides, and moreover provided with the benefit of hindsight that all reviewing bodies have, and in a position to assess the evidence before it comprehensively, elect, instead, to look at reality not in a holistic manner but in a disconnected way, making wild flights of fancy on the basis of misinterpreted sentences taken out of context so as to make dead men say what they never said or intended? All that can be said is that this is not the level of reasoning expected of a Tribunal concerned with the quality of justice and not only with finality of litigation.
31. The Tribunal, wishing to buttress the imaginary with the unreliable, has had to fall back on the evidence of witnesses who testified for the SPLM/A.⁵⁰ I find this particularly objectionable and worthless. Objectionable because the accusations by some Ngok Dinka of intimidation by the SPLM/A were never disproved and were indeed reiterated before the Tribunal. Moreover it is worthless because, first, I think it would be frankly fantastic to expect a recollection calibrated with regard to a particular year (1905) of where a tribe was located on the basis of memories of those alive in 2005. Secondly, oral evidence by interested parties after the dispute, although admissible to the extent that the ABC was no more than a fact-finding commission charged with determining an historical fact, should be treated with the utmost care and cannot in any event have the same probative value as older evidence emanating from Condominium officials and other disinterested third parties. In fact the Experts in this respect recognize this,⁵¹ but in another piece of contradictory reasoning ultimately come to depend on oral evidence, but only of the SPLM/A witnesses.
32. Thus the eastern and western boundaries of Abyei as drawn by the Tribunal are not reasoned by the standards of Article 9, paragraph (2) of the Arbitration Agreement which should be understood by the rigour required in an arbitration pertaining to the sovereignty and territorial integrity of the State and on which

⁴⁹ *Legal Status of Eastern Greenland*, PCIJ Series A/B No. 53, Judgment of 5 April 1933, p. 46 (noting that “[i]t is impossible to read the records of decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided the other State could not make out a superior claim”); *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, 23 May 2008, para. 67 (noting that “international law is satisfied with varying degrees in the display of State authority, depending on the specific circumstances of each case”).

⁵⁰ Award, footnotes 1237-1246.

⁵¹ ABC Experts' Report, p. 11: “Because the initial presentations of the GOS and SPLM/A, along with the oral testimony of the two communities, largely contradicted each other, and did not conclusively prove either side's position, the ABC experts set out to obtain as much evidence as they could from archives and other sources in Sudan, the United Kingdom, South Africa and Ethiopia.”

decisions of peace and war may depend. My respectful conclusion that the Tribunal's reasoning for the eastern and western boundaries and as a consequence for the northern boundary falls short of the standard of reasoning expected from the Tribunal, by the Tribunal's own standards, leads to the inescapable conclusion that on these three boundary lines, the Tribunal is in excess of its mandate.

33. However for the sake of completeness I shall turn to the question of the area of shared rights above 10° 10' N and the invalidation by the Tribunal of the Experts' findings and the attendant question of separability.

3. The Shortened Line at 10° 10' N and the Effect of the Changes in the Eastern and Western Boundaries

34. It is not entirely clear, despite statements confirming the 10° 10' N line,⁵² whether that line is in fact a mere confirmation of the Experts' line or in essence a new line.⁵³ To start with, it is shortened by some 70 kilometres in the east and nearly 20 kilometres in the west. The point at which quantitative changes become qualitative ones is difficult to verify, but as a matter of common sense, if the new longitudinal lines were closer to each other would it be reasonable, reasonableness being a holy mantra in the Award, to speak any more of a northern line?
35. More importantly, inadvertently in all likelihood, by shifting the eastern boundary line west to a new (arbitrary) line and likewise the western boundary east to another (arbitrary) line, the rationale, if ever there was one, of the 10° 10' N line collapses. In the process of collapsing it exposes, once more, the futility of drawing longitudinal and latitudinal lines – in the best traditions of the 1878 Berlin Conference, “*prises de possession sur le papier*”, as Bismarck famously called them⁵⁴ – which bear no resemblance to reality or to local conditions or tribal locations. But at least the plenipotentiaries at the 1878 Conference were not pretending they were drawing tribal boundaries. Thus the Tribunal notes that “lines of longitude and latitude when delimiting boundaries have been used in appropriate circumstances by international courts and tribunals and is recognized in public international law”,⁵⁵ and “deems it proper to delimit the eastern and western boundaries based on lines of longitude”.⁵⁶ There may indeed be circumstances in which it is appropriate for international courts and tribunals to delimit boundaries on the basis of lines of longitude and latitude, which on most maps (depending on the projection) appear as straight lines. Where a tribunal has been charged with a task which it interprets as the determination of a tribal area, this is not what I would consider to be an appropriate instance in which to adopt such lines.

⁵² Award, para. 696.

⁵³ Indeed, the members of the Majority are divided on this point. Significantly, in the *Dispositif* in Section (a) (3) the Tribunal does not use the confirmatory language it uses for the southern line in (b) (2). With respect, it cannot confirm the northern line because that line is shorter than the Experts' line.

⁵⁴ Cited in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 303, Separate Opinion of Judge Al-Khasawneh, at p. 499, para. 7 (d).

⁵⁵ Award, para. 746.

⁵⁶ Award, para. 747.

36. The Experts, it would be recalled, had admitted that “[t]here is, as yet, no clear independent evidence establishing the northern-most boundary of the area either settled or seasonally used by the Ngok.”⁵⁷ Instead, according to the Tribunal, the Experts “sought indicators and clues in administrative records as well as human geography – the fact that the goz was not settled by anybody – to draw what seemed the best defensible line under the circumstances”.⁵⁸ I am surprised that it did not occur to my colleagues that in the circumstances the proper, the only proper thing to do for the Experts would have been to say that there was not enough evidence to draw the line. Unperturbed by the obviously contradictory reasoning of the Experts (drawing the line while admitting that there was no clear evidence for establishing the northern-most boundary), the Tribunal was satisfied with this reasoning which it described as seeking “indicators and clues in administrative records as well as human geography”⁵⁹ and concluded that “[i]n the Tribunal’s view, the Experts’ reasoning regarding the selection of latitude 10° 10' N is comprehensible and complete”.⁶⁰ Nothing can be more debatable. The whole exercise is based on clues from administrative officials and human geography to draw the best defensible line under the circumstances. This is indeed a lax and novel standard for drawing boundary lines and no government can or should accept it. It is impossible to understand why these “clues” are no longer applicable to those parts of the 10° 10' N line that were severed from it in the east and west. In effect, the unity of purpose of the reasoning simply collapses and when a line drawn arbitrarily by the Experts is replaced by another line drawn arbitrarily by the Tribunal, the only outcome is that the total arbitrariness of the two lines is fully exposed.
37. Moreover, the Experts state that “the Ngok assertion that the boundary between the two peoples is the Goz belt that separates them has yet to be tested by a systematic survey”.⁶¹ Yet their mandate was to be based on “scientific analysis” of which a systematic survey is a prime example and although such a survey was by their admission “yet to be tested” in the Goz belt, this did not preclude them from proceeding nevertheless to limit the area at 10° 10' N. Again, the contradictory reasoning is obvious.
38. A measure of the lack of clarity of whether the 10° 10' N line, in its shortened form, is a confirmation of the earlier Experts’ line or the Tribunal’s brainchild is that the Award includes a number of independent justifications for it some of which are found in explaining the eastern and western boundaries, and these have been commented upon in respect of the alleged Howell lines in Part 2 of this Dissenting Opinion. The Tribunal does not merely say that the 29° E and 27° 50' E lines go up to 10° 10' N because the Experts’ line is reasoned and therefore unreviewable under this Tribunal’s mandate⁶² but also it tries to justify those lines independently of the Experts’ findings on the basis of where the Ngok were situated and the conflation of

⁵⁷ ABC Experts’ Report, Part 1, p. 43.

⁵⁸ Award, para. 680. Emphasis added.

⁵⁹ Award, para. 680.

⁶⁰ Award, para. 681.

⁶¹ ABC Experts’ Report, p. 43.

⁶² In fact the members of the Majority are divided on this point: *supra* note 62. One member, Professor Hafner, explains that the Tribunal should follow the Experts’ line, i.e., that the Tribunal is precluded by its mandate from enquiry into that line. See Award, para. 696.

the area roughly with its own misquoted reading of Cunnison and Tibbs. In effect, Sub-articles 2 (a) and 2 (c) of the Arbitration Agreement are now fused. If the 10° 10' N is in fact a new line then it is unreasoned, the same inadequacy of reasoning that applies to the eastern and western line applying to it, and besides, by cutting off its eastern and western extensions, it has lost any underlying rationale. If on the other hand it is the old line then the lack of reasoning of the Experts (by their admission) and the lack of a systematic survey as to whether the Goz forms the boundary and the total lack of contemporaneous or near-contemporaneous evidence suggesting Ngok presence at that particular latitude would also render the decision of the Experts at 10° 10' N in excess of their mandate by the same criterion, namely, lack of evidence or lack of reasoning, or both which the Tribunal applies to impugn the eastern and western boundaries and the northern boundary at 10° 22' N. Independently of this lack of clarity in the Award, the line is not the “best defensible line in the circumstances”⁶³ as the Award proclaims it to be, thus introducing a new standard, not exactly representing the zenith of care and meticulousness in territorial delimitation, but closer to the nadir. The line is not defensible at all and has no basis in law, nor is it supported by one shred of evidence.

39. Formally, of course, it should not be forgotten that the 10° 10' N line did not represent the northern boundary decided by the Experts. That was the line at 10° 22' N, which bisected the Goz. The 10° 10' N line is a new boundary line: according to the logic of the Experts' Report it is merely where the “dominant rights” of the Dinka stop. Thus the Tribunal's 10° 10' N line is a new line, although confusedly justified both under Sub-articles 2 (a) and 2 (c) in the Award. Moreover to the extent that it was based by the Experts on the odious, pseudo-legal concept of dominant rights, the Award nevertheless upholds it.

4. Separability

40. I shall now turn to the issue of separability or severability as it is sometimes called and before considering, as a matter of the interpretation of our mandate, whether such separability is permissible, I shall start by observing that it is somewhat remarkable that the eastern, northern, and western boundaries of the area are the least reasoned and defended in the Experts' Report. Considering that the southern boundary, the so-called *uti possidetis* line of 1956 is not in disagreement, it seems obvious – but so many things were so obvious that the Tribunal has not seen them – that when my learned colleagues impugn the whole of the eastern and western boundaries and impugn the northern boundary, or at least a considerable part of it,⁶⁴ what is left is so thin and truncated that by any criterion of severability it should also be set aside for it cannot stand on its own.⁶⁵ Indeed it would be an act of unparalleled fantasy to expect it to stand on its own. To quote the second hemistich of Hafiz, its “foundations rest on air”. The only logical conclusion, indeed duty, of the Tribunal is to annul the Report in its entirety. Having reached this

⁶³ Award, para. 680. Emphasis added.

⁶⁴ Depending on whether, as noted in the previous part of this Dissenting Opinion, the 10° 10' N line is considered a new line or a confirmation of the Experts' 10° 10' N line, the Experts' northern boundary line being 10° 22' N.

⁶⁵ *Aerial Incident of 10 August 1999 (Pakistan v. India)*, *Jurisdiction, Judgment*, *I.C.J. Reports 2000*, p. 12, Dissenting Opinion of Judge Al-Khasawneh, p. 56, para. 32.

conclusion, I shall now address the question of whether partial severability of the Report is permissible under our Tribunal's mandate according to the Arbitration Agreement.

41. Under Sub-article 2 (*b*) of the Arbitration Agreement, "If the *Tribunal* determines, pursuant to sub-article (*a*) herein, that the ABC experts did not exceed their mandate, it shall make a declaration to that effect and shall issue an award for the full and immediate implementation of the ABC Report." Under Sub-article (*c*):

"If the *Tribunal* determines that the ABC experts exceeded their mandate, it shall make a declaration to that effect, and shall proceed to define (i.e. delimit) on map the boundaries of the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905, based on the submissions of the Parties."

42. There is therefore a two-stage mandate in Article 2: first, to determine whether there was an excess of mandate, second, if there was no excess, to issue an award for full and immediate implementation, or, if there was excess, to delimit the area.

43. There is no provision for the event of a partial delimitation based on a finding of partial nullity. This is inconsistent with the clear terms of Article 2 of the Arbitration Agreement in context and in the light of their object and purpose. The clear terms of Sub-articles 2 (*b*) and 2 (*c*) show that a finding that there was no excess of mandate must relate to the whole Report and that in the event of an excess of mandate a delimitation must be carried out in relation to the entire boundary.

44. The Award points out that the sequence of Article 2 gives the Tribunal a secondary role – to carry out the delimitation only if the Experts' Report cannot stand due to an excess of mandate.⁶⁶

45. The object and purpose of the Arbitration Agreement must be seen in light of the context of this arbitration, namely, the delimitation of a boundary that could potentially become an international boundary, as the Tribunal recalls.⁶⁷ One of the purposes of the present arbitration proceedings is to provide the necessary redress against a decision made on that boundary if it is found to be defective for excess of mandate. In view of the rule of finality and stability accorded to boundaries in international law once delimited, the Parties cannot be assumed to have agreed that a decision, once found to be tainted by excess of mandate in some respects, should otherwise be upheld as far as possible. On the contrary, the decision of the Experts should be subject to careful scrutiny as to whether the rest of the decision can stand in spite of a finding of excess of mandate.

46. It is doubtful whether the treaty texts cited by the Tribunal,⁶⁸ which give an express power to make a finding of partial nullity, can be invoked as authority for a presumption in favour of a power of partial annulment, let alone a presumption in favour of partial nullity. The relevant general principles of law and practices may

⁶⁶ Award, para. 415.

⁶⁷ Award, para. 428.

⁶⁸ Award, paras. 418, 420.

allow a finding of partial nullity under appropriate circumstances, but those circumstances are clearly circumscribed and do not exist in the present case.

47. It is apparent from the precedents cited by the Tribunal that the obligation to strive to uphold the rest of the decision under review only applies where there is severability of the part that has been annulled, that is to say, when certain objective conditions for severability have been met. Those conditions are expressed in the decision in *The Orinoco Steamship Company Case*, for example, where it was held that:

“following the principles of equity in accordance with law, when an arbitral award embraces several independent claims, and consequently several decisions, the nullity is one without influence on any of the others, more especially when, as in the present case, the integrity and good faith of the Arbitrator are not questioned”.⁶⁹

48. It is not necessary to dwell on the question of the “integrity and good faith” of the ABC Experts. Suffice it to note that one of the Parties has made allegations of serious violations of fundamental rules of procedure; that the essential facts giving rise to those allegations are not in dispute; and that the departures from the rules of procedure that took place were, in my opinion, serious improprieties which departed not only from those rules but also from imperative requirements of due process.⁷⁰ By *a contrario* argument, when the integrity and good faith of the arbitrator are in question, that is to be contextually taken into account as a factor against separability.

49. The requirement stated in *The Orinoco Steamship Company Case* that for severability of an impugned part, the case under review should concern “several independent claims” rather than one indivisible question was confirmed by Judge Weeramantry in his Dissenting Opinion in the case concerning the *Arbitral Award of 31 July 1989*.⁷¹ It is only in cases “where different segments of the total matter in dispute can be decided as separate and discrete problems, the answers to which can stand independently of each other” that “the segments of the dispute that have been properly determined can maintain their integrity though the findings on other segments are assailed or do not exist”.⁷² In other words, “even if the valid and invalid parts are distinct, the invalidity of some will result in the invalidity of the whole, if they all form part of a single scheme intended to operate as a whole”.⁷³

50. The majority simply assumes that the excess of mandate it has found in the present case relates to issues which are separate. That is not the case here. The present dispute is more properly characterized as one such as the case concerning the *Arbitral Award of 31 July 1989*, where, on the facts, the issues were so intrinsically connected that it was clear that the Parties intended that the circumstances be

⁶⁹ *The Orinoco Steamship Company Case* (United States/Venezuela), 25 October 1910, XI RIAA 27, 234 (1910), cited in Award, para. 416. Emphasis added.

⁷⁰ See *infra*, notes 238, 239.

⁷¹ *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, I.C.J. Reports 1991, p. 53, *Dissenting Opinion of Judge Weeramantry*, at p. 168.

⁷² *Ibid.* Emphasis added.

⁷³ *Aerial Incident of 10 August 1999 (Pakistan v. India)*, *Jurisdiction, Judgment*, I.C.J. Reports 2000, p. 12, *Dissenting Opinion of Judge Al-Khasawneh*, *supra* note 65, at p. 55, para. 30.

determined in a “composite process”.⁷⁴ The boundary to be delimited in the present case is not, to use the words of Judge Weeramantry, composed of “separate and discrete problems, the answers to which can stand independently of one another”.⁷⁵

51. The agreed basis on which the delimitation should be carried out is the boundary of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905: there is only one criterion for the delimitation and it should be applied clearly and consistently. This is not a case where different parts of the boundary are governed by different instruments⁷⁶ or where there are different zones subject to differentiated legal régimes.⁷⁷ On the contrary, the decision of the Experts was composed of fundamentally interrelated elements, including their findings as to the secondary nature of Misseriya land use and occupation in the region; their reliance on the factual situation beyond the stipulated 1905 date; their projection back in time of the 1965 extent of Ngok Dinka occupation; and their making these findings despite overwhelming evidence to the contrary. Any determination of the extent of the territory transferred or even of those nine Chiefdoms as at 1905 must be composed of elements which are fundamentally interrelated. The question of the geographical extent of the nine Chiefdoms is intrinsically related to the provincial transfer, an administrative act of the Condominium administration; the date of that act, 1905, is the temporal limit; the extent of the territory is limited by the claims of neighbouring tribes; and all of those factors are qualified by the understanding of the Condominium officials as to what was being transferred. No single part of the process by which that delimitation is carried out can be severed such that some segments of the boundary might survive and others be declared a nullity.

