

# **PERMANENT COURT OF ARBITRATION**

**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**

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**BETWEEN:**

**GOVERNMENT OF SUDAN**

**and**

**SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY**



**REJOINDER OF THE GOVERNMENT OF SUDAN**

28 FEBRUARY 2009



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## Chapter 1

### Introduction

1. There are essentially three issues for the Tribunal to decide in this case:
  - (a) what was the ABC mandated to do and on what conditions?
  - (b) did the ABC Experts' exceed that mandate?
  - (c) if so, what was the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905?
2. Underlying all three questions is the issue of the interpretation of the formula "the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905". This is the subject of Chapter 2 of this Rejoinder.
3. Chapter II of the SPLM/A's interminable Counter-Memorial<sup>1</sup> spends almost 200 pages on the second question, that of excess of mandate. It is addressed in Chapter 3 of this Rejoinder.
4. If the ABC Experts exceeded their mandate in any respect, the Tribunal has to consider the issue identified in the Abyei Protocol and the Arbitration Agreement *de novo*, and to reach its own conclusion. Here there are two possibilities. Either the issue concerns an area transferred from one province to another – as the words of the formula ("area... transferred to Kordofan in 1905") clearly indicate. Or these words refer to an area pertaining to the nine chiefdoms in 1905, even if part of that area was already in Kordofan. The identification of the area on the first and, it is submitted, obviously correct and intended meaning, is discussed in Chapter 4 of this Rejoinder. Its identification on the basis of the second meaning, that advocated by the SPLM/A, is discussed in Chapter 5. On either basis the SPLM/A claim to an area of Kordofan up to 10°35'N, as set out in Chapter III of its Counter-Memorial, fails utterly.
5. Attached to this Rejoinder are four appendices. The first is a further expert report by Alastair Macdonald commenting on mapping questions. The second addresses the Community Mapping Report filed with the SPLM/A Counter-Memorial. The third is a table of incomplete citations (by no means exclusive) referred to by the SPLM/A in its Counter-

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<sup>1</sup> For consistency, the GoS employs the term "Counter-Memorial" in this Rejoinder. The SPLM/A Submission is entitled a Reply.

Memorial. The fourth comprises additional pages from sources cited by the SPLM/A in its pleadings which were omitted from the Exhibits annexed thereto.

6. The Tribunal will understand that in the short time available to prepare this Rejoinder, it has not been possible to deal with every issue raised in the SPLM/A's Counter-Memorial. To the extent that issues are not dealt with in this Rejoinder, no admission is to be inferred. The Government of Sudan reserves the right – subject to the Rules of Procedure and the guidance of the Tribunal – to respond to other issues in the oral round.

7. In the preparation of this Rejoinder, a number of errors have come to light, including some noted by the SPLM/A. The Government of Sudan apologises to the Tribunal and the SPLM/A for these.

**Errata**

<b>Source</b>	<b>Existing text</b>	<b>Correction</b>
GoS Memorial, para. 256	"uncertainty for the Bahr el Arab continued..."	"uncertainty for the Bahr el Arab basin continued..."
GoS Memorial, para. 359	"In the wet season..."	"In the dry season..."
GoS Memorial, para. 310	"Proceeding on foot, he nonetheless surveyed the first 47½ miles (76 km) of the river."	Withdrawn
GoS Memorial, para. 313	"Finally, in February 1905 (i.e., before the 1905 transfer) he reported on the Bahr el Arab."	"Finally, in March 1905 (i.e., in the same issue as the 1905 transfer) he reported on the Bahr el Arab."
GoS Counter-Memorial, para. 311	"(four of the nine chiefdoms)"	"(five of the nine chiefdoms)"



## Chapter 2

### The Meaning of the Substantive Formula

8. One of the important issues that continues to divide the Parties at this stage of the proceedings concerns the meaning of the formula pursuant to which the ABC (including the Experts) was supposed to delimit the "Abyei Area", and which also defines the issue this Tribunal is to decide in the event that it finds the ABC Experts exceeded their mandate.

9. The wording of the formula itself is not in dispute. It is referred to in the Abyei Protocol, the ABC's Terms of Reference and the other relevant instruments in substantially the same way as it is phrased in Article 2(c) of the Arbitration Agreement. In relevant part, Article 2(c) requests the Tribunal -

"to define (i.e. delimit) on map the boundaries of the area of the Nine Ngok Dinka chiefdoms transferred to Kordofan in 1905."

#### ***A. The Temporal Significance of the Formula's Reference to the 1905 Transfer***

10. The Parties agree that this formula was a compromise solution they both accepted in the Abyei Protocol and reaffirmed in the Arbitration Agreement.<sup>2</sup> The formula encompassed a *renvoi* to a documented historical event – an administrative transfer in 1905 of an area of Ngok Dinka chiefdoms from the province of Bahr el Ghazal to the province of Kordofan, a transfer decided on by Condominium officials during that year. By referring to a past historical event that both Parties agreed took place (and that did in fact take place), the formula removed the definition of the "Abyei Area" from more recent political events which had given rise to controversy, and fixed the relevant date for determining the disputed area as of 1905.<sup>3</sup>

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<sup>2</sup> SPLM Preliminary Presentation on the Boundaries of the Abyei Area, p. 2, SPLM Exhibit FE 14/1.

<sup>3</sup> The SPLM/A Memorial continues the tactic of trying to insert some of these later issues into the formula and into the arbitration. For example it repeatedly assumes that the present case involves the fate of a single "people", the Ngok Dinka, to the exclusion of all others such as the Misseriya (including the Humr), the Ruweng Dinka, etc. This is unjustified. As shown in GoS Memorial (paras. 43-55) a restricted formula was adopted in the Abyei Protocol precisely because of these conflicting claims and rights.

11. As the Government of Sudan has pointed out, the formula adopted contains both a temporal and area dimension.<sup>4</sup> The temporal reference point – 1905 – does not appear to be disputed by the Parties, although the SPLM/A's pleadings seek (as did the Report of the ABC Experts) to shift the meaning of the formula to a transfer of people not of territory. Thus, the SPLM/A seeks to inject human elements into the formula, including post-1905 demographic and political factors; these have nothing to do with the actual formula as drafted which refers to a situation existing in 1905 and the area of the Ngok Dinka chiefdoms transferred in that year.

12. Notwithstanding these efforts, 1905 is clearly the "crucial date" in terms of delimiting the area that was transferred, and both Parties have devoted considerable discussion to the events that took place in that year relating to the transfer. As the SPLM/A Counter-Memorial notes:

"It is clear that the GoS and SPLM/A were familiar with the Sudan Government's records regarding its 1905 decision to transfer Sultan Rob and the Ngok Dinka; the parties referred specifically to the Government's records during the course of their negotiation of the Abyei Protocol."<sup>5</sup>

13. Given this familiarity with the 1905 records pertaining to the transfer, it is all the more extraordinary that both the SPLM/A Memorial and the Counter-Memorial continue to mischaracterize the documentary references relating to the transfer, including the effect that the transfer had on the provincial boundary between Kordofan and Bahr el Ghazal, and to ignore important pieces of evidence relating to the transfer, such as the Memorandum written by the Governor-General of Sudan, Major General Sir R. Wingate, included in the 1905 *Report on the Finances, Administration and Condition of the Sudan*.<sup>6</sup>

14. Since the formula refers to an administrative transfer from one Sudan province to another in a given year, it follows that one must also determine the area that was transferred by reference to the provincial boundary between Bahr el Ghazal and Kordofan that existed just before the transfer as opposed to the way the provincial boundary was depicted afterwards. It is evident that areas already falling within Kordofan prior to the transfer could not have been transferred to it in 1905 and thus could not have formed part of the transferred area.<sup>7</sup> This is one important factor shedding light on what area was transferred at the time, though it is not the only one.

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<sup>4</sup> GoS Counter-Memorial, paras. 94-110.

<sup>5</sup> SPLM/A Counter-Memorial, para. 1547.

<sup>6</sup> *Reports on the Finances, Administration, and Condition of the Sudan, Annual Report (1905)*, Wingate Memorandum, p. 24 (SM Annex 24).

<sup>7</sup> GoS Counter-Memorial, paras. 175 and 383-393.

15. Notwithstanding this, the SPLM/A Counter-Memorial asserts that such an analysis "requires indirect and speculative inferences, drawn from the putative Kordofan/Bahr el Ghazal provincial boundary, to determine what was transferred in 1905."<sup>8</sup> The factual basis for this assertion is misplaced, as Chapter 4 will show. Nonetheless, the SPLM/A Counter-Memorial goes on to argue that:

"The more direct, less speculative and reliable approach is, as discussed above, simply to look at what the Condominium administrators said that they transferred to Kordofan in 1905 - which was the Ngok Dinka people and their territory."<sup>9</sup>

16. Two points may be made in response. First, none of the relevant historical documents refers to the transfer of the Ngok Dinka "people". Those documents refer to the "territories" of Sultan Rob or the "districts" of Sultan Rob and of Sheikh Rihan.<sup>10</sup> Second, if – to use the SPLM/A's words – one looks at "what the Condominium administrators said that they transferred to Kordofan in 1905", then it would seem obvious that what the most senior Condominium official in Sudan – Governor-General Wingate – specifically said about what was transferred would have the highest probative value. Reference to his contemporaneous views would be – to borrow the SPLM/A's words – "the more direct, less speculative and reliable approach." What the Governor-General said was the following:

"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."<sup>11</sup>

17. The Government of Sudan will return to Wingate's Memorandum in Chapter 4 where it will also be shown that, by the time Wingate wrote his Memorandum, the "real" Bahr el Arab had been correctly identified. For present purposes, the key point is that in order to interpret the scope, as well as the object and purpose, of the reference to the 1905 transfer in the formula, it is necessary to determine the territorial implications of what Sudanese Government officials did in 1905 when they transferred the area of the Ngok Dinka (and Twic Dinka) chiefdoms from one province to another. In this connection, the Government of Sudan draws the Tribunal's attention to the statement in the SPLM/A Counter-Memorial which emphasized:

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<sup>8</sup> SPLM/A Counter-Memorial, para. 1580.

<sup>9</sup> Ibid.

<sup>10</sup> *Reports on the Finances, Administration, and Condition of the Sudan, Annual Report (1905) Report for Bahr el Ghazal Province*, p.3 and Wingate Memorandum, p. 24 (SM Annex 24)

<sup>11</sup> Ibid., p. 24.

"It is not open to the Government to rewrite or second-guess either the Anglo-Egyptian administrators' decision in 1905 (or the ABC Experts' interpretation of that decision)."<sup>12</sup>

18. The ABC Experts' manifestly incorrect approach to interpreting the formula will be addressed in Chapter 3. But the Government of Sudan would here point out that it has addressed *all* the relevant 1905 documents relating to the transfer. It has not rewritten those documents nor second-guessed the Anglo-Egyptian administrators' decision in 1905. Of course, it is equally not open to the SPLM/A "to rewrite or second-guess the Anglo-Egyptian administrators' decision in 1905", or to ignore other key items of evidence that indicate the limits of the area that was transferred. Yet that is precisely what the SPLM/A does when it adds the word "people" to the formula, it attempts to belittle the importance of the provincial boundary between Kordofan and Bahr el Ghazal at the time, and ignores the Wingate Memorandum.

***B. The Significance in the Formula of the Reference to the "Area" that Was Transferred***

19. The reference in Article 2(a) of the Arbitration Agreement to the Tribunal's task – "to define (i.e. delimit) on map the *boundaries* of the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905"<sup>13</sup> – presupposes that the Tribunal must determine and delimit the area that was transferred by Condominium officials in that year. It is the "boundaries" of the area that are to be delimited. The meaning of this phrase in the formula would be both absurd and unreasonable if it were construed as calling on the Tribunal to draw new lines for the boundaries of an "area", which was the subject of a specific transfer over a hundred years ago, not at all contemplated by Government officials at the time.

20. The Government of Sudan has previously demonstrated that the plain meaning of the formula, coupled with the historical facts relating to the 1905 transfer, concerns an area that was transferred from Bahr el Ghazal to Kordofan. The question is: what was the area that was transferred in that year?

21. The differences between the Parties on this aspect of the formula stem from the SPLM/A's attempt in these proceedings, and contrary to what they maintained in their submissions to the ABC, to rewrite the agreed formula. The essence of the SPLM/A's

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<sup>12</sup> SPLM/A Counter-Memorial, para. 1579.

<sup>13</sup> Emphasis added.

argument is summed up in the following passage from the SPLM/A Counter-Memorial, which repeats an argument made in their Memorial:

"As detailed in the SPLM/A's Memorial (at paragraphs 1095-1189), the definition of the Abyei Area refers to the area *inhabited and used by* the nine Ngok Dinka Chiefdoms that *were* transferred to Kordofan in 1905."<sup>14</sup>

22. There are two mischaracterizations in this version of the formula which fundamentally distort its meaning.

23. The first is that the words "inhabited and used by" (the nine Ngok Dinka chiefdoms) do not appear in formula. They were not agreed by the Parties and have no place in a proper interpretation of the plain and ordinary language that the Parties jointly agreed. These words have simply been added by the SPLM/A in an ill-disguised attempt to introduce a demographic element in the formula that does not exist and to broaden the geographical scope of the 1905 transfer beyond what it actually was.

24. The second distortion is that none of the 1905 transfer documents employ the words "inhabited and used by" the Ngok Dinka either in referring to the transfer. For example, the March 1905 *Sudan Intelligence Report* refers to "Sultan Rob, whose *country* is on the Kir river, and Sheikh Rihan of Toj... are to belong to Kordofan Province."<sup>15</sup> The 1905 *Annual Report* states that, "In the north the *territories* of Sultan Rob and Sheikh Gokwei have been taken from this Province and added to Kordofan."<sup>16</sup> There is no mention in either of these sources to a transfer of an area "inhabited and used" by the nine Ngok Dinka chiefdoms.

25. Nor is there any such reference in Wingate's 1905 Memorandum. That document referred to the "districts" of Sultan Rob and Sheikh Okwai that were transferred, not to areas supposedly "inhabited and used" by the Ngok Dinka.<sup>17</sup> Moreover, Wingate's Memorandum also included a specific geographic limitation to the districts that were transferred. They were described as situated "to the south of the Bahr el Arab."

26. These contemporary references to the transfer flatly contradict the SPLM/A's argument that the formula should be read as including areas "inhabited and used" by the Ngok Dinka in 1905.

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<sup>14</sup> SPLM/A Counter-Memorial, para. 76 (emphasis added).

<sup>15</sup> *Sudan Intelligence Reports*, No. 128 (March 1905), p. 3 (SM Annex 9)

<sup>16</sup> *Reports on the Finances, Administration, and Condition of the Sudan, Annual Report (1905) Report for Bahr el Ghazal Province*, p.3 (SM Annex 24). These passages are repeatedly cited at paras. 88, 769, 1057, 1485, 1545 and 1577 of the SPLM/A Counter-Memorial.

<sup>17</sup> *Ibid.*, Wingate Memorandum, p. 24.

27. A further way in which the SPLM/A tries to recast the formula is by a grammatical parsing of the relevant phrase. On this point, the SPLM/A Counter-Memorial does no more than repeat what it already said in its Memorial. The basic argument is that the phrase "transferred to Kordofan in 1905" refers to the preceding word "chiefdoms", not to the word "area" or the phrase "area of the nine Ngok Dinka chiefdoms."<sup>18</sup>

28. Once again, however, the SPLM/A Counter-Memorial rewrites the relevant instruments. According to the SPLM/A, Article 1.1.2 of the Abyei Protocol "referred to **all** of the area of the nine Ngok Dinka Chiefdoms that were transferred in 1905."<sup>19</sup>

29. In the first place, the word "all" does not appear in Article 1.1.2 of the Abyei Protocol. Nor does it appear in any of the other instruments signed by the Parties, including the Arbitration Agreement. And it did not appear in any of the 1905 transfer documents either.

30. Second, the SPLM/A adds the words "that were" before the words "transferred in 1905". This is another *ex post facto* addition. By use of the plural "were", the SPLM/A Counter-Memorial wrongly tries to reinforce its argument that the phrase in the formula "transferred to Kordofan in 1905" relates to the word "chiefdoms" (plural) rather than to the word "area" (singular).

31. Thirdly, not only does the SPLM/A add words to the formula which are not there: it also ignores words which are there. On the SPLM/A's interpretation, the words "to Kordofan" become redundant. Instead the formula should simply have read: "the area of the Nine Ngok Dinka chiefdoms transferred... in 1905". But even on this interpretation the importance of the 1905 boundary does not diminish, as the word "transferred" still has significance. So the word "transferred" is also eliminated: under the SPLM/A's thesis, the formula reads, in effect, "the area ... the Nine Ngok Dinka chiefdoms used and inhabited... in 1905". If the parties to the Abyei Protocol had meant that, they would have said it.

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<sup>18</sup> SPLM/A Counter-Memorial, paras. 77-79 and 1505-1511.

<sup>19</sup> Ibid., para. 1512 (emphasis in the SPLM/A version).

32. The same misreading vitiates the analysis by Professor D. Crystal: he was only asked "what is being transferred" and not where to.<sup>20</sup> In any event, as a matter of ordinary English – a matter for the Tribunal, not for expert evidence – the word "transferred" is equally capable of qualifying the noun "area" as the phrase "nine Ngok Dinka chiefdoms". No one would write "the area transferred to Kordofan in 1905 of the nine Ngok Dinka chiefdoms": this would have been pedantic and clumsy. Moreover the context – a transfer between provinces – confirms the significance of the key noun, "area". No people moved in 1905: an area was transferred.

33. The SPLM/A's manipulations of the agreed formula are not only contrary to the plain language of the formula – which is to define and delimit the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 – but they also fly in the face of what the SPLM/A previously stated in its submissions to ABC where the SPLM/A emphasized that it was the "area" transferred in 1905 that was the essential criterion.

34. This is what the SPLM had to say about the question of the formula in its Preliminary Presentation on the Boundaries of the Abyei Area to the ABC dated 10 April 2005.

"The Protocol that was signed on 26/05/04 defines Abyei area as *an area of the nine Ngok Dinka Chiefdoms that was transferred to Kordofan in 1905.*"<sup>21</sup>

35. Quite clearly, by employing the words "an area" and using the singular verb – that "was" transferred – the SPLM took the same position as the Government of Sudan – a position which is directly at odds with what it now argues. Moreover, as the SPLM also emphasized in its submission to the ABC: "This definition satisfied the two parties – the SPLM and the Government of Sudan."<sup>22</sup> It is not open to the SPLM/A to argue now for a different interpretation.

36. Elsewhere in its first submission to the ABC, the SPLM underscored the same point. To quote again from the SPLM's submissions:

"Hence, the colonial authorities took the measure of shifting the administration of *specific Dinka lands* to Kordofan in northern Sudan."<sup>23</sup>

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<sup>20</sup> SPLM/A Counter-Memorial, Report of Professor David Crystal, para. 2

<sup>21</sup> SPLM Preliminary Presentation on the Boundaries of the Abyei Area (First SPLM/A Presentation) p. 2 SPLM/A Exhibit FE 14/1 (emphasis added).

<sup>22</sup> Ibid.

<sup>23</sup> Ibid., p. 4 (emphasis added).

And further:

"The Dinka *areas* that were moved administratively were initially Part of Bahr el Ghazal Province."<sup>24</sup>

What were these "specific Dinka lands" that were shifted? They were clearly spelled out in Governor-General Wingate's Memorandum as: "the districts of Sultan Rob and Okwai, to the south of the Bahr el Arab."

37. The same emphasis on the "area" that was transferred in 1905, as opposed to a transfer of people (as the SPLM/A now maintains), appears in the SPLM's Final Presentation on the Boundaries of the Abyei Area dated 14-16 May 2005. There, the SPLM drew attention to the March 1905 *Sudan Intelligence Report* in which the following was recorded:

"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 [where he had stated that his district was situated between the Kir and Lol Rivers] 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."<sup>25</sup>

Based on this account, the SPLM then argued that:

"Hence, one really wonders why the Government team likes this quotation since the reasons for the transfer of the two areas and not the people are explicitly stated – the occasional raids by the Southern Kordofan Arabs."<sup>26</sup>

38. What is striking is the SPLM's emphasis on the area transferred, not the people. Seen in this light, the novel interpretation of the formula now advanced by the SPLM/A, based on the alleged location of Ngok Dinka people in 1905 and areas they are claimed to have occupied or used, bears no relation to the SPLM/A's previous position – a position which it said "satisfied the two parties."

39. It follows that the focus of the formula is on the area transferred to Kordofan in 1905. This was also the focus of the Condominium officials at the time they decided on the transfer, as will be further explained in Chapter 4.

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<sup>24</sup> Ibid., (emphasis added).

<sup>25</sup> SPLM Final Presentation on the Boundaries of the Abyei Area, p. 26, SPLM/A Exhibit FE 14/13.

<sup>26</sup> Ibid., p. 27 (underlining in the original)



40. In view of the plain and ordinary language used in the formula, the GoS respectfully submits that the task of the Tribunal (as it should have been for the ABC Experts as well) is to answer the question put to it, not to seek to reformulate the question. As the Court stated in the *Case Concerning the Arbitral Award* of 31 July 1989:

"Furthermore, when States sign an arbitration agreement, they are concluding an agreement with a very specific object and purpose: to entrust an arbitral tribunal with the task of settling a dispute in accordance with the terms agreed by the parties, who define in the agreement the jurisdiction of the tribunal and determine its limits. In the performance of the task entrusted to it, the tribunal 'must conform to the terms by which the Parties have defined this task'."<sup>27</sup>

In a similar vein is the Court's pronouncement in its 1950 Advisory Opinion that:

"When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning."<sup>28</sup>

**C. The Extraneous Character of the SPLM/A's Other Arguments  
Relating to the Formula**

41. The SPLM/A Counter-Memorial also raises a number of other factors which are claimed to have relevance for determining the meaning and scope of the formula. These include the arguments that limiting the definition of the "Abyei Area" to areas lying south of the Bahr el Arab would (i) "arbitrarily divide the territory of the Ngok Dinka",<sup>29</sup> (ii) exclude the Ngok Dinka from what is said to be their "historic homeland" including Abyei town and Burakol,<sup>30</sup> (iii) deprive the Ngok Dinka of their right of self-determination,<sup>31</sup> and (iv) result in a situation where only six of the nine Ngok Dinka chiefdoms would be included in the "Abyei Area."<sup>32</sup>

42. The first and fourth of these allegations are inconsistent with the factual situation that existed as of 1905 and, equally importantly, with the way in which Condominium officials viewed the situation, including the location of the Ngok Dinka, when they transferred the district of Sultan Rob to the south of the Bahr el Arab in 1905. The second and third complaints rest on circular reasoning and are mere question begging when it is recalled that what is at issue is the area of the nine Ngok Dinka chiefdoms

<sup>27</sup> *Arbitral Award of 31 July 1989*, Judgment, I.C.J. Reports, 1991, p. 70, para. 49, citing *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, I.C.J. Reports 1984, p. 266, para. 23.

<sup>28</sup> *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, I.C.J. Reports 1950, p. 8.

<sup>29</sup> SPLM/A Counter-Memorial, paras. 81 and 1543-1544.

<sup>30</sup> Ibid., paras. 82, 85, and 1520-1521.

<sup>31</sup> Ibid., paras. 83 and 1517-1519.

<sup>32</sup> Ibid., paras. 86 and 1530-1532.

transferred to Kordofan in 1905, not the demographic location of Ngok Dinka people or the location of towns today or at any time prior to or after 1905.

43. When the historical records relating to the 1905 transfer are examined, it is quite clear that Sudanese Government officials were focused on the transfer of the districts, country or territories of Sultan Rob and Sheikh Rihan from the province of Bahr el Ghazal to the province of Kordofan. As the SPLM/A itself has noted, Sultan Rob was the Paramount Chief of all the Ngok Dinka, and Condominium officials viewed him in the same way in 1905.

44. Sultan Rob was repeatedly referred to in the contemporary documents as primarily residing in his village just to the south of the Bahr el Arab. His "country" was said to be on the Kir river in the March 1905 *Sudan Intelligence Reports*,<sup>33</sup> not north of the river up to the Ragaba ez Zarga. Sheikh Rihan had himself indicated to Sudanese officials that his territory lay between the Lol and Kir rivers as recorded in the February 1905 *Sudan Intelligence Report*.<sup>34</sup> And Percival's 1905 sketch map of the area depicted very clearly Sultan Rob's territory as lying south of the Kir river. This can be seen on Map 14b of the Government of Sudan Counter-Memorial Map Atlas.

45. It is entirely understandable, therefore, that Governor-General Wingate's Memorandum noted that the districts of both chiefs "to the south of the Bahr el Arab", which had formerly been a portion of the Bahr el Ghazal Province, had been incorporated into Kordofan. Both Parties agree that the main purpose of the transfer was to place the Ngok and Twic Dinka, previously situated in Bahr el Ghazal, in Kordofan so as to have them under the same administration that was responsible for the Arab tribes in Kordofan whose raids south of the Bahr el Arab had given rise to complaints. With respect to the Ngok Dinka, the transfer of Sultan Rob's district was evidently seen as satisfying this object.

46. There was no intent by Sudanese Government officials at the time to "arbitrarily divide" the Ngok Dinka. To the extent there was any limited Dinka presence north of the Bahr el Arab (and the evidence is that, as of 1905, this was sparse in any event and situated in a small area lying just to the north of the Bahr el Arab), these were already situated in Kordofan and did not need to be transferred. When viewed in the light of the Wingate Memorandum, this is further evidence that the pre-1905 provincial boundary was deemed to be the Bahr el Arab as stated in many contemporary sources.

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<sup>33</sup> *Sudan Intelligence Reports*, No. 128 (March 1905), p. 3 (SM Annex 9).

<sup>34</sup> *Sudan Intelligence Reports*, No. 127 (February 1905), p. 2 (SM Annex 8).

47. Nor is there any evidence that Ngok Dinka who may have lived north of the Bahr el Arab at the time – and thus were already in a sense "divided" from the district of Sultan Rob to the south – had any complaint of being located in Kordofan Province prior to the transfer. Since they were not part of the area transferred to Kordofan in 1905, they could scarcely complain of being divided as a result of a finding that the transferred area is, as Wingate stated, to the south of the Bahr el Arab. To recall the SPLM/A's own words: it is not open to the Government (or to the SPLM/A) "to rewrite or second-guess... the administrators' decision in 1905."<sup>35</sup>

48. As for the SPLM/A's complaint that three of the nine Ngok chiefdoms – Alei, Achaak and Bongo – would be excluded if the transferred area was limited to an area south of the Bahr el Arab, the contemporary evidence as of 1905 simply does not support the assertion.

49. With respect to the Alei, there is no evidence that they were north of the Bahr el Arab in 1905. Indeed, there is no map evidence where they were at any time.<sup>36</sup> As for the Achaak, the earliest indication of them is not until 1914, well after the crucial date, and even then they are situated just north of the Bahr el Arab.<sup>37</sup> No contemporary evidence exists, however, that they were there as of 1905. The Bongo were not reliably identified as being located in any particular location. As Map 9 annexed to the Government of Sudan's Counter-Memorial shows, the earliest they appear is in 1907 where they are also depicted east of the present-day boundary of Kordofan. Wilkinson, in 1902, did find a village he labelled Bongo (or Bombo) a short distance north of the Kir river, but this was deserted and he gave no indication that it was an area belonging to the so-called Bongo chiefdom.<sup>38</sup>

50. It should also be recalled that C.A. Willis, the Inspector for Nahud responsible for the area of Kordofan at issue here, contradicts the whole notion advanced by the SPLM/A that there was a separate existence for each chiefdom. As he notes:

"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."<sup>39</sup>

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<sup>35</sup> SPLM/A Counter-Memorial, para. 1579.

<sup>36</sup> GoS Counter-Memorial Map Atlas, Map 7.

<sup>37</sup> GoS Counter-Memorial Map Atlas, Map 5.

<sup>38</sup> Gleichen, A., *The Handbook of Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* (Volume 2, HMSO, London, 1905) p.155, (SM Annex 38).

<sup>39</sup> *Sudan Intelligence Reports*, No. 178 (May 1909), p. 17 (SM Annex 19).

51. These same considerations undermine the SPLM/A's argument that the Government of Sudan's interpretation of the formula would deprive the Ngok Dinka of their "historic homeland" and would exclude Abyei town, which is said to be "the undisputed centre of Ngok Dinka political, cultural and commercial life for more than a century."<sup>40</sup>

52. Once again, it is necessary to test these assertions against the contemporary situation as it existed and was appreciated by Sudanese Government officials at the relevant date of 1905. To the extent there was an "historic homeland" of the Ngok Dinka at that time – and none of the contemporary sources use such words – it was viewed as being the district of the Paramount Chief, Sultan Rob. His territory was viewed, and depicted,<sup>41</sup> as lying to the south of the Kir or Bahr el Arab, and it was this area that Wingate said was transferred. The transferred area thus comprised what Government officials considered to be the Ngok Dinka "homeland" as of 1905.

53. Neither Abyei town nor the "Abyei Area" existed in 1905. They were not referred to at that time, nor are they referred to in the transfer documents. Abyei was not depicted as a village on maps until several years *after* the critical date.<sup>42</sup> It played no role whatsoever in the thinking of Sudanese officials in 1905 when they decided the transfer or in Wingate's description of the area that had been transferred. How the town of Abyei subsequently developed is wholly irrelevant to an assessment of what the 1905 transfer involved or what Government officials said about that transfer.<sup>43</sup>

54. The "Abyei Area" is a defined term which only surfaced in the Abyei Protocol. To assert that it would be implausible "to think that either party would seriously have expected that the Abyei Area would not include Abyei Town", as the SPLM/A Counter-Memorial does,<sup>44</sup> is nothing more than a bootstrap argument based on circular reasoning.

55. It was precisely because the Parties could not agree on what constituted the "Abyei Area" that they agreed on a formula for determining the boundary of that area based on an administrative decision that took place in 1905. That formula had nothing to do with the location of Abyei Town either in 2005 or at any time before; it defined the "Abyei Area", stipulatively, as the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905. The definition of the disputed area was thus intentionally removed

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<sup>40</sup> SPLM/A Counter-Memorial, para. 1520.

<sup>41</sup> GoS Counter-Memorial Map Atlas, Map 14b.

<sup>42</sup> See para. 493 below.

<sup>43</sup> On Abyei town see also Chapter 5, paras. 476-494.

<sup>44</sup> SPLM/A Counter-Memorial, para. 1521.

from post-1905 demographics or post-independence political considerations. Moreover, even the Abyei Appendix envisaged a situation in which Abyei town might not fall within the "Abyei Area". Under paragraph 7 of the Abyei Appendix, if the ABC Report was delayed beyond a two-year period, Abyei town would provisionally be the seat of the Abyei Area, but "subject to any readjustment or confirmation by the ABC final report."<sup>45</sup>

56. The wording of the formula, and the object and purpose behind it, also disprove the SPLM/A's contention that defining the "Abyei Area" as an area lying south of the Bahr el Arab would "contradict the basic principles of self-determination" for the Ngok Dinka people provided for by the Abyei referendum.<sup>46</sup>

57. The formula does not include any reference to issues relating to the referendum or to the notion of self-determination. It is a neutral formula agreed by both Parties grounded on a historical fact. In contrast, the SPLM/A's "self-determination" argument is based on present day demographics as to where Ngok Dinka are said to currently reside. But that has nothing to do with the considerations that motivated the Government's decision in 1905 to transfer the Ngok Dinka districts to Kordofan or with how the transferred area was defined at that time. Quite obviously, the 1905 transfer had nothing to do with issues of self-determination.<sup>47</sup>

58. In short, the SPLM/A contends that the very issue that the Parties could not agree in the Abyei Protocol – the limits of the disputed area – should 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.

59. In the final analysis, the agreed formula depends on the identification and delimitation of a specific area that was subject to an administrative transfer from one province to another in 1905. That is the crucial date, and 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.

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<sup>45</sup> Abyei Appendix, attached to the ABC Experts' Report, paragraph 7 (SM Annex 81).

<sup>46</sup> SPLM/A Counter-Memorial, para. 1519.

<sup>47</sup> Moreover, self-determination assumes a single people, whereas here there are several people: the "Abyei area" delimited by the ABC Experts is part of Dar Misseriya. As shown in the GoS Memorial, Chapter 2, it was to avoid prejudicing the claims of the Misseriya that a restricted formula was agreed.

#### **D. Final Remarks**

60. While the question of excess of mandate will be addressed in the next Chapter, it is appropriate to address here the SPLM/A's assertion in its Reply Memorial relating to the task of this Tribunal under the Arbitration Agreement that an excess of mandate under Article 2(a) of the Agreement is limited to "a decision by the ABC Experts that was *ultra petita*, purporting to decide matters outside the scope of the disputes submitted by the parties."<sup>48</sup> For the SPLM/A this conclusion is confirmed by the use of the words "which is" in Article 2(a). In particular, the SPLM/A Reply Memorial argues that:

"[T]he Parties provided, in clear and mandatory terms, for a bespoke definition of 'excess of mandate' in Article 2(a) ('**their mandate WHICH IS...**')... Article 2(a) defined the concept of 'excess of mandate' by reference to the ABC Experts' substantive task 'which is' defining and delimiting the Abyei Area."<sup>49</sup>

In other words, the SPLM/A focuses on two words in this provision, the words "which is", in order to limit the Tribunal's mandate to purely substantive matters addressed in the formula and to exclude any grounds of invalidity other than *ultra petita* - notably any violation of procedural rules by the ABC Experts.<sup>50</sup>

61. For present purposes, it is necessary to point out that the self-serving and garbled interpretation of Article 2(a) offered by the SPLM/A is evident if this provision is read in its entirety, rather than in a fragmented fashion as is done in the SPLM/A Reply Memorial. Article 2(a) provides that this Tribunal is to determine "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.*"

62. The SPLM/A analysis is both erroneous and misleading, not only because it clearly defies common sense, but also - more importantly - because the SPLM/A completely passes over two essential parts of Article 2(a): i) the fact that the Tribunal is asked to determine whether the Experts exceeded their mandate "*on the basis of the agreement of the Parties, as per the CPA*", and ii) the express reference made in Article 2(a) to the ABC Terms of Reference and Rules of Procedure in addition to the Abyei Protocol, and the

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<sup>48</sup> SPLM/A Counter-Memorial, para. 165.

<sup>49</sup> *Ibid.*, paras. 12-13; see also paras. 167-171.

<sup>50</sup> See also GoS Rejoinder, paras. 87-90.

Abyei Appendix. Finally, an ordinary reading of the text reveals that it does not in fact define what constitutes an excess of mandate.

63. The SPLM/A is clearly wrong when it asserts that "Article 2(a) did not refer to the Rules of Procedure (or Terms of Reference)"<sup>51</sup> when the Parties took great care in drafting the provision dedicated to the Tribunal's mandate precisely by referring to all of the relevant instruments, and specifically included amongst them a "*renvoi*" to the Terms of Reference and Rules of Procedure. The Parties could have omitted any reference to these instruments, instead, and in accordance with the importance they placed on these documents, expressly included them in the list of agreements contained in Article 2(a), confirming their intention to incorporate procedural matters within the Tribunal's mandate.<sup>52</sup> As the Court noted in the *Libya-Chad* case: "Any other construction would be contrary to one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness."<sup>53</sup>

64. The SPLM/A further argues that the Parties intended to exclude procedural violations from the scope of a determination of excess of mandate under Article 2(a), because "Article 2(a) does not refer to 'procedural conditions', to violations of procedural rights, or to denial of an opportunity to be heard."<sup>54</sup> However, the SPLM/A's allegations are refuted by the plain terms of the relevant provision since the specific reference to both the Terms of Reference and Rules of Procedure in the text of Article 2(a) renders unnecessary and redundant any additional reference to vague 'procedural conditions', which would in any event have been encompassed by these agreements.

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<sup>51</sup> SPLM/A Counter-Memorial, para. 170.

<sup>52</sup> See GoS Rejoinder, paras. 104-106.

<sup>53</sup> See *Territorial Dispute, Judgment, I.C.J. Reports 1994*, para. 51 and the Court precedents cited therein.

<sup>54</sup> SPLM/A Counter-Memorial, para. 163.

## Chapter 3

### Excess of Mandate

#### A. Introduction

65. The SPLM/A devotes 200 pages of its Counter-Memorial to an attempted rebuttal of the arguments made by the Government of Sudan that the ABC Experts exceeded their mandate. The GoS will not try to compete with the SPLM/A on this ground, if only because its own Counter-Memorial had already (although more concisely) answered the main points raised by the SPLM/A<sup>55</sup>. Moreover, the GoS wishes to make clear at the outset that it does not challenge the proposition that a claim for excess of mandate must not be made lightly by a Party to an arbitration process, nor accepted in an offhand manner by the competent tribunal. It is thus unnecessary to discuss the countless pages of the SPLM/A Counter-Memorial which deal at great length with this so-called "principle"<sup>56</sup>.

66. But it is precisely because the grounds for excess of mandate are manifest that the GoS needs not dwell on the question *ad nauseam* in order to establish this obvious fact. It is also because they are manifest that the SPLM/A has to devote so many words and so much effort to fabricate artificial arguments to the contrary. However, when the arguments are cleared from the quibbles advanced by the SPLM/A, it is apparent that the ABC Experts acted in excess of their mandate by misinterpreting and misapplying the substance of their mandate (see Section D below) and committing gross violations of applicable procedural rules (see Section C below). Before reviewing the few new arguments advanced by the SPLM/A in these two respects, the GoS will briefly answer some general points (Section B below).

#### B. General Considerations

67. In its Counter-Memorial, the SPLM/A tries to develop and to strengthen a series of vain and frivolous arguments bearing upon the general characteristics of both the present proceedings and those which took place (or should have taken place) within the framework of the ABC. In particular, it wrongly asserts that the GoS:

- (i) waived its objections to the validity of the ABC Experts' findings;

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<sup>55</sup> GoS Memorial, paras. 87-199.

<sup>56</sup> SPLM/A Counter-Memorial, paras. 27, 45, 48, 105, 110, 114, 140, 622-624 and 654-660.



- (ii) disregarded the particular character of the ABC proceedings; and
- (iii) misinterpreted the notion of "excess of mandate".

**(i) The Frivolous Argument Based on Waiver**

68. According to the SPLM/A, "the Government has in any event waived its objections to the validity of the ABC Experts' decision. The GoS did so both in its agreements relating to the ABC proceedings in the Comprehensive Peace Agreement and then in its conduct during those proceedings"<sup>57</sup>. But, apparently, the SPLM/A has virtually abandoned this argument which has been relegated to the very end of the Chapter of its Counter-Memorial (while the point is clearly preliminary) and remains as weak as it always was.<sup>58</sup>

69. However, weak as it is, the waiver argument has been "refined" in that it has now two different branches. On the one hand, it is said that the GoS has "waived its objections to the validity of the ABC Experts' decision by agreeing both that the ABC Report would be 'final and binding' and that the Report would be given 'immediate effect,' without any possibility for appeal or other challenge."<sup>59</sup> And, on the other hand, the SPLM/A now alleges that "the GoS raised no jurisdictional (or other) objection at any time during the ABC's work – in which it actively participated."<sup>60</sup>

70. As it becomes apparent with the juxtaposition of those two quotes, these two allegedly different arguments amount to exactly the same thing.

71. Indeed, as recalled in Article 2(a) of the Arbitration Agreement of 7 July 2008, the Parties had entrusted the ABC with the task to "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." Within this framework, and as long as the Commission (or, in the conditions clarified in Rule 14 of the Rules of Procedure, the Experts) respected their mandate, the decision was, indeed, intended to be "final and binding" – as provided for in Article 5 of the Abyei Annex Understanding on Abyei Boundaries Commission. This was

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<sup>57</sup> SPLM/A Counter-Memorial, para. 57, textually reproduced in paras. 113 and 861.

<sup>58</sup> GoS Counter-Memorial, paras. 120-121.

<sup>59</sup> SPLM/A Counter-Memorial, para. 861.

<sup>60</sup> Ibid., para. 867.

exactly what was reiterated by Ambassador Dirdeiry on several occasions cited by the SPLM/A.

72. However, it is certainly not true that the GoS and the SPLM/A accepted any kind of "blanket advance waiver" for the following reasons<sup>61</sup>:

- accepting a compulsory settlement of a dispute is not a "waiver" but is subject to the usual rules applying to such means of settlement;
- in particular, the findings of the bodies entrusted with this mission are subject to respect for their mandate.

73. As was recalled in the Counter-Memorial of the GoS<sup>62</sup>, it is precisely because there were serious doubts – to say the least – as to respect for this mandate by the ABC Experts that both Parties agreed, pursuant to the 2008 Arbitration Agreement, to submit the present dispute to this Tribunal. Since the SPLM/A has agreed to this proceeding, it is now estopped from raising objections against the jurisdiction of this Tribunal, which it has freely – and for good reasons – accepted.

74. Nor can the SPLM/A base itself on the principle it now invokes according to which it would be "well-settled that jurisdictional and procedural objections must be raised at the time they occurred or they will be waived". Even accepting that such a principle exists, which is dubious under this general form<sup>63</sup>, the GoS has indeed fully complied with it:

- immediately when the Report was presented to the Presidency, on 14 July 2005, the GoS objected to it on the ground that the "Committee of Experts

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<sup>61</sup> Ibid., para. 863.

<sup>62</sup> GoS Counter-Memorial, para. 131.

<sup>63</sup> See for example, A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration* 10, pp. 451-452 (2004), SPLM/A Exhibit LE 23/1, an exhibit presented to highlight the "well-settled" concept of waiver, solely refers to the constitution of an arbitral tribunal and not to general procedural objections. Furthermore, the SPLM/A relies on the Judgment of 13 July 1994, *China Nanhai Oil Joint Service Cpn. v. Gee Tai Holdings Co. Ltd.* 19 (1994) (Hong Kong Supreme Court) SPLM/A Exhibit LE 29/2, (said to be available at [www.hklii.com](http://www.hklii.com) - which is not the case...), a case in which the Supreme Court of Hong Kong "found the applicants procedural objections to have been waived" (SPLM/A Counter-Memorial, para. 358). However, the SPLM/A fails to point out that the Hong Kong Court paid great attention to the fact that the defendant had been informed of the procedural violation "at the earliest possible opportunity" (which is clearly not the case for the procedural violations committed by the Experts in the present case). The SPLM/A also makes more of the "well-settled" doctrine in the sources it cites than is actually apparent upon inspection. For example, the reference to waiver in Carlston's book is given a mere three lines, hardly the concrete establishment of a well-settled doctrine (K. Carlston, *The Process of International Arbitration* 85 (1946, reprint 1972), SPLM/A Exhibit LE 27/24, quoted in full at para. 354 of the SPLM/A Counter-Memorial). This follows the statement that an excess of jurisdiction cannot be placed in "a rigid, logical formula; rather, the nature of each must be examined in light of its particular circumstances and of the principles made the subject of the present work" (ibid.).

on Abyei area failed to respect its mandate."<sup>64</sup> Indeed the SPLM/A expressly recognized this in its Memorial<sup>65</sup> - while it is significantly mute on this point in its Counter-Memorial.<sup>66</sup> However, the SPLM/A's own witnesses acknowledged that "the GoS started to claim that the mandate was exceeded because the ABC Experts did not find a 1905 map and considered information from 1965 in their analysis. The GoS' position on this seemed to harden as time went on."<sup>67</sup>;

- and as far as the gross violations of their procedural rules by the ABC Experts are concerned, they have been protested as soon as they have been brought to the GoS' knowledge, but they consist in large part precisely in that the GoS and its representatives have not been informed of some important unilateral actions taken by the Experts without consultation with them.<sup>68</sup>

75. It must also be recalled that a waiver of rights by a State cannot be presumed lightly. As the ILC recalled in its commentary of Article 45 of the Draft Articles on Responsibility of States for internationally wrongful acts:

"[a]lthough it may be possible to infer a waiver from the conduct of the States concerned or from a unilateral statement, the conduct or statement must be unequivocal."<sup>69</sup>

Similarly, the I.C.J. observed

"that waivers or renunciations of claims or rights must either be express or unequivocally implied from the conduct of the State alleged to have waived or renounced its right."<sup>70</sup>

76. In the present case, the GoS has never, explicitly or implicitly, waived its right to challenge a decision by the ABC Experts (or the ABC itself) which would have been adopted in excess of its mandate, whether on the substance of the mandate or for gross procedural violations. And, on both grounds, it has expressly and rigorously protested as

<sup>64</sup> "SPLM shoulders delay in peace implementation – Sudan's Bashir", *Sudan Tribune*, Wednesday 10 January 2007, SPLM/A FE 15/9.

<sup>65</sup> SPLM/A Memorial, paras. 534-536.

<sup>66</sup> On this point, see also GoS Counter-Memorial, para. 132.

<sup>67</sup> SPLM/A Memorial, Witness Statement of James Lual Deng Tab 2, para. 109. See also SPLM/A Memorial, Witness Statement of Minister Deng Alor Kuol, Tab 1, para. 161 and General Sumbeiywo's Witness Statement, Tab 4, para. 122.

<sup>68</sup> See below, paras. 113-131; see also GoS Counter-Memorial, paras. 189-193.

<sup>69</sup> I.L.C., *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, Report of the International Law Commission on its fifty-third session, A/56/10, *ILC Yearbook*, 2001, Vol. II, Part. 2, p. 122, para. 5) of the commentary of Draft Article 45.

<sup>70</sup> I.C.J., Judgment of 19 December 2005, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *I.C.J. Reports* 2005, p. 266, para. 293.

soon as these excesses have been known by it. By no means can a waiver of its rights by the GoS, by conduct or in words, be detected and invoked by the SPLM/A.

## (ii) The Character of the ABC Proceedings

77. In its Counter-Memorial, the GoS has stressed the "Special Circumstances of the Case"<sup>71</sup> and especially that "the composition of the ABC and in particular of the Experts group, was quite unusual compared with that of arbitral tribunals usually established at the international level for this kind of boundary dispute, especially since it was not composed of lawyers but primarily of historians and political scientists. In these conditions an excess of power could be less unpredictable and exceptional, and is less remarkable than it could have been in the case of a body composed of lawyers experienced in arbitrating boundary disputes."<sup>72</sup> It is therefore astonishing that, in its own Counter-Memorial, the SPLM/A repeatedly and harshly reproaches the GoS for disregarding "the specialized character of the ABC proceedings."<sup>73</sup>

78. Indeed, it can be accepted that "the ABC was a specialized, *sui generis* boundary commission of experts which, despite its adjudicative character and role, differed in a substantial number of vital respects from an investment or commercial arbitral tribunal."<sup>74</sup> However, even so, as will be seen later in this Chapter<sup>75</sup>, any body entrusted with the task of settling disputes between two Parties such as those involved in the present case is bound by some fundamental basic rules which must be respected in all cases. Failing this, the body in question violates its mandate and its decision must be declared null and void.

79. But the next step in the SPLM/A's reasoning is derisory: it reproaches the GoS for not including amongst the authorities cited in its Memorial, "a boundary commission such as the ABC."<sup>76</sup> Such an argument is in total contradiction with the character *sui generis* in great part rightly attributed to the ABC process by the SPLM/A. In accordance with its definition in the *Black's Law Dictionary*, *sui generis* means: "of its own kind or class; unique or peculiar."<sup>77</sup> It is absurd to criticize the SPLM/A for not referring to similar bodies, since such bodies do not exist, significantly, the SPLM/A is no more in a position to mention any such bodies (no reference is provided in the 400 pages of its Counter-Memorial) than the GoS.

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<sup>71</sup> GoS Counter-Memorial, paras. 130-134.

<sup>72</sup> Ibid., para. 130.

<sup>73</sup> SPLM/A Counter-Memorial, paras. 27(a), 114-117, 122, 125-126, 234 and 256.

<sup>74</sup> Ibid., para. 125.

<sup>75</sup> At paras. 109-110.

<sup>76</sup> SPLM/A Counter-Memorial, para. 832.

<sup>77</sup> Black's Law Dictionary (8th ed. 2004), *sui generis*.

80. It is also ironic that the SPLM/A chastises the GoS for focusing "entirely on a highly-selective presentation of authorities and commentary drawn from international commercial and investment arbitration, practice of the International Court of Justice ('ICJ') and occasional references to state-to-state arbitrations"<sup>78</sup> and for ignoring "the fact [...] that the ABC was **not** an international arbitral tribunal and that the ABC proceedings were not international arbitral proceedings"<sup>79</sup>, while the SPLM itself limits its analysis precisely to the very same sources:

- the World Court (PCIJ and ICJ), in approximately eleven occasions<sup>80</sup>;
- the European Court of Justice, at least twice; or
- at least six ICSID cases<sup>81</sup>; and
- national jurisprudence, countless times; etc.

Indeed, the SPLM/A's reliance on these authorities was so extensive that a great number of the references made in the GoS' Counter-Memorial were drawn from the (over-) abundant legal exhibits that the SPLM/A deemed necessary to annex to its own Memorial.

81. Just to take the example of ICSID case law, according to the SPLM/A, "the Government's Memorial incorrectly attempts to equate the ABC and its proceedings with an international investment or commercial arbitral tribunal and this Tribunal with an annulment panel constituted under the auspices of the International Centre for the Settlement of Investment Disputes ('ICSID')." <sup>82</sup> That same argument is repeatedly made in the SPLM/A's Counter-Memorial. <sup>83</sup>

82. Of course, the GoS does not "equate" the ABC or the ABC Experts with an ICSID arbitral panel: a border dispute is not an investment dispute; the composition of both bodies is different; the material principles to be applied substantially differ too. It remains nevertheless the case that ICSID tribunals, like the present Tribunal, are entrusted with the task of settling disputes between two or more parties by adopting a binding decision in accordance with a precise mandate based on the consent of those

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<sup>78</sup> SPLM/A Counter-Memorial, para. 120.

<sup>79</sup> Ibid., para. 234.

<sup>80</sup> Ibid., paras. 13, 182-184, 185, 286, 648, 649-651, 799, 802, 811, 819, 822-823.

<sup>81</sup> See the list in footnote 88.

<sup>82</sup> SPLM/A Counter-Memorial, para. 115.

<sup>83</sup> Ibid., paras. 2, 23, 26, 28, 31, 94, 103, 115, 122, 125, 126, 127, 128, 158, 247, 256, 267, 742.

parties, and with the same basic procedural rules (publicity, the adversarial principle in particular). The irony is that the SPLM/A in fact seems to agree with this common sense approach. While it sharply and abundantly criticizes the GoS for referring to ICSID jurisprudence,<sup>84</sup> it copiously refers to it when it deems it helpful for its case – in no less than 28 paragraphs of its Counter-Memorial.<sup>85</sup>

83. The same can be said concerning the alleged assimilation made by the GoS between this Tribunal and an ICSID annulment Committee.<sup>86</sup> Here again, it goes without saying that "[t]his Tribunal was not constituted as an annulment panel under the ICSID Convention or the ICSID Rules, nor an annulment or recognition court under the New York Convention, nor a national court considering an ICC or UNCITRAL arbitral award."<sup>87</sup> It is nonetheless true that:

- this Tribunal is entrusted with the mission to make a declaration on "[w]hether or not the ABC Experts had, on the basis of the agreement of the Parties as per the CPA, exceeded their mandate" and if it decides in the affirmative, this declaration will amount to an annulment of the ABC Experts' decision;
- the requirements concerning the composition of this Tribunal are comparable to those not really applicable to ICSID panels in general – including ICSID annulment committees;<sup>88</sup>
- like Article 9(2) of the Arbitration Agreement, Article 48(3) of the Washington Convention provides that: "The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based";
- Similarly, Articles 1(1) and 9(2) of the Arbitration Agreement provide for the binding and final effect of the award as does Article 53(1) of the Washington Convention concerning the awards of ICSID panels and Article 52(4) concerning the ICSID annulment awards.

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<sup>84</sup> See *ibid.*

<sup>85</sup> SPLM/A Counter-Memorial, paras. 15, 132, 133, 134, 186, 187, 189-193, 209, 277, 287, 298, 300, 355, 356, 360, 576, 582, 583, 663, 664, 740, 799, 800 and 824.

<sup>86</sup> See also, SPLM/A Counter-Memorial, paras. 2, 23, 28, 103, 115, 120, 122, 127, 128, 156, 158 and 179.

<sup>87</sup> SPLM/A Counter-Memorial, para. 158.

<sup>88</sup> See Article 5(2) of the Arbitration Agreement of 7 July 2008 and Article 14 (in combination with Art. 52(3)) of the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States).

84. Again, it is ironic that the SPLM/A itself does not hesitate to refer to decisions of ICSID annulment committees when in its view they can help its case.<sup>89</sup> A striking example is given in paragraphs 189 and 190 of its Counter-Memorial, where the SPLM/A recites a long quote from the *Lucchetti ad hoc* Committee decision (which was cited in the GoS Memorial) and tries to turn it to its own advantage not alluding at all to the possible inappropriateness of such an authority. Similarly, and just to give another example, the SPLM/A does not hesitate to rely heavily on a judgment of the European Court of Justice relating to the annulment of an arbitral award<sup>90</sup>.

85. According to the SPLM/A, "the Government ignores the well-settled body of general principles of law that apply to the decisions of consensually constituted adjudicatory bodies such as the ABC."<sup>91</sup> The problem for the SPLM/A is that while it argues for the application of a specific set of legal principles to similar adjudicatory bodies, it is incapable of mentioning any such similar body and, in fact, it resorts to applying exactly the same rules and basing itself on the same authorities as the GoS.

### (iii) The Admissible Grounds for a Claim of an Excess of Mandate

86. SPLM/A criticizes the GoS for raising "a scatter-shot collection of eleven separate objections to the ABC Experts' actions and the ABC Report."<sup>92</sup> According to the SPLM/A's Counter-Memorial, by setting forth such a "laundry list"<sup>93</sup> "[t]he Government's analysis ignores the specific terms of the Abyei Arbitration Agreement, and instead seeks to substitute a catch-all reference to 'general principle of law and practice' for the parties' carefully negotiated agreement."<sup>94</sup>

87. A general comment is in order here: the fact that there are several grounds for establishing the excess of mandate committed by the ABC Experts, far from resulting

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<sup>89</sup> *Klöckner v. Cameroon Case*, (ARB/81/2) *ICSID Review – Foreign Investment Law Journal* 90 (1986), SPLM/A Exhibit LE 23/7, SPLM/A Counter-Memorial, paras. 132, 356, 581; *Judgment of the Ad Hoc Committee of 16 May 1986 on the Application for Annulment Submitted by the Republic of Indonesia Against the Arbitral Award Rendered on 20 November 1984 in Amco Asia v. Indonesia*, 1 ICSID Rep. 509 (1993), SPLM/A Exhibit LE 23/8, SPLM/A Counter-Memorial, paras. 132, 799, 800; *Annulment Decision of the Ad Hoc Committee of 5 September 2007, in Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A.*, ICSID Case No. ARB/03/4, at p. 18 (2007), SPLM/A Exhibit LE 24/12, SPLM/A Counter-Memorial, para. 189; *MINE v. Government of Guinea Case* (ARB/84/4), 95 (1988), SPLM/A Exhibit LE 26/24, SPLM/A Counter-Memorial, paras. 287, 579, 664, 739; *Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, CMS Gas Transmission Company v. Argentine Republic (25 September 2007)*, (ICSID Case No. ARB/01/8) (Annulment Proceeding) (2007), Exhibit LE 15/2, SPLM/A Counter-Memorial, paras. 578, 740, *Soufraki v. UAE*, Decision on Annulment 5 June 2007, SPLM/A Counter-Memorial, para. 582.

<sup>90</sup> SPLM/A Counter-Memorial, para. 143.

<sup>91</sup> *Ibid.*, para. 129.

<sup>92</sup> *Ibid.*, para. 95; see also para. 149.

<sup>93</sup> *Ibid.*, para. 149; when the SPLM/A has found a formula, it relies incessantly on it – see also, paras. 2, 22, 97, 102, 149, 150, 151 and 227-228.

<sup>94</sup> *Ibid.*, para. 181.

from a "catch-call" enterprise by the GoS, is but a confirmation of the comprehensive failure by the Experts to adhere to their mandate and to comply with it in accordance with the applicable rules of procedure. Moreover, as shown in the GoS' Counter-Memorial, the grounds for excess of mandate can be easily classified into three categories:

- the first, a pronouncement *ultra petita*, is accepted by the SPLM/A as a possible ground for an excess of mandate;
- the second, a decision *infra petita*, seems to be excluded as constituting such a ground by the SPLM/A, although no justification is provided for such an exclusion,<sup>95</sup> which is, in any case, not defensible: breaches *infra* and *ultra petita* are two sides of the same coin; and
- the third, gross violations of procedural rules, is more vigorously challenged by the SPLM/A,<sup>96</sup> but, as will be shown in some detail below,<sup>97</sup> it can certainly not be accepted that the "mandate" of a Tribunal is limited to substantive matters. The Tribunal must settle a given issue following a given, agreed procedure laid down by the parties, the violation of which, when concerning rules of fundamental importance, also constitutes an excess of mandate.

88. The SPLM/A argues that the notion of excess of mandate is narrowly defined in the present case. It states:

"Under Article 2 of the Arbitration Agreement, the sole basis for this Tribunal to disregard the ABC Report is narrowly defined as an excess of the ABC Expert's mandate. No other ground for alleging nullity of, or refusing to comply with, the ABC Report is permitted by the Arbitration Agreement. In particular, the Arbitration Agreement does not permit review or appeal of alleged errors of law or fact by the ABC Experts, objections to the ABC Experts' procedure, the composition of the ABC, the impartiality of the ABC Experts, or any of the other grounds sometimes suggested historically as bases for findings of nullity of adjudicative decisions."<sup>98</sup>

89. While it is certainly true that Article 2 of the Arbitration Agreement constitutes "the sole basis for this Tribunal to disregard the ABC Report", there is no basis for the SPLM/A's contention that this ground "is narrowly defined". The notion of an excess of

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<sup>95</sup> The sole hint at this in the SPLM/A Memorial is ambiguous – see fn. No. 1139, see also GoS Counter-Memorial, para. 162.

<sup>96</sup> SPLM/A Counter-Memorial, paras. 160-200.

<sup>97</sup> See *infra*, paras. 98-110.

<sup>98</sup> SPLM/A Memorial, para. 148; see also para. 99.



mandate is simply not defined at all in the Arbitration Agreement and the Parties as well as this Tribunal have to rely on the general definition of an excess of mandate, as defined in accordance with general principles of law, which has already been discussed at length in the GoS Memorial and Counter-Memorial.<sup>99</sup> This holds true whether one reads Article 2(a) of the Agreement in isolation, or in conjunction with paragraphs (b) and (c).<sup>100</sup>

90. Contrary to the SPLM/A, which simply repeats the expression "excess of mandate" as a mantra, without discussing its meaning save for asserting that it must be interpreted "narrowly"; the GoS took pain to determine its meaning as precisely as possible and cited respected and convincing authorities to that effect.<sup>101</sup> To this day, the SPLM/A has not advanced any persuasive argument challenging this presentation.

91. It is to be noted in particular that the SPLM/A impugns the "large" definition of "excess of power" allegedly provided by the GoS and affirms that it must be distinguished from an "excess of mandate" as defined in the Agreement.<sup>102</sup> However, this is pure speculation and the SPLM/A does not advance any argument justifying that an excess of mandate would be narrower than an excess of power in spite of the ordinary meaning of both words.

92. It would indeed be objectionable to dissociate excess of mandate from excess of power. The notions are certainly proximate, however, while an excess of power "constitutes an exercise of jurisdiction in excess of, or inconsistent with, the range of powers vested in the tribunal or court by the arbitral treaty, special agreement, or terms of reference",<sup>103</sup> the notion of excess of mandate – a less common notion – is wider in that it relates to the substance of the issue, the powers of the body concerned and the essentials of the procedure required to be followed.

93. Moreover, it is noticeable that the SPLM/A itself makes reference and often quotes with approval (and without restrictions based on the irrelevance of the notion) authorities relating to excess of power (works by Kaikobad, Guermanoff or Lapradelle on excess of

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<sup>99</sup> GoS Memorial, paras. 135-137; GoS Counter-Memorial, paras. 138-139; 162-165 and 186-187.

<sup>100</sup> Contrary to what is asserted by the SPLM/A: "Remarkably, the GoS's lengthy Memorial never discusses, quotes or even refers to Article 2(b) of the Arbitration Agreement" (SPLM/A Counter-Memorial, para. 156), the GoS has not limited its discussion of the definition of the notion of an "excess of mandate" in the Agreement to Article 2(a): "The first task of the Tribunal as spelled out *in Article 2 of the Arbitration Agreement* refers to the ABC Experts' Report: the Tribunal is requested by the Parties to determine whether the Experts exceeded their mandate." (GoS Memorial, para. 21, emphasized by the GoS); on the contrary, it specifically mentioned paragraphs 2(b) and (c) in its discussion of the concept of excess of mandate (GoS Memorial, paras. 94-95).

<sup>101</sup> GoS Memorial, paras. 129-191; GoS Counter-Memorial, paras. 138-139; 162-165 and 186-187.

<sup>102</sup> SPLM/A Memorial, paras. 190, 197 and 199.

<sup>103</sup> Kaikobad, K.H., "Quality of Justice: 'Excès de Pouvoir' in the Adjudication and Arbitration of Territorial and Boundary Disputes" in G. Goodwin-Gill & S. Talmon (eds.), *Reality of International Law*, 293, 295 (1999), SPLM/A Exhibit LE 1/2.

power are all cited<sup>104</sup>). And, in its Memorial, the SPLM/A does not hesitate to assimilate an excess of power with an excess of mandate; thus, discussing the proposition that "[a]n excess of mandate requires a 'manifest,' 'glaring' and 'flagrant' showing", it asserts that: "it is also well-settled under general principles of international law that *an excess of power* is an exceptional conclusion."<sup>105</sup>

94. To give another example, the SPLM/A also mentions Article 27 of the IDI's *Projet de Règlement pour la procédure arbitrale internationale* which reads: "The arbitral award is null in the event of a null arbitration agreement, or of excess of power, or of proven corruption of one of the arbitrators, or of essential error." Significantly, the SPLM/A expressly interprets this as including "(b) excess of mandate (*excès de pouvoir*)."<sup>106</sup> Again, in its Counter-Memorial, the SPLM/A relies on the ICSID Convention and purely and simply assimilates an excess of power with an excess of mandate: "Not surprisingly, the ICSID Convention does not treat a failure to state reasons as an excess of mandate (with the Convention instead dealing separately with a failure to state reasons in Articles 48(3) and 52(1)(e) and with an excess of powers in Article 52(1)(b))."<sup>107</sup>

95. The very narrow interpretation that the SPLM/A wants to give to the concept of "excess of mandate" results in a reduction of the concept to a pronouncement *ultra petita* and to reject any other possible grounds:

"an 'excess of mandate' is a specific, identifiable type of defect. By its plain terms, an 'excess of mandate' under Article 2(a) is a decision by the ABC Experts that was *ultra petita*, purporting to decide matters outside the scope of the disputes submitted by the parties. That is evident from the parties'

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<sup>104</sup> Ibid., 293, SPLM/A Counter-Memorial, paras. 14 and 174; Guermanoff D. , *L'excès de pouvoir de l'arbitre*, (1929), 116. SPLM/A Exhibit LE 13/9, SPLM/A Counter-Memorial, paras. 140 and 577; De Lapradelle, *L'excès de pouvoir de l'arbitre*, 2 Rev. de Droit Int'l 5 (1928), Exhibit LE 13/10, SPLM/A Counter-Memorial, para. 140.

