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ABYEI ARBITRATION: FINAL AWARD RENDERED

THE HAGUE, July 22, 2009

In the matter of an arbitration pursuant to the Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting Abyei Area, the Presiding Arbitrator rendered and communicated, on behalf of the Tribunal, its Final Award on July 22 at the Permanent Court of Arbitration, the Peace Palace, The Hague.

A summary of the proceedings and of the Final Award is set forth below. It must be emphasized that the summary contained in this Press Release, though approved by the Tribunal as an accurate summary of the principal features of the Award, is not an official text. The Final Award, including its *Dispositif*, is the authentic statement of the Tribunal's final and binding decision.

History of the proceedings

On July 7, 2008, the Government of Sudan ("GoS") and the Sudan People's Liberation Movement /Army ("SPML/A") signed the "Arbitration Agreement between The Government of Sudan and The Sudan People's Liberation Movement/Army on Delimiting the Abyei Area" ("Arbitration Agreement"). In the Arbitration Agreement, the Parties agreed to submit, for final and binding decision, their dispute as to whether or not the experts of the Abyei Boundaries Commission (the "ABC" Experts), established pursuant to the Comprehensive Peace Agreement signed by the Parties on January 9, 2005 ("CPA"), exceeded their mandate.

In accordance with the Arbitration Agreement, on July 11, 2008, the Parties deposited the Arbitration Agreement with the Secretary-General of the Permanent Court of Arbitration. The arbitral tribunal was fully constituted on October 30, 2008, and is composed of the following members:

Professor Pierre-Marie Dupuy (Presiding Arbitrator)

H.E. Judge Awn Al-Khasawneh

Professor Gerhard Hafner

Professor W. Michael Reisman

Judge Stephen Schwebel

In accordance with Article 8.3(i) of the Arbitration Agreement and the schedule set by the Tribunal, the Parties filed their written Memorials on December 16, 2008, their Counter-Memorials on February 13, 2009, and their Rejoinders on February 28, 2009. Oral pleadings, which were open to the public and attended by over 200 representatives of the Parties, were held at the Peace Palace in The Hague from April 18 to April 23, 2009. Under Article 9(1) of the Arbitration Agreement, the final award was to be rendered within ninety days from the closure of submissions, i.e., on July 22, 2009.

Mandate of the Tribunal

Under Article 2 of the Arbitration Agreement, the issues to be determined by the Tribunal were the following:

- (a) Whether or not the ABC Experts had, on the basis of the agreement of the Parties as per the CPA, exceeded their mandate which is 'to define (i.e.

delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905' as stated in the Abyei Protocol, and reiterated in the Abyei Appendix and the ABC Terms of Reference and Rules of Procedure.

- (b) If the Tribunal determines, pursuant to Sub-article (a) herein, that the ABC Experts did not exceed their mandate, it shall make a declaration to that effect and issue an award for the full and immediate implementation of the ABC Report.
- (c) If the Tribunal determines, pursuant to Sub-article (a) herein, that the ABC Experts exceeded their mandate, it shall make a declaration to that effect, and shall proceed to define (i.e. delimit) on map the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, based on the submissions of the Parties.

The mandate of the ABC Experts was expressed in Section 5.1 of the Abyei Protocol, signed between the Parties on May 26, 2004 and included in the Comprehensive Peace Agreement:

5. Determination of Geographic Boundaries

5.1 There shall be established by the Presidency, Abyei Boundaries Commission (ABC) to define and demarcate the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905, referred to herein as the Abyei Area.

The Abyei Area was defined in Section 1.1.2 of the Abyei Protocol:

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

Applicable Law

Pursuant to the Arbitration Agreement, the Tribunal was required to reach its decision based on the following "applicable law": the CPA (particularly the Abyei Protocol and the Abyei Appendix), the Interim National Constitution of the Republic of Sudan (2005), general principles of law and practices that the Tribunal deemed relevant, and the Arbitration Agreement itself.

Parties' Positions

The GoS formally submitted that (i) the ABC Experts exceeded their mandate, and (ii) the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 is the area bounded on the north by the Bahr el-Arab and otherwise by the boundaries of Kordofan as at independence (Figure 17, GoS Memorial).

