

**REPORTS OF INTERNATIONAL
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**RECUEIL DES SENTENCES
ARBITRALES**

**Award in the Arbitration regarding the delimitation of the Abyei Area
between the Government of Sudan and the Sudan People's Liberation
Movement/Army, Dissenting Opinion of Judge Awn Shawkat Al-
Khasawneh -- Sentence arbitrale relative à la délimitation de la région de
l'Abyei entre le Gouvernement du Soudan et le Mouvement/Armée,
Opinion dissidente de Juge Awn Shawkat Al-Khasawneh**

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DISSENTING OPINION OF HIS EXCELLENCY
JUDGE AWN SHAWKAT AL-KHASAWNEH
MEMBER OF THE INTERNATIONAL COURT OF JUSTICE

Introduction

I regret that I am unable to concur with the conclusions of the Tribunal contained in the *Dispositif* of the Award or to agree, in general, with the reasoning deployed by the majority to arrive at those conclusions. Indeed, and I say this with great respect to my learned colleagues, I find the underlying logic of the Award singularly unpersuasive (let alone convincing), self-contradicting, result-oriented, in many respects cavalier, insufficiently critical and unsupported by evidence, and indeed flying in the face of overwhelming contrary evidence. In other words very similar to the ABC Experts' Report itself and like it as far in excess of mandate as it is removed from historical (and contemporary) reality. I must therefore dissent.

I also feel duty-bound to explain my dissent comprehensively not only because the litany of negative observations I have just enumerated would of itself warrant a full exposé but equally because this is no ordinary arbitration. Its outcome will, in all likelihood, have a profound impact on the future of the Sudan as a State and the peace and well-being of all its long-suffering citizens regardless of their ethnicity or creed.

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* Secretariat note: the map contained in the Appendix to the Dissenting Opinion is located in the rear pocket of this volume.

1. The Experts went on a frolic of their own

1. The ABC Experts were tasked with a straightforward and specific mandate. It was not to ascertain where the Ngok people lived in 1905 nor to pronounce on land uses in southern Kordofan. Their mandate was simply to ascertain the spatial implications with reference to a single defining date (1905) and a single defining event (the transfer *to* Kordofan of [the area of] [the nine Ngok Dinka Chiefdoms]). To be sure, the provincial boundary between Kordofan and Bahr el Ghazal was not as clear as the provincial boundaries of a late 20th-century, highly centralised State would be, but they were, by the standards of their time and place, clear enough to effect a delimitation, and the mandate itself assumed the existence of such a boundary. At any rate it was the job of the Experts to clarify any confusion or doubts – an achievable task by reference to, and close reading of, Condominium documents and other available evidence. Ironically it was this very confusion that caused the Experts to abandon their mandate and to embark on a frolic of their own¹ with no apparent justification.

2. The Report in which the different episodes of this frolic are recounted is a remarkable 250-page interdisciplinary document. The thought process contained in it meanders (like the Bahr el Arab) from that initial fundamental misinterpretation of the Experts' mandate to their ultimate delimitation of the area, which placed the boundaries of the nine Ngok Chiefdoms in areas where they never had any presence in 1905 nor at any other time after that, and where other people, the Misseriya tribe and others, lived.

3. The Report is remarkable also as a *mélange* containing *clues* from human geography and administrative records; sociological theories about dominant versus secondary rights and uses; and ecological and anthropological evidence, all interspersed with fragmentary quotations from near-contemporaneous official evidence. Also remarkably, despite its varied sources and exotic reasoning (by the dim standard of lawyers), or perhaps because of them, the ultimate delimitation exercise is the least defended part of the Report. One is left with the impression that the Experts were more concerned with testing and putting into use their theories about dominant rights and the clues one can glean from geography, etc., than in the tedious exercise of delimitation itself and the meticulousness it requires. Thus they expressed their findings in the form of straight lines, unperturbed by the obvious fact that tribal territories are never straight. By contrast, Condominium officials, who knew more about local conditions and tribal locations than the Experts or my learned colleagues, never drew straight lines on the same scale to represent tribal boundaries.

¹ This phrase is borrowed from the English law of vicarious liability, as stated in *Joel v Morison* [1834] EWHC KB J39 (Court of Exchequer, 3 July 1834), *per* Parke, B: "The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable."

4. Equally ominously, the Experts included by their delimitation method, which can only be described as cavalier, vast tracts of territory (the size of Belgium), despite overwhelming contrary evidence. And, not being able to deny that this was also the land of Misseriya and others, they reduced them to holders of secondary rights in their own land on the basis of their life style which was not significantly different from the Ngok.

5. The Tribunal has now, for reasons that have more to do with compromise than principle, impugned the northern line which stood at 10°22'N where the Experts had bisected the Goz area on the basis of one of their theories relating to the "equal division of shared natural resources", a concept with which I am not familiar. The Tribunal replaced that line with a shortened line at 10°10'N, which was not the Experts' northern boundary line of the area, but only where the Experts concluded that the Ngok Dinka "dominant rights" stopped. In addition to impugning the northern line, the Tribunal has also impugned the eastern and western lines. But at this point, the Tribunal has not drawn what is the only possible conclusion, namely, that nothing is now left of the Experts' Report except sociological theories and clues from human geography, and that therefore the Report must be set aside. Only after drawing that conclusion should the Tribunal have embarked on its own delimitation on the basis of the submissions of the Parties and the benefit it derived from guidance by learned counsel. Instead, it has opted, without sanction from its own mandate permitting partial nullity, (for this reason it is in excess of mandate), to effect new straight lines. These are unsupported by any "conclusive evidence", the standard the Tribunal has applied in impugning the northern line, or by "adequate reasoning", the standard it has applied to the impugning of the eastern and western boundaries. This is another reason why by drawing boundary lines without the reasoning it required of the Experts, the Tribunal is by the same standards in excess of mandate. To substantiate these assertions, this Dissenting Opinion will begin by examining the evidence for the new boundary lines.

2. The supporting evidence and reasoning for the eastern and western boundaries and their intersection with the northern boundary at 10°10'N

6. "The house of hope is built on sand," as Hafiz of Shiraz² once wrote, and indeed if we are to look in the Award for a "*fondation solide*" on which to delimit the *tribal* boundaries of the Ngok Chiefdoms we will seek in vain.

² Shams-ud-din Mohammed, better known as Hafiz of Shiraz (born circa 1320 A.D.) is one the greatest poets not only of Iran and Islam but of humanity at large. The full quotation is:

"The house of hope is built on sand,
And life's foundations rest on air".

The Tribunal cannot, with all the hopes that the hearts of my learned colleagues may contain, erect its reasoning for allotting such a vast area on such meagre factual evidence. The only source for the 29°E and 27°50'E lines are the imprecise, non-contemporaneous remarks made in 1951 by Howell³ which the majority quoted out of context and misinterpreted. The ABC Experts were aware of Howell's writings and quoted them at length in their own Report,⁴ however they did not base their delimitations of the boundary on those remarks – whether out of recognition of their generality or because they would not have included enough territory especially to the east is a matter of speculation.

7. The relevant extract from Howell's "Notes on the Ngork Dinka of Western Kordofan" reads:

"The Ngok Dinka occupy the area between approximately long 27°50' and long 29° on the Bahr el Arab, extending northwards *along the main water-course* of which the largest is the Ragaba Um Biero."⁵

8. *First*, Howell's use of the word "approximately" suggests that he was trying to give a general and approximate appreciation of the area. Surely – for the meticulous at least – that is no basis on which to draw a vertical line stretching due north some 50 kilometres from the Bahr el Arab where it meets the Upper Nile border at around 9°40'N to the 10°10'N line, and to allot the enclosed area to the Ngok. This is simply an affront to the science of delimitation.

9. *Secondly*, the Ngok do extend northwards, but not *ad infinitum* and Howell, who reminded the reader that the longitudes are approximate (as befits a tribe and not a regimented army) indicated that the area of occupation was "*along the middle reaches* of the Bahr el Arab" and its tributaries.⁶ Neither the Bahr el Arab nor its Ragabas in their middle reaches are anywhere near 10°10'N. Moreover, neither the Bahr el Arab nor the Ragabas are horizontal or latitudinal, let alone forming straight lines: they follow a north-westerly direction from 9°20'5"N at the eastern border of Kordofan to approximately 9°50'5"N at the Kordofan/Darfur border. The Ragaba Um Biero meets the Bahr el Arab and is filled by it at Chweng approximately at 9°30'3"N; it reaches beyond the 10°N line near the Darfur border (although no one is sure as to where its upper reaches end). The Ragaba ez Zarga, the most northerly of the

³ P.P. Howell, "Notes on the Ngork Dinka of Western Kordofan", (1951) 32 Sudan Notes and Records 239, p. 242, cited in Award at paras. 701 *et seq.*

⁴ See, e.g., ABC Experts' Report, Appendix 5.13, at p. 201.

⁵ P.P. Howell, *supra* note 3 (emphasis added).

⁶ *Ibid.*, *supra* note 3, at p. 241: "*The Ngork Dinka . . . occupy an area along the middle reaches of the Bahr el Arab.*"; ABC Experts' Report, Appendix 5.13, p. 201, citing P.P. Howell, 1948, in P.P. Howell Papers, Sudan Archive, University of Durham ("SAD") 768/2/15 "*The Ngork Dinka of Western Kordofan live along the middle reaches of the Bahr el Arab and its tributaries. During the dry season the Homr Messiria mingle freely with them in pastures and they have a long history of contact with the Arab world – probably for at least a century.*" (emphasis added).

Ragabas, enters Kordofan at approximately 9°40'5"N, goes up in a north-westerly direction, meanders at a more or less straight line around 9°50'N and then starts to climb at about 28°30'E to somewhere on or above latitude 10°N (although, again, no one knows whether it reaches the 10°10'N line or above). Thus "*along their middle reaches*", where Howell placed the Ngok, is nowhere near the 10°10'N line. It would follow, by necessary implication, that in 1951 when the Ngok may have reached, in their northward expansion, the Ragaba ez Zarga/Ngol, there is no evidence, even by then, that the vast area north and north-east of the Ragaba ez Zarga, ascribed to the Ngok by the Experts, ever had any collective Ngok Dinka presence in it, and the same applies to the reduced area ascribed by the Award *without a shred of evidence* let alone "conclusive evidence" to the Ngok, that is, the area north of the Ragaba ez Zarga and to the east of it until the 10°10'N line meets, arbitrarily, longitude 29°E and the areas bordering Darfur which have always been traditional Homr lands.

10. Howell, an anthropologist and a British official⁷ – who was by all accounts a distinguished civil servant in an exceptionally meticulous civil service – would have been appalled at how his words were twisted by my learned colleagues. He would have been equally appalled by how he was quoted out of context by a Tribunal that has, elsewhere in the Award, stressed the importance of context, such as for example the fact that the Experts were social scientists, if only in that other instance, to prove doubtful propositions or to infuse doubt into clear ones – something to which I shall return later in my Dissenting Opinion – but I shall revert first to Howell and try to put his opinion in context.

11. In his 1951 publication, Howell says about the Ngok:

"Permanent villages, and cultivations are set along the higher ground north of Bahr el Arab, while dry season grazing grounds are for the most part in the open grassland (*toich*) south of the river. *Villages are usually built close to the river or to one of the main watercourses*, since water is more easily available during the early part of the dry season, either in pools or in shallow wells dug in the river bed. Clusters of homesteads each consisting of several living-huts (*ghot*) and one or more cattle byres (*luak*) are built in an almost continuous line *along these rivers*."⁸

12. And still if any doubt remains as to where the Ngok were located when Howell wrote his Notes, he supplies a general answer at the outset, by way of introduction:

"The Ngork Dinka . . . occupy an area *along the middle reaches* of the Bahr el Arab. They border the Rueng Alor Dinka in the south-east and the Twij Dinka to the south, and with both of these peoples have close cultural affinities. To the south-west are the Malwal Dinka. North of the Ngok are the Bag-

⁷ ABC Experts' Report, Part 1, p. 16.

⁸ Howell, *supra* note 3, at p. 243 (emphasis added).

gara Arabs of the Messeria Humr, with whom they have direct and seasonal contact . . .”⁹

13. Yet again Howell makes the observation that the Ngok were along “*the middle reaches of the Bahr el Arab*”. As already noted, Howell had observed in 1948 that the area of occupation of the Ngok lies “*along the middle reaches of the Bahr el Arab and its tributaries*” and that “[d]uring the dry season the Homr Messiria mingle freely with them in pastures”.¹⁰ A simple exercise in logic would show that the Ngok were in the “middle reaches”, not the upper reaches, of the Bahr el Arab, the Ragaba Zarga and the Ragaba Um Biero, and this tallies completely with all contemporaneous cartographic and written evidence and with the evidence of Cunnison on whom the Award rightly heaps justified praise. The idea that they had moved even further north and east beyond the Ragaba ez Zarga, where the Award wishes to place them is, to put it mildly, quite remarkable.

14. I shall deal in Parts 6 and 7 of this Dissenting Opinion with the Experts’ “Proposition 8” on continuity of Ngok presence from 1905 until the mid-1950s, and with the evidence that both the Report and the Award chose to neglect, as to where the Ngok were from 1905 to 1965, but for the time being I shall concentrate on the evidence relied on by the Tribunal.

15. Not content with leaving Howell appalled, the majority in the Tribunal goes further in harnessing what looks like a hastily arranged *ex post facto* ensemble of authorities to buttress the misquoted Howell. Thus the reader is told that “[h]is calculations are also confirmed both by earlier sources as well as contemporaries of Howell”,¹¹ with the important caveat that these are “less specific than Howell”.¹² According to the Award “all authors have in common the fact that they define the location of the Ngok Dinka by reference to the Bahr region, which they describe in a similar fashion”.¹³ However those authors describe the location of the Ngok by reference to the Bahr region in the mid-20th century and it is not in dispute that, in the 1950s, the Ngok were in the Bahr region, namely, along the middle reaches of the Ragabas and the river itself. Nothing, even when all allowance is made for the non-specificity of those authors, can be inferred from their writings.

16. Thus Robertson depicts the Bahr as “the great semi-circle from Grinti to Keilak on the Bahr Al Arab and its system of tributary (wadis) regebas”.¹⁴ But even if Keilak falls within some expansive definition of the Bahr (Keilak is above 10°50’N, well above the Goz), as documented by Wilkinson, it was a per-

⁹ Howell, *ibid.*, p. 241 (emphasis added).

¹⁰ P.P. Howell, 1948, *supra* note 6 (emphasis added).

¹¹ Award, para. 726.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Award, para. 727, citing J. Robertson, “Handing over Notes on Western Kordofan District”, 1936, Chapter IV “The Humr Administration”.

manent Arab settlement in 1902¹⁵ and not even the ABC Experts were ready to assign it to the Ngok Dinka. Apart from that, it is quite perplexing how this expansive definition of the Bahr supports the Tribunal's 29°E and 27°50'E longitudinal lines. Howell, the ever so careful official, has already indicated in unmistakable terms where the Ngok were in his time. He is being used, in what can only be called a desperate attempt to distil from dead men things they never said. In contrast to this expansive definition of the Bahr (which definition Cunnison also makes), the Bahr in the *proper sense*, where the Homr intermingled with the Ngok (the relevant area of the Bahr, so to speak) is a more restricted area between the Ragaba ez Zarga and the Bahr el Arab, and that is the sense in which Cunnison understood the shared-rights area to be.¹⁶ In his expert testimony he states:

“The real area of shared grazing was further south, in the Bahr. There, the two groups co-existed for a fairly short season – but this was not a ‘host-guest’ relationship. At this season it was the Dinka who, apart from a few caretakers, left to go south as part of a transhumance pattern rather than one of nomadism.”¹⁷

17. Thus the area of contention was not *the Bahr* in its expansive definition but an area *in the Bahr* where the two tribes co-existed for a season and where the Ngok had a presence.

18. Moreover, the earlier sources cited by the Award,¹⁸ namely, the 1912 Kordofan Handbook; the 1913 Anglo-Egyptian Kordofan Province Map; the 1914 Anglo-Egyptian Sudan War Office Map; and the 1916 Darfur War Office Map all suffer from the fatal flaw that they never refer to the Ngok Dinka but only to “Dinka” or “Dar Jange”, and it should not be forgotten that the Dinka is a great tribe of which the Ngok, sometimes referred to as the western Dinka, are but one branch.

19. It is perhaps on account of the uncertainty inherent in these earlier descriptions, and the plain impossibility in realistic terms of the Ngok Dinka being at Keilak in 1905 when they were demonstrably at most on the middle reaches of the Ragabas in the 1950s, that the Award acknowledges this incongruity in the following terms:

“However, a close reading of the evidence shows that an expansive view of the area occupied by the Ngok Dinka, such as to encompass the Bahr up to, and as far east as, Lake Keilak and Lake Abiad, is not warranted. Rather, the evidence indicates that Ngok territory occupation was concentrated approximately between the longitudes provided by Howell, up to latitude 10°10'N.”¹⁹

¹⁵ Gleichen Handbook, 1905, p. 157.

¹⁶ *Supra* note 24.

¹⁷ Witness Statement of Professor Ian Cunnison, GoS Memorial, p. 190.

¹⁸ Award, paras. 733–734.

¹⁹ Award, para. 735.

20. But why at latitude 10°10'N? There is no logical link between the premise and the conclusion and not a shred of factual evidence supports the finding for either the eastern or the western “lines”, allegedly Howell’s,²⁰ nor their intersection with the northern line at 10°10'N. The leap in reasoning is totally unexplained. There is still no justification for the 10°10'N line.

21. At this point the Tribunal, having exhausted the readily-exhaustible supporting sources, should, in my respectful opinion, have paused and reflected, self-doubt being preferable when we are dispensing justice to doctrinal certainty. Instead the insistence on making Howell’s imaginary lines reach 10°10'N has prompted the Tribunal to try another strand of justification in the hope that by repetition its arguments, no matter how weary and unconvincing, will somehow reach 10°10'N.²¹ Thus the Award reads:

“In Cunnison’s analysis, the Ngok Dinka permanent settlements are in fact mostly located around the Bahr river system, which includes the Bahr el Arab, the Ragaba Umm Biero, and the Ragaba ez Zarga, and ‘numerous winding watercourses all connected eventually with the Bahr el Arab’. While this area does not go beyond latitude 10°10'N – where as noted by Professor Cunnison there is no significant collective presence of the Ngok Dinka (in the north west, in the goz, in north east, in the upper Bahr region towards lake Keilak and Abiad) – Howell’s lines of latitude do encompass and coincide roughly with much of the three main rivers and intricate network of smaller waterways of this portion of the Bahr, as shown on the Tribunal’s Award Map.”²²

Here, the majority rely on Cunnison’s reference to “numerous winding watercourses, all connected eventually with the Bahr el Arab”.²³ Remarkably, when Cunnison was describing the Bahr using this phrase, he was doing so in the context of depicting where Homr presence was. Furthermore, within that area under its expansive definition, Cunnison distinguished between the “Regeba” and the “Bahr proper”. Cunnison noted that the part of the Homr dry-season watering country known as “[t]he ‘Bahr’ proper” was located “mainly around the largest watercourses, the Regeba Umm Biero and Regeba Zerga”.²⁴

²⁰ The Tribunal speaks of “Howell’s lines of longitude” and proceeds as if Howell had drawn lines at these longitudes to indicate the area. For example at para. 741 it refers to “Howell’s longitude of 29°E, west of which one enters Ngok territory”. I would emphasize that Howell never drew lines and had he done so he would have in all probability come up with a differently shaped boundary as close to the reality of his times as it is removed from the wild flight of fancy of 10°10'N, 29°E and 27°50'E.

²¹ As Algernon Swinburne once put it, “even the weariest river winds somewhere safely to the sea”.

²² Award, para. 736, citing Cunnison, *infra* note 23 (emphasis added).

²³ Award, para. 727, citing I. Cunnison, *Baggara Arabs: Power and Lineage in a Sudanese Nomad Tribe* (1966), at p. 172.

²⁴ *Ibid.*

22. The Award continues: “[t]his is confirmed by earlier evidence including the 1912 Kordofan Handbook which locates the Ngok Dinka in the centre and west of the area extending from the Bahr el Arab to Lake Keilak.”²⁵ This exotic reasoning calls for a number of comments.

a. The area of the Bahr in its upper reaches certainly does not go beyond 10°10’N (the Bahr el Arab enters Kordofan from Darfur at 9°52’N, the Ragaba Um Biero’s upper reach and the Ragaba ez Zarga’s upper reach are not free of controversy)²⁶ but in any event they do not go to 10°10’N.²⁷

b. Even if they did, there is no evidence or suggestion by either Cunnison or Howell that the Ngok had reached the *upper* reaches of these watercourses even in the mid-20th century, let alone in 1905.

c. Howell expressly maintains that the Ngok Dinka are along the “*middle reaches*” of the Bahr and the two Ragabas.

d. Assuming there were Ngok Dinka settlements on the upper reaches of the Ragaba Um Biero, the distance from there to the eastern Howell “line” where it intersects 10°10’N would be roughly 150 kilometres. It would be roughly the same from the upper reaches of the Ragaba ez Zarga and even greater from the Bahr el Arab. What is the special quality of Ngok dug dugs that can generate so much entitlement to territory?

e. Howell’s longitudinal references are expressly stated to be approximate. He never described them as extending to 10°10’N. On top of this considerable uncertainty, the defence for the 29°E and 27°50’E lines is that the area coincides *roughly* with Howell’s limit. Thus an *approximate* description of an area along the *middle reaches* of the river and the Ragabas is mysteriously understood to reach 10°10’N in the face of contrary evidence from the quoted authority, and, as if this is not enough, an area described by Cunnison is interpreted without reason as *roughly* corresponding to Howell’s eastern and western limits, and, by being quoted out of context, is superimposed on the Howell “lines” to produce the eastern and western borders. If this is not frivolous reasoning, nothing is. I do not think the whole history of delimitation has attested a more vague criterion on which to effect territorial delimitation.

f. The habit of quoting out of context and misinterpreting is repeated. The 1912 Kordofan Handbook is misquoted: according to the Award it “locates the Ngok Dinka in the centre and the west of the area extending from the Bahr el

²⁵ Award, para. 737.

