

# **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

BETWEEN:

GOVERNMENT OF SUDAN

and

SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY



**COUNTER-MEMORIAL OF THE GOVERNMENT OF SUDAN**

13 FEBRUARY 2009



## Table of Contents

### Volume I

	Pages
<b>1. Introduction</b> .....	1
A. General Overview .....	1
B. Preliminary Remarks .....	3
(i) The Weight of the Documentary Evidence.....	3
(ii) Assessing Modern Oral Evidence of Historic Events .....	9
(a) The SPLM/A's Witness Statements Refer to Past Events to Which the Witnesses Cannot Personally Testify .....	14
(b) The SPLM/A's Witness Statements Concern Time Periods Which Have No Bearing on the Year 1905 .....	17
(c) The SPLM/A's Witness Statements Are Vague as to the Specific Territory to Which They Refer .....	18
(d) The SPLM/A's Witness Statements Are Not Corroborated by Contemporaneous Evidence.....	18
(e) The SPLM/A's Witness Statements Are Provided by Interested Parties.....	19
(iii) The Onus of Proof .....	21
C. The Outline of this Counter-Memorial.....	25
<b>2. The Interpretation of the Formula</b> .....	27
A. Introduction.....	27
B. The Temporal Dimension.....	28
C. The Territorial Dimension .....	30
D. The Task of the Tribunal.....	33
<b>3. The Excess of Mandate of the ABC Experts</b> .....	36
A. General Considerations.....	36
(i) The "Estoppel" and "Finality" Arguments .....	36
(ii) The SPLM/A's Claims Concerning the Exceptional Character of a Finding of Excess of Mandate and the Burden of Proof .....	38
(iii) The Special Circumstances of the Case .....	39

B.	Grounds for Excess of Mandate .....	43
	(i) The ABC Experts Decided <i>Ultra Petita</i> .....	45
	(a) Answers to Questions Not Submitted: the “Secondary 74Rights” Issue.....	47
	(b) Misinterpretation of the Express Provisions of the 77Mandate .....	50
	(ii) The ABC Experts Decided <i>Infra Petita</i> .....	55
	(iii) The ABC Experts Committed Gross Violations of Applicable Procedural Rules .....	68
<b>4.</b>	<b>The SPLM/A Claim to a Boundary at 10°35’N.....</b>	<b>74</b>
A.	The SPLM/A Claim.....	74
B.	The Documentary Evidence of Nogk “Title” in 1905 .....	76
	(i) The Ngok Foundation Myth: the 18 <sup>th</sup> Century .....	77
	(a) Oral Sources of the Ngok Foundation Myth.....	78
	(b) The Scholarly Sources.....	79
	(c) The SPLM/A’s Selective Use of Sources .....	82
	(ii) The Differential Impact of the Mahdiyya .....	86
	(iii) The Late 19 <sup>th</sup> -Early 20 <sup>th</sup> Centuries (1898-1905).....	94
	(iv) The Period After the Transfer .....	107
	(a) Post-1905 Boundary Descriptions and Maps .....	107
	(b) Hallam’s Route Report 1907 and Other Documents .....	109
	(c) Conclusions on the Post-Transfer Period .....	119
	(v) The Inter-War Period .....	119
	(vi) The Period Prior to Independence in 1956 .....	128
	(vii) Conclusions from the Documentary Evidence .....	133
C.	Recently-Prepared Evidence of Oral Tradition .....	133
	(i) Accuracy of Oral History Generally.....	135
	(ii) The Coming of the Humr/Messeriya .....	136
	(iii) Northerly Extension of Certain Dinka Sections.....	138
	(iv) The Humr/Messeriya as Traders not Cattlemen.....	138
	(v) The So-Called Border at Tebeldiya .....	139
	(vi) Conclusions on the Oral Evidence .....	144

D.	The Expert Evidence .....	145
E.	The Map Evidence of Tribal Areas .....	147
	(i) SPLM/A Map 12 - "Southern Sudan: Tribes" .....	148
	(ii) The "Ngok Dinka Chiefdoms 1905": SPLM/A Maps 13-22 .....	152
F.	Conclusions.....	156
<b>5.</b>	<b>The Boundary Between Kordofan and Bahr el Ghazal Before 1905 and the 1905 Transfer .....</b>	<b>158</b>
A.	Introduction.....	158
B.	The Evidence Showing that the Pre-1905 Administrative Boundary Was the Bahr el Arab.....	161
	(i) Prior to 1905, the Bahr el Arab Was a Well Known Boundary Between the Arab Tribes to the North and the Dinka to the South.....	163
	(ii) The Bahr el Arab Was the Provincial Boundary Between Kordofan and Bahr el Ghazal before the 1905 Transfer .....	170
C.	The 1905 Transfer.....	179
D.	The Southern Limits to the Transferred Area after 1905 .....	189
E.	The "Transferred Area" Did Not Include Areas North of the Bahr el Arab.....	194
F.	Conclusions.....	198

**Submissions**

A.S. Macdonald, Mapping Issues Raised by the SPLM/A Memorial, Expert Report

Volume II: Documentary Annexes

Volume III: Map Atlas

Volume IV: Witness Statements

## List of Figures

<b>Figure</b>	<b>Title</b>	<b>Page</b>
1	The Humr and their Land from, Cunnison (1954)	91
2	Tribal Districts, from Collins (1971)	93
3	Wilkinson's Sketch (1902)	96
4	Percival 1904 route map	103
5	Percival's Sketch (1904)	105
6	Comyn's Sketch (1906)	110
7	Hallam route map (1907)	112
8	Homr Dry Season Camps (1908)	114
9	Whittingham Sketch (1910)	116
10	Whittingham Route map (1910)	117
11	Heinekey Route Map (1918)	121
12	Dupuis Route Map (1921)	123
13	Titherington Sketch (1924)	125
14	Grazing Area Map (1933)	126
15	Dinka Tribal Groups, from Lienhardt (1961)	129
16	Humr Migration Routes, from Cunnison (1966)	131
17	Upper Niles Tribal Map (1941)	149
18	Equatorial Tribal Map (1941)	150
19	Kordofan Native Administrations Map (1941)	151
20	Arab Tribes	153
21	Dinka Tribes	154
22	Ngok Tribes	155

## **Chapter 1**

### **Introduction**

#### **A. *General Overview***

1. This Counter-Memorial is filed pursuant to agreement reached at the procedural meeting of 24 November 2008, fixing 13 February 2009 as the date for the simultaneous submissions of Counter-Memorials by the Parties. It responds to the contentions of law, fact and myth raised in the SPLM/A Memorial.

2. There are two issues which the Parties have requested the Tribunal to decide. Both issues are set out in Article 2 of the Arbitration Agreement. First, the Tribunal is requested to determine whether or not the ABC Experts exceeded their mandate, which was "to define (*i.e.*, delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905." Second, in the event the Tribunal determines that the Experts did exceed their mandate, the Tribunal shall proceed to define and delimit on a map the boundaries of the same chiefdoms transferred to Kordofan in 1905 based on the submissions of the Parties.

3. With respect to the first issue, the SPLM/A Memorial contends that (i) the Government of Sudan has no right to appeal because it "prospectively waived" that right in the instruments constituting the ABC, (ii) the Experts in any event did not exceed their mandate, and (iii) the Government of Sudan's claim of excess of mandate must be subject to "the most demanding standards of proof."

4. All three arguments are fundamentally misplaced. The first is disposed of by the Arbitration Agreement itself. That is the agreement vesting jurisdiction in the present Tribunal and it is the agreement that governs these proceedings. The Arbitration Agreement is a consensual instrument. Both Parties have jointly submitted to the Tribunal the issues it is to decide. One of these issues is whether or not the Experts exceeded their mandate. In these circumstances, it is absurd for the SPLM/A to argue that the Government of Sudan is somehow precluded or estopped from challenging the decision of the

Experts and the grounds and procedures on which it was based. That is an issue which this Tribunal has expressly been asked to decide.

5. The third argument is equally untenable and is also rebutted by the terms of the Arbitration Agreement and the procedural rules that the Parties have agreed govern these proceedings. More will be said on this issue in Section B(iii) below.

6. As for whether the ABC Experts exceeded their mandate, the GoS Memorial has showed in considerable detail that the Experts did exceed their mandate, and in a number of fundamental ways. The SPLM/A Memorial fails to address the many shortenings underlying the Experts' decision and the procedures they followed in reaching that decision in excess of their mandate. What arguments the SPLM/A does present in its Memorial are fully responded to in Chapter 3.

7. As for the second issue before this Tribunal - the delimitation of the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 - the arguments advanced in the SPLM/A Memorial suffer from three general defects. First, the SPLM/A misinterprets the mandate, or formula. Instead of focusing on the *area* of the nine Ngok Dinka chiefdoms that was *transferred* by Sudanese officers from the province of Bahr el Ghazal to that of Kordofan in 1905, the SPLM/A elects to concentrate on areas which the Ngok Dinka allegedly "occupied and used", both before the 1905 transfer and afterwards. But this was not the question put to the ABC Experts and it is equally not the question put to this Tribunal.

8. As this Counter-Memorial will show (in Chapter 5), there was a well documented, administrative transfer of the area of the Ngok Dinka chiefdoms in 1905 from one province to another. It is possible to identify the area that was transferred at the time from contemporary official sources and from contemporary maps. It lay south of the Bahr el Arab.

9. Nonetheless, even if the mandate was as the SPLM/A Memorial wrongly asserts, to be based on areas the Ngok Dinka "occupied and used", the evidence does not in the least support the SPLM/A claim that the transferred area extended up to the 10°35'N latitude, or even up to the Ragaba ez Zarga. This will be shown in Chapter 4.



10. It is submitted that the contemporary documents, most of which emanate from official Government sources, provide ample evidence of where the transferred area lay. They are the best evidence available to answer the second issue before the Tribunal. In contrast, the SPLM/A's claims are largely "supported" by recently prepared witness statements and so-called oral tradition. These materials have virtually no evidentiary value. However, since so much of the SPLM/A case rests on this kind of material, it is necessary to say a few words about the weight of the evidence and the value of "oral tradition" and witness statements when measured against the contemporary documentary record.

## **B. Preliminary Remarks**

### **(i) The Weight of the Documentary Evidence**

11. The ABC Experts, by their own omission, relied on a "host of documentary... evidence".<sup>1</sup> Notwithstanding this, the SPLM/A asserts in its Memorial that:

"There is very limited documentary evidence regarding the Ngok Dinka or neighboring tribes prior to the 20th century"<sup>2</sup>

12. Nothing could be further from the truth. As this Counter-Memorial will demonstrate, there is an abundance of evidence, both concerning the geographical position of the Ngok in and their transfer to the Kordofan province in 1905. This and similar statements in the SPLM/A Memorial are nothing more than a reflection of the SPLM/A's selective reading of contemporary<sup>3</sup> historical sources relating to the 1905 transfer - selectivity amounting in many cases to a self-denying ordinance.

13. Rather than going through *all* the contemporary material, the present section seeks to provide some illustrative examples, which are only a fraction of the voluminous material presented to the Tribunal, the most compelling of which were disregarded or denied by the SPLM/A Memorial. Reference will be

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<sup>1</sup> SPLM/A Memorial, para. 41.

<sup>2</sup> *Ibid.*, para. 119.

<sup>3</sup> It should be noted that whenever the word "contemporary" is used, it is in the sense of contemporary with the critical date of 1905.

made to three contemporary sources: H.W. Mardon, N. Shoucair and Sir Reginald Wingate.

*H.W. Mardon*

14. As already noted in the GoS Memorial, H.W. Mardon was a well-known author and cartographer. The list of acknowledgments in his *A Geography of Egypt and the Anglo-Egyptian Sudan* (1906) includes such prominent people as:

- H.E. Yakub Artin Pasha, Under Secretary of State;
- Lieutenant-Colonel Gleichen, Director of Intelligence and Sudan Agent, War Office;
- Captain H.G. Lyons, R.E., Director of General Surveys, Egypt; and
- Colonel M.G. Talbot, R.E., Director General of Surveys, Sudan.<sup>4</sup>

15. One of Mardon's publications were acknowledged in the 1911 *Encyclopaedia Britannica* as being "excellent" and were extensively referred to by other writers,<sup>5</sup> such as, for example, W.G. Baker in his publication, *The Geography of the British Empire* (1907).<sup>6</sup> A Mardon map was also used in the 1905 *Compendium of the Anglo-Egyptian Sudan*.<sup>7</sup> There is no doubt that H.W. Mardon was a distinguished cartographer of the region.

16. Mardon's reliability as a source of Anglo-Egyptian history is also recognised by the SPLM/A who refers to him in its Memorial as an authority on matters such as population density,<sup>8</sup> demography,<sup>9</sup> and geography of the early 20th century Sudan.<sup>10</sup>

17. Mardon's 1906 publication *A Geography of Egypt and the Anglo-Egyptian Sudan*, was mainly prepared to meet the need of Egyptian schools. This explains why, according to the author himself, the book was written in

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<sup>4</sup> Mardon, H.W., *A Geography of Egypt and the Anglo-Egyptian Sudan* (Blackie & Son, London, 1906) p. 3, SPLM/A-FE 2/20.

<sup>5</sup> See *Encyclopaedia Britannica* (1911), under the heading 'Egypt'.

<sup>6</sup> See e.g., Baker, W.G., *The Geography of the British Empire* (Blackie & Son, London, 1907).

<sup>7</sup> See paragraph 444.

<sup>8</sup> SPLM/A Memorial, para. 70.

<sup>9</sup> Ibid., para. 73.

<sup>10</sup> Ibid., para. 312.

"simple language".<sup>11</sup> The purpose of the book was not to be "simplistic", but rather to pedagogically convey knowledge of Egypt and the Anglo-Egyptian Sudan to schoolchildren.

18. Among the information contained in the book, but conspicuously ignored by the SPLM/A, is a description of the Bahr el Ghazal Province. The book states as follows:

"The Bahr el Ghazal Province embraces practically the whole of the Sudan territory lying to the south of the Bahr el Arab and the Bahr el Ghazal..."<sup>12</sup>

19. This is consistent with the map drawn by Mardon in 1901, as reissued in 1903.<sup>13</sup> This map shows the Mudiria (i.e. provincial) boundaries as dotted red lines, including along the Bahr el Arab, the northern boundary of Bahr el Ghazal with both Kordofan and part of adjacent Darfur. The same map was used as the main reference map in the second edition of Gleichen's *Handbook of the Sudan* (1905). It was also inserted as an end paper in that same *Handbook*.<sup>14</sup>

20. While the SPLM/A seeks to belittle the importance of both Mardon's maps and publications, the fact that this border description was published in an early 20<sup>th</sup> century schoolbook quite literally means that - at the time - even a child would have known that the Bahr el Arab was the northern border of the Bahr el Ghazal Province.

#### *Naum Shoucair*

21. Another contemporary source mentioned by M.W. Daly, who however completely ignores when addressing early 20<sup>th</sup> century boundaries, is Naum Shoucair's *History and Geography of the Sudan* (1903). This is one of the most celebrated works on Sudanese history. At the time of writing Shoucair was the Chef-de-bureau of the Sudan Agent General in Cairo. He was also one of the contributors to the *Gleichen's 1905 Compendium*. Shoucair's book corroborates both Mardon's map and his description of the Bahr el Arab as the

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<sup>11</sup> Mardon, H.W., *A Geography of Egypt and the Anglo-Egyptian Sudan* (Blackie & Son, London, 1906) p. 3, SPLM/A-FE 2/20.

<sup>12</sup> *Ibid.*, p. 175.

<sup>13</sup> GoS Memorial, Map Atlas, Map 5.

<sup>14</sup> See paragraph 444 below.

pre-1905 boundary. Shoucair's book, which again is referred to by numerous scholars, contains the following descriptions of the Kordofan Province:

"From the north it is bounded by a line that extends from Gabra to Wadi El-Milih near Ain Hamid, *from the south Bahr-el-Ghazal and Bahr el Arab*, from east El Jazeera and Fashoda mudirias, and from the west Darfur."<sup>15</sup>

22. Correspondingly, the Bahr el Ghazal Province is described as follows:

"It is the country irrigated by the Bahr-el-Ghazal and its tributaries, *its boundary from the north is the Bahr-el-Arab* and Bahr-el-Ghazal separating it from Darfur and Kordofan, from east Bahr-el-Jebel is the border between it and Fashoda, from the south Congo free state, and from the west the mountains separating it from French Congo."<sup>16</sup>

23. Interestingly, Shoucair also notes that the inhabitants of Kordofan are "Arabs", who cultivate millet, and that the inhabitants of Bahr el Ghazal are "blacks", who cultivate dura (sorghum).<sup>17</sup> Thus, Shoucair's description of southern Sudan is consistent with many other scholars who emphasize the Bahr el Arab as the cultural divide between the Arab tribes of the north and the black African tribes, including Dinka, of the south.<sup>18</sup>

#### *Sir Reginald Wingate*

24. A third source to be emphasized is Sir Reginald Wingate. Wingate was a prominent figure in the Sudan. M.W. Daly writes:

"Despite Wingate's subordination to Cairo, within the Sudan he was personally supreme. He exalted his position with viceregal trappings, and by simulating a court at Khartoum. To Cromer he may have been a mere 'lt. gov.' but in the Sudan Wingate acted like a Monarch."<sup>19</sup>

25. Wingate was Governor-General of the Sudan, and thus the highest civil servant in the country, from 1899 to 1916. He was known for his personal involvement in the administration of the Sudan. In this regard, Gabriel Warburg writes that:

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<sup>15</sup> Shoucair, N., *History and Geography of the Sudan* (El-Maarif Press, Cairo, 1903) (in Arabic) p. 71 (SCM Annex 1). (Emphasis added).

<sup>16</sup> Ibid., p. 72.

<sup>17</sup> Ibid.

<sup>18</sup> See below Chapter 5, paragraphs 440-442.

<sup>19</sup> Daly, M.W., *Empire on the Nile, 1898-1934*, (CUP, Cambridge, 2003), p. 93, SPLM/A-FE 11/5.

"He [Wingate] was a strong believer in the direct personal approach both in his relations to his subordinates and his dealings with the Sudanese people."<sup>20</sup>

26. Unlike what is suggested by M.W. Daly, Wingate also took an interest in southern Sudan. His attention to the question is *inter alia* evident by the fact that his 1905 Memorandum, published in the *Annual Report on Finances, Administration, and Condition of the Sudan*, explicitly mentions the 1905 transfer. It states:

"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>21</sup>

27. As emphasized in Chapter 5, this description could not have been clearer, both as regards the northern boundary before 1905 and with regard to what was transferred in that year. Moreover, this was not the first time that Governor-General Wingate had taken a specific interest in southern Sudan or indeed the Bahr el Arab.<sup>22</sup>

28. As noted above, these three selected sources are but a small representation of the large quantity of material recorded in contemporary records or by historians. Their omission or the highly selective citations provided by the SPLM/A are nonetheless representative of its approach to the relevant contemporary evidence regarding the 1905 transfer.

29. The importance of the first contemporary source, H.W. Mardon, is belittled and his works are labelled as "unofficial" and "simplistic" by the SPLM/A.<sup>23</sup> As to Mardon's maps, the SPLM/A's critique is dealt with in Alastair Macdonald's second Expert Report.<sup>24</sup> Here it suffices to note that it is remarkable that the SPLM/A quotes Mardon as saying that: "[t]he exact limits of the provinces, especially those in the south, are not yet very definitely fixed.", but omits the very next page where the same author states that: "The

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<sup>20</sup> Warburg, G., *The Sudan Under Wingate*, (Routledge Press, Haifa, 1971), p. 188, SPLM/A Exhibit-FE 5/1.

<sup>21</sup> Cited in the GoS Memorial, para. 360; 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>22</sup> See e.g., *Reports on the Finances, Administration and Condition of the Sudan*, Annual Report (1904), p. 8 (SM Annex 23).

<sup>23</sup> SPLM/A Memorial, para. 308.

<sup>24</sup> Second Mcdonald Report, paras. 8, 13(1) and 32.

Bahr el Ghazal Province embraces practically the whole of the Sudan territory lying to the south of the *Bahr el Arab*...<sup>25</sup>

30. Even more astonishing is the fact that a distinguished scholar such as Professor Daly apparently overlooked the above description of the Kordofan province provided by N. Shoucair. Instead of citing the most pertinent part of Shoucair's *History and Geography of the Sudan*, Professor Daly limits his analysis to other parts of the same study, which concern the Mahdiyya in the late 19<sup>th</sup> century. In so doing, Professor Daly neglects entirely to mention the passages quoted at paragraphs 21 and 22 above, describing in the plainest terms the Kordofan-Bahr el Ghazal boundary as being the Bahr el Arab.<sup>26</sup>

31. But, perhaps the most remarkable omission from the SPLM/A Memorial, and indeed from Professor Daly's Expert Report, is the extract from Wingate's 1905 Memorandum quoted at paragraph 26 above. This latter omission is especially striking, given the date of this document, 1905, and its provenance: the Governor-General of the Sudan from 1899 to 1916. Wingate not only mentions the border, but he also describes the area transferred and its northern limit, the Bahr el Arab. Despite this, not a single reference is made in the entire SPLM/A Memorial to Wingate's 1905 Memorandum.

32. These, and many other contemporary sources, fundamentally contradict the entire SPLM/A argument that the area transferred in 1905 extended north of the Bahr el Arab. By the same token, as will be shown in greater detail in Chapter 5 below, the contemporaneous evidence in the record also undermines the conclusion of the ABC Experts that a huge portion of the transferred area lay to the north of the Bahr el Arab. This, perhaps, is the reason why these documents were omitted by the SPLM/A. As this Counter-Memorial will illustrate, there are numerous other sources that have shared a similar fate.

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<sup>25</sup> SPLMA Memorial, para. 308 and Mardon, H.W., *A Geography of Egypt and the Anglo-Egyptian Sudan* (Blackie & Son, London, 1906) p. 175, SPLM/A-FE 2/20.

<sup>26</sup> Daly Report, p. 23 and Shoucair, N., *History and Geography of the Sudan* (El-Maarif Press, Cairo, 1903), SPLM/A-MD 1/25.

## (ii) Assessing Modern Oral Evidence of Historic Events

33. The SPLM/A Memorial states that there is "very limited documentary evidence regarding the Ngok Dinka or neighboring tribes prior to the 20th century."<sup>27</sup> It consequently relies extensively on the oral traditions of the Ngok people, as reflected in the witness statements before the ABC, to support its account of the presence and activities of the Ngok Dinka and Misseriya populations in the Abyei region.<sup>28</sup> The SPLM/A alleges that the oral traditions recount that the Ngok Dinka migrated to the region in the early 18th century and that, by the end of the 19th century, Abyei town had become the centre of Ngok commercial and political affairs.<sup>29</sup> The Memorial also asserts that parts of the Abyei region had been used seasonally as grazing grounds by the Misseriya and a few other tribes, such as the Twic and Rueng Dinka.<sup>30</sup>

34. The SPLM/A's allegations are largely based on uncorroborated oral statements provided by interested witnesses recounting facts which took place at a time (1905) before they (and their fathers) were even born and when the town of Abyei did not appear on any map.<sup>31</sup> The witnesses rely on oral accounts of the practices, customs, traditions and locations of the dwelling-places of their people. The difficulties inherent in this kind of evidence are obvious.

35. Even from a purely historical perspective, oral tradition taken by itself has very limited value. As noted by one of the leading authorities on the subject, Jan Vansina, in his seminal work, *Oral Tradition: A Study in Historical Methodology*:

"A testimony is no more than a mirage of the reality it describes. The initial informant in an oral tradition gives, either consciously or unconsciously, a distorted account of what has really happened, because he sees only some aspects of it, and places his own interpretation on what he has seen. His testimony is stamped by his personality, coloured by his private interests, and set within the framework of reference provided by the cultural values of the society he belongs to. This initial testimony then

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<sup>27</sup> See SPLM/A Memorial, para. 119.

<sup>28</sup> Ibid., paras. 86, 119-127 and 883-896.

<sup>29</sup> Ibid., para. 86.

<sup>30</sup> Ibid., paras. 87-88.

<sup>31</sup> See GoS Memorial, para. 6.

undergoes alterations and distortions at the hands of all the other informants in the chain of transmission, down to and including the very last one, all of them being influenced by the same factors as the first..."<sup>32</sup>

36. Further limitations include the fact that the accuracy of oral tradition is distorted by the passage of time and distant memories of events. Vansina observes in this respect as follows:

"[Distortions] all result from the fact that that things become lost to memory, either through some lapse on the part of an informant, or because the circumstances which would explain the events described have been forgotten."<sup>33</sup>

37. Given the shortcomings of this kind of oral evidence as a historical source, historians assess different oral accounts by using a comparative methodology, whereby oral traditions are submitted to careful examination and confirmed by other kind of evidence before they can be accepted. Vansina advises that "[w]herever the comparative method can be used, this is the best way of establishing the extent to which a tradition is a true reflection of the events described."<sup>34</sup> Only this method "is the one which enables the historian to arrive at an overall estimate of the relative reliability of the various testimonies."<sup>35</sup>

38. Through comparative methodology, oral testimonies are to be "corroborated" by other sources of evidence, including other testimonies which describe the same events. Accurate results only emerge where oral testimonies are compared against other historical sources. Vansina notes in this respect:

"If use of the comparative method is extended to include comparison of oral traditions with other historical sources this increases the chances of establishing that traditions are completely independent, and this in turn further adds to the usefulness of the comparative method, for the main aim here is to establish whether independent sources do or do not agree in their accounts of the same events."<sup>36</sup>

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<sup>32</sup> Vansina, J., *Oral Tradition, A Study in Historical Methodology* (Aldine Publishing Company, Chicago, 1961), p. 76 (SCM Annex 2). Oral testimonies are also limited because they are hearsay accounts, as Vansina notes: "Oral traditions exclusively consist of hearsay accounts, that is, testimonies that narrate an event which has not been witnessed and remembered by the informant himself, but which he has learnt about through hearsay." *Ibid.*, p. 20.

<sup>33</sup> *Ibid.*, p. 45.

<sup>34</sup> *Ibid.*, p. 140.

<sup>35</sup> *Ibid.*, p. 114.

<sup>36</sup> *Ibid.*, p. 138.



39. More specifically, when it comes to the so-called oral traditions of Sudan, it is doubtful that - to the extent that these are referred to in witness statements of individuals who have no personal knowledge of the facts at issue - they can be of any historical value. As noted by another authority in the field:

"Today there is a debate in the scholarly community as to whether verbal traditions are historical documents, or whether they are sources for merely discerning contemporary social arrangements and cultural statements. (...) Hence, most scholars are aware that they are not completely accurate as indicators of the past; some writing South Sudanese history today refuse to use oral data. (...) This methodology is especially appropriate for writing a history from broad, shallow data without precise chronological events. Thus, a number of scholars believe that oral traditions/histories contain "nuggets of meaning" preserving parts of the past in the present. (...) They are not intended to provide accurate chronological information or abstract quantification but rather are products of oral historians' attempts to make sense of the past."<sup>37</sup>

40. It is interesting to observe that this author applied the same rigorous methodology discussed above in treating oral testimonies in Sudan, which she describes as follows:

"[R]elying on Vansina's methodology, I have crosschecked the oral data above against oral histories collected by British administrators, missionaries and other scholars as well as against nonverbal evidence, including primary and secondary source materials..."<sup>38</sup>

41. In the present instance, not only it is evident that such an exercise has not been carried out by the SPLM/A, but the so-called evidence of oral tradition submitted by the SPLM/A is inherently flawed by its very nature. Indeed, the SPLM/A has submitted the testimonies of interested witnesses testifying on its behalf for the sole purpose of this case. As a result, such testimonies do not have an historical purpose and their value is fundamentally vitiated by the fact that they were specially prepared for this litigation. As Vansina observes with respect to the interrogation of informants:

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<sup>37</sup> Beswick, S., *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* (University of Rochester Press, Rochester, 2006), p. 3 (SCM Annex 3).

<sup>38</sup> Ibid., p. 3.

"In practice it is usually impossible to establish which part of the testimony is due to the influence of the questions and which stems from the tradition with which the person questioned is acquainted. Thus statements of this kind are generally unreliable."<sup>39</sup>

42. The probative weight of oral tradition in relation to native title claims has been examined by the courts of Canada and Australia in a number of cases where oral history was used to support native customs and traditions in the absence of any written records. In these cases, the significance of oral tradition was emphasised in an attempt to establish aboriginal rights. However, even in that particular context, the challenges and limitations of this form of evidence, which mixes past events with subjective interpretation, are great. As noted by one commentator, discussing the value of oral tradition in the context of the aboriginal peoples of Canada:

"Oral history presents both risk and insight because it simultaneously intermingles the events that took place in the past *and* the meaning that people ascribe to those events. (...) The blending of incident and interpretation presents special problems of verification for oral history, problems which are sometimes different from those contained in a documentary reconstruction of the past.

(...)

There are enormous risks for non-apprehension and misinterpretation when Aboriginal peoples submit their "facts" to the judiciary for interpretation. This problem is especially poignant in litigation as factual determinations are presented in an adversarial environment, and interpretations made by judges with a different language, cultural orientation, and experiential background than aboriginal people. The potential for misunderstanding exists because each culture has somewhat different perceptions of space, time, historical truth, and causality"<sup>40</sup>

43. In the *Mitchell v. M.N.R.* case, the majority of the Supreme Court of Canada also warned that - if aboriginal evidence should not be undervalued - "neither should it be artificially strained to carry more weight than it can reasonably support."<sup>41</sup>

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<sup>39</sup> Vansina, J., *Oral Tradition, A Study in Historical Methodology* (Aldine Publishing Company, Chicago, 1961), p. 30 (SCM Annex 2).

<sup>40</sup> Borrows, J., "Listening for a Change: the Courts and Oral Tradition" (2001) 2 *Osgoode Hall Law Journal* 39, pp. 5 and 29, footnotes omitted (SCM Annex 4).

<sup>41</sup> *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, para. 39 (SCM Annex 5).

44. The Canadian Supreme Court also stressed that oral history can be admissible as evidence only when it is "both useful and reasonably reliable".<sup>42</sup> With respect to the usefulness of this kind of evidence, the Court emphasised as follows:

"Aboriginal oral histories may meet the test of usefulness on two grounds. First, they may offer evidence of ancestral practices and their significance that would not otherwise be available. No other means of obtaining the same evidence may exist, given the absence of contemporary records. Second, oral histories may provide the aboriginal perspective on the right claimed."<sup>43</sup>

45. *A contrario*, it can be inferred from these precedents that, if contemporary written records do exist, evidence of oral tradition will only be useful - and can only have any probative value - if it confirms or corroborates the contemporary written record. If that is not the case, and, in fact if it is contradicted by the contemporary documentary evidence, including maps, as in the present case, oral tradition should be given no weight. Vansina notes, referring to the research work undertaken with regard to the value of oral tradition as historical source: "Should a tradition contain some internal contradiction, or go against facts established from other sources, it must be regarded as unreliable."<sup>44</sup> As stated further by the Canadian Supreme Court in *Mitchell v. M.N.R.*, "claims must be proven on the basis of cogent evidence establishing their validity on the balance of probabilities. Sparse, doubtful and equivocal evidence cannot serve as the foundation for a successful claim."<sup>45</sup>

46. In conclusion, oral traditions, in the proper sense of the word, narrate stories, sagas, legends and anecdotes. They are more concerned with expressing the cultural identity of populations than with providing an accurate record of events, precisely referring to specific facts, figures and dates. They must therefore be carefully examined against established facts and corroborated with other kind of evidence. In the present circumstances, where the task of the Tribunal is to determine the precise location of specific people (the nine Ngok Dinka chiefdoms) in connection with a specific event (the

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<sup>42</sup> Ibid., para. 31.

<sup>43</sup> Ibid., para. 32. Australian judicial practice has shown greater restraint when confronted with this type of evidence and has preferred to rely on anthropological writings rather than on the "traditional evidence" of natives, see *Milirrpum and Others v. Nabalco Pty. Ltd. and the Commonwealth of Australia* (1971) 17 F.L.R. 141 and *Members of the Yorta-Yorta Aboriginal Community v. Victoria* [2002] HCA 58 (12 December 2002).

<sup>44</sup> Vansina, J., *Oral Tradition, A Study in Historical Methodology* (Aldine Publishing Company, Chicago, 1961), p. 4 (SCM Annex 2), referring to Bernheim, E., *Einleitung in der Geschichtswissenschaft*, 1908/6, pp. 382-384.

<sup>45</sup> *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, para. 51 (SCM Annex 5).

transfer to Kordofan) and a specific date (1905), the so-called "evidence of oral traditions" produced by the SPLM/A is useless.

47. Furthermore, oral evidence cannot be attributed any weight if - as in the present case - a) it is based on hearsay, since it refers to a time when the witnesses recounting the events were not even born and thus have no personal knowledge; b) to the extent that it provides direct evidence, it concerns time periods which have no bearing on the temporal dimension of the dispute, in this case the year 1905; c) it lacks in detail as to the specific territory to which it refers; d) it is not corroborated (and indeed contradicted) by contemporaneous evidence; and e) it is provided by interested parties. As Rosenne has noted in his study *The Law and Practice of the International Court, 1920-1996*:

"Nevertheless, the Court will normally exclude hearsay evidence; that is to say, evidence attributed by the witness or deponent to third parties of which the Court has received no personal and direct confirmation."<sup>46</sup>

(a) *The SPLM/A's Witness Statements Refer to Past Events to Which the Witnesses Cannot Personally Testify*

48. The statements submitted on behalf of SPLM/A recount events which took place in the distant past and which the person providing the testimony could not possibly have witnessed in person.

49. For instance, the statement of Ajak Malual Beliu, a Chief of the Achueng Chiefdom, refers to the location of settlements from "the times of my father, grandfather, great-grandfather and his father before him."<sup>47</sup> The statement of Jok Deng Kek, of the Achueng Chiefdom, states: "I have never heard that my grandfather ever saw Misseriya. My father did not see Misseriya until his later age when he saw them coming to trade."<sup>48</sup> Nyol Pagout Deng Ayei, Paramount Chief of the Bongo tribe, testifies: "This is the information about the time of my father, grandfather and great grandfather. It has been taught to me by my elders. Of course there was no map."<sup>49</sup>

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<sup>46</sup> Rosenne, S., *The International Court of Justice, An Essay in Political and Legal Theory*, (2<sup>nd</sup> ed., A. E. Sythoff, Leiden, 1961), p. 405 (SCM Annex 6).

<sup>47</sup> SPLM/A Memorial, Witness Statement of Ajak Malual Beliu, Tab 13, para. 7.

<sup>48</sup> Ibid., Witness Statement of Jok Deng Kek, Tab 14, para. 12.

<sup>49</sup> Ibid., Witness Statement of Nyol Pagout Den Ayei, Tab 20, para. 8.

50. It is evident that reliability of witnesses is greatly diminished or nullified if they recall a distant past of which they only have a very indirect knowledge. The Court of Arbitration in the *Dubai-Sharjah* dispute was confronted with a number of statements introduced by the parties which related to a distant past and were mutually contradictory. The Court noted as follows:

"The Court has no doubt of the good faith of the witnesses. These contradictions may be explained by the fact that very often the evidence given related to incidents that took place many years ago - in some cases as much as forty years ago. In this situation the Court has been forced to take such evidence into consideration with the greatest of caution. Generally, the Court has preferred to pay attention to written documents from the period in question which afford a more reliable source of evidence."<sup>50</sup>

51. In the *Benin/Niger* case, Benin presented testimony taken many years after the relevant period.<sup>51</sup> This testimony was not invoked by Benin in later stages of the proceedings and played no role whatsoever in the Chamber's judgment, which relied entirely on the documentary evidence, including cartographic material. In commenting on this case, one well-respected author observed as follows:

"Selon toute vraisemblance, aucune des personnes interrogées n'avait 120 ans au moment des interrogatoires, âge nécessaire pour avoir des souvenirs de la période précoloniale considérée. Certes, on ne saurait écarter par principe de tels témoignages, s'agissant en particulier de l'Afrique qui reste encore, dans une large mesure, un continent des traditions orales. Mais comment s'assurer que dans le témoignage oral d'un arrière-grand-père qui a pu parvenir à son arrière-petit-fils, l'endroit indiqué est celui qui fait aujourd'hui l'objet du litige; par exemple qu'il s'agissait bien d l'île de Lété et pas d'une autre? Avec la longueur du temps les souvenirs peuvent être imprécis et les témoignages tout relatifs. Il est donc difficile d'accorder crédit à telles déclarations."<sup>52</sup>

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<sup>50</sup> *Dubai-Sharjah Border Arbitration*, 91 *I.L.R.* 543, at p. 590.

<sup>51</sup> *Frontier Dispute (Benin-Niger)*, *I.C.J. Reports 2005*, p. 90, at para. 80.

<sup>52</sup> "Most likely, none of the persons questioned was 120 years old at the time of the interrogations, the necessary age to have any memories of the pre-colonial period in question. To be sure, these testimonies cannot be dismissed as a matter of principle, since Africa remains still, to a large extent, a continent of oral traditions. However, how can one be sure that in the oral testimony of a great-grandfather which reached his great-grandson, the locality indicated is that which forms the object of the dispute today; for instance that it concerned indeed the island of Lété and not another island? With the passing of time, memories can become imprecise and testimonies relative. It is therefore difficult to lend credit to such declarations." Kamto, M., "Les moyens de preuve devant la Cour internationale de justice à la lumière de quelques affaires récentes portées devant elle" (2006) 49 *German Yearbook of International Law*, p. 283 (SCM Annex 7).

He added:

"[L]orsque l'affidavit ou le témoignage est établi longtemps après les faits concernés, le juge international est enclin à ne leur accorder que très peu de crédit.

(...) L'exigence de la contemporanéité de l'acte probatoire est particulièrement justifiée en ce qui concerne la preuve par témoignages. L'écoulement plus ou moins long du temps peut altérer, on l'a vu, leur fiabilité. C'est pourquoi les juridictions internationales, en l'occurrence la CIJ, préfèrent la preuve la plus proche dans le temps des faits qu'il s'agit d'établir."<sup>53</sup>

52. Generally speaking, hearsay evidence should be excluded and witnesses should testify only about matters within their knowledge. As observed by one authority, "Statements of this kind will be regarded as 'allegations falling short of conclusive evidence'."<sup>54</sup>

53. In the *Military and Paramilitary Activities* case, regarding testimony on matters not in the witness' direct knowledge, the Court had the following to say:

"Nor is testimony of matters not within the direct knowledge of the witness, but known to him only from hearsay, of much weight; as the Court observed in relation to a particular witness in the *Corfu Channel* case:

'The statements attributed by the witness ... to third parties, of which the Court has received no personal and direct confirmation, can be regarded only as allegations falling short of conclusive evidence.'*(I.C.J. Reports 1949, pp. 16-17.)*<sup>55</sup>

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<sup>53</sup> "When the affidavit or the testimony was established long after the relevant facts, the international judge is inclined to grant only very little credit. (...) The need of the contemporaneousness of the probative act is particularly justified for what concerns proof by testimonies. The more or less long lapsing of time may alter, as has been seen, their trustworthiness. That is why international jurisdictions, in this case the ICJ, prefer evidence which is the closest in time to the facts that need to be established." *Ibid.*, pp. 283 and 287.

<sup>54</sup> Rosenne, S., *The International Court of Justice, An Essay in Political and Legal Theory*, (2<sup>nd</sup> ed., A. E. Sythoff, Leiden, 1961), p. 405 (SCM Annex 6).

<sup>55</sup> *Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1986, para. 68.*

(b) *The SPLM/A's Witness Statements Concern Time Periods Which Have No Bearing on the Year 1905*

54. As recalled in the GoS Memorial,<sup>56</sup> one of the key features of the present case is that the Parties have agreed that the year 1905 is the relevant date. The Tribunal's mandate is limited to defining, i.e. delimiting, the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905.<sup>57</sup> However, to the extent that they provide testimony of certain events, the witness statements submitted by the SPLM/A refer to a time frame that has no relevance in the present dispute, since the statements testify to events that allegedly took place in the 1940s<sup>58</sup>, the 1950s<sup>59</sup> or the 1960s and even later.<sup>60</sup>

55. In past sovereignty or boundary disputes where State parties have relied on the oral traditions of local populations in support of their claims and allegations, when oral tradition was considered and assessed by the Court or arbitrators, no weight was given to allegations regarding a different period than that relevant to the dispute.

56. In *Island of Palmas*, the Sole Arbitrator had to consider *inter alia* whether and to what extent Spanish sovereignty over the disputed Island had been manifested. Declarations made by natives regarding visits to the Island by Spanish ships had been filed by Spain. However, since the contemporary record did not contain any information corroborating these declarations, the Sole Arbitrator concluded that "no weight can be given to such allegations as to the exercise of Spanish sovereignty in recent times - quite apart from the fact that the evidence in question belongs to an epoch subsequent to the rise of the dispute."<sup>61</sup> With respect to other statements made by native chiefs and others whose memories went back to 1870 and on which The Netherlands relied, the Sole Arbitrator did not pronounce himself on their value but was satisfied that their contents were at least partially supported by other documentary evidence.<sup>62</sup>

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<sup>56</sup> GoS Memorial, paras. 31-33.

<sup>57</sup> Ibid., para. 31.

<sup>58</sup> SPLM/A Memorial, Witness Statement of Arop Deng Kuol Arop, Tab 9, paras. 22-23.

<sup>59</sup> Ibid., Witness Statement of Mijok Bol Atem, Tab 23, para. 15.

<sup>60</sup> Ibid., Witness Statement of Ring Makuac Dhel Yak, Tab 11, para. 17; *ibid.*, Witness Statement of Mijak Kuot Kur, Tab 12, paras. 13-17; *ibid.*, Witness Statement of Ajak Malual Beliu, Tab 13, para. 7; *ibid.*, Witness Statement of Jok Deng Kek, Tab 14, paras. 13-15; *ibid.*, Witness Statement of Belbel Chol Akuei Deng, Tab 15, paras. 15-16.

<sup>61</sup> *Island of Palmas* (1928), 4 *UNRIIAA*, p. 831, at p. 851.

<sup>62</sup> *Ibid.*, p. 865.

(c) *The SPLM/A's Witness Statements Are Vague as to the Specific Territory to Which They Refer*

57. Furthermore, the witness statements made in support of SPLM/A in these arbitral proceedings lack specificity as to the land which is said to be part of the Abyei area in 1905 but, rather, refer to vague and generic terms such as "Abyei area", "our lands", without further definition or clarification. Such statements beg the questions in dispute.

58. The witness statement of Arop Deng Kuol Arop provides a good example. He states as follows: "When I was a young boy, I remember the first time I saw a Misseriya was *in Abyei*... I also understand from our oral history that in my grand-father's time the Misseriya did not come down to *the Abyei area* in large numbers at all."<sup>63</sup> This statement also generically refers to the fact that: "by the turn of the 20th century *our lands* were settled and the tribal boundaries of the Ngok Dinka ... were well-known."<sup>64</sup> Nyol Pagout Deng Ayei acknowledges that "In Sudan at the time there was no map known to us. We did not need a map to know where one another's lands started and finished."<sup>65</sup>

59. Vague or generalised testimony is entitled to very limited or no probative value. In the *Arthur Young & Company* case, the Iran-U.S. Claims Tribunal stated, with respect to testimony contained in an affidavit:

"(..) the information is so vague that it is insufficient to warrant a finding that such acts indeed occurred or that they attributable to Iran."<sup>66</sup>

(d) *The SPLM/A's Witness Statements Are Not Corroborated by Contemporaneous Evidence*

60. As it will be shown in the following chapters, the statements provided by SPLM/A are also unsupported, and in fact they are outright contradicted, by the contemporaneous documentary evidence. In general terms, uncorroborated oral statements may be accepted as evidence only in

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<sup>63</sup> SPLM/A Memorial, Witness Statement of Arop Deng Kuol Arop, Tab 9, paras. 22-23.

<sup>64</sup> Ibid., Witness statement of Kuol Alor Makuac Biong, Tab 6, para. 10 (emphasis added).

<sup>65</sup> Ibid., Witness Statement of Nyol Pagout Deng Ayei, Tab 20, para. 15.

<sup>66</sup> *Arthur Young & Company, Iran-U.S. C.T.R.*, Vol. 17, p. 257.



exceptional circumstances when it is impossible or extremely difficult to obtain corroborating evidence. In the *Military and Paramilitary Activities* case, the Court held as follows:

"The Court has not treated as evidence any part of the testimony given which was not a statement of fact, but a mere expression of opinion as to the probability or otherwise of the existence of such facts, not directly known to the witness. Testimony of this kind, which may be highly subjective, cannot take the place of evidence. An opinion expressed by a witness is a mere personal and subjective evaluation of a possibility, which has yet to be shown to correspond to a fact ; it may, in conjunction with other material, assist the Court in determining a question of fact, but is not proof in itself."<sup>67</sup>

61. The Court concluded that it could not give weight to "alleged statements to that effect of which there is insufficient evidence."<sup>68</sup>

62. If oral evidence is contradicted by contemporary documents, it cannot have any probative weight. In the *United States Diplomatic and Consular Staff in Tehran* case, the Court was confronted with a large body of information from various sources, including official statements of both Iranian and United States authorities. The Court held that the allegations of fact on which the United States based its claims in the case were well founded because the information available was consistent and concordant with the main facts and circumstances of the case. Moreover, while the information had been communicated by the Court to the Iranian Government, it had not been denied or questioned by the latter.<sup>69</sup> Clearly, had the testimony provided by the witnesses been inconsistent with the information drawn from the written record, the Court would not have taken it into account.

(e) *The SPLM/A's Witness Statements Are Provided by Interested Parties*

63. The witness statements in this case have been submitted by individuals who have a direct personal interest in the outcome of the dispute. This must be given the necessary consideration. While witnesses that have no interest in the claim can be considered impartial, when a relationship exists

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<sup>67</sup> *Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1986*, para. 68.

<sup>68</sup> *Ibid.*, para. 159.

<sup>69</sup> *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, para. 13.

between a witness and a party on whose behalf the witness testifies, that must be taken into account in assessing the value of the testimony.<sup>70</sup>

64. Given the special circumstances of the *Military and Paramilitary Activities* case, where the oral proceedings on the merits were conducted in the absence of the Respondent, the Court stated that it was forced to attach considerable significance to the declarations made by the responsible authorities of the States concerned. Nevertheless, and even in that case, the Court stressed that it "was still bound to subject these declarations to the necessary critical scrutiny."<sup>71</sup> With respect to the declarations by Government ministers on each side, the Court held as follows:

"A member of the government of a State engaged, not merely in international litigation, but in litigation relating to armed conflict, will probably tend to identify himself with the interests of his country, and to be anxious when giving evidence to say nothing which could prove adverse to its cause. The Court thus considers that it can certainly retain such parts of the evidence given by Ministers, orally or in writing, as may be regarded as contrary to the interests or contentions of the State to which the witness owes allegiance, or as relating to matters not controverted. For the rest, while in no way impugning the honour or veracity of the Ministers of either Party who have given evidence, the Court considers that the special circumstances of this case require it to treat such evidence with great reserve. The Court believes this approach to be the more justified in view of the need to respect the equality of the parties in a case where one of them is no longer appearing; but this should not be taken to mean that the non-appearing party enjoys *a priori* a presumption in its favour."<sup>72</sup>

65. Any relationship between the witness and the party on behalf of which it testifies should be taken into account by a court or tribunal. The arbitrator in the *Walfish Bay Case* noted that the value of testimony: "being in favour of the high party invoking it, should be weighed more carefully than is necessary when it is unfavourable to that party."<sup>73</sup>

66. In the light of what has been discussed above, the following points may be made by way of conclusion:

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<sup>70</sup> See, in general, Amerasinghe, C. F., *Evidence in International Litigation* (Martinus Nijhoff Publishers, Leiden, 2005) pp. 189 *et seq.*

<sup>71</sup> *Island of Palmas, op. cit.*, para. 69.

<sup>72</sup> *Ibid.*, para. 70.

<sup>73</sup> 11 *UNRIAA*, p. 302, cited in Amerasinghe, C. F., *Evidence in International Litigation* (Martinus Nijhoff Publishers, Leiden, 2005) p. 202 (SCM Annex 8).

- Oral tradition suffers from a number of drawbacks and - save for situations where no other contemporaneous evidence exists - has no evidentiary value;
- No weight can be attributed to witness statements when they refer to past events to which the witnesses cannot personally testify;
- No weight can be attributed to witness statements when there is no corroborating contemporaneous evidence;
- No weight can be attributed to witness statements when they are vague and imprecise as to the relevant facts;
- No weight can be attributed to witness statements when they are provided by interested persons.

### **(iii) The Onus of Proof**

67. At various places in its Memorial, the SPLM/A argues that the GoS's legal claims relating to the ABC Experts' Report, and the issue of "excess of mandate", should be subject to an enhanced burden of proof. For example, in Chapter 1 of the Memorial, the SPLM/A asserts that the GoS's claims are subject "to the most demanding standards of proof."<sup>74</sup> Elsewhere, Chapter VII (C) of the Memorial contains a lengthy section on the issue in which it is variously contented that:

- in the light of the principles of *res judicata* and the stability of boundaries: "It is well-established that the party challenging an adjudicative decision bears the burden of proving an excess of mandate or other exception to the presumptive validity of that decision";<sup>75</sup> and
- "there are particularly weighty reasons for requiring a party challenging the Report to bear the full burden of establishing an excess of mandate."<sup>76</sup>

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<sup>74</sup> SPLM/A Memorial, para. 28.

<sup>75</sup> Ibid., para. 748, and see para. 750.

<sup>76</sup> Ibid., para. 761.

68. These arguments are fundamentally misplaced and are advanced at the expense of ignoring the particular circumstances in which the present dispute was brought before the Tribunal - *i.e.*, pursuant to a consensual Arbitration Agreement and procedural rules that the Parties agreed should govern the proceedings - the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of which only One Is a State (the "PCA Rules"). The SPLM/A Memorial studiously ignores discussing these instruments, but both make it clear that *each* Party bears the burden - the same burden - of proving the facts and contentions on which its claims are based.

69. This standard applies with respect to each of the two main issues that the Tribunal is charged with deciding: (i) whether the ABC Experts exceeded their mandate and, if so, (ii) what were the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905. Neither the Arbitration Agreement nor the PCA Rules draws any distinction between these two issues as far as the question of burden of proof is concerned.

70. It is striking that the SPLM/A Memorial only addresses the burden of proof issue in connection with the first issue - the question of excess of mandate. Presumably, the SPLM/A recognizes, as it must, that it bears the burden of proof with respect to its own claims relating to the area of the Ngok Dinka chiefdoms transferred to Kordofan in 1905. As Article 2(c) of Arbitration Agreement provides, the Tribunal is tasked with defining (delimiting) the area transferred to Kordofan in 1905 "based on the submissions of the Parties". Clearly, both Parties bear the burden of proof on this issue as is normal in boundary disputes. Yet, neither the Arbitration Agreement nor the PCA Rules draws any distinction between the two issues (excess of mandate vs. delimitation of the area) for burden of proof purposes. On each issue, the Parties bear the same onus of proof.

71. If we start with the Arbitration Agreement, the last two "Whereas clauses" clearly indicate that a dispute exists between the Parties as to whether or not the ABC Experts exceeded their mandate, and that the Parties have agreed to refer that dispute to binding arbitration. The clauses in question read as follows:

**"Whereas** the **Parties** differed over whether or not the ABC Experts exceeded their mandate as per the provisions of the CPA,

the Abyei Protocol, the Abyei Appendix, and the ABC Terms of Reference and Rules of Procedure.

**Whereas** on 8<sup>th</sup> June 2008, the **Parties** agreed to refer their dispute to final and binding arbitration."

72. These two clauses formed the predicate for Article 1 of the Arbitration Agreement in which the Parties agreed to refer their dispute (defined in Article 2 as comprising the two main issues referred to above) to final and binding arbitration under the PCA Rules.

73. These provisions show that there was a dispute between the Parties concerning whether or not the ABC Experts had exceeded their mandate and that the Parties agreed to submit that dispute to arbitration. The dispute relating to excess of mandate was referred to in neutral terms in Article 2(a) of the Arbitration Agreement: "Whether or not the ABC Experts had... exceeded their mandate." That formula in no way suggests that a Party arguing that there was an excess of mandate bears any different burden of proof than a Party arguing that there was no excess of mandate.

74. Contrary to the impression that the SPLM/A Memorial attempts to convey, this is not a case where one party has unilaterally applied to annul or oppose the enforcement of a prior decision of an adjudicating body. Thus, the precedents cited by the SPLM/A to the effect that such a party would be expected to bear the burden of proof are completely inapposite. Rather, there is a dispute which both Parties have mutually and jointly agreed to refer to arbitration. The Arbitration Agreement, in this respect, is similar to a Special Agreement. In these circumstances, each Party bears the same burden of proof with respect to its contentions on the issues in dispute. As would be expected, the Arbitration Agreement draws no distinction between the status of the Parties or their respective burdens of proof, and there is no such distinction.

75. Further evidence of the misplaced nature of the SPLM/A's arguments may be found in Article 8(3) of the Arbitration Agreement. That Article provides that each Party would file simultaneously Memorials covering all issues in dispute, Counter-Memorials and Rejoinders with the Tribunal. Once again, the procedure adopted in the Arbitration Agreement presupposes that there is no "applicant" and no "respondent", and that both Parties are expected to file simultaneous pleadings on all the issues in dispute together

with their documentary or other evidence. Such a provision is incompatible with the SPLM/A's argument that the GoS bears an enhanced burden of proof in any way different, or more onerous, from that which applies to the SPLM/A itself.

76. The Arbitration Agreement is thus clear that both Parties bear the same burden of proof with respect to the issues in dispute. Yet, even if there was any remaining doubt on the point - which the GoS does not believe to be the case - it is conclusively dispelled by the procedural rules - the PCA Rules - under which both Parties have agreed the arbitration will be conducted.

77. The relevant provision of the PCA Rules is Article 24(1) which reads as follows:

"Each party shall have the burden of proving the facts relied on to support its claim or defence."<sup>77</sup>

78. This provision is clear on its face and is entirely consistent with the intent of the Parties as expressed in the Arbitration Agreement. Article 1(2) of the Arbitration Agreement states that the Tribunal is to arbitrate the Parties' dispute in accordance with that Agreement and the PCA Rules, except that the PCA Rules shall not apply when excluded or modified by the Arbitration Agreement. Nothing in the Arbitration Agreement serves to exclude or modify Article 24(1) of the PCA Rules, which therefore applies.

79. Curiously, the SPLM/A buries a reference to the PCA Rules in a footnote (No. 1249 to page 171, para. 750) in its Memorial. Even more astonishing is the fact that the Memorial cites the relevant rule (which it wrongly identifies as Article 26 instead of Article 24(1)) for the proposition that:

"It is equally clear that the burden of establishing the applicability of one of the specified bases for the nullity of an adjudicative decision - and in particular the burden of establishing an excess of mandate - is on the party seeking to set the decision aside."<sup>78</sup>

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<sup>77</sup> It is significant that this provision, adopted in 1993, placed the same burden of proof on the parties and, in that respect, modified an earlier (1962) version of the PCA Rules which had provided instead:

"The Tribunal shall determine the procedure and the duration of the proceedings. It shall be free to designate the party on which the burden of proof lies and likewise to evaluate the evidence produced."

<sup>78</sup> SPLM/A Memorial, para. 750.

80. Article 24(1) of the PCA Rules supports no such proposition. As noted above, it makes it abundantly clear that both Parties bear the burden of proof with respect to their claims. Again, it must be emphasized that this is not a case where one party is seeking to set a prior decision aside. Rather, it is a case when the Parties have jointly identified a dispute and have together submitted that dispute to consensual arbitration.

81. It follows that the burden of proof that the GoS bears for showing that the ABC Experts exceeded their mandate is no more onerous than the burden of proof that the SPLM/A bears to support its contention that there was no excess of mandate. By the same token, both Parties also bear the burden of proof with respect to the definition of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.

### ***C. The Outline of this Counter-Memorial***

82. In addition to this Introduction, this Counter-Memorial comprises four chapters. Chapter 2 addresses the formula, or mandate, containing the relevant question put to the Tribunal (as well as the ABC Experts). It will show that the reference to "the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905" has a clear temporal as well as territorial limitation.

83. Chapter 3 will discuss the different grounds on which the ABC Experts exceeded their mandate. It will first consider the arguments raised in the SPLM/A's Memorial on the basis of the principles of *res judicata* and finality of boundaries and it will show that these arguments are not apposite in the present case in the light of the Parties' consensual Arbitration Agreement. Next, it will be demonstrated that the ABC Experts exceeded their mandate in a number of fundamental ways, namely: a) they decided *ultra petita* by grossly misinterpreting the provisions of their mandate, with respect to both the question addressed to them by the Parties and the basis of their findings, which should have been based on "scientific analysis and research" and not on equitable considerations, b) they decided *infra petita* in contradiction with their clear mandate by not answering the question that had been addressed to them by the Parties, but, rather, answered a truncated and undefined question of their own making, and c) they committed several flagrant violations of the applicable procedural rules.

84. In Chapter 4, the GoS will rebut the SPLM/A's claim to a boundary lying at 10°35'N. It will be shown that the documentary evidence does not support the SPLM/A claim; rather, it supports the conclusion that the Ngok were located in 1905 along and principally to the south of the Bahr el Arab; even in later years, they continued to range between the riverine area just to the north of the River and areas to the south of it. The substantial body of map and sketch evidence before the Tribunal likewise supports the same conclusion. The witness statements and expert report prepared for the purposes of this case ignore most or all of this evidence, are contradicted by it, and are accordingly entitled to no weight.

85. Chapter 5 will then turn to the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905. Contrary to the arguments set out in the SPLM/A's Memorial, this chapter will demonstrate that - by 1905 and on the basis of contemporary official documents - the Bahr el Arab river had been correctly identified, the Kordofan-Bahr el Ghazal boundary before the transfer lay along the Bahr el Arab, and that the 1905 transfer only concerned areas lying to the *south* of the Bahr el Arab, which were formerly part of the province of Bahr el Ghazal but were then transferred to Kordofan. Chapter 5 will also show that developments after 1905 are only relevant to the extent that they show how the southern limit of the transferred area was defined.

86. Appended to this Counter-Memorial is a second Expert Report by A. S. Macdonald MA MSc FRGS entitled: "Mapping Issues raised by the SPLM/A Memorial". The Counter-Memorial is accompanied by Volume II (documentary annexes), a Map Atlas as Volume III and witness statements as Volume IV.



## Chapter 2

### The Interpretation of the Formula

#### A. Introduction

87. The Abyei Area is defined in Articles 1.1.2 and 5.1 of the Abyei Protocol as "the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905". This formula also applied to the mandate of the ABC Experts, and it substantially applies in these proceedings pursuant to Article 2(c) of the Arbitration Agreement which provides that, if the Tribunal determines the ABC Experts exceeded their mandate -

"it shall make a declaration to that effect, and shall proceed to define (i.e. delimit) on map the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, based on the submissions of the Parties."

88. It follows that the present dispute concerns the transfer of a specific area at a specific time. In other words, the formula contains both a temporal as well as a territorial dimension.

89. The ABC Experts failed to adhere to this mandate. This aspect is addressed in Chapter 3. For present purposes, it is necessary to underline the importance of complying with the precise mandate agreed by the Parties in order not to jeopardize the overall peace process and the political agreements reached pursuant, *inter alia*, to the 2005 Comprehensive Peace Agreement, its related instruments, and the Arbitration Agreement in this case.

90. In its Memorial, the GoS set forth its understanding of the formula, or mandate, which the Parties agreed upon in the Arbitration Agreement, and in the ABC's Terms of Reference. The reference to the "area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905" is based on specific facts and legally relevant events that occurred in 1905. As Chapter 5 will show, the formula adopted by the Parties refers to an administrative transfer that took place in 1905 of an area previously forming part of the province of Bahr el Ghazal to the province of Kordofan. There is a considerable body of contemporary documentation, emanating from official Sudan Government sources, which describes this transfer and the area it applied to.

91. Contrary to what is argued in the SPLM/A Memorial, the area transferred from Bahr el Ghazal to Kordofan in 1905 concerned exactly that - an "area". It did not involve a transfer of every single individual belonging to the Ngok Dinka chiefdoms no matter where they may have lived in 1905 or during the roughly 100 years since that time.

92. Only the territorial dimension of the transfer is before the Tribunal. All other extraneous factors are beyond the scope of the formula and thus outside the jurisdiction of this Tribunal - just as they were outside the jurisdiction of the ABC Experts. What is essential is that the mandate does not ask this Tribunal (any more than it asked the Experts) to conduct an analysis of the anthropological roots or demographics of the nine Ngok Dinka chiefdoms. The formula exclusively addressed the question of the area of such chiefdoms transferred in 1905. The scope of this Tribunal's jurisdiction is limited to the specific question that the Parties consented to submit to it.

93. It is appropriate to turn to the two main principles underlying the formula: the temporal dimension and the territorial dimension.

### ***B. The Temporal Dimension***

94. It must be emphasised at the outset that there is no dispute in principle between the Parties concerning the temporal dimension. Both Parties agree that the crucial date is 1905 and the formula "the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905" makes specific reference to the year 1905.

95. The SPLM/A Memorial states that:

"The 'area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905,' as set forth in Article 1.1.2 of the Abyei Protocol, encompasses all of the territory occupied and used by the Ngok Dinka *in 1905*."<sup>79</sup>

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<sup>79</sup> SPLM/A Memorial, para. 50 (emphasis added).

96. While the formula certainly does not contain the words "all of the territory occupied and used by"<sup>80</sup> the Ngok Dinka, gratuitously added by the SPLM/A Memorial, this statement at least contains a recognition that 1905 is the relevant date.

97. At para. 56 of the SPLM/A Memorial, a further reference is made to the importance of the year 1905:

"Article 1.1.2 is also only sensibly interpreted as referring to the territory of the nine Ngok Dinka Chiefdoms that were transferred to Kordofan in 1905 because this is the way in which the Sudan Government's transfer documents in 1905 addressed the issue."

98. Moreover, both Parties have dealt with the 1905 documents which describe and refer to the transfer - what Professor Daly calls the "Foundation Texts" - although a crucial part of the documentary record relating to the transfer has been ignored by both the SPLM/A Memorial and the Daly Report.<sup>81</sup>

99. It is clear, therefore, that both Parties view 1905 as the only relevant date for the definition of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in that year. This corresponds to the fact that a group of Ngok Dinka under Paramount Chief Arob Biong ("Sultan Rob") were administratively transferred from Bahr al Ghazal to Kordofan precisely in 1905.

100. The year 1905 thus represents what might be termed the critical date in this case - not the "critical date" in terms of when a dispute crystallized since there was no dispute over the "Abyei Area" in 1905 - but rather the "critical date" in the sense of being the date as of which the facts relating to the transfer fall to be assessed. As Professor Goldie puts it:

"In international law the point of time falling at the end of a period within which the material facts of a dispute are said to have occurred is usually called the 'critical date'."<sup>82</sup>

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<sup>80</sup> See paragraphs 104 below.

<sup>81</sup> See paragraphs 113-114 below.

