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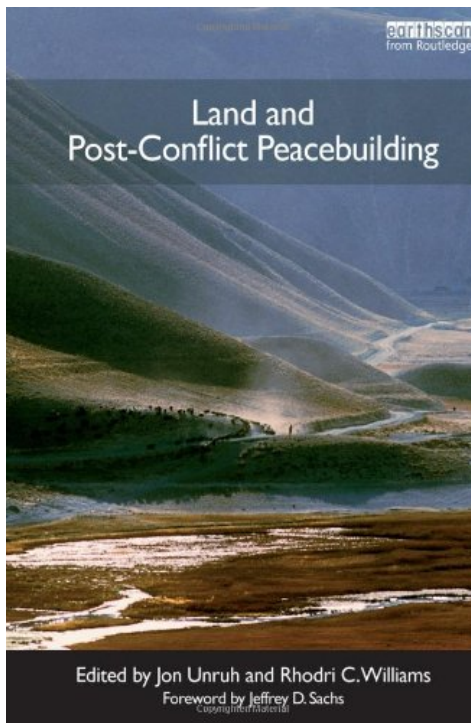
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The Abyei territorial dispute between North and South Sudan: Why has its resolution proven difficult?

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The Abyei territorial dispute between North and South Sudan: Why has its resolution proven difficult?

Salman M. A. Salman

Abyei is an area on the border between Northern and Southern Sudan that has been the focus of a dispute between the two parts of the country since independence of Sudan in 1956. This dispute has a number of unique aspects. First, it concerns not only the question of to which of the disputing parties the territory belongs, but also the boundaries and limits of the territory itself. The issue of the boundaries needed to be resolved first, to be followed by a referendum in which the residents of Abyei would decide which part of the country, the North or the South, the area would become part of. In the interim, the area would be placed under special administrative arrangements. The second unique aspect is the large number of agreements that have been concluded by the disputing parties—not to resolve the dispute itself but to put forth arrangements and mechanisms for resolving it. Third is the significant contribution of the international community to the dispute resolution process. This has involved a major role by the United States; the Abyei Boundaries Commission (ABC), composed of independent experts; and the Permanent Court of Arbitration (PCA) in The Hague, as well as the United Nations and the African Union. Indeed, there is no precedent for resolution by the PCA, or any other international tribunal, of a country's internal territorial dispute. Fourth, in addition to the government of Sudan (GOS) and the Sudan People's Liberation Movement/Sudan People's Liberation Army (SPLM/A) (and now the government of South Sudan), the dispute involves the Ngok Dinka, a Southern tribe, and the Misseriya, a Northern tribe, each claiming the area, and both deeply enmeshed in the dispute. Indeed, the crux of the dispute gradually shifted since 2009 from the limits and boundaries of the Abyei area to whether the Misseriya are entitled to participate in the referendum.

This chapter reviews the recent history of the Abyei dispute and the agreements that have been reached to resolve it, and analyzes the decisions of the ABC and the PCA. It examines the reasons for not undertaking the referendum

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on the future of the area, as scheduled, and the aftermath, including the takeover of the area by GOS forces in May 2011. The chapter also discusses the implications of the dispute and the failure thus far to resolve it for the Abyei area, and for the future relations between Sudan and the new state of South Sudan.¹

RECENT HISTORY OF THE ABYEI DISPUTE

The recent history of the Abyei dispute dates back to the beginning of the twentieth century.² After the Anglo-Egyptian forces conquered Sudan in 1898, they confirmed existing provincial boundaries, including the borders between Northern and Southern Sudan. However, in 1905 authority over nine chiefdoms of the Ngok Dinka was transferred from the Southern province of Bahr el Ghazal to the Northern province of Kordofan, and the border between Northern and Southern Sudan was adjusted accordingly. No movement of people was involved, only the map was redrawn to reflect this redistricting. The territory in question is known as the Abyei area.

The main reason for the transfer of the area to the North was the contentious relationship between the Misseriya and Ngok Dinka tribes. The Misseriya lived and moved in the southern part of Kordofan Province, near the border with Bahr el Ghazal Province. The Ngok Dinka lived in the northern part of Bahr el Ghazal Province, adjacent to where the Misseriya lived. The two tribes share parts of the Abyei area and have conflicting claims on it. In 1905, the British colonial administration

concluded that it made sense to put the two contending groups under the same administration. For one thing it was much more difficult to reach the area from the British headquarters in Bahr el Ghazal than it was from Kordofan. In addition, it would be more effective to adjudicate the dispute if the two parties were under the same provincial administration. . . . As a result, the anomaly of a southern Sudanese group administered as part of northern Sudan was created (Pettersen 2008, 22–23).

The relationship between the Ngok Dinka and the Misseriya, from the time of the transfer through the remainder of the colonial era, was by and large peaceful, despite their basic differences. The Ngok Dinka are part of the larger Dinka tribe, which is a Nilotic African tribe. It is the largest, wealthiest, and politically

¹ This chapter uses the terms *Southern Sudan* and *Northern Sudan* to refer to the two parts of the country before the independence of South Sudan. On February 13, 2011, one week after the Southern Sudan referendum results were officially announced, showing that the overwhelming majority of Southern Sudanese voted for secession (see note 19), the government of Southern Sudan decided to call their new country the Republic of South Sudan. Accordingly, the chapter uses the term *South Sudan* when referring to the new state.

² See “Milestones in the Abyei Territorial Dispute between North and South Sudan,” at the end of this chapter.



Notes: A – The Hala’ib Triangle is claimed by Sudan and de facto administered by Egypt.
 B – The Ilemi Triangle is claimed by Ethiopia, South Sudan, and Kenya and de facto controlled by Kenya.

strongest group in the South. Many of the influential Southern politicians and academicians are from the Dinka tribe. Its members practice indigenous religions, although many of the political leaders have embraced Christianity, and some members of the tribe have converted to Islam. The Misseriya, on the other hand, are Arabs and Muslims. A wealthy tribe with huge numbers of livestock, its members move across Southern Kordofan and the Abyei area in search of fodder and water for their livestock. A number of their tribal leaders are prominent members of political parties in the North.

Problems between the two tribes emerged following the outbreak of civil war between the North and the South in August 1955, a few months before Sudan became independent on January 1, 1956. Naturally, the Ngok Dinka sided with the Southern movement, while the Misseriya sided with the Northern government in Khartoum. The first round of civil war ended with the conclusion of the Addis

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Ababa Agreement on the Problem of South Sudan (Addis Ababa Agreement) on March 12, 1972, between the Government of the Democratic Republic of the Sudan and the Southern Sudan Liberation Movement.³

The Addis Ababa Agreement, in article 3(c), defined the Southern provinces of Sudan to include “the Provinces of Bahr El Ghazal, Equatoria and Upper Nile in accordance with their boundaries as they stood January 1, 1956, and other areas that were culturally and geographically a part of the Southern Complex as may be decided by a referendum.” Although the agreement did not refer explicitly to Abyei, it was understood and agreed that the second part of the definition referred to Abyei because of the geographical and cultural aspects of the area and its residents. However, the agreement did not specify the boundaries of the area, or establish a process for defining and delimiting them. It called for a referendum on whether the area would be part of the Southern or the Northern Sudan, but did not go into any detail, or specify a schedule for the referendum. Nothing substantive with regard to Abyei took place following the conclusion of the Addis Ababa Agreement; no special administrative arrangements were put in place,⁴ and no referendum was held.

The Addis Ababa Agreement granted Southern Sudan self-government and established a People’s Regional Assembly and a High Executive Council as the legislative and executive organs there. It excluded certain matters from their authority, conferring them instead on the national government in Khartoum, and included detailed provisions on the relationship between the two parts of the country. However, the agreement faced a number of difficulties as well as successive major breaches by the GOS that led eventually to its collapse in 1983 (Alier 1990). In that year, the SPLM and the SPLA were established, and they led the renewed civil war that broke out in 1983. The old alliances of the Khartoum government and the Misseriya tribe on the one hand, and the SPLM/A and the Ngok Dinka tribe on the other hand, were revived and grew stronger during the civil war, and each tribe fought on the side of its respective ally. As a consequence, the relationship between the two tribes worsened, and occasionally they fought each other. As with the larger North-South conflict, the ethnic and religious differences between the Misseriya and the Ngok Dinka no doubt exacerbated the conflict between them.

Negotiations between the GOS and the SPLM/A, which started in 2002 in Kenya, led to the conclusion of a series of agreements and protocols which were later consolidated and signed as the Comprehensive Peace Agreement (CPA) on January 9, 2005.⁵ Those agreements and protocols started with the Machakos Protocol that was concluded on July 20, 2002. That protocol granted Southern Sudan the right of self-determination, to be exercised through a referendum to

³ For the complete text of the Addis Ababa Agreement, see www.goss-online.org/magnoliaPublic/en/about/politicalsituation/mainColumnParagraphs/00/content_files/file3/Addis%20Ababa%20Agreement.pdf.

⁴ A presidential decree was issued in 1974 placing the Abyei area administratively under the presidency, but nothing was done to implement that decree.

⁵ For the complete text of the CPA, see www.sd.undp.org/doc/CPA.pdf.

be held on January 9, 2011, six months before the end of a six-year interim period on July 8, 2011. On that date, according to paragraph 2.5 of the Machakos Protocol, “there shall be an internationally-monitored referendum, organized jointly by the government of Sudan and the SPLM/A, for the people of the South Sudan to confirm: the unity of the Sudan . . . or to vote for secession.” The six-year interim period was intended to give the Southern Sudanese the opportunity to make an informed decision on the choice between unity and secession.

The Machakos Protocol was followed on September 25, 2003, with the Agreement on Security Arrangements. This agreement confirmed the existence of two separate armed forces during the interim period: the Sudanese Armed Forces (SAF) and the SPLA, with both forces treated equally as part of Sudan’s National Armed Forces. It also established Joint/Integrated Units from the two armed forces. The Agreement on Wealth Sharing was concluded on January 7, 2004, and dealt mainly with the sharing of natural resources, particularly oil, between the North and the South. Three more agreements were concluded on May 26, 2004. The first was on power sharing and included detailed governance provisions. The second dealt with the states of Southern Kordofan and Blue Nile, which are geographically part of Northern Sudan but identify culturally with Southern Sudan. This agreement devolved more powers to those states and called for popular consultations on implementation of the agreement at the end of the interim period. The third agreement, known as the Abyei Protocol but formally titled “The Resolution of the Abyei Conflict,”⁶ is discussed in more detail below.

Thus, six agreements were concluded between 2002 and 2004. On December 31, 2004, two annexures were concluded spelling out detailed implementation arrangements for these agreements, including the Abyei Protocol. This brought to a successful conclusion an arduous negotiation process that had spanned almost three years.

As indicated above, these documents made up the CPA, which was signed on January 9, 2005.⁷ The CPA was signed by the then – first vice president of the Republic of the Sudan and the chairman of the SPLM/A. It was witnessed by envoys of thirteen countries and organizations: the presidents of Kenya and Uganda and representatives of Egypt, Italy, the Netherlands, Norway, the United Kingdom, the United States, the African Union, the European Union, the Intergovernmental Authority on Development (IGAD),⁸ the Arab League, and the United Nations.

⁶ The title of the protocol was changed on December 31, 2004, to the Protocol between the Government of the Sudan and the Sudan People’s Liberation Movement/Army on the Resolution of the Abyei Conflict. It is noteworthy that the protocol used the term *Abyei conflict* and not *Abyei dispute*. For the complete text of the Abyei Protocol, see www.gossmission.org/goss/images/agreements/Abyei_protocol.pdf.

⁷ The CPA is also known as the Naivasha Agreement, after the town in Kenya where most of the agreements of the CPA were concluded.

⁸ IGAD is a regional organization of East African countries dedicated to achieving peace, prosperity, and regional intergration. Negotiations on the CPA were conducted under the auspices of IGAD. At that time, its members were Djibouti, Eritrea, Ethiopia, Kenya, Somalia, Sudan, and Uganda. (Following independence, South Sudan became a member.)

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The Interim National Constitution of the Republic of the Sudan was issued on July 6, 2005,⁹ six months after the conclusion of the CPA.¹⁰ It incorporated the basic undertakings of the CPA, including those relating to Abyei.¹¹

THE ABYEI PROTOCOL AND OTHER AGREEMENTS ON THE ABYEI DISPUTE

During the negotiations for the CPA, the issue of Abyei turned out to be more difficult and complex than was thought by the two parties. There was no agreement on the boundaries or the size of the Abyei area. The GOS took the stand at the beginning of the negotiations that the borders between the North and the South were to be as they stood on independence day, January 1, 1956 (see figure 1), and were not subject to negotiations or change.

