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PROSPECTIVE SOLUTIONS TO THE FAILURE TO IMPLEMENT AN ADMINISTRATION IN THE ABYEI AREA OF THE SUDAN

Legal Memorandum

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PROSPECTIVE SOLUTIONS TO THE FAILURE TO IMPLEMENT AN ADMINISTRATION IN THE ABYEI AREA

Executive Summary

This memorandum determines the legal requirements of providing an administration in the Abyei Area, details the present failure of implementation in administration in the Abyei Area, and suggests various solutions. The Comprehensive Peace Agreement (CPA), which includes the Abyei Protocol on the Resolution of the Abyei Conflict (Abyei Protocol), the Interim National Constitution of the Republic of Sudan (INC), and the Interim Constitution of Southern Sudan (ICSS) legally obligate various government entities to establish an administration in the Abyei Area. Since the proper governmental actors have failed to create the Abyei administration, key stakeholders in Sudan may wish to examine their legal rights and remedies, as well as creative practical solutions.

Prior to the January 2005 signing of the CPA between the Government of the Republic of Sudan (GoS) and the Sudan People's Liberation Movement/Army (SPLM/A), the two parties came together to draft and sign the Abyei Protocol in 2004. The GoS and the SPLM/A recognized the highly sensitive dispute over the region, and agreed that the Government of National Unity (GNU) would establish Abyei as a special administrative state during the Interim Period. The Abyei Protocol also calls for an Abyei referendum in 2011, concurrent with the Southern Sudanese referendum, where the Abyei people will vote on remaining a special administrative state of the North, or joining the South.

The GNU bears the primary responsibility for implementing the administration in Abyei. However, since the signing of the CPA in January 2005, the National Government has not fulfilled its obligations toward the Abyei Area as mandated by the INC, ICSS, CPA or the Abyei Protocol.

Both practical and constitutional solutions will assist the establishment of the administration in the Abyei Area. The constitutional solutions include electing the councils through the constitutional process; exercising political pressure; and meeting the constitutionally-delineated "serious needs of conflict affected areas." The practical solutions include engaging the international community to bridge implementation problems; utilizing civil society to provide an administration; and calming spoilers by preserving traditional land and grazing rights, and providing a natural resource sharing framework.

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PROSPECTIVE SOLUTIONS TO THE FAILURE TO IMPLEMENT AN ADMINISTRATION IN THE ABYEI AREA

Statement of Purpose

This memorandum details the present failure to implement an administration in the Abyei Area, determines the legal requirements of providing an administration in the Abyei Area, and suggests various constitutional and practical solutions.

Introduction

In January 2005, the Government of the Republic of Sudan (GoS) and the Sudan People's Liberation Movement/Army (SPLM/A) signed the Comprehensive Peace Agreement (CPA), a collection of agreements detailing a permanent ceasefire, arrangements for security, power-sharing and wealth-sharing, and the reconstruction of Sudan. While the parties have implemented certain provisions of the CPA, many obstacles remain regarding the provisions concerning the Abyei Area.

The Comprehensive Peace Agreement (CPA), which includes the Abyei Protocol on the Resolution of the Abyei Conflict (Abyei Protocol), the Interim National Constitution of the Republic of Sudan (INC), and the Interim Constitution of Southern Sudan (ICSS) each dictate governmental responsibility toward Abyei and present a roadmap for an interim administration of the area. The principal failure in Abyei is that the required administration has not been created, and as a result, no official government currently fulfills administrative functions or provides necessary services in the Abyei Area. As well, the GNU¹ has not accepted the final report issued by the Abyei Boundaries Commission (ABC), leaving the formal and permanent boundary line between North and South Sudan uncertain. The establishment of a safe and secure Abyei Area with clearly delineated boundaries and a proper administration is critical to the implementation of the CPA.

1. Background on the Abyei Area

¹ The writers of this document acknowledge that when speaking of the GNU or the GoS post-CPA, one is referring to a government that is largely dominated and controlled by the National Congress Party (NCP).

Abyei lies between North and South Sudan, straddling the Bahr el Arab River, and is the likely location of the future boundary line between Northern and Southern Sudan. It is the traditional home of the Ngok Dinka, a tribe of the populous Dinka to the South. The neighboring Misseriya, an Arab pastoralist tribe, passes through Abyei every year to graze at the river Kiir (Bahr el-Arab) and further southwards.

In 1905, the British colonial administrators transferred the Abyei region from Bahr el Ghazal Province in South Sudan to Kordofan Province in the north. The Ngok Dinka wished to be governed by Juba, which was the capital of an “autonomous” Southern Sudan. However, once the region was incorporated into Kordofan, Khartoum controlled it. This decision generated a great deal of local resentment, and the Ngok Dinka have pressed for Abyei to be made part of Bahr al-Ghazal.

Parties have disputed stewardship of the area since 1965, when Sudan’s first civil war reached Abyei.² The area is highly desirable for cattle grazing and for natural resource production. Both the Misseriya and the Ngok Dinka tribes each have claimed legal ownership over the Abyei region in the past. As well, over the course of the second civil war, a majority of the Ngok Dinka were internally displaced in the North or became refugees.

Because of the sensitivity of the Abyei issue, and its critical role in any potential agreement, the GoS and the SPLM/A signed a special protocol to address the conflict in May 2004, The Protocol on the Resolution of the Abyei Conflict (Abyei Protocol).

Abyei is at the heart of the Comprehensive Peace Agreement, as Abyei’s border determination will also determine the north-south boundary and the resulting demarcation of critical oil fields. In addition to the presence of oil, Abyei continues to be a particularly important region for the passage of refugees and internally displaced persons and for historical grazing rights enjoyed by the Misseriya Arabs largely with the consent of the Dinka tribal leadership.

Abyei is a significant point of return for internally displaced persons (IDPs) and refugees (together, “returnees”). With the signing of the CPA and the

² See Donald Petterson, *Abyei — A test of the Comprehensive Peace Agreement parties*, SUDAN TRIBUNE, May 4, 2006, available at http://www.sudantribune.com/article.php3?id_article=15444; see also *SUDAN: Interview with Douglas Johnson, expert on the Abyei Boundary Commission*, SUDANESEONLINE, May 29, 2006, available at <http://www.irinnews.org/report.asp?ReportID=53574>.

beginning of its implementation, many IDPs have begun to return to Abyei. It is on a main north-south transport route, and it is a gateway for returnees, including Ngok Dinka returning to the Abyei Area and others returning to other parts of Southern Sudan. As well, Darfese IDPs cross through Abyei to evade the conflict in Darfur and resettle in neighboring states. Accordingly, it is a security sensitive area, since these returnees are susceptible to armed attacks and other hostilities. It is also a place where returnees stop to obtain essential services and basic needs before transiting to other areas in the South.

