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

BETWEEN:

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

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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Day 1  Saturday, 18th April 2009

09:38  1  THE CHAIRMAN: Good morning, mesdames, gentlemen. The
2  Tribunal now meets to hear the oral arguments of the
3  parties in this arbitration, which is constituted
4  under the Arbitration Agreement between the Government
5  of Sudan and the Sudan People's Liberation
6  Movement/Army on delimiting Abyei Area.
7  My name is Pierre-Marie Dupuy, and it is my great
8  honour to serve as chairman of this distinguished
9  Tribunal. To my right sit Judge Awn Al-Khasawneh and
10  Professor Gerhard Hafner. To my left sit Judge
11  Stephen Schwebel and Professor Michael Reisman.
12  My colleagues and I are very privileged to be
13  sitting as arbitrators in this important matter, and we
14  look forward to discharging our responsibilities to the
15  best of our ability.
16  At each end of this table sit representatives from
17  the Permanent Court of Arbitration, Mr Aloysius Llamzon
18  and Paul-Jean Le Cannu, both legal counsel at the PCA.
19  The PCA serves as registry in this arbitration and the
20  Tribunal is grateful for the invaluable assistance they
21  have provided in administering the case.
22  I also acknowledge the presence of the experts
23  appointed by the Tribunal to assist it in this case.

09:33  1  DR RIEK MACHAR: Honourable chair of the arbitration,
2  distinguished members of the arbitration, members of
3  the PCA staff, Government of Sudan representatives,
4  and counsel, I have the honour to introduce to you our
5  counsel. It is composed of the following: Gary Born,
6  Wilmer Hale, Wendy Miles; and, from PILPG,
7  Paul Williams and Vanessa Jiménez; plus numerous
8  additional counsel who can be named later.
9  Your honour, allow me also to introduce briefly the
10  SPLM delegation: Dr Luka Biong, who is co-agent;
11  Minister Deng Alor, Minister of Foreign Affairs of
12  Sudan; Minister Michael Makuei, who is our minister for
13  legal affairs; Justice Ambrose Riing, our former Chief
14  Justice; and many members of Southern Sudan legislative
15  assemblies sitting with us.
16  We are accompanied by civil society chiefs from each
17  of the nine Ngok Dinka chiefdoms led by the paramount
18  chief of the Abyei Area which is under arbitration,
19  Chief Kwon. We are also accompanied by members of
20  neighbouring tribes of the Ngok Dinka, namely the
21  Melawal Dinka, the Twic Dinka, the Ruen Dinka, and the
22  Nuef.
23  I'm happy that we have come as Sudanese to seek your
24  assistance in resolving this case. Those days we would
25  have used different means but now we have decided to

09:36  1  talk and to use legal means. I am happy that we the
2  Sudanese, not only government but also political
3  parties, are here: the SPLM, the Umma Party I believe
4  are present, the Democratic Unionist Party are present.
5  This is important because we need acceptance of the
6  outcome of this arbitration, and everybody in Sudan has
7  a vested interest in the outcome of this arbitration.
8  I would want to end by thanking you again for the
9  time and the commitment that you have put and continued
10  to dedicate to this important matter to the people of
11  Sudan. The SPLM, whom I represent as its second-top
12  person, remains at your disposal to assist you in any
13  way to carry out your work.
14  Thank you, honourable president, thank you.
15  THE CHAIRMAN: I thank you very much, Dr Riek Machar.
16  May I take this opportunity to commend the parties
17  on both sides for the extraordinary efforts they have
18  made in producing such thorough written submissions in
19  the very short period of time set under the Arbitration
20  Agreement. The Tribunal recognises that this must have
21  entailed herculean efforts by all involved.
22  The Tribunal has determined a schedule for these
23  hearings through Procedural Order No. 1 after consulting
24  with the parties. Today and each day until Thursday we
25  will hear the parties' arguments and the examination of
Day 1 Saturday, 18th April 2009

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

Page 5

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."

Page 6

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

Page 7

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

Page 8
Day 1 Saturday, 18th April 2009

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

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.

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

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.
in compliance with the Rules of Procedure.

Among the key failures were the failure of the attempt to arrive at a consensus before proceeding to decide unilaterally. All the arguments reached between the parties with regard to the ABC envisaged you to allow the parties to help collaboratively to determine the area transferred to Kordofan in 1905.

Fundamental to this was the fact that any final decision was to be achieved through a consensus. Only if such a consensus was not reached were the experts and the Procedural Rule 14 permitted to make a final and binding decision on their own. No attempt to reach a consensus was ever made. The experts simply took it upon themselves to make a decision, bypassing the clearly-established process.

In their memorial the SPLM/A made reference to only one attempt to reach a decision by consensus. This was a one-to-one meeting between one member of each delegation. The SPLM/A claimed that Mr Ahmed Assalih Sallouha, a government member of the ABC, participated in this meeting and presented a proposal to me that I subsequently rejected.

Mr President, I believe the witness statement of Mr Sallouha speaks for itself. He makes it very clear that no such meeting ever took place.

Page 15

Then the SPLM/A suddenly recalled in its counter-memorial two further attempts to reach a decision by consensus. My colleague Ms Malintoppi will go into more detail on the specifics of this, but the fact is that neither of these two alleged attempts actually took place. The lack of any supporting evidence in this respect is certainly telling.

In their final report the experts never made any reference to any attempt to seek a final decision through consensus, even though the SPLM/A claims that the experts instigated one of the attempts themselves. This again supports the fact that at no point was a decision by consensus sought; a violation not just of the specific agreement signed by the parties but of the spirit in which the ABC was formed.

It has also been said that objections of excess of mandate should be raised at the earliest feasible opportunity, but most of the procedural violations and certainly the final outcome were only discovered upon reading the experts' report. It was from that moment onwards that the Government objected to the report.

That the Government objected to the experts' report promptly after presentation to the presidency is evidenced by the SPLM/A's own witnesses. In fact, even the SPLM/A's pleadings accept that in the days

Page 16

report, a conclusion utterly at odds with the parties' agreements, with all the contemporary evidence, and with the mandate conferred.

On crucial issues the experts' report is also devoid of reasoning. The terms of reference state that the experts shall consult the British archives and other relevant sources of the Sudan wherever they may be available, with a view to arriving at a decision that shall be based on research and scientific analysis.

I emphasise the words "research and scientific analysis". Yet not a shred of documentary evidence supports the line of latitude they drew; not one.

Our opponents have advanced other arguments as to why the Government cannot object to this decision, such as my comments at the conclusion of the original hearing, comments which our opponents have thought necessary to quote on no less than nine occasions. It is certainly true that I undertook on behalf of the Government to respect the decision of the Abyei Boundaries Commission in answering the question the parties put to it. But I did not undertake to respect the unilateral decision of the experts acting in lieu of the Commission without any attempt to get a consensus among its members, as they should have.

Nor did I or anyone else undertake to respect an experts' report which in no way reflected the agreed mandate, much less responded to it. Moreover, paragraph 5 of the Abyei Appendix makes clear that it is the experts' report, arrived at as prescribed in the ABC Rules of Procedure, that shall be final and binding on the parties.

After the report was presented to the presidency it quickly became evident that those rules had been ignored in important respects. No commitment could have been or was made to abide by a report which was not arrived at.

Page 14

Among the key failures were the failure of the attempt to arrive at a consensus before proceeding to decide unilaterally. All the arguments reached between the parties with regard to the ABC envisaged you to allow the parties to help collaboratively to determine the area transferred to Kordofan in 1905.

Fundamental to this was the fact that any final decision was to be achieved through a consensus. Only if such a consensus was not reached were the experts and the Procedural Rule 14 permitted to make a final and binding decision on their own. No attempt to reach a consensus was ever made. The experts simply took it upon themselves to make a decision, bypassing the clearly-established process.

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Page 13

It has also been said on numerous occasions that the Government's objection contradicts well-settled principles of finality. And by agreeing that the Commission's decision would be final and binding the Government somewhat prospectively and completely waived its right to challenge the experts' report, whatever the outcome.

This cannot be right. It would be ridiculous to say that if the experts deemed Khartoum or Muglad to fall within the Abyei Area, the Government could not object but must abide by that decision because it had agreed that any decision would be final and binding. No one could possibly accept such a result. It would be inconceivable and irrebutably in excess of mandate. And yet such a result is analogous to the experts' actual report, a conclusion utterly at odds with the parties' agreements, with all the contemporary evidence, and with the mandate conferred.

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After the report was presented to the presidency it quickly became evident that those rules had been ignored in important respects. No commitment could have been or was made to abide by a report which was not arrived at.
immediately following the publication of the report the
Government indicated it could not accept it, and it is
undisputed that no one but the experts knew the contents
of that report until it was revealed to the presidency
on 14th July 2005.
Mr President, members of the Tribunal, you have been
flooded with correspondence, correspondence on a range
of procedural issues, in the past weeks. We hope that
these issues have been largely resolved, in particular
the financial issues, but I will need to mention for the
record two of the points covered in recent
correspondence. The first of these concerns a threat
made against some of our witnesses; the second concerns
access to archives and documents.
The Government was concerned to hear of threats
apparently made against the Ngok Dinka witnesses it has
presented in this arbitration. These witnesses have
given evidence on what they believe to be the truth and
we deplore any attempt to have them change their
statements.
Our counterparts opposite appear to have taken these
allegations rather lightly. Their reply on 13th March
claimed there was no basis for the allegations, but the
investigation report they attached to their subsequent
letter of 14th April shows that there was indeed a basis

for the allegations.
The report of the National Security and Intelligence
Organ makes the following clear: that Majid Yak Kur was
approached by high-ranking Ngok Dinka elders, namely
Nyol Pagout, who gave a witness statement in favour of
the SPLM/A in this arbitration, and Deng Monyluak; that
both elders told him they were unhappy with his
statement; that he was encouraged to avoid appearing in
The Hague in support of his statement; that a failure to
change his statement or not appear in The Hague
would see him shoulder the consequences of his
statement.
Hearing those words, as I would, as a none too
subtle threat of harm, the report concluded that the
matter does not give rise to the level of security
threat leading to the elimination of a minister. That
is an assessment of the level of the threat, not
an allegation of it.
We accept the report even though it is presented by
the SPLM/A. We had access to the investigation as the
SPLM/A did. It proves that threats were made to
Majid Yak Kur.
Moreover, the SPLM/A has failed to address the claim
that other Government witnesses have been harassed by
the SPLM/A, by the SPLM/A elements, as a direct result

of supporting the Government in this arbitration. Three
of these men are present at your request and will be
presented to you during the course of these hearings.
I turn to the second procedural issue, access to
Sudanese archives. From the recent correspondence
several issues have become clear.
First, the SPLM/A had and always has had, throughout
these proceedings, full access to these archives. When,
after the counter-memorial phase, the SPLM/A finally
sought access, they obtained it.
The witness statement of the SPLM/A legal counsel
concerning the visit is indicative of this, as well as
of the general state of the archives. Due to financial
constraints the survey department does not have
a professional filing system, and its staff often face
challenges in locating historic documents.
In reality this is an attempt by the SPLM/A to
obscure the fact that it neglected researching in
a timely manner obvious and important archives for this
case. As I said, the plain fact is that the SPLM/A only
attempted to access these archives once the
counter-memorial had been filed.
There was explicit agreement that, absent leave of
the Tribunal, no new documentary exhibits would be
submitted after filing the counter-memorials.
Mr President, members of the Tribunal, no one in the limited mandate conferred on the ABC experts. Respect for the peace process involved respect for the formula, the reference in the Abyei Protocol, repeated in the Arbitration Agreement in almost the same words, to the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.

Then my colleague Professor Pellet will introduce the notion of excess of mandate and will explain its relation to the formula. Then Ms Loretta Malintoppi will deal with procedural excess of mandate, and finally Professor Pellet will return to discuss substantive excess of mandate. As always, we encourage questions from the Tribunal.

Mr President, members of the Tribunal, the Abyei Protocol required the ABC, and I quote: "... to define ... and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905."

The language of that formula was carefully chosen and repeatedly reaffirmed within consequential differences in wording, notably the addition of the phrase in brackets, "i.e. delimit", and the deletion of the reference to demarcation. It also defines your own interpretation for you, both in determining whether there was an excess of mandate and also in fulfilling this task for yourself if there was.

In determining that question of interpretation you do not need expert evidence on an ordinary English phrase. Relevant instruments, including the Abyei Protocol and the Arbitration Agreement, are not, it is true, treaties; but you are entitled under the applicable law clause to have regard to general principles of law, and I think the parties accept that the rules of interpretation in the Vienna Convention on the Law of Treaties reflect general principles of law in

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<td>23</td>
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<td>phrase in brackets, &quot;i.e. delimit&quot;, and the deletion of</td>
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<td>the reference to demarcation. It also defines your own</td>
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<th>Page 22</th>
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<td>10:16</td>
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<tr>
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<td>define the area transferred to Kordofan in 1905, but</td>
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<td>and instead to take a view on the land rights of the</td>
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<td>Ngok independently of any area transferred, then they</td>
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<td>committed an excess of mandate. This is true, one may</td>
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<td>do not need expert evidence on an ordinary English</td>
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25 the matter of interpretation.
20 So I turn to the interpretation of the formula in
15 accordance with general principles of law.
10 The position of the parties on the meaning of the
5 formula are by now clearly defined, and except on two
0 points they are clearly discrepant.
10 According to the Government of Sudan, the formula
5 refers to the area of the nine Ngok Dinka chieftains
0 under Paramount Chief Kwal Arob, otherwise known as
5 Sultan Rob, and they were transferred to Kordofan in
0 1905. I'm going to call this, for short, the
territorial interpretation.
5 According to the SPLM/A, the formula refers to the
total area occupied and used by the nine Ngok Dinka
0 chieftains in 1905, whether or not any part of that area
0 was transferred to Kordofan in that year. I'm going to
call this the tribal interpretation.
5 Now, I said there are two points of agreement, and
0 that's true. There aren't many point of agreement, but
0 these ones are important. The first point of agreement
0 is that there was historically a transfer to Kordofan in
0 1905. The second is that the transferred area has to be
defined in principle as at 1905.
5 The agreement between us on the key date of 1905 is
0 of the first importance. That date was chosen because

10:20 1 passage, in paragraph 231 of our memorial, to which
0 I refer you. But I also refer you to Professor Pellet,
5 who will discuss it in more detail and who is never at
0 a loss for words.
5 The point I want to make now, by reference to this
0 passage, is the following: it was only according to the
0 ABC experts because it was impossible to determine the
0 boundary of Kordofan before 1905 in accordance with
0 scientific survey techniques, for heaven's sake, that
0 other issues became relevant, in particular land use
0 claims.
10 On the other hand, the ABC experts, having reached
0 that problematic conclusion, paid little or no further
0 attention to the date of 1905; to give you one example,
0 the guesthouse at Tebeldiya -- I'm not sure how it's
0 pronounced -- and the alleged Government road repair
0 programmes which were connected to the site of that
0 guesthouse.
15 These were a key element in the ABC's determination
0 of the northern boundary of the area. Tebeldiya is
0 specifically referred to in the second bullet point that
0 constitutes the experts' final and binding decision.
15 There are only five bullet points. But neither the rest
0 house at Tebeldiya nor the road repair programme existed
0 in 1905, or for years afterwards, and the ABC experts do

