Jennifer Christian
International Courts, Fall 2009

A Calculated Compromise?

The Abyei Arbitration As A Model For Intrastate Dispute Resolution

Introduction

The state as the only recognized actor at international law is a principle as old as the idea it posits.[1] With the expansion of international law's purview to include individual rights,[2] crimes perpetrated by both persons and states,[3] and peace agreements,[4] coupled with the proliferation of international organizations, trans-national corporations, and sub-state entities operating in the international arena, the concept of the state as *the* actor at international law is beginning to see signs of erosion. For instance, in the realm of international courts and judicial tribunals, the evolution of the International Criminal Court (ICC), the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), and regional human rights courts and tribunals[5] evidences international law's increasing willingness to accept the individual as an actor, complete with cognizable rights and obligations. However, the jurisdiction of the International

---

[1] Burns H. Weston, Richard A. Falk, Hilary Charlesworth, Andrew L. Strauss, International Law and World Order 367 (2006).

[2] *See, e.g.,* International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171; International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195; Universal Declaration of Human Rights, U.N.G.A. res. 217A (III), U.N. Doc A/810 at 71 (Dec. 10, 1948).

[3] *See, e.g.,* Rome State of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (Jul. 17, 1998).

[4] International law applies to agreements concluded between and among subjects of international law, including states, intergovernmental organizations, and sub-state entities. *See* Thomas Burgenthal and Sean Murphy, Public International Law in a Nutshell 107-8 (2007); *see also* Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100 Amer. J. Int'l L. 373, 381 (2006).

[5] For instance, the European Court of Human Rights has jurisdiction to hear cases referred directly to it by individuals, non-governmental organizations, or groups of individuals claiming to be the victims of a human rights violation perpetrated by a state party to the European Convention for the Protection of Human Rights and Fundamental Freedoms. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221.

Court of Justice (ICJ), the principal judicial organ of the United Nations (UN) and, arguably, the most esteemed of international tribunals, does not reach beyond the state, limiting the ability of entities and persons alike to seek recourse and remedy through an ICJ ruling.[6]

One such group of entities effectively precluded from entering the Peace Palace to seek judicial redress before the ICJ is sub-state entities or groups that enter into peace agreements following violent intrastate conflict with their respective state sovereigns. Such agreements are considered "treaties" under international law and subject to customary international law norms regulating the same.[7] While disputes over the interpretation of parties' obligations under treaties are commonly brought before the ICJ, sub-state entities, as non-state actors, are precluded from seeking redress before the ICJ in the event they are injured by a government's breach of a peace agreement. Furthermore, unless the peace agreement in question provides for an enforcement mechanism or judicial recourse, a sub-state entity injured by the breach of a peace agreement has little choice in terms of a judicial venue in which to seek redress for its injury. This lack of a judicial dispute resolution mechanism at international law for the breach of peace agreements is troubling, particularly when one considers the probability that previously warring groups may again resort to violence as a means of resolving disputes arising out of the interpretation or application of a peace agreement.

---

[6] Statute of the International Court of Justice, art. 34(1), 1945, T.S. 993 ("Only states may be parties to cases before the Court.").

[7] Considering international law has begun to recognize and regulate peace agreements, these instruments are now largely considered "treaties," and are therefore subject to regulation and interpretation in accordance with customary international law principles applicable to treaties. Thomas Burgenthal and Sean Murphy, PUBLIC INTERNATIONAL LAW IN A NUTSHELL 107-8 (2007). While the Vienna Convention on the Law of Treaties defines a "treaty" as an international agreement concluded between two states, the Convention further emphasizes that its definition of a "treaty" in no way affects the legal force of other international agreements falling outside of the Convention's definition. In fact, the International Law Commission's commentary on the final draft of the Convention clearly indicates that the Convention's rules may be relevant in interpreting other international agreements conclude between state and non-state actors, such as intrastate peace agreements. *See* Jeffery Dunoff, Steven Ratner, and David Wippman, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 44 (2006).

The recent Abyei Arbitration, between the Government of Sudan (GoS) and the Sudan People's Liberation Movement/Army (SPLM/A), may, however, offer a solution to sub-state entities injured by the breach of a peace agreement that lacks an enforcement mechanism or judicial recourse. In July 2008, the GoS and the SPLM/A (collectively, the "Parties") signed the Abyei Arbitration Agreement, and subsequently constituted the five member Abyei Arbitration Tribunal (the "Tribunal"), seated at the Permanent Court of Arbitration (PCA) in The Hague. The Parties tasked the Tribunal with determining whether the Abyei Boundaries Commission (ABC) Experts exceeded their mandate in defining the Abyei Area's boundaries in 2005.[8] The process and outcome of the Abyei Arbitration may provide a model for intrastate dispute resolution, particularly in relation to breach of peace agreements following violent conflict. The arbitration provided the SPLM/A, a non-state actor, access to an international, third-party, and transparent dispute resolution mechanism not provided for in the Comprehensive Peace Agreement (CPA), a mechanism the Parties had great flexibility in creating through the arbitration agreement. Further, the Abyei Arbitration demonstrated the ability of a neutral forum to promote community buy-in, heighten international awareness, and ultimately provide a resolution to a dispute that both Parties could accept. That said, the Parties' inability to ensure timely enforcement of the arbitration award may evidence the limitation of international arbitration in resolving intrastate conflict, particularly in Sudan.

The Abyei Area in the Context of War and Peace

Since Sudan's independence in 1956, the Government of Sudan (GoS), with its power base centralized in Khartoum, the nation's capital, and forces from Southern Sudan have been in

[8] *Abyei Arbitration Agreement*, Government of Sudan-Sudan People's Liberation Movement/Army, art. 2, Jul. 7, 2008.

an almost constant state of warfare, save for a brief and tenuous peace from 1973 to 1983. Sudan's second civil war, fought from 1983 to 2005, is considered by some to be the "world's most destructive civil conflict."[9] Two million Sudanese died and an additional four million were displaced during the two-decades long war.[10]

Caught in the midst of the war's devastation was the Abyei Area. Straddling Sudan's north-south border, the Abyei Area is commonly described as "a bridge between the north and south, linking the people of Sudan."[11] The Ngok Dinka, a Southern Sudanese tribe, inhabit the regions fertile river delta, while the Misseriya, a Arab nomadic group with its cultural center at Muglad, north of the Abyei Area, seasonally traverse the region in search of water and pasture land for their cattle. The GoS armed Misseriya militias during Sudan's civil war, prompting them to raid Ngok Dinka villages and capture women and children as slaves.[12] Indeed, the Abyei Area served as the GoS's testing ground for "a new government strategy combining regular army forces with Arab militias to clear the Ngok Dinka population out of the oil fields" that dot the Abyei Area's landscape.[13] Securing control over the Abyei Area's oil fields at Diffra, Bamboo, and, in particular, Heglig, motivated the GoS to target the Ngok Dinka and surrounding tribes in

---

[9] E. Reeves, *Can Peace Ever Be Made with the National Islamic Front*, Jun. 13, 2003, *in* Memorial of Sudan People's Liberation Movement/Army at 93, *Government of Sudan v. Sudan People's Liberation Movement/Army*, PCA No. GOS-SPLM 53,391 (2009).

[10] Douglas Johnson, THE ROOT CAUSES OF SUDAN'S CIVIL WARS 143 (2003).

[11] *Abyei Protocol* para. 1.1 (Government of the Republic of Sudan-Sudan People's Liberation Movement/Army, 2004).

[12] Johnson, *supra* note 10, at 157.

[13] There are three major oil complexes in and around the Abyei Area: Diffra, Bamboo, and Heglig. Oil was first discovered in the region in 1982 (at Heglig). The Abyei Area as defined by the ABC Experts included all three of these complexes, as well as approximately 10% of the Toma South field, which is located primarily in the Southern state of Unity. In July 2009, the Abyei Area's three major oil complexes produced 53,000 barrels/day, or about 11% of Sudan's total oil output. The Abyei Arbitration Tribunal's subsequent award left only Diffra within the Abyei Area. At present, Diffra produces approximately 3,000 barrels/day. *See* Douglas Johnson, *Why Abyei Matters*, 107 AFRICAN AFFAIRS 1, 7 (2007); *see also* The Economist Intelligence Unit, *Line Drawn: A Border Dispute in Southern Sudan is Resolved*, THE ECONOMIST (Jul. 23, 2009).

an effort to clear those civilian populations from the areas around these critical oil installations.[14] The violence perpetrated against the Ngok Dinka led many to join the Sudan People's Liberation Army (SPLA), formed in 1983 from factions of Anya Nya II and Southern army units.[15] Fighting between the SPLA and the GoS, and its proxy militias, continued through 2004 until the signing of the Comprehensive Peace Agreement (CPA) in January 2005.