The SPLM argued that Abyei was an exception to the issue of Sudan's January 1, 1956, borders, as it was addressed in the 1972 Addis Ababa Agreement, and insisted that it be addressed during the CPA negotiations. The GOS later agreed to discuss Abyei but insisted that the area south of the Bahr el Arab River (also known as the Kiir River) was the only area transferred to the North in 1905, and thus the only area that should be considered as the Abyei area. Under this scenario, the Bahr el Arab River would become the natural boundary between the North and the South in that area, as indicated in figure 2, in case the area becomes part of the South. Abyei Town, the main city in the area, falls north of the Bahr el Arab River, and thus would not be included in the area proposed by the government.¹² The SPLM insisted that the area was far larger than that, extending well into Kordofan, running south of Lake Keilak to the area immediately south of Muglad Town. Negotiations on this matter became deadlocked. Thus, the crux of the Abyei dispute at that time was that a certain area was transferred from Southern Sudan to Northern Sudan, but there was no agreement on its boundaries or size.

The United States, which was actively involved in the Sudan peace negotiations, attempted to break the deadlock over Abyei. On March 19, 2004, the then – U.S. special envoy to Sudan, Senator John Danforth, presented proposals to the two parties, including a definition of the area and a process for delimiting

⁹ See www.mpil.de/shared/data/pdf/inc_official_electronic_version.pdf for the complete text of the interim constitution.

¹⁰ The first six months after the CPA was signed were primarily devoted to adopting the interim constitution. Article 226 set an interim period to start on July 9, 2005, and to last until July 8, 2011, six months after the referendum on the status of Southern Sudan on January 9, 2011. The first six months (January 9 to July 8, 2005) are referred to as the pre-interim period.

¹¹ Article 183 of the interim constitution incorporated the main provisions of the Abyei Protocol.

¹² The GOS and the Misseriya claim that Abyei Town was actually established some years after the transfer of the area to the North. See Zainelabideen (2009).



Figure 1. Sudan with the 1956 boundary between Northern and Southern Sudan

it and resolving the dispute.¹³ Those proposals were accepted by both parties and became the basis for the Abyei Protocol, which was concluded on May 26, 2004, and formed part of the CPA.¹⁴ The Abyei Protocol did not attempt to resolve the conflict; it simply established arrangements and mechanisms for resolving it.

¹³ In the context of this chapter, in line with boundaries' terminology, *define* means to generally describe the limits of an area; *delimit* means to mark its boundaries on a map; and *demarkate* means to mark its boundaries on the ground.

¹⁴ The footnote to the Abyei Protocol states: "This is the full text of the proposal entitled 'Principles of Agreement on Abyei,' presented by US Special Envoy Senator John Danforth to H.E. First Vice President Ali Osman Mohamed Taha and SPLM/A Chairman Dr. John Garang on the 19th of March 2004. The parties hereby declare to adopt these Principles as the basis for the resolution of Abyei Conflict."

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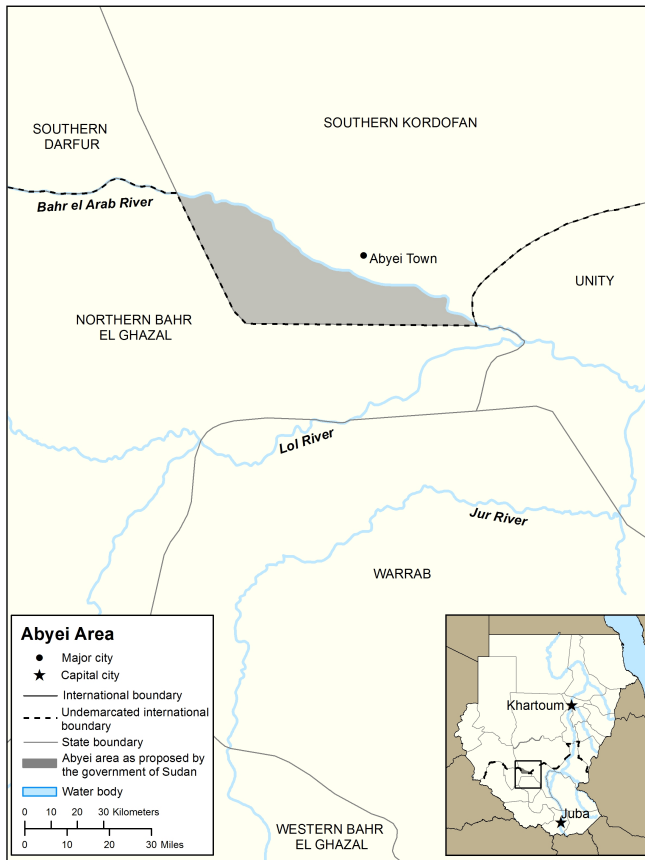


Figure 2. The borders of Abyei area as proposed by the government of Sudan

Source: PCA (2009), reprinted with permission from Terralink.

In line with the U.S. proposals, Abyei was defined under paragraph 1.13 of the Abyei Protocol “as the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.”¹⁵ The protocol placed Abyei under the presidency (consisting of the president of the Republic of the Sudan and the two vice presidents)

¹⁵ It should be added in this context that academics and politicians from the Misseriya tribe do not agree with this definition, and claim that the Abyei area belonged historically to the Misseriya who migrated there in the eighteenth century, and that they were the ones who welcomed the Ngok Dinka in the Abyei area many years later (Zainelabideen 2009). On the other hand, Dinka academics and politicians hold exactly the opposite view, namely that the Ngok Dinka lived in the Abyei area long before the Misseriya, and they were the ones who welcomed the Misseriya to the area (Deng 1986). This chapter does not attempt to address those claims and is focused primarily on the dispute resolution process and the challenges facing it.

and stated that it would be administered by an executive council elected by the residents of Abyei. Pending that election, the council's initial members would be appointed by the presidency. The protocol stated that the residents of Abyei comprised the members of the Ngok Dinka community and other Sudanese residing in the area, and that such residents would be citizens of both Kordofan and Bahr el Ghazal.¹⁶ It also included detailed provisions on the sharing of the revenue from the oil produced in the Abyei area during the interim period.¹⁷

More importantly, the protocol set forth arrangements for delimiting the boundaries of Abyei, as well as for a referendum on its status.¹⁸ This referendum was scheduled to take place on January 9, 2011, simultaneously with the Southern Sudan referendum, offering Abyei residents the choice of retaining their special administrative status in Northern Sudan or becoming part of Bahr el Ghazal in Southern Sudan. However, as discussed later, this referendum did not take place on January 9, 2011, as stipulated under the Abyei Protocol, although the Southern Sudan referendum did take place. On that date, and for the next six days (ending on January 15, 2011), the people of Southern Sudan voted overwhelmingly to secede from Sudan.¹⁹

As mentioned earlier, the dispute over Abyei also involves the Southern tribe of the Ngok Dinka and the Northern tribe of the Misseriya. The leadership of the national government and the SPLM/A includes prominent members of

¹⁶ The two states with which Abyei has been associated, Kordofan and Bahr el Ghazal, were divided in 2005—Kordofan into Northern and Southern Kordofan, and Bahr el Ghazal into Northern Bahr el Ghazal, Western Bahr el Ghazal, Warrab, and Lakes states. The issues of Abyei concern the current states of Southern Kordofan and Northern Bahr el Ghazal.

¹⁷ The Abyei Protocol set the following percentages for sharing Abyei net oil revenues: 50 percent for the national government, 42 percent for the government of Southern Sudan, and 2 percent each for Bahr el Ghazal State, Kordofan State, the Ngok Dinka, and the Misseriya. For an analysis of sharing of oil revenues from the region, see Wennmann (2012).

¹⁸ The fact that the Abyei Protocol called for the status of the Abyei area (after its boundaries are demarcated) to be determined by referendum rather than for its outright return to Southern Sudan, from where it was transferred in 1905, may have been based on the precedent of the Addis Ababa Agreement, which also called for a referendum on the status of the area. The referendum was seen in both instances as conferring legality and legitimacy to any changes of the boundaries between the North and the South as they stood on January 1, 1956. It is also worth noting that placing the Abyei area under the presidency, as stipulated by the Abyei Protocol, is perhaps based on the similar arrangement pronounced by the 1974 presidential decree, which was issued as a result of the Addis Ababa Agreement (see note 4).

¹⁹ The results of the referendum were officially announced on February 7, 2011, and indicated that close to 99 percent of the Southern Sudanese voters opted for secession (Southern Sudan Referendum Commission 2011). Consequently, and as per the CPA, the state of South Sudan formally came into existence on July 9, 2011, following the end of the interim period on July 8, 2011.

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the Misseriya and Ngok Dinka, respectively, some of whom played key roles in the Abyei negotiations. The Misseriya claim that they are residents of the Abyei area, and as such they are entitled to participate in the Abyei referendum. This demand is categorically rejected by the SPLM and the Ngok Dinka who argue that the Misseriya have only grazing rights in the Abyei area, and as such are not residents of the area. This issue has now become the crux of the dispute, and its resolution has thus far eluded the two parties. The discovery of oil in and around Abyei has been another complicating factor, because whichever way Abyei goes, the oil resources within the area will go with it.

Both sides agreed under the Abyei Protocol that Abyei is the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905. The dispute has been, however, over the boundaries of that area. The GOS and the Misseriya argued that the area in question was a triangle of land south of the Bahr el Arab River, and that the Ngok Dinka expanded north of the river, including to Abyei Town itself, only after 1905. The SPLM and the Ngok Dinka, on the other hand, claimed that the area extended far north of the Bahr el Arab River and well into Kordofan, close to the town of Muglad, the heart of the Misseriya tribe. To determine the boundaries of Abyei, the GOS and the SPLM agreed, under paragraph 5.1 of the Abyei Protocol, to establish the Abyei Boundaries Commission (ABC), which was to include independent experts and representatives of the local communities and the local administration, and was to complete its work within the first two years of the interim period.

Because the Abyei Protocol dealt mainly with the basic elements for resolving the dispute, more detailed arrangements needed to be worked out and agreed upon. Thus, on December 17, 2004, seven months after the Abyei Protocol was signed, the two parties concluded the Understandings on the Abyei Boundaries Commission, referred to as the Abyei Annex or Abyei Appendix to the Abyei Protocol. This document specified that the ABC would consist of fifteen members: five appointed by the GOS, representing the government, the Misseriya, and the administrators of Abyei; five appointed by the SPLM, representing the SPLM, the Ngok Dinka, and the administrators of Abyei; and five impartial experts, to be appointed by the United States, United Kingdom, and IGAD. The ABC would be chaired by one of the experts. It was to hear testimony from representatives of the people of Abyei and its neighbors and the two conflicting parties, and to consult the British archives and other relevant sources on Sudan. It was required under the Abyei Annex to submit its report to the presidency by July 2005, and not two years after the interim period began, as had been stipulated in the Abyei Protocol. Its report would be considered final and binding.

On December 31, 2004, the two parties concluded the Implementation Modalities of the Protocol on the Resolution of the Abyei Conflict, which addressed the timing, executing body, funding sources, composition, and procedures for a number of elements of the Abyei Protocol. This document also established mechanisms for selecting the members of the ABC. It became part of annexure II of the CPA.

As indicated earlier, the CPA was signed on January 9, 2005. It consisted of a chapeau,²⁰ six separate protocols and agreements, and two annexures, as described above. As mentioned above, one of the protocols and one of the annexures dealt specifically with the Abyei dispute.

The next step toward resolving the Abyei dispute was conclusion of the March 12, 2005, agreement on the Text of the Terms of Reference for the Abyei Boundaries Commission. This agreement reiterated the mandate and structure of the ABC. It listed the five appointees from each of the two parties and set out the ABC's work program, schedule, and funding. It established Nairobi as the seat of the ABC. By that time, the United States, United Kingdom, and IGAD had selected the commission's five experts.²¹ By mid-March 2005, the fifteen-member ABC was in place.

On April 11, 2005, the delegations of the GOS and the SPLM agreed, in Nairobi, on the Rules of Procedure for the Abyei Boundaries Commission. This document described in detail the ABC's work program, including field visits, hearing of presentations by representatives of both sides, and, after completion of this process, evaluation of the evidence and preparation of a final report. The ABC was to endeavor to reach a decision by consensus, but if this was not possible, the experts would have the final say.²² However, the other ten members of the ABC would continue to be part of the process of hearings, field visits, and deliberations. The report would become a public document after its formal presentation to the presidency.

Thus, a wide range of legal instruments were concluded by the two parties with the hope that they would pave the way for a just, peaceful, and sustainable resolution of the Abyei dispute. Unfortunately, that did not turn out to be the case, as discussed in the next parts of this chapter.

THE ABYEI BOUNDARIES COMMISSION REPORT

Following agreement on the Rules of Procedure, the GOS and the SPLM submitted their preliminary presentations to the experts on April 12, 2005, through their

²⁰ The chapeau is the umbrella agreement that was signed by the two parties and the thirteen witnesses on January 9, 2005, and which listed and attached the other agreements and protocols constituting the CPA.

²¹ The five experts were Ambassador Donald Petterson (former U.S. ambassador to Sudan), the U.S. appointee; Douglas Johnson (scholar and expert on Southern Sudan), the UK appointee; and three IGAD appointees: Godfrey Muriuki (University of Nairobi), Kassahun Berhanu (University of Addis Ababa), and Shadrack Gutto (a South African lawyer). Ambassador Petterson was selected as the chair of the ABC in accordance with the wishes of the GOS and the SPLM.