<sup>82</sup> Goldie, L.F.E., "The Critical Date", *ICLQ*, Vol. 12, No. 4, (October, 1963), p. 1251.

Or, as this author also observes:

"The critical date doctrine provides a point of time as the touchstone for resolving or selecting the operative facts, and hence for characterising appropriate cases."<sup>83</sup>

101. It is significant that both Parties agree on the importance of the 1905 date. In many cases, parties disagree on the critical date, a matter which complicates the task of a Tribunal. Here, however, the formula itself requires determining the territorial consequences of an event that took place at a specific time: 1905.

102. As already explained in the GoS Memorial, the dispute submitted to the present arbitration revolves around a specific historical fact, namely, a decision by the Condominium Administration to transfer an area from Bahr el Ghazal to Kordofan Province in 1905. Accordingly, the "area" transferred is to be determined as of 1905 – both with regard to what is included in the transfer and to what is excluded from it. The Parties agree on the historical fact of the transfer, which is clearly established by the documentary record.<sup>84</sup>

103. Given this, the drawing of a new, unsubstantiated and never-before-seen, boundary encompassing areas that were never transferred in 1905 (as the ABC Experts did) was clearly an excess of mandate. Drawing another new boundary is not within the purview of this Tribunal either. In both cases, the question that needs to be answered is a question of historical fact containing a temporal element – what was the area of the nine Ngok Dinka chiefdoms that was transferred to Kordofan in 1905?

### ***C. The Territorial Dimension***

104. The SPLM/A Memorial repeatedly argues that "the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905 encompasses **all** of the territory occupied and used by the Ngok Dinka in 1905."<sup>85</sup> This reformulation of the relevant issue is no more than a thinly disguised attempt to go beyond the specific limits of the mandate and to inject a tribal and demographic element not present or agreed upon in the formula adopted.

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<sup>83</sup> Ibid., at p. 1284.

<sup>84</sup> The relevant transfer documents are discussed in Chapter 5 below.

<sup>85</sup> SPLM/A Memorial, para. 879. See, also, paras. 50 and 1095.

105. In support of its assertion, the SPLM/A resorts to a self-serving application of the "grammatical rule of proximity"<sup>86</sup> and proceeds to break down the language of Article 1.1.2 into separate parts, thus reaching the following result:

"Applied to the language of Article 1.1.2, the natural reading is to relate the postmodifying construction of 'transferred to Kordofan' back to the immediately preceding noun of 'chiefdoms.' It would disregard the rule of proximity and strain the syntax of the sentence to the breaking point to interpret it in any other way. It is therefore the 'chiefdoms' which are referred to as having been 'transferred to Kordofan' in Article 1.1.2, not the 'area'."<sup>87</sup>

106. This application of the principle of proximity is artificial in the extreme. Furthermore, and more importantly, the analysis provided by the SPLM/A misses the point since it wholly ignores the preposition "to" after the verb "transferred". In general terms, this preposition conveys the idea of movement in a particular direction; in the present instance, the transfer of an area of the nine Ngok Dinka chiefdoms from Bahr el Ghazal *to* the province of Kordofan. Thus, even assuming that the SPLM/A's interpretation is correct and the verb "transferred" relates to the noun "chiefdoms" (rather than to the term "the area", which is more plausible), this expression could still not encompass territory arguably belonging (*quod non*) to such chiefdoms that was already *in* Kordofan, as this would distort the meaning of the whole sentence. This would not only "strain the syntax" of the sentence "to the breaking point", to use the SPLM/A's turn of phrase, but would completely alter the meaning of one of the most common English prepositions.

107. Taking the English nursery rhyme mentioned in the SPLM/A Memorial as an example: "This is the dog **that** worried the cat **that** killed the rat **that** ate the malt **that** lay in the house **that** Jack built."<sup>88</sup>, while this sentence might contain some theoretical object/subject uncertainty with regard to the

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<sup>86</sup> This is referred to at para. 1103 of the SPLM/A Memorial. The application of this rule is rather controversial: "There is great uncertainty and confusion in contemporary English about concord (or agreement) between subject and verb, in the limited cases where this still applies... confusion and uncertainty is rather greater than *CGEL* [*Comprehensive Grammar of the English Language*] appears to allow, and what is more, many examples cannot be completely accounted for by the principles given in it. Of these principles, proximity in particular seems to be somewhat vague and lacking in explanatory power." Taylor, D.S., "A question of concord", *English Today* 35, Vol. 9, No. 3 (July 1993) 10.

<sup>87</sup> SPLM/A Memorial, para. 1107.

<sup>88</sup> *Ibid.*, para. 1105.

pronoun "that",<sup>89</sup> there is no doubt that the preposition "in" relates to the house. By the same rationale, there is no doubt that the preposition "to" in the formula relates to Kordofan.

108. Therefore, there can be no doubt that whatever area was "transferred" to Kordofan in 1905, it clearly could not have been part of the province before, otherwise it could not have been *transferred to* this province on this date. As shown in Chapter 5.C, the contemporary documents, including the important Memorandum written by Governor-General Wingate, demonstrate that the area transferred *to* Kordofan encompassed territory lying exclusively south of the Bahr el Arab, which, until 1905, had been the boundary between Kordofan and Bahr el Ghazal.

109. It is an undeniable consequence of the wording of the formula that the modern village of Abyei would not be part of the "Abyei Area" in 1905 if the location of such village - which was not identified as existing at the relevant time - was already situated in Kordofan.<sup>90</sup> In this regard, the SPLM/A Memorial's argument that excluding Abyei town would be a "bizarre result... akin to defining France to exclude Paris or Austria to exclude Vienna" is without object.<sup>91</sup> Abyei town did not exist at the time, and the key question is to determine the area that was transferred in 1905, not an allocation of towns, villages or people appearing afterwards.

110. There is no doubt that the area where the modern village of Abyei stands today (north of the Bahr al Arab) was part of Kordofan prior to 1905. Despite this, the SPLM/A Memorial argues that the whole point of the referendum and other provisions of the Abyei Protocol would be frustrated if the present-day principal population centre in the immediate region was not within the area of the referendum. However, the mandate of the Experts, as of this Tribunal, is not to consider areas according to their demographics, but rather to delimit an area that was transferred from the Bahr el Ghazal to Kordofan in 1905.

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<sup>89</sup> Ibid., para. 1106.

<sup>90</sup> On the information available, Abyei did not exist as a town or village in 1905.

<sup>91</sup> SPLM/A Memorial, paras. 54-55 and 1126.

#### ***D. The Task of the Tribunal***

111. The task of the Tribunal is closely related to that of the ABC. As described in Article 2(c) of the Arbitration Agreement, the Tribunal's task is to "proceed to define (i.e. delimit) on map the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, based on the submissions of the Parties". The text as it stands confirms the territorial limitation, as well as the relevant historical date. The 1905 date is the only reference date for the Tribunal's determination.

112. Although the formulation in the Arbitration Agreement varies slightly from the original formula (cf. "proceed to define (i.e., delimit) on map the boundaries"), it still relies on the critical formulation "area... transferred to Kordofan". As noted above, it follows from this wording that the area transferred cannot have already been in Kordofan prior to the transfer.

113. Accordingly, the SPLM/A's claim that the transferred area extends far to the north of the Bahr el Arab, as exemplified below, is completely untenable. In this regard, the SPLM/A states that:

"If the Tribunal were to consider the issue that Article 2(c) presents, the evidence would demonstrate that the Abyei Area as defined in Article 1.1.2 of the Abyei Protocol encompasses all of the territory that the Ngok Dinka occupied and used in 1905. Specifically, the Abyei Area would include all of the territory marked on **Map 13** (Ngok Dinka Chiefdoms, 1905), extending north from the current Kordofan/Bahr el Ghazal boundary to a line marking the approximate northern border of the *goz* (a largely uninhabited woodland in the north/west of the Abyei region) and across at latitude 10°35'N. This area is bounded on the west by the current Kordofan/Darfur border, and on the east near the Ngok settlements of Miding [Arabic: Heglig] and Mardhok."<sup>92</sup>

114. The SPLM/A Map 13 is a complete fabrication, with no basis or support in the historical evidence, as Chapter 4 will show. Moreover, as discussed in Chapter 5, there is no doubt that, prior to the 1905 transfer, the Bahr el Arab constituted the boundary between Kordofan and Bahr el Ghazal. Consequently, nothing north of this river could have been transferred "to Kordofan" in 1905, and nothing north was in fact transferred.

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<sup>92</sup> Ibid., para. 40.

115. Finally, it must be emphasized that the task of the Tribunal does not require recourse to supplementary sources of interpretation. The general rule reflected in Article 31(1) of the Vienna Convention on the Law of Treaties is fully sufficient. The meaning of the relevant phrase – "the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905" – is clear, especially given the fact that the Parties do not dispute that there was such a transfer in 1905.<sup>93</sup> The object and purpose of the transfer is also clear. It was an administrative decision to transfer an area from one province to another to enable better administrative control over tensions between Baggara Arab and Dinka tribes. There is ample documentary evidence to determine what the transferred area was deemed to be at the time which was considered to achieve that purpose.

116. In these circumstances, it would be manifestly unreasonable to read Article 2(c) of the Arbitration Agreement as calling on the Tribunal to recast the formula in the manner argued for in the SPLM/A Memorial in order to draw new lines for the boundaries of an "area" which was already the subject of a specific transfer over a hundred years ago. As held by the Permanent Court in the *Acquisition of Polish Nationality* Advisory Opinion:

"The Court's task is clearly defined. Having before it a clause which leaves little to be desired in the nature of clearness, it is bound to apply this clause as it stands without considering whether other provisions might with advantage have been added to or substituted for it."<sup>94</sup>

117. It also bears repeating that the mandate of this Tribunal, as well as of the ABC Experts, does not allow any equitable division of areas or a decision taken *ex aequo et bono*. This was one of the many defects of the Experts'

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<sup>93</sup> See Figures 4a and 4b, at GoS Memorial, p. 11.

<sup>94</sup> *Acquisition of Polish Nationality*, Advisory Opinion, 1923, P.C.I.J., Series B, No. 7, p. 20. See, also, Judgment of 3 February 1994, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, I.C.J. Reports 1994, p. 25 and Judgment of 27 June 2001, *LaGrand (Germany v. United States of America)*, I.C.J. Reports 2001, p. 494, para. 77. See also ICSID, Award of 27 June 1990, *AAPL v. Sri Lanka*, ICSID case no. ARB/87/3, para. 40 (Rule A), 30 ILM 580 (1991), at 594-595. The Court also recalled that, according to its established jurisprudence, "words are to be interpreted according to their natural and ordinary meaning in the context in which they occur" (Judgment of 26 May 1961, *Temple of Preah Vihear (Cambodia v. Thailand)*, Preliminary Objections, I.C.J. Reports 1961, p. 32; Judgment of 12 December 1996, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, I.C.J. Reports 1996, p. 818, para. 45; and ICSID, *AAPL v. Sri Lanka*, supra, para. 40 (Rule B), 30 ILM 580 (1991), at 595.



Report, as will be discussed in Chapter 3. Suffice it to note that this Tribunal has been tasked with deciding the issues before it on the basis of the relevant instruments and general principles of law - a mandate which does not allow any scope for a decision *ex aequo et bono* or taken in equity.

## Chapter 3

### The Excess of Mandate of the ABC Experts

#### A. General Considerations

##### (i) The "Estoppel" and "Finality" Arguments

118. According to Article 2(a) of the Arbitration Agreement of 7 July 2008, the first issue to be determined by this Tribunal is as follows:

"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."

119. It is most revealing that, apart from the introductory Chapter where the SPLM/A summarizes its arguments, this key provision appears for the first time at para. 544 of the SPLM/A Memorial. Instead, the SPLM/A raises a smoke screen based on feigned indignation that "[d]espite its undertakings that the Commission's Report would be 'final and binding' and entitled to 'immediate effect,' the GoS has subsequently refused to comply with the ABC's decision"<sup>95</sup>.

120. This argument is beside the point. Indeed, the Parties agreed, at para. 5 of the Abyei Appendix, that the report of the ABC Experts, "arrived at as prescribed in the ABC rules of procedure, shall be final and binding on the Parties." But - and these are crucial "buts" -

- this formula, by itself, shows that only a decision "*arrived at as prescribed in the ABC rules of procedure*" would be final and binding upon the Parties. The formula also implies, *a contrario*, that should the report not be in conformity with the ABC rules of procedure, then it would *not* be final and binding. This is precisely what happened in the present case;

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<sup>95</sup> SPLM/A Memorial, para. 2. See also e.g., *ibid.*, paras. 17, 534-535 and 659-660.

- It is also a test that the Parties agreed to ask this Tribunal to decide "[w]hether or not the ABC Experts had, on the basis of the agreement of the Parties as per the CPA, exceeded their mandate."

121. Therefore, all the allegations repeatedly made by the SPLM/A arguing that the Government of Sudan waived its right to claim that the ABC Experts exceeded their mandate<sup>96</sup> or is "estopped from asserting excess of mandate claims in these proceedings"<sup>97</sup> are frivolous and inadmissible. This Tribunal has been created precisely in order to ascertain whether the ABC Experts have exceeded their mandate, and the SPLM/A has fully and freely accepted to vest it with this function<sup>98</sup>. The SPLM/A must now respect *bona fide* this valid agreement and *it* is estopped from raising objections to this Tribunal's unambiguously agreed mandate.

122. Similarly, it is of no avail to the SPLM/A to rely on the "finality argument" based on both the principle *res judicata* and the principle of the stability of boundaries.<sup>99</sup> Indeed, border settlements do enjoy a particular regime of stability and permanence. However, in the present case:

- the question is to determine where the boundary was in 1905;
- this question is disputed between the Parties; and
- the boundary has not been definitely settled since, precisely, this Tribunal has been assigned, by the common will of the Parties, the task of determining whether the ABC Report is tainted with an excess of mandate and, in the affirmative, of defining (*i.e.*, delimiting) "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."<sup>100</sup>

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<sup>96</sup> SPLM/A Memorial, para. 34; see also, paras. 553, 792, 808-826, or 843-868.

<sup>97</sup> *Ibid.*, para. 37; see also e.g., para. 553 or paras. 795, 843, 855 and 867.

<sup>98</sup> On the circumstances of this agreement to re-arbitrate, see GoS Counter-Memorial, Witness Statement of Vice-President Ali Osman Mohamed Taha, SCM Vol. 4, Tab 2, paras. 42-43.

<sup>99</sup> SPLM/A Memorial, paras. 29, 549 and 692-745.

<sup>100</sup> Article 2(c) of the Arbitration Agreement of 7 July 2008.

123. It is therefore only once this Tribunal will have performed its duty that both the *res judicata* and "finality" principles will apply. Consequently, the Government of Sudan does not deem it necessary to discuss these aspects of the SPLM/A Memorial any further. It is entirely untenable to hold – as the SPLM/A does – that "**any** challenge by the GoS to the finality of the ABC Report (whether for excess of mandate or otherwise)" is precluded.<sup>101</sup>

**(ii) The SPLM/A's Claims Concerning the Exceptional Character of a Finding of Excess of Mandate and the Burden of Proof**

124. It is indeed quite apparent that the SPLM/A itself has no confidence in the soundness of its arguments based on waiver or estoppel since it draws no conclusion from them and - rightly - proceeds to a discussion of one of the key issues before this Tribunal: "Whether or not the ABC Experts [have] ... exceeded their mandate". This is mainly done in Chapter VII of the SPLM/A Memorial;<sup>102</sup> the corresponding Chapters in the Government of Sudan's Memorial are Chapters 4 and 5.<sup>103</sup>

125. A careful reading of the relevant passages of the Parties' Memorials shows that, while they are in broad agreement – albeit with some *nuances* – with respect to the applicable principles and rules, as will be briefly shown in the present Section, they differ greatly when it comes to the application of the various grounds for the excess of mandate – as will be shown in some detail in the next Section of this Chapter.

126. The basic position of the SPLM/A with respect to the rules applicable to allegations of excess of mandate by arbitrators is expressed in para. 551 of its Memorial:

"These rules are common to developed international and national legal systems, and constitute well-settled general principles of law fully applicable in these proceedings:

a. First, finding an excess of mandate is an *exceptional conclusion*, as to which the party refusing to comply with a decision bears a *heavy burden of proof*.

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<sup>101</sup> SPLM/A Memorial, para. 727 (emphasised by SPLM/A).

<sup>102</sup> Ibid., at paras. 544-868.

<sup>103</sup> GoS Memorial, paras. 93-276.

b. Second, equally well-settled international and national authority holds that any excess of authority must be '*manifest*,' '*glaring*,' '*flagrant*' and unambiguous. An excess of authority does not arise from debatable or complex circumstances, where reasonable minds might differ, but only in extreme and clear-cut cases.

c. Third, it is also clear that *errors of law or treaty interpretation*, or of fact and evidentiary findings, are *not grounds for finding an excess of mandate*. These are errors of substance, and not an excess of the decision-maker's mandate."<sup>104</sup>

127. Regarding the first point, the Government of Sudan has shown in paragraphs 67 to 81, above, that, while it is rather exceptional for an arbitrator or arbitration tribunal to be found to have exceeded its mandate, the rules of evidence do not differ from the usual rules applicable in international law and, more generally, as in all systems of law, in comparable circumstances: it is for each Party to prove its own submissions, since "it is the litigant seeking to establish a fact who bears the burden of proving it."<sup>105</sup>

128. The other two propositions of the SPLM/A - *i.e.*, that the excess of authority must be flagrant and that errors of law are not grounds for excess of mandate - are less debatable in the abstract. However, they do call for certain qualifications especially in the present circumstances.

129. It is certainly true that an allegation of excess of power cannot be accepted lightly. However, a general remark must be made: the Parties agree that, in the present case, the decision which was to be given by the ABC (or the ABC Experts) had the main characteristics of an arbitral award (and can therefore be challenged on the same grounds). Three brief remarks are necessary before introducing the various grounds which, in isolation and, *a fortiori* when taken together, must lead this Tribunal to conclude that the ABC Experts have indeed exceeded their mandate.

### **(iii) The Special Circumstances of the Case**

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<sup>104</sup> See also SPLM/A Memorial, para. 699.

<sup>105</sup> I.C.J., Judgment of 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, I.C.J. Reports 1984, p. 437, para. 101; see also I.C.J., Judgment of 31 March 2004, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, I.C.J. Reports 2004, p. 41, para. 55; or I.C.J., Judgment of 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, para. 204.

130. *First*, 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.<sup>106</sup> In these conditions an excess of power could be less unpredictable and exceptional, and is less astonishing than it could have been in the case of a body composed of lawyers experienced in arbitrating boundary disputes.

131. *Second*, the international community did not endorse the ABC Experts' report, which instead met with a telling silence. As noted by Dr. Douglas H. Johnson, the British member of the ABC, "[t]here has been a lack of public reaction from the international community, particularly the US and the UK governments, which is surprising given the role they played in establishing and funding the ABC. Any representations they may have made through 'quiet diplomacy' have been so muted as to be silent."<sup>107</sup> Indeed, had the Report not been flawed, the international community would have urged the Parties – and, in particular, the GoS, to implement it promptly. But nothing of the kind happened. Instead:

- the United Nations by no means insisted that the report be implemented, but simply encouraged the GoS and SPLM/A to settle their dispute through dialogue. In its Resolution 1812 of 30 April 2008, the Security Council "[c]all[ed] upon the parties to address and find a mutually agreeable solution to the Abyei issue."<sup>108</sup>;
- for his part, the U.N. Secretary-General emphasised that "[f]ailure by the parties to provide the political will necessary to resolve their differences and make concrete progress on the outstanding issues without further delay could undermine the integrity of this crucial, hard-won agreement. The *unresolved status of Abyei*, the lack of demarcation of the 1956 border, and the incomplete redeployment of

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<sup>106</sup> SPLM/A Memorial, para. 598, states that Prof. Gutto was "a lawyer and land rights expert". While it emerges from his CV, SPLM/A Exhibit - FE 14/12, that Prof. Gutto holds law degrees, he does not appear to have been admitted to practice law before any bar or to have any arbitration experience, whether as counsel and advocate or arbitrator, in boundary disputes or otherwise. Furthermore, Prof. Gutto had not been present for a substantial part of the process.

<sup>107</sup> Johnson, D., "Why Abyei Matters – The Breaking Point of Sudan's Comprehensive Peace Agreement", 107 *African Affairs* 1 (2008) p. 17 (SCM Annex 9).

<sup>108</sup> United Nations, *Security Council Resolution 1812 (2008)*, S/RES/1812 (2008), 30 April 2008, para. 7 (SCM Annex 10).

SAF and SPLA forces form a dangerous constellation of deadlocked issues which is likely to further test the resilience of the NCP-SPLM partnership. Both parties have understandable concerns and interests, closely linked to the cultural and political demands of communities as well as to the strategic value of oilfields concentrated in the 1956 border area. I urge both parties to intensify their efforts to tackle these issues peacefully and expeditiously";<sup>109</sup>

- the British Minister of State, Foreign and Commonwealth Office, Lord Malloch-Brown, stated on 9 January 2008 that the United Kingdom "have not specifically pressed [the national Sudanese Government and the Government of Southern Sudan] to accept the recommendations of the Abyei Boundary Commission."<sup>110</sup>;

132. *Third*, it is untrue that the GoS "did not articulate any comprehensible basis for its purported excess of mandate claim in July 2005 or, so far as the SPLM/A is aware, at any time subsequent to that date."<sup>111</sup>:

- The fact that the Experts exceeded their mandate was immediately made clear – as soon as the Report was made known – by the GoS in a press conference which was addressed jointly by ABC Chairman Donald Peterson, SPLM/A's Deng Alor and GoS Agent, Dirdeiry Mohamed Ahmed; this conference was convened on 14 July 2005, in the Presidential Palace a few minutes after the ABC Experts delivered their report to the Presidency; the SPLM/A referred to it and to the position made by the GoS Representative in their Memorial<sup>112</sup>.
- In the days that followed the presentation of the Report, several officials and representatives of the GoS addressed in the press the failure of the ABC Experts to carry on their mandate to delimit the Abyei Area<sup>113</sup>; furthermore, in May 2006, when the two parties met to

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<sup>109</sup> United Nations, *Report of the Secretary-General on the Sudan, S/2007/624*, 23 October 2007, para. 72 (SCM Annex 11) (emphasis added).

<sup>110</sup> HL, 9 January 2008, Vol. 697, c. WA 209 (SCM Annex 12).

<sup>111</sup> SPLM/A Memorial, para. 26; see also, para. 62 or para. 795.

<sup>112</sup> SPLM/A Memorial, paras. 534-536. But see also, GoS Counter-Memorial, Witness Statement of Zakaria Atem Diyin Thibeik Deng Kiir, SCM Vol. IV, Tab 3, para. 31; *ibid.*, Witness Statement of Abdul Rasul El-Nour Ismail, SCM Vol. IV, Tab 5, paras. 29-31; *ibid.*, Witness Statement of Ahmed Assalih Sallouha, SCM Vol. IV, Tab 4, para. 21; or *ibid.*, Witness Statement of Ali Osman Mohamed Taha, SCM Vol. IV, Tab 2, para. 34.

<sup>113</sup> GoS Counter-Memorial, Witness Statement of Ali Osman Mohamed Taha, SCM Vol. IV, Tab 2, para. 36: "NCP senior officials and representatives in the ABC talked to the press starting from 14<sup>th</sup> July 2005 and pointed out that the Experts exceeded their mandate

discuss how to address the Abyei crisis, "[t]he NCP explained at length how the Experts exceeded their mandate and indeed violated the CPA."<sup>114</sup>

- Moreover, in its Memorial, directly or through Witnesses Statements, the SPLM/A itself recognizes that "[i]n the weeks and months that followed [the release of the ABC Report], the GoS began to argue that the mandate was exceeded because the ABC Experts did not find a 1905 map and considered information from 1965 in their analysis."<sup>115</sup>

133. In the same spirit, it can also be noted that, on 15 September 2005, the Government of Sudan wrote to Senator Danforth of the United States<sup>116</sup>, stating in some detail why it believed that the ABC Experts exceeded their mandate. This forms quite a comprehensive exposure of the reasons why the Government of Sudan contended that there was excess of mandate and is worth quoting at some length:

"[T]he parties agreed to form a joint committee, the Abyei Boundaries Commission (ABC), of five members each, and five international experts, to conduct some archival research and establish, on scientific basis, where the Kordofan and Bahr-el-Ghazal boundaries stood in 1905.

Unfortunately, the five experts surprised everybody by concluding that '***in 1905 there was no clearly demarcated boundary of the area transferred from Bahr-el-Ghazal to Kordofan!***'

Because the two parties were indeed confident that the 1905 yardstick is veritable, they didn't speculate for such remote and unlikely situation. The experts had taken undue advantage of that and purported to prescribe another yardstick, that shall apply by default, for defining the area. Their substitute yardstick could be roughly summarized as that: '***the area shall be defined by the tribal settlements in 1965, plus the***

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and admittedly defined the area in terms of dominant rights of the Ngok tribe, instead of defining the area of the nine Ngok chiefdoms transferred to Kordofan in 1905". See also "Enraged meeting for Messeriya leaders after submitting the ABC Report to the Presidency", *Akhbar El Youm*, Issue, No. 3868, 16 July 2005 (SCM Annex 13); *Akhbar El Youm*, Issue, No. 3872, 20 July 2005 (SCM Annex 13); "The National Congress Party: The ABC Failed in its Task", *Akhbar El Youm*, Issue, No. 3874, 22 July 2005 (SCM Annex 13); or "President Bashir to the Messeriya", *Akhbar El Youm*, Issue, No. 3876, 24 July 2005 (SCM Annex 13).

<sup>114</sup> Ibid., Witness Statement of Ali Osman Mohamed Taha, SCM Vol. IV, Tab 2, para. 39.

<sup>115</sup> SPLM/A Memorial, Witness Statement of Minister Deng Alor Kuol, Tab 1, para. 161; see also, more generally, *ibid.*, paras. 152-157, or SPLM/A Memorial, paras. 533-537, or para. 660, *ibid.*, Witness Statement of James Lual Deng, Tab 2, para. 109; or *ibid.*, Witness Statement of Lieutenant General Lazaro K. Sumbeiywo, Tab 4, para. 122.

<sup>116</sup> Letter from the GoS to Senator John Danforth, 15 September 2005 (SCM Annex 14).



***provincial boundaries of 1956.*** This was distinctly beyond their specific mandate.

...

The experts report had sent a major blow to the efforts of resolving the Abyei boundaries issue. By disqualifying and discrediting the 1905 yardstick, the experts scuttled the Abyei settlement and left the whole process in disarray. Their naïve attempt to invent a new yardstick of their own making reveals but their ignorance of the complex nature of the subject and underscores their utter disregard of the painstaking efforts that were exerted before the consensus on the 1905 parameter had emerged.

We, the representatives of the Government of the Sudan at the Commission, had advised our principals in no uncertain terms to reject the report of the experts on the following grounds:

1. The experts had admittedly failed to carry out their specific mandate of defining and demarcating the 1905 boundaries.
2. They had exceeded their restricted mandate of demarcating the 1905 boundaries by brazenly improvising and applying a new parameter of their own making.
3. They had outrageously discarded the agreed parameter that now forms part of the Comprehensive Peace Agreement and the new Interim Constitution. Consequently, they are effectively asking the parties to go back to the negotiating table and amend the peace agreement and the constitution.
4. They had flagrantly violated the ABC Rules of Procedure, which emphasized the strict nature of the mandate, and arrived at their decision in violation of the Rules. Therefore, the experts decision is neither final nor binding as it was not '*arrived at as prescribed in the Rules of Procedure*' – (section 5 of the Protocol's Appendix).

They had violated the rules of natural justice and compromised their impartiality as independent experts by referring to a third party to seek an explanation for the mandate given to them by the parties of the peace agreement behind their backs."<sup>117</sup>

134. Although they will be articulated in a slightly different way in the next Section of the present Chapter, in view of the strictly legal nature of these proceedings, the grounds exposed in this letter, in the opinion of the Government of Sudan, form the basis of nullity for excess of power contained in the ABC Experts Report.

#### ***B. Grounds for Excess of Mandate***

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<sup>117</sup> Ibid., emphasised in the original letter.

135. The Government of Sudan has introduced at length the notion of excess of mandate in Chapter 4 of its Memorial, and, in particular, in paras. 129-191 thereof, where it has shown that:

"It is well settled that the decision maker must not exceed the jurisdiction that has been conferred on it and must also exercise that jurisdiction fully. Failure to do so represents an *excès de pouvoir* rendering the decision subject to annulment, and thus tantamount to an excess of mandate.

In addition, a decision is fundamentally tainted and subject to annulment when there has been any of the following:

- a failure to state reasons regarding a necessary part of the decision;
- a failure to respect the basis on which the dispute is to be decided, as agreed by the Parties;
- a decision taken *ex aequo et bono* without the express consent of the Parties; or
- a serious departure from a fundamental rule of procedure."<sup>118</sup>

136. For its part, the SPLM/A repeats like a mantra that "[t]he GoS's claim that the ABC Experts exceeded their mandate contradicts well-settled principles of finality" and that "[t]he GoS has excluded or waived any rights to claim that the ABC Experts exceeded their mandate",<sup>119</sup> without taking the trouble to define the notion of "excess of mandate" as envisaged in Article 2 of the Arbitration Agreement of 7 July 2008.

137. However, the SPLM/A seems to be in agreement at least with the fact that there would be excess of mandate if "the decision was *ultra petita*"<sup>120</sup> or, maybe, *infra petita*.<sup>121</sup> In any case, the SPLM/A does accept that "an excess of mandate under Article 2(a) would arise only where the ABC Experts decided disputes falling outside the category of disputes submitted for its resolution."<sup>122</sup> As made clear by an author repeatedly quoted by the SPLM/A, "[a] tribunal may exceed its powers where it fails to do what is required of it in terms of delineation and/or allocation, and sets about carrying out a task

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<sup>118</sup> GoS Memorial, paras. 190-191.

<sup>119</sup> SPLM/A Memorial, paras. 692-791 and 792-868.

<sup>120</sup> *Ibid.*, para. 22; see also, paras. 678 and 686.

<sup>121</sup> See *ibid.*, para. 673, fn. 1139.

<sup>122</sup> GoS Memorial, para. 673.

not entrusted to it or carrying it out in a manner inconsistent with its terms of reference. The general rule is that the tribunal is obliged to execute the task, especially the territorial aspects thereof, *in the precise way stated in the instrument*."<sup>123</sup> This, indeed is the crucial issue<sup>124</sup> - to which the various grounds analyzed *in concreto* in Chapter 5 of the Memorial of the Government of Sudan and in the sections below are all tightly related.

**(i) The ABC Experts Decided *Ultra Petita***

138. As correctly noted by the SPLM/A,<sup>125</sup> arbitrators commit an excess of mandate if they decide "***upon that which was not in fact submitted to them***."<sup>126</sup> And the Government of Sudan also agrees with the other quotations on which the SPLM/A's Memorial relies to define the notion of *ultra petita*, such as the following<sup>127</sup>:

- *The Laguna del Desierto Award*, 113 I.L.R. 1, 45 (1999): "***The jurisdiction of international tribunals is limited by the powers which the Parties in the case grant to them*** and by the maximum claims of the Parties in the course of the proceedings. If they exceed either limitation, their decision will be *ultra vires* and vitiated on grounds of nullity for *excès de pouvoir*.";<sup>128</sup>
- *Nordell Int'l Res., Ltd. v. Triton Indonesia, Inc.*, 1993 WL 280169 at \*8 (9th Cir. 1993): "***An arbitration panel exceeds its authority ... if it decides issues other than those submitted to it by the parties***.";<sup>129</sup>
- *Black's Law Dictionary* (excess of jurisdiction) 604 (8th ed. 2004): "A court's acting beyond the limits of its power, *usu.* in one of three ways: (1) when the court has no power to deal

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<sup>123</sup> Kaikobad, K.H., "The Quality of Justice: 'Excès de Pouvoir' in the adjudication and arbitration or territorial and boundary disputes" in G. Goodwin-Gill & S. Talmon (eds.), *Reality of International Law*, (1999) p. 309, SPLM/A Exhibit-LE 1/2. Emphasis added.

<sup>124</sup> See GoS Memorial, paras. 134-150.

<sup>125</sup> SPLM/A Memorial, para. 22, or para. 678.

<sup>126</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, p. 107; SPLM/A Exhibit-LE 1/1 referring to de Vattel, E., *Le droit des gens*, 1758 ed. (Carnegie, Washington, 1961), Vol. 1, sect. 329, p. 520 (emphasis added by the SPLM/A).

<sup>127</sup> SPLM/A Memorial, para. 678, fn. 1142.

<sup>128</sup> *Ibid.*, p. 8, SPLM/A Exhibit-LE 3/12 (emphasis added by SPLM/A).

<sup>129</sup> *Ibid.*, p. 45, SPLM/A Exhibit-LE 3/13 (emphasis added by SPLM/A).

with the kind of matter at issue, (2) when the court has no power to deal with the particular person concerned, or (3) when the judgment or order issued is of a kind that the court has no power to issue."<sup>130</sup>;

- Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration*, 248 (2004): "**An arbitral tribunal may only validly determine those disputes that the parties have agreed that it should determine.** This rule is an inevitable and proper consequence of the voluntary nature of arbitration. In consensual arbitration, the authority or competence of the arbitral tribunal comes from the agreement of the parties; [*indeed, there is no other source from which it can come*].<sup>131</sup> It is the parties who give to a private tribunal the authority to decide disputes between them; and the arbitral tribunal must take care to stay within the terms of its mandate."<sup>132</sup>

139. Moreover, as explained by the Arbitral Tribunal in the *Orinoco Steamship Company case*, "excessive exercise of power may consist not only in deciding a question not submitted to the Arbitrators, but also in misinterpreting the express provisions of the Agreement in respect of the way in which they are to reach their decisions, notably with regard to the legislation or the principles of law to be applied."<sup>133</sup> In both respects, the ABC Experts have acted *ultra petita* and thus committed an excess of mandate:

- while not answering the precise question they had been asked,<sup>134</sup> they have decided on issues which were not submitted to them (*e.g.* by regulating Misseriya rights across the territory of Abyei as well as the Ngok "secondary rights" North of the "decided" line); and

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<sup>130</sup> Ibid., p. 604, SPLM/A Exhibit-LE 4/1.

<sup>131</sup> The passage in italics and between square brackets was interestingly omitted by the SPLM/A.

<sup>132</sup> SPLM/A Exhibit-LE 4/2 (emphasis added by SPLM/A).

<sup>133</sup> Arbitral Award, 25 October 1910, *Orinoco Steamship Co. Case (United States v. Venezuela)*, XI U.N.R.I.A.A., 227 (2006) p. 239; SPLM/A Exhibit-LE 8/3. See also Salmon, J., *Dictionnaire de Droit International Public* (Bruylant, Brussels, 2001), p. 475 (SCM Annex 15): "Il en est ainsi par exemple, lorsqu'ils [les arbitres] statuent *ultra petita*, en tranchant des questions non prévues dans le compromis ou lorsqu'ils ne respectent pas ses directives sur le droit applicable". ("This is the case, for example, when they [the arbitrators] rule *ultra petita*, in deciding questions not foreseen in the *compromis* or when they do not respect directions regarding the applicable law").

<sup>134</sup> See below, Sub-Section (ii).

- they have manifestly misinterpreted the express provisions of their mandate in disregarding the basis for the decision provided for in the Abyei Protocol.

(a) *Answers to Questions Not Submitted: the "Secondary Rights" Issue*

140. The ABC Experts' "decision" is entirely based on a fragile and specious distinction between "dominant" and "secondary" respective rights of the Ngok on the one hand and of the Misseriya on the other hand:

"1) The Ngok have a legitimate dominant claim to the territory from the Kordofan-Bahr el-Ghazal boundary north to latitude 10°10' N, stretching from the boundary with Darfur to the boundary with Upper Nile, as they were in 1956;

2) North of latitude 10°10' N, through the Goz up to and including Tebeldia (north of latitude 10°35' N) the Ngok and Misseriya share isolated occupation and use rights, dating from at least the Condominium period. This gave rise to the shared secondary rights for both the Ngok and Misseriya;

3) The two parties lay equal claim to the shared 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. The western boundary shall be the Kordofan-Darfur boundary as it was defined on 1 January 1956. The southern boundary shall be the Kordofan-Bahr el Ghazal-Upper Nile boundary as it was defined on 1 January 1956. The eastern boundary shall extend the line of the Kordofan-Upper Nile boundary at approximately longitude 29°32'15" E northwards until it meets latitude 10°22'30"N";<sup>135</sup>

141. The scope of these findings has been explained by Dr. Douglas Johnson, the UK appointed Expert:

"... the experts were guided by the legal principles regulating land rights, as opposed to land ownership. A distinction was made between 'dominant rights' in permanent settlements, and 'secondary' or seasonal rights to the use of land. There are numerous examples in the Sudan, and elsewhere in British-administered territories in Africa, where a transhumant group, such as the Humr, had shared rights in land use on a seasonal basis: examples of the Malwal Dinka and Rizeigat Baggara, and the Lou and Gaawar Nuer are mentioned above.

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<sup>135</sup> ABC Experts' Report, 14 July 2005, pp. 21-22 (SM Annex 81).

The area of the nine Ngok Dinka chiefdoms, therefore, included territory where they had dominant rights (permanent settlements) and territory where they had secondary rights (seasonal use). Ngok secondary rights overlapped with Misseriya secondary rights. The experts determined that the boundary, stipulated by the Abyei Protocol, should bisect the area of shared secondary rights equally. This placed it in the Qoz belt that intervened between the Ngok and Misseriya permanent settlements, south of the line claimed by the SPLM and Ngok."<sup>136</sup>

142. It is plain that these equity-based "decisions" overrode the interpretation of the mandate as fixed in the Abyei Protocol.

143. As recalled correctly in the SPLM/A Memorial, "the ABC's mandate under Article 5.1 of the Protocol [is] 'to define and demarcate the Area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905'."<sup>137</sup> Moreover, as also rightly stated in the SPLM/A Memorial: "In turn, the Abyei Annex states that '[u]pon signature, and notwithstanding Article 5.1 of the Protocol on Abyei, there shall be established by the Parties Abyei Boundaries Commission (ABC) to define and demarcate the Area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905, referred to herein as Abyei Area.' The mandate was repeated in the ABC Terms of Reference and Rules of Procedure."<sup>138</sup>

144. By no stretch of the imagination can this encompass any findings regarding allocation or limitation of grazing rights. As shown in the GoS Memorial<sup>139</sup>, and quite independently of the total absence of evidence of any traditional rights of the Ngok in the area mentioned by the ABC Experts, their findings concerning the "secondary rights" of the Ngok (as well as those of the Misseriya) have strictly nothing to do with their mandate.<sup>140</sup>

145. Moreover, at least with respect to the grazing rights of the Misseriya, these were clearly already dealt with in Article 1.1.3 of the Abyei Protocol according to which:

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<sup>136</sup> Johnson, D., "Why Abyei Matters – The Breaking Point of Sudan's Comprehensive Peace Agreement", 107 *African Affairs* 1 (2008), pp. 12-13 (SCM Annex 9); see also Johnson, D., "The Abyei Protocol Demystified", *Sudan Tribune*, Tuesday, 11 December 2007 (SCM Annex 16).

<sup>137</sup> SPLM/A Memorial, para. 24. See, also, paras. 23, 502, 568, 646, 683, or para. 800.

<sup>138</sup> Ibid., para. 502; see also para. 573.

<sup>139</sup> GoS Memorial, paras. 249-253.

<sup>140</sup> This has been very negatively resented by the Messeriya. See e.g. GoS Counter-Memorial, Witness Statement of Zakaria Atem Diyin Thibeik Deng Kiir, Tab 3, para. 32.

"The Misseriya and other nomadic peoples retain their traditional rights to graze cattle and move across the territory of Abyei."

It is to be noted that this formula obviously excludes the Ngok which, given the context, cannot be included among the "other nomadic peoples". Therefore, *a contrario* it excludes any right of the Ngok north or east the Abyei area.

146. In any case, interpretation and/or application of Article 1.1.3 were entirely outside the jurisdiction of the Experts. By deciding on these matters, they have committed an excess of mandate within the meaning of Article 2 of the Arbitration Agreement of 7 July 2008.

147. As aptly explained by Professor Kaikobad, "a Tribunal would be in *excès de pouvoir* if it sought to establish title or a regime inconsistent with the terms provided, especially where they were clear and unambiguous."<sup>141</sup> This is precisely what happened in the present case when the Tribunal, instead of answering the only question which was asked to it concerning the limit of the Ngok Dinka chiefdoms transferred to Kordofan in 1905, decided on the regime of the transferred area in question at a more recent time (apparently 1956). As Judge Weeramantry explained:

"The jurisprudence of international law offers us many examples where the principle of the integrity of the *compromis* has prevailed over that of the integrity of the award. For example, where a tribunal, invited to decide whether one party or the other should be awarded sovereignty over a territory does not decide this question but examines rather whether there should be a servitude over the territory, the award clearly cannot stand (as happened in the *Aves Island* case of 1865 where the Queen of Spain was arbitrator)."<sup>142</sup>

148. Therefore, there can be no doubt that, by purporting:

- to confer on the Ngok "established secondary rights to the use of land" outside the Abyei area, *i.e.* north of 10°22'30"N; and

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<sup>141</sup> Kaikobad, K. H., *The Quality of Justice: 'Excès de Pouvoir' in the adjudication and arbitration or territorial and boundary disputes* in G. Goodwin-Gill & S. Talmon (eds.), *Reality of International Law*, (1999) p. 313, SPLM/A, Exhibit-LE 1/2.

<sup>142</sup> *Arbitral Award of 31 July 1989*, Dissenting Opinion of Judge Weeramantry, *I.C.J. Reports*, 1991, p. 153. For the opinion that the *Aves Island* arbitration constituted an excess of power, see A. de La Pradelle et N. Politis, II *Recueil des arbitrages internationaux* (1923) pp. 420-421 (SCM Annex 17), or Castberg, F., "L'excès de pouvoir dans la justice internationale", 35 *Recueil des Cours*, pp. 371-372 (1931), SPLM/A Exhibit-LE 13/11.

- to limit the Misseriya's traditional rights of grazing and transit to the southern part of the "shared area", *i.e.* the area between 10°10'N and 10°22'30"N,

the ABC Experts have exceeded their mandate.

(b) *Misinterpretation of the Express Provisions of the Mandate*

- **The ABC Experts have decided *ex aequo et bono* without any express authorization**

149. In doing so, and by the same token, the ABC Experts grossly misinterpreted the provisions of their mandate, not only with respect to the question they were asked to answer, but also with regard to the basis for the decision, which is clearly enunciated in Article 4 of the "Abyei Annex Understanding on Abyei Boundaries Commission", in the following terms:

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

Similarly, Section 3.4 of the 2005 Terms of Reference provides:

"The experts shall consult the British archives and other relevant sources on the Sudan wherever they may be available, with a view to arriving at a decision that shall be based on research and scientific analysis."

150. By no means can these provisions be interpreted as authorizations to decide *ex aequo et bono*. And yet, this is exactly what the ABC Experts did:

"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. The western boundary shall be the Kordofan-Darfur boundary as it was defined on 1 January 1956. The southern boundary shall be the Kordofan-Bahr el Ghazal-Upper Nile boundary as it was defined on 1 January 1956. The eastern boundary shall extend the line of the



Kordofan-Upper Nile boundary at approximately longitude 29°32'15" E northwards until it meets latitude 10°22'30"N;..."<sup>143</sup>

151. This is the *only* reason given in the decision in support of fixing the boundary along the parallel 10°22'30"N - reasonableness and equity - without any allusion to a legal principle or "research and scientific analysis" whatsoever. As already shown in some detail in the Memorial of Sudan,<sup>144</sup> in the absence of express authorisation, a decision arrived at on the basis of an equitable division, or taken *ex aequo et bono*, constitutes an excess of mandate.

152. The ABC Experts' reliance on the 10°35'N and 10°10'N latitudes manifestly reflects a failure to state reasons and an *ex aequo et bono* decision, amounting to an excess of mandate. The ABC Experts' use of the 10°35'N and 10°10'N latitudes as the limits of an equitable division of the Goz belt was entirely artificial and unsupported by facts or reasons. Their failure to justify the use of the 10°35'N line is particularly egregious given that in their Report, the ABC Experts rejected the SPLM/A's claim to that latitude, stating that it was "impossible" to accept it as conclusive.<sup>145</sup> Having rejected this line as the northern boundary due to insufficient evidence, the ABC Experts nevertheless, and without any justification, used it as the northernmost limit for establishing the final boundary on the Goz, which is a compromise split between the 10°35'N and 10°10'N latitude. The ABC Experts state their intention as follows:

"to place the boundary at 10°22'30" N, so as to bisect equally the band between latitudes 10°10' N and 10°35' N".<sup>146</sup>

153. Similarly, there was no justification for the ABC Experts' use of latitude 10°10'N, and none is given in their decision.<sup>147</sup> The ABC Experts' use of both the 10°35'N and 10°10'N latitudes as the limits of the area they would

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<sup>143</sup> ABC Experts' Report, 14 July 2005, pp. 21-22 (SM Annex 81). (Emphasis added). The expression "*legitimate* dominant claim" in para. 1) of the "decision" (emphasis added) also points to the same conclusion. See also Petterson, D., "Abyei Unresolved: A Threat to the North-South Agreement", Conference Proceedings from 11 September 2006 Symposium entitled, Sudan's Peace Settlement: Progress and Perils, p. 4, SPLM/A Exhibit-FE 15/6: "The two parties lay equal claim to the shared area, and accordingly *it is reasonable and equitable* to divide it between them and locate the northern boundary in a straight line at approximately latitude 10°22'30"N." (emphasis added).

<sup>144</sup> GoS Memorial, paras. 166-176; see also paras. 263-265.

<sup>145</sup> ABC Experts' Report, 14 July 2005, p. 44 (SM Annex 81): "In the absence of a copy of the presidential decree, or verbatim quotation from the text, and a more precise location of the sites mentioned, it is impossible to accept this definition as conclusive".

<sup>146</sup> Ibid., p. 45.

<sup>147</sup> See GoS Memorial, paras. 260-262.

subsequently divide rests on a demonstrable gap in reasoning. These limits represent the parameters on which their entire determination of the Abyei Area turned.

154. In addition to the failure to state reasons for the determination of the 10°35'N and 10°10'N latitudes, the ABC Experts exceeded their mandate when, without the Parties' consent, they made an *ex aequo et bono* decision to divide the area by a line half-way in between. Despite the fact that the Parties never agreed to allow the ABC Experts to make a decision in equity, the Experts determined that:

"[T]he 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>148</sup>

This too was a clear excess of mandate.

155. In the present case, these extra-legal considerations are also apparent when keeping in mind the ABC Experts' attempt to allocate oil resources under the guise of the transferred area.<sup>149</sup> While the SPLM/A Memorial devotes a Sub-Section to describing "Oil Resources"<sup>150</sup> and rightly recalls that "Sudan possesses significant oil reserves",<sup>151</sup> it carefully omits to note that, while mute on the issue of the oil,<sup>152</sup> the Experts' Report puts all the oil resources of the region in the Abyei Area.<sup>153</sup> The Report's deafening silence has, however, been broken by Dr. Douglas Johnson, who declared in an interview to the *Sudan Tribune* of 29 May 2006, that:

"...there is a lot of oil there – the Abyei Protocol stipulates that the oil revenues that come from the sale of oil in the Abyei area be divided between the Misseriya and the Ngok Dinka, the government and the SPLM. If the boundary is defined one way, it

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<sup>148</sup> ABC Experts' Report, Appendix 2, p. 26 (SM Annex 81). See also GoS Memorial, paras. 263-265.

<sup>149</sup> GoS Memorial, paras. 270-275.

<sup>150</sup> SPLM/A Memorial, paras. 109-110.

<sup>151</sup> *Ibid.*, para. 109.

<sup>152</sup> Some references were made to the oil exploitation in witnesses statements annexed to the ABC Experts' Report (see e.g., SPLM/A Memorial, Witness Statement of Minister Deng Alor Kuol, Tab 1, para. 143; SPLM/A Memorial, Witness Statement of James Lual Deng, Tab 2, para. 84).

<sup>153</sup> GoS Memorial, Witness Statement of Ali Osman Mohamed Taha, SCM Vol. IV, Tab 2, para. 36: "There is no doubt at all that the only criteria that could have led the experts to drawing that straight line in the desert is to make sure that all nearby oil fields are included."

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."<sup>154</sup>

And, for his part, Ambassador Donald Petterson, the President of the Commission, stated that the boundary does not "affect the distribution of oil revenues, the shares of which are laid out in the Protocol".<sup>155</sup>

156. This constitutes a clear recognition that, in reality, the ABC Experts took into full consideration the "Wealth Sharing" provisions in the CPA and Section 3 of the Abyei Protocol, while they were given strictly no competence by the Parties to take this aspect of the global settlement into account. As Dr. Johnson himself recognized, in doing so, they would "have been violating [their] mandate."<sup>156</sup>

- **The ABC Experts have not based their decision on any specified "legal principles"**

157. It is extremely revealing that *nowhere, not in a single paragraph* of their Memorial, does the SPLM/A quote, nor even refer to the decisive passage of paragraph 3 of the "Final and Binding Decision" - quoted at paragraph 150 above - which clearly is the crucial part of the Report. In paragraph 107 of its Memorial, the SPLM/A provides a truncated quote of that provision by carefully omitting the following key terms: "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...". It is thus obvious that the SPLM/A is trying to conceal, by way of highly selective quotation, the Experts' reliance on equity.<sup>157</sup> Understandably, the SPLM/A prefers to stress<sup>158</sup> that the Experts mention *en passant*, under the discussion of "Proposition 9" of the Report, "the legal principle of the equitable division of

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<sup>154</sup> "Interview with Douglas Johnson, expert on the Abyei Boundary Commission", *Sudan Tribune*, Monday, 29 May 2006 (SM Annex 85); see also full text in GoS Memorial, para. 274.

<sup>155</sup> Petterson, D., "Abyei Unresolved: A Threat to the North-South Agreement", Conference Proceedings from 11 September 2006, Symposium entitled, Sudan's Peace Settlement: Progress and Perils, p. 4, SPLM/A Exhibit-FE 15/6.

<sup>156</sup> "Interview with Douglas Johnson, expert on the Abyei Boundary Commission", *Sudan Tribune*, Monday 29 May 2006 (SM Annex 85).

<sup>157</sup> The text in SPLM/A Memorial, para. 107 reads: "the northern boundary [of the Abyei Area is defined by] a straight line at approximately latitude 10°22'30"N."

<sup>158</sup> SPLM/A Memorial, paras. 529, or 656.

shared secondary rights."<sup>159</sup> The approach adopted by the SPLM/A calls for three remarks, when analysed in the light of the ABC Experts' Report.

158. *First*, the SPLM/A's characterization of this "principle" as "legal" finds no support whatsoever in the Experts' Report. To the contrary, as explained at length in "Appendix 2: Land Occupation, Land Rights and Land Use as Relevant Evidence for Delimiting and Demarcating the Boundaries", the Experts justify their finding concerning the determination of the boundary based on the dominant/secondary rights argument as follows:

"The implication of all of the above is that 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>160</sup>

This is also confirmed by the UK appointed Member of the Board of Experts, Dr. Johnson, who stressed that:

"Applying the *principles of justice and equity* also commonly applied to resolve such disputes, it was decided to bisect the area of shared secondary rights into equal portions at approximately 10°22'30"N."<sup>161</sup>

159. *Second*, according to its mandate, the ABC was supposed to base itself on "on scientific analysis and research",<sup>162</sup> but not on any particular system of law and, in particular, not on the "legal principles [for] determining land rights in former British-administered African territories...",<sup>163</sup> as they purported to have done. Moreover, even if such principles were relevant to the ABC Experts' task - which they were not - the ABC Expert's "decision" provides no reasoning underlying the content of the principle they purported to rely on.

160. *Third*, in any case, absent any justification for the categorical and ill-founded assertion that, in the present case, law is based on a pure reference to equity, the Report is devoid of any kind of motivation on this crucial point. Therefore, it must be seen not as based on an erroneous or debatable motivation, but as completely and manifestly lacking in motivation. It is a well

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<sup>159</sup> ABC Experts' Report, 14 July 2005, p. 20 (SM Annex 81).

<sup>160</sup> Ibid., Appendix 2: Land Occupation, Land Rights and Land Use as Relevant Evidence for Delimiting and Demarcating the Boundaries, p. 26 (SM Annex 81).

<sup>161</sup> Johnson, D., "The Abyei Protocol Demystified", *Sudan Tribune*, Tuesday, 11 December 2007 (SCM Annex 16) (emphasis added).

<sup>162</sup> See above, paragraph 149.

<sup>163</sup> ABC Experts' Report, 14 July 2005, p. 12 (SM Annex 81).

established principle that the failure to state the reasons for an arbitral decision is an excess of power which results in the nullity of the award.<sup>164</sup>

161. In other words, in the absence of any consent expressly given by the Parties, the ABC Experts have exceeded their mandate by deciding *ex aequo et bono* on the sole basis of their perception of what would have been "reasonable and equitable". This perception was thinly veiled under an unspecified, non-demonstrated and unexplained "legal principle of the equitable division of shared secondary rights" which is, nevertheless, the sole basis for the "decision". This is a far cry from the jointly agreed criterion of a decision that should have been, exclusively, "based on scientific analysis and research".

## (ii) The ABC Experts Decided *Infra Petita*

162. As noted above,<sup>165</sup> the SPLM/A does not categorically deny that the ABC Experts would have committed an excess of mandate if they failed to decide matters submitted to them by the common agreement of the Parties. The SPLM/A, however, does not explain why this well established rule should not apply in the present case. It is certainly not true that, as they purport to have Professor Kaikobad say, "[a]n 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 reference and thus exceeds the territorial scope of its jurisdictional powers'"<sup>166</sup>, for the real quote from Professor Kaikobad's article calls for an entirely different conclusion. It reads:

"This kind of *excès* occurs when the tribunal delimits, in whole or in part, a boundary in areas not covered by the terms of reference and thus exceeds the territorial scope of its jurisdictional powers."<sup>167</sup>

163. The underlined words above clearly show that this is only one example of an excess of mandate that can be committed by an arbitral tribunal, thus clearly implying that other kinds of excesses do exist. And, indeed, the

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<sup>164</sup> See GoS Memorial, paras. 151-165, and more specifically concerning this case, paras. 255-262, and paras. 266-269.

<sup>165</sup> See above, paragraph 138.

<sup>166</sup> SPLM/A Memorial, para. 679.

<sup>167</sup> Kaikobad, K., "The 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*, (1999), p. 302, SPLM/A Memorial Exhibit-LE 1/2 (underlined by the GoS).

learned author describes those other kinds of *excès* when he introduces his paper:

"Cases of *excès de pouvoir* fall into two broad categories. In the first lies *excès* which is inconsistent with the territorial scope and elements of the terms of reference; in the second lie matters involving the criteria applied in the resolution of the dispute. The common element is that at some level or other, an exercise of power conflicts with the jurisdiction vested in the tribunal by the terms of reference. Only the first category, namely the territorial aspects of *excès*, will be examined here, in the light of the three principal subcategories, namely (a) *nemo iudex non ultra petita*; (b) territory not included in the terms of reference; (c) location and allocation precluded by the parties."<sup>168</sup>

164. Legally speaking, there can be no doubt that, as explained in a classical work in French on the nullity of arbitral awards:

"Il est bien entendu que l'*excès de pouvoir* du tribunal peut être commis non seulement par action, mais par omission, par inaction, par abstention, par manquement aux règles prescrites dans le compromis ou par la nature et le but de la fonction juridictionnelle. Ainsi le tribunal doit juger tout point prévu au compromis, fût-il d'avis qu'il n'y a pas lieu de l'examiner."<sup>169</sup>

Or, in the words of Judge Weeramantry:

"[D]ecisions can take a positive or negative form. One can take a decision to act when the compromise clearly requires one not to act, just as one can take a decision not to act where the *compromis* clearly requires one to act. In both cases alike the decision is one beyond the scope of the arbitrator's authority and involves the arbitrator in stepping out, so to speak, from the frame of the *compromis*. When this happens the resulting decision can command no claim to validity, for it is not based on that bedrock of mutual consent which is a prerequisite to arbitral authority. The award, lacking that foundation, cannot sustain itself or command recognition."<sup>170</sup>

165. A Chamber of the International Court of Justice itself concluded "that, in the task conferred upon it, it must conform to the terms by which the

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<sup>168</sup> Ibid., p. 295 (underlined by the GoS).

<sup>169</sup> "It is understood that the excess of power of the Tribunal can result not only from an action, but also from an omission, a decision not to act or an abstention, from non-compliance with the rules prescribed by the Agreement or by the nature and goal of the judicial function. Thus, the Tribunal must rule on every aspect of the Agreement, even though it considers that it does not need to examine one." Balasko, A., *Causes de nullité de la sentence arbitrale en droit international public*, (1938) p. 200, which, significantly, was omitted from SPLM/A Exhibit-LE 11/12. See also the authorities cited in SPLM/A Memorial, para. 673, fn. 1139, quoted above at paragraph 137.

<sup>170</sup> *Arbitral Award of 31 July 1989*, Dissenting Opinion of Judge Weeramantry, *I.C.J. Reports 1991*, p. 153.

Parties have defined this task. If it did not do so, it would overstep its jurisdiction."<sup>171</sup>

166. In the present case, according to its mandate, the ABC (and the Experts) were supposed "to define and demarcate the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905, referred to herein as Abyei Area."<sup>172</sup> This mandate has been repeated in Article 1 of the "Abyei Annex Understanding on Abyei Boundaries Commission", in Sections 1.1. and 1.2. of the Terms of Reference and in Article 1 of the Rules of Procedure of the ABC.

167. In conformity with its "method" of repeating again and again the same allegations, the SPLM/A, in not less than three different places, asserts – in virtually the same terms – that:

"Based on these conclusions, and having 'duly considered, assessed, and weighed the evidence before them,' the ABC Report identified an area where the Ngok Dinka had (in 1905) 'established dominant rights of occupation,' as well as a further area ('between latitudes 10°10' N and 10°35' N') as to which both the Ngok Dinka and the Misseriya shared 'secondary rights.' The Commission separately noted that the area of shared rights which it had identified 'closely coincides with the band of Goz, which a number of sources identify as the border zone between the Ngok and Misseriya.' The ABC then relied on local principles of land law, and their 'legal principle of the equitable division of shared secondary rights,' to divide the area of shared rights between the Ngok Dinka and the Misseriya."<sup>173</sup>

168. Notwithstanding the erroneous character of the SPLM/A's findings, this is indeed what the Experts, not the Commission, purported to do, and purported to do *ultra petita*<sup>174</sup> – but this also is all they did and it, by no means, corresponds to their mandate which was "to define and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905."

169. As is well known, according to the "general rule of interpretation" as reflected in Article 31 of the Vienna Convention on the Law of Treaties, a legal instrument must be interpreted first "in accordance with the ordinary meaning to be given to the terms of the [instrument] in their context and in the light of

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<sup>171</sup> Judgment of 12 October 1984, *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, I.C.J. Reports 1984, p. 266, para. 23.

<sup>172</sup> Abyei Protocol signed at Naivasha, Kenya, 26 May 2004, Article 5.1 (SM Annex 71).

<sup>173</sup> SPLM/A Memorial, para. 529; see also paras. 656 and 878; see also in the same vein: paras. 557, 684-685, 881, or 1142.

<sup>174</sup> See above, paragraphs 138-161.

its object and purpose". A simple reading of the mandate shows that the ABC Experts grossly erred in the interpretation of their mandate which they apparently stopped reading after the expression: "to define and demarcate the area of the nine Ngok Dinka chiefdoms...", without paying attention to the end of the definition of their mandate: "...transferred to Kordofan in 1905". Read as a whole, the mandate was straightforward: the Commission was mandated to define a territory *transferred to Kordofan in 1905*, it being specified that this area was that of the nine chiefdoms. But it clearly results from the text, just the text, of Article 5.1. of the Abyei Protocol (as well as from Article 1 of the "Abyei Annex Understanding on Abyei Boundaries Commission", Sections 1.1. and 1.2. of the Terms of Reference and Article 1 of the Rules of Procedure of the ABC), read in accordance with its ordinary meaning, that the area concerned was that which had been transferred to Kordofan in 1905: it had to encompass the area of the nine chiefdoms, but it did not necessarily coincide with it.<sup>175</sup> The important and specific element of the mandate was the transfer in 1905.

170. In other words, the mandate was clear; it referred to a specific event: the 1905 territorial *transfer* – not the Ngok's "dominant rights" or effective settlement in 1956, in 1965, or even in 1905.<sup>176</sup> And this was deliberate. As explained by Minister Deng Alor in his witness statement:

"The SPLM/A did produce various earlier drafts that sought to elaborate on the language of the mandate, including that the Abyei Area was the 'Area referred to in the Addis Ababa Agreement and which was administered from 1974 to 1978 under the President's Office'. [Exhibit - DA-23 to 25] Ultimately, however, the GoS insisted that we leave the mandate exactly as put in the US Principles of Agreement; after all it had been sold to the parties as take-it-or-leave-it non-negotiable document."<sup>177</sup>

171. According to the Addis Ababa Agreement, "'Southern Provinces of the Sudan' means the Provinces of Bahr El Ghazal, Equatoria and Upper Nile in accordance with their boundaries *as they stood on January 1, 1956, and any*

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<sup>175</sup> GoS Counter-Memorial, Witness Statement of Abdul Rasul El-Nour Ismail, SCM Vol. 4, Tab 5, paras. 8-10. See below, paragraph 172.

<sup>176</sup> See also GoS Counter-Memorial, Witness Statement of Yahia Hussain Babiker, SCM Vol. IV, Tab 14, para. 11: "The Proposal which applied self-determination to Abyei, had however, provided clearly that the Abyei area shall be defined as 'the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905'. It did not speak about the 'Abyei District'. The area of 'Southern Complex' or the area of any other later years."

<sup>177</sup> SPLM/A Memorial, Witness Statement of Minister Deng Alor Kuol, Tab 1, para. 64. See also GoS Counter-Memorial, Witness Statement of Ahmed Assalih Sallouha, SCM Vol. IV, Tab 4, para. 8: "We particularly emphasised that we would not accept any compromise, we would not accept any date other than the 1905 and we would not agree to demarcate any boundary for any territory other than that transferred to Kordofan."



*other areas that were culturally and geographically a part of the Southern Complex* as may be decided by a referendum."<sup>178</sup> By refusing to include a mention of the culture, the geography or of the year 1956, the date of Sudan's independence, the Parties made clear that they wanted to stick to *the* question, as proposed by the U.S., of *the territorial transfer of 1905* without any other interfering factor.

