

The Abyei Arbitration and the Rule of Law

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This article examines the widely publicized international arbitration that took place in 2008–2009 to determine the boundaries of the Abyei region of southern Sudan in the wake of decades of civil war. On the surface, the Abyei Arbitration is a striking example of how arbitration can resolve even the most intractable international disputes. But a closer examination suggests an award that invoked principles of judicial restraint and the rule of law, but compromised those principles by disregarding the terms of the tribunal's mandate and the thoroughly reasoned determination by experts appointed by the parties. The Abyei Award instead fashioned a diplomatic solution intended to reduce the risks of renewed warfare between the parties. That solution produced neither peace nor a stable Sudan, which has been torn by violence in the years since the award, including in the Abyei region. But whatever future results it produces in Sudan, the Tribunal's Award also raises important questions about the rule of law and international adjudication. By adopting a result based less on the law and the facts than on an apparent political compromise, the Abyei Award arguably undercut key principles of international law that have developed over the last century.

I. INTRODUCTION

At first glance, the Abyei Arbitration of 2008–2009 is a striking example of how international arbitration can resolve—expeditiously and fairly—even the most intractable international disputes. The arbitration took place against the background of four decades of civil war in Sudan, with millions of dead and displaced civilians.¹ The war was ultimately ended by a negotiated agreement.² Essential to this peace accord was an agreement between warring parties—the Government of Sudan (“GoS”) and the Sudan People’s Liberation Movement/Army (“SPLM/A”)—to resolve bitter disputes over the proper boundaries of the Abyei region of southern Sudan by arbitration.³ The arbitration took place in accordance with an innovative procedure negotiated by the parties and included public hearings that were webcast worldwide.⁴ The arbitration produced an erudite award, authored by very experienced authorities on international law and adjudication, whose language affirmed the rule of law in ringing terms.⁵

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1. See *infra* Part II.A.

2. See *infra* Part II.A.

3. See *infra* Parts II.B–D.

4. See *infra* Part II.D.

5. See *infra* Part III.

With the benefit of hindsight, the truth is more complicated. The reality is that the Abyei Arbitration produced an award that invoked principles of judicial restraint and the rule of law, but the substance of the dispute raised pointed challenges to those very principles in important respects. As detailed in this Article, the Abyei Tribunal ignored both the terms of the parties' dispute resolution agreements and the principles of restraint that they invoked, and instead of presenting a legal opinion, fashioned what was principally a diplomatic solution intended to reduce the risks of renewed warfare between the parties—as opposed to an outcome dictated by the law and evidence before the Tribunal.

This diplomatic solution produced neither peace nor a stable Sudan. In the years since the Abyei Award, the Abyei Area has remained subject to instability and violence that is kept in check only by the presence of international peacekeepers, while Sudan and South Sudan continue to be torn by civil war.⁶ These consequences cannot, of course, be attributed entirely to the Abyei Award, but it did not produce the result its authors intended.

More fundamentally, this Article argues that whatever future results it produces in Sudan, the Tribunal's Award raises important questions about the rule of law and the role of adjudication in contemporary international affairs. The doctrine of *pacta sunt servanda*,⁷ and international law more generally, require giving effect to international agreements. When international tribunals fail to respect the terms of those agreements, they undermine the rule of law and the legitimacy of international adjudication. Such a refusal not only violates basic principles of international law, it will also inevitably dissuade parties from concluding agreements to peacefully resolve their disputes by adjudication in the first place.

Ultimately, lasting peace rests on the rule of law. The past century has seen remarkable advances in the rule of law and the use of international adjudication. To safeguard and extend these advances, it is essential that the Abyei Award stand as an exception that proves the rule. To treat the award instead as the norm would undermine the rule of law and the role of international adjudication.

Part II of this Article briefly describes the historical events in Sudan that led to the landmark Abyei Arbitration of 2008–2009, including the appointment of a panel of international experts who were chosen to demarcate the boundaries of the Abyei Area, and the GoS's subsequent refusal to abide by the expert's determination. Part III describes the arbitral Tribunal's award, which assessed whether the experts had properly fulfilled their mandate. Part IV critiques the award, in particular the Tribunal's conclusion that the experts had exceeded their mandate. Part V considers the implica-

6. See *infra* Part V.C.

7. Black's Law Dictionary defines *pacta sunt servanda* simply as "[t]he rule that agreements and stipulations, esp[ecially] those contained in treaties, must be observed." *Pacta sunt servanda*, BLACK'S LAW DICTIONARY (10th ed. 2014).

tions of the Abyei Award for the rule of law and the capacity of international tribunals to promote peace and agreement. Part VI concludes.

II. THE ESTABLISHMENT OF THE ABYEI BOUNDARIES COMMISSION AND THE ABYEI ARBITRATION AGREEMENT

The events that ultimately led to the Abyei Arbitration trace back many hundreds of years to the tribal history of southern Sudan. In recent decades, the region has been torn by horrific warfare that continues to this day. This Part provides a brief overview of the relevant events, with a focus on the negotiations over the disputed Abyei region in the mid-2000s and the resulting arbitration over its boundaries.

A. *The Sudanese Civil Wars*

Sudan lies near the heart of Africa. It covers some 1.86 million square kilometers and is inhabited by roughly 36.7 million people comprising dozens of tribal groups.⁸ The country straddles a divide between arid deserts and primarily Arabic-speaking Muslims to the north and heavily watered forests and swampland inhabited by, among others, non-Arabic-speaking Christians to the south.⁹

For nearly five decades, starting with its independence in 1956, Sudan was torn by civil war, waged generally between northern and southern Sudanese, which caused vast civilian suffering.¹⁰ The desire of the southern Sudanese people for self-determination and religious, cultural, educational and

8. CIA, *Sudan*, THE WORLD FACTBOOK (2016), <https://www.cia.gov/library/publications/the-world-factbook/geos/su.html>.

9. *Id.*

10. The estimated death toll resulting from the first and second civil wars varies. By the end of the 1960s the first civil war had caused the death of between 500,000 and one million civilians. See EDGAR O'BALLANCE, *THE SECRET WAR IN THE SUDAN: 1955–1972* 158 (1977); Luka Biang Deng, *Education in Southern Sudan: War, Status and Challenges of Achieving Education For All Goals* 6 (UNESCO Education for All Global Monitoring Report, Background Report, 2003), <http://unesdoc.unesco.org/images/0014/001467/146759e.pdf>; CECILE EPRILE, *WAR AND PEACE IN THE SUDAN 1955–1972* 49 (1974) (noting, with caution, that unofficial estimates put the number of deaths at closer to one million people). As of April 2001, the U.S. Committee for Refugees estimated that during the second civil war nearly two million people had died due to “war-related famine, disease and casualties, [while] four million people (nearly 80%) of the southern Sudanese population ha[d] been forced to flee . . . at one time or another.” U.S. COMM. FOR REFUGEES, *SUDAN: NEARLY 2 MILLION DEAD AS A RESULT OF THE WORLD’S LONGEST RUNNING CIVIL WAR* (April 2001), <http://web.archive.org/web/20041210024759/http://www.refugees.org/news/crisis/sudan.htm>. U.S. Senator John Danforth, who was intimately involved in subsequent negotiations to resolve the second civil war, commented similarly in 2002 that “[a]fter 18 years, with over two million dead and over 4.5 million refugees and internally displaced, the war continued.” JOHN C. DANFORTH, *REPORT TO THE PRESIDENT OF THE UNITED STATES FROM JOHN C. DANFORTH, SPECIAL ENVOY FOR PEACE: THE OUTLOOK FOR PEACE IN THE SUDAN* 5 (Apr. 26, 2002), <http://www.state.gov/p/af/trls/rpt/2002/10150.htm>. Before the second civil war ended, estimates that it had claimed 2.5 to 3 million lives were more commonly cited. See DOUGLAS H. JOHNSON, *THE ROOT CAUSES OF SUDAN’S CIVIL WARS* 143 (2003).

other freedoms, and the concurrent insistence by northern Sudanese on imposing centralized rule from Khartoum, was a root cause of the civil war.¹¹

Numerous efforts were made to resolve the Sudanese civil war. The 1972 Addis Ababa Accords between the GoS and the Southern Sudanese Liberation Movement brought a temporary halt to hostilities, with the parties agreeing to a united Sudan in which the South enjoyed substantial regional autonomy.¹² These Accords were eventually largely abrogated, and civil war resumed with the southern Sudanese resistance coalescing around the SPLM/A.¹³ The “second civil war” lasted for another two decades. During the conflict, millions of southern Sudanese died in GoS army and militia attacks, slave raids and other atrocities.¹⁴

The consequences of the second civil war were especially grave in the border regions between northern and southern Sudan. The Abyei Area—located in southwestern Sudan on the border between the Bahr el Ghazal and Kordofan provinces—was the site of particular civilian suffering.¹⁵ The Area was also the historic homeland of the Ngok Dinka people, one of the most populous tribes in southern Sudan.¹⁶ Below is a rough map of the Abyei Area and its surroundings, although—as discussed in this Article—Abyei’s exact contours are hotly disputed.¹⁷



11. See JOHNSON, *supra* note 10, at 29–31.

12. See David H. Shinn, *Addis Ababa Agreement: Was it Destined to Fail and Are There Lessons for the Current Sudan Peace Process?*, 20 ANNALES D'ETHIOPIE 239, 242–43 (2004).

13. *Id.* at 246, 253–54, 256.

14. See U.S. COMM. FOR REFUGEES, *supra* note 10.

15. See, e.g., *The Government of Sudan v. The Sudan People's Liberation Movement/Army*, 30 R.I.A.A. para. 109 (Perm. Ct. Arb. 2009) [hereinafter *Award*].

16. Elke Grawert, *Introduction to AFTER THE COMPREHENSIVE PEACE AGREEMENT IN SUDAN* 2, 4–5 (Elke Grawert ed., 2010).

17. *Map of Abyei Area*, WIKIPEDIA, https://en.wikipedia.org/wiki/Abyei#/media/File:Map_of_Abyei_Area_en.png (last visited Aug. 13, 2015).

After the turn of the century, the parties and the international community undertook new efforts to resolve the Sudanese civil war by a comprehensive peace agreement. Under a framework prescribed by the so-called Machakos Protocol,¹⁸ negotiations commenced in 2002.¹⁹ The negotiations included the active participation of the United Nations, regional African institutions, the United States, and the United Kingdom.²⁰

In these negotiations, the status of Abyei and other disputed areas was a critical issue.²¹ The SPLM/A insisted that these regions were part of southern Sudan, entitled to either autonomy or independence, along with the rest of the South; the GoS resisted these claims, demanding that Abyei and the other conflict areas be treated as part of the North. It was clear that, absent resolution of these issues, there could be no peace agreement.

In March 2004, U.S. Senator John Danforth, who had been appointed as a special envoy to the Sudan, presented a U.S. proposal entitled “Principles of Agreement on Abyei.”²² The Danforth proposal provided for a referendum to be held in the Abyei Area to determine whether the residents of the Area wished to join the South or remain a special administrative unit within the North.²³

The Danforth proposal established the basis for an agreement between the GoS and the SPLM/A regarding the Abyei Area (and several other disputed areas). The parties subsequently agreed to the “Abyei Protocol,” which set forth a detailed and carefully constructed agreement to resolve the disputes between the GoS and SPLM/A over the Abyei Area.²⁴ The Abyei Protocol was incorporated into, and formed a critical component of, the broader Comprehensive Peace Agreement that was ultimately concluded between the GoS and SPLM/A on December 31, 2004.

B. The Abyei Protocol, the Abyei Annex and the Abyei Boundaries Commission

The Abyei Protocol set out “Principles of Agreement on Abyei,” including, critically, a definition of “Abyei.”²⁵ This definition has been termed the “key to the settlement” and its creation “the most difficult and painstaking

18. See JOHNSON, *Preface* to THE ROOT CAUSES OF SUDAN'S CIVIL WARS, *supra* note 10, at ix; ROBERT O. COLLINS, A HISTORY OF MODERN SUDAN 263 (2008).

19. Machakos Protocol, Sudan-SPLM/A (Jul. 20, 2002) http://www1.chr.up.ac.za/chr_old/indigenous/documents/Sudan/Legislation/Machakos%20Protocol%202002.pdf.

20. See generally HILDE F. JOHNSON, WAGING PEACE IN SUDAN: THE INSIDE STORY OF THE NEGOTIATIONS THAT ENDED AFRICA'S LONGEST CIVIL WAR 42–45, 104–05 (2011).

21. See, e.g., S.M.A. Salman, *The Abyei Territorial Dispute between North and South Sudan: Why has its Resolution Proven Difficult? in LAND AND POST-CONFLICT PEACEBUILDING* 25, 29–31 (Jon Unruh & Rhodri C. Williams eds., 2013).

22. Proposal by John Danforth, Special Envoy Senator, U.S., to Ali Osman Mohamed Taha, First Vice President, and John Garang, SPLM/A Chairman, *Principles of Agreement on Abyei* (Mar. 19, 2004).

23. *Id.* art. 1.3.

24. Protocol Between the GoS and the SPLM/A on the Resolution of Abyei Conflict, May 26, 2004, [hereinafter *Abyei Protocol*], http://www.sudantribune.com/IMG/pdf/20040527_abyei_protocol.pdf.

25. *Id.* art. 1.

exercise of the whole peace process.”²⁶ The agreed-upon definition ultimately reflected a consensus that the Abyei Area had been the traditional homeland of the Ngok Dinka tribes. The Principles provided in part:

- 1.1.1. Abyei is a bridge between the north and the south, linking the people of Sudan;
- 1.1.2. The territory is defined as the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905;
- 1.1.3. The Misseriya and other nomadic peoples retain their traditional rights to graze cattle and move across the territory of Abyei.²⁷

The Protocol also provided for the establishment of a specialized boundary commission, whose mandate was to define and demarcate the Abyei Area:

- 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 Abyei Area.”²⁸

The parties also prescribed procedures for the ABC and, in particular, a fast-track procedure aimed at producing a prompt and binding resolution of the Abyei dispute.²⁹

The Abyei Protocol ultimately provided for a referendum, to be conducted simultaneously with the 2011 Southern Sudan referendum, in which residents of the Abyei Area (as defined by the ABC) would vote on whether Abyei would become part of the north or the south of Sudan.³⁰ In addition, the Protocol set out terms for the administration, wealth sharing and security of the Abyei Area prior to the referendum.³¹

The Abyei Protocol was supplemented by additional agreements regarding the constitution, procedures, and activities of the ABC. One such agree-

26. Government of Sudan First Presentation to Abyei Boundaries Commission 7 (Apr. 12, 2005) (on file with authors).

27. Abyei Protocol, *supra* note 24, art. 1.1. The Misseriya referred to in Article 1.1.3 were nomadic Arabic-speaking herdsmen who lived principally in the Muglad region, to the north of the Abyei Area. See Award, *supra* note 15, para. 107.

28. Abyei Protocol, *supra* note 24, art. 5.1.

29. Article 5.2 provided that the ABC’s members would be selected by the parties and would include “experts, representatives of the local communities and the local administration.” *Id.* art. 5.2. Article 5.3 required the ABC to present a “final report to the Presidency.” *Id.* art. 5.3. As to the timeframe for the work of the ABC, Article 5.2 provided that the ABC “shall finish its work within the first two years of the Interim Period,” while Article 5.3 required that, as soon as the ABC Report was presented to the Presidency, the Presidency “shall take necessary action to put the special administrative status of Abyei Area into immediate effect.” *Id.* art. 5.2–5.3. These provisions reflected the parties’ demands for a prompt and final determination of the Abyei Area’s geographic territory, as necessitated by the parties’ other commitments in the Comprehensive Peace Agreement.