²² Donald Petterson raised the question as to why the two sides would delegate to five outsiders the power to make the decision on the boundaries of Abyei. He answered the question: "For one, they knew they couldn't do it themselves. And it's possible that one or both sides figured it would be better that blame for an adverse decision would fall on the outsiders, not on themselves. Beyond that is the fact that each side believed its case was ironclad" (Petterson 2008, 24).

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members in the ABC. Subsequently, the ABC visited Abyei for six days, collecting testimony from members of both tribes.

In addition to receiving oral and written testimony, and after the visit to the Abyei area in April, the experts examined historic documents at the National Records Office in Khartoum, as well as in the United Kingdom. Final presentations were heard in June, after which the report was completed by the experts and presented to the presidency on July 14, 2005 (ABC 2005). This was just a few days after the interim constitution was adopted on July 6, 2005. Subsequent to the adoption of the constitution, the SPLM joined the ruling National Congress Party (NCP) as a junior partner in the government, and John Garang, the leader of the SPLM/A, returned to Khartoum, where he was sworn in as the first vice president.²³

The ABC report found that “no map exists showing the area inhabited by the Ngok Dinka in 1905. Nor is there sufficient documentation produced in that year by Anglo-Egyptian Condominium authorities that adequately spell out the administrative situation that existed in that area at that time” (ABC 2005, 4). The report stated further that “in 1905 there was no clearly demarcated boundary of the area transferred from Bahr el-Ghazal to Kordofan” (ABC 2005, 20). The report rejected both: (i) the claim of the GOS that the area transferred in 1905 lay entirely south of the Bahr el Arab River, and (ii) the claim of the Ngok Dinka that their boundary with the Misseriya should run from Lake Keilak to Muglad Town (ABC 2005).

The report classified land rights in three categories: dominant (full rights evidenced by permanent settlements), secondary (involving seasonal use of land), and shared secondary (exercised by two or more communities). It presented the following conclusions:

- The Ngok Dinka “have a legitimate dominant claim to the territory from the Kordofan–Bahr el Ghazal boundary north to latitude 10°10′ N,” extending from the boundary with Darfur Province in the west to Upper Nile Province in the east, as these boundaries stood at independence in 1956 (ABC 2005, 21).
- From latitude 10°10′ N and up to latitude 10°35′ N, “the Ngok and the Misseriya share isolated occupation and use rights” (ABC 2005, 21). Thus, this area should be divided between them, and the northern boundary should be located at latitude 10°22′30″ N.
- “The western boundary shall be the Kordofan-Darfur boundary as it was defined on 1 January 1956. The southern boundary shall be the Kordofan-Bahr el-Ghazal-Upper Nile boundary as it was defined on 1 January 1956. The eastern boundary shall extend the line of the Kordofan-Upper Nile boundary

²³ John Garang was killed in a plane crash on July 30, 2005 (three weeks after he was sworn as first vice president), as he flew from Uganda to Southern Sudan. He was succeeded by his deputy, Salva Kiir Mayardit.

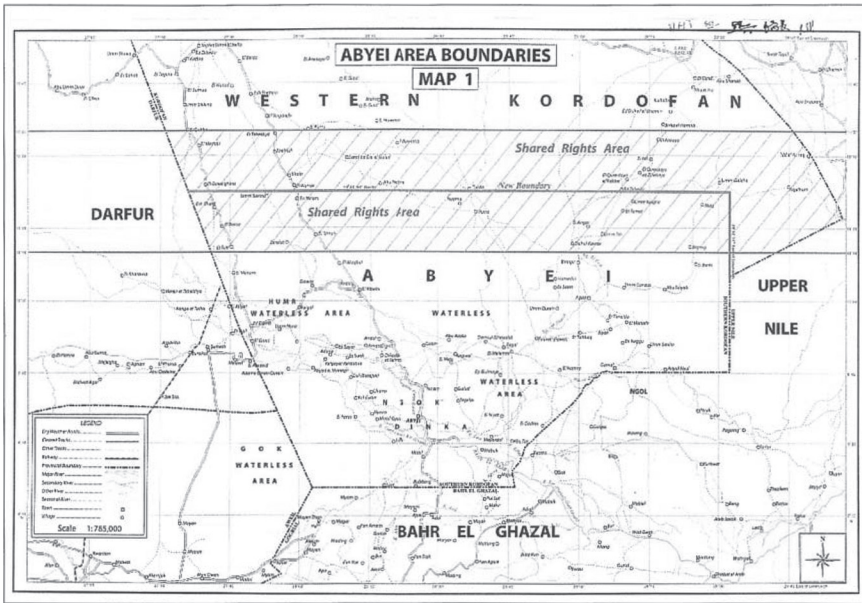


Figure 3. Map of the Abyei area as delimited by Abyei Boundaries Commission experts

Source: PCA (2009), reprinted with permission from Terralink.

at approximately longitude 29°32'15" E northwards until it meets latitude 10°22'30" N" (ABC 2005, 22).

- “The Ngok Dinka and the Misseriya should retain their established secondary rights to the use of land north and south of this boundary” (ABC 2005, 22).²⁴

Figure 3 shows the Abyei area as delimited in the ABC report.

The ABC report accommodated a large part of the SPLM’s claims by extending the Abyei area well into Kordofan, and rejecting the government’s claim that Abyei was limited to the land south of the Bahr el Arab River. The SPLM and the Ngok Dinka immediately accepted the report and asserted that, according to the agreements signed by the two parties, it was final and binding. The government and the Misseriya rejected the report, claiming that the ABC

²⁴ The ABC report called for the demarcation of the northern and eastern boundaries by a survey team comprising three professional surveyors, one nominated by the GOS, one by the government of Southern Sudan, and the third by IGAD, to be assisted by four representatives, one from the Ngok Dinka, one from the Misseriya, and two from the presidency. The ABC report also asked the presidency to send the nominations for this team to IGAD for final approval by the international experts. Thus, the experts extended their authority beyond issuance of the report.

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had exceeded its mandate by taking into consideration developments in the area after it was transferred to the North in 1905.

Thus the arduous work of the ABC did not attain the expected results. A stalemate developed that would last for three years before the next attempt to resolve the dispute.

STALEMATE, SETBACKS, AND THE DECISION TO SEEK ARBITRATION

The rejection by the government and the Misseriya of the ABC report was the first major setback in the implementation of the CPA; as it took place less than a week after the NCP and SPLM government was constituted. The rejection of the report resulted in a complete stalemate on the Abyei dispute. The boundaries of the Abyei area remained without agreement, and its status uncertain. Without a clear demarcation of the Abyei area, it would not be possible to meaningfully implement the provisions of the Abyei Protocol regarding the administrative arrangements for the area during the interim period leading to the referendum. Henceforth, Abyei has remained the thorniest issue in the North-South peace process and relations.

In October 2007, the SPLM withdrew from the national government over a number of issues, including the refusal of the NCP to accept the ABC report. The SPLM ministers eventually returned to their ministries, but the Abyei dispute remained unresolved. Diplomatic efforts by the IGAD and the U.S. special envoy to Sudan continued but did not lead to a breakthrough.

In May 2008, fighting broke out between the Sudanese army and the SPLA in Abyei Town, and the city was devastated. The fighting had erupted over a personal argument between government and SPLA soldiers (*Sudan Tribune* 2008). United Nations officials estimated that one hundred people might have been killed, and that 30,000 residents of Abyei Town and 20,000 from neighboring villages fled at the height of the fighting. That incident underscored the fragility of the situation in Abyei, and indicated the threat to the larger North-South peace process posed by the failure to resolve the Abyei dispute.

The fighting and devastation of Abyei Town prompted the two parties to rethink their strategies and return to the negotiating table over the Abyei dispute. Consequently, on June 8, 2008, two weeks after the outbreak of the fighting, they signed the Road Map for Return of IDPs [internally displaced persons] and Implementation of the Abyei Protocol. The agreement dealt in detail with security arrangements, deploying in Abyei a new integrated battalion with troops from the SAF and the SPLA, as well as a police unit and a force from the United Nations Mission in Sudan (UNMIS). The agreement also required the government to provide the necessary resources for the return of civilians to their homes. It established interim arrangements for administering the Abyei area, based on the Abyei Protocol. These arrangements included interim boundaries for the area as well as the appointment by the presidency of a chief administrator from the SPLM and a deputy administrator from the NCP, both residents of the Abyei area.

The agreement reconfirmed the oil revenue shares agreed upon earlier (see note 17), and established a fund to develop the areas along the North-South border and to finance joint projects there. The GOS would contribute 50 percent and the government of Southern Sudan 25 percent of their Abyei oil revenues, respectively, to this fund.

In a major breakthrough, the agreement also stated that the parties would submit the dispute over the findings of the ABC to binding arbitration. This became possible when the SPLM dropped its demand that the ABC report be considered final and binding. The two parties agreed to work out the terms of reference for the arbitration, including the process for selecting arbitrators, issues to be referred for arbitration, procedures, the decision-making process, and enforcement. The agreement called for the entire arbitration process to be completed within six months from the date of establishment of the tribunal. More importantly, it stated that if the two parties failed to reach agreement within one month on the arbitration tribunal, the secretary-general of the PCA would establish one within fifteen days, and would finalize procedures and terms of reference in accordance with PCA rules and international practices. Those provisions on arbitration were confirmed in a Memorandum of Understanding on the Abyei Arbitration signed by the two parties on June 21, 2008.²⁵

On July 7, 2008, both parties signed the Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting Abyei Area.²⁶ That decision was another major attempt to resolve the Abyei dispute, and is also another significant step in the internationalization of the dispute, as discussed below.

THE PERMANENT COURT OF ARBITRATION: PROCESS AND AWARD

Under the Arbitration Agreement, the parties agreed to refer their dispute for final and binding arbitration to the PCA, governed by the PCA's Optional Rules

²⁵ In article 3.2, the Arbitration Agreement consolidated the Memorandum of Understanding on the Abyei Arbitration and the Road Map for Return of IDPs and Implementation of Abyei Protocol. For the complete text of the Arbitration Agreement, see www.pca-cpa.org/upload/files/Abyei%20Arbitration%20Agreement.pdf.

²⁶ One other unique aspect of the Abyei dispute is that the arbitration before the PCA was between the GOS and the SPLM. The SPLM was, at that time, a junior, albeit an important, partner in the GOS, as established by the CPA and the interim constitution, and held important portfolios, including the first vice president, as well as the minister of foreign affairs. However, the SPLM was an adversarial party against the GOS before the PCA. In fact, the minister of foreign affairs was also a member of the SPLM delegation to the arbitration hearings before the PCA in The Hague. This dilemma was also faced earlier when the Road Map for Return of IDPs and Implementation of the Abyei Protocol was concluded, but that agreement was eventually signed by representatives of the NCP and the SPLM. However, in the PCA process, only one of the parties had to be a state, because the dispute was adjudicated, under the PCA's Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State (PCA 1993).

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for Arbitrating Disputes between Two Parties of Which Only One is a State. The PCA arbitral tribunal was to determine whether the ABC had exceeded its mandate—to delimit the area of the nine Ngok Dinka chiefdoms that had been transferred to Kordofan in 1905.²⁷ If it determined that the ABC did not exceed its mandate, the tribunal should make a determination to that effect and issue an award for the full and immediate implementation of the ABC report. If it determined that the ABC did exceed its mandate, the tribunal should make a declaration to that effect, and should proceed to delimit the area of the nine Ngok Dinka chiefdoms transferred to the North in 1905. The tribunal was to work in accordance with the provisions of the CPA, particularly the Abyei Protocol and Appendix, and the interim constitution—and with other relevant principles of law and practice as the tribunal may determine to be relevant.

The tribunal consisted of five arbitrators.²⁸ Each party appointed two arbitrators, and these four arbitrators were tasked with appointing a presiding arbitrator. However, none of the five candidates they identified was accepted by both parties, and the PCA secretary-general appointed the presiding arbitrator.²⁹ The tribunal adhered to a very tight schedule. Memorials were filed on December 18, 2008, and counter-memorials on February 13, 2009, with the rejoinder filed on February 28. Oral hearings took place at The Hague from April 18 to 23, and the tribunal issued its award on July 22, 2009.

The award is a fairly detailed one, spanning more than 270 pages (Salman 2010). It started with a discussion of the geography of Sudan, the history of the Abyei dispute, the peace process, and the instruments it had produced. It suggested three motivations for the original transfer of the nine Ngok Dinka chiefdoms to the North: (1) to pacify the area and end attacks by the Humr (a subgroup of the Misseriya) on the Ngok Dinka, (2) to demonstrate an authoritative presence to the inhabitants of the area, and (3) to bring the feuding tribes under a single administration (PCA 2009).³⁰

The parties' arguments were summarized at length, particularly on the question of whether the ABC had exceeded its mandate either procedurally or substantively. The tribunal also discussed the question of whether Abyei was defined

²⁷ That mandate was stated in the Abyei Protocol and reiterated in the Abyei Appendix and the ABC Terms of Reference and Rules of Procedure.

²⁸ Unlike the International Court of Justice (which is also at The Hague, and is usually referred to as the ICJ), the PCA does not have its own regularly presiding judges. Instead, each party to a case appoints an equal number of arbitrators. Once appointed, those arbitrators together recommend a presiding arbitrator to the two parties.

