

The Abyei Arbitration: A Model Procedure for Intra-State Dispute Settlement in Resource-Rich Conflict Areas?

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Abstract

In 2009, the Permanent Court of Arbitration administered a unique case: the *Abyei Arbitration* between the Government of Sudan and the Sudan People's Liberation Movement/Army. This case is unique in several aspects: first, it is an example of intra-state dispute settlement in a conflict zone rich in natural resources, second, it was conducted under a fast-track procedure, and third, it was fully transparent, with all documents and full webcast of the proceedings still available on the PCA website. Currently there is a large number of outstanding intra-state disputes, not limited to Africa, so this paper assesses why the Parties in the *Abyei Arbitration* chose arbitration in the first place and whether this model could be successfully applied to other similar disputes.

A. Introduction

In 2009, the Permanent Court of Arbitration administered a unique case: the *Abyei Arbitration* between the Government of Sudan and the Sudan People's Liberation Movement/Army.¹ This case is unique in several aspects: first, it is an example of intra-state dispute settlement in a conflict zone rich in natural resources, second, it was conducted under a fast-track procedure, and third, it was fully transparent, with all documents and full webcast of the proceedings still available on the PCA website. Currently there is a large number of outstanding intra-state disputes, not limited to Africa, so it is interesting to assess why the Parties in the *Abyei Arbitration* chose arbitration in the first place and whether this model could be successfully applied to other similar disputes.

As this topic encompasses an award of 270 pages, a dissenting opinion and over 20,000 pages of pleadings, the scope of the first part of this study is limited to its procedural aspects and the challenges they posed to the five-member arbitral tribunal, comprised of Prof. Pierre-Marie Dupuy (Presiding Arbitrator), H.E. Judge Awn Al-Khasawneh, Prof. Dr. Gerhard Hafner,

¹ In the Matter of an Arbitration before a Tribunal Constituted in Accordance with Article 5 of the Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting Abyei Area (*Government of Sudan v. Sudan People's Liberation Movement/Army*), Final Award, PCA No. GOS-SPLM/A, 22 July 2009, [hereinafter *Abyei-Arbitration*].

Prof. W. Michael Reisman and Judge Stephen W. Schwebel. In particular, this paper will analyze the effectiveness of the fast-track proceedings enshrined in the Arbitration Agreement between the Parties, requiring the tribunal to render its award only 90 days after the end of the hearings. Attention will also be paid to the transparency of the proceedings as a model for involving not just the interested stake holders but also the civil society interested in the dispute in the proceedings as part of the peace and reconciliation process.

The second part of this study will assess the viability of arbitration as a method of peaceful settlement of intra-State disputes over land and natural resources, particularly where one of the Parties is invoking its right to self-determination, as recognized by the international community.² A typology of cases will be devised to determine the target group of conflicts for which this type of dispute settlement could form a solution. What parties perceive to be a fair and efficient method of dispute resolution in such politically sensitive and economically relevant instances will also be examined. The final section of this paper will address the importance of awareness and participation of both the local and the international community, implementation of the award by both the Parties to this dispute and the actual impact of the award on the ground.

² On the recognition of self-determination as a people's right in general, see UN GA Resolution 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (1960) adopted by 89 votes to 0 with 9 abstentions; Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Social, Economic and Cultural Rights; see the International Court of Justice affirming the right to self-determination in its advisory opinions on *Namibia*, *ICJ Reports 1971*, p. 16 and in *Western Sahara*, *ICJ Reports 1975*, p.12. Finally, see on the *erga omnes* character of self-determination, *East Timor (Portugal v. Australia)*, *ICJ Reports 1995*, p. 90, at 102. On the recognition of the right to self-determination of Southern Sudan, see the Comprehensive Peace Agreement, concluded in 2005, between the Parties to this dispute and the numerous references in the Abyei Award (paras 109; 253; 255; 266; 269; 473; 587; 588; 601; 610; 706).

B. Background of the Abyei Dispute

The Abyei area is located in the region of South Kordofan (Sudan) situated on the border between Northern and Southern Sudan (see Figure 1 below). The Government of Sudan and the Sudan People's Liberation Movement/Army (SPLM/A) disagreed on the boundaries of the Abyei Area which they defined as "the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905"³.

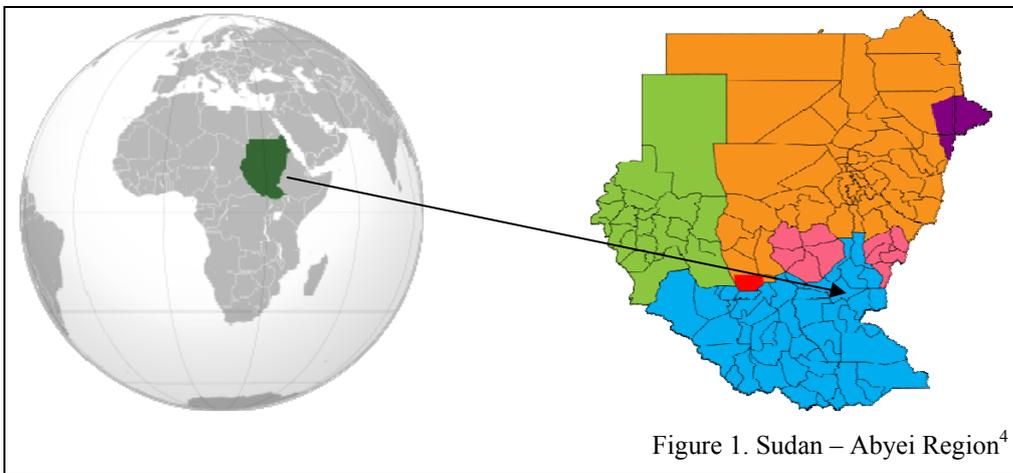


Figure 1. Sudan – Abyei Region⁴

³ Protocol between the Government of the Republic of Sudan (GOS) and the Sudan People's Liberation Movement/Army (SPLM/A) on the Resolution of Abyei Conflict, 26 May 2004, section 1.1.2 [Abyei Protocol].

⁴ The image is a derivative work by the authors. It is based upon [http://en.wikipedia.org/wiki/File:Sudan_\(orthographic_projection\)_highlighted.svg](http://en.wikipedia.org/wiki/File:Sudan_(orthographic_projection)_highlighted.svg), originally created by Dinamik, licensed under the Creative Commons Attribution-Share Alike 3.0 Unported license (<http://creativecommons.org/licenses/by-sa/3.0/deed.en>) and upon http://en.wikipedia.org/wiki/File:Political_Regions_of_Sudan,_July_2006.svg, originally created by Lokal_Profil and Wiz9999, licensed under the Creative Commons Attribution-Share Alike 2.5 Generic license (<http://creativecommons.org/licenses/by-sa/2.5/deed.en>). The resulting image therefore is licensed under the Creative Commons Attribution-Share Alike 2.5 Generic license.

I. Historic Background

As is the case with many (or even most) current disputes, the roots of the conflict can be traced to the past. In the eighteenth century, Abyei was inhabited by the sedentary Ngok Dinka and the nomadic Misseriya.⁵ At the time of the establishment of the Anglo-Egyptian Condominium in 1899, the Misseriya could be predominantly situated in “northern” Kordofan, while the Ngok Dinka inhabited “southern” Bahr el Ghazal. However, in 1905 the British redistricted all nine Ngok Dinka chiefdoms into Kordofan – which explains the above formulation of the definition of the Abyei area.

