**The Abyei Protocol Demystified**

By Douglas H. Johnson

December 10, 2007 — The Abyei Protocol and the Report of the Abyei Boundaries Commission (ABC) are once again at the centre of political controversy in Sudan. Although the ABC Report is available on the internet through the Sudan Open Archive ([www.sudanarchive.net](http://www.sudanarchive.net/%20cgi-bin/sudan?e=--and-TX-Abyei-1025-10-1-0-Abyei&a=d&cl=search&d=Dl1d18)), [Sudan Tribune](http://www.sudantribune.com/spip.php?article11633), and a number of other websites, its contents are not widely known in the Sudan, or among many of those who have joined in the debate. To repeat false statements and misinformation is neither neutral nor truthful, and it is time that the arguments about the ABC Report should refer back to the language used in the Abyei Protocol of the Comprehensive Peace Agreement (CPA) and the ABC Report.

As the National Congress Party (NCP) has yet to put in writing a formal objection to the findings in the ABC Report, I have had to rely on statements reported in the Sudanese media, on the assumption that these reports are accurate.

**Why is there a separate protocol on Abyei?**

The Addis Ababa Agreement made a provision that *‘areas that were culturally and geographically a part of the Southern complex’* could decide by referendum whether or not they wanted to join the Southern Region (*Organic Law to Organize Regional Self-Government in the Southern Provinces of the Democratic Republic of the Sudan, 1972, chapter II, article 3.iii*). The people of Abyei were denied this right when they petitioned to hold a referendum, and this became one of the grievances that led to the outbreak of civil war in 1983. Both sides agreed during the negotiations of 2002 that the grievances of Abyei (along with the Nuba Mountains and Blue Nile) should be addressed in any comprehensive peace agreement.

**What does the Abyei Protocol do?**

The Abyei Protocol defines the terms for a special administrative status for the Abyei Area throughout the interim period of the CPA. The Presidency is to establish an Executive Council, representative of all the residents of the Abyei Area, pending elections, when the people of the Abyei Area will elect their own Executive Council (Abyei Protocol, article 1.2). In addition to other revenues (Abyei Protocol, article 3.2), the Abyei Area is also to get a share of the ‘net-oil revenue produced in the Abyei Area’ (Abyei Protocol, article 3.1).

At the end of the Interim Period in 2011 the residents of the Abyei area will vote whether they wish to retain their special administrative status in the north, or become part of Bahr el Ghazal (Abyei Protocol, article 1.3).

The Misseriya are not defined as residents of Abyei, but specifically ‘*retain their traditional rights to graze cattle and move across the territory of Abyei’* (Abyei Protocol, article 1.1.3).

International monitors are to be deployed to Abyei ‘to ensure full implementation of these agreements’ (Abyei Protocol, article 1.2.5).

**Why was there an Abyei Boundaries Commission?**

The Abyei Protocol stated that ‘the territory is defined as the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905’ (Abyei Protocol, article 1.1.2), but the two sides could not agree on what the extent of that territory was. The Abyei Boundaries Commission (ABC) was established ‘to define and demarcate the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905’ (Abyei Protocol, article 5.1)

**What was the composition of the ABC?**

The ABC was composed of 5 members of the government of Sudan’s delegation, 5 members of the SPLM’s delegation, and 5 international experts.

**How were they experts chosen?**

The experts were chosen at the request of the two parties, as follows: ‘The Parties shall ask the US, UK and the IGAD to nominate five impartial experts knowledgeable in history, geography and any other relevant expertise. The ABC shall be chaired by one of those experts’ (Abyei Appendix, article 2.2).

**Who were these ‘so-called experts’, and what was their expertise?**

The experts were:

**Ambassador Donald Petterson:** Chair of the ABC, nominated by the US. He was a career Foreign Service officer of the US from 1960 to 1995 and served as US Ambassador to Somalia (1978-1982), Tanzania (1986-1989) and Sudan (1992-1995). He has been a consultant on Sudan affairs since 1999 and is the author of two books, one on Sudan and one on Zanzibar.

**Prof. Shadrack Gutto**: Nominated by IGAD. He is Professor, Director and Chair of the Centre for African Renaissance Studies at the University of South Africa in Pretoria. He is a specialist in constitutional, international and development law, especially on human rights and land resources and the environment. He has been a consultant to the UN, AU and some leading international NGOs, is an advisor to the Minister of Justice and Constitutional Development in South Africa and has drafted several of South Africa’s laws on land reform, housing and equality. He has published over 30 scientific journal articles and 6 books. including Property Relations and Land Reform. He is the founding editor of The International Journal of African Renaissance Studies.