The SPLM/A formally submitted that the ABC Experts did not exceed their mandate. In the alternative, the SPLM/A formally submitted that if the Tribunal determines that the ABC Experts exceeded their mandate, a declaration be made that the boundaries of the area of the nine Ngok Dinka

Chiefdoms transferred to Kordofan in 1905 are the current boundary of Kordofan and Bahr el-Ghazal to the south extending to 10°35'N latitude to the north and the current boundary of Kordofan and Darfur to the west extending to 29°32'15"E longitude to the east.

Summary of the Decision

In its Final Award, the Tribunal reaches the following decision:

The Tribunal's Task Pursuant to the Arbitration Agreement

At the outset, the Tribunal establishes that Article 2 of the Arbitration Agreement requires the Tribunal to proceed in a contingent two-stage sequence:

- First, the Tribunal must determine, under Article 2(a) of the Arbitration Agreement, whether the ABC Experts exceeded their mandate, which was “to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.”
- Second, to the extent that the Tribunal determines that the ABC Experts exceeded their mandate, Article 2(c) of the Arbitration Agreement requires the Tribunal to itself “define (i.e. delimit) on map the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 based on the submissions of the Parties.”

In the Tribunal's view, the sequence of these two stages in the Arbitration Agreement is important, as it prescribes the methodology to be used by the Tribunal. The Tribunal is to first decide whether or not the ABC Experts exceeded their mandate, i.e., to determine whether or not the Experts' *interpretation* and *implementation* of its mandate was reasonable. If and to the extent that the Tribunal finds that the Experts did exceed their mandate, the Parties require the Tribunal to itself define and delimit the borders of the Abyei Area, based on the submissions of the Parties in these proceedings.

Thus, the Tribunal finds that the sequence of Article 2 requires the Tribunal to conduct a new review of all evidence if, and only if, the ABC Experts were found to have exceeded their mandate. Conversely, for the primary task of determining whether an excess of mandate occurred, the Parties did not expect or authorize the Tribunal to evaluate the evidence in such a manner as to amount to a re-determination of the *correct* boundaries of the Abyei Area in 1905.

The Tribunal notes that this conclusion is also in accordance with the applicable law stipulated by the Arbitration Agreement. The Tribunal, while remaining mindful of the primary importance of deciding the issues presented based on the CPA, the Interim National Constitution, and the Arbitration Agreement, interprets the term “general principles of law and practices” in Article 3 of the Arbitration Agreement to include relevant principles of public international law. Relevant general principles of law and practices of institutional review confirm that the “correctness” of the ABC Experts' decision is beyond the Tribunal's review for purposes of determining an excess of mandate under Article 2(a).

Standard of Review for Determining an Excess of Mandate

To determine whether an “excess of mandate” occurred under Article 2(a), the Tribunal is required to analyze the specific standard of review applicable with respect to both the ABC Experts' *interpretation* and *implementation* of their mandate.

With regard to *interpretation*, the Tribunal is again guided by the sequence of Article 2 of the Arbitration Agreement in determining the applicable standard. The Tribunal finds that it is authorized

by the Parties to make its own determination as to the boundaries of the Abyei Area only under Article 2(c). Thus, it can only proceed to a comprehensive evaluation and delimitation using the available evidence if and when it has found that an excess of mandate occurred and an Article 2(c) determination is thus required. An excess of mandate determination under Article 2(a) cannot extend to a determination of whether the ABC Experts' interpretation of the "Formula" defining their mandate was *correct*. To interpret Article 2(a) as requiring the Tribunal to already decide whether the Experts' interpretation of the mandate was correct would eliminate the distinction between Article 2(a) and 2(c). The Tribunal concludes that its review pursuant to Article 2(a) is limited to determining the reasonableness of the ABC Experts' interpretation of their mandate.

In addition, the Tribunal finds that the ABC Experts were vested with the competence to interpret their own competence (*Kompetenz-Kompetenz*), and were thus empowered to determine the bounds of their own mandate. Legal principles requiring a court or tribunal to defer to the reasonable findings of a primary decision-maker support the Tribunal's conclusion that review pursuant to Article 2(a) is limited to determining the reasonableness of the ABC Experts' interpretation of their mandate.