172. In particular, as explained by Vice-President Ali Osman Mohamed Taha:

"The 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]*'. (Brackets in the original). 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>179</sup>

And, pointing more precisely to paras. 483 and 484 of the SPLM/A Memorial, the Vice-President added:

"The SPLM never posed at any point of time any proposal or queries of whether this definition includes the '*entire Ngok territory*' or not"<sup>180</sup>;

and concerning General Sumbeiywo's Statement:

"I find it inexplicable for General Sumbeiywo to state that: '*there was never any suggestion by either party that the language of article 1(b) would divide the territory of the Ngok Dinka Chiefdoms as it existed historically in 1905 into different parts*'. There was no reason for the parties to make suggestions to General Sumbeiywo or any other body on this point or any other point related to the Danforth Proposal. After the acceptance of

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<sup>178</sup> Draft Organic Law to Organize Regional Self-Government in the Southern Provinces of the Democratic Republic of the Sudan, Chapter II, Art. 3, at para. iii (1972) (a core component of "The Addis Ababa Agreement"), SPLM/A Exhibit-FE 5/6 (emphasis added).

<sup>179</sup> GoS Counter-Memorial, Witness Statement of Ali Osman Mohamed Taha, SCM Vol. IV, Tab 2, para. 25. See also *ibid.*, Witness Statement of Yahia Hussain Babiker, SCM Vol. IV, Tab 14, para. 15: "The GoS never needed to clarify the meaning of the Danforth proposal from General Lazaro Sumbeiywo or any American envoy. It was a short self-explanatory text. Before GoS accepted we have never approached any body seeking clarification."

<sup>180</sup> *Ibid.*, Witness Statement of Ali Osman Mohamed Taha, SCM Vol. IV, Tab 2, para. 30.

the proposal it was owned by the parties who were to agree on interpreting its language if need be."<sup>181</sup>

173. This is also confirmed by the witness statement by Mr. Abdul Rasul El-Nour, the member of the ABC representing the Messeriya:

"... it was agreed that the ABC's task was to define and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905. The SPLM/A never suggested that the area was to be defined using any other parameter. They never said they understand the ABC task to be defining and demarcating 'the entire area of the nine Ngok Dinka chiefdoms' be it transferred to Kordofan in 1905 or not. They had indeed clearly stated the same understanding as ours at the beginning of their presentation."<sup>182</sup>

174. Similarly, Mr. Zakaria Atem Diyin Thibeik Deng Kiir, the representative of the local Administration in the ABC, has declared under oath that:

"The leaders of the two parties and the experts made it clear in all public meetings that the ABC task is to define and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan from Bahr el Ghazal in 1905. This clearly excludes areas of Ngok settlements which were in Kordofan before the transfer."<sup>183</sup>

175. As will be explained in more details in Chapter 5 of this Counter-Memorial, it is evident that any areas already situated in Kordofan prior to 1905 could not have been included or intended to have been included in the subsequent transfer. Furthermore, even if the ABC Experts (*quod non*) had been correct that the Ragaba ez Zarga was deemed to be the provincial boundary between Kordofan and Bahr el Ghazal before the 1905 transfer, the conclusion would be that areas north of the Ragaba ez Zarga were already part of Kordofan before 1905. Therefore, it follows that there are no areas north of the Ragaba ez Zarga that could have been administratively transferred to Kordofan in 1905 because such areas, even on the Experts' reasoning, were north of the pre-existing boundary between the two provinces.

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<sup>181</sup> Ibid., para. 28.

<sup>182</sup> Ibid., Witness Statement of Abdul Rasul El-Nour Ismail, SCM Vol. IV, Tab 5, para. 8 (italics in the original text; underlined by the GoS).

<sup>183</sup> GoS Counter-Memorial, Witness Statement of Zakaria Atem Diyin Thibeik Deng Kiir, SCM Vol. IV, Tab 3, para. 28 (emphasis added by the GoS).

176. In spite of the clear terms of their mandate, the ABC Experts did not consider either the actual territorial transfer or its date in their Report. The best evidence of this absolute neglect is given by the absence of both the word "transfer" (or "transferred") and the date 1905 – in the "Final and Binding Decision" concluding the Report. This is more than enough to conclude that the ABC Experts have not answered the question which had been asked to the ABC, thus deciding *infra petita* in contradiction with their clear mandate. Instead of answering the only question which was before them: defining and demarcating "the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, referred to herein as Abyei Area", they answered the truncated and undefined question of the "area of the nine Ngok Dinka chiefdoms" without a clear temporal reference for the Experts' findings, the only date appearing (*twice*) in the "decision" being 1956.<sup>184</sup>

177. It is clear in any event that, when the SPLM/A argues that "[t]he administrative record of the Condominium period and testimony of persons familiar with the area attest to the continuity of Ngok Dinka settlements in, and use of, places north of the Bahr el-Arab between 1905 and 1965, as claimed by the Ngok and the SPLM/A"<sup>185</sup>, it does not make any reference to the area "transferred to Kordofan in 1905". Nor does it do so when it "decides" that: "The Ngok have a legitimate dominant claim to the territory from the Kordofan-Bahr el-Ghazal boundary north to latitude 10°10'N, stretching from the boundary with Darfur to the boundary with Upper Nile, as they were in 1956."<sup>186</sup> Again, the issue is not about a "claim", whether dominant or secondary, in 1956 or today, but to ascertain what were the limits of the territory "transferred to Kordofan in 1905".

178. According to the ABC Experts' Report:

"The boundaries of the Ngok Dinka that were transferred to Kordofan for administrative reasons in 1905 were, like most boundaries in the Sudan at the time, not precisely delimited and demarcated in accordance with scientific survey techniques and methods. It is therefore incumbent upon the experts to determine the nature of the established land or territorial occupation and/or use rights by all the nine Ngok Dinka

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<sup>184</sup> On the ABC Expert's ignoring the stipulated date of 1905, see further GoS Memorial, paras. 242-248.

<sup>185</sup> ABC Experts' Report, 14 July 2005, p. 21 (SM Annex 81).

<sup>186</sup> *Ibid.*, p. 21, para. 1 of the "Final and Binding Decision".

chiefdoms, with particular focus on those in the northern most areas that formed the transferred territory."<sup>187</sup>

179. That the boundary was "not precisely delimited and demarcated in accordance with scientific survey techniques and methods" is obvious: if it had been, there would have been no dispute, no Abyei Boundaries Commission would have been created, no decision would have been needed. But the next sentence is a *non sequitur*. Indeed, it does not follow from this premise that it was "*therefore* incumbent upon the experts to determine the nature of the established land or territorial occupation and/or use rights by all the nine Ngok Dinka chiefdoms." To the contrary: since the territory transferred in 1905 had no boundary precisely delimited, therefore it was incumbent upon the ABC and the Experts to use the scientific survey techniques and methods now at their disposal to determine (delimit) where the boundary was (at the time) in view of the elements at their disposal and to demarcate it by demarcating this area "on map and on land."<sup>188</sup>

180. The "explanation" given by Dr. Douglas Johnson calls for the same remarks:

"The Abyei Protocol stated that 'the territory is defined as the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905' (Abyei Protocol, article 1.1.2), but the two sides could not agree on what the extent of that territory was. The Abyei Boundaries Commission (ABC) was established 'to define and demarcate the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905' (Abyei Protocol, article 5.1)

[...]

However, the Abyei Protocol makes no reference to an administrative boundary in 1905. It refers, instead, to 'the nine Ngok Dinka chiefdoms'. The mandate required the ABC to define the territory of the Ngok Dinka in 1905, which involved defining the tribal territory.

[...]

Since the ABC was not mandated to find a 1905 boundary, it did not fail, and nor did the experts claim to have failed."<sup>189</sup>

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<sup>187</sup> Ibid., Appendix 2, p. 21 (SM Annex 81).

<sup>188</sup> Terms of Reference, 12 March 2005, Sect. 1.2 (SM Annex 74); Rules of Procedure, 11 April 2005, Art. 1.2 (SM Annex 75). On these points, see in particular: GoS Memorial, paras. 231-234.

<sup>189</sup> Johnson, D., "The Abyei Protocol Demystified", *Sudan Tribune*, Tuesday, 11 December 2007 pp. 2 and 6 (SCM Annex 16).

181. When writing that "the two sides could not agree on what the extent of that territory was", the U.K. member of the Board of Experts, pushes at an open door. He is right to recall that: "The Abyei Boundaries Commission (ABC) was established 'to define and demarcate the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905' (Abyei Protocol, Article 5.1)", as well as to recall, in another paper, that "[t]he mandate of the ABC was cast in historical terms, to reconstruct a situation as it existed in 1905, rather than take into consideration any developments of the last forty years, when the area has been actively disputed"<sup>190</sup> – although this is exactly what the Experts did.<sup>191</sup> However, Dr. Johnson is patently wrong when he adds that:

- "the ABC was not mandated to find a 1905 boundary". Of course it was, as a simple reading of Article 5.1 of the Abyei Protocol shows. One cannot "define and demarcate" an area without finding its boundary first; and that:
- "[t]he mandate required the ABC to define the territory of the Ngok Dinka in 1905, which involved defining the tribal territory" – here we find again the same *non sequitur*: the mandate required the ABC to define the territory of the Ngoks but only in so far as it was "transferred to Kordofan in 1905"; and this certainly does not involve defining in the abstract "the tribal territory".

182. Now, according to the SPLM/A,

"The ABC experts repeatedly explained their Understanding of the Parties' definition of 'Abyei Area,' Without Any Suggestion by the GoS that this Definition Exceeded the ABC's Mandate or that the ABC Lacked Authority to Adopt this Definition."<sup>192</sup>

183. This statement is extremely misleading for the following reasons:

- *first*, as explained in the Report, the Experts had "pledge[d] not to reveal to any person or institution the substance of their decision before they present it to the Sudanese Presidency";<sup>193</sup> it is then only at

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<sup>190</sup> Johnson, D., "Why Abyei Matters – The Breaking Point of Sudan's Comprehensive Peace Agreement", (2008) 107 *African Affairs*, p. 17 (SCM Annex 9).

<sup>191</sup> See GoS Memorial, para. 32. See also, paras. 235, 242-248 or 267.

<sup>192</sup> SPLM/A Memorial, p. 140, title of Sub-Section 4. See also paras. 626-642.

<sup>193</sup> ABC Experts' Report, p. 5 (SM Annex 81).

that time that their final interpretation – the only one which can constitute an excess of mandate – could be known by the Parties; and,

- *second*, if the SPLM/A were aware of the "decisions" of the Experts before that date, clearly, the GoS were not, as shown, for example, by the immediate and spontaneous reaction of the GoS Delegation when the Report was made public;<sup>194</sup> moreover,
- *third*, it must be noted that considering the list of the occasions when, according to the SPLM/A Memorial, the ABC Experts made public their interpretations of the mandate, then these "interpretations" certainly cannot be taken seriously, so changing and ambiguous they were, as shown by the table hereinafter, which repeats *verbatim*, paras. 628-630 of the SPLM/A Memorial<sup>195</sup>:

"628. At the ABC's first meeting on 14 April 2005 (in Abyei town), Dr. Johnson explained, at Ambassador Petterson's invitation, that:

"The Peace Agreement between the Government of Sudan and SPLM made a special provision for Abyei. ... The Peace Agreement, that was mentioned, speaks specifically about the nine sections of the Ngok Dinka. The Peace Agreement refers ***to the Abyei area that was occupied by the nine sections of the Ngok Dinka.***"<sup>196</sup>

**This is true, but also  
ambiguous and  
incomplete.**

629. There was no disagreement with this explanation of the parties' agreements. There was no suggestion by the GoS or the SPLM/A that Dr. Johnson's description of the Abyei Protocol was inaccurate or incomplete, and no suggestion that the ABC was not entitled to interpret the parties' definition of the term "Abyei Area" in the course of its work.

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<sup>194</sup> SPLM/A Memorial, Witness Statement of James Lual Deng Tab 2, paras. 101 and 105; GoS Counter-Memorial, Witness Statement of Abdul Rasul El-Nour Ismail, SCM Vol. 4, Tab 5, paras. 30 and 31 and *ibid.*, *ibid.*, Witness Statement of Ahmed Assalih Sallouha, SCM Vol. 4, Tab 2, para. 21.

<sup>195</sup> Emphasis added by SPLM/A.

<sup>196</sup> ABC Experts' Report, Appendix 4, p. 129 (SM Annex 81).

630. The ABC Experts subsequently reiterated their understanding of the parties' definition of the Abyei Area in the Abyei Protocol (and elsewhere) on multiple occasions:

a. At the meeting on 16 April 2005 in Dembloya, Ambassador Petterson stated: "They have explained to you about the Peace Agreement and our part is a small part – ***to determine the boundaries of the nine Dinka Chieftoms as they existed 100 years ago.***"<sup>197</sup> There was no disagreement from any of the GoS members of the ABC or GoS representatives at the meeting.

**This is clearly erroneous.**

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<sup>197</sup> Ibid., p. 41.

b. At the meeting in Umm Baleal on 17 April 2005, Professor Muriuki explained that the ABC was set up "because during the negotiations, the two groups could not agree on what to do about Abyei. ... ***Our purpose is to decide on the boundaries that existed in 1905 between the Misseriya and Ngok Dinka.***"<sup>198</sup>

Again, there was no disagreement from any of the GoS members of the ABC or GoS representatives at the meeting.

**This is ambiguous and incomplete.**

c. At the meeting in Muglad also on 17 April 2005, Ambassador Petterson explained that "[our job is solely to] define and to demarcate ***the area of the nine Ngok Dinka Chiefdoms that were transferred to Kordofan from Bahr el-Ghazal province in 1905.***"<sup>199</sup> Once more, there was no disagreement from any of the GoS members of the ABC or GoS representatives at the meeting.

**This is an acceptable interpretation of the mandate. There was no disagreement of the SPLM/A members of the ABC or GoS representatives at the meeting.**

d. At the meeting in Agok on 18 April 2005, Ambassador Petterson again stated that it was the mandate of the ABC to "define and demarcate ***the area of the nine Ngok Dinka Chiefdoms, which were transferred to Kordofan Province from Bahr El-Ghazal Province in 1905.*** In making our decision as to the location of the nine Ngok Dinka chiefdoms, we, the members of the Commission, will examine historical records and documents and we shall listen to the representatives of the people of the Abyei Area and the neighbours. ... Again, the mandate of the Abyei Boundaries Commission is only, is

**This too is an acceptable interpretation of the mandate. There was no disagreement of the SPLM/A members of the ABC or GoS representatives at the meeting.**

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<sup>198</sup> Ibid., pp. 52-53.

<sup>199</sup> Ibid., p. 79.



solely to define and demarcate the Abyei Area."<sup>200</sup> As on other occasions, there was no disagreement with that statement by either party."

184. One last point must be made in respect to the non-exercise of their mandate by the ABC Experts (who have then decided *infra petita*). While, evidently,<sup>201</sup> the 1905 new boundary was not demarcated, it is even more shocking to read in the Preface of the Report that "[n]o map exists showing the area inhabited by the Ngok Dinka in 1905. Nor is there sufficient documentation produced in that year by Anglo-Egyptian Condominium government authorities that adequately spell out the administrative situation that existed in that area at that time".<sup>202</sup>

- With regard to the first allegation (no map "showing the area inhabited by the Ngok Dinka in 1905"), this is based on the same mistaken interpretation of the mandate, which is not to determine where the Ngok Dinka lived, but what was the territory (which they inhabited) that was transferred to Kordofan in 1905. Furthermore, had a map answered the question, there would have been no dispute and no need for defining the boundary through an arbitration-like process;
- With respect to the second allegation made by the SPLM/A, an alleged absence of sufficient documentation is certainly not a justification for an arbitrator to refuse to answer a question or to substitute the question asked by the Parties in the *compromis* with a different one.<sup>203</sup> Moreover, as has been shown in Chapter 6 of the Memorial of the GoS, and as will be shown again below in Chapter 5 of this Counter-

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<sup>200</sup> Ibid., p. 58.

<sup>201</sup> See GoS Memorial, paras. 28, 213(c), or 231.

<sup>202</sup> ABC Experts' Report, p. 4 (SM Annex 81).

<sup>203</sup> See e.g., Deuxième rapport par M. Georges Scelle, rapporteur spécial sur la Procédure arbitrale: "*Le non liquet consiste, de la part du juge, à se refuser à juger sur l'ensemble du litige ou sur l'un des aspects du litige, en affirmant qu'il est insuffisamment informé des faits de la cause ou que le droit positif en vigueur ou les normes reconnues comme obligatoires par les parties dans le compromis sont inapplicables*" ("*Non liquet* is a situation where the judge refuses to rule the entire dispute or one aspect of the dispute, asserting that he has been insufficiently informed of the facts of the matter or that the applicable law or the rules recognized as mandatory by the parties in the agreement are inapplicable.") A/CN.4/18, *ILC Yearbook 1950*, vol. II, p. 131 (SCM Annex 18); see *ibid.*, "Article 19: *Le tribunal arbitral ne peut refuser de se prononcer sous prétexte qu'il n'est pas suffisamment éclairé, soit sur les faits, soit sur les principes juridiques qu'il doit appliquer*" ("The arbitral tribunal cannot refuse to rule on the basis that it is not sufficiently knowledgeable, on the facts or on the judicial principles that it must apply", *Règlement de l'Institut du droit international de 1875*).

Memorial, there is abundance of material which could (and should) have permitted the Experts to comply with their mandate with reasonable efficiency.

185. By way of conclusion on this point, it is apparent that:

- (a) The mandate of the ABC was straightforward: the Commission was mandated to define the area of the nine Ngok Dinka chiefdoms *transferred to Kordofan in 1905*;
- (b) The ABC Experts grossly erred in the interpretation of their mandate as they did not consider the actual transfer or its date in their Report;
- (c) The Experts failed to use the scientific techniques and methods at their disposal to define the boundary in 1905 and to demarcate it;
- (d) The ABC Experts never explained clearly and unambiguously their understanding of the definition of "Abyei Area".

**(iii) The ABC Experts Committed Gross Violations of the Applicable Procedural Rules**

186. As explained by Castberg:

"[U]n tribunal arbitral peut également commettre un excès de pouvoir en appliquant au procès des règles de procédure différant de celles qui lui ont été prescrites."<sup>204</sup>

187. As shown in the GoS Memorial,<sup>205</sup> this is widely accepted in practice and in the teachings of international lawyers as being a ground for excess of mandate since, clearly, rules of procedure are part of the mandate. Therefore, there can be no doubt that, in the present case, the ABC Experts grossly violated their mandate also in this respect.

188. In accordance with its usual – and manifestly irrelevant – objection according to which "the GoS never raised objections that the ABC was

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<sup>204</sup> "An arbitral tribunal can also commit an excess of power when applying rules of procedure different from the one that has been prescribed to it" (Castberg, F., "L'excès de pouvoir dans la justice internationale", (1931) 35 *Recueil des Cours*, p. 389, SPLM/A Exhibit-LE 13/11).

<sup>205</sup> See GoS Memorial, paras. 177-186.

exceeding its mandate during the proceedings before the Commission",<sup>206</sup> the SPLM/A emphatically asserts that "[t]he GoS never objected to the Commission's conduct of the ABC proceedings."<sup>207</sup> Since, however, gross procedural violations constitute excess of mandate, they must follow the same rules and, therefore, they can be invoked at any time, particularly when there exists a formal agreement submitting the alleged excess of mandate to an arbitral tribunal, as is the case here.<sup>208</sup>

189. This is all the more so in the present case that the procedural violations committed by the ABC Experts only became known after the adoption of their "decision" and could not have been detected earlier by the GoS. Indeed, several of them are precisely due to the concealment to the GoS of certain facts or behaviour of the ABC Experts. This is particularly the case concerning two episodes presented in some detail in the Memorial of the GoS:

- that of Mr. Millington's e-mail of 27 April 2005; and
- that of the three unscheduled meetings with representatives of the Ngok Dinka in the absence of the Parties in April and May 2005.

190. Concerning Millington's e-mail, the Government of Sudan will reiterate what it had established in its Memorial<sup>209</sup> *i.e.* that:

- the consultation of this official of the U.S. Embassy in Nairobi was done without any sounding of the Parties, in manifest breach of Arbitration Rules 3 and 14 and, more generally of the spirit of transparency that inspired the drafters of the Rules of Procedure<sup>210</sup>;
- whatever could have been the view of the Americans,<sup>211</sup> it was for the ABC Experts to decide in full independence without external interference and on the basis of the clear terms of their mandate (all

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<sup>206</sup> SPLM/A Memorial, para. 843; see above, paragraph 121.

<sup>207</sup> *Ibid.*, paras. 855-868.

<sup>208</sup> Article 2 of the Arbitration Agreement of 7 July 2008, quoted at paragraph 118 above.

<sup>209</sup> GoS Memorial, paras. 209-218.

<sup>210</sup> "The Commission will endeavour to reach a decision by consensus. If, however, an agreed position by two sides is not achieved, the experts will have the final say." Rules of Procedure for the Abyei Boundaries Commission, Nairobi, 11 April 2005, Rule 14 (SM Annex 75.)

<sup>211</sup> Mr. Millington's response: "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]." (ABC Experts' Report, 14 July 2005, p. 4 (SM Annex 81)).

the more so that Mr. Millington gives no evidence nor even any kind of indication concerning the reasons for this "view");

- in any case the response was meaningless: clearly (i) the area of Abyei has never been demarcated; and (ii) if this were the common view, there would have been no need to refer to the transfer realized in 1905; and,
- aggravating circumstance: the Parties were never given an opportunity to comment on the position taken by Mr. Millington.<sup>212</sup>

191. As for the episode of the unscheduled meetings in Khartoum, the SPLM/A does not deny what was exposed in the GoS Memorial. But, probably conscious that this was clearly in breach of the Rules of Procedure, the Memorial simply mentions *en passant* in a footnote that:

"The ABC representatives of the GoS and SPLM participated in all witness meetings, except the Khartoum meetings held on 21 April 2005, 6 and 8 May 2005, which were agreed to by the ABC Experts at the request of people not having participated in the meetings agreed to by the parties."<sup>213</sup>

192. This statement contains an egregious omission since it fails to specify that, as explained in the GoS Memorial,<sup>214</sup> the fact that Government of Sudan and SPLM/A representatives did not participate in the Khartoum meetings was in total disregard of Section 3 of the Terms of Reference and paragraphs 6 to 10 of the Rules of Procedure since the Parties (and the Government of Sudan and SPLM/A representatives in the Commission) - or at last neither the Government of Sudan nor its appointees in the ABC - were ever consulted on these interviews, which were conducted *after* the Experts had formally informed the Parties that they would proceed to no more interviews.<sup>215</sup> Here again, the breach of the procedural elements of the mandate (as well as of the fundamental general principle of an adversarial process) is manifest.

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<sup>212</sup> See GoS Memorial, para. 226.

<sup>213</sup> SPLM/A Memorial, p. 135, fn. 1021. See also ABC Experts' Report, 14 July 2005, Appendix 4, pp. 148-158 (SM Annex 81); or SPLM/A Memorial, Witness Statement of Kuol Deng Kuol Arop, Tab 5, para. 48, see also para. 57.

<sup>214</sup> GoS Memorial, paras. 197-208.

<sup>215</sup> Abyei Boundary Commission, Note on Testimony Obtained in Field Visit: 14-20 April 2005, 25 April 2005, (SM Annex 78).

193. In his Witness Statement, submitted by the SPLM/A before this Tribunal, Minister Deng Alor Kuol affirms that "[n]either party objected or sent its ABC representatives to the meetings."<sup>216</sup> For his part, Lieutenant Colonel James Lual Deng alleges that "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."; and he insists that "Ambassador Dirdeiry expressed his approval of the ABC Experts' work in Khartoum during the final presentation."<sup>217</sup> The Government of Sudan categorically denies that itself or its appointees in the Commission were ever informed of these three meetings or invited to attend them.<sup>218</sup>

194. More generally, the ABC Experts have shown, on several occasions, a propensity to side with the SPLM/A. In particular, it is interesting to note that "[a]t the invitation of GoS and following strong criticism by the NCP, the experts of the Abyei Borders Commission made a one-day visit to the South on 15 September [2007] and met at the South Sudan Legislative Assembly's headquarters in Juba with MPs, GoS officials and civil society representatives to *defend their findings*."<sup>219</sup> The ABC Experts started working with the SPLM/A after the release of the Report. This type of behavior is in line with Dr. Johnson's statement in reference with the oil wells. The Government of Sudan has already pointed out the lack of impartiality of this expert,<sup>220</sup> when he declared in an interview to the *Sudan Tribune* of 29 May 2006: "[t]he 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>221</sup> Not only the reference to the oil resources was not relevant for delimiting the Abyei area,<sup>222</sup> but more importantly, this statement clearly demonstrates the lack of neutrality of the

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<sup>216</sup> SPLM/A Memorial, Witness Statement of Minister Deng Alor Kuol, Tab 1, para. 136.

<sup>217</sup> SPLM/A Memorial, Witness Statement of James Lual Deng, Tab 2, paras. 79-80.

<sup>218</sup> GoS Counter-Memorial, Witness Statement of Zakaria Atem Diyin Thibeik Deng Kiir, SCM Vol. 4, Tab 3, para. 30; *ibid.*, Witness Statement of Abdul Rasul El-Nour Ismail, SCM Vol. 4, Tab 5, paras. 22 and 26 and Witness Statement of Ahmed Assalih Sallouha, SCM Vol. 4, Tab 4, para 13.

<sup>219</sup> United Nations Mission in Sudan, *The CPA Monitor*, paras. 125-126 (October 2008) available at [http://www.unmis.org/common/documents/cpamonitor/cpaMonitor\\_oct08.pdf](http://www.unmis.org/common/documents/cpamonitor/cpaMonitor_oct08.pdf) - SPLM/A Exhibit-FE 16/13a (emphasis added by GoS).

<sup>220</sup> GoS Memorial, para. 274.

<sup>221</sup> Interview with Douglas Johnson, expert on the Abyei Boundary Commission, *Sudan Tribune*, Monday 29 May 2006. Source: <http://www.sudantribune.com/spip.php?article15913> (SM Annex 85).

<sup>222</sup> See above, paragraph 155.

declarant. This is hardly surprising, given that Dr. Johnson himself acknowledged in an article published in 2007 that he had "recently advised the Government of South Sudan on the North-South boundary issue."<sup>223</sup>

195. In accordance with Rule of Procedure 14, "[t]he Commission will endeavour to reach a decision by consensus. If, however, an agreed position by two sides is not achieved, the experts will have the final say."

196. Interestingly, while the SPLM/A Memorial devotes a full Section to the collaboration between the Parties with the ABC Experts,<sup>224</sup> at no place does it mention that the Experts released the report without showing it to the other ABC members – let alone does it endeavour to explain or justify this omission. Indeed, in four paragraphs,<sup>225</sup> the SPLM/A mentions Rule 14, but in each case, the emphasis is exclusively put on the fact that "the experts will have the final say", an expression which allegedly reflected "the parties' desire for a final decision, if no consensus decision could be achieved by the Commission's experts on Sudanese history, politics, law and ethnography"<sup>226</sup>. But the issue is that, at no stage, did the ABC Experts try to achieve a consensus decision.

197. As shown in the GoS Memorial<sup>227</sup>, this too constitutes a gross procedural breach and is, as such, an excess of mandate.

198. While the SPLM/A in its Memorial does not deny this absence of any attempt to reach a consensus of the whole ABC, Minister Deng Alor tries to create the contrary impression in his witness statement, annexed to the SPLM/A Memorial, where he asserts that there was some kind of last minute efforts to find a compromise, which he testifies were categorically dismissed by the GoS' Representatives.<sup>228</sup> This is categorically denied by the Government of Sudan: there has been no attempt of any kind by the ABC Experts to reach a consensus in the larger framework of the Commission.<sup>229</sup> However, had Rule of Procedure 14 been scrupulously applied, the ABC, and

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<sup>223</sup> Johnson, D., "Why Abyei Matters – *The Breaking Point of Sudan's Comprehensive Peace Agreement*", 107 *African Affairs* 1 (2008) (SCM Annex 9), at p. 1, fn.

<sup>224</sup> SPLM/A Memorial, paras. 607-625.

<sup>225</sup> Ibid., para. 510, paras. 531, 591, or 806.

<sup>226</sup> Ibid., para. 591.

<sup>227</sup> GoS Memorial, paras. 219-226.

<sup>228</sup> SPLM/A Memorial, Deng Alor Kuol's Witness Statement, Tab 1, paras. 142-143. See also *ibid.*, James Lual Deng's Witness Statement, Tab 2, paras. 85-86, and General Sumbeiywo's Witness Statement, Tab 4, para. 118.

<sup>229</sup> GoS Counter-Memorial, Witness Statement of Abdul Rasul El-Nour Ismail, SCM Vol. IV, Tab 5, paras. 27-28 and 32(e) and *ibid.*, Witness Statement of Ahmed Assalih Sallouha, SCM Vol. IV, Tab 4, paras. 14-21.

thus the Experts, would have avoided acting in excess of their mandate as they have clearly and very unfortunately done.

199. It then appears that,

- (a) by having contacted a US official without consulting the Parties, and not communicated his response to the Parties,
- (b) by having held several meetings with representative of the Ngok Ginka at the Hilton in Khartoum at the end of April and beginning of May 2005 without consulting or even informing the GoS and their representatives,
- (c) by having held unilateral consultations with representatives of the SPLM/A, and
- (d) by having omitted to endeavour to reach a decision by consensus as provided for in Rule of Procedure No. 14,

the ABC Experts have grossly violated their fundamental rules of procedure binding on them and, consequently, manifestly exceeded their mandate.

## Chapter 4

### The SPLM/A Claim to a Boundary at 10° 35'N

"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."

P.M. Holt & M.W. Daly, *A History of the Sudan* (5th edn., Pearson Education, London, 2000), p. 62; to the same effect P.M. Holt & M.W. Daly, *A History of the Sudan* (4<sup>th</sup> edn., Longman, London, 1988), p. 70.

"Flowing from the Dar Fartit in the west to Lake No in the east, the Bahr al-'Arab forms a natural demarcation, but not a formidable obstacle, between the Baqqara Arabs of Kordofan and Darfur to the north and the Dinka tribes inhabiting the plains to the south..."

The Humr and particularly the Rizayqat not only claimed rights to wells south of the Bahr al-'Arab but sought to levy tribute on the Malwal, the Twij and the Ngok Dinka...

The raids were annual affairs, occurring at any point along the line of the Bahr al-'Arab and Bahr al-Ghazal rivers and usually in the dry season when rapid movement was possible...

The Dinka demanded the Bahr al-'Arab as their northern boundary, but the Arabs claimed rights to wells south of the river, insisting that such rights had been traditional and acknowledged by the Dinka who had paid tribute to the Arabs".

Collins, R.O., *Land beyond the Rivers. The Southern Sudan, 1898-1918* (Yale, New Haven, 1971), pp. 185, 186, 187, 189.<sup>230</sup>

#### A. The SPLM/A Claim

200. The core substantive claim of the SPLM/A Memorial<sup>231</sup> is that the territory of the nine Ngok Dinka chiefdoms in 1905 extended up to a line of latitude 10°35'N, westwards as far as the boundary with Darfur and eastwards as far as what became (at a later date) the boundary with Upper Nile Province. That claim was not accepted by the ABC Experts themselves; but that is the least of the difficulties it faces.

201. The SPLM/A claim is put forward without reference to the southern boundary of Kordofan in 1905. According to the SPLM/A, even if the southern

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<sup>230</sup> The SPLM/A Memorial quotes Collins extensively and includes a large part of it at Exhibit-FE 4/21. However, they have not quoted these passages and have provided the Tribunal with extracts only up to p.180, omitting the four pages containing the passages quoted.

<sup>231</sup> That is, on the assumption that the ABC Experts' did exceed their mandate, as to which see Chapters 2, 3 above.



boundary prior to the transfer was the Bahr el Arab, the "Abyei area" as defined in the CPA includes all the area which the nine Ngok Dinka chiefdoms held title to, or at least possessed, in that year: "the 'area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905' encompasses *all* the territory that the Ngok Dinka occupied and used in 1905",<sup>232</sup> irrespective of whether it was also used by the Humr or by others. Far from being limited to the area transferred to Kordofan in 1905, the SPLM/A claims what are said to be the "traditional homelands"<sup>233</sup> or "historic homeland"<sup>234</sup> of the Ngok Dinka, on the assumption of Ngok priority over all others.

202. For reasons explained in Chapter 2 this interpretation cannot possibly be correct; and to the extent the ABC Experts' proceeded on such a basis they exceeded their mandate. However in this chapter it will be assumed, *arguendo*, that the formula "the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905" means "the area the nine Ngok Dinka chiefdoms occupied and used as of right in 1905, whether or not it was already in Kordofan and whether or not such occupation and use was exclusive". On the basis of this "interpretation" of the formula, the question is: what was that area?

203. The SPLM/A Memorial claims a Ngok-Baggara boundary across the whole of Kordofan at 10°35'N. It seeks to support that claim in three ways: by extensive documentary appendices; by a large number of recently-prepared witness statements, and by the report of Professor Daly. These elements will be addressed separately in this chapter. It will be shown:

- (1) that the documentary evidence does not support the SPLM/A claim; rather, it supports the conclusion that the Ngok were located in 1905 along and principally to the south of the Bahr el Arab; even in later years, they continued to range between the riverine area just to the north of the River and areas to the south (see **Section B** below);
- (2) that the SPLM/A oral evidence is contradictory and, to the extent it supports the SPLM/A claim, is entitled to no credit (see **Section C** below); (3) that the SPLM/A's expert witness,

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<sup>232</sup> SPLM/A Memorial, para. 879 (emphasis in the original).

<sup>233</sup> Ibid., paras. 875, 1085.

<sup>234</sup> Ibid., paras. 1189, 1139.

Professor Daly, does not support the SPLM/A claim (except in a short afterthought to his Report), and that his conclusions are contradicted by much of the evidence which he cites and by even more that he fails to cite (see **Section D** below).

204. The SPLM/A Memorial places much less stress on the map evidence – and for good reason. In **Section E** below, the map evidence so far produced will be reviewed.

205. To summarise, it will be demonstrated in this Chapter that, even on a "tribal" interpretation of the formula, the nine Ngok chiefdoms occupied a confined area around and to the south of the Bahr el Arab; that their paramount chief in 1905 lived (and in 1906 died) to the south of the Bahr el Arab,<sup>235</sup> and that the territory they shared with the Homr Arabs in 1905 bears no relationship whatsoever to the SPLM/A claim, or even to the area below 10°10'N which the ABC Experts awarded – quite improperly – exclusively to the Ngok.

#### ***B. The Documentary Evidence of Ngok "Title" in 1905***

206. There is already a huge volume of documentary material before the Tribunal. Sudan's Memorial had 86 documentary annexes. The SPLM/A Memorial had 334. The Daly Report had 96. Many of the SPLM/A documents are merely excerpted (often selectively, as has been and will be demonstrated). But the Tribunal can already expect that if there *was* a Ngok-Baggara boundary at 10°35'N, this would show up in the contemporary documentary record. The same thing is true of the map evidence. The single most important fact about this large archive of documents and maps is that it does not support the SPLM/A claim – *at all*.

207. Rather than reciting the evidence in full, it seems most helpful to the Tribunal to take in turn the key periods and to sample the documentary record for each period, highlighting key documents. In order to be fully responsive, all the periods covered by the SPLM/A Memorial will be considered, whether or not they are relevant to the position in 1905. On this basis it is proposed to take the following periods:

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<sup>235</sup> Remarkably the SPLM/A Memorial gets wrong when Sultan Rob (Arob Biong) died, as well as where he was buried: see SPLM/A Memorial, para. 136; cf. para. 938.

- (i) the 18<sup>th</sup> century;
- (ii) the Mahddiya (1883-1898);
- (iii) the late 19<sup>th</sup>-early 20<sup>th</sup> centuries (1898-early 1905);
- (iv) the period immediately after the transfer in 1905;
- (v) the inter-war period;
- (vi) the years prior to independence in 1956.

208. It stands to reason that the closer the evidence relates to the crucial year of 1905, the more probative it is, and conversely. The period of the 18<sup>th</sup> century, on which Ngok mythology (and the SPLM/A Memorial) place such emphasis is hardly relevant to the position in 1905. Periods after 1905 are – as already noted – also only indirectly relevant to the position in 1905; but they do shed light on that position. In particular, if it can be shown that the Ngok Dinka in the 1930s or the 1950s were limited to the basin of the Bahr el Arab, that is powerful evidence that they were no further to the north in 1905. There are indications that the Ngok Dinka spread somewhat to the north of the Bahr el Arab after 1905.<sup>236</sup> No-one suggests that the area occupied by them after 1905 *contracted* further to the south.

#### **(i) The Ngok Foundation Myth: the 18<sup>th</sup> Century**

209. The SPLM/A Memorial relies heavily on the early Ngok migration to the area near the Bahr el Arab, concluding that:

"In sum, a considerable body of Ngok oral tradition describes the Ngok Dinka migration to the Bahr river basin the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab and, by the end of the 19<sup>th</sup> century, the Ngok occupation of that region."<sup>237</sup>

The thesis is that the Ngok arrived first in the Bahr el Arab river basin and continually occupied it, at least up to the Ragaba ez Zarga; they remained in occupation at the end of the 19<sup>th</sup> century and thus have priority in title, irrespective of the notional southern boundary of Kordofan before 1905.

210. As this section will illustrate, while some of the scholarly sources referred to support the claim that the Ngok migrated as far north as the

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<sup>236</sup> See GoS Memorial, paras. 366-367.

<sup>237</sup> SPLM/A Memorial, para. 893 (punctuation in original). See generally *ibid.*, paras. 883-893.

Ragaba ez Zarga in the 18<sup>th</sup> century, the SPLM/A account neglects to mention that the same sources affirm that the Ngok returned south after coming into contact with the Baggara Arabs at that time. The idea that the area around the Ngol/Ragaba ez Zarga has been the Ngok's "permanent home" since the 18<sup>th</sup> century finds no support in the literature.<sup>238</sup>

211. This section will first consider the uncertainty with regard to oral sources on which the SPLM/A Memorial principally relies; it then summarises what may be considered the established doctrine with regard to the migration of the Ngok; and, finally, it illustrates some of the selective quotation that characterizes the SPLM/A pleading on this point.

(a) *Oral Sources of the Ngok Foundation Myth*

212. Various theories exist as to how the Ngok came to occupy the area near the Bahr el Arab. Most of these theories rely on oral accounts, which – as noted in Chapter 1 – are not necessarily reliable. The point is of particular significance here, at the core of the SPLM/A case.

213. There are several factors that influence the reliability of oral histories. First, with regard to Ngok settlement, migration occurred over 200 years ago, which – with a conservative estimate of a thirty-year time span for each generation – is more than six generations.<sup>239</sup>

214. The area settled near the Bahr el Arab was, moreover, not uninhabited. P.P. Howell states that "the Baggara Arabs came into contact with Dinka in the area about the year 1745, but they may have been Dinka of a different origin with whom the Ngork have now fused".<sup>240</sup> Each of these earlier groups may also have had their own migration myths; just as groups fuse, so may their migration myths have been compounded.

215. Such factors may well have obscured the migration myths of individual groups. As stated by Howell, "as among all Dinka tribes with whom I am

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<sup>238</sup> Ibid., para. 124.

<sup>239</sup> Cf. Beswick, S., *Sudan's Blood Memory* (University of Rochester Press, Rochester, 2006) p. 4 (SCM Annex 3).

<sup>240</sup> Howell, P.P., "Notes on the Ngork Dinka of Western Kordofan", (1951) 32 *Sudan Notes and Records* 239, 241 (SM Annex 53); citing Henderson, K.D.D., "A Note on the Migration of the Messiria Tribe into South West Kordofan", (1939) 22(1) *Sudan Notes and Records* pp. 49, 57 (SM Annex 52).

acquainted, genealogies are unreliable and confused and the origins of the present tribe [the Ngok] must remain obscure."<sup>241</sup>

(b) *The Scholarly Sources*

216. Despite the uncertainty of the oral sources, there is general agreement that both the Ngok and the Baggara Arabs are relative newcomers to the area near the Bahr el Arab.<sup>242</sup> The Ngok are thought to have arrived in the area at the end of the 18<sup>th</sup> century and the Baggara at about the same time.<sup>243</sup> In fact Ngok and Messeriya oral testimony as to 18<sup>th</sup> century priority is in conflict – but the crucial date for this case is 1905, and the conflict of oral testimony is not one the Tribunal need resolve.

217. Several scholars have written about the Ngok migration.<sup>244</sup> The most recent account is that provided by Stephanie Beswick, who lists various oral versions of the Ngok migration myth.<sup>245</sup> One such myth recounts that the Western Ngok comprised a number of people who later formed the Ruweng.<sup>246</sup> Another oral tradition claims that two of the sections of the Western Ngok split when they crossed the Nile. Yet another oral tradition recounts that it was the Alei clan that first arrived in southwest Kordofan.

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<sup>241</sup> Ibid., p. 241 (SM Annex 53).

<sup>242</sup> Henderson, K.D.D., "A Note on the Migration of the Messiria Tribe into South West Kordofan", (1939) 22(1) *Sudan Notes and Records* pp. 49, 58 (SM Annex 52); Howell, P.P., "Notes on the Ngork Dinka of Western Kordofan, (1951) 32 *Sudan Notes and Records* pp. 239, 241 (SM Annex 53); MacMichael, H.A., *The Tribes of Northern and Central Kordofan*, (Cambridge, 1912), reissued, (Routledge, London, 1967), pp. 140-146 (SCM Annex 19); Cunnison, I., *Baggara Arabs, Power and the Lineage in a Sudanese Nomad Tribe*, (Clarendon Press, Oxford, 1966), p. 3, SPLM/A Exhibit-FE 4/16; Santandrea, S., *Ethno-Geography of the Bahr el Ghazal* (Editrice Missionara, Bologna, 1981), p. 126 (SCM Annex 20); Beswick, S., *Sudan's Blood Memory*, (University of Rochester Press, Rochester, 2006), p. 154, SPLM/A Exhibit-FE 12/18.

<sup>243</sup> Both Henderson and Beswick suggest that the Humr arrived within a generation after the Ngok. Henderson, K.D.D., "A Note on the Migration of the Messiria Tribe into South West Kordofan", (1939) 22(1) *Sudan Notes and Records* 49, 58 (SM Annex 52); Beswick, S., *Sudan's Blood Memory* (University of Rochester Press, Rochester, 2006) 154 (SCM Annex 3).

<sup>244</sup> See for instance the works of: Henderson, K.D.D., "A Note on the Migration of the Messiria Tribe into South West Kordofan", (1939) 22(1) *Sudan Notes and Records* 49 (SM Annex 52); Santandrea, S., *Ethno-Geography of the Bahr el Ghazal* (Editrice Missionara, Bologna, 1981) (SCM Annex 20); 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), SPLM/A Exhibit-FE 6/7; Deng, F., *War of Visions: Conflicts of Identities in the Sudan* (Brookings Institution, Washington, 1995), SPLM/A Exhibit-FE 8/13; Beswick, S., *Sudan's Blood Memory* (University of Rochester Press, Rochester, 2006) SPLM/A Exhibit-FE 12/18.

<sup>245</sup> Cf. Beswick, S., *Sudan's Blood Memory* (University of Rochester Press, Rochester, 2006) pp. 51-52, SPLM/A Exhibit-FE 12/18.

<sup>246</sup> Ibid., p. 51.

218. Prior to the arrival in their western homeland, all the Ngok peoples (this includes both the eastern and western Ngok) resided east of the Nile. Writing of the Western Ngok, Beswick cites an oral account:

"Western Ngok Dinka Abyei Kon states that they approached from the east and forged north of what is now the Western Ngok homeland and came to reside along the river Ngol in the latter seventeenth and early eighteenth centuries. They later spread as far north as Muglad."<sup>247</sup>

She continues:

"A few decades later the Pajok/Abyor and another powerful clan, the Mannyuar, approached this region from much farther south. Other oral histories and a number of scholars estimate that around 1740 the first clans under a priest, Kwoldit of the Abyor, moved north across the Kir/Bahr el-Arab river."<sup>248</sup>

There seems to be support for the view that the ancestors of the early Ngok lived north of the Bahr el Arab. Even if true, however (and again there is no documentary evidence of any kind), this situation was short-lived.

219. Beswick's account may be quoted in full:

"For a generation (at most) the Ngok resided in peace until the arrival of Islamic nomads, the stateless pastoral Baggara on their northern frontier (c. 1770). This event marked the beginning of permanent instability in the region, for these Islamic pastoralists were a slave-raiding society. The Baggara had previously resided northwest of Dinkaland in the region of Dar Burgo (Bagirmi) within the environs of the Islamic Kingdom of Wadai in what is now Chad. This society formerly herded camels as well as cattle and forged east into what is now Muglad around 1770. They settled in modern-day southwest Kordofan province directly north of the various clans of the Western Ngok Dinka. Once in the region they followed typical pastoral lineage society politics and fissioned or splintered into various groups: the Humr and Zurug (now called Messiria), the Hawazma, and the Rizeiqat. After bitter fighting among each other, eventually only the Humr-Messiria remained and the others were forced northwest. Messiria oral histories account that a leader, Hameidan Abu Hazla, arrived in Muglad and declared war on the Beigi King Dienga, a people believed to be closely related to the Luel [the earlier inhabitants of the region]. Easily defeated, the king fled south towards the Ngok Dinka territory. Following in hot pursuit, Baggara warriors came into contact for the first time with the Alei Dinka clan (of what was later to become the large Western Ngok

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<sup>247</sup> Ibid., p. 52.  
<sup>248</sup> Ibid.

Dinka section) who had settled along the Ngol River north of the modern-day town of Abyei...

The Alei Dinka clan were expanding northward when they met the Humr-Messiria and began a war that lasted for several years. Most of the fighting took place along the northern Ngol River area leading up to the modern town of Muglad, known to the Dinka as *Aguoth*. Initially the Alei defeated the Humr and continued moving north as far as what is now the Babanusa region. To their east were the Nuba (in Dinka *dhony*). The Alei Dinka resided in this region many years and then other Baggara joined the Humr so that the Alei was pushed south of the river Ngol once more. In the meantime, the Baggara met another Dinka clan group, one of whose leaders, Deng (Deing) of Torjok (the Abyor clan) resided at Debbat al Mushbak near the modern Dinka town of Abyei. Another prominent Dinka leader of the time, Moindong (son of Kwal Dit, chief of the Mannyuar), has (*sic*) settled his people near Hasoba.

Soon after their arrival, pastoral politics and ethnic stress associated with the struggle to acquire land among individual Baggara sections gave rise to an alliance between the Baggara and certain Western Ngok Dinka. Much of the following information was noted in the British period by Disitric Commissioner Lampen who acquired it from an old man, Rihaima Kabbashi, (a Mahri), who later passed it on to District Commissioner Henderson. A Seruri *feki* (holy man), Ali Abu Gurun, persuaded the leader of the Torjok Dinka (later the Abyor and also known as the Jok), as well as the Ack Dinka sections of the Western Ngok, to join him in the battle against the Messiria Zurug leader, Abu Agbar, at a place called Fut. Other Ngok leaders, however, preferred to remain peripheral to the fray, returning south; these included the Alor chief of the Mannyuar clan. At some point these intra-Baggara feuds evolved into slave and cattle raids, first in the southern Nuba mountains and then south of the Kir/Bahr el Arab River in Dinka territory. The motivation to move south came from the previous residents, the Luel, of what had recently become Dinka territory. They also had become peripherally involved in the Baggara fray and appealed to the latter for assistance in returning to their previous homelands. Now the Malwal and the Western Twic Dinka became fair game for these new Islamic slave raiders."<sup>249</sup>

220. Thus while the Dinka initially were successful, they were slowly forced further south by the Baggara Arabs. But the Ngok were to some extent in a privileged position. Beswick writes:

"[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

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<sup>249</sup> Ibid., pp. 154-155 (SCM Annex 3).

physical barrier between what is today the 'Arab' Muslim north and the African non-Muslim south in the modern country of Sudan."<sup>250</sup>

221. Beswick uses much the same sources for her account of the Ngok migration as the SPLM/A, yet her description stands in stark contrast both to the SPLM/A Memorial and the opinion provided by M.W. Daly. The point to be made here is that, while there is general agreement that some Dinka tribes in the 18<sup>th</sup> century migrated north of the Bahr el Arab, they were pushed back by the Baggara Arabs by the end of that century. The claim that the Ragaba ez Zarga has been the Ngok's permanent home since the 18<sup>th</sup> century is contradicted by the published sources.

(c) *The SPLM/A's Selective Use of Sources*

222. In order to hide that contradiction, the SPLM/A Memorial is highly selective.

223. For example, K.D.D. Henderson is quoted to support the argument that the Ngok lived along and around the Ragaba ez Zarga for centuries. Henderson states:

"the Ngork moved west along the Gnoi, driving the Shatt before them, and settled from Tebusayya to Hugnet Abu Urf. This was one generation before the Baggara came south to Turda."<sup>251</sup>

But the SPLM Memorial omits the rest of the passage, which states that:

"Kwal Dit's grandson Alor subsequently moved south to Kerreita to avoid being separated from the Twij and caught between the Nuer and the Baggara, who then occupied the Tebusayya bend of the Regeba. Later still, ... [Alor's son, Biong] handed over to [the Rueng Ajubba] the rather unsatisfactory bit of country at Kerrieta and moved further west to the site now called Sultan Arob after his son."<sup>252</sup>

Sultan Rob's was to the south of the Bahr el Arab.<sup>253</sup>

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<sup>250</sup> Ibid., p. 156 (SCM Annex 3).

<sup>251</sup> Henderson, K.D.D., "A Note on the Migration of the Messiria Tribe into South West Kordofan", (1939) 22(1) *Sudan Notes and Records* 49, p. 58 (SM Annex 52); quoted in SPLM/A Memorial, para. 885.

<sup>252</sup> Ibid.

<sup>253</sup> See GoS Memorial, para. 338; see also *ibid.*, Map Atlas, Maps 9 and 12.



224. Similarly, S. Santandrea is quoted to support the claim that the Ngok lived on the Ragaba ez Zarga: "Kwol settled along the Ngol, called in Arabic 'Ragaba ez Zarka'."<sup>254</sup> Yet Santandrea also goes on to say:

"Alor pushed further on, invading the territory of the Begi or Girma, and arrived as far as Abyei. ... His son Biong, settled south of Abyei. ... Biong's heir, Arop, shifted his headquarters to Mirok."<sup>255</sup>

225. Then A. Sabah is cited:

"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."<sup>256</sup>

The reference to "permanent home" has become the central pillar of the SPLM/A case. However, on the following page, Sabah describes two wars with the Rizeigat: of the second war, Sabah states:

"Arob's chieftainship was characterized by the outbreak of war with the Rizigatt again. This time the war was hard; destruction and losses in Dinka land were great. The Ngok retreated to present-day Makair in Tuich-land."<sup>257</sup>

This would again have been to the south of the Bahr el Arab. The passage is not cited in the SPLM/A Memorial.

226. Likewise, Francis Deng is used to support the claim that the Alei Chieftdom migrated even further to the north than the Ngol/Ragaba ez Zarga.<sup>258</sup> But Deng also confirms the subsequent southern migration, in a passage again not cited:

"Alei was later forced by increasing Arab pressure to move southward and join the bulk of the Ngok."<sup>259</sup>

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<sup>254</sup> Santandrea, S., *The Luo of the Bahr El Ghazal* (Editrice Nigrizia, Bologna, 1968), p. 195, SPLM/A Exhibit-FE 4/18, quoted in SPLM/A Memorial, para. 886.

<sup>255</sup> *Ibid.*, p. 196.

<sup>256</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. 4, SPLM/A Exhibit-FE 6/7, quoted in SPLM/A Memorial, para. 887.

<sup>257</sup> *Ibid.*, p. 5.

<sup>258</sup> Deng, F., *War of Visions: Conflicts of Identities in the Sudan* (Brookings Institution, Washington, 1995), pp. 253-254, SPLM/A Exhibit-FE 8/13, quoted in SPLM/A Memorial, para. 889.

<sup>259</sup> Deng, F., *War of Visions: Conflicts of Identities in the Sudan* (Brookings Institution, Washington, 1995), p. 254, SPLM/A Exhibit-FE 8/13.

227. Finally, Henderson is quoted at length:

"... as **the Ngork Dinka already held the GnoI river (Rageba Zerga) up to Hugnāt Abu Urf...** Deinga was easily defeated by Hameidan.... He fled south eastwards to Turda and so brought the Arabs for the first time into contact [sic] with the **Ngork, whose leading man at this time was Deing of Torjok, residing at Debbat El Mushbak, near Hasoba.**"<sup>260</sup>

Henderson too next describes the Ngok exodus to the south:

"The rest of the Ngork, led by Alor ... seem already to have moved south to Kerreita. They had occupied the Tebussaya bend of the GnoI ... a generation before the Baggara reached Muglad."<sup>261</sup>

And the following (uncited) passage shows that, in Henderson's opinion, the Ngok had left the Ragaba ez Zarga region permanently:

"Kwal Arob, who subsequently became paramount chief of all the Ngork by a series of accidents(?) in the rival house of Alor, chief of Malonweir(?), had therefore no right some 50 years later to bestow Tebussaya upon these Rueng on the ground that it had once belonged to Kwal Dit."<sup>262</sup>

228. Information about the southwards trajectory of the Dinka more generally is also to be found in 19<sup>th</sup> century sources. Gessi Pasha, Governor of Bahr el Ghazal in the 1870s, writes in his book, *Seven Years in the Soudan* that:

"All the strip of land that borders the Bahr-el-Ghazal from Delegauna to where the river Bahr-el-Arab flows into the Bahr-el-Ghazal, was, some time ago, inhabited by more than two hundred thousand families of the tribe of the Jangeh [Dinka]. The Arabs of Bahr-el-Ghazal, as well as those of Shakka and Kalaka, preferred the Jangeh country as the place of their raids because of the numerous cattle. The Jangeh diminished to the number of thirty thousand families who, to escape persecution, emigrated to the Nuer country along the banks of the Bahr-el-Ghazal, in places inaccessible because of the marshes and morasses. It was only after the war against Suleiman that I could persuade them to return to their native homes, promising that their life and property should be respected."<sup>263</sup>

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<sup>260</sup> Henderson, K.D.D., "A Note on the History of the Homer tribe of Western Kordofan," (660/11/1-244, 1930,) p. 4, SPLM/A Exhibit-FE 3/12 (emphasis SPLM/A), quoted in SPLM/A Memorial, para. 890.

<sup>261</sup> Ibid., p. 6. Khor Abu Kareita is just south of Mellum.

<sup>262</sup> Ibid.

<sup>263</sup> Gessi, R. & Gessi F., *Seven Years in the Soudan* (Low & Co., London, 1892), pp. 388-389 (SCM Annex 21).

This is why references of a generic sort to "Dinka country" ("Dar Jange") on 19<sup>th</sup> century maps are likely to be misleading. Preference must be given to 20<sup>th</sup> century maps, and especially those based on actual observations or field trips. Read together these, as will be seen shortly, make it clear that the SPLM/A claim is without any foundation.

229. To conclude, the sources surrounding the Ngok migration throughout the 18<sup>th</sup> and 19<sup>th</sup> centuries tell a disjointed story. However, there are some points of general agreement. In all likelihood, during the 18<sup>th</sup> century, the Ngok migrated to the north up around the Ragaba ez Zarga. But following tribal wars with both the Baggara from the north and other Nilotic tribes to the east, they migrated south and settled in a region later known as "Sultan Rob's". It is clear from early 20<sup>th</sup> century sources that this region is situated on the southern banks of the Kir/Bahr el Arab.

230. Curiously, the SPLM/A Memorial stops chronologically at the time when the Baggara and Ngok first meet. This is surprising as it is the period following which shaped tribal destinies in the lead-up to the Condominium and the key date of 1905. But the story is told, essentially in the same terms, by the Ngok's own historian, Francis Deng.<sup>264</sup> Having observed the oral tradition that the Alei Chieftdom migrated even further to the north than the Ngol/Ragaba ez Zarga he adds:

"Alei was later forced by increasing Arab pressure to move southward and join the bulk of the Ngok."<sup>265</sup>

He then recounts the conflict between the Dinka and the Rezeigat Arabs and the "devastation to Dinkaland".<sup>266</sup> Neither this nor the preceding page is extracted in the SPLM/A Exhibit. Deng concludes:

"As the forces of Madibbo [the Rezeigat] overran the country, Arob Biong and Allor Ajing ... were taken to the South for protection ... Although the land had been mostly abandoned, Dau Kir and another warrior ... remained defiant ... They lived in hiding places along the river ... and whenever possible attacked the Arabs, inflicted casualties, and outran them back into hiding."<sup>267</sup>

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<sup>264</sup> Deng, F., *War of Visions: Conflict of Identities in the Sudan* (Brookings Institution, Washington, 1995), SPLM/A Exhibit-FE 8/13.

<sup>265</sup> Ibid., p.254, SPLM/A Exhibit-FE 8/13 .

<sup>266</sup> Ibid., p.257 (SCM Annex 22).

<sup>267</sup> Ibid., p.255.

According to Deng, there was then a peace settlement, with a Rizeigat guarantee that the raids would stop. But Deng is silent as to the state of the boundary after the war. Although he records that the Ngok chiefs fled to the south, he does not mention that they returned north. The evidence of the early Condominium period is that they did not. Not even the Ngok's own historian supports the tale of Ngok supremacy to 10° 35'N.

## **(ii) The Differential Impact of the Mahdiyya**

231. Relying on a selective reading of available sources, the SPLM/A Memorial (and even, to an extent, the Expert Report by M.W. Daly) paint a distorted picture of the Ngok as the dominant group in the area north of the Bahr el Arab. In particular, it is suggested, the turbulent period of the Mahdiyya gave the Ngok a differential advantage over the Humr, enabling them to return well to the north of the Bahr el Arab before 1905.

232. First, the SPLM/A Memorial describes the apparently positive effect of the Mahdiyya (1881-1898) on the Ngok:

"The events of the 19th century did nothing to displace the Ngok Dinka from the lands of the Abyei region to which they had migrated. On the contrary, circumstantial evidence indicates that the rise and fall of the Mahdist regime during the final decades of the 19th century had the indirect effect of enhancing the Ngok position in the area."<sup>268</sup>

233. Later, the Memorial discusses the relationship between the Messeriya and the Mahdiyya, emphasizing the detrimental impact of the Mahdi on the Messeriya.<sup>269</sup> Combining the positive effect of the Mahdiyya on the Ngok and the detrimental effect on the Messeriya, the SPLM Memorial concludes that:

"As a consequence, by the end of the 19th century, the Messeriya were left decimated, with their adult male populations severely reduced. At the same time, the Ngok were largely unscathed..."<sup>270</sup>

Similarly:

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<sup>268</sup> SPLM/A Memorial, para. 128.

<sup>269</sup> Ibid., paras. 228-232.

<sup>270</sup> Ibid, para. 232.

"The events of the Mahdiyya did little to disrupt or curtail the Ngok occupation of the region, and on the contrary disproportionately benefited the Ngok vis-à-vis the Misseriya to the north."<sup>271</sup>

234. It was on this basis, apparently, that the spectral shadow of the Ngok presence could dominate the whole area up to 10°35'N and even beyond, as shown in Map 13 of the SPLM/A Map Atlas. Thus, it is said:

"...the asymmetric effects of the Mahdiyya on the Ngok and the Misseriya enabled the Ngok to *expand their historic territories at the end of the 19th century*."<sup>272</sup>

235. This is a helpful admission – despite the alternative story of the "Ngok foundation myth"<sup>273</sup> – that the "historic territories" of the Ngok did not extend so far to the north prior to the Mahdiyya. Indeed one might wonder how this "new historic title" of a group such as the Ngok could be created during the violent circumstances of that time. But that conceptual issue does not arise, because the SPLM/A image of the events of the late 19th century is unsupported by the evidence. Indeed the SPLM/A Memorial itself states that it is based on "circumstantial evidence", and it seems to rely entirely on the writings of Francis Deng, which are no less shrouded in mist and myth.<sup>274</sup>

236. The Daly Report also refers to the argument, though in speculative terms:

"[T]he absence from the scene of most of the Humr during the Mahdiyya *created the opportunity* for expansion of Ngok grazing areas and reduced any demographic or climatic pressures."<sup>275</sup>

He continues:

"Even if we posit a later struggle for dominance of the region's grazing... it is clear that the Ngok *should have gained* the upper hand during the Mahdiyya and *would still have enjoyed* a superior position in 1905."<sup>276</sup>

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<sup>271</sup> Ibid., para. 903.

<sup>272</sup> Ibid., para. 898 (emphasis added).

<sup>273</sup> See above, paragraphs 209-230.

<sup>274</sup> SPLM/A Memorial, para. 132. The only direct reference appears at Deng, F., *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* (Yale University Press, New Haven, 1968), p. 47, fn. 20, SPLM/A Exhibit-FE 7/4: "Although the Mahdiya was one of the most violent chapters in southern history, it was a relatively peaceful period for the Ngok."

<sup>275</sup> Daly Report, p. 48 (emphasis added).

<sup>276</sup> Ibid., p. 49 (emphasis added).

This can only be described as speculation – as subjunctive history. In the event (and in contrast to the SPLM/A Memorial), Professor Daly does not draw any adverse inference for the Humr's territorial position as a result of the Mahdiyya.

237. As seen above, while some Dinka tribes in the mid 18<sup>th</sup> century occupied territory as far north as the Ragaba ez Zarga, the Dinka occupation was short, as they were soon forced south by the Humr. In the following years the Ngok were forced south to the Bahr el Arab, and there is nothing to suggest that the rule of the Mahdi led the Ngok to migrate north again.

238. Importantly, the portrayal of the Ngok in the Memorial neglects the devastating impact of the Turkiyya (1821-1881) and the continued effects of slave raiding. As expressed by the SPLM themselves in their preliminary presentation before the ABC:

"The Ngok Dinka of Abyei area had suffered greatly during the Turko-Egyptian Rule (1821-1881) and *The Mahdist state* (1881-1898) because of their proximity and exposure to slavers from Northern Sudan..."<sup>277</sup>

While it is undeniable that the Baggara of Kordofan suffered under the Mahdiyya, the image of the Ngok as expanding undisturbed to the north is unsupported. The Ngok also suffered severely during the Turkiyya from the slave raids, which was centred on the area of northern Bahr el Ghazal,<sup>278</sup> and these raids continued uninhibited during the Mahdiyya.

239. To appreciate the extent of the slave raids, which was a prominent feature of the region, it is necessary to resort to other sources. The *1911 Anglo-Egyptian Handbook* describes the history of the Bahr el Ghazal Province. The Handbook mentions the ivory trader, John Petherick, who visited Meshra el Rek in 1853.<sup>279</sup> It continues:

"The slavers penetrated the Bahr el Ghazal immediately after Petherick's first visit, and advancing for most part via Meshra El

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<sup>277</sup> *SPLM Preliminary Presentation*, 10 April 2005, p. 6, SPLM/A Exhibit-FE 14/1.

<sup>278</sup> Collins, R. & Herzog, R., "Early British Administration in the Southern Sudan", (1961) 2(1) *Journal of African History* 119, p. 129, SPLM/A Exhibit-FE 4/9: "Slavery ... in the Southern Sudan centred in the northern and western part of the Bahr al-Ghazal".