**Prof. Kassahun Berhanu:** Nominated by IGAD. He is a political scientist specializing in the political dynamics of the Horn of Africa and the Middle East. He has conducted research on issues of cross-border population movements, conflict and cooperation, competition over internal and trans-boundary resources, the refugee phenomena in the Horn sub-region in general, and the countries of Ethiopia, Sudan and Somalia in particular. He has published his research findings in books, journal articles, book chapters and monographs.

**Prof. Godfrey Muriuki:** Nominated by IGAD. He is professor of history at the University of Nairobi. He has written a major work, A History of the Kikuyu, using oral and documentary evidence, which examines, among other things, competing land claims in Kenya’s central highlands. He is among the pioneers of use of oral sources in reconstructing African History. He has been on the editorial boards of the major journals dealing with Africa, including African Affairs, Journal of African History, and The International Journal of African Historical Studies. He was one of the ten historians in the world who was offered life membership of the Historical Association of Great Britain when it celebrated its centennial.

**Dr. Douglas H. Johnson:** Nominated by the UK. He is an historian who has been researching the history of the Sudan for some forty years. He was Assistant Director for Archives in the Southern Regional Government before the war and is the author of Nuer Prophets and The Root Causes of Sudan’s Civil Wars. He has edited 5 volumes of historical documents on the Sudan and the Southern Sudan, co-edited three other books, and published over 50 articles. Nuer Prophets was awarded the Royal Anthropological Institute’s Amaury Talbot Prize for African Anthropology, and his book of edited documents, Governing the Nuer was awarded the African Studies Association’s text prize for the editing of historical documents.

It should be noted that neither the government nor SPLM’s delegations included anyone with equivalent academic or research experience in gathering and analysing oral historical testimony or historical documents, or legal expertise in land rights and land disputes.

**What was the mandate of the ABC?**

The mandate of the ABC was ‘to define and demarcate the Area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905’ (Abyei Protocol, article 5.1, and Abyei Appendix, article 1).

The Commission as a whole was to ‘listen to representatives of the people of Abyei Area and the neighbours, and shall also listen to presentations of the two Parties’ (Abyei Appendix, article 3).

The role of the experts was further defined, ‘In determining their findings, the Experts in the Commission shall 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. The experts shall also determine the rules of procedure of the ABC’ (Abyei Appendix, article 4).

The Rules of Procedure, subsequently agreed to by all parties and adopted by the ABC, confirmed the terms of reference and stipulated that ‘Upon completion of the visits to the field…the experts will determine what additional documentation and/or archival materials will need to be consulted’ (ABC Report, appendix 1.4, Text of the Rules of Procedure).

**Who was supposed to make the final decision in the ABC?**

In the Rules of Procedure it was agreed by all sides that, following the field visits and the final presentations of both parties ‘the experts will examine and evaluate all the material they have gathered and will prepare the final report.’ In addition to this it was agreed ‘the Commission will endeavour to reach a decision by consensus. If, however, an agreed position by the two sides is not achieved, the experts will have the final say’ (ABC Report, appendix 1.4, Text of the Rules of Procedure).

The Abyei Appendix to the CPA states: ‘The ABC shall present its final report to the Presidency before the end of the Pre-Interim Period. The report of the experts, arrived at as prescribed in the ABC rules of procedure, shall be final and binding on the Parties’ (Abyei Appendix, article 5).

**How was evidence presented?**

The government and SPLM delegations made oral and powerpoint presentations at the beginning and the end of the commission’s work. The Ngok Dinka, Misseriya and their neighbours presented oral testimony at meetings convened in the field, which was recorded and transcribed in Appendix 4 of the ABC Report.

**What material was submitted to the ABC?**

The NCP has claimed that it consulted all the archives in the UK and Sudan and presented 53 documents that proved their case ‘beyond reasonable doubt’. In fact, the government delegation made three powerpoint presentations in which they showed extracts from a number of documents dating from 1902 to 1966 and publications dating up to 1999. They did not submit any copies of the full documents cited, even when requested to do so by the experts.

The SPLM also did not present any copies of full documents to support their claims.

Neither the Misseriya nor the Ngok Dinka provided contemporary documentation in support of their oral testimony.