<sup>105</sup> SPLM/A Memorial, para. 762, (emphasis added by the GoS). See also e.g. para. 583.

<sup>106</sup> Ibid., para. 704 (SPLM/A Exhibit LE 5/2); translation by the SPLM/A (fn. 1164); the original text reads "La sentence arbitrale est nulle en cas de compromis nul, ou d'excès de pouvoir ou de corruption prouvée d'un des arbitres ou d'erreur essentielle"; see also the end of fn. No.1164: "See also G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals* (1986), 700, 703 et seq. SPLM/A Exhibit LE 5/5; M. Reisman, *Nullity and Revision*, (1971), 31-34 SPLM/A Exhibit LE 5/4; K. Carlston, *The Process of International Arbitration*, (1946 reprinted 1972), 214, SPLM/A Exhibit LE 1/3". In his article, Professor Reisman recalls that during the *travaux préparatoires* of the Institut's Resolution, "Excès de pouvoir was apparently reinstated to cover a host of Goldschmidt's grounds of nullity. Goldschmidt expressed his regret over the adoption of this term [...]. The Institut refused to support such a daring experiment [*i.e.* the limitations/precisions of the grounds] and reverted to the term *excès de pouvoir*, in place of most of the grounds suggested by Goldschmidt [according to the Goldschmidt's project: "eight of the eleven grounds of nullity that he discerned related to breaches of provisions in his project, *i.e.* to some aspect of the process of concluding the compromise or to the process of arbitration, while three were acts that were generally contrary to international law or morality" (p. 32)]. Like many later writers, it seemed to have the fond belief that in some mysterious way ambiguity was a means of control; in fact it was an invitation to license." (p. 34). See also arguments to the same effect based on the Draft ILC Convention on Arbitral Procedure, *ibid.*, paras. 195 or 210; or based on the book by D. Guermanoff, *L'excès de pouvoir de l'arbitre* (1929), at para. 577.

<sup>107</sup> SPLM/A Counter-Memorial, para. 209.

use of the word '**excess of** mandate,' which referred to situation where the ABC Experts might have gone beyond or outside ('**exceeded**') the scope of the issues submitted to them."<sup>108</sup>

96. In view of justifying this limitation, the SPLM/A introduces a list of five quotes from various authorities by asserting that "[a]uthorities from a range of sources treat, with reasonable consistency, the concept of an 'excess of mandate' as referring to a tribunal going beyond the scope of the disputes submitted to it."<sup>109</sup> A more careful study of that list reveals that:

- a) "An arbitral tribunal may only validly determine those disputes that the parties have agreed that it should determine"<sup>110</sup>. This does not exclude – on the contrary, it implies – that such a body must respect the agreement of the parties by both determining only the dispute deferred to it, and by determining it completely;
- b) "[A]n excess of jurisdiction occurs when the arbitrators **exceed the mission given them**."<sup>111</sup> This statement certainly does not exclude that an excess of mandate encompasses other grounds; moreover, this quote (which is cited by Carlston but authored by Nys),<sup>112</sup> is followed in the classical book on *The Process of International Arbitration* by Carlston by the references to various authors who expressly declare themselves in favour of a broader definition than that advocated by the SPLM/A. They are as follows:

"Lammasch has a broader definition. He considers that within the concept of excess of jurisdiction is a decision by the arbitrator on matters not entrusted to him, *a failure to apply the rules of law prescribed, an inobservance of procedural rules* such as rendering a decision before the submission of the required briefs or failure to hear the parties, or failure to give reasons as required by the *compromise*. Balasko considers excess of jurisdiction (*excès de pouvoir*) occurs in a failure to observe the jurisdiction limits of the tribunal as defined by the parties...";<sup>113</sup>

- c) "An excess of mandate may only be alleged where 'the tribunal **delimits, in whole or in part, a boundary in areas not covered by the terms of**

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<sup>108</sup> Ibid., para. 165.

<sup>109</sup> Ibid., para. 174.

<sup>110</sup> Ibid., para. 174 quoting from A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration* ¶15-30 (2004), SPLM/A Exhibit LE 4/2.

<sup>111</sup> Quoting *ibid.*, Carlston, K., *The Process of International Arbitration* (1946, reprinted 1972), 83, SPLM/A Exhibit LE 1/3 (emphasis added). It can be noted in passing that by relying on these quotes the SPLM/A equates an excess of mandate with an "excess of jurisdiction".

<sup>112</sup> Nys, E., "La révision de la sentence arbitrale" (1910, 2d ser.) 12 *Rev. de Droit Int. L.C.* 621.

<sup>113</sup> Carlston, K., *The Process of International Arbitration* (1946, reprinted 1972), 83, SPLM/A Exhibit LE 1/3 citing: Lammasch, H., *Die Rechtskraft Internationaler Schiedssprüche* (1913) 167, 168; Balasko, A., *Causes de nullité de la sentence arbitrale en droit international public* (1938) 153 (emphasis added).

**reference and thus exceeds the territorial scope of its jurisdictional powers'.**"<sup>114</sup> As already pointed out in the GoS Counter-Memorial<sup>115</sup>, the real quote from Professor Kaikobad's article calls for an entirely different conclusion. This quote gives only an example of what constitutes an excess of mandate but is not a definition of the notion;

- d) "An excess of mandate occurs where a tribunal '**decides upon that which was not in fact submitted to them**... The question of excess of power or jurisdiction is, in essence, a question of treaty interpretation. It is a question which is to be answered by a careful comparison of the award or other contested action by the tribunal with the relevant provisions of the *compromise*'."<sup>116</sup> The GoS already indicated that it agrees with this statement in its Counter-Memorial.<sup>117</sup> Interestingly, the SPLM/A omits to quote the examples contained in this Commentary, which are particularly apposite in the present case. In particular, "In the *Aves Island* case, decided on 30 June 1865 by the Queen of Spain, the question was raised whether an arbitrator charged with the decision of 'the question of the right of dominion and of sovereignty over the Island of Aves' as between the parties to the dispute could enter into the collateral question of the existence of a servitude."<sup>118</sup> This case has been referred to in the GoS Counter-Memorial and was described by Judge Weeramantry as a case where "the award clearly cannot stand."<sup>119</sup>
- e) "[A]n arbitral award must be set aside, if it either concerns a dispute that has not been mentioned in the arbitration agreement (first alternative), or if it exceeds the scope defined in the arbitration agreement (second alternative), i.e. *ultra petita*. ... [T]his corresponds in content to Art. IX(1)(c) European Convention and Art. V(1)(c) New York Convention, as well as the old version of Section 595 (1) lit. 5 of the [Austrian] Code of Civil Procedure, that simply put, provided for the case **where the arbitral tribunal has exceeded its task**."<sup>120</sup>

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<sup>114</sup> SPLM/A Counter-Memorial, para. 174 quoting from Kaikobad, K.H., "Quality of Justice: 'Excès de Pouvoir' in the adjudication and arbitration of territorial and boundary disputes" in G. Goodwin-Gill & S. Talmon (eds.), *Reality of International Law*, 293, 302 (1999), SPLM/A Exhibit LE 1/2 (emphasis added by the SPLM/A).

<sup>115</sup> GoS Counter-Memorial, paras. 162-163.

<sup>116</sup> SPLM/A Counter-Memorial, para. 174 quoting from *Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission at its Fifth Session*, UN Doc. A/CN.4/92, 107-108, available at [www.un.org](http://www.un.org), Exhibit LE 1/1 referring to E. de Vattel, *Le droit des gens*, 1758 ed. Vol. 1, sect. 329, p. 520 (1916), Exhibit LE 3/11 (emphasis added).

<sup>117</sup> GoS Counter-Memorial, para. 138.

<sup>118</sup> *Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission at its Fifth Session*, UN Doc. A/CN.4/92, 108, SPLM/A Exhibit LE 1/1.

<sup>119</sup> GoS Counter-Memorial, para. 147.

<sup>120</sup> SPLM/A Counter-Memorial, para. 174 quoting from Hausmaninger, C., *Kommentar zu den Zivilprozeßgesetzen* (Fasching, W. & Konecny, A. eds.) (Vol. 4, Part 2, 2nd ed., Vienna, 2007) §611, paras. 141 *et seq.* (2d ed. 2007), Exhibit LE 23/19 (emphasis added).

This text interprets Article 611(2)(3) of the Austrian Civil Code of Procedure, which provides that an award shall be set aside if it deals with a dispute not falling within the terms of the arbitration agreement, or contains a decision on matters beyond the scope of the arbitration agreement or beyond the claims of the parties. Further, where an error may be separated from the award, then only that part of the award shall be set aside.<sup>121</sup> A reading of the full text provides a broader interpretation of this provision, including several examples of excess of mandate, such as where arbitrators have determined performance of a purchase agreement based on altered conditions.<sup>122</sup> It even acknowledges that, while not specifically included in the text of Article 611, an *infra petita* decision by a tribunal may in certain circumstances be implied in Article 611(3).<sup>123</sup>

97. This more complete analysis of the authorities only very partially cited by the SPLM/A makes very clear that not only a finding *ultra petita*, but also an omission to decide on all the issues (decision *infra petita*) and non-observance of important procedural rules, will, when they are manifest and material, constitute excesses of mandate.

### ***C. Gross Breaches of Applicable Procedural Rules***

98. It is equally undisputable that gross breaches of applicable procedural rules constitute an excess of mandate (i). In the present case, three such violations have been committed by the ABC Experts (ii).

#### **(i) Gross Breaches of Applicable Procedural Rules Constitute an Excess of Mandate**

99. The mandate of the ABC – which could be complied with by the Experts alone in case a consensus could not be reached within the Commission -, was "to define and

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<sup>121</sup> Hausmaniger, C., *Kommentar zu den Zivilprozeßgesetzen* (Fasching, W. & Konecny, A. eds.) (Vol. 4, Part 2, 2nd ed., Vienna, 2007) p. 716, Article 611(2)(3) of the Austrian code of Civil Procedure, Application for Setting Aside an Award, provides "An Award shall be set aside if the award deals with a dispute not falling within the terms of the arbitration agreement or contains decisions on matters beyond the scope of the arbitration agreement or beyond the claims of the parties; however, if the defect concerns only a seperable part of the award, then only that part of the award shall be set aside".

<sup>122</sup> Ibid., p. 752, para. 144, provides "The same shall apply when a tribunal decides on the acceptance and payment of the purchased goods under altered conditions instead of deciding on the damages asserted based on non-performance of a purchase agreement."

<sup>123</sup> Ibid., p. 753, para. 152, provides "Not expressly mentioned in line 3 is the case where the tribunal decides *infra petita*, or only on a portion of the parties' claims, in other words decides on a minus. If it is obvious that only a global resolution is intended, the question arises whether an analogous application may apply."

demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905"<sup>124</sup> under the conditions "prescribed in the ABC Rules of Procedure".<sup>125</sup> This was a paramount condition for the validity and binding character of the Commission's findings – as also confirmed by the express reference to the Terms of Reference and Rules of Procedure of the ABC in Article 2(a) of the 2008 Arbitration Agreement entrusting this Tribunal with the mission to ascertain whether the Report of the ABC Experts was tainted with an excess of mandate.

100. As the GoS has explained in its Memorial,<sup>126</sup> these two instruments, expressly mentioned in the Arbitration Agreement, were drafted with care and expressly agreed by the Parties: if the Experts materially deviated from the Terms of Reference or the Rules of Procedure in carrying out the task conferred on them, this would be inconsistent with the conditions laid down for the exercise of their mandate and the express reference to these documents in the 2008 Arbitration Agreement further confirms this (which would, in any case, results from the applicable general principles of law).

101. Contrary to SPLM/A's allegations,<sup>127</sup> the GoS has not based its demonstration to that effect exclusively on sources relating to investment disputes.<sup>128</sup> But, in any case, the authorities in the investment field are perfectly relevant as well. While there is no question of applying the law concerning commercial or investment arbitration, these legal rules reflect general principles of law common to all legal systems and, indeed, inherent to the mission of settling a dispute with binding force on the basis of the consent of the parties.<sup>129</sup> Any tribunal or body entrusted with such a task must respect the agreement of the parties both on the substance and on the procedure they have fixed. The special character of the ABC proceedings does not justify an exception to these general principles, whether they concern the independence of the Experts, or their alleged wide discretionary power.

102. The SPLM/A asserts that the ABC's Rules of Procedure were not sufficiently detailed: "Among other things, the parties' agreements relating to the ABC did not incorporate a detailed set of procedural rules (like the UNCITRAL, ICSID, ICC or PCA

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<sup>124</sup> Article 5.1. of the Abyei Protocol, Article 1 of the Abyei Appendix, Sections 1.1. and 1.2 of the Terms of Reference and Article 1 of the Rules of Procedure of the ABC.

<sup>125</sup> Article 5 of the Abyei Appendix.

<sup>126</sup> GoS Memorial, para. 120.

<sup>127</sup> SPLM/A Counter-Memorial, para. 233.

<sup>128</sup> See GoS Memorial, paras. 177-186 and 192-226 and GoS Counter-Memorial, paras. 186-187 where the following authorities (ignored by the SPLM/A's Counter-Memorial) are cited: see e.g. P. Daillier and A. Pellet, *Droit International Public (Nguyen Quoc Dinh)*, (LGDJ, 7<sup>th</sup> edition, 1999), p. 886 (GoS Memorial, at para. 179) or F. Castberg, "L'excès de pouvoir dans la justice internationale", (1931) 35 *Recueil des Cours*, p. 389 (GoS Counter-Memorial, at para. 189 - SPLM/A Exhibit LE 13/11).

<sup>129</sup> See also above, para. 80.

Rules), with the various procedural requirements that characterize those rules."<sup>130</sup> Nevertheless, the fact that the parties to a given case have chosen not to draft detailed rules of procedure can certainly not be interpreted as a repudiation of accepted universally procedural principles. Any tribunal or body called upon to decide a dispute has to reach its decision in applying general principles applicable to any settlement of disputes and constitute the basic requirements for a due process.<sup>131</sup> Moreover, it is simply untrue that these basic principles are absent from the rules agreed by the Parties in relation with the ABC proceedings.

103. At paragraph 139 of its Counter-Memorial, the SPLM/A lists what it sees as being "the mandatory procedural restrictions on the ABC Experts" contained in the Abyei Protocol, the Abyei Annex and the Terms of Reference and it feels authorized to conclude that "the foregoing provisions of the parties' agreements imposed very few, and very limited constraints on the ABC Experts' procedural discretion".<sup>132</sup> Eventually the SPLM/A also refers to a selective list drawn from the Rules of Procedure and declares that "there can be no dispute that each of these various provisions was fully satisfied. The ABC and the ABC Experts undertook the travels contemplated by the Rules of Procedure (with various adjustments) [...]".<sup>133</sup> This calls for several remarks.

104. In the first place, the rules and principles embodied in these various important agreements were more significant in the eyes of the Parties than the SPLM/A now suggests. Article 5 of the Abyei Appendix provides that: "The report of the Experts, arrived at *as prescribed in the ABC rules of procedure*, shall be final and binding" (emphasised by GoS). In other words, the Parties linked the final and binding character of the Report with respect for the Rules of Procedure.

105. Secondly, these rules *are*, by themselves, more significant than alleged in the SPLM/A's Counter-Memorial. The provisions quoted there stress or clearly imply that the following principles were mandatory for the ABC and for the Experts:

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<sup>130</sup> SPLM/A Counter-Memorial, para. 235.

<sup>131</sup> "[I]n both international and domestic arbitration, an arbitral award can be set aside or refused enforcement in France if the arbitrators have failed to comply with due process." (Ph. Fouchard, E. Gaillard, B. Goldman, J. Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, 2<sup>nd</sup> ed., Kluwer Law International, 1999, p. 948, § 1638), (this paragraph is interestingly omitted in the SPLM/A Exhibit LE 23/2); see also *ibid.*, para. 1639, quoting from CA Paris, Apr. 6, 1995, *Thyssen Stahlunion v. Maaden*, 1995 Rev. Arb. 448, 5th decision: "the principle of due process implies that the arbitral tribunal cannot introduce any new legal or factual issue without inviting the parties to comment on it."

<sup>132</sup> SPLM/A Counter-Memorial, para. 240; see also paras. 248-252.

<sup>133</sup> *Ibid.*, para. 242 – it is interesting to note that the SPLM/A states that each of the provisions "was fully satisfied" and then repeats thrice that it has been satisfied "with various adjustments".

- Article 2 of the Abyei Appendix imposes a duty of impartiality on the Experts;<sup>134</sup>
- it also stems from Article 3 of that same text which also recalls the adversarial principle,<sup>135</sup> as do Sections 3.1<sup>136</sup> and 3.5<sup>137</sup> of the Terms of Reference;
- Articles 5.2<sup>138</sup> and 5.3<sup>139</sup> of the Abyei Protocol highlight the Parties' will that the Commission should work as a whole in full transparency.<sup>140</sup>

106. Thirdly, and most importantly, this last principle draws the attention to the SPLM/A's unfortunate tendency to confuse the ABC on the one hand and the Experts on the other hand. Most of these rules apply to the ABC, *i.e.* the Commission as a whole, not to the Experts in isolation. Thus, it is the ABC, and not the Experts, which is directed to listen to the presentations of the Parties or to interview witnesses and to travel to specified places. Indeed, the Experts are part of the ABC, but the fact that the essential tasks are assigned to the Commission as a whole and not to the Experts alone was a guarantee of transparency and of equality of the Parties' treatment, namely that the points of view of each Party would be duly taken into consideration.<sup>141</sup> Insofar as the Experts have worked separately without notice to the parties, these guarantees have been neglected and a fundamental rule of procedure has been violated –a violation which clearly amounts to an excess of mandate.

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<sup>134</sup> Article 2 of the "Abyei Annex Understanding on Abyei Boundaries Commission": "The ABC shall be composed as follows: 2.1 One representative from each Party; 2.2 The Parties shall ask the US, UK and the IGAD to nominate five impartial experts knowledgeable in history, geography and any other relevant expertise [...]".

<sup>135</sup> Article 3 of the "Abyei Annex Understanding on Abyei Boundaries Commission": "The ABC shall listen to representatives of the people of Abyei Area and the neighbours, and shall also listen to presentations of the two Parties".

<sup>136</sup> Section 3.1 of the Terms of Reference: "The two parties shall submit their presentations to the ABC at its seat in Nairobi. The experts and other members may ask questions and seek clarifications."

<sup>137</sup> Section 3.5 of the Terms of Reference: "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 [...]".

<sup>138</sup> Article 5.2 of the Abyei Protocol: "The composition and timeframe of the Abyei Boundaries Commission (ABC) shall be determined by the Presidency. However, the Commission shall include, *inter alia*, experts, representatives of the local communities and the local administration. [...]"

<sup>139</sup> Article 5.3 of the Abyei Protocol: "The 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." See also Rule 14 of the Rules of Procedure: "The Commission will endeavour to reach a decision by consensus. If, however, an agreed position by the two sides is not achieved, the experts will have the final say."

<sup>140</sup> See also Rule 7 of the Rules of Procedure "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." and Rule 9 of the Rules of Procedure: "As agreed to by the experts at the 10<sup>th</sup> April meeting, the two sides and IGAD will make recordings of all oral testimonies heard. Verbatim transcripts that are translated into English, will after approval by the two sides be provided to all members of the Commission. IGAD's recording will be accepted as the official version, but reference can be made to the recordings by both sides for points of clarification."

<sup>141</sup> See also GoS Memorial, para. 178.



107. The GoS does not deny that the Experts enjoyed a margin of appreciation in conducting their investigations and researches.<sup>142</sup> But, at all relevant stages, they had to act openly, in close cooperation and under the overall supervision of the Commission as a whole. Thus, in accordance with the instruments cited above:

- it is *the Commission*, not the Experts, which is called upon to "listen to representatives of the people of Abyei Area and the neighbours, and ... to presentations of the two Parties."<sup>143</sup>
- the two parties were to submit their presentations *to the ABC*, not to the Experts alone, and "[t]he experts *and other members*" were authorized to "ask questions and seek clarifications";<sup>144</sup>
- after the consultation and analysis of the British archives and other relevant sources on the Sudan by the Experts, *the ABC*, not the Experts alone, were to reconvene in Nairobi to listen to the final presentations of the two parties, examine and evaluate evidence received; and prepare their final report that was to be presented to the Presidency in Khartoum";<sup>145</sup>
- Verbatim transcripts of oral testimonies should have been *provided to all members of the Commission*" after approval by the two sides, not to the Experts alone<sup>146</sup>; and
- last but not least, the Commission should have endeavoured "to reach a decision by consensus."<sup>147</sup>

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<sup>142</sup> See SPLM/A Counter-Memorial, paras. 25, 33(a) and 124(d).

<sup>143</sup> Article 3 of the Abyei Appendix; see also Section 3.2 of the Terms of Reference.

<sup>144</sup> Section 3.1 of the Terms of Reference.

<sup>145</sup> Section 3.5 of the Terms of Reference.

<sup>146</sup> Rule 9 of the Rules of Procedure.

<sup>147</sup> Rule 14 of the Rules of Procedure.

108. It is certainly not satisfactory to allege - as the SPLM/A does - that like any arbitral body, the ABC Experts enjoyed "broad procedural discretion"<sup>148</sup> and could therefore amend their Rules of Procedure as they would have deemed useful:<sup>149</sup>

- (i) once again, the Rules were adopted by consensus of the whole Commission<sup>150</sup> and could not have been modified unilaterally by the Experts without submission to the Commission as a whole;
- (ii) moreover, and in any case, the Rules of Procedure have not been amended. Thus, the ABC Experts, like any other authority of the same kind, were bound by the rules the Commission itself made as long as it did not – validly – change them (*tu patere legem quem ipse fecisti*);<sup>151</sup>
- (iii) the above mentioned rules and principles are found not only in the Rules of Procedure prepared by the Experts and accepted by the Commission by consensus, but also in instruments agreed by the Parties (the Abyei Annex, the Terms of Reference) which were binding on the ABC and, *a fortiori*, the ABC Experts; and
- (iv) the rules enunciated in the Rules of Procedure are but an illustration of very general and fundamental principles of law recognized in all legal systems: adversarial debates; equality of the arms; publicity and transparency (at least as long as the parties are concerned).

109. According to the SPLM/A, "[i]nternational conventions are uniform in granting broad discretion to arbitral tribunals and similar adjudicatory bodies to determine their own procedures and make procedural decisions."<sup>152</sup> However, according to the very same conventions invoked by the SPLM/A, this "broad discretion" is limited and restricted by the general principles just mentioned, from which the "discretion" claimed by the SPLM/A in favour of the ABC (or more precisely of the ABC Experts) cannot be dissociated:

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<sup>148</sup> SPLM/A Counter-Memorial, paras. 270-284

<sup>149</sup> Ibid., para. 375.

<sup>150</sup> Rule 3 of the Rules of Procedure.

<sup>151</sup> ILOAT, Judgment, No. 963, 27 June 1989, para. 5: "Any authority is bound by the rules it has itself issued until it amends or repeals them. The general principle is that rules govern only what is to happen henceforth, and it is binding on any authority since it affords the basis for relations between the parties in law"; see also ILOAT, Judgment No. 2170, 3 February 2003, para. 14; see also Judgment No. 2414, 2 February 2005, para. 23, or I.C.J., Judgment of 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction of the Court and Admissibility of the Application*, I.C.J. Reports 1984, p. 419, para. 61.

<sup>152</sup> SPLM/A Counter-Memorial, para. 271.

- Article 45 of the Hague Convention on the Pacific Settlement of International Disputes of 1899 provides that "[t]he agents and counsel of the parties are authorized to present orally to the Tribunal all the arguments they may think expedient in defence of their case"; Article 46 also grants them "the right to raise objections and points;" the exact same provisions are reproduced in Article 70 and 71 of the Hague Convention on the Pacific Settlement of International Disputes of 1907;
- According to Article 14 of the Draft ILC Convention on Arbitral Procedures, "[t]he parties are equal in any proceedings before the tribunal";<sup>153</sup> and, as noted in the Commentary of Article 14, "[t]he rule embodied in this article is deemed to be important enough to be made the subject of a separate article. It is a fundamental rule of procedure, nonobservance of which would, under Article 30, paragraph (c), justify an application for the annulment of the Award";<sup>154</sup>
- Similarly, the ILC Model Rules provide at paragraph 5 of the Preamble: "The parties shall be equal in all proceedings before the arbitral tribunal";<sup>155</sup>
- An ICSID *ad hoc* Committee stressed that "[i]t is fundamental, as a matter of procedure, that each party is given the right to be heard before an independent and impartial tribunal. *This includes the right to state its claim or its defense and to produce all arguments and evidence in support of it. This fundamental right has to be ensured on an equal level, in a way that allows each party to respond adequately to the arguments and evidence presented by the other*";<sup>156</sup> both Parties, relying on the same sources, accept these basic principles;
- Article V, paragraph 1 (b), of the New York Convention provides that "[r]ecognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: [...] The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case"; and

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<sup>153</sup> I.L.C., Draft Convention on Arbitral Procedures, *ILC Yearbook*, 1953, Vol. II, p. 210.

<sup>154</sup> I.L.C., Draft Convention on Arbitral Procedures, *ILC Yearbook*, 1952, Vol. II, p. 64.

<sup>155</sup> I.L.C. Model Rules, *ILC Yearbook*, 1958, Vol. II, p. 83.

<sup>156</sup> Interpretation Decision on Application for Annulment of 5 February 2002, *Wena Hotels Limited v. Arab Republic of Egypt (ICSID Case No. ARB/98/4)*, 6 *ICSID Rep.* 129 (2004), p. 142, paras. 56-57 (emphasis added by GoS).

- Finally, Article 18 of the UNCITRAL Model Law is dedicated specifically to the "Equal treatment of parties": "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

110. It then appears that if this Tribunal finds that the Experts have committed gross violations of the fundamental principles applying to them by virtue of the instruments fixing the procedure to be followed by the ABC, as well as by general principles of procedural law, applicable to all international arbitral tribunals or similar adjudicatory bodies (which are reflected in those instruments), said breaches would constitute excesses of mandate within the meaning of Article 2(1) of the 2008 Arbitration Agreement and would call for a declaration to that effect by this Tribunal.

### (ii) The ABC Experts Have Violated Fundamental Procedural Rules

111. In its Memorial<sup>157</sup> and Counter-Memorial,<sup>158</sup> the GoS has detailed three gross and manifest breaches of the applicable procedural principles by the ABC Experts, which constituted obvious excesses of their mandate based on violations of the applicable procedural principles:

- the holding of secret, unauthorised meetings with witnesses outside the presence of the GoS representatives;
- contacts with a foreign official without any discussion within the Commission after and before the action was taken unilaterally by the Experts;
- the absence of the slightest effort to reach a consensus within the Commission.

112. In an effort to answer these very serious grounds of gross breaches of fundamental principles of procedure, the SPLM/A insists that "none of the purported violations violated the terms of the Abyei Protocol, the Abyei Appendix, the Terms of Reference of the Rules of Procedure"<sup>159</sup> since "***nothing in any of these instruments forbade the ABC Experts from taking further or additional actions***".<sup>160</sup>

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<sup>157</sup> GoS Memorial, paras. 196-226.

<sup>158</sup> GoS Counter-Memorial, paras. 189-199.

<sup>159</sup> SPLM/A Counter-Memorial, para. 161.

<sup>160</sup> Ibid., para. 243; emphasised by SPLM/A; see also, paras. 263-264 and 322.

113. It is certainly true that the Experts could have taken "further or additional actions" but – and these are extremely important restrictions – *only while respecting the fundamental principles recalled in Sub-Section (i) above* and certainly not by holding secret meetings, sending confidential e-mails seeking instructions or guidance from foreign governments, or exempting themselves from the mandatory requirement to try to reach a consensus within the ABC. This is exactly what happened as will be shown again in the following paragraphs.

(a) *Khartoum Secret Meetings*

114. As explained in the GoS' previous written pleadings,<sup>161</sup> after finishing the scheduled field interviews in Abyei, Agok and Muglad in April 2005 the ABC was to split up and reconvene again in Nairobi in May<sup>162</sup> while the Experts were, according to the agreed work program, to return to Khartoum to consult the archives and take their flight to Nairobi. However, while in Khartoum - ostensibly to consult the archives - they arranged three unscheduled meetings with Ngok Dinka and Twic Dinka at the Hilton Hotel without informing either the GoS nor its representatives in the ABC. Three such meetings were held on 21 April, 6 and 8 May 2005.<sup>163</sup> The first meeting was held on 21 April 2005, just before the Experts released a "Note on Testimony Obtained in Field Visits, 14-20 April 2005".<sup>164</sup> The Note in question was handed to the Parties on 25 April 2005 but it does not include information about the 21 April 2005 meeting, even though it would have been the perfect opportunity for the Experts to inform the other Members of the Commission about the next Khartoum meetings and to invite them to participate. Despite the fact that the first meeting occurred several days before the release of the Note, the Experts did not mention this first meeting nor their intention to convene two further meetings with one of the parties in interest. Amazingly, the Experts announced in that Note that they will dismiss all oral testimonies already taken, explicitly ruling out the possibility of collecting more testimonies, as explained hereunder.

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<sup>161</sup> GoS Memorial, paras. 71-79 and 198 and GoS Counter-Memorial, paras. 191-193.

<sup>162</sup> See the "Program of Work" at the end of the Terms of Reference.

<sup>163</sup> In paras. 76 and 77 of its Memorial, the GoS mentions inadvertently 2006 instead of 2005 for the two May meetings. The GoS apologises for this typing mistake to the members of the Tribunal and the SPLM/A.

<sup>164</sup> SPLM/A Exhibit FE 14/6.

115. The SPLM/A does not deny the reality of these witness meetings nor the fact that neither the ABC representatives of the GoS nor of the SPLM/A attended<sup>165</sup>. But it keeps on alleging in a rather twisted way that "the GoS complaints about the ABC Experts Khartoum meetings ignore the parties' specific discussions of the subject".<sup>166</sup> In an attempt to prove this, it bases itself on statements made by representatives of the Parties during the Abyei meeting in April 2005,<sup>167</sup> on testimonies relating to that same meeting<sup>168</sup> and on rather daring inferences of facts.<sup>169</sup>

116. Concerning the statements made on 12 April 2005<sup>170</sup> by Minister Deng Alor, Dr. Johnson and Ambassadors Petterson and Dirdeiry, they relate to very general issues concerning oral testimonies and bear no relation whatsoever with the precise point at issue. They concerned the oral testimonies to be taken during the field visits in general, and did not relate to the issue at stake: whether or not the GoS and its representatives had been consulted about these meetings and invited to participate in accordance with the fundamental procedural principles encapsulated in the ABC mandate. Even if one draws the (uncertain) conclusion from this exchange of views that it leaves "no serious doubt as to [the Experts] freedom to speak with third party witnesses",<sup>171</sup> it would not mean that the Experts (nor the Commission itself) could free themselves from said principles. They could hear third party witnesses, but only in accordance with e.g., Article 3 of the Abyei Appendix and Sections 3.1 and 3.2 of the Terms of Reference, which neither the Experts nor the ABC as a whole could modify as they wished.<sup>172</sup>

117. With due respect, the testimonies by Minister Deng Alor or Lieutenant-Colonel James Lual Deng are not more probative:

- the first written statements by these two witnesses were unusually vague. They state, in relevant part:

- "Later in April and in early May 2005, the ABC Experts did notify the parties that they were meeting with some additional individuals in Khartoum. Neither party objected or sent its ABC representatives to these

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<sup>165</sup> SPLM/A Memorial, fn. No. 1021, and SPLM/A Counter-Memorial, paras. 335 *et seq.*

<sup>166</sup> SPLM/A Counter-Memorial, paras. 335-352.

<sup>167</sup> *Ibid.*, paras. 337-340.

<sup>168</sup> *Ibid.*, paras. 342-345.

<sup>169</sup> *Ibid.*, paras. 341 and 346-350.

<sup>170</sup> SPLM/A Exhibit FE 14/5a. This document "Oral Evidence Submitted to the Abyei Boundaries Commission, 14 to 21 April 2005" contains the transcripts of the "Presentations on the Boundaries of the Abyei Area, Nairobi 12<sup>th</sup> April 2005". It was never transmitted to the GoS and there are some inaccuracies in the transcripts of the original presentation made by Ambassador Dirdeiry.

<sup>171</sup> SPLM/A Counter-Memorial, para. 340.

<sup>172</sup> See above, para. 107.

meetings".<sup>173</sup> The words: "later in April" are vague, while "early May" is eccentric: the first of these meetings took place on 21 April. The words "the ABC Experts did notify" omit to specify when and how such alleged notifications were made;

- "The ABC Experts made the other ABC members aware that they were conducting these interviews. Both parties were happy for the ABC Experts to carry out these additional interviews, and no-one from the GoS or the SPLM/A objected".<sup>174</sup> Again, no information is given on the real questions: how and when?
- the second written statements of both witnesses<sup>175</sup>, interestingly drafted in nearly identical terms, are even less probative. These dinner chats, or table talks, were clearly unofficial and probably made in private without all participants listening. In any case, the "announcement", if there was an announcement, was so vague that it certainly did not meet the elementary procedural requirements of transparent and adversarial discussions. It can also be noted that this new Abyei story is in stark contrast to the former line followed by the SPLM/A according to which those meetings were formally agreed in the framework of the ABC and the GoS was invited to attend them;<sup>176</sup>
- the SPLM/A contentions in this respect have been categorically rejected by the GoS,<sup>177</sup> and it formally reiterates this rejection in this Rejoinder; three witness statements by Mr. Zakaria Atem Diyin Thibeik Deng Kiir, Chairman of the National Congress Party in Abyei,<sup>178</sup> Mr. Abdul Rasul El-Nour Ismail, member of the Abyei Boundaries Commission (ABC), representing the Messeriya tribe,<sup>179</sup> and Mr. Ahmed Assalih Sallouha, Chairman of Western Kordofan Development Fund,<sup>180</sup> are unambiguous in this respect;

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<sup>173</sup> SPLM/A Memorial, Witness Statement of Minister Deng Alor Kuol, Tab 1, para. 136.

<sup>174</sup> SPLM/A Memorial, Witness Statement of James Lual Deng, Tab 2, para. 79.

<sup>175</sup> SPLM/A Counter-Memorial, Second Witness Statement of Minister Deng Alor Kuol, Tab 1, paras. 8, 9 and 11; and Second Witness Statement of James Lual Deng, Tab 2, paras. 19-21. These passages are copied in SPLM/A Counter-Memorial, paras. 344-345.

<sup>176</sup> SPLM/A Counter-Memorial, paras. 33b, 342-345.

<sup>177</sup> GoS Counter-Memorial, para. 193.

<sup>178</sup> GoS Counter-Memorial, Witness Statement of Zakaria Atem Diyin Thibeik Deng Kiir, "When the ABC was dispersed, the ABC experts went to visit some SPLM/A Ngok Dinka intellectuals. None of the five Government of Sudan ABC members were informed of this meeting, nor were we informed of the ABC Experts' conclusions or the fact that they were going to present a final report to the Presidency" (SCM, Vol. 4, Tab 3, para. 30).

<sup>179</sup> Witness Statement of Abdul Rasul El-Nour Ismail, SCM Vol. 4, Tab 5, para. 26: "In the final meeting, the Experts never told us about the fact that they had met separately with the Ngok Dinka intellectuals in Khartoum. There was no ABC decision to convene any of those meetings. On the contrary, there was a decision to dismiss all oral testimonies and resort to the archives".

<sup>180</sup> Witness Statement of Ahmed Assalih Sallouha, SCM Vol. 4, Tab 4, para 13: "Nonetheless I was surprised when I found that they continued taking more oral testimonies from Ngok intellectuals, a

- contrary to SPLM/A<sup>181</sup> and Minister Deng Alor's assertions,<sup>182</sup> the GoS had no role in organizing these meetings (of which it had no knowledge) or the logistics of the ABC Experts' activities for the duration of their stay in Khartoum. The Government provided the logistics for the transportation of the ABC and the safety of its members;<sup>183</sup> however, by contrast, the SPLM/A does not provide the slightest evidence that the GoS was concerned with organizing the Khartoum meetings in April-May 2005. This contrast is telling. As for the "Field Interviews" corresponding to these meetings,<sup>184</sup> they were not circulated at all and they were not the subject of any discussion as mentioned in the Witness Statements submitted by the GoS.<sup>185</sup> They were not released during the last ABC session.<sup>186</sup>

118. Moreover, the context cannot leave any doubt about the implausibility of the SPLM/A's allegations:

- it is evidently not because, on another occasion, the GoS had not objected to meetings between the ABC Experts and independent experts – meetings which were publicly announced by the President of the ABC Experts, Ambassador Peterson, that "this alone would have permitted the ABC Experts to proceed with the Khartoum meetings and other contacts with witnesses";<sup>187</sup>
- indeed, the GoS (as well as Ambassador Dirdeiry) were aware of the Experts' stay in Khartoum after returning from Abyei end of April 2005;<sup>188</sup> but by no means does this imply that they were aware that three sessions of witness interviews had taken place during that period.<sup>189</sup> In fact, as stated in the Program of Work, after the field visits, the Experts were supposed to "consult archives and other documents as they deem appropriate". In his Witness Statement, General

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British expert and a British official without the knowledge or authorisation of the ABC. Astonishingly, and in spite of their decision to drop oral testimonies, their final report had given full recognition of the SPLM-Ngok oral testimonies and dropped oral testimonies collected from other Ngok and Messeriya. This was indeed what we had feared when we pointed out to the importance of agreeing before hand to a transparent scientific methodology for dealing with oral testimonies".

<sup>181</sup> SPLM/A Counter-Memorial, para. 348.

<sup>182</sup> SPLM/A Counter-Memorial, Second Witness Statement of Minister Deng Alor Kuol, Tab 1, paras. 45-46.

<sup>183</sup> See SPLM/A Counter-Memorial, para. 348 and fn. No. 338.

<sup>184</sup> SPLM/A Exhibit LE 19/14.

<sup>185</sup> GoS Counter-Memorial, Witness Statement of Zakaria Atem Diyin Thibeik Deng Kiir, SCM Vol. 4, Tab 3, para. 30 and Witness Statement of Abdul Rasul El-Nour Ismail, SCM Vol. 4, Tab 5, paras. 26-29.

<sup>186</sup> As a consequence, Ambassador Dirdeiry could not include any mention to these transcripts in his presentation – which explains the rather odd formula he used when he referred to the Khartoum meetings: "During our stay in Abyei *and maybe also* during your stay in Khartoum..." (Ambassador Dirdeiry, Taped Recording of GoS Final Presentation, dated 16 June 2005, File 1, at p. 1, SPLM/A Exhibit FE 19/15 (emphasis added by the GoS)).

<sup>187</sup> SPLM/A Counter-Memorial, para. 341.

<sup>188</sup> Ibid., para. 346.

<sup>189</sup> Regarding the argument based on the fact that the 8 May 2005 meeting was arranged by Bona Malwal (SPLM/A Counter-Memorial, paras. 350 and 368), see below para. 120.



Sumbeiywo confirmed that the Experts carried "further research from archives in Khartoum"<sup>190</sup> for about two weeks in a period of time that corresponds to the timing of the second and third Khartoum meetings. He added that "[o]n 3 May 2005, [he] wrote to the Swiss Ambassador in Nairobi noting that the ABC was currently in Khartoum carrying out research in the archives, and requesting somebody with cartographic expertise to assist the ABC";<sup>191</sup>

- according to the SPLM/A, "there can also be no doubt but that the Government was well aware of the ABC Experts' meetings in particular with the Twic Dinka on 8 May 2005 which were organized and attended by a prominent supporter and adviser of the Government."<sup>192</sup> Thus, the SPLM/A suggests that Mr. Bona Malwal was representing the Government of Sudan. This does not make much sense and amounts to saying that all actions by, for example, Minister Deng Alor can, in the present case, be attributed to the SPLM/A. At the time, Mr. Bona Malwal was not even a Minister in the GoS.<sup>193</sup> At present, he is not a member of the NCP but a leader of his own political party. Furthermore, neither the President's advisors nor the Ministers belonging to parties other than the NPC can be taken to represent GoS in this arbitration or for ABC purposes. The political scene in the Sudan is complex and no one can be seen to represent a party unless they are explicitly mandated by that party to do so. In any case, the GoS never knew that the meeting was arranged by Mr. Malwal until they read it in the Experts' Report;<sup>194</sup>
- given the fact that only persons belonging to the Ngok Dinka and Twic Dinka tribes were interviewed during these three meetings, it would have been extraordinary for the GoS and its representatives not to attend the meetings as they were legally entitled to; and,
- last but not least, the Experts had made known, on 25 April, in the "Note on Testimony Obtained in Field Visits, 14-20 April 2005",<sup>195</sup> that, "since there is no agreement from the oral testimony and that testimony does not conclusively prove either side's position," they would in the future "confine [themselves] to records contemporary with or referring to the period of the Anglo-Egyptian

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<sup>190</sup> SPLM/A Memorial, Witness Statement of General Sumbeiywo, Tab. 4, para. 107.

<sup>191</sup> Ibid., para. 108 (emphasis added by GoS).

<sup>192</sup> SPLM/A Counter-Memorial, paras. 350 and 368.

<sup>193</sup> He joined the Government in September 2005, after the CPA was signed. The quality of advisors to the President is not dependent on any particular political affiliation. The President currently has three advisors from the SPLM.

<sup>194</sup> ABC Experts' Report, 14 July 2005, Appendix 4, p. 156 (SM Annex 81).

<sup>195</sup> SPLM/A Exhibit FE 14/6; see also above, para. 114.

Condominium.";<sup>196</sup> this Note was released immediately to the parties after the field visits and formed an announcement of the Experts' future plans; consequently, neither the GoS nor the members of the Commission other than the Experts had the slightest reason to think that the ABC Experts had the intention to conduct new interviews.

119. Conducting interviews *in camera*, in the absence of the other members of the ABC, is not a minor change to the program. It is a clear violation of Article 3 of the Abyei Annex and of Section 3.2 of the Terms of Reference, which assigns to the whole Commission the task to "listen to representatives of the people of Abyei Area and the neighbours...". It is also a breach of the adversarial principle and of the fundamental principles of transparency and publicity. Such a serious and manifest departure from the procedural rules applying to the ABC proceedings constitutes an excess of mandate within the meaning of Article 2 of the 2008 Arbitration Agreement.

120. Basing itself mostly on domestic case law, the SPLM/A also emphasises that "the Khartoum meetings caused no prejudice to the Government and did not alter the outcome of the ABC Decision in the slightest".<sup>197</sup> Even taking for granted that there exists a principle excluding procedural complaints in the absence of demonstrable serious prejudice,<sup>198</sup> which is far from being established under this general form,<sup>199</sup> the following must be added:

- *First*, by itself, the holding of such meetings outside the presence of the Parties, and without the GoS or its representatives having been invited to attend, has deprived the Government of its right to a fair procedure and a due process. Moreover, the very fact that the Experts were so keen to arrange these meetings which were not envisaged by their Program of Work shows that they at least deemed them to be potentially important;
- *second*, the allegation that the GoS' absence from the meetings and the impossibility to ask questions or seek clarifications in accordance with Section 3.1 of the ABC Terms of Reference caused no prejudice, is pure speculation. This amounts to alleging that non-respect of the adversarial principle as expressly embodied and detailed in the applicable instruments is benign neglect, which is

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<sup>196</sup> Abyei Boundary Commission, Note on Testimony Obtained in Field Visit: 14-20 April 2005 (25 April 2005) (SM, Annex 78).

<sup>197</sup> SPLM/A Counter-Memorial, paras. 363-389.

<sup>198</sup> *Ibid.*, paras. 298-307.

<sup>199</sup> What seems less debatable is that the breach must be manifest and material.

not so. As stressed by the International Court of Justice: "the equality of the parties to the dispute must remain the basic principle for the Court";<sup>200</sup>

- *third*, as explained above,<sup>201</sup> the fact that Mr. Bona Malwal attended or "arranged" the third Khartoum meeting, as insistently alleged by the SPLM/A,<sup>202</sup> a circumstance unknown to the GoS until it was publicized by the SPLM/A, has no relevance whatsoever in the present case; and
- *fourth*, contrary to what is alleged in the SPLM/A's Counter-Memorial, the Experts made great use of the information (or, rather, misinformation) unilaterally and secretly obtained from the interviews realized during the meetings.

121. Contrary to what the SPLM/A argues in its Counter-Memorial,<sup>203</sup> the Experts' Report was substantially influenced by the Khartoum meetings. According to the transcripts of the meetings, the Experts received maps and documents that were not shown to the ABC but that were used by the Experts. In particular, as emphasized by the GoS in its Memorial, the Experts admitted receiving a sketch map and reportedly highlighted information on their own copy.<sup>204</sup>

122. Furthermore, during those meetings, Dr. Johnson gave an unacceptable interpretation of the formula and stated that "[t]he area to be defined is described in the protocol as the area of the nine Ngok Dinka chiefdoms – no one else. And we were supposed to discover what territory was being used and claimed by those nine chiefdoms when the administrative decision was made to place them in Kordofan."<sup>205</sup>

123. This restatement of the formula is unusual on two grounds. First, Dr. Johnson is not using the agreed word "transferred". It is important to note that, even though in

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<sup>200</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits*, Judgment of 27 June 1986, *I.C.J. Reports 1986*, pp. 25-26, para. 31. Therefore, "[t]he Court is bound by the relevant provisions of its Statute and its Rules relating to the system of evidence, provisions devised to guarantee the sound administration of justice, while respecting the equality of the parties. The presentation of evidence is governed by specific rules relating to, for instance, the observance of time-limits, the communication of evidence to the other party, the submission of observations on it by that party, and the various forms of challenge by each party of the other's evidence." (ibid., pp. 39-40, para. 59). See also *Commission de Conciliation franco-italienne instituée en exécution de l'article 83 du Traité de Paix avec l'Italie (France, Italie)*, Decision No. 183 of 7 March 1955, *RSA*, Vol. XIII, p. 367.

<sup>201</sup> At para. 118, above.

<sup>202</sup> SPLM/A Counter-Memorial, paras. 363-373.

<sup>203</sup> Ibid., paras. 376-389.

<sup>204</sup> GoS Memorial, paras. 72-73 quoting the Experts' Report: "They will also copy the sketch map they made of the area and give us a copy. They had highlighted place names on a copy of NOs-L Ghabat Arab map, and we transferred those to our photocopy of that map." (ABC Experts' Report, Appendix 4.2, p. 156 (SM, Annex 81)).

<sup>205</sup> ABC Experts' Report, Appendix 4.2, pp. 155-156 (SM Annex 81). See also, GoS Memorial, para. 77.

some occasions<sup>206</sup> the Experts restated the formula without using the word "transferred", *the last time* Ambassador Petterson, as Chairman of the ABC, referred to the formula, *in the presence of the GoS*, he stated: "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."<sup>207</sup> Second, not only Dr. Johnson, omits the word "transferred" but he does not even refer to 1905. His statement is therefore in sharp contrast with the mandate given to the ABC, and the GoS had no opportunity to contest this most inaccurate formulation. Furthermore, it is in contradistinction with Dr. Johnson's own statement in these proceedings: "[t]hroughout the gathering of testimony in the field members of the government delegation repeatedly reminded the experts that only evidence referring to conditions in 1905 was relevant."<sup>208</sup>

124. By way of conclusion on this point, three observations must be made:

- (i) there can be no doubt (and it is not denied by the SPLM/A) that three witness meetings took place in Khartoum on 21 April in the absence of the GoS and of its representatives within the ABC;
- (ii) these meetings which were not discussed with the Parties (at least not with the GoS and its representatives) were in manifest violation of the fundamental principles of fair procedure and due process, reflected and encapsulated in the texts defining the mandate of the ABC;
- (iii) accordingly, the fact that the Experts held such meetings as they did constitutes material breach of Article 3 of the Abyei Annex, and Sections 3.1 and 3.2 of the Terms of Reference of the Commission – thus constituting a patent excess of the ABC's (and its Experts') Mandate.

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<sup>206</sup> SPLM/A Counter-Memorial, para. 484. See also GoS Counter-Memorial, para. 628 for an analysis of the restatements of the formula.

<sup>207</sup> ABC Experts' Report, p. 79 (SM Annex 81), emphasis added by GoS.

<sup>208</sup> Johnson, D., "Why Abyei Matters – *The Breaking Point of Sudan's Comprehensive Peace Agreement*", 107 *African Affairs* 10 (2008) (SM Annex 9).

(b) *The Millington E-mail*

125. Similar conclusions are in order concerning the e-mail that the Experts (alone) sought from Mr. Jeffrey Millington, an official at the US Embassy in Nairobi – an episode on which there is no disagreement between the Parties as far as the facts are concerned.<sup>209</sup>

126. However, the SPLM/A maintains that the Millington email:

- "was fully consistent with, and did not violate, the Parties' procedural agreements"<sup>210</sup> and "was not a serious departure from a fundamental rule of procedure";<sup>211</sup> and
- "caused no prejudice to the Government and did not affect the outcome of the ABC decision in the slightest."<sup>212</sup>

127. In the first place, it must be noted that, contrary to the basic assumption on which the whole SPLM/A's reasoning is based, Mr. Millington has nothing to do with the "independent investigations and scientific research" that the ABC Experts were supposed to conduct.<sup>213</sup> In particular:

- Article 7 of the Rules of Procedure provides that "[a]s 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 Millington episode bears no relation with the "locations visited";
- according to Article 4 of the Abyei Annex and Section 3.4 of the Terms of Reference, the Experts "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". The expression "other relevant sources" was meant to cover other non-British archives, such as the research that the Experts did in South Africa and in Addis Ababa, in conformity with the Terms of Reference. The information required from Mr. Millington and

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<sup>209</sup> See GoS Memorial, para. 82, and GoS Counter-Memorial, para. 190.

<sup>210</sup> SPLM/A Counter-Memorial, paras. 394-403.

<sup>211</sup> Ibid., paras. 404-407. There is no reason to discuss separately these two headings: as shown above (paras. 98-110), the Parties' procedural agreements reflects the fundamental principles of procedure inherent to any settlement of dispute of this kind.

<sup>212</sup> SPLM/A Counter-Memorial, paras. 408-418.

<sup>213</sup> Ibid., para. 394.

given by him<sup>214</sup> had nothing to do with "British Archives and other relevant sources on Sudan" and did not lend itself to any "scientific analysis and research" in sharp contrast to the information sought from Mr. Cunnison or Mr. and Mrs. Tibbs.<sup>215</sup>

128. In fact, to the extent that the information requested from Mr. Millington has any relevance, it is not in relation to the sources of information of the Experts (which are the only object of the provisions cited by the SPLM/A and quoted above), but to the definition of the mandate – an entirely different matter, which had to be dealt with in compliance with the basic procedural requirements. In paragraph 402 of its Counter-Memorial, the SPLM/A concedes that "the parties were given no notice of, or opportunity to comment on" the Millington e-mail. Such deliberate behaviour by the Experts is in clear violation of the principles demanding adversarial debate, publicity and transparency. This gross violation of fundamental principles of procedure and due process, reflected in the precise instruments relevant to the procedure to be followed by the ABC and the Experts manifestly constitutes an excess of mandate.

129. To pretend that this breach "did not affect the outcome of the ABC decision in the slightest" is "contrived and frivolous" to borrow an expression which the SPLM/A is particularly fond of. Of course it did affect the outcome, since it obviously strengthened the Experts in their manifestly wrong interpretation of the substance of their mandate: the mention of the disputed e-mail immediately precedes in the Report the fundamentally biased interpretation of the formula by the Experts<sup>216</sup>, from which the word "transferred" had carefully been deleted:

"...to determine as accurately as possible the area of the nine Ngok Dinka chiefdoms as it was in 1905. In doing this the experts are mindful that the drafters of the American proposal which was incorporated into the Abyei Protocol have stated: ..."

And here is quoted the Mr. Millington's misinterpretation.

130. Whatever could have been the "rough" view of the initial proponents of the formula, the latter had been agreed *by the Parties* and should have been discussed *with the Parties*. Had that been the case, the GoS could have objected to this interpretation

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<sup>214</sup> "It was clearly our view when we submitted our proposal the area transferred in 1905 was roughly equivalent to the area of Abyei that was demarcated in later years." ABC Experts' Report, p. 4 (SM Annex 81).

<sup>215</sup> See above, para. 118. Mr. Michael Tibbs was former District Commissioner of Kordofan and Mr. Ian Cunnison is a respected anthropologist and the author of *Baggara Arabs. Power and Lineage in a Sudanese Nomad Tribe*, Oxford, Clarendon Press, 1966, p. 323.

<sup>216</sup> See above, Chapter 2, paras. 21-26.

which was in complete contradiction with the letter and clear meaning of the text which had been accepted by it,<sup>217</sup> and it would have pointed out that, contrary to the Experts' further erroneous assertion,<sup>218</sup> this interpretation was by no means "conveyed to the two sides at the Naivasha talks" and that neither the SPLM/A nor Mr. Millington himself provide any kind of evidence to this effect. As explained by Vice-President Ali Osman Mohamed Taha:

"[t]he GoS did not need to approach any of the US mediators for any explanation of the Danforth proposal. I was personally surprised when I saw in the Experts' Report a statement attributed to an American diplomat who was quoted as had [*sic*] said: "*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]*". Neither Danforth nor any of his assistants expressed this view to me or any of my aids, 'clearly' or otherwise. Neither I nor any of my assistants was informed of any "later [years]" revision or version of the definition."<sup>219</sup>

131. By seeking and accepting without any discussion with the Parties and without giving any possibility to the GoS to discuss Mr. Millington's unsubstantiated allegation, the Experts committed an excess of mandate particularly detrimental to the GoS.

(c) *Absence of Any Attempt to Reach a Consensus*

132. In a way, the third procedural excess of mandate by the ABC Experts might be the most disturbing to the extent that it puts into question the very spirit of the whole exercise and the special characteristic of the ABC on which the SPLM/A puts particular emphasis.

133. It must be recalled that, in accordance with Rule of Procedure 14, "[t]he Commission will endeavour to reach a decision by consensus. If, however, an agreed position by the two sides is not achieved, the experts will have the final say." This mandatory rule – as long as it was not modified by the authors of the Rules of Procedure<sup>220</sup> (and it was not) – simply encapsulates the general spirit of the envisaged proceeding, which, as stressed by the SPLM/A itself, was supposed to reflect the "procedural collaboration" of the Parties seen as a "partnership": "Like the parties' original agreements regarding the ABC, their subsequent procedural agreements were a remarkable example of constructive cooperation to resolve previously intractable

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<sup>217</sup> See above, Chapter 2, paras. 19-40.

<sup>218</sup> ABC Experts' Report, p. 4 (SM Annex 81). Nowhere in the super-abundant documentation furnished by the Parties is there the slightest hint that such a "pre-decided" interpretation was ever conveyed to, let alone accepted by the Parties.

<sup>219</sup> GoS Counter-Memorial, para. 172.

<sup>220</sup> See above, para. 108 and, in particular, fn. No. 150.

disputes".<sup>221</sup> And, as the SPLM/A stresses in its Counter-Memorial, among the salient features of the procedure featured "the emphasis on '**the spirit of goodwill**'<sup>[222]</sup> and '**partnership**,'<sup>[223]</sup> and '**informal yet businesslike**'<sup>[224]</sup> proceedings, without incorporation of (any of the numerous available) institutional arbitration rules,<sup>[225]</sup> and the procedural formalities those rules entail."<sup>226</sup> The requirement that the ABC were to endeavour to reach a consensus was the logical and natural consequence of these characteristics.

134. This requirement is also in line with the very composition of the ABC Commission: as also explained by the SPLM/A (and accepted by the GoS<sup>227</sup>), "[t]he Parties *collaboratively* constituted the ABC"<sup>228</sup> and the composition of the Abyei Boundaries Commission is another of the "salient features" of the process:<sup>229</sup> it was not composed exclusively of impartial members but of "15 members, including **10 party-appointed and overtly partisan and partial members**".<sup>230</sup> By deciding without any discussion on the substance of their final Report with those other members, by ostracizing them from the decision-making process and presenting their Report without any consultation, the five Experts have completely changed the very spirit of this special mechanism of dispute resolution.

135. It is certainly true that - as the SPLM/A alleges - "Article 14 sensibly contemplates only reasonable efforts ("**will ENDEAVOUR**") to reach a consensus"...",<sup>231</sup> but at least such efforts should have been endeavoured. This was not the case.

136. In a highly artificial attempt to make the Tribunal believe the contrary, the SPLM/A invokes the ABC Program of Work annexed to its Terms of Reference.<sup>232</sup> It must be kept in mind that the Program of Work was agreed along with the Rules of Procedure which provides for an endeavour to reach a consensus. Therefore, it is apparent that the program cannot be taken as evidence of an agreement to drop consensus. The Program of Work arranges things as follows:

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<sup>221</sup> SPLM/A Memorial, paras. 11, 495 and 311.

<sup>222</sup> Rules of Procedure, Article 2.

<sup>223</sup> Terms of Reference, Preamble.

<sup>224</sup> Rules of Procedure, Article 2.

<sup>225</sup> As indicated by the SPLM/A, "[t]he parties could have agreed to incorporate any number of sets of institutional arbitrations rules (e.g., PCA, UNCITRAL, LCIA), but chose not to. SPLM/A Counter-Memorial, fn. 27.

<sup>226</sup> SPLM/A Counter-Memorial, para. 124 (emphasis by the SPLM/A).

<sup>227</sup> GoS Counter-Memorial, para. 130.

<sup>228</sup> SPLM/A Memorial, p. 131 (emphasis added by the GoS).

<sup>229</sup> SPLM/A Counter-Memorial, paras. 124 and 424.

<sup>230</sup> Ibid.

<sup>231</sup> Ibid., para. 431.

<sup>232</sup> Ibid., paras. 433-437.



- 19 May: "ABC reconvenes in Nairobi and the parties make their final presentations";
- 20-26 May: "the experts examine and evaluate the evidence received and prepare *the* final report" (not "*their* final report");
- 28 May: "the ABC [the whole body, not the Experts alone] travels [together from Nairobi] to Khartoum for the presentation of *the* [not '*their*'] final report".

137. The Experts were initially allocated six days to examine and evaluate the evidence while the Parties were supposed to be around in Nairobi, ready to be called for any consultation or finalization of the Report or any other endeavour to find a consensus. Instead, the Experts asked for thirty days and met ... with General Sumbeiywo,<sup>233</sup> to the exclusion of any meeting with the Parties and they never told the ABC that they had agreed on a report, thus leaving no room at all for any kind of attempt to find a consensus.

138. The SPLM/A keeps claiming that the Program of Work was flexible and that "[t]he summary of activities in the Program of work did not, however, purport to be an exclusive or all inclusive list of events that would occur over the pending months".<sup>234</sup> This is true, however, the program cannot be used as a pretext in order to contradict and paralyze the application of the Rules of Procedure approved on the same day by consensus by all the members of the ABC. It is contradictory to say, at one and the same time, that it is not an all-inclusive document, and that the obligation to endeavour to reach a consensus ought to have been expressly mentioned in it. On the contrary, the program should (and could) have been interpreted as leaving room for this endeavour. And yet, no meeting was called for, no contact was made, no attempt to reconcile the views of the Parties was ever tried.

139. Again, however flexible, the Program of Work cannot be considered by any stretch of the imagination to have covered the audience sought by the Experts with the Presidency after dropping the ABC-Presidency meeting scheduled to take place within six days of the last Nairobi meeting. That audience, which the Experts decided to seek at the end of their thirty-days' consultation, was neither scheduled nor a substitute for any meeting scheduled in that Program. The agenda for a substitute meeting should be the same as that of the original meeting, whereas the agenda of the Expert's requested

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<sup>233</sup> ABC Report, Part I, p. 5; see also the table at page 61 of the SPLM/A Counter-Memorial.  
<sup>234</sup> SPLM/A Counter-Memorial, paras. 260; see also paras. 257-263, 322 and 437.

meeting were not even known. They had in fact decided to keep the agenda as a secret from General Sumbeiyow, the party members of the ABC and even the Presidency.<sup>235</sup> Likewise, the participants of a substitute meeting should be the same as of the originally scheduled one; in this case the Experts sought the audience for themselves, it was the Presidency that decided to invite the party members to attend.<sup>236</sup> The Experts never announced after their thirty days consultation that they now had a report to communicate to the Parties or the Presidency, although they confided to Sumbeiyow before their retreat that they had already prepared the report. The Experts never announced their decision to do without any endeavour for consultation. They did indeed ask Minister Alor and Ambassador Dirdeiry to arrange for that requested meeting, but nothing in their e-mails, privately exchanged, reveals any agenda or says that the Experts intended to present their final report in that meeting.<sup>237</sup>

140. The SPLM/A Counter-Memorial recalls "(at least) three attempts to reach a consensus between the members of the ABC".<sup>238</sup> The GoS has already established that the second of these alleged attempts is a mere fabrication on the part of the SPLM/A in its Counter-Memorial<sup>239</sup> and does not propose to readdress this issue here.

141. The first of these attempts was allegedly put to, and rejected by, Ambassador Dirdeiry in June 2005, following "discussions between some politicians in Khartoum that the proposing Ngok Dinka people and Misseriya people could agree on the disputed Ngok boundaries. The suggestion by these politicians was passed on to Dr. Luka Biong Deng and he took it up with Ambassador Dirdeiry."<sup>240</sup> Firstly, it must be noted that it is highly questionable that "a group of Ngok and Misseriya community representatives"<sup>241</sup> (if these are what the "politicians in 'Khartoum", referred to by Minister Deng Alor, in fact were), would approach the SPLM/A alone, and not the Government as well, with such an important suggestion and possible solution to the issue of Abyei. Secondly, no representative of the GoS on the ABC has ever made any reference to such a suggestion, and neither did the ABC Experts in their final report to the Presidency. Once again, it is left to the GoS to state that, absent any documentary evidence of such an attempt to reach a consensus, this is again a mere fabrication on the part of the SPLM/A.

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<sup>235</sup> GoS Counter-Memorial, Witness Statement of Ali Osman Mohamed Taha, SCM Vol. IV, Tab 2, para. 31: "When the Experts sought to meet with the Presidency on 14 July 2005, I personally felt that the only reasonable request that the Experts might make in that meeting was to seek permission of the parties to utilize all the time stated in the Abyei Protocol with a view to arrive at a consensus. I never had any idea at all of what they were going to present in that meeting."

<sup>236</sup> Gos Counter-Memorial, Witness Statements of Zahamia Atem Diyin Thibeih Dang Kiir, SCM Vol. IV, Tab 3, para. 31; Ahmed Assalih Sallouha, SCM Vol. IV, Tab 4, para. 23; and Abdul rasul El-Nour Ismail, SCM Vol. IV, Tab 5, para. 30.