<sup>279</sup> *Anglo-Egyptian Sudan Handbook Series – The Bahr el Ghazal Province*, (HMSO, London, 1911), p. 49, SPLM/A Exhibit-FE 3/8.

Rek, arrived in the country of the Bongo tribe, whence they extended their operations to the districts of the Jur, Golo, Mittu and other smaller tribes. In a very short time the greater portion of the region was partitioned into 'spheres of influence' in which armed settlements ('zeribas'...) were established, and the natives laid under levy of slaves and corn for miles around."<sup>280</sup>

The overall effect of the slave trade was startling. Concerning the late 19<sup>th</sup> century, the 1911 Handbook states:

"With the exception of the Zande districts in the south and a portion of the Dinka country to the north, the whole region had been devastated by the operations of slavers."<sup>281</sup>

240. True, the extent of the slave trade during the Turkiyya is mentioned in the Memorial:

"The Turco-Egyptian authorities and private traders undertook slave raids on a considerable scale, with Khartoum and Sinnar garrisons in particular launching armed expeditions (*ghazawat*) and slave-raids against the tribes of southern Sudan."<sup>282</sup>

241. But the Mahdi did not stop the slave raids. Even the groups that had supported the Mahdi were not spared:

"the Negroid tribes, who had hoped for the return of their independence now that the Egyptian Administration had disappeared, were required to pay tribute, preferably in slaves, or be plundered."<sup>283</sup>

The southern Sudan during the Mahdiyya was "virtually the preserve of slave traders".<sup>284</sup>

242. That slave raiding continued through the Mahdiyya is confirmed by Peel, who in 1904 wrote:

"The Bahr el Ghazal is the most recently occupied province. Posts are now occupied at Wau, Rumbek, Deni Zubehr, Shambe, Chak Chak, Tonj, Meshra-el-Rek, and Channamin on the Jur River. The country was occupied without difficulty. Here the two principal tribes were the Dinkas in the north and east and the Niam-Niams

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<sup>280</sup> Ibid., p. 50.

<sup>281</sup> Ibid., p. 52.

<sup>282</sup> SPLM/A Memorial, para. 129 (italics original).

<sup>283</sup> Collins, R., *The Southern Sudan, 1883-1898: A Struggle for Control* (Yale University Press, New Haven, 1962), p. 42, SPLM/A Exhibit-FE 4/12.

<sup>284</sup> SPLM/A Memorial, para. 300. See also *ibid.*, para. 346.

or Azande in the south. All the smaller tribes, Jur, Bongo, Golo, etc., had been broken up by repeated raids, and had fled to one or other of these powerful neighbours for protection, the protection practically taking the form of slavery. A tract of 150 miles square had thus relapsed into absolute wilderness, though once thickly peopled."<sup>285</sup>

243. No doubt the Humr suffered severely during the Mahdiyya.<sup>286</sup> What is disputed is the confusing claim that the differential impact of the Mahdiyya allowed the Ngok to resettle far to the north of the Bahr el Arab. Of this there is simply no evidence. The foremost expert on the Baggara, Professor Ian Cunnison, has explained the influence of the Mahdiyya in the following terms:

"This adherence [to the Mahdi]... proved disastrous: the Khalifa's emissaries ransacked the wealth of the country, and the Ansar returning from Omdurman were plundered by Zurg, who had not left their Dar, on their return. Few cattle remained and there was much hunger. The tribe lived among the river-beds north of the Bahr el 'Arab, and rebuilt their stocks of cattle by trading ivory they hunted, for cattle from traders who established buying centres there."<sup>287</sup>

244. The disastrous impact of the Mahdiyya did, however, influence land use patterns, as also explained by Cunnison:

"Another historical change of great importance is the peace imposed. In terms of Humr settlement this has meant the establishment of friendly relationships and a certain amount of economic co-operation with their pagan neighbours – Dinka, Nuer and Nuba. Whereas in the past there seems to have been a wide tract of no-man's land between Humr and Dinka they now intermingle in the dry season and even share pasture for two months a year."<sup>288</sup>

Cunnison's account of the Mahdiyya is accompanied by a map (see **Figure 1**), which indicates that the Ngok lived predominantly south of the Bahr el Arab.

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<sup>285</sup> Peel, S., *The Binding of the Nile and the New Soudan* (E. Arnold & Co., London, 1904), p. 194 (SM Annex 44).

<sup>286</sup> This did not make them any gentler. MacMichael describes the Baggara as "the most warlike Arabs in the Sudan: they are also the most inveterate slave traders and raiders, and living as they do on the northern confines of the negro country they have indulged their predatory propensities *ad libitum* for so long as they have not been repressed by the firm hand of the Arabs in the Sudan." MacMichael, H.A., *A History of the Arabs in the Sudan* (CUP, Cambridge, 1922), Vol. 1, p. 272 (SCM Annex 23).

<sup>287</sup> Cunnison, I. "The Humr and their Land," (1954) 35(2) *Sudan Notes and Records* 50, p. 50, SPLM/A Exhibit-FE 4/5.

<sup>288</sup> Ibid.



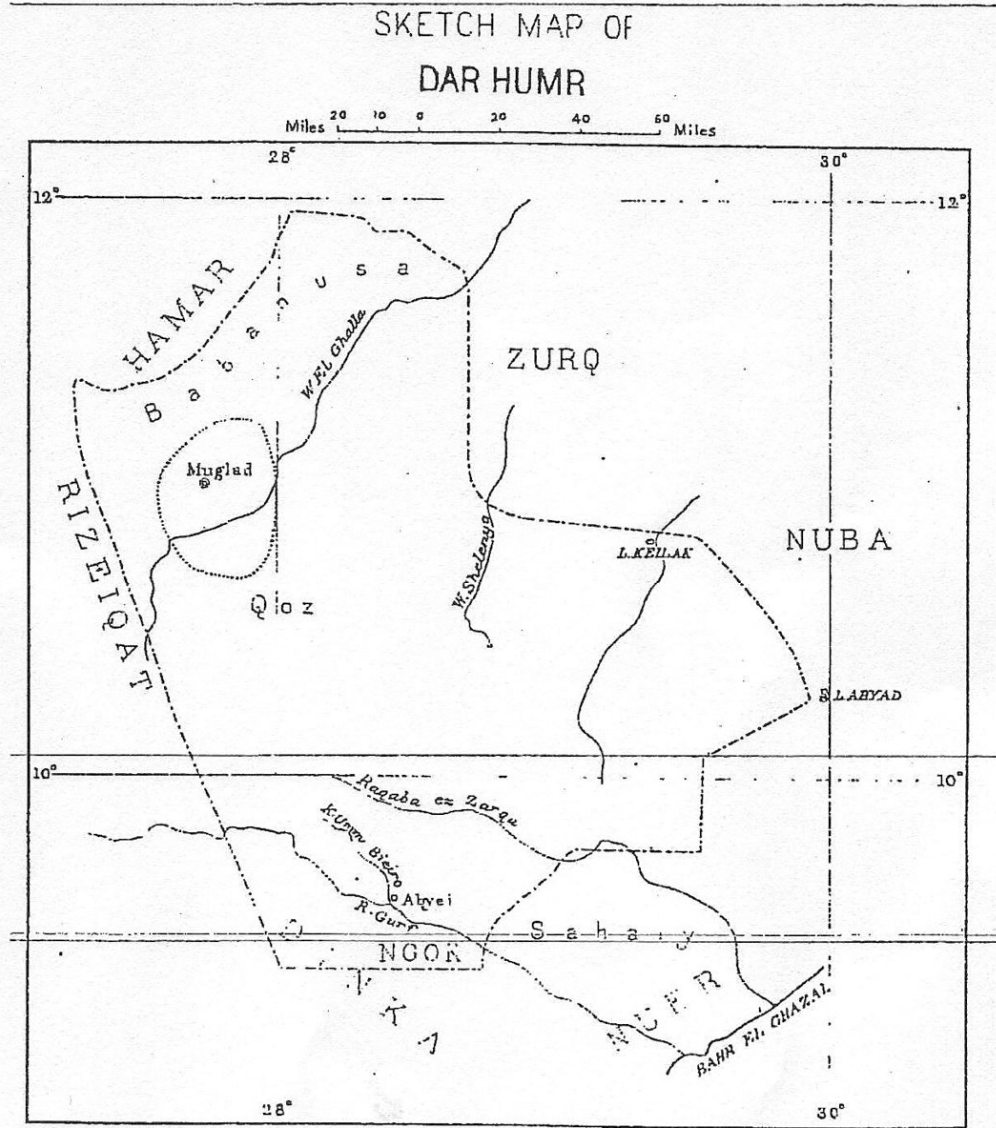


Figure 1. The Humr and their Land, from Cunnison (1954).<sup>289</sup>

<sup>289</sup> Source: Cunnison, I. "The Humr and their Land," (1954) 35(2) *Sudan Notes and Records* 50, p. 51, SPLM/A Exhibit-FE4/5.

245. The Daly Report notes that the Ngok Chief, Arop Biong (Sultan Rob), travelled to the Mahdi's camp and was "promised independence in exchange for allegiance".<sup>290</sup> The idea that the Ngok were allies of the regime is one of the principal bases for the assumption that the Ngok "survived relatively unscathed" during the Mahdiyya.<sup>291</sup> But it is contradicted by the historical record.

246. Thus Collins writes that:

"During the Mahdiyya, the plains of the Bahr al-'Arab were a highroad for Karam Allah's invasion of the Bahr al-Ghazal."<sup>292</sup>

The Mahdists invaded the Dinka country in 1893-94 although eventually defeated. Thereafter Collins notes that the traditional "cattle raids between the Baqqara and the Dinka were firmly re-established".<sup>293</sup> According to Collins, central to the raids was the claim by the Humr and particularly the Reizegat that they had rights to the wells, south of the Bahr el Arab; they also demanded tribute from the Malwal, Twij and Ngok Dinkas. In contrast, the Dinkas declared that the Bahr el Arab was their northern boundary.<sup>294</sup>

"The raids were annual affairs, occurring at any point along the line of the Bahr al-'Arab and Bahr al-Ghazal rivers and usually in the dry season when rapid movement was possible."<sup>295</sup>

Nor were threats limited to Baggara raids. Collins records several inter-tribal wars between the Dinkas themselves, as well as constant raiding from the Nuer to the East.<sup>296</sup> During the Mahdiyya, in the south, the Azande pushed northward and constantly plundered many neighbouring tribes in the centre and west of Bahr el Ghazal. The Avungara, led by Tambura, sought to fill the political vacuum left by the withdrawal of the Mahdists in 1895:

"[Tambura] completed his subjection of the Belanda and pressed further down the Sue River to the Dinka country, subduing the Bongo and other tribes near Wau."<sup>297</sup>

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<sup>290</sup> Daly Report, p. 24.

<sup>291</sup> Ibid., p. 25.

<sup>292</sup> Collins, R.O., *Land Beyond the Rivers: The Southern Sudan 1898-1918* (Yale University Press, London, 1971), p. 186 (SCM Annex 24).

<sup>293</sup> Ibid., p 186 (SCM Annex 24).

<sup>294</sup> Ibid., p. 189 (SCM Annex 24).

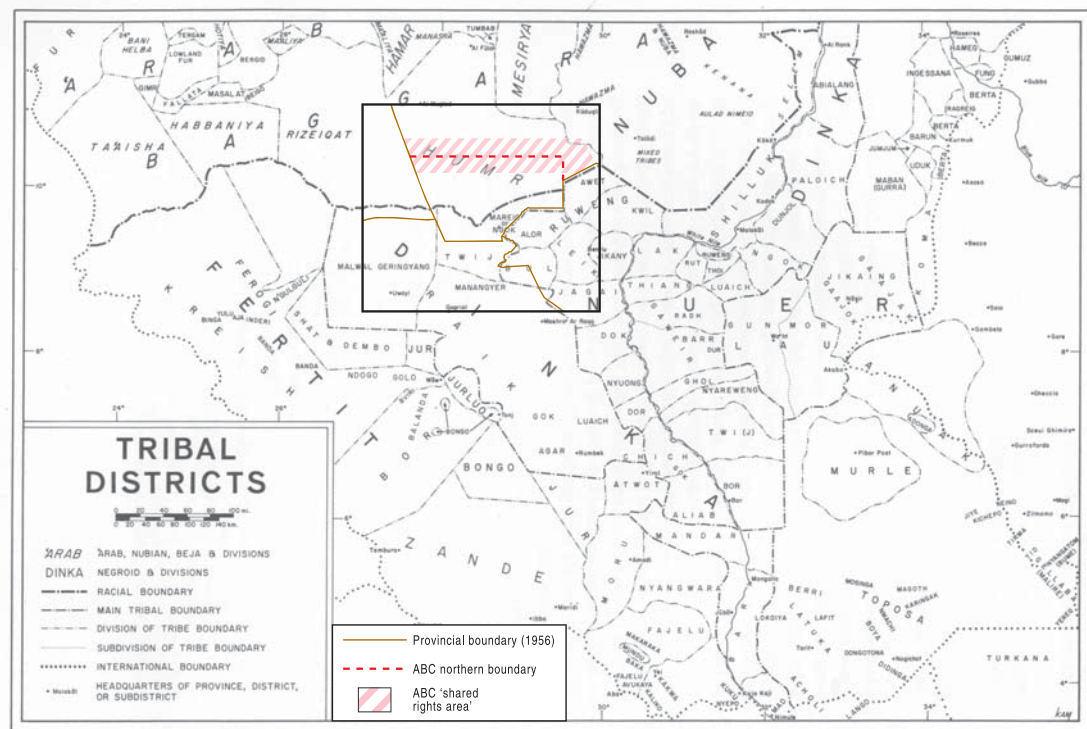
<sup>295</sup> Ibid., p. 187 (SCM Annex 24).

<sup>296</sup> Ibid., p. 190 (SCM Annex 24).

<sup>297</sup> Ibid., p. 74 (SCM Annex 24).

Thus tribal warfare raged on all sides during the Mahdiyya period, and for the Ngok Dinkas, well into the Condominium period as well.

247. Collins' book is accompanied by a map (see **Figure 2**, opposite) showing the "Mareig or Ngok" predominantly south of the Bahr el Arab and entirely unconnected with the Rizeigat.



**Figure 2. Tribal Districts, from Collins (1971).**<sup>298</sup>

<sup>298</sup>

Source: Collins, R.O., *Land Beyond the Rivers: The Southern Sudan 1898-1918* (Yale University Press, London, 1971), p. 52

### (iii) The Late 19<sup>th</sup>-Early 20<sup>th</sup> Centuries (1898-1905)

248. From the end of the Mahdiyya in 1898 to the transfer of the Ngok and Twic Dinkas in 1905 there is no evidence that anything changed. Despite this, the SPLM/A Memorial claim that the historical record provides evidence of...

"Ngok Dinka occupation and use of the area extending from south of the Kiir/Bahr el Arab to the Ngol/Ragaba ez Zarga and further north to Nyama, Turda and surrounding settlements."<sup>299</sup>

As this section will show, this claim is unsupported by contemporary sources.

249. Curiously, the SPLM/A Memorial's first reference to a supposedly 20th century historical record placing the Ngok north of the Bahr el Arab, is W.G. Browne (1768-1831).<sup>300</sup> Browne cannot possibly be relied upon as establishing the position of the Ngok in the early 20th century.

250. But the main SPLM/A argument is the *argumentum ab ignorantia*:

"The officials of the Sudan Government had limited knowledge of the Ngok Dinka, and generally the Bahr river basin, in the first decade of the 20th century. ... [T]he Abyei region was remote and difficult to access, particularly during the rainy season, while also being of limited interest to the Anglo-Egyptian administration. Commenting on this, Professor Daly states 'British knowledge of the Ngok was based on a few hours' pathcrossing.' Indeed, as of 1905, the area of the nine Ngok Dinka Chiefdoms, and much of Kordofan and Bahr el Ghazal more generally, had not been mapped or even explored by the Sudan Government. As a consequence, the Government's early records regarding the Abyei region are inevitably limited in number and detail."<sup>301</sup>

It is no doubt convenient for the SPLM/A to discard official sources at will. Both the Memorial and the Daly Report discount or ignore official documents recording the transfer of the Ngok in 1905. Although what Daly calls the "foundation text" is unequivocal, it is rejected out of hand as a mere "hypothesis",<sup>302</sup> a rejection justified by the argument from ignorance – the British had little or no knowledge of the region. But the comment that "British

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<sup>299</sup> SPLM/A Memorial, para. 904.

<sup>300</sup> Ibid., para. 905.

<sup>301</sup> Ibid., para. 909.

<sup>302</sup> Daly Report, p. 42.

knowledge of the Ngok was based on a few hours' pathcrossing" is misleading. Starting from 1901, Sultan Rob was visited at least once a year before the transfer in 1905. In 1901 he was visited by Mahon Pasha.<sup>303</sup> In 1902 Major E.B. Wilkinson travelled specifically to Sultan Rob's village.<sup>304</sup> In 1903, Mahon Pasha visited Sultan Rob again and bestowed on him a Second Class Robe of Honor<sup>305</sup> – not a distinction awarded as a result of mere "pathcrossing". In 1904, Sub-Lieutenant R.N. Bayldon reported having visited both Sultan Rob and Sheik Rihan of Gorwei, the two chiefs affected by the transfer of 1905, both of whom lived to the south of the Bahr el Arab.<sup>306</sup>

251. Reading the travel itineraries of these journeys, often taking months, it is clear that Condominium officials took great care in measuring distances and triangulating their positions; the phrase coined by Daly that "British knowledge of the Ngok was based on a few hours' pathcrossing" is untrue and unfair. It is only necessary to take a few examples in the period prior to the transfer.<sup>307</sup>

#### 1901 – Mahon Pasha

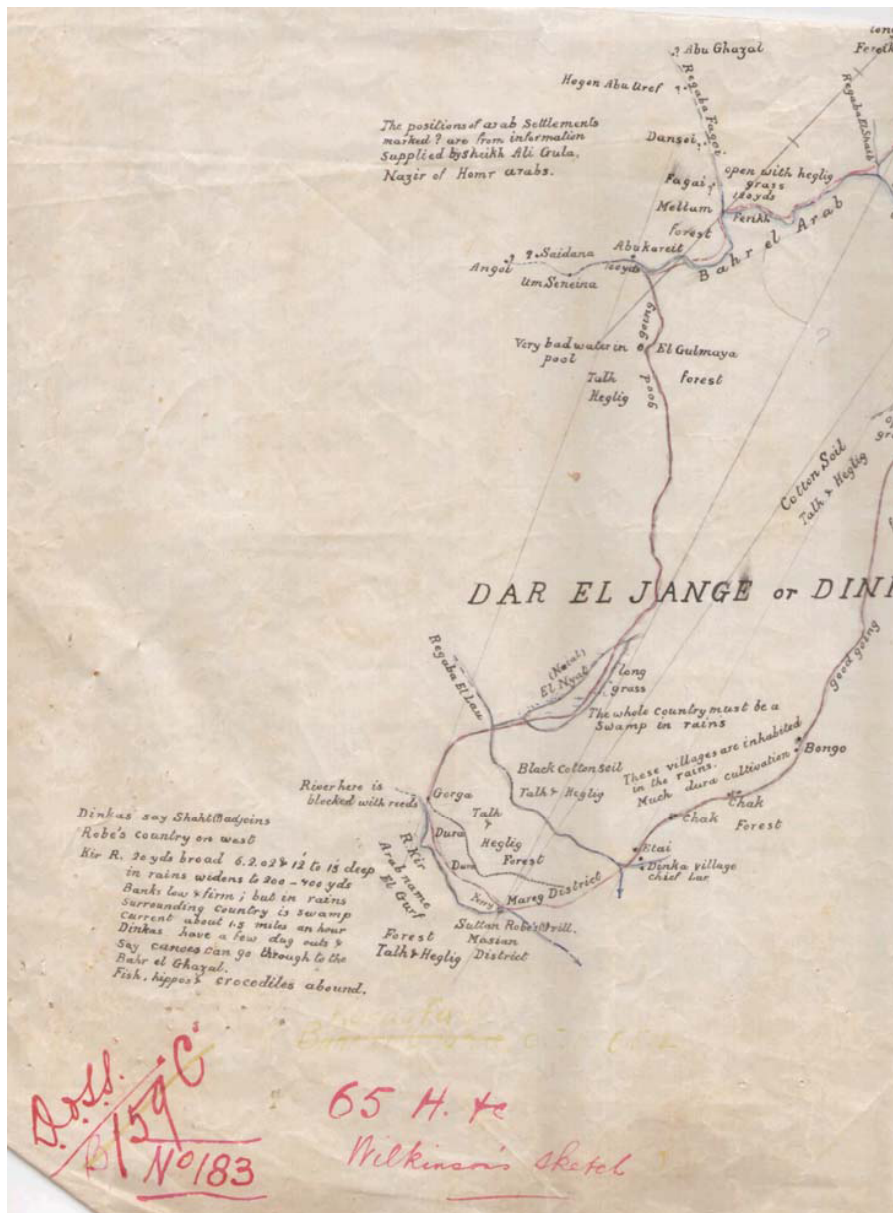
252. The first travel description mentioning Sultan Rob's village is Mahon Pasha's report on the country from El Obeid to Sultan Rob's, which he mentions as situated on the "Bahr El Homr, about two days from Lake Ambady."<sup>308</sup> Writing on the population, he states that it is "much more numerous than I had expected both as regards "Arabs and Nubas".<sup>309</sup> The SPLM/A Memorial treats the relevant passage of Mahon's report as one concerning only the prosperity of the Ngok,<sup>310</sup> but in fact it concerned "[t]he people" generally, Arab, Nuba and Dinka.<sup>311</sup> More significantly, there is no hint in Mahon's account that the Dinka are living well to the north of the Bahr el Arab,<sup>312</sup> still less at 10°35'N.

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<sup>303</sup> Sudan Intelligence Reports, No. 92 (March 1901), Appendix F, pp. 19-20 (SM Annex 4).  
<sup>304</sup> Gleichen, A., *The Handbook of Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* (2 vols., HMSO, London, 1905), Vol. II, pp. 155-157 (SM Annex 38).  
<sup>305</sup> Sudan Intelligence Reports, No. 104 (March 1903), p. 19 (SM Annex 5).  
<sup>306</sup> Sudan Intelligence Reports, No. 127 (February 1905), p. 2 (SM Annex 7).  
<sup>307</sup> See also Second Macdonald Report.  
<sup>308</sup> Sudan Intelligence Reports, No. 92 (March 1901), Appendix F, p. 19 (SM Annex 4).  
<sup>309</sup> *Ibid.*, p 19 (SM Annex 4)  
<sup>310</sup> SPLM/A Memorial, para. 916.  
<sup>311</sup> Sudan Intelligence Reports, No. 92 (March 1901), Appendix F, p. 19 (SM Annex 4).  
<sup>312</sup> The Bahr el Arab/Kir is about 55 km north from Lake Ambadi, which is a long 2 days' march. To the northwest, the Lol (also sometimes referred to as the Bahr el Homr) is 45km away. Since the reference in the Sudan Intelligence Report is to "Sultan Rob's

1902 – Major E.B. Wilkinson

253. The SPML/A Memorial then turns to Major E.B. Wilkinson's 1902 travel itinerary, but again in a highly selective manner. The relevant journey was discussed in Alastair Macdonald's first Expert Report and in the GoS Memorial:<sup>313</sup> accordingly only a few comments are necessary here. Wilkinson's journey south to Sultan Rob's village can be traced on his sketch which is Map 13b in the SCM Atlas, and is **Figure 3**.



**Figure 3. Wilkinson's Sketch (1902).** [SCM Map Atlas 13a]

<sup>313</sup> country on the Bahr el Homr", the former is more likely. What is clear is that it does *not* refer to the Ragaba ez Zarga (at least 150 kms away from Lake Ambadi). GoS Memorial, paras. 314-322; First Macdonald Report, paras. 3.9-3.10.

254. Wilkinson was meticulous in his observations and clearly noted where the Humr and the Ngok were living. Some 239¼ miles from El Obeid, Wilkinson reports as follows:

"Three and a-half miles S.W., El Debekir was reached. Here there was an Arab (Homr) settlement... Debekir road runs over black cotton soil very much fissured. W. by S. for 13¾ miles then S.S.W. for three miles when heglig forest is entered and El Anga on the river is reached. Here there is an Arab settlement and there was a little water."<sup>314</sup>

255. At Kuek, he observes: "Large Arab settlement and many cattle". Six miles later, "when H. Debib is passed", Wilkinson encounters "a few Homr Arabs living here". Later, Wilkinson reached Fauwel, which is shown on all contemporary maps. The position of Fauwel was reported to be 286¾ miles from El Obeid. He states:

"Fauwel is reached. Large Arab settlements; much water in river, and an open expanse 1¾ miles surrounded by reeds. Geese and waterfowl. Homr Arabs here very wild, but possess many cattle, goats and sheep."<sup>315</sup>

256. After Fauwel, Wilkinson follows a watercourse until he reaches what he believed was the Bahr el Arab but which was actually the unmapped Ragaba ez Zarga/Gnol. After crossing the Ragaba, Wilkinson travels another 14¾ (24 km) miles before reaching the Ngok Dinka village "Bombo". Here Wilkinson reports as follows.

"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>316</sup>

257. Travelling some 7½ miles further south, at the village of Etai, Wilkinson reports:

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<sup>314</sup> Gleichen, A., *The Handbook of Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* (2 vols., HMSO, London, 1905), Vol. II, p. 155 (SM Annex 38).

<sup>315</sup> Gleichen, A., *The Handbook of Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* (2 vols., HMSO, London, 1905), Vol. II, p. 155 (SM Annex 38).

<sup>316</sup> *Ibid.*, p 155 (SM Annex 38).

"Reached Etai, where the first Dinkas were met."<sup>317</sup>

In other words, these Ngok Dinka had gone south from their villages, not north. Eventually, of course, Wilkinson reached Sultan Rob's, south of the Kir/Gurf.

258. We may compare this to the description in the SPLM/A Memorial:

"Wilkinson's record provides contemporaneous evidence that the Ngok lived in permanent, prosperous villages, with substantial agricultural fields, between the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga."<sup>318</sup>

259. This calls for two comments. First, Wilkinson also observes that the Homr Arabs possess many cattle. Nor does Wilkinson state that the Ngok lived in permanent villages. He specifically states that: "These villages... are used by the Dinkas in the rains and as long as the water lasts." Far from being permanently inhabited, "all the inhabitants had left and were grazing their herds of cattle where grass and water were to be found."

260. The SPLM/A Memorial rejects this account:

Wilkinson's report is ... consistent with the general pattern of Ngok village placement ... On the other hand, it is *implausible* that 'all the inhabitants had left' such villages; as discussed above, only younger Ngok men and unmarried women accompanied Ngok cattle on seasonal grazing migrations during the dry season."<sup>319</sup>

261. But in fact – and however inconsistent with much later residence patterns – Wilkinson found the Bongo village empty. The SPLM/A's approach is that careful, contemporary, written, official accounts are to be treated as "implausible" unless confirmed by Ngok mythology. And theirs was the line of the ABC Experts, mandated to decide on the basis of scientific research rather than wishful thinking.

262. Other elements in Wilkinson's report contradict the SPLM/A theory of dominance and permanent habitation at 10°35'N. Firstly, according to Wilkinson, Arabs are reported living at Fauwel, on the Ragaba (where the

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<sup>317</sup> Ibid., p 155 (SM Annex 38).

<sup>318</sup> SPLM/A Memorial, para. 918.

<sup>319</sup> SPLM/A Memorial, para. 922 (emphasis added).



Ngok were not). In addition, the Arabs are reported living on "black cotton soil", which according to the SPLM/A claim is a Ngok prerogative.<sup>320</sup> Wilkinson's report also repeatedly mentions that the Humr Arabs have large herds of cattle, which contrasts with the impoverished portrait of the Humr advanced in M.W. Daly's Expert Report and the SPLM/A Memorial.<sup>321</sup>

#### 1903 – Mahon Pasha

263. In 1903 Mahon Pasha, then Mudir (Governor) of Kordofan, visited the Ngok again. Mahon travelled from from Muglad to Turdo, which the SPLM/A states is "almost certainly a reference to Turda".<sup>322</sup> If so, Mahon is reporting on a village at around 10°22'N, 28°36'E, far below latitude 10°35'N. About this village, Mahon writes:

"The people here had a lot of cattle and a fair amount of horses."<sup>323</sup>

264. Ngok are not generally known to have kept horses whereas the Humr were famous for theirs; thus it seems fair to infer that these were Arab horses. This inference is further supported by the fact that Mahon travelled south-east to Debka, where he:

"...had all the Sheiks assembled and gave them 3 days to pay their tribute, which they did after a little persuasion. From here I sent Bimbashi Bedl back with about 50 camels, I only taking 60 Camel Corps on with me. I then went to Fowel [Fauwel] and Um Semima, where I had the *remainder* of the Homr Sheikhs to meet me to collect their tribute."<sup>324</sup>

265. None of this is mentioned in the SPLM/A Memorial. Instead they quote a passage just below:

"I next went west to Sultan Rob's, and was very well received; invested Rob with a Second Class Robe of Honour. From there I went south to the Riverain country, and north-west to Tosh and the Rizeigat country. The Dinkas everywhere thought I had come to collect tribute from them, and said they were willing to pay, but I told them I wanted nothing for last year, and that when the Government wanted tribute they would be warned beforehand. It would not be the slightest use trying to collect tribute from them

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<sup>320</sup> SPLM/A Memorial, paras. 178-179.

<sup>321</sup> SPLM/A Memorial, para. 232 and Daly Report, p. 23.

<sup>322</sup> SPLM/A Memorial, para. 929.

<sup>323</sup> Sudan Intelligence Reports, No. 104 (March 1903), p. 19 (SM Annex 5).

<sup>324</sup> Ibid.

until there is a Mamur and a post in that direction. Although they say they will pay, I know it would take months and a lot of troops to make them do so. They have large herds of cattle. The two chiefs, Lor and Rob, who I made make friends last year after 30 years' war, were on the best of terms, and one and all Dinka said how pleased they were that Government had come, because they had not been raided by the Arabs since I was there last year. As a proof of that, I met several herds of Dinka cattle grazing right in the Arab country, where they were afraid to go last year."<sup>325</sup>

266. According to the SPLM/A Memorial, Mahon's report...

"...confirms the presence of permanent Ngok settlements to the north of the Kiir/Bahr el Arab River. While the generality of the direction prevents entirely precise identification, Mahon's description indicates that he travelled 'west' from Fauwel (Pawol) to Arop Biong's, indicating that Ngok Dinka (Arop Biong's people) were located on the same latitude as Fauwel and Um Semina on the Ngol/Ragaba ez Zarga River. That is consistent with Wilkinson's trek record (discussed above). It is also notable that the reports regarding the Ngok in 1902 and 1903 emanate from the **Kordofan** Governor –indicating the location of the Ngok north of the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga, which was often referred to as the approximate provisional boundary between Kordofan and Bahr el Ghazal."<sup>326</sup>

267. This is not consistent with the SPLM/A's claim concerning the position of Sultan Rob's village, i.e. that Sultan Rob's was "east of the Nyamora/Ragaba Umm Biero, where the modern-day Abyei town market is located".<sup>327</sup> Mahon reports going to "Sultan Rob's". If this village were on the same "latitude as Fauwel" but many kilometres to the west, it could not be situated on the Ragaba ez Zarga. Nor does it correspond to the position of modern Abyei. The position is explained in the second Macdonald Report as follows:

"There is no evidence that Sultan Rob had moved from his original village in 1903. His 'old' village is shown on the Intelligence Office 1904 map and other officials visited him on the Bahr el Arab in 1905 and 1906. Mahon's use of the direction 'west' could be explained if he chose to travel in a loop to the west before turning southeast to reach Sultan Rob's. He was clearly an enthusiastic trekker as the later detour northwest to the Rizeigat before returning eastwards all the way to the White Nile clearly shows. He might well have chosen a longer route to Sultan Rob's. To suggest that this flimsy piece of evidence means

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<sup>325</sup> Sudan Intelligence Reports, No. 104 (March 1903), p. 19 (SM Annex 5).

<sup>326</sup> SPLM/A Memorial, para. 931.

<sup>327</sup> SPLM/A Memorial, para. 915.

that Arop Biong had moved up to the latitude of Fauwel and Um Semima seems to be stretching credibility."<sup>328</sup>

268. Mahon's comment – made in relation to Sultan Rob, not the Ragaba ez Zarga – that the Ngok are reported to have started "grazing right in the Arab country, where they were afraid to go last year" is significant. It shows that Mahon Pasha, the Governor of Kordofan, considered the relevant area to be Arab. It shows, secondly, that the Ngok were "afraid" to go to this area in 1902, which clashes with the theory of Ngok dominance.

269. The SPLM/A Memorial goes on to record another incident of Humr raids against the Dinka, citing a 1903 Sudan Intelligence Report:

"Two runners who arrived at Fashoda on 13th September [1903], from the Dinka district of Gnak (Sheik Rob Wad Rung), reported that some Homr under one Mohammed Khada had raided their district about a month previously, and had killed two men and carried off 30 men and 1,000 head of cattle. The Mudir of Kordofan investigated and settled this case. The Dinkas received back their men and cattle. One of the Homr was killed in the fighting."<sup>329</sup>

According to the SPLM/A Memorial:

"...the Report is corroborative of the other descriptions (discussed above) by the Sudan Government of the Ngok and their location during the period."<sup>330</sup>

270. It is far from certain that this refers to the Ngok chief Sultan Rob; but even if it does, it says nothing about the location of either the Humr or Ngok. (Fashoda (Kodok) is on the Nile.) What it does do, on that assumption, is to show the involvement of Kordofan in Ngok-Humr relations even before the transfer of 1905: this belies the claim of British official ignorance.

#### 1904-5 – Percival

271. In 1904-5, Percival made two important journeys across the "Bahr". He left Keilak on 12 November 1904, reached Burakol (Sultan Rob's new village) on the Bahr el Arab on 28 November and arrived in Wau on 22

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<sup>328</sup> Second Macdonald Report, para. 25.

<sup>329</sup> Sudan Intelligence Report No. 110 (September 1903), p 1, SPLM/A Exhibit-FE 1/24. cited in SPLM/A Memorial, para. 933.

<sup>330</sup> Ibid., para. 934.

December. After a 3-month stay in Wau, he left there on 24 March 1905, passed the junction of the Lol and the Pongo on 30 March and arrived in Taufikia on the White Nile on 26 April.

272. On his first journey, he travelled to Wau "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>331</sup> He was still under the influence of Wilkinson's mistaken identification of the Bahr-el-Arab for the Ragaba ez Zarga;<sup>332</sup> but he knew where the people he met were, and he is unequivocal that Sultan Rob's country is "on the Kir River", 50 miles *south* of the Ragaba. His reaction to being told that Sultan Rob's country extended even further, up to 10°35'N, can be imagined.

273. His route report, annexed,<sup>333</sup> overestimates mileages: these have been adjusted in **Figure 4** to correspond to known locations and distances.<sup>334</sup> On 10 November 1904 he came across the Ragaba ez Zarga on 19 November (the start of the dry season) and found it completely devoid of people:

"I have been some miles up a down the river but can find no trace of inhabitants. The country between here and the Jebels would appear to be uninhabited as I should think I would be bound to have found some traces of natives if any had been about lately."<sup>335</sup>

Travelling without a guide, and without any locals present, Percival described the river thus "...came on to what I take to be the BAHR EL ARAB".<sup>336</sup>

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<sup>331</sup> Sudan Intelligence Reports, No. 126 (January 1905), pp. 3,4 (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.

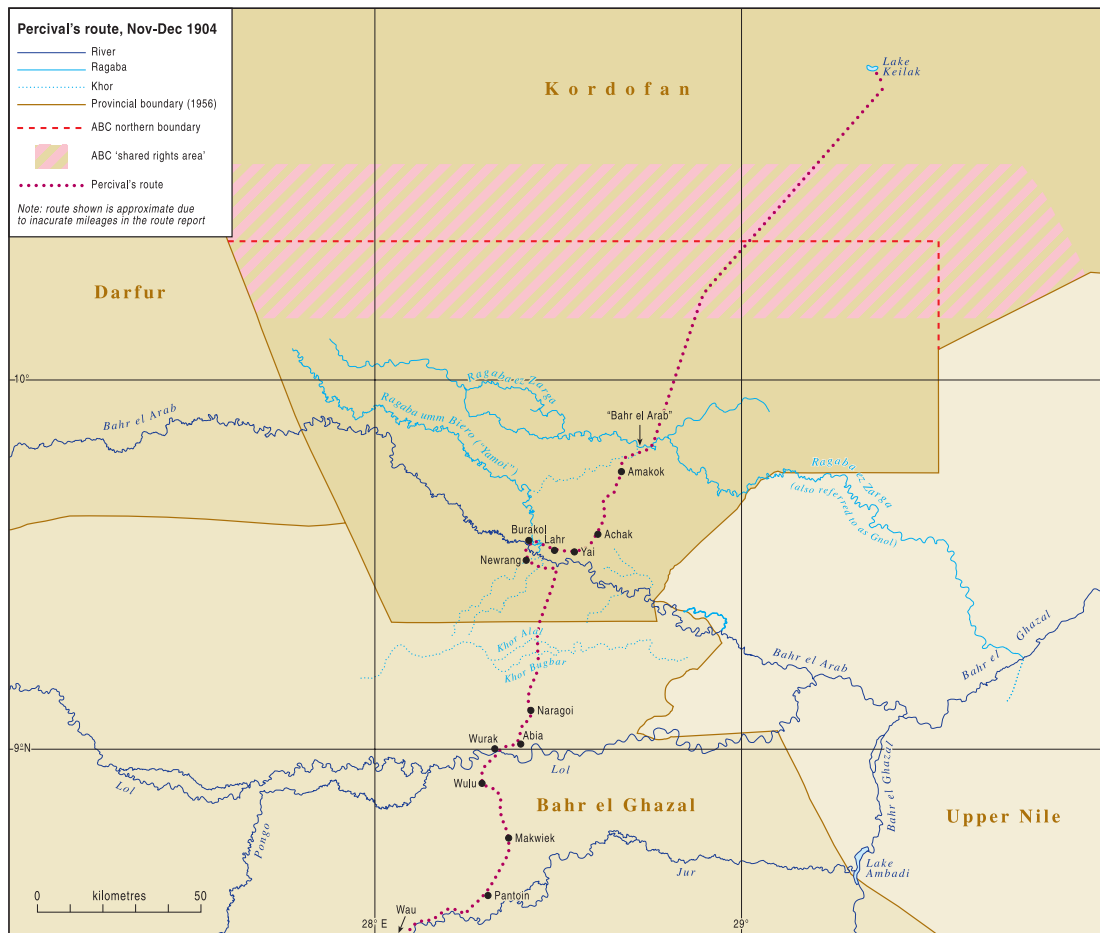
<sup>332</sup> See First Macdonald Report, paras. 3.8-4.4.

<sup>333</sup> Percival, A., *Route Report: Keilak to Wau*, December 1904 (SCM Annex 26).

<sup>334</sup> Percival acknowledges in his route report that he over-estimated mileages. Plotting his reported route suggests that this could be by a factor as high as 25%. This would make the true distance between the two rivers 40 miles.

<sup>335</sup> *Ibid.*, p 2.

<sup>336</sup> *Ibid.*, from thenceforth, references in his report to the "Bahr el Arab" should be read as being the Ragaba ez Zarga.



**Figure 4. Percival 1904 route map. [SCM Map Atlas 14b]**

274. Percival had Wilkinson's Map and was using it as a reference; he makes clear that, in the complete absence of local guides, he is *assuming* this to be the Bahr el Arab but that he does not know for certain. The fact that he assumes the (as yet unknown) Ragaba ez Zarga to be the Bahr el Arab proves nothing. What is material is his description of the countryside, given that we can now place where he was when he made those observations.

275. After marching 14 miles due south-west, Percival came across cattle tracks – the first sign of habitation thus far – which he followed:

"Sent out parties one of which brought in Dinkas who were driving cattle south as hard as they could. I surprised them and they thought we were Arabs raiding."<sup>337</sup>

Marching a further 18 miles due south-west, Percival came across the village of Achak; a further 18 miles (due west) from there he found Burakol, "where

337

Ibid., p. 2.

Sultan Rob is at present living."<sup>338</sup> The qualifying words "at present" are important. Later, Percival refers to "Sultan Rob's old residence (see Wilkinson's Map)".<sup>339</sup> Dinka chiefs would spend some time in each of their villages, the fact that Sultan Rob was "at present" living in Burakol does not mean he had abandoned Mithiang. Percival spoke to Sultan Rob and notes:

"There are no Dinkas west of Burakol as far as I could see and Sultan Rob told me that *there are only Homr Arabs west of him*."<sup>340</sup>

With regard to lands north, Rob told Percival that the Ragaba ez Zarga (called Bahr el Arab) was uninhabited by Dinkas, whereas Arab parties were known to frequent that area. Extrapolating from this, in his 1905 Route Report – where Percival travelled from the Pongo River to Taufikia – Percival remarks that "the Bahr el Arab [is Rob's] Arab frontier."<sup>341</sup> While Percival was referring to the Ragaba ez Zarga, it is equally clear that he also observed (and Sultan Rob confirmed) that there were no Dinkas living near it. Rather, Arabs frequented the area.

276. Percival next recorded that Burakol was 2 miles north of the Kir. It is clear, from both the description by Percival and the accompanying sketch (see **Figure 5** at p. 105) that Burakol was not in the same place as, nor known by any variant of the name of, Abyei town.<sup>342</sup> It is also notable that in the 1904 Route Report, Percival is unable to identify any Dinka boundary north of the Bahr el Arab, merely commenting that Rob considered the Ragaba ez Zarga as the "Arab frontier".

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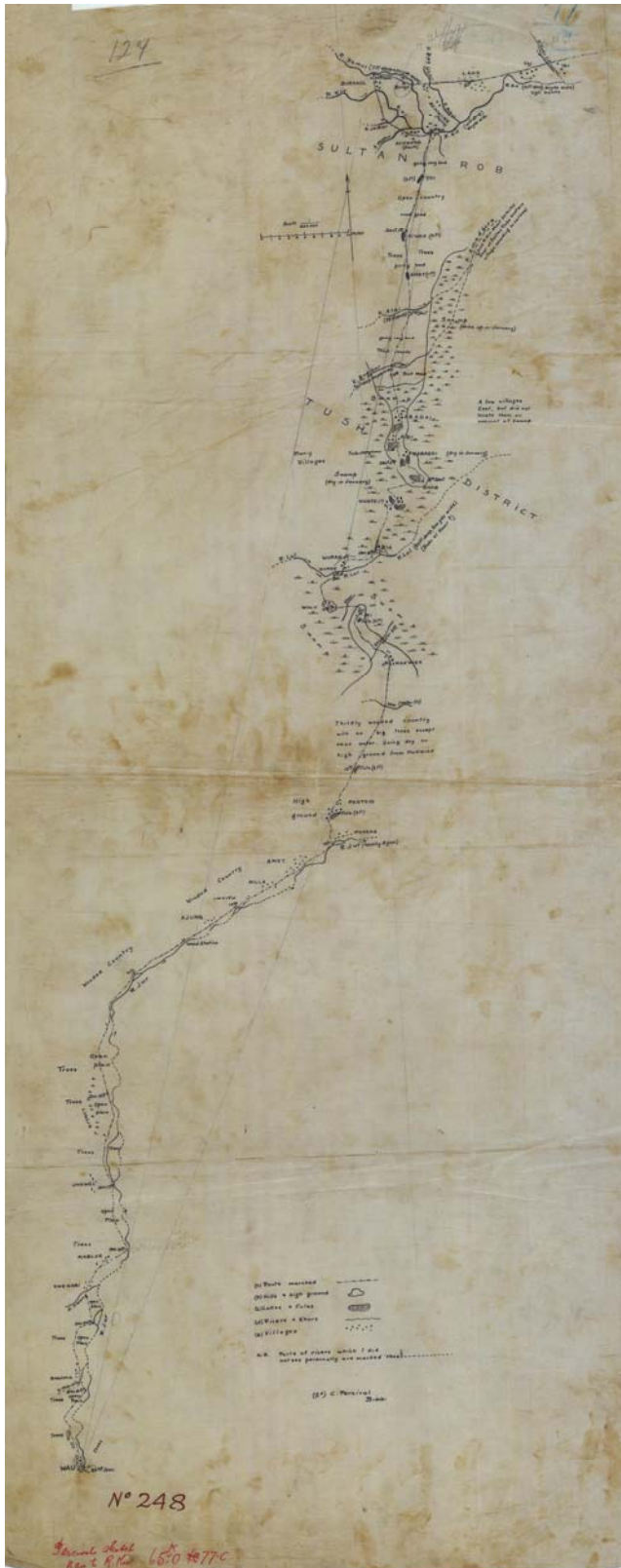
<sup>338</sup> Ibid., p 3.

<sup>339</sup> Ibid., p. 4.

<sup>340</sup> Ibid., p 3 (emphasis added).

<sup>341</sup> Percival, A., *Route Report: Pongo River to Taufikia*, March/April 1905, General Remarks: p. 1 (SCM Annex 27).

<sup>342</sup> The SPLM/A Memorial assumes Burakol is Abyei; cf. SPLM/A Memorial, para. 997.



**Figure 5. Percival's Sketch (1904).** [SCM Map Atlas 14a]

277. Percival then crossed the Kir and continued due south, where he observed several Dinka villages, some of which paid tribute to Sultan Rob. In his report of his second journey in 1905, he observed that "South of Lol and

Kir rivers is Nuer country but all under Rob."<sup>343</sup> As with the 1904 Route Report, the reference to the Kir correctly identifies the Kir/Bahr el Arab River. He also recorded the boundary between Sultan Rob and Chak Chak at a point 10 miles downstream along the Lol from its confluence with the Pongo.

#### Gleichen's 1905 Compendium

278. Both the SPLM/A Memorial and the Daly Report seek to downgrade Gleichen's 1905 Compendium. The SPLM/A Memorial states:

"The foregoing descriptions in Sudan Government records describe the Ngok Dinka as occupying permanent settlements, with substantial cattle herds even in the dry season, in the Bahr river basin centered on the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab river systems. These descriptions are consistent with the 1905 version of Gleichen's *The Anglo-Egyptian Sudan*, which included brief references to the Ngok Dinka that described 'Sultan Rob and Dar Jange belonging to Kordofan,' while also describing the southern boundary of the province as 'southwards to the Bahr el Arab leaving the Maalia and Rizeigat to Darfur, and the Homr and Dar Jange to Kordofan.'"<sup>344</sup>

279. First, it has to be emphasised (as shown above) that *none* of "[t]he foregoing descriptions" records the Ngok occupying permanent settlements on the Ragaba ez Zarga. And the 1905 Compendium itself tells a very different story. Describing the southern boundary after the 1905 transfer, it states:

"From Lake No up the Thalweg of the Bahr El Ghazal and roughly westwards along the 9° parallel, Sultan Rob, and Dar Jange belonging to Kordofan."<sup>345</sup>

This does not give any precise indication of where Sultan Rob lived, but if he and his village were situated far north of the 9° parallel, there would have been no need to mention him in this context.<sup>346</sup>

280. Nor is there any mention of Abyei in the Compendium.

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<sup>343</sup> Percival, A., *Route Report: Pongo River to Taufikia*, March/April 1905, p. 2 (SCM Annex 27).

<sup>344</sup> SPLM/A Memorial, para. 935.

<sup>345</sup> Gleichen, A., *The Handbook of Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* (2 vols., HMSO, London, 1905), Vol. I, p. 337 (SM Annex 38).

<sup>346</sup> The *Index Gazetteer of the Anglo-Egyptian Sudan* (Sudan Survey Department, Khartoum, 1931) p. 294 (SCM Annex 28) has "Sultan Arob (Old Vills.)" at 9°27'N 28°38'E. It does not list Burakol.



281. 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, 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 (**Figure 5**, above, page 105) has them. And when – however "implausibly" – 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.<sup>347</sup> The northern-most Ngok village mentioned is Bongo, a few kilometres further north at 9°32'N 28°49'E.<sup>348</sup> Abyei is nowhere mentioned.

#### (iv) The Period After the Transfer

282. As demonstrated in the Memorial<sup>349</sup> and further in Chapter 5, the 1905 transfer of the Twic and the Ngok from Bahr el Ghazal to Kordofan was well recorded in contemporary documents. Both the annual reports of the provinces, as well as the 1905 Memorandum of the Governor-General, Sir Reginald Wingate, recorded the transfer.<sup>350</sup>

##### (a) Post-1905 Boundary Descriptions and Maps

283. Furthermore, at this period no other change was recorded to the Bahr el Ghazal and Kordofan boundary. Contemporary documents provide no other explanation for the border change depicted on numerous post-1905 maps.

284. The 1906 Annual Report of the Bahr el Ghazal Province simply states that:

"Boundaries.- Boundaries remain as before. A delimitation commission between the Province and the French and Belgian Congo is as desirable as ever."<sup>351</sup>

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<sup>347</sup> *Index Gazetteer of the Anglo-Egyptian Sudan* (Sudan Survey Department, Khartoum, 1931) p. 102 (SCM Annex 28).

<sup>348</sup> *Ibid.*, p. 69. See above, paragraphs 256-261 and **Figure 5**, p. 105.

<sup>349</sup> GoS Memorial, paras. 332-383.

<sup>350</sup> See above, paragraph 26.

<sup>351</sup> Reports on the Finances, Administration, and Condition of the Sudan, *Annual Report, Bahr el Ghazal Province*, (1906) p. 552, SPLM/A Exhibit-FE 2/19.

Nothing is stated about boundaries in the Annual Report of 1906 for Kordofan Province.

285. Similarly no changes are recorded in 1907. The Annual Report for Bahr el Ghazal Province states as follows:

"Boundaries.- The Province boundaries remain the same..."<sup>352</sup>

In that same year, the Annual Report for Kordofan simply states:

"Boundaries.- These are unaltered."<sup>353</sup>

286. Also in 1908 no changes are recorded. The Annual Report for Bahr el Ghazal Province states:

"Province boundaries.- There has been no alterations in the boundaries this year..."<sup>354</sup>

The Annual Report for Kordofan notes a minor correction to the Darfur boundary:

"General situation:

...There has been no alteration in the boundaries where these have been settled but during my tour in Dar Homr last December I found that on the Bahr El Homr, the Rizeigat, who belong to Darfur, extended Eastwards to about Long. 28 E. instead of near Long. 27 E..."<sup>355</sup>

287. In 1909, the Annual Report for Bahr el Ghazal Province notes:

"Province Boundaries.- No change..."<sup>356</sup>

In that same year nothing was mentioned about boundaries in the Annual Report of Kordofan Province. Nor were any changes recorded in 1910.

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<sup>352</sup> Reports on the Finances, Administration, and Condition of the Sudan, *Annual Report, Bahr el Ghazal Province*, (1907) p. 164, SPLM/A Exhibit-FE 3/3.

<sup>353</sup> Reports on the Finances, Administration, and Condition of the Sudan, *Annual Report, Kordofan Province*, (1907) p. 318 (SCM Annex 29).

<sup>354</sup> Reports on the Finances, Administration, and Condition of the Sudan, *Annual Report, Bahr el Ghazal Province*, (1908) *Annual Report, Bahr el Ghazal Province*, p. 456 (SCM Annex 30).

<sup>355</sup> Reports on the Finances, Administration, and Condition of the Sudan, *Annual Report, Bahr el Ghazal Province*, (1908) *Annual Report, Kordofan Province*, p. 591 (SCM Annex 30).

<sup>356</sup> Reports on the Finances, Administration, and Condition of the Sudan, *Annual Report, Bahr el Ghazal Province*, (1909) p. 599, SPLM/A Exhibit-FE 3/8.

288. In summary, only the 1905 transfer can explain the curved line on Governor Lloyd's map, published in the *Geographical Journal* in 1910. That map, covering the whole of Kordofan and the southern part of Bahr el Ghazal, depicts the border as running south of the Bahr el Arab, including Sultan Rob's "Old village" within Kordofan.<sup>357</sup>

(b) *Hallam's Route Report 1907 and Other Documents*

289. Other contemporary documents confirm that the Ngok lived on the Bahr el Arab and not further north. The following are examples.

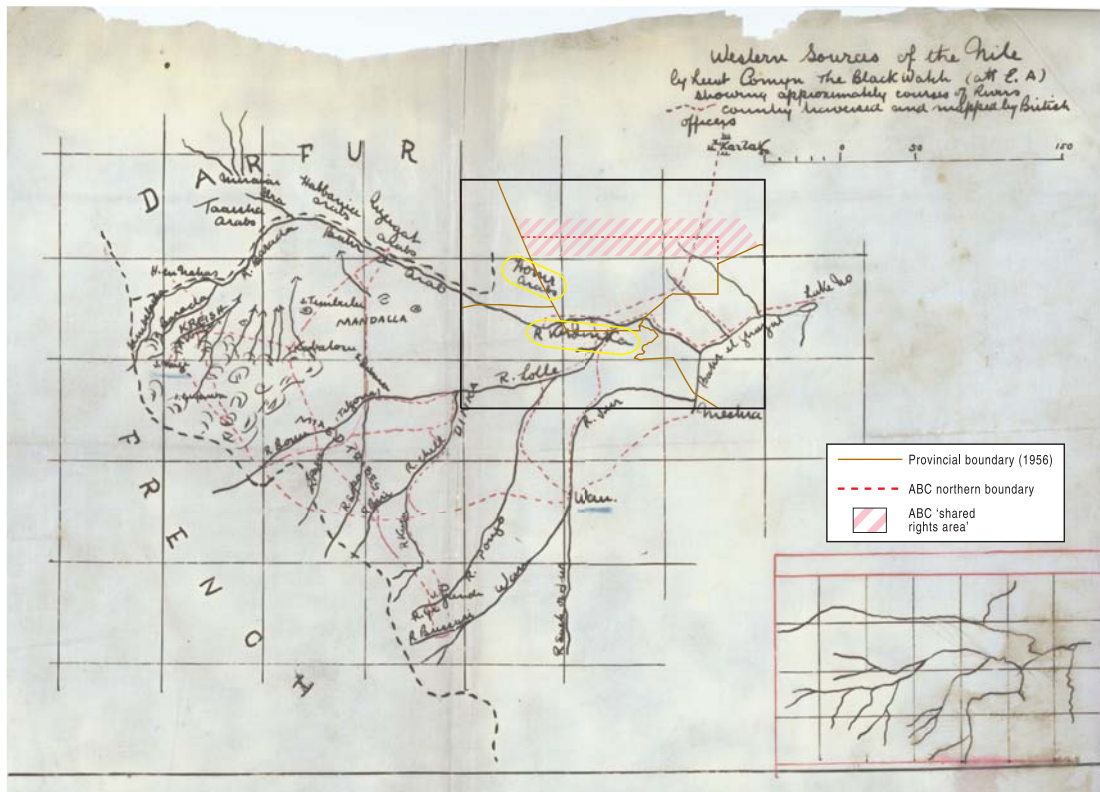
Comyn's sketch map (1906)

290. Reference was made in Sudan's Memorial to Comyn's article in the *Geographical Journal* of November 1907, to which was attached a map.<sup>358</sup> A manuscript draft of that article has now been located: the original map, in Comyn's hand, is **Figure 6**. It is clear that he deliberately placed the Dinka to the south of the River Kir, named upstream the Bahr el Arab, with the Homr Arabs to the north of the Kir. There is no confusion with the Ragaba ez Zarga.

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<sup>357</sup> Lloyd's 1910 map is the GoS Memorial, Map Atlas, Map 11; the relevant section is shown in detail as Figure 13, SM, p. 143.

<sup>358</sup> For the article see SM Annex 50; for the map, GoS Memorial, Map Atlas, Map 9.



**Figure 6. Comyn's Sketch map (1906)**

Hallam's route report (1907)

291. A report of Mr. Hallam, an inspector in the Slavery Department based at El Obeid, records his findings en route from "Dawas (Bahr el Homr)" to "Dar Jange (Bahr el Arab)" in December 1907.<sup>359</sup> The route is depicted on **Figure 7**; it is based on Hallam's original sketch which is Map 16b in the SCM Map Atlas. It provides first-hand evidence of the geographical position of both Sultan Rob's new and old villages. The following excerpts from the report are relevant.

292. The "Um Bioru" is described as follows:

"Rahad or Ragaba said to rise near Shatt a Muba settlement in Dar Riseigat & which flows into the river Gurf or Kir (Bahr el Arab) near Kual Wad Rob's village..."<sup>360</sup>

293. Hallam's report makes frequent mention of Arab, i.e. Humr, camps at locations that can be followed on **Figure 7**:

<sup>359</sup> Hallam, H., *Route Report: Dawas to Dar Jange*, December 1907, (SCM, Annex 31).  
<sup>360</sup> *Ibid.*, p.1 (SCM, Annex 31).

"R. EL SAYAR... Connects with Um Bioru & holds much surface water. Arab camps.

...

E. EL SORIK... Large Rahad, many arab camps in dry season

...

R. ABU DINAT... Passed the Rahad plenty of water. Arab camping ground in dry season.

R. FADLULLA... Connects with the Um Bioru. Camping ground in dry season.

SAHEEB... On the Um Bioru. A camping ground."<sup>361</sup>

294. Hallam's account of Arab camping grounds along the Umm Biero may be contrasted with his account of Ngok villages spread along the Bahr el Arab between Rob's New and Old Villages. His report reads:

ROB'S NEW... Kual Wad Rob's village...  
VILLAGE ... I rode across the Gurf [Bahr el Arab] 2 miles S.W. of Kual's village. It is here about 30 yards wide with little open water. Kual's village is large & scattered & covering the country between the Um Bioru & and the Gurf near their junction. It is about [41 miles travelling] S.E. of Rahad El Dona.

Ford across...  
UM BIERO Cross from the right bank to the left bank at a point S.E. of Kual's. Baggage animals had to be unloaded & baggage carried over by hand. The junction with the Gurf is one mile S. of this ford.

CHWENG...  
Village of Chweng Dinkas who said they had no head man. Their villages are on both banks of the Gurf which is here full of Sudd, no clear water. Direction E.S.E.

LAR'S VILLAGE ...  
Good shade under heglig trees. Two miles on Lar's population is mostly on the right bank of the R. Gurf which is here a fine stretch of open water, low banks the edges of the banks being full of Sudd.

ROB'S old V.  
on BAHR EL ARAB.  
Arriver [*sic*] opposite the old village which is now occupied by Lar's people. See route 49. The track from the Um Biero generally runs through villages & cultivation. The River was full of Sudd on 13.12.07."<sup>362</sup>

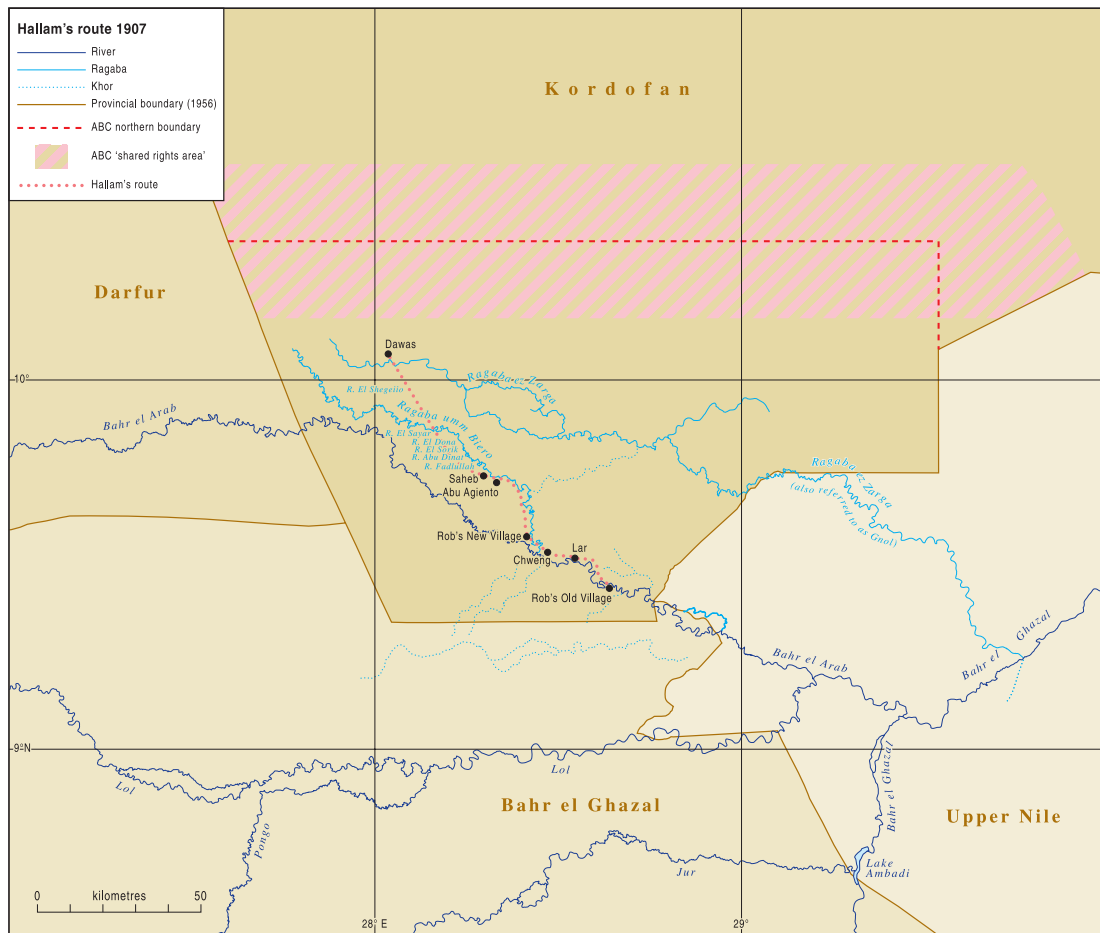
To which Hallam adds this domestic footnote: "In the Dinka country chickens and eggs are not procurable except near Rob's old village."<sup>363</sup>

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<sup>361</sup> Ibid. (SCM, Annex 31).

<sup>362</sup> Ibid., pp. 1,2 (SCM, Annex 31).

<sup>363</sup> Ibid., p.2 (SCM, Annex 31).



**Figure 7. Hallam route Map. [SCM Map Atlas 16a]**

295. 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. Sultan Rob's new village was on the Ragaba Umm Biero, close to the Bahr el Arab. It was coming to be known as Kuol's village; he was the successor to Sultan Rob.<sup>364</sup> His village is described as "covering the country between the Um Bioru & and the Gurf near their junction". Thence the country stretched south-east to the old village. This is "Dinka country", full of villages and cultivation if not chickens and eggs. The description does not include any significant extent of territory north of the Bahr el Arab. It does not evidence Ngok occupation anywhere near Dawas (on the Ragaba ez Zarga). And there is no mention of Abyei.

Lloyd's report (1908)

<sup>364</sup> Sultan Rob died in April 1906: Sudan Intelligence Reports, No. 142 (May 1906), p. 2 (SCM Annex 32). There was a succession dispute, quickly resolved by the British: Sudan Intelligence Reports, No. 146 (September 1906), p. 6 (SCM Annex 33).