This approach is also consistent with general principles of international law: as the International Court of Justice ("ICJ") held, in reviewing the findings of a primary decision-maker vested with *Kompetenz-Kompetenz*, the reviewing court or tribunal is not "called upon to pronounce on whether the arbitrator's decision was right or wrong" but merely whether the original decision-maker acted in "manifest breach" of the competence conferred on it by the arbitration agreement.

Moving to the standard of review applicable to the *implementation* of the ABC Experts' mandate, the Tribunal rules that, while it is not authorized under the Arbitration Agreement to review the ABC Experts' decision for "substantive errors," a failure to state sufficient reasons for a decision may amount to an "excess of mandate." The Tribunal finds that the ABC Experts' mandate included the duty to state reasons. This follows from the Parties' shared expectations, which may be inferred from the context in which the ABC Experts were expected to operate and the function that they were assigned within the greater peace process. Moreover, the fact that the ABC Experts' Report was to be "based on scientific analysis and research" as well as the object and purpose of the ABC's constitutive instruments demonstrate that the duty to state reasons was integral to the ABC Experts' mandate.

Based on "general principles of law and practices" regarding the annulment of arbitral decisions as well as the object and purpose of the ABC's constitutive instruments, the Tribunal finds that the Experts were required to sufficiently explain their decisions to allow the readers to understand how these were arrived at. The ABC Experts would have exceeded their mandate if some or all of their conclusions were unsupported by sufficient reasons, if the reasoning was incoherent, or if the reasons provided were obviously contradictory or frivolous.

Reasonableness of the ABC Experts' Interpretation of Their Mandate

Having established that the ABC Experts would have acted in excess of mandate if their *interpretation* of their task must be considered unreasonable, the Tribunal then turns to an assessment of the ABC Experts' interpretation of their mandate. Based on the Parties' arguments before the ABC as well as statements by the ABC Experts in their Report, the Tribunal establishes that the ABC Experts adopted a predominantly "tribal" interpretation of their mandate: the ABC Experts understood their mandate as requiring them to delimit and demarcate the area of the nine Ngok Dinka Chiefdoms as of 1905, i.e., the extent of Ngok Dinka settlements in 1905. This is in contradistinction to the GoS's predominantly "territorial" understanding of the ABC Experts' mandate, which comprehended determining a defined area of land that was administratively transferred by the Anglo-Egyptian Condominium in 1905.

The Tribunal concludes that the predominantly tribal interpretation adopted by the ABC Experts is not unreasonable, on the following grounds:

- The wording of the Formula can be interpreted as supporting either the “tribal” or the “territorial” interpretation, and it was therefore not unreasonable for the Experts to adopt the former.
- The object and purpose of the Formula supports a predominantly “tribal” interpretation. In the Tribunal’s view, the ABC Experts’ Report had a specific and crucial function within the Sudanese peace process: the decision was intended to authoritatively define the boundaries of the Abyei Area, the residents of which would be entitled to decide in a referendum in 2011 whether they should be part of the north or the south of Sudan. As clarified by the “Protocol on the Resolution of the Abyei Area dated May 26, 2004” between the Parties, the Ngok Dinka people were intended to be the main beneficiaries of this referendum. Since the tribal interpretation would lead to a definition of the Abyei Area that encompasses all of the Nine Ngok Dinka Chiefdoms in 1905, it cannot be considered unreasonable.
- The text of the applicable instruments, in particular, the procedural provisions in the CPA and the drafting history of the Protocol, support the reasonableness of the predominantly “tribal” interpretation.
- Finally, the predominantly “tribal” interpretation is reasonable in light of the historic facts of the 1905 transfer. In the Tribunal’s view, the evidence on record can reasonably be interpreted as supporting the following propositions: (1) the provincial boundaries between Bahr el-Ghazal and Kordofan in 1905 were uncertain; (2) there was very limited administration by the Condominium officials in the area in 1905; (3) the Condominium officials had limited knowledge of the extent of territory used and occupied by the Ngok Dinka; and (4) the 1905 transfer was principally effectuated to pacify the area and protect the Ngok Dinka from raids by the Humr.