In the experts’ opinion none of the parties presented enough evidence to support ‘beyond a reasonable doubt’ the claims each made. This did not mean that their evidence was ignored. It did mean that the experts had to examine in full the original documents cited, and seek out additional sources of information to see if the oral testimony collected could be corroborated by other sources.

The experts read through 84 files in Khartoum (National Records Office and the Sudan Collection of the University of Khartoum) and 27 files in the United Kingdom (Bodleian Library, University of Oxford, and the Sudan Archive, University of Durham), consulting some 175 relevant documents and primary publications. 71 of these documents are cited in Appendix 5 of the ABC Report.

**What maps were available to the ABC?**

The NCP has alleged that the experts cited only 2 maps from 1907 in support of their decision.

In fact the experts consulted 47 separate maps, which are listed and discussed in Appendix 6 of the ABC Report. 27 of these maps came from the Sudan Survey Authority office in Khartoum.

**What was the government’s claim and how did the experts evaluate that claim?**

The government claimed that before 1905 the Bahr el-Arab was the provincial boundary between Kordofan and Bahr el-Ghazal provinces, and that the Ngok Dinka lived south of the river at this time; therefore the only area transferred from Bahr el-Ghazal to Kordofan was a small strip of land south of the Bahr al-Arab. They further claimed that the Ngok Dinka settled north of the Bahr el-Arab only after 1905 (ABC Report, Appendix 3).

The experts found that the contemporary maps and documents cited by the government delegation contradicted their contention that in 1905 a de facto administrative boundary existed along the Bahr el-Arab river, and that the Ngok Dinka lived entirely south of the river at that time. Other sources consulted by the experts, but which had not been cited by the government delegation, revealed that before 1905 the Ngok Dinka were under no clear administrative jurisdiction but were visited by administrators from both Kordofan and Bahr el-Ghazal, and that there was confusion within the administration about the location of the Bahr el-Arab itself, a confusion that was not resolved until after 1905 (ABC Report, Appendix 5).

**What was the Misseriya’s claim and how did the experts evaluate that claim?**

The Misseriya claimed that Dar Misseriya in 1905 extended all the way to the 1956 Kordofan–Bahr el-Ghazal border (ABC Report, Appendix 4). This claim was not supported by the government delegation, who claimed that Dar Misseriya at that time extended only as far as the Bahr el-Arab (ABC Report, Appendix 3).

The experts also discovered from records of testimony gathered in the 1930s, 1950s and 1960s, and publications that pre-dated the dispute over Abyei, that the Misseriya made no claim to ownership of the area between the Bahr el-Arab (or Kiir) and the Ragaba ez-Zarga (or Ngol) until 1965, and that these claims were rejected in 1966 at an inter-tribal meeting composed entirely of Sudanese, and presided over by the Nazir of the neighbouring Hamar (ABC Report, Appendix 5).

**What were the Ngok and SPLM claims and how did the experts evaluate these claims?**

The SPLM based their case on the Ngok Dinka claims; thus presenting a more consistent case than that presented by the Misseriya and government. While some Ngok claimed that their territory extended as far north as Muglad and beyond, the bulk of the testimony laid claim only to territory extending into the Qoz belt north of the Ragaba ez-Zarga (or Ngol) (ABC Report, Appendices 3 & 4).

The experts considered the testimony presented by them and compared it with the other evidence gathered. They found that the Ngok claims to Muglad were unsupported by the evidence and had to be dismissed, but that the claims to part of the Qoz territory were supported by administrative records and other sources (ABC Report, Appendix 5). They also found that the Ngok Dinka testimony demonstrated a far more detailed knowledge of the area they laid claim to than the Misseriya informants were able to display about the same territory.

The boundary determined by the experts was still further south than the SPLM and most Ngok Dinka claimed.

**How did the experts determine what was ‘the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905’?**

The dispute between the Misseriya and Ngok, as presented to the experts, was as much about rights to the access and use of land as to ownership and occupation. The established legal distinction in such cases is between ‘dominant rights’ in land which is permanently occupied, and ‘secondary rights’ in land where there is temporary or seasonal use. The legal principles involved in the decision are described in Appendix 2 of the ABC Report.

Determining ‘the area’ of the Ngok Dinka in 1905 thus involved identifying where they had ‘dominant rights’ (permanent villages and cultivations) and where they had ‘secondary’ or seasonal rights. It was also necessary to make a similar distinction between the ‘dominant’ and ‘secondary’ rights of the Misseriya.

