IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL
CONSTITUTED IN ACCORDANCE WITH ARTICLE 5 OF
THE ARBITRATION AGREEMENT BETWEEN THE GOVERNMENT OF SUDAN
AND THE SUDAN PEOPLE’S LIBERATION MOVEMENT/ARMY
ON DELIMITING ABBEI AREA
-and-
THE PERMANENT COURT OF ARBITRATION OPTIONAL RULES
FOR ARBITRATING DISPUTES BETWEEN TWO PARTIES
OF WHICH ONLY ONE IS A STATE
Peace Palace, The Hague
Procedural Hearing

Monday, 24th November 2008

Before:
PROFESSOR PIERRE-MARIE DUPUY
JUDGE AWN AL-KHASAWNEH
PROFESSOR DR GERHARD HAFNER
JUDGE STEPHEN M SCHWEBEL
PROFESSOR W MICHAEL REISMAN

BETWEEN:

THE GOVERNMENT OF SUDAN
and

THE SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY
PROFESSOR JAMES CRAWFORD SC appeared on behalf of the Government of Sudan.

GARY BORN and WENDY MILES, of Wilmer Cutler Pickering Hale & Dorr LLP, PROFESSOR PAUL R WILLIAMS and VANESSA JIMÉNEZ, of Public International Law & Policy Group, and DR LUKE BIONG DENG, HON. DENG AROP KUOL, KUOL DUEIM KUOL, MATHEW OTUROMOI MARTINSON appeared on behalf of the SPLM/A.

REGISTRY: JUDITH LEVINE, Registrar and legal counsel, and ALOYSIUS LLAMZON, legal counsel, appeared for the Permanent Court of Arbitration.

Transcript produced by Trevor McGowan
Tel: +33 (0)6 98 26 34 44
info@TMGreporting.com
09:30

1. Monday, 24th November 2008
2. (9.48 am)
3. THE CHAIRMAN: Good morning, ladies and gentlemen. This is the first procedural meeting in the arbitration under the Arbitration Agreement between the Government of Sudan and The Sudan People's Liberation Movement/Army on delimiting Abyei Area.
4. I am Pierre-Marie Dupuy, chairman of the Tribunal.
5. I welcome my distinguished colleagues on the Arbitral Tribunal. To my left, Judge Awn A-Khasawneh and Professor Gerhard Hafner; to my right, Judge Stephen Schwabel and Professor Michael Reisman.
6. Also present are the representatives of the PCA with the parties, and Ms Judith Levine, legal counsel, and Aloysius Llamzon, legal counsel.
7. I welcome you, the representatives of the parties, for coming to The Hague today with such horrible weather. Perhaps before getting into today's agenda you could introduce yourself for the record of the Tribunal.
8. PROFESSOR CRAWFORD: Sir, this won't take long on my side.
9. The agent, Dirdeiry Ahmed, apologises for not being able to be here. He's having to travel to Europe in conjunction with work on the arbitration, so it just wasn't possible today.
10. My name is James Crawford, and I represent the Government of Sudan with, I can assure you, numbers of others.
11. THE CHAIRMAN: Thank you very much.
12. MR BORN: Thank you, Mr President. I am Gary Born, I represent the Sudan People's Liberation Movement/Army. I am accompanied by some of the numbers, and I think, given the number of them, I will let them each introduce themselves. Thank you.
13. MS MILES: Wendy Miles, partner at WilmerHale, with Gary Born.
14. DR DENG: Thank you, Mr President, for being here. My name is Luka Biong Deng for the Sudan People's Liberation Movement/Army. I am Gary Born.
15. PROFESSOR WILLIAMS: Good morning. Paul Williams, the executive director of the Public International Law & Policy Group, and also co-counsel for the SPLM/A.
16. MS JIMÉNEZ: Vanessa Jiménez, attorney with the Public International Law & Policy Group, and also co-counsel for the SPLM/A.
17. MR KUOL: Kuol Dueim Kuol, Sudan People's Liberation Movement / Sudan People's Liberation Army.
18. THE HONOURABLE MR KUOL: Honourable Deng Arop Kuol,
THE GOVERNMENT OF SUDAN / THE SUDAN PEOPLE’S LIBERATION MOVEMENT/ARMY

Procedural hearing
Monday, 24th November 2008

09:55
1. to follow what the parties had already agreed in the
2. Arbitration Agreement, recognising, of course, that in
3. a sense the Arbitration Agreement stands for what it is
4. already, and the language that is here doesn't affect
5. that.
6. THE CHAIRMAN: May I ask Professor Crawford to react to
7. this proposal.
8. PROFESSOR CRAWFORD: Sir, I wasn't given notice of these
9. changes. I'm not the signatory to the terms of
10. appointment, the agent is, and arrangements have been
11. made for him to sign them, as it were, in escrow, so
12. that they could be completed today.
13. It might be helpful for me to know what the
14. remaining changes proposed by the other party are, and
15. then perhaps I could respond to them all.
16. THE CHAIRMAN: Could you circulate a copy of the changes
17. that you propose?
18. MR BORN: We certainly could. Should I give it to
19. Professor Crawford?
20. THE CHAIRMAN: Yes, please.
21. MR BORN: The only other changes --
22. THE CHAIRMAN: And could you give the Tribunal as well
23. a copy.
24. MR BORN: It would mean giving up the copy that
25. Professor Crawford has, but I'm happy to.

09:58
1. can --
2. PROFESSOR CRAWFORD: It would be helpful with the
3. remaining changes could be read into the record now.
4. THE CHAIRMAN: Yes.
5. MR BORN: The other changes which will be on the marked
6. copy that the PCA distributes involve Articles 6 and
7. 7; Article 6.3.2 refers to the costs of things other
8. than the hearings rooms being borne by the parties.
9. That formulation is then repeated in Article 7.1, 7.2
10. and 7.3.
11. Our suggestion in each of those instances is that
12. rather than referring to the parties there be
13. a reference to the Presidency of the Republic of Sudan
14. as per Article 11.1 of the Arbitration Agreement.
15. THE CHAIRMAN: Here again I would like to get a copy
16. circulated to the other party and to the Tribunal.
17. PROFESSOR CRAWFORD: Sir, in relation to 7.1, it's true
18. that it is the presidency, but the presidency in this
19. respect is acting on behalf of both parties. In any
20. event, I agree that you that we need to see the actual
21. language.
22. THE CHAIRMAN: No further comments?
23. PROFESSOR CRAWFORD: Not for the moment. Until I've seen
24. the language it's difficult to comment, I have had no
25. notice of this.