30. *Id.* art. 8.

31. *Id.* arts. 2, 3, 7.

ment was the “Abyei Appendix: Understanding on Abyei Boundaries Commission” (the “Abyei Annex”). Elaborating on the Abyei Protocol, the Annex specified the composition and procedures of the ABC.³²

A key part of the Abyei Annex detailed the parties’ agreement regarding the composition of the ABC.³³ Five of the Commission’s fifteen members were to be “impartial experts knowledgeable in history, geography and any other relevant expertise” (“ABC Experts”), who would be appointed by the United States, United Kingdom, and the Intergovernmental Authority on Development.³⁴ The GoS and the SPLM/A were each permitted to nominate five additional members of the Commission.³⁵ The ABC was to be chaired by one of the five ABC Experts.³⁶

The Abyei Annex also prescribed procedures to be followed by the ABC. Article 3 of the Annex provided for an adjudicative proceeding in which the ABC “shall listen to representatives of the people of Abyei Area and the neighbours” and “shall also listen to presentations of the two Parties.”³⁷ Article 4 provided that “[i]n determining their findings, the Experts in the Commission shall consult the British Archives and other relevant sources on Sudan wherever they may be available,” while permitting the Experts to “determine the rules of procedure of the ABC.”³⁸ Article 4 also directed the Experts to conduct the proceedings “with a view to arriving at a decision that shall be based on scientific analysis and research.”³⁹

The Abyei Annex underscored the parties’ shared interest in a definitive and swift decision. It required the ABC to prepare and present a “final report” to the Presidency of Sudan by June 30, 2005.⁴⁰ This was a more rapid timetable than originally contemplated in the Abyei Protocol,⁴¹ providing the ABC only a matter of months to hear the parties, conduct its investigation, deliberate, and present its decision. The Annex also confirmed the parties’ commitment to finally resolve the Abyei problem, mandating that the “report of the experts . . . shall be final and binding on the Parties.”⁴²

32. Article 1 of the Annex (paralleling Article 5.1 of the Abyei Protocol) reaffirmed the parties’ agreement as to the ABC’s mandate and the territorial scope of the Abyei Area, namely “to define and demarcate the Area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905, referred to herein as Abyei Area.” Abyei Boundaries Commission, *Abyei Boundaries Commission Report*, app. at 217 (2005) [hereinafter *Abyei Annex*] (Annex to the Report).

33. *Id.* art. 2.

34. *Id.* art. 2.2.

35. Specifically, each of the GoS and SPLM/A were permitted to nominate one representative on the ABC, to nominate two members from the then existing Abyei administration and to nominate two members from local tribal groups (the GoS nominating two Misseriya, and the SPLM/A nominating two representatives from the neighboring Dinka tribes to the South of Abyei Area). *Id.* arts. 2.1, 2.3–2.5.

36. *Id.* art. 2.2.

37. *Id.* art. 3.

38. *Id.* art. 4.

39. *Id.*

40. *Id.* art. 5.

41. See Abyei Protocol, *supra* note 24, art. 5.2 (“The Commission shall finish its work within the first two years of the Interim Period.”).

42. Abyei Annex, *supra* note 32, art. 5.

In mid-March 2005, the GoS and the SPLM/A negotiated additional specific procedures for the ABC proceedings, which were set forth in the “Terms of Reference.”⁴³ In the Terms of Reference, the GoS and the SPLM/A specifically defined the ABC’s mandate: to “demarcate the [Abyei] area . . . on map and on land.”⁴⁴ The Terms of Reference also provided that the ABC would hear GoS and SPLM/A presentations,⁴⁵ conduct a series of public meetings with Ngok Dinka and Misseriya in and around Abyei and Muglad,⁴⁶ meet with tribes neighboring the Abyei Area,⁴⁷ visit “sites of historical significance,”⁴⁸ and “consult British archives and other relevant sources on the Sudan.”⁴⁹ Thereafter, the Terms of Reference provided that the ABC would “reconvene in Nairobi to listen to the final presentations of the two parties, examine and evaluate evidence received; and prepare their final report that shall be presented to the Presidency in Khartoum.”⁵⁰

The Terms of Reference also set forth a detailed timetable of the ABC’s contemplated activities. The GoS and SPLM/A would make their final presentations to the ABC on May 19, 2005 and the ABC Experts would have from May 20 to 26 to “examine and evaluate the evidence received and prepare the final report.”⁵¹ This was an ambitious timetable—even more so considering that the Terms of Reference provided that the ABC would not begin its work until April 1, 2005.⁵² The schedule appeared to reflect the parties’ shared desire for, and commitment to, a speedy and final resolution of their dispute over the Abyei Area.

C. *The ABC Proceedings and Report*

The ABC conducted its work, with the cooperation of the parties, in accordance with the Abyei Annex and Terms of Reference. On April 10 and 11, the ABC met in Nairobi and the Experts prepared Rules of Procedure for the ABC’s work.⁵³ Over the next two months, the ABC and the parties implemented the procedures set forth in the Terms of Reference and Rules

43. Abyei Boundaries Commission, *Abyei Boundaries Commission Report*, app. at 14–15 (2005) [hereinafter ABC Terms of Reference], <http://sudanarchive.net/cgi-bin/pagessoa?a=pdf&d=D11d18.1.256&dl=1&sim=Screen2Image>.

44. *Id.* art. 1.2.

45. *Id.* art. 3.1.

46. *Id.* art. 3.2.

47. *Id.*

48. ABC Terms of Reference, *supra* note 43, art. 3.3.

49. *Id.* art. 3.4.

50. *Id.* art. 3.5.

51. *Id.* at 16.

52. *Id.* at 15.

53. Abyei Annex, *supra* note 32, art. 4 (“The experts shall also determine the rules of procedure of the ABC.”). Even though not required by the Annex, the Experts nonetheless obtained the parties’ agreement to the Rules of Procedure, which they adopted. *Id.*; Abyei Boundaries Commission, *Abyei Boundaries Commission Report*, 9 (2005) [hereinafter ABC Report], <http://sudanarchive.net/cgi-bin/pagessoa?a=pdf&d=D11d18.1.256&dl=1&sim=Screen2Image>.

of Procedure. The proceedings were conducted smoothly and cooperatively and went forth without material delays.

As contemplated by the parties' agreements, the ABC proceedings included a series of meetings with residents of the Abyei Area, at which testimony was publicly given to the ABC. In total, more than one hundred live witnesses were heard by the ABC.⁵⁴ Comprehensive transcripts detail the witnesses' testimony.⁵⁵ The GoS and the SPLM/A made a number of presentations to the ABC, culminating in the parties' final presentations on June 16 and 17.⁵⁶ Thereafter, the Experts completed their deliberations on June 20 and began preparation of a map delimiting their decision and an accompanying report.⁵⁷ The ABC's report was presented to the Presidency on July 14.⁵⁸

The Experts' Report did not accept in full the submissions of either the GoS or the SPLM/A. The GoS had argued that the Abyei Area should be confined to a relatively narrow strip of territory lying to the south of the Bahr el Arab river, while the SPLM/A had variously claimed territory extending north to either a line between Lake Keilak and Muglad or to latitude 10°35'N.⁵⁹ The Experts instead concluded that the Abyei Area extended north to latitude 10°22'30"N, which was about fourteen kilometers south of the SPLM/A's preferred latitude.⁶⁰

The Experts' map demarcated the Abyei Area, which included the southern part of the so-called "shared rights" area in which both the Ngok Dinka and Misseriya had traditionally lived.⁶¹ Although it did not incorporate the SPLM/A's more northerly claims, the Experts' decision was in broad terms more favorable to it than to the GoS. The Experts rejected the GoS's claim that the Abyei Area consisted solely of a narrow strip of land south of the Bahr el-Arab river, and instead found that it included a substantial amount of territory north of the river.⁶²

The SPLM/A accepted the Experts' Report and called upon the GoS to do so as well.⁶³ But, the GoS claimed that the "Abyei Boundaries Commission [had] exceeded its mandate and they had no power to do so,"⁶⁴ notwith-

54. *See id.* at 9.

55. *See generally id.*, app. 4.

56. *See id.* at 5.

57. *See id.*

58. Award, *supra* note 15, para. 122.

59. *See ABC Report, supra* note 53, at 11–12, 19.

60. *See id.* at 22.

61. *Id.* at Map 1.

62. *See id.* at 11, 18.

63. James Gadget Dak, *SPLM Committed to Respect and Implement the Hague's Ruling on Abyei*, SUDAN TRIBUNE (Jul. 17, 2009), <http://www.sudantribune.com/spip.php?article31832>.

64. *Sudan's Bashir Reiterates Opposition to Abyei Report*, SUDAN TRIBUNE (24 Nov. 2007), <http://www.sudantribune.com/spip.php?article24880>. *See also SPLM/A Shoulders Delay in Peace Implementation – Sudan's Bashir*, SUDAN TRIBUNE (Jan. 9, 2007), <http://www.sudantribune.com/spip.php?article19677> (reporting President Bashir's speech, including that "Al-Bashir said that Committee of Experts on Abyei area failed to respect its mandate").

standing the GoS's prior commitment to accept the ABC's decision as "final and binding."⁶⁵ For some three years, the parties remained deadlocked by their disagreement over the ABC Experts' Report. Eventually, the parties began discussions aimed at resolving their dispute by means of a further dispute resolution proceeding—ultimately producing the Abyei Arbitration Agreement in July of 2008.

D. *The Abyei Arbitration*

The Abyei Arbitration Agreement provided for the resolution by arbitration of the dispute between the GoS and SPLM/A over acceptance and adoption of the ABC Experts' report on the proper boundaries of Abyei. In negotiating the Agreement, both parties repeatedly emphasized the importance that they attached to a decision based upon the interpretation of their agreements and applicable rules of law.

Article 2 of the Abyei Arbitration Agreement was carefully negotiated and defined with precision the issues to be decided by the arbitral tribunal:

a. Whether or not the ABC experts had, on the basis of the agreement of the Parties as per the [Comprehensive Peace Agreement], 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.⁶⁶

The Agreement included an applicable law clause, providing for application of "the provisions of the [Comprehensive Peace Agreement], particularly the Abyei Protocol and the Abyei Appendix, the Interim National

65. See Abyei Annex, *supra* note 32, art. 5; Abyei Protocol, *supra* note 24, art. 5.3; Abyei Boundaries Commission, *Abyei Boundaries Commission Report*, app. at 18–20, art. 13 (2005) [hereinafter ABC Rules of Procedure], <http://sudanarchive.net/cgi-bin/pagessoa?a=pdf&d=D11d18.1.256&dl=1&sim=screen2Im> age (Rules of Procedure for the ABC).

66. Arbitration Agreement between The Government of Sudan and The Sudan People's Liberation Movement/Army on Delimiting Abyei Area, GoS-SPLM/A, No. GOS-SPLM 53,004, art. 2 (Jul. 11, 2008) [hereinafter Arbitration Agreement].

Constitution of the Republic of Sudan, 2005, and general principles of law and practices as the Tribunal may determine to be relevant.”⁶⁷ With regard to procedural matters, the parties provided for the arbitration to be administered by the Permanent Court of Arbitration (“PCA”), under the Court’s Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State.⁶⁸

By the terms of the Arbitration Agreement, the Tribunal consisted of five arbitrators—two appointed by each party and the fifth appointed by the Secretary-General of the PCA.⁶⁹ Like the preparation of the ABC Report, the arbitration was to take place on an accelerated timetable. The Tribunal was required to conduct all proceedings and issue its final award within six months of being constituted, with the possibility of an extension not to exceed three additional months.⁷⁰

Applying the procedural provisions of the Abyei Arbitration Agreement, the Tribunal conducted a thorough arbitral proceeding in accordance with the parties’ Agreement. The parties submitted extensive factual evidence (totalling over 1,400 pages in written memorials, documentary evidence of some 9,750 pages, nearly 700 pages of fact and expert witness statements, and sizeable map indexes) and legal arguments (in addition to the memorials noted above, nearly 550 legal authorities).⁷¹ The Tribunal also conducted a six-day oral hearing in The Hague, with argument and witness examinations, webcast around the world.⁷²

In their submissions, both the GoS and SPLM/A argued in detail why the terms of the parties’ agreements and general principles of law supported their respective views of the Experts’ Report.⁷³ Neither party appealed to *ex aequo et bono* authority on the part of the Tribunal and both parties indicated, either expressly or impliedly, that no such authority was available to the Tribunal.⁷⁴

67. *Id.* art. 3(1).

68. *Id.* art. 1.

69. *Id.* art. 5(1); Award, *supra* note 15, para. 15.

70. Arbitration Agreement, *supra* note 66, art. 4(3).

71. See Written Submissions, Permanent Court of Arbitration Case Repository, <https://pcacases.com/web/view/92> (last visited Oct. 3, 2016).

72. See *Abyei Arbitration*, Permanent Court of Arbitration, <https://pcacases.com/web/view/92> (last visited Oct. 3, 2016). These hearings can be reviewed on the website of the PCA. *Id.*

73. See generally Written Submissions, *supra* note 71.

74. See Memorial of the Gov’t of Sudan, para. 166–67, *The Gov’t of Sudan v. The Sudan People’s Liberation Movement/Army*, PCA No. GOS-SPLM 53,391 (2008) [hereinafter GoS Memorial]; SPLM/A Counter-Memorial, paras. 786-813, *The Gov’t of Sudan v. The Sudan People’s Liberation Movement/Army*, PCA No. GOS-SPLM 53,391 (2009) [hereinafter SPLM/A Counter-Memorial].

III. THE ABYEI AWARD

The Tribunal delivered its Award at a public ceremony in The Hague on July 22, 2009.⁷⁵ The Award was 269 pages long and recorded the views of four of the five arbitrators. An attached dissenting opinion, sixty-seven pages long, set forth the disagreement of one arbitrator—Judge Awn Al-Khasawneh, an appointee of the GoS—with the remaining four members of the Tribunal.⁷⁶

A. Overview of the Tribunal's Award

The Tribunal's Award upheld many aspects of the Experts' Report. Among other things, the Tribunal affirmed the Experts' decision that the Abyei Area included the entire territory of the nine Ngok Dinka chiefdoms as they existed in 1905, and not merely territory that had been located outside of Kordofan, a western province of Sudan, in 1905.⁷⁷ At the same time, however, the Tribunal held that the Experts had failed to provide adequate reasons for the northern, western and eastern boundaries that they established, and that this failure constituted an excess of mandate.⁷⁸ In place of the Experts' boundaries, the Tribunal established its own northern, western and eastern boundaries for the Abyei Area—in each case adjusting the border inwards, to reduce the size of the Abyei Area.⁷⁹

In case readers of the Award might not comprehend the results of the Tribunal's actions, the Tribunal included a notation on a "comparative map" attached to its Award.⁸⁰ The map prominently noted the square kilometers included within the Abyei Area as delimited by the Experts and the Abyei Area as delimited by the Tribunal. The notation recorded that the Experts had included 18,599 square kilometers within the Abyei Area, while the Tribunal had included 10,460 square kilometers.⁸¹ The reduction was some 40 percent of the area in dispute, as shown in the map reproduced below.⁸²

75. See Award, *supra* note 15.

76. *Id.* app. 3 (Al-Khasawneh, J., dissenting).