²⁶ The GoS maps show the start of the Ragaba ez Zarga north of Maper Apaal. The SPLM/A maps show the Ragaba ez Zarga starting to the south east of Rumthil (Antilla) just below 10°N latitude. The Ragaba Um Biero finishes on most maps in south Darfur but Map 62 of the SPLM/A Reply Memorial shows it extending into a network extending some way to the north. There is no evidence that these points have been determined definitively in the field.

²⁷ *Supra* para. 9.

Arab to Lake Abiad”.²⁸ The statement in the 1912 Kordofan Handbook locating the Ngok Dinka is worth quoting in full:

“The three main divisions are: ~ On the east, the Ruweng section under *Sultan* Anot; in the centre, the followers of the late *Sultan* Rob, who are now under his son, Kanoni; and to the west, a number of Rob’s ex-followers, under another of his sons named Kwal.”²⁹

It is plain that these words mean that the Rueng, a Dinka but not a Ngok Dinka tribe were to the east, and to the west of them were two Ngok groups: in the centre the followers of Kanoni, son of Sultan Rob (whose presence on the Kiir in 1905 is beyond dispute) and yet to the west of that were the followers of another of his sons. How this is transformed into “additional evidence” to confirm the western and eastern “lines” attributed to Howell³⁰ is based on anything but contradictory reasoning is beyond my comprehension.

23. The Award goes on to quote what it calls: “Evidence Corroborating Howell’s Western and Eastern Limits”.³¹ These are:

a. A remark recorded in 1954 by Michael Tibbs that the area around Gerinti very close to longitude 27°50’E is “Ngok territory, although the Arabs used to graze in it in the spring”.³² This clearly means that the area was a shared grazing rights area and described the position around his time. It is difficult to see how it can be transposed back to 1905 when more contemporaneous evidence, such as that of Willis,³³ points to a much more limited presence of the Ngok being the case. To fit, at any cost, the 1905 reality with the position around Howell’s times, the earlier and naturally more pertinent evidence is either ignored or misinterpreted. Sultan Rob’s statement that there “are only Humr” west of him is dismissed as “equally unhelpful” or in the SPLM/A pleadings as “dissembled”,³⁴ words which in themselves reveal how result-driven the exercise is. Of course it is unhelpful because Sultan Rob, the Paramount Chief of the Ngok Dinka, was reflecting the simple truth. He was not interested in being helpful to the Tribunal in trying to build its house of hope by drawing unreasoned straight lines in the sands and ascribing them to Howell.

²⁸ Award, para. 737.

²⁹ Kordofan and the Region to the West of the White Nile, Anglo-Egyptian Handbook Series (London: Her Majesty’s Stationery Office 1912), p. 73. See also C.A. Willis, “Notes on the Western Kordofan Dinkas”, 10 April 1909, Sudan Intelligence Report No. 178 (May 1909), Appendix C, p. 16: “The Western Kordofan Dinkas seem to be divided into three main heads: on the east the Ruweng, under Sultan Qot; in the middle the followers of the late Sultan Lar, under his son Kanoni, and to the west the followers of the late Sultan Rob, under his son Kwal.”

³⁰ See *supra* note 20.

³¹ Award, paras. 738 *et seq.*

³² Award, para. 739, citing M. and A. Tibbs, *A Sudan Sunset*, pp. 247–8, as cited in ABC Experts’ Report, Part 2, p. 203.

³³ Willis, 1909, Sudan Intelligence Report No. 178 (May 1909), Appendix C, p. 16.

³⁴ Transcript, 22 April 2009, 16/23 (Born).

b. Tibbs's remark that "while the Dinka tolerated the Misseria, *neither of them* wanted the Rizeigat from Darfur there".³⁵ This means only that two pastoralist tribes from the same "dar" did not want an "intruder" from a different dar (*dar-fur*). This statement relating to the 1940s or 1950s should be read in context. The exact relationship between the Misseriya and the Dinka was explained more thoroughly by Cunnison than anyone else. His explanation merits reproduction in full:

"The real area of sharing was further south, in the Bahr. There the two groups co-existed for a fairly short season – but this was not a 'host-guest' relationship. At this season it was the Dinka who, apart from a few caretakers, left to go south as part of a transhumance pattern rather than one of nomadism. As I noted in my book (p. 19) 'much of the Bahr has permanent Dinka settlements, although during most of the time that the Humr occupy it the Dinka are with their cattle south of the Bahr al-Arab'. *I never observed the Humr asking permission from Dinka to come to the Bahr, and they did not consider themselves as visitors there. The whole region was regarded by the Humr as their 'dar' or country.*"³⁶

24. In a similar vein, Howell, concerning the upper reaches of the Bahr el Arab watercourses during the period from November to February, states that "water supplies dry out early and the Baggara herds from the north begin to enter the area about this time, occupying the remaining water points *which they regard as theirs*".³⁷

25. By contrast, earlier evidence that does not support the 27°50'E line is dismissed. Heinekey trek report of 1918, which showed no Ngok Dinka in the same area is dismissed by the words: "[b]y contrast Heinekey who began a trek in Gerinti in March 1918 merely notes the absence of tracks and the necessity to be accompanied by a guide".³⁸ That is exactly the point: Heinekey did not find Ngok in Gerinti in 1918 but Tibbs did find them, along with the Homr Arabs, in the mid-20th century. To real reasoning (as opposed to frivolous or contradictory

³⁵ *Supra* note 32 (emphasis added).

³⁶ GoS Memorial, Witness Statement of Professor Ian Cunnison, 3 December 2008, para. 6 (emphasis added). In para. 731 of the Award, my learned colleagues refer to Professor Cunnison's statement that he "never observed the Humr asking permission from Dinka to come to the Bahr", a statement that I had myself quoted in support of the proposition that the Homr thought of the Bahr area not in terms of "dominant" Ngok versus "secondary" Homr rights, but in the sense that the area was a shared rights area. In an exotic interpretation, my learned colleagues cite that observation by Cunnison in support of the fact that the rights of the Misseriya are confined to the right to graze cattle and to move in the Abyei area. In fact the purport of Cunnison's remark could only have been that the Homr considered the Bahr area as theirs, as confirmed by Cunnison himself, who in the same Witness Statement also observed that "the whole region was regarded by the Humr as their 'dar' or country". This is yet another example of tendentious and result-driven interpretation of evidence.

³⁷ P.P. Howell, *supra* note 3, at p. 244, fn. 2 (emphasis added).

³⁸ Award, para. 740.

reasoning), the implication is clear: the Ngok moved to Gerinti in the intervening period between 1918 and when Tibbs made his remark. When Heinekey saw Dinka he did make a note, thus he mentions Ngok villages along the Bahr el Arab, which is exactly where Willis in 1909 (close to the crucial date of 1905) also confirms their presence, and Heinekey refers to Homr camps and Homr cattle on the way to Gerinti, and north of Mek Kwal's village.

26. I shall revert to this at the appropriate place to indicate where the Ngok were located around 1905. I have cited these examples to show that the evidence harnessed by the Tribunal is inconclusive, tendentious and misinterpreted and so vague that even if we accept it, i.e., even if we accept that Gerinti had a Ngok Dinka presence in 1905, there is no motivation for a line at longitude 27°50'E or extending all the way up to 10°10'N and I would suggest, with respect, that drawing boundaries requires more precision and meticulousness than this.

27. However, before leaving the issue of the boundaries drawn by the Tribunal I should turn, as the Award does to the eastern boundary.³⁹ And here four remarks are called for.

a. The Award quotes Robertson's study of Kordofan in 1933–1936 in which Robertson describes a tribal incident that occurred in that period when the people of the Western Nuer District in Upper Nile Province "had crossed the Ragaba and built their big cattle luarks – thatched huts – on the Kordofan side of the river, thereby trespassing on the Ngok Dinka lands" and he gave orders to burn the huts and make the intruders "go back to their own tribal lands".⁴⁰ The facts are undisputed but they do not support the conclusion drawn. The Nuer, or to be more precise those who came from the western Nuer district, in Upper Nile must have crossed the Ragaba ez Zarga around 29°E, Howell's alleged "line", but they must have crossed around 9°45'N (unless they went up to 10°10'N and then down again to 9°45'N in order to be more helpful to the Tribunal and only then crossed the Ragaba), and by this time there is no disagreement that the Ngok Dinka were (at these locations) on the Ragaba ez Zarga. This is confirmed also by the map bearing the title "Native Administrations of Kordofan Province" and dated 1941.⁴¹ But it is clear that official action was taken only after the intruders from Upper Nile crossed the Ragaba. However, the Ragaba ez Zarga does not go at this longitude up to 10°10'N, which is 50 kilometres due north, but flows in a westerly, then slightly north-westerly direction. Moreover the fact that the Nuer crossed the Ragaba confirms clearly that the Ngok, even at this location, were on the southern side of the Ragaba.

³⁹ Award, para. 741.

⁴⁰ J. Robertson, *Transition in Africa* (London: C. Hurst, 1974), p. 51, GoS Memorial Annex 45, SPLM/A Exhibit FE 5/10, cited in Award, para. 741 (emphasis added).

⁴¹ "Native Administrations of Kordofan Province" (Khartoum: The Sudan Survey Department, 1941), GoS Memorial Map Atlas, Map 27.

The use of this evidence is not only ill-advised; it is contradictory with the result sought.

b. The second remark I wish to make relates to another inference drawn from this tribal incident. In the same place, the Award goes on to state:

“This description (of 29°E) is more useful to this Tribunal than Dupuis’ sketch which merely suggests that the Ngok Dinka’s southeastern border is with the Rueng, a border in any event confirmed by Howell. It is also a more reliable and better indication than the village of Etai, which the GoS claims is evidence of the Abyei area’s eastern limit.”⁴²

28. Contrary to this assertion – and forgetting, for a second time, the Freudian “more useful to this Tribunal”, the Award rather than denigrating contemporaneous evidence that does not agree with the result it seeks to achieve, should have appreciated the earlier evidence more objectively. Dupuis wrote in 1921, when the most northerly Dinka presence that he indicated was a dug dug, i.e., a Dinka cattle camp, north of Lukji on the Ragaba Um Biero.⁴³ The only inference to be drawn from those dates is that the Ngok, if indeed the dug dug in question belonged to Ngok Dinka, were slowly extending northward and westward, taking advantage of better conditions under the Condominium and of the good relations existing between their Paramount Chief and the Nazir Omom of the Misseriya. Again if we go back in time we will find that in 1902 the area occupied and used by the Ngok above the Bahr el Arab was even smaller. Wilkinson says that the first Dinka village he encountered was Bongo, which was however empty, and then Etai.⁴⁴ Of course Wilkinson never said that this was the Ngok Dinka boundary, but his description does confirm that this is where they were sighted in 1902. At any rate in 1909 Willis, who gave a very detailed depiction of Ngok Dinka locations, had the following to say: “Just after the rains they [the Ngok] go as far North as they think safe from the Arabs (Bongo or El Myat)”.⁴⁵ El Mayat, according to the Government⁴⁶ is a swamp near Bongo. Just to give an idea of the scale of the discrepancy between contemporaneous depictions of where the Ngok were around 1905 and where the Tribunal put them, the following distances should be considered. Bongo is about 150 kilometres to the south-east of the 10°10’N line where it intersects the western line of the delimited area at 27°50’E. It is about 90 kilometres to the south-west of 10°10’N where it intersects the eastern boundary at 29°E.

⁴² Award, para. 741.

⁴³ See GoS Counter Memorial, Maps 39b and 39c: Dupuis Sketch, 1921 (Sudan Survey Department archives) and Extract. It is not certain that the dug dug sighted was in fact a Ngok dug dug rather than that of another tribe of the Dinka.

⁴⁴ Major E.B. Wilkinson, Itinerary, “El Obeid to Dar El Jange” (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government*, Vol. II (1905). SPLM/A FE 2/15.

⁴⁵ Willis, *supra* note 33.

⁴⁶ Transcript, 21 April 2009, 108/6 (Crawford).

29. There are, scattered throughout the record, statements corroborating the obvious fact that the Ngok were slowly expanding to the North. They were going to places where they had not dared to go the previous year, for example, Mahon Pasha, in 1903 states: "I met several herds of Dinka cattle grazing right in the Arab country, where they were afraid to go last year."⁴⁷ To quote another example, there is evidence that they were encouraged by Chief Kwal Arop "to build houses among the Humr in the winter".⁴⁸

30. The job of demolishing the construct the Tribunal seeks to erect is relatively easy, for that construct is a weak one, as weak as a spider's web, and this is so, not because of my learned colleagues' lack of legal imagination but rather despite it. The contemporaneous and near-contemporaneous support for the eastern, northern, and western boundaries is not only utterly lacking, but also contradicted by overwhelming evidence to the contrary, both cartographic evidence and accounts written by disinterested parties, usually State officials, regarding an area under their Condominium in circumstances where international law would be normally satisfied by minimum evidence, a standard surpassed in this case.⁴⁹ The question therefore, and it is a disquieting one, is why does a Tribunal, provided with all the available evidence and guided through it by learned counsel on both sides, and moreover provided with the benefit of hindsight that all reviewing bodies have, and in a position to assess the evidence before it comprehensively, elect, instead, to look at reality not in a holistic manner but in a disconnected way, making wild flights of fancy on the basis of misinterpreted sentences taken out of context so as to make dead men say what they never said or intended? All that can be said is that this is not the level of reasoning expected of a Tribunal concerned with the quality of justice and not only with finality of litigation.

31. The Tribunal, wishing to buttress the imaginary with the unreliable, has had to fall back on the evidence of witnesses who testified for the SPLM/A.⁵⁰ I find this particularly objectionable and worthless. Objectionable because the accusations by some Ngok Dinka of intimidation by the SPLM/A were never disproved and were indeed reiterated before the Tribunal. Moreover it is worthless because, first, I think it would be frankly fantastic to expect a recollection cali-

⁴⁷ Appendix E to the Sudan Intelligence Report No. 104 of March 1903, p. 19.

⁴⁸ Kordofan Monthly Diary, 1940, p. 2, cited in ABC Report Appendix 5.13, p. 201 as follows: "Summary of Information: Kwal Arop is suspected of encouraging the Dinka to build houses among the Homr in the winter."

⁴⁹ *Legal Status of Eastern Greenland*, PCIJ Series A/B No. 53, Judgment of 5 April 1933, p. 46 (noting that "[i]t is impossible to read the records of decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided the other State could not make out a superior claim"); *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, 23 May 2008, para. 67 (noting that "international law is satisfied with varying degrees in the display of State authority, depending on the specific circumstances of each case").

⁵⁰ Award, footnotes 1237–1246.

brated with regard to a particular year (1905) of where a tribe was located on the basis of memories of those alive in 2005. Secondly, oral evidence by interested parties after the dispute, although admissible to the extent that the ABC was no more than a fact-finding commission charged with determining an historical fact, should be treated with the utmost care and cannot in any event have the same probative value as older evidence emanating from Condominium officials and other disinterested third parties. In fact the Experts in this respect recognize this,⁵¹ but in another piece of contradictory reasoning ultimately come to depend on oral evidence, but only of the SPLM/A witnesses.

32. Thus the eastern and western boundaries of Abyei as drawn by the Tribunal are not reasoned by the standards of Article 9, paragraph (2) of the Arbitration Agreement which should be understood by the rigour required in an arbitration pertaining to the sovereignty and territorial integrity of the State and on which decisions of peace and war may depend. My respectful conclusion that the Tribunal's reasoning for the eastern and western boundaries and as a consequence for the northern boundary falls short of the standard of reasoning expected from the Tribunal, by the Tribunal's own standards, leads to the inescapable conclusion that on these three boundary lines, the Tribunal is in excess of its mandate.

33. However for the sake of completeness I shall turn to the question of the area of shared rights above 10°10'N and the invalidation by the Tribunal of the Experts' findings and the attendant question of separability.

3. The shortened line at 10°10'N and the effect of the changes in the eastern and western boundaries

34. It is not entirely clear, despite statements confirming the 10°10'N line,⁵² whether that line is in fact a mere confirmation of the Experts' line or in essence a new line.⁵³ To start with, it is shortened by some 70 kilometres in the east and nearly 20 kilometres in the west. The point at which quantitative changes become qualitative ones is difficult to verify, but as a matter of common sense, if the new longitudinal lines were closer to each other would it be reasonable, reasonableness being a holy mantra in the Award, to speak any more of a northern line?

⁵¹ ABC Experts' Report, p. 11: "Because the initial presentations of the GOS and SPLM/A, along with the oral testimony of the two communities, largely contradicted each other, and did not conclusively prove either side's position, the ABC experts set out to obtain as much evidence as they could from archives and other sources in Sudan, the United Kingdom, South Africa and Ethiopia."

⁵² Award, para. 696.

⁵³ Indeed, the members of the Majority are divided on this point. Significantly, in the *Dispositif* in Section (a) (3) the Tribunal does not use the confirmatory language it uses for the southern line in (b) (2). With respect, it cannot confirm the northern line because that line is shorter than the Experts' line.

35. More importantly, inadvertently in all likelihood, by shifting the eastern boundary line west to a new (arbitrary) line and likewise the western boundary east to another (arbitrary) line, the rationale, if ever there was one, of the 10°10'N line collapses. In the process of collapsing it exposes, once more, the futility of drawing longitudinal and latitudinal lines – in the best traditions of the 1878 Berlin Conference, “*prises de possession sur le papier*”, as Bismarck famously called them⁵⁴ – which bear no resemblance to reality or to local conditions or tribal locations. But at least the plenipotentiaries at the 1878 Conference were not pretending they were drawing tribal boundaries. Thus the Tribunal notes that “lines of longitude and latitude when delimiting boundaries have been used in appropriate circumstances by international courts and tribunals and is recognized in public international law”,⁵⁵ and “deems it proper to delimit the eastern and western boundaries based on lines of longitude”.⁵⁶ There may indeed be circumstances in which it is appropriate for international courts and tribunals to delimit boundaries on the basis of lines of longitude and latitude, which on most maps (depending on the projection) appear as straight lines. Where a tribunal has been charged with a task which it interprets as the determination of a tribal area, this is not what I would consider to be an appropriate instance in which to adopt such lines.

36. The Experts, it would be recalled, had admitted that “[t]here is, as yet, no clear independent evidence establishing the northern-most boundary of the area either settled or seasonally used by the Ngok.”⁵⁷ Instead, according to the Tribunal, the Experts “sought indicators and *clues* in administrative records as well as human geography – the fact that the goz was not settled by anybody – to draw what seemed *the best defensible line under the circumstances*”.⁵⁸ I am surprised that it did not occur to my colleagues that in the circumstances the proper, the only proper thing to do for the Experts would have been to say that there was not enough evidence to draw the line. Unperturbed by the obviously contradictory reasoning of the Experts (drawing the line while admitting that there was no clear evidence for establishing the northern-most boundary), the Tribunal was satisfied with this reasoning which it described as seeking “indicators and clues in administrative records as well as human geography”⁵⁹ and concluded that “[i]n the Tribunal’s view, the Experts’ reasoning regarding the selection of latitude 10°10'N is comprehensible and complete”.⁶⁰ Nothing can be more debatable. The whole exercise

⁵⁴ Cited in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 303, Separate Opinion of Judge Al-Khasawneh, at p. 499, para. 7 (d).

⁵⁵ Award, para. 746.

⁵⁶ Award, para. 747.

⁵⁷ ABC Experts’ Report, Part 1, p. 43.

⁵⁸ Award, para. 680 (emphasis added).

⁵⁹ *Ibid.*

⁶⁰ Award, para. 681.

is based on *clues* from administrative officials and human geography to draw *the best defensible line under the circumstances*. This is indeed a lax and novel standard for drawing boundary lines and no government can or should accept it. It is impossible to understand why these “clues” are no longer applicable to those parts of the 10°10'N line that were severed from it in the east and west. In effect, the unity of purpose of the reasoning simply collapses and when a line drawn arbitrarily by the Experts is replaced by another line drawn arbitrarily by the Tribunal, the only outcome is that the total arbitrariness of the two lines is fully exposed.

37. Moreover, the Experts state that “the Ngok assertion that the boundary between the two peoples is the Goz belt that separates them has yet to be tested by a systematic survey”.⁶¹ Yet their mandate was to be based on “scientific analysis” of which a systematic survey is a prime example and although such a survey was by their admission “yet to be tested” in the Goz belt, this did not preclude them from proceeding nevertheless to limit the area at 10°10'N. Again, the contradictory reasoning is obvious.

38. A measure of the lack of clarity of whether the 10°10'N line, in its shortened form, is a confirmation of the earlier Experts' line or the Tribunal's brainchild is that the Award includes a number of independent justifications for it some of which are found in explaining the eastern and western boundaries, and these have been commented upon in respect of the alleged Howell lines in Part 2 of this Dissenting Opinion. The Tribunal does not merely say that the 29°E and 27°50'E lines go up to 10°10'N because the Experts' line is reasoned and therefore unreviewable under this Tribunal's mandate⁶² but also it tries to justify those lines independently of the Experts' findings on the basis of where the Ngok were situated and the conflation of the area roughly with its own misquoted reading of Cunnison and Tibbs. In effect, Sub-articles 2 (a) and 2 (c) of the Arbitration Agreement are now fused. If the 10°10'N is in fact a new line then it is unreasoned, the same inadequacy of reasoning that applies to the eastern and western line applying to it, and besides, by cutting off its eastern and western extensions, it has lost any underlying rationale. If on the other hand it is the old line then the lack of reasoning of the Experts (by their admission) and the lack of a systematic survey as to whether the Goz forms the boundary and the total lack of contemporaneous or near-contemporaneous evidence suggesting Ngok presence at that particular latitude would also render the decision of the Experts at 10°10'N in excess of their mandate by the same criterion, namely, lack of evidence or lack of reasoning, or both which the Tribunal applies to impugn the eastern and western boundaries and the northern boundary at 10°22'N. Independently of this lack of clarity

⁶¹ ABC Experts' Report, p. 43.