09:57
1. The other changes all relate to the description of
2. who is responsible for the costs, and again the effort
3. is made to track more precisely the Arbitration
4. Agreement.
5. I certainly hope, and I certainly think, on our
6. side, that these are not changes that are anything but
7. of a ministerial character. I too received late notice
8. of them, and I apologise for any inconvenience that this
9. might cause to either Professor Crawford or the
10. Tribunal, but I do think that they are truly in the
11. nature of housekeeping.
12. PROFESSOR CRAWFORD: Sir, I've made arrangements to
13. contact the agent if necessary during this morning.
14. So what I suggest is that we put on the record the
15. changes that are sought and that we then adjourn this
16. item so that I can get clarification.
17. It's obviously an important question. I agree with
18. Mr Born that the dominant instrument is the agreement to
19. arbitrate, but it's desirable that the terms of
20. appointment be consistent with the agreement to
21. arbitrate, and we are certainly not in principle opposed
22. to any move that makes them consistent, but I would need
23. to get approval.
24. THE CHAIRMAN: Alright. So if necessary we will be able
25. to suspend also this morning's session so that you

10:00
1. What I can say is that prima facie the changes, with
2. the possible exception of 6.1, don't seem to create a
3. problem but I would need to see them in writing.
4. MR BORN: That's entirely understandable. I would very
5. much hope that these are in the nature of housekeeping
6. changes and they can be worked out, but until
7. Professor Crawford sees them he obviously can't
8. respond.
9. THE CHAIRMAN: Alright, thank you.
10. So before getting copies of the changes, the first
11. suggestion you made, and if necessary suspending the
12. hearing for a few minutes so that Professor Crawford can
13. get in touch with the agent, we should go on and look to
14. the further points of the draft agenda. Then we move to
15. schedule of proceedings, which is the second item.
16. We appreciate the parties' desire for a speedy
17. resolution of this dispute, and each of us from the
18. Tribunal were aware of the timeframe for resolution of
19. this dispute when we accepted our appointments and
20. committed to serve. In particular we note the terms of
21. Article 4.3 of the agreement which provides, and
22. I quote:
23. "... the Tribunal shall endeavour to complete the
24. arbitration proceedings including the issuance of the
25. final award within a period of six months from the date
<table>
<thead>
<tr>
<th>Page 9</th>
<th>Page 10</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>10:05</strong></td>
<td><strong>10:08</strong></td>
</tr>
</tbody>
</table>
| 1. of the commencement of arbitration proceedings subject to three months extension.”  
2. We further note the relatively tight deadlines set for these steps in the arbitration set out in Article 8 of the Arbitration Agreement, and we note that Article 8.7 provides some scope for flexibility in the schedule in so far as it sets out:  
3. “... notwithstanding Article 4.3, the Tribunal shall be empowered to extend for good cause the periods established for the arbitration proceedings on its own motion or at the request of either party. The total cumulative extension of the periods granted by the Tribunal at the request of either party may not exceed thirty days for each party.”  
4. Finally we note that Article 9.1 provides: “Subject to Article 8.7 of this agreement, the final award should be rendered by the Tribunal within a maximum of 90 days from the closure of submissions.”  
5. Now, there is here a point of clarification that the Tribunal would like to confirm with the parties today. Article 2 of the Arbitration Agreement sets the Tribunal two tasks; the first task is to determine whether the Abyei Boundaries Commission exceeded its mandate. The second task, which will be reached only if the answer to the first question is a positive one, is to proceed to address the Abyei Boundaries Commission’s mandate.  
6. It is our current understanding, based on the terms of the agreement, that there will be just one set of written proceedings and one set of oral proceedings, and the intention is to deal with both issues together. The reference to consecutive treatment of the issues does not imply that the proceeding should be bifurcated. The timeframe also does not appear to allow for bifurcation. Is our understanding correct that all issues will be dealt with in one hit? I turn to the representative of the Government of Sudan.  
7. PROFESSOR CRAWFORD: Sir, that’s our understanding as well. The word “consecutively” has caused me some puzzlement in the context of the agreement as a whole, but it’s quite obvious from the timetable, and from all other circumstances, that it’s intended that each memorial deal with all of the issues in dispute, and  
8. We both intend to submit the memorial on time, but it would be impractical to bifurcate in any event.  
9. THE CHAIRMAN: Alright, thank you. And I turn to Mr Born.  
10. MR BORN: Our understanding is precisely the same as the Tribunal’s. The reference to consecutively, I think, refers only to the obvious fact that in so far as the Tribunal decides that there was no excess of mandate, there’s no need to spend further time on the later question in the case.  
11. THE CHAIRMAN: Alright, so we take note of this interpretation of the terms of the agreement, which of course confronts everyone in this room to a very heavy and difficult task. I’m sure we are all conscious of that.  
12. Moving on to the nuts and bolts of the schedule itself, shall we start with the written pleadings and then move to the oral pleadings?  
13. PROFESSOR CRAWFORD: Sir, if I may make a suggestion. On matters of scheduling the parties would be able to agree, and the Tribunal I think within limits would be able to agree as well, to a slightly more relaxed scheduling. At present I’m confronted with the problem of cancelling my Christmas holiday because of the schedule of pleadings. I think the sensible thing to do would be to fix the oral hearing first, and then we can work out within the flexibility allowed what would be an appropriate point for the submission of the written pleadings.  
14. I should say I have had some discussion with Mr Born, and we both agree that we will submit our memorials within the week, and the reference in the Arbitration Agreement is to the week, not the day, in question. We can come back to the precise day in that week.  
15. We both intend to submit the memorial on time, but given that the next period of four weeks includes a holiday period, I’m afraid it’s inhuman, degrading treatment and punishment to require a large counter-memorial in that period, and we will be arguing very strenuously for an extension in relation to the counter-memorial. A short reply is quite a good idea, because that could be focused, but the counter-memorial -- both parties need to see how the case is pleaded by the other, and I’m afraid this agreement was drawn up by someone who has never had responsibility for producing pleadings before.  
16. MR BORN: Just briefly, Mr Chairman, the agreement was... | 1. that will certainly be the case with us.  
2. In any event, the Tribunal will find it difficult to understand the issues of excess of mandate unless it understands something about the issues of substance. So it would be impractical to bifurcate in any event.  
3. THE CHAIRMAN: Alright, thank you. And I turn to Mr Born.  
4. MR BORN: Our understanding is precisely the same as the Tribunal’s. The reference to consecutively, I think, refers only to the obvious fact that in so far as the Tribunal decides that there was no excess of mandate, there’s no need to spend further time on the later question in the case.  
5. THE CHAIRMAN: Alright, so we take note of this interpretation of the terms of the agreement, which of course confronts everyone in this room to a very heavy and difficult task. I’m sure we are all conscious of that.  
6. Moving on to the nuts and bolts of the schedule itself, shall we start with the written pleadings and then move to the oral pleadings?  
7. PROFESSOR CRAWFORD: Sir, if I may make a suggestion. On matters of scheduling the parties would be able to agree, and the Tribunal I think within limits would be able to agree as well, to a slightly more relaxed scheduling. At present I’m confronted with the problem of cancelling my Christmas holiday because of the schedule of pleadings. I think the sensible thing to do would be to fix the oral hearing first, and then we can work out within the flexibility allowed what would be an appropriate point for the submission of the written pleadings.  
8. I should say I have had some discussion with Mr Born, and we both agree that we will submit our memorials within the week, and the reference in the Arbitration Agreement is to the week, not the day, in question. We can come back to the precise day in that week.  
9. We both intend to submit the memorial on time, but given that the next period of four weeks includes a holiday period, I’m afraid it's inhuman, degrading treatment and punishment to require a large counter-memorial in that period, and we will be arguing very strenuously for an extension in relation to the counter-memorial. A short reply is quite a good idea, because that could be focused, but the counter-memorial -- both parties need to see how the case is pleaded by the other, and I’m afraid this agreement was drawn up by someone who has never had responsibility for producing pleadings before.  
10. MR BORN: Just briefly, Mr Chairman, the agreement was... |
Procedural hearing
Monday, 24th November 2008