77. See *infra* Part III.C.

78. See *infra* Part IV.B.

79. See *infra* Part IV.C.

80. Award, *supra* note 15 app. 2.

81. *Id.*

82. *Id.*

for a two-stage process of review of the ABC Experts' Report.⁸⁵ The first stage of the Tribunal's mandate, pursuant to Article 2(a), was to determine:

Whether or not the ABC Experts had, on the basis of the agreement of the Parties as per the [Comprehensive Peace Agreement], 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.⁸⁶

The second stage of the Tribunal's mandate was relevant only if the Tribunal concluded in the first stage of its analysis, under Article 2(a), that the Experts had exceeded their mandate. If the Tribunal determined pursuant to Article 2(a) that the Experts had exceeded their mandate, Article 2(c) provided for the Tribunal to do what the Experts had been previously tasked with: "to define (i.e. delimit) on a map the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, based on the submissions of the Parties."⁸⁷

In its Award, the Tribunal devoted considerable attention to the interpretation of its mandate under Article 2. The Award repeatedly and emphatically affirmed the limited scope of the Tribunal's mandate, the deference that was due the Experts' decision, and the obligation of the Tribunal to comply with the terms of the Arbitration Agreement. The Tribunal explained that it was a "creature of the Parties' consent," and that it "cannot and must not allow itself to stray down"⁸⁸ the path of ignoring the terms of its mandate in favor of its own consideration of the evidence. As the Tribunal explained:

Tellingly, *neither* Party has asked the Tribunal to assume a review function akin to a 'court of appeals,' a clear demonstration of their continued wish to circumscribe this Tribunal's jurisdiction. If the Tribunal were to engage at the outset in an omnibus re-opening of the ABC Experts' appreciation of evidence and their substantive conclusions, then the Tribunal would itself be committing an *excès de pouvoir*.⁸⁹

The Tribunal thus concluded that its enquiry under Article 2(a) as to whether the ABC had exceeded its mandate did not involve a *de novo* evidentiary determination.⁹⁰ Instead, Article 2 indicated that the Tribunal's au-

85. *Id.*

86. *Id.* art. 2(a).

87. *Id.* art. 2(c).

88. Award, *supra* note 15, para. 411.

89. *Id.*

90. *Id.* para. 398.

thority under Article 2(a) was limited to considering whether the ABC Experts' definition of the Abyei Area in their 2005 Experts' Report could be understood as a "reasonable, or at least a not unreasonable, discharge of their mandate."⁹¹

In support of this interpretation, the Tribunal cited principles of institutional review in international and national legal systems.⁹² The Tribunal concluded that, as a matter of public international law, "it is an established principle of arbitral and, more generally, institutional review that the original decision-maker's findings will be subject to limited review only."⁹³ It also reasoned that the "relevant case law draws a clear distinction between an appeal on the merits—to determine whether the original decision was legally and factually 'right or wrong'—and a review of whether the decision-maker that rendered a decision exceeded its powers."⁹⁴ Citing *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906*, the Tribunal emphatically disclaimed any authority to review the correctness of the Experts' decision: under international law, where a reviewing body considered an alleged excess of powers, it was not entitled to "pronounce on whether the [original] decision was right or wrong, as this question is legally irrelevant within an excess of powers inquiry."⁹⁵

The Tribunal also emphasized the various types of expertise possessed by the ABC Experts (in Sudanese history, geography and the like) and the opportunities available to the ABC Experts (for visiting the Abyei Area, interviewing witnesses and conducting independent archival research)—all attributes and opportunities the Tribunal acknowledged that it lacked.⁹⁶ The Tribunal took the view that this "difference in methodology between the ABC Experts and the Tribunal confirms that . . . this Tribunal cannot have been expected or authorized to determine whether the ABC Experts' findings were 'correct.'"⁹⁷ The Tribunal also emphasized that the Experts "were indeed considered best placed to interpret the mandate that was entrusted to them."⁹⁸

91. *Id.* para. 400.

92. *Id.* paras. 403–406.

93. *Id.* para. 403.

94. *Id.* (citing *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906* (Hond. v. Nicar.), Judgment, 1960 I.C.J. Rep. 192, 214, which was cited with approval in *Case concerning the Arbitral Award of 31 July 1989* (Guinea-Bissau v. Sen.), Judgment, 1991 I.C.J. Rep. 220, ¶ 25).

95. Award, *supra* note 15, para. 403 (citing *Arbitral Award Made by the King of Spain*, *supra* note 94, at 214).

96. *Id.* paras. 122–126, 408.

97. *Id.* para. 409. The Tribunal also observed that, "[h]ad the Parties intended to have the correctness of the ABC Experts' findings reviewed, they would have presumably selected a panel of scientists with relevant methodological expertise to review the ABC Experts' Report in the light of scientific principles." *Id.*

98. *Id.* para. 508.

C. *The Tribunal's Review of the ABC Experts' Interpretation of their Mandate*

Applying the standards outlined above, the Tribunal next reviewed the reasonableness of the Experts' interpretation of their mandate under the Abyei Protocol and related agreements. The Experts' mandate under the Abyei Protocol was "to define and demarcate the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905."⁹⁹ As discussed above, the parties had agreed on this definition of the Abyei Area because Abyei had traditionally been the homeland of the Ngok Dinka tribes. But, the GoS and the SPLM/A put forward materially different interpretations of that mandate.

The GoS's preferred interpretation of the definition of the Abyei Area was a so-called "territorial interpretation."¹⁰⁰ The GoS submitted that, for an area to have been "transferred to Kordofan in 1905," it must have been located outside Kordofan prior to the 1905 transfer.¹⁰¹ Accordingly, the GoS focused on the location of the putative provincial boundary between Kordofan and Bahr el-Ghazal provinces immediately prior to the transfer in 1905, and argued that it was only the area of the nine Ngok Dinka chiefdoms to the south of the Kordofan-Bahr el-Ghazal provincial boundary (and thus, in Bahr el-Ghazal province) that was transferred to Kordofan in 1905.¹⁰²

In contrast, the SPLM/A advocated for what the Tribunal termed a "tribal interpretation."¹⁰³ The SPLM/A interpretation rested on the premise that it was the Ngok Dinka *people* (organized into the nine Ngok Dinka chiefdoms) that were transferred to the administration of Kordofan province from the administration of Bahr el-Ghazal province, rather than the land itself.¹⁰⁴ The tribal interpretation thus concluded that the Abyei Area referred to all land areas occupied and used by the nine Ngok Dinka chiefdoms in 1905.¹⁰⁵

The Tribunal concluded that the Experts' chosen interpretation of the term "Abyei Area"—namely the "tribal" interpretation preferred by the SPLM/A—was reasonable.¹⁰⁶ In rejecting the "territorial" interpretation, the Tribunal relied upon various historical facts and principles that "con-

99. Abyei Protocol, *supra* note 24, art. 5.1.

100. See Award, *supra* note 27, para. 168.

101. *Id.* para. 551.

102. *Id.* para. 552.

103. *Id.* para. 232.

104. See *id.* para. 546.

105. *Id.* para. 232.

106. Award, *supra* note 15, para. 617. The Tribunal noted that the Experts did not spell out in a separate Part of their Report how they interpreted the term "Abyei Area." *Id.* para. 540. Nonetheless, the Tribunal concluded that the Report made clear both how the Experts interpreted the term and that the Experts adopted the so-called "tribal" interpretation of the Abyei Area. *Id.* The Tribunal concluded that "the ABC Experts' recourse to an interpretation of the Formula that focused on tribal elements, rather than on what the Condominium administrators considered to be the province boundaries, was reasonable in light of the wording, object and purpose and context of the Formula." *Id.* para. 665.

verge[d] to confirm that it was reasonable for the ABC Experts to adopt this interpretation.”¹⁰⁷

Having concluded that the Experts’ “tribal” interpretation of their mandate was reasonable, the Tribunal also acknowledged that the GoS’s competing “territorial” interpretation would have been reasonable.¹⁰⁸ Again, the Tribunal’s analysis and rhetoric affirmed the limited scope of its own authority: not to identify the correct or most reasonable interpretation of the Abyei Area, but instead to determine only whether or not the Experts’ interpretation was reasonable.

IV. CRITIQUE OF THE TRIBUNAL’S AWARD

The Tribunal’s interpretation of both the ABC Experts’ mandate and its own mandate was an accurate and proper holding that paid appropriate deference to the role of the Experts and the Tribunal’s limited review authority, as established in the parties’ agreements. But, as this Part explains, the Tribunal’s analysis lost its way in the next part of the Award, where it considered whether the Experts had exceeded their mandate and, in particular, whether the Experts were required to state the reasons for their findings. It then compounded its erroneous analysis by determining not only that the Experts were, in fact, required to state their reasons, but also holding that they had failed to do so.

A. *The Tribunal’s Erroneous Conclusion that the Experts Were Required to State Reasons for their Determination*

The GoS advanced a dozen or so different claims that the Experts had exceeded their mandate.¹⁰⁹ The Tribunal summarily dismissed all but one of these objections,¹¹⁰ but devoted a great deal of its attention to the one remaining issue: the Experts’ alleged failure to provide adequate reasons.¹¹¹ In particular, the Tribunal held that the ABC’s mandate included a duty to state reasons for its decision and that a failure to fulfil this obligation would amount to an excess of mandate.¹¹²

107. *Id.* para. 617; *see also id.* para. 665.

108. *See id.* paras. 542, 666–672.

109. *See, e.g.,* GoS Memorial, *supra* note 74, paras. 177–186, 196 (alleging procedural violations); *id.* paras. 166–176 (claims that Experts actually decided *ex aequo et bono*); *id.* paras. 227–260 (arguing that Experts disregarded their substantive mandate); *id.* paras. 266–269; Counter-Memorial of the Gov’t of Sudan Memorial paras. 157–61, The Gov’t of Sudan v. The Sudan People’s Liberation Movement/Army, PCA No. GOS-SPLM 53,391 (2009) [hereinafter GoS Counter-Memorial] (arguing the Experts applied unspecified legal principles in determining land rights); GoS Memorial, *supra* note 74, paras. 270–275; GoS Counter-Memorial, *supra* note 74, para. 155 (arguing the Experts attempted to allocate oil resources under the guise of the transferred area).

110. *See* Award, *supra* note 15, paras. 436–443.

111. *See* GoS Memorial, *supra* note 74, paras. 255–262.

112. *See* Award, *supra* note 15, paras. 519–525.

As in earlier parts of its Award, the Tribunal's language regarding excess of mandate emphasized restraint and deference, both to the Experts and to international precedent.¹¹³ But, as discussed below, the Award's conclusions on this issue in fact adopted an expansive and interventionist view of the Tribunal's authority—concluding that the Experts were subject to implied obligations that are difficult to reconcile with the language or terms of the parties' agreements, or with applicable principles of international law.

In the Tribunal's view, no general principles of international law resolved the question of whether the Experts were required to state reasons for their decision.¹¹⁴ The Tribunal emphasized that the ABC was the creature of an "extraordinarily complex political process," which was "not comparable to ordinary commercial or investment arbitrations,"¹¹⁵ where obligations to provide reasoned decisions often exist.¹¹⁶ As a consequence, the Tribunal held: "[w]hether reasons had to be presented is not conclusively resolved by 'general principles of law and practices' but by evidence of the Parties' expectations, which may be inferred from the context in which the ABC was intended to operate and from the function it had been assigned within the peace process."¹¹⁷ As discussed below, the Tribunal's analysis led it to conclusions that were supported neither by the parties' agreement nor well-established principles of international law.

1. *International Law and Practice with Respect to the Alleged Reasoning Requirement*

The Tribunal was correct that no mandatory rule of international law independently required that the Experts' decision state its reasons. International arbitral tribunals have no general obligation to render reasoned awards: nothing in the New York Convention requires arbitral awards to be reasoned¹¹⁸ and, on a national level, many legal systems—including the United States,¹¹⁹ France (in international matters),¹²⁰ and England¹²¹—impose no such requirement.

113. See *id.* paras. 512–517.

114. *Id.* para. 520.

115. *Id.*

116. See *infra* Parts IV.A.1–IV.B.

117. Award, *supra* note 15, para. 520.

118. See The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, arts. III, IV and V, June 10, 1958, 2 U.N.T.S. XXII [hereinafter New York Convention].

119. See, e.g., *United Steel Workers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960) ("Arbitrators have no obligation to court to give reasons for an award."); MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION § 34:7 (Gabriel M. Wilner ed., 3d ed. 2008) ("Arbitrators are not required to state the reasons for their award Of course, the written and signed award is a general requirement under the law in all jurisdictions in the United States, but it need not be accompanied by an opinion setting forth the arbitrator's reasoning."); Thomas E. Carbonneau, *Rendering Arbitral Awards with Reasons: The Elaboration of A Common Law of International Transactions*, 23 COLUM. J. TRANSNAT'L L. 579, 581 (1985) ("The prevalent practice has been to render international arbitral awards without explaining the reasons by which the decision was reached.").

Moreover, when arbitrators are required to state the reasons for their award, it is typically because the applicable international arbitral rules selected by the parties expressly require them to do so. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”), for example, specifically requires each award to “state the reasons upon which it is based.”¹²² So do the rules that govern most major institutional and ad hoc commercial arbitrations worldwide, including but by no means limited to the rules of the International Chamber of Commerce (“ICC”),¹²³ the United Nations Commission on International Trade Law (“UNCITRAL”),¹²⁴ the London Court of International Arbitration (“LCIA”),¹²⁵ the China International Economic and Trade Arbitration Commission (“CIETAC”),¹²⁶ and the International Centre for Dispute Resolution (“ICDR”),¹²⁷ except in some cases where the parties agree to the contrary.

There is even less of a conventional expectation that experts, as compared to arbitrators, must state the reasons for their conclusions. The predominant treatise on expert determination, citing numerous decisions by national courts, concludes: “Where the contract between the parties and the expert contains no requirement that the expert should give reasons for his decision the court will not order the expert either to give reasons or to amplify his reasons.”¹²⁸

As with arbitrators, experts are only required to state their reasons when the parties’ agreement or the applicable rules require them to do so. The World Intellectual Property Organization’s Expert Determination Rules ex-

120. See, e.g., EMMANUEL GAILLARD & JOHN SAVAGE, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶ 1394 (1999) (“In French domestic arbitration, the grounds for the award must be stated. No such requirement exists in French international arbitration law.”).

121. Arbitration Act 1996, c. 23, § 52, sch. 4 (Eng.) (“The award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons.”).

122. Int’l Ctr. for Settlement of Inv. Disp., ICSID Convention, art. 48(3) (2006), <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/ICSID%20Convention%20English.pdf>; see also INT’L CTR. FOR SETTLEMENT OF INV. DISP., ICSID ARBITRATION RULES rule 47(1)(i), <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/ICSID%20Convention%20English.pdf>.

123. INT’L CHAMBER OF COM., ICC RULES OF ARBITRATION art. 31(2) (2012), <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/>.

124. U.N. COMM’N ON INT’L TRADE L., UNCITRAL ARBITRATION RULES art. 34(3) (2013), <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf>.

125. LONDON CT. OF INT’L ARB., LCIA ARBITRATION RULES art. 26.2 (2014), http://www.lcia.org/dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx.

126. CHINA INT’L ECON. AND TRADE ARB. COMM’N., CIETAC ARBITRATION RULES art. 49(3) (2014), <http://www.cietac.org/index.php?m=page&a=index&id=106&l=en>.

127. INT’L CTR. FOR DISP. RESOL., ICDR INTERNATIONAL ARBITRATION RULES art. 30(1) (2014), https://www.icdr.org/icdr/faces/i_search/i_rule/i_rule_detail?doc=ADRSTAGE2025301&_afLoop=139405077302855&_afWindowMode=0&_afWindowId=mnxsp8xy6_160#%40%3F_afWindowId%3Dmnxsp8xy6_160%26_afLoop%3D139405077302855%26doc%3DADRSTAGE2025301%26_afWindowMode%3D0%26_adf.ctrl-state%3Dmnxsp8xy6_220.