⁶² In fact the members of the Majority are divided on this point: supra note 62. One member, Professor Hafner, explains that the Tribunal should follow the Experts' line, i.e., that the Tribunal is precluded by its mandate from enquiry into that line. See Award, para. 696.

in the Award, the line is not the “best defensible line in the circumstances”⁶³ as the Award proclaims it to be, thus introducing a new standard, not exactly representing the zenith of care and meticulousness in territorial delimitation, but closer to the nadir. The line is not defensible at all and has no basis in law, nor is it supported by one shred of evidence.

39. Formally, of course, it should not be forgotten that the 10°10’N line did not represent the northern boundary decided by the Experts. That was the line at 10°22’N, which bisected the Goz. The 10°10’N line is a new boundary line: according to the logic of the Experts’ Report it is merely where the “dominant rights” of the Dinka stop. Thus the Tribunal’s 10°10’N line is a new line, although confusedly justified both under Sub-articles 2 (a) and 2 (c) in the Award. Moreover to the extent that it was based by the Experts on the odious, pseudo-legal concept of dominant rights, the Award nevertheless upholds it.

4. Separability

40. I shall now turn to the issue of separability or severability as it is sometimes called and before considering, as a matter of the interpretation of our mandate, whether such separability is permissible, I shall start by observing that it is somewhat remarkable that the eastern, northern, and western boundaries of the area are the least reasoned and defended in the Experts’ Report. Considering that the southern boundary, the so-called *uti possidetis* line of 1956 is not in disagreement, it seems obvious – but so many things were so obvious that the Tribunal has not seen them – that when my learned colleagues impugn the whole of the eastern and western boundaries and impugn the northern boundary, or at least a considerable part of it,⁶⁴ what is left is so thin and truncated that by any criterion of severability it should also be set aside for it cannot stand on its own.⁶⁵ Indeed it would be an act of unparalleled fantasy to expect it to stand on its own. To quote the second hemistich of Hafiz, its “foundations rest on air”. The only logical conclusion, indeed duty, of the Tribunal is to annul the Report in its entirety. Having reached this conclusion, I shall now address the question of whether partial severability of the Report is permissible under our Tribunal’s mandate according to the Arbitration Agreement.

41. Under Sub-article 2 (b) of the Arbitration Agreement, “If the *Tribunal* determines, pursuant to sub-article (a) herein, that the ABC experts did not exceed their mandate, it shall make a declaration to that effect and shall

⁶³ Award, para. 680 (emphasis added).

⁶⁴ Depending on whether, as noted in the previous part of this Dissenting Opinion, the 10°10’N line is considered a new line or a confirmation of the Experts’ 10°10’N line, the Experts’ northern boundary line being 10°22’N.

⁶⁵ *Aerial Incident of 10 August 1999 (Pakistan v. India)*, Jurisdiction, Judgment, *I.C.J. Reports 2000*, p. 12, Dissenting Opinion of Judge Al-Khasawneh, p. 56, para. 32.

issue an award for the full and immediate implementation of the ABC Report.” Under Sub-article (c):

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

42. There is therefore a two-stage mandate in Article 2: first, to determine whether there was an excess of mandate, second, if there was no excess, to issue an award for full and immediate implementation, or, if there was excess, to delimit the area.

43. There is no provision for the event of a partial delimitation based on a finding of partial nullity. This is inconsistent with the clear terms of Article 2 of the Arbitration Agreement in context and in the light of their object and purpose. The clear terms of Sub-articles 2 (b) and 2 (c) show that a finding that there was no excess of mandate must relate to the whole Report and that in the event of an excess of mandate a delimitation must be carried out in relation to the entire boundary.

44. The Award points out that the sequence of Article 2 gives the Tribunal a secondary role – to carry out the delimitation only if the Experts’ Report cannot stand due to an excess of mandate.⁶⁶

45. The object and purpose of the Arbitration Agreement must be seen in light of the context of this arbitration, namely, the delimitation of a boundary that could potentially become an international boundary, as the Tribunal recalls.⁶⁷ One of the purposes of the present arbitration proceedings is to provide the necessary redress against a decision made on that boundary if it is found to be defective for excess of mandate. In view of the rule of finality and stability accorded to boundaries in international law once delimited, the Parties cannot be assumed to have agreed that a decision, once found to be tainted by excess of mandate in some respects, should otherwise be upheld as far as possible. On the contrary, the decision of the Experts should be subject to careful scrutiny as to whether the rest of the decision can stand in spite of a finding of excess of mandate.

46. It is doubtful whether the treaty texts cited by the Tribunal,⁶⁸ which give an express power to make a finding of partial nullity, can be invoked as authority for a presumption in favour of a power of partial annulment, let alone a presumption in favour of partial nullity. The relevant general principles of law and practices may allow a finding of partial nullity under appropriate circumstances, but those circumstances are clearly circumscribed and do not exist in the present case.

⁶⁶ Award, para. 415.

⁶⁷ Award, para. 428.

⁶⁸ Award, paras. 418, 420.

47. It is apparent from the precedents cited by the Tribunal that the obligation to strive to uphold the rest of the decision under review only applies where there is severability of the part that has been annulled, that is to say, when certain objective conditions for severability have been met. Those conditions are expressed in the decision in *The Orinoco Steamship Company Case*, for example, where it was held that:

“following the principles of equity in accordance with law, when an arbitral award *embraces several independent claims, and consequently several decisions*, the nullity is one without influence on any of the others, more especially when, as in the present case, *the integrity and good faith of the Arbitrator are not questioned*”.⁶⁹

48. It is not necessary to dwell on the question of the “integrity and good faith” of the ABC Experts. Suffice it to note that one of the Parties has made allegations of serious violations of fundamental rules of procedure; that the essential facts giving rise to those allegations are not in dispute; and that the departures from the rules of procedure that took place were, in my opinion, serious improprieties which departed not only from those rules but also from imperative requirements of due process.⁷⁰ By *a contrario* argument, when the integrity and good faith of the arbitrator are in question, that is to be contextually taken into account as a factor against separability.

49. The requirement stated in *The Orinoco Steamship Company Case* that for severability of an impugned part, the case under review should concern “several independent claims” rather than one indivisible question was confirmed by Judge Weeramantry in his Dissenting Opinion in the case concerning the *Arbitral Award of 31 July 1989*.⁷¹ It is only in cases “where *different segments* of the total matter in dispute can be decided as *separate and discrete problems, the answers to which can stand independently of each other*” that “the segments of the dispute that have been properly determined can maintain their integrity though the findings on other segments are assailed or do not exist”.⁷² In other words, “even if the valid and invalid parts are distinct, the invalidity of some will result in the invalidity of the whole, if they all form part of a single scheme intended to operate as a whole”.⁷³

50. The majority simply assumes that the excess of mandate it has found in the present case relates to issues which are separate. That is not the case here. The present dispute is more properly characterized as one such as the case

⁶⁹ *The Orinoco Steamship Company Case (United States/Venezuela)*, 25 October 1910, XI RIAA 27, 234 (1910), cited in Award, para. 416 (emphasis added).

⁷⁰ See *infra*, notes 238, 239.

⁷¹ *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, I.C.J. Reports 1991, p. 53, *Dissenting Opinion of Judge Weeramantry*, at p. 168.

⁷² *Ibid.*, (emphasis added).

⁷³ *Aerial Incident of 10 August 1999 (Pakistan v. India)*, *Jurisdiction, Judgment*, I.C.J. Reports 2000, p. 12, *Dissenting Opinion of Judge Al-Khasawneh*, *supra* note 65, at p. 55, para. 30.

concerning the *Arbitral Award of 31 July 1989*, where, on the facts, the issues were so intrinsically connected that it was clear that the Parties intended that the circumstances be determined in a “composite process”.⁷⁴ The boundary to be delimited in the present case is not, to use the words of Judge Weeramantry, composed of “separate and discrete problems, the answers to which can stand independently of one another”.⁷⁵

51. The agreed basis on which the delimitation should be carried out is the boundary of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905: there is only one criterion for the delimitation and it should be applied clearly and consistently. This is not a case where different parts of the boundary are governed by different instruments⁷⁶ or where there are different zones subject to differentiated legal regimes.⁷⁷ On the contrary, the decision of the Experts was composed of fundamentally interrelated elements, including their findings as to the secondary nature of Misseriya land use and occupation in the region; their reliance on the factual situation beyond the stipulated 1905 date; their projection back in time of the 1965 extent of Ngok Dinka occupation; and their making these findings despite overwhelming evidence to the contrary. Any determination of the extent of the territory transferred or even of those nine Chiefdoms as at 1905 must be composed of elements which are fundamentally interrelated. The question of the geographical extent of the nine Chiefdoms is intrinsically related to the provincial transfer, an administrative act of the Condominium administration; the date of that act, 1905, is the temporal limit; the extent of the territory is limited by the claims of neighbouring tribes; and all of those factors are qualified by the understanding of the Condominium officials as to what was being transferred. No single part of the process by which that delimitation is carried out can be severed such that some segments of the boundary might survive and others be declared a nullity.

5. The first pillar of the Experts' reasoning: the dominant/secondary rights paradigm

52. I shall now turn to the question of shared rights in the Goz. As a preliminary remark, it should be noted that the Tribunal does not construct its reasoning for impugning the Experts' decision on the 10°35'N and the 10°22'N line on the use of the “shared rights area” concept, but rather on a

⁷⁴ *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, I.C.J. Reports 1991, p. 53, *Dissenting Opinion of Judge Weeramantry*, at p. 169.

⁷⁵ *Supra* note 72.

⁷⁶ See, for example, the *Eritrea-Ethiopia Boundary Commission, Decision on Delimitation* of 13 April 2002, (2002) 41 ILM 1057, where different colonial treaties dated 1900, 1902 and 1908 applied respectively to the central, western, and eastern sectors of the boundary.

⁷⁷ See, for example, the different maritime spaces in the case concerning the *Arbitral Award of 31 July 1989*, *supra* note 71.

different reason namely that “[i]n the Experts’ view, if there was *no conclusive evidence* of such permanent settlements north of latitude 10°10’N, it is difficult to understand why the Abyei area was nonetheless extended further north, beyond that line up to latitude 10°22’N”.⁷⁸ For once, my learned colleagues and I are in perfect accord. If indeed there is *no conclusive evidence* (whether in the Experts’ view or otherwise, this is the standard adopted by the Tribunal), no reason can exist to extend the line to 10°22’N.

53. The same criterion of “conclusive evidence” should, if the minimum of consistency is to be maintained, apply to the concepts of secondary rights versus dominant rights. Is there any evidence, let alone conclusive evidence, that the concept was part of the law and practice of Kordofan at the crucial year or indeed at any time? Is the Tribunal precluded by Article 2 (a) from making the most basic enquiry about whether the concept really exists? After all legal ideas, especially exotic ones, cannot just be presumed to exist or to be applicable in certain territories or provinces without supporting evidence. We are told that one of the Experts, Professor Shadrack Gutto, is a prominent authority on African land law,⁷⁹ and I have not the slightest doubt as to his prominence. However, Africa, where the concept of dominant versus secondary rights allegedly originated, is a vast and varied continent, and the former possessions of the British Empire, another alleged inspiration for that concept, also extensive and not unattuned to heterogeneous local custom. Besides, there is no reason to believe that an African land law exists any more than an Asian land law.

54. It then makes sense to enquire, within the constraints of time and available sources, as to whether the crucial concept of secondary and dominant rights has any existence. This enquiry is crucial because according to the Experts themselves it is *this concept* which served as the justification for abandoning the administrative boundary, since

“any administrative boundary as may have existed did not or could not have coincided exactly with boundaries of land use rights of sedentary or pastoral peasant communities whose tenure rights and obligations overlap in the absence of concrete walls separating the communities”.⁸⁰

55. Notwithstanding the obvious fact that the more arduous and in all probability unachievable task of drawing boundaries between tribal groups whose occupation and land rights overlap, as the Experts themselves recap, should have caused the Experts to go back to their original mandate, which is nowhere near as confused as drawing tribal boundaries, the Experts persisted in trying to effect the delimitation on the basis of what they thought were three types of land rights. The Experts set out their understanding of this concept as follows:

⁷⁸ Award, para. 693 (emphasis added).

⁷⁹ See *infra*, note 236.

⁸⁰ ABC Experts’ Report, Part 2, Appendix 2, para. 3, point (i).

"It is critical in interpreting the established occupation, land rights and land use of the two communities to appreciate the sociological fact that by 1905 there existed three main categories of such occupation, land rights and land use:

- (i) Dominant occupation, land rights and land use by a community that were 'exclusive' to members of the community and permitted no cession of secondary use rights to non-members of the community;
- (ii) Dominant occupation, land rights and land use by a community but allowing for non-members of the community to acquire limited land use rights on seasonal basis or sporadic periods – the 'primary' and 'secondary' rights paradigm;
- (iii) 'Shared secondary' occupation, land rights and land use by members of two or more communities within a territory marking the 'boundaries' between them – the so-called 'conflicting': or 'no man's land' or the 'Goz'.⁸¹

56. In support of these propositions, the Experts quote only two sources: an "unpublished PhD Dissertation" by Abdalbasit Saeed⁸² and a book on the Sudan by Gaim Kibraeb.⁸³

57. The latter text, which I have had a chance to consult, describes these dar rights as follows:

"... the most articulate and elaborate definition of dar rights has been that of Hayes.

After hearing a great deal of oral evidence concerning the traditional and customary conception of 'Dar rights', and after collecting extensive corroborating evidence from provincial and district files, Hayes, who was a high court judge in the Sudan between 1944 and 1953, defined dar rights as follows:

'If I had to declare what these [Dar] rights comprise, I should have said that, where there is no settled government outside the Dar and with authority over it, Dar rights are almost the same as the right of sovereignty, the only substantial difference from normal State sovereignty being that, with the nomads, boundaries are drawn with less precision. Where, however, there is a settled government, as in the Sudan, Dar rights are restricted to the extent of the State's encroachments upon them. The principal rights brought to my notice, apart from rights of normal user, were:

⁸¹ ABC Experts' Report, Part 2, Appendix 2, para. 6.

⁸² Abdalbasit Saeed, "The State and socioeconomic transformation in the Sudan: The case of social conflict in Southwest Kurdufan", unpublished PhD dissertation, University of Connecticut, USA, 1982, p. 128. Cited in footnote 10 of ABC Experts' Appendix 2, p. 25. It was not possible within the extremely short time available to obtain a copy.

⁸³ Gaim Kibraeb, *State Intervention and the Environment in Sudan, 1889–1989: the Demise of Communal Resource Management*, (NY/Lewiston/Queenston/Lampeter: Edwin Mellen Press, 2002), pp. 21–23, 45–52, Ch. 3. Cited in footnotes 11–13 of ABC Experts' Appendix 2, p. 25.

The right to admit or refuse strangers to water and graze in the Dar, and the right to impose conditions on such entry.

The right to build permanent buildings in the Dar.

The right to cultivate.

The right to sink new wells, or dig out old ones.

The right to beat the *nuggara* (drum), and to put *wasms* (tribal marks) on trees and rocks.

As to cultivation, the holder of the Dar is entitled to exact from strangers admitted the same tribal dues on cultivation – known as *sharaiya* – as he exacts from his own tribesmen.’

During my field work, I asked the present Nazir, the Paramount Sheikh of the Shukria, Mohamed Hamed Abu Sin, to describe the nomadic pastoralists’ the small cultivators’ and their leaders’ conceptions of dar rights and how these conceptions have been continuing and changing over time. The fit between his definition of dar rights and the definition given by Hayes is astonishingly analogous.”⁸⁴

58. Elsewhere in the book Kibreab states “ownership, as we saw before is represented in the power to limit the ability of others to enjoy the benefits to be derived from access to, and enjoyment of, resources”⁸⁵ The conclusion that would follow from the asserted premise, that the Ngok held dominant rights of the second type, is that the Homr held only secondary grazing rights. However the evidence in its entirety points in the opposite direction. Thus, to quote Cunnison again: “the real area of sharing was further south in the Bahr”,⁸⁶ and here, lest some expansionist 10°10’N interpretations of the Bahr creep in, let me add in the same page Cunnison says: “They [the Homr] moved south through the extensive sandy Goz to the area called the Bahr; this is the area around the Bahr al-Arab and Regeba Zerga”.⁸⁷ He adds: “There the two groups co-existed for a fairly short season – but this was not a “host guest” relationship. At this season it was the Dinka who apart from a few caretakers, left to go south as part of a transhumance pattern rather than one of nomadism”.⁸⁸ He adds, further:

“As I noted in my book (p. 19) much of the Bahr region has permanent Dinka settlements, although during most of the time the Humr occupy it the Dinka are with their cattle south of the Bahr al Arab. *I never observed the Humr asking permission from Dinka to come to the Bahr and they did not consider themselves to be visitors there.*”⁸⁹

⁸⁴ Kibreab, *supra* note 83, p. 22.

⁸⁵ Kibreab, *supra* note 83, p. 85.

⁸⁶ Witness Statement of Professor Ian Cunnison, 3 December 2008, at para. 6, GoS Memorial, p. 190.

⁸⁷ *Ibid.*, (emphasis added).

⁸⁸ *Ibid.*, para. 9.

⁸⁹ *Ibid.*, (emphasis added).

59. Cunnison refers to his map to indicate that the Dar Homr included areas *south of the River*.⁹⁰ This was the situation in the early 1950s and probably for some time before that, save for the fact that the Ngok Dinka had been much closer to the Bahr el Arab and in 1905 were located at the triangle where that river is met by the Ragaba Um Biero.

60. Cunnison also clarifies his earlier remarks that the Homr have no land while the Dinka do by saying that:

“As I note at pp. 146–147 of the book, the Humr did not have any conception of individual or collective legal title to grazing land. They regarded all the grazing land they used as public land, open and available to them.”⁹¹

61. So much for the dominant rights of the Ngok and the secondary rights of the Homr in what the latter and other observers regarded as their dar.⁹² Those observers include some from around 1905 such as Willis who visited the Ngok Dinka in winter 1909 and described their congregations on and just north of the river Kir, noting the fact the Ngok take their cattle north to where they can be safe from the Arabs, such as Bongo or El Mayat.

62. Also remarkable is that Kibreab in fact has an opposite view of the situation of boundaries around Bahr el Arab:

“Unlike in northern Sudan where dar rights are said to antedate the advent of the Funji kingdom, *in southern Sudan the concept of dar was alien to the culture and land tenure systems of the Nuer and Dinka peoples*. In addition, to borrow Johnson’s eloquent formulation, among these societies the border is ‘ . . . a transitional zone where one system merges into the other: a border without a boundary’.”⁹³

63. Kibreab notes, further:

“For the tribes, abstract imaginary lines marked on maps were devoid of meaning. For them not only were boundaries porous, they were also naturally represented in the form of river courses, large trees, mountains or hills. The most natural boundary was one marked by a river course. *That was the reason why in the pre-reconquest period and for some time after the reconquest, both the northern and the southern tribes perceived the Bahr al-*

⁹⁰ *Ibid.*

⁹¹ Witness Statement of Professor Ian Cunnison, 3 December 2008, para. 10.

⁹² The utter frivolity of the Experts reasoning can be gleaned from the fact that the origin of the dar rights has nothing to do with the so-called African land law (is there any more African land law than Asian land law?), but from the Islamic Sultanate of Funji and Fur and follows earlier Islamic practices from the Middle East and Central Asia. Moreover Kibreab states in fn. 85 at p. 123: “*the notion of dar rights was never applied to the southern Sudanese people*” (emphasis added).

⁹³ Kibreab, *supra* note 83, at p. 65, (citing D. Johnson, ‘Tribal Boundaries and border wars: Nuer-Dinka relations in the Sobat and Zaraf valleys, c. 1860–1976’, *Journal of African History* 23 (1982): 202, 183–203) (emphasis added).

*Arab as forming the natural frontier separating the northern and the southern tribes.*⁹⁴

64. Had the Experts followed what was known by general repute, they would have stayed within their mandate. Instead they ignored what is there and tried to distil from Kibreab's book what is not there and to present it as authority for these pseudo-legal concepts of dominant rights of the first and second type.

65. The next question is whether the fact that Ngok built luaks and dug dugs and the Homr did not in itself give different rights to the same land. At the outset it should be recalled that this was not a case of aimlessly wandering nomads on the one hand versus a sedentary peasant community on the other. Both the Homr and the Dinka have been variously described as pastoralists or as practising transhumance. The 1912 Kordofan Handbook, for instance, describes the Dinkas as "a pastoral people and [they] possess large herds of fine, big cattle".⁹⁵ Both are tribes of warrior cattle herders and both practise primitive agriculture: the one millet, the other sorghum. I do not think that the difference between millet and sorghum or between a luak – (there are indications that some were temporary⁹⁶) – and a tent should generate such discrepancy in land rights. Neither principle nor precedent supports the allocation of land rights and consequent territorial delimitation on such "differences" in lifestyle. Indeed, the Experts themselves quoted Cunnison where he stated that "Humr do not have permanent houses but surras have strong identification with particular camping sites to which they seek to return year after year."⁹⁷

66. The presence of Misseriya Homr which could not be wished away, is instead dealt with by reducing them, under the dominant/secondary paradigm, to second-class citizens in their own land, allowed to graze their animals but nothing more. I find this part of the Report, with regret, objectionable and, frankly, odious. But aside from that, the pseudo-legal principle itself is unsupported by any evidence as to its existence or to its applicability to Kordofan. It was never part of the law or custom of Kordofan.⁹⁸ Yet, regardless of the correctness or reasonableness of the Experts' interpretation of their mandate (as tribal or territorial) there is no doubt that the whole Report is based upon this "dominant/secondary rights" distinction. The lack of evidence and misquotation of the authorities in its support, of which I have already spoken; its inapplicability to Kordofan; and its discriminatory nature, besides the fact that it was contradicted by overwhelming evidence, leads me to the conclusion that

⁹⁴ Gaim Kibreab, *State Intervention and the Environment in Sudan 1889–1989*, p. 83 (emphasis added). The reconquest took place in 1896–1898: see ABC Experts' Report, Part 1, p. 37

⁹⁵ See *supra* note 29. See also Howell, *infra* note 166, at p. 245.