<table>
<thead>
<tr>
<th>Page 13</th>
<th>Page 15</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>THE GOVERNMENT OF SUDAN / THE SUDAN PEOPLE’S LIBERATION MOVEMENT/ARMY</strong></td>
<td><strong>THE GOVERNMENT OF SUDAN / THE SUDAN PEOPLE’S LIBERATION MOVEMENT/ARMY</strong></td>
</tr>
</tbody>
</table>
| **THE CHAIRMAN:** Thank you. | **THE REGISTRAR:** The dates on which all members of the Tribunal would be available for oral hearings in The Hague would be, in the first place, Saturday April 18th 2009, Sunday April 19th 2009, Monday April 20th 2009, Tuesday April 21st 199, Wednesday April 22nd 2009, and Thursday April 23rd 2009. 
**PROFESSOR CRAWFORD:** Mr President, it may help the Tribunal, if necessary, would also be able on Thursday April 30th 2009, Friday May 1st 2009, and Saturday May 2nd 2009, if necessary. 
**MR BORN:** We certainly did agree that the Government of Sudan would go first. We agreed that the hearing would not take longer than six days. I don't think we addressed the question of whether all six days would be required. 
**THE CHAIRMAN:** Alright, I thank you. So should I understand that prima facie the dates which have been indicated so far for the oral pleadings, starting... | **THE REGISTRAR:** The dates on which all members of the Tribunal would be available for oral hearings in The Hague would be, in the first place, Saturday April 18th 2009, Sunday April 19th 2009, Monday April 20th 2009, Tuesday April 21st 199, Wednesday April 22nd 2009, and Thursday April 23rd 2009. 
**PROFESSOR CRAWFORD:** Mr President, it may help the Tribunal, if necessary, would also be able on Thursday April 30th 2009, Friday May 1st 2009, and Saturday May 2nd 2009, if necessary. 
**MR BORN:** We certainly did agree that the Government of Sudan would go first. We agreed that the hearing would not take longer than six days. I don't think we addressed the question of whether all six days would be required. 
**THE CHAIRMAN:** Alright, I thank you. So should I understand that prima facie the dates which have been indicated so far for the oral pleadings, starting... |

<table>
<thead>
<tr>
<th>10:09</th>
<th>10:13</th>
</tr>
</thead>
<tbody>
<tr>
<td>drawn up, in fact, by the parties, and at the end of the day all of us in this room, as the Chairman pointed out, knew what we were getting into when we signed up for it. It is a difficult and ambitious timetable that is set forth in the Arbitration Agreement. It is difficult and ambitious, though not for frivolous reasons or for reasons of lack of attention to the demands on counsel; rather it is ambitious because of the exigencies of the situation. This determination is central to a larger peace process, it is essential that it proceed on the basis that the parties agreed in the Arbitration Agreement, and which, as Professor Crawford rightly put it, we all signed up to. We therefore do not think it is appropriate, as one might do in a commercial arbitration or some other arbitration, to fix a convenient hearing date and work backward from that. Rather what we all have here is a timetable fixed in the Arbitration Agreement to which our mandate is to comply. We therefore intend to proceed with submission of the memorial pursuant to the terms of the Arbitration Agreement in the week of the 15th. I think it, we all signed up to.</td>
<td>days, in our case, should relate to the counter-memorial, because that is the period of time, having regard to the date when it falls, where more time will inevitably be required.</td>
</tr>
</tbody>
</table>
Procedural hearing
Monday, 24th November 2008

