

Frequently Asked Questions and Answers about the Decision of the Abyei Arbitration Tribunal (July 28, 2009)

● Did the Tribunal find that the Abyei Boundaries Commission (ABC) Experts exceeded their mandate?

Yes and No. The Tribunal found that in certain respects the ABC Experts did not exceed their mandate and in other respects, they did exceed their mandate. Most importantly, the Tribunal determined that the ABC Experts acted reasonably and did not exceed their mandate when they interpreted their authority as requiring them to identify where the people of the nine Ngok Dinka Chiefdoms lived in 1905 (the “tribal” interpretation), and not, as the Government of Sudan alleged, where a provincial border was in 1905 (the “territorial” interpretation).¹ In doing this, the Tribunal confirmed that the Abyei Area was the ancestral homeland of the Ngok Dinka people. It also rejected the Government of Sudan’s primary argument that the Abyei Area should be no more than a narrow 14-mile wide strip of land just south of the Kiir/Bahr el Arab River, which would have excluded the majority of the nine Ngok Dinka Chiefdoms from the Abyei Area and Abyei Town itself. If the Tribunal had adopted the Government’s “territorial” interpretation, it may have defined an Abyei Area of no more than approximately 2,714 square kilometers below the Kiir/Bahr el Ghazal River. Instead, the Tribunal defined an area of approximately 10,460 square kilometers. (*See Figure A*).

● Did the Tribunal change the boundaries of the Abyei Area as originally defined by the ABC?

Yes and No. (*See Figure A*). The Tribunal determined that the ABC Experts did not exceed their mandate by determining that the southern boundary of the Abyei Area was effectively the 1956 Kordofan-Bahr el Ghazal-Upper Nile provincial boundary. This southern boundary, as defined by the ABC Experts, therefore remains the same.² The Tribunal also determined that the ABC Experts did not exceed their mandate when they determined that Ngok Dinka permanent occupation in 1905 extended all the way from the southern boundary (just described) to latitude 10°10'00 N.³ It did, however, find that the ABC Experts exceed their mandate when they defined the northern boundary all the way to 10°22'00 N (just above Nyama).⁴ There is no practical affect, however, to the Tribunal’s adjustment of this northern boundary for the Ngok Dinka people in terms of their movements. As explained below, the Ngok Dinka may continue to graze their cattle and move above latitude 10°10' 00 N as per their traditional and historic practices.⁵ The Tribunal further determined that the ABC Experts exceeded their mandate in

defining the Abyei Area's western and eastern boundaries.⁶ Applying the "tribal" interpretation, the Tribunal determined that Ngok Dinka occupation in 1905 extended in the west to longitude 27° 50'00 E (somewhere midway between Maper Amaal (Debab) and Meiram) and in the east to longitude 29°00'00 E (approximately just west of the village of Ajaj). These are the new eastern and western boundaries of the Abyei Area.⁷

● **Is Abyei Area defined by the Tribunal now part of the South?**

No. The Tribunal only defined the "Abyei Area" that would be subject to the special administrative status under the Abyei Protocol. The Abyei Area is neither a northern or southern state, but its own special administrative unit. It has its own local governance and special administration.⁸ It will be for the residents of Abyei in 2011 to decide in their own referendum if it will retain its special administrative status as part of the north, or become part of the southern state of Bahr el Ghazal.⁹ Until then it belongs neither to the north or the south, just to Sudan.

● **What is the affect of the Tribunal's award on the jurisdiction of the Abyei Area Administration?**

As of June 2008, the Abyei Roadmap Agreement set the interim boundaries of the Abyei Area, which defined the jurisdiction of the Abyei Area Administration (AAA).¹⁰ With the Tribunal's new award, the AAA's jurisdiction is now different. While the AAA's boundaries to the north and south remain largely unchanged, the AAA's boundaries to the east and west are now different from those the Abyei Roadmap Agreement originally established. Specifically, the Tribunal's award has moved the AAA boundary in the east to longitude 29°00'00 E rather than approximately 29°15'00 E. Therefore, its eastern limit is now just west of the village of Ajaj. The Tribunal's award, however, has increased the AAA's jurisdiction further west to longitude 27°50'00 E rather than what was previously its furthest western border between approximately 27°55'00 E and 28°00'00 E. Its limit is now approximately midway between Maper Amaal (Debab) and Meiram. Full demarcation on the ground by a survey team must be completed to precisely clarify which communities, particularly in east and west, fall within or outside of the newly defined Abyei Area. (See Figure A).

