

IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL  
CONSTITUTED IN ACCORDANCE WITH ARTICLE 5 OF  
THE ARBITRATION AGREEMENT BETWEEN THE GOVERNMENT OF SUDAN  
AND THE SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY  
ON DELIMITING ABYEI AREA

-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

Saturday, 18th April 2009

Before:

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

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BETWEEN:

THE GOVERNMENT OF SUDAN  
and  
THE SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY

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AMBASSADOR MOHAMED AHMED DIRDEIRY of Dirdeiry & Co,  
PROFESSOR JAMES CRAWFORD SC of Matrix Chambers,  
PROFESSOR ALAIN PELLET of University of Paris Ouest,  
MR RODMAN BUNDY and MS LORETTA MALINTOPPI of Eversheds LLP  
appeared on behalf of the Government of Sudan.

DR RIEK MACHAR TENY, GARY BORN, WENDY MILES, of Wilmer  
Cutler Pickering Hale & Dorr LLP, PAUL R WILLIAMS and  
VANESSA JIMÉNEZ of Public International Law & Policy Group  
appeared on behalf of the SPLM/A.

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REGISTRY: JUDITH LEVINE, Registrar and legal  
counsel, ALOYSIUS LLAMZON, acting Registrar and legal  
counsel, PAUL-JEAN LE CANNU, legal counsel, appeared for  
the Permanent Court of Arbitration.

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<p>09:39 1 a number of witnesses and experts who have been 2 identified and whose order of appearance has been 3 established. 4 The parties have been allocated equal time. The 5 Tribunal will first hear from the parties on the issue 6 of excess of mandate, and afterwards on the issue of 7 delimitation of the Abyei Area. 8 Before we start with the parties' argument and any 9 witness or expert testimony, I shall briefly recall for 10 the record and the benefit of those present the 11 principal steps of the procedure so far followed in this 12 case. 13 On July 7th 2008 the Government of Sudan and the 14 Sudan People's Liberation Movement/Army signed the 15 Arbitration Agreement between the Government of Sudan 16 and the Sudan People's Liberation Movement/Army on 17 delimiting Abyei Area. The parties deposited the 18 Arbitration Agreement with the Secretary-General of the 19 Permanent Court of Arbitration on July 11th 2008. 20 Under Article 1 of the Arbitration Agreement the 21 parties agreed to refer the dispute to final and binding 22 arbitration under the Arbitration Agreement and the PCA 23 Optional Rules for Arbitrating Disputes Between Two 24 Parties of which Only One is a State. The parties 25 agreed that the PCA would act as registry in this</p> <p style="text-align: center;">Page 5</p>	<p>09:43 1 All members of this Tribunal have signed 2 declarations of independence and impartiality and are 3 committed to fulfilling all the tasks bestowed upon us 4 in this arbitration fairly and efficiently. The 5 arbitration proceedings formally commenced on 6 October 30th [2008]. 7 Under Article 9 of the Arbitration Agreement, the 8 final award shall be rendered by this Tribunal within 9 90 days from the closure of submissions, which shall 10 occur at the end of the oral pleadings. Further 11 extensions for good cause are permitted by the 12 Arbitration Agreement. 13 On November 24th 2008 the Tribunal met with the 14 parties for a preliminary procedural meeting here in 15 The Hague. At the meeting the terms of appointment were 16 signed and time limits were fixed for the written and 17 oral phases of the proceedings. 18 The parties confirmed that the PCA would serve as 19 registry and that the Tribunal may appoint a member of 20 the PCA International Bureau to act as registrar for the 21 proceedings, and for the purpose of the Tribunal had 22 appointed Ms Judith Levine, PCA legal counsel, as 23 registrar. From March 16th 2009 Mr Aloysius Llamzon has 24 been serving as acting registrar. 25 In accordance with Article 8.6 of the Arbitration</p> <p style="text-align: center;">Page 7</p>
<p>09:41 1 matter. The parties agreed to form a five-member 2 Tribunal to arbitrate their dispute. 3 Article 2 of the Arbitration Agreement establishes 4 the issues to be determined by the Tribunal as follows, 5 and I quote it in full because it is fundamentally 6 important: 7 "a. Whether or not the ABC experts had, on the 8 basis of the agreement of the Parties as per the PCA, 9 exceeded their mandate, which is 'to define (i.e. 10 delimit) and demarcate the area of the nine Ngok Dinka 11 chiefdoms transferred to Kordofan in 1905' as stated in 12 the Abyei Protocol, and reiterated in the Abyei Appendix 13 and the ABC Terms of Reference and Rules of Procedure. 14 "b. If the Tribunal determines, pursuant to 15 Sub-article (a) herein, that the ABC experts did not 16 exceed their mandate, it shall make a declaration to 17 that effect and issue an award for the full and 18 immediate implementation of the ABC report. 19 "c. If the Tribunal determines, pursuant to 20 Sub-article (a) herein, that the ABC experts exceeded 21 their mandate, it shall make a declaration to that 22 effect, and shall proceed to define (i.e. delimit) on 23 map the boundaries of the area of the nine Ngok Dinka 24 chiefdoms transferred to Kordofan in 1905, based on the 25 submissions of the Parties."</p> <p style="text-align: center;">Page 6</p>	<p>09:45 1 Agreement, copies of the parties' pleadings as well as 2 the terms of appointment and other key documents are 3 available on the PCA's website. These proceedings are 4 also being webcast live via the internet. 5 According to our schedule we will be hearing from 6 the Government first on the issue of excess of mandate. 7 In this first session the Government may available 8 itself of a short extension beyond 11.00 am if it 9 wishes, in view of the 15 minutes taken up by the 10 introduction this morning. 11 I now give the floor to Ambassador Dirdeiry and 12 Professor Crawford. 13 Submissions by AMBASSADOR DIRDEIRY 14 AMBASSADOR DIRDEIRY: Mr President, distinguished members 15 of the Tribunal, it is my honour to appear before you 16 as agent of the Government of Sudan in this unique and 17 vital case. I do so in the company of my co-agents 18 and of distinguished counsel, who need no introduction 19 to this Tribunal. 20 I do so also in the presence of my delegation, whose 21 names have been notified to you. They include ministers 22 from The Government of National Unity, Members of 23 Parliament and notables of the Messiriya, Ngok Dinka, 24 Twic Dinka, Rizeigat, Homr and others. 25 The Government of Sudan also invited representatives</p> <p style="text-align: center;">Page 8</p>

<p>09:47 1 of all political parties across the divide, and 2 a representative section of the media, with a view to 3 observing these important proceedings. 4 The Government of Sudan is most grateful to each and 5 every member of the Tribunal for undertaking this 6 onerous task. It was already onerous because of the 7 importance of the issues for the peoples concerned and 8 for the future of the Sudan. 9 It was also onerous because of the strict timetables 10 laid down in the Arbitration Agreement. It has become 11 ever more onerous because of the vast volume of 12 documentation, often irrelevant, placed before you by 13 the SPLM/A. The dossier was always going to be 14 substantial, but it has been inflated to a considerable 15 extent by our opponents. 16 In our presentations we will try to stick to the 17 essentials concerning, first, excess of mandate; then 18 the task of delimitation, which you will face once we 19 show that the ABC experts exceeded their mandate, as 20 they surely did. 21 Mr President, members of the Tribunal, on 22 9th January 2005 the parties before you concluded the 23 Comprehensive Peace Agreement, an unprecedented document 24 to which both the Government of Sudan and the Sudanese 25 People's Liberation Army/Movement remain committed to</p> <p style="text-align: center;">Page 9</p>	<p>09:52 1 My colleagues will go through the main points in 2 more detail. But allow me to explain the issue before 3 the Tribunal in simple terms. The mandate posited 4 a question of historic fact: what was the area of the 5 nine Ngok Dinka chiefdoms transferred to Kordofan in 6 1905? The Commission never answered this question 7 because the experts acting in lieu of the Commission 8 decided on a completely novel northern boundary. 9 In other words, the Comprehensive Peace Agreement 10 established a body to answer a specific question by 11 means of a specific and detailed framework. What we got 12 was a report which neither answered the question nor 13 complied with the framework. The effect of these 14 deficiencies -- manifest deficiencies -- is that at law 15 no decision was made, no question was answered. The 16 task was simply ignored. 17 For this reason the Government of Sudan requests the 18 Tribunal to declare that the experts exceeded their 19 mandate; and, in accordance with the Arbitration 20 Agreement, to proceed to define -- that is to say 21 delimit -- or mark the boundaries of the area of the 22 nine Ngok Dinka chiefdoms transferred to Kordofan in 23 1905 based on the submissions of the parties. 24 Our opponents have said on numerous occasions that 25 what is at stake here is the upholding of long-standing</p> <p style="text-align: center;">Page 11</p>
<p>09:49 1 this day. Today, Sudan has a unity government, 2 a government formed by people who only a few years ago 3 were at war. It was in the CPA that the parties agreed 4 to lay down their arms and work together. And it was in 5 the CPA that the parties agreed to resolve the dispute 6 over the Abyei Area by means of a boundaries commission. 7 The parties formulated a precise mandate, contained 8 in the Abyei Protocol, which forms part of the CPA, and 9 created the Abyei Boundaries Commission, comprising 10 members from both sides, as well as inter alia experts, 11 representatives of the local communities and the local 12 administration. 13 That commission was charged with answering 14 a specific question that was put to it, namely: to 15 define -- that is to say delimit -- and demarcate the 16 area of the nine Ngok Dinka chiefdoms transferred to 17 Kordofan in 1905; and to do so in a specific way and 18 following a specific procedure. 19 But that question was never answered. Instead the 20 experts split the difference between two parallels, one 21 of their own making, one a claim line put forward by the 22 SPLM/A which it had already rejected. The exercise was 23 devoid of reasoning and bore no relationship whatever to 24 any contemporary evidence of the boundaries of Kordofan 25 in 1905, or the area then occupied by the Ngok.</p> <p style="text-align: center;">Page 10</p>	<p>09:53 1 principles of international and national law, the rule 2 of law itself, the doctrine of pacta sunt servanda, the 3 fundamental concept that contracting parties be held to 4 their agreements. With respect, we entirely agree. 5 Where parties agree to a dispute resolution process, 6 it's not just the litigants who must be held to the 7 agreements; the decision-maker must do so as well. It 8 is a fundamental principle of all legal systems that the 9 decision-maker must answer the question referred to it. 10 The parties' agreement is key because it delineates the 11 scope of consent to arbitrate, and the authority of the 12 decision-maker to act. 13 The ABC experts were not asked to determine the best 14 boundary for the Ngok Dinka in 2005, or to share the 15 resources -- particularly the oil resources -- of 16 southern Kordofan. They were asked a specific 17 historical question concerning the year 1905, and 18 a documented event in that year. They declined to 19 answer the question asked, and did something entirely 20 different, acting totally outside the constituted 21 framework of the commission of which they were a part. 22 Where decision-makers ignore the agreement which 23 defines the task, ignore the framework laid down for 24 them, ignore the mandate by which they, as well as the 25 parties, are bound, then everything falls apart.</p> <p style="text-align: center;">Page 12</p>

<p>09:55 1 It has also been said on numerous occasions that the 2 Government's objection contradicts well-settled 3 principles of finality. And by agreeing that the 4 Commission's decision would be final and binding the 5 Government somehow prospectively and completely waived 6 its right to challenge the experts' report, whatever the 7 outcome. 8 This cannot be right. It would be ridiculous to say 9 that if the experts deemed Khartoum or Muglad to fall 10 within the Abyei Area, the Government could not object 11 but must abide by that decision because it had agreed 12 that any decision would be final and binding. No one 13 could possibly accept such a result. It would be 14 inconceivable and irrefutably in excess of mandate. And 15 yet such a result is analogous to the experts' actual 16 report, a conclusion utterly at odds with the parties' 17 agreements, with all the contemporary evidence, and with 18 the mandate conferred. 19 On crucial issues the experts' report is also devoid 20 of reasoning. The terms of reference state that the 21 experts shall consult the British archives and other 22 relevant sources of the Sudan wherever they may be 23 available, with a view to arriving at a decision that 24 shall be based on research and scientific analysis. 25 I emphasise the words "research and scientific</p> <p style="text-align: center;">Page 13</p>	<p>09:59 1 in compliance with the Rules of Procedure. 2 Among the key failures were the failure of the 3 attempt to arrive at a consensus before proceeding to 4 decide unilaterally. All the arguments reached between 5 the parties with regard to the ABC envisaged you to 6 allow the parties to help collaboratively to determine 7 the area transferred to Kordofan in 1905. 8 Fundamental to this was the fact that any final 9 decision was to be achieved through a consensus. Only 10 if such a consensus was not reached were the experts and 11 the Procedural Rule 14 permitted to make a final and 12 binding decision on their own. No attempt to reach 13 a consensus was ever made. The experts simply took it 14 upon themselves to make a decision, bypassing the 15 clearly-established process. 16 In their memorial the SPLM/A made reference to only 17 one attempt to reach a decision by consensus. This was 18 a one-to-one meeting between one member of each 19 delegation. The SPLM/A claimed that Mr Ahmed Assalih 20 Sallouha, a government member of the ABC, participated 21 in this meeting and presented a proposal to me that 22 I subsequently rejected. 23 Mr President, I believe the witness statement of 24 Mr Sallouha speaks for itself. He makes it very clear 25 that no such meeting ever took place.</p> <p style="text-align: center;">Page 15</p>
<p>09:57 1 analysis". Yet not a shred of documentary evidence 2 supports the line of latitude they drew; not one. 3 Our opponents have advanced other arguments as to 4 why the Government cannot object to this decision, such 5 as my comments at the conclusion of the original 6 hearing, comments which our opponents have thought 7 necessary to quote on no less than nine occasions. It 8 is certainly true that I undertook on behalf of the 9 Government to respect the decision of the Abyei 10 Boundaries Commission in answering the question the 11 parties put to it. But I did not undertake to respect 12 the unilateral decision of the experts acting in lieu of 13 the Commission without any attempt to get a consensus 14 among its members, as they should have. 15 Nor did I or anyone else undertake to respect 16 an experts' report which in no way reflected the agreed 17 mandate, much less responded to it. Moreover, 18 paragraph 5 of the Abyei Appendix makes clear that it is 19 the experts' report, arrived at as prescribed in the ABC 20 Rules of Procedure, that shall be final and binding on 21 the parties. 22 After the report was presented to the presidency it 23 quickly became evident that those rules had been ignored 24 in important respects. No commitment could have been or 25 was made to abide by a report which was not arrived at</p> <p style="text-align: center;">Page 14</p>	<p>10:01 1 Then the SPLM/A suddenly recalled in its 2 counter-memorial two further attempts to reach 3 a decision by consensus. My colleague Ms Malintoppi 4 will go into more detail on the specifics of this, but 5 the fact is that neither of these two alleged attempts 6 actually took place. The lack of any supporting 7 evidence in this respect is certainly telling. 8 In their final report the experts never made any 9 reference to any attempt to seek a final decision 10 through consensus, even though the SPLM/A claims that 11 the experts instigated one of the attempts themselves. 12 This again supports the fact that at no point was 13 a decision by consensus sought; a violation not just of 14 the specific agreement signed by the parties but of the 15 spirit in which the ABC was formed. 16 It has also been said that objections of excess of 17 mandate should be raised at the earliest feasible 18 opportunity, but most of the procedural violations and 19 certainly the final outcome were only discovered upon 20 reading the experts' report. It was from that moment 21 onwards that the Government objected to the report. 22 That the Government objected to the experts' report 23 promptly after presentation to the presidency is 24 evidenced by the SPLM/A's own witnesses. In fact, even 25 the SPLM/A's pleadings accept that in the days</p> <p style="text-align: center;">Page 16</p>

<p>10:03 1 immediately following the publication of the report the 2 Government indicated it could not accept it, and it is 3 undisputed that no one but the experts knew the contents 4 of that report until it was revealed to the presidency 5 on 14th July 2005.</p> <p>6 Mr President, members of the Tribunal, you have been 7 flooded with correspondence, correspondence on a range 8 of procedural issues, in the past weeks. We hope that 9 these issues have been largely resolved, in particular 10 the financial issues, but I will need to mention for the 11 record two of the points covered in recent 12 correspondence. The first of these concerns a threat 13 made against some of our witnesses; the second concerns 14 access to archives and documents.</p> <p>15 The Government was concerned to hear of threats 16 apparently made against the Ngok Dinka witnesses it has 17 presented in this arbitration. These witnesses have 18 given evidence on what they believe to be the truth and 19 we deplore any attempt to have them change their 20 statements.</p> <p>21 Our counterparts opposite appear to have taken these 22 allegations rather lightly. Their reply on 13th March 23 claimed there was no basis for the allegations, but the 24 investigation report they attached to their subsequent 25 letter of 14th April shows that there was indeed a basis</p> <p style="text-align: center;">Page 17</p>	<p>10:07 1 of supporting the Government in this arbitration. Three 2 of these men are present at your request and will be 3 presented to you during the course of these hearings.</p> <p>4 I turn to the second procedural issue, access to 5 Sudanese archives. From the recent correspondence 6 several issues have become clear.</p> <p>7 First, the SPLM/A had and always has had, throughout 8 these proceedings, full access to these archives. When, 9 after the counter-memorial phase, the SPLM/A finally 10 sought access, they obtained it.</p> <p>11 The witness statement of the SPLM/A legal counsel 12 concerning the visit is indicative of this, as well as 13 of the general state of the archives. Due to financial 14 constraints the survey department does not have 15 a professional filing system, and its staff often face 16 challenges in locating historic documents.</p> <p>17 In reality this is an attempt by the SPLM/A to 18 obscure the fact that it neglected researching in 19 a timely manner obvious and important archives for this 20 case. As I said, the plain fact is that the SPLM/A only 21 attempted to access these archives once the 22 counter-memorial had been filed.</p> <p>23 There was explicit agreement that, absent leave of 24 the Tribunal, no new documentary exhibits would be 25 submitted after filing the counter-memorials.</p> <p style="text-align: center;">Page 19</p>
<p>10:05 1 for the allegations.</p> <p>2 The report of the National Security and Intelligence 3 Organ makes the following clear: that Majid Yak Kur was 4 approached by high-ranking Ngok Dinka elders, namely 5 Nyol Pagout, who gave a witness statement in favour of 6 the SPLM/A in this arbitration, and Deng Monyluak; that 7 both elders told him they were unhappy with his 8 statement; that he was encouraged to avoid appearing in 9 The Hague in support of his statement; that a failure to 10 either change his statement or not appear in The Hague 11 would see him shoulder the consequences of his 12 statement.</p> <p>13 Hearing those words, as I would, as a none too 14 subtle threat of harm, the report concluded that the 15 matter does not give rise to the level of security 16 threat leading to the elimination of a minister. That 17 is an assessment of the level of the threat, not 18 allegation of it.</p> <p>19 We accept the report even though it is presented by 20 the SPLM/A. We had access to the investigation as the 21 SPLM/A did. It proves that threats were made to 22 Majid Yak Kur.</p> <p>23 Moreover, the SPLM/A has failed to address the claim 24 that other Government witnesses have been harassed by 25 the SPLM/A, by the SPLM/A elements, as a direct result</p> <p style="text-align: center;">Page 18</p>	<p>10:09 1 Mr President, members of the Tribunal, what has all this 2 late sound and fury produced? Nothing of any substance 3 at all.</p> <p>4 The few additional documents submitted by the SPLM/A 5 change nothing, as Professor Crawford will demonstrate 6 in the delimitation phase of these proceedings. The 7 late documents add nothing to what is already on the 8 record in the form of maps and route reports. All we 9 are left with is a vague allegation of a conspiracy to 10 hide unspecified documents from the Tribunal.</p> <p>11 What, I might ask, are these hidden documents 12 supposed to say; that there were not villages at 13 10 degrees, 35 miles north in 1905? Such documents do 14 not exist. Nor is there any basis for the conspiracy 15 allegations.</p> <p>16 But I understand from your letter of 11th April that 17 the Tribunal wants to ensure that the documentary record 18 is as complete as possible and that there has been no 19 failure to disclose relevant documents. Speaking on 20 behalf of the Government of Sudan, I would welcome any 21 measure the Tribunal may decide to take to ensure itself 22 of this.</p> <p>23 One possibility would be for the acting registrar 24 and one of the cartography experts to come to Khartoum 25 and to inspect the files, maps and a collection of route</p> <p style="text-align: center;">Page 20</p>

<p>10:11 1 reports from which we drew in our counter-memorial. If 2 any new relevant documents are discovered, the parties 3 would be given time to comment on them. The Government 4 of Sudan has nothing to hide and would fully cooperate 5 in the implementation of such an order. 6 Mr President, distinguished members of the Tribunal, 7 in conclusion it must be emphasised that this is not 8 simply an issue of Messiriya versus Ngok. It is far 9 more complex than that. The area now in dispute 10 includes many peoples, not only Ngok from the south and 11 Messiriya from the north, but other peoples of the 12 region. In fact, there are Ngok on both sides of this 13 dispute, and the current Government of National Unity 14 includes senior SPLM/A representatives in its rank. 15 True, the issue of the Abyei Protocol does touch on 16 broader concepts, including the viability of the whole 17 peace process under the CPA, but it was not the function 18 of the ABC experts to address general north/south issues 19 or to prefer one contending people to another. 20 It was precisely because of the complexity that the 21 mandate of the Commission was such a confined one to 22 identify an area historically transferred to Kordofan in 23 1905. Respect for the peace process involved respect 24 for the limited mandate conferred on the ABC experts. 25 Mr President, members of the Tribunal, no one in</p> <p style="text-align: center;">Page 21</p>	<p>10:14 1 of course give a copy to our opponents at the same time. 2 Our presentation on excess of mandate will consist 3 of four further parts. First I will discuss the 4 interpretation of what we've come to call for short "the 5 formula", the reference in the Abyei Protocol, repeated 6 in the Arbitration Agreement in almost the same words, 7 to the area of the nine Ngok Dinka chiefdoms transferred 8 to Kordofan in 1905. 9 Then my colleague Professor Pellet will introduce 10 the notion of excess of mandate and will explain its 11 relation to the formula. Then Ms Loretta Malintoppi 12 will deal with procedural excess of mandate, and finally 13 Professor Pellet will return to discuss substantive 14 excess of mandate. As always, we encourage questions 15 from the Tribunal. 16 Mr President, members of the Tribunal, the Abyei 17 Protocol required the ABC, and I quote: 18 "... to define ... and demarcate the area of the 19 nine Ngok Dinka chiefdoms transferred to Kordofan in 20 1905." 21 The language of that formula was carefully chosen 22 and repeatedly reaffirmed within consequential 23 differences in wording, notably the addition of the 24 phrase in brackets, "i.e. delimit", and the deletion of 25 the reference to demarcation. It also defines your own</p> <p style="text-align: center;">Page 23</p>
<p>10:13 1 1905 could conceivably have thought that the area of the 2 nine Ngok Dinka chiefdoms transferred to Kordofan 3 extended as far north as 10 degrees 22 minutes 30 4 seconds north, and constituted a straight line of 5 latitude across a featureless plain, swinging 90 degrees 6 to the south so as to encompass oilfields. That result 7 is so inconceivable, so lacking in any reasoned or 8 documentary support, that the ABC experts' report simply 9 cannot stand. 10 Mr President, members of the Tribunal, I thank you 11 for your attention. May I ask, Mr President, that you 12 can now call upon Professor Crawford. Thank you. 13 THE CHAIRMAN: Ambassador, I thank you very much and 14 I give the floor to Professor James Crawford. 15 (10.14 am) 16 Submissions by MR CRAWFORD 17 PROFESSOR CRAWFORD: Mr President, members of the 18 Tribunal, it is an honour to appear before you on 19 behalf of the Government of Sudan. You may feel 20 you've had enough of procedural points but I am going 21 to raise a small one. 22 Our respective speeches contain footnote references 23 to the dossier. Unless instructed by you, Mr President, 24 we would propose to hand up those speeches at the end of 25 the day to enable you to find these sources and we will</p> <p style="text-align: center;">Page 22</p>	<p>10:16 1 mandate under Article 2(c) of the Arbitration Agreement 2 if you determine that there has been an excess of 3 mandate on the part of the experts. 4 The focus at present, of course, is on excess of 5 mandate. If the Abyei Protocol required the ABC to 6 define the area transferred to Kordofan in 1905, but 7 what the experts did was to refuse to perform that task 8 and instead to take a view on the land rights of the 9 Ngok independently of any area transferred, then they 10 committed an excess of mandate. This is true, one may 11 say, a fortiori if they did so without paying regard to 12 the crucial date of 1905. 13 The meaning of the formula now is a matter of 14 interpretation for you, both in determining whether 15 there was an excess of mandate and also in fulfilling 16 this task for yourself if there was. 17 In determining that question of interpretation you 18 do not need expert evidence on an ordinary English 19 phrase. Relevant instruments, including the Abyei 20 Protocol and the Arbitration Agreement, are not, it is 21 true, treaties; but you are entitled under the 22 applicable law clause to have regard to general 23 principles of law, and I think the parties accept that 24 the rules of interpretation in the Vienna Convention on 25 the Law of Treaties reflect general principles of law in</p> <p style="text-align: center;">Page 24</p>