The First Sudanese Civil War (1956–1972) – in which the Misseriya and the Ngok Dinka found themselves on opposite sides – was ended by the 1972 Addis Ababa Agreement which included a clause that provided for a referendum to allow Abyei to choose to remain in the North or join the autonomous South.⁶ This referendum was never held and renewed conflicts “about power, resources, religion and self-determination led in 1983 to a second civil war”.⁷ In particular, the discovery of oil in the region led to many ‘initiatives’ on both sides to consolidate oil-rich areas into the northern, respectively the southern administration.⁸ Many Ngok Dinka supported the rebels and rose to leadership positions in the Sudan People’s

⁵ Abyei Arbitration, *supra* note 1, 32–37; D. Bekoe *et al.*, ‘Resolving the Boundary Dispute in Sudan’s Abyei Region’ (October 2005) available at <http://www.usip.org/publications/resolving-boundary-dispute-sudans-abyei-region> (last visited 9 March 2011).

⁶ SPLM/A Memorial, PCA No. GOS-SPLM 53,391, 18 December 2008, paras 381-405.

⁷ Abyei Arbitration, *supra* note 1, para. 109.

⁸ Abyei is located within the Muglad Basin, a large rift basin which contains a number of hydrocarbon accumulations. Following intensive oil exploration in the 1970s and 1980s, a period of significant investment in Sudan’s oil industry occurred in the 1990s and by 2003 Abyei contributed more than one quarter of Sudan’s total crude oil output. Production volumes have since declined and reports suggest that Abyei’s reserves are nearing depletion. An important oil pipeline, the Greater Nile Oil Pipeline, travels through the Abyei area from the Heglig and Unity oil fields to Port Sudan on the Red Sea via Khartoum. The pipeline is vital to Sudan’s oil exports which have boomed since the pipeline commenced operation in 1999. (APS Review Downstream Trends, ‘SUDAN: The oil sector’ (29 October 2007) available at <http://www.entrepreneur.com/tradejournals/article/170592332.html> (last visited 11 March 2011); USAID 2001, ‘Sudan: Oil and gas concession holders’ (map), University of Texas Library, available at http://www.lib.utexas.edu/maps/africa/sudan_oil_usaid_2001.pdf (last visited 14 March 2011).

Liberation Movement/Army (SPLM/A). In contrast, the Misseriya opted to side the northern government in the 1980s. By the time of conclusion of the Comprehensive Peace Agreement,⁹ ending the Second Sudanese Civil War in 2005, most Ngok Dinka had moved out of Abyei, a fact on which the Misseriya partially base their claim for ownership of the area.

II. Legal Background

One of the cornerstones of a successful peace agreement had to be the determination of the status of Abyei. The first step towards such peace agreement was the 2002 *Machakos Protocol*, which defined Southern Sudan as the area as of independence in 1956,¹⁰ thus excluding the SPLM/A strongholds in Abyei, the Nuba Mountains and Blue Nile, known collectively during the talks as the Three Areas. It also provided for an internationally monitored referendum entitling the Southern Sudanese to vote on whether to secede from Sudan.¹¹

The 2004 Protocol on the Resolution of the Abyei Conflict accorded Abyei special administrative status, governed by a local executive council elected by the Abyei Area residents.¹² This Protocol also provided for the establishment of the Abyei Borders Commission (ABC) which would have to define and demarcate the precise borders of the area.¹³ The Abyei Appendix, signed later in the same year, elaborated on the 15-member composition of the ABC: five members were to be appointed by the government, five by the SPLM/A and five impartial experts by the Intergovernmental Authority on Development, the United States and the United Kingdom.¹⁴ Finally, in 2005, the Comprehensive Peace Agreement

⁹ 'The Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/ Sudan People's Army' (9 January 2005) available at <http://www.aec-sudan.org/docs/cpa/cpa-en.pdf> (last visited 9 March 2011).

¹⁰ The Machakos Protocol (20 July 2002) available at <http://www.aec-sudan.org/docs/cpa/cpa-en.pdf> (last visited 9 March 2011).

¹¹ *Id.*, Article 2.5.

¹² Abyei Protocol, *supra* note 3, sections 2.1-2.2.

¹³ Abyei Protocol, *supra* note 3, section 5.1-5.3.

¹⁴ Abyei Appendix, 'Understanding on Abyei Boundary Commission' available at http://www.sslagoss.org/documents/Implementation_Modalties_of_the_Protocol_on_the_Resolution_of_the_Abyei_Conflict.pdf (last visited 9 March 2011), section 2.

was signed which integrated the aforementioned and other instruments under one overarching umbrella.

III. The ABC Report and the Subsequent Arbitration Agreement

The ABC Experts studied the arguments of the Government of Sudan and the SPLM/A, heard testimony from a large number of witnesses and examined archives and sources in Sudan, the United Kingdom, South Africa and Ethiopia. The ABC Experts officially presented their report to the Sudanese president on 14 July 2005, determining that the Ngok “have a legitimate dominant claim to the territory from the Kordofan-Bahr el-Ghazal boundary north to latitude 10°10’N” while recognizing that the two Parties have shared rights to the remaining area.¹⁵ The latter conclusion led the ABC Experts to decide that it was “reasonable and equitable to divide [this remaining area] between them”, leaving the precise identification and demarcation of the northern and eastern boundaries to a survey team.¹⁶

Upon delivery of this Report, disagreements arose between the Parties as to whether the Experts had exceeded their mandate and sufficiently reasoned their decision.¹⁷ By 2007, armed violence between Ngok Dinka and Misseriya was again widespread and the SPLM/A had withdrawn from the Government of National Unity, amidst rising tensions allegedly fuelled by foreign pressures.¹⁸ To avoid a return to a full-blown civil war, the

¹⁵ ABC Experts’ Report to the Sudanese Presidency, 14 July 2005, Part 1, 20-21.

¹⁶ *Id.*, 21-22.

¹⁷ Abyei Arbitration, *supra* note 1, para. 133.

¹⁸ Z. Ochieng ‘Sudan: CPA Was Doomed - None of the Signatories Had Any Conviction’ (20 October 2007) available at <http://allafrica.com/stories/200710230704.html> (last visited 11 March 2011); D. Kilner, ‘Clashes on Sudan’s North-South border threaten Peace Deal’ (10 March 2008) available at <http://www.voanews.com/english/news/a-13-2008-03-10-voa49-66809837.html?rss=africa> (last visited 11 March 2011); S. Wheeler., ‘Armed Sudanese nomads block key north-south route’ (12 February 2008); IRIN, ‘SUDAN: War of words after scores killed in Abyei’ (3 March 2008) <http://www.irinnews.org/Report.aspx?ReportId=77072> (last visited 11 March 2011), BBC, ‘Arab nomads dead in Sudan clashes’ (2 March 2008) available at <http://news.bbc.co.uk/2/hi/africa/7273838.stm> (last visited 11 March 2011); A. Shahine., ‘Sudan nomads clash with ex-rebels, dozens killed’ (2 March 2008) available at http://www.reuters.com/article/2008/03/02/idUSL02440386.CH_2400 (last visited 11 March 2011); Sudan Tribune, ‘Fresh fighting breaks out in Sudan North-South border region’ (21 March 2008) available at http://www.sudantribune.com/spip.php?page=imprimable&id_article=26451; IRIN,

Sudanese President, Omar al-Bashir, and the President of the autonomous Government of Southern Sudan, Salva Kiir Mayardit, agreed in June 2008 upon The Road Map for Return of IDPs and Implementation of Abyei Protocol which provided, among other matters, for the referral of the *Abyei* dispute to arbitration.¹⁹ This agreement was implemented a month later through the conclusion of the Arbitration Agreement between the Government of Sudan and SPLM/A.²⁰ The arbitral procedures were to take place at the Permanent Court of Arbitration (PCA) under the PCA's Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State. Both Parties to the dispute committed to abide by and implement the resulting arbitral award.