The Tribunal adds that, since the interpretation made by the ABC Experts is subject to a reasonableness test (rather than a correctness test), its conclusion should not be taken to suggest that the opposite, predominantly territorial, interpretation was less reasonable. Rather, the Tribunal is not required or authorized to decide which out of the two possible interpretations is more “correct.”

The Tribunal therefore finds that the ABC Experts did not exceed their mandate in interpreting their mandate in the manner that Experts did.

Implementation of the ABC Experts’ Mandate

However, the Tribunal decides that the ABC Experts exceeded their mandate in certain areas of its implementation. Specifically, the ABC Experts failed to state sufficient reasons concerning some aspects of their decisions and thus exceeded their mandate with respect to some of their conclusions.

Northern Boundary of the Abyei Area

The Tribunal does not find that there was an excess of mandate with respect to the ABC Experts’ decision to adopt latitude 10°10’N as the northern limit of the Area of permanent Ngok Dinka

habitation transferred in 1905. In the Tribunal's view, the Experts' reasoning regarding the selection of latitude 10°10'N is comprehensible and complete.

However, the Tribunal rules that the ABC Experts did exceed their mandate regarding the drawing of the northernmost limit of the Ngok Dinka and Misseriya's "shared rights" area at latitude 10°35'N (and, by implication, the northern limit of the Abyei Area at latitude 10°22'N) because they did not provide sufficient reasoning. The Tribunal notes that the ABC Experts themselves accepted that the evidence in support of latitude line 10°35'N was "inconclusive." In the absence of other evidence, the ABC Experts' decision relied on the mere observation that the SPLM/A's northernmost claim coincided with the northernmost limit of the Goz. The Tribunal finds that such coincidence does not *per se* amount to the principled decision based on reasons required from the ABC Experts.

Southern boundary

The Tribunal rules that the ABC Experts were not in excess of mandate regarding their decision over the southern boundary of the Abyei Area. The Tribunal recalls that the southern boundary remained uncontroversial during the ABC proceedings as well as the present proceedings.

The Eastern and Western Boundaries of the Abyei Area

The Tribunal finds that the ABC Experts' decisions regarding the eastern and western boundary lines were in excess of mandate for failure to state sufficient reasoning. For the Tribunal, the selection of the western boundary line by the ABC Experts was entirely unreasoned; indeed the ABC Experts made no specific pronouncement regarding the western boundary at all, merely stating in summary fashion that "[a]ll other boundaries ... shall remain as they are." The eastern boundary coincided with the easternmost claim of the SPLM/A and was supported by a sketch map that the ABC Experts themselves regarded as "inconclusive." The Tribunal concludes that it was plainly contradictory for the ABC Experts to draw conclusions from evidence that they themselves considered inconclusive.

Given this excess of mandate by the ABC Experts, the Tribunal therefore turns to the second aspect of its own mandate, namely to define (i.e. delimit) on map the eastern and western boundaries of the Abyei Area in accordance with Article 2(c) of the Arbitration Agreement.

Pursuant to its Article 2(c) inquiry, the Tribunal rules that the eastern boundary of the Abyei Area runs along longitude 29°00'00"E, from latitude 10°10'00"N south to the Kordofan – Upper Nile boundary as it was defined on 1 January 1956. Moreover, the Tribunal rules that the western boundary of the Abyei Area runs along longitude 27°50'00"E, from latitude 10°10'00"N south to the Kordofan – Darfur boundary as it was defined on 1 January 1956. The western boundary of Abyei Area then follows the Darfur-Kordofan boundary until it meets the southern boundary of the Abyei Area.

The Tribunal arrives at these conclusions by looking at the scholarly, documentary, cartographic and oral evidence submitted by the Parties. This evidence demonstrates that Ngok Dinka permanent settlements were mostly located around the Bahr river system and its main watercourses, including the Bahr el-Arab, the Ragaba Umm Biero, and the Ragaba ez Zarga, and concentrated approximately between longitudes 27°50'00"E and 29°00'00"E, up to latitude 10°10'00"N.

With regard to the available evidence, a careful review of the Parties' submissions reveals that the evidence remains scanty. In particular, the evidence does not include any map from 1905, or indeed later years, that provides the specific coordinates of the western or eastern limits of the area occupied by the nine Ngok Dinka Chiefdoms transferred in 1905. The Tribunal notes both Parties' recognition that drawing these limits is not an easy task. Accordingly, the Tribunal emphasizes that it has a duty

to render its decision on the basis of what it considers, after careful review and within the confines of the predominantly tribal interpretation of the mandate, as the best available evidence.