128. CLIVE FREEDMAN & JAMES FARRELL, KENDALL ON EXPERT DETERMINATION § 14.7–6 (5th ed. 2015).

pressly require determinations to state reasons, “unless otherwise agreed by the parties.”¹²⁹ So do the Expert Determination Rules of Australia’s Institute of Arbitrators and Mediators¹³⁰ and of the ICC.¹³¹ But, the rules of the Academy of Experts, based in London, expressly provide that “the Expert will not give reasons for his determination” unless the parties otherwise agree,¹³² as does the Institute of Chartered Accountants in England and Wales.¹³³ The LCIA’s Draft Expert Determination Rules are entirely silent on the necessity of giving a statement of reasons.¹³⁴

Indeed, the very same PCA arbitration rules that the GoS and SPLM/A agreed to apply to the Abyei Arbitration impose a reasoning requirement unless the parties agree otherwise.¹³⁵ It would have been a simple matter for the GoS and SPLM/A to include a similar provision in their mandate to the Experts. They did not.

More generally, in many legal systems, including in the United States¹³⁶ and Canada,¹³⁷ numerous civil and even criminal judgments are rendered without any statement of reasons (including jury verdicts and summary dispositions). And as discussed above, much less is there any appreciable support for a general principle of international law mandating that a sui generis body of experts, such as the ABC, set forth the reasons for its decisions. The Abyei Tribunal was correct, therefore, in rejecting suggestions that international law independently obligated the ABC Experts to provide reasons for their decision.

129. WORLD INTELL. PROP. ORG., WIPO EXPERT DETERMINATION RULES art. 17(c)(iii) (2016), <http://www.wipo.int/amc/en/expert-determination/rules/>.

130. INST. OF ARBS. AND MEDIATORS AUSTR., EXPERT DETERMINATION RULES rule 10(2) (2010), <https://www.iama.org.au/sites/default/files/resources/rules-guidelines/expert-determination-rules/Expert%20Rules%202010.pdf>.

131. INT’L CHAMBER OF COM., ICC RULES FOR THE ADMINISTRATION OF EXPERT PROCEEDINGS art. 8(1) (2015), <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Experts/Administration-of-Expert-Proceedings/ICC-Rules-for-the-Administration-of-Expert-Proceedings/#art8>.

132. THE ACAD. OF EXPERTS, RULES FOR EXPERT DETERMINATION rule 7(2) (2008), http://www.academyofexperts.org/system/files/documents/ed_rules_booklet.pdf.

133. INST. OF CHARTERED ACCTS. IN ENG. AND WALES, RULES FOR EXPERT DETERMINATION part 2.7.2 (2014), <https://www.icaew.com/-/media/corporate/files/about-icaew/where-we-are/find-a-chartered-accountant/icaew-rules-for-expert-determination.aspx?la=en>.

134. LONDON CT. OF INT’L ARB., EXPERT DETERMINATION DRAFT RULES, www.lcia.org/media/Download.aspx?MediaId=11.

135. PERMANENT CT. OF ARB., OPTIONAL RULES FOR ARBITRATING DISPUTES BETWEEN TWO PARTIES OF WHICH ONLY ONE IS A STATE art. 32(3) (1993), <https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/Optional-Rules-for-Arbitrating-Disputes-between-Two-Parties-of-Which-Only-One-is-a-State-1993.pdf>.

136. See *United States v. Powell*, 469 U.S. 57, 67 (1984) (“Courts have always resisted inquiring into a jury’s thought processes . . . through this deference the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality.”); see also *Barzelis v. Kulikowski*, 418 F.2d 869, 870 (9th Cir. 1969) (“A jury . . . does not have to give reasons for what it does.”).

137. *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 78 (Can.) (“The jury is never called upon to explain the reasons which lie behind a verdict.”); Lisa Dufraimont, *Evidence Law and the Jury: A Reassessment*, 53 MCGILL L.J. 199, 209 (2008) (“Juries deliberate in secret; they are not required to give reasons for and are not accountable for their decisions in any way.”).

2. *The Intention of the Parties to the Abyei Protocol*

Having concluded that no general principle of international law determined whether the Experts were required to give reasons for their decisions, the Tribunal next considered “evidence of the Parties’ expectations.”¹³⁸ The Tribunal’s consideration of this issue involved a considerable measure of *sua sponte* analysis: even the GoS had not seriously argued that the parties’ agreement imposed an obligation to state reasons; instead it focused almost exclusively on alleged mandatory rules of international law.¹³⁹ The Tribunal acknowledged that “general principles of law and practices” did not necessarily require the Experts to state the reasons for their conclusions.¹⁴⁰ However, the Tribunal then identified characteristics of the ABC process that led it to conclude that the parties implicitly intended that the Experts would provide reasons for their decision.¹⁴¹ This conclusion, if not wholly implausible, was ultimately and by a fair margin flawed. There are powerful reasons, not addressed by the Tribunal, militating strongly against implying such an obligation.

First, the Tribunal ignored the parties’ undisputed decision not to impose any express requirement on the Experts to state reasons, even as they imposed many other express obligations. The Abyei Protocol, the Abyei Annex, the Terms of Reference, and the Rules of Procedure prescribed a detailed and comprehensive set of procedural requirements for the ABC Experts’ work, including daily schedules for visits to villages in the Abyei Area, meetings with the parties, the taking of oral testimony, internal deliberations, and the like.¹⁴² In contrast, nothing in these very detailed agreements imposed any requirement that the Experts provide reasons for their determination. It is difficult to imagine that the parties intended any such requirement if they omitted it entirely from their agreements or the Experts’ very detailed work program.

Second, as acknowledged by the Tribunal,¹⁴³ the mandate of the ABC Experts, as set forth in the parties’ agreements, was “to define and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.”¹⁴⁴ Specifically, both the Terms of Reference for the ABC procedure and the ABC’s Rules of Procedure defined the ABC’s “mandate” as being to

138. See Award, *supra* note 15, para. 520. The Tribunal said that identifying the Parties’ expectations was “a question of proper interpretation of the ABC’s constitutive instruments in light of their ordinary meaning and object and purpose.” *Id.* The Tribunal added that this purpose “may be inferred from the context in which the ABC was intended to operate and from the function it had been assigned within the peace process.” *Id.*

139. See *id.* paras. 519–525; GoS Memorial, *supra* note 74, paras. 255–262.

140. Award, *supra* note 15, para. 520.

141. *Id.* paras. 519–525.

142. See *supra* Part II.B.

143. Award, *supra* note 15, para. 539.

144. Abyei Protocol, *supra* note 24, art. 5.1; Abyei Annex, *supra* note 32, art. 1.

“demarcate the [Abyei Area] on map and on land.”¹⁴⁵ Simply put, the work product required of the ABC Experts was to draw the boundaries of the Abyei Area on a map. Rather than requiring reasons, the parties’ agreement required only a final result—in the form of a map.¹⁴⁶

Third, because of the exigencies of the Sudan peace process, the parties required the Experts to produce a final and binding decision under an extremely short timetable. The Experts were required to begin their work on April 1, 2005, and to present their final report to the Sudan Presidency eight weeks later, on May 29, 2005.¹⁴⁷ Moreover, after hearing the parties’ presentations and conducting public hearings in the Abyei Area, the Experts were granted from May 20–26 to prepare the final report—a total of five working days.¹⁴⁸

This timetable was not compatible with a mandatory requirement to provide meaningful explanations or reasoning. Rather, it was a schedule that accommodated only an opportunity for deliberations among the five Experts regarding the conclusions, and boundaries, to be drawn based on the substantial amounts of evidence that they had reviewed. The Experts were required, during these five days, to delimit the northern, southern, eastern and western boundaries of an area roughly the size of Belgium. A five-day time period for reaching conclusions on these issues was manageable, though very short. But it is simply not realistic to imagine that the parties also intended to require that, in these five days, the Experts would also be under a mandatory obligation to prepare a comprehensive statement of the reasons for their decision.¹⁴⁹

Fourth, the parties’ agreements, although detailed in other respects, granted the Experts an unusual degree of procedural discretion to conduct independent investigations, including archival research and witness interviews.¹⁵⁰ As the Tribunal acknowledged, “[n]one of the . . . Parties’ agreements or the Rules of Procedure imposed prohibitions or limitations on the ABC Experts’ procedural, investigatory, or fact finding actions.”¹⁵¹ It is difficult to see how agreements that gave the Experts such discretion as to how

145. ABC Terms of Reference, *supra* note 43, art. 1.2; ABC Rules of Procedure, *supra* note 65, art. 1.1.2.

146. ABC Terms of Reference, *supra* note 43, art. 1.2; ABC Rules of Procedure, *supra* note 65, art. 1.1.2.

147. See ABC Terms of Reference, *supra* note 43 at 15–16.

148. *Id.* In practice, instead of occurring on April 2, 2005, the parties did not make their first presentations to the ABC until April 12, 2005, and the final presentations of the GoS and the SPLM/A were delayed by a similar period, made on June 16 and 17, 2005 respectively, rather than on May 19 as contemplated by the Terms of Reference. The Experts then completed their deliberations on June 20, 2005. See ABC Report, *supra* note 53, at 4–5.

149. That the Experts ultimately were able to produce a detailed report in addition to a map was a tribute to their extraordinary diligence and productivity in a limited timeframe. But this did not mean that they were required to do so, or that an alleged failure to make that report detailed enough in its reasons constituted a violation of their mandate.

150. See, e.g., Abyei Annex, *supra* note 32, art. 4; ABC Terms of Reference, *supra* note 43, art. 3.2.

151. Award, *supra* note 15, para. 471.

to do their job would have also imposed an unwritten obligation to provide reasons.

The Tribunal suggested that the parties must have wanted the Experts to provide reasons, because this would increase “the legitimacy and acceptability of the decision.”¹⁵² But as discussed, there is no general obligation under international law for arbitral tribunals or other adjudicatory bodies to provide reasons for their decisions. In a substantial number of cases, important international decisions have been either entirely or largely unreasoned;¹⁵³ there is no evidence that unreasoned decisions are less legitimate or less likely to be respected than reasoned decisions.

Moreover, general obligations of fairness and due process are mandatorily applicable in all arbitral (and other adjudicative) proceedings, regardless of whether the eventual decisions are reasoned or not. These protections, as well as the parties’ autonomy in selecting the members of arbitral tribunals¹⁵⁴ and tailoring arbitral procedures,¹⁵⁵ ensure the legitimacy of the proceedings. In any event, any perceived benefits of reasoned decisions cannot justify a mandatory requirement for reasoned awards, applicable independent of the parties’ agreement.

At bottom, the Tribunal’s conclusion that the Experts were impliedly required to state reasons is difficult to reconcile with the parties’ agreements. The GoS and SPLM/A could easily have imposed a reasoning requirement in the Abyei Protocol, the Abyei Annex, the Terms of Reference, or the Rules of Procedure. Such a requirement could have taken the form of a provision requiring the Experts to explain their reasons (as in the Abyei Arbitration Agreement’s requirement that the arbitrators do so¹⁵⁶), or the adoption of rules (such as the PCA Rules used in the Abyei Arbitration) that require a reasoned decision. Of course, the parties’ agreements contained no such provision. If anything, the lack of a requirement for reasons, where a

152. *Id.* para. 522.

153. See e.g., U.N. Secretary-General, Case Concerning the Differences Between France and New Zealand Arising From the Rainbow Warrior Affair, 19 R.I.A.A. 199, 212–15 (July 6, 1986) (where the Secretary-General of the United Nations made an unreasoned ruling on matters relating to the sinking of the Rainbow Warrior); JACKSON H. RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LO-CARNO 91 (1929) (discussing the Portendick affair (1843) between France and Great Britain, where the King of Prussia gave no reasons for his decision) (discussing *Derbec (France) v. United States* (1880): “In the *Derbec* case before the French-American Claims Commission, it was stated by the majority of the Commission that ‘international commissions do not usually give the reasons for their decisions except when the decision stands upon some principle of law which they think ought to be made known.’”) (emphasis added)); Award Regarding the Boundary between the Colony of British Guiana and the United States of Venezuela, 28 R.I.A.A. 331, 338 (1899); RALSTON at 91–92 (“[I]t cannot be accepted that an award is null simply because of the failure of the arbitrators or umpire to assign reasons or because they or he assign an insufficient one . . . Of course, it may be readily understood that the giving of reasons is scarcely approved or is entirely unnecessary in cases where the dispute does not rest upon any clear-cut question of fact or law. This is often the case in boundary disputes . . .”) (emphasis added).

154. See GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1637 (2d ed. 2014).

155. See *id.* at 2129–39.

156. Arbitration Agreement, *supra* note 66, art. 9(2) (“The Tribunal shall comprehensively state the reasons upon which the award is based.”).

number of international agreements do contain such a requirement, leads to a negative inference as to the parties' intention.

Despite the Tribunal's (correct) disavowal of any general requirement for reasons under international law, its treatment of the ABC agreements is at best perilously close to the same incorrect rule. The Tribunal's lack of deference to both the parties' agreements and comparable international practice is inconsistent with the rhetoric of the Tribunal's Award and ill serves the objects of international law and international dispute resolution.

B. The Tribunal's Erroneous Conclusion that the ABC Experts Failed to State Reasons for their Determination

Having incorrectly concluded that the Experts were required to state reasons for their decision, the Tribunal then addressed whether they had satisfactorily provided such reasons. The Tribunal held that the Experts' explanations for the northern, eastern and western boundaries of the Abyei Area were inadequate and that the Experts had exceeded their mandate in establishing these boundaries—thus enabling the Tribunal to redraw those boundaries, which it then did, removing material portions from the Abyei Area. If anything, this conclusion was even less defensible than the Tribunal's holding that the ABC Experts were required to state reasons in the first place.

1. The Experts' Reasoning

Despite their tight time schedule, the ABC Experts produced a report that was lengthy, detailed and comprehensive.¹⁵⁷ The Report totals more than 250 pages and consists of two principal parts. Part I of the Report is forty-five pages long, and includes a summary of the "Experts' Report and Decision," analyses of nine "Propositions" which were advanced in the parties' presentations and the evidence, a series of related "Conclusions" by the Commission, and the Experts' "Final and Binding Decision."¹⁵⁸ The remainder of Part I of the Report then sets out a more detailed analysis of the nine Propositions, accompanied by a more thorough evidentiary discussion.¹⁵⁹

Part II of the Report consists of six appendices, totalling more than 200 additional pages. The Appendices contain further analysis of a variety of legal and evidentiary issues. Among other things, the appendices address African land law concepts and the Experts' reasons for applying these principles,¹⁶⁰ the contents of the GoS and SPLM/A presentations to the Experts,¹⁶¹

157. See generally ABC Report, *supra* note 53.

158. *Id.* at Part I, 1–23.

159. *Id.* at 23–45.

160. *Id.* at Part II, app. 2.

