

# **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

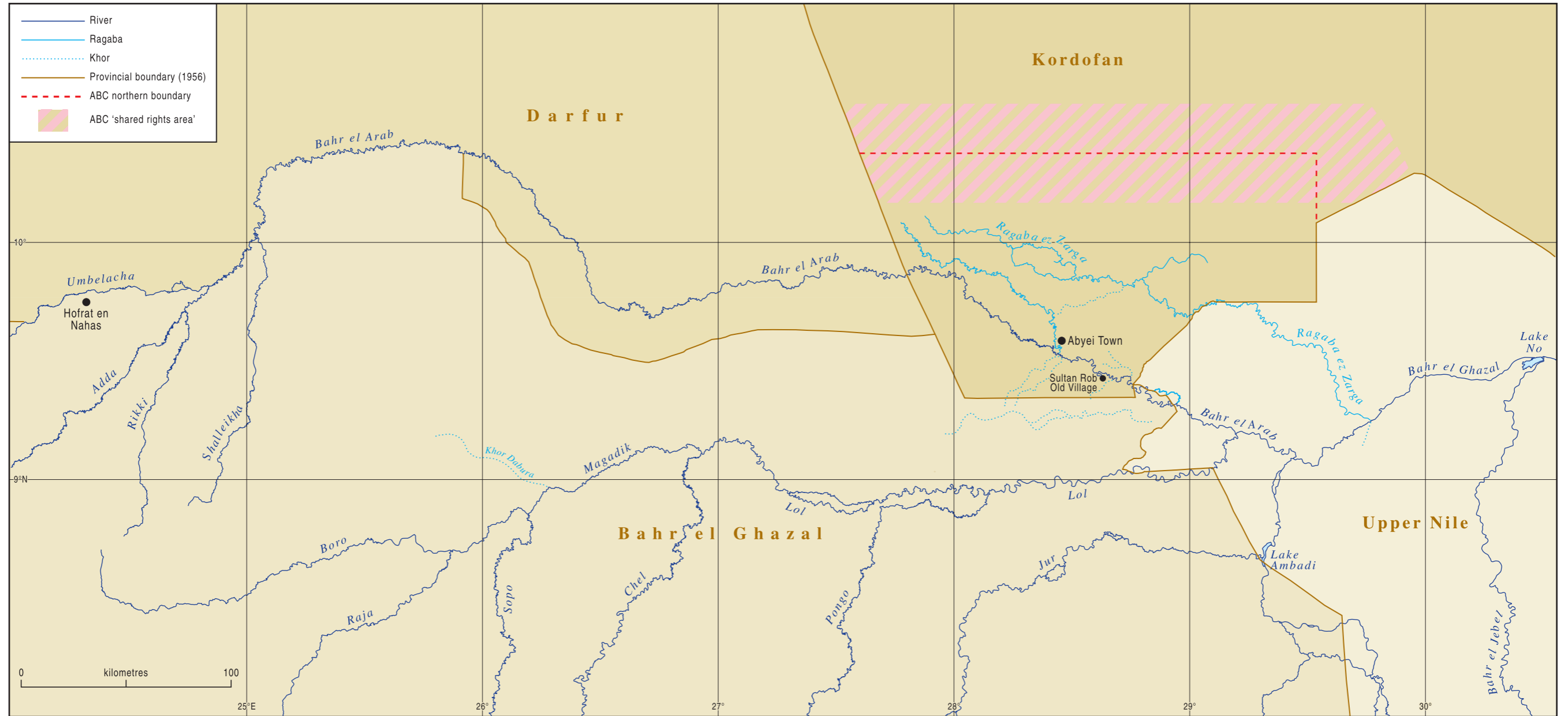
and

SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY



**MEMORIAL OF THE GOVERNMENT OF SUDAN**

18 DECEMBER 2008



**Figure 1 The Area of the Bahr el Arab**

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**Submissions**

- A.S. MacDonald, The Bahr el Arab and its Relationship with other Western Sources of the Nile, Expert Report
- Professor Ian Cunnison, Witness Statement
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## Glossary

<b>ADC</b>	Assistant District Commissioner
<b>Babanusa</b>	a sandy area in southern Kordofan; one of the four main seasonal zones of the Humr
<b>Baggara</b>	literally “cattlemen”, generally used to refer to Arab nomads of Southern Kordofan and Darfur; includes the Messeriya
<b>Bahr el Arab</b>	(also known as Gurf, Bahr El Rizeigat, Bahr El Homr and the Kir) a river that runs through the southwest of Sudan into the Bahr el Ghazal; southern boundary of Kordofan Province before 1905
<b>Bahr el Ghazal</b>	a province in southwest Sudan inter alia bordering Kordofan and Darfur
<b>Bahr</b>	the area around the Bahr el Arab; one of the four main seasonal zones of the Humr
<b>Bey</b>	a Turkish title
<b>Bimbashi</b>	a Turkish military title equivalent to Major
<b>Bongo</b>	a Ngok Dinka chiefdom
<b>Civsec</b>	Sudan Civil Secretary’s files (Khartoum)
<b>Dar</b>	Arab for homeland or tribal region
<b>DC</b>	District Commissioner
<b>Dinka</b>	a collection of tribes of Nilotic origin
<b>Ferik</b>	family-based Baggara (nomadic) group
<b>Goz</b>	strictly a sand dune, but also the name for a waterless area used for transit by nomads in southern Kordofan; one of the four main seasonal zones of the Humr
<b>Humr</b>	(also spelt Homr) cattle-owning nomadic Arab tribe of southern Kordofan, one of two Messiriya sections
<b>Jebel</b>	hill or mountain
<b>Jur River</b>	a river in south-western Sudan, flowing through the Bahr el Ghazal and Equatorial regions into the Bahr el Ghazal
<b>Kaimakam</b>	Turkish military title equivalent to lieutenant-colonel
<b>Khor</b>	a watercourse, ravine, or dry riverbed
<b>Kordofan</b>	a western province of the Sudan
<b>Mahdiyya</b>	time of Mahdist rule of the Sudan (1885-1898)
<b>Mamur</b>	administrative officer junior to the ADC
<b>Mareig</b>	Another name for the Ngok
<b>Merkaz</b>	(Merkas) District Headquarters

<b>Messeriya</b>	(Messeria) cattle-owning nomadic Arab tribe of southern Kordofan, part of the Baggara
<b>Mudir</b>	the Governor of a province
<b>Mudiria</b>	the territory of a mudir, i.e. an administrative province
<b>Muglad</b>	an area of roughly 800 km <sup>2</sup> south of the Babanusa; one of the four main seasonal zones of the Humr
<b>Nazir</b>	Arab chief or head of a tribe
<b>Nazir Umum</b>	paramount chief
<b>Ngok</b>	a Dinka tribe
<b>NRO</b>	National Records Office, Khartoum
<b>Nuba</b>	tribe principally inhabiting the Nuba Mountains in southern Kordofan
<b>Omda</b>	tribal headman, junior to the Nazir
<b>Ragaba</b>	(also spelled regaba) creek, seasonal stream
<b>Rezeigat</b>	Baggara tribe; living mostly in Darfur
<b>SAD</b>	Sudan Archive Durham
<b>Twic</b>	Dinka tribe
<b>Sheikh</b>	Arab title for the chief of a village or villages; junior to Omda
<b>Sudd</b>	mass of floating vegetable matter which obstructs navigation
<b>Turkiyya</b>	period of Turkish-Egyptian rule of Sudan (1821-1881)
<b>Zurg</b>	(with Humr) one of two sections of the Messeriya tribe

## **Personalia**

**Bayldon**, Sub-Lieutenant R.N., military officer who explored the Bahr el Arab in early 1905.

**Boulnois**, W.A., Governor of Bahr el Ghazal Province (1904-1905).

**Brown**, W.G., (1768-1813) British traveller; one of the first Europeans to describe Darfur.

**Comyn**, Lieutenant, D.C.E., Posted as inspector of the Daym al-Zubayr, Bahr el Ghazal Province, 1904. Wrote, among other subjects, on the western source of the Nile and published several maps from his time in the Sudan.

**Gessi** Pasha, R., (1831-1881) Italian governor under General C.G. Gordon.

**Gordon**, C.G., (1833-1885) Governor-General of the Sudan (1874-1880).

**Gorkwei**, R. chief of the Twic Dinka of south-west Kordofan.



**Henderson, K.K.D.**, (1903-1988) Entered the Sudan Political Service in 1926. During his long service in the Sudan he was Governor of Darfur Province (1949-1953). Published extensively on the Sudan.

**Hill, R.**, (1901-1996) Colonial civil servant and historian; responsible for the establishment of the Durham Sudan Archive.

**Junker, W.**, (1840-1892) German explorer of Africa; in eastern Equatorial Africa from 1875 to 1886.

**Kitchener, Earl of Khartoum, H.H.**, (1850-1916) British officer, responsible for the re-occupation of the Sudan (1898). Entered Royal Engineers 1871; Governor-General of the Eastern Sudan (1886-1888); Governor-General (1899).

**Kwal Arob** ( -1945) chief of the Ngok Dinka of south-west Kordofan, son of Sultan Rob.

**Lienhardt, G.** (1921–1993), Anthropologist; between 1947 and 1950 carried out fieldwork among the Dinka. Taught African sociology at Exeter College, Oxford (1949-1988). His leading work *Divinity and Experience* (1961).

**Lloyd, Captain H.D.W.**, (1872-1915) later Major in the British Army, and *Qa'immaqam* (Colonel) in the Egyptian Army; seconded to the Egyptian Army; in 1901 entered Sudan Government Service. Governor of Kordofan Province (1908).

**MacMichael, Sir H.A.**, (1882-1969) Condominium Governor who served in the Sudan 1905-1933. He had a long experience in Kordofan, where he served from early 1906 until 1912. Assistant Civil Secretary in the Sudan Government (1919-1925); Civil Secretary (1926-1933).

**Mahon, B.T.** (1862-1930), Governor of Kordofan Province (1901-1906).

**Marchand, Major J.B.**, (1863-1934) French commandant and explorer; in 1897 sent to Africa to establish French control of the headwaters of the White Nile. Took the Egyptian military post at Fashoda in 1898, leading to the so-called Fashoda incident.

**Mardon, H.W.**, author and cartographer, at one time employed by the Education Department in Cairo. Works include *A Geography of Egypt and the Anglo-Egyptian Sudan* (1902).

**Newbold, Sir D.**, (1894-1945), Condominium Governor; joined Sudan Political Service in 1920. Governor of Kordofan Province (1932-38); Civil Secretary (1939-1945).

**Pallme, I.**, (1810-1877) Austrian trader who went to Egypt in 1837.

**Percival, Captain C.**, (1863-1941) British officer whose surveys, around 1906, allowed detailed maps of the Bahr El Ghazal Province. Governor of Halfa District from 1911.

**Raafee, A.R.**, (1899-1966) Egyptian historian.

**Robertson, J.W.**, (1899-1983) Joined the Sudan Political Service in 1922. District Commissioner of Western Kordofan (1933-1936). Civil Secretary (1945-1953).

**Rüppel, E.W.P.S.**, (1794-1884) German naturalist who travelled in regions of Dongola and Kordofan.

**Schweinfurth, G.A.**, (1835-1925) German naturalist and explorer.

**Slatin** Pasha, R.A., von Baron (1857-1932) Austrian officer in the service of the Egyptian and Sudan Government; Inspector-General of the Sudan 1899-1914.

**Sparkes** W.S., (1862-1906) Commandant of Fashoda District (1899-1900). Commanded the Egyptian detachment that occupied Bahr el Ghazal in 1903. Governor of Bahr el Ghazal Province (1904).

**Sultan Rob** (Arob) ( -1906), chief of the Ngok Dinka of south-west Kordofan.

**Wheatley** M.J., served on several operations in the Sudan. Governor of Bahr el Ghazal Province (1921-1928).

**Wilkinson**, E.B., (1864-1946) British soldier and administrator, Governor of Gezira Province (1903), Governor of Kassala Province (1903-1908); Governor of Berber Province (1908-1910).

**Wingate**, Sir R., (1861-1953) Governor-General of Sudan (1899-1916).

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**Figure 2 Sudan Provinces at Independence**



# Chapter 1

## Introduction

### A. *Geographical Outline*

1. The locality of the present dispute is the territory bordering the Bahr el Arab. This 450-mile-long (720 km) river arises in south-western Sudan, then flows north-east, then generally south-east until it reaches the river Bahr el Ghazal, itself a tributary of the White Nile. The course of the Bahr el Arab and other western rivers and streams is shown on the fold-out map (**Figure 1**) opposite the Table of Contents. Seasonal streams such as the Ragaba ez Zarga may be dry for half the year; by contrast, the Bahr el Arab is a source of water and pasture throughout the year.

2. The Bahr el Arab runs through the adjoining provinces of Bahr el Ghazal, Darfur and Kordofan. The boundaries of these three provinces have remained unchanged since the independence of Sudan on 1 January 1956.<sup>1</sup> They are shown on **Figure 2**, opposite.

3. The Bahr el Arab is known by other names, attributable to the different tribes living along its course. The Baggara, Arab cattle-breeding nomads, include a number of tribal groupings: in Darfur are the Rizeigat; in south-western Kordofan the Messeria, with two sections, the Homr and the Zurg.<sup>2</sup> In addition the Ngok Dinka are present in the south of Kordofan. Along its course the Bahr el Arab is also known as the Rizeigat and Homr; the Dinka call it the Kir or the Gurf.

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<sup>1</sup> At different periods, the names of provinces were changed or they were subdivided. But the alignments of the provincial boundaries as at 1 January 1956 did not change.

<sup>2</sup> Orthography is not consistent: these spellings will be used except in quotations.

**B. *The Comprehensive Peace Agreement and the Boundaries of 1956***

4. The Comprehensive Peace Agreement (CPA),<sup>3</sup> concluded on 9 January 2005 between the Government of Sudan (hereafter GoS) and the southern Sudan People's Liberation Movement/Army (SPLM/A), provides that a referendum is to be held in southern Sudan, with the options of independence or self-government within a federal system. For this purpose, the CPA repeatedly affirms the inviolability of the 1 January 1956 line between north and south. Article 3 of Chapter II of the CPA provides that "there shall be a Government of South Sudan (GoSS), within the borders of 1/1/56..." with its own Constitution and institutions. On two occasions the Abyei Protocol (which constitutes Chapter IV of the CPA) stresses the importance of the 1 January 1956 line between north and south. Section 1.4 of the Abyei Protocol provides:

"1.4 The January 1, 1956 line between north and south will be inviolate, except as agreed above."

Section 8.3 ("Abyei Referendum Commission") provides:

"8.3 The January 1, 1956 line between north and south shall be inviolate, except as agreed above."

In each case the exception is for the "Abyei Area" as defined by Article 5.1 of the Protocol: "the Area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905, referred to herein as Abyei Area".

5. It is also appropriate to mention in this context the Interim National Constitution of the Republic of Sudan of 2005. Article 183 dealing with the "Abyei Area" provides:

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

...

(4) The January 1<sup>st</sup>, 1956 line between the north and the south shall be inviolable, except as agreed in sub-article (3) above."

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<sup>3</sup> Comprehensive Peace Agreement between the Government of the Republic of Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army, 9 January 2005, available from: <http://www.unmis.org/English/documents/cpa-en.pdf>.

Sub-article (3) deals with the future referendum.

### *C. Abyei and “the Abyei Area”*

6. The town of Abyei is located on the Ragaba Umm Biero just north of the Bahr el Arab. It was established around 1914. The first mapping instruction to insert the name “Abyei” as a township was given in the Sudan Survey Department in about 1916: the instruction, given in red ink, is shown on **Figure 3**, on page 4. In 1956 the population of Abyei town was about 2000 people.

7. During the latter years of the Anglo-Egyptian Condominium (1899-1955), there was an Abyei Local Government Area, otherwise referred to as a Native Administration Unit. It is shown, for example, on the “Map of Native Administrations of Kordofan Province” of 1938, which is Map 27 of the Map Atlas accompanying this Memorial.<sup>4</sup> It will be referred to here as the Abyei LGA. All the remaining area of south-western Kordofan was administered for the Humr.

8. The CPA provided for an interim period of administration for the “Abyei Area” which would be accorded special administrative status. The interim period is to end in 2011 when, simultaneously with the general referendum for Southern Sudan, the residents of the Abyei Area will vote on whether they wish the Area to retain its special administrative status in the north or to become part of the south.<sup>5</sup>

9. As noted already, the “Abyei Area” was defined by Article 5.1 as “the Area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905, referred to herein as Abyei Area”. The term “the Abyei Area” will be used in this Memorial with this meaning. The term “Abyei” will be used to refer to Abyei township.

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<sup>4</sup> The map, obtained from National Records Office, Khartoum, has been updated by hand to 1941. A post-independence version of the map, entitled “Local Government Map”, is at Map Atlas, Map 28.

<sup>5</sup> Article 1.3 of Chapter IV of the CPA (contained at Sudan Memorial Vol. II, [hereafter, SM] Annex 71).





**D.      *Origins of the Dispute Submitted to the Tribunal***

10.     Since the Parties could not agree on the extent of the area defined in Article 5.1, an Abyei Boundaries Commission (“ABC” or “the Commission”) was provided for. The relevant article of the Abyei Protocol – the only article of the CPA pertaining to the work of the Commission – provided:

“5      Determination of Geographic Boundaries

5.1     There shall be established by the Presidency, 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.

5.2     The composition and timeframe of the Abyei Boundaries Commission shall be determined by the Presidency. However, the Commission shall include, *inter alia*, experts, representatives of the local communities and the local administration. The Commission shall finish its work within the first two years of the Interim Period.

5.3     The Abyei Boundaries Commission (ABC) shall present its final report to the Presidency as soon as it is ready. Upon presentation of the final report, the Presidency shall take necessary action to put the special administrative status of Abyei Area into immediate effect.”<sup>6</sup>

11.     The Understanding on the Abyei Boundaries Commission provided for it to be “composed as follows”:

“2.1    One representative from each Party;

2.2    The Parties shall ask the US, UK and IGAD to nominate five impartial experts knowledgeable in history, geography and any other relevant expertise. The ABC shall be chaired by one of those experts;

2.3    Each Party shall nominate two from the present two administrations of Abyei Area;

2.4    The GOS shall nominate two from the Messiriya;

2.5    The SPLM/A shall nominate two from the neighbouring Dinka tribes to the South of Abyei Area.”<sup>7</sup>

12.     The Understanding set out the basis on which the Commission was to make its decision:

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<sup>6</sup>     Abyei Protocol, signed at Naivasha, Kenya, 26 May 2004, Chapter IV of the CPA (SM Annex 71).

<sup>7</sup>     Understanding on Abyei Boundaries Commission, 17 December 2004 (SM Annex 69).

“4. 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.”

13. The Experts were Donald Petterson (Chair), Dr. Douglas Johnson, Professor Godfrey Muriuki, Professor Kassahun Berhanu and Professor Shadrack Gutto (hereafter “the ABC Experts”). They presented their Report on 14 July 2005. They concluded:

“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>8</sup>

14. The ABC Experts stipulated that the Ngok and Misseriya should “retain their established secondary rights to the use of land north and south of this boundary.”<sup>9</sup>

15. The GoS immediately rejected the decision on the basis, *inter alia*, that the ABC had acted beyond its authority as it was only mandated to define and demarcate the area of the nine Ngok Dinka Chiefdoms transferred from Bahr el Ghazal to Kordofan Province in 1905.

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<sup>8</sup> ABC Experts’ Report, 14 July 2005, pp. 21-22 (SM Annex 81).

<sup>9</sup> Ibid, p. 22, para. 5.

## *E. The Task of this Tribunal*

### **(i) Key Provisions**

16. Given the dispute exacerbated (rather than solved) by the ABC Experts' decision, the Parties agreed to refer the boundary question to a Tribunal under the auspices of the Permanent Court of Arbitration (PCA). The Roadmap for the implementation of the Abyei Protocol provided that:

“The two parties shall resort to a professional and specialized arbitration tribunal to be agreed upon by the Parties to settle their dispute over the finding of the Abyei Boundaries Commission (ABC).”<sup>10</sup>

17. This was followed by the Arbitration Agreement of 7 July 2008.<sup>11</sup> The Arbitration Agreement defined the dispute in the following terms:

#### “Article 2

#### *Scope of Dispute*

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

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

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<sup>10</sup> The Roadmap for Return of IDPs and Implementation of Abyei Protocol, Khartoum, 8 June 2008, Article 4(1) (SM Annex 82).

<sup>11</sup> Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting Abyei Area. Located at: <http://www.pca-cpa.org/upload/files/Abyei%20Arbitration%20Agreement.pdf> (SM Annex 83).

18. Article 3 of Arbitration Agreement deals with the applicable law. It provides:

“Article 3  
*Applicable Law*”

1. The Tribunal shall apply and resolve the disputes before it in accordance with the provisions of the CPA, particularly the Abyei Protocol and the Abyei Appendix, the Interim National Constitution of the Republic of Sudan, 2005, and general principles of law and practices as the Tribunal may determine to be relevant.
2. This Agreement, which consolidates the Abyei Road Map signed on June 8<sup>th</sup> 2008 and Memorandum of Understandings signed on June 21<sup>st</sup> 2008 by the Parties with the view of referring their dispute to arbitration, shall also be applied by the Tribunal as binding on the Parties.”

**(ii) The Dispute submitted to Arbitration**

19. The dispute submitted to arbitration revolves around a specific historical fact, namely, a decision by the Condominium Administration in 1905 to transfer an area from one Sudanese province (Bahr el Ghazal) to another (Kordofan). In principle, the “area” transferred is to be determined as of 1905 – both as to what is included in the transfer and what is excluded. In particular, areas which were *already* part of Kordofan in 1905 could not have been transferred *to* it. The Parties agree on the historical fact of the transfer – which is anyway sufficiently established by the documentary record. They identified the scope of the dispute accordingly. Drawing a new, never-before-seen, boundary of an area of indeterminate population (as the ABC Experts did) was an excess of their mandate. Drawing another new boundary is not within the purview of the Tribunal either. In both cases, the question is a question of historical fact – what was the area of the nine Ngok Dinka chiefdoms which was transferred to Kordofan in 1905?

20. The parameters of this task were jointly accepted by the Parties and clearly defined in the text of Article 5.1 of the Abyei Protocol, which expressed the consent of the two Parties to solve the dispute by reference to the 1905 transfer – and only by reference to that transfer. That consent is defined in two specific respects: (1) *ratione loci*: an area was transferred to Kordofan; (2) *ratione temporis*: the transfer occurred in 1905.

### (iii) The Excess of Mandate

21. The first task of the Tribunal as spelled out in Article 2 of the Arbitration Agreement refers to the ABC Experts' Report: the Tribunal is requested by the Parties to determine whether the Experts exceeded their mandate. There are various respects in which, as shown in Chapter 5, it did so. But the paramount question is whether the Report can be said to address, with a view to delimiting, the boundaries of the "area" transferred to Kordofan in 1905. Even a first reading of the ABC Experts' Report shows that they dismissed that task as too difficult and decided the case on grounds unrelated either to the area transferred or to the year of transfer. Instead they looked at (what they took to be) land-use rights at some later, unspecified, date.<sup>12</sup> In doing so, they exceeded their mandate, and did so beyond peradventure.

### (iv) The area transferred

#### (a) *The Territorial Dimension*

22. On that basis, the task of the Tribunal, as described in Article 2(c) of the Arbitration Agreement, 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 a territorial limitation, as well as the relevant historical date, the date of transfer.

23. Judged by the yardstick provided by general principles of law,<sup>13</sup> the text of Article 2(c) defining the task of the Tribunal does not require recourse to any supplementary sources. The meaning of the relevant phrase – "the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905" – is

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<sup>12</sup> Cf. ABC Experts' Report, Appendix 2, p. 21 (SM Annex 81): "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 [*sic*] incumbent upon the experts to determine the nature of established land or territorial occupation and/or use rights by all the nine Ngok Dinka chiefdoms, with particular focus on those in the northern-most areas that formed the transferred territory."

<sup>13</sup> As referred to in Article 3 of the Arbitration Agreement, which concerning interpretation of agreements may find expression in the provisions of the 1969 Vienna Convention on the Law of Treaties.

perfectly clear. An initial point to stress is that there *was* such a transfer in 1905:  
see **Figure 4a and 4b**, on page 11.



**Figure 4a.** Extract from 1903 map of Sudan (H.W. Mardon, Map Atlas, Map 5) showing the pre-1905 Kordofan-Bahr el Ghazal boundary following the Bahr el Arab.



**Figure 4b.** Extract from 1910 Royal Geographical Society map of Kordofan (Map Atlas, Map 11) showing the Kordofan-Bahr el Ghazal boundary following the 1905 transfer of the nine Ngok Dinka chiefdoms to Kordofan.<sup>14</sup>

<sup>14</sup> The river labelled "Bahr el Homr" on the 1903 map is more commonly known as the Lol. The river labelled "Bahr el Homr" on the 1910 map is more commonly known as the Ragaba ez Zarga (see Macdonald Report, paras.1.5-1.6). Both maps correctly identify the Bahr el Arab and Bahr el Ghazal rivers.

24. In those circumstances it would be manifestly absurd and unreasonable to read Article 2(c) as calling on the Tribunal to draw new lines for the boundaries of an “area” which was already the subject of a transfer over a hundred years ago. But in order to confirm the ordinary meaning of the text, it is shown in Chapter 2 that the negotiating history does not allow for any other meaning: the term refers to an area transferred at a defined time and not an area populated or used at some other, undefined time.

25. As the World Court has explained on numerous occasions...

“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>15</sup>

That is equally the position with this negotiated text. The only reasonable and defensible interpretation of the text is that it mandates the Tribunal to “confirm” on map the boundaries of the “area” of the transferred in 1905.

26. The Tribunal’s jurisdiction is limited to rendering its decision on the question addressed to it. As is well established in international adjudication, the task of an international tribunal is to answer the question put to it, not to seek to reformulate that question.

27. Two points should be made in this context. First, the transfer of the “area” was an administrative decision taken in 1905. It is not to be retaken now in a different way. Secondly, the transfer did not entail any forced transfer of population. It merely subjected the “area” to the administrative authority of

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<sup>15</sup> *Acquisition of Polish Nationality*, Advisory Opinion, 1923, P.C.I.J., Series B, No. 7, p. 20. See also, I.C.J., 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 has 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*, prec., para. 40 (Rule B), 30 *ILM* 580 (1991), at 595).



Kordofan. The result was that the administrative boundaries of Kordofan were enlarged to the south.

28. Contrary to many other administrative lines in Africa the 1905 line between Kordofan and Bahr el Ghazal provinces did not become an international boundary. The line was never incorporated in treaty form since it separated two administrative units within the same polity, the Anglo-Egyptian Sudan. It was never demarcated.<sup>16</sup> The line was, however, reflected on official maps, as well as in written reports and documents by competent officials.<sup>17</sup> These have probative value. They corroborate the alignment of the boundaries and serve as an accurate reflection of the intention of the colonial power. As Brownlie rightly points out “the internal administrative and constitutional arrangements of the former colonial governments have been of decisive importance”.<sup>18</sup>

29. For these reasons the Tribunal is requested to render its judgment on boundaries of an area which was decided in the past. The role of the Tribunal is declaratory: it is confined to conferring a judicial imprint on previously established facts and not establishing a new situation.

30. In particular no jurisdiction is conferred on the Tribunal to select boundaries of the area at another period of time or to be influenced by later developments, by population migration or by perceived “dominant” and “secondary” grazing rights. This was a major defect of the ABC Experts’ Report, amounting to an excess of mandate.

(b) *The Temporal Dimension*

31. The question addressed to the Tribunal is anchored by a clear reference to the year of 1905. All boundary disputes require the competent judicial organs to ascertain facts, but in this case the facts have attached to them a specific date. The point to be emphasized is that the two sides have *agreed* on the relevant date, i.e.,

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<sup>16</sup> There does not appear to be any case where federal or inter-provincial boundaries have been demarcated.

<sup>17</sup> See for further discussion Chapter 6 of this Memorial.

<sup>18</sup> Brownlie, I., *African Boundaries* (C. Hurst & Co., London, 1979), p. 6.

1905. The Tribunal is only authorized to define, i.e. to delimit, the area of the nine Ngok Dinka Chiefdoms as it was transferred in 1905.

32. This does not mean that prior or subsequent developments are without significance. Developments prior to 1905 may have relevance in determining what was already within Kordofan – and therefore could not have been transferred. Subsequent developments may also be relevant if and to the extent they consolidate and confirm the extent of the transfer, and more precisely fix its limits. As will be explained below, that is the case here. But the crucial point is that the task of the Tribunal concerns a determinate event of 1905.

33. The most relevant legal consequence of the determination of the date of transfer is that a Tribunal confronted with a clear reference to that date is not empowered to draw a new or different line as of another date. In this respect, the 1905 line is an accepted deviation by the Parties from what may be termed the *uti possidetis* line, i.e. the line between the northern and southern provinces as it was on the date of independence, 1 January 1956 (see paragraph 4 above). That it is an exception to *uti possidetis* emphasises the imperative reflected in the relevant date.

(c) *The Applicable Law*

34. Article 3 of Arbitration Agreement is set out in paragraph 18 above. The term “general principles of law and practices as the Tribunal may determine to be relevant” should be interpreted in light of the scope of the dispute as formulated in the preceding article. The context and object and purpose of the arbitration agreement provide the guideline for the interpretation. The task of the Tribunal, as provided in Article 2, does not allow for any deviation from the identification of the boundaries of the “area” transferred in 1905.

35. It is well established in international litigation that jurisdiction is limited to the mandate conferred on the Tribunal by the Parties. A Tribunal cannot proceed to decide *ex aequo et bono* without the express authorisation of the Parties. It is relevant to quote the Rules of Procedure: “The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly

authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.”<sup>19</sup> The Parties in the instant case did not confer such power on the Tribunal.

(d) *Conclusion*

36. To conclude, the Arbitration Agreement confers on the Tribunal a specific task defining the boundaries of an “area” determined as of 1905. Both Parties have agreed to that date. Developments that may have occurred after 1905 cannot be decisive; in particular they cannot substitute for evidence of the area actually transferred. This task is declaratory in character and does not extend to drawing new boundaries which bear no relation to those of 1905. It is respectfully submitted that this task is to be performed by strictly applying law and fact. There is no room for decisions *ex aequo et bono* or for taking into account extraneous elements of equity or other political, economic or demographic considerations.

**F. *Outline of this Memorial***

37. This Memorial consists of five further chapters. Chapter 2 explains, by reference to the legislative history, the meaning to be given to the formula “the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905”. Chapter 3 outlines the process supposed to have been adopted by the Commission and what the ABC Experts made of it. Chapter 4 analyses the concept of excess of mandate, while Chapter 5 demonstrates the ways in which the ABC Experts exceeded their mandate, procedurally, substantively, and in terms of the applicable law. Finally, Chapter 6 sets out the documentary, cartographic and other evidence on the basis of which the Tribunal should determine the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.

38. To this Memorial are appended:

- (1) an Expert Report, “The Bahr el Arab and its Relationship with other Western Sources of the Nile”, by A.S. Macdonald, a former Director of Surveys and Production and acting Director General at the Ordnance

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<sup>19</sup> Permanent Court of Arbitration, Optional Rules for Arbitrating Disputes between Two Parties of which only one is a State, Article 33(1) (emphasis added).

Survey of Great Britain and a Fellow of the Royal Geographical Society;

- (2) a witness statement by Professor Ian Cunnison, Emeritus Professor of Social Anthropology at the University of Hull.<sup>20</sup>

Annexed to the Memorial, in volume 2, are 89 documentary annexes and as volume 3, a number of maps.

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<sup>20</sup> Professor Cunnison is the author of the classic monograph on the Baggara (Humr) of Southern Kordofan, based on fieldwork carried out from 1952-1955: *Baggara Arabs: Power and the Lineage in a Sudanese Nomad Tribe* (Clarendon Press, Oxford, 1966) (SM Annex 33).

## Chapter 2

### The Meaning of the Formula

#### A. Introduction

39. As explained in Chapter 1, the formula “the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905” is clear in referring to the administrative transfer between provinces of a given area. It was not a transfer of people but of a territory inhabited by them.

40. But if there is any doubt as to the meaning of the formula, it is confirmed by its negotiating history, set out below.

#### B. The Addis Ababa Agreement of 1972

41. The Addis Ababa Agreement of 27 February 1972, which put an end to the first civil war, provided that:

“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 other areas that were culturally and geographically a part of the Southern Complex as may be decided by a referendum.”<sup>21</sup>

The term “other areas” was intended to refer to the Local Government Area of Abyei referred to in paragraph 7 above.

42. The Agreement proposed to resolve any cultural differences by providing for a referendum. The referendum was intended to allow the residents of the Abyei Local Government Area to choose whether they wanted to stay in the north or to become part of the south. If they chose to join the south, then the “the cultural and geographic” area would become a part of the “southern complex” – but still within a united Sudan.

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<sup>21</sup> Article 3(iii) (emphasis added) (SM Annex 63).

*C. Discussions leading to the CPA and the Abyei Protocol*

43. During the peace talks of 1999-2005, which ended the second civil war, Southern Sudan was granted the right of self-determination. This complicated the issue of Abyei. *Inter alia*, the Addis Ababa Agreement, addressing the problem of a cultural and geographic irredenta within one country, became obsolete. What was formerly thought to become an administrative border could now become an international boundary.

44. In January 2000 the Sudan People's Liberation Movement (SPLM/A) requested a referendum concerning the status of "the District of Abyei". The SPLM made the following statement and demands:

"2. The SPLM/SPLA conceives self-determination as a democratic, human and people's right. In order to resolve the current civil war in the country on the basis of the right of self-determination, this right shall be exercised in referendum by the people of the following areas:

- a) Southern Sudan in its borders as they stood on 1/1/1956 including the District of Abyei whose population is of Ngok Dinka.
- b) Southern Kordofan (Nuba Mountains).
- c) Southern Blue Nile.

2.2. Separate referendum shall be carried out in the three areas mentioned above.

2.3. For the purpose of Administration during the interim period, The Southern Sudan Confederal State proposed by the SPLM/SPLA shall comprise of:

- a. Southern Sudan (Bahr el Ghazal including Abyei, Equatoria and Upper Nile).
- b. Southern Kordofan.
- c. Southern Blue Nile."<sup>22</sup>

The District of Abyei was the Abyei LGA shown on Maps 27 and 28 of the Map Atlas.

45. The GoS refused to accept the demands of the SPLM/A, which they considered to include areas outside "Southern Sudan".

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<sup>22</sup> SPLM/SPLA Position for the Political Committee on Sudan Peace Talks: 15<sup>th</sup>-20<sup>th</sup> January 2000, available at [www.vigilsd.org/adoc01.htm](http://www.vigilsd.org/adoc01.htm) (SM Annex 64).

46. After long deliberation, on 20 January 2000 both Parties agreed to sign a “Common Understanding and Points of Differences”, which confirmed the right of self-determination of the peoples of southern Sudan. The Common Understanding *inter alia* stated that:

“the Parties agree to the exercise of self-determination of the people of Southern Sudan as of the borders of 1.1.56.”<sup>23</sup>

47. The GoS insisted to include a specific reference to Abyei, reflecting its position on the limits of the southern area. The GoS formulated its position as follows:

“The GOS contended that Abyei is not part of Southern Sudan but the position of Abyei may be discussed.”<sup>24</sup>

48. In the same document, the SPLM/A expressed its position:

“With regard to Abyei, the SPLM/A shall respect the will and the wish of the people of Abyei through a referendum whether to be part of Southern Sudan or remain in the North. The Dinka Ngok people and the territory of Abyei shall therefore [*sic*] be administered as part of Southern Sudan.”<sup>25</sup>

49. Subsequently, in February 2000, the GoS restated its position on Abyei in the following terms:

“That Abyei, homeland of Ngok Dinka, Misseria and other people is not part of the South.

That being an area of ethnic and cultural multiplicity and one of the least developed areas of the country, Abyei is posing problems of its own. The GOS is ready to address those problems as appropriate.

That the problems of Abyei shall be discussed in the presence of all stakeholders.

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<sup>23</sup> First Meeting of the Political Committee between Government of Sudan and the Sudanese People’s Liberation Movement/Army, Nairobi, 15<sup>th</sup>-20<sup>th</sup> January, 2000, p. 3.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid., p. 4.

That GOS proposes the conveying of a comprehensive conference on Abyei to discuss the problems of the area and came out with adequate solutions.”<sup>26</sup>

50. At the same meeting the SPLM/A introduced (for the first time) the concept of an area “annexed to the north for administrative purposes”. The SPLM/A stated:

“That Abyei was annexed to the North for administrative purposes, through an administrative decision and not via a referendum. Therefore, it should be restored to South Sudan using the same mechanism. Hence, the acceptance of a referendum by the SPLM/A on Abyei represents a concession.”<sup>27</sup>

51. In 2003, the Inter-Governmental Authority on Development (IGAD) convened a workshop on the “Three Areas”, i.e., Abyei, Nuba Mountains and Southern Blue Nile. At that workshop, Douglas Johnson, who was later to become a member of the ABC, presented a paper which explicitly referred to the 1905 transfer. This was the first time the year 1905 had been mentioned. Dr. Johnson referred to the Sudan Intelligence Report of March 1905, which states:

“It has been decided that Sultan Rob (Arob), whose country is on Kiir river, and Sheik’a Rihan of Toj (Twic), mentioned in the last intelligence Report, are to belong to Kordofan Province. These people have, on certain occasion 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>28</sup>

52. Despite Dr. Johnson’s suggestion, the two Parties maintained their respective positions without any significant change until 2004. The GoS insisted on the administrative borders of 1956 whereas the SPLM/A insisted on a border stretching further north, including all the land allegedly inhabited by Ngok Dinka before the Abyei Agreement of 1966.<sup>29</sup> The insistence on these historical boundaries (i.e. the actual boundary of 1956 and the alleged boundary of 1965)

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<sup>26</sup> Second Meeting of the Political Committee between Government of Sudan and the Sudanese People’s Liberation Movement/Army, Nairobi, 26<sup>th</sup> February, 2000, p. 7.

<sup>27</sup> Ibid., p. 8.

<sup>28</sup> Sudan Intelligence Report, No. 128 (March 1905), p. 3 (SM Annex 9).

<sup>29</sup> Abyei Agreement between Tribes of Messeria and Mareg Dinka, 22 March 1966 (SM Annex 62). The 1966 Agreement replaced an interim Agreement of 3 March 1965.



made it impossible to reach any agreement on the Abyei issue, which stalled the whole peace process.

53. On 19 March 2004, the US Special Envoy to Sudan, Senator John Danforth, with a view to rescuing the IGAD peace talks, presented the two Parties with a proposal entitled “Principles of Agreement on Abyei”. The principles contained the “1905 formula” which was eventually accepted by the Parties and formed the basis of the Abyei Protocol.

54. The 1905 formula was regarded by the Parties as self-explanatory. It accepted neither the 1956 critical date (which otherwise applies under the CPA) nor, *a fortiori*, that of 1965.

55. Neither Party requested nor received any further explanation from the drafters of the proposal about its meaning or implications.

#### ***D. Conclusions***

56. The following conclusions may be drawn:

- (1) The formula “the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905” refers to the administrative transfer of a given area from Bahr el Ghazal to Kordofan in 1905.
- (2) The definition of the Abyei Area in the CPA, in particular Chapter IV, is clear. It does not refer to the “District of Abyei”, as later established, still less to any area inhabited by the Ngok Dinka in 1956, 1965 or any later date.
- (3) This is confirmed by the history of what became Article 5 of the Abyei Protocol, and in particular the reliance on the Sudan Intelligence Report of March 1905 which recorded the transfer.



## Chapter 3

### The ABC Process

#### A. Introduction

57. The establishment of the Abyei Boundaries Commission (ABC) was provided for in the Abyei Protocol, signed on 26 May 2004, and annexed to the CPA. In line with the suggestion first made by Dr. Johnson and later promoted by Senator Danforth, the mandate of the ABC was exclusively to:

“define and demarcate the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905, referred to herein as Abyei Area.”<sup>30</sup>

58. Acting on the suggestion by Senator Danforth, the GoS and the SPLM/A met in December 2004 to try and reach agreement on the area transferred in 1905. The GoS relied on historical maps whereas the SPLM/A made use of oral accounts. The Parties failed to reach any agreement. In order to avoid reverting to their old negotiating positions, they decided to confirm the definition of the area. In addition, the Parties decided to engage experts to work with the Parties in what was later to become the ABC. This Chapter traces the process laid down by the Parties, and contrasts the way in which the ABC Experts responded to these process requirements.

#### B. Procedure of the ABC and the Experts

59. The Parties and the ABC Experts met from 10-12 March 2005, in Nairobi to agree on the terms of reference for the ABC. The ABC’s Terms of Reference detailed the work program as follows:<sup>31</sup>

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<sup>30</sup> Abyei Protocol (2004), Article 5(1) (SM Annex 71).

<sup>31</sup> ABC Experts’ Report, Appendix 1, pp. 15-16 (SM Annex 81).

Timing	Activity
Last week of March 05	Experts meet in Nairobi and develop rules of procedure
April 1,	ABC convenes with its full membership in Nairobi. The experts present the rules of procedure
April 2,	Presentations of the two parties
April 4-7,	ABC travels to Abyei and listens to the Abyei meeting
April 8-9,	Visits sites in the Abyei Area
April 10-11,	The ABC travels and listens to Agok meeting
April 12,	The ABC travels to Muglad
April 13-14,	ABC listens to the Muglad meeting
April 15,	ABC expert return to Nairobi and party members return to Nairobi or their respective locations
April 16 to May 16,	Experts consult archives and other documents as they deem appropriate
May 19,	ABC reconvenes in Nairobi and the parties make their final presentations

60. Early delays meant that the program was approximately 10 days behind schedule. Thus the first meeting with the Parties (originally scheduled for 2 April) took place on 12 April 2005. At this meeting, the GoS unequivocally explained their understanding of the ABC mandate. In its Notes on the Mandate of the Abyei Boundaries Commission, circulated at the meeting, the GoS stressed that “all other dates [other than 1905] previously touted by Parties are now immaterial.”<sup>32</sup> In addition, the Notes stated:

“1. The 1956 boundaries between the north and the south are inviolable; however, for the purposes of the Abyei Area the 1905 boundaries shall be observed, subject to the will of the people of the area.

2. The issue shall be resolved on scientific basis in order to avoid, in the eventuality of session, a new Kashmir at the international border of the new States of Northern and Southern Sudan.”<sup>33</sup>

It went on:

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<sup>32</sup> Notes on the Mandate of the Abyei Boundaries Commission (ABC), 12 April 2005, p. 1 (SM Annex 77).

<sup>33</sup> Ibid.

“The local communities shall know their boundaries as they stood in 1905, i.e. before they moved into each other [*sic*] territories. **This is a safety valve against slipping back to conflict over land ownership.**”<sup>34</sup>

61. According to the Notes on the Mandate, the ABC was limited to two specific issues. Firstly, to...

“Define the nine Ngok Dinka Chiefdoms territory transferred to Kordofan in 1905.”<sup>35</sup>

Secondly, to...

“Demarcate that definition on land.”

Anything else, the Notes stated, was...

“not within the ABC mandate and shall be left to the implementation of the negotiated settlement.”<sup>36</sup>

62. Thus from the very beginning, the GoS made it clear that the function of the ABC was limited to the two specific tasks, *viz.* that of defining and demarcating the Abyei area. The GoS emphasised this limited mandate. After clarifying that the ABC was only to define and demarcate the area transferred in 1905, the Notes on the Mandate stated that:

“Anything else is not within the ABC mandate and shall be left to the implementation of the negotiated settlement.”<sup>37</sup>

63. In addition, the Notes on the Mandate provided concrete examples of issues going beyond the ABC mandate. This included that:

- “1. It shall not open the issue for renegotiation.
2. It shall not prefer equitable compromise to scientific research.
3. It shall not invent a new parameter other than the yardstick of the year 1905.
4. It shall not touch on other aspects of the settlement.”<sup>38</sup>

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<sup>34</sup> Ibid. (emphasis original) (SM Annex 77).

<sup>35</sup> Ibid., p. 2.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

64. It was then reiterated *en bloc* that “(such issues are *ultra vires* the ABC mandate)”<sup>39</sup>

65. The SPLM/A representatives neither objected to nor made any comments upon this interpretation.

66. The role of the Parties was emphasised in the Rules of Procedure, which were adopted on 11 April 2005. The Rules of Procedure were definite with regard to the final meeting of the ABC. After the ABC had examined and evaluated all the material gathered, the Experts and the Parties were to reconvene and discuss the findings. To this effect, the Rules of Procedure stated:

“14. 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.”<sup>40</sup>

67. In this regard, it is important to note that the Understanding on the Abyei Boundaries Commission provided that the “Commission” was distinct from the ABC Experts.<sup>41</sup> It was the Commission – in its full composition including the Experts *and* the Parties – that was to meet and “endeavour to reach a decision by consensus”. Thus while the Experts would have the “final say”, the Rules of Procedure clearly envisaged a prior communicative process involving both the Experts and the Parties. Only if the Commission as a whole failed to reach a decision by consensus, were the ABC Experts mandated to arbitrate between the Parties.

68. At the same meeting where the GoS presented the Note on the Mandate, the SPLM/A made its first presentation entitled “The SPLM Preliminary Presentation on the Boundaries of the Abyei Area”. In its statement, the SPLM/A made a very specific claim concerning the Abyei area. It claimed that:

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<sup>38</sup> Ibid. (SM Annex 77)

<sup>39</sup> Ibid. (emphasis original).

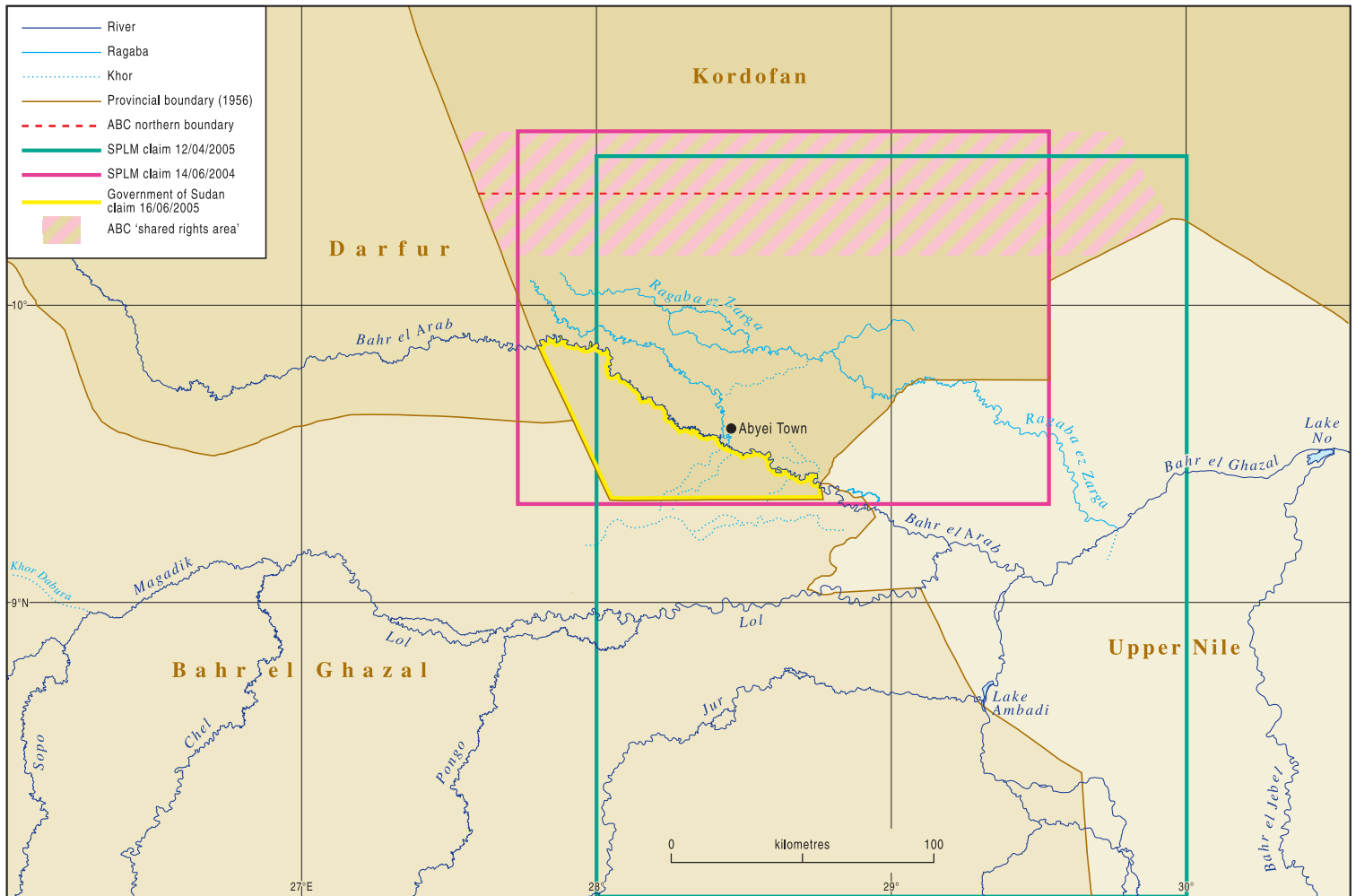
<sup>40</sup> Rules of Procedure for the Abyei Boundaries Commission, Nairobi, 11 April 2005, r. 14 (SM Annex 75).