296. As to the camping grounds of the Humr in the early 20<sup>th</sup> century, in his 1908 report on Kordofan Province, Governor Lloyd provides the following description:

"The Baggara or cattle owners are numerous. They all live south of 12°. From west to east the tribes are the Homr, Messeria, Hawazma, Habbania, Walad, Hamedi, and Selin... The Homrs cultivate round Muglad and Baraka, but as soon as the water dries up they migrate southwards to the Bahr el Homr. The Homr Ageira dry season camps and the Badana occupy them as follows, reading down stream from the frontier: -

Place.	Badana.	Remarks.
Bok	Fairin	Wells when dry
Dawas	"	"
Bambon	"	"
Antila	"	"
Fugara	Dar Um Sheiba	Wells when dry
Abu Erdu	"	"
Goli	Dar Muta	Wells when dry
Bueidat	Dar Salam	"
Abu Azala	Dar Muta	"
Abu Uruf	"	"
Demsoi	Kalabina	and "
Fagai	Mizagina	"
Mellum	"	"
Hasoba	"	"

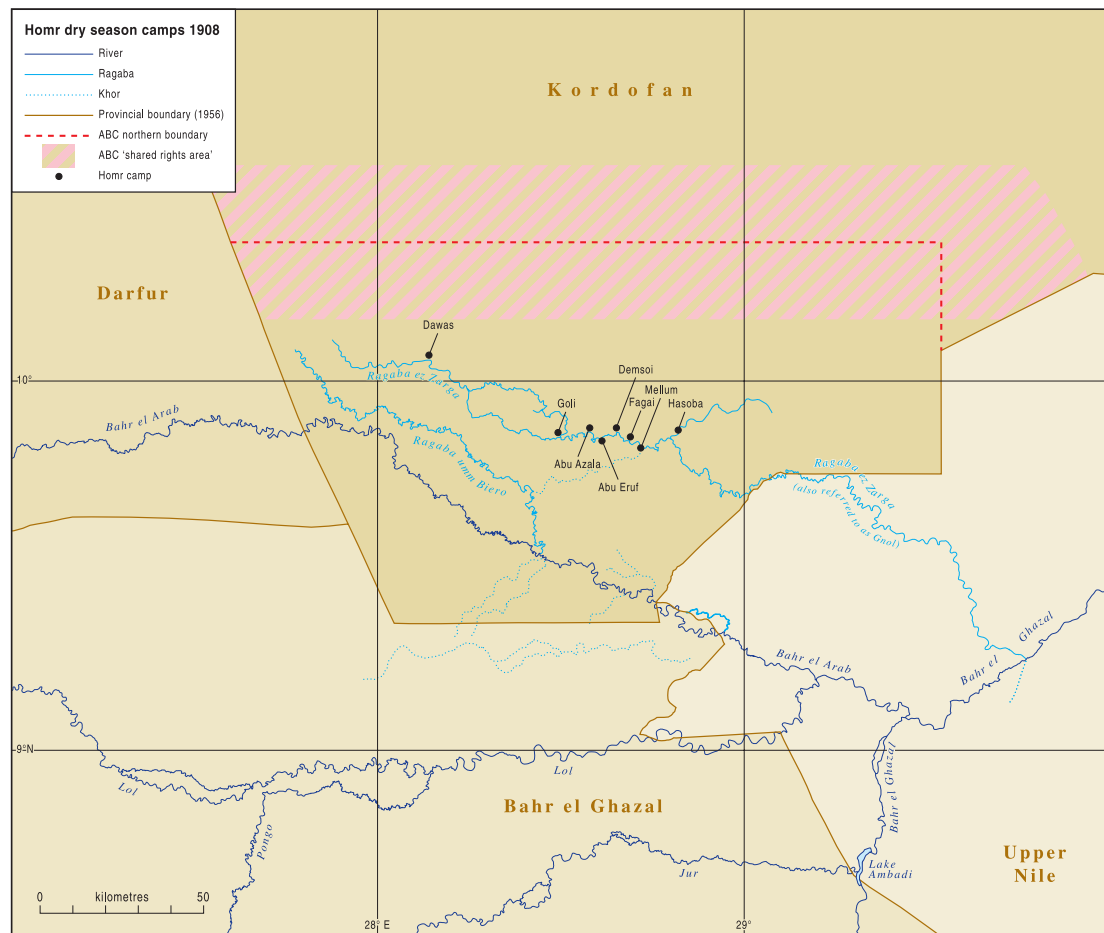
The Walad Umran section goes to Fael, Fut, Koak and Turda. The Homr Felaita to Keilak and the Abiad. Each Badana has a road of its own from their cultivation and rain camps near Muglad, to their dry season camps on 'El Bahr'.<sup>365</sup>

The term "Badana" was used by Lloyd instead of "omodiyas"; it refers to Baggara sub-sections.<sup>366</sup>

297. The camps of the Humr Ageira, based on Governor Lloyd's description, are depicted on **Figure 8**. They are essentially along the Ragaba ez Zarga. The Humr camped in an area that according to the SPLM/A Memorial was inhabited permanently by the Ngok. However, as this section has illustrated, there is no contemporary documentary evidence of permanent Ngok villages north this far north of the Bahr el Arab. In addition, contemporary documents describe the Humr as migrating further south, to the "Bahr", which according

<sup>365</sup> Sudan Intelligence Report, No. 171 (October 1908), p. 53, SPLM/A Exhibit-FE 3/5.  
<sup>366</sup> See Professor Cunnison's first Witness Statement, GoS Memorial, p. 189, para. 5.

to Professor Cunnison is one of the four main seasonal zones of the Homr, where they reside during the dry season (January to May).<sup>367</sup>



Camp location data from: 1:250,000 sheet 65-L, 1910 (SPLM/A Memorial atlas map 46), 1914 (GoS Memorial atlas map 13) and 1922 (GoS Memorial atlas map 19); "The Anglo-Egyptian Sudan", 1914 (GoS Memorial atlas map 14); "Darfur", 1916 (GoS Memorial atlas map 16).

**Figure 8. Homr Dry Season Camps.** [SCM Map Atlas 17]

Willis' notes (1909)

298. Other accounts corroborate Hallam's report. For example, in 1909, C.A. Willis, Inspector, made the following notes on the western Kordofan Dinkas:

"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

<sup>367</sup> Ibid., paras. 6 and 9.



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... As the water dries up and the mosquitoes decreases, the Dinkas move towards the Gurf; their camps are much less elaborate..."<sup>368</sup>

Bongo and El Nyat are shown on Wilkinson's sketch of 1902 which is **Figure 3** on page 96 above. They are just north of the Bahr el Arab/Kir.

Whittingham's sketch map (1910)

299. A very early record of a village appearing near the site of present-day Abyei town is on the 1910 Whittingham Sketch, where he charts "Abyia" and describes it as "Mek Kwal's Village". The original sketch, dated 17 April 1910, is **Figure 9**; a modern rendering of key features is **Figure 10**.

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<sup>368</sup> Sudan Intelligence Reports, No.178 (May 1909), Appendix C, p. 17 (SM Annex 19).

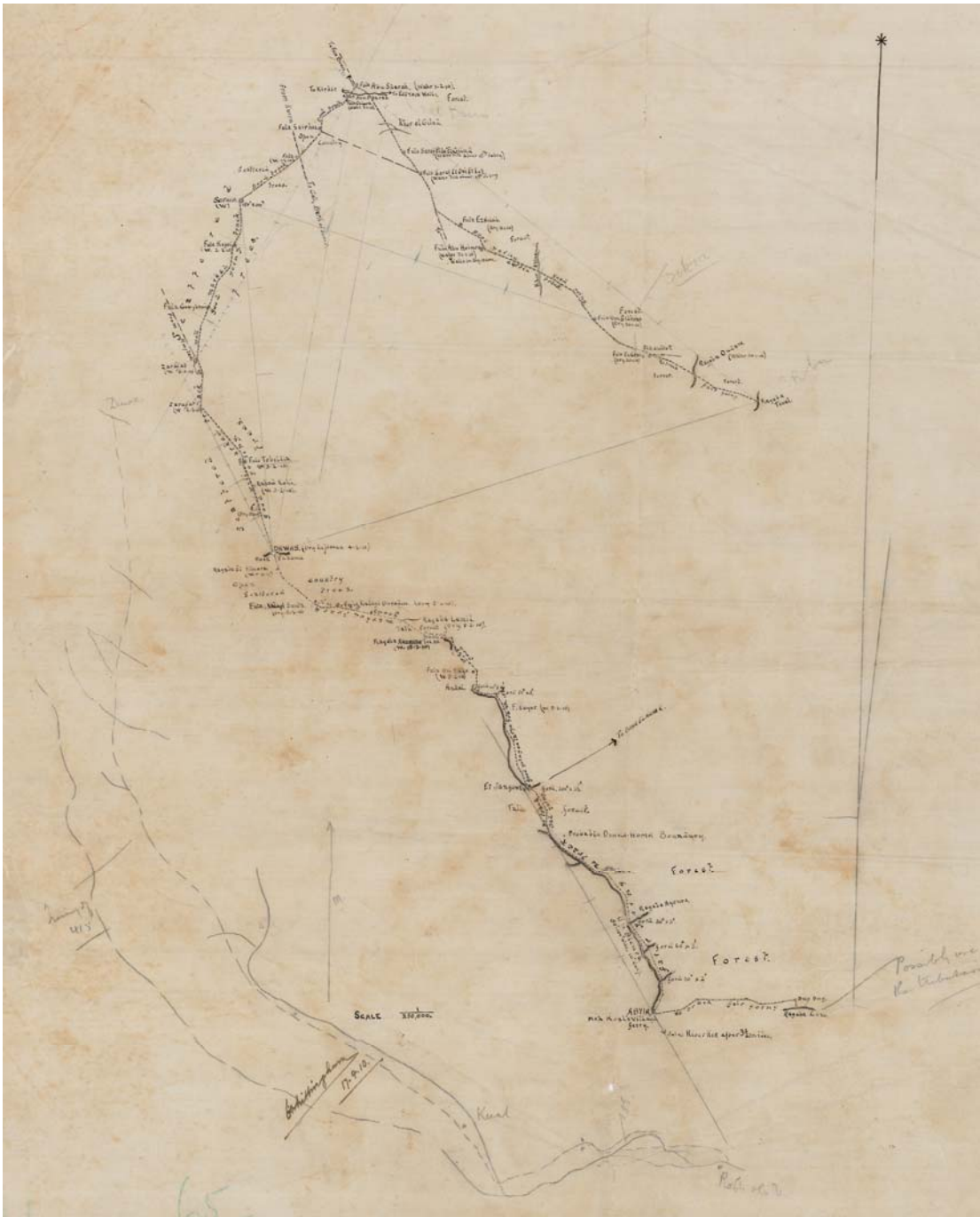
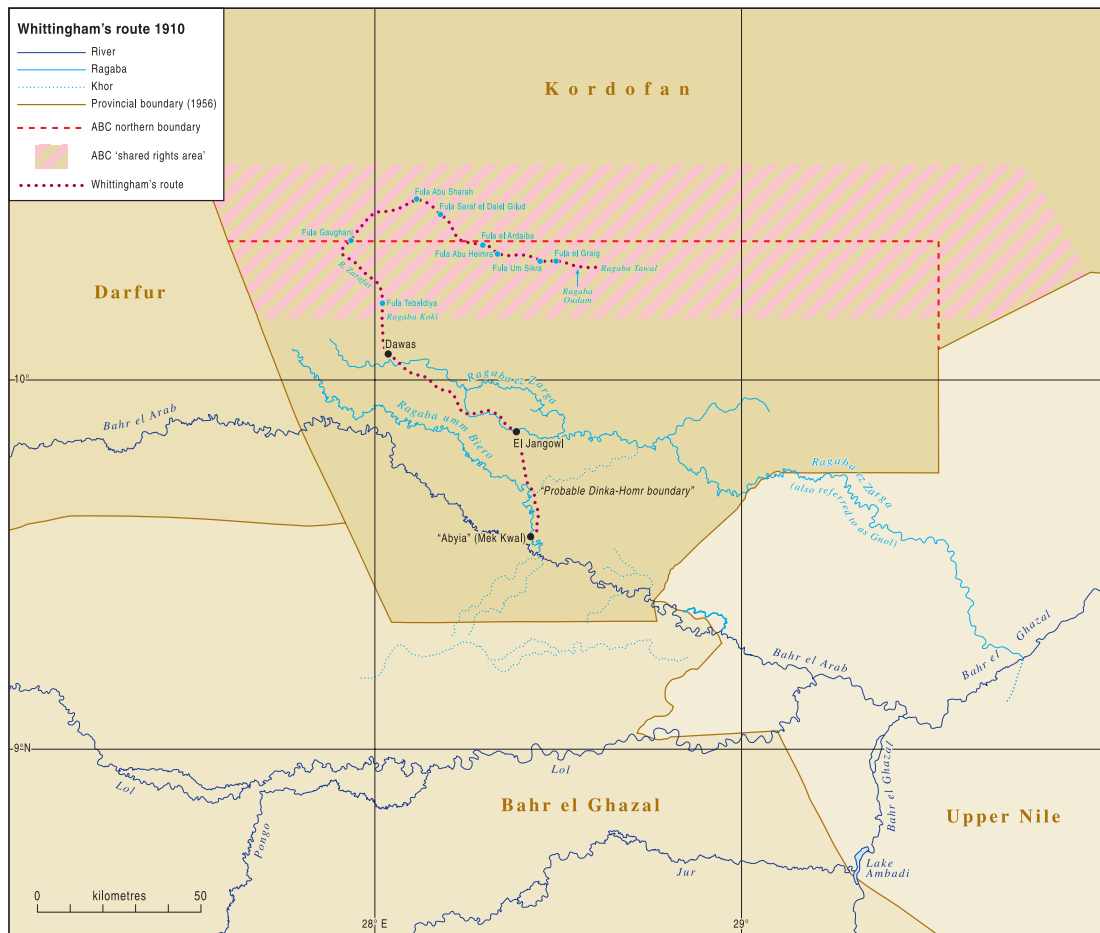


Figure 9. Whittingham Sketch. [SCM Map Atlas 18a]



**Figure 10. Whittingham Route Map.**

300. Whittingham seems to have thought he was breaking new ground in mapping the area of the Ragaba Umm Biero, as can be seen in the attached letter dated 26 April 1910 and addressed to Captain Pearson (Director of the Survey Department):

"I have sent to Governor here today, some hundreds of miles, to add to the map of Kordofan.

These are

(1) Country N. of TURDA, and S. to DAWAS and ABYIA"<sup>369</sup>

301. Whittingham ignores the Kir, as well as the last section of the Ragaba Umm Biero. Since it had not previously appeared on maps, he measured the location of "Abyia" carefully and said:

<sup>369</sup>

Whittingham, Letter to Pearson (26 April 1910), p. 1 (SCM Annex 34).

"I have struck three or four times and it is about 3½ miles up the tributary which is shown on the HASOBA sheet."<sup>370</sup>

302. This cannot be Burakol, which Percival noted was on the right bank, 2 miles north up the Ragaba Umm Bieiro. Nor is this "Sultan Rob's Village" which both Whittingham and Percival noted was on the south bank of the Kir. Whittingham marked in pencil "Rob's old V." on the south bank of the Kir.

303. It is notable that in the three visits – Wilkinson (1902); Percival (1904); Whittingham (1910) – the Paramount Chief was situated in a different village. It is relevant to note that Pearson in turn commented one month later:

"the difficulties of keeping the maps up to date are much increased by the fact that the positions of villages are constantly changing, new villages are being built, and the names, often called after the headman, alter as soon as the sheik dies."<sup>371</sup>

304. In fact the modern town of Abyei is situated approximately 5 miles (8 km) up the Ragaba Umm Biero. Whittingham likely walked straight past that spot and yet there is no mention of it. It seems that the village has been relocated since 1910, possibly more than once. Thus Burakol was 2 miles up the Ragaba Um Biero in 1904; Abyia 3½ miles up in 1910; and Abyei town 4.7 miles up in 2005<sup>372</sup>.

305. Even more significant for present purposes, Whittingham notes "Probable DINKA-HOMR Boundary" a few miles to the north of Abyia. He does not explain on what basis he surmised the boundary to be located there, but he clearly was not suggesting that the boundary was the Ragaba ez Zarga; much less 10°35'N. Moreover, as **Figure 10** shows, he had travelled through much of the ABC's "Shared Rights Zone" on his way to the south: he would not have proposed a Dinka-Homr boundary south of El Jangowi if he had found Ngok villages any further north. In this respect his route map is in itself decisive against the SPLM/A claim.

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<sup>370</sup> Ibid., p. 1.

<sup>371</sup> Pearson, H.D., "Progress of Survey in the Anglo-Egyptian Sudan", (35/5) *The Geographical Journal*, (May, 1910), 532, at p. 540 (SM Annex 58); see also First Macdonald Report, para. 3.5, p. 170.

<sup>372</sup> See Abyei Map prepared by University of Berne for the ABC Experts, available at: [http://www.cde.unibe.ch/Tools/Gis\\_Sudan\\_Ts.asp#Abyei\\_1](http://www.cde.unibe.ch/Tools/Gis_Sudan_Ts.asp#Abyei_1)

(c) *Conclusions on the Post-Transfer Period*

306. To conclude, in the years after the transfer in 1905 there may have been some continued movement by the Ngok into areas just to the north of the Kir/Bahr el Arab, but this was limited. The nine Ngok Dinka chiefdoms remained essentially located on and around the Bahr el Arab. Moreover during this period the head of the Ngok resided at the "new village", Burakol, between the Bahr el Arab and the Umbieiro. Claims to occupation and use of the area north to 10°35'N are entirely unsubstantiated in the documentary record contemporary with the transfer.

(v) **The Inter-War Period**

307. According to the SPLM/A Memorial, in the inter-war period, the situation did not change. This is evident from their analysis of three 1936 maps<sup>373</sup> – the only maps referred to in the Memorial made during the inter-war years, and chronologically their last maps. Indeed it is a central tenet of the SPLM/A case that Ngok and Baggara usage and occupation of the surrounding areas has not changed *at all* since 1905. Thus, the Memorial asserts:

"Absent some affirmative reason to conclude that the territories of the Ngok or the Misseriya altered between 1905 and later points in time, the correct inference is that the Ngok continued to inhabit and use the same lands that they historically had occupied and used."<sup>374</sup>

308. The true situation can be seen in a series of sketch maps and route reports covering this period. It did indeed not change to any degree; Ngok Dinka settlements remained on and around the Bahr el Arab.

Heinekey's route reports (February-March 1918)

309. The first of these reports is a three part journey made by El Bimbashi G.A. Heinekey in the late summer of 1918. His route is shown on **Figure 11**. He travelled (1) from Muglad south to Gerinti, near the Bahr el Arab, briefly crossing into Darfur and back again into Kordofan; (2) from Gerinti along the

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<sup>373</sup> See SPLM/A Memorial, paras. 998-1003.

<sup>374</sup> Ibid., para. 946.

Gurf/Bahr el Arab to Mek Kwal's village, and then (3) from Mek Kwal's village to Jebel Shat Safia in the Nuba Mountains. Highlights of the reports<sup>375</sup> are as follows:

**Heinekey Route Report: From Gereiga (Muglad) to Gerinti and the River Gurf February, 1918**

Ghereiga	The track is good and runs through much cultivation and many ferigs which are occupied during the rainy season
Megabi	Arabs (Homr) who do not migrate south in dry weather dig wells here.
...	...
Rahad El	...
Id El Fuda	Wells here only opened in the late summer by Arabs returning from the river.
...	...
R. Meri	Camps on both sides of river.

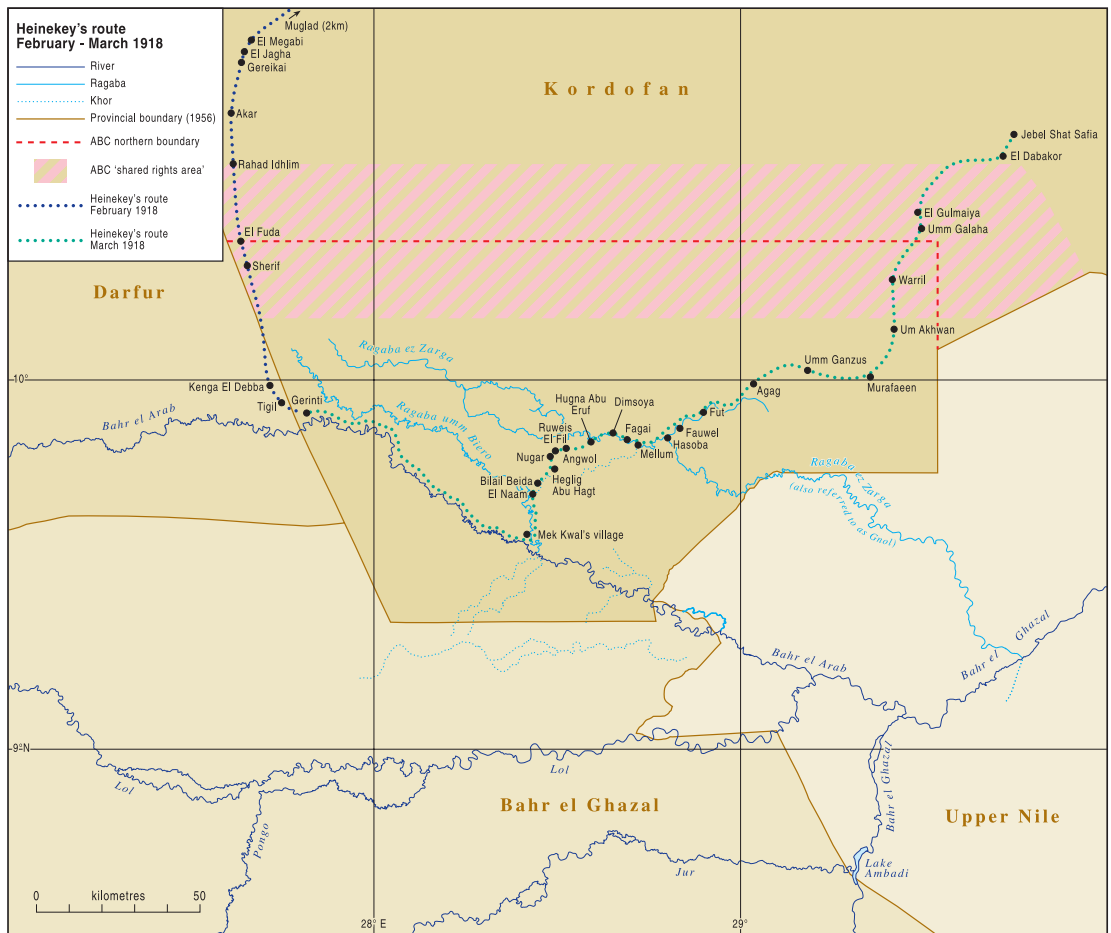
**Heinekey Route Report: Fom Gerinti to Mek Kwal's Village (Dinka)**

**March, 1918**

Note: - A guide is essential – no track.  
From GERINTI to Mek KWAL's village along the River GURF (except where it takes a big bend south) is about sixty miles.  
....  
There is no track of any sort... ..The Arabs when they go down to Kwal to buy grain do not go along the Gurf but along the Ragaba Um Biero which flows parallel and is North of the Gurf.  
...  
Mek Kwal's village is situated between the Ragaba Um Biero and River Gurf and not far off the place they flow into each other (3 miles). Mek KWAL himself is the leading Mek of the Kordofan Dinkas and also chief of the MARAEIG Dinkas. There is much cultivation all around. There is also a Rest House.

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<sup>375</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).



**Figure 11. Heinekey Route Map.** [SCM Map Atlas 19]

**Heinekey Route Report: From Mek Kwal's Village to Jebel Shat Safia, March, 1918**

Kwal's village	... The Ragaba Um Bieiro to the East is crossed after about 4 miles...
...	...
Nugar	A Ragaba with plenty of water standing ... Ferigs. This Ragaba is the head waters of the Ragaba El Zerga.
...	...
Hasoba	On the Ragaba El Zerga. Homr Ferigs. Track here follows the Ragaba.
...	...
Agag	A Ragaba with abundant water ... Good shade. Many ferigs.
...	...
Murafaen	Track which is clearly defined is the one Arabs use when on way to Jebels to buy grain.
...	...
El Gulmaiya	Waterholes dug by Arabs also dry at 1 ft.
...	...
El Dabakar	An Arab village off track to left. After another 3 miles first view of the Jebels is obtained and cultivation starts and Jebel Shat Safia wells are passed.
Jebel Shat Safia	A small thickly populated jebel. With plenty of water."

310. Heinekey's reports largely speak for themselves, but the following remarks may be made:

- (a) There are numerous mentions of Arab (Humr) wells on the journey south to Gerinti, in particular of Humr migrations south to the river. There are numerous references to Humr cattle camps (ferigs). There is no reference to the Ngok.
- (b) From Gerinti to Mek Kwal's village, "[t]here is no track of any sort"; the impression given is of an unpopulated region.
- (c) The position changes near Mek Kwal's village, between the Bahr el Arab and the Umbieiro: "[t]here is much cultivation all around".
- (d) Mek Kwal's village is still on the right bank of the Umm Biero: there is no mention of the name Abyei in the report, although it had already appeared in the documentary record.
- (e) Shortly after leaving Mek Kwal's village references to the Ngok cease; by the Ragaba ez Zerga, there are frequent references to "Humr Ferigs", at Nugar, Hasoba and Agag.

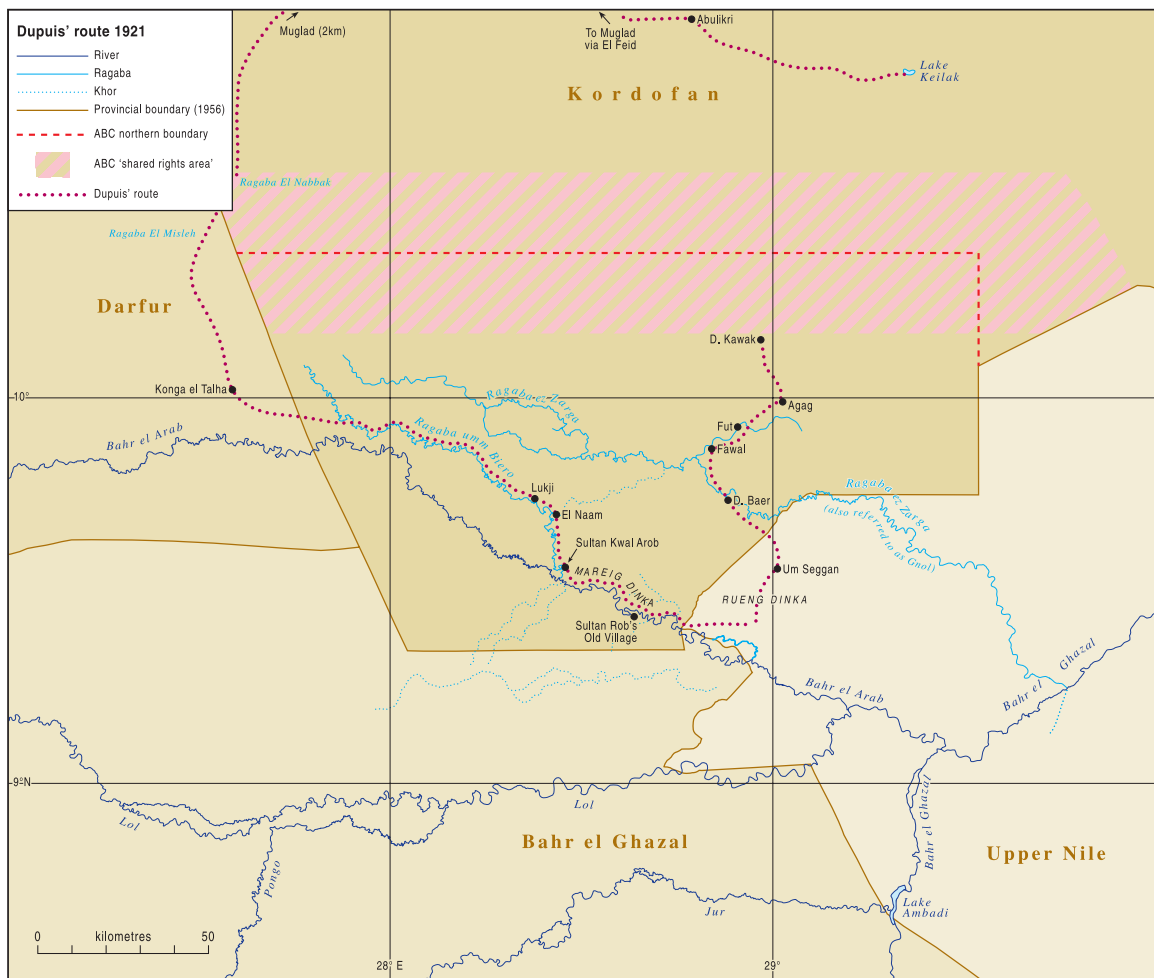
Yet for approximately 85% of this lengthy journey, Heinekey was travelling through what the SPLM/A Memorial pretends is "Ngok Dinka country", i.e. the vast area below 10°35'N. For most of his trip the Ngok are notable only for their absence.

#### Dupuis' sketch of Dar Humr (1921)

311. The same is true of the quasi-circular "Wheel and Compass Sketch of a tour of Dar Humr" made by Inspector C.J. Dupuis, District Commissioner of West Kordofan, dated 5 May 1921. The track sketched starts at Keilak in the north, passes through Muglad, thence south to the region of the Ragaba Umm Biero, passing through Lukji, El Naam (where there is a dugdug or Dinka cattle camp), through Sultan Kwal Arob (on the left bank of the Ragaba), thence through "Mareig Dinka" country east to Khor Etai, thence the country of the Rueng Dinkas and further north east. Of this vast expanse (a large fraction of which is included in the ABC Experts' "Abyei Area"), the Mareig Dinka are indicated as occupying only the extreme south. See **Figure 12**, and for the whole sketch see SCM Map Atlas, Map 39a. There are clustered the following names under the rubric "Mareig Dinkas": Bongo, Abyor, Manyweir,



Marang, Achak (four of the nine chiefdoms). The sketch shows no trace of any northerly Ngok possession or use. Nor do the Ngok extend east of "Sultan Rob's village": the next group on the river is the Anyanga, then the Rueng, neither of them Ngok. The most northerly indication is the word "dugdug" some miles north of Lukji on the Um Biero. The term "Abyei" does not appear, though Sultan Kwal Arob is located approximately where Abyei town now is. Again, the sketch, official in preparation and provenance, flatly contradicts the SPLM/A claim.

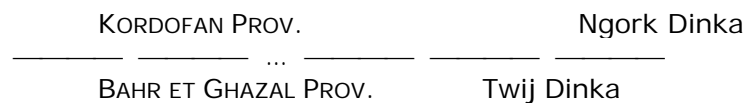


**Figure 12. Dupuis Route Map.** [SCM Map Atlas 39a]

G.W. Titherington's sketch of Bahr el Ghazal (1924)

312. Useful information on several fronts is also contained in a sketch of corrections for Map sheets 65 K-L-O, signed by G.W. Titherington Bimb[ashi] and dated 1924: it is **Figure 13**. For the most part it shows areas of Bahr el Ghazal Province of no relevance to the present dispute. But the northern-most

section of the sketch has important indications. First, there is the straight-line boundary shown as follows:



This confirms that the adoption of the straight-line southern boundary of Kordofan was associated with the return of the Twic Dinka to Bahr el Ghazal.<sup>376</sup>

313. Secondly, there is the following annotation on the left bank of the Umm Bieiro, just north of the Bahr el Arab:

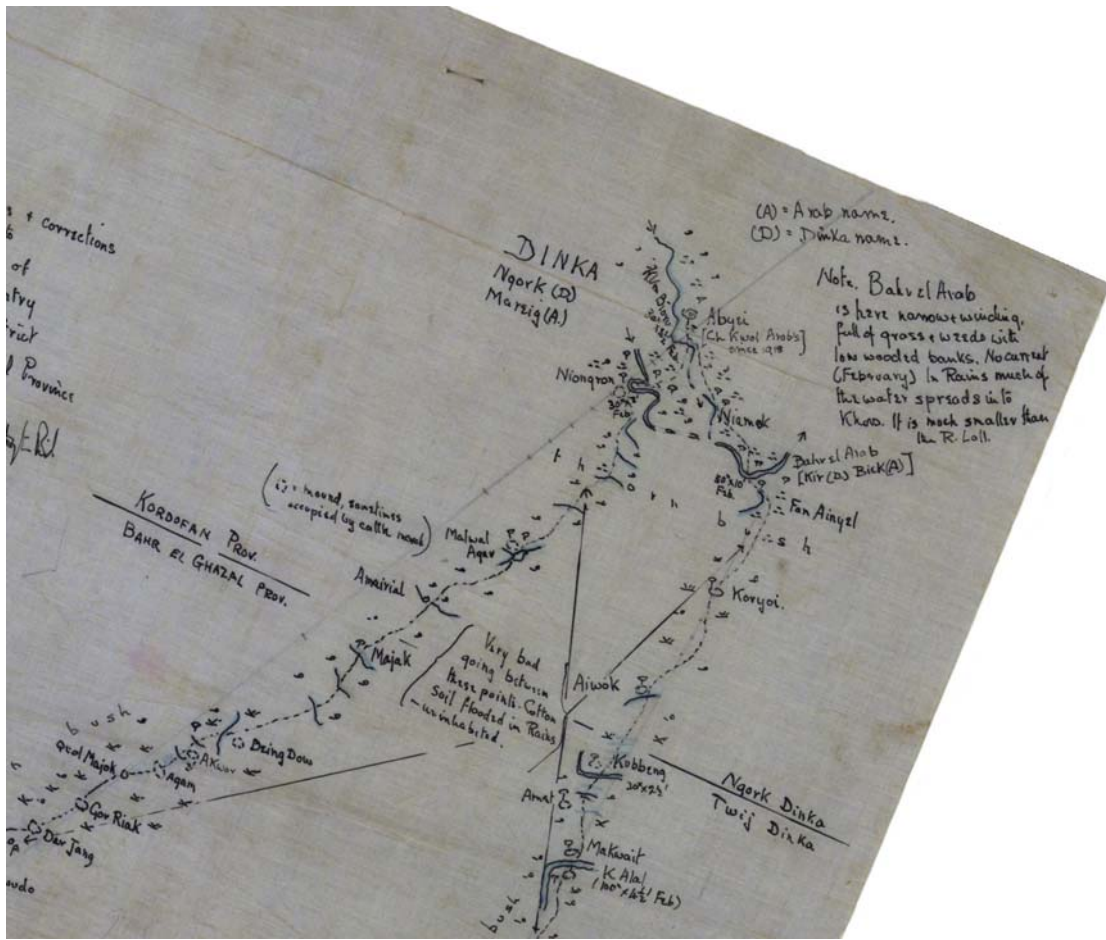
"Abyei  
[Ch Kwol Arob's  
since 1918]"

This is good evidence, from a knowledgeable Condominium official,<sup>377</sup> of the date from which Kwol Arob took up residence in Abyei.

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<sup>376</sup> See GoS Memorial, para. 381.

<sup>377</sup> Titherington is the author of works on the Dinka: see for instance, "The Raik Dinka of Bahr el Ghazal Province", (1927) 10 *Sudan Notes and Records* 158-209 (SM Annex 59).



**Figure 13. Titherington Sketch.**

Henderson's route report (1933)

314. Perhaps of even greater significance – given his status as an authority on Ngok migration – is a route report by K.D.D. Henderson of the dry weather motor road Muglad to Abyei, dated 2 March 1933. Henderson motored from Muglad to Abyei and further south, recording distances, settlements and other features. Henderson's report reads in part (numbering represents road kilometres from Muglad):

- "133. Emerges into open country at Intila. Road skirts east side of Regeba Zerga (which here runs south east) for seven kilos and passes through a gap in the line of the regeba, at
- 139. Rigl Um Kheir.  
Soil now changes and the Talh appears again at last.
- 139. Regeba Um Kheir. Pools and thick trees to the west.
- ...
- 180. Regeba Um Bieiro, Thick Talh.
- 186. Lukji. *First Dinka houses.*
- 189. Naam. Pool and house of Deing Majok.  
Bad going on cracked cotton soil henceforward.

...  
Abyei Resthouse and airodrome."<sup>378</sup>

315. The following points may be made about Henderson's report:

- (a) The first Dinka houses are located at Lukji, only 18 kilometres north of Abyei and south of the Um Bieiro.<sup>379</sup>
- (b) No Dinka houses or camps are reported between the Ragaba ez-Zarga and the Um Bieiro, even though access to this area along the main road would have been easy.
- (c) Paramount Chief Deng Majok's house is located at Naam, 15 kilometres north of Abyei. This was where the Dinka court was held at the time; it only moved to Abyei later in the decade.
- (d) By contrast, the line of latitude 10°35'N is only 54 kilometres along the Muglad-Abyei road, approximately 150 road kilometres north of Abyei, 132 kilometres north of Lukji.

Henderson's report is likewise completely inconsistent with the SPLM/A claim.

Civil Secretary files, coloured sketch map (1933)

316. The same is true of a sketch-map from the Civil Secretary files attached to minutes of a meeting held on 28 October 1933 to settle Malwal Dinka claims vis-à-vis the Rizeigat of Darfur and the Humr to graze to the south of the Bahr el Arab.<sup>380</sup> The coloured sketch-map is reproduced as **Figure 14**. It shows the "Ngork Dinka" (shown in purple) as confined to the basin of the Bahr el Arab, between the Umbieiro and the southern boundary of Kordofan, hemmed in by waterless areas to the east, west and north. They occupy an area of approximately 500 square miles, whereas the area between the southern boundary of Kordofan and latitude 10°35'N is approximately 9660 square miles, nearly 20 times as much. Also to the north (but to the

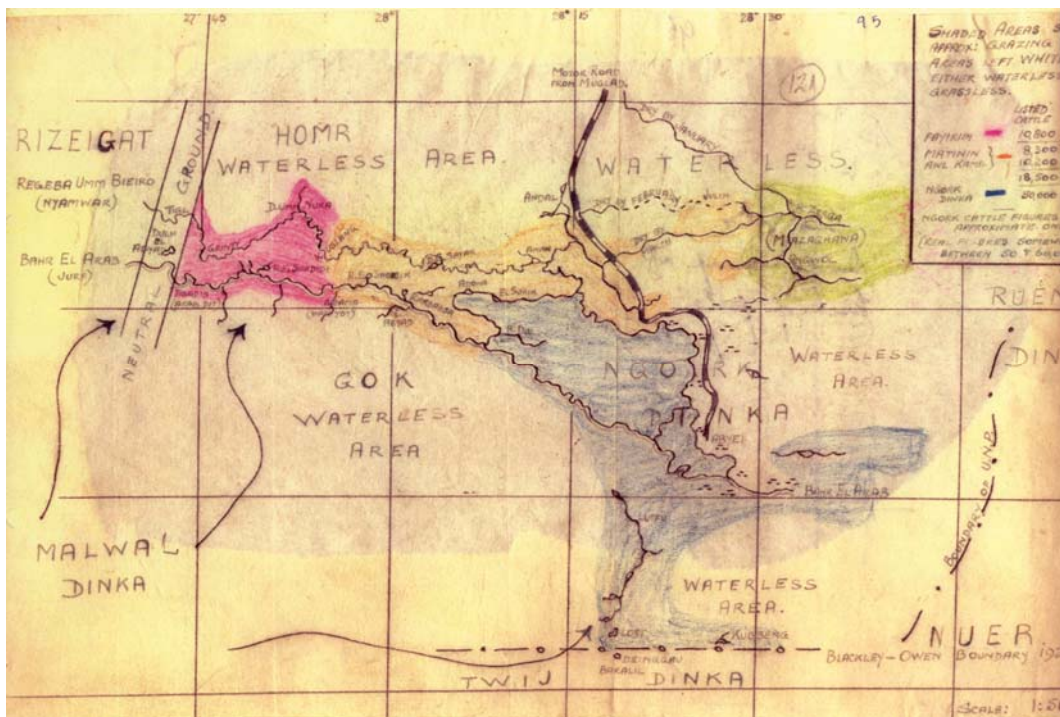
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<sup>378</sup> Henderson, K.D.D., Route Report: *Muglad to Abyei*, March 1933 (emphasis added) (SCM Annex 38).

<sup>379</sup> Lukji is shown on Sheet 65-K, Abyei (1936): GoS Memorial, Map Atlas, Map 25, at approx. 9°44'N, 28°23'E (these are the co-ordinates listed in the 1931 gazetteer (SCM 28).

<sup>380</sup> Civsec 66/4/35, "Minutes of Meeting", 28 October 1933, pp. 92-95 (SCM Annex 39). The same map was attached to the Agreement of 7 March 1935 about the Ngork-Twij Grazing Dispute on the Alal: Civsec 66/4/35, "Agreement made at Wunrog", 7 March 1935, pp. 135-139 (SCM Annex XX).

south of the Ragaba ez-Zarga) are shown Humr omodiyas such as the Mazaghana and the Fayirim. The maximum northerly reach of the Ngok Dinka according to this map was about 9°30'N in 1933. It is significant that the interests of the Ngok Dinka were not considered as relevant at the meeting of 28 October 1933:<sup>381</sup> the clear implication is that the Rizeigat and the Homr, not the Ngok, were interested in grazing rights on the Bahr el Arab west of 28°05'E. Those grazing rights have now been acquired exclusively by the Ngok Dinka, according to the decision of the ABC Experts.<sup>382</sup>



**Figure 14. Grazing Area Map 1933.** [SCM Map Atlas 22a]

317. The documents discussed in the preceding paragraphs are illustrative, not exhaustive. Other contemporary documents to similar effect – in relation to the interwar period – include the following:

- (1) MacMichael, writing in 1922, notes that the Humr country extends all the way south to the Bahr el Arab;<sup>383</sup>
- (2) the 1938 Map of Native Administration of Kordofan Province<sup>384</sup> clearly shows the Ngok Dinka occupy an area well south of 10°N;

<sup>381</sup> See Civsec 66/4/35, "Minutes of Meeting", 28 October 1933 (SCM Annex 39).

<sup>382</sup> See GoS Memorial, paras. 249-253.

<sup>383</sup> MacMichael, H.A., *A History of the Arabs in the Sudan* (CUP, Cambridge, 1922), p. 286 (SM Annex 41); see GoS Memorial, para. 386.

- (3) Stubbs & Morrison (1938), state the north-most river on which the Ngok live is the Bahr el Arab.<sup>385</sup>

318. Even during the inter-war period, then, the area of Ngok use and occupation, reliably attested by knowledgeable, neutral observers, bore no resemblance to the SPLM/A claim.

#### (vi) The Period Prior to Independence in 1956

319. As seen in the previous sections, all evidence place the Ngok on and around the Bahr el Arab. This is so for the late 19<sup>th</sup> century and the early 20<sup>th</sup> century – both before and after the crucial year of 1905. After the 1905 transfer, and improvements in relations between the Humr and Ngok, the latter slowly moved north. Yet even in the inter-war period, official records still show that the centre of Ngok life and government was on the Bahr el Arab. Correspondingly, official documents repeatedly state that the Humr migrated from Muglad in the north to the Bahr, i.e. the area between the Ragaba ez Zarga and the Bahr el Arab, settling there for up to five months a year (approx. January-May).

320. This section looks at the period after the Second World War but prior to independence in 1956. The period is interesting in that two distinguished scholars, independently of each other, conducted major research on the Humr and the Ngok. From 1947 to 1950, Dr. Lienhardt conducted fieldwork on Dinka religion. Later, Dr Ian Cunnison lived with and studied the Humr Arabs from 1952 to 1955, traveling with them twice on their seasonal migration. Both scholars published their findings and their publications contain illustrations of Humr and Ngok settlements.<sup>386</sup> The veracity of their studies is further emphasized by the fact that they correspond to official records of earlier periods.

321. Lienhardt's sketch of the regional aggregations of the various sub-tribes is reproduced as **Figure 15**; the present Kordofan boundaries and the

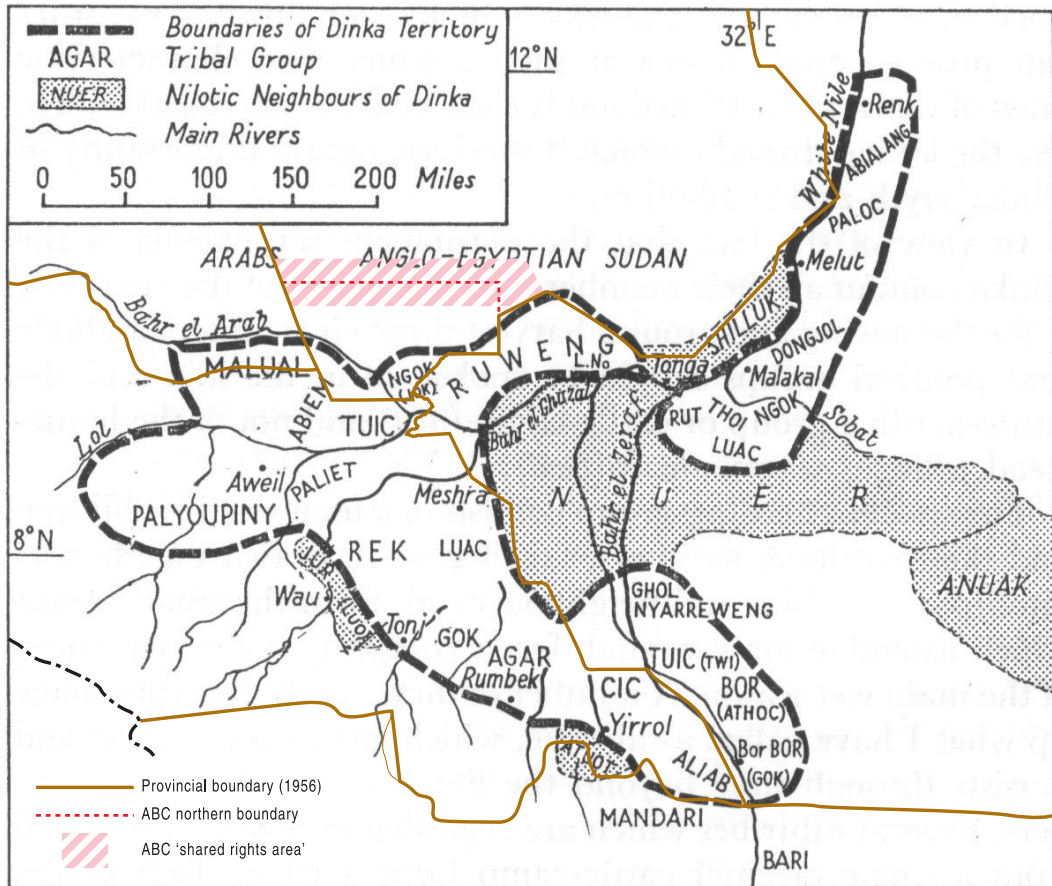
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<sup>384</sup> GoS Memorial, Map Atlas, Map 27 (note that map was updated in 1941); see GoS Memorial, para. 7

<sup>385</sup> Stubbs, J.M & Morrison, C.G.T., "The Western Dinkas, Their Land and their Agriculture", (1938) 21 *Sudan Notes and Records* 251, p. 251 (SM Annex 60); see also GoS Memorial, para. 335.

<sup>386</sup> Lienhardt, G., *Divinity and Experience: The Religion of the Dinka* (Clarendon Press, Oxford, 1967) (SCM Annex 41); Cunnison, I., *Baggara Arabs: Power and the Lineage in a Sudanese Nomad Tribe* (Clarendon Press, Oxford, 1966) (SM Annex 33).

ABC's "boundary" and "shared rights area" have been added to it. As can be seen, the Ngok occupy only a small sector of south-eastern Kordofan; that area does not overlap at all with the ABC "shared rights area" nor is there any representation of Ngok settlements near 10°35'N, as alleged in the SPLM/A Memorial.



**Figure 15. Dinka Tribal Groups, from Lienhardt.**

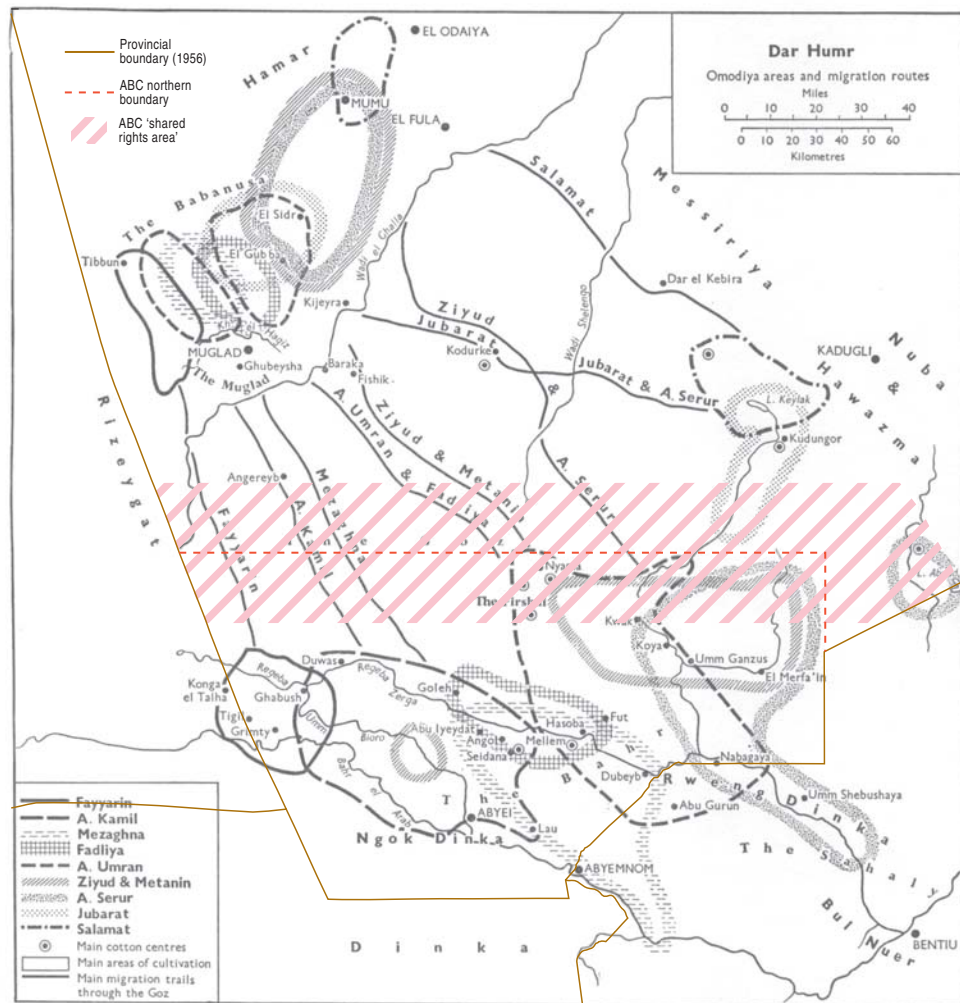
322. Cunnison's sketch is reproduced as **Figure 16**. To the original illustration have been added the present Kordofan boundaries and the ABC's "boundary" and "shared rights area". The summer grazing area of the Messeriya groups lies almost exclusively to the south – indeed many miles to the south – of the so-called "shared rights area". Cunnison depicts the Ngok on the Bahr el Arab: there is no indication that the Ngok inhabited any area significantly to the north, still less anywhere near 10°35'N. Cunnison notes

that the different sub-sections or omodiyas of the Messeriya migrate down to and in some cases over the Bahr el Arab.<sup>387</sup>

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<sup>387</sup> Cunnison, I., *Baggara Arabs: Power and the Lineage in a Sudanese Nomad Tribe* (Clarendon Press, Oxford, 1966), p. 152 (SM Annex 33).





For explanation of the map see Appendix I, and p. 26 footnote 26

(Facing p. 224)

**Figure 16. Humr Migration Routes, from Cunnison.**

323. In his second Witness Statement annexed to this Counter-Memorial, Professor Cunnison comments on the SPLM/A claim to a boundary at 10°35'N in the following terms:

"Firstly, concerning the Ngok northern Migration, it is true that individual Ngok did move north after the Mahdiya, but there was never, as suggested in the SPLM/A Memorial, any significant collective presence north of the Bahr el Arab."

He adds:

"A few words should also be said about the Humr cattle. Reading the SPLM/A Memorial one gets the impression that Dinka cattle it ideally suited for all areas whereas the Humr cattle cannot survive by the Bahr. There is even a quote from Bennet and

Hewison's *Handbook on of Agriculture as Practiced in the Anglo-Egyptian Sudan*, stating that "a large proportion of Arab cattle will die if maintained in the south during the rains." (para. 193. It is important to emphasize that this does not refer to the individual survivability of Humr cattle, but to the husbandry practice in general. In fact, as explained in my 1954 article, "...nowadays there are [Humr] cattle that remain on the Bahr to provide milk for those who stay there to tend the cotton garden during the rain." (p.55). Even so, Humr and Dinka cattle Dinka cattle are ideally suited to each their form of life. As explained in my 1960 article, the "Baggara prefer long-legged lightly built animals for the bulk of their herds, because these are well adapted to a migration life moving swiftly from camp to camp, keeping pace and not straggling. Perhaps this is best understood with reference to the Humr migration patten, which is briefly explained in my 1960 article: "Dar Humr is in four main ecological zones. In the extreme north there is *Combretum cordofanum* – *Dalbergia* – *Albizzia sericocephala* woodland savannah (the Babanusa) where the cattle graze from July to mid-September. South of this is a small area of 'Baggara Repeating Pattern' (the Muglad) in which a plain of non-cracking red clay is intersected by numerous sand ridges upon which the Humr cultivate. The Mulgad, apart from being the main cultivation area, is also the administrative centre of the tribe and has the biggest market town; cattle graze there during the early rains and round about harvest. South of the Muglad is the vast area of *Terminalia* – *Sclerocaryea* – *Anogeissus* – *Prosopis* woodland savannah (the Goz). This is really only a transit stage between the Muglad and the Bahr, although it is also used by cattle for a short time to get them away from harvesting activities. Finally, there is the 'Regeba Repeating Pattern' (the Bahr) in the south, a land of meandering watercourses, *talk* forests – *Accacia syal* – and meadows, where cattle spend the summer." There is also a diagram of this migration in my book, *Baggara Arabs*, (1966). The most important thing to note here is that, the Humr spent most of the year, from early January to late May, by the Bahr (p. 22)."

In short, the two post-war scholars with intimate knowledge of the Humr and the Ngok authoritatively contradict the SPLM/A claim.

324. The documents discussed in the preceding paragraphs are illustrative, not exhaustive. Other contemporary documents to similar effect – in relation to the post-war period – include the following:

- (1) Davies describes Dinka life as centred on the Bahr el Arab; migrating south in the wet season.<sup>388</sup>

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<sup>388</sup> Davies, R., *The Camel's Back* (John Murray, London, 1957), p. 130 (SM Annex 35); see GoS Memorial, para. 389.

- (2) Howell similarly describes the Dinka as inhabiting "the middle stretches of the Bahr el Arab" as well as up the Ragaba Um Biero.<sup>389</sup>

**(vii) Conclusions from the Documentary Evidence**

325. To summarise:

- (a) There is no contemporary document so far in the case file which shows the Ngok Dinka exercising grazing or other rights of occupation and use at 10°35'N or anywhere remotely close to it.
- (b) Nor is there any document prior to 1910 that attaches any significance to Abyei as a Ngok centre. The evidence is that Paramount Chief Kwai Arob moved to Abyei in 1918 – but still not permanently, since he resided at Naam in 1933.
- (c) By contrast, the Humr Arabs are recorded as having a significant presence seasonally down to the Bahr el Arab.

***C. Recently-Prepared Evidence of Oral Tradition***

326. Both before the ABC and now before the Tribunal, the SPLM/A has relied – it is not too much to say, relied primarily – on witness statements prepared since the Abyei dispute has arisen and taken from persons directly interested in the outcome of that dispute. The approach that should be taken to oral testimony garnered in such circumstances was discussed in Chapter 1.<sup>390</sup> The comments which follow are supplementary.

327. In the SPLM/A witness statements, there are three major assertions that feature in almost every witness statement:

- (a) The Messeriya have only been grazing their cattle in the Abyei region since the 1950s or 1960s;
- (b) Immediately prior to that, the Messeriya did come to the area but only as traders, not cattle grazers;
- (c) The real boundary between the Ngok and the Messeriya can be found at Tebeldiya (approximately 10°35'N).

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<sup>389</sup> Howell, P.P., "Notes on the Ngork Dinka of Western Kordofan", (1950) 32 *Sudan Notes and Records* 239, pp. 241-242 (SM Annex 53); see GoS Memorial, para. 390.

<sup>390</sup> See above, paragraphs 33-47.

No-one with any experience of real oral testimony of traditional title or ancient boundaries would expect such unanimity. The problem is accentuated in that each of these three propositions is contradicted by the documentary and map evidence, to the point of being demonstrably untrue.

328. Yet the ABC Experts seem to have fallen for uncorroborated oral evidence. True, in the summary of their Report, they stated that the much of the oral testimony appeared to be based on inferences and that "details of actual events in 1905 were scanty".<sup>391</sup> During the process, they announced:

"since there is no agreement from the oral testimony and that testimony does not conclusively prove either side's position, we will undertake to find as much evidence from contemporary records as we can... We will confine ourselves to records contemporary with or referring to the period of the Anglo-Egyptian Condominium."<sup>392</sup>

329. The reason for adopting such a position was subsequently explained by the Chair of the ABC Experts, Mr D. Petterson, in the following terms:

"Because the positions of the two sides were almost identical to that of the Government on the one hand, and the SPLM on the other hand, and because the wording used by many of the people who were interviewed was so similar, it was apparent to us that they had been coached and that the testimony, while of some use, was essentially worthless in terms of our making a decision."<sup>393</sup>

330. In contrast to their announced finding and this subsequent statement, however, the ABC Experts did rely on uncorroborated oral evidence. With respect to Proposition 8, the Experts found that Ngok responses were "detailed and extensive" whereas Misseriya testimony was "sparse".<sup>394</sup> The SPLM/A Memorial draws from this and argues that the witness statements of the Ngok Dinka witnesses is similarly "detailed and extensive" and should be given significant weight.<sup>395</sup>

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<sup>391</sup> ABC Experts' Report, p. 10 (SM Annex 81).

<sup>392</sup> ABC Experts, Note of 25 April 2005, cited in GoS Memorial, para. 75.

<sup>393</sup> North, H., Interview with Donald Petterson (United States Institute for Peace, Association for Diplomatic Studies and Training, 22 August 2006; available at <http://www.usip.org/library/oh/sops/sudan/19.pdf> (last accessed, 11 February 2009) (SCM Annex 42).

<sup>394</sup> ABC Experts' Report, pp 41,42 (SM Annex 81); cited in the SPLM/A Memorial, para. 1018.

<sup>395</sup> SPLM/A Memorial, para. 1019.

### (i) Accuracy of Oral History Generally

331. From a historiographical perspective, uncorroborated oral histories are notoriously inaccurate. Even outside the forensic context, they tend to reflect cultural identity rather than constituting an accurate record of the past. As stories are repeated, precise periods of time become blurred; facts and figures overlooked; and the fallibility of human memory becomes clear.

332. A simple example: the witness statement of Mijak Kuol Lual Deng, the new Mareng chief, states that his father was born in 1938.<sup>396</sup> However, in his father's witness statement, he clearly states he was born in 1914 – a difference of 24 years.<sup>397</sup> The discrepancy is no doubt trivial in itself; but in the context of a mandate referring to a precise date in time – 1905 – discrepancies of this kind raise questions as to the reliability of oral history.

333. Ngok oral traditions and history depend upon repetition, and are only as accurate as the last person who spoke, or more to the point, the last person who remembered. In fact many witnesses qualify their statements with phrases such as:

- "I understand...";<sup>398</sup>
- "My knowledge from our oral history is that...";<sup>399</sup>
- "as far as I understand";<sup>400</sup>
- "According to the Ngok oral history taught to me by my father and his father...".<sup>401</sup>

The truth of a statement of this kind – uncorroborated by documentary sources – is essentially unverifiable.

334. Akon Ajuong Deng Tiel, the Anyiel Chief, explains how the oral history is passed on to each generation. He states:

"An example of how our oral history is passed on is an incident in the north about 10 years ago. In 1995 I attended a meeting of traditional chiefs in Nahud, between the Misseriya and Ngok

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<sup>396</sup> SPLM/A Memorial, Witness Statement of Mijak Kuol Lual Deng, Tab 26, para. 3.

<sup>397</sup> Ibid., Witness Statement of Kuol Lual Deng Akonon, Tab 27, para. 3.

<sup>398</sup> Ibid., Witness Statement of Kuol Deng Kuol Arop, Tab 5, para. 21.

<sup>399</sup> Ibid., at para. 23.

<sup>400</sup> Ibid., Witness Statement of Kuol Alor Mackuac Biong, Tab 6, para. 9.

<sup>401</sup> Ibid., Witness Statement of Alor Kuol Arop, Tab 8, at para. 8.

Dinka. On our way to Nahyd we spent the night in the town of Mumu [Arabic: El Oddaya]. Mumu [El Oddaya] is located north of Deinga [Arabic: Muglad] and Babanusa. One of the elders, who passed away in 1998, woke me and the other young chiefs at night to explain that Mumu: [El Oddaya] was the historic boundary between the Ngok Dinka, particularly the Alei section, and the Arab Hamar (not the Messeriya because they were not in the area at that time). He said the river Kol Lang, 6 hours walk to the northeast of Mumu [el Oddaya], was the actual border. The elder told us that this border dated back to the time of the Turkish and also the time of the Mahdi."<sup>402</sup>

335. Akon Ajuong Deng Tiel further states that Dinka songs play an important part in their history. In attempting to trace the presence of Messeriya in Ngok songs, all he can recall is from the conflict in 1960, but not before. He later goes on to conclude that the Messeriya did not start coming to "Ngok lands" until the 1950s. This is a startling assertion, yet it is one of many. In fact, many of the tribal elders put 1960 as the putative date in which the Messeriya began to bring cattle into the region – a statement falsified by multiple documents and by the expert evidence of Professor Cunnison.

336. With regard to the Turkiyya and Mahdiyya periods, Kuol Alor Mackuac Biong, the Abyior Chief states:

"As far as I understand from the oral history there were no major land disputes within the Ngok or with our neighbours in the Abyei area throughout the 19<sup>th</sup> century or prior to independence in 1954."<sup>403</sup>

Accurate enough as concerns the period after 1918, this statement flies in the face of all documentary evidence and published histories: as Professor Collins notes, the 19<sup>th</sup> century was a period of great unrest, slave-raiding and conflict.<sup>404</sup>

## **(ii) The Coming of the Humr/Messeriya**

337. Although precise dates are unavailable, it is generally agreed in the historical literature that the Humr/Messeriya first came into contact with the Ngok in the late 18<sup>th</sup> century.<sup>405</sup> Yet to judge from the witness statements this

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<sup>402</sup> Ibid., Witness Statement of Akon Ajuong Deng Tiel, Tab 17, at para. 9.