The CPA comprises a set of six subsidiary agreements the GoS and the SPLM/A concluded between July 2002 and December 2004.[16] These subsidiary agreements, or Protocols, address issues related to security, wealth and power sharing, the resolution of the conflict in Southern Kordofan and Blue Nile states, and the resolution of the conflict in Abyei. Notably, the CPA establishes a six-year interim period, during which the GoS and the SPLM are to govern Sudan jointly through a Government of National Unity (GoNU).[17] The South is afforded a significant amount of autonomy during the interim period, with its own regional government (the Government of Southern Sudan, GoSS) and interim constitution. At the interim period's conclusion, the CPA affords the people of Southern Sudan with the right to vote in a final status referendum to decide whether the South will remain united with Sudan or form an independent state.

The Protocol on the Resolution of the Conflict in Abyei, or the Abyei Protocol, recognizes Abyei's distinct character as a bridge between the north and south, and provides the

---

[14] *See* Human Rights Watch Report, *Sudan, Oil, and Human Rights: Internal Displacement and International Humanitarian Law*, 313 (Nov. 2003).

[15] Francis Deng, WAR OF VISIONS: CONFLICT OF IDENTITIES IN THE SUDAN 332 (1995).

[16] *Comprehensive Peace Agreement* Chapeau (Government of the Republic of Sudan-Sudan People's Liberation Movement/Army, 2005).

[17] *See Machakos Protocol* 2.3-2.5 (Government of the Republic of Sudan-Sudan People's Liberation Movement/Army, 2002); *see also Power Sharing Protocol* (Government of the Republic of Sudan-Sudan People's Liberation Movement/Army, 2004).

Ngok Dinka and other Sudanese residing in the Area[18] the ability to decide, via a referendum held concurrently with the Southern Sudan referendum, whether Abyei will retain its special administrative status in the North or join Bahr el Ghazal in the South.[19] In the negotiations leading up to the Abyei Protocol's conclusion, the determination of the Abyei Area's boundaries was hotly contested among the Parties.[20] Ultimately, the Parties agreed to define the Abyei Area as "the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905."[21] This phraseology refers to Condominium officials'[22] 1905 administrative transfer of the nine Ngok Dinka chiefdoms from the Southern province of Bahr el Ghazal to the northern province of Kordofan. The transfer was never recorded cartographically, that is, no map exists today of the area Condominium officials transferred in 1905. To determine the boundaries of this transferred area, the Abyei Protocol called for the formation of the Abyei Boundaries Commission (ABC) to define and demarcate the transferred area and present its final report to the Presidency for immediate implementation.[23]

Definition and Rejection: The Abyei Boundaries Commission

The Implementation Modalities on Abyei and, most importantly, the Abyei Appendix, both concluded in December 2004 and appended to the CPA, detail the ABC's composition, mandate, and work plan. The ABC was comprised of five members each from the SPLM/A and

---

[18] The Abyei Protocol defines "residents of Abyei Area" as "(a) The Members of the Ngok Dinka community and other Sudanese residing in the area; (b) The criteria of residence shall be worked out by the Abyei Referendum Commission." As of December 7, 2009, the Parties had yet to constitute the Abyei Referendum Commission, and had not yet agreed upon criteria for Abyei Area residency vis-à-vis the 2011 Abyei Area Referendum. *Abyei Protocol* at para. 1.1.

[19] *Abyei Protocol* at 1.1.1; 1.3.

[20] Johnson, *supra* note 13, at 8-9.

[21] *Abyei Protocol* at para. 5.1.

[22] In 1899, British and Egyptian authorities created the Anglo-Egyptian Condominium, which governed Sudan until its independence on January 1, 1956. Memorial of Sudan People's Liberation Movement/Army at 57.

[23] *Abyei Protocol* at para. 5.

the GoS, and five international "Experts," which the United States, the United Kingdom, and the Inter-Governmental Authority on Development (IGAD) nominated.[24] The ABC's mandate was to "define and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905," that is, the Abyei Area.[25] To fulfill this mandate, the ABC was to hear presentations of the two Parties offering their respective interpretations of the Abyei Area's borders, interview the people of the Abyei Area and its surrounding regions, and consult the British Archives and "other relevant sources on Sudan wherever they may be available, with a view to arriving at a decision that shall be based on scientific analysis and research."[26] The ABC was to present its final and binding report to the Presidency by the pre-interim period's conclusion, in July 2005.[27]

The Parties constituted the ABC in April 2005. Pursuant to the Abyei Appendix, the ABC drafted a Rules of Procedure, which detailed the ABC's work plan.[28] Notably, the Rules of Procedure provided that that the ABC "will endeavour to reach a decision by consensus," however, if the Parties failed to agree on the definition of the Abyei Area, the experts were to have the final say.[29]

The Parties initially presented and maintained two radically different opinions as to the Abyei Area's definition. The GoS argued that the 1905 transfer was a simple territorial transfer shifting control over a small swath of land south of the Bahr el Arab river from Bahr el Ghazal

---

[24] *Abyei Appendix: Understanding on Abyei Boundaries Commission* para. 2 (Government of the Republic of Sudan-Sudan People's Liberation Movement/Army, 2004).
[25] *Abyei Appendix* at para. 1.
[26] *Abyei Appendix* at paras. 3-4.
[27] *Abyei Appendix* at para. 5.
[28] The ABC's work plan provided that the Commission would hear presentations from both parties in Nairobi, and then travel to Khartoum and Abyei Town. The work plan called for the ABC to spend no more than five days in Abyei and its surrounding areas, including visits to Agok and Muglad. Following these field visits, the Commission was to reconvene in Nairobi, via Khartoum, to determine whether the Commission needed to review additional documents or archival materials. Abyei Boundaries Commission Rules of Procedure, paras. 4-6 (Apr. 11, 2005).
[29] Abyei Boundaries Commission Rules of Procedure at para. 14.

province to Kordofan province.[30] Conversely, the SPLM/A asserted that the transfer was administrative in nature, removing jurisdiction over all lands the Ngok Dinka inhabited in 1905 from Bahr el Ghazal province to Kordofan province.[31] In accordance with the work plan established in the ABC's Rules of Procedure, the Experts and representatives of the Parties traveled to Khartoum, Muglad, and the Abyei Area to hear oral testimony from members of the Misseriya, Ngok Dinka, and Twic, Rek, and Rueng Dinka[32] communities in an effort to ascertain the bounds of the 1905 transfer. The ABC Experts additionally traveled to and examined archives in the United Kingdom, Sudan, South Africa, and Ethiopia housing documents from the Anglo-Egyptian Condominium period (1899-1956).[33]

Following the gathering of oral testimony and the examination of archival records, the Parties were still unable to reach consensus as to the definition of the Abyei Area, leaving that determination to the five Experts. After careful examination of the propositions the Ngok Dinka, the Misseriya, the GoS, and the SPLM/A respectively proffered, and after analysis of available documentation from the Anglo-Egyptian Condominium period, the Expert's presented their Final Report to the Presidency on July 14, 2005.[34] The Final Report provided a brief overview of the ABC's process and identified nine propositions that emerged from the Parties' presentations, as well as from the oral hearings. The ABC Experts analyzed and compared each one of these propositions against available historical evidence to test the propositions' validity. Based on this analysis, the ABC Expert's concluded that the area transferred in 1905 was not clearly demarcated, but that there was "compelling evidence" to support the Ngok Dinka's claims of

[30] Abyei Boundaries Commission Report, Appendix 3 (Jul. 14, 2005).
[31] Abyei Boundaries Commission Final Report at Appendix 3.
[32] Twic, Rek, and Rueng Dinka live primarily south and east of the Ngok Dinka in Warrab and Unity states.
[33] Abyei Boundaries Commission Report at 11.
[34] *See* Abyei Boundaries Commission Report.

holding "dominant rights" (permanent) to areas along the Bahr el Arab and Ragaba ez Zarga rivers, and "secondary" (seasonal) rights north of the Ragaba ez Zarga.[35]

The ABC Expert's *final and binding decision*, therefore, defined the Abyei Area's northern boundary at latitude 10°22'30"N, the midpoint between the northern boundary of the Ngok Dinka's dominant rights area and the southern boundary of the Misseriya's dominant rights area.[36] The Abyei Area's western boundary was defined as running along the Darfur-Kordofan provincial boundary, as defined on January 1, 1956, and the Area's southern boundary was defined as running along the Kordofan-Bahr el Ghazal-Upper Nile boundary, as defined on January 1, 1956.[37] The ABC Expert's definition of the Abyei Area's eastern boundary extended the January 1, 1956 Korodfan-Upper Nile provincial boundary at longitude 29°32'15"E northward to latitude 10°22'30"N.[38] (*See Figure A*.)