In Abyei, there is significant tension between pastoralists and agriculturists in determining land and water use. Recently, elders of the Dinka and Misseriya tribes, however, have largely agreed that the land delineated by the final report of the Abyei Boundaries Commission (ABC Report) is Dinka land, and that the Misseriya have traditional grazing rights over that land. Despite the fact that there is general agreement among the tribes that are directly concerned with Abyei's status, the NCP-dominated GoS refuses to implement the negotiated Abyei Protocol.

The presence of vast oil fields in Abyei prevents the final determination of the national north-south border, the determination of Abyei's borders, and acceptance and implementation of the ABC Report. Until the major parties reach a political solution its borders and therefore ownership over Abyei's natural resources, the Presidency³ will not likely implement the provisions of the Abyei Protocol and Abyei's future status will remain uncertain.

This political impasse creates a problem for Abyei's citizens and returnees, as they do not have sufficient access to basic social services, such as housing, water, healthcare and education. While international agencies and organizations continue to work with local governments in other states to provide these services, the absence of an Abyei administration and the political tensions surrounding its establishment make such arrangements difficult. The Abyei Protocol, the INC and the ICSS all establish that these services will be provided by an interim administration in Abyei. The overriding issue, then, is how to implement an administration in Abyei to fulfill the short-term needs of its residents and returnees, even if Abyei's borders have not been legally defined.

³ The Presidency of Sudan consists of three members: President Omar al Bashir (NCP), Vice President Ali Osman Taha (NCP), and Vice President Salva Kirr Mayarditt (SPLM). When this memorandum refers to the "Presidency" it includes the institution that consists of these three officials. It is largely accepted that President al Bashir often dominates and controls this institution.

This memorandum analyzes the legal status of the Abyei Area, the legal requirements of providing an administration in Abyei and proposes various solutions to the administrative problem.

2. Legal Status of the Abyei Area

Abyei's legal status is defined in the Comprehensive Peace Agreement (CPA), the Interim National Constitution of Sudan (INC) and the Interim Constitution of Southern Sudan (ICSS). Despite its many provisions, the exact status of the Abyei Area itself remains unclear.

2.1 *Special Administrative Status*

All three instruments recognize Abyei as an area with special administrative status under the Presidency of the Republic of Sudan.⁴ The INC declares simply that the Abyei Area shall be accorded special administrative status under the institution of the Presidency.⁵ The ICSS provides that the "Abyei Area, the territory of the nine Ngok Dinka chiefdoms transferred from Bahr el Ghazal Province to Kordofan Province in 1905, is accorded a special administrative status under the Presidency of the Republic, in which its residents shall be citizens of both Southern Kordofan and Warrap State."⁶ The CPA provides that once the Abyei Boundaries Commission (ABC) presents its final report to the Presidency that defines and demarcates the chiefdoms in the Abyei Area, the Presidency is responsible for immediately granting the special administrative status of the region.⁷ While many hoped the Presidency would be a cooperative body, at times, the NCP and SPLM members do not agree, and President Bashir often dominates the decision making within the institution.

The CPA mandates the ABC to present the final report within the first two years of the Interim Period.⁸ The ABC began its work in April 2005. After the Government of the Republic of Sudan (GoS) and the Sudan People's Liberation Movement/Army (SPLM/A) representatives were unable to reach a consensus on the Abyei boundary, the Commission experts proceeded to interview more than 125 persons and consult official and historical documents. The Commission

⁴ INTERIM NAT'L CONST. OF SUDAN, art. 183(2) (2005); INTERIM CONST. OF S. SUDAN, art. 176 (2005).

⁵ INTERIM NAT'L CONST. OF SUDAN, art. 183(2) (2005) [hereinafter "INC"].

⁶ INTERIM CONST. OF S. SUDAN, art. 176 (2005) [hereinafter "ICSS"].

⁷ COMPREHENSIVE PEACE AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF SUDAN AND THE SUDAN PEOPLE'S LIBERATION MOVEMENT/ SUDAN PEOPLE'S LIBERATION ARMY, ch. IV, art. 2.1 and 5.3 (2005). [hereinafter "CPA"].

⁸ CPA, ch. IV, art. 5.2 (2005).

announced its decision in July 2005. The Government of Southern Sudan (GoSS) members immediately announced that the conclusions were final and binding. However, the NCP denounced the decisions, and President Bashir has since refused to proceed with the implementation of the report and the Abyei Protocol provisions.⁹ Because of the standstill, the Presidency has not appointed members to a local Executive Council, as required by the Abyei Protocol until elections take place, or members of the Area Council, and there has been no implementation of the Abyei Area administration.

2.2 *The Abyei Administration*

These instruments create an administration in the Abyei Area by mandating the establishment of two governing councils, an executive council and a legislative council. The overarching requirement of the administration of the Abyei Area is that it shall be *representative and inclusive of all the residents of the area*.¹⁰

2.2.a The Executive Council: The Executive Council is the chief administrative body in the Abyei Area. The Executive Council is composed of a Chief Administrator, a deputy, and no more than five heads of departments.¹¹

Prior to the elections of the Executive Council by citizens of Abyei, the Presidency of Sudan has the power to appoint the initial members.¹² The Executive Council has the power to render necessary services;¹³ supervise and promote security and stability in the area;¹⁴ propose development and urbanization projects for the area to both the Abyei Area Council and to the Presidency;¹⁵ and present to the National Government proposals regarding the provision of assistance to improve the lives of the peoples of Abyei, including urbanization and development.¹⁶ In summary, the Executive Council is responsible for the

⁹ See Donald Petterson, *Abyei — A test of the Comprehensive Peace Agreement parties*, SUDAN TRIBUNE, May 4, 2006, available at http://www.sudantribune.com/article.php3?id_article=15444; see also *SUDAN: Interview with Douglas Johnson, expert on the Abyei Boundary Commission*, SUDANESEONLINE, May 29, 2006, available at <http://www.irinnews.org/report.asp?ReportID=53574>.

¹⁰ CPA, ch. IV, art. 2.3.

¹¹ CPA, ch. IV, art. 2.4. Section 2.4 states that “[t]he Chief Administrator shall make recommendations to the Presidency regarding the appointments of the heads of departments.” Thus, it is not clear whether the Presidency or the Chief Administrator appoints the heads of department, or whether they are elected officials as well.

¹² CPA, ch. IV, art. 2.4.

¹³ CPA, ch. IV, art. 2.5.1.

¹⁴ CPA, ch. IV, art. 2.5.2.

¹⁵ CPA, ch. IV, art. 2.5.3.