5. The First Pillar of the Experts’ Reasoning: The Dominant/Secondary Rights Paradigm

52. I shall now turn to the question of shared rights in the Goz. As a preliminary remark, it should be noted that the Tribunal does not construct its reasoning for impugning the Experts’ decision on the 10° 35' N and the 10° 22' N line on the use of the “shared rights area” concept, but rather on a different reason namely that “[i]n the Experts’ view, if there was no conclusive evidence of such permanent settlements north of latitude 10° 10' N, it is difficult to understand why the Abyei area was nonetheless extended further north, beyond that line up to latitude 10° 22' N”.⁷⁸ For once, my learned colleagues and I are in perfect accord. If indeed there is no conclusive evidence (whether in the Experts’ view or otherwise, this is the standard adopted by the Tribunal), no reason can exist to extend the line to 10° 22' N.

⁷⁴ *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, I.C.J. Reports 1991, p. 53, *Dissenting Opinion of Judge Weeramantry*, at p. 169.

⁷⁵ *Supra*, note 72.

⁷⁶ See, for example, the *Eritrea-Ethiopia Boundary Commission, Decision on Delimitation* of 13 April 2002, (2002) 41 ILM 1057, where different colonial treaties dated 1900, 1902 and 1908 applied respectively to the central, western, and eastern sectors of the boundary.

⁷⁷ See, for example, the different maritime spaces in the case concerning the *Arbitral Award of 31 July 1989*, *supra* note 71.

⁷⁸ Award, para. 693. Emphasis added.

53. The same criterion of “conclusive evidence” should, if the minimum of consistency is to be maintained, apply to the concepts of secondary rights versus dominant rights. Is there any evidence, let alone conclusive evidence, that the concept was part of the law and practice of Kordofan at the crucial year or indeed at any time? Is the Tribunal precluded by Article 2 (a) from making the most basic enquiry about whether the concept really exists? After all legal ideas, especially exotic ones, cannot just be presumed to exist or to be applicable in certain territories or provinces without supporting evidence. We are told that one of the Experts, Professor Shadrack Gutto, is a prominent authority on African land law,⁷⁹ and I have not the slightest doubt as to his prominence. However, Africa, where the concept of dominant versus secondary rights allegedly originated, is a vast and varied continent, and the former possessions of the British Empire, another alleged inspiration for that concept, also extensive and not unattuned to heterogeneous local custom. Besides, there is no reason to believe that an African land law exists any more than an Asian land law.

54. It then makes sense to enquire, within the constraints of time and available sources, as to whether the crucial concept of secondary and dominant rights has any existence. This enquiry is crucial because according to the Experts themselves it is this concept which served as the justification for abandoning the administrative boundary, since

“any administrative boundary as may have existed did not or could not have coincided exactly with boundaries of land use rights of sedentary or pastoral peasant communities whose tenure rights and obligations overlap in the absence of concrete walls separating the communities”.⁸⁰

55. Notwithstanding the obvious fact that the more arduous and in all probability unachievable task of drawing boundaries between tribal groups whose occupation and land rights overlap, as the Experts themselves recap, should have caused the Experts to go back to their original mandate, which is nowhere near as confused as drawing tribal boundaries, the Experts persisted in trying to effect the delimitation on the basis of what they thought were three types of land rights. The Experts set out their understanding of this concept as follows:

“It is critical in interpreting the established occupation, land rights and land use of the two communities to appreciate the sociological fact that by 1905 there existed three main categories of such occupation, land rights and land use:

(i) Dominant occupation, land rights and land use by a community that were ‘exclusive’ to members of the community and permitted no cession of secondary use rights to non-members of the community;

(ii) Dominant occupation, land rights and land use by a community but allowing for non-members of the community to acquire limited land use rights on seasonal basis or sporadic periods – the ‘primary’ and ‘secondary’ rights paradigm;

⁷⁹ See *infra*, note 236.

⁸⁰ ABC Experts’ Report, Part 2, Appendix 2, para. 3, point (i).

(iii) ‘Shared secondary’ occupation, land rights and land use by members of two or more communities within a territory marking the ‘boundaries’ between them – the so-called ‘conflicting’: or ‘no man’s land’ or the ‘Goz’.”⁸¹

56. In support of these propositions, the Experts quote only two sources: an “unpublished PhD Dissertation” by Abdalbasit Saeed⁸² and a book on the Sudan by Gaim Kibraeb.⁸³

57. The latter text, which I have had a chance to consult, describes these dar rights as follows:

“. . . the most articulate and elaborate definition of dar rights has been that of Hayes.

After hearing a great deal of oral evidence concerning the traditional and customary conception of ‘Dar rights’, and after collecting extensive corroborating evidence from provincial and district files, Hayes, who was a high court judge in the Sudan between 1944 and 1953, defined dar rights as follows:

‘If I had to declare what these [Dar] rights comprise, I should have said that, where there is no settled government outside the Dar and with authority over it, Dar rights are almost the same as the right of sovereignty, the only substantial difference from normal State sovereignty being that, with the nomads, boundaries are drawn with less precision. Where, however, there is a settled government, as in the Sudan, Dar rights are restricted to the extent of the State’s encroachments upon them. The principal rights brought to my notice, apart from rights of normal user, were:

The right to admit or refuse strangers to water and graze in the Dar, and the right to impose conditions on such entry.

The right to build permanent buildings in the Dar.

The right to cultivate.

The right to sink new wells, or dig out old ones.

The right to beat the *nuggara* (drum), and to put *wasms* (tribal marks) on trees and rocks.

⁸¹ ABC Experts’ Report, Part 2, Appendix 2, para. 6.

⁸² Abdalbasit Saeed, “The State and socioeconomic transformation in the Sudan: The case of social conflict in Southwest Kurdufan”, unpublished PhD dissertation, University of Connecticut, USA, 1982, p. 128. Cited in footnote 10 of ABC Experts’ Appendix 2, p. 25. It was not possible within the extremely short time available to obtain a copy.

⁸³ Gaim Kibraeb, *State Intervention and the Environment in Sudan, 1889-1989: the Demise of Communal Resource Management*, (NY/Lewiston/Queenston/Lampeter: Edwin Mellen Press, 2002), pp. 21-23, 45-52, Ch. 3. Cited in footnotes 11-13 of ABC Experts’ Appendix 2, p. 25.

As to cultivation, the holder of the Dar is entitled to exact from strangers admitted the same tribal dues on cultivation – known as *sharaiya* – as he exacts from his own tribesmen.’

During my field work, I asked the present Nazir, the Paramount Sheikh of the Shukria, Mohamed Hamed Abu Sin, to describe the nomadic pastoralists’, the small cultivators’ and their leaders’ conceptions of dar rights and how these conceptions have been continuing and changing over time. The fit between his definition of dar rights and the definition given by Hayes is astonishingly analogous.”⁸⁴

58. Elsewhere in the book Kibreab states “ownership, as we saw before is represented in the power to limit the ability of others to enjoy the benefits to be derived from access to, and enjoyment of, resources”⁸⁵ The conclusion that would follow from the asserted premise, that the Ngok held dominant rights of the second type, is that the Homr held only secondary grazing rights. However the evidence in its entirety points in the opposite direction. Thus, to quote Cunnison again: “the real area of sharing was further south in the Bahr”,⁸⁶ and here, lest some expansionist 10° 10' N interpretations of the Bahr creep in, let me add in the same page Cunnison says: “They [the Homr] moved south through the extensive sandy Goz to the area called the Bahr; this is the area around the Bahr al-Arab and Regeba Zerga”.⁸⁷ He adds: “There the two groups co-existed for a fairly short season – but this was not a “host guest” relationship. At this season it was the Dinka who apart from a few caretakers, left to go south as part of a transhumance pattern rather than one of nomadism”.⁸⁸ He adds, further:

“As I noted in my book (p. 19) much of the Bahr region has permanent Dinka settlements, although during most of the time the Humr occupy it the Dinka are with their cattle south of the Bahr al Arab. I never observed the Humr asking permission from Dinka to come to the Bahr and they did not consider themselves to be visitors there.”⁸⁹

59. Cunnison refers to his map to indicate that the Dar Homr included areas south of the River.⁹⁰ This was the situation in the early 1950s and probably for some time before that, save for the fact that the Ngok Dinka had been much closer to the Bahr el Arab and in 1905 were located at the triangle where that river is met by the Ragaba Um Biero.
60. Cunnison also clarifies his earlier remarks that the Homr have no land while the Dinka do by saying that:

⁸⁴ Kibreab, *supra* note 83, p. 22.

⁸⁵ Kibreab, *supra* note 83, p. 85.

⁸⁶ Witness Statement of Professor Ian Cunnison, 3 December 2008, at para. 6, GoS Memorial, p. 190.

⁸⁷ *Ibid.* Emphasis added.

⁸⁸ *Ibid.*, para. 9.

⁸⁹ *Ibid.* Emphasis added.

⁹⁰ *Ibid.*

“As I note at pp. 146-147 of the book, the Humr did not have any conception of individual or collective legal title to grazing land. They regarded all the grazing land they used as public land, open and available to them.”⁹¹

61. So much for the dominant rights of the Ngok and the secondary rights of the Homr in what the latter and other observers regarded as their dar.⁹² Those observers include some from around 1905 such as Willis who visited the Ngok Dinka in winter 1909 and described their congregations on and just north of the river Kir, noting the fact the Ngok take their cattle north to where they can be safe from the Arabs, such as Bongo or El Mayat.

62. Also remarkable is that Kibreab in fact has an opposite view of the situation of boundaries around Bahr el Arab:

“Unlike in northern Sudan where dar rights are said to antedate the advent of the Funji kingdom, in southern Sudan the concept of dar was alien to the culture and land tenure systems of the Nuer and Dinka peoples. In addition, to borrow Johnson’s eloquent formulation, among these societies the border is ‘ . . . a transitional zone where one system merges into the other: a border without a boundary’.”⁹³

63. Kibreab notes, further:

“For the tribes, abstract imaginary lines marked on maps were devoid of meaning. For them not only were boundaries porous, they were also naturally represented in the form of river courses, large trees, mountains or hills. The most natural boundary was one marked by a river course. That was the reason why in the pre-reconquest period and for some time after the reconquest, both the northern and the southern tribes perceived the Bahr al-Arab as forming the natural frontier separating the northern and the southern tribes.”⁹⁴

64. Had the Experts followed what was known by general repute, they would have stayed within their mandate. Instead they ignored what is there and tried to distil from Kibreab’s book what is not there and to present it as authority for these pseudo-legal concepts of dominant rights of the first and second type.

65. The next question is whether the fact that Ngok built luaks and dug dugs and the Homr did not in itself give different rights to the same land. At the outset it should be recalled that this was not a case of aimlessly wandering nomads on the one hand versus a sedentary peasant community on the other. Both the Homr and the

⁹¹ Witness Statement of Professor Ian Cunnison, 3 December 2008, para. 10.

⁹² The utter frivolity of the Experts reasoning can be gleaned from the fact that the origin of the dar rights has nothing to do with the so-called African land law (is there any more African land law than Asian land law?), but from the Islamic Sultanate of Funji and Fur” and follows earlier Islamic practices from the Middle East and Central Asia. Moreover Kibreab states in fn. 85 at p. 123: “the notion of dar rights was never applied to the southern Sudanese people”. Emphasis added.

⁹³ Kibreab, *supra* note 83, at p. 65, (citing D. Johnson, ‘Tribal Boundaries and border wars: Nuer-Dinka relations in the Sobat and Zaraf valleys, c. 1860-1976’, *Journal of African History* 23 (1982): 202, 183-203). Emphasis added.

⁹⁴ Gaim Kibreab, *State Intervention and the Environment in Sudan 1889-1989*, p. 83. Emphasis added. The reconquest took place in 1896-1898: see ABC Experts’ Report, Part 1, p. 37.

Dinka have been variously described as pastoralists or as practising transhumance. The 1912 Kordofan Handbook, for instance, describes the Dinkas as “a pastoral people and [they] possess large herds of fine, big cattle”.⁹⁵ Both are tribes of warrior cattle herders and both practise primitive agriculture: the one millet, the other sorghum. I do not think that the difference between millet and sorghum or between a luak – (there are indications that some were temporary⁹⁶) – and a tent should generate such discrepancy in land rights. Neither principle nor precedent supports the allocation of land rights and consequent territorial delimitation on such “differences” in lifestyle. Indeed, the Experts themselves quoted Cunnison where he stated that “Humr do not have permanent houses but surras have strong identification with particular camping sites to which they seek to return year after year.”⁹⁷

66. The presence of Misseriya Homr which could not be wished away, is instead dealt with by reducing them, under the dominant/secondary paradigm, to second-class citizens in their own land, allowed to graze their animals but nothing more. I find this part of the Report, with regret, objectionable and, frankly, odious. But aside from that, the pseudo-legal principle itself is unsupported by any evidence as to its existence or to its applicability to Kordofan. It was never part of the law or custom of Kordofan.⁹⁸ Yet, regardless of the correctness or reasonableness of the Experts’ interpretation of their mandate (as tribal or territorial) there is no doubt that the whole Report is based upon this “dominant/secondary rights” distinction. The lack of evidence and misquotation of the authorities in its support, of which I have already spoken; its inapplicability to Kordofan; and its discriminatory nature, besides the fact that it was contradicted by overwhelming evidence, leads me to the conclusion that this is a clear instance of reasoning so flagrantly contradictory and so manifestly flawed that it must be characterized as excess of mandate.

a. Mise à point: Traditional Rights

67. The Award has devoted a few pages in what looks like a judicial afterthought to traditional rights, and comes to an understandably general conclusion about the effect of territorial change on traditional rights. The Tribunal states that “traditional rights, in the absence of an explicit agreement to the contrary, have usually been deemed to remain unaffected by any territorial delimitation”.⁹⁹ Whilst this is true – and inconsequential – it misses the point. The issue here is not the subsistence of grazing rights after territorial delimitation. It is that the territorial delimitation itself is based on a baseless allegation by one Party that one group, the Ngok Dinka, are entitled to dominant rights in the concerned area while the other group, the Misseriya, are reduced to the enjoyment of secondary rights in what they consider part of their dar. It is discrimination itself, as a function, which is both invoked as justification and employed as methodology to effect the tribal delimitation. Moreover, the words relating to the right to graze and move in the Abyei area in

⁹⁵ See *supra*, note 29. See also Howell, *infra* note 166, at p. 245.

⁹⁶ See *infra*, para. 76.

⁹⁷ ABC Experts’ Report, Part 2, p. 161.

⁹⁸ Kibreab, *supra* note 93, at p. 83.

⁹⁹ Award, para. 766.

section 1.1.3 of the Abyei Protocol are not and cannot be interpreted as words of limitation. All those to whom Abyei is home, even if for a season, are entitled to all the rights guaranteed by the rules of international law and human rights standards, especially equal treatment in the enjoyment of those rights.¹⁰⁰

6. The Second Pillar of the Experts' Reasoning: The Assumption of Ngok Dinka Continuity of Occupation

68. In Part 5 of this Dissenting Opinion, I analysed the concept of the dominant/secondary rights paradigm and showed it never to have been part of the law and custom of Kordofan nor to have governed relations between the Ngok and the Homr.

69. I shall now turn to a second, central tenet of the Experts' reasoning: an assumption regarding continued Ngok presence in the Bahr area from circa 1905 until the mid-1950s or even the early 1960s, which represented the period of maximum Ngok Dinka expansion to the North. The technique used to substantiate this claim was to read history backwards, turning the temporal limitation of the Experts' mandate on its head. Thus, interviews with Cunnison and Tibbs and other modern sources are misquoted or quoted out of context and these are superimposed on fragmentary quotations from third-party sources from around 1905. Given its importance, the relevant parts of the Experts' Report (the claims made in the Summary of Propositions and in the main body of the Report) and the sources relied on by them are reviewed in detail to show that this was not simply a matter of an appreciation of facts, which should normally be left to the discretion of the fact-finder, but a flagrant and easily demonstrable misuse of the evidence to support, in a tendentious way, a certain result.

70. The relevant part of the Experts' Report is found under Proposition 8, which reads as follows:

“Proposition 8: There was a continuity in the territory occupied and used by the nine Ngok Dinka chiefdoms which was unchanged between 1905 and 1965, when armed conflict between the Ngok and the Misseriya began. (Ngok oral testimony and SPLM/A presentation)”¹⁰¹

1. The Experts' Summary of Propositions

71. In their “Summary of Propositions”, the Experts stated:

¹⁰⁰ See, especially, Universal Declaration of Human Rights, Article 2; International Covenant on Civil and Political Rights, Article 2(1); African Charter of Human and Peoples' Rights (to which Sudan became a Party on 18 February 1986), Article 2; International Labour Organization Convention No. 169 on Indigenous and Tribal Peoples, Article 3. The last Convention is not ratified by the Sudan, however see Articles 1 and 2 of the United Nations Declaration on the Rights of Indigenous Peoples, annexed to General Assembly Resolution 61/295 of 13 September 2007. This was adopted by a majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).

¹⁰¹ ABC Experts' Report, Part 1, p. 19.

“The administrative record of the Condominium period, along with the testimony of persons familiar with this area at the end of the Condominium, establishes that there was a continuity of Ngok Dinka settlements in the area of the Bahr el-Arab/Kir, the Umm Bieiro, the Ragaba Lau, and the Ragaba ez-Zarga/Ngol.”¹⁰²

72. In the same paragraph, the Experts cited the following evidence:

“For instance, in 1909 Kordofan official C.A. Willis wrote that Ngok settlements were found all along the Gurf (Bahr et-Arab) and that Dinka influence extended a considerable distance further North at one time. Michael Tibbs states categorically that there was continuity of the Ngok settlements up to the end of the Condominium. Ian Cunnison was equally definite in stating that the general area in which the Ngok maintained their permanent settlements remained the same over the years. At the peace agreement between the Misseriya Humr and the Ngok Dinka in March 1965 both sides agreed that the Ngok could return to their homesteads at ‘Ragaba Zarga and other places where they used to live’ and that the Arabs would have unrestricted access to all ragabas that they had been frequenting before the outbreak of hostilities.”¹⁰³

73. On closer examination, the evidence mentioned in the above paragraph does not support the proposition in aid of which it is cited here. Each of those sources will be reviewed in turn below.