10:16 1 on April 18th, would be convenient for both sides?
2 PROFESSOR CRAWFORD: Yes, sir.
3 MR BORN: On my side we can do the first six dates at some
4 difficulty, that means the dates from the 18th through
5 the 23rd. It will potentially involve my resignation
6 as an arbitrator in another case, which I need to
7 confirm with the parties. I would not do that
8 lightly. I would need to listen to the reactions of
9 the presiding arbitrator and the co-arbitrator as well
10 as counsel for the parties. This case, though, has
11 special characteristics that I think justify an
12 exceptional step of that nature, and if this is the
13 only date we can do I will take it.
14 I am unable to do the remaining four dates which
15 were mentioned. I am sitting in another case there
16 where, owing to its peculiarities, it would be untenable
17 for me to resign.
18 PROFESSOR CRAWFORD: Sir, I think we're talking about the
19 first six dates and I think we have agreement on the
20 first six dates.
21 THE CHAIRMAN: I thank you, and I ask the registrar to
22 take note of this agreement.
23 So if we turn back now to the issue of the written
24 pleadings, I suggest that we examine the draft timeline,
25 the estimated timeline which has been prepared by the

10:18 1 registrar. We already understand that the parties will
2 be able to provide the Tribunal with the memorial on
3 15th December.
4 PROFESSOR CRAWFORD: Sir, the agreement says the week of
5 15th December, and I'm afraid when one is working to
6 these timetables, days matter. I was going to suggest
7 18th December in that week, certainly later than in
8 that week, 18th or 19th, which would still be
9 consistent with the agreement.
10 MR BORN: If the 18th suits Professor Crawford it suits me
11 as well.
12 PROFESSOR CRAWFORD: I'm grateful.
13 MR BORN: I want to make sure he keeps speaking to me.
14 THE CHAIRMAN: I thank the two parties for this agreement.
15 In principle, the parties should submit
16 a simultaneous counter-memorial at the end of January,
17 and the date which had been indicated so far is Monday
18 26th, January. But we heard the observation made by
19 Professor Crawford, and I would be grateful if --
20 PROFESSOR CRAWFORD: Sir, it involves our using a
21 substantial part of the 30 days provided for in the
22 agreement for each party within which we can seek an
23 extension. I'm very happy to spend those days in the
24 circumstances, and I would suggest 27th February, the
25 Friday, which is three weeks from 30th January, being

10:22 1 the last day in the week of 26th January, for the
2 submission of the counter-memorial, at least for the
3 submission of our counter-memorial.
4 But I assume the agreement means that if we use our
5 days, the days are inured to the benefit of the other
6 side as well. Again, we're happy with that. We think
7 the Tribunal will be assisted by having considered
8 counter-memorials which are responsible for the cases
9 put forward in the memorial.
10 THE CHAIRMAN: Should I ask Ms Levine to indicate what
11 would be the further changes in the timeline if, on
12 hypothesis, we take the suggestion made by the
13 Government of Sudan?
14 THE REGISTRAR: Were the counter-memorials to be filed on
15 Friday February 27th, I believe that the rejoinders 15
16 days later would be due on March 14th, which is
17 a Saturday.
18 PROFESSOR CRAWFORD: We are content with that, sir, and it
19 gives the Tribunal a month between the submission of
20 the memorial and the beginning of the oral phase to
21 absorb the rejoinders. So it seems, within the
22 context of a not very -- well, let me put it
23 positively, a very compressed timetable, it seems
24 a reasonable balance.
25 MR BORN: If I may just briefly speak to that.
THE GOVERNMENT OF SUDAN / THE SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY

Procedural hearing

Monday, 24th November 2008

10:24

PROFESSOR CRAWFORD: Sir, first of all the Tribunal's
now.

THE CHAIRMAN: The Tribunal will adjourn for

Page 22

10:26

to the counter-memorial I do so for the very good reason
that neither party knows with clarity the case that will
be put forward by the other. It is obvious now that it
will be beneficial to the Tribunal in this difficult
case for the counter-memorial to be properly considered,
and for the other party to have a short opportunity, and
it will be a short opportunity, to respond to anything
that is said in the counter-memorial. In those
circumstances, I request the Tribunal -- I'm perfectly
happy to cancel my own personal holiday now, not that
I have very many, if it will make Mr Born happy. That's
not the point. The point is that during this period --
I mentioned a holiday, in fact it is a period of time in
which I will be working but working in another place.
We request that the Tribunal grant the extension now to
us in relation to the date which has been mentioned.
Thank you, sir.

THE CHAIRMAN: The Tribunal will adjourn for

Page 22

11:20

PROFESSOR CRAWFORD: Sir, for the record I would say, and
this is again what I understand to be the result of
a discussion with Mr Born, that by "submit" we mean
submit to the PCA here at 5 o'clock on that day.

MR BORN: We will do our best for 5 o'clock. It certainly
meets that day, and to the PCA.

PROFESSOR CRAWFORD: I see Mr Born wants flexibility after
all!!

MR BORN: Within the day.

THE REGISTRAR: Mr Chairman, we would be ready to
circulate the terms of appointment for signature now,
or we can wait until the next adjournment.

THE CHAIRMAN: I think you can do that now in order to
save time.

THE REGISTRAR: And we already have the signature for the
agent of the Government of Sudan, and I understand,
Professor Crawford, you are now authorised for that to
be used in the final version.

PROFESSOR CRAWFORD: Yes, I am. (Pause)

THE CHAIRMAN: Now we turn to the issue of dates for
delivery of the different written pleadings.