<sup>41</sup> Understanding on Abyei Boundaries Commission, 17 December 2004, Article 2 (SM Annex 69).

“The area lies between latitudes 8.0 – 10.5° and longitudes 28 – 30°.”<sup>42</sup>

This entailed *inter alia* that the SPLM/A did not claim any land adjacent to the province of Darfur, which falls to the west of longitude 28°E: see **Figure 5** below.

**Figure 5: The Claims of the Parties before the ABC**



69. After the initial meeting of 12 April, the ABC Experts flew to Khartoum and then to Abyei. The ABC spent the next six days (14-19 April 2005) taking testimony, first in Abyei and later in Agok and Muglad.

<sup>42</sup> The SPLM Preliminary Presentation on the Boundaries of the Abyei Area, 12 April 2005, Nairobi, Kenya, para. 2.1 (SM Annex 68).

70. During the visit to Agok, the GoS recommended a visit to the shrine of Sultan Rob at the town of Mathiang (south of the Bahr el Arab). Sultan Rob was the paramount chief of the Ngok Dinka at the time of the transfer in 1905. As the shrine was in a SPLM/A controlled area, the SPLM/A commanders agreed to provide security. When the ABC delegation arrived at Mathiang, they found the shrine and the crossing-point of Major E.B. Wilkinson who visited Sultan Rob in 1902.<sup>43</sup> The ABC Experts then read Wilkinson's 1902 report "El Obeid to Dar Jange"<sup>44</sup> and compared it to what they saw at the site. The observations and the coordinates of the shrine were recorded. While the Experts had seen the shrine of Sultan Rob – south of the Bahr el Arab – and confirmed its position in accordance with Wilkinson's observations, it was never mentioned by the Experts in their Final Report. This was despite it being a focus of the GoS final presentation.<sup>45</sup>

71. According to the Experts' own account, the ABC arrived in Abyei on the morning of 14 April 2005, where:

"Over the ensuing six days, the ABC heard testimony from the Sudanese in Abyei Town."<sup>46</sup>

After this:

"The ABC returned to Khartoum on April 26."<sup>47</sup>

Evidently this leaves a gap of five days, from 21 until 25 April 2005. According to the Terms of Reference, after having finished taking testimony in Muglad, the ABC Experts were to return to Nairobi.<sup>48</sup> After spending a day in Nairobi, they were then to start their archival research. From the Appendix to the ABC decision it is, however, clear that the Experts returned to Khartoum before 26 April 2005. According to the information given in appendix 4.2, the Experts organised a

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<sup>43</sup> On Wilkinson's journey see below, paragraphs 329-336.

<sup>44</sup> ABC Experts' Report, p. 38 (SM Annex 81); Wilkinson's report is in Gleichen, A., *Handbook of the Sudan: A Compendium Prepared by Officers of the Sudan Government*, (2 Vols., HMSO, London 1905), Vol. II, pp. 154-156 (SM Annex 38).

<sup>45</sup> Basic Documents of the Government of the Sudan, Final Presentation, 16 June 2005, para. 2(a).

<sup>46</sup> ABC Experts' Report, Preface, p. 3 (SM Annex 81).

<sup>47</sup> Ibid.

<sup>48</sup> See work program above, paragraph 59.



meeting at the Khartoum Hilton on 21 April 2005, where they took testimony from Ngok Dinkas living in the city.<sup>49</sup>

72. In the minutes of the Hilton meeting of 21 April 2005, it is stated that the ABC Experts asked Justin Deng, former Assistant Commissioner of Abyei during the time of President Nimeiri (1969-1985), to show approximate locations of some places on map.<sup>50</sup> Reportedly, he found this very difficult.<sup>51</sup> It was agreed that Mr. Deng would meet with the ABC Experts at a later date, so that he could provide the Experts with the requested information. This does not, however, appear in the transcript. Neither does the transcript mention that no GoS representative was present. (In fact GoS had not been notified, still less invited to attend). The transcript also neglects to mention that the interviews were conducted without authority from the Commission.

73. It was later revealed that the ABC Experts had obtained maps and other documents from subsequent meetings. The Experts themselves acknowledged that the informants...

“left us with a draft list of Ngok Dinka age sets and said a final one would be given to us before we left. They will also copy the sketch map they made of the area and give us a copy. They had highlighted place names on a copy of NC35-L Ghabat Arab [sic] map, and we transferred those to our photocopy of that map.”<sup>52</sup>

Again this was done without the approval or knowledge of the Parties and without any authority from the Commission. The documents obtained by the Experts were never shown to the Parties, although some were used in the final Report.

74. On 25 April 2005, the Experts released to the Commission a note of the testimonies obtained by the field visits.<sup>53</sup> The note, however, only contained information on the scheduled interviews in Abyei and villages around Agok and

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<sup>49</sup> ABC Experts' Report, Appendix 4.2, p. 148 (SM Annex 81).

<sup>50</sup> Ibid., p. 149.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid., p. 156.

<sup>53</sup> Abyei Boundary Commission, Note on Testimony Obtained in Field Visit: 14-20 April 2005 (25 April 2005), p. 2 (SM Annex 78).

Muglad. In other words, the note did not mention the Hilton meeting of 21 April 2005.

75. In the note of 25 April 2005, the ABC Experts concluded that:

“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>54</sup>

76. Despite their announced decision to stop collecting oral testimony and to resort to archival research, the Experts arranged two subsequent meetings at the Hilton, Khartoum, on 6 and 8 May 2006. Again, these were unscheduled and had not previously been agreed to by the Commission. At these subsequent meetings there were 14 representatives of Ngok Dinkas from Khartoum, as well as a new translator who had not previously been appointed by the Parties.

77. At the Khartoum meeting on 8 May 2006, one of the ABC Experts reportedly presented his own interpretation of the 1905 formula. He said:

“The area to be defined is described in the protocol as the area of the nine Ngok Dinka chiefdoms – no one else. And we were supposed to discover what territory was being used and claimed by those nine chiefdoms when the administrative decision was made to place them in Kordofan.”<sup>55</sup>

The phrase “used and claimed” instead of the agreed formula “transferred” was a potentially material deviation from the original formula. That deviation had not been agreed to nor even discussed with the Commission beforehand.

78. There was no indication in the transcripts of the Hilton meetings whether the witnesses were testifying under oath, although this had been the practice until then. Neither was the meeting a continuation of the previous meetings, as testimony was given on new issues by previously unidentified witnesses. Nor did the ABC Experts seem troubled that they were interviewing witnesses without the

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<sup>54</sup> Ibid. (SM Annex 81)

<sup>55</sup> ABC Experts’ Report, Appendix 4.2, pp. 155-156 (SM Annex 81).

presence of both Parties. By contrast, when asked whether they would be willing to speak to some Hamar and Messeria in Khartoum they reportedly stated:

“We said we would, as long as it was understood that we shared whatever they told us with both the government and SPLM delegations.”<sup>56</sup>

79. This, however, never happened. None of the Hilton meetings were ever agreed to by the Commission. They were not mentioned in the Terms of Reference nor were they included in the agreed program of work. The GoS was neither invited nor even informed of these meetings beforehand.

80. After having been to Nairobi, the Experts returned to Khartoum and started their research on 27 April 2005. After two weeks of research at the Sudan National Records Office, the Sudan National Survey Authority and the University of Khartoum Library, the ABC Experts found that:

“No map exists showing the area inhabited by the Ngok Dinka in 1905. Nor is there sufficient documentation produced in that year by Anglo-Egyptian Condominium government authorities that adequately spell out the administrative situation that existed in that area at that time.”<sup>57</sup>

81. The failure to find any information led the Experts to conclude that it was...

“...necessary for the experts to avail themselves of relevant historical material produced both before and after 1905, as well as during that year, to determine as accurately as possible the area of the nine Ngok Dinka chiefdoms as it was in 1905.”<sup>58</sup>

82. At some point prior to the scheduled two weeks research in Khartoum, the ABC Experts had however, contacted Jeffrey Millington, an official at the American Embassy in Nairobi, seeking an interpretation of the 1905 formula. Neither the date nor the full content of this contact was ever disclosed to the GoS. In fact, the GoS did not know of this communication before it was published in the

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<sup>56</sup> ABC Experts’ Report, Appendix 4.2, p. 156 (SM Annex 81).

<sup>57</sup> ABC Experts’ Report, p. 4.

<sup>58</sup> Ibid.

ABC Experts' Report on 14 July 2005. From the Report, it is only known that Mr. Millington replied by email to a request by the ABC Experts on 27 April 2005. In the passage quoted in the Report, Mr. Millington is reported to have said that:

“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.”<sup>59</sup>

Whether this was the full answer of Mr. Millington or how the question had been formulated by the ABC Experts has never been disclosed. All that is known, from a lecture by Ambassador Donald Petterson given on 11 September 2006, is that it was Petterson who sent the email to Mr. Millington.<sup>60</sup>

83. On 11 May 2005, the ABC Experts returned from Khartoum to Nairobi, where they met and briefed the IGAD Special Envoy Lt.-General Lazaro Sumbeiywo. Five days later, on 16 May 2006, the ABC Experts convened another meeting at the IGAD office in Nairobi to brief the fifth expert, Professor Shadrack B.O. Gutto, who had so far not participated in the process.

84. The following day the Chairman of the ABC designated two experts (Dr Johnson and Mr Muriuki) to travel to England, where they conducted research from 17-27 May 2005. In the same period, Professors Berhanu and Gutto, travelled to their respective home towns in Addis Ababa and Pretoria where they “undertook additional research” with undisclosed results.<sup>61</sup>

85. In their note of 25 April the Experts stated that:

“we will confine ourselves to records contemporary with or referring to the period of the Anglo-Egyptian Condominium”.<sup>62</sup>

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<sup>59</sup> ABC Experts' Report, p. 4 (SM Annex 81).

<sup>60</sup> Petterson, D., “Abyei Unresolved: A Threat to the North-South Agreement”, Prepared remarks for the National Defense University and Wilson Center Symposium, Sudan's Peace Settlement, University Fort Lesley J. McNair, 11 September 2006; in *Implementing Sudan's Comprehensive Peace Agreement* (Woodrow Wilson International Center, Washington, DC, May 2008) pp. 22-31 (SM Annex 86).

<sup>61</sup> ABC Experts' Report, p. 5 (SM Annex 81).

<sup>62</sup> Abyei Border Commission, Note on Testimony Obtained in Field Visits: 14-20 April 2005, (25 April 2005), p. 2 (SM Annex 78).

Such evidence was, according to the Experts, primarily to be found in the National Records Office, Khartoum and the Sudan Archive at Durham, United Kingdom, “and in any other relevant offices, archives or libraries”.<sup>63</sup> This was in line with Rule 11 of the Rules of Procedure. After having visited the Oxford University libraries the Experts “met with former District Commissioner Michael Tibbs in Sussex and with Ian Cunnison, anthropologist and author of *Baggara Arabs* in Hull.”<sup>64</sup> Neither of those meetings had been agreed beforehand. Again, the GoS only learned about these meetings from the final report of the Experts. Former British officials and other experts could have been invited to testify on oath before *all* Commission members, but that opportunity was not pursued.

86. In accordance with the agreed Rules of Procedure, all five Experts reconvened in Nairobi, where the GoS and the SPLM/A were to make their final presentations on 14-17 June 2005 (originally scheduled for 19 May).

87. In their original claim of 12 April 2005, the SPLM/A did not claim any land adjacent to the Province of Darfur (see **Figure 5**, page 26). But in their final presentation on 14 June 2005, the SPLM/A adjusted their claim concerning the borders of the Abyei area. Although the transferred area was supposed to be defined by reference to 1905, it was redefined. Now the SPLM/A advocated an “Abyei area” lying approximately between:

“latitude 9 degree 21 minutes - 10 degree 35 minutes and longitude 27 degree 44 - 29 degree 32 minutes.”<sup>65</sup>

88. According to the Experts, the SPLM/A position was that:

“the Ngok Dinka have established historical claims to an area extending from the existing Kordofan/ Bahr el-Ghazal boundary to north of the Ragaba ez-Zarga/Ngol, and that the boundary should run in a straight line along latitude 10°35’N.”<sup>66</sup>

The Experts went on to claim that they understood the SPLM/A claim as follows:

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<sup>63</sup> Ibid., p. 2. (SM Annex 78)

<sup>64</sup> ABC Experts’ Report, p. 4 (SM Annex 81).

<sup>65</sup> The SPLM Final Presentation of the Boundaries of the Abyei Area, 14<sup>th</sup> – 16<sup>th</sup> May 2006, Nairobi Kenya, p. 18 (SM Annex 79).

<sup>66</sup> ABC Experts’ Report., p. 11(SM Annex 81).

“The Southern and Western boundaries coincide with those of Upper Nile, Bahr el-Ghazal and Darfur provinces, as established at the time of independence.”<sup>67</sup>

89. After having listened to the final presentations by the Parties, the Experts adjourned the meeting and prepared the Report by themselves. At no point were the GoS asked for their opinions or any other form of input. There was no attempt to reach a decision by consensus.

90. The Experts completed their evaluation on 20 June 2005, but they did not inform the GoS. Instead, after having completed their deliberations, the Experts met with Lt.-General Sumbeiywo and together they pledged...

“not to reveal to any person or institution the substance of their decision before they present it to the Sudanese Presidency.”<sup>68</sup>

91. The summary of the ABC Experts’ decision states that:

“As it happened, the two sides, i.e., the Government of Sudan (GOS) and the Sudan People’s Liberation Movement/Army (SPLM/A), were unable to reconcile their differences on the Abyei issue. Thus the decision arrived at by the ABC Experts shall be the determinant of the boundaries in question.”<sup>69</sup>

This position was taken *ex parte*. No meeting was ever called to try and reconcile the views of the two Parties. The Commission (i.e. the Experts and the Parties) was never involved in the final decision. Thus instead of the process which was clearly envisaged by the Rules of Procedure, the Experts made no attempt to follow it. The aim of the Abyei Protocol was to establish a communicative process between the two stakeholders, but no attempt was made by the Experts to reach a consensus between the Parties.

### **C. Conclusions**

92. The process adopted by the ABC Experts thus had the following features:

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<sup>67</sup> Ibid., p. 44.

<sup>68</sup> Ibid., p. 5.

<sup>69</sup> Ibid., p. 9

- (1) The ABC's Terms of Reference were agreed with the Parties and specified the work program in detail. They provided for full exchange of information and full transparency. The program of gathering information and evidence could be, and was, varied by agreement but material changes required the consent of the Parties.
- (2) The limitations on the ABC's mandate were clearly spelled out by GoS, without objection from the SPLM/A and without demur from the Commission.
- (3) Paragraph 14 of the Rules of Procedure, agreed by the Parties, required the Experts to present their conclusions to the Commission and to endeavour to reach a decision by consensus. Only if an agreed position by the two sides could not be reached were the Experts to have the final say. The Report was to be that of the Commission and was to be presented by the Commission to the Presidency.
- (4) Without informing GoS, the Experts held at least 3 meetings in Khartoum (on 21 April, 6 & 8 May 2006) at which evidence of Ngok Dinka witnesses was taken. Documents obtained by the Experts at these meetings were never shown to GoS, although some were used in the final report. Two of these meetings were held after the Experts had announced that they would "confine [themselves] to records contemporary with or referring to the period of the Anglo-Egyptian Condominium."<sup>70</sup>
- (5) Without informing GoS, the Experts contacted an official at the American Embassy in Nairobi, seeking an interpretation of the 1905 formula. GoS did not know of this communication before it was published in the ABC Experts' Report on 14 July 2005.
- (6) The Experts made no attempt to discuss their findings with the Parties. They unilaterally communicated their Report to the Presidency, not acting through the Commission as required by the Rules of Procedure.

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<sup>70</sup> ABC, Note on Testimony obtained in Field Visits, 14-20 April, (25 April 2005), p. 2 (SM Annex 78).





## Chapter 4

### The Concept of Excess of Mandate

#### A. Introduction

93. Article 2 of the Arbitration Agreement deals with the scope of the present dispute. Sub-paragraph (a) provides that the first issue to be determined by the Tribunal is:

“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.”

94. With respect to the Tribunal’s consideration of this issue, as well as the other issues set out in sub-paragraphs (b) and (c) of Article 2, Article 3(1) of the Arbitration Agreement provides as follows:

“The **Tribunal** shall apply and resolve the disputes before it in accordance with the provisions of the CPA, particularly the Abyei Protocol and the Abyei Appendix, the Interim National Constitution of the Republic of Sudan, 2005, and general principles of law and practice as the **Tribunal** may determine to be relevant.”

95. It must be stressed that, if the Experts exceeded their mandate *in any respect*, this is sufficient to trigger Article 2(c) of the Arbitration Agreement. This stipulates:

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

In other words, once excess of mandate is established, the Experts’ Report is set aside entirely and the task of determining the boundaries of “the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905” becomes one for the

Tribunal. This does not mean the Tribunal may not take the material set out in the Experts' Report into account. But it *does* mean that the Tribunal must make its own decision on the extent of the area transferred, based on all the evidence and submissions presented to it. Once it is set aside, the Experts' Report may be a potential source of information and argument – but it is not legally binding and has no general evidentiary value in itself. Moreover in performing the task set out in Article 2(c) of the Arbitration Agreement, the Tribunal is not limited to the information placed before the ABC Experts, still less the information utilized by the Experts. The Tribunal must examine the whole dossier placed before it based on the submissions of the Parties.

96. This Chapter discusses the notion of excess of mandate. **Section B** reviews the scope of the mandate of the ABC Experts based on the consent of the Parties as provided for in the relevant instruments. **Section C** addresses the notion of “excess of mandate” under general principles of law and practice. **Section D** summarises the conclusions reached. In Chapter 5, these conclusions will be applied to demonstrate that there was indeed an excess of mandate in this case, and on more than one ground.

### ***B. The Mandate of the ABC under the Applicable Instruments***

97. The resolution of the Abyei issue is the subject of a complex and integrated series of agreements reflecting the precise limits to which the two Parties consented. As noted above, Article 2(a) of the Arbitration Agreement, in setting forth the issue whether or not the ABC Experts had, on the basis of the Parties' agreement as per the CPA, exceeded their mandate, describes that mandate as being “to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905”. However, Article 2(a) also refers to a number of other instruments, which were part of an overall package of arrangements between the Parties. These include the Abyei Protocol, the Abyei Appendix, the ABC Terms of Reference and the ABC Rules of Procedure. In considering the scope of the mandate given to the ABC Experts, it is necessary to examine how each of these instruments dealt with the matter since, taken together, they provided for the substantive and procedural scope of the Experts' task.

**(i) The CPA and the Abyei Protocol**

98. The reference in Article 2(a) of the Arbitration Agreement to the “CPA” is to the Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People’s Liberation Movement/Sudan People’s Liberation Army concluded on 9 January 2005. The CPA is essentially a compendium of separate agreements. Chapter IV of that Agreement is entitled “The Resolution of the Abyei Conflict signed at Naivasha, Kenya on 26<sup>th</sup> May 2004.” At the time it was concluded, that instrument was referred to as the “Protocol” between the two Parties on the “Resolution of Abyei Conflict”, and it is the “Abyei Protocol” referred to in Article 2(a) of the Arbitration Agreement. Since the relevant provisions of Chapter IV of the CPA and the Abyei Protocol are identical – the former incorporates verbatim the latter – it is appropriate to refer directly to the provisions of the Abyei Protocol in so far as they relate to the mandate of the ABC Experts.

99. Section 1.1 of the Abyei Protocol refers to the territory of the Abyei area in the following terms:

“1.1.1 Abyei is a bridge between the north and the south, linking the people of Sudan;

1.1.2 The territory is defined as the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905;

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

100. Considering the relevant instruments in turn, this is the first reference to the Abyei area being defined as “the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905” which ultimately was to appear in Article 2(a) of the Arbitration Agreement. It is also noteworthy that, while Section 1.1.3 of the Protocol stipulated that the Misseriya and other nomadic people retained their traditional rights to graze their cattle and move across the territory of Abyei, no similar provision was made with respect to such rights in any areas lying outside that territory.

101. Section 5 of the Abyei Protocol is labelled “Determination of Geographic Boundaries”. It provides:

“5.1 There shall be established by the Presidency, 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.

5.2 The composition and timeframe of the Abyei Boundaries Commission (ABC) shall be determined by the Presidency. However, the Commission shall include, *inter alia*, experts, representatives of the local communities and the local administration. The Commission shall finish its work within the first two years of the Interim Period.

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

102. As can be seen, Section 5.1 of the Abyei Protocol refers to the establishment of the Abyei Boundaries Commission (ABC), the task of which was “to define and demarcate the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905.” This provision made it quite clear that 1905 was considered to be the key date for purposes of determining the area of the Ngok chiefdoms transferred to the existing province of Kordofan in that year.

103. Section 5.2 contained a general disposition as to the composition of the ABC. The ABC was to be comprised not only of “experts”, but also representatives of the local communities and the local administrations. Section 5.3 stipulated that the ABC – that is, the Commission as a whole as opposed to solely the Experts – “shall present its final report to the Presidency”.

**(ii) The Abyei Appendix**

104. The next instrument referred to in Article 2(a) of the Arbitration Agreement is the “Abyei Appendix” in which the mandate of the ABC Experts is reiterated.

105. The “Abyei Appendix”, which is referred to in the actual document as the “Abyei Annex Understanding on Abyei Boundaries Commission”, was adopted by

the Parties on 17 December 2004.<sup>71</sup> Paragraph 1 of the Abyei Appendix provided as follows:

“Upon 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.”

106. The second paragraph of the Abyei Appendix set out in detail how the ABC would be composed. It provided that there would be 15 members of the Commission, five of whom were to be “impartial experts knowledgeable in history, geography and any other relevant expertise”. The reference to the need for the Experts to be “impartial” was straightforward and entirely consistent with the criteria applied to other third party settlement institutions such as boundary commissions, international courts and international arbitral tribunals. Paragraph 3 of the Abyei Appendix provided that the Commission, as opposed to simply the Experts, “shall listen to the representatives of the people of Abyei Area and the neighbours, and shall also listen to presentations of the two Parties.”

107. While there was no “governing law” provision as such in the Abyei Appendix, paragraph 4 played an equivalent role in prescribing the manner in which the Experts in the Commission were to carry out their mandate and determine their findings. Because paragraph 4 only referred to the “Experts”, not to the ABC as a whole – just as Article 2(a) of the Arbitration Agreement refers to whether the “ABC Experts” have exceeded their mandate, not whether ABC exceeded its mandate – it is an important provision for purposes of the present proceedings. The paragraph reads as follows:

“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.”

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<sup>71</sup> To avoid confusion on this point, the instrument in question will be referred to as the “Abyei Appendix”.

108. This provision underscores the important point, specifically agreed to by the Parties, that the Experts were to base their decision on “scientific analysis and research”. Significantly, there was no stipulation that the Experts were authorized to base their decision on notions of equity, equitable division, fairness or natural justice or access to resources. Nor was there any reference to the Experts making a decision *ex aequo et bono* – the kind of provision that requires the specific consent of Parties to third party settlement agreements. Nor were the Experts empowered to rely on any specific (still less generic) system of legal principles to decide the issue put to them.

109. Paragraph 5 of the Abyei Appendix provided that the ABC – that is, the Commission as a whole – “shall present its final report to the Presidency”. Paragraph 5 also provided that “the report of the experts, *arrived at as prescribed in the ABC rules of procedure*, shall be final and binding on the Parties” (emphasis added). In short, only if they acted in accordance with the agreed rules of procedure were the Experts empowered to bind the Parties.

110. The Terms of Reference and the Rules of Procedure of the ABC provided further specifications as to how the ABC as a whole, and the Experts, were to carry out their mandate. These are the last two instruments referred to in Article 2(a) of the Arbitration Agreement dealing with the scope of the dispute.

### **(iii) The ABC’s Terms of Reference**

111. The Terms of Reference of the ABC were set out in a document that the Parties agreed when they met in Nairobi between 10-12 March 2005. The document is recorded in its Preamble as having been arrived at based on the Parties’ “joint understanding on all the issues”. Section 1 of the ABC’s Terms of Reference was entitled “Mandate”. It reads as follows:

“1.1 The Abyei area is defined in the Abyei Protocol in article 1.1.2 as ‘The area of the Nine Ngok Dinka chiefdoms transferred to Kordofan in 1905’. The ABC shall confirm this definition.

1.2 The ABC shall demarcate the area, specified above on map and on land.”

Once again, the reference is clear that the Abyei area to be determined by the ABC was the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905. No other date is referred to in the Terms of Reference as a relevant date for determining the area that was deemed to be the “Abyei area”.

112. The Terms of Reference provided, in Section 2, for the structure of the ABC according to the criteria stated in the Abyei Appendix and, in Section 3, for the functioning of the ABC. Section 3.2 of the Terms of Reference, as well as the “Program of Work” set out thereafter, made it clear that it was to be the ABC, not the Experts acting alone, that would listen to the oral presentations of various representatives of the people of Abyei Area and the neighbours. Thus, Sub-section A provided that the ABC would conduct one meeting in Abyei Town with representatives of the nine Ngok Dinka chiefdoms; Sub-Section B provided that the ABC would hold another meeting in Muglad Town with representatives of the Messirya and would make certain field visits; and Sub-Section C provided for a meeting in Agok with representatives of the neighbours of Abyei to the south.

113. In contrast, Section 3.4 of the Terms of Reference dealt with a separate role of the Experts, providing that the Experts would consult certain archives and other relevant sources on the Sudan, and it reiterated that the Experts’ decision should be based on research and scientific analysis as previously stipulated in the Abyei Appendix. The provision reads:

“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.”

114. Particular note should also be made of Section 3.5 which provided that, following the collection of the relevant data:

“The ABC shall thereafter reconvene in Nairobi to listen to the final presentations of the two parties, examine and evaluate evidence received, and prepare their final report that shall be presented to the Presidency in Khartoum.”

This provision made it clear that the final report that had to be submitted to the Presidency in Khartoum (“their final report”) was a final report of the Commission. The “Experts” are not referred to in this provision.

**(iv) The ABC’s Rules of Procedure**

115. It will be recalled that para. 4 of the Abyei Appendix provided, *inter alia*, that “The experts shall also determine the rules of procedure of the ABC”. The “Rules of Procedure for the Abyei Boundaries Commission” were drawn up in Nairobi and agreed to by the delegations of the two Parties on 11 April 2005. Paragraph 1 of the Rules of Procedure underscored the fact that the work of the ABC was to be carried out in the light of the compendium of agreements to which the Parties had subscribed, and it repeated the formula according to which the Abyei area was to be defined. It reads:

“1. The work of the Commission will be guided by the principles of agreement on Abyei, the Abyei Annex, ‘Understanding on Abyei Boundaries Commission’ ‘ABC’ and Terms of Reference, which includes the following mandate:-

1.1 The Abyei area is defined in the Abyei Protocol in Article 1.1.2 as ‘The area of the Nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905’. The ABC shall confirm this definition.

1.2 The ABC shall demarcate the area specified above on map and on land.”<sup>72</sup>

116. The Rules of Procedure go on to specify the work programme of the Commission and the Experts. Paragraphs 6-10 of the Rules again made it clear that the Commission would conduct the meetings with various representatives referred to in the Terms of Reference, and that the “two sides and IGAD will make recordings of all oral testimonies heard”.<sup>73</sup> After the completion of the field visits, the Rules of Procedure provided that the Experts would then determine what additional documentation and/or archive materials needed to be consulted.<sup>74</sup> Paragraph 12 stipulated that the Commission would reconvene in Nairobi at which

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<sup>72</sup> The phrase “‘ABC’” in para. 1 was a reference to the “Abyei Appendix”.

<sup>73</sup> ABC Rules of Procedure, para. 9 (SM Annex 75).

<sup>74</sup> *Ibid.*, para. 11 (SM Annex 75).



time the Parties would make their final presentations. Paragraph 13 then provided that:

“After that, the experts will examine and evaluate all the material they have gathered and will prepare the final report.”

117. It must be emphasized that while the Experts were to prepare the report, that report was to be submitted to the Commission before being transferred to the Presidency. In this respect, para. 14 provided:

“The Commission will endeavour to reach a decision by consensus. If, however, an agreed position by the two sides is not achieved, the experts will have the final say.”

Paragraph 15 then stipulated that the report will be considered a public document “after it has been formally presented to the Presidency”.

118. It was thus clear that the Experts would draw up their final report based on the collection of facts and the presentations of the Parties, but that their report would be submitted to the ABC as a whole, which would endeavour to reach a decision by consensus. It was only if consensus was not possible and an agreed position by the two sides was not achieved that the Experts would have the final say. Moreover, the report would not be made public until after it had been formally presented to the Presidency of the Government of Sudan.

#### **(v) Conclusions as to the Mandate of the ABC Experts**

119. A body, empowered to make final decisions which are legally binding on a State, is not just a number of characters “in search of a courtroom or a case”.<sup>75</sup> This is particularly true of *ad hoc* bodies, assembled for a given purpose. The mandate of such a body is determined by law, and not by discretion or by an arbitrary act of will or preference. The body in question must act in accordance with the basic conditions for its constitution as a collective body (and not other, quite different conditions). It must perform the task required of it (and not some other, quite different, task). It must apply the criteria laid down for the task (and

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<sup>75</sup> As aptly noted by Vice-President Schwebel in *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, I.C.J. Reports 1995*, p. 288, at p. 309.

not other, quite different, criteria). All this constitutes its mandate, in default of which the persons appointed have acted arbitrarily as individuals and not as the collective body mandated to act at all (and thus to bind the parties). It is true that in international relations there may be no tribunal empowered to determine whether these fundamental requirements for *intra vires* action are met. But that is not an issue in this case: this is precisely the task of the present Tribunal. In this regard it is useful to distinguish between three categories of excess of mandate.

(a) *The procedural conditions for a binding decision of the ABC Experts*

120. It is evident that the Parties took care in the various agreements referred to in Article 2 of the Arbitration Agreement to prescribe the basic procedural conditions pursuant to which that task would be carried out. In accordance with these agreements the Experts were required to perform their mandate within the Terms of Reference and the Rules of Procedure – two documents that were drafted with care and expressly agreed by the Parties and which are referred to in Article 2(a) of the Arbitration Agreement. If the Experts materially deviated from the Terms of Reference or the Rules of Procedure in carrying out the task conferred on them, this would be inconsistent with the conditions laid down for the exercise of their mandate. This is not to say that minor deviations from the Rules of Procedure would amount to an excess of mandate. It is certainly to say that fundamental deviations could do so. For example, if the ABC Experts delegated a key part of the decision to a third party – or if they violated principles of due process in some fundamental respect – they could not be said to have remained within their mandate.

(b) *The substantive mandate of the ABC Experts*

121. It is also apparent, based on the chronology of the relevant instruments discussed above, that the single substantive task of the ABC and of the Experts was referred to as “to define (delimit) and demarcate the area of the nine Ngok chiefdoms transferred to Kordofan in 1905”. The area so transferred in 1905 was agreed by the Parties to constitute the “Abyei Area”. That substantive mandate was consistently and repeatedly defined: see paragraphs 6-9 above.

122. The reference to determining the relevant area as of the year 1905 is crucial. None of the agreements refer to any other date other than 1905 for purposes of determining the extent of the Abyei area. Nor is there any indication in any of the instruments that the Abyei area should be defined by reference to where various peoples or tribes may have lived or grazed after 1905. No distinction was drawn in the instruments between different parts of the area transferred. There is no suggestion that there was to be any further inquiry – *within* the area transferred – as to sub-areas used or not used, still less as to alleged “dominant” or “secondary” rights there. *A fortiori* this was true of land *outside* the transferred area. In other words, the ABC Experts were required to determine the area transferred, the whole area transferred and nothing but the area transferred.

123. In this respect, an analogy can be drawn between the present case and the situation confronted by the Chamber in the *Land, Island and Maritime Frontier Dispute*.<sup>76</sup> There, the Chamber drew attention to the fact that whether or not people of one country may have settled in a particular area after a particular date is not dispositive in a boundary dispute where the central issue involves determining the boundary as of that date. As the Chamber stated:

“The effect of the Chamber’s Judgment will however not be that certain areas will ‘become’ part of Honduras; the Chamber’s task is to declare what areas are, and what are not, *already* part of the one State and the other. If Salvadorians have settled in areas of Honduras, neither that fact, nor the consequences of the application of Honduran law to their properties, can affect the matter.”<sup>77</sup>

124. Given that 1905 was the key date that formed the predicate of the Experts’ task, the relevant question for the Experts was: “what was the area of the nine Ngok chiefdoms that was transferred to Kordofan in 1905?” If the Experts sought to answer a different question not related to the 1905 transfer, they exceeded their mandate.

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<sup>76</sup> *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)*, I.C.J. Reports 1992, p. 351.

<sup>77</sup> *Ibid.*, p. 419, para. 97.

125. The relevant instruments also did not grant to the Experts the power to determine “permanent” or “secondary rights” of the concerned tribes, or to apportion grazing or other rights amongst the tribes. Article 1.1.3 of the Abyei Protocol stipulates that the Misseriya and other nomadic peoples would retain their traditional rights to graze cattle and move across the territory of Abyei, but it was not part of the Experts’ mandate to decide on the scope or extent of traditional rights *within* the Abyei Area. The mandate of the ABC is defined in Article 5; the ABC is given no authority with respect to Article 1. Still less was the ABC given any authority to define or confer rights over land lying *outside* of the Abyei Area as delimited. Moreover, since there was no reference, in either the Abyei Protocol or in any of the other instruments, to any grazing or other rights of the nine Ngok Dinka chiefdoms themselves, the Experts were not given the competence to decide this matter either.

(c) *The criteria to be applied in carrying out the mandate*

126. It is also evident that the Parties took care in their various agreements referred to in Article 2 of the Arbitration Agreement to prescribe the considerations which would be relevant in fulfilling the mandate (and by clear implication those which would not be relevant).

127. Both the Abyei Appendix (para. 4) and the ABC’s Terms of Reference (Article 3.4) stipulated that the Experts were to arrive at their decision on the basis of scientific analysis and research. This presupposed that the reasoning underlying their decision would reflect that scientific analysis and research. The Parties did not consent to the Experts making their determination on any other grounds. They did not consent to the application of alleged principles of land rights applicable elsewhere in Africa.

128. Nor did they consent to the Experts deciding the matter on the basis of equity, fairness or an equitable division of areas. Authority to act *ex aequo et bono* must be specifically conferred: it was not conferred here.

**C.      *The Concept of “Excess of Mandate”***  
***under General Principles of Law and Practice***

129. Article 3 of the Arbitration Agreement is labelled “Applicable Law”. As noted above, Article 3(1) provides that:

“The Tribunal shall apply and resolve the disputes before it in accordance with the provisions of the CPA, particularly the Abyei Protocol and the Abyei Appendix, the Interim National Constitution of the Republic of Sudan, 2005, and general principles of law and practice as the Tribunal may determine to be relevant.”

130. This Section will discuss the concept of “excess of mandate” within the framework of general principles of law and practice. The relevant general principles and practices are those that emerge and can be borrowed from similar instances where disputes have been submitted to third-party settlement. While general principles of law and practice applicable to the resolution of territorial disputes are relevant to the subject of the present proceedings, it is also appropriate to have recourse to a wider body of third-party dispute principles given that the notion of “excess of mandate” arises in the context of the general practice of international courts and arbitral tribunals.

131. Reference to arbitral practice in general, including annulment proceedings under Article 53 of the ICSID Convention, is apposite given that the Tribunal in this case is called upon to act in a manner that is, at least as concerns this aspect of its task, similar to that of an annulment panel. If the Tribunal determines that the Experts did not exceed their mandate, it is to make a declaration to that effect. If it determines that the Experts exceeded their mandate, it is to make a declaration to that effect. The Experts’ Report stands or falls accordingly.

132. Moreover, the entire mechanism by which the ABC and the Experts were entrusted with their task closely resembled that found in international arbitral practice. First, the CPA, which incorporated the Abyei Protocol, contained a compromissory clause recording the Parties’ consent to have a third party decide a defined dispute (the definition of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905). Second, the ABC and the Experts operated

pursuant to specific Terms of Reference – another common feature of arbitral practice. Third, the ABC and the Experts were to carry out their mandate pursuant to agreed Rules of Procedure – yet another standard aspect of arbitral practice.

133. Of course, there is an important difference between the scope of the present Tribunal’s task and general arbitral practice should the Tribunal find that the Experts exceeded their mandate. In this event, the Tribunal is also given the power to define (*i.e.*, delimit) the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, based on the submissions of the Parties.

**(i) The Primary Role of the Consent of the Parties: *Excès de Pouvoir* and Lack of Jurisdiction**

134. When two Parties submit a dispute to third-party settlement, the mandate or power of the adjudicating body to decide the dispute rests, above all, on the scope of the consent given by the Parties to the decision-maker to resolve the dispute. The competence of a third party to resolve a particular dispute, and the manner in which that task is to be exercised, depend upon the agreement of the Parties to confer the power to adjudicate the substance of that dispute on such third party and to stipulate the procedures according to which that task is to be undertaken. This is true, *a fortiori*, when one of those Parties is a State.

135. While “excess of mandate” may not be a technical term that is frequently referred to in the jurisprudence and doctrine, concepts such as “excess of jurisdiction”, decisions taken *ultra vires*, or decisions involving an excess of power (*excès de pouvoir*) are comprised within the notion of excess of mandate. A third party adjudicator clearly has no “mandate” to decide issues that the Parties did not intend it, nor confer jurisdiction on it, to decide. Nor does the mandate of a third party adjudicator include the power to depart from the substantive scope of, or the fundamental procedural rules governing the performance of, the task. The governing principle is that of consent.

136. The notion of *excès de pouvoir* is discussed at some length in the *Dictionnaire de Droit International Public* published under the direction of Professor Jean Salmon. There, the basic concept is defined in the following way:

“Dépassement par un sujet de droit international des limites assignées par le droit international à l’exercice de ses pouvoirs. Emprunté droit administratif interne, ce principe s’applique aussi en droit international lorsque le sujet de droit, ou ses organes, excèdent les compétences qui leur sont attribuées.”<sup>78</sup>

137. With respect to international arbitration, the same study notes that: “Un tribunal arbitral commet un excès de pouvoir lorsqu’il méconnaît les demandes des parties ou dépasse les limites de sa compétence.”<sup>79</sup> Citing from the treatise on international law by Daillier and Pellet, the *Dictionnaire* goes on to set out a number of situations, including where a tribunal deals with questions not foreseen in the *compromis*, fails to respect the applicable law, or violates a fundamental rule of procedure, all of which constitute an *excès de pouvoir*. The relevant passage reads as follows:

“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. L’excès de pouvoir peut aussi résulter de la violation d’une règle fondamentale de procédure, ce qui entache la sentence d’un *vice de forme* substantiel.”<sup>80</sup>

138. In its Judgment in the *Case Concerning the Arbitral Award of 31 July 1989*, the International Court of Justice recalled that the supervisory body must...

“ascertain whether by rendering the disputed Award the Tribunal acted in manifest breach of the competence conferred on it by the

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<sup>78</sup> “Going beyond by a subject of international law the limits assigned by international law in the exercise of its powers. Borrowed from internal administrative law, this principle is applied also in international law when the subject of law, or its organs, go beyond the competence which has been attributed to them.” J. Salmon, *Dictionnaire de Droit International* (Bruylant, Brussels, 2001), 475.

<sup>79</sup> “A tribunal commits an *excès de pouvoir* when it misconceives the requests of the parties or goes beyond the limits of its competence.” Ibid.

<sup>80</sup> “It is thus, for example, when they rule *ultra petita*, in deciding questions not foreseen in the *compromis* or where they do not respect directives regarding the applicable law. *Excès de pouvoir* can also result from the violation of a fundamental rule of procedure, which taints the award with a substantial technical error.” Ibid.

Arbitration Agreement, either by deciding in excess of, or by failing to exercise, its jurisdiction.”<sup>81</sup>

In another context, the Court has noted that:

“since the jurisdiction of the Court derives from the Special Agreement between the Parties, the definition of the task so conferred upon it is primarily a matter of ascertainment of the intention of the Parties by interpretation of the Special Agreement. The Court must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent.”<sup>82</sup>

139. The fundamental principles that are at work under the notion of *excès de pouvoir* in connection with the role played by the consent of the parties have been summarized by one commentator in the following way:

“C’est en premier lieu un instrument de protection de la volonté des parties. Il est là pour freiner les ardeurs du juge et lui rappeler, là où la volonté des parties est souveraine, qu’il lui faut y déférer.”<sup>83</sup>

140. Reference in this connection may, once again, be made to the Judgment of the International Court of Justice in the *Case Concerning the Arbitral Award of 31 July 1989*, where the Court stated:

“Furthermore, when States sign an arbitration agreement, they are concluding an agreement with a very specific object and purpose: to entrust an arbitral tribunal with the task of settling a dispute in accordance with the terms agreed by the parties, who define in the agreement the jurisdiction of the tribunal and determine its limits. In the performance of the task entrusted to it, the tribunal ‘must conform to the terms by which the Parties have defined this task’.”<sup>84</sup>

141. The relation between a decision taken in *excès de pouvoir* and one for which there is a lack of jurisdiction is not clear cut, although both are viewed as grounds for nullifying a prior decision and both can therefore be viewed as

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<sup>81</sup> *Arbitral Award of 31 July 1989, Judgment, I.C.J. Reports 1991*, p. 53, at p. 69, para. 47.

<sup>82</sup> *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, *I.C.J. Reports 1985*, p. 13, at p. 23, para. 19.

<sup>83</sup> “It is in the first place an instrument of protection of the will of the parties. It is there to put the brakes on the enthusiasm of the judge and to remind him, in situations where the will of the parties is sovereign, that he must defer to that will.” D. Foussard, “Le recours pour excès de pouvoir dans le domaine de l’arbitrage” (2002) 3 *Revue de l’arbitrage* p. 615.

<sup>84</sup> *Arbitral Award of 31 July 1989*, p. 70, para. 49, citing *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 266, para. 23.



amounting to an excess of mandate. The section of the *Max Planck Encyclopedia of Public International Law* dealing with “Judicial and Arbitral Decisions, validity and nullity” explains the relationship in the following way:

“The most important ground for nullity of international acts in general, as well as of awards and decisions, is that of excess of powers, which is not clearly distinguishable from lack of jurisdiction. Due to the principle of consensual jurisdiction in international law, the arbitrator or judge is expected to remain within the limits of the competence transferred upon him according to the Roman law principles: ‘*arbitor nihil extra compromissum facere potest*’. Theoretically, lack of jurisdiction relates to the limits of competence as defined in the underlying treaty or *compromis* while excess of power concerns the use of the competence conferred upon an international judge. However, this difference is of no relevance in practice, so excess of power and lack of jurisdiction as grounds for annulment can be treated together under the heading of excess of power.”<sup>85</sup>

142. It is well settled that a decision rendered on an issue for which the decision-maker does not have jurisdiction is subject to annulment for lack of jurisdiction. In the words of D.P. O’Connell:

“Where an award is given in excess of jurisdiction, such as decision on a point not raised and which alters the contemplated result, it is a nullity.”<sup>86</sup>

143. While numerous examples of arbitral practice can be cited for the same principle, a recent decision in the field of investment arbitration rendered by the *ad hoc* Committee in *Lucchetti v. Peru* states the point with efficient clarity. There, the Committee identified the basic principle as follows:

“Where a tribunal assumes jurisdiction in a manner for which it lacks competence under the relevant BIT, it exceeds its powers.”<sup>87</sup>

The Committee went on to observe:

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<sup>85</sup> *Max Planck Encyclopedia of Public International Law*, K. Oellers-Frahm, “Judicial and Arbitral Decisions, Validity and Nullity”, Oxford University Press, para. 8. And see, *ibid.*, M. Reisman and D. Pulkowski, “Nullity in International Law”, para. 13.

<sup>86</sup> D.P. O’Connell, *International Law* (2<sup>nd</sup> ed, Stevens & Sons, London, 1970) vol. II, p. 1110;

<sup>87</sup> *Lucchetti v. Peru (sub nomine: Industria Nacional de Alimentos)*, Decision on Annulment, 5 September 2007, para. 99.

“The same holds true in the inverse case where a tribunal refuses or fails to exercise jurisdiction in a matter for which it is competent under the BIT. The *Ad hoc* Committee considers these situations are analogous and should be assessed according to the same legal standards.”<sup>88</sup>

144. The manner in which a tribunal can exceed its powers was also aptly summarized in the *ad hoc* Committee’s Decision on Annulment in the *CDC Group v. Seychelles* case. As the *ad hoc* Committee observed:

“Common examples of such ‘excesses’ are a Tribunal deciding questions not submitted to it or refusing to decide questions properly before it. Failure to apply the law specified by the parties is also an excess of powers. Essentially, a Tribunal’s legitimate exercise of power is tied to the consent of the parties, and so it exceeds its powers where it acts in contravention of that consent (or without their consent, *i.e.*, absent jurisdiction).”<sup>89</sup>

145. In the light of these principles, the relevant questions are whether the Experts decided any issues, and thus assumed jurisdiction over any matters, that were not included within their mandate (which was to “define (*i.e.*, delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905”) and whether they failed to exercise their jurisdiction to decide the specific question put to them by the Parties. These questions will be addressed in Chapter 5.

146. It is also well settled as a matter of general principles of law and practice that conduct representing an *excès de pouvoir* includes the failure of the decision-maker to apply the express provisions in the agreement, or agreements, vesting competence in them governing the principles on which the dispute is to be decided.

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<sup>88</sup> Ibid., para. 99. See also the decision of the *ad hoc* Committee in the *Soufraki v. UAE* case, which stated that: “The manifest and consequential non-exercise of one’s full powers conferred or recognized in a Tribunal’s constituent instrument such as the ICSID Convention and the relevant BIT, is as much a disregard of the power as the overstepping of the limits of that power.” *Soufraki v. UAE*, Decision on Annulment, 5 June 2007, para. 43.

<sup>89</sup> *CDC Group v. Seychelles*, Decision on Annulment dated 29 June 2005, 11 ICSID Reports 237, at p. 251, para. 40.

147. The underlying principle at issue here was articulated by the arbitral tribunal in an early case, the *Orinoco Steamship Company* case, in the following way:

“[E]xcessive 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>90</sup>

148. Similar statements of this principle may be found in more recent arbitral practice which attest to their nature as a general principle of law or practice. In *Lucchetti v. Peru* case, for example, the *ad hoc* Committee put the matter in the following way:

“It is widely accepted that a failure to apply the proper law may amount to an excess of powers by a Tribunal, as referred to in Article 52(1)(b) [of the ICSID Convention].”<sup>91</sup>

149. Reference may also be made to the decision of the *ad hoc* Committee in the *Soufraki* case, where the Committee observed:

“ICSID *ad hoc* committees have commonly been quite clear in their statements – if not always in the effective implementation of these statements – that a distinction must be made between the failure to apply the proper law, *which can result in annulment*, and an error in the application of the law, which is not a ground for annulment.”<sup>92</sup>

150. In the present case, it has previously been noted that the relevant instruments setting out the Experts’ mandate did not provide for an applicable law. They did, however, provide that the Experts were to arrive at their decision “based on scientific analysis and research”. If the Experts departed from this provision in a material respect, this would constitute an *excès de pouvoir* under general principles of law, and an excess of mandate.