<p>10:17 1 the matter of interpretation. 2 So I turn to the interpretation of the formula in 3 accordance with general principles of law. 4 The position of the parties on the meaning of the 5 formula are by now clearly defined, and except on two 6 points they are clearly discrepant. 7 According to the Government of Sudan, the formula 8 refers to the area of the nine Ngok Dinka chieftains 9 under Paramount Chief Kwal Arob, otherwise known as 10 Sultan Rob, and they were transferred to Kordofan in 11 1905. I'm going to call this, for short, the 12 territorial interpretation. 13 According to the SPLM/A, the formula refers to the 14 total area occupied and used by the nine Ngok Dinka 15 chieftains in 1905, whether or not any part of that area 16 was transferred to Kordofan in that year. I'm going to 17 call this the tribal interpretation. 18 Now, I said there are two points of agreement, and 19 that's true. There aren't many point of agreement, but 20 these ones are important. The first point of agreement 21 is that there was historically a transfer to Kordofan in 22 1905. The second is that the transferred area has to be 23 defined in principle as at 1905. 24 The agreement between us on the key date of 1905 is 25 of the first importance. That date was chosen because</p> <p style="text-align: center;">Page 25</p>	<p>10:20 1 passage, in paragraph 231 of our memorial, to which 2 I refer you. But I also refer you to Professor Pellet, 3 who will discuss it in more detail and who is never at 4 a loss for words. 5 The point I want to make now, by reference to this 6 passage, is the following: it was only according to the 7 ABC experts because it was impossible to determine the 8 boundary of Kordofan before 1905 in accordance with 9 scientific survey techniques, for heaven's sake, that 10 other issues became relevant, in particular land use 11 claims. 12 On the other hand, the ABC experts, having reached 13 that problematic conclusion, paid little or no further 14 attention to the date of 1905; to give you one example, 15 the guesthouse at Tebeldiya -- I'm not sure how it's 16 pronounced -- and the alleged Government road repair 17 programmes which were connected to the site of that 18 guesthouse. 19 These were a key element in the ABC's determination 20 of the northern boundary of the area. Tebeldiya is 21 specifically referred to in the second bullet point that 22 constitutes the experts' final and binding decision. 23 There are only five bullet points. But neither the rest 24 house at Tebeldiya nor the road repair programme existed 25 in 1905, or for years afterwards, and the ABC experts do</p> <p style="text-align: center;">Page 27</p>
<p>10:18 1 it was the date of the transfer. It was only by 2 reference to the fact of the transfer at that date that 3 agreement could be reached on the Abyei Protocol, as we 4 showed in our pleadings. If the criterion of a transfer 5 to Kordofan in 1905 had not been put forward and agreed, 6 there would have been no Abyei Protocol. That makes it 7 vital that the criterion, the formula, be respected. 8 Here it is instructive to ask: what was the position 9 taken by the ABC experts in their report? I would refer 10 you in particular to the following key passage, and 11 I quote: 12 "The boundaries of the Ngok Dinka that were 13 transferred to Kordofan for administrative reasons in 14 1905 were, like most boundaries in the Sudan at the 15 time, not precisely delimited and demarcated in 16 accordance with scientific survey techniques and 17 methods. It is therefore incumbent upon the experts to 18 determine the nature of the established land or 19 territorial occupation and/or use rights by all the nine 20 Ngok Dinka chiefdoms, with particular focus on those in 21 the northernmost areas that form the transferred 22 territory." 23 Mr President, members of the Tribunal, I must 24 confess that the reasoning here leaves me at a loss for 25 words, though we tried to analyse that formula, that</p> <p style="text-align: center;">Page 26</p>	<p>10:22 1 not suggest otherwise. They effectively abandoned the 2 critical date of 1905, a central element in the formula. 3 The point to emphasise is this: the position taken 4 by the SPLM/A now on the formula, and in particular on 5 the crucial date of 1905, is not the same as the ABC 6 experts. The ABC experts abandoned 1905. The SPLM/A 7 have returned to it, and rightly. 8 So the SPLM/A attempts to defend the eventual 9 decision of the ABC experts, but on crucially different 10 grounds. They are already on shaky territory. 11 So much for the points of interpretation on which 12 the parties agree. I now turn to the points on which we 13 disagree: the conflict over the territorial as compared 14 with the tribal interpretation. 15 Of course, in accordance with general principles, we 16 must look carefully at the specific language in 17 question. In the Abyei Protocol it is -- and 18 I re-quote: 19 "... to define and demarcate the area of the nine 20 Ngok Dinka chiefdoms transferred to Kordofan in 1905." 21 In the Arbitration Agreement that becomes -- and 22 I quote: 23 "To define (ie delimit) on map the boundaries of the 24 area of the nine Ngok Dinka chiefdoms transferred to 25 Kordofan in 1905."</p> <p style="text-align: center;">Page 28</p>

10:23 1 The first point to note is that many of the words of  
2 the formula imply a territorial approach. "To define"  
3 is equated with "to delimit". The area identified was  
4 first to be demarcated. Now, one might define a tribe,  
5 the Nuer as compared with the Ngok or the Shilluk; but  
6 one hardly delimits a tribe. And I've never heard of  
7 a tribe being demarcated. How would you demarcate so  
8 protean and dynamic an entity as a tribe? Would you  
9 chain the chiefs to the demarcation pillars? And what  
10 if someone unchained them, like Prometheus? What would  
11 happen then?

12 Then there is the word "area". In Article 2(c) of  
13 the Arbitration Agreement this becomes "the boundaries  
14 of the area". But there's no indication that the task  
15 of the Tribunal under Article 2(c) is any different from  
16 that of the ABC under the Abyei Protocol. In both these  
17 respects, and in particular in the addition of the word  
18 "delimit", Article 2(c) of the Arbitration Agreement is  
19 an authoritative interpretation of the original formula.  
20 So the point for the ABC was to delimit and demarcate  
21 the boundaries of an area. All four terms support the  
22 territorial interpretation.

23 Then there is the phrase "transferred to Kordofan".  
24 Kordofan was a province. It had been a province of the  
25 Sudan since the 1820s. It was a territorial

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10:27 1 talk about the transfer to Kordofan of an area 88% of  
2 which is already in Kordofan.  
3 And even if the southern boundary of Kordofan before  
4 1905 was the Ragaba ez Zarga -- which no one at the time  
5 suggested, for the good reason that they didn't know it  
6 was there -- then still 68% of the area was still in  
7 Kordofan.

8 The SPLM/A implies that if the Government's  
9 territorial interpretation is correct, the formula  
10 should have read: "to define and demarcate the area  
11 transferred to Kordofan in 1905 of the nine Ngok Dinka  
12 chiefdoms". There are several answers to this.

13 First, no one would actually say that. It's  
14 pedantic and clumsy. In English there's no rule that  
15 adjectival phrases such as "transferred to Kordofan"  
16 have to follow immediately the noun they qualify. It  
17 depends on euphony, on the sound.

18 Secondly, the adjectival phrase "transferred to  
19 Kordofan" can and should be read as qualifying the  
20 preceding phrase as a whole, "the area of the nine  
21 Ngok Dinka chiefdoms." That phrase needs to be read as  
22 a whole.

23 Thirdly, a redesigned formula referring to "the area  
24 transferred to Kordofan of ..." et cetera, would not  
25 have served in 1905. It would have left it open to

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10:25 1 administrative unit bordering the tributary state of  
2 Darfur to the west, and the province of Bahr el Ghazal  
3 to the south. There was a tri-point on the Bahr el Arab  
4 between Darfur, Bahr el Ghazal and Kordofan.  
5 Neither Kordofan nor Bahr el Ghazal were tribal  
6 units; both contained many different tribes. The phrase  
7 "transferred to Kordofan" prima facie indicates  
8 a territorial transfer, a transfer from one  
9 administrative unit or province to another. But here  
10 the parties disagree. According to the SPLM/A the  
11 phrase "transferred to Kordofan" qualifies the phrase  
12 "the nine Ngok Dinka chiefdoms". The formula should be  
13 interpreted as if it read: "all the area of the nine  
14 Ngok Dinka chiefdoms which were transferred to Kordofan  
15 in 1905, including areas which were already in Kordofan  
16 before 1905."

17 You can see the effect of this graphically, I hope,  
18 by reference to figure 11 at page 121 of Sudan's  
19 memorial, which is now on the screen. According to the  
20 SPLM/A the area of the nine Ngok Dinka chiefdoms in 1905  
21 extended right up to 10 degrees 35 minutes north. If  
22 the southern boundary of Kordofan before 1905 was the  
23 Bahr el Arab, as all contemporary authorities said it  
24 was, the effect of the interpretation is that 88% of the  
25 transferred area was already in Kordofan. It's odd to

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10:29 1 argument that some part of the chiefdoms were not  
2 transferred to Kordofan. That's why the SPLM/A has to  
3 add still further words to the formula so that it would  
4 read, "all the area of the nine Ngok Dinka chiefdoms  
5 which were transferred." It's the combination of the  
6 word "all" and the verbal phrase "which were" that is  
7 necessary taken together.

8 In effect, the SPLM/A proposes that, given that some  
9 fraction of the nine Ngok Dinka chiefdoms were  
10 transferred to Kordofan, the ABC was tasked to determine  
11 the total area of all those chiefdoms, including the  
12 areas already in Kordofan. That interpretation calls  
13 for three comments.

14 First, it involves not an interpretation, but  
15 a complete rewriting of the formula. Words have to be  
16 added, other words have to be ignored.

17 Second, it's a new rewriting done for the purposes  
18 of these proceedings. It does not reflect what the  
19 SPLM/A said before the ABC. For example, in its  
20 preliminary presentation on the boundaries of the Abyei  
21 Area of 10th April 2005 the SPLM/A said, and I quote:  
22 "The Protocol [that's the Abyei Protocol] ...  
23 defines Abyei Area as an area of the nine Ngok Dinka  
24 chiefdoms that was transferred ['that was transferred']  
25 to Kordofan in 1905."

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<p>10:30 1 Third, not only does the SPLM/A now add words which 2 it did not add before the ABC, but the interpretation it 3 now prefers has the fatal flaw that it gives no meaning 4 at all to the phrase "transferred to Kordofan". It 5 would make no difference whatever for the SPLM/A's 6 position if the formula had simply read "the area of the 7 nine Ngok Dinka chiefdoms in 1905." Indeed, on their 8 view that is effectively how it should be read.</p> <p>9 But this conflicts with a basic principle of 10 interpretation: agreed words should not be interpreted 11 to lack meaning or as being surplus to requirements, 12 "not wanted on voyage", so to speak.</p> <p>13 To summarise, on its face the formula serves to 14 answer clearly three questions: What happened? An area 15 was transferred to Kordofan. When did this happen? In 16 1905. What area was it? It was the area of the nine 17 Ngok Dinka chiefdoms. All three elements form the 18 substantive mandate; that was what the ABC had to do.</p> <p>19 These three answers not only make grammatical sense, 20 and give effect to every word and phrase of the formula; 21 they also make historical sense. For the criterion of 22 delimitation here is not a purely geographic one, such 23 as a parallel of latitude, or a watershed line; nor is 24 it a conceptual or legal criterion, such as an area 25 reflecting the asserted traditional rights of the</p> <p style="text-align: center;">Page 33</p>	<p>10:34 1 Four, the reason for the transfer was to bring the 2 relevant people within southern Kordofan so as to 3 control raiding by the Arabs of southern Kordofan across 4 the Bahr el Arab. In fact, one of the original 5 complaints of raiding related to a raid on 6 Sheikh Rihan's people, the Twic, and it's never been 7 suggested that they lived north of the Bahr el Arab.</p> <p>8 These facts were patent from the text of the 9 transfer documents. You just had to look at them. 10 They're publicly available. As paragraph 1547 of the 11 SPLM/A reply memorial accepts, some of the transfer 12 documents were actually quoted during the negotiations 13 of the Abyei Protocol. They show what the drafters of 14 the Abyei Protocol understood, and could readily have 15 understood, about the historical transfer. Again they 16 reinforce the territorial interpretation.</p> <p>17 I turn to the travaux of the Abyei Protocol, which 18 can be referred to in order to confirm the meaning 19 arrived at on an analysis of the text taken in its 20 context. The negotiations leading to the Abyei Protocol 21 and the agreement on the formula are traced in chapter 2 22 of Sudan's memorial, and I will not repeat them. I will 23 simply make the following points.</p> <p>24 1. This was a crunch issue. It had the potential 25 to derail the CPA as a whole.</p> <p style="text-align: center;">Page 35</p>
<p>10:32 1 Ngok Dinka at some indeterminate date; it is historical. 2 It relates to a defined historical event, an actual 3 transfer of an area from one province of Sudan to 4 another.</p> <p>5 It's therefore legitimate to refer to the documents 6 evidencing that event. The drafters of the formula were 7 not rewriting history when they took the transfer as the 8 criterion of delimitation; they were recalling history.</p> <p>9 I will not go through the transfer documents in 10 detail; this will be done by Mr Bundy in the 11 delimitation phase. It's sufficient here to note four 12 points about the transfer documents.</p> <p>13 First, there is no reference in the transfer 14 documents to the nine chiefdoms, but only to Sultan Rob. 15 There's also reference to Sheikh Rihan of the Twic.</p> <p>16 Second, the references in the transfer documents are 17 more territorial than tribal; they refer to the country 18 or territory of these two leaders.</p> <p>19 Third, these territories are stated to be on or to 20 the south of the Bahr el Arab. And by "the 21 Bahr el Arab" is meant the Bahr el Arab, of all wonders, 22 the Kiir. In 1905 British officers knew where the two 23 leaders lived, and it was in fact south of the Kiir; it 24 was not somewhere north, near an anonymous and 25 practically unknown Ragaba.</p> <p style="text-align: center;">Page 34</p>	<p>10:35 1 2. The Government insisted that Kordofan was part 2 of the north, and that the 1956 boundaries of the 3 northern provinces, including Kordofan, were sacrosanct.</p> <p>4 3. The SPLM/A sought to make substantial inroads 5 into the territory of southern Kordofan by reference to 6 what it said was the farthest northern most extent of 7 Ngok settlement in 1966.</p> <p>8 4. The general principle of the uti possidetis of 9 1956 is repeatedly recognised in the CPA, including the 10 Abyei Protocol. The provisions relating to the Abyei 11 Area are an exception to it.</p> <p>12 5. The basis for the exception was the historic 13 fact that certain areas not part of Kordofan were added 14 to it in 1905. Reference was specifically made to the 15 Sudan intelligence report of March 1905, one of the 16 transfer documents. In effect, what had previously been 17 in the southern province of Bahr el Ghazal could be 18 returned to it, if not by pure administrative act then 19 after a plebiscite of its inhabitants. It was on this 20 ground and this ground alone that the deadlock was 21 broken and agreement reached.</p> <p>22 This legislative history supports the territorial 23 interpretation of the formula in at least three ways.</p> <p>24 1. The Abyei Protocol constituted an exception to 25 the territorial principle of the uti possidetis of 1956,</p> <p style="text-align: center;">Page 36</p>

<p>10:37 1 repeatedly affirmed in the CPA. 2 2. The territorial integrity of Kordofan was upheld 3 against a claim to an extensive tribal boundary of 1966. 4 3. But an exception was made for an area 5 administratively added to Kordofan in 1905. That area, 6 once identified, could in principle be returned to 7 Bahr el Ghazal if the inhabitants preferred that course 8 of action. 9 To conclude, the Tribunal should find on this basis 10 that the language of the Abyei Protocol refers to 11 an area not part of Kordofan in 1905, but which was 12 administratively transferred from Bahr el Ghazal to 13 Kordofan in that year. The reason for the transfer -- 14 a reason understood by the drafters of the Abyei 15 Protocol -- was to bring within southern Kordofan the 16 people of Sultan Rob and Sheikh Rihan, the Ngok and the 17 Twic, who were being raided by the Homr across the 18 Bahr el Arab. These leaders were known to live south of 19 the Bahr el Arab. 20 The ABC had one function, and one function only: it 21 was to define -- ie delimit -- and demarcate the area 22 transferred in 1905. 23 I turn to the arguments which are made by the SPLM/A 24 against what we say is that obvious conclusion. In 25 response to that conclusion the SPLM/A now presents five</p> <p style="text-align: center;">Page 37</p>	<p>10:40 1 The SPLM/A sought to maximise the transferred area 2 by reference to the post-independence date of 1966. The 3 Government was prepared to address issues of development 4 for the region, but insisted on the uti possidetis line 5 of 1956. A compromise between these completely 6 conflicting positions was only possible by reference to 7 an area administratively transferred to Kordofan in 1905 8 which was thus not part of Kordofan at the beginning of 9 the Condominium period. 10 As so often, there were competing peoples and 11 competing interests involved. To invoke 12 self-determination now, a principle irrelevant at the 13 time of the transfer, is in effect to re-open the 14 negotiated settlement of the Abyei Protocol for the 15 benefit of the one of the parties and to the detriment 16 of the other. That's not a legitimate exercise of 17 interpretation. 18 The second SPLM/A argument for the tribal 19 interpretation is what I will call the Abyei argument. 20 This is the argument that something called Abyei Area 21 must include the town of Abyei itself. To quote the 22 SPLM/A rejoinder: 23 "... the Government's position leads to the utterly 24 untenable ..." 25 When I raise my voice this is merely for the sake of</p> <p style="text-align: center;">Page 39</p>
<p>10:39 1 main arguments, which I will take in turn. 2 The first is a reference to the object and purpose 3 of the formula. It is said -- and I quote: 4 "The basic purpose of the parties' agreement on the 5 definition of the Abyei Area was to specify the region 6 whose residents would be entitled to participate in the 7 Abyei referendum provided for by Article 8 of the Abyei 8 Protocol." 9 Therefore, it is said in line with the principle of 10 self-determination the Abyei Area should be construed to 11 be an area belonging to the Ngok Dinka, not an area 12 which is merely subject to an administrative 13 inter-provincial transfer. 14 Not content, as earlier, just to rewrite the 15 formula, this argument seeks to go behind it. This is 16 done by reference to what the SPLM/A claims was their 17 underlying subjective purpose when signing the Abyei 18 Protocol, but this is not an accepted method of 19 interpretation and for good reason. 20 Of course, agreements of this kind, whether they are 21 international or internal, but nonetheless political 22 agreements of this character, are always based on 23 compromise, and one party's underlying purpose is often 24 at odds with the other's. That was certainly the case 25 here, as we have shown.</p> <p style="text-align: center;">Page 38</p>	<p>10:42 1 emphasis: 2 "... result that the Abyei Area would not include 3 either the seat of the Ngok Dinka Paramount Chief in 4 1905 -- or Abyei town -- the location of the Ngok 5 Dinka's cultural, political and commercial heart for 6 more than a century. That is absurd." 7 The SPLM/A pleadings proclaim repeatedly Abyei 8 Town's centrality and its ancestral pre-eminence for the 9 Ngok. This centrality is said to be undisputed. Any 10 mention of Abyei Town falling outside Abyei Area is 11 denigrated as inconceivable, bizarre, absurd. This is 12 despite the fact that the Abyei Appendix expressly 13 contemplates that Abyei Town might fall outside the 14 Abyei Area. 15 But the key point here is that the formula expressly 16 refers to the date of transfer 1905, and I'm afraid to 17 say that, despite the myths, there is no documentary 18 evidence that Abyei existed as a settlement in 1905. 19 The earliest date that we have is Whittingham's "Abyia" 20 in 1910, and this is to a different place than where 21 Abyei Town now is. The earliest map that shows Abyei in 22 its present location dates from 1916, where it is added 23 in red ink, evidently as a recent discovery. 24 Dispute the absolute certainty in which the SPLM/A's 25 assertion is made, it's noteworthy that as the pleadings</p> <p style="text-align: center;">Page 40</p>

<p>10:43 1 progressed the status of Abyei town tended to diminish 2 a bit. For example, the SPLM/A memorial stated that, 3 and I quote: 4 "... the area in the immediate proximity of current 5 Abyei Town has been the centre of Ngok Dinka political, 6 commercial and cultural life for nearly two centuries." 7 The memorial also states that it is "undisputed" 8 that Abyei Town has been the centre of the Ngok for more 9 than a century. This undisputed status continues in the 10 reply memorial. Interestingly, however, the reference 11 to two centuries is quietly dropped. Now it becomes: 12 "... the undisputed centre of Ngok Dinka political 13 and cultural life for more than a century." 14 By the time of the rejoinder the formula has 15 undergone yet more softening: 16 "... the general region around what is present-day 17 Abyei town has, for more than a century, been the centre 18 of Ngok Dinka political, cultural and commercial life." 19 This final adaption is no doubt a reference to 20 Government's pleadings, which show the existence of 21 Burakol and Abyia, both of which were closer to the 22 Bahr el Arab than modern-day Abyei, as well as being 23 situated between the Bahr el Arab and the Ragaba Umm 24 Biero. 25 Moreover the Condominium officials who recorded</p> <p style="text-align: center;">Page 41</p>	<p>10:46 1 life, in 1905 cannot possibly provide the criterion for 2 the determination of an area transferred in that year. 3 The third SPLM/A argument is that prior to 1905 the 4 Ngok were not subject to any administration at all on 5 the part of the Condominium officials. The implication 6 is that an administrative transfer from one ineffective 7 set of provincial authorities to another is 8 a meaningless concept which should be abandoned. 9 For example, the SPLM/A rejoinder says, and I quote: 10 "The Government attempts to equate what it said were 11 frequent visits to the Abyei Area with governmental 12 administration. It is abundantly clear from the 13 evidence that there was no administration of any kind." 14 Now, there's a short answer to that: meaningless or 15 not, the fact of a transfer to the province of Kordofan 16 was the criterion chosen by the parties in the 17 Abyei Protocol to define the Abyei Area, and it's not 18 for the SPLM/A now to say that that criterion was 19 meaningless. 20 Moreover, it was not meaningless. The record 21 shows -- Mr Bundy will take you to it in the 22 delimitation phase -- that both the governor of 23 Bahr el Ghazal and the governor of Kordofan recorded the 24 transfer in the same terms, as did Governor-General 25 Wingate. Whatever the immediate practical consequences</p> <p style="text-align: center;">Page 43</p>
<p>10:45 1 these towns or villages more properly made no reference 2 to Abyei Town. For example, in 1910 Whittingham walked 3 straight past, as far as we can see from his route 4 report, the present location of the centre of Ngok Dinka 5 political, commercial and cultural life for two 6 centuries without noticing it. 7 This complete absence of a documentary record is 8 mirrored in a sort of converse way by the frenetic 9 manner in which the SPLM/A's pleadings insist upon 10 Abyei's existence at the relevant time whilst 11 simultaneously modifying their position as to the 12 character of the existence. In fact, the SPLM/A can 13 find no reliable source to fix Abyei Town's existence 14 from the relevant date. 15 To summarise, on the basis of the written pleadings 16 and the documentary material it is now clear that the 17 town of Abyei -- which came to be significant, 18 undoubtedly, in cultural, political and commercial life 19 at a later date -- did not exist at the date of the 20 transfer. 21 Since the SPLM/A quite properly accepts that the 22 date 1905 is the relevant date for the purposes of the 23 application of the Abyei Protocol, that's the end of the 24 matter. A location that did not exist as a named 25 locality, still less as the centre of Ngok cultural</p> <p style="text-align: center;">Page 42</p>	<p>10:48 1 may or may not have been, a transfer was officially 2 noticed and recorded. 3 It may also be that apart from the recording the 4 transfer, the governor of Bahr el Ghazal paid little 5 attention to the Ngok. Bahr el Ghazal was a large 6 province with more than the usual difficulties of 7 communication. It only reverted to civilian control in 8 1902, and it had a very small staff. But that does not 9 mean that the Ngok Dinka living south of the 10 Bahr el Arab were not in the province of Bahr el Ghazal, 11 just as the Twic were, subject to the same transfer. 12 The whole of the Sudan, including both provinces, 13 was under Condominium administration. The 14 administration was carried out in a formal and 15 an informal but, looking at the documents, relatively 16 expeditious way. There was no reason why Kordofan 17 officials could not visit and enquire into conditions in 18 Bahr el Ghazal, and we know they did. 19 In fact, Sultan Rob was repeatedly visited from 20 Kordofan. He was even give a Kordofan robe of honour, 21 second class, in 1903, prior to the transfer, which he 22 wore proudly thereafter. 23 Moreover, it will be apparent to the Tribunal, 24 taking account as one must of local circumstances, that 25 there is plenty of evidence of Condominium</p> <p style="text-align: center;">Page 44</p>

<p>10:49 1 administration by 1905. Condominium officials visited 2 Sultan Rob regularly: Mahon in 1901, Wilkinson in 1902, 3 Mahon again in 1903, Percival in 1904 to 1905. There 4 are also accounts from Huntley-Walsh and Bayldon, who 5 were involved in extending river communications along 6 the Bahr el Arab, as well as throughout the Sudan. 7 The argument that there was no administration of any 8 kind, even if it was relevant, is just not tenable. 9 Fourthly, it is argued that because there was Ngok 10 north of the Bahr el Arab, this proves that at least the 11 area between the Bahr el Arab and the Ragaba ez Zarga 12 was Ngok territory by 1905 and must have been the 13 subject of the transfer. This fact is said to support 14 the tribal interpretation. 15 According to the SPLM/A rejoinder, and I quote 16 again: 17 "... the Government in its Reply Memorial and 18 accompanying evidence now repeatedly concedes that, 19 prior to 1905, the Ngok Dinka were located north of the 20 Kiir/Bahr el Arab, extending up at least to the 21 Ngol/Ragaba ez Zarga, with the Ngok Dinka Paramount 22 Chief (Arop Biong, referred to as Sultan Rob) living and 23 holding court in Burakol to the north of the 24 Kiir/Bahr el Arab in 1905." 25 I pause to note, I hope dispassionately, the</p> <p style="text-align: center;">Page 45</p>	<p>10:53 1 Finally, my fifth point. The SPLM/A insists that as 2 the experts had jurisdiction to interpret their mandate, 3 then the mere fact that they got their mandate wrong 4 doesn't mean that they committed an excess. 5 This, of course, is an argument in the alternative. 6 It accepts -- and of course it accepts only for the sake 7 of argument, we realise that -- that the tribal 8 interpretation may be wrong and pleads that it is 9 nonetheless an excess of mandate. 10 This is a point that will be dealt with by 11 Professor Pellet in a moment -- I'm sorry, I should 12 rephrase this. This is a point that will be dealt with 13 in a moment by Professor Pellet -- but the short point 14 is that as a minimum the decision-maker must apply the 15 mandate. It cannot simply place the mandate to one side 16 and come up with a new result-driven expression of what 17 it feels it would like to achieve. Yet that's precisely 18 what occurred here. 19 Once the experts felt that they need not apply their 20 mandate, for want of a boundary precisely delimited and 21 demarcated in accordance with scientific survey 22 techniques and methods in 1905, they proceeded to 23 delimit on a completely different basis, without 24 reference to the area transferred and without reference 25 to the date of transfer. In doing so they flouted the</p> <p style="text-align: center;">Page 47</p>
<p>10:51 1 continued tendency of the SPLM/A's counsel to seek to 2 foist on us as concessions positions we have never held 3 and which we say we do not hold. 4 We have never said there were Ngok settlements on, 5 still less north of, the Ragaba ez Zarga. There is no 6 documentary evidence of such settlements in 1905 or 7 subsequent years, no contemporary evidence whatever. 8 The overwhelming evidence of use of the area on and to 9 the north of the Ragaba ez Zarga is that of Arab Homr 10 use, a point I will demonstrate in some detail in the 11 delimitation round. 12 On the other hand, we have always accepted that 13 there were Ngok settlements on the Bahr el Arab prior to 14 1905. Indeed, there is documentary evidence -- produced 15 by us, I might say, relevant in light of the brouhaha 16 about archives -- of limited Ngok presence just north of 17 the Bahr el Arab at the time of the transfer. I will 18 explore this and its limits in the delimitation round on 19 Tuesday. 20 But to the limited extent that there were Ngok to 21 the north of the Bahr el Arab in 1905, they were already 22 in Kordofan. The transfer documents speak of Sultan Rob 23 as being on or alternatively south of the river, and 24 that is entirely consistent with the territorial 25 interpretation.</p> <p style="text-align: center;">Page 46</p>	<p>10:54 1 mandate, as Professor Pellet will now explain. 2 Mr President, members of the Tribunal, for these 3 reasons the formula of the Abyei Protocol should have 4 been interpreted as referring to the territory of 5 Sultan Rob's people which was transferred from 6 Bahr el Ghazal to Kordofan in 1905, and not as 7 encompassing the alleged tribal reach of the nine or ten 8 Ngok Dinka chiefdoms irrespective of the fact or extent 9 of the inter-provincial transfer. The function of the 10 ABC experts was declaratory: to determine as a matter of 11 fact the territory so transferred. 12 Mr President, members of the Tribunal, thank you for 13 your attention. Mr President, it's a little before 14 11.00; it's a matter for you whether to call 15 Professor Pellet now or to have the coffee break by way 16 of internal fortitude in preparation for him. 17 THE CHAIRMAN: I thank you very much for your 18 presentation, Professor Crawford. The hearing is 19 suspended until 11.15. 20 MR BORN: Just as a general comment with the president's 21 leave, insofar as our colleagues across the 22 table would require a little bit more or a little bit 23 less time than that allocated at any particular 24 segment, we have no objection. 25 Obviously it's difficult for counsel to plan exactly</p> <p style="text-align: center;">Page 48</p>