Immediately following the ABC Expert's presentation of their report to the Presidency, the GoS began to downplay its "final and binding" nature. At a press conference following the ABC Expert's presentation, the head of the GoS's delegation to the ABC "announced that the report contained 'recommendations' which would be 'studied.'"[39] The next day, the GoS briefed Misseriya community members in Khartoum on the Expert's report. Among the GoS's criticisms was the accusation that the ABC Experts had exceeded their mandate in defining the

---

[35] Abyei Boundaries Commission Report at 20-21.

[36] Abyei Boundaries Commission Report at 21-22.

[37] Abyei Boundaries Commission Report at 22. The use of the January 1, 1956 provincial boundary is premised on the principle *uti possidetis*. Under the principle *uti possidetis*, both internal and external colonial boundaries states inherit at the time of independence are inviolable. This principle, adhered to throughout the decolonization process in Latin America (19th century) and, later, Africa (20th century), constitutes customary international law. It is premised on the respect for territorial boundaries "at the moment when independence is achieved." *Land, Island and Maritime Frontier* (El Salvador v. Honudras: Nicaragua intervening), 1992 I.C.J. 351, 544. *See also Frontier Dispute* (Burkina Faso v. Mali), 1986 I.C.J. 554, 565.

[38] Abyei Boundaries Commission Report at 22.

[39] Johnson, *supra* note 13, at 14.

Abyei Area, because the Experts had failed to rely on the provincial boundaries immediately before and after the 1905 transfer to define the Area.[40] This accusation became the GoS's battle cry against the ABC Experts findings, one to which the GoS repeatedly referred in justifying its steadfast rejection of the ABC Expert's final report.[41]

The Road to Arbitration

The Parties' impasse over the ABC Experts' final report continued for nearly three years. Tensions in and around Abyei Town remained high during this period, as members of the Sudan Armed Forces' (SAF) 31st Brigade used "terror tactics to systematically clear the population from the villages outside of Abyei town."[42] On May 13, 2008 tensions boiled over into violence, as an incident between the Sudan People's Liberation Army (SPLA), police, and the SAF sparked fighting across the Area. On May 14, SAF forces began a heavy bombardment of Abyei Town's civilian areas. An estimated 106,500 people were displaced, fleeing south to Agok and other nearby towns.[43] Abyei Town, once the commercial and social anchor of the Abyei Area, was reduced to rubble overnight.

The Parties immediately engaged in discussions to quell tensions and avoid a return to war. On June 8, 2008, the Parties concluded the *Roadmap for Return of IDPs and Implementation of Abyei Protocol* (the "Abyei Roadmap"). The Abyei Roadmap established interim boundaries for the Abyei Area, excluded both SAF and SPLA forces from operating within those boundaries, and provided for the return of IDPs driven from their homes in and

[40] Johnson, *supra* note 13, at 14.
[41] *See, e.g.,* Statement by President Hassan al-Bashir, November 2007 ("[The] Abyei Boundaries Commission exceeded its mandate and they had no power to do so.").
[42] Roger Winter, *Abyei Aflame: An Update From the Field (Strategy Paper)*, ENOUGH (May 30, 2008).
[43] *Id.*

around Abyei Town.[44] The Parties further agreed to submit their dispute over the ABC Experts' final report to "a professional and specialized arbitration tribunal," and to jointly concluded the terms of reference, or *compromis*, for the arbitration.[45] Subsequent to signing the Abyei Roadmap, the Parties concluded a Memorandum of Understanding on Main Issues of the Abyei Arbitration Agreement, which provided that the arbitration would take place under the auspices of the Permanent Court of Arbitration (PCA)[46] and, further, laid out a basic framework for the arbitral process.[47]

One month later, on July 7, 2008, the Parties concluded the *Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting Abyei Area* (the "Abyei Arbitration Agreement"). In the Abyei Arbitration Agreement, the Parties agreed to resolve their dispute over the ABC Experts' report through final and binding arbitration under the rules and procedures laid out in both the Abyei Arbitration Agreement and the *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State*.[48] The Parties agreed that the PCA would act as registry for the arbitration, and that the Secretary General of the PCA would act as the appointing authority for the arbitration tribunal.[49]

The Abyei Arbitration Agreement defined the scope of the Parties' dispute as whether or

---

[44] *The Roadmap for Return of IDPs and Implementation of Abyei Protocol* para. 1-2 (Government of Sudan-Sudan People's Liberation Movement, Jun. 8, 2008).
[45] *Abyei Roadmap Agreement* at para. 4.
[46] The PCA is not like the ICJ, in that it is not a permanent court. Rather, the PCA is an international nongovernmental organization, with over 100 member states, that provides registry services and legal and administrative support for arbitral tribunals. *See* Wendy Miles, *Adjudication of Intrastate Disputes: A Review of Possible Mechanisms*, 220, *in* IMPLEMENTING NEGOTIATED AGREEMENTS: THE REAL CHALLENGE TO INTRASTATE PEACE (2007, Miek Blotjes, ed.).
[47] Luka Biong Deng, *Justice in Sudan: Will the Final Award of Abyei Arbitration be Honoured?*, 9 (Sept. 2009).
[48] *Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting Abyei Area* art. 1. (Jul. 7, 2008).
[49] *Abyei Arbitration Agreement* at arts. 3-4.

not the ABC Experts had exceeded their mandate, which was "to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905."[50] Should the Tribunal determine the Experts did not exceed their mandate, the Abyei Arbitration Agreement required the Tribunal "to make a declaration to that effect and issue an award for the full and immediate implementation of the ABC Report."[51] Conversely, should the Tribunal determine the Experts did exceed their mandate, the Tribunal was to go onto define, on map, "the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, based on the submissions of the Parties."[52]

The Abyei Arbitration Agreement defined the "applicable law" the Tribunal was to apply to the dispute as the CPA, specifically the Abyei Protocol and Abyei Appendix, the Interim Nation Constitution of the Republic of Sudan, and "general principles of law and practices as the Tribunal may determine relevant."[53] The Tribunal was further permitted to consider the Abyei Road Map Agreement and Memorandum of Understanding as binding on the Parties.[54] This body of applicable law, or the *lex specialis*, was to factor strongly into the reasoning underlying the Tribunal's final award, discussed further herein.

The Abyei Arbitration Agreement further provided for a procedure through which the Parties would constitute the five-member Arbitration Tribunal,[55] as well as described the

[50] *Abyei Arbitration Agreement* at art. 2(a).
[51] *Abyei Arbitration Agreement* at art. 2(b).
[52] *Abyei Arbitration Agreement* at art. 2(c).
[53] *Abyei Arbitration Agreement* at art. 3(1).
[54] *Abyei Arbitration Agreement* at art. 3(2).
[55] Pursuant to the Abyei Arbitration Agreement, each Party designated two arbitrators, both of whom had to be current or former members of the PCA or members of tribunals for which the PCA acted as registry. The four Party-appointed arbitrators met and compiled a list of five candidates for the fifth arbitrator. The Parties then ranked the five candidates in order of preference, and were permitted to delete the names of candidates to whom they objected. Ultimately, the Parties, either individually or together, objected to all five candidates. This triggered article 5.12 of the Abyei Arbitration Agreement, which required the PCA's Secretary-General to appoint, in consultation with the four Party-appointed arbitrators, the fifth arbitrator. *See Abyei Arbitration Agreement* at art. 5;

arbitration proceedings.[56] The arbitration was "fast-tracked," which meant that the Tribunal was to complete the entire arbitral process, including the issuance of the final and binding award, within six months from the date the Tribunal was constituted ("the date of the commencement of arbitration proceedings"), subject to a three month extension.[57]

The Arbitral Process

On October 30, 2008, the Parties constituted the Abyei Arbitration Tribunal. Its membership included Professor Pierre-Marie Dupuy (Chairman of the Tribunal), Judge Awn Al-Khasawneh, Professor Gerhard Hafner, Professor W. Michael Reisman, and Judge Stephen Schwebel. In accordance with the Abyei Arbitration Agreement, each Party selected two arbitrators, while the PCA chose the Chairman of the Tribunal.[58]

During the written pleadings phase, each Party submitted a memorial, a counter-memorial, and a rejoinder.[59] From April 18-23, 2009, the Parties' agents and counsel presented oral pleadings before the Tribunal in the Peace Palace. As per the Abyei Arbitration Agreement, each Party presented, in both its written and oral pleadings, arguments related to whether the ABC Experts had exceeded their mandate, as well as arguments related to the Party's respective definitions of the Abyei Area. A discussion of the full scope of these arguments is beyond the

---

see also Abyei Arbitration (Government of Sudan v. Sudan People's Liberation Movement/Army), 2-4 (Per. Ct. Arb. 2009).