(a) C.A. Willis, 1909

74. As regards the first example cited, the statement of the Experts that “in 1909 Kordofan official C.A. Willis wrote that Ngok settlements were found all along the Gurf (Bahr et-Arab) and that Dinka influence extended a considerable distance further North at one time” is misleading because it is taken out of context and does not accurately reflect the contents of Willis’s Report.

75. Concerning the Ngok Dinka, what Willis wrote began as follows:

“All along the Gurf are villages consisting of perhaps two or three houses each. The ones I saw at the Ferry by Rob’s old village were about a mile apart, and I was told they continued all along the Gurf both ways.”¹⁰⁴

76. In the same place, Willis then made some observations about Dinka behaviour and society then noted that: “Just after the rains they go as far North as they think safe from the Arabs (Bongo or El Myat); there they build temporary villages, no doubt owing to the prevalence of mosquitoes.”¹⁰⁵ Willis noted, further, that: “As the water dries up and the mosquitoes decrease, the Dinka move towards the Gurf: their

¹⁰² ABC Experts’ Report, Part 1, p. 19.

¹⁰³ ABC Experts’ Report, Part 1, p. 19.

¹⁰⁴ C.A. Willis, “Notes on the Western Kordofan Dinkas”, Sudan Intelligence Report No. 178, May 1908, Appendix C, p. 16, at p. 17.

¹⁰⁵ *Ibid.*

campes are much less elaborate, and consist of simply a zeriba with small zeribas inside and the cattle pegs.”¹⁰⁶ Following more observations on social and other habits, Willis mentioned slavery and noted:

“The Dinkas have a certain number of slaves. I gather some were obtained in the famous year of starvation; others from the Rizeigat and Nuer (and possibly Nubas, though I saw none; Dinka influence extended a considerable distance further North at one time).”¹⁰⁷

77. Willis did not specify in his 1909 Report the area “further North” from which Dinka had influence extended nor did he specify any time period, in fact it is possible that he was speaking about the 18th century. But at any rate, someone in 1909 speaking of 1905 would not, to my mind, use the phrase “at one time”. This is certainly not evidence from which one can conclude that there was continuity of occupation by the Ngok Dinka in permanent settlements from 1905 to 1965.

(b) Mr. and Mrs. Michael and Anne Tibbs, 2005

78. The statement in the Summary of Propositions that “Michael Tibbs states categorically that there was continuity of the Ngok settlements up to the end of the Condominium” is misleading. The Experts’ record of the interview of 21 May 2005 with Mr. and Mrs. Tibbs in **Appendix 4.3** states: “Tibbs responded affirmatively when asked if there was continuity in the Ngok Dinka permanent settlements.”¹⁰⁸ It says nothing about the time period and certainly does not mention the end of the Condominium. The statement that there was continuity in the Ngok Dinka permanent settlements, without any indication of the time period or any specification of those settlements, no matter how firmly made, is too general to be of any use.

(c) Professor Ian Cunnison, 2005

79. The statement in the Summary of Propositions that “Ian Cunnison was equally definite in stating that the general area in which the Ngok maintained their permanent settlements remained the same over the years” is also misleading. The Experts’ record in Appendix 4.3 of the Report of their interview with Ian Cunnison notes in relevant part:

“Quite definite in stating that the general area in which the Ngok maintained their permanent settlements remained the same over the years. There were a lot of Dinka villages around Lau, and upstream along the Bahr el-Arab, and also eastward.

¹⁰⁶ C.A. Willis, “Notes on the Western Kordofan Dinkas”, Sudan Intelligence Report No. 178, May 1908, Appendix C, p. 16, at p. 17.

¹⁰⁷ C.A. Willis, “Notes on the Western Kordofan Dinkas”, Sudan Intelligence Report No. 178, May 1908, Appendix C, p. 16, at p. 17.

¹⁰⁸ ABC Experts’ Report, Part 2, p. 159. Emphasis added.

It is very likely that the Dinka lived along the R. Zerga before the Humr came, based on the fact that they were there before the Humr and would have occupied the Zerga as an ecological niche.”¹⁰⁹

80. The Experts then quote Cunnison’s response directly:

“The substantial nature of Dinka houses means that their settlements have remained similar for a long period – probably from the beginning of the 20th century, or the end of the Mahdiya.

I said to you that Dinka were on the Regeba Zerga before the Humr. But I do have statement from an old Humnawi which suggests that before the Mahdiya, in the Jellaba period, the regeba was unoccupied. (It seems unlikely.)”¹¹⁰

81. It may be observed that the evidence of Professor Cunnison, as noted in this record, is too general to be of use: the “general area” of occupation remained the same “over the years”. The following sentence refers in indefinite terms to “a lot of Dinka villages around Lau, and upstream along the Bahr el Arab” without specifying the limits of the area. If Lau is the same place as Lou, slightly to the South-East of Abyei town, then this by no means confirms that any continuity existed from 1905 to 1965 in the area of the Ragaba ez Zerga. Moreover, the evidence of Ian Cunnison is not “equally definite” to that of Mr. Tibbs: on the contrary, using the words “very likely”, “probably”, and “seems unlikely”, Cunnison limits his evidence to expressions of probability.

82. Moreover it is possible that the Ngok were on the Ragaba ez Zerga in the 18th century but they were subsequently pushed down by the Homr. The 18th century is nowhere near 1905.

83. Thus the testimony of Mr. Tibbs and Professor Cunnison before the Experts is too vague and uncertain to support Proposition 8.

(d) The Agreement of March 1965

84. This source is the March 1965 Peace Agreement between the Ngok Dinka and the Misseriya. It provides, in Article 9, as follows:

“Both sides agreed to restore normalcy to relations between them to pre-fighting modes of normal interaction; that is, the return of Dinka to their homesteads at Ragaba Zerga and other localities, and that the Arabs shall have unrestricted access to all Regeba’s that they had been frequenting before the outbreak of hostilities.

¹⁰⁹ ABC Experts’ Report, Part 2, p. 162. Emphasis added. It would appear that here Professor Cunnison would probably have been speaking about the 18th or the early 19th century: see Professor Cunnison’s Witness Statement, *infra* note 216.

¹¹⁰ ABC Experts’ Report, Part 2, p. 162. Emphasis added.

Both sides have also agreed that each shall hold meetings with the local security authorities at Abyei for the normalization of relations and the execution of the terms of this agreement.”¹¹¹

85. As noted above, the Experts stated with regard to this Agreement that:

“In March 1965 both sides agreed that the Ngok could return to their homesteads at ‘Ragaba Zarga and other places where they used to live’ and that the Arabs would have unrestricted access to all ragabas that they had been frequenting before the outbreak of hostilities.”¹¹²

86. The Experts relied on this as support for the proposition of continuity of occupation from 1905, but this is not evidence of Ngok Dinka occupation of the Ragaba ez Zarga in 1905: it is only evidence of their location prior to the outbreak of hostilities. However, the only evidence cited by the Experts, apart from the 1965 Agreement itself (which says nothing about the situation in 1905), is a secondary, non-contemporaneous source, namely, the “unpublished PhD Thesis of Abdalbasit Saeed” dating from 1982. The extract cited does not relate to 1905 but to 1966. The notes in the Experts’ Report state:

“At a peace conference in Abyei in March 1966: Nazir Baboo also claimed that the Ragaba Zarga belonged to the Humur who were kind enough to allow the Ngok to settle there . . . This is the first time claims on the territory known as Ngokland have been tabled by Misiriyya openly in a conference.”¹¹³

87. Even assuming that it is true that the 1966 peace conference was “the first time claims on the territory known as Ngokland have been tabled by Misiriyya openly in a conference”, this statement is of limited relevance. It clearly relates only to 1966, post-dating the transfer by six decades, and any territorial claim by the Ngok to the area of the Ragaba ez Zarga could have arisen during time. This statement, assuming that it is true, is also qualified by the words “openly in a conference”. Thus it may well have been that the Misseriya considered this territory to be theirs, whether or not they tabled this openly in a conference, and indeed before the outbreak of hostilities they simply had no need to make such a claim in any conference. Moreover, the idea that the Ragaba ez Zarga was in fact “Ngokland” is contradicted by a wide range of sources stating that the territory of the Homr extends south to the Bahr el Arab.¹¹⁴ It is also contradicted by eye-witness evidence, such as that of Wilkinson locating permanent Homr settlements at Fauwel and Um Semina in 1902.¹¹⁵

¹¹¹ “The First Peace Agreement Between The Misiriyya Humur And The Ngok Dinka, Concluded At Abyei, March 3, 1965”, Appendix 12 to A.D. Saeed “The State And Socioeconomic Transformation In The Sudan: The Case Of Social Conflict In Southwest Kurdufan” (January 1, 1982), ETD Collection for University of Connecticut, Paper AAI8213913. SPLM/A FE 18/30.

¹¹² ABC Experts’ Report, *supra* note 103.

¹¹³ Saeed, at p. 235 cited in ABC Experts’ Report, Part II, p. 190.

¹¹⁴ *See, e.g.,* Gleichen, *infra* note 192.

¹¹⁵ Wilkinson, *infra* note 129.

2. The Main Body of the Experts' Report

88. In the main body of their Report, where they examine each proposition in more detail, the Experts cite some additional sources in support of Proposition 8.¹¹⁶ The Experts first cite the non-contemporaneous oral evidence of the Ngok Dinka and the Misseriya. Due to the fact that it was prepared after the dispute had arisen, that will not be examined here. The Experts then state:

“There are strong arguments for the continuity of Ngok Dinka settlement along the main waterways of the Bahr el-Arab basin (the Bahr el-Arab/Kir Itself, the Umm Bierio, the Ragaba Lau, the Ragaba ez-Zarga/Ngoi and its tributaries). This is not only suggested by the evidence cited in the previous propositions, but is confirmed by the testimony of two impartial witnesses who were familiar with the area and the use to which its inhabitants put it immediately prior to independence (Tibbs and Cunnison in **Appendix 4.3**).”¹¹⁷

89. As noted above, the testimony of Tibbs and Cunnison in Appendix 4.3 is too vague and uncertain to support Proposition 8.

The Experts' Report continues:

“We do not have a detailed and systematic description of Ngok settlement and land use patterns throughout the Condominium period, because of the seasonality of administrative visits to Ngok territory. Since officials came only in the dry season (between December and April: Tibbs in **Appendices 5.7** and **5.13**), what few descriptions we do have are of Ngok dry season activities, which were concentrated around the rivers. But there are suggestions from the beginning of the twentieth century that administrators were aware that Ngok Dinka territory extended further north (Mahon 1903, Willis 1909 in **Appendix 5.13**), and this seems to have been the basis on which settlement and grazing patterns were condoned and managed by subsequent generations of administrators throughout the Condominium period, following the general principle of reviving tribal homelands.”¹¹⁸

90. The 1903 Report of Mahon Pasha¹¹⁹ does not relate to the extension of Dinka territory. Mahon merely stated that “I next went west [from Fauwel and Um Semima] to Sultan Rob's”¹²⁰ and, further, “[f]rom there I went south to the Riverain country, and north-west to Tosh and the Rizeigat country”.¹²¹ Mahon also stated, without any specific geographic reference, “I met several herds of Dinka cattle grazing right in the Arab country, where they were afraid to go last year”. It is difficult to see how this report constitutes a suggestion that administrators were

¹¹⁶ ABC Experts' Report, Part 1, p. 41 *et seq.*

¹¹⁷ ABC Experts' Report, Part 1, p. 43.

¹¹⁸ *Ibid.*

¹¹⁹ Sudan Intelligence Report No. 104 (March 1903), Appendix E, p. 18. GoS Memorial, Annex 5, SPLM/A FE 1/21.

¹²⁰ *Ibid.*, p. 19.

¹²¹ *Ibid.*

aware that “Ngok Dinka territory” extended anywhere near 10° 10’ N, since it is framed in terms of where the Dinka dared to venture, as is that of Willis.

91. It has already been observed that the statement by Willis in 1909 that Ngok Dinka “influence” extended “further North” was made without specific reference to time or place. Willis made no mention whatsoever of Ngok Dinka territory extending further north than the Bahr el Arab: on the contrary he noted that just after the rains the Dinka “go as far North as they think safe from the Arab (Bongo or El Myat)” where they build temporary villages or camps.¹²²
92. The Experts then note the lack of any clear evidence establishing the northern-most boundary of the area either settled or used by the Ngok as follows:

“There is, as yet, no clear independent evidence establishing the northern-most boundary of the area either settled or seasonally used by the Ngok. The lack of distinctive physical features and the overlapping use of the area discouraged Condominium administrators from attempting to define such a boundary (see Henderson's 1935 comment, quoted above). There is some evidence in the administrative records of attempts to segregate Ngok and Humr communities in some areas: e.g. the expulsion of Ngok and other Dinka from Hasoba in 1932, at the request of both the Humr and the Ngok leaders (Henderson Diary in **Appendix 5.13**); the allegation that chief Kwol Arop was encouraging the Ngok to settle among the Humr in 1940 (Kordofan Monthly Diary 1940 in **Appendix 5.13**). But these citations lack either the context or the details that would enable us to draw any firm conclusions from them.”¹²³
93. The details in individual sources may be lacking, but context certainly is not. Firm conclusions may be safely drawn from those sources taken together, especially as they are corroborated not only by the independent observations of Professor Cunnison, but also by the circumstantial evidence. The improvement in Homr-Ngok relations as a result of Condominium presence or intervention, and Ngok movement in a northerly direction as a corollary of that improvement, is verified around 1905 by Mahon Pasha already in 1903 and also by Willis in 1909. In the cartographic record, there is a clearly discernable general pattern in the maps: from those produced in the early years with labels placing the Ngok on and south of the Bahr el Arab around 1905, to the tribal administration maps of for instance 1927 and 1941. The cartographic evidence cannot merely be dismissed by claiming that there was insufficient knowledge at the time of Ngok Dinka presence extending to 1965 lines. This does not stand given the availability of highly detailed evidence such as the October 1908 Sudan Intelligence Report¹²⁴ describing each tribal group in considerable detail.
94. The fundamental flaw in the Experts’ reasoning concerning Proposition 8 on the continuity of Ngok Dinka occupation up to 1965 is the sheer absence of any contemporaneous or even near-contemporaneous basis for concluding that there was

¹²² See *supra*, notes 105, 106.

¹²³ ABC Experts’ Report, Part 1, p. 43.

¹²⁴ Sudan Intelligence Report No. 171 (October 1908), Appendix D, GoS Memorial Annex 18, SPLM/A FE 3/5.

any occupation of the 1965 area in 1905. It rests entirely on assumption: the assumption that in all of the places occupied in 1965, the Ngok had been living continuously from 1905.

95. Based on such flimsy evidence, there is no justification for employing the method of projecting, 60 years backwards in time, the situation as at 1965. This effectively overrides the agreed date specified in the mandate.

96. The Experts then turned to the general agreement in the sources consulted that the Goz is an area settled by neither the Ngok nor the Homr and seasonally used by both. On the status of the Goz, they noted:

“The Ngok assertion that the boundary between the two peoples is the Goz belt that separates them has yet to be tested by a systematic survey. There is general agreement from other sources, however, that the band of Goz intervening between the Humr permanent territory and the Ngok permanent settlements is settled by nobody; that it is an area to be traversed, rather than occupied; and that there is regular seasonal use of the Goz by both peoples (Cunnison 1954 in **Appendix 5.2**; Cunnison 1966 in **Appendix 5.3**; Tibbs 1999 in **Appendix 5.13**).”¹²⁵

97. Finally, the Experts stated their conclusion as follows:

“The Commission finds sufficient evidence, therefore, to accept Ngok claims to permanent rights southwards roughly from latitude 10° 10' N and of Ngok secondary rights extending north of that line.”¹²⁶

98. There is thus nothing in the contemporaneous or near-contemporaneous evidence (i.e., from 1905 or within 10-15 years of it) cited by the Experts to support the adoption of latitude 10° 10' N as a point of reference.

99. Having shown that the two crucial stages in the Experts' thought processes are built on sand I shall turn now to the important question of the procedural framework within which the Experts' mandate was conferred on them and within which they were expected to operate.

7. Locations of the Ngok Dinka and of the Homr around 1905

100. I have maintained throughout this Dissenting Opinion that the results achieved by the Experts and this Tribunal bear no relation to the reality of where the Ngok Dinka were situated around 1905 and that both exercises are contradicted by overwhelming, contemporaneous and near-contemporaneous evidence. The sheer volume of this evidence and its strong probative value are matched only by the degree to which it was neglected by the Experts and the Tribunal. This cannot be properly relegated to the margin of appreciation of facts normally left to the fact-finder or the arbitrators. It must be seen, when regard is had to how obvious the

¹²⁵ ABC Experts' Report, Part 1, p. 43.

¹²⁶ *Ibid.*, at p. 44.

evidence and how reluctant the fact-finder or the arbitrator to see it, as a ground for excess of mandate properly so described.

101. Lest the reader think that an element of exaggeration has crept into what I have written, I have compiled from contemporaneous and near-contemporaneous sources, cited in the written pleadings of the Parties and in their presentations before the Tribunal, a detailed review of where the Ngok and the Misseriya and their camps or settlements were sighted around 1905.*
102. I address this evidence in chronological order, to the appropriate extent. As some sources concern both tribal groups, there is some repetition. A Map illustrating this review of the evidence is appended to this Dissenting Opinion.¹²⁷

1. Evidence of Ngok Dinka Occupation

(a) Evidence from up to and including 1905

103. E.B. Wilkinson, who travelled in 1902 from El Obeid to “Sultan Rob’s”, recorded in a detailed itinerary that the “first Dinka village” he reached was the village of Bombo. This has been marked as Bongo on the map, and is located at 9° 32’ N, 28° 49’ E.¹²⁸ This village was empty. Wilkinson did not encounter any Ngok before Etai (9° 29’ N 28° 44’ E). Both Bongo and Etai are far south of the Ragaba ez Zarga.¹²⁹ Wilkinson found only Arab settlements along the Ragaba ez Zarga, the watercourse to which he refers as the Bahr el Arab, five or six miles south-west of the “large Arab settlement” at Fauwel.¹³⁰
104. Wilkinson noted on a sketch map illustrating his route that “the positions of arab settlements marked [with the symbol, ?] are from information supplied by Skeih Ali Gula Nazir of Homr arabs”.¹³¹ The watercourse marked as the Bahr el Arab on this sketch was later established as the Ragaba ez Zarga. No Dinka dwellings or settlements are marked by Wilkinson on this watercourse.