⁹⁶ See *infra* para. 76.

⁹⁷ ABC Experts' Report, Part 2, p. 161.

⁹⁸ Kibreab, *supra* note 93, at p. 83.

this is a clear instance of reasoning so flagrantly contradictory and so manifestly flawed that it must be characterized as excess of mandate.

a. Mise à point: traditional rights

67. The Award has devoted a few pages in what looks like a judicial afterthought to traditional rights, and comes to an understandably general conclusion about the effect of territorial change on traditional rights. The Tribunal states that “traditional rights, in the absence of an explicit agreement to the contrary, have usually been deemed to remain unaffected by any territorial delimitation”.⁹⁹ Whilst this is true – and inconsequential – it misses the point. The issue here is not the subsistence of grazing rights after territorial delimitation. It is that the territorial delimitation itself is based on a baseless allegation by one Party that one group, the Ngok Dinka, are entitled to dominant rights in the concerned area while the other group, the Misseriya, are reduced to the enjoyment of secondary rights in what they consider part of their dar. It is discrimination itself, as a function, which is both invoked as justification and employed as methodology to effect the tribal delimitation. Moreover, the words relating to the right to graze and move in the Abyei area in section 1.1.3 of the Abyei Protocol are not and cannot be interpreted as words of limitation. All those to whom Abyei is home, even if for a season, are entitled to all the rights guaranteed by the rules of international law and human rights standards, especially equal treatment in the enjoyment of those rights.¹⁰⁰

6. The second pillar of the experts' reasoning: the assumption of Ngok Dinka continuity of occupation

68. In Part 5 of this Dissenting Opinion, I analysed the concept of the dominant/secondary rights paradigm and showed it never to have been part of the law and custom of Kordofan nor to have governed relations between the Ngok and the Homr.

69. I shall now turn to a second, central tenet of the Experts' reasoning: an assumption regarding continued Ngok presence in the Bahr area from circa

⁹⁹ Award, para. 766.

¹⁰⁰ See, especially, Universal Declaration of Human Rights, Article 2; International Covenant on Civil and Political Rights, Article 2(1); African Charter of Human and Peoples' Rights (to which Sudan became a Party on 18 February 1986), Article 2; International Labour Organization Convention No. 169 on Indigenous and Tribal Peoples, Article 3. The last Convention is not ratified by the Sudan, however see Articles 1 and 2 of the United Nations Declaration on the Rights of Indigenous Peoples, annexed to General Assembly Resolution 61/295 of 13 September 2007. This was adopted by a majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).

1905 until the mid-1950s or even the early 1960s, which represented the period of maximum Ngok Dinka expansion to the North. The technique used to substantiate this claim was to read history backwards, turning the temporal limitation of the Experts' mandate on its head. Thus, interviews with Cunnison and Tibbs and other modern sources are misquoted or quoted out of context and these are superimposed on fragmentary quotations from third-party sources from around 1905. Given its importance, the relevant parts of the Experts' Report (the claims made in the Summary of Propositions and in the main body of the Report) and the sources relied on by them are reviewed in detail to show that this was not simply a matter of an appreciation of facts, which should normally be left to the discretion of the fact-finder, but a flagrant and easily demonstrable misuse of the evidence to support, in a tendentious way, a certain result.

70. The relevant part of the Experts' Report is found under Proposition 8, which reads as follows:

"Proposition 8: There was a continuity in the territory occupied and used by the nine Ngok Dinka chiefdoms which was unchanged between 1905 and 1965, when armed conflict between the Ngok and the Misseriya began. (Ngok oral testimony and SPLM/A presentation)"¹⁰¹

1. *The Experts' Summary of Propositions*

71. In their "Summary of Propositions", the Experts stated:

"The administrative record of the Condominium period, along with the testimony of persons familiar with this area at the end of the Condominium, establishes that there was a continuity of Ngok Dinka settlements in the area of the Bahr el-Arab/Kir, the Umm Bieiro, the Ragaba Lau, and the Ragaba ez-Zarga/Ngol."¹⁰²

72. In the same paragraph, the Experts cited the following evidence:

"For instance, in 1909 Kordofan official C.A. Willis wrote that Ngok settlements were found all along the Gurf (Bahr et-Arab) and that Dinka influence extended a considerable distance further North at one time. Michael Tibbs states categorically that there was continuity of the Ngok settlements up to the end of the Condominium. Ian Cunnison was equally definite in stating that the general area in which the Ngok maintained their permanent settlements remained the same over the years. At the peace agreement between the Misseriya Humr and the Ngok Dinka in March 1965 both sides agreed that the Ngok could return to their homesteads at 'Ragaba Zarga and other places where they used to live' and that the Arabs would have unrestricted access to all ragabas that they had been frequenting before the outbreak of hostilities."¹⁰³

¹⁰¹ ABC Experts' Report, Part 1, p. 19.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

73. On closer examination, the evidence mentioned in the above paragraph does not support the proposition in aid of which it is cited here. Each of those sources will be reviewed in turn below.

(a) C.A. Willis, 1909

74. As regards the first example cited, the statement of the Experts that "in 1909 Kordofan official C.A. Willis wrote that Ngok settlements were found all along the Gurf (Bahr et-Arab) and that Dinka influence extended a considerable distance further North at one time" is misleading because it is taken out of context and does not accurately reflect the contents of Willis's Report.

75. Concerning the Ngok Dinka, what Willis wrote began as follows:

"All along the Gurf are villages consisting of perhaps two or three houses each. The ones I saw at the Ferry by Rob's old village were about a mile apart, and I was told they continued all along the Gurf both ways."¹⁰⁴

76. In the same place, Willis then made some observations about Dinka behaviour and society then noted that: "Just after the rains they go as far North as they think safe from the Arabs (Bongo or El Myat); there they build temporary villages, no doubt owing to the prevalence of mosquitoes."¹⁰⁵ Willis noted, further, that: "As the water dries up and the mosquitoes decrease, the Dinka move towards the Gurf: their camps are much less elaborate, and consist of simply a zeriba with small zeribas inside and the cattle pegs."¹⁰⁶ Following more observations on social and other habits, Willis mentioned slavery and noted:

"The Dinkas have a certain number of slaves. I gather some were obtained in the famous year of starvation; others from the Rizeigat and Nuer (and possibly Nubas, though I saw none; Dinka influence extended a considerable distance further North at one time)."¹⁰⁷

77. Willis did not specify in his 1909 Report the area "further North" from which Dinka had influence extended nor did he specify any time period, in fact it is possible that he was speaking about the 18th century. But at any rate, someone in 1909 speaking of 1905 would not, to my mind, use the phrase "at one time". This is certainly not evidence from which one can conclude that there was continuity of occupation by the Ngok Dinka in permanent settlements from 1905 to 1965.

¹⁰⁴ C.A. Willis, "Notes on the Western Kordofan Dinkas", Sudan Intelligence Report No. 178, May 1908, Appendix C, p. 16, at p. 17.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

(b) Mr. and Mrs. Michael and Anne Tibbs, 2005

78. The statement in the Summary of Propositions that “Michael Tibbs states categorically that there was continuity of the Ngok settlements up to the end of the Condominium” is misleading. The Experts’ record of the interview of 21 May 2005 with Mr. and Mrs. Tibbs in Appendix 4.3 states: “Tibbs responded affirmatively when asked if there was continuity in the Ngok Dinka permanent settlements.”¹⁰⁸ It says nothing about the time period and certainly does not mention the end of the Condominium. The statement that there was continuity in the Ngok Dinka permanent settlements, without any indication of the time period or any specification of those settlements, no matter how firmly made, is too general to be of any use.

(c) Professor Ian Cunnison, 2005

79. The statement in the Summary of Propositions that “Ian Cunnison was equally definite in stating that *the general area* in which the Ngok maintained their permanent settlements remained the same *over the years*” is also misleading. The Experts’ record in Appendix 4.3 of the Report of their interview with Ian Cunnison notes in relevant part:

“Quite definite in stating that the *general area* in which the Ngok maintained their permanent settlements remained the same *over the years*. There were a lot of Dinka villages around Lau, and upstream along the Bahr el-Arab, and also eastward.

It is *very likely* that the Dinka lived along the R. Zerga before the Humr came, based on the fact that they were there before the Humr and would have occupied the Zerga as an ecological niche.”¹⁰⁹

80. The Experts then quote Cunnison’s response directly:

“The substantial nature of Dinka houses means that their settlements have remained similar for a long period – *probably* from the beginning of the 20th century, or the end of the Mahdiya.

I said to you that Dinka were on the Regeba Zerga before the Humr. But I do have statement from an old Humnawi which suggests that before the Mahdiya, in the Jellaba period, the regeba was unoccupied. (*It seems unlikely.*)”¹¹⁰

81. It may be observed that the evidence of Professor Cunnison, as noted in this record, is too general to be of use: the “general area” of occupation remained the same “over the years”. The following sentence refers in indefinite terms to “a lot of Dinka villages around Lau, and upstream along the Bahr el Arab” without specifying the limits of the area. If Lau is the same place as Lou,

¹⁰⁸ ABC Experts’ Report, Part 2, p. 159 (emphasis added).

¹⁰⁹ ABC Experts’ Report, Part 2, p. 162 (emphasis added). It would appear that here Professor Cunnison would probably have been speaking about the 18th or the early 19th century: see Professor Cunnison’s Witness Statement, *infra* note 216.

¹¹⁰ ABC Experts’ Report, Part 2, p. 162 (emphasis added).

slightly to the South-East of Abyei town, then this by no means confirms that any continuity existed from 1905 to 1965 in the area of the Ragaba ez Zarga. Moreover, the evidence of Ian Cunnison is not "equally definite" to that of Mr. Tibbs: on the contrary, using the words "very likely", "probably", and "seems unlikely", Cunnison limits his evidence to expressions of probability.

82. Moreover it is possible that the Ngok were on the Ragaba ez Zarga in the 18th century but they were subsequently pushed down by the Homr. The 18th century is nowhere near 1905.

83. Thus the testimony of Mr. Tibbs and Professor Cunnison before the Experts is too vague and uncertain to support Proposition 8.

(d) The Agreement of March 1965

84. This source is the March 1965 Peace Agreement between the Ngok Dinka and the Misseriya. It provides, in Article 9, as follows:

"Both sides agreed to restore normalcy to relations between them to pre-fighting modes of normal interaction; that is, the return of Dinka to their homesteads at Ragaba Zarga and other localities, and that the Arabs shall have unrestricted access to all Regeba's that they had been frequenting before the outbreak of hostilities.

Both sides have also agreed that each shall hold meetings with the local security authorities at Abyei for the normalization of relations and the execution of the terms of this agreement."¹¹¹

85. As noted above, the Experts stated with regard to this Agreement that:

"In March 1965 both sides agreed that the Ngok could return to their homesteads at 'Ragaba Zarga and other places where they used to live' and that the Arabs would have unrestricted access to all ragabas that they had been frequenting before the outbreak of hostilities."¹¹²

86. The Experts relied on this as support for the proposition of continuity of occupation from 1905, but this is not evidence of Ngok Dinka occupation of the Ragaba ez Zarga in 1905: it is only evidence of their location prior to the outbreak of hostilities. However, the only evidence cited by the Experts, apart from the 1965 Agreement itself (which says nothing about the situation in 1905), is a secondary, non-contemporaneous source, namely, the "unpublished PhD Thesis of Abdalbasit Saeed" dating from 1982. The extract cited does not relate to 1905 but to 1966. The notes in the Experts' Report state:

¹¹¹ The First Peace Agreement Between The Misiriyya Humur And The Ngok Dinka, Concluded At Abyei, March 3, 1965", Appendix 12 to A.D. Saeed 'The State And Socio-economic Transformation In The Sudan: The Case Of Social Conflict In Southwest Kurdufan' (January 1, 1982), ETD Collection for University of Connecticut, Paper AAI8213913. SPLM/A FE 18/30.

¹¹² ABC Experts' Report, *supra* note 103.

“At a peace conference in Abyei in March 1966: Nazir Baboo also claimed that the Ragaba Zarga belonged to the Humur who were kind enough to allow the Ngok to settle there . . . This is the first time claims on the territory known as Ngokland have been tabled by Misiriyya openly in a conference.”¹¹³

87. Even assuming that it is true that the 1966 peace conference was “the first time claims on the territory known as Ngokland have been tabled by Misiriyya openly in a conference”, this statement is of limited relevance. It clearly relates only to 1966, post-dating the transfer by six decades, and any territorial claim by the Ngok to the area of the Ragaba ez Zarga could have arisen during time. This statement, assuming that it is true, is also qualified by the words “openly in a conference”. Thus it may well have been that the Misseriya considered this territory to be theirs, whether or not they tabled this openly in a conference, and indeed before the outbreak of hostilities they simply had no need to make such a claim in any conference. Moreover, the idea that the Ragaba ez Zarga was in fact “Ngokland” is contradicted by a wide range of sources stating that the territory of the Homr extends south to the Bahr el Arab.¹¹⁴ It is also contradicted by eye-witness evidence, such as that of Wilkinson locating permanent Homr settlements at Fauwel and Um Semina in 1902.¹¹⁵

2. *The main body of the Experts’ Report*

88. In the main body of their Report, where they examine each proposition in more detail, the Experts cite some additional sources in support of Proposition 8.¹¹⁶ The Experts first cite the non-contemporaneous oral evidence of the Ngok Dinka and the Misseriya. Due to the fact that it was prepared after the dispute had arisen, that will not be examined here. The Experts then state:

“There are strong arguments for the continuity of Ngok Dinka settlement along the main waterways of the Bahr el-Arab basin (the Bahr el-Arab/Kir Itself, the Umm Bierio, the Ragaba Lau, the Ragaba ez-Zarga/NGOI and its tributaries). This is not only suggested by the evidence cited in the previous propositions, but is confirmed by the testimony of two impartial witnesses who were familiar with the area and the use to which its inhabitants put it immediately prior to independence (Tibbs and Cunnison in Appendix 4.3).”¹¹⁷

89. As noted above, the testimony of Tibbs and Cunnison in Appendix 4.3 is too vague and uncertain to support Proposition 8.

The Experts’ Report continues:

“We do not have a detailed and systematic description of Ngok settlement and land use patterns throughout the Condominium period, because of the

¹¹³ Saeed, at p. 235 cited in ABC Experts’ Report, Part II, p. 190.

¹¹⁴ See, e.g., Gleichen, *infra* note 192.

¹¹⁵ Wilkinson, *infra* note 129.

¹¹⁶ ABC Experts’ Report, Part I, p. 41 *et seq.*

¹¹⁷ ABC Experts’ Report, Part I, p. 43.

seasonality of administrative visits to Ngok territory. Since officials came only in the dry season (between December and April: Tibbs in Appendices 5.7 and 5.13), what few descriptions we do have are of Ngok dry season activities, which were concentrated around the rivers. But there are suggestions from the beginning of the twentieth century that administrators were aware that Ngok Dinka territory extended further north (Mahon 1903, Willis 1909 in Appendix 5.13), and this seems to have been the basis on which settlement and grazing patterns were condoned and managed by subsequent generations of administrators throughout the Condominium period, following the general principle of reviving tribal homelands.”¹¹⁸

90. The 1903 Report of Mahon Pasha¹¹⁹ does not relate to the extension of Dinka territory. Mahon merely stated that “I next went west [from Fauwel and Um Semima] to Sultan Rob’s”¹²⁰ and, further, “[f]rom there I went south to the Riverain country, and north-west to Tosh and the Rizeigat country”.¹²¹ Mahon also stated, without any specific geographic reference, “I met several herds of Dinka cattle grazing right in the Arab country, where they were afraid to go last year”. It is difficult to see how this report constitutes a suggestion that administrators were aware that “Ngok Dinka territory” extended anywhere near 10°10’N, since it is framed in terms of where the Dinka dared to venture, as is that of Willis.

91. It has already been observed that the statement by Willis in 1909 that Ngok Dinka “influence” extended “further North” was made without specific reference to time or place. Willis made no mention whatsoever of Ngok Dinka territory extending further north than the Bahr el Arab: on the contrary he noted that just after the rains the Dinka “go as far North as they think safe from the Arab (Bongo or El Myat)” where they build *temporary villages or camps*.¹²²

92. The Experts then note the lack of any clear evidence establishing the northern-most boundary of the area either settled or used by the Ngok as follows:

“There is, as yet, no clear independent evidence establishing the northern-most boundary of the area either settled or seasonally used by the Ngok. The lack of distinctive physical features and the overlapping use of the area discouraged Condominium administrators from attempting to define such a boundary (see Henderson’s 1935 comment, quoted above). There is some evidence in the administrative records of attempts to segregate Ngok and Humr communities in some areas: e.g. the expulsion of Ngok and other Dinka from Hasoba in 1932, at the request of both the Humr and the Ngok leaders (Henderson Diary in Appendix 5.13); the allegation that chief Kwol Arop was encouraging

¹¹⁸ *Ibid.*

¹¹⁹ Sudan Intelligence Report No. 104 (March 1903), Appendix E, p. 18. GoS Memorial, Annex 5, SPLM/A FE 1/21.

¹²⁰ *Ibid.*, p. 19.

¹²¹ *Ibid.*

¹²² See *supra* notes 105, 106.

the Ngok to settle among the Humr in 1940 (Kordofan Monthly Diary 1940 in Appendix 5.13). But these citations lack either the context or the details that would enable us to draw any firm conclusions from them.¹²³

93. The details in individual sources may be lacking, but context certainly is not. Firm conclusions may be safely drawn from those sources taken together, especially as they are corroborated not only by the independent observations of Professor Cunnison, but also by the circumstantial evidence. The improvement in Homr-Ngok relations as a result of Condominium presence or intervention, and Ngok movement in a northerly direction as a corollary of that improvement, is verified *around 1905* by Mahon Pasha already in 1903 and also by Willis in 1909. In the cartographic record, there is a clearly discernable general pattern in the maps: from those produced in the early years with labels placing the Ngok on and south of the Bahr el Arab around 1905, to the tribal administration maps of for instance 1927 and 1941. The cartographic evidence cannot merely be dismissed by claiming that there was insufficient knowledge at the time of Ngok Dinka presence extending to 1965 lines. This does not stand given the availability of highly detailed evidence such as the October 1908 Sudan Intelligence Report¹²⁴ describing each tribal group in considerable detail.

94. The fundamental flaw in the Experts' reasoning concerning Proposition 8 on the continuity of Ngok Dinka occupation up to 1965 is the sheer absence of any contemporaneous or even near-contemporaneous basis for concluding that there was *any* occupation of the 1965 area in 1905. It rests entirely on assumption: the assumption that in *all* of the places occupied in 1965, the Ngok had been living continuously from 1905.

95. Based on such flimsy evidence, there is no justification for employing the method of projecting, 60 years backwards in time, the situation as at 1965. This effectively overrides the agreed date specified in the mandate.

96. The Experts then turned to the general agreement in the sources consulted that the Goz is an area settled by neither the Ngok nor the Homr and seasonally used by both. On the status of the Goz, they noted:

“The Ngok assertion that the boundary between the two peoples is the Goz belt that separates them has yet to be tested by a systematic survey. There is general agreement from other sources, however, that the band of Goz intervening between the Humr permanent territory and the Ngok permanent settlements is settled by nobody; that it is an area to be traversed, rather than occupied; and that there is regular seasonal use of the Goz by both peoples (Cunnison 1954 in Appendix 5.2; Cunnison 1966 in Appendix 5.3; Tibbs 1999 in Appendix 5.13).¹²⁵”

¹²³ ABC Experts' Report, Part 1, p. 43.

¹²⁴ Sudan Intelligence Report No. 171 (October 1908), Appendix D, GoS Memorial Annex 18, SPLM/A FE 3/5.

¹²⁵ ABC Experts' Report, Part 1, p. 43.

97. Finally, the Experts stated their conclusion as follows:

“The Commission finds sufficient evidence, therefore, to accept Ngok claims to permanent rights southwards roughly from latitude 10°10'N and of Ngok secondary rights extending north of that line.”¹²⁶

98. There is thus nothing in the contemporaneous or near-contemporaneous evidence (i.e., from 1905 or within 10–15 years of it) cited by the Experts to support the adoption of latitude 10°10'N as a point of reference.

99. Having shown that the two crucial stages in the Experts' thought processes are built on sand I shall turn now to the important question of the procedural framework within which the Experts' mandate was conferred on them and within which they were expected to operate.

7. Locations of the Ngok Dinka and of the Homr around 1905

100. I have maintained throughout this Dissenting Opinion that the results achieved by the Experts and this Tribunal bear no relation to the reality of where the Ngok Dinka were situated around 1905 and that both exercises are contradicted by overwhelming, contemporaneous and near-contemporaneous evidence. The sheer volume of this evidence and its strong probative value are matched only by the degree to which it was neglected by the Experts and the Tribunal. This cannot be properly relegated to the margin of appreciation of facts normally left to the fact-finder or the arbitrators. It must be seen, when regard is had to how obvious the evidence and how reluctant the fact-finder or the arbitrator to see it, as a ground for excess of mandate properly so described.

101. Lest the reader think that an element of exaggeration has crept into what I have written, I have compiled from contemporaneous and near-contemporaneous sources, cited in the written pleadings of the Parties and in their presentations before the Tribunal, a detailed review of where the Ngok and the Misseriya and their camps or settlements were sighted around 1905.[†]

102. I address this evidence in chronological order, to the appropriate extent. As some sources concern both tribal groups, there is some repetition.

¹²⁶ *Ibid.*, at p. 44.