10:18 1 it was the date of the transfer. It was only by
0 reference to the fact of the transfer at that date that
0 agreement could be reached on the Abyei Protocol, as we
0 showed in our pleadings. If the criterion of a transfer
0 to Kordofan in 1905 had not been put forward and agreed,
0 there would have been no Abyei Protocol. That makes it
0 vital that the criterion, the formula, be respected.
0 Here it is instructive to ask: what was the position
0 taken by the ABC experts in their report? I would refer
0 you in particular to the following key passage, and
0 I quote:
0 "The boundaries of the Ngok Dinka that were
0 transferred to Kordofan for administrative reasons in
0 1905 were, like most boundaries in the Sudan at the
0 time, not precisely delimited and demarcated in
0 accordance with scientific survey techniques and
0 methods. It is therefore incumbent upon the experts to
0 determine the nature of the established land or
0 territorial occupation and/or use rights by all the nine
0 Ngok Dinka chiefdoms, with particular focus on those in
0 the northernmost areas that form the transferred
0 territory."
0 Mr President, members of the Tribunal, I must
0 confess that the reasoning here leaves me at a loss for
0 words, though we tried to analyse that formula, that

10:22 1 not suggest otherwise. They effectively abandoned the
0 critical date of 1905, a central element in the formula.
0 The point to emphasise is this: the position taken
0 by the SPLM/A now on the formula, and in particular on
0 the crucial date of 1905, is not the same as the ABC
0 experts. The ABC experts abandoned 1905. The SPLM/A
0 have returned to it, and rightly.
0 So the SPLM/A attempts to defend the eventual
0 decision of the ABC experts, but on crucially different
0 grounds. They are already on shaky territory.
0 So much for the points of interpretation on which
0 the parties agree. I now turn to the points on which we
0 disagree: the conflict over the territorial as compared
0 with the tribal interpretation.
0 Of course, in accordance with general principles, we
0 must look carefully at the specific language in
0 the question. In the Abyei Protocol it is -- and
0 I re-quote:
0 "... to define and demarcate the area of the nine
0 Ngok Dinka chiefdoms transferred to Kordofan in 1905."
0 In the Arbitration Agreement that becomes -- and
0 I quote:
0 "To define (ie delimit) on map the boundaries of the
0 area of the nine Ngok Dinka chiefdoms transferred to
0 Kordofan in 1905."
The first point to note is that many of the words of the formula imply a territorial approach. "To define" is equated with "to delimit." The area identified as the boundaries of the area. But there's no indication that the task of the ABC under the Abyei Protocol. In both these respects, and in particular in the addition of the word "delimit", Article 2(c) of the Arbitration Agreement is an authoritative interpretation of the original formula. So the point for the ABC was to delimit and demarcate the boundaries of an area. All four terms support the territorial interpretation.

Then there is the phrase "transferred to Kordofan". Kordofan was a province. It had been a province of the Sudan since the 1820s. It was a territorial administrative unit bordering the tributary state of Darfur to the west, and the province of Bahr el Ghazal to the south. There was a tri-point on the Bahr el Arab between Darfur, Bahr el Ghazal and Kordofan.

Neither Kordofan nor Bahr el Ghazal were tribal units; both contained many different tribes. The phrase "transferred to Kordofan" prima facie indicates a territorial transfer, a transfer from one administrative unit or province to another. But here the parties disagree. According to the SPLM/A the phrase "transferred to Kordofan" qualifies the phrase "the area of the nine Ngok Dinka chiefdoms." The formula should be interpreted as if it read: "all the area of the nine Ngok Dinka chiefdoms which were transferred to Kordofan in 1905, including areas which were already in Kordofan before 1905."

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

And even if the southern boundary of Kordofan before 1905 was the Ragaba ez Zarga -- which no one at the time suggested, for the good reason that they didn't know it was there -- then still 68% of the area was still in Kordofan. The SPLM/A implies that if the Government's territorial interpretation is correct, the formula should have read: "to define and demarcate the area transferred to Kordofan in 1905 of the nine Ngok Dinka chiefdoms". There are several answers to this.

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

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

Thirdly, a redesigned formula referring to "the area transferred to Kordofan" had been served in 1905. It would have left it open to argument that some part of the chiefdoms were not transferred to Kordofan. That's why the SPLM/A has to add still further words to the formula so that it would read, "all the area of the nine Ngok Dinka chiefdoms which were transferred." It's the combination of the word "all" and the verbal phrase "which were" that is necessary taken together.

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

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

Second, it's a new rewriting done for the purposes of these proceedings. It does not reflect what the SPLM/A said before the ABC. For example, in its preliminary presentation on the boundaries of the Abyei Area of 10th April 2005 the SPLM/A said, and I quote: "The Protocol [that's the Abyei Protocol] ... defines Abyei Area as an area of the nine Ngok Dinka chiefdoms that was transferred [that was transferred] to Kordofan in 1905."
Third, not only does the SPLM/A now add words which it did not add before the ABC, but the interpretation it now prefers has the fatal flaw that it gives no meaning at all to the phrase “transferred to Kordofan”. It would make no difference whatever for the SPLM/A’s position if the formula had simply read “the area of the nine Ngok Dinka chiefdoms in 1905.” Indeed, on their view that is effectively how it should be read. But this conflicts with a basic principle of interpretation: agreed words should not be interpreted to lack meaning or as being surplus to requirements, “not wanted on voyage”, so to speak. To summarise, on its face the formula serves to answer clearly three questions: What happened? An area was transferred to Kordofan. When did this happen? In 1905. What area was it? It was the area of the nine Ngok Dinka chiefdoms. All three elements form the substantive mandate; that was what the ABC had to do. These three answers not only make grammatical sense, and give effect to every word and phrase of the formula; they also make historical sense. For the criterion of delimitation here is not a purely geographic one, such as a parallel of latitude, or a watershed line; nor is it delimitation phase. It’s sufficient here to note four substantive mandate; that was what the ABC had to do. First, there is no reference in the transfer documents to the nine chiefdoms, but only to Sultan Rob. There’s also reference to Sheikh Rihan of the Twic. It’s therefore legitimate to refer to the documents evidencing that event. The drafters of the formula were not rewriting history when they took the transfer as the criterion of delimitation; they were recalling history. I will not go through the transfer documents in detail; this will be done by Mr Bundy in the delimitation phase. It’s sufficient here to note four points about the transfer documents. First, there is no reference in the transfer documents to the nine chiefdoms, but only to Sultan Rob. There’s also reference to Sheikh Rihan of the Twic. Second, the references in the transfer documents are more territorial than tribal; they refer to the country or territory of these two leaders. Third, these territories are stated to be on or to the south of the Bahr el Arab. And by “the Bahr el Arab” is meant the Bahr el Arab, of all wonders, the Kiir. In 1905 British officers knew where the two leaders lived, and it was in fact south of the Kiir; it was not somewhere north, near an anonymous and practically unknown Ragaba. Four, the reason for the transfer was to bring the relevant people within southern Kordofan so as to control raiding by the Arabs of southern Kordofan across the Bahr el Arab. In fact, one of the original complaints of raiding related to a raid on Sheikh Rihan’s people, the Twic, and it’s never been suggested that they lived north of the Bahr el Arab. These facts were patent from the text of the transfer documents. You just had to look at them. They’re publicly available. As paragraph 1547 of the SPLM/A reply memorial accepts, some of the transfer documents were actually quoted during the negotiations of the Abyei Protocol. They show what the drafters of the Abyei Protocol understood, and could readily have understood, about the historical transfer. Again they reinforce the territorial interpretation. I turn to the travaux of the Abyei Protocol, which can be referred to in order to confirm the meaning arrived at on an analysis of the text taken in its context. The negotiations leading to the Abyei Protocol and the agreement on the formula are traced in chapter 2 of Sudan’s memorial, and I will not repeat them. I will simply make the following points. 1. This was a crunch issue. It had the potential to derail the CPA as a whole.

<p>| 10:30 | 1. Ngok Dinka at some indeterminate date; it is historical. It relates to a defined historical event, an actual transfer of an area from one province of Sudan to another. It's therefore legitimate to refer to the documents evidencing that event. The drafters of the formula were not rewriting history when they took the transfer as the criterion of delimitation; they were recalling history. I will not go through the transfer documents in detail; this will be done by Mr Bundy in the delimitation phase. It's sufficient here to note four points about the transfer documents. First, there is no reference in the transfer documents to the nine chiefdoms, but only to Sultan Rob. There's also reference to Sheikh Rihan of the Twic. Second, the references in the transfer documents are more territorial than tribal; they refer to the country or territory of these two leaders. Third, these territories are stated to be on or to the south of the Bahr el Arab. And by &quot;the Bahr el Arab&quot; is meant the Bahr el Arab, of all wonders, the Kiir. In 1905 British officers knew where the two leaders lived, and it was in fact south of the Kiir; it was not somewhere north, near an anonymous and practically unknown Ragaba. |
| 10:35 | 2. The Government insisted that Kordofan was part of the north, and that the 1956 boundaries of the northern provinces, including Kordofan, were sacrosanct. 3. The SPLM/A sought to make substantial inroads into the territory of southern Kordofan by reference to what it said was the farthest northern most extent of Ngok settlement in 1966. 4. The general principle of the uti possidetis of 1956 is repeatedly recognised in the CPA, including the Abyei Protocol. The provisions relating to the Abyei Area are an exception to it. 5. The basis for the exception was the historic fact that certain areas not part of Kordofan were added to it in 1905. Reference was specifically made to the Sudan intelligence report of March 1905, one of the transfer documents. In effect, what had previously been in the southern province of Bahr el Ghazal could be returned to it, if not by pure administrative act then after a plebiscite of its inhabitants. It was on this ground and this ground alone that the deadlock was broken and agreement reached. This legislative history supports the territorial interpretation of the formula in at least three ways. 1. The Abyei Protocol constituted an exception to the territorial principle of the uti possidetis of 1956, |</p>
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<td>As so often, there were competing peoples and competing interests involved. To invoke self-determination now, a principle irrelevant at the time of the transfer, is in effect to re-open the negotiated settlement of the Abyei Protocol for the benefit of the one of the parties and to the detriment of the other. That's not a legitimate exercise of interpretation.</td>
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**Page 37**

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10:43 1 these towns or villages more properly made no reference
to Abyei Town. For example, in 1910 Whittingham walked
straight past, as far as we can see from his route
report, the present location of the centre of Ngok Dinka
political, commercial and cultural life for two
centuries without noticing it.
2 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

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

Page 41

Page 42

Page 43

Page 44

13 (Pages 41 to 44)
continued tendency of the SPLM/A's counsel to seek to
foist on us as concessions positions we have never held
and which we say we do not hold.

We have never said there were Ngok settlements on,
still less north of, the Ragaba ez Zarga. There is no
documentary evidence of such settlements in 1905 or
subsequent years, no contemporary evidence whatever.

The overwhelming evidence of use of the area on and to
the north of the Ragaba ez Zarga is that of Arab Homr
use, a point I will demonstrate in some detail in the
delimitation round.

On the other hand, we have always accepted that
there were Ngok settlements on the Bahr el Arab prior to
1905. Indeed, there is documentary evidence -- produced
by us, I might say, relevant in light of the brouhaha
about archives -- of limited Ngok presence just north of
the Bahr el Arab at the time of the transfer. I will
explore this and its limits in the delimitation round on
Tuesday.

But to the limited extent that there were Ngok to
the north of the Bahr el Arab in 1905, they were already
in Kordofan. The transfer documents speak of Sultan Rob
as being on or alternatively south of the river, and
that is entirely consistent with the territorial
interpretation.

Finally, my fifth point. The SPLM/A insists that as
the experts had jurisdiction to interpret their mandate,
then the mere fact that they got their mandate wrong
doesn't mean that they committed an excess.

This, of course, is an argument in the alternative.

It accepts -- and of course it accepts only for the sake
of argument, we realise that -- that the tribal
interpretation may be wrong and pleads that it is
nonetheless an excess of mandate.

This is a point that will be dealt with by
Professor Pellet in a moment -- I'm sorry, I should
rephrase this. This is a point that will be dealt with
in a moment by Professor Pellet -- but the short point
is that as a minimum the decision-maker must apply the
mandate. It cannot simply place the mandate to one side
and come up with a new result-driven expression of what
it feels it would like to achieve. Yet that's precisely
what occurred here.

Once the experts felt that they need not apply their
mandate, for want of a boundary precisely delimited and
demarcated in accordance with scientific survey
techniques and methods in 1905, they proceeded to
delimit on a completely different basis, without
reference to the area transferred and without reference
to the date of transfer. In doing so they flouted the
mandate, as Professor Pellet will now explain.

Mr President, members of the Tribunal, for these
reasons the formula of the Abyei Protocol should have
been interpreted as referring to the territory of
Sultan Rob's people which was transferred from
Bahr el Ghazal to Kordofan in 1905, and not as
encompassing the alleged tribal reach of the nine or ten
Ngok Dinka chiefdoms irrespective of the fact or extent
of the inter-provincial transfer. The function of the
ABC experts was declaratory: to determine as a matter of
fact the territory so transferred.

Mr President, members of the Tribunal, thank you for
your attention. Mr President, it's a little before
11.00: it's a matter for you whether to call
Professor Pellet now or to have the coffee break by way
of internal fortitude in preparation for him.

THE CHAIRMAN: I thank you very much for your
presentation, Professor Crawford. The hearing is
suspended until 11.15.

MR BORN: Just as a general comment with the president's
leave, insofar as our colleagues across the
table would require a little bit more or a little bit
less time than that allocated at any particular
segment, we have no objection.