* I am grateful for the research assistance of Ms. Fedelma Claire Smith in compiling this review. I would also like to take the opportunity to extend my thanks to Mr. Bill Robertson, Mr. Vincent Belgrave, and Mr. Sam Brown, for their cartographic expertise and timely assistance, and to my secretary, Mrs. Jean van Hamel-Newall, for her invaluable support. This Opinion could not have been produced without their Amazonian and Herculean efforts.

¹²⁷ See Map appended to this Dissenting Opinion, *infra*. This map is intended to illustrate the locations of Ngok Dinka and Homr Arab presence around 1905 using the contemporaneous and near-contemporaneous evidence in the record. Place names that are marked in colour illustrate where first-hand or official accounts from around 1905 identify either Ngok Dinka (shown in pink) or Homr (shown in orange) at the named location.

¹²⁸ *Gazetteer of the Anglo-Egyptian Sudan* (Sudan Survey Department, Khastoum, 1931), p. 102, GoS Counter Memorial, Annex 28. Locations of places named in the evidence reviewed in this part of the Opinion have been made using the cartographic evidence in the record, with particular reference to the 1936 Mosaic of 250,000 Series Maps in the SPLM/A Reply Map Atlas.

¹²⁹ Wilkinson, El Obeid to Dar El Jange (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government*, Vol. II (1905), p. 155. GoS Memorial, Annex 38, SPLM/A FE 2/14 and 2/15.

¹³⁰ *Ibid.*

¹³¹ Annex 5 of the GoS Maps produced in response to the Request of the Tribunal. An extract of this map is annexed to GoS CM, Map 13b.

105. Mahon Pasha in 1903 reported that the Ngok Dinka lived in the area between the Ragaba ez Zarga and the Bahr el Arab.¹³² He wrote:

“From Muglad I went to Turda. The people here had a lot of cattle and a fair amount of horses. . . . From Turda I went south-east to Dehka and there had all the Sheikhs assembled and gave them 3 days to pay their tribute, which they did after a little persuasion. . . . I then went to Fawel and Um Semina, where I had the remainder of the Homr Sheikhs to meet me to collect their tribute . . . I next went west to Sultan Rob’s, and was very well received; invested Sultan Rob with a Second Class Robe of Honour. From there I went south to the Riverain country, and north-west to Tosh and the Rizeigat country. . . . The two chiefs, Lor and Rob, who I made make friends last year after 30 years’ war, were on the best of terms, and one and all Dinkas said how pleased they were that Government had come, because they had not been raided by the Arabs since I was there last year. As proof of that, I met several herds of Dinka cattle grazing right in the Arab country, where they were afraid to go last year.”¹³³

Mahon Pasha is unspecific about the latitude of “Sultan Rob’s” in his Report. It might be inferred that he had travelled there due west from Fawel and Um Semina, but this impression is contradicted by other contemporaneous evidence also from before 1905.

106. Percival, in his route report from Keilak to Wau, December 1904, described “what I take to be the Bahr el Arab”, which is now known to be the Ragaba ez Zarga. He wrote, on 19 November:

“I have been some miles up and down the river but can find no trace of inhabitants. The country between here and the Jebela would appear to be uninhabited as I should think that I would be bound to have found some traces of natives if any had been about lately.”¹³⁴

On 27 November he noted that Sultan Rob was “at present” living in Burakol and noted “There are no Dinkas west of Burakol as far as I could see and Sultan Rob told me that there are only Homr Arabs west of him.”¹³⁵ He then noted that:

“The Bahr el Arab [the river which was later identified as the Ragaba ez Zarga] is uninhabited he told us except for occasional wandered parties of Arabs. He knew Chak Chak which he said was the next lot of natives to those he ruled.”¹³⁶

107. Percival also reported seeing some Dinka driving cattle south at Amakok. On the most expansive proper view of the evidence, it can be inferred as a possibility, in the absence of any more detailed (or contradictory) contemporaneous evidence on Amakok, that there was Ngok Dinka presence somewhere in its vicinity. However,

¹³² Sudan Intelligence Report No. 104 (March 1903), Appendix E, p. 19. GoS Memorial, Annex 5, SPLM/A FE 1/21.

¹³³ *Ibid.*

¹³⁴ A. Percival, “Route Report: Keilak to Wau”, December 1904, p. 2. GoS Counter Memorial, Annex 26.

¹³⁵ *Ibid.*, at p. 3.

¹³⁶ *Ibid.*

any attempt to place the Ngok Dinka further north, in the form of a permanent settlement, on the basis of this one sighting, would be pure speculation. One might indeed remark that any incidence of Dinka driving their cattle southwards as hard as they could at that latitude, at a time when the Dinka only tended to graze their cattle “as far North as they think safe from the Arab”, does not seem likely to concern Dinka coming from their own permanent settlements.

108. Percival’s 1904 sketch map places Sultan Rob south of the river Kir, not far from the village of Bongo, and mentions the village of Burakol, just north of the Kir.¹³⁷
109. Gleichen’s Handbook of 1905 includes an “Itinerary of the Bahr el Ghazal River, Lake No – Mashra El Rek”, by “Garstin, Peake, Editor, et al” which notes, regarding Lau: “From 6 miles above the junction a succession of Dinka villages line both banks. Some of these are large and appear to be thickly peopled. The principal village is called Lau.”¹³⁸

(b) Evidence from after 1905

110. In his “Progress Report – Bahr Bahr el Arab Reconnaissance”, dated 8 March 1906, Bimbashi Huntley Walsh stated:

“I have on board now Sheikh Akanon, the son of Sheikh Lar who is dead, he has been a great help to me and wishes to report himself to His Excellency the Governor-General, so, unless I receive a wire to the contrary, I shall bring him to Khartoum with me. He is the biggest Dinka Sheikh in this part of the country and has considerably more people and a much larger stretch of country than Sheikh Rob.”¹³⁹

111. Hallam’s 1907 route report describes Sultan Rob’s new village as “covering the country between the Um Bioru and the Gurf [Bahr el Arab] near their junction”.¹⁴⁰ From there, Hallam travelled south-east towards Sultan Rob’s old village. He states that “ROB’S old V. is on BAHR EL ARAB”. This description does not include any significant extent of territory north of the Bahr el Arab nor does the report evidence any Ngok occupation anywhere near the Ragaba ez Zarga, or north of it. Hallam located one Ngok village on the Umm Biero, namely, Rob’s New Village at the Um Biero – Bahr Bahr El Arab junction, and others along both banks of the Bahr el Arab: Chweng; Lar’s village; and Sultan Rob’s old village.
112. Lloyd wrote in 1907:

“Dar Homr, or the country of the Homr Arabs, is situated in the south-west corner of the province of Kordofan. The western boundary is the Darfur frontier,

¹³⁷ Percival’s Sketch Map (River Kir to Wau), (Sudan Survey Department archives, 1904). GoS Counter Memorial, Map 14b.

¹³⁸ E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government*, Vol. II (1905), p. 168. GoS Memorial, Annex 38, SPLM/A FE 2/14 and 2/15.

¹³⁹ Sudan Intelligence Report No. 140 (March 1906), p. 15. GoS Memorial, Annex 12, SPLM/A FE 17/22.

¹⁴⁰ H. Hallam, *Route Report: Dawas to Dar Jange*, December 1907, p. 2. GoS Counter Memorial, Annex 31. Hallam’s sketch map is annexed to the GoS Counter Memorial, Map 16b.

beyond which live the Rizeigat Arabs. On the north, the boundary passes through El Odaiya, now the headquarters of a Merkez, or administrative district, and thence south-eastwards, passing south of Burdia and Jebel Dago to Keilak. El Odaiya is in the Hamr country, the inhabitants being a sedentary tribe of Arabs. Burdia and Jebel Dago are in the Messeria, and Keilak in the Hawazma country. Both these tribes, like the Homr, are Baggara Arabs – that is to say, cattle-owning nomads. The southern boundary is between the Bahr el Arab and the river Kir, the latter being occupied by the Dinkas under Sultan Rob.”¹⁴¹

In response to Lloyd, Percival submitted an explanation published in the following of the Geographical Journal, stating that “[t]he Bahr el Arab is the river Kir, and takes this name ‘Kir’ when it enters the Dinka country either before or after joining with the rivers that join the river Lol below Sultan Rob’s”.¹⁴²

113. Lloyd, in the Sudan Intelligence Report, 1908, recorded that “the Homrs cultivate round Muglad and Baraka, but as soon as the water dries up they migrate southwards to the Bahr el Homr”.¹⁴³

114. C.A. Willis made detailed “Notes on the Western Kordofan Dinkas” following a visit in 1909.¹⁴⁴ He stated:

“The Western Kordofan Dinkas seem to be divided into three main heads: on the east the Ruweng, under Sultan Qot; in the middle the followers of the late Sultan Lar, under his son Kanoni; and to the west the followers of the late Sultan Rob, under his son Kwal.”

115. Willis noted, further:

“Practically speaking, the Dinkas after the rains are scattered about and mixed up, in so far as their private feuds allow. It is only in the rains that they sort themselves out, and more or less combine in families. Even so, they say there is no hard-and-fast rule by which a sub-tribe always lives in the same place. All along the Gurf are villages consisting of perhaps two or three houses each. The ones I saw at the Ferry by Rob’s old village were about a mile apart, and I was told they continued all along the Gurf both ways. Total distance from end to end in which these Dinkas live (Lar and Rob) is not more than two days (say 50 miles). They gather together in the rains in order to combine to make their houses . . .”¹⁴⁵

116. Willis made observations on the habits and locations of the Ngok Dinka in the rainy season, and noted:

“As I saw their winter camps only (the villages on the Gurf were empty except for a few old men and women); I did not see the Dinkas in full kit –

¹⁴¹ Geographical Journal, Vol. 29, 1907. GoS Memorial, Annex 54, SPLM/A FE 17/27.

¹⁴² Geographical Journal, Vol. 30, 1907. GoS Memorial, Annex 55.

¹⁴³ Sudan Intelligence Report No. 171, October 1908, p. 53. GoS Memorial, Annex 18, SPLM/A FE 3/5.

¹⁴⁴ C.A. Willis, “Notes on the Western Kordofan Dinkas”, 10 April 1909, Sudan Intelligence Report No. 178, May 1908, Appendix C, at p. 16. GoS Memorial, Annex 19.

¹⁴⁵ *Ibid.*, at p. 17.

they had with them only their helmets (Filliul) and their arms. . . . Just after the rains they go as far North as they think safe from the Arabs (Bongo or El Myat); there they build temporary villages, no doubt owing to the presence of mosquitoes. The tukls are made with the floor rising to a point in the centre... (the Arabs at Sinut and Burdia do the same for their children owing to the mosquitoes). . . . As the water dries up and the mosquitoes decrease, the Dinkas move towards the Gurf.”¹⁴⁶

117. Willis also noted that “From a piece of rising ground between the Lau and the Gurf one sees the plain of the Gurf extending for miles covered with grass, with here and there big trees and a Dinka village.”¹⁴⁷
118. A sketch by Whittingham, dated 1910, is, as noted by the GoS, the first map to depict something with a name resembling that of Abyei, namely, Abyia.¹⁴⁸ Whittingham measured the position of Abyia and noted “I have struck it three or four times and it is about 3½ miles up the tributary which is shown on the HASOBA sheet”.¹⁴⁹
119. From this evidence, the GoS suggests that the Ngok Dinka were moving slowly north: Burakol was 2 miles up the Um Biero in 1904; Abyia 3½ miles up in 1910, and Abyei town 4.7 miles up in 2005.¹⁵⁰ This appears to be supported by other evidence, such as Titherington’s sketch map of 1924, where on the left bank of the Um Biero, just north of the Bahr el Arab, there is an annotation stating: “Abyei [Ch Kwol Arob’s since 1918]”.¹⁵¹
120. G.A. Heinekey travelled in 1918 from Muglad to Gerinti,¹⁵² then south along the Bahr el Arab until he came to Mek Kwal’s village,¹⁵³ where he turned north and travelled towards the Ragaba Um Biero and from there further north.¹⁵⁴ Heinekey only mentioned Ngok villages along the Bahr el Arab.
121. Heinekey noted Homr cattle and Homr camps on his way to Gerinti, and, north of Mek Kwal’s village, only Homr. He stated that “From Gerinti to Mek Kwal’s village, there is no track of any sort.”¹⁵⁵ Later in the same section he noted, “The Arabs when they go down to Kwal to buy grain do not go along the Gurf but

¹⁴⁶ *Ibid.*

¹⁴⁷ C.A. Willis, “Notes on the Western Kordofan Dinkas”, 10 April 1909, Sudan Intelligence Report No. 178, May 1908, Appendix C, at p. 18.

¹⁴⁸ Transcript, 21 April 2009, 93/20 (Crawford).

¹⁴⁹ Whittingham, Letter to Pearson, 26 April 1910. GoS Memorial, Annex 34.

¹⁵⁰ Transcript, 21 April 2009, 98/12-14 (Crawford).

¹⁵¹ *Infra*, note 159.

¹⁵² G.A. Heinekey, Route Report: Muglad to Gerinti, February 1918. GoS Counter Memorial, Annex 35.

¹⁵³ G.A. Heinekey, Route Report: Gerinti to Mek Kwal’s Village, March 1918. GoS Counter Memorial, Annex 36.

¹⁵⁴ G.A. Heinekey, Route Report: Mek Kwal’s Village to Jebel Shat Safia, March 1918. GoS Counter Memorial, Annex 37.

¹⁵⁵ *Supra* note 153.

along the Ragaba Um Biero which flows parallel to and North of the Gurf.”¹⁵⁶ This suggests that Gerinti was populated by Arabs rather than by the Ngok.

122. Dupuis’s 1921 sketch of Dar Homr “shows no sign of Ngok presence in the area claimed by the SPLM/A”. The “most northerly indication of Ngok” is the word “dugdug” some miles north of Lukji on the Ragaba Um Biero.¹⁵⁷
123. H.A. MacMichael, an historian, wrote in 1922 that “the Humr country lies on the extreme west of southern Kordofan, from the neighbourhood of el Odaya to the Bahr el Arab, or ‘Bahr el Humr’”.¹⁵⁸
124. On the 1924 sketch map by Titherington, in 1924, on the left bank of the Um Biero, just north of the Bahr el Arab, there is an annotation stating: “Abyei [Ch Kwol Arob’s since 1918]”.¹⁵⁹ The Kordofan Tribal Distribution Map of 1927 shows the “Mareig” (Ngok) Dinka next to Abyei, marked well to the south of the Ragaba ez Zarga.¹⁶⁰
125. In 1933 Henderson travelled from Muglad to Abyei by way of Tebeldiya, Antilla, Lukji and Na’am. It was not before Lukji, approximately 16 kilometres north of the Bahr el Arab that Henderson reported the first Ngok houses.¹⁶¹ Lukji is to the south of the Ragaba ez Zarga.
126. The “Grazing Areas Map” produced by the Civil Secretary’s Office and dated 1933 places the Ngok grazing area to the south of the Bahr el Arab, south of 10° N, and 40 kilometres south of the 10° 10’ N line.¹⁶²
127. The map showing Native Administrations of Kordofan Province, dated 1941,¹⁶³ shows the Dinka confined to a small, semi-circular area around Abyei, on the Bahr el Arab. That area is about 3,000 square kilometres. The area claimed by the SPLM/A is 23,300 square kilometres.
128. As recalled in Part 2 of this Dissenting Opinion, P.P. Howell, who is cited in the Award,¹⁶⁴ wrote in some detail on the locations of the Ngok. In 1948, Howell noted:

“The Ngok Dinka of Western Kordofan live along the middle reaches of the Bahr el Arab and its tributaries . . . During the dry season the Homr Messiria

¹⁵⁶ *Ibid.*

¹⁵⁷ See Transcript, 21 April 2009, 98/3-6 (Crawford).

¹⁵⁸ H.A. MacMichael, *A History of the Arabs in the Sudan* (Cambridge: Cambridge University Press, 1922), p. 286. GoS Memorial, Annex 41.

¹⁵⁹ Additions and Corrections to Sketch of Dinka Country (Khartoum: Sudan Survey Department, 1924). GoS Counter Memorial, Map 38.

¹⁶⁰ Kordofan Tribal Distribution Map (Khartoum: Sudan Survey Department, 1927), GoS Counter Memorial, Map 21.

¹⁶¹ K.D.D. Henderson, “Route Report: Muglad to Abyei”, March 1933. GoS Counter Memorial, Annex 38.

¹⁶² Grazing Areas Map, 1933, Civsec 66/4/35 Vol. I p. 95. GoS Counter Memorial, Map 22a.

¹⁶³ Native Administrations of Kordofan Province (Khartoum: Sudan Survey Department, 1941). GoS Memorial, Map 27.