In view of the consideration advanced by both sides,
the Tribunal believes that it would be convenient to
grant an additional time, considering in particular the
crucial importance of the counter-memorial. Due to the

Page 23

8 (Pages 21 to 24)

Trevor McGowan
info@TMGreporting.com
Page 25

11:22 1 fact that delivery of memorials is simultaneous, it
2 appears to the Tribunal that the counter-memorial will
3 constitute a very important piece of the pleading, but
4 we are also aware of the timeframe and of the overall
5 context, so the Tribunal decides to grant an additional
6 time not of 31 days, but of a shorter length.
7 I would be grateful if Ms Levine could give us the
8 reading of the new dates which have been established.
9 THE REGISTRAR: In accordance with the instruction of the
10 Tribunal, as agreed the date for the exchange of
11 memorials, in accordance with Article 8.3(i) of the
12 agreement, will be Thursday December 18th 2008.
13 The revised date for submission of counter-memorials
14 in accordance with Article 8.3(ii) would be Friday
15 February 13th 2009.
16 The date for submission of rejoinders in accordance
17 with Article 8.3(iii) would be Saturday February
18 28th 2009.
19 By Monday March 16th 2009, in accordance with
20 Article 8.3(iv), other written pleadings that the
21 Tribunal deems necessary to be requested will be
22 requested.
23 PROFESSOR CRAWFORD: Sorry, what was that date?
24 THE REGISTRAR: That was Monday March 16th 2009. And the
25 Tribunal has also decided that the date of Friday

Page 26

11:25 1 March 20th 2009 will be the date for notification, in
2 accordance with Article 8.4 of the agreement, of those
3 experts and witnesses intended to be presented.
4 The dates that I have just read and the deadlines
5 I have just read would be by close of business Hague
6 time 5 pm.
7 THE CHAIRMAN: And you will send to the parties a written
8 copy of the different dates?
9 THE REGISTRAR: That's correct. The PCA will distribute
10 a letter confirming those dates subsequent to today's
11 meeting.
12 THE CHAIRMAN: I thank you.
13 Now I think we can move directly to point 4(b),
14 which deals with technical requirements in the framework
15 of oral pleadings, and we would like to hear the parties
16 on that issue, and in particular the parties should
17 liaise with the PCA closer to the date of the hearings
18 regarding the technical requirements for the oral
19 pleadings.
20 There is the issue of interpreters, the equipment,
21 court reporting. Any comment?
22 MR BORN: I suspect this is something that the parties can
23 work out between themselves. I suspect there will not
24 need to be unusually complicated technical equipment,
25 although Professor Crawford can speak for himself.

Page 27

11:27 1 On our side, having simultaneous transcription,
2 so-called LiveNote, and facilities for audio visual,
3 whether PowerPoint or something of that sort, would be
4 desirable. I suspect there will not need to be
5 interpreters, counsel can speak slowly, and in so far as
6 interpreters are required, I think counsel can
7 communicate with each other and arrange on satisfactory
8 individuals.
9 PROFESSOR CRAWFORD: I agree with all of that.
10 THE CHAIRMAN: I thank you. So we are left with point 5,
11 publicity. There are here a couple of points of
12 clarification that the Tribunal would like to seek
13 from the parties. With respect to implementation of
14 Article 8.6, Article 8.6 provides:
15 "The oral pleading(s) of the Tribunal shall be open
16 to the media. A portion of a hearing may only be closed
17 at the discretion of the Tribunal for security reasons.
18 The parties authorise the PCA to issue periodic press
19 releases regarding the progress of the arbitration
20 proceedings and to make publicly available on its
21 website the final award as well as party submissions."
22 Now the first question: for the publication of
23 submission on the website, can this occur immediately
24 after the filing, or should the PCA hold off until the
25 end of the proceedings? We would like the hear the

Page 28

11:29 1 parties on that. Professor Crawford.
2 PROFESSOR CRAWFORD: Sir, this is not a matter on which
3 I have specific instructions. It is clear from the
4 Arbitration Agreement that this is not a private or
5 confidential arbitration. I think, if the pleadings
6 were to be made public instantaneously upon deposit --
7 although I certainly haven't had experience of that
8 happening, and I'd be interested in Mr Born's view
9 about it -- we don't have any a priori view.
10 THE CHAIRMAN: Thank you. Mr Born?
11 MR BORN: It may be also that Professor Crawford would
12 like to consult with his agent on his side, we
13 certainly would have no objection to him taking the
14 time to do that. On our side, I think past experience
15 has been that the PCA has put things up relatively
16 quickly on their website. Prima facie we don't see
17 a reason to treat pleadings differently. However, if
18 there are objections from the government we can
19 certainly consider those.
20 PROFESSOR CRAWFORD: Sir, I wasn't making an objection.
21 When I do make an objection you will know it.
22 The pleadings will be given to you in hard copy
23 form. Because of the nature of illustrations and maps
24 and so on it may not be possible to give you electronic
25 versions of the pleadings at the same time. We would
11:30 1 certainly not have any difficulty about the hard copy of
2 the pleadings being made available to the media
3 et cetera upon deposit. If Mr Born is happy with that
4 I think we are happy with it.
5 We would have to have some discussion about the
6 modalities of making electronic copies available and how
7 much longer that would take, because obviously the whole
8 process of production is quite a complicated one. We
9 are obviously putting in a map atlas, and to prepare
10 that in an electronic form may take some further time.
11 MR BORN: If the Government of Sudan has no objections to
12 the materials going onto the website as soon as
13 technically feasible then I think we have agreement.
14 Obviously there will need to be technical discussions
15 but I'm not sure that need detain us today.
16 THE CHAIRMAN: Of course, the Tribunal insists that the
17 electronic version be completed before the work of the
18 Tribunal as it's very useful.
19 Now I come to the second point of clarification. As
20 I read just before, the oral pleading shall be open to
21 the media. Does it imply also that the proceedings are
22 open to members of the public generally?
23 PROFESSOR CRAWFORD: Sir, if the parties had wanted to
24 make the oral proceedings open to members of the
25 public they would have said so. I think the