[†] I am grateful for the research assistance of Ms. Fedelma Claire Smith in compiling this review. I would also like to take the opportunity to extend my thanks to Mr. Bill Robertson, Mr. Vincent Belgrave, and Mr. Sam Brown, for their cartographic expertise and timely assistance, and to my secretary, Mrs. Jean van Hamel-Newall, for her invaluable support. This Opinion could not have been produced without their Amazonian and Herculean efforts.

A Map illustrating this review of the evidence is appended to this Dissenting Opinion.¹²⁷

1. *Evidence of Ngok Dinka occupation*

(a) **Evidence from up to and including 1905**

103. E.B. Wilkinson, who travelled in 1902 from El Obeid to “Sultan Rob’s”, recorded in a detailed itinerary that the “first Dinka village” he reached was the village of Bombo. This has been marked as Bongo on the map, and is located at 9°32’N, 28°49’E.¹²⁸ This village was empty. Wilkinson did not encounter any Ngok before Etai (9°29’N 28°44’E). Both Bongo and Etai are far south of the Ragaba ez Zarga.¹²⁹ Wilkinson found only Arab settlements along the Ragaba ez Zarga, the watercourse to which he refers as the Bahr el Arab, five or six miles south-west of the “large Arab settlement” at Fauwel.¹³⁰

104. Wilkinson noted on a sketch map illustrating his route that “the positions of arab settlements marked [with the symbol, ?] are from information supplied by Skeih Ali Gula Nazir of Homr arabs”.¹³¹ The watercourse marked as the Bahr el Arab on this sketch was later established as the Ragaba ez Zarga. No Dinka dwellings or settlements are marked by Wilkinson on this watercourse.

105. Mahon Pasha in 1903 reported that the Ngok Dinka lived in the area between the Ragaba ez Zarga and the Bahr el Arab.¹³² He wrote:

“From Muglad I went to Turda. The people here had a lot of cattle and a fair amount of horses. . . . From Turda I went south-east to Dehka and there had all the Sheikhs assembled and gave them 3 days to pay their tribute, which

¹²⁷ See Map appended to this Dissenting Opinion, *infra*. This map is intended to illustrate the locations of Ngok Dinka and Homr Arab presence around 1905 using the contemporaneous and near-contemporaneous evidence in the record. Place names that are marked in colour illustrate where first-hand or official accounts from around 1905 identify either Ngok Dinka (shown in pink) or Homr (shown in orange) at the named location. Secretariat note: the map is located in the rear pocket of this volume.

¹²⁸ *Gazetteer of the Anglo-Egyptian Sudan* (Sudan Survey Department, Khartoum, 1931), p. 102, GoS Counter Memorial, Annex 28. Locations of places named in the evidence reviewed in this part of the Opinion have been made using the cartographic evidence in the record, with particular reference to the 1936 Mosaic of 250,000 Series Maps in the SPLM/A Reply Map Atlas.

¹²⁹ Wilkinson, El Obeid to Dar El Jange (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government*, Vol. II (1905), p. 155. GoS Memorial, Annex 38, SPLM/A FE 2/14 and 2/15.

¹³⁰ *Ibid.*

¹³¹ Annex 5 of the GoS Maps produced in response to the Request of the Tribunal. An extract of this map is annexed to GoS CM, Map 13b.

¹³² Sudan Intelligence Report No. 104 (March 1903), Appendix E, p. 19. GoS Memorial, Annex 5, SPLM/A FE 1/21.

they did after a little persuasion. . . . I then went to Fawel and Um Semina, where I had the remainder of the Homr Sheikhs to meet me to collect their tribute . . . I next went west to Sultan Rob's, and was very well received; invested Sultan Rob with a Second Class Robe of Honour. From there I went south to the Riverain country, and north-west to Tosh and the Rizeigat country. . . . The two chiefs, Lor and Rob, who I made make friends last year after 30 years' war, were on the best of terms, and one and all Dinkas said how pleased they were that Government had come, because they had not been raided by the Arabs since I was there last year. As proof of that, I met several herds of Dinka cattle grazing right in the Arab country, where they were afraid to go last year."¹³³

Mahon Pasha is unspecific about the latitude of "Sultan Rob's" in his Report. It might be inferred that he had travelled there due west from Fawel and Um Semina, but this impression is contradicted by other contemporaneous evidence also from before 1905.

106. Percival, in his route report from Keilak to Wau, December 1904, described "what I take to be the Bahr el Arab", which is now known to be the Ragaba ez Zarga. He wrote, on 19 November:

"I have been some miles up and down the river but can find no trace of inhabitants. The country between here and the Jebela would appear to be uninhabited as I should think that I would be bound to have found some traces of natives if any had been about lately."¹³⁴

On 27 November he noted that Sultan Rob was "at present" living in Burakol and noted "There are no Dinkas west of Burakol as far as I could see and Sultan Rob told me that there are only Homr Arabs west of him."¹³⁵ He then noted that:

"The Bahr el Arab [the river which was later identified as the Ragaba ez Zarga] is uninhabited he told us except for occasional wandered parties of Arabs. He knew Chak Chak which he said was the next lot of natives to those he ruled."¹³⁶

107. Percival also reported seeing some Dinka driving cattle south at Amakok. On the most expansive proper view of the evidence, it can be inferred as a possibility, in the absence of any more detailed (or contradictory) contemporaneous evidence on Amakok, that there was Ngok Dinka presence somewhere in its vicinity. However, any attempt to place the Ngok Dinka further north, in the form of a permanent settlement, on the basis of this one sighting, would be pure speculation. One might indeed remark that any incidence of Dinka driving their cattle southwards as hard as they could at that latitude, at

¹³³ *Ibid.*

¹³⁴ A. Percival, "Route Report: Keilak to Wau", December 1904, p. 2. GoS Counter Memorial, Annex 26.

¹³⁵ *Ibid.*, at p. 3.

¹³⁶ *Ibid.*

a time when the Dinka only tended to graze their cattle “as far North as they think safe from the Arab”, does not seem likely to concern Dinka coming from their own permanent settlements.

108. Percival’s 1904 sketch map places Sultan Rob south of the river Kir, not far from the village of Bongo, and mentions the village of Burakol, just north of the Kir.¹³⁷

109. Gleichen’s Handbook of 1905 includes an “Itinerary of the Bahr el Ghazal River, Lake No – Mashra El Rek”, by “Garstin, Peake, Editor, et al” which notes, regarding Lau: “From 6 miles above the junction a succession of Dinka villages line both banks. Some of these are large and appear to be thickly peopled. The principal village is called Lau.”¹³⁸

(b) Evidence from after 1905

110. In his “Progress Report – Bahr Bahr el Arab Reconnaissance”, dated 8 March 1906, Bimbashi Huntley Walsh stated:

“I have on board now Sheikh Akanon, the son of Sheikh Lar who is dead, he has been a great help to me and wishes to report himself to His Excellency the Governor-General, so, unless I receive a wire to the contrary, I shall bring him to Khartoum with me. He is the biggest Dinka Sheikh in this part of the country and has considerably more people and a much larger stretch of country than Sheikh Rob.”¹³⁹

111. Hallam’s 1907 route report describes Sultan Rob’s new village as “covering the country between the Um Bioru and the Gurf [Bahr el Arab] near their junction”.¹⁴⁰ From there, Hallam travelled south-east towards Sultan Rob’s old village. He states that “ROB’S old V. is on BAHR EL ARAB”. This description does not include any significant extent of territory north of the Bahr el Arab nor does the report evidence any Ngok occupation anywhere near the Ragaba ez Zarga, or north of it. Hallam located one Ngok village on the Umm Biero, namely, Rob’s New Village at the Um Biero – Bahr Bahr El Arab junction, and others along both banks of the Bahr el Arab: Chweng; Lar’s village; and Sultan Rob’s old village.

112. Lloyd wrote in 1907:

¹³⁷ Percival’s Sketch Map (River Kir to Wau), (Sudan Survey Department archives, 1904). GoS Counter Memorial, Map 14b.

¹³⁸ E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government*, Vol. II (1905), p. 168. GoS Memorial, Annex 38, SPLM/A FE 2/14 and 2/15.

¹³⁹ Sudan Intelligence Report No. 140 (March 1906), p. 15. GoS Memorial, Annex 12, SPLM/A FE 17/22.

¹⁴⁰ H. Hallam, *Route Report: Dawas to Dar Jange*, December 1907, p. 2. GoS Counter Memorial, Annex 31. Hallam’s sketch map is annexed to the GoS Counter Memorial, Map 16b.

“Dar Homr, or the country of the Homr Arabs, is situated in the south-west corner of the province of Kordofan. The western boundary is the Darfur frontier, beyond which live the Rizeigat Arabs. On the north, the boundary passes through El Odaiya, now the headquarters of a Merkez, or administrative district, and thence south-eastwards, passing south of Burdia and Jebel Dago to Keilak. El Odaiya is in the Hamr country, the inhabitants being a sedentary tribe of Arabs. Burdia and Jebel Dago are in the Messeria, and Keilak in the Hawazma country. Both these tribes, like the Homr, are Baggara Arabs – that is to say, cattle-owning nomads. The southern boundary is between the Bahr el Arab and the river Kir, the latter being occupied by the Dinkas under Sultan Rob.”¹⁴¹

In response to Lloyd, Percival submitted an explanation published in the following of the Geographical Journal, stating that “[t]he Bahr el Arab is the river Kir, and takes this name ‘Kir’ when it enters the Dinka country either before or after joining with the rivers that join the river Lol below Sultan Rob’s”.¹⁴²

113. Lloyd, in the Sudan Intelligence Report, 1908, recorded that “the Homrs cultivate round Muglad and Baraka, but as soon as the water dries up they migrate southwards to the Bahr el Homr”.¹⁴³

114. C.A. Willis made detailed “Notes on the Western Kordofan Dinkas” following a visit in 1909.¹⁴⁴ He stated:

“The Western Kordofan Dinkas seem to be divided into three main heads: on the east the Ruweng, under Sultan Qot; in the middle the followers of the late Sultan Lar, under his son Kanoni; and to the west the followers of the late Sultan Rob, under his son Kwal.”

115. Willis noted, further:

“Practically speaking, the Dinkas after the rains are scattered about and mixed up, in so far as their private feuds allow. It is only in the rains that they sort themselves out, and more or less combine in families. Even so, they say there is no hard-and-fast rule by which a sub-tribe always lives in the same place. All along the Gurf are villages consisting of perhaps two or three houses each. The ones I saw at the Ferry by Rob’s old village were about a mile apart, and I was told they continued all along the Gurf both ways. Total distance from end to end in which these Dinkas live (Lar and Rob) is not more than two days (say 50 miles). They gather together in the rains in order to combine to make their houses . . .”¹⁴⁵

¹⁴¹ Geographical Journal, Vol. 29, 1907. GoS Memorial, Annex 54, SPLM/A FE 17/27.

¹⁴² Geographical Journal, Vol. 30, 1907. GoS Memorial, Annex 55.

¹⁴³ Sudan Intelligence Report No. 171, October 1908, p. 53. GoS Memorial, Annex 18, SPLM/A FE 3/5.

¹⁴⁴ C.A. Willis, “Notes on the Western Kordofan Dinkas”, 10 April 1909, Sudan Intelligence Report No. 178, May 1908, Appendix C, at p. 16. GoS Memorial, Annex 19.

¹⁴⁵ *Ibid.*, at p. 17.

116. Willis made observations on the habits and locations of the Ngok Dinka in the rainy season, and noted:

“As I saw their winter camps only (the villages on the Gurf were empty except for a few old men and women); I did not see the Dinkas in full kit – they had with them only their helmets (Filliul) and their arms. . . . Just after the rains they go as far North as they think safe from the Arabs (Bongo or El Myat); there they build temporary villages, no doubt owing to the presence of mosquitoes. The tukls are made with the floor rising to a point in the centre. . . . (the Arabs at Sinut and Burdia do the same for their children owing to the mosquitoes). . . . As the water dries up and the mosquitoes decrease, the Dinkas move towards the Gurf.”¹⁴⁶

117. Willis also noted that “From a piece of rising ground between the Lau and the Gurf one sees the plain of the Gurf extending for miles covered with grass, with here and there big trees and a Dinka village.”¹⁴⁷

118. A sketch by Whittingham, dated 1910, is, as noted by the GoS, the first map to depict something with a name resembling that of Abyei, namely, Abyia.¹⁴⁸ Whittingham measured the position of Abyia and noted “I have struck it three or four times and it is about 3½ miles up the tributary which is shown on the HASOBA sheet”.¹⁴⁹

119. From this evidence, the GoS suggests that the Ngok Dinka were moving slowly north: Burakol was 2 miles up the Um Biero in 1904; Abyia 3 ½ miles up in 1910, and Abyei town 4.7 miles up in 2005.¹⁵⁰ This appears to be supported by other evidence, such as Titherington’s sketch map of 1924, where on the left bank of the Um Biero, just north of the Bahr el Arab, there is an annotation stating: “Abyei [Ch Kwol Arob’s since 1918]”.¹⁵¹

120. G.A. Heinekey travelled in 1918 from Muglad to Gerinti,¹⁵² then south along the Bahr el Arab until he came to Mek Kwal’s village,¹⁵³ where he turned north and travelled towards the Ragaba Um Biero and from there further north.¹⁵⁴ Heinekey only mentioned Ngok villages along the Bahr el Arab.

¹⁴⁶ *Ibid.*

¹⁴⁷ C.A. Willis, “Notes on the Western Kordofan Dinkas”, 10 April 1909, Sudan Intelligence Report No. 178, May 1908, Appendix C, at p. 18.

¹⁴⁸ Transcript, 21 April 2009, 93/20 (Crawford).

¹⁴⁹ Whittingham, Letter to Pearson, 26 April 1910. GoS Memorial, Annex 34.

¹⁵⁰ Transcript, 21 April 2009, 98/12–14 (Crawford).

¹⁵¹ *Infra* note 159.

¹⁵² G.A. Heinekey, Route Report: Muglad to Gerinti, February 1918. GoS Counter Memorial, Annex 35.

¹⁵³ G.A. Heinekey, Route Report: Gerinti to Mek Kwal’s Village, March 1918. GoS Counter Memorial, Annex 36.

¹⁵⁴ G.A. Heinekey, Route Report: Mek Kwal’s Village to Jebel Shat Safia, March 1918. GoS Counter Memorial, Annex 37.

121. Heinekey noted Homr cattle and Homr camps on his way to Gerinti, and, north of Mek Kwal's village, only Homr. He stated that "From Gerinti to Mek Kwal's village, there is no track of any sort."¹⁵⁵ Later in the same section he noted, "The Arabs when they go down to Kwal to buy grain do not go along the Gurf but along the Ragaba Um Biero which flows parallel to and North of the Gurf."¹⁵⁶ This suggests that Gerinti was populated by Arabs rather than by the Ngok.

122. Dupuis's 1921 sketch of Dar Homr "shows no sign of Ngok presence in the area claimed by the SPLM/A". The "most northerly indication of Ngok" is the word "dugdug" some miles north of Lukji on the Ragaba Um Biero.¹⁵⁷

123. H.A. MacMichael, an historian, wrote in 1922 that "the Humr country lies on the extreme west of southern Kordofan, from the neighbourhood of el Odaya to the Bahr el Arab, or 'Bahr el Humr'".¹⁵⁸

124. On the 1924 sketch map by Titherington, in 1924, on the left bank of the Um Biero, just north of the Bahr el Arab, there is an annotation stating: "Abyei [Ch Kwol Arob's since 1918]".¹⁵⁹ The Kordofan Tribal Distribution Map of 1927 shows the "Mareig" (Ngok) Dinka next to Abyei, marked well to the south of the Ragaba ez Zarga.¹⁶⁰

125. In 1933 Henderson travelled from Muglad to Abyei by way of Tebeldiya, Antilla, Lukji and Na'am. It was not before Lukji, approximately 16 kilometres north of the Bahr el Arab that Henderson reported the first Ngok houses.¹⁶¹ Lukji is to the south of the Ragaba ez Zarga.

126. The "Grazing Areas Map" produced by the Civil Secretary's Office and dated 1933 places the Ngok grazing area to the south of the Bahr el Arab, south of 10°N, and 40 kilometres south of the 10°10'N line.¹⁶²

127. The map showing Native Administrations of Kordofan Province, dated 1941,¹⁶³ shows the Dinka confined to a small, semi-circular area around

¹⁵⁵ *Supra* note 153.

¹⁵⁶ *Ibid.*

¹⁵⁷ See Transcript, 21 April 2009, 98/3-6 (Crawford).

¹⁵⁸ H.A. MacMichael, *A History of the Arabs in the Sudan* (Cambridge: Cambridge University Press, 1922), p. 286. GoS Memorial, Annex 41.

¹⁵⁹ Additions and Corrections to Sketch of Dinka Country (Khartoum: Sudan Survey Department, 1924). GoS Counter Memorial, Map 38.

¹⁶⁰ Kordofan Tribal Distribution Map (Khartoum: Sudan Survey Department, 1927), GoS Counter Memorial, Map 21.

¹⁶¹ K.D.D. Henderson, "Route Report: Muglad to Abyei", March 1933. GoS Counter Memorial, Annex 38.

¹⁶² Grazing Areas Map, 1933, Civsec 66/4/35 Vol. I p. 95. GoS Counter Memorial, Map 22a.

¹⁶³ Native Administrations of Kordofan Province (Khartoum: Sudan Survey Department, 1941). GoS Memorial, Map 27.

Abyei, on the Bahr el Arab. That area is about 3,000 square kilometres. The area claimed by the SPLM/A is 23,300 square kilometres.

128. As recalled in Part 2 of this Dissenting Opinion, P.P. Howell, who is cited in the Award,¹⁶⁴ wrote in some detail on the locations of the Ngok. In 1948, Howell noted:

“The Ngok Dinka of Western Kordofan live along the middle reaches of the Bahr el Arab and its tributaries . . . During the dry season the Homr Messiria mingle freely with them in pastures and they have a long history of contact with the Arab world – probably for at least a century.”¹⁶⁵

129. In a work published in 1951, to which reference has also been made in Part 2 of this Dissenting Opinion, Howell noted:

“The Ngork Dinka, whose population is estimated between 20,000 and 25,000, occupy an area along the middle stretches of the Bahr el Arab. They border the RUENG ALUR Dinka in the south-east and the TWIJ Dinka to the south, and with both these Dinka peoples they have close cultural affinities. To the south-west are the MALUAL Dinka. North of the Ngork are the Baggara Arabs of the MESSIRIA HOMR with whom they have direct seasonal contact and they are therefore on the most northerly extremities of the Western Dinka block, lying between the Nilotics of the south and Muslim peoples of the north . . . Administrative action . . . has placed the Ngork in Kordofan Province and the Rueng in the Upper Nile Province . . . The Ngork Dinka of Western Kordofan occupy an area between approximately Long. 27°50'E and Long. 29° on the Bahr el Arab extending northwards along the main watercourses of which the largest is the Ragaba Um Biero . . .”¹⁶⁶

130. Professor Ian Cunnison, in a sketch map, dated 1954, shows the Dar Humr, with the word “Ngok” printed to the South of the Bahr el Arab.¹⁶⁷ Cunnison wrote in 1966, in a study based on field work between August 1952 and January 1955:

“The Bahr is the name which the Humr give to the whole of this dry-season watering country. Within it they recognize different districts: the Regeba is the northern part of the Bahr, where the Humr make their earliest dry-season camps . . . the ‘Bahr’ proper is the region where the camps are made towards the end of the dry season, mainly around the largest watercourse, the Regeba Umm Biero and the Regeba Zarga . . . Finally, much of the Bahr has permanent Dinka settlements, although during most of the time that

¹⁶⁴ Award, paras. 720 *et seq.*

¹⁶⁵ P.P. Howell, 1948, P.P. Howell Papers, Sudan Archives, Durham, 768/2/15, cited in ABC Experts' Report, Part II, Appendix 5.11, at p. 201.

¹⁶⁶ P.P. Howell, “Notes on the Ngork Dinka of Western Kordofan”, (1951) 32 Sudan Notes and Records 239, pp. 241–242. GoS Memorial, Annex 53, SPLM/A FE 4/3.

¹⁶⁷ I. Cunnison, “The Humr and their Land”, (1954) 35(2) Sudan Notes and Records 50, p. 50. SPLM/A FE 4/5. See also Figure A, *infra*.

the Humr occupy it the Dinka are with their cattle south of the Bahr el Arab . . .¹⁶⁸

Cunnison also wrote that “[t]he way in which the tribal sections move seems not to have varied much since the Reoccupation.”¹⁶⁹

131. R. Davies, a former Sudan civil servant, described the position of the Dinka in a 1957 publication in the following terms:

“[The] Dinka, the great majority of whom belonged to Bahr el Ghazal Province, though by a freak of organization two sections of the tribe, Mareig and Ruweng, were for administrative purposes part of the Western Kordofan inspectorate.

The reason for this arrangement was that these sections played Cox and Box with the Homr in the occupation of the shallow basin of the Bahr el Arab river, which was the theoretical boundary between the two provinces. When the Homr went south to it in the dry season, the Dinka withdrew still farther south into the Bahr el Ghazal; but when the rains came and the Arabs took their cattle north to the area of El Muglad, the Dinka, whose small bred of cattle had acquired immunity to fly-borne disease, moved up and occupied the river region, where their animals profited from the grass.”¹⁷⁰

132. Sir James Robertson, Civil Secretary of the Sudan Government from 1945 to 1953, wrote on the Humr and Dinka as follows:

“Further south, the Humr section of the Messeria centred round Muglad and Keilak in the rainy season, migrating in the late autumn southwards to the green pastures of the Bahr el Arab, where water and grass could be found in plenty for their cattle during the dry season. The cattle nomads on the river mingled with the tall Nilotic Dinkas, of whom, one tribe, the Ngok, was administered by Western Kordofan, and other, the Twij and the Malwal, came north from Tonj and Aweil districts of Bahr el Ghazal Province . . . About eighty miles south of El Odaiya is Muglad, the centre of the Humr Administration, where there was a small office and a police post. From Muglad it is still another hundred miles south to Abyei near the Bahr el Arab, where Chief Kwal Arob presided over the destinies of the Ngok Dinkas . . . Chief Arob of the Ngok Dinka lived in a buffer area between the Arabs and the great mass of the Dinka to the south . . .”¹⁷¹

133. Michael Tibbs wrote, on taking up his appointment as Assistant District Commissioner for Dar Messeria in the early 1950s:

¹⁶⁸ I. Cunnison, *Baggara Arabs: Power and Lineage in a Sudanese Nomad Tribe* (Oxford: Clarendon Press, 1966), pp. 18–19, SM Annex 33.