²⁹ The GOS appointed Awn Al-Khasawneh and Gerhard Hafner. The SPLM appointed Michael Reisman and Stephen Schwebel. The secretary-general of the PCA appointed Pierre-Marie Dupuy as the presiding arbitrator, because the nominees of the four arbitrators for this position were all rejected by either of the two parties, or by both of them.

³⁰ The ABC report stated that the reason for the transfer of the nine Ngok Dinka chiefdoms to the North was the Ngok Dinka complaint about the Humr raids (ABC 2005).

in 1905 in a tribal sense or a territorial sense. This was particularly relevant with regard to the ABC inquiry into the Ngok Dinka settlements and grazing rights. The tribunal also discussed the basis on which it should review the ABC analysis and conclusions, distinguishing between the criteria of reasonableness and correctness, and noted that it had to defer to the ABC's interpretation of its mandate as long as that interpretation was reasonable (PCA 2009).³¹

The tribunal basically accepted the ABC's classification of land rights into dominant (permanent), secondary (seasonal), and shared secondary rights. Based on its reading and interpretation of the evidence presented by the two parties, the tribunal reached the following conclusions:

- Northern boundary: The ABC experts did not exceed their mandate in ruling that "the Ngok have a legitimate dominant claim to the territory from the Kordofan–Bahr el Ghazal boundary north to latitude 10°10' N" (PCA 2009, para. 131.1). However, they did exceed their mandate with regard to the shared secondary rights area between latitudes 10°10' N and 10°35' N. The northern boundary of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 runs along latitude 10°10'00" N, from longitude 27°50'00" E to 29°00'00" E.
- Southern boundary: The ABC experts did not exceed their mandate in ruling that "the southern boundary shall be the Kordofan–Bahr el Ghazal–Upper Nile boundary as it was defined on 1 January 1956" (PCA 2009, para. 131.3); and the boundaries as established by the ABC were confirmed.³²
- Eastern boundary: The ABC experts exceeded their mandate in ruling that "the eastern boundary shall extend the line of the Kordofan–Upper Nile boundary at approximately longitude 29°32'15" E northwards until it meets latitude 10°22'30" N" (PCA 2009, para. 131.3). The eastern boundary of the area runs in a straight line along longitude 29°00'00" E, from latitude 10°10'00" N south to the Kordofan–Upper Nile boundary as it was defined on January 1, 1956.
- Western boundary: The ABC experts exceeded their mandate in ruling that "the western boundary shall be the Kordofan–Darfur boundary as it was defined on 1 January 1956" (PCA 2009, para 131.3). The western boundary runs in a straight line along longitude 27°50'00" E, from latitude 10°10'00" N south to the Kordofan–Darfur boundary as it was defined on January 1, 1956, and continuing on the Kordofan–Darfur boundary until it meets the southern boundary.
- Grazing and other traditional rights: The ABC experts did not exceed their mandate in ruling that "the Ngok and Misseriya shall retain their established

³¹ For further analysis of this issue, see Crook (2009).

³² There has been no dispute with regard to the southern boundary, since the GOS has taken the position that the triangle falling south of the Bahr el Arab River was the area transferred to Kordofan in 1905.

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secondary rights to the use of land north and south of this boundary” (PCA 2009, para. 131.5). Furthermore, the arbitral tribunal ruled that “The exercise of established traditional rights within or in the vicinity of the Abyei Area, particularly the right (guaranteed by Section 1.1.3 of the Abyei Protocol) of the Misseriya and other nomadic peoples to graze cattle and move across the Abyei Area (as defined in this Award) remains unaffected” (PCA 2009, para. 770.e.2).

The map of Abyei as defined by the arbitral tribunal is shown in figure 4.

The size of the Abyei area, as delimited by the tribunal award, is about 10,460 square kilometers. This is a considerable reduction from the area set by the ABC report, which was 18,559 square kilometers for the area below 10°22'30" N, or 25,293 square kilometers for the area below 10°35' N. This substantial reduction made it easier for the GOS to accept the decision of the tribunal, and indeed to present it as a victory, even though the area was still larger than what the government initially presented. Figure 5 compares the PCA tribunal award map with that of the ABC report.

As a result of the reduction of the Abyei area in the eastern part, some major oil fields, including Heglig and Bamboo, reverted to Northern Sudan, with Defra oil field falling within the Abyei area.³³ On the other hand, the Bahr el Arab River, which is the main river in the area, together with other rivers and tributaries of the Bahr el Arab River, such as Ragaba ez Zarga (or Ngol River), Ragaba umm Biero, and Ragaba el Shaib, all fell largely within the Abyei area as delimited by the tribunal award. The established secondary rights of the Ngok Dinka and Misseriya to the use of land north and south of Abyei were confirmed by the tribunal award. The award also confirmed the exercise of established traditional rights within or in the vicinity of the Abyei area, particularly the right of the Misseriya and other nomadic peoples to graze cattle and move across the Abyei area.³⁴ Thus, according to the tribunal award, the Ngok Dinka and the

³³ The GOS indicated, immediately after the PCA tribunal award was issued, that the government of Southern Sudan would no longer receive any of the revenue from the oil in those fields, now that they were no longer in the Abyei area. The government of Southern Sudan responded that it would still claim those oil fields as part of Southern Sudan when the process of delimiting the complete borders between the North and the South commenced (*Sudan Tribune* 2009c). Oil has not been a concern to either the Misseriya or the Ngok Dinka, as the claims of both of them emphasized land and water. Neither tribe has received any benefits from the Abyei oil, despite the entitlement of each, under the CPA, to 2 percent of its revenues (see note 17).

³⁴ The tribunal addressed the grazing rights of the Misseriya in case Abyei becomes part of an independent South Sudan. The tribunal stated in this connection that “the jurisprudence of international courts and tribunals as well as international treaty practice lend additional support to the principle that, in the absence of an explicit prohibition to the contrary, the transfer of sovereignty in the context of boundary delimitation should not be construed to extinguish traditional rights to the use of land” (PCA 2009, para. 753).

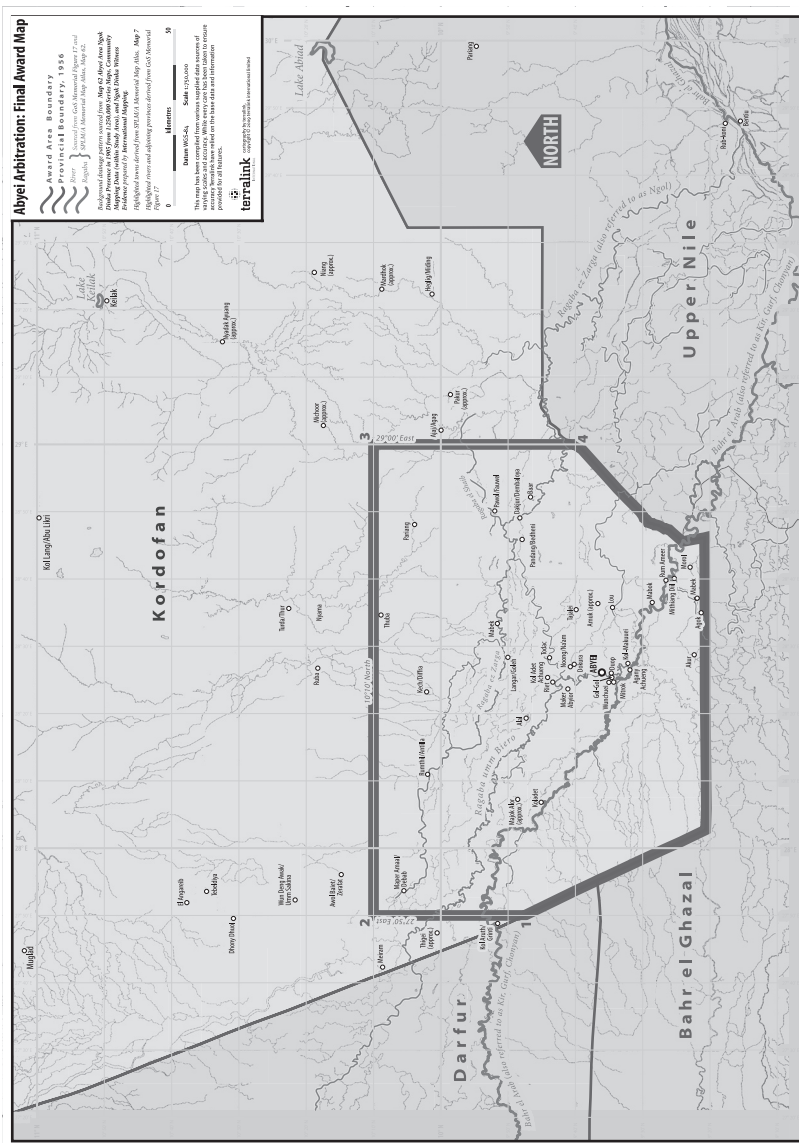


Figure 4. The Permanent Court of Arbitration final award map of the Abyei area

Source: PCA (2009), reprinted with permission from Terralink.

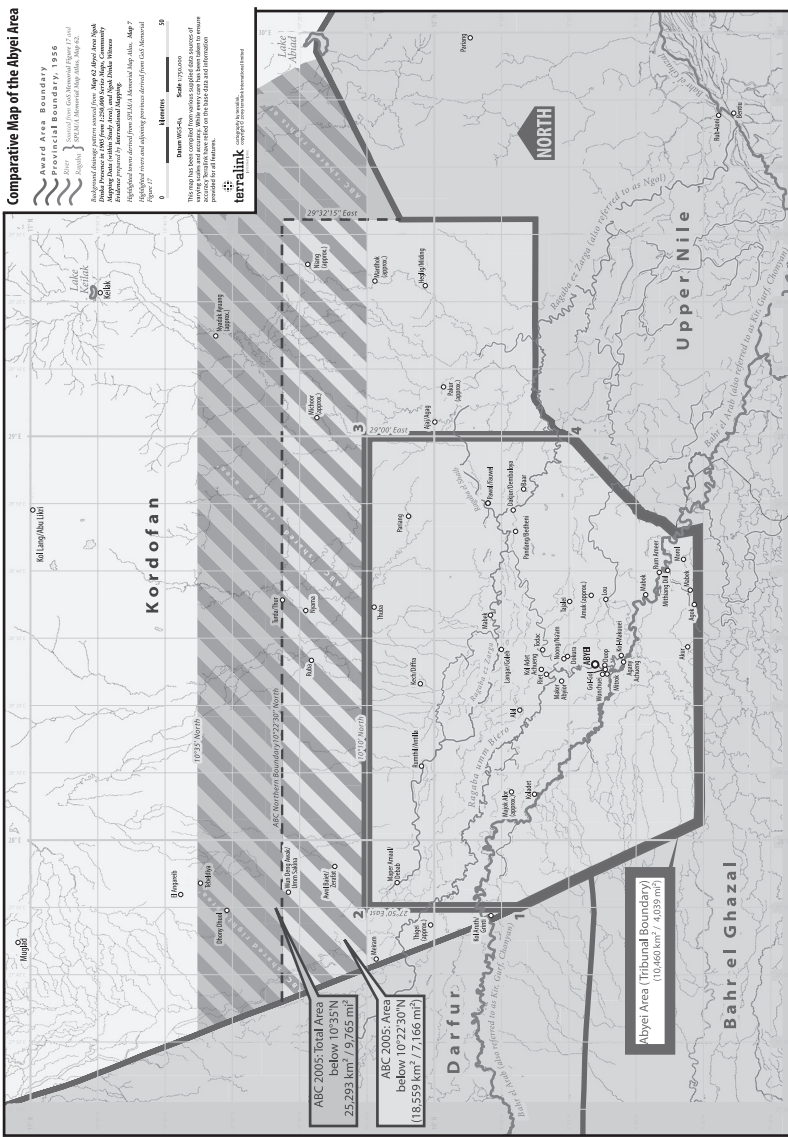


Figure 5. Comparison of the Permanent Court of Arbitration award map with that of the Abyei Boundaries Commission experts map
 Source: PCA (2009), reprinted with permission from Terralink.

SPLM/A got land and water, the GOS got most of the oil fields in the area,³⁵ and the Misseriya's grazing rights within and around the Abyei area were confirmed.

In a dissenting opinion, Awn Al-Khasawneh (one of the tribunal members appointed by the GOS) called his colleagues' opinions unpersuasive and self-contradicting, and disagreed with the test of reasonableness. He accused the majority of exceeding its own mandate, and asked who "gave the Experts or the Tribunal the right to reduce the Misseriya to second class citizens in their own land and to create conditions which may deny them access to water" (PCA 2009, Dissenting Opinion, para. 203).