The Ngok have dominant rights where their permanent villages and main agricultural and grazing areas were, which the experts determined extended up to the line of 10°10’N, while the Misseriya have dominant rights around the areas of Muglad and Babanusa, far to the north of the Abyei Area. Ngok secondary rights extend north into the Qoz, up to 10°35’N, while Misseriya secondary rights extend south into the area of Ngok dominant rights. There is, therefore, an area where the secondary rights of both peoples overlap. Applying the principles of justice and equity also commonly applied to resolve such disputes, it was decided to bisect the area of shared secondary rights into equal portions at approximately 10°22’30”N.

**How far north does the ABC boundary lie?**

The NCP claims that the boundary the experts draw lies 150 km north of Abyei and extends as far as Lake Keilak.

The map accompanying the report clearly shows that the line the experts drew is only about 87 km north of Abyei town. Lake Keilak is far to the north of that line.

**Did the experts find ‘in favour of the South’ and give Abyei to the South?**

No. The role of the experts was not to find for or against any claimant, but to examine all the available evidence in order to make a definition of the Abyei Area, as stipulated by the mandate of the Abyei Protocol. Only the residents of the Abyei Area can decide whether the territory will, or will not, become part of the South in 2011. The ABC Report merely defines the area that will be affected by such a referendum.

**Why does the NCP claim the experts ‘exceeded their mandate’?**

The NCP claims that the ABC was mandated to define the administrative boundary between Kordofan and Bahr al-Ghazal in 1905 only, and that the Abyei Protocol limited the ABC to examining an ‘administrative’ boundary, and not a ‘tribal’ boundary.

However, the Abyei Protocol makes no reference to an administrative boundary in 1905. It refers, instead, to ‘the nine Ngok Dinka chiefdoms’. The mandate required the ABC to define the territory of the Ngok Dinka in 1905, which involved defining the tribal territory.

**Why does the NCP claim that the experts ‘failed’?**

The NCP claim that the ‘experts failed’ to find the 1905 boundary, and having failed should have come back to the Presidency to let them decide what the area was. Instead the experts came back ‘and began to talk to us about the Dinka of 1965 and 1956’.

Since the ABC was not mandated to find a 1905 boundary, it did not fail, and nor did the experts claim to have failed. The experts state in their report:

‘They note that a 1905 map showing the Ngok territory does not exist. Nor do the historical records of the then government definitively attest to the Ngok boundaries at that time. In analysing the material collected, the experts have applied the generally accepted historical method of comparing oral with written material. They have also been guided by the established legal principles in determining land rights in former British-administered African territories, including the Sudan’ (ABC Report, p.12).

Both the government and SPLM referred to the events of 1965 in their presentations. Hereika Izz ed-Din cited statements from the intertribal meetings of the 1960s in his own testimony to the ABC in Muglad (ABC Report, Appendix 4, p.84), and Dirdeiry Mohammed Ahmed cited the minutes of the 1966 intertribal meeting in his final presentation. The experts therefore were duty-bound to examine further this evidence to determine its relevance.

It should also be noted that the Abyei Protocol does not mandate the Presidency to make a final decision about the area. The Presidency was mandated to ‘establish…Abyei Boundaries Commission’ (Abyei Protocol. article 5.1), to determine ‘the composition and timeframe of the Abyei Boundaries Commission’ (Abyei Protocol, article 5.2), and to ‘take necessary action to put the special administrative status of Abyei Area into immediate effect’ upon the ABC presenting its final report (Abyei Protocol, article 5.3).

**Why does the NCP claim that the experts’ decision was not ‘final and binding’?**

The NCP claims that the government had agreed the decision would be ‘final and binding’ only if it identified the 1905 administrative boundary.

This is not what the Abyei Protocol says. In a footnote attached to the Abyei Protocol the two parties stated, ‘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 March, 2004. The Parties hereby declare to adopt these Principles as the basis for the resolution of the Abyei Conflict’ (Abyei Protocol, p.65). There is no qualification stated here to accepting the Abyei Protocol.

The experts sought additional clarification from the US team that presented the text of the Abyei Protocol to the two parties at Naivasha and were told, ‘“It was clearly our view when we submitted our proposal that the area transferred in 1905 was roughly equivalent to the area to the area of Abyei that was demarcated in later [years].” This position was, according [to] the American participants, conveyed to the two sides at the Naivasha talks’ (ABC Report, p.4).