¹⁶⁹ *Ibid.*, at p. 26. “Cox and Box” is a 19th-century operetta with a libretto by F. C. Burnand and music by A. Sullivan, in which a landlord mischievously lets the same room to two lodgers, one of whom works at night and the other during the day.

¹⁷⁰ R. Davies, *The Camel's Back* (London 1957), p. 130. GoS Memorial, Annex 35.

¹⁷¹ J. Robertson, *Transition in Africa* (London: C. Hurst, 1974), pp. 42, 44, 50. GoS Memorial, Annex 45.

“As I read through the Messeria section of the District files, the task and the distance seemed formidable, I would be looking after an area of 25,000 square miles. Most of this was the territory of the Messeria tribe. They are cattle owning Arab nomads, some 90,000 of them. Also within the area there were three other ethnic races. In the south on either side of the Bahr (river) el Arab, lived the Ngok Dinka, numbering 30,000 . . .”¹⁷²

134. Professor Martin Daly, in his expert testimony in these proceedings, notes the following concerning the location of the Ngok Dinka in 1905:

“We are left then with the conclusion that the best documentary evidence so far located for the northern boundary of the area of the nine Ngok Dinka chiefdoms in 1905 remains, in the opinion of this historian and as of the date of the present report, Wilkinson’s itinerary of 1902, which establishes a permanent Ngok presence on the Ragaba al-Zarqa.”¹⁷³

On being questioned on that statement in cross-examination by Professor Crawford, Professor Daly admitted that he could not point to anything in Wilkinson’s itinerary that established, or where Wilkinson said that there had been established, a permanent Ngok presence on the Ragaba ez Zarga.¹⁷⁴

2. Evidence of Homr Occupation

(a) Evidence from up to and including 1905

135. Wilkinson made detailed observations on Ngok and on Homr locations, as described in his Itinerary No. 101, “El Obeid to Dar El Jange”.¹⁷⁵ In the section beginning on page 153, “From Kadugli to Keilak”, Wilkinson noted that the road crosses the outlet from Lake Keilak, and then noted, two miles from that crossing: “Keilak is a series of groups of tukls badly built and inhabited by Homr Arabs who possess few flocks, a few horses, and appear to live on the Nubas.”¹⁷⁶ Six and a half miles from Keilak, he noted “El Geref; Homr settlement”.¹⁷⁷ After proceeding 35¾ miles south-west from the Homr settlement at El Geref, he noted “. . . El Debekir was reached. Here there was an Arab (Homr) settlement . . .”.¹⁷⁸ From El Debekir, 16¾ miles on, he noted: “. . . El Anga on river is reached. Here there is an Arab settlement . . .”.¹⁷⁹ Five

¹⁷² M. Tibbs and A. Tibbs, *A Sudan Sunset* (privately published, Welkin, 1999), “Dar Messeria”, p. 55.

¹⁷³ SPLM/A Memorial, First Report of Professor Martin Daly, p. 49.

¹⁷⁴ Transcript, 22 April 2009, 117/16–20 (Crawford/Daly).

¹⁷⁵ Wilkinson, *supra* note 129, at p. 154.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*, at p. 155.

¹⁷⁹ *Ibid.*

and a half miles from the Arab settlement at El Anga, he noted that "... Kuek is reached ... Large Arab settlement and many cattle."¹⁸⁰

136. With the aid of the sketch map drawn by Wilkinson, Kuek has been located at latitude 28°58'E, 10°12'N. Six miles south-west from the large Arab settlement at Kuek, Wilkinson noted: "H. Debib ... a few Homr Arabs living here ...".¹⁸¹ The next mention of the Homr is at Fauwel; between H. Debib and Fauwel, three and a half miles from H. Debib, Wilkinson noted "Fula Hamadai ... Small villages – mere collection of three or four huts passed at El Jaart and Um Geren" and then, 11¼ miles from Fula Hamadai, "village named Fut was passed". All of these were before "the first Dinka village of Bombo is reached" (just over 14 miles south of what was really the Ragaba ez Zarga), thus it can safely be inferred that Fula Hamadai, El Jaart, Um Geren and Fut were Homr locations.

137. Some 19 miles from H. Debib, Wilkinson noted: "Fauwel is reached. Large Arab settlement; much water in river, and an open expanse 1¼ miles surrounded by reeds. Geese and waterfowl. Homr Arabs here very wild, but possess many cattle, goats and sheep." Fauwel, using Wilkinson's sketch map, can be located at 9°53'N, south of the "shared grazing rights area" of the ABC, about 32 kilometres due south of the 10°10'N line.

138. In his Itinerary No. 102, "River Kir to Fauwel", Wilkinson described his journey starting from Sultan Rob's settlement on the River Kir and going towards Fauwel. Towards the Ragaba ez Zarga, 29¼ miles from Sultan Rob's settlement, he noted reaching "Abu Kareit, on [Ragaba ez Zarga]. Homr settlement." Three and a quarter miles further on, he notes reaching "Mellum, an Arab settlement". These locations are both south of 9°50'N.

139. At the end of that Itinerary, Wilkinson set forth a "General Description of Bahr el Arab and Dar El Homr". In this he stated: "Only in a few places, Fauwel, Keilak, and Kuek, do the Homr Arabs remain throughout the year, as they say that the flies and mosquitoes torment man and beasts to such an extent as to make life unbearable."¹⁸² This statement is significant first because it shows that Homr's presence as far south as Fauwel was not exclusively transitory. But also significant is the fact that some Homr Arabs clearly remained in this area even during unfavourable conditions. In itself, the presence of the Homr Arabs throughout the year at Kuek and Fauwel, in spite of the seasonal conditions rather than because of them, suggests that those people did not have a fully nomadic existence. This theory is corroborated by Howell in 1951 who notes that "the Ngork are no different from other Nilotic cattle-owners, nor indeed in general principle from the Baggara Arabs who live to the north of them."¹⁸³

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² Gleichen Handbook, *supra* note 138, at p. 156.

¹⁸³ Howell, *supra* note 166, at p. 245.

140. Mahon Pasha in 1903 described places at which he collected tribute in his report annexed to the Sudan Intelligence Report No. 104 of March 1903. He describes assembling the Sheikhs and collecting tribute from them at Dehka, Fauwel, and Um Semina. These are by necessary implication Arab locations because Mahon Pasha states that it “would not be the slightest use trying to collect tribute” from the Dinka “until there is a Mamur and a post in that direction”.¹⁸⁴ It has not been possible to pinpoint the location of Dehka from the map evidence in the record; Mahon Pasha describes it as being Dehka was “south-east” of Turda¹⁸⁵ but it may not have been far from Turda which is at 10°20’N. Fauwel is located according to several sources at about 9°52’N, 28°50’E. Um Semina has been located at around 9°47’N, 28°36’E.

141. Mahon Pasha recorded that, when the Sheikhs at Fauwel and Um Semina failed to pay the colonial tribute within three days, he

“made some of the Sheikhs prisoners and seized cattle and horses to the value of about three times their tribute. I told them that if they liked they could pay and redeem their property, but must pay 40L extra as a fine. They all paid before I left the country.”¹⁸⁶

It is significant that Fauwel and Um Semina the Homr were not only present, but they were paying taxes to the administration there, and in fact the tax was extracted on pain of imprisonment and confiscation of property.

142. It is thus clear from the reports of Wilkinson and Mahon Pasha that the presence of the Homr Arabs as far south as Fauwel and Um Semina was a fact which the Condominium authorities officially recognized, to the material detriment of those Homr. Mahon Pasha recorded in the same place that there was as yet insufficient infrastructure to collect tax from the Ngok Dinka in that direction. It would be most strange to regard as only fleeting and transitory, and as a matter of grazing by permission in the territory of another, a presence which was recognized for tax purposes by the long arm of the Condominium administration. However, there is no reason to imagine that the administration might have been so heavy-handed as to exact, using force, tax tribute in at sites where the taxpayers were merely temporarily passing through as nomads, there is clear evidence showing that at one of those locations, Fauwel, the Homr remained throughout the year.

143. Percival, who began his trek from Keilak on 12 November 1904, noted that there was “a small Homr Arab settlement at Keilak”. Percival was unable to obtain a guide at Keilak; he noted on leaving on 13 November: “Made an Arab accompany me, but he was very unwilling and did not even want to put me on the track out of the village, and on 16 November he noted: “Have let the Arab go back to Keilak as he cannot give me any information.” Percival travelled 56 miles south-west before he “Found remains of huts three years

¹⁸⁴ Mahon Pasha, *supra* note 132, at p. 19.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

old" at a khor.¹⁸⁷ A further 39 miles on, he came to what is now known as the Ragaba ez Zarga, where he noted:

"I have been up and down the river but can find no trace of inhabitants. The country between here and the Jebels would appear to be uninhabited, as I should think that I would be bound to have found some traces of natives if any had been about lately."¹⁸⁸

Percival's notes show that from Keilak up to the Ragaba ez Zarga and up and down that Ragaba, he made sightings of neither Homr nor Dinka.

144. After he crossed the Ragaba ez Zarga, at Amakok, on 30 November 1904, Percival noted that he "sent out parties one of whom brought in Dinkas who were driving cattle south as hard as they could. I surprised them and they thought we were Arabs raiding, but I found them very friendly and obtained a guide."¹⁸⁹ After Amakok Percival recorded that he encountered several villages, including Yai, Lahr, and Yamoi. Since he was in the care of a Dinka guide – who was quite possibly of the Ngok tribe, but this is not specified – it would be fair to infer that those were Ngok Dinka villages, and in the case of Lahr this has been independently corroborated.

145. Percival trekked on 27 November from Bongo to Burakol where he noted that "Sultan Rob is at present living". Percival noted that

"Sultan Rob told me that there are only Homr Arabs west of him. The [Ragaba ez Zarga] is uninhabited he told me except for occasional wandered parties of Arabs. He knew Chak Chak which he said was the next lot of natives to those he ruled."¹⁹⁰

Percival also described Sultan Rob's authority:

"He seemed to have a good deal of authority & is very loyal I should say. He corresponds with El Obeid and says he has not been fighting the Arabs since the Government came to see him & that the Homr Arabs are fairly quiet, but I gathered that they do not trust each other much yet."

The fact that Sultan Rob was able to make such observations on the quietness or otherwise of the Homr corroborates Wilkinson's evidence that the Homr were located on the Ragaba ez Zarga.

146. Lloyd, writing on Kordofan in the *Gleichen Handbook*,¹⁹¹ under the sub-heading, "Nomads, Baggara", lists the "most important tribes" of the nomads or Baggara, stating that "[t]he Homr, south of El Eddaiya towards the Bahr El Arab, are a large and fairly rich tribe, and the Gimma, near Gedid, the

¹⁸⁷ Percival, *supra* note 134, at p. 1.

¹⁸⁸ *Ibid.*, at p. 2.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*, at p. 3.

¹⁹¹ *Gleichen, supra* note 138, at p. 179

majority of whom, however, have permanent houses”. The Homr are also listed in a table showing “Tribes and Sheikhs”.¹⁹² They appear as follows:

| | | | |
|--------------------|------------------|------------------------|--|
| Homr | Ali Gula (Nazir) | | Large and comparatively rich Baggara tribe, owning cattle and horses. At present (1903) pay ££450 tribute. |
| Ageria Walad Omran | Muhammed Khadson | Muglad | |
| Agaira Walad Kamil | Masood Iriz | Muglad to Bahr el Arab | |
| Felaita | El Hag Wad Yagob | Keilak and Abiad Lakes | |

147. Appendix G of the *Gleichen Handbook* is entitled “Boundaries of Provinces (Defined)”¹⁹³ Under “Kordofan” it states, in relevant part:

“From Lake No up the Thalweg of the Bahr el Ghazal and roughly westwards along the 9 degree parallel. Sultan Rob and Dar Jange belonging to Kordofan. The western boundary is the eastern frontier of Darfur, which leaves Um Badr and Foga to Kordofan and Kaja to Darfur, thence in a south-westerly direction to Dam Jamad, thence southwards, leaving Zernak, Um Bahr, Wad Zarag, Gad El Habub and Sherafa to Kordofan. Thence southwards to the Bahr El Arab, leaving the . . . Rizeigat to Darfur, and the Homr and Dar Jange to Kordofan.”

The Homr are thus mentioned in connection with the boundary at the Bahr el Arab so they must have been present on or near the Bahr el Arab for at least some of the year.

(b) Evidence from after 1905

148. A figure illustrating the continuity from 1927 to 1954 in the general outline of the “dar” of the Homr or Misseriya is appended to this Part.¹⁹⁴

149. The 1906 sketch map by Comyn situates the Homr on the Bahr el Arab, just above 10°0’N.¹⁹⁵

150. Huntley Walsh reported hearing that there was a Homr raid on Sheikh Aweng’s village “immediately after the last Bahr El Arab expedition

¹⁹² *Ibid.*, at p. 327.

¹⁹³ *Ibid.*, at p. 335.

¹⁹⁴ Figure A, *infra*.

¹⁹⁵ Sketch map of the western sources of the Nile (London: Royal Geographical Society, 1907). GoS Memorial, Map 7.

left for Khartoum” and that Sheikh Rob and Ali Gula work together.¹⁹⁶ He then stated, later:

“The Arabs, according to the Nuers and Dinkas have been causing trouble again, having taken a lot of cattle and 50 children from the next village above this. . . . I calculate I am only 40 miles roughly from the mouth of the river. Natives tell me it is one day’s march to Sultan Rob’s across country, and three days by river in canoes.”¹⁹⁷

151. Lloyd wrote extensively on the Homr in several publications. In his “Notes on Dar Homr,” of 1907, Lloyd wrote that “[t]he Homr are divided into two chief divisions . . . east of Turda and Fauel”.¹⁹⁸ This corroborates the evidence of Wilkinson dated 1902 that the Homr were located around Fauwel.¹⁹⁹ In a Report on a Tour of Inspection of Kordofan Province, Lloyd noted that: “The Walad Omrau section goes to Fawel, Fut, Kuek, and Turda.”²⁰⁰

152. Hallam, writing in 1907, described Arab camps and dry season camping grounds along the Umm Biero at R. El Sayar, R. El Sorik (dry season), R. Abu Dinat (dry season), R. Fadlulla (dry season), and Saheb.²⁰¹

153. The 1908 “Report on Kordofan Province”, edited by Lloyd,²⁰² includes extensive and detailed notes on the history and the human and physical geography of Kordofan. It describes the dry season camps of the Homr as follows:

“The Homrs cultivate round Muglad and Baraka, but as soon as the water dries up they migrate southwards to the Bahr El Homr. The Homr Ageira dry season camps and the Badana occupy them as follows, reading down stream from the frontier:

| Place | Badana | Remarks |
|--------|---------------|-----------------|
| Bok | Fairom | Wells when dry. |
| Dawas | “ | |
| Bambon | “ | |
| Antila | “ | |
| Fugara | Dar Um Sheiba | Wells when dry. |

¹⁹⁶ Huntley Walsh, *supra* note 139, at p. 15.

¹⁹⁷ *Ibid.*, at pp. 15–16.

¹⁹⁸ Lloyd, *supra* note 142.

¹⁹⁹ See Wilkinson, *supra* note 129, at p. 156.

²⁰⁰ Sudan Intelligence Report No. 162, (January 1908), Appendix G, p. 56. SPLM/A FE 3/4.

²⁰¹ H. Hallam, *Route Report: Dawas to Dar Jange*, December 1907, p. 2. GoS Counter Memorial, Annex 31. Hallam’s sketch map is annexed to the GoS Counter Memorial, Map 16b.

²⁰² Sudan Intelligence Report No. 171 (October 1908), Appendix D. GoS Memorial Annex 18, SPLM/A FE 3/5.

| Place | Badana | Remarks |
|-----------|-----------------------|-----------------|
| Abu Erdu | | |
| Goli | Dar Muta | Wells when dry. |
| Bueidat | Dar Salam | “ “ “ |
| Abu Azala | Dar Muta | “ “ “ |
| Abu Uruf | “ “ | “ “ “ |
| Damsoi | Kalabina and Mizagina | “ “ “ |
| Fagai | “ “ “ | “ “ “ |
| Mellum | “ “ “ | “ “ “ |
| Hasoba | “ “ “ | “ “ “ |

...²⁰³

154. The Report continues, in the same section:

“The Walad Umran section goes to Fauwel, Fut, Koak, and Turda. The Homr Felaita to Keilak and the Abiad. Each Badana has a road of its own from their cultivation and rain camps near Muglad to their dry season camps on ‘El Bahr’.”²⁰⁴

155. Those roads are mentioned in the same Report where it describes the physical geography of Southern Kordofan, and it is worth reproducing that description in full:

“West of Dar Nuba is Dar Homr, a vast plain extending far beyond the frontier. This plain is sandy north of Muglad, but black soil covered with thick bush to the south. The black mud is, however, crossed by sandy belts running S.E. and N.W. along which are the roads from Muglad and Baraka, where the people have their cultivation, to the Bahr El Homr, where they go in the dry season.”²⁰⁵

In the same section, the Report states:

“In the south, about Latitude 10°, is the Bahr El Homr, which rises some thirty miles across the Darfur frontier and flows eastwards to Hasoba, where it turns south-east and joins the Bahr El Ghazal. It flows through a very flat country, but has not a very wide basin. It is on an average about 100 yards wide, and its upper reaches have steep well-defined banks from 10 to 15 feet high; but it is full of grass. When it dries up (about January) wells are dug in the bed, from which the Homr water thousands of cattle, until the rains and fly drive them north to their cultivation area near Muglad. Some thirty miles south is the Bahr El Arab (or Gurf), which forms the southern boundary of the Province.”²⁰⁶

²⁰³ *Ibid.*, at p. 53.

²⁰⁴ *Supra* note 202, at p. 53. GoS Memorial Annex 18, SPLM/A FE 3/5.

²⁰⁵ *Ibid.*, at p. 34.

²⁰⁶ Sudan Intelligence Report No. 171 (October 1908), Appendix D, at p. 35.

156. Whittingham, in 1910, produced a sketch map where he noted what he thought was the “probable boundary” between the Dinka and the Homr.

157. As noted above,²⁰⁷ Heinekey recorded Homr cattle and Homr camps on his way to Gerinti, and, north of Mek Kwal's village, only Homr. He stated that “[f]rom Gerinti to Mek Kwal's village, there is no track of any sort.”²⁰⁸ Later in the same section he noted, “[t]he Arabs when they go down to Kwal to buy grain do not go along the Gurf but along the Ragaba Um Biero which flows parallel to and North of the Gurf.”²⁰⁹ This remark suggests that Gerinti was populated by those “Arabs” rather than by the Ngok.

158. In Sudan Intelligence Report No. 324 of July 1921, F.C.E. Balfour noted:

“Relations with Arabs – Remain good. Arab and Dinka herds grazing side by side on the lower reaches of the Ragaba Um Biero, and the Dinka (Bongo section) have shown their confidence in the Arabs by extending their permanent villages farther to the North of the Gurf.”²¹⁰

159. The historian H. MacMichael, in 1922 placed the Homr “between El Odaya and the Bahr el ‘Arab’.”²¹¹ He noted that “[t]he Humr country lies on the extreme west of southern Kordofan, from the neighbourhood of El Odaya to the Bahr el ‘Arab, or ‘Bahr el Humr’. In the rains the Homr are between Muglad and the confines of the Hamar to the north, but in the dry season they and their cattle move southwards to the Bahr el ‘Arab, where they come into contact with the Dinka.”²¹²

160. Professor Ian Cunnison wrote in 1966, in a study based on field work between August 1952 and January 1955:

“The Bahr is the name which the Homr give to the whole of this dry season watering country. Within it they recognize different districts: the Regeba is the northern part of the Bahr, where the Homr make their earliest dry-season camps . . . the ‘Bahr’ proper is the region where the camps are made towards the end of the dry season, mainly around the largest watercourse, the Regeba Umm Biero and the Regeba Zarga . . . Finally, much of the Bahr has permanent Dinka settlements, although during most of the time that the Humr occupy it the Dinka are with their cattle south of the Bahr el Arab . . .”²¹³

Significantly, Cunnison noted that “[t]he way in which the tribal sections move seems not to have varied much since the Reoccupation.”²¹⁴ The

²⁰⁷ *Supra* notes 152, 153, 154.

²⁰⁸ *Supra* note 153.

²⁰⁹ *Ibid.*

²¹⁰ Sudan Intelligence Report No. 324 (July 1921), report of F.C.E. Balfour, at p. 6. SPLM/A FE 18/5.

²¹¹ H.A. MacMichael, *supra* note 158, at p. 273.

²¹² *Ibid.*, at p. 286.

²¹³ Cunnison, *supra* note 168, at pp. 18–19.