Both the GOS and the SPLM accepted the PCA tribunal award.³⁶ The United Nations, European Union, United States, and IGAD also welcomed the decision and saw it as a major step toward resolving the Abyei dispute. On the other hand, the leaders of the Misseriya tribe rejected the decision. They claimed that the territory delimited by the PCA tribunal award as the Abyei area gave too much of their own land and villages to the Ngok Dinka, and restricted their rights over the area to grazing rights.³⁷ They saw the dissenting opinion as reflecting and vindicating their position. The rejection by the Misseriya of the tribunal award presented a major setback to the attempts to resolve the Abyei dispute, and threw the whole process into uncertainty. The rejection took the parties back to July 2005 when the GOS and the Misseriya rejected the ABC report.

THE ABYEI AREA REFERENDUM: WHY IT WAS NOT UNDERTAKEN

Demarcation of the Abyei area was supposed to be the next step following issuance of the PCA tribunal award. However, that did not take place because of the rejection by the Misseriya of the award and their opposition to any demarcation of the area based on that award. A second stalemate developed and lasted until negotiations between the GOS and the SPLM on the Abyei referendum commenced in late 2009. On December 30, 2009, five months after the PCA tribunal award was issued, the National Assembly passed both the Southern Sudan Referendum Act and the Abyei Area Referendum Act.³⁸

The Southern Sudan Referendum Act listed a number of issues that need to be resolved by the two parties. These issues include nationality; currency; public service; position of Joint/Integrated Units (JIUs); international agreements and

³⁵ For discussion of oil in the Abyei area and its quantity and likely depletion dates, see ICG (2007).

³⁶ The Ngok Dinka were initially disappointed that the Abyei area was reduced considerably from that delimited by the ABC, but they did not oppose the tribunal award. Indeed, later on they embraced the award and demanded its full and immediate implementation.

³⁷ For the views of those leaders, see *Sudan Tribune* (2009a).

³⁸ For the major points raised during the discussion of the Abyei Area Referendum Act, and the Misseriya protest against the act, see *Sudan Tribune* (2009b).

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treaties; debts and assets; oil fields, production, and transport; oil contracts; water resources; and property.³⁹ These issues are in addition to disputes on a number of border areas between Northern and Southern Sudan. These borders extend for more than 2,000 kilometers, and a joint committee had started working on their demarcation for some time before the Southern Sudan Referendum Act was adopted. However, as with Abyei dispute and the post-referendum issues, not much progress took place on any of the borders issues.⁴⁰ Henceforth, the pending issues between the North and the South could be clustered into three separate groups: the issues listed under the Southern Sudan Referendum Act, the border issues, and the Abyei dispute.

The Abyei Area Referendum Act confirmed the boundaries of the Abyei area (as determined and delimited by the PCA tribunal award), notwithstanding the Misseriya rejection of the award. The act also confirmed the date for the Abyei referendum (January 9, 2011, as determined by the Abyei Protocol of the CPA and the interim constitution). It called for an Abyei Area Referendum Commission to be established as a legally and financially independent entity with its head office in Abyei Town, and branch offices where the commission deemed necessary. The act gave the commission wide powers with regard to the conduct of the referendum, including preparing registration forms and determining the number and location of the polling stations and the polling schedule. The commission was to conduct the referendum in collaboration with the Abyei administration, the national government, and the government of Southern Sudan, under international supervision. The act invited the thirteen countries and organizations that had witnessed the signing of the CPA, as well as international, regional, and local nongovernmental organizations, to supervise the Abyei referendum.

The Abyei Area Referendum Act was silent on who are considered as residents of the Abyei area, and thus would be eligible to participate in the referendum. As mentioned earlier, the Abyei Protocol (paragraph 6.1) defined the residents of Abyei as “the Members of the Ngok Dinka community and other Sudanese residing in the area” and stated that the criteria for residence should be worked out by the Abyei Area Referendum Commission, which is yet to be established.

³⁹ See article 67 of the act. In addition to those issues, the article added “any other issues to be agreed upon by the two parties.”

⁴⁰ On June 21–22, 2010, representatives of the ruling NCP and the SPLM met in Mekelle, Ethiopia, to discuss the post-referendum issues. On June 23 they signed the Mekelle Memorandum of Understanding between the NCP and SPLM on Post-Referendum Issues and Arrangements (Mekelle MOU). The Mekelle MOU stated that negotiations on post-referendum issues would be conducted by a joint negotiating team consisting of six members from each party, to be assisted by a joint technical secretariat. The Mekelle MOU clustered the issues to be negotiated into four categories: (i) citizenship; (ii) security; (iii) financial, economic, and natural resources; and (iv) international treaties and legal issues. However, the pending issues on the Abyei dispute were not discussed or referred to in the MOU. For the complete text of the Mekelle MOU, see www.cmi.no/sudan/doc/?id=1283.

The act did not reiterate the definition of residency, as it did with other provisions of the Abyei Protocol and other parts of the CPA. Perhaps the reason for this was the demand of the Misseriya tribe that they also be mentioned by name in the act as residents of the Abyei area, which was vehemently rejected by the SPLM and the Ngok Dinka. It seems that the compromise reached by the framers of the act was neither to reiterate the Abyei Protocol's definition (which specified the Ngok Dinka) nor to mention the Misseriya by name, but to leave the issue to the Abyei Referendum Commission. This approach must also be seen as a way of allaying the disappointment of the Misseriya over the incorporation by the act of the boundaries of the Abyei area as established and delimited by the tribunal award.

However, the adoption of the Abyei Area Referendum Act did not pave the way for holding the referendum in Abyei on January 9, 2011, as envisaged under the Abyei Protocol. The Misseriya, with support from the GOS, insisted that they are residents of the Abyei area, and that they have lived there long before the Ngok Dinka moved to the area. They contended that they are covered by the Abyei Protocol under "other Sudanese residing in the area." Thus, they believe, they have the right to participate in the referendum. They also raised the point that they are entitled under the Abyei Protocol to 2 percent of the net oil revenue from the Abyei area, on par with the Ngok Dinka (see note 17). This, in their view, is a clear recognition of their equal rights with the Ngok Dinka over the Abyei area, and that such equality should extend to participating in the referendum on equal footing with the Ngok Dinka.

The SPLM and the Ngok Dinka rejected this demand. They contend that the Misseriya are not specifically mentioned, like the Ngok Dinka, as residents of the area under the Abyei Protocol, and accordingly are not eligible to participate in the referendum. Moreover, they claim that the definition of the Abyei area under the Abyei Protocol makes it clear that the area is exclusively a Ngok Dinka area. They also interpret the PCA tribunal award which confirmed the Misseriya's grazing rights as an indication that the Misseriya are not residents of the Abyei area but are only rights holders.

This issue has turned out to be the crux of the Abyei dispute, overshadowing the original issue of the size and borders of the Abyei area. The extension of the Abyei area by both the ABC report, and later by the tribunal award, beyond the triangle south of the Bahr el Arab River (as claimed by the GOS and agreed to by the Misseriya) must have prompted the claim of the Misseriya that they are residents of the expanded Abyei area. As indicated earlier, the Misseriya claimed, and complained, that the tribunal award gave too much of their own land and villages to the Ngok Dinka. Furthermore, because of this basic difference, the Abyei Referendum Commission has not been established. Differences persisted on who should head the commission, as each party insisted on its chairmanship.⁴¹

⁴¹ The SPLM insisted that since the Southern Sudan Referendum Commission was headed by a Northerner (Southern Referendum Commission 2011), then the Abyei Area Referendum Commission should be headed by a Southerner.

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Moreover, the boundaries of the Abyei area have not yet been demarcated because of the rejection by the Misseriya of the PCA tribunal award.

Various attempts to reach a compromise on the residency issue took place in 2010. Those attempts included interventions by the U.S. special envoy,⁴² as well as the African Union.⁴³ However, as 2010 was coming to a close, it became clear that the Abyei referendum would not take place as scheduled, because the issues in dispute were far from being resolved. As indicated earlier, on January 9, 2011, and as envisaged under the Machakos Protocol of the CPA, the Southern Sudan referendum took place, and the people of Southern Sudan voted overwhelmingly to secede from Sudan, complicating further the process for resolving the Abyei dispute. The Abyei referendum that was supposed to take place simultaneously with the Southern Sudan referendum, as stipulated under the CPA, simply slipped away.⁴⁴

AFTERMATH OF THE FAILURE TO UNDERTAKE THE ABYEI AREA REFERENDUM

As the people of Southern Sudan started voting on January 9, 2011,⁴⁵ a series of clashes took place in the Abyei area between the Misseriya and the Ngok Dinka. It was reported that a number of people from the two tribes, as well as a number of soldiers, were killed during the three days of clashes. Ironically, the clashes

⁴² Representatives of the two parties, with mediation by the U.S. special envoy to the Sudan, Scott Gration, met in Addis Ababa in October 2010 to discuss pending issues on the peace process, including Abyei. On October 12, after nine days of intensive discussion, the parties announced that they had not been able to agree on the eligibility criteria for the voters in the Abyei referendum (*Sudan Tribune* 2010). Although the parties agreed to meet again in Addis Ababa in late October, that meeting was postponed to give the mediators more time to try to reach a compromise.

⁴³ The African Union established a special committee named the African Union High-Level Implementation Panel on Sudan (AUHIP), headed by Thabo Mbeki, the former president of South Africa. The AUHIP is mediating the pending issues between the North and the South, including the Abyei dispute (AUHIP 2010).

⁴⁴ Questions were raised as to why the SPLM did not insist on the Abyei referendum taking place simultaneously with the Southern Sudan referendum as stipulated under the CPA and the interim constitution. The main reason for this, in the author's view, was that the SPLM was concentrating on the Southern Sudan referendum and did not want anything to jeopardize or detract from the carrying out of that referendum on January 9, 2011, as planned.

⁴⁵ The residents of the Abyei area did not participate in the Southern Sudan referendum because Abyei was placed under the presidency, and as such was not part of Southern Sudan. Two questions arose in this connection: (i) Under the Abyei Protocol, the residents of Abyei area would be citizens of both Kordofan and Bahr el Ghazal (see note 16). If they are citizens of the southern state of Bahr el Ghazal (now Northern Bahr el Ghazal), would they not be entitled to vote? (ii) Would the Ngok Dinka of the Abyei area, being Southerners, not be entitled to vote in the referendum on par with the other Southerners residing in Northern Sudan? Those questions were not raised, and it seemed the issue was sidelined by the other developments in the Abyei area.

led the leaders of the two tribes to conclude an agreement on January 13, 2011, independently of the GOS and the SPLM. The agreement dealt with compensation payments to the families of those killed during the three days of clashes. It also dealt with allowing the Misseriya to move in the Abyei area with their cattle to get access to water and grazing (*Sudan Tribune* 2011a). This agreement was endorsed by the GOS and the SPLM through another agreement concluded on January 17, 2011. The two parties also agreed to assign to the JIUs the responsibility for law and order in the Abyei area. The two agreements were concluded at the town of Kadugli, capital of the state of Southern Kordofan, and referred to as the Kadugli agreements. The Kadugli agreements did not, however, go beyond these issues, and unfortunately they did not last for long. Clashes erupted again a few days later and continued intermittently during February and March, resulting in a number of deaths and forcing the United Nations to beef up its presence in the Abyei area in an attempt to keep peace there (*Sudan Tribune* 2011b). Each side blamed the other for the collapse of the Kadugli agreements.

The deterioration of the situation in Abyei prompted the President of the United Nations Security Council (UNSC) to issue a statement on March 3, 2011, on the situation in Abyei. The statement expressed UNSC's deep concern over the fighting, condemned the use of violence, and "underlined the urgent need for a political agreement on the status of Abyei in the framework of ongoing discussions between the CPA parties" (UN 2011a). This statement was, no doubt, another milestone in the internationalization of the Abyei dispute.

The steady deterioration of the situation in Abyei and the continuation of the clashes and deaths on both sides, following the collapse of the Kadugli agreements, and perhaps the statement by the President of the UNSC, prompted the GOS and the SPLM to sign, on March 4, 2011, another agreement to contain the situation (Abyei Agreement).⁴⁶ The agreement called for the full and immediate implementation of the Kadugli agreements, and established a mechanism consisting of an equal number of representatives from each party for overseeing implementation of the agreements. It instructed an immediate withdrawal of the forces of the two parties from the Abyei area, and their replacement by soldiers from the JIUs. The agreement gave the United Nations unhindered access to all of the Abyei area within the PCA boundaries, "consistent with the CPA," and requested the United Nations to facilitate implementation of the two earlier Kadugli agreements. This agreement resembled in a number of aspects the Road Map for Return of IDPs and Implementation of the Abyei Protocol, which was concluded on June 8, 2008, after the outbreak of fighting in the Abyei area early that month. The history of the Abyei dispute resolution process keeps repeating

⁴⁶ The agreement was signed by two high level politicians—the presidential adviser for security affairs signed on behalf of the GOS, while the minister of the armed forces of the government of Southern Sudan signed for the SPLM. For the agreement, see http://unmis.unmissions.org/Portals/UNMIS/2011Docs/Abyei%20Agreement%204%20March%202011_En.pdf.

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itself, albeit without achieving its intended objective. This agreement was considered a continuation of the earlier two Kadugli agreements (of January 13 and 17, 2011), and the three agreements were henceforth referred to collectively as the Kadugli agreements.