Following an extensive exchange of written submissions, the Parties presented their oral submissions to the arbitral tribunal from 18 to 23 April 2009 during the hearings at the Peace Palace in The Hague. Contrary to the highly confidential atmosphere which usually surrounds such proceedings, the Parties to this dispute agreed to broadcast the hearings via the internet, which allowed the public in Sudan and elsewhere to watch how and which arguments were put forward. After the conclusion of the oral hearings, the arbitral tribunal commenced its deliberations and, less than ninety days later, on 22 July 2009, a final and binding decision was rendered concerning the validity of the Abyei Area boundaries identified and delimited by the ABC Expert Report.²¹ Announcements by both – the Government of Sudan and the SPLM/A, that they would accept the arbitral decision were

'SUDAN: Rising tension in Abyei as clashes displace hundreds' (24 March 2008) available at <http://www.irinnews.org/Report.aspx?ReportID=77419> (last visited 11 March 2011).

¹⁹ 'The Road Map for Return of Internationally Displaced Persons and Implementation of Abyei Protocol' (8 June 2008) available at <http://www.cmi.no/sudan/doc/?id=976> (last visited 9 March 2011), section 4.

²⁰ *Arbitration Agreement between The Government of Sudan and The Sudan People's Liberation Movement/Army on Delimiting Abyei Area*, PCA No. GOS-SPLM-53,004, 7 July 2008.

²¹ The Award was rendered by a majority of 4 to 5 (Judge Awn Al-Khasawneh dissented because he found the majority opinion "very similar to the ABC Experts' Report itself and like it as far in excess of mandate as it is removed from historical (and contemporary) reality". Dissenting Opinion of His Excellency Judge Awn Shawkat Al-Khasawneh Member of the International Court of Justice, 1.

welcomed by the United Nations, the European Union and the United States.²²

The award partially annulled the conclusions of the ABC Report based on the finding that the Experts had exceeded their mandate in certain respects. The re-delimitation of the northern, eastern and western boundaries was ordered, while the arbitral panel endorsed the experts' conclusions with respect to the southern boundaries and the grazing and other traditional rights.²³ The re-defined borders accord control over the richest oil fields in the Abyei region to the government of (northern) Sudan, but not without assigning several oil fields to the south and reaffirming the status of the town of Abyei as the heartland of the Ngok Dinka (see Figure 2 below). As a result, the size of the Abyei Area has been decreased which might prove to be of crucial influence on the outcome of the referendum on 9 January 2011. In this referendum, the residents of the Abyei Area were able to vote on whether to become part of northern or southern Sudan. Most members of the Misseriya tribe are located outside the redefined borders, making it presumably more likely that the region will vote to join the south. The stakes here are considerable as through this choice, the residents of the Abyei Area might in fact be opting to become nationals of an entirely different country – if, as expected, South Sudan secedes from the North on the basis of the recognized right of self-determination of its inhabitants.²⁴

²² S. Ottermann, 'Court Redraws Disputed Area in Sudan' (22 July 2009) available at <http://www.nytimes.com/2009/07/23/world/africa/23sudan.html> (last visited 11 March 2011).

²³ Abyei Arbitration, *supra* note 1, para. 770.

²⁴ Abyei Arbitration, *supra* note 1, paras 594-601; see also 'New borders for Sudan oil region', *BBC News* (22 July 2009).

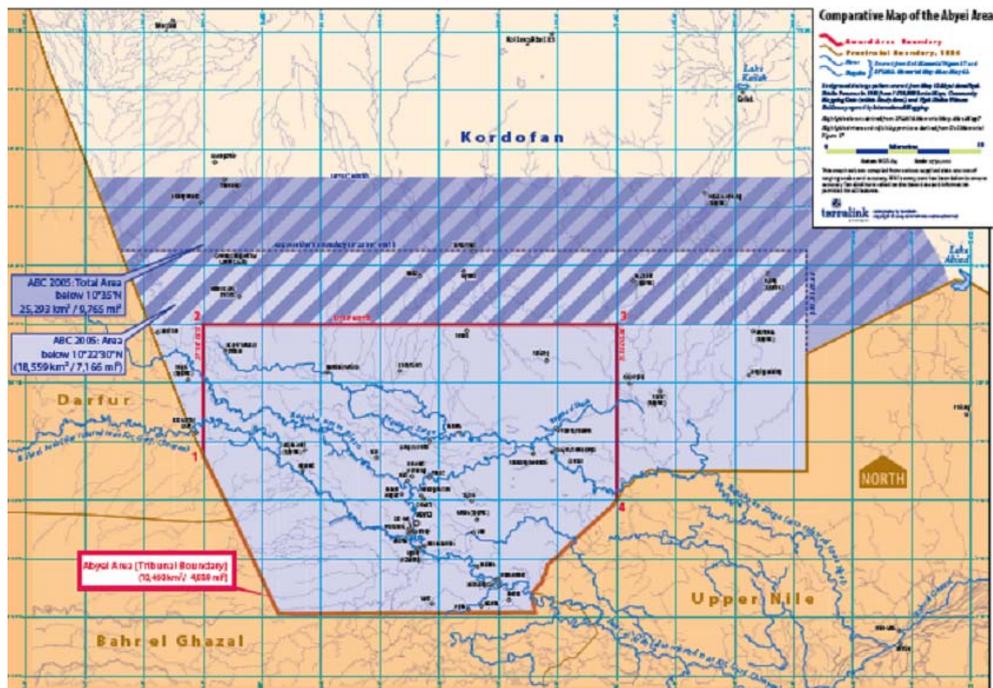


Figure 2. Comparative Map of the Abyei Area²⁵

C. Special Procedural Features of the Abyei Arbitration

This part aims to focus on the most specific procedural features of the *Abyei* proceedings, which distinguish it from other mixed arbitrations, so as to analyze whether they could serve as a model or as a lesson for future instances of intra-State dispute resolution. Three points will be assessed in particular: first, the choice by the Parties of the 1993 PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State as a governing procedural framework and their utility therein; second, the underlying needs prompting the modification of the so-chosen procedural rules, in particular the unique fast-track time lines set out in the Arbitration Agreement between the Parties, requiring *inter alia* the tribunal to render its award within 90 days after the end of the hearings; and third, the transparency of the proceedings as a model for involving the interested stake holders and the affected civil society in the proceedings as part of the peace

²⁵ *The Government of Sudan/The Sudan People's Liberation Movement/Army (Abyei Arbitration)*, Final Award, PCA, 22 July 2009, Appendix 2, 272.

and reconciliation process; and finally the way the Parties dealt with the costs of the arbitration.