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<sup>90</sup> *The Orinoco Steamship Company* case, 25 October 1910, *R.I.A.A.*, Vol. 41, at p. 239.

<sup>91</sup> *Lucchetti v. Peru*, para. 98.

<sup>92</sup> *Soufraki v. UAE*, para. 85 (emphasis added). And see, also, *CMS v. Argentina*, Decision on Annulment, 25 September 2007, para. 49.

**(ii) Failure to State Reasons Capable of Supporting the Decision  
Would Constitute an Excess of Mandate**

151. As a matter of general principles of law and practice, there is ample authority for the proposition that a failure of a panel charged with deciding a dispute to state the reasons on which its decision is based also constitutes an excess of mandate in the sense that a statement of reasons is an inherent part of the decision making process, and a failure to do so renders such a decision subject to annulment. In the present case, it was especially incumbent on the Experts to state the reasons on which their decision was based in the light of the Parties' stipulation, reflected in both the Abyei Appendix and the Terms of Reference, that the Experts' decision "shall be based on scientific analysis and research."

152. The general principle that a decision must state the reasons on which it is based was clearly articulated in 1950 by the Special Rapporteur to the International Law Commission, Georges Scelle, who addressed the issue in his Report on Arbitral Procedure. Commenting on the form and content of the arbitral award, the Special Rapporteur stated:

"Que la sentence juridictionnelle, disposant du fond du litige (*on its merits*), doive être écrite, soigneusement rédigée, lue en séance publique, et *motivée*, ce sont là choses acquises et passées en 'force de droit' depuis un temps indéfini. Il paraît sans intérêt d'insister sur les points hors de contestation et suffisant de souligner la clause de la motivation. Une sentence non motivée n'est pas une sentence, mais une simple opinion."<sup>93</sup>

153. This view was reflected in the Model Rules on Arbitral Procedure adopted by the International Law Commission at its tenth session in 1958. Article 29 of the Model Rules provides:

"The award shall, in respect of every point on which it rules, state the reasons on which it is based."

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<sup>93</sup> *Yearbook of the International Law Commission*, 1950, Vol. II, p. 139. "That the jurisdictional award, disposing of the merits of the litigation (*on its merits*), ought to be written, carefully drafted, read in a public sitting, and *motivated*, these are established and passed things having the force of law since time immemorial. There would appear to be no point in stressing these undisputed principles here, and it is enough to emphasize the need for a statement of reasons. A judgment unaccompanied by a statement of reasons is not a judgment, but a mere opinion."

In addition, Article 35(c) stipulates that the validity of an award may be challenged by a party on the ground, *inter alia*:

“That there has been a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure.”

154. In his dissenting opinion in the *Arbitral Award of 31 July 1989* case, Judge Weeramantry referred to these developments. As he observed:

“The necessity for reasons in an arbitral award is of course obvious as it removes any appearance of arbitrariness in the Tribunal’s decision. It is a long-established and well-respected rule.”<sup>94</sup>

155. As for the practice of international courts and tribunals, it is well known that Article 56(1) of the Statute of the International Court of Justice provides:

“The judgment shall state the reasons on which it is based.”

156. Both the UNCITRAL Arbitration Rules and the Permanent Court of Arbitration’s Optional Rules for Arbitrating Disputes between two Parties of which Only One is a State – the latter of which applies to the current proceedings by virtue of Article 1(1) of the Arbitration Agreement – contain similar provisions. Article 32(2) of the UNCITRAL Rules states:

“The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.”

Article 32(3) of the PCA Rules is drafted in identical terms.

157. As noted above, the Parties did not agree that the ABC or the Experts were absolved from stating the reasons upon which their decision was based. To the contrary, that decision was to be “based on scientific analysis and research.”

158. The field of investment arbitration also recognizes the need for an award to state the reasons on which it is based and the fact that a failure to state reasons

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<sup>94</sup> *Arbitral Award of 31 July 1989*, Dissenting Opinion of Judge Weeramantry, *I.C.J. Reports*, 1991, p. 164.

constitutes a ground for annulment. For example, Article 48(3) of the ICSID Convention provides that:

“The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.”

This requirement is repeated in Rule 47(1)(i) of the Arbitration Rules which states that the award shall contain:

“the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based.”

159. The sanction provided by the ICSID Convention for failing to respect this requirement is severe and has direct relevance to the first issue that this Tribunal is tasked with deciding. Article 52(1)(e) of the Convention provides that one of the grounds for the annulment of an award is “that the award has failed to state the reasons on which it is based.”

160. This does not mean that an award can be annulled simply because a party disagrees with the reasoning of a tribunal on a point of fact or law, even if the Tribunal was in error in its reasoning on a point of fact or law. Annulment is to be distinguished from appeal. But an award must be annulled if there are no reasons given or if those reasons are manifestly insufficient to allow an informed reader to follow the logic underlying the decision.

161. The same considerations apply in this case with respect to the question whether the Experts exceeded their mandate. It is not the case that a mere disagreement, however justified, with the Experts’ appreciation of the facts is sufficient to indicate an excess of mandate. Rather, the issue is whether the Experts reached their decision on the basis of reasoning which met the minimum standard of articulation described in the preceding paragraphs. If not, there has been an excess of mandate justifying this Tribunal to reach its own decision on the merits based on the submissions of the Parties.

162. In the context of the annulment provisions of the ICSID Convention (Article 52(1)(e)), the *ad hoc* Committee in the *Klöckner I* case addressed the issue in the following way:

“The text of this Article requires a *statement* of reasons *on which the award is based*. This does not mean just any reasons, purely formal or apparent, but rather reasons having some substance, allowing the reader to follow the arbitral tribunal’s reasoning, on facts and on law.”<sup>95</sup>

The *ad hoc* Committee then went on to reach the following conclusion as a matter of principle:

“A middle and reasonable path is to be satisfied with reasons that are ‘sufficiently relevant,’ that is, reasonably capable of justifying the result reached by the Tribunal. In other words, there would be a ‘failure to state reasons’ in the absence of a statement of reasons that are ‘sufficiently relevant,’ that is, reasonably sustainable and capable of providing a basis for the decision.”<sup>96</sup>

163. The same issue was analysed by the *ad hoc* Committee in the *MINE* case in a somewhat different manner. The relevant passage from the *ad hoc* Committee’s decision on annulment reads as follows:

“The Committee is of the opinion that the requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that. The adequacy of the reasoning is not an appropriate standard of review under paragraph 1(e), because it almost inevitably draws an *ad hoc* Committee into an examination of the substance of the tribunal’s decision, in disregard of the remedy of appeal by Article 53 of the Convention.”<sup>97</sup>

The *ad hoc* Committee went on to elaborate its views in the following way:

“In the Committee’s view, the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if made in error of fact or of law.”<sup>98</sup>

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<sup>95</sup> *Klöckner v. Cameroon*, Decision on Annulment, 3 May 1985, 2 *ICSID Reports* p. 138, para. 119.

<sup>96</sup> *Ibid.*, at p. 139, para. 120.

<sup>97</sup> *MINE v. Guinea*, Decision on Annulment, 22 December 1989, 4 *ICSID Reports* p. 88, para. 5.08.

<sup>98</sup> *Ibid.*, para. 5.09.

164. Reference may also be made to the decision of the *ad hoc* Committee in the *Vivendi v. Argentina* (“*Vivendi I*”) case where the scope of the requirement for an award to state reasons was addressed in some detail. The relevant passages from the *ad hoc* Committee’s decision merit citing:

“64. A greater source of concern is perhaps the ground of ‘failure to state reasons’, which is not qualified by any such phrase as ‘manifestly’ or ‘serious’. However, it is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state *any* reasons with respect to all or part of an award, not the failure to state correct or convincing reasons. It bears reiterating that an *ad hoc* committee is not a court of appeal. Provided that the reasons given by a tribunal can be followed and related to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e). Moreover, reasons may be stated succinctly or at length, and different legal traditions differ in their modes of expressing reasons. Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning.

65. In the Committee’s view, annulment under Article 52(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal’s decision.”<sup>99</sup>

165. The ABC Experts’ decision should be assessed, amongst other things, in the light of the obligation for that decision to be a “reasoned” one allowing the rationale underlying the key elements of the decision to be understood and followed. Chapter 5 will review the Experts’ decision in this perspective and will show that, for a number of the most important elements underlying the Experts’ decision on the delimitation of the area said to have been transferred to Kordofan in 1905, the decision manifestly fails to state the reasons on which it is based.

**(iii) 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**

166. It has been seen that none of the relevant instruments referred to in Article 2(a) of the Arbitration Agreement provided that the Experts were to arrive

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<sup>99</sup> *Vivendi v. Argentina*, Decision on Annulment, 3 July 2002, paras. 64-65, 6 *ICSID Reports*, p. 358.



at their decision based on equity, an equitable division of areas, or by making a decision *ex aequo et bono*. As will be shown in this section, under general principles of law, decisions based on equity or taken *ex aequo et bono* are only permissible if the parties have expressly consented thereto.

167. The widespread practice of international courts and tribunals confirms the principle that disputes can only be settled on an *ex aequo et bono* basis with the express consent of the parties to the dispute.

168. A clear example of this principle is found in Article 38 of the Statute of the International Court of Justice. After listing the sources of law that the Court applies, paragraph 2 of Article 38 provides:

“This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.”<sup>100</sup>

169. A concrete example of the practical application of this principle in relation to boundary disputes is found in the Chamber’s Judgment in the *Frontier Dispute*. There, the Chamber indicated that the line of the frontier had to be defined as it existed in the years of 1959-1960 (when the parties became independent and inherited the *uti possidetis juris*).<sup>101</sup> The Chamber also stated in no uncertain terms that it “cannot decide *ex aequo et bono*,”<sup>102</sup> and it went on to observe:

“The Chamber would however stress more generally that to resort to the concept of equity in order to modify an established frontier would be quite unjustified.”<sup>103</sup>

170. The Statute of the International Tribunal for the Law of the Sea contains essentially the same rule appearing in the Court’s Statute. Article 23, dealing with the applicable law, refers back to Article 293 of the Law of the Sea Convention, paragraph 2 of which provides:

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<sup>100</sup> On numerous occasions, the Court has affirmed that it can only decide a case *ex aequo et bono* if the parties agree. See, for example, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)*, Judgment, I.C.J. Reports 1992, p. 351, at pp. 390-391, para. 47; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18, at p. 60, para. 71; *Frontier Dispute*, Judgment, I.C.J. Reports 1986, p. 567, paras. 27-28.

<sup>101</sup> *Frontier Dispute*, Judgment, I.C.J. Reports 1986, p. 570, para. 34.

<sup>102</sup> Ibid., p. 567, para. 28.

<sup>103</sup> Ibid., p. 633, para. 149.

“Paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case *ex aequo et bono*, if the parties so agree.”

171. The same restraints govern international arbitral practice. For example, the UNCITRAL Arbitration Rules provide, in Article 33(2), that:

“The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.”

Exactly the same provision appears in Article 33(2) of the PCA Rules.

172. In the field of investment arbitration, Article 42(3) of the ICSID Convention is drafted in similar terms. It provides:

“The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a case *ex aequo et bono* if the Parties so agree.”<sup>104</sup>

173. Failure of a tribunal to respect this provision results in an award that must be annulled. As the *ad hoc* Committee noted in the *MINE v. Guinea* case:

“[A] tribunal’s disregard of the agreed rules of law would constitute a derogation from the terms of reference within which the tribunal has been authorized to function. Examples of such a derogation include the application of rules of law other than the ones agreed by parties, or a decision not based on any law unless the parties had agreed on a decision *ex aequo et bono*. If the derogation is manifest, it entails a manifest excess of power.”<sup>105</sup>

174. Turning to the Rules of Arbitration of the International Court of Arbitration of the ICC, Article 17(3) states that:

“The Arbitral Tribunal shall assume the powers of an *amiable compositeur* or decide *ex aequo et bono* only if the parties have agreed to give it such powers.”

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<sup>104</sup> Moreover, r. 50 of the ICSID Rules of Procedure for Arbitration Proceedings provides, in paragraph (1)(c)(iii), that the grounds for annulment of an award include situations where “the Tribunal has manifestly exceeded its powers” and where “there has been a serious departure from a fundamental rule of procedure.” The same provisions also appear at Article 52 of the Convention.

<sup>105</sup> *MINE v. Guinea*, Decision on Annulment, 22 December 1989, para. 5.03.

175. Other arbitral institutions contain provisions along the same lines in their rules. For example, Article 22.4 of the Rules of Procedure of the London Court of International Arbitration states:

“The Arbitral Tribunal shall only apply to the merits of the dispute principles deriving from ‘*ex aequo et bono*’, ‘*amiable composition*’ or ‘honourable engagement’ where the parties have so agreed expressly in writing.”

176. On the basis of the foregoing, it can be concluded that a third party decision-maker does not have the power to render a decision *ex aequo et bono*, based on equity or as an *amiable compositeur* without the express consent of the parties to the dispute. Just as a failure to respect this basic rule would constitute either an *excès de pouvoir* or a decision taken in a manner for which the decision-maker lacks jurisdiction, so also would it amount to an excess of mandate when considered in the context of the scope of consent given by the Parties.

**(iv) A Serious Departure from a Fundamental Rule of Procedure Constitutes an Excess of Mandate**

177. Under general principles of law and practice, a serious departure from a fundamental rule of procedure also constitutes a ground for annulment of an award and, as such, a ground for finding an excess of mandate.

178. Chapter 2.1 described the care the Parties took in drafting detailed Terms of Reference and Rules of Procedure according to which the Experts were obliged to carry out their mandate. Amongst these were the important provisions contained in Section 3.2 of the Terms of Reference and the work program – that the ABC as a whole would interview witnesses, not the Experts acting alone; those appearing in Section 3.5 – that it was to be the report of the ABC that was to be presented to the Presidency; and those contained in para. 4 of the Rules of Procedure – that the Commission will endeavour to reach a decision by consensus, only failing which the Experts would have the final say.

179. There are numerous authorities that support the principle that a departure from a fundamental rule of procedure constitutes a ground for annulment. To cite

again from the work of Nguyen Quoc Dinh, Daillier and Pellet, *Droit International Public*:

“L’excès de pouvoir peut aussi résulter de la violation d’une règle fondamentale de procédure, ce qui entache la sentence d’un *vice de forme* substantiel.”<sup>106</sup>

180. For example, an international tribunal’s treatment of evidence in conformity with basic notions of due process, including interviews of witnesses, constitutes a cornerstone of legal procedure. In order to be procedurally fair, tribunals respect principles governing evidence. As one commentator notes, “[t]here can be no doubt that providing a fair proceeding in terms of evidentiary principles is the basic principle applied by all international tribunals”.<sup>107</sup>

181. In the field of international arbitration, it has been rightly noted that:

“Under all developed legal regimes, international arbitration awards may be challenged on the grounds of procedural unfairness or irregularity. This exception to the presumptive enforceability of an arbitral award includes the related topics of serious procedural irregularity or unfairness (e.g., due process) and of failure to comply with the procedural requirements of the parties’ arbitration agreement or the procedural law governing the arbitration.”<sup>108</sup>

182. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) is of particular relevance. As of 18 December 2008, there were 143 State Parties to the Convention attesting to its wide-spread reflection of general principles. Article V(1)(d) of the Convention provides that recognition and enforcement of an award may be refused where:

“The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.”

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<sup>106</sup> P. Daillier and A. Pellet, *Droit International Public (Nguyen Quoc Dinh)*, (LGDJ, 7<sup>th</sup> edition, 1999), p. 886.

<sup>107</sup> Amerasinghe, C.F., *Evidence in International Litigation*, (Martinus Nijhoff, Boston, 2005) p. 16.

<sup>108</sup> Born, G.B., *International Commercial Arbitration: Commentary and Materials*, (2nd ed.) (Kluwer Law, The Hague, 2001), p. 832.

183. With respect to the grounds for annulment provided in the ICSID Convention, Article 52(d) is the relevant provision. It states that a party may request annulment of an award on the ground, *inter alia*, “that there has been a serious departure from a fundamental rule of procedure”. The same provision appears in Rule 50(1)(c)(iii) of the ICSID Arbitration Rules.

184. Article 36(1)(a)(iv) of the UNCITRAL Model Law on International Commercial Arbitration (amended as of 2006) also includes a failure to respect the procedures agreed by the parties as a ground for the non-recognition or enforcement of an arbitral award. The Model Law was originally adopted by the U.N. Commission on International Trade Law on 21 June 1985 and amended on 7 July 2006.

185. The relevant provision of the Model Law is sub-paragraph (1)(a)(iv) of Article 36, which mirrors the equivalent provision in the New York Convention. It provides that recognition or enforcement of an award may be refused where...

“the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.”<sup>109</sup>

186. In the light of the principles reflected in these instruments, it is clear that a departure from a fundamental rule of procedure expressly agreed to by the Parties constitutes an excess of mandate subjecting the underlying decision to annulment.

#### ***D. Conclusions on “Excess of Mandate”***

187. To conclude, the relevant instruments referred to in Article 2(a) of the Arbitration Agreement provide that the mandate of the Experts was to delimit the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.

188. At the same time, the Parties also agreed in the Abyei Appendix, the Terms of Reference and the Rules of Procedure the precise manner in which the Experts

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<sup>109</sup> A similar provision appears in Article 34 of the Model Law dealing with the setting aside of awards.

were charged with carrying out their mandate. If the Experts failed to adhere to the obligations provided for in these instruments, this would have been inconsistent with the scope of their mandate and would represent an excess of mandate.

189. Under general principles of law and practice, there are a number of well established rules pursuant to which the decision maker is required to perform its task. All of these flow from the overriding principle that the decision maker is bound by the limits of the scope of consent to which the parties have agreed.

190. 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.

191. 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.

The application of these grounds, for finding an excess of mandate, to the Experts' decision in this case will be addressed in the next Chapter.

## Chapter 5

### The ABC Experts Exceeded their Mandate

#### A. *Introduction*

192. The previous Chapter discussed excess of mandate in principle. The present Chapter will apply that principle to the decision of the ABC Experts. The core concept of excess of mandate is that the ABC Experts acted in some material respect beyond the scope of the authority given to them, i.e. clearly beyond the expressed consent of the Parties. The terms of that consent are primarily to be derived from the constituent instruments analysed in Chapter 4. But in construing them it is useful to take into account, pursuant to Article 3(1) of the Arbitration Agreement, the approach to invalidity of awards and arbitral-type decisions as developed in State practice, also analysed in Chapter 4.

193. As stated in paragraph 119 above, it is useful to distinguish three categories of excess of mandate:

- (a) breach of procedural conditions for a binding decision;
- (b) disregard of the substantive mandate;
- (c) violation of mandatory criteria in carrying out the mandate.

In each case the failure must be material, that is to say significant both in itself and as to the result reached.

194. The grounds of excess of mandate will be analysed generally under these three heads. It is convenient to deal with all aspects of a given point together under the principal classification for that point, and this has been done. In all cases the governing principle is that stated in paragraphs 134-135 above, i.e., the principle of consent.

195. The grounds of excess of mandate are summarised in tabular form at pages 94-98 below.

**B. Breach of Procedural Conditions for a Binding Decision**

196. The procedure adopted by the ABC Experts was described in Chapter 3 above. On at least three separate grounds the ABC Experts breached material procedural requirements which were express conditions for the exercise of their mandate.

**(ii) Irregular Procedures in Breach of Due Process**

197. The Experts took evidence from Ngok Dinka informants, who must be considered Parties in interest, without procedural safeguards and without informing the adverse Party, the GoS.

198. After finishing the scheduled field interviews in Abyei, Agok and Muglad (14-19 April 2005) the ABC Experts were, according to the agreed work program, to return to Nairobi. This is not what happened. Instead of returning to Nairobi, the Experts arranged three unscheduled meetings with Ngok Dinka informants at the Hilton Hotel, Khartoum without informing the GoS. See paragraphs 71-79 above.

199. The Terms of Reference were unusually detailed and specific, and correspondingly to be taken seriously. Section 3 provided, in part:

**“Functioning of the ABC**

...

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

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



Section 3 carefully distinguishes between acts of the ABC, i.e. the Commission as a whole, and that of the Experts.

200. No meeting was scheduled in Khartoum, neither with the Ngok, the Messeria or any other group outside the agreed areas designated by the Parties. That is not to say that such meetings were excluded. On the contrary, the program of the Commission was flexible, subject to the consent of the Parties. The unscheduled visit to the shrine of Sultan Rob (see above, paragraph 70) is a clear example of the flexibility of the work program.

201. A meeting could have been arranged in Khartoum with or even without the Parties (i.e., by the Experts alone) – provided the Parties consented and subject to appropriate safeguards. But instead of approaching the Parties to arrange a meeting in Khartoum, the ABC Experts took it upon themselves to convene meetings without the knowledge of the GoS. On 21 April 2005, having returned from the field interviews, the ABC Experts had a secret meeting with Ngok Dinka informants at the Hilton, Khartoum. This meeting was followed by (at least) another two unscheduled meetings on 6 and 8 May 2005. These meetings are mentioned in Appendix 4.2 of the ABC Experts' Report, but not in their resumé of their work.<sup>110</sup> Thus the ABC conducted at least three unscheduled meetings, all with Ngok Dinka informants, and all without informing the GoS.

202. On 25 April 2005, the Experts released to the Commission a note of the testimonies obtained by the field visits.<sup>111</sup> The note, however, only contained information on the scheduled interviews in Abyei and villages around Agok and Muglad. The note did not mention the Hilton meeting of 21 April 2005.

203. In the note of 25 April 2005, the ABC Experts concluded that:

“since there is no agreement from the oral testimony and that testimony does not conclusively prove either side's position, we will

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<sup>110</sup> Cf. ABC Experts' Report, preface pp. 3-5 and Appendix 4.2, pp. 148-158 (SM Annex 81).

<sup>111</sup> Abyei Boundary Commission, Note on Testimony Obtained in Field Visit: 14-20 April 2005 (25 April 2005) (SM Annex 78).

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>112</sup>

This was a perfectly proper position to have taken. The peoples affected no doubt had to have their say – but in the end, oral testimony could not reliably indicate the area transferred between two provinces a century before.

204. Despite their announced decision to stop collecting oral testimony and to resort to archival research, the Experts then arranged the two Hilton meetings on 6 and 8 May 2006. These were unscheduled and conducted without the knowledge of the GoS. At these meetings there were 14 representatives of Ngok Dinkas from Khartoum, as well as a new translator who had not previously been appointed by the Parties or sworn (as other translators were).

205. By arranging interviews without the knowledge of the Parties, the ABC Experts not only deliberately circumvented the agreed work program; they also deprived the GoS their right to a fair procedure. This is especially so since no information of these meetings were provided to the GoS until the final presentation of the ABC Experts’ Report.

206. Paragraphs 6-10 of the Rules of Procedure made it clear that the Commission, not the Experts alone, would conduct the meetings with various representatives referred to in the Terms of Reference, and that the “Two sides and IGAD” would make recordings of all oral testimonies heard (Paragraph 10). Paragraph 3 of the Abyei Appendix further provided that the Commission, as opposed to simply the Experts, would listen to the representatives of “Abyei Area and the neighbours...” After the completion of the field visits, the Rules of Procedure provided that the Experts would then determine what additional documentation or archive materials needed to be consulted (Paragraph 11).

207. The Rules of Procedure place great emphasis on establishing a transparent process enabling the Parties to receive *all* information. The rules were established

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<sup>112</sup> Ibid., p. 2 (SM Annex 78).

to enable the Commission, as a whole, to engage in an informed discussion with a view to arriving at a decision, if possible by consensus. By circumventing the agreed schedule and breaching the Procedural Rules the Experts materially affected the final outcome of the process. This was a material breach of the Rules of Procedure.

208. As stated in Chapter 4, a serious departure from a fundamental rule of procedure constitutes a ground for annulment of an award and, as such, a ground for finding an excess of mandate. The fact that the ABC Experts unilaterally scheduled meetings and kept these secret from the Parties until the presentation of the ABC Report represents a clear departure from the Rules of Procedure, and indeed the purpose of the Abyei Protocol. In and of itself, the taking of evidence without procedural safeguards and without informing the adverse Party constitutes an excess of mandate.

**(ii) The Millington e-mail**

209. Not only did the ABC Experts conduct secret meetings; they also unilaterally sought and then relied on an e-mail from Jeffrey Millington, an official at the American Embassy in Nairobi, to establish their interpretation of the 1905 formula. Such unilateral actions involved a serious departure from a fundamental rule of procedure in three distinct ways.

210. First, because the Experts were not authorised to consult the US Government; or indeed any other third party. They were called on to act independently not only of the Parties but also of third parties, including third States.

211. Secondly, because the Parties were given no notice of the request or the response and thus had no opportunity to comment. This was a clear failure of due process and a patent breach of Arbitration Rule 14.

212. Thirdly, because – having failed to give the Parties the opportunity to comment on the content of the Millington e-mail – the Experts failed to see that the

response raised many more questions than it resolved. Mr Millington’s response, as recorded in the ABC Experts’ Report, was that:

“It was clearly our view when we submitted our proposal the area transferred in 1905 was roughly equivalent to the area of Abyei that was demarcated in later years.”<sup>113</sup>

213. The response calls for the following comments:

- (a) Whatever the view of the proponents, there is no relation between “the Area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905” and “the area of Abyei that was demarcated in later years”. The point will be demonstrated in Chapter 6, but it is sufficient to observe that the town of Abyei did not exist in 1905 (see paragraph 6 and **Figure 3** above), nor does its subsequent location fall within the area transferred in that year.
- (b) The formula “the Area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905” was first introduced by reference to the relevant issue of the Sudan Intelligence Report for 1905: see above, paragraph 51. That formulation was later agreed on by the Parties. The formula having been agreed on had to be applied in the context of 1905, and not by reference to “the area of Abyei that was demarcated in later years”.
- (c) In any event, no area of Abyei was ever demarcated. This is acknowledged in terms in the Abyei Protocol: if the Abyei Area had been demarcated (or even delimited) there would have been no need for the Commission.
- (d) It is true that an Abyei Local Government Area existed and was shown on maps in later years (see Map Atlas, Maps 27, 28). But if the Parties had wished the Abyei LGA to count as the relevant area, they would have said so in terms – avoiding the need for historical inquiry.
- (e) There is no evidence that Senator Danforth or Mr Millington had conducted such an inquiry. In the light of the history of the

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<sup>113</sup> ABC Experts’ Report, p. 4 (SM Annex 81).

negotiations outlined in Chapter 2, it is clear that the Parties did not agree on any equivalence between “the Area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905” and any later area. If any such equivalence had been asserted by Senator Danforth, the Abyei Protocol would not have been concluded.

214. It might be argued that – however irregular the procedure – the Millington e-mail was without incidence for the result, because the Experts proceeded patently to misapply it. The “Abyei Area” they delimited had never been conceived before, let alone “demarcated in later years”. The Abyei LGA bears no resemblance to the area delimited by the Experts. But although the limitation in the Millington e-mail was ignored by the Experts, the implied invitation to rewrite the formula was not. Mr Millington might have transmuted “the Area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905” into “the area of Abyei that was demarcated in later years”; the Experts were encouraged to transmute the formula for themselves and in an even more ambitious manner. The implication of the exchange was that the mandate might be rewritten, one way or another. Moreover, in citing and relying on the Millington e-mail in their Report, the ABC Experts seem to have thought it assisted them. They may not have applied it – but of this fact they seem to have been unaware.

215. It may be recalled that the 1905 formula was regarded by the Parties as self-explanatory and that neither party requested nor received any further explanation from the drafters of the proposal about its meaning or implications.<sup>114</sup> From the moment the formula was agreed to by the Parties, it became their formula, not that of any intermediary. It was the intent of the Parties, and not the intent of the original drafters, that was important. Thus the communication to Mr Millington was not only a breach of mandate. It also illustrated the disregard of the constituent agreements which, unfortunately, pervaded the work of the ABC Experts.

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<sup>114</sup> See above, paragraph 54.

216. This matter is one of fundamental principle. Agreements for third-party settlement of issues of international concern are frequently reached as a result of international mediation. Once the agreement has been concluded and is being implemented by the Parties in good faith (as was the case here), the time for mediation is over and the process of settlement must be allowed to run its course untrammelled. It is an elementary violation of due process for an expert adjudicator to ask someone else, without notice to the Parties, for the meaning of the formula which it is the task of the adjudicator independently to apply. The reason for appointing the Experts – and not Senator Danforth or some government official – was precisely so they could act independently and in their expert capacity. By covertly seeking an answer from someone else (by definition not an expert), the Experts plainly exceeded their mandate.

217. In dealing with this matter, it is not necessary for the Tribunal to rule on the propriety of Mr Millington having responded to the request. Neither the terms of the request made, nor the full text of his reply e-mail, have been made available, at least to GoS. It is possible that Mr Millington was told that the request was made with the consent of the Parties. Alternatively he may have assumed that this was so; or at least that the Parties would be given an opportunity to comment on his reply. That this did not happen was the fault of the ABC Experts, not Mr Millington.

218. It follows, however, that the ABC Experts' decision must be quashed on this basis alone – that they unilaterally sought and then relied on an e-mail communication from a third State official, without the prior consent of the affected Party or any opportunity to comment on the response.

**(iii) Failure to act through the Commission (Arbitration Rule 14)**

219. As recorded above, the Experts unilaterally “pledge[d] not to reveal to any person or institution the substance of their decision before they present it to the Sudanese Presidency”.<sup>115</sup>

220. The Rules of Procedure unequivocally stated that:

“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.”<sup>116</sup>

221. Despite this clear wording the ABC Experts never called a final meeting. Instead they “pledge[d] not to reveal to any person or institution the substance of their decision before they present it to the Sudanese Presidency”,<sup>117</sup> and they purportedly obtained the consent of Lt.-General Sumbeiywo of IGAD for this procedure.

222. It is clear that Lt.-General Sumbeiywo had no authority to dispense with the requirements of the Rules of Procedure. The Experts never called a final meeting; they did not “endeavour to reach a decision by consensus” and they were therefore never placed in a situation where they could have the “final say”, under Rule 14. It follows that the Report was not “arrived at as prescribed in the ABC rules of procedure” (ABC Understanding, para. 5).

223. Further, Article 5.3 of the Abyei Protocol states that:

“The Abyei Boundaries Commission (ABC) shall present its final report to the Presidency as soon as it is ready. Upon presentation of the final report, the Presidency shall take necessary action to put the special administrative status of Abyei Area into immediate effect.”<sup>118</sup>

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<sup>115</sup> See above, paragraph 90, quoting from ABC Experts’ Report, Preface, p. 5 (SM Annex 81).

<sup>116</sup> Rules of Procedure for the Abyei Boundaries Commission, Nairobi, 11 April 2005, Rule 14 (SM Annex 75).

<sup>117</sup> ABC Experts Report, Preface, p. 5 (SM Annex 81).

<sup>118</sup> Abyei Protocol, signed at Naivasha, Kenya, 26 May 2004, Chapter IV of the CPA (SM Annex 71).

224. From Article 5.3, there can be no doubt that that while the Experts were to prepare the report, and even assuming that they had the “final say”, the report was the report of the Commission, not just the Experts. It had to be submitted to the Commission, and then presented by the Commission to the Presidency. Paragraph 15 of the Rules of Procedure further stipulated that the report will be considered a public document “after it has been formally presented to the Presidency”.

225. Despite the clear language and intent of the Abyei Protocol and the Rules of Procedure, the GoS was neither informed nor consulted on the final outcome of the ABC Report. No meeting was ever called to try to reconcile the views of the two Parties. Thus the Commission (i.e. the Experts *and* the Parties) was never involved in the final decision. The constituent instruments specified the conditions – the only conditions –under which the Experts could decide for themselves. Those conditions were never fulfilled.

226. In a matter as sensitive as the present one, issues of form are important. But this is not just a formal point. The failures analysed in the preceding sections (unscheduled meetings with partisans of one side; the Millington e-mail) could perhaps have been remedied had the ABC Experts complied with the Rules of Procedure. For example, while it was irregular even to approach Mr Millington with a request to interpret the mandate, it was still more irregular not to give the Parties the opportunity to comment on his reply. Not only did the ABC Experts not comply with the Rules of Procedure; through that failure they produced a result which impugned the integrity of the process as a whole.

### *C. Disregard of the Substantive Mandate*

227. As stated above, when two Parties submit a dispute to third-party settlement, the mandate or power of the adjudicating body to decide the dispute rests, above all, on the scope of the consent given by the Parties to the decision-maker to resolve the dispute.

228. In the present case, the substantive mandate of the Commission is provided in the Abyei Protocol, and reiterated in the Abyei Appendix, the ABC Terms of



Reference and the Rules of Procedure, which all specify that the Commission was mandated “to define and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905”. In the Arbitration Agreement the meaning of the word “define” is authoritatively clarified, if clarification was required, by the addition of the phrase in brackets “(i.e. delimit)”.

229. As explained in Chapter 1, the 1905 formula “the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905” is clear in referring to the administrative transfer between provinces of a given area. It was not a transfer of people but of a territory inhabited by them: one delimits a territory, not a people, particularly a mobile one. Despite this, the ABC Experts exceeded their substantive mandate on at least the following grounds:

- (i) Refusal to decide the question asked;
- (ii) Answering a different question than that asked;
- (iii) Ignoring the stipulated date of 1905;
- (iv) Allocating grazing rights within and beyond the “Abyei Area”.

**(i) Refusal to decide the question asked**

230. The mandate of the ABC Experts was clear, i.e. to define an area transferred in 1905. But the ABC Experts declined to answer the question they were tasked to answer. This can be seen, for example, from the following passage of their 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 chiefdoms, with particular focus on those in the northern most areas that formed the transferred territory.”<sup>119</sup>

231. This passage calls for the following comments:

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<sup>119</sup> ABC Experts’ Report, Appendix 2, p. 21 (SM Annex 81).

- (a) In the first place the question which was put to the ABC Experts they reformulated as follows: “[t]he boundaries of the Ngok Dinka that were transferred to Kordofan for administrative reasons in 1905”. This is already imprecise. Section 5.1 of the Abyei Protocol refers to “the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905”: by contrast, the Experts’ formulation refers to the “boundaries of the Ngok Dinka”, a phrase not contained in Section 5.1.
- (b) The imprecision is carried further when “[t]he boundaries of the Ngok Dinka that were transferred to Kordofan ... in 1905” are compared with other “boundaries in the Sudan at the time”. The *only* boundaries in Sudan at the time were provincial administrative boundaries. The many peoples of the Sudan had never had fixed boundaries. Indeed since most of them, the Ngok included, moved around seasonally, and since internal communications were still difficult, it would have been practically impossible to draw boundaries for them, and no effort was made at the time to do so. The Native Administrations, which did have boundaries, were a much later development.<sup>120</sup>
- (c) The ABC Experts stated that “most boundaries in the Sudan at the time [were] not precisely delimited and demarcated in accordance with scientific survey techniques and methods”. That is a patent misdirection, and for several reasons. First, *no* internal boundaries, in Sudan or (as far as is known) anywhere else in the world, were demarcated. Secondly, *no* boundaries in Africa – international or internal – were “precisely delimited ... in accordance with scientific survey techniques and methods” in 1905. Nonetheless boundaries existed and could be determined, even in remote areas. Thirdly, the Abyei Protocol clearly proceeded on the basis that “the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905” *could* be determined. To assert that this was impossible because the area was not already “precisely delimited and demarcated in accordance with

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<sup>120</sup> See Map Atlas, Map 27 (SM Annex 81).

scientific survey techniques and methods” was effectively to refuse to undertake the task required by the Abyei Protocol.

- (d) Indeed the Experts’ reasoning is contradictory. Their mandate was to resolve a dispute by determining the area affected by a given inter-provincial transfer. That transfer actually occurred. If the area had already been “precisely delimited and demarcated in accordance with scientific survey techniques and methods” the mandate would not have been necessary and would not have been given. The very conditions of the mandate excluded the test the Experts invented to excuse themselves from fulfilling it.

232. Similar remarks apply to the Experts’ summary of their reasoning: they assert that there was not “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>121</sup> This again is a misdirection: whether sufficient documentation is produced depends *inter alia* on whether any contradictory documentation is produced. There is no presumption against proving a boundary of 1905 – but the Experts acted as if the matter had to be proved beyond a reasonable doubt.

233. In fact there was ample evidence which showed the southern boundary of Kordofan prior to the transfer, and there was no evidence to the contrary. For reasons explained in Chapter 6, the Experts’ selection of the Ragaba ez Zarga as the southern boundary of Kordofan was perverse,<sup>122</sup> but still (right or wrong) it was based on at least *some* contemporary evidence, however misconstrued. By contrast there is *no evidence whatever* for the line actually chosen by the Experts – still less, if that is possible, for that boundary as of 1905. Obviously that line did not exist before it was plucked out of the air in 2005.

234. As is clear from Chapter 6, the administrative boundary between Kordofan and Bahr el Ghazal prior to 1905 was no less definite than most other boundaries in

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<sup>121</sup> ABC Experts’ Report, Preface, p. 4 (SM Annex 81).

<sup>122</sup> See below, paragraphs 296-304.

Africa, many of which have served as the basis for international delimitations. The 1905 border should – according to the agreement of the Parties – have served as the basis for delimitation. But the Experts in effect refused to carry out this task, and thereby exceeded their mandate.

**(ii) Answering a different question than that asked**

235. Rather than asking the right question – what was “the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905” – the Experts answered a quite different question, about tribal customary rights concerning a much later date (apparently 1956 or 1965).

236. This reformulation of the question is evident from the primary conclusion of the ABC Experts:

“1) The Ngok have a *legitimate dominant claim* to the territory from the Kordofan-Bahr el-Ghazal boundary north to latitude 10°10’ N, stretching from the boundary with Darfur to the boundary with Upper Nile, as they were in 1956.”<sup>123</sup>

This is not expressed at all in terms of territory transferred: it is expressed in terms of an alleged dominant tribal claim of a group. It is expressed in terms of legitimacy,<sup>124</sup> but the ABC was tasked to determine a question of fact. Moreover it is expressed in the present tense (“The Ngok have...”), whereas the ABC was tasked to determine a historical question by reference to the date of 1905.

237. The reformulation of the question is also evident from the reasoning of the ABC Experts. Having first set aside the question identified by the Parties because of the lack of a demarcated boundary,<sup>125</sup> the ABC Experts stated:

“It is *therefore* incumbent upon the experts to determine the nature of established land or territorial occupation and/or use rights by all the nine Ngok Dinka chiefdoms, with particular focus on those in the northern-most areas that formed the transferred territory”.<sup>126</sup>

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<sup>123</sup> ABC Experts Report, p. 21 (emphasis added) (SM Annex 81).

<sup>124</sup> For the dubious and unmandated criteria of legitimacy see below, paragraphs 266-299.

<sup>125</sup> See above, paragraphs 230-234.

<sup>126</sup> ABC Experts Report, Appendix 2, p. 21 (SM Annex 81) (emphasis added).

238. There is here not one *non sequitur* but several.

- (a) First of all, it does not follow from the assertion that the transferred area was “not precisely delimited and demarcated in accordance with scientific survey techniques and methods” that it was necessary “to determine the nature of established land or territorial occupation and/or use rights”. The Ngok Dinka annually used land south of the Amadagora River and down to the Loll. That did not make those regions part of the transferred area: why should it do so for regions north of the Bahr el Arab? The criterion was transfer, not use.
- (b) This brings us to the second *non sequitur*. The Experts deduce from the lack of scientific surveys the need to focus “on those [chiefdoms] in the northern-most areas that formed the transferred territory”. But the premise is that, for lack of precise demarcation, one cannot know what is the transferred territory. If one cannot know what was the transferred territory one cannot know which were “the northern-most areas that formed the transferred territory”. Under cover of the absence of scientific surveys the Experts shift to the (utterly unscientific) assessment of land use without records, of land rights without land rights laws.
- (c) But there is more. Why focus on the “northern-most areas”? The Commission was tasked to define an area, not just its northern boundary. The area to the west of Sultan Rob’s, south of the Bahr el Arab, was used by the Humr (and not by the Dinka).<sup>127</sup> Yet no inquiry was made as to this.
- (d) The character of the inquiry is indicated also by the reference to “territorial occupation and/or use rights by *all* the nine Ngok Dinka chiefdoms” (emphasis added). Yet there is no inquiry as to land use rights of *any* of the Humr omodiyas. Not merely is there an unwarranted shift from transferred area to land use; the terms in which it is announced presage the partisan inquiry that is to follow.

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<sup>127</sup> See e.g. Figure 15, p. 152.

239. The reformulation of the question is also evident in the Experts' treatment of the evidence. They stated:

“The narratives contained in the Annual Reports of Kordofan and Bahr el-Ghazal provinces immediately before and after 1905 refer to “lines” drawn between rivers, mountains and longitudes as well as roads, settlements, soil types and trees but these hardly ever demarcate actual boundaries in terms of land use rights and population dynamics on the ground.”<sup>128</sup>

240. This is an extraordinary statement. It is difficult to imagine any boundary that is not established by “lines” between mountains and other landmarks. The Experts were asked to define an “area” transferred between two Provinces, not to establish “population dynamics”.

241. In short, by taking it upon themselves to consider “territorial occupation and/or use rights” and “population dynamics”, the Experts sought to answer a question that they had never been asked, and thereby exceeded the agreement adopted by the Parties.

**(iii) Ignoring the stipulated date of 1905**

242. Having initially identified the agreed date for determination of the transferred area (1905),<sup>129</sup> the Experts referred to a much more recent, albeit indeterminate, date (apparently 1965).

243. Apart from 1905, only one other date is mentioned in the Abyei Protocol: the date of independence (1 January 1956). As noted, the year 1905 is an exception to the inviolability of the 1956 boundaries.<sup>130</sup> Yet the Experts gave an answer which bears no relationship to either date. In particular, there is no credible information as to the position of tribes in 1905 which could warrant a line anywhere north of the Bahr el Arab – still less one as far north as 10°22'30"N.

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<sup>128</sup> ABC Experts Report, Appendix 2, p. 22 (SM Annex 81).

<sup>129</sup> Ibid., p. 21; above paragraph 230.

<sup>130</sup> See above paragraph 4.

244. Virtually ignoring the key 1905 date, the ABC Experts made reference to other wholly irrelevant dates. For example, in relation to Proposition 8, it was stated:

“At the peace agreement between the Messeriya Humr and the Ngok Dinka in March 1965 both sides agreed that the Ngok could return to their homesteads at ‘Ragaba Zarga and other places where they used to live’ and that the Arabs would have unrestricted access to all ragabas that they had been frequenting before the outbreak of the hostilities.”<sup>131</sup>

245. The ABC Experts’ reliance on the situation post-independence can be seen from the following passage, which relied, *inter alia*, on the 1965 Agreement:

“From the above evidence it stands to reason that the Ngok had established dominant rights of occupation along the Ragaba ez-Zarga and the area to its north, while the Messeriya enjoyed established secondary rights of use in the same region. Further to the north, however, the two communities exercised equal secondary rights to use the land on a seasonal basis.”<sup>132</sup>

246. Not only is the 1965 agreement unrelated both to the 1905 transfer and the ABC Experts’ final boundary; but that agreement was superseded by the Abyei Agreement between Tribes of Messeria and Mareg Dinka of 1966.<sup>133</sup> The 1966 Agreement marked an attempted return to the *status quo ante* between the two groups: it evidences their joint use of “Ragabas and water pasture places”. It contains no trace of any theory of dominant versus secondary land use rights.<sup>134</sup> Yet again, in referring to material of later date, the ABC Experts failed to attend to what that material actually says. The salient point for present purposes is that there was no mandate under the CPA to refer to events of 1966 at all, except as they may have shed light on the position in 1905 – which the 1966 Agreement does not do.

247. It may be added that the most northerly point of the Ragaba ez Zarga is below 9°52’N. Even on the basis of the misconceived theory that Ragaba ez Zarga

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<sup>131</sup> ABC Experts’ Report, p. 19 (SM Annex 81).

<sup>132</sup> Ibid., Preface, p. 19.

<sup>133</sup> Abyei Agreement Between Tribes of Messeria and Mareg Dinka, 22 March 1966 (SM Annex 62).

<sup>134</sup> “Ragabas and water pasture places” are a feature of the Bahr, not the Goz where the ABC Experts concocted their “shared rights area”: see below, paragraphs 260-262.

was the administrative boundary before 1905, there is no basis for the Experts to delimit the northern boundary at latitude 10°22'30"N.

248. It follows from the above that the ABC Experts effectively ignored the stipulated date of 1905 and thereby exceeded their mandate.

**(iv) Allocating grazing rights beyond and limiting them within the “Abyei Area”**

249. The ABC Experts exceeded their mandate in seeking to regulate grazing rights. They did this in two respects: first, in seeking to confer on the Ngok grazing rights outside the “Abyei Area”; secondly, in seeking to limit within the Abyei Area the exercise of the rights conferred by Article 1.1.3 of the Abyei Protocol.

250. Article 1.1.3 of the Abyei Protocol provides that:

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

Beyond defining the “Abyei Area”, the ABC has no role in relation to Article 1.1.3. The rights conferred exist by virtue of Article 1.1.3 with respect to the whole of the Abyei Area and nowhere beyond. Moreover it seems obvious from the context that the Ngok are not included in the phrase “[t]he Misseriya and other nomadic peoples”.

251. The ABC Experts completely ignored these limitations in deciding that:

“2) North of latitude 10°10'N through the Goz up to and including Tebeldia (north of 10°35'N.) the Ngok and the 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 Messeriya.”<sup>135</sup>

Leaving aside the total absence of any evidence of the exercise of grazing rights by the Ngok in this area,<sup>136</sup> the point is that the ABC Experts purported to confer on

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<sup>135</sup> ABC Experts' Report, p. 22 (SM Annex 81).

<sup>136</sup> See below, paragraphs 392-393.



the Ngok “established secondary rights to the use of land” to the north and east of what they held to constitute the Abyei Area, i.e. north of 10°22’30’’N.

252. Not only did the ABC Experts purport to confer rights to the use of land outside the Abyei area, they also limited 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°35’N.

253. Again, the question here is not the lack of any evidence supporting the 10°10’N as the southern limit of Messeriya grazing activity. It is that the ABC had no mandate under the CPA or subsequent agreements to allocate transit or grazing rights. Such rights derive from Article 1.1.3 of the Abyei Protocol (over which the ABC had no jurisdiction).

### ***C. Violation of Mandatory Criteria in carrying out the Mandate***

254. As demonstrated in Chapter 4, it is a general principle of law, confirmed in practice, that the failure of a panel charged with deciding a dispute to state any reasons on the basis of which its decision can be supported constitutes an excess of mandate. In the present case, it was especially incumbent on the Experts to state the reasons on which their decision was based in the light of the Parties’ stipulation, reflected in both the Abyei Appendix and the Terms of Reference, that the Experts’ decision “shall be based on scientific analysis and research”.

#### **(i) Failure to give reasons**

255. The Experts failed to provide reasons capable of forming the basis of a valid decision (within the meaning of the Abyei Annex and the ABC Terms of Reference). Two illustrations will be given, which suffice for these purposes. They are: (a) the rejection of the Bahr el Arab as the southern boundary of Kordofan (the Experts’ Proposition 7), and (b) the assertion that latitude 10°10’N constitutes the southern boundary of Misseriya rights (their Proposition 9).