<sup>237</sup> See e-mail correspondence regarding final presentation of ABC Report, SPLM/A Exhibit FE 19/19.

<sup>238</sup> SPLM/A Counter-Memorial, para. 460.

<sup>239</sup> GoS Counter-Memorial, para. 198.

<sup>240</sup> SPLM/A Memorial, Witness Statement of Minister Deng Alor Kuol, Tab. 1, para. 140.

<sup>241</sup> SPLM/A Counter-Memorial, para. 461.

142. The third attempt alleged by the SPLM/A apparently took place on 17 June 2005, following the final presentation of the GoS. The SPLM/A states that this was at the behest of Chairman Petterson who "noted that it would be much better if the parties could agree some kind of compromise between themselves, rather than placing the burden of the decision on the ABC Experts."<sup>242</sup>

143. Both Minister Deng Alor and Mr. James Lual Deng make reference to this new one-to-one meeting, this time between Ambassador Dirdeiry and Minister Deng Alor.<sup>243</sup> The GoS is left to wondering why, if the alleged meeting between Messrs. Ahmed Assalih Sallouha and James Lual Deng in Nairobi was placed on the record in the SPLM/A Memorial, while the 17 June meeting, between arguably the two most senior officials of each party to the Abyei dispute, was not. Further, this alleged meeting is not mentioned by the ABC Experts either in their final Report, or in their presentation to the Presidency.<sup>244</sup> Having taken the step of producing what they referred to as "a final and binding decision", it is remarkable (and very odd) that the ABC Experts did not refer to what is now alleged was their own final attempt to reach a consensus between the Parties. The GoS denies that this alleged attempt, with Professor Berhanu as facilitator, ever took place.

144. As repeatedly stated throughout the ABC proceedings, the GoS always maintained its position that it would not agree to a compromise. But this is completely different to being against achieving a consensus which, it obviously was not.<sup>245</sup> Ambassador Dirdeiry made this point clearly to the ABC in the Nairobi Presentation on 12 April 2005:

"I shall start with what was said by Ambassador [Petterson] on the mandate. He said that the issue of land ownership is an issue of basic rights, which is not liable to political *compromise*. We say that no party can make concession with regard to such an issue. I mean normally no party can generally make *compromises* on issues related to the legal rights of land. And this is the reason why this Commission has been established. If we were to make any *compromises*, those *compromises* should have already been put on the table during the negotiations. The nature of such things does not allow you to make *compromises* about them [...] This is an issue that is going to be like an international boundary between two independent states. What we said is that the decision on Abyei boundaries *should be based on scientific research*, not *compromises*. Point number four of the annex to the Abyei Boundaries Commission says 'in determination [...] the

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<sup>242</sup> SPLM/A Counter-Memorial, Second Witness Statement of Minister Deng Alor Kuol, Tab 1, para. 81.

<sup>243</sup> Ibid., paras. 82-83 and SPLM/A Counter-Memorial, Second Witness Statement of James Lual Deng, Tab 2, para. 16.

<sup>244</sup> GoS Counter-Memorial, Witness Statement of Abdul Rasul El-Nour Ismail, SCM Vol. IV, Tab 5, para. 30.

<sup>245</sup> GoS Counter-Memorial, Witness Statement of Ahmed Assalih Sallouha, Tab 4, paras. 15-16, 19 and 22 and, Ibid. Witness Statement of Abdul Rasul El-Nour Ismail, Tab 5, paras. 27, 30 and 33d.

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'. This is the way forward. We are supposed to mainly consult the British archives and other archives."<sup>246</sup>

145. However, refusing a political "compromise" is clearly different from achieving a consensus on reasonable scientific findings.

146. The ABC Experts never noted that the GoS was specifically against achieving a consensus and, conversely, never praised the SPLM/A for actively seeking one. Evidence of this can be found in the words of Douglas Johnson himself: "The government's [...] rejection of any notion of *compromise* had a direct bearing on how evidence was presented".<sup>247</sup>

147. In conformity with their systematic practice, the SPLM/A adds that "the ABC Experts' actions in this regard would have had no impact on the outcome of the Experts' decision"<sup>248</sup> since, according to the SPLM/A, there would have been no prospect to reach a consensus.<sup>249</sup> The GoS strongly disagrees with this peremptory allegation. From the Government's point of view, the SPLM/A's Final Presentation<sup>250</sup> was quite encouraging and shows that, in all probability, a consensus – not to be confused with renegotiations – could have been reached, had the Experts endeavoured to find one sincerely. The Final Presentation contains many examples of deferring to reality on the SPLM/A part and fighting only for a small area north of the river to include Abyei town – although clearly not in conformity with the situation of the territory transferred in 1905 to Kordofan, this moderate position could have paved the way for a consensus.

148. For instance in its presentation, the SPLM/A included a section "3.2.2 The Country of Sultan Arob North and South of River Kiir" in which it stated that the country of Sultan Rob was north and south of the River Kiir. That section starts with a key statement explaining SPLM/A's new understanding of the Rob Country: "The villages of Sultan Arob to the north of the river Kiir (being the majority of his villages) and the ones to the south of the River, *were all part of the Bahr El Ghazal Province*. The boundaries between the Provinces were not surveyed at that time".<sup>251</sup> This statement demonstrates that, up until

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<sup>246</sup> SPLM/A Exhibit FE 14/5a, p. 29 (emphasis added by the GoS).

<sup>247</sup> Johnson, D., "Why Abyei Matters - The Breaking Point of Sudan's Comprehensive Peace Agreement", 107 African Affairs 17 (2008), emphasis added by the GoS (SCM, Annex 9).

<sup>248</sup> SPLM/A Counter-Memorial, para. 476.

<sup>249</sup> Ibid., paras. 477-478.

<sup>250</sup> SPLM Final Presentation on the Boundaries of the Abyei Area, 14th - 16th May 2005, Nairobi, Kenya, SPLM/A Exhibit FE 14/13.

<sup>251</sup> Ibid., p. 13 (emphasis added by the GoS). See also, at p. 7: "The Bahr El Ghazal Province administration found that *the Dinka living around the Bahr el Arab* were largely inaccessible because of

their Final Presentation, the SPLM/A was only claiming the land transferred and was convinced that it was along the River Kiir, not along the Ragaba ez Zerga as the Experts later claimed. It is clear that the SPLM/A was in fact convinced that the River Kiir, not the Ragaba ez Zerga, was the boundary. This was a solid basis for a consensus.

149. Unfortunately, the Experts never endeavoured to seek any kind of consensus, and rushed to issue their Final Report without alerting the ABC about their intention to do so – and, more than that, they agreed with General Sumbeiywo to keep everything secret.<sup>252</sup> Furthermore, the Experts misinformed General Sumbeiywo on two accounts. First, the Experts told him that the attempt and failure to reach a consensus were to be mentioned in the records. Second, they told him that the Parties' positions were too far apart to lead to a consensus. General Sumbeiywo affirms in his witness statement that he understood "from the record that the ABC experts did give the parties the opportunity to reach a decision between themselves by consensus in that final meeting but perhaps unsurprisingly this was not possible."<sup>253</sup>

150. Needless to say, of course, the GoS never waived any objection to the ABC Experts' efforts to reach consensus.<sup>254</sup> The final meeting was conveyed by phone and without any explanation about the procedure the Experts intended to follow. When the meeting took place, all the other ABC Members were presented with a *fait accompli* and no specific protest could be made nor could have any immediate result. In any case, the head of the GoS Delegation immediately made it clear that the Government protested against the manifest violation of their mandate by the Experts. The Experts did not even attempt to reach a reasonable consensus, thus devoiding the special character of the mechanism of dispute resolution envisaged by the Abyei Protocol and Annex of most of its substance. This is an excess of mandate.

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the sudd blocks in the rivers at that time. [...] As 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 Province to Kordofan [...]" (emphasis added by the GoS); or, at p. 17, citing P.P. Howel: "The Ngok Dinka occupy the area between approximately Long. 27degree 50 minutes and Long. 29 degree on the Bahr el Arab, extending northwards along the main watercourses of which the largest is the Ragaba Um Biero".

<sup>252</sup> ABC Experts Report, p. 5 (SM Annex 81). See also, SPLM/A Memorial, General Sumbeiywo's Witness Statement, Tab 4, para. 116: "The ABC Experts and I agreed that it made sense for security reasons to treat the ABC Report as confidential until the ABC Experts presented it to the Presidency in Khartoum. The ABC Experts did not share their final decision with me nor did they describe the methods they had used in reaching their conclusions."

<sup>253</sup> SPLM/A Memorial, General Sumbeiywo's Witness Statement, Tab 4, para. 118.

<sup>254</sup> SPLM/A Counter-Memorial, paras. 472-475.

#### **D. Misinterpretation and Misapplication of the Substantial Mandate**

151. The SPLM/A insists that the GoS would ask the Tribunal to "relitigate" *de novo* the substantive issues decided by the ABC Experts. This is another mantra in the SPLM/A Counter-Memorial.<sup>255</sup> But besides adding numerous pages to an unreasonably lengthy piece, the argument does not help the SPLM/A's case:

- it is partly true in that, in full accordance with Article 2(c) of the Arbitration Agreement, this Tribunal is requested "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" if it determines that the ABC experts exceeded their mandates; it goes without saying that said submissions must be based on an argumentation which, unavoidably, partly "relitigates" the issues presented before the ABC. This is the purpose of Chapters 4 and 5 of the GoS Counter-Memorial and of Part III of the SPLM/A's own Counter-Memorial;
- but, if it is directed against Chapter 3 of the GoS Counter-Memorial, this argument of "re-litigation" is obviously inadmissible: in accordance with Article 2(1) of the Arbitration Agreement the Government may (and must) of course, introduce its arguments showing that the ABC Experts exceeded their mandates (the SPLM/A attempts to show the contrary in Part II of its Counter-Memorial).<sup>256</sup>

152. In doing so, the Parties can discuss not only the gross violations of basic procedural rules by the ABC Experts (as done in Section C above), but also the material mistakes made by the Experts in interpreting and applying their mandate as it results from the formula used in Articles 1.1.2 and 5.1 of the Abyei Protocol. Besides, the SPLM/A itself accepts that a pronouncement *ultra petita* may amount to an excess of mandate<sup>257</sup> and, in effect, this is the case here (ii). However, as the GoS has shown,<sup>258</sup> an excess of mandate would also occur if a mechanism for the compulsory settlement of a dispute omits to decide on part of the dispute – that is, if it decides *infra petita* (iii), or if it bases its decision on manifestly inadmissible grounds (i) as is also averred in the present case.

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<sup>255</sup> Ibid., paras. 137, 139, 150 and 571-621.

<sup>256</sup> See also above, "The Frivolous Argument Based on Waiver", paras. 68-76.

<sup>257</sup> See SPLM/A Counter-Memorial, paras. 165 and 174.

<sup>258</sup> GoS Memorial, paras. 129-191, and GoS Counter-Memorial, paras. 135-137.

**(i) Use of Manifestly Inadmissible Justifications**

153. According to its mandate, the ABC (and, in case of impossibility to reach a consensus, the ABC Experts) was to carry out its mandate based on the findings of the Experts who ought 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."<sup>259</sup> It seems obvious that arriving at a decision *on this basis* (and on this basis only) was part of the mandate of the ABC and the ABC Experts. Although reluctantly, the SPLM/A must recognize that courts and tribunals, international as well as domestic, have accepted that a dispute resolution decision may be invalidated in case of violations of mandatory law<sup>260</sup> - admittedly "only in rare and exceptional cases"<sup>261</sup>, and precisely:

- a failure for a dispute resolution body to state reasons (a), and/or
- a failure to decide according to the applicable rules (b)

do constitute such grounds.

*(a) Failure to State Reasons*

154. The SPLM/A asserts that "[t]here is nothing in the parties' agreement, or in any arguably applicable legal rules that mandatorily required the ABC Experts to give reasons for their decision."<sup>262</sup> The GoS does not deem it suitable to lose time and to make the Tribunal lose its time, by discussing this most extraordinary statement. Suffice it to recall<sup>263</sup> that:

- the general peremptory principle in modern systems of law (whether domestic or international) is, beyond any possible doubt, that an adjudicative decision must be motivated;

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<sup>259</sup> Abyei Appendix, Article 4. See also the Terms of Reference of the ABC and, in particular, Section 3.4.

<sup>260</sup> To be noted: the word "mandatory" derives from the word "mandate".

<sup>261</sup> SPLM/A Counter-Memorial, paras. 682-702.

<sup>262</sup> *Ibid.*, para. 707.

<sup>263</sup> GoS Memorial, para. 151-165.

- only on exceptional occasions can such a decision be "struck" without giving motives if and when the parties have expressly waived this fundamental requirement;<sup>264</sup> and
- this is clearly not so in the present case where, on the contrary, the Parties have instructed the ABC Experts rather precisely of the grounds required for their decision.<sup>265</sup>

155. Moreover, the odd argument advanced by the SPLM/A according to which "the timetable that was contemplated for the ABC Experts' work and the character of the ABC itself ... was hardly a timeframe consistent with the preparation of an extensively reasoned report"<sup>266</sup> is contravened both by pure logic and by the facts of this case. The initially envisaged period of eight weeks could have been sufficient for any diligent group of experts to draft a reasoned (which does not necessarily means lengthy) Report.<sup>267</sup> This period was extended to three months and a half, which is amply sufficient to research and draft a reasonably motivated Report. In any case, time constraints have nothing to do with the obligation to give a reasoned decision. Moreover it is a fact that a 256 pages Report *was* produced by the Experts but, however long, it unfortunately does not meet the requirement of stating sufficient, motivated reasons.

156. In this respect, the GoS must repeat<sup>268</sup> that "[t]he adequacy of the reasoning is not an appropriate standard"<sup>269</sup> to determine an excess of mandate and that, at this stage, it does not request this Tribunal to determine whether the Experts were right or wrong. The only question to be answered at the present stage is not whether the Experts have given convincing reasons, but whether they have given any reasons (right or wrong) in support of their decision. In this respect, the GoS maintains the absolute relevance<sup>270</sup> 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.<sup>271</sup> Both conditions are fulfilled in the present case.

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<sup>264</sup> Even though there might be some exaggeration in the SPLM/A's general allegation that "the parties are free not to require a reasoned award", SPLM/A Counter-Memorial, para. 727.

<sup>265</sup> See above, para. 138.

<sup>266</sup> SPLM/A Counter-Memorial, para. 715.

<sup>267</sup> The GoS notes that the SPLM/A legal team produced a 400 single-space page Counter-Memorial in eight weeks.

<sup>268</sup> GoS Memorial, para. 163.

<sup>269</sup> *MINE v. Guinea*, Decision on Annulment, 22 December 1989, 4 *ICSID Reports* p. 88, para. 5.08.

<sup>270</sup> GoS Memorial, para. 164, SPLM/A Counter-Memorial, para. 740.

<sup>271</sup> *Vivendi v. Argentina*, Decision on Annulment, 3 July 2002, paras. 64-65, 6 *ICSID Reports*, p. 358.



157. According to the SPLM/A, the Report is a "substantial document",<sup>272</sup> providing an "intensively researched and expert analysis".<sup>273</sup> Once again, "quantitative" aspects are not in issue. What is lacking in the Report is not number of pages, but number of *reasons* on crucial and decisive points.

158. *First*, the SPLM/A alleges that "Proposition 7 [in the Experts' Report, according to which "The only area affected by the 1905 decision of the Condominium authorities to administer the Ngok Dinka as part of Kordofan was an area south of the Bahr el-Arab"] was careful, complete and correct."<sup>274</sup> Not only was it not, but it was entirely based on a *non sequitur*, which amounts to a total failure to state reasons:

- according to that "Proposition": "the full context of [the contemporary administrative record] reveals that the Ragaba ez-Zarga/Ngol, rather than the river Kir, which is now known as the Bahr el-Arab, was treated as the province boundary, and that the Ngok people were regarded as part of Bahr el-Ghazal Province until their transfer in 1905";<sup>275</sup>
- if this were true – *quod non*<sup>276</sup> – the inescapable conclusion should have been that the transferred area was south of the Ragaba ez-Zarga and that, consequently, *that* area had been transferred to Kordofan in 1905;
- but this is not the conclusion obtained by the Experts who, *without any explanation*, abandon this line of reasoning to conclude that "[t]he Abyei Area is defined as the territory of Kordofan encompassed by latitude 10°35'N in the north...".<sup>277</sup>

159. This manifest *non sequitur* is not addressed in the SPLM/A Counter-Memorial which simply "summarizes" at length the Experts' "argument" probably in the hope to hide the total lack of justification and the internal contradiction in the Experts decision. This has nothing to do with a "substantive disagreement" of the GoS with the Report.<sup>278</sup> The GoS does indeed disagree, but at this stage the issue is not one of disagreement but of a manifest (no need for pages of explanation) gap in the reasoning of the Experts – that is, more precisely, a failure to state the reasons of the decision in clear contradiction with their mandate.

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<sup>272</sup> SPLM/A Counter-Memorial, para. 745.

<sup>273</sup> Ibid., para. 748.

<sup>274</sup> Ibid., paras. 761-777.

<sup>275</sup> ABC Report, Part I, at p. 39, GoS Memorial, Annex 81.

<sup>276</sup> See below, paras. 360-361.

<sup>277</sup> Proposition 9, ABC Report, Part I, at p. 44 (SM, Annex 81).

<sup>278</sup> SPLM/A Counter-Memorial, para. 772.

160. *Second*, this holds true as well for the ABC Experts' reliance on the 10°10'N latitude as the limit of the Ngok to the north. Here again, the failure to give any reason is patent and manifest and does not require a lengthy demonstration. The Experts conclude their "Proposition 8" – which the SPLM/A describes as "careful, complete and correct"<sup>279</sup> – by affirming: "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".<sup>280</sup> However, *nowhere* else in the Report does this latitude appear: it comes out of the blue and is entirely unsupported by any reasons.

161. *Third*, the ABC Experts' use of the 10° 35' N latitude as the limit of the Misseriya rights finds absolutely no justification in the Report either. The origin of this line is less obscure than that the 10°10'N line since it corresponds to the SPLM/A claim;<sup>281</sup> but it was for the ABC Experts to establish that this position was well founded and this it does not do – nor does it even *attempt* to do. Again, the absence of reason is manifest and is made more evident by the fact that this is the SPLM/A's most extreme claim. The Experts do not give the slightest beginning of evidence to justify their taking this line in consideration. This failure is all the more outrageous that, on the other hand, the Experts stated that "it is impossible to accept this definition [of the Ngok rights] as conclusive".<sup>282</sup> The SPLM/A Counter-Memorial summarizes the Experts Report on this point but, again does not address *this* precise but decisive issue.

162. The GoS wishes to stress once more that:

- (i) the issues discussed in this Section do not relate to its "disagreement" with the reasons given by the Experts in support with their findings, but to the failure of the Experts to give any kind of reasons;
- (ii) these failures to give reasons do not concern insignificant or secondary aspects of the Experts' findings. They go to the very core of the dispute they were supposed to settle since all three issues discussed in the present Section are decisive to the determination of the location of the territory transferred to Kordofan in 1905;

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<sup>279</sup> Ibid., paras. 778-784.

<sup>280</sup> ABC Report, Part I, at p. 44, SM Annex 81; see also p. 19.

<sup>281</sup> "...latitude 10°35' N represents the northern-most limit to the claim of dominant rights for the Ngok that the SPLM/A is willing to put forward". Ibid., p. 44.

<sup>282</sup> Ibid.

- (iii) after having found that "the Ragaba ez-Zarga/Ngol ... was treated as the province boundary", the Experts fail to give *any reason* in support of the two other lines they determine as being the limits of the Misseriya rights on the one hand and the Ngok Dinka rights on the other hand;
- (iv) there is no need for complicated and lengthy demonstrations or speculations to establish this excess of the ABC Experts' mandate: it is manifest and obvious and can be exposed in a single sentence.<sup>283</sup>

(b) *Failure to Decide According to the Applicable Rules*

163. As straightforwardly explained by the ABC Experts,

"the principles of *equity, substantive justice and fairness* shall guide the drawing of the line(s) within the territory of shared secondary rights that separates the land of the nine Ngok Dinka chiefdoms and the Misseriya, being the approximate Abyei boundaries."<sup>284</sup>

164. The Report does indeed apply very strictly this openly declared guideline when it concludes that:

"3) The two parties lay equal claim to the shared areas 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."<sup>285</sup>

165. In short, after having fixed on no (disclosed) basis the "legitimate"<sup>286</sup> respective claims of the Ngok and the Misseriya, the ABC Experts fixed the supposed border line of the territory transferred in 1905 in conformity with "the principles of equity, substantive justice and fairness" (and only on this basis – undoubtedly "reasonableness" is no different ground). This is clearly in excess of their mandate.

166. The SPLM/A brushes aside the ground for the Experts' decision expressly indicated by them and seeks to sidestep this indisputable and openly recognised basis by discussing various points,<sup>287</sup> which can be summarized as follows:

<sup>283</sup> Each of the three propositions under (iii) constitutes in, and by itself, an excess of mandate.

<sup>284</sup> ABC Experts' Report, Appendix 2: Land Occupation, Land Rights and Land Use as Relevant Evidence for Delimiting and Demarcating the Boundaries, p. 26 (GoS Memorial, Annex 81 – emphasis added).

<sup>285</sup> Ibid., pp. 21-22 (emphasis added).

<sup>286</sup> The word "legitimate" also points to an application of pure equity (*ex aequo et bono*).

<sup>287</sup> SPLM/A Counter-Memorial, paras. 788-797 and 840-842.

- the Experts "reasoned" (?) that in the area defined as the "goz" (between the arbitrarily determined latitudes 10°10'N and 10°35'N) "the two communities exercised equal secondary rights to use of the land on a seasonal basis";<sup>288</sup>
- since these rights were "equal" (a proposition not based on any ascertainable fact);
- the Experts were entitled to apply "the legal principle of the equitable division of shared secondary rights"<sup>289</sup> by bisecting "equally the band between latitudes 10°10'N and 10°35'N."<sup>290</sup>

167. Indeed, the expression "legal principle of the equitable division" contains the word "legal". But, even accepting for a moment and for the sole sake of the discussion that such a "principle" exists, the Report would have failed to establish its existence. Such failure was all the more serious that the Experts were not lawyers by training.<sup>291</sup> They should therefore have discussed in their Report the existence of such a debatable principle which proved essential for the final decision. If only for this lack of justification, the Report would be in excess of mandate for the reasons explained in the previous Sub-Section ("Failure To State Reasons").

168. Moreover, the SPLM/A itself provides no clarification as to what such legal principle might consist of and loses sight entirely of the fact that the ABC Experts should have confined their decision to the terms of the mandate conferred upon them by the Parties and that they were not authorised to base their determination on what they – arbitrarily – considered to be a legal principle.<sup>292</sup> It should also be noted that the SPLM/A in its Counter-Memorial states that the "ABC Report relied expressly on what *it considered to be* a legal principle mandating this equal division",<sup>293</sup> thus admitting that this principle was the Experts' own creation.

169. In any case, should such a principle exist, *quod non*, it would not have been amongst the grounds on which the ABC and its Experts were instructed to base their

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<sup>288</sup> ABC Experts' Report, p. 44 (SM Annex 81).

<sup>289</sup> Ibid., p. 20.

<sup>290</sup> Ibid., p. 45.

<sup>291</sup> On Prof. Gutto's background, see GoS Counter-Memorial, fn. 106.

<sup>292</sup> GoS Counter-Memorial, paras. 158-161. Needless to say that the discussion in para. 840 of the SPLM/A's Counter-Memorial, relating to "the legal principles that they [the ABC Experts] referred to in Appendix B" is irrelevant for the present purpose: it bears upon the discussion by the Experts of the various forms of ownership in former British colonies and protectorates and has nothing to do with the so-called "legal principle" of "equitable division of shared secondary rights"

<sup>293</sup> SPLM/A Counter-Memorial, para. 796 (emphasis added by the GoS).

findings. As recalled above,<sup>294</sup> their decision ought to be "based on scientific analysis and research";<sup>295</sup> the so-called "legal principle" invoked by the Experts does not meet this mandatory requirement.

170. According to the SPLM/A, the expression "*with a view to arriving at a decision*" in Article 4 of the Abyei Annex, should not be seen as mandatory since it is "phrased precatorily and aspirationally".<sup>296</sup> The GoS has some difficulty in understanding how the end of the sentence in Article 4 – also reproduced in Section 3.4 of the 2005 Terms of Reference – "a decision that *shall be based* on scientific analysis and research" - could be interpreted otherwise than as being mandatory.

171. The SPLM/A makes a big deal of the fact that "[t]here is nothing in the parties' agreements or in any general principles of law that forbid[s] an *ex aequo et bono* decision".<sup>297</sup> It is rare for a *compromis* or an equivalent text instituting a dispute settlement mechanism to list the principles and rules which the body it entrusts to solve the dispute is forbidden to apply. Nevertheless, the important element is not that the applicable instruments did not forbid recourse to equity (or an *ex aequo et bono* decision) but that it mandated the ABC and its Experts to *base* their decision "on scientific analysis and research" – and on nothing else.

172. However, although the basic proposition contained in the SPLM/A Counter-Memorial is that the ABC Experts did not rule *ex aequo et bono*, the SPLM/A's reasoning does not stop here, for it goes on to argue that the Experts would not have exceeded their mandate even if they had ruled *ex aequo et bono*, since there was no express prohibition against this kind of decision.<sup>298</sup>

173. This is a bizarre argument indeed, since it is widely recognised that – in the absence of specific provisions authorizing a decision *ex aequo et bono* – such a decision cannot be implied. As authoritatively stated:

"Neither national laws nor other sources of authority lightly presume that parties have agreed to amiable composition or arbitration *ex aequo et bono*. Both national laws and most institutional rules authorize arbitrators to act as amiable compositeurs, or to decide *ex aequo et bono*, only if the parties expressly and specifically agree to such provisions."<sup>299</sup>

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<sup>294</sup> At para. 144, above.

<sup>295</sup> Abyei Appendix, Article 4. See also the Terms of Reference of the ABC and, in particular, Section 3.4.

<sup>296</sup> SPLM/A Counter-Memorial, para. 817.

<sup>297</sup> Ibid., paras. 814 and 817.

<sup>298</sup> Ibid., paras. 826-830.

<sup>299</sup> Born, G., *International Commercial Arbitration*, 2009, p. 2240. See also the numerous authorities cited in GoS Memorial, paras. 167-175.

174. The SPLM/A also goes to great lengths to find some support for the even more extraordinary proposition that "the possibility of *ex aequo et bono* decisions" is encouraged "as one of the distinguishing characteristics of arbitration."<sup>300</sup> However, the SPLM/A's efforts in corroborating this statement fall short of their target since even the few arbitration laws and rules that the SPLM/A managed to discover do not lend any measure of support to its position:

- The Argentinean Code of Civil Procedure in reality provides that arbitrators "have to be authorized to decide *ex aequo et bono*";
- The Arbitration Law of El Salvador also allows arbitrators to decide *ex aequo et bono* in accordance with the agreement of the parties;
- The Israeli Arbitration Act contains no mentions whatsoever of the notion of "*ex aequo et bono*";
- The Arbitration Law of Panama does not refer to this notion either but - rather - distinguishes arbitration in law from arbitration in equity;
- The 1926 General Act for the Pacific Settlement of International Disputes and the European Convention for the Peaceful Settlement of Disputes of 1957 allow decisions *ex aequo et bono* only in the absence of specific provisions in the special agreement.<sup>301</sup>

175. There is one clear point that emerges from the authorities, including those cited by the SPLM/A: adjudicatory bodies cannot resort to principles of fairness and reasonableness and decide *ex aequo et bono* if the parties wish that they solve the dispute by reference to specific rules of law or by the terms of an arbitration agreement. Clearly, this is precisely the situation in the present case since the ABC Experts had precise instructions as to their mandate pursuant to Article 5.1 of the Protocol. It is equally evident that the Commission was under an obligation to base its decision on scientific analysis and research, given the mandatory language used in Article 4 of the Abyei Annex, which provided that the Experts should conduct their research "with a view to arriving at a decision *that shall be based* on scientific analysis and research". This is plainly the correct interpretation of this text and not that carried out by the SPLM/A

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<sup>300</sup> SPLM/A Counter-Memorial, paras. 824, and 826-830.

<sup>301</sup> Chinese arbitration practice refers to amiable composition or "principles of fairness and reasonableness" and not expressly to *ex aequo et bono*.

which, in an effort to deny any mandatory character to this provision misleadingly focuses on the first words of this sentence: "with a view to arriving at a decision", thus distorting its meaning entirely.

176. In its Counter-Memorial, the SPLM/A dismisses the Government of Sudan's complaints that the ABC Experts rendered their decision *ex aequo et bono* as "frivolous"<sup>302</sup>. Besides the allegation, examined above, that, even assuming that the Experts ruled *ex aequo et bono*, there is nothing in the Parties' agreements or in general principles of law prohibiting *ex aequo et bono* decisions,<sup>303</sup> the SPLM/A relies in this respect on two main arguments: (a) the determination of the Experts was not reached *ex aequo et bono*;<sup>304</sup> (b) the ABC Experts relied on "general principles of equity", and this is not objectionable because equity can be applied by judges and tribunals as part of the law even without express or specific consent by the parties.<sup>305</sup> These two allegations will be rebutted in turn below.

177. It is a truism that a decision taken in equity is different from one rendered strictly in accordance with legal principles. In international law, equity can be included in the decision of a court or tribunal in particular circumstances when it is necessary to supplement the law. However, this is quite different from a situation where a tribunal relies on equitable principles or vague considerations of fairness instead of following the law or the principles which it is has been mandated to apply.

178. While a tribunal can resort to equity or equitable considerations to correct or fill some existing gaps in the law, it cannot step outside the bounds of the law and arbitrarily rule *ex aequo et bono* without the parties' express consent. The International Court of Justice clarified the distinction between equity and a decision *ex aequo et bono* in the *North Sea Continental Shelf* case. The Court stated:

"The Court comes next to the rule of equity.... Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable. Nevertheless, *when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles.* There is consequently no question in this case of any decision *ex aequo et bono*, such as would only be possible under the condition prescribed by Article 38, paragraph 2, of the Court's Statute."<sup>306</sup>

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<sup>302</sup> SPLM/A Counter-Memorial, para. 787.

<sup>303</sup> *Ibid.*, paras. 814-833.

<sup>304</sup> *Ibid.*, paras. 807-813.

<sup>305</sup> *Ibid.*, paras. 798-812.

<sup>306</sup> *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, para. 88 (emphasis added).

179. Thus, the Court distinguished between a decision *ex aequo et bono*, which a court or tribunal reaches outside of the law and on the basis of justice and fairness (rather than by the terms of the governing law) and a decision that applies "principles of equity" to the law, thus remaining faithful to and within the scope of the rule of law. In the *Tunisia/Libya Continental Shelf* case, the Court further specified:

"Application of equitable principles is to be distinguished from a decision *ex aequo et bono*. The Court can take such a decision only on condition that the Parties agree (Art. 38, para. 2 of the Statute), and the Court is then freed from the strict application of legal rules to bring about an appropriate settlement. The task of the Court in the present case is quite different: it is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result. While it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case, this is very far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice."<sup>307</sup>

180. In the present case, even though there was no specific provision expressly stipulating that the Experts were not to decide *ex aequo et bono* without the Parties' agreement, unlike Article 38, paragraph 2, of the Statute for the authorities cited above, the ABC Experts did have a clear and precise mandate. However, instead of adhering to it, they placed themselves outside the law and arbitrarily carried out an unauthorised "operation of distributive justice".

181. Moreover, while the Experts were not bound by specially agreed legal principles, nevertheless their decision to divide the disputed area between 10° 35'N and 10° 10'N was ostensibly grounded on a self-proclaimed legal principle, i.e. "the legal principle of the equitable division of shared secondary rights" in the Goz.<sup>308</sup> Two problems emerge from this.

182. First, as explained above,<sup>309</sup> the Experts were not to decide on any such alleged "legal principle" which is never explained or justified. Second, the Experts were bound by the formula as part of their mandate which was to define the area of the Chiefdoms transferred to Kordofan in 1905. That transfer had nothing to do with an equitable sharing of secondary rights. It was an administrative transfer of an area, as the GoS emphasized in its Counter-Memorial.<sup>310</sup> Consequently, when the Experts purported to

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<sup>307</sup> *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, para. 71.

<sup>308</sup> ABC Experts' Report, 14 July 2005, p. 20 (SM Annex 81).

<sup>309</sup> See para. 167.

<sup>310</sup> GoS Counter-Memorial, paras. 80, 115 and 170.



divide "equitably" an area of allegedly shared secondary rights in order to determine the boundary, they radically departed from their mandate. In this sense, the SPLM/A's effort to distinguish a decision in equity from one *ex aequo et bono* is without object and misses the essential points noted above.

183. In any event, the Experts' finding – on *the* core issue: the definition of the line they were called to determine – is a decision based on what the decision makers thought of as fair or just regardless of the strict application of their mandate, which demanded that the decision be based "on scientific analysis and research", not on what the Experts regarded as equitable. Such a decision is precisely what must be called *ex aequo et bono*. Such an application of distributive justice is in manifest violation of the ABC's mandate as well as of the general principles applicable to dispute resolution mechanisms.

184. The SPLM/A must be convinced that the Experts could not decide on such a ground since it insists that "[i]t is only as to one issue (the division of the *goz*), that the Government even attempts to allege that the ABC Experts made an *ex aequo et bono* division."<sup>311</sup> Therefore, it argues that, were this aspect of the Experts' Report to be defined as an *ex aequo et bono* decision, it could be separated from the rest of the Report and would not convert the entire Report into an *ex aequo et bono* decision.<sup>312</sup> This affirmation is wrong on three accounts.

185. First, it is wrong that the GoS limits its complaint relating to the *ex aequo et bono* character of the Experts' Report only to the issue of the division of shared secondary rights in the Goz. More fundamentally, it argues that the conclusion of the Experts on the delimitation of the Abyei Area, and in particular the choice of the 10° 22' 30" N line, is wrongly based on pure equity in manifest violation of their mandate.<sup>313</sup> This is certainly a key aspect of the Experts' decision.

186. Second, the SPLM/A seeks to minimise the weight of the Expert's decision regarding the division of the Goz and refers to it as a "discrete issue".<sup>314</sup> This statement is in contradiction with the Experts' Report, which deals with this aspect in the Section of its Report constituting its "Final and Binding Decision".<sup>315</sup> Indeed, fixing the line was *the mandate* of the ABC.

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<sup>311</sup> SPLM/A Counter-Memorial, para. 808. See also, para. 789.

<sup>312</sup> *Ibid.*, para. 809.

<sup>313</sup> GoS Counter-Memorial, para. 151.

<sup>314</sup> SPLM/A Counter-Memorial, para. 810.

<sup>315</sup> ABC Experts Report, 14 July 2005, pp. 21-22 (SM Annex 81).

187. Third, as discussed above, the Experts produced absolutely no reasons, let alone evidence, for their identification of the northern limit (10°35'3" N latitude) and southern limit (10°10'0" N latitude) they arbitrarily divided on the basis of equity.

188. One important element taken into consideration by the Experts in making their decision has been the location of the oil fields. As stressed by the GoS in its Memorial<sup>316</sup> and Counter-Memorial,<sup>317</sup> the boundaries drawn by the ABC Experts conveniently locate some of the highest producing oil fields of Sudan in the Abyei Area. The SPLM/A deals with this question in three pages of its voluminous Chapter 2 on excess of mandate.<sup>318</sup> Its attempt to ridicule this argument falls short in comparison with the evidence submitted by the GoS and in particular, Dr. Johnson's statement, in which he asserts that:

"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.*"<sup>319</sup>

189. The SPLM/A describes this evidence as a "dripping wet squib" and insists that "when one reads the words attributed to Dr. Johnson in 2006, they amount to nothing of [an admission of excess of mandate and evidence of lack of partiality]."<sup>320</sup> As explained by the GoS in its Counter-Memorial, this is not the only example of this expert's bias.<sup>321</sup> Despite the SPLM/A's attempt to down play what Dr. Johnson said, the words speak for themselves. Dr. Johnson clearly expressed his partiality in favour of allocating oil in the Abyei Area.

190. According to the SPLM/A, "the Government does not cite a single authority for its suggestion that an adjudicator's alleged subjective motivations can provide the basis for impugning his or her decisions."<sup>322</sup> This argument ignores the fundamental procedural requirement that an adjudicator must be impartial. "Among the fundamental procedural rights of parties to an international arbitration, denial of which will lead to the nullity of

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<sup>316</sup> GoS Memorial, paras. 270-275.

<sup>317</sup> GoS Counter-Memorial, paras. 212-214.

<sup>318</sup> Ibid., paras. 843-856.

<sup>319</sup> GoS Memorial, para. 274 quoting from "Interview with Douglas Johnson, expert on the Abyei Boundary Commission", *Sudan Tribune*, Monday 29 May 2006. Source: <http://www.sudantribune.com/spip.php?article15913> emphasis added by GoS (SM Annex 85).

<sup>320</sup> SPLM/A Counter-Memorial, para. 855.

<sup>321</sup> GoS Memorial, para. 194.

<sup>322</sup> SPLM/A Counter-Memorial, para. 844; see also para. 213.

any award rendered therein, are following: [...] (3) Right of the parties to equal and *impartial* treatment."<sup>323</sup>

191. Furthermore, the SPLM/A argues that "[i]n any case, there is no basis at all for the Government's tendentious accusations. The exact location of the oil fields in the Abyei region is not information that was readily known in 2005 (or even today), and there is no indication from the extensive documentary record of the proceedings [...]"<sup>324</sup> The Abyei Protocol provides in Article 1.2.3. that "[n]et oil revenues from Abyei will be divided six ways during the Interim Period [...]". The Interim Period started upon the signature of the Peace Agreement on 9 January 2005. Therefore, there must have been some information already available in 2005 about the location of the oil fields in Abyei.

192. Furthermore, Dr. Johnson's post-Report interview shows that he knew a lot about the location of the oil fields. Describing the peace negotiations process, he stated that "[t]here was also a determination not to lose control over Western Kordofan's large oil deposits, *most of which are found within or around the area claimed by the Ngok Dinka*."<sup>325</sup> He also recognizes that "[p]art of the NCP's dissatisfaction with the boundary is based on the fact that the boundary places certain development projects – the agricultural schemes in Nyama, the railway town of Meiram, and the *oil fields of Bamboo and Heglig* – within the Abyei Area."<sup>326</sup>

193. It will be apparent that by deciding the core issue dividing the Parties – as expressly indicated in their mandate - not on the basis of "scientific analysis and research" but on a purely subjective positions of what the Experts deemed to be "reasonable and equitable" and to correspond to "the principles of equity, substantive justice and fairness", they decided *ex aequo et bono*, thus, by any means, manifestly exceeding their mandate.

## **(ii) Decisions *Ultra Petita***

194. The SPLM/A congratulates the ABC Experts for having "carefully and thoroughly addressed exactly the issue that was submitted to them."<sup>327</sup> Unfortunately, this compliment is ill-deserved: not only have they *not* addressed the issue which had been

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<sup>323</sup> Comments on Article 30 of the Draft ILC Convention on Arbitral Procedure (A/CN.4/92), p. 110 (emphasis added by GoS).

<sup>324</sup> SPLM/A Counter-Memorial, para. 845.

<sup>325</sup> Johnson, D., "Why Abyei Matters – The Breaking Point of Sudan's Comprehensive Peace Agreement", (2008) 107 *African Affairs*, p. 8, SCM Annex 9 (emphasis added by the GoS). See also, *ibid.*, pp. 9, 14 and 15.

<sup>326</sup> *Ibid.*, p. 17.

<sup>327</sup> *Ibid.*, para. 492.

submitted to them,<sup>328</sup> but also, they pronounced themselves on issues which the Parties had not placed before them, thus deciding *ultra petita*.

195. Unusually, the SPLM/A agrees on the principle that this Tribunal may find that the ABC Experts exceeded their mandate if they have decided *ultra petita* although it prudently only uses this expression twice.<sup>329</sup> There seems to exist no flagrant differences between the Parties as to the content of this commonly recognised ground; it simply means "going beyond the dispute that they had been assigned to decide."<sup>330</sup> But, of course, the SPLM/A contends that the ABC Experts did not decide *ultra petita* by purporting to confer rights on the Ngok Dinka outside the Abyei area or by limiting the Misseriya's traditional rights,<sup>331</sup> while this indeed was what they did by pretending to regulate the Mysseriya's and the Ngok Dinka's respective so-called "secondary rights".<sup>332</sup>

196. The GoS wishes to put on the record that, once again, there is no need and no room for long and sophisticated demonstrations, since:<sup>333</sup>

- the Experts decided that "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" and "5) The Ngok and Misseriya shall retain their established secondary rights to the use of land north and south of" the boundary arbitrarily fixed "at approximately latitude 10°22'30"N";<sup>334</sup>
- these findings are included in the "FINAL AND BINDING DECISION" featured at the end of the Report;
- there is no trace in the applicable instruments – whether the Abyei Protocol, the Abyei Annex or the Terms of Reference of the ABC - of any mandate given to the Commission or to its Experts to ascertain, attribute, regulate or share the grazing rights (since it appears that the so-called "secondary rights" are nothing but that<sup>335</sup>) on both sides of the boundary;

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<sup>328</sup> This aspect of the ABC Experts' excess of mandate is dealt with in the next and last Section of this Chapter.

<sup>329</sup> SPLM/A Counter-Memorial, paras. 165 and 174 (the latter being a quote).

<sup>330</sup> Ibid., para. 166; see also GoS Counter-Memorial, para. 138.

<sup>331</sup> Ibid., paras. 625-675.

<sup>332</sup> GoS Memorial, paras. 249-253, and GoS Counter-Memorial, paras. 140-148.

<sup>333</sup> Nor is there any "ambiguity" in the decision made by the ABC Experts, contrary to what the SPLM/A would have the Tribunal think. SPLM/A Counter-Memorial, para. 644.

<sup>334</sup> ABC Experts Report, pp. 21-22 (SM Annex 81).

<sup>335</sup> SPLM/A Counter-Memorial, para. 638.

- in doing so, the ABC Experts evidently acted *ultra petita* in clear excess of their mandate.

197. Paradoxically, the SPLM/A attempts to define this *decision* – clearly presented as such in the Report – as a non-decision, a limitation of the Experts' decision on the boundary: "This was not an excess of mandate, but the opposite: an effort to ensure that the ABC Report addressed only the issues presented to the ABC Experts and that no excess of mandate could be alleged".<sup>336</sup>

198. This is a purely self-serving assertion. The fact that, contrary to other crucial findings, the "historical finding" on which this decision is based "had been explained in the body of the ABC Report (specifically, at pages 19 to 20 and 43 to 45)",<sup>337</sup> does not change its nature: the decision might have been documented (erroneously in the GoS' view, but this is beside the point), it nevertheless remains a decision – and a decision not requested from the ABC. In reality, the SPLM/A knows this and virtually concedes it when it accepts that the Experts "defined the Abyei Area" in the previous paragraph (2) of their "Final and Binding Decision",<sup>338</sup> thus also accepting that *this* was the mandate of the ABC Experts.<sup>339</sup> It then, makes no sense to pretend that recognition of "secondary rights" provides only the "rationale for the ABC Experts' boundary delimitation".<sup>340</sup> If this were the case, the fact that rights were conferred would have been included in the reasons, not in the last paragraph 5) of the "final and binding decision" (rather than paragraph 2). As such, it comes after paragraph 3), which describes the boundary, and is the provision that defines (*ultra petita*) the rights of the Misseriya and the Ngok.

199. In the manifest absence of mandate, the SPLM/A wants to interpret the formulas in dispute as resulting from "an exercise of incidental or ancillary authority, which was included in the ABC Experts' primary mandate".<sup>341</sup> The GoS does not dispute that adjudicative bodies are vested with incidental competence. But as made clear by the SPLM/A itself "[t]he purpose of incidental or ancillary powers is to provide for the full and orderly settlement of the disputes submitted by the parties."<sup>342</sup> This is confirmed by the authorities quoted by the SPLM/A, such an inherent incidental jurisdiction is strictly limited to "questions préjudicielles auxquelles donne lieu l'instruction d'un procès [qui]

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<sup>336</sup> Ibid., para. 628; see also para. 639.

<sup>337</sup> Ibid., para. 631.

<sup>338</sup> Ibid., para. 632.

<sup>339</sup> Even if wrongly interpreted for other reasons (see Sub-Section (iii) below).

<sup>340</sup> SPLM/A Counter-Memorial, para. 632.

<sup>341</sup> Ibid., para. 645.

<sup>342</sup> Ibid., para. 651 (emphasis added by the GoS).

doivent être examinées par le juge compétent pour statuer sur le litige principal [...]”<sup>343</sup>  
This is on condition that determination of the issue "must be regarded as incidental to a decision on a point in regard to which it has jurisdiction..."<sup>344</sup>. In other words, it is necessary to answer the incidental question examined by an adjudicative body, acting on the basis of its incidental jurisdiction, in order to resolve the dispute put before it.

200. And, contrary to what the SPLM/A seems – or feigns – to believe,<sup>345</sup> the dispute put before the ABC was clearly and strictly defined by the Abyei Protocol: (only) "to define (i.e. delimit) on map the boundaries of the area of the Nine Ngok Dinka chiefdoms transferred to Kordofan in 1905."<sup>346</sup>

201. Indeed, the allocation of "secondary rights" to the Ngok and the Misseriya was not part of the dispute submitted to the ABC – which only required the definition of a line delimiting the Abyei area – and a pronouncement on this matter was by no stretch of the imagination necessary "to provide for the orderly settlement of all matters in dispute"<sup>347</sup> (as defined by the Parties in the mandate). It is indisputable that:

- at best, the incidental jurisdiction applies to the motives of a decision, not to the *dispositive*, contrary to what happened in the present case;
- above all, Article 1.1.3. of the Abyei Protocol expressly provides that: "The Misseriya and other nomadic peoples retain their traditional rights to graze cattle and move across the territory of Abyei" – which means that the question had been decided by the Parties themselves and was not in dispute; and,
- far from deriving from the question in dispute or from being necessary to its solution, the findings of the ABC Experts run directly *against* the agreement between the Parties, since the Ngok cannot be included among the "*other* nomadic peoples" having rights in the Abyei area that the ABC was supposed to define.<sup>348</sup>

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<sup>343</sup> *Judgment of 12 July 1926, Compagnie pour la Construction du Chemin de Fer d'Ogulin à la Frontière, S.A.* 6 T.A.M. 505, 507 (1926), Exhibit-LE 27/22 (quoted by the SPLM/A, Counter-Memorial, para. 647 - emphasis added by the GoS). ("incidental questions arising in the decision of the case [which] ought to be examined by the judge competent to decide on the principal issue") (SPLM/A translation).

<sup>344</sup> P.C.I.J., *Case concerning certain German Interests in Polish Upper Silesia (Preliminary Objections) Judgment of 25 August 1925* P.C.I.J. Series A, No. 6, 18 (P.C.I.J. 1925), Exhibit LE 31/15 (emphasis added by the GoS – quoted by the SPLM/A, Counter-Memorial, para. 648)

<sup>345</sup> SPLM/A Counter-Memorial, para. 646.

<sup>346</sup> See Chapter 2 above.

<sup>347</sup> Judgments of 20 December 1974, *Nuclear Tests Case (Australia v. France)*, I.C.J. Reports 1974, 253, p. 259 and *Nuclear Tests Case (New Zealand v. France)*, I.C.J. Reports 1974, 457, p. 463 (quoted by the SPLM/A in its Counter-Memorial, para. 650).

<sup>348</sup> GoS Counter-Memorial, para. 145.

202. Understandably, the SPLM/A expends great efforts in order to minimize the gravity of the excess of mandate thus attributable to the ABC Experts. It argues that the decision thus made *ultra petita*:

- would only affect "a very specific and limited right of usage,"<sup>349</sup>
- "in an even more limited area";<sup>350</sup>
- "was an unintentional, incidental and minor excess"<sup>351</sup>
- which "would not affect the remainder of the Report".<sup>352</sup>

203. The three first arguments are so manifestly irrelevant and ill-founded that they hardly call for a rebuttal. Suffice it to say that:

- this so-called "very specific and limited right of usage ... in an even more limited area" is in manifest contradiction with an express provision of the Abyei Protocol;
- it concerns an issue which was described by the Experts themselves as particularly sensitive<sup>353</sup> (which is not a reason to make it part of their mandate); and
- it goes without saying that the fact that this – not minor – excess was "unintentional" has no consequence on its constituting an excess of mandate within the meaning of Article 2 of the Arbitration Agreement.

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<sup>349</sup> SPLM/A Counter-Memorial, para. 656.

<sup>350</sup> Ibid., para. 657.

<sup>351</sup> Ibid., para. 658.

<sup>352</sup> Ibid., paras. 661-670.

<sup>353</sup> ABC Experts Report, p. 9 (SM Annex 81); see also SPLM/A Counter-Memorial, para. 636, or *ibid.*, General Sumbeiywo's Witness Statement, Vol. 4, para. 55.

204. Furthermore, the very fact of describing the Experts' decision on the Ngok's alleged rights as being "unintentional, incidental and minor", constitutes a clear admission that it is indeed in excess of their mandate. The same is true for the SPLM/A's efforts to minimize the consequences of this obvious finding: "the only consequence would be to treat the 'excessive' grant of rights as a nullity but to leave the remainder of the ABC Report intact."<sup>354</sup>

205. Such a position is unsympathetic with the SPLM/A's insistence that the recognition of the respective "secondary rights" of the Ngok and the Misseriya was "part ... of the reasoning of the ABC Experts"<sup>355</sup> and "provides ... the rationale for the ABC Experts' boundary delimitation...."<sup>356</sup> If this is the case, such recognition is the indispensable basis for the reasoning guiding the Experts and cannot be severed from the rest of the Report.

206. Moreover, the GoS notes that the SPLM/A invokes, in support of its proposition that the specific parts of the decision relating to the "secondary rights" should be separated from the rest of the Report, a litany of authorities supposedly establishing "well-settled general principles of law, which provide for recognition and enforcement of arbitral awards even where some aspect of the award exceeded the arbitral tribunal's mandate"<sup>357</sup> and that *all* the authorities cited are "drawn from international commercial and investment arbitration" elsewhere vilified...<sup>358</sup>

207. But there is no need to analyze those authorities in detail since, in the present case, the text governing the present proceeding is unambiguous. In effect, contrary to the SPLM/A contention, this separation is not "consistent with the Abyei Arbitration Agreement",<sup>359</sup> the text of which does not call for interpretation: "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..."<sup>360</sup>

208. Because they decided *ultra petita*, the Abyei Experts acted in excess of their mandate and this Tribunal must, according to its own mandate, determine the consequences of such a finding, as provided in the 2008 Arbitration Agreement.

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<sup>354</sup> SPLM/A Counter-Memorial, para. 661.

<sup>355</sup> Ibid., para. 631.

<sup>356</sup> Ibid., para. 632.

<sup>357</sup> Ibid., para. 662.

<sup>358</sup> See e.g. paras. 82-85, above.

<sup>359</sup> SPLM/A Counter-Memorial, para. 668.

<sup>360</sup> Arbitration Agreement, Article 2(c).



### (iii) Decisions *Infra Petita*

209. Moreover, the ABC Experts' Report does not only decide *ultra petita*, it also decides *infra petita* to the extent that, while answering questions which were not before it, it omits to answer *the* question which was put to it in Articles 1.1.2 and 5.1 of the Abyei Protocol and 1 of the Abyei Annex, and reiterated once more in Section 1 of the Terms of Reference of the ABC.

210. In this respect, it is simply absurd on the part of the SPLM/A to assert that "the Government never defines what it considers the dispute to be. [...] It is impossible to see how the Government can claim that the terms of the ABC Experts did not substantively address this task."<sup>361</sup> The GoS respectfully draws the Tribunal's attention to Chapter 2 of its Memorial, Chapter 2 of its Counter-Memorial, and Chapter 2 of the present Rejoinder, where it discusses in detail the "formula" defining the substantive element of the mandate of the ABC (which also applies in the present proceeding).

211. This being said, as shown above,<sup>362</sup> it cannot be seriously maintained that when an adjudicative body decides *infra petita* (*i.e.* does not answer the questions asked to it by the parties to the dispute), it does not act in excess of its mandate – and stressing only the word "excess" is unduly playing with the words: the important issue is whether or not the Experts complied with their mandate, and they did not.

212. Optimistically, the SPLM/A affirms that "any attention to the terms of the ABC Report makes it clear that the ABC Experts decided exactly the matter that was submitted to them."<sup>363</sup> It might be true that the Experts began the Report by accurately referring to their mandate.<sup>364</sup> Unfortunately, this line was soon abandoned for another one clearly disconnected from the mandate since, as the SPLM/A itself curiously emphasises, the ABC Report then "explained that the Commission had sought 'to determine as accurately as possible ***the area of the nine Ngok Dinka Chiefdoms as it was in 1905***'."<sup>365</sup> This was precisely *not* the ABC's mandate which was to "to define and demarcate the area of the nine Ngok Dinka Chiefdoms *transferred to Kordofan* in 1905, referred to herein as Abyei Area."<sup>366</sup> This formula reproduced the definition of this territory given in Article 1.1.2 of the Protocol and, contrary to the SPLM/A allegations<sup>367</sup>,

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<sup>361</sup> SPLM/A Counter-Memorial, paras. 493 and 590.

<sup>362</sup> See above, paras. 87-97.

<sup>363</sup> SPLM/A Counter-Memorial, para. 493.

<sup>364</sup> *Ibid.*, para. 494, referring to the ABC Experts Report, p. 3 (SM Annex 81) (emphasis added by the SPLM/A).

<sup>365</sup> *Ibid.*, para. 496, quoting ABC Experts Report, p. 4 (SM Annex 81).

<sup>366</sup> Abyei Protocol, Article 5.1.

<sup>367</sup> SPLM/A Counter-Memorial, paras. 574 and 587-589.

it implies that the area in question was to (i) be that of the nine Ngok Dinka Chiefdoms, (ii) transferred to Kordofan in 1905.

213. The same remark applies with regard to the other quotes of the Report repeatedly made in the SPLM/A Counter-Memorial:

"The ABC Experts' treatment of the definition of the Abyei Area in the ABC Report was consistent with the explanations that the Experts had provided during the preceding months, without objection from the parties, of the definition of the Abyei Area. These explanations included (by way of example) references to the "territory [which] was being ***used and claimed by those 9 chiefdoms*** when the administrative decision was made to place them in Kordofan,"<sup>368</sup> "the ***boundaries of the nine Dinka Chiefdoms*** as they existed 100 years ago,"<sup>369</sup> and "the ***area of the nine Ngok Dinka Chiefdoms***, which were transferred to Kordofan Province from Bahr El Ghazal Province in 1905"<sup>370</sup>.<sup>371</sup>

214. Only the last quote reflects faithfully the ABC's mandate – significantly, the expression "which were transferred to Kordofan Province from Bahr El Ghazal Province in 1905" has not been highlighted by the SPLM/A.

215. And yet, this is the crucial point. It is because the ABC Experts deviated 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 – that they have decided in excess (manifest violation) of their mandate. By so doing, they have substituted their question to that agreed and asked by the Parties. Clearly the question of the transfer of an area *transferred* at a given date is different from that of an area *occupied* by a particular tribe at the same date. To comply with their mandate, the Experts should have answered *both* questions in order to determine:

- which area was occupied by the Ngok Dinka at the time of the transfer; *and*
- if all or only part of this area had been transferred to Kordofan.

In examining only the first aspect, the Experts have not, and could not have, answered the question which constituted the substantive part of their mandate.

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<sup>368</sup> ABC Experts Report, pp. 155-156 (SM Annex 81) (emphasis added by the SPLM/A).

<sup>369</sup> Ibid., p. 41 (SM Annex 81) (emphasis added by the SPLM/A).

<sup>370</sup> Ibid., p. 58 (SM Annex 81) (emphasis added by the SPLM/A).

<sup>371</sup> SPLM/A Counter-Memorial, para. 499; see also, e.g. para. 522.

216. For the same reason, the lengthy gloss in the SPLM/A's Counter-Memorial<sup>372</sup> of the reasoning of the Experts in order to establish "the area of the nine Ngok Dinka Chiefdoms as it was in 1905"<sup>373</sup> or "the territory occupied and used by the nine Ngok Dinka Chiefdoms",<sup>374</sup> is entirely irrelevant for the present discussion. This is also true in large part concerning the SPLM/A's efforts to stand up for the ABC Experts' exclusive approach through the notion of "dominant rights".<sup>375</sup> And, of course, the same can be said in relation with the discussion by the SPLM/A of the rights of the Misseriya.<sup>376</sup>

217. In paragraphs 505 to 514 of its Counter-Memorial, the SPLM/A attempts to justify the shift from the question asked to the question answered by focusing on the ABC Experts' finding that the "boundaries of the Ngok Dinka ... [were] not precisely delimited and demarcated,"<sup>377</sup> which is to state the obvious (otherwise there would have been no need to have recourse to the ABC!). But what is much less obvious is the statement that follows, *i.e.* "that the ABC Experts *therefore* had to 'determine the nature of the established land or territorial occupation and/or use rights by all the nine Ngok Dinka chiefdoms'."<sup>378</sup> This is a *non sequitur* – for at least two reasons:

- *first*, the fact that the "boundaries of the Ngok Dinka ... [were] not precisely delimited and demarcated" does not necessarily imply that the limits of "the transferred territory" were also not delimited; and
- *second*, determining the nature of the established land or territorial occupation and/or use rights by all nine Ngok Dinka chiefdoms is certainly not the way to determine the boundaries of the transferred area. Again, this method attempts to answer the non-asked (or the partial) question (what area was occupied by the Ngok Dinka in 1905), but not the real (or entire) question (what area of the nine Ngok Dinka Chiefdoms was transferred to Kordofan in 1905).

218. In a further effort to justify the Experts' misinterpretation of the ABC's mandate, the SPLM/A attempts to demonstrate that the GoS itself addressed the questions of land use and settlements "because they were – and were understood by the parties to be – central to the ABC Experts' decision".<sup>379</sup> It selectively quotes from the GoS' first and final

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<sup>372</sup> Ibid., paras. 499-504, and again at paras. 515-544.

<sup>373</sup> ABC Experts Report, p. 18 (SM Annex 81).

<sup>374</sup> Ibid., pp. 13-14, 16-17 and 19 (SM Annex 81).

<sup>375</sup> SPLM/A Counter-Memorial, paras. 524-527.

<sup>376</sup> Ibid., paras. 534-537. However, the Government maintains that the inquiry by the Experts was partisan in this regard.

<sup>377</sup> Ibid., para. 505, quoting the ABC Experts Report, p. 21 (SM Annex 81).

<sup>378</sup> Ibid., emphasis added by the GoS; see also SPLM/A Counter-Memorial, paras. 518-522.

<sup>379</sup> SPLM/A Counter-Memorial, para. 533.

presentations and fails to present the context in which the GoS dealt with the "questions of land use and settlements".

219. Concerning the first set of quotes made in the SPLM/A Counter-Memorial,<sup>380</sup> it is important to note that they are not extracted from the first presentation of the GoS but from the "Basic Documents of the Government of Sudan". Those documents have one and only goal: to describe the boundary of Kordofan and Bahr El Ghazal in 1905 and the alteration of the boundary following the 1905 transfer. The passages extracted by the SPLM/A wrongly focus on the "authority" of Sultan Rob and fail to point out the fundamental reason for the quote to feature in the GoS' basic documents, namely to show that the Bahr el Arab is the northern boundary of Sultan's Rob country.<sup>381</sup>

220. Second, while it is true that the GoS dealt partly in its final presentation with the historic usage of the territory, it did so only to respond to the massive amount of historical details provided by the SPLM/A. It must be noted in particular that the presentation "History of coexistence",<sup>382</sup> on 17 June 2005, was not initially scheduled by the GoS, which had not requested to make this presentation. After the very historical presentation of the SPLM/A, the Experts, out of their own volition, thought it would be fair to give the GoS an opportunity to make their own historical presentation. Given the short time limit, the GoS used a presentation prepared for the Naivasha talks and written before the signing of the Abyei Protocol. Furthermore, the GoS included in this presentation a section titled "Transferring of the Ngok Dinka to Kordofan". The SPLM/A quotes specifically from this section of the presentation without pointing out that it is related to the 1905 transfer.<sup>383</sup>

221. In any event, the grossly erroneous (or manifestly partial) definition of the ABC Experts' mandate led them to conclusions which clearly denote their misunderstanding or misinterpretation of their mandate.

222. A telling example of this practice is the extraordinary statement according to which "[t]he narratives contained in the Annual Reports of Kordofan and Bahr el Ghazal provinces immediately before and after 1905 refer to 'lines' drawn between rivers, mountains and longitudes as well as roads, settlements, soil types and trees but these

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<sup>380</sup> Ibid., para. 532(a).

<sup>381</sup> Basic Documents of the Government of Sudan, First Presentation, at p. 19, SPLM/A Exhibit FE 14/4.

<sup>382</sup> Final Presentation of the GoS to the ABC, dated 17 June 2005, SPLM/A Exhibit FE 14/17.

<sup>383</sup> SPLM/A Counter-Memorial, para. 532c. The Section "Transferring of the Ngok Dinka to Kordofan" starts on page 15 of the Presentation and the SPLM/A quotes from pages 14-16.

hardly ever demarcate actual boundaries in terms of land use rights and population dynamics on the ground."<sup>384</sup>

223. In spite of the SPLM/A's protests,<sup>385</sup> this *is* extraordinary as it amounts to a clear admission by the Experts that they had at their disposal official documents which would have allowed them TO ANSWER THE QUESTION AND COMPLY WITH THEIR MANDATE. Instead of using them, the ABC Experts put them aside in order to answer *their* question, the one *they* exclusively raised and asked to themselves as clearly explained by the SPLM/A:

"The ABC Experts' statement was ... a simple and accurate observation that any purported provincial boundary between Kordofan and Bahr el Ghazal did not reflect the territory that the Ngok Dinka used and occupied in 1905."<sup>386</sup>

This may be so, however the ABC's mandate was *not* to define "the territory that the Ngok Dinka used and occupied in 1905",<sup>387</sup> but, precisely, to find the "lines" constituting the boundary of the area transferred to Kordofan in 1905.

224. As far as the "critical" date is concerned, the GoS notes that the Parties seem to agree that it clearly is 1905, the date of the transfer of the Abyei area to Kordofan.<sup>388</sup> But in its zealous defence of the Experts' Report, the SPLM/A limits itself to adding the quotes from the Report where 1905 is mentioned. This is not the point, the fact remains that:

- in the "final and binding decision", this date does not appear once;
- the first and the third paragraphs of said decision relate to the situation in 1956, and
- the Experts lean heavily on the 1965 Agreement on the basis of a misconceived "continuity argument".

225. According to the SPLM/A, "[m]aterials from earlier and later periods were being considered only to determine circumstantially and indirectly what the territory of the Ngok Dinka had been in 1905."<sup>389</sup> However, this is not so. In reality, as a simple reading of the Report shows, the continuity is only postulated in order to use the 1965

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<sup>384</sup> ABC Experts Report, Appendix 2 p. 22 (SM Annex 81).