No qualification to acceptance of the Abyei Protocol is recorded in the CPA itself. In addition to this the Abyei Protocol further commits the Presidency to immediate implementation, stating, ‘The Abyei Boundaries Commission (ABC) shall present its final report to the Presidency as soon as it is ready. Upon presentation of the final report, the Presidency shall take necessary action to put the special administrative status of the Abyei Area into immediate effect’ (Abyei Protocol, article 5.3).

In refusing to accept the decision of the ABC Report as ‘final and binding’, the Presidency has also failed to implement the rest of the Abyei Protocol, ‘with immediate effect’.

**Is there a further role for the ABC experts?**

The experts were set the task to ‘define and demarcate’ the Abyei Area. The ABC Report defines the area. Demarcation involves surveying the area so defined on the ground. The ABC Report outlines the further role of the experts in supervising that demarcation (ABC Report, p.22), which has yet to take place.

**Is there a role for IGAD or any other foreign government in implementing the Abyei Protocol?**

The ABC was established with international participation and support. The IGAD Secretariat supervised and helped to organize the work of the experts, as well as that of full Commission when it met in Nairobi. IGAD, as well as the US and UK governments who eached nominated members of the panel of experts, have a continuing interest in ensuring that this part of the CPA is implemented as intended.

**What are the implications for the CPA of the NCP’s rejection of the ABC Report?**

Defining and demarcating the Abyei Area is the pre-condition for implementing the Abyei Protocol. By refusing to accept the ABC Report the NCP have abrogated the whole of the Abyei Protocol. This is contrary to the Machakos Protocol, which states:

*‘The Parties shall refrain from any form of unilateral revocation or abrogation of the Peace Agreement’* (Machakos Protocol, article 2.6)

A prededent has now been established whereby one party has abrogated a part of the CPA.

The Abyei Protocol also established a precedent for settling border disputes between the northern and southern Sudan. The failure to resolve this one section of the border sets a bad precedent for the definition of the 2000 km North-South border, whereby one party to the CPA is able to prevent the implementation of any section of the CPA with which it disagrees. A failure to resolve the North-South border will jeopardize the faithful implementation of the other protocols in the CPA dealing with security, wealth-sharing, elections and the referendum. In other words, if the borders cannot be agreed, the CPA cannot be implemented as written, or as intended.

The rules of procedure adopted by the North-South Boundary Technical Committee state that any irreconcilable differences over the boundary will be referred to the Presidency for resolution. The current impasse over the Abyei Protocol demonstrates that the Presidency has not yet demonstrated that it can resolve such disputes quickly or equitably.

**Why should other Sudanese people care whether the Abyei Protocol is implemented or not?**

If the CPA is to establish the foundation for peace in the Sudan, whatever the outcome of the 2011 referendum, there must be peace along the 2000 km North-South border, and mechanisms established to maintain peace among the peoples of that border. The Abyei Protocol, as written, recognizes the traditional rights of the Misseriya to pass through and graze on land that they do not own. They are the only Northern Sudanese people specifically mentioned whose rights are so guaranteed. If the Abyei Protocol is implemented according to the letter of the CPA, this provides the basis for managing future relations between the Misseriya and their Southern neighbours, whether the Southern Sudan remains part of the Sudan or becomes independent.

The opposition to the Abyei Protocol and the ABC Report, currently being organized by the NCP, means that the Misseriya, and other peoples north of the North-South border, face a future of perpetual war with the peoples of the South. They must ask themselves, is this in their best interest? Do they wish to be permanently on the front line of a battle zone? Or can lessons learned from the Abyei Protocol be applied to other areas of the North-South border to ensure that the rights of the peoples on both sides of the border are protected, and peaceful relations can be re-established and maintained?

**Conclusions**

According to the Abyei Appendix to the CPA and the Terms of Reference for the ABC, each of which was drafted by the two sides before the ABC was appointed, and according to the Rules of Procedure agreed to by all parties prior to the beginning of the ABC’s work, it was open to the two parties to present the experts with an agreed position. If they failed to agree, then the final decision was to be made by the experts. By failing to agree both sides admitted they were unable to resolve the issue between themselves and handed the responsibility to the experts.

The experts conducted their investigation along accepted scientific principles of historical research, following recognized legal principles in resolving land disputes. They arrived at a decision in accordance to the agreed rules of procedure. Both parties had committed themselves in advance to accept this decision. There is no provision in the CPA that allows one party, in this case the NCP, to refuse to accept this decision and put another one in its place.

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