¹⁶⁴ Award, paras. 720 *et seq.*

mingle freely with them in pastures and they have a long history of contact with the Arab world – probably for at least a century.”¹⁶⁵

129. In a work published in 1951, to which reference has also been made in Part 2 of this Dissenting Opinion, Howell noted:

“The Ngork Dinka, whose population is estimated between 20,000 and 25,000, occupy an area along the middle stretches of the Bahr el Arab. They border the RUENG ALUR Dinka in the south-east and the TWIJ Dinka to the south, and with both these Dinka peoples they have close cultural affinities. To the south-west are the MALUAL Dinka. North of the Ngork are the Baggara Arabs of the MESSIRIA HOMR with whom they have direct seasonal contact and they are therefore on the most northerly extremities of the Western Dinka block, lying between the Nilotics of the south and Muslim peoples of the north . . . Administrative action . . . has placed the Ngork in Kordofan Province and the Rueng in the Upper Nile Province . . . The Ngork Dinka of Western Kordofan occupy an area between approximately Long. 27° 50' E and Long. 29° on the Bahr el Arab extending northwards along the main watercourses of which the largest is the Ragaba Um Biero . . .”¹⁶⁶

130. Professor Ian Cunnison, in a sketch map, dated 1954, shows the Dar Humr, with the word “Ngok” printed to the South of the Bahr el Arab.¹⁶⁷ Cunnison wrote in 1966, in a study based on field work between August 1952 and January 1955:

“The Bahr is the name which the Humr give to the whole of this dry-season watering country. Within it they recognize different districts: the Regeba is the northern part of the Bahr, where the Humr make their earliest dry-season camps . . . the ‘Bahr’ proper is the region where the camps are made towards the end of the dry season, mainly around the largest watercourse, the Regeba Umm Biero and the Regeba Zarga . . . Finally, much of the Bahr has permanent Dinka settlements, although during most of the time that the Humr occupy it the Dinka are with their cattle south of the Bahr el Arab . . .”¹⁶⁸

Cunnison also wrote that “[t]he way in which the tribal sections move seems not to have varied much since the Reoccupation.”¹⁶⁹

131. R. Davies, a former Sudan civil servant, described the position of the Dinka in a 1957 publication in the following terms:

¹⁶⁵ P.P. Howell, 1948, P.P. Howell Papers, Sudan Archives, Durham, 768/2/15, cited in ABC Experts’ Report, Part II, Appendix 5.11, at p. 201.

¹⁶⁶ P.P. Howell, “Notes on the Ngork Dinka of Western Kordofan”, (1951) 32 Sudan Notes and Records 239, pp. 241-242. GoS Memorial, Annex 53, SPLM/A FE 4/3.

¹⁶⁷ I. Cunnison, “The Humr and their Land”, (1954) 35(2) Sudan Notes and Records 50, p. 50. SPLM/A FE 4/5. See also Figure A, *infra*.

¹⁶⁸ I. Cunnison, *Baggara Arabs: Power and Lineage in a Sudanese Nomad Tribe* (Oxford: Clarendon Press, 1966), pp. 18-19, SM Annex 33.

¹⁶⁹ *Ibid.*, at p. 26. “Cox and Box” is a 19th-century operetta with a libretto by F. C. Burnand and music by A. Sullivan, in which a landlord mischievously lets the same room to two lodgers, one of whom works at night and the other during the day.

“[The] Dinka, the great majority of whom belonged to Bahr el Ghazal Province, though by a freak of organization two sections of the tribe, Mareig and Ruweng, were for administrative purposes part of the Western Kordofan inspectorate.

The reason for this arrangement was that these sections played Cox and Box with the Homr in the occupation of the shallow basin of the Bahr el Arab river, which was the theoretical boundary between the two provinces. When the Homr went south to it in the dry season, the Dinka withdrew still farther south into the Bahr el Ghazal; but when the rains came and the Arabs took their cattle north to the area of El Muglad, the Dinka, whose small bred of cattle had acquired immunity to fly-borne disease, moved up and occupied the river region, where their animals profited from the grass.”¹⁷⁰

132. Sir James Robertson, Civil Secretary of the Sudan Government from 1945 to 1953, wrote on the Humr and Dinka as follows:

“Further south, the Humr section of the Messeria centred round Muglad and Keilak in the rainy season, migrating in the late autumn southwards to the green pastures of the Bahr el Arab, where water and grass could be found in plenty for their cattle during the dry season. The cattle nomads on the river mingled with the tall Nilotic Dinkas, of whom, one tribe, the Ngok, was administered by Western Kordofan, and other, the Twij and the Malwal, came north from Tonj and Aweil districts of Bahr el Ghazal Province . . . About eighty miles south of El Odaiya is Muglad, the centre of the Humr Administration, where there was a small office and a police post. From Muglad it is still another hundred miles south to Abyei near the Bahr el Arab, where Chief Kwal Arob presided over the destinies of the Ngok Dinkas . . . Chief Arob of the Ngok Dinka lived in a buffer area between the Arabs and the great mass of the Dinka to the south . . .”¹⁷¹

133. Michael Tibbs wrote, on taking up his appointment as Assistant District Commissioner for Dar Messeria in the early 1950s:

“As I read through the Messeria section of the District files, the task and the distance seemed formidable, I would be looking after an area of 25,000 square miles. Most of this was the territory of the Messeria tribe. They are cattle owning Arab nomads, some 90,000 of them. Also within the area there were three other ethnic races. In the south on either side of the Bahr (river) el Arab, lived the Ngok Dinka, numbering 30,000 . . .”¹⁷²

134. Professor Martin Daly, in his expert testimony in these proceedings, notes the following concerning the location of the Ngok Dinka in 1905:

“We are left then with the conclusion that the best documentary evidence so far located for the northern boundary of the area of the nine Ngok Dinka chiefdoms in 1905 remains, in the opinion of this historian and as of the

¹⁷⁰ R. Davies, *The Camel's Back* (London 1957), p. 130. GoS Memorial, Annex 35.

¹⁷¹ J. Robertson, *Transition in Africa* (London: C. Hurst, 1974), pp. 42, 44, 50. GoS Memorial, Annex 45.

¹⁷² M. Tibbs and A. Tibbs, *A Sudan Sunset* (privately published, Welkin, 1999), “Dar Messeria”, p. 55.

date of the present report, Wilkinson's itinerary of 1902, which establishes a permanent Ngok presence on the Ragaba al-Zarqa."¹⁷³

On being questioned on that statement in cross-examination by Professor Crawford, Professor Daly admitted that he could not point to anything in Wilkinson's itinerary that established, or where Wilkinson said that there had been established, a permanent Ngok presence on the Ragaba ez Zarga.¹⁷⁴

2. Evidence of Homr Occupation

(a) Evidence from up to and including 1905

135. Wilkinson made detailed observations on Ngok and on Homr locations, as described in his Itinerary No. 101, "El Obeid to Dar El Jange".¹⁷⁵ In the section beginning on page 153, "From Kadugli to Keilak", Wilkinson noted that the road crosses the outlet from Lake Keilak, and then noted, two miles from that crossing: "Keilak is a series of groups of tukls badly built and inhabited by Homr Arabs who possess few flocks, a few horses, and appear to live on the Nubas."¹⁷⁶ Six and a half miles from Keilak, he noted "El Geref; Homr settlement".¹⁷⁷ After proceeding 35¾ miles south-west from the Homr settlement at El Geref, he noted "... El Debekir was reached. Here there was an Arab (Homr) settlement ...".¹⁷⁸ From El Debekir, 16¾ miles on, he noted: "... El Anga on river is reached. Here there is an Arab settlement ...".¹⁷⁹ Five and a half miles from the Arab settlement at El Anga, he noted that "... Kuek is reached ... Large Arab settlement and many cattle."¹⁸⁰
136. With the aid of the sketch map drawn by Wilkinson, Kuek has been located at latitude 28° 58' E, 10° 12' N. Six miles south-west from the large Arab settlement at Kuek, Wilkinson noted: "H. Debib ... a few Homr Arabs living here ...".¹⁸¹ The next mention of the Homr is at Fauwel; between H. Debib and Fauwel, three and a half miles from H. Debib, Wilkinson noted "Fula Hamadai ... Small villages – mere collection of three or four huts passed at El Jaart and Um Geren" and then, 11¾ miles from Fula Hamadai, "village named Fut was passed". All of these were before "the first Dinka village of Bombo is reached" (just over 14 miles south of what was really the Ragaba ez Zarga), thus it can safely be inferred that Fula Hamadai, El Jaart, Um Geren and Fut were Homr locations.
137. Some 19 miles from H. Debib, Wilkinson noted: "Fauwel is reached. Large Arab settlement; much water in river, and an open expanse 1¾ miles surrounded by

¹⁷³ SPLM/A Memorial, First Report of Professor Martin Daly, p. 49.

¹⁷⁴ Transcript, 22 April 2009, 117/16-20 (Crawford/Daly).

¹⁷⁵ Wilkinson, *supra* note 129, at p. 154.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*, at p. 155.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

reeds. Geese and waterfowl. Homr Arabs here very wild, but possess many cattle, goats and sheep.” Fauwel, using Wilkinson’s sketch map, can be located at 9° 53’ N, south of the “shared grazing rights area” of the ABC, about 32 kilometres due south of the 10° 10’ N line.

138. In his Itinerary No. 102, “River Kir to Fauwel”, Wilkinson described his journey starting from Sultan Rob’s settlement on the River Kir and going towards Fauwel. Towards the Ragaba ez Zarga, 29¼ miles from Sultan Rob’s settlement, he noted reaching “Abu Kareit, on [Ragaba ez Zarga]. Homr settlement.” Three and a quarter miles further on, he notes reaching “Mellum, an Arab settlement”. These locations are both south of 9° 50’ N.
139. At the end of that Itinerary, Wilkinson set forth a “General Description of Bahr el Arab and Dar El Homr”. In this he stated: “Only in a few places, Fauwel, Keilak, and Kuek, do the Homr Arabs remain throughout the year, as they say that the flies and mosquitoes torment man and beasts to such an extent as to make life unbearable.”¹⁸² This statement is significant first because it shows that Homr’s presence as far south as Fauwel was not exclusively transitory. But also significant is the fact that some Homr Arabs clearly remained in this area even during unfavourable conditions. In itself, the presence of the Homr Arabs throughout the year at Kuek and Fauwel, in spite of the seasonal conditions rather than because of them, suggests that those people did not have a fully nomadic existence. This theory is corroborated by Howell in 1951 who notes that “the Ngork are no different from other Nilotic cattle-owners, nor indeed in general principle from the Baggara Arabs who live to the north of them.”¹⁸³
140. Mahon Pasha in 1903 described places at which he collected tribute in his report annexed to the Sudan Intelligence Report No. 104 of March 1903. He describes assembling the Sheikhs and collecting tribute from them at Dehka, Fauwel, and Um Semina. These are by necessary implication Arab locations because Mahon Pasha states that it “would not be the slightest use trying to collect tribute” from the Dinka “until there is a Mamur and a post in that direction”.¹⁸⁴ It has not been possible to pinpoint the location of Dehka from the map evidence in the record; Mahon Pasha describes it as being Dehka was “south-east” of Turda¹⁸⁵ but it may not have been far from Turda which is at 10° 20’ N. Fauwel is located according to several sources at about 9° 52’ N, 28° 50’ E. Um Semina has been located at around 9° 47’ N, 28° 36’ E.
141. Mahon Pasha recorded that, when the Sheikhs at Fauwel and Um Semina failed to pay the colonial tribute within three days, he
- “made some of the Sheikhs prisoners and seized cattle and horses to the value of about three times their tribute. I told them that if they liked they

¹⁸² Gleichen Handbook, *supra* note 138, at p. 156.

¹⁸³ Howell, *supra* note 166, at p. 245.

¹⁸⁴ Mahon Pasha, *supra* note 132, at p. 19.

¹⁸⁵ *Ibid.*

could pay and redeem their property, but must pay 40L extra as a fine. They all paid before I left the country.”¹⁸⁶

It is significant that Fauwel and Um Semina the Homr were not only present, but they were paying taxes to the administration there, and in fact the tax was extracted on pain of imprisonment and confiscation of property.

142. It is thus clear from the reports of Wilkinson and Mahon Pasha that the presence of the Homr Arabs as far south as Fauwel and Um Semina was a fact which the Condominium authorities officially recognized, to the material detriment of those Homr. Mahon Pasha recorded in the same place that there was as yet insufficient infrastructure to collect tax from the Ngok Dinka in that direction. It would be most strange to regard as only fleeting and transitory, and as a matter of grazing by permission in the territory of another, a presence which was recognized for tax purposes by the long arm of the Condominium administration. However, there is no reason to imagine that the administration might have been so heavy-handed as to exact, using force, tax tribute in at sites where the taxpayers were merely temporarily passing through as nomads, there is clear evidence showing that at one of those locations, Fauwel, the Homr remained throughout the year.

143. Percival, who began his trek from Keilak on 12 November 1904, noted that there was “a small Homr Arab settlement at Keilak”. Percival was unable to obtain a guide at Keilak; he noted on leaving on 13 November: “Made an Arab accompany me, but he was very unwilling and did not even want to put me on the track out of the village”, and on 16 November he noted: “Have let the Arab go back to Keilak as he cannot give me any information.” Percival travelled 56 miles south-west before he “Found remains of huts three years old” at a khor.¹⁸⁷ A further 39 miles on, he came to what is now known as the Ragaba ez Zarga, where he noted:

“I have been up and down the river but can find no trace of inhabitants. The country between here and the Jebels would appear to be uninhabited, as I should think that I would be bound to have found some traces of natives if any had been about lately.”¹⁸⁸

Percival’s notes show that from Keilak up to the Ragaba ez Zarga and up and down that Ragaba, he made sightings of neither Homr nor Dinka.

144. After he crossed the Ragaba ez Zarga, at Amakok, on 30 November 1904, Percival noted that he “sent out parties one of whom brought in Dinkas who were driving cattle south as hard as they could. I surprised them and they thought we were Arabs raiding, but I found them very friendly and obtained a guide.”¹⁸⁹ After Amakok Percival recorded that he encountered several villages, including Yai, Lahr, and Yamoi. Since he was in the care of a Dinka guide – who was quite possibly of the Ngok tribe, but this is not specified – it would be fair to infer that those were

¹⁸⁶ *Ibid.*

¹⁸⁷ Percival, *supra* note 134, at p. 1.

¹⁸⁸ *Ibid.*, at p. 2.

¹⁸⁹ *Ibid.*,

Ngok Dinka villages, and in the case of Lahr this has been independently corroborated.

145. Percival trekked on 27 November from Bongo to Burakol where he noted that “Sultan Rob is at present living”. Percival noted that

“Sultan Rob told me that there are only Homr Arabs west of him. The [Ragaba ez Zarga] is uninhabited he told me except for occasional wandered parties of Arabs. He knew Chak Chak which he said was the next lot of natives to those he ruled.”¹⁹⁰

Percival also described Sultan Rob’s authority:

“He seemed to have a good deal of authority & is very loyal I should say. He corresponds with El Obeid and says he has not been fighting the Arabs since the Government came to see him & that the Homr Arabs are fairly quiet, but I gathered that they do not trust each other much yet.”

The fact that Sultan Rob was able to make such observations on the quietness or otherwise of the Homr corroborates Wilkinson’s evidence that the Homr were located on the Ragaba ez Zarga.

146. Lloyd, writing on Kordofan in the Gleichen Handbook,¹⁹¹ under the sub-heading, “Nomads, Baggara”, lists the “most important tribes” of the nomads or Baggara, stating that “[t]he Homr, south of El Eddaiya towards the Bahr El Arab, are a large and fairly rich tribe, and the Gimma, near Gedid, the majority of whom, however, have permanent houses”. The Homr are also listed in a table showing “Tribes and Sheikhs”.¹⁹² They appear as follows:

Homr	Ali Gula (Nazir)		Large and comparatively rich Baggara tribe, owning cattle and horses. At present (1903) pay ££450 tribute.
Ageria Walad Omran	Muhammed Khadson	Muglad	
Agaira Walad Kamil	Masood Iriz	Muglad to Bahr el Arab	
Felaita	El Hag Wad Yagob	Keilak and Abiad Lakes	

147. Appendix G of the Gleichen Handbook is entitled “Boundaries of Provinces (Defined)”.¹⁹³ Under “Kordofan” it states, in relevant part:

¹⁹⁰ *Ibid.*, at p. 3.

¹⁹¹ Gleichen, *supra* note 138, at p. 179.

¹⁹² *Ibid.*, at p. 327.

¹⁹³ *Ibid.*, at p. 335.

“From Lake No up the Thalweg of the Bahr el Ghazal and roughly westwards along the 9 degree parallel. Sultan Rob and Dar Jange belonging to Kordofan. The western boundary is the eastern frontier of Darfur, which leaves Um Badr and Foga to Kordofan and Kaja to Darfur, thence in a south-westerly direction to Dam Jamad, thence southwards, leaving Zernak, Um Bahr, Wad Zarag, Gad El Habub and Sherafa to Kordofan. Thence southwards to the Bahr El Arab, leaving the . . . Rizeigat to Darfur, and the Homr and Dar Jange to Kordofan.”

The Homr are thus mentioned in connection with the boundary at the Bahr el Arab so they must have been present on or near the Bahr el Arab for at least some of the year.

(b) Evidence from after 1905

148. A figure illustrating the continuity from 1927 to 1954 in the general outline of the “dar” of the Homr or Misseriya is appended to this Part.¹⁹⁴

149. The 1906 sketch map by Comyn situates the Homr on the Bahr el Arab, just above 10° 0' N.¹⁹⁵

150. Huntley Walsh reported hearing that there was a Homr raid on Sheikh Aweng’s village “immediately after the last Bahr El Arab expedition left for Khartoum” and that Sheikh Rob and Ali Gula work together.¹⁹⁶ He then stated, later:

“The Arabs, according to the Nuers and Dinkas have been causing trouble again, having taken a lot of cattle and 50 children from the next village above this. . . . I calculate I am only 40 miles roughly from the mouth of the river. Natives tell me it is one day’s march to Sultan Rob’s across country, and three days by river in canoes.”¹⁹⁷

151. Lloyd wrote extensively on the Homr in several publications. In his “Notes on Dar Homr,” of 1907, Lloyd wrote that “[t]he Homr are divided into two chief divisions . . . east of Turda and Fael”.¹⁹⁸ This corroborates the evidence of Wilkinson dated 1902 that the Homr were located around Fauwel.¹⁹⁹ In a Report on a Tour of Inspection of Kordofan Province, Lloyd noted that: “The Walad Omrau section goes to Fawel, Fut, Kuek, and Turda.”²⁰⁰

¹⁹⁴ Figure A, *infra*.

¹⁹⁵ Sketch map of the western sources of the Nile (London: Royal Geographical Society, 1907). GoS Memorial, Map 7.

¹⁹⁶ Huntley Walsh, *supra* note 139, at p. 15.