<sup>385</sup> SPLM/A Counter-Memorial, paras. 538-541.

<sup>386</sup> Ibid., para. 539.

<sup>387</sup> Ibid., para. 541.

<sup>388</sup> Ibid., paras. 545-559.

<sup>389</sup> Ibid., para. 550, see also paras. 558 and 564

Agreement as the absolute evidence of ... "the continuity of Ngok Dinka settlements in, and use of, places north of the Bahr el-Arab between 1905 and 1965, Ngok establishment."<sup>390</sup> Here again, even if it were true, which the GoS categorically denies, this is not the question that the ABC was mandated to resolve, but the one that was substituted by the Experts.

226. Moreover, as a conclusion to its Section in its Counter-Memorial, the SPLM/A states that "[t]he ABC Experts said in clear terms that they were determining the area of the nine Ngok Dinka Chiefdoms in 1905 and that is precisely what their analysis did".<sup>391</sup> This is in great part true – although by basing largely themselves on posterior documents and neglecting the most important available contemporaneous evidence, the Experts were wrong as will be shown in the two following Chapters of this Rejoinder – BUT, in any case, this is NOT what they were requested to do by their mandate.

227. The question is not, at this stage whether the Experts were right or wrong in their assessment of the evidence<sup>392</sup> or in applying the scientific analysis they were mandated to apply<sup>393</sup> - even though as will be shown in Chapters 4 and 5 below they were indeed wrong on both grounds. The question is, as has been demonstrated in the present Section, that:

- (i) they misinterpreted their mandate in such a way that they deprive themselves of any possibility to comply with it, as
- (ii) they substituted the question agreed by the Parties and encapsulated in the relevant instruments by another one, different and more restricted; and
- (iii) this grossly erroneous misinterpretation led them to neglecting the relevant historical and scientific evidence they had gathered and which could have permitted them to answer the question which was put before them – an issue which can only remain in the interrogative since the Experts obstinately decided *infra petita*.

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<sup>390</sup> ABC Experts Report, p. 19 (SM Annex 81).

<sup>391</sup> SPLM/A Counter-Memorial, para. 569.

<sup>392</sup> In this respect, the GoS agrees with the SPLM/A (see SPLM/A Counter-Memorial, para. 576).

<sup>393</sup> As a reminder, in the present case, it is not entirely accurate to evoke "a substantive error of law" as does the SPLM/A (see SPLM/A Counter-Memorial, paras. 577-587) – according to their mandate the ABC Experts were supposed to decide on the basis of "scientific analysis and research".

## Chapter 4

### The Area Transferred in 1905

#### A. Introduction

228. This Chapter will address the central issue in the case: the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.

229. The basic difference between the Parties concerns the northern limits of the transferred area. The southern limits are not in dispute. Both Parties agree that they are the Kordofan - Bahr el Ghazal provincial boundary as it existed after the transfer and reflected at the time of Sudan's independence in 1956.<sup>394</sup>

230. The SPLM/A's position regarding the transferred area rests on two main lines of argument. First, the SPLM/A contends that the transferred area must be interpreted as dealing with a transfer of people, including all of the area that the Ngok Dinka used and occupied as of 1905. According to the SPLM/A, this includes an area stretching up to the 10°35'N latitude, which is the substantive position the SPLM/A advances in the event that the Experts' finding of a northern limit falling along the "equitable division" line of 10°22'30" is not accepted.<sup>395</sup>

231. Second, the SPLM/A Counter-Memorial seeks to paint a picture of uncertainty amongst Sudanese Government officials regarding the location of certain rivers - primarily the Bahr el Arab (Kir) and the Ragaba ez Zarga (Ngol) - to bolster its argument that the Bahr el Arab was not well known as of 1905, that references at that time to the Bahr el Arab should be read as referring to the Ragaba ez Zarga, and that the Bahr el Arab cannot therefore be deemed to represent the northern boundary of the area transferred in 1905. On the back of this argument, the SPLM/A also tries to minimize the importance of the Kordofan - Bahr el Arab provincial boundary, which was consistently referred to before the transfer as the Bahr el Arab, as a further element which assists in identifying the limits of the transferred area.

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<sup>394</sup> SPLM/A Counter-Memorial, para. 1600.

<sup>395</sup> Ibid., para. 1598.

232. The SPLM/A's arguments on the meaning of the formula have been addressed in Chapter 2. Suffice it to recall that there is no basis for rewriting the agreed formula to include all areas allegedly occupied and used by Ngok Dinka in 1905, and that this was not even the SPLM/A's position in its presentation before the ABC. Moreover, as Chapter 4 of the Government of Sudan's Counter-Memorial showed, and as will again be demonstrated in Chapter 5 below, the facts in any event simply do not support the contention that the Ngok Dinka were located well to the north of the Bahr el Arab in 1905 either up to the Ragaba ez Zarga or, much less, to the 10°22'30"N latitude or the 10°35'N latitude.

233. With respect to the SPLM/A's second argument, the contemporaneous records prepared by senior Government officials attest to the fact that the transferred area consisted of the districts of Sultan Rob of the Ngok Dinka and Sheikh Rihan Gorkwei of the Twic situated to the *south* of the Bahr el Arab. These records also show that, as of 1905, the Bahr el Arab had been correctly identified as a result of a specific expedition carried out by Lieutenant Bayldon, and later by Lieutenant Huntley Walsh, to investigate the river. The Governor-General of Sudan himself referred to this expedition in his 1904 and 1905 Memoranda included with the *Annual Reports* of those years. Consequently, when the Governor-General stated in his 1905 Memorandum that "the districts of Sultans Rob and Okwei, to the South of the Bahr el Arab and formerly a portion of the Bahr el Ghazal Province, have been incorporated into Kordofan", he was referring to the "real" (i.e., correct) Bahr el Arab.

234. In taking up these issues, this Chapter will start by reviewing the evidence from 1905 which refers specifically to the transfer (Section B). In and of itself, this evidence is sufficient to enable the northern limits of the transferred area to be defined and delimited (the southern limits not being in dispute). Following this, the GoS will review the evidence that shows that, as of 1905, the correct identity of the Bahr el Arab was known (Section C).

235. Quite apart from these elements that identify the area that was transferred, there is also an impressive array of contemporary records demonstrating that Sudanese Government officials considered the territory of Sultan Rob (the Paramount Chief of the Ngok Dinka), as well as that of Sheikh Rihan Gorkwei, to lie on and to the south of the Bahr el Arab. These factors, discussed in Section D, constitute important additional evidence of how Government officials viewed the area that was being transferred at the relevant time. They confirm Wingate's description.



236. Section E will then turn to the significance of the way in which the Kordofan - Bahr el Ghazal provincial boundary was described prior to the transfer as compared with how it was described at the end of 1905 after the transfer had taken place, and how it was later depicted on official Government maps.

237. Contrary to the SPLM/A's arguments, these are important additional factors shedding light on the territorial limits of the transferred area. While the SPLM/A Counter-Memorial, and the MENAS Report appended thereto, are at pains to play down the significance of the provincial boundary, the 1905 transfer documents are unequivocal that the transfer related to a change in that boundary and that districts taken from one province (Bahr el Ghazal) were incorporated into another (Kordofan). This underscores the relevance of the provincial boundary for the case, given that areas already falling within Kordofan prior to the transfer could not have been transferred to that province in 1905.

## ***B. The 1905 Transfer Documents***

### **(i) The Relevant Texts**

238. The most direct evidence relating to the area of the Ngok Dinka chiefdoms transferred to Kordofan in 1905 comprises a number of contemporary, official records referring to the transfer. In no less than five places in its Counter-Memorial, the SPLM/A refers to three of the relevant transfer documents. However, it conspicuously ignores the fourth, and most important, piece of evidence.<sup>396</sup> This was the same tactic that the SPLM/A and the Daly Report adopted in the Memorial where the same three references were discussed, but not the fourth.

239. The first three references which both Parties have cited are the following:

- The March 1905 *Sudanese Intelligence Report*,<sup>397</sup>
- The 1905 *Annual Report* for the Province of Bahr el Ghazal;<sup>398</sup> and

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<sup>396</sup> SPLM/A Counter-Memorial, paras. 88, 1057, 1485, 1545 and 1577.

<sup>397</sup> *Sudan Intelligence Reports*, No. 128 (March 1905) (SM Annex 9).

<sup>398</sup> *Reports on the Finances, Administration and Condition of the Sudan, Annual Report (1903), Annual Report for Bahr el Ghazal Province*, pp. 2-3 (SM Annex 24).

- The 1905 *Annual Report* for the Province of Kordofan.<sup>399</sup>

The fourth reference which the SPLM/A Counter-Memorial totally ignores is:

- Governor-General Wingate's Memorandum included in the 1905 *Report on the Finances, Administration and Condition of the Sudan*.<sup>400</sup>

240. It is useful to take these documents in turn to see how they refer to the transfer.

241. The March 1905 *Sudan Intelligence Report* contains the first reference to the transfer. The relevant passage reads as follows:

"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. 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."<sup>401</sup>

242. Several points stand out. First, the transfer involved the country of the main chiefs: Sultan Rob who was the Paramount Chief of the Ngok Dinka; and Sheikh Rihan, who was the Chief of the Twic. While only the area of Sultan Rob of the Ngok Dinka is the subject matter of the present proceedings, the reference to Sheikh Rihan is significant because the location of his territory as of 1905 sheds light on the limits of the area that Government officials decided to transfer from Bahr el Ghazal to Kordofan in that year.

243. It is noteworthy that Sultan Rob's country is said in the March *Intelligence Report* to be "on the Kir river", not on the Ragaba ez Zarga (or Ngol), and not up to the 10° 35'N latitude. This fundamentally rebuts the SPLM/A's contention that Government officials considered that they were transferring areas lying far to the north of the Kir to Kordofan. They were not. These areas were already within Kordofan prior to the transfer.

244. Sheikh Rihan's district is not identified in the March *Intelligence Report*. However, there is a reference in the relevant passage of the *Intelligence Report* to this being mentioned "in the last Intelligence Report" - i.e., the March *Intelligence Report* for February 1905. That *Intelligence Report* stated in clear terms that Sheikh Rihan had said

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<sup>399</sup> Ibid., *Annual Report* for Kordofan Province, pp. 112-113.

<sup>400</sup> Ibid., Wingate Memorandum, pp. 23-24.

<sup>401</sup> *Sudan Intelligence Reports*, No. 128 (March 1905), p. 3 (SM Annex 9).

that his district (of the Tweit or Toj) was "situated between the Kir and Lol Rivers"<sup>402</sup> - in other words, south of the Kir.

245. At the same time, the March 1905 *Intelligence Report* also referred to the Bimbashi Bayldon's explorations "of the Bahr el Arab sudd", and reported that Bayldon had returned to Khartoum from his explorations on 23 March 1905.<sup>403</sup> Prior to his return, on 20 March 1905, Bayldon wrote a report from the vessel S.W. Hannek then navigating on the Bahr el Arab.

246. Bayldon's report is attached as Appendix "C" to the March 1905 *Intelligence Report*. It of critical importance because Bayldon there noted that:

"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."<sup>404</sup>

He also reported:

"That the River Kir is the real Bahr el Arab. It being called Kir by the Nuers, and El Gurf by the Rizeigat Arabs, who live close to it, on its higher reaches."<sup>405</sup>

247. While more will be said about Bayldon's report later in this Chapter,<sup>406</sup> the point deserving emphasis here is that the "real" Bahr el Arab was correctly identified by Bayldon and reported as such in the very same *Intelligence Report* that mentioned the transfer. Bayldon noted that the Kir and Bahr el Arab rivers were the same. The *Intelligence Report* said that Sultan Rob's country was on the Kir. Sheikh Rihan's territory was between the Kir and the Lol. These are the areas that Government officials decided to transfer to Kordofan.

248. Nothing was said about the transfer of any areas to the north of the Kir. The clear implication was that the transferred areas lay on the Kir and to the south of it.

249. The next references to the transfer cited by both Parties are found in the 1905 *Annual Reports* for Bahr el Ghazal and Kordofan Provinces. It is significant that the

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<sup>402</sup> *Sudan Intelligence Reports*, No. 127 (February 1905), p. 2 (SM Annex 8).

<sup>403</sup> *Sudan Intelligence Reports*, No. 128 (March 2005), p. 2 (SM Annex 9), also annexed at SPLM/A Exhibit FE 2/8, p. 2.

<sup>404</sup> *Ibid.*, p. 10.

<sup>405</sup> *Ibid.*, p. 11.

<sup>406</sup> See paras. 311-324 below.

relevant passages from both *Reports* come under the heading "**Province Boundaries**".<sup>407</sup>

250. The relevant passage from the *Annual Report* for Bahr el Ghazal reads as follows:

**"Province Boundaries** - In the north the territories of Sultan Rob and Sheikh Gokwei have been taken from this Province and added to Kordofan."<sup>408</sup>

251. This shows that what was being transferred were the "territories" of Sultan Rob and Sheikh Gokwei, not the Dinka people as argued by the SPLM/A.<sup>409</sup> Sultan Rob's territory had been identified in the March 1905 *Intelligence Report* as "on the Kir river". Sheikh Gokwei's territory had been identified in the February 1905 *Intelligence Report* as "between the Kir and Lol Rivers." The clear inference is that these areas had previously been situated within the province of Bahr el Ghazal, but that as a result of the transfer, they were taken from that province and "added to Kordofan". How this justifies the SPLM/A's claim to a transferred area extending up to the 10°35'N latitude, or the Experts' conclusion that the transferred area extended up to the 10°22'30"N latitude, is impossible to discern.

252. The relevant passage from the *Annual Report* for Kordofan reads as follows:

**"Province Boundaries** - ... The Dinka sheikhs, Sultan Rob and Sultan Rihan Gorkwei are now included in Kordofan instead of Bahr el Ghazal."<sup>410</sup>

This was consistent with the *Annual Report* for Bahr el Ghazal.

253. The fact that both *Annual Reports* discussed the transfer under sections entitled "Province Boundaries" confirms that the question of the transferred area was perceived by Government officials at the time as being directly related to such boundaries. It also serves to place in proper perspective the assertion contained in the MENAS Report that:

"Accordingly, in our opinion, it would be impossible to determine the area transferred between Kordofan and Bahr el Ghazal by reason of the transfer of the Ngok Dinka, based simply on characterisation of any putative provincial boundaries existing prior to and after 1905."<sup>411</sup>

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<sup>407</sup> *Reports on the Finances, Administration and Condition of the Sudan, Annual Report (1903) Annual Report for Bahr el Ghazal Province, p. 3; Annual Report for Kordofan Province, p. 113 (SM Annex 24).*

<sup>408</sup> *Ibid., Annual Report for Bahr el Ghazal Province, p. 3.*

<sup>409</sup> SPLM/A Counter-Memorial, para. 1058.

<sup>410</sup> *Reports on the Finances, Administration and Condition of the Sudan, Annual Report for Kordofan Province, p. 113 (SM Annex 9).*

<sup>411</sup> SPLM/A Counter-Memorial, MENAS Report, Vol. 1, para. 3.

254. The nuanced way in which this conclusion is drafted merits attention. The Government of Sudan does not suggest that the transferred area can be determined solely (if this is what is meant by MENAS's term "simply") by reference to the Kordofan-Bahr el Ghazal provincial boundary. There are other key factors which also assist to define that area - including Wingate's 1905 Memorandum, which MENAS ignores, and the contemporary references and sketch maps showing where Sultan Rob's territory was situated. But to imply that the Kordofan-Bahr el Ghazal boundary was irrelevant to ascertaining the location of the transferred area is to ignore the fact that the transfer is specifically referred to in the *Annual Reports* in relation to a change in that boundary. As discussed in Section E below, the 1905 *Annual Reports* changed the way the boundary had previously been described - which had been the Bahr el Arab river before the transfer - precisely because areas to the south of that river, which formerly formed part of Bahr el Ghazal, were then incorporated into Kordofan.

255. The final reference to the transferred area is found in Governor-General Wingate's Memorandum also included as part of the *1905 Reports on the Finances, Administration, and Condition of the Sudan*. This is the reference that is ignored in both the SPLM/A Memorial and Counter-Memorial, the first Daly Report and the MENAS Report, despite the fact that it provides the best evidence, authored by the most senior official in the Sudan, of what the transferred area was considered to comprise.

256. The relevant passage appears in a section of Wingate's Memorandum entitled "**CHANGES IN PROVINCIAL BOUNDARIES AND NOMENCLATURE**". The relevance of the provincial boundary aspect of the issue is once again apparent.

257. After first indicating that, "as the country develops, the necessity naturally arises for a closer administrative control", Wingate went on to state that:

"In spite, however, of the difficulties to which I have referred, it has been possible during the past year [1905] to make some important alterations in the provincial boundaries, which have tended to a general improvement in administration, and a few further changes will also take place from the beginning of the new year."<sup>412</sup>

He then listed four "principal alterations already effected". With respect to the area of concern in this case, the relevant entry reads as follows:

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<sup>412</sup> *Reports on the Finances, Administration, and Condition of the Sudan, Annual Report (1905) Wingate Memorandum, p. 23 (SM Annex 24).*

"(4) - The 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."<sup>413</sup>

258. This description provides critical information on the Ngok Dinka area that was transferred in 1905. While it does not define the southern limits of the transferred area (as to which there is no dispute between the Parties), it is perfectly clear as to the northern limits of the transferred area. By referring to the incorporation into Kordofan of the districts of Sultans Rob and Okwai to the south of the Bahr el Arab, Wingate clearly placed the northern limits of the transferred area along the Bahr el Arab.

259. The utter silence of the SPLM/A Memorial and Counter-Memorial with respect to this document is impossible to justify, although it is apparent that the document is as devastating for the SPLM/A's position on the transferred area as it is for the conclusions reached by the ABC Experts.<sup>414</sup> As the SPLM/A Counter-Memorial admonishes, "it would be entirely wrong to ignore the explicit terms of the Anglo-Egyptian administrators' 1905 transfer records regarding the Ngok Dinka transfer."<sup>415</sup> Yet that is precisely what the SPLM/A does when it ignores the explicit terms appearing in Wingate's Memorandum.

260. That silence is all the more striking when it is recalled that the SPLM did briefly address the Wingate document in its Final Presentation to the ABC. There the SPLM stated that Wingate's words, "to the South of the Bahr el Arab" -

"Is about the *limit* of the two districts and not the actual areas. However, if the preposition 'from' were to be used, the passage would definitely suit the Government's position."<sup>416</sup>

261. The second sentence of this comment is not readily understandable. However, the first sentence is key. There, the SPLM expressly acknowledged that Wingate's description was about the "limit" of the two districts (of Sultans Rob and Okwai) even if not about actual areas.

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<sup>413</sup> Ibid., p. 24.

<sup>414</sup> Inexplicably, the Wingate Memorandum was also ignored by the ABC Experts in their Report.

<sup>415</sup> SPLM/A Counter-Memorial, para. 1583.

<sup>416</sup> SPLM/A Memorial, Exhibit FE 14/13, p. 27 (emphasis added).

262. That is precisely the point. Governor-General Wingate clearly placed a northern limit on the districts that were transferred. That limit was the Bahr el Arab. Wingate did not define the rest of the transferred area, but that is of little importance given that the Parties agree on the southern boundary of the transferred area. It is the northern limit of the area that is principally in dispute between the Parties, and on this Wingate is clear.

263. Professor Daly's first Report, supplied with the SPLM/A Memorial, also failed to address this critical document notwithstanding the fact that Professor Daly purported to deal in his Report with "the most direct records we have of the reported transfer."<sup>417</sup> In his second Report, Professor Daly continues to take the position that, what he calls the "foundation texts" (from which he excludes the Wingate Memorandum), provide "the only authoritative indication of what the Sudan Government considered the 1905 transfer to involve."<sup>418</sup> This is a completely untenable proposition considering the contemporaneous nature of Wingate's statement, his position as the Governor-General of the Sudan at the time, and the substantive content of his description of the area transferred.

264. Professor Daly's Second Report does finally mention the Wingate Memorandum where, out of 61-pages, the author devotes a single paragraph to try to explain it away. This is Professor Daly's comment on the Memorandum:

"There is simply no reason to believe that the author of this statement - whether Wingate or someone under his authority, or even an official at the Residency in Cairo to whom a draft had been referred by Cromer - knew at the time where Rob's country was. But since we now know the extent of Ngok permanent settlement north of the Bahr al-Arab, 'on' and 'along' the Ragaba al-Zarqa and to its north, we must conclude that that 'country' was what was intended for transfer."<sup>419</sup>

265. This short paragraph is fraught with unwarranted speculations and wholly unjustified conclusions.

266. First, Professor Daly casts doubts on whether Wingate actually wrote the Memorandum. This is an utterly unsupported attempt to diminish the significance of the Memorandum. Wingate obviously wrote the Memorandum. The first page of the Memorandum makes this clear. After noting that he was forwarding to "Your Lordship's instructions" (a reference to Lord Cromer in Cairo to whom Wingate reported) the

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<sup>417</sup> SPLM/A Memorial, First Daly Report, p. 39. This was commented on in the GoS Counter-Memorial at paras. 465-469.

<sup>418</sup> SPLM/A Counter-Memorial, Second Daly Report, p. 4.

<sup>419</sup> Ibid., p. 33.

marginally noted Reports from various Department Heads and Governors of Provinces, he goes on to state:

"I shall begin by describing briefly the situation on the various frontiers bordering the Anglo-Egyptian Sudan."<sup>420</sup>

Thereafter, Wingate's Memorandum repeatedly introduces various sections of his Memorandum by using the first person singular, "I", in setting out his observations. When it comes to his section on "Changes in Provincial Boundaries and Nomenclature", once again Wingate uses the first person singular to discuss the important alterations in the provincial boundaries that had been made.

267. Next, Professor Daly suggests that there is no reason to believe that the author of the Memorandum knew at the time where Rob's country was. But this is sheer speculation unsupported by any evidenciary support. Wingate was the Governor-General of the Sudan, the most senior official in the country. He clearly would have had access to the relevant documents referring to and depicting Sultan Rob's country on and to the south of the Kir river, including the *Intelligence Reports*, as will be shown below.<sup>421</sup>

268. Lastly, Professor Daly reaches the conclusion that because "we" now know the extent of the Ngok permanent settlement "on" and "along" the Ragaba ez Zarga and to its north, "we must conclude that that 'country' was what was intended for transfer."

269. This assertion is factually wrong and logically a non-sequitur. What "we" know "now" is irrelevant to what Sudanese Government officials knew in 1905. Neither now nor then was there any documentary evidence attesting to the Ngok Dinka along the Ragaba ez Zarga or to its north. One of Professor Daly's "foundation texts" - the March 1905 *Sudan Intelligence Report* - placed Sultan Rob's country on the Kir, not the Ragaba ez Zarga (or further north). Percival's 1904 sketch showed Sultan Rob's country clearly to the south of the Kir river.<sup>422</sup>

270. To use Wingate's Memorandum as a springboard for jumping to the conclusion that "that country" - i.e., up to the Ragaba ez Zarga and to its north - was what was intended for transfer is not simply to distort, but also to rewrite completely, what Wingate actually said, which was that "[T]he districts of Sultan Rob and Sheikh Okwai, to the South of the Bahr el Arab and formerly a portion of the Bahr el Ghazal Province, have

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<sup>420</sup> *Reports on the Finances, Administration, and Condition of the Sudan, Annual Report (1905)* Wingate Memorandum, p. 3 (SM Annex 24).

<sup>421</sup> See paras. 271-281 below.

<sup>422</sup> SCM Map Atlas, Map 14b.



been incorporated into Kordofan." Nothing in Wingate's statement in the least supports Professor Daly's arguments. Nor do they support the SPLM/A's assertion that it is "absurd" to consider that territory north of the Kir/Bahr el Arab would be excluded from the transferred area - the "Abyei Area".<sup>423</sup> That is precisely the effect of Wingate's description of the area.

## (ii) Wingate's Position

271. In order to place the significance of Wingate's description of the transferred area in its proper evidentiary perspective, it is necessary to say a few words about the importance of his position.

272. Major-General Wingate became Governor-General of Sudan in December 1899. Under the Condominium Agreement concluded earlier that year:

"The Supreme Military and Civil Command of the Soudan shall be vested in one officer, termed the 'Governor-General of the Soudan'."<sup>424</sup>

273. Professor Daly's second Report describes Wingate in the following terms:

- "The Governor-General was a virtual dictator";<sup>425</sup> and
- "The power of the Governor-General was therefore absolute so long as he remained in the good graces of the British government that nominated him."<sup>426</sup>

274. Given Wingate's position, it is untenable for the MENAS Report to speculate that reports filed by Government officials that MENAS finds inconvenient - such as that of Lieutenant Bayldon, who was specifically sent to explore the Bahr el Arab in late 1904 and 1905 and whose report on the Bahr el Arab appeared in the March 1905 *Sudan Intelligence Reports* - would be unlikely to "have had a wide effect in the Anglo-Egyptian administration for at least many months, probably years" because of their security classification.<sup>427</sup>

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<sup>423</sup> SPLM/A Counter-Memorial, para. 61(b).

<sup>424</sup> GoS Counter-Memorial, para. 466 and SPLM/A Exhibit FE 11/5, p. 15.

<sup>425</sup> SPLM/A Counter-Memorial, Second Daly Report, p. 15.

<sup>426</sup> Ibid., p. 16. Professor Daly also notes that the Governor-General was obliged to notify Lord Cromer in Cairo, which of course he did in addressing the *Annual Reports* to him.

<sup>427</sup> SPLM/A Counter-Memorial, MENAS Report, para. 47.

275. Equally unsupported is MENAS' contention that:

"Given these practicalities it [Bayldon's March 1905 Report] would have been of no assistance to the decision makers who transferred the area of the Ngok Dinka from Bahr el Ghazal to Kordofan, which was first reported on 1 April 1905."<sup>428</sup>

276. These assertions overlook the fact that, even before he became Governor-General in 1899, Wingate was signing off on Intelligence Reports. For example, *Sudan Intelligence Report* No. 60 for May-December 1898 contains Wingate's note that he had compiled the Report.<sup>429</sup>

277. Following his appointment as Governor-General, Wingate continued to be involved in the preparation and circulation of *Intelligence Reports*. Thus, in SIR No. 74 for September 1900, Wingate is the official who forwards the Report to the War Office in Cairo.<sup>430</sup> The same is shown in SIR No. 99 for October 1902.<sup>431</sup>

278. It is unreasonable in the extreme for MENAS to assume that the senior government (and military) official in Sudan would not be aware of, and review, sensitive documents such as Intelligence Reports.

279. Wingate's 1905 Memorandum, which the MENAS Report ignores, also disproves the argument. Before addressing the transfer of the districts of Sultans Rob and Okwai to Kordofan, Wingate commented on the exploration of the Bahr el Arab undertaken by Bayldon and Walsh in 1905 under a section entitled: "Sudd Cutting on the Bahr el Arab."<sup>432</sup>

280. Bayldon's investigations will be taken up in greater detail in the next Section. For present purposes, two points may be made. First, Wingate clearly was apprised of the activities of Bayldon and Walsh noted in various editions of the 1905 *Sudan Intelligence Reports*. Their sudd-cutting operations were proceeding up the river towards Sultan Rob's village at the time. Wingate referred to this fact. Second, it stands to reason that when, thirteen pages later in his Memorandum, Wingate referred to the transfer of the districts of Sultans Rob and Okwai, to the *south* of the Bahr el Arab, he was referring to the same

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<sup>428</sup> Ibid.

<sup>429</sup> *Sudan Intelligence Reports*, No.99 (October 1902), p.1, SPLM/A Exhibit FE 1/8.

<sup>430</sup> *Sudan Intelligence Reports*, No. 74 (September 1900), p. 1 (SM Annex 1).

<sup>431</sup> *Sudan Intelligence Reports*, No.99 (October 1902), p.1, SPLM/A Exhibit FE 1/18, and see *Sudan Intelligence Reports*, No. 114 (January 1904) in which Slatin dispatched the Intelligence Report on the Instructions of the Governor-General of the Sudan, p. 5 (SM Annex 6).

<sup>432</sup> *Reports on Finances, Administration, and Condition of the Sudan in 1905*, p.11, SPLM/A Exhibit FE 2/13.

Bahr el Arab on which Bayldon's and Walsh's operations were taking place mentioned earlier in his Memorandum. As Bayldon had recorded in March 1905, that was the "real" Bahr el Arab.

281. For these reasons, Governor-General Wingate's description of the area that was transferred constitutes the best evidence of the northern limits of that area. He was the senior Government official in Sudan, his report was prepared contemporaneously, and it was specific as to what was transferred.

### **C. *The Identity of the Bahr el Arab***

282. Having dealt with the 1905 "transfer documents", this section will address another important issue on which the Parties remain divided. This is the question whether by 1905 the Bahr el Arab had been correctly identified.

283. The SPLM/A's thesis is that there "was a high degree of geographical confusion about the Bahr region generally, and even greater confusion about the identity and location of the 'Bahr el Arab'."<sup>433</sup> In particular, the SPLM/A argues that a number of Anglo-Egyptian officials (Wilkinson, Mahon, Percival, Boulnois and Lloyd) understood the Bahr el Arab to refer to what was actually the Ngol/Ragaba ez Zarga.<sup>434</sup> The SPLM/A thus adopts the conclusion of the ABC Experts that this confusion was not clarified by "responsible officials" until at least 1907.<sup>435</sup>

#### **(i) Assessing the Evidence from the Contemporary Reports**

284. It is evident that knowledge of the rivers along the Kordofan-Bahr el Ghazal boundary region evolved over the first few years of the twentieth century. In assessing the evidence on this issue, however, two important points should be borne in mind.

285. The first is that the periodic accounts prepared by various individuals who reported on the course of the Bahr el Arab between 1900-1905 must be assessed in the light of the task they were entrusted with. Visitors to the region on whom the SPLM/A relies, such as Wilkinson and Percival, crossed various rivers in the course of undertaking

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<sup>433</sup> SPLM/A Counter-Memorial, para. 72.

<sup>434</sup> Ibid.

<sup>435</sup> Ibid. It may be noted in this connection that no less than nine times in its Counter-Memorial (at paragraphs 25, 61, 74, 116, 124(c), 236, 237, 529 and 1063), the SPLM/A asserts that the ABC Experts were experts in geography. While it is certainly apparent that geographic expertise was as important for the ABC Experts' investigations as it is in this case, it is not clear on what basis the SPLM/A repeats this assertion since it is not apparent in whom this "expertise" resided or that any of the Experts were trained as geographers, cartographers or surveyors.

general marches through the region. They were not armed with any particular instructions to investigate the rivers in detail and they did not do so. They simply reported on areas (and rivers) they traversed.

286. In contrast, other individuals were tasked by the Government with specific instructions to explore the Bahr el Arab and other rivers of the region. This was particularly the case for the explorations of Lieutenant Bayldon and his successor, Lieutenant Huntely Walsh. Their instructions were not to march from north to south, but rather to carry out specific investigations of rivers such as the Bahr el Arab. Given these instructions, they spent considerable time on the Bahr el Arab exploring it and cutting sudd, rather than simply crossing it one day. This factor lends to their reports a much higher probative value as far as the identity of the rivers they explored is concerned.

287. The second factor requiring careful attention is the chronology of when specific visits to the region took place. The key here is to ascertain the extent of the Government's knowledge of the identity of the actual Bahr el Arab at the time that the transfer occurred in 1905 and was reported in Government accounts for that year.

288. Here, there is a fundamental difference between the Parties. The SPLM/A prefers to focus on the voyages of Wilkinson, which took place in 1902, and on Percival, who crossed the relevant rivers in November 1904, rather than to give weight to the much more detailed reports of Bayldon, and later Huntley Walsh, who, unlike their predecessors, were actively exploring and clearing the Bahr el Arab during precisely the year - 1905 - that the transfer occurred. Because their investigations were more detailed and contemporaneous with the transfer, they were able to provide more accurate information on the actual characteristics and identity of the Bahr el Arab relevant for assessing what the transfer entailed.

289. The MENAS Report tries to downplay the significance of Bayldon's explorations. This may serve the SPLM/A's current litigation strategy, but it is not an accurate reflection of the facts as and when they were known.

290. It is for this reason that the Government of Sudan will adopt a chronological approach to the evidence. As that evidence shows, by the time the 1905 transfer took place, and certainly by the time Wingate referred to the area that had been transferred as lying to the south of the Bahr el Arab in his Memorandum written at the end of 1905, the Bahr el Arab had been correctly identified.

## (ii) The Chronology of the Relevant Accounts

### (a) *Saunders: 1900*

291. The first account based on a visit to the area was that of Bimbashi Saunders dated 7 September 1900. He travelled to the eastern portion of the Bahr el Arab at its junction with the Bahr el Ghazal river and identified the Bahr el Arab at this point.<sup>436</sup>

292. Even the MENAS Report acknowledges that "it appears that Saunders correctly identified the Bahr el Arab", although it goes on to state that he did not correctly identify what he called the "Bahr el Homr."<sup>437</sup>

### (b) *Mahon: 1901-1903*

293. The MENAS Report asserts that in Mahon's 1901 Report,<sup>438</sup> Mahon in fact was referring to the Ragaba ez Zarga when he mentioned the Bahr el Arab.<sup>439</sup> The Macdonald Report attached to this Rejoinder rebuts that assertion and explains why there is no justification for the claim.<sup>440</sup>

294. The Macdonald Report also shows why MENAS's reliance on Mahon's 1902 and 1903 Reports (contained in *Sudan Intelligence Reports* Nos. 92<sup>441</sup> and 104<sup>442</sup>) to show that Sultan Rob's country was perceived as lying on the Ragaba ez Zarga is equally misplaced. It is based on unjustified assumptions and distorted calculations of the distances referred to. The Macdonald Report fully rebuts MENAS's account and observes that: "It is well documented that Sultan Rob lived on the Kir/Bahr el Arab and this invalid argument [by MENAS] does nothing to change this."<sup>443</sup>

### (c) *Wilkinson: 1902*

295. The SPLM/A pleadings place much heavier reliance on Wilkinson's trek through the region in 1902,<sup>444</sup> as did the ABC Experts in their Report.

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<sup>436</sup> *Sudan Intelligence Reports*, No. 74 (September 1900), p. 3 (SM Annex 1).

<sup>437</sup> SPLM/A Counter-Memorial, MENAS Report, para. 23.

<sup>438</sup> *Sudan Intelligence Reports*, No. 90 (January 1901), pp. 9-10, SPLM/A Exhibit FE 17/9.

<sup>439</sup> SPLM/A Counter-Memorial, MENAS Report, para. 25.

<sup>440</sup> Third Macdonald Report, Appendix 1, para. 68.

<sup>441</sup> *Sudan Intelligence Reports*, No.92 (March 1902), pp. 19-20, SPLM/A Exhibit FE 1/16

<sup>442</sup> *Sudan Intelligence Report*, No.104 (March 1903), SPLM/A Exhibit FE 1/21.

<sup>443</sup> Third Macdonald Report, Appendix 1, para. 69.

<sup>444</sup> SPLM/A Memorial, Daly Report, p. 49.

296. Wilkinson's trek was one of the earlier trips to the region, but it was not part of an expedition specifically intended to investigate rivers. He proceeded from El Obeid in Kordofan in a southerly direction as far as Sultan Rob who was located just to the south of the Kir river. In the course of this trek, Wilkinson crossed what he referred to as the Bahr el Arab, but which the Parties agree was actually the Ragaba ez Zarga.

297. Notably, and contrary to what Professor Daly contended in his first Report,<sup>445</sup> Wilkinson found only Arab settlements along the Ragaba ez Zarga. One of these settlements, at Abu Kareit (or Gulmaia), is described by Wilkinson as a "Homr settlement" and is located well to the *south* of the Ragaba ez Zarga as can be seen on the enlargement of Map 11 to the GoS Memorial Map Atlas and on the SPLM/A's Memorial Atlas (Map 29) showing Wilkinson's route. Another is the village of Mellum on the Ragaba ez Zarga which is also recorded by Wilkinson as "an Arab settlement".<sup>446</sup>

298. Notwithstanding this, Professor Daly's second Report persists in making the same mistake and in confidently advancing assertions that are contrary to the documented facts. According to Professor Daly:

"Instead, the critical importance of Wilkinson's report for our purposes, when seen in the light of the terms of reference of the ABC, is that *Wilkinson found Ngok Dinka in permanent occupation of sites along and to the north (left) bank of the Ragaba ez Zarga.*"<sup>447</sup>

299. This is simply wrong, and egregiously so. It is striking that Professor Daly provides no reference to Percival's Route Report to back up his assertion. The reason he does not do so is because Percival's account flatly disproves Professor Daly's thesis.

300. There is not a single reference in Percival's Report saying that he found any Ngok Dinka (or any Dinka at all) along or to the north (left) bank of the Ragaba ez Zarga, let alone "Ngok Dinka in permanent occupation". What Percival found, both along the Ragaba and some distance to the *south* of it, were Arab settlements.

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<sup>445</sup> Ibid., p. 49, where the author wrongly asserts that Wilkinson's itinerary "establishes a permanent Ngok presence on the Ragaba al-Zarga." It does nothing of the kind.

<sup>446</sup> Gleichen, A., The Handbook of Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government, Vol. II, p. 156 (SM Annex 38).

<sup>447</sup> SPLM/A Counter-Memorial, Daly Report, p. 19 (emphasis provided by Professor Daly in the original).

301. Indeed, Wilkinson did not encounter *any* Dinka villages until he was a short distance north of the Kir river and, even then, the first villages he passed were deserted - scarcely evidence of "permanent occupation".<sup>448</sup> With respect to the Kir, in contrast, Wilkinson noted the following:

"The district on N. bank is called Mareg. The district on the S. bank is called Masian, and the Sultan Rob lives in the latter."<sup>449</sup>

This placed Sultan Rob south of the Kir (or what, by March 1905, was correctly identified as the "real" Bahr el Arab), and it is consistent with Wingate's later description in his 1905 Memorandum of Sultan Rob's district: "to the South of the Bahr el Arab".

302. While Wilkinson accurately described Sultan Rob's district as situated south of the Kir, he did wrongly identify the Bahr el Arab which was actually the Ragaba ez Zarga. On this point the Parties are in agreement.

303. However, it was this error that was later corrected by Lt. Bayldon when he was sent to explore the Bahr el Arab in late 1904 and early 1905.

(d) *Percival: 1904*

304. During the months of November and December 1904, Percival marched from Lake Keilak in Southern Kordofan to Wau in the Bahr el Ghazal province. His task was described in the November 1904 *Sudan Intelligence Reports* in the following way:

"Captain A.J. Percival, D.S.O, left El Obeid on the 23<sup>rd</sup> October in command of one company of Camel Corps, mounted on mules, to march to Wau through Southern Kordofan and Dar Jange. He expects to reach Wau about the 20<sup>th</sup> December."<sup>450</sup>

305. During the course of this trek, Percival crossed over a number of the rivers. As was the case with Wilkinson, Percival did not spend time on the rivers exploring them or clearing sudd. It was a fairly rapid march covering a long stretch of territory which he accomplished in just over five weeks.

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<sup>448</sup> GoS Counter-Memorial, paras. 475-476.

<sup>449</sup> Gleichen, A., *The Handbook of Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government*, Vol. II, p. 156 (SM Annex 38).

<sup>450</sup> *Sudan Intelligence Reports* No. 124 (November 1904), p. 1 (SM Annex 7).

306. The MENAS Report emphasizes that Percival, like Wilkinson before him, wrongly identified the Ragaba ez Zarga as the Bahr el Arab.<sup>451</sup> Significantly, however, Percival did not voice a definite opinion that the Ragaba ez Zarga was the Bahr el Arab. He cautiously indicted in his Route Report that the river was what "I take to be the BAHR EL ARAB."<sup>452</sup> Subsequently, and consistent with Lieutenant Bayldon's findings discussed below, Percival acknowledged his mistake (i.e., that Bayldon was right) and confirmed that "the Bahr el Arab is the river Kir."<sup>453</sup>

307. Further south, Percival noted that Sultan Rob was at present living in Burakol, and he was told by Sultan Rob that there were only Arabs west of him. Sultan Rob also informed Percival that the Bahr el Arab (meaning the Ragaba ez Zarga) was uninhabited except for occasional wandered parties of Arabs. In other words, there were no Dinka on the Ragaba ez Zarga (Wilkinson had reported only Arab settlements), and Sultan Rob did not claim that his territory extended up to the Ragaba ez Zarga let alone further north.

308. Percival then crossed the Kir and proceed south towards Wau. His sketch map of the area he traversed, which is reproduced after page 103, is of particular importance because it depicts the country of Sultan Rob as lying to the south of the Kir river.<sup>454</sup>

(e) *Comyn: 1905*

309. Sudan's pleadings also pointed out that, in 1905, Lieutenant Comyn travelled to the western reaches of the Bahr el Arab and correctly identified the river, pointing out that previous descriptions (such as by Wilkinson and Percival) had been mistaken.<sup>455</sup> Professor Daly grudgingly accepts Comyn's report, but goes on to argue that "it does not follow that other 'officials' agreed with him, let alone that they 'knew' that he was right."<sup>456</sup>

310. But others did agree with him, particularly Lieutenants Bayldon and Huntley Walsh, as will presently be seen.

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<sup>451</sup> SPLM/A Counter-Memorial, MENAS Report, paras. 36-40.

<sup>452</sup> Percival, A., Route Report: Keilah to Wau, December 1904, p. 2 (SCM Annex 26).

<sup>453</sup> Lloyd, W., (Percival, C.) "*Correspondence: The Dar Homr*" (1907) 30 *The Geographical Journal*, p. 219 (SM Annex 55).

<sup>454</sup> Also reproduced in Map 14b to the SCM Map Atlas. The SPLM/A Counter-Memorial also relies on the statements of Boulnois (see, e.g., para. 1012), but it is clear that Boulnois made no independent investigation but simply repeated Percival's Report.

<sup>455</sup> GoS Memorial, para. 318; GoS Counter-Memorial, para. 423, and see also the first Macdonald Report attached to the GoS Memorial, paras. 3.20-3.24 and Figure 10 thereto.

<sup>456</sup> SPLM/A Counter-Memorial, Daly Report, p. 19.



(f) *Bayldon and Walsh: 1904-1905*

311. The explorations of Lieutenants Bayldon and Huntley Walsh started in late 1904 and continued throughout 1905. Their explorations of the Bahr el Arab are highly relevant for the present case for two reasons. First, unlike his predecessors such as Wilkinson and Percival, Bayldon's instructions were expressly to explore the rivers of the region. As the MENAS Report states: "his trip was in the nature of an exploratory excursion or fact finding mission."<sup>457</sup> Explore he did, spending several months on the Bahr el Arab until he fell ill, whereafter he was replaced in the autumn of 1905 by Huntley Walsh. Second, the reports of Bayldon's findings are recorded in the very same year that the transfer took place. They are the most proximate in time to the relevant date and by far the most detailed accounts about the characteristics of the real Bahr el Arab.

312. Bayldon's instructions are set out in the December 1904 *Sudan Intelligence Reports*,<sup>458</sup> a document which the SPLM/A did not elect to annex to either its Memorial or Counter-Memorial. Under the marginal headings "Bahr el Arab Reconnaissance", the following record appears:

"Sub-Lieutenant Bayldon, R.N., left Khartoum on the 18<sup>th</sup> instant by steamer with instructions to explore the Bahr el Arab from its mouth; and if possible other little known rivers in the N.W. of the Bahr el Ghazal."<sup>459</sup>

313. This record contradicts Professor Daly's assertion that "Southern Kordofan's complex hydrology was of little or no concern to the Sudan Government in 1905."<sup>460</sup> Clearly, it was of concern, and this is why Bayldon was sent with specific instructions to explore the Bahr el Arab and other rivers.

314. Professor Daly's assertion is also belied by Governor-General Wingate's reference to the issue in his Memorandum included with the 1904 *Annual Report*. There, Wingate stated the following:

**"Exploration of the Bahr el Arab by Lieutenant Bayldon R.N. -** Meanwhile, I am endeavouring by further explorations of little known rivers, such as the Bahr el Arab, the Kyr, the Lol, and other streams, to obtain information which may be of use in solving this interesting problem."<sup>461</sup>

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<sup>457</sup> SPLM/A Counter-Memorial, MENAS Report, para. 10.

<sup>458</sup> *Sudan Intelligence Reports*, No. 125, (December 1904) (SCM Annex 45).

<sup>459</sup> *Ibid.*, p. 2.

<sup>460</sup> SPLM/A Counter-Memorial, Daly Report, p. 3.

<sup>461</sup> *Reports on the Finances, Administration, and Condition of Sudan, Annual Reports*, (1904) Wingate Memorandum, p. 8 (SM Annex 23).

315. As detailed in the Government of Sudan's Counter-Memorial,<sup>462</sup> by 20 March 1905 Bayldon had reached the following important conclusions, as recorded in his Report of that date reproduced in the March 1905 *Sudan Intelligence Reports*.<sup>463</sup>

- "The river usually spoken of as the Bahr el Arab (I do not refer to the mouth of its junction with the Bahr el Ghazal,<sup>464</sup> but up country), is really the Bahr el Homr."
- "the River Kir is the real Bahr el Arab. It being called Kir by the Nuers, and El Gurf by the Rizeizat Arabs, who live close to it, on its higher reaches."

316. This account was written at least nine months *before* Wingate stated that the districts of Sultans Rob and Okwai, to the south of the Bahr el Arab, had been incorporated into Kordofan.

317. The *Sudan Intelligence Report* for June 1905 reported on Bayldon's continued operations on the Bahr el Arab. As of 4 June 1905, Bayldon had spend a further four weeks on the river. More men were sent up to assist him in this work.<sup>465</sup>

318. The July 1905 *Intelligence Report* also addressed sudd cutting on the Bahr el Arab. By 15 July 1905, a distance of over 20,000 yards had been cut, and only six miles remained to be cleared.<sup>466</sup>

319. The August 1905 *Sudan Intelligence Report* contains another section under the heading in the margin: "Bahr el Arab Sudd". The progress of work proceeding up the Bahr el Arab was recorded under that section, and it was noted that, at the present rate, open water would be reached by 1<sup>st</sup> September.<sup>467</sup> As Huntley Walsh reported in February 1906, he had been informed by local natives that this open water continued as far as Sultan Rob's village.<sup>468</sup> Neither the August *Intelligence Report*, nor those for the months of June or July have been annexed by the SPLM/A.

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<sup>462</sup> GoS Counter-Memorial, paras. 411-416.

<sup>463</sup> See paras. 245-246 above.

<sup>464</sup> Already in 1900, Saunders had correctly identified the junction, or mouth, of the Bahr el Arab with the Bahr el Ghazal. See paras. 291-292 above and *Sudan Intelligence Reports*, No. 74 (September 1900), p. 3 (SM Annex 1).

<sup>465</sup> *Sudan Intelligence Reports*, No. 131 (June 1905), p. 1 (SCM Annex 47).

<sup>466</sup> *Sudan Intelligence Reports*, No. 132 (July 1905), p. 1 (SCM Annex 48).

<sup>467</sup> *Sudan Intelligence Reports*, No. 133 (August 1905), p. 2 (SCM Annex 49).

<sup>468</sup> *Sudan Intelligence Reports*, No. 139 (February 1906), pp. 3 and 18 (SM Annex 11).

320. The October 1905 *Intelligence Report* contained similar information under the heading "Bahr el Arab".<sup>469</sup> It noted that Bimbashi's Walsh's arrival was expected and that Bayldon's engineer, Mr. Sciplini, was present. As Bayldon had indicated in his March 1905 Report, Mr. Sciplini "has seen the river with me and knows all about it."<sup>470</sup>

321. The November 1905 *Intelligence Report* also included a marginal heading entitled "Bahr el Arab Sudd".<sup>471</sup> It reported that Walsh had returned to Khartoum on 26 November and that over 18 miles of sudd had been cut on the river. The *Intelligence Report* went on to note that:

"From all reports the river from this point up to Sultan Rob's is a broad deep river. The expedition to be sent up shortly is for the purpose of exploring the river and surrounding country, to ascertain the advisability of further opening up the river called by the natives Bahr El Riziekat."<sup>472</sup>

The November *Intelligence Report* thus provided further confirmation that the Bahr el Arab was the same river as the Kir on which Sultan Rob lived.

322. Throughout this period of intensive work on the Bahr el Arab, the river was always referred to as the Bahr el Arab. In other words, there was no dissent from Bayldon's assessment written in March 1905 that the Bahr el Arab and Kir rivers were one and the same, and were quite distinct from the Ragaba ez Zarga (called by Bayldon the "Bahr el Homr").<sup>473</sup> The correct Bahr el Arab was thus consistently referred to in the *Intelligence Reports* throughout 1905.

323. It is in the light of these contemporary accounts that Wingate's statement about the transferred area, written at the end of 1905, falls to be considered. As noted earlier, Wingate clearly knew of the work of Bayldon, Walsh and Sciplini carried out in 1905 along the Bahr el Arab.<sup>474</sup> At page 11 of his Memorandum, there is a section entitled "Sudd Cutting on the Bahr el Arab" in which Wingate refers to all three individuals and the progress of their work.<sup>475</sup> He even quotes Lieutenant Walsh who, upon his return to Khartoum due to the weather in November 1905, wrote:

"The Bahr el Arab - or to name it correctly as the natives name it, the Bahr el Rizighat - is, as far as I could see from the beginning of open water, a

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<sup>469</sup> *Sudan Intelligence Reports*, No. 135 (October 1905), p. 1 (SCM Annex 50).

<sup>470</sup> *Sudan Intelligence Reports*, No. 128 (March 1905), p. 12, SPLM/A Exhibit FE 2/8.

<sup>471</sup> *Sudan Intelligence Reports*, No. 136 (November 1905), p. 3, SPLM/A Exhibit FE 17/18.

<sup>472</sup> *Ibid.*, p. 4.

<sup>473</sup> *Ibid.*, p. 11.

<sup>474</sup> Paras. 279-280 above.

<sup>475</sup> *Report on Finances, Administration, and Condition of the Sudan in 1905*, Wingate Memorandum, p. 11, SPLM/A Exhibit FE 2/13.

very fine river with plenty of water, 7 to 8 feet in places, and opens out to a breadth of 60 to 70 yards. The climate is better and drier up here than at the mouth."<sup>476</sup>

324. Wingate's references to Bayldon and Walsh thoroughly rebut the assertion in the MENAS Report that Bayldon's Report "would have been of no assistance to the decision makers who transferred the area of the Ngok Dinka from Bahr el Ghazal to Kordofan, which was first reported on 1 April 1905."<sup>477</sup> Bayldon's work on the Bahr el Arab was, in fact, specifically referred to by the most senior "decision maker" in the same document in which he identified the area of the Dinka that had been transferred from Bahr el Ghazal to Kordofan.

325. Wingate's Memorandum also rebuts Professor Daly's contention that, while Comyn and Huntley Walsh "may be termed 'Condominium officials', they were not 'officials' shown in any way to have been connected with the 1905 'foundation texts' at the heart of the Abyei dispute."<sup>478</sup>

326. The fact that Governor-General Wingate specifically referred to Huntley Walsh in connection with his work on the Bahr el Arab does, indeed, connect Walsh (as well as Bayldon) to Wingate's key account which refers to the transfer.

327. Given the attention that Wingate gave the Bahr el Arab in his Memorandum, his subsequent reference at page 24 of the Memorandum - "The 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" - could only have been a reference to the same river, the real Bahr el Arab.

328. It is therefore clear that Government officials did know in 1905 the correct identification of the Bahr el Arab (as a distinct from the Ragaba ez Zarga), and that this was taken into account in the Governor-General's description of the transferred area. References to the "Bahr el Arab", correctly identified by Bayldon, appear in repeated editions of the *Intelligence Reports* throughout that year. Of equal importance, they appear in Wingate's Memorandum. As the SPLM/A itself has emphasized, it is not open to a party to rewrite or second-guess the Anglo-Egyptian administrators' decision in 1905. In terms of describing the actual area transferred, Wingate's account is the most complete, accurate and authoritative description of that decision that exists.

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<sup>476</sup> Ibid.

<sup>477</sup> SPLM/A Counter-Memorial, MENAS Report, para. 47.

<sup>478</sup> Ibid., p. 19.

#### **D. Further Evidence Relating to the Transferred Area**

329. Wingate's identification of the transferred area is also consistent with two other factors. The first, which will be discussed in this section, is that there are various official accounts on record as of 1905 indicating where Sultan Rob's district, and that of Sheikh Gorkei, were deemed to lie. They all show Sultan Rob, and his territory, on or to the south of the Bahr el Arab. The second important element, which will be addressed in the following section, is that Wingate's reference to the location of the transferred area is consistent with the fact that the Bahr el Arab was the boundary between the provinces of Kordofan and Bahr el Ghazal before the transfer, but not, in so far as the relevant area is concerned, afterwards.

330. The evidence for the first proposition has been discussed previously and will only be summarized here. Once again, it is helpful to adopt a chronological approach to the facts in order to keep in perspective what and when Sudanese Government officials knew about the location of the territories that were ultimately decided to be transferred in 1905.

331. Wilkinson is the first source expressly locating Sultan Rob's district. As discussed above, on reaching the Kir river, Wilkinson recorded the following:

"The district on S. bank is called Masian, and the Sultan Rob lives in the latter."<sup>479</sup>

332. The relevant extract from Wilkinson's sketch map of his trek appears as Map 13b in the Sudan Counter-Memorial Map Atlas. It shows the "Masian district", which is labelled on the sketch, situated to the *south* of the Kir river. As previously pointed out, Wilkinson only found Arab settlements along the Ragaba ez Zarga.<sup>480</sup>

333. Then there is Percival's account dating from November 1904. While Percival noted that Sultan Rob was, at that time, living in Burakol, his sketch map showing the area he traversed depicts the territory of Sultan Rob as lying to the *south* of the Kir. A reproduction of the sketch in question is reproduced as **Figure 1**. It could not be clearer as to where Percival considered Sultan Rob's country to be located. Percival's Route Report also notes that Sultan Rob had himself told Percival that the Bahr el Arab (actually the Ragaba ez Zarga) was uninhabited except for occasional Arabs.<sup>481</sup> This fundamentally

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<sup>479</sup> See para. 301 above.

<sup>480</sup> See paras. 297-300 above and GoS Counter-Memorial, paras. 475-476.

<sup>481</sup> Percival, A., Route Report: Keilah to Wau, December 1904, p. 3 (SCM Annex 26).

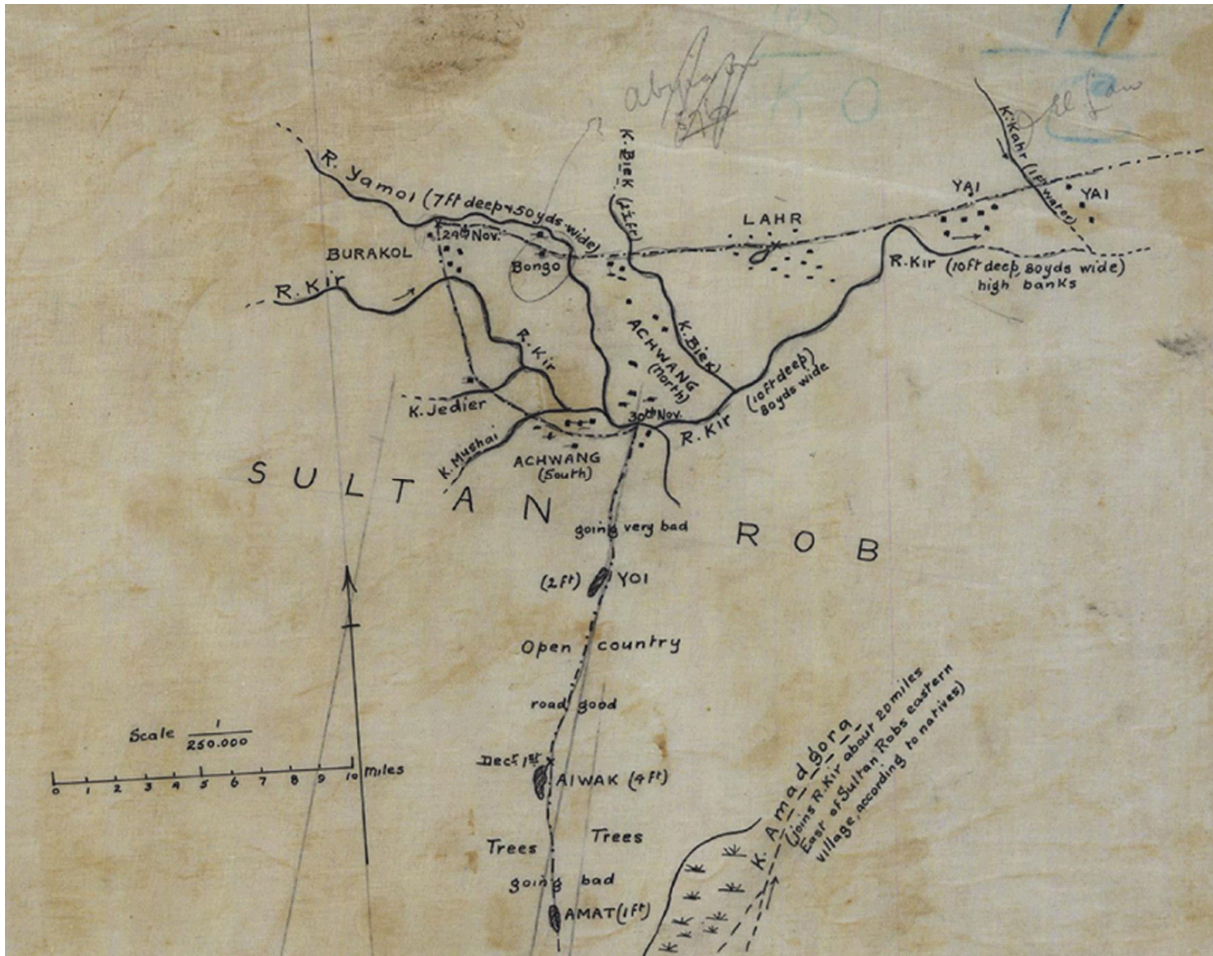


Figure 1. Extract of Percival's Sketch Map (River Kir to Wau)

contradicts the SPLM/A's thesis, supported by Professor Daly, that the Ngok Dinka's territory extended up to the Ragaba ez Zarga and beyond.

334. Next, there is the reference in the February 1905 *Sudan Intelligence Report* to the location of the territory of Sheikh Rihan Gorkwei, whose district was also included in the 1905 transfer. Sheikh Gorkwei is reported as informing Bayldon that his district "is situated between the Kir and Lol Rivers."<sup>482</sup> Given that Bayldon confirmed that the Kir and the Bahr el Arab were one and the same, this placed Sheikh Gorkwei's district *south* of the Bahr el Arab.

335. Lastly, we have the account found in the March 1905 *Intelligence Report* first reporting on the transfer. It records the fact that Sultan Rob's country was described as being "on the Kir river," as well as the fact that Bayldon had determined that the Kir and the Bahr el Arab were the same river.<sup>483</sup>

336. These are the accounts that would have informed Government administrators of the whereabouts of the districts of Sultan Rob and Sheikh Rihan Gorkwei transferred to Kordofan in 1905. They explain, and are entirely consistent with, Wingate's description of that area in his 1905 Memorandum.

#### ***E. The Relevance of the Kordofan-Bahr el Ghazal Provincial Boundary***

##### **(i) The Provincial Boundary Before the Transfer and as Changed in 1905 Because of the Transfer**

337. Had there been areas north of the Bahr el Arab that Government officials intended to transfer from Bahr el Ghazal to Kordofan in 1905, Wingate's Memorandum would have said so. It did not. The reason it did not was due to two factors. First, as just explained, the districts of Sultan Rob and Sheikh Rihan were understood by responsible officials to lie on, and to the south of, the Bahr el Arab. Second, areas to the north of the Bahr el Arab already formed part of the province of Kordofan before the transfer and thus could not have been subject to the transfer in any event. That is the only logical way to interpret Wingate's account, particularly when it is recalled that Wingate included his description of the transferred area under a section of his Memorandum entitled "Changes

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<sup>482</sup> *Sudan Intelligence Reports*, No. 127 (February 1905), p. 2 (SM Annex 8).

<sup>483</sup> *Sudan Intelligence Reports*, No. 128 (March 1905), p. 3 (SM Annex 9).

in Provincial Boundaries and Nomenclature" and introduced the relevant passage by indicating that the transfer was one of "the principal alterations already effected."<sup>484</sup>

338. The SPLM/A Counter-Memorial, mainly by means of the MENAS Report, seeks to cast doubt on the existence of a pre-transfer Kordofan-Bahr el Ghazal provincial boundary.

339. With respect to the actual transfer texts, the MENAS Report asserts the following:

"Turning to the transfer in 1905, we note that the documents referring to the transfer of the Ngok Dinka from Bahr el Ghazal to Kordofan refer neither to any specific boundary nor to where any such territorial limit may have been located."<sup>485</sup>

340. This statement is clearly wrong. MENAS overlooks the fact that Wingate most certainly did refer to where the territorial limit of the transferred area was located. This he described as follows: "The 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."

341. Given that Wingate discussed the transfer under a section of his Memorandum dealing with "Changes in Provincial Boundaries", and that his account of the transfer was listed as the fourth item after the words, "The principal alterations already effected are:", it can also be concluded that Wingate considered the pre-transfer boundary between Bahr el Ghazal and Kordofan to be the Bahr el Arab.

342. The transfer changed that boundary. It was one of the "principal alterations" effected in 1905. The transferred districts south of the Bahr el Arab were noted by Wingate to lie in what had formerly been a portion of the Bahr el Ghazal Province. Thus, prior to the transfer, areas south of the Bahr el Arab were part of Bahr el Ghazal. In 1905, those districts were "incorporated into Kordofan". Again, the clear inference is that, before the transfer, Kordofan extended down to the Bahr el Arab and that, after the transfer, it extended further south to incorporate the districts of Sultans Rob and Okwai that had been transferred. Prior to the transfer, the *Annual Reports* for Kordofan and Bahr el Ghazal consistently referred to the provincial boundary as the Bahr el Arab. That description changed in the 1905 *Annual Reports* for both provinces as a consequence of the transfer.

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<sup>484</sup> *Reports on the Finances, Administration and Condition of the Sudan, Annual Report (1903) Annual Report for Bahr el Ghazal Province, p. 3; Annual Report for Kordofan Province, pp. 23-24 (SM Annex 24).*

<sup>485</sup> SPLM/A Counter-Memorial, MENAS Report, para. 79.