161. *Id.* at app. 3.

the oral evidence from the Ngok Dinka and others who testified before the Experts,¹⁶² the documentary evidence,¹⁶³ and the cartographic evidence.¹⁶⁴

Taken as a whole, it is beyond dispute that the ABC Report provided a very detailed examination of the evidence and the parties' submissions. The Experts came to a thoroughly reasoned conclusion as to the proper boundaries of the Abyei Area. These conclusions were summarized in the "Conclusions" and "Final and Binding Decision" in Part I of the Report, which synthesized the Experts' analysis of the evidence,¹⁶⁵ and then delineated on a map attached to the Experts' report.¹⁶⁶

Any objective review of the Experts' work would have to find that they thoroughly and adequately explained the reasons for their conclusion. The Court of Appeal of New South Wales, for example, has explained that when reviewing an expert determination to determine whether the expert offered the required reasons for his decision, "[i]t is not a matter of requiring any particular detail of the reasoning process to be given but simply of requiring the basic ground for decision to be identified."¹⁶⁷ The ABC Experts provided that "basic ground," and far more. The Experts' conclusions as to the proper northern, western, and eastern boundaries of the Abyei Area, and the Tribunal's disagreement with those conclusions, are discussed in the following Parts.

2. *The Northern Boundary of the Abyei Area*

The location of the northern boundary of the Abyei Area was a central issue in dispute before both the Experts and the Tribunal. The GoS's position was that the Ngok Dinka never inhabited territory to the north of the Bahr el Arab river prior to 1905. By contrast, the Ngok Dinka maintained that for generations prior to 1905 they had occupied and used territory not only north of the Bahr el Arab river, but extending hundreds of kilometers north to approximately latitude 10°35'N.

The Experts' Report contained a lengthy analysis of the parties' respective claims regarding the northern boundary.¹⁶⁸ The Experts did not accept either party's representations in full. First, the Experts rejected the factual claims of both the GoS and the SPLM/A with respect to the use of the Abyei Area. Contrary to the SPLM/A's view, the Experts saw "no foundation" sup-

162. *Id.* at app. 4. The Appendix sets out some 130 pages of transcripts of the witness testimony.

163. *Id.* at app. 5.

164. *Id.* at app. 6.

165. *Id.* at Part I, 20–22.

166. *Id.* at Map 1.

167. *Firedam Civil Engineering Pty Ltd v. Shoalhaven City Council* [2010] NSWSC 59 (Austl.). Likewise, in the analogous area of administrative law, U.S. courts defer to the expertise of specialized agencies, and will normally uphold an agency's decision so long as it "considered the pertinent evidence, examined the relevant factors, and articulated a satisfactory explanation for its action." *J. Andrew Lange, Inc. v. Fed. Aviation Admin.* 208 F.3d 389, 391 (2d Cir. 2000).

168. See ABC Report, *supra* note 53 at Part. I, 25–29, 33–41, 44–45.

porting the Ngok Dinka's claim "that their boundary with the Misseriya should run from Lake Keilak to Muglad."¹⁶⁹ On the other hand, the Experts also rejected the GoS's claim that the Misseriya territory extended south of the Bahr el Arab.¹⁷⁰

Second, the Experts concluded that the extent of the nine Ngok Dinka chiefdoms' territory should be determined by reference to principles of local land law, in particular the "legal principle of the equitable division of shared secondary rights."¹⁷¹ The Experts attached a six-page appendix to their Report that developed these principles, and in particular the concepts of "dominant" rights and "secondary" or "shared" rights.¹⁷²

Third, applying these concepts, the Experts held that the Ngok Dinka had a "dominant" claim to territories extending north to latitude 10°10'N, bounded on the east and west by the boundaries discussed below.¹⁷³ According to the Experts, "[t]he Ngok have a legitimate dominant claim to the territory from the Kordofan-Bahr el-Ghazal boundary north to latitude 10°10'N, stretching from the boundary with Darfur to the boundary with Upper Nile, as they were in 1956."¹⁷⁴

Fourth, the Experts found that the Ngok Dinka and Misseriya "share isolated occupation and use rights" extending north of latitude 10°10'N to "north of latitude 10°35'N," in an area called the "Goz."¹⁷⁵ The Experts concluded that this circumstance gave rise to "shared secondary rights for both the Ngok and the Misseriya"¹⁷⁶ in this territory, and that the Ngok and the Misseriya had "equal claim to the shared areas."¹⁷⁷ On the basis of these findings, and again applying principles of African land law, the Experts held that it was "reasonable and equitable" to divide the "shared area" equally between the Ngok Dinka and Misseriya and locate the northern boundary in a straight bisecting line between 10°10'N and 10°35'N at approximately latitude 10°22'30"N.¹⁷⁸

Accordingly, the Tribunal's conclusion that the Experts failed to provide reasons for the northern boundary of the Abyei Area was almost certainly wrong under any credible legal standard. Remarkably, the Tribunal did not discuss, or even mention, the most directly relevant analysis in the Report regarding the Abyei Area's northern boundary. That analysis explained, in

169. See *id.* at 20.

170. See *id.*; see also *id.* at 25–26 ("Proposition 1"); *id.* at 20–21 ("Although the Misseriya have clear 'secondary' (seasonal) grazing rights to specific locations north and south of Abyei Town, their allegation that they have 'dominant' (permanent) rights to these places is not supported by documentary or material evidence."); *id.* at 26–29 ("Proposition 2").

171. *Id.* at 20.

172. *Id.* at Part II, app. 2, 6.

173. *Id.* at Part I, 19.

174. ABC Report, *supra* note 53, at Part I, 21.

175. *Id.*

176. *Id.* at 19.

177. *Id.* at 22.

178. *Id.* at 20–22.

explicit and coherent terms, the Experts' conclusion that the evidence was sufficient to uphold Ngok Dinka claims to secondary shared rights between latitudes 10°10'N and 10°35'N.¹⁷⁹ The Experts' analysis also discussed the relevant evidence—including specific references in witness testimony, cartographic evidence and historical accounts of Ngok and Misseriya.¹⁸⁰ The Tribunal's Award referred to none of the Experts' discussion.

Rather, the Tribunal directed its attention to the Experts' conclusion that particular items of Ngok Dinka evidence did not establish that the Ngok had dominant rights to the territory between latitudes 10°10'N and 10°35'N.¹⁸¹ But, that conclusion concerned only specific items of evidence and, more fundamentally, did not involve Ngok Dinka claims of *secondary* rights, but only *dominant* rights. The Experts' conclusion that particular items of evidence did not support the Ngok Dinka claims of *dominant* rights in no way contradicted their thoroughly supported determination that the Ngok Dinka enjoyed *shared secondary* rights to the territory between latitudes 10°10'N and 10°35'N.¹⁸² On the contrary, the Experts' treatments of these items of evidence were indications of both their objectivity and the care and nuance of their analysis.

Reasonable people may fairly debate whether it is appropriate to distinguish between dominant and secondary rights (although the Tribunal did not engage in such debate). But that distinction was central to the Experts' analysis of the evidence regarding the Abyei Area's northern boundary. And critiques of the Experts' distinction (again, critiques not advanced by the Tribunal) would go only to the merits of the Experts' decision, not to whether it was reasoned—to the correctness of the Experts' reasoning, not to the existence of such reasoning. Remarkably, though, the Tribunal rejected as unreasoned the Experts' analysis on this point without ever mentioning or addressing the Experts' careful and reasoned discussion of the issue.

In sum, it is very difficult to avoid the conclusion that the Tribunal reached an erroneous conclusion regarding the ABC Experts' determination of the northern boundary of Abyei. It did so only by ignoring both the substantial evidence the ABC Experts considered in demarcating the boundary and the considered reasoning that the Experts applied to that evidence.

3. *The Western Boundary of the Abyei Area*

The Tribunal also held that the Experts provided inadequate reasons for their delimitation of the Abyei Area's western boundary. The Award argued that the Experts' use of the 1956 Kordofan–Darfur boundary was “entirely unreasoned” and that no analysis was presented that supported “the conclusion that the 1956 boundary between the provinces of Kordofan and Darfur

179. *Id.* at 19–20, 44–45.

180. *See id.*

181. Award, *supra* note 15, paras. 683–696.

182. ABC Report, *supra* note 53, Part I, 19–22, 41–44.

also represents the westernmost limits of the” Abyei Area as defined by the Abyei Protocol.¹⁸³ The Tribunal considered it “noteworthy that the ABC Experts did not make any specific pronouncement as to the location of the western boundary line of the Abyei Area; instead, the ABC Experts stated only that: ‘[a]ll other boundaries of the area that coincide with the provincial boundaries as they were at independence on 1 January 1956 shall remain as they are.’”¹⁸⁴

The Tribunal again failed to address, or even mention, the relevant portions of the ABC Report, where the Experts did explain their reasons for locating the western boundary of the Abyei Area at the 1956 Kordofan–Darfur boundary. The Experts’ Report concluded that, “[h]aving duly considered, assessed, and weighed the evidence before them, the experts have come to the following decision,” and then held:

The Ngok have a legitimate dominant claim to the territory from the Kordofan-Bahr el-Ghazal boundary north to latitude 10°10’N, *stretching from the boundary with Darfur* to the boundary with Upper Nile, as they were in 1956.¹⁸⁵

The Experts explained that using the Kordofan-Darfur boundary was appropriate because this was the boundary “as established at the time of [Sudan’s] independence” in 1956.¹⁸⁶ Based on this conclusion, the Experts then went on—in another passage of the Report not mentioned by the Tribunal—to hold that “[t]he western boundary shall be the Kordofan-Darfur boundary as it was defined on 1 January 1956.”¹⁸⁷

The Experts’ reasoning was straightforward and logical. Their analysis of the evidence showed that the Ngok Dinka had dominant rights—as defined in the Report and its Appendices—to territory lying south of latitude 10°10’N and extending west from the boundary between Kordofan and Darfur. Contrary to the Tribunal’s assertion, the Experts *did* make a “specific pronouncement” regarding the western boundary. Indeed, the Experts made two such “specific pronouncements”—the first, linking the western boundary to both the evidence and the relevant legal standard (i.e., dominant rights) and the second declaring that this border was the western boundary of the Abyei Area.

The Experts’ Report also provided specific evidentiary observations and conclusions about each of the principal settlements located in the portions of the Abyei Area lying adjacent to the Kordofan-Darfur border, on the western edge of Abyei—specifically, the settlements of Grinti, Meirem, and

183. Award, *supra* note 15, para. 706.

184. *Id.*

185. ABC Report, *supra* note 53, Part I, 21 (emphasis added).

186. ABC Report, *supra* note 53, Part I, 44; *see also id.* at 45 (“All other boundaries of the area that coincide with the provincial boundaries as they were at Independence on 1 January 1956 shall remain as they are.”).

187. *Id.* at 22.

Thigei, which were expressly identified in the Report.¹⁸⁸ The Report's discussion of these locations makes it clear that the Experts concluded that these were Ngok Dinka settlements, providing a clear and express rationale for locating the western boundary of the Abyei Area just to the east of these settlements. Taken together, these statements by the Experts satisfy any reasonable standard for reasoning—and yet, the Tribunal ignored them.

4. *The Eastern Boundary of the Abyei Area*

Finally, the Tribunal also rejected the Experts' reasoning as to the eastern boundary of the Abyei Area. The Experts' Report concluded that "[t]he eastern boundary shall extend the line of the Kordofan-Bahr el-Ghazal-Upper Nile boundary at approximately longitude 29°32'15"E northwards until it meets latitude 10°22'30"N."¹⁸⁹ The Tribunal concluded that this aspect of the Experts' conclusion was insufficiently reasoned, rejecting two arguments that they determined the Experts had relied on in reaching a conclusion regarding the eastern boundary.¹⁹⁰

First, the Tribunal rejected as inadequate the Experts' statement that "[a]s neither the Ngok nor the SPLM/A have presented claims to the territory east of longitude 29°32'15"E, it is reasonable to take this line as the eastern boundary."¹⁹¹ With regard to this part of the Experts' analysis, the Tribunal said that relying on the SPLM/A's claim alone did not "constitute a sufficiently reasoned justification for the eastern boundary; rather, it was a mere summary of one of the Parties' positions."¹⁹²

Second, the Tribunal argued that the "only other possible justification of the eastern boundary line that the Tribunal discern from the Report stems from the ABC Experts' analysis of a sketch map produced by the SPLM/A."¹⁹³ The Tribunal concluded that it was "contradictory (not to mention inappropriate in its failure to articulate reasons based on the best available evidence) for the ABC Experts to base their decision exclusively on evidence which they themselves have qualified as inconclusive."¹⁹⁴

The Award's conclusion regarding the Abyei Area's eastern boundary is almost certainly wrong. The Tribunal once more failed to consider those parts of the Experts' reasoning which were most significant in their treatment of the eastern boundary. In particular, the ABC Report and its Appendices provided specific evidence of Ngok settlements in territories located very close to the Experts' eastern boundary. For example, multiple witnesses

188. *Id.* at 16, 24; *see also id.* Part II at 32, 34–35, 148–149, 154, 159, 187, 202–203; Award, *supra* note 15, app. 2 (showing map comparing the Experts' designation of the Abyei Area, which includes these settlements, and the Award Area, which excludes them).

189. ABC Report, *supra* note 53, Part I at 22.

190. *See* Award, *supra* note 15, paras. 702–709.

191. ABC Report, *supra* note 53, Part I at 20, 45.

192. Award, *supra* note 15, para. 704.

193. *Id.* para. 705.

194. *Id.*

testified that Ngok Dinka settlements were located in the settlements of Miding (also known as Heglig) and Mardhok, which are located at approximately 29°25'E.¹⁹⁵ The Experts also found that the testimonial and other evidence showed that the Ngok Dinka had permanent settlements and dominant rights along the Ragaba ez Zarga, a river running to the north of the Bahr el Arab, and the territories to the north of the river.¹⁹⁶

Moreover, the Tribunal ignored the Experts' explanation, in the final portion of their Report, that, "[h]aving duly considered, assessed, and weighed the evidence before them, the experts have come to the following decision": "The Ngok have a legitimate dominant claim to the territory from the Kordofan-Bahr el-Ghazal boundary north to latitude 10°10'N, *stretching from the boundary with Darfur to the boundary with Upper Nile, as they were in 1956.*"¹⁹⁷ Again, this conclusion was well supported by the testimonial evidence regarding settlements, as discussed above.

Even if the Tribunal had been correct in holding that the Experts were required to provide reasons for their decision, it was incorrect to conclude that the Experts had failed to do so. On the contrary, the ABC Experts—in the limited time allotted to them—provided detailed and well-reasoned explanations for their determination. The Tribunal improperly second-guessed much of that reasoning, and, even more remarkably, simply ignored the rest of the Experts' reasoning. That reasoning might reasonably be challenged on the merits; one of the Experts' substantive distinctions and evidentiary conclusions might be debatable. But, the Experts' conclusions cannot fairly be branded as unreasoned, as the Tribunal held.

C. *The Tribunal's Unreasoned Redrawing of the Boundaries of the Abyei Area*

Having found an excess of mandate in the Experts' asserted failure to explain the reasoning for its northern, eastern and western boundaries of the Abyei Area, the Tribunal then considered its own mandate pursuant to Article 2(c) of the Arbitration Agreement to redraw the boundaries of the Area.¹⁹⁸ In doing so, having upheld the reasonableness of the Experts' predominantly tribal interpretation, the Tribunal considered itself bound to proceed with its delimitation without departing from the same "predominantly tribal approach."¹⁹⁹

In applying this definition of the Abyei Area, the Tribunal arrived at different conclusions from the Experts regarding its northern, western and eastern boundaries, in each case reducing the size of the Abyei Area.²⁰⁰ Ironically, each of the Tribunal's determinations failed to meet the same standard

195. See ABC Report, *supra* note 53, Part II at 114, 120, 124–125, 133, 137, 149–150, 153, 155. 196. *Id.*, Part I at 35, 43.

197. *Id.*, Part I at 21 (emphasis added).

198. Award, *supra* note 15, paras. 710–747.

199. *Id.* para. 710.