Page 29

11:33 1 and does not address specifically the question of the
2 public, although it goes on to say that the hearings
3 shall only be closed for security reasons.
4 The Sudan People's Liberation Movement/Army submits
5 that the better view of that provision, both in terms of
6 the parties' intentions and the overall objectives of
7 this process, is to permit those members of the public, 
8 and particularly the interested and affected group on 
9 the side of the Sudan People's Liberation Movement/Army, 
10 to attend. It would not object to attending with
11 appropriate security arrangements, which might include
12 viewing from another room.
13 But I think we should all not lose sight of the fact 
14 that this arbitration concerns a land that a specific
15 people claims is theirs, and has been decided to be
16 theirs, and should they wish to attend and see this
17 process, huge benefits would be served by that.
18 Those same people have a deep concern that the lack
19 of public attention in the past has led us to where we
20 are today, and they therefore wish there to be maximal 
21 transparency, maximal public attention to this, and
22 hence the provisions already in the agreement. 
23 I think it therefore sensible, indeed fundamentally 
24 important, that the public see this themselves, not just
25 through the filter of the media or the press, but be

Page 30

11:35 1 able to say that they saw you and us deliberate upon
2 this matter.
3 PROFESSOR CRAWFORD: Sir, this arbitration is being held
4 because it is not the case, according to the
5 Government of Sudan, that there is only one people
6 involved, but several. And the arbitration is
7 certainly not being conducted on the footing that
8 there is no difficulty in that regard.
9 Mr Born said he would be happy with a separate room
10 in the Peace Palace being available for viewing, and
11 subject to normal security arrangements in the
12 Peace Palace we would be happy with that as well. But
13 we think the orderly conduct of the proceedings
14 themselves would be better if attendance to the
15 proceedings was limited to accredited members of the
16 media.
17 THE CHAIRMAN: Alright, I thank both parties, and the
18 Tribunal will consider the issue in coordination with
19 the PCA in order to define the best ways to organise
20 the hearings. We do consider that there is
21 an agreement among the two sides, particularly for the
22 use of a special room for the public.
23 MR BORN: Just to be clear, Mr Chairman, although there is
24 an agreement on that, our position remains that if
25 appropriate security measures could be taken also to

Page 31
11:37 1 ensure expeditious seating and the like, it would be
2 appropriate and just for members of the public to be
3 able to watch in person. It might be a limited
4 number, but this is a matter which affects the people
5 as well as counsel.
6 THE CHAIRMAN: Yes. Once again, I think this is a point
7 to be considered with the PCA so that we can examine
8 these eventual possibilities.
9 Yes, it is true that there are still some issues
10 which have not been considered so far and which are of
11 interest for the organisation of the written pleadings.
12 The first deals with evidence, documents, witness
13 statements, expert reports, maps, which of course are of
14 particular importance from a material point of view for
15 the clarification of the positions of the two sides --
16 The agreement appears to be silent on this, and we
17 would be happy to have your clarifications on that
18 point.
19 PROFESSOR CRAWFORD: Sir, we were envisaging the
20 submission of a memorial which would contain some
21 maps, but a separate map annex. Obviously the
22 submission will be accompanied by a certificate of the
23 agent as to the authenticity of the maps.
24 To the extent that there are witness statements, the
25 witness statements should be attested in the normal way,

Page 33

11:39 1 as would be done for ICJ proceedings. There is a great
2 volume of documentary material, including quite a lot of
3 published documentary material; as the Tribunal will
4 discover, the proceedings of the administration of the
5 Condominium were largely published by Her Majesty's
6 Stationery Office, and it would produce a huge volume of
7 annexes if all this material was submitted.
8 What we were proposing to do was to submit only the
9 front sheet and the relevant page from which a quotation
10 comes. But in many cases there exist electronic
11 versions of these documents, and we would propose,
12 possibly not on the day of submission but within as
13 short a time thereafter as is technically possible,
14 giving you a CD.
15 For example, there is a 1995 handbook of the Sudan
16 in two volumes which is available on the internet, and
17 we would give you a copy of that in electronic form.
18 Unfortunately it's not available in hard copy anymore
19 except in selected libraries, so we can't give you the
20 whole thing, but we will give you with the memorial the
21 relevant pages we quote, and then subsequently give you
22 electronic versions of the documents to the extent that
23 they are available, which is a surprising extent.
24 THE CHAIRMAN: I thank you. Mr Born.
25 MR BORN: I take it that the Sudan intends, as we

Page 34

11:40 1 certainly do, to submit witness statements, in so far
2 as they are to be provided, documentary evidence,
3 expert reports and maps, together with the memorial.
4 That's certainly, as I say, our intention as opposed
5 to submitting them at some other time.
6 We agree entirely that with regard to modern
7 technology, be it CDs or something else, that can be
8 submitted slight thereafter. There may be technical
9 issues in terms of transferring it to the appropriate
10 medium, I'm certainly not the person that can master
11 those technical issues, but I would expect that they
12 would be surmountable in the days, perhaps week,
13 following hard copy submission.
14 THE CHAIRMAN: Alright. I take it that there is
15 an agreement among the parties on that issue.
16 MR BORN: Just noticing one point that I failed to
17 address. We certainly do not object to extracts, if
18 you will, of books, the front page and the relevant
19 material. I think it would be helpful if relevant
20 material were defined, obviously it's within both
21 parties' discretion, but were defined with an effort
22 to provide both the other party and the Tribunal with
23 not just the particular sentence that one thinks is
24 ideally suited, but rather the immediately surrounding
25 context.

Page 35

11:42 1 We also suggest that both parties be responsible for
2 providing the translation, in so far as the original
3 language of the document is not the English language, of
4 that selected excerpt, meaning not just the particular
5 sentence that one wishes to draw attention to but rather
6 the immediately surrounding context.
7 THE CHAIRMAN: Which means that you would produce the
8 original text together with a translation.
9 MR BORN: Precisely.
10 THE CHAIRMAN: I thank you.
11 PROFESSOR REISMAN: Do I understand then that the
12 documents will be submitted with the memorials in
13 accordance with 8.3(i), and that the counter-memorials
14 will not be including documents?
15 My second question is with respect to the production
16 of witnesses, I presume that every witness produced will
17 have already submitted a witness statement?
18 PROFESSOR CRAWFORD: Sir, if I can respond to those
19 questions. On the first, I don't take the
20 non-reference to documents in relation to the
21 counter-memorial as meaning that one is precluded from
22 submitting new documents in the counter-memorial,
23 although it's too early to tell. We would certainly
24 envisage doing so, and I would be very surprised if
25 Mr Born had a different view.