Subsequent to the failure of the two parties to undertake the referendum in the Abyei area, some ideas for resolution of the Abyei dispute started being discussed publicly. One of those ideas was giving the Misseriya who reside in the Abyei area for more than six months a year the right to participate in the referendum. Another idea was to establish Abyei as an integration area with special ties to both states of Sudan and South Sudan. A third proposal floated was to divide the Abyei area, as delimited by the PCA tribunal award, between the Misseriya and the Ngok Dinka (and hence between Sudan and the new state of South Sudan). Another idea raised was referring the dispute over whether the Misseriya are entitled to vote for international adjudication or arbitration, or to have the dispute referred to and decided by the traditional leaders of the two tribes. The possibility of formally extending the period for resolving the pending issues between the North and the South, including the Abyei dispute, by six to twelve months beyond the interim period (which would end on July 8, 2011), was also raised. However, no agreement was reached on any of these proposals, as none of them was acceptable to both parties. Each party stuck firmly to its position as each continued to believe that its case is ironclad.⁴⁷

However, the brief calm that followed the Kadugli agreements did not last long. The cycle of ups and downs continued in the Abyei area. On March 11, 2011, one week after the Abyei Agreement was concluded, the government of Southern Sudan issued a strongly worded statement accusing the GOS of trying to overthrow the government of Southern Sudan by arming and supplying militias opposed to it, accusations that were denied by the GOS. The government of Southern Sudan indicated that it would complain to the UNSC and suspended talks and contacts with the GOS on all the pending issues, including Abyei (*Sudan Tribune* 2011c).⁴⁸ It should be added in this connection that the security situation in a number of areas in Southern Sudan had been steadily deteriorating in the latter years of the interim period. Military clashes with armed militias, intertribal fights, and food shortages have been regularly reported since early 2009 (UNHCR 2009; Schomerus and Allen 2010). Suspension of talks on all pending issues between the two parties was indeed a major reversal of the attempts and hopes to find a resolution to those issues, particularly the Abyei dispute. Nonetheless, the

⁴⁷ The SPLM asked that the Abyei area be transferred to Southern Sudan through a presidential decree since the referendum did not take place. This was of course rejected by the GOS and the Misseriya.

⁴⁸ The UNSC invited both the secretary general of the SPLM as well as the representative of the GOS to its 6499th meeting held on March 21, 2011 to discuss the "Reports of the Secretary-General on the Sudan." However, no decisions were made on the complaint of the SPLM (UNSC 2011a).

mediation efforts of the African Union High-Level Implementation Panel on Sudan (AUHIP) and the United States continued,⁴⁹ and the presidency held a few meetings. As per the instructions of the presidency, the Joint Defense Council ceased to exist as of April 10, 2011, and the mandate of the JIUs established under the Agreement on Security Arrangements of September 23, 2003, also ended on that date. However, a battalion of the JIUs was kept at Abyei, as well as in the oil fields (*Sudan Vision* 2011), but it did not seem effective in keeping peace and order.⁵⁰

By mid-April 2011, there was a general resignation among all the parties and the mediators that the Abyei dispute, and perhaps most other pending issues between the North and the South, would most likely remain without resolution by the end of the interim period and the emergence of South Sudan as an independent state on July 9, 2011. Indeed, the United Nations itself seemed to think that this would be the likely situation on that date. Briefing the UNSC on April 20, 2011, the Assistant Secretary-General for Peacekeeping Operations of the UN voiced his concern over the slow progress on several outstanding issues from the 2005 CPA, including the Abyei dispute. He stated that: “Due to . . . disagreements, there is a possibility that the residual CPA issues will not be solved and/or that the post-referendum negotiations will not be concluded by 9 July [the expected date when Southern Sudan becomes independent]” (UN 2011a).

However, one other major complication took place toward the end of April. On April 22, 2011, the government of Southern Sudan issued a draft of the Transitional Constitution of the Republic of South Sudan.⁵¹ Article 1(2) of the draft defined the territory of the Republic of South Sudan to comprise “all lands and air space that constituted the three former Southern Provinces of Bahr el Ghazal, Equatoria and Upper Nile in their boundaries as they stood on January 1, 1956, and the Abyei Area, the territory of the nine Ngok Dinka chiefdoms transferred from Bahr el Ghazal Province to Kordofan Province in 1905 as defined by the Abyei Arbitration Tribunal Award of July 2009.” The president of Sudan responded by claiming that the Abyei area belongs to North Sudan, and warned that the North would revoke its recognition of South Sudan’s independence if the latter claimed ownership of Abyei in its constitution (*Sudan Tribune* 2011d).

⁴⁹ On March 31, 2011, the United States announced the appointment of Ambassador Princeton Lyman as its new special envoy, replacing Scott Gration. Ambassador Lyman and Thabo Mbeki both visited Sudan in early April.

⁵⁰ Article 4 of the Agreement on Security Arrangements, which is set out in chapter VI of the CPA, states that “there shall be formed Joint/Integrated Units consisting of equal number from the Sudanese Armed Forces (SAF) and the Sudan People’s Liberation Army (SPLA) during the Interim Period. The Joint/Integrated Units shall constitute a nucleus of a post referendum army of Sudan, should the result of the referendum confirm unity, otherwise they would be dissolved and component parts integrated into their respective forces.” The decision of the presidency to keep a battalion at Abyei after dissolution of the JIUs is a clear amendment of the agreement.

⁵¹ For the complete text of the Transitional Constitution of the Republic of Southern Sudan, see www.sudantribune.com/IMG/pdf/The_Draft_Transitional_Constitution_of_the_ROSS2-2.pdf.

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Those developments showed a clear hardening of the positions of the parties over Abyei, and a further deterioration of the relationship between them.

On May 2, 2011, elections were held in the state of Southern Kordofan, one year after the general elections in Sudan, because of disputes over voter registration in the state. As indicated earlier, the Southern Kordofan and Blue Nile states are geographically part of Northern Sudan but identify culturally more with Southern Sudan, and there is a separate protocol calling for popular consultations in these two states. Moreover, the Abyei Protocol stated that the residents of Abyei area would be citizens of both Kordofan and Bahr el Ghazal. The SPLM and the NCP, in addition to other political parties, filed candidates for gubernatorial and legislative elections. However, the elections process was marred by disputes between the NCP and SPLM, with the latter claiming major irregularities in the voting process, and declaring in advance their rejection of the results. On May 15, 2011, the Elections Commission announced the NCP candidate as the winner of the gubernatorial elections, and the SPLM asserted its nonrecognition of the results.⁵² This situation added more complications to the already tense situation in Abyei, and the overall relations between the North and the South.

Just as the aftermath of the elections was being debated, the GOS announced that on May 20, 2011, forces of the SPLA ambushed and killed twenty-two soldiers of the SAF, who were part of the JIUs, as they were moving out of Abyei Town. The government also stated that many other soldiers were wounded and scores were missing. The government claimed that the assailed troops were moving out of the Abyei area in implementation of the Kadugli agreements and were being escorted by the UN peacekeeping force (UNMIS) in the area. At the beginning, the SPLA/M denied that they carried out the attack and asked for an investigation; UNMIS said that the attack was carried out by unknown assailants. However, the government of Southern Sudan later apologized to the UN for the attack. The GOS criticized the UN for failure to assign blame to Southern Sudan for the attack. The following day the SAF launched heavy ground and air assaults on the positions of the SPLA in the Abyei area, and on May 21, it announced that it had taken over Abyei Town and the surrounding areas. Subsequently, and on that same day, the president of Sudan issued two decrees dissolving the Abyei Administrative Council and dismissing its head (a Southerner) and his deputy (a Northerner), as well as the directors of the five departments that administered the area. (This was the GOS/SPLM joint body established by the presidency under the Abyei Protocol.) The government of Southern Sudan denounced the takeover of the area and the dissolution of the administration of Abyei, and stated that this was done without consultations with them and was a gross violation of the CPA.

The takeover of Abyei and the declaration by the GOS that Abyei is a Northern territory meant that the GOS had decided to impose its earlier claim that the area that was transferred to the North from the South was only the triangle

⁵² The Elections Commission also announced that the NCP won twenty-two seats in the parliamentary elections, while the SPLM won only ten seats.

south of the Bahr el Arab River (see figure 2). The GOS also reasserted its claim that this line is the 1956 North-South border, which is sacrosanct. As a result of the fighting and widespread looting in Abyei Town and the surrounding area, a large number of Ngok Dinka refugees crossed the Bahr el Arab River southward. The UN estimated their numbers as being in the tens of thousands (UN 2011b).

Meanwhile, the fifteen members of the UNSC began a visit to Sudan. On May 20, 2011, on their way to Sudan, they met in Addis Ababa with the African Union Peace and Security Council. The members of the UNSC had planned to travel thereafter to Khartoum, Juba, and Abyei, but an announcement was issued cancelling the visit to Abyei following its takeover by the government forces. The members of the UNSC arrived in Khartoum on May 21, 2011, and issued a statement on May 22, 2011. The statement indicated that the takeover of Abyei by the GOS constituted a serious violation of the CPA and threatened to undermine the mutual commitment of the parties to avoid a return to conflict and resolve all remaining CPA and post-CPA issues peacefully. The statement called on the Sudanese government to withdraw its forces from Abyei and to halt its military operations there. It also denounced the attack by the SPLA on the SAF units that triggered the retaliation by the Northern government, and the attack against the UNMIS forces escorting the SAF soldiers on May 19, 2011. The statement deplored the unilateral decision by the president of Sudan to dissolve the Abyei Administrative Council and called for its reinstatement. It urged both parties to restore calm, uphold the CPA, and recommit to a negotiated political settlement of the future status of Abyei, including under the auspices of the African Union High-Level Implementation Panel (AUHIP). In parallel to the statement of the UNSC, the UN Secretary-General Ban Ki-moon strongly condemned the continuing violence in the Abyei area (UN 2011c). While in Khartoum, the UNSC members were not met by the vice president of Sudan or the minister of foreign affairs, as was planned. The members visited Juba thereafter, and travelled to the border areas near Abyei to assess the situation and needs of the Ngok Dinka who fled Abyei.

Similarly, the governments of the United States, United Kingdom, and France denounced the killing of the Northern Sudanese soldiers and the takeover of Abyei by the SAF, called the takeover disproportionate, and demanded an immediate withdrawal of the Sudanese government forces from Abyei and reinstatement of the Abyei administration.

On May 26, 2011, one week after the takeover of Abyei, the Sudanese army declared the end to military operations in Abyei, and called on the Ngok Dinka, Misseriya, and other tribes to return to Abyei Town. The Misseriya welcomed the takeover of Abyei, and it was reported that they had indeed started moving into the area. The GOS announced the appointment of an army officer to be in charge of Abyei. It also announced that the mandate of the UNMIS would end on July 8, 2011, as originally scheduled, and that it would not be renewed, and asked for the withdrawal of all military and civilian personnel of UNMIS from Northern Sudan by that date. Meanwhile, the government of Southern Sudan indicated that a new and revamped role for the UN military and civilian personnel of

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UNMIS would be worked out and agreed upon with the United Nations for the new state of South Sudan.

On May 28, 2011, the vice president of the government of Southern Sudan, Riek Machar, arrived in Khartoum and held a meeting on May 30 with the vice president of Sudan, Ali Osman Taha. The meeting concentrated on the recent developments in Abyei, but also dealt with the other pending issues. However, the meeting did not result in an agreement on how to deal with the situation; instead a decision was made to set up a joint committee that would look into ways to defuse the crisis (*Sudan Tribune* 2011e).⁵³

The government of Southern Sudan wanted to contain the situation so that it would secede on July 9, 2011, without the threat of conflict with the North overshadowing the festivities of independence. However, it became clear, as of the end of May 2011, that the Abyei dispute as well as all the pending issues would await the birth of the new state of South Sudan on July 9, 2011, and would have to be dealt with by two sovereign states. This would no doubt make the negotiations more complex and intricate, as negotiations between two states are usually more difficult than negotiations between geographical units within one state.

No doubt, the ambush and killing of SAF soldiers by the SPLA and the takeover of the Abyei area by the GOS troops marked a major reversal to the attempts to resolve the Abyei dispute peacefully. Those developments showed clearly the repercussions and impact of the Abyei dispute on the overall relationship between the North and the South, and between the Misseriya and the Ngok Dinka, as well as on the attempts to resolve the other pending issues. Indeed, the Abyei dispute is now the thorniest issue between the two parties and will clearly be the maker or breaker of the whole peace process. It is quite ironic, and indeed very sad, that the ambush and killing of the Northern Sudanese soldiers and the takeover of Abyei by the Sudanese government took place almost exactly seven years after the Abyei Protocol was concluded by the GOS and the SPLM/A on May 26, 2004, aiming to resolve the Abyei dispute.