<sup>403</sup> Ibid., Witness Statement of Kuol Alor Mackuac Biong, Tab 6, para. 9.

<sup>404</sup> See above, paragraph 246.

<sup>405</sup> See above, paragraph 216.

was a relatively recent event. Alor Kuol Arop, an Abyior Elder who was born in 1914 or 1915, states that according to the history taught to him from his father, the Ngok have been settled in Abyei area for hundreds of years<sup>406</sup> whereas:

"The Misseriya only came later [to the area] during the time of Biong Alor and for a long time came only to trade."<sup>407</sup>

Mijat Kuot of the Aachak tribe (born in the 1940s) places the date even later:

"Humr started coming in the time of Kuol Arop."<sup>408</sup>

Akon Ajuong Deng Tiel, the Anyiel Chief who was born in 1965 puts the date even later:

"My elders have told me that it was in the mid-1950s that Misseriya first began travelling to the Anyeil lands. They were just traders then. Before this time I have heard stories of the Rizeigat coming but not the Misseriya."<sup>409</sup>

Similarly, Peter Nyuat Agok Bol, an Alei Elder born in 1933, and sub-Chief recalls:

"In the early 1950s when I was a young man ... there were many Misseriya in Deinga at this time, but only Ngok were in Nyama and Pawol, Dakjur and the Ngol area, where we were living peacefully."

It may be noted that, generally speaking, the younger the person, the more recent the arrival of the Messeriya.

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<sup>406</sup> SPLM/A Memorial, Witness Statement of Alor Kuol Arop, Tab 8, para. 8.

<sup>407</sup> Ibid., para. 17.

<sup>408</sup> ABC Experts' Report, Appendix 4.2, p.150 (SM Annex 81).

<sup>409</sup> SPLM/A Memorial, Witness Statement of Akon Ajuong Deng Tiel, Tab 17, para. 17.

### **(iii) Northerly Extension of Certain Dinka Sections**

338. Belbel Chol Akuei Deng, the Alei Chief states:

"AREA OF THE ALEI CHIEFDOM LANDS IN 1905:

Before the British came to Sudan, the Alei chiefdom was much larger and extended further to the north and Alei were settled at a place we called Maker [Arabic: El Oddaya]. Our chiefdom has always been at the frontier of the Arab north. Over time the Alei moved further south to Thur [Arabic: Turda], which is to the northeast of Nyama."<sup>410</sup>

339. Whether or not the Alei Dinkas may ever have occupied areas as far north as Muglad (El Oddaya is much further north than this – being just north of 12°N), the indications are that they were pushed back by the Baggara in the late 18<sup>th</sup> century. Following further conflicts in the 19<sup>th</sup> century, the Ngok retreated to the Bahr el Arab.<sup>411</sup>

340. Alor Kuol Arop, an Abyior Elder born in 1914 or 1915 recounts that the Messeriya originally would come into contact with the Ngok when they came down to the Bahr during the dry season: they would then return to Muglad, and go further north<sup>412</sup>. He then adds:

"But when the Government began supporting and arming the Misseriya the Misseriya moved to Deinga [Arabic: Muglad], and then continued south and tried to claim the Alei's lands in the north as their own."<sup>413</sup>

He is recounting these events as if they were his own memories, yet if they occurred at all it was in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries. Moreover his reference to "the government" and "arming" can only refer to the period after independence.

### **(iv) The Humr/Messeriya as Traders not Cattlemen**

341. As noted earlier, the Paramount Chief states that:

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<sup>410</sup> Ibid., Witness Statement of Belbel Chol Akuei Deng, Tab 15, para. 9.

<sup>411</sup> See above, paragraphs 209-230.

<sup>412</sup> SPLM/A Memorial, Witness Statement of Alor Kuol Arop, Tab 8, para. 23.

<sup>413</sup> Ibid., para. 23.



"From around the late 18<sup>th</sup> Century, the Misseriya came to parts of the Ngok land, although not all, and mostly to trade. Later still, the Misseriya came to Ngok land to graze their cattle."<sup>414</sup>

Alor Kuol Arop, an Abyior Elder, who was born around 1914 or 1915, goes even further:

"When I was a young boy I saw Misseriya ... they had no cattle. The early groups [of Misseriya] were just traders. They would trade salt. Later I saw them trading millet which they had cultivated from up around Deinga [Arabic: Muglad]."<sup>415</sup>

342. Many other witnesses state that the Messeriya were traders and did not bring cattle down to the Bahr until just prior to the war in 1964.<sup>416</sup>

343. This *communis opinio* is flatly inconsistent with the documentary record. Reference may be made, for example, to the writings of Gessi Pasha (above, paragraph 228), Wilkinson (above, paragraphs 258-262), Mahon (above, paragraph 264), Lloyd (above, paragraph 296), Hallam (above, paragraph 295), and Heinekey (above, paragraph 309), as well as to the scholarly writings of Cunnison (above, paragraph 244) and Collins (above, paragraph 246). And the problem is not one of some isolated factual issue: it is fundamental to the credibility of the witness statements in their ensemble.

#### **(v) The So-Called Border at Tebeldiya**

344. Six of the nine tribes feature stories regarding the rest house at Tebeldiya, which is situated at 10°35'N.<sup>417</sup> They assert that this was the actual border between the Ngok and Misseriya. This is highly relevant to both issues on the appeal as the oral testimony is the only evidentiary basis on which the Experts proposed the 10°35'N claimed border as entitled to any weight. In fact, however, there is not one piece of documentary evidence that supports this proposition, and there is much that contradicts it.

#### Alei Chiefdom

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<sup>414</sup> SPLM/A Memorial, Witness Statement of Kuol Deng Kuol Arop, Tab 5, para. 35.

<sup>415</sup> Ibid, Witness Statement of Alor Kuol Arop, Tab 8, para. 18.

<sup>416</sup> See also, e.g., *ibid.*, Witness Statement of Jok Deng Kek, Tab 14, para. 12; *ibid.*, Witness Statement of Nyol Pagout Den Ayei, Tab 20, para. 21; *ibid.*, Witness Statement of Malual Alei Deng, Tab 29, para. 12; *ibid.* Witness Statement of Malok Mien Ayiek, Tab 18, para. 9; *ibid.*, Witness Statement of Mijak Kuot Kur, Tab 12, para. 13.

<sup>417</sup> Like many names in Sudan this name derives from a tree. The 1931 Gazetteer, p. 303, lists 18 features with that name.

345. The first reference during the Khartoum interviews to this border was made by an Alei Dinka – Peter Nyuat Agok Bol, an Alei Elder and sub-chief.

"Q: We pointed out that the Ngok were not claiming to return to Muglad and El Oddaya. What we needed was evidence of Pawol, Nyama, etc.?"

A: Dhinyduol/Tebeldia. A government rest house was built there as a meeting point for Ngok and Misseriya. N & S of Tebeldia there were no villages."<sup>418</sup>

### Abyior Chiefdom

346. Deng Chier Agoth, an Abyior elder who was present at the Khartoum Interviews, states at p 154 of the Experts' Report:

"At Tebeldia the rest house was built as a land mark for the border (told this by Deng Major). A post was placed between two baobab trees by the colonial government to demarcate the border between Ngok and Misseriya, so even if it is no longer there, the trees will be."<sup>419</sup>

This assertion is then largely repeated in his witness statement where he says:

"Tebeldiya itself was nothing more than a rest house for the government representatives travelling from el Obeid to the south through Abyei town ... the Paramount Chief Deng Majok had told me that the rest house at Tebeldiya marked the border between the Ngok and Misseriya. A post was actually put up between two tebeldiya trees by the British to mark the border between the Ngok and Misseriya."<sup>420</sup>

347. Kuol Alor Mackuac Biong, the Abyior chief also states:

"Tebeldiya is a place marked by a tebeldiya tree. It is where the British marked the border between the Ngok and the Misseriya lands."<sup>421</sup>

348. Arop Deng Kuol Arop, an Abyior elder, states:

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<sup>418</sup> ABC Experts' Report, Appendix 4.2, p.151 (SM Annex 81).

<sup>419</sup> Ibid., p 154.

<sup>420</sup> SPLM/A Memorial, Witness Statement of Deng Chier Agoth, Tab 7, para. 10.

<sup>421</sup> Ibid., Witness Statement of Kuol Alor Mackuac Biong, Tab 6, para. 16.

"The British would put down tribal markers. One of these markers is the post in concrete along the road from Abyei town to Deinga [Arabic: Muglad] at a place called Tebeldiya, which marks the border between the Ngok and the Misseriya."<sup>422</sup>

#### Achaak Chiefdom

349. Mijak Kuot Kur, an Achaak Elder who also was present at the Khartoum meeting recalls that he was required to assist in road clearing. He adds:

"If there is no road passing in your section's territory you are called to help in areas where the people are few or one section alone cannot do all the work. In Tebeldiya there was a British centre. There was no problem when the Ngok Dinka met the Misseriya in Tebeldiya."<sup>423</sup>

#### Anyiel Chiefdom

350. Deng Aru, who did not give a Witness Statement in the SPLM/A folder but was present at the Khartoum meeting is recorded in the Khartoum transcripts as stating:

"Up to the time of Arop Biong the Anyiel were still living in the northern line of villages from [sic] Nyama to Tebeldia. These are where they were living when the British came."<sup>424</sup>

351. The story of clearing the road to Tebeldiya is repeated by Malok Mien Ayiek, an Anyiel Elder. He states that the road went from Abyei town to the "far north:

"The Nogk, including the Anyiel, had to clear the road up to Tebeldiya. My father and his father before him have cleared the same road that I cleared when I was younger. Members from all the Ngok Dinka chiefdoms, except the Diil and Achaak, helped to clear this road. The Arabs or Misseriya cleared the same road but only further north, up past Tebeldiya"<sup>425</sup>

Yet he also mentions that his grandfather died during the Mahdiyya (Witness Statement of Malok Mien Ayiek, at ¶14). There was clearly no road during that time, thus it is clear that this statement is, at least partly, based on

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<sup>422</sup> Ibid., Witness Statement of Arop Deng Kuol Arop, Tab 9, para. 25.

<sup>423</sup> Ibid., Witness Statement of Mijak Kuot Kur, Tab 12, para. 12.

<sup>424</sup> ABC Experts' Report, Appendix 4.2, p. 153 (SM Annex 81).

<sup>425</sup> SPLM/A Memorial, Witness Statement of Malok Mien Ayiek, Tab 18, para. 8.

unacknowledged inferences and assumptions. Interestingly enough, while he asserts that the Achaak and Diil would not have participated in the road (presumably because there claimed lands do not come anywhere near the motor road from Abyei town to Muglad), Mijak Juot Kur, from the Achaak tribe claims that he did work on the motor road.

### Bongo Chiefdom

352. Nyol Pagout Deng Ayei, the Bongo chief states:

"The Ngok lands went as far north as Tebeldiya. There was no settlement there that I know of. Traditionally we considered it the border between the Ngok and the Misseriya. The British put a post here as the border between our lands. At this location there used to be a resting house built by Mr Tibbs, the British District Commissioner."<sup>426</sup>

He also volunteers that the Messeriya regarded Tebeldiya as lying outside their lands (and therefore presumably, well within Ngok Dinka lands)

"For the road from Abyei town to the north, we Ngok used to cut up to Seteib (Setep) and beyond to Tebeldiya. The Misseriya would take over responsibility for the road from Tebeldiya (although they were not happy about that because they had not homes in that area so disputed that they should be required to cut the road from there)."<sup>427</sup>

### Diil Chiefdom

353. Mijok Bol Atem, a Diil Elder states:

"I recall in 1955, I passed through the main road to Dhony Dhoul [near Tebeldiya] driving cattle. Dhony Dhoul was an Abyior settlement at this time.

...

The British built a centre at Tebeldiya, where the bricks remain to this day. I passed this place when I was very young. The British constructed a police centre due to complaints about Arabs abducting children."<sup>428</sup>

354. The following points may be made about the so-called "border at Tebeldiya":

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<sup>426</sup> Ibid., Witness Statement of Nyol Pagout Deng Ayei, Tab 20, para. 14.

<sup>427</sup> Ibid., para. 15.

<sup>428</sup> Ibid., Witness Statement of Mijak Bol Atem, Tab 23, at paras. 12-13.

- (a) It is not supported by a single item of documentary evidence.<sup>429</sup>
- (b) It is contradicted by all the written and map evidence, reviewed above. Reference may be made, *inter alia*, to the reports of Wilkinson (above, paragraph 253), Mahon (above, paragraph 252), Comyn (above, paragraph 290), Willis (above, paragraph 298), Hallam (above, paragraph 291), Heinekey (above, paragraph 309), Dupuis and Henderson (above, paragraph 311), as well as to the scholarly writings of Cunnison (above, paragraph 322), Santandrea (above, paragraph 224), Sabah (above, paragraph 225), and Beswick (above, paragraph 221).
- (c) In terms of a boundary determined as at 1905, it is doubly inconsequential to refer to an alleged Condominium requirement for maintenance of a single road. First, that requirement did not exist in 1905, when there were only tracks in the area and no maintained roads. Secondly, there is no evidence at all that in allocating lengths of the Muglad-Abyei road to be maintained, the Kordofan officials were establishing a lateral province-wide boundary along the 10°35' parallel. Why would they do so?<sup>430</sup> Their concern was to maintain a road, not to divide a province.
- (d) It will be recalled that the only contemporary evidence relating to tribal locations on the main road – that of Henderson in 1933 – has the first Ngok village on the way south at Lukji, much more than 100 kilometres from the alleged "border at Tebeldiya".<sup>431</sup> That "border" wholly lacks credibility. In giving it credence, the ABC Experts lost their own credibility too.

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<sup>429</sup> The only document cited by the SPLM/A Memorial, para. 986 is the 1907 Lloyd Map (Map 39 of the SPLM/A Memorial) where an arrow appears south of where Tebeldiya might be, stating "to Dar Jange". This is not evidence of a border at Tebeldiya.

<sup>430</sup> For the modern practice in relation to road maintenance see the witness statement of Herika Izz-Aldin Humeda Khamis, former administrative officer in Abyei 1970-1971, para. 30.

<sup>431</sup> See above, paragraph 328.

## (vi) Conclusions on the Oral Evidence

355. In perhaps the leading work on oral tradition as history, Vansina states:

"the pool of information kept in memory and its relatively free flow means that we cannot assume that the testimony of two different informants from the same community or even society is really independent. This is very important. In history, proof is given only when two independent sources confirm the same event or situation, but this proof cannot be given under most conditions from oral sources alone... The further one goes away from the present the more this rule holds. It holds already for most renderings purporting to deal with the past beyond the lives of the living elders in a community...What is there then to do? The historian should attempt to complete his oral sources by outside sources that can be checked and certified as independent. This means that oral tradition is to be used in conjunction with writings, archaeology, linguistic or even ethnographic evidence, etc."<sup>432</sup>

356. Vansina acknowledges that all historical sources, written and oral, employ a degree of selectivity and interpretation:

"yet selectivity and interpretation weigh more heavily on oral tradition than on written sources. This is because, once a written source exists it becomes permanent, it is subtracted from time. It is no longer affected by selection or interpretation, as long as it survives. ... Its past is the time it testifies about. It is contemporary when both overlap. For that reason historians appreciate contemporary documents more than any other."<sup>433</sup>

357. There are here two conflicting bodies of oral testimony, that of the Ngok witnesses and that of a range of witnesses – Messeriya, Ngok and Twic – annexed to this Counter-Memorial. In the circumstances, the only modern evidence entitled to any weight is evidence corroborated by contemporary documentary or map evidence. None of the Ngok evidence fulfils this criterion.

358. Indeed, one can go further. The virtual unanimity in the Ngok oral evidence in favour of incredible propositions – that the Baggara-Homr only started bringing their cattle to the Bahr in the 1950s or 1960s; that there was in 1905 an unrecorded province-wide tribal boundary at 10°35' based on post-

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<sup>432</sup> Vansina, J., *Oral Tradition as History* (University of Wisconsin Press, Madison, 1985) pp. 159-160 (SCM Annex 2).

<sup>433</sup> *Ibid.*, p 191 (SCM Annex 2)

1905 arrangements for the maintenance of a single road – discredits the whole corpus.

#### ***D. The Expert Evidence***

359. Professor M.W. Daly's Expert Reports purport to be "an independent analysis of historical evidence".<sup>434</sup> Headed "CONFIDENTIAL... Not to be quoted without written permission of the author", it is remarkable for the extent to which it ignores the documentary evidence.

360. The Daly report reaches seven conclusions. In so far as they concern the subject matter of this Chapter, they will be commented on briefly:

1. *Sources – Documentary sources for the study of southern Sudanese history before the early twentieth century are meagre.*

361. Strictly speaking this observation is irrelevant as the present dispute concerns events in the early twentieth century. But in fact there is a reasonable amount of 19th century, including among others Slatin, Gessi and Lupton Bey. Professor Daly's own exhibits show substantial acts of administration in the circumstances. For example, the Notes on civil administration in the Sudan, Wingate Papers, January 1898, show that Condominium officials was engaged in administrative tasks at provincial level from as early as 1898.<sup>435</sup>

2. *The Abyei region was both remote and, during the annual rainy season, almost inaccessible to government officials in the early twentieth century.*

362. This is linked to the thesis of "the differential impact of the Mahdiyya", discussed already. It suffices here to say that the remoteness of the area is greatly exaggerated, as the evidence discussed above shows. Indeed Francis Deng acknowledges as much:

"As his father had done with the Mahdiyya, Kwol pledged his allegiance to the new government under the provisional jurisdiction of Kordofan and won protection against sporadic raids by Arab slavers."<sup>436</sup>

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<sup>434</sup> Daly Report, p. 3.

<sup>435</sup> Daly Exhibit 34.

<sup>436</sup> Deng, F., *White Nile, Black Blood*, (Red Sea Press, Asmara, 2000) p. 136, SPLM/A Exhibit-FE 9/2.

3. *There was essentially no administration of the Abyei area by the Anglo-Egyptian regime during the first decade of the twentieth century.*

363. It suffices to say that while the region surrounding the modern village of Abyei is home to one of the world's largest swamps,<sup>437</sup> it was visited frequently during the early 20<sup>th</sup> century. Moreover, as illustrated in First Expert Report by A. Macdonald, there was an intense exploration of the area, especially the Bahr el Arab.<sup>438</sup>

3. *Provisional boundaries in general in early twentieth-century southern Sudan were vague and frequently altered.*

364. This general assertion relates more to the territorial or boundary issues and will be discussed in that context on Chapter 5. In fact contemporary documents all state that it was a river, the Bahr el Arab, that was the border between Kordofan and Bahr el Ghazal before 1905. As to the central importance of the Bahr el Arab, R.O. Collins has written:

"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 swamps of the Sudd. The other rivers of the Bahr al-Ghazal cannot claim its cultural or hydrologic importance."<sup>439</sup>

4. *There is evidence that the Ngok Dinka resided north of the Ragaba al-Zarga/Ngol River in and around 1905.*

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<sup>437</sup> Beswick, S., *Sudan's Blood Memory* (University of Rochester Press, Rochester, 2006), p. 12, (SCM Annex 3).

<sup>438</sup> A. MacDonald, First Expert Report, paras. 3.1-3.28.

<sup>439</sup> Collins, R.O., *The Nile* (Yale University Press, London, 2002) pp. 63-64, SPLM/A Exhibit-FE 10/6.



365. Not even the evidence presented by Daly supports this conclusion, which is furthermore contradicted by the extensive evidence referred to in this Chapter. It is sufficient to quote Michael Tibbs, the last assistant district commissioner of Dar Messeriya:

"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..."<sup>440</sup>

5. *Ignorant of the Ngok Dinka and their territory, and without having delimited definite boundaries between Kordofan and Bahr el Ghazal provinces, the Sudan Government decided in 1905 that the Ngok Dinka chiefdoms would in the future be administered by and included within Kordofan.*

366. Again the assertion that the Government was ignorant of the territory is contrary to contemporary documents, summarised above. Similarly, the assertion that there were no definite boundaries ignores the fact that official documents continuously describe the boundary before the 1905 transfer as being on the Bahr el Arab.

6. *The Missiriyya nomads, who ranged mainly from the north, around the Bananusa, moved south through the Ngok region between the Bahr al-Ghazal/Kir and Ragaba al-Zarga/Ngol rivers during the dry season.*

367. This is evident from the illustrations of migration patterns from Lienhardt (page 129) and Cunnison (page 131) and from the dry season camps of the Homr described by Lloyd in 1908 and depicted on figure 8 on page 114. But it begs the question to refer to the Bahr al-Ghazal/Kir and Ragaba al-Zarga/Ngol rivers as "the Ngok region": as demonstrated here, the Ngok occupied a considerably lesser area, even well after 1905.

### ***E. The Map Evidence of Tribal Areas***

368. Finally, it is necessary to review the extent to which the maps currently before the Tribunal support the existence of a Ngok-Baggara boundary in 1905 at 10°35'N (or, indeed, anywhere else). The SPLM/A Memorial has chosen to make its case by producing a series of new graphics

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<sup>440</sup> Letter from Tibbs, M. to Deng, Z.B., 6 January 2004, p. 3, SPLM/A Exhibit-FE 11/9; quoting Cunnison, I., *Baggara Arabs, Power and the Lineage in a Sudanese Nomad Tribe*, (Clarendon Press, Oxford, 1966), p. 25, fn 24, SPLM/A Exhibit-FE 4/16.

supposedly reflecting "the best available sources", but mostly without identifying those sources.

369. The validity of this form of presentation can be tested in several ways. Where a "manufactured" map does identify sources, these can (if locatable) be checked. Where it does not, the impression given can be verified from *all* the historical maps in the dossier to see to what extent the information given is concordant.

**(i) SPLM/A Map 12 – "Southern Sudan: Tribes"**

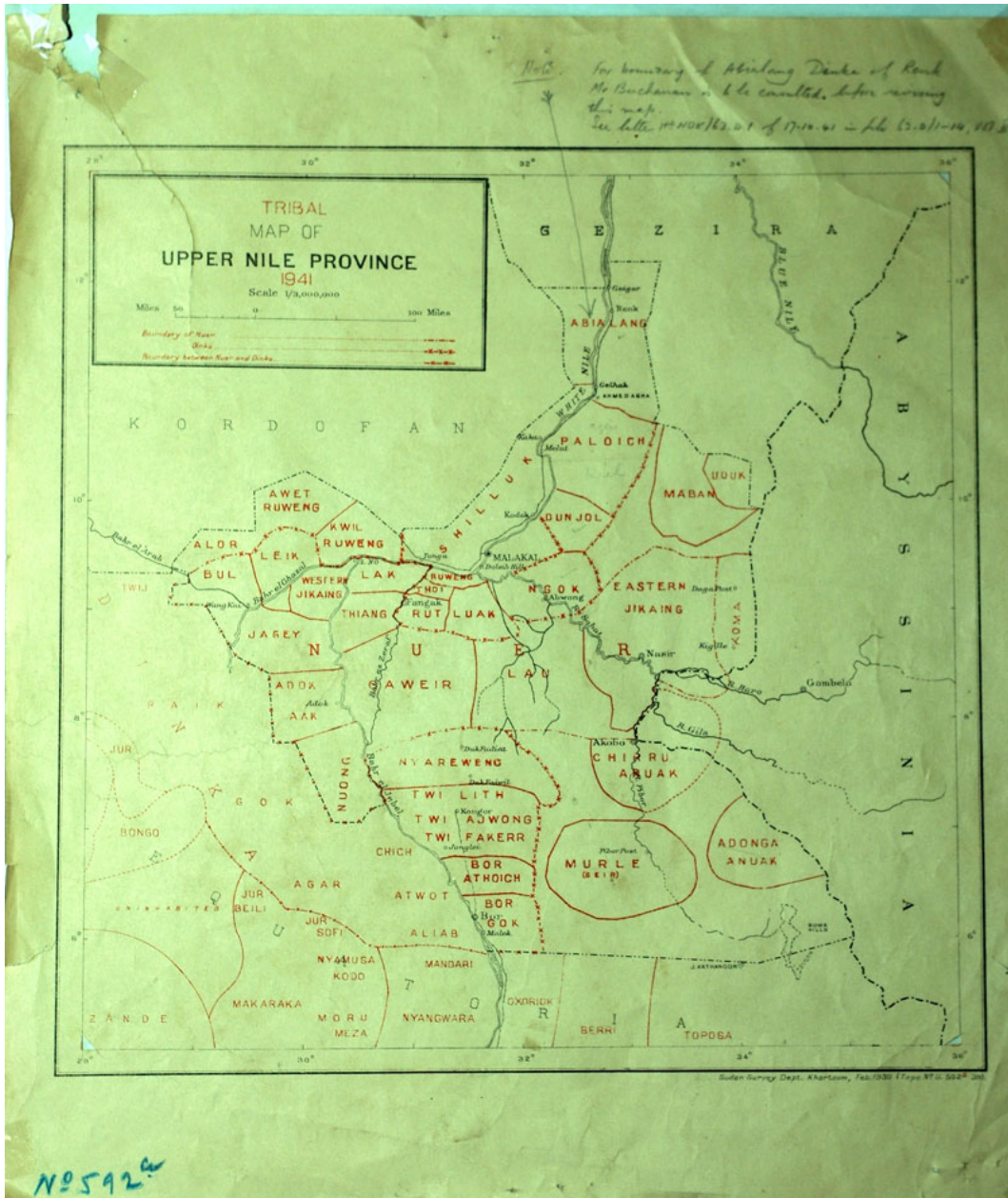
370. The first method of checking is applicable to only one of the "manufactured" maps: remarkably, only one of these identifies any historical maps as sources. This is SPLM/A Memorial Atlas, Map 12, a specially-prepared graphic which depicts the approximate territories of the tribes of southern Sudan. It shows the Ngok extending slightly to the north of the ABC Experts' boundary. Three sources for this depiction are identified on page 3 of the Atlas: (1) *Map No. 1 Equatoria Province, Tribal and Administrative*, Sudan Survey Department Khartoum, 1951; (2) *Tribal Map of Upper Nile Province*, Sudan Survey Department Khartoum, 1941; and (3) *Map Showing Approximate Tribal Boundaries (Adok, Jagey, Jikaing, Nuer and Ruweng Dinka)*, Sudan Survey Department Khartoum, 1943(?). None of these three source maps is produced in the SPLM/A Atlas.

371. The 1941 Upper Nile tribal map is reproduced as **figure 17** at page 149. A 1941 tribal map of Equatoria (also reproduced as **figure 18**), shows a similar distribution of tribes to the map in the SPLM/A Atlas. Neither map shows the Ngok Dinka, which is not surprising since the Ngok were in Kordofan as a result of the 1905 transfer, not in Equatoria or Upper Nile. It is also unlikely that the Ngok are shown on the third source map referred to, and this for two reasons: (1) the title of the map identifies the tribes shown but makes no mention of the Ngok; (2) if it had been relevant, it would have been included in the SPLM/A Atlas.

372. Since the SPLM/A relies on tribal maps produced by the Sudan Survey Department during the 1940s and 1950s for all the other tribes shown on the map, it is surprising that Map 12 ignores the Department's 1941 Map of Native Administrations of Kordofan Province (GoS Atlas Map 27, reproduced

as **Figure 19** at page 151) which shows the area of Kordofan appertaining to the Ngok at the time. That area bears no relationship to that shown on SPLM/A Map 12.

373. It appears that the area attributed to the Ngok on SPLM/A Map 12 is based, not on "best available sources" but on no sources at all.



**Figure 17. Upper Nile Tribal Map (1941).**

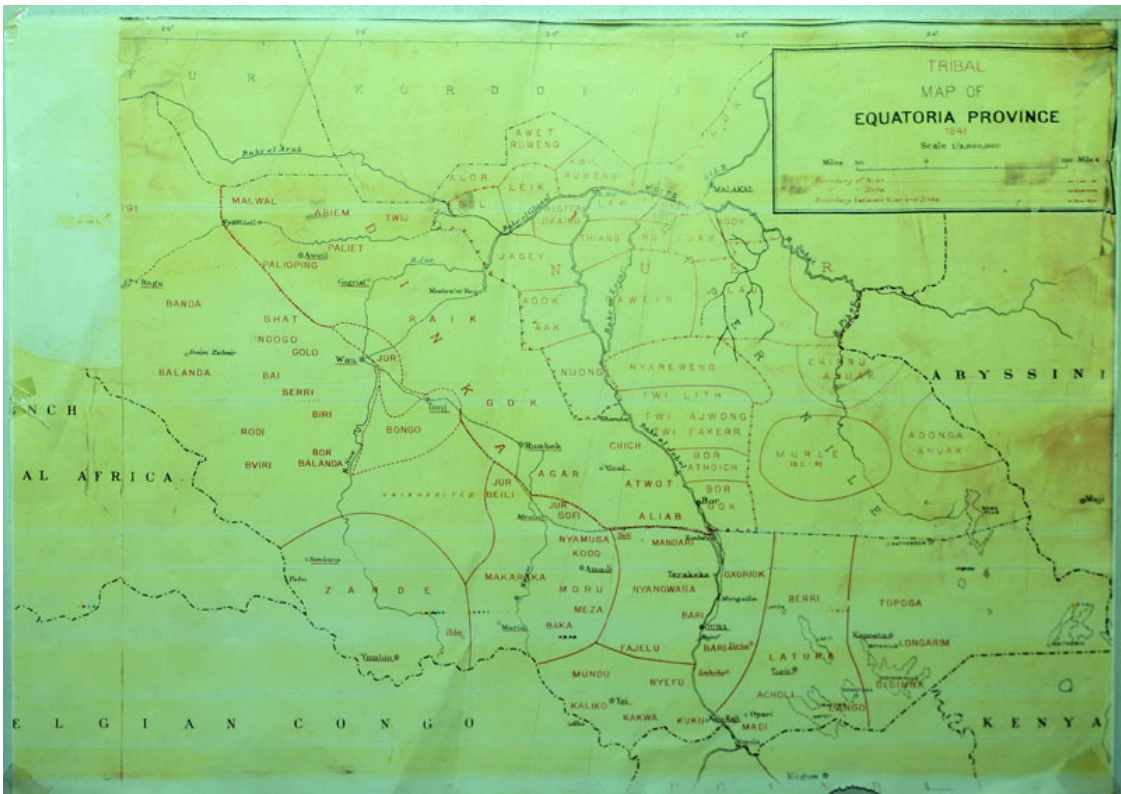


Figure 18. Equatoria tribal Map (1941).

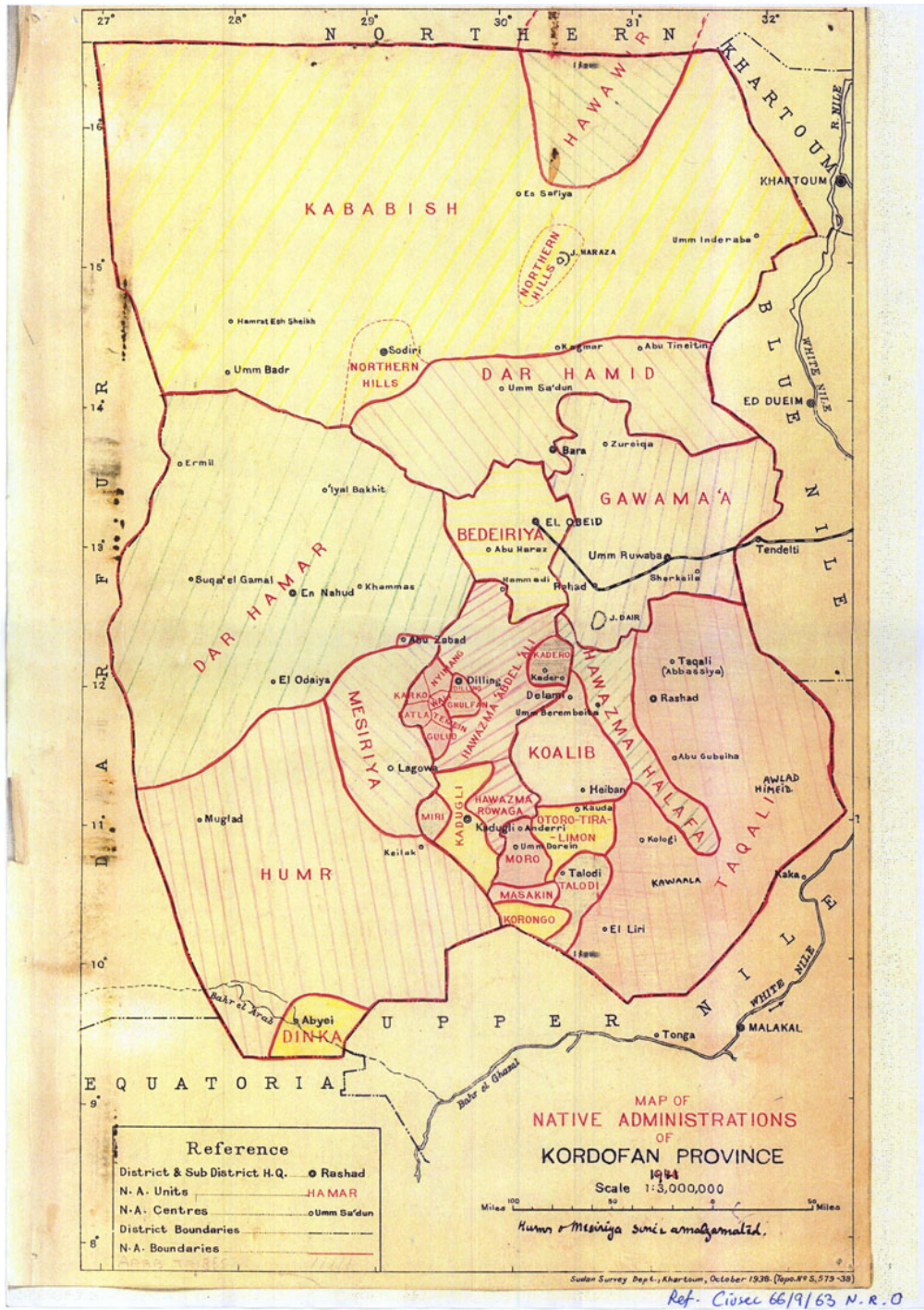


Figure 19. Kordofan Native Administrations map (1941). [SM Map Atlas 27]

**(ii) The "Ngok Dinka Chiefdoms 1905": SPLM/A Maps 13-22**

374. The second method of checking what might be regarded as "best available sources" is applicable to a large group of "manufactured" maps, viz. Maps 13-22. These show the "Ngok Dinka Chiefdoms 1905", collectively and individually. The same treatment is given to the Messeriya, who are shown (Map 24) as confined to a small area between Muglad and Babanusa, not even extending to the ABC Experts' "shared rights area". The reader is assured that "Maps have been created from best available sources and [*sic*] are not necessarily authoritative". No attempt is made to identify these sources.

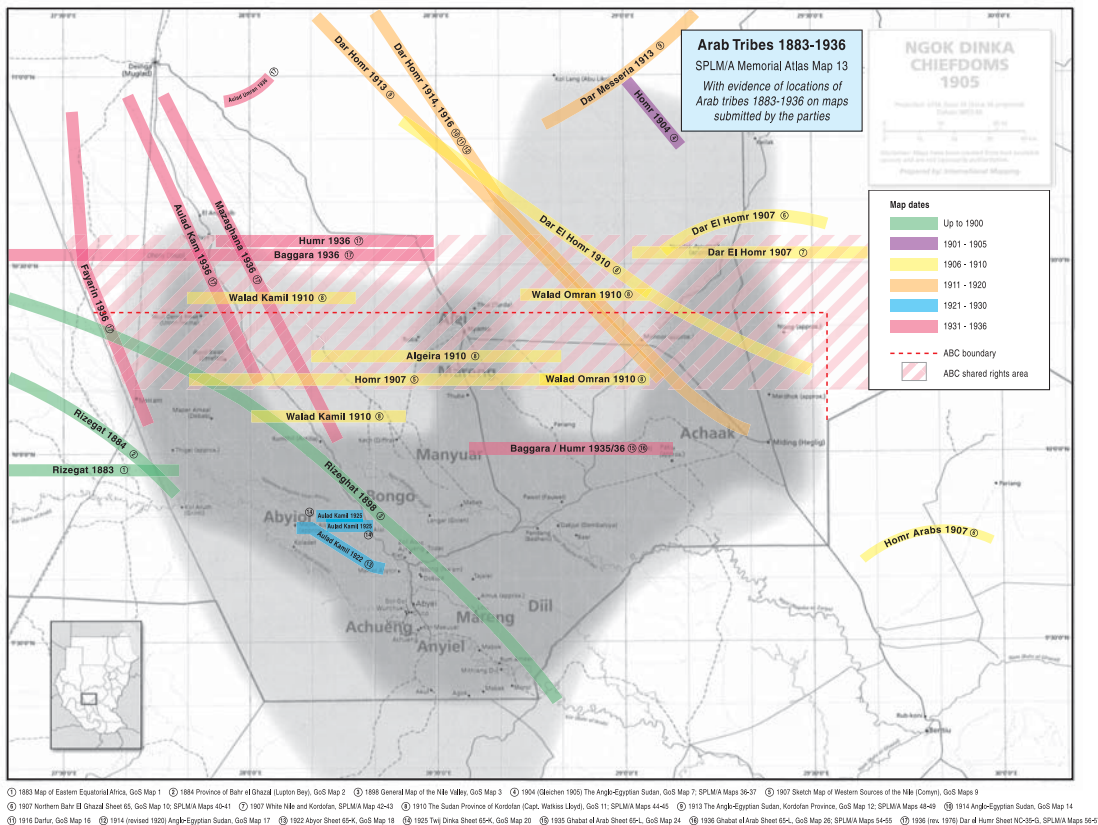
375. The overall effect of these innominate sources can be seen from SPLMA Map Atlas Map 13, which shows a giant dominating figure, muscular arms outstretched, shadow going before up to the latitude of Muglad at 11°00'N.

376. In order to test this giant's mettle, the entire suite of historical maps (1883-1936) produced in both Memorials has been used, and all references to tribal groups or sub-groups on those maps have been plotted onto the SPLM/A Memorial's basemap, with references to sources. This has been done generically, by reference to such descriptors as "Dar Jange" or "Dinka", as well as specifically in relation to particular chiefdoms. The result can be seen in SCM Map Atlas, Maps 1-12. It will be seen that there is virtually no relation between the SPLM/A claim and the actual descriptions and references found on the maps.

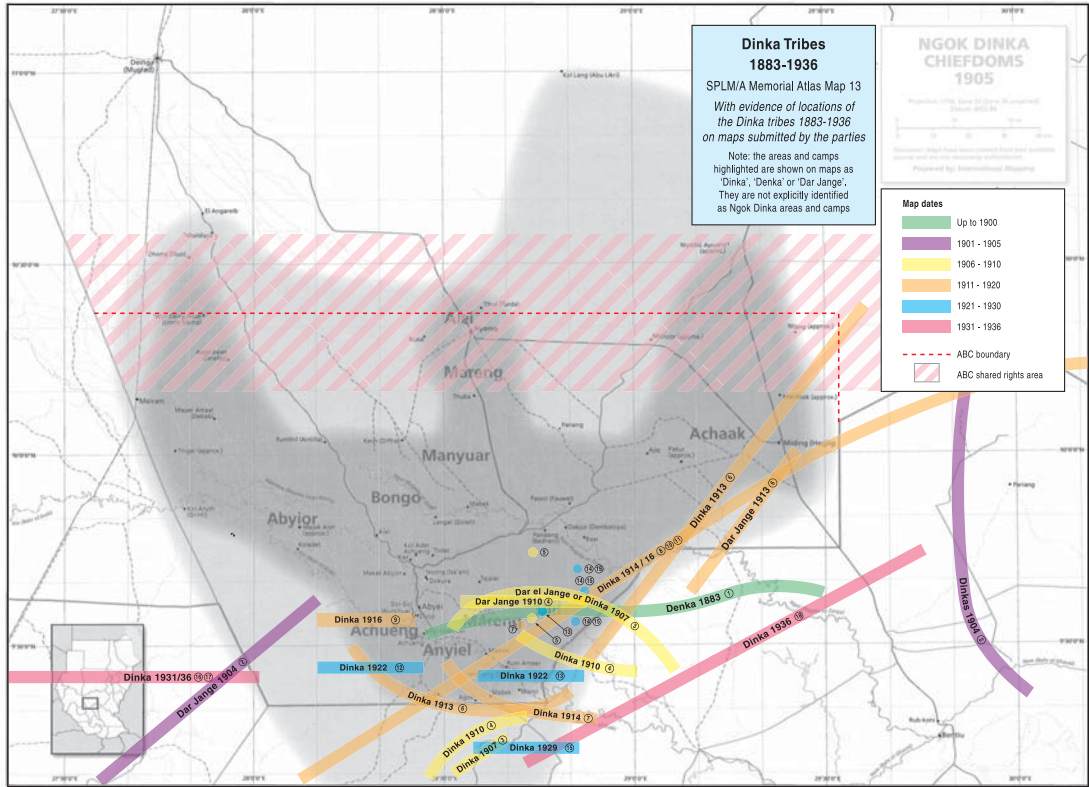
377. This can be seen in composite form by comparing **Figure 20** (Arab tribes) with **Figure 21** (Dinka tribes) and **Figure 22** (Ngok Dinka) on the succeeding pages. The figures largely speak for themselves, but the following comments may be made:

- (a) References to the Dinka or to Dar Jange may be generic and do not necessarily refer to the Ngok. Thus **Figure 22** is over-inclusive.
- (b) Specific references to the Ngok or the Mareig, or to specific chiefdoms, do occur but are relatively few and are concentrated on the Bahr El Arab. In no case do they extend in such a way as to reflect or support the SPLM/A claim.

(c) The comparison of **Figure 20** (Arab tribes) with **Figure 22** (Ngok Dinka) shows intermingling in the south, near the Bahr el Arab, and Arab/Humr dominance elsewhere. It is entirely consistent with the documentary record analysed in this Chapter. It is entirely inconsistent with the SPLM/A claim.



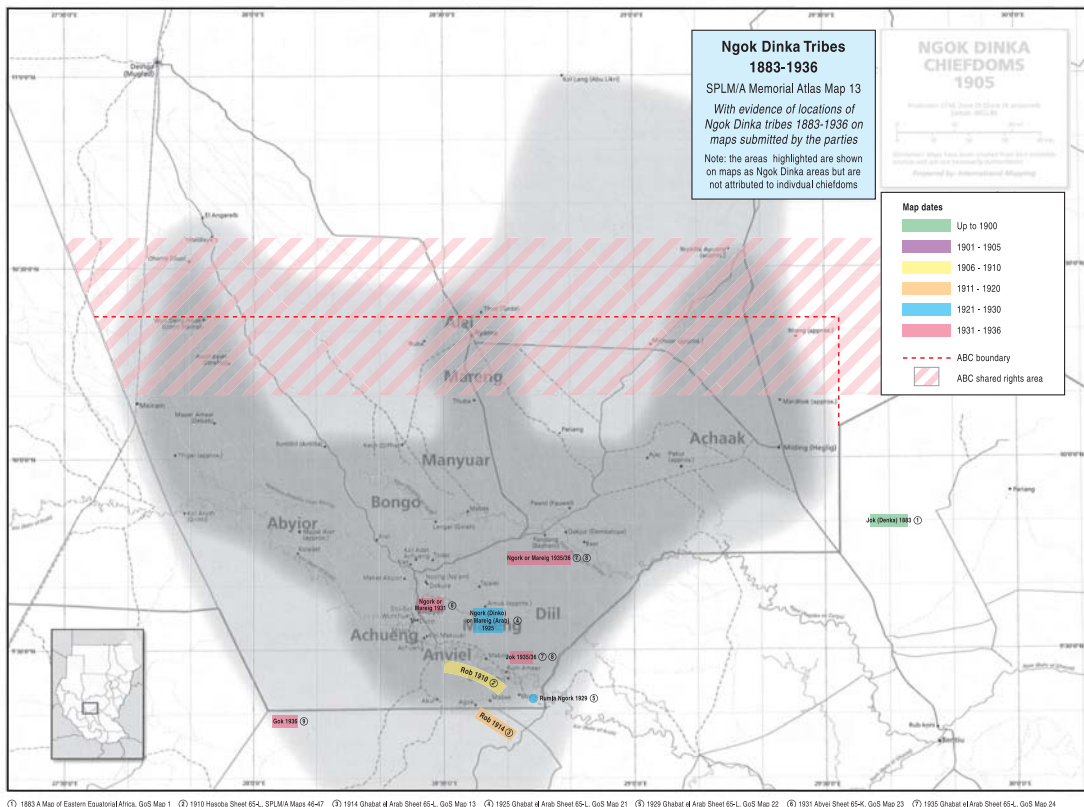
**Figure 20. Arab Tribes.** [SCM Map Atlas 1]



1883 The Egyptian Sudan, SPLM/A Map 30 1914 (Bachlan 1905) The Anglo-Egyptian Sudan, GUS Map 7, SPLM/A Maps 36-37 1907 Northern Bahr el Jebel Sheet 65, GUS Map 10, SPLM/A Maps 40-41 1910 The Sudan Province of Kordofan (Capt. Walker 1895), GUS 11, SPLM/A Maps 44-45  
 1910 Hansard Sheet 65-L, SPLM/A Maps 46-47 (← Location of Dinka cattle camp north and Dinka dugdag south) 1913 The Anglo-Egyptian Sudan, Kordofan Province, GUS Map 12, SPLM/A Maps 48-49 1914 Ghazal el Arab Sheet 65-L, GUS Map 13 (← Location of Dinka dugdag) 1914 Anglo-Egyptian Sudan, GUS Map 14  
 1916 Ashang Sheet 65-K, GUS Map 15, SPLM/A Maps 50-51 1916 Darfur, GUS Map 16 1916 (revised 1920) Anglo-Egyptian Sudan, GUS Map 17 1922 Koyur Sheet 65-K, GUS Map 18 1922 Ghazal el Arab Sheet 65-L, GUS Map 19 (← Location of Dinka dugdag) 1925 Ghazal el Arab Sheet 65-L, GUS Map 21 (← Location of Dinka cattle camp)  
 1929 Ghazal el Arab Sheet 65-L, GUS Map 22 (← Location of Dinka cattle camp) 1931 Abyei Sheet 65-K, GUS Map 23 1936 Abyei Sheet 65-K, GUS Map 25, SPLM/A Maps 52-53 1936 Ghazal el Arab Sheet 65-L, GUS Map 26, SPLM/A Maps 54-55

**Figure 21. Dinka Tribes. [SCM Map Atlas 2]**





© 1983-A Map of Eastern Equatorial Africa, GOS Map 1 © 1910-Mercator Sheet 65-L, SPLM/A Maps 44-47 © 1914-Globe of Arab Sheet 65-L, GOS Map 13 © 1925-Globe of Arab Sheet 65-L, GOS Map 21 © 1929-Globe of Arab Sheet 65-L, GOS Map 22 © 1931-Abyss Sheet 65-K, GOS Map 23 © 1935-Globe of Arab Sheet 65-L, GOS Map 24 © 1936-Globe of Arab Sheet 65-L, GOS Map 26, SPLM/A Maps 54-55 © 1936-Abyss Sheet 65-K, GOS Map 25, SPLM/A Maps 53-53 © Indications always name

**Figure 22. Ngok Tribes. [SCM Map Atlas 3]**

In addition, all references in historical maps included in either Memorial to particular Ngok chiefdoms have been plotted against the SPLM/A representation of the “territory” of that chiefdom: see SCM Map Atlas, Maps 4-12. The following comments may be made about these “Chiefdom” maps:

- (a) In 6 cases<sup>441</sup> the historical map references show locations of the chiefdom in the extreme south of the range shown in the corresponding SPLM/A map. In other words, the area attributed to the chiefdom has been grossly distended in a northerly direction to cover the areas awarded by the ABC Experts. In most cases the historical map references cover only 10% or so of the range shown by the SPLM/A. The prize for distension goes to the Manyuar (SCM Map 11). The historical map references to the Manyuar are clustered along the Bahr el Arab: there are a respectable number of them (5). But in a curious form of “long-arm jurisdiction” the Manyuar are shown stretching more than 150 kms up to Turda, without a skerrick of cartographic support. But *proxime accessit* must go to the Abyior

<sup>441</sup> These are: Abyior (SCM Map 4), Anyiel (SCM Map 8), Bongo (SCM Map 9), Diil (SCM Map 10), Manyuar (SCM Map 11), Mareng (SCM Map 12).

(SCM Map 4) whose 3 references in the vicinity of Abyei count for thousands of square miles of dominion, over to the Darfur boundary and up to Tebeldiya.

(b) In two cases,<sup>442</sup> there is *no* overlap between the area attributed by the SPLM/A and the historic map references. These, perhaps coincidentally, cover the left and right flanks of the nine Ngok Dinka chiefdoms – which British official accounts show to have been clustered between Rob's new and old villages. On the left flank, the Achaak are shown in the historic maps as clustered in the south (4 references) – but the SPLM/A Map 15 has them well to the north of the Ragaba ez Zarga, in the barren area near Heglig and the oilfields. How they could have lived there is a mystery – but in future, if the ABC Experts' Award stands, they should have no difficulty. On the right flank, and equally mysterious, is the SPLM/A depiction of the Achweng, who are shown well to the west of Abyei, over to the Darfur boundary. Two facts in the historical record cast doubt on this. First, Heinekey in 1918 noted there was no track along the Bahr el Arab between Gerinti and Sultan Kwol's;<sup>443</sup> evidently the Achweng omitted to make tracks. Secondly, Sultan Rob told Percival in 1904 that there were no Ngok to the west of Burakol;<sup>444</sup> perhaps he forgot about the Achweng.

(c) Finally, in one case,<sup>445</sup> there is no historical map reference to the kingdom and no way of checking the unspecified source of the corresponding SPLM/A map.

To summarise, the SPLM/A "tribal" maps are concoctions. all spectre and no substance.

## ***F. Conclusions***

378. As noted repeatedly, the issue in this case is what was the area of the nine Ngok Dinka kingdoms transferred from Bahr el Ghazal to Kordofan province in 1905. It is not whether there were areas within Kordofan before 1905 which the Ngok might have wished to claim on historic or other grounds.

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<sup>442</sup> These are: Achaak (SCM Map 5) and Achweng (SCM Map 6).

<sup>443</sup> See above, paragraph 309.

<sup>444</sup> See above, paragraph 271.

<sup>445</sup> This is the Alei (SCM Map 7).

If the southern boundary of Kordofan in 1905 was the Ragaba ez Zarga, then the area south of the Ragaba ez Zarga was the area transferred. But, as will be demonstrated again in Chapter 5, no-one at the time thought the Ragaba was the southern boundary of Kordofan, and until the present dispute arose, no one has thought so since. Still less is it remotely conceivable that it was the parallel of 10°35'N that was the southern boundary of Kordofan in 1905.

379. But even if – *quod non* – "the 'area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905' encompasses **all** the territory that the Ngok Dinka occupied and used in 1905",<sup>446</sup> this Chapter has shown that that area was a very confined one indeed – the area on and to the south of the Bahr el Arab shown on maps as pertaining to Sultan Rob. It bears not the slightest relationship to the area awarded by the ABC Experts.

380. It should be stressed that it is not enough for the SPLM/A to say that it was doubtful where the Ngok Dinka were in 1905, or that "no clear demarcating line is likely ever to be found".<sup>447</sup> It is the SPLM/A that relies on a tribal argument, and the onus is on the SPLM/A to establish their case. In fact, as has been demonstrated,<sup>448</sup> one reason for adopting the formula of an area transferred is that it is open to objective determination as matter of fact, by reference to documents and maps. By contrast a tribal interpretation of the formula – apart from being contrary to the actual language of the text – must inevitably lead to endless bickering over tribal affiliations or the undatable and unverifiable nuances of a pure oral history.

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<sup>446</sup> SPLM/A Memorial, para. 879 (emphasis in the original).

<sup>447</sup> Henderson, epigram to Daly Report, p. 1. Where Henderson thought the Ngok Dinka were to be found in 1933 is in fact clear enough: see above, paragraph 223.

<sup>448</sup> GoS Memorial, Chapter 2.

## Chapter 5

### **The Boundary Between Kordofan and Bahr el Ghazal Before 1905 and the 1905 Transfer**

#### ***A. Introduction***

381. The Mandate of the ABC, including the Experts, was to delimit the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905. The same mandate applies to this Tribunal in the event it determines that the ABC Experts exceeded their mandate.

382. That there was an administrative transfer of an area in 1905 from one province (Bahr el Ghazal) to another (Kordofan) is not disputed between the Parties. The element of "transfer" thus is crucial to the central question in the case - what was the area that was transferred at that time.

383. The answer to this question depends on the facts relating to two main issues: first, what was the provincial boundary between Kordofan and Bahr el Ghazal prior to the 1905 transfer, since it is self-evident that any areas already situated within Kordofan prior to 1905 could not have been included, or intended to have been included, in the transfer; and second, what was the area of the nine Ngok Dinka chiefdoms previously falling within the province of Bahr el Ghazal - *i.e.*, south of the pre-1905 Kordofan/Bahr el Ghazal boundary - that was transferred to Kordofan in that year.

384. It follows that the northern boundary of "the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905" must be the same as the provincial boundary that existed between Kordofan and Bahr el Ghazal just before the transfer. In other words, areas south of the northern limit of the transferred area must be shown not to have constituted part of Kordofan prior to the 1905 transfer, but rather to have been included in Bahr el Ghazal, in order for them to be considered part of the "transferred area". If such areas were already part of Kordofan, they could not - by definition - have been transferred to it in 1905.

385. The failure to take this element into account is one of the fundamental shortcomings of the Report of the ABC Experts, and it equally undermines the SPLM/A's attempt to argue that, if the 10°22'30"N latitude boundary line decided by the Experts is not accepted, the northern limits of the transferred area should fall along the 10°35'N latitude.

386. If we start with the Experts' Report, its conclusions on this point were based on Major Wilkinson's journey to the area in 1902 during which he wrongly identified the Ragaba ez Zarga as the Bahr el Arab. The Experts thus concluded "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..."<sup>449</sup>.

387. Although it is correct that Wilkinson mistook the Ragaba ez Zarga for the Bahr el Arab in 1902 (a point with which the SPLM/A's expert, Professor Daly, agrees),<sup>450</sup> this error was recognized and rectified by 1905. It is therefore wrong to conclude that Condominium officials thereby treated the Ragaba ez Zarga as the provincial boundary between Kordofan and Bahr el-Ghazal prior to the 1905 transfer. This has been fully explained in the GoS Memorial and in the first Macdonald Expert Report annexed thereto.<sup>451</sup> Furthermore, the second Macdonald Report attached to this Counter-Memorial points out there is no evidence to support the idea that, in 1905, Sudan Government officials knew either the name or the course of the Ragaba ez Zarga.<sup>452</sup>

388. However, even if (*quod non*) the Experts had been correct that the Ragaba ez Zarga was deemed to be the provincial boundary between Kordofan and Bahr el Ghazal before the 1905 transfer, the conclusion would be that areas north of the Ragaba ez Zarga were already part of Kordofan before 1905. It follows from the Experts own findings, therefore, that there are no areas north of the Ragaba ez Zarga that could possibly have been administratively transferred to Kordofan in 1905 because such areas, even on the Experts' reasoning, were north of the pre-existing boundary between the two provinces.

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<sup>449</sup> ABC Experts' Report, p. 39 (SM Annex 81); and see *ibid.*, p. 38 where the Experts state the same thing - *i.e.*, "that administrative officials mistook the Ragaba ez-Zarga/Ngo for the Bahr el-Arab, and treated it as the boundary between Kordofan and Bahr el Ghazal."

<sup>450</sup> Daly Report, p. 33.

<sup>451</sup> GoS Memorial, paras. 317-330; and First Macdonald Report, GoS Memorial, pp. 161 *et seq.*

<sup>452</sup> Second Macdonald Report, para. 15.

389. It was thus completely untenable for the Experts to draw the northern boundary of the "transferred area" considerably further north than the Ragaba ez Zarga along the latitude 10°22'30"N, a line which represented an arbitrary compromise half-way between the 10°10'N latitude and the 10°35'N latitude. The Experts' finding that the 10°22'30"N latitude was the northern boundary of the area transferred necessarily implies that the administrative boundary between Kordofan and Bahr el Ghazal was deemed to be this latitude prior to 1905. Otherwise, areas lying south of the 10°22'30"N latitude could not have been the subject of any transfer.

390. Yet there is not a shred of evidence - not a single reference in any of the voluminous materials presented to the Tribunal - that the 10°22'30"N latitude constituted the pre-1905 administrative boundary. The Experts' proposition runs counter to *all* available evidence including, most importantly, the contemporary administrative documents emanating from Government records prepared in 1905 and during the years just before. Nor is there any evidence that the Kordofan/Bahr el Ghazal administrative boundary was along either the 10°10'N latitude (which was the southern limit of the Experts' "compromise area") or along the 10°35'N latitude, which was the northern limit of the Experts' "compromise area", and is also the line that is advanced as an alternative to the 10°22'30" line by the SPLM/A in its Memorial.<sup>453</sup>

391. In and of itself, this fact demonstrates the false reasoning - or, indeed, the lack of any reasoning - underlying the conclusions reached by the ABC Experts.<sup>454</sup> It also rebuts the argument advanced in the SPLM/A Memorial regarding the northern limit of the area transferred to Kordofan in 1905.

392. In contrast, there is an impressive array of contemporary evidence, recorded by senior officials of the Condominium before the date of the transfer, and noted as a matter of general repute, that the administrative boundary between Kordofan and Bahr el Ghazal prior to the 1905 transfer was the Bahr el Arab - the *real* Bahr el Arab. No other pre-1905 administrative boundary in the area of concern is referred to in any of the relevant documents. They all point to the Bahr el Arab as the pre-transfer provincial boundary.

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<sup>453</sup> SPLM/A Memorial, para. 871.

<sup>454</sup> See paragraphs 151-154 above.

393. This being the case, the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 necessarily lay to the south of the Bahr el Arab. As will be seen, the key account authored at the end of 1905 by the Governor-General of The Sudan - the highest official in Sudan at the time - expressly stated that the areas of the Dinka districts transferred in that year lay to the *south* of the Bahr el Arab in what was formerly a portion of the Bahr el Ghazal province, and that, as of 1905, these areas were incorporated with Kordofan.

394. Section B of this Chapter will review the evidence showing that, before the 1905 transfer, the Bahr el Arab was well known as a matter of general repute and had been the focus of specific Government expeditions. It will also address the documentary and cartographic evidence demonstrating that the pre-transfer administrative boundary between Kordofan and Bahr el Ghazal was the Bahr el Arab river. In so doing, it will respond to the arguments put forward in the SPLM/A Memorial and the Daly Report. Section C will then deal with the evidence relating to the 1905 transfer and will point up the fallacies contained in the SPLM/A's pleadings, and in Professor Daly's Report, on this point. Section D will address the relevance of post-1905 changes in the boundary particularly for purposes of identifying the southern limits of the transferred area. Section E will then show why there is no support for the SPLM/A's position that northern limits of the transferred area lay well to the north of the Bahr el Arab, and Section F will summarize the conclusions to be drawn from the contemporary documentation on these issues.

***B. The Evidence Showing that the Pre-1905 Administrative Boundary Was the Bahr el Arab***

395. The SPLM/A Memorial is obviously sensitive to the fact that Ngok Dinka areas could not have been transferred to Kordofan in 1905 if such areas already fell within the province of Kordofan. It is for this reason that the Memorial argues that the Condominium had little knowledge of, or presence in, the relevant area at the time and that:

"As a consequence of these factors, the Sudan Government was slow to develop or delimit provincial boundaries during the first decade of the 20<sup>th</sup> century and, when administrative boundaries

were referred to, they typically were uncertain, approximate and provisional."<sup>455</sup>

396. The Daly Report makes the same argument. It states that: "Provincial boundaries in general in early twentieth-century southern Sudan were vague and frequently altered." The Report then concludes that:

"The Kordofan-Bahr el-Ghazal boundary was only approximate and had little basis in knowledge about the region and its people."<sup>456</sup>

397. Professor Daly also asserts that there was an "almost complete irrelevance of boundaries (in at least the southern regions) to all aspects of everyday life," and that "[t]he British administrative cadre was small, communications were poor, and there was often no particular reason at all for drawing boundaries."<sup>457</sup>

398. Whatever the truth of this statement is for other parts of Sudan, the fact is that the boundary between Kordofan and Bahr al Ghazal was deemed particularly relevant during the early years of the 20<sup>th</sup> century, and British administrators sent a number of expeditions to the area to supplement their knowledge of the region. The alteration of the Kordofan/Bahr el Ghazal administrative boundary in 1905 was adopted by Sudan officials in order to control administratively the friction that existed between the Arab Baggera tribes to the north and the Dinka tribes to the south. This was the whole *raison d'être* of the 1905 transfer - a transfer that was of a quintessential administrative character and recorded as such in contemporary Government documents. As the Governor-General of Sudan wrote in his Memorandum included in the 1905 publication *Reports on the Finances, Administration, and Condition of the Sudan*:

"As the country develops, the necessity naturally arises for a closer administrative control, and the enormous districts which can now only be supervised in a general way must be gradually divided up into smaller areas to allow for the introduction of a more detailed scheme of Government."<sup>458</sup>

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<sup>455</sup> SPLM/A Memorial, para. 297.

<sup>456</sup> Daly Report, p. 5.

<sup>457</sup> *Ibid.*, p. 31.

<sup>458</sup> *Reports on the Finances, Administration, and Condition of the Sudan*, Annual Report (1905), Memorandum by Governor General, p. 23 (SM Annex 24).



And he added:

"In spite, however, of the difficulties to which I have referred, it has been possible during the last year to make some important alterations in the provincial boundaries, which have tended to a general improvement in administration, and a few other changes which will also take place from the beginning of the new year."<sup>459</sup>

399. The transfer of the Ngok Dinka, lying to the south of the Bahr el Arab, was one of these "important administrative alterations" in the provincial boundaries.

**(i) Prior to 1905, the Bahr el Arab Was a Well Known Boundary Between the Arab Tribes to the North and the Dinka to the South**

400. Chapter 4 has referred to the fact that, as a matter of general repute prior to 1905, the Bahr el Arab was consistently recorded as a dividing line between the Arab population to the north and areas in which non-Arab tribes, including the Dinka, lived to the south. To recall Professor Daly's own writings on the province of Bahr el Ghazal:

"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>460</sup>

401. Robert Collins, another historian whose works the SPLM/A Memorial relies on, makes a similar observation. He writes:

"Following from the Dar Fartit in the west to Lake No in the east, the Bahr al-'Arab forms a natural demarcation, but not a formidable obstacle, between the Baqqara Arabs of Kordofan and Darfur to the north and the Dinka tribes inhabiting the plains of the south."<sup>461</sup>

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<sup>459</sup> Ibid., p. 23.

<sup>460</sup> Daly, M.W., and Holt, P.M., *A History of the Sudan*, (Longman, London, 2000), p. 62 (SCM Annex 44).