343. The MENAS Report also asserts that:

"the putative boundary between Kordofan and Bahr el Ghazal provinces - sometimes broadly described as correlating with the 'Bahr el Arab' - was uncertain, provisional and indeterminate in 1905 (and it remained so after 1905)."<sup>486</sup>

344. The words "putative", "uncertain", "provisional" and "indeterminate" are MENAS's words; they do not reflect the manner in which Condominium officials themselves described the boundary in official reports. Nor does Professor Daly's suggestion that the Kordofan-Bahr el Ghazal boundary may be called a "working boundary" mirror the contemporary description of that boundary.<sup>487</sup>

345. The references to the boundary between Kordofan and Bahr el Ghazal were discussed in Sudan's Counter-Memorial.<sup>488</sup> To recapitulate:

- The 1902 *Annual Report* for Bahr el Ghazal states, under the heading "Mudiria Boundaries", that the boundaries of the province were understood to be "on North Bahr-el Ghazal and Bahr-el-Arab as far as Hofret on Nabas."<sup>489</sup>
- The 1903 *Annual Report* for Kordofan states under the heading "Boundaries": "Southern. Bahr el Arab and Bahr el Ghazal to Lake No."<sup>490</sup>
- The 1904 *Annual Report* for Kordofan states under the heading "Boundaries":

"the Boundaries of the Province have not altered. The Darfur Frontier has however been defined. It runs from Foga south westwards between Dam Gamad and Um Shanga, west of Zalata district to Hafir Ogr which is shared by inhabitants of both Kordofan and Darfur: thence it runs southwards, west of Dar Homr to the Bahr-El-Arab which is the northern boundary of the Bahr-El-Ghazal Province."<sup>491</sup>

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<sup>486</sup> Ibid., para. 3(d).

<sup>487</sup> Ibid., p. 17.

<sup>488</sup> GoS Counter-Memorial, paras. 426-456 for the pre-transfer boundary; paras. 461-463 for the 1905 change to that boundary; and paras. 484-505 for the post-1905 boundary.

<sup>489</sup> *Reports on the Finances, Administration, and Condition of the Sudan, Annual Reports* (1902), p. 230 (SM Annex 21).

<sup>490</sup> *Reports on the Finances, Administration, and Condition of the Sudan, Annual Reports* (1903), p. 71 (SM Annex 22).

<sup>491</sup> *Reports on the Finances, Administration, and Condition of the Sudan, Annual Reports* (1904), p. 101 (SM Annex 23). The 1904 *Annual Report* for Bahr el Ghazal indicated that there were no alterations. The northern boundary of Bahr el Ghazal thus remained the Bahr el Arab.

Nowhere did Condominium officials use the words employed by MENAS.

346. In addition to these sources, there is also the contemporary account written by the noted scholar, Naum Shoucair, which identified the northern boundary of Bahr el Ghazal, and the southern boundary of Kordofan, as the Bahr el Arab.<sup>492</sup> There is also the 1901/1903 map of Mardon, which will be discussed later on.

347. Notwithstanding these accounts, the MENAS Report contends that by 1905, "all we have on record is some vague references to what might have been considered a provincial boundary between Kordofan and Bahr el Ghazal provinces, namely the river course that was believed to comprise the 'Bahr el Arab'."<sup>493</sup>

348. The references cited above are not vague; they unequivocally state that the provincial boundary was the Bahr el Arab. Nor do they represent "what might have been considered a provincial boundary". They say what that boundary was, and they were recorded in official Government documents.

349. The MENAS Report even appears to question whether the pre-transfer Kordofan-Bahr el Ghazal boundary followed a river. According to MENAS:

"there is no assumption that provincial or international boundaries follow the course of a river or natural feature. This is obviously the case, and the *current* Bahr el Ghazal/Darfur boundary makes this point itself - the *current* provincial boundary is somewhat to the south of the Kiir/Bahr el Arab and the *current* Kordofan/Bahr el Ghazal boundary is of course not based on the course of the Kiir/Bahr el Arab (or any river)."<sup>494</sup>

350. This passage is a remarkable example of irrelevancies and distortions. Obviously, there is no assumption that provincial or international boundaries have to follow the course of a river or natural feature, although many certainly do. But that is irrelevant to the present case. Here, the official *Annual Reports* for the relevant administrative provinces expressly said that the boundary did follow a river - the Bahr el Arab.

351. Moreover, the fact that the "current" Kordofan/Bahr el Ghazal boundary and the "current" Bahr el Ghazal/Darfur boundary do not follow a river has no bearing on what those boundaries were over a hundred years ago prior to the transfer. It is misleading to suggest otherwise.

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<sup>492</sup> GoS Counter-Memorial, paras. 440-442 and Shoucair, N., *History and Geography of the Sudan* (El-Maarif Press, Cairo, 1903) (in Arabic), pp. 71-72 (SCM Annex 1).

<sup>493</sup> SPLM/A Counter-Memorial, MENAS Report, para. 56.

<sup>494</sup> *Ibid.*, para. 73 (emphasis added).

352. Prior to 1905, the Kordofan/Bahr el Ghazal boundary did follow a river. The *Annual Reports* and other contemporary sources demonstrate as much. After the transfer, they did not follow the river because certain tribal districts had been transferred from Bahr el Ghazal to Kordofan in the meantime, and the southern limits of those districts (as opposed to their northern limits which were bounded by the Bahr el Arab) did not coincide with any river.

353. That is why the 1905 *Annual Reports* for both Kordofan and Bahr el Ghazal no longer stated that the provincial boundary was the Bahr el Arab, but simply referred to the transfer. It is also why Wingate emphasized that the districts of Sultans Rob and Okwai to *south* of the Bahr el Arab had been incorporated into Kordofan, and why post-1905 maps of the boundary - while broadly consistent in showing the new boundary south of the Bahr el Arab in the relevant area - do not precisely match. The southern limits of the transferred districts had not been finally delimited in 1905. As noted by Professor Daly, in 1900 Maxwell had written to Wingate stating that, with respect to the fixing of boundaries, "Along the river there is no great difficulty."<sup>495</sup> But in purely tribal areas, the situation was different.

354. In other words, what the MENAS Report avoids discussing is why the provincial boundaries they cite changed after 1905. In the case of the Bahr el Ghazal/Darfur boundary, it was because of a 1924 agreement reached by responsible Government officials. In the case of the Kordofan/Bahr el Ghazal boundary, it was because of the 1905 transfer of the districts of Sultans Rob and Okwai to the south of the Bahr el Arab.

355. With respect to the Bahr el Ghazal/Darfur boundary, as of 1905 the western portion of that boundary was the Bahr el Arab. That fact cannot be questioned. That boundary was only shifted south to a position not following the course of the river as a result of the subsequent Munroe-Wheatley Agreement of 1924.<sup>496</sup>

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<sup>495</sup> Maxwell to Wingate, 19 January 1900, SAD 270/77, SPLM/A Exhibit MD 41.

<sup>496</sup> GoS Memorial, paras. 305-306 and para. 328(d) and (e).

356. The MENAS Report acknowledges that, "to the eyes of the colonial powers, 'natural boundaries' represented the best opportunities for defence and could be more easily identified on the typically crude cartography being used as geographical base references at this time." However, MENAS then goes on to assert that rivers "rarely performed such a divisive function" and, citing Bouchez, that such rivers "are natural links for the people who live adjacent to them."<sup>497</sup>

357. This citation is incomplete. It fails to point out that Bouchez prefaced his statement with the qualification: "if one approaches boundary rivers from the *cultural* and *economic* points of view".<sup>498</sup> That, of course, is not the relevant issue in this case. Bouchez actually cites a multitude of examples where river boundaries are adopted, and the Tribunal itself will be well aware of such boundaries - either as former internal administrative boundaries, such as in the *El Salvador/Honduras* case, or as international boundaries, as in the *Cameroon-Nigeria* case.

358. The main thrust of the MENAS Report's contention that the pre-1905 provincial boundary was indeterminate rests on the argument that there was "very serious geographical confusion at the time", and that it is thus "impossible" to determine whether the reference to the Bahr el Arab as the provincial boundary was to the real Bahr el Arab, the Ragaba ez Zarga, the Lol or some other river.<sup>499</sup>

359. The reference to the Lol and "some other river" is gratuitous. No one ever confused the Lol with either the Bahr el Arab or the Ragaba ez Zarga. Nor is there any credible evidence that other rivers were mixed up with the Bahr el Arab. The question is, therefore, whether the reference to the Bahr el Arab as the provincial boundary in the *Annual Reports* can be considered to be to the actual Bahr el Arab or to the Ragaba ez Zarga.

360. Whatever the answer to this question - and it will be shown that the real Bahr el Arab must have been considered to be the provincial boundary - one thing is clear. The provincial boundary was recognized by Government officials to be a river. There is no river that fits that role north of the Ragaba ez Zarga, and even the Ragaba ez Zarga was not the relevant river. By itself, this totally undermines the SPLM/A's position that the

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<sup>497</sup> SPLM/A Counter-Memorial, MENAS Report, para. 63.

<sup>498</sup> Bouchez, L.J., *The Fixing of Boundaries in International Boundary Rivers*, The American Journal of International Law, July 1963, MENAS Report, Exhibit 38 (emphasis added).

<sup>499</sup> SPLM/A Counter-Memorial, MENAS Report, para. 78.

transferred area extended up to the 10°35'N latitude, as well as the Experts' decision that that area extended up to the 10°22'30"N latitude.

361. There are no rivers along either of these latitudes and nothing there that could have been confused with the Bahr el Arab by Government administrators when they referred to the provincial boundary as the Bahr el Arab. It is impossible, therefore, that in 1905 Government officials had any intention to transfer such areas. Whichever river was considered to be the Bahr el Arab, areas north of that river were already situated in Kordofan before the transfer and could not, by definition, have been taken from Bahr el Ghazal and "incorporated" into Kordofan at that time.

362. Moreover, there is considerable evidence that the Bahr el Arab provincial boundary was meant to be the real Bahr el Arab. Condominium officials were clearly aware that there was a major river that crossed the area between Kordofan and Bahr el Ghazal that had its origins further to the west between Darfur and Bahr el Ghazal. As a matter of general repute, the fact that this river was seen as constituting a natural dividing line between north and south cannot be seriously disputed.

363. The GoS Counter-Memorial pointed out that even Professor Daly has written (with respect to the Bahr el Ghazal) that:

"The northern districts of this region, roughly speaking, along the line of the Bahr al-'Arab, had *for centuries* been the *border* between the Baqqara Arabs, and the Dinka and other non-Arab tribes."<sup>500</sup>

364. A number of other doctrinal sources were cited in the GoS Counter-Memorial all attesting to the same proposition. These included works by Collins, Warburg and Jünker.<sup>501</sup> There is no suggestion that any of these authors actually meant the Ragaba ez Zarga when they referred to the Bahr el Arab as the dividing line, and the proposition is not credible. The Bahr el Arab was clearly viewed as the significant river in the region throughout modern history.

365. The Ragaba ez Zarga is not in the same class as the Bahr el Arab in terms of its length or characteristics. The SPLM/A Counter-Memorial and the MENAS Report contest this and argue that the Ragaba ez Zarga was not a "seasonal river" or "seasonal creek".<sup>502</sup> But the relevant facts show otherwise.

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<sup>500</sup> Daly, M.W., and Holt, P.M., *A History of Sudan* (Longham, London, 2000), p. 62 (SCM Annex 44) (emphasis added), discussed at SCM, para. 400.

<sup>501</sup> GoS Counter-Memorial, paras. 401-403.

<sup>502</sup> SPLM/A Counter-Memorial, para. 1402, and MENAS Report, para. 112.

366. Both the SPLM/A Counter-Memorial and the MENAS Report overlook the manner in which the SPLM itself described the Ragaba ez Zarga in its Final Presentation to the ABC. This is how the SPLM characterized the Ragaba (called the Ngol) in its presentation to the ABC describing the area:

"There are no mountains or hills except high and open ground in northern part of the area. River Kiir runs west-east through the area. There are also some *seasonal streams* such as the Ngol and Ngamora."<sup>503</sup>

Clearly, the SPLM itself distinguished between the Kir (Bahr el Arab), which was described as a "river", and the Ngol (Ragaba ez Zarga) which was described as a "seasonal stream". The fact that the SPLM/A may now find it expedient to change its position does not detract from the force or relevance of what it previously affirmed.

367. In terms of pre-1905 sources, the MENAS Report relies exclusively on Percival and Wilkinson for descriptions of the Ragaba ez Zarga, both of whom crossed the feature in one day rather than exploring it in depth. Their accounts provide little in the way of detail.

368. Far more relevant is the description of Lt. Bayldon who was specifically sent to the region to explore the rivers and who, in 1905, travelled more than 40 miles up the Ragaba ez Zarga. His observations are as follows (in speaking of what he called the Bahr el Homr - i.e., the Ragaba ez Zarga):

- " from all accounts (Arab and Dinka) this river is much more in the nature of a Khor than a river, being shallow with shelving banks and full of weed, the deep and open parts being few. What I saw of it certainly confirms this."<sup>504</sup>
- "Having traced the Bahr el Homr for a distance of over 40 miles, and found still a very clearly defined channel, although little or no water in it."<sup>505</sup>

369. It is also significant that Lt. Bayldon offered suggestions for opening up the Bahr el Arab for navigation, but made no such proposal for the Ragaba ez Zarga. The Sudan Government thus devoted considerable resources to the exploration and cutting of sudd

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<sup>503</sup> SPLM Final Presentation on the Boundaries of the Abyei Area, p. 18, SPLM/A Exhibit FE 14/13 (emphasis added).

<sup>504</sup> *Sudan Intelligence Reports*, No. 128 (March 1905), p. 10 (SM Annex 9).

<sup>505</sup> *Ibid.*, p. 11.

along the Bahr el Arab (in 1905), but did nothing with respect to the Ragaba ez Zarga. Indeed, the Ragaba ez Zarga is not even mentioned in Wingate's 1905 Memorandum dealing with changes to the provincial boundaries while the Bahr el Arab, where Bayldon and Huntley Walsh had been working, is.

370. MENAS's reliance on Lloyd's post-1905 (December 1907) observations confirms the same point. Lloyd noted:

"At Hasoba the banks almost disappear... and when I was there in 1906 I was inclined to think that the river was really a Ragaba. There is, however, no doubt, that when full it must be a considerable stream. But, on account of the grass and shallows, I doubt if it will ever be navigable, and the Gurf (or Bahr El Arab or Bahr El Rizeigat) seems to offer much greater possibilities."<sup>506</sup>

371. Turning to the identity of the Bahr el Arab, it is accepted by MENAS that, in 1900, Saunders correctly identified the eastern origin of the Bahr el Arab.<sup>507</sup> Sudan has also provided evidence that Major Peake travelled up the Bahr el Arab for a distance of 9 miles from its mouth in that year.<sup>508</sup> With respect to the western portion of the Bahr el Arab, Comyn explored this area and correctly identified the Bahr el Arab in 1905.<sup>509</sup> Professor Daly does not dispute this point.

372. In the meantime, Government records make it clear that the eastern portion of the Darfur-Bahr el Ghazal boundary was constituted by the Bahr el Arab. Professor Daly complains that "no one has ever suggested that the border between Darfur and the Bahr el-Ghazal was the Bahr el-Arab *to its source*." He notes that the westernmost portion up to French territory is simply portrayed as a dotted line.<sup>510</sup>

373. This quibble is immaterial since the boundary of Darfur with French territory is not germane. The important point is that the eastern part of the Darfur-Bahr el Ghazal boundary did follow the same Bahr el Arab. Yet even this point appears to be disputed by Professor Daly. He writes with respect to Kordofan's and Darfur's southern boundaries: "they were similar because neither existed,"<sup>511</sup> and he adds with respect to Darfur that

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<sup>506</sup> *Sudan Intelligence Reports*, No. 162 (December 1907), p. 55, SPLM/A Exhibit FE 17/30; cited at para. 114(d) of the MENAS Report.

<sup>507</sup> SPLM/A Counter-Memorial, MENAS Report, para. 23.

<sup>508</sup> *Sudan Intelligence Reports*, No. 77 (December 1900) p. 8 (SM Annex 2).

<sup>509</sup> GoS Memorial para. 318 and see Comyn, D., *The Western Sources of the Nile* (1907) 30 *The Geographical Journal*, 524, (SM Annex 50), Comyn, D., *Service and Sport in the Sudan* (1911) John Lane, London (SCM Annex 46) and Figure 10 to the first Macdonald Report.

<sup>510</sup> SPLM/A Memorial, Daly Report, p. 25 (emphasis in Professor Daly's original).

<sup>511</sup> *Ibid.*, p. 36.

the Anglo-Egyptian Condominium cared so little about internal boundaries "that it made no effort to establish any."<sup>512</sup>

374. These far reaching assertions are fully disproved by the contemporary record. First, there is Governor-General Wingate's Memorandum included with the *Reports on the Finances, Administration and Condition of the Sudan* for 1903. In this document, Wingate states the following under the heading "Darfur Frontier" in response to reports of uneasiness on the frontier:

"I recently dispatched the Inspector General, Sir Rudolf von Slatin, to this locality; he has now returned having arranged matters on an entirely satisfactory footing, and *the boundary having been now defined in detail* and the tribute illegally levied by the Darfur force having been returned to the villagers, it is hoped that there will be no further trouble in this direction."<sup>513</sup>

Wingate's statement - "the boundary having been now defined in detail" - hardly squares with Professor Daly's assertion that the Condominium regime made no effort to establish any boundaries or that such boundaries did not exist.

375. The *Sudan Intelligence Report* for January 1904 included in Appendix "A" the detailed letter that Slatin wrote to the local ruler of Darfur on the question of boundaries. The relevant part of that letter was set out at length at pages 112-113 of the GoS Memorial. The letter explains in considerable detail the "description of the line of the boundary." In fact, Slatin says in the letter that he is describing the boundary for a second time and that it "will remain as it was in old days." The relevant portion is where Slatin writes the following:

"From Sharafa the line would extend to Hillet Abu Shetala, which is the last village on the border between the Hamar and Ma'alia, and *thence it will continue between Dar El Homr and Rizeigat, whilst Dar El Jange, which belongs to Kordofan, will fall on the left; then the line continues to Bahr El Rizeigat, known as Bahr El Arab*, and from there it will stretch west to Mulam El Habbania, north of Dango, and this forms the boundary between Darfur and Bahr El Ghazal."<sup>514</sup>

376. Thus, Slatin made it clear that the boundary between Darfur and Bahr el Ghazal in its eastern section was the Bahr el Arab. There is no evidence that the Bahr el Arab in this area was ever confused with the Ragaba ez Zarga. The latter was never referred to

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<sup>512</sup> Ibid.

<sup>513</sup> *Reports on the Finances, Administration and Condition of the Sudan*, pp. v-vi (emphasis added), SPLM/A Exhibit FE 1/26.

<sup>514</sup> *Sudan Intelligence Reports*, No.114 (January 1904), p. 5 (emphasis added) (SM Annex 6).



in connection with the Darfur-Bahr el Ghazal boundary and did not extend into the boundary area in any event.

377. Slatin's description of the Darfur boundary (in so far as it concerned Kordofan) was also picked up in the 1904 *Annual Report* for Kordofan where it is stated:

"The Darfur Frontier has however been defined. It runs from Foga south westwards between Dam Gamad and Um Shanga, west of Zalata district to Hafir Ogr which is shared by inhabitants of both Kordofan and Darfur; Thence it runs southwards, west of Dar Homr to *the Bahr-El-Arab which is the northern boundary of the Bahr-El-Ghazal Province.*"<sup>515</sup>

378. Thus, we have a reference in 1903 stating that the Bahr el Arab was the Darfur-Bahr el Ghazal boundary. That could only have been the actual Bahr el Arab. And we have a 1904 reference relating to Kordofan's boundaries, which not only reflects Kordofan's boundary with Darfur described by Slatin, but also Kordofan's boundary with Bahr el Ghazal, which is also the Bahr el Arab. There is no doubt that Government officials were referring to the same river.

379. The 1903 revision to the Mardon map depicts both the Kordofan - Bahr el Ghazal boundary and the eastern half of the Darfur-Bahr el Ghazal boundary as following the Bahr el Arab river. This is clearly shown on both the full-scale and enlarged reproductions of the map included as Map 5 in the GoS Memorial Map Atlas. At the time, there was clearly a tripoint where these boundaries met. It was on the Bahr el Arab.

380. The MENAS Report takes aim at the Mardon map in a number of ways. It first claims that the provenance of the map is unknown.<sup>516</sup> But the provenance is noted on the map as having been drawn by H.W. Mardon. MENAS then asserts that there is a "hand drawn dotted boundary along the course of the 'Bahr el Arab'." But the boundary line is printed (in red) on the map just as other lines and features are.

381. MENAS contends that Mardon's maps were not primary or official maps "and therefore cannot be held to express the position or decisions of the Sudan Government (or any other Government)."<sup>517</sup>

382. But the map was included in Volume II to what MENAS calls Gleichen's 1905 *The Anglo-Egyptian Sudan*. It would have been more accurate for MENAS to refer to the full

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<sup>515</sup> *Reports on the Finances, Administration, and Condition of the Sudan, Annual Report (1904) Annual Report for Kordofan Province*, p. 101 (emphasis added) (SM Annex 23).

<sup>516</sup> SPLM/A Counter-Memorial, MENAS Report, para. 15.

<sup>517</sup> *Ibid.*, para. 60.

title of the work which is: "The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government."<sup>518</sup>

383. The Compendium was edited by Lieutenant-Colonel Count Gleichen, described as "the late Director of Intelligence, Sudan Government and Egyptian Army, and Sudan Agent, Cairo." The Contributors included Sir William Garstin, Captain Lyons (Director of Egyptian Government Surveys), and Captain H.H.S. Morant (Assistant Director of Intelligence).<sup>519</sup> It was also printed for His Majesty's Stationery Office. These references impart an "official" character to the map.

384. The *Compendium* also features a preface by Major-General Sir Reginald Wingate, the Governor-General of the Sudan. Furthermore, Appendix H, on page 339 is entitled "Bibliography and Cartography of the Sudan". It separates this bibliography into official publications and unofficial publications. Clearly, the editor and contributors thought that the 1905 book was "official" and hence had the authority to decide what else was "official" and what was not. Maps of the War Office library are also listed on page 349. Finally, Volume II consists of 140 trek reports from different officers of the Condominium. Some of these Reports are already in evidence as they appeared in the *Sudan Intelligence Reports* first. It is notable then that the 1905 Handbook had amassed over 140 reports within the first seven years of Condominium Rule. The final page of Volume II features the fold-out Mardon map which is the only map in Volume II.

385. Mardon's map was never disowned or stated to be inaccurate in any way by Sudanese officers.

386. The MENAS Report places stress on the fact that it was not until well after 1914 that the Kiir/Bahr el Arab was fully surveyed.<sup>520</sup> However, general principles of law do not require a river to be fully surveyed in order for it to constitute a boundary. This applies equally to internal administrative boundaries as well as to international boundaries. To recall the conclusion of the Chamber of the Court in its Judgment in the *El Salvador/Honduras* case on this point:

"The Chamber considers that, particularly in the light of the materials before it, it is entitled to start from a presumption that an inter-provincial boundary

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<sup>518</sup> SPLM/A Exhibit FE 2/14.

<sup>519</sup> Gleichen, A., *Handbook of the Sudan: A Compendium Prepared by Officers of the Sudan Government*, (2 Vols., HMSO, London 1905), Vol. I, frontispiece (SM Annex 38).

<sup>520</sup> SPLM/ Counter-Memorial, MENAS Report, para. 15.

which follows a river is likely to continue to follow it so long as its course runs in the same general direction."<sup>521</sup>

387. Lastly, we come full circle to Wingate's 1905 Memorandum. That Memorandum was included in the same collection of *Annual Reports* for Kordofan and Bahr el Ghazal which recorded the change in the way in which the provincial boundary was described. The 1905 *Annual Reports* no longer stated that the southern boundary of Kordofan and the northern boundary of Bahr el Ghazal was the Bahr el Arab. Instead, they referred to the transfer. Thus, when Wingate said that the 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, the clear inference is that the pre-transfer provincial boundary had been the Bahr el Arab - the river described earlier in Wingate's Memorandum where Bayldon and Walsh were carrying out their operations.

## (ii) The Boundary after the Transfer

388. Turning to post-1905 transfer period, the MENAS Report contends that the confusion over the identity of the Bahr el Arab continued. The only source cited for this argument is Lloyd, who, MENAS notes, in 1907 "records that the 'southern boundary of [Dar Homr] is between the Bahr el Arab and the river Kir, the latter being occupied by Dinkas under Sultan Rob." MENAS uses this reference to indicate that Lloyd considered the Bahr el Arab and the Kir to be different rivers.<sup>522</sup>

389. There are several points to make in response, all of which flow from the fact that MENAS did not provide a full account of the relevant correspondence.

390. First, in making the statement mentioned above, Lloyd was not referring in any way to provincial boundaries. The section of his account cited relates to "Some Notes on Dar Homr" and does not refer to provincial boundaries at all. The southern boundary of the Dar Homr is said by Lloyd to be between the Bahr el Arab and the Kir.<sup>523</sup>

391. Second, MENAS fails to mention that Lloyd's description of apparently two different rivers - the Bahr el Arab and the Kir - was immediately corrected by Percival on 2 July 1907. There, Percival referred to Lloyds notes, which had just reached him from Egypt, and said the following:

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<sup>521</sup> *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua Intervening)*, Judgment, *J.C.J. Reports* 1992, p. 504, para. 244.

<sup>522</sup> SPLM/A Counter-Memorial, MENAS Report, para. 49.

<sup>523</sup> Lloyd, W., *Some Notes on Dar Homr* (1907) 29 *The Geographical Journal* 649, p. 649 (SM Annex 54).

Note. - The Bahr el Arab is the river Kir, and takes this name 'Kir' when it enters Dinka country either before or after joining with the rivers that join the river Lol below Sultan Rob."<sup>524</sup>

392. Third, Lloyd thereafter corrected his mistake. In his "Notes on Kordofan Province" published in 1910, Lloyd clearly places the correct Bahr el Arab thirty miles south of, and nearly parallel with, the Bahr el Homr (Ragaba ez Zarga). Moreover, Lloyd describes the Bahr el Arab in this account as "the large river which rises beyond Hofrat el Nahas and flows eastward to the Bahr el Ghazal", and that "Lieut. Huntley-Walsh, R.N., who has explored much of its course, believes it would be possible to clear it."<sup>525</sup>

393. The MENAS Report also tries to gain traction by indicating that the Kordofan/Bahr el Ghazal provincial boundary was not delimited for many years after 1905. To this end, MENAS cites the 1911 *Handbook on the Sudan* which states that Bahr el Ghazal's "actual boundary line is not yet delimited". From this, MENAS asserts that, "the position post-1905 serves to reinforce the indeterminate nature of any 1905 boundary."<sup>526</sup>

394. In advancing this argument, MENAS tilts at windmills. The Government of Sudan does not maintain that the *southern* limits of the transferred area were delimited with precision in 1905 or that, consequently, the new Kordofan-Bahr el Ghazal boundary was fixed at that time. This is because the southern limits of the districts of Sultans Rob and Okwai were not precisely known because they did not necessarily follow a river.

395. In contrast, the *northern* limit of the transferred area had been defined. Wingate's Memorandum made clear that this was the Bahr el Arab, since it was the tribal districts to the south of that river that were transferred.

396. It is because the southern limits of the transferred area had not been firmly established, and because the Twic were subsequently re-transferred to Kordofan in the late 1920s, that post-1905 maps - notably the Sheet 65-K and Sheet 65-L series of maps - vary to some degree in the way they depict the new Kordofan-Bahr el Ghazal boundary. As has been noted, it was much easier to delimit a boundary along a river. Nonetheless, the maps in question were uniform in showing that the post-transfer provincial boundary lay well to the south of the Bahr el Arab in the area of concern. This was discussed in the

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<sup>524</sup> Lloyd, W., (Percival, C.) *Correspondence : The Dar Homr* (1907) 30 *The Geographical Journal* 219, p. 219 (SM Annex 55).

<sup>525</sup> Lloyd, W., *Notes on the Kordofan Province* (1910) 35 *The Geographical Journal* 249 (SM Annex 55).

<sup>526</sup> SPLM/A Counter-Memorial, MENAS Report, para. 66.

GoS Counter-Memorial,<sup>527</sup> and illustrated on Figure 14 (page 146) of the GoS Memorial as well as on Map 60 to the SPLM/A Counter-Memorial Atlas.

397. It follows that when MENAS asserts that, "the fact that depiction on maps was changed so often confirms that there was no common understanding as to the consequences of the transfer,"<sup>528</sup> it only presents half of the equation. That may have been true for the southern limits of the transferred area, but it was not true for the northern limits. As far as the southern limits are concerned, there is no dispute between the Parties on this point since they agree that such limits are those of the 1956 boundary - a line which lies in the same general area as the other post-1905 maps.

## **F. Conclusions**

398. Given the fact that the transfer took place over 100 years ago, it is remarkable that there is such a well-documented, contemporary record relating to it. Numerous official sources identify what Sudanese Government officers stated was the provincial boundary between Kordofan and Bahr el Ghazal both before and just after the transfer. Many of these sources record the fact of the transfer and the area that was transferred. And a large number of maps show how the revised provincial boundary was depicted after the transfer.

399. Contrary to the SPLM/A's attempt to sow the seeds of confusion in the contemporary record, when the record is examined as a whole, the pieces of the puzzle fit together with remarkable clarity.

- As a matter of general repute, the Bahr el Arab was consistently referred to as the historic border, or dividing line, between the Arab tribes of the north and the Dinka and other non-Arab tribes to the south. There is no basis for believing that these sources were referring to any other river than the correct Bahr el Arab.
  
- The *Annual Reports* for the Provinces of Kordofan and Bahr el Ghazal, as well as other contemporary sources, referred to the Bahr el Arab as the boundary between the two provinces before the transfer.

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<sup>527</sup> GoS Counter-Memorial, paras. 484-505.

<sup>528</sup> SPLM/A Counter-Memorial, MENAS Report, para. 62.

- The Bahr el Arab was also the boundary between Darfur and Bahr el Ghazal, at least up until 1924.
- Once the transfer occurred, these *Reports* reflected a change to the provincial boundary to take into account the area that had been transferred in 1905 from Bahr el Ghazal to Kordofan.
- By that time, the real Bahr el Arab had been identified by Government officials who had sent expeditions specifically to explore it and clear it of sudd.
- The 1905 transfer documents clearly identified where the transferred area was situated - to the south of the Bahr el Arab.
- This reflected the fact that the districts of Sultans Rob and Okwai were considered to lie on or to the south of the Bahr el Arab and that the former provincial boundary, which had been along the Bahr el Arab, was then changed.
- Post-transfer maps of the region show the new Kordofan-Bahr el Ghazal boundary as lying to the south of the Bahr el Arab, thus reflecting the transfer.
- This boundary ultimately became the provincial boundary upon independence in 1956.
- Consequently, in perfect harmony with the entire record, the transferred area can be seen to be the area between the Bahr el Arab and the 1956 boundary.

## Chapter 5

### Where the Ngok Were in 1905

#### A. *The Claims of the Parties on Ngok Location*

400. In its Counter-Memorial the SPLM/A repeatedly states that the GoS Memorial claimed that the Ngok Dinka were located "entirely" or "only" to the south of the Bahr el Arab.<sup>529</sup> This is not so. The GoS never claimed that the Ngok lived "entirely" or "only" to the south of the Bahr el Arab.

401. For its repeated claim, the SPLM/A relies on paras. 279(b) and 332 of the GoS Memorial, which state as follows:

"In this Chapter it will be shown that:

(b) The territories of the Ngok Dinka under Sultan Arob and Sultan Rihan Gorkwei (which territories were to the south of the Bahr al Arab at this time) were transferred administratively to Kordofan in 1905."

"Prior to 1905, the Western Dinkas (including the Ngok Dinka) were located to the south of the Bahr el Arab. Before setting out the evidence for this proposition, something should be said about the Dinka as a group."

It should be noted that neither the words "entirely" nor "only" appear. Nor do these passages imply, as repeatedly asserted by the SPLM/A, that the GoS claim that all Ngok Dinka lived entirely south of the Bahr el Arab. This is not only clear from the context, but is clarified in the concluding paragraph of the relevant section:

"Thus there was no particular uncertainty as to where the Dinkas lived in this period. Travellers had regularly visited and reported on the area since the 1870s. Most importantly, all the descriptions refer to the Baggara Arabs living on the Bahr el Arab, and state that they were the northern neighbours of the Dinkas. There is no suggestion, either in the literature or the cartography of the period that the Dinkas lived well to the *north* of the Bahr el Arab; in particular there is no suggestion that they lived to the north of 10°N."<sup>530</sup>

402. The position of the GoS is restated in its Counter-Memorial:

"To conclude, there is no contemporary evidence, in the period from 1898 until the transfer of 1905, that the people of the nine Ngok Dinka chiefdoms,

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<sup>529</sup> See for example SPLM/A Counter-Memorial, paras. 61, 63 (heading), 872, 875, 876, 885, 891, 962, 982, 1011, 1031, 1047, 1049, 1122, 1127, 1191, 1195, 1200 and 1544.

<sup>530</sup> GoS Memorial, para. 354 (emphasis original).

Sultan Rob's people, inhabited and used the Ragaba ez Zarga, still less the areas to the north up to 10°35'N. Rather they were located on and around the Bahr el Arab/Kir, predominantly to the south – which is where Percival's sketch of December 1904 ... has them. And when ... they left their houses to look after their cattle, they went further south, not north. The northern-most village where the officials whose reports are analysed in this section met Ngok Dinka in person was at Etai, 9°29'N 28°44'E, about 5 kilometres north of the Bahr el Arab. The northern-most Ngok village mentioned is Bongo, a few kilometres further north at 9°32'N 28°49'E. Abyei is nowhere mentioned."<sup>531</sup>

The GoS reiterates its position, that the only area transferred *to* Kordofan in 1905, as noted by Governor-General Wingate himself, was the area "south of the Bahr el Arab".<sup>532</sup> At that time, the Ngok were living on and to the south of the Bahr el Arab.

403. This position may be contrasted with that of the SPLM/A, which asserts that there were Ngok permanent settlements in 1905 on and to the north of the Ragaba ez Zarga, up to Tebeldiya at 10°35'N. There is no contemporary<sup>533</sup> document in the record which supports either claim.

404. In the end this is a question of fact, to be determined by reference to the evidence before the Tribunal. In assessing that evidence, the Tribunal should prefer:

- contemporary evidence over evidence of a much earlier or later time;
- documentary evidence over oral hearsay evidence (or expert reports or "mapping exercises" essentially dependent on oral hearsay evidence);
- specific indications of Ngok presence or absence, as compared with generic indications such as the phrase "Dar Jangeh" spread across the map;<sup>534</sup>
- impartial evidence over evidence given by representatives of interested groups; hence Anglo-Egyptian records are of particular value, whereas post-dispute witness statements prepared for the case are of limited or no value.

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<sup>531</sup> GoS Counter-Memorial, para. 281.

<sup>532</sup> Cited in the GoS Memorial, para. 360; GoS Counter-Memorial, para. 26; and see *Annual Report on Finances, Administration, and Condition of the Sudan*, Memorandum by Major General Sir Wingate (1905), p. 24 (SM Annex 24).

<sup>533</sup> Again, "contemporary" is meant in or around 1905, the crucial date for this case.

<sup>534</sup> There were and are other groups of Dinka north of the Bahr el Arab, including the Ruweng. This is why reliance on place names in Dinka is non-specific and of little help.



**B. Contemporary Evidence of Ngok Location Annexed to the SPLM/A Counter-Memorial**

405. The location of the Ngok in and around 1905 was on and around the Kir/Bahr el Arab, from which they went south in the dry season. There is no contemporary document or map annexed to the SPLM/A Counter-Memorial which contradicts this picture.

**(i) Contemporary Official Reports**

406. Contrary to what is suggested by the SPLM/A, there was never any suggestion that the Ngok lived anywhere else than "on" the Bahr el Arab. In particular, there are no contemporary documents that report the Ngok significantly north of that river, in villages located up to 10°35'N latitude.

407. Already in 1884, the Dinkas were noted as living south of the Bahr el Arab. The Report on the Egyptian Province of the Sudan records the following on the mudiria (province) of Bahr el Ghazal:

"That portion of the province to the north-east inhabited by the Denka tribe, and included in the angle between the Bahr el-Arab and Rohl rivers, is vast alluvial flat, rising but slightly above the Bahr el-Ghazal river of which it is the basin."<sup>535</sup>

It continues:

"The Denka country in the Bahr el-Ghazal includes nearly the whole of the low ground extending from the Dyur and Bongo [between 6° and 8° N. latitude, p. 94] countries as far as Bahr el-Ghazal and Bahr el-Arab. It is a vast plain of dark alluvial clay, unbroken by a single hill or mass of rock, and the tracts of forest are limited in extent."<sup>536</sup>

408. This 1884 description is echoed in the first Handbook of the Sudan (1898), which on the topography of Bahr el Ghazal states:

"That portion of the province to the north-east inhabited by the Dinka tribe, and included in the angle between the Bahr el Arab and Rohl Rivers, is a vast alluvial flat, rising but slightly above the Bahr el Ghazal River, of which it is the basin. The soil of this region is an unfathomable clay, in places covered by wastes of sand about 10 feet thick."<sup>537</sup>

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<sup>535</sup> Report on the Egyptian Province of the Sudan, Red Sea, and Equator (W. Clowes & Sons, London, 1884), p. 92, SPLM/A Exhibit FE 17/5.

<sup>536</sup> Ibid., p. 98.

<sup>537</sup> Gleichen, A., *Handbook of the Sudan* (HMSO, London, 1898), p. 112 (SM Annex 37).

409. The Handbook adds:

"The Dinka (or Jangeh) country in the Bahr el Ghazal Country, includes nearly the whole of the low ground extending from the Jur and Bongo countries as far as the Bahr el Ghazal and Bahr el Arab. It is a vast plain of dark alluvial clay, unbroken by a single hill or mass of rock, and the tracts of forest are limited in extent. This district has already been described under the general topography of the Bahr el Ghazal province..."<sup>538</sup>

410. Similarly, Lupton Bey, who stated that the Bahr el Ghazal was "bounded on the north by the Bahr-el-Arab", stated that:

"The principal tribes inhabiting this immense region, are the Bongo, Denka (or Dinka), Golo, Sehre, and Jur..."<sup>539</sup>

411. The first travel description mentioning Sultan Rob's village is Mahon Pasha, who reports that Sultan Rob's village is situated on the "Bahr El Homr, about two days from Lake Ambady".<sup>540</sup> There is disagreement between the parties as to which river Mahon was being referred to – at the time the label Bahr el Homr could be applied to each of the Ragaba ez Zarga, the Bahr el Arab and the Lol. The position can be seen from **Figure 2**, opposite. As noted in Alastair Macdonald's Third Report, attached to this Rejoinder:

"Para 26 [of the MENAS Report] contains further unjustified assumptions adopted by the authors to advance the argument they wish to make. They seek to show that Mahon's note that Sultan Rob's country was 2 days' walk from Lake Ambadi was evidence that he (Sultan Rob) lived on the Ragaba ez Zarga. They first assume that the 2 days referred to walking speed of a Dinka and was therefore 70 miles. Then to make the argument that the journey commenced on the Ragaba ez Zarga succeed, they take the shortest distance of 'approximately 20 miles' between the lake and the Bahr el Arab and argue that it is too short for two days' walk and so cannot be Sultan Rob's river. In fact the shortest distance to the Bahr el Arab is 25 miles. But Sultan Rob did not live anywhere near the point on the Bahr el Arab closest to Lake Ambadi – he lived some 60 miles further upstream and about 69 miles from Lake Ambadi, closely fitting the distance the authors have chosen for the journey. It is well documented that Sultan Rob lived on the Kir/Bahr el Arab and this invalid argument does nothing to change this."

No contemporary document in the record has Sultan Rob anywhere but on the Bahr el Arab/Kir, and Mahon's report is entirely consistent with this.

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<sup>538</sup> Ibid., 119.

<sup>539</sup> "Mr. Frank Lupton's (Lupton Bey) Geographical Observations in the Bahr-el-Ghazal Region: With Introductory Remarks by Malcolm Lupton. See the Royal Geographical Society 10 March 1884, (1884) 6 *Proceedings of the Royal Geographical Society* 245, p. 245 (emphasis added) (SM Annex 57).

<sup>540</sup> Sudan Intelligence Reports, No. 92 (March 1901), Appendix F, p. 19 (SM Annex 4).

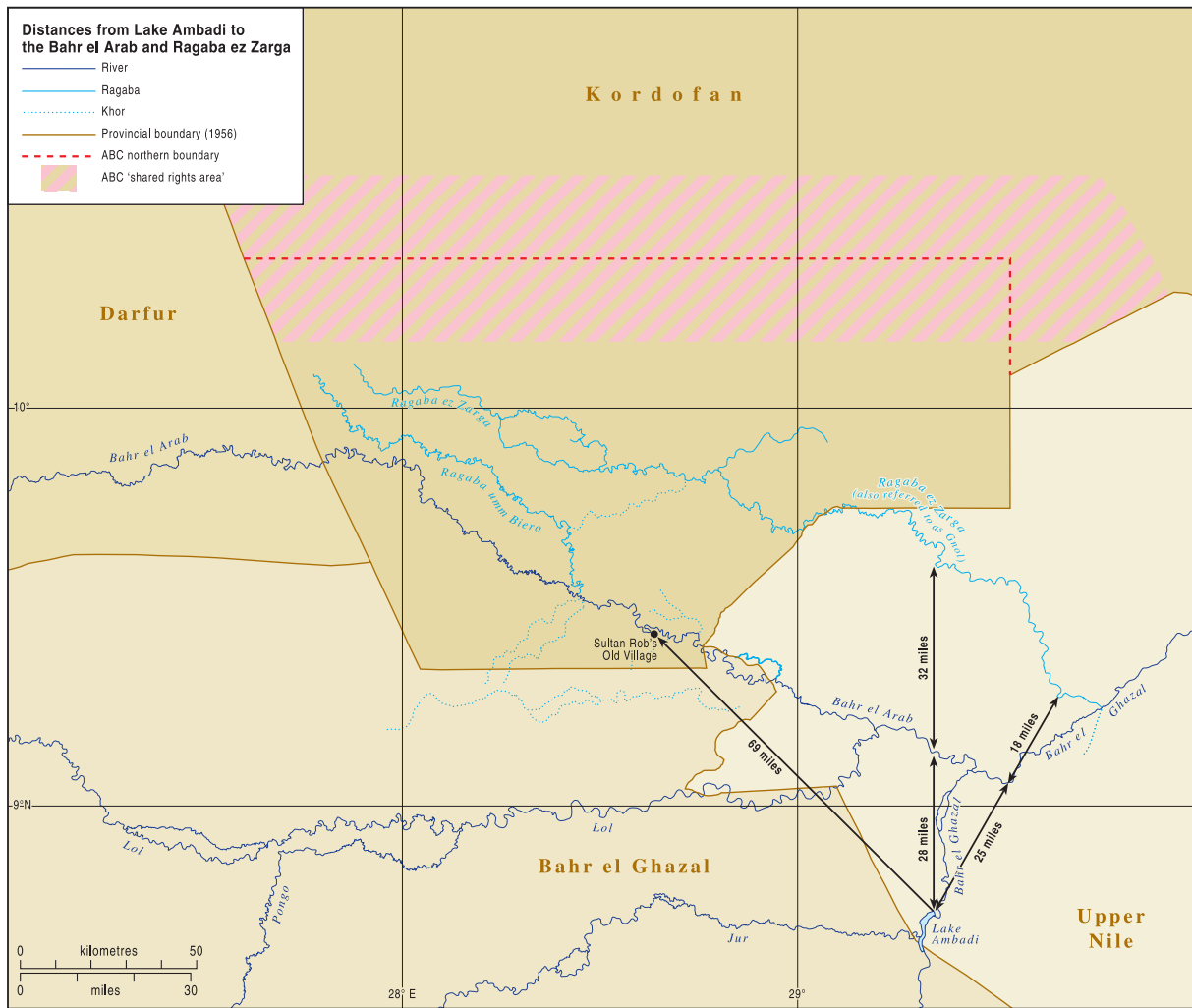


Figure 2. Distances from Lake Ambadi

412. Later, in 1902 Major E.B. Wilkinson, reported to have found Sultan Rob's village 45 km south of what he believed was the Bahr el Arab.<sup>541</sup> Since it is undisputed that Wilkinson mistook the northern watercourse, the Ragaba ez Zarga, for the Bahr el Arab, Wilkinson's travel itinerary unmistakably put Sultan Rob on the real Bahr el Arab (see SCM Map Atlas, Map 13a).

413. Contrary to what is asserted by the SPLM/A,<sup>542</sup> Wilkinson did not report any Ngok villages north of the Ragaba ez Zarga. On the contrary, Wilkinson specifically noted that the "first" Ngok village, Bombo (Bongo), appeared 24 km after he had crossed the first watercourse, i.e. the Ragaba ez Zarga.

414. In 1903 Mahon Pasha visited Sultan Rob's village again, on his way he met with Arab sheikhs at Fauwel, south of the Ragaba ez Zarga.<sup>543</sup> According to the SPLM/A, Mahon's report confirms that the Ngok Dinka lived in the area between the Ragaba ez Zarga and the Bahr el Arab during the dry season of 1903.<sup>544</sup> It is not disputed that some Ngok lived just north of the Bahr el Arab, but there is nothing in Mahon's report to indicate that the Ngok lived far north of this river. In addition, both the SPML/A Counter-Memorial and the MENAS Report omit to mention that Mahon reports to have met people with horses at Turdo (10°23'N, 28°36'E), well below latitude 10°35'N. As noted in the Counter-Memorial, the presence of horses indicates that Mahon met Arabs, not Ngok.<sup>545</sup>

415. In 1904 Bimbashi Percival, still under the influence of Wilkinson's mistake, reported that the Ngok lived on the Kir, 50 miles south of the "Bahr el Arab":

"On the 22nd December Bimbashi Percival, D.S.O., arrived at Wau with the Mounted Infantry Company, having come from Kordofan, via Keilak, Bahr-el-Arab and Sultan Rob's country on the Kir River, which he crossed 50 miles south of the Bahr-el-Arab."<sup>546</sup>

Thus Sultan Rob's village is once again confirmed on the second watercourse from the north, the Kir or the Bahr el Arab. Percival also reported that he found "no trace of

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<sup>541</sup> See First Macdonald Report, para. 3.8.

<sup>542</sup> SPLM/A Counter-Memorial, paras. 967 and 970.

<sup>543</sup> Sudan Intelligence Reports, No. 104 (March 1903), p.19 (SM Annex 5).

<sup>544</sup> SPLM/A Counter-Memorial, para. 982.

<sup>545</sup> Beswick, S., *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* (University of Rochester Press, Rochester, 2006), pp. 155-156. (SCM Annex 3).

<sup>546</sup> Sudan Intelligence Reports, No. 126 (January 1905), pp. 3 (SCM Annex 25); a verbatim account can also be found at "Letter from Boulnois to Wingate" (23 December 1904), *Sudan Correspondence*, Box 275/9/39, p 1, SPLM/A Exhibit MD-48. In addition, the journey is recorded in the *Reports on Finances, Administration, and Condition of the Sudan* in 1904, at p. 8 (SM Annex 23), and a fuller account appears in Percival, A., *Route Report: Keilak to Wau*, December 1904 (SCM Annex 26).

inhabitants" along the Ragaba ez Zarga.<sup>547</sup> This clearly contradicts the SPLM/A assertion that the Ngok had permanent villages in this area.

416. Trying to explain the absence of Ngok, the SPLM/A suggests that Percival frightened them away.<sup>548</sup> But even if the Ngok were hiding, this does not explain the absence of their houses or cattle. The SPLM/A also suggests that:

"Percival likely meant that he could not find signs of habitations in the immediate area on and around the southern bank of the Ngol/Ragaba ez Zarga, and not that the areas set further back from the river were uninhabited."<sup>549</sup>

This is unconvincing. Percival mentioned everything notable he found on his way, including cattle tracks and the boldness of lions.<sup>550</sup> If the area had been inhabited, such fact would surely have been reported as well.

417. The SPLM/A also claims that because Percival observed grass fire and found cattle tracks either on or close to the Ngol/Ragaba ez Zarga, then Ngok must have been living in this area.<sup>551</sup> Again this is unconvincing. There is no indication whether the tracks were made by Ngok or Humr cattle. Nor was burning grass exclusively a "characteristic of Ngok Dinka agricultural practices".<sup>552</sup> In his note on Dar Homr, for example, Lloyd observed of the Homr that:

"As soon as the grass is dry enough to burn, the people move south, burning it before them to the ragabas, where there is surface water, and finally, as the ragabas dry up, to the Bahr el Arab, where they remain until the rain breaks."<sup>553</sup>

418. Percival made a second trip, where he once again encountered Ngok south of the Ragaba ez Zarga (see SCM, Map Atlas, Map 14b). On his second trip, Percival recorded Sultan Rob's new village at Burakol, two miles north of the Bahr el Arab.<sup>554</sup> As noted in the Counter-Memorial, no Dinkas were reported living near the Ragaba ez Zarga.<sup>555</sup> The SPLM/A Reply Map Atlas, Map 71 shows Burakol on the left bank of the Umbieiro, i.e. in

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<sup>547</sup> Percival, A., *Route Report: Keilak to Wau*, December 1904 (SCM Annex 26).

<sup>548</sup> SPLM/A Counter-Memorial, para. 991.

<sup>549</sup> Ibid., para. 992.

<sup>550</sup> Percival, A., *Route Report: Keilak to Wau*, December 1904, pp. 25-26 (SCM Annex 26).

<sup>551</sup> SPLM/A Counter-Memorial, para. 993.

<sup>552</sup> Ibid.

<sup>553</sup> Lloyd, W., "Some Notes on Dar Homr", (1907) 29 *The Geographical Journal* p. 651, SPLM/A FE 3/4.

<sup>554</sup> See Percival, A., *Route Report: Keilak to Wau*, December 1904 (SCM Annex 26).

<sup>555</sup> GoS Counter-Memorial, para. 276.

the position of modern-day Abyei. This is inconsistent with all contemporary reports and maps, which locate Burakol between the Umbieiro and the Bahr el Arab.<sup>556</sup>

419. Lieutenant Bayldon, who clarified the confusion over the nomenclature of the Bahr el Arab,<sup>557</sup> put Sultan Rob's village squarely on the Bahr el Arab. At the same time he had useful information about the Ragaba ez Zarga, which he called the Bahr el Homr. In his report, which appeared in the same Intelligence Report that recorded the 1905 transfer, stated as follows:

"That the river usually spoken of as the Bahr el Arab (I do not refer to the mouth at its junction to with the Bahr el Ghazal, but up country) is really the Bahr el Homr. Running through practically uninhabited country, but to which in dry weather the Homr Arabs used to come down with their cattle. I say 'used to bring their cattle', as now they say that it is safe for them to go into the Dinka country they go there, for better grazing and water."<sup>558</sup>

The Dinka country – including that of the Ruweng and the Anyanga – was south of the Ragaba ez Zarga/Bahr el Homr, which was "practically uninhabited". No one ever described the Kir/Bahr el Arab as uninhabited, except in the area west of Burakol. But, as seen above, Percival did describe the Ragaba ez Zarga as uninhabited. Finally, while Bayldon states that there was evidence of "many Arabs and Dinkas who have crossed it", referring to the Ragaba ez Zarga, there is no indication that these "Dinka"<sup>559</sup> were Ngok. In fact, there is little reason to assume that the Ngok would have travelled for trade to El Obeid, as suggested by the SPLM/A.<sup>560</sup>

420. The 1905 Gleichen Handbook of the Sudan notes in relation to the Baggara:

"The nomad tribes are far superior to the villagers, both physically and mentally. The various BAGGARA tribes live chiefly in Southern Kordofan, and only move during the rains. They occupy plains between the El Obeid and the Bahr el Arab, and, being constantly in touch with the NUBAS in the hills..."<sup>561</sup>

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<sup>556</sup> See e.g., SM Map Atlas, Maps 14, 26 and 28; SCM Map Atlas, Map 18a.

<sup>557</sup> SPLM/A Memorial, para. 339.

<sup>558</sup> Sudan Intelligence Reports, No. 128 (March 1905) Appendix C, p. 10 (SM Annex 9).

<sup>559</sup> In this regard reference may also be made to para. 1030 of the SPLM/A Counter-Memorial: "The Government's quotation is misleading. It refers to 'the Dinkas' generically, without specifying which of the numerous tribes comprising the Dinka who inhabited Bahr el Ghazal it means (including, for example, the Rueng, Rek and Twic)"

<sup>560</sup> Ibid., para. 1027. With regard to the Ngok, Howell notes that: "Apart from a necessary reliance on Arab resources in time of famine, economic exchange is not great because of the Dinka's limited desire to trade". Howell, P.P., "Notes on the Ngork Dinka of Western Kordofan", (1950) 32 *Sudan Notes and Records* 239, p. 247 (SM Annex 36).

<sup>561</sup> Gleichen, A., *Handbook of the Sudan: A Compendium Prepared by Officers of the Sudan Government* (2 vols., HMSO, London, 1905), p. 179 (SM Annex 38).

421. In 1906 Bimbashi Huntley-Walsh wrote:

"I have ascertained the following facts about the Bahr el Arab...

Above Sheikh Rob the river is of a totally different character. I went four days beyond Sheikh Rob, and it is the same the whole way. The river is from 12 to 30 yards broad with a least depth of 5 feet in the centre, and about 2 feet on the sides, with very high banks and a current I estimate at from a knot to a knot and a half. There is not sudd at all, but big trees grow very close to and the branches hang over the river, and small trees are growing in the river. The river is very winding with sharp turns. It was evidently running down very fast, and I should say was below the average level, and 2 or 3 feet below its height when the river is up. In my opinion, it could, with a little trouble, be made navigable in this part. A considerable part, in fact most of the current, losses itself in the many khors round Sheikh Rob. I only saw two other khors of any size above Sheik Rob, one being nearly as big as a river, but only about 3 feet deep and with no current. Below Rob the Khors are large and numerous, but without exception sudded up."<sup>562</sup>

Again he is speaking of the Kir/Bahr el Arab.

422. In 1907, Huntley-Walsh again reported on Sultan Rob on the Bahr el Arab. The following is recorded of his travels:

"Above Sheikh Rob the features of the [Bahr el Arab] river altered considerably. Its breadth became 12 to 30 yards, never less than 5 feet deep, and with high banks on either side..."<sup>563</sup>

423. In the same year Comyn published his article in the *Geographical Journal*, which was probably written the previous year. The SPLM/A states that "no decisive inference can be drawn" from Comyn's description, and that it is "entirely consistent with the Ngok Dinka occupying both the southern and the northern regions around the river".<sup>564</sup> Contrary to this assertion,<sup>565</sup> Comyn's hand-drawn sketch map<sup>565</sup> clearly placed the Dinka south of the river Kir, i.e. the Bahr el Arab. In addition, the words "Homr Arabs" appear just north of the river.

424. That fact that Comyn depicts the Homr just north of the Bahr el Arab contradicts the SPLM/A assertion of permanent Ngok villages on and even north of the Ragaba ez Zarga. Other contemporary documents, such as Hallam's Route Report of 1907, also place the Ngok on and around the Bahr el Arab.<sup>566</sup> In addition, Hallam mentions several

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<sup>562</sup> Sudan Intelligence Reports, No. 140 (March 1906) Appendix D, p. 14 (SM Annex 12).

<sup>563</sup> Sudan Intelligence Reports, No. 161 (December 1907) p. 17. (SM Annex 16).

<sup>564</sup> SPLM/A Counter-Memorial, para. 1034.

<sup>565</sup> GoS Counter-Memorial, Figure 6, p. 110.

<sup>566</sup> Ibid., paras. 291-295.

Arab camping grounds along the Umbieiro, south of the Ragaba ez Zarga. Thus contrary to what is asserted in the SPLM/A Memorial, the record confirms Arab settlements only just to the north of the Bahr el Arab in December 1907.<sup>567</sup>

425. Governor Lloyd's report on the province of Kordofan of 1908 likewise places the Baggara, not the Ngok, immediately south of the Ragaba ez Zarga (see SCM Map Atlas, Map 17). The SPLM/A places much emphasis on the last sentence of the second paragraph of Lloyd's 1907 piece, "Some notes on Dar Homr" where he refers to an area:

"between the Bahr el Arab and the river Kir, the latter being occupied by the Dinkas under Sultan Rob."<sup>568</sup>

The SPLM/A cite this mistake as evidence that the confusion surrounding the Bahr el Arab was not short lived;<sup>569</sup> indeed, it is taken as "highlighting the extent and persistence of the confusion."<sup>570</sup> They ignore the fact, as noted in Chapter 4, that the *Geographical Journal* corrected the mistake two months after its publication.<sup>571</sup> Writing on 2 July 1907, Percival stated:

"The copy of the Journal for June, 1907, has just reached me from Egypt; in it I noticed some noted on Dar Homr by Captain W.Loyd (p. 649), and send you the following remarks: -

1. The southern boundary is Bahr el Arab and the River Kir.

Note.- The 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."<sup>572</sup>

426. The SPLM/A further state that:

"Lloyd places the southern boundary of 'Dar Homr' in the dry season between the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab. Lloyd's conclusions (published only a few months before he became Governor of Kordofan) clearly indicate that the Ngok Dinka were present to the north of the Kiir/Bahr el Arab during the dry season."

It is not suggested that the Ngok abandoned the Bahr entirely during the dry season; some stayed behind for whatever reason and co-existed with the Homr, as several accounts note. But Lloyd's paper is unequivocal in this key respect: it is the Kir, not the

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<sup>567</sup> Ibid., Figure 6, para. 291-295.

<sup>568</sup> SPLM/A Memorial, para. 1037.

<sup>569</sup> SPLM/A Counter-Memorial, para. 1041.

<sup>570</sup> Ibid.

<sup>571</sup> This is however mentioned in footnote 1203 of the SPLM/A Counter-Memorial.

<sup>572</sup> Lloyd, W., (Percival, C.) "Correspondence: The Dar Homr" (1907) 30 *The Geographical Journal*, p. 219 (SM Annex 55).



Ragaba ez Zarga, which is "occupied by the Dinkas under Sultan Rob". Faced with this account, the idea of a Ngok-Homr boundary at 10°35'N is unsustainable.

427. Other official reports confirm that Sultan Rob's village was on the Gurf/Kir/Bahr el Arab. One report that provides a more detailed description of the Ngok territory is the 1909 report by Willis, which states:

"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, which are two sizes – one about 15 to 20 yards diameter and 25 feet high for the men, and a very much smaller one, in which the door is a mere hole, for the women...

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..."<sup>573</sup>

428. In 1910, Whittingham marked his sketch "Probable DINKA-HOMR Boundary" a few miles north of "Abyia".<sup>574</sup>

429. When Heinekey in 1918 travelled through what the SPLM/A alleges was Ngok land, Ngok are notable only in their absence, whereas several Homr settlements are reported south of the Ragaba ez Zarga, e.g. at Nugar, Hasoba, Agag El Dabakar.<sup>575</sup>

430. Similarly, 16 years after the transfer, Dupuis's 1921 tour 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 Um Biero.<sup>576</sup>

431. In the same year, the Sudan Intelligence Report confirmed that the Ngok lived far south of the Ragaba ez Zarga:

"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 confidence in the Arabs by extending their permanent

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<sup>573</sup> Sudan Intelligence Reports, No. 178 (May 1909), Appendix C, p. 17 (SM Annex 19). See SCM Map Atlas, Map 13a. GoS Counter-Memorial, para. 298.

<sup>574</sup> See SCM Map Atlas, Map 18a. GoS Counter-Memorial, paras. 300-305.

<sup>575</sup> Heinekey, G.A., Route Report: *Muglad to Gerinti*, February 1918 (SCM Annex 35); Heinekey, G.A., Route Report: *Gerinti to Mek Kwal's Village*, March 1918 (SCM Annex 36); Heinekey, G.A., Route Report: *Mek Kwal's Village to Jebel Shat Safia*, March 1918 (SCM Annex 37). See SCM Map Atlas, Map 18a and GoS Counter-Memorial, paras. 309-310.

<sup>576</sup> Dupuis, 1922 Report: *Note on Dinka of Western Kordofan* (SCM Annex 52). See also SCM Map Atlas, Map 39b and GoS Counter-Memorial, para. 311.

villages *farther north of the Gurf*. There were usual trading disputes, but I am glad to see no killing, nor even fights..."<sup>577</sup>

This passage shows three things: (a) the Humr and the Ngok shared the lower reaches of the Um biero; (b) since the transfer to Kordofan, the good relations between the two groups had allowed the Bongo section to move further north of the Bahr el Arab; and (c) there is no suggestion that in 1921 this movement north extended as far as the Ragaba ez Zarga.

432. To summarise, the position of the Ngok Dinka during this period can be seen from **Figure 3**, opposite. This shows the locations of Ngok Dinka villages reported by Condominium officials as such in the period 1902-1933. **Figure 3**, and the underlying reports, show the following:

- (a) All the locations of Ngok and Homr are in the southern portion of the Bahr (i.e. the area between the Bahr el Arab and the Ragaba ez Zarga);
- (b) With the sole exception of Wilkinson's deserted village of Bombo, all the pre-transfer locations are on or to the south of the Bahr el Arab;
- (c) 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);
- (d) But not very far north: Naam and Lukji are both on the Umbieiro. There is no contemporary report of permanent Ngok villages on the Ragaba ez Zarga or north of it; and
- (e) 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.

## (ii) Subsequent Writings

433. The many Condominium officials that consistently reported that the Ngok lived on or near the Bahr el Arab, are confirmed in their observations by later writers.

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<sup>577</sup> Sudan Intelligence Reports, No. 324 (July 1921) p. 5 (SM Annex 20) (emphasis added).