200. See *id.* app. 2 (map comparing the Tribunal's determination to the Experts').

of reasoned decision-making that the Tribunal set for the Experts. Indeed, with respect to each of the boundaries of the Abyei Area that the Tribunal revised, it failed to provide either comprehensible explanations for its conclusions or responses to the Experts' own reasoning on these issues.

1. *The Northern Boundary*

Although the Tribunal criticized the Experts for the brevity of portions of their Report,²⁰¹ the Tribunal explained its reasons for relocating the northern boundary of the Abyei Area in a single sentence, stating: “[b]y invalidating the 10°35’N and 10°22’30”N lines while upholding the 10°10’N line, the Tribunal has fulfilled its mandate with respect to the northern limit of the Abyei Area and will not address the issue any further.”²⁰²

That conclusion is illogical and, in the Tribunal's terminology, almost entirely “unreasoned.” The boundary drawn by the Experts at latitude 10°10’N was not their determination of the northern limit of the Abyei Area. Rather, as discussed above, latitude 10°10’N was the Experts' conclusion as to the northern boundary of the territory over which the Ngok possessed *dominant* land use and occupation rights.²⁰³ Critically, however, the Experts also concluded that, under applicable principles of African land law, the Ngok Dinka shared *secondary* rights over territory between latitude 10°10’N and latitude 10°35’N.²⁰⁴ The Experts also reasoned, based again on African land law, that it was “reasonable and equitable” to divide the resulting shared area equally between the Ngok Dinka and Misseriya, placing half of this territory in the Abyei Area.²⁰⁵

The Tribunal did not engage, in any respect, with the Experts' carefully considered conclusion that the secondary rights of the Ngok Dinka had to be taken into account in drawing the northern boundary of the Area. That failure to address, much less criticize or rebut, the central elements of the Experts' analysis is unfortunate—and deeply inconsistent in a decision that the Experts' conclusions were unreasoned. That is particularly true given that, unlike the Experts, the Tribunal was expressly required to state reasons for its decision.²⁰⁶

2. *The Western Boundary*

The Award also moved the western boundary of Abyei to the east, to run southward along longitude 27°50’E.²⁰⁷ The Tribunal acknowledged that

201. *Id.* para. 709.

202. *Id.* para. 711.

203. ABC Report, *supra* note 53, Part I at 19.

204. *Id.*

205. ABC Report, *supra* note 53, Part I, 19, 21–22.

206. Arbitration Agreement, *supra* note 66, art. 9(2) (“The Tribunal shall comprehensively state the reasons on which the award is based.”).

207. Award, *supra* note 15, para. 745.

there was oral testimony that there were Ngok settlements west of that line, but argued that “the *vast majority* of Ngok traditional sites and settlements were concentrated in the portion of the Bahr region located between longitudes 27°50'E and 29°00'E.”²⁰⁸

The Tribunal's logic is equivalent to saying that Florida should not be considered part of the United States because the vast majority of the United States is north and west of Florida. Moreover, nothing in the Award sought to explain why a substantial portion of the Ngok Dinka's territory should be excluded from the Abyei Area simply because the “vast majority” of the Ngok Dinka settlements were not in this territory. On the contrary, having accepted the “tribal” definition of the Abyei Area, the Tribunal should have included all of the areas occupied by the Ngok Dinka, not just most of them. And, more fundamentally, if the Tribunal was going to exclude this territory from the Abyei Area, it was obligated—under the very standards it applied to the Experts, as well as the express terms of its own mandate—to explain its reasoning for doing so. It did not.

3. *The Eastern Boundary*

Finally, the Tribunal drew a new eastern boundary of the Abyei Area at longitude 29°00'E, explaining its conclusions in only four paragraphs.²⁰⁹ Again, the Tribunal provided no reasoning with regard to the ultimate basis for its decision, while relying on evidence that the Experts had specifically considered and rejected, and disregarding evidence that had led the Experts to draw the boundary farther east. Indeed, the Tribunal acknowledged that there was witness testimony of Ngok Dinka settlements east of the boundary the Tribunal had drawn, including in the areas of Miding, Ajaj and Mardhok.²¹⁰ But, the Tribunal once again discounted this evidence for the illogical reason that the “vast majority” of Ngok Dinka settlements were elsewhere.²¹¹

In sum, the Tribunal's redrawing of the boundaries of the Abyei Area failed to meet the very standard of reasoning that the Tribunal applied to the Experts. The Award applied—without explanation—a standard for defining the territory of the Ngok Dinka which flatly contradicts the parties' agreements in the Abyei Protocol and Abyei Arbitration Agreement. This standard was apparently designed to—and inevitably did—materially reduce the territory of both the Ngok Dinka and the Abyei Area. As discussed below, this reduction was apparently motivated by considerations of a political and diplomatic character, rather than regard for the rule of law.

208. *Id.* para. 744 (emphasis added).

209. *See id.* paras. 741–744.

210. *Id.* para. 744.

211. *Id.*

V. THE ABYEI AWARD AND THE RULE OF LAW

The Abyei Award raises foundational questions about the role of international adjudication and international law. The rule of law was famously described by A.V. Dicey as the supremacy of legal principles over the arbitrary or discretionary exercise of power.²¹² When states or similar parties agree to resolve international disputes by adjudication, pursuant to legal rules, do they intend to be bound by the rule of law? Or do they intend, contrary to the specific terms of their agreements, that their disputes should be resolved by diplomatic compromise, based on assessments of the parties' resolve and expectations, and on diplomatic considerations? If states' agreements are ignored, then what is the role of consent in international adjudication? These are highly important questions, which the Abyei Award presents in a very direct and pointed manner.

Carefully considered, the Abyei Award is a striking example of an experienced international tribunal's refusal to give effect to carefully negotiated dispute resolution agreements or to the applicable substantive rules of law agreed to by the parties. No matter how well-intentioned, those refusals raise fundamental questions about the efficacy of international law and the role of international adjudication more generally.

A. *Did the Abyei Award Comport with the Rule of Law?*

An initial review of the Abyei Award indicates that it provides the kind of decision—one based on the terms of the parties' agreements and applicable law—that the parties contemplated in the Abyei Arbitration Agreement. The Award includes extensive discussions of the evidence,²¹³ the terms of the parties' agreements (including the Abyei Arbitration Agreement and Abyei Protocol)²¹⁴ and relevant principles of international law.²¹⁵

Moreover, the Tribunal repeatedly emphasized the limited scope of its mandate under the parties' agreements²¹⁶ and the vital importance of respecting those limits.²¹⁷ The Tribunal wrote that it "cannot have been expected or authorized to determine whether the ABC Experts' findings were 'correct.'" ²¹⁸ Rather, "[t]he Tribunal's task under the Arbitration Agree-

212. A.V. DICEY, *THE LAW OF THE CONSTITUTION* 120 (10th ed. 1985) ("[Rule of law] means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the use of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.").

213. See Award, *supra* note 15, paras. 96–109, 136–394, 452–455, 467–474, 558–570, 616–649, 660–664, 675–695, 698–700, 702–708, 710–744.

214. See *id.* paras. 110–135, 395–415, 439–442, 468–474, 479–480, 493–497, 504, 508–509, 516–517, 520–524, 532–535, 584–596, 597–615, 650–659, 748–752, 767–769.

215. See *id.* paras. 401–409, 416–424, 425–435, 443, 444–451, 456–462, 476–478, 486, 498–502, 505–507, 512–515, 526–531, 575–579, 583, 753–766.

216. See Arbitration Agreement, *supra* note 66.

217. See *supra* Part II.A.

218. Award, *supra* note 15, para. 409.

ment [was] essentially a legal one.”²¹⁹ Namely, to determine “whether the ABC Experts exceeded their mandate and, if this is found to be the case, delimit ‘on map’ the Abyei Area by applying the Parties’ *lex specialis*,” or their agreed-upon specific legal principles.²²⁰

Accordingly, the Tribunal’s decision has been lauded in some quarters as a salutary example of restraint and deference. As one commentator observed, “it can be hoped that the articulation of general principles in this award will be cited favorably by future review bodies.”²²¹ Another argued that “[t]he Award reinforces the principle that the task of an international tribunal reviewing decisions made by another institution is to assess the institution’s process, not the correctness of its decisions.”²²²

In reality, a closer examination of the Award leads to the conclusion that the Tribunal’s decision was not restrained and did not pay deference either to the parties’ dispute resolution agreements or to the applicable rules of law. Rather, the Tribunal adopted an apparent Solomonic compromise, intended to keep the peace by partially assuaging all interested parties. The result is a well-intentioned, but ultimately interventionist, effort to construct a diplomatic compromise to settle the Abyei dispute—not based upon, but instead contrary to, the parties’ agreements.

A supporter of the process could reason that, after 40 years of brutal warfare and failed negotiations, the parties laid down their arms and submitted their dispute to peaceful resolution in an adjudicative process. The parties cooperatively negotiated an ambitious arbitral timetable, while providing for an unprecedented degree of public access and transparency. Among other things, the parties’ written submissions were made public by the PCA and accessible by Internet, almost as soon as they were filed, while the oral proceedings were webcast live around the world. The residents of Abyei, and the neighboring regions, were able to observe, in real time, every step of the proceedings. The Tribunal then rendered a balanced Award that gave neither party all of what it sought, nor took what either party might have feared.

This is an uplifting and optimistic narrative. But in truth, the Abyei Award raises fundamental and discomfoting questions about the international legal system. In reality, the very experienced members of the Abyei Tribunal disregarded the unequivocal terms of the parties’ agreements and basic principles of international law. They apparently did so in order to reach what they acknowledged to be the overriding objective of encouraging peace in the region—rather than fulfilling their mandate as adjudicators applying the rule of law.

219. *Id.* para. 407.

220. *Id.*

221. Coalter G. Lathrop, *Government of Sudan v. Sudan People’s Liberation Movement/Army*, 104 AM. J. INT’L L. 66, 73 (2010).

222. See John R. Crook, *Abyei Arbitration – Final Award*, 13 ASIL INSIGHTS 15 (2009).

Indeed, this is apparently the conclusion reached by Judge Al-Khasawneh, the lone dissenter on the Tribunal. He would have set aside the Experts' Report in its entirety and replaced it with an award reflecting the GoS's position as to the proper boundaries of the Abyei Area.²²³ His dissenting opinion was harshly critical of the Award, particularly on the grounds that the Tribunal had made an unprincipled and illegitimate compromise decision.²²⁴

1. *The Parties to the Abyei Arbitration Agreed to An Arbitral Determination, Not A Diplomatic Compromise*

The parties to the Abyei Arbitration went to exceptional lengths to submit themselves to specific, determinate contractual terms and principles of law, applied in a formal adjudicative proceeding that would produce a final and binding result. As discussed above, Article 2 of the Abyei Arbitration Agreement defined with precision the issues to be decided by the Tribunal, specifying the exact scope of the Tribunal's authority.²²⁵

The parties to the Abyei Arbitration Agreement did not authorize the Tribunal to decide their dispute *ex aequo et bono*, in which they could set aside the strict requirements of the law and instead reach what they considered to be a fair, equitable, and practical award. They could readily have done so; Article 33(2) of the PCA Rules provided that "the arbitral tribunal [may] decide a case . . . *ex aequo et bono* . . . if the parties have expressly authorized the arbitral tribunal to do so."²²⁶ The GoS and SPLM/A concluded no such agreement and instead included an express applicable law clause²²⁷ and provided for a formal adversarial procedure.

Similarly, the representatives of both the GoS and the SPLM/A repeatedly made clear in public statements that they wanted the Tribunal to apply the terms of their agreements and any relevant general principles of law. For example, the designated Agent of the GoS in the arbitration, Ambassador Dirdeiry Mohammed Ahmed, declared that "[w]e are confident that the Tribunal's decision will be grounded on the facts and the law."²²⁸ Similarly, prior to the Abyei Award, the SPLM/A's Agent, Dr. Riek Machar Teny, said that, as a result of the arbitration, "Sudanese citizens saw their leaders and their own people resolving their differences with reason and law, the tools of a nation committed to peace."²²⁹

223. See Award, *supra* note 15, app. 3, paras. 40–51 (Al-Khasawneh, J., dissenting).

224. *Id.* at para. 30 (Al-Khasawneh, J., dissenting).

225. See *supra* Part II.D.

226. PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State, Art. 33(2).

227. Arbitration Agreement, *supra* note 66, at art. 3(1).

228. Oral Closing Hearing, The Hague (18–23 Apr. 2009), Tr., 6/44/10-14 (Ambassador Dirdeiry Mohammed Ahmed).

229. Award Ceremony at 21:42, Gov't of Sudan v. Sudan People's Liberation Movement/Army, PCA Repository (2009) (No. 2008-07) http://www.wx4all.net/pca/22-07-2009_1.6.html.

The parties to the Abyei Arbitration selected arbitrators with legal training and experience, rather than diplomats.²³⁰ They chose distinguished international law professors, lawyers and jurists, rather than men or women from political or diplomatic spheres. They did so because they expected and desired that the Tribunal would fulfil its mandate as adjudicators, applying the rule of law—and not as political or diplomatic agents, seeking a palatable compromise for both parties. Equally, the parties' submissions in the Abyei Arbitration were devoid of appeals to equity and replete with invocations of the rule of law, legal rules and evidentiary submissions.²³¹ Nowhere in the parties' conduct was there any suggestion that the parties sought or expected some sort of diplomatic or compromise decision.

There is no serious doubt that the parties to the Abyei agreements sought—deliberately and specifically—a decision based on the rule of law and an application of the parties' agreements. They structured and drafted their agreements in the clearest terms to accomplish precisely that. Then, by presenting legal argument and evidence rather than appeals to equity or diplomatic pragmatism, they conducted themselves under those agreements in exactly that manner.

2. *Settled Principles of International Law Require Giving Effect to Agreements to Resolve International Disputes by Adjudication*

The past century has seen a decisive movement towards acceptance of the resolution of international disputes through adjudicative proceedings where impartial tribunals apply substantive rules of international law.²³² When states consent, international law requires giving effect to their agreements to resolve their disputes by adjudication, applying rules of international law, rather than by other means of dispute resolution.

The 1899 Hague Peace Conference included, as one of its principal achievements, the Convention for the Pacific Settlement of International Disputes which, in turn, provided substantial impetus for the use of international arbitration to resolve state-to-state disputes and a legal framework for conducting such arbitrations.²³³ The 1899 Convention was followed by a revised, but largely identical, 1907 Convention for the Pacific Settlement of International Disputes.²³⁴ Negotiated by 44 states, representing a substan-

230. The Tribunal consisted of three law professors—Pierre-Marie Dupuy, Dr. Gerhard Hafner, and W. Michael Reisman—and two former judges—Awn Al-Khasawneh and Stephen M. Schwebel. Terms of Appointment §§ 3.3, 3.4, 3.6, *Gov't of Sudan v. Sudan People's Liberation Movement/Army*, PCA Repository 14025 (2008) (No. 2008-07), <https://pcacases.com/web/sendAttach/677>.

231. See generally David J. Bederman, *International Decisions*, 104 AM. J. INT'L L. 66 (2010).

232. See generally Gary B. Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775 (2012).

233. Convention (I) for the Pacific Settlement of International Disputes arts. 15–29, July 29, 1899, 32 Stat. 1779, 1 Bevans 230; see also David D. Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AM. J. INT'L L. 4, 13–15 (2000).

234. Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907, 36 Stat. 2199, 1 Bevans 577.

tial majority of all states claiming sovereignty in the early twentieth century,²³⁵ the 1907 Convention formalized a growing commitment to the resolution of international disputes in accordance with legal rules in adjudicative proceedings—rather than by force, political pressure, or similar means.