CONCLUSION

The unique nature and complexity of the Abyei dispute are quite evident. It is a dispute about both the boundaries and size of the area as well as to whom it

⁵³ The *Sudan Tribune* also reported that “Western officials have revealed to the *New York Times* that there are behind the scenes efforts to bring in Ethiopian peacekeepers into Abyei to act as buffer between the North and South. ‘We need something quick for Abyei, and the Ethiopians are it,’ a Western diplomat said Monday. Under the proposal, the northern army would withdraw from the Abyei area in the next few weeks, and in their place would come thousands of Ethiopian soldiers until a permanent solution could be reached” (*Sudan Tribune* 2011e). However, no mention of this proposal was made by either party. Ethiopia indicated that it would be willing to send troops and play a role in resolution of the Abyei dispute, but only if asked explicitly by both parties.

belongs. Because of the duality of the issues involved, the parties agreed on a two-stage resolution process, namely a quasi-judicial process for determining the boundaries and size of the area, to be followed by a political process, the referendum, which would decide which part of the country the area would belong. However, the first stage of the process agreed upon for delimiting and demarcating the area (the ABC report) turned into a source of dispute and resulted in adjudication before the PCA. The decision of the PCA tribunal was supposed to bring to an end the first stage of the dispute: the Abyei area had been delimited and was awaiting demarcation. That did not happen because of substantial opposition by the Misseriya. The second stage was supposed to be the referendum, scheduled for January 9, 2011, in which the residents of the Abyei area were to decide which part of the country—the North or the South—the area would become part of. That did not happen either because of disagreement over who the residents are of the Abyei area. Accordingly, seven years after the Abyei Protocol was signed, the Abyei dispute has eluded all attempts and hopes for its resolution.

Completion of the first stage took more than five years, beginning with the signing of the Abyei Protocol in May 2004. It required the conclusion of a large number of agreements to clarify and elaborate on the provisions of the Abyei Protocol, including the more wide-ranging CPA, signed in January 2005; the Understandings on the Abyei Boundaries Commission (the Abyei Annex or Appendix) of December 2004; and the Implementation Modalities of the Protocol on the Resolution of the Abyei Conflict, signed in December 2004. Following the signing of the CPA on January 9, 2005, a number of other agreements were also concluded to clarify and elaborate the process for resolving the dispute, including the Text of the Terms of Reference for the Abyei Boundaries Commission (March 2005) and the Rules of Procedure for the Abyei Boundaries Commission (April 2005). All those agreements did not lead to resolution of the dispute. More agreements were needed to move the process forward, including the Road Map for Return of IDPs and Implementation of the Abyei Protocol (June 2008), which was concluded after the fighting that led to the devastation of Abyei Town; the Memorandum of Understanding on the Abyei Arbitration (June 2008); and the Arbitration Agreement on Delimiting the Abyei Area (July 2008). The Abyei Area Referendum Act adopted on December 30, 2009, should also be considered an agreement as it was only adopted by the National Assembly after an agreement on its details was reached by the NCP and SPLM.⁵⁴ Mention should also be made of the Kadugli agreements of January 13 and 17, 2011, as well as the

⁵⁴ The speaker of the National Assembly of Sudan declared the membership of those elected from constituencies within Southern Sudan for the National Assembly as having lapsed on March 31, 2011, as a result of the decision of Southern Sudan to secede from Sudan. The members of the assembly from Southern Sudan argued that their membership would only lapse at the end of the interim period on July 8, 2011. However, they reluctantly agreed to leave the assembly. This had no doubt added to the acrimonious atmosphere between the two parties.

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Abyei Agreement of March 4, 2011. As a result, the Abyei dispute, no doubt, has one of the largest number of agreements aimed at its resolution.

The resolution process agreed by the two parties was itself unusual and required substantial international intervention at three levels. The U.S. special envoy to Sudan broke the deadlock over the definition of the Abyei area, and basically drafted the Abyei Protocol, which the two parties adopted in May 2004. The ABC experts were appointed by the United States, United Kingdom, and IGAD, and included an American, a Briton, and three Africans. Rejection of the ABC report by the GOS and the Misseriya in 2005 led to adjudication before the PCA in 2009. Indeed, the Abyei dispute is the first internal territorial dispute to be adjudicated before, and decided on by, an international tribunal. Mention should also be made of the mediation efforts of the U.S. special envoys to Sudan as well as the AUHIP. Although the ABC report was rejected by the GOS, that report made it easier for the government to accept the PCA tribunal award, and even to portray it as a victory, because it decreased the Abyei area delimited by the ABC by almost half. However, the Misseriya rejection of the tribunal award, because of their claim that the award took away large areas of their territory and added it to the Abyei area, threw the whole process into uncertainty. As a result, demarcation of the area has not yet taken place.

Consequently, the second stage of the dispute resolution process, the referendum, did not take place as envisaged, as the process continued to be fraught with disagreements. Although the Abyei Area Referendum Act was adopted by the National Assembly in December 2009, the issue of who has the right to participate in the referendum was left unresolved, with the Misseriya demanding the right to participate, a demand the Ngok Dinka and SPLM vehemently reject. Indeed, the question of whether the members of the Misseriya tribe are residents of the Abyei area, and thus are entitled to vote in the Abyei referendum, has become the crux of the dispute, and has overshadowed the original main issue of the dispute of defining, delimiting, and demarcating the Abyei area. Henceforth, the dispute has become more about who has the right to participate in the referendum than about the size and boundaries of the Abyei area.

The complexity of the Abyei dispute stems from the multiplicity of the parties, claims, and issues. As stated throughout this chapter, the dispute involved not only the GOS and the SPLM, but also the Misseriya and the Ngok Dinka tribes. The claims extend beyond land to include oil and water resources. Oil remained the main contentious issue between the North and the South,⁵⁵ while water and grazing rights are the focal points of the dispute for the Misseriya. Indeed, the Abyei dispute shows clearly the centrality of water resources in post-conflict

⁵⁵ It is estimated that 75 percent of the proven oil resources in Sudan would fall within South Sudan following its decision to secede. On the other hand, the entire oil infrastructure of pipelines, refineries, ports, port facilities, and human resources are in the North. Thus, it is argued that this situation may provide incentives for the two parties to look for solutions to the pending issues and existing disputes, including Abyei.

situations (Salman 2011, 2013). The issues have gradually changed during the last six years from delimiting and demarcating the Abyei area to who is entitled to participate in the referendum. Because of these complexities, the interim period during which the Abyei dispute was supposed to have been resolved witnessed, instead, a widening gap in and the hardening of positions. The decision of the Southern Sudanese to secede from Sudan has exacerbated the already existing complications, because negotiations between two states are likely to be more difficult than negotiations between units within one state. Moreover, and as discussed earlier, the Southern Sudan Referendum Act of 2009 listed ten issues that need to be discussed and resolved by the two parties. All of those issues remained without a resolution when Southern Sudan voted overwhelmingly for secession, more than a year after the act was adopted; and all remained unresolved by the end of May 2011. Those issues are in addition to some serious border issues which remain disputed by the two parties. Thus, by the end of May 2011, the two parties had three clusters of complex issues that await resolution: the Abyei dispute, the borders, and the issues listed in the Southern Sudan Referendum Act.

Of all the ideas put forth to resolve the Abyei dispute, as discussed in the previous section of this chapter, the proposal to take the dispute back to the traditional leaders of both tribes seems, in the author's view, to be the one with the best chance of providing a resolution to the dispute. The Misseriya and the Ngok Dinka lived in peace for a long time prior to the eruption of the civil war in 1955. Differences between members of the two communities were resolved by their leaders on the basis of the traditions and customs of the two tribes. Those leaders know better than anyone else (the GOS and the government of South Sudan included) the boundaries and rights of each community, and the timing and manner in which such rights are exercised. Indeed, the dispute should have been placed, from the very beginning of the process, in the hands of the traditional leaders and should not have been dealt with by the politicians and international experts and entities. A resolution of the dispute by the leaders of the two tribes is more likely to be acceptable to the members of the two tribes, and accordingly should be more implementable and sustainable than a resolution by the two governments or by a third party.

It may be argued that it may be too late to refer the dispute to the leaders of the two communities because the events in Abyei since 2005 have resulted in an acrimonious environment and have widened the gap between the members of the two tribes. It may also be argued that the decisions of the ABC and PCA, and the takeover of the area by the GOS on May 20, 2011, may harden the position of the SPLM and the Ngok Dinka. This all may be true. Yet, resorting to the leaders of the two communities remains, in this author's view, the only viable, or perhaps even possible, option. The Kadugli agreements, despite their collapse, indicate the willingness of the parties to discuss the dispute, and their ability to reach agreements on some of its aspects.

The seeds of the Abyei dispute were sown by an act intended to achieve administrative convenience and expediency—bringing two feuding tribes under

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one jurisdiction by transferring a Southern Sudan area to the North where it could be more easily governed by the Anglo-Egyptian colonial administration. That 1905 decision by mid-level provincial administrators mushroomed, a century later, into a national dispute, posing a major and serious threat to the entire relations between Northern and Southern Sudan, as well as between the Misseriya and the Ngok Dinka, and prompting major international interventions which had limitations. Now the Abyei dispute poses a major threat to the relations between Sudan and the new state of South Sudan, particularly after the developments since May 19, 2011. Clearly, some of the worst problems can result from some of the best intentions.

The opening paragraph of the Abyei Protocol stated that “Abyei is a bridge between the north and the south, linking the people of Sudan.” The Road Map for Return of IDPs and Implementation of the Abyei Protocol called on the presidency to “work at making Abyei a model for national reconciliation and peace building” (Road Map of Abyei Protocol 2008, para. 3.8). No doubt, these were lofty aspirations when the CPA was being negotiated and finalized, and during the early years of the interim period. Regrettably, Abyei is currently the thorniest issue between Sudan and the new state of South Sudan. It is now quite apparent that the relations between the two states will depend heavily on a resolution of the Abyei dispute in a manner that is acceptable not only to the GOS and the government of South Sudan, but also to the Misseriya and the Ngok Dinka tribes. Whether that is still achievable seems as remote as ever.

EPILOGUE

The developments discussed and analyzed in this chapter were current through May 31, 2011. From that time through July 10, 2011, three major developments took place in the Sudan North-South relations that will affect the Abyei dispute.

The first and most important development was, as expected, the formal secession of South Sudan and its emergence as an independent state on July 9, 2011. On that date South Sudan became the 193rd member of the global family of nations, and the 54th African state. As a result, all the pending issues between North and South Sudan, including any negotiations and agreements on Abyei, would henceforth be between two sovereign nations.

The second development was the rapid deterioration of the situation in the state of Southern Kordofan following the announcement of the results of the May 2011 elections. As indicated earlier, the NCP gubernatorial candidate was declared the winner over the SPLM candidate. On June 5, 2011, fighting erupted and escalated in the following weeks between GOS forces and the SPLA. The fighting forced thousands to flee the state capital Kadugli and surrounding areas, and sparked an international concern over the humanitarian situation there and the overall North-South relations. The UN suspended its operations and evacuated most of its staff from the state. As indicated earlier, a separate protocol of the CPA dealt with the states of Southern Kordofan and Blue Nile, calling for popular consultations there. Moreover, the Abyei area was administered as part

of Kordofan before the CPA was concluded, and Abyei residents were considered citizens of both Kordofan and Bahr el Ghazal states.

The third major development took place on June 20, 2011, while the fighting was going on in the state of Southern Kordofan. On that day, the GOS and the SPLM signed in Addis Ababa, Ethiopia, an agreement on Temporary Arrangements for the Administration and Security of the Abyei Area (Abyei Addis Ababa Agreement).⁵⁶ The agreement, which was brokered by the AUHIP and other international mediators, was also signed by Thabo Mbeki, for the AUHIP, as a witness. The preamble of the agreement (referred to as the introduction) confirmed (1) the boundaries of the Abyei area as defined by the PCA tribunal award, and (2) the provisions of the Abyei Protocol as modified by the agreement. It also confirmed the 1956 borders between the North and the South, unless changed as a result of the outcome of the referendum foreseen in the Abyei Protocol, or other decision of the parties on the final status of Abyei.

The agreement mandated the redeployment of both the SAF and the SPLA from the Abyei area, immediately “consequent on” the deployment of an Interim Security Force for Abyei (ISFA) which shall consist of one armored brigade of Ethiopian troops. Hence, with the exception of the ISFA, the agreement declared the Abyei area as demilitarized. The mandate of the ISFA included monitoring and verification; protection of monitoring teams; security within the Abyei area; and protection of the borders of the Abyei area from incursions by unauthorized elements. The mandate also included support and capacity building to the Abyei police service; facilitation and protection of humanitarian assistance; and protection of civilians under imminent threat. A committee consisting of the GOS, SPLM, and the UN was assigned the task of drafting the detailed mandate of the ISFA which would be submitted to the UNSC. The GOS and the SPLM would request the UNSC to approve the deployment, mandate, and the financing of the ISFA, with the understanding that the mandate shall not be changed without the agreement of the GOS, the SPLM, and the Government of Ethiopia. The force commander of the ISFA shall report to the UN. The annex to the agreement established a timetable for the deployment of the ISFA, with the day of the authorization by the UNSC as the D-day, and with the deployment of the main body of the ISFA by the ninth day thereafter, and the handover of responsibilities between the tenth and thirteenth day from the D-day.

A Joint Military Observer Committee (JMOC) consisting of an equal number of observers from both parties, to be stationed at Abyei, is also established under the agreement. The force commander of the ISFA shall chair the JMOC which shall liaise with the ISFA in carrying out its functions. The JMOC shall submit its reports to the Abyei Joint Oversight Committee (AJOC) discussed below.