¹⁹⁷ *Ibid.*, at pp. 15-16.

¹⁹⁸ Lloyd, *supra* note 142.

¹⁹⁹ See Wilkinson, *supra* note 129, at p. 156.

²⁰⁰ Sudan Intelligence Report No. 162, (January 1908), Appendix G, p. 56. SPLM/A FE 3/4.

152. Hallam, writing in 1907, described Arab camps and dry season camping grounds along the Umm Biero at R. El Sayar, R. El Sorik (dry season), R. Abu Dinat (dry season), R. Fadlulla (dry season), and Saheb.²⁰¹

153. The 1908 “Report on Kordofan Province”, edited by Lloyd,²⁰² includes extensive and detailed notes on the history and the human and physical geography of Kordofan. It describes the dry season camps of the Homr as follows:

“The Homrs cultivate round Muglad and Baraka, but as soon as the water dries up they migrate southwards to the Bahr El Homr. The Homr Ageira dry season camps and the Badana occupy them as follows, reading down stream from the frontier:

Place.	Badana	Remarks.
Bok	Fairom	Wells when dry.
Dawas	”	
Bambon	”	
Antila	”	
Fugara	Dar Um Sheiba	Wells when dry.
Abu Erdu		
Goli	Dar Muta	Wells when dry.
Bueidat	Dar Salam	” ” ”
Abu Azala	Dar Muta	” ” ”
Abu Uruf	” ”	” ” ”
Damsoi	Kalabina and Mizagina	” ” ”
Fagai	” ” ”	” ” ”
Mellum	” ” ”	” ” ”
Hasoba	” ” ”	” ” ”

...²⁰³

154. The Report continues, in the same section:

“The Walad Umran section goes to Fauwel, Fut, Koak, and Turda. The Homr Felaita to Keilak and the Abiad. Each Badana has a road of its own from their cultivation and rain camps near Muglad to their dry season camps on ‘El Bahr’.”²⁰⁴

155. Those roads are mentioned in the same Report where it describes the physical geography of Southern Kordofan, and it is worth reproducing that description in full:

“West of Dar Nuba is Dar Homr, a vast plain extending far beyond the frontier. This plain is sandy north of Muglad, but black soil covered with thick bush to the south. The black mud is, however, crossed by sandy belts running S.E. and N.W. along which are the roads from Muglad and Baraka, where the

²⁰¹ H. Hallam, *Route Report: Dawas to Dar Jange*, December 1907, p. 2. GoS Counter Memorial, Annex 31. Hallam’s sketch map is annexed to the GoS Counter Memorial, Map 16b.

²⁰² Sudan Intelligence Report No. 171 (October 1908), Appendix D. GoS Memorial Annex 18, SPLM/A FE 3/5.

²⁰³ *Ibid.*, at p. 53.

²⁰⁴ *Supra* note 202, at p. 53. GoS Memorial Annex 18, SPLM/A FE 3/5.

people have their cultivation, to the Bahr El Homr, where they go in the dry season.”²⁰⁵

In the same section, the Report states:

“In the south, about Latitude 10°, is the Bahr El Homr, which rises some thirty miles across the Darfur frontier and flows eastwards to Hasoba, where it turns south-east and joins the Bahr El Ghazal. It flows through a very flat country, but has not a very wide basin. It is on an average about 100 yards wide, and its upper reaches have steep well-defined banks from 10 to 15 feet high; but it is full of grass. When it dries up (about January) wells are dug in the bed, from which the Homr water thousands of cattle, until the rains and fly drive them north to their cultivation area near Muglad. Some thirty miles south is the Bahr El Arab (or Gurf), which forms the southern boundary of the Province.”²⁰⁶

156. Whittingham, in 1910, produced a sketch map where he noted what he thought was the “probable boundary” between the Dinka and the Homr.

157. As noted above,²⁰⁷ Heinekey recorded Homr cattle and Homr camps on his way to Gerinti, and, north of Mek Kwal’s village, only Homr. He stated that “[f]rom Gerinti to Mek Kwal’s village, there is no track of any sort.”²⁰⁸ Later in the same section he noted, “[t]he Arabs when they go down to Kwal to buy grain do not go along the Gurf but along the Ragaba Um Biero which flows parallel to and North of the Gurf.”²⁰⁹ This remark suggests that Gerinti was populated by those “Arabs” rather than by the Ngok.

158. In Sudan Intelligence Report No. 324 of July 1921, F.C.E. Balfour noted:

“Relations with Arabs – Remain good. Arab and Dinka herds grazing side by side on the lower reaches of the Ragaba Um Biero, and the Dinka (Bongo section) have shown their confidence in the Arabs by extending their permanent villages farther to the North of the Gurf.”²¹⁰

159. The historian H. MacMichael, in 1922 placed the Homr “between El Odaya and the Bahr el ‘Arab”.²¹¹ He noted that “[t]he Humr country lies on the extreme west of southern Kordofan, from the neighbourhood of El Odaya to the Bahr el ‘Arab, or ‘Bahr el Humr’. In the rains the Homr are between Muglad and the confines of the Hamar to the north, but in the dry season they and their cattle move southwards to the Bahr el ‘Arab, where they come into contact with the Dinka.”²¹²

²⁰⁵ *Ibid.*, at p. 34.

²⁰⁶ Sudan Intelligence Report No. 171 (October 1908), Appendix D, at p. 35.

²⁰⁷ *Supra* notes 152, 153, 154.

²⁰⁸ *Supra* note 153.

²⁰⁹ *Ibid.*

²¹⁰ Sudan Intelligence Report No. 324 (July 1921), report of F.C.E. Balfour, at p. 6. SPLM/A FE 18/5.

²¹¹ H.A. MacMichael, *supra* note 158, at p. 273.

²¹² *Ibid.*, at p. 286.

160. Professor Ian Cunnison wrote in 1966, in a study based on field work between August 1952 and January 1955:

“The Bahr is the name which the Homr give to the whole of this dry season watering country. Within it they recognize different districts: the Regeba is the northern part of the Bahr, where the Homr make their earliest dry-season camps . . . the ‘Bahr’ proper is the region where the camps are made towards the end of the dry season, mainly around the largest watercourse, the Regeba Umm Bioro and the Regeba Zarga . . . Finally, much of the Bahr has permanent Dinka settlements, although during most of the time that the Humr occupy it the Dinka are with their cattle south of the Bahr el Arab . . .”²¹³

Significantly, Cunnison noted that “[t]he way in which the tribal sections move seems not to have varied much since the Reoccupation.”²¹⁴ The same book includes a sketch map of Homr Migratory Routes, which shows the “areas and migration routes” of the Homr omodiyas (sub-sections), with those of Fayyarin and Salamat (Feilata) situated on the Bahr el Arab and its tributaries; the Ngok Dinka are indicated just south of Abyei and south of the Bahr el Arab.²¹⁵

161. In his witness statement in these proceedings, also cited elsewhere in this Dissenting Opinion, Professor Cunnison described the Homr migration as follows:

“The indications are that the Humr have lived in this area since at least the early 1800s. Their semi-migratory life revolves around the movement of their cattle (I refer to the 1950s, but there is reason to believe that the pattern of life is of long standing). Attached is a map, taken from my book, which depicts the migratory patterns as I observed it and participated in it. During the wet season the Humr lived in settled camps to the north of the Babanusa, as indicated on the map. As the dry season came, they moved first briefly to the Muglad where the cattle grazed on the remains of the millet harvest. They then moved south through the extensive sandy Goz to the area called the Bahr: this is the area around the Bahr al-Arab and the Regeba Zarga. Here, water and good summer grazing are to be found. They lived in scattered camps across this region during the summer months (January-May). For part of this time they shared the area with Dinka, whose permanent houses were dotted around; but shortly after the arrival of the Humr sections, most of the Dinka would decamp further south to their dry season areas. During my time in Western Kordofan, there was a good relationship between Humr and Dinka. I knew the Dinka leader, Deng Majok, who was an impressive man.”²¹⁶

162. Regarding the ABC Experts’ conclusions Professor Cunnison says:

“The Goz overlaps the so-called ‘Shared Rights Area’ of the ABC Report. In describing that area in this way it seems to me the ABC was fundamentally

²¹³ Cunnison, *supra* note 168, at pp. 18-19.

²¹⁴ Cunnison, *supra* note 168, at p. 26.

²¹⁵ Cunnison, *supra* note 168, at figure facing p. 20, cited *infra*, note 216.

²¹⁶ Witness Statement of Professor Ian Cunnison, 3 December 2008, para. 6. GoS Memorial, p. 190. Emphasis added.

mistaken. I did not observe this as an area of shared rights at all; nor was the 'dividing line' drawn by the ABC within that area in any way regarded as a boundary between Humr and Dinka. The Dinka were to the south, as I have said. Some Dinka sought employment in Muglad. It was not unknown for individual families to travel north and be, so to speak, 'adopted' into one or another of the omodiyas of the Humr. They might also take surplus cattle north to market. But they did not exercise regular grazing or similar rights in the so-called 'Shared Rights Area'. The real area of sharing was further south, in the Bahr. There the two groups co-existed for a fairly short season – but this was not a 'host-guest' relationship. At this season it was the Dinka who, apart from a few caretakers, left to go south as part of a transhumance pattern rather than one of nomadism. As I noted in my book (p. 19) 'much of the Bahr has permanent Dinka settlements, although during most of the time that the Humr occupy it the Dinka are with their cattle south of the Bahr al-Arab'. I never observed the Humr asking permission from Dinka to come to the Bahr, and they did not consider themselves as visitors there. The whole region was regarded by the Humr as their 'dar' or country. On the map on p. 5 of my book (attached) I show the area I knew as 'Dar Humr': it covers the whole south-western corner of Kordofan and includes an area south of the Bahr al-Arab. The table on p. 22 shows that during 1954, the cattle of one section of the Mezaghna omodiya spent more time, and more continuous time, in the Bahr (142 days) than in any other of the four main areas of Dar Humr."²¹⁷

163. The sketch map by Michael Tibbs shows the outline of the Dar Messeria, which extends below the Bahr el Arab about 25 miles south of Abyei.²¹⁸
164. The evidence of Homr occupation, taken together, suggests a strong degree of continuity of Homr occupation of the area shown in the sketch maps of Cunnison and Tibbs and shown also in the Kordofan Tribal Distribution Map of 1927. Figure A at the end of this Part of this Dissenting Opinion reproduces the sketch maps of Cunnison (1954) and Tibbs (1999) and the relevant part of the Kordofan Tribal Distribution Map, in order to illustrate the continuity of Homr occupation, in the relevant area, which is apparent on the face of the record.

²¹⁷ Witness Statement of Professor Ian Cunnison, 3 December 2008, para. 6. GoS Memorial, p. 190. Emphasis added.

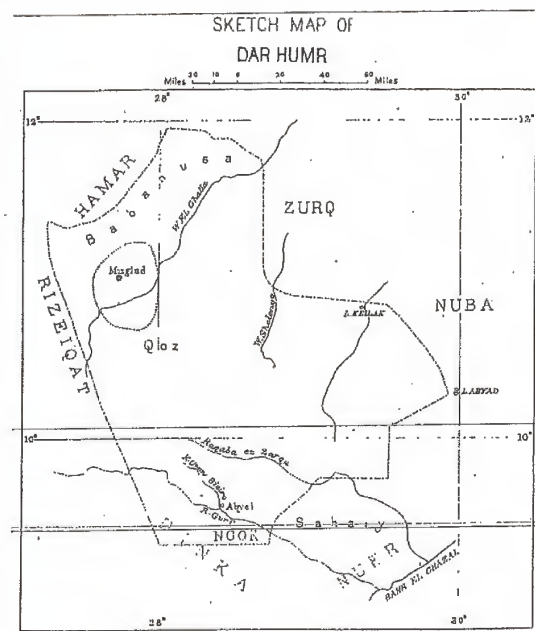
²¹⁸ Michael and Anne Tibbs, *A Sudan Sunset*, at p. 50. GoS Memorial, fig. 12, p. 129.

Figure A
Continuity of Occupation of the Dar Homr and Dar Messeria



(a) Kordofan Tribal Distribution Map, 1927

Sudan Survey Department
 GoS Counter Memorial, Map 21



(b) Cunnison Sketch Map, 1954

“The Humr and their Land”, 35(2) Sudan
 Notes and Records 50, p. 50
 SPLM/A Memorial, Fact Exhibit 4/5



(c) Tibbs Sketch Map, 1999

Michael and Anne Tibbs, *A Sudan Sunset*, (privately
 published: Welkin, 1999), p. 55
 GoS Memorial, Fig. 12, p. 1

8. Procedural Excess

165. Having shown that the two crucial stages in the Experts' thought process have no foundations, I shall turn now to the important question of the procedural framework within which the Experts' mandate was conferred on them and within which they were expected to operate.

166. It is readily apparent that the ABC, whilst a juridical entity, was by no stretch of the imagination a judicial or an arbitral body. It is out of the question to seek to endow its findings with qualities of *res judicata* or finality that it simply did not and could not possess. This is also accepted by the Award. However, the findings of the Commission are not without validity or finality. They are "final and binding" by virtue of Article 5 of the Abyei Appendix, which this Tribunal is mandated to apply under Article 3 of the Arbitration Agreement. Appendix 5 provides:

"The ABC shall present its final report to the Presidency before the end of the pre-interim period. The report of the experts, arrived at as prescribed in the ABC rules of procedure, shall be final and binding on the parties."²¹⁹

167. In other words, the finality and binding nature of the Report is not innate but emanates solely from the Parties decision to accept it which is conditioned.

168. The language of the mandate could not have been clearer. To be final and binding, the Report had to be arrived at as prescribed in the rules of procedure. These rules are therefore mandatory and non-compliance with them would, *per se* and without the need to show prejudice, constitute an excess of mandate. The clarity of the mandate is in inverse relationship to the margin of appreciation of the Commission including its Experts. The obligations of the Experts were not simply to discharge their mandate but to do so in a specific manner, i.e., in accordance with the rules of procedure. This was the condition for the acceptance of the report in advance as final and binding. The Experts, acting in lieu of the Commission, violated these rules of procedure on four counts.

a. By holding meetings at the Khartoum Hilton on 21 April, 6 May and 8 May with Ngok Dinka individuals, they obviously went beyond the procedural framework under which they were mandated to follow a particular schedule.

b. By "sneaking in" their Report before a meeting of the Commission as a whole had a chance to assemble with the aim of arriving at a consensus. This was a safety valve reflecting the fact that the Presidency of Sudan had not given a *carte blanche* to the Experts to make decisions affecting the potential disposition of the territory of Sudan as they wished. The suggestion that the Presidency may not have received the Report had it known in advance its contents, apart from being speculative, does not take cognizance of the fact that the ends do not justify the means and that the Experts' mandate could not go beyond the limits of the Parties' consent which clearly circumscribed their mandate by a clear procedural framework. This procedural

²¹⁹ Emphasis added.

framework was aptly summarized by Ms Malintoppi appearing for the GoS, and it is worth reproducing this in full:

“It is evident from reading the Rules of Procedure that the experts adopted a chronological approach to the tasks that were to be undertaken, starting with a reference in Rule 2 to the Commission’s opening meeting on 10th April 2005, and ending with Rule 16, where the experts would, at the end, appoint technical personnel to survey and demarcate the boundary on the land.

In addressing the requirement that the Commission endeavour to reach a decision by consensus, the SPLM/A basically stops at Rules 12 and 13. Rule 12, it will be remembered, states that the Commission will reconvene in Nairobi at a date in May to be determined, and that the parties will make their final presentations at that time.

At the time of the parties’ final presentations the proceedings were essentially at the advocacy stage. Each party was setting out or explaining its position.

Then Rule 13 provided that afterwards the experts will examine and evaluate all the material they have gathered and prepare the final report.

However, that was not the end of the process, for Rule 14 then stipulated that the Commission – and again I emphasise the Commission as a whole – would endeavour to reach a decision by consensus. This necessarily meant that the Commission would discuss the report prepared by the experts, and after the parties’ final submissions it would endeavour to reach a decision by consensus. It was only if an agreed position at the time was not achieved that the experts would have the final say.

This step, the effort to reach a consensus on the report prepared by the experts, is the missing link in the actual chain of events. The parties never saw the report before it was presented to the presidency. They were given no chance, as part of the Commission, to attempt to reach a consensus on it.

[. . .] [T]his was disregard for a fundamental and essential part of the process that was envisaged. And yet, what is the evidence offered by the SPLM/A that there had indeed been efforts at reaching consensus? Nothing other than witness statements which have been refuted by the Government’s own witnesses.”²²⁰

c. The Experts committed an excess of mandate also by consulting a U.S. diplomat about the interpretation of their mandate. The argument that this should be excused because no objection was raised to their consulting Cunnison or Tibbs is unconvincing. The consultation of British Archives and other relevant sources on Sudan, namely, the views of individuals informed about the historical facts, was expressly included in the procedural framework under Article 3.4 of the Terms of Reference of the ABC. But to try to verify an interpretation of their mandate from a third party is outside the procedural rules. If the Experts were not sure about the

²²⁰ Transcript, 20 April 2009, 38/1-25, 39/1-19 (Malintoppi).

meaning of their mandate, they should have sought clarification from the Parties but should not have sought to rewrite the agreement of the Parties by resort to a third party.

169. It is clear from the above analysis that the obligation on the ABC Experts was an obligation of means. They had, to fulfil their mandate, to follow a certain procedural course. Moreover, compliance with that condition was part and parcel of their mandate and not, as wrongly asserted in the Award, part of their conduct. This is clear from reading together Article 3 of the Arbitration Agreement and Article 5 of the Abyei Appendix.