[56] The proceedings consisted of two phases, one for written pleadings and one for oral pleadings. *Abyei Arbitration Agreement* at art. 8.

[57] *Abyei Arbitration Agreement* at art. 4.

[58] Deng, *supra* note 47, at 10.

[59] The memorials were submitted on December 18, 2008, the counter-memorials on February 13, 2009, and the rejoinders on February 28, 2009. The Parties' submissions are publicly available on the PCA's website: http://www.pca-cpa.org/showpage.asp?pag_id=1306.

purview of this paper. It is, however, relevant to note that the GoS, for its part, maintained that the ABC Experts had exceeded their mandate because their decision was taken *ultra vires*, that is, beyond the scope of the power the Parties had accorded the ABC.[60] Underlying this excess of mandate argument was the GoS's interpretation of the "formula," or the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905. The GoS maintained, as it had before the ABC in 2005, that the formula referred to the bounds of the actual land transferred from Bahr el Ghazal to Kordofan province in 1905, and did not contemplate the entire area of land the nine Ngok Dinka chiefdoms inhabited in 1905.[61] In other words, the GoS argued that the transfer was territorial in nature, and did not refer to the transfer of administration over an entire group of people. The GoS's arguments related to the Abyei Area's definition, which the Tribunal was to take into account in defining the Area, should an excess of mandate be found, were substantially related to the GoS's interpretation of the formula and called for the Tribunal to define the Abyei Area as a small swath of land lying south of the Bahr el Arab river.[62]

Conversely, the SPLM/A asserted that the Tribunal would only be able to conclude that the ABC Experts exceeded their mandate if the Tribunal determined that the Experts' decision was *ultra petita*, that is, a decision that went outside the scope of the issues the Parties argued.[63] The SPLM/A contended that the Tribunal was not permitted to assess whether the ABC's substantive decisions were "correct" or "incorrect." Rather, the question within the Tribunal's jurisdiction related to whether the ABC Experts answered a question outside the scope of their competence. As the ABC Experts' definition of the Abyei Area was premised on the

---

[60] *See* Counter-Memorial of Government of Sudan at 43-74, *Government of Sudan v. Sudan People's Liberation Movement/Army*, PCA No. GOS-SPLM 53,391 (2009).
[61] *See Id.* at 27-36.
[62] *See Id.* at 194-198.
[63] *See* Memorial of Sudan People's Liberation Movement/Army at 151.

information the Parties presented to the Commission and was not taken outside the scope of the Experts' authority, the Experts did not, according to the SPLM/A, exceed their mandate.[64] In the event the Tribunal found the Experts had exceeded their mandate, the SPLM/A offered Ngok Dinka witness testimony, an impressive community mapping project, and historical data from the Condominium period to support its claim that the area transferred in 1905 extended north from the Bahr el Arab river to latitude 10°35'N.[65]

The Tribunal's "Final and Binding Award"

On July 22, 2009, the Abyei Arbitration Tribunal issued its final award in a small ceremony at the Peace Palace. In the days and weeks leading up to the announcement, many saw the Parties' reactions and willingness to implement the Tribunal's award as a crucial test of the CPA's continued viability. Acceptance and implementation of the award could prompt the Parties to reach consensus in other stalled areas of CPA implementation, including definition and demarcation of the remaining portions of the north-south border, reconciliation of the disputed 2008 census results, and passage of crucial legislation needed to carry out the 2011 Southern Sudan referendum. Alternatively, some feared that another failure on the part of the Parties to adhere to a "final and binding" resolution to the question of the Abyei Area's borders could prompt a backslide into war.[66]

The award the Tribunal issued on July 22 was that of four of the five Tribunal members. The fifth issued a dissenting opinion.[67] The Tribunal's nearly 300-page award details its findings

---

[64] *See Id.* at 123-203.

[65] *See Id.* at 203. Latitude 10°35'N was the northern-most boundary of the area over which the ABC Experts determined the Ngok Dinka and Misseriya held shared secondary rights.

[66] *See* Colin Thomas-Jensen and Maggie Fick, *Abyei: Sudan's Next Test*, ENOUGH (Jul. 20, 2009).

[67] Judge Awn Shawkat Al-Khasawneh dissented from the Tribunal's award. Judge Al-Khasawneh determined that the ABC Experts' mandate required them to delimit the precise area of land transferred to Kordofan in 1905, and not to locate where the Ngok Dinka lived in 1905. Further, Judge Khasawneh disagreed with the Tribunal's delimitation

on each point of law the Parties brought before it. The crux of the decision lay in the Tribunal's determination that the ABC Experts had exceeded their mandate in defining the Abyei Area's northern, western, and eastern boundaries, because the Experts failed to state sufficient reasons for their findings.[68] Notably, the Tribunal emphasized the impact that the ABC Experts' conclusions would have on the peace process in Sudan and the lives of the Ngok Dinka and Misseriya of Abyei, and asserted that these stakeholders were entitled to know the reasons upon which the ABC Experts based their conclusions, particularly given non-appealable nature of the Experts' final report.[69]

Pursuant to the Abyei Arbitration Agreement, because the Tribunal determined that the ABC Experts had exceeded their mandate in defining the Abyei Area's northern, western, and eastern boundaries, the Tribunal went onto define those boundaries based on the Parties' submissions. The Tribunal determined that the ABC Experts provided sufficient reasoning to support their conclusion that the Ngok Dinka had permanently occupied, in 1905, lands extending north from the Bahr el Arab and Ragaba ez Zarga rivers to latitude 10°10'N (otherwise known as the southern boundary of the ABC Experts' "shared rights area").[70] As such, the Tribunal defined the Abyei Area's northern boundary as running along latitude 10°10'N.

To define the Abyei Area's eastern and western boundaries, the Tribunal relied primarily

---

of the Abyei Area, and accused the Tribunal of exceeding its own mandate by (1) effecting a partial annulment of the Experts' findings without the power to do so, and (2) lacking reasons for its own delimitation of the Abyei Area. *Abyei Arbitration, Dissenting Opinion* (Government of Sudan v. Sudan People's Liberation Movement/Army), 2-4 (Per. Ct. Arb. 2009).

[68] The Tribunal adopted the ABC Experts' definition of the Abyei Area's southern boundary as the January 1, 1956 Kordofan-Bahr el Ghazal-Upper Nile provincial boundary. The Tribunal noted that both Parties admitted in their submissions that the Southern boundary was not in dispute, and therefore the Tribunal saw no need to examine the matter further. *Abyei Arbitration* at 241-42.

[69] *Abyei Arbitration* at 183.

[70] *Abyei Arbitration* at 235-41.

on the opinions of P.P. Howell,[71] Professor Ian Cunninson,[72] and Michael Tibbs[73] in concluding that the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 extended from longitude 29°00'00 E in the east to longitude 27°50'00 E in the west.[74] The practical effect of the Tribunal's award was to decrease the Abyei Area's size from 7,166 square miles, as defined by the ABC Experts, to 4,039 square miles.[75] Notably, the Tribunal's definition of the Abyei Area also excluded from the Area the Heglig and Bamboo oil complexes, leaving only the relatively small Diffra oil field within the region.[76] (*See Figure A*.)