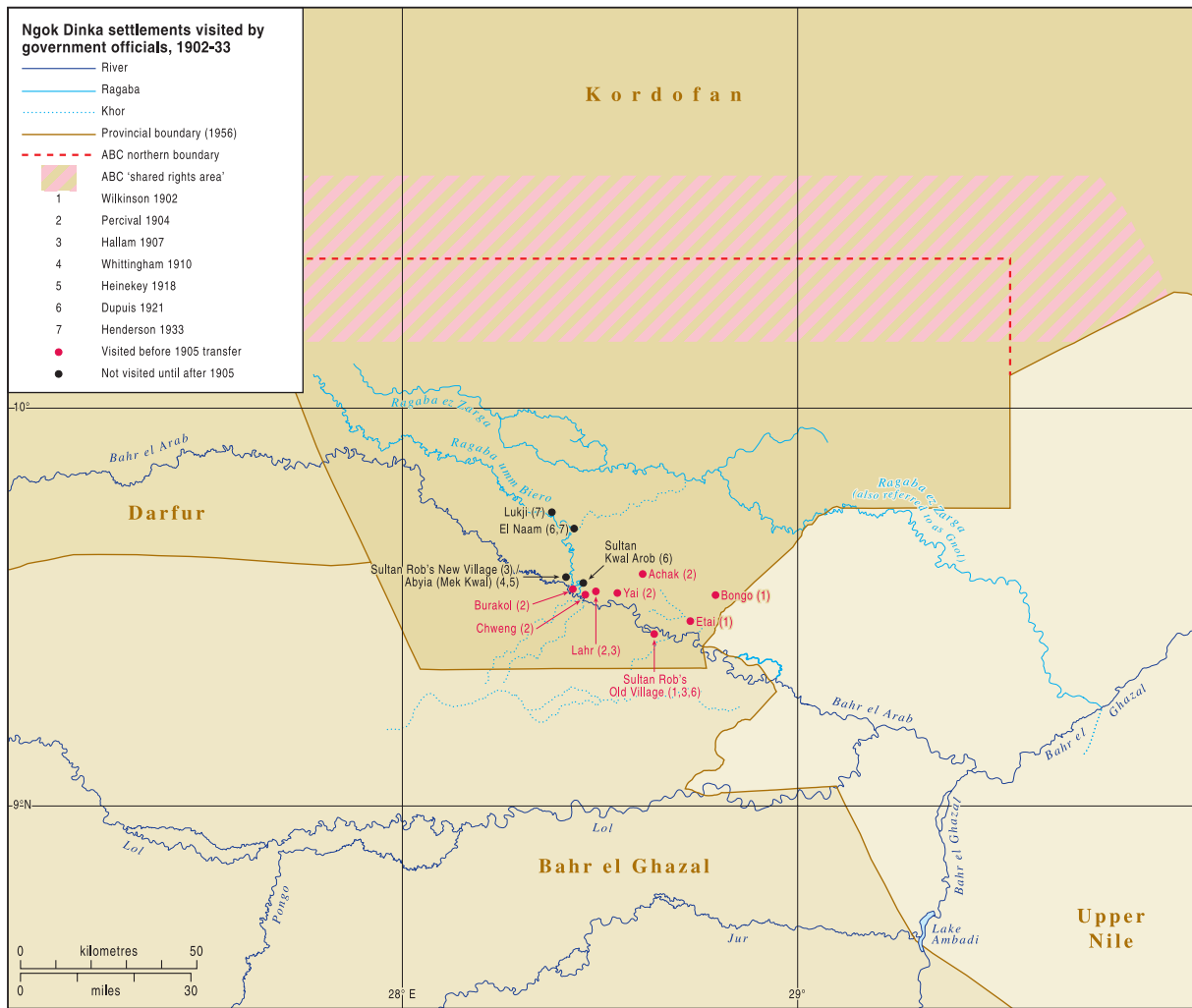


Figure 3. Villages visited by British Officials

434. For example, in 1951 Howell wrote:

"The Ngork Dinka, whose population is estimated between 20,000 and 25,000, 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... To the south-west are the Malwal Dinka. North of the Ngork are the Baggara Arabs of the Messiria Homr..."<sup>578</sup>

More specifically on where the Ngok lived, he wrote:

"The Ngork 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."<sup>579</sup>

He continued:

"Permanent villages, and cultivations are set along the higher ground north of the Bahr el Arab, while dry season grazing-grounds are for the most parts in the open grassland (toich) south of the river."<sup>580</sup>

435. In 1957 Davies wrote that the Ngok lived on the Bahr el Arab, and (contrary to the purported unattractiveness of the southern area)<sup>581</sup> he states that the Ngok withdrew still farther south when leaving the Bahr el Arab:

"these [Dinka] sections played Cox and Box with the Homr Arabs 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 Bahr el Ghazal Province; but when the rains came and the Arabs took their cattle north ... the Dinka ... moved up and occupied the river region."<sup>582</sup>

436. In 1966 Cunnison (cited by Tibbs<sup>583</sup>) notes that the Ngok did not go north of the Bahr el Arab.

"The country, centred on Abyei, of the Ngok Dinka is traditional grazing ground of the Humr in the dry season, and it forms part of the Dar Messeriya administrative district. Ngok Dinka are free to migrate north with the Humr, but only a handful of cattlemen do so in company with the Humr camps."<sup>584</sup>

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<sup>578</sup> Howell, P.P., "Notes on the Ngork Dinka of West Kordofan," 32 *Sudan Notes and Records*, 239 (1951), p. 241 (SM Annex 53).

<sup>579</sup> Ibid., p. 242.

<sup>580</sup> Ibid., p. 243.

<sup>581</sup> MENAS Report, para. 161.

<sup>582</sup> Davies, R., *The Camel's Back* (John Murray Ltd., London, 1957), p. 130 (SM Annex 35).

<sup>583</sup> Letter from M. Tibbs to Zacharia Bol Deng, (4 January 2004), SPLM/A Exhibit FE 11/9.

<sup>584</sup> Cunnison, I., *Baggara Arabs: Power and the Lineage in a Sudanese Nomad Tribe* (Clarendon Press, Oxford, 1966), p. 25 (SM Annex 33).

437. Thus both contemporary records as well as scholarly writings all confirm that the Ngok lived on the Bahr el Arab and not, as suggested by the SPLM/A, on the Ragaba ez Zarga. The latter was Arab country, as MacMichael (an authority as well as an official) confirmed:

"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 Homr'. North of Muglad it consists of a great sandy plain, but to the south it is black cotton-soil covered with thick bush and crossed by sandy belts. In the rains the HUMR 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."<sup>585</sup>

On migration, MacMichael wrote:

"In the dry season of the year the BAKKARA move with all their cattle to the rivers of the south and there hunt the elephant and raid the negros, but when the rains render the southern BAKKARA country a swamp of cotton-soil infested by the fly they move northwards to the clean pastures of the higher ground and cultivate or graze their herds"<sup>586</sup>

He continues:

"The present distribution of the BAKKARA is as follows:... the HUMR between El Odaya and the Bahr el Arab."<sup>587</sup>

438. The travel descriptions of C. Treatt record the Baggara on the Bahr el Arab and the Ngok as travelling to the river from the *south*:

"As the ground hardens, there begins the invasion of man. From their sandy tracts in the north the Baggara Arab ride in on their bulls to water their cattle at the pools and to pasture them on the lush grass; within a few hours *feriks* appear along the [Bahr el Arab] river bank and the people settle down to lead a care free hunting, fishing and gathering the honey that in this district is plentiful. From the south comes the Dinkas to dispute the luscious pasture with the Arabs..."<sup>588</sup>

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<sup>585</sup> MacMichael, H.A., *A History of the Arabs in the Sudan*, (CUP, Cambridge: 1922), p. 287, SPLM/A FE 18/6.

<sup>586</sup> *Ibid.*, p. 272.

<sup>587</sup> *Ibid.*, p. 273.

<sup>588</sup> Treatt, C., *Out of the Beaten Track, A Narrative of Travel in Little Known Africa* (1931), p. 52, SPLM/A FE 3/13. As noted below, Treatt's work is a travel description written as a form of entertainment.

439. Barbour likewise confirms that the Baggara lived and at times crossed the Bahr el Arab:

"these Arabs [the Baggara] are not confined to the sandy country, but also occupy the plains which lie between the Nuba Mountains where clay soils and red sandy loams occur. Moreover, even as the Arabs of the north move beyond the limits of the Qoz during the summer, in winter many of the Baqqara retreat southwards across the clays to watering places along the Bahr el Arab. ... At the start of the rainy season ... the [Baggara] tribes arrive at their home *dars* from their wintering areas, which are situated either along the Bahr el Arab or in the ironstone plateau beyond it."<sup>589</sup>

440. Cunnison, the foremost expert on the Baggara describes their territory as follows:

"The Humr themselves gained a wide expanse of country which stretches from the Bahr al 'Arab in the south to el Odaya in the north, from the Darfur boundary in the west to lakes Kaylak and Abyad in the east. Their neighbours are Zurg, Nuba, Dinka, Rizeygat and Hamar."<sup>590</sup>

In a later publication, Cunnison notes the overlapping use of the Bahr, again emphasising the Dinka being south of the river:

"Finally, much of the Bahr has permanent Dinka settlements, although during most of the time that the Humr occupy it [roughly from early January to late May, cf. p. 22] the Dinka are with their cattle south of the Bahr el Arab..."<sup>591</sup>

441. Robertson also wrote on the Humr and the Ngok:

"...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..."<sup>592</sup>

"[A]bout 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

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<sup>589</sup> Barbour, K.M., *The Republic of the Sudan* (University of London Press, London, 1961), p. 165, SPLM/A FE 18/24. See also **Figure 4**. This map is not currently in the record. However, at Exhibit FE 18/24 of the SPLM/A Memorial the SPLM/A has annexed other pages from the same reference work. In order to place these sources in their proper perspective, the GoS is providing the relevant additional page not included with the SPLM/A's exhibits.

<sup>590</sup> Cunnison, I., "*Humr and their Land*," 35, *Sudan Notes and Records*, 50 (1954), p. 50, SPLM/A FE 4/5.

<sup>591</sup> Cunnison, I., *Baggara Arabs. Power and Lineage in a Sudanese Nomad Tribe* (1966), p. 18 (SM Annex 33).

<sup>592</sup> Robertson, J., *Transition in Africa* (C. Hurst, London, 1974), p. 42 (SM Annex 45).

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..."<sup>593</sup>

"Chief Arob of the Ngok Dinka lived in a buffer area between the Arabs and the great mass of the Dinka to the south..."<sup>594</sup>

442. The SPLM/A dedicates lengthy paragraphs of their Counter-Memorial to affirming that Cunnison had the Ngok living north of the Bahr el Arab.<sup>595</sup> This, however, has never been disputed. The SPLM/A exposition of Cunnison's work are, however, misleading. In his first witness statement, Cunnison stated:

"On the map of 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."<sup>596</sup>

In his second witness statement, Cunnison disputed the SPLM/A assertion that his use of the word "Bahr" might imply that the Ngok lived near the Ragaba ez Zarga. He stated:

"But in the period I worked there – and as far as I am aware at earlier periods too – there was never, as suggested in the SPLM/A Memorial, any collective presence north of the area I refer to as the Bahr, viz. The area centred on the Bahr el Arab and Regaba ez Zarga. Indeed, for much of the season that the Humr were in this region, many Ngok were further south with their herds, leaving other behind to care for their substantial houses".<sup>597</sup>

Cunnison attached a sketch map that depicts the Dar Humr. Both this map and the map from Cunnison's book clearly put the Ngok on or south of the Bahr el Arab, with the Homr occupying the area north of the river.

443. With regard to the map of Dr. Lienhardt, the SPLM/A states that:

"The Government's reliance on Lienhardt and his map is entirely misconceived. No mention is made by Lienhardt in any of his works of the Ngok Dinka."<sup>598</sup>

It should be noted that F.M. Deng (himself a Ngok) refers to Dr. Lienhardt as "the leading authority on the Dinka."<sup>599</sup> While the book from which the relevant map (figure 16, p. 155, in the GoS Memorial) is reproduced mainly considered other Dinka groups, it is not

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<sup>593</sup> Ibid., p. 44.

<sup>594</sup> Ibid., p. 50.

<sup>595</sup> SPLM/A Counter-Memorial, paras. 1110-1137.

<sup>596</sup> Witness Statement of Professor I. Cunnison, 3 December 2008, para. 1 (GoS Memorial, Annex 2)

<sup>597</sup> Witness Statement of Professor I. Cunnison, 3 February 2008, para. 3 (GoS Couter-Memorial, Volume IV, Tab 1).

<sup>598</sup> SPLM/A Counter-Memorial, para. 1267.

<sup>599</sup> Deng, F.M., *The Dinka of the Sudan*, (1984), p. xi, SPLM/A Exhibit FE 5/5.

true that "[n]o mention is made... of the Ngok Dinka." For instance, writing on external influences on the Dinka, Lienhardt writes that "Deng<sup>600</sup> seems to be particularly strong on the Ngok and Rueng..." and he refers to "these parts of Dinka land which have been for the longest in intimate contact with the northern Sudan..."<sup>601</sup> He continues:

"The Arabs themselves are to the Dinka red or yellow-brown men from a land of sand. These are the colours of GARANG; but further, the cattle-Arabs to the north of the Ngok and the Twij Dinka have a particular reputation as great hunters of the giraffe."<sup>602</sup>

Although the quoted passages are not relevant to the present dispute, it appears that Lienhardt had a good knowledge of the Ngok and where they (and the Twij) lived. He also knew the Humr were their northern neighbours. Thus the SPLM/A is wrong when it states that Lienhardt's studies "had nothing to do with the Ngok".<sup>603</sup> In fact the SPLM/A's own Memorial on five separate occasions refers to Lienhardt's work, all with specific reference to the Ngok.<sup>604</sup>

444. With reference to Lienhardt's map, the SPLM/A Counter-Memorial asserts that this:

"is not a serious basis to reach conclusions about where the Ngok Dinka lived in 1905, nor to draw an authoritative map."<sup>605</sup>

But the map is not put forward as in itself authoritative. Instead the point is this: when *no authority* on the area, whether on the Dinka (Lienhardt), the Baggara (Cunnison), the Ngok specifically (Willis, Howell), or the Sudan generally (MacMichael, Barbour, Robertson), 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. The writings on the Humr correspond with and overwhelmingly confirm the Ngok's location in and around the Bahr el Arab.

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<sup>600</sup> The term Deng represents an integration of political and moral experiences of nature in a single image. Lienhardt, G., *Divinity and Experience. The Religion of the Dinka* (Clarendon Press, Oxford, 1961), p. 162. This page is not currently in the record. However, at Exhibit-FE 11/7 of the SPLM/A Memorial the SPLM/A has annexed other pages from the same work. In order to place these sources in their proper perspective, the GoS is providing the relevant additional page not included with the SPLM/A's exhibits.

<sup>601</sup> Ibid., p. 163.

<sup>602</sup> Ibid.

<sup>603</sup> SPLM/A Counter-Memorial, paras. 1268 and 1339, respectively.

<sup>604</sup> SPLM/A Memorial, paras. 164 (fn. 199), 195, (fn. 270), 208 (fn. 302), 214 (fn. 315 and 316) and 936 (fn. 1501).

<sup>605</sup> SPLM/A Counter-Memorial, para. 1270.



### **(iii) The Mapping Evidence**

445. The SPLM/A Counter-Memorial attaches two reports which in different ways address mapping issues: the MENAS Report and the "Community Mapping" Report. The "Community Mapping" Report is discussed in Appendix II of this Rejoinder. The MENAS Report is considered in Chapter 4.

446. Cartographic aspects of the Second Daly Report and of the MENAS Report are also discussed in a further Response by Alastair Macdonald, attached hereto at Appendix I to which the Tribunal is respectfully referred.

447. Overall, the historical maps now displayed in the SPLM/A Counter-Memorial Map Atlas add little to the cartographic picture analysed in the GoS Counter-Memorial.<sup>606</sup> In particular, they offer no new evidence of Ngok presence north of the Bahr area.

### **(iv) Conclusions**

448. To summarise, nothing in the SPLM/A Counter-Memorial offers any new evidence, from the period around 1905 or even later, of Ngok Dinka occupation and use of the areas the SPLM/A now claims.

## ***C. Other Relevant Issues***

449. Aside from the basic question of fact, where were the Ngok in 1905, a number of other issues – some relevant to the issues before the Tribunal, some not – divide the parties.

### **(i) 18<sup>th</sup>-19<sup>th</sup> Century Accounts of the Region and their Utility**

450. The SPLM/A Counter-Memorial states that the early travellers mentioned in the GoS Memorial are "irrelevant":

"pre-Condominium sources cited by the Government contain nothing concerning the locations of the Ngok Dinka and Misseriya, either in 1905 or at any other time".<sup>607</sup>

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<sup>606</sup> See GoS Counter-Memorial, paras. 368-377.

<sup>607</sup> SPLM/A Counter-Memorial, para. 908.

The SPLM/A nonetheless proceeds to include several maps and sketches by such antique travellers as W.G. Browne,<sup>608</sup> Erhard Bonaparte<sup>609</sup> and Dr. Schweinfurth.<sup>610</sup>

451. Professor Daly comments that:

"Not a single traveller has been documented as having passed through the Kordofan-Bahr al-Ghazal borderlands before the 20<sup>th</sup> century."<sup>611</sup>

By contrast the SPLM/A asserts that the British traveller W.G. Browne's 1794 Report was "...based on first-hand observations".<sup>612</sup> There is no evidence that this was so: Browne's map of the Ada is a wild outlier, incorporated in SPLM/A Counter-Memorial Atlas Map 61 for no good reason.<sup>613</sup>

452. For its part, the GoS introduced late 19<sup>th</sup> century travel descriptions and maps to illustrate the growing understanding of the course of the Bahr el Arab; and not, as asserted by the SPLM/A, to state anything about the geographical position of the Ngok Dinka or the Messeriya.<sup>614</sup> Thus Deputy-Governor Lupton Bey was cited for his comment that the Bahr el Arab constituted the northern border of the Bahr el Ghazal Province, which he stated was the:

"tract of country which lies between 6°30" and 9°30" N. lat., and roughly speaking from 25° to 31° E. long. It is bounded on the north by the Bahr-el-Arab, and stretches in the south to within a few days' march of the Congo."<sup>615</sup>

This statement is significant in illustrating that pre-Condominium officials considered the Bahr el Arab as the border of the Bahr el Ghazal Province.

## **(ii) How Many Ngok Were There in 1905?**

453. In the GoS Memorial, an estimate of Ngok population in 1905 was given of around 5,000: this was admittedly approximate.<sup>616</sup> This suggestion triggered a dramatic

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<sup>608</sup> Ibid., Atlas, Map 72.

<sup>609</sup> Ibid., Atlas, Map 73.

<sup>610</sup> Ibid., Atlas, Maps 74 and 75.

<sup>611</sup> Daly Second Expert Report, p. 10.

<sup>612</sup> SPML/A Counter-Memorial, para. 911

<sup>613</sup> See also Macdonald, Third Report, para. 9.

<sup>614</sup> Similarly, SPML/A Counter-Memorial, para. 938.

<sup>615</sup> Cited in the GoS Memorial, para 292. "Mr. Frank Lupton's (Lupton Bey) Geographical Observations in the Bahr-el-Ghazal Region (1884) 6 *Proceedings of the Royal Geographical Society* 245, p. 245 (emphasis added) (SM Annex 57).

<sup>616</sup> See GoS Memorial, para. 339.

response from the SPLM/A, which puts the figure as high as 50,000.<sup>617</sup> Only with such a large population could the Ngok occupation of the ABC Experts' "Abyei area" (18,370 km<sup>2</sup>) have been credible. In fact even a population of 50,000 would have given a population density of only 2.7 Ngok/km<sup>2</sup>. If there were 5,000 Ngok at the time, population densities would have been around 1 Ngok to every 4 km<sup>2</sup>. This may explain why no-one ever saw them more than a few miles north of the River.

454. The actual number of Ngok Dinka in 1905 is unknowable, but in order-of-magnitude terms the GoS Memorial is much more likely to be correct; and in any event the SPLM/A's is a hopeless overestimate. This can be inferred from the following figures:

Year	Ngok Population Estimate	Source
1934	15,000	Governor of Kordofan <sup>618</sup>
1948	20,000-25,000	District Commissioner of Upper Nile Province <sup>619</sup>
1951	30,000	Governor of Kordofan <sup>620</sup>
1952	30,000	Assistant District Commissioner of Dar Messeriya <sup>621</sup>
1955	31,135 <sup>622</sup>	Sudan Census

As is clear from this data (illustrated in the chart below) the estimate of 5,000 Ngok in 1905 is consistent with later estimates. There is no doubt there was a very substantial population increase in the Sudan as a whole, and in every population group, in the decades after 1900. This certainly applied to the Ngok: the slave trade definitively ended, cattle raiding and inter-tribal conflicts were suppressed, food supplies were stabilised, etc. On this basis the SPLM/A figure (which implies a calamitous population *decrease* of the Ngok from 1905 to 1934) is evidently fallacious.

<sup>617</sup> SPLM/A Counter-Memorial, para. 1370, fn 1730. The SPLM/A estimate the 1905 population of Kordofan at c. 500,000, of which the Ngok are said to represent 10%, hence 50,000.

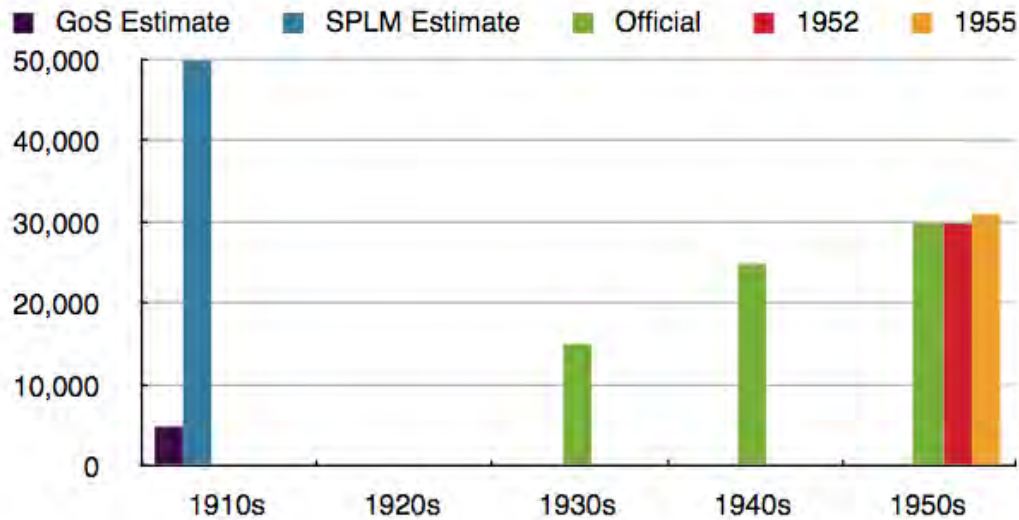
<sup>618</sup> Letter from Newbold to the Civil Secretary, 8 May 1934, Civsec 1/36/97 (SM Annex 89); see also GoS Memorial, para. 339.

<sup>619</sup> Howell, P.P., "Notes on the Ngork Dinka of Western Kordofan", (1950) 32 *Sudan Notes and Records* 239, p. 241 (SM Annex 53); see also GoS Memorial, para 390; note also the date 1948 is accepted by the First Daly Report, p. 43.

<sup>620</sup> Letter from G. Hawkesworth (Governor Kordofan) to Editor Kordofan Magazine, dated 3 April 1951, SPLM/A Exhibit FE 18/17; see also Letter from Governor's Office, El Obeid re The Future of Ngork Dinka, dated 26 March 1951, SPLM/A Exhibit FE 18/16.

<sup>621</sup> Tibbs, M. & Tibbs, A., *A Sudan Sunset* (privately published, Welkin, 1999) p. 55 (SM Annex 47); see also GoS Memorial, para. 339.

<sup>622</sup> Technically, this figure is 30,869, however the SPLM/A figure (appearing at SPLM/A Counter-Memorial, para. 1375) is virtually the same.



455. In order to support its position, the SPLM/A posits a competing "range of data".<sup>623</sup> Its three "competing" estimates consider either the entire Dinka population, or else the entire population of the province of Kordofan.

456. The first estimate is by the French explorer J-B Marchand, who in 1898 estimated that there were four or five million Dinka in the entire Sudan.<sup>624</sup> By comparison, in 1952 Lienhardt estimated the overall Dinka population "may amount to about one million".<sup>625</sup> He revised this estimate in 1958 to 900,000.<sup>626</sup> A complete tally of all Dinka throughout the Sudan in the 1956 census revealed a number of 1,151,896. This encompassed all Dinka, including Northeastern; Ruweng; Bor; Southeastern, and "other". Thus it is apparent that the estimates of four to five million in 1898 cannot be right. Indeed, Daly comments that:

"Estimates of the population of the Sudan as a whole [in 1900] are ... unreliable and inconsistent. What is more, such overall figures were evidently presented without any concern about their provenance ... how was it decided that Kordofan, estimated in 1898 to have had 280,000 people in 1875, lost 1,250,000 during the Mahdia?"<sup>627</sup>

457. As its second source, the SPLM/A relies on a 1906 letter regarding the construction of a church mission at Bor. In it, the author relays to a church missionary

<sup>623</sup> SPLM/A Counter-Memorial, para. 1371.

<sup>624</sup> "Presumably", because the relevant reference does not appear in the SPLM/A Exhibits.

<sup>625</sup> Lienhardt, R.G., *The Dinka of the Sudan*, Exeter College, Oxford, D. Phil. Thesis, presented in May 1952, p. iii, SPLM/A Exhibit FE 18/19.

<sup>626</sup> Lienhardt, R.G., "The Western Dinka" in Middleton, J. & Tait, D. (ed.), *Tribes Without Rulers* (Routledge, London, 1958), p. 98, SPLM/A Exhibit FE 18/23.

<sup>627</sup> Daly, M.W., *Empire on the Nile, 1898-1934* (CUP, Cambridge, 2003), p. 20, SPLM/A Exhibit FE 11/5. It appears Daly meant to say "lost 125,000", hence the population of Kordofan in 1898 was taken to be about 155,000 – being just over half the 1875 figure. Such a reduction of population would be broadly consistent with the effects of the Mahdiyya: see GoS Memorial, fn 236.

representative the news that Cameron Bey informed him the Dinka "amount to about 2 million".<sup>628</sup> It appears the conversation occurred at Mongalla (approximately 5°12'N, 31°46'E).<sup>629</sup> This is 610 km away from the modern village of Abyei. This figure is similarly incompatible with Lienhardt's later estimates.

458. As its third source – and the only one which may be potentially relevant – the SPLM/A refers to the 1908 Lloyd Report, which estimates the entire Kordofan population as "roughly at half a million".<sup>630</sup> The SPLM/A takes its estimate of the current Ngok population fraction and applies it to the 1908 figure.

459. It should be noted that while Lloyd's estimate clearly included the Baggara, it is uncertain whether it included the Ngok. Governor Lloyd wrote:

"The population estimated at half a million, now consists of Arabs in the plains and Nubas in the hills."<sup>631</sup>

Lloyd added two appendices that listed the "names of the principal tribes". These included the "Homr Ageira" and "Homr Felaita", but notably not the Ngok Dinka.<sup>632</sup> The Governor evidently did not consider the Ngok a "principal" tribe of the province of Kordofan.<sup>633</sup>

460. The SPLM/A's current estimate of the Ngok as a percentage of Kordofan's population is 10% of the entire population.<sup>634</sup> No source is cited to support this assertion.<sup>635</sup>

461. In startling contrast, the SPLM/A's own historian notes that in the 1955 census, the Ngok comprised 1.8% of the population of Kordofan.<sup>636</sup> Applying this percentage to Lloyd's 1908 population estimate, the Ngok would have numbered around 9,000 at that time.

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<sup>628</sup> Letter from Cook to Bayliss (30 January 1906), SPLM/A Exhibit-FE 17/20.

<sup>629</sup> As given by the *Index Gazetteer of the Anglo-Egyptian Sudan* (Sudan Survey Department, Khartoum, 1931) p. 231.

<sup>630</sup> *Sudan Intelligence Reports*, No. 171 (October 1908), Appendix D, p. 52, SPLM/A Exhibit FE 17/31.

<sup>631</sup> *Ibid.*

<sup>632</sup> *Ibid.*, p. 70.

<sup>633</sup> That Lloyd was aware of the Ngok being part of Kordofan is beyond question as he makes an additional Report on Kwal Arob in *Sudan Intelligence Reports*, No. 171 (October 1908), Appendix E, p. 87.

<sup>634</sup> See SPLM/A Counter Memorial, fn 1730.

<sup>635</sup> It is noted that in the SPLM/A Memorial, para. 116. The SPLM/A asserts that the Ngok number 300,000 today. It would appear that this number refers to all Ngok and not just inhabitants of Kordofan, still less the Ngok: the source cited for this proposition is the SPLM/A's website.

<sup>636</sup> First Daly Report, p. 43.

462. In addition to the highly inflated numbers of Ngok, the SPLM/A Counter-Memorial also suggests that the number of Messeriya that entered the Bahr region was less than 30,000.<sup>637</sup> In footnote 1734, the SPLM/A states:

"The only omodiyas who come south to graze in the Abyei area are members of the Ajaira. Their population in 1952 totalled 30,947 and only a portion of these would have had summer seasonal grazing lands in the Abyei area."

Cunnison's population table records that the Humr numbered 54,997 in 1955. However the footnote to this table states:

"At all times a number of people are absent from their country. Perhaps accordingly we may safely say that the number of Humr approaches sixty thousand."<sup>638</sup>

Indeed, the 1955-56 census records the "Messeriya Humr" census area to contain 60,871 Arabs. This qualification, and the actual census figure, are ignored, instead the SPLM/A takes the lower number (54,997), excludes the Felaita Messeriya entirely on the basis that only the Ajaira (numbering 30,974) come down to graze in the "Abyei region",<sup>639</sup> a fact disputed by Cunnison himself,<sup>640</sup> then rounds this number down to "less than 30,000". Even that underestimate produces a number comparable to the total number of Ngok Dinka in the 1950s. Yet in accordance with the ABC Experts' findings, the Messeriya Humr are excluded from the area south of 10°10'N, and the Ngok have the entire southern area to themselves, the clear stipulations of the Abyei Protocol notwithstanding.

### **(iii) Official Ignorance of Ngok Northern Settlements**

463. Faced with the fact that the Condominium records before and after 1905 make no mention of Ngok settlements on and north of the Ragaba ez Zarga, the SPLM/A blames them as dry-weather tourists, ignorant of local usage. The SPLM/A Counter-Memorial states:

"The few Anglo-Egyptian officials who travelled to the Abyei region prior to 1905 – Mahon, Wilkinson, Percival, Bayldon, Lloyd – also all did so in the dry season. Inevitably, these officials did not observe the Ngok Dinka and their

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<sup>637</sup> SPLM/A Counter-Memorial, para. 1373.

<sup>638</sup> Cunnison, I., *Baggara Arabs, Power and the Lineage in a Sudanese Nomad Tribe* (Clarendon Press, Oxford, 1966), p 8, fn 26, SPLM/A Exhibit FE 4/16.

<sup>639</sup> SPLM/A Counter-Memorial, para. 1375, fn 1734.

<sup>640</sup> See GoS Memorial, Figure 15, p. 152; appearing in Cunnison, I., *Baggara Arabs, Power and the Lineage in a Sudanese Nomad Tribe*, (Clarendon Press, Oxford, 1966), Map 3, facing p. 224.

land use in the wet season, when the Ngok inhabited their permanent villages to the north."<sup>641</sup>

But the route reports and other documents contain much information about water supplies and vegetation as well as the location of cattle camps (ferigs, dugdugs) and permanent habitations. The suggestion that all travellers would have overlooked uninhabited permanent villages is absurd. Wilkinson, for example, reported as follows:

"The first Dinka village of Bombo is reached. This district is known as Bongo, and 3 miles on S.W., is one of the villages of Tehak, another of the same name being met 2½ miles on.

These villages, neatly built, are used by the Dinkas in the rains and as long as the water lasts. At the present date, 2.2.02., all the inhabitants had left and were grazing their herds of cattle where grass and water were to be found."<sup>642</sup>

It was not before Etai that "the first Dinka was met."<sup>643</sup> Thus Wilkinson clearly recorded the first Dinka village (24 km south of the Ragaba ez Zarga) and the first Dinka he met (36 km south of the Ragaba ez Zarga).

464. Despite this record, the SPLM/A Counter-Memorial asserts that:

"...Wilkinson's trek notes also strongly suggest the existence of Ngok Dinka villages well to the *north* of the Ngol/Ragaba ez Zarga."<sup>644</sup>

There is simply no basis for this. It was only after crossing the Ragaba ez Zarga that Wilkinson stated "The first Dinka village of Bombo is reached."

465. To justify its claim that Wilkinson found Ngok villages north of the Ragaba ez Zarga, the SPLM/A assume that these villages must have been Ngok because the Misseriya...

"(a) did not inhabit villages, (b) would have been in the area during the dry season, and (c) did not build houses and instead carried their tents with them. The uninhabited huts could not have belonged to the Misseriya because they did not inhabit 'huts' or any kind of permanent structure, but rather tents."<sup>645</sup>

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<sup>641</sup> SPLM/A Counter-Memorial, para. 922.

<sup>642</sup> Partly cited in the GoS Memorial, paras. 314-321; GoS Counter-Memorial, paras. 261 and 953-972; Gleichen, A., *Handbook of the Sudan* (1905), Vol. II, pp. 154-156 (SM Annex 38).

<sup>643</sup> *Ibid.*, pp. 155 (SM Annex 38).

<sup>644</sup> SPLM/A Counter-Memorial, para. 967 (emphasis added).

<sup>645</sup> *Ibid.*, para. 971.

This line of reasoning contains not one *non sequitur* but several.

466. With regard to (a) and (c), the SPLM/A relies on a distorted not to say speculative understanding of "village" and "hut". Reaching Fula Hamadai, some 29 miles north of the Ragaba ez Zarga, Wilkinson reported "small villages – mere collection of three and four huts..."<sup>646</sup> His description, according to the SPLM/A "*perfectly* describes the Ngok Dinka village structure and plan".<sup>647</sup> This ignores the point that Wilkinson, on his way to the Arab settlement of Fauwel, in no way described or inferred that this "mere collection of ... huts" was Dinka, still less Ngok. Moreover the phrase "mere collection of ... huts" suggests neither structure nor plan, still less perfection. In fact, it is impossible to infer anything from this brief description, except to note Wilkinson's silence. When he wanted to refer to the Ngok he did so, as when he stated: "The first Dinka village of Bombo is reached" 24 km south of the Ragaba ez Zarga.

467. As regards point (b), this is contradicted by Wilkinson's travel itinerary. In his general description of the Bahr el Arab and Dar el Homr, Wilkinson's wrote as follows:

"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 men and beasts to such an extent as to make life unbearable."<sup>648</sup>

Wilkinson noted "large Arab settlements" at Fauwel, which is south of Fula Hamdadai. Since the inhabitants of Fauwel were Arab, the "clear inference" is that places further north were Arab also.

468. Further, the assertion that Wilkinson or other travellers overlooked permanent Ngok villages further north than they actually recorded is improbable, given the unmistakable appearance of permanent Ngok housing, described at length in the SPLM/A Memorial.<sup>649</sup> We are told that visitors "over the years have been struck by the design and construction" of Ngok houses – but when they were so struck they were always on or near the Kir/Bahr el Arab.

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<sup>646</sup> Gleichen, A., *Handbook of the Sudan* (1905), vol. II, pp. 154-156 (SM Annex 38).

<sup>647</sup> SPLM/A Counter-Memorial, para. 970 (emphasis added).

<sup>648</sup> Gleichen, A., *The Handbook of Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government*, HMSO, London (1905), Vol. II, pp. 156 (SM Annex 38).

<sup>649</sup> SPLM/A Memorial, paras. 206-216.



469. The SPLM/A's argues that...

"officials' observations cannot indicate the absence of the Ngok Dinka from the overwhelming bulk of the Abyei Area – for the simple reason that the officials never went to the bulk of the Abyei Area."<sup>650</sup>

But not only did officials travel extensively north to south and east to west over the years; they also gathered information from those they met, as the SPLM/A Counter-Memorial itself accepts.<sup>651</sup> It is inconceivable – if the Goz had been dotted with permanent (even unoccupied) Ngok Dinka housing, with perfectly planned structures – that someone would not have commented on it.

470. The subject of officials not seeing Ngok Dinka brings us to the evidence of G.W. Tibbs. In a letter dated 1 March 2003, Mr. Tibbs wrote to Dr. Zacharia Bol Deng, acknowledging Dr. Deng had "telephoned me to ask whether I could throw any light on the boundaries between the Messeria and Ngok Dinka".<sup>652</sup> Relevantly, he recalls:

"Two hours south from Muglad there was a rest house at Tebeldia. Then there was a long stretch until Antilla [approximately 50 miles from Abyei]... The country just south of Tebeldia as far as Antilla was 'goz' country. This was really a 'no-man's' land between the Messeria and the Ngok Dinka."<sup>653</sup>

A similar account is given in the Tibbs' book: Tebeldiya featured a rest house, but there is never a suggestion that it was a "border".<sup>654</sup>

471. In Mr. Tibbs' Witness Statement of 12 February 2009 he states (with reference to the 1950s):

"I always considered the area south from Antilla, on our direct road route from Mulad to Abyei, to be within Ngok territory."<sup>655</sup>

Antilla is at beginning of the Goz in the south: it is well south of 10°35'.

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<sup>650</sup> SPLM/A Counter-Memorial, para. 924.

<sup>651</sup> Ibid., para. 1002.

<sup>652</sup> Letter from Tibbs, M. to Deng, Z.B. (1 March 2003), p. 1, SPLM/A Exhibit FE 19/6.

<sup>653</sup> Ibid., p. 2, SPLM/A Exhibit FE 19/6.

<sup>654</sup> Tibbs, M. & Tibbs, A., *A Sudan Sunset* (privately published, Welkin, 1999) p. 162, SPLM/A Exhibit FE 19/3.

<sup>655</sup> SPLM/A Counter-Memorial, Witness Statement of G.M.G. Tibbs, Tab 3, para. 22.

472. Yet he adds (in apparent contradiction to what he had "always considered"):

*"I understand that at some time a post was placed at Tebeldiya that marked the spot up to which the Ngok were responsible for making up the road after the rains. It is certainly possible that Tebeldiya was considered a boundary."*<sup>656</sup>

Mr. Tibbs concedes that he had previously described this region as "no mans' land". Now Tebeldiya is elevated to a possibility.

473. Regarding the places of Nyama and Subu, Mr. Tibbs recounts that the Messeriya used this area for their cotton cultivations, leaving in the wet season only to return after the harvest and burning of their crop. He adds: "The fact that I saw no Ngok does not exclude the possibility that they may have been around the area".<sup>657</sup> Mr. Tibbs was the District Commissioner of Dar Messeriya for two years in the 1950s. During this time he saw no Ngok at these locations, but they *might* have been there!

474. There is also an element of contradiction in the SPLM/A's own pleadings. Contrary to its thesis concerning the absence of actual administration in southern Sudan,<sup>658</sup> the SPLM/A Counter-Memorial now asserts that:

*"...it would be very unusual if there were in fact not continuity in the locations of the Ngok Dinka and Misseriya in the decades following 1905. As discussed in the SPLM/A Memorial, the Sudan Government brought a substantial measure of security and law and order to the Abyei region, while deliberately insulating the area from most external influences."*<sup>659</sup>

Thus the SPLM/A simultaneously asserts that Condominium officials did not know where the Ngok lived, while at the same time bringing a "substantial measure of security and law and order to the Abyei region". But they brought law and order to real people in real villages, not to inflated imaginary populations whose presence they never noted.

475. The lengths to which the SPLM/A is now driven in defence of its claim to a boundary at 10°35'N can be best seen from the assertion that Sultan Rob's village was on the Ragaba ez Zarga and not, after all, on the Bahr el Arab/Kir.<sup>660</sup> In fact every

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<sup>656</sup> Ibid., para. 23 (emphasis added).

<sup>657</sup> Ibid., para. 24.

<sup>658</sup> SPLM/A Memorial, paras. 281-296, and Daly's First Expert Report. See also SPLM/A Counter-Memorial, para. 929: "It is also important to note that, for most of the Condominium period, the Ngok Dinka were left to govern themselves with little contact with the Condominium administrators."

<sup>659</sup> SPLM/A Counter-Memorial, para. 1076.

<sup>660</sup> SPLM/A Counter-Memorial, paras. 944-5 and 1488-97.

contemporary map which shows Sultan Rob has him on the Kir,<sup>661</sup> which was where Wilkinson and Percival found him,<sup>662</sup> and which name was never applied to the Ragaba ez Zerga. It says much for the state of the evidence of a boundary at 10°35'N that the SPLM/A is driven, in its second pleading at the second instance, to maintain this desperate counterfactual.

#### (iv) The "Centrality" of Abyei Town

476. The SPLM/A's pleadings focus to a marked degree on Abyei Town as the core of its case:<sup>663</sup> an Abyei area which does not include Abyei township is said to be "unthinkable".<sup>664</sup> In short, "the immediate proximity of current Abyei town has been the center of Ngok Dinka political, commercial and cultural life for nearly two centuries".<sup>665</sup>

477. This "Abyei township claim" is based principally on Ngok Dinka oral history: the first citation in support of the sentence just quoted is to the Witness Statement of Paramount Chief Kuol Deng Kuol Arop. But as demonstrated in the GoS Counter-Memorial, modern oral evidence of facts or events which occurred one or more centuries ago is entitled to little weight unless corroborated by contemporary documents and to no weight at all if contradicted by such documents.<sup>666</sup>

478. Chapter 2 addressed the legal argument that an area described as "the Abyei Area" in the CPA must of necessity include the township of Abyei. It is proposed here to address first the documentary evidence in support of the "Abyei township claim", before turning briefly to the modern oral evidence.

##### (a) *Documentary Sources*

479. The SPLM/A cites several sources in support of the Abyei township claim. These will be discussed in turn.

480. A. Sabah, *Tribal Structure of the Ngok Dinka of Southern Kordofan Province* (1978)<sup>667</sup> is the first documentary source quoted, yet it is merely a Working Report,

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<sup>661</sup> See SM Map Atlas, Vol. III, maps 7, 9, 10, 11, 12, 14; SCM Map Atlas, Vol. III, Maps 13b, 14b, 16b.

<sup>662</sup> See also Bayldon: Sudan Intelligence Report, No. 127 (March, 1905), 2 (SM Annex 8); Comyn: Comyn (1907), p. 529 (SM Annex 50); Lloyd: Lloyd, W., "Some Notes on Dar Homr", (1907) 29 *The Geographical Journal* pp. 649-654 (SM Annex 54).

<sup>663</sup> See SPLM/A Memorial, paras. 961-967.

<sup>664</sup> SPLM/A Counter-Memorial, para. 1519.

<sup>665</sup> *Ibid.*, paras. 1184-1193; see also SPLM/A Memorial, para. 961.

<sup>666</sup> GoS Counter-Memorial, paras. 33-53.

<sup>667</sup> SPLM/A Exhibit FE 6/7, cited in the SPLM/A Memorial, para. 963.

gauging the changes in tribal structures due to modernisation. The term "Abyei town" is used only once, in reference to 19<sup>th</sup> century Ngok migration patterns:

"Alor Maindan's son, Biong, succeeded him. He and his sons moved to Majak near Abyei town."<sup>668</sup>

This single sentence does not establish Abyei town to be the Ngok cultural or administrative centre, nor even that it existed during the 19<sup>th</sup> century. It is more likely to be a modern geographic reference to a place that could be recognisable to the reader in 1978. If on the death of Chief Alor Abyei was "the center of Ngok Dinka political, commercial and cultural life", why did Biong not move to Abyei rather than Majak? Moreover, the following paragraph continues the migratory history and (after recording a series of wars) notes that: "The Ngok retreated to present-day Makair in Tuichland."<sup>669</sup> If the Ngok were still on the move to the south, the fleeting reference to "Abyei town" provides no evidentiary support for a village of constant occupation, let alone the centre of Ngok political, commercial and cultural life.

481. S. Santandrea, *The Luo of the Bahr El Ghazal* (1968)<sup>670</sup> is an anthropological study, attempting to trace migration patterns and racial lineage of the Luo and related people. Its slightly eccentric methodology shows that the author is not drawing definitive conclusions, but rather making inferences and assumptions based on genealogy. While introducing competing accounts of migration patterns, Santandrea is quoted by the SPLM/A Memorial as stating:

"This will be indifferently called 'Ngok country', 'north of the Kir' and 'Abyei' or 'Abyei area' – Abyei being the 'capital' of the Ngok."<sup>671</sup>

Again it is necessary to read the entire passage, with its many hypotheses and uncertainties. The first reference is to "Abyei area, *at present* Ngok country" (emphasis added). Santandrea continues:

"As an introduction, two remarks should be born in mind: first, we cannot disjoint Luel from Ngok migration; secondly, the account already given represents the 'southern' version, and must be completed with the 'northern' one, that is from the very place where the Ngok live [in 1969]. "This will be indifferently called 'Ngok country', 'north of the Kir' and 'Abyei' or 'Abyei area' – Abyei being the 'capital' of the Ngok."

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<sup>668</sup> Sabah, S., *Tribal Structure of the Ngok Dinka of Southern Kordofan Province*, Abyei Project Working Report No. 1, (Development Studies and Research Centre, Khartoum, 1978), p. 5, SPLM/A Exhibit FE 6/7.

<sup>669</sup> Ibid., Makair (sc. Makier: GoS Counter-Memorial Map Atlas, Vol III, Map 34, 9°07'N 28°23'E) is in Bahr el Ghazal Province.

<sup>670</sup> SPLM/A Exhibit FE 4/18.

<sup>671</sup> Ibid., p. 192, cited by SPLM/A Memorial, para. 963.

The truncated quotation used in the SPLM/A Memorial makes it appear that Santandrea was referring to Abyei town. But it is clear from the text as a whole that he was referring to the area in general. Moreover his account was written in 1968 (when Abyei town was the administrative centre of Abyei LGA). Later Santandrea deals with the migration of the Ngok.<sup>672</sup> He states:

"Alor [mid-late 18th century] pushed further on, invading the territory of the Begi or Girma, and arrived as far as Abyei [implying this was the furthest northern point]... his son, Biong, settled south of Abyei, on the Kir, Wuncwei, where he died and was buried... Biong's son, Arop, shifted his headquarter to Mirok, where he was also buried."

Santandrea adds that this was "evidently a period of great confusion".<sup>673</sup> His account supports the view that at the end of the 19<sup>th</sup> century the Ngok were living on the Bahr el Arab and not further north: in any case, it provides no support for Abyei as having been the unique, long-established political and cultural centre of the Ngok.

482. C. Treatt, *Out of the Beaten Track* (1931)<sup>674</sup> is an anecdotal account of the author's travels in the late 1920s. He records his journey to Abyei town, which is described as the "head settlement of the Dinkas".<sup>675</sup> This is a travel description written as a kind of entertainment, and it is much later than 1905. The passage bears no weight whatever for present purposes.

483. Professor I. Cunnison, *The Humr and their Land* (1954),<sup>676</sup> is quoted as referring to Abyei as the "capital". The passage quoted reads as follows:

"Through the Goz there are numerous trails southwards, apart from the *dry-season motor road* linking Muglad with Abyei, the capital of the Ngok Dinka."<sup>677</sup>

That Professor Cunnison was not referring to the state of affairs in the 19<sup>th</sup> or early 20<sup>th</sup> century is made clear by his reference to the motor road. In fact he was emphasising the use of the area by the Humr, not the Ngok. The full passage reads:

"Through the Goz there are numerous trails southwards, apart from the dry-season motor road linking Muglad with Abyei, the capital of the Ngok Dinka. All these trails are associated with particular 'omodiyas' [Humr sections],

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<sup>672</sup> Ibid., p. 196.

<sup>673</sup> Ibid., p. 197.

<sup>674</sup> SPLM/A Exhibit FE 3/13.

<sup>675</sup> Ibid., p. 55.

<sup>676</sup> SPLM/A Exhibit FE 4/5; cited by SPLM/A Memorial, para. 963.

<sup>677</sup> Ibid., p. 61 (emphasis added).

according to the district of the Bahr they point towards, and are used mainly by these 'omodiyas', although of course not exclusively."<sup>678</sup>

484. P.A. Howell, "Notes on the Ngork Dinka of West Kordofan"<sup>679</sup> is cited for his observation that there were permanent Dinka villages north of the Bahr el Arab in 1951. That has nothing to do with when Abyei town was founded or when it became the centre of Ngok political, commercial and cultural life.

485. The SPLM/A Memorial also quotes a private letter from M. Tibbs to Zacharia Bol Deng of 6 January 2004, the covering note of which states:

"There is no doubt at all that Abyei has always been the centre of the Ngok Dinka although many of the merchants were Arab and at certain times of the year the market was used by the Messeria."<sup>680</sup>

The Memorial then quotes Tibbs, in the main body of the letter, as saying:

"Abyei was the centre of the Ngok Dinka in the same way that Muglad was the headquarters of the Messeriya Humr and Lagawa of the Messeriya Zurug. Apart from a few Arab merchants the inhabitants of Abyei were the Ngok Dinka."<sup>681</sup>

486. Several observations should be made:

- (a) First the phrase "*has always been* the centre..." is unsupported by the evidence, and does not even reflect the position of the SPLM/A, according to whom the Ngok only settled in the Abyei region some time during the 19<sup>th</sup> century.
- (b) Second, the phrase appearing in the main body of the letter, relates to the 1950s only. Tibbs is expressing an opinion based on personal experience during the 1950s. This is not a historical analysis.
- (c) Third, Tibbs' account, unreferenced and undocumented, sheds no light on when Abyei town was founded or when it became the centre of political, commercial and cultural life.

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<sup>678</sup> Ibid.

<sup>679</sup> SPLM/A Exhibit FE 4/3; cited at SPLM/A Memorial, para. 965.

<sup>680</sup> SPLM/A Exhibit FE 11/9; cited at SPLM/A Memorial, para. 965.

<sup>681</sup> Ibid., (emphasis SPLM/A).

- (d) Tibbs served as Assistant District-Commissioner for Dar Messeria for 2 years before independence. His privately-published account gives no indication of any prior knowledge of the history of the Ngok Dinka or of any historical expertise.<sup>682</sup> It does not address the "antiquity" of Abyei.

487. In summary, passing references from the late 1920s or the 1950s to Abyei town in no way support the Abyei township claim. Yet, the SPLM/A's documentary sources consist of such sources: Treatt (1931); Cunnison (1954); Santandrea (1968); Sabah (1978), and Tibbs (2003, 2004). Indeed the lack of reference to Abyei town as a political or other centre before the 1920s is not absence of evidence: it is evidence of absence. The SPLM/A dossier confirms that Abyei did not perform that role until well after the crucial date of 1905.<sup>683</sup>

488. So does the only source with a compelling date: the Sudan Intelligence Report No. 92, dated March 1902. This states that "Rob's place is a great trade centre for Bahr El Ghazal and a lot of ivory comes there..."<sup>684</sup> But we know from Wilkinson's travels and other sources that in March 1902 "Rob's place" was south of the Bahr el Arab.<sup>685</sup> That this key Ngok village was the "great trade centre for Bahr El Ghazal" in 1902 is strong evidence that Abyei town did not perform that role at that time.

(b) *Modern Oral Evidence*

489. Furthermore, the Ngok oral history – on which the Abyei township claim is primarily based – is itself inconclusive. The SPLM/A Memorial quotes Kuol Deng Kuol Arop in support of its thesis that "Abyei town had become the home of the Paramount Chief and the seat of central government ... by the mid 1800s".<sup>686</sup> However, this is a misquotation. The witness makes no reference to "central government" but instead states:

"[from Kwol Dit onwards] the seat of the paramount chiefs has been the settlement at Abyei, *known now* as Abyei town. It is the title town of the

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<sup>682</sup> Cited at GoS Memorial, para. 339.

<sup>683</sup> Even then, Abyei was not only a Ngok centre: it was also a tribal center for the Messeriya. Francis Deng records the Messeriya leader Babo Nimir as saying "My father became Chief in 1918 and died in 1924 on the 13th of January... The tribe, the Ajaira, heard about it and met in Abyei to select his successor. Chief Kwol of the Ngok Dinka and Chief El Haj Ajbar of the Falaiyta were there. The District Commissioner, Mr. Crawford, also attended. They went as far as Abyei and met with the whole tribe. The Ajaira all assembled and said 'we want this son of Nimir'." F. Deng, *The Recollections of Babo Nimir* 40 (1982), p. 11. SPLM/A Exhibit FE 6/11.

<sup>684</sup> *Sudan Intelligence Reports*, No. 92 (March 1901) (SM Annex 4); SPLM/A Exhibit FE 1/16, at p. 20.

<sup>685</sup> GoS Memorial, para. 338.

<sup>686</sup> SPLM/A Memorial, para. 962.

Abyior and the place of the authorities and the government *after the wars*."<sup>687</sup>

490. The two italicised phrases here are each significant in their own way.

- First, the phrase "known now as Abyei" (repeated in various formulations in the SPLM/A Memorial) betrays an awareness that at the time of Kwol Dit there was no town known as Abyei. Yet the Abyior section of the Ngok was known by that name at the time, as confirmed in Inspector Willis' note published in May 1909.<sup>688</sup> It seems likely that "the title town of the Abyior" did not exist as such in 1909. If it had done, Willis would surely have mentioned it.
- Secondly, the inclusion of the phrase "after the wars" is an important qualification. It suggests that Abyei town became the place of "the authorities and the government" "after the wars", i.e. later in the 20<sup>th</sup> century. And this is indeed the case.

491. Misquotation aside, there is other conflicting evidence. In a letter sent by Ngok Dinka Chiefs to General Sumbeiywo in January 2003 – long after the dispute had erupted – the chiefs stated: "...the [Abyei] area was usually referred to as the country of Sultan (Chief) Rob *long before Abyei town became its administrative centre*..."<sup>689</sup> This is an official document to IGAD from several executive chiefs and Dinka representatives. It is reasonable to conclude that the precise wording was carefully chosen. One thing this passage establishes is that Abyei town was not the administrative centre during the life of Sultan Rob. It thus contradicts the Abyei township claim – more especially when it is observed from the maps and from Wilkinson's account that Sultan Rob's was many miles to the south-east of what became Abyei town, and on the other side of the Bahr el Arab.

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<sup>687</sup> SPLM/A Memorial, Witness Statement of Kuol Deng Kuol Arop, Tab 5, para. 30 (emphasis added).

<sup>688</sup> See Willis's "Note on the western Kordofan Dinkas" (1909), quoted in GoS Memorial, para. 337, referring to the "Abier [sub-tribe] (Kwal's family)". *Sudan Intelligence Reports*, No. 178 (May 1909), Appendix C (SM Annex 19).

<sup>689</sup> Ngok Dinka Speak: On Restoration of Abyei Area to Southern Sudan, 10 January 2003, Exhibit FE 10/9, p. 2 (emphasis added).



(c) *Conclusion*

492. This review of the SPLM/A evidence in support of the Abyei township claim reveals again the fragility of the oral tradition upon which, virtually exclusively, its claim is based.

493. But hard evidence is not lacking.

- The first documentary reference to what might later become the town was produced by the GoS: it is Whittingham's route map of 1910, which refers to "Abyia".<sup>690</sup>
- The GoS Memorial cited a hand-written instruction given within the Sudan Survey Department, written on Sheet 65-K (1916).<sup>691</sup> In consequence (presumably) of that instruction, the first map in the dossier on which Abyei is marked is the 1920 revision of the War Office map of the Anglo-Egyptian Sudan.<sup>692</sup> Thereafter it appears regularly.
- A note on G.W. Titherington's sketch of 1924 suggests that Sultan Kwal Arob took up residence at Abyei in 1918.<sup>693</sup>
- But as late as 1933, his successor as Paramount Chief, Deng Majok's house was located at Naam, 15 kilometres north of Abyei. This is where the Dinka court was held at the time; it only moved to Abyei later in the decade.<sup>694</sup>
- In 1938, Abyei was the centre of a Native Administration Unit, which was the basis for its subsequent political history.<sup>695</sup>

494. The point is a simple one. The crucial date in this case is – and is agreed to be – 1905. Whether or not Abyei existed as a locality in 1905, it was certainly not "the center of Ngok Dinka political, commercial and cultural life". The Ngok Paramount Chief at the time, Sultan Rob, did not live there: in 1902, he was living south of the Bahr el Arab

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<sup>690</sup> See GoS Counter-Memorial, paras. 300-306, *ibid.*, Map Atlas, Map 18a.

<sup>691</sup> Sheet 65-K, "Achwang", is at GoS Memorial, Map Atlas, Map15. The hand-written annotation is at GoS Memorial, Figure 3.

<sup>692</sup> GoS Memorial, Map Atlas, Map 17.

<sup>693</sup> See GoS Counter-Memorial, para. 313, *ibid.*, Map Atlas, Map 38.

<sup>694</sup> *Ibid.*, para. 314.

<sup>695</sup> See GoS Memorial, Map Atlas, Map 27.

(though he also spent time at Burakol); in 1906 Rob was buried south of the Bahr el Arab. The subsequent location of Abyei township is irrelevant in determining "the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905".

**D. Irrelevant Issues Raised in the SPLM/A "Counter-Memorial"**

495. Rather than focusing on the contemporary documents showing approximately where the Ngok were in 1905, the SPLM/A raises a smokescreen of indignation about a number of matters. Some refer to errors in the GoS Memorial: it is true that there were some errors, for which the GoS apologises. However, it does not accept that these were consequential to the arguments made.

496. Of more consequence are a number of quasi-geographical arguments put forward, in the mode of shadow boxing since even if the SPLM/A is correct in the positions taken, this alters nothing. Some of these points will be dealt with here.

**(i) The Bahr el Arab as a Barrier**

497. The first concerns a false issue raised by both the SPLM/A and Professor Daly, who suggest that the GoS Memorial presents the Bahr el Arab as an impermeable barrier. According to the SPLM/A:

"... to suggest that an indigenous people inhabiting a region characterized by its sprawling watercourses are unable to traverse an unspectacular waterway, with the result that it forms an impassable physical barrier to their movement, is impossible to credit. Rather, the evidence shows very clearly that the Kiir/Bahr el Arab was one of the innumerable waterways of the Bahr region that the Ngok used in the course of their daily lives to facilitate, not to obstruct, movement throughout their homeland."<sup>696</sup>

In fact the word "impassable" appears in Junker's text.<sup>697</sup> All that was stated in the GoS Memorial was that:

"The Bahr el Arab was in the nature of a *physical* barrier, something which a mere ragaba could not be."<sup>698</sup>

498. Professor Daly likewise refers to "the even more provocative and equally specious statement about the river's "character as a barrier between Arab and southern tribes....

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<sup>696</sup> SPLM/A Counter-Memorial, para. 1360.

<sup>697</sup> Quoted in the GoS Memorial, para. 290.

<sup>698</sup> Ibid., para. 290 (emphasis original).

[T]he Bahr al-Arab was nothing of the kind, nor does the Memorial suggest any source for such a nonsensical 'characterisation'.<sup>699</sup>

499. In fact since the GoS referred in its pleadings to slave raids from Kordofan and Darfur into Bahr el Ghazal, to both the Homr and the Ngok going south of the Bahr el Arab on a regular basis, and to multiple journeys by Condominium officials who crossed the river, this is simply a great deal of hot air. The GoS has never suggested that the river was impassable. Obviously it was and is not.

500. It is a barrier, nonetheless; at least so reputable historians have said. Thus Jünker:

"The Bahr-el-Arab is fordable in the dry season at 25 1/3° east, but not, it is said, lower down. For five months or more it floods the swamps on its banks so as to form an almost impassable barrier between the negro and the Arab, the fertile and the desert regions of the Soudan, everywhere east of Hofrat, or of long. 25°."<sup>700</sup>

501. Thus Warburg:

"The southern provinces were in a different category. The negroid tribes of the Sudan occupied the area roughly south of latitude 10°, with the Bahr al-'Arab forming a natural frontier between them and the Muslim north."<sup>701</sup>

502. Thus Collins:

"The Bahr al-Arab, the Kiir, is unique among these rivers [in the Bahr al-Ghazal basin], for it is more a symbol than a purveyor of water. It has the largest drainage basin of any river in the Bahr al-Ghazal or the Lake plateau. It also has the least water. The wadis of Sahel in the north are spasmodic. The seasonal rivers from the Congo-Nile watershed have a greater volume than the Bahr al-Arab, but they are not its tributaries. *Its sluggish waters represent, however, the cultural divide between Arabs and Africans on the frontiers of traditional African religions, Islam and Christianity.* Throughout its long convex passage the Arab Baggara, who call it the Bahr al-Arab, and the African Dinka, who call it the Kiir, have fought for cattle, grass, slaves, and souls from time beyond their oral traditions. Today it remains a shallow, sudd-filled river running red with the blood of Arabs and Africans from hostilities that will be remembered long after its waters are cleansed in the

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<sup>699</sup> Daly's Second Report, p. 23. See also *ibid.*, p. 25.

<sup>700</sup> 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). GoS Memorial, para. 292 and Lupton, F., "Mr. Frank Lupton's (Lupton Bey) Geographical Observations in the Bahr-el-Ghazal Region", 1884 6 Proceedings of the Royal Geographical Society, p. 245 (SM Annex 57).

<sup>701</sup> Warburg, G., *The Sudan Under Wingate, Administration in the Anglo-Egyptian Sudan 1890-1916*, Routledge Press, Haifa (1971), p. 137, SPLM/A Exhibit FE 5/1.

swamps of the Sudd. The other rivers of the Bahr al-Ghazal cannot claim its cultural or hydrologic importance."<sup>702</sup>

503. Thus Beswick:

"[T]he Western Ngok Dinka as a whole, who were subjected to far fewer raids because of the Abyor and Acak alliance with their Baggara neighbours, returned with their herds to the Kir/Bahr el-Arab River region for grazing. This river and its vicinity is viewed by some scholars as a frontier representing an ideological and physical barrier between what is today the 'Arab' Muslim north and the African non-Muslim south in the modern country of Sudan."<sup>703</sup>

504. Thus indeed Professor Daly himself (with his co-author Holt):

"A similar sequence of developments was occurring at about the same time in the vast area, west of the Upper Nile, watered by the tributaries of the Bahr al-Ghazal... The northern districts of this region, roughly speaking, along the lines of the Bahr al- 'Arab, had for centuries been the border between the Baqqara Arabs, and the Dinka and other non-Arab tribes."<sup>704</sup>

The idea of the Bahr el Arab as a border or barrier is a standard one.

## **(ii) The Physical Geography of the Bahr Region**

505. According to the SPLM/A:

"The GoS Memorial ignores the overwhelming bulk of the environmental and cultural evidence."<sup>705</sup>

As to cultural evidence, this is virtually absent, so there is little or nothing to ignore.<sup>706</sup>

As to so-called environmental arguments, these are without merit. The assertion that because the Ngok are "well-adapted to the specific environmental conditions of the Abyei region",<sup>707</sup> then this provides evidence of Ngok habitation is fundamentally flawed.

506. First, the term "well-adapted" is highly subjective. The SPLM/A for example states that:

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<sup>702</sup> Collins, R.O., *The Nile*, Yale University Press, London (2002) pp. 63-64, SPLM/A Exhibit FE 10/6 (emphasis added).

<sup>703</sup> Beswick, S., *Sudan's Blood Memory*, University of Rochester Press, Rochester (2006) p. 156, SPLM/A Exhibit FE 12/18.

<sup>704</sup> Holt, P.M., & Daly, M.W., *A History of the Sudan* (5th ed., Pearson Education, London, 2000), p. 62, SPLM/A Exhibit FE 9/3.

<sup>705</sup> SPLM/A Counter-Memorial, para. 172.

<sup>706</sup> For discussion of the Community Mapping Report see Appendix II.

<sup>707</sup> SPLM/A Memorial, para. 47.

"for most of the year, the ecology of the Bahr offered little, and was instead affirmatively hostile, to the Misseriya's nomadic, non-agricultural lifestyle."<sup>708</sup>

This statement is wrong in fact – the Misseriya did not have a "non-agricultural lifestyle", as Cunnison shows, though they did not cultivate the Bahr. Indeed the argument is not devoid of bias: the Baggara were as "well adapted" to their yearly migration as the Ngok to their transhumance lifestyle. But this is all fundamentally irrelevant: where the Ngok were in 1905 cannot be determined on the basis of alleged adaptation. Neither ecologists nor evolutionary biologists are renowned as the arbiters of boundary disputes.