Obviously it's difficult for counsel to plan exactly...
### Page 49

<table>
<thead>
<tr>
<th>Time</th>
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<tr>
<td>10:56</td>
<td>1. how long it's going to take them to do things and we are&lt;br&gt;2. completely relaxed, if I can put it that way, subject of&lt;br&gt;3. course to the Tribunal's control, about going over or&lt;br&gt;4. going under a bit.</td>
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<td>THE CHAIRMAN: I thank you very much. The hearing is&lt;br&gt;6. adjourned.</td>
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<td>(10.56 am)</td>
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<td>11:28</td>
<td>1. justifications and second, but probably only this&lt;br&gt;2. afternoon, at least in part, I will show that the ABC&lt;br&gt;3. experts have committed an excess of mandate both in&lt;br&gt;4. deciding ultra petita on certain points and infra petita&lt;br&gt;5. on others.</td>
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<td>But before starting this presentation, please allow&lt;br&gt;7. me to make three general remarks.</td>
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<td>8. First, in its rejoinder the SPLM/A uses 17 times the&lt;br&gt;9. pleasant word &quot;absurd&quot; or &quot;absurdity&quot; to characterise&lt;br&gt;10. our arguments, eight time in the excess of mandate&lt;br&gt;11. chapter only; &quot;frivolous&quot; appears 12 times, &quot;parochial&quot;&lt;br&gt;12. six times, and I leave aside &quot;spurious&quot;, &quot;egregious&quot; or,&lt;br&gt;13. in alphabetical order, &quot;abstruse&quot;, &quot;archaic&quot;,&lt;br&gt;14. &quot;artificial&quot;, &quot;disguised&quot;, &quot;distorted&quot;, &quot;hopeless&quot;,&lt;br&gt;15. &quot;misconceived&quot;, &quot;narrow-minded&quot;, &quot;nonsensical&quot;,&lt;br&gt;16. &quot;purported&quot; or &quot;untenable&quot;.</td>
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<td>17. Mr President, insult and abuse are not very&lt;br&gt;18. dignified ways of arguing in serious litigation. I will&lt;br&gt;19. not follow our opponents on this ground, as eccentric or&lt;br&gt;20. frivolous or untenable their case may be on certain&lt;br&gt;21. points.</td>
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<td>Second remark: the parties have already exchanged&lt;br&gt;23. three sets of written pleadings, at frantic rhythm, and&lt;br&gt;24. I would think that there is no need to come back on all&lt;br&gt;25. and every point on which the parties disagree. I will</td>
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### Page 50

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<th>Time</th>
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<tr>
<td>11:30</td>
<td>1. then concentrate on the arguments made by our opponents&lt;br&gt;2. in their rejoinder, but I wish to make clear that we&lt;br&gt;3. maintain in all full all of our previous arguments.</td>
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<td>4. This is true for the excess of mandate part of our case&lt;br&gt;5. as well as for the delimitation part.</td>
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<td>6. Third, I cannot help thinking and saying that there&lt;br&gt;7. has been an unacceptable profusion of paper by the other&lt;br&gt;8. party. Nine full boxes -- boxes, not bundles -- of&lt;br&gt;9. annexes for the memorial was unreasonable, and globally&lt;br&gt;10. with 16 boxes and 76 files the exaggeration is patent.</td>
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<td>11. Just compare our respective documentation: our small&lt;br&gt;12. library on the left, their enormous library on the&lt;br&gt;13. right.</td>
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<td>14. What is true for the annexes is also true for the&lt;br&gt;15. pleadings themselves. Quite interestingly, in its&lt;br&gt;16. rejoinder the SPLM/A criticises us for having devoted&lt;br&gt;17. &quot;less than 32 pages&quot; of our reply to the excess of&lt;br&gt;18. mandate. With due respect, I would rather criticise&lt;br&gt;19. them for the extremely repetitive more than 200 pages on&lt;br&gt;20. that theme in their own reply.</td>
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<td>21. If, as they claim, &quot;an excess of mandate will be&lt;br&gt;22. found only in circumstances involving manifest, flagrant&lt;br&gt;23. or glaring excesses by the decision-maker&quot;, it then&lt;br&gt;24. should go without saying that you do not need pages and&lt;br&gt;25. pages or hours and hours of pleadings to prove that such</td>
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### Page 51

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<td>11:33</td>
<td>1. an excess of mandate does exist or to prove that it does&lt;br&gt;2. not exist.</td>
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<td>3. The only reason why in the present case the&lt;br&gt;4. demonstration of the excess of mandate must take some&lt;br&gt;5. time is that it is averred not only in one respect but&lt;br&gt;6. in several, this being said, all being rather obvious.</td>
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<td>7. With these three remarks in mind I will now turn to&lt;br&gt;8. some general observations concerning successively the&lt;br&gt;9. waiver argument, the finality and presumptive validity&lt;br&gt;10. argument and the very definition of an excess of&lt;br&gt;11. mandate, including the issue of motivation.</td>
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<td>12. The waiver argument first. Mr President, let me&lt;br&gt;13. please begin with the last argument of the SPLM/A in&lt;br&gt;14. respect to the excess of mandate, the waiver argument.</td>
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<td>15. It maintains that:</td>
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<td>16. &quot;The Government excluded or waived any rights to&lt;br&gt;17. claim that the ABC experts exceeded their mandate.&quot;</td>
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<td>18. Although the SPLM/A complains that, &quot;the&lt;br&gt;19. Government's reply memorial responds to these arguments&lt;br&gt;20. only in passing&quot;, this can be dealt with briefly, not at&lt;br&gt;21. all because we &quot;hope that the arguments in question will&lt;br&gt;22. not be considered in any detail&quot;, but simply because we&lt;br&gt;23. think that they do not deserve more.</td>
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<td>24. The short and sufficient answer is that this&lt;br&gt;25. argument completely ignores the fundamental fact that</td>
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Day 1 Saturday, 18th April 2009

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

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

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.
In this respect, Mr President, I wish to make clear that this Tribunal is not at all in the same situation as the World Court when the question could have been asked of whether or not the court had jurisdiction to review arbitral awards, for example in the case of Socobel, la Société Commerciale de Belgique. In that case, absent any agreement between the parties, the court noted that: "[It can] neither confirm nor annul the arbitral awards, either wholly or in part."

On the contrary, in the case concerning the Award of the King of Spain, the court interpreted -- although with some obscurities -- the agreement between the parties to submit their dispute to the court -- it was the 1957 Washington agreement -- as conferring upon it, and I quote, "the function ... to decide whether the award is proved to be a nullity, having no effect".

In the Guinea Bissau/Senegal case the ICJ accepted the function ... to decide whether the award is proved to be a nullity, having no effect".

... such a decision be accepted, respected and carried out by the parties without any reservations."

End of the quote made by the rejoinder. But strikingly our opponents refrain from quoting the immediately next "whereas", where the Tribunal notes: "But whereas in the present case, it having been argued that the decision is void, the parties have entered into a new agreement under date of 13th February 1909, according to which, without considering the conclusive character of the first decision, this Tribunal is called upon to decide whether the decision of Umpire Barge, in virtue of the circumstances and in accordance with the principles of international law, be not void, and whether it must be considered so conclusive as to preclude a re-examination of the case on its merits."

In that case -- the Orinoco Steamship Company -- the first decision was declared partially void for excess of power. But this is omitted by the SPLM/A.

Similarly, while quoting in the next paragraph of its rejoinder an extract of the final award in the Trail Smelter arbitration, the SPLM/A omits to note that the Tribunal in that case quoted the passage from the judgment of the PCIG in Socobel, which I have already mentioned, and which makes clear that it was only -- and I quote it again -- it was only: "... since the court has received no mandate from the parties in regard to [the final arbitral awards to which these submissions relate], [that] it can neither confirm nor annul them either wholly or in part."

Tribunal the task of deciding whether or not the ABC experts had exceeded their mandate, and to draw the consequences of this determination.

It is also worth noting that the jurisprudence invoked by the SPLM/A clearly makes the distinction. The decisions cited stress that arbitral awards are final and binding, except when the parties agree to settle a review mechanism or to seize an existing arbitral or judicial body to operate such a review. The SPLM/A emphasises the first proposition, but very carefully and systematically omits the second one.

Just to take a striking example, at paragraph 178 of its rejoinder, the SPLM/A refers to the well-known award of 1910 in the case of the Orinoco Steamship Company. It quotes this passage: "It is assuredly in the interest of peace and the development of the institution of international arbitration, so essential to the well-being of nations, that on principle such ..." "Such" is omitted in the quote by the SPLM/A: "... such a decision be accepted, respected and carried out by the parties without any reservations."

End of the quote made by the rejoinder. But strikingly our opponents refrain from quoting the immediately next "whereas", where the Tribunal notes: The Trail Smelter award also makes a very useful quote to the same effect, a quote omitted by the SPLM/A from a judgment of the US Supreme Court in Frelinghuysen v Key, and I quote: "As between the United States and Mexico the awards are final and conclusive until set aside by agreement between the two Governments or otherwise."

This all is in Exhibit LE8-4.

Finally, in the same vein, the SPLM/A quotes at paragraph 180 of its rejoinder the award in Laguna del Desierto, pointing out that: "A judgment having the authority of res judicata is judicially binding on the parties to the dispute."

But, once again, the SPLM/A fails to mention in the next paragraph of the award that, I quote: "The parties have not challenged the authority of the award of 1902 as res judicata and accordingly they have recognised that its provisions are legally binding on them."

By contrast, in the present case the Government has immediately challenged the ABC experts' report after its release. As very aptly noted by an authority abundantly referred to by the SPLM/A, Professor Kaikobad: "Not unlike many other rules of both international and domestic law, res judicata cannot be seen in vacuo;
it has to be read and applied in the context of not only
a variety of principles of law, but with respect to the
facts applicable to a particular situation."
And further, I still quote Professor Kaikobad:
"The basic position is simply that, not unlike all
other notions and regimes of international law,
res judicata is not immune from the relevant rules of
international law which continue its operation and
application."

Needless to say that an agreement between the
parties for the determination of an alleged
excess of mandate conditions the operation and
application of the res judicata principle, a principle
that nobody on this side of the bar would deny or
neglect. Simply, the valid conclusion of the
Arbitration Agreement must lead the Tribunal to set the
experts' report aside as long as an excess of mandate is
alleged and proven.

These principles fully apply to border determination
cases, of which stability and finality are indeed
primary objects. But such objects cannot be obtained
when the adjudicative body completely ignores the
agreements which define its task, failing which it does
not comply with its mandate.

In the present case, the weakness of the reactions
of the international community when the Government of
Sudan made its claim that the experts exceeded their
mandate shows that this conviction was probably largely
shared.
The SPLM/A discusses this situation at length;
I will not follow them on this terrain.
May I also add, just en passant, that it is
precisely in matters of border disputes that arbitral
awards have been challenged with the biggest, I would
say, success rate.
Just think, for example, of the cases where
an express recognition of the right of states to
challenge the validity of an arbitral territorial award
was recognised in Latin America, which were listed by
judge ad hoc Urrutia Holguin in his dissent in the case
of the King of Spain award.
This can be easily understood. It is precisely in
those cases so co-substantial with the sovereignty of
the state that arbitral awards and judicial decisions
must be above any suspicion.
By saying this, I do not mean that de minimis
curat praetor the challenge to the binding character of
an initial territorial award must be serious; I simply
wish to stress that finality cannot be obtained at the
cost of illegitimacy, especially in territorial or
boundary cases, and that it would be the case if the
sanctity of the res judicata principle were as rigid as
the SPLM/A alleges.
Anyway, once again the parties have wisely, I would
suggest, accepted to have the question of the excess of
mandate reviewed by this Tribunal, which makes all these
legal niceties rather moot.
Mr President, the two last points developed also at
great length by the SPLM/A in relation with the
so-called presumptive validity principle can be dealt
with together and rather briefly too. They read
respectively as follows:
"4. The Government ignores generally applicable
principles regarding the allocation and nature of the
burden of invalidating adjudicative decisions."
And I still quote:
"5. The Abyei Arbitration Agreement does not alter
the Government's very onerous burden of proving
an excess of mandate by the ABC experts."
Here again I do not intend to follow our opponents
in the meanders of their extensive discussion of
a rather obvious point. The two parties have agreed to
ask this Tribunal whether or not the ABC experts' report
was tainted with an excess of mandate. It is for the
Government of Sudan to prove that it is the case and it
And further:

"A party cannot simply assert or deny a proposition and then rest his case upon a technical rule, throwing the burden of proof on the other party, without running a risk of adverse inference being drawn from his failure to produce evidence."

This is also the position of Dr Amerasinghe as well as of Dr Kazazi, an authority frequently cited by the SPLM/A, who defines "the underlying concept" outlining the concept of burden of proof as:

"The obligation of each of the parties to a dispute before an international tribunal to prove its claims to the satisfaction of, and in accordance with, the rules acceptable to the tribunal."

In reality, the proposition that it is for the claimant to prove his claim is as true as saying that it is for the defendant to make proof of his defence. Any party who advances a proposition must prove it. In the present case the Government has clearly to prove that the ABC experts exceeded their mandate; while it is incumbent on the SPLM/A to prove that they did not, and on the Tribunal to decide on the basis of their respective submissions.

Mr President, I now arrive to my last part, the notion of an excess of mandate. What I have said, second, the Government of Sudan may have recharacterised, as they put it, the numerous grounds of the Parties as per the CPA, exceeded their mandate provides that this Tribunal must determine "Whether or not the ABC experts on the one hand and the notion of excess of mandate on the other hand."

"The sole basis for this Tribunal to disregard the ABC report is ... defined as an excess of the ABC experts' mandate."

Whether it is narrowly defined, as the SPLM/A contends, or not is another issue to which I will come back. But there can be no doubt that it is the sole basis for setting the ABC report aside in this procedure.

Second, the Government of Sudan may have recharacterised, as they put it, the numerous grounds for an excess of mandate in its various pieces of written procedure, but this is a purely terminological presentation.

While in our memorial we had simply listed the many motives for which it turns out that the experts acted in excess of their mandate, we deemed it clearer to group together these grounds in a more systematic way in our counter-memorial and in our rejoinder, if only not to have to repeat the same explanations when they apply to several grounds.

Mr President, leaves open the definition of an excess of mandate; a rather unusual ground for an annulment of an arbitral award, and certainly not a term of art usual in international or nation litigation.

But let me clarify first two important preliminary points. First, we have no problem in agreeing with the other party that:

"The sole basis for this Tribunal to disregard the ABC report is ... defined as an excess of the ABC experts' mandate."

Whatever their label, the claims remain. However, as sometimes acknowledged by our opponents, this certainly does not mean that we have abandoned or changed our claims, and indeed, as they write:

"It does not make the slightest difference how the Government chooses to label its claims."

Therefore in the second instance, again contrary to the SPLM/A's allegation, the ground for an excess of mandate must be defined by reference to general principles of law according to which -- and this is the third point -- such an adjudicative body must motivate its decision on the grounds chosen and decided by the parties.

I will successively tackle each of these three issues. First, curiously, or it might be a pleading tactic, it seems that the more the SPLM/A is obviously wrong, the more vociferous it becomes. To be honest, it is nearly continuously vociferous.

This is certainly the case in respect of the would-be definition of an excess of mandate in Article 2(a) of the 2008 Arbitration Agreement and the relationship between the formula in that provision and the corresponding provisions defining the mission of the ABC experts on the one hand and the notion of excess of mandate on the other hand.

On many occasions the SPLM/A refers to excess or excesses of mandate within the meaning of the Abyei Arbitration Agreement. But, Mr President, the Arbitration Agreement by no stretch of the imagination can be seen as defining an excess of mandate; it gives no particular mention to that expression, and must be interpreted in accordance with the usual principles of interpretation. Contrary to what our opponents say, there is no parties' agreed definition of an excess of mandate.

When Article 2(a) of the Arbitration Agreement provides that this Tribunal must determine "Whether or not the ABC experts had, on the basis of the agreement of the Parties as per the CPA, exceeded their mandate which is 'to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905' as stated in the Abyei Protocol, and
reiterated in the Abyei Appendix and the ABC Terms of Reference and Rules of Procedure,” Article 2(a) does two different things.

First, it recalls what was the substantial mandate of the ABC experts, which is “to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905”; and second, it defines the mandate of this Tribunal, which is to determine whether or not the ABC experts exceeded their mandate. It does these two things, but it does not do the third thing which the SPLM/A alleges; that is, to define what an excess of mandate is. It is certainly true that an excess of mandate in the present case must be defined by reference to that category of disputes which the parties submitted to the Arbitral Body, as our opponents write, exactly as the mandate of this Tribunal is defined by the same formula if this Tribunal determines that the experts have exceeded their mandate. But still, this does not give any information on what an excess of mandate is. Therefore, absent any special agreed meaning between the parties, “excess of mandate” must be interpreted by analogy in accordance with the general rule of interpretation, and in particular in accordance with the ordinary meaning to be given to this expression.

The second point: it is, however, certainly not enough in this respect to simply assert, as the SPLM/A does, that: “By its plain terms, an excess of mandate under Article 2(a) is a decision by the ABC experts that was ultra petita purporting to decide matters outside the scope of the dispute submitted by the Parties.” Even excess of power, a more classical ground for annulment of arbitral decisions, is not thus limited. While power clearly evokes jurisdiction, excess of power has always been interpreted as including all serious misuses of their jurisdiction as well as gross violations of procedural rules. This has been already discussed at length in the parties’ written pleadings and does not bear repeating now. I just mention that it is in our memorial at paragraphs 135-137, in our counter-memorial at 138-139, and 162-165, and also paragraphs 186-187. What deserves to be repeated, to be reiterated, however, is that nothing in the language of Article 2 supports the narrow interpretation advocated by the SPLM/A. On the contrary, when this provision is read in its entirety, that is in its context, as it must, rather than in the fragmented fashion put forward by the SPLM/A, it becomes evident that the Tribunal is asked to determine whether the experts exceeded their mandate “on the basis of the agreement of the parties, as per the CPA”, and Article 2(a) makes express reference to the ABC Terms of Reference and Rules of Procedure in addition to the Abyei Protocol and the Abyei Appendix.