The most obvious procedural specificity of the *Abyei* Arbitration is the involvement as a party to it of a non-State actor, *i.e.*, a self-determination unit of people, represented in the proceedings by the Sudan People's Liberation Movement/Army. This unique instance of procedural standing in a contentious case would have been unfeasible under the governing rules of any standing international court or tribunal as they stand today. This was surely an underlying consideration in choosing arbitration to resolve the dispute. Another interesting feature in terms of procedural standing was that the Parties did not fall under the most typical opposition "applicant" v. "respondent" but were placed on the exact same procedural footing. Last but not least, it is specific to this arbitration that its underlying subject matter remains yet to be qualified as being an internal or an international boundary, depending on the results of the 2011 referendum.²⁶

I. The Choice of the PCA Optional Rules for Arbitrating Disputes between two Parties of Which Only one is a State

The Parties to the Arbitration Agreement chose as suitable rules of procedure the PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State in their latest 1993 edition and introduced specific modifications therein, tailored to meet their needs.

The PCA Optional Rules are a flexible set designed by the institution specifically for mixed arbitration and are unique in that sense. Their roots can be traced back to the 1935 case of *Radio Corporation of America v. the National Government of the Republic of China*,²⁷ which was the first arbitration involving a non-State party administered under the auspices of the PCA. Back then, such a situation was unusual and not expressly contemplated under the 1899 and 1907 founding Hague Conventions for the

²⁶ See e.g. P. Muhlendahl, 'International tribunal Redraws Boundaries of Sudanese Abyei Region: a Chance for Peace?' (10 December 2009) available at <http://www.haguejusticeportal.net/eCache/DEF/11/256.html> (last visited 9 March 2011), 1.

²⁷ 'Radio Corporation of America v. the National Government of the Republic of China', Award of the Tribunal (13 April 1935) available at <http://www.pca-cpa.org/upload/files/RCA%20v.%20China.pdf> (last visited 9 March 2011).

Pacific Settlement of International Disputes, so the International Bureau of the PCA had to inform the Member States through the Administrative Council that it considered itself having the power to administer the case, having been requested to do so by the Presiding Arbitrator in that case, Professor van Hamel.²⁸ In 1960, the Administrative Council gave its authoritative broad interpretation of Article 47 of the 1907 Hague Convention, so as to authorize the development of the first 1962 Optional Rules for Arbitrating Disputes between two Parties of which Only One is a State.²⁹ The provision was used as a basis for allowing the administration of mixed arbitrations provides in the relevant part,

“The Bureau is authorized to place its offices and staff at the disposal of the Contracting Powers for the use of any special Board of Arbitration”.

The PCA Member States endorsed the interpretation of “special Board of Arbitration” as encompassing mixed arbitrations in addition to the traditional inter-State ones, given the absence of specific wording to the contrary, following the precedent already set in 1935.³⁰

The underlying reason for the drafting of these rules was not unrelated to the diminishing amount of inter-State disputes referred to arbitration after the establishment of the World Court. There was a need to search for a different procedural mandate, identified expressly in 1960 by the Secretary-General of the PCA when informing the Administrative Council that the International Bureau was studying the possibility of facilitating arbitration between a State and private corporations, requesting the Council to charge him to continue these studies.³¹ Unlike the current 1993 Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State, which are open to States not members of the PCA, the 1962 set provided that the State concerned had to be a Party to one of the two Hague Conventions.

²⁸ Conseil Administratif de la Cour Permanente D'Arbitrage, *Annuaire*, 1 April 1935.

²⁹ Bureau International de la Cour Permanente D'Arbitrage, *Annuaire*, 29 November 1960.

³⁰ Conseil Administratif de la Cour Permanente D'Arbitrage, *Annuaire*, 1 April 1935.

³¹ Bureau International de la Cour Permanente D'Arbitrage, *Annuaire*, 29 November 1960. Note du Secetaire General No. 9980 C.A. regardant les conflits entre les Etats et les corporations privées.

It is noteworthy that the current rules are largely based on the UNCITRAL Arbitration Rules of 1976, which were created to meet the need of an *ad hoc* procedure acceptable for disputing private parties coming from different legal, social and economic systems, to enhance their economic relations.³² The Rules from the States' perspective represent a mutually acceptable international standard.³³ The UNCITRAL Rules were a success as they are still widely used, very often by States themselves in their disputes with private parties arising under contracts and multilateral treaties. States also chose the UNCITRAL Rules as applicable procedure for mass-claim dispute settlement within the Iran-US Claims Tribunal and the UN Compensation Commission.

From a procedural point of view, all sets of the PCA Optional Rules are adopted by its Administrative Council acting pursuant to its mandate under Article 49 of the 1907 Hague Convention and its 1900 Rules of Procedure, setting out its power to adopt "its rules of procedure and *all other necessary regulations*" (emphasis added) making them an act of a recommendatory nature,³⁴ adopted by an organ of an international organization.³⁵ They are model rules, formally endorsed by the organization and made available not only to its Member States pursuant to Art. 51 of the 1907 Hague Convention, but also to other States, international organizations and private entities to agree upon, e.g., by a reference in their arbitration agreement. These Rules are optional, e.g., they need to be expressly agreed upon in writing by the Parties and furthermore, are flexible as they can be modified by a written agreement between the parties to Article 1(1) of the Optional Rules.

The PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State, contain themselves a few

³² GA Res. 31/98, 15 December 1976.

³³ D. Caron, L. Caplan & M. Pellonp, *The UNCITRAL Arbitration Rules: A Commentary* (2006), 1-2.

³⁴ "Les résolutions d'un organe internationale adressées à un ou plusieurs destinataires qui lui sont extérieurs et impliquant une invitation à adopter un comportement déterminé, action ou abstention.", M. Virally, 'La valeur juridique des recommandations des organisations internationales', 2 *Annuaire français de droit international* (1956) 66, 68.

³⁵ H. Schemers & N. Blokker, *International Institutional Law*, 4th ed. (2003), 769, para. 1244.

modifications to the UNCITRAL Rules, so as to reflect some of the special procedural considerations in arbitration involving a State. For instance, they provide for time periods which are twice as long with respect to (1) the timeline for constituting the arbitral tribunal, (2) for bringing challenges against arbitrators, (3) for providing witness evidence and (4) for requesting an additional award.³⁶ However, given the fast-track timeline adopted by the Parties to the *Abyei Arbitration*, these time periods could not have been a consideration for choosing the set of Optional Rules.

The PCA Rules do provide expressly though that the agreement to arbitrate under them constitutes a waiver of any sovereign immunity from jurisdiction.³⁷ This solution, despite the nearly settled jurisprudence on the matter is a useful consideration, worth explicit incorporation in an arbitration involving a State. The provision also sets out that the waiver of immunity from execution cannot be implied and has to be explicit. The Parties to the *Abyei Arbitration* did include a clause to that effect in Article 9(5) of their Agreement.