<p>10:56 1 how long it's going to take them to do things and we are 2 completely relaxed, if I can put it that way, subject of 3 course to the Tribunal's control, about going over or 4 going under a bit. 5 THE CHAIRMAN: I thank you very much. The hearing is 6 adjourned. 7 (10.56 am) 8 (A short break) 9 (11.27 am) 10 THE CHAIRMAN: Professor Pellet, you have the floor. 11 Submissions by PROFESSOR PELLET 12 PROFESSOR PELLET: Monsieur President, members of the 13 Tribunal, as decided by the Tribunal, the Government 14 of Sudan will today plead its case in respect to the 15 excess of mandate committed by the ABC experts. 16 I will first recall what this rather unusual 17 expression "excess of mandate" covers, and I will show 18 that the SPLM/A errs in its interpretation of the role 19 of the Tribunal in this respect. Ms Loretta Malintoppi 20 will then demonstrate that the experts also have 21 violated fundamental procedural rules which were part of 22 their mandate. 23 Then, with your permission, Mr President, I will 24 take the floor again in order to show first that the ABC 25 experts have based themselves on manifestly inadmissible</p> <p style="text-align: center;">Page 49</p>	<p>11:30 1 then concentrate on the arguments made by our opponents 2 in their rejoinder, but I wish to make clear that we 3 maintain in all full all of our previous arguments. 4 This is true for the excess of mandate part of our case 5 as well as for the delimitation part. 6 Third, I cannot help thinking and saying that there 7 has been an unacceptable profusion of paper by the other 8 party. Nine full boxes -- boxes, not bundles -- of 9 annexes for the memorial was unreasonable, and globally 10 with 16 boxes and 76 files the exaggeration is patent. 11 Just compare our respective documentation: our small 12 library on the left, their enormous library on the 13 right. 14 What is true for the annexes is also true for the 15 pleadings themselves. Quite interestingly, in its 16 rejoinder the SPLM/A criticises us for having devoted 17 "less than 32 pages" of our reply to the excess of 18 mandate. With due respect, I would rather criticise 19 them for the extremely repetitive more than 200 pages on 20 that theme in their own reply. 21 If, as they claim, "an excess of mandate will be 22 found only in circumstances involving manifest, flagrant 23 or glaring excesses by the decision-maker", it then 24 should go without saying that you do not need pages and 25 pages or hours and hours of pleadings to prove that such</p> <p style="text-align: center;">Page 51</p>
<p>11:28 1 justifications and second, but probably only this 2 afternoon, at least in part, I will show that the ABC 3 experts have committed an excess of mandate both in 4 deciding ultra petita on certain points and infra petita 5 on others. 6 But before starting this presentation, please allow 7 me to make three general remarks. 8 First, in its rejoinder the SPLM/A uses 17 times the 9 pleasant word "absurd" or "absurdity" to characterise 10 our arguments, eight time in the excess of mandate 11 chapter only; "frivolous" appears 12 times, "parochial" 12 six times, and I leave aside "spurious", "egregious" or, 13 in alphabetical order, "abstruse", "archaic", 14 "artificial", "disguised", "distorted", "hopeless", 15 "misconceived", "narrow-minded", "nonsensical", 16 "purported" or "untenable". 17 Mr President, insult and abuse are not very 18 dignified ways of arguing in serious litigation. I will 19 not follow our opponents on this ground, as eccentric or 20 frivolous or untenable their case may be on certain 21 points. 22 Second remark: the parties have already exchanged 23 three sets of written pleadings, at frantic rhythm, and 24 I would think that there is no need to come back on all 25 and every point on which the parties disagree. I will</p> <p style="text-align: center;">Page 50</p>	<p>11:33 1 an excess of mandate does exist or to prove that it does 2 not exist. 3 The only reason why in the present case the 4 demonstration of the excess of mandate must take some 5 time is that it is averred not only in one respect but 6 in several, this being said, all being rather obvious. 7 With these three remarks in mind I will now turn to 8 some general observations concerning successively the 9 waiver argument, the finality and presumptive validity 10 argument and the very definition of an excess of 11 mandate, including the issue of motivation. 12 The waiver argument first. Mr President, let me 13 please begin with the last argument of the SPLM/A in 14 respect to the excess of mandate, the waiver argument. 15 It maintains that: 16 "The Government excluded or waived any rights to 17 claim that the ABC experts exceeded their mandate." 18 Although the SPLM/A complains that, "the 19 Government's reply memorial responds to these arguments 20 only in passing", this can be dealt with briefly, not at 21 all because we "hope that the arguments in question will 22 not be considered in any detail", but simply because we 23 think that they do not deserve more. 24 The short and sufficient answer is that this 25 argument completely ignores the fundamental fact that</p> <p style="text-align: center;">Page 52</p>

<p>11:35 1 the Government of Sudan and the Sudan People's 2 Liberation Movement have signed the Arbitration 3 Agreement of 7th July 2008. 4 If the parties had not agreed to the present 5 procedure by that agreement -- the agreement is in tab 1 6 of the common bundle -- if this had not happened, it 7 would have been true that there would have been no forum 8 in which the Government could have complained of the 9 excesses of mandate committed by the ABC experts, and 10 this would have left open the issue of the binding 11 nature of the report vitiated by such excesses. 12 But precisely the Arbitration Agreement has been 13 concluded and the SPLM/A does not dispute that it is 14 a valid agreement, binding upon the parties. In 15 accordance with Article 2(a) of that agreement 16 describing the scope of the dispute, that you have 17 already read this morning, Mr President, but as you have 18 rightly stressed it is fundamentally important, and 19 I will read again paragraph (a): 20 "The issues that shall be determined by the 21 [present] Tribunal are the following: 22 "a. Whether or not the ABC experts had, on the 23 basis of the agreement of the Parties as per the CPA, 24 exceeded their mandate, which is to 'to define (i.e. 25 delimit) and demarcate the area of the nine Ngok Dinka</p> <p style="text-align: center;">Page 53</p>	<p>11:39 1 within the framework of the ABC, the Government of Sudan 2 had expressed its commitment to respect the ABC's final 3 decision. This was in conformity with the provisions of 4 Article 5 of the Abyei Annex, which is at tab 4 of the 5 common bundle. But of course this was under the obvious 6 condition that the ABC, and in particular the experts, 7 acted in conformity with their mandate. 8 As for the question of an implicit waiver resulting 9 from the Government's silence at the time when the 10 excesses of mandate occurred, it cannot be denied that 11 the Government protested immediately when the excesses 12 of mandate were made apparent to it; that is, 13 immediately after the presentation of the report to the 14 presidency. 15 As vividly described by an SPLM/A witness, 16 Mr James Lual Deng, the negative reactions of both the 17 Sudanese president and the Government's agent before the 18 ABC were immediate. And very shortly after the first 19 study of the report it was apparent that the Government 20 considered that the experts had exceeded their mandate. 21 In accordance with Article 2 of the Arbitration 22 Agreement, which settles the mandate of this Tribunal -- 23 your own mandate, Mr President and members of the 24 Tribunal -- it belongs to you to decide whether or not 25 the ABC experts have exceeded their mandate; and this</p> <p style="text-align: center;">Page 55</p>
<p>11:37 1 chiefdoms transferred to Kordofan in 1905' as stated in 2 the Abyei Protocol, and reiterated in the Abyei Appendix 3 and the ABC Terms of Reference and Rules of Procedure." 4 And it must be noted that this was decided in full 5 conscience that, as expressly indicated in the preamble 6 of the compromis, and I quote the preamble: 7 "It was ... agreed in the Abyei Appendix that 'the 8 ABC shall present its final report to the presidency 9 before the end of the pre-interim period. The report of 10 the experts, arrived at as prescribed in the ABC Rules 11 of Procedure, shall be final and binding on the 12 parties'." 13 This is in the preamble of the Arbitration 14 Agreement. There is no room here for a specious 15 discussion on waiver of rights or estoppel in general. 16 Suffice it to note that pacta sunt servanda, and that 17 our pactum provides for a review by this Tribunal of the 18 ABC experts' report in case of an excess of mandate. In 19 which case, as expressly provided for in Article 2(c) of 20 the Arbitration Agreement, this Tribunal will have to: 21 "... proceed to define (i.e. delimit) on map the 22 boundaries of the area of the nine Ngok Dinka chiefdoms 23 transferred to Kordofan in 1905, based on the 24 submissions of the parties." 25 It is certainly true that during the proceedings</p> <p style="text-align: center;">Page 54</p>	<p>11:41 1 must be done on the basis of the respective submissions 2 of the parties. The Government of Sudan is by no means 3 more estopped to claim that the ABC experts committed 4 an excess, or several excesses of mandate than the 5 SPLM/A can be said to have waived its right to oppose 6 this claim. Both, as well as the Tribunal, must apply 7 the 2008 agreement; nothing more, nothing less. 8 Mr President, I now come to the finality and 9 presumptive validity argument. The SPLM/A rejoinder 10 devotes a lengthy passage -- not less than 27 pages 11 single spaced, and more than 100 paragraphs -- to 12 denouncing what it calls the Government the Government's 13 ignorance "of the presumptive finality of adjudicative 14 decisions", and the Government's disregard for "the 15 specialised character of the ABC proceedings". I must 16 say that I cannot help seeing this effort either as 17 an admission of weakness from the SPLM/A or as pure 18 padding. 19 Be that as it may, this lengthy argument certainly 20 does not call for an equally lengthy rebuttal, if only 21 because the answer has already been pre-figured by what 22 I have just said. Yes indeed, the parties had in 23 principle accepted that "the report of the experts 24 arrived at as prescribed in the ABC Rules of Procedure 25 [would be] final and binding." Yes indeed, such</p> <p style="text-align: center;">Page 56</p>

<p>11:44 1 an adjudicative decision is presumed to be valid. 2 But it was under the evident condition that the 3 experts would comply with their mandate as agreed by the 4 parties. And these same parties have agreed to submit 5 the question of the validity of the experts' findings to 6 this Tribunal on the basis of an excess of mandate 7 alleged by the Government of Sudan and denied by the 8 SPLM/A. 9 Therefore, the only real issue definitely is whether 10 or not the ABC experts' decision is vitiated by 11 an excess of mandate; a notion on which the parties 12 disagree and, and I will come back to this in a moment. 13 All the rest is smokescreen without much relevance. 14 I then can be brief in taking successively each heading 15 of this lengthy part of the rejoinder. 16 1. "The Government acknowledges that the ABC 17 proceedings were adjudicative in nature". This is true. 18 Apparently one of the rare points of agreement between 19 the parties seems to be that "the ABC was 20 an adjudicative body", and that "the ABC proceedings 21 were adjudicative in nature". Therefore, while the 22 Government certainly does not "ignore and unacceptably 23 denigrate the specialised character of the ABC and the 24 ABC proceedings" -- the second point made by the 25 SPLM/A -- such a special character must not be</p> <p style="text-align: center;">Page 57</p>	<p>11:48 1 as well as to Article 33 of the PCA Optional Rules for 2 arbitrating disputes between two parties of which one 3 only is a state. Those provisions clearly demand that 4 this dispute must be settled on the basis of respect for 5 law, which is one of the founding rules of the Permanent 6 Court of Arbitration. 7 The situation can probably be described as follows: 8 the ABC was composed in an unusual manner, was governed 9 by special rules of procedure, and was supposed to base 10 its decision on factual findings precisely described by 11 its constitutive instruments, and these are the 12 peculiarities. 13 However, the outcome of its work was similar to that 14 of an arbitral award, and the general principles 15 concerning the validity and annulment of arbitral awards 16 do apply. Apparently the SPLM/A adheres to this idea 17 when it thinks again that it serves its views, and it 18 objects when it realises that it is threatening for its 19 case. 20 With your permission, Mr President, I will refrain 21 from responding to the very unpleasant SPLM/A innuendos 22 about our views on the composition of the ABC experts, 23 which the other party gratuitously caricatures to make 24 them despicable. What we had written, and that we fully 25 maintain, is that the experts in question, but one, were</p> <p style="text-align: center;">Page 59</p>
<p>11:46 1 exaggerated. 2 We fully agree that the ICSID Convention or the 3 UNCITRAL Model Law, or the New York Convention, or 4 similar investments or commercial Arbitration Rules do 5 not apply as such in the present case. But the 6 adjudicative nature of the report of the ABC experts 7 calls for the application of the rules and principles 8 applicable to any binding decision made by a national or 9 international court or tribunal. Even if rules applying 10 to the annulment of awards before other tribunals do not 11 apply as such here, nevertheless analogies can and must 12 be made. 13 In this respect it is rather ironical that the 14 SPLM/A, while vociferously denouncing the Government's 15 mentions of ICSID Rules or annulment jurisprudence, for 16 example, or of the UNCITRAL Model Law, the SPLM/A does 17 not hesitate itself to amply resort to such analogies 18 when it thinks that it serves its interests. 19 Moreover, it is extremely revealing that this 20 Tribunal -- a rather classical Arbitral Tribunal, with 21 all due respect -- this Tribunal has been entrusted with 22 the task of appreciating whether or not the ABC experts 23 committed an excess of mandate. And I draw in 24 particular your attention, Mr President, and members of 25 the Tribunal, to Article 3 of the Arbitration Agreement,</p> <p style="text-align: center;">Page 58</p>	<p>11:51 1 not lawyers, and were certainly less prepared than 2 trained lawyers in territorial disputes and 3 international adjudication would have been to avoid 4 committing any excess of mandate. 5 Moreover, until it received the report the 6 Government of Sudan was sincerely convinced that the 7 five experts retained were both impartial and 8 knowledgeable in history, geography and other relevant 9 expertise, as provided for in Article 2.2 of the 10 Abyei Annex, which is in tab 4 of the common bundle. 11 Only after the study of the report doubts as rose in 12 this respect. But, Mr President and members of the 13 Tribunal, you are not called upon to give judgment on 14 the quality of the experts themselves but on the 15 conformity of their report to their mandate. 16 Mr President, the SPLM/A's third allegation is that: 17 "3. The Government ignores the presumptive finality 18 and validity of adjudicative decisions, particularly 19 concerning boundary determinations." 20 In fact, this is another avatar of the waiver 21 argument. Once again, as long as the experts respected 22 their mandate, the decision was no doubt to be final and 23 binding. But the parties have agreed to ask this 24 Tribunal to determine whether or not this condition is 25 fulfilled.</p> <p style="text-align: center;">Page 60</p>

<p>11:53 1 In this respect, Mr President, I wish to make clear 2 that this Tribunal is not at all in the same situation 3 as the World Court when the question could have been 4 asked of whether or not the court had jurisdiction to 5 review arbitral awards, for example in the case of 6 Socobel, la Société Commerciale de Belgique. In that 7 case, absent any agreement between the parties, the 8 court noted that: 9 "[It can] neither confirm nor annul the arbitral 10 awards, either wholly or in part." 11 On the contrary, in the case concerning the Award of 12 the King of Spain, the court interpreted -- although 13 with some obscurities -- the agreement between the 14 parties to submit their dispute to the court -- it was 15 the 1957 Washington agreement -- as conferring upon it, 16 and I quote, "the function ... to decide whether the 17 award is proved to be a nullity, having no effect". 18 In the Guinea Bissau/Senegal case the ICJ accepted 19 to exercise its jurisdiction in view of the position of 20 the parties during the proceedings according to which it 21 had jurisdiction as to the Guinean allegations 22 concerning "the inexistence and nullity of the award 23 rendered by the Arbitral Tribunal". 24 There is no such uncertainty in the present case. 25 The 2008 Arbitration Agreement clearly assigns to the</p> <p style="text-align: center;">Page 61</p>	<p>11:57 1 "But whereas in the present case, it having been 2 argued that the decision is void, the parties have 3 entered into a new agreement under date of 4 13th February 1909, according to which, without 5 considering the conclusive character of the first 6 decision, this Tribunal is called upon to decide whether 7 the decision of Umpire Barge, in virtue of the 8 circumstances and in accordance with the principles of 9 international law, be not void, and whether it must be 10 considered so conclusive as to preclude a re-examination 11 of the case on its merits." 12 In that case -- the Orinoco Steamship Company -- the 13 first decision was declared partially void for excess of 14 power. But this is omitted by the SPLM/A. 15 Similarly, while quoting in the next paragraph of 16 its rejoinder an extract of the final award in the 17 Trail Smelter arbitration, the SPLM/A omits to note that 18 the Tribunal in that case quoted the passage from the 19 judgment of the PCIG in Socobel, which I have already 20 mentioned, and which makes clear that it was only -- and 21 I quote it again -- it was only: 22 "... since the court has received no mandate from 23 the parties in regard to [the final arbitral awards to 24 which these submissions relate], [that] it can neither 25 confirm nor annul them either wholly or in part."</p> <p style="text-align: center;">Page 63</p>
<p>11:55 1 Tribunal the task of deciding whether or not the ABC 2 experts had exceeded their mandate, and to draw the 3 consequences of this determination. 4 It is also worth noting that the jurisprudence 5 invoked by the SPLM/A clearly makes the distinction. 6 The decisions cited stress that arbitral awards are 7 final and binding, except when the parties agree to 8 settle a review mechanism or to seize an existing 9 arbitral or judicial body to operate such a review. The 10 SPLM/A emphasises the first proposition, but very 11 carefully and systematically omits the second one. 12 Just to take a striking example, at paragraph 178 of 13 its rejoinder, the SPLM/A refers to the well-known award 14 of 1910 in the case of the Orinoco Steamship Company. 15 It quotes this passage: 16 "It is assuredly in the interest of peace and the 17 development of the institution of international 18 arbitration, so essential to the well-being of nations, 19 that on principle such ..." 20 "Such" is omitted in the quote by the SPLM/A: 21 "... such a decision be accepted, respected and 22 carried out by the parties without any reservations." 23 End of the quote made by the rejoinder. But 24 strikingly our opponents refrain from quoting the 25 immediately next "whereas", where the Tribunal notes:</p> <p style="text-align: center;">Page 62</p>	<p>11:59 1 The Trail Smelter award also makes a very useful 2 quote to the same effect, a quote omitted by the SPLM/A 3 from a judgment of the US Supreme Court in <i>Frelinghuysen</i> 4 <i>v Key</i>, and I quote: 5 "As between the United States and Mexico the awards 6 are final and conclusive until set aside by agreement 7 between the two Governments or otherwise." 8 This all is in Exhibit LE8-4. 9 Finally, in the same vein, the SPLM/A quotes at 10 paragraph 180 of its rejoinder the award in <i>Laguna</i> 11 <i>del Desierto</i>, pointing out that: 12 "A judgment having the authority of <i>res judicata</i> is 13 judicially binding on the parties to the dispute." 14 But, once again, the SPLM/A fails to mention in the 15 next paragraph of the award that, I quote: 16 "The parties have not challenged the authority of 17 the award of 1902 as <i>res judicata</i> and accordingly they 18 have recognised that its provisions are legally binding 19 on them." 20 By contrast, in the present case the Government has 21 immediately challenged the ABC experts' report after its 22 release. As very aptly noted by an authority abundantly 23 referred to by the SPLM/A, Professor Kaikobad: 24 "Not unlike many other rules of both international 25 and domestic law, <i>res judicata</i> cannot be seen in <i>vacuo</i>;</p> <p style="text-align: center;">Page 64</p>

<p>12:02 1 it has to be read and applied in the context of not only 2 a variety of principles of law, but with respect to the 3 facts applicable to a particular situation." 4 And further, I still quote Professor Kaikobad: 5 "The basic position is simply that, not unlike all 6 other notions and regimes of international law, 7 res judicata is not immune from the relevant rules of 8 international law which continue its operation and 9 application." 10 Needless to say that an agreement between the 11 parties providing for the determination of an alleged 12 excess of mandate conditions the operation and 13 application of the res judicata principle, a principle 14 that nobody on this side of the bar would deny or 15 neglect. Simply, the valid conclusion of the 16 Arbitration Agreement must lead the Tribunal to set the 17 experts' report aside as long as an excess of mandate is 18 alleged and proven. 19 These principles fully apply to border determination 20 cases, of which stability and finality are indeed 21 primary objects. But such objects cannot be obtained 22 when the adjudicative body completely ignores the 23 agreements which define its task, failing which it does 24 not comply with its mandate. 25 In the present case, the weakness of the reactions</p> <p style="text-align: center;">Page 65</p>	<p>12:06 1 boundary cases, and that it would be the case if the 2 sanctity of the res judicata principle were as rigid as 3 the SPLM/A alleges. 4 Anyway, once again the parties have wisely, I would 5 suggest, accepted to have the question of the excess of 6 mandate reviewed by this Tribunal, which makes all these 7 legal niceties rather moot. 8 Mr President, the two last points developed also at 9 great length by the SPLM/A in relation with the 10 so-called presumptive validity principle can be dealt 11 with together and rather briefly too. They read 12 respectively as follows: 13 "4. The Government ignores generally applicable 14 principles regarding the allocation and nature of the 15 burden of invalidating adjudicative decisions." 16 And I still quote: 17 "5. The Abyei Arbitration Agreement does not alter 18 the Government's very onerous burden of proving 19 an excess of mandate by the ABC experts." 20 Here again I do not intend to follow our opponents 21 in the meanders of their extensive discussion of 22 a rather obvious point. The two parties have agreed to 23 ask this Tribunal whether or not the ABC experts' report 24 was tainted with an excess of mandate. It is for the 25 Government of Sudan to prove that it is the case and it</p> <p style="text-align: center;">Page 67</p>
<p>12:04 1 of the international community when the Government of 2 Sudan made its claim that the experts exceeded their 3 mandate shows that this conviction was probably largely 4 shared. 5 The SPLM/A discusses this situation at length; 6 I will not follow them on this terrain. 7 May I also add, just en passant, that it is 8 precisely in matters of border disputes that arbitral 9 awards have been challenged with the biggest, I would 10 say, success rate. 11 Just think, for example, of the cases where 12 an express recognition of the right of states to 13 challenge the validity of an arbitral territorial award 14 was recognised in Latin America, which were listed by 15 judge ad hoc Urrutia Holguin in his dissent in the case 16 of the King of Spain award. 17 This can be easily understood. It is precisely in 18 those cases so co-substantial with the sovereignty of 19 the state that arbitral awards and judicial decisions 20 must be above any suspicion. 21 By saying this, I do not mean that de minimis 22 curat praetor the challenge to the binding character of 23 an initial territorial award must be serious; I simply 24 wish to stress that finality cannot be obtained at the 25 cost of illegitimacy, especially in territorial or</p> <p style="text-align: center;">Page 66</p>	<p>12:08 1 is for the SPLM/A to persuade the Tribunal that it is 2 not. 3 If the Tribunal finds that the experts did not 4 commit an excess of mandate, then it will confirm the 5 binding nature of the report in accordance with 6 paragraph (b) of Article 2 of the Arbitration Agreement, 7 thus acknowledging it is res judicata: 8 "If the Tribunal determines ... that the ABC experts 9 exceeded their mandate, it shall make a declaration to 10 that effect, and shall proceed to define (i.e. delimit) 11 on map the boundaries of the area of the nine Ngok Dinka 12 chiefdoms transferred to Kordofan in 1905, based on the 13 submissions of the Parties." 14 I have just quoted paragraph (c) of Article 2 of the 15 Arbitration Agreement. 16 In accordance with the general principles of 17 international or domestic adjudication or arbitration, 18 it simply belongs to each party to prove its own case. 19 As Sandifer, a leading authority in this field, put it: 20 "The broad basic rule of burden of proof adopted in 21 general by international tribunals resembles the civil 22 law rule and may be simply stated: that the burden of 23 proof rests upon him who asserts the affirmative of 24 a proposition that if not substantiated will result 25 a decision adverse to his contention."</p> <p style="text-align: center;">Page 68</p>