Given both the purposes and the precise drafting of the CPA -- which is at tab 108 of the common bundle -- and of the subsequent agreements concerning the resolution of the Abyei conflict, it will be apparent that the ABC and the ABC experts were supposed to comply strictly with their mandate as defined in those instruments, and not to depart from it either in deciding issues already agreed upon or in omitting to decide on issues entrusted to them. Moreover, the respect for the agreed procedure was also clearly part of their mandate, as is strikingly confirmed by the express mention of the Abyei Protocol, the Abyei Appendix, the ABC Terms of Reference and, even more, the Rules of Procedure of the ABC; all these mentioned in Article 2 of the Arbitration Agreement. The only purpose of such a mention is and could only have been to show that the respect of the ABC experts for their mandate must be determined not only in view of the substance of the manned in question, which is “to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905”.

The third point: it is also clear from the above discussion that, first, Professor Crawford must be deemed to fall within the definition/delimitation of the area defined by the formula already discussed by the experts to: “... consult the British archives and other relevant sources on Sudan, wherever they may be available, with a view to arriving at a decision that shall be based on scientific analysis and research.” This too was part of the mandate; or, to put it more precisely, their mandate could only be complied with if the experts had effectively consulted the relevant...
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<th>Page 77</th>
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<td>available sources and if they had arrived at a decision</td>
<td>it writes:</td>
<td>definition or delimitation of the Abyei Area.”</td>
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<td>2 genuinely based on scientific analysis and research. In</td>
<td>&quot;... nothing in the parties' agreements ...</td>
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<td>3 omitting to do so, or in manifestly neglecting</td>
<td>3 forbidding ex aequo et bono decisions [or] forbidding</td>
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<td>4 fundamental and obvious sources, the ABC experts have</td>
<td>4 application of 'unspecified legal principles' ...&quot;</td>
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<td>5 also exceeded their mandate.</td>
<td>5 This is verbatim. Indeed, Mr President, nothing</td>
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<td>6 Mr President and members of the Tribunal, this issue</td>
<td>6 forbids it in the agreement, but nothing authorises it;</td>
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<td>7 of motivation, or more precisely of lack of motivation</td>
<td>7 and, more importantly, this is patently incompatible</td>
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<td>8 or incorrect motivation, of the ABC experts' report is</td>
<td>8 with the mandatory rule according to which they must</td>
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<td>9 an important aspect of the case which the SPLM/A</td>
<td>9 base themselves on a scientific -- not equitable or</td>
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<td>10 dismisses rather flippantly.</td>
<td>10 pseudo-legal -- analysis and research of the available</td>
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<td>11 As I have just shown, to comply with their mandate</td>
<td>11 documentation.</td>
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<td>12 the experts had to base their decision on scientific</td>
<td>12 In resorting to those grounds -- I mean equitable or</td>
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<td>13 analysis and research, after having consulted the</td>
<td>13 pseudo-legal grounds -- and obviously neglecting</td>
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<td>14 available British archives and other relevant sources on</td>
<td>14 relevant available archives, the ABC experts have indeed</td>
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<td>15 Sudan. This, Mr President, was part of their mandate.</td>
<td>15 acted ultra petita, or at least extra petita; that is,</td>
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<td>16 They could not simply decide the line by drawing lots,</td>
<td>16 outside the framework of their mandate.</td>
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<td>17 or by asking a prophetess or by organising a leaders'</td>
<td>17 Even more troubling is the insistent argument made</td>
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<td>18 fight or an intertribal sprint competition, as sometimes</td>
<td>18 by the SPLM/A according to which the parties' agreements</td>
<td></td>
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<td>19 happened in the past; for example, for dividing the</td>
<td>19 did not require a reasoned decision. It is rather</td>
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<td>20 Caribbean island of St Martin's between France and the</td>
<td>20 staggering to read in the SPLM/A's rejoinder that the</td>
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<td>21 Netherlands.</td>
<td>21 experts could not have exceeded their mandate in this</td>
<td></td>
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<td>22 No, the experts had to comply with their mandate,</td>
<td>22 perspective since:</td>
<td></td>
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<td>23 which clearly included obligations to search, consult</td>
<td>23 &quot;Nothing in any of the parties' agreements relating</td>
<td></td>
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<td>24 and analyse the available relevant archives, and this</td>
<td>24 to the ABC proceedings required that the ABC experts</td>
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<td>25 was a mandatory rule, mandatory in that they cannot be</td>
<td>25 explain their reasoning for adopting a particular</td>
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Trevor McGowan  
info@TMGreporting.com
of the dispute was of such a nature that it is simply
unthinkable that it could have been otherwise, and it
had mandatorily also to be established on the basis
agreed by the parties, mandatorily too, not at the
goodwill of the experts.

It was not, and these breaches of their obligation
by the experts constitute excesses of mandate. With
your permission, Mr Chairman, I will come back to them
in a more detailed manner this afternoon, after
Ms Malintoppi has introduced the other category of
excesses of mandate constituted by the manifest
violation of their procedural obligations by the
experts. But beforehand I would like to very briefly
summarise what I have said.

Indeed, in the present case the excess of mandate
committed by the ABC experts must be defined by
reference to the ABC's mandate, which is to apply, and
apply fully and exclusively, the formula. But such
an excess must be deemed to have occurred not only if
the experts have decided ultra petita as well as
infra petita, but also if they have neglected the other
aspects of their mandate, that is the scientific data
available, or if they have not followed the ABC Rules of
Procedure.

This is this last aspect that Ms Malintoppi will now

12:36

THE GOVERNMENT OF SUDAN / THE SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY
Day 1 Saturday, 18th April 2009

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
to implement its mandate", the mandate of the ABC.

6

Accordingly, by the SPLM/A's own admission, the
7

ABC's mandate was to be implemented pursuant to specific
8

procedural rules.

9

Our opponents further stressed in the memorial that
10

the parties collaborated to design "their own dispute
11

resolution mechanism" and adopted the Rules of Procedure
12

by consensus. The memorial observed that:

13

"The parties' subsequent work ..."

14

Again it's a quote:

15

"... to adopt mutually satisfactory procedures was
16

a striking example of constructive joint collaboration."

17

In discussing the various procedural instruments
18

agreed by the parties, the SPLM/A's memorial
19

acknowledged that the Abyei Appendix "set forth
20

additional adjudicative procedures for the Commission",
21

and that the Terms of Reference:

22

"... further elaborated on the procedures for the
23

ABC, prescribing in greater detail a specialised set of
24

adjudicative procedures tailored to the requirements of

25

the parties' dispute."

12:41

They set forth:

1

"... a carefully considered set of visits by the
2

ABC, not the experts alone, and provided that the ABC as
3

a whole would conduct specific meetings."

4

The SPLM/A also acknowledged that the Rules of
5

Procedure established "the procedures for the ABC's
6

work."

7

In subsequent pleadings the SPLM/A has modified this
8

tone of argument considerably, presumably in light of
9

the Government's own submissions, and sought to downplay
10

the importance of the procedural framework by pointing
11

to its rudimentary character and exercising it as
12

a sui generis set of procedures.

13

For the SPLM/A, regardless of the parties' agreed
14

rules, the experts had full discretion to decide any
15

procedural questions, could conduct their research, and
16

I quote, "without notice to or involvement of the
17

parties", and could "meet with third parties of their
18

own choosing without the involvement of the parties".

19

The weaknesses inherent in the belated change of
20

heart on the part of the SPLM/A are self-evident. This
21

carefully drafted procedural structure was clearly part
22

of the ABC's mandate and cannot be summarily dismissed,
23

as the SPLM/A purports to do by the use of Latin phrases

Page 81

Page 82

Page 83

Page 84

Page 82

Page 83

Page 84

Page 83

Page 84
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 compromise. 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.

Page 85

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

Page 86

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

Page 87

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
denial of an opportunity to be heard.”
12 But the SPLM/A’s allegations are refuted by the
13 plain terms of this relevant provision, since the
14 specific reference to both the terms of reference and
15 the Rules of Procedure in the text of Article 2(a)
16 render redundant any additional reference to vague
17 procedural conditions, which would in any event have
18 been encompassed by these agreements.
19 The first set of procedural rules agreed by the
20 parties for the work of the ABC was the Abyei Protocol
21 of 26th May 2004. The protocol defined the principles
22 of agreement on Abyei, and included a section 5,
23 entitled “Determination of Geographic Boundaries”. This
24 instrument can be found at tab 3 of the common bundle.
Day 1 Saturday, 18th April 2009

12:49
1. Sections 5.1 and 5.2 of the protocol provide for the establishment of the Abyei Boundaries Commission, and describe its composition, ie they specify that it should include inter alia experts, representatives of the local communities and the local administration; and the timeframe of the Commission.
2. Article 2 states that the Abyei Boundaries Commission -- the ABC, not simply the experts -- shall present its final report to the presidency as soon as it is ready.
3. Next is the Abyei Annex, which was also referred to as the Abyei Appendix, which was concluded on 17th December 2004. It is under tab 4 of the common bundle. Its procedural character is well described by the SPLM/A itself in the memorial, as follows: "... the Abyei Annex set out in greater specificity the parties' agreement on matters relating to the constitution and activities of the Abyei Boundaries Commission."
4. Paragraph 2 of the annex set forth in detail the composition of the ABC, and imposes an impartiality requirement on the experts. Paragraph 3, a provision which is clearly inspired by principles of equality and transparency, further indicates that: "The Commission ..."

Page 90

12:50
1. Not just the experts: "... [was] to listen to the representatives of the people of the Abyei Area and the neighbours, and shall also listen to the presentations of the two parties."
2. Finally, paragraph 5 of the annex provided that: "... the report of the experts arrived at as prescribed in the ABC Rules of Procedure shall be final and binding on the parties."
3. From this provision alone it is clear that the experts' report was to be arrived at as prescribed in the ABC Rules of Procedure.
4. The terms of reference were agreed at a meeting of the experts held on 10th-12th March 2005, and it is at tab 5 of the common bundle. The terms of reference contain a number of articles dealing with the work and functioning of the ABC, including a detailed programme of work, listing of activities, and the time for which these activities were planned.
5. The Terms of Reference provide a telling illustration of how closely intertwined the procedural and substantive provisions in the instruments setting up the process of resolution of the Abyei dispute were. Article 1 of the terms of reference repeats the mandate of the ABC as defined in the protocol; Article 2 specifies the structure of the ABC again; while Article 3 deals with its functioning.

Page 91

12:52
1. Article 3.1 is inspired by the principle of equality of the parties and impartiality of the Commission. It provides that: "The two parties shall submit their presentations to the ABC at its seat in Nairobi. The experts and other members may ask questions and seek clarifications."
2. Article 3.2 made it clear that it was the ABC, and not the experts alone, that was to hear the various testimonies of witnesses and representatives. It reads in relevant part: "The ABC shall thereafter travel to the Sudan to listen to representatives of the people of Abyei Area and the neighbours, as indicated hereunder."
3. This provision also went on to specify the number of meetings that were to be held, locations, and numbers of tribal representatives that were going to be interviewed.
4. Article 3.4 carved out a special role for the experts, and stressed again that the final decision was to be based on research and scientific analysis.
5. Article 3.5 stated that the ABC -- not the experts alone -- were to reconvene in Nairobi to hear both parties' presentations and prepare the ABC's final report for presentation to the presidency in Khartoum.

Page 92

12:53
1. The ABC Rules of Procedure were drawn up by the experts and agreed by the parties' delegations on 11th April 2005. They are reproduced under tab 6 of the common bundle.
2. Rule 1 repeats the substantive formula for the delimitation. It makes express reference to fact that the work of the Commission would be guided by the principles of agreement on Abyei, the Abyei Annex, the understanding on the Abyei Boundaries Commission, and the terms of reference. The provision is now on the screen, and I will read it in its entirety: "The work of the Commission will be guided by the principles of agreement on Abyei, the Abyei Annex, 'Understanding Abyei Commission' (ABC) and terms of reference, which includes the following mandate ...
3. The Abyei Area is defined in the Abyei Protocol in Article 1.1.2 as: "The area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905."
4. The ABC shall confirm this definition. "1.2. The ABC shall demarcate the area specified above on map and on land."
5. Significantly, Rules 6 through 10, dealing with meetings, testimonies and access to the members of the public, make reference to Rule 6, the schedule of the
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<td>Commission's meetings; Rule 7, the fact that the Commission members should have free access to members of the public other than those in the official delegations at the locations to be visited; Rule 8, that at each meeting with the public the chairman will explain the purpose of the Commission; Rule 9, that the recordings of the testimonies should be provided to all members of the Commission; and Rule 10, that, in addition to sites in the field based on recommendations of both sides. This terminology leaves no doubt as to the fact that fact that these rules were addressed to the Commission in its entirety, not just the experts, and that the work of the ABC was to be open and transparent. Furthermore, as the Tribunal will note, Rule 9 refers to the recordings of the meetings being made by both sides, thus implicitly requiring that both sides be present. Finally, the last relevant rule, Rule 14, states that: “The Commission will endeavour to reach a decision by consensus. If, however, an agreed position by two sides is not achieved, the experts will have the final say.” This was the procedural framework agreed for the work of the ABC. In the light of such a clear and detailed procedural structure, the SPLM/A’s allegations and objections that the ABC experts were not required to follow a specific set of procedural rules, given the so-called “rudimentary character” of the parties’ agreement regarding the ABC’s procedures, is simply wrong. The fact of the matter is that the SPLM/A wants it both ways. When it does not suit its purposes, the ABC is a sui generis body, and not an arbitral tribunal subject to rules of procedure. On the other hand, when it is convenient to the SPLM/A, then the ABC turns into an adjudicative body whose decision is final and binding. A good example of the SPLM/A’s contradictory and self-serving approach is provided by its characterisation of the proceedings before the ABC. The memorial recognised the adjudicative nature of the proceedings before the Commission. For instance, it acknowledged that -- and I quote: “The ABC conducted itself in the manner of an adjudicative body and rendered an adjudicative decision.” It also stated that -- and again I quote: “There can be no doubt that the Commission afforded the parties opportunities to present their cases.</td>
<td>12:58</td>
<td>regarding definition and delimitation of the Abyei Area, and to be heard in an adjudicative manner.” With regard to the manner in which the Commission heard witnesses, the SPLM/A noted that -- and I quote: “It employed quintessentially adjudicative procedures in its conduct of the proceedings before it.” The SPLM/A further emphasised that -- again I quote: “… each party was fully aware of the other party’s submissions and evidence, and enjoyed multiple opportunities to meet and rebut the submissions and evidence.” The SPLM/A also noted with approval that the testimony of witnesses before the Commission was recorded and transcribed, and that each party was aware of the other’s submissions and evidence. By contrast, when it comes to assessing the experts’ conduct in receiving evidence from Ngok Dinka witnesses ex parte, and without informing the Government of Sudan, the SPLM/A denies the mandatory character of the experts’ procedural obligations, and sees no irregularity or procedural unfairness in this conduct. Mr President, our opponents ignore a key aspect of this case, and have ignored it in every one of their written submissions: no matter how bespoke the ABC was, it was the body that had been entrusted with the complex task of adjudicating a highly sensitive dispute. Conscious of this delicate role the parties paid a great deal of attention in imposing specific procedural requirements on the work of the ABC and the experts, regulating the ABC’s work through a set of agreed rules inspired by the respect of the adversarial principle, the equality of the parties, and the imperative need for open and transparent proceedings. The experts themselves had contributed to this process by assisting in drawing up the Rules of Procedure which were presented to the parties for comments, and which were approved by consensus under Rule 3 of the procedural rules. The parties were entitled to rely on the Commission to carry out its work in conformity with such rules. The experts were under obligation to respect such procedural rules and to comply with the parties’ expectations. There is nothing “parochial” or “distorted”, to use the disparaging terms employed by our opponents, about such an interpretation of the experts’ mission. Before I turn to our discussion of the specific procedural violations, which will probably take place after the lunch break, I would like to mention briefly conduct by the experts that took place after the</td>
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issue of the report, the appropriateness of which is suspect.
I refer to the fact that the ABC experts paid a one-day visit to the south on 15th September 2007 at the invitation of the Government of South Sudan. According to what is reported at page 16, paragraph 122 of the October 2008 CPA Monitor -- which is the monthly report on the implementation of the CPA prepared by the UN mission in Sudan, filed as Exhibit FE16/13A with the SPLM/A’s memorial, and also reproduced under tab 5 of the arbitrators’ folders -- according to this report the experts met at the headquarters of the South Sudan Legislative Assembly in Juba with MPs, officials of the Government of South Sudan, and civil society representatives, ostensibly to defend their -- the ABC experts’ -- findings.