<sup>461</sup> Collins, R.O., *Land Beyond the Rivers, the Southern Sudan, 1898-1918*, (Yale University Press, New Haven, 1971), p. 185 (SCM Annex 24).

402. Professor Warburg's analysis contained in his book, *The Sudan under Wingate*, elaborates on the same point. In Warburg's words:

"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>462</sup>

Moreover, in his book entitled *The Nile*, Warburg adds the following in speaking of the Bahr el Arab:

"Its sluggish waters represent, however, the cultural divide between Arabs and Africans on the frontiers of traditional African religious, Islam and Christianity."<sup>463</sup>

403. Turning to the late 19<sup>th</sup> century, Dr. Wilhelm Jünker also commented on the fact that the Bahr el Arab was a natural barrier between the Arab north and the black-African tribes of the south. As he put it:

"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>464</sup>

404. As described in the GoS Memorial, Frank Lupton (Lupton Bey) also described the Bahr el Arab in 1884 as the northern boundary of the Bahr el Ghazal.<sup>465</sup> His map of the province of Bahr el Ghazal, published by the Royal Geographic Society in the same year, depicted the Bahr el Arab which, in its lower reaches, he also labelled as the Bahr el Homr.<sup>466</sup> The Bahr el Arab similarly appears on Stanford's map, published on behalf of the War Office in 1898.<sup>467</sup>

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<sup>462</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.

<sup>463</sup> Collins, R.O., *The Nile*, (Yale University Press, New Haven, 2002), p. 63, SPLM/A Exhibit-FE 10/6.

<sup>464</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).

<sup>465</sup> 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* 245, p. 245 (SM Annex 57).

<sup>466</sup> GoS Memorial, Figure 7, at p. 105; GoS Memorial, Map Atlas, Map 2.

<sup>467</sup> GoS Memorial, Map Atlas, Map 3.

405. Thus, even before the turn of the century, as a matter of general repute the Bahr el Arab was a well-known feature of considerable prominence and was viewed as forming a natural frontier between the Arab Baggara tribes to the north, and the Negroid tribes, including the Dinka, to the south.

406. Government officials in Khartoum clearly recognised the importance of the Bahr el Arab, although they acknowledged in 1898 that little was known about its course and that the river had not been traversed in its entirety.<sup>468</sup> To remedy this situation, they commissioned a number of expeditions to the river prior to and around the time of the transfer.

407. For example, in September 1900, Bimbashi Saunders journeyed to the Bahr el Arab where he found the river "quite impassable".<sup>469</sup> This was followed by the trip of Major Peake in March 1901 during which he went up the Bahr el Arab for about nine miles.<sup>470</sup> Shortly afterwards, H. Butler, the Inspector for Southern Kordofan, reported that he had arranged the boundary between the South Kordofan and Nahud (also in Kordofan) Inspectorates as follows:

"East of Jebel Metan to belong to Southern Kordofan, and all east of a line drawn on the map I.D. No. 332, to the Bahr El Arab passing through the word Resegrat, to belong to South Kordofan."<sup>471</sup>

408. This was followed by the travels of Mahon Pasha in March 1902, in the course of which he met Sultan Rob.<sup>472</sup> The following year, Mahon again visited Sultan Rob and invested him with a Second Class Robe of Honour - an administrative act.<sup>473</sup> The trek of Major Wilkinson also in 1902, which the GoS Memorial and the first Macdonald Report addressed, was another such investigation to the region.<sup>474</sup> Others of a more detailed nature followed.

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<sup>468</sup> See Gleichen, A., *Handbook of the Sudan*, (HMSO, London, 1898), pp. 35-36; and GoS Memorial, paras. 296-297.

<sup>469</sup> *Sudan Intelligence Reports*, No. 74 (September 1900), p. 3 (SM Annex 1).

<sup>470</sup> *Sudan Intelligence Reports*, No. 77 (December 1900), p. 8 (SM Annex 2).

<sup>471</sup> *Sudan Intelligence Reports*, No. 83 (June 1901), p. 8 (SM Annex 3).

<sup>472</sup> *Sudan Intelligence Reports*, No. 104 (March 1902) (SM Annex 4); Second Macdonald Report, para. 21.

<sup>473</sup> *Sudan Intelligence Reports*, No. 104 (March 1903), p. 20 (SM Annex 5).

<sup>474</sup> GoS Memorial, paras. 314-321 and First Macdonald Report, paras. 3.8-3.9.

409. In his Memorandum included in the 1904 *Report on the Finances, Administration and Condition of the Sudan*, Governor-General Wingate drew attention to the fact that he was endeavouring, by means of further explorations, to obtain additional information about rivers such as the Bahr el Arab, the Kir and the Lol in order to establish communications with Southern Kordofan and Western Bahr el Ghazal and to promote the commercial development of these regions.<sup>475</sup> This underscores the importance of the Bahr el Arab as recognized by senior Government officials at the time.

410. To this end, Lieutenant Bayldon left Khartoum in 1904 "with instructions to explore the Bahr-el-Arab from its mouth, and if possible the other little known rivers in the N.W. of the Bahr-el-Ghazal."<sup>476</sup>

411. The *Sudan Intelligence Report* for November 1904 records the fact that Bayldon had reached Wau in the Bahr el Ghazal province by that time, and that he was beginning to investigate areas to the north.<sup>477</sup> In February 1905, a report on Bayldon's progress reproduced in the *Sudan Intelligence Reports* included the following account:

"Sheikh Riham Gorkwei, of the district of Tweit or Toj, which he says is situated between the Kir and Lol Rivers, reported to Bimbashi Bayldon on the 29<sup>th</sup> January that a party of Homr Arabs, under Sheikh Ali Gula, armed with some 15 rifles and many spears, had come and raided his district, saying they were sent to collect cattle for Government.

Sheikh Riham, after a journey of 23 days to Taufikia, came into Kodok to see a representative of the Government. The Governor sent him on to Khartoum, where he arrived on the 26<sup>th</sup> February. He repeated his story of the raids by the Homr, who he says captured some 16 boys of the Toj Dinkas whilst the latter were out fishing.

The Camel Corps Company, now in the Bahr el Ghazal, will investigate the case on their return to Kordofan."<sup>478</sup>

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<sup>475</sup> *Reports on the Finances, Administration and Condition of the Sudan*, Annual Report (1904), p. 8 (SM Annex 23).

<sup>476</sup> *Sudan Intelligence Reports*, No. 125 (December 1904), p. 2 (SCM Annex 45).

<sup>477</sup> *Sudan Intelligence Reports*, No. 124 (November 1904), p. 4 (SM Annex 7).

<sup>478</sup> *Sudan Intelligence Reports*, No. 127 (February 1905), p. 2 (SM Annex 8).

412. Several important points emerge from this account. First, the district of the Tweit or Toj was stated by their chief, Sheikh Rihan Gorkwei, to lie between the Kir (Bahr el Arab) and Lol rivers. *i.e.*, south of the Bahr el Arab. As the subsequent report of Wingate issued in the 1905 *Annual Report* made clear, it was precisely this area, along with that of Sultan Rob also to the south of the Bahr el Arab, that was transferred to Kordofan during that year. Second, it was equally clear that Homr Arabs were present in this area south of the Bahr el Arab, as Sheikh Rihan complained of their raids. Third, Bayldon sent Sheikh Rihan to Kodok (in the south) to see a Government representative because, as of February 1905, the areas south of the Bahr el Arab still did not fall within the province of Kordofan. Sheikh Rihan's district was only transferred to Kordofan afterwards.

413. The March 1905 edition of *Sudan Intelligence Reports* contains a detailed description of the progress of Bayldon's expedition along the Bahr el Arab.<sup>479</sup> In the summary of his report dated 20 March 1905 attached to the *Intelligence Report*, Bayldon identified the junction of the mouth of the Bahr el Arab with the Bahr el Ghazal river. More importantly, he noted that the river Kir was the "real" Bahr el Arab, which he distinguished from the Bahr el Homr.<sup>480</sup> And he made suggestions for opening the Bahr el Arab and Lol for navigation.

414. The identity of the Bahr el Arab was thus known by March 1905 at the latest.<sup>481</sup> In the meantime, Sheikh Rihan had arrived in Khartoum on 26 February 1905 to communicate his complaints of raiding by Homr Arabs in his district.

415. It seems highly likely that Sheikh Rihan's visit to Khartoum played an important role in the Government of Sudan's subsequent decision to transfer his district, and that of Sultan Rob, to Kordofan. As recorded in the text of the March 1905 *Sudan Intelligence Report*:

"It has been decided that Sultan Rob, whose territory is on the Kir river [correctly identified by Bayldon as the 'real' Bahr el Arab] and Sheikh Rihan of Toj, mentioned in the last Intelligence Report, are to belong to Kordofan province. These people have,

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<sup>479</sup> *Sudan Intelligence Reports*, No. 128 (March 1905), p. 10 (SM Annex 9).

<sup>480</sup> *Ibid.*, at p. 11; and see, Second Macdonald Report, paras. 13(2) and 14.

<sup>481</sup> The SPLM/A Memorial refers to Bayldon's trip at para. 339.

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>482</sup>

416. There was no mention in this report of the transfer of any areas lying *north* of the Kir (Bahr el Arab) river, and certainly no suggestion that the areas to be transferred extended to either the Ragaba ez Zarga, the 10°22'30"N latitude, or the 10°35'N latitude.

417. At the same time Bayldon was exploring and clearing sudd<sup>483</sup> from the lower reaches of the Bahr el Arab, Percival was also engaged in investigations in the region. His sketch maps of areas he visited are included in SCM Map Atlas, Map 14b.

418. Bayldon's report included in the March 1905 *Sudan Intelligence Report* refers to Percival's journey and the latter's observation that, in southern areas, he crossed no rivers between the Jur and the Kir except the Lol. Bayldon was able to verify that the Kir river visited by himself and Percival was in fact the "real" Bahr al Arab.

419. Further details of Percival's expedition appear in the *Sudan Intelligence Report* for May 1905. It recounts the following:

"El Bimbashi Percival and his Camel Corps Company left Wau on the 20<sup>th</sup> March; marching by the Chak Chak road to the river Pongo, 56 miles north-west of Wau. He followed the Pongo river for 40 miles north, and then struck the Lol river, 30 miles north-east... Bimbashi Percival followed the Lol river for 45 miles, thence 54 miles round a swamp to the junction of the Lol and Kir rivers, which latter he followed for 110 miles through Nuer tribes to its junction with the Bahr el Ghazal. From here he kept parallel to the left bank on the Nile, marching through Nuer, Dinka, and Shilluks tribes to Taufikia. The total distance of his march from Wau to Taufikia was about 459 miles."<sup>484</sup>

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<sup>482</sup> *Sudan Intelligence Reports*, No. 128 (March 1905), p. 3 (SM Annex 9), also cited at SPLM/A Memorial, para. 351.

<sup>483</sup> As noted in the Glossary to the GoS Memorial, p. viii, "sudd" is a mass of vegetable matter which obstructs navigation.

<sup>484</sup> *Sudan Intelligence Reports*, No. 130 (May 1905), p. 2 (SM Annex 10).

420. Percival's trip took him squarely through the Ngok Dinka areas lying between the Kir and the Lol rivers. His sketch map of his itinerary labels the area to the *south* of the Kir river as "Sultan Rob."<sup>485</sup> These locations can also be seen on Lieutenant Comyn's sketch map of the area that was reproduced as Map 9 to the GoS Memorial Map Atlas. The earlier handwritten version is now produced as SCM Map Atlas, Map 15. Not only did Percival cross the Lol river, he also travelled extensively down the Kir, which Bayldon had correctly identified as the Bahr el Arab.

421. The contents of Percival's report on his march are attached as Appendix "A" to the May 1905 *Sudan Intelligence Reports*. As recounted in the GoS Memorial, Percival noted the following:

"Sultan Rob appears to exercise a certain amount of authority over a large area of country extending from the Shalluk's boundary to the east to Chak Chak's boundary in the west, with the Bahr el Arab as his Arab frontier on the north and the Lol river (both banks) and the Bahr el Ghazal on the south."<sup>486</sup>

422. Sultan Rob's village was just south of the Kir at the time, although the March 1905 *Sudan Intelligence Report* stated that Sultan Rob's territory was on the Kir.<sup>487</sup> Bayldon refers to Sultan Rob's village in his 20 March 1905 report and Walsh, in 1906, was also informed that the open water of the Bahr el Arab continued as far as Sultan Rob's village.<sup>488</sup>

423. Lieutenant Comyn also travelled to the Bahr el Arab in 1905. Figure 10 to the first Macdonald Report is an extract from the Survey Department Accessions Register which records that Comyn reached the Bahr el Arab in 1905, having explored its western sources near Hofra en Nahas.<sup>489</sup> Referring to the explorations of Captain Percival and Lieutenant Bayldon, Comyn also correctly identified the Bahr el Arab.<sup>490</sup>

424. Throughout the remainder of 1905, Bayldon continued his sudd-cutting operations along the Bahr el Arab. These are referred to in the *Sudan*

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<sup>485</sup> GoS Counter-Memorial, Map Atlas, Map 14b.

<sup>486</sup> *Sudan Intelligence Reports*, No. 130 (May 1905), p. 4 (SM Annex 10).

<sup>487</sup> *Sudan Intelligence Reports*, No. 128 (March 1905), p. 3 (SM Annex 9).

<sup>488</sup> *Sudan Intelligence Reports*, No. 139 (February 1906), p. 3 (SM Annex 11).

<sup>489</sup> Figure 10 to First Macdonald Report, GoS Memorial, at p. 180.

<sup>490</sup> *Ibid.*, at p. 179; and see Comyn, D., "The Western Sources of the Nile" (1907), 30/5 *The Geographical Journal* 524, pp. 524-525 and p. 529 (SM Annex 50), and Comyn, D., *Service and Sport in the Sudan*, (John Lane, London, 1911), p. 183 (SCM Annex 46).

*Intelligence Reports* for June, July, August and October 1905.<sup>491</sup> He was joined by Bimbashi Huntley Walsh who pursued the work into 1906 as part of further administrative efforts to clear various rivers including the Bahr el Arab.<sup>492</sup> Of particular interest is Walsh's account attached to the March 1906 *Sudan Intelligence Reports*,<sup>493</sup> in which he noted Sultan Rob's presence on the Bahr el Arab and indicated that he found the descriptions of the Bahr el Arab supplied by Arab merchants to be more helpful than those of Sultan Rob's men.

425. Contrary to the arguments advanced in the SPLM/A Memorial, it is clear that Sudan officials took an active interest in the Bahr el Arab prior to the 1905 transfer and sent a number of expeditions to the region. Despite the fact that there was some initial uncertainty about the identity of the river, this was cleared up by early 1905 as a result primarily of Bayldon's voyage. Further, as a result of these expeditions, the fact that the country of the Dinka tribes, including that of the Paramount Chief of the Ngok Dinka (Sultan Rob), was to the south of the Bahr el Arab was known on the eve of the transfer.

**(ii) The Bahr el Arab Was the Provincial Boundary Between Kordofan and Bahr el Ghazal before the 1905 Transfer**

426. With respect to the first years of the 20<sup>th</sup> century, the SPLM/A Memorial acknowledges that: "The location of the Bahr el Ghazal/Kordofan boundary during this period was often described in general terms as the 'Bahr el Arab'. "<sup>494</sup> However, the Memorial then asserts that this boundary -

"was a provisional and approximate reference, made by officials who had very little knowledge of the geography or peoples of the region",

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<sup>491</sup> *Sudan Intelligence Reports*, No. 131 (June 1905) (SCM Annex 47); *Sudan Intelligence Reports*, No. 132 (July 1905) (SCM Annex 48); *Sudan Intelligence Reports*, No. 133 (August 1905) (SCM Annex 49); *Sudan Intelligence Reports*, No. 135 (October 1905) (SCM Annex 50).

<sup>492</sup> *Sudan Intelligence Reports*, No. 139 (February 1906), p. 3 (SM Annex 11); *Sudan Intelligence Reports*, No. 140 (March 1906) (SM Annex 12).

<sup>493</sup> *Sudan Intelligence Reports*, No. 140 (March 1906), p. 14 (SM Annex 12).

<sup>494</sup> SPLM/A Memorial, para. 313.



and that:

"this putative boundary was also based on a demonstrably mistaken geographic understanding, with Sudan Government administrators confusing the Bahr el Arab for other waterways (lying further to the north)."<sup>495</sup>

427. The fact that the Bahr el Arab was recognised as a matter of general repute to be the dividing line between the Arab tribes to the north and the Dinka and other Negroid tribes to the south was addressed in the previous section. It has also been shown that the Bahr el Arab attracted considerable attention from Government officials at the time, even though its entire course had not been surveyed, and that there was no confusion as to which river was the actual Bahr el Arab when the 1905 transfer occurred.

428. With respect to the argument that the references to the Bahr el Arab as constituting the pre-1905 boundary can only be understood to be a "provisional" or "approximate" boundary, the contemporary records simply do not bear this contention out. As will be seen, there are repeated references in official Government records of the time stating in unequivocal terms that the boundary between the two provinces was the Bahr el Arab. These references, many of which are either ignored in the SPLM/A pleadings or summarily dismissed by Professor Daly in his Report, do not suggest that the boundary was "provisional" or "approximate".

429. Nor does it matter whether administrative boundaries may have been "provisional" or not - although the Bahr el Arab was not referred to in such terms prior to 1905. The Parties agree that the boundary between Kordofan and Bahr el Ghazal changed in 1905 as a result of an administrative decision taken that year. In this sense, the pre-1905 boundary between Kordofan and Bahr el Ghazal may, in retrospect, be thought to have been "provisional". But this is not how the situation was viewed prior to the transfer, and the relevant question, whether provisional or not, is what the pre-transfer provincial boundary was. As explained earlier in this Chapter, areas that were already within Kordofan before 1905 could not have been transferred to it in 1905, and accordingly such areas cannot be deemed to comprise part of the "areas of the nine Ngok Dinka chiefdoms" transferred in that year.

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<sup>495</sup> Ibid.

430. To appreciate the breadth of the evidence that supports the conclusion that the pre-1905 Kordofan/Bahr el Ghazal boundary lay along the Bahr el Arab, this section will adopt a chronological approach to the documentary record.

431. Before doing so, a note on the documentary sources must be interjected. While the SPLM/A Memorial and the Daly Report are at pains to emphasize the relatively unknown characteristics of Southern Kordofan, Bahr el Ghazal and the Bahr el Arab river, there is in fact a large number of official documents which refer specifically to the points in issue. These include *Annual Reports* for both Kordofan and Bahr el Ghazal, *Handbooks of the Sudan* compiled from the accounts of senior Government officials, and the *Sudan Intelligence Reports*.

432. Professor Daly's Report acknowledges this point. He states that: "Sources for the study of the Anglo-Egyptian colonial period are extensive and varied."<sup>496</sup> With respect to what Professor Daly terms the "relevant primary sources", he says the following:

"Of the many publications of the Sudan Government several are particularly relevant for our purposes. These include the *Sudan Gazette* (sometimes *Sudan Government Gazette*), the *Sudan Intelligence Report* series, the annual *Report* of the governor-general of Sudan, provincial, district, and departmental annual reports, the periodical *Civil Administration Orders*, and reports occasioned from time to time by special political or economic circumstances."<sup>497</sup>

433. These sources attract the highest probative value because of their official provenance and since they were compiled contemporaneously with, or shortly before, the relevant date in this dispute - the 1905 transfer. As one well-respected commentator has noted:

"Documentary evidence stating, recording, or sometimes even incorporating the facts at issue, written or executed either contemporaneously or shortly after the events in question by persons having a direct knowledge thereof, and for purposes other than the presentation of a claim or the support of a contention in a suit, is ordinarily free from the distrust and frailty

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<sup>496</sup> Daly Report, p. 37.  
<sup>497</sup> Ibid., p. 38.

associated with testimonial evidence. It is, thus, considered in general of higher probative value."<sup>498</sup>

434. The official documentary record also stands in stark contrast to the so-called "oral tradition" that the SPLM/A Memorial so heavily relies on, based on witness statements prepared for this case, for the proposition that the northern limit of the transferred area lay along the 10°35'N latitude. While the extremely limited value of such materials from the legal perspective has been discussed in Chapter 1,<sup>499</sup> it is worth recalling the words of the International Court of Justice in its Judgment in the *Congo-Uganda* case, where it stated:

"The Court will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge."<sup>500</sup>

435. With respect to the location of the Kordofan-Bahr el Ghazal provincial boundary before the 1905 transfer, it has previously been pointed out that as early as 1884, Frank Lupton described the northern boundary of Bahr el Ghazal as being "bounded on the north by the Bahr-el-Arab."<sup>501</sup> Given that Lupton was the Deputy-Governor of the Equatoria Province in the south, and thus a senior official at the time, it is striking that the SPLM/A Memorial and the Daly Report ignore his account.

436. It is true, as the GoS Memorial noted, that Gleichen's *Handbook on the Sudan* published in 1898 indicated that the "Mudiriah" of Bahr el Ghazal "was vaguely defined, but may be described as enclosing the entire district watered by the southern tributaries of the Bahr el Arab and Bahr el Ghazal Rivers."<sup>502</sup> Nonetheless, by 1902, the northern boundary of the Bahr el Ghazal ceased being described as "vaguely defined" and was stated to be the Bahr el Arab.

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<sup>498</sup> Amerasinghe, C.F., *Evidence in International Litigation*, (Martinus Nijhoff, Leiden, 2005), p. 203, (SCM Annex 8).

<sup>499</sup> See paragraphs 33-47 above.

<sup>500</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, at para. 61. Another well-known authority, M. Kamto, also introduces a word of caution about the value of expert evidence. As he observes: "Les consultations d'experts et d'autres spécialistes, rédigées à la demande de l'une des parties au différend, constituent un autre type de preuve qui soulève le problème de sa valeur probatoire, en particulier lorsque ces consultations sont réalisées *in tempore suspecto*. Il serait bien imprudent et hasardeux d'attribuer un quelconque poids à de telles consultations en matière de preuve, car elles ne sont rien d'autre qu'un "self serving evidence". Kamto, M., "Les moyens de preuve devant la Cour internationale de justice à la lumière de quelques affaires récentes portées devant elle", (2006) 49 *German Yearbook of International Law*, at p. 284 (SCM Annex 7).

<sup>501</sup> See paragraph 404 above.

<sup>502</sup> GoS Memorial, para. 294 and Gleichen, A., *Handbook of the Sudan* (HMSO, London, 1898), p. 110 (SM Annex 37); cited also at the SPLM/A Memorial, para. 317.

437. For example, the 1902 *Annual Report* for Bahr el Ghazal, which was the first one issued after Bahr el Ghazal became a separate Mudiria at the beginning of 1902<sup>503</sup>, noted 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>504</sup>

438. The 1903 Annual Report for Kordofan Province was more specific, and contained no disclaimers to the effect that the southern boundary of Kordofan was considered either to be "provisional" or "approximate". It stated under the heading "Boundaries":

"*Southern* - Bahr-El-Arab and Bahr-El-Ghazal to Lake No."<sup>505</sup>

439. Two other sources from 1903 confirm the Bahr el Arab as the provincial boundary between Kordofan and Bahr el Ghazal.

440. The first is taken from one of the pre-eminent books on Sudan history of the time written by the historian Naum Shoucair. With respect to the boundaries of Kordofan, he writes:

"From the north it is bounded by a line that extends from Gabra to Wadi El-Milih near Ain Hamid, *from the south Bahr-el-Ghazal and Bahr-el-Arab*, from east El Jazeera and Fashoda Mudirias and from the west Darfur."<sup>506</sup>

441. Naum Shoucair's study also refers to the boundaries of the Province of Bahr el Ghazal, which he identified as follows:

"It is the country irrigated by the Bahr-el-Ghazal and its tributaries, its *boundary from the north is the Bahr-el-Arab and Bahr-el-Ghazal separating it from Darfuf and Kordofan...*"<sup>507</sup>

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<sup>503</sup> Daly, M., *Empire on the Nile, 1898-1934*, (CUP, Cambridge, 2003), p. 72, SPLM/A-FE 11/5.

<sup>504</sup> *Reports on the Finances, Administration, and Condition of the Sudan*, Annual Report (1902), p. 230 (SM Annex 21).

<sup>505</sup> *Reports on the Finances, Administration, and Condition of the Sudan*, Annual Report (1903), p. 71 (SM Annex 22).

<sup>506</sup> Shoucair, N., *History and Geography of the Sudan*, (El-Maarif Press, Cairo, 1903), p. 71 (SCM Annex 1). (Emphasis added).

<sup>507</sup> *Ibid.*, (emphasis added).

442. Professor Daly refers to Naum Shoucair in his Report and thus evidently considers his work to be a reliable source. Chapter 1 has also discussed the credentials of Shoucair.<sup>508</sup> However, the extracts included from Naum Shoucair's work annexed to the Daly Report only address the Mahdiyya period in the 1880s, and Professor Daly ignores the relevant passages quoted above which clearly describe the Kordofan-Bahr el Ghazal boundary as being constituted by the Bahr el Arab.<sup>509</sup>

443. The second important source dating from 1903 is Mardon's revised map (originally published in 1901) depicting Sudan's provincial boundaries as of that year. A reproduction of this map appears as Figure 9 at page 111 of the GoS Memorial. The map indicates the boundaries of Sudan's Mudirias by red-dotted lines. The boundary between Kordofan and Bahr el Ghazal on the map is clearly shown to lie along the Bahr el Arab.

444. The SPLM/A Memorial asserts that Mardon's 1901/1903 map, along with his 1906 map, "were unofficial products and were simplistic in their presentations, obviously not purporting to define provisional boundaries."<sup>510</sup> However, Mardon's map was included at the end of Gleichen's *Compendium* Volume II and, as the second Macdonald Report notes, produced a shape for the Bahr el Arab river that was "remarkably close to the truth".<sup>511</sup> Apart from the index map, it was one of only two maps included in the whole *Compendium*.<sup>512</sup> It was also included in Public Records Office files which suggests that it was treated as accurate by British officials.<sup>513</sup> Moreover, in his *Geography of Egypt and the Anglo-Egyptian Sudan*, Mardon acknowledges that he had received information and assistance provided by Senior Sudan officials. Contrary to the SPLM/A's contention, Mardon's 1903 map most assuredly did identify provincial boundaries: the red-dotted lines are specifically labelled as boundaries of Mudirias.

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<sup>508</sup> See paragraphs 21-23 above.

<sup>509</sup> Daly Report, p. 23 and Shoucair, N., *History and Geography of the Sudan* (El-Maarif Press, Cairo, 1903), SPLM/A-MD 1/25.

<sup>510</sup> SPLM/A Memorial, para. 308.

<sup>511</sup> Second Macdonald Report, paras. 13(1) and 32.

<sup>512</sup> As was noted in *Reports on the Finances, Administration, and Condition of the Sudan* (1905), p. 14 (SCM Annex 51), Gleichen "supplies also a full geographical description of the country".

<sup>513</sup> Second Macdonald Report, para. 8.

445. The 1904 *Annual Report* for Kordofan Province is equally clear with respect to the southern boundary of Kordofan. The SPLM/A Memorial neglects to mention the relevant passage from this Report, although it annexes a copy in its Fact Exhibits, Tab 2/4. If the document is consulted, it will be seen that, under the heading "Boundaries", the following description appears:

"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-EI-Arab which is the northern boundary of the Bahr-EI-Ghazal Province."<sup>514</sup>

446. In the light of these references to the Bahr el Arab as constituting the provincial boundary between Kordofan and Bahr el Ghazal, it is incorrect and misleading for the SPLM/A Memorial to assert that: "'By 1905, the most concrete references to a Bahr el Ghazal/Kordofan boundary were the 1903 Kordofan Annual Report which referred to the southern boundary of Kordofan as being 'Bahr-EI-Arab and Bahr-EI-Ghazal to Lake No'."<sup>515</sup> Prior to 1902, and as a matter of general repute, the Bahr el Arab had already been described as the boundary. From 1902 to 1905, there are the following references relating expressly to the relevant provincial boundaries:

- The 1902 *Annual Report* noting that the Bahr el Arab and Bahr el Ghazal rivers were understood to be the northern boundary of the Bahr el Ghazal province (and consequently the southern boundary of Kordofan);
- The 1903 *Annual Report* referring to the Bahr el Arab as the southern boundary of Kordofan;
- The 1903 account by the noted historian, Naum Shoucair, placing the Kordofan/Bahr el Ghazal boundary along the Bahr el Arab;

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<sup>514</sup> *Reports on the Finances, Administration, and Condition of the Sudan*, Annual Report (1904), p. 101 (SM Annex 23). With respect to the boundaries of Bahr el Ghazal Province, the 1904 *Annual Report* states that there are "no alterations", *Ibid.*, p. 3. This meant that the description contained in the 1902 *Report* - that on the north the boundary was the Bahr el Ghazal and Bahr el Arab rivers - remained unchanged.

<sup>515</sup> SPLM/A Memorial, para. 321.

- The 1901/1903 Mardon map depicting the provincial boundary along the Bahr el Arab;
- The 1904 *Annual Report* stating that the southern boundary of Kordofan was the Bahr el Arab "which is the northern boundary of the Bahr-El-Ghazal Province"; and
- Gleichen's 1905 *Handbook* which also stated that "The Bahr El Ghazal province is bounded... on the north by the Bahr El Arab and Bahr El Ghazal."<sup>516</sup>

447. There is not a single mention in these contemporary sources of any other boundary between the two provinces before the 1905 transfer. As such, there is no basis whatsoever to allege that there is insufficient evidence of the provincial boundary or for considering that either the Ragaba ez Zarga, the 10°22'30"N latitude or the 10°35'N latitude represented the boundary between Kordofan and Bahr el Ghazal. The pre-transfer provincial boundary was the Bahr el Arab.

448. In the light of this record, it is astonishing - to say the least - to find that Professor Daly's Report dismisses their relevance altogether. Having earlier in his Report noted the existence of primary sources relevant to the issues before this Tribunal, and having gone so far as to label the Government sources such as the *Annual Reports* and the *Sudan Intelligence Reports* "particularly relevant for our purposes,"<sup>517</sup> the author then asserts:

"We dismiss entirely suggestions that the declarations in 1905 regarding 'Sultan Rob' provide meaningful evidence that the Ngok Dinka lived only south of the Bahr al-Arab, and that the rivers conflated under that name were an established provincial boundary."<sup>518</sup>

449. There is no justification for such cavalier approach to the official documentary record, and none is provided by Professor Daly. Over a period of four years - 1902 to 1905 - the provincial boundary between Kordofan and Bahr el Ghazal was recorded as being the Bahr el Arab. It was an established

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<sup>516</sup> Gleichen, A., *The Handbook of Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government*, (2 Vols., HMSO, London, 1905), p. 153 (SM Annex 38).

<sup>517</sup> Daly Report, p. 38.

<sup>518</sup> *Ibid.*, p. 49.

provincial boundary. The fact that the Bahr el Arab had been correctly identified by Bayldon by March 1905, and further surveyed after 1905, in no way caused Government officials to reassess their view that the Bahr el Arab was the boundary between Kordofan and Bahr el Ghazal prior to the transfer.

450. It is also immaterial that provincial boundaries were not prescribed in any constitutional, legislative or executive decree or proclamation - a factor the SPLM/A Memorial attaches importance to.<sup>519</sup>

451. There was no legal requirement for provincial boundaries to be prescribed by legislation or decree and the SPLM/A cites none. Nor was there any requirement that boundary changes be gazetted. Certainly, the fact that the 1905 transfer is recorded in the *Annual Report* for 1905 and in the *Sudan Intelligence Reports*, but was not otherwise gazetted, scarcely detracts from the existence of the transfer or its legal significance.

452. The boundary between Kordofan and Bahr el Ghazal was consistently referred in the Government's *Annual Report*, as well as in other historical and cartographic sources, as the Bahr el Arab. This is ample evidence of what the Government of the day considered the boundaries to be.

453. In these circumstances, it is appropriate to recall what the Chamber of the Court said in its Judgment in the *Land, Island and Maritime Frontier Dispute* with respect to internal administrative boundaries that follow a river. The relevant passage reads as follows:

"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 which follows a river is likely to continue to follow it so long as its course runs in the same general direction."<sup>520</sup>

454. This principle applies even in situations where there may be some ambiguity in the precise course of the feature in question (and here, there was no ambiguity by 1905 as to the real identity of the Bahr el Arab). To quote once again from the Chamber's Judgment:

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<sup>519</sup> SPLM/A Memorial, para. 304.

<sup>520</sup> *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)*, Judgment, I.C.J. Reports 1992, at p. 504, para. 244.



"When therefore the very many instruments cited, even after minute examination, are found to give no clear and unambiguous indication, the Chamber has felt it right similarly to take some account of the suitability of certain topographical features to provide an identifiable and convenient boundary."

And the Chamber added:

"The Chamber is here appealing not so much to any concept of 'natural frontiers', but rather to a presumption underlying the boundaries on which the *uti possidetis juris* operates. Considerations of this kind have been a factor in boundary-making everywhere, and accordingly are likely, in cases otherwise dubious, to have been a factor also with those who made the provincial boundaries previous to 1821."<sup>521</sup>

In this connection, it should be recalled that the Bahr el Arab was unquestionably the boundary between Darfur and Bahr el Ghazal at the relevant time.<sup>522</sup>

455. Given the repeated references to the Bahr el Arab as the provincial boundary between Kordofan and Bahr el Ghazal prior to the transfer, the Chamber's observation in the *Frontier Dispute* case is also apposite to the task of the Tribunal in this case. As the Chamber stated:

"Having thus established how far the regulative or administrative texts relied on by the Parties are applicable in determining the frontier line, the Chamber now comes to the question of how these can be implemented. In this respect the Chamber's task is chiefly to identify the topographical elements used as reference points in these documents, and to locate them on the maps and on the ground in relation to the modern place-names."<sup>523</sup>

456. Having shown that, up to 1905, the provincial boundary between Kordofan and Bahr el Ghazal lay along the Bahr el Arab, the next section will turn to the 1905 transfer itself.

### **C. The 1905 Transfer**

457. In taking up this central aspect of the case, the SPLM/A Memorial starts out by stating with respect to the contemporary documents:

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<sup>521</sup> Ibid., at p. 390, para. 46.

<sup>522</sup> GoS Memorial, paras. 328(e) and 369-370.

<sup>523</sup> *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 610, para. 106.

"Those records show that, during early 1905, the Ngok Dinka were transferred by Sudan Government officials from what was described at the time by those officials as Bahr el Ghazal to Kordofan and the administrative authority of the Kordofan provincial government. The purpose of the transfer was to reduce the risk to the Ngok Dinka of slave and cattle raids, conducted by Baggara Arabs located in Kordofan, by placing the Ngok and the Baggara under the same provincial administration."<sup>524</sup>

458. The first documentary reference to the transfer, cited in both Parties' Memorials,<sup>525</sup> appears in the March 1905 *Sudan Intelligence Report* where the following notation appears:

"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>526</sup>

459. There is no doubt that the Kir river referred to in this passage was the Bahr el Arab. This was expressly noted in Bayldon's 20 March 1905 report attached as Appendix "C" to the same edition of the *Sudan Intelligence Reports* referring to the transfer. Similarly, Sheikh Rihan's territory was also south of the Bahr el Arab. This had been confirmed in the February 1905 *Sudan Intelligence Report* which reported that the Sheikh had said that his district was situated between the Kir and Lol rivers.<sup>527</sup> It follows that the reference to the administrative transfer appearing in the March 1905 *Sudan Intelligence Reports* was to areas lying on, or to the south of, the Bahr el Arab.

460. Both Parties, as well as the Daly Report, also refer to the fact that the 1905 *Annual Reports* for Kordofan and Bahr el Ghazal record the transfer.<sup>528</sup>

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<sup>524</sup> SPLM/A Memorial, para. 346.

<sup>525</sup> GoS Memorial, para. 359; SPLM/A Memorial, para. 351.

<sup>526</sup> *Sudan Intelligence Reports*, No. 128 (March 1905), p. 3 (SM Annex 9).

<sup>527</sup> *Sudan Intelligence Reports*, No. 127 (February 1905), p. 2 (SM Annex 8).

<sup>528</sup> GoS Memorial, paras. 361 and 362; SPLM/A Memorial, paras. 352 and 353; Daly Report, pp. 38-39 where he refers to these documents as part of what he calls the "Foundation Texts".

461. With respect to the boundaries of Kordofan Province, the 1905 *Annual Report* states the following:

**"Province Boundaries** - The Dinka Sheikhs, Sultan Rob and Sultan Rihan Gorkwei are now included in Kordofan instead of the Bahr-El-Ghazal."<sup>529</sup>

The 1905 *Annual Report* for Bahr el Ghazal province records the situation in similar terms:

**"Province Boundaries** - In the north the territories of Sultan Rob and Sheikh Gokwei have been taken from this Province and added to Kordofan."<sup>530</sup>

462. The significance of these accounts is apparent when they are compared with the description of the Kordofan-Bahr el Ghazal boundary recorded in earlier *Annual Reports*. As noted in the previous section, the *Annual Reports* for Kordofan and Bahr el Ghazal during the period from 1902 through 1904 described the southern boundary of Kordofan, and the northern boundary of Bahr el Ghazal, as the Bahr el Arab.

463. In 1905, that changed. No longer was there a reference to the Bahr el Arab as the provincial boundary. The territories of Sultan Rob and Sheikh Gorkwei that were previously situated in Bahr el Ghazal were stated to have been taken from that province and added to Kordofan. The conclusion to be drawn from this new way in which the boundaries of both provinces were described is that the transferred territories were located to the *south* of the previous provincial boundary - in other words, to the *south* of the Bahr el Arab in what had hitherto been part of Bahr el Ghazal.

464. Seen in this light, it is plainly wrong for the SPLM/A Memorial to assert that "the transfer of the Ngok and Twic Dinka to Kordofan was not accompanied at the time by any recorded change to the putative provincial boundaries of either Kordofan or Bahr el Ghazal."<sup>531</sup> That is precisely what the alterations in "Province Boundaries" recorded in the 1905 *Annual Reports* did,

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<sup>529</sup> Copies of these *Reports* are annexed to the GoS Memorial at Annex 24.

<sup>530</sup> *Reports on the Finances, Administration, and Condition of the Sudan*, Annual Report, Bahr el Ghazal Province (1905), p. 3 (SM Annex 24).

<sup>531</sup> SPLM/A Memorial, para. 355.

especially when compared with the way that the boundary was described in earlier *Annual Reports*.

465. In and of themselves, the references in the 1905 *Annual Reports* and in the March 1905 *Sudan Intelligence Report* are more than sufficient to show that the administrative transfer that took place in 1905 concerned Dinka areas lying to the south of the Bahr el Arab. Yet, despite Professor Daly's statement that the texts referred to above are "the most direct records we have of the reported transfer,"<sup>532</sup> there is still more in terms of contemporary documentary evidence that the SPLM/A Memorial and the Daly Report pass over in silence.

466. The crucial document in question is Governor-General Wingate's Memorandum included in the 1905 *Annual Report on Finances, Administration, and Condition of the Sudan*. A copy may be found at Annex 24 of Volume II-A of the GoS Memorial. The importance of Wingate's position in the Sudan cannot be underestimated. Professor Daly, in his book *Empire on the Nile*, cites Article 3 of the 1899 Anglo-Egyptian Agreement which provided that:

"The supreme military and civil command of the Soudan shall be vested in one officer, termed the 'Governor-General of the Soudan'."<sup>533</sup>

467. Wingate's Memorandum included a section entitled "Changes in Provincial Boundaries and Nomenclature". Under that section, he discusses the alterations to provincial boundaries that were made in 1905 to improve administration, and he lists four "principal alterations". The fourth entry on Wingate's list reads as follows:

"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>534</sup>

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<sup>532</sup> Daly Report, p. 39.

<sup>533</sup> Daly, M.W., *Empire on the Nile* (CUP, Cambridge, 1986), p. 15, SPLM/A-FE 11/5.

<sup>534</sup> Cited at GoS Memorial, para. 360; and see *Reports on the Finances, Administration, and Condition of the Sudan*, Memorandum by Major General Sir Wingate (1905), p. 24 (SM Annex 24).

468. This description could not be clearer as regards the northern limit of the area that was transferred in 1905. It states unequivocally that the tribal districts that were being incorporated into Kordofan were to the *south* of the Bahr el Arab, and had formerly been a portion of the Bahr el Ghazal province. This conclusively rebuts any notion that the Bahr el Ghazal province extended north of the Bahr el Arab, and it is further confirmatory evidence that the pre-transfer boundary between Kordofan and Bahr el Ghazal was the Bahr el Arab. Wingate makes absolutely no mention of any areas lying to the *north* of the river being transferred, obviously because such areas were already part of Kordofan prior to 1905 and were not transferred.

469. It is extraordinary that both the SPLM/A Memorial and the Daly Report fail to mention this crucial document - yet one more example of their selective treatment of the contemporary evidence. However, Wingate's Memorandum fundamentally contradicts the entire SPLM/A argument that the area transferred in 1905 extended north - indeed, far to the north - of the Bahr el Arab. By the same token, it also undermines the conclusion of the ABC Experts that a huge portion of the transferred area lay to the north of that river.

470. Notwithstanding this, Professor Daly argues in his Report that-

"the governors of the Bahr al-Ghazal and of Kordofan, like the government in Khartoum, had no real idea of the extent of territory or people which it 'transferred' to Kordofan in 1905."<sup>535</sup>

He then adds:

"In each case, no effort was made to delineate in even the broadest terms the territory of 'Sultan Rob' - indeed, the *Sudan Intelligence Report* does not refer to a transfer of territory at all, but only states that 'Sultan Rob, whose country is on the Kir river... [is] to belong to Kordofan Province'."<sup>536</sup>

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<sup>535</sup> Daly Report, p. 41.  
<sup>536</sup> Ibid.

471. These assertions are advanced at the expense of ignoring the other key piece of evidence - Wingate's Memorandum - which describes very clearly the northern extent of the territory ("districts"), including those of Sultan Rob, that were transferred to Kordofan in 1905. That limit was the Bahr el Arab.<sup>537</sup>

472. Professor Daly's failure to mention the Wingate Memorandum also colours the conclusion he reaches with respect to the area transferred in 1905. After dismissing the relevance of the *Annual Reports* as evidence for the pre-transfer boundary between Kordofan and Bahr el Ghazal, he advances the following argument:

"We are left then with the conclusion that the best documentary evidence so far located for the northern boundary of the area of the nine Ngok chiefdoms in 1905 remains, in the opinion of this historian and as of the date of the present report, Wilkinson's itinerary of 1902, which establishes a permanent Ngok presence on the Ragaba al-Zarqa. That evidence is consistent with other documentary records, although it relates only to the specific route Wilkinson followed, in the east of the Abyei area, and during the dry season."<sup>538</sup>

473. There are several basic problems with this line of argument.

474. First, the "best documentary evidence" regarding the northern boundary of the chiefdoms transferred to Kordofan in 1905 is not the Wilkinson itinerary, but rather the 1905 records taken from the *Annual Reports* and especially Governor-General Wingate's Memorandum. It is these contemporary accounts that refer specifically to the transfer - Wilkinson obviously says nothing about any transfer since his travels were in 1902 - and that define the northern boundary of the area transferred as the Bahr el Arab (which Bayldon had correctly identified earlier that year). There is no other reasonable way to interpret Wingate's description 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."

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<sup>537</sup> Wingate's reference to the "districts" of Sultan Rob and Okwai being situated to the south of the Bahr el Arab also rebuts Professor Daly's contention that Sultan Rob's "people" were transferred. Clearly, it was territory that was transferred.

<sup>538</sup> Daly Report, p. 49.

475. Second, the Wilkinson itinerary in no way "establishes a permanent Ngok presence on the Ragaba al-Zarqa" as Professor Daly contends. A careful review of Wilkinson's itinerary, attached to Volume II of the *Anglo-Egyptian Soudan Handbook* edited by Lieutenant-Colonel Count Gleichen, disproves Professor Daly's thesis.<sup>539</sup> The relevant entries, which were also mentioned in Chapter 4,<sup>540</sup> show the following, and can be located by reference to the sketch map appearing at page 116 of the GoS Memorial.<sup>541</sup>

- Fauwel: This is the first relevant entry. Fauwel is a short distance north of the Ragaba ez Zarga. Wilkinson records that there is a "Large Arab settlement" there, and that "Homr Arabs here very wild, but possess many cattle, goats and sheep."
- Wilkinson next comes to what he calls the Bahr el Arab, but which both Parties agree is actually the Ragaba ez Zarga. He crosses the river (*i.e.*, to the south), and is now in an area "which is known to the Arabs, as the district of Bara." So Arab tribes were south of the Ragaba ez Zarga.
- Wilkinson next notes that the track then runs south for five miles at which point it divides. Wilkinson states that one track runs "S.S.W. to the country of a Dinka Chief called "Rueng," while the other - also said to run S.S.W. - leads over a wide plain. It should be noted that Wilkinson does not actually say he is in the country of Chief Rueng; just that a track leads to his country. This contradicts the assertion in the SPLM/A Memorial that Wilkinson "reached" the country of a Dinka chief called Rueng.<sup>542</sup> He did not. Moreover, Chief Rueng was not a Ngok Dinka in any event, so his location is irrelevant the issue in this case.

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<sup>539</sup> The itinerary may be found in Gleichen, A., *The Handbook of Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* (2 Vols. HMSO, London, 1905), pp. 155-156 (SM Annex 38).

<sup>540</sup> See paragraphs 252-263 above.

<sup>541</sup> See also, the Second Macdonald Report where the itinerary is discussed at paras. 22-24 and para. 29.

<sup>542</sup> SPLM/A Memorial, para. 920.

- Bongo. Wilkinson does not encounter the first Dinka village of Bongo (or Bombo) until a point almost 15 miles south of the Ragaba ez Zarga, much closer to the Kir. A second Dinka village (Tehak) is then reported about 2 ½ miles away, but all the inhabitants had left when Wilkinson passed through.
- Etai. Wilkinson does not actually meet any Dinkas until he reaches Etai, which is about five miles north of the Kir river.
- Kir. Here, Wilkinson notes that Sultan Rob lived on the *south* bank of the river.
- Wilkinson then leaves Sultan Rob's settlement and follows the Kir along its north (or left) bank. He notes: The country here is all open and much dura cultivated. Dinka dwellings are dotted about, and the country presents a most prosperous aspect."
- The SPLM/A Memorial intimates that these settlements, as well as "Ngok territory", were reached after Wilkinson's return north and northwest from the Kir in the direction of the Ngol/Ragaba ez Zarga.<sup>543</sup> But this is misleading. Wilkinson's actual account notes that the Dinka settlements were in the vicinity of the left bank of the Kir, not scattered all the way up to the Ragaba ez Zarga.
- El Niat. About five miles north of the Kir, Wilkinson encounters a large swamp called El Niat. No mention is made of any Dinkas or Dinka settlements in this area.
- Abu Kareit. This settlement is on what Wilkinson calls the Bahr el Arab, but which is actually the Ragaba ez Zarga. There are no Dinkas there. To the contrary, Wilkinson describes Abu Kareit as a "Homr settlement."

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<sup>543</sup> SPLM/A Memorial, para. 926.



- Mellum. Wilkinson then reaches Mellum also on the Ragaba ez Zarga. Once again, he states that Mellum is "an Arab Settlement."
- From Mellum, Wilkinson crosses the river and proceeds back to Fauwel.

476. Based on the notes of Wilkinson's itinerary, it can be seen that only Arab settlements (Abu Kareit and Mellum) are mentioned as situated along the Ragaba ez Zarga. The first (deserted, and thus obviously not "permanent") Dinka village is much further to the south at Bongo, and the first Dinka people are seen at Etai, a short distance north of the Kir. In the area between Kir and the Ragaba ez Zarga, no Dinka villages are recorded except in the immediate vicinity of the north bank of the Kir. It follows that Wilkinson's itinerary does not in the least support Professor Daly's contention that it "establishes a permanent Ngok presence on the Ragaba al-Zarga," and it is misleading for the author to suggest otherwise.

477. Third, having taken the position that the best documentary evidence for the northern boundary of the area of the nine Ngok chiefdoms in 1905 is Wilkinson's itinerary (supposedly establishing a permanent Ngok presence up to the Ragaba ez Zarga), Professor Daly then modifies his conclusion. For, on the basis of so-called "oral tradition", the toponymy of certain place names, and archaeology - for none of which any evidence is produced other than references to oral statements furnished to (and given no weight by) the ABC Experts - he concludes:

"On the basis of the available evidence, the northern boundary [of the 'Abyei area'] is well to the north of the Ragaba al-Zarqa in the goz."<sup>544</sup>

478. The logic of this reasoning is not easy to follow. Be that as it may, the fact remains that the documentary evidence relating to the transfer itself, taken from 1905 official government records, flatly contradicts Professor Daly's thesis. It shows that the northern boundary of the Dinka areas that were transferred in that year was the Bahr el Arab river.

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<sup>544</sup> Daly Report, p. 51.

479. This was entirely consistent with the pre-transfer record which referred to the Bahr el Arab as the Kordofan-Bahr el Ghazal boundary. Given that areas north of the Bahr el Arab were already part of Kordofan before 1905, and that Wingate's 1905 Memorandum stated that the Dinka districts of Sultan Rob and Sultan Okwai (also referred to as Sheikh Gorkwei) lay "south of the Bahr el Arab and formerly [in] a portion of the Bahr el Ghazal Province" were then incorporated into Kordofan, the Bahr el Arab must have been regarded as the northern limit of the area of the nine Ngok Dinka chiefdoms transferred in 1905.

480. Whether there was a limited Dinka population present on a seasonal or other basis north of the Bahr el Arab in 1905 is not germane to the issue. Wilkinson suggests their presence was spotty in any event, and that Dinka settlements north of the river were situated close to the river. They certainly did not extend up to the Ragaba ez Zarga, let alone to areas further north, as Chapter 4 has shown.

481. But the mandate of this Tribunal (as well as of the ABC Experts), is not to determine where various tribes lived or grazed in 1905; it is to determine the *area* of the nine Ngok Dinka Chiefdoms *transferred* to Kordofan in that year. On this point, the evidence is clear. The areas transferred lay south of the Bahr el Arab. Areas to the north of that river, even if they could have contained a limited Dinka presence, were not transferred because they already formed part of the province of Kordofan.

482. In this connection, it is appropriate to refer to the manner in which the Chamber in the *Frontier Dispute* dealt with a similar issue. To quote from the relevant passage of the Chamber's Judgment:

"In the colonial period, the fact that inhabitants of one village in a French colony left in order to cultivate land lying on the territory of another neighbouring French colony, or *a fortiori* on the territory of another *cercle* belonging to the same colony, did not contradict the notion of a clearly-defined boundary between the various colonies or *cercles*. That was the situation inherited by the two Parties at the moment of achieving independence; and it is the frontier as it existed at that moment which the Chamber is required to identify. The Parties have not requested the Chamber to decide what should become of the land rights and other rights which, on the eve of the independence of both States, were being exercised across the boundary between the two pre-existing colonies. If such rights had no impact on the position of that boundary, then they do not affect the line of the

frontier, and it is this line alone which the Parties have requested the Chamber to investigate."<sup>545</sup>

483. The same considerations apply here. The Tribunal is tasked with deciding an area transferred as of 1905. It is the boundary of this area, as it existed at that moment, that the Tribunal is required to identify. Neither this Tribunal nor the Experts were requested to decide what should become of land rights or other rights which, as of the date of the transfer, might have been exercised across the boundary between two pre-existing provinces.

**D. The Southern Limits to the Transferred Area after 1905**

484. The previous section has shown that the northern limit of the transferred area was identified as of 1905. This limit was the Bahr el Arab, as Wingate's Memorandum clearly shows. Thus, events after 1905 are not relevant for determining or delimiting the northern area of the Ngok Dinka chiefdoms transferred in 1905.

485. The situation is different, however, with respect to the southern, and to some extent, the eastern and western, limits of the transferred area.

486. It will be recalled that the 1905 *Annual Reports* for Kordofan and Bahr el Ghazal no longer referred to the boundary between Kordofan and Bahr el Ghazal as the Bahr el Arab, but rather noted that the territories of Sultan Rob and Sheikh Gokwei (or Gorkwei) had been taken from Bahr el Ghazal and added to Kordofan. Wingate's Memorandum added an important precision to these references by expressly recording that 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 with Kordofan." As specific as these accounts were of the northern limit, they did not address the southern limit of the transferred area.

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<sup>545</sup> *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 617, para. 116. See also the Chamber's Judgment in the *El Salvador-Honduras* case cited at para. 123 of the GoS Memorial; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, *I.C.J. Reports 1992*, p. 419, para. 97.

487. Reference to post-1905 events, including the maps issued by the Sudan Government between 1910 and 1936, shed light on this question.<sup>546</sup>

488. That the southern limit of the transferred area remained to be delimited can be seen from the December 1911 *Anglo-Egyptian Handbook Series* for the Bahr el Ghazal province. As noted in the GoS Memorial, it reports under the heading "Boundaries" that:

"The province is bounded on the north by the southern frontiers of the suzerain State of Darfur and the province of Kordofan. *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.*"<sup>547</sup>

489. The reference to "tribal districts" in the *Handbook* mirrored Wingate's 1905 Memorandum which had referred to the "districts" of Sultan Rob and Okwai south of the Bahr el Arab having been incorporated into Kordofan. What is evident from this account, however, is that the southern limits of these tribal districts had not yet been fully delimited.

490. That the southern limits of the transferred area lay to the south of the Bahr el Arab was shown on a map published in 1910 by the Royal Geographic Society entitled "The Sudan Province of Kordofan." It was a map prepared to illustrate an earlier paper by Captain Watkiss Lloyd who was the Governor of Kordofan. A copy may be found as Map 11 in the GoS Memorial Map Atlas.<sup>548</sup>

491. The map clearly shows that in the relevant area the Kordofan-Bahr el Ghazal boundary no longer followed the Bahr el Arab, as the 1903 revision of Mardon's map had shown and as recorded in the 1902-1904 *Annual Reports*. Rather, on the west the provincial boundary passes south of the Bahr el Arab near the 28° E meridian and then trends to the east passing the village of Atwak and linking up with the Khor Amadgora. It then follows that river until it meets the Bahr el Arab east of Sultan Rob's territory.

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<sup>546</sup> Certain of these maps are also discussed in the Second Macdonald Report, paras. 34-38.  
<sup>547</sup> GoS Memorial, para. 376, and *Anglo-Egyptian Handbook Series - The Bahr el Ghazal Province*, (HMSO, London, 1911), p. 5 (SM Annex 26). (Emphasis added).  
<sup>548</sup> See also, SPLM/A Memorial Atlas, Maps 44 and 44a.

492. The map thus depicts a stretch of territory lying to the south of the Bahr el Arab which by then fell within the province of Kordofan. Given that the pre-transfer Kordofan-Bahr el Ghazal boundary had been the Bahr el Arab, this stretch of territory illustrates what was considered to be the area transferred in 1905.<sup>549</sup>

493. The SPLM/A enlargement of the 1910 map has added a label "Approximate Boundary" to the southern part of the map where the boundary lies between Kordofan and Bahr el Ghazal. On the actual map, such a label only appears much further north between Kordofan and Darfur. While the southern boundary of the transferred area had not yet been delimited, as the 1911 *Handbook* referred to above observes, the map nonetheless must have represented Lloyd's views of roughly where such an area lay. Moreover, as will be seen, later maps were consistent in depicting the post-transfer Kordofan-Bahr el Ghazal boundary in more or less the same place.

494. In 1913, the Sudan Survey Office compiled a map of Kordofan Province which, in a similar fashion, showed the southern boundary of Kordofan lying to the south of Sultan Rob's village (which is, in turn, indicated as being south of the Bahr el Arab).<sup>550</sup> The provincial boundary was not labelled as "approximate". It too passed south of the Bahr el Arab and linked up with an unnamed river flowing into the Lol which appears to be the same river along which the boundary ran on the 1910 Map. Once again, this provides a good picture of where the southern limits of the transferred area were considered to lie.

495. The following year (1914), the Geographic Section, General Staff, War Office compiled a 1:3,000,000 scale map of Sudan depicting provincial boundaries which are not labelled "approximate".<sup>551</sup> The SPLM/A Memorial Atlas omits to produce this map. Once again, however, it shows the Kordofan-Bahr el Ghazal boundary passing well south of the Bahr el Arab and again linking up to the Amadagora river.

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<sup>549</sup> The SPLM/A Memorial notes (para. 340), as had the GoS Memorial (para. 373), that in a 1908 *Sudan Intelligence Report* Lloyd refers to the southern boundary of Kordofan as the Bahr el Arab. This evidently did not incorporate the update resulting from the 1905 transfer. But the subsequent 1910 map published to illustrate Lloyd's paper clearly does reflect the transfer by placing the provincial boundary to the south of the Bahr el Arab.

<sup>550</sup> GoS Memorial, Map Atlas, Map 12. In the Map Atlas, the map is labelled as a 1910 Map, but this should read 1913.

<sup>551</sup> *Ibid.*, Map Atlas, Map 14.

496. In the same year, the Survey Office, Khartoum published new editions of the much larger-scale 1:250,000 sheets of the area in the vicinity of the boundary. Both sheets 65-K<sup>552</sup> and 65-L depicted the boundary south of the Bahr el Arab (labelled this time as an approximate province boundary). Sheet 65-K shows the western section of the adjusted boundary running in a broad arc south of the Bahr el Arab or Kir river; sheet 65-L shows the boundary to the east following the Khor Amadgora and the River Lol. While the SPLM/A Memorial reproduced the 1910 edition of Sheet 65-L,<sup>553</sup> which did not show the new boundary to the south of the Bahr el Arab, it failed to produce these maps.

497. Both Parties have produced the 1916 edition of the Survey Office's Sheet 65-K.<sup>554</sup> Again, the "approximate" Kordofan-Bahr el Ghazal boundary is shown descending in a broad arc south of the Bahr el Arab or Kir river.<sup>555</sup> The same thing appears on the 1916 Geographic Section of the War Office map of Darfur as well as on the 1920 revision to the map of the Anglo-Egyptian Sudan.<sup>556</sup>

498. The GoS Memorial (but not the SPLM/A Memorial) also reproduced the 1922 revisions to Sheets 65-K and 65-L which continued to show the boundary of Kordofan in the relevant area in much the same way.<sup>557</sup>

499. It was only in the 1925 editions of Sheets 65-K and 65-L that the Kordofan-Bahr el Ghazal boundary south of the Bahr el Arab began to adopt straight line segments instead of curved lines in the area of concern.<sup>558</sup> Nonetheless, the "transferred area" south of the Bahr el Arab continued to be depicted in the same general way.

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<sup>552</sup> GoS Counter-Memorial, Map Atlas, Map 26.

<sup>553</sup> SPLM/A Memorial, Atlas, Map 46.

<sup>554</sup> GoS Memorial, Map Atlas, Map 15; SPLM/A Memorial, Atlas, Map 50.

<sup>555</sup> The Second Macdonald Report, at para. 38, responds to the SPLM/A Memorial's attempt to equate Burakol with the modern location of the town of Abyei.

<sup>556</sup> Gos Memorial, Map Atlas, Maps 16 and 17. These maps are not produced in the SPLM/A Memorial.

<sup>557</sup> Note that on Figure 14 at page 146 of the GoS Memorial, these were referred to as Maps 14 and 15 in the Map Atlas, whereas the correct reference is to Maps 18 and 19.

<sup>558</sup> Gos Memorial, Map Atlas, Maps 20 and 21.

500. A further "straightening" of the southern boundary of Kordofan was depicted on the 1931 and 1936 editions of Sheet 65-K and on the 1935 and 1936 editions of Sheet 65-L.<sup>559</sup> By 1936, therefore, the boundary closely resembled the provincial boundary in force as of independence in 1956.

501. This "straightening" of the southern boundary after 1931, which moved the boundary somewhat north of the Amadgora and the Lol in the east, reflected the fact that, in the meantime, the Twic has been retransferred back to Bahr el Ghazal.<sup>560</sup>

502. In this connection, it will be recalled that the 1905 transfer concerned the districts of Sultan Rob (Paramount Chief of the Ngok Dinka) and Sheikh Rihan Gorkwei of the Twic whose territory was between the Lol and the Kir. The Twic were not part of the Ngok Dinka. In 1922, the District Commissioner of Western Kordofan, Dupuis, referred to the Twic in his note on the Dinka of Western Kordofan, thus placing the Twic still in Kordofan at that time.<sup>561</sup> However, the Ngok/Twic dividing line was depicted on a 1924 sketch of the area reproduced as Map 38 to the GoS Counter-Memorial Map Atlas, and by 1928, the *Monthly Record of Sudan* referred to the "Twij area" under the section on the Bahr el Ghazal Province, showing that they had been transferred back to Bahr el Ghazal by that time.<sup>562</sup>

503. This explains why the mandate of this Tribunal, as well as that of the ABC Experts, was framed only to delimit the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, not the area of the Twic as well.

504. As noted above, a comparison of the Kordofan-Bahr el Ghazal boundary depicted on various maps after the 1905 transfer can be seen on Figure 14 at page 146 of the GoS Memorial. While the lines do not precisely coincide, when the retransfer of the Twic in the late 1920s is taken into account, they all encompass broadly the same area south of the Bahr el Arab corresponding to the area of the Ngok Dinka in contrast to the pre-transfer boundary which was recorded as following that river. These maps thus

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<sup>559</sup> Ibid., Maps 23, 24, 25 and 26.

<sup>560</sup> GoS Memorial, para. 381(4).

<sup>561</sup> Dupuis 1922 Report: Note on Dinka of Western Kordofan (SCM Annex 52).

<sup>562</sup> *Sudan Monthly Record*, No. 407, June 1928 (SCM Annex 53).

provide the best evidence of how the southern limit of the transferred area was interpreted after 1905, up to independence.

505. Both Parties accept that the 1956 provincial boundary, which continues to be the boundary today, constitutes the southern limit of the area transferred in 1905.<sup>563</sup> There is accordingly no dispute on this aspect of the case. What the SPLM/A Memorial fails to grapple with, however, is why the pre-transfer provincial boundary was consistently referred to as the Bahr el Arab while the post-transfer depiction of that boundary lay significantly further south. As explained in this Chapter, the reason was because the 1905 transfer documents were clear in recording that it was only Dinka areas to the south of the Bahr el Arab that were transferred in that year. The transferred area is thus the area shown on Figure 17 of the GoS Memorial.

***E. The "Transferred Area" Did Not Include Areas North of the Bahr el Arab***

506. In the light of the facts recounted in the previous sections, it is necessary to return to the argument advanced in the SPLM/A Memorial that the northern limit of the area of nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 lies along either the 10°22'30"N latitude, as decided by the ABC Experts, or the 10°35'N latitude, which is the SPLM/A's alternative submission in the event the Experts are found to have exceeded their mandate.<sup>564</sup>

507. The gist of the SPLM/A's thesis is that the "Abyei Area" should be defined "to encompass all of the territory occupied and used by the Ngok Dinka in 1905."<sup>565</sup> According to the SPLM/A Memorial, this area extends up to "an approximate latitude 10°35'N."<sup>566</sup> As noted in Chapter 2, however, this formulation of the issue fundamentally distorts the actual mandate of the ABC and the mandate of this Tribunal.