● **Did the Tribunal say anything about the 2011 Abyei Referendum?**

The Tribunal emphasized that the ABC Expert's *tribal* interpretation of their mandate (that is, defining the Abyei Area to coincide with the historic occupation of the Ngok Dinka in 1905) was reasonable and not an excess of mandate because it "further[s] a key objective of the CPA, which is to submit, through a referendum, to the whole Ngok Dinka community the choice of either retaining the Abyei Area's special administrative status in the north or joining the South in the event that the South were to secede."¹¹ The Tribunal opined that the "rigid application" of the GoS's *territorial* interpretation "could result in splitting the Ngok Dinka community depending on the outcome of the envisaged [Abyei Area] referendum."¹² According to the Tribunal, application of the *tribal* interpretation, however, "would result in the inclusion and the participation in the 2011 referendum of most members of the targeted community, the Ngok Dinka..."¹³ In this way the Tribunal affirmed that the 2011 Abyei referendum is meant to provide the Ngok Dinka with the exercise of their right to self-determination.

● What affect does the Tribunal’s award have on the determination of who will vote in the Abyei Referendum of 2011?

The Tribunal’s authority did not extend to determining who should vote in the 2011 Abyei Referendum. The Tribunal only had the authority to define the boundaries of the Abyei Area from within which voters will reside. The Abyei Protocol provides that the “residents” of the Abyei Area will vote in the 2011 Abyei Referendum¹⁴ and that these “residents” shall be “Members of Ngok Dinka community and other Sudanese residing in the area.”¹⁵ This means that, in addition to all the members of the Ngok Dinka community voting in the referendum, the “other Sudanese” who will vote must “reside” in the newly defined Abyei Area. (Eligibility to vote in the Abyei Referendum is separate and distinct from determinations about voter eligibility for purposes of the 2010 national elections.

● Does the Tribunal say how long the “other Sudanese” must reside in the newly defined Abyei Area to be eligible to vote in the 2011 Abyei Referendum?

No. This was not the authority of the Tribunal. According to the agreement of the parties in the Abyei Protocol, the “criteria of residence shall be worked out by the Abyei Referendum Commission,” which “shall be established by the Presidency.”¹⁶ The Presidency has not yet established the Commission, but when it does, the Commission will likely contain representatives of the two parties to the CPA. In defining the “criteria of residenc[y],” the Commission will need to consider the boundaries of the Abyei Area as defined by the Tribunal. To ensure acceptance by the people as well as the international community, the Commission will also need to consider international law and state practice on residency requirements for referenda. For instance, the Venice Commission Guidelines on the Holding of Referendums (a recognized international authority on elections and referenda matters) has defined residency requirements to mean those with “habitual residence.”¹⁷ This would tend to exclude nomadic or other migratory populations who may have seasonal movements through the Abyei Area, but who have permanent residence elsewhere. Most often state referenda and legislation have included residency requirements ranging anywhere from six months to 25 and even 75 years (i.e. Montenegro, Pacific Island of Tokelau/ New Zealand, New Caledonia/France, Gibraltar). At times continuous and uninterrupted residency has been required and at other times not. Longer residency requirements are sometimes favored where a particular lineage or ethnicity (by birth or marriage) cannot be proven. If applied to the Sudan context, these longer residency requirements would likely preclude voter eligibility for any new individuals who move to the Abyei Area after the Tribunal’s award has been issued, with the exception of displaced Ngok Dinka, whose return to the Abyei Area and voter eligibility is separately provided for in the CPA.

Indeed, in approving a twenty (20) year residency requirement in the case of New Caledonia’s intended independence referendum from France, the United Nation’s Human Rights committee said that a residency requirement showing that an eligible voter has “sufficiently strong ties to the territory whose future is being decided” is valid in the context of a self determination referendum.¹⁸ For these reasons, several prior state referenda legislation have provided for shorter or no residency requirements for certain groups with a proven distinct ethnicity, lineage, or connection to the area subject to the referenda, while simultaneously requiring longer

residency requirements to those not deemed ethnically tied to the region (i.e Pacific Island of Tokelau/ New Zealand, Gibraltar). Sometimes the residency periods are even tagged to a particular event in history that is deemed to have altered the character of that region such as a date of independence or commencement of hostilities (i.e. Western Sahara/Morroco, Gibraltar). All of this will need to be considered by the Abyei Referendum Commission and it was not addressed by the Tribunal's decision.