It should be stressed that, according to the same monthly report, the meeting took place at the invitation of the GoSS, the Government of South Sudan, and not at the invitation of the Southern Sudan legislative assembly, as the SPLM/A alleges in its rejoinder. The report also notes that this invitation gave rise to -- and I quote the report -- "strong criticism by the NCP".

The Government of Sudan was not invited to participate in this meeting, and no equivalent meeting was held with the Government of South Sudan, and civil society representatives, ostensibly to defend their -- the ABC experts’ -- findings.

It should be stressed that, according to the same monthly report, the meeting took place at the invitation of the GoSS, the Government of South Sudan, and not at the invitation of the Southern Sudan legislative assembly, as the SPLM/A alleges in its rejoinder. The report also notes that this invitation gave rise to -- and I quote the report -- "strong criticism by the NCP".

The Government of Sudan was not invited to participate in this meeting, and no equivalent meeting was held with the Government of South Sudan, and civil society representatives, ostensibly to defend their -- the ABC experts’ -- findings.

Perhaps even more striking is the conduct of one of the ABC experts, Dr Douglas Johnson, who revealed that he has "recently advised the Government of South Sudan on the north/south boundary issue", precisely the matter at issue in this case. This remarkable statement is contained in a footnote to an article published in 2008 by Dr Johnson in the journal African Affairs. The article is produced under tab 124 of the common bundle, and the relevant footnote appears on the first page.

Mr President, this is hardly the kind of conduct that one would expect from one of the five experts of the ABC, who were under the obligation to act impartially pursuant to paragraph 2.2 of the Abyei Annex. Even if Dr Johnson’s advice was provided after the work of the ABC was concluded, his conduct is very strange indeed, and casts a shadow over the whole process.

Mr President, this may be a convenient time to pause for lunch, if you so wish, and I can then resume after the break.

THE CHAIRMAN: I thank you very much. The hearing will resume at 3 o'clock this afternoon.

(Adjourned until 3.00 pm)
Trevor McGowan

Day 1 Saturday, 18th April 2009

Page 101

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.

Page 102

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,

Page 103

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

Page 104

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

28 (Pages 101 to 104)
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.

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 Luol 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

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 Luol 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.

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
the experts modified the original schedule, the original
programme of work in order to accommodate these
additional interviews. By acting separately and
covertly as they did in conducting the Khartoum
meetings, the experts patently violated the procedural
rules and exceeded the ABC's mandate.

Another example of a situation where the experts
confused their role with that of the Commission arose
when, some time before they started the research in
Khartoum, on 24th April 2005, they apparently contacted
Mr Jeffrey Millington, a US official who had worked with
Senator Danforth during the negotiations that culminated
in the CPA. The Government of Sudan was not informed of
this, and only found out about Mr Millington's response
when the experts' report was issued on 14th July 2005.

Rule 7 of the Rules of Procedure refers to the fact
that Commission members "should have free access to
members of the public other than those in the official
delegations at the locations to be visited". The words
"Commission members" clearly do not refer only to the
experts. And, needless to say, Mr Millington hardly
qualifies as a member of the public at the locations to
be visited.

By way of background, it should be recalled that the
experts' report stated at page 4 of its preface that no

Three comments are warranted on the substance of
the experts' report which is also reproduced under
Tab 7 of the folders, bears no relation to the experts'
area.

For reasons that are not entirely clear, the experts
purported to attribute great importance to the US
interpretation of the formula -- an interpretation that
is not accurate -- as provided by Mr Millington. The
experts did not explain why Mr Millington's advice was
believed to be so significant, particularly in the light
of his witness statement -- provided at the request of
the SPLM/A in these proceedings -- that his role in the
peace talks was merely -- and I quote -- "to observe and
be available to assist the parties as required", and not
even to negotiate, mediate or represent either party.

But further details about this episode emerged one
year later at a lecture given by Ambassador Petterson at
the National Defense University and Wilson Center
Symposium on 11th September 2006. This document was
filed at Annex 86 of the Government of Sudan's memorial
and is also reproduced under tab 11 of the common

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maps depicting the area inhabited by the Ngok Dinka in
1905 exist. The preface to the report added at page 4
that, since the experts found no sufficient
documentation showing the administrative situation on
the ground at the time -- and I read from the preface of
the report:

"[They had] to avail themselves of relevant
historical material produced before and after 1905, as
well as during that year, to determine as accurately as
possible the area of the nine Ngok Dinka chiefdoms as it
was in 1905."

The preface of the report then went on to state:

"In doing this the experts are mindful that the
drafters of the American proposal which was incorporated
into the Abyei Protocol have stated: 'It was clearly our
view when we submitted our proposal that the area
transferred in 1905 was roughly equivalent to the area
of Abyei that was demarcated in later years.'

"The Americans had not meant to limit the gathering
of information about Abyei strictly to information
available in 1905, which my colleagues and I found
extremely limited and manifestly insufficient upon which
to base a decision on Abyei's boundaries.'

Ambassador Petterson's remarks call for four
important comments. First, it is obvious that
Mr Millington's email played an important role to the
extent that it was used to provide a US interpretation
of the formula and that the experts stated in the report
that in determining the area of the nine Ngok Dinka
chiefdoms they were mindful of the American position as
conveyed by Mr Millington.

Second, Mr Millington's advice apparently comforted
the experts in their analysis, as reported by the

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On that occasion Ambassador Petterson revealed that
he had sent an email to Mr Millington and repeated his
statement that:

"It was clearly our view [the Americans' view] ...
that the area transferred in 1905 was roughly equivalent
to the area of Abyei that was demarcated in later
years."

More precisely, Ambassador Petterson, in commenting
on Mr Millington's views, remarked as follows:

"The Americans had not meant to limit the gathering
of information about Abyei strictly to information
available in 1905, which my colleagues and I found
extremely limited and manifestly insufficient upon which
to base a decision on Abyei's boundaries."

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that in determining the area of the nine Ngok Dinka
chiefdoms they were mindful of the American position as
conveyed by Mr Millington.

Second, Mr Millington's advice apparently comforted
the experts in their analysis, as reported by the
chairman of the ABC in his 2006 lecture, that it was
extremely limited and manifestly insufficient to limit
the gathering of information about Abyei strictly to
information available in 1905.
Third, Ambassador Petterson’s remarks provide
a highly pertinent example of the disregard that the
experts manifested for the agreed procedural framework.
It was not up to the experts to seek the views of
a third party to interpret the mandate of the ABC, and
even less to look for external support, without
disclosing their initiative to the other ABC members or
the parties, in order to modify or expand the scope of
the ABC’s mission. In fact, Ambassador Petterson confuses two things: the
relevant date, 1905; and earlier or later evidence
bearing on the position in 1905. Such evidence was
never excluded.

Apart from its usual generic rebuttal that the
experts were granted broad procedural discretion by the
parties and therefore could meet with third parties if
they thought it appropriate, and its customary dismissal
of the Government’s complaints as contrived and
frivolous, the SPLM/A seeks to minimise the importance
of Millington’s advice by characterising it as a single
email exchange. It adds that the experts’ conduct in
this respect was not “a serious violation of
a fundamental procedural guarantee”, and states that in
any event it caused no injury.
On the contrary, Mr President, the Government
submits that this was indeed a serious violation. It
was neither necessary nor conforming with the agreed
procedural rules for the experts to solicit the views of
a US representative in the negotiating sessions in order
to ascertain the meaning of the formula.
As stated by Vice President Taha in his witness
statement filed with the Government’s counter-memorial:
“The GoS did not need to approach any of the US
mediators for any explanation of the Danforth proposal.”
The Vice President of Sudan also expressed surprise
at Mr Millington’s opinion as formulated in the report.
He stated as follows:
“Neither Danforth nor any of his assistants
expressed this view to me or any of my aides, clearly or
otherwise. Neither I nor any of my assistants were
informed of any later [years’] revision or version of
the definition.”
Furthermore, the parties had requested the experts
in no uncertain terms to base their findings on research
and scientific analysis. Procedural Rule 11 allows the
experts to determine what additional documentation
and/or archival material will need to be consulted and
certainly does not authorise them to contact
representatives of unrelated governments.
Article 4 of the Abyei Annex provides that:
“...The experts shall consult the British archives and
other relevant sources on Sudan, wherever they may be
available, with a view to arriving at a decision that
shall be based on scientific analysis and research.”

Not based on the opinion of an unrelated third party
solicited without the parties’ knowledge and prior
approval. Article 3.4 of the Terms of Reference repeats
the same language verbatim, thus reiterating its
significance for the parties.
In the light of these provisions, what was the point
of soliciting Mr Millington’s views and attributing them
so much significance that the experts felt compelled to
preface their report with the specification that in
reaching their decision they were mindful of the views
expressed by the US in their original proposal? What
possible bearing could those views have on the task that
the parties had assigned to the ABC?
In the Government’s submission, the experts
therefore committed a manifest excess of mandate when
they accepted Mr Millington’s views without giving prior
notice to the ABC as a whole.
A further procedural excess of mandate was committed
when the experts proceeded to issue their report in
disregard of Procedural Rule 14. This goes to the heart
doing the functioning of the ABC, and as such it is
a particularly egregious violation. The plain fact is
that there never was an endeavour to reach a decision by
consensus of all the Commission members as required by
Rule 14.
You will recall that this rule imposes the following
obligation:
“The Commission will endeavour to reach a decision
by consensus. If, however, an agreed position by two
sides is not achieved, the experts will have the final
say.”
It should also be noted that paragraph 5 of the
Abyei Annex provides that:
“The report of the experts arrived at as prescribed
by the ABC Rules of Procedure shall be final and binding.”

Hence the experts could finalise the report only in the absence of a decision by consensus pursuant to Rule 14 of the Rules of Procedure.

In contrast with these very clear mandatory provisions the experts fundamentally misinterpreted and misconstrued the Abyei Annex and the Rules of Procedure when they stated in their report that since the parties, the SPLM/A and the GoS were unable to reconcile their differences on the disputed issue, then the decision of the experts “shall be the determinant of the boundaries in question”. This erroneous interpretation appears to have been endorsed also by Minister Deng Alor Kuol, who in his first statement referred to the fact that a final report would have been issued by the experts had agreement not been reached by the parties.

However, the procedural requirements were quite different. It was the Commission as a whole which should have endeavoured to reach a decision by consensus. The summary of the experts’ report gets it right. It correctly states that only “if the 15-person Abyei Area’s boundaries should be” could the experts issue a decision that was “final and binding on the parties”.

In the event there was no endeavour to discuss the issue with party representatives on the ABC. The experts simply rushed to a decision, based on the fact that the presentations made by the parties were different, as was to be expected, without ascertaining first whether a consensus could be reached amongst the members of the Commission in proper deliberations within the Commission.

The Government of Sudan’s written submissions have extensively dealt with the lack of any attempt to reach a consensus in conformity with Rule 14, including a rebuttal of the SPLM/A’s arguments in this respect, therefore it is not necessary for me to return to this at great length here. It suffices to recall that the requirement contained in this provision is drafted in mandatory terms: the Commission will endeavour to reach a decision by consensus. Only in the event the Commission – not the parties – had been unable to reach a consensus would the experts have had the final say. In other words, Rule 14 imposed an obligation at least to attempt to obtain a consensus amongst the Commission’s 15 members. To use an example, the chairman of an assembly would ask the members whether there is a consensus on a particular issue or issues, and when the reply is negative would conclude that the consensus has not been reached. This is what should have happened in the present circumstances, but none of this ever took place.

The ABC as a whole never saw the experts’ report, either in draft or in final form. Instead the experts sought a meeting with the president directly, without even disclosing the purpose of such a meeting.

By the experts’ own admission, their conclusion that there was no consensus was based on parties had opposing views on the disputed issue. I shall recall the words used by the experts in the summary of their report and decision at page 9: “... the two sides, ie the Government of Sudan (GoS) and the Sudan People’s Liberation Movement/Army (SPLM/A), were unable to reconcile their differences on the Abyei issue. Thus the decision arrived at by the five ABC experts shall be the determinant of the boundaries in question.”

The SPLM/A asserts that there had been attempts at reaching a consensus, which it alleges were systematically rebuffed by representatives of the Government. However, these assertions are based on witness statements provided on behalf of the SPLM/A, and are unsupported by any documentary evidence. I refer in this respect to the Tribunal to our rejoinder at paragraphs 140-143. I would also add that there is no mention in the experts’ report, nor was there any mention at the meeting with the president presenting the report, of the three alleged attempts to reach a consensus brought up by the SPLM/A witnesses. This is odd since the report does refer to the need to reach a consensual decision. Had these meetings indeed taken place they would have been mentioned expressly in order to provide a valid explanation of why a general consensus had not been reached.

It is particularly strange that the third and final attempt -- allegedly initiated by the chairman of the ABC, Ambassador Petterson, following the Government’s final presentation, and as such undoubtedly very important, had it indeed taken place -- was not mentioned in the report. In fact, the chairman’s alleged attempt was not even mentioned in the SPLM/A’s memorial, and the first reference to it appeared in the witness statement of Mr Abdul Rasul El-Nour Ismail filed with the reply. Consequently, the Government submits that the fact that the experts reached a decision by themselves
### Day 1: Saturday, 18th April 2009

#### Terms of Reference

The Abyei Area and the neighbours, and shall also listen when paragraph 3 of the Abyei Annex stated that the ABC parties had a right to ask questions. For instance, as a corollary of that adversarial principle, if the parties were to be present and participate on equal terms in all the various aspects of the procedure, as specified in the Terms of Reference and the procedural rules. This was emphasised in particular in Article 3 of the Terms of Reference, in paragraph 3 of the Abyei Annex, and Rule 9 of the Rules of Procedure. When certain tasks were to be carried out by the experts alone, this was specifically stated, as in the case of consultation of the British archives and other relevant sources on Sudan, as indicated in Article 3.4 of the Terms of Reference.