508. Chapter 4 has already rebutted the SPLM/A's contention based on where the Dinka (as opposed to the Baggara Arabs) were alleged to have had a presence. For present purposes, the focus is on how the SPLM's arguments

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<sup>563</sup> GoS Memorial, p. 160, Submissions (b) and Figure 17 at p. 159 of the Memorial; SPLM/A Memorial, para. 1202(c).

<sup>564</sup> SPLM/A Memorial, paras. 869-871.

<sup>565</sup> Ibid., para. 869.

<sup>566</sup> Ibid., paras. 871 and 877.



cannot possibly be reconciled with the mandate of the Experts or of this Tribunal.

509. That mandate centered on the issue of an *area* that was transferred to Kordofan in 1905 ("the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905"). Quite clearly, the relevant question, or mandate, was not framed in terms of "territory occupied or used" by the Ngok Dinka. Those words simply do not appear in the formula and it is inadmissible for the SPLM/A Memorial to try to read them into a text on which the Parties have previously agreed.

510. The SPLM/A Memorial tries to circumvent this obvious problem by a lengthy discourse on grammar.<sup>567</sup> As noted in Chapter 2, the argument appears to be that the phrase in the mandate, "transferred to Kordofan in 1905", relates to the preceding word "chiefdoms", not to the word "area". To quote the words of the SPLM/A Memorial:

"It is therefore the 'chiefdoms' which are referred to as having been 'transferred to Kordofan' in Article 1.1.2, not the 'area'."<sup>568</sup>

511. The Government of Sudan does not agree with the SPLM/A's grammatical analysis. In Sudan's submission, the phrase "the area of the nine Ngok Dinka Chiefdoms" should be read together as forming the subject matter of the "transfer". An "area" was clearly transferred from Bahr el Ghazal to Kordofan in 1905. The question is: what area?

512. The Tribunal does not need to delve into esoteric issues of grammar in order to answer this question. For it makes no difference if the word "transferred" relates to "chiefdoms" instead of to "area". On either interpretation, it would still be necessary to determine what the area of those chiefdoms was that Sudanese Government Officials decided to transfer to Kordofan in 1905.

513. The SPLM/A Memorial emphasizes that: "In every one of the Sudan Government instruments referring to the 1905 transfer of the Ngok Dinka, reference was made to a transfer of the Ngok Dinka Paramount Chief or of all the territory of the Ngok Dinka Paramount Chief, not to some portion

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<sup>567</sup> Ibid., paras. 1096-1122.

<sup>568</sup> Ibid., para. 1107.

thereof."<sup>569</sup> This is incorrect. In fact, as Chapter 2 noted, the words "all of the territory" do not appear in any of the relevant instruments. This is a further invention of the SPLM/A Memorial.

514. Nevertheless, the SPLM/A Memorial appears to accept that Sultan Rob's territory encompassed all of the nine Ngok Dinka chiefdoms as a consequence of his position as Paramount Chief. It then refers to the transfer language appearing in the March 1905 *Sudan Intelligence Reports*, the 1905 *Annual Report* for the Province of Kordofan, and the 1905 *Annual Report* for the Province of Bahr el Ghazal, which contain references to Sultan Rob's "country", or "The Dinka Sheikhs, Sultan Rob and Sultan Rihan Gorkwei", or "the territories of Sultan Rob".<sup>570</sup> The relevant passages from each of these documents are as follows:

- The March 1905 SIR: "It has been decided that Sultan Rob, whose country is on the Kir river, and Sheikh Rihan of Toj... are to belong to Kordofan Province";
- The 1905 *Annual Report* for Kordofan: "The Dinka Sheikhs, Sultan Rob and Sultan Rihan Gorkwei are now included in Kordofan instead of the Bahr el Ghazal";
- The 1905 *Annual Report* for Bahr el Ghazal: "In the north the territories of Sultan Rob and Sheikh Gokwei have been taken from this Province and added to Kordofan".

515. Based on these texts, the SPLM/A Memorial then argues:

"In particular, it would make no sense to conclude that the 1905 transfer of Sultan Rob and his territories only affected that portion of Ngok territory lying south of the Kiir/Bahr el Arab River. This would be directly contrary to what was specifically stated in the 1905 transfer instruments - which were those actions and statements by the Sudan Government that were must specifically focused on where the Ngok Dinka were located in relation to the Kordofan/Bahr el Ghazal boundary."<sup>571</sup>

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<sup>569</sup> Ibid., para. 1112.

<sup>570</sup> Ibid.

<sup>571</sup> SPLM/A Memorial, para. 1119.

516. There are two fundamental and, in the Government of Sudan's submission, insurmountable problems with this line of argument.

517. First, the SPLM/A Memorial once again blatantly disregards the single most important piece of documentary evidence comprising the "transfer instruments" that so conclusively disproves its thesis. This, of course, is Governor-General Wingate's Memorandum included with the 1905 *Annual Reports on Finances, Administration, and Condition of the Sudan* in which the Senior Government official in the Sudan expressly stated that the transferred area, which was formerly a portion of the Bahr el Ghazal province and now incorporated into Kordofan, was the "districts of Sultans Rob and Okwai, to the South of the Bahr el Arab."<sup>572</sup>

518. Thus, it is clear that the 1905 "transfer documents" did indeed focus on where the Ngok Dinka were located in relation to the Kordofan/Bahr el Ghazal boundary. That area was "to the South of the Bahr el Arab", and it is this area that was transferred; no other. What is "directly contrary to what was specifically stated in the 1905 transfer instruments" - to borrow the words of the SPLM/A Memorial - is to read Wingate's description as supporting the contention that *any areas* north of the Bahr el Arab were transferred, or were intended to be transferred, at that time.

519. Second, the SPLM/A's argument also fails to take into account the fact that areas lying north of the Bahr el Arab could not have been transferred to Kordofan in 1905 in any event. As Section B has demonstrated, this is because the southern boundary of Kordofan (and the northern boundary of Bahr el Ghazal) was repeatedly recorded as being the Bahr el Arab prior to the transfer. It follows that areas north of the Bahr el Arab were already incorporated in Kordofan prior to 1905, and could not therefore have been transferred to it in 1905.

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<sup>572</sup> *Report on the Finances, Administration, and Condition of the Sudan*, Annual Report (1905), p. 24 (SM Annex 24). (Emphasis added).

520. To accept the argument set forth in the SPLM/A Memorial would mean that, prior to the transfer, the 10°35'N latitude (or the 10°22'30"N latitude, if the Experts' decision is followed) constituted the provincial boundary between Kordofan and Bahr el Ghazal. Not one piece of evidence has been advanced in the SPLM/A Memorial (or in the Experts' Report) to support this extraordinary proposition. A further extensive archived search has revealed no such evidence.

521. In short, there is absolutely nothing emanating from Sudan Government officials at any time before the transfer that suggests that the province of Kordofan was bounded in the south along the 10°35'N latitude (or the 10°22'30"N latitude), or that the province of Bahr el Ghazal extended that far north. To the contrary, *all* evidence points to the Bahr el Arab as the pre-transfer provincial boundary, and the areas of Sultan Rob and Sheikh Gorkwei south of that river as having been the subject of the 1905 transfer.

#### ***F. Conclusions***

522. The following conclusions emerge from the contemporary documentary evidence.

- (i) As a matter of general repute, the Bahr el Arab was well known prior to the transfer as the dividing line between Arab tribes to the north and Negroid tribes, including the Dinka, to the south.
- (ii) Official Government records from the period 1902-1904, as well as maps and other reliable sources, placed the Kordofan-Bahr el Ghazal boundary along the Bahr el Arab prior to the transfer.
- (iii) The Bahr el Arab was the focus of considerable attention from Government officials after 1900. While there was a short period of uncertainty over the identity of the river (based primarily on Wilkinson's 1902 itinerary), by early 1905 the "real" Bahr el Arab had been correctly identified by Bayldon and others. Its identity was thus known before the 1905 transfer took place.

- (iv) The 1905 transfer concerned the districts of Sultan Rob and Sultan Gorkwei which were specifically stated to lie *south* of the Bahr el Arab.
- (v) Post-1905 maps showed the change in the provincial boundary that resulted from the transfer, and depicted the new boundary well to the south of the Bahr el Arab. The area between the Bahr el Arab and the new provincial boundary was thus the "transferred area".
- (vi) There is no evidence whatsoever that the pre-1905 Kordofan-Bahr el Ghazal boundary lay north of the Bahr el Arab, whether along the Ragaba ez Zarga, the 10°22'30"N latitude or the 10°35'N latitude.
- (vii) No areas north of the Bahr el Arab were transferred to Kordofan in 1905 because Wingate said as much in his Memorandum and because such areas already formed part of Kordofan.









## MAPPING ISSUES RAISED BY THE SPLM/A MEMORIAL

A S Macdonald MA MSc FRGS\*

### INTRODUCTION

1. In both the Memorial of the SPLM/A and the attached Expert Report, there are many assertions of a geographical kind and many references to, and interpretations of, maps that require comment and/or rebuttal if a correct understanding of the situation in 1905 is to be achieved.
2. The issues that are raised are covered here in three separate sections and two appendices:
  - A. Erroneous statements of fact
  - B. Assertions lacking supporting evidence
  - C. Misunderstandings when assessing individual mapsAppendix 1: Deficiencies in the SPLM/A Map Atlas  
Appendix 2: Provincial Boundary Making
3. The relevant paragraph numbers and text are taken from the SPLM/A Memorial and are quoted in each case in bold text.

### A. ERRONEOUS STATEMENTS OF FACT

**305. By 1905, the only real effort comprehensively to describe the limits of the territory of Sudan's provinces was an Appendix to Gleichen's unofficial 1905 *The Anglo-Egyptian Sudan*. Gleichen's 1905 Appendix contained a discursive, textual description of the author's views regarding the administrative boundaries of the then existing Sudanese provinces. That unofficial account was by its terms vague, approximate and provisional, reflecting Gleichen's understanding of the Sudan Government's ongoing efforts to develop internal administrative regions.**

**306. For example, Gleichen's description of the northern boundary of Berber province was "[t]he northern boundary of the Sudan from *about E. long. 33°* to the Red Sea." Similarly, the description of the boundary between Berber and Suakin provinces was by reference to neighboring tribes: "[f]rom the point where the northern boundary touches the sea the line runs in a**

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southerly direction to Kokreb, leaving the Hamedorab, Shantirab, and other Bisharin tribes to Berber and the Amarrar to Suakin.” As described in Professor Daly’s expert report, numerous other aspects of Gleichen’s descriptions were similar.

4. The claims that Gleichen had produced an “unofficial 1905 *The Anglo Egyptian Sudan*”, that Appendix G “contained a discursive, textual description of the author’s views regarding the administrative boundaries” and that the “unofficial account was by its terms vague, approximate and provisional” are incorrect and misleading. The full title of the publication includes the phrase “A Compendium prepared by Officers of the Sudan Government”. Gleichen himself was Director of Intelligence and Sudan Agent in the Egyptian Army from 1901 to 1903 who, as the Governor General said in his Preface, “from the somewhat indiscriminate mass of reports, documents and books at his disposal, has evolved a compendium which cannot fail to be of use and value to the officers and officials of the Sudan Government”.<sup>1</sup> The book was published by His Majesty’s Stationery Office. Its publication was noted in the 1905 Annual Report of the Sudan Survey Department. It can be taken to be an official document.<sup>2</sup> To suggest that it was an unofficial publication and that it contained Gleichen’s own views on the provincial boundaries is misleading. In the Preface, he extends his thanks “to Captain H.H.S. Morant (Assistant Director of Intelligence) for assistance rendered in compiling and editing.” It was a successor to Morant as Assistant Director of Intelligence who sent out the 1907 circular (illustrated at Appendix 2, Figs. 1 and 2) requesting boundary information from Governors. So it is not unreasonable to assume that maintaining a record of boundary information was one of the Assistant Director’s duties.
5. Whether or not Appendix G, as contested in the SPLM/A Memorial, is a correct representation of other provincial boundaries is not relevant to the present dispute. What is clear is that Appendix G does contain the description of the boundary between Kordofan and Bahr el Ghazal Provinces that had been reported by the respective Governors in their Annual Reports in 1902, 1903 and 1904.<sup>3</sup>
6. The final sentence of para 306, referring to M.W. Daly’s Expert Report appears to be aimed at further reducing Gleichen’s reputation. It is not, however, clear what “further aspects of Gleichen’s descriptions” are being referred to and hence what similarity exists.

**307. To the same effect, Gleichen’s 1905 *The Anglo-Egyptian Sudan* included a map of Sudan, which identified some provincial boundaries, but omitted**

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<sup>1</sup> E. Gleichen (ed.), *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. 1, Preface (1905) (SPLM/A Exhibit-FE 2/14).

<sup>2</sup> Annual Report, Survey Department, 1905, p. 14 (SCM Annex 51).

<sup>3</sup> Annual Report, Bahr el Ghazal Province, 1902, p. 230 (SM Annex 21); Annual Report, Kordofan Province, 1903, p. 71 (SM Annex 22); Annual Report, Bahr el Ghazal Province, 1904, p. 3 (SM Annex 23); Annual Report, Kordofan Province, 1904, p. 101 (SM Annex 23).

boundaries between many provinces (recognizing that such boundaries were in the process of development and uncertain and/or provisional). The map is attached as Map 36 (*The Anglo-Egyptian Sudan*, Intelligence Office Khartoum, 1904 (in Gleichen, 1905)). Among other things, Gleichen's map depicted no boundary (not even an approximate one) between Bahr el Ghazal and Kordofan.

7. Para 307 imputes to the Intelligence Office a reason for omitting "some" provincial boundaries: "recognizing that such boundaries were in the process of development and uncertain and/or provisional". There is no evidence for such a claim. The SPLM/A Atlas Map 36<sup>4</sup> shows no provincial boundaries anywhere in the country. The only administrative boundary shown on the map is between Darfur and the rest of Sudan. This acknowledged the fact that Darfur at that time enjoyed a measure of independence as a tributary state. Thus it is not surprising that the boundary between Bahr el Ghazal and Kordofan is not shown. But it is worth noting that the boundary of Darfur goes down to the Bahr el Arab, where it formed the tripoint between Darfur, Kordofan and Bahr el Ghazal.

308. The same absence of definite or permanent provincial boundaries was evident in a map prepared by Mardon for his 1906 *Geography of Egypt and the Anglo-Egyptian Sudan*, which is attached as Map 32 (*The Anglo-Egyptian Sudan*, Mardon, 1906). Mardon's 1906 text noted that "[t]he exact limits of the provinces, especially those in the south, are not yet very definitely fixed." The qualification applied *a fortiori* to an earlier map prepared by Mardon in 1901, attached as Map 33 (*The Anglo-Egyptian Sudan*, Mardon, 1901 (rev. 1903)), although not specifically noted. Both Mardon maps were unofficial products and were simplistic in their presentations, obviously not purporting to define provincial boundaries.

8. The argument that, a map with no boundaries is evidence that the boundaries were unknown seems curious, to say the least. Alongside other work Mardon produced educational materials and the 1906 *Geography of Egypt and the Anglo-Egyptian Sudan* was intended for school children. The map in the book shows no provincial boundaries and Mardon has left no explanation for this omission; we are not entitled to make any on his behalf. While he certainly made the statement quoted about the exactness of the boundaries, he goes on (on the following page) to describe the southern limit of Kordofan and the northern limit of Bahr el Ghazal as the Bahr el Arab.<sup>5</sup> His earlier map of 1901 did show all the provincial boundaries throughout the country and was selected by Morant and Gleichen for insertion into the 1905 Compendium. It can only be assumed that they found it an adequate representation of the provincial boundaries at that time. In addition, the fact that a copy of this map found its way into a Foreign Office file<sup>6</sup> at the time may be taken to mean that the British Government found it a useful document too.

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<sup>4</sup> GoS Memorial Map Atlas Map 7.

<sup>5</sup> H. Mardon, *A Geography of Egypt and the Anglo-Egyptian Sudan* 175 (1906) (SPLM/A Exhibit-FE 2/20).

<sup>6</sup> PRO FO 141/737 (SCM Annex 54).

313. ... .. The location of the Bahr el Ghazal/Kordofan boundary during this period was often described in general terms as the “Bahr el Arab,” but this was a provisional and approximate reference, made by officials who had very little knowledge of the geography or peoples of the region. Indeed, as discussed below, this putative boundary was also based on a demonstrably mistaken geographic understanding, with Sudan Government administrators confusing the Bahr el Arab for other waterways (lying further to the north).

9. The inference of the words “in general terms” suggests that the use of the Bahr el Arab was a vague definition. It is reinforced by the suggestion that the officials who made that decision had very little knowledge of the geography. Yet, in the first decade of the 20<sup>th</sup> century, there were regular visits to Sultan Rob on the Bahr el Arab such as:

Mahon 1902 and 1903<sup>7</sup>  
Wilkinson 1902<sup>8</sup>  
Percival 1904<sup>9</sup>  
Bayldon 1905<sup>10</sup>  
Huntley Walsh 1906<sup>11</sup>  
Lloyd 1907<sup>12</sup>  
Hallam 1907<sup>13</sup>  
Coningham 1909<sup>14</sup>  
Willis 1909<sup>15</sup>

These included journeys from north to south across the Bahr el Arab and east to west along the river. At the same time, Lieut. Comyn was energetically exploring the country further west towards the river’s headwaters.<sup>16</sup> The suggestion that there was little knowledge of the people can be judged after reading the account of the Dinka people in the 1905 Compendium.<sup>17</sup>

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<sup>7</sup> Sudan Intelligence Reports, No. 92, March 1902, Appendix F, p. 19-20 (SM Annex 4); Sudan Intelligence Reports, No. 104, March 1903, Appendix E, p. 19 (SM Annex 5).

<sup>8</sup> Gleichen, Count, *The Anglo-Egyptian Sudan*, Vol. II, (1905) pp. 151-156 (SM Annex 38).

<sup>9</sup> Sudan Intelligence Reports, No. 126, January 1905 p. 3 (SCM Annex 25).

<sup>10</sup> Sudan Intelligence Reports, No. 128, February 1905, Appendix C, pp. 10-11 (SM Annex 9).

<sup>11</sup> Sudan Intelligence Reports, No. 140, March 1906, Appendix D pp. 13-15 (SM Annex 12).

<sup>12</sup> Sudan Intelligence Reports, No 162, (January 1908), Appendix G, p. 55 (SM Annex 17).

<sup>13</sup> Survey Department Topographical Archive, Kordofan Route Report, No. 78 (December 1907) (SCM Annex [ ]).

<sup>14</sup> Annual Report, Survey Department, Khartoum, 1909, p. 556 (SCM Annex 55).

<sup>15</sup> Sudan Intelligence Reports, No.178, May 1909, Appendix C, pp. 16-18 (SM Annex 19).

<sup>16</sup> Comyn, D, The Western Sources of the Nile, *The Geographical Journal*, Vol. 30, No. 5 (Nov., 1907), p. 524 (SM Annex 50).

<sup>17</sup> E. Gleichen (ed.), *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. 1, 160-163 (1905) (SPLM/A Exhibit-FE 2/14).

10. The claim that the “putative boundary” was based on a “demonstrably mistaken geographic understanding” is also wrong. As already explained in the Expert Report attached to the GoS Memorial, there was a short lived period of confusion after Wilkinson’s journey in 1902 which resulted in one map being issued with a distortion of the course of the Bahr el Arab to the north of Sultan Rob’s village. But that had been corrected by 1907.

**330. To similar effect, the Survey Office of Khartoum produced a map in 1916 which also identified a boundary between Bahr el Ghazal and Kordofan, but again described this as “Approx. Province Bdy: Kordofan/Bahr El Ghazal.” The 1916 Survey Office map is attached as Map 50 (Achwang: Sheet 65-K, Survey Office Khartoum, 1916).**

11. In fact, the Survey Department first showed provincial boundaries on Sheets 65-K and 65-L in their 1914 Editions. For the record, the 1914 Edition of Sheet 65-K is submitted as Map 27 in the Counter-Memorial Atlas to supplement the 1914 Edition of Sheet 65-L which was submitted in the GoS Memorial Atlas.<sup>18</sup>

**336. In these circumstances, it was entirely understandable that the Sudan Government’s administrators did not adopt the Kiir/Bahr el Arab as a definitive or permanent boundary between Kordofan and Bahr el Ghazal during the first decade of the 20th century. As the Sudan Government’s internal reports repeatedly cautioned, its officials lacked the geographic information necessary for a definite or permanent boundary between the provinces (as well as any pressing administrative need to define such a boundary).**

12. On the contrary, the Governors of the adjacent provinces did adopt the Bahr el Arab as their boundary and reported the fact in their Annual Reports. Administrators were aware of the fact that the Bahr el Arab rose in the vicinity of Hofrat en Nahas and flowed down through the swamps to reach Ghabat el Arab on the Bahr el Ghazal. Their many visits to Sultan Rob who lived on this river had made them realise that the boundary between the Dinka and Arab tribes could be conveniently described by the course of this river.

**337. Beyond the Sudan Government’s recognition of the general state of its ignorance regarding the southern territories and rivers of Bahr el Ghazal and Kordofan, there was a further, specific aspect of uncertainty. Specifically, Government administrators realized in 1905 that they had frequently been mistaken in their understanding of the location and identity of the so-called “Bahr el Arab” River.**

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<sup>18</sup> GoS Memorial Map Atlas Map 13.

**338. As noted above, the approximate boundary between Bahr el Ghazal and Kordofan was occasionally referred to in administrative reports between 1902 and 1905 as the Bahr el Arab. In reality, however, Sudan Government administrators were mistaken about what constituted the “Bahr el Arab,” wrongly believing that the Ngol/Ragaba ez Zarga was the “Bahr el Arab.” Indeed, the Gleichen 1904 Map mislabeled the Ngol/Ragaba ez Zarga as the “Bahr el Arab”.**

13. These extracts contain yet further exaggerations of the situation. There are three incorrect statements.

(1) The Sudan Government was not ignorant “regarding the southern territories and rivers” and, in particular, the Bahr el Arab. From 1900, a series of journeys had been gradually uncovering the drainage system of the area. In 1901, Mardon<sup>19</sup> had produced a shape for the river which was remarkably close to the truth. What was lacking in his map was accurate longitude information, an understandable deficiency at the time. No telegraphic time signals were then available and so time determination (an essential prerequisite of longitude determination) was unreliable.

(2) Government administrators did not realise in 1905 that “they had frequently been mistaken in their understanding of the location and identity of the so-called “Bahr el Arab” River”. That was because they had not “frequently been mistaken”. There was one instance of mistaken identity which affected the depiction of the river on one map. In 1902, Wilkinson mistakenly reported that he had met the Bahr el Arab a few miles to the south of Fauwel. The SPLM/A Memorial itself confirms the short lived nature of this mistake: “The extent of the confusion over the Bahr el Arab River was realized by the Sudan Government’s administrators following explorations of the region by Lieutenant Bayldon in 1904/1905. Bayldon’s findings were reported in 1906.”<sup>20</sup> In fact, Bayldon’s report is dated 20<sup>th</sup> March 1905 and appears in the Sudan Intelligence Report of that month.<sup>21</sup> Moreover, it was Bayldon in February 1905 to whom Sheikh Rihan first came with his complaint which led to the 1905 transfer. Bayldon sent him on to Kodok from where he continued to Khartoum.

(3) The “Gleichen 1904 Map” (actually a map produced by the Intelligence Office in Khartoum<sup>22</sup>) did not mislabel the Ngol/Ragaba ez Zarga as the “Bahr el Arab”. The Intelligence Office in Khartoum responded to Wilkinson’s information on its 1904 map not by misnaming the Ragaba ez Zarga but by diverting the course of the Bahr el Arab from a point close to the present day location of Abyei northeastwards to Mellum and then turning it southeastwards to

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<sup>19</sup> GoS Memorial Map Atlas Map 5; SPLM/A Atlas Map 35 (*The Anglo-Egyptian Sudan*, Mardon, 1901, rev.1903).

<sup>20</sup> SPLM/A Memorial, para. 339.

<sup>21</sup> Sudan Intelligence Reports, No. 128, March 1905, Appendix C, pp. 10-11 (SM Annex 9).

<sup>22</sup> GoS Memorial Map Atlas Map 7; SPLM/A Atlas Map 36 (*The Anglo-Egyptian Sudan*, Intelligence Office, Khartoum, 1904 (in Gleichen 1905)).

reach the Bahr el Ghazal at Ghabat el Arab, its known mouth. Up to that point, no map had shown the Ragaba ez Zarga either by its course or by its name. Certainly, the depiction on the 1904 map did not and could not bear any relation to the course of the Ragaba at all because there was no awareness of where it came from and where it joined the Bahr el Ghazal. This point is further developed in paragraph 15 below.

14. Sultan Rob was now left without a river so a new river using the name Kir was inserted rising in Dar Fertit and flowing east to his village before turning southeast to reach the Bahr el Ghazal 30 km south of Ghabat el Arab. Bayldon and Comyn were soon attacking the existence of this “new” river in its upper reaches as a figment of the imagination and Comyn insisted that the river from Hofrat en Nahas must be that which passed Sultan Rob’s village.<sup>23</sup> As a result the next official map that we know about, Sheet 65 of the national 1: 1 000 000 series,<sup>24</sup> removed this imaginary river and set the Bahr el Arab back on its proper course past Sultan Rob’s village.

**342. Based on the Sudan Government’s mistaken understanding of the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga, the ABC concluded that the approximate boundary between Bahr el Ghazal and Kordofan was in fact regarded by the Sudan Government as what is now known to be the Ngol/Ragaba ez Zarga River: “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.”**

**343. In sum, when Sudan Government officials had previously referred to the Bahr el Arab, they had in fact generally meant the Ngol/Ragaba ez Zarga, and not what is today known the Kiir/Bahr el Arab. In turn, when the “Bahr el Arab” was referred to as the Kordofan/Bahr el Ghazal boundary (as discussed above), this confusion compounded the uncertain and approximate character of the putative provincial boundary.**

15. As has already been pointed out, there is no evidence to support the idea that, in 1905, Sudan Government officials knew either the name or the course of the Ragaba ez Zarga. An unnamed approximation to its course appears on the 1907 1:1 000 000 map produced by the Survey Department.<sup>25</sup> The first appearance of a more accurate course and a name occurs on the 1909 Edition of Sheet 65-L of the 1:250 000 series where it is annotated as “River Gnol (Dinka) Ragaba (Arab)”.<sup>26</sup> The information was provided to the Survey Department by Coningham, who had

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<sup>23</sup> For further details, see the Expert Report attached to the GoS Memorial, paras 3.13-3.26.

<sup>24</sup> GoS Memorial Map Atlas Map 10; SPLM/A Atlas Map 40.

<sup>25</sup> GoS Memorial Map Atlas Map 10; SPLM/A Atlas Map 40.

<sup>26</sup> GoS Counter Memorial Map Atlas Map 26. This is a poor scan copy of the original which is the revision record copy of the 1909 Edition on which all changes for the 1912 Edition were recorded in red. This record copy is in the topographical archives of the Survey Department and is itself in poor condition.

been on a march from Talodi to Meshra el Rek (see Fig. 1 and 2: The comment on the name is at the bottom of Sketch III and in the bottom left corner of Sketch IV).

16. Thus it is wrong to suggest that officials “had in fact generally meant the Ngol/Ragaba ez Zarga, and not what is today known the Kiir/Bahr el Arab”. There was no confusion over which river was the Bahr el Arab – there was a short period in 1902-4 during which the course of the river in the vicinity of Sultan Rob was wrongly shown on a map but that was soon rectified.



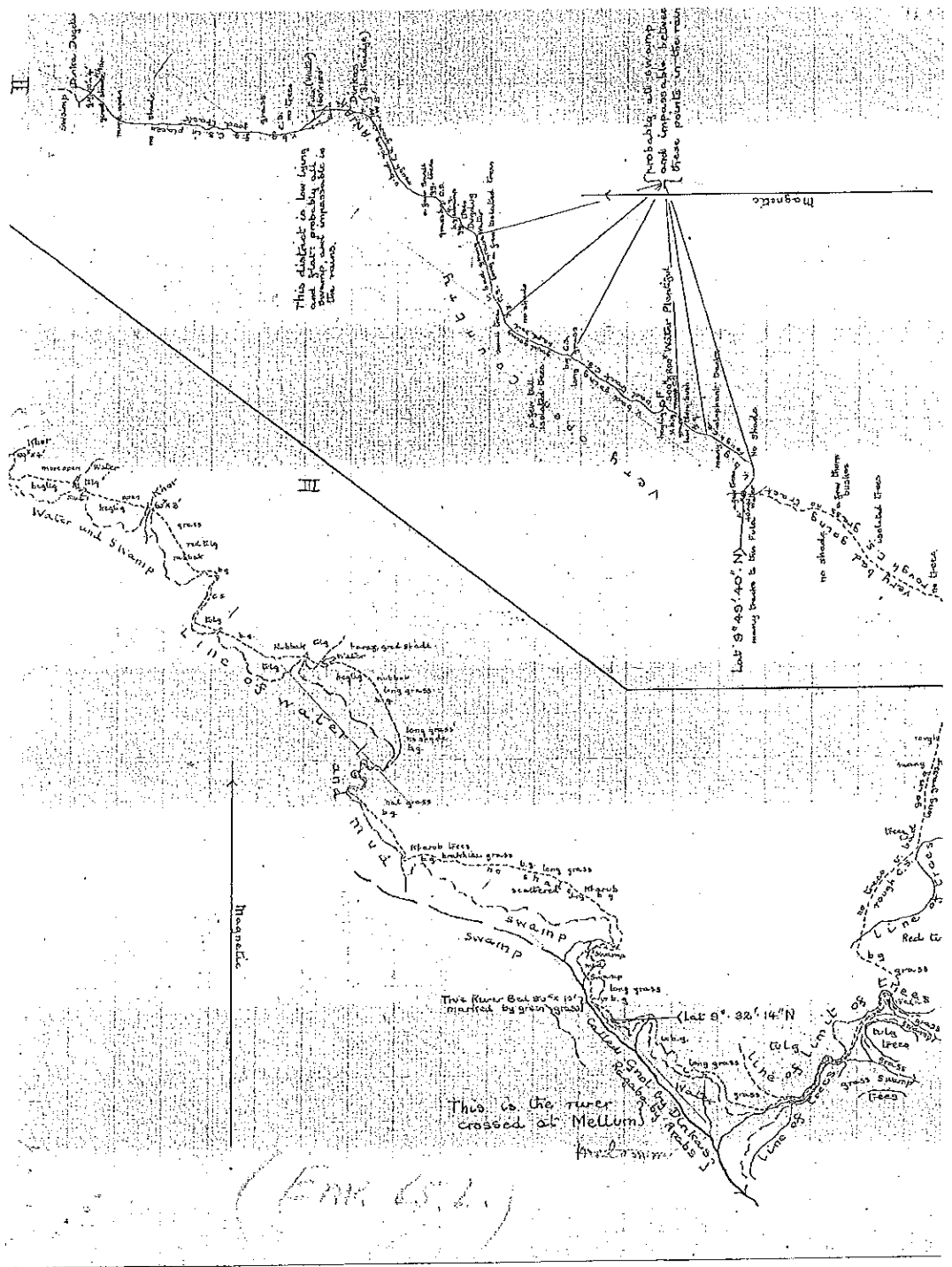


Fig 1 Coningham Route Sketch 1909 Sheets II and III<sup>27</sup>

<sup>27</sup> Survey Department Topographical Archive, Talodi to Meshra el Rek Route Sketch, No. 513, (1909).

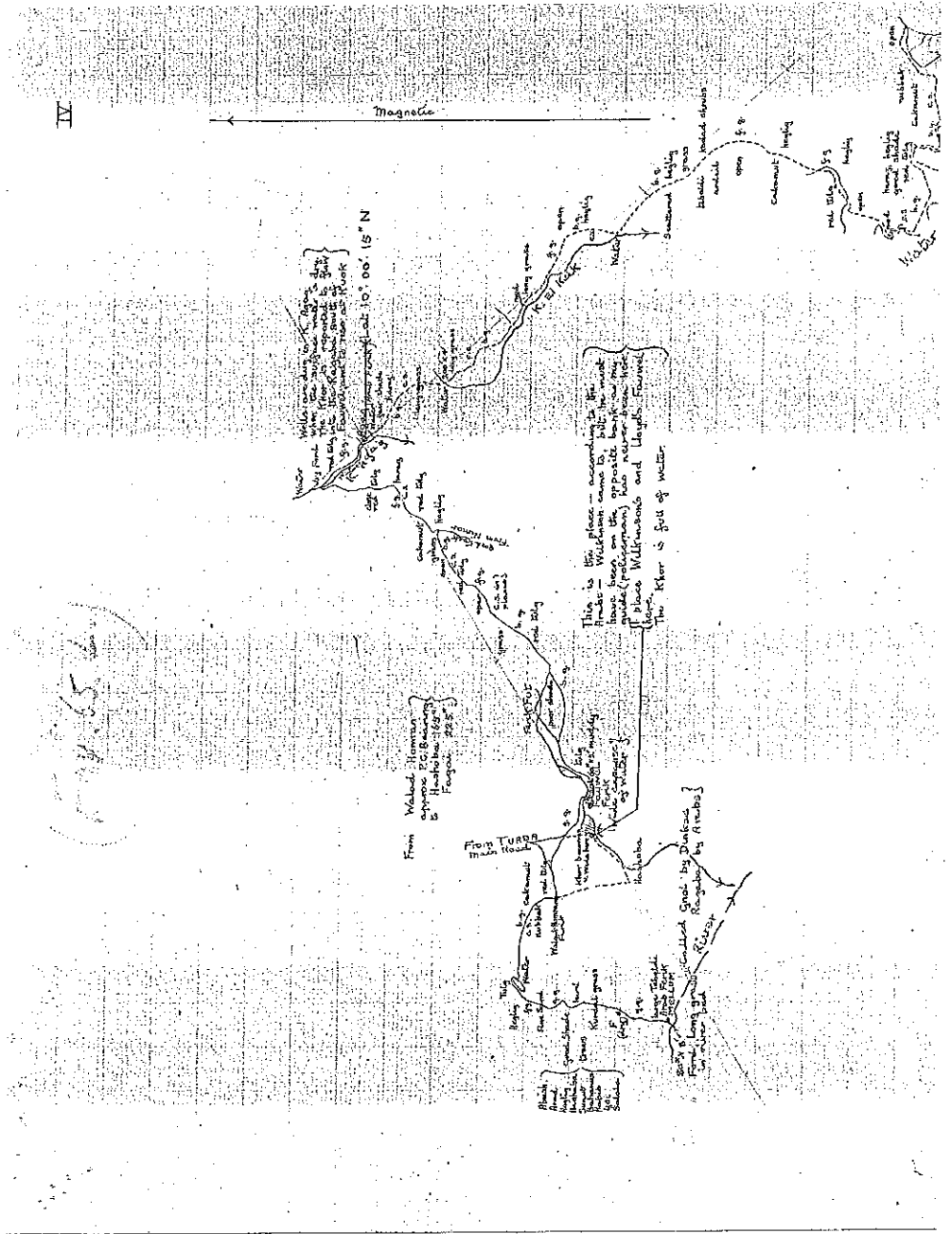


Fig. 2 Coningham Route Sketch 1909, Sheet IV<sup>28</sup>

<sup>28</sup> Survey Department Topographical Archive, Talodi to Meshra el Rck Route Sketch, No. 513, (1909).

895. Extract from the table in this para:

Paramount Chief	Approximate Dates	Place of Burial
Alor Monydhang	Mid-late 18th century	Majok Alor (near Abyei Town)
Biong Alor	[not relevant]	[not relevant]
Arop Biong	b. early 19th century d. 1905	Gol Gol (near Abyei town)

17. In the above extract, Majok Alor is quoted as being “near Abyei Town” but Majok Alor is inserted on Map 23 of the SPLM/A Atlas at a point some 45 km northwest of Abyei Town. The provenance of this position is not known. It does not seem “near” to Abyei.

18. Similarly, Arop Biong is said to be buried at Gol Gol, placed very close to Abyei Town on Map 23. However, the ABC visited the shrine of Sultan Rob in 2007 and obtained its coordinates as 09° 26.5’N 28° 38.4’E<sup>29</sup>, close to Mithiang in the vicinity of Sultan Rob’s old (1902) village.<sup>30</sup> This is 28 km southeast of Gol Gol.

19. I In the table, it is also claimed that Arop Biong died in 1905. The Sudan Intelligence Report of April 1906 records news of his death thus:

Sultan Rob, who was getting old, and perhaps troublesome, has been buried alive in accordance with the custom of his country, and has been succeeded by his son Rahal.<sup>31</sup>

Huntley Walsh had reported seeing Sultan Rob in a letter dated 8<sup>th</sup> March 1906<sup>32</sup> so it appears that Sultan Rob died between the date of departure of Huntley Walsh soon after 8<sup>th</sup> March and the end of April 1906.

20. These three discrepancies cast doubt on the validity of the evidence used for constructing the table in para 895 of the SPLM/A Memorial.

**914. The report [a 1902 Sudan Intelligence Report (No. 92) describing a trip by Brian Mahon] itself is scant on detail, and the reference to “Bahr El Homr” could be either a reference to the Ngol/Ragaba ez Zarga or the Kiir/Bahr el Arab. (Lake Ambady is approximately 60 miles from the Kiir/Bahr el Arab which is about two days walk). Either way, Mahon’s report provides first-hand observations firmly establishing the Ngok Dinka either on the**

<sup>29</sup> No datum was given so one must assume that the Global Positioning System equipment was set to WGS84, the satellite datum.

<sup>30</sup> The position of Mithiang is taken as the position of Mithiang Diil on SPLM/A Atlas Map 23. This is 4 km southeast of the GPS position quoted.

<sup>31</sup> Sudan Intelligence Reports, No. 142, April 1906, p. 2 (SCM Annex 32).

<sup>32</sup> Sudan Intelligence Reports, No. 140, March 1906, Appendix D pp. 13-15 (SM Annex 12).

**Kiir/Bahr el Arab or the Ngol/Ragaba ez Zarga during the dry season of 1902, which is consistent with the Ngok's dry season cattle grazing patterns.**

21. The extract from Mahon's report<sup>33</sup> which is being discussed in this paragraph does not include any mention of the "Bahr el Homr". This occurs in the introductory heading in Appendix F which one can assume was written by the compiler of the Intelligence Report. However that might be, this report must refer to a journey that took place before the issue of the Intelligence Report at the end of March 1902 and it would be reasonable to assume that Mahon made the journey in late February or early March. Wilkinson visited Sultan Rob on 2<sup>nd</sup> February 1902 at his village on the south side of the Bahr el Arab/Kir. The very strong likelihood is that Mahon met Sultan Rob at exactly the same place as Wilkinson. To suggest that Mahon might have met Sultan Rob on the Ragaba ez Zarga is quite clearly wrong and suggests that the evidence has not been sufficiently analysed.

**920. Wilkinson crossed the Ngol/Ragaba ez Zarga River, where he reached the country of "a Dinka chief called Rueng,"**

22. The statement in para. 920 is untrue. Wilkinson actually wrote: "Track now runs S., and at 5 miles divides one running S.S.W. [sic] to the country of a Dinka chief called Rueng, the other S.S.W. leads over a wide plain covered with long grass and a few bushes ...". SPLM/A Atlas Map 46 illustrates the layout. From the vicinity of Etai, a track to Ruing [Rueng's] runs generally S.S.E.,<sup>34</sup> while another (that Wilkinson followed) runs S.S.W. to Sultan Rob's. Wilkinson describes the various routes in the area, but at no point does he claim to have followed them all, nor does he suggest that he crossed the Ragaba ez Zarga.

**924. Wilkinson next records that, at a point 28 miles from the Ngol/Ragaba ez Zarga, he reached what he termed "the Kir River, or Bahr El Jange" and the "settlements of Sultan Rob" which were located on both sides of the river.**

23. Also this citation is not true to its source. Instead it conveniently omits Wilkinson's comment that Sultan Rob lived in the village on the south side of the river.

**926. Wilkinson then notes that, when "[l]eaving Sultan Rob's settlement," the "country here is open, and much dura cultivated. Dinka dwellings are dotted about, and the country presents a most prosperous aspect." As indicated on Map 29 (Wilkinson's Route, 1902), this portion of Wilkinson's trek involved his return north and north-west in the direction of the Ngol/Ragaba ez Zarga, through Ngok territory. His descriptions of the Ngok settlements in**

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<sup>33</sup> Sudan Intelligence Reports, No. 92, March 1902, Appendix F, pp. 19-20 (SM Annex 4).

<sup>34</sup> Wilkinson's attribution of a direction of S.S.W. to this track can be assumed to be an error.

this area are perfectly consistent with other evidence regarding both the Ngok agricultural practices (cultivation of sorghum (*dura*)) and the Ngoks' permanent, well-maintained settlements.

24. Once Wilkinson leaves the river, he is heading N and N.E. (not N.W. as stated in para. 926) and 10 miles from Sultan Rob's (and 5 miles from the river) he crosses the swamp of El Niat where he makes no mention of Dinka settlement. He next mentions the tribe of the occupants when he reaches Abu Kareit and Mellum on what he believed to be the Bahr el Arab (i.e. the Ragaba ez Zarga). In both cases, he refers to them as Homr settlements. This paragraph exaggerates the extent of Dinka settlement that can be inferred from Wilkinson's account.

931. Again, Mahon's report confirms the presence of permanent Ngok settlements to the north of the Kiir/Bahr el Arab River. While the generality of the direction prevents entirely precise identification, Mahon's description indicates that he travelled "west" from Fauwel (Pawol) to Arop Biong's, indicating that Ngok Dinka (Arop Biong's people) were located on the same latitude as Fauwel and Um Semina on the Ngol/Ragaba ez Zarga River. That is consistent with Wilkinson's trek record (discussed above). It is also notable that the reports regarding the Ngok in 1902 and 1903 emanate from the *Kordofan* Governor – indicating the location of the Ngok north of the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga, which was often referred to as the approximate provisional boundary between Kordofan and Bahr el Ghazal.

25. There is no evidence that Sultan Rob had moved from his original village in 1903. His "old" village is shown on the Intelligence Office 1904 map<sup>35</sup> and other officials visited him on the Bahr el Arab in 1905 and 1906.<sup>36</sup> Mahon's use of the direction "west" could be explained if he chose to travel in a loop to the west before turning southeast to reach Sultan Rob's. He was clearly an enthusiastic trekker as the later detour northwest to the Rizeigat before returning eastwards all the way to the White Nile clearly shows. He might well have chosen a longer route to Sultan Rob's. To suggest that this flimsy piece of evidence means that Arop Biong had moved up to the latitude of Fauwel and Um Semima seems to be stretching credibility.

## B. ASSERTIONS LACKING SUPPORTING EVIDENCE

311. Provincial boundary alterations were also made without serious consideration. For example, the Governor of Kordofan commented that the area of Kaka and Um Aherin in eastern Kordofan had been transferred from Kordofan to Fashoda, and that at the time of the transfer he had "made no

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<sup>35</sup> GoS Memorial Map Atlas Map 7; SPLM/A Atlas Map 36 (*The Anglo-Egyptian Sudan*, Intelligence Office, Khartoum, 1904 (in Gleichen 1905)).

<sup>36</sup> See above paragraph 9.

remark,” because he “did not know of any good reason for or against it.” Learning more about the people who were transferred, he later reported that “I certainly think that on the west bank of the White Nile north of Kaka, and up to the boundary at Dueim, ought to be transferred back to Kordofan.”

26. The opening sentence of this paragraph is a sweeping criticism of the boundary process which lacks supporting evidence. The one example given does not show a lack of “serious consideration” but simply provides evidence of a gradually evolving system of provincial government. See further Appendix 2.

**341. The Sudan Government’s mistakes regarding the identity, location and course of the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga, and therefore the approximate boundary between affected provinces, underscores the uncertain and provisional character of the provincial boundaries which were being developed by the Sudan Government during this period. This was the conclusion of the ABC, which explained:**

*“The experts’ research revealed to them that there was considerable geographical confusion about the Bahr el-Arab and the Bahr el-Ghazal regions for the first two decades of the Condominium rule. This was part of a broad range of geographical inaccuracies regarding most of the Sudan in that time.”*

27. This is an exaggeration by the ABC Experts who extend the period of confusion over the Bahr el Arab to twenty years and extend the area of confusion to “most of the Sudan” without providing any supporting evidence for either extension. The extent of the confusion is examined in a more measured way, with supporting evidence in the Expert Report attached to the GoS Memorial.

**904. ... .. The same records confirm the Ngok Paramount Chiefs’ settlement both before and after 1905 in the immediate vicinity of what is now Abyei town and the role of Abyei town as the historic center of Ngok Dinka political, cultural and commercial life.**

28. Nowhere in the following paragraphs are these claims substantiated. The Paramount Chief’s settlement in 1905 was at the site of his old village near present day Mithiang and that is 30 km southeast of the present location of Abyei – hardly the “immediate vicinity”.

**912. ... .. Professor Daly concludes that the contemporaneous documentary evidence “establishes a permanent Ngok presence on the Ragaba al-Zarqa.”**

29. An examination of the Daly Report suggests that Daly's grounds for making such a claim were weak. In para. 49 of the Report, he states:

"We are then left with the conclusion that the best documentary evidence so far located for the northern boundary of the area of the nine Ngok chiefdoms in 1905 remains, in the opinion of this historian and as of the date of the present report, Wilkinson's itinerary of 1902, which establishes a permanent presence on the Ragaba al-Zarqa."

Wilkinson did not find a permanent presence of Ngok on the Ragaba ez Zarga. He reports that, travelling south, he found the first Dinka village at Bongo, more than half way between the Ragaba and the Bahr el Arab. Taking its position from the 1:250 000 map, Bongo lies 23 km south of the Ragaba and 17 km north of the Bahr el Arab.<sup>37</sup> Travelling north on his return journey, the only settlements he records, after leaving the Kir/Bahr el Arab, are those of the Homr at Abu Kareit and Mellum on the Ragaba. How this represents a permanent presence by the Ngok on the Ragaba needs further explanation.

**915. The [Mahon] Report's description of "Rob's place" as a trading center is consistent with subsequent descriptions of the location of Abyei town as the center of Ngok commercial affairs. Map evidence indicates that the site of Sultan Rob's "trade centre" was on the east of the Nyamora/Ragaba Umm Baiero, where the modern-day Abyei town market is located and where oral traditions record the Ngok Paramount Chiefs as having resided for four generations by 1902.**

30. These claims contain more inconsistencies. Mahon visited Sultan Rob in February or March 1902 (probably early March 1902) just after Wilkinson had done so on 2 February 1902. There is no evidence that Sultan Rob had moved upriver at this stage and Mahon's report in no way connects "Rob's place" with the site of what was to become Abyei. It is clear that Rob was still living at Mithiang, some 30 km SE of the present-day location of Abyei Town.<sup>38</sup> Map evidence does not indicate that the site of the "trade centre" was to the east of the Ragaba um Bieiro but, to take one example, SPLM/A Atlas Map 40 (GoS Atlas Map 10) was published 5 years after Mahon's visit and shows both the old and new villages, the latter on the west side of the Ragaba um Bieiro.

31. As to the oral claim that Ngok Paramount Chiefs had resided at Abyei since 1902, there is clear evidence to the contrary: i.e., that Sultan Rob lived at Mithiang up to his death in 1906.<sup>39</sup> An inspector in the Slavery Department, Hallam, visited Burakol in December 1907<sup>40</sup> on a journey down from Dawas. He referred to it as

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<sup>37</sup> See for instance SPLM/A Atlas Map 46.

<sup>38</sup> See paragraph 19 above.

<sup>39</sup> See paragraph 19 above.

<sup>40</sup> Survey Department Topographical Archive, Kordofan Route Report, No. 78, (December 1907) (SCM Annex 31).

“Rob’s new village” and added that it was “Kual Wad Rob’s village”. He described its location in the following terms:

“I rode across to the Gurf 2 miles S.W. of Kual’s village. It is here about 30 yards wide with little open water. Kual’s village is large and scattered & covering the country between the Um Bioru and the Gurf near their junction. It is about S.E. of Rahad el Dona.”

In March 1918, another Condominium official, Bimbashi G.A Heinekey journeyed from Gerinti to Mek Kwal’s village along the Gurf. He described Mek Kwal’s village thus<sup>41</sup>:

“Mek Kwal’s village is situated between the Ragaba um Bieiro and River Gurf and not far off the place they flow into each other (3 miles). Mek KWAL himself is the leading Mek of the Kordofan Dinkas and also chief of the MAREIG Dinkas. There is much cultivation around. There is also a Rest House.”

These contemporaneous accounts indicate that Kwal Arop maintained his village headquarters on the west side of the Ragaba um Bieiro until 1918 at least. It is incorrect to claim “the Ngok Paramount Chiefs as having resided for four generations by 1902” at the present day location of Abyei town.

### C. MISUNDERSTANDINGS WHEN ASSESSING INDIVIDUAL MAPS

**982. As the historical overlay of the Mardon Map at Map 35 (*The Anglo-Egyptian Sudan, Mardon, 1901 (rev. 1903) – Overlay*) shows, the Kiir/Bah r el Arab is placed significantly south of the actual Kiir/Bahr el Arab (although it is correctly named). The Ngol/Ragaba ez Zarga is entirely absent. The Lol river is called the Bahr el Homr, located correctly below the Kiir/Bahr el Arab.**

32. It does seem rather far-fetched to be comparing what is essentially a sketch map with a modern satellite map. Be that as it may, the comparison is a good example of the deficiency of the process. If the longitude error were removed locally by making the two versions of the Bahr el Arab coincide at its mouth, the coincidence between the two depictions of the Bahr el Arab would be much better. Note the good agreement along the White Nile and the existence of a telegraph line to Taufikia – this is no coincidence. Longitudes in this area would be much more accurate because of the better determination of local time. See also Appendix 1.

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<sup>41</sup> Survey Department Topographical Archive, Kordofan Route Report, A.G./Kordofan: II/22 (March 1918) (SCM Annex 36).



984. 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 GnoI” 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.

33. This shows a complete misunderstanding of the impact of Wilkinson’s error and how the cartographer interpreted his mistake. The issue is covered in comments on para. 338 above.

986. As depicted on the historical overlay, at Map 39 (*Kordofan: Map of Dar Homr*, Watkiss Lloyd, 1907 – Overlay), the 1907 Watkiss Lloyd Map contains information only reflecting a single route through the center of the Abyei region to Fawuel and Hasoba. Nonetheless, it is noteworthy that, just above Tebeldiya, in the northwest of the Abyei region, Watkiss Lloyd marked two arrows “To *Dar Junge*,” one pointing due south and the second pointing southeast, directly into the heart of the Abyei region. The *goz*, located immediately above Tebeldiya, is described by Watkiss Lloyd as “Hard sandy soil Open forest.”

34. The claim that this map represents a single route through the centre of the Abyei region is an exaggeration. Even if it is accepted that the Abyei region includes the whole of the area awarded by the ABC, the journey only passes through the northern area. However, Watkiss Lloyd himself entitles the map “Dar Homr” (the country of the Homr) and that is what this map portrays.

992. The *Geographic Journal* published a map of “The Sudan Province of Kordofan” in 1910 (the “1910 Kordofan Watkiss Lloyd Map”). The map and historic overlay at Map 45 (*The Sudan Province of Kordofan*, Watkiss Lloyd, 1910 – Overlay) identifies the areas of the Abyei region which Watkiss Lloyd explored as “*Dar Jange*,” referring to the Ngok Dinka. The Abyei area to the west and north west remained unexplored. Mithiang is identified in the 1910 Kordofan Lloyd Map as “*Sultan Rob’s Old Village*,” located to the north of the Kiir/Bahr el Arab.

35. It is noteworthy that no mention is made of the fact that this map<sup>42</sup> displays the post-transfer boundary between Kordofan and Bahr el Ghazal.

994. “As with other Sudan Government maps and records of the time, the 1913 Kordofan Map<sup>43</sup> confuses the names of the rivers in the Abyei region –

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<sup>42</sup> Also at GoS Memorial Map Atlas Map 11.

<sup>43</sup> SPLM/A Atlas Map 48 (*Kordofan Province*, Survey Office Khartoum, 1913).

to wit, the Ngol/Ragaba ez Zarga is erroneously described as the “Bahr el Homr” the Nyamora/Ragaba Umm Biairo is erroneously described as the “Bahr el Arab;” and the Kiir/Bahr el Arab is erroneously described as the “Lol.””

36. The author seems to have misread the map. The Ragaba um Bieiro does not appear thereon. The Lol and the Bahr el Arab are correctly shown.

995. “As shown in the historic overlay, the 1913 Kordofan Map correctly locates Abyei town (described as “*Sultan Rob*”) in the “V”-shaped area between what are in fact the rivers Kiir/Bahr el Arab and Nyamora/Ragaba Umm Biairo. The territory around Abyei town, between the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga and above the Ngol/Ragaba ez Zarga is labelled “*DINKA (DAR JANGE)*” in the east, while the west of the area remains blank.”

37. This is a result of the same misreading. The author has probably taken the upper reach of the Bahr el Arab to be the Ragaba um Bieiro and a tributary of the Lol (actually the Amadgora) to be the Bahr el Arab. He has thus created a V shaped area of his own making. Sultan Rob’s village is shown on the map in the position located by the ABC on the south side of the Bahr el Arab and not in the vicinity of present day Abyei. To suggest that the name “Dinka (Dar Jange)” is in the Abyei area shows a serious lack of cartographic understanding, arising from a complete misinterpretation of the map information.

997. The 1916 Achwang Map identifies Abyei town as “*Burakol (Sultan Kuol Wad Rob)*,” a reference to Paramount Chief Kuol Arop.

38. This is a quite unjustified claim based on wishful thinking. The fact is that this map places Burakol on the west side of the Ragaba um Biairo whereas Abyei town is on the east side of the Ragaba. This map cannot be used as evidence of the location of Abyei town at this date. It has been established in para. 31 above that Kwal Arop’s headquarters were on the west side of the Ragaba um Bieiro two years later in 1918.

999. As shown by the historic overlay, on the 1936 Abyei Map<sup>44</sup>, Kuol Arop’s settlement is renamed “*Abyei (Chf. Kwol Arob)*.” The 1936 Abyei Map names a number of Ngok Dinka villages along the west of the Kiir/Bahr el Arab, including Kolading and Majok. The 1936 map also marks the place of the tomb of Paramount Chief Alor Monydhang at Majok Alor, northwest of Abyei town.

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<sup>44</sup> SPLM/A Atlas Map 53 (*Abyei: Sheet 65-K*, Survey Office Khartoum, 1936 – Overlay).

39. This is another unsubstantiated assertion in the SPLM/A Memorial. The historical overlay (being a reduction) is rather difficult to read. However, the Detail version available at SPLM/A Map 52a does allow a close examination of the villages in the vicinity of Abyei. A careful search of the villages “along the west of the Kiir/Bahr el Arab” has not revealed any that go by the name of Kolading or Majok. There is a village called Duhul el Gara (Kolading) at 9° 52’N 28° 04’E some way to the north of the Bahr el Arab if this is of any help. As for Majok, the name appears in countless locations throughout the map as far west along the Bahr el Arab as 27° 24’E and as far southwest as 09° 04’N 27° 16’E. A further search of the map for Majok Alor<sup>45</sup> has been unsuccessful. More detailed information is required.
40. The same close examination also reveals that no mention has been made in the SPLM/A Memorial of the notation “Homr summer villages” at 09° 45’N 27° 55’E, just south of the Bahr el Arab.

**1001. “On the 1936 Ghabat El Arab Map, there is more detail around the rivers than on previous maps, but large tracts of country (sometimes described as uninhabited) remain unsurveyed, as illustrated on the historical overlay at Map 55”.**

41. The relevance of this comment (on unsurveyed territory) is not understood as the enlarged area is outside the area of interest in this case.

Alastair Macdonald  
6 February 2009

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<sup>45</sup> An approximate location for Majok Alor is given on (e.g.) SPLM/A Atlas Map 23 without any attribution as to source.

## DEFICIENCIES IN THE SPLM/A MAP ATLAS

### Explanation of Symbols

1. Abyei Area Base: The depiction of the rivers used in the comparison with historical maps uses two symbols – a continuous line and a dot-dash-dot-dash line. The meaning of the latter is not explained and may indicate a degree of uncertainty or unreliability.
2. Chiefdom Maps: These employ two shadings without explanation – the reader is left to guess what they mean. They also carry a disclaimer: **“Maps have been created from best available sources and are not necessarily authoritative”**. The shadings can only have been based on witness statements and not from any known maps. This is not made clear.

### Comparison of Old Maps against Modern River Detail

In the SPLM/A Atlas, most of the historical maps are compared with the modern version of the drainage system and some village locations obtained from modern satellite imagery. The comparison has been done by using the latitude/longitude grids to position the two depictions over each other, together with a process of rubber-sheeting which (simply stated) adjusts each rectangle of lat/long on the old map (usually a rectangle) to fit the equivalent lat/long quadrilateral on the satellite image. This latter is composed of curved lines due to the projection in use. The same transformation is applied to all the detail within the old map rectangle.

Such comparisons can be instructive in a general sense but care must be taken to avoid reading too much into them. This is particularly the case if there is not a clear understanding of how the historical maps were constructed. It is easy to pay too much attention to the absolute accuracy against a global latitude/longitude system and to lose sight of the local accuracy that has been achieved in the shape of features on the map.

The 1:250 000 maps were constructed by using sketches of routes walked by various officials who carried out wheel and compass surveys as they moved along, checking their position from day to day with latitude determinations. Latitude was an easy calculation and with reasonable care could be determined to +/- a mile. Longitude was a different matter – for this computation, accurate time was essential and a 1 minute error in time could produce a distance error of 15 miles.

Accurate time could be obtained from a time signal sent along a telegraph line but it required careful planning and the nearest telegraph line ended at Taufikia on the White Nile. It was not until 1924 that wireless time signals started to be used.<sup>46</sup> Thus longitude determination in the years we are interested in must have relied on watches or chronometers carried on the journey and checked on return. The longer the journey, the

<sup>46</sup> Survey Department, Khartoum, Annual Report 1924, p.1 (SCM Annex 56).

more likely it was that the error would increase. Thus we can expect longitude position to deteriorate as officials moved south from El Obeid or west from Taufikia and much of the discrepancy that we see in the comparisons can be attributed to that.

A further source of error would be the varying ability of individual officers who were not surveyors by profession but had been given a week's training in Khartoum on arrival in the country.

It can certainly be argued that, even if the accuracy comparison is of only limited use, it does give us some idea of how well the administrators of the time understood the drainage pattern. This makes two assumptions, neither of which can be asserted with certainty:

- (i) *The channels apparent on the satellite mapping are identical to those existing at the time of the old mapping. A look at any satellite image<sup>47</sup> makes it clear that there have been many channels in the past and it would be a brave man who asserted that there has been no change over a period of 100 years.*
- (ii) *The cartographer who selected the channels shown on the satellite mapping made the right choices. It is unlikely that the compilers of the modern drainage maps had the advantage of field visits to check their work. Thus there can be no absolute certainty that they have selected the correct channels of each river. For example, the headwaters of the Ragaba ez Zarga are not shown further west than 28° 16'E even though the 1936 1:250 000 map series continues the Ragaba much further west.*

The comparison is useful in that it reminds the user of what the "true" drainage system looks like and how the historical maps gradually improved over the years. It allows the reader to assess the quality of the historical mapping in the context of what might be considered reasonable for the time of its production. But it has limited value as an accuracy test. To assess, for instance, an 1883 map for accuracy against the "true" system seems to be a pointless exercise – no cartographer would expect it to be accurate at that time. What it does show is that there was a clear understanding that a major river looped up to the north near Shakka and then flowed down to the Bahr el Ghazal at Ghabat el Arab. That fact, not the question of unachievable accuracy, is the implication contained in this map comparison.

Alastair Macdonald  
6 February 2009

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<sup>47</sup> Those presented as Maps 3 and 4 in the SPLM/A Atlas give a disappointing indication of what is available even from low resolution imagery such as that generally available on Google Earth.

## PROVINCIAL BOUNDARY MAKING

Further research in the archives of the Survey Department in Khartoum has shed light on the process by which provincial boundaries were determined and on the procedure followed by the Survey Department once it had decided to show provincial boundaries on its maps.

The earliest maps produced by the Survey Department as a national series were the 1:1 000 000 series, of which Sheet 65 (1907) covered the area of the Kordofan – Bahr el Ghazal boundary. No boundary was shown but, in April of the same year the Intelligence Office issued a circular to Governors signifying an intention to add boundaries to both the 1:1 000 000 and 1:250 000 maps. A map of the intended boundary depiction for each province was attached and comments and corrections were invited. Copies of the letters to the Governors in Kassala and Sennar are at Figures 1 and 2. It can be seen that adjacent Governors were expected to agree over any changes to be made. A reply from the Sennar Governor is at Figure 3.

There is no evidence that any immediate action was taken in the Survey Department as a result of this initiative but, in its Annual Report for 1912 (Figure 4), the production of a 1:3 000 000 map showing provincial boundaries is announced with the further comment:

“Arrangements have been made to have the map ready in manuscript at the war Office in London for next leave season, and all Governors and others interested in the matter are invited to visit the War Office and record their criticisms and thus assisting the preparation of a really up to date production, which it is hoped will be ready for issue in early 1914.”

This map is to be found at Map 14 in the GoS Memorial Atlas.

The first editions of the 1:250 000 series to show provincial boundaries in the Kordofan/Bahr el Ghazal were also produced in 1914. The Survey Department took the depiction of these boundaries seriously and regarded Governors as the ultimate authority. An early example is an undated internal memorandum at Fig. 5 which states the authorities for the boundaries of Kassala province. Three of these refer to Provincial Annual Reports (i.e., to the Governors). A later exchange of letters with the Governor of Fung Province is at Figures 6 and 7. These too make clear the Governor was the authority for his boundaries.

It is clear from these documents that provincial boundaries were determined by adjacent Governors. Their primary aim was to understand which villages and which tribes came under the control of which Governor. The Survey Department took great care to obtain the comments of Governors on the depiction of their boundaries. This leads to two conclusions:

- (1) Governors were the *de facto* authorities for provincial boundaries and adjacent governors liaised over their common boundary. Their comments on boundaries in their annual reports were definitive.
- (2) Boundaries shown on national mapping had been checked with Governors before publication and can therefore be taken as having their assent.

Alastair Macdonald  
6 February 2009

Sources of the documents appearing in Figures 1 to 7

Figure 1:	Survey Department, Khartoum, Kassala Boundary File
Figures 2 & 3:	Survey Department, Khartoum, Sennar Boundary File
Figure 4:	Survey Department, Khartoum, Annual Report, 1912
Figure 5:	Survey Department, Khartoum, Kassala Boundary File
Figures 6 & 7:	Survey Department, Khartoum, Fung Boundary File










## Submissions

For the reasons set out in this Counter-Memorial, and rejecting the arguments contained in the Memorial of the SPLM/A, the Government of Sudan reaffirms the Submissions appearing in its Memorial 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  
13 February 2009