(a) *The rejection of the Bahr el Arab*

256. In contrast to other propositions, Proposition 7 was not rejected on the basis of lack of evidence, but because “geographical uncertainty for the Bahr el-Arab continued until the end of the World War One”.<sup>137</sup> The Experts continued:

“It was not until 1905-06 that surveys along the Bahr el-Ghazal, and into the mouth of the false “Bahr el-Arab” and the Bahr el-Arab corrected this error. Lt R.C. Bayldon, R.N. first correctly identified the Kir as the Bahr el-Arab in his survey of in March 1905 (**Appendix 5.12**). He further identified the Ragaba ez-Zarga/Ngol as the ‘Bahr el Homr’, the place where the Humr brought their cattle in the dry season (it was to be labelled the Bahr el-Homr on official maps for some time thereafter), His findings were confirmed by surveys in 1906, where it was noted that the local name for the Bahr el-Arab was the Kir, and that the Ngok Dinka chief Arop Biong (Sultan Rob) and Alor Ajing (Sheik Lar) both lived along this river (**Huntley-Walsh, Appendix 5.12**).”<sup>138</sup>

257. But Bayldon’s observations appeared in the same 1905 *Sudan Handbook* that also contained a correct map of the Bahr el Arab and a description both of the 1905 and the post-1905 border. As will be shown in Chapter 6, the Condominium Authorities knew the position of the Bahr el Arab and considered this the border at the time of the 1905 transfer.<sup>139</sup>

258. But even more important in relation to the failure to state reasons is the following passage:

“The Government’s claim that only the Ngok Dinka territory south of the Bahr el-Arab was transferred to Kordofan in 1905 is therefore found to be mistaken. It is an understandable mistake, given the geographical confusion at the time, but it is based on an incomplete reading of the contemporary administrative record, *the full context of which reveals that the Ragaba ez-Zarga/Ngol, rather than the river Kir, which is now the Bahr el-Arab, was treated as the province boundary, and that the Ngok people were regarded as part of the Bahr-el Ghazal Province until their transfer in 1905.*”<sup>140</sup>

The Experts continued:

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<sup>137</sup> ABC Experts’ Report, p. 38 (SM Annex 81).

<sup>138</sup> Ibid., p. 38.

<sup>139</sup> See below, paragraph 289.

<sup>140</sup> ABC Experts’ Report, p. 39 (SM Annex 81) (emphasis added).

“All references before 1908 to ‘Sultan Rob’s’ boundary with the Arabs being the Bahr el Arab now must be understood as meaning the Ragaba ez-Zarga/Ngol.”<sup>141</sup>

259. The Experts’ conclusion on this point is examined in Chapter 6 and is shown to be clearly wrong.<sup>142</sup> But that is not the present point. The point is that if (*quod non*) the Ragaba ez Zarga was the southern boundary of the Province of Kordofan in 1905, then the transferred area must have been south of the Ragaba ez Zarga. Yet the Experts provide no reason whatever for then abandoning that feature in favour of a line much further to the north. There is simply a vacuum on this point, where explanation was called for. And this is a central step in the reasoning of the Experts in rejecting the case put forward by GoS.

(b) *The adoption of 10°10’N as the limit of Messeriya rights*

260. The same can be said of the ABC Experts’ selection of 10°10’N as the limit of Messeriya rights to the south. According to the Experts themselves:

“The narratives contained in the Annual Reports of Kordofan and Bahr el-Ghazal provinces immediately before and after 1905 refer to ‘lines’ drawn between rivers, mountains and longitudes as well as roads, settlements, soil types and trees but these hardly ever demarcate actual boundaries in terms of land use rights and population dynamics on the ground.”<sup>143</sup>

Yet “land use” was exactly what the Experts allegedly based their decision on, and in doing so, they come up with a straight line, more than 200 km long, totally lacking in any evidentiary support. There is simply no justification for latitude 10°10’N in their Report. In their account of Proposition 8 (that there was continuity in the territory occupied and used by the nine Ngok chiefdoms) the Experts concluded that:

“The Commission finds sufficient evidence, therefore, to accept Ngok claims to permanent rights southwards roughly from latitude 10°10’ N, and of Ngok secondary rights extending north of that line”

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<sup>141</sup> Ibid., 40.

<sup>142</sup> See below, paragraphs 328-329 (SM Annex 81).

<sup>143</sup> ABC Experts’ Report, Appendix 2, p. 22 (SM Annex 81).

261. There is, however, not a single reference to latitude 10°10'N, in the Report or in the relevant Appendices. The only thing that is stated is that:

“Representatives of each of the nine chiefdoms were able immediately to give detailed accounts of their territory.”<sup>144</sup>

And that:

“A number of settlements that the Ngok mentioned were also confirmed by their Dinka neighbours in Agok (**Appendix 4.2**), specifically the sites of Dhinydhuol (Tebeldiya), Nyama, Pagai, Tuba, Rube, Akotok, Maper Amal and Majeng Alor.”<sup>145</sup>

How these sites relate to latitude 10°10' N is left completely unspecified. No coordinates appear for any of the sites referred to by the Experts. Neither do the Experts seem to have invested any effort into confirming the positions of these villages, a matter of particular importance as many villages are known to have moved. In short, there is no evidence supporting the 10°10'N parallel, or anywhere north of it, as included in the “area of the nine Ngok Dinka chiefdoms”. There is simply a vacuum on this point, where explanation was called for. And this is a central step in the reasoning of the Experts in fixing the northern limit of the “Abyei Area”.

262. To summarise, there are crucial gaps in the argumentation of the Experts both in their rejection of the GoS case and in the adoption of the 10°10'N line as the limit of the “shared rights area”, on the identification of which the northern boundary of the “Abyei Area” in turn depended. The ABC Experts’ decision fails to withstand even minimum scrutiny as an act of reason, not of will.

**(ii) A decision based on “equitable division”/taken *ex aequo et bono***

263. As illustrated in Chapter 4, decisions based on equity or taken *ex aequo et bono* are only permissible if the parties have expressly consented thereto.<sup>146</sup> Further, none of the relevant instruments referred to in Article 2(a) of the Arbitration Agreement provided that the Experts were to arrive at their decision

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<sup>144</sup> Ibid., p. 41 (SM Annex 81).

<sup>145</sup> Ibid., p. 42.

<sup>146</sup> See above, paragraphs 166-176/

based on equity, an equitable division of areas, or by making a decision *ex aequo et bono*.

264. Despite this, the Experts found that:

“The two parties lay equal claim to the shared areas and accordingly it is reasonable and equitable to divide the Goz between them”.<sup>147</sup>

No other reasoning was provided to justify the final line.

265. The Experts were, first, not mandated to establish shared areas. Nor, secondly, were they mandated to divide them by way of a decision taken *ex aequo et bono*. Instead, their decision was to be based on “scientific analysis and research” by reference to a carefully defined criterion: “the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905”. By dividing the Goz on an “equitable” basis in this way, the Experts completely disregarded, and thereby exceeded, their mandate.

**(iii) Applying unspecified “legal principles in determining land rights”**

266. The Experts purported to apply legal principles in determining land rights in former British administered African territories, including the Sudan.

267. As seen above, the ABC Experts transformed the question identified by the Abyei Protocol and answered a quite different question, about tribal customary rights at a much later date (apparently 1956 or 1965).

268. In doing so, the ABC Experts *inter alia* purported to rely on various legal principles, although they completely failed to identify with precision what these principles were or where they came from.<sup>148</sup> They stated:

“Based on the legal principle of the equitable division of shared secondary rights, therefore the northern boundary should fall within the zone between latitudes 10°10’ N and 10°35’ N.”<sup>149</sup>

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<sup>147</sup> ABC Experts’ Report, p. 22 (SM Annex 81).

<sup>148</sup> See *ibid.*, Appendix 2.

No legal authority was cited as to the so-called “legal principle of the equitable division of shared secondary rights”.

269. Even if authority had been cited, the Experts were not authorised to apply the laws of other British-administered African territories. Further, if a legal decision had been required, rather than a factual one, then this would have been reflected in the composition of the ABC itself. In addition, the Experts paid no attention to the land rights law of the Sudan, the *locus in quo*. The position is that the law of Sudan, in 1956 as in 2005, did not recognise customary land rights as distinct from rights of use and pasturage which could be exercised in common.<sup>150</sup> By applying unsourced and indeterminate “legal principles” without authorisation from the Parties, the ABC Experts exceeded their mandate.

**(iv) Attempt to allocate oil resources under the guise of the transferred area**

270. Given the absence of any articulated justification for the ABC Experts’ “boundary”, it is appropriate to consider whether there may have been other, unarticulated, reasons. In this regard, the Experts’ unexplained reference to the Wealth Sharing Agreement<sup>151</sup> is suggestive.

271. Wealth Sharing is the subject of Chapter III of the CPA. Chapter III is national in scope, although it makes special provision for regional needs. It provides for the establishment of a range of bodies charged with the implementation of the principle of equitable sharing of the wealth of Sudan. The ABC is not one of them. There is no relationship of any kind between the Abyei Protocol and Chapter III of the CPA on Wealth Sharing. Nor is the ABC given any role in relation to Section 3 of the Abyei Protocol (“Financial Resources”). For the ABC to take “wealth sharing” or access to financial resources into account in determining the boundary would be an obvious excess of mandate.

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<sup>149</sup> Ibid, Conclusions, p. 20 (SM Annex 81).

<sup>150</sup> Article 2.5 of Chapter II of the CPA (“Wealth Sharing”) provides that “a process be instituted to progressively develop and amend the relevant laws to incorporate customary laws and practices, local heritage and international trends and practices”. This is prospective only and it gives no authority to the ABC.

<sup>151</sup> ABC Experts’ Report, p. 21 (SM Annex 81).

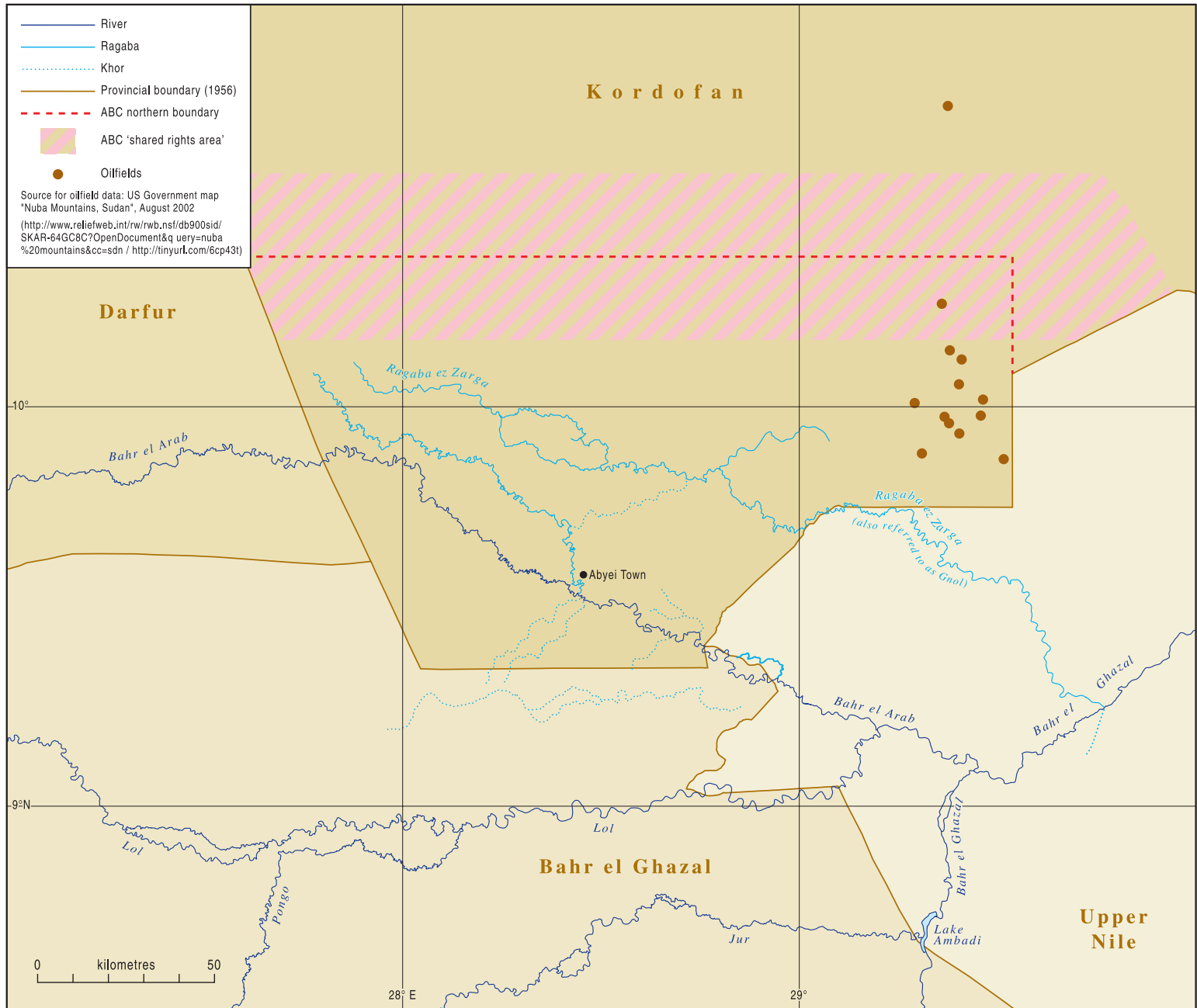
272. Yet the indications are that this is precisely what the ABC Experts did. Indeed it goes far to explain the obvious disconnect between the reasoning of the Experts on such matters as the Ragaba ez Zarga and their eventual choice of boundaries.

273. Reference is made to **Figure 6** on page 92. This shows the location of some of Sudan's most important oil fields relative to the ABC's "boundary" and "shared rights area". Three things are obvious from **Figure 6**.

- (a) First, almost all the producing wells fall within the "Abyei Area" but well to the north of the Ragaba ez Zarga which – according to the ABC Experts – constituted the southern boundary of Kordofan at the time of the transfer. The oil reserves were, on the Experts' own analysis, in Kordofan already prior to 1905.
- (b) Secondly, the boundary is drawn so as to envelop the oil fields. In particular, and even without extrinsic evidence, one could infer that the north-eastern turning point of the boundary was chosen for that purpose.
- (c) Thirdly, this inference is reinforced by the fact that the "shared rights area" extends well to the east, whereas the boundary turns at right angles just after it has passed the oil fields area, leaving the cluster of producing wells to the south. The express justification given for locating the boundary – viz., dividing the "shared rights area" – is abandoned just as soon as the oil fields are safely in the "Abyei Area".

274. But the Tribunal is not limited to inference. In an interview given to the *Sudan Tribune* on 29 May 2006, the principal drafter of the ABC Report, Dr Johnson, said the following:

**Figure 6 Oil wells in the Sudan and the ABC Experts' Choice of Boundary**





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

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

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

This statement, by the architect of the ABC Experts’ Report, is tantamount to an admission of excess of mandate. It is also evidence of lack of impartiality.

275. In the circumstances the Tribunal is entitled to conclude that the actual alignment of the ABC Experts’ boundary was determined by reference to totally irrelevant considerations. Not merely were they irrelevant: they were improper – an avowed attempt to ensure that “that oil becomes southern oil and is not northern oil”. Undeniably this would be an excess of mandate.

#### **D. Conclusions**

276. For these reasons the ABC Experts exceeded their mandate. The ways in which they did so are summarised in the following table.

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<sup>152</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).

## Summary: The Decision of the ABC Experts

### Excesses of Mandate

Decision/process	Experts' Report	Ground of Excess of Mandate
<b>A. Breach of Procedural Conditions for a Binding Decision</b>		
<b>A1.</b> The Experts took evidence from Ngok Dinka informants without procedural safeguards and without informing the other party.	Appendix 4.2, pp. 148, 149	(a) The Experts conducted these interviews in the absence of any representative of GoS and without notice to GoS.  (b) Collection and examination of evidence in the presence of representatives of a party in interest without notice to the other party is a serious departure from a fundamental rule of procedure.
<b>A2.</b> The Experts unilaterally sought and relied on the Millington e-mail, without notice, to establish their interpretation of the formula.	Preface, p. 4	(a) The Experts were not authorised to consult the US Government;  (b) The Parties were given no notice of the request or the response and thus had no opportunity to comment (breach of Arbitration Rule 14; serious departure from a fundamental rule of procedure).  (c) The Experts misapplied the Millington e-mail, which referred to “the area of Abyei that was demarcated in later years”. This can only have referred to the Abyei Local Government Area which bears no resemblance to the area defined by the Experts.
<b>A3.</b> The Experts unilaterally “pledge[d] not to reveal to any person or institution the substance of their decision before they present it to the	Preface, p. 5	(a) This was a straightforward breach of Arbitration Rule 14. It also involved a serious departure from a fundamental rule of procedure (in light of Points A1 and A2 above).  (b) Lt.-General Sumbeiywo of EGAD had no authority to dispense with the

Sudanese Presidency”.

**B. Disregard of the Substantive Mandate**

**B1.** The Experts declined to delimit the area transferred in 1905 on the ground that there was not “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”; “In 1905 there was no clearly demarcated boundary of the area transferred ... to Kordofan.”

Preface, p. 4

Report, p. 20

requirements of Arbitration Rule 14.

(c) As a result the Experts were never placed in a situation where they could have the “final say” under Arbitration Rule 14.

(d) The Report was not “arrived at as prescribed in the ABC rules of procedure” (ABC Understanding, para 5); the failure was manifest and material.

(a) The Experts set an impossibly high burden of proof. Documents produced in the years around 1905 demonstrate the situation.

(b) In fact there was evidence which showed the southern boundary of Kordofan prior to the transfer and no evidence to the contrary. The Experts’ selection of the Ragaba ez Zarga as the southern boundary of Kordofan was perverse.

(c) In stating that “there was no clearly demarcated boundary of the area transferred ... to Kordofan” the Tribunal misdirected itself. It has never been suggested that there was a demarcated border; the function of the ABC was to delimit a border based on the evidence and this it refused to do.

(d) In fact Condominium maps in the years after 1905 show the area concerned, which is adequately described in official sources. There are no official depictions or descriptions whatever for the area eventually delimited by the Experts.

<p><b>B2.</b> The Experts answered a quite different question, about tribal customary rights at a much later date (apparently 1965).</p>	<p>Preface, p. 4 Report, p. 19 Appendix 2, at p. 23</p>	<p>(a) The Experts included in their “Abyei area” territory which was certainly (even on their own analysis) within Kordofan prior to 1905.</p> <p>(b) Instead of deciding what was the “area of the nine Ngok Dinka chiefdoms as it was in 1905” (and as transferred to Kordofan), they decided a quite different question.</p> <p>(c) The Experts gave an answer which bears no relationship to any credible information as to the position in 1905.</p>
<p><b>B3.</b> Having correctly identified the agreed date for determination of the transferred area (viz., 1905), the Experts referred to a much more recent, albeit indeterminate, date (apparently 1965).</p>	<p>Report, p. 19</p>	<p>(a) Reference to the 1965 peace agreement was a departure from the relevant date under the Abyei Agreement.</p> <p>(b) In any event the 1966 Agreement contradicts the Experts’ conclusion.</p>
<p><b>B4.</b> The Experts purported 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. They also purported 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.</p>	<p>Report, p. 22</p>	<p>(a) The ABC had no mandate under the CPA or subsequent agreements to allocate transit or grazing rights. Such rights derive from Art 1.1.3 of the Abyei Protocol (over which the ABC had no jurisdiction).</p> <p>(b) <i>A fortiori</i> the Experts had no authority to allocate grazing or transit rights outside the Abyei area.</p> <p>(c) Under Art 1.1.3 of the Abyei Protocol, the Misseriya and other nomadic people retain their traditional rights over the whole Abyei Area, not limited to the area north of 10°10’N.</p> <p>(d) In fact they have traditionally exercised such rights down to the Bahr Al Arab and the Experts had no authority to limit their exercise.</p>

**C. Violation of Mandatory Criteria in carrying out the Mandate**

<p><b>C1.</b> The Experts failed to provide reasons capable of forming the basis of a valid decision (within the meaning of the Abyei Annex or the ABC Terms of Reference).</p>	<p>Not in Report</p>	<p>(a) A failure to give reasons capable of supporting an <i>intra vires</i> decision constitutes an excess of mandate</p> <p>(b) The Experts' Report fails entirely to examine the evidence of the transferred area as shown, e.g., on contemporary maps, and contains many lacunae (e.g. the selection of 10°10' north is utterly arbitrary).</p>
<p><b>C2.</b> The Experts divided a so-called "shared area" of Kordofan by a line along latitude 10°22'30"N on the grounds that this was "reasonable and equitable".</p>	<p>Report, p. 22</p>	<p>(a) The ABC's mandate was to determine the area transferred to Kordofan in 1905, not to allocate competing tribal claims on grounds of reasonableness and equity.</p> <p>(b) The ABC Experts had no authority to make decisions on an <i>ex aequo et bono</i> basis.</p>
<p><b>C3.</b> The Experts applied "legal principles in determining land rights in former British administered African territories, including the Sudan".</p>	<p>Report, p. 12, Appendix 2</p>	<p>(a) The Experts were not authorised to apply the laws of other British-administered African territories.</p> <p>(b) The Experts failed to cite any authority for the "principle" they referred to.</p> <p>(c) The law of Sudan prior to 1956 did not recognise land rights as distinct from common rights of use and pasturage.</p>
<p><b>C4.</b> The Experts purported to decide <i>ex aequo et bono</i>.</p>	<p>Report, p. 20</p> <p>Appendix 2, p. 26</p>	<p>(a) Both the Abyei Appendix (para. 4) and the ABC's Terms of Reference (Art. 3.4) stipulated that the Experts were to arrive at their decision on the basis of scientific analysis and research.</p> <p>(b) The Experts were only empowered to arrive at their decision on the basis of scientific analysis and research.</p> <p>(c) Accordingly, any recourse by the Experts to issues of equity constituted an excess of mandate.</p>

**C4.** The Experts took into account location of oil fields in deciding on the transferred area.

Not in the Report, but cf reference to the Wealth Sharing Agreement, 2004 at Appendix 2, p. 21

Such considerations were entirely irrelevant to the determination of the facts in issue.

## Chapter 6

### The Area of the Nine Ngok Dinka Chiefdoms Transferred to Kordofan in 1905

#### A. Introduction

277. In Chapter 5 it was established that the ABC Experts' Report involved an excess of mandate in numerous respects. As pointed out in paragraph 95 above, the corollary is that the Tribunal must determine for itself the question referred to it. According to Article 2(c) of the Arbitration Agreement:

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

The phrase “based on the submissions of the *Parties*” refers to the Parties' submissions *to the Tribunal*. The Tribunal must perform this task *de novo*, based on the submissions of the Parties and the evidence and arguments they adduce.

278. In performing this task, the Tribunal may take into account information recorded by the ABC Experts and documents to which they referred. But – as will be demonstrated in this Chapter – the ABC Experts committed many errors of substance; overall, their wilful blindness to crucial items of evidence (and to crucial gaps in the evidence) entitles their assessments to no weight.

279. In this Chapter it will be shown that:

- (a) The boundary between the provinces of Kordofan and Bahr el Ghazal prior to 1905 was the Bahr el Arab, not the Ragaba ez Zarga.
- (b) The territories of the Ngok Dinka under Sultan Arob and Sultan Rihan Gorkwei (which territories were to the south of the Bahr al Arab at this time) were transferred administratively to Kordofan in 1905.

- (c) The consequential boundary changes to the two provinces were reflected on maps and in other documents which enable the Tribunal to determine the area transferred to Kordofan in 1905.
- (d) The area attributed to the “Nine Ngok Dinka Chiefdoms” by the ABC Experts bears no relation to the historic and demographic facts of the matter. In particular, the area they identified bears no relationship to any area which was or might conceivably have been transferred in 1905.
- (e) Further, the Ngok Dinka never had a collective presence north of 10°10’N. By contrast the Humr annually migrated down to the Bahr al Arab. The “Area of Shared Rights” identified by the ABC Experts is a fabrication.

280. In his Expert Report, attached to this Memorial, Alastair Macdonald concludes as follows:

“By the end of the nineteenth century there was a clear understanding that there was a substantial river rising in the vicinity of Hofrat en Nahas and flowing some 750 km east-south-east to join the Bahr el Ghazal at a well-determined location. This river marked the boundary between the provinces of Darfur and Kordofan to the north and the province of Bahr el Ghazal to the south. Although, in the early twentieth century, there was some confusion as to the precise course of this river, there was only one river that fitted this general description. The confusion in the early twentieth century was resolved within a few years: moreover, it never gave rise to the idea that there was any other river than the Bahr el Arab that constituted the boundary between the provinces of Kordofan and Bahr el Ghazal prior to 1905.”<sup>153</sup>

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<sup>153</sup> Macdonald Report, para. 5.5.



**B.     *The Bahr el Arab, Boundary between Kordofan  
and Bahr el Ghazal before 1905***

**(i)     The pre-Condominium period**

*(a) Contemporary knowledge of the region*

281. In 1821 Kordofan, like most of the Sudan, was conquered by Mohammed Ali, the Viceroy of Egypt, and came within the Ottoman Empire.<sup>154</sup> On 13 February 1841 the Ottoman Sultan recognised Mohammed Ali's efforts and conferred on him the Governorship of the Sudanese Provinces of Nubia, Darfur, Kordofan, Sennar, and their dependencies.<sup>155</sup> Bahr el Ghazal became a province in 1873.

282. The Sudan remained under Ottoman control until 1883 when the country was swept by the Mahdist revolution. The Mahdists had political control of most of the Sudan, including the Kordofan and Bahr el Ghazal Provinces, until 1898, after which the country was "re-occupied" by British and Egyptian forces. After the re-occupation the Sudan came under the Anglo-Egyptian Condominium from 1899 until the Sudan achieved independence on 1 January 1956.<sup>156</sup> As noted in paragraphs 33 above, the CPA places great emphasis on 1 January 1956 as the *uti possidetis* date for determining the boundary between North and South – with the sole exception of 1905, the date of the transfer of the nine Ngok Dinka kingdoms to Kordofan.

283. In the Condominium period, the history of the country is generally well documented. For example, an official *Handbook of the Sudan* was published in the same year as the Battle of Omdurman (2 September 1898). The Handbook was compiled in the Intelligence Division, War Office, by Captain Count Gleichen.<sup>157</sup> A

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<sup>154</sup> Cf. Hill, R., *Egypt in the Sudan 1820-1881* (OUP, London, 1959), pp. 8-13 (SM Annex 39).

<sup>155</sup> 74 BFSP 320. Darfur was semi-independent for most of the 19<sup>th</sup> century: it was finally incorporated as a province in 1916.

<sup>156</sup> See Taha, F., "Some Legal Aspects of the Anglo-Egyptian Condominium over the Sudan: 1899-1954" (2005) 67 *British Year Book of International Law* 377. For a more general overview of the history of the Sudan, see Daly, M.W., *Empire on the Nile, 1898-1934* (CUP, Cambridge, 2003).

<sup>157</sup> Gleichen, A., *Handbook of the Sudan* (HMSO, London, 1898) (SM Annex 37).

second edition, much expanded, was published in 1905.<sup>158</sup> In 1911, Lieutenant Comyn described the 1905 Handbook as follows:

“The compendium of the Anglo-Egyptian Sudan, by Count Gleichen, gives one the best available information on the country.”<sup>159</sup>

284. The reason it was possible to publish an official handbook of the Sudan in the very year the Condominium was established was that travellers and merchants had already described the area, and that Europeans (notably, Gordon, Lupton, Gessi, Slatin) had been appointed to official positions in the Sudan and had published their experiences.<sup>160</sup>

285. In 1838, an expedition set out to discover the sources of the White Nile. The expedition failed in its mission, but traversed a considerable part of the Bahr el Jebel. In doing so, it discovered Lake No and the Bahr el Ghazal.<sup>161</sup>

286. In the same period the Austrian businessman Ignatius Pallme explored the Province of Kordofan. In 1844, Pallme published his book *Travels in Kordofan*, containing a description of the Province from his visits there from 1837-1839.<sup>162</sup> This was one of the first descriptions of Kordofan Province. In 1910, H.D.W. Lloyd, Governor of Kordofan, referred to Pallme as “one of the most accurate observers... much of whose work might have been written yesterday.”<sup>163</sup>

287. Other early travellers included Dr. George August Schweinfurth, who spent in several years in southern Sudan. Although a botanist, Dr. Schweinfurth’s observations made a significant contribution to the understanding of the hydrography of the Bahr el Ghazal system. He also made significant contribution to the knowledge of the indigenous population of southern Kordofan. His observations were recorded

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<sup>158</sup> Gleichen, A., *Handbook of the Sudan: A Compendium Prepared by Officers of the Sudan Government* (2 vols., HMSO, London, 1905) (SM Annex 38). These Handbooks were compiled from reports of Condominium officials as well as printed sources.

<sup>159</sup> Comyn, D.C.E., *Service and Sports in the Sudan* (1911), p. 18 (SM Annex 32).

<sup>160</sup> For example, Gordon was Governor of the Equatorial Provinces (1873-6), later Governor-General; Slatin was Governor of Darfur (1881-3) and served in the Sudan until 1914.

<sup>161</sup> Muhammed Ali, A.I., “A History of European Geographical Exploration of the Sudan: 1820-1865” (1974) 55 *Sudan Notes and Records* pp. 8-10 (SM Annex 48).

<sup>162</sup> Pallme, I. *Travels in Kordofan* (J. Madden & Co., London, 1844), originally published in German as *Beschreibung von Kordofan* (Stuttgart, 1843).

<sup>163</sup> Lloyd, W., “Notes on Kordofan Province” (1910) 35 *The Geographical Journal* 249 (SM Annex 56).

in his 1871 book *Im Herzen von Afrika*, published in English in 1873 (*The Heart of Africa*), re-published in 1878.<sup>164</sup>

288. Another important figure was Dr. Wilhelm Junker, a Russian explorer of German descent, who in 1887 received a gold medal from the Royal Geographical Society. Between 1875 and 1886, Junker carried out extensive journeys in central Africa, ascending the Sobat River and exploring the Bahr el Ghazal and neighbouring districts.<sup>165</sup>

289. The region of southern Kordofan and northern Bahr el Ghazal is vast in size and its drainage system exceptionally complex. For these and other reasons, there were uncertainties and confusions about the drainage in general and, in particular, about the precise course of the major river that drained the area, the Bahr el Arab, in its middle reaches. One important source of confusion was that a single river could have many different names, depending on the tribes which inhabited its banks.<sup>166</sup> The Bahr el Arab was also known as the Rizeigat, and by the Dinka names “Kir” and “Gurf”. But despite the confusing nomenclature, it was understood by the latter part of the 19<sup>th</sup> century that there was a large river, more than 700 km in length, arising to the south of Hofret en Nahas, flowing north into Darfur, then turning generally south-east to join the Bahr el Ghazal at Ghabat el Arab (9°05’N, 29°26’E). Only one river meets this description.<sup>167</sup> When contemporary accounts refer to the Bahr el Arab as the boundary between Kordofan and Bahr el Ghazal, they are referring to this river and to none other.

(b) *The boundary between Kordofan and Bahr el Ghazal before 1898*

290. Despite some uncertainty concerning the precise course of the Bahr el Arab in its middle reaches, it is clear that this river constituted the border between Darfur and Bahr el Ghazal, and also between Kordofan and Bahr el Ghazal prior to 1905. In other words, the lateral boundary between Darfur and Kordofan stopped on the Bahr

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<sup>164</sup> Schweinfurth, G.A. *Im Herzen von Afrika* (Leipzig, 1874); published as *The Heart of Africa* (Sampson, London, 1873).

<sup>165</sup> Garstin, W., “Fifty Years of Nile Exploration, and Some of its Results”, (1909) 33 *The Geographical Journal* 131(SM Annex 51).

<sup>166</sup> See Macdonald Report, paras. 1.5-1.6.

<sup>167</sup> See, e.g. Lupton’s sketch of Bahr el Ghazal (1883): Map Atlas, Map 2.

el Arab, with the Province of Bahr el Ghazal to the south of both. There was never any suggestion that the boundary between Kordofan and Bahr el Ghazal lay well to the north of the Bahr el Arab, along the Ragaba ez Zarga. The Bahr el Arab was in the nature of a *physical* barrier, something which a mere ragaba could not be.

291. This notion of the Bahr el Arab as a barrier was expressed, for example, by Junker, who wrote in 1882 that:

“The Bahr-el-Arab is fordable in the dry season at 25  $\frac{1}{3}$ ° 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 Arab, the fertile and the desert regions of the Soudan, everywhere east of Hofrat, or long. 25°.”<sup>168</sup>

292. In 1884, Frank Lupton (Lupton Bey), who in 1879 was appointed Deputy-Governor of the Equatorial Province, described Bahr el Ghazal, as the...

“tract of country which lies between 6°30” and 9°30” N. lat., and roughly speaking from 25° to 31° E. long. It is *bounded on the north by the Bahr-el-Arab*, and stretches in the south to within a few days’ march of the Congo.”<sup>169</sup>

A sketch-map of the province of Bahr el Ghazal based on Lupton’s understanding was published by the Royal Geographical Society in 1884. It is reproduced as **Figure 7** on page 105 (and see Map 2 in the Map Atlas). It is consistent with this description.

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<sup>168</sup> Dr. Junker’s 1882 letters were read at the Royal Geographical Society in 1887: Wills, J.T., “Between the Nile and the Congo: Dr. Junker and the (Welle) Makua”, (1887) 9 *Proceedings of the Royal Geographical Society* 285, p. 294 (SM Annex 61).

<sup>169</sup> “Mr. Frank Lupton’s (Lupton Bey) Geographical Observations in the Bahr-el-Ghazal Region: With Introductory Remarks by Malcolm Lupton. Read at the Royal Geographical Society 10 March 1884”, (1884) 6 *Proceedings of the Royal Geographical Society* 245, p. 245 (emphasis added) (SM Annex 57).



293. In 1884, a report compiled in the Intelligence Branch of the War Office also linked the southern border of the Kordofan Province with the Bahr el Arab.<sup>170</sup> Although this report noted that the limits of the province were “ill-defined”, it described the boundaries of the Bahr-el-Ghazal province as follows:

“The boundaries of this province are but 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.*”<sup>171</sup>

Evidently the tributaries and ragabas to the north of the Bahr el Arab were considered not to be in Bahr el Ghazal Province.

294. Echoing the description of the border in the 1884 report by the War Office, the first *Handbook of the Sudan* (1898) described the Province of Bahr el Ghazal as follows:

“The Southern Provinces in former days, up to 1878, included four mudiriehs, as follows :-

1. Bahr el Ghazal.—This mudirieh was vaguely defined, but may be described as enclosing the entire district watered by the southern tributaries of the Bahr el Arab and the Bahr el Ghazal Rivers. Its eastern boundary was the River Rohl.”<sup>172</sup>

295. This situation was shown on contemporary maps and in later historical studies. An example of the former is the 1898 reprint in *The Daily Graphic* (London) of Marchand’s map of his epic journey across Africa to the Nile at Fashoda: see Map 4 in the Map Atlas. An example of the latter is a map from Al Raafee’s book (in Arabic) on *The Reign of Ismael*, reproduced as **Figure 8** on page 107.<sup>173</sup>

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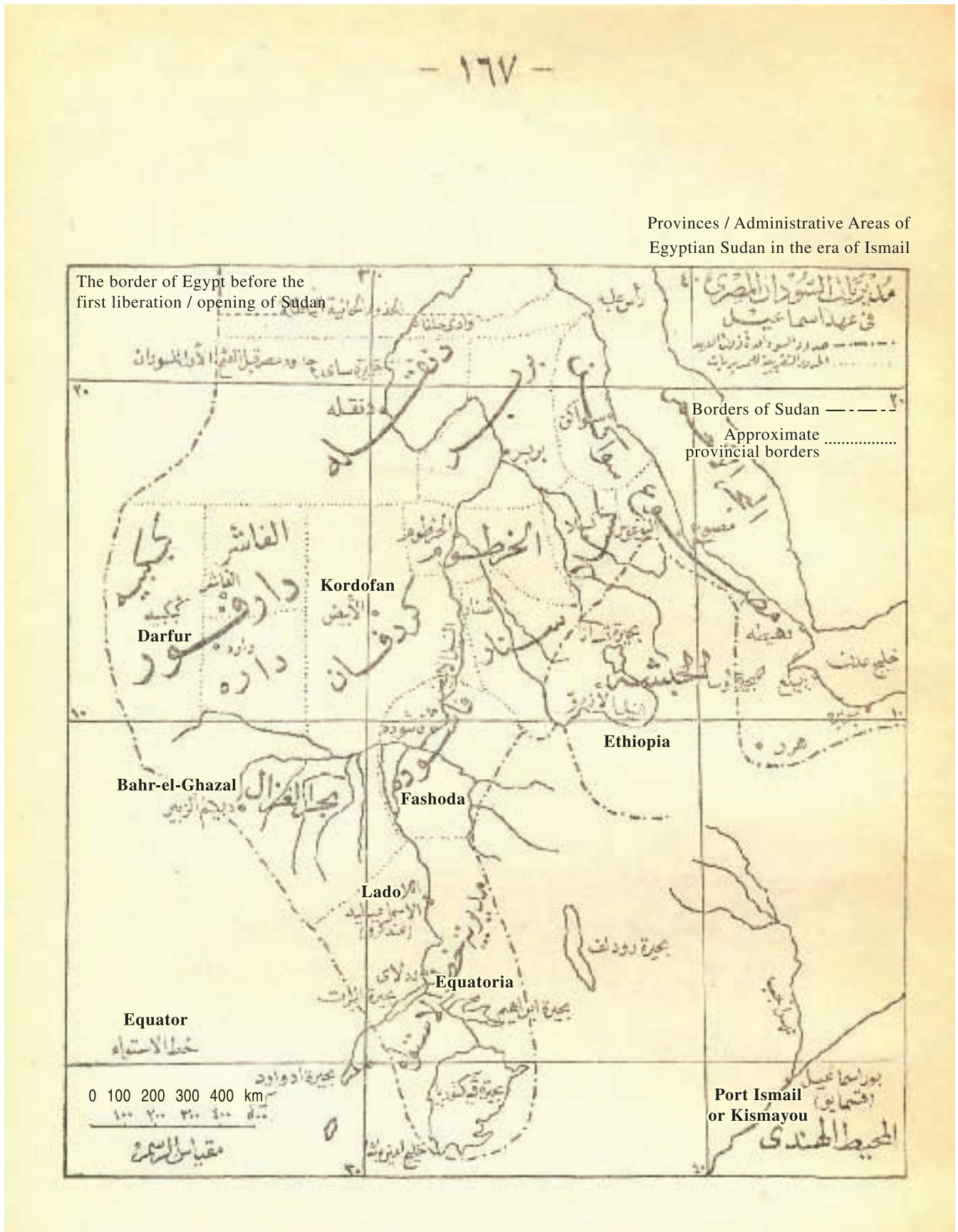
<sup>170</sup> *Report of the Egyptian Province of the Sudan, Red Sea, and Equator* (HMSO, London, 1884), p. 91 (SM Annex 28).

<sup>171</sup> *Ibid.*, (emphasis added).

<sup>172</sup> Gleichen, *Handbook of the Sudan* (HMSO, London, 1898), p. 110 (SM Annex 37).

<sup>173</sup> Abdel Rahman Al Rafaee, *The Reign of Ismael. Part One* (Al Nahda Printing Press, Cairo, 1932), p. 167.

**Figure 8 Al Rafae's Map (1932)**



**(ii) The early Condominium period**

*(a) Contemporary understandings of the course of the western affluents of the Nile*

296. The 1898 *Handbook of the Sudan* described the Bahr el Arab as follows:

“The Bahr el Arab rises in Southern Darfur and flows for a distance of about 400 miles before reaching the Bahr el Ghazal. Very little is known of its course; it is 120 yards broad 300 miles above its month, and has at that point been crossed in boats (Felkin). Natives state it is navigable from above Taimo (330 miles,) down to the Bahr el Ghazal, but it appears to pass through marshy depressions on its course.”<sup>174</sup>

297. In addition to the Bahr el Arab, there are several other rivers and waterways in southern Kordofan and northern Bahr el Ghazal.<sup>175</sup> The 1898 *Sudan Handbook* contains a section on the “Southern Affluents of the Bahr el Ghazal and Bahr el Arab”, which describes the early Condominium knowledge of the waterways as follows:

“The chief rivers, supplied by numberless streams and tributaries, are the Rohl, the Jau, the Tonj, and the Sueh; the latter becomes the Jur about the seventh, parallel, and flows into the Wau. These all flow into the Bahr el Ghazal.

The chief affluents of the Bahr el Arab are the Dembo and the Bili.

None of these rivers have been traversed in their entirety, and it is probable that none of them are navigable throughout the year. The natives do not appear to use them for transit, and for trade purposes navigation from the Bahr el Ghazal has always stopped at Meshra er Rek, whence goods have been transported by land.”<sup>176</sup>

None of these accounts make any mention of the Ragaba ez Zarga as having anything to do with the province of Bahr el Ghazal.

*(b) Descriptions and depictions of provincial boundaries after 1898*

298. The Condominium was seen as a “re-occupation”, a reversion to the period of Turkish-Egyptian rule after the disruptive period of the Mahdiyya. This applied

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<sup>174</sup> Gleichen, A., *Handbook of the Sudan* (1898) pp. 35-36 (SM Annex 37).

<sup>175</sup> See Macdonald Report, para. 1.4 & Figure 1.

<sup>176</sup> Gleichen, A., *Handbook of the Sudan* (1898), p. 36 (SM Annex 37).



equally to provincial boundaries, including that between Bahr el Ghazal and Kordofan:

“When the British created the Condominium in 1899 after the Anglo-Egyptian reconquest of the Sudan, they... built squarely on Egyptian foundations... The permanent element in the local government, and most of the provincial capitals and boundaries, go back to Egyptian times.”<sup>177</sup>

299. This conclusion is supported by descriptions of the provincial borders in the Annual Reports from the Governors of Bahr el Ghazal and Kordofan Provinces. In the Annual Report for 1902, the Governor of Bahr el Ghazal defined the boundary in the following terms:

“Mudiria Boundaries.—I understand them to be, except for the ‘Enclave de Lado’ intrusion, as follows; on South and West the hills forming Watershed of Nile and Congo basins, it may be noted that this boundary is understood and accepted by the important Niam Niam tribes that it effects. On East the Bahr-El-Gebel, *on North Bahr-El-Ghazal and Bahr-el-Arab as far as Hofrat on Nahas* and from latter place a line drawn West to the Watershed already referred to, or its prolongation north.”<sup>178</sup>

As the reference to Hofrat en Nahas makes clear, the Bahr el Arab was the boundary between Bahr el Ghazal and Darfur as well between Bahr el Ghazal and Kordofan.

300. The report by the Governor of Kordofan Province for 1902 states that the boundary is the “same as last year”.<sup>179</sup>

301. Later reports likewise referred to the Bahr el Arab as the dividing line between Kordofan and Bahr el Ghazal. The 1903 Annual Kordofan Report describes the southern border as:

“Bahr-El-Arab and Bahr-El-Ghazal to Lake No.”<sup>180</sup>

The 1903 Annual Report for Bahr el Ghazal Province mentions no changes.

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<sup>177</sup> Hill, R., *Egypt in the Sudan 1820-1881* (OUP, London, 1959), p. 167 (SM Annex 39).

<sup>178</sup> Reports on the Finances, Administration, and Condition of the Sudan, Annual Report Bahr El Ghazal Province (1902), 230 (emphasis added) (SM Annex 21).

<sup>179</sup> Reports on the Finances, Administration, and Condition of the Sudan, Annual Report Kordofan Province (1902), p. 315 (SM Annex 21).

<sup>180</sup> Reports on the Finances, Administration, and Condition of the Sudan, Annual Report Kordofan Province (1903), p. 71 (SM Annex 22).

302. Similarly, no changes were recorded in 1904. The Annual Report for Bahr el Ghazal Province for that year simply states that there were “No alterations”.<sup>181</sup> The 1904 Annual Report for Kordofan states:

“Boundaries. – The boundaries of the Province have not altered. The Darfur Frontier has however been defined. It runs from Foga south westwards between Dam Gamad and Um Shanga, west of Zalata district to Hafir Ogr which is shared by inhabitants of both Kordofan and Darfur: thence it runs southwards, west of Dar Homr to the Bahr el Arab *which is the northern boundary of the Bahr-El-Ghazal Province*”.<sup>182</sup>

303. In other words, in 1904 the Bahr el Arab was the southern boundary of both Kordofan *and* Darfur, and – by the same token – the northern boundary of Bahr el Ghazal, which abutted both provinces.

304. Early Condominium maps depicting the administrative border are consistent with the descriptions in the Annual Reports. H.W. Mardon’s map of 1901, as reissued in 1903, is Map 5 in the Map Atlas: it is reproduced as **Figure 9** on page 112. It 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. Mardon’s map was used as the main reference map in the second edition of Gleichen’s *Handbook of the Sudan* (1905). Mardon’s map was also inserted as an end paper in the *Handbook*.

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<sup>181</sup> Reports on the Finances, Administration, and Condition of the Sudan, Annual Report Bahr El Ghazal Province (1904), p. 3 (SM Annex 23).

<sup>182</sup> Reports on the Finances, Administration, and Condition of the Sudan, Annual Report Kordofan Province (1904), p. 101 (emphasis added) (SM Annex 23).



305. A vivid impression of early boundary-making can be gained from the following January 1904 Sudan Intelligence Report, where Slatin Pasha, by now Inspector General of the Condominium serving directly under the Governor-General, Wingate, affirmed the boundary between Darfur and Kordofan. The Report may be quoted in full:

**“Darfur frontier:**

H.E. Sir R. Slatin Pasha arrived at Khartoum on return from the Kordofan-Darfur frontier on the 17<sup>th</sup> instant. At Nahud he was met by a nephew of the Sultan Ali Dinar, named Gabr Abdel Rahman. Slatin Pasha, after explaining how wrong Mansur had been in recently crossing the frontier and collecting tribute from people in Kordofan, informed him fully of the detail of this part of the frontier and communicated the same by letter to Ali Dinar.... [The letter *inter alia* stated] The question of frontier is what I want to explain in particular, and for a second time in this letter, although a full description of the boundary has already been communicated to you, I do this in order to ensure that no misunderstanding or errors should occur in the future... The following is a description of the boundary.

This line would extend from Foga to Dem Gamad, but will not embrace Kaga Serug, under Sheikh Mohammed Mufarrih, which belongs to Darfur, yet the section of this tribe living at Foga under Sheik Mohammed Nurein, which by origin belongs to Kaga El Um, belongs to Kordofan, and this fact is well known to you.

This line would continue from Dem Gamad to Kella El Zarnak, and will include Hillet Hemeir Sebil which belongs to us; the line will continue to Hillet El Zalata, which will end on the west and include Hillet El Girgid, and Hillet Um Zemil; and will extend to Hillet El Aghabeish and embrace Hillet Um Subana, Gad El Habub, Dumia, Abu Geleiha, and Hillet Sharafa, the last of which is inhabited by the Gawama of Kordofan. Helal Badri Walad El Safi, which lies in the vicinity of Hillet El Sharafa, would belong to Darfur. I think you quite understand that the water which the Aafir known as Ogr contains, is free for the use of both Darfur and Kordofan people, as it lies in the immediate frontier.

From Sharafa the line would extend to Hillet Abu Shetala, which is the last village on the border between the Hamar and Ma’alia, and *thence it will continue between Dar El Homr and Rizeigat, whilst Dar El Jange, which belongs to Kordofan, will fall on the left; then the line continues to Bahr El Rizeigat, known as Bahr El Arab*, and from there it will stretch west to Mulam El Habbania, north of Dango, and this forms the boundary between Darfur and Bahr El Ghazal. From El Mulam the line will continue to the border of west Ta’aisha Masalat, and stretch to the border of Dar Tama, and the old frontier between Darfur and Wadai along to the west of Zaghawa Guba and Dar El Bedaiat; from here the line would wind on the frontier of Badaiat north of Dar Zaghawa and Jebel

El Magdub (Meidub?) to Foga; this is the same line of frontier explained to you formerly, and which comprises the country of Darfur as governed by me in the former days, which form the country subject to your rule.”<sup>183</sup>

306. Slatin (who had been Governor of Darfur in the early 1880s) was clear that the boundary between Kordofan and Darfur extended down to the Bahr el Arab, as described in the 1904 Annual Report of Kordofan. He was also clear that the Bahr el Arab (or the Bahr el Rizeigat as it was known to the Rizeigat of Darfur) was the boundary between Darfur and Bahr el Ghazal to the south.<sup>184</sup>

307. The second edition of the *Handbook of the Sudan* (1905), a revision and amplification of the 1898 Handbook, contained a comprehensive description of the Sudan. In its general description of the Bahr El Ghazal Province, the 1905 *Handbook* mentions that:

“The Bahr El Ghazal province is bounded on the south and west by the Congo-Nile watershed, *on the north by the Bahr El Arab* and Bahr El Ghazal, and on the east by the Bahr El Jebel...”<sup>185</sup>

308. In addition Appendix G, which is entitled “Boundaries of Provinces (Defined)”, contained the border after the 1905 transfer: see paragraph 376 below.