As a corollary of that adversarial principle, if evidence were to be produced, the parties had a right to test that evidence; if witnesses were to be heard, the parties had a right to ask questions. For instance, when paragraph 3 of the Abyei Annex stated that the ABC should "listen to the representatives of the people of the Abyei Area and the neighbours, and shall also listen" to the presentations of the two parties", this is an obvious reference to the principle of contradiction. And yet the experts violated that principle over and again by holding the Khartoum meetings, by soliciting Mr Millington's advice ex parte, and by not seeking a consensus of the ABC as a whole before they issued the final report.

To return to the Khartoum meetings with this principle of contradiction in mind, they were held in the absence of the parties' representatives, and the ABC as a whole never had an opportunity to provide its views on the subject. Moreover, some of the interviews conducted in Khartoum are not recorded in the experts' report, and therefore the parties are in the dark as to the context to this day.

The minutes of the Khartoum interviews contained in appendix 4 to the experts' report, starting at page 148, list the names of eight Ngok Dinka people apparently interviewed by the experts. However, the only interview recorded in the minutes and attached to the report is that conducted with Mr Deng, who apparently provided information in his capacity of former administrator of the Abyei Area. No further minutes of the interviews taken on 21st April 2005 at the Khartoum Hilton are attached to

#### Excess of Mandate

But in each of the episodes I just mentioned, the experts also violated the principles of contradiction, which inspired the entire ABC process and ensured that the parties were to be present and participate on equal terms in all the various aspects of the procedure, as specified in the Terms of Reference and the procedural rules. This was emphasised in particular in Article 3 of the Terms of Reference, in paragraph 3 of the Abyei Annex, and Rule 9 of the Rules of Procedure. When certain tasks were to be carried out by the experts alone, this was specifically stated, as in the case of consultation of the British archives and other relevant sources on Sudan, as indicated in Article 3.4 of the Terms of Reference.

As Professor Crawford has explained, this is not an obvious reference to the principle of contradiction. But in each of the episodes I just mentioned, the experts also violated the principles of contradiction, which inspired the entire ABC process and ensured that the parties were to be present and participate on equal terms in all the various aspects of the procedure, as specified in the Terms of Reference and the procedural rules. This was emphasised in particular in Article 3 of the Terms of Reference, in paragraph 3 of the Abyei Annex, and Rule 9 of the Rules of Procedure. When certain tasks were to be carried out by the experts alone, this was specifically stated, as in the case of consultation of the British archives and other relevant sources on Sudan, as indicated in Article 3.4 of the Terms of Reference.

#### Procedural Rules

The SPLM/A's allegation that the experts were free to consult anyone they wished ex parte flies in the face of logic and the plain terms of the agreed Procedural Rules. As I mentioned earlier, only in specific instances set out in the Terms of Reference and the Procedural Rules were the experts authorised to act ex parte, as for instance in conducting research in the British archives.

For the experts to conduct meetings without the parties' prior knowledge and presence was a blatant violation of paragraph 3 of the Abyei Annex, Article 3.2 of the Terms of Reference, and amounts to excess of mandate under Article 2 of the Arbitration Agreement. The experts' conduct was also a violation of basic notions of due process.

Moreover, we know from the experts' report that the Ngok Dinka individuals interviewed on 6th May 2005 gave the experts documents and maps of the relevant area which were never handed over to the Government. In particular, the experts were given at some point a sketch map highlighting certain place names. The relevant part of the minutes of the meetings attached to the report, page 156, reads as follows:

"They [the witnesses] will also copy the sketch map they made of the area and give us [the experts] a copy. They had highlighted place names on a copy of NC35-L Ghabat Arab map, and we transferred those to our photocopy of that map."

Some of the statements recorded in these meetings are also cause for concern, and would have been objected to by the Government had the other ABC members been present, and had they had an opportunity to comment. In particular, when Dr Johnson referred to the area to be delimited, he omitted any reference to the year 1905, and did not use the key word "transferred". He stated, and I read from his statement:

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

You will find this at pages 155-156 of tab 2 in the common bundle.

As Professor Crawford has explained, this is not
what the agreed formula said. The definition given by Dr Johnson is unacceptable and represents a clear violation of Rule of Procedure 8, which states in no uncertain terms that:

"At each meeting with the public the Chairman will explain the purpose of the Commission, noting that the said purpose is limited to defining and demarcating the area of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905."

There was no justification for Dr Johnson's representatives to be present, the experts must have known what he was doing, not only because the terms of reference were drafted by the experts themselves, but also because he had previously recognised the importance of the formula, at least for the Government, when he stated in an article he recently wrote that:

"Throughout the gathering of testimony in the field, members of the Government delegation repeatedly reminded the experts that only evidence referring to conditions in 1905 was relevant."

This passage was cited at paragraph 123 of the Government's counter-memorial. It also appears that during the Khartoum meetings the experts sought to clarify their understanding of certain locations and certain Ngok place names and requested information in that regard, which included highlighting certain place names on a map. All this information was exchanged and discussed before the experts alone and in the absence of the Government. As to Mr Millington's advice, his witness statement does not shed any light on the modalities of the advice he rendered to the experts. As the SPLM/A it self does not shed any light on the modalities of the advice Mr Millington's advice because (1) it was incorrect as formulated, what were the modalities of the exchange, and (2) because the experts were not afforded the opportunity to respond or comment before Mr Millington's views were apparently endorsed in the experts' report.

The experts' failure to attempt to reach a consensus within the Commission as a whole, pursuant to Rule of Procedure 14, is another clear action of a violation of the principle of contradiction. The experts acted alone and provided their final say without checking with the entire ABC as to whether there was any common ground on particular issues in order to reach a consensus. Our opponents seek to justify the experts' conduct by arguing that, under general principles of law, arbitral tribunals possess broad procedural discretion. This argument actually provides another telling example of the double standards that the SPLM/A employs when describing the role of the ABC: on the one hand it criticises the Government for equating the ABC to an arbitral tribunal, and on the other hand it resorts to the same analogy when it suits its purposes.

Be that as it may, while it may be true that in general terms a tribunal possesses a certain discretion when it comes to adopting procedural rules, such discretion can be exercised only subject to two important caveats: it can only exist in respect of the due process requirements and in the absence of different agreement by the parties. Notably, a tribunal cannot act in disregard of the procedural conditions that the parties might have agreed to.

I will just mention a few examples of arbitration rules which corroborate this conclusion, and this is taken from our opponent's own selection.
tailored to the requirements of the parties' dispute".

Indeed, the so-called "broad procedural discretion"
that the experts allegedly enjoyed, according to our
opponents, is nowhere to be found in the relevant
agreement, and our opponents are unable to point to
a single provision to that effect. In fact, the
arguments advanced by the SPLM/A are based on either
speculation or distortion of the existing procedural
rules.

It is therefore wrong to allege, as the SPLM/A does,
that the ABC experts enjoyed unlimited powers of
procedural discretion. They did not, for the parties
had chosen specific procedures. When the experts
violated binding rules of procedure, such as the
parties' right to enjoy equal treatment, to participate
in every step of the process and to be heard in an adversarial procedure, they manifestly exceeded their
mandate.

The experts also failed to respect the requirement
of transparency. In light of the public interest
surrounding the dispute and the importance of the
substantive issues, the entire procedural framework was
inspired by the notion of a commission composed of
parties' representatives and outside experts, in order
to guarantee impartiality and transparency.

In particular, Articles 5.1 and 5.2 of the
Abyei Protocol highlighted the parties' intention that
the Commission be impartial and work in full
transparency. Rules of Procedure 6 to 10 also
emphasised the transparency of the process by requiring
that the whole Commission participate in the process,
including the fact that a recording of all oral
testimonies be provided to all members of the
Commission; this is Rule 9.

This procedural framework was based on the respect
general principles of equality of the parties’
treatment, and not on the idea of giving free rein to
the experts to act on their own initiative and
ultimately do as they pleased.

These were the principles that should have guided
the experts when they held the Khartoum meetings, when they
solicited Mr Millington's views or when they issued
their final report. Instead in each instance the
experts worked separately from the other ABC members and
did not disclose in advance to the parties their
conduct, which became known only when the report was
made public.

In complete disregard of the Rules of Procedure, the
experts held meetings in Khartoum on 6th and
8th May 2005 unbeknownst to the parties, after they had
announced in April of that year that they would:
"... confine [themselves] to records contemporary
with or referring to the period of the Anglo-Egyptian
Condominium."

The reference will be found at page 2 of the note on
testimony of field visits reproduced at tab 6 of the
arbitrators' folders.

The experts also violated the principle of
transparency when they sought guidelines from
Mr Millington, a national of the United States, a third
party, without consulting the parties' representatives
or seeking their views, even though the procedural
agreements made it abundantly clear that all the ABC
members should be involved in the process and have
access to all the information exchanged.

The requirement of transparency was also similarly
disregarded when the experts proceeded to issue a final
decision without trying to reach a consensus within the
ABC as a whole and never disclosed the contents of their
decision to the other members of the ABC, who were
simply put before the fait accompli without having the
chance to express their views.

The fact that the experts also took no notice of the
agreed procedural requirements with regard to the
transparency of the process amounted to excess of

Page 129

Page 132
mandate.

In conclusion, the ABC experts manifestly exceeded their mandate conferred upon them by the parties, which included the obligation to adhere to the agreed procedural provisions. The parties had taken great care in agreeing to a specific procedural framework for the ABC that comprised four separate instruments all recalled expressly in the Arbitration Agreement entrusting the Tribunal -- this Tribunal -- with its mandate.

There can be no question that if a body invested with de facto adjudicative powers such as the ABC does not respect the principles of procedure agreed by the parties, this represents an excess of mandate and the final decision of that body must be subject to annulment.

The procedural violations which occurred in this case clear fall under that category. I will briefly recall them once more.

The fact that the experts held meetings in camera with a number of Ngok Dinka individuals outside of the planned schedule and without the parties' knowledge and presence amounted to a violation of Article 3 of the Abyei Annex, Article 3.2 of the Terms of Reference and Rule 7 of the Rules of Procedure.

The fact that the experts proceeded to issue a final decision without the slightest attempt to reach a consensus within the ABC as a whole amounted to a violation of Rule 14 of the Rules of Procedure.

These are not trivial omissions or mere defects of form, Mr President; these were key aspects of the ABC process, and the parties had a legitimate expectation that the ABC would comply with them, since the validity of the experts' decision depended on its conformity with the mandatory procedural requirements imposed by the parties as forming part of the Commission's mandate.

Mr President, members of the Tribunal, I thank you for your kind attention. May I ask you now to call on Professor Pellet to continue with the Government's presentation on excess of mandate.

THE CHAIRMAN: I thank you very much and I give now the floor to Professor Pellet.

(3.55 pm)
Mr President, let me begin with the excess of mandate resulting in a decision ultra petita independently of the question of motivation or non-motivation. It is, if I may put it this way, an easy point, since our opponents accept that, quoting their memorial:

"An excess of mandate under Article 2(a) is a decision by the ABC experts that was ultra petita purporting to decide matters outside the scope of the disputes submitted by the parties."

They also concede that, quote again from their reply:

"... an admissible excess of mandate claim concerns traditional grazing rights in the goz."

The SPLM/A does not come back to this in its rejoinder, and simply refers the reader back to its reply. As for us, our answer is given at pages 69-74 of our rejoinder, which follow and complete pages 45-50 of our counter-memorial.

Our opponents make three main points. First, the ABC experts did not confer rights on the Ngok Dinka outside the Abyei Area, nor did they limit the Messiriya's traditional rights; they only clarified existing rights. Second -- still the SPLM/A speaking -- in any case such findings are included in the incidental jurisdiction vested in the ABC. And third, this is obviously constitutes an excess of mandate.

Moreover, Mr President, I suspect that the hidden concession that the SPLM/A makes -- yes, the experts acted in excess of their mandate in this respect but it does not really matter -- aims at inciting you to accept a kind of quid pro quo according to which the recognition of an excess of mandate on this point would constitute a sufficient satisfaction for the Government, without any other consequence deriving from this.

This Mr President, clearly is a decision, but it is not, however, as trivial and minor as the SPLM/A tries to present it, if only because it shows how cavalier the experts' approach of their mandate was.

Moreover, the analysis made by the experts of the so-called "secondary rights" of the Ngok Dinka gives the key of their final decision. In other words, the experts' findings concerning the rights in question not only is an excess of mandate per se but also it decisively contributes to the manifestly untenable reasoning underlying the other aspects of the experts' decision.

Moreover, Mr President, I suspect that the hidden concession that the SPLM/A makes -- yes, the experts acted in excess of their mandate in this respect but it does not really matter -- is a misdirection and aimed at inciting you to accept a kind of quid pro quo according to which the recognition of an excess of mandate on this point would constitute a sufficient satisfaction for the Government, without any other consequence deriving from this.

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| Page 141 |
|---|---|
| 16:07 | 16:11 |
| 1 | 1 |
| the SPLM/A itself, I quote from their reply, | both possessed 'shared secondary rights' in the goz) did not purport to define the full extent of the Misseriya's |
| 2 | 2 |
| paragraph 651: | rights of usage in other areas. As discussed above, the |
| 3 | 3 |
| "The purpose of incidental or ancillary powers is to | ABC experts' sentence was merely the basis for the |
| 4 | 4 |
| provide for the full and orderly settlement of the | boundary which was drawn bisecting the goz. That is |
| 5 | 5 |
| disputes submitted by the parties." | made crystal clear by the extensive and very specific |
| 6 | 6 |
| As is obvious from a mere reading of the mandate, | discussions in the ABC Report of the fact that the |
| 7 | 7 |
| the question of the secondary rights was not submitted | Misseriya enjoyed substantial rights of usage to the |
| 8 | 8 |
| by the parties to the ABC. | south of the goz ..." |
| 9 | 9 |
| Even more, it was decided and agreed by the parties | However, it must be noted that the only logical |
| 10 | 10 |
| themselves in Article 1.1.3 of the Abyei Protocol, which | implication of a shared rights area is that outside this |
| 11 | 11 |
| is in tab 3 of the common bundle, which provides that: | area rights are not shared. And I still quote from the |
| 12 | 12 |
| "The Misseriya and other nomadic peoples retain | SPLM/A reply that the statements made by the experts: |
| 13 | 13 |
| their traditional rights to graze cattle and move across | "... made very clear that the ABC Experts had |
| 14 | 14 |
| the territory of Abyei." | concluded that the Misseriya had historically exercised |
| 15 | 15 |
| At first reading it could be thought that after all | secondary rights of usage well south of the goz |
| 16 | 16 |
| the experts had only confirmed what had already been | (extending to locations south of Abyei Town)."

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| Page 142 |
|---|---|
| 16:09 | 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 | Messeriya? |
| 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 Messeriya'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? |

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| Page 143 |
|---|---|
| 16:11 | 16:14 |
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| 2 | chosen without any justification by the experts. |
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| 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? |
16:16 1 This brings us to other aspects of the excess of mandate. However, before I turn to them, it is probably appropriate to summarise the ultra petita point. The ABC's mandate was strictly limited to drawing the line constituting the border of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905. Neither the Commission nor the experts were asked to make any pronouncement regarding grazing or other secondary rights of the Ngok Dinka or the Messiria, or of any other tribes in the region. By including a paragraph on this matter in their decision the experts clearly exceeded their mandate; all the more so that they contradict in part the agreement reached by the parties in the Abyei Protocol on this matter.

Last but not least, the experts' position on this point puts into crude light the arbitrary basis of their decision on the border itself.

This brings me, Mr President, to another and crucial aspect of the excess of mandate which vitiates the experts' report: the failure to motivate; or, since there is a semblance of justification on some aspects, the total discrepancy between the reasons given by the experts on the one hand, and the mandatory instructions agreed by the parties.