<p>12:10 1 And further: 2 "A party cannot simply assert or deny a proposition 3 and then rest his case upon a technical rule, throwing 4 the burden of proof on the other party, without running 5 a risk of adverse inference being drawn from his failure 6 to produce evidence." 7 This is also the position of Dr Amerasinghe as well 8 as of Dr Kazazi, an authority frequently cited by the 9 SPLM/A, who defines "the underlying concept" outlining 10 the concept of burden of proof as: 11 "The obligation of each of the parties to a dispute 12 before an international tribunal to prove its claims to 13 the satisfaction of, and in accordance with, the rules 14 acceptable to the tribunal." 15 In reality, the proposition that it is for the 16 claimant to prove his claim is as true as saying that it 17 is for the defendant to make proof of his defence. Any 18 party who advances a proposition must prove it. In the 19 present case the Government has clearly to prove that 20 the ABC experts exceeded their mandate; while it is 21 incumbent on the SPLM/A to prove that they did not, and 22 on the Tribunal to decide on the basis of their 23 respective submissions. 24 Mr President, I now arrive to my last part, the 25 notion of an excess of mandate. What I have said,</p> <p style="text-align: center;">Page 69</p>	<p>12:14 1 have to repeat the same explanations when they apply to 2 several grounds. 3 However, as sometimes acknowledged by our opponents, 4 this certainly does not mean that we have abandoned or 5 changed our claims, and indeed, as they write: 6 "It does not make the slightest difference how the 7 Government chooses to label its claims." 8 Whatever their label, the claims remain. 9 Three other points call for more detailed remarks 10 since, in the first place, contrary to the SPLM/A's 11 allegations, Article 2(a) of the Arbitration Agreement 12 certainly defines the mandate of the ABC experts, but 13 certainly not the excess of mandate which can be 14 attributed to the ABC experts. 15 Therefore in the second instance, again contrary to 16 the SPLM/A's allegation, the ground for an excess of 17 mandate must be defined by reference to general 18 principles of law according to which -- and this is the 19 third point -- such an adjudicative body must motivate 20 its decision on the grounds chosen and decided by the 21 parties. 22 I will successively tackle each of these three 23 issues. First, curiously, or it might be a pleading 24 tactic, it seems that the more the SPLM/A is obviously 25 wrong, the more vociferous it becomes. To be honest, it</p> <p style="text-align: center;">Page 71</p>
<p>12:12 1 Mr President, leaves open the definition of an excess of 2 mandate; a rather unusual ground for an annulment of 3 an arbitral award, and certainly not a term of art usual 4 in international or nation litigation. 5 But let me clarify first two important preliminary 6 points. First, we have no problem in agreeing with the 7 other party that: 8 "The sole basis for this Tribunal to disregard the 9 ABC report is ... defined as an excess of the ABC 10 experts' mandate." 11 Whether it is narrowly defined, as the SPLM/A 12 contends, or not is another issue to which I will come 13 back. But there can be no doubt that it is the sole 14 basis for setting the ABC report aside in this 15 procedure. 16 Second, the Government of Sudan may have 17 recharacterised, as they put it, the numerous grounds 18 for an excess of mandate in its various pieces of 19 written procedure, but this is a purely terminological 20 presentation. 21 While in our memorial we had simply listed the many 22 motives for which it turns out that the experts acted in 23 excess of their mandate, we deemed it clearer to group 24 together these grounds in a more systematic way in our 25 counter-memorial and in our rejoinder, if only not to</p> <p style="text-align: center;">Page 70</p>	<p>12:16 1 is nearly continuously vociferous. 2 This is certainly the case in respect of the 3 would-be definition of an excess of mandate in 4 Article 2(a) of the 2008 Arbitration Agreement and the 5 relationship between the formula in that provision and 6 the corresponding provisions defining the mission of the 7 ABC experts on the one hand and the notion of excess of 8 mandate on the other hand. 9 On many occasions the SPLM/A refers to excess or 10 excesses of mandate within the meaning of the Abyei 11 Arbitration Agreement. But, Mr President, the 12 Arbitration Agreement by no stretch of the imagination 13 can be seen as defining an excess of mandate; it gives 14 no particular mention to that expression, and must be 15 interpreted in accordance with the usual principles of 16 interpretation. Contrary to what our opponents say, 17 there is no parties' agreed definition of an excess of 18 mandate. 19 When Article 2(a) of the Arbitration Agreement 20 provides that this Tribunal must determine "Whether or 21 not the ABC experts had, on the basis of the agreement 22 of the Parties as per the CPA, exceeded their mandate 23 which is 'to define (i.e. delimit) and demarcate the 24 area of the nine Ngok Dinka chiefdoms transferred to 25 Kordofan in 1905' as stated in the Abyei Protocol, and</p> <p style="text-align: center;">Page 72</p>

<p>12:18 1 reiterated in the Abyei Appendix and the ABC Terms of 2 Reference and Rules of Procedure," Article 2(a) does two 3 different things. 4 First, it recalls what was the substantial mandate 5 of the ABC experts, which is "to define (i.e. delimit) 6 and demarcate the area of the nine Ngok Dinka chiefdoms 7 transferred to Kordofan in 1905"; and second, it defines 8 the mandate of this Tribunal, which is to determine 9 whether or not the ABC experts exceeded their mandate. 10 It does these two things, but it does not do the 11 third thing which the SPLM/A alleges; that is, to define 12 what an excess of mandate is. 13 It is certainly true that an excess of mandate in 14 the present case must be defined by reference to that 15 category of disputes which the parties submitted to the 16 ABC, as our opponents write, exactly as the mandate of 17 this Tribunal is defined by the same formula if this 18 Tribunal determines that the experts have exceeded their 19 mandate. But still, this does not give any information 20 on what an excess of mandate is. 21 Therefore, absent any special agreed meaning between 22 the parties, "excess of mandate" must be interpreted by 23 analogy in accordance with the general rule of 24 interpretation, and in particular in accordance with the 25 ordinary meaning to be given to this expression.</p> <p style="text-align: center;">Page 73</p>	<p>12:23 1 determine whether the experts exceeded their mandate "on 2 the basis of the agreement of the parties, as per the 3 CPA", and Article 2(a) makes express reference to the 4 ABC Terms of Reference and Rules of Procedure in 5 addition to the Abyei Protocol and the Abyei Appendix. 6 Given both the purposes and the precise drafting of 7 the CPA -- which is at tab 108 of the common bundle -- 8 and of the subsequent agreements concerning the 9 resolution of the Abyei conflict, it will be apparent 10 that the ABC and the ABC experts were supposed to comply 11 strictly with their mandate as defined in those 12 instruments, and not to depart from it either in 13 deciding issues already agreed upon or in omitting to 14 decide on issues entrusted to them. 15 Moreover, the respect for the agreed procedure was 16 also clearly part of their mandate, as is strikingly 17 confirmed by the express mention of the Abyei Protocol, 18 the Abyei Appendix, the ABC Terms of Reference and, even 19 more, the Rules of Procedure of the ABC; all these 20 mentioned in Article 2 of the Arbitration Agreement. 21 The only purpose of such a mention is and could only 22 have been to show that the respect of the ABC experts 23 for their mandate must be determined not only in view of 24 the substance of the matter in question, which is "to 25 define (i.e. delimit) and demarcate the area of the nine</p> <p style="text-align: center;">Page 75</p>
<p>12:20 1 The second point: it is, however, certainly not 2 enough in this respect to simply assert, as the SPLM/A 3 does, that: 4 "By its plain terms, an excess of mandate under 5 Article 2(a) is a decision by the ABC experts that was 6 ultra petita purporting to decide matters outside the 7 scope of the dispute submitted by the Parties." 8 Even excess of power, a more classical ground for 9 annulment of arbitral decisions, is not thus limited. 10 While power clearly evokes jurisdiction, excess of power 11 has always been interpreted as including all serious 12 misuses of their jurisdiction as well as gross 13 violations of procedural rules. 14 This has been already discussed at length in the 15 parties' written pleadings and does not bear repeating 16 now. I just mention that it is in our memorial at 17 paragraphs 135-137, in our counter-memorial at 138-139, 18 and 162-165, and also paragraphs 186-187. 19 What deserves to be repeated, to be reiterated, 20 however, is that nothing in the language of Article 2 21 supports the narrow interpretation advocated by the 22 SPLM/A. On the contrary, when this provision is read in 23 its entirety, that is in its context, as it must, rather 24 than in the fragmented fashion put forward by the 25 SPLM/A, it becomes evident that the Tribunal is asked to</p> <p style="text-align: center;">Page 74</p>	<p>12:25 1 Ngok Dinka chiefdoms transferred to Kordofan in 1905", 2 but also in relation with the procedure fixed in those 3 instruments. 4 As made evident by paragraph 5 of the Abyei Annex: 5 "The report of the experts arrived at as prescribed 6 in the ABC Rules of Procedure shall be final and binding 7 upon the Parties." 8 This means first that the definition/delimitation of 9 the area defined by the formula already discussed by 10 Professor Crawford must be deemed to fall within the 11 mandate of the ABC experts only if that 12 definition/delimitation has been arrived at in 13 conformity with the ABC Rules of Procedure, failing 14 which they have exceeded their power; and second, that 15 if it is not the case, the findings of the experts are 16 not final and binding on the parties. 17 Similarly, paragraph 4 of the Abyei Annex instructed 18 the experts to: 19 "... consult the British archives and other relevant 20 sources on Sudan, wherever they may be available, with 21 a view to arriving at a decision that shall be based on 22 scientific analysis and research." 23 This too was part of the mandate; or, to put it more 24 precisely, their mandate could only be complied with if 25 the experts had effectively consulted the relevant</p> <p style="text-align: center;">Page 76</p>

<p>12:27 1 available sources and if they had arrived at a decision 2 genuinely based on scientific analysis and research. In 3 omitting to do so, or in manifestly neglecting 4 fundamental and obvious sources, the ABC experts have 5 also exceeded their mandate. 6 Mr President and members of the Tribunal, this issue 7 of motivation, or more precisely of lack of motivation 8 or incorrect motivation, of the ABC experts' report is 9 an important aspect of the case which the SPLM/A 10 dismisses rather flippantly. 11 As I have just shown, to comply with their mandate 12 the experts had to base their decision on scientific 13 analysis and research, after having consulted the 14 available British archives and other relevant sources on 15 Sudan. This, Mr President, was part of their mandate. 16 They could not simply decide the line by drawing lots, 17 or by asking a prophetess or by organising a leaders' 18 fight or an intertribal sprint competition, as sometimes 19 happened in the past; for example, for dividing the 20 Caribbean island of St Martin's between France and the 21 Netherlands. 22 No, the experts had to comply with their mandate, 23 which clearly included obligations to search, consult 24 and analyse the available relevant archives, and this 25 was a mandatory rule, mandatory in that they cannot be</p> <p style="text-align: center;">Page 77</p>	<p>12:32 1 it writes: 2 "... nothing in the parties' agreements ... 3 forbidding ex aequo et bono decisions [or] forbidding 4 application of 'unspecified legal principles' ..." 5 This is verbatim. Indeed, Mr President, nothing 6 forbids it in the agreement, but nothing authorises it; 7 and, more importantly, this is patently incompatible 8 with the mandatory rule according to which they must 9 base themselves on a scientific -- not equitable or 10 pseudo-legal -- analysis and research of the available 11 documentation. 12 In resorting to those grounds -- I mean equitable or 13 pseudo-legal grounds -- and obviously neglecting 14 relevant available archives, the ABC experts have indeed 15 acted ultra petita, or at least extra petita; that is, 16 outside the framework of their mandate. 17 Even more troubling is the insistent argument made 18 by the SPLM/A according to which the parties' agreements 19 did not require a reasoned decision. It is rather 20 staggering to read in the SPLM/A's rejoinder that the 21 experts could not have exceeded their mandate in this 22 perspective since: 23 "Nothing in any of the parties' agreements relating 24 to the ABC proceedings required that the ABC experts 25 explain their reasoning for adopting a particular</p> <p style="text-align: center;">Page 79</p>
<p>12:30 1 deemed to have complied with their mandate if their 2 report was not drafted in compliance with these 3 obligations. 4 I use the word "mandatory", Mr President, since the 5 other party complains that we have abandoned this 6 terminology in our counter-memorial and suggests that we 7 were, I quote, "no doubt sensitive to this fatal flaw in 8 [our] argument" that it had brilliantly demonstrated. 9 Well, I do not want to disappoint our opponents, but 10 the reason was more simple and more pragmatic: since the 11 proceedings in this case is simultaneous instead of 12 consecutive, we were simply answering their own 13 memorial, and we had thought that we would probably 14 answer it more directly by characterising these grounds 15 as deciding ultra petita. 16 Now, there is no contradiction between both. Simply 17 by not respecting mandatory rules concerning the 18 motivation of their report, by relying on considerations 19 which had nothing to do with their mandate, the ABC 20 experts have acted ultra petita. Moreover, the 21 Government's rejoinder very clearly gathers and combines 22 both terminologies. 23 The SPLM/A pursues with two perplexing and similar 24 arguments which certainly would have left 25 Professor Crawford at a loss for words too. There is,</p> <p style="text-align: center;">Page 78</p>	<p>12:33 1 definition or delimitation of the Abyei Area." 2 This, of course, lies in stark contrast with the 3 other party's insistence on the adjudicative nature of 4 the ABC proceedings. 5 It is astonishing, to say the least, that at the 6 beginning of the 21st century lawyers can contend that 7 an adjudicative body in charge of determining a border 8 line can decide without stating the reasons to its 9 decision. The obvious falseness of this argument saves 10 me from pursuing the discussion on this ground. 11 Let me just quote from Georges Scelle's first report 12 on arbitral procedure, it is my own translation: 13 "That an adjudicative award, disposing of the 14 litigation (on its merits), ought to be written, 15 carefully drafted, read in a public sitting, and 16 motivated, these are established and passed things 17 having the force of law since time immemorial. There 18 would appear to be no point in stressing these 19 indisputable principles here, and it is enough to 20 emphasise the need for a statement of reasons. An award 21 without a statement of reasons is not an award, but 22 a mere opinion." 23 This is in Exhibit LE12-2 of the other party. 24 The experts' report had mandatorily to be reasoned 25 because it was an adjudicative body, because the object</p> <p style="text-align: center;">Page 80</p>

<p>12:36 1 of the dispute was of such a nature that it is simply 2 unthinkable that it could have been otherwise, and it 3 had mandatorily also to be established on the basis 4 agreed by the parties, mandatorily too, not at the 5 goodwill of the experts. 6 It was not, and these breaches of their obligation 7 by the experts constitute excesses of mandate. With 8 your permission, Mr Chairman, I will come back to them 9 in a more detailed manner this afternoon, after 10 Ms Malintoppi has introduced the other category of 11 excesses of mandate constituted by the manifest 12 violation of their procedural obligations by the 13 experts. But beforehand I would like to very briefly 14 summarise what I have said. 15 Indeed, in the present case the excess of mandate 16 committed by the ABC experts must be defined by 17 reference to the ABC's mandate, which is to apply, and 18 apply fully and exclusively, the formula. But such 19 an excess must be deemed to have occurred not only if 20 the experts have decided ultra petita as well as 21 infra petita, but also if they have neglected the other 22 aspects of their mandate, that is the scientific data 23 available, or if they have not followed the ABC Rules of 24 Procedure. 25 This is this last aspect that Ms Malintoppi will now</p> <p style="text-align: center;">Page 81</p>	<p>12:39 1 I quote: 2 "... the procedures were specifically tailored to 3 the parties' particular needs and to the Abyei dispute." 4 The memorial also went on to specify that the ABC 5 experts, again I quote, "developed specific procedures 6 to implement its mandate", the mandate of the ABC. 7 Accordingly, by the SPLM/A's own admission, the 8 ABC's mandate was to be implemented pursuant to specific 9 procedural rules. 10 Our opponents further stressed in the memorial that 11 the parties collaborated to design "their own dispute 12 resolution mechanism" and adopted the Rules of Procedure 13 by consensus. The memorial observed that: 14 "The parties' subsequent work ..." 15 Again it's a quote: 16 "... to adopt mutually satisfactory procedures was 17 a striking example of constructive joint collaboration." 18 In discussing the various procedural instruments 19 agreed by the parties, the SPLM/A's memorial 20 acknowledged that the Abyei Appendix "set forth 21 additional adjudicative procedures for the Commission", 22 that the Terms of Reference: 23 "... further elaborated on the procedures for the 24 ABC, prescribing in greater detail a specialised set of 25 adjudicative procedures tailored to the requirements of</p> <p style="text-align: center;">Page 83</p>
<p>12:37 1 address, or begin to address maybe, Mr President, if you 2 are good enough to call her to this bar. 3 THE CHAIRMAN: I thank you very much, Professor Pellet, 4 and I call to the floor Ms Malintoppi. 5 (12.38 pm) 6 Submissions by MS MALINTOPPI 7 MS MALINTOPPI: Thank you, Mr President. 8 Mr President, members of the Tribunal, the 9 procedural dimension of the Abyei Boundary Commission's 10 mandate was highly significant. It inspired every one 11 of the instruments concluded in view of the resolution 12 of the Abyei conflict, from the 2004 Protocol to the 13 2005 Rules of Procedure drafted by the ABC experts and 14 agreed by the parties. 15 This is underscored by the fact that the parties 16 took great care to establish, through a series of 17 separate arguments, specific terms of reference and 18 procedures that were adapted to the task of the ABC, and 19 also to recall specifically this procedural framework as 20 we have seen just now in Article 2(a) of the Arbitration 21 Agreement. 22 The SPLM/A itself admitted in its memorial that the 23 procedural rules established by the parties were 24 an important component of the process. In particular 25 the memorial mentioned with approval the fact that, and</p> <p style="text-align: center;">Page 82</p>	<p>12:41 1 the parties' dispute." 2 They set forth: 3 "... a carefully considered set of visits by the 4 ABC, not the experts alone, and provided that the ABC as 5 a whole would conduct specific meetings." 6 The SPLM/A also acknowledged that the Rules of 7 Procedure established "the procedures for the ABC's 8 work". 9 In subsequent pleadings the SPLM/A has modified this 10 line of argument considerably, presumably in light of 11 the Government's own submissions, and sought to downplay 12 the importance of the procedural framework by pointing 13 to its rudimentary character and exercising it as 14 a sui generis set of procedures. 15 For the SPLM/A, regardless of the parties' agreed 16 rules, the experts had full discretion to decide any 17 procedural questions, could conduct their research, and 18 I quote, "without notice to or involvement of the 19 parties", and could "meet with third parties of their 20 own choosing without the involvement of the parties". 21 The weaknesses inherent in the belated change of 22 heart on the part of the SPLM/A are self-evident. This 23 carefully drafted procedural structure was clearly part 24 of the ABC's mandate and cannot be summarily dismissed, 25 as the SPLM/A purports to do by the use of Latin phrases</p> <p style="text-align: center;">Page 84</p>

<p>12:42 1 such as sui generis. 2 The procedures before the ABC defined the limits of 3 the powers of the Commission and its members in 4 conformity with the parties' agreement and will. The 5 glaring disregard which the experts showed for these 6 rules constitutes an excess of mandate. 7 THE CHAIRMAN: May I ask you, please, to speak a bit more 8 slowly? 9 MS MALINTOPPI: More slowly? I will. 10 THE CHAIRMAN: Thank you very much. 11 MS MALINTOPPI: You're very welcome. 12 I will now move on to a review of the relevant 13 instruments in so far as they relate to the procedures 14 that the ABC, including the experts, were obliged to 15 follow. 16 First there is the Arbitration Agreement, which the 17 Tribunal will find under tab 1 of the common bundle of 18 key documents. Professor Pellet has already called 19 attention to the preamble of this compromis. I will add 20 that the preamble of the agreement, the relevant portion 21 of which will now appear on the screen, makes an express 22 renvoi to the protocol on the resolution of the Abyei 23 conflict and the Abyei Appendix, also referred to as the 24 Abyei Annex, and states that they form part of the 25 Comprehensive Peace Agreement, or CPA.</p> <p style="text-align: center;">Page 85</p>	<p>12:45 1 contentions that this provision is "narrowly defined", 2 and that it is limited to a "single excess of mandate 3 ground". I will not dwell further on this, except to 4 reiterate that nothing in the language of Article 2 5 supports the narrow interpretation advocated by our 6 opponents. 7 The parties explicitly and deliberately included in 8 the provision dedicated to this Tribunal's mandate all 9 the relevant instruments, and specifically referred to 10 the terms of reference and Rules of Procedure. If the 11 SPLM/A's narrow view of the mandate were correct, this 12 was not merely unnecessary, it was misleading. 13 Reference to the procedural instruments should and could 14 have been omitted. The fact that it was expressly 15 included is further evidence of the importance that the 16 parties place on these documents, and confirms their 17 intention to incorporate any serious procedural 18 violation within the Tribunal's mandate. 19 Any other interpretation would run contrary to one 20 of the main principles of treaty interpretation, the 21 principle of effet utile, or effectiveness, ie that the 22 language of a treaty must be interpreted in a sense that 23 gives it full meaning and effect. As the court noted in 24 the Libya-Chad case: 25 "Any other construction would be contrary to one of</p> <p style="text-align: center;">Page 87</p>
<p>12:44 1 The preamble also expressly refers to the ABC 2 mandate, as defined both in the ABC terms of reference 3 and the Rules of Procedure, and reiterates for emphasis 4 that, and I quote: 5 "The parties differed over whether or not the ABC 6 Experts exceeded their mandate as per the provisions of 7 the CPA, the Abyei Protocol, the Abyei Appendix, and the 8 ABC Terms of Reference and Rules of Procedure." 9 Express reference to the procedural framework is 10 also made in the same terms in Article 2(a) of the 11 Arbitration Agreement, which was earlier discussed by 12 Professor Pellet. 13 These repeated and emphatic references to the 14 procedural instruments must be given their full weight. 15 It is obvious from the plain and ordinary meaning of 16 Article 2(a), read in its context and in the light of 17 the object and purpose of the Arbitration Agreement, 18 that the mission of this Tribunal is to decide whether 19 the ABC experts exceeded their mandate, including 20 whether they did so by breaching fundamental rules of 21 procedure "on the basis of the agreement of the parties 22 as per the CPA", and "as stated in the Abyei Protocol, 23 and reiterated in the Abyei Appendix and the ABC Terms 24 of Reference and Rules of Procedure". 25 Professor Pellet has already rebutted the SPLM/A's</p> <p style="text-align: center;">Page 86</p>	<p>12:47 1 the fundamental principles of interpretation of 2 treaties, consistently upheld by international 3 jurisprudence, namely that of effectiveness." 4 In this context, it is astonishing that the SPLM/A 5 asserts that "Article 2(a) did not refer to the Rules of 6 Procedure or terms of reference", and that the parties 7 intended to exclude procedural violations from the scope 8 of any determination of an excess of mandate under 9 Article 2(a) because: 10 "Article 2(a) does not refer to procedural 11 conditions, to violations of procedural rights, or to 12 denial of an opportunity to be heard." 13 But the SPLM/A's allegations are refuted by the 14 plain terms of this relevant provision, since the 15 specific reference to both the terms of reference and 16 the Rules of Procedure in the text of Article 2(a) 17 render redundant any additional reference to vague 18 procedural conditions, which would in any event have 19 been encompassed by these agreements. 20 The first set of procedural rules agreed by the 21 parties for the work of the ABC was the Abyei Protocol 22 of 26th May 2004. The protocol defined the principles 23 of agreement on Abyei, and included a section 5, 24 entitled "Determination of Geographic Boundaries". This 25 instrument can be found at tab 3 of the common bundle.</p> <p style="text-align: center;">Page 88</p>

<p>12:49 1 Sections 5.1 and 5.2 of the protocol provide for the 2 establishment of the Abyei Boundaries Commission, and 3 describe its composition, ie they specify that it should 4 include inter alia experts, representatives of the local 5 communities and the local administration; and the 6 timeframe of the Commission. 7 Section 5.3 states that the Abyei Boundaries 8 Commission -- the ABC, not simply the experts -- shall 9 present its final report to the presidency as soon as it 10 is ready. 11 Next is the Abyei Annex, which was also referred to 12 as the Abyei Appendix, which was concluded on 13 17th December 2004. It is under tab 4 of the common 14 bundle. Its procedural character is well described by 15 the SPLM/A itself in the memorial, as follows: 16 "... the Abyei Annex set out in greater specificity 17 the parties' agreement on matters relating to the 18 constitution and activities of the Abyei Boundaries 19 Commission." 20 Paragraph 2 of the annex set forth in detail the 21 composition of the ABC, and imposes an impartiality 22 requirement on the experts. Paragraph 3, a provision 23 which is clearly inspired by principles of equality and 24 transparency, further indicates that: 25 "The Commission ..."</p> <p style="text-align: center;">Page 89</p>	<p>12:52 1 Article 3 deals with its functioning. 2 Article 3.1 is inspired by the principle of equality 3 of the parties and impartiality of the Commission. It 4 provides that: 5 "The two parties shall submit their presentations to 6 the ABC at its seat in Nairobi. The experts and other 7 members may ask questions and seek clarifications." 8 Article 3.2 made it clear that it was the ABC, and 9 not the experts alone, that was to hear the various 10 testimonies of witnesses and representatives. It reads 11 in relevant part: 12 "The ABC shall thereafter travel to the Sudan to 13 listen to representatives of the people of Abyei Area 14 and the neighbours, as indicated hereunder." 15 This provision also went on to specify the number of 16 meetings that were to be held, locations, and numbers of 17 tribal representatives that were going to be 18 interviewed. 19 Article 3.4 carved out a special role for the 20 experts, and stressed again that the final decision was 21 to be based on research and scientific analysis. 22 Article 3.5 stated that the ABC -- not the experts 23 alone -- were to reconvene in Nairobi to hear both 24 parties' presentations and prepare the ABC's final 25 report for presentation to the presidency in Khartoum.</p> <p style="text-align: center;">Page 91</p>
<p>12:50 1 Not just the experts: 2 "... [was] to listen to the representatives of the 3 people of the Abyei Area and the neighbours, and shall 4 also listen to the presentations of the two parties." 5 Finally, paragraph 5 of the annex provided that: 6 "... the report of the experts arrived at as 7 prescribed in the ABC Rules of Procedure shall be final 8 and binding on the parties." 9 From this provision alone it is clear that the 10 experts' report was to be arrived at as prescribed in 11 the ABC Rules of Procedure. 12 The terms of reference were agreed at a meeting of 13 the experts held on 10th-12th March 2005, and it is at 14 tab 5 of the common bundle. The terms of reference 15 contain a number of articles dealing with the work and 16 functioning of the ABC, including a detailed programme 17 of work, listing of activities, and the time for which 18 these activities were planned. 19 The Terms of Reference provide a telling 20 illustration of how closely intertwined the procedural 21 and substantive provisions in the instruments setting up 22 the process of resolution of the Abyei dispute were. 23 Article 1 of the terms of reference repeats the mandate 24 of the ABC as defined in the protocol; Article 2 25 specifies the structure of the ABC again; while</p> <p style="text-align: center;">Page 90</p>	<p>12:53 1 The ABC Rules of Procedure were drawn up by the 2 experts and agreed by the parties' delegations on 3 11th April 2005. They are reproduced under tab 6 of the 4 common bundle. 5 Rule 1 repeats the substantive formula for the 6 delimitation. It makes express reference to fact that 7 the work of the Commission would be guided by the 8 principles of agreement on Abyei, the Abyei Annex, the 9 understanding on the Abyei Boundaries Commission, and 10 the terms of reference. The provision is now on the 11 screen, and I will read it in its entirety: 12 "The work of the Commission will be guided by the 13 principles of agreement on Abyei, the Abyei Annex, 14 'Understanding Abyei Commission' (ABC) and terms of 15 reference, which includes the following mandate ..." 16 The Abyei Area is defined in the Abyei Protocol in 17 Article 1.1.2 as: 18 "The area of the nine Ngok Dinka chiefdoms 19 transferred to Kordofan in 1905." 20 The ABC shall confirm this definition. 21 "1.2. The ABC shall demarcate the area specified 22 above on map and on land." 23 Significantly, Rules 6 through 10, dealing with 24 meetings, testimonies and access to the members of the 25 public, make reference to Rule 6, the schedule of the</p> <p style="text-align: center;">Page 92</p>