Another modification to the UNCITRAL Rules is set out in Article 1(4), providing for a possible role of the PCA as secretariat of the proceedings if agreed by all the parties. The Parties to the *Abyei* did make use of this option. They left without modification Article 16 of the Rules providing for The Hague as place of arbitration. This deliberate choice can be seen as a way of bringing the proceedings outside the area of conflict to a place traditionally perceived as neutral and arbitration-friendly in terms of its arbitration laws, as well as the non-interference approach adopted consistently by its national courts. The latter can constitute an important consideration in arbitral proceedings involving a sovereign.

³⁶ Arts 5, 11(1), 25 and 37(1) PCA Optional Rules for Arbitrating Disputes between two Parties of Which Only One is a State [PCA Optional Rules].

³⁷ *Id.*, Article 1(2).

II. The Modifications to the PCA Rules Introduced by the Parties

1. The Fast-Track Procedure

The Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting the Abyei Area was deposited with the PCA on 11 July 2008, four days after its signature by the Parties on 7 July. The Agreement itself however stipulated in Article 4(1) that the arbitration process was deemed to have commenced prior to that date – on 8 June 2008. This is an indication of the underlying urgency of the proceedings. The contextual element of the ongoing conflict and ethnic tensions discussed above, prompted the Parties to conduct the probably fastest delimitation arbitration in modern history.

Illustrative of the unusual speed of the proceedings is not only the 'retroactive' commencement of the arbitration, but more importantly the tight timelines set by the Parties. Namely, pursuant to Article 4(3) of the Agreement, the Tribunal had to endeavor to complete the entire arbitration within six months of its commencement, subject to the possibility of an extension for three months, if necessary. Furthermore, the procedure for the appointment of arbitrators (set out in great detail in Article 5), unlike other procedural rules imposes specific deadlines not only on both Parties, but also on the Appointing Authority and the Party-appointed arbitrators, with no previewed possibility for their extension. The formation of the five-member Arbitral Tribunal was completed on 27 October 2008 with the appointment of the fifth, Presiding Arbitrator by the Secretary-General of the PCA pursuant to Article 5(12) of the Arbitration Agreement. The Tribunal started to work as soon as it was constituted in accordance with Article 4(2) of the Agreement, *i.e.* on 30 October 2008, when the fifth Presiding Arbitrator signed his declaration of independence and communicated it to the Parties. In fact, the first two arbitrators were appointed by the Government of Sudan on 14 August, followed on the very next day by the two appointments by the SPLM/A and the appointment of the President of the Tribunal filing the agreement of the four arbitrators on 27 October 2008 by the Appointing Authority. The entire process took 95 days.

The conduct of the proceedings themselves was also specifically defined as fast-track, in accordance with Article 8(3) of the Agreement. The

two phases of the written pleadings consisted of simultaneous exchanges of memorials and counter-memorials within two six-week periods, followed only 30 days later by the oral pleadings. The written submissions exceeded 20,000 pages in volume and the hearings went on for six days. In the definition of the timelines for the proceedings, in contrast to those regarding the appointment of arbitrators, the Tribunal was given the discretion of extension 'for good cause' and up to a maximum of 30 days for each party.³⁸ This provision was used by the Tribunal in the course of the proceedings to grant a 14-day extension to the Government of Sudan at its request.

Another specific characteristic of the Arbitration Agreement was the incorporation of multiple safeguards to prevent any possible obstruction or delay of the fast-track proceedings by either the parties or the arbitrators. These were set out for instance in Article 4(8), providing for the continuation of the proceedings if either party defaults in submitting written pleadings or in appearing at the oral stage. Article 5(5) safeguards against a default of any of the parties in appointing their respective arbitrators by empowering the appointing authority to act on their behalf. Last but not least Article 5(14) previews a situation of a truncated tribunal, giving discretion to the remaining at a minimum of three arbitrators to continue the proceedings and to issue an award. It can be observed that the Arbitration Agreement was successfully complied with by the arbitrators and the Registry and the ambitious fast-track procedure previewed therein was adhered to. The proceedings were completed within a year of their commencement with the issuing of a 269-page award on 22 July 2008, accompanied by a 67-page dissenting opinion. The 90-day post the closure of submissions requirement was also met as the hearings were closed on 23 April and the award followed exactly on the 90th day.

The unprecedented expediency of the *Abyei* proceedings demonstrates the freedom of parties to arbitration to tailor its procedure so as to meet their political and other contextual needs, making it particularly suitable for dispute resolution in the context of post-conflict situations. It is remarkable that there were no outbreaks of hostilities during the proceedings, which were broadcasted publicly in Sudan and the Abyei region. It can be

³⁸ Arbitration Agreement, *supra* note 20, Article 8(7).

observed therefore, that the fast-track proceedings met not only the formal deadlines imposed, but also the broader practical objectives of the Parties.

2. The Transparency of the Proceedings

It is very rare in instances of mixed arbitration that parties agree to make the very existence of the proceedings, let alone each of their stages public. In the record of the PCA, this has happened only in a few instances, including the 1935 case between the Radio Corporation of America and China, the 2003 *Eurotunnel* arbitration,³⁹ three NAFTA proceedings and a few investment arbitrations.⁴⁰ Confidentiality remains the overall rule.

In this context, transparency was a procedural feature specific to the *Abyei Arbitration*. It was set out in the Arbitration Agreement itself and later reinforced by specific requests of the Parties. It should be noted that the PCA Optional Rules follow the UNCITRAL Rules on the issue of confidentiality, providing e.g. in Article 25(4) that in the absence of an agreement to the contrary, hearings shall be held *in camera* and that the award shall not be made public without the consent of both parties pursuant to Article 32(5). However, the Parties to the *Abyei Arbitration* did expressly agree otherwise, providing specifically that the oral pleadings were to be open to the media and that the PCA ought to issue periodic press releases regarding the progress of the proceedings, as well as to make publicly available on its website the submissions of the Parties and the final award.⁴¹ An additional requirement imposed by the Parties was the translation of the award into Arabic.

In addition to these very strong guarantees of transparency, the Parties agreed to the proposal of the PCA to make a live webcast of the proceedings, available on its website, which, together with the broadcast of the award ceremony, was accessed by over 3000 spectators from more than 50 countries. Furthermore, the Parties specifically requested the Registry to

³⁹ 1. *The Channel Tunnel Group Limited 2. France-Manche S.A. v. 1. The Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland 2. Le ministre de l'équipement, des transports, de l'aménagement du territoire, du tourisme et de la mer du Gouvernement de la République française*, 2003.

⁴⁰ Available at http://www.pca-cpa.org/showpage.asp?pag_id=1029 (last visited 9 March 2011).

⁴¹ Arbitration Agreement, *supra* note 20, Arts 8(6) and 9(3).

organize a special ceremony for the rendering of the arbitral award, another act not typical for arbitration where copies of the awards are usually communicated to the parties.⁴² The ceremony attracted 200 attendees from the Parties, broad media coverage, as well as representatives from the 13 witness States and from the EU. Both Parties expressed publicly their satisfaction after the rendering of the award, as well as their readiness to comply with it.