As I have shown in my speech this morning, it is absurd to allege that an adjudicative decision does not have to be reasoned, as the SPLM/A insistently does. Such a decision has to be motivated. This is true in general, but even more so when it concerns the delimitation of a border. Moreover, the reasons given in support of the award must relate to the sources decided by the parties, at least when the parties make such a determination, as is the case here, since paragraph or Article 4 of the Abyei Annex provides:

“In determining their findings, the experts in the Commission shall [‘shall’ consult the British archives and other relevant sources on Sudan wherever they may be available, with a view to arriving at a decision that shall [‘shall’ again] be based on scientific analysis and research.”

“Shall consult”, “shall be based”. These expressions leave no room for doubt as to the mandatory nature of these prescriptions, which are confirmed in paragraph 3.4 of the Terms of Reference. Unfortunately, Mr President, the ABC experts did not comply with these instructions which are part of the ABC mandate, and this not benign neglect is a matter of serious and legitimate concern; even though, with its usual sense of nuance, the SPLM/A has chosen to characterise as “frivolous” all the reasons given by the Government: frivolous our complaints that on some fundamental points the experts have simply given no justification; frivolous too our complaints that on other points the experts decided ex aequo et b.ono, including the Government’s suggestion that in reality the experts purported to allocate oil resources in favour of the SPLM/A; and frivolous as well our complaints that the experts relied on unspecified legal principles.

Well, I’m not sure in which camp the frivolity lies, Mr President. I will take these three points in turn, but my first point is rather long; it is on the failure to motivate. Maybe this is a good time for a break. It is up to you.

16:20 1 THE CHAIRMAN: I follow your suggestion, and the hearing is suspended.

16:17 (4.21 pm) 17:01 (5.00 pm) 1

16:21 1 PROFESSOR PELLET: Thank you very much.

16:22 1 Mr President, members of the Tribunal, I arrived at the second part of my second speech, where I will show that the ABC experts failed to motivate their decision in accordance with their mandate, and more precisely my first point on that is the real failure to motivate.

On this central issue the SPLM/A limits itself to referring to its reply. As I said earlier, the more delicate a point is, the more silent the other side becomes. Since we are here at the very heart of the present dispute, I will not imitate them; although the arbitrators might be interested to note that we already dealt with this crucial issue at pages 85-88 of our memorial, 51-55 of our counter-memorial, and 57-61 of our rejoinder. But this deserves at least a reminder together with some additional thoughts.

I now leave aside the rather eccentric idea that in the modern world an adjudication of territories or the drawing of a border line could remain unmotivated or unreasoned, although it must be noted that this is the SPLM/A’s main argument on this matter, and by the same token an admission that the experts’ report was not motivated.

I wish to be clear, Mr President. Of course, when I say that the experts’ report was not motivated, I do not mean that it does not contain any reason. After all, it counts not less than 256 pages which are alleged to explain the five paragraphs included in the supposedly final and binding decision. What I mean is that in spite of this apparently lengthy justification,
some of the main points in the decision remain completely and manifestly lacking in motivation. This also means that the question here is not the fact that the Government of Sudan disapproves of the report or disagrees with the reasoning of the parties; the issue here is that there is nothing to disagree with. There is no reason, no argument, no justification; just a pure affirmation. Or, more exactly, pure affirmations, in the plural, since at least three absolutely crucial decisions of the experts come out of the blue, without the slightest bit of reasoning.

The first entirely unmotivated allegation by the experts is the first paragraph of their decision: "The Ngok have a legitimate dominant claim to the territory from the Kordofan-Bahr el-Ghazal boundary north to latitude 10 degrees 10 minutes north, stretching from the boundary with Darfur to the boundary with Upper Nile, as they were in 1956 ..." Leaving aside the reference to 1956 while the only critical date stemming from the formula is 1905, nothing in the report, nor indeed outside the report, absolutely nothing can explain the acceptance of the latitude 10 degrees 10 minutes north. The SPLM/A tries to find an explanation. They introduce in the reply the: 

"... inescapable fact that the ABC report expressly equates latitude 10 degrees 10 minutes with the southern border of what it described as the goz."

This strong assertion calls for at least two more remarks. First, the SPLM/A gives absolutely no reference to support this strong affirmation. Second, this is not at all what is said in the report. The only mention to latitude 10 degrees 10 minutes north in the report -- which is reproduced at tab 2 of the common bundle -- can be found in proposition 9, where it is said:

"The experts, having examined the evidence presented in the preceding propositions, are confident that the area south of latitude 10 degrees 10 minutes north contains the territory in which the Ngok have dominant rights, based on permanent settlements and land use."

But this is clearly not a justification; all the less so that nowhere -- nowhere -- in the preceding propositions is 10 degrees 10 minutes north even mentioned. Then there will be two or three mentions afterwards of this latitude in the report, but not at all to justify the latitude; rather, exclusively to infer consequences from it, and fundamental consequences, since it will be one of the two lines from which the experts will draw the final goz dividing line, since they write: "The area between latitudes 10 degrees 10 minutes north and 10 degrees 35 minutes north therefore represents the area of secondary rights shared between the Ngok and Misseriya."

I will come back to this "therefore" in a few moments, but the fact is that, first, nowhere in the report is there the least explanation of why the experts fixed the limit of the Ngok Dinka dominant rights at this place.

Second, reading the report does not at all confirm the explanation offered by the SPLM/A in its reply, since of course the fact that the experts note "that the goz belt is roughly contained within these limits" is an ex post description, but by no means a justification. Three, in spite of this, the 10 degrees 10 minutes north parallel is one of the crucial elements in the whole artificial scaffolding built by the experts. If it is not valid, their whole decision crumbles. Absent any proof, any explanation, any reasoning, it cannot be valid, and this finding made without any scientific analysis of the available documentation clearly constitutes an excess of the experts' mandate.

The same holds true mutatis mutandis concerning the 10 degrees 35 minutes north line which corresponds to nothing but to the extreme claim to the north of the SPLM/A, with the only limited qualification that at page 44 of their report the experts state that this line coincides more or less, but not exactly, with Dinka names on certain maps.

The result is that in fact neither of the two lines from which the alleged border is manufactured finds any reasoned explanation in the report, nor anywhere else, as my learned colleagues and friends Rodman Bundy and James Crawford will explain on Monday.

The third major aspect of the case decided by the ABC experts without the slightest basis of any kind of reasoning relating to a scientific analysis of the available archives is the incredible non sequitur in their defence -- or absence of defence might be more accurate -- of the rejection of the Bahr el Arab as the southern limit of the province of Kordofan before the 1905 transfer.

The issue is explained, I think, with great clarity at pages 86 and 87 of the Government's memorial. I will try to be as clear as the memorial was on this point, which our opponents, who carefully do not come back to it in their rejoinder, have done their best to make as clear as possible.
Mr President, like most tragedies the story is in five acts.

Act I: the point of departure of the discussion must be -- as acknowledged by the SPLM/A itself -- that in a first stage the experts find that: "... the evidence presented supporting the Government's interpretation of the 1905 boundary is strong.”

That's a quote from the experts' report, page 36. That claim is -- and I quote again from the experts' report itself: "... that the southern boundary of Kordofan province at the inception of the Anglo-Egyptian Condominium was the Bahr el Arab river, and that all peoples living north of that boundary before 1905 were already in Kordofan.”

Act II, a minor episode for my story. I quote the experts again: "... there was considerable geographical confusion about the Bahr el Arab and Bahr el Ghazal regions for the first two decades of Condominium rule.”

Therefore Act III: "... the full context ... reveals that the Ragaba ez Zarga/Ngol, rather than the River Kiir, which is now known as Bahr el Arab, was treated as the province boundary, and that the Ngok people were regarded as part of Bahr el Ghazal province until their transfer in 1905." Still from the experts' report.

We do not accept this, Mr President. But this is not my own province; it will fall on Rodman Bundy to show this. We agree that the Tribunal is not a Court of Appeal, and cannot control the veracity of this finding unless it accepts that the experts have exceeded their mandate. The fact is that, based on an alleged geographical confusion, the experts now sustain that the southern limit of Kordofan in 1905 was the Ragaba ez Zarga. Now Act V: the decision of the experts. They say: "... it is reasonable and equitable to divide the Goz between them ['them' being the Ngok Dinka and the Missirya] and locate the northern boundary in a straight line at approximately latitude 10 degrees 22 minutes 30 seconds north.”

This is the first sentence of the final and binding decision of the experts. But here is the missing Act IV, and here is the excess of mandate. Act IV could be entitled "The Experts' Magic”, or "How the river Ragaba ez Zarga turns to be a parallel situated to the River Kiir, which 50 kilometres further north”.

Page 155

50 kilometres further north”. Here again our opponents give absolutely no explanation; and they could not, of course. The experts offer none -- absolutely none -- for this pure conjuring. And yet their mandate was to define -- ie delimit -- and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905; and this, in basing themselves on a scientific analysis of the available documentation.

In finding that the southern border of Kordofan in 1905 followed the Ragaba ez Zarga they were wrong. But we agree this is not an excess of mandate; just an incredible mistake for supposedly knowledgeable experts. But by jumping from this erroneous conclusion within their mandate to a parallel without offering any kind of explanation, the experts purely and simply exceeded their mandate. And this is related to their fundamentally wrong interpretation of their mandate, which will be my last point in a few moments.

Before that, Mr President, I must turn to other aspects of the motivation or lack of motivation of the experts' report, and in particular to the fact that they have based part of their decision on vague legal considerations which not only are unspecified, as we explained in our memorial, but also which find no basis whatsoever in their mandate. In effect, in so doing they do not define an already-existing area that they were supposed to determine on the basis of a scientific analysis; they allocate territories, an operation for which they had no mandate and no jurisdiction, if I may use this maybe too legalistic wording.

It might be useful to recall that the solution adopted -- it may be more accurate to say "invented" -- by the ABC experts mainly lies on a distinction between dominant rights on the one hand, and secondary rights on the other. I can live with this distinction as long as it is used for factual description purposes. It is certainly true that among nomadic or semi-nomadic societies there exist, besides classical proprietary rights, traditional customary rights which could be called "secondary rights”. But this is not the issue, except for one point: purely nomadic peoples who never settle for a long period in the same place will never have any dominant rights like the Messiriya.

The fact is that the Anglo-Egyptians did not administer the Condominium on this basis; and that the transfer operated in 1905, which the experts were entrusted with the task to determine, basing themselves on a scientific analysis of the available archives, the fact is that that transfer was not operated on the basis...
of these secondary rights as opposed to dominant rights; the transfer was operated on a territorial basis. And this is confirmed by the analysis that the experts themselves made in part of their proposition 7 that you will find under tab 2 of the common bundle at pages 35-38. Before this analysis takes place -- which is a debatable analysis, but it is a kind of analysis which takes place before the unfortunate loss of follow-up in the reasoning reflected in the missing Act IV, right or wrong -- globally wrong indeed, we think -- there was analysis. This analysis shows that the administration of the Condominium was, if I may say so, territorialised, based on territorial units, not on tribal divisions, or even less on tribal rights, whether dominant or secondary. Professor Crawford has already discussed this point in his pleading on the meaning of the formula this morning. 

Therefore, it is apparent that the transfer of territory of 1905, once again the one whose result was to define, not to decide anew -- to define, not to be transferred -- to the experts' report: “Based on the legal principle of the equitable mandate by basing themselves on what they held as being reasonable and equitable, which is very precisely the definition of an ex aequo et bono decision.

Just a reminder: as I have discussed some minutes ago, in the immediately preceding paragraph the experts had decided -- once again purely out of the blue, without any explanation, let alone any kind of scientific analysis -- they had decided just before that the limits of the secondary rights of the Missiriya on one hand, and of the Ngok Dinka on the other hand, were the parallels 10 degrees 10 minutes north and 10 degrees 35 minutes north respectively. This is an excess of mandate. But this is not my point anymore, just a reminder.

The point now is that, arriving at this stage, the experts were confronted with two lines. And in order to select the final one they committed another excess of mandate by basing themselves on what they held as being reasonable and equitable, which is very precisely the definition of an ex aequo et bono decision.”

“There is nothing in the parties' agreements or in general principles of law that forbids an ex aequo et bono decision”.

Mr President, I have promised not to use pejoratives to characterise our opponents' arguments, but I cannot help it. It is simply absurd.
As I have said in my previous speech this morning, it is true that the parties did not expressly agree to forbid the ABC to recourse to equity. But -- and this is much more relevant -- it is also true that there is nothing either authorising the Commission or the experts to do so. And in our modern world, as amply shown in the memorial of the Government, and again at pages 61-63, and again in our rejoinder at 63-66, without real contradiction from our opponents, it is well established that an adjudicative body can only decide ex aequo et bono when it is expressly authorised to do so by the parties. And this is particularly cogent when a sovereign state is concerned.

Moreover, in the present case the parties expressly instructed the ABC experts about the sources which they mandatorily had to rely on: “... the British archives and other relevant sources on Sudan, wherever they may be available, with a view to arriving at a decision that shall be based ['shall be based'] on scientific analysis and research.”

This leaves no room to apply equity. May I add, Mr President, that once again our opponents try in vain to turn this argument concerning the application of the ex aequo et bono principle into a simple “disagreement” by the Government with the way in which the ABC interpreted their mandate. Indeed we disagree, but it is much more than that: instead of basing themselves on the grounds agreed by the parties, the experts chose to decide on another basis, and to invoke their view of reasonableness and fairness in lieu of historical research and analysis. And I must say that, whatever one can think of British -- or French, for that matter -- colonisation, the least one must admit is that the coloniser might have based himself on a variety of factors, but that equity and fairness were probably not on the top of his list, including when territorial division was at stake.

Moreover, again, by deciding ex aequo et bono, instead of basing themselves on their analysis and research of the available archives, the experts, far from defining the pre-existing limits of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, have allocated territories to the parties on the basis of what they deemed to be reasonable and equitable. This is clearly ultra petita; this clearly exceeds their mandate.

There is something else, Mr President: contrary to what the SPLM/A tries to demonstrate, the location of the oilfields has undoubtedly weighed on the experts' decision. The SPLM/A may insist in its rejoinder that the position of the oilfields was "unknown in 2005 as they are today". This last assertion is obviously wrong, as those fields are already active. The situation has been described by Dr Johnson, the British expert in the ABC, in these apparently genuine words:

“If the boundary is defined one way, it puts quite a lot of oil in the Abyei Area, and therefore more of that oil revenue had to be shared. If we had accepted the Government’s claim that the boundary was the river, there would have been no oil revenue to share. The other thing is that if the boundary defines a certain area, and that area contains oil and active oil-wells, if the people of Abyei vote in a referendum to join the south, and the south votes to become independent, then that oil becomes southern oil, and is not northern oil.”

This shows at least something: the experts were perfectly aware of what they were doing in this let’s say quite important respect. And a glance at the map showing the ABC boundary line drawn by the experts on a map of Sudan’s oil resources confirms that they have not been “insensitive”, to put it politely, to this aspect.

Moreover, it is ironical to note that in their report the experts have criticised the relevance of a straight boundary line, and insisted that: “... lines drawn between rivers, mountains and longitudes, as well as roads, settlements, soil types and trees, hardly ever demarcate actual boundaries in terms of land use, rights and population dynamics on the ground.” Yet not only is the ABC northern boundary a perfect straight line, but it also makes, without true justification, a perfect 90-degree southern turn which very conveniently locates all the major oilfields in the Abyei Area.

May I suggest, Mr President, members of the Tribunal, that this is a strange coincidence which raises significant doubts about the very idea that the experts had of their mandate and of equity, a mandate which certainly did not include handing over the oil resources of Sudan to any of the parties, or even sharing them or taking them into consideration. Indeed, this could not have been in the minds of the decision-makers in 1905.