<p>12:55 1 Commission's meetings; Rule 7, the fact that the 2 Commission members should have free access to members of 3 the public other than those in the official delegations 4 at the locations to be visited; Rule 8, that at each 5 meeting with the public the chairman will explain the 6 purpose of the Commission; Rule 9, that the recordings 7 of the testimonies should be provided to all members of 8 the Commission; and Rule 10, that, in addition to 9 talking with the public, the Commission shall visit 10 sites in the field based on recommendations of both 11 sides.</p> <p>12 This terminology leaves no doubt as to the fact that 13 fact that these rules were addressed to the Commission 14 in its entirety, not just the experts, and that the work 15 of the ABC was to be open and transparent. Furthermore, 16 as the Tribunal will note, Rule 9 refers to the 17 recordings of the meetings being made by both sides, 18 thus implicitly requiring that both sides be present.</p> <p>19 Finally, the last relevant rule, Rule 14, states 20 that: 21 "The Commission will endeavour to reach a decision 22 by consensus. If, however, an agreed position by two 23 sides is not achieved, the experts will have the final 24 say." 25 This was the procedural framework agreed for the</p> <p style="text-align: center;">Page 93</p>	<p>12:58 1 regarding definition and delimitation of the Abyei Area, 2 and to be heard in an adjudicative manner." 3 With regard to the manner in which the Commission 4 heard witnesses, the SPLM/A noted that -- and I quote: 5 "It employed quintessentially adjudicative 6 procedures in its conduct of the proceedings before it." 7 The SPLM/A further emphasised that -- again I quote: 8 "... each party was fully aware of the other party's 9 submissions and evidence, and enjoyed multiple 10 opportunities to meet and rebut the submissions and 11 evidence." 12 The SPLM/A also noted with approval that the 13 testimony of witnesses before the Commission was 14 recorded and transcribed, and that each party was aware 15 of the other's submissions and evidence.</p> <p>16 By contrast, when it comes to assessing the experts' 17 conduct in receiving evidence from Ngok Dinka witnesses 18 ex parte, and without informing the Government of Sudan, 19 the SPLM/A denies the mandatory character of the 20 experts' procedural obligations, and sees no 21 irregularity or procedural unfairness in this conduct.</p> <p>22 Mr President, our opponents ignore a key aspect of 23 this case, and have ignored it in every one of their 24 written submissions: no matter how bespoke the ABC was, 25 it was the body that had been entrusted with the complex</p> <p style="text-align: center;">Page 95</p>
<p>12:56 1 work of the ABC. In the light of such a clear and 2 detailed procedural structure, the SPLM/A's allegations 3 and objections that the ABC experts were not required to 4 follow a specific set of procedural rules, given the 5 so-called "rudimentary character" of the parties' 6 agreement regarding the ABC procedures, is simply wrong.</p> <p>7 The fact of the matter is that the SPLM/A wants it 8 both ways. When it does not suit its purposes, the ABC 9 is a sui generis body, and not an arbitral tribunal 10 subject to rules of procedure. On the other hand, when 11 it is convenient to the SPLM/A, then the ABC turns into 12 an adjudicative body whose decision is final and 13 binding.</p> <p>14 A good example of the SPLM/A's contradictory and 15 self-serving approach is provided by its 16 characterisation of the proceedings before the ABC. The 17 memorial recognised the adjudicative nature of the 18 proceedings before the Commission. For instance, it 19 acknowledged that -- and I quote: 20 "The ABC conducted itself in the manner of 21 an adjudicative body and rendered an adjudicative 22 decision." 23 It also stated that -- and again I quote: 24 "There can be no doubt that the Commission afforded 25 the parties opportunities to present their cases</p> <p style="text-align: center;">Page 94</p>	<p>12:59 1 task of adjudicating a highly sensitive dispute. 2 Conscious of this delicate role the parties paid 3 a great deal of attention in imposing specific 4 procedural requirements on the work of the ABC and the 5 experts, regulating the ABC's work through a set of 6 agreed rules inspired by the respect of the adversarial 7 principle, the equality of the parties, and the 8 imperative need for open and transparent proceedings.</p> <p>9 The experts themselves had contributed to this 10 process by assisting in drawing up the Rules of 11 Procedure which were presented to the parties for 12 comments, and which were approved by consensus under 13 Rule 3 of the procedural rules.</p> <p>14 The parties were entitled to rely on the Commission 15 to carry out its work in conformity with such rules. 16 The experts were under obligation to respect such 17 procedural rules and to comply with the parties' 18 expectations. There is nothing "parochial" or 19 "distorted", to use the disparaging terms employed by 20 our opponents, about such an interpretation of the 21 experts' mission.</p> <p>22 Before I turn to our discussion of the specific 23 procedural violations, which will probably take place 24 after the lunch break, I would like to mention briefly 25 conduct by the experts that took place after the</p> <p style="text-align: center;">Page 96</p>

<p>13:01 1 issuance of the report, the appropriateness of which is 2 suspect. 3 I refer to the fact that the ABC experts paid 4 a one-day visit to the south on 15th September 2007 at 5 the invitation of the Government of South Sudan. 6 According to what is reported at page 16, paragraph 122 7 of the October 2008 CPA Monitor -- which is the monthly 8 report on the implementation of the CPA prepared by the 9 UN mission in Sudan, filed as Exhibit FE16/13A with the 10 SPLM/A's memorial, and also reproduced under tab 5 of 11 the arbitrators' folders -- according to this report the 12 experts met at the headquarters of the South Sudan 13 Legislative Assembly in Juba with MPs, officials of the 14 Government of South Sudan, and civil society 15 representatives, ostensibly to defend their -- the ABC 16 experts' -- findings. 17 It should be stressed that, according to the same 18 monthly report, the meeting took place at the invitation 19 of the GoSS, the Government of South Sudan, and not at 20 the invitation of the Southern Sudan legislative 21 assembly, as the SPLM/A alleges in its rejoinder. The 22 report also notes that this invitation gave rise to -- 23 and I quote the report -- "strong criticism by the NCP". 24 The Government of Sudan was not invited to participate 25 in this meeting, and no equivalent meeting was held with</p> <p style="text-align: center;">Page 97</p>	<p>14:52 1 (2.58 pm) 2 MS MALINTOPPI: Thank you, Mr President. I will now turn 3 to the procedural violations committed by the experts. 4 As it will be shown, the extent to which the experts 5 disregarded the agreed procedural framework in 6 a number of fundamental ways is striking. 7 To summarise: 8 1. The experts carried out essential tasks which 9 the relevant procedural instruments had reserved to the 10 ABC as a whole, thus systematically ignoring the 11 distinction that had been carefully drawn between the 12 experts and the ABC. 13 2. They grossly violated the adversarial principle; 14 and 15 3. They manifestly neglected to respect the 16 requirements of transparency that had been emphasised in 17 the governing procedural instruments. 18 I propose to examine each one of these grounds of 19 excess of mandate in turn, applying the pertinent 20 procedural rules to specific instances in which the 21 experts misapplied, deviated from, or misinterpreted the 22 agreed procedural framework, or blatantly violated 23 general principles of due process and equal treatment of 24 the parties. 25 The first main ground of procedural violations</p> <p style="text-align: center;">Page 99</p>
<p>13:03 1 representatives of the north. 2 Perhaps even more striking is the conduct of one of 3 the ABC experts, Dr Douglas Johnson, who revealed that 4 he has "recently advised the Government of South Sudan 5 on the north/south boundary issue", precisely the matter 6 at issue in this case. This remarkable statement is 7 contained in a footnote to an article published in 2008 8 by Dr Johnson in the journal African Affairs. The 9 article is produced under tab 124 of the common bundle, 10 and the relevant footnote appears on the first page. 11 Mr President, this is hardly the kind of conduct 12 that one would expect from one of the five experts of 13 the ABC, who were under the obligation to act 14 impartially pursuant to paragraph 2.2 of the Abyei 15 Annex. Even if Dr Johnson's advice was provided after 16 the work of the ABC was concluded, his conduct is very 17 strange indeed, and casts a shadow over the whole 18 process. 19 Mr President, this may be a convenient time to pause 20 for lunch, if you so wish, and I can then resume after 21 the break. 22 THE CHAIRMAN: I thank you very much. The hearing will 23 resume at 3 o'clock this afternoon. 24 (1.04 pm) 25 (Adjourned until 3.00 pm)</p> <p style="text-align: center;">Page 98</p>	<p>14:59 1 committed by the experts is the fact that they 2 repeatedly ignored the clear distinction drawn in the 3 procedural rules between the experts and the full 4 Abyei Boundaries Commission. 5 As I recalled earlier, paragraph 3 of the Abyei 6 Annex stipulated that the Commission as a whole, and not 7 just the experts on their own initiative, was to: 8 "... listen to the representatives of the people of 9 the Abyei Area and the neighbours." 10 In addition, paragraph 5 imposed the obligation that 11 the report of the experts should be arrived at as 12 prescribed in the ABC Rules of Procedure. 13 The terms of reference reiterated the distinction at 14 Article 3.2, where it was stated that the ABC, and not 15 the experts, would travel to Sudan to listen to the 16 representatives of the people of the Abyei Area and 17 their neighbours. The same requirements were repeated 18 in Rules 6 to 10 of the ABC Rules of Procedure, where 19 all meetings, testimonies and access to the public were 20 reserved to the Commission or members of the Commission. 21 In blatant disregard of these rules, the experts by 22 themselves held a series of unauthorised ex parte 23 meetings. As the Tribunal will recall, at the initial 24 meetings held in Nairobi on 10th-12th March 2005 the 25 experts and the parties agreed on the terms of reference</p> <p style="text-align: center;">Page 100</p>

<p>15:01 1 for the ABC and issued a detailed schedule for the 2 programme of work of the Commission. 3 The Rules of Procedure, which involved a process 4 involving both the experts and the two parties, were 5 adopted on 11th April 2005. The first meeting of the 6 parties and experts took place on 12th April 2005, some 7 ten days behind the schedule that had been originally 8 planned in the programme of work adopted in March. 9 Subsequent to this, the experts flew to Khartoum and 10 then to Abyei and interviewed a number of witnesses, 11 according to the original schedule, from 12 14th-20th April 2005 in localities which included Abyei, 13 Agok and Muglad. 14 After these scheduled interviews the experts should 15 have gone back to Nairobi in conformity with the agreed 16 programme of work. Instead, it is recorded in the 17 experts' report at pages 9 and 10 -- this is tab 2 of 18 the common bundle -- that the experts also met on 19 21st April 2005 and on 6th and 8th May 2005 at the 20 Hilton Hotel in Khartoum with a number of Ngok Dinka 21 individuals living in the city, including the former 22 Assistant Commissioner of Abyei, Mr Justin Deng, and two 23 Twic Dinka chiefs. 24 The minutes of the Khartoum interviews can be found 25 at appendix 4 of the experts' report at pages 148-158,</p> <p style="text-align: center;">Page 101</p>	<p>15:04 1 and it contains nothing about these interviews' 2 modalities. 3 The SPLM/A acknowledges that the Khartoum meetings 4 of 21st April, 6th and 8th May 2005 took place without 5 the parties' representatives, but it does so 6 half-heartedly in a footnote at page 135 of its 7 memorial. In the reply it recognises more openly that 8 the parties and the other ABC members did not attend the 9 meetings, but it still refuses to accept that this is 10 a serious departure from a fundamental rule of 11 procedure. 12 In its written submissions the SPLM/A raises 13 a hotchpotch of different arguments against the 14 Government's complaints concerning these meetings. It 15 asserts that the Government must have been aware of them 16 because the experts discussed the subject of 17 interviewing third parties with the delegations and at 18 the time no objections were raised. 19 The SPLM/A further alleges that the experts enjoyed 20 broad procedural discretion and investigatory powers, 21 including the authority to conduct the Khartoum 22 meetings. 23 Our opponents also contend that these meetings were 24 entirely consistent with the parties' procedural 25 arguments. It argues that, at most, this conduct by the</p> <p style="text-align: center;">Page 103</p>
<p>15:03 1 which are reproduced under tab 2 of the common bundle. 2 All these meetings were organised without the 3 Government's prior knowledge and the Government only 4 found out about them after the final report of the 5 experts was made public. 6 In this context it is important to recall that on 7 25th April 2005, three months before the experts' report 8 was made public on 14th July 2005, the ABC issued a note 9 on testimony obtained in field visits in which it 10 recounted what emerged from the various oral testimonies 11 and set forth what the ABC purported to do in order to 12 find evidence from contemporary records. 13 The note was filed at Annex SM78 with Sudan's 14 memorial and it's also at tab 6 of the arbitrators' 15 folders. It refers to the testimony taken from 16 14th-20th April and to meetings held over a seven-day 17 period. It carefully specifies that: 18 "All testimony was gathered in public group 19 meetings, where the witnesses spoke under oath, could 20 hear the testimony of others, and could be heard by 21 a large audience as well." 22 There is, however, a glaring omission in this note, 23 since it contains no mention of any of the interviews 24 conducted after the seven-day period but before the note 25 of 25th April was issued, notably on 21st April 2005,</p> <p style="text-align: center;">Page 102</p>	<p>15:06 1 experts amounted to, "an inadvertent misunderstanding of 2 the limits of the ABC experts' investigative authority", 3 and does not represent a serious violation of 4 a fundamental rule of procedure. 5 This arguments are misguided and they are based, 6 among other things, precisely on the wrong premise that 7 the experts and the Commission were one and the same 8 thing. As I stated earlier, this is clearly not the 9 case. 10 Paragraph 3 of the Abyei Annex states that the ABC, 11 not the experts, shall listen to the representatives of 12 the people of the Abyei Area and the neighbours and 13 shall also listen to presentations of the two parties. 14 Likewise, Article 3.2 of the ABC Terms of Reference 15 clearly specifies that the ABC, and not the experts 16 alone, shall travel to the Sudan to listen to 17 representatives of the people of the Abyei Area and the 18 neighbours as indicated therein. 19 As for the Rules of Procedure, as the title 20 indicates, "Rules of Procedure for the 21 Abyei Boundaries Commission", they address the work of 22 the Commission as a whole. When it was necessary to 23 specify in the rules that certain activities would be 24 carried out by the experts alone, the specific term 25 "experts" is used. Otherwise reference is made to "the</p> <p style="text-align: center;">Page 104</p>

<p>15:07 1 Commission" or "Commission members". 2 Thus, when Rule 7, for instance, referred to the 3 fact that, "Commission members should have free access 4 to members of the public other than those in the 5 official delegations at the locations to be visited", 6 this provision clearly does not just refer to the 7 experts, but to all the members of the Commission. 8 With respect to the SPLM/A's arguments that the 9 parties had discussions on the subject of interviewing 10 third parties, this is a conjecture based on their own 11 distortion of the Government's preliminary presentation 12 to the Commission in April 2005 and on witness 13 statements provided on behalf of the SPLM/A. These 14 arguments have been rebutted in detail in the 15 Government's rejoinder, and only some brief remarks are 16 warranted in this respect. 17 The discussions to which the SPLM/A refers in the 18 reply memorial took place at an early stage, when the 19 parties made their initial presentations to the ABC in 20 2005, and concerned the possibility for the ABC to 21 obtain testimony from the people in the disputed area. 22 These general exchanges do not concern the issue which 23 is relevant here, ie fact that the experts should not 24 have conducted interviews without informing both parties 25 or the other ABC members.</p> <p style="text-align: center;">Page 105</p>	<p>15:11 1 Moreover, these testimonies do not constitute proof 2 of the facts alleged, since no documentary evidence in 3 the form of minutes, recordings, et cetera, supports 4 them, as would have been expected had the account of the 5 SPLM/A's witnesses been accurate. As has been stated by 6 one authority: 7 "Personal interest of the deponent and the 8 uncontrolled character of his affirmation are therefore 9 important factors which generally deprive a claimant's 10 affidavit, even though sworn, of much of its probative 11 value." 12 In stark contrast with the testimonies submitted on 13 behalf of the SPLM/A, three Government witnesses -- one 14 of whom, Mr Abdul Rasul El-Nour Ismail, was a member of 15 the ABC, like Mr James Lual Deng -- reject this version 16 of facts and confirm that the Government had not been 17 informed of the Khartoum meetings, and only found out 18 about them when the experts' report was issued. 19 With regard to the SPLM/A's argument that the 20 meeting held on 8th May 2005 was organised by the 21 Sudanese politician Bona Malwal, the Government has 22 already replied in its rejoinder. It should be added 23 that it is not at all certain that the meetings were 24 indeed initiated by Mr Malwal. One of the SPLM/A's own 25 witnesses, Kuol Deng Kuol Arop, states in his testimony</p> <p style="text-align: center;">Page 107</p>
<p>15:09 1 The purpose of these exchanges was to clarify the 2 parties' and the ABC's understanding of the Commission's 3 mandate in respect of the testimonies that were to be 4 collected. It was in that context that the Government's 5 representative agreed that oral testimony could be of 6 assistance. However, nowhere is it stated by any of the 7 participants in these discussions that the experts were 8 free to take oral testimony in camera from persons 9 associated with one side without first informing all the 10 ABC members and in their absence. 11 As to the specific discussions which allegedly the 12 parties had on the subject, the only evidence adduced by 13 the SPLM/A is provided by two of its witnesses, Minister 14 Deng Alor Kuol and Mr James Lual Deng. They testified 15 that the parties were notified, or rather the other ABC 16 members were somehow made aware, it is not said how, 17 that the experts were to conduct the Khartoum meetings 18 in April and May 2005, and that neither party objected. 19 The witnesses in question testified as to their 20 personal belief. But, as stated in the Government's 21 rejoinder, their statements are framed in very general 22 terms, and provide no direct evidence that the experts 23 ever formally notified both parties, or the other ABC 24 members, that they planned to conduct specific 25 interviews by themselves on certain specific dates.</p> <p style="text-align: center;">Page 106</p>	<p>15:13 1 that the meetings in Khartoum "occurred at the request 2 of those who wanted to talk to the ABC experts". 3 Be that as it may, even assuming that Mr Malwal 4 initiated these meetings, he was not an ABC member, and 5 did not represent the Government of Sudan in any 6 capacity. The fact remains that the Government was 7 never notified, and the meetings did take place without 8 the Government's prior knowledge, and in the absence of 9 its proper representatives. 10 The SPLM/A also alleges that the Khartoum meetings 11 were irrelevant because they did not cause prejudice to 12 the Government and "did not alter the outcome of the ABC 13 decision in the slightest". This is pure speculation. 14 In fact, there's no way of knowing the extent to which 15 the meetings influenced the experts' approach to the 16 whole delimitation issue and the impact that they 17 ultimately had on the report. In fact, the rejoinder of 18 the Government has already explained in detail that 19 these meetings did indeed influence their report. 20 These were not unimportant gatherings with 21 irrelevant people. The individuals involved were 22 a group of Sudanese intellectuals -- one of them was 23 a former Assistant Commissioner of Abyei -- and the 24 interviews must have been conducted for a reason. 25 Indeed, their opinion was considered so important that</p> <p style="text-align: center;">Page 108</p>

<p>15:14 1 the experts modified the original schedule, the original 2 programme of work in order to accommodate these 3 additional interviews. By acting separately and 4 covertly as they did in conducting the Khartoum 5 meetings, the experts patently violated the procedural 6 rules and exceeded the ABC's mandate. 7 Another example of a situation where the experts 8 confused their role with that of the Commission arose 9 when, some time before they started the research in 10 Khartoum, on 27th April 2005, they apparently contacted 11 Mr Jeffrey Millington, a US official who had worked with 12 Senator Danforth during the negotiations that culminated 13 in the CPA. The Government of Sudan was not informed of 14 this, and only found out about Mr Millington's response 15 when the experts' report was issued on 14th July 2005. 16 Rule 7 of the Rules of Procedure refers to the fact 17 that Commission members "should have free access to 18 members of the public other than those in the official 19 delegations at the locations to be visited". The words 20 "Commission members" clearly do not refer only to the 21 experts. And, needless to say, Mr Millington hardly 22 qualifies as a member of the public at the locations to 23 be visited. 24 By way of background, it should be recalled that the 25 experts' report stated at page 4 of its preface that no</p> <p style="text-align: center;">Page 109</p>	<p>15:18 1 Mr Millington's views. First, there is no indication 2 that this statement is true, that this was indeed the US 3 position at the time. Second, no Abyei Area was ever 4 demarcated. Third, the Abyei local government area, as 5 shown in map 27 in volume III of the memorial of the 6 Government of Sudan, which is also reproduced under 7 tab 7 of the folders, bears no relation to the experts' 8 area. 9 For reasons that are not entirely clear, the experts 10 purported to attribute great importance to the US 11 interpretation of the formula -- an interpretation that 12 is not accurate -- as provided by Mr Millington. The 13 experts did not explain why Mr Millington's advice was 14 believed to be so significant, particularly in the light 15 of his witness statement -- provided at the request of 16 the SPLM/A in these proceedings -- that his role in the 17 peace talks was merely -- and I quote -- "to observe and 18 be available to assist the parties as required", and not 19 even to negotiate, mediate or represent either party. 20 But further details about this episode emerged one 21 year later at a lecture given by Ambassador Petterson at 22 the National Defense University and Wilson Center 23 Symposium on 11th September 2006. This document was 24 filed at Annex 86 of the Government of Sudan's memorial 25 and is also reproduced under tab 11 of the common</p> <p style="text-align: center;">Page 111</p>
<p>15:16 1 maps depicting the area inhabited by the Ngok Dinka in 2 1905 exist. The preface to the report added at page 4 3 that, since the experts found no sufficient 4 documentation showing the administrative situation on 5 the ground at the time -- and I read from the preface of 6 the report: 7 "[They had] to avail themselves of relevant 8 historical material produced before and after 1905, as 9 well as during that year, to determine as accurately as 10 possible the area of the nine Ngok Dinka chiefdoms as it 11 was in 1905." 12 The preface of the report then went on to state: 13 "In doing this the experts are mindful that the 14 drafters of the American proposal which was incorporated 15 into the Abyei Protocol have stated: 'It was clearly our 16 view when we submitted our proposal that the area 17 transferred in 1905 was roughly equivalent to the area 18 of Abyei that was demarcated in later [years].' This 19 position was, according to the American participants, 20 conveyed to the two sides at the Naivasha talks." 21 The footnote at the end of this paragraph refers to 22 an email from Jeffrey Millington to the US embassy in 23 Nairobi, Kenya of 27th April 2005. This is the extent 24 of the reference to this advice in the experts' report. 25 Three comments are warranted on the substance of</p> <p style="text-align: center;">Page 110</p>	<p>15:19 1 bundle. 2 On that occasion Ambassador Petterson revealed that 3 he had sent an email to Mr Millington and repeated his 4 statement that: 5 "It was clearly our view [the Americans' view] ... 6 that the area transferred in 1905 was roughly equivalent 7 to the area of Abyei that was demarcated in later 8 years." 9 More precisely, Ambassador Petterson, in commenting 10 on Mr Millington's views, remarked as follows: 11 "The Americans had not meant to limit the gathering 12 of information about Abyei strictly to information 13 available in 1905, which my colleagues and I found 14 extremely limited and manifestly insufficient upon which 15 to base a decision on Abyei's boundaries." 16 Ambassador Petterson's remarks call for four 17 important comments. First, it is obvious that 18 Mr Millington's email played an important role to the 19 extent that it was used to provide a US interpretation 20 of the formula and that the experts stated in the report 21 that in determining the area of the nine Ngok Dinka 22 chiefdoms they were mindful of the American position as 23 conveyed by Mr Millington. 24 Second, Mr Millington's advice apparently comforted 25 the experts in their analysis, as reported by the</p> <p style="text-align: center;">Page 112</p>