⁵⁶ The full name of the agreement is the Agreement between the Government of the Republic of Sudan and the Sudan People's Liberation Movement on Temporary Arrangements for the Administration and Security of the Abyei Area. For the text of the agreement, see www.sudantribune.com/IMG/pdf/Abyei_Agreement_20110620.pdf.

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The agreement established the Abyei Area Administration, which consists of a chief administrator, his deputy, and five heads of department (the executive council). The chief administrator shall be a nominee of the SPLM agreed by the GOS, while his deputy shall be a nominee of the GOS agreed by the SPLM. Of the five heads of department, three shall be nominees of the SPLM, and two of the GOS. The decision of the executive council shall be taken by consensus. The local council (a legislative body) shall continue to consist of twenty members as indicated in the Abyei Protocol, with the chairmanship resting with the GOS. This was, more or less, the same administrative structure that existed before the GOS forces overtook Abyei on May 21, 2011, and dissolved the executive council and the local council.

In addition, the agreement established the AJOC, which consists of four members, with each party appointing two members. The AJOC would be chaired jointly by two members, one from each party. The African Union Commission chairperson shall appoint a nonvoting member, while the ISFA commander shall attend the AJOC meetings as a nonvoting member when security matters are discussed. On behalf of the president of Sudan and the president of South Sudan, the AJOC shall exercise political and administrative oversight over the executive council, and shall deal with any matter in case of a deadlock in the executive council. The budget of the Abyei area is prepared by the executive council and approved by the local council, and shall be financed jointly by the GOS and government of South Sudan (GOSS).

The agreement called for the return of the former residents of Abyei to their former places of residence. It also required the parties to ensure that humanitarian assistance reaches those in need, and to facilitate the work of the UN and other humanitarian agencies. The parties shall make a joint appeal for assistance for the return and rehabilitation of those displaced or affected by the conflict. Under the subtitle "Pastoralist Migration," the agreement confirmed the right of the pastoral nomads to enjoy rights of migration and access to pasture and water in accordance with traditional migration routes in the Abyei area, and consistent with the Abyei Protocol. The Abyei Police Service (APS) shall be established, with the AJOC determining its size and composition. A special unit of the APS shall deal with the issues arising from the nomadic migration, including accompanying nomads within the Abyei area on their annual migration.

With regard to the process for resolution of the final status of Abyei, the agreement indicated the commitment of the parties to a peaceful resolution, and stated that they shall consider in good faith proposals that the AUHIP shall make to resolve the matter. As mentioned above, the preamble to the agreement stated that borders between the North and the South will be inviolate unless changed as a result of the outcome of the referendum foreseen in the Abyei Protocol. However, no new date or procedures for the referendum are included in the agreement, nor does the agreement address who would be eligible to vote, although this has been the main reason for the impasse.

The agreement requested the African Union and the UN to support the agreement and its implementation, and the UNSC to approve the deployment,

mandate, and the financing of the ISFA. On June 27, 2011, the UNSC unanimously adopted Resolution 1990 (UNSC 2011b). The resolution established and renamed the force as the United Nations Interim Security Force for Abyei (UNISFA), consisting of a maximum of 4,200 military personnel, fifty police personnel, and appropriate civilian support. The resolution elaborated the mandate of UNISFA to include, *inter alia*, monitoring and verification of the redeployment of any SAF and SPLA from the Abyei area as defined by the PCA, and declared the Abyei area as demilitarized from any forces except UNISFA and the APS. The mandate also included demining assistance and technical advice, strengthening the capacity of the APS, assisting in providing security for the oil infrastructure in the Abyei area, and facilitating the delivery of humanitarian aid and the free movement of the humanitarian personnel. Acting under chapter VII of the Charter of the United Nations,⁵⁷ the resolution authorized UNISFA to take actions to protect UNISFA and UN personnel, facilities, installations, and equipment; ensure the security and freedom of movement of UN personnel; protect civilians in the Abyei area under imminent threat of physical violence; protect the Abyei area from incursions by unauthorized elements; and ensure security in the Abyei area.

The resolution urged the GOS and GOSS to fulfill their commitment under the CPA to peacefully resolve the final status of Abyei, and to consider in good faith proposals that the AUHIP shall make to resolve the matter. The resolution requested the UN Secretary-General to keep the UNSC regularly informed of the progress in implementing the agreement and to report no later than thirty days after the adoption of the resolution, and every sixty days thereafter. It also requested the Secretary-General to ensure that effective human rights monitoring is carried out in the Abyei area, and the results included in the Secretary-General's report to the UNSC. UNISFA's role in the implementation of the agreement would be reviewed by the UNSC not later than three months after adoption of the resolution. The conclusion of the agreement and the adoption of the resolution are the most remarkable developments in the internationalization of the Abyei dispute, coinciding with the emergence of South Sudan as an independent nation.

The failure to undertake the Abyei referendum on January 9, 2011, and the end of the interim period and the emergence of South Sudan as an independent nation on July 9, 2011, have rendered the Abyei Protocol largely obsolete. New arrangements were urgently needed for the Abyei area, which are now reflected in the Abyei Addis Ababa Agreement, and elaborated on and strengthened by the UNSC resolution. Although called temporary, those arrangements are likely to last for a long time, because the main issue of who has the right to vote in the referendum has proven difficult to resolve. If and when peace and security

⁵⁷ Chapter VII of the UN Charter authorizes the UNSC to take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security, should other measures—such as complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations—be considered inadequate.

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return to the Abyei area, it would be timely and appropriate to take the dispute back to the traditional leaders of the Ngok Dinka and Misseriya, as recommended in this chapter. After the failure of the GOS, SPLM, the UN, the AUHIP, other mediators, international commissions, and tribunals, the traditional leaders are the only remaining viable alternative for resolving the Abyei dispute.

Milestones in the Abyei territorial dispute between North and South Sudan

- 1905 Transfer of nine Ngok Dinka chiefdoms from Southern to Northern Sudan.
- August 1955 Outbreak of civil war between Northern and Southern Sudan.
- January 1, 1956 Independence of Sudan from the Anglo-Egyptian condominium rule.
- March 12, 1972 Conclusion of the Addis Ababa Agreement on the Problem of Southern Sudan, ending the conflict between the North and the South.
- May 1983 Outbreak of renewed civil war between the South (led by the SPLM/A), and the North, following collapse of the Addis Ababa Agreement.
- July 20, 2002 Signature of the Machakos Protocol between the GOS and the SPLM/A, granting Southern Sudan the right of self determination.
- September 25, 2003 Signature of the Agreement on Security Arrangements between GOS and the SPLM/A.
- January 7, 2004 Signature of the Agreement on Wealth Sharing between GOS and the SPLM/A.
- March 19, 2004 Senator John Danforth, U.S. special envoy to Sudan, presented his proposals for resolution of the Abyei conflict to the two parties, which accepted them.
- May 26, 2004 Signature of the Resolution of the Abyei Conflict between GOS and SPLM/A (the Abyei Protocol), reflecting Senator Danforth's proposals.
- May 26, 2004 Signature of the Agreement on the Resolution of the Conflict in Southern Kordofan and Blue Nile States between GOS and SPLM/A.
- May 26, 2004 Signature of the Agreement on Power Sharing between GOS and SPLM/A.
- December 17, 2004 Signature of the Understandings on the Abyei Boundaries Commission (also known as the Abyei Annex, or Appendix).
- December 31, 2004 Signature of the Implementation Modalities of the Protocol on the Resolution of the Abyei Conflict.

- January 9, 2005 Signature of the Comprehensive Peace Agreement (the CPA) (which included the agreements and protocols between the GOS and the SPLM/A referred to above).
- March 12, 2005 Signature of the Text of the Terms of Reference for the Abyei Boundaries Commission (ABC).
- March 15, 2005 Completion of the selection of the members of the ABC.
- April 11, 2005 Signature of the Rules of Procedure for the ABC.
- April 2005 Members of the ABC visited the Abyei area and Khartoum.
- June 2005 Members of the ABC completed their report.
- July 6, 2005 Issuance of the Interim National Constitution of the Republic of the Sudan.
- July 14, 2005 Presentation of the ABC report to GOS and SPLM/A; the report was rejected by GOS.
- October 2007 SPLM withdrew from the national government, protesting a number of issues, including failure to implement the ABC report.
- May 2008 Outbreak of fighting between GOS forces and SPLA in Abyei Town.
- June 8, 2008 Signature of the Road Map for Return of IDPs (internally displaced persons) and Implementation of the Abyei Protocol. The agreement confirmed a role in the peacekeeping process in Abyei for UNMIS.
- June 21, 2008 Signature of the Memorandum of Understanding on the Abyei Arbitration.
- July 7, 2008 Signature of the Arbitration Agreement between GOS and SPLM/A on Delimiting Abyei Area, referring the Abyei dispute to the Permanent Court of Arbitration (PCA).
- October 2008 PCA tribunal for the Abyei dispute was constituted.
- April 18, 2009 Oral hearings by the two parties before the PCA tribunal.
- July 22, 2009 Issuance of the award of the PCA tribunal on the Abyei dispute.
- July 22, 2009 GOS and SPLM/A accepted award; the Misseriya rejected it.
- December 30, 2009 Adoption of the Southern Sudan Referendum Act and the Abyei Area Referendum Act.
- June 2010 Establishment of the Southern Sudan Referendum Commission.
- June 2010 Conclusion of the Mekelle Memorandum of Understanding between the NCP and SPLM on Post-Referendum Issues and Arrangements; no mention of Abyei pending issues.

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- October 2010 Addis Ababa meeting of the two parties failed to resolve, among other things, the pending issues on the Abyei dispute.
- January 9, 2011 Planned date for the Southern Sudan and Abyei referendums; the latter did not take place.
- January 9, 2011 Clashes took place between the Misseriya and the Ngok Dinka in the Abyei area, lasting for three days.
- January 13 and 17, 2011 Conclusion of the Kadugli agreements between the leaders of the Misseriya and the Ngok Dinka for ending the clashes which erupted that week. The agreements collapsed a few weeks later.
- February 7, 2011 Results of Southern Sudan referendum announced, showing that close to 99 percent of the voters opted for secession; GOS officially accepted the results.
- February 2011 Clashes continued between the Misseriya and the Ngok Dinka in the Abyei area.
- March 3, 2011 The President of the UNSC issued a statement expressing concern over the situation in Abyei.
- March 4, 2011 Conclusion of the Abyei March 4 Agreement between the GOS and the SPLM, attempting to contain the situation in Abyei.
- March 11, 2011 Government of Southern Sudan claimed plot by Khartoum to overthrow the government in Southern Sudan and announced suspension of talks and contacts with the GOS on all pending issues, including Abyei, as well as plans to lodge a formal complaint to the UNSC.
- March 21, 2011 The UNSC considered the “Reports of the Secretary-General on the Sudan,” but no further action was taken.
- April 9, 2011 Presidency decided to end mandate of the Joint/Integrated Units, but a battalion was kept at Abyei and oil fields.
- April 20, 2011 The Assistant Secretary-General for Peacekeeping Operations of the UN briefed the UNSC over the slow progress on several outstanding issues from the 2005 CPA, including the Abyei dispute.
- April 22, 2011 Draft constitution of the Republic of South Sudan issued; it includes the Abyei area as part of South Sudan.
- April 27, 2011 President of Sudan rejected inclusion of Abyei as part of the state of South Sudan, and threatened to revoke recognition of South Sudan’s independence if the latter claimed ownership of Abyei in its constitution.

- May 15, 2011 Results of gubernatorial and legislative elections in Southern Kordofan state announced, with the NCP candidate as the winner for the gubernatorial elections. SPLM asserted its nonrecognition of the results.
- May 20, 2011 GOS announced the ambush and killing by SPLA forces of twenty-two of its soldiers. The SPLM denied involvement in the attack.
- May 21, 2011 GOS took over the Abyei area and announced dissolution of the Abyei Administrative Council.
- May 22, 2011 Members of the UNSC started a visit to Khartoum, and cancelled their planned visit to Abyei.
- May 22, 2011 The UNSC issued a statement from Khartoum deploring the killing of the GOS soldiers and the occupation by the GOS forces of the Abyei area, and called for withdrawal of those troops.
- May 23, 2011 Members of the UNSC visited Juba.
- May 29–30, 2011 Vice president of the government of Southern Sudan visited Khartoum and met with the vice president of Sudan on Abyei. However, no agreement was reached on how to deal with Abyei's takeover by the GOS forces, and the aftermath.
- June 5, 2011 Fighting erupted in the state of Southern Kordofan following the announcement of the May election results, which were rejected by the SPLM.
- June 20, 2011 Conclusion in Addis Ababa of the agreement on Temporary Arrangements for the Administration and Security of the Abyei Area, between the GOS and the SPLM.
- June 27, 2011 UNSC issued Resolution 1990, incorporating and elaborating the agreement on Temporary Arrangements for the Administration and Security of the Abyei Area.
- July 9, 2011 South Sudan formally seceded from Sudan and emerged as an independent nation.

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