It seems that the underlying reason that prompted the Parties to choose transparency as opposed to confidentiality despite the high political sensitivity of the subject matter of the dispute was the bringing the process of justice closer to the people whose lives it directly affected as a matter of confidence-building and legitimacy and as a measure for counteracting the tension in the region. Given the absence of hostile outbreaks during the proceedings and the rendering ceremony, despite the fears to the contrary, it can be concluded that transparency served its purpose. It also contributed to the raising of awareness and the engagement of the international community in the peace process, of which the arbitration itself was only a part. Transparency served as a channel of communication both ways, from justice to the people and the other way round, keeping the Tribunal conscious of the people's livelihoods at stake. As stated by the President of the Tribunal,

“[t]he presence of party representatives from all of Sudan, many of whom have a direct stake in the outcome of these proceedings, has been particularly significant to us, and truly fulfils the very purpose for which this peace palace was built”⁴³.

Last, but not least, transparency enhanced the widespread support of the award by observers and interested Parties, as well as the academic community, manifested in the increasing numbers of journal articles analyzing it.⁴⁴

⁴² See e.g. 1976 UNCITRAL Arbitration Rules, Art. 32(6); and PCA Optional Rules, *supra* note 36, Art. 32(6).

⁴³ P.-M. Dupuy, Presiding Arbitrator of the Tribunal, Award Rendering Ceremony, 22 July 2009.

⁴⁴ See e.g., J. R. Crook, ‘Abyei Arbitration – Final Award’, 13 *American Society of International Law Insights* (2009) 15; W. J. Miles & D. Mallett, ‘The Abyei Arbitration and the Use of Arbitration to Resolve Inter-state and Intra-state Conflicts’, 1 *Journal of International Dispute Settlement* (2010) 2, 313; B. W. Daly, ‘The Abyei

3. The Costs of the Arbitration

Costs of the proceedings are a feature of international arbitration often referred to as one of its disadvantages compared to court proceedings, the latter being described as ‘free’. What is not mentioned often is that the biggest part of the costs, in both instances, tends to be the one spent on legal representation, rather than on the administration of justice itself. The Parties to the *Abyei Arbitration* were clearly in an unequal position as between each other, as well as in an overall weak position in terms of meeting the costs of the proceedings. The latter observation shows why they provided in Article 11 of the Arbitration Agreement that it is for the Government of Sudan to direct the payment of the costs of the arbitration regardless of the outcome of the proceedings, whereas their comparatively low financial possibilities motivated them to apply to the PCA Financial Assistance Fund and seek assistance by the international community.

The PCA Financial Assistance Fund for the Settlement of International Disputes was established in 1995 at the initiative of the Secretary-General and with the approval of the Administrative Council. In accordance with its Terms of Reference and Guidelines, it has as an objective the “making [of] funds available to meet costs of this nature [to] facilitate recourse to arbitration or other means of settlement, thus advancing the aims and purposes of the Conventions, and promoting friendly relations and cooperation among States”⁴⁵. It is open to “qualifying” Member States e.g. those listed in the OECD list of developing countries and consists of voluntary contributions by States, international organizations and other members of the international community.⁴⁶ For the *Abyei Arbitration*, 500,000 EUR were contributed to the Fund by The Netherlands, France and Norway and allotted respectively to the Parties to meet what amounted to 20% of the overall costs of the arbitration.

This experience is indicative of the interest and readiness of the international community to facilitate the resolution of intra-State disputes in

Arbitration: Procedural Aspects of an Intra-State Border Arbitration’, 23 *Leiden Journal of International Law* (2010) 4, 801.

⁴⁵ Permanent Court of Arbitration, Terms of Reference and Guidelines of the Permanent Court of Arbitration Financial Assistance Fund (11 December 1995), available at: <http://www.pca-cpa.org/upload/files/FUNDENG.pdf> (last visited 12 March 2011), para. 2.

⁴⁶ *Id.*, paras 4 and 5.

conflict areas by supporting the Parties in their recourse to peaceful third-party settlement where they cannot afford covering the expenses. It is a rare instance of communitarian action at the international level. Notably, in the *Abyei Arbitration*, the private sector contributed to the cost efficiency too, e.g. the SPLM/A was represented *pro bono* by Wilmer Cutler Pickering Hale and Dorr LLP, London and by the Public International Law Policy Group (“PILPG”).

D. Arbitration: The Future for Intra-State Conflicts?

The situation in Abyei is not unique: many conflicts on the African continent and beyond consist of an explosive mix of disputed boundaries, contentious ownership of natural resources, self-determination claims, absence of access to dispute settlement for non-State entities, lack of conclusive historical evidence, non-transparency of pending legal procedures (if any). There are numerous examples in this regard, to name just a few: the civil war in Chad, the conflicts in the aftermath of the war in the Democratic Republic of Congo, the ongoing violence in Nigeria and the most recent power shifts and challenges in the Arab States. These conflicts are evidently not identical to the Abyei Area dispute, but they contain all or most of the factors enumerated above.

In the following paragraphs, this study will address the viability of arbitration as a method of peaceful settlement of intra-state disputes over land and natural resources, particularly where one of the Parties is invoking its right to self-determination, as recognized by the international community. The question of what the Parties perceive to be a fair and efficient procedural framework in such politically sensitive and financially relevant instances will also be touched upon. Finally, the implementation by both Parties to the dispute and the actual impact of the award on the ground will be assessed.

I. Disputes Concerning (Non-)Tangible Matters Involving Non-State Actors

International law traditionally was seen as the law regulating relations between States.⁴⁷ Innovative developments, especially in the 20th century,

⁴⁷ E.g. L. Oppenheim, *International Law: A Treatise*, Vol. 1, 3rd ed. (2005), 25.

have established the role of the individual in the international legal system, both as the holder of rights, for example, in human rights law, or more rarely, even as the holder of duties, for example, in international criminal law. Even companies have, if the required investment treaties are in force, access to international arbitration if they wish to bring a claim against the State hosting their investment. However, entities which do not fit within the human rights or investment framework on the one hand, but which are not States or international organizations on the other hand, may fall in a procedural legal void. Such entities include most prominently ‘rebel’ or secessionist movements, which either wish to take over control of the mother State (for example, in cases where the outcome of an election is not recognized by the previous government) or which wish to rely on self-determination to establish their own independent State.

This study does not elaborate on whether such claims are well-founded under the international rules on self-determination, but rather, the focus is on the options available to non-State entities to have their disputes settled by peaceful means. Arbitration seems to be a good means for this purpose, when negotiation and national legal remedies have failed, as States are understandably unwilling to allow such disputes to be brought before the International Court of Justice since doing so might be interpreted as an implicit recognition of the statehood of their secessionist adversary. One of the core tasks which arbitral panels have fulfilled in the past has been territorial and maritime delimitations, in other words, the solution of boundary disputes, often entailing a division of natural resources.⁴⁸ As many current conflicts center around this issue (albeit not necessarily the delimitation of boundaries between States, but also of internal boundaries, *i.e.* within one State), the only new element would be that there is a non-State actor participating in the arbitral process.