<p>15:21 1 chairman of the ABC in his 2006 lecture, that it was 2 extremely limited and manifestly insufficient to limit 3 the gathering of information about Abyei strictly to 4 information available in 1905. 5 Third, Ambassador Petterson's remarks provide 6 a highly pertinent example of the disregard that the 7 experts manifested for the agreed procedural framework. 8 It was not up to the experts to seek the views of 9 a third party to interpret the mandate of the ABC, and 10 even less to look for external support, without 11 disclosing their initiative to the other ABC members or 12 the parties, in order to modify or expand the scope of 13 the ABC's mission. The formula comprising part of the 14 mandate of the commission had been clearly defined and 15 agreed by the parties, and it was the experts' duty to 16 keep their decision within the bounds of such an agreed 17 mandate. 18 Fourth, Mr Millington's views did not accurately 19 reflect the formula that was expressly agreed by the 20 parties, namely to delimit the area of the nine Ngok 21 Dinka chiefdoms transferred to Kordofan in 1905. In 22 fact, Ambassador Petterson confuses two things: the 23 relevant date, 1905; and earlier or later evidence 24 bearing on the position in 1905. Such evidence was 25 never excluded.</p> <p style="text-align: center;">Page 113</p>	<p>15:24 1 expressed this view to me or any of my aides, clearly or 2 otherwise. Neither I nor any of my assistants were 3 informed of any later [years'] revision or version of 4 the definition." 5 Furthermore, the parties had requested the experts 6 in no uncertain terms to base their findings on research 7 and scientific analysis. Procedural Rule 11 allows the 8 experts to determine what additional documentation 9 and/or archival material will need to be consulted and 10 certainly does not authorise them to contact 11 representatives of unrelated governments. 12 Article 4 of the Abyei Annex provides that: 13 "The experts shall consult the British archives and 14 other relevant sources on Sudan, wherever they may be 15 available, with a view to arriving at a decision that 16 shall be based on scientific analysis and research." 17 Not based on the opinion of an unrelated third party 18 solicited without the parties' knowledge and prior 19 approval. Article 3.4 of the Terms of Reference repeats 20 the same language verbatim, thus reiterating its 21 significance for the parties. 22 In the light of these provisions, what was the point 23 of soliciting Mr Millington's views and attributing them 24 so much significance that the experts felt compelled to 25 preface their report with the specification that in</p> <p style="text-align: center;">Page 115</p>
<p>15:22 1 Apart from its usual generic rebuttal that the 2 experts were granted broad procedural discretion by the 3 parties and therefore could meet with third parties if 4 they thought it appropriate, and its customary dismissal 5 of the Government's complaints as contrived and 6 frivolous, the SPLM/A seeks to minimise the importance 7 of Millington's advice by characterising it as a single 8 email exchange. It adds that the experts' conduct in 9 this respect was not "a serious violation of 10 a fundamental procedural guarantee", and states that in 11 any event it caused no injury. 12 On the contrary, Mr President, the Government 13 submits that this was indeed a serious violation. It 14 was neither necessary nor conforming with the agreed 15 procedural rules for the experts to solicit the views of 16 a US representative in the negotiating sessions in order 17 to ascertain the meaning of the formula. 18 As stated by Vice President Taha in his witness 19 statement filed with the Government's counter-memorial: 20 "The GoS did not need to approach any of the US 21 mediators for any explanation of the Danforth proposal." 22 The Vice President of Sudan also expressed surprise 23 at Mr Millington's opinion as formulated in the report. 24 He stated as follows: 25 "Neither Danforth nor any of his assistants</p> <p style="text-align: center;">Page 114</p>	<p>15:25 1 reaching their decision they were mindful of the views 2 expressed by the US in their original proposal? What 3 possible bearing could those views have on the task that 4 the parties had assigned to the ABC? 5 In the Government's submission, the experts 6 therefore committed a manifest excess of mandate when 7 they accepted Mr Millington's views without giving prior 8 notice to the ABC as a whole. 9 A further procedural excess of mandate was committed 10 when the experts proceeded to issue their report in 11 disregard of Procedural Rule 14. This goes to the heart 12 of the functioning of the ABC, and as such it is 13 a particularly egregious violation. The plain fact is 14 that there never was an endeavour to reach a decision by 15 consensus of all the Commission members as required by 16 Rule 14. 17 You will recall that this rule imposes the following 18 obligation: 19 "The Commission will endeavour to reach a decision 20 by consensus. If, however, an agreed position by two 21 sides is not achieved, the experts will have the final 22 say." 23 It should also be noted that paragraph 5 of the 24 Abyei Annex provides that: 25 "The report of the experts arrived at as prescribed</p> <p style="text-align: center;">Page 116</p>

<p>15:27 1 by the ABC Rules of Procedure shall be final and 2 binding." 3 Hence the experts could finalise the report only in 4 the absence of a decision by consensus pursuant to 5 Rule 14 of the Rules of Procedure. 6 In contrast with these very clear mandatory 7 provisions the experts fundamentally misinterpreted and 8 misconstrued the Abyei Annex and the Rules of Procedure 9 when they stated in their report that since the parties, 10 the SPLM/A and the GoS were unable to reconcile their 11 differences on the disputed issue, then the decision of 12 the experts "shall be the determinant of the boundaries 13 in question". This erroneous interpretation appears to 14 have been endorsed also by Minister Deng Alor Kuol, who 15 in his first statement referred to the fact that a final 16 report would have been issued by the experts had 17 agreement not been reached by the parties. 18 However, the procedural requirements were quite 19 different. It was the Commission as a whole which 20 should have endeavoured to reach a decision by 21 consensus. The summary of the experts' report gets it 22 right. It correctly states that only "if the 15-person 23 ABC is unable to reach a consensual decision on what the 24 Abyei Area's boundaries should be" could the experts 25 issue a decision that was "final and binding on the</p> <p style="text-align: center;">Page 117</p>	<p>15:30 1 there is a consensus on a particular issue or issues, 2 and when the reply is negative would conclude that the 3 consensus has not been reached. This is what should 4 have happened in the present circumstances, but none of 5 this ever took place. 6 The ABC as a whole never saw the experts' report, 7 either in draft or in final form. Instead the experts 8 sought a meeting with the president directly, without 9 even disclosing the purpose of such a meeting. 10 By the experts' own admission, their conclusion that 11 there was no consensus was based on the fact that the 12 parties had opposing views on the disputed issue. 13 I shall recall the words used by the experts in the 14 summary of their report and decision at page 9: 15 "... the two sides, ie the Government of Sudan (GoS) 16 and the Sudan People's Liberation Movement/Army 17 (SPLM/A), were unable to reconcile their differences on 18 the Abyei issue. Thus the decision arrived at by the 19 five ABC experts shall be the determinant of the 20 boundaries in question." 21 The SPLM/A asserts that there had been attempts at 22 reaching a consensus, which it alleges were 23 systematically rebuffed by representatives of the 24 Government. However, these assertions are based on 25 witness statements provided on behalf of the SPLM/A, and</p> <p style="text-align: center;">Page 119</p>
<p>15:29 1 parties". 2 In the event there was no endeavour to discuss the 3 issue with party representatives on the ABC. The 4 experts simply rushed to a decision, based on the fact 5 that the presentations made by the parties were 6 different, as was to be expected, without ascertaining 7 first whether a consensus could be reached amongst the 8 members of the Commission in proper deliberations within 9 the Commission. 10 The Government of Sudan's written submissions have 11 extensively dealt with the lack of any attempt to reach 12 a consensus in conformity with Rule 14, including 13 a rebuttal of the SPLM/A's arguments in this respect, 14 therefore it is not necessary for me to return to this 15 at great length here. It suffices to recall that the 16 requirement contained in this provision is drafted in 17 mandatory terms: the Commission will endeavour to reach 18 a decision by consensus. Only in the event the 19 Commission -- not the parties -- had been unable to 20 reach a consensus would the experts have had the final 21 say. 22 In other words, Rule 14 imposed an obligation at 23 least to attempt to obtain a consensus amongst the 24 Commission's 15 members. To use an example, the 25 chairman of an assembly would ask the members whether</p> <p style="text-align: center;">Page 118</p>	<p>15:31 1 are unsupported by any documentary evidence. I refer in 2 this respect the Tribunal to our rejoinder at 3 paragraphs 140-143. 4 I would also add that there is no mention in the 5 experts' report, nor was there any mention at the 6 meeting with the president presenting the report, of the 7 three alleged attempts to reach a consensus brought up 8 by the SPLM/A witnesses. This is odd since the report 9 does refer to the need to reach a consensual decision. 10 Had these meetings indeed taken place they would have 11 been mentioned expressly in order to provide a valid 12 explanation of why a general consensus had not been 13 reached. 14 It is particularly strange that the third and final 15 attempt -- allegedly initiated by the chairman of the 16 ABC, Ambassador Petterson, following the Government's 17 final presentation, and as such undoubtedly very 18 important, had it indeed taken place -- was not 19 mentioned in the report. In fact, the chairman's 20 alleged attempt was not even mentioned in the SPLM/A's 21 memorial, and the first reference to it appeared in the 22 witness statement of Mr Abdul Rasul El-Nour Ismail filed 23 with the reply. 24 Consequently, the Government submits that the fact 25 that the experts reached a decision by themselves</p> <p style="text-align: center;">Page 120</p>

<p>15:33 1 without endeavouring to reach a decision by consensus of 2 the 15-person ABC, in violation of the mandatory 3 requirement of Rule of Procedure 14, represents manifest 4 excess of mandate. 5 But in each of the episodes I just mentioned, the 6 experts also violated the principles of contradiction, 7 which inspired the entire ABC process and ensured that 8 the parties were to be present and participate on equal 9 terms in all the various aspects of the procedure, as 10 specified in the Terms of Reference and the procedural 11 rules. This was emphasised in particular in Article 3 12 of the Terms of Reference, in paragraph 3 of the Abyei 13 Annex, and Rule 9 of the Rules of Procedure. When 14 certain tasks were to be carried out by the experts 15 alone, this was specifically stated, as in the case of 16 consultation of the British archives and other relevant 17 sources on Sudan, as indicated in Article 3.4 of the 18 Terms of Reference. 19 As a corollary of that adversarial principle, if 20 evidence were to be produced, the parties had a right to 21 test that evidence; if witnesses were to be heard, the 22 parties had a right to ask questions. For instance, 23 when paragraph 3 of the Abyei Annex stated that the ABC 24 should "listen to the representatives of the people of 25 the Abyei Area and the neighbours, and shall also listen</p> <p style="text-align: center;">Page 121</p>	<p>15:36 1 or otherwise mentioned in the experts' report. The 2 Government's representatives on the Commission were not 3 informed that these interviews were going to take place, 4 and were unaware of them until they read the experts' 5 report. 6 The SPLM/A's allegation that the experts were free 7 to consult anyone they wished ex parte flies in the face 8 of logic and the plain terms of the agreed Procedural 9 Rules. As I mentioned earlier, only in specific 10 instances set out in the Terms of Reference and the 11 Procedural Rules were the experts authorised to act 12 ex parte, as for instance in conducting research in the 13 British archives. 14 For the experts to conduct meetings without the 15 parties' prior knowledge and presence was a blatant 16 violation of paragraph 3 of the Abyei Annex, Article 3.2 17 of the Terms of Reference, and amounts to excess of 18 mandate under Article 2 of the Arbitration Agreement. 19 The experts' conduct was also a violation of basic 20 notions of due process. 21 Moreover, we know from the experts' report that the 22 Ngok Dinka individuals interviewed on 6th May 2005 gave 23 the experts documents and maps of the relevant area 24 which were never handed over to the Government. In 25 particular, the experts were given at some point</p> <p style="text-align: center;">Page 123</p>
<p>15:35 1 to the presentations of the two parties", this is 2 an obvious reference to the principle of contradiction. 3 And yet the experts violated that principle over and 4 again by holding the Khartoum meetings, by soliciting 5 Mr Millington's advice ex parte, and by not seeking 6 a consensus of the ABC as a whole before they issued the 7 final report. 8 To return to the Khartoum meetings with this 9 principle of contradiction in mind, they were held in 10 the absence of the parties' representatives, and the ABC 11 as a whole never had an opportunity to provide its views 12 on the subject. Moreover, some of the interviews 13 conducted in Khartoum are not recorded in the experts' 14 report, and therefore the parties are in the dark as to 15 the context to this day. 16 The minutes of the Khartoum interviews contained in 17 appendix 4 to the experts' report, starting at page 148, 18 list the names of eight Ngok Dinka people apparently 19 interviewed by the experts. However, the only interview 20 recorded in the minutes and attached to the report is 21 that conducted with Mr Deng, who apparently provided 22 information in his capacity of former administrator of 23 the Abyei Area. 24 No further minutes of the interviews taken on 25 21st April 2005 at the Khartoum Hilton are attached to</p> <p style="text-align: center;">Page 122</p>	<p>15:38 1 a sketch map highlighting certain place names. The 2 relevant part of the minutes of the meetings attached to 3 the report, page 156, reads as follows: 4 "They [the witnesses] will also copy the sketch map 5 they made of the area and give us [the experts] a copy. 6 They had highlighted place names on a copy of NC35-L 7 Ghabat Arab map, and we transferred those to our 8 photocopy of that map." 9 Some of the statements recorded in these meetings 10 are also cause for concern, and would have been objected 11 to by the Government had the other ABC members been 12 present, and had they had an opportunity to comment. In 13 particular, when Dr Johnson referred to the area to be 14 delimited, he omitted any reference to the year 1905, 15 and did not use the key word "transferred". He stated, 16 and I read from his statement: 17 "The area to be defined is described in the protocol 18 as the area of the nine Ngok Dinka chiefdoms -- no one 19 else. And we were supposed to discover what territory 20 was being used and claimed by those nine chiefdoms when 21 the administrative decision was made to place them in 22 Kordofan." 23 You will find this at pages 155-156 of tab 2 in the 24 common bundle. 25 As Professor Crawford has explained, this is not</p> <p style="text-align: center;">Page 124</p>

<p>15:39 1 what the agreed formula said. The definition given by 2 Dr Johnson is unacceptable and represents a clear 3 violation of Rule of Procedure 8, which states in no 4 uncertain terms that: 5 "At each meeting with the public the Chairman will 6 explain the purpose of the Commission, noting that the 7 said purpose is limited to defining and demarcating the 8 area of the area of the nine Ngok Dinka chiefdoms 9 transferred to Kordofan in 1905." 10 There was no justification for Dr Johnson's 11 disregard of such a carefully drafted provision. 12 Moreover, Dr Johnson must have known what he was 13 doing, not only because the terms of reference were 14 drafted by the experts themselves, but also because he 15 had previously recognised the importance of the formula, 16 at least for the Government, when he stated in 17 an article he recently wrote that: 18 "Throughout the gathering of testimony in the field, 19 members of the Government delegation repeatedly reminded 20 the experts that only evidence referring to conditions 21 in 1905 was relevant." 22 This passage was cited at paragraph 123 of the 23 Government's counter-memorial. 24 On those occasions, therefore, when Government 25 representatives were present, the experts must have</p> <p style="text-align: center;">Page 125</p>	<p>15:42 1 advice that Mr Millington provided. To this day the 2 Government has not seen the full text of this email 3 exchange and we're none the wiser as to who initiated 4 the exchange. 5 As I mentioned earlier, Ambassador Petterson stated 6 at a conference in 2006 that he did; but even accepting 7 this, we still do not know how the initial question was 8 formulated, what were the modalities of the exchange, 9 nor do we know why the experts considered that a third 10 party communication regarding the formula was relevant 11 or appropriate. Had Mr Millington been tendered as 12 a witness by the SPLM/A in these hearings, the 13 Government of Sudan would have questioned him about all 14 of this. 15 In any event, the experts' manner of proceeding is 16 not a mere irregularity. It is evident that the experts 17 committed an excess of mandate when they accepted 18 Mr Millington's advice because (1) it was incorrect as 19 to the meaning of the formula, and (2) because the 20 parties were not afforded the opportunity to respond or 21 comment before Mr Millington's views were apparently 22 endorsed in the experts' report. 23 The experts' failure to attempt to reach a consensus 24 within the Commission as a whole, pursuant to Rule of 25 Procedure 14, is another clear action of a violation of</p> <p style="text-align: center;">Page 127</p>
<p>15:41 1 weighed their words and were careful to provide accurate 2 descriptions of their mandate. The absence of 3 Government representatives at the Khartoum meetings 4 tainted the process resulting in the experts' report in 5 a fundamental way also for that reason. In particular, 6 the experts' conduct with regard to these meetings 7 breached Article 3 of the Abyei Annex and Articles 3.1 8 and 3.2 of the Terms of Reference. 9 Also objectionable is the fact that, as I mentioned 10 earlier, during these meetings the experts were provided 11 with documents and maps to which the parties, or at 12 least the Government of Sudan, were not privy. The 13 substance of the information provided is still unknown. 14 It also appears that during the Khartoum meetings 15 the experts sought to clarify their understanding of 16 certain locations and certain Ngok place names and 17 requested information in that regard, which included 18 highlighting certain place names on a map. All this 19 information was exchanged and discussed before the 20 experts alone and in the absence of the Government. 21 As to Mr Millington's advice, his witness statement 22 does not shed any light on the modalities of the advice 23 he rendered to the experts. As the SPLM/A itself 24 recognises in its reply memorial, the parties were not 25 informed of and had no opportunity to comment on the</p> <p style="text-align: center;">Page 126</p>	<p>15:44 1 the principle of contradiction. The experts acted alone 2 and provided their final say without checking with the 3 entire ABC as to whether there was any common ground on 4 particular issues in order to reach a consensus. 5 Our opponents seek to justify the experts' conduct 6 by arguing that, under general principles of law, 7 arbitral tribunals possess broad procedural discretion. 8 This argument actually provides another telling example 9 of the double standards that the SPLM/A employs when 10 describing the role of the ABC: on the one hand it 11 criticises the Government for equating the ABC to 12 an arbitral tribunal, and on the other hand it resorts 13 to the same analogy when it suits its purposes. 14 Be that as it may, while it may be true that in 15 general terms a tribunal possesses a certain discretion 16 when it comes to adopting procedural rules, such 17 discretion can be exercised only subject to two 18 important caveats: it can only exist in respect of the 19 due process requirements and in the absence of different 20 agreement by the parties. Notably, a tribunal cannot 21 act in disregard of the procedural conditions that the 22 parties might have agreed to. 23 I will just mention a few examples of arbitration 24 rules which corroborate this conclusion, and this is 25 taken from our opponent's own selection.</p> <p style="text-align: center;">Page 128</p>

<p>15:46 1 Article 13(2) of the Draft ILC Convention on 2 Arbitral Procedures provides that: 3 "In the absence of any agreement between the parties 4 concerning the procedure of the Tribunal, the Tribunal 5 shall be competent to formulate its Rules of Procedure." 6 Article 44 of the ICSID Convention states: 7 "Any arbitration proceeding shall be conducted in 8 accordance with the provisions of this section and, 9 except as the parties otherwise agree, in accordance 10 with the Arbitration Rules." 11 Article 19 of the UNCITRAL Rules states in its first 12 paragraph that: 13 "The parties are free to agree on the procedure to 14 be followed by the Arbitral Tribunal." 15 And paragraph 2 continues, that only: 16 "... failing that agreement, the Tribunal may [...] 17 conduct the arbitration in such a manner as it considers 18 appropriate." 19 A number of arbitration rules contain similar 20 provisions stating that the arbitrators' procedural 21 discretion ends where the parties agreement begins. 22 In this case the parties had agreed to a set of 23 procedural rules in advance, which the SPLM/A itself 24 appraised as, and I quote from the memorial of the 25 SPLM/A, "a specialised set of adjudicative procedures</p> <p style="text-align: center;">Page 129</p>	<p>15:49 1 In particular, Articles 5.1 and 5.2 of the 2 Abyei Protocol highlighted the parties' intention that 3 the Commission be impartial and work in full 4 transparency. Rules of Procedure 6 to 10 also 5 emphasised the transparency of the process by requiring 6 that the whole Commission participate in the process, 7 including the fact that a recording of all oral 8 testimonies be provided to all members of the 9 Commission; this is Rule 9. 10 This procedural framework was based on the respect 11 of general principles of equality of the parties' 12 treatment, and not on the idea of giving free rein to 13 the experts to act on their own initiative and 14 ultimately do as they pleased. 15 These were the principles that should have guided 16 experts when they held the Khartoum meetings, when they 17 solicited Mr Millington's views or when they issued 18 their final report. Instead in each instance the 19 experts worked separately from the other ABC members and 20 did not disclose in advance to the parties their 21 conduct, which became known only when the report was 22 made public. 23 In complete disregard of the Rules of Procedure, the 24 experts held meetings in Khartoum on 6th and 25 8th May 2005 unbeknownst to the parties, after they had</p> <p style="text-align: center;">Page 131</p>
<p>15:47 1 tailored to the requirements of the parties' dispute". 2 Indeed, the so-called "broad procedural discretion" 3 that the experts allegedly enjoyed, according to our 4 opponents, is nowhere to be found in the relevant 5 agreement, and our opponents are unable to point to 6 a single provision to that effect. In fact, the 7 arguments advanced by the SPLM/A are based on either 8 speculation or distortion of the existing procedural 9 rules. 10 It is therefore wrong to allege, as the SPLM/A does, 11 that the ABC experts enjoyed unlimited powers of 12 procedural discretion. They did not, for the parties 13 had chosen specific procedures. When the experts 14 violated binding rules of procedure, such as the 15 parties' right to enjoy equal treatment, to participate 16 in every step of the process and to be heard in 17 an adversarial procedure, they manifestly exceeded their 18 mandate. 19 The experts also failed to respect the requirement 20 of transparency. In light of the public interest 21 surrounding the dispute and the importance of the 22 substantive issues, the entire procedural framework was 23 inspired by the notion of a commission composed of 24 parties' representatives and outside experts, in order 25 to guarantee impartiality and transparency.</p> <p style="text-align: center;">Page 130</p>	<p>15:50 1 announced in April of that year that they would: 2 "... confine [themselves] to records contemporary 3 with or referring to the period of the Anglo-Egyptian 4 Condominium." 5 The reference will be found at page 2 of the note on 6 testimony of field visits reproduced at tab 6 of the 7 arbitrators' folders. 8 The experts also violated the principle of 9 transparency when they sought guidelines from 10 Mr Millington, a national of the United States, a third 11 party, without consulting the parties' representatives 12 or seeking their views, even though the procedural 13 agreements made it abundantly clear that all the ABC 14 members should be involved in the process and have 15 access to all the information exchanged. 16 The requirement of transparency was also similarly 17 disregarded when the experts proceeded to issue a final 18 decision without trying to reach a consensus within the 19 ABC as a whole and never disclosed the contents of their 20 decision to the other members of the ABC, who were 21 simply put before the fait accompli without having the 22 chance to express their views. 23 The fact that the experts also took no notice of the 24 agreed procedural requirements with regard to the 25 transparency of the process amounted to excess of</p> <p style="text-align: center;">Page 132</p>

<p>15:51 1 mandate.</p> <p>2 In conclusion, the ABC experts manifestly exceeded</p> <p>3 their mandate conferred upon them by the parties, which</p> <p>4 included the obligation to adhere to the agreed</p> <p>5 procedural provisions. The parties had taken great care</p> <p>6 in agreeing to a specific procedural framework for the</p> <p>7 ABC that comprised four separate instruments all</p> <p>8 recalled expressly in the Arbitration Agreement</p> <p>9 entrusting the Tribunal -- this Tribunal -- with its</p> <p>10 mandate.</p> <p>11 There can be no question that if a body invested</p> <p>12 with de facto adjudicative powers such as the ABC does</p> <p>13 not respect the principles of procedure agreed by the</p> <p>14 parties, this represents an excess of mandate and the</p> <p>15 final decision of that body must be subject to</p> <p>16 annulment.</p> <p>17 The procedural violations which occurred in this</p> <p>18 case clear fall under that category. I will briefly</p> <p>19 recall them once more.</p> <p>20 The fact that the experts held meetings in camera</p> <p>21 with a number of Ngok Dinka individuals outside of the</p> <p>22 planned schedule and without the parties' knowledge and</p> <p>23 presence amounted to a violation of Article 3 of the</p> <p>24 Abyei Annex, Article 3.2 of the Terms of Reference and</p> <p>25 Rule 7 of the Rules of Procedure.</p> <p style="text-align: center;">Page 133</p>	<p>15:55 1 Submissions by PROFESSOR PELLET</p> <p>2 PROFESSOR PELLET: Thank you very much, Mr President.</p> <p>3 Mr President, members of the Tribunal, the ABC</p> <p>4 experts exceeded their mandate not only by grossly</p> <p>5 breaching their Rules of Procedure, but also</p> <p>6 substantively by basing themselves on grounds which had</p> <p>7 never been agreed, not even envisaged at any time by the</p> <p>8 parties, and by reinterpreting their substantial mandate</p> <p>9 in such a way that they omitted to answer the main issue</p> <p>10 resulting from the definition of their mandate in</p> <p>11 Article 5.1 of the Abyei Protocol, reiterated in the</p> <p>12 Abyei Annex, in the Terms of Reference and in the Rules</p> <p>13 of Procedure, which are all cited in Article 2 of the</p> <p>14 Arbitration Agreement.</p> <p>15 Curiously enough, our opponents, who are so</p> <p>16 talkative on numerous peripheral points, are suddenly at</p> <p>17 a loss for words -- this is something they have in</p> <p>18 common with James Crawford -- when it comes to the</p> <p>19 central issues; 10 pages of their rejoinder in toto for</p> <p>20 the nine different grounds for a substantive excess of</p> <p>21 mandate, absence of justification, infra or ultra petita</p> <p>22 pronouncements, to be compared with the same number of</p> <p>23 pages devoted to the rather futile development on the</p> <p>24 burden of proof or with the 25 -- yes, Mr President,</p> <p>25 25 pages -- dedicated to the rather academic discussion</p> <p style="text-align: center;">Page 135</p>
<p>15:53 1 The fact that the experts contacted a third party</p> <p>2 representative to provide his understanding of the</p> <p>3 formula without the parties' knowledge and without them</p> <p>4 being afforded an opportunity to comment amounted to</p> <p>5 a violation of Article 4 of the Abyei Annex, Article 3.4</p> <p>6 of the Terms of Reference and Rule 7 of the Rules of</p> <p>7 Procedure.</p> <p>8 The fact that the experts proceeded to issue a final</p> <p>9 decision without the slightest attempt to reach</p> <p>10 a consensus within the ABC as a whole amounted to</p> <p>11 a violation of Rule 14 of the Rules of Procedure.</p> <p>12 These are not trivial omissions or mere defects of</p> <p>13 form, Mr President; these were key aspects of the ABC</p> <p>14 process, and the parties had a legitimate expectation</p> <p>15 that the ABC would comply with them, since the validity</p> <p>16 of the experts' decision depended on its conformity with</p> <p>17 the mandatory procedural requirements imposed by the</p> <p>18 parties as forming part of the Commission's mandate.</p> <p>19 Mr President, members of the Tribunal, I thank you</p> <p>20 for your kind attention. May I ask you now to call on</p> <p>21 Professor Pellet to continue with the Government's</p> <p>22 presentation on excess of mandate.</p> <p>23 THE CHAIRMAN: I thank you very much and I give now the</p> <p>24 floor to Professor Pellet.</p> <p>25 (3.55 pm)</p> <p style="text-align: center;">Page 134</p>	<p>15:57 1 of the finality principle.</p> <p>2 This does not make my task easy. If I only answer</p> <p>3 those ten pages, I would miss quite a few important</p> <p>4 issues. If I deal with all the relevant points,</p> <p>5 including those conveniently forgotten by our opponents,</p> <p>6 I will have to repeat what we have already said at</p> <p>7 reasonable length in our own written pleadings.</p> <p>8 Since I do not see any advantage in repetition,</p> <p>9 first I will respectfully refer you, members of the</p> <p>10 Tribunal, to our own written pleadings which we</p> <p>11 integrally maintain. The relevant passages appear at</p> <p>12 pages 76-98 of the Government's memorial, pages 43-68 of</p> <p>13 our counter-memorial and at pages 56-80 of our</p> <p>14 rejoinder. Second, I will only indulge myself in</p> <p>15 reminding you of the main points at stake. Third,</p> <p>16 I will reply in some detail to the few arguments still</p> <p>17 advanced by the SPLM/A in its rejoinder.</p> <p>18 I will do this by discussing successively the</p> <p>19 ultra petita aspect of the ABC experts' report; then the</p> <p>20 failure of the experts to motivate their decision in</p> <p>21 accordance with their mandate, which in fact can also be</p> <p>22 related to ultra petita; and third, their refusal to</p> <p>23 decide the petitum or, in other words, their</p> <p>24 infra petita decision.</p> <p>25 First, the ABC experts decided ultra petita.</p> <p style="text-align: center;">Page 136</p>