● Based on the Tribunal's award, must all individuals who are not Ngok Dinka leave the Abyei Area? Will populations be forcibly removed from the area if they are not Ngok Dinka?

No. Notwithstanding the CPA parties' commitment to facilitate the return and resettlement of Abyei Area residents who were displaced and forced to leave due to the war, nothing in the Tribunal's decision or the CPA, Abyei Protocol, or Abyei Roadmap – the implementation of which this arbitral decision was meant to facilitate – requires the displacement or movement of populations. In fact, the Tribunal notes in its award that its use of permanent Ngok Dinka settlements throughout the Bahr region to determine the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 by no means implies that other peoples “cannot, or will not be able to, use the Bahr and its pastures.”¹⁹

● Because of the award, do the Misseriya and other nomads have to stop moving through the area of Abyei?

No. The Tribunal's decision is meant to facilitate, and in no way undermine, implementation of the Abyei Protocol. The Protocol provides that the “Misseriya and other nomadic peoples retain their traditional rights to graze cattle and move across the territory of Abyei.”²⁰ The Tribunal's decision protects these rights and does nothing to abolish, limit, or affect those rights in any way. In fact, the Tribunal specifically provided that the “exercise of established traditional rights within or in the vicinity of the Abyei Area, particularly the right (guaranteed by Section 1.1.3 of the Abyei Protocol) of the Misseriya and other nomadic peoples to graze cattle and move across the Abyei Area (as defined in this Award), remains unaffected.”²¹ Notably, the Tribunal refers to “traditional rights” which of course arise from the customary laws and practices that have developed among the Misseriya, other nomads, and Ngok Dinka. As such it is expected that these historic practices and all of their protocols are to be respected in the implementation of the decision, including agreements between the groups on the timing, location and manner of their respective movements through each other's territory.

● Under the Tribunal's decisions, are the Ngok Dinka confined to grazing and moving exclusively within the Abyei Area?

No. Like the Misseriya and other nomads, the Tribunal's award in no way affects Ngok Dinka's traditional grazing and movements. The Ngok Dinka are not limited to grazing or moving exclusively within the Abyei Area. The Tribunal affirmed, “In respect of the ABC Experts' decision that ‘[t]he Ngok and Misseriya shall retain their established secondary rights to the use of land north and south of this boundary,’ the ABC Experts did not exceed their mandate.”²²

This means that both the Ngok Dinka, along with the Misseriya and other nomads, can continue to move their cattle north and south of the newly defined Abyei Area as per their traditional practices and customs. As mentioned above, while the northern boundary of the Abyei Area moved southward from latitude 10°22' 30 N to latitude 10°10'00 N, there is no practical affect to the Ngok people in terms of their movements. Their continued access to these areas is preserved by the Tribunal's decision. The Ngok Dinka may continue to graze their cattle and move above latitude 10°10' 00 N as per their traditional and historic practices just as they may graze and move south of the Abyei Area as recently defined.

● Did the Tribunal say whether the Heglig and Bamboo oil fields belong to the north or south?

No. The Tribunal only decided that the areas in the east and northeast, where the Heglig and Bamboo oil fields are located, are *not* part of the Abyei Area. Applying the “tribal” interpretation, the Tribunal merely reached the conclusion that these areas were *not* part of the Ngok Dinka ancestral homeland in 1905. The Tribunal said nothing, nor does its decision imply anything, about whether these two fields were part of the north or south in 1956. This is the jurisdiction and charge of the Technical Ad-Hoc North-South Border Committee, established by the CPA. That Committee will determine where the 1956 north-south border was and therefore what areas –including relevant oil fields – fall north or south of that border.

● What does the Tribunal's award mean for future distributions of oil revenue?