²¹⁴ Cunnison, *supra* note 168, at p. 26.

same book includes a sketch map of Homr Migratory Routes, which shows the “areas and migration routes” of the Homr omodiyas (sub-sections), with those of Fayyarin and Salamat (Feilata) situated on the Bahr el Arab and its tributaries; the Ngok Dinka are indicated just south of Abyei and south of the Bahr el Arab.²¹⁵

161. In his witness statement in these proceedings, also cited elsewhere in this Dissenting Opinion, Professor Cunnison described the Homr migration as follows:

“The indications are that the Humr have lived in this area since at least the early 1800s. Their semi-migratory life revolves around the movement of their cattle (I refer to the 1950s, but there is reason to believe that the pattern of life is of long standing). Attached is a map, taken from my book, which depicts the migratory patterns as I observed it and participated in it. During the wet season the Humr lived in settled camps to the north of the Babanusa, as indicated on the map. As the dry season came, they moved first briefly to the Muglad where the cattle grazed on the remains of the millet harvest. They then moved south through the extensive sandy Goz *to the area called the Bahr: this is the area around the Bahr al-Arab and the Regeba Zarga*. Here, water and good summer grazing are to be found. *They lived in scattered camps across this region during the summer months (January-May). For part of this time they shared the area with Dinka, whose permanent houses were dotted around; but shortly after the arrival of the Humr sections, most of the Dinka would decamp further south to their dry season areas*. During my time in Western Kordofan, there was a good relationship between Humr and Dinka. I knew the Dinka leader, Deng Majok, who was an impressive man.”²¹⁶

162. Regarding the ABC Experts’ conclusions Professor Cunnison says:

“The Goz overlaps the so-called ‘Shared Rights Area’ of the ABC Report. In describing that area in this way it seems to me the ABC was fundamentally 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

²¹⁵ Cunnison, *supra* note 168, at figure facing p. 20, cited *infra*, note 216

²¹⁶ Witness Statement of Professor Ian Cunnison, 3 December 2008, para. 6. GoS Memorial, p. 190 (emphasis added).

of the Bahr has permanent Dinka settlements, although during most of the time that the Humr occupy it the Dinka are with their cattle south of the Bahr al-Arab'. *I never observed the Humr asking permission from Dinka to come to the Bahr, and they did not consider themselves as visitors there. The whole region was regarded by the Humr as their 'dar' or country.* On the map on p. 5 of my book (attached) I show the area I knew as 'Dar Humr': it covers the whole south-western corner of Kordofan and includes an area south of the Bahr al-Arab. The table on p. 22 shows that during 1954, the cattle of one section of the Mezaghna omodiya spent more time, and more continuous time, in the Bahr (142 days) than in any other of the four main areas of Dar Humr."²¹⁷

163. The sketch map by Michael Tibbs shows the outline of the Dar Meseria, which extends below the Bahr el Arab about 25 miles south of Abyei.²¹⁸

164. The evidence of Homr occupation, taken together, suggests a strong degree of continuity of Homr occupation of the area shown in the sketch maps of Cunnison and Tibbs and shown also in the Kordofan Tribal Distribution Map of 1927. *Figure A** at the end of this Part of this Dissenting Opinion reproduces the sketch maps of Cunnison (1954) and Tibbs (1999) and the relevant part of the Kordofan Tribal Distribution Map, in order to illustrate the continuity of Homr occupation, in the relevant area, which is apparent on the face of the record.

8. Procedural excess

165. Having shown that the two crucial stages in the Experts' thought process have no foundations, I shall turn now to the important question of the procedural framework within which the Experts' mandate was conferred on them and within which they were expected to operate.

166. It is readily apparent that the ABC, whilst a juridical entity, was by no stretch of the imagination a judicial or an arbitral body. It is out of the question to seek to endow its findings with qualities of *res judicata* or finality that it simply did not and could not possess. This is also accepted by the Award. However, the findings of the Commission are not without validity or finality. They are "final and binding" by virtue of Article 5 of the Abyei Appendix, which this Tribunal is mandated to apply under Article 3 of the Arbitration Agreement. Appendix 5 provides:

²¹⁷ Witness Statement of Professor Ian Cunnison, 3 December 2008, para. 6. GoS Memorial, p. 190 (emphasis added).

²¹⁸ Michael and Anne Tibbs, *A Sudan Sunset*, at p. 50. GoS Memorial, fig. 12, p. 129.

* Secretariat note: Figure A is located in the rear pocket of this volume.

“The ABC shall present its final report to the Presidency before the end of the pre-interim period. The report of the experts, *arrived at as prescribed in the ABC rules of procedure*, shall be final and binding on the parties.”²¹⁹

167. In other words, the finality and binding nature of the Report is not innate but emanates solely from the Parties decision to accept it which is conditioned.

168. The language of the mandate could not have been clearer. To be final and binding, the Report had to be arrived at as prescribed in the rules of procedure. These rules are therefore mandatory and non-compliance with them would, *per se* and without the need to show prejudice, constitute an excess of mandate. The clarity of the mandate is in inverse relationship to the margin of appreciation of the Commission including its Experts. The obligations of the Experts were not simply to discharge their mandate but to do so in a specific manner, i.e., in accordance with the rules of procedure. This was the condition for the acceptance of the report in advance as final and binding. The Experts, acting in lieu of the Commission, violated these rules of procedure on four counts.

a. By holding meetings at the Khartoum Hilton on 21 April, 6 May and 8 May with Ngok Dinka individuals, they obviously went beyond the procedural framework under which they were mandated to follow a particular schedule.

b. By “sneaking in” their Report before a meeting of the Commission as a whole had a chance to assemble with the aim of arriving at a consensus. This was a safety valve reflecting the fact that the Presidency of Sudan had not given a *carte blanche* to the Experts to make decisions affecting the potential disposition of the territory of Sudan as they wished. The suggestion that the Presidency may not have received the Report had it known in advance its contents, apart from being speculative, does not take cognizance of the fact that the ends do not justify the means and that the Experts’ mandate could not go beyond the limits of the Parties’ consent which clearly circumscribed their mandate by a clear procedural framework. This procedural framework was aptly summarized by Ms Malintoppi appearing for the GoS, and it is worth reproducing this in full:

“It is evident from reading the Rules of Procedure that the experts adopted a chronological approach to the tasks that were to be undertaken, starting with a reference in Rule 2 to the Commission’s opening meeting on 10th April 2005, and ending with Rule 16, where the experts would, at the end, appoint technical personnel to survey and demarcate the boundary on the land.

In addressing the requirement that the Commission endeavour to reach a decision by consensus, the SPLM/A basically stops at Rules 12 and 13. Rule 12, it will be remembered, states that the Commission will reconvene in Nairobi at a date in May to be determined, and that the parties will make their final presentations at that time.

²¹⁹ Emphasis added.

At the time of the parties' final presentations the proceedings were essentially at the advocacy stage. Each party was setting out or explaining its position.

Then Rule 13 provided that afterwards the experts will examine and evaluate all the material they have gathered and prepare the final report.

However, that was not the end of the process, for Rule 14 then stipulated that the Commission – and again I emphasise the Commission as a whole – would endeavour to reach a decision by consensus. This necessarily meant that the Commission would discuss the report prepared by the experts, and after the parties' final submissions it would endeavour to reach a decision by consensus. It was only if an agreed position at the time was not achieved that the experts would have the final say.

This step, the effort to reach a consensus on the report prepared by the experts, is the missing link in the actual chain of events. The parties never saw the report before it was presented to the presidency. They were given no chance, as part of the Commission, to attempt to reach a consensus on it.

[. . .] [T]his was disregard for a fundamental and essential part of the process that was envisaged. And yet, what is the evidence offered by the SPLM/A that there had indeed been efforts at reaching consensus? Nothing other than witness statements which have been refuted by the Government's own witnesses.²²⁰

c. The Experts committed an excess of mandate also by consulting a U.S. diplomat about the interpretation of their mandate. The argument that this should be excused because no objection was raised to their consulting Cunnison or Tibbs is unconvincing. The consultation of British Archives and other relevant sources on Sudan, namely, the views of individuals informed about the historical facts, was expressly included in the procedural framework under Article 3.4 of the Terms of Reference of the ABC. But to try to verify an interpretation of their mandate from a third party is outside the procedural rules. If the Experts were not sure about the meaning of their mandate, they should have sought clarification from the Parties but should not have sought to rewrite the agreement of the Parties by resort to a third party.

169. It is clear from the above analysis that the obligation on the ABC Experts was an obligation of means. They had, to fulfil their mandate, to follow a certain procedural course. Moreover, compliance with that condition was part and parcel of their mandate and not, as wrongly asserted in the Award, part of their conduct. This is clear from reading together Article 3 of the Arbitration Agreement and Article 5 of the Abyei Appendix.

²²⁰ Transcript, 20 April 2009, 38/1–25, 39/1–19 (Malintoppi).

9. The substantive mandate

170. The Award distinguishes first between the substantive mandate of the Experts and their procedural mandate,²²¹ a well established distinction in law and a readily discernible one. However it seeks to make a distinction between the Experts' interpretation of their mandate and their implementation of it.²²² This distinction, though often made in legal parlance (perhaps too often made), is in fact almost always impossible to maintain. One example would suffice to illustrate the point. The Experts' decision to rely on "land uses" and "ecological evidence" flows directly from the choice of a "predominantly tribal" interpretation and is therefore a matter of implementation of the mandate rather than of its interpretation. If a "predominantly territorial"²²³ interpretation had been chosen instead by the Experts, there would in all likelihood be no place for reasoning based on "land use" or "ecological evidence". That might well be so, but, there is always an element of interpretation of the mandate, even as the implementation of it progresses. In other words, interpretation and implementation are present throughout the Report and they cannot be divided into distinct mental stages. It is preferable to think of the carrying out by the Experts of their mandate, from their choice of "interpretation" to the ultimate delimitation, as a continuous thought process. It would follow that there cannot be two standards, one, of correctness, in the first stage, and another, reasonableness applying in the second.

171. Having made this preliminary remark, I shall turn now to the substantive mandate itself. The Award has made a number of assumptions without basis or supporting evidence; it has chosen standards which, be they from commercial, investor-state or even from inter-State arbitration, are mostly subject to pre-existing treaty or institutional frameworks and are wholly unsuited to the present arbitration. The Award has reduced the scope of review to one ground, lack of reasoning, and even then it has reduced the standard of "reasoning" to formalisms which it has applied inconsistently. Further the Tribunal has tried to shield the Experts' Report from criticism by ascribing to them, as "preferred arbiters of fact", a status wholly inappropriate in the present context. It has made a rigid distinction, with regard to our own mandate, between Sub-articles 2 (a) and 2 (c) of the Arbitration Agreement, and has tried unconvincingly to substantiate this distinction by a wishful interpretation of the Commission's composition and the expectations of the Parties from this Tribunal. In the event it has contradicted itself by not following this distinction but embarking instead on an uncharted route of "partial nullity" not provided for in the mandate.

172. I shall analyse these assertions in more detail.

²²¹ Award, para. 440.

²²² Award, para. 515.

²²³ Award, para. 545.

a. *The proposition that the ABC's singular characteristics included, but went beyond, fact-finding*

173. The mandate of the ABC and its Experts is determined initially by its nature but ultimately by the will of the Parties as expressed in the mandate and as may be distilled from the object and purpose of the mandate and its negotiating history.

174. Regarding the nature of the ABC, it is undoubtedly a fact-finding commission charged in this instance with ascertaining and clarifying an historical event on the basis of scientific research, including archival research. Its Chairman and Members stressed its fact-finding nature on numerous occasions, some in fact cited in the Award.²²⁴ The proposition that in addition to its fact-finding nature it had also an adjudicatory aspect²²⁵ is totally baseless. A presumption entailing that, by implication, the Presidency of Sudan wished to give adjudicatory or prescriptive powers having an *ex nunc* constitutive effect to the Commission is not one to be lightly made. It is clear that the Report's final and binding nature does not *per se* bestow a prescriptive power on the Commission's decisions. Professor Hafner rightly pointed out that provisions both in the 1907 Hague Convention (Article 35) and the PCA Optional Rules on Fact-Finding Commission's of Enquiry (Article 24 (2)) allow for the possibility that the decisions of fact-finding bodies can be made binding.²²⁶ Moreover in the case of the *Treaty of Lausanne* Advisory Opinion,²²⁷ referred to by the Tribunal, the circumstances were totally different: a decision by the Council of the League of Nations to draw the boundary between Turkey and Iraq under an existing treaty is a world apart from asking social scientists to find out, on the basis of scientific study and resort to archives, an historical fact.

175. It is equally clear that the Experts could have returned a factual *non liquet* which would in fact have been the only proper thing to do had they come to the conclusion that the confusion was such that they could not carry out their task. To claim that the exigencies of the peace process dictated that the Experts could not return a *non liquet* is no more than an excuse that the ends justify the means, an excuse which is misplaced in the context of the delimitation of what could potentially become an international boundary.²²⁸ Finally even the reference to the Iraq-Kuwait Boundary Demarcation Commission²²⁹ does not help, indeed it contradicts the Award's conclusions since the *rationale* for characterizing that body as "quasi-arbitral" was that it was conscious of and took

²²⁴ Award, para. 663.

²²⁵ Award, para. 483.

²²⁶ Award, para. 484.

²²⁷ *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne*, Advisory Opinion of 21 November 1925, PCIJ Rep. Series B, No. 12 (1925), cited in Award, para. 481.

²²⁸ Award, para. 428.

²²⁹ Award, para. 461.

into consideration a variety of rules of international law in its decision-making process.²³⁰ Moreover it included distinguished international lawyers.²³¹

b. The proposition that the Experts are the preferred arbiters of fact

176. In commercial arbitrations, particularly those of a scientific or technical nature, the deference given to specialists and experts is driven by two important and, in those contexts, understandable considerations. The first is that litigations cannot be left to linger too long and secondly that a body of lawyers cannot hope to possess within a relatively short time-span the experience of experts and their deep knowledge nor to match their familiarity with the subject-matter (the facts). The second of these considerations carries deep epistemological and moral implications which the reader will be relieved to know I am constrained by the extremely short time available from analysing. There is, to be sure, a more general consideration which is not confined to those two spheres but extends to interstate arbitrations, namely, that a degree of discretion and an assumption of good faith should be left to the body making the decision.²³²

177. But, for our immediate purposes, is the test appropriate for a group of experts who can by no stretch of the imagination be thought of as the repositories of some highly specialised branch of knowledge or the votaries of some esoteric science that the juristic mind (limited as I readily acknowledge) cannot penetrate and analyse? Surely the answer must be in the negative. The ABC Experts were two historians,²³³ a political scientist,²³⁴

²³⁰ K.H. Kaikobad, *Interpretation and Revision of International Boundary Decisions* (2007), p. 7, fn. 6.

²³¹ These included two Members of the UN International Law Commission, namely Ambassador Riyadh Al Qaisi of Iraq and Minister Ahmed Mukhtar Kusuma-Atmaja of Indonesia.

²³² In the *Case concerning the Arbitral Award of the King of Spain on 23 December 1906 (Honduras v Nicaragua)*, Judgment of 18 November 1960: I.C.J. Reports 1960, p. 192, the International Court of Justice was categorical in saying “The instances of ‘essential error’ that Nicaragua has brought to the notice of the Court amount to no more than evaluation of documents and of other evidence submitted to the arbitrator. The appraisal of the probative value of documents and evidence appertained to the discretionary power of the arbitrator is not open to question”. In the present case there was not an evaluation of documents or maps, thus the post-1907 official maps are simply declared “inaccurate” or a line is drawn at 10°10'N without evidence. The point is that for excess of mandate and not appeal purposes the discretion of the Experts or arbitrators to evaluate facts cannot be limitless. There has to be some factual evidence to evaluate. As noted above, in the *Orinoco Steamship Company* case, *supra* note 69, the requirements of good faith and procedural propriety were also relevant to the degree of deference to be accorded to the original decision-maker.

²³³ Dr. Douglas Johnson, professor of History at Oxford University, and Professor Godfrey Muriuki, professor of African History at the University of Nairobi. See Award, para. 467 and fn. 862.

²³⁴ Professor Kassahun Bernahu, Professor of Political Science, Addis Ababa University. See Award, para. 467 and fn. 862.

a former diplomat²³⁵ and a professor of African land law.²³⁶ Hardly a year passes in which the International Court of Justice, to give only one example, does not resolve territorial and delimitational disputes²³⁷ on the basis of history and geography, including not only the diplomatic history of States but also of local communities be they the sea people of the Malay world or the tribes of Western Sahara, and this in itself should have caused the majority to think before introducing this extra shield to protect further the Experts' Report from criticism.

178. Moreover, considering that the only ground for excess of mandate left by the Award is lack of reasoning, and that this reasoning itself had been reduced into mere formalisms, and considering that the reasoning of the Experts did not consist of pure reasoning but in misinterpretation of evidence and then misquotation (or quotation out of context) of sources, the degree to which the scope of review had been reduced becomes apparent. I do not find it conceivable that this is what the Parties expected when they framed this Arbitration Agreement in terms of excess of mandate. On the contrary, the legitimate expectations of the Parties in subjecting the Experts' Report to a level of scrutiny appropriate to the final determination of what could potentially become an international boundary have been completely frustrated.

179. When one of the Experts admitted to having advised the SPLM/A on north-south borders²³⁸ and when that same Expert suggested in an interview

²³⁵ Mr. Donald Petterson, former US Ambassador to Sudan from 1992 to 1995. See Award, para. 467 and fn 862.

²³⁶ Professor Shadrack Gutto, widely-published scholar of "subjects of regional and international, legal and political economy", and (since 2008) Professor of African Renaissance Studies, University of South Africa. See Award, para. 467 and fn. 862.

²³⁷ See, for example, cases that culminated in the last decade: *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (2009); *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (2008); *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* (2007); *Frontier Dispute (Benin/Niger)* (2005); *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)(El Salvador v. Honduras)* (2003); *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (2002); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (2002); *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* (2001); *Kasikili/Sedudu Island (Botswana/Namibia)* (1999); *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections (Nigeria v. Cameroon)* (1999).

²³⁸ Transcript, 18 April 2009, 98/2-18 (Malintoppi).

that giving oil to the south was a consideration in the delimitation²³⁹ should not this Tribunal, which repeats the mantra of context and contextual analysis at every conceivable occasion take those accusations into account, if only as context, before deferring to the Experts as the best arbiters of fact? There is no reason for transposing the presumption favouring experts as arbiters of fact into the totally different context of this arbitration, where procedural propriety and good faith are in question; where there is no pre-existing institutional framework; and where the Parties have expressly authorized the *de novo* review of all the evidence under Sub-article 2 (c) of the Arbitration Agreement. I would argue that the very facts of this case, its unusual character and the composition of the Commission and the area of expertise of these Experts not to speak of the close involvement of one of the Experts in local affairs, should all have demanded a more, not less, rigorous standard of review.

180. Lastly I would have understood the introduction of the concept that the Experts are entitled to deference as the “best arbiters of fact” if this had been part of a uniform and uniformly applicable standard, but as I have said it simply is not applicable here and is best seen as no more than a rebuttable presumption.

c. The standard of interpretation (reasonableness versus correctness)

181. The Tribunal, having generously endowed the Experts with adjudicatory powers that the Parties never gave them and having narrowed the scope of its own power of review to very little by excluding appreciation of facts, also choose a low standard of review, euphemistically called a “permissive standard of review” including a “test of reasonableness”, rather than a test of correctness, to assess the Experts’ interpretation of their substantive mandate. Even

²³⁹ Full quotation from Douglas Johnson interview to Sudan Tribune of 29 May 2006:

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

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

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

if a test of correctness would render this Tribunal too much akin to a “court of appeals”, which neither Party expects, there remains an important issue concerning our reasoning. Surely it is our duty, for the sake of a balanced Award and in the interests of the due administration of justice, not to remain silent when distinguishing between excess on the one hand and mistakes on the other. After all, the party to whose detriment a mistake not amounting to excess is allowed to stand has, if not a right, a legitimate expectation to know why that is the case. As stated by Lord Justice Bingham, “at the end of the day the party should be left in no doubt as to the basis on which the award has been given against him”.²⁴⁰ This has been the practice in other instances of institutional review.²⁴¹

182. The proposition can be safely advanced that people can and do understand texts in different ways, but it is also said that the truth cannot have two faces. Moreover reasonableness is never a ready-made yardstick against which the limits of the Experts’ (and others) powers to interpret can be objectively measured. Indeed it is often a false friend that gives the impression of an objective threshold where none exists. Be all of this as it may, what determines the limits of reasonableness in interpretation of the mandate or the limits of the Experts’ *Kompetenz-Kompetenz* is ultimately their mandate itself.

183. The Experts were mandated after long and difficult negotiations regarding the very issue that became their mandate, namely, “to define, i.e.,

²⁴⁰ *JH Rayner (Mincing Lane) Ltd v Shaher Trading Co* [1982] 1 Lloyd’s Rep, 632 at 637.

²⁴¹ In the context of ICSID proceedings see: *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on Application for Annulment of Award, 1 November 2006, at para. 45; *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Decision on Application for Annulment, 25 September 2007, paras. 123–127, 132–136, 146–150, 158.

See, also, national jurisprudence on review of arbitral reasoning in the following countries: England (serious irregularity under Article 68(2)(d) of the Arbitration Act: *Weldon Plant Ltd v Commission for the New Towns* [2001] 1 All ER 264 (Comm) at 279; *Margulead Ltd v Exide Technologies* [2004] EWHC 1019 (Comm) at [42]; *World Trade Corp Ltd v C Czarnikow Sugar Ltd* [2004] EWHC 2332 at [20]); France (no annulment for contradictory or unclear reasoning: *Inter Arab Investment Guarantee Corp. v Banque Arabe et Internationale d’Investissement* (Cour de Cassation, 14 June 2000, Cass Civ 1re D 2000 IR 95) and *Pawelec v SA Pernod Ricard and SA PR Europe* (Paris Cour d’Appel, 2 October 2000, 1reChC)); Switzerland (on the limits of review under the public policy provision in Article 190(2)(e) of the Swiss Private International Law: Decision of the Swiss Federal Tribunal, 10 November 2005, 4P.98/2005/svc); and the USA (on standard of review for ‘manifest disregard of the law’: *Westerbeke Corp. v Daihatsu Motor Co Ltd*, 304 F. 3d 200, 209 (2d Cir. 2002), and *Interdigital Communications Corp v Nokia Corp* 407 F.Supp.2d 522 (SDNY 2005)). See, especially, A. Mourre, *Réflexions critiques sur la suppression du contrôle de la motivation des sentences arbitrales en droit française*, (2001) 19(4) ASA Bulletin 652 (criticizing the decision of the French Supreme Court that “the claim of contradiction in reasoning constitutes necessarily a criticism of the award on the merits which is not subject to judicial review”, C. Paris, 17 février 2000, Gaz. Pal. 1er – 2 déc. 2000, p. 55).

delimit and demarcate the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan". The formula spoke of an area and of nine Ngok Chiefdoms with whom this area has a special connection. It spoke also of a transfer to Kordofan in 1905, and we know also that the transfer was effected by Condominium officials for administrative purposes.²⁴² The remaining question is whether the transfer to Kordofan was by way of a population transfer, as apparently happened to the Twic Dinka or a territorial transfer of an area to Kordofan from what, by necessity, must have been Bahr El Ghazal, which would normally take place by extending the boundary of Kordofan to include the area of the nine Chiefdoms.