A Calculated Compromise? - The Abyei Arbitration As A Model For Intrastate Dispute Resolution

The process and outcome of the Abyei Arbitration provides a model for intrastate dispute resolution, particularly in relation to the breach of a peace treaty following violent conflict. Specifically, the arbitration afforded the SPLM/A, a non-state actor, with access to an international, third-party, and transparent dispute settlement mechanism not provided for in the Comprehensive Peace Agreement (CPA), a mechanism the Parties had great flexibility in creating through the Abyei Arbitration Agreement. Further, the Abyei Arbitration demonstrated the ability of a neutral forum to promote community buy-in, heighten international awareness, and ultimately provide a resolution to the dispute that both Parties could accept. That said, the Parties' inability to ensure timely enforcement of the arbitration award may evidence the limitations of international arbitration in resolving intrastate conflict, particularly in Sudan.

---

[71] P.P. Howell was an anthropologist and District Commissioner at Nahud (Kordofan) in 1948.
[72] Ian Cunninson was a professor of social anthropology who lived with and studied the Baggara Humr in the 1950s.
[73] Michael Tibbs was the Assistant District Commissioner of the Western Kordofan District (1952-1953) and District Commissioner of the Dar Misseryia District (1953-1954).
[74] *Abyei Arbitration* at 242-57.
[75] Deng, *supra* note 45, at 24.
[76] *See* note 13.

Access to an International Judicial Process

Arbitration before the PCA provides a judicial forum at international law for those previously excluded from international judicial processes – sub-state or non-state actors, such as the SPLM/A. Until 1993, the PCA, like its prestigious cousin, the International Court of Justice (ICJ), excluded all but states from its jurisdiction.[77] That year, the PCA promulgated its *Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State*[78] (the "Rules"), which transformed the PCA "from an institution for the settlement of inter-State disputes, as it was originally intended and conceived, into one with broad jurisdiction capable of embracing dispute resolution between States and international organizations or private persons… and between international organizations and private persons."[79] The Rules are based almost entirely on the United Nations Commission on International Trade Law's (UNCITRAL) 1976 arbitration rules, save that the Rules require one party to be a state,[80] compel the state party to waive its sovereign immunity,[81] and provide that a three person tribunal may continue to arbitrate, should one of its members leave.[82]

The PCA's jurisdictional ability to accept as parties to arbitrations sub-state actors, such

---

[77] The Permanent Court of Arbitration was founded in 1899 to serve as a mechanism for inter-state dispute resolution. Shi Jiuyong, *Forward, in* The Permanent Court of Arbitration: International Arbitration and Dispute Resolution (1999).

[78] *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State*, *effective* Jul. 6, 1993; *see also* Shi Jiuyong, *Forward, in* The Permanent Court of Arbitration: International Arbitration and Dispute Resolution (1999).

[79] Jiuyong, *supra* note 71.

[80] *See Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State.*

[81] *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State* at art. 1(2).

[82] *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State* at art. 13(3); *see also* Wendy Miles, *Adjudication of Intrastate Disputes: A Review of Possible Mechanisms*, 220, *in* Implementing Negotiated Agreements: The Real Challenge to Intrastate Peace (Miek Blotjes, ed., 2007).

as the SPLM/A, makes the institution an ideal venue for the resolution of intrastate conflict, as both the state sovereign and sub-state actor may appear as parties in the proceedings. Absent the Rules, the PCA would not have jurisdiction to preside over an arbitration involving a non-state actor. Further, the Rules' requirement that the state party to an arbitral proceeding waive its sovereign immunity is of great import, because it ensures a state cannot use its position as a sovereign to argue that it is immune from prosecution, the PCA's jurisdiction, or any award a tribunal issues.[83] Indeed, the Rules require a state to *explicitly* waive its "immunity relating to the execution of an arbitral award."[84] In the Abyei Arbitration Agreement, both the SPLM/A and the GoS waived any immunity they may have from the execution of the Tribunal's award.[85] Waivers of this sort, particularly with regards to the state party to an arbitral process, further solidify non-state actors' abilities to access international judicial processes via arbitration by ensuring that the state party may not use its status as a sovereign to subvert the arbitral process through breach of the arbitral agreement or refusal to implement a final and binding arbitral award.

Moreover, a state party's waiver of sovereign immunity serves to equalize state and non-state parties under international law, which may promote a general perception of parity between the parties involved.[86] In intrastate conflict, the power dynamic between the sovereign and the sub-state entity often creates a perception, likely accurate, that the more powerful sovereign may dictate the relationship between itself and the sub-state entity. This power dynamic has, in

---

[83] *See* Miles, *supra* note 75.

[84] *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State* at art. 1(2).

[85] *Abyei Arbitration Agreement* at art. 9(5).

[86] *See* Miek Boltjes, *The Implementation Challenge in Intrastate Peace Processes: An Analysis*, 47 *in* IMPLEMENTING NEGOTIATED AGREEMENTS: THE REAL CHALLENGE TO INTRASTATE PEACE (2007, Miek Blotjes, ed.).

certain respects, played itself out in Sudan. However, before the Abyei Arbitration Tribunal, the GoS's position as a sovereign and the SPLM/A's position as a "mere" sub-state political actor was of no consequence, as both parties were equal in the eyes of the Tribunal, and were treated as such.[87] In the resolution of intrastate conflict, parity of this sort is crucial, as a non-state actor may be less inclined to reinitiate armed conflict with the state sovereign if the non-state actor has a forum in which it and the state sovereign may engage and resolve disputes as equals.

A Dispute Resolution Mechanism for the CPA

State practice indicates that fifty percent of negotiated peace agreements fail within the first five years following their conclusion.[88] The GoS and the SPLM/A's dispute over the ABC Experts' definition of the Abyei Area exemplifies how easily a negotiated peace can crumble, hurtling a nation back into a state of armed conflict. Despite the fragility of negotiated peace agreements, many do not contain adequate dispute resolution mechanisms.[89] Again, the experience of the SPLM/A and the GoS is indicative of this trend. While the CPA provides for the establishment of "an independent Assessment and Evaluation Commission (AEC)…to monitor implementation of the Peace Agreement," the Parties, in practice, control the AEC's work, making it a poor mechanism to ensure CPA implementation.[90] Moreover, as is the case in many post-conflict states, the likely absence of impartiality within domestic court proceedings makes Sudan's judiciary an unsatisfactory forum in which the Parties may settle disputes arising

---

[87] *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State* at art. 15 ("Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, *provided that the parties are treated with equality* and that at any stage of the proceedings each party is given a full opportunity of presenting its case."). (Emphasis added.)

[88] On average, peace agreements last three and a half years before hostilities resume. Dorina A. Bekoe, IMPLEMENTING PEACE AGREEMENTS: LESSONS FROM MOZAMBIQUE, ANGOLA, AND LIBERIA 1 (2008).

[89] *See* Boltjes, *supra* note 79, at 31-34.

[90] *Machakos Protocol* para. 2.4 (Government of the Republic of Sudan-Sudan People's Liberation Movement/Army, 2002).

out of CPA interpretation and implementation.[91]

International arbitration, however, extended to the Parties what the CPA did not, an impartial, third party dispute resolution mechanism with "final and binding" force. Specifically, pursuant to the Abyei Arbitration Agreement, the Secretary General of the PCA, in conjunction with the four Party-appointed members of the Tribunal, choose the Tribunal's Chairman, Professor Pierre-Marie Dupuy.[92] The Secretary General's appointment of Professor Dupuy added an ostensibly neutral member to the Tribunal. The PCA further facilitated resolution of disputes that arose between the Parties during the course of the arbitral process vis-à-vis access to relevant archival records in Khartoum and allegations of witness intimidation.[93] Given the Parties' mutual mistrust and inability to reach consensus over contentious issues – for instance, over the Abyei Area's borders – the Abyei Arbitration Agreement's provision for the PCA, a neutral, third party, to support and facilitate the proceedings, as well as to resolve disputes that arose during the process, no doubt contributed greatly to the Parties' ability to see the arbitration through to its conclusion, as well as to the perception of the Abyei Arbitration as a fair and just process.[94] The PCA, or another impartial international arbitral institution,[95] may similarly afford

[91] *See* Boltjes, *supra* note 79, at 46 (noting that non-state actors "may not have confidence in domestic courts where these courts treat the state and non-state parties unequally").

[92] *See Abyei Arbitration Agreement* at art. 15; *see also* Deng, *supra* note 45, at 10.