The Abyei Protocol divides oil revenues generated from reserves within the Abyei Area six ways, with the National Government receiving 50%; the Government of Southern Sudan receiving 42%; Bahr el Ghazal region receiving 2%; Western Kordofan receiving 2%; and the Ngok Dinka and Misseriya people receiving 2%, respectively.²³ This means that oil revenue generated from the reserves in Diffra and any other oil fields now found within the newly defined Abyei Area must be divided accordingly. To the extent this revenue has not yet been distributed in whole or part, as per the Abyei Roadmap²⁴ and as per recent the agreements of the parties reached in Washington and Khartoum, these distributions must begin as well as payment of arrears owed.

The Wealth Sharing Protocol of the CPA does not provide expressly for revenue sharing between the National Government and the Government of Southern Sudan with respect to oil generated from producing wells located in the north. The CPA, however, does outline “general principles in respect of an equitable sharing in common [national] wealth.”²⁵ As for oil emanating from wells in Southern Sudan, the CPA provides that after payments are made to the Oil Revenue Stabilization Account and to the state in which the oil was produced (2%), fifty percent (50%) of the net oil revenue is to be allocated to the Government of Southern Sudan and the remaining fifty percent (50%) is to go to the National Government and states in the north.²⁶ In light of these CPA provisions and the fact that the Tribunal's decision does not determine whether the areas of Heglig in particular are in the north or south, and given the fact that the ownership of this oil producing area remains contested, the parties will now need to consider a way forward on the revenues generated from this region pending the final decision of the Technical Ad-hoc North South Border Committee. Notably, under the Wealth Sharing provisions of the CPA, “any

level of Government may initiate proceedings in the Constitutional Court should any other organ or level withhold monies due to it.”²⁷

- **What does the Tribunal’s award mean for the various assistance and reconstruction funds created to benefit the Abyei Area and its people?**

The Abyei Protocol requires the National Government to provide the Abyei Area with assistance “to improve the lives of the peoples of Abyei, including urbanization and development projects.”²⁸ Those people living within the Abyei Area as defined by the Tribunal will benefit from any assistance the National Government provides under this provision of the Abyei Protocol. The Abyei Protocol further entitles the newly defined Abyei Area to the Area’s share of the National Reconstruction and Development Fund, the Southern Sudan Development and Reconstruction Fund, and national revenue as per the CPA’s Wealth Sharing Agreement. Additionally, the Abyei Area is entitled to receive revenues raised in the Abyei Area from taxes and levies, contributions from the National Government to the Abyei Area Administration, and money from the Abyei Resettlement, Construction, and Development Fund.²⁹ The Presidency must also avail all “necessary funds to the Abyei Area Administration for the delivery of basic services and running of [the] administration.”³⁰ The parties recently agreed that these overdue funds to the AAA would be made after the Tribunal’s decision was issued. In addition, the Abyei Roadmap provides that the “Government of National Unity and Government of Southern Sudan shall contribute fifty percent (50%) and twenty five percent (24%) respectively from their oil revenue shares from oilfields in the *areas under arbitration*” (emphasis added) to fund development in areas the north-south border.³¹ This fund, of course, may now draw on less revenues given the exclusion of the Heglig and Bamboo oil fields from the Abyei Area and the limited or broad interpretation the parties give to “areas under arbitration.”