184. Here I would pause to recall that the word "chiefdom" itself can be a territorial concept.²⁴³ After all, the whole claim of the SPLM/A to dominant rights is that the land belongs to the permanent settlers. The word "chiefdom" meant for the south Sudanese people what the word "sheikhdom" or "sultanate" meant to the muslims of the north (or the word "emirate", i.e., principedom). It is not without significance that by 1905, Arop Biong had taken the title "sultan" (Sultan Rob) and the area under his authority was chiefdoms as befits a paramount chief, i.e., territorial units. In other words had the formula spoken of the area of the nine Ngok Dinka "tribes" or "clans" or "sub-tribes" one can begin to understand – but only barely – that a tribal interpretation might be possible, although ultimately this would not make any difference. But the word "chiefdom" is as territorial a concept as the word "area". At any rate, in the absence of a population transfer, which both Parties agree did not take place, the formula can only be understood in a predominantly territorial context, not only because the Condominium itself was a territorial entity and the words "delimit" and "demarcate" connote a territorial entity, but also because, by logical elimination, no other interpretation is possible.

185. In any event, what prompted the Experts to depart from the only correct interpretation of the text is not the territorial versus the tribal interpretation. It was their "conclusion" that: "In 1905 there was no clearly demarcated boundary of the area transferred from Bahr El Ghazal to Kordofan".²⁴⁴ To achieve their mandate they had to clarify the confusion and, if that was impossible, to return a factual *non liquet*. But in fact the confusion they talked of was literally no more than a storm in a teacup: Wilkinson and Percival mistook the Ragaba ez Zarga/Ngol, also referred to as the Bahr el Homr, for

²⁴² We can also safely assume that preparing the Ngok Dinka for self-determination was not a consideration in the minds of Condominium officials when the decision to transfer was made.

²⁴³ Defined by the Oxford English Dictionary as "the estate, position or dominion of a chief; headship, leadership, chief place".

²⁴⁴ ABC Experts' Report, Part 1, p. 20. In other words the Experts themselves acknowledge in very clear terms that the 1905 transfer was territorial, i.e., "of the area transferred from Bahr El Ghazal to Kordofan", but the area in question was not clearly demarcated.

the Bahr el Arab/Kir. It was only a short-lived confusion as to nomenclature and not an existential question. Moreover, the Bahr el Arab/Kir was known by general repute to be the dividing line between Kordofan and Darfur in the north and Bahr el Ghazal to the south. There was never any confusion as to the River Kir, hence the reference to "Sultan Rob, whose country is on the Kir river".²⁴⁵ All the descriptions of Bahr el Ghazal before 1905 speak of its northern boundaries as the Bahr el Arab and it was only after 1905 that the boundary line between Bahr el Ghazal and Kordofan started to be shown running in a curved triangle that ultimately became the 1956 so-called *uti possidetis* line, and we know that there was no other recorded historical event to account for drawing the line south of the river. A simple exercise of logic will lead to the conclusion that the area included in Kordofan which had not been hitherto part of it is the transferred area. Neither by the standard of correctness nor even by the most elastic notions of reasonableness could this change in provincial boundary have been overlooked by the Experts. In any event, the confusion regarding the name of the river which never affected the Dinka name for it, Kiir, was corrected by Bayldon and Walsh and the result of their work was and must have been seen by Wingate, the Governor General of the Sudan, when in his memorandum he wrote "[t]he districts of Sultans Rob and Okwai, to the South of the Bahr el Arab and formerly a portion of the Bahr el Ghazal Province, have been incorporated into Kordofan."²⁴⁶ It should be noted that the results of Bayldon's exploration were included in the same Report in which the transfer is recorded.²⁴⁷

186. One of the measurements of reasonableness is whether a person or a group of persons would in similar situations draw opposite conclusions. One has only to compare the allegation of confusion, which it was the Experts' task to clarify but which instead caused them to abandon their mandate and go on a frolic of their own,²⁴⁸ with their behaviour regarding the 10°10'N. Thus with regard to the Bahr el Arab the Experts concluded: "In 1905 there was no clearly demarcated boundary of the area transferred from Bahr el Ghazal to Kordofan."²⁴⁹ With regard to 10°10'N they admitted: "There is, as yet, no *clear independent* evidence establishing the northern-most boundary of the area either settled or seasonally used by the Ngok."²⁵⁰ This did not preclude them

²⁴⁵ Sudan Intelligence Report No. 128 (March 1905), p. 3. GoS Memorial Annex 9, SPLM/A FE 2/8.

²⁴⁶ Major General Sir Reginald Wingate, in *Reports on the Finances, Administration and Condition of the Sudan, Annual Report* (1905), Part II, Memorandum by Governor General, at p. 24. GoS Memorial, Administration and Condition of the Sudan. GoS Memorial, Annex 24, SPLM/E FE 2/13.

²⁴⁷ *Ibid.*, pp. 10–11.

²⁴⁸ *Supra* note 1.

²⁴⁹ *Supra* note 244.

²⁵⁰ *Supra* note 57 (emphasis added).

from proceeding to delimit a northern front measuring some 240 kilometres at latitude 10°10'N.

187. Reverting to the test of reasonableness with regard to the interpretation by the Experts of their mandate, I should add that the question of defining the Abyei boundaries was a major stumbling block in the peace process. Lack of time precludes a full treatment of the background history but I believe I can encompass all the elements of the dispute when I say that it centred on two arguments.

a. The SPLM/A wanted Abyei, among other areas, to be entitled to participate in the exercise of self-determination which could lead to the secession of the southern provinces of the Sudan. Their argument was that notwithstanding the location of those areas north of the 1956 provincial line as at independence, which was agreed to be the spatial limit to where the right of self-determination was to be exercised, the Abyei area, being of “a southern complexion” was nevertheless entitled to be considered as an exception to that limit.

b. The Government was strongly opposed to this view, arguing that Abyei was the land not only of the Ngok Dinka but also of the Misseriya and others.

188. This deadlock was broken by the Danforth proposal, based as it was on the notion of a “restoration” of a territory to the south as it had been part of the south before 1905. The Government accepted this compromise formula on the understanding that it was defined by reference to a transfer that had taken place in 1905. The SPLM/A may or may not have accepted the same interpretation. The record is not entirely clear. Be this as it may, if the Parties had such opposite interpretations of the formula which was the Experts’ mandate, the honest thing, the proper thing for the Experts to have done was to seek clarification or to return a *non liquet*, but not to seek to re-write the agreement of the Parties, much less to embody that re-writing in a secret report, in violation of procedural safeguards.

189. This is why I think the Experts were in excess of their mandate from the very beginning. They fundamentally misunderstood or misconceived their mandate, which is undoubtedly a ground for excess of mandate; they did not comply with mandatory rules of procedure; and their reasoning, leading up to their remarkable finding that 10°10'N was the northern boundary where the Ngok had had dominant rights since 1905, is totally baseless in law, unsupported by evidence, untrue and unreasoned. Moreover what both Parties somewhat confusingly refer to as the application of the mandate and what I think of as both interpretation and application was fundamentally flawed at every crucial step. Thus the concoction of a theory of dominant Ngok rights versus secondary Misseriya rights is not only odious (if only on this basis the Report should be considered worthless) but based on misquotations and inapplicable to Kordofan. A shared grazing area exists in Kordofan, and indeed such areas exist in many countries where nomadism or transhumance is

practised. However, no area of “dominant and secondary rights” existed in south-western Kordofan in 1905, and yet this is the foundation on which the Report is based.

190. The second application or interpretation of the Experts’ mandate is the assumption of Ngok continuity, by projection backwards in time from the 1950s to a single year, 1905, and the assemblage of disparate evidence in its support must represent the nadir of reasoning even by the standards of some social scientists.

191. I have no doubt that the only answer to the specific question put to the Experts was that it was the area to the south of the Bahr el Arab/Kiir and bordered in the south by the 1956 provincial line. But I would like immediately to qualify this conclusion by two observations:

a. In 1905 the Ngok Dinka were not just to the south of the Bahr el Arab. They were on the river and north of it, their greatest concentration was in the area between the Bahr el Arab and the Ragaba Um Biero and they were not very far to the west, and were not at 27°50’ E in the west where Howell correctly placed them *in 1951*. There is evidence that they were slowly expanding to the north, west and east and that they reached some points on the Ragaba ez Zarga by 1965. In this area and indeed south of the river they co-existed with the Homr for a season every year.

b. There is evidence that in the 18th century the Ngok, newly arrived from the east, settled in the Bahr area and when some Ngok Dinka witnesses, including government witnesses, spoke about their particular sub-sections being on the Ragaba ez Zarga they were right. That was in the 18th and probably the early 19th centuries. However the arrival of the Baggara including the Misseriya pushed the Ngok below the river Bahr el Arab/Kiir, and even there they were not safe from Homr depredations, as evident from the reasons cited by the Condominium officials to transfer their Chiefdoms (*their area*) to Kordofan in 1905.

10. Conclusions

192. From the beginning the Tribunal faced a dilemma. Its reasoning was deployed with the avid aim of shielding the ABC Experts’ Report from criticism and annulment. Thus, the Tribunal was too generous, at the expense of Sudan, in ascribing to the Experts prescriptive powers that went beyond a strictly fact-finding mission. Such a presumption, totally unsupported, should not have been made too lightly, given that the Sudan never gave the Experts a *carte blanche* to dispose of its territories as they pleased. The Tribunal then went on to endow the Experts with a power of discretion to interpret their mandate that they did not have, all allowance being made for *Kompetenz-Kompetenz*. This so-called reasonableness standard could not have been the expectation of the two Parties when they conferred on the Tribunal its mandate. We

should not assume that the SPLM/A expected that the delimitation of Abyei, which could become an international boundary, would be located not based on a correct interpretation but only on a reasonable one.

193. The Experts knew how vital to breaking the deadlock over Abyei was the territorial interpretation by the Government of their mandate. If they were not sure what their mandate was they should have gone back to the Parties or rendered a factual *non liquet*. To say that they had to proceed on a different interpretation because they were expected to delimit the area as part of the peace process is totally unconvincing. By proceeding as they did, they in fact derailed that peace process and caused a conflict in which Abyei itself was destroyed.

194. Moreover, the Tribunal started by defining its mandate in a rigid manner, then clouded that self-imposed distinction, which could not, in logic, admit of an intermediate solution, by partially invalidating the Experts' decision. It contradicted itself by doing so with regard to the very distinction between Sub-articles 2 (a) and 2 (c) of its mandate. Equally importantly, by proceeding to a partial annulment without express or implied sanction from its own mandate, the Tribunal committed an excess of mandate. An assertion that highly skilled jurists have committed an excess of mandate, the very accusation they were mandated to investigate and to redress if found to be true, is not an assertion to be made lightly and it is not being made lightly but this is the truth of the matter and it is an inescapable conclusion that neither the Tribunal's reasoning nor its skill and status can hide. The Tribunal, still deploying its intellectual resources to shield the Experts' Report, bestowed upon the Experts the status of "preferred arbiters of fact", a status contextually wholly inappropriate given the area of their expertise and the accusations of procedural improprieties which are not disputed on the facts. These devices and other techniques reveal a low standard of review which excluded fundamental error (a standard that the Tribunal could and indeed should have applied even *proprio motu* if only to account for the fantastic difference between contemporaneous evidence and the results achieved by the Experts). In short all these assumptions devices and techniques should have seen the Experts' Report safely to shore i.e., intact but of course as removed from reality as it is possible to be.

195. However, and this is where a simple mistake metamorphosed into a dilemma, the Tribunal decided to dabble in compromise, always a hazardous and ill-advised venture for tribunals, but especially so in the present case. This compromise took cartographic shape by the impugning, i.e., invalidating, of the eastern and western lines of the Abyei area as delimited by the Experts for lack of reasoning, and this is where the Tribunal committed its second excess of mandate. It redrew the eastern and western boundaries at 29°E and 27°50' E respectively with no "reasoning" or no "adequate reasoning", the very standards it used to invalidate the Experts' eastern and western boundaries, except that its own excess of mandate was more inexcusable than that of the Experts. For it had the benefit of hindsight, of learned and extensive legal arguments, and of being

composed of prominent jurists. Considerable efforts were devoted to support the new lines but any close reading of the evidence will reveal it to be disparate in sources and desperate in tone. Thus dead men are made to say things they never said and the living are misquoted. Unreliable witness evidence is harnessed to support delimitation lines that the witnesses never knew existed. The meticulousness and diligence required to effect delimitation is thrown to the wind. *Approximate, imaginary* lines are superimposed on *rough areas*. Any reference to Dar Jange, or to Dinka, no matter how general, is picked and moulded to support these new lines. But there are a few problems. The River and Ragabas simply do not flow due north where they are supposed to by the Tribunal, but rather in a northwesterly direction; too many contemporaneous witnesses are not "helpful" to the Tribunal; and there is total blindness to evidence that the Ngok were not where the Tribunal wishes them to have been but in a much smaller area to the south and the east around the Bahr el Arab. There is even more blindness to overwhelming evidence that these were areas where the Homr were collectively present; where they felt and acted on the knowledge that it was their own country; where they sought no permission to enter from Ngok or anyone else; and where they had permanent settlements, such as at Fauwel, and places to which their surras felt attached and returned annually.

196. Here, what started as a dilemma, namely, how to shield the Experts whilst effecting a compromise that would impugn all their lines, at the same time becomes a fully-fledged trilemma: how to shield the Experts, impugn all their lines, and, acting in its own delimitation, how to draw these lines not only with no evidence, but in spite of contrary evidence as to where the Ngok and the Homr actually were. And this is why I felt that it would be useful, if only in defence of realism and credulity, to review all the evidence I could find on where the Ngok and Homr were located circa 1905. The picture that emerges and which is reflected in the Map appended to this Dissenting Opinion* is totally different from both the Experts' and the Tribunal's lines.

197. In doing this I am assuming, for the sake of exploring all the logical possibilities, that the transfer of 1905 to Kordofan is a tribal one. For me this is only one assumption; for my learned colleagues they consider themselves obliged,²⁵¹ by their earlier finding that a predominantly tribal transfer was a

²⁵¹ Award, para. 710: "Having upheld the reasonableness of the ABC Experts' predominantly tribal interpretation of the Formula, this Tribunal considers itself obliged to proceed with the delimitation phase of the mandate without departing from the same predominantly tribal approach. This conclusion applies *a fortiori* given the Tribunal's determination that the northern limit of the area of permanent habitation of the nine Ngok Chiefdoms transferred in 1905 (i.e., the ABC Experts' findings and delimitation at latitude 10°10'N) was reasoned and within the ABC Experts' mandate. As discussed above, the retained northern boundary of the Abyei Area was drawn by the ABC Experts on the basis of a predominantly tribal interpretation as opposed to a predominantly territorial interpretation."

* Secretariat note: the map contained in the Appendix to the Dissenting Opinion is located in the rear pocket of this volume.

reasonable interpretation of the “formula”, to adopt the same interpretation for the Tribunal’s own delimitation. But no reason is given for this conclusion. Under Sub-article (c) of the Arbitration Agreement, the mandate of this Tribunal requires it, in the event of a finding of excess of mandate, “to proceed to define (*i.e.*, delimit) on map the boundaries of the area . . . based on the submissions of the Parties”, not to adopt and recycle those parts of the Experts’ Report that it considers “reasonable”. The moment the majority had freed themselves from their self-imposed shackles, they could follow any delimitation *i.e.*, what was more accurate on the basis of the submissions of the Parties and not what was just reasonable.

198. The Tribunal also failed in enquiring into the two key concepts of the Experts’ thought process: the assumption of “dominant” (Ngok) rights versus “secondary” (Misseriya) rights. Presumably the reason for this reticence was that the Tribunal would classify such a concept as part of the assessment of facts left to the Experts as “preferred arbiters of fact”. But this is not the case, this concept is a crucial step in the Experts’ reasoning that was neither reasoned nor supported as to its existence and applicability to Kordofan. The second crucial concept in the reasoning of the Experts, which the Tribunal failed to review, is the assumption of Ngok continuity of occupation which is more than an appreciation of facts. It is a wholesale abandonment of the temporal limitation on the Experts’ mandate by turning it on its own head, and it should have been reviewed by the Tribunal, such review on the basis of lack of reasoning being within our mandate. Here the Tribunal may have been acting *infra petita* with regard to not answering questions about two crucial steps in the Tribunal’s reasoning.

199. Moreover, having impugned so much, the Tribunal, by any standard of separability, should have set aside the remainder of the Report for, apart from the southern line drawn by Condominium officials, nothing was left. The Report was so thin and truncated that it could not stand on its own. The Tribunal contradicted itself in a fundamental way. It cornered itself by making a sharp distinction between Sub-articles 2 (a) and 2 (c) of its mandate and then clouded that distinction. The fact that inseparability was the obvious consequence not only of the wording of Sub-article 2 (b) but also of the distinction between Sub-articles 2 (a) and 2 (c) was overlooked by my learned colleagues. The dichotomous distinction between the Tribunal’s “enquiry” under Sub-articles 2 (a) and 2 (c) cannot accommodate the power of partial annulment that it has assumed. Formalism and teleology are words that do not sit together well.

200. Lastly, the Tribunal used “lack of reasoning” to impugn parts of the Experts’ reasoning, but did so inconsistently. Thus, with regard to the area north of 10°10’N, it used “lack of conclusive evidence”, but it did not use the same lack of conclusive evidence south of 10°10’N and north of Ragaba ez Zarga, although there is no shred of evidence, let alone conclusive evidence, that the Ngok were there in 1905 or indeed at any time after that, not even in 1965,

the year of maximum Ngok Dinka expansion. The majority was inconsistent in demolishing the western and eastern lines for lack of reasoning or adequate reasoning and then replacing them with new lines, which it did on the basis of frivolous reasoning and hastily assembled evidence, without thinking twice about using evidence prepared after the dispute had arisen and tainted by accusations of intimidation. To use evidence tainted by accusations of duress that were not properly answered is not – to put it mildly – the zenith in maintaining evidentiary standards and no court should engage in such practice. To construct straight lines on the basis of *approximate* evidence and *rough areas* is an affront to the science of delimitation and no country should accept such a delimitation. The authors of the Award may congratulate themselves on their Herculean efforts, but the result is, not for lack of cleverness on their part, a feeble and modest construct with much to be modest about.

201. In the introduction to this Dissenting Opinion, I described the considerations that prompted me to explain comprehensively the reasons for my dissent. I believe that I have now substantiated my criticisms of the Award's conclusions and the reasoning deployed by the Majority to reach them. I need therefore say no more regarding the Award but leave it instead to the sand on which it has been built. I do however need to say a few words regarding another aspect of this unusual arbitration. I have already mentioned the likelihood that the Award may have a profound impact on the future of Sudan as a State and the peace and well being of all its citizens regardless of ethnicity or creed.

202. I am saddened that in this arbitration, which provided a perfect and rare chance for the Tribunal to contribute to the process of peace and reconciliation in Abyei and in the Sudan, that chance has been missed because of a wish to marry an ill-advised, misconceived compromise to a self-imposed restrictive interpretation of its mandate, the Tribunal neither maintained the integrity of its reasoning nor contributed to a durable peace. International law and indeed law in general sometimes provide only simple recipes for complex situations where populations and tribes intermingle and where the livelihood of certain groups transcends borders. In such cases, defensible compromises may sometimes bring more acceptable, more durable and indeed fairer solutions. After all Kipling, who knew a few things about the Sudan, and more about human nature, once wrote:

“Man, a bear in most relations—
worm and savage otherwise, -
Man propounds negotiations,
Man accepts the compromise.”²⁵²

203. This Tribunal could have been a peace-maker had it realised the obvious fact that peace-making is more difficult than law-making and judgment drafting. To be successful a compromise does not have to be a non-principled solution. On the contrary its chances of success increase if it is perceived

²⁵² Rudyard Kipling, *The Female of the Species*.

by those the Award called the “stakeholders” as a fair and workable scheme. The stakeholders in this case are not only the Government and the SPLM/A, they are also the Ngok and the Misseriya. Today, we are more remote from achieving a durable peace than before the rendering of this Award, because of the very simple fact that the Award failed utterly to take the rights of the Misseriya into consideration and could have the effect of denying them access to the waters of the Bahr, except for a small piece of land on the border of Darfur (and nothing in the Award on traditional rights changes this fact). Therefore the question that will never go away is who, in the process of delimiting the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905, gave the Experts or this Tribunal the right to reduce the Misseriya to second class citizens in their own land and to create conditions which may deny them access to water. This would disrupt the very livelihood of the Misseriya that has depended for as long as they have been in Kordofan on access to the Abyei area. I can only hope that both Misseriya and Ngok Dinka will reach into their traditions and common history to find solutions better suited to their community of existence that should transcend all boundaries.

Appendix. Map illustrating locations of Ngok Dinka and Homr Arab presence around 1905*

* The map contained in the Appendix to the Dissenting Opinion is located in the rear pocket of the present volume.