507. The MENAS Report tries to make the same deterministic point, though in a more subtle manner.<sup>709</sup> It defines the Bahr region geographically and relies on a description by Lebon<sup>710</sup> and illustrations by Barbour.<sup>711</sup> MENAS refers to two maps from Barbour<sup>712</sup> which show a single geographical region, ranging from the ironstone plateau in the south up to the Goz on the north-east and further to Lake Keilak on the north-west. These are confirmed in several satellite images.<sup>713</sup> Thus both Lebon and Barbour show that any geographical "dividing line" between the goz and the Bahr region lies not on the Kir/Bahr el Arab river but is far to the north: 10°0'N on the western side, and even further north than 10°35'N on the eastern side. The Report concludes:

"When the satellite imagery is reviewed a very clear definition of the Bahr region, contrasted with the area of the *goz* emerges".<sup>714</sup>

508. The significance of this is puzzling because it does not resemble the ABC Experts' delimitation or the SPLM/A's submission. It assists neither the SPLM/A nor the GoS case and just describes a geographical region. It is a third class of "boundary" that is neither here nor there.

509. Nevertheless, as will be shown below, the inference is that the Ngok could conceivably have lived throughout the entire Bahr region; and therefore up to the northern edge and past the 10°35'N line. That the sources relied on – Barbour and Lebon – refute this possibility entirely is conveniently omitted from the Report and the accompanying exhibits.

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<sup>708</sup> SPLM/A Memorial, para. 1012.

<sup>709</sup> SPLM/A Counter-Memorial, MENAS Report, pp. 37-38.

<sup>710</sup> SPLM/A Counter-Memorial, MENAS Report, para. 140.

<sup>711</sup> See for example, MENAS Report, para 145; Barbour is referred to repeatedly throughout the Report at fn 104, fn 105, fn 106, fn 109, fn 110, fn 115.

<sup>712</sup> See Barbour, K.M., *The Republic of the Sudan*, University of London Press, London (1961), fig. 24 at p. 53 and fig. 39 at p. 99; See MENAS Report, paras. 141, 142, 146.

<sup>713</sup> Being principally SPLM/A Map Atlas Counter-Memorial, Maps 68, 69; see also Maps 67, 70; see also MENAS Report, fn 107.

<sup>714</sup> SPLM/A Counter-Memorial, MENAS Report, para. 145.

510. Barbour writes:

"these Arabs [the Baggara] are not confined to the sandy country, but also occupy the plains which lie between the Nuba Mountains where clay soils and red sandy loams occur. Moreover, even as the Arabs of the north move beyond the limits of the Qoz during the summer, in winter [dry season] many of the Baqqara retreat southwards across the clays to watering places along the Bahr el Arab. ... At the start of the rainy season ... the [Baggara] tribes arrive at their home *dars* from their wintering areas, which are situated either along the Bahr el Arab or in the ironstone plateau beyond it."<sup>715</sup>

Complementing this description is an illustration appearing at page 150 of Barbour's book. It should be noted that whereas page 149 is extracted in SPLM/A Exhibit 17/24, page 150 was omitted. It is **Figure 4**, opposite.<sup>716</sup>

511. Similarly, Lebon also includes a map depicting Baggara grazing patterns, taken from Cunnison. It is **Figure 5**, opposite.<sup>717</sup>

512. The incongruity between the illustrations of these sources and the inference derived from them by the MENAS Report is stark. It also shows that the geographical Bahr region boundary is doubly irrelevant because: (1) it does not support the 10°35'N line, rather, the Bahr only extends to 10°0'N on the west but past 10°35'N on the east; and (2) the sources from which this is drawn – Barbour and Lebon – make abundantly clear that tribal habitation patterns did not follow the geographical features *at all*.

513. In the MENAS Report, the Messeriya are reduced to a fleeting reference:

"both the Ngok Dinka and the Messeriya Baggara developed livestock management strategies to use the *goz* and its vegetation. The *goz* was integral to both their livelihoods. The Messeriya used the *goz* in the winter [dry season] when their grazing further north was inadequate."<sup>718</sup>

This paints a highly distorted picture of the Messeriya and even suggests the *goz* was merely their "back up" grazing land. There is also no mention of the Messeriya using the

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<sup>715</sup> Barbour, K.M., *The Republic of the Sudan*, (University of London Press, London, 1961) pp. 163 and 165, SPLM/A Exhibit FE 18/24.

<sup>716</sup> This map is not currently on the record. However, at Exhibit 37 of the SPLM/A Counter-Memorial, MENAS Report, the SPLM/A has annexed other pages from the same reference work. In order to place these sources in their proper perspective, the GoS is providing the relevant additional map not included with the SPLM/A's Exhibits.

<sup>717</sup> This map is not currently on the record. However, at Exhibit 39 of the SPLM/A Counter-Memorial, MENAS Report, the SPLM/A has annexed other pages from the same reference work. In order to place these sources in their proper perspective, the GoS is providing the relevant additional map not included with the SPLM/A's Exhibits.

<sup>718</sup> SPLM/A Counter-Memorial, MENAS Report, para. 144.

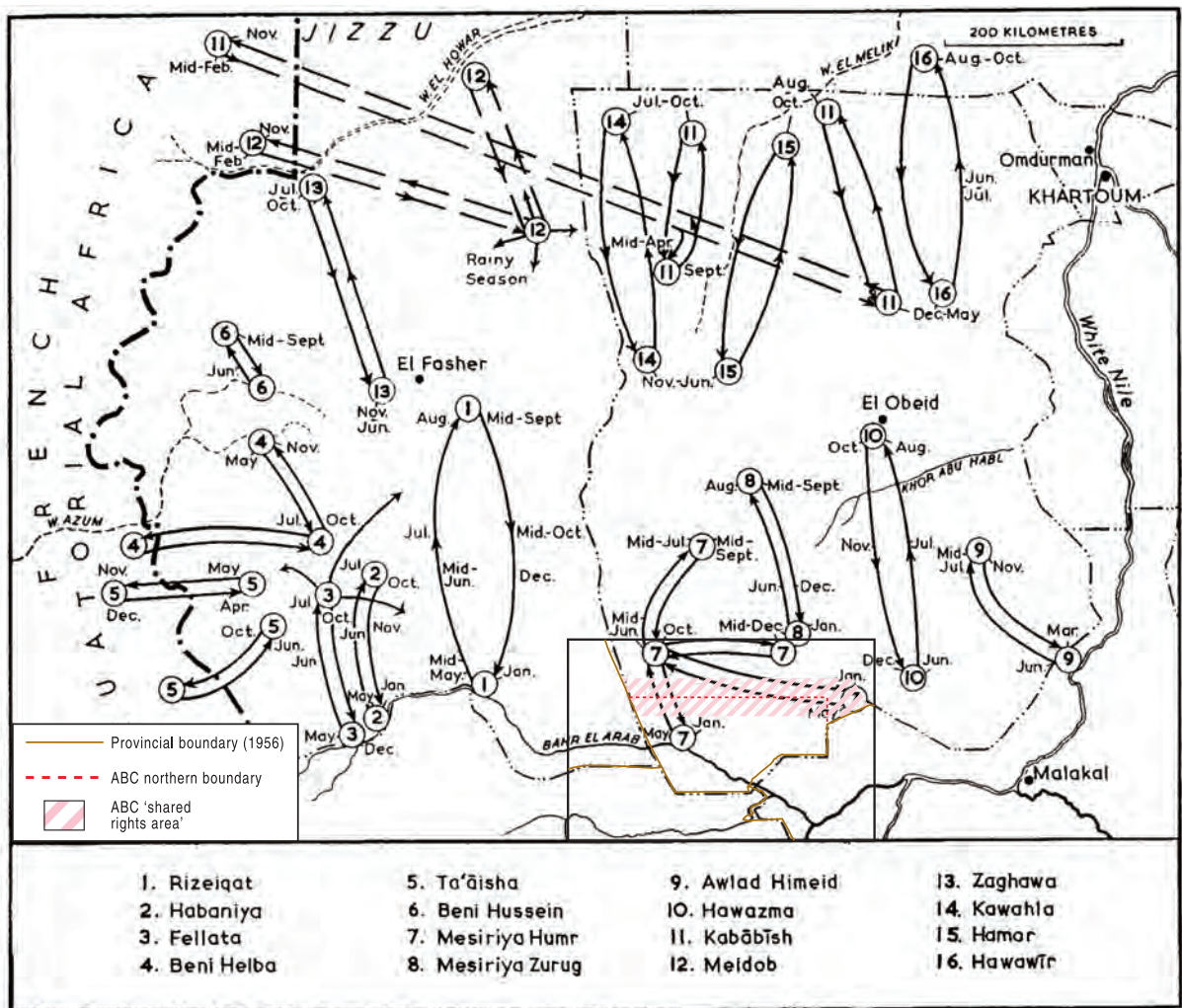


Figure 4. K.M. Barbour's map (1961)

Source: *The Republic of Sudan: A Regional Geography*, (1961), p.150



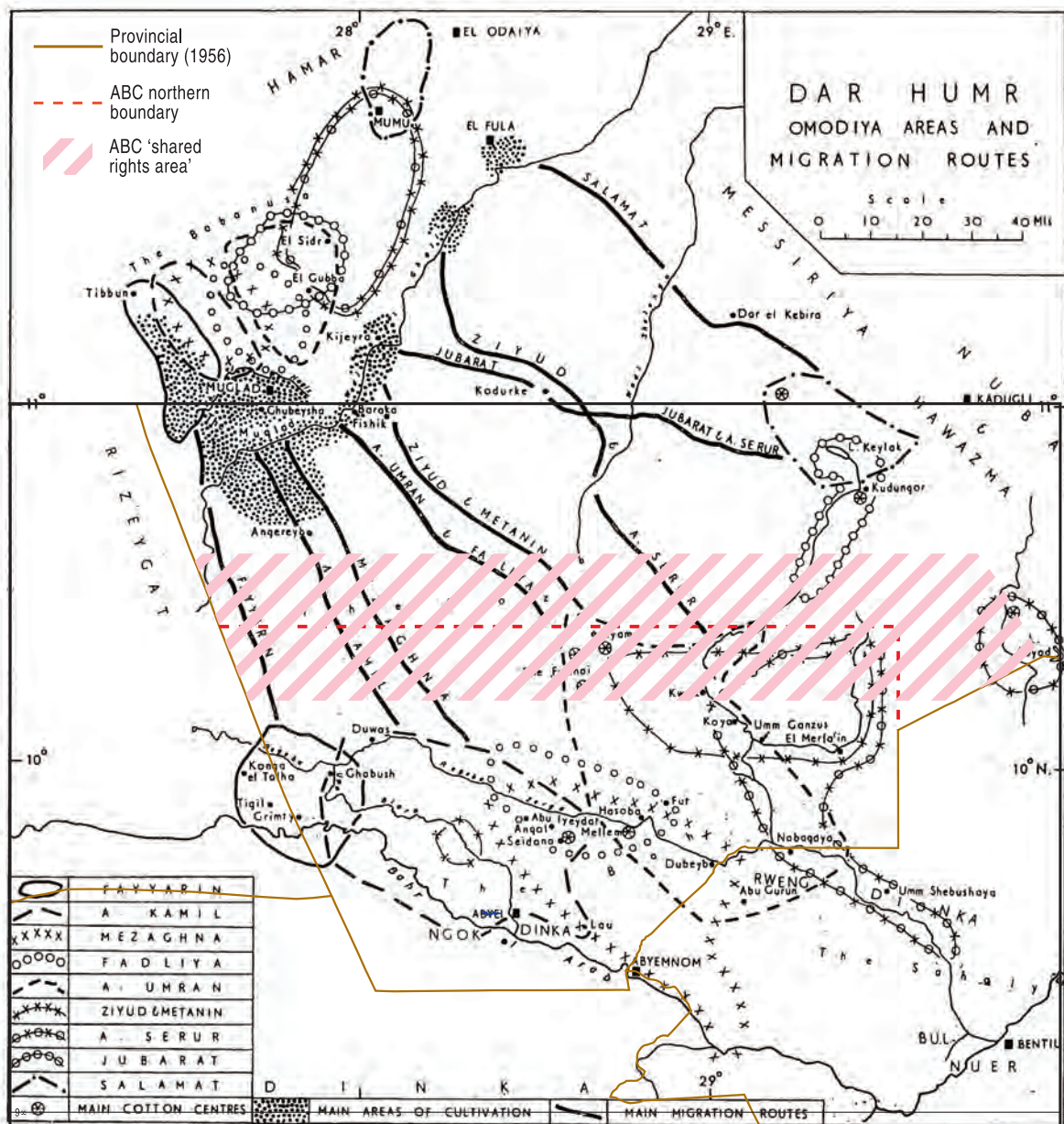


Figure 5. J.H.G. Lebon's map (1965)

Source: *Land Use in Sudan*, The World Land Use Survey, No.4, 1965, p.123



Bahr. Such an omission is striking; especially given that even the Report's own exhibits show that the Messeriya would come down to graze "either along the Bahr el Arab or in the ironstone plateau beyond it".<sup>719</sup> That the Messeriya are deliberately ignored in relation to the entirety of the Bahr region (and mentioned only once in relation to the goz) illustrates the imbalance of the MENAS Report.

514. The Report notes that "the Bahr region has significant levels of vegetation, pastures and land for growing crops in all but the height of the dry season"<sup>720</sup>; whereas the Goz exhibits "significant" amounts of vegetation in the wet season only.<sup>721</sup> The Report claims that:

"it is clear that the *goz* around Tebeldiya, and to the north and south of Tebeldiya has this quality of vegetation and has good pastures which would be suitable for cattle and maintain crops in the wet season".<sup>722</sup>

Tebeldiya is located at 10°35'N, 27°54'E: it is not surrounded by goz (which is semi-desert); it rather marks the end of the Muglad zone. It is not at all clear how far the MENAS Report considers the (non-existent) goz area "to the north ... of Tebeldiya" to extend. Elsewhere the Report posits rather more cautiously that: "*it is possible* that the *goz* supported Ngok permanent inhabitation".<sup>723</sup> Overall the MENAS presentation on Tebeldiya is thoroughly confused.

515. The dry season map (SPLM/A Counter-Memorial Atlas, Map 70) also suggests that the Ngok could not have lived in much of the Bahr, let alone the Goz during the dry season. The Report simultaneously concedes and disregards this paradox:

"the dry season images show lack of vegetation in the *goz* (and even in the Bahr) This does not necessarily provide that there was no permanent settlement in those areas of the *goz*, but that any occupants would need to have a perennial (or very near perennial) water source (such as a naturally forming well or pool of water). The satellite imagery does not permit us to identify whether or not there are currently any such permanent (or temporary dry season) wells or pools in the *goz*. Of course, in modern times mechanical wells have made it possible to extract water from the table below the *goz*, providing a year round water supply."<sup>724</sup>

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<sup>719</sup> Barbour, K.M., *The Republic of the Sudan*, (University of London Press, London, 1961) p. 165, SPLM/A Exhibit FE 18/24.

<sup>720</sup> SPLM/A Counter-Memorial, MENAS Report, paras. 148; see also para. 147 and SPLM/A Map Atlas, Maps 69 and 70.

<sup>721</sup> *Ibid.*, para. 151.

<sup>722</sup> *Ibid.*, para. 152.

<sup>723</sup> *Ibid.*, para. 144 (emphasis added).

<sup>724</sup> *Ibid.*, para. 149.

Thus, on the Report's own reasoning, there is no evidence to suggest the area around Tebeldiya or even much of the Bahr could have supported permanent habitation in 1905.<sup>725</sup> Yet the Report ignores this – presumably so as to fit within the SPLM/A's claim to 10°35'N – and contends that just because we cannot see evidence of water does not mean it is not there. The last comment regarding "mechanical wells" is irrelevant to the situation in 1905.

### ***E. Conclusions***

516. It is – to repeat – not the GoS case that the boundaries of the "Abyei area" should be drawn by reference to tribal or, to put it more politely, "cultural" considerations. Indeed it is not the GoS case that such a tribal boundary *can* be drawn at all. By contrast a provincial administrative boundary can be drawn. As soon as the Tribunal decides on the pre-1905 boundary of Kordofan, then the area now in Kordofan by reason of the transfer in 1905 of the nine Ngok Dinka chiefdoms is known for sure. If the southern provincial boundary of Kordofan was on the Bahr el Arab – as the administrators of the time thought and repeatedly wrote – then the "Abyei area" is as shown on Figure 17 of the GoS Memorial. It simply cannot be the case, given the record, that there was *no* southern boundary of Kordofan. And no-one has hitherto suggested, or ever depicted, the Ragaba ez Zarga as that boundary.

517. In fact it does not appear that the SPLM/A unequivocally believes in tribal boundaries either. It only believes in tribal *northern* boundaries (which remarkably turn out to be straight lines drawn to encompass oil fields). The eastern, western and southern boundaries of the ABC Experts' "Abyei area" are provincial, i.e. administrative, boundaries – none of which were in their present location in 1905, the crucial year of the transfer. Yet the SPLM/A readily accepts *those* provincial boundaries. The SPLM/A has not ventured to explain how this acceptance can be understood in the context of its tribal interpretation of the formula notwithstanding 856 pages of pleadings and associated reports.

518. But if a tribal boundary had, hypothetically, been able to be drawn around the nine Ngok Dinka chiefdoms as they were in 1905 (without regard to provincial boundaries), some things are clear from the evidence:

- (1) It would not have extended westwards beyond 28°E (or even as far) and certainly not to the Darfur boundary;

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<sup>725</sup> See also SCM Map Atlas, Map 22a.

- (2) It would not have extended northwards beyond about 9°30'N;
- (3) It would not have extended eastwards to encompass the lands of the Ruweng;
- (4) It would not have extended southwards to the area of the Twic.

519. A visual impression of that area – as at 1933 – is at Map 22a of the GoS Counter-Memorial Map Atlas. Given that the population of the Ngok Dinka must have greatly multiplied between 1905 and 1933, they cannot possibly have occupied and used a larger area in 1905.

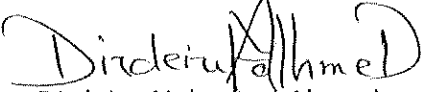
520. Above all, the evidence reviewed in this Chapter shows that the "Abyei area" selected by the ABC Experts bears no relation to the facts.



## Submissions

For the reasons set out in this Rejoinder, and rejecting the arguments contained in the Memorial and Reply Memorial of the SPLM/A, the Government of Sudan reaffirms its previous Submissions and 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) of the Government of Sudan's Memorial, being the area bounded on the north by the Bahr el Arab and otherwise by the boundaries of Kordofan as at independence.

  
Dirdeiry Mohamed Ahmed  
Agent of the Government of Sudan  
28 February 2009



## APPENDIX I

### RESPONSE TO CARTOGRAPHIC ISSUES RAISED IN THE SPLM/A REPLY

**Alastair Macdonald MA MSc FRGS**

1. This paper covers the following documents submitted by the SPLM/A in its “Reply Memorial”:
  - a. Section IV of the Supplemental Expert report of MW Daly dated 11 Feb 2009.
  - b. Appendix B to the “Reply”.
  - c. Sections B, C and D of the MENAS Borders report.
2. It also includes a section on the process of comparison with modern mapping which has become a major feature of the SPLM/A cartographic argument.

#### **A. The Daly Supplementary Report, Section IV**

3. Before commenting on Professor Daly’s remarks, I find it necessary to explain the way in which I approached the compilation of my first Expert Report. It was my intention to chronicle the gradual development of an understanding of the course of the Bahr el Arab and to show the consequential development of its depictions on contemporary maps. In doing this, I came across mistakes and contradictions. I discussed these and tried to produce a reasoned assessment which, in my view, was the best explanation. Based on a lifetime’s experience in surveying and mapping and 15 years’ experience of living and working in Africa, I believe that my conclusions are fully justified. They are consistent with the normal evolution of a major feature on a sequence of mapping stretching from the first stirrings of cartography in Africa to the years between the two World Wars when technology had made some advances but surveyors had yet to enjoy the advantages of aerial imaging and satellite navigation.
4. Professor Daly seeks to damn my arguments by force of expression often without evidence but simply relying on his opinions derived from his long experience of Sudan. The lack of paragraph numbering makes documenting this tendency more difficult but the following are examples. Extracts from Professor Daly’s paper are set in bold type.

**p.49: “Paragraph 1.2 states that the Bahr al-Arab "was to play an important part in the delimitation of the Kordofan/Darfur/Bahr el Ghazal provincial boundaries in the early part of the nineteenth century".**

**This implies that such delimitation was itself "important". Clearly it was not: ...**

5. This appears to be a completely unjustified implication. The Bahr el Arab played an important part, as I said – and that is all I said. I did not go on to infer from this that the “delimitation was itself important”. Professor Daly also misquotes me in

the extract that he uses. He suggests that I wrote "the nineteenth century". In fact, I correctly wrote "the twentieth century".

**p.49: "But delimitation was not important, nor was "trade", so Mr. Macdonald is left with no real reason for the "considerable efforts" he discovers (where none were made) and their "remarkably successful" result.**

6. Professor Daly unreasonably dismisses the efforts of Saunders, Wilkinson, Percival, Bayldon, Huntley Walsh and Comyn which were both considerable and successful. He may belittle their efforts and dismiss the importance of their work but the Governor General himself had a different view. In a Memorandum of 1904 under the heading "Explorations and Sudd Cuttings", he wrote:

"Exploration of the Bahr El Arab by Lieutenant Bayldon R. N. –  
Meanwhile, I am endeavouring by further explorations of little known rivers, such as the Bahr el Arab, the Kyr, the Lol, and other streams, to obtain information which may be of use in solving this interesting problem. Apart from irrigation considerations, the opening of these rivers will, I hope, lead to the establishment of communication with the little known districts of Southern Kordofan and Western Bahr el Ghazal, and to important commercial developments in the region."<sup>1</sup>

7. At the bottom of p.49, Professor Daly takes exception to the title of the paper. "The Western Sources of the Nile" seems to me a convenient and inoffensive term.
8. On p. 50, Professor Daly mocks the inclusion of a table of names (inserted for the benefit of the reader). I could have used the column title "Names that proved over time to have been mistaken" but that would have taken up more space than the table itself. He says of the Bahr el Homr: "**Nor is it at all clear why the author sees "Bahr el Homr" (the Bahr al-Humr) as the "mistaken" name of the Ragaba al-Zarqa, Bahr al-Arab, and Lol if it was not the correct name of any river**". I find this an opaque comment which I do not follow. He goes on to apply the word "gratuitously" to my definitions of 'bahr' and 'ragaba' though his own definitions seem close to mine. In this connection, a quotation from Barbour is relevant:

"The term *raqaba* means a shallow, meandering, clay-bottomed water channel, 20-100 meters wide, of which there are many in this area. The channels are connected with the Bahr el Arab, from which they flood in the summer, and they also receive water from local drainage. They are flanked by stands of *Acacia Arabica*."<sup>2</sup>

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<sup>1</sup> Reports on the Finances, Administration, and Condition of the Sudan, Memorandum by Major General Sir R. Wingate (1904), p. 8 (SM Annex 23).

<sup>2</sup> Barbour K.M., *The Republic of the Sudan*, 1961, p.69. This page is not currently in the record. However, at Exhibit 18/24 of the SPLM/A (Memorial or Counter-Memorial), the SPLM/A has annexed other pages from the same reference work. In order to place these sources in their proper perspective, the GoS is providing the relevant additional page(s) not included with the SPLM/A's exhibits.



**p.51: “The paucity of sources for the GOS Memorial's case is implicit in the first paragraph (2.1) of its Expert report:**

**The Bahr el Arab first appears on a Western map when it was mentioned by William Browne in 1799 as the Bahr el Ada. However, the depiction was vague and of little use. However, the Adda is one of the tributaries of the Bahr el Arab in its upper reaches so, if nothing else, Browne provides evidence that there was awareness of a river flowing from the vicinity of Hofrat en Nahas to the Bahr el Ghazal as early as the end of the eighteenth century.**

**The yawning gap between the Report's "sources" - Browne's mention in 1799 of a map (not provided) and a map of Equatorial Africa produced in 1881-1883 - (some 80 years) is noteworthy.”**

9. This implies that my Report reveals some unexplained deficiencies. What paucity is implicit in a decision to refer to, as the first map in the analysis, a map by Browne in 1799? Browne was referred to because it was the earliest map that I could find that showed some trace of the river. Ravenstein was chosen because his reputation as a conscientious compiler meant that he would have examined all the earlier available mapping and made a sensible choice, thus effectively covering the gap of 80 years and contributing to a shorter discussion of the issues. In truth, the 1863 map of Speke and Grant travels submitted by the SPLM/A<sup>3</sup> is a good example of what little was to be gained by detailed analysis of such maps.
10. At the bottom of p. 51, there comes the rather gnomonic claim that **“the Report did not attempt to equate omission with absence”**. The comments that follow do not help me to understand it. Professor Daly denies the Governors of Bahr el Ghazal and Kordofan, and indeed the Governor General himself, any status as authorities on the boundary, all of whom had made written reference to that boundary by 1905.
11. Professor Daly thinks my quotation in para. 3.3 from *Progress of Survey in the Anglo-Egyptian Sudan* is irrelevant and, with his background as an historian, that is perhaps understandable. However, I included it because it gives a useful picture of how the maps which are being presented in this case as evidence were constructed and what reliance the Survey Department was placing on the contribution of administrative officers in the form of detailed route reports.
12. Professor Daly complains of my treatment of Wilkinson. I believe that Wilkinson was quite justified at the time in taking the name of Bahr el Arab from his local informant. As to Professor Daly’s conclusions at the top of p. 54, I agree with the first, consider the second overstated (all that my text implies is that no one yet understood the extent and course of the waterway called Ragaba ez Zarga) and reject the third as a piece of unjustified speculation. My reference to Percival only shows that Percival himself – and no one else – accepted Wilkinson’s view. After all, when walking along the Ragaba el Zarga, he found it deserted so there was no one to ask about its name.

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<sup>3</sup> SPLM/A Counter-Memorial, Map Atlas, Map 73.

13. At the bottom of p. 54, Professor Daly makes derogatory comments on both my assessment of the Compendium published in 1905 and on Gleichen himself. My claim that “it brought together a wealth of information that would be useful to administrators, travellers and others with an interest in the Sudan” seems innocuous enough but Professor Daly sees it as consistent with my **“misapprehension of the embryonic Sudan Government as a well-settled administration in command of detailed data on the vast territories under its rule.”** I find that an excessive and unjustified reaction. He further claims that the editor of what he refers to as the *Handbook* was unknown. It is surprising that he did not read the preface by the Governor General which includes a number of statements that would have helped his understanding of how the work was compiled. Wingate says *inter alia*:

“the main work of editing and compiling has fallen on Lt Col Count Gleichen (the Editor)...”<sup>4</sup>

and on his transfer to Berlin:

“that he should have been able to continue his compilation in his new position speaks volumes for his industry and capacity.”<sup>5</sup>

and on the local input:

“The Editor’s thanks are particularly due to ... .. Captain H. H. S. Morant (Assistant Director of Intelligence), for assistance rendered in compiling and editing.”<sup>6</sup>

14. Professor Daly refers to **“the unreliability of the footless *Handbook*”** and elsewhere challenges its official status. Yet the front cover contains the phrase “A Compendium prepared by Officers of the Sudan Government”.

15. On p.56, Professor Daly suggests that I **“eagerly cite[] any reference that can be found in the scanty documentary record that will support a contention that the Humr were longstanding, permanent inhabitants of the whole of southern Kordofan down to and across the Bahr al-Arab, and even – contrary to all reliable evidence and their own reports in other places – settled on that land.”** I refute that claim. I confined myself to the topic and intention of the paper. I quoted Lloyd as part of the discussion of the confusion that arose from Wilkinson’s initial visit. The reason for the quote in 3.17 is given in the succeeding para 3.18.

16. Professor Daly (p.57) finds my use of the term “Exploration Period” inflammatory. It was an innocent attempt to find a phrase to refer back to the period covered by Section 3 which, after all, used the title “Intense Exploration”. I have been an explorer myself on four expeditions to the Arctic so I perhaps use the term rather more freely than Professor Daly. I am supported by the Governor General of the time, Wingate, who also used the word to describe what was going on.<sup>7</sup>

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<sup>4</sup> Gleichen, A., *The Anglo-Egyptian Sudan*, Vol I (1905), frontispiece, MENAS Exhibit 17.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> See above., para. 6.

17. Professor Daly's second point raises the issue of what level of depiction determines "clarity". For Professor Daly, that is a very high level, enabling him to condemn anything that offers a reasonable solution. For me, the test is whether there is sufficient indication of the course of a river to make its identification reliable. It cannot be denied that the river which rose in the vicinity of Hofrat en Nahas, flowed north of 10°N and then southeast past Sultan Rob's villages to Ghabat el Arab was shown correctly, although with varying degrees of precision, on most of the maps we have been considering. Where I see natural evolution from vagueness in the 19<sup>th</sup> century through to as good a profile in 1936 as the techniques of the time and the lie of the land would allow, Professor Daly sees only confusion and muddle. This might be explained by our different backgrounds.
18. We then come to an unjustified denigration of Lloyd, Wilkinson and Comyn. They are charged with being **"regrettable latecomers to that Holy Grail of global exploration – the source of the Nile"**<sup>8</sup>. Their determination to unravel the drainage of the western sources of the Nile had a significance which has been lowered **"to the point of nullity"**. Finally, Professor Daly asks with remarkable arrogance: **"Who has ever heard of Lloyd or Wilkinson or Comyn?"**<sup>9</sup>. A simple answer is the Director of Surveys, who respected and valued their contributions to the making of the maps of Sudan. These were men who took on challenging treks in hot, hostile country for periods of up to 3 months at a time. They did not achieve the fame of Speke and Grant, but they made a contribution to our understanding of the country they worked in that should not be mocked.
19. Professor Daly goes on to suggest that there is **"little evidence of when – or if – [their reports] were read."**<sup>10</sup> He should look at Fig. 10 in my paper, where there is an extract from the register of route reports kept by the Survey Department which contains the names of Bayldon and Comyn. Other pages refer to Wilkinson and Percival. He should read the Annual Reports of the Survey Department where the Director never fails to praise the contributions of administrative officers and to thank them for their work. While many reports were published in the classified Sudan Intelligence Reports, it is clear from the archives of the Survey Department that that Department must have had rapid access to this information. It had a highly developed system for transferring the information from route sketches and reports onto its maps and new editions were issued whenever there was a significant amount of change, sometimes in a simpler form than full lithographic printing.
20. In Section C, Professor Daly quite rightly points out a contradiction between paras 5.1 and 5.5 of my Report. My two attempts at time referencing went wrong. In para 5.1, I was referring to the last years of the 19<sup>th</sup> century and, in para 5.5, to the early years of the 20<sup>th</sup> century. I apologise for this and hope these comments rectify the misunderstanding.
21. However, at the top of p.59, I take issue with Professor Daly's claim that nothing in the quotation from my paper is correct. Professor Daly simply chooses to ignore the statements made by the Governors of the two Provinces in their Annual Reports. I accept that my claim that the status of the Bahr el Arab as a boundary

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<sup>8</sup> Second Daly Report, pp. 57-58

<sup>9</sup> Ibid. p.58

<sup>10</sup> Ibid.

gave greater impetus to the task of sorting out the courses of the waterways in the area is an assumption on my part, but I would argue that it is a reasonable assumption.

22. Professor Daly goes on to claim that the references to the transfer of Sultan Rob's territories to Kordofan in 1905:

**“make abundantly clear the government's intention, then, *not to define a border other than by reference to where the people actually were.***

**\*The Sudan Government's intention was to generate "boundaries" accordingly, not by reference to the course of a river. ... ..”**

Neither of these statements is true. As to the first of them, Professor Daly once again ignores the statements made by the respective Governors, referred to in the preceding paragraph. As to the second, there are two local examples of river boundaries which were in existence in 1905. The Bahr el Ghazal river was being used as a provincial boundary between the provinces of Bahr el Ghazal and Nuba Mountains) as a glance at Map 60 of the SPLM/A “Reply” Atlas will show. The Bahr el Arab itself was in use as a boundary between Darfur and Bahr el Ghazal.

23. In conclusion, I would suggest that Professor Daly misinterprets the intentions behind my paper and that too many of his sweeping criticisms are based more on personal opinion than evidence. Professor Daly betrays his lack of geographical training on many occasions – and my paper was fundamentally geographical in approach.

## **B. Appendix B of the SPLM/A Reply**

24. This Appendix likewise contains a greater number of errors than one might expect from a professional examination of the maps in question. Extracts from the Appendix are quoted in bold type with the GoS comment following.

**1. The cartographic evidence also confirms that there was no determinate provincial boundary between Kordofan and Bahr el Ghazal in 1905 (or at any time before 1911 at the earliest). As discussed below, there was no official Sudan Government map prior to 1905 that identified a Kordofan/Bahr el Ghazal provincial boundary (although official Condominium maps did identify *other* provincial borders). At the same time, the cartographic evidence also shows very clearly that the “Bahr el Arab” was used variously to refer to a number of different watercourses in the Bahr region, with no consistent use of the term being arrived at until at least 1907 or 1908.**

25. The cartographic evidence offers no such confirmation. It merely shows that the Sudan Government did not publish any maps showing any provincial boundaries at that time, although the Mardon map of 1901/1903, showing all province boundaries, was included in the official 1905 *Compendium*. The claim that “official Condominium maps did identify *other* provincial borders” implies that the Kordofan/Bahr el Ghazal boundary was in some way of less interest to Khartoum.

This claim has not been supported by any evidence. The only internal boundary shown on official maps at that time was the boundary of Darfur which was in a different, tributary relationship and was not a province.

26. The phraseology used to describe the application of the name “Bahr el Arab” gives an exaggerated indication of the facts – it was applied to only two waterways.

**2. Preliminarily, the GoS Memorial and accompanying Macdonald Report suggest that the Abyei region was well mapped from the late 19<sup>th</sup> century. The Government’s Memorial acknowledges that “[a]t the beginning of the Condominium,” the “course of the western rivers was uncertain.” The Government nonetheless goes on to declare, without support, that “determining the precise course and navigability of the waterways became a high priority. ... ..”**

27. The GoS Memorial and the accompanying Macdonald Report do not give the impression that what the SPLM/A anachronistically describes as the “Abyei region”, was “well mapped” at the end of the 19<sup>th</sup> century. This is confirmed by the contradictory text at para 3: “As Professor Daly observes, the Government’s acknowledgment of the limited Condominium understanding of the Bahr region is correct”. The importance of navigability is referred to by Wingate in 1904 as mentioned above<sup>11</sup>.

**4. The lack of any real understanding by Anglo-Egyptian officials of the course of the Kiir/Bahr el Arab prior to 1905 is illustrated on Map 61 ...**  
...

28. The value of Map 61, which is questionable, is discussed later in this paper in Section C.

**7. As Browne’s map makes plain, not only is the river relied upon by Macdonald as supposed evidence of “awareness” of the Kiir/Bahr el Arab given a completely different name (“Bahr el Ada”), but the river is in fact barely depicted on the map at all and, insofar as it is, the depiction is wildly inaccurate. The Bahr el Ada is depicted at 29° E longitude and north of 10° N latitude, far from the location of the Kiir/Bahr el Arab. Although not mentioned by the Government, there is no suggestion whatsoever on the map of any boundary between Bahr el Ghazal and Kordofan provinces.**

29. The Bahr el Ada is a tributary of the Bahr el Arab. Reference was made to this map merely to show that there was some understanding of a tributary coming into the Nile system from that area at that time. The map itself did not appear to offer any particular guidance on the course of the river and, for this reason, was not included as an exhibit. It seems quite unreasonable to expect modern standards of accuracy from a map that was drawn 200 years ago and no cartographer would do so. The map is called “wildly inaccurate” but it does at

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<sup>11</sup> See above, para. 6

least display a first, albeit vague, understanding of the presence of a tributary river, which was the sole purpose of the reference.

30. In paras 8 to 24, more old maps of the 19<sup>th</sup> century are subjected to a comparison with modern mapping based on satellite imaging. Because the comparison is an unsophisticated process displaying little understanding of the difficulties facing any mapping of that era in Africa, the conclusion is drawn that these maps are “far off course”, “inaccurate” or “too far south”. This is dealt with in Section C.

**27. Additional confusion is introduced in the 1898 Stanford map at the junction between the Kiir/Bahr el Arab and Bahr el Ghazal, with a triangular pattern that appears for the first time (and is repeated in later maps). Judging by the 15 minute south discrepancy in the location in the juncture of the Kiir/Bahr el Arab and Bahr el Ghazal, the more northern dotted line in fact appears to be the Ngol/Ragaba ez Zarga, where it has its juncture with the Bahr el Ghazal. If so, it is erroneously marked as rejoining the Kiir/Bahr el Arab upstream. Moreover, the more southern Lol appears (again erroneously) to reconnect with the Bahr el Ghazal south of Lake Ambady, creating a further, and mistaken, depiction that is repeated in later maps.**



**Fig. 1 Extract from GoS Memorial, Map Atlas, Map 3**

31. This map is not a “Stanford” map but a War Office map published by Stanford on its behalf. The SPLM/A comment is difficult to follow; an extract from the map is at Fig. 1 to assist the reader’s understanding. The reference to the “more northern dotted line” is taken to mean that section of the triangular pattern that

is denoted by a pecked line<sup>12</sup>. If so, it is a fanciful interpretation to suggest that it is the Ragaba ez Zarga. The pecked channel is only about 30 miles long, leaves and rejoins the Bahr el Arab, has no direct connection to the Bahr el Ghazal and is some 25 miles distant from where the Ragaba might be.<sup>13</sup> In any case, there was no certain knowledge of the Ragaba ez Zarga at that time. The reason for the triangular depiction is simpler than the SPLM/A interpretation makes out. The cartographer has chosen for whatever reason to show a more complex pattern of channels as the Bahr el Arab approaches the Bahr el Ghazal. This more complicated choice can be justified by the number of old channels that can be seen on modern satellite imagery of the area. It is an area where there are a multitude of channels, old and new.

32. On the map, the point where the Bahr el Ghazal turns to the northeast (the conventional position of Ghabat el Arab) is placed at approximately 9°N. The river junction is about 3 minutes (or 3 miles) south of that point<sup>14</sup>. Reference is made in the extract above to the “15 minute south discrepancy” at the “juncture” but no information is given as to what data source the 1898 position is to be measured against. Taking Map 61 as a convenient source, the latitude of the “juncture” on that map is about 9° 05’N giving a discrepancy of about 8 minutes, not 15. Why this discrepancy should lead one to assume the pecked line represents the Ragaba ez Zarga is not immediately clear. The Bahr el Homr (not named as the Lol) is shown on this map as joining the Ghazal south of the Bahr el Arab and, in 1898, there may well have been a channel in that area that led to that depiction. It is, of course, agreed that later depictions moved the Lol to join the Bahr el Arab further upstream. The reference to “Lake Ambady” is also misleading as it is not shown on the map under discussion.
33. Whatever the reasons for the more complex presentation of the area of the confluence, depicting the Ragaba ez Zarga was not one of them.

**30. The GoS Memorial relies on a 1901 Skeleton map of Sudan from the Intelligence Division of the War Office which depicts railways, telegraphs and routes (GoS Map 6). As expected given that this is a Skeleton Map “to illustrate railways, telegraph and Routes,” no provincial boundaries are depicted on the map.**

34. This comment again reflects the unfamiliarity of the author with cartography. The Skeleton Map was intended as a base map on which information about a specific topic might be overprinted e.g. Post Offices. The title “POST OFFICES” would then be printed to appear below the line “to illustrate”. The reference at the bottom of the title box to railways, telegraphs and routes is merely part of the legend describing features already printed on the map and might be added to at the

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<sup>12</sup> It is also possible that the reference is to a watercourse that is shown by a pecked line entering the Bahr el Ghazal at Lake No on the meridian of 30°E. The position of its mouth at Lake No and the location as far east as 30° makes this an equally unlikely candidate for the Ragaba ez Zarga.

<sup>13</sup> GoS Rejoinder, Figure 2.

<sup>14</sup> The map is really too small a scale to deal in such small distances with precision.

overprinting stage. This is not relevant to the case but does indicate the standard of review in this Appendix.

35. More confusion follows in paras 32 and 33 where a double channel south of the junction of Bahr el Arab and Bahr el Ghazal<sup>15</sup> is taken to be Lake Ambady even though no such name appears on the map and the position of the double channel is well north of the true position of the Lake<sup>16</sup>. In fact, in the depiction of the junction, the Skeleton Map follows very closely the depiction on the 1898 War Office map, as one might expect.

**42. The 1901 Mardon Map, which was created on the very small scale of 1:8,000,000, was included in Volume 2 simply to provide a superficial, at-a-glance overview of the Sudan. A comparison of Mardon's 1901 map with a contemporary image of the Abyei Area also illustrates the grossly simplistic and inaccurate nature of Mardon's work. An historic overlay map at Map 35 illustrates graphically how inaccurate the river courses, and in particular the Bahr el Arab and Bahr el Ghazal, are, and how much detail is missing.**

36. Here again there is an unreasonable expectation of what can be achieved. The scale of the map is so small that a great deal of generalization is to be expected and, indeed, is essential if the map is to be legible.

**44. The 1905 Gleichen *Handbook* contains a detailed Map of "The Anglo-Egyptian Sudan, compiled in the Intelligence Office, Khartoum, May 1904" (the "1905 Gleichen Map"), referred to above. The 1905 Gleichen Map contains no boundary between Kordofan and Bahr el Ghazal, whether along the Kiir/Bahr el Arab or otherwise. That is true notwithstanding the fact that other boundaries are shown on the 1905 Gleichen Map (for example, of Darfur).**

**45. As the historic overlay at Map 37 (*The Anglo-Egyptian Sudan, Intelligence Office Khartoum, 1904* (in Gleichen, 1905), – Overlay) shows, the Kiir/Bahr el Arab is confusingly identified on the 1905 Gleichen Map as the "R. Kiir or El Gno" and the river's fork with the Bahr el Ghazal is again mapped significantly south of the actual fork. The Ngol/Ragaba ez Zarga is incorporated, but erroneously named the Bahr el Arab. Neither river is correctly placed, even taking into account the name confusion.**

37. Here again, an apparent lack of cartographic experience shows through. Though the map under review is "detailed", it is at the small scale of 1:4,000,000 and the amount of detail is limited by that scale. The final sentence of para 44 is very misleading. "Other boundaries" (plural) are not shown. The only boundary on the map divides the tributary state of Darfur from the rest of Sudan. The

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<sup>15</sup> The existence of this double channel even today can be confirmed by an examination of SPLM/A Map 60.

<sup>16</sup> See SPLM/A Counter-Memorial Atlas, Map 61 for a map which shows both features.



Bahr el Arab is not shown as the “Kiir or El Gnoi”. The river named on the map as the Bahr el Arab just above 10°N and again as it crosses 28°E has been diverted (because of Wilkinson’s claims) up to Mellum where it follows a section of the waterway that is now known as the Ragaba el Zarga before returning southeast to join the Bahr el Ghazal where it changes direction from flowing north to northeast. It is an exaggeration to say the “the Ragaba el Zarga has been incorporated” – at a rough and generous guess, about 3% of its length has been incorporated. The “River Kiir *or* El Gnoi” is, if the map is carefully studied, actually named the “Kir or El Gurf”. Its name is not confusing even if its course might be. An explanation for the mis-mapping of the course of the Kir is given in my first Expert Report<sup>17</sup>.

38. Paras 46 and 47 discuss Comyn’s map. As para 47 suggests, the location of Sultan Rob’s village is inaccurate and can be discounted as a mistake by Comyn. But to then claim “the river depicted in Comyn’s map as the “Bahr el Arab” does not go anywhere near Sultan Rob’s” as another “fundamental error” is far fetched. The river should not go past Sultan Rob’s because Sultan Rob’s has been given a significantly wrong position. There is nothing wrong with the course of the Bahr el Arab on Comyn’s map if one applies the standards that one can expect from such a map.

**[Footnote] 2035: GoS Memorial, at para. 322 (quoting Macdonald Report, at para. 4.4). The authors of the 1907 Northern Bahr el Ghazal Map were much less categorical about their product than the Government Memorial is. The map contains the caveat “[t]here are practically no astronomically fixed positions on the sheet. The topography of the North East corner and the South portion of the map are probably approximately correct. The remainder however has been compiled from sketches which there is no means of checking and which must not be relied on.” By contrast, the Map of Southern Bahr el Ghazal from the same series has a more reassuring legend: “Most of the principal places on this sheet have been astronomically fixed. The courses of the rivers are not accurately known, and some of the roads, notably those from Wau to Tembura’s, and Yambios to Rikita, may be shown wrong. But within the Sudan Boundary the distances between the principal places are probably fairly correct.”**

39. It is quite true that the 1907 map of Northern Bahr el Ghazal contains the caveat quoted. The question is really what is covered by the phrase “the North East Corner and the South portion”. To a cartographer’s eye, this would appear to relate to the area of detailed mapping in the eastern third and southern third of the map. One only has to look at the depiction of the Bahr el Arab outside this area to realise that it is not a reliable representation of the river’s course. However, the information it conveys is that there is a river flowing in this general area coming down from Darfur to Sultan Rob’s village and that is sufficient for our purposes.

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<sup>17</sup> GoS Memorial, Macdonald Report, para 3.9.

40. In para 54, reference is made to the label “Approximate Boundary” applied to the Kordofan boundary. There is only one such label and that is in the northwest of the province, well over 250 miles to the north of the area of interest in this case. It is irrelevant.

**58. The 1913 Kordofan Map contains multiple inaccuracies. It labels the Ngol/Ragaba ez Zarga as the “Bahr el Homr.” The Nyamora/Ragaba Umm Biairo appears to be depicted, but is described later along its course as the “Bahr el Arab.” It also appears that the Kiir/Bahr el Arab is erroneously described as the “Lol” for at least part of its middle course. The inaccuracy of the course of the Kiir/Bahr el Arab is depicted in Map 49.**

41. The mistakes in this paragraph were made in the SPLM/A Memorial and were discussed in my Second Report<sup>18</sup>. The Ragaba um Bieiro is not depicted on the 1913 Kordofan map; the Kir/Bahr el Arab is not depicted as the Lol on the same map. Again, the map is at a scale of 1:2,000,000 and was prepared 95 years ago. It is not going to match a modern map based on satellite imagery.
42. In para 60, the argument about what is reasonable accuracy resurfaces. It is claimed that the Kiir/Bahr el Arab is “grossly off course” on the 1914 Edition of sheet 65-L. In fact, cartographers of the day would have been quite pleased with their achievement.

**63. The GoS relies on a 1916 map of Darfur prepared by Geographical Section of the War Office (GoS Map 16). The Government fails to mention, however, that this map also shows the boundary between Kordofan and Bahr el Ghazal as running north of the Kiir/Bahr el Arab until approximately 24°30’ E longitude, then swinging south to run beneath the Kiir/Bahr el Arab and then arch northwest to the Darfur frontier. This line is depicted at Map 60.**

43. This is another example of a lack of cartographic competence. Clearly, there is a gross error in the longitude quoted which, it would seem, should be 29°. But, even allowing for this, it is very difficult to follow the claim that the boundary runs first north of the Bahr el Arab and then swings south. Coming from the east, the boundary follows the Bahr el Ghazal<sup>19</sup> up to the mouth of the Bahr el Arab, turns up this river to the junction with the Lol before running to the south of it by following the Lol and Amadgora rivers, thence up to the Darfur frontier. This is how the boundary is actually depicted on SPLM/A Map 60.

**64. The 1918 Nyamell Map is likely a misnamed map in the Achwang (and later Abyei) Sheet 65-K Series. A copy of this map is at Map 83. The approximate provincial boundary depicted in the 1918 Nyamell Map is identical to that in the 1916 Achwang map, apparently undoing the**

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<sup>18</sup> GoS Counter-Memorial, *Mapping Issues raised by the SPLM/A Memorial*, p.18, para 36.

<sup>19</sup> In accordance with a common cartographic custom, there is no specific boundary symbol shown on this map for any section of the boundary that runs along a river.

**variation introduced by the 1916 Darfur Map. This line is depicted at Map 60.**

44. More confusion follows in para 64. The 1918 Nyamell map<sup>20</sup> is not misnamed – it takes its name from a government post in the southwest corner of the map. The boundary depicted on the 1918 map is not the same as the June 1916 Achwang map<sup>21</sup> – on the later map, it has, in the north, been moved further to the west through a place called Debbat el Khashkhash. This place name continues to feature on later editions of the map and does change its position again, the boundary moving to continue passing through it. The 1916 Darfur map<sup>22</sup> did not introduce a variation from the June 1916 Achwang map; the two maps show roughly the same boundary alignment north of the Amadgora river<sup>23</sup>. It is the 1918 Nyamell map which introduces the change.

### **C. The Question of Comparison**

45. The SPLM/A has made extensive use of comparisons of old mapping with a detailed depiction of the drainage of the Bahr taken from modern mapping based on satellite imagery. Its intention is to rubbish all the maps that were produced in the period leading up to 1936. But a simplistic method has been used. When comparing maps from different eras in order to discover their inaccuracies, it is necessary to consider a number of issues.
46. Firstly, what can be expected of a map in the period with which this case is concerned? In early 20<sup>th</sup> century Sudan, the biggest problem was the determination of longitude. Simple longitude determination requires accurate time. The Greenwich Mean Time of the highest elevation of the sun in the observer's location (ie local midday) gives longitude in units of time and this can easily be converted into degrees. The drawback is that one minute of error in time produces 15 miles of error in longitude. So travellers on long treks, as many of the Sudan officials were, would always have a problem with knowing how closely their watches were keeping correct time. Eventually, the telegraph line and, in the 1920's, the use of wireless time signals, improved the quality of time and so longitude determination improved. It is possible to determine time astronomically but this would be beyond the expertise of most of the administrative officers concerned.
47. Position in longitude on north-south treks could also be controlled by the distances and bearings taken by travellers. The accuracy of this method would depend on how accurate the distances and bearings were. Some travellers knew their own rate of travel and assumed it was uniform over flat ground; others used bicycle wheels fitted with a milometer.

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<sup>20</sup> SPLM/A Counter-Memorial Atlas, Map 83.

<sup>21</sup> GoS Memorial, Map Atlas, Map 15; SPLM/A Memorial Atlas, Map 50.

<sup>22</sup> GoS Memorial, Map Atlas, Map 16.

<sup>23</sup> The comparison is necessarily very rough as one map is at a scale of 1:250,000 and the other 1:9,000,000.

48. Latitude was much less of a problem. A careful observer taking a measurement of the maximum elevation of the sun at midday was all that was required. But mistakes could be made by individual observers and there was no reliable check on each individual determination. So undetectable errors could and did occur from time to time.
49. However, in the flat lands of the Bahr, there was another problem. The traveller was unable to get any view of the ground to trace the twists and turns of the rivers and the way they were interwoven.
50. This means that one can expect to find significant east-west errors and it is unreasonable to expect a detailed depiction of river courses until the arrival of aerial photography which, in the case of the Sudan, was after the Second World War. It was simply not possible to produce maps beyond this level in the period with which this case is concerned.
51. The SPLM/A has ignored these restrictions in its comparisons. No attempt has been made to remove longitude error by, for instance, moving each historical map eastwards so that the longitude error at Ghabat el Arab is removed. A glance at the SPLM/A's Map 61<sup>24</sup> will alert any surveyor to a problem of "systematic error" – that is to say, a similar error in a set of data under review. In fact, an experienced observer would identify four families of map having similar errors when under comparison as follows:
- i. The 1883 Ravenstein, 1884 Lupton Bey and 1898 Marchand maps.
  - ii. The 1898 War Office, 1901 Mardon and 1901 War Office maps.
  - iii. The outliers, viz. the 1799 Browne, 1863 Speke and Grant and 1875 Nachtigal maps.
  - iv. The lone special case: the 1904 Intelligence Department map.
52. Groups i. and ii. have similar but slightly different "systematic error". This error arises from a difference in latitude and longitude which can be explained by the era of the mapping (1883 to 1904<sup>25</sup>). As actual latitudes and longitudes are immaterial to the boundary definition in this case (no part of the boundary in 1905 is so determined), it would be more illuminating to remove the systematic error by a block shift so that each map coincides with the modern depiction at Ghabat el Arab. It would then be possible to consider the relationship of historical depictions. That is not to say that these historical comparisons have any effect on the arguments about the degree of understanding of the Bahr el Arab and whether that degree was sufficient for the purpose. But it does provide a better understanding of the depiction of the Bahr el Arab over time.
53. The outliers can all be dismissed as early and relatively poor attempts to portray the Bahr el Arab. The Browne map has already been commented upon<sup>26</sup>. A simple inspection of the 1:6,000,000 1863 Speke and Grant map<sup>27</sup> reveals serious errors in the course of the Nile and in the way that the "Bahr el Arab?" has been connected

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<sup>24</sup> SPLM/A Counter-Memorial Atlas, Map 61.

<sup>25</sup> The comparison with a 1799 map is discounted as being manifestly absurd.

<sup>26</sup> See para 29.

<sup>27</sup> SPLM/A Counter-Memorial Atlas, Map 73.

to the “Bahr Solongo?/Fl. Kidi”. The course of the Nile from Khartoum down to the big bend north of 11°N is reasonably accurate but thereafter, the course runs in a direction too far to the southwest so that the bend at 9° 10’N (at Taufikia) to a westerly direction is some 110 km too far to the west. The connection of the Bahr el Arab to the Solongo/Kidi introduces an error in the position of the confluence which is much too close to the Taufikia bend but, because of the error at Taufikia, appears to be in a longitude of 29° 55’ E of Greenwich. This means that in the comparison on Map 73a, the course of the Bahr el Arab appears to follow that of the Ragaba ez Zarga initially. However, the map in this area is completely unreliable and should be rejected. The 1875 Nachtigal map<sup>28</sup>, produced at a scale of 1:2,000,000, places the junction of the Bahr el Arab half way along the northeast section of the Bahr el Ghazal and gives the former a very flat profile along 9° 30’N without any loop to the north above 10°N. This depiction follows that of an earlier German map of Schweinfurth’s discoveries<sup>29</sup> produced some time after 1871. It bears no relation to the known profile of the river and should also be rejected.

54. The special case is the 1904 Intelligence Department map which contains the mistake fostered by Wilkinson. This map has been discussed above at para. 37.
55. In constructing Map 61, it would have been more illuminating to accept that there was a longitude error in the historical maps that probably varied from place to place. By eliminating that error at the mouth of the Bahr el Arab, a more sensible comparison of the course of the river would have been achieved. If the latitude error is also removed, a comparison is made based on a known starting point. Fig. 2 and 3 are examples of such a comparison. In Fig. 2, the maps in group i. above have been moved to fit the modern position of the mouth of the Bahr el Arab. In Fig. 3, the same has been done to the maps in group ii. In fig. 2, the improvement in correlation is not particularly marked and there is only good agreement over the lower part of the course. However, in Fig 3 the improvement is very marked indeed. The differences with the modern waterway depiction that remain in Fig. 3 are exaggerated because the comparison is being made on a base map whose scale is greater than the maps under review. The scale of the base map is of the order of 1: 1,200,000<sup>30</sup> whereas the maps under review are at 1:4,000,000 to 1: 8,000,000. Thus the differences are enlarged by a factor of approximately 3 to 6.
56. The question of scale is another serious presentational problem with the comparisons on SPLM/A Map 61. The maps chosen for comparison range in scale from 1: 1,000,000 to 1: 8,000,000. The extracted detail is presented on a map (Map 61) that has no quoted scale<sup>31</sup>. Measuring the scale bar suggests that the scale is of the order of 1:1,100,000. Thus the old maps have all been enlarged (with one exception), one by a factor of over 7, to again create an exaggerated visual impression of the difference with modern mapping. A balance has to be struck between clarity and probity but the exaggeration produced by the justifiable

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<sup>28</sup> SPLM/A Counter-Memorial Atlas, Map 76. The map was reprinted in Cairo with the confusing annotation “Photographically produced ... from an original at 1:4,500,000 scale”

<sup>29</sup> SPLM/A Counter-Memorial Atlas, Map 75.

<sup>30</sup> It is difficult to control scale through the drafting and printing process. This does justify the lack of a clear statement of scale as a representative fraction. The reader has to use the scale bar to determine scale.

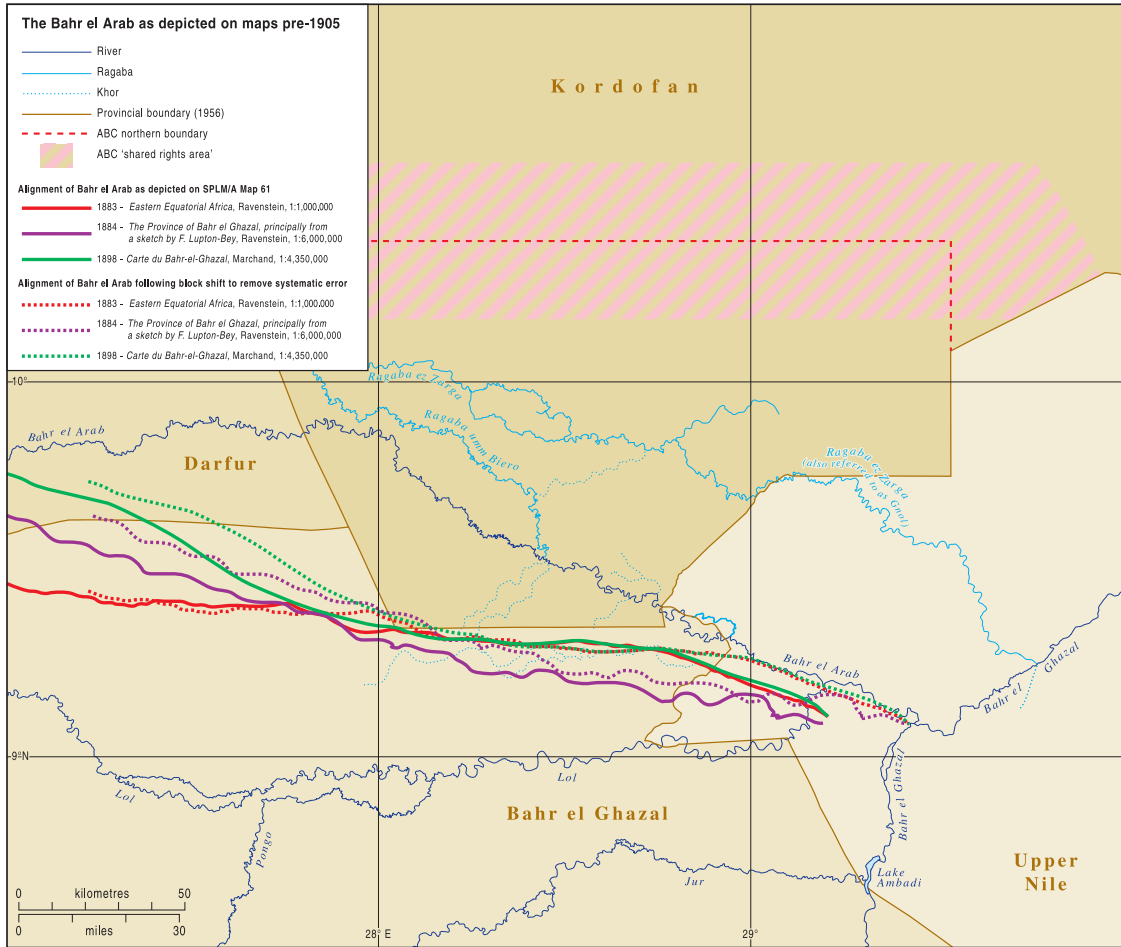
<sup>31</sup> See footnote 24 above.

decision to go for clarity has not been explained. To a surveyor, that is unprofessional.

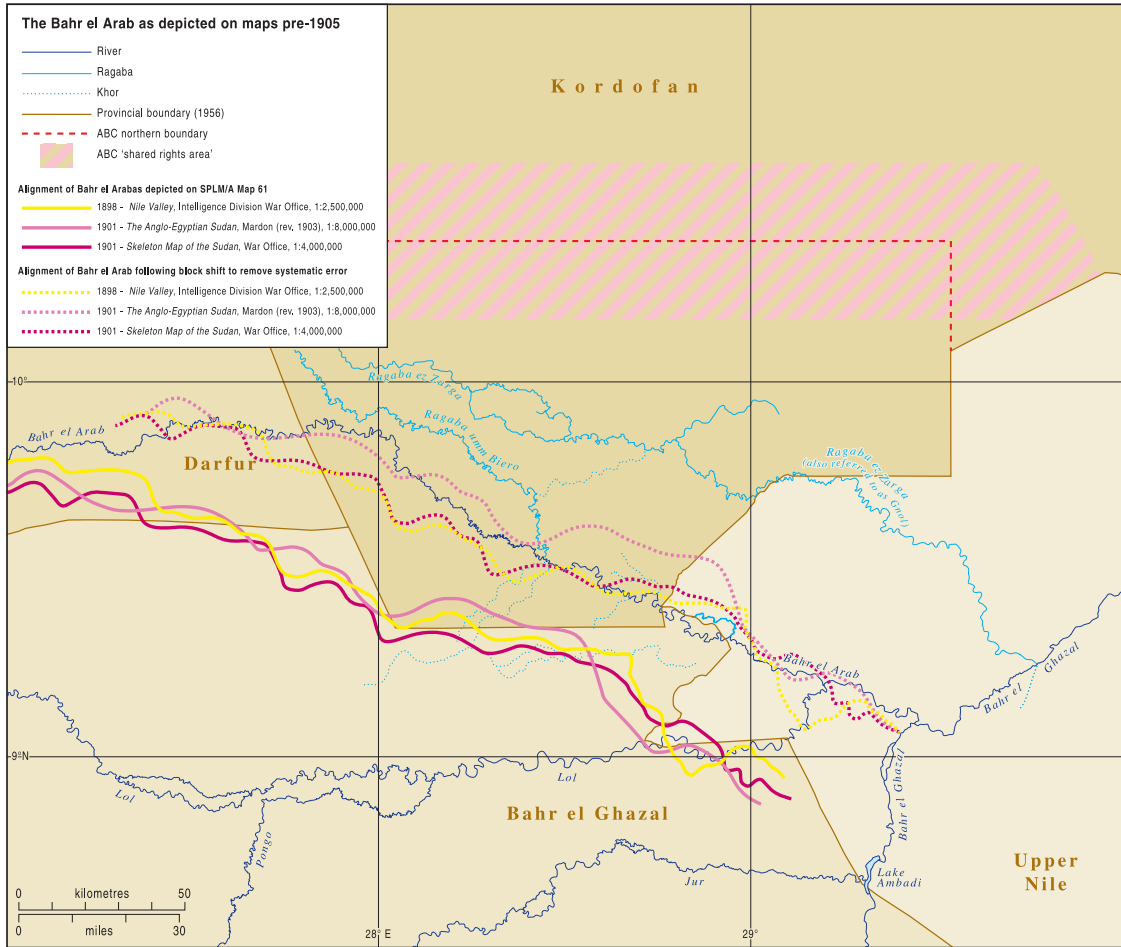
57. Where Map 61 is useful is in displaying very powerfully how the cartographer who produced the 1904 Intelligence Department map<sup>32</sup> treated Wilkinson's information. It can be clearly seen that he simply diverted the generally accepted course of the river up to Mellum and onto a section of the Ragaba ez Zarga before returning it southeastwards to Ghabat el Arab, the known mouth of the Bahr el Arab. Of course, the discrepancy at the confluence has been visually magnified nearly 4 times by the SPLM/A comparison procedure.