⁴⁸ E.g., *Dutch-Portuguese Boundaries on the Island of Timor*, *The Netherlands v. Portugal*, PCA Award, 25 June 1914; *The Island of Palmas Case (or Miangas)*, *United States of America v. The Netherlands*, PCA Award, 4 April 1928; *Eritrea/Yemen – Sovereignty of Various Red Sea Islands*, *State of Eritrea v. Republic of Yemen*, PCA Award, on Sovereignty, 9 October 1998; *Eritrea v. Yemen*, PCA Award on Maritime Delimitation, 17 December 1999; *Proceedings Pursuant to the Law of the Sea Convention (UNCLOS)*, *Barbados v. Trinidad and Tobago*, PCA Award, 11 April 2006; *Proceedings Pursuant to the Law of the Sea Convention (UNCLOS)*, *Guyana v. Suriname*, PCA Award, 17 September 2007.

The solution of conflicts about ‘intangible issues’, such as violations of human rights or the return of internally displaced persons (IDPs), is more difficult than the drawing of a boundary, but even then, devising such a solution is not impossible. A compensation formula could possibly be worked out for the assessment of mass claims, similar to the Eritrea–Ethiopia Claims Commission⁴⁹ or the Iran–United States Claims Tribunal.⁵⁰ This could imply that a system with a transparent evidence threshold would be devised: victims would have to prove ‘x, y and z’ in order to fall in a certain compensation category. This compensation could then be paid from funds transferred by the parties into a blocked account.

II. Fair and Efficient Dispute Resolution

1. Arbitration v. Litigation

It is often asked why the Government of Sudan and the SPLM/A opted for arbitration. Clearly there was more than one underlying consideration, including but not limited to the legal personality of one of the disputing Parties and the absence of an appropriate international court, giving procedural standing to non-State parties like the SPLM/A e.g., Article 34(1) of the Statute of the ICJ unequivocally sets out that: “Only States may be parties in cases before the Court”. Cases of such caliber often do not fall in the narrow competence of specialized courts and tribunals, many of which are not open to non-State parties, too.

⁴⁹ The Eritrea-Ethiopia Claims Commission was established and operated pursuant to the ‘Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea’, 12 December 2000. The Commission rendered its Final Awards on Damages in each Party’s Claims on 17 August 2009; see also H. Van Houtte, ‘Arbitration to Settle Private War-Damage Claims? The Eritrea-Ethiopia Claims Commission Revisited’, in T. Weiler & F. Baetens, *New Directions in International Economic Law – In Memoriam Thomas Wälde* (forthcoming – manuscript on file with author).

⁵⁰ The Iran-United States Claims Tribunal was established on 19 January 1981 by the Islamic Republic of Iran and the United States of America as recorded in two Declarations made on 19 January 1981: the “General Declaration” and the “Claims Settlement Declaration” (the “Algiers Declarations”). To date, the Tribunal has finalized over 3,900 cases; see also C. R. Drahozal & C. S. Gibson, ‘The Iran-U.S. Claims Tribunal at 25 – The Cases Everyone Needs to Know for Investor-State & International Arbitration’ (2007).

Therefore, the only possibility for peaceful 3rd party dispute settlement left to non-state actors, including self-determination units and other distinct groups or movements, with regard to their disputes with the State or among each other is through arbitration. However, even if this reason is an important one, it cannot have been the only reason to resort to arbitration. There were other procedural advantages in the dispute settlement process, which are also relevant to future similar cases.

2. An Arbitration Agreement Tailored to the Needs of the Parties

Certain considerations cannot and should not be automatically ‘copied’ from the *Abyei* to other cases, although the main underlying principles such as a final and binding award, would remain the same. Setting up arbitrations for other conflicts might even be easier as certain ‘unique’ factors in the *Abyei* case, such as the issues relating to the partial annulment of the ABC Report, are not likely to feature in other intra-State cases. Hence, it would be advisable that parties to this type of disputes would separately conclude an arbitration agreement for each dispute, identifying the applicable law and the mandate of the arbitral tribunal among other matters.

In addition, the PCA’s *Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State* seem well-suited for the purpose as shown by the *Abyei* case. These Rules emphasize flexibility and party autonomy, but moreover provide that agreement to arbitrate under the Rules constitutes a waiver of any sovereign immunity from jurisdiction. Particularly for some conflicts, it is relevant that these Rules are also appropriate for use in connection with multiparty agreements, provided that appropriate changes are made in the procedures for choosing arbitrators and sharing costs.

3. Neutrality

The perceived neutrality of binding dispute settlement by an independent third party was politically more viable for both sides than accepting a negotiated settlement, inevitably involving concessions by the two parties. This was even more so against the background of their historical opposition while the prior expert determination set out in the ABC Report on both fact and law could not outweigh the persisting differences.

Furthermore, the choice of The Hague, “the capital of justice” as a place of the arbitration was surely not coincidental, but contributed further to the perception of neutrality. However, parties to similar conflicts in the future might wish to avoid any allegations of real or perceived ‘euro-centricity’ and therefore consider choosing a location within or closer to their region as seat of the arbitration, depending on the scale of the conflict at hand. Such choice is perfectly possible within the remit of the PCA Optional Rules⁵¹ and should certainly not automatically be seen as negatively affecting the neutrality of the whole procedure.

4. Fast-Track?

The speed of the proceedings was a major consideration for the Parties as the arbitration was only a part, even if an important one indeed, of the larger peace process and the flexibility of arbitration allowed the parties to adjust it to their specific needs. The question is whether the *Abyei* procedure, which was specifically tailored to meet the needs of the Parties to this longstanding dispute, involving the use of force and very particular political considerations, could be a viable model for other intra-State disputes. The tight timeline might not always be the optimal procedural model except where an underlying urgency and upcoming political event like a referendum so require. Even though feasible, fast track proceedings in delimitations and disputes of such complexity pose a substantial challenge to both parties and arbitrators.

As a result, a similar fast-track procedure might be seen as not advisable unless unavoidable *i.e.*, in the face of outbreak of hostilities, civil war, or a situation requiring a particularly urgent need of justice for the sake of maintaining or restoring peace. It is important to keep the option open in the light of new developments and changing circumstances, such as those currently witnessed in the Arab world. One might even raise the question, hypothetically, who would be the legitimate representative of a State in an arbitration/mediation/conciliation procedure when a Government is being challenged and overthrown. Another potential complication is that by entering into an international agreement, even if only a dispute settlement one, a Government is endowing the other entity with recognition under international law. However, in most cases, the advantages of such fast-track

⁵¹ PCA Optional Rules, *supra* note 36, Art. 16.

procedure are outweighed by its disadvantages, such as too much pressure on Parties, counsel and arbitrators; an extremely - restrictive time frame to develop normal-length arguments of substantial complexity; and, insufficient time to produce all necessary evidence and documents. These disadvantages could be especially burdening on the Respondent who is being brought to arbitration and has to organize its defense in a very short time.