[93] In its rejoinder, the SPLM/A noted that the GoS had failed to provide it with complete copies of certain sketch maps and cartographic records and that, furthermore, the GoS had denied it access to certain archival records. In response, the Tribunal requested that the GoS provide full copies of certain sketch maps the GoS had submitted with its counter-memorial. The GoS complied with the Tribunal's request, but continued to deny the SPLM/A's persistent accusations that the GoS had not provided it with full access to certain archival records. Furthermore, in a letter dated March 30, 2009, the GoS informed the Tribunal of an article in the Sudanese newspaper AL-AYAM, which alleged that members of the SPLM/A had threatened a Ngok Dinka witness for the GoS, Majid Yak, with being "physically eliminated." The SPLM/A denied the accusations. For its part, the Tribunal investigated the accusations and found them to be baseless. *See Abyei Arbitration* at 10-16.

[94] *See, e.g.,* Vice President Riek Machar's Opening Remarks at the Ceremony Commemorating the Release of the Abyei Arbitration Tribunal's Award, *delivered* Jul. 22, 2009.

[95] For instance, the London Court of International Arbitration (LCIA). Unlike many international arbitration institutions, which focus almost exclusively on business disputes, the LCIA's rules do not limit the LCIA's jurisdiction to business disputes. *See* Miles, *supra* note 75, at 225.

other intrastate parties, who may have deep-seeding mistrust of one another stemming from years of conflict, a neutral forum in which to air their grievances. Such neutrality may not only serve the practical effect of fostering an unbiased resolution to the parties' dispute, but may also ensure communities in the state perceive and accept the award as unbiased.

Flexibility of Arbitration

The flexibility arbitration affords parties further lends this form of international judicial proceeding to the resolution of intrastate disputes. Parties to an intrastate dispute can, essentially, craft an arbitral proceeding, through an agreement, uniquely suited to serve their needs. In particular, under the Rules, parties have the flexibility to define the scope of the dispute,[96] the location of the proceedings,[97] the language in which the proceedings will take place,[98] and the applicable law the arbitrator or tribunal will apply[99]. While some commentators express skepticism over international arbitration's ability to address issues of public international law, such as those implicit in disputes arising out of peace agreements,[100] the flexibility arbitration provides, particularly under the PCA's Rules, arguably lends itself well to the resolution of such disputes, given that the parties to the dispute consent to the arbitral tribunal's jurisdiction and freely determine the limits of the proceedings.

For instance, in the Abyei Arbitration, the Parties were able to pose a unique, two-

---

[96] *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State* at art. 20.

[97] *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State* at art. 16.

[98] *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State* at art. 17.

[99] *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State* at art. 33.

[100] Disputes arising out of peace agreements may implicate issues related to sovereignty, self-determination, the delimitation of an external or internal boundary (e.g. the Abyei Arbitration), or autonomy. *See* J.H. Barton and M.C. Greenberg, *Lessons of the Case Studies,* 358, *in* WORDS OVER WAR (J.H. Barton and M.C. Greenberg, M.E. McGuinness, eds., 2000).

pronged question to the Tribunal, well suited to the resolution of their dispute.[101] The Parties' ability to define the scope of the dispute in this way permitted the Tribunal to not only determine whether the ABC Experts exceeding their mandate, but also to define the Abyei Area's boundaries, should it determine an excess of mandate occurred. This two-pronged approached ensured that the proceedings would conclude with a defined Abyei Area.

Moreover, there is rarely recourse to appeal arbitral decisions, reinforcing their final and binding nature. Under the Rules, awards are "final and binding" on the parties to the arbitration.[102] The GoS and the SPLM/A explicitly reinforced the final and binding nature of the Tribunal's award in the Abyei Arbitration Agreement. Provision for final and binding awards may be particularly warranted and desirous in arbitrations between two previously warring intrastate groups, as their finality *may* preclude one party from abrogating the award. Nonetheless, should abrogation occur, international arbitration provides the non-abrogating party an award, with binding legal effect on both parties under international law, upon which the non-abrogating party may base any actions it takes in retaliation to the other party's abrogation.

Moreover, the Parties' ability to outline in the Abyei Arbitration Agreement the law applicable to the proceedings further exemplifies why international arbitration of this sort is particularly well suited to the resolution of intrastate conflict, in particular, intrastate conflict

---

[101] Article 2 of the *Abyei Arbitration Agreement* provides: "The issues that shall be determined by the Tribunal are the following: (a) Whether or not the ABC experts had, on the basis of the agreement of the Parties as per the CPA, exceeded their mandate which is 'to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905' as stated in the Abyei Protocol, and reiterated in the Abyei Appendix and the ABC Terms of Reference and Rules of Procedure. (b) If the Tribunal determines, pursuant to Sub-article (a) herein, that the ABC experts did not exceed their mandate, it shall make a declaration to that effect and issue an award for the full and immediate implementation of the ABC Report. (c) If the Tribunal determines, pursuant to Sub-article (a) herein that the ABC experts exceeded their mandate, it shall make a declaration to that effect, and shall proceed to define (i.e. delimit) on map the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, based on the submissions of the Parties."

[102] *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State* at art. 32.

arising out of the application or interpretation of a peace agreement. Article 3 of the Abyei Arbitration Agreement identifies "the provisions of the CPA, particularly the Abyei Protocol and the Abyei Appendix, the Interim National Constitution of the Republic of Sudan, 2005, and general principles of law and practice," as well as the Arbitration Agreement itself, the Abyei Road Map, and the Memorandum of Understanding, as the body of law, or *lex specialis*, the Tribunal was to apply in resolving the dispute.[103]

In its award, the Tribunal expressed great awareness of this *lex specialis*, particularly in concluding that the ABC Experts' failure to provide the reasons underlying their definition of the Abyei Area constituted an excess of mandate. Specifically, the Tribunal, while applying relevant principles of international law, was "particularly attentive to the wording, context, object and purpose of the Abyei Protocol, the Abyei Appendix, the Interim National Constitution and the Arbitration Agreement" in assessing whether the ABC Experts exceeded their mandate.[104] The Tribunal noted that the general principles of law and practices the Parties highlighted in their submissions "disagree[d] as to whether the ABC Experts were under an obligation to state [the] reasons" underlying their definition of the Abyei Area.[105] The Tribunal went on to determine, however, that the text of those documents comprising the *lex specialis*,[106] coupled with the greater context of the Sudanese peace process, in which both the ABC Experts and the Tribunal operated, and the fact that the ABC Experts' findings were not subject to appeal, demanded that

---

[103] *Abyei Arbitration Agreement* at art. 3. In its award, the Tribunal described article 3 as providing "a functional hierarchy among applicable sources of law," with the CPA taking precedence in application. The Tribunal further noted that article 3's reference to the Abyei Arbitration Agreement itself underscored the importance of the Parties' definition of the scope and limitation of the Tribunal's jurisdiction. *Abyei Arbitration* at 156.

[104] *Abyei Arbitration* at 156.

[105] *Abyei Arbitration* at 182.

[106] In particular, the Tribunal emphasized the Abyei Appendix's requirement that the ABC's definition of the Abyei Area be "based on scientific analysis and research." The Tribunal determined that this preference for scientific methodology demanded "an exposition of the key evidence in support of the ABC Experts' 'final and binding decision.'" *Abyei Arbitration* at 183.

the ABC Experts provide reasons for their definition of the Abyei Area.[107] Of particular import in this determination, the Tribunal explained, was the impact the ABC's definition of the Abyei Area's boundaries would have on "stakeholders in the Sudanese peace process," in particular on those local residences potentially eligible to vote in the 2011 Abyei Area referendum.[108] These stakeholders in the Sudanese peace process, the Tribunal concluded, had a right to know on what facts the ABC Experts based their definition of the Abyei Area.[109] The ABC Experts' failure to sufficiently explain those facts led the Tribunal to determine the ABC Experts exceeded their mandate in defining the Abyei Area's northern, eastern, and western boundaries.[110]

The Tribunal's reasoning and awareness of its role, along with that of the ABC Experts', in the Sudanese peace process demonstrates the benefits arbitration's flexibility affords parties to an intrastate dispute arising out of the interpretation or implementation of a peace agreement. This flexibility permits such parties to choose the peace agreement itself as the law the arbitrator or tribunal is to apply to the parties' dispute. In the Abyei Arbitration, the Parties' ability to include the CPA and other relevant agreements as among those sources of law the Tribunal was to apply in resolving the dispute served to encourage the Tribunal to assess the entire case within the broader context of the Sudanese peace process. Such an assessment may ultimately lend itself to a decision that promotes, rather than frustrates, a sustainable peace within a post-conflict society, as it expresses an awareness of the context in which the decision is made and will

---

[107] *Abyei Arbitration* at 183-4.