Article 38 of the 1907 Convention captured that commitment:

In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Contracting Powers as the most effective, and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle. Consequently, it would be desirable that, in disputes about the above-mentioned questions, the Contracting Powers should, if the case arose, have recourse, to arbitration, in so far as circumstances permit.²³⁶

As the text of the Convention makes clear, arbitration was regarded as the “most effective” and “most equitable” means of resolving only certain disputes—namely, “questions of a legal nature,” particularly involving the interpretation of international conventions.²³⁷ That limitation was neither accidental nor incidental. Rather, it expressed the fundamental attributes of the arbitral process. Arbitration was not diplomacy, conciliation, or an exercise in Solomonic compromise. Rather, arbitration was an adjudicative process for the resolution of “questions of a *legal nature*”: a process for identifying the law and applying that law in an adjudicatory proceeding.²³⁸

This conception of adjudication of state-to-state disputes was reaffirmed and extended in subsequent decades.²³⁹ The Statute of the Permanent Court of International Justice (“ICJ Statute”) again provided for resolution by the Court of “legal disputes,” including particularly disputes involving “the interpretation of a treaty” or “any question of international law.”²⁴⁰ Additionally, Article 38 of the PCIJ Statute marked a further step in the development of international law as the basis for resolution of international disputes, requiring the Court to resolve disputes before it by applying legal rules—international conventions, international custom, general principles of

235. Caron, *supra* note 233, at 19.

236. Convention for the Pacific Settlement of International Disputes, *supra* note 234, art. 38.

237. *Id.*

238. See Baron Descamps, *Report to the Peace Conference of 1899 from the Third Commission on Pacific Settlement of International Disputes*, reprinted in *THE REPORTS TO THE HAGUE CONFERENCES OF 1899 AND 1907*, 42 (J.B. Scott ed., 1916).

239. For example, Article 13 of the Covenant of the League of Nations provided: “Members of the League agree that whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration or judicial settlement and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration or judicial settlement.” *Covenant of the League of Nations*, art. 13.

240. Statute of the Permanent Court of International Justice, art. 36, Dec. 16, 1920, 6 LNTS 379; see also HERSH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 34–37 (1933).

law, and, subsidiary, judicial decisions and the teachings of publicists—as opposed to subjective assessments of fairness or diplomatic outcomes.²⁴¹ Article 38 provided that the requirement to apply legal principles “shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto”²⁴²—but in no case have the parties ever actually agreed to do so.

The International Court of Justice Statute continued these developments following the Second World War. Article 38 of the ICJ Statute requires application of the same four sources of international law as those in the PCIJ Statute to resolve international disputes, while limiting *ex aequo et bono* decisions to circumstances where the parties grant the Court this power—again, an authority that the Court has never exercised.²⁴³ At the same time, the ICJ Statute and subsequent developments²⁴⁴ have prescribed an increasingly formal adjudicative process, by which rules of law are neutrally applied to resolve international disputes.

The resolution of international disputes by arbitration (as opposed to court adjudication) developed in the same manner; indeed, arbitration has been resorted to far more frequently than adjudication in an international court to resolve state-to-state disputes.²⁴⁵ The PCA’s 1992 Optional Rules for Arbitrating Disputes between Two States provide, in Article 33(1), that arbitral tribunals shall apply the “law designated by the parties” and, in the absence of any choice, “international law” (determined by the same sources as those listed in Article 38(1) of the ICJ Statute).²⁴⁶ Article 33(2) permits *ex aequo et bono* decisions, but again, only “if the parties agree thereto.”²⁴⁷ Articles 5 to 32 of the PCA Rules provide for an adjudicative procedure, ensuring each party an opportunity to be heard.²⁴⁸ These, and other arbitral rules, have been used by states with increasing frequency over the past 50 years.²⁴⁹

241. Statute of the Permanent Court of International Justice, art. 38, Dec. 16, 1920, 6 LNTS 379.

242. *Id.*

243. Statute of the International Court of Justice, art. 38(1), Apr. 18, 1946, 3 Bevens 1179.

244. International Court of Justice, Practice Directions I-XIII (2013), <http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0>.

245. See Born, *supra* note 232, at 779.

246. PERMANENT COURT OF ARBITRATION OPTIONAL RULES FOR ARBITRATING DISPUTES BETWEEN TWO PARTIES OF WHICH ONLY ONE IS A STATE art. 33(1) (1992).

247. *Id.* art. 33(2). Similarly, art. 2(1) of the International Law Association Model Rules on Arbitral Procedure provides that “The compromise shall likewise include any other provisions deemed desirable by the parties, such as: (1) The rules of law and the principles to be applied by the tribunal, and the right, if any, conferred on it to decide *ex aequo et bono* as though it had legislative functions in the matter.” 1958 (hereinafter “ILA Model Rules”), http://legal.un.org/ilc/texts/instruments/english/commentaries/10_1_1958.pdf. The ILA Model Rules on Arbitral Procedure were adopted by the Commission at its tenth session in 1958 and submitted the same year to the General Assembly. By its resolution 1262 (XIII), the General Assembly brought the draft articles on arbitral procedure to the attention of Member States for their consideration and use, in such cases and to such extent as they considered appropriate, in drawing up treaties of arbitration or compromise.

248. *Id.* arts. 5–32.

249. See Born, *supra* note 232, at 798.

Similar developments occurred in other international contexts. The resolution of investor-state disputes evolved from the ad hoc espousal of claims in diplomatic negotiations to formal arbitral proceedings in which rules of law are applied pursuant to adjudicative procedures under the ICSID Convention and investment treaties.²⁵⁰ Claims against foreign states and their agents, once the subject of diplomatic and political resolution, have been subject in increasing numbers to judicial and arbitral resolution since the 1950s. The resolution process for disputes involving the law of the sea developed similarly, with the establishment of the International Tribunal for the Law of the Sea, again applying specialized rules of international law in formal adjudicative proceedings.²⁵¹ Other comparable examples abound.²⁵² And the Nuremberg Trials (subsequently followed by multiple other international criminal proceedings) saw the rule of law, applied in adjudicatory proceedings, introduced in international criminal contexts.

There is also no question that states' commitments to resolve international disputes by international adjudication are binding, mandatory obligations under international law. It is elementary that the principle of *pacta sunt servanda* requires that international agreements be performed in good faith. The preamble to the Vienna Convention on the Law of Treaties, for example, declares that "the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized," while Article 26 prescribes that "[e]very treaty in force is binding upon the parties and must be performed by them in good faith."²⁵³ And as noted, Article 38 of the ICJ Statute provides that international conventions are a primary source of international law, affirming the binding and decisive character of such agreements.²⁵⁴

Arbitral awards have also emphatically affirmed the overriding importance of the *pacta sunt servanda* doctrine. In the words of one award: "It need hardly be stated that the obligations of a treaty are as binding upon nations as private contracts upon individuals. This principle has been too often cited by publicists and enforced by international decisions to need amplification here."²⁵⁵ Similarly, in the *North Atlantic Coast Fisheries* case, the tribunal

250. See, e.g., ICSID Convention, Regulations, and Rules (2006); LUCY REED ET AL., *GUIDE TO ICSID ARBITRATION* (2d ed. 2010).

251. Born, *supra* note 232, at 808–10; see generally John E. Noyes, *Law of the Sea Dispute Settlement: Past, Present, and Future*, 5 ILSA J. INT'L & COMP. L. 301 (1999).

252. Consider the European Court of Human Rights and the European Court of Justice for examples in the human rights area. See Born, *supra* note 232, at 816–18; see also Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L. J. 273 (1997).

253. Vienna Convention on the Law of Treaties Preamble, art. 26, May 23, 1969, 1155 U.N.T.S. 331.

254. Statute of the International Court of Justice, art. 38(1), Apr. 18, 1946 [hereinafter ICJ Statute].

255. *Claim of John D. Metzger & Co. vs. Haiti*, in PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES WITH THE ANNUAL MESSAGE OF THE PRESIDENT 1901-1909, THEODORE ROOSEVELT, 262, 276 (1901); see also JOHN BASSETT MOORE, *Case of Charles Adrian Van Bokkelen – Protocol Between the United States and Hayti of May 24, 1888*, in HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY VOLUME II 1807,

affirmed that “every State has to execute the obligations incurred by Treaty bona fide, and is urged thereto by the ordinary sanctions of International Law in regard to observance of Treaty obligations.”²⁵⁶

ICJ judgments have expressed additional support for this view, with one (separate) opinion declaring:

Observance of treaty obligations is not only moral, but serves an important role in maintaining peace and security between neighboring States and in preventing military conflicts between them.²⁵⁷

Commentators describe *pacta sunt servanda* as an “indisputable rule of international law,”²⁵⁸ of “overriding importance.”²⁵⁹ It has rightly been observed that “this principle . . . touches every aspect of international law,”²⁶⁰ and that without the *pacta sunt servanda* rule, “[i]nternational law as well as civil law would be a mere mockery.”²⁶¹

The doctrine of *pacta sunt servanda* is fully applicable to agreements by states to submit their disputes for adjudication by third parties—including the ICJ, international arbitral tribunals, ITLOS, investment arbitration tribunals, and other forms of adjudication. For example, the ICSID Convention provides that “[w]hen the parties have given their consent,” to the Centre’s jurisdiction, “no party may withdraw its consent unilaterally.”²⁶² Accordingly, in *Murphy Exploration and Production Company International v. Ecuador*, an ICSID tribunal observed that “[t]he *pacta sunt servanda* principle requires good faith compliance with all obligations under the BIT,” and accordingly rejected Ecuador’s attempt to withdraw its prior treaty consent to the tribunal’s jurisdiction.²⁶³ And an ad hoc UNCITRAL panel explained in *Jan Oostergetel and Theodora Laurentius v. Slovak Republic* that “there is no doubt that a state cannot unilaterally withdraw its offer to submit an invest-

1849–1850 (1898) (“Treaties of every kind, when made by the competent authority, are as obligatory upon nations as private contracts are binding upon individuals . . . and to be kept with the most scrupulous good faith.”).

256. *N. Atl. Coast Fisheries (U.K. v. U.S.)*, 11 R.I.A.A. 167, 186 (Perm. Ct. Arb. 1910).

257. *Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Declaration of J. Koroma, 2005 I.C.J. Rep. 168, 284, 291 (Dec. 19).

258. BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 113 (George A. Keaton et al. eds., 1953) (citing *Codification of International Law: Part III—Law of Treaties*, 29 AM. J. INT’L L. SUP. 671, 671–85 (Supp. 1935)).

259. H. LAUTERPACHT, *OPPENHEIM’S INTERNATIONAL LAW* 38 (Robert Jennings et al. eds., 9th ed. 1992).

260. *Id.*

261. Cheng, *supra* note 258, at 113 (quoting the Interlocutory Award in the Rudloff Case, American-Venezuelan Commission, 9 R.I.A.A. 244, 255 (1903–1905)).

262. ICSID Convention, art. 25(1).

263. *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction ¶ 73 (Dec. 15, 2010).

ment dispute to arbitration after the investor has made its investment in reliance on this promise.”²⁶⁴

Likewise, the ICJ Statute provides that “[t]he jurisdiction of the Court comprises all cases which the parties refer to it.”²⁶⁵ The ITLOS Statute similarly provides that “[t]he jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.”²⁶⁶ And the New York Convention, which applies to state parties for arbitral agreements as well as to private parties, mandates that “[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration.”²⁶⁷

The doctrine of *pacta sunt servanda* also has particular significance with regard to agreements concerning boundary determinations. Article 62 of the Vienna Convention on the Law of Treaties, for example, provides special rules for application of the doctrine of *res sic stantibus*, or change in circumstances, to boundary settlements.²⁶⁸ In its report on the Draft Vienna Convention, the ILC explained that “treaties establishing a boundary should be recognized to be an exception to the rule, because otherwise the rule, instead of being an instrument of peaceful change, might become a source of dangerous frictions.”²⁶⁹

Similarly, Article 11 of the Convention on Succession of States in Respect of Treaties provides that a succession of states does not, as such, affect a boundary established by treaty.²⁷⁰ And Article 62(2) of the Convention on the Law of Treaties between States and International Organisations or between International Organisations provides that a fundamental change of circumstances does not provide grounds for terminating or withdrawing from a treaty “if the treaty establishes a boundary.”²⁷¹

Finally, the doctrine of *res judicata*—the longstanding and fundamental legal principle that once a matter has been fully adjudicated by a competent authority, the outcome cannot later be revisited and revised—applies to international adjudications just as it applies in domestic courts. As one commentator put it: “If it is true that international relations based on law and

264. Jan Oostergetel and Theodora Laurentius v. The Slovak Republic, UNCITRAL, Decision on Jurisdiction, para. 95 (Apr. 30, 2010).

265. ICJ Statute, *supra* note 254, art. 36(1).

266. Statute of the International Tribunal for the Law of the Sea art. 21, Dec. 10, 1982, 1833 U.N.T.S. 561.

267. New York Convention, *supra* note 118, art. II(1).

268. Vienna Convention 1969, *supra* note 253, art. 62(2) (“A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty . . . if the treaty establishes a boundary . . .”).

269. Int’l Law Comm’n, Rep. on the Work of Its Eighteenth Session, U.N. Doc. A/6309/Rev.1, at 259 (1966).

270. Vienna Convention on Succession of States in respect of Treaties art. 11, Aug. 23, 1978, 1946 U.N.T.S. 10; *see also* Lauterpacht, *supra* note 259, at 663.

271. Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations art. 62(2), Mar. 21, 1986, U.N. Doc. A/Conf.129/15, at 27 (2005).

justice require arbitral or judicial adjudication of international disputes, it is equally true that such adjudication must, in principle, remain unchallenged, if it is to be effective to that end.”²⁷² As another has observed: “Without the notion of *res judicata*, no dispute could ever be resolved efficiently, and parties would be tempted to resubmit their claims in the same or a different forum, with all the tactical manoeuvring [sic] that opponents see as dilatory tactics.”²⁷³

The importance of *res judicata* is reflected in treaties that address international disputes. The Hague Conventions on the Pacific Settlement of Disputes of 1899 and 1907 respectively provide that “[t]he award, duly pronounced and notified to the agents of the parties at variance, puts an end to the dispute definitively and without appeal” and “[t]he Award, duly pronounced and notified to the agents of the parties, settles the dispute definitively and without appeal.”²⁷⁴ The New York Convention likewise provides that “[e]ach Contracting State shall recognize arbitral awards as binding and enforce them.”²⁷⁵

Moreover, respect for *res judicata*, like *pacta sunt servanda*, is paramount in boundary disputes. One author has explained that it is “fundamental” that *res judicata* prevent the “reopening of issues conclusively settled between the litigating parties” in boundary disputes.²⁷⁶ This is because, in the words of the ICJ, “when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality.”²⁷⁷

All of these authorities affirm the fundamental rule that international agreements between states should be given effect according to their terms, particularly when those agreements are aimed at submitting disputes to adjudication or drawing territorial boundaries. Needless to say, none of these authorities supports the notion that international agreements between states are second-class contracts, whose undertakings are not really binding or do not really mean what they say.

3. *The Abyei Award Disregarded the Parties' Agreements and Principles of International Law*

The Abyei Award gives the appearance of furthering the past century's progressive affirmation of international adjudication and the rule of law. In reality, however, the Abyei Tribunal embraced what was at bottom an at-

272. CHENG, *supra* note 258, at 336.

273. Florian Kremslehner, *Lis pendens and res judicata in International Commercial Arbitration*, in 2007 Y.B. AUSTRIAN ARBITRATION, 127–28.