(c) *British explorations in the period 1902-1907*

309. At the beginning of the Condominium, the *Handbook of the Sudan* (1905) acknowledged that the course of the western rivers was uncertain.<sup>186</sup> During the early

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<sup>183</sup> Sudan Intelligence Reports, No. 114, January 1904, 3; Appendix A, p.5 (emphasis added) (SM Annex 6).

<sup>184</sup> Compare Slatin’s description of the extent of Mahdist control over the Sudan after 1883: “On the west it [sc. dervish control] extended in a south-westerly direction through the southern Libyan desert, including Selima, the Dongola, Kordofan and Darfur Provinces, up to the Wadai frontier, and thence southwards across the Bahr el Arab through Dar Runga, and included Dar Fertit, the Bahr el Ghazal and a portion of Equatoria.”

Again, the province of Bahr el Ghazal lies “southwards across the Bahr el Arab”. See Slatin Pasha, R., *Fire and Sword in the Sudan* (London, 1899), p. 331 (SM Annex 46).

<sup>185</sup> Gleichen, *Handbook of the Sudan*, Vol. I (HMSO, London, 1905), 153 (emphasis added) (SM Annex 38).

<sup>186</sup> *Ibid.*, p. 16 (“not even roughly determined”) (SM Annex 38). In retrospect this seems exaggerated; but the uncertainty caused by Wilkinson’s error of 1902 was still in the course of being resolved: see Macdonald Report, paras. 3.10-3.11.

years, determining the precise course and navigability of the waterways became a high priority.

310. One of the first explorations of southern Sudan in this period occurred in 1900, when Bimbashi R.M. Saunders travelled up the Bahr el Ghazal to the Bahr el Arab.<sup>187</sup> Saunders found the Bahr el Arab impassable for river navigation, as the river was covered by impenetrable vegetation (known as sudd) less than 100m from its mouth. Proceeding on foot, he nonetheless surveyed the first 47½ miles (76 km) of the river.

311. In mid-1901, El Kaimakam H. Butler, while on inspection in the Nuba mountains, arranged the boundary between the South Kordofan and Nahud inspectorates as follows:

“East of Jebel Metan to belong to Southern Kordofan, and all east of a line drawn on the map I.D. 332, to the *Bahr el Arab* passing through the word Resegrat, to belong to South Kordofan.”<sup>188</sup>

312. In 1902 Mahon Pasha reported on his travels overland from El Obeid to Sultan Rob on the Bahr el Homr.<sup>189</sup> In that same year, Wilkinson Bey also crossed the Bahr el Arab. His travels will be recorded below.

313. In December 1904, Captain Percival, of the Arab mounted infantry, proceeded south via Keilak where he crossed what he thought was the Bahr el Arab 100 miles from its mouth.<sup>190</sup> He reported to have crossed another river, some 50 miles south, which he reported to be the “Kyr” [Kir].<sup>191</sup> The same year, Sub-Lieutenant R.N Bayldon was ordered to explore the Bahr el Arab.<sup>192</sup> In December 1904 he reached Wau and reported on the Jur river.<sup>193</sup> About a month later he met Sheikh Rihan Gorkwei, of the District of Tweit, which Gorkwei said was “between the Kir and Lol

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<sup>187</sup> Sudan Intelligence Report, No. 74 (September, 1900), Appendix A, p. 3 (SM Annex 1).

<sup>188</sup> Sudan Intelligence Report, No. 83 (June, 1901), Appendix A.2, p. 8 (emphasis added) (SM Annex 3).

<sup>189</sup> Sudan Intelligence Report, No. 92 (March, 1901), Appendix F, pp. 19-20 (SM Annex 4).

<sup>190</sup> Reports on the Finances, Administration, and Condition of the Sudan, Memorandum by Major General Sir R. Wingate, (1904), p. 8 (SM Annex 23).

<sup>191</sup> Ibid.

<sup>192</sup> Both journeys were mentioned by the Governor General, Sir Reginald Wingate, in his 1904 Memorandum: Reports on the Finances, Administration, and Condition of the Sudan, Memorandum by Major General Sir R. Wingate (1904), p. 8 (SM Annex 23).

<sup>193</sup> Sudan Intelligence Reports, No. 124 (November 1904), p. 4 (SM Annex 7).

Rivers”.<sup>194</sup> Finally, in February 1905 (i.e., before the 1905 transfer) he reported on the Bahr el Arab.<sup>195</sup>

(d) *Major E.B. Wilkinson’s journey*

314. For present purposes the most relevant journey was that of Captain E.B. Wilkinson, a British soldier and administrator – relevant because it figured so predominantly in the ABC Experts’ Report.<sup>196</sup> Indeed the principal strand of the ABC Experts’ argument opposing the Bahr el Arab as the southern boundary of Kordofan before 1905 rests on Wilkinson’s account.

315. Wilkinson’s 1902 journey from El Obeid to Sultan Rob’s is analysed by Macdonald in his Expert Report.<sup>197</sup> Wilkinson’s itinerary was recorded in Vol. II of the 1905 *Handbook of the Sudan*.<sup>198</sup> Starting from Keilak, Wilkinson travelled some 103 miles (166 km) before he reached what he thought was the Bahr el Arab. He recorded his distances meticulously, and it is still possible to trace many of the place names that he mentioned today: they are shown on **Figure 10** on the next page.<sup>199</sup>

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<sup>194</sup> Sudan Intelligence Report, No. 127 (February, 1905), 2 (SM Annex 8).

<sup>195</sup> Sudan Intelligence Report, No. 128 (February, 1905), 2 (SM Annex 9).

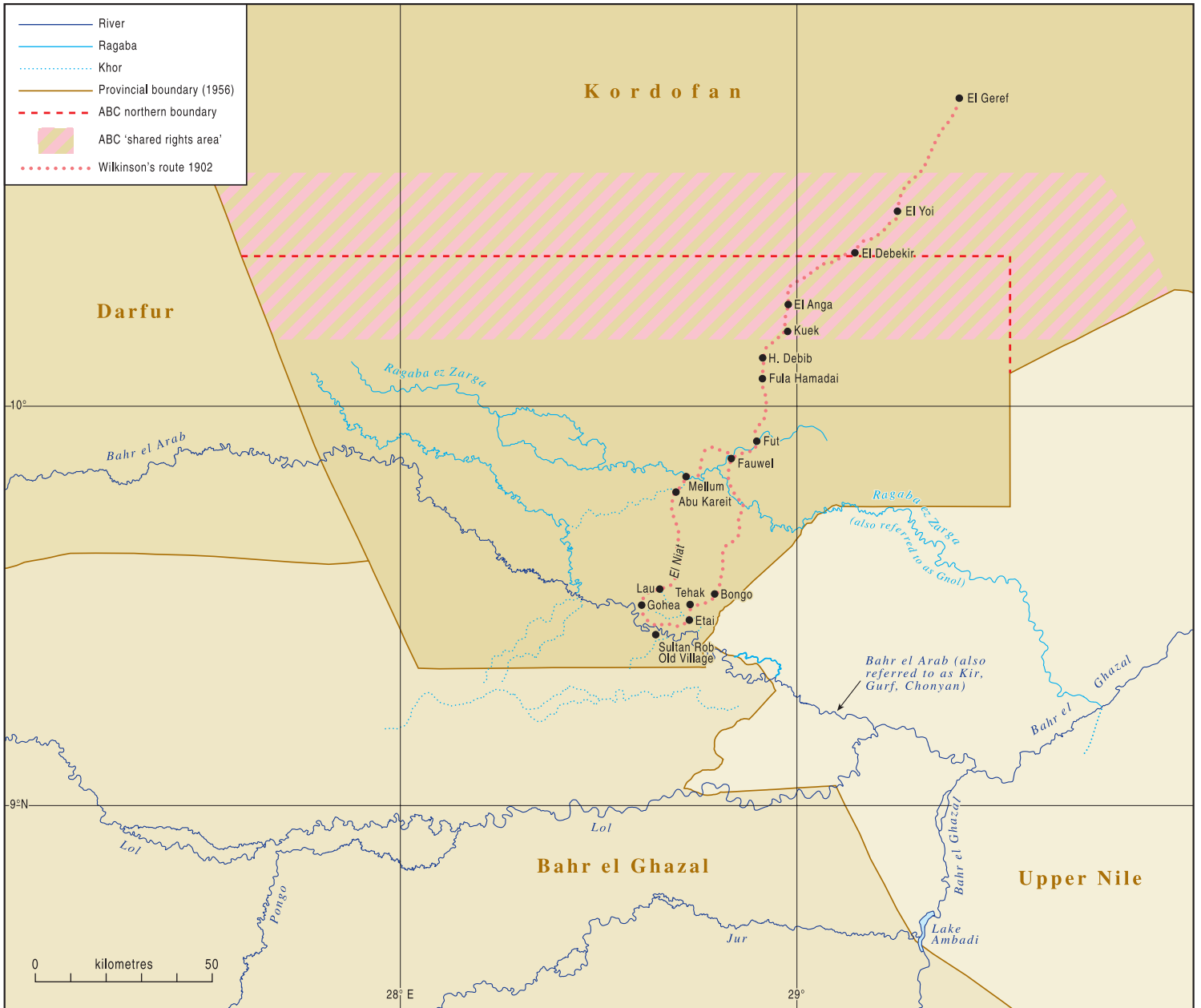
<sup>196</sup> Cf. ABC Experts’ Report (2005), p. 38 (SM Annex 81).

<sup>197</sup> A.S. Macdonald, *The Bahr el Arab and its Relationship with other Western Sources of the Nile*, paras. 3.7-3.9.

<sup>198</sup> Gleichen, *Handbook of the Sudan* (1905), vol. II, pp. 154-156 (SM Annex 38).

<sup>199</sup> See below, page 116. See also the detailed analysis in the Macdonald Report, paras. 3.8-3.9.

**Figure 10 Wilkinson's Itinerary (1902)**





316. Leaving Keilak, Wilkinson passed through a series of Homr (Arab) settlements, including a larger one at Fauwel. From there he travelled 13¾ miles (22 km) to what he thought was the Bahr el Arab, some 103½ miles (166 km) from Keilak. From the river he identified as the Bahr el Arab he went south, where after 5 miles (8 km) he reported having reached the country of the Dinka Chief Rueng. The first Dinka village of “Bombo” in the district of Bongo he reportedly found 14¾ miles (24 km) south from the “Bahr el Arab”. Then after some 22¼ miles (36 km) Wilkinson reported having met the first Dinka, near the Khor Etai, where Chief Lor was said to have his headquarters. From Etai, Wilkinson travelled another 5½ miles (9 km) before he reached the settlement of Sultan Rob on what he was told was the River Kir. This, according to Wilkinson, was in the Mareg District.<sup>200</sup>

317. Plotting Wilkinson’s travels on a modern map it becomes clear that Wilkinson mistook the Ragaba ez Zarga for the Bahr el Arab. Wilkinson’s observations created some confusion as to the position of the real Bahr el Arab and its relations to other rivers and seasonal watercourses. This confusion influenced the official map of the Sudan produced by the Intelligence Office in Khartoum in May 1904, which mistakenly pictured the Bahr el Arab too far north.<sup>201</sup>

318. As shown by Macdonald in his Expert Report, this mistake was short-lived.<sup>202</sup> In 1905, Lieutenant Comyn explored the area and found Wilkinson’s observations to be wrong. Comyn’s findings, and a map illustrating the actual course of the Bahr el Arab, were published in the *Geographical Journal* in 1907.<sup>203</sup> In his paper, he stated that the Bahr el Arab and the Homr rivers were in fact one and the same:

“...from the Bahr el Rizeigat to the Boru, I have found no stream to cross: all those, on another line I had traversed, flowing west. Hence I do not think that there can be any doubt remaining as to the water system of the western sources of the Nile.”<sup>204</sup>

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<sup>200</sup> Mareig is another name for the Ngok Dinka.

<sup>201</sup> See Macdonald Report, paras. 3.7-3.9, and Map Atlas, Map 7.

<sup>202</sup> Macdonald Report, paras. 3.20-3.28.

<sup>203</sup> Comyn, D, “The Western Sources of the Nile”, (1907) 30 *The Geographical Journal* 524 (SM Annex 50). Comyn’s map is reproduced in Map Atlas, Map 9. For a more detailed description, see Comyn, D. *Service & Sport in the Sudan* (Edinburgh, 1911), 224 ff (SM Annex 32).

<sup>204</sup> Comyn (1907), p. 530 (SM Annex 50).

319. Lieutenant Huntley-Walsh, who explored the Bahr el Arab upstream of Sultan Rob's in 1906, supported Comyn's observations.<sup>205</sup> Huntley-Walsh, reporting in the 1906 March issue of the Sudan Intelligence Report, clearly stated that Sultan Rob lived on the Bahr el Arab, i.e. the Kir. Under the heading "Bahr el Arab", he reported:

"On reaching Sultan Rob I asked him for a guide to take me up river."<sup>206</sup>

320. In 1908, the renowned civil engineer, Sir W.E. Garstin, explained the confusion to the Royal Geographical Society in the following terms:

"The so-called Bahr-el-Arab and el Homr, of the older maps, are not, as was formerly supposed, distinct rivers, rising in southern Kordofan. They are one and the same stream, of which the name differs in different localities, and which is the outfall of a net-work of swampy channels, coming from the south-west, which cross and recross one another in a bewildering labyrinth."<sup>207</sup>

321. Thus Wilkinson's mistaken identification of the Bahr el Arab in 1902 was known to be wrong by Condominium officials in 1905. The 1905 *Sudan Handbook*, for example, the same book that contains Wilkinson's erroneous description, makes specific reference to the "false Bahr el Arab", referring to Lieutenant R.N. Bayldon's travels in early 1905 (see above, paragraph 313). In other words, the very publication emphasised by the ABC Experts to illustrate the confusion surrounding the course of the Bahr el Arab, also contained the correction to the previous mistake.<sup>208</sup> Not only does the 1905 *Sudan Handbook* contain Bayldon's correction; it also contains two maps that correctly depict the course of the Bahr el Arab and show it as the border.<sup>209</sup> In addition, several travellers, such as Bayldon and Comyn had surveyed the river and noted Wilkinson's mistake even before the transfer of 1905. By 1907, moreover, a new map had been published showing with reasonable accuracy the actual course of

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<sup>205</sup> Sudan Intelligence Reports, No. 160 (November 1907), Appendix B, p. 5 (SM Annex 15).

<sup>206</sup> Sudan Intelligence Reports, No. 140, (March 1906), Appendix D, p. 14 (SM Annex 12).

<sup>207</sup> Garstin (1909), p. 142 (SM Annex 51).

<sup>208</sup> Gleichen, *Handbook of the Sudan* (London, 1905), Vol. I, p. 168 (SM Annex 38). The ABC Experts themselves referred to Bayldon as "the first [person who] correctly identified the Kir as the Bahr el Arab in his Survey of March 1905": ABC Experts' Report (2005), 38 (SM Annex 81).

<sup>209</sup> The red lines on the index map illustrate which provinces are covered by different chapters of the *Handbook*, e.g. Bahr el Ghazal is chapter VII and Kordofan and Darfur is Chapter VIII. See Map 8 in the Map Atlas.

the river, *viz.* the map of Northern Bahr el Ghazal (Sheet 65), which is Map 10 in the Map Atlas.

(e) *The situation at the end of the exploration period in 1907*

322. After a thorough examination, the Macdonald Report reaches the following conclusions on this point:

“4.3 It is apparent from the above that a true understanding of which river was the Bahr el Arab had been reached in published form in 1907 although men such as Comyn had determined this a year or two earlier. The depiction of the river on the 1:1 000 000 map of that year was a remarkably good approximation to its known alignment today, bearing in mind the technical limitations of position-fixing at that time. There still remained uncertainty about the actual detail of its course from Sultan Rob’s village up to 10° North. Even so, by then it was clear that the river which rose near Hofrat en Nahas, flowed down past Sultan Rob’s village and reached the Bahr el Ghazal where the latter river changed direction, was the Bahr el Arab.

4.4 From this point on, there was no confusion about depiction of the course of the Bahr el Arab. In successive editions of the 1:250 000 series maps, published by the Survey Department, the Bahr el Arab was gradually shown in greater detail, but always similar to the line shown on the 1907 map. It was also accepted, as Comyn had claimed, that the Bahr el Arab had several names, some of which began to appear on the Survey Department’s maps. The short section of river that in 1907 was annotated with a question mark (*viz.* ‘(?) From Kordofan’) had by 1914 become the ‘Bahr el Homr or GnoI’ and, by 1922, the ‘Ragaba ez Zarga or GnoI’. The latter was extended to the northwest as a separate waterway to the Bahr el Arab.”<sup>210</sup>

(f) *The ABC Experts’ reliance on Wilkinson*

323. As against this evidence there is the position taken by the ABC Experts, who concluded that it was:

“... apparent from this [referring *inter alia* to Wilkinson’s travel itinerary], and other, reports that administrative officials mistook the Ragaba ez-Zarga/Ngol for the Bahr el Arab, and treated it as the boundary between Kordofan and Bahr el-Ghazal. Bimbashi Percival’s 1904 visit from Wau (the capital of Bahr el-Ghazal Province) to Arop Biong on the Kir river repeats this mistake, describing the Kir as being 50 miles south of the Bahr el Arab.

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<sup>210</sup> Macdonald Report, paras. 4.3-4.4.

It was not until 1905-06 that surveys along the Bahr el-Ghazal, and into the mouths of the 'false Bahr el-Arab' and the Bahr el-Arab corrected this error. Lt. R.C. Bayldon, R.N. first correctly identified the Kir as the Bahr el-Arab in his survey of March 1905... He further identified the Ragaba ez-Zarga/Ngol as the "Bahr el-Homr", the place where the Humr brought their cattle in the dry season (it was to be labelled the Bahr el-Homr on official maps for some time thereafter). His findings were confirmed by surveys in 1906, where it was noted that the local name for the Bahr el-Arab was the Kir, and that the Ngok Dinka chiefs Arop Biong (Sultan Rob) and Alor Ajing (Sheik Lar) both lived along this river (Huntley Walsh)...

The Survey Department noted this change in 1906..., after the Ngok had been transferred to Kordofan, but did not record the name changes on their 1:125.000 maps until 1909... Local administrators in Kordofan continued to confuse the two waterways. It was not until 1908 that they consistently described the Ragaba ez Zarga/Ngol as the Bahr el Homr in their official reports.

...

The government's claim that only the Ngok Dinka territory south of the Bahr el-Arab was transferred to Kordofan in 1905 is therefore found to be mistaken. It is an understandable mistake, given the geographical confusion at the time, but it is based on an incomplete reading of the contemporary administrative record, the full context of which reveals that the Ragaba ez-Zarga/Ngol, rather than the river Kir, which is now known as the Bahr el-Arab, was treated as the province boundary, and that the Ngok people were regarded as part of the Bahr el-Ghazal Province until their transfer in 1905."<sup>211</sup>

324. Thus, in the view of the ABC Experts:

- (1) references in contemporary documents to the Bahr al Arab should be taken as references to the Ragaba ez Zarga;
- (2) correspondingly, the southern boundary of Kordofan before 1905 was the Ragaba ez Zarga;
- (3) this confusion was not cleared up until well after the transfer.

325. Before turning to the evidence on this point it should be repeated that, even if one were to credit this theory, the consequence should have been that it was the area south of the Ragaba ez Zarga which was defined as the northern boundary of the transferred area, rather than the unsubstantiated and implausible line actually adopted by the ABC Experts. The difference between the two can be seen from **Figure 11**,

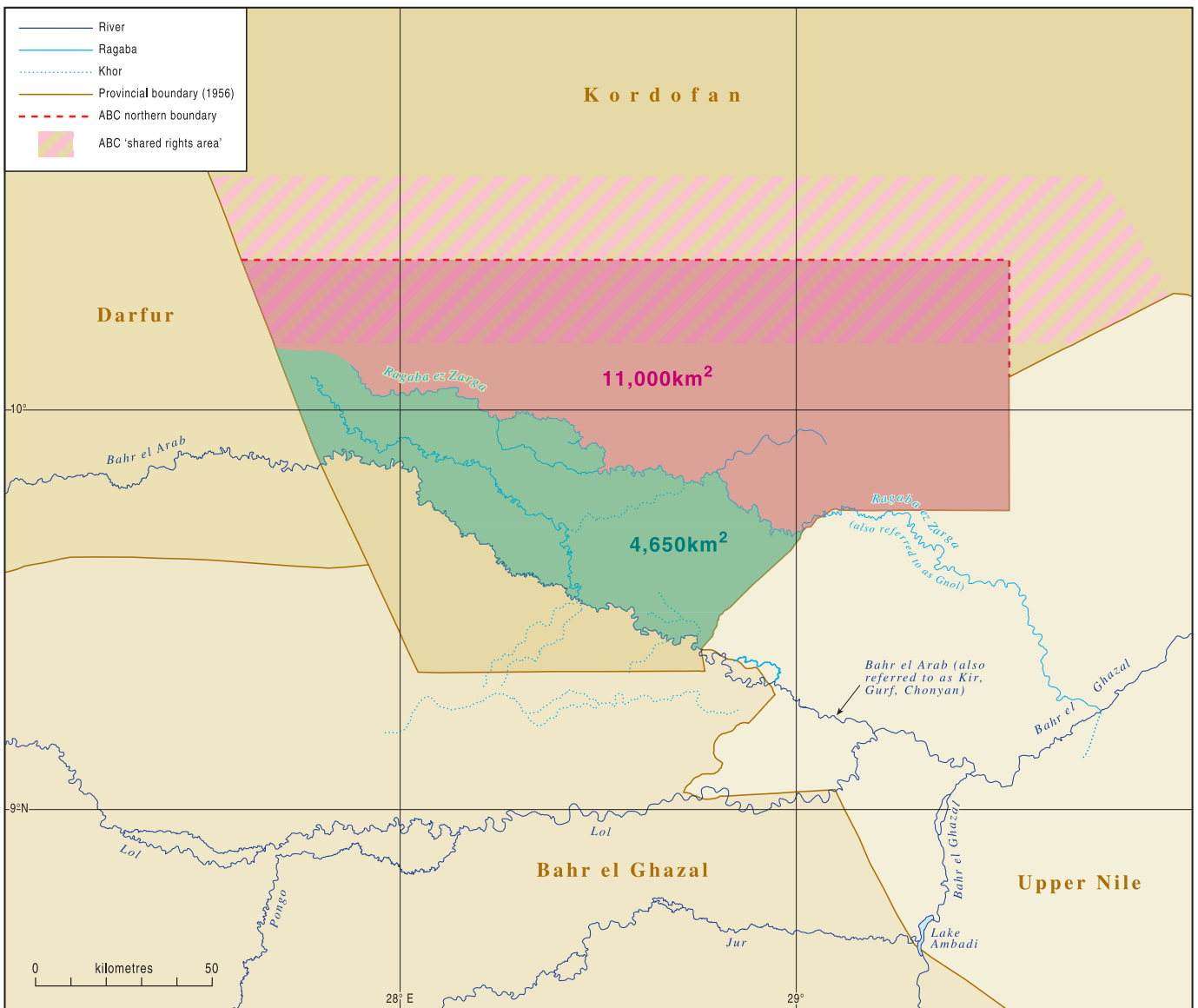
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<sup>211</sup> ABC Experts' Report, pp. 38-39 (SM Annex 81).

next page, which shows (a) the ABC Experts' line; (b) the line of the Ragaba ez Zarga, and (c) the Bahr el Arab. The area between the ABC Experts' line (at 10°22'30"N) and the Ragaba ez Zarga is approximately 11,000 square kilometres. The area between the Ragaba ez Zarga and the Bahr el Arab is approximately 4,650 square kilometres. Based on the assertion that the Ragaba ez Zarga "was" the Bahr el Arab, the ABC Experts included in the "Abyei Area" more than twice the area to the north of the Ragaba ez Zarga than there is to the south. The inclusion of that northern area cannot possibly be justified by reference to Wilkinson's mistake.

326. But there is a more serious problem with the ABC Experts' theory: it is contrary to all the evidence. The three propositions set out in paragraph 324 above will be examined in turn.

**Figure 11 Areas north of the Bahr el Arab**



327. The Ragaba ez Zarga was “really” the Bahr el Arab. The following points may be made:

- (a) It makes no sense to describe the Ragaba ez Zarga as “really” the Bahr el Arab, and apart from the short-lived confusion caused by Wilkinson’s mistake, no one thought of the Bahr el Arab as a ragaba. The Bahr el Arab was known as a long perennial river arising near Hofret el Nahas. It was not a seasonal creek.
- (b) Uncertainty as to the course of the Bahr el Arab in the vicinity of Fauwel did not involve any existential question. The “real” Bahr el Arab was temporarily shown on a 1904 War Office map (Map Atlas, Map 7) as looping 50 km to the north, then returning to its known outlet at Ghabat el Arab (9°05’N; 29°26’E) on the Bahr el Ghazal. That was all.<sup>212</sup> The Bahr el Arab remained the provincial boundary even in its incorrect depiction.
- (c) If there were uncertainties about the Bahr el Arab, these paled into insignificance compared with the lack of contemporary information about the existence of any waterways north of the Bahr el Arab. A waterway approximating to the line of the Ragaba ez Zarga appeared unnamed on the 1907 1:1 000 000 map (Sheet 65)<sup>213</sup> and again, this time named as the Bahr el Homr, on a map published by the Royal Geographical Society in 1910.<sup>214</sup> By 1914, Sheet 65-L showed a reasonably accurate alignment with the names Bahr el Homr, G nol and Ragaba.<sup>215</sup> The full name “Ragaba ez Zarga” first appeared on the 1922 edition of this map.<sup>216</sup> In other words, while the Bahr el Arab was well-known, the Ragaba ez Zarga was unknown (including to Wilkinson). This being so, the Ragaba ez Zarga could not possibly have had the significance in 1905 that the ABC Experts gave it.

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<sup>212</sup> See Macdonald Report, para. 3.9, and for subsequent clarifications, *ibid.*, paras. 3.13-3.28.

<sup>213</sup> Map Atlas, Map 10.

<sup>214</sup> See also Macdonald Report, para. 4.4.

<sup>215</sup> Map Atlas, Map 13.

<sup>216</sup> Map Atlas, Map 19.

328. The southern boundary of Kordofan before 1905 was the Ragaba ez Zarga. Still less does it make any sense to stipulate that the southern boundary of Kordofan before 1905 was the Ragaba ez Zarga. Again the following points can be made:

- (a) There is no map which has ever shown the Ragaba ez Zarga as the southern boundary of Kordofan.
- (b) There is no document, official or unofficial, which so describes it.
- (c) Although there were some uncertainties about the precise course of the Bahr el Arab in the period around 1905, a good deal was known about it: its source, its general alignment or signature, its approximate length, the location of its mouth, the identity of the Arab tribes who lived along most of its reach, its character as barrier between Arab and southern tribes, etc.<sup>217</sup> By contrast, little or nothing was known of the Ragaba ez Zarga, which is not even shown on most maps of the period,<sup>218</sup> or, if shown, is not shown with any precision and not as extending as far west as the boundary with Darfur.<sup>219</sup> How could an indeterminate seasonal creek, of uncertain length, not shown on most maps, have constituted the southern boundary of Kordofan up to the boundary with Darfur?
- (d) A decisive point is that both maps and narrative accounts are uniform in stating that there was a tripoint on the Bahr el Arab between Darfur, Kordofan and Bahr el Ghazal. This was stated, for example, by Slatin Pasha in 1904 (paragraph 305 above) and by MacMichael in 1910 (paragraph 368 below). The southern boundary of Darfur prior to 1916 was the Bahr el Arab and the *same* river was the southern boundary of Kordofan until 1905. No-one has ever suggested that the Ragaba ez Zarga was the southern boundary of Darfur.<sup>220</sup> Nor did anyone (until the ABC Experts, at least) suggest that Darfur ever had a boundary with Bahr el Ghazal *to the east*.

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<sup>217</sup> See Junker's account, above, paragraph 291.

<sup>218</sup> Comyn's sketch map of 1907 (Map Atlas, Map 9) shows a short unnamed stream that could be the Ragaba ez Zarga. It is obviously not the southern boundary of Kordofan. The 1907 Sudan Survey Office map (Map Atlas, Map 10) shows a longer unnamed river flowing south of Fauwel, labelled "(?) from Kordofan". It was evidently not thought of as the boundary of Kordofan.

<sup>219</sup> Indeed the majority view on modern maps is that it is no recognizable watercourse west of the Kordofan-Darfur boundary.

<sup>220</sup> Since the Ragaba ez Zarga stops, at most, a few kilometres into Darfur, it could not constitute a boundary between Darfur and anywhere else.

- (e) Indeed, the Darfur/Kordofan/Bahr el Ghazal tripoint on the Bahr el Arab remained in play even after the transfer of 1905, since (as will be seen) it marked the western limit of the transferred area. The provincial tripoint remained on the Bahr el Arab until the Darfur boundary was moved south to its current location in 1924. The position before that change can be seen, for example, from the 1921 War Office map of the Anglo-Egyptian Sudan, which is Map 17 in the Map Atlas: here the provincial tripoint is located on the Bahr el Arab. The position after the change can be seen on the 1929 edition of Sheet 65-K of the 1:250 000 series which is Map 22 in the Map Atlas: now the tripoint has moved to the south-southeast some 27 km. This corresponds to the boundary zone south of the Bahr el Arab acknowledged as being inhabited by the Rizeigat in the Munroe-Wheatley Agreement of 1924.<sup>221</sup> To suggest that all the time the “real” provincial tripoint was on the Ragaba ez Zarga some 80 km further north is unhistorical and counter-factual. It is not supported by any evidence whatsoever.

329. The confusion between Ragaba ez Zarga and Bahr el Arab lasted until well after the transfer of 1905. According to the ABC Experts, “geographical uncertainty for the Bahr el-Arab continued until the end of the World War One”.<sup>222</sup> Insofar as this remark was supposed to be relevant to the exercise of the Experts’ mandate, it verges on the absurd. Reference need only be made to the following maps in the Map Atlas: Map 9 (Comyn, 1907, but based on field work of 1905), Map 10 (Sudan Survey Office, 1907), Map 11 (Lloyd, 1910), Map 12 (Sudan Survey Office, 1910), not to mention later maps. As the Macdonald Report concludes, “a true understanding of which river was the Bahr el Arab had been reached in published form in 1907 although men such as Comyn had determined this a year or two earlier”.<sup>223</sup> Wilkinson’s confusion of 1902 never became a *communis error* – it neither changed the southern boundary of Kordofan, nor involved any form of redefinition of the boundary. The real boundary change of 1905 proceeded by reference to the Bahr el Arab, as will be seen.

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<sup>221</sup> Agreement of 22 April 1924, Civsec 66/4/35 Vol. I, p. 17 (SM Annex 88).

<sup>222</sup> ABC Experts’ Report, p. 38 (SM Annex 81).

<sup>223</sup> Macdonald Report, para. 4.3: the full passage is cited in paragraph 322 above.



330. To conclude, the ABC Expert's theory is entirely novel, lacking in support from any contemporary map or document and inconsistent with the actual history of the boundary (notably the Darfur-Kordofan-Bahr el Ghazal tripoint). The theory does not even justify the ABC Experts' own result: *on their own view*, the area to the north of the Ragaba ez Zarga was within Kordofan prior to 1905 and could not therefore have been transferred to Kordofan in that year (see **Figure 11** at page 124 above). The ABC Experts' theory is an imaginative figment – and an inconsequential one as well.

**(iii) Conclusion: the southern boundary of Kordofan prior to 1905**

331. For these reasons, the Tribunal should draw the following conclusions:

- (a) the southern boundary of Kordofan prior to 1905 was the Bahr el Arab, not the Ragaba ez Zarga;
- (b) despite some uncertainty as to the precise course of the Bahr el Arab (in any event resolved by 1907), the identity of the river which constituted the southern boundary of Kordofan and Darfur was never in doubt;
- (c) correspondingly, the area transferred from Bahr el Ghazal to Kordofan in 1905 lay south of the Bahr el Arab.

**C. The Transfer of the Ngok Dinka to Kordofan in 1905**

**(i) Location of the Ngok Dinka prior to 1905**

332. Prior to 1905, the Western Dinkas (including the Ngok Dinka) were located to the south of the Bahr el Arab. Before setting out the evidence for this proposition, something should be said about the Dinka as a group.

333. The Dinka are a large group of tribes sharing common characteristics, among others, their Nilotic origin. As a group they are widely dispersed in southern Sudan. Traditionally the majority of Dinka lived near the White Nile up to about 12°N, around the mouth of the Bahr el Ghazal, along the right bank of that river and on the

banks of the lower Sobat.<sup>224</sup> Some groups, however, gradually migrated westwards along the Bahr el Ghazal and Bahr el Arab.

334. This migration has been described by K.D.D. Henderson:

“It was probably well into the 18th century therefore before the Nuer began to drive the Twij [Dinkas] west from Wonkai and push up the lower Gnol and harass the Ngork [Ngok], who were living with the Rueng south of Lake Abyad. Under Kwai Dit of the Abyor section the Ngork moved west along the Gnol [Bahr el Arab], driving the Shatt before them, and settled from Tebusayya to Hugnet Abu Urf. This was one generation before the Baggara came south to Turda. Deing of Torjok was then their leading man, and his headquarters were at Debbat El Mushbak, a prominent mound near Hasoba. Kwai 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, when the Rueng Ajubba were dislodged from Lake Abyad by internal feuds or Hawazma raids, Biong son of Alor, handed over to them the rather unsatisfactory bit of country at Kerreita and moved further west to the site now called Sultan Rob after his son.”<sup>225</sup>

335. The Dinka living near the border between Kordofan and Bahr el Ghazal are referred to as the western Dinka. These have been described by J.M. Stubbs & C.G.T. Morison:

“The Western Dinkas, who now number some 140,000 persons, living along the Lol, the Chel, the Pongo and the Bahr el Arab, are a branch of the Raik who in turn originate from the Agar Dinkas. They probably began to push westwards from the river Jur some 300 years ago, being forced to expand by an increasing population.”<sup>226</sup>

336. The Ngok Dinkas are a subsection of the Western Dinkas. While the term “Ngok” (or “Ngork”) was used in the early nineteenth century, it rarely appears in the official publications of the time. Neither the 1898 nor the 1905 *Handbooks of the Sudan*, for example, uses the term “Ngok”. Despite this, there is considerable

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<sup>224</sup> Cf. Titherington, G.W., “The Raik Dinka of Bahr el Ghazal Province”, (1927) 10 *Sudan Notes and Records* 158-209 (SM Annex 59).

<sup>225</sup> Henderson, K.D.D., “A Note on the Migration of the Messiria Tribe into South West Kordofan”, (1939) 22 *Sudan Notes and Records* 58 (SM Annex 52).

<sup>226</sup> Stubbs, J.M & Morison, C.G.T., “The Western Dinkas, Their Land and their Agriculture”, (1938) 21 *Sudan Notes and Records* 251, p. 251 (SM Annex 60).

information about the Ngok Dinkas and their interaction with the Condominium authorities.

337. The Ngok inhabited a relatively small group of Dinka villages. They were unusual for the Dinka in having a centralised leadership. The following note provides a useful survey:

**“Notes on the western Kordofan Dinkas, by Mr. C.A. Willis, Inspector:**

The Western Kordofan Dinkas seems to be divided into three main heads: on the east the Ruweng, under the Sultan Qut; in the middle the followers of the late Sultan Lar, under his son Kanoni; and to the west the followers of the late Sultan Rob, under his son Kwal. As far as I can gather, Hageir are independent of these Dinkas now, whatever they may have been during the lifetime of Sultan Rob.

Of the Ruweng I gathered practically no information, because they keep to themselves and live apart from the Dinkas I meet.

I gathered that the Lar and Rob followers mingle freely. The folk are so independent that whilst they may acknowledge the headship of So-and-so to the extent of paying a very light tribute, they do not let that interfere with their own affairs.

The various sub-tribes, as far as I can ascertain, are:

Lar:-

Muran  
Achak  
Minweir  
Mareng  
Anyang...

Rob:-

Abier (Kwal's family)  
Anyanga...  
El Dil  
Torgok  
Bongo

The names on the map are somewhat misleading, as they may refer to where a certain section of the tribe happened to be when the sketcher passed, or they may actually refer to a real name of a place. Also there are sometimes alternate Dinka and Arab names. [fn. Dinka villages in Bahr El Ghazal, and probably here also, are usually known by the name of their Sheikh, and when he dies the name of the village changes to that of his successor.]<sup>227</sup>

Willis lists ten “sub-tribes” or sections, of which one since disappeared – hence the “nine Ngok Dinka Chiefdoms”.<sup>228</sup>

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<sup>227</sup> Sudan Intelligence Reports, No.178, May 1909, Appendix C, 16-18 (footnote in original) (SM Annex 19).

<sup>228</sup> Nine units were listed by Howell in 1950: Howell, P.P., “Notes on the Ngork Dinka of Western Kordofan”, (1950) 32 *Sudan Notes and Records* 239, p. 254 (SM Annex 36).

338. As noted by Willis, the Ngok Dinka paramount chiefs came from the Abier (or Abyor) section. From father to son the lineage is said to be: Bulabek, Dongbek, Kwoldit, Monydhang, Allor, Biong, Arob, Kwol, Deng Majok.<sup>229</sup> The two paramount chiefs primarily relevant to the present case are Arob (also referred to as Rob) and his son Kwol who succeeded him in 1906, was deposed in 1942 and died in 1945. Sultan Rob was buried at a location referred to on later maps as “Sultan Rob’s old village”, where he had been visited by Wilkinson in 1902.<sup>230</sup> His grave, which was visited by the ABC,<sup>231</sup> is still venerated. Using satellite navigation, the Commission located the grave at 9°26’N, 28°38’E, 2.5 km south of the Bahr el Arab.<sup>232</sup>

339. At the time the Ngok Dinka were a relatively small group. There are no statistics for 1905, but later figures enable some estimates to be made. Michael Tibbs was the last assistant district commissioner of Dar Messeriya, the southern half of the Western Kordofan District, before independence. At that time, the sub-district of Dar Messeriya included the area transferred in 1905 and the town of Abyei itself. The district is shown on the hand-drawn map which is included in the Tibbs’ account of their life in the Sudan: see **Figure 12**, at page 131.<sup>233</sup> In the early 1950s, the population of Dar Messeriya was some 130,000, of which the Dinka represented 30,000. According to a note by Sir Douglas Newbold, Governor of Kordofan, in 1934 there were some 15,000 Ngok.<sup>234</sup> This is consistent with a report of the same period on the Ngok Dinka Administration which estimates the adult male population at 3,500.<sup>235</sup> Thirty years before then, they might have numbered less than 5,000 in total.<sup>236</sup>

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<sup>229</sup> Deng, F.M., *The Man Called Deng Majok* (Yale University Press, London, 1986) p. 45 (SM Annex 36).

<sup>230</sup> See paragraph 314-317 above.

<sup>231</sup> See ABC Experts’ Report, Appendix 3, GoS and SPLM/A Presentations, p. 27 (SM Annex 81).

<sup>232</sup> Plotting the coordinates on Google Earth produces a distance of 500 metres.

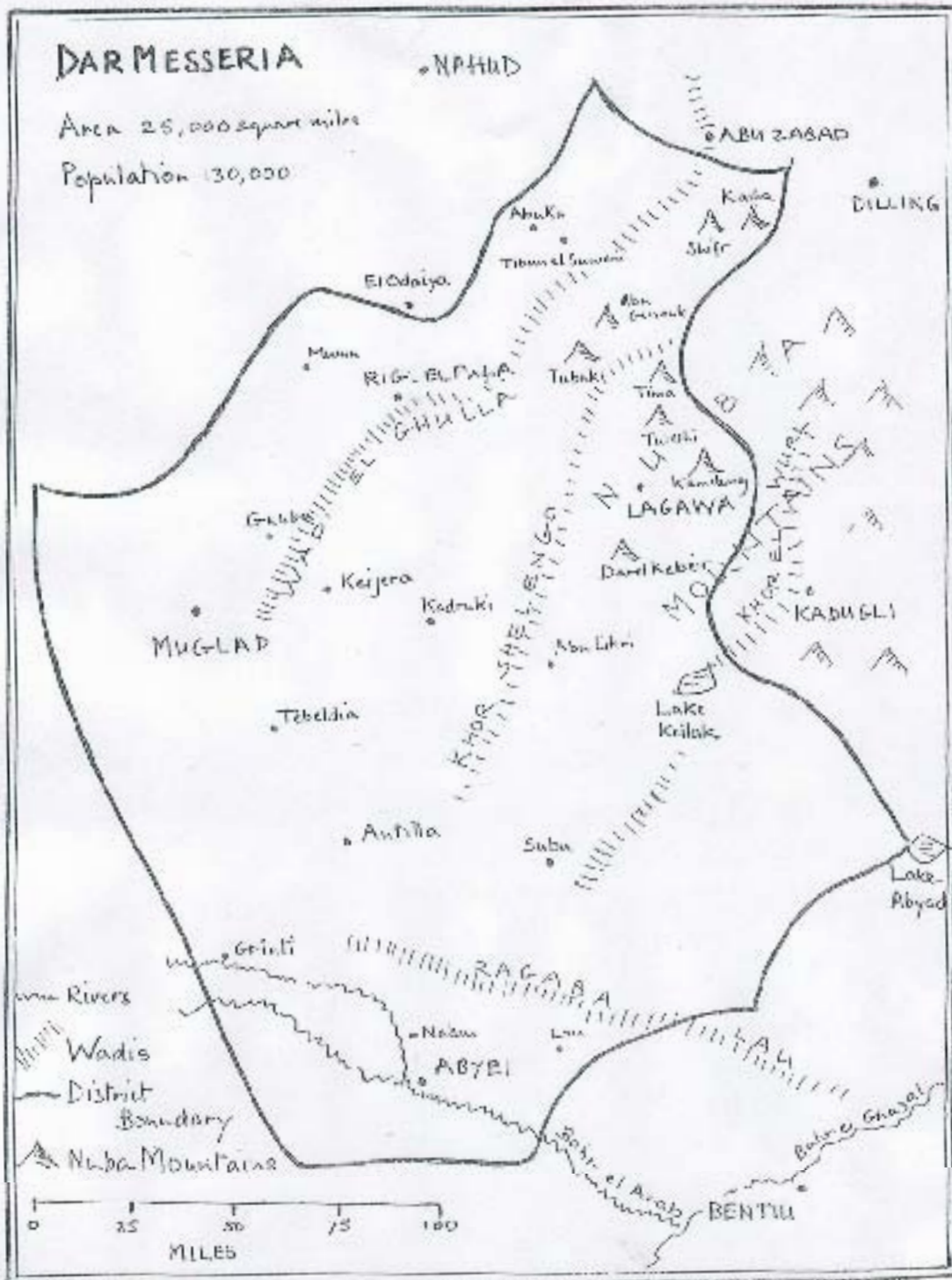
<sup>233</sup> Tibbs, M. & Tibbs, A., *A Sudan Sunset* (privately published, Welkin, 1999) p. 50 (SM Annex 47); for population figures see *ibid.*, p. 55. To this map has been added the ABC’s “boundary” and “shared rights area”.

<sup>234</sup> Letter from the Governor of Kordofan to the Civil Secretary, 8 May 1934, Civsec 1/36/97 (SM Annex 89).

<sup>235</sup> Kordofan Province, Civsec 1/1/7, p. 27 (SM Annex 87)

<sup>236</sup> Many tribes in the area near the Bahr el Arab suffered considerably at the hands of the slave dealers. Cf. Peel, S., *The Binding of the Nile and the New Sudan* (London, 1904), p. 194 (SM Annex 44). With particular reference to the Bongo, a Ngok sub-tribe, see *The Anglo-Egyptian Sudan Handbook Series – The Bahr el Ghazal Province*, (HMSO, London, 1911), p. 29 (SM Annex 26).

Figure 12 Dar Messeria, from Tibbs (1999)



Sketch map of the District.

340. F.M. Deng suggests that it was Kwol who in 1905 was the first Dinka to make contact with the newly established Anglo-Egyptian regime.<sup>237</sup> He continues:

“He pledged his allegiance and sought protection against the continuing Arab raids. After being scrutinized to ensure that he was indeed the chief he claimed to be, Kwol was recognized as the leader not only of the Ngok, but of several neighbouring Dinka tribes to the south, including the Ruweng and Twich...”<sup>238</sup>

This is mistaken. Already in 1902, Pasha Mahon reported that he was on his way to Sultan Rob’s country, where he “was very well received” by Sultan Rob, Kwol’s father.<sup>239</sup> Not only was Mahon well received; he invested Sultan Rob with a Second Class Robe of Honour. The first contact between Condominium officials and the Ngok Dinka occurred well before 1905.

341. Having established who the Ngok Dinka are and where they came from, we may now consider where they lived prior to 1905.

342. In 1883 Lupton Bey wrote of the Bahr el Ghazal in the following terms:

“The principal tribes inhabiting this immense region, are the Bongo, Denka (or Dinka), Golo, Sehre, and Jur. The country of the Bongo lies between latitudes 6° and 8° on the south-western depression of the Ghazal basin.”<sup>240</sup>

Speaking about the Dinka, he continued:

“The Denka territory extends over an area of about 60,000 square miles; Schweinfurth stayed in this country for two years, and gives in his book, ‘The Heart of Africa,’ an excellent account of the different tribes inhabiting the Ghazal region”.<sup>241</sup>

Lupton mentioned a third tribe, the Jur, the country of which was said to lie between the Bongo and the Dinka.<sup>242</sup>

343. On the Bahr el Arab, Wills stated that:

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<sup>237</sup> Deng, F.M. (1986), p. 47 (SM Annex 36).

<sup>238</sup> Ibid., p 48.

<sup>239</sup> Sudan Intelligence Reports, No. 92 (March 1902), Appendix F, p. 20 (SM Annex 4).

<sup>240</sup> Lupton (1884), p. 246 (SM Annex 57).

<sup>241</sup> Ibid.

<sup>242</sup> Ibid.

“It is no doubt obstructed by sudd and reeds below, but except for this ought to be navigable for eight months; its course is only too flat. This triangular flat would be suitable for growing rice, but at present is worthless, and is thinly inhabited by Dinka negroes with their thin, but highly venerated cows.”<sup>243</sup>

344. The 1884 version of *Stanford's Compendium of Geography and Travel* contains a detailed description of the location of the Dinkas. In a section on the White Nile and its Tributaries, it states as follows:

“On the southern limits of the Nuehr district we come upon the Dinka Negroes, whose domain occupies the whole of the low-lying tract stretching round the Nuehr from the Bahr-el-Arab, across the Ghazal and Jebel, to the lower Sobat.

...

A great many of these seribas, mostly belonging to Nubian traders, have in recent years been established in the region of the upper Ghazal, which has on this account come to be known as the ‘Seriba country’ – a convenient name for the whole territory between the Bahr-el-Jebel and Bahr-el-Arab, watered by the Rohl [Naam], Dyur, Dembo, and many other parallel tributaries of the Ghazal.”<sup>244</sup>

345. *Stanford's Compendium* contains an index of tribes in Africa and their location. In regard to the Dinkas, it states:

“Right bank of White Nile, S. of and akin to the Nuehr.”<sup>245</sup>

By contrast in relation to the Baggara, it states:

“On the Bahr-el-Arab.”<sup>246</sup>

346. In the section on the Bahr el Ghazal Province, the 1898 *Handbook* describes the area inhabited by the Dinkas at that time. It states:

“That portion of the province to the north-east inhabited by the Dinka tribe, and included in the angle between the Bahr el Arab and Rohl

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<sup>243</sup> Wills, J.T., (1887), p. 294 (SM Annex 61).

<sup>244</sup> Johnston, K., *Stanford's Compendium of Geography and Travel* (4<sup>th</sup> edn, London, 1884), p. 230 (SM Annex 40).

<sup>245</sup> *Ibid.*, p. 550.

<sup>246</sup> *Ibid.*, p. 547.