[108] As noted above, the Abyei Protocol provides that residents of the Abyei Area, i.e. "members of the Ngok Dinka community and other Sudanese residing in the area," may vote in a referendum in 2011 to decide whether the Abyei Area will retain its special administrative status in the North or become part of the South. While the Parties have yet to constitute the Abyei Area Referendum Commission, and therefore the Commission has yet to determine the precise criteria for Abyei Area residency, this determination will no doubt be linked, in some way, to residency in the Abyei Area as defined by the Tribunal.

[109] *Abyei Arbitration* at 245.

[110] *See Abyei Arbitration* at 235-45.

operate.

Public Awareness and Community Buy-In[111]

Still further, parties to an international arbitral process, particularly under the PCA's Rules, may choose to make the award, as well as the proceedings, open and available to the public.[112] As the Abyei Arbitration demonstrates, public awareness of the arbitral proceedings may help to ensure one party cannot manipulate public perceptions of the process or the award, as well as promote community buy-in, not only with respect to the arbitral process, but also to the peace process as a whole.

In the Abyei Arbitration, one of the major factors motivating the Parties to choose the PCA as registry for and to provide administrative support to the arbitration was to ensure the arbitration would be carried out "in a transparent manner that would allow the public to follow the process."[113] The Parties agreed in the Abyei Arbitration Agreement that the oral proceedings would be open to the media, and that the PCA would make publicly available on its website the Tribunal's final award, as well as the Parties' submissions.[114] The PCA additionally streamed the oral hearings and final award ceremony live on its website, affording audiences worldwide unprecedented access to the proceedings. Notably, this access allowed local communities in

---

[111] This section is based primarily on actions the SPLM/A took to involve the Ngok Dinka in the arbitral process, and the Ngok Dinka community's subsequent acceptance of the Tribunal's award and desire to implement the same. Notably, immediately following the award's release, the Misseriya community announced that it felt the GoS had betrayed the Missierya people, as the GoS received the award as a victory, while the Misseriya saw it as a loss. Some sections of the Misseriya have since refused to adhere to the award and have demanded that the decision be appealed. The Misseriya's reaction to the award may further underscore the need for parties to an arbitration to include affected communities in the arbitral process and take into account those communities' perceptions of the dispute as well as the outcome. *See* Sudan Tribune, *Sudan Misseriya Community Refuse to Implement Abyei Ruling*, Oct. 5, 2009.

[112] *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State* at art. 32(5).

[113] Deng, *supra* note 45, at 10.

[114] *Abyei Arbitration Agreement* at art. 8(6).

Sudan to see for themselves the neutrality of the arbitral process, which, for some, led to acceptance of the Tribunal's award, as well as hope that the peace process in Sudan was, indeed, sustainable.[115] Public awareness of the process was of great import, particularly considering the GoS's history of manipulating public perceptions through control of the Sudanese media, a phenomenon not that uncommon in other post-conflict societies.[116]

Furthermore, the general openness of the arbitral process facilitated constructive community buy-in. In the Abyei Area, for instance, a community mapping expert the SPLM/A hired trained local Ngok Dinka in the use of handheld GPS systems and basic cartography, which allowed Ngok Dinka community members to compile data on the location of traditional Ngok Dinka settlements, ceremonial sites, fishing areas, grazing grounds, grave sites, and farm lands.[117] This data was then used to create a community map, depicting the area the nine Ngok Dinka chiefdoms occupied in 1905, which the SPLM/A submitted to the Tribunal along with its counter-memorial. While commentators differ as to whether external solutions, imposed by the international community, promote community buy-in within peace processes, it is clear that community buy-in is a fundamental cornerstone of sustainable peace.[118] The Abyei Arbitration

---

[115] *See, e.g.,* Sudan Radio, *Community Leaders Pledge to Abide by Ruling*, Jul. 22, 2009 (quoting Mohammed Omar Al Ansari, leader of the Abyei Liberation Front and the former governor of Abyei, as saying, "We were expecting this resolution, because I have always told the media that the resolution will not have a winner or a loser, because this court is for arbitration…. Now according to me, this resolution didn't satisfy our ambitions, but it's much better than the experts report. This resolution, with it is consequences, will be imposed on both the Dinka Ngok and the Messiriya. They have no alternative except to live together. It is an opportunity to mend the social fabric and create peaceful coexistence between Dinka and Messiriya, and we as Messiriya, we respect this resolution.").

[116] For instance, in April 2009, two Sudanese newspapers – a pro-SPLM daily and a pro-Sudanese Communist Party weekly – were forced to halt production after Sudan's security service censored certain articles, in particular, those concerning a draft press law that was then being discussed in the National Assembly. In June 2009, the National Assembly passed the *Press and Publications Act*, which was heralded by members of both the National Congress Party and the SPLM as "a victory for the Sudanese media and Sudanese journalists." *See* Sudan Tribune, *Harsh Censorship Pushes Sudanese Paper to Cancel this Week Edition*, Apr. 16, 2009.

[117] Peter Poole, *Ngok Dinka Abyei Area Community Mapping Project* (Feb. 2009), *submitted with* Counter-Memorial of Sudan People's Liberation Movement/Army at 93, *Government of Sudan v. Sudan People's Liberation Movement/Army*, PCA No. GOS-SPLM 53,391 (2009).

[118] *See, e.g.,* Edward P. Joseph, *A Decade After Dayton: Lessons Not to Learn about Democracy Building from*

demonstrates that one avenue through which relevant actors may secure such buy-in is in the creation of a transparent arbitral process for the resolution of disputes within the context of a negotiated peace, a process that affords a degree of constructive community involvement, which, in turn, promotes community buy-in.

Despite the availability of the Abyei Arbitration's proceedings and final award to the public, media reports and the GoS alike publicly misinterpreted the contents and ramifications of the Tribunal's award, causing confusion among affected communities in Sudan.[119] Such confusion and manipulation does not, however, undermine the import of making publicly available arbitral proceedings instituted to resolve an intrastate conflict. Transparency and public awareness will only serve to highlight inaccurate media coverage and one, or both, party's manipulation of the facts.

A Calculate Compromise?

A notable facet of the Abyei Arbitration was both Parties' immediate acceptance of the

---

Bosnia, *in* DEMOCRACY AT LARGE (2006) ("The standard argument against vigorous international intervention and for ownership is that solutions imposed from the outside will fail as they lack local 'buy in.' However, the post-Dayton record suggests the opposite: imposed solutions, even highly controversial ones, *do achieve widespread acceptance*."). (Emphasis in original.)

[119] For instance, a July 25, 2009 article published in the SUDAN TRIBUNE, one of Southern Sudan's major news outlets, described, "The Permanent Court of Arbitration (PCA) Abyei's award confirmed that the boundary of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 are part of southern Sudan based on tribal understanding of the Abyei Boundary Commission (ABC) panel of experts." This, however, is incorrect. The Tribunal did not determine whether the Abyei Area is part of the North or the South. Rather, the Tribunal merely defined the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905. Similarly, following the award's release, the GoS maintained the award was a victory for the North, as it defined the Abyei Area so as to place the Heglig and Bamboo oil complexes in the North. This, however, is a misleading characterization of the Tribunal's award. While the Tribunal excluded the Heglig and Bamboo oil complexes from the Abyei Area, the region in which these complexes are located now falls under the purview of the Technical ad-hoc Border Committee, which the CPA tasks with defining the remaining portions of the Sudan's north-south border (excluding Abyei). Depending on the Technical ad-hoc Border Committee's definition of the north-south border, the Heglig and Bamboo oil complexes may ultimately lie in Southern Sudan.