9. The Substantive Mandate

170. The Award distinguishes first between the substantive mandate of the Experts and their procedural mandate,²²¹ a well established distinction in law and a readily discernible one. However it seeks to make a distinction between the Experts' interpretation of their mandate and their implementation of it.²²² This distinction, though often made in legal parlance (perhaps too often made), is in fact almost always impossible to maintain. One example would suffice to illustrate the point. The Experts' decision to rely on "land uses" and "ecological evidence" flows directly from the choice of a "predominantly tribal" interpretation and is therefore a matter of implementation of the mandate rather than of its interpretation. If a "predominantly territorial"²²³ interpretation had been chosen instead by the Experts, there would in all likelihood be no place for reasoning based on "land use" or "ecological evidence". That might well be so, but, there is always an element of interpretation of the mandate, even as the implementation of it progresses. In other words, interpretation and implementation are present throughout the Report and they cannot be divided into distinct mental stages. It is preferable to think of the carrying out by the Experts of their mandate, from their choice of "interpretation" to the ultimate delimitation, as a continuous thought process. It would follow that there cannot be two standards, one, of correctness, in the first stage, and another, reasonableness applying in the second.

171. Having made this preliminary remark, I shall turn now to the substantive mandate itself. The Award has made a number of assumptions without basis or supporting evidence; it has chosen standards which, be they from commercial, investor-state or even from inter-State arbitration, are mostly subject to pre-existing treaty or institutional frameworks and are wholly unsuited to the present arbitration. The Award has reduced the scope of review to one ground, lack of reasoning, and even then it has reduced the standard of "reasoning" to formalisms which it has applied inconsistently. Further the Tribunal has tried to shield the Experts' Report from criticism by ascribing to them, as "preferred arbiters of fact", a status wholly inappropriate in the present context. It has made a rigid distinction, with regard to

²²¹ Award, para. 440.

²²² Award, para. 515.

²²³ Award, para. 545.

our own mandate, between Sub-articles 2 (a) and 2 (c) of the Arbitration Agreement, and has tried unconvincingly to substantiate this distinction by a wishful interpretation of the Commission's composition and the expectations of the Parties from this Tribunal. In the event it has contradicted itself by not following this distinction but embarking instead on an uncharted route of "partial nullity" not provided for in the mandate.

172. I shall analyse these assertions in more detail.

a. The Proposition that the ABC's Singular Characteristics Included, but Went Beyond, Fact-Finding

173. The mandate of the ABC and its Experts is determined initially by its nature but ultimately by the will of the Parties as expressed in the mandate and as may be distilled from the object and purpose of the mandate and its negotiating history.

174. Regarding the nature of the ABC, it is undoubtedly a fact-finding commission charged in this instance with ascertaining and clarifying an historical event on the basis of scientific research, including archival research. Its Chairman and Members stressed its fact-finding nature on numerous occasions, some in fact cited in the Award.²²⁴ The proposition that in addition to its fact-finding nature it had also an adjudicatory aspect²²⁵ is totally baseless. A presumption entailing that, by implication, the Presidency of Sudan wished to give adjudicatory or prescriptive powers having an *ex nunc* constitutive effect to the Commission is not one to be lightly made. It is clear that the Report's final and binding nature does not *per se* bestow a prescriptive power on the Commission's decisions. Professor Hafner rightly pointed out that provisions both in the 1907 Hague Convention (Article 35) and the PCA Optional Rules on Fact-Finding Commission's of Enquiry (Article 24 (2)) allow for the possibility that the decisions of fact-finding bodies can be made binding.²²⁶ Moreover in the case of the *Treaty of Lausanne Advisory Opinion*,²²⁷ referred to by the Tribunal, the circumstances were totally different: a decision by the Council of the League of Nations to draw the boundary between Turkey and Iraq under an existing treaty is a world apart from asking social scientists to find out, on the basis of scientific study and resort to archives, an historical fact.

175. It is equally clear that the Experts could have returned a factual *non liquet* which would in fact have been the only proper thing to do had they come to the conclusion that the confusion was such that they could not carry out their task. To claim that the exigencies of the peace process dictated that the Experts could not return a *non liquet* is no more than an excuse that the ends justify the means, an excuse which is misplaced in the context of the delimitation of what could potentially become an international boundary.²²⁸ Finally even the reference to the Iraq-Kuwait

²²⁴ Award, para. 663.

²²⁵ Award, para. 483.

²²⁶ Award, para. 484.

²²⁷ *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne*, Advisory Opinion of 21 November 1925, PCIJ Rep. Series B, No. 12 (1925), cited in Award, para. 481.

²²⁸ Award, para. 428.

Boundary Demarcation Commission²²⁹ does not help, indeed it contradicts the Award's conclusions since the rationale for characterizing that body as "quasi-arbitral" was that it was conscious of and took into consideration a variety of rules of international law in its decision-making process.²³⁰ Moreover it included distinguished international lawyers.²³¹

b. The Proposition that the Experts are the Preferred Arbiters of Fact

176. In commercial arbitrations, particularly those of a scientific or technical nature, the deference given to specialists and experts is driven by two important and, in those contexts, understandable considerations. The first is that litigations cannot be left to linger too long and secondly that a body of lawyers cannot hope to possess within a relatively short time-span the experience of experts and their deep knowledge nor to match their familiarity with the subject-matter (the facts). The second of these considerations carries deep epistemological and moral implications which the reader will be relieved to know I am constrained by the extremely short time available from analysing. There is, to be sure, a more general consideration which is not confined to those two spheres but extends to interstate arbitrations, namely, that a degree of discretion and an assumption of good faith should be left to the body making the decision.²³²

177. But, for our immediate purposes, is the test appropriate for a group of experts who can by no stretch of the imagination be thought of as the repositories of some highly specialised branch of knowledge or the votaries of some esoteric science that the juristic mind (limited as I readily acknowledge) cannot penetrate and analyse? Surely the answer must be in the negative. The ABC Experts were two historians,²³³ a political scientist,²³⁴ a former diplomat²³⁵ and a professor of African land law.²³⁶ Hardly a year passes in which the International Court of Justice, to give only one

²²⁹ Award, para. 461.

²³⁰ K.H. Kaikobad, *Interpretation and Revision of International Boundary Decisions* (2007), p. 7, fn. 6.

²³¹ These included two Members of the UN International Law Commission, namely Ambassador Riyadh Al Qaisi of Iraq and Minister Ahmed Mukhtar Kusuma-Atmaja of Indonesia.

²³² In the *Case concerning the Arbitral Award of the King of Spain on 23 December 1906 (Honduras v Nicaragua)*, *Judgment of 18 November 1960: I.C.J. Reports 1960*, p. 192, the International Court of Justice was categorical in saying "The instances of 'essential error' that Nicaragua has brought to the notice of the Court amount to no more than evaluation of documents and of other evidence submitted to the arbitrator. The appraisal of the probative value of documents and evidence appertained to the discretionary power of the arbitrator is not open to question". In the present case there was not an evaluation of documents or maps, thus the post-1907 official maps are simply declared "inaccurate" or a line is drawn at 10° 10' N without evidence. The point is that for excess of mandate and not appeal purposes the discretion of the Experts or arbitrators to evaluate facts cannot be limitless. There has to be some factual evidence to evaluate. As noted above, in the *Orinoco Steamship Company* case, *supra*, note 69, the requirements of good faith and procedural propriety were also relevant to the degree of deference to be accorded to the original decision-maker.

²³³ Dr Douglas Johnson, professor of History at Oxford University, and Professor Godfrey Muriuki, professor of African History at the University of Nairobi. See Award, para. 467 and fn. 862.

²³⁴ Professor Kassahun Bernahu, Professor of Political Science, Addis Ababa University. See Award, para. 467 and fn. 862.

²³⁵ Mr. Donald Petterson, former US Ambassador to Sudan from 1992 to 1995. See Award, para. 467 and fn. 862.

²³⁶ Professor Shadrack Gutto, widely-published scholar of "subjects of regional and international, legal and political economy", and (since 2008) Professor of African Renaissance Studies, University of South Africa. See Award, para. 467 and fn. 862.

example, does not resolve territorial and delimitational disputes²³⁷ on the basis of history and geography, including not only the diplomatic history of States but also of local communities be they the sea people of the Malay world or the tribes of Western Sahara, and this in itself should have caused the majority to think before introducing this extra shield to protect further the Experts' Report from criticism.

178. Moreover, considering that the only ground for excess of mandate left by the Award is lack of reasoning, and that this reasoning itself had been reduced into mere formalisms, and considering that the reasoning of the Experts did not consist of pure reasoning but in misinterpretation of evidence and then misquotation (or quotation out of context) of sources, the degree to which the scope of review had been reduced becomes apparent. I do not find it conceivable that this is what the Parties expected when they framed this Arbitration Agreement in terms of excess of mandate. On the contrary, the legitimate expectations of the Parties in subjecting the Experts' Report to a level of scrutiny appropriate to the final determination of what could potentially become an international boundary have been completely frustrated.

179. When one of the Experts admitted to having advised the SPLM/A on north-south borders²³⁸ and when that same Expert suggested in an interview that giving oil to the south was a consideration in the delimitation²³⁹ should not this Tribunal, which repeats the mantra of context and contextual analysis at every conceivable occasion take those accusations into account, if only as context, before deferring to the Experts as the best arbiters of fact? There is no reason for transposing the presumption favouring experts as arbiters of fact into the totally different context of this arbitration, where procedural propriety and good faith are in question; where there is no pre-existing institutional framework; and where the Parties have expressly authorized the *de novo* review of all the evidence under Sub-article 2 (c) of the Arbitration Agreement. I would argue that the very facts of

²³⁷ See, for example, cases that culminated in the last decade: *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (2009); *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (2008); *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* (2007); *Frontier Dispute (Benin/Niger)* (2005); *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)(El Salvador v. Honduras)* (2003); *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (2002); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (2002); *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* (2001); *Kasikili/Sedudu Island (Botswana/Namibia)* (1999); *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections (Nigeria v. Cameroon)* (1999).

²³⁸ Transcript, 18 April 2009, 98/2-18 (Malintoppi).

²³⁹ Full quotation from Douglas Johnson interview to Sudan Tribune of 29 May 2006:

“The other aspect is that the Abyei area is contained within one of the oil blocks, and there has been quite a lot of exploration and drilling of oil wells in the area. Now, we were not shown a map of where these oil wells were. We were told our mandate was to define the area in 1905 – of course there were no oil wells in 1905. There was no mechanised farming; there was no railway; there were no towns. If we had taken into consideration these developments since 1905, we would have been violating our mandate.

But there is a lot of oil there – the Abyei Protocol stipulates that the oil revenues that come from the sale of oil in the Abyei area be divided between the Misseriya and the Ngok Dinka, the government and the SPLM. If the boundary is defined one way, it puts quite a lot of oil in the Abyei area, and therefore more of that oil revenue has to be shared. If we had accepted the government's claim that the boundary was the river, there would have been no oil revenue to share.

The other thing is that if the boundary defines a certain area and that area contains oil and active oil wells, [and] if the people of Abyei vote in a referendum to join the south and the south votes to become independent, then that oil becomes southern oil and is not northern oil.”

this case, its unusual character and the composition of the Commission and the area of expertise of these Experts not to speak of the close involvement of one of the Experts in local affairs, should all have demanded a more, not less, rigorous standard of review.

180. Lastly I would have understood the introduction of the concept that the Experts are entitled to deference as the “best arbiters of fact” if this had been part of a uniform and uniformly applicable standard, but as I have said it simply is not applicable here and is best seen as no more than a rebuttable presumption.

c. The Standard of Interpretation (Reasonableness versus Correctness)

181. The Tribunal, having generously endowed the Experts with adjudicatory powers that the Parties never gave them and having narrowed the scope of its own power of review to very little by excluding appreciation of facts, also choose a low standard of review, euphemistically called a “permissive standard of review” including a “test of reasonableness”, rather than a test of correctness, to assess the Experts’ interpretation of their substantive mandate. Even if a test of correctness would render this Tribunal too much akin to a “court of appeals”, which neither Party expects, there remains an important issue concerning our reasoning. Surely it is our duty, for the sake of a balanced Award and in the interests of the due administration of justice, not to remain silent when distinguishing between excess on the one hand and mistakes on the other. After all, the party to whose detriment a mistake not amounting to excess is allowed to stand has, if not a right, a legitimate expectation to know why that is the case. As stated by Lord Justice Bingham, “at the end of the day the party should be left in no doubt as to the basis on which the award has been given against him”.²⁴⁰ This has been the practice in other instances of institutional review.²⁴¹

182. The proposition can be safely advanced that people can and do understand texts in different ways, but it is also said that the truth cannot have two faces. Moreover reasonableness is never a ready-made yardstick against which the limits of

²⁴⁰ *JH Rayner (Mincing Lane) Ltd v Shafer Trading Co* [1982] 1 Lloyd’s Rep, 632 at 637.

²⁴¹ In the context of ICSID proceedings see: *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on Application for Annulment of Award, 1 November 2006, at para. 45; *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Decision on Application for Annulment, 25 September 2007, paras. 123-127, 132-136, 146-150, 158.

See, also, national jurisprudence on review of arbitral reasoning in the following countries: England (serious irregularity under Article 68(2)(d) of the Arbitration Act: *Weldon Plant Ltd v Commission for the New Towns* [2001] 1 All ER 264 (Comm) at 279; *Margulead Ltd v Exide Technologies* [2004] EWHC 1019 (Comm) at [42]; *World Trade Corp Ltd v C Czarnikow Sugar Ltd* [2004] EWHC 2332 at [20]); France (no annulment for contradictory or unclear reasoning: *Inter Arab Investment Guarantee Corp. v Banque Arabe et Internationale d’Investissement* (Cour de Cassation, 14 June 2000, Cass Civ 1^{re} D 2000 IR 95) and *Pawelec v SA Pernod Ricard and SA PR Europe* (Paris Cour d’Appel, 2 October 2000, 1reChC)); Switzerland (on the limits of review under the public policy provision in Article 190(2)(e) of the Swiss Private International Law: Decision of the Swiss Federal Tribunal, 10 November 2005, 4P.98/2005/svc); and the USA (on standard of review for ‘manifest disregard of the law’: *Westerbeke Corp. v Daihatsu Motor Co Ltd*, 304 F. 3d 200, 209 (2d Cir. 2002), and *Interdigital Communications Corp v Nokia Corp* 407 F.Supp.2d 522 (SDNY 2005)). See, especially, A. Mourre, *Réflexions critiques sur la suppression du contrôle de la motivation des sentences arbitrales en droit française*, (2001) 19(4) ASA Bulletin 652 (criticizing the decision of the French Supreme Court that “the claim of contradiction in reasoning constitutes necessarily a criticism of the award on the merits which is not subject to judicial review”, C. Paris, 17 février 2000, Gaz. Pal. 1er – 2 déc. 2000, p. 55).

the Experts' (and others) powers to interpret can be objectively measured. Indeed it is often a false friend that gives the impression of an objective threshold where none exists. Be all of this as it may, what determines the limits of reasonableness in interpretation of the mandate or the limits of the Experts' *Kompetenz-Kompetenz* is ultimately their mandate itself.

183. The Experts were mandated after long and difficult negotiations regarding the very issue that became their mandate, namely, "to define, i.e., delimit and demarcate the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan". The formula spoke of an area and of nine Ngok Chiefdoms with whom this area has a special connection. It spoke also of a transfer to Kordofan in 1905, and we know also that the transfer was effected by Condominium officials for administrative purposes.²⁴² The remaining question is whether the transfer to Kordofan was by way of a population transfer, as apparently happened to the Twic Dinka or a territorial transfer of an area to Kordofan from what, by necessity, must have been Bahr El Ghazal, which would normally take place by extending the boundary of Kordofan to include the area of the nine Chiefdoms.
184. Here I would pause to recall that the word "chiefdom" itself can be a territorial concept.²⁴³ After all, the whole claim of the SPLM/A to dominant rights is that the land belongs to the permanent settlers. The word "chiefdom" meant for the south Sudanese people what the word "sheikhdom" or "sultanate" meant to the muslims of the north (or the word "emirate", i.e., principedom). It is not without significance that by 1905, Arop Biong had taken the title "sultan" (Sultan Rob) and the area under his authority was chiefdoms as befits a paramount chief, i.e., territorial units. In other words had the formula spoken of the area of the nine Ngok Dinka "tribes" or "clans" or "sub-tribes" one can begin to understand – but only barely – that a tribal interpretation might be possible, although ultimately this would not make any difference. But the word "chiefdom" is as territorial a concept as the word "area". At any rate, in the absence of a population transfer, which both Parties agree did not take place, the formula can only be understood in a predominantly territorial context, not only because the Condominium itself was a territorial entity and the words "delimit" and "demarcate" connote a territorial entity, but also because, by logical elimination, no other interpretation is possible.
185. In any event, what prompted the Experts to depart from the only correct interpretation of the text is not the territorial versus the tribal interpretation. It was their "conclusion" that: "In 1905 there was no clearly demarcated boundary of the area transferred from Bahr El Ghazal to Kordofan".²⁴⁴ To achieve their mandate they had to clarify the confusion and, if that was impossible, to return a factual *non liquet*. But in fact the confusion they talked of was literally no more than a storm in a teacup: Wilkinson and Percival mistook the Ragaba ez Zarga/Ngol, also referred to as the Bahr el Homr, for the Bahr el Arab/Kir. It was only a short-lived confusion as to

²⁴² We can also safely assume that preparing the Ngok Dinka for self-determination was not a consideration in the minds of Condominium officials when the decision to transfer was made.

²⁴³ Defined by the Oxford English Dictionary as "the estate, position or dominion of a chief; headship, leadership, chief place".