Key to the Tribunal's decision is the evidence provided by anthropological experts, in particular District Commissioner Howell and Professor Cunnison. These specialists were relied upon by both Parties in these proceedings, and the Tribunal finds their work to be particularly cogent. Howell's and Cunnison's extensive experience based on field visits in the region where the Ngok Dinka resided, with Professor Cunnison in particular having lived for more than two years in a Humr camp, has led the Tribunal to place greater reliance on their understanding. The Tribunal also notes that the descriptions by Cunnison match the satellite photographs of the Bahr region submitted to the Tribunal and are consistent with the observations of an expert witness, Professor Allan, regarding the geographic extension of the "Bahr region."

Based on the evidence on record, the Tribunal finds that there has been continuity of Ngok Dinka historic territory, within an unchanged ecology, in the Bahr region. The many scholarly and documentary sources describe the Bahr in the same way, namely the whole of the tributary systems of the Bahr el Arab including to the north and east of the Ragaba ez Zarga. In addition, these sources also consistently refer to the Bahr region as the traditional home of the Ngok Dinka, and as the seasonal grazing area of the Humr Misseriya. Statements by Professor Cunnison make it appear most likely that Ngok Dinka settlements have been continuous from as early as "the beginning of the 20th century, or the end of the Mahdiya."

The Tribunal also considers the seasonal grazing patterns of both the Ngok Dinka and the Misseriya Humr, and how their use of land was affected by the seasonal ecology of the region. All this evidence confirms the conclusion that the Area of the Nine Ngok Dinka Chiefdoms transferred in 1905 extended between longitudes 27°50'00"E and 29°00'00"E.

The Boundary Delimited by the Tribunal Does Not Prejudice Traditional Grazing Rights

The Tribunal emphasizes that the CPA (including the Abyei Protocol), which is part of the Tribunal's applicable law, confirms the Parties' intention to accord special protection to the traditional rights of the people settling within and in the vicinity of the Abyei Area. Most importantly, the Protocol specifically recognizes the need to safeguard the grazing rights of the Misseriya and other nomadic peoples.

The Tribunal also finds that, under relevant principles of international law as applied in boundary disputes, traditional rights have usually been deemed to remain unaffected by any territorial delimitation. The transfer of sovereignty in the context of a boundary delimitation should not be construed to extinguish traditional rights to the use of land.

Finally, the Tribunal stresses that its mandate under Article 2(c) requires it to delimit "on map" the boundaries of the Abyei Area. The Tribunal's attention to territorial boundaries should not, however, be taken to imply that the Parties are entitled to disregard other territorial relationships that people living in and in the vicinity of the Abyei Area have historically maintained.

Dispositif

Having considered all relevant arguments, the Tribunal concludes that:

(a) Northern Boundary

1. In respect of the ABC Experts' decision that "[t]he Ngok have a legitimate dominant claim to the territory from the Kordofan – Bahr el-Ghazal boundary north to latitude 10°10'N," the ABC Experts did not exceed their mandate.
2. In respect of the ABC Experts' decision relating to the "shared secondary rights" area between latitude 10°10'N and latitude 10°35'N, the ABC Experts exceeded their mandate.
3. The northern boundary of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 runs along latitude 10°10'00"N, from longitude 27°50'00"E to longitude 29°00'00"E.

(b) Southern Boundary

1. In respect of the ABC Experts' decision that "[t]he southern boundary shall be the Kordofan – Bahr el-Ghazal – Upper Nile boundary as it was defined on 1 January 1956," the ABC Experts did not exceed their mandate.
2. The southern boundary as established by the ABC Experts is therefore confirmed, subject to paragraph (c) below.

(c) Eastern Boundary

1. In respect of the ABC Experts' decision that "the eastern boundary shall extend the line of the Kordofan – Upper Nile boundary at approximately longitude 29°32'15"E northwards until it meets latitude 10°22'30"N", the ABC Experts exceeded their mandate.
2. The eastern boundary of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 runs in a straight line along longitude 29°00'00"E, from latitude 10°10'00"N south to the Kordofan – Upper Nile boundary as it was defined on 1 January 1956.