<p>15:59 1 Mr President, let me begin with the excess of mandate 2 resulting in a decision ultra petita independently of 3 the question of motivation or non-motivation. 4 It is, if I may put it this way, an easy point, 5 since our opponents accept that, quoting their memorial: 6 "An excess of mandate under Article 2(a) is 7 a decision by the ABC experts that was ultra petita 8 purporting to decide matters outside the scope of the 9 disputes submitted by the parties." 10 They also concede that, quote again from their 11 reply: 12 "... an admissible excess of mandate claim concerns 13 traditional grazing rights in the goz." 14 The SPLM/A does not come back to this in its 15 rejoinder, and simply refers the reader back to its 16 reply. As for us, our answer is given at pages 69-74 of 17 our rejoinder, which follow and complete pages 45-50 of 18 our counter-memorial. 19 Our opponents make three main points. First, the 20 ABC experts did not confer rights on the Ngok Dinka 21 outside the Abyei Area, nor did they limit the 22 Messiriya's traditional rights; they only clarified 23 existing rights. Second -- still the SPLM/A speaking -- 24 in any case such findings are included in the incidental 25 jurisdiction vested in the ABC. And third, this is</p> <p style="text-align: center;">Page 137</p>	<p>16:03 1 acknowledgment. 2 This is, of course, unacceptable. This Tribunal 3 must decide on the basis of legal principles, and its 4 mandate does not open the door to such, nor to any 5 quid pro quo. 6 If the Tribunal finds that the granting or 7 limitation of grazing rights to the Ngok Dinka or to the 8 Messiriya constitutes an excess of power, an excess of 9 mandate a fortiori, the obvious consequence has to be 10 that provided for in Article 2(c) of the Arbitration 11 Agreement. According to that provision: 12 "If the Tribunal determines ... that the ABC experts 13 exceeded their mandate, it shall make a declaration to 14 that effect, and shall proceed to define the 15 boundaries ..." 16 There is no distinction in the mandate of this 17 Tribunal thus defined between different categories of 18 excesses of mandate. If the Tribunal determines that 19 an excess of mandate was committed by the experts, then 20 it can and must proceed to the second phase. 21 There can be no doubt that by pronouncing themselves 22 on the grazing rights of the Ngok Dinka and of the 23 Messiriya the ABC experts did exceed their mandate, 24 which is, if I dare recall the formula again, "to define 25 (i.e. delimit) and demarcate the area of the nine Ngok</p> <p style="text-align: center;">Page 139</p>
<p>16:01 1 a secondary issue that must be interpreted in such a way 2 that the decision is consistent with the mandate and 3 anyway could not affect the remainder of the report. 4 I will tackle this last point first. Indeed, the 5 issue of the grazing rights is not at the core of the 6 present dispute. It is not, however, as trivial and 7 minor as the SPLM/A tries to present it, if only because 8 it shows how cavalier the experts' approach of their 9 mandate was. 10 Moreover, the analysis made by the experts of the 11 so-called "secondary rights" of the Ngok Dinka gives the 12 key of their final decision. In other words, the 13 experts' findings concerning the rights in question not 14 only is an excess of mandate per se but also it 15 decisively contributes to the manifestly untenable 16 reasoning underlying the other aspects of the experts' 17 decision. 18 Moreover, Mr President, I suspect that the hidden 19 concession that the SPLM/A makes -- yes, the experts 20 acted in excess of their mandate in this respect but it 21 does not really matter -- aims at inciting you to accept 22 a kind of quid pro quo according to which the 23 recognition of an excess of mandate on this point would 24 constitute a sufficient satisfaction for the Government, 25 without any other consequence deriving from this</p> <p style="text-align: center;">Page 138</p>	<p>16:05 1 Dinka chiefdoms transferred to Kordofan in 1905"; to 2 define and demarcate an area, not to decide on grazing 3 rights. 4 The SPLM/A tries hard to make you, members of the 5 Tribunal, think that the experts have not conferred any 6 right to the Ngok Dinka nor limited those of the 7 Messiriya. Well, let me just read the relevant part of 8 the report, and I insist not on the introductory part, 9 the so-called "propositions", where the experts try to 10 explain their findings, but on the dispositive, the final 11 and binding decision, paragraph 5 of which reads: 12 "The Ngok and Messiriya shall retain their 13 established secondary rights to the use of land north 14 and south of this boundary." 15 This Mr President, clearly is a decision, but it is 16 manifestly a decision which falls outside the mandate of 17 the ABC, which is ... et cetera. Therefore, it cannot 18 be denied that the experts decided ultra petita, which 19 obviously constitutes an excess of mandate. 20 Only two things deserve to be added, or more exactly 21 recalled. First, by no means such a decision can be 22 seen as the exercise of an incidental jurisdiction; and 23 second, it contradicts the agreement between the parties 24 in this respect. 25 As for the incidental jurisdiction, as accepted by</p> <p style="text-align: center;">Page 140</p>

<p>16:07 1 the SPLM/A itself, I quote from their reply, 2 paragraph 651: 3 "The purpose of incidental or ancillary powers is to 4 provide for the full and orderly settlement of the 5 disputes submitted by the parties." 6 As is obvious from a mere reading of the mandate, 7 the question of the secondary rights was not submitted 8 by the parties to the ABC. 9 Even more, it was decided and agreed by the parties 10 themselves in Article 1.1.3 of the Abyei Protocol, which 11 is in tab 3 of the common bundle, which provides that: 12 "The Misseriya and other nomadic peoples retain 13 their traditional rights to graze cattle and move across 14 the territory of Abyei." 15 At first reading it could be thought that after all 16 the experts had only confirmed what had already been 17 decided by the parties, which would be only venial sin. 18 It could be argued whether venial sin may constitute 19 an excess of mandate. But the question does not arise 20 in our context since the experts went much beyond 21 a minor violation: they in fact decided differently, or 22 at least clearly beyond what the parties had agreed, as 23 is apparent if you compare both texts. 24 While the Abyei Protocol recognised rights to the 25 Messiriya and other nomadic people on the territory of</p> <p style="text-align: center;">Page 141</p>	<p>16:11 1 both possessed 'shared secondary rights' in the goz) did 2 not purport to define the full extent of the Misseriya's 3 rights of usage in other areas. As discussed above, the 4 ABC experts' sentence was merely the basis for the 5 boundary which was drawn bisecting the goz. That is 6 made crystal clear by the extensive and very specific 7 discussions in the ABC Report of the fact that the 8 Misseriya enjoyed substantial rights of usage to the 9 south of the goz ..." 10 However, it must be noted that the only logical 11 implication of a shared rights area is that outside this 12 area rights are not shared. And I still quote from the 13 SPLM/A reply that the statements made by the experts: 14 "... made very clear that the ABC Experts had 15 concluded that the Misseriya had historically exercised 16 secondary rights of usage well south of the goz 17 (extending to locations south of Abyei Town)." 18 These are long quotes, Mr President, but they 19 deserve to be made because, beyond the more limited 20 issue of the manifest excess of mandate constituted by 21 these ultra petita findings, these quotes show something 22 extremely important. 23 While apparently the experts limit the secondary 24 right of the Messiriya to the shared area, the SPLM/A 25 acknowledges that those rights extended south of the</p> <p style="text-align: center;">Page 143</p>
<p>16:09 1 Abyei, the experts for their part recognise secondary 2 rights to the Ngok Dinka outside -- north -- of that 3 territory. Whether it is an attribution of rights or 4 a confirmation, this clearly falls outside their 5 mandate, and it changes the careful balance arrived at 6 in the Abyei Protocol. 7 Another and last remark is in order, Mr President; 8 it concerns the Messiriya. According to the SPLM/A, the 9 sentence in the experts' decision, and I read from their 10 reply: 11 "... in no way limits the Misseriya's rights to 'the 12 southern part of the "shared area", i.e., the area 13 between 10 degrees 10 minutes north and 10 degrees 14 35 minutes north'. To the contrary, it confirms that 15 the Misseriya retain their rights 'south of this 16 boundary' (i.e., the northern boundary of the Abyei 17 Area)." 18 I note in passing that this is in no way clear from 19 the ABC's report, and it begs the question why it had to 20 establish an area of shared rights or why the experts 21 thought it necessary to confer or confirm rights to 22 grazing. 23 I read again from the SPLM/A reply, the sentence in 24 question: 25 "... (stating that the Misseriya and the Ngok Dinka</p> <p style="text-align: center;">Page 142</p>	<p>16:14 1 10 degrees 10 minutes -- entirely arbitrary -- line 2 chosen without any justification by the experts. 3 This puts into full light the arbitrariness not only 4 of this line, but of all the experts' reasoning. While 5 wrongly they have fixed the 10 degrees 35 minutes line 6 at the extreme northern limit of the secondary rights 7 they had recognised as belonging to the Ngok, with the 8 sole justification that it represented "the northernmost 9 limit that the SPLM/A was willing to put forward", why, 10 Mr President, why have the experts not used the same 11 criterion for fixing the southern line from which the 12 middle line solution would have been drawn, that is at 13 the extreme south of the grazing rights of the 14 Messiriya? 15 Indeed, this is a striking confirmation of the 16 experts' state of mind. The northern line was drawn 17 according to the Ngok Dinka's claimed secondary rights; 18 the southern line on the basis of the Ngok Dinka's still 19 alleged dominant rights. But what about the Messiriya's 20 rights, which could in any case only have been 21 secondary, according to the experts' classification, 22 since being nomads they do not establish permanent 23 structures, the only apparent source of dominant rights 24 for the experts? In any case again, why did the experts 25 not adopt a consistent line of reasoning?</p> <p style="text-align: center;">Page 144</p>

<p>16:16 1 This brings us to other aspects of the excess of 2 mandate. However, before I turn to them, it is probably 3 appropriate to summarise the ultra petita point. 4 The ABC's mandate was strictly limited to drawing 5 the line constituting the border of the area of the nine 6 Ngok Dinka chiefdoms transferred to Kordofan in 1905. 7 Neither the Commission nor the experts were asked to 8 make any pronouncement regarding grazing or other 9 secondary rights of the Ngok Dinka or the Messiriya, or 10 of any other tribes in the region. By including 11 a paragraph on this matter in their decision the experts 12 clearly exceeded their mandate; all the more so that 13 they contradict in part the agreement reached by the 14 parties in the Abyei Protocol on this matter. 15 Last but not least, the experts' position on this 16 point puts into crude light the arbitrary basis of their 17 decision on the border itself. 18 This brings me, Mr President, to another and crucial 19 aspect of the excess of mandate which vitiates the 20 experts' report: the failure to motivate; or, since 21 there is a semblance of justification on some aspects, 22 the total discrepancy between the reasons given by the 23 experts on the one hand, and the mandatory instructions 24 agreed by the parties. 25 As I have shown in my speech this morning, it is</p> <p style="text-align: center;">Page 145</p>	<p>16:20 1 characterise as "frivolous" all the reasons given by the 2 Government: frivolous our complaints that on some 3 fundamental points the experts have simply given no 4 justification; frivolous too our complaints that on 5 other points the experts decided ex aequo et bono, 6 including the Government's suggestion that in reality 7 the experts purported to allocate oil resources in 8 favour of the SPLM/A; and frivolous as well our 9 complaints that the experts relied on unspecified legal 10 principles. 11 Well, I'm not sure in which camp the frivolity lies, 12 Mr President. I will take these three points in turn, 13 but my first point is rather long; it is on the failure 14 to motivate. Maybe this is a good time for a break. It 15 is up to you. 16 THE CHAIRMAN: I follow your suggestion, and the hearing 17 is suspended. 18 (4.21 pm) 19 (A short break) 20 (5.00 pm) 21 PROFESSOR PELLET: Thank you very much. 22 Mr President, members of the Tribunal, I arrived at 23 the second part of my second speech, where I will show 24 that the ABC experts failed to motivate their decision 25 in accordance with their mandate, and more precisely my</p> <p style="text-align: center;">Page 147</p>
<p>16:18 1 absurd to allege that an adjudicative decision does not 2 have to be reasoned, as the SPLM/A insistently does. 3 Such a decision has to be motivated. This is true in 4 general, but even more so when it concerns the 5 delimitation of a border. 6 Moreover, the reasons given in support of the award 7 must relate to the sources decided by the parties, at 8 least when the parties make such a determination, as is 9 the case here, since paragraph or Article 4 of the Abyei 10 Annex provides: 11 "In determining their findings, the experts in the 12 Commission shall ['shall'] consult the British archives 13 and other relevant sources on Sudan wherever they may be 14 available, with a view to arriving at a decision that 15 shall ['shall' again] be based on scientific analysis 16 and research." 17 "Shall consult", "shall be based". These 18 expressions leave no room for doubt as to the mandatory 19 nature of these prescriptions, which are confirmed in 20 paragraph 3.4 of the Terms of Reference. 21 Unfortunately, Mr President, the ABC experts did not 22 comply with these instructions which are part of the ABC 23 mandate, and this not benign neglect is a matter of 24 serious and legitimate concern; even though, with its 25 usual sense of nuance, the SPLM/A has chosen to</p> <p style="text-align: center;">Page 146</p>	<p>17:01 1 first point on that is the real failure to motivate. 2 On this central issue the SPLM/A limits itself to 3 referring to its reply. As I said earlier, the more 4 delicate a point is, the more silent the other side 5 becomes. Since we are here at the very heart of the 6 present dispute, I will not imitate them; although the 7 arbitrators might be interested to note that we already 8 dealt with this crucial issue at pages 85-88 of our 9 memorial, 51-55 of our counter-memorial, and 57-61 of 10 our rejoinder. But this deserves at least a reminder 11 together with some additional thoughts. 12 I now leave aside the rather eccentric idea that in 13 the modern world an adjudication of territories or the 14 drawing of a border line could remain unmotivated or 15 unreasoned, although it must be noted that this is the 16 SPLM/A's main argument on this matter, and by the same 17 token an admission that the experts' report was not 18 motivated. 19 I wish to be clear, Mr President. Of course, when 20 I say that the experts' report was not motivated, I do 21 not mean that it does not contain any reason. After 22 all, it counts not less than 256 pages which are alleged 23 to explain the five paragraphs included in the 24 supposedly final and binding decision. What I mean is 25 that in spite of this apparently lengthy justification,</p> <p style="text-align: center;">Page 148</p>

<p>17:03 1 some of the main points in the decision remain 2 completely and manifestly lacking in motivation. 3 This also means that the question here is not the 4 fact that the Government of Sudan disapproves of the 5 report or disagrees with the reasoning of the parties; 6 the issue here is that there is nothing to disagree 7 with. There is no reason, no argument, no 8 justification; just a pure affirmation. Or, more 9 exactly, pure affirmations, in the plural, since at 10 least three absolutely crucial decisions of the experts 11 come out of the blue, without the slightest bit of 12 reasoning. 13 The first entirely unmotivated allegation by the 14 experts is the first paragraph of their decision: 15 "The Ngok have a legitimate dominant claim to the 16 territory from the Kordofan-Bahr el-Ghazal boundary 17 north to latitude 10 degrees 10 minutes north, 18 stretching from the boundary with Darfur to the boundary 19 with Upper Nile, as they were in 1956 ..." 20 Leaving aside the reference to 1956 while the only 21 critical date stemming from the formula is 1905, nothing 22 in the report, nor indeed outside the report, absolutely 23 nothing can explain the acceptance of the latitude 24 10 degrees 10 minutes north. 25 The SPLM/A tries to find an explanation. They</p> <p style="text-align: center;">Page 149</p>	<p>17:07 1 since it will be one of the two lines from which the 2 experts will draw the final goz dividing line, since 3 they write: 4 "The area between latitudes 10 degrees 10 minutes 5 north and 10 degrees 35 minutes north therefore 6 represents the area of secondary rights shared between 7 the Ngok and Misseriya." 8 I will come back to this "therefore" in a few 9 moments, but the fact is that, first, nowhere in the 10 report is there the least explanation of why the experts 11 fixed the limit of the Ngok Dinka dominant rights at 12 this place. 13 Second, reading the report does not at all confirm 14 the explanation offered by the SPLM/A in its reply, 15 since of course the fact that the experts note "that the 16 goz belt is roughly contained within these limits" is 17 an ex post description, but by no means a justification. 18 Three, in spite of this, the 10 degrees 10 minutes 19 north parallel is one of the crucial elements in the 20 whole artificial scaffolding built by the experts. If 21 it is not valid, their whole decision crumbles. Absent 22 any proof, any explanation, any reasoning, it cannot be 23 valid, and this finding made without any scientific 24 analysis of the available documentation clearly 25 constitutes an excess of the experts' mandate.</p> <p style="text-align: center;">Page 151</p>
<p>17:05 1 introduce in the reply the: 2 "... inescapable fact that the ABC report expressly 3 equates latitude 10 degrees 10 minutes with the southern 4 border of what it described as the goz." 5 This strong assertion calls for at least two 6 remarks. First, the SPLM/A gives absolutely no 7 reference to support this strong affirmation. Second, 8 this is not at all what is said in the report. 9 The only mention to latitude 10 degrees 10 minutes 10 north in the report -- which is reproduced at tab 2 of 11 the common bundle -- can be found in proposition 9, 12 where it is said: 13 "The experts, having examined the evidence presented 14 in the preceding propositions, are confident that the 15 area south of latitude 10 degrees 10 minutes north 16 contains the territory in which the Ngok have dominant 17 rights, based on permanent settlements and land use." 18 But this is clearly not a justification; all the 19 less so that nowhere -- nowhere -- in the preceding 20 propositions is 10 degrees 10 minutes north even 21 mentioned. 22 Then there will be two or three mentions afterwards 23 of this latitude in the report, but not at all to 24 justify the latitude; rather, exclusively to infer 25 consequences from it, and fundamental consequences,</p> <p style="text-align: center;">Page 150</p>	<p>17:09 1 The same holds true mutatis mutandis concerning the 2 10 degrees 35 minutes north line which corresponds to 3 nothing but to the extreme claim to the north of the 4 SPLM/A, with the only limited qualification that at 5 page 44 of their report the experts state that this 6 line coincides more or less, but not exactly, with Dinka 7 names on certain maps. 8 The result is that in fact neither of the two lines 9 from which the alleged border is manufactured finds any 10 reasoned explanation in the report, nor anywhere else, 11 as my learned colleagues and friends Rodman Bundy and 12 James Crawford will explain on Monday. 13 The third major aspect of the case decided by the 14 ABC experts without the slightest basis of any kind of 15 reasoning relating to a scientific analysis of the 16 available archives is the incredible non sequitur in 17 their defence -- or absence of defence might be more 18 accurate -- of the rejection of the Bahr el Arab as the 19 southern limit of the province of Kordofan before the 20 1905 transfer. 21 The issue is explained, I think, with great clarity 22 at pages 86 and 87 of the Government's memorial. I will 23 try to be as clear as the memorial was on this point, 24 which our opponents, who carefully do not come back to 25 it in their rejoinder, have done their best to make as</p> <p style="text-align: center;">Page 152</p>

<p>17:12 1 obscure and incomprehensible as possible in their reply. 2 Mr President, like most tragedies the story is in 3 five acts. 4 Act I: the point of departure of the discussion must 5 be -- as acknowledged by the SPLM/A itself -- that in 6 a first stage the experts find that: 7 "... the evidence presented supporting the 8 Government's interpretation of the 1905 boundary is 9 strong." 10 That's a quote from the experts' report, page 36. 11 That claim is -- and I quote again from the experts' 12 report itself: 13 "... that the southern boundary of Kordofan province 14 at the inception of the Anglo-Egyptian Condominium was 15 the Bahr el Arab river, and that all peoples living 16 north of that boundary before 1905 were already in 17 Kordofan." 18 Act II, a minor episode for my story. I quote the 19 experts again: 20 "... there was considerable geographical confusion 21 about the Bahr el Arab and Bahr el Ghazal regions for 22 the first two decades of Condominium rule." 23 Therefore Act III: 24 "... the full context ... reveals that the 25 Ragaba ez Zarga/Ngol, rather than the River Kiir, which</p> <p style="text-align: center;">Page 153</p>	<p>17:16 1 50 kilometres further north". 2 Here again our opponents give absolutely no 3 explanation; and they could not, of course. The experts 4 offer none -- absolutely none -- for this pure 5 conjuring. And yet their mandate was to define -- ie 6 delimit -- and demarcate the area of the nine Ngok Dinka 7 chiefdoms transferred to Kordofan in 1905; and this, in 8 basing themselves on a scientific analysis of the 9 available documentation. 10 In finding that the southern border of Kordofan in 11 1905 followed the Ragaba ez Zarga they were wrong. But 12 we agree this is not an excess of mandate; just 13 an incredible mistake for supposedly knowledgeable 14 experts. But by jumping from this erroneous conclusion 15 within their mandate to a parallel without offering any 16 kind of explanation, the experts purely and simply 17 exceeded their mandate. And this is related to their 18 fundamentally wrong interpretation of their mandate, 19 which will be my last point in a few moments. 20 Before that, Mr President, I must turn to other 21 aspects of the motivation or lack of motivation of the 22 experts' report, and in particular to the fact that they 23 have based part of their decision on vague legal 24 considerations which not only are unspecified, as we 25 explained in our memorial, but also which find no basis</p> <p style="text-align: center;">Page 155</p>
<p>17:14 1 is now known as Bahr el Arab, was treated as the 2 province boundary, and that the Ngok people were 3 regarded as part of Bahr el Ghazal province until their 4 transfer in 1905." 5 Still from the experts' report. 6 We do not accept this, Mr President. But this is 7 not my own province; it will fall on Rodman Bundy to 8 show this. We agree that the Tribunal is not a Court of 9 Appeal, and cannot control the veracity of this finding 10 unless it accepts that the experts have exceeded their 11 mandate. The fact is that, based on an alleged 12 geographical confusion, the experts now sustain that the 13 southern limit of Kordofan in 1905 was the 14 Ragaba ez Zarga. 15 Now Act V: the decision of the experts. They say: 16 "... it is reasonable and equitable to divide the 17 Goz between them ['them' being the Ngok Dinka and the 18 Misseriya] and locate the northern boundary in 19 a straight line at approximately latitude 10 degrees 20 22 minutes 30 seconds north." 21 This is the first sentence of the final and binding 22 decision of the experts. But here is the missing 23 Act IV, and here is the excess of mandate. Act IV could 24 be entitled "The Experts' Magic", or "How the river 25 Ragaba ez Zarga turns to be a parallel situated</p> <p style="text-align: center;">Page 154</p>	<p>17:18 1 whatsoever in their mandate. In effect, in so doing 2 they do not define an already-existing area that they 3 were supposed to determine on the basis of a scientific 4 analysis; they allocate territories, an operation for 5 which they had no mandate and no jurisdiction, if I may 6 use this maybe too legalistic wording. 7 It might be useful to recall that the solution 8 adopted -- it may be more accurate to say "invented" -- 9 by the ABC experts mainly lies on a distinction between 10 dominant rights on the one hand, and secondary rights on 11 the other hand. I can live with this distinction as 12 long as it is used for factual description purposes. 13 It is certainly true that among nomadic or 14 semi-nomadic societies there exist, besides classical 15 proprietary rights, traditional customary rights which 16 could be called "secondary rights". But this is not the 17 issue, except for one point: purely nomadic peoples who 18 never settle for a long period in the same place will 19 then never have any dominant rights like the Messiriya. 20 The fact is that the Anglo-Egyptians did not 21 administer the Condominium on this basis; and that the 22 transfer operated in 1905, which the experts were 23 entrusted with the task to determine, basing themselves 24 on a scientific analysis of the available archives, the 25 fact is that that transfer was not operated on the basis</p> <p style="text-align: center;">Page 156</p>