- **Given the Tribunal’s award, who is now in charge of security in Abyei?**

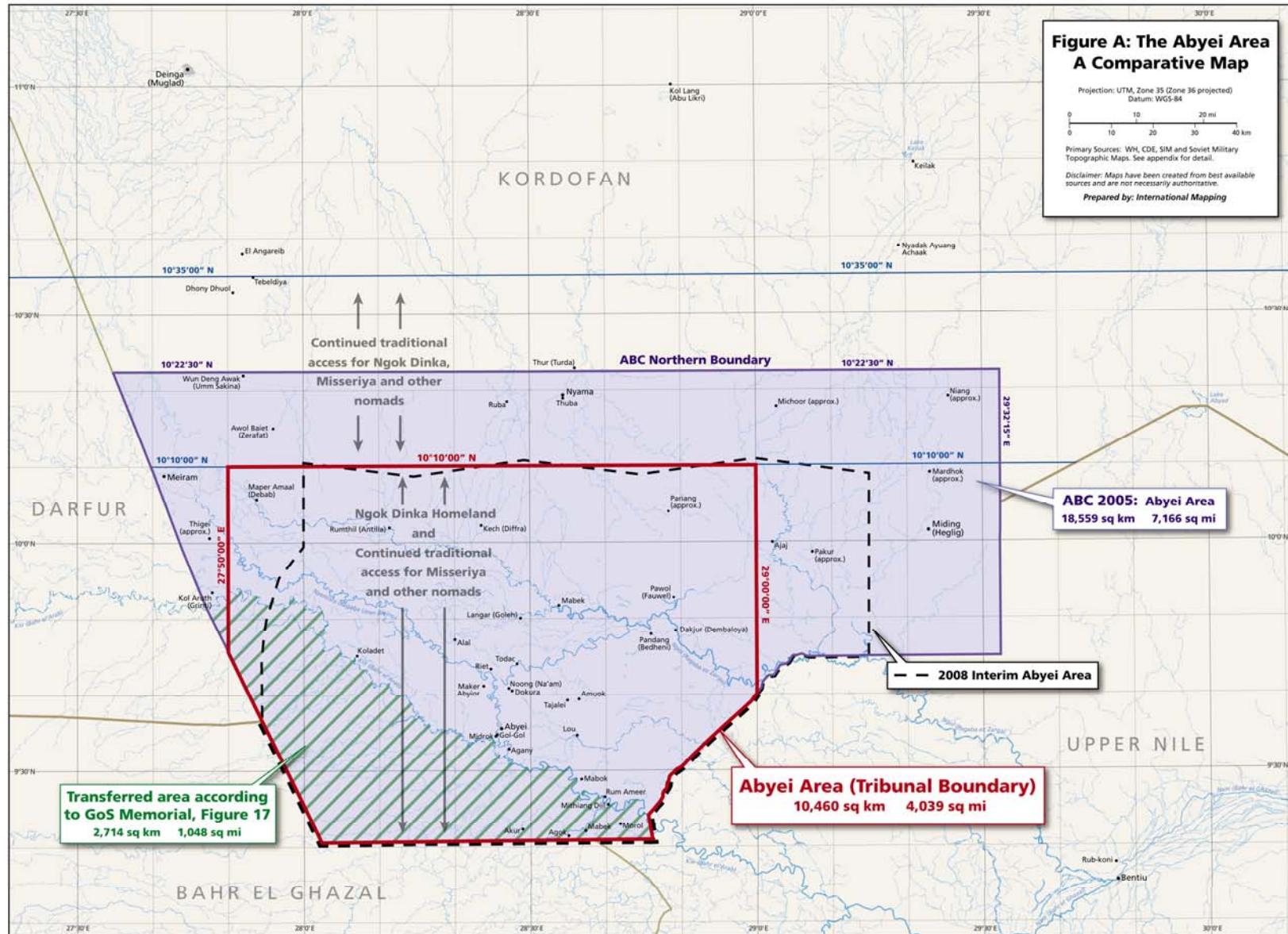
Pursuant to the Abyei Protocol and the Abyei Roadmap Agreement, the Abyei Area Joint Integrated Units (JIUs) and police force are responsible for maintaining security within the newly defined Abyei Area.³² This has not been changed by the Tribunal’s decision. The Tribunal’s decision, however, altered the borders of the Abyei Area and therefore the jurisdiction of the Abyei Area JIUs and police force -- particularly with respect to the eastern and the western boundaries previously established by the interim boundaries of the Abyei Roadmap. The CPA further requires the Sudan Armed Forces (SAF) and Sudan People’s Liberation Army (SPLA) to redeploy outside the Abyei Area.³³ To the extent that any of these conventional forces exist within Abyei, they must be removed in accordance with the new boundaries defined by the Tribunal. Additionally, under the Abyei Roadmap which is still in effect, “UNMIS force shall have free movement and access to the north and south of Abyei area to carry out its mandate as specified in the CPA” (particularly section 7 of the Abyei Protocol providing for international monitors to observe compliance by the parties with the CPA’s security arrangements).³⁴ The jurisdiction of UNMIS must therefore change as well. The parties recently agreed that the Ceasefire Joint Military Committee would convene a security meeting no later than one week after the decision (i.e. by the end of the month), to discuss the full impact of the decision on the security provisions in the Abyei Protocol.