²⁴⁴ ABC Experts' Report, Part 1, p. 20. In other words the Experts themselves acknowledge in very clear terms that the 1905 transfer was territorial, i.e., "of the area transferred from Bahr El Ghazal to Kordofan", but the area in question was not clearly demarcated.

nomenclature and not an existential question. Moreover, the Bahr el Arab/Kir was known by general repute to be the dividing line between Kordofan and Darfur in the north and Bahr el Ghazal to the south. There was never any confusion as to the River Kir, hence the reference to “Sultan Rob, whose country is on the Kir river”.²⁴⁵ All the descriptions of Bahr el Ghazal before 1905 speak of its northern boundaries as the Bahr el Arab and it was only after 1905 that the boundary line between Bahr el Ghazal and Kordofan started to be shown running in a curved triangle that ultimately became the 1956 so-called *uti possidetis* line, and we know that there was no other recorded historical event to account for drawing the line south of the river. A simple exercise of logic will lead to the conclusion that the area included in Kordofan which had not been hitherto part of it is the transferred area. Neither by the standard of correctness nor even by the most elastic notions of reasonableness could this change in provincial boundary have been overlooked by the Experts. In any event, the confusion regarding the name of the river which never affected the Dinka name for it, Kiir, was corrected by Bayldon and Walsh and the result of their work was and must have been seen by Wingate, the Governor General of the Sudan, when in his memorandum he wrote “[t]he districts of Sultans Rob and Okwai, to the South of the Bahr el Arab and formerly a portion of the Bahr el Ghazal Province, have been incorporated into Kordofan.”²⁴⁶ It should be noted that the results of Bayldon’s exploration were included in the same Report in which the transfer is recorded.²⁴⁷

186. One of the measurements of reasonableness is whether a person or a group of persons would in similar situations draw opposite conclusions. One has only to compare the allegation of confusion, which it was the Experts’ task to clarify but which instead caused them to abandon their mandate and go on a frolic of their own,²⁴⁸ with their behaviour regarding the 10° 10’ N. Thus with regard to the Bahr el Arab the Experts concluded: “In 1905 there was no clearly demarcated boundary of the area transferred from Bahr el Ghazal to Kordofan.”²⁴⁹ With regard to 10° 10’ N they admitted: “There is, as yet, no clear independent evidence establishing the northern-most boundary of the area either settled or seasonally used by the Ngok.”²⁵⁰ This did not preclude them from proceeding to delimit a northern front measuring some 240 kilometres at latitude 10° 10’ N.
187. Reverting to the test of reasonableness with regard to the interpretation by the Experts of their mandate, I should add that the question of defining the Abyei boundaries was a major stumbling block in the peace process. Lack of time precludes a full treatment of the background history but I believe I can encompass all the elements of the dispute when I say that it centred on two arguments.
- a. The SPLM/A wanted Abyei, among other areas, to be entitled to participate in the exercise of self-determination which could lead to the secession of the southern

²⁴⁵ Sudan Intelligence Report No. 128 (March 1905), p. 3. GoS Memorial Annex 9, SPLM/A FE 2/8.

²⁴⁶ Major General Sir Reginald Wingate, in *Reports on the Finances, Administration and Condition of the Sudan, Annual Report* (1905), Part II, Memorandum by Governor General, at p. 24. GoS Memorial, Administration and Condition of the Sudan. GoS Memorial, Annex 24, SPLM/E FE 2/13.

²⁴⁷ *Ibid.*, pp. 10-11.

²⁴⁸ *Supra*, note 1.

²⁴⁹ *Supra*, note 244.

²⁵⁰ *Supra*, note 57. Emphasis added.

provinces of the Sudan. Their argument was that notwithstanding the location of those areas north of the 1956 provincial line as at independence, which was agreed to be the spatial limit to where the right of self-determination was to be exercised, the Abyei area, being of “a southern complexion” was nevertheless entitled to be considered as an exception to that limit.

b. The Government was strongly opposed to this view, arguing that Abyei was the land not only of the Ngok Dinka but also of the Misseriya and others.

188. This deadlock was broken by the Danforth proposal, based as it was on the notion of a “restoration” of a territory to the south as it had been part of the south before 1905. The Government accepted this compromise formula on the understanding that it was defined by reference to a transfer that had taken place in 1905. The SPLM/A may or may not have accepted the same interpretation. The record is not entirely clear. Be this as it may, if the Parties had such opposite interpretations of the formula which was the Experts’ mandate, the honest thing, the proper thing for the Experts to have done was to seek clarification or to return a *non liquet*, but not to seek to re-write the agreement of the Parties, much less to embody that re-writing in a secret report, in violation of procedural safeguards.

189. This is why I think the Experts were in excess of their mandate from the very beginning. They fundamentally misunderstood or misconceived their mandate, which is undoubtedly a ground for excess of mandate; they did not comply with mandatory rules of procedure; and their reasoning, leading up to their remarkable finding that 10° 10' N was the northern boundary where the Ngok had had dominant rights since 1905, is totally baseless in law, unsupported by evidence, untrue and unreasoned. Moreover what both Parties somewhat confusingly refer to as the application of the mandate and what I think of as both interpretation and application was fundamentally flawed at every crucial step. Thus the concoction of a theory of dominant Ngok rights versus secondary Misseriya rights is not only odious (if only on this basis the Report should be considered worthless) but based on misquotations and inapplicable to Kordofan. A shared grazing area exists in Kordofan, and indeed such areas exist in many countries where nomadism or transhumance is practised. However, no area of “dominant and secondary rights” existed in south-western Kordofan in 1905, and yet this is the foundation on which the Report is based.

190. The second application or interpretation of the Experts’ mandate is the assumption of Ngok continuity, by projection backwards in time from the 1950s to a single year, 1905, and the assemblage of disparate evidence in its support must represent the nadir of reasoning even by the standards of some social scientists.

191. I have no doubt that the only answer to the specific question put to the Experts was that it was the area to the south of the Bahr el Arab/Kiir and bordered in the south by the 1956 provincial line. But I would like immediately to qualify this conclusion by two observations:

a. In 1905 the Ngok Dinka were not just to the south of the Bahr el Arab. They were on the river and north of it, their greatest concentration was in the area between the Bahr el Arab and the Ragaba Um Biero and they were not very far to the west, and were not at 27° 50' E in the west where Howell correctly placed them in 1951. There is evidence that they were slowly expanding to the north, west and east and that

they reached some points on the Ragaba ez Zarga by 1965. In this area and indeed south of the river they co-existed with the Homr for a season every year.

b. There is evidence that in the 18th century the Ngok, newly arrived from the east, settled in the Bahr area and when some Ngok Dinka witnesses, including government witnesses, spoke about their particular sub-sections being on the Ragaba ez Zarga they were right. That was in the 18th and probably the early 19th centuries. However the arrival of the Baggara including the Misseriya pushed the Ngok below the river Bahr el Arab/Kiir, and even there they were not safe from Homr depredations, as evident from the reasons cited by the Condominium officials to transfer their Chiefdoms (their area) to Kordofan in 1905.

Conclusions

192. From the beginning the Tribunal faced a dilemma. Its reasoning was deployed with the avid aim of shielding the ABC Experts' Report from criticism and annulment. Thus, the Tribunal was too generous, at the expense of Sudan, in ascribing to the Experts prescriptive powers that went beyond a strictly fact-finding mission. Such a presumption, totally unsupported, should not have been made too lightly, given that the Sudan never gave the Experts a *carte blanche* to dispose of its territories as they pleased. The Tribunal then went on to endow the Experts with a power of discretion to interpret their mandate that they did not have, all allowance being made for *Kompetenz-Kompetenz*. This so-called reasonableness standard could not have been the expectation of the two Parties when they conferred on the Tribunal its mandate. We should not assume that the SPLM/A expected that the delimitation of Abyei, which could become an international boundary, would be located not based on a correct interpretation but only on a reasonable one.
193. The Experts knew how vital to breaking the deadlock over Abyei was the territorial interpretation by the Government of their mandate. If they were not sure what their mandate was they should have gone back to the Parties or rendered a factual *non liquet*. To say that they had to proceed on a different interpretation because they were expected to delimit the area as part of the peace process is totally unconvincing. By proceeding as they did, they in fact derailed that peace process and caused a conflict in which Abyei itself was destroyed.
194. Moreover, the Tribunal started by defining its mandate in a rigid manner, then clouded that self-imposed distinction, which could not, in logic, admit of an intermediate solution, by partially invalidating the Experts' decision. It contradicted itself by doing so with regard to the very distinction between Sub-articles 2 (a) and 2 (c) of its mandate. Equally importantly, by proceeding to a partial annulment without express or implied sanction from its own mandate, the Tribunal committed an excess of mandate. An assertion that highly skilled jurists have committed an excess of mandate, the very accusation they were mandated to investigate and to redress if found to be true, is not an assertion to be made lightly and it is not being made lightly but this is the truth of the matter and it is an inescapable conclusion that neither the Tribunal's reasoning nor its skill and status can hide. The Tribunal, still deploying its intellectual resources to shield the Experts' Report, bestowed upon the Experts the status of "preferred arbiters of fact", a status contextually wholly inappropriate given the area of their expertise and the accusations of procedural improprieties which are

not disputed on the facts. These devices and other techniques reveal a low standard of review which excluded fundamental error (a standard that the Tribunal could and indeed should have applied even *proprio motu* if only to account for the fantastic difference between contemporaneous evidence and the results achieved by the Experts). In short all these assumptions devices and techniques should have seen the Experts' Report safely to shore i.e., intact but of course as removed from reality as it is possible to be.

195. However, and this is where a simple mistake metamorphosed into a dilemma, the Tribunal decided to dabble in compromise, always a hazardous and ill-advised venture for tribunals, but especially so in the present case. This compromise took cartographic shape by the impugning, i.e., invalidating, of the eastern and western lines of the Abyei area as delimited by the Experts for lack of reasoning, and this is where the Tribunal committed its second excess of mandate. It redrew the eastern and western boundaries at 29° E and 27° 50' E respectively with no "reasoning" or no "adequate reasoning", the very standards it used to invalidate the Experts' eastern and western boundaries, except that its own excess of mandate was more inexcusable than that of the Experts. For it had the benefit of hindsight, of learned and extensive legal arguments, and of being composed of prominent jurists. Considerable efforts were devoted to support the new lines but any close reading of the evidence will reveal it to be disparate in sources and desperate in tone. Thus dead men are made to say things they never said and the living are misquoted. Unreliable witness evidence is harnessed to support delimitation lines that the witnesses never knew existed. The meticulousness and diligence required to effect delimitation is thrown to the wind. Approximate, imaginary lines are superimposed on rough areas. Any reference to Dar Jange, or to Dinka, no matter how general, is picked and moulded to support these new lines. But there are a few problems. The River and Ragabas simply do not flow due north where they are supposed to by the Tribunal, but rather in a north-westerly direction; too many contemporaneous witnesses are not "helpful" to the Tribunal; and there is total blindness to evidence that the Ngok were not where the Tribunal wishes them to have been but in a much smaller area to the south and the east around the Bahr el Arab. There is even more blindness to overwhelming evidence that these were areas where the Homr were collectively present; where they felt and acted on the knowledge that it was their own country; where they sought no permission to enter from Ngok or anyone else; and where they had permanent settlements, such as at Fauwel, and places to which their surras felt attached and returned annually.
196. Here, what started as a dilemma, namely, how to shield the Experts whilst effecting a compromise that would impugn all their lines, at the same time becomes a fully-fledged trilemma: how to shield the Experts, impugn all their lines, and, acting in its own delimitation, how to draw these lines not only with no evidence, but in spite of contrary evidence as to where the Ngok and the Homr actually were. And this is why I felt that it would be useful, if only in defence of realism and credulity, to review all the evidence I could find on where the Ngok and Homr were located circa 1905. The picture that emerges and which is reflected in the Map appended to this Dissenting Opinion is totally different from both the Experts' and the Tribunal's lines.
197. In doing this I am assuming, for the sake of exploring all the logical possibilities, that the transfer of 1905 to Kordofan is a tribal one. For me this is only

one assumption; for my learned colleagues they consider themselves obliged,²⁵¹ by their earlier finding that a predominantly tribal transfer was a reasonable interpretation of the “formula”, to adopt the same interpretation for the Tribunal’s own delimitation. But no reason is given for this conclusion. Under Sub-article (c) of the Arbitration Agreement, the mandate of this Tribunal requires it, in the event of a finding of excess of mandate, “to proceed to define (i.e. delimit) on map the boundaries of the area . . . based on the submissions of the Parties”, not to adopt and recycle those parts of the Experts’ Report that it considers “reasonable”. The moment the majority had freed themselves from their self-imposed shackles, they could follow any delimitation i.e., what was more accurate on the basis of the submissions of the Parties and not what was just reasonable.

198. The Tribunal also failed in enquiring into the two key concepts of the Experts’ thought process: the assumption of “dominant” (Ngok) rights versus “secondary” (Misseriya) rights. Presumably the reason for this reticence was that the Tribunal would classify such a concept as part of the assessment of facts left to the Experts as “preferred arbiters of fact”. But this is not the case, this concept is a crucial step in the Experts’ reasoning that was neither reasoned nor supported as to its existence and applicability to Kordofan. The second crucial concept in the reasoning of the Experts, which the Tribunal failed to review, is the assumption of Ngok continuity of occupation which is more than an appreciation of facts. It is a wholesale abandonment of the temporal limitation on the Experts’ mandate by turning it on its own head, and it should have been reviewed by the Tribunal, such review on the basis of lack of reasoning being within our mandate. Here the Tribunal may have been acting *infra petita* with regard to not answering questions about two crucial steps in the Tribunal’s reasoning.
199. Moreover, having impugned so much, the Tribunal, by any standard of separability, should have set aside the remainder of the Report for, apart from the southern line drawn by Condominium officials, nothing was left. The Report was so thin and truncated that it could not stand on its own. The Tribunal contradicted itself in a fundamental way. It cornered itself by making a sharp distinction between Sub-articles 2 (a) and 2 (c) of its mandate and then clouded that distinction. The fact that inseparability was the obvious consequence not only of the wording of Sub-article 2 (b) but also of the distinction between Sub-articles 2 (a) and 2 (c) was overlooked by my learned colleagues. The dichotomous distinction between the Tribunal’s “enquiry” under Sub-articles 2 (a) and 2 (c) cannot accommodate the power of partial annulment that it has assumed. Formalism and teleology are words that do not sit together well.
200. Lastly, the Tribunal used “lack of reasoning” to impugn parts of the Experts’ reasoning, but did so inconsistently. Thus, with regard to the area north of 10° 10' N, it used “lack of conclusive evidence”, but it did not use the same lack of conclusive evidence south of 10° 10' N and north of Ragaba ez Zarga, although there is no shred

²⁵¹ Award, para. 710: “Having upheld the reasonableness of the ABC Experts’ predominantly tribal interpretation of the Formula, this Tribunal considers itself obliged to proceed with the delimitation phase of the mandate without departing from the same predominantly tribal approach. This conclusion applies *a fortiori* given the Tribunal’s determination that the northern limit of the area of permanent habitation of the nine Ngok Chiefdoms transferred in 1905 (i.e., the ABC Experts’ findings and delimitation at latitude 10° 10' N) was reasoned and within the ABC Experts’ mandate. As discussed above, the retained northern boundary of the Abyei Area was drawn by the ABC Experts on the basis of a predominantly tribal interpretation as opposed to a predominantly territorial interpretation.”

of evidence, let alone conclusive evidence, that the Ngok were there in 1905 or indeed at any time after that, not even in 1965, the year of maximum Ngok Dinka expansion. The majority was inconsistent in demolishing the western and eastern lines for lack of reasoning or adequate reasoning and then replacing them with new lines, which it did on the basis of frivolous reasoning and hastily assembled evidence, without thinking twice about using evidence prepared after the dispute had arisen and tainted by accusations of intimidation. To use evidence tainted by accusations of duress that were not properly answered is not – to put it mildly – the zenith in maintaining evidentiary standards and no court should engage in such practice. To construct straight lines on the basis of approximate evidence and rough areas is an affront to the science of delimitation and no country should accept such a delimitation. The authors of the Award may congratulate themselves on their Herculean efforts, but the result is, not for lack of cleverness on their part, a feeble and modest construct with much to be modest about.

201. In the introduction to this Dissenting Opinion, I described the considerations that prompted me to explain comprehensively the reasons for my dissent. I believe that I have now substantiated my criticisms of the Award's conclusions and the reasoning deployed by the Majority to reach them. I need therefore say no more regarding the Award but leave it instead to the sand on which it has been built. I do however need to say a few words regarding another aspect of this unusual arbitration. I have already mentioned the likelihood that the Award may have a profound impact on the future of Sudan as a State and the peace and well being of all its citizens regardless of ethnicity or creed.

202. I am saddened that in this arbitration, which provided a perfect and rare chance for the Tribunal to contribute to the process of peace and reconciliation in Abyei and in the Sudan, that chance has been missed because of a wish to marry an ill-advised, misconceived compromise to a self-imposed restrictive interpretation of its mandate, the Tribunal neither maintained the integrity of its reasoning nor contributed to a durable peace. International law and indeed law in general sometimes provide only simple recipes for complex situations where populations and tribes intermingle and where the livelihood of certain groups transcends borders. In such cases, defensible compromises may sometimes bring more acceptable, more durable and indeed fairer solutions. After all Kipling, who knew a few things about the Sudan, and more about human nature, once wrote:

“Man, a bear in most relations -
worm and savage otherwise, -
Man propounds negotiations,
Man accepts the compromise.”²⁵²

203. This Tribunal could have been a peace-maker had it realised the obvious fact that peace-making is more difficult than law-making and judgment drafting. To be successful a compromise does not have to be a non-principled solution. On the contrary its chances of success increase if it is perceived by those the Award called the “stakeholders” as a fair and workable scheme. The stakeholders in this case are not only the Government and the SPLM/A, they are also the Ngok and the Misseriya. Today, we are more remote from achieving a durable peace than before the rendering

²⁵² Rudyard Kipling, *The Female of the Species*.

of this Award, because of the very simple fact that the Award failed utterly to take the rights of the Misseriya into consideration and could have the effect of denying them access to the waters of the Bahr, except for a small piece of land on the border of Darfur (and nothing in the Award on traditional rights changes this fact). Therefore the question that will never go away is who, in the process of delimiting the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905, gave the Experts or this Tribunal the right to reduce the Misseriya to second class citizens in their own land and to create conditions which may deny them access to water. This would disrupt the very livelihood of the Misseriya that has depended for as long as they have been in Kordofan on access to the Abyei area. I can only hope that both Misseriya and Ngok Dinka will reach into their traditions and common history to find solutions better suited to their community of existence that should transcend all boundaries.

A handwritten signature in Arabic script, enclosed in a large, hand-drawn oval. The signature is written in black ink on a white background.

(Signed) Awn Shawkat AL-KHASAWNEH