¹⁶ CPA, ch. IV, art. 1.2.4.

administration of the Abyei Area, including basic services, security and stability, and development and urbanization projects.¹⁷

2.2.b The Abyei Area Council: The Abyei Area Council (AAC) is the legislative power in the Abyei Area is meant to ensure public participation in the administration. The AAC is comprised of not more than twenty members.¹⁸ The AAC has the power to issue local enactments within the powers of local government and on customary matters;¹⁹ approve the budget of the Area;²⁰ adopt reconstruction, development and urbanization plans for the Area;²¹ if necessary, recommend to the Presidency the relief of the Chief Administrator or his/her Deputy;²² and participate in the promotion of reconciliation efforts in the Area.²³ As with the Executive Council, the Presidency of Sudan can appoint the members of the AAC prior to holding elections in the Abyei Area.²⁴

2.3 Executive, Legislative, Judicial and Financial Powers of Abyei Area

The Presidency of Sudan has the ultimate power to determine the executive, legislative, judicial,²⁵ and financial powers accorded to the Abyei Area under its special status.²⁶ However, the Presidency only may act upon the recommendation of the Executive Council, and its decisions must “have regard” to the Abyei Protocol on Abyei as well as other protocols, agreements and the CPA.²⁷

2.4 Legal Status of Abyei Residents

The legally recognized residents of the Abyei Area are the Ngok Dinka community and other Sudanese residing in the area.

¹⁷ CPA, ch. IV, arts. 2.2 and 2.4.

¹⁸ CPA, ch. IV, art. 4.1.

¹⁹ CPA, ch. IV, art. 4.3.1.

²⁰ CPA, ch. IV, art. 4.3.2.

²¹ CPA, ch. IV, art. 4.3.3.

²² CPA, ch. IV, art. 4.3.4.

²³ CPA, ch. IV, art. 4.3.5.

²⁴ CPA, ch. IV, art. 4.2.

²⁵ CPA, ch. IV, art. 2.7 provides that “[i]n view of the special status of Abyei Area, the Presidency shall apply to the Judiciary to establish courts for Abyei Area as deemed appropriate.” It is unclear what it means for the Presidency to *apply to* the Judiciary.

²⁶ CPA, ch. IV, art. 2.6, 2.7.

²⁷ CPA, ch. IV, art. 2.6 provides that “[t]he Presidency, upon the recommendation of the Executive Council, shall determine the executive, legislative and financial powers and competencies of the special status of Abyei Area, having regard to this protocol, other protocols, agreements, and the Comprehensive Peace Agreement.”

The residents of Abyei Area shall be: (a) The Members of Ngok Dinka community and other Sudanese residing in the area; (b) The criteria of residence shall be worked out by the Abyei Referendum Commission.²⁸

The INC and the Abyei Protocol recognizes the residents of the Abyei area as citizens of both Southern Kordofan and Bahr el Ghazal.²⁹ As such, Abyei residents are entitled to representation in the legislatures of both states.³⁰ However, this representation is subject to a determination by the Presidency of Sudan before elections, and then by the National Election Commission after elections.³¹ It is not clear what exactly this determination entails.

The INC also grants the Abyei area two observers on the Council of States, the Republic of Sudan's upper-house, who the AAC will elect.³² Since they merely are observers, it seems clear that they have no voting power within the Council of States, although the INC does not state so specifically.

In addition, the ICSS explicitly provides that the residents of the Abyei area are entitled to all the rights, freedoms and other protections contained within the ICSS.³³

2.5 Funding and Revenues for the Abyei Area

The administration of the Abyei Area is entitled to a share of the oil wealth and national revenue for the exercise of its duties and powers.³⁴

The Abyei Protocol stipulates that the oil revenue generated in the Abyei Area is to be divided during the Interim Period, with the majority (92%) going to the National Government (50%) and the Government of Southern Sudan (42%).³⁵

²⁸ CPA, ch. IV, art. 6.1.

²⁹ INC, art. 183.2.; Abyei Protocol, art. 1.2.1.

³⁰ CPA, ch. IV, art. 6.2.

³¹ CPA, ch. IV, art. 6.2. provides that "Residents of Abyei shall be citizens of both Western Kordofan and Bahr el Ghazal with representation in the legislatures of both States as determined by the National Electoral Commission. However, prior to elections, the Presidency shall determine such representation."

³² INC, art. 85(2), stating that "Abyei Area shall have two observers in the Council of States elected by Abyei Area Council."

³³ ICSS, art. 176.2.

³⁴ CPA, ch. IV, art. 3.1.

³⁵ CPA, ch. IV, arts. 3.1.1- 3.1.6. Article 3.1 provides that "Without prejudice to the provisions of the Wealth Sharing Agreement, the net-oil revenue from the oil produced in Abyei Area shall be shared during the Interim Period as follows:

3.1.1 Fifty Percent (50%) to the National Government;

3.1.2 Forty Two Percent (42%) to the Government of Southern Sudan;

The Bahr el Ghazal region, Western Kordofan, the Ngok Dinka, and Misseriya people each receive two percent (2%) of the oil revenue from the Abyei Area.³⁶

In addition, the administration will receive financial resources from a variety of other national revenues, including the area share of the national revenue as per the Wealth Sharing Agreement; the revenues raised in the Abyei Area from permitted income tax and other taxes and levies; the share of the Abyei Area in the National Reconstruction and Development Fund; an equitable share of the Southern Sudan Development and Reconstruction Fund; allocations from the National Government to cover the cost of establishment of the new administration, its running and provision of services; and other donations and grants.³⁷ In most cases, these shares are not explicit, but described in such ways as “equitable shares” or “allocations from the National Government.”

2.6 Distribution of Funding and Revenues

The Executive Council must establish the Abyei Resettlement, Construction, and Development Fund (Abyei Fund) to distribute the revenues received from oil and other resources in order to assist relief, repatriation, resettlement, reintegration, rehabilitation, and reconstruction programs in Abyei.³⁸ The Abyei Fund may establish specialized agencies to assist in its mandate. The absence of this fund currently impedes the Abyei Area’s ability to receive and disseminate its portion of national and oil wealth. Further, the CPA obligates the National Government to appeal to the international and donor community to facilitate the return and resettlement of the residents of Abyei Area.³⁹ This would presumably include solicitations for funds on Abyei’s behalf.

The other financial resources due to the Abyei Area must be deposited in special accounts that are acceptable to the Presidency.⁴⁰ The Abyei administration only may draw on funds from these special accounts or from the Abyei Fund.

2.7 Determination of Final Status

-
- 3.1.3 Two Percent (2%) to Bahr el Ghazal Region;
 - 3.1.4 Two Percent (2%) to Western Kordofan;
 - 3.1.5 Two Percent (2%) locally with the Ngok Dinka;
 - 3.1.6 Two Percent (2%) locally with the Misseriya people.”

³⁶ CPA, ch. IV, arts. 3.1.1 – 3.1.6.

³⁷ CPA, ch. IV, arts. 3.2 – 3.2.6.

³⁸ CPA, ch. IV, art. 3.3.

³⁹ CPA, ch. IV, art. 3.4.

⁴⁰ CPA, ch. IV, art. 3.5.