Rivers [tributaries of the Bahr el Ghazal], is a vast alluvial flat, rising but slightly above the Bahr el Ghazal River, of which it is the basin.”<sup>247</sup>

It goes on to say:

“The Dinka (or Jangeh) country in the Bahr el Ghazal includes nearly the whole of the low ground extending from the Jur and Bongo countries as far as the Bahr el Ghazal and Bahr el Arab.”<sup>248</sup>

In regard to other tribes near the Bahr el Arab, the 1898 Handbook, making particular reference to one Ngok Dinka tribe (the Bongo), states:

“The territory of the Krej lies to the west of the Bongo Country and Golo lands. It is bounded on the north by the Baggara Arabs, on the west by the Mango and Benda tribes, who have their districts on the Upper Bahr el Arab; on the south the territory approaches the Niam-Niam country...”<sup>249</sup>

347. It can be seen that, even before the establishment of the Anglo-Egyptian Condominium, there was a considerable knowledge regarding the position of the western Dinkas. Schweinfurth was among the first westerners to encounter the Dinkas near the Bahr el Arab. More information was collected after the establishment of the Condominium. As noted, one of the first reported encounters by Condominium officials with the Ngok Dinkas occurred in 1902, when Mahon Pasha reported travelling from El Obeid to Sultan Rob’s. According to Mahon, Sultan Rob’s country was situated on the Bahr el Homr, “about two days from Lake Ambady”.<sup>250</sup>

348. In 1903 Mahon again reported on Sultan Rob’s country. Starting from Muglad, Mahon travelled to Fauwel and Um Semima to collect tribute from the Homrs.<sup>251</sup> After collecting taxes in Um Semima, Mahon travelled west to Sultan Rob’s. From here, he “went south to the Riverain country, and north-west to Tosh and the Rizegat country”.<sup>252</sup> Mahon stated that:

“The two chiefs, Lor and Rob, who I made make friends last year after 30 years’ war were on the best of terms, and one and all Dinkas said how pleased they were that the Government had come, because they

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<sup>247</sup> Gleichen, *Handbook of the Sudan* (1898), p. 112 (SM Annex 37).

<sup>248</sup> *Ibid.*, 119.

<sup>249</sup> *Ibid.*, pp. 125-126 (SM Annex 37).

<sup>250</sup> Sudan Intelligence Reports, No. 92 (March 1902), Appendix F, 19 (SM Annex 4). Lake Ambadi is about 20 miles south of the Bahr el Arab at 29°20’E.

<sup>251</sup> Sudan Intelligence Reports, No. 104 (March 1903), Appendix E, 19 (SM Annex 5).

<sup>252</sup> *Ibid.*, p. 19.



had not been raided by 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>253</sup>

After having visited Sultan Rob, Mahon reportedly returned to the “Bahr el Homr”, where he arrested an Arab sheikh.

349. One of the next descriptions of the Ngok position appears in the May issue of the 1905 Intelligence Report by Bimbashi Percival. Percival reported as follows:

“(a) Sultan Rob appears to exercise a certain amount of authority over a large area of country extending from Shilluk’s boundary in 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 al Ghazal on the south.* He extracts tribute from most of the bigger sheikhs (both Dinka and Nuer tribes), many of whom visit him twice a year, every six months...”<sup>254</sup>

This puts Sultan Rob’s country squarely south of the Bahr el Arab and in the province of Bahr el Ghazal (like all the other tribes and places mentioned).

350. Percival’s description corresponds with the information that was available before the establishment of the Anglo-Egyptian Condominium.<sup>255</sup> Both before and after the establishment of the Condominium the Shilluks were reported to live east of the Dinkas. Likewise the position of the Baggara Arabs corresponded with earlier descriptions and with contemporary maps. It had always been stated that the Baggaras lived north of the Dinkas, on the Bahr el Arab.

351. In regard to the tribes of the Bahr el Ghazal Province, the 1905 *Handbook of the Sudan* stated that:

“The Dinkas occupy the lowlands in the north of the province, their southern limit being the edge of the tableland, where good grazing and pasture land terminates.”<sup>256</sup>

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<sup>253</sup> Ibid.

<sup>254</sup> Sudan Intelligence Reports, No. 130 (May 1905), Appendix A, p. 4 (emphasis added) (SM Annex 10).

<sup>255</sup> See above, paragraph 341-349.

<sup>256</sup> Gleichen, *Handbook of the Sudan* (1905) vol. I, p. 159 (SM Annex 38).

No Dinkas are mentioned as living in the Province of Kordofan, *i.e.* to the north of the Bahr el Arab.

352. Lieutenant Comyn received information on the Dinkas while exploring the Bahr el Arab in 1905. He subsequently wrote:

“Standing on the summit of Jebel Migi... I was shown a hill, about 100 miles away, near which the Bahr el Arab rises... From the point the sandy bed disappears..., and the river, taking the names of the various tribes who graze their flocks on its ‘butas’ when sufficiently dry, becomes what I found it to be about 150 miles in a straight line from Hofra en Nahas. A long and waterless march has brought me to this point, Sheikh Shenoa’s ‘village’...

I had not been many minutes there before I was surrounded by a number of Rizeigat sheikhs and Arab merchants. They all told me, as did men of my escort who knew the country, that the river was known at various points by the name of the tribe which grazed its flocks on its banks – all Arabs – till finally it entered the Dinka country, and changed its name from Bahr el Homr to Kir.”<sup>257</sup>

353. Between June 1904 and February 1906, Captain W. Lloyd made four journeys in the area near Sultan Rob: he refers to the River Kir (*i.e.*, the Bahr el Arab) as “being occupied by the Dinkas under Sultan Rob”.<sup>258</sup>

354. Thus there was no particular uncertainty as to where the Dinkas lived in this period. Travellers had regularly visited and reported on the area since the 1870s. Most importantly, all the descriptions refer to the Baggara Arabs living on the Bahr el Arab, and state that they were the northern neighbours of the Dinkas. There is no suggestion, either in the literature or the cartography of the period that the Dinkas lived well to the *north* of the Bahr el Arab; in particular there is no suggestion that they lived to the north of 10°N.

355. This is to be contrasted with the available evidence about the Baggara, the cattle-breeding Arabs of Kordofan (also referred to as the Homr or the Messeriya): in Darfur their counterparts are the Rizeigat. The map and other evidence – summarised

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<sup>257</sup> Comyn (1907), p. 529 (SM Annex 50).

<sup>258</sup> Lloyd, W., “Some Notes on Dar Homr”, (1907) 29 *The Geographical Journal* pp. 649-654 (SM Annex 54).

below – shows that they regularly used, on a seasonal basis, the whole area from around the Bahr el Arab northwards, including areas well to the south of the ABC Experts’ so-called “shared rights area”.

**(ii) The transfer of 1905 and its aftermath**

356. In the 1905 Memorandum of the Governor General, Sir Reginald Wingate states:

“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.

Kordofan, for instance, covers an area of some 167,000 square miles and is at present administered by some half a dozen British officers and Officials...

In spite, however, of the difficulties to which I have referred, it has been possible during the past year to make some important alterations in the provincial boundaries, which have tended to a general improvement in administration, and a few further changes will also take place from the beginning of the new year.”<sup>259</sup>

357. In relation to Kordofan and Bahr el Ghazal, the necessity of closer supervision was made pressing as a result of raiding by the Misseriya Arabs across the Bahr el Arab. As the Misseriya were under the Province of Kordofan and the Ngok and Twic Dinkas, who were the subject of these raids, were under Bahr el Ghazal, it was decided in early 1905 to transfer the latter groups to Kordofan.

358. According to the February 1905 Intelligence Report:

“Sheikh Riham Gorwei, of the district of Tweit or Toj, which he says is situated between the Kir [Bahr Al Arab] 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 for Government.

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<sup>259</sup> Reports on the Finances, Administration, and Condition of the Sudan, Memorandum by Governor General (1905), p. 23 (SM Annex 24). On the change of provincial and district boundaries, see generally Daly, M.W., (2003), pp. 72-73 (SM Annex 34).

Sheikh Rihan, after a journey of 23 days to Taufika, came to Kodok [Fashoda] 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>260</sup>

359. Apparently investigations were carried out, and a decision was promptly made to transfer both the Ngok and the Twic to Kordofan. The March 1905 Sudan Intelligence Report stated as the reason for the transfer:

“It has been decided that Sultan Rob (Arob), whose country is on Kir river, and Sheik Rihan of Toj (Twic), 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>261</sup>

It will be recalled that it was precisely this passage which led to the formulation of the ABC’s mandate and that of this Tribunal: see paragraph 51 above. Further, there has never been any confusion between the Kir and any other river: all sources (including Wilkinson) report the Ngok under Sultan Rob as living at this time along the Kir, i.e., along the Bahr el Arab. Sultan Rob was their Paramount Chief: his village was to the south of the river, in Bahr el Ghazal: see paragraph 338 above. In the wet season he went south to the River Lol, not north.

360. This situation was accurately reflected in the 1905 Memorandum of the Governor-General, Sir Reginald Wingate:

“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>262</sup>

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<sup>260</sup> Sudan Intelligence Reports, No. 127 (February 1905), p. 2 (SM Annex 8).

<sup>261</sup> Sudan Intelligence Reports, No. 128 (March 1905), p. 3 (SM Annex 9).

<sup>262</sup> Reports on the Finances, Administration, and Condition of the Sudan, Memorandum by Major General Sir R. Wingate (1905), p. 24 (emphasis added) (SM Annex 24).

361. The Annual Reports of the Kordofan and Bahr el Ghazal Provinces likewise recorded the 1905 transfer. Thus the Annual Report of Bahr el Ghazal Province, stated as follows:

“Province Boundaries.- In the north the territories of Sultan Rob and Sheikh Gokwei have been taken from this province and added to Kordofan.”<sup>263</sup>

362. Correspondingly, the 1905 Annual Report of Kordofan Province, stated:

“Province Boundaries.- ...The Dinka Sheikhs, Sultan Rob and Sultan Rihan Gorkwei are now included in Kordofan instead of the Bahr El Ghazal.”<sup>264</sup>

363. Thus in 1905 the territories of the two Dinka groups, the Ngok under Sheik Arob and the Twic under Rihan Gorkwei, both situated to the south of the Bahr al Arab, were transferred administratively to Kordofan. The transfer was clearly recorded, by the Governor General as well as the Governors of Kordofan and Bahr el Ghazal Provinces.

364. The transfer to Kordofan did not immediately stop the raiding, but it did enable control measures to be taken. A report of February 1906 stated:

“Small raids by Homr Arabs on Dinkas in Southern Kordofan are reported. This raiding is a matter of constant occurrence, but the Governor of Kordofan hopes to be able to deal with the Homr Arabs as soon as the rains begin, and they are forced to come north.”<sup>265</sup>

365. Retribution was not long in coming. In the following month it is recorded:

“...The Homr Arabs, who were reported in the February Intelligence Report as having raided Dinkas in Southern Kordofan, have been captured and punished...”<sup>266</sup>

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<sup>263</sup> Reports on the Finances, Administration, and Condition of the Sudan, Annual Report, Bahr el Ghazal Province, (1905), p. 3 (SM Annex 24).

<sup>264</sup> Reports on the Finances, Administration, and Condition of the Sudan, Annual Report, Kordofan Province (1905), p. 113 (SM Annex 24).

<sup>265</sup> Sudan Intelligence Reports, No. 139 (February 1906), Appendix A, p. 3 (SM Annex 11).

<sup>266</sup> Sudan Intelligence Reports, No. 140 (March 1906), p. 3 (SM Annex 12). But Rob himself was by no means blameless: see Walsh’s lengthy report: *ibid.*, Appendix D, pp. 13-15, where he refers to the fact that “Sheikh Lar ... is the biggest Dinka Sheikh in this part of the country and has considerably more people and a much larger stretch of country than Sheikh Rob.” See also Sudan

366. The consequence of these administrative measures is that the Dinka tended to move north of the Bahr el Arab. By July 1921 it was reported that:

“Relations with Arabs:- Remain good. Arab and Dinka herds grazing side by side on the lower reaches of the Ragaba Um Biero, and the Dinka (Bongo section) have shown confidence in the Arabs *by extending their permanent villages farther north of the Gurf* [i.e. the Bahr el Arab]. There were usual trading disputes, but I am glad to see no killing or, nor even fights...”<sup>267</sup>

367. This process of extension can be traced in the movement of the Ngok Dinka village which even some time after his death went by the name of Sultan Rob. As already shown, in the period 1902-1906 it was just south of the Bahr el Arab or Kir.<sup>268</sup> Comyn, who travelled extensively in the region and solved the river issue, has Sultan Rob on the Lol.<sup>269</sup> this may have been seasonal as the Dinka went south in the dry season. But in 1907, two years after the transfer to Kordofan, the Sudan Survey Office records “Sultan Rob’s new village”, just north of the Bahr el Arab and further up-river, near Burakol.<sup>270</sup> Sultan Rob himself was by now dead and buried – his burial place is at his old village, south of the Bahr el Arab.<sup>271</sup> But maps continued to show either or both the old and the new village, respectively just to the south and just to the north of the river.<sup>272</sup> In the Sudan Survey Office map of May 1914 the “Mareng” or Ngok are shown between the Bahr el Arab and the Umbieiro, a ragaba (Map Atlas, Map 14); but Abyei is not shown. As noted in paragraph 6 above, the first instruction to include Abyei on a map was given between 1912 and 1914: thereafter Abyei comes to be shown on most maps.<sup>273</sup> But the toponymy took some

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Intelligence Reports, No. 161 (December 1907), Appendix E, p. 17 (SM Annex 16). A report of further stolen cattle being returned to the Dinka is at Sudan Intelligence Reports, No. 148 (November 1906), p. 2 (SM Annex 14).

<sup>267</sup> Sudan Intelligence Reports, No.324, (July 1921), 5-6 (emphasis added) (SM Annex 20). As noted by Willis (paragraph 337 above), the Bongo were a Ngok sub-tribe or section.

<sup>268</sup> See above, paragraphs 314-316 (Wilkinson), 319 (Huntley-Walsh) and 340 (Mahon).

<sup>269</sup> Map Atlas, Map 9 (1907).

<sup>270</sup> Map Atlas, Map 10 (May 1907).

<sup>271</sup> See above, paragraph 70.

<sup>272</sup> See Map Atlas, Map 11 (1910); Map 12 (1910), Map 13 (1913), Map 14 (1914), Map 16 (1916).

<sup>273</sup> See Map Atlas, Map 17 (1920).

time to stabilise: Sheet 65-K (corrected 1922) has “Abyor (Sultan Kwal”) as well as a sign at the eastern edge of the map “To Rob’s Old Vill[age]”.<sup>274</sup>

368. It is worth noting that provincial boundaries at this period were not laid down or recorded in any very formal way, and they were often stated to be approximate. But that does not mean they were indeterminate, still less inexistent. A close analogy is available in the border between Darfur and Kordofan. This is particularly so since (as we have seen) Darfur, Kordofan and Bahr el Ghazal shared a tripoint on the Bahr el Arab until 1924. In 1912 H.A. MacMichael<sup>275</sup> described the boundary between Darfur and Kordofan as follows:

“The present approximate boundary which runs west of Um Badr, Kága el Surrüg and the districts of Mūmū and Muglad was very roughly fixed in 1877... It has been readjusted and corrected in minor particulars since the reoccupation. Disputes arose on the subject in 1903 and after the settlement the boundary was defined. At present it runs west of Um Badr through Gebels Darasáni and Sakunja. Thence southwards to Abu Tóg: thence south-westwards to the east of Um Shanga through Gebel el Kesch, and on southwards, west of Zalata district, to Háfir Ogr. Thence it runs southwards and very slightly eastwards to the Bahr El ’Arab.”<sup>276</sup>

369. Three points may be made about the boundaries of Darfur which apply equally – *mutatis mutandis* – to the boundaries of Kordofan.

- First, the administrative boundaries were, with minor adjustments, continuous from the Turkish period through to the Condominium.
- Secondly, while the boundaries were shown on contemporary maps as approximate, they were nonetheless real boundaries between administrative/political units. (At the time MacMichael was writing, Darfur was nominally a tributary State so the boundary was notionally an

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<sup>274</sup> Map Atlas, Map 18 (corrected to April 1922).

<sup>275</sup> H.A. MacMichael (1882-1969) was a dominant figure in the history of Anglo-Egyptian Condominium. He served in the Sudan from 1905 until 1933. He had a long experience in Kordofan, where he served from early 1906 until 1912. In 1916 he became a political officer with the Darfur Field Forces, and the year after, sub-governor of Darfur. After this, he was Assistant Civil Secretary in the Sudan Government from 1919 to 1925 and Civil Secretary (i.e. head of the Sudan civil service) from 1925 until 1933. Among his many works on the Sudan, *The Tribes of Northern and Central Kordofan* (Cambridge, CUP, 1912; reissued London, Cass, 1967) and *A History of the Arabs in the Sudan* (1922) were both regarded as authoritative.

<sup>276</sup> MacMichael, H.A., *The Tribes of Northern and Central Kordofan* (1912), p. 21, fn 1 (SM Annex 42). Cf. Slatin Pasha’s earlier description: above, paragraph 305.

international one, but the position did not alter after 1916 when Darfur was finally incorporated in the Sudan.)

- Thirdly, in the passage quoted MacMichael confirms that the Kordofan/Darfur boundary terminated on the Bahr el Arab. To repeat, this is because (prior to the transfer of 1905) the boundary between Kordofan, on the one hand, and Bahr el Ghazal, on the other, was the Bahr el Arab, and that point remained a provincial tripoint after 1905.<sup>277</sup>

370. An international tribunal called on to delimit the Darfur/Kordofan boundary in 1912 could have done so, even if some element of approximation and convenience in selecting the final line might have been involved. There are many similar examples of international boundary delimitations concerning this period which involved approximate – but nonetheless real – boundaries.<sup>278</sup> An international tribunal which declined to delimit a boundary in such a case on grounds of lack of categorical evidence would fail to comply with its mandate. A tribunal which, instead of delimiting the boundary on the basis of the available evidence, decided on a quite different boundary, whether by splitting the difference between the claims of the Parties or by way of considerations of an *ex aequo et bono* kind, would manifestly exceed its mandate. Yet this is, as has been shown, precisely what the ABC Experts did.<sup>279</sup>

371. It is clear from the above that part of the Bahr el Ghazal Province was transferred into the Province of Kordofan in 1905. The transfer included the territory of the Ngok Dinka under Sultan Rob and that of the Twic under Sultan Rihan; both were south of the Bahr el Arab. The 1905 transfer created what Sir Douglas Newbold, Governor of Kordofan, later referred to as an “anomaly”, since the Ngok

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<sup>277</sup> As MacMichael elsewhere confirms: *ibid.*, p. 223 (SM Annex 42). For a contemporary depiction of the boundaries between Kordofan and Darfur see e.g. the 1914 War Office map: Map Atlas, Map 14.

<sup>278</sup> See, e.g., *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, ICJ Reports 2002, p. 344, para. 55; p. 395, para. 179; *Indo-Pakistan Western Boundary (Rann of Kutch) between India and Pakistan*, Award, 19 February 1969, 17 RIAA 1, 570; *Decision regarding delimitation of the border between Eritrea and Ethiopia*, 13 April 2002, 25 RIAA 83, pp. 173-4 (para. 8.1.B).

<sup>279</sup> See above, paragraphs 260-265.



Dinka became the only Nilotic tribe in the province of Kordofan.<sup>280</sup> But for the reason given, an administrative border south was preferred to the natural border of the Bahr el Arab.

### (iii) Descriptions and depictions of the Transferred Area

372. The first depiction of the post-1905 boundary appeared on a map accompanying a report issued by the Governor of Kordofan Province, H.D.W. Lloyd, in 1908. The section on Kordofan Province stated:

“For the purpose of this chapter Kordofan is taken as including the whole of the country between the White Nile and the Darfur frontier, and between Latitude 16° N. and the Bahr El Ghazal, but excluding the Shilluk country near Kodok.”<sup>281</sup>

He continued:

In the south, about Latitude 10° is the Bahr El Homr [also known as the Ragaba], which rises some thirty miles across the Darfur frontier and flows eastward to Hassoba, where it turns south-east and joins the Bahr El Ghazal...

Some thirty miles south is the Bahr El Arab (or Gurf), which forms the southern boundary of the Province...<sup>282</sup>

373. Although the report was written in 1908, the part describing the southern border was not updated to include the 1905 transfer. However, a map prepared to illustrate a paper by Lloyd on Kordofan was published in the *Geographical Journal* in 1910: it depicts the 1905 boundary adjustment. The 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>283</sup> Lloyd’s map is Map 11 in the Map Atlas: the relevant section is shown in detail as **Figure 13**, on page 143. The map calls for the following observations:

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<sup>280</sup> Newbold, D., *The Making of Modern Sudan* (1974) p. 60 (SM Annex 43). Similarly, F.M. Deng notes: “While the line of demarcation between the North and the South has been neatly drawn and observed in the history of modern day Sudan, Ngok Dinka present somewhat of an anomaly on the South-North Border... Although ethnically and culturally a southern people, the Ngok have been administered in Kordofan... since the days of colonial intervention”: F.M. Deng, (1986), pp. 42-43 (SM Annex 36).

<sup>281</sup> Sudan Intelligence Reports, No. 171, October 1908, Appendix D, pp. 32-35 (SM Annex 18).

<sup>282</sup> Ibid. p. 35.

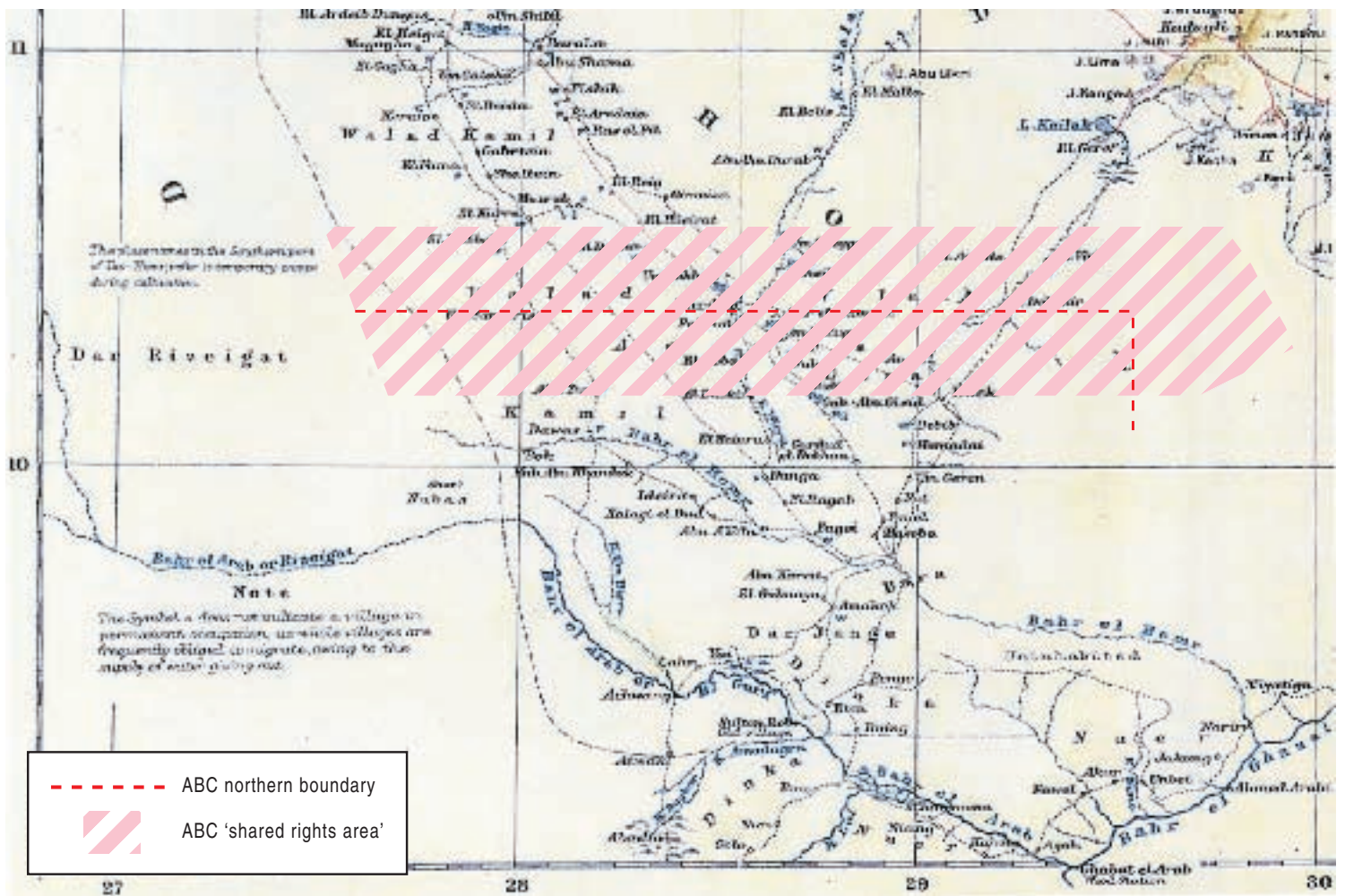
<sup>283</sup> Lloyd (1910), pp. 249-267 (SM Annex 56).

- (a) There is a curved line, the extension southwards of the Kordofan-Darfur boundary, swinging round to the east to join the line of the Amadagora River, a tributary of the Bahr el Arab.
- (b) What was previously part of Bahr al Ghazal is now shown as included in Kordofan: it is approximately 2,400 square km in area.
- (c) That area includes Sultan Rob's old village.
- (d) It may be contrasted with the ABC's "boundary" and "Shared Rights Area", which are superimposed in red for comparative purposes on **Figure 13**. The ABC Experts' "boundary" and "Shared Rights Area" lie far to the north, well beyond any locality shown by Lloyd as inhabited by Dinka. For example, the Awlad Kamil, one of the Humr sections or omodiyas, are shown just north of the Ragaba ez Zarga.<sup>284</sup>

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<sup>284</sup> For the Awlad Kamil see Cunnison (1966), p. 196.

Figure 13 The Sudan Province of Kordofan (1910) (detail)



374. The 1910 article in the *Geographical Journal* does not mention the Bahr el Arab as the border. Instead the article, which in parts is an almost verbatim copy of the 1908 report, states that:

“In the south, about lat. 10° N., is the Bahr el Homr, a river which, according to Sheikh Ali Gulla, the Nazir of the Homr Ageira, rises some 30 miles beyond the frontier. Following its course from the frontier to Hassoba, I found its actual bed was usually 100 yards wide, with steep, well-defined banks 10 or 15 feet high, but it contains much grass, and its lower reaches are completely blocked. It eventually joins the Bahr el Ghazal, but its actual point of junction is disputed...”<sup>285</sup>

375. Even though the 1908 report was not updated in the part describing the southern border, it is clear from the statement quoted in paragraph 372 above that Captain Lloyd knew the position of both the Ragaba ez Zarga and the Bahr el Arab, and, more importantly, that the latter was the border prior to 1905. Most important, however, is that the Governor of Kordofan depicted the border as being south of the Bahr el Arab, with no other explanation than the 1905 transfer.

376. The first updated description of the post-1905 border appears already, it seems, in the 1905 *Handbook on the Sudan*. The description, however, is somewhat cryptic and suggests that sources seen by the Editor were limited.<sup>286</sup> A clearer description appeared in the 1911 *Anglo-Egyptian Handbook* on the Bahr el Ghazal Province. The 1911 Handbook reports that:

“The province [Bahr el Ghazal] is bounded on the north by the southern frontiers of the suzerain State of Dafur 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>287</sup>

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<sup>285</sup> Lloyd (1910) pp. 256-257 (SM Annex 56).

<sup>286</sup> See Macdonald Report, para. 3.11; below, page 14.

<sup>287</sup> *The Anglo-Egyptian Handbook Series – The Bahr el Ghazal Province* (1911), p. 5 (SM Annex 26).

377. The language is significant: contrary to previous descriptions, it does not say that the boundary between Kordofan and Bahr el Ghazal continues to follow the Bahr el Arab, but that it “divides certain tribal districts to Lake No”.

378. In the following year, the 1912 *Anglo-Egyptian Handbook* on Kordofan Province described the border, also somewhat indefinitely, as follows:

“The southern boundary is formed by the While Nile as far as its junction, at Lake No, with Bahr el Jebel. From here the southern boundary of Dar Nuba follows the left bank of the Bahr el Ghazal to a large watercourse 10 miles to the east of Ghabat el Arab. From here the line is considered to follow the course of the Bahr el Arab to the intersection of 9°30’N. Lat. with 28°E. Long.”<sup>288</sup>

379. This wording is likewise significant, first, because of the reference to the watercourse 10 miles to the east of the Ghabat el Arab. This watercourse appears both on the 1904 Intelligence Department Map<sup>289</sup> and on the 1914 edition of Sheet 65-L of the Survey Department’s 1:250 000 series.<sup>290</sup> From the 1914 map, it is clear that the administrative boundary between Kordofan and Bahr el Ghazal Provinces follows this watercourse, as described in the 1912 *Anglo-Egyptian Handbook*. The boundary on this later map is shown to run as far north as 9°17’N when it turns to the west and crosses the Bahr el Arab. It is equally significant that, from the point where the boundary crosses the Bahr el Arab, the boundary line remains south of the river until it reaches the intersection 9°30’N, 28°E. The boundary line is never more than 25 km from the Bahr el Arab and can be said to be generally following the “course” of the river.

380. Subsequent maps, whether produced by the Sudan Survey Office<sup>291</sup> or by the War Office,<sup>292</sup> all show the transferred area in this way. The curved boundary is described as approximate in the early maps, but the lines drawn are broadly congruent. This can be seen from **Figure 14**, on the following page.

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<sup>288</sup> *The Anglo-Egyptian Handbook Series – Kordofan and the Region to the West of the Nile* (1912), p. 7 (emphasis added) (SM Annex 27).

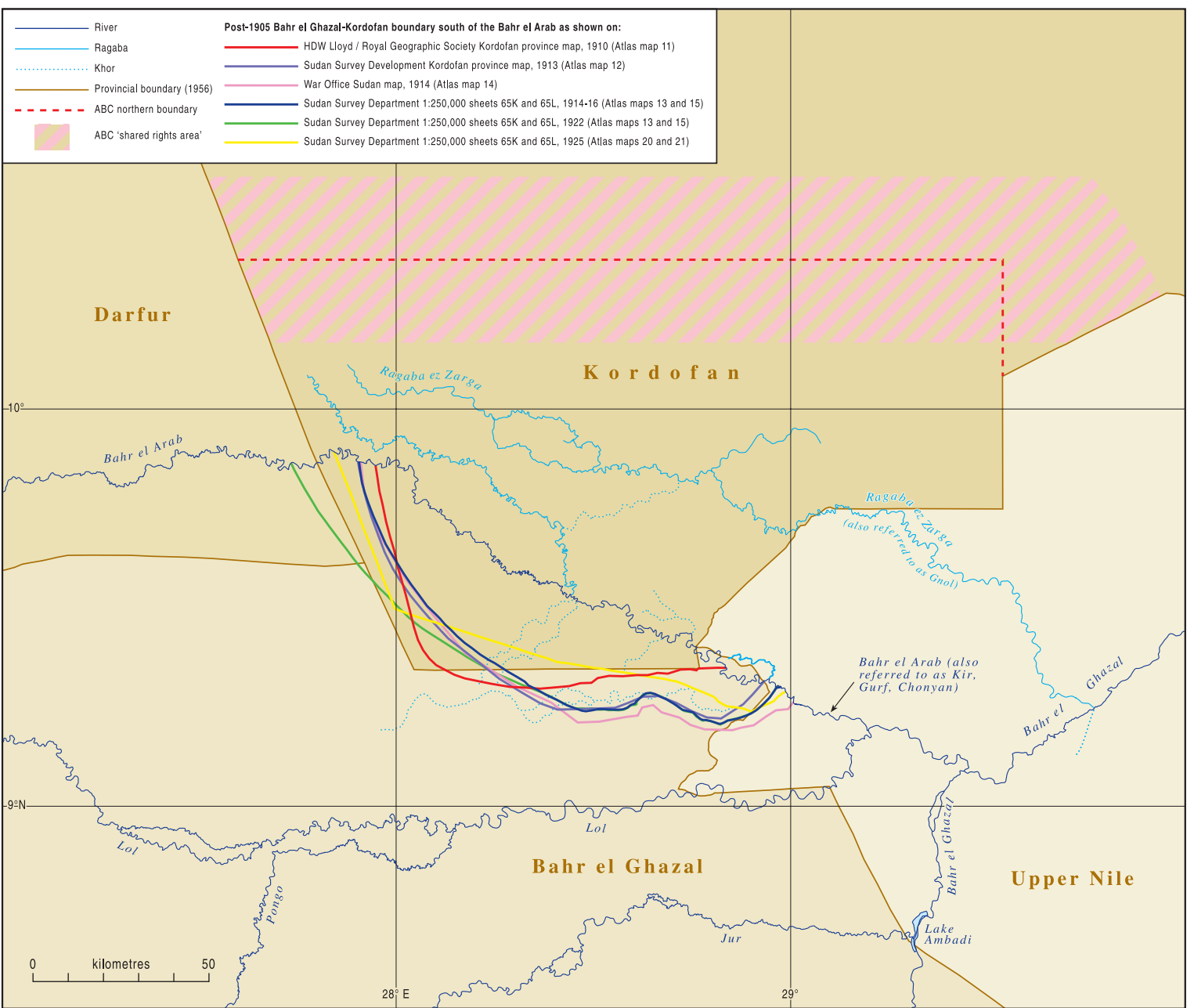
<sup>289</sup> Map Atlas, Map 7.

<sup>290</sup> Map Atlas, Map 13.

<sup>291</sup> See e.g., Map Atlas, Map 13 (1914); Map 15 (1916); Map 18 (1922); Map 19 (1922); Map Atlas, Map 20 (1925); Map 21 (1925); Map 22 (1929); Map 23 (1931); Map 24 (1935); Map 25 (1936); Map 26 (1936).

<sup>292</sup> Map Atlas, Map 14 (1914); Map 16 (1916); Map 17 (1920).

**Figure 14 The Transferred Area as Depicted on Maps after 1905**



381. As **Figure 14** shows, the transferred area went through a certain evolution. A number of developments contributed to this:

- (1) The eastern boundary of Kordofan was altered, following the creation of the Nuba Mountains Province in 1912.<sup>293</sup>
- (2) A straight-line boundary of the transferred area was substituted for the “approximate” curved-line boundary of the early maps. This is first seen on Survey Office Sheet 65-K of 1925 (Map Atlas, Map 20), which uses as its western turning points the tripoint with Darfur on the Bahr el Arab and the “the intersection of 9°30’N. Lat. with 28°E. Long” referred to in the 1912 *Handbook* (paragraph 378 above).
- (3) That straight-line boundary was itself modified, in consequence of the Munroe-Wheatley Agreement of 22 April 1924, which led to the Darfur-Bahr el Ghazal boundary being shifted 14 miles to the south of the Bahr el Arab.<sup>294</sup> This change was shown on Sheet 65-K in 1931 together with a further modification that moved the turning point from 9°30’N 28°E to 9°21’N 28°02’E (approx.).<sup>295</sup>
- (4) The Twic Dinka were retransferred to Bahr el Ghazal Province.<sup>296</sup>

382. It is not necessary to go into these developments in any detail, because the outcome is clear and is not (apparently) in dispute. At any rate it was adopted without discussion or analysis by the ABC Experts. It can be seen on the maps in the Sudan Survey Office 1:250 000 series, Sheets 65-K (1931) and 65-L (1935), respectively Maps 23 and 24 in the Map Atlas.<sup>297</sup> This is the southern boundary of Kordofan as it was at independence and as it is today.

383. To summarise:

- (1) Prior to 1905, the southern boundary of Kordofan with Bahr el Ghazal was the Bahr el Arab.

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<sup>293</sup> Sudan Government Gazette No. 227, 28 December 1912, p. 734 (SM Annex 30); Sudan Government Gazette No. 398, 15 May 1922, p. 1568 (SM Annex 31).

<sup>294</sup> See above, paragraph 328.

<sup>295</sup> Map Atlas, Map 23.

<sup>296</sup> The date of this retransfer remains uncertain: at any rate it was before 1931.

<sup>297</sup> Later editions of these maps show the same provincial boundaries: e.g. Map Atlas, Map 25 (Abyei Sheet 65-K, 1936) and Map Atlas, Map 26 (Ghabat el Arab Sheet 65-L, 1936).

- (2) At that time, the Ngok Dinka under Sultan Rob lived south of the Bahr el Arab. Their neighbours to the north were the Humr (Baggara) Arabs; to the south, the Twic Dinka under Sultan Rihan.
- (3) In 1905, as a result of Baggara raids to the south of the Bahr el Arab, an area was transferred from Bahr el Ghazal Province to Kordofan Province. That area was consistently shown on maps, first as an approximate curved line, then as a straight line. It was adjusted to account for various changes, including the creation of Nuba Mountains Province, changes in the boundaries of Darfur, and the retransfer of the Twic Dinka to Bahr el Ghazal.
- (4) In 1905 the Ngok Dinka did not inhabit the whole of the area transferred. The evidence is that there were no Ngok settlements west of 28°E.
- (5) The definition of the “Abyei area” in Section 5.1 of the Abyei Protocol refers to an area transferred *to* Kordofan, and it is not in dispute that the area was transferred *from* Bahr el Ghazal. The transferred area is territory that ceased to be part of Bahr el Ghazal Province and became part of Kordofan Province.
- (6) Despite minor adjustments, the transferred area remained identifiable in principle throughout: see **Figure 14** at page 146 above. It was the area not previously part of Kordofan which became part of Kordofan by reason of the 1905 transfer. That area is the area south of the Bahr el Arab down to the provincial boundaries of Kordofan as defined by 1931, as they remained in 1956, and as they are today.

**(iv) The Ngok Dinka and their Baggara neighbours during the Condominium**

384. Having regard to this conclusion, it is strictly unnecessary to consider what happened to the Ngok Dinka and their Baggara neighbours in the years since 1905. But the following points may be made.

385. After the 1905 transfer, several commentators refer to the Ngok Dinka living in Kordofan. Their accounts are generally consistent, and contain the following elements.



386. First, the area to the north of the Bahr el Arab was the territory of the Baggara cattle herders, variously referred to as the Humr or the Messeriya. MacMichael (1912) writes that:

“The Humr country lies on the extreme west of southern Kordofan, from the neighbourhood of el Odaya to the Bahr el 'Arab, or 'Bahr el Humr' .”<sup>298</sup>

The Messeriya (as they will be referred to here) moved from winter grazing areas well to the north to the area of the Bahr el Arab in the dry season – approximately early January to late May. For some of that time they overlapped with the Dinka in the area immediately around the Bahr el Arab.

387. This migratory pattern was described by anthropologist Ian Cunnison, writing of the early 1950s, in the following terms:

“The Bahr is the name which the Humr give to the whole of this dry-season watering country. Within it they recognize different districts: the Regeba is the northern part of the Bahr, where the Humr make their earliest dry-season camps... the 'Bahr' proper is the region where the camps are made towards the end of the dry season, mainly around the largest watercourse, the Regeba Umm Bioro and the Regeba Zarga... Finally, much of the Bahr has permanent Dinka settlements, although during most of the time that the Humr occupy it the Dinka are with their cattle south of the Bahr el Arab...”<sup>299</sup>

According to Cunnison:

“The way in which the tribal sections move seems not to have varied much since the Reoccupation.”<sup>300</sup>

388. Similarly Sir James Robertson, Civil Secretary of the Sudan Government from 1945 to 1953, wrote on the Humr and Dinkas in the following terms:

“Further south, the Humr section of the Messeria centred round Muglad and Keilak in the rainy season, migrating in the late autumn southwards to the green pastures of the Bahr el Arab, where water and grass could be found in plenty for their cattle during the dry season. The cattle nomads on the river mingled with the tall Nilotic Dinkas, of

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<sup>298</sup> MacMichael, H.A., *A History of the Arabs in the Sudan* (1922), p. 286 (SM Annex 41).

<sup>299</sup> Cunnison, I., *Baggara Arabs. Power and Lineage in a Sudanese Nomad Tribe* (1966), pp. 18-19 (SM Annex 33). This study was based on field work between August 1952 and January 1955.

<sup>300</sup> *Ibid.*, 26.

whom, one tribe, the Ngok, was administered by Western Kordofan, and other, the Twij and the Malwal, came north from Tonj and Aweil districts of Bahr el Ghazal Province...

... About eighty miles south of El Odaiya is Muglad, the centre of the Humr Administration, where there was a small office and a police post. From Muglad it is still another hundred miles south to Abyei near the Bahr el Arab, where Chief Kwal Arob presided over the destinies of the Ngok Dinkas...

Chief Arob of the Ngok Dinka lived in a buffer area between the Arabs and the great mass of the Dinka to the south...<sup>301</sup>

389. Another former Sudan civil servant, R. Davies, explained the position in the following terms:

“[The] Dinka, the great majority of whom belonged to Bahr el Ghazal Province, though by a freak of organization two sections of the tribe, Mareig and Ruweng, were for administrative purposes part of the Western Kordofan inspectorate.

The reason for this arrangement was that these sections played Cox and Box with the Homr in the occupation of the shallow basin of the Bahr el Arab river, which was the theoretical boundary between the two provinces. When the Homr went south to it in the dry season, the Dinka withdrew still farther south into the Bahr el Ghazal; but when the rains came and the Arabs took their cattle north to the area of El Muglad, the Dinka, whose small bred of cattle had acquired immunity to fly-borne disease, moved up and occupied the river region, where their animals profited from the grass.”<sup>302</sup>

390. In his 1950 article, P.P Howell writes:

“The Ngork Dinka, whose population is estimated between 20,000 and 25,000, occupy an area along the middle stretches of the Bahr el Arab. They border the RUENG ALUR Dinka in the south-east and the TWIJ Dinka to the south, and with both these Dinka peoples they have close cultural affinities. To the south-west are the MALUAL Dinka. North of the Ngork are the Baggara Arabs of the MESSIRIA HOMR with whom they have direct seasonal contact and they are therefore on the most northerly extremities of the Western Dinka block, lying between the Nilotics of the south and Muslim peoples of the north...

Administrative action... has placed the Ngork in Kordofan Province and the Rueng in the Upper Nile Province...

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<sup>301</sup> Robertson, J., *Transition in Africa* (C. Hurst, London, 1974), pp. 42; 44; 50, respectively (SM Annex 45).

<sup>302</sup> Davies, R., *The Camel's Back*, (John Murray, London, 1957), p. 130 (SM Annex 35).

The Ngork Dinka of Western Kordofan occupy an area between approximately Long. 27° 50' and Long. 29° on the Bahr el Arab extending northwards along the main watercourses of which the largest is the Ragaba Um Biero...<sup>303</sup>

391. Another source for the early 1950s is the last Assistant District Commissioner for Dar Messeria, Michael Tibbs. Dar Messeria was the southern portion of the District of Western Kordofan. Tibbs describes the migratory pattern in chapter 5 of his memoirs: the map of his sub-district is **Figure 12** at page 129 above, and the relevant chapter is annexed.<sup>304</sup> On taking up his appointment, he wrote:

“As I read through the Messeria section of the District files, the task and the distances seemed formidable, I would be looking after an area of 25,000 square miles. Most of this was the territory of the Messeria tribe. They are cattle owning Arab nomads, some 90,000 of them. Also within the area there were three other ethnic races. In the south on either side of the Bahr (river) el Arab, lived the Ngork Dinka numbering 30,000...<sup>305</sup>

392. The migratory pattern of the Messeriya or Humr can be seen from **Figure 15** on page 152, taken from Cunnison’s book.<sup>306</sup> As Cunnison notes, the different sub-sections or omodiyas of the Messeriya migrate down to and some cases over the Bahr el Arab. To the graphic have been added the present Kordofan boundaries and the ABC’s “boundary” and “shared rights area”. It will be seen that 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”.

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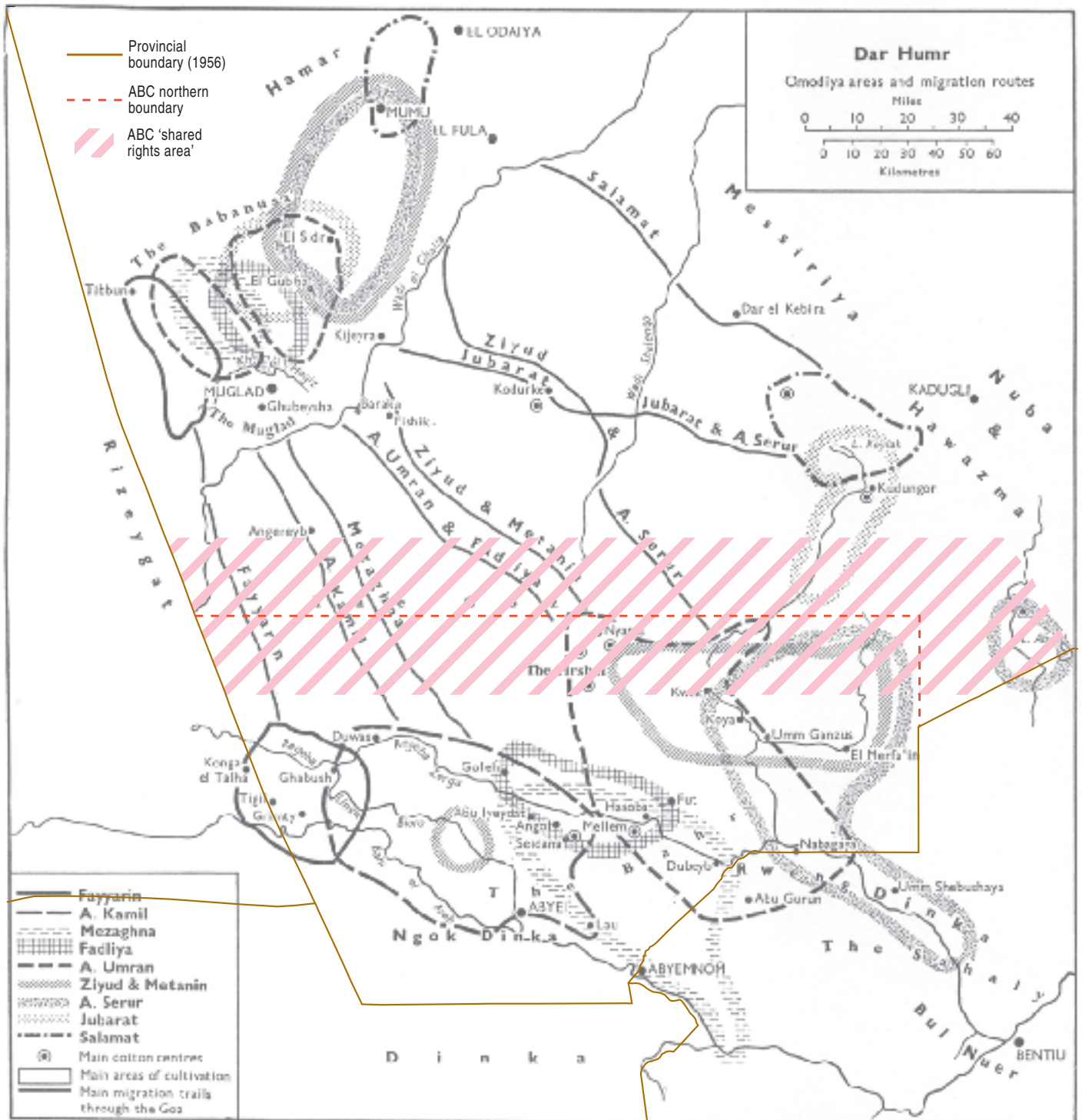
<sup>303</sup> Howell, P.P., “Notes on the Ngork Dinka of Western Kordofan”, (1950) 32 *Sudan Notes and Records* 239, pp. 241-242 (SM Annex 53).

<sup>304</sup> Tibbs, M. & Tibbs, A., *A Sudan Sunset* (privately published, Welkin, 1999), ch 5, “Western Kordofan – A.D.C. Messeria and the Messeria Tribe”, 51-61 (SM Annex 47).

<sup>305</sup> *Ibid.*, 55.

<sup>306</sup> Cunnison (1966), map facing 224.