(d) Western Boundary

1. In respect of the ABC Experts' decision that "[t]he western boundary shall be the Kordofan – Darfur boundary as it was defined on 1 January 1956," the ABC Experts exceeded their mandate.
2. The western boundary of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 runs in a straight line along longitude 27°50'00"E, from latitude 10°10'00"N south to the Kordofan – Darfur boundary as it was defined on 1 January 1956, and continuing on the Kordofan – Darfur boundary until it meets the southern boundary confirmed in paragraph (b) above.

(e) Grazing and other Traditional Rights

1. In respect of the ABC Experts' decision that "[t]he Ngok and Misseriya shall retain their established secondary rights to the use of land north and south of this boundary," the ABC Experts did not exceed their mandate.
2. The exercise of established traditional rights within or in the vicinity of the Abyei Area, particularly the right (guaranteed by Section 1.1.3 of the Abyei Protocol) of the Misseriya and other nomadic peoples to graze cattle and move across the Abyei Area (as defined in this Award), remains unaffected.

In arriving at its decision, the Tribunal emphasizes that its mandate was limited by the Parties' agreement in the Arbitration Agreement. The Tribunal acknowledges the possibility that the boundary lines may inadvertently lead to the partition of an inhabited permanent settlement, such as a village or town, in a manner that causes manifest impracticability to the inhabitants. In this regard, the Tribunal urges the Parties to begin immediate discussions with a view to reaching express agreement to mitigate hardships on the ground and to facilitate resolutions to such problems.

Final and Binding Nature of the Tribunal's Award

Under the Abyei Road Map, "[t]he parties commit themselves to abide by and implement the award of the arbitration tribunal." The Arbitration Agreement reiterates: "[t]he Parties agree that the arbitration award delimiting the "Abyei Area" through determining the issues of the dispute as stated in Article 2 of this Agreement shall be final and binding."

During the ceremony held at the Peace Palace on July 22, 2009, the Presiding Arbitrator stated:

"The Security Council of the United Nations, which recognizes the importance of this Award to peace and reconciliation in Sudan among all of its peoples, has called upon the Government of Sudan and the SPLM/A to treat the Award as binding and to implement it fully. The Parties are so bound by the terms of their Arbitration Agreement and by the force of international law. The Tribunal has produced an Award which resolves the dispute between the Parties over the validity of the ABC Decision and which, in accordance with the Arbitration Agreement, draws a boundary that reflects the facts and law of the matter. The Tribunal has acted scrupulously within its mandate to prepare an award in whose terms and holdings it has every confidence. It is equally confident that the Parties will abide by and implement the Award in good faith."

Dissenting Opinion

The Chairman also noted that one of the members of the Tribunal, H.E. Judge Awn Al-Khasawneh, has filed a dissenting opinion. (A brief summary of Judge Al-Khasawneh's dissenting opinion is appended hereto as an annex.)

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By agreement, pleadings, transcripts, and other documents relating to these proceedings have also been made public. These are all available at the PCA website (http://www.pca-cpa.org/showpage.asp?pag_id=1306). The oral pleadings were webstreamed live on the PCA website, and a video recording of those proceedings remains available.

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With reference to recent press reports regarding the rendering of an award in the Arbitration between the Government of Sudan and the Sudan People's Liberation Movement/Army, the PCA believes it might be useful to provide a brief background note clarifying the work of the PCA and its role in the settlement of international disputes.

The PCA was established by treaty in 1899 and is the oldest intergovernmental organization devoted to the peaceful resolution of disputes through arbitration in the world. Its seat is the Peace Palace, The Hague, The Netherlands. The PCA provides institutional support for arbitrations and other alternative

dispute resolution mechanisms in which the judicial panel for each case is chosen by the parties on an *ad hoc* basis. Specifically, the PCA's secretariat – the International Bureau – provides registry services and legal support to arbitral tribunals, commissions, and other similar bodies. Members of the International Bureau frequently serve as registrar or administrative secretary to tribunals and other bodies. In this capacity, they provide, *inter alia*, an official channel for communications between parties and tribunals, financial administration, and archival services. The PCA does not, however, itself render awards or decisions. Rather, the arbitral tribunals and other bodies, which are established under the auspices of the PCA, render the award.