The residents of the Abyei area will determine the final legal status of the region through a referendum occurring simultaneously with the referendum for Southern Sudan to be held in 2011.⁴¹ The residents will choose either to retain the special administrative status of the Abyei in the north or to allow Abyei to become a part of Bahr el Ghazal in the South.⁴²

2.8 Functions of the Government of National Unity

Under the CPA it is the duty of the GNU “to protect and promote the national sovereignty of Sudan and the welfare of its people.”⁴³ The welfare of the people in the Abyei Area is directly related to the successful implementation of the Abyei provisions in the CPA, INC, and ICSS. The National Government also has the duty to implement the national policies included in the INC.⁴⁴

The National Government is responsible for providing economic assistance to Abyei to improve the lives of the people.⁴⁵ This power gives the National Government broad authority over aspects of social development, such as urbanization and development projects. The National Reconstruction and Development Fund could assume the responsibility for administering these types of projects. However, as indicated above, the Fund’s establishment depends first on the creation of the Executive Council, which depends on appointments by the Presidency or an election. Furthermore, the Abyei Protocol requires the National Government to appeal to the international donor community to facilitate the resettlement of Abyei Area.⁴⁶

2.9 Functions of the Presidency of the Republic

The Presidency of the Republic of Sudan wields significant power over the fate of the Abyei Area. The Presidency consists of the President (NCP), the First Vice President (SPLM and also GoSS President), and the Vice President (NCP).⁴⁷

⁴¹ INC, art. 183(3), providing that “Simultaneously with the referendum for Southern Sudan, the residents of Abyei Area shall vote in a separate referendum, which shall present the residents of Abyei Area, irrespective of the results of Southern Sudan Referendum, with the following choices:

(a) that Abyei retain its special administrative status in the north;

(b) that Abyei be part of Bahr el Ghazal;”

⁴² INC, art. 183.3; ICSS, art. 176.

⁴³ CPA, ch. II, art. 1.3.1.

⁴⁴ CPA, ch. II, art. 2.5.6.

⁴⁵ CPA, ch. IV, art. 1.2.4.

⁴⁶ CPA, ch. IV, art. 3.4.

⁴⁷ INC, ch. II, art. 51.

In theory, the Presidency should serve as a cooperative mechanism to ensure the implementation of the CPA. However, with the President and Vice President both from the NCP—and only the Vice President from the SPLM—the institution has not functioned effectively in resolving contentious political issues like establishing the Abyei administration.

While President Bashir has broad constitutional authority, according to the CPA, he must obtain the consent of the First Vice President for some functions, including to make appointments, to summon, adjourn, or discontinue the National Legislature's session, declare war, and declare and terminate a state of national emergency.⁴⁸ This affirms President Bashir's ability to encourage or initiate the necessary legislation delineated in the CPA including legislation relevant to the Abyei region. As well, the CPA allocates the majority of responsibility for the creation of the administration of the Abyei Area to the institution of the Presidency. Neither the CPA nor the INC prescribes in much detail how the Presidency shall make decisions, which further complicates its ability to solve controversial political issues.

2.9.a Special Administrative Status: The Presidency must put the special administrative status of Abyei Area into effect, upon receiving the final report of the Abyei Boundaries Commission.

2.9.b Executive Council: Until elections of the Executive Council by the Abyei residents, the Presidency shall appoint the initial members of the Executive Council, including the Chief Administrator and his/her Deputy.

2.9.c Abyei Area Council: Prior to holding elections in the Abyei Area, the Presidency is responsible for appointing members of the Abyei Area Council⁴⁹

2.9.d Representation in State Legislatures: The Presidency is responsible for determining the Abyei representation in the legislature of both the Western Kordofan and Bahr el Ghazal State.⁵⁰

2.9.e Abyei Referendum Commission and Reconciliation Process: The Presidency shall establish an Abyei Referendum Commission for the purpose of conducting the Abyei referendum simultaneously with the Southern Sudan independence referendum. The Presidency shall determine the composition of the

⁴⁸ INC, ch. II, art. 58(2).

⁴⁹ CPA, ch. IV, art 4.2.

⁵⁰ CPA, ch. IV, art. 6.2.

Commission, which will conduct and oversee the referendum on whether Abyei Area will remain a part of the North or become a part of the South.⁵¹

2.9.f Peace and Reconciliation Efforts: The Presidency “shall, as a matter of urgency,” begin the peace and reconciliation process in Abyei upon the signing of the CPA. The process shall work towards harmony and peace between the North and South of Sudan and throughout Abyei Area.⁵²

2.10 Functions of the Southern Sudan Executive

Under the CPA, the executive authority of Southern Sudan shall establish, at times in conjunction with the National Government, the independent institutions stipulated in the CPA, the INC, and the ICSS.⁵³ The Southern Executive has further authority to establish other commissions and institutions it deems necessary to promote the welfare of the people, good governance, and justice.⁵⁴ This provision of the CPA confirms the power of the Presidency of Southern Sudan to implement the necessary mechanisms in the CPA, INC, and ICSS, but also allows it leeway in determining other necessary mechanisms that might not be stipulated.

3. Creative Solutions to the Implementation Failure

The implementation failure can be overcome through both constitutional and practical solutions. The **constitutional solutions** include (i) the role of the Dinkas in the Administration, (ii) electing the councils through the constitutional process, (iii) using legislative powers to exercise political pressure, and (iv) meeting the constitutionally-delineated “serious needs of conflict affected areas.” The **practical solutions** include (i) engaging the international community to bridge implementation problems, (ii) utilizing civil society to provide an administration, and (iii) calming spoilers by preserving traditional land and grazing rights, and providing a natural resource sharing framework. If implemented properly, these proposed solutions do not prejudice in any way, any existing rights of the various parties, or the findings of the ABC Report. These solutions, however, are not infallible, and carry substantial legal, political and practical risks.

3.1 The Role of the Dinkas in the Administration

⁵¹ CPA, ch. IV, art. 8.1.

⁵² CPA, ch. IV, art. 9.

⁵³ CPA, ch. II, art. 3.6.2.

⁵⁴ CPA, ch. II, art. 3.6.2.

Since the Ngok Dinka are the traditional owners of the Abyei land,⁵⁵ the Ngok Dinka have the right to govern the Abyei area. Indigenous landowners have the right to own, control, and manage the ancestral lands and natural resources they traditionally used and occupied. Indigenous human rights law affirms this right to control their land and natural resources. Furthermore, the fact that the Ngok Dinka have continued to traditionally use and occupy the land, despite their large displacement during the war, strengthens this right. Accordingly, any solution that creates an interim administration in Abyei, either under the Abyei Protocol or on an ad hoc basis, must guarantee Dinka self-governance.

Returnees that are resettling in Abyei also affect the composition of the Abyei Area and its governance and development, as they will have the right to vote, and also should have the right to participate in the administration. Indigenous people who live on and benefit from the land have the right to participate in the administration and have input in any decision affecting their land. International law supports these propositions through the right of indigenous groups to control and administer their traditional lands and the institutions affecting them.