274. The Hague Conventions on the Pacific Settlement of International Disputes 1899 art. 54, July 29, 1899, T.S. No. 392; The Hague Conventions on the Pacific Settlement of International Disputes 1907 art. 81, Oct. 18, 1907, T.S. No. 536.

275. New York Convention, *supra* note 118, art. III.

276. KAIYAN HOMI KAIKOBAD, INTERPRETATION AND REVISION OF INTERNATIONAL BOUNDARY DECISIONS 143 (2007).

277. Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. Rep. 6, 34 (June 15).

tempted diplomatic and political compromise. In doing so, the Award violated three core principles of international law—the *pacta sunt servanda* doctrine, the inviolability of territorial boundary decisions, and *res judicata*.

As detailed above, it is all but impossible to reconcile the Tribunal's Award with the terms of the parties' agreements. The Tribunal fashioned a requirement for a reasoned award almost entirely out of whole cloth, ignoring the absence of any such requirement in the detailed terms of the Comprehensive Peace Agreement, the Abyei Protocol, the Abyei Annex, the Terms of Reference, or the Rules of Procedure, as well as other indicia of the parties' intentions. The Tribunal then strained to detect an absence of reasoning in the Experts' carefully-reasoned 250 page decision, managing to do so only by omitting any discussion of the pertinent passages of the Experts' decision. And the Tribunal then redrew the boundaries of the Abyei Area to materially reduce its size, providing either no reasoning or implausible reasoning to justify its conclusions. Finally, the Tribunal concluded its analysis with an appeal to the paramount importance of peace in the region—a sentiment which, though laudable in a vacuum, was at odds with the legal question they were tasked with answering.

All in all, the Tribunal's Award was manifestly the product of an effort at diplomatic compromise. Stepping back from the details of the Award, it is impossible to avoid the conclusion that the Tribunal's decision was the result of a powerful motivation—conscious or otherwise—independent from the legal or factual merits of the case. That objective was apparently to establish grounds for reducing the territory of the Abyei Area to achieve what was perceived to be a diplomatically and politically desirable outcome, rather than a result consistent with the rule of law and terms of the parties' agreements.

The Tribunal all but acknowledged the true motivations for its Award in its concluding comment, that, “[c]onscious of its paramount obligation to the people within and around the Abyei Area . . . and to the Sudanese people themselves, this Tribunal has done its utmost to contribute, through the task assigned to it, to a peaceful resolution of the bitter conflict over the Abyei Area.”²⁷⁸ The Tribunal also took pains to emphasize the compromise result that it had produced in the “comparative map,” attached to the Award, which highlighted the reduction of the Abyei Area by more than 8,000 square kilometres.²⁷⁹

Conversely, Judge Al-Khasawneh captured the essence of the Tribunal's Award with brutal—yet accurate—directness in his dissent, where he wrote

278. Award, *supra* note 15, para. 767.

279. *Id.* app. 2. It is also not a coincidence that the Tribunal left untouched the one boundary that had no practical relevance to the separation of North and South Sudan—the southern boundary, which demarcated the border between Abyei and South Sudan. The Tribunal's repeated and exclusive focus on ways to reduce the size of the Abyei Area betrayed its true motive: to present the parties with a compromise that it calculated they would live with.

that the Award was “an ill-advised, misconceived compromise”²⁸⁰ that had “more to do with compromise than principle.”²⁸¹ In particular, he wrote:

The question therefore, and it is a disquieting one, is why does a Tribunal, provided with all the available evidence and guided through it by learned counsel on both sides, and moreover provided with the benefit of hindsight that all reviewing bodies have, and in a position to assess the evidence before it comprehensively, elect, instead, to look at reality not in a holistic manner but in a disconnected way, making wild flights of fancy on the basis of misinterpreted sentences taken out of context so as to make dead men say what they never said or intended?²⁸²

It is correct to say that the Tribunal did, indeed, do “its utmost” to contribute to peace in Sudan in making its Award. But, to put it directly, as Judge Al-Khasawneh did, this well-intentioned objective must ultimately be regarded as a serious departure from the Tribunal’s mandate.

The Tribunal’s effort at diplomatic compromise violated basic rules of *pacta sunt servanda*. The members of the Tribunal were appointed to serve as arbitrators applying the law, not as diplomats, engaged in negotiation and conciliation. The arbitrators were selected for their experience and expertise in international arbitration and international law—not for any expertise in diplomacy or Sudanese political affairs. The arbitrators possessed none of the important political intelligence and other resources that might have enabled them to engage in true and effective diplomacy, nor were they provided these resources. The arbitrators were instead assigned a mandate, by the GoS and SPLM/A, to render an award based on the facts and the rule of law. They were not mandated to act *ex aequo et bono* or to reach a result that would achieve, in their judgment, “a peaceful resolution of the bitter conflict over the Abyei Area.”²⁸³

Basic principles of international law required that the Tribunal give effect to its mandate in accordance with the principle of *pacta sunt servanda*—not to rewrite it or disregard it. Equally important, international law required the Tribunal to respect the sanctity of territorial boundary decisions and rules of *res judicata*. Regrettably, the Tribunal’s Award disregarded these core principles of international law.

B. *Did the Abyei Award Advance or Undermine the Rule of Law?*

The Tribunal’s treatment of its mandate and applicable rules of international law in the Abyei Award raises fundamental questions about the role of

280. *Id.* app. 3, para. 202 (Al-Khasawneh, J., dissenting).

281. *Id.* app. 3, para. 5.

282. *Id.* app. 3, para. 30.

283. *Id.* para. 767.

international adjudication and the rule of law in state-to-state disputes. In particular, the Tribunal's actions raise questions about what states in fact seek from international adjudication—notwithstanding what they say or what they agree on. More fundamentally, the Tribunal's actions raise questions about the reliability of international adjudication. Put most pointedly, can international tribunals be trusted to fulfill their mandates if a tribunal as experienced as the Abyei Tribunal, with a set of agreements as explicit as the Abyei Agreements, chose not to do so?

One view might be that international adjudications like Abyei should produce flexible and pragmatic diplomatic solutions. Maybe the demands of peace, and international harmony, are overriding objectives, which prevail even when not spoken or when contrary texts are agreed. Likewise, perhaps international actors should realize, and do realize, that the terms of their agreements will be interpreted in the light of diplomatic considerations and concerns for peace. And, of course it is easy to be sympathetic with a decision, like the Abyei Award, motivated by evident concern for human welfare and a desire for peace.

If that view is correct, then the Abyei Tribunal's decision is, perhaps, defensible. It is possible that the Abyei Award really did not disregard the parties' true agreements and intentions. It instead discerned those fundamental objectives despite the literal text of the parties' agreements and the words the parties (perhaps clumsily) used. On this view, the Award was a wise and judicious discernment of the parties' genuine intentions and the true objectives of international law.

It would be comforting to adopt this view. It would also be wrong. States, like people, are capable of protecting their interests, including by drafting and concluding international agreements. This is the basis for the rule of *pacta sunt servanda*. Unless international agreements are given effect, including when tribunals think them unwise, the very basis of international law is compromised. Equally, the legitimacy of international adjudication is compromised; if tribunals do not apply the rule of law, or adhere to their mandate, then they diminish the rule of law and, ultimately, the willingness of states to submit their disputes to international adjudication.

The international legal system is not a charade, in which "rules of law," "evidence," "legal submissions," and "impartial tribunals" are all masks behind which the real business of diplomatic negotiations is silently conducted by wise elders. The international legal system has evolved radically, and positively, in the 20th and 21st centuries, particularly insofar as dispute resolution is concerned: when states conclude agreements, and submit themselves to third-party adjudication, international law binds them to their agreements. The doctrine of *pacta sunt servanda* is not accompanied with a wink and a nod, or with lingering notions that states are entirely political actors, above the law. Instead, international law, and the institutions that

support it, gives full effect to the promises of states, no less than those of other actors.

This conclusion is not only what the law is—what contemporary international law provides—but is also what international law *should* provide. Although the allure of diplomatic compromise, of mature and seasoned political judgment, is powerful, it is false and short-sighted. Arbitrators lack the resources and experience to engage in diplomatic compromise and the adjudicative process is not designed to facilitate diplomacy. Conversely, states, like other parties, know how to negotiate and compromise, how to conciliate and how to arbitrate *ex aequo et bono*. When they do not pursue these avenues, and instead agree to resolve their disputes by international adjudication in accordance with the rule of law, their agreements both must and should be given effect.

Doing so is fundamentally important. If states are not held to their promises, and able to enforce their commitments, then they will no longer honor, and no longer conclude, such agreements. International law rests on consent, and if consent is not honored and enforced, then the foundation of international law crumbles: in the words of W.B. Yeats, “the centre cannot hold,”²⁸⁴ and states will inevitably resort to other methods to secure their interests. Tragically, this is precisely what occurred following the Abyei Award.²⁸⁵

C. *The Abyei Area Since the Abyei Award*

Finally, and also regrettably, the Tribunal failed in its stated effort to attain “a peaceful resolution of the bitter conflict over the Abyei Area.”²⁸⁶ Insofar as the Abyei Tribunal sought a diplomatic compromise that would ensure a politically stable and conflict-free Abyei region, reality has not borne out that ambition.

After the Abyei Award was published, both parties repeated their commitments to accept and implement the Tribunal’s decision—whatever its Solomonic features.²⁸⁷ But the planned 2011 referendum on whether Abyei would be part of Sudan or South Sudan never took place.²⁸⁸ Instead, on May 21, 2011, 5,000 troops of the Sudanese armed forces took control of Abyei after undertaking widespread aerial bombing, shelling, and tank attacks,

284. W.B. Yeats, *The Second Coming* (1919).

285. See *infra* Part IV.C.

286. Award, *supra* note 15, para. 767.

287. See *Joint Statement by the National Congress Party and the Sudan People’s Liberation Movement on the Abyei Arbitration Decision*, SUDAN NEWS AGENCY, July 22, 2009, <http://www.sunanews.net/english-latest-news/2761-joint-statement-by-the-national-congress-party-and-the-sudan-peoples-liberation-movement-on-the-abyei-arbitration-decision>.

288. Alex Thurston, *Five Challenges South Sudan Will Face After Referendum*, CHRISTIAN SCIENCE MONITOR, Jan. 27, 2011, <http://www.csmonitor.com/World/Africa/Africa-Monitor/2011/0127/Five-challenges-South-Sudan-will-face-after-referendum>.

killing both civilians and South Sudan soldiers.²⁸⁹ Over 20,000 residents of the area fled south, and South Sudan withdrew its troops from the area.²⁹⁰

After protests and negotiations brokered by the African Union, Sudan and South Sudan reached a temporary demilitarization agreement in June 2011.²⁹¹ The agreement provided for Sudanese soldiers to leave the area, which would be patrolled by UN-authorized Ethiopian peacekeepers.²⁹² The peacekeepers began arriving that July 2011.²⁹³ They have remained ever since.²⁹⁴

The political status of Abyei thus remains unsettled, and Sudan continues to claim sovereignty over the entire Abyei region. The African Union proposed that the Abyei referendum be rescheduled for October 2013, but Sudan's foreign minister said that the proposal "will never see the light of day" and warned that a referendum would jeopardize peace between the two countries.²⁹⁵ Nonetheless, in October 2013 more than 63,000 members of the Ngok Dinka tribe, resident in the Abyei Area, held an unofficial referendum on Abyei. 99.98% of them voted to join South Sudan, but as of this writing there is no indication that the popular will of Abyei's residents will be respected or implemented.²⁹⁶

Violence and political instability continue in the region. A January 2015 United Nations report on the status of Abyei described on-going inter-tribe violence and an "absence of law and order institutions in the Abyei Area."²⁹⁷ The report noted a "deteriorating security environment in the Abyei Area," highlighted by a "lack of political dialogue, aggravated by dangerous security incidents."²⁹⁸ A subsequent Security Council resolution expressed "concern for the fragility of the security situation in Abyei Area" and for a "public administration and rule of law vacuum."²⁹⁹ The Abyei Award was of

289. *Sudan: Abyei Seizure by North 'Act of War', Says South*, BBC WORLD NEWS, May 21, 2011, <http://www.bbc.com/news/world-africa-13491445>.

290. *Id.*

291. *AU: Agreement on Abyei Demilitarization Done, More Deals in Works*, PEOPLE'S DAILY ONLINE, June 21, 2011, <http://en.people.cn/90001/90777/90856/7415698.html>.

292. *Id.*; see also U.N. Security Council Res. 1990 (June 27, 2011) (establishing a peacekeeping security force for Abyei).

293. Agraw Ashine, *Ethiopian Peacekeepers Arrive in Contested Abyei*, AFRICA REVIEW, July 15, 2011, <http://www.africareview.com/News/Ethiopian™roops+arrive+ Abyei/-/979180/1201882/-/blxyr5z/-/index.html>.

294. See generally UNITED NATIONS INTERIM SECURITY FORCE FOR ABYEI, <http://www.un.org/en/peacekeeping/missions/unisfa/>. In May 2013, a UN Security Council resolution increased the number of authorized peacekeeping troops from 4,200 to 5,326. U.N. Security Council Res. 2104 (May 29, 2013).

295. *Sudanese Foreign Minister Predicts Additional Time over Abyei*, SUDAN TRIBUNE, Dec. 4, 2012, <http://www.sudantribune.com/spip.php?article44746>.

296. *Abyei's Dinka Vote to Join South Sudan*, AL JAZEERA, Oct. 31, 2013, <http://www.aljazeera.com/news/africa/2013/10/abyei-dinka-vote-join-south-sudan-2013103193942652913.html>.

297. U.N. Security Council, *Report of the Secretary-General on the Situation in Abyei*, Jan. 30, 2015, paras. 3–9.

298. *Id.* paras. 35–37.

299. U.N. Security Council Res. 2205 (Feb. 26, 2015); see also U.N. Security Council, *Report of the Secretary-General on the Situation in Abyei*, June 16, 2015 (reporting on continuing violence and instability in the region).

course not the cause of this violence and instability; but nonetheless, the Award has failed to achieve the diplomatic solution its authors hoped.

VI. CONCLUSION

The aftermath of the Abyei Award belies the Tribunal's stated belief that its decision would help ensure a stable Abyei region or a stable Sudan. Despite the Tribunal's best intentions, its Award achieved the worst of both worlds. The Tribunal failed to achieve the diplomatic compromise it sought or to prevent the violence, chaos, and human tragedy that have prevailed in the Abyei Area in recent years. At the same time, by issuing a ruling that disregarded the parties' agreements and settled principles of international law in favor of political ends, the Tribunal compromised the rule of law for future cases and future parties.

Decisions like the Abyei Award provide sobering reminders of the shortcomings of the international legal system and its capacity to resolve interstate disputes. Nonetheless, the past century has witnessed remarkable advances in the rule of law and examples of effective international adjudication. Moreover, the absence of palatable alternatives will in all likelihood continue to induce many states and state-like actors to resolve their disagreements pursuant to consensual dispute resolution mechanisms. The Tribunal's decision in the Abyei Arbitration will hopefully prove to be an anomaly—an exception that proves the rule and does not compromise the rule of law.

Ultimately, the rule of law depends on restraint and duty, and on the willingness of decision makers, as well as parties, to submit themselves to what the law prescribes. That demands both humility and courage on the part of tribunals: the humility to recognize that they cannot resolve all the world's problems and the courage to resolve, faithfully, those with which they are entrusted. If those charged with resolving disputes fail to honor these obligations, then, no matter how well intentioned, they turn from instruments of the law into instruments of lawlessness, compromising the very principles they are mandated to uphold.