Further information on the PCA is available at <http://www.pca-cpa.org>.

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Dissenting Opinion of Judge Al-Khasawneh

Summary

A member of the Tribunal, Judge Awn Shawkat Al-Khasawneh, who is a serving member of the International Court of Justice, appended a dissenting opinion explaining the reasons for his dissent. It is a 69-page document in English.

The main points of the Dissenting Opinion of Judge Al-Khasawneh are as follows:

- The Award and its reasoning are unconvincing, self-contradictory, result-oriented, and are not supported by evidence but rather contradicted by overwhelming evidence.
- The Award is likely to have a profound impact on the Sudan and its future as a State and on the peace and well-being of all its citizens regardless of ethnicity or creed.
- The ABC Experts had a relatively clear mandate: to delimit the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905. It was not to locate where the Ngok Dinka were in 1905 or at any other date, which is a totally different question.
- In case of doubt, the ABC Experts should have sought clarification of their mandate from the Parties. Instead, they went on a frolic of their own and adopted a new mandate.
- The cornerstone of the misinterpreted mandate is based on the paradigm of “dominant” (Ngok) rights versus “secondary” (Homr) rights. This is discriminatory concept is totally baseless in law and custom of Kordofan. It will make the Homr second-class citizens in their own country.
- The ABC Experts, without supporting evidence, ascribed vast tracts of land to the Ngok in areas where they never had any collective presence in 1905 or indeed in 19065, the year of their maximum expansion to the North.
- The Award is an ill-assorted mélange between two aims:
 - (a) to protect the Experts’ Report from invalidation; and
 - (b) to uphold parts of the Experts’ Report whilst invalidating others but without taking account of the fundamental rights of the Misseriya tribe.
- The delimitation by the Tribunal is based on a misquotation from P. P. Howell (a Condominium official and an anthropologist), who indicated in 1951 that the Ngok lived approximately between 29° E and 27° 50’ E. Even if this was true in 1951, it was not true in 1905, when contemporaneous evidence places the Ngok just to the North of the Bahr el Arab and not as far west as 27° 50’ E. Moreover, all that land was a shared rights area where the Homr behaved on the assumption that it was their ‘dar’ (country), and where they paid ‘tribute’ (tax) to Condominium officials.

- Judge Al-Khasawneh also explained that the Tribunal itself was in excess of mandate on at least two counts:
 - (a) First, it effected a partial annulment of the Experts' delimitation without authority from its own mandate. Moreover, it persisted in effecting this partial annulment despite having impugned so much of the Experts' decision that the remainder is so thin and truncated that it cannot stand on its own.
 - (b) Secondly, it replaced the Experts' unreasoned delimitation lines by equally unreasoned lines of its own. Lack of reasoning is a ground for excess of mandate which applies, following the Tribunal's own reasoning, to the Tribunal's delimitation.
 - By dabbling into compromise, the Tribunal lost the logical integrity of its reasoning: the reasoning with which it evaluated the ABC Report. At the same time it could not provide a durable and fair compromise because it failed utterly to take on board the rights of the Misseriya.
 - Judge Al-Khasawneh, quoting the great Persian poet Hafiz, who said that "The house of hope is built on sand", concluded by noting that the construct the Tribunal had made was weaker than a spider's web because it disposed of so much on the basis of such meagre evidence.
 - He also pointed out the inadequacy of the Tribunal's reasoning:
 - (a) The low standard of "reasonableness" (rather than correctness) cannot be the basis on which to define what could potentially become an international boundary.
 - (b) Reliance on approximate locations and rough areas to delimit a land boundary is an affront to the science of territorial delimitation.
 - (c) Transposing concepts essentially from commercial arbitration was inappropriate. Thus the experts are not entitled to the status of 'preferred arbiters of fact' because of accusations against them of bad faith and because their mandate was purely fact-finding and they had no prescriptive powers.
 - Judge Al-Khasawneh came to the conclusion that even on a predominantly tribal interpretation of the ABC Experts' mandate, the extent of the location of the Ngok Dinka was nowhere near that of the area ascribed to them by the Experts or the Tribunal.