Convention 169 of the International Labour Organization (ILO Convention 169)⁵⁶ establishes international human rights related to the protection of indigenous and tribal people. This Convention, written in 1989, is dedicated to the rights of indigenous people. The Republic of Sudan has not ratified this convention. Nonetheless, ILO Convention 169 has contributed to the definition and modern understanding of the rights of indigenous peoples. The rights articulated therein have been affirmed by numerous United Nations human rights committees monitoring the implementation and application of United Nations human rights treaties to which Sudan is a party.⁵⁷ Article 14 recognizes the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy.⁵⁸ Article 6 requires Governments to:

(a) Consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is

⁵⁵ See ABC Report.

⁵⁶ See International Labour Organization, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 169, available at <http://www.ilo.org/ilolex/english/convdisp1.htm> (On left menu, scroll to and select C169).

⁵⁷ See Forest Peoples Programme “Indigenous Peoples and United Nations Human Rights Treaty Bodies: A Compilation of Treaty Body Jurisprudence 1993-2004,” (September 2005), available at http://www.forestpeoples.org/documents/law_hr/un_jurisprudence_comp_sept05_eng.pdf.

⁵⁸ International Labour Organization, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 169, art. 14, available at <http://www.ilo.org/ilolex/english/convdisp1.htm> (On left menu, scroll to and select C169).

being given to legislative or administrative measures which may affect them directly;

(b) Establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

This same article clarifies that such consultation processes should be carried out with a view to securing agreement or consent of the effected peoples. Modern indigenous human rights law, as mirrored by ILO Convention 169, establishes the right of ownership over land that indigenous peoples traditionally occupy, and mandates that governments (i) consult these peoples when legislative or administrative acts affect their rights, and (ii) allow theirs direct participation in elective institutions, administrative or other bodies responsible for programs or policies which concern them. The Draft United Nations Declaration on the Rights of Indigenous Peoples, adopted by the UN Human Rights Council, also recognizes indigenous peoples' rights to the lands, territories and resources they have traditionally used or occupied. It also provides for the right of indigenous peoples to participate fully at all levels of decision-making in matters which may affect their lives, and in devising legislative or administrative measures that may affect them. It further requires that the state obtain the free and informed consent before adopting and implementing measures which affect indigenous peoples.⁵⁹

International law regarding the rights of indigenous peoples affirms the right of the Dinka to freely participate in any interim administration in Abyei, and creates the duty on Sudan to guarantee to the Dinka not only their free and informed consent before adopting any measures which affect them, but also their right to preserve and maintain their own indigenous government institutions. At a minimum, this means Dinka control over administration in Abyei.

Dinka control over Abyei administration does not preclude Misseriya participation in governance as deemed consistent with the CPA and Abyei Protocol. Methods for Misseriya participation respecting Dinka rights to self-governance can be crafted based on traditional understandings and practices among those two peoples. The Dinka and Misseriya have mutual recognition mechanisms, and in the past have agreed upon the roles, rights, and responsibilities of each group. Therefore, both Dinka and Misseriya could have a role in the

⁵⁹ Draft United Nations Declaration on the Rights of Indigenous Peoples art. 20, *available at* [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.1994.45.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1994.45.En?OpenDocument).

administration of Abyei that draws inspiration from their historic and existing customs. Regional, national and international support for dialogues between these two groups could also help encourage local solutions to Abyei governance.

Apart from actual representation and membership in any interim administration, the creation of additional mechanisms might be an appropriate way for Dinka and Misseriya to participate in any interim administration. One such mechanism could be a Governing Council, which has the final right to approve or deny any measures passed by any interim administration. The Governing Council could reflect the relationships that were previously utilized in Abyei by the Dinka and Misseriya to resolve disputes, address each other's group needs and recognize each other's rights. Any Governing Council could have the participation of both Dinka and Misseriya, and perhaps even other "residents" of the area (consistent with the CPA and Abyei Protocol), but preserving Dinka self governance by ensuring that the majority of the membership is comprised of Dinka. The interim administration also could create a different kind of mechanism that allows significant oversight and control by the Dinka.

3.2 Electing the Councils through the Constitutional Process

The Presidency's appointment power over the initial members of the Executive Council and the Abyei Area Council constitutes a provisional power – the Presidency's power exists only until and unless the Abyei Area citizens elect the members of these councils.

As the Presidency's power of appointment is discretionary and valid only until a legal election by the Abyei citizens, the citizens of the Abyei Area *presently* may elect members of both the Executive Council and the Abyei Area Council. Technically, they do not have to wait for presidential appointments.

Thus, holding elections for the members of the two Abyei councils is one legal and immediate solution to the present failure of implementing an administration in the Abyei Area. However, this solution is subject to both legal and political constraints.

3.2.a Lack of Special Administrative Status: There may be opposition to an immediate election of these councils, on the basis that the Abyei Area does not yet have its "special administrative status." This argument depends on the fact that the Presidency has not acted to accord this status, either through a proclamation, directive, introduction of legislation, or other means.

Even though the INC, the ICSS and the Abyei Protocol provide slightly different formulations, it can reasonably be interpreted that the Abyei Area *already* has its “special administrative status” under the Presidency of the Republic. Indeed, this status is *automatic*. Both the INC and the ICSS simply provide that Abyei Area shall be accorded special administrative status. Section 1.2 of the Abyei Protocol, however, provides that “*upon signing the peace agreement*, Abyei will be accorded special administrative status.” Likewise, section 2.1 of the Abyei Protocol states that *upon signing the peace agreement*, Abyei shall be accorded special administrative status under the institution of the Presidency. By its plain language, section 1.2 and section 2.1 can be interpreted to establish that the signing of the peace agreement is the event that triggers Abyei Area’s special administrative status, *not* a subsequent Presidential act.

Section 5.2 of the Abyei Protocol, however does provide that “upon presentation of the final report [of the Abyei Boundaries Commission,] the Presidency shall take necessary action to put the special administrative status of Abyei Area into immediate effect.” This is the only provision that might open the Abyei Protocol to an interpretation that seems to condition the establishment of the special administrative status on some other event. Interpreting it in the manner, however, would be inconsistent with two provisions of the CPA described above, each declaring that the administrative status would be accorded upon the signing of the CPA. Given that the Commission had the first two years after signing the peace agreement to complete its work, conditioning the administrative status on the conclusion of its work would not be a reasonable interpretation of the Protocol.

This non-conditional approach is further affirmed by the fact that the Protocol tasks the Presidency to start the peace and reconciliation process “as a matter of urgency.” There is also an obligation on the government to meet the serious needs of conflict affected areas under section 185(4) of the INC. These immediate and urgent tasks could not be done if the Protocol was interpreted as conditioning Abyei’s administrative status on a Presidential Act that had the potential for being delayed by two years. Abyei Area’s status must be resolved immediately and not be subject to the conclusion or adoption of the final report.