<p>17:20 1 of these secondary rights as opposed to dominant rights; 2 the transfer was operated on a territorial basis. 3 And this is confirmed by the analysis that the 4 experts themselves made in part of their proposition 7 5 that you will find under tab 2 of the common bundle at 6 pages 35-38. Before this analysis takes place -- which 7 is a debatable analysis, but it is a kind of analysis 8 which takes place before the unfortunate loss of 9 follow-up in the reasoning reflected in the missing 10 Act IV, right or wrong -- globally wrong indeed, we 11 think -- there was analysis. 12 This analysis shows that the administration of the 13 Condominium was, if I may say so, territorialised, based 14 on territorial units, not on tribal divisions, or even 15 less on tribal rights, whether dominant or secondary. 16 Professor Crawford has already discussed this point in 17 his pleading on the meaning of the formula this morning. 18 Therefore, it is apparent that the transfer of 19 territory of 1905, once again the one whose result was 20 to be defined by the experts, the transfer of territory 21 of 1905 could not have been done on the basis of 22 a sharing of secondary rights. And there is definitely 23 not the slightest basis for the position that -- I quote 24 the experts' report: 25 "Based on the legal principle of the equitable</p> <p style="text-align: center;">Page 157</p>	<p>17:25 1 "legal principle" was that it helped in constructing 2 an ex aequo et bono reasoning into I would say a more 3 presentable "legal-like" argument; even though I must 4 repeat that they were no more entitled to allocate 5 territories under the guise of law than to recourse to 6 equity to that effect. Be that as it may, when one 7 reads the final and binding decision made by the 8 experts, it clearly appears that in their minds equity 9 prevails over law. 10 This is quite apparent from the conclusion of 11 appendix 2 of the report, which I read. It is page 26: 12 "The implication of all of the above is that the 13 principles of equity, substantive justice and fairness 14 shall guide the drawing of the line(s) within the 15 territory of shared secondary rights that separates the 16 land of the nine Ngok Dinka chiefdoms and the Misseriya, 17 being the approximate Abyei boundaries." 18 And this is fully confirmed in paragraph 3 of the 19 final and binding decision of the report itself, which 20 reads as follows -- and I quote: 21 "The two parties lay equal claim to the shared areas 22 and accordingly it is reasonable and equitable to divide 23 the Goz between them and locate the northern boundary in 24 a straight line at approximately latitude 10 degrees 25 22 minutes 30 seconds north."</p> <p style="text-align: center;">Page 159</p>
<p>17:22 1 division of shared secondary rights, therefore, the 2 northern boundary should fall within the zone between 3 latitudes 10 degrees 10 minutes north and 10 degrees 4 35 minutes north." 5 The issue is not so much that the principle applied 6 by the expert is indeterminate -- although it is -- than 7 the fact that this inter-tribe principle, if it existed 8 at all, could not have been in the minds of the British 9 administrators when they decided and operated the 1905 10 transfer. And yet the transfer was made. 11 And it was not for the experts to make it de novo. 12 Their only mandate was to determine the result of the 13 transfer made in 1905. And indeed they disposed of 14 an ample documentation which could have been used to 15 define -- to define, not to decide anew -- to define 16 what was, and not what should have been, the area of the 17 nine Ngok Dinka chiefdoms transferred -- that is, which 18 had been transferred, and not to be transferred -- to 19 Kordofan in 1905 -- and not in 2005 on the basis of 20 a pseudo-legal rule relating to the allocation of 21 territories. 22 By doing this the experts again have exceeded their 23 mandate. 24 Mr President, it is likely that one of the 25 advantages the experts found in invoking this so-called</p> <p style="text-align: center;">Page 158</p>	<p>17:27 1 Just a reminder: as I have discussed some minutes 2 ago, in the immediately preceding paragraph the experts 3 had decided -- once again purely out of the blue, 4 without any explanation, let alone any kind of 5 scientific analysis -- they had decided just before that 6 the limits of the secondary rights of the Messiriya on 7 the one hand, and of the Ngok Dinka on the other hand, 8 were the parallels 10 degrees 10 minutes north and 9 10 degrees 35 minutes north respectively. This is 10 an excess of mandate. But this is not my point anymore, 11 just a reminder. 12 The point now is that, arriving at this stage, the 13 experts were confronted with two lines. And in order to 14 select the final one they committed another excess of 15 mandate by basing themselves on what they held as being 16 reasonable and equitable, which is very precisely the 17 definition of an ex aequo et bono decision. 18 The repeated answer of the SPLM/A is, first, that -- 19 and I quote: 20 "There is nothing in the parties' agreements or in 21 general principles of law that forbids 22 an ex aequo et bono decision". 23 Mr President, I have promised not to use pejoratives 24 to characterise our opponents' arguments, but I cannot 25 help it. It is simply absurd.</p> <p style="text-align: center;">Page 160</p>

<p>17:29 1 As I have said in my previous speech this morning, 2 it is true that the parties did not expressly agree to 3 forbid the ABC to recourse to equity. But -- and this 4 is much more relevant -- it is also true that there is 5 nothing either authorising the Commission or the experts 6 to do so. And in our modern world, as amply shown in 7 the memorial of the Government, and again at 8 pages 61-63, and again in our rejoinder at 63-66, 9 without real contradiction from our opponents, it is 10 well established that an adjudicative body can only 11 decide ex aequo et bono when it is expressly authorised 12 to do so by the parties. And this is particularly 13 cogent when a sovereign state is concerned.</p> <p>14 Moreover, in the present case the parties expressly 15 instructed the ABC experts about the sources which they 16 mandatorily had to rely on:</p> <p>17 "... the British archives and other relevant sources 18 on Sudan, wherever they may be available, with a view to 19 arriving at a decision that shall be based ['shall be 20 based'] on scientific analysis and research."</p> <p>21 This leaves no room to apply equity.</p> <p>22 May I add, Mr President, that once again our 23 opponents try in vain to turn this argument concerning 24 the application of the ex aequo et bono principle into 25 a simple "disagreement" by the Government with the way</p> <p style="text-align: center;">Page 161</p>	<p>17:33 1 the position of the oilfields was "unknown in 2005 as 2 they are today". This last assertion is obviously 3 wrong, as those fields are already active.</p> <p>4 The situation has been described by Dr Johnson, the 5 British expert in the ABC, in these apparently genuine 6 words:</p> <p>7 "If the boundary is defined one way, it puts quite 8 a lot of oil in the Abyei Area, and therefore more of 9 that oil revenue had to be shared. If we had accepted 10 the Government's claim that the boundary was the river, 11 there would have been no oil revenue to share. The 12 other thing is that if the boundary defines a certain 13 area, and that area contains oil and active oil-wells, 14 if the people of Abyei vote in a referendum to join the 15 south, and the south votes to become independent, then 16 that oil becomes southern oil, and is not northern oil."</p> <p>17 This shows at least something: the experts were 18 perfectly aware of what they were doing in this let's 19 say quite important respect.</p> <p>20 And a glance at the map showing the ABC boundary 21 line drawn by the experts on a map of Sudan's oil 22 resources confirms that they have not been 23 "insensitive", to put it politely, to this aspect. 24 Moreover, it is ironical to note that in their report 25 the experts have criticised the relevance of a straight</p> <p style="text-align: center;">Page 163</p>
<p>17:31 1 in which the ABC interpreted their mandate. Indeed we 2 disagree, but it is much more than that: instead of 3 basing themselves on the grounds agreed by the parties, 4 the experts chose to decide on another basis, and to 5 invoke their view of reasonableness and fairness in lieu 6 of historical research and analysis.</p> <p>7 And I must say that, whatever one can think of 8 British -- or French, for that matter -- colonisation, 9 the least one must admit is that the coloniser might 10 have based himself on a variety of factors, but that 11 equity and fairness were probably not on the top of his 12 list, including when territorial division was at stake.</p> <p>13 Moreover, again, by deciding ex aequo et bono, 14 instead of basing themselves on their analysis and 15 research of the available archives, the experts, far 16 from defining the pre-existing limits of the area of the 17 nine Ngok Dinka chiefdoms transferred to Kordofan in 18 1905, have allocated territories to the parties on the 19 basis of what they deemed to be reasonable and 20 equitable. This is clearly ultra petita; this clearly 21 exceeds their mandate.</p> <p>22 There is something else, Mr President: contrary to 23 what the SPLM/A tries to demonstrate, the location of 24 the oilfields has undoubtedly weighed on the experts' 25 decision. The SPLM/A may insist in its rejoinder that</p> <p style="text-align: center;">Page 162</p>	<p>17:35 1 boundary line, and insisted that: 2 "... lines drawn between rivers, mountains and 3 longitudes, as well as roads, settlements, soil types 4 and trees, hardly ever demarcate actual boundaries in 5 terms of land use, rights and population dynamics on the 6 ground."</p> <p>7 Yet not only is the ABC northern boundary a perfect 8 straight line, but it also makes, without true 9 justification, a perfect 90-degree southern turn which 10 very conveniently locates all the major oilfields in the 11 Abyei Area.</p> <p>12 May I suggest, Mr President, members of the 13 Tribunal, that this is a strange coincidence which 14 raises significant doubts about the very idea that the 15 experts had of their mandate and of equity, a mandate 16 which certainly did not include handing over the oil 17 resources of Sudan to any of the parties, or even 18 sharing them or taking them into consideration. Indeed, 19 this could not have been in the minds of the 20 decision-makers in 1905.</p> <p>21 And this, Mr President, takes us back again to the 22 very interpretation of their mandate by the ABC experts, 23 and this is the last part of my presentation. The ABC 24 experts decided infra petita.</p> <p>25 Up to now I have shown that the experts have</p> <p style="text-align: center;">Page 164</p>

<p>17:37 1 abusively left their mandate aside and indulged 2 themselves in answering questions which were not part of 3 their mandate, or which, being included in their 4 mandate, they have answered on the basis of 5 impressionistic, pseudo-legal or equitable rules 6 tailored to the circumstances. 7 All this results in several excesses of mandate by 8 addition, if I may say so, because they have added 9 either new questions or new grounds to answer the 10 questions, and grounds which were not part of their 11 mandate. But they have also reached their mandate by 12 subtraction; or, to put it more legally, by deciding 13 <i>infra petita</i>. 14 Faithful to their usual tactic, our opponents 15 display most of their efforts trying to show that what 16 is really at stake here is not an excess of mandate but 17 an essential error. As we have explained on several 18 occasions, although an excess of mandate is certainly 19 wider than the more restrictive and technical notion of 20 "excess of power", we entirely agree that, while 21 an essential error of law or of fact of an arbitral 22 tribunal is a ground for nullity of the award, this 23 Tribunal has probably no jurisdiction to that effect. 24 I put it with a question mark since it could be said 25 to have jurisdiction on the basis of the incidental</p> <p style="text-align: center;">Page 165</p>	<p>17:42 1 that time -- your Tribunal's award by the Government of 2 Sudan. 3 If I understand well their reasoning, as exposed at 4 page 66 of their rejoinder, it consists in saying: 5 first, the Government criticises the ABC experts for 6 having misinterpreted the definition of the Abyei Area; 7 second, it, the Government, designates this 8 misinterpretation as an excess of mandate; third, since 9 the Tribunal, your Tribunal, is entrusted with the same 10 mandate as the ABC, the Government will invoke an excess 11 of mandate again if it disagrees with the future award. 12 Mr President, I hate accusing my adversaries of bad 13 faith, but I must admit that in the present case 14 I cannot help at least having a doubt. Indeed, we are 15 convinced that the experts erred in their definition of 16 the Abyei Area. But this is not -- I repeat, this is 17 not -- the issue at this stage, as we have always made 18 clear. 19 What is at stake is not the definition of the Abyei 20 Area given by the experts, but the definition of the 21 mandate of the ABC, which was to define the area in 22 question not on the basis of the sole area occupied by 23 the nine Ngok Dinka chiefdoms in 1905, but by reference 24 to the area transferred to Kordofan at this date. 25 As for this Tribunal, we have no doubt that it will</p> <p style="text-align: center;">Page 167</p>
<p>17:39 1 jurisdiction doctrine advocated several times by our 2 opponents. 3 It could also be the case that an essential error 4 amounts to an excess of mandate. But the point is moot. 5 At the present stage of the pleadings we do not allege 6 that the Tribunal has made an error in implementing its 7 mandate. What we say for the moment is that it has not 8 implemented its mandate since it has not answered the 9 only question which was -- it's not the Tribunal's, it 10 is the experts' body -- since it has not answered the 11 only question which was asked to them, which was -- do 12 I dare to repeat it again? Yes, I do, so important it 13 is -- which was only, "to define (i.e. delimit) the 14 boundaries of the area of the nine Ngok Dinka chiefdoms 15 transferred to Kordofan in 1905". 16 In other words, the experts have made an essential 17 error of interpretation, but this error -- the only one 18 I am dealing with for the moment -- bears upon the 19 mandate itself, not on its implementation, not on the 20 answer to the question. These errors do exist but they 21 will be dealt with at the appropriate moment; that is 22 during the delimitation part of these hearings. 23 Our opponents seem eager not to understand this 24 point and obstinately try to wave the red flag of 25 non-compliance with this Tribunal's -- this Tribunal</p> <p style="text-align: center;">Page 166</p>	<p>17:44 1 comply with its mandate and will answer completely the 2 question put before it by Article 2 of the Arbitration 3 Agreement. 4 In spite of his quite unusual self-proclaimed loss 5 of words, Professor Crawford has this morning eloquently 6 detailed, word by word, the formula which defines the 7 substantive mandate of the Tribunal as well as it 8 defined the mandate of the ABC. 9 It belonged to the Commission and its experts to 10 define an area, that is a territory with defined limits, 11 where the nine Ngok Dinka tribes -- which apparently 12 were ten at the relevant time -- were established; 13 a territory which was transferred to Kordofan in 1905. 14 Yet it happens that the experts have, as it may, 15 swallowed half of the mandate thus worded, which they 16 have changed into the following formula: to define and 17 demarcate the nine Ngok Dinka chiefdoms ... in 1905. 18 And even more, there can be at least doubts that the 19 experts have paid attention to the date clearly 20 indicated as critical in the formula: 1905. 21 With your permission, Mr President, I will briefly 22 come back to two different aspects of this very obvious 23 and particularly worrying excess of mandate by the ABC 24 experts: first, their genuinely admitted refusal to 25 answer the agreed question, including their marked</p> <p style="text-align: center;">Page 168</p>

<p>17:46 1 indifference towards the agreed critical date; and 2 second, their answer to the question they artificially 3 substituted to that asked in their mandate. 4 Let me put the issue straightforwardly, 5 Mr President. The experts did not like the question 6 before them, and since they didn't like it for reasons 7 which might have a connection with what I said before, 8 when I dealt with the ex aequo et bono part of my 9 speech, they have substituted another question to the 10 one specified in their mandate which they found more 11 appropriate. 12 How do I know that the experts did not like the 13 mandatory question as agreed by the parties in 14 Article 5.1 of the Abyei Protocol and reiterated in 15 Article 1 of the Abyei Annex and reiterated in 16 paragraphs 1.1 and 1.2 of the Terms of Reference and 17 again in the Rules of Procedure at 1.1 and 1.2? Quite 18 simply because the experts themselves said so, and 19 I quote from page 22 of appendix 2: 20 "The narratives contained in the annual reports of 21 Kordofan and Bahr el Ghazal provinces immediately before 22 and after 1905 refer to 'lines' drawn between rivers, 23 mountains and longitudes as well as roads, settlements, 24 soil types and trees. But these hardly ever demarcate 25 actual boundaries in terms of land use rights and</p> <p style="text-align: center;">Page 169</p>	<p>17:50 1 fanciful question. Irrelevant answer to an irrelevant 2 question. 3 It goes without saying that, having changed the 4 question asked to the ABC, the experts could only answer 5 besides or outside the question which constituted their 6 mandate, and this is of course what happened. 7 Instead of answering the mandate question, that is 8 instead of indicating the limit of the area of the nine 9 Ngok Dinka chiefdoms transferred to Kordofan in 1905, 10 the experts embarked on a long demonstration based on 11 the distinction I have already mentioned between 12 dominant and secondary rights from which it appears, 13 among other things of even more limited interest, in 14 order to answer the mandatory question. 15 It is said in the preface of the report that: 16 "No map exists showing the area inhabited by the 17 Ngok Dinka in 1905." 18 My remark: had such a map existed, it would in any 19 case have been of very limited interest to determine 20 whether this whole area or only part of it was 21 transferred to Kordofan in 1905. 22 Therefore, it is said in that same preface, it was 23 necessary for the experts to avail themselves of 24 relevant historical material to determine as accurately 25 as possible the area of the nine Ngok Dinka chiefdoms as</p> <p style="text-align: center;">Page 171</p>
<p>17:48 1 population dynamics on the ground." 2 This is quite an extraordinary declaration with 3 a disarming straightforwardness. The experts write in 4 substance: yes, we have all the elements which would 5 allow us to answer the question, but these lines are not 6 convenient; let's then try something else. What else? 7 Just what is already foreshadowed in the passage I have 8 just read: land use rights and population dynamics on 9 the ground. And in effect consequential the experts 10 will declare that it was: 11 "... incumbent upon [them] to determine the nature 12 of established land or territorial occupation and/or use 13 rights by all the nine Ngok Dinka chiefdoms with 14 particular focus on those in the northernmost areas that 15 formed the transferred territory." 16 This might correspond to the experts' self-assigned 17 mandate, but certainly not to their real mandate, which 18 was to determine which area occupied by the Ngok Dinka 19 chiefdoms was transferred to Kordofan in 1905. This 20 could not be found more in the use rights, whether 21 dominant or secondary, of the local tribes than in 22 coffee grounds. 23 This shift from one question to another, from a real 24 mandate to another imaginary, self-given mandate is also 25 apparent from the answers given by the experts to their</p> <p style="text-align: center;">Page 170</p>	<p>17:52 1 it was in 1905. But again, this is not the point. The 2 point is: were they transferred? 3 The same remark is in order in respect to the six 4 first propositions discussed in the summary of the 5 experts' report and expanded in the appendices, which 6 all relate exclusively on the respective presence of the 7 Ngok Dinka and the Messiriya in the region. 8 Only in proposition 7 do the experts tackle the 9 issue of the area affected by the 1905 decision, and it 10 is on this occasion already related in my five acts 11 minus one tragedy that, after having found that "the 12 evidence supporting the Government's interpretation of 13 the 1905 boundary as following the Bahr el Arab" was 14 strong, they nevertheless accept not the Bahr el Arab 15 but the Ragaba ez Zarga as the 1905 limit. 16 Whether or not this was right is not my problem. 17 Mr Bundy will show that it was wrong. But at least this 18 did answer the mandatory question. But immediately 19 after, without any kind of explanation, the experts 20 return to their question and discuss in proposition 8 21 the issue of the "continuity in the territory occupied 22 and used by the nine Ngok Dinka chiefdoms which was 23 unchanged between 1905 and 1965". 24 It is at the end of this discussion of proposition 8 25 that the parallel of latitude 10 degrees 10 minutes</p> <p style="text-align: center;">Page 172</p>

<p>17:54 1 north is introduced without a single word of 2 justification, exactly as 10 degrees 35 minutes north 3 appeared in the discussion of proposition 9, being 4 presented as the limit of the Ngok's permanent dominant 5 rights and secondary rights respectively, which again 6 bears no relation with the question in the mandate. 7 Then comes the oracle. I read: 8 "Based on the legal principle of the equitable 9 division of shared secondary rights, therefore the 10 northern boundary should fall within the zone between 11 latitudes 10 degrees 10 minutes north and 10 degrees 12 35 minutes north." 13 May I just note that "should fall" is a clear 14 indication of the absolute deviation from their mandate 15 realised by the experts. They had not been asked where 16 the boundary should be placed, but where lay the limit 17 of the area transferred to Kordofan a century ago. 18 Something else must be noted: while paying 19 lip-service to the temporal issue by mentioning from 20 time to time the year 1905, the critical date according 21 to the mandate, the ABC experts have largely ignored 22 this date. Very tellingly, the final and binding 23 decision only mentions one date three times; however, it 24 is not 1905 but 1956. 25 I just wished to recall this, Mr President. More</p> <p style="text-align: center;">Page 173</p>	<p>17:58 1 reinterpretation of their mandate by the experts, since 2 this way of proceeding has prevented them from examining 3 the issue which was before them in all its dimensions. 4 Having postulated that their task was to define and 5 demarcate the area of the nine Ngok Dinka chiefdoms in 6 1905 without paying attention to the agreed formulation 7 of their mandate, they could not address some very real 8 and important issues such as the following. 9 What part(s), if any, of the nine Ngok Dinka 10 chiefdoms were already part of Kordofan before 1905? 11 Or, on the contrary, were not certain parts of those 12 same chiefdoms left outside of Kordofan after the 13 transfer? 14 In any case, in reasoning exclusively in terms of 15 tribes and not of areas, as explained by 16 Professor Crawford in his introductory speech, it is 17 crystal-clear that the experts condemned themselves not 18 to take into consideration the transfer -- a colonial 19 transfer, I must recall -- effected in 1905, and 20 consequently grossly exceeded their mandate. 21 Mr President, members of the Tribunal, you will 22 probably not be sorry to hear that I have nearly 23 finished with this long speech. I just wish to make two 24 remarks before concluding, or as part of my conclusion. 25 My first remark is that the mandate as first agreed</p> <p style="text-align: center;">Page 175</p>
<p>17:56 1 detail can be found in our written pleadings, in 2 particular at pages 82-84 of our memorial, page 61 of 3 the counter-memorial and 224-225 of the rejoinder. 4 Finally, in their final and binding decision the 5 experts, as if nothing had happened in 1905, allocate to 6 the Ngok and the Messiriya equal parts of what they call 7 "shared areas" where both parties could claim secondary 8 rights without apparently realising that, being 9 a nomadic people, the Messiriya could not by definition 10 prevail themselves of any kind of dominant right as 11 defined by the experts. This is because, the experts 12 explain, this division in equal part is reasonable and 13 equitable. 14 Clearly, Mr President, this does not answer the 15 question which formed the substantive mandate of the 16 experts. Far from determining the area which had been 17 transferred to Kordofan in 1905, they decided to divide 18 an alleged no man's land into two parts and to allocate 19 each part to one of the parties. This clearly had 20 nothing to do with the mandate they had been given. 21 Whether you call it infra or ultra petita, the decision 22 is in any case outside the ABC's mandate and constitutes 23 a clear excess of it. 24 Before concluding, Mr President, I would like to 25 stress the far-reaching consequences of this</p> <p style="text-align: center;">Page 174</p>	<p>18:01 1 in the Abyei Protocol was not just drafted, as it were, 2 by chance or inadvertently; it was carefully negotiated 3 and adopted after long discussions. Moreover, as noted 4 by Minister Deng Alor in his witness statement, the 5 SPLM/A tried to change it but received a flat refusal 6 from the Government. 7 The reproduction of this mandate in the Abyei Annex, 8 in the Terms of Reference of the ABC and in 9 paragraph 1.2 of the Rules of Procedure of the 10 Commission can leave no doubt of its paramount 11 importance in the eyes of the parties, at least 12 certainly of the Government; and the fact that it is 13 again reproduced between inverted brackets in the 14 definition of your own mandate shows that the parties 15 were in agreement that it was to be respected, and 16 respected not approximately, grosso modo, but strictly, 17 word by word. 18 I have some doubts that the insistence put by our 19 opponents on the absolutely extraordinary character of 20 an excess of mandate is really in line with the 21 requirement of meticulous implementation that the 22 wording of the mandate and the circumstances surrounding 23 its adoption indisputably imply. Moreover, one must 24 keep in mind that while an excess of power, for example, 25 is a reasonably well-known notion in the legal</p> <p style="text-align: center;">Page 176</p>

<p>18:02 1 terminology, the precise meaning of an excess of mandate 2 is less clear. 3 Let me be clear, Mr President. By saying this I do 4 not suggest that this Tribunal should behave as a Court 5 of Appeals, which it is not; at least as long as it has 6 not found first that the experts had exceeded their 7 mandate. In other words, whether the line decided in 8 the report is well founded or not, in law or in fact, is 9 not at stake at this juncture. But such a restraint is 10 not in order when the mandate is at stake. It belongs 11 to this Tribunal to sanction any excess of mandate 12 committed by the ABC experts, whether big or of lesser 13 importance, whether procedural or substantive. 14 This brings me to my second and last remark. It 15 could come as a surprise that the Government has raised 16 such a long list of excesses of mandate; whether they 17 are 10, 11 or 12 does not really matter since several 18 are in any case tightly interconnected. But I can 19 venture an explanation for this. 20 Law is said to be too serious a thing to be left to 21 lawyers. It might also be the case that border disputes 22 are too serious cases to be left to non-lawyers, at 23 least when they are asked to act as an adjudicative 24 body. With all due respect, we maintain that, 25 retrospectively at least, the composition of the board</p> <p style="text-align: center;">Page 177</p>	<p>18:06 1 By, finally, allocating territories to the parties 2 on the basis of their feeling that it was reasonable or 3 equitable and without having regard for the instructions 4 contained in their mandate nor for the sources on which 5 they should have based their findings exclusively. 6 This makes an impressive list, Mr President. It 7 unfortunately simply reflects the inappropriate 8 behaviour of the ABC experts, who have apparently 9 confused the mandate they were given by the parties with 10 that of a amiable compositeur. 11 Mr President, members of the Tribunal, we have 12 finished at last this part of presentation. I thank you 13 very much for your patience and kind attention, and 14 particularly for your kind endurance of the peculiar 15 language I have inflicted upon you. Let me make 16 an announcement in confidence: this was supposed to be 17 English! 18 THE CHAIRMAN: I thank you very much, Professor Pellet. 19 This brings to an end the pleading of the Government 20 of Sudan on the issue of excess of mandate, for which 21 the Tribunal thanks the counsel of the Government. 22 There is so far no question to be asked from the part 23 of the Tribunal members to the Government. 24 Unless the agent of the SPLM/A would like to make 25 his introductory statement right now, at least until</p> <p style="text-align: center;">Page 179</p>
<p>18:04 1 of experts might prove not to have been particularly 2 fortunate. 3 Be that as it may, we submit that the ABC experts 4 have exceeded their mandate in multiple ways: 5 By having ignored the distinction between themselves 6 and the ABC; 7 By having acted in violation of the adversarial 8 principle and without due respect to the requirement for 9 transparency; 10 By deciding ultra petita on questions which were not 11 before them, like the respective grazing rights of the 12 Ngok Dinka and the Messiriya; 13 By answering a question which was clearly outside 14 their mandate, that of the limits of the nine Ngok Dinka 15 chiefdoms at an indeterminate period, instead of 16 deciding the issue of the limit of the area of those 17 chiefdoms transferred to Kordofan in 1905; 18 By omitting to motivate essential elements of their 19 decisions, including the rejection of a line that they 20 had themselves indicated as being the limit of the 21 concerned area in 1905 as well as the choice of the 22 final line; 23 By basing themselves for taking their decision on 24 other aspects on a pseudo-legal principle the 25 application of which was clearly outside their mandate;</p> <p style="text-align: center;">Page 178</p>	<p>18:08 1 6.30, the hearing will resume tomorrow at 9.30 and it 2 will be for the SPLM/A to present its argument on the 3 same issue. 4 MR BORN: Thank you, Mr Chairman. With just two brief 5 comments, the SPLM/A will keep to the existing 6 schedule and begin its comments tomorrow morning at 7 9.30. 8 The first comment is that we heard, I think -- at 9 this stage I've lost track -- but perhaps half a dozen 10 hidden concessions, admissions, acceptances of the 11 Government's case on the part of the SPLM/A. I hardly 12 need say there were no hidden concessions, there were no 13 admissions. When we admit something, we do it openly 14 and clearly. We did not admit to any of the things that 15 the Government said. 16 Secondly, you will hear a lot from me tomorrow; as 17 a consequence, I will deliver the SPLM/A's comments 18 seated rather than standing. I hope that enables me 19 both to survive the day but also to keep my speed to 20 a reasonable tempo so that you can understand me. 21 Obviously in the event either that I get carried away or 22 speak too quickly, you'll interrupt me, or if you have 23 questions of course you'll interrupt me as well. 24 Thank you, Mr Chairman. 25 THE CHAIRMAN: I thank you very much, Mr Born.</p> <p style="text-align: center;">Page 180</p>

18:10 1 The session of today is adjourned and will begin  
 2 tomorrow morning at 9.30.  
 3 (6.10 pm)  
 4 (The hearing adjourned until 9.30 am the following day)  
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