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<sup>32</sup> GoS Memorial Map Atlas, Map 7.



**Figure 2: Effect of block shift to correct systematic error in depiction of the Bahr el Arab on pre -1905 maps (group i.)**



**Figure 3: Effect of block shift to correct systematic error in depiction of the Bahr el Arab on pre -1905 maps (group ii.)**



58. The majority of the maps under comparison on Map 60 are of a scale (1:250,000) larger than the base map – and therefore more suitable for the kind of comparison undertaken by the SPLM/A (and by the GoS in Figure 14 in its Memorial) – but there are some examples of small scale maps being enlarged, most notably the 1916 Darfur map which is enlarged by a factor of 9.
59. In summary, the SPLM/A comparisons in Map 61 are unprofessionally presented to give an exaggerated visual impression of the comparisons. They include some early maps which are seriously deficient in their depictions and, if these three outliers are removed and the remainder adjusted for longitude error, there would remain a much more consistent picture of the river. This is not surprising because cartographers of the 19<sup>th</sup> century, in the absence of any new information from the ground, would rely very much on the maps that had already been published. Thus a graphic such as Map 61 does not really advance the argument at all.
60. As for the rest of the comparisons of individual maps throughout the SPLM/A case, similar questions have to be asked. How important is latitude and longitude? How precisely could determinations of these elements be made at the time of the map? Is it more important to remove the longitude error before carrying out a comparison? Finally, is the difference one that might be expected of maps throughout Africa at that period?
61. This Appendix, like the references to cartography in the earlier SPLM/A Memorial, contains many errors and misunderstandings, some of them repeated verbatim from the Memorial. It relies to a great extent on a comprehensive evaluation of virtually every map in the GoS Memorial Atlas by a comparison with the depiction of a number of waterways taken from mapping derived from satellite imagery. This technique has been applied in a simplistic manner and should be discounted. There is no doubt that the aim of the SPLM/A is to imply that all maps of the period were unreliable and greatly contributed to a general confusion that they claim surrounded the location of the Bahr el Arab. In fact, the depiction of the Bahr el Arab followed a natural course of evolution with discrepancies that were of an order that would occur, in the era under consideration, in any remote part of Africa. However, as it has turned out, even someone as early as Ravenstein did get the general existence and course of the river correct. Once Wilkinson's incorrect name gathering was disposed of, all the later depictions of the river were consistent and sufficient.

#### **D. The MENAS Report**

62. The MENAS Report will be examined section by section from Section B onwards before returning to Section A: Conclusions. Extracts are again in bold type.
63. In Section B, the authors are generally correct in what they say but they are, rather optimistically, looking for evidence of surveyors carrying out professional surveys. They imply that if surveyors have not produced accurate maps, boundaries are impossible to define. This may be an understandable view from London in the 21<sup>st</sup> century but it bears little relation to Africa at the start of the 20<sup>th</sup> century. If

boundary agreements had had to wait for accurate mapping, many would not have been made. As Brownlie has observed:

“Within a framework of overall political bargaining, the accidents of prior exploration and military penetration were often to determine delimitation as between Britain, France and Germany. Thus was the map of West Africa drawn. In any case lines were commonly drawn on maps when there was no very great knowledge of the region concerned. The boundaries which emerged were generally based upon geographical features, especially rivers and watersheds, and astronomical or geometrical lines.”<sup>33</sup>

64. The MENAS conclusion in para 16 is that any boundary “based upon riverain features as of 1905 would necessarily be approximate, provisional and unreliable”. While its depiction on maps might be approximate to start with, it would be gradually improving with time and this was a very common state of affairs in Africa at the time. But that is no reason why the boundary should be regarded as provisional, a term which implies that the boundary might be changed to follow some other line. Neither is there any reason to call it unreliable – both provincial administrations knew that the boundary was the Bahr el Arab and could rely on that fact. If a dispute over definition arose, they would go out on the ground and settle the matter.
65. In Section C, the journeys of various travellers are reconstructed. In para 19, reference is made to a detailed treatment in Annex A. However, the MENAS report does not contain any annexes.
66. In para 21, attention is drawn quite rightly to a mistake in the GoS Memorial in which it was claimed that Saunders walked up the Bahr el Arab<sup>34</sup>. However, the SPLM/A Reply, at para 934, says this (emphasis added):

**The Government’s Memorial and Mr. Macdonald claim that because the “Bahr el Arab” was blocked by sudd, “[p]roceeding on foot, [Saunders] nonetheless surveyed the first 47 ½ miles (76 km) of the [Kiir/Bahr el Arab] river.” As demonstrated in the attached Expert Report by MENAS, this statement by the Government and its expert is wrong.**

67. I made no such claim in my Expert Report. I was aware that Saunders made little contribution to the course of the Bahr el Arab other than defining the location of its mouth. His distance of 94 miles from Lake No along the Bahr el Ghazal may have allowed an improvement in the longitudinal position of the mouth.
68. Para 25 refers to Mahon’s journeys and the claim is made that “in each of the three separate descriptions, [i.e. 1901, 1902 and 1903] Mahon is in fact referring to the river today called the Ngol/Ragaba el Zarga” when referring to the Bahr el Arab. That may be true of the later trips but clearly it is not true of the 1901 journey when he simply talks of the Bahr el Arab while a considerable distance away without ever visiting it. The authors give these remarks exaggerated importance and there is

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<sup>33</sup> *African Boundaries*, Brownlie, I., Hurst and Company, London, 1979, p.6.

<sup>34</sup> GoS Memorial, para 310.

no justification in his report for any connection of the name with the Ragaba ez Zarga.

**26. In the 1902 report, Mahon describes his trip to "Sultan Rob's country on the Bahr El Homr, about 2 days from Lake Ambady," the distance being an approximation based on the knowledge of locals. Whilst this description does not permit absolute certainty, in our opinion it locates Sultan Rob's "country" on the Ngol/Ragaba ez Zarga (roughly 50 miles from Lake Ambady), given the contemporary observation that the Ngok consider 35 miles to be one day's travel by foot. (In our opinion, a distance of 35 miles per day is a realistic estimate of walking distances for indigenous people.) We think it is unlikely, given the distances in question, that Mahon would have been referring to the Kiir/Bahr el Arab, which is only approximately 20 miles from Lake Ambady.**

69. Para 26 contains further unjustified assumptions adopted by the authors to advance the argument they wish to make. They seek to show that Mahon's note that Sultan Rob's country was 2 days' walk from Lake Ambadi was evidence that he (Sultan Rob) lived on the Ragaba ez Zarga. They first assume that the 2 days referred to walking speed of a Dinka and was therefore 70 miles. Then to make the argument that the journey commenced on the Ragaba ez Zarga succeed, they take the shortest distance of "approximately 20 miles" between the lake and the Bahr el Arab and argue that it is too short for two days' walk and so cannot be Sultan Rob's river. In fact the shortest distance to the Bahr el Arab is 25 miles. But Sultan Rob did not live anywhere near the point on the Bahr el Arab closest to Lake Ambadi – he lived some 60 miles further upstream and about 69 miles from Lake Ambadi, closely fitting the distance the authors have chosen for the journey<sup>35</sup>. It is well documented that Sultan Rob lived on the Kir/Bahr el Arab and this invalid argument does nothing to change this.

**29. Further, Mahon's 1903 report states that he arrested an Arab Sheikh on the "Bahr el Homr" on his return from Sultan Rob's. Mahon was describing his return northward from Rob's "new" Village, or Burakol, north of the Kiir/Bahr el Arab. Given that he was "returning," i.e. proceeding north, from a location already north of the Kiir/Bahr el Arab (or even on the Kiir Bahr el Arab were Rob at his "old" village", which we do not consider he was), Mahon could only be referring to the Ngol/Ragaba ez Zarga when he identifies a major waterway ("Bahr el Homr") as the place of the Sheikh's apprehension. This is because the Ngol/Ragaba ez Zarga was the first major waterway north of Burakol (or even Rob's old village on the Kiir/Bahr el Arab). In our view it is clear that Mahon has given the name Bahr el Homr to the Ngol/Ragaba ez Zarga.**

**30. This usage by Mahon illuminates our knowledge of his 1902 placement of Sultan Rob's "country" on the "Bahr el Homr", meaning it could only be a reference to his country being on the Ngol/Ragaba ez Zarga.**

70. In para 29, the authors seek to show that Mahon's use of "Bahr el Homr" referred to the Ragaba ez Zarga. They claim that Mahon returned northwards from Sultan

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<sup>35</sup> GoS Rejoinder, Figure 2.

Rob's new village so when he reached the Bahr el Homr it could only be the Ragaba ez Zarga. Their unfamiliarity with the geography of the area leads them astray. Mahon records his travels after Sultan Rob's thus (emphasis added):

“From there I went south to the Riverain country and north-west to Tosh and the Rizeigat country.”<sup>36</sup>

It is accepted that the Rizeigat lived on and north of the Bahr el Arab in that part of the river approaching and running along the Darfur – Bahr el Ghazal boundary. So when Mahon talks of traveling northwest to the Rizeigat, he is traveling to that area. It follows that it is more than likely that he arrested Sheikh Abd el Khalil in this area on the Bahr el Arab (which he called the Bahr el Homr). The MENAS argument just does not stand up.

71. As for para 30, there is no “illumination” for the authors from their argument in para 29 and no justifiable claim that Mahon's report leads one to suppose that Sultan Rob's country was on the Ragaba ez Zarga.

**45. Bayldon's report on the subject was not published until late March 1905 (in a secret Sudan Intelligence Report). The Sudan Intelligence Report did not accept as definitive Bayldon's propositions and adopted a more properly cautious tone, with its summary of Bayldon's opinion tellingly lacking certainty or conviction:**

*“The explorations of Lieut. Bayldon, R.N., seem to establish that, contrary to the view hitherto held, the river rising to the south of Hofrat en Nahas and bending eastwards to the north of lat. 10° N. should be called the Bahr el Homr, while the more southern river rising in the Dar Fertit hills to the west of Liffi is the Bahr EI Arab or Kir...”*

**46. The caution adopted by the Sudan Intelligence Report was appropriate, not only because this appeared to be the first attempt at resolving a pervasive lack of knowledge and confusion, but also because Bayldon's description of the Bahr el Homr (the Ngol/Ragaba ez Zarga) itself remains inaccurate in important respects: that river does not in fact rise to the south of Hofrat en Nahas, but rather some 30 miles north into Darfur, it being the Kiir/Bahr el Arab that rises at Hofrat en Nahas. One cannot regard Bayldon as having “corrected” the earlier misconceptions, but rather as having reported observations that indicated that there could be a geographic confusion; it remained for further explorations and analysis to draw conclusions as to the correct geographic position.**

72. In para 45, the authors quote from a summary note on the Bahr el Arab written by Lyons, who was Director General of the Survey Department in Cairo. In fact, he misinterpreted Bayldon's work perhaps because he was some way away, sitting in Cairo. A more logical interpretation of Lyon's contribution is set out in the Expert Report submitted with the GoS Memorial<sup>37</sup>.

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<sup>36</sup> Sudan Intelligence Report, No. 104 (March 1903), Appendix E, pp. 19-22, MENAS Exhibit- 9.

<sup>37</sup> GoS Memorial, Macdonald Report, para 3.16.

73. In para 61, the authors confuse Lyons' account of Bayldon's work with Bayldon's own account which can be found in an earlier Intelligence Report<sup>38</sup>. Lyons is describing the drainage system depicted on the 1904 Intelligence map. Bayldon's report makes no mention of Hofrat en Nahas and offers no link of that place to his Bahr el Homr.
74. In the following para, MENAS suggests that Bayldon's report would have been kept secret for "many months, probably years". The Register of route reports, illustrated at Fig. 10 of the Expert Report attached to the GoS Memorial, lists Bayldon's contribution in 1905. In all probability the Director of Surveys was cleared to receive secret documents and make use of them in his mapping programme.

**69. The Condominium cartography also support the above conclusions. No map issued by the Sudan Government prior to 1914 depicts any provincial boundary between Kordofan and Bahr el Ghazal. Tellingly, the only pre-1905 Sudan Government map that shows any provincial boundaries at all is a War Office map of 1904 - yet even this omits any boundary between Kordofan/Bahr el Ghazal.**

75. The authors make the inference "tellingly" in respect of the Intelligence Office map of 1904<sup>39</sup>. This map does not show inter-provincial boundaries in any part of Sudan, just the boundary of the tributary state of Darfur. They also ignore the fact that Mardon's map of 1901/03, which did show inter-provincial boundaries, was included in the 1905 *Compendium* prepared by Government officials.

### Summary of Conclusions

**2. Our primary conclusion is that in 1905 there existed no provincial boundary between Bahr el Ghazal and Kordofan provinces.**

**3. We also conclude that it would be impossible to determine the area transferred from Bahr el Ghazal to Kordofan in 1905 by reason of the transfer of the Ngok Dinka, based simply on putative provincial boundaries prior to and after 1905. Our reasons for this conclusion are that as of 1905:**

**a. there existed no allocated or delimited boundary between the provinces of Bahr el Ghazal and Kordofan in 1905;**

**b. there was extreme uncertainty as to the physical geography and the river systems in the Bahr region;**

**c. in particular, there was consistent confusion, on the part of Condominium Government officials between 1898 and 1907, as to which watercourse in fact constituted the "Bahr al Arab", and which physical feature was being referred to by the term "Bahr al Arab;"**

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<sup>38</sup> Sudan Intelligence Report No. 128 (March 1905) Appendix C, pp.10-12, MENAS Exhibit-15.

<sup>39</sup> The map was compiled by the Sudan Intelligence Office. The War Office simply lithographed it.

**d. as a consequence, the putative boundary between Kordofan and Bahr el Ghazal provinces - sometimes broadly described as correlating with the "Bahr el Arab" - was uncertain, approximate, provisional and indeterminate in 1905 (and it remained so after 1905).**

**Accordingly, in our opinion it would be impossible to determine the area transferred from Bahr el Ghazal to Kordofan by reason of the transfer of the Ngok Dinka, based simply on characterisation of any putative provincial boundaries existing prior to and after 1905.**

76. In respect of Conclusion 2, the authors have presented, in the body of their Report, some rather confused arguments about the rivers and their names. The errors and deficiencies in these arguments have been highlighted above. The fact that the authors have confused themselves by an incorrect and incomplete reading of the evidence available does not entitle them to assume that others are equally confused. Their claim that no provincial boundary existed in 1905 has not been proved on cartographic grounds. The same response can be made to the conclusion in 3a.
77. To say, in conclusion 3b, that there was “extreme” uncertainty is another exaggeration. They may have found the documents confusing but there are rational explanations for their concerns. What uncertainty did exist was typical of the time, especially for areas where views of the drainage system from above were difficult to achieve. Nevertheless, the course of the Bahr el Arab was sufficiently well determined for the boundary declarations by the Governors of the respective Provinces to be valid.
78. The confusion was not “consistent” throughout the period from 1898 to 1907 as claimed in conclusion 3c. As far as the course of the Bahr el Arab was concerned, Wilkinson introduced some confusion in 1902 but that was resolved by 1905.
79. In the light of the above, the MENAS conclusion 3d is invalid. Likewise, the authors’ concluding opinion that it is impossible to determine the area transferred in 1905 has no standing.

Alastair Macdonald  
24 February 2009

## APPENDIX II

### THE COMMUNITY MAPPING EXPERT REPORT

#### Introduction

1. In the absence of primary, contemporary documentation to support its claim to a boundary at 10°35'N, existing as at 1905, the SPLM/A Counter-Memorial appends what is termed the “Ngok Dinka Abyei Area Community Mapping Project” (hereafter “Community Mapping Report”). The Report calls for the following remarks.
2. Despite being referred to as an “Expert Report”, it appears that most of the data on which this Report is based was collected by 12 Ngok men with little or no mapping experience. The frontispiece shows these 12 Ngok men only.
3. Moreover, it should be emphasised that no attempt has been made in the Report to ask for or identify Messeriya burial sites; villages; ferigs, or other similar landmarks. It is unusual to suggest that this information accurately depicts any boundary when it relies entirely upon the say-so of one party to the dispute, to the exclusion of any consideration of the other.

#### Past use of Community Mapping

4. The Report annexes a folder of material illustrating past instances where community mapping has been used by courts and tribunals; but none of those examples are analogous to Abyei.
5. Rather, this is the specific delimitation of a disputed boundary as at 1905; to the exclusion of later years; in the context of two groups – among several others – who used an area; and where only one group has participated in the study. On this basis alone, the Tribunal should give this Report no weight.
6. The decisions of the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights deal with customary property rights of indigenous groups in relation to their ancestral lands. At no point did either body rely on community mapping to determine the boundaries *inter se* of the several opposing indigenous groups’ ancestral lands: quite the opposite, the Commission’s recommendation and the Court’s decisions required the States to enact an adequate legal framework *to proceed to* the delimitation, demarcation and titling of the land in question.<sup>1</sup>
7. Other annexed documents relating to community-mapping in Indonesia and Malaysia similarly illustrate the very circumscribed role played by community mapping generally. Again, these cases concern encroachment on the lands of

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<sup>1</sup> See: *Maya Indigenous Communities of the Toledo District (Belize)*, Report No. 40/04, Case 12.053 (2004), para. 197. Although the Inter-American Commission relied on the Maya Atlas only to confirm that the Maya Communities had inhabited the Toledo District since time immemorial: it did not rely on it to demarcate those lands. See further: *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*, I/A Ct. HR, Ser. C, No. 79 (2001), para. 153; *Case of the Saramaka People v Suriname*, I/A Ct. HR (2007), para. 214(5).

indigenous groups which are not in competition with one another; they do not concern the identification of precise boundaries at a given date.

8. Even if this “Community Mapping” method was applicable to the present dispute, the Report itself also suffers from serious methodological deficiencies. These are addressed below.

### **Composition of the Abyei Mapping Team**

9. Dr. Poole states:

“I was instructed by the SPLM/A to train Ngok Dinka in the Abyei Area to gather the raw data necessary to prepare a community map”.<sup>2</sup>

This team was headed by Kwol Biong, who in turn selected 11 other Ngok men, to constitute the “Abyei Mapping Team”.<sup>3</sup> From the outset this entire study was exclusively comprised of handpicked Ngok men, all of them interested parties in this dispute. Furthermore, they collected data in a manner where there was no oversight from independent – much less impartial – sources to verify the landmarks recorded on their sheets.

10. Dr. Poole goes on to explain that in this Community Mapping methodology...

“The two principal data sources are: (1) interviews with local informants; and (2) direct GPS-based field observations. Often, the first source prompts the second, as was the case in this project.”<sup>4</sup>

Thus it is all the more imperative that the person conducting the interviews is impartial and independent, as often a leading question can provoke a favourable answer.

11. Moreover, the outcome of this study is expressed in a single document and none of the data is annexed to it: this makes it impossible to unravel the two sources. For instance, it cannot be ascertained whether a nominated feature (such as a depression in the ground, suggesting a grave) is recorded as a grave because an interviewee has indicated a grave exists in a nominated area and the recorder has found a depression in the ground that matches this description or because the recorder stumbled upon a depression in the ground and assumed this indicates the presence of a grave.

12. Furthermore, many Ngok have given witness statements in this dispute and it is unclear to what extent the Mapping Team are connected with those witnesses. What is clear is that some of the elders that participated in the Community Interviews have already given Witness Statements.<sup>5</sup>

13. From a statistical perspective, it is essential that data collection be undertaken by impartial agents. Dr. Poole recognises this need when he notes that “the maps”

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<sup>2</sup> Community Mapping Report, p. 7.

<sup>3</sup> Community Mapping Report, p. 16.

<sup>4</sup> Community Mapping Report, p. 15.

<sup>5</sup> These include Deng Chir Agoth (tab 7); Mijok Bol Atiim (tab 23); Adol Kuot Malual (tab 25).



(only one of which is made available) “were produced by an external cartographer”.<sup>6</sup> But this fails to remedy the fact that the raw data had already been tainted.

### **Oversight by Dr. Poole**

14. There is an important distinction between what Dr Poole observed or performed in his expert opinion and what he was told. For instance, Dr. Poole states:

“I was told that Abyei Town was effectively the center of the economic, political, and cultural life of the Ngok Dinka since at least 1905.”<sup>7</sup>

As demonstrated above in the GoS Rejoinder (see paras. 476-494), this statement is incorrect.

15. Dr. Poole also states:

“I also understand that Ngok landmarks extend considerably north of the study Area”.<sup>8</sup>

It is clear that, owing to constraints on time, weather, and topography, Dr. Poole was not able to conduct community mapping further north, and he is only relaying what he has been told by the SPLM/A. Yet as an expert he cannot express this assumption without mapping evidence.

16. There are also constraints of time. Dr. Poole emphasises repeatedly that normally such a project would take about a year whereas this has been accomplished in two months.<sup>9</sup> Dr. Poole praises the Abyei Mapping Team “who adeptly mastered the art of community mapping in such a short time.”<sup>10</sup> Indeed, it was...

“*The Abyei Mapping Team* [that] photographed [Abyei] ... *The Abyei Mapping Team* took GPS coordinates of the town”.<sup>11</sup>

At the beginning of the Report, Dr. Poole lists the members of the “Abyei Mapping Team” but his own name is absent from this list.<sup>12</sup> He later adds:

“Through the course of *its* community interviews and field-based observations ... the *Ngok Dinka Abyei Area Community Mapping Team* identified areas of Ngok Dinka historic occupancy”.<sup>13</sup>

And:

“*The Abyei Mapping Team* ... identified a number of burial places of the elders’ ancestors”.<sup>14</sup>

And:

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<sup>6</sup> Community Mapping Report, p. 8.  
<sup>7</sup> Community Mapping Report, p. 22.  
<sup>8</sup> Community Mapping Report, p. 7.  
<sup>9</sup> Community Mapping Report, pp. 7, 21, 29.  
<sup>10</sup> Community Mapping Report, p. 5.  
<sup>11</sup> Community Mapping Report, p. 23 (emphasis added).  
<sup>12</sup> Community Mapping Report, p. 5.  
<sup>13</sup> Community Mapping Report, p. 23 (emphasis added).  
<sup>14</sup> Community Mapping Report, p. 23 (emphasis added).

*“I am aware that the Mapping Team visited and took GPS readings of six Ngok Dinka settlements...”*<sup>15</sup>

He finally concludes:

*“I am confident that the methodology was implemented appropriately and carried out effectively.”*<sup>16</sup>

17. These comments – and more importantly, the qualifications preceding them – raise questions regarding the amount of oversight Dr. Poole exercised over the Mapping Team. If he was limited to training and arranging the collation of their data, this can hardly be described as an Expert Report.

18. The only reference to Dr. Poole’s involvement<sup>17</sup> appears at page 23, where he states:

*“I observed from my limited involvement in the field visits and review of the raw data...”*<sup>18</sup>

This begs the question, “what involvement?” Despite Dr. Poole’s emphasis that no experience is necessary for this type of study,<sup>19</sup> the fact is that this “community map” appears to be the outcome of: 12 interested parties with two weeks’ training<sup>20</sup> armed with questionnaires prepared by their lawyers<sup>21</sup> and GPS readers.

19. This calls for a detailed analysis of the data collection methods and the data itself; however, the Report is accompanied by two pages of sample “raw data”<sup>22</sup> and eight pages of map data.<sup>23</sup> It is simply not possible to assess the reliability of the original data – and whether Dr. Poole had any input in collecting it – when only two pages have been displayed.

### **Questions put to the participants**

20. Further anomalies exist in the study. For instance, it appears that the sample of questions asked at the community meetings were prepared by legal counsel with a view to testing “historically significant places to the Ngok Dinka”.<sup>24</sup>

21. Dr. Poole notes that

*“Community meetings were held with elders from each of nine Ngok Dinka chiefdoms ... Prior to the meetings, the Chief and elders from each section identified 25 elders to represent each section”*.<sup>25</sup>

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<sup>15</sup> Community Mapping Report, pp. 24-25 (emphasis added).

<sup>16</sup> Community Mapping Report, p. 29.

<sup>17</sup> He does “directly observe” in his conclusion at p. 29, but this does not seem to be the same as “involvement”.

<sup>18</sup> Community Mapping Report, p. 23 (emphasis added).

<sup>19</sup> Community Mapping Report, pp. 14-15.

<sup>20</sup> Community Mapping Report, p. 17.

<sup>21</sup> Community Mapping Report, p. 20.

<sup>22</sup> Community Mapping Report, Appendix D.

<sup>23</sup> Community Mapping Report, Annex F.

<sup>24</sup> Community Mapping Report, p. 20, fn 28.

<sup>25</sup> Community Mapping Report, p. 19.

Dr. Poole states that 25 is the minimum number for a mathematically acceptable “normal” distribution. Yet, how this is relevant to non-numerical data is puzzling, moreover, the elders could consult with each other anyway, and members of the community could also confer with them. By allowing an open conference, the whole sample was tainted and cannot be considered independent. In fact a number of the tribal elders who participated had already given witness statements in this dispute.

22. Annex C is entitled: “Questions used by Mappers to Assist in Community Meetings”. It records certain questions which, it is assumed, formed the basis of the interviews by the Mapping Team. The questions, administered in 2008, are prefaced by the phrase:

“in your grandfather’s time (in the time of Arop Biong)...”<sup>26</sup>

This question conflates two separate periods of time. It assumes that the time of the respondent’s grandfather was the time of Arop Biong (who died in 1906). But for many people, this will not be the case: as at 2001, the life expectancy in Southern Sudan was 42 years.<sup>27</sup> Whereas it is certainly possible that the respondent’s grandfather was alive in 1905, this can by no means be assumed: neither the interviewees nor their respective ages are included in this Report. Whether the interviewee was aware of this flaw, whether the interviewee’s grandfather was alive at the time of Arop Biong, on such matters the Tribunal can only speculate.

23. Furthermore, it is notable that the majority of questions are ethnological or anthropological and are of only peripheral relevance to the issue of a disputed boundary. Some of these questions can only be described as “leading”:

Animals: Can you tell me about how Ngok Dinka made use of the wild animals within their lands during your grandfather’s time and during the time of Arop Biong? Did they hunt? Where did they hunt and for what animals? Did they use the animals just for food or for other things? Do we still hunt or use these animals? Do they still exist in our lands? If not, why?

Plants/forests: How did our people use the plants and forests and trees during the time of your grandfather and the time of Arop Biong? To make houses? To make luaks? For firewood? For food? For medicine? Did we use certain trees to collect fruits or other products to eat? Did we use certain plants to cure illnesses – for medical purposes? Which plants are these? What are their names? ... how do you know this information (oral history)?”<sup>28</sup>

24. One question that is not ethnological but merits particular attention is extracted below:

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<sup>26</sup> Community Mapping Report, Appendix C.

<sup>27</sup> See UNICEF Report, May 2004, (last accessed, 20 February 2009), available at [www.reliefweb.int/library/documents/2004/splm-sud-31may.pdf](http://www.reliefweb.int/library/documents/2004/splm-sud-31may.pdf).

<sup>28</sup> Community Mapping Report, Annex C, p. 2.

“Did your grandfather and his father help to clear the road to Tibeldia that was constructed when the British colonial administration began? Where did your chiefdom clear the road?”<sup>29</sup>

Firstly, as noted above, it is rare that a person’s grandfather would have been alive, much less old enough to recall, precisely the location of Ngok villages at 1905. Thus, on this occasion the question correctly refers to the generation preceding that – hence “did you grandfather *and his father*”. It is also noteworthy that the word “and” appears rather than “or” as it implies that such a road must have existed for both “grandfather **and** his father” to clear.

25. Secondly, there is no evidence of road clearing at relevant times prior to the 1920s, and it is certain that there was no road clearing “when the British colonial administration began”.

26. Third, the follow-up question “where did your chiefdom clear the road” cements the suggestive line that such a road existed at the transfer date; it was cleared by both grandfather and great-grandfather; the only question is “where” – or more importantly, “up to where?”

27. Finally, the answers are not provided by the Report. The Tribunal can only speculate that those answers were not included in the Report because they would not have assisted the SPLM/A case.<sup>30</sup>

### **The features identified**

28. The Community Map identifies certain landmarks characteristic of habitation. These include, but are not limited to: age initiation sites; cattle camps; cultivation sites; sacred sites etc. It cannot simply be assumed that if these sites exist today, they provide evidence that they existed and were used in 1905. Yet that assumption pervades the study.

29. Other floral and faunal indicators are equally unhelpful. It is simply not possible that through the use of beehives;<sup>31</sup> distinctive trees;<sup>32</sup> plants<sup>33</sup> etc, that the Tribunal can form a view as to where a border existed in 1905. Moreover, no evidence is cited to support such claims as are made to bees, trees, plants, etc.

### **The 56 burial sites**

30. The only piece of information that could have some relevance to the border as at 1905 is the recording of 56 burial sites, purporting to pre-date the transfer. Curiously, there are no burial sites at all – let alone those purporting to predate the transfer – recorded at Abyei. This alone suggests that such data should be treated with caution.

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<sup>29</sup> Community Mapping Report, Annex C, p. 1.

<sup>30</sup> For criticism of the “Tebeldiya argument” see GoS Counter-Memorial, paras. 344-354.

<sup>31</sup> Community Mapping Report, p. 27; see also figure 33.

<sup>32</sup> Community Mapping Report, p. 27.

<sup>33</sup> Community Mapping Report, pp. 27-28; see also figure 34.

A31. There are other difficulties too. Geographically, locating an Ngok gravesite that is probably over 100 years old is difficult; but then verifying that it is indeed over 100 years old is virtually impossible. Dr. Poole concedes that:

“Locating Ngok Dinka grave sites can be challenging since it was not customary to mark the grave with stones or sepulchers”.<sup>34</sup>

This is an understatement: it was customary not to mark graves, except chiefly graves, at all. In some instances it appears that graves were located “through visible indentations in the ground”, without exhumation or other forensic work.<sup>35</sup> Moreover, even if a burial site can be found – which itself appears to be an entirely subjective exercise – there is no way of determining that it predates the transfer of 1905.

32. It is notable then, that all relevant gravesites are described as “(buried 1905 or before)”.<sup>36</sup> Whether these sites pre-date the transfer is based entirely on speculation. And even if it can be argued that the location of a paramount or tribal chief might still be known today through oral traditions, this cannot explain the fact that 56 burial sites have been nominated as pre-dating the transfer.

33. Furthermore, even if these burial sites did predate the 1905 transfer, this does not establish Ngok territory as at 1905. Taken at its highest, this community mapping exercise nominates 56 Ngok burial sites north of the Bahr el Arab purporting to date back to 1905. All this establishes is some Ngok habitation north of the river (which is not itself in dispute).

34. Finally, it may be noted that with the exception of one burial site in Thim-Thoi (located at 9°51’N, 28°40’E), every burial site that purports to pre-date the 1905 transfer is situated either at or below the Ragaba ez Zarga. Even this indentational evidence lends no support to the theory of a Ngok boundary at 10°35’N.

## **Conclusion**

35. In the Government of Sudan’s Counter-Memorial the deficiencies of uncorroborated oral evidence were analysed.<sup>37</sup> This Report does not address these in any way. In particular, oral evidence remains uncorroborated even when it is given to someone with two weeks’ training (by now, quadruple hearsay) and even when the auditor is grasping a GPS device. A fable is no less fabulous for the place of its recital being precisely located.

36. In short the “Community Mapping” Report adds nothing. At most it shows that at some time in the first half of the twentieth century there was a Ngok presence north of the Bahr el Arab (a matter not in dispute). It cannot date that presence, nor can the Tribunal verify it. Moreover, it does not contrast the scope of that presence with Messeriya landmarks, gravesites, ferigs etc.

37. There is only one relevant point arising out of the Community Mapping Report: the question regarding the border at Tebeldiya was put to many Ngok and the

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<sup>34</sup> Community Mapping Report, p. 24.

<sup>35</sup> Community Mapping Report, p. 24; see also Figure 21.

<sup>36</sup> Community Mapping Report, Appendix F.

<sup>37</sup> See GoS Counter-Memorial, paras. 33-66 and 331-336.

answers must have been so incongruous to the SPLM/A case that they were collectively wiped from the Report.

## APPENDIX III

### A DIGEST OF SPLM/A EXHIBITS

Fact Exhibit Number	Quote or comment as appearing in pleadings: (document name; relevant paragraph; and extracted quote or conclusion)	Quote or quotes as they appear in the original text: (underlined words represent words quoted in the SPLM/A pleadings)
1/1	<p>Browne, W., Travels in Africa, Egypt, and Syria from the year 1792 to 1798 (2d ed. 1806).</p> <p>Para. 907, Memorial: Browne's description of "tall and black" tribesmen [located at a place called Jungeion] accords well with the Ngok's physical characteristics. (citing p. 572)</p> <p>Para. 910, Counter-Memorial: Browne provides directly relevant evidence. His book described "numerous" inhabitants of the Abyei region, who were "tall and black," being located at a place called "<b>Jungeion</b>". (citing p. 572)</p>	<p>"Baraka is inhabited by independent Arabs. The greater part of this road is deep sand; the remainder, from Baraka by the Bahr-el-ada, is clay. The part of that river, which is here meant, is occupied by tribes of Arabs feeding cows and sheep; they are called Missirie. This part of the river is frequented by wild and ferocious animals. The Missirie Arabs comb their hair back, twist it, and fasten it in the form of a scorpion's tail behind. They collect honey of the wild kind in great quantity, and hunt the elephant.</p> <p>From Baraka to Turrut [S.E. 4 Days] From Turrut to Jungeion [S.E. 1 Days]</p> <p>The people from Jungeion are <u>tall and black</u>; they have cows, sheep, and goats, and feed on the Mahriek or white maize." (p. 571-572)</p>
1/6	<p>Gleichen, A., Handbook of the Sudan (HMSO, London, 1898)</p> <p>Para. 302, Memorial: the mudiria "<b>limits</b>" were in general "<b>ill-defined</b>," and they "<b>[could not] be fixed with any precision</b>." (citing p. 40)</p>	<p>"The <u>limits</u> of the province in the old days <u>were ill-defined</u>. ... Dar Nuba (or country of black slaves) lies at the southern corner of Kordofan, but its limits cannot <u>be fixed with any precision</u>." (p. 40)</p>
1/13	Letter from Maxwell to Wingate, (19 January 1900), 270/1	

	<p>Para. 323, Memorial: This was reflected in the earlier comments that <b>“it is impossible to fix”</b> the <b>“boundaries between Muderiehs,”</b> which would necessarily be <b>“vague”</b> and lacking <b>“any idea of permanency.”</b> (citing letter at 270/1/77)</p>	<p><u>“it is impossible to fix these [boundaries] with any idea of permanency until we have a real systematic survey of the whole country and more or less fix our lines of [*unintelligible*] communication. Along the river there is no great difficulty but where Sennar ends and Kassala begins in the desert is rather vague.”</u> (p. 270/1/77)</p>
2/4	<p>Reports on the Finances, Administration and Condition of the Sudan, Annual Report (1904)</p> <p>Para. 296, Memorial: [areas of southern Kordofan] <b>“are not yet fully subject to Government control.”</b> (p. 10)</p>	<p>“Sir R. von Slatin remarks: ‘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. However much we may regret such drastic measures, they were, in my opinion, inevitable. The Nubas have learnt a wholesome lesson, and the thorough manner in which the operations were carried out should save us much trouble in the administration of this part of Kordofan.</p> <p>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 <u>not yet fully subject to Government control.</u>” (p. 10)</p>
3/3	<p>Reports on the Finance, Administration and Condition of the Sudan, Annual Report (1907)</p> <p>Para. 296, Memorial: Condominium reports noted that Southern Kordofan was largely unknown to government officials, who lamented that <b>“much still remains to be done before these extensive districts may be said to be fully</b></p>	<p><u>“Internally there have been comparatively few disturbing elements to contend with during the past year. The conditions of Southern Kordofan, which was recently a source of some anxiety to the Government, and which was specially visited by the Inspector-General, Sir Rudolf von Slatin, has considerably improved owing to the presence of more troops, better communications, and the introduction of an elementary system of administration; but <u>much still remains to be done before these extensive districts may be said</u></u></p>



	<p><b>under Control.”</b> (p. 2)</p> <p>Para. 335, Memorial:  <b>“very little is known of the country on either side of the northern boundary of the Province,</b> and probably swamps or other obstacles will be found ....” (p. 165)</p>	<p>to be <u>fully under control.</u> (p. 2)</p> <p>“To the north-west the Province is bounded by Darfur, and the main trade route from Nahud Ragaa passes outside the Sudan. Under another heading I am pointing out the advantage of altering this trade route; <u>but very little is known of the country on either side of the northern boundary of the Province, and probably swamps or other obstacles will be found</u> to account for the pedlars and ivory traders taking the road via Shakka on which they are liable to a tax from Sheikhs owing nominal allegiance to Sultan Ali Dinar’. (p. 165)</p>
3/6	<p>Reports on the Finance, Administration and Condition of the Sudan, 1909</p> <p>Para. 335, Memorial:  <b>“[m]uch of the course of the Bahr-el-Arab is still unexplored.”</b> (p. 52)</p>	<p>“Much of the course of the Bahr-el-Arab is still unexplored but Captain Coningham’s work has laid the foundation of the accurate mapping of the northern portion of the Bahr-el-Ghazal Province.” (p. 52)</p>
3/8	<p>Anglo-Egyptian Handbook Series – The Bahr el Ghazal Province (HMSO, London, 1911)</p> <p>Para. 291, Memorial:  “[a] comparatively small proportion of the tribe living in the Central district [of the province] has been brought under administration, and <b>many of the northern districts are practically unvisited.</b>” (p. 29)</p>	<p>“The Dinka tribe – ... since the arrival of the present Government the various sections of the tribe are fast recovering their former numbers and wealth, and, with the exception of certain of the eastern sections, have given little trouble. <u>A comparatively small proportion of the tribe living in the Central district [of Bahr el Ghazal] has been brought under administration, and many of the northern districts are practically unvisited.</u> Those of the tribesmen who are within an administrative area pay tribute in the form of a light animal tax and show an increasing tendency to bring disputed</p>

	<p>Para. 323, Memorial:  <b>"[t]he actual boundary line is not yet delimited [sic]"</b>. (p. 5)</p>	<p>cases to an inspector for settlement." (pp. 29-30)</p> <p>"The actual boundary line is not yet delimited but it follows the course of the Bahr El Arab or Rizeigat from the Nile-Congo watershed until the frontier of Kordofan is reached when the boundary divides certain tribal districts to Lake No." (p. 5)</p>
<p>3/18</p>	<p>The Sudan Government, The Sudan: A Record of Progress: 1898-1947</p> <p>Para. 285, Memorial:  <b>"in practice it took a quarter of a century before the [Condominium] administration extended itself over the whole [of Southern Sudan]."</b> (p. 12)</p>	<p>"The fighting tribes, like the Shilluk, had held the North successfully at bay until the introduction of firearms in the 19th Century, during which they were in a constant state of warfare against the Government and the slavers. Those of them who were accessible were deeply suspicious of the new government while the rest, like the unconquered Nuer, withdrew into their swamps. The gentler tribes who lived further south beyond the great Sudd block were also accustomed to take to the bush at the sight of a stranger and in practice it took a quarter of a century before the administration extended itself over the whole area."</p>
<p>4/3</p>	<p>Howell, "Notes on the Ngork Dinka of West Kordofan," 32(2) Sudan Notes and Records 239, 242 (1951)</p> <p>Para. 955, Memorial:  <b>"permanent villages, and cultivations"</b> of the Ngok "are set along the higher ground <b>north of the Bahr el Arab.</b>" (p. 243)</p>	<p>"Permanent villages, and cultivations are set along the higher ground north of the Bahr el Arab, while dry season grazing-grounds are for the most part in the open grassland (toich) south of the river." (p. 243)</p>
<p>4/5</p>	<p>Cunnison, "Humr and their Land" (1954) 35(2) Sudan Notes and Records 50</p> <p>Para. 963, Memorial: Cunnison described Abyei as <b>"the capital of the Ngok Dinka."</b> (p. 61)</p>	<p>"Through the Goz there are numerous trails southwards, apart from the dry-season motor road linking Muglad with Abyei, <u>the capital of the Ngok Dinka</u>. All these trails are associated with particular 'omodiyas, according to the district of the Bahr they point towards,</p>

		and are used mainly by these 'omodiyas, although not of course exclusively." (p. 61)
4/8	<p>Cunnison, I., "The Social Role of Cattle", (1960) 1/1 Sudan Journal of Veterinary Science and Animal Husbandry 8</p> <p>Para. 1011, Memorial:  "[the] <b>nature of the [Misseriya's] land itself ... favours cattle rather than grain.</b>" (p. 10)</p> <p>Para. 1012, Memorial: the Misseriya engaged in little agriculture (thus having no reason to avail themselves of the fertile soil of the Abyei region). (citing p. 9)</p>	<p>"The nature of the land itself as it is at present also favours cattle rather than grain; it is unlikely that the present population could survive with a mainly agricultural economy. The limiting factor is lack of enough suitable agricultural land near permanent water." (p. 10)</p> <p>"In seasons of Dinka hunger, which are quite frequent, Humr make big profits by selling grain to the Dinka in exchange for cattle and then exporting the cattle." (p. 12)</p>
4/9	<p>Collins, R. &amp; Herzog, R., "Early British Administration in the Southern Sudan", (1961) 2(1) Journal of African History 1</p> <p>Para. 285, Memorial:  "Southern Sudan ... in the main ... changed little during the first decade of Anglo-Egyptian administration." (p. 135)</p>	<p>Such success, however, was not a frequent occurrence in the Southern Sudan, which in the main had changed little during the first decade of Anglo-Egyptian administration. To be sure intertribal warfare had been reduced but it had not been eliminated." (p. 135)</p>
4/11	<p>Cunnison, I., "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.</p> <p>Memorial Para, 956:  [The Messeriya] "have no permanent homes and move</p>	<p>"the Nuer and Dinka have permanent homes from which they move away for a part of the year, the Baggara have no permanent homes</p>

	<p>about, though within circumscribed tribal territories." (p. 112)</p> <p>Para. 1012, Memorial: Not surprisingly, the Misseriya engaged in little agriculture (thus having no reason to avail themselves of the fertile soil of the Abyei region). (citing p. 109)</p>	<p>and move about, though within circumscribed tribal territories." (p. 112)</p> <p>"The Humr cultivate millet a little and they have been increasing their cultivation of cotton". (p. 107)</p>
6/5	<p>Tayab, A., Agricultural and Natural Resources Abyei District, West Region Southern Kordofan Province, Working Report No. 6, 1978.</p> <p>Para. 177, Memorial: Ngok men and women both contribute to the field work during the planting and growing seasons for sorghum and other crops; at harvest, both men and women cut the sorghum heads. (citing p. 12)</p> <p>Para. 184, Memorial: The Ngok crop rotation minimizes the risk of local pests or diseases. (citing p. 11)</p>	<p>"women do most of the field work. They sow, weed, harvest, thresh and winnow." (p. 12)</p> <p>"crop rotation is not practised in the Abyei area; the same crop is grown in the same area for as many as six to ten seasons. This continues until the area is no longer productive." (p. 12)</p>
6/7	<p>Sabah, S., Tribal Structure of the Ngok Dinka of Southern Kordofan Province, Abyei Project Working Report No. 1, (Development Studies and Research Centre, Khartoum, 1978)</p> <p>Para. 887, Memorial: The Ngok "moved up to the present Ngowl" (referring to the Ngol/Ragaba ez Zarga) under "Paramount Chief Won Kwoldit" (Kuol Dongbek) and observ[ed] that the land "became the Ngok's permanent home." (p. 4)</p>	<p>"At Ragaba Zargha the Ngok met with the Chad tribes and fierce wars broke out between them. The Chad tribes were driven away, and the evacuated land became the Ngok's permanent home." (p 4)</p> <p>...</p> <p>"Arob's chieftainship was characterized by the outbreak of war with the Rizigatt again. This time the war was hard; destruction and</p>

		losses in Dinka land were great. The Ngok retreated to present-day Makair in Tuich-land." (p 5)
8/13	<p>F. Deng, War of Visions: Conflict of Identities in the Sudan (Brookings Institution, Washington, 1995)</p> <p>Para. 889, Memorial: Francis Deng ... describe[s] the Alei Chiefdom arriving from the northwest separately from the other Ngok lineages, and settling in the northern part of the Bahr river basin, above the Ngol/Ragaba ez Zarga and close to Turda and Nyama. (pp. 253-254)</p>	<p>"The Dinka believe that Deinga, the present headquarters of the Missiriya Baggara Arabs, derives its name from the name of Alei's leader, Deing [or Deng]. [Prior to the Turkiyya,] Alei was later forced by increasing Arab pressure to move southward and join the bulk of the Ngok." (p 254) (italicised brackets GoS)</p>
8/14	<p>Cole, D., &amp; Huntington, R., Between a Swamp and a Hard Place (Harvard University Press, Harvard, 1997)</p> <p>Para. 97, fn 65, Memorial: Abyei is "heart" of traditional farming. (citing p. 24)</p> <p>Para. 1006, Memorial: Recent authors describe the fertile clay soil of the area around Abyei town as the "heart" of the traditional farming area. (citing p 24)</p> <p>Para. 184, Memorial: The Ngok cultivate different types of sorghum, in a form of crop rotation adapted to the exigencies of the Abyei environment. (citing p. 117)</p>	<p>"Abyei was in the heart of this "traditional" farming area, far removed from the grand schemes and isolated from modern transportation and communication facilities." (p 24)</p> <p>The Ngok did not appear to practise crop rotation. See Exhibit-FE 6/5</p>
11/5	<p>Daly M.W., Empire on the Nile, 1898-1934 (CUP, Cambridge, 2003)</p> <p>Para. 277, Memorial: Consistent with this, the Government's efforts during its first 20 years</p>	<p>"The first task of the government in the south was to extend and secure its river communications. In October 1898 Kitchener</p>

	(particularly in the South) were largely directed towards establishing security, setting up posts and training staff, rather than attempting to exercise governmental authority over the country. (citing p. 135)	despatched Major Malcolm Peake to reconnoitre the Bahr al-Ghazal and the Bahr al-Jabal." (p. 135)
12/18	<p>Beswick, S., Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan (University of Rochester Press, Rochester, 2006)</p> <p>Para. 183, Memorial: The Ngok Dinka's sorghum is also well-suited to the Abyei region for other reasons, including because it is "<b>drought resistant</b>" – a distinct advantage given climatic conditions. (citing p. 92)</p> <p>Para 1008, Memorial: "Equally, the Ngok sorghum is well-suited to the Abyei region because it is "drought resistant". (p. 92)</p>	<p>"Caudatum Sorghum agriculture is related to Nilotic folk movements, and by the year 1000 it was already grown in many parts of Africa in the savanna belt, stretching from the eastern shores of Lake Chad to southwestern Ethiopia. Of importance here is that this type of grain agriculture is <u>drought resistant</u> and produces well with very little care." (p. 92)</p>
17/25	<p>Sudan Intelligence Reports, No. 151 (February 1907)</p> <p>Para. 926, Counter Memorial: Provincial officials in the early Condominium described it as "impossible" to get around the whole province. (citing p. 7, and FE 17/30 below)</p>	<p>"Mek Rahal Andal is most anxious that the 'Government should come and live there [at Kadugli] again' and I personally consider it advisable, for it is impossible for the new mamuria at Eliri to satisfactorily administer the country lying more than 40 miles west of J. Eliri, in addition to the huge extent of country lying north, east, and south of it." (p. 7)</p>
17/30	<p>Sudan Intelligence Reports, No. 162 (January 1908)</p> <p>Para. 926, Counter-Memorial: Provincial officials described it as "impossible" to get around the whole province. (citing pp. 56-57, and FE 17/25 above)</p>	<p>"But, as I said in the Budget proposals for 1908, Western Kordofan wants two Inspectors. I can say after nearly four years' experience, that it is quite <u>impossible</u> for one official to get round the working year." (p. 57)</p>
18/1	Garstin, W., "Fifty Years of Nile Exploration, and some	

	<p>of its results"(1909) 33(2) The Geographical Journal 117</p> <p>Para. 1442, Counter-Memorial: the location and course of the Bahr el Arab was ... "bewildering" (citing p. 142)</p>	<p>"The so-called Bahrs-el-Arab and el Homr, of the older maps, are not, as was formerly supposed, distinct rivers, rising in southern Kordofan. They are one and the same stream, of which the name differs in different localities, and which is the outfall of a net-work of swampy channels, coming from the south-west, which cross and recross one another in a <u>bewildering labyrinth</u>." (p. 142)</p>
18/9	<p>Report on the Finances, Administration and Condition of the Sudan in 1929 (HMSO, London, 1930)</p> <p>Para. 929, Counter-Memorial:  <b>"In the three southern provinces of the Sudan, the policy of fostering native authority among the negroid peoples has been continued."</b> (p. 12)</p>	<p>"the policy of devolving judicial functions upon courts established under the 'Powers of Sheikhs Ordinance, 1928' was continued in 1929." (p. 10)</p> <p>"Pari passu with the devolution of judicial functions to native authorities, steps have been taken to begin the process of devolving executive functions upon those native chiefs who appear capable of undertaking increased responsibilities." (p 11)</p> <p>"in several provinces a start has been made in delegating responsibility for various public services to local native tribal and territorial chiefs." (p 12)</p> <p><u>"In the three southern provinces of the Sudan the policy of fostering native authority among the negroid peoples has been continued."</u> (p. 12)</p>
18/16	<p>Letter from Governor's Office, El Obeid re The Future of Ngork Dinka, dated 26 March 1951</p> <p>Para. 1179, Counter-Memorial: a transfer of the Ngok to Bahr el Ghazal would mean that the Misseriya's</p>	<p>"As regards the Messeria, the Homr Agaira have a strong incentive to keep the Ngork in their council. Their <u>summer water and grazing</u> will thereby be assured. If the Ngork turn south and the Province</p>

	<p>boundary was moved North (I am not entirely convinced that an immediate alteration of the boundary would be either wise or necessary. C.f. the Kababish at Um *illegible*) they would not receive the consideration to which they have been accustomed in the past even if their grazing and water rights were guaranteed by treaty. They fear, too, that other Tribes in the Bahr El Ghazal will be allowed to encroach on the grazing. To the argument that at Lake Abyad the Messeria graze quite happily in Upper Nile Province they reply that comparatively small numbers are involved there. The Zurug and Felaita are lukewarm about keeping the Ngork, regarding them as a liability. They would almost certainly insist on their paying their way." (p. 2)</p>	
18/18	<p>Hill, R., A Biographical dictionary of the Anglo-Egyptian Sudan (OUP, London, 1951)</p> <p>Para. 895, Counter-Memorial, fn 1019:  "[Pallme] started on a journey to the Sudan and went via Dongola to al-Ubaiyad". (p. 301)</p>	<p>"in 1837 he started on a journey to the Sudan and went <u>via Dongola to al-Ubaiyad</u>; after travelling in Kordofan and in 1839 accompanying a military expedition sent by the Turkish governor of the province to the Nuba hills ... he returned by way of Berber and the Nubian desert in Cairo in 1841." (p. 301)</p>
18/25	<p>Lebon, J.H.G. Land Use in Sudan (Geographical Publications, 1965)</p> <p>Para. 1349, Counter-Memorial: the Kiir/Bahr el Arab is described as "<b>impermanent</b>". (citing p. 18)</p>	<p>"The permanent rivers, and pools lingering in the courses of the <u>impermanent</u>, such as the Bahr el Arab, and the southern tributaries of the Pibor, are the chief sources of domestic water during the dry season, with water-holes, often much polluted and very muddy, in the quasi-permanent marshes." (p 18)</p>



## **APPENDIX IV**

### **Additional Pages Omitted from Exhibits Filed by the SPLM/A**

1. Lienhardt, G., Divinity and Experience: The Religion of the Dinka (Clarendon Press, Oxford, 1976), pp.162-163, SPLM/A Exhibit FE 11/7
2. Barbour, K.M., The Republic of Sudan: A Regional Geography (University of London Press, London, 1961), p.69, SPLM/A Exhibit FE 18/24

Lienhardt, G., *Divinity and Experience: The Religion of the Dinka* (Clarendon Press, Oxford, 1976), pp.162-163, SPLM/A Exhibit FE 11/7

# THE REPUBLIC OF THE SUDAN

*A Regional Geography*

K. M. BARBOUR, B.Litt., M.A.  
*Lecturer in Geography, University College, London*



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can penetrate for long distances along the joints between the boulders to find water.

(b) On the rocky slopes very many species are found, characteristic trees being *Boswellia papyrifera*, *Sterculia setigaria*, *Combretum*, *Terminalia* and *Acacia* spp., *Anogeissus schimperi*, and the conspicuous pink-flowered *Adenium honghel*; many grasses, including *Hyparrhenia*, *Beckeropsis* spp., and *Pennisetum pedicellatum* are also seen.

(c) The hard-surfaced loam soils (*qardūd*) are unfavourable to tree growth, and even the grass cover is often scanty. *Adansonia* often occurs just at the break of the slope above the *qardūd*; and in more permeable areas *Hyphaene thebaica* is common; the grasses include *Aristida*, *Hyparrhenia* and *Setaria* spp.

(d) Along the zone of transition from loam to heavy clays *Anogeissus schimperi* and *Combretum hartmannium* are characteristic, gradually merging into *Acacia-Balanites* savannah in the plains.

(e) The watercourses vary according to the size of their catchment areas. In Darfur, the terraces beside the large wadis bear fine specimens of *Acacia albida*, with *Cordia abyssinica* and *Khaya senegalensis* in wetter areas; in the Nuba Mountains the terraces are characteristically narrower, and often bear both *döm* and *doleib* palms (*Hyphaene thebaica* and *Borassus aethiopicum*).

The Baqqara Repeating Pattern consists of frequently alternating small patches of contrasting soil types that lie along the southern edge of the Qoz flats: these are flats of non-cracking clay (*naqa'a*) and slightly higher areas of stabilized sand-dune (*atamur*), with between them a transitional zone, whose vegetation is of particular value for its 'saltiness'.

The smooth-surfaced *naqa'a*, almost impenetrable to water, has a scanty grass cover and rarely supports any trees or bushes except at its edges or where its drainage collects in shallow rain pools around which several kinds of tree may grow. The grasses of the *naqa'a* include several species of *Aristida* and many others, among which may be *Sporobolus marginatus*, which also occurs along the transition zones. Trees found at the periphery of the *naqa'a* include *Acacia mellifera*, *A. hebacladoides* and *Lannea humilis*; those by the pools com-

prise *Tamarindus indica*, *Anogeissus schimperi*, and many others including *Acacia* and *Ficus* spp.

The transition zone grasses of high salt value are *Sporobolus* sp., *Dactyloctenium aegyptium*, *Brachiaria* sp. aff. *xantholenca*, and others; within the pools *Echinochloa stagnina*, *Oryza breviligulata*, and *E. colona* grow, the former in the deepest and the latter in the shallowest water. On the *atamur* the vegetation is very variable, with mixtures of all three rainfall belts of Low Rainfall Woodland Savannah.

The Raqaba Repeating Pattern has three frequently alternating types of country; taken as a whole the area has a distinctive character, and cannot readily be fitted into any single type of vegetation. The term *raqaba* means a shallow, meandering, clay-bottomed water channel, 20-100 metres wide, of which there are many in this area. The channels are connected with the Bahr el Arab, from which they flood in the summer, and they also receive water from local drainage. They are flanked by stands of *Acacia arabica*.

Beside the channels the lowest ground consists of areas of dark cracking clay, known as *fau*, which are liable to shallow flooding and support a vegetation of tussocky grasses, chiefly *Setaria incressata*, *Hyparrhenia rufa* and *Vetivaria nigritana*; it could be classified, in fact, as Intermediate Grassland of the Flood Region. Rather higher than the *fau* there are areas of cracking clay that are not liable to flooding: these are known as *talha*, and support typical *Acacia seyal-Balanites* Savannah. Highest of all are the areas of *qardūd*, non-cracking clay flats with a high run-off; this is very similar to the *naqa'a* of the Baqqara Pattern, and bears the same vegetation.

#### *High Rainfall Woodland Savannah*

(a) Known as *Anogeissus-Khaya-Isobertinia* Woodland. In contrast with the Low Rainfall Woodland Savannah, which Harrison and Jackson have divided into numerous categories on the basis of soil type and rainfall, the High Rainfall type is shown as two vegetation-types throughout most of the Bahr el Ghazal and western Equatoria Province, covering a total of 300,000 sq. km. (120,000 sq. miles) of the Ironstone Plateau region. The limits of the drier

Barbour, K.M., *The Republic of Sudan: A Regional Geography* (University of London Press, London, 1961), p.69, SPLM/A Exhibit FE 18/24

# DIVINITY AND EXPERIENCE

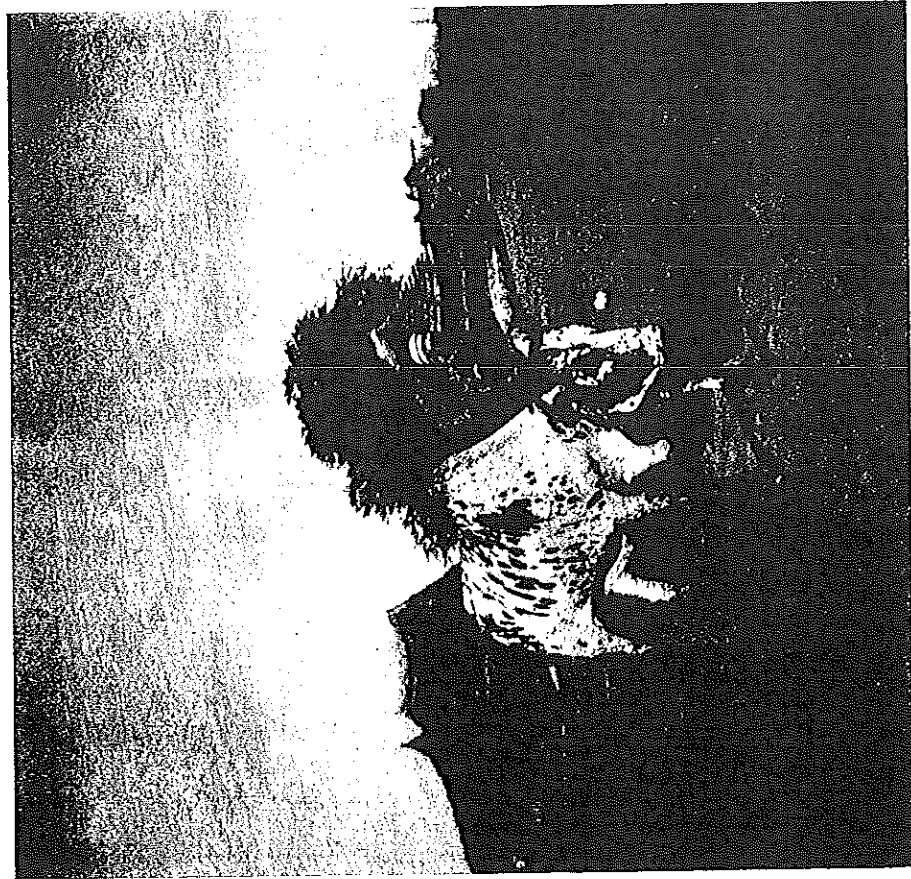
*The Religion of the Dinka*

BY

GODFREY LIENHARDT

*Lecturer in African Sociology at the  
University of Oxford*

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distinction between Nature and Mind, it is rather that some men on occasion incorporate in themselves the ultra-human forces of Nature, than that they endow Nature with qualities which they recognize in themselves and in human kind. When the Dinka ask, as in a hymn,

DENG, Governor, support his life . . .

the term DENG represents an integration of political and moral experience with experience of nature in a single image. Through the colour-symbolism we have already mentioned, this image also includes the black-and-white configurations in cattle, which again impress themselves upon the minds of the Dinka as does the lightning in dark, lowering skies which signifies the activities of DENG.

Such associations of the Powers as we have mentioned still do not exhaust their 'meaning'; for as experience, though it be fundamentally experience of the same basic situations of Dinka life, varies from place to place, time to time, and in a smaller measure from individual to individual, so there are local and individual variations in the Powers known and the ways in which they are represented. First, since divinities are manifest in human prophets and diviners who claim to speak for them, the particular characteristics of these prophets, as men, modify the Dinkas' representation of the Powers themselves. Hence we find the numerous refractions of DENG, for example, to be distinct from each other as those in whom they have been recognized are different persons, alike in the fundamental experience they image. Also, even as representing only rain or meteorites or thunder and lightning, DENG is likely to fall anywhere, but does in fact fall in particular places at particular times. As rain, or thunder and lightning, or a meteorite, which fall in one place, are not, and yet are, the same as those which fall elsewhere at some other time, so DENG is one and many.

There is further the imaging in the Powers of what must be presumed to be external influences of whole groups of people, but for which unfortunately, for the Dinka, there is little independent historical evidence. We hear that Powers have come into particular parts of Dinka country, or have spread from one part to another. GARANG and DENG are thus at one and the same time an original father and son, two Powers with the

general experiential associations we have mentioned, and also known in some parts of Dinkaland as the clan-divinities of particular clans. We cannot now know the historical factors involved in this supposed appearance or reappearance of Powers in particular places and at particular times, nor in the relationship between DENG and GARANG known to be the divinities of particular clans, and DENG and GARANG as free divinities potentially affecting all people. It is interesting to note though that a traveller forms the impression that the Dinka whose countries are nearest to foreign influence are those among whom the Powers are regarded as most strongly operating. Western Twij Dinka country is singled out by the Rek as a source of diffusion of knowledge of the free-divinities. It is generally held that GARANG in particular entered Western Dinkaland from there. GARANG is also well known among the Bor and Twij Dinka of the east bank of the Nile, and there can be no doubt that the Western Twij Dinka came originally from there.<sup>1</sup> DENG seems to be particularly strong among the Ngok and Rueng, and to judge by the earlier literature, among the northern groups of Dinka.

It is these parts of Dinkaland which have been for longest in intimate contact with the northern Sudan and, I suggest, it is possible that among them not only has the experience of a strong influence coming from without been assimilated to the experience imaged in the free-divinities but in the case of GARANG, at least, some of the associations of that Power are particularly appropriate also to the Dinka experience of the Arabs to the north. The north is known as a hot land, from which, however, the cool winds come; and GARANG, as in the hymn we have quoted (p. 87), though associated with sun and heat, is asked to bring coolness. The Arabs themselves are to the Dinka red or yellow-brown men from a land of sand. These are the colours of GARANG; but further, the cattle-Arabs to the north of the Ngok and Twij Dinkas have a particular reputation as great hunters of the giraffe, the game with which GARANG is also specially associated. It is possible then that these free-divinities (which according to many Dinka have always existed,

<sup>1</sup> Western Twij who have not visited the east bank of the Nile not only speak a dialect resembling that of the east bank, but also have traditions which agree in detail with some of those of the east bank Twij.