Tribunal's award as a victory. Such acceptance may reflect the unique ability of the arbitral process to offer a final and binding award suitable to all parties to a dispute. With the Abyei Arbitration, in particular, the Tribunal's awareness of its role in the Sudanese peace process may have contributed to the Tribunal issuing an award many saw as a compromise.[120] Indeed, both the GoS and the SPLM/A were quick to note the benefits that the award accorded. Dirdeiry Mohamed Ahmed, the head of the GoS's delegation to The Hague, called the decision a victory. "We welcome the fact that the oilfields are now excluded from the Abyei area, particularly the Heglig oil field," he said.[121] On the other hand, Riek Machar, Vice President of the Government of Southern Sudan, described the ruling as "balanced," saying, "I think this is going to consolidate peace in Sudan. It is a victory for the Sudanese people and a victory for peace."[122]

Dirderiy and Machar's statements evidence the contrasting meanings the award has come to hold for the people of Sudan. For the GoS and others in the North, the award means that the Heglig and Bamboo oil complexes, located within the Abyei Area as defined by the ABC, are now excluded from the Abyei Area, which, in 2011, may become a part of an independent Southern Sudan. While the area in which the Heglig and Bamboo oil complexes are located remains subject to the jurisdiction of the Technical ad hoc Border Committee – which could potentially define Sudan's north-south border so as to include Heglig and Bamboo in the South – the GoS, nonetheless, sees Heglig and Bamboo's exclusion from the Abyei Area as solidifying the North's ownership over these two oil complexes.

Conversely, the SPLM/A and the Ngok Dinka of Abyei see the award as confirming that

---

[120] "The tribunal gave something to everybody," a sentiment those following the proceedings commonly expressed after the release of the Tribunal's award. New York Times, *Arbitration Panel Gives Oil Field to Sudanese Government,* Jul. 22, 2009.

[121] BBC, *Sudan Welcomes Oil Border Ruling,* Jul. 22, 2009.

[122] BBS, *Sudan Welcomes Oil Border Ruling,* Jul. 22, 2009.

the Abyei Area is indeed the Ngok Dinka's ancestral homeland. The SPLM/A was further aware that the Tribunal's exclusion of Heglig from the Abyei Area would potentially make the GoS more likely to accept and implement the award, a point the SPLM/A considered important in terms of ensuring continued peace throughout the whole of Sudan.

The compromise the Abyei Arbitration Award arguably entails underscores the benefits the arbitral process may generally accord intrastate actors, particularly those emerging from violent conflict. In such situations, it is vitally important to balance the benefits and losses each side receives so as to mitigate the likelihood of further conflict.[123] As indicated above, the Parties ability to include the CPA as among the law the Tribunal was to apply fostered an awareness on the part of the Tribunal of its role in the Sudanese peace process. This awareness may, arguably, have led the Tribunal to reach a decision it determined both Parties would accept. Similarly situated intrastate actors may likewise conclude an arbitral agreement that establishes a relevant peace agreement as the law applicable to their dispute in an effort to raise an arbitral tribunal's awareness of the context in which it operates, which may, in turn, facilitate a resolution to the dispute mutually acceptable to all parties.

Compromise without Implementation: The Ultimate Utility of the Abyei Arbitration

As demonstrated above, the Abyei Arbitration offers a model for intrastate dispute resolution, particularly within the context of disputes arising out of negotiated peace agreements. Specifically, the Abyei Arbitration demonstrates the utility of arbitration as an international judicial forum to which non-state actors, such as the SPLM/A, may gain access and before which

[123] Bekoe, *supra* note 81, at 2. Bekoe's central hypothesis vis-à-vis the implementation and sustainability of peace agreements is that "factions and their leaders continually evaluate their military or political positions with respect to the other factions and will only advance the implementation process if the level of military or political vulnerability is balanced." Applied to the Abyei Arbitration, this hypothesis would appear to indicate that the GoS and the SPLM/A would only accept and implement the Tribunal's award if each Party felt there was parity among the Parties' respective losses and gains.

non-state actors and state sovereigns, such as the GoS, are considered equal. Such a forum offered the GoS and the SPLM/A what the CPA, along with so many other peace agreements, does not – a neutral, third party dispute resolution mechanism. Moreover, the flexibility arbitration provides permitted the GoS and the SPLM/A to freely define the scope of and law applicable to their dispute. The Parties' use of the CPA, the very agreement out of which their dispute arose, as the law the Tribunal was to apply helped to facilitate an awareness on the part of the Tribunal as to its role in the Sudanese peace process, an awareness that largely motivated the reasoning behind the Tribunal's award. Further, the flexibility the Parties enjoyed under the PCA's *Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State* to publicize the arbitration allowed for public awareness of and participation in the arbitral process, which, in turn, promoted community buy-in, not only with regards to the arbitration, but also with regards to the broader Sudanese peace process. Ultimately, the Tribunal's award itself, an apparent compromise, too contributed to the promotion and sustainability of the peace process in Sudan.

Indeed, the energy of the Parties, along with that of the international community, immediately following the award's release appeared refocused on CPA implementation, a welcome adjustment after nearly five years of stalled progress. The recourse to violence that so many feared the award would spark did not come to pass. Instead, both Parties were able to arrive home from The Hague with something to offer their respective constituencies.[124]

However, while violence did not flare immediately following the issuance of the

[124] That said, the Misseriya have increasingly expressed discontent over the Tribunal's award and have accused the GoS of caring more about oil than the its people. In October 2009, a group of Misseriya announced that they will not follow the Tribunal's award, and demanded the decision be appealed. Biong, *supra* note 45, at 25; Sudan Tribune, *Sudan Misseriya Community Refuse to Implement Abyei Ruling*, Oct. 6, 2009.

Tribunal's award, implementation has been slow, if not non-existent. While the Parties constituted the team that is to implement the Tribunal's award through demarcation of the Abyei Area's boundaries, insecurity in the Abyei Area and disagreement among the Parties has brought the team's work to a standstill.[125] It would appear that, yet again, the GoS and the SPLM/A have reached an impasse over issues related to the definition and demarcation of the Abyei Area.

Despite the arbitration's initial success, the process ultimately took the Parties only so far. While the Abyei Arbitration Tribunal resolved the Parties dispute on paper, the Parties are still ultimately responsible for operationalizing that resolution. A compromise has undoubtedly been reached, placing the Parties in arguably a better position than they were prior to the arbitration, as they now have, on map, boundaries for the Abyei Area upon which they both agree. This fact, coupled with Sudan's relatively peaceful reception of the Tribunal's award and the factors outlined herein, highlights the utility of the Abyei Arbitration as a model for intrastate dispute resolution. However, the utility of the Abyei Arbitration as a model for dispute resolution specifically between the GoS and the SPLM/A is, ironically, in some doubt, given the Parties' inability to unite and implement an award upon which, in theory, they both agree. This is not to say that the Abyei Arbitration is not a general model for intrastate dispute resolution, or that elements of the arbitral process may not be used to successfully resolve future disputes between the GoS and the SPLM/A. Rather, the Abyei Arbitration Agreement's reliance on the Parties to implement the Tribunal's award has proven, in practice, to be the model's weakness, indicating that an identical process may not be well suited to resolve future disputes between the GoS and the SPLM/A. Implementation of arbitral awards may too prove problematic in other

[125] *See* Sudan Tribune, *Ruling NCP Slams Sudan's FVP Accusations on Hindrances in Abyei Demarcation*, Dec. 3, 2009.

post-conflict society's, should the onus to implement fall on the Parties themselves, and not on a third party, such as the arbitral Tribunal or members of the international community. Similarly situated states may wish to consider the GoS and the SPLM/A's inability to implement the Abyei Arbitration Tribunal's award and, perhaps, use the flexibility of arbitration to conclude an arbitral agreement that provides for a mechanism through which implementation is ensured.

That the Abyei Arbitration may not necessarily be a model for the future resolution of disputes between the GoS and the SPLM/A is notable, given the increasing likelihood that the Technical ad-hoc Border Committee will fail to reach consensus over delimitation of the remaining portion's of Sudan's north-south border prior to 2011. Relevant actors, seizing on the Abyei Arbitration's apparent success, increasingly raise arbitration as a mechanism the Parties may use to define the north-south border. While arbitration may indeed be a mechanism through which the Parties may resolve disputes over the remaining portions of Sudan's north-south border, it may relevant for the Parties, along with the international community, to bear in mind when concluding any future arbitral agreements the continued non-implementation of the Abyei Arbitration Tribunal's award, and account for the likelihood that future arbitral awards may prove equally as difficult to implement. Should the Parties resort to arbitration to resolve outstanding disputes over the north-south border, they may wish to use the flexibility that arbitration provides to conclude an agreement that not only ensures definition of the border on map, but also provides recourse for demarcation of the border on the ground.

Figure A: The Abyei Area
A Comparative Map