Page 36
THE GOVERNMENT OF SUDAN / THE SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY

Procedural hearing

Monday, 24th November 2008

11:43

As to the witness statements, I agree entirely that any witness who intends to give oral evidence must previously have submitted a witness statement.

THE CHAIRMAN: Mr Born.

MR BORN: That certainly is the position of the Sudan People's Liberation Movement/Army. I would be quite surprised if there were not documents or additional materials attached to the counter-memorial in just the same way as they are attached to the memorial, and the same arrangements that we discussed ought also to apply to that.

PROFESSOR CRAWFORD: Sir, it's crystal ball gazing at this stage, but I'm not sure that it's going to be very easy to draw a distinction between purely responsive arguments and the development of arguments in the memorial. I think in the nature of things the two will run together.

But obviously the principal function of the counter-memorial will be to respond by such arguments as each party is advised to the arguments made by the other in the memorial.

PROFESSOR REISMAN: In that case, if I understand counsel, that means that we may also be presented with documents in the rejoinder, because new documents will have been presented in the counter-memorial to which a rejoinder may be necessary. Is that the understanding, Mr President?

THE CHAIRMAN: My tendency would be to say that at some point the parties should restrain from producing too many document which, after a certain threshold, can become counter-productive. So perhaps we could consider that at the level of rejoinders, the two sides would not in principal produce new documentation, but this is a question to be discussed.

PROFESSOR CRAWFORD: Sir, we would be happy with that as a guideline, even as a strict guideline, so that you would have to have good cause.

If the Tribunal were minded to do so, it could be put in the form of a rule that without the permission of the Tribunal, but there's very little time between the two phases. So I would be happy with the Tribunal's injunction, and it's the function of the parties to produce a counter-memorial without being counter-productive.

I would be happy with a strong injunction that all of the materials should be produced as soon as possible.

THE CHAIRMAN: I thank you. Mr Born.

MR BORN: In principle, the Sudan People's Liberation Movement/Army doesn't disagree with that. We would point out, though, that in a sense we will be seeing the case for an excess of mandate for the first time when we receive the memorial, and therefore we will be facing only one opportunity in the counter-memorial to meet that case.

PROFESSOR CRAWFORD: Sir, if the pleadings are to be made publicly accessible, it might be desirable for the PCA to have more than the bare minimum. So I would propose ten copies for the PCA, including of course for the Tribunal, and Mr Born and I have also discussed this and I think we agreed on a number of ten as between the parties. Once we know what the number is there's no particular problem in

Page 37

11:46

THE CHAIRMAN: Alright.

PROFESSOR REISMAN: My question goes to whether the counter-memorials will be introducing new material, so that they will in effect be a second memorial, or whether the documents in the counter-memorial will essentially be responding to issues raised in the memorial.

PROFESSOR CRAWFORD: Sir, we would be happy with that as a guideline, even as a strict guideline, so that you would have to have good cause.

THE CHAIRMAN: Alright.

11:48

THE REGISTRAR: Five hard copies to be made available to the public would be sufficient for the PCA. The provision in 8.6 provides for the PCA to make the documents publicly available on its website, so that would be the primary form of making the information available, for example, diplomatic representatives in The Hague who may wish to come and inspect in person.

The hard copies, if each party provides five copies that should be sufficient.

THE CHAIRMAN: Alright, I thank you.

We have already touched upon the question of the translation of documents not being in English, so I think the question is solved.

I think then we come to the end of this agenda. Are there any questions from the members of the Tribunal?

PROFESSOR REISMAN: Mr President, I hate to belabour the point, but I am concerned about an orderly procedure.

One of the ways of refuting a document is by

Page 39

MR BORN: I would be very much guided by the PCA's desires on this, but my understanding would be that we would then adjust the numbers that are in the agenda to five for the Tribunal, five for the PCA and ten for each party.

THE CHAIRMAN: Ms Levine?

THE REGISTRAR: Ms Levine?

THE REGISTRAR: Five hard copies to be made available to the public would be sufficient for the PCA. The public accessibility, for example, diplomatic representatives in The Hague who may wish to come and inspect in person.

The hard copies, if each party provides five copies that should be sufficient.

THE CHAIRMAN: Alright, I thank you.

We have already touched upon the question of the translation of documents not being in English, so I think the question is solved.

I think then we come to the end of this agenda. Are there any questions from the members of the Tribunal?

PROFESSOR REISMAN: Mr President, I hate to belabour the point, but I am concerned about an orderly procedure.

One of the ways of refuting a document is by

Page 40
submitting a different document. If documents can be submitted through the rejoinder period, a party will have submitted documents that another party will not have had an opportunity to challenge in a documentary fashion, which is one of the reasons why in many procedures it is assumed, without the permission of the Tribunal, that the documentary record is closed after the counter-memorial.

If documents can be submitted by a party in rebuttal in the rejoinder in response to documents that were in the counter-memorial, then we will have documents that will not have been tested in an adversarial fashion by the possible submission of other documents. I appreciate there are special problems with simultaneous exchange, but the Tribunal benefits from adversarial testing of documents, and I just wonder, if there are documentary submissions at the rejoinder phase, whether that will be precluded. Thank you.

MR BORN: We certainly agree that there should not be references to documents outside of the record that is placed in front of the Tribunal. We also believe that there should, insofar as humanly possible, not be references to documents which are so-called public if they haven't been put before the Tribunal. Many things can be found on the internet these days and I assume that's public, and I really think that the Tribunal would be best served by having a fixed documentary record.