And this, Mr President, takes us back again to the very interpretation of their mandate by the ABC experts, and this is the last part of my presentation. The ABC experts decided infra petita. Up to now I have shown that the experts have
day 1
saturday, 18th april 2009

17:37

abusive left their mandate aside and indulged
themselves in answering questions which were not part of
their mandate, or which, being included in their
mandate, they have answered on the basis of
impressionistic, pseudo-legal or equitable rules
tailored to the circumstances.
All this results in several excesses of mandate by
addition, if I may say so, because they have added
either new questions or new grounds to answer the
questions, and grounds which were not part of their
mandate. But they have also reached their mandate by
subtraction; or, to put it more legally, by deciding
infra petita.
Faithful to their usual tactic, our opponents
display most of their efforts trying to show that what
is really at stake here is not an excess of mandate but
an essential error. As we have explained on several
occasions, although an excess of mandate is certainly
wider than the more restrictive and technical notion of
"excess of power", we entirely agree that, while
an essential error of law or of fact of an arbitral
tribunal is a ground for nullity of the award, this
Tribunal has probably no jurisdiction to that effect.
I put it with a question mark since it could be said
to have jurisdiction on the basis of the incidental

17:42

that time -- your Tribunal's award by the Government of
Sudan.
If I understand well their reasoning, as exposed at
page 66 of their rejoinder, it consists in saying:
first, the Government criticises the ABC experts for
having misinterpreted the definition of the Abyei Area;
second, it, the Government, designates this
misinterpretation as an excess of mandate; third, since
the Tribunal, your Tribunal, is entrusted with the same
mandate as the ABC, the Government will invoke an excess
of mandate again if it disagrees with the future award.
Mr President, I hate accusing my adversaries of bad
faith, but I must admit that in the present case
I cannot help at least having a doubt. Indeed, we are
convinced that the experts erred in their definition of
the Abyei Area. But this is not -- I repeat, this is
not -- the issue at this stage, as we have always made
clear.
What is at stake is not the definition of the Abyei
Area given by the experts, but the definition of the
mandate of the ABC, which was to define the area in
question not on the basis of the sole area occupied by
the nine Ngok Dinka chiefdoms in 1905, but by reference
to the area transferred to Kordofan at this date.
As for this Tribunal, we have no doubt that it will

17:39

jurisdiction doctrine advocated several times by our
opponents.
It could also be the case that an essential error
amounts to an excess of mandate. But the point is moot.
At the present stage of the pleadings we do not allege
that the Tribunal has made an error in implementing its
mandate. What we say for the moment is that it has not
implemented its mandate since it has not answered the
only question which was -- it’s not the Tribunal’s, it
is the experts’ body -- since it has not answered the
only question which was asked to them, which was -- do
I dare to repeat it again? Yes, I do, so important it
is -- which was only, "to define (i.e. delimit) the
boundaries of the area of the nine Ngok Dinka chiefdoms
transferred to Kordofan in 1905".
In other words, the experts have made an essential
error of interpretation, but this error -- the only one
I am dealing with for the moment -- bears upon the
mandate itself, not on its implementation, not on the
answer to the question. These errors do exist but they
will be dealt with at the appropriate moment; that is
during the delimitation part of these hearings.
Our opponents seem eager not to understand this
point and obstinately try to wave the red flag of
non-compliance with this Tribunal’s -- this Tribunal

17:44

comply with its mandate and will answer completely the
question put before it by Article 2 of the Arbitration
Agreement.
In spite of his quite unusual self-proclaimed loss
of words, Professor Crawford has this morning eloquently
detailed, word by word, the formula which defines the
substantive mandate of the Tribunal as well as it
defined the mandate of the ABC.
It belonged to the Commission and its experts to
define an area, that is a territory with defined limits,
where the nine Ngok Dinka tribes -- which apparently
were ten at the relevant time -- were established;
a territory which was transferred to Kordofan in 1905.
Yet it happens that the experts have, as it may,
swallowed half of the mandate thus worded, which they
have changed into the following formula: to define and
demarcate the nine Ngok Dinka chiefdoms ... in 1905.
And even more, there can be at least doubts that the
experts have paid attention to the date clearly
indicated as critical in the formula: 1905.
With your permission, Mr President, I will briefly
come back to two different aspects of this very obvious
and particularly worrying excess of mandate by the ABC
experts: first, their genuinely admitted refusal to
answer the agreed question, including their marked

44 (Pages 165 to 168)

Trevor McGowan
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indifference towards the agreed critical date; and second, their answer to the question they artificially substituted to that asked in their mandate. Let me put the issue straightforwardly, Mr President. The experts did not like the question before them, and since they didn’t like it for reasons which might have a connection with what I said before, when I dealt with the ex aequo et bono part of my speech, they have substituted another question to the one specified in their mandate which they found more appropriate.

How do I know that the experts did not like the mandatory question as agreed by the parties in Article 5.1 of the Abyei Protocol and reiterated in Article 1 of the Abyei Annex and reiterated in paragraphs 1.1 and 1.2 of the Terms of Reference and again in the Rules of Procedure at 1.1 and 1.2? Quite simply because the experts themselves said so, and I quote from page 22 of appendix 2: “The narratives contained in the annual reports of Kordofan and Bahr el Ghazal provinces immediately before and after 1905 refer to ‘lines’ drawn between rivers, mountains and longitudes as well as roads, settlements, soil types and trees. But these hardly ever demarcate actual boundaries in terms of land use rights and as possible the area of the nine Ngok Dinka chiefdoms as apparent from the answers given by the experts to their question.”

Let me put the issue straightforwardly, this is quite an extraordinary declaration with a disarming straightforwardness. The experts write in substance: yes, we have all the elements which would be convenient; let’s then try something else. What else? Just what is already foreshadowed in the passage I have just read: land use rights and population dynamics on the ground. And in effect consequential the experts will declare that it was: “... incumbent upon [them] to determine the nature of established land or territorial occupation and/or use rights by all the nine Ngok Dinka chiefdoms with particular focus on those in the northernmost areas that formed the transferred territory.” This might correspond to the experts’ self-assigned mandate, but certainly not to their real mandate, which was to determine which area occupied by the Ngok Dinka chiefdoms was transferred to Kordofan in 1905. This could not be found more in the use rights, whether dominant or secondary, of the local tribes than in coffee grounds. This shift from one question to another, from a real mandate to another imaginary, self-given mandate is also apparent from the answers given by the experts to their question.

It goes without saying that, having changed the question asked to the ABC, the experts could only answer besides or outside the question which constituted their mandate, and this is of course what happened. Instead of answering the mandate question, that is instead of indicating the limit of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, the experts embarked on a long demonstration based on the distinction I have already mentioned between dominant and secondary rights from which it appears, among other things of even more limited interest, in order to answer the mandatory question. It is said in the preface of the report that: "No map exists showing the area inhabited by the Ngok Dinka in 1905.” My remark: had such a map existed, it would in any case have been of very limited interest to determine whether this whole area or only part of it was transferred to Kordofan in 1905. Therefore, it is said in that same preface, it was necessary for the experts to avail themselves of relevant historical material to determine as accurately as possible the area of the nine Ngok Dinka chiefdoms as it was in 1905. But again, this is not the point. The point is: were they transferred? The same remark is in order in respect to the six first propositions discussed in the summary of the experts’ report and expanded in the appendices, which all relate exclusively on the respective presence of the Ngok Dinka and the Messiriya in the region. Only in proposition 7 do the experts tackle the issue of the area affected by the 1905 decision, and it is on this occasion already related in my five acts minus one tragedy that, after having found that “the evidence supporting the Government’s interpretation of the 1905 boundary as following the Bahr el Arab” was strong, they nevertheless accept not the Bahr el Arab but the Ragaba ez Zarga as the 1905 limit. Whether or not this was right is not my problem. Mr Bundy will show that it was wrong. But at least this did answer the mandatory question. But immediately after, without any kind of explanation, the experts return to their question and discuss in proposition 8 the issue of the “continuity in the territory occupied and used by the nine Ngok Dinka chiefdoms which was unchanged between 1905 and 1965”. It is at the end of this discussion of proposition 8 that the parallel of latitude 10 degrees 10 minutes...
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

Page 173

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

Page 175

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 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

Page 174

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

Page 176

46 (Pages 173 to 176)
By deciding ultra petita on questions which were not application of which was clearly outside their mandate; other aspects on a pseudo-legal principle the concerned area in 1905 as well as the choice of the decisions, including the rejection of a line that they had themselves indicated as being the limit of the area. By omitting to motivate essential elements of their venture an explanation for this.

Page 177

Page 179

of experts might prove not to have been particularly fortunate.

Be that as it may, we submit that the ABC experts have exceeded their mandate in multiple ways:

By having ignored the distinction between themselves and the ABC;

By having acted in violation of the adversarial principle and without due respect to the requirement for transparency;

By deciding ultra petita on questions which were not before them, like the respective grazing rights of the Ngok Dinka and the Messiriya;

By answering a question which was clearly outside their mandate, that of the limits of the nine Ngok Dinka chieftoms at an indeterminate period, instead of deciding the issue of the limit of the area of those chieftoms transferred to Kordofan in 1905;

By omitting to motivate essential elements of their decisions, including the rejection of a line that they had themselves indicated as being the limit of the concerned area in 1905 as well as the choice of the final line;

By basing themselves for taking their decision on other aspects on a pseudo-legal principle the application of which was clearly outside their mandate;

6.30, the hearing will resume tomorrow at 9.30 and it will be for the SPLM/A to present its argument on the same issue.

MR BORN: Thank you, Mr Chairman. With just two brief comments, the SPLM/A will keep to the existing schedule and begin its comments tomorrow morning at 9.30.

The first comment is that we heard, I think -- at this stage I've lost track -- but perhaps half a dozen hidden concessions, admissions, acceptances of the Government's case on the part of the SPLM/A. I hardly need say there were no hidden concessions, there were no admissions. When we admit something, we do it openly and clearly. We did not admit to any of the things that the Government said.

Secondly, you will hear a lot from me tomorrow; as a consequence, I will deliver the SPLM/A's comments seated rather than standing. I hope that enables me both to survive the day but also to keep my speed of speech too quickly, you'll interrupt me, or if you have questions of course you'll interrupt me as well.

Thank you, Mr Chairman.

THE CHAIRMAN: I thank you very much, Mr Born.
18:10  The session of today is adjourned and will begin
tomorrow morning at 9.30.
(6.10 pm)
(The hearing adjourned until 9.30 am the following day)

INDEX

Submissions by AMBASSADOR DIRDEIRY ...............8
Submissions by MR CRAWFORD .........................22
Submissions by PROFESSOR PELLET ..................49
Submissions by MS MALINTOPPI .........................82
Submissions by PROFESSOR PELLET ..................135
THE GOVERNMENT OF SUDAN / THE SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY

Day 1

Saturday, 18th April 2009

Page 2

Trevor McGowan
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THE GOVERNMENT OF SUDAN / THE SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY

Day 1 Saturday, 18th April 2009

confine 132:2
confined 21:21
confirmation 142:4 144:15
confirmed 7:18 75:17 141:16 146:19 153:19 159:18
concerns 87:16 142:14 163:22
conflict 28:13 75:9 120:8 85:23
conflicting 39:6
conflicts 33:9
conforming 114:14
confined 160:13
confusion 113:22
confusion 153:20 154:12
conjecture 105:10
conjugate 155:5
connection 169:7
conscience 54:5
Consciences 96:2
consecutive 78:12
consensual 117:23 120:9
consider 12:11
consideration 138:25 139:10 120:28 131:22
considerable 23:22
considerably 20:12 24:3
considerable 22:17 175:20
considered 9:14 153:20
considerably 84:10
consideration 164:18 175:18
considerations 78:18 155:24
considering 63:5
Trevor McGowan
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Page 5
THE GOVERNMENT OF SUDAN / THE SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY

Day 1  
Saturday, 18th April 2009

Trevor McGowan

Page 6
THE GOVERNMENT OF SUDAN / THE SUDAN PEOPLE’S LIBERATION MOVEMENT/ARMY

Day 1  
Saturday, 18th April 2009

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

Day 1

Saturday, 18th April 2009

Trevor McGowan
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<table>
<thead>
<tr>
<th>Day 1</th>
<th>Saturday, 18th April 2009</th>
</tr>
</thead>
<tbody>
<tr>
<td>summary</td>
<td>117:21</td>
</tr>
<tr>
<td>119:14 172:4</td>
<td></td>
</tr>
<tr>
<td>sunt</td>
<td>12:2 54:16</td>
</tr>
<tr>
<td>support</td>
<td>18:9 22:8</td>
</tr>
<tr>
<td>28:21 45:13 113:10</td>
<td></td>
</tr>
<tr>
<td>145:6 150:7</td>
<td></td>
</tr>
<tr>
<td>supporting</td>
<td>16:6 19:1</td>
</tr>
<tr>
<td>153:7 172:12</td>
<td></td>
</tr>
<tr>
<td>supports</td>
<td>14:2 16:12</td>
</tr>
<tr>
<td>36:22 74:21 87:5</td>
<td></td>
</tr>
<tr>
<td>sworn</td>
<td>707:3</td>
</tr>
<tr>
<td>supposed</td>
<td>20:12 59:9</td>
</tr>
<tr>
<td>75:10 124:19 156:3</td>
<td></td>
</tr>
<tr>
<td>179:16</td>
<td></td>
</tr>
<tr>
<td>supremely</td>
<td>148:24 155:13</td>
</tr>
<tr>
<td>Supreme</td>
<td>64:3</td>
</tr>
<tr>
<td>sure</td>
<td>27:15 147:11</td>
</tr>
<tr>
<td>surely</td>
<td>9:20</td>
</tr>
<tr>
<td>surmise</td>
<td>33:11</td>
</tr>
<tr>
<td>surprise</td>
<td>114:22</td>
</tr>
<tr>
<td>177:15</td>
<td></td>
</tr>
<tr>
<td>surrounding</td>
<td>130:21 176:22</td>
</tr>
<tr>
<td>survey</td>
<td>19:14 26:16</td>
</tr>
<tr>
<td>27:9 47:21</td>
<td></td>
</tr>
<tr>
<td>survive</td>
<td>180:19</td>
</tr>
<tr>
<td>suspect</td>
<td>97:2 138:18</td>
</tr>
<tr>
<td>suspected</td>
<td>48:19</td>
</tr>
<tr>
<td>suspectedly</td>
<td>66:20</td>
</tr>
<tr>
<td>sustain</td>
<td>154:12</td>
</tr>
<tr>
<td>swallowed</td>
<td>168:15</td>
</tr>
<tr>
<td>swinging</td>
<td>22:5</td>
</tr>
<tr>
<td>sworn</td>
<td>107:10</td>
</tr>
<tr>
<td>Symposium</td>
<td>111:23</td>
</tr>
<tr>
<td>system</td>
<td>19:15</td>
</tr>
<tr>
<td>systematic</td>
<td>70:24</td>
</tr>
<tr>
<td>systematically</td>
<td>62:11</td>
</tr>
<tr>
<td>99:10 119:23</td>
<td></td>
</tr>
<tr>
<td>systems</td>
<td>128:7</td>
</tr>
</tbody>
</table>
THE GOVERNMENT OF SUDAN / THE SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20

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

Day 1  Saturday, 18th April 2009

Page 20
| 90 7:9 22:5 |
| 90-degree 164:9 |
| 98 2:13 |