Figure 15 Humr Migratory Routes. from Cunnison (1966)



For explanation of the map see Appendix I, and p. 16 footnote 26

(Facing p. 224)

393. In his witness statement of 3 December 2008, Professor Cunnison described the Humr migration as follows:

“The indications are that the Humr have lived in this area since at least the early 1800s. Their semi-migratory life revolves around the movement of their cattle (I refer to the 1950s, but there is reason to believe that the patten of life is of long standing). Attached is a map [Figure 15], taken from my book, which depicts the migratory patterns as I observed it and participated in it. During the wet season the Humr lived in settled camps to the north of the Babanusa, as indicated on the map. As the dry season came, they moved first briefly to the Muglad where the cattle grazed on the remains of the millet harvest. They then moved south through the extensive sandy Goz to the area called the Bahr: this is the area around the Bahr al-Arab and the Regeba Zarga. Here, water and good summer grazing are to be found. They lived in scattered camps across this region during the summer months (January-May). For part of this time they shared the area with Dinka, whose permanent houses were dotted around; but shortly after the arrival of the Humr sections, most of the Dinka would decamp further south to their dry season areas. During my time in Western Kordofan, there was a good relationship between Humr and Dinka. I knew the Dinka leader, Deng Majok, who was an impressive man.”<sup>307</sup>

394. Of the ABC’s conclusions Professor Cunnison says:

“The Goz overlaps the so-called ‘Shared Rights Area’ of the ABC Report. In describing that area in this way it seems to me the ABC was fundamentally mistaken. I did not observe this as an area of shared rights at all; nor was the ‘dividing line’ drawn by the ABC within that area in any way regarded as a boundary between Humr and Dinka. The Dinka were to the south, as I have said. Some Dinka sought employment in Muglad. It was not unknown for individual families to travel north and be, so to speak, ‘adopted’ into one or another of the omodiyas of the Humr. They might also take surplus cattle north to market. But they did not exercise regular grazing or similar rights in the so-called ‘Shared Rights Area’. The real area of sharing was further south, in the Bahr. There the two groups co-existed for a fairly short season – but this was not a ‘host-guest’ relationship. At this season it was the Dinka who, apart from a few caretakers, left to go south as part of a transhumance pattern rather than one of nomadism. As I noted in my book (p. 19) ‘much of the Bahr has permanent Dinka settlements, although during most of the time that the Humr occupy it the Dinka are with their cattle south of the Bahr al-Arab’. I never observed the Humr asking permission from Dinka to come to the Bahr, and they did not consider themselves as visitors there. The whole region was regarded by the Humr as their “dar” or country. On the

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<sup>307</sup>

Witness statement by Professor I. Cunnison, 3 December 2008, para. 6.

map on p. 5 of my book (attached) I show the area I knew as ‘Dar Humr’: it covers the whole south-western corner of Kordofan and includes an area south of the Bahr al-Arab. The table on p.22 shows that during 1954, the cattle of one section of the Mezaghna omodiya spent more time, and more continuous time, in the Bahr (142 days) than in any other of the four main areas of Dar Humr.”<sup>308</sup>

395. Cunnison’s description of the Humr migration pattern may be compared with another contemporary source, Dr. Godfrey Lienhardt. Lienhardt’s field work on Dinka religion was likewise financed by the Condominium Government: it covered the years from 1947-1950. Lienhardt, a leading authority on the Dinka,<sup>309</sup> provides a sketch of the regional aggregations of the various sub-tribes.<sup>310</sup> This is **Figure 16** on the following page; the present Kordofan boundaries and the 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, and that area does not overlap at all with the “shared rights area”.

396. As it is clear from both Cunnison’s description and Lienhardt’s map, in the years around 1950 – just before independence – the Humr Arab spent substantial time on and around the Bahr el Arab, including south of the river. There they overlapped briefly with the Ngok Dinka, but the latter went *south* during the dry season. There is no evidence in the sources cited in this Chapter – knowledgeable, independent sources – that the Ngok Dinka occupied or used any part of the “shared rights area”. The area of overlap during part of the summer months occurred in area around the Bahr el Arab itself, where water could reliably be found for the cattle in the dry season.

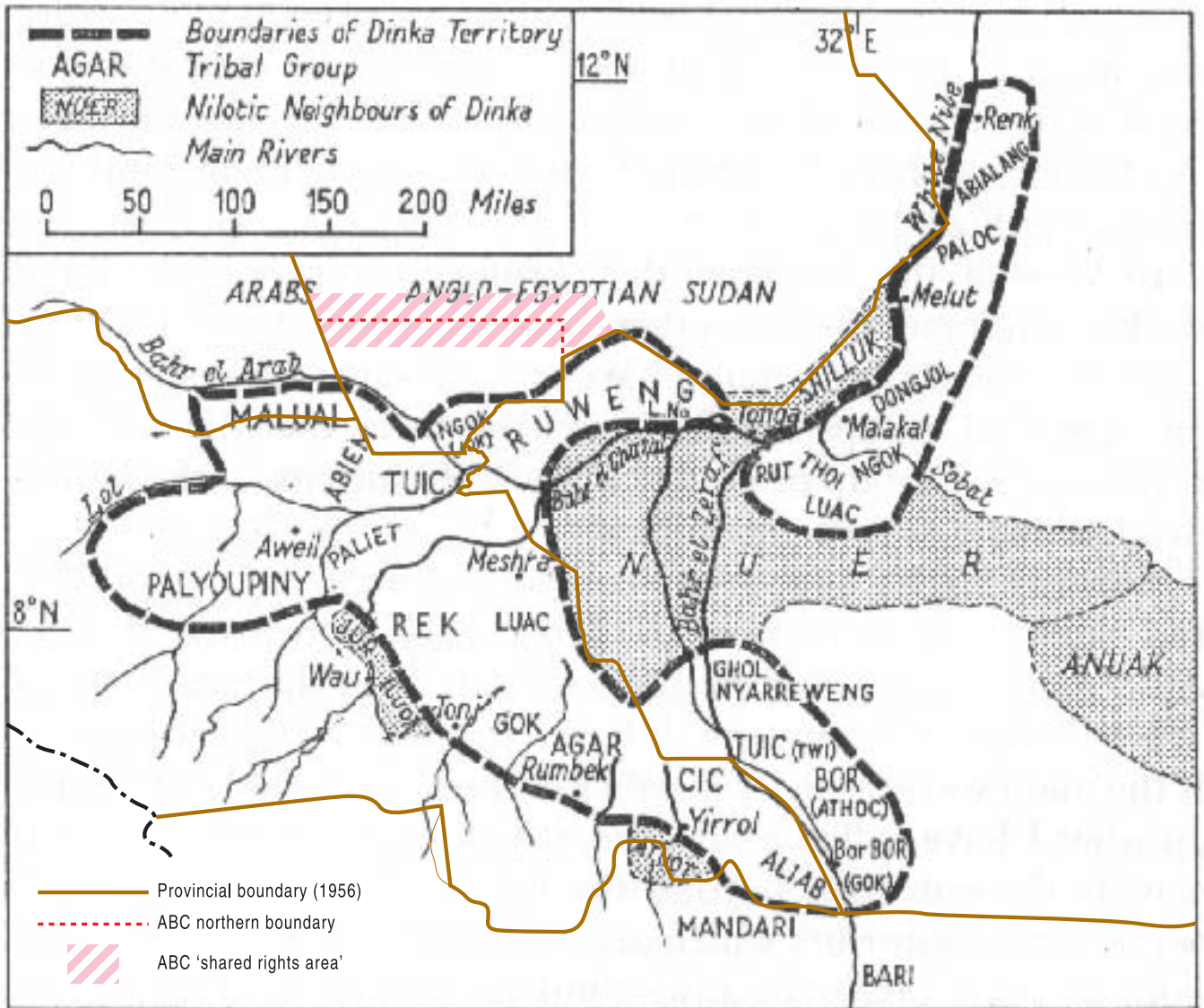
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<sup>308</sup> Ibid., para. 6.

<sup>309</sup> As acknowledged by Deng, F.M., *The Dinka of the Sudan* (Waveland, Illinois, 1972), X.

<sup>310</sup> Lienhardt, G., *Divinity and Experience. The Religion of the Dinka* (Clarendon Press, Oxford: 1967), p. 8.

Figure 16 The Dinka Tribal Groups, from Lienhardt (1961)



#### **D. Conclusions for the Tribunal**

397. The conclusions to be drawn from this material may now be summarised.

##### **(i) The availability of evidence**

398. Although the ABC Experts declined to answer the question put to them on grounds of lack of precise evidence of the transferred area as of 1905, there is a substantial body of evidence of the position as it was in that year, and it is powerfully illuminated by material from the preceding and immediately following years. Moreover the assessment of a factual question – “the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905” – depends on the available countervailing evidence. There is *no* evidence whatever that the area identified by the ABC Experts as “the Abyei Area” was transferred to Kordofan in 1905 or (for that matter) in any other year.

##### **(ii) Manifest incorrectness of the ABC’s boundary**

399. Moreover, the reasoning by which the ABC Experts arrived at their “boundary”, via the equal division of a purported “zone of shared rights”, is unsustainable. There is no contemporary evidence that the Ngok Dinka exercised any rights whatever over any part of that zone in 1905, and no credible evidence that they did so, collectively, in later years. Further, according to the Experts, the Misseriya did not exercise rights of abode and pasturage south of 10°10’N. This conclusion is frankly absurd and contrary to all the evidence. The ABC Experts’ boundary is an impermissible division of a purely fictional zone of their own creation.

##### **(iii) The facts of the case summarised**

400. Turning to the positive case, the material set out in this Chapter demonstrates the following:

- (a) It was understood by the latter part of the 19<sup>th</sup> century that there was a large river, arising to the south of Hofret en Nahas, flowing north into Darfur, then turning generally south-east to join the Bahr el Ghazal at Ghabat el Arab.



When contemporary accounts refer to the Bahr el Arab as the boundary between Kordofan and Bahr el Ghazal, they are referring to this river and to none other (paragraphs 327-328).

- (b) Prior to 1905, the Bahr el Arab was the southern boundary of Kordofan. The lateral boundary between Darfur and Kordofan stopped on the Bahr el Arab, with the Province of Bahr el Ghazal to the south of both. All contemporary maps which showed a boundary between Kordofan and Bahr el Ghazal showed it on the Bahr el Arab. Similarly for contemporary official accounts of the border (paragraphs 298-308).
- (c) Wilkinson's mistaken identification of the Bahr el Arab in 1902 was known by Condominium officials to be wrong by 1905. By 1907, a new map had been published showing with reasonable accuracy the actual course of the river. No-one (including Wilkinson) ever presented the virtually unknown Ragaba ez Zarga as the southern boundary of Kordofan (paragraphs 318-322).
- (d) Prior to 1905, the Ngok Dinka were located to the south of the Bahr el Arab. In 1905, Percival described "the Bahr el Arab as [Sultan Rob's] Arab frontier on the north and the Lol river (both banks) and the Bahr al Ghazal on the south".<sup>311</sup> Sultan Rob was the Paramount Chief of the Ngok Dinka: his village was to the south of the river, in Bahr el Ghazal. In the wet season his people went south to the River Lol, not north (paragraphs 342-354).
- (e) In 1905 the Governor-General reported 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 into Kordofan."<sup>312</sup> This transfer was subsequently described and depicted in terms of an area south of the Bahr el Arab becoming part of Kordofan (paragraphs 360-363).
- (f) In consequence of the transfer certain Ngok Dinka sections later "extend[ed] their permanent villages farther north of the Gurf [i.e. the Bahr el Arab]".<sup>313</sup> But they shared this area with the Humr (Baggara) herders, who spent a substantial part of the year on and around the Bahr el Arab (see paragraphs 366-367).

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<sup>311</sup> Sudan Intelligence Reports, No. 130 (May 1905), Appendix A, p. 4 (SM Annex 10).

<sup>312</sup> Reports on the Finances, Administration, and Condition of the Sudan, Memorandum by Major General Sir R. Wingate (1905), p. 24 (SM Annex 24).

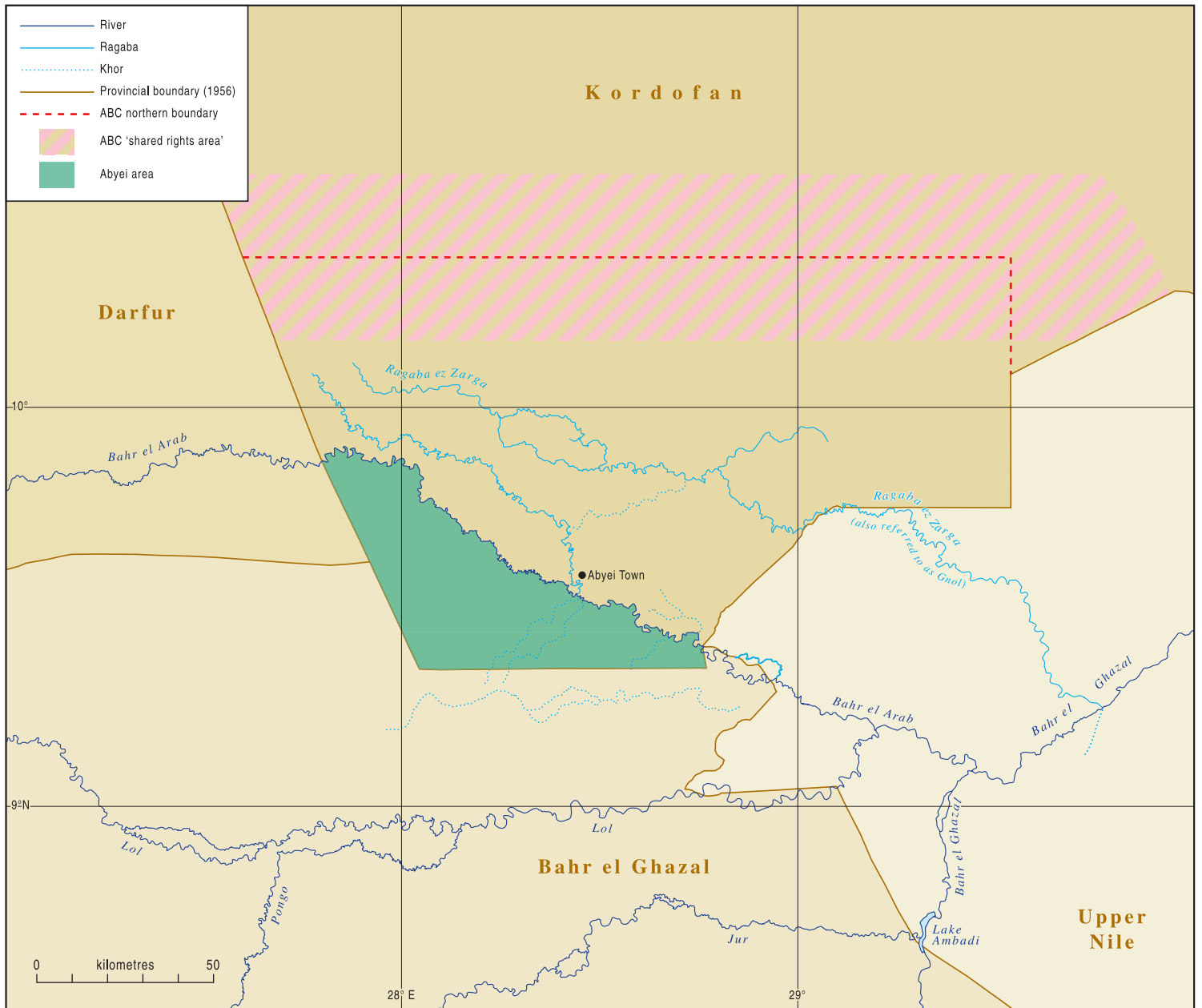
<sup>313</sup> Sudan Intelligence Reports, No.324, July 1921, 5-6 (SM Annex 20).

- (g) The transferred area was consistently shown on maps, first as an approximate curved line, then as a straight line. It was adjusted to account for various changes, including the creation of Nuba Mountains Province, changes in the boundaries of Darfur, and the retransfer of the Twic Dinka to Bahr el Ghazal (see paragraphs 380-382).

**(iv) Conclusion: “the area ... transferred to Kordofan in 1905”**

401. For these reasons, “the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905” are as shown on **Figure 17** on the following page. This is the area which was not within Kordofan prior to 1905 but which falls within Kordofan now by reason of the transfer of 1905. The area transferred was initially depicted on maps and in official documents in a somewhat different way (as shown on **Figure 14**). Moreover the Ngok (a small group in 1905) did not in fact occupy the western part of even that area. But the area south of the Bahr el Arab was refined and adjusted between 1912 and 1931. In part this involved a reduction of the area transferred to the south – including the retransfer of the Twic Dinka to Bahr el Ghazal. In part it involved a straightening of the boundary shown as approximate on the early maps, and the adjustment of that straight line boundary in the west consequential upon changes to the boundary of Darfur. But it remains the case that this area, which was not within Kordofan prior to 1905, is now part of Kordofan by reason of the transfer of 1905. Nor is it a trivial area: it occupies 2,714 square kilometres, rather more than the area of Luxembourg. It is the transferred area.

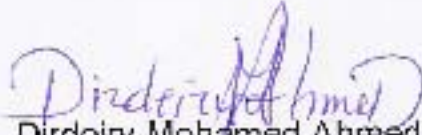
**Figure 17 The Transferred Area**



## Submissions

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

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

  
Dirdeiry Mohamed Ahmed  
Agent of the Government of Sudan  
18 December 2008

# THE BAHR EL ARAB AND ITS RELATIONSHIP WITH OTHER WESTERN SOURCES OF THE NILE

## An Expert Report

**A.S. Macdonald MA MSc FRGS\***

### 1. PURPOSE OF THIS REPORT

1.1 During the nineteenth century, interest grew among western explorers in clarifying the western sources of the Nile and the location of the Nile-Lake Chad watershed. By the time of the Anglo-Egyptian Condominium (1898-1956), this had become a strategic issue. The boundary with French Central Africa needed to be delimited and the Nile-Lake Chad watershed was a potential candidate. Furthermore river transport was seen as a convenient way of opening up the Condominium to trade. So it became important to map the courses of the rivers involved and discover how far upstream they were navigable.

1.2 One of these rivers was the Bahr el Arab or the “Arab River” which was to play an important part in the delimitation of the Kordofan/Darfur/Bahr el Ghazal provincial boundaries in the early part of the twentieth century. Because of this and its transport potential, Condominium officials made considerable efforts to understand its location and course and these efforts were remarkably successful.

1.3 The purpose of this report is twofold:

- To chronicle the gradual development of a clear understanding of the course of the Bahr el Arab from the middle of the nineteenth century;
- To show the consequential development of the depiction of that river on maps of the Sudan.

1.4 Before recounting the early attempts at tracing the Bahr el Arab, it is worth examining recent satellite imagery to establish its known position today.<sup>1</sup> The

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\* Alastair Macdonald worked as a land surveyor in various African countries from 1955 to 1971. Between 1983 and 1992, he was Director of Surveys and Production and acting Director General at the Ordnance Survey of Great Britain. During his career, he was a Member of Council of the Royal Geographical Society and President of Commission IV of the International Society of Photogrammetry and Remote Sensing. Since retiring in 1992, he has assisted in several boundary cases: as an Advocate for Nigeria in *Cameroun v. Nigeria*; as an adviser to Ethiopia’s legal team in *Eritrea v. Ethiopia*; and as a consultant to the Palestine Authority.

sketch map (Fig. 1) is based on modern imagery. The headwaters of the Bahr el Arab rise on the Nile-Lake Chad watershed in latitude 8° 55' North longitude 23° 45' East. It then flows in a north-easterly direction, past Hofrat en Nahas<sup>2</sup>, the site of an ancient copper mine, as far as 10° 20' North 25° 06' East. Here it turns to the east and follows a series of small and frequent meanders until 10° 25' North 25° 50' East when it turns to the southeast to run down to 9° 40' North 26° 40' East. Then it turns east until 9° 52' North 27° 53' East, then southeast to pass to the south of Abyei town and reach 9° 19' North 28° 45' East. From here it runs generally east-south-east to join the Bahr el Ghazal at Ghabat el Arab, 9° 05' North 29° 26' East, a wood station for steamers in need of fuel in the nineteenth and early twentieth century. This confluence is itself at a point where the Bahr el Ghazal makes a significant change of direction from north to north-east. In summary, when judging earlier depictions, we need to remember that the Bahr el Arab:

- Has headwaters which rise to the west and southwest of Hofrat en Nahas;
- Flows in a loop to the north as far as 10° 20' North (some 220 km from its source) and roughly follows that parallel for 80 km;
- Then runs South-east for 120 km, East for 130 km, South-east for 110 km (passing Abyei after 70 km) and finally East-south-east for 80 km;
- Joins the Bahr el Ghazal at a point where the Bahr el Ghazal changes direction from North to North-east, holding that direction for a distance of 110 km, after which it flows South of East for 120 km past Lake No to Sobat.

The phrase “the Western Sources of the Nile” was usually taken to refer to a series of rivers and seasonal watercourses which flowed eastwards from the Nile-Lake Chad watershed. Condominium officials tracked the following rivers and streams in the course of their investigations. From north to south, they are now known to be (See Fig. 1):

- *Ragaba ez Zarga*: this rises in Darfur and crosses the boundary with Kordofan within about 15 km of the Bahr el Arab, then flows South-east and East to pass Mellum and Fauwel, by which time it is 50 km away from the Bahr el Arab. It then flows South-south-east to join the

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<sup>1</sup> Latitudes and longitudes in this section are taken from satellite imagery and are approximate. They also involve an element of interpretation of the river course in what is an area of very complex river patterns. An example of the imagery can be seen at <<http://tinyurl.com/5e2pun>>.

<sup>2</sup> Also spelt Hofrat el Nahas.

Bahr el Ghazal 40 km downstream from Ghabat el Arab, opposite Bentiu. The Ragaba ez Zarga was, for a short period, thought to be the Bahr el Arab and at other times was referred to as the Bahr el Homr. It also carries the Dinka name of GnoI.<sup>3</sup>

- *Bahr el Arab*: this also carries the Dinka name of Kir and the Rizeigat name Gurf. It too was given the name Bahr el Homr by some early travellers.
- *Lol, or Lolle*: this significant river rises close to the headwaters of the Bahr el Arab but flows generally east to join it some 55 km upstream from Ghabat el Arab. This river was also thought to be the Bahr el Homr in the early days.

1.4 All these rivers flow through swampy areas in their middle and lower courses, areas which were and are inundated over a wide area after the rainy season (April to October). Inundation hampered investigations of the local geography considerably. A further hindrance to an easy understanding of the rivers and their relationships to each other is the fact that they have had various names applied to them throughout the period of exploration. This is largely because these rivers are long and pass through the territory of many different tribes and clans who speak different languages and give different names to them.<sup>4</sup> A second reason is that the Western explorers were very dependent on the reliability of their informants and on the tribe to which an informant belonged.<sup>5</sup> The table below sets out the names which have been rightly or mistakenly applied to the rivers mentioned in 1.4.

MODERN NAME	ALTERNATIVE NAMES	MISTAKEN NAMES	NOTES
Ragaba ez Zarga	GnoI	Bahr el Arab Bahr el Homr	A 'ragaba' (Arabic) is a spillover channel which usually only carries water during the rainy season
Bahr el Arab	Bahr el Ada Bahr el Rizeigat Chonyen Gurf Kir, Kiir or Kyr Umbelacha	Bahr el Homr	A 'bahr' (Arabic for river or sea) is a main river
Lol	Boro	Bahr el Homr	

<sup>3</sup> For the nomenclature of rivers and streams in the Kordofan and Bahr el Ghazal Provinces, see Comyn, D., Western Sources of the Nile, *The Geographical Journal*, Vol. 30, No.5 (Nov., 1907), pp. 524-530 (SM Annex 50). For the name 'GnoI' see e.g. Henderson, K. D. D., A Note on the Migration of the Messiria Tribe into South West Kordofan, *Sudan Notes and Records*, Vol. 22 (1939) 49 (SM Annex 52).

<sup>4</sup> Cf. Comyn, D, The Western Sources of the Nile, *The Geographical Journal*, Vol. 30, No. 5 (Nov., 1907), pp. 524 (SM Annex 50). Quoted below at 3.17.

<sup>5</sup> Cf. e.g. Sudan Intelligence Reports, No. 140, (March 1906), appendix D, pp. 13-15 (SM Annex 12).

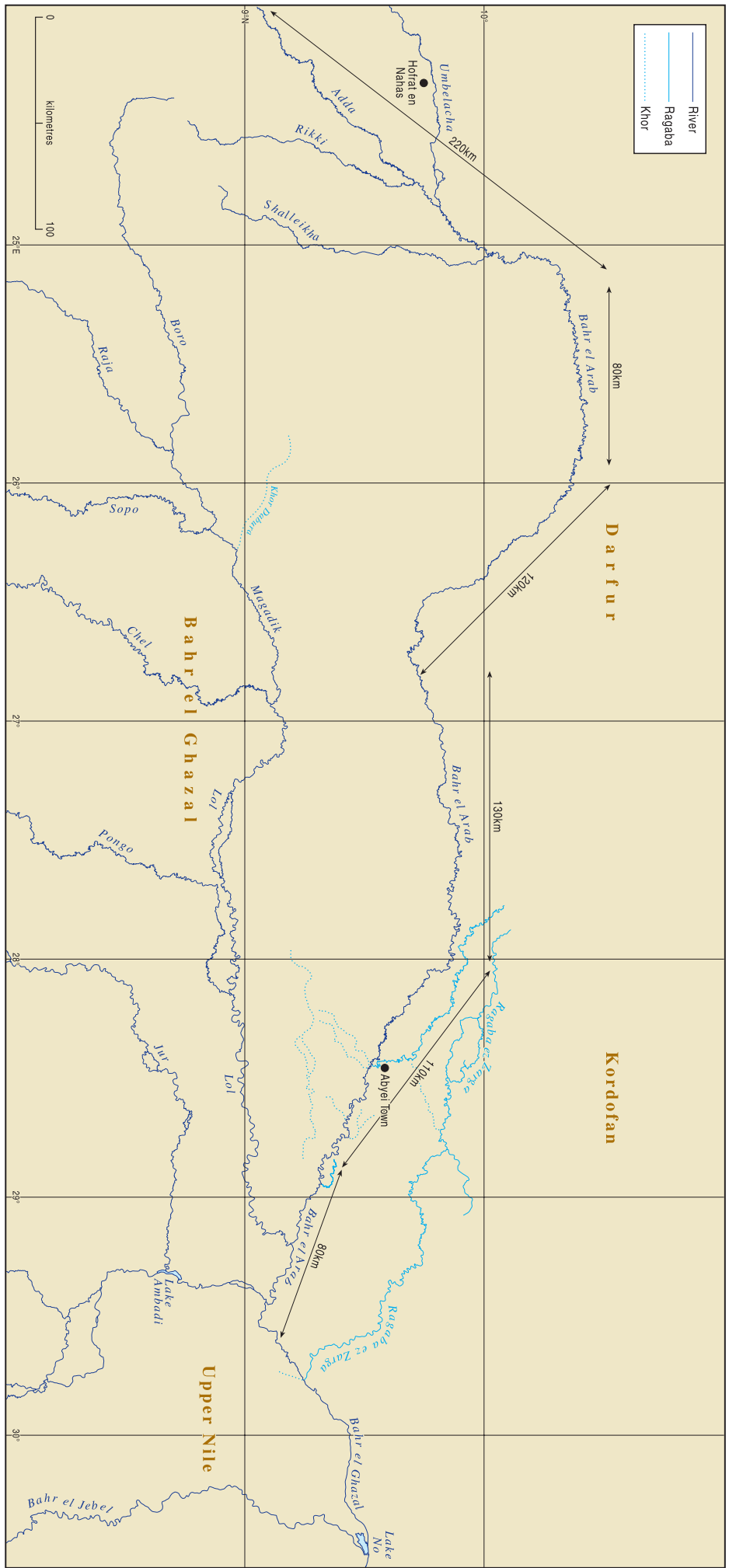


Fig. 1 the Western Sources of the Nile



1.5 The name Bahr el Homr has at one time or another been attached to all three rivers mentioned above. This might be explained by its use by the Homr tribe.<sup>6</sup> The Homr are nomadic Arab cattle herders (a sub-group of the Messiriya: the collective term for the cattle-herding Arabs of this region is the Baggara.) Their migration pattern brings them south to the Bahr el Arab: it is possible that the name 'Bahr el Homr' was applied to whichever river they were located on at the time of a particular explorer's visit.<sup>7</sup>

## 2. NINETEENTH CENTURY KNOWLEDGE OF THE BAHR EL ARAB

2.1 The Bahr el Arab first appears on a Western map when it was mentioned by William Browne in 1799 as the Bahr el Ada.<sup>8</sup> However, the depiction was vague<sup>9</sup> and of little use. However, the Adda is one of the tributaries of the Bahr el Arab in its upper reaches so, if nothing else, Browne provides evidence that there was awareness of a river flowing from the vicinity of Hofrat en Nahas to the Bahr el Ghazal as early as the end of the eighteenth century.

2.2 From travellers' reports during the nineteenth century a clearer picture of the course of the Bahr el Arab gradually emerged. In 1877 the Royal Geographical Society opened negotiations with E.G. Ravenstein, a noted professional cartographer, to produce a map of Eastern Africa between 10° North and 20° South at a scale of 1: 1 000 000.<sup>10</sup> The result, A Map of Eastern Equatorial Africa, was produced in 25 sheets between 1881 and 1883. Ravenstein was a diligent researcher and the map series represented a distillation of all information gained by Western explorers until that time. On Sheet 1, published in December 1883, only the lower course of the Bahr el Arab is shown down to its junction with the Bahr el Ghazal (See Fig. 2). This point is given the latitude of 9° 5' North, exactly the latitude that it is known to have today.<sup>11</sup> The highest point on that part of the river shown on the map is 10° North 26° East, which is within 30 km of the true position of the river. So Ravenstein was able to display on his map a reasonable approximation of the lower course of the Bahr el Arab and a very good position for its confluence with the Bahr el Ghazal. He presented a long list of names that had been attributed to this river by that time including the Lol and shows some major tributaries joining from the south including the Boro. No rivers are shown to the north of the Bahr el Arab.

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<sup>6</sup> Variably spelt 'Humr' or 'Homr'. This paper will adopt the latter.

<sup>7</sup> For information on the Homr, see Cunnison, I., *Baggara Arabs, Power and the Linage in a Sudanese Nomad Tribe* (Oxford: Clarendon Press, 1966) (SM Annex 33).

<sup>8</sup> Browne, W G, *Travels in Africa, Egypt, and Syria, from the year 1792 to 1798*, London: Printed for T. Cadell and W. Davies, (1799).

<sup>9</sup> See Schirmer at 3.1 below.

<sup>10</sup> Cf. Bederman, S. H. The Royal Geographical Society, E. G. Ravenstein, and a map of eastern equatorial Africa: 1877-1883, *Imago Mundi*, Vol. 44 (1992), pp. 106-119 (SM Annex 49).

<sup>11</sup> Longitude was about 15 minutes of arc in error but this can be explained by the poor determinations of longitude at that time, before the arrival of the telegraph.



Fig. 2 Extract from A Map of Eastern Equatorial Africa (1883)<sup>12</sup>

2.3 In March 1884, Malcolm Lupton, the son of Lupton Bey, the Governor of Bahr el Ghazal Province under the Egyptian Administration, described his father's travels in Bahr el Ghazal to the Royal Geographical Society.<sup>13</sup> His son's talk revealed that, in a very modest and unassuming way, Lupton Bey had been diligently exploring and mapping his Province since he was appointed Governor and that it was only later that he realised the Royal Geographical Society was interested in what he had been doing. The map of the Bahr el Ghazal Province (Fig. 3) that accompanied the paper was the first to show a course for the whole of the Bahr el Arab. The river on the map rises on the Nile-Lake Chad watershed and one of its headwaters flows past Hofrat en Nahas and continues in a north-easterly direction to 10° 30' North, within 10 miles of the true position. It then runs southeast and finally east-south-east (the correct bearing) into the Bahr el Ghazal at the correct point, i.e. the point at which the direction of the Bahr el Ghazal changes from north to northeast (see Para. 1.4). Lupton Bey gave the river two names, Bahr el Arab and Bahr el Homr. He also correctly named the Lol, but diverted it into the Jur which on his map joined the Bahr el Ghazal just below Meshra el Rek. The headwater of the Lol carried the name Boro. Unfortunately, Lupton Bey had to surrender to the Mahdists only a month after the talk and he died in captivity in 1888.

<sup>12</sup> Map Atlas, Map 1.

<sup>13</sup> Frank Lupton (Lupton Bey), Geographical Observations in the Bahr el Ghazal Region, *Proceedings of the Royal Geographical Society and Monthly Record of Geography*, New Monthly Series, Vol. 6, No. 5 (May, 1884), pp. 245-255 (SM Annex 57).



Fig. 3 Extract from Lupton Bey's Map of the Bahr el Ghazal (1884)<sup>14</sup>

2.4 A sequence of maps published in the last decade of the nineteenth century continued Lupton Bey's depiction of the Bahr el Arab. A General Map of the Nile Valley published by the War Office in 1898 (Fig. 4) showed the Bahr el Arab with its loop above 10° North and joining the Bahr el Ghazal in the correct position. Other rivers did not, however, follow Lupton Bey's depiction so closely. The 1898 map showed a significant tributary running east from Faroga to the Bahr el Arab.

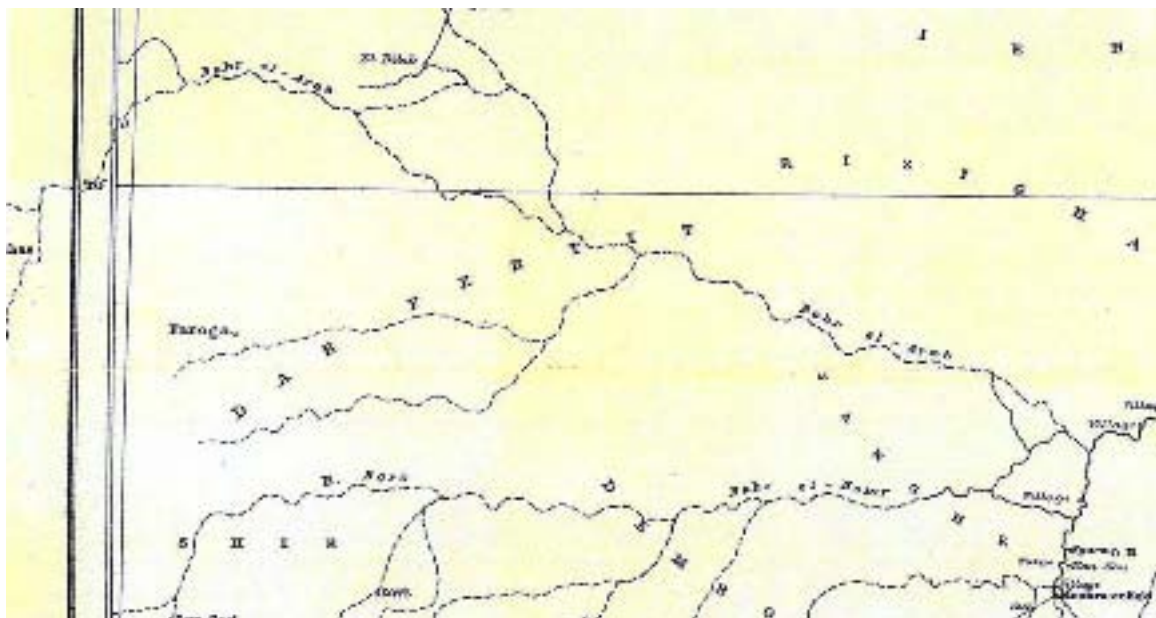


Fig. 4 Extract from A General Map of the Nile Valley (1898)<sup>15</sup>

<sup>14</sup> Map Atlas, Map 2.

<sup>15</sup> Map Atlas, Map 3.

The Boro had become the Bahr el Homr in its lower reaches and joined the Bahr el Ghazal further upstream. A map published in a British newspaper in the same year<sup>16</sup> is a simplified version of the 1898 map, and was produced by the French Commandant Marchand. A general purpose “Skeleton Map” of 1901<sup>17</sup>, published by the War Office, also has a similar but simplified depiction, albeit with some changes to the junction of the Bahr el Arab with the Bahr el Ghazal.

2.5 Thus by the end of the nineteenth century and the start of British administration of the southern provinces, it was clear that the authorities knew where the Bahr el Arab came from and where it emptied into the Bahr el Ghazal. They may not have had a clear idea of the precise course of the river in its middle section, but they were in no doubt about which river was the Bahr el Arab.

2.6 One feature of all maps of the late nineteenth century is that there was significant river detail to the south of the Bahr el Arab but very little detail immediately to the north in Kordofan. That is to say, in the area north of the lower reaches of the Bahr el Arab no rivers were shown. This point is important when discussing the journey made by Wilkinson: see Section 3.

2.7 A close examination of modern satellite imagery does much to explain the uncertainty surrounding the middle reaches of the Bahr el Arab.<sup>18</sup> For a large part of its middle and lower course, the Bahr el Arab is surrounded by a complex web of alternative channels, some with water and some apparently dry. As the Lol approaches the Bahr el Arab, it becomes embroiled in similar complexity. After the rainy season, most of the area will be inundated and there must be a strong possibility that channels change with the season and year by year. Without on-the-spot knowledge, it is difficult to know how permanent the river courses are. In the early twentieth century it must have been even more difficult to understand.

### 3. INTENSE EXPLORATION 1900-1910

3.1 Professor J. H. Schirmer summed up the situation in 1898 as follows:

“It will be all the more interesting to learn the course of the Bahr el Arab... ... Almost a century has passed since Brown[e] first marked it vaguely on the map, and our knowledge of it is even now scarcely more definite. No European has explored the whole course of the stream; in two places only has it been crossed, *i.e.* by Gessi and Felkin.”<sup>19</sup>

3.2 In the ABC Experts’ Report, it is stated:

“The difference between historic and current maps may be characterised as follows: historic maps were produced from information supplied by persons who had ‘been

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<sup>16</sup> Map Atlas, Map 4.

<sup>17</sup> Map Atlas, Map 6.

<sup>18</sup> An example of the imagery can be seen at <<http://tinyurl.com/5e2pun>>.

<sup>19</sup> Quoted in the *Supplement to the Handbook of the Sudan* (HMSO, London, 1899), pp 186-187 (SM Annex 29).

there', but who could not always be certain where 'there' was; current maps are produced from data supplied by sources who need not have 'been there', but whose technology allows them to be quite certain where 'there' is."<sup>20</sup>

3.3 This is a neat aphorism but it is nevertheless an unjust comment on the maps produced by the Survey Department in the first decade of the 20th century. A description of the mapping process of the era was given in the *Geographical Journal* in 1909 and showed that considerable care was taken to obtain good astronomical positions:

"The plan initiated by Colonel Talbot is being followed. His triangulations are being extended as opportunities occur and local conditions require. Advantage is taken of the extension of the telegraph system to fix wherever possible telegraphic longitudes. Latitudes are now observed by at least three Sudan officials, and connected with the survey department, who have been provided with spare instruments and coached in their use. Where the telegraph has not reached, and neither triangulation nor latitudes and azimuths can be run except at prohibitive cost, wheel and compass sketches are made and checked by chronometric longitudes and observed latitudes. Railway reconnaissances, telegraph reconnaissances, and the Irrigation Department's lines of levels and explorations have furnished other lines of a considerable degree of accuracy.

The remainder of the topographical information we possess is due to the time and compass sketches executed by civilian and military officials. A very large number of such sketches, of varying quality, have been made, and the circumstances which have caused the members of the department to hasten from one part of the Sudan to another, have, at any rate, enabled a number of positions to be fixed, on to which the sketches can be adjusted. The last entry in the receipt book for these sketches is No. 560, and if any credit can be claimed from the fact that, at the present time, all but three sheets of the inhabited portion of the Sudan are available for issue on the 1: 250,000 scale, it is to the Province officials that the chief share is due. Without their co-operation the maps must have remained to this day little more than skeleton sheets..."<sup>21</sup>

3.4 In his Annual Report in 1906, the Director of the Survey Department outlined the care taken over cross-checking positions among different travellers who, once the necessary calculations were made and checked, did have a very good idea of where they were:

"Advantage was taken of the fact that the telegraph line had just been finished from El Obeid to Nahud, and for the length furnished by Bimbashi Dale, two lines were run down to the south. From El Obeid the sketches of Wilkinson Bey, Morant Bey, Lloyd Bey and Leveson Bey were combined to check one another whenever possible, and a position obtained for Fauwell, a distance of some 250 miles as the crow flies. From Nahud, chiefly from work of Lloyd Bey, checked by his own work as far as possible, a second position of Fauwell was obtained.

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<sup>20</sup> Abyei Boundaries Commission Experts' Report (14 July 2005) Appendix 6, p. 204 (SM Annex 81).

<sup>21</sup> Pearson, H. D., Progress of Survey in the Anglo-Egyptian Sudan, *The Geographical Journal*, Vol. 35, No. 5 (May, 1910), pp. 532-541, at p. 539 (SM Annex 58).

These two fixings differed from one another by a mile and a half, an eloquent testimony to the valuable work done by the officers named.

I should add that Wilkinson Bey and Lloyd Bey had both furnished a number of observed latitudes which were of course used in adjusting the route sketches. Without such observations, such a result would have been quite impossible.”<sup>22</sup>

3.5 A problem that could cause confusion when mapping an area was later described by Captain H.D. Pearson, R.E., Director of Sudan Surveys:

“...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 sheikh dies. As in other parts of Africa, it often happens that travellers, going over the same roads, will furnish entirely different names for the villages, hills, and rivers they have passed, and in many cases it is by no means easy to identify the routes followed.”<sup>23</sup>

3.6 With all this in mind, we can turn our attention to the explorations by British officials in this first decade of the twentieth century. Soon after the British administration arrived, it instigated a series of exploratory journeys in southern Kordofan and northern Bahr el Ghazal. These journeys are shown on Fig. 5.

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<sup>22</sup> Annual Report, Sudan Survey Department, (1906), p. 513 (SM Annex 25).

<sup>23</sup> Pearson, H. D., Progress of Survey in the Anglo-Egyptian Sudan, *The Geographical Journal*, Vol. 35, No. 5 (May, 1910), p. 540 (SM Annex 58).

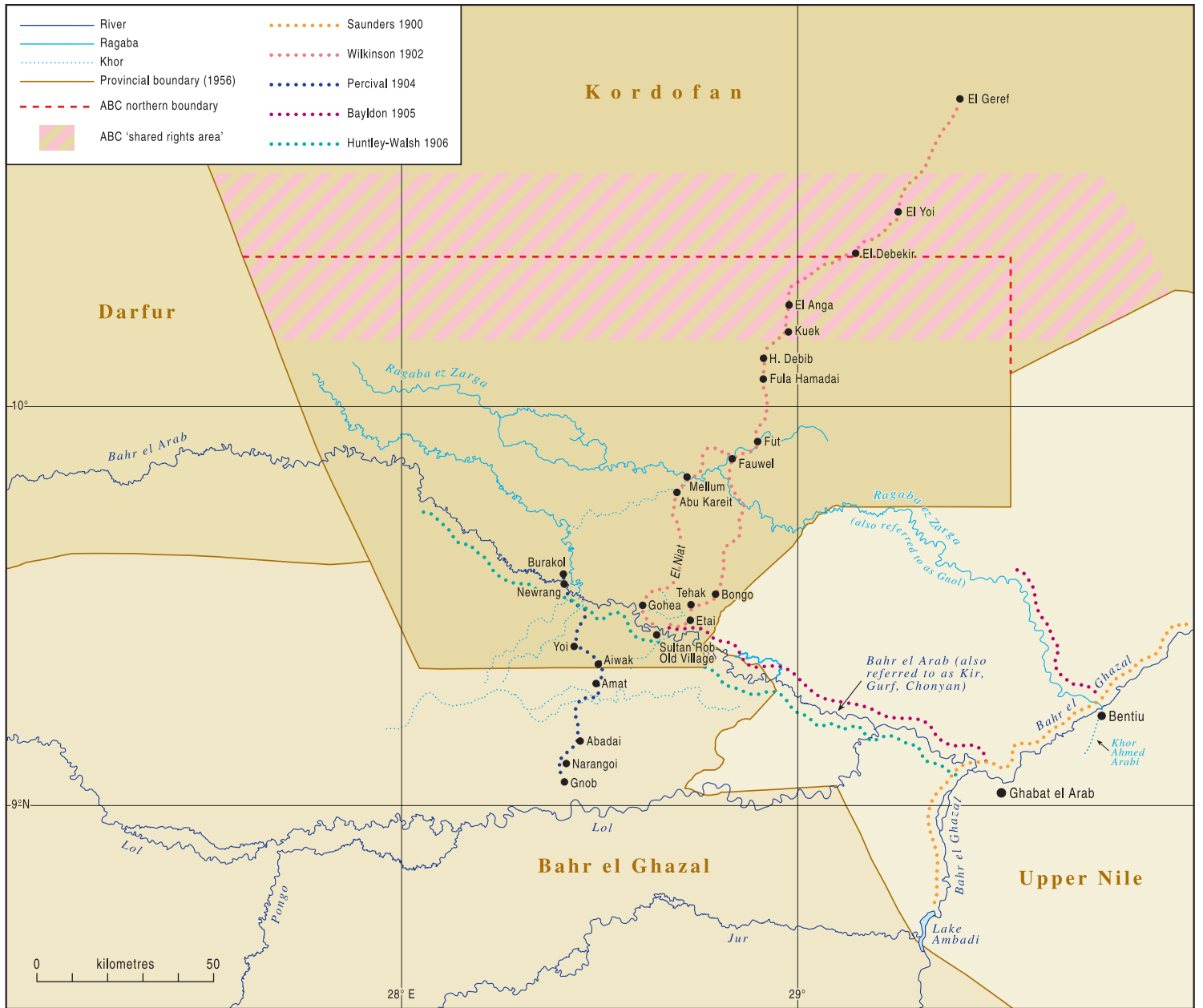


Fig. 5 Sketch map of exploratory journeys.

- 3.7 Bimbashi R.M. Saunders, one of the earliest river travellers in the area, confirmed the location of the mouth of the Bahr el Arab with some certainty in September, 1900.<sup>24</sup> In his report, he stated that the Bahr el Arab flows into the Bahr el Ghazal from west-north-west and gave a distance of 30 miles (50 km) from this mouth upstream along the Bahr el Ghazal to Lake Abadi. Both observations accord with our modern knowledge of the Bahr el Arab.
- 3.8 Saunders was followed by Major E.B. Wilkinson, who travelled overland from El Obeid in early 1902.<sup>25</sup> According to Wilkinson, he reached a significant river some 8 miles (13 km) south of the village of Fauwel which, he was told, was the Bahr el Arab. This was 40-50 km further north than he might have expected to find it using the maps that would have been available to him at the time. Contemporary maps available to Wilkinson did not, moreover, show any river north of the Bahr el Arab, which would have led him to believe that the river he had met was the Bahr el Arab (see 2.6 above). He was clearly convinced that he had actually reached the Bahr el Arab. He continued for a further 28 miles (45 km) beyond this river to reach the village of Sultan Rob, a notable Dinka paramount chief, on a river he was told was the Kir (the Dinka name for the Bahr el Arab) or Bahr el Jange. Prior to Wilkinson's journey, maps had shown the Bahr el Arab, from the vicinity of 10° North, to flow in a general south-south-east direction to the confluence with the Bahr el Ghazal. Wilkinson, however, believed that this was not the case and he was supported in his belief by Percival who travelled from El Obeid to Wau in 1904.<sup>26</sup> Percival reported crossing first the Bahr el Arab, then 50 miles (80 km) further on, the Kyr and, after a further 50 miles, the Lol. These distances are greater than one might expect but the existence of three major rivers, where previously maps only showed two, was not at that time in doubt. Both travellers implied that the Bahr el Arab made a major loop to the north as it flowed towards the Bahr el Ghazal.
- 3.9 The quotation in 3.4 above makes it clear the Wilkinson knew where he was when he reached the significant river just to the south of Fauwel. There was therefore no doubt that there was a river at 9° 45' North and that, at the time of his visit, it contained a lot of water. Initially, it was accepted by the Condominium administration that he was right in calling this stream the Bahr el Arab. The 1:4 000 000 map of the Sudan produced by the Intelligence Office in Khartoum in May 1904 (Fig. 6) reflects Wilkinson's assumption. It simply turned the course of the Bahr el Arab northwards before it reached Sultan Rob's village, then it passed Mellum (Al Malam) and ran south of Fauwel before turning southeastwards to meet the Bahr el Ghazal at the confluence, where the latter changes direction. This, however, made the direction of the Bahr el Arab's lower course south-south-easterly instead of the correct east-south-east, a significant deviation. The 'Kir', which passes Sultan Rob's village, was given a

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<sup>24</sup> Sudan Intelligence Reports, No. 74 (September 1900), Appendix A, p. 3 (SM Annex 1). His distance of 94 miles from Lake No agrees with measurements on modern maps.