With regard to counter-memorials and rejoinders, I am a bit concerned that we are engaged in crystal ball gazing at this stage. Certainly documents need to be tested by an adversarial procedure; on the other hand the real question is where you draw the line. Does it stop after counter-memorials or after rejoinders? In either instance, if you stop it in a particular place there will be no more adversarial testing of that. It strikes me at least that more rather than less adversarial testing is probably a good thing.

That said, if the Tribunal, in the interests of clarity, wishes to draw a line after counter-memorials and before rejoinders where, save for very clear and exceptional circumstances, no further documents will be permitted, so be it, we will then know what rules we are playing by and we would not object to that.

THE CHAIRMAN: Alright, I thank you. I think we can keep to this rule that the record should be closed with the counter-memorial except with the authorisation of the Tribunal at the stage of the rejoinder, in order for us, all of us, to be disciplined and remain with the possibility of a reaction by both sides.

Would you like to draw other points?

THE REGISTRAR: Yes. Thank you, Mr President. One further point of clarification with respect to implementing Article 8.6, Article 8.6 refers to making available on the PCA website the final award as well as parties' submissions. It makes no references to transcripts of proceedings or to procedural orders or to the terms of appointment, and the PCA would like some instruction with respect to those other types of documents in the case, and whether we should make those publicly available also.

MR BORN: I think from the Sudan People's Liberation Movement/Army's perspective all materials should be available.

PROFESSOR CRAWFORD: Mr President, an allied point is that if there was something new in our counter-memorial it that's obviously right, unless there is some if the Tribunal, in the interests of the counter-memorial, then we will have documents that will not have been tested in an adversarial fashion by the possible submission of other documents. I appreciate there are special problems with simultaneous exchange, but the Tribunal benefits from adversarial testing of documents, and I just wonder, if there are documentary submissions at the rejoinder phase, whether that will be precluded. Thank you.

MR BORN: I think from the Sudan People's Liberation Movement/Army's perspective all materials should be available.

PROFESSOR CRAWFORD: Mr President, an allied point is that if there was something new in our counter-memorial it that's obviously right, unless there is some if the Tribunal, in the interests of the counter-memorial, then we will have documents that will not have been tested in an adversarial fashion by the possible submission of other documents. I appreciate there are special problems with simultaneous exchange, but the Tribunal benefits from adversarial testing of documents, and I just wonder, if there are documentary submissions at the rejoinder phase, whether that will be precluded. Thank you.

MR BORN: I think from the Sudan People's Liberation Movement/Army's perspective all materials should be available.
registry, in accordance with the terms of appointment signed today, and as provided by Article 41 of the PCA Rules, a deposit has been requested in the amount of €1 million.

The PCA notes the terms of Article 11 of the Arbitration Agreement, which provides for the Presidency of the Republic of Sudan to direct for the payment of the cost of the arbitration from the unity fund, regardless of the outcome of the arbitration, and Article 11.2 of the agreement, which notes that the Government of Sudan shall apply to the PCA Financial Assistance Fund, and the parties may solicit additional assistance from the international community.

Speaking with respect to the anticipated application to the PCA's Financial Assistance Fund, the PCA received in July, at the time of deposit of the agreement -- I believe it was July 11th -- a request from the Government of Sudan in general terms for assistance from the PCA Financial Assistance Fund. That fund was established in 1994, at the initiative of the PCA's member states; it is available to qualifying states who are participating in arbitration proceedings before the PCA, and in order to qualify a state must be a member state, which Sudan is, and be on a list of developing countries established by the OECD, which Sudan is a member of.

The current balance of the Financial Assistance Fund does not cover €1 million. There is however currently available a couple of hundred thousand euros possibly for use in this case, and we have been informed at the end of last week, and given permission to tell the parties, that the Government of Norway intends to make a contribution of 2 million Norwegian kroner to the PCA Financial Assistance Fund for the purposes of allocation to this case, which is approximately equivalent to £230,000.

The PCA anticipates that now that the deposit has been established, and that the terms of appointment have been signed, the Secretary General of the PCA will forward on behalf of the Government of Sudan, which represents a request on behalf of both parties to this case, a request of financial assistance from the PCA Financial Assistance Fund board of trustees.

The Secretary General anticipates that, should the Norwegian funds come through as promised, there could be an allocation in the vicinity of €400,000 from the PCA Financial Assistance Fund, and therefore that the Presidency of the Republic of Sudan ought to contribute in the vicinity of €600,000 towards the deposit in this case.

We will confirm these amounts once the contributions are finalised, and keep the parties abreast of any developments with respect to that funding.

The usual timeline for requesting a deposit from a state in matters such as this would be around 30 days, and with that timeframe in mind, once we can confirm the amount to be requested, that will be forwarded to the Government of Sudan's agent, and both parties will be kept abreast of those developments.

THE CHAIRMAN: Thank you very much. Would the representative of the government like to react to this information?

PROFESSOR CRAWFORD: I managed to take note of it, sir, and I would be grateful if Ms Levine would keep me personally informed about the process, because it's obviously important that this be done with appropriate expedition.

THE CHAIRMAN: I thank you. Mr Born?

MR BORN: The PCA's efforts are appreciated.

THE CHAIRMAN: Thank you. So I thank you very much for your cooperation. I think that all the points on the agenda have been discussed and agreed upon, so I thank you very much, and we adjourn this meeting. Thank you.

MR BORN: Thank you, Mr President.
THE GOVERNMENT OF SUDAN / THE SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY

Procedural hearing
Monday, 24th November 2008

Page 1

Trevor McGowan
info@TMGreporting.com
THE GOVERNMENT OF SUDAN / THE SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY

Procedural hearing

Monday, 24th November 2008

Page 2

Trevor McGowan
info@TMGreporting.com
THE GOVERNMENT OF SUDAN / THE SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY

Procedural hearing  Monday, 24th November 2008

Page 3

Trevor McGowan
info@TMreporting.com