Even if the alternative were true, the ABC submitted to the Presidency its final report on July 14, 2006. Under the Protocol, the “presentation of the final report”—and not the *acceptance* of its findings—triggered the Presidency’s obligation to put the special administrative status of Abyei Area into immediate

effect. The Presidency's duty to act is in no way connected to its acceptance of its binding findings.

Moreover the call in Article 5.2 of the Protocol to have the Presidency take necessary action to put the administrative status "into immediate effect" does not mandate an interpretation that conditions the status on a Presidential act. It can also be interpreted to simply require that the Presidency exercise the necessary powers of its office to ensure that the administrative status of Abyei translates into effective governance with the resources and support required of the National Government. Regardless, at a minimum, the Abyei Protocol, INC and ICSS require that Presidency must take measures to implement all the relevant provisions concerning Abyei Area, as detailed above. Its failure to do so constitutes nonfeasance of a constitutional duty, the failure to act when a duty to act existed.

3.2.b Lack of Defined Borders: The NCP component of the GNU did not accept the ABC Report, so there is no final and established north-south border and no agreed upon boundaries in the Abyei Area. There could be legal challenges to an elected council on the basis of this refusal to accept the boundaries determination and therefore the area over which such a council would presumably exercise jurisdiction. In essence, a legal challenge may arise concerning whether Abyei can have a legal administration without legal borders. On the other hand, given that the ABC results are binding on the parties, it could be argued that the borders have been declared and exist regardless of one party's refusal to accept the findings. Nevertheless, to avoid conflict, a prior agreement can be reached between the parties, consistent with the CPA and Protocol, affirming that the new executive council would not engage in any acts that would prejudice the north-south border determinations. This would be further relevant given that the Technical Ad Hoc Border Committee has not completed its work.

3.2.c Lack of a Mandate: Under the Abyei Protocol, the Presidency controls the determination of the executive, legislative, and financial powers and competencies of the special status of Abyei Area. The Presidency has the right and obligation to grant the Abyei Area its "mandate," and authorize its legitimate spheres of activity. Until the Presidency determines the powers and competencies of the Abyei Area, any elected council may be subject to a legal challenge that its actions are unconstitutional because of a lack of a legal mandate. It is important to recall, however, that this presidential power is exercised based on recommendations by the Executive Council. The Council's legitimacy and the Presidency's nonfeasance would be highlighted if the Council made these

recommendations immediately and sought presidential approval. If the Presidency unreasonably withheld this approval, the international community might still have the new Executive Council's support, weakening the effect of a legal challenge.

3.2.d Lack of Political Will for Elections Process: A high level of political will must be present for a successful elections process. In order to establish a free and fair election, political will must be present to apportion funding for the elections, update the electoral law and electoral commission as necessary, provide for voter registration, introduce candidates through fair media use, provide for a fair voting system, employ third party election monitors and certify the results. Political actors can prevent a successful election by refusing to apportion funds, refusing to initiate the elections process, refusing to undertake necessary duties throughout the process, and, if elections actually take place, contesting the elections result. Even if the citizens of Abyei Area have the legal right to elect the councils, a lack of political will can prevent the exercise of that right.

More importantly only “residents” can participate in elections⁶⁰ and it is the Abyei Referendum Commission, which establishes the “criteria of residence”. The Commission however, is established by the Presidency. As such, the party that controls the Presidency can also hold up any local born initiatives to hold elections.

The citizens of the Abyei Area can overcome the administration failure through their legal right to elect the councils. However, under the protocol, it will be difficult to initiate the elections process without action by the Presidency. There may be legal challenges to this electoral process if initiated by residents of the area, on the basis of a lack of a mandate for the new councils or a lack of defined borders clarifying the councils' jurisdiction. As well, even if these legal challenges are overcome, political foot-dragging can impede the exercise of this right. In order for these elections to be successful, the key stakeholders could encourage political support before taking any action.

3.3 Using Legislative Powers to Exercise Political Pressure

The CPA and INC clearly stipulate that the Presidency shall accord the Abyei Area special administrative status.⁶¹ The Presidency also has the responsibility to establish and appoint the interim administration in the Abyei

⁶⁰Protocol Between the Government of the Sudan (GoS) and the Sudan People's Liberation Movement/Army (SPLM/A) on the Resolution of Abyei Conflict Art. 2.2.

⁶¹ CPA, ch IV, arts. 2.1 and 5.3; INC, art. 183(2).

Area.⁶² Without this special administrative status, the implementation of the CPA and INC in the Abyei Area will remain at a standstill, further blocking the peace process. Although this status likely is automatic and went into effect upon the signing of the CPA itself, it will remain open to challenge until the Presidency affirms the status through an executive order or some other proclamation. In order to advance these goals, the National Legislature possesses certain powers that can be used to influence the Presidency to grant the status, establish the interim administration, and fulfill its obligations in the Abyei Area. While recognizing that the NCP and its allies largely control the legislature, awareness of these powers can be important in order to seize on opportunities when political spaces to do so emerge.

The INC clearly defines the powers delegated to the National Legislature. Among these is the authority to convene to authorize the annual allocation of resources and revenues.⁶³ The National Legislature can use their fiscal powers as a negotiating instrument to pressure the Presidency to act on certain issues. The Legislature can allocate a certain amount to be used for Abyei elections, thereby inducing the Presidency to follow suit with the necessary appointments. By refusing to approve the budget or by actively amending it, the National Legislature can further influence the Executive, and in particular the Presidency's agenda.

In the most severe case of the Presidency refusing to act, the National Legislature is granted the power to convene to amend the INC and approve amendments that affect the CPA.⁶⁴ If the situation becomes desperate and the Presidency still has not appointed members to the Abyei Area Council or "accorded" special administrative status, it is possible that the National Assembly could meet to discuss ways of amending the Presidency's responsibilities concerning these issues and perhaps devolving these powers to other bodies.

In another extreme instance, that National Assembly does have the power to impeach the President of the Republic or the Vice President of the Republic.⁶⁵ If the Presidency continues to refuse to act on this matter, the Assembly could move for impeachment hearings on the basis of nonfeasance of a constitutional duty. The President could be removed from office if found guilty.

⁶² CPA, ch IV, art. 1.2.2.

⁶³ INC, art. 91(2)(c).

⁶⁴ INC, art. 91(2)(a).

⁶⁵ INC, art. 91(2)(h).

Given that the National Legislature is controlled by members of the NPC loyal to the Presidency, exercising this option would likely require either 1) an upset in the legislature's composition as a result of the 2009 mid-term elections; or 2) a critical event or situation prompting the legislature to see the establishment of an administration in Abyei as essential to furthering their interests (i.e. pressure from Northern supporters who want the return of Southern IDPs residing in their northern towns, but understand that conditions in the South—particularly in Abyei—make returning difficult).