<sup>25</sup> Wilkinson's travel description is recorded in Gleichen, A., *The Anglo-Egyptian Sudan*, Vol. II (1905) pp. 151-156 (SM Annex 38).

<sup>26</sup> Annual Report, Sudan Survey Department, 1904, p.102.





“The southern boundary of Kordofan and thence westwards up the Bahr el Arab to the French frontier”<sup>29</sup>

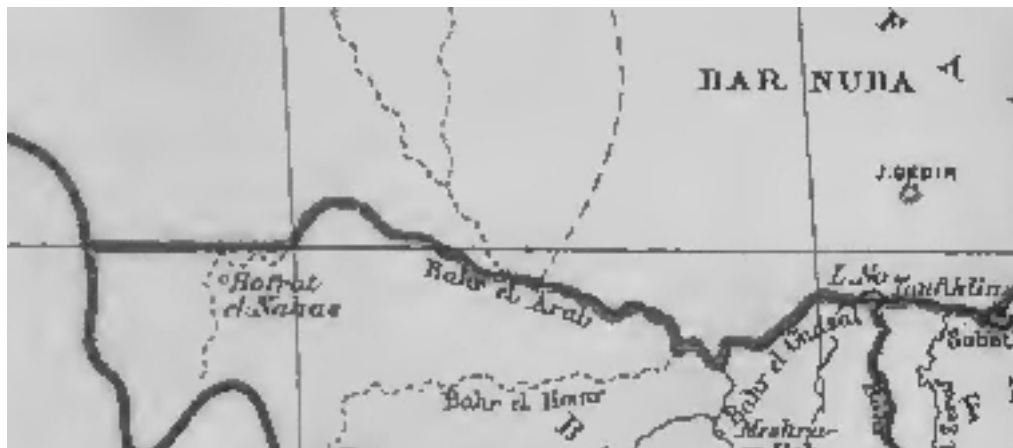
For Kordofan:

“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>30</sup>

Finally, for Kordofan/Darfur:

“Thence southwards to the Bahr el Arab leaving the Maalia and Rizeigat to Darfur, and the Homr and Dar Jange to Kordofan.”<sup>31</sup>

- 3.11 The description of the Bahr el Ghazal boundaries was easily the most cryptic in the Appendix consisting of only four half lines, suggesting that the sources seen by the Editor were limited. The Kordofan description reflected the 1905 transfer to Kordofan although this was not reflected in the cryptic Bahr el Ghazal description nor in the Index Map (Fig. 7) which clearly showed the pre-1905 border. The 1905 Compendium could have suffered from being compiled around the time of the 1905 boundary changes in Kordofan and Bahr el Ghazal. The Editor made it clear that an attempt had been made to introduce the latest information prior to publication and this may have been responsible for conflicting accounts of the provincial boundaries.<sup>32</sup> The Compendium index map, however, is evidence that the Condominium administration had accepted that the Bahr el Arab connected Hofrat en Nahas to the point at which the Bahr el Ghazal changed direction close to the 9° parallel, i.e. the correct course, even though its depiction on the map was very simplified.



<sup>29</sup> *Ibid.*, at p. 335 (SM Annex 38).

<sup>30</sup> *Ibid.*, at p. 337.

<sup>31</sup> *Ibid.*

<sup>32</sup> Gleichen, Count, *The Anglo-Egyptian Sudan*, Vol. I (1905), pp. 335-337.

Fig. 7 Extract from Compendium Index Map (1905)<sup>33</sup>

3.12 Also included in the 1905 Compendium is a map of the whole of Sudan by H.W. Mardon which shows provincial boundaries (Fig. 8).<sup>34</sup> This clearly identifies the Bahr el Arab as the boundary between Kordofan and Bahr el Ghazal:

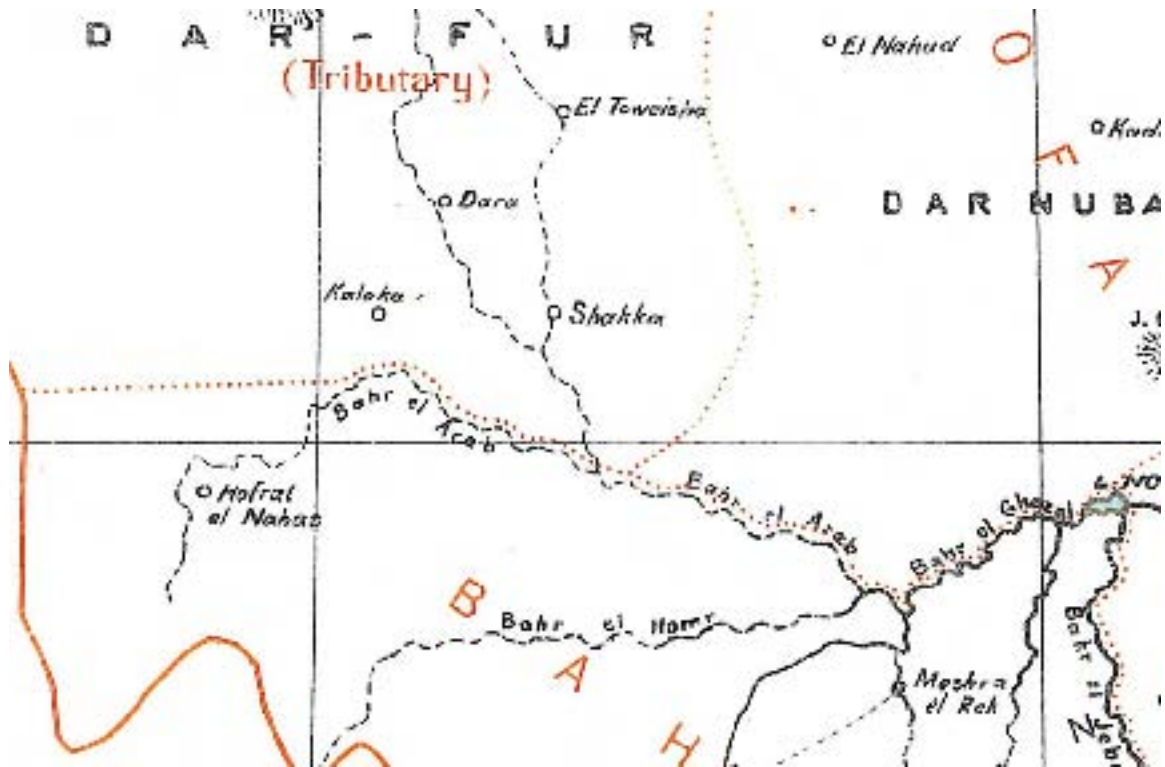


Fig. 8 Extract from HW Mardon's Map (1903)<sup>35</sup>

3.13 Another Survey Department officer, Bimbashi Bayldon, set out his own conclusions after his explorations in 1905.<sup>36</sup> He said that the waterway which Wilkinson identified as the Bahr el Arab was in fact called the Bahr el Homr, that it came from upcountry and that it joined the Bahr el Ghazal 40 km further downstream from the change of direction. He also found that this river in its lower reaches carried an insignificant amount of water. This is the waterway that we now know as the Ragaba ez Zarga.

3.14 Bayldon returned the name "Bahr el Arab" to the river flowing past Sultan Rob's. He confirmed that the Lol was a tributary to this river and gave the combined river yet another name, the Chonyen.

3.15 In April 1906, Lyons (Director General, Survey Department, Cairo) attempted to sum up the then current state of thinking:

<sup>33</sup> Map Atlas, Map 8.

<sup>34</sup> *Ibid.*, Vol. II, endpaper after p. 236.

<sup>35</sup> Map Atlas, Map 5.

<sup>36</sup> Sudan Intelligence Reports, No. 128 (March 1905), Appendix C, pp. 10-11 (SM Annex 9).

“The explorations of Lieut. Bayldon, R.N., seem to establish that, contrary to the view hitherto held, the river rising to the south of Hofrat en Nahas and bending eastwards to the north of lat. 10° N. should be called the Bahr El Homr, while the more southern river rising in the Dar Fertit Hills to the west of Liffi is the Bahr El Arab or Kir, which has the Lol or Lolli as a large tributary on its right bank in its lower reaches.

...

The Bahr El Homr (hitherto called the Bahr El Arab) rises in the hills to the south of Hofrat en Nahas, while another branch comes from the Dar Minga country to the west. It is about 750 kilos. long from Kofrat en Nahas [*sic.*] to its junction with the Bahr El Ghazal at a point 120 kilos. up-stream of Lake No, which is 132 Kilos. above the junction with the White Nile and the Sobat river. Measurements of the upper reaches are scarce; Felkin [Proceedings of Royal Geographical Society, June 1880] crossed it in December 1879 in long. 25° 20' E. after a season of unusually heavy rain, and found it to be 110 metres wide, with banks 4 to 5 metres high which are flooded in rainy season, when the whole country is a vast swamp. This point is about 500 kilos. above the junction with the Bahr El Ghazal.

About 80 (?) kilos. from the Bahr El Ghazal, where crossed by Wilkinson Bey in January and February 1902, the river is 100 metres wide with water from 0.75 to 1 meter deep...

South of this river, and generally parallel to it is the Fir [*sic*] or Bahr El Arab, which receives the streams of the Dar Fertit hills, though their junction with it is not accurately known. It joins the Bahr El Ghazal about 55 kilos. below Meshra el Rek at a point known as Ghabat El Arab, having received a considerable tributary, the Lol, on its right bank 60 kilos. higher up.”<sup>37</sup>

3.16 Lyons was saying that the river that rose in the vicinity of Hofrat en Nahas was the river that Wilkinson had named Bahr el Arab and Bayldon had named Bahr el Homr. It did not, in his view, flow past Sultan Rob’s village but instead joined the Bahr el Ghazal 40 km below Ghabat el Arab. The river that did flow past Sultan Rob’s village was the Kir and, to justify its size at this point, he suggested that it had a significant headwater flowing east from the Dar Fertit hills close to Hofrat en Nahas. Thus a third major river was inserted between Bayldon’s Bahr el Homr and the Lol even though no details of the upper course of this new river were known.<sup>38</sup> The Lol was acknowledged to be a tributary of the Kir. It is difficult to justify Lyons’ interpretation of Bayldon’s work on the basis of Bayldon’s report which makes no mention of a third river but Lyons, sitting in Cairo, only had the 1904 map (Fig. 6) for reference and was simply accepting that depiction with the change of names provided by Bayldon.

3.17 Lloyd Bey, Governor of Kordofan Province at this time, made four journeys down from the north as far as Bayldon’s Bahr el Homr between June 1904 and February 1906. He wrote a short article for the June 1907 issue of the Geographical Journal entitled “Some Notes on Dar Homr” and delineated this area in the following terms:

“Dar Homr, or the country of the Homr Arabs, is situated in the south-west corner of the province of Kordofan. The western boundary is the Darfur

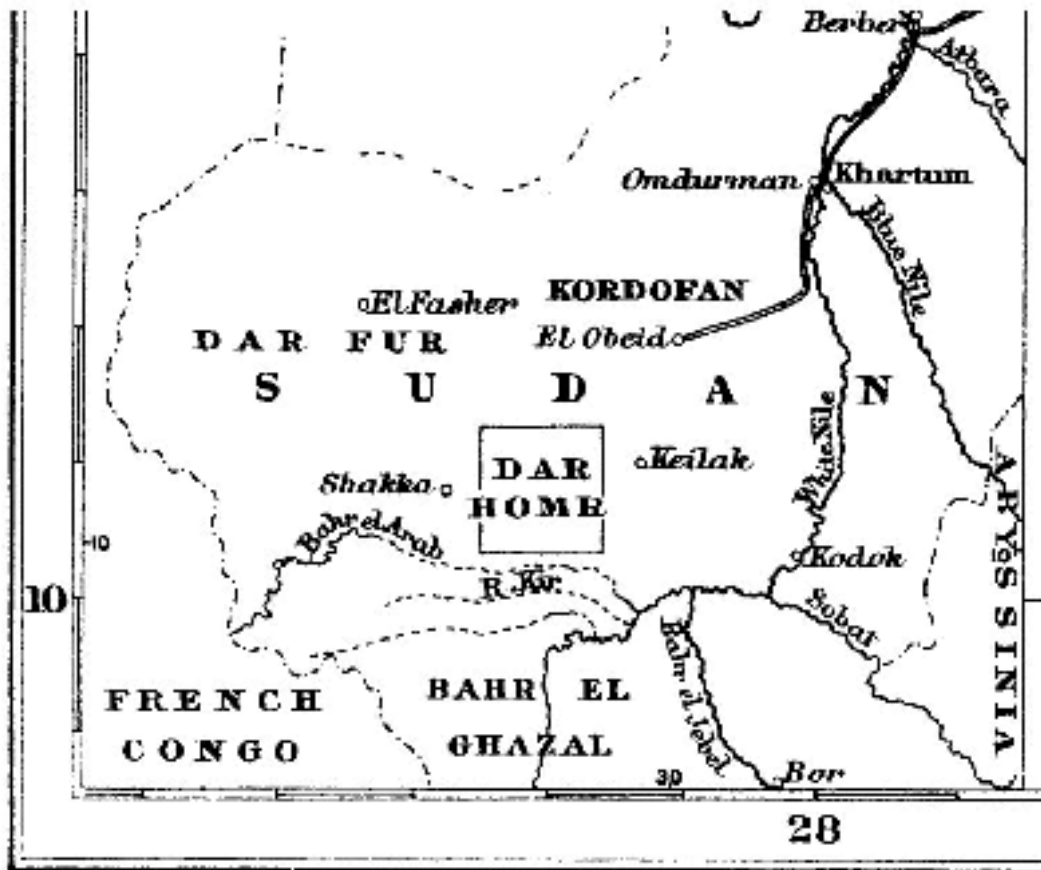
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<sup>37</sup> Sudan Intelligence Reports, No. 141 (April 1906), Appendix C, pp. 6-7 (SM Annex 13).

<sup>38</sup> The 1904 Intelligence Map (Fig. 4) places this river between 9° North and 9° 20' North.

frontier, beyond which live the Rizeigat Arabs. On the north, the boundary passes through El Odaiya, now the headquarters of a Merkaz, or administrative district, and thence south-eastwards, passing south of Burdia and Jebel Dago to Keilak. El Odiya is in the Humr country, the inhabitants being a sedentary tribe of Arabs. Burdia and Jebel Dago are in the Messeria, and Keilak in the Hawazma country. Both these tribes, like the Homr, are Baggara Arabs – that is to say, cattle owing nomads. The southern boundary is between the Bahr el Arab and the river Kir, the latter being occupied by the Dinkas under Sultan Rob.”<sup>39</sup>

3.18 The final sentence of this description implies that Lloyd also believed that the Bahr el Arab and the Kir were separate rivers. A comparison of the map which illustrates his article and, in particular, the index map in the bottom left corner (Fig. 9) with the 1904 Intelligence Department Map (Fig. 6) that resulted from Wilkinson’s information makes it very clear that Lloyd, like Lyons, largely accepted the depiction of the 1904 map.<sup>40</sup>



<sup>39</sup> Lloyd, W., “Some Notes on Dar Homr”, (Jun. 1907) 29 *The Geographical Journal*, 649-654 (SM Annex 54).

<sup>40</sup> Map Atlas, Map 7.

Fig. 9 Extract from Map illustrating Lloyd's paper "Some Notes on Dar Homr"

However, an interesting postscript occurs in the August 1907 issue of the *Geographical Journal*. In a letter to the editor, Percival makes it clear that his later explorations had changed the view he had had in 1904 (see 3.6):

"The copy of the *Journal* for June, 1907, has just reached me from Egypt; in it I notice some remarks on Dar Homr by Captain W. Lloyd (p.649), and send you the following remarks:-

1. The southern boundary is Bahr el Arab and the river Kir.

NOTE. – The Bahr el Arab is the river Kir, and takes this name "Kir" when it enters Dinka country either before or after joining with the rivers that join the river Lol below Sultan Robs.

... ..<sup>41</sup>

3.19 Percival knew this part of the country better than Lloyd and certainly better than Lyons and his opinion should be preferred. The confusion created by Wilkinson and Lyons was also being challenged by Lieutenant Comyn, who had travelled extensively in the western part of the catchment in 1905-6, as the entries from the Accessions Register of the Survey Department concerning his submission of the relevant sketches and information show (Fig. 10).

3.20 Using knowledge gained on these travels, Comyn published a paper in the *Geographical Journal* in November 1907, in which he strongly challenged the existence of a third river running eastwards out of the Dar Fertit hills to become the Kir. He started with a warning about multiple names for a single feature:

"Such ... is the variety in the nomenclature of a single river, that the reader must be prepared for it. To one uninitiated it would appear as though he were running the description of several countries into one another, such a wealth of rivers being impossible in one... And it has frequently happened that, when travelling on a road I had previously mapped, I found the names of the various features given to me by the second guide entirely different to those given me by the first – the reason being that each tribe (and they are numerous), I might almost say each village, has its own name for them."<sup>42</sup>

3.21 He suggested that the authorities had made assumptions about the upper parts of the rivers in question without all the necessary information:

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<sup>41</sup> Correspondence, (Aug. 1907) 30 *The Geographical Journal*, 219 (SM Annex 55).

<sup>42</sup> Comyn, D, The Western Sources of the Nile, *The Geographical Journal*, Vol. 30, No. 5 (Nov., 1907), pp. 524 (SM Annex 50).

“The mouth of the Bahr el Arab, the river itself for the short way near it, and likewise part of its tributary the Lol, have been explored by Captain Percival, D.S.O., and Lieut. Bayldon, R.N. Their explorations, combined with information drawn from the maps of old explorers, have, however, led authorities into the mistake, I should add the very natural mistake, of thinking that three waterways of importance are to be found flowing east from the hills of our western frontier, whereas there are but two. The above named officers determined positions, as I have already said, near the mouth of the rivers in question and I nearer their sources.”<sup>43</sup>

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<sup>43</sup> *Ibid*, at pp. 524-525 (SM Anenx 50).

No.	NH	Formation revealed	Sheet	Province	Description	Date	Remarks
254		Sherry Bay	65 C P M	-do-	Sherry Bay, Alaska, 5 miles N. from	1906	Wadden's survey
260		Bayless Bend	65 F M	-do-	Bayless Bend, Alaska, 10 miles S. of	1907	Wadden's survey
261		Madison of Arley, Coors	77 B C M	-do-	Madison of Arley, Alaska, 12 miles	1902	Survey
262		Wagoner Bend	45 P 77 B C M	-do-	Wagoner Bend, Alaska, 12 miles S. of	1905	Wagoner Bend
263		Wagoner Bend	77 B F M	-do-	Wagoner Bend, Alaska, 12 miles S. of	1905	Wagoner Bend
264		Wagoner Bend	65 M N	-do-	Wagoner Bend, Alaska, 12 miles S. of	1905	Wagoner Bend
265		Wagoner Bend	65 N W	-do-	Wagoner Bend, Alaska, 12 miles S. of	1905	Wagoner Bend
266		Wagoner Bend	65 N O M	-do-	Wagoner Bend, Alaska, 12 miles S. of	1905	Wagoner Bend
267		Wagoner Bend	65 N W	-do-	Wagoner Bend, Alaska, 12 miles S. of	1905	Wagoner Bend
268		Wagoner Bend	77 B F	-do-	Wagoner Bend, Alaska, 12 miles S. of	1905	Wagoner Bend
269		Wagoner Bend	77 F	-do-	Wagoner Bend, Alaska, 12 miles S. of	1905	Wagoner Bend
270		Wagoner Bend	65 P	-do-	Wagoner Bend, Alaska, 12 miles S. of	1905	Wagoner Bend
271		Wagoner Bend	65 L V M	-do-	Wagoner Bend, Alaska, 12 miles S. of	1905	Wagoner Bend

Fig. 10 Extract from Survey Department Accessions Register



3.22 He went on to say that the only watercourse that he saw between the Boro (a headwater of the Lol) and the river in 10° North was the Dabura (see Fig. 9). It was very small and flowed south-east into the Lol system. It had been exaggerated on previous maps because it was the only source of water (obtained by digging 8 feet down in the sand) between these two rivers. He describes the upper reaches of the Bahr el Arab in some detail:

“The Bahr el Arab starts life flowing in a northerly direction for over 50 miles through hills, taking a sharp turn to the east in the vicinity of Hofrat el Nahas, where it is a fine river, 100 yards broad, the bed being sandy, with huge smooth reefs of rock crossing it at intervals; the banks are about 15 feet high...

From that point [*the junction of the Bahr el Arab with the Ibra*] the sandy bed disappears and the river, taking the names of the various Arab tribes who graze their flocks on its “butas” when sufficiently dry, becomes what I found it to be about 150 miles in a straight line from Hofrat el Nahas...

I had not been many minutes there [*Sheikh Shenoa’s village on the upper reaches of the Bahr el Arab*] before I was surrounded by a number of Rizeigat sheikhs and Arab merchants. They all told me, as did men of my escort who knew the country, that the river was known at various points by the name of the tribe which grazed its flocks on its banks – all Arabs – till finally it entered the Dinka country and changed its name from Bahr el Homr to Kir.”<sup>44</sup>

3.23 Comyn was quite insistent that Lyon’s assumption of a third river was wrong:

“It has been suggested that the river that flows by Hofrat el Nahas is not the Kir; but unless the latter is the Khor Dabura, which is denied by the natives, and which is so insignificant 100 miles from the junction of the Kir and Lol to render it, flowing as it does in a flat country, a miracle of growth, were it to become what the Kir is reported to be, which would be physical impossibility, the tenet cannot be maintained, so I fail to see where a third river can be fitted in. ... And again, from the Bahr el Rizeigat to the Boru, I have found no stream to cross: all those, on another line I had traversed, flowing west. Hence I do not think that there can be any doubt remaining as to the water system of the western sources of the Nile.”<sup>45</sup>

3.24 Comyn was supported by Lieutenant Huntley Walsh who explored the Bahr el Arab above Sultan Rob’s village in 1906. Reporting on Walsh’s discoveries, the Director of Steamers and Boats said:

“The Bahr El Arab, or Kir River, Lieutenant Huntly Walsh concluded from his own personal examination to be navigable in the flood for over 100 miles above the mouth of Lolle.

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<sup>44</sup> *Ibid.*, at pp. 529- 530 (SM Annex 50).

<sup>45</sup> *Ibid.*, at p. 530.

From information gathered from various sources, other than personal examination, he thinks it may be further concluded that the navigable parts include also the upper part of the Bahr el Arab as far as Hofrat El Nahas...<sup>46</sup>

3.25 Comyn set out his version of the drainage system in an accompanying map (Fig. 11). In the same year, the Survey Department followed his depiction in their 1:1 000 000 map sheet of the Northern Bahr el Ghazal (Sheet 65) (Fig 12).

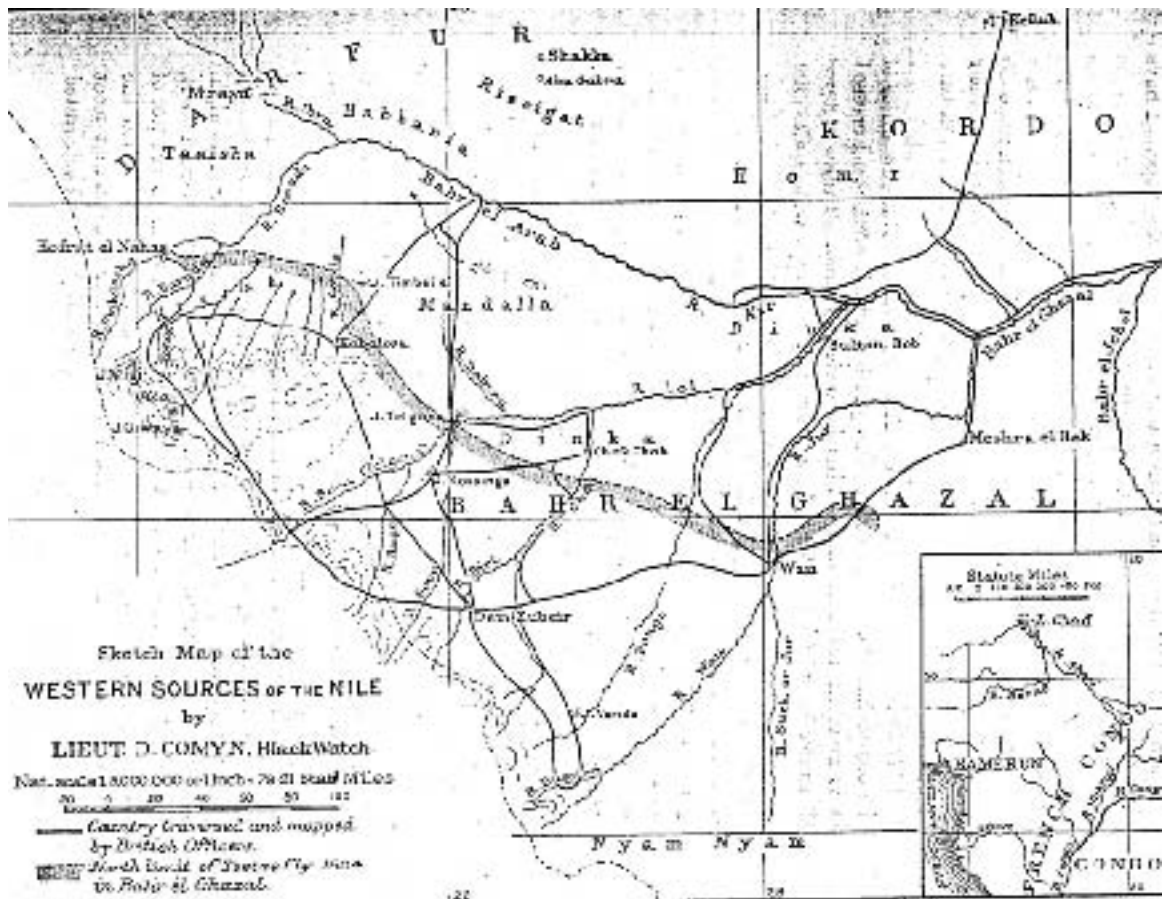


Fig. 11 Sketch Map of the Western Sources of the Nile (1907)<sup>47</sup>

3.26 This map showed the river rising near to Hofrat en Nahas, carrying the names Bahr el Arab, Bahr el Rizeigat, Bahr el Homr and Kir, flowing past Sultan Rob's village and joining the Bahr el Ghazal at its change of direction. Another waterway, passing close to Mellum and Fauwel, was only shown in its lower course and was annotated "(?) From Kordofan". The Lol now appeared as a tributary of the Bahr el Arab and yet another river, the Jur, is shown flowing into Lake Ambadi.

3.27 Lloyd, who had apparently accepted Wilkinson's views in his article published in June 1907, made a further tour of inspection of southwest Kordofan

<sup>46</sup> Sudan Intelligence Reports, No. 160, (November 1907), Appendix B, p. 5 (SM Annex 15).

<sup>47</sup> Map Atlas, Map 9.

in December 1907. His report now supported the idea that Wilkinson's river was less significant than Wilkinson himself had thought:

"7. At Um Gerenkoi, on the Wadi El Ghalla, Mr. Hallam left me to march *viâ* Dawas to Rob's country, and then to Keilak and Kadugli. I remained until December 4th to collect tribute, and then followed to Dawas with Nazir and Sheikh Rahima, of the Farin section of the Homr Agaira, as I was determined to find out where the Homrs go in the dry season.

8. I marched by the road used by the Fairin, which is said to be the most western in Dar Homr. We reached Bahr El Homr on the 7th, and crossed at Dawas...

9. Leaving Dawas on the 7th, I wanted to follow the course of the river eastwards to Hasoba.... At Hasoba the banks almost disappear (see Wilkinson Bey's report in Compendium, Vol. II., p. [151-156]), and when I was there in 1906 I was inclined to think the river was really a Ragaba. There is, however, no doubt, that the Arab account that the water actually flows during the rains, and when full it must be a considerable stream. But, on account of the grass and shallows, I doubt if it will ever be navigable, and the Gurf (or Bahr El Arab or Bahr El Rizeigat) seems to offer much greater possibilities."<sup>48</sup>

3.27 Lloyd refers to a ragaba (i.e. a creek). He was probably using the term to suggest that the waterway at Dawas and Hasoba was a spillover channel and therefore not as significant as the Bahr el Arab. Barbour gives the following definition:

"The term *raqaba* means a shallow, meandering, clay-bottomed water channel, 20-100 meters wide, of which there are many in this area. The channels are connected with the *Bahr el Arab*, from which they flood in the summer, and they also receive water from local drainage."<sup>49</sup>

3.28 Dawas lies about 30 km north of the Bahr el Arab<sup>50</sup> and the waterway that Lloyd called the Bahr el Homr is today known to be the Ragaba ez Zarga, as Lloyd had suspected in 1907.<sup>51</sup> Like Bayldon at the mouth of this waterway where it joins the Bahr el Ghazal, Lloyd found it to be shallow with no navigation potential, whereas the Bahr el Arab had much greater potential.

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<sup>48</sup> Sudan Intelligence Reports, No 162, (January 1908), Appendix G, p. 55 (SM Annex 17).

<sup>49</sup> Barbour, K. M., *The Republic of the Sudan*, London: University of London Press, (1961), p. 69.

<sup>50</sup> For the position of Dawas, cf. Atlas Map 14 (Near the intersection of 10°N and 28°E).

<sup>51</sup> See above 3.19.

#### 4. REVIEW OF THE RESULTS OF THE EXPLORATION PERIOD

4.3 As a result of the work put in by all these officials and travellers and the meticulous recording and assessment of their work by the Survey Department, a clear picture of the western sources of the Nile, and, in particular, the Bahr el Arab, had emerged during this period. This was best exemplified on Sheet 65 of the national 1: 1 000 000 series published by the Survey Department in 1907. It is now possible to test this map against the more detailed alignments of the waterways taken from recent satellite imagery by relating the two by the latitudes and longitudes on each source. This comparison is shown in Figs. 12 and 13 where the satellite information is displayed in blue.

4.2 The 1907 depiction of the course of the Bahr el Ghazal can be seen to match almost exactly the satellite information. The lower course of the Bahr el Arab up as far as Sultan Rob's village is also close to the true position. Likewise, there is a reasonable understanding of the layout of the headwaters from north of 10° N upstream although there is some longitudinal error.<sup>52</sup> Between these two locations lies a difficult area of swamp containing a multiplicity of channels and lagoons, some with water, others dry, and all of it subject to flooding in and after the rains. Western travellers were further discouraged by the heavy presence of malarial mosquitoes and so the area was simply bypassed in favour of more appealing routes to the east and west. It is therefore not so surprising that the 1907 alignment of the Bahr el Arab begins to diverge from today's known course in the swamps above Sultan Rob's village. First, the 1907 depiction swings to the north of today's alignment and then to the south with a maximum deviation of around 30 km. It is of note that the two alignments come close together in the vicinity of Sheikh Shenoa's village which Comyn had visited in 1905-6 (See 3.22). He would have made astronomical observations to fix his position there and would have reported the position of the river to the Survey Department. Above this point, there is a further divergence before the two alignments come together again north of 10° N.

4.3 It is apparent from the above that a true understanding of which river was the Bahr el Arab had been reached in published form in 1907 although men such as Comyn had determined this a year or two earlier. The depiction of the river on the 1:1 000 000 map of that year was a remarkably good approximation to its known alignment today, bearing in mind the technical limitations of position-fixing at that time. There still remained uncertainty about the actual detail of its course from Sultan Rob's village up to 10° North. Even so, by then it was clear that the river which rose near Hofrat en Nahas, flowed down past Sultan Rob's village and reached the Bahr el Ghazal where the latter river changed direction, was the Bahr el Arab.

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<sup>52</sup> This is not unusual in an area far from the telegraph where the rating of chronometers would be difficult and the consequential errors in time would induce equivalent errors in longitude.



Fig. 12 Extract from 1907 1:1 000 000 Map compared with Satellite Imagery.

Map Atlas, Map 10

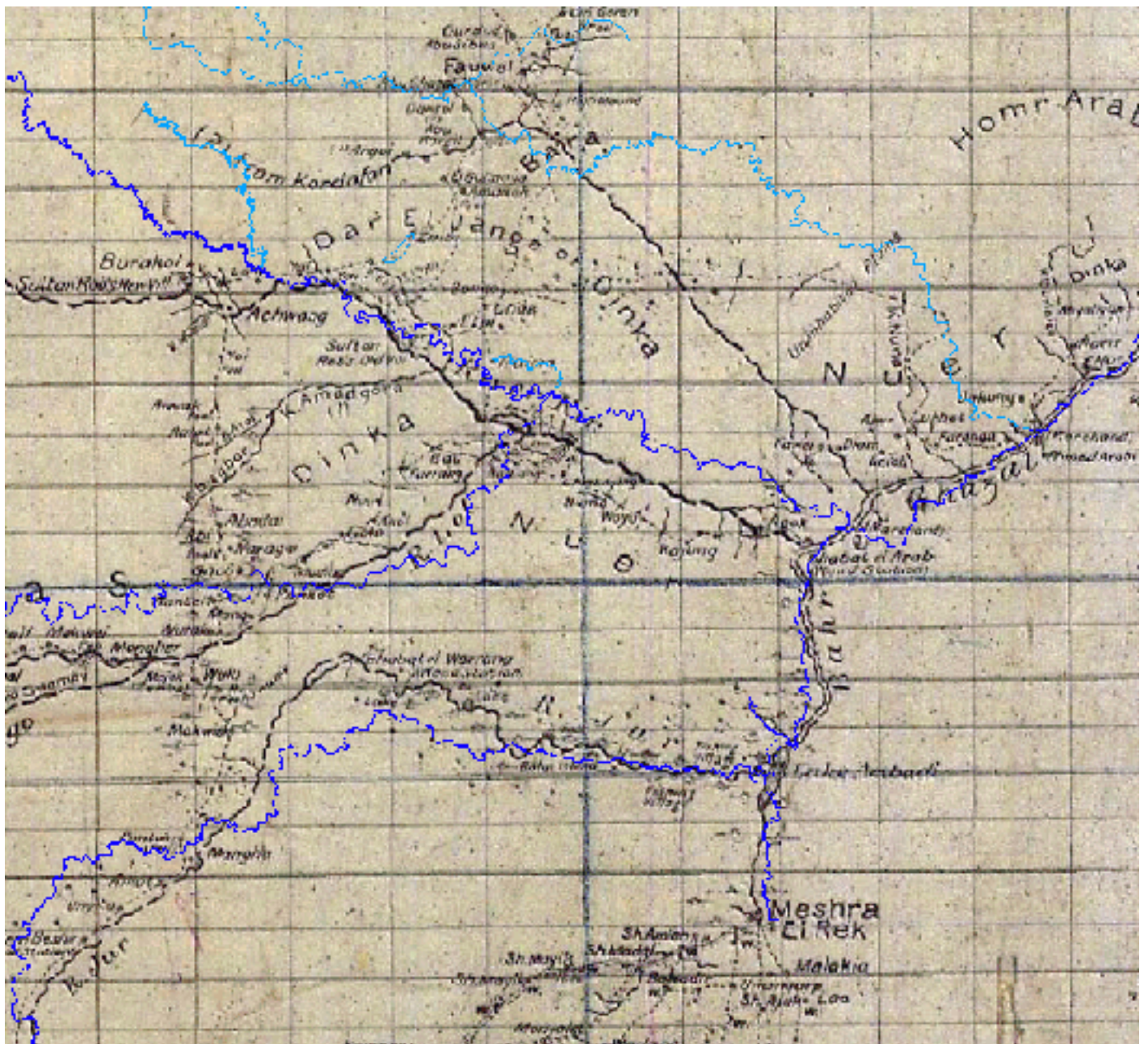


Fig. 13 Detail of comparison of lower course of Bahr el Arab<sup>53</sup>

4.4 From this point on, there was no confusion about depiction of the course of the Bahr el Arab. In successive editions of the 1:250 000 series maps, published by the Survey Department, the Bahr el Arab was gradually shown in greater detail, but always similar to the line shown on the 1907 map. It was also accepted, as Comyn had claimed, that the Bahr el Arab had several names, some of which began to appear on the Survey Department's maps. The short section of river that in 1907 was annotated with a question mark (*viz.* "(?) From Kordofan") had by 1914 become the "Bahr el Homr or GnoI" and, by 1922, the "Ragaba ez Zarga or GnoI". The latter was extended to the northwest as a separate waterway to the Bahr el Arab. The Bahr el Arab, on the 1922 edition of

<sup>53</sup> Map Atlas, Map 10.

the 1:250 000 map,<sup>54</sup> also carried the names Gurf and Kir.

## 5. CONCLUSIONS

5.1 Western travellers first reported the existence of a significant tributary of the Nile, referred to as the Bahr el Ada, at the beginning of the nineteenth century. As the Bahr el Ghazal was opened up as a transport corridor, the location of the mouths of tributaries was soon known with some accuracy. At the same time, exploration was also taking place in the higher land along the Nile-Lake Chad watershed. Travelling in the country between the Bahr el Ghazal and the watershed was, however, much more difficult and, by the end of the nineteenth century, it had not been possible to connect rivers on the watershed with the known mouths of tributaries on the Bahr el Ghazal with any certainty.

5.2 After the re-conquest (1898), the Condominium administration declared the Bahr el Arab to be the boundary between Kordofan and Darfur on the north, and Bahr el Ghazal on the south. This gave greater impetus to the task of sorting out the courses of the waterways in the area. In very difficult, flat country, the task proved to be very challenging and it was quite understandable that there was some confusion to begin with. Count Gleichen, in his 1905 Compendium, writes of this confusion about the courses (but not, it should be noted, of the existence) of the western rivers thus:

“The course of the comparatively short Bahr El Ghazal river, known to the slave-traders of old times, was laid down by Petherick, Gessi, etc., in 1864-78; but the courses of the western rivers which flow into it, such as the Bahr El Arab or El Homr, have not yet been even roughly determined”.<sup>55</sup>

5.3 Uncertainties were, however, quickly removed, most notably by the work of Comyn and, by 1907, the maps of the Survey Department had adopted alignments for the Bahr el Arab, the Lol and the Ragaba ez Zarga which essentially remained the same over the years that followed, although extra detail was added as exploration revealed the complex meandering nature of these waterways.

5.4 In 1911, the Anglo Egyptian Sudan Handbook Series on the Bahr el Ghazal Province gives a description of the Bahr el Arab which accords with today's knowledge of this waterway:

“*Bahr El Arab (also called B. El Rizeigat, El Gurf and Kir River).*—This river rises in Dar Fertit. Its source is formed by the Adda and Um Belasha Rivers, flowing from the hills south of Hofrat El Nahas, which join at a point about 50 miles north-north-east of Kafiakingi, and thus combine to form the outlet of the Bahr El Arab from the hills of Dar Fertit.

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<sup>54</sup> Map Atlas, Map 22.

<sup>55</sup> Gleichen, A., *The Anglo-Egyptian Sudan*, Vol. I (1905), p 16 (SM Annex 38).

The river then follows a tortuous course along 10° N. Lat., and joins the Bahr El Ghazal at about 55 kiloms. north of Meshra El Rek, after receiving a considerable tributary – the Lol – on its right bank some 60 kiloms. higher up.

The river is on the whole a fine one. Its unexplored upper reaches are reported to contain open water throughout the year – at any rate, in pools – and it flows between good, sound banks.

Information gathered from various sources suggests the probability that these upper reaches may be navigable as far as Hofrat El Nahas. But before it can be utilized as a waterway considerable clearing must be effected from the Lol junction to its mouth.

The river above the Lol junction has been navigated for about 100 miles.”<sup>56</sup>

5.5 By the end of the nineteenth century there was a clear understanding that there was a substantial river rising in the vicinity of Hofrat en Nahas and flowing some 750 km east-south-east to join the Bahr el Ghazal at a well-determined location. This river marked the boundary between the provinces of Darfur and Kordofan to the north and the province of Bahr el Ghazal to the south. Although, in the early twentieth century, there was some confusion as to the precise course of this river, there was only one river that fitted this general description. The confusion in the early twentieth century was resolved within a few years: moreover, it never gave rise to the idea that there was any river other than the Bahr el Arab that constituted the boundary between the provinces of Kordofan and Bahr el Ghazal prior to 1905.

A. S. Macdonald

1 December 2008

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<sup>56</sup> *The Anglo Egyptian Sudan Handbook Series: The Bahr el Ghazal Province*, Compiled in the Intelligence Department, Sudan Government, Khartoum (December 1911), p. 9 (SM Annex 26).



## ABYEI BOUNDARY DISPUTE

### WITNESS STATEMENT

1. My name is Ian Connison and I live at 3 Market Hill, Hedon, Hull UK. I am a retired professor of social anthropology.
2. I have been asked by the Government of Sudan to provide a witness statement in relation to the "Shared Rights Area" identified by the Abyei Boundary Commission in its Report of 14 July 2005. I have not been paid any fee for making this Statement.
3. My qualifications for making this Statement are as follows. After reading anthropology at the University of Cambridge, I undertook doctoral work in the late 1940s on a fishing community in Northern Rhodesia (now Zambia). My doctoral supervisor was E.E. Evans-Pritchard, Professor of Social Anthropology at Oxford, who had himself worked in the Sudan and produced a major study on the Nuer. My doctoral work was published in 1960 as *The Luapula Peoples of Northern Rhodesia* (Manchester University Press). After finishing my doctorate, an opportunity arose in 1951 to undertake a study of the Baggara Arabs of South-western Kordofan. The study was funded by the then Condominium Government of the Sudan, but it was an independent academic study; I produced a short report for the Ministry of the Interior at the end of my fieldwork, but otherwise I had no reporting relationship to the Government and I reached my own conclusions. I spent slightly over 2 years in Southern Kordofan, between August 1952 and January 1955 with a break in the middle. The resulting book was published as *Baggara Arabs: Power and the Lineage in a Sudanese Nomad Tribe* (Clarendon Press, Oxford, 1966).
4. Subsequently I taught anthropology at the Universities of Manchester (1956-9) and Khartoum (1959-1965) before taking up the Chair of Anthropology at Hull. A copy of my cv is attached.
5. The term Baggara is a generic word for the cattle-rearing Arabs of Western Sudan. It comes from the Arabic word *baggar* (cattle). The Messiriya, one of the Baggara tribes, is divided into two sections, the Humr and the Zurg. My time was spent with the Humr. I lived in the camp of one of its eleven sections or *omodiya*s. In Appendix 1 of the book the *omodiya* areas are described and explained. An *omodiya* is a patrilineal lineage group under an *omda*. "My" *omodiya* was the Mezaghna; the name of their *omda* was Hargas Merida. But I travelled throughout most of the area used by the Humr and visited all the *omodiya*s. I obtained through personal participation and observation a clear view of the migratory patterns of the Humr.
6. The indications are that the Humr have lived in this area since at least the early 1800s. Their semi-migratory life revolves around the movement of their cattle (I refer to the 1950s, but there is reason to believe that this pattern of life is of long standing). Attached is a map, taken from my book, which depicts the migratory pattern as I

observed it and participated in it. During the wet season the Humr lived in settled camps to the north in the Babanusa, as indicated on the map. As the dry season came, they moved first briefly to the Muglad where the cattle grazed on the remains of the millet harvest. They then moved south through the extensive sandy Goz to the area called the Bahr: this is the area around the Bahr al-Arab and the Regeba Zerga. Here, water and good summer grazing are to be found. They lived in scattered camps across this region during the summer months (January-May). For part of this time they shared the area with Dinka, whose permanent houses were dotted around, but shortly after the arrival of the Humr sections, most of the Dinka would decamp further south to their dry season areas. During my time in western Kordofan, there was a good relationship between Humr and Dinka. I knew the Dinka leader, Deng Majek, who was an impressive man.

7. The amodiyas moved their large herds of cattle annually from winter to summer grazing areas and back again. The distances travelled were quite substantial, in the order of 80-120 miles, but the journey was accomplished in around 10-14 days. The men mostly travelled on horses or sometimes on bulls, the women on bullocks. These also carried substantial loads of household goods, etc. Indeed Humr cattle were bred for their long legs, endurance and load-carrying capacity. They are quite unlike the much smaller Dinka cattle, which were not ridden or used as beasts of burden; the Humr did not encourage inter-breeding between the two.

8. The reason for the relatively rapid movement from north to south was that - although there was some variability from year to year - there might be little water and not much fodder for the substantial herds in the intervening Goz. This movement is shown on the map I have referred to.

9. The Goz overlaps the so-called "Shared Rights Area" of the ABC Report. In describing that area in this way it seems to me the ABC was fundamentally mistaken. I did not observe this as an area of shared rights at all, nor was the "dividing line" drawn by the ABC within that area in any way regarded as a boundary between Humr and Dinka. The Dinka were to the south, as I have said. Some Dinka sought employment in Muglad. It was not unknown for individual families to travel north and be, so to speak, "adopted" into one or another of the amodiyas of the Humr. They might also take surplus cattle north to market. But they did not exercise regular grazing or similar rights in the so-called "Shared Rights Area". The real area of sharing was further south, in the Bahr. There the two groups co-existed for a fairly short season - but this was not a "host-guest" relationship. At this season it was the Dinka who, apart from a few caretakers, left to go south as part of a transhumance pattern rather than one of nomadism. As I noted in my book (p. 19) "much of the Bahr has permanent Dinka settlements, although during most of the time that the Humr occupy it the Dinka are with their cattle south of the Bahr al-Arab". I never observed the Humr asking permission from Dinka to come to the Bahr, and they did not consider themselves as visitors there. The whole region was regarded by the Humr as their "dar" or country. On the map on p. 5 of my book (attached) I show the area I knew as "The Humr": it covers the whole south-western corner of Kordofan and includes an area south of the Bahr al-Arab. The table on p. 22 shows that during 1954, the

cattle of one section of the Mezaghna omodiyā spent more time, and more continuous time, in the Bahr (142 days) than in any other of the four main areas of Dar Humr.

10 As I note at pp. 146-147 of the book, the Humr did not have any conception of individual or collective legal title to grazing land. They regarded all the grazing land they used as public land, open and available to them.

"In general, Humr custom demands that, individually owned agricultural land apart, no person or group of persons should have specific rights to land in Dar Humr; that, as they now express it, the land belongs to the Government and is open for exploitation by any member of any group."

11 I am informed that the effect of the ABC's decision would be to exclude the Humr from their summer grazing and living areas in the Bahr: this I would regard as fundamentally unjust.

12 During my time in Kordofan I had only occasional – though entirely cooperative – contact with government officers. The District Commissioner was Michael Tibbels, whom I met from time to time. I drew heavily on the files of one of his predecessors, Dr. P.P. Howell. This and the literature on the region, which of course I read, persuaded me that "(t)he way in which the tribal sections move seems not to have varied much since the Reoccupation" (p. 26). In short I believed – and still believe – that the position I described was of long standing.

13 Two members of the ABC visited me in 2005, including Dr. Johnston, whom I had previously met. They do not attribute any particular views to me in their Report – but I do not recall saying anything to them that could have supported the belief that there was a defined area of "shared rights" across the Goz, or even a boundary between Humr and Dinka in that region.

14 I confirm that the contents of this statement are to the best of my knowledge true and correct.

  
Professor Ian Cummins

Hedon, United Kingdom

1 December 2008

**Ian Cunison**  
**Curriculum Vitae**

1923	born Milngavie, Scotland
1929	preparatory school
1934-41	Glasgow Academy
1941-2	Cambridge University
1942-4	Royal Artillery (Lieut.)
1945-7	Cambridge University, Pt 2 Social Anthropology ( Hons Class I)
1948-51	Anthropological fieldwork – Luapula, (49-59 at Oxford University)
1952-5	Anthropological fieldwork – Baggara (53-4 at Manchester University)
1956-9	Lecturer, Manchester University
1959-65	Senior Lecturer then Professor, University of Khartoum
1966-89	Professor at University of Hull