● **What are the next steps to implementing the Tribunal's Award?**

Both parties have publicly committed to implementing the award. During its recent meetings in Washington and Khartoum the parties have agreed to establish a joint survey team to immediately demarcate the borders on the ground pursuant to the map and coordinates provided by the Tribunal. They have also agreed to carry out a plan to educate the people about the award, enhance security and consolidate peace, implement the entire Abyei Protocol, and work with local communities' to establish mechanisms to resolve grievances arising from the decision. The parties also invited the Three Areas Working Group of the Assessment and Evaluation Committee to visit the Abyei Area within fourteen (14) days of the decision to observe and report on the progress the parties are making to implement the decision. That visit should happen within the first week of August. Further assistance and contributions from the international community also will be needed to ensure that the full peace dividends of the Abyei Protocol are now delivered to Abyei and its surrounding areas in light of the final settlement of the area's boundaries as per the Tribunal's decision.

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- ¹ *Abyei Arbitration Final Award* (Government of Sudan v. Sudan People's Liberation Movement/Army) at 228 (July 22, 2009) available at http://www.pca-cpa.org/showpage.asp?pag_id=1306 [hereinafter *Abyei Arbitration Final Award*].
- ² *Id.* at 241.
- ³ *Id.* at 235-37.
- ⁴ *Id.* at 235, 238-41.
- ⁵ *Id.* at 265.
- ⁶ *Id.* at 242-45.
- ⁷ *Id.* at 258.
- ⁸ *Comprehensive Peace Agreement* chapt. IV, para. 2 (Government of Sudan and the Sudan People's Liberation Movement/Army, 2005), available at <http://www.unmis.org/english/documents/cpa-en.pdf>.CPA [hereinafter *CPA*].
- ⁹ *Id.* at chapt. IV, para. 8.2.
- ¹⁰ *The Road Map for Return of IDPs and Implementation of Abyei Protocol* para. 3.2 (National Congress Party and the Sudan People's Liberation Movement/Army, 2008) [hereinafter *Abyei Roadmap*].
- ¹¹ *Abyei Arbitration Final Award*, at 228.
- ¹² *Id.* at 207-08.
- ¹³ *Id.* at 229.
- ¹⁴ *CPA*, at chapt. IV, para. 8.2.
- ¹⁵ *Id.* at chapt. IV, para. 6.1(a).
- ¹⁶ *Id.* at chapt. IV, paras. 8.1, 6.1(b).
- ¹⁷ Guidelines on the Holding of Referendums, Venice Commission, European Commission for Democracy, sec. I.1.1.c.i, 8 November 2006, available at [http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)027rev-e.pdf](http://www.venice.coe.int/docs/2006/CDL-AD(2006)027rev-e.pdf).
- ¹⁸ *Gillot v. France*, Human Rights Committee, Commc'n No. 932/2000, U.N. Doc. A/57/40, at 270, ¶ 14.7 (2002), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/12769c97c02eee6ac1256c38002e171f?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/12769c97c02eee6ac1256c38002e171f?Opendocument).
- ¹⁹ *Abyei Arbitration Final Award* at 252.
- ²⁰ *CPA*, at chapt. IV, para. 1.1.3.
- ²¹ *Abyei Arbitration Final Award*, at 268.
- ²² *Id.* at 265 & 268.
- ²³ *CPA*, at chapt. IV, para. 3.1.
- ²⁴ *Abyei Roadmap*, at paras. 3.9-3.10.
- ²⁵ *CPA*, at chapt. III, para. 1.
- ²⁶ *Id.* at chapt. III, para. 5.6.
- ²⁷ *Id.* at chapt. III, para. 1.14.
- ²⁸ *Id.* at chapt. IV, para. 2.5.4.
- ²⁹ *Id.* at chapt. IV, para. 3.2.
- ³⁰ *Abyei Roadmap*, at para. 3.6.
- ³¹ *Id.* at para. 3.10.
- ³² *CPA*, at chapt. IV, para. 7; *Abyei Roadmap*, at para. 1.
- ³³ *CPA*, at annex. I, para. 18.7.
- ³⁴ *Id.* at para.1.3.

Figure A: The Abyei Area A Comparative Map



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