3.3.a National Assembly: The National Assembly, one of the Chambers of the National Legislature, has the ability to oversee the performance of the National Executive.⁶⁶ This provides a general check on the Executive to ensure it is performing its duties. Since the Presidency is responsible for granting the administrative status and establishing an interim administration, the National Assembly can supervise this to ensure compliance to the INC and CPA; however, effective control by the NCP of the National Assembly may hinder efforts to do so.

To aid in their oversight of the National Executive's performance, the National Assembly may summon national ministers to report on the Executive's performance in general or of particular activities.⁶⁷ Furthermore, the Assembly may interrogate national ministers about their own performance.⁶⁸ The National Assembly can use their powers on the Council of Ministers to pressure the Presidency to fulfill their obligations.

The National Assembly may also adopt resolution on matters of public concern.⁶⁹ The administration of the Abyei Area is a particularly important public issue, because as long as its status remains unstable the peace process as a whole will be unstable. Naturally, it is in the interests of the public that the parties implement the peace process as planned. The National Assembly therefore has the power to adopt resolutions that may affect the Abyei Area in various capacities, including endorsing the necessary provision of services by civil society organizations and providing funding for them. Although resolutions will not force the Presidency to act, it will further the pressure on it to fulfill its duties.

3.3.b Council of States: The Council of States, the second Chamber of the National Legislature, is composed of two representatives of each state, including

⁶⁶ INC, art. 91(3)(e).

⁶⁷ INC, art. 91(3)(g).

⁶⁸ INC, art. 91(3)(h).

⁶⁹ INC, art. 91(3)(f).

two observers from Abyei Area who are elected by the Abyei Area Council.⁷⁰ In the Interim Period, the Presidency has the responsibility to appoint representatives from Abyei Area to ensure that Abyei interests are being included in the Council.⁷¹

The Council, which at this point is NCP dominated, has the authority to issue resolutions and directives that may guide all levels of government relating to the decentralization of government.⁷² The Council therefore may pass a resolution or directive that could express its disapproval with the fact that the national government has not yet relegated power to the Abyei Area. The Council could also pass a resolution or directive empowering a civil society organization to provide necessary services in Abyei. The Council could adopt a resolution encouraging, perhaps even directing, the states of Southern Kordofan and Bahr el Ghazal to take certain governance roles in Abyei—in consultation and with full participation of its residents—in such a way so as not to prejudice implementation of the Protocol yet ensure certain delivery of services to increase security and stability in the area. This is a goal both parties to the CPA and both major parties to the GNU can likely agree upon.

3.3.c Southern Sudan Legislative Assembly: The Southern Sudan Legislative Assembly (SS Assembly) has similar powers to the National Legislature in terms of influencing the Executive. While the influence over the National Presidency may be limited, the SS Assembly could rally its powers to influence the Southern Sudan President, who also serves as the First Vice President of the Republic. The Southern Sudan President's participation in the National Presidency makes him equally responsible for the inaction regarding Abyei Area. While the members of the SS Assembly—largely aligned with Salva Kiir—would be unlikely to engage in actions which could be interpreted as undermining Kiir's power, their power to influence Kiir's actions should be acknowledged, particularly if and when they feel that Kiir has not taken a stronger or more decisive position in a given circumstance.

The SS Assembly has the authority to oversee the performance by Southern Sudan Government organs.⁷³ The SS Assembly may therefore use its general oversight capacity to pressure the Southern Sudan President to influence the National Presidency in fulfilling its Abyei obligations.

⁷⁰ INC, art. 85.

⁷¹ INC, art. 117(2).

⁷² INC, art. 91(4)(b).

⁷³ ICSS, art. 59(2)(f).

Furthermore the SS Assembly has the ability to adopt resolutions on matters of public concern.⁷⁴ As stated before, issues concerning Abyei Area are of greatest public concern. Similar to the National Assembly, the SS Assembly may issue a resolution detailing its dissatisfaction with the National Presidency's failure to act. These resolutions could help foster both public and international sentiment that may urge the Presidency to take action.

The SS Assembly could also use its fiscal powers to influence the President of Southern Sudan. The President of Southern Sudan annually presents the SS Assembly a bill allocating the resources and revenues of the GoS. The SS Assembly is then responsible for approving, modifying, or rejecting the bill.⁷⁵ The SS Assembly could use this power as leverage to induce the President of Southern Sudan to influence the National Presidency to act.

3.3.d Limitations: Overall, the legislatures in Sudan can exercise substantial influence on the presidency, to create the administration in the Abyei Area. The legislatures can pass resolutions or measures, control the budget, call up the Ministers for hearings, and, in a grave situation, impeach the president or vice-president.

The legislature acting alone likely cannot provide for the administration, however. The legislatures may be able to empower civil society organizations, which provide administrative services, by formally ratifying their actions, or by providing them a budget.

However, under the current situation, it is unlikely that the legislative process and legislative powers will be able to implement the Abyei Protocol. The national legislature is dominated by the NCP, which opposes the ABC Report and unlikely to support any initiative perceived at giving strength to Dinka governance in Abyei or greater Southern influence in the area. Accordingly, NCP members will not likely take a position against the party lines. Even if an SPLM minister or other member of parliament raises the issue of implementing the Abyei administration, it will not likely succeed—as a majority of parliamentarians will not adhere to a minority view. In general, the Presidency is also dysfunctional. NCP maneuvering prevents GNU First Vice President Salva Kiir from exerting sufficient powers in the Presidency to implement the Abyei administration. Moreover, the Southern Sudan Legislative Assembly is not likely to take steps that

⁷⁴ ICSS, art. 59(2)(1).

⁷⁵ ICSS, art. 87(1).

could be interpreted as undermining the SPLM Vice Presidency at the GNU level. Kiir largely shares the same interests as the members of the Southern Assembly. As a result, using legislative powers to attempt to fundamentally change the situation in Abyei and guarantee the establishment of an administration in Abyei will not likely succeed. The powers of the legislative, however, could possibly be used creatively to foster smaller changes and programs in Abyei that can be seen as bi-partisan and serving mutual interests without prejudicing the rights under the CPA and Protocol which each party is defending.

3.4 Meeting the Constitutionally-Delineated “Serious Needs of Conflict Affected Areas”

The Comprehensive Peace Agreement (CPA), the Interim National Constitution (INC), and the Interim Constitution of Southern Sudan (ICSS) legally obligate various government organs to establish an administration in the Abyei Area. Despite the fact that the Presidency has not implemented the Abyei administration, other general provisions create an obligation on other entities to provide necessary administrative services. It can be argued that the Presidency’s nonfeasance does not fully absolve them of their respective duties and obligations to the citizens of Abyei.