5. Transparency

The transparency of dispute settlement proceedings which directly affect the lives of the peoples enhances the legitimacy, as well as the acceptance of the award. The publicity of the documents pertaining to the pending proceedings, the online webcasting of the hearings and the rendering of the award were a *sui generis* testimony of the Parties' reiterated commitments to respect it. At the award ceremony, the Parties spoke before the award was rendered, confirming that they would accept themselves to be bound by the decision, whatever it was, in front of the international community and society. The transparency of this arbitration was also an important confidence-building measure, aiming at bringing the Sudanese people closer to the administration of justice, as opposed to alienating them from the intra-state affairs that concern them directly. To this end, after authorization by the Tribunal, the PCA published the Press Release summarizing the final award in Arabic and English simultaneously on 22 July 2010. In sum, the transparency of the proceedings is definitely a positive model to be followed in future instances – its example was already followed by the ICJ, which opted to provide a webcast of the reading of the Kosovo Advisory Opinion.⁵²

⁵² 'Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion' (22 July 2010) available at <http://www.icj-cij.org/docket/files/141/15987.pdf> (last visited 9 March 2011).

III. Building Blocks Towards Long-Term Peace

1. Awareness and Participation

This arbitration succeeded in raising the awareness of the Sudanese people, the international community as a whole and the international civil society, including NGOs and other non-State actors in similar situations. Particularly through its transparency, local shareholders obtained a form of ‘local ownership of the claim’, which will hopefully in turn contribute towards an actual implementation on the ground. The sheer local interest in following or even participating in the arbitral procedures have made clear that a decision to rely on arbitration is supported by the real stakeholders in this type of dispute. Raising awareness among the international community created an atmosphere of ‘international co-responsibility’, involvement and support, culminating in a substantial financial contribution. The PCA Financial Assistance Fund which served to cover 20 % of the costs of the arbitration can surely be called a success, which could hopefully establish a precedent for future instances. In sum, the *Abyei* precedent of transparency and bringing international justice to the people could add to the legitimacy of future arbitrations, which have a similar significant public interest. The transparency provided by the application of information technology, which is a drastic departure of the classic creed of confidentiality, has certainly increased the legitimacy of this form of international dispute settlement in the eyes of the broader public.

2. Implementation

The goal of any type of international dispute settlement is precisely that: to settle, once and for all, an international dispute. Hence, one of the most important yardsticks to measure the success of the *Abyei* case and thereby its usefulness as a model for future intra-State dispute settlement is whether the *Abyei* award actually put an end to the violence (or is likely to do so in the foreseeable future). As explained above, the case was followed with great interest and approval by local stakeholders, many of which actually travelled to The Hague to witness the procedures in person. The award was well-received by both Parties and representatives of both the Government of Sudan and the SPLM/A expressed their firm intention to implement the ruling. Since then, the record has remained silent and there is very little data on what is currently happening in the Abyei Area. All actors

seem to be waiting with any demarcation until after the referendum of 9 January 2011.

However, in July 2010, Salah Abdullah, who is a senior (north) Sudanese official and former director of national security Gosh, already claimed that the Abyei issue should not be regarded as settled: “The [PCA] ruling did not resolve the dispute and was not adequate or fulfilling to the needs of both sides”⁵³. Moreover, the government of Sudan seems to be suggesting that migratory Misseriya from northern Sudan are “residents” of Abyei who must be allowed to vote in the referendum. This might affect the relative homogeneity of the region, resulting from the PCA award which decreased the size of the Abyei Area to its Ngok Dinka concentrated core. If the Misseriya are allowed to vote, this could potentially tip the voting balance in favour of joining the north. On 15 and 16 November 2010, Ngok Dinka leaders convened in an Abyei Referendum Forum opened by Government of South Sudan (GOSS) President Salva Kiir Mayardit. The final conference resolution was that, if no referendum is held on 9 January 2011, the Ngok Dinka will resort to ‘other means’ to join the South.⁵⁴ At the time of writing, the government of Sudan was refusing to allow the Abyei Referendum Commission to be established, which in turn prevented solutions of residency issues, voter registration, border demarcation (as opposed to delineation), wealth sharing, citizenship, and security.⁵⁵ International protest so far, including from the US and the EU, does not seem to resort any effect.

What does this tell us for future intra-State conflicts? While the *Abyei* dispute was pending in The Hague, violence in the region did not entirely come to a halt, where the deployment of military force (the Joint Integrated Units of the Sudanese army) and the eruption of violence, caused continued

⁵³ E. Reeves, ‘Compromising with Khartoum: Abyei and the Perils of Accommodation’ (26 November 2010) available at <http://www.dissentmagazine.org/atw.php?id=318> (last visited 12 March 2011), ‘Southern Sudan rejects ruling party’s proposal on Abyei’, *Sudan Tribune website* (17 September 2010); ‘Oil-rich Abyei region “likely” to ignite full-scale war in Sudan’ – commentary, *Sudan Tribune website* (17 September 2010); ‘Sudanese Official Hopes Abyei meeting will achieve “just peace” for area tribes’, *Sudan Tribune website* (4 October 2010).

⁵⁴ ‘Abyei waits’, 51 *Africa Confidential* (19 November 2010) 23, 6-7.

⁵⁵ Reeves, *supra* note 53; ‘Abyei waits’, *supra* note 54.

displacement of residents.⁵⁶ Peaceful and violent attempts to settle disputes are not *per se* mutually exclusive. However, it can be expected that the more peaceful settlement is resorted to, the more use of force will decrease – but good will is required by both Parties. It would be dangerously naive to assume that as soon as parties agree to bring their dispute before an arbitral panel, violence will automatically stop. Moreover, as a worst-case scenario, the danger exists that unimplemented awards, although legally binding, become irrelevant in practice through lack of enforcement. For future cases, it could be worth considering to develop some form of implementation strategy already in the arbitration agreement, rather than merely issuing general promises that an award will be complied with ‘regardless of the outcome’, e.g., by assuring more involvement of the international community.

E. Conclusion

While scholars and journalists nowadays often seem focused on presenting these cases as a necessary choice between either peace or justice in the context of the post-conflict reconciliation and rebuilding in Africa and other internal-conflict regions in the world, the *Abyei Arbitration* may serve as an integrating illustration that peace and justice are not mutually exclusive but instead complementary objectives. Parties must be made aware of the choice and given the means to settle their disputes peacefully through a neutral judicial process of their own choosing, including but not limited to arbitration. In this context, the possibility to initiate arbitration may not so much prevent the emergence of a conflict, but it could contribute to prevent further escalation and resolve existing conflicts.

Arbitration has some important advantages, first and foremost that it is a peaceful form of dispute settlement (as opposed to armed conflict). It is flexible, allowing access to international procedures for non-State parties to a dispute (as opposed to the litigation before the International Court of Justice). Arbitration enables structural peace building for the future (as opposed to e.g., the International Criminal Court which establishes only post-fact individual criminal liability, hoping to deter individuals from adopting certain conduct). Arbitration provides for a legal solution in the

⁵⁶ BBC News, ‘Sudan army quits town after death’ (14 December 2008) available at <http://news.bbc.co.uk/2/hi/7782867.stm> (last visited 12 March 2011).

form of a final and binding decision (as opposed to diplomatic pressure and continuous re-negotiation). It promotes predictability and stability of the legal system while still being acceptable to warring parties as they maintain an important say in the resolution of the dispute (as opposed to ‘traditional litigation’) which in turn leads to a higher legitimacy of the decision and (hopefully) makes it easier to implement and enforce the decision on the ground. When justice is not only done, but also seen and recognized to be done, international dispute settlement truly fulfills its purpose.