The INC provides that:

The State recognizes that Southern Sudan, Southern Kordofan, Blue Nile, Abyei Area and other conflict affected areas face serious needs to: (i) be able to perform basic government functions, (ii) establish or build up the civil administration, and (iii) rehabilitate and reconstruct/construct the social and physical infrastructure in a post-conflict Sudan.⁷⁶

Through this provision, Sudan recognizes the serious needs faced by the area. Indeed, the Chapeau of the CPA supports this meaning, by acknowledging that the conflict has produced a tragic and urgent situation in Sudan. The signatories to the CPA note that they are:

CONSCIOUS that the conflict in the Sudan is the longest running conflict in Africa; that it has caused tragic loss of life, destroyed the infrastructure of the country, eroded its economic resources and caused suffering to the people of the Sudan;

⁷⁶ INC, art. 185.4.

MINDFUL of the urgent need to bring peace and security to the people of the Sudan who have endured this conflict for far too long;⁷⁷

Until the Presidency establishes a formal administration in Abyei, it can be argued that Bahr el Ghazal and Southern Kordofan, and the government of Southern Sudan, still have a legal duty to guarantee certain rights and services to the people of Abyei. To exercise these duties and obligations, it can be argued that each of these governing entities therefore has the right to fill this implementation gap.

3.4.a Shared Obligations of the Republic of Sudan and Southern Sudan: Since the residents of Abyei have dual citizenship in Southern Sudan and the Republic of Sudan, there is a shared obligation by the Republic of Sudan and Southern Sudan to meet the serious needs of conflict affected areas (which includes Abyei) and provide their citizens their delineated rights under the Interim National Constitution (INC) and the Interim Constitution of Southern Sudan (ICSS). Certainly no government official in Sudan would argue, for instance, that the fundamental rights and freedoms affirmed for all citizens of Sudan in the INC, the ICSS, and the CPA are only to be enjoyed by Abyei residents if and when its administration is established.

Citizens of the Republic of Sudan have various rights provided them by the INC. The INC provides Sudanese citizens with rights to certain services, including education⁷⁸ and public health.⁷⁹ As well, there are analogous rights provided by the Interim Constitution of Southern Sudan. Basic rights mentioned in the ICSS include certain services that the government has a duty and an obligation to provide. These include an obligation to provide education to all children,⁸⁰ access to education, employment, necessary medical care and public utilities for people with special needs and the elderly,⁸¹ access to public health care,⁸² and the right to a clean and healthy environment.⁸³

⁷⁷ CPA, Chapeau.

⁷⁸ ICSS, art. 13(1)(a) (The State shall promote education at the primary, secondary and tertiary levels, all over the Sudan and shall ensure free education at the primary level and in illiteracy eradication programme. The State, within the limits of its economic capacity, shall make education affordable at other levels.)

⁷⁹ INC, art. 13 (The State shall promote public health and provide basic medical services and facilities).

⁸⁰ ICSS, art. 33 (Education is a right for every citizen and all levels of government in Southern Sudan shall provide access to education without discrimination as to religion, race, ethnicity, HIV status, gender or disability. All levels of government in Southern Sudan shall promote education at all levels and shall ensure free and compulsory education at the primary level; they shall also provide free illiteracy eradication programmes.)

⁸¹ ICSS, art. 34 (All levels of government in Southern Sudan shall guarantee to persons with special needs participation in society and the enjoyment of rights and freedoms set out in this Constitution, especially access to

The ICSS is also intended to improve the lives of Southern Sudanese by dedicating public resources to provide gainful employment for the people, improve their lives by building roads, schools, airports, community institutions, hospitals, providing clean water, electric power and telecommunications services to every part of Southern Sudan.⁸⁴ Further, the ICSS provides an affirmative duty to ensure the security and welfare of the people⁸⁵ and their resources.⁸⁶

The ICSS specifically provides that “the residents of Abyei Area shall enjoy all rights and freedoms guaranteed by this Constitution.”⁸⁷ Since the ICSS specifically includes the provision that these rights are for the residents of the Abyei Area as well as the rest of the South, these rights must be provided for them by the government of Southern Sudan, regardless of the existence or not of a special administrative status under the Presidency.

Since the Abyei residents are citizens of both the Republic of Sudan and Southern Sudan, they are entitled to the benefits of their citizenship. The residents and citizens of Abyei have the legal right to certain services through the INC and ICSS. The GoSS accordingly has the duty to guarantee the rights of Abyei citizens as affirmed under both the INC and the ICSS. Even if the National Government does not provide these obligatory services, the GoSS is under an affirmative duty to provide these personal and community rights. Since the GoSS is under such a duty, it can be argued that it must follow that it is legally required to take reasonable steps to provide for administrative services in Abyei required to guarantee delivery of essential services necessary to ensure the rights and freedoms of Abyei residents. This can be done without violating the Abyei Protocol or the CPA, and without dishonoring the peace agreement process.

public utilities, suitable education and employment.(2) The elderly and persons with special needs shall have the right to the respect of their dignity. They shall be provided with the necessary care and medical services as shall be regulated by law.)

⁸² ICSS, art. 35 (All levels of government in Southern Sudan shall promote public health, establish, rehabilitate and develop basic medical and diagnostic institutions and provide free primary health care and emergency services for all citizens.).

⁸³ ICSS, art. 44(1) (Every person or community shall have the right to a clean and healthy Environment).

⁸⁴ ICSS, art. 38.

⁸⁵ ICSS, art. 39.3 (The security and welfare of the people of Southern Sudan shall be the primary duty of all levels of government in Southern Sudan).

⁸⁶ ICSS, art. 40(2)(b) (...protect and ensure the sustainable management and utilization of natural resources including land, water, petroleum, minerals, fauna and flora for the benefit of the people of Southern Sudan).

⁸⁷ ICSS, art. 176(2).

As well, all actors, including the GoSS, have the legal responsibility to meet the serious needs of conflict affected areas. On an emergency basis, under this provision, it can be argued that the GoSS can provide for an administration in Abyei.

3.4.b Shared Obligations of Bahr El Ghazal and Southern Kordofan: By nature of the dual citizenship of the residents of Abyei it can be argued that both Bahr el Ghazal and Southern Kordofan also have a legal duty to provide services and administration to the area to meet its serious needs, and to provide its citizens with the rights delineated by their state constitutions.⁸⁸

As there is an implementation gap in the administration of the Abyei Area, either Bahr el Ghazal or Southern Kordofan can be called in to assist in providing some form of administration. Such assistance presumably could only be provided until the President appoints the Executive Council and Area Council, or until the citizens of Abyei elect its members.

3.4.c Political Challenges: Any exercise of administrative services by Southern institutions may be politically difficult for the National Congress Party (NCP) or the Government of National Unity (GNU) to accept. Since the residents of Abyei will vote in 2011 to determine whether they will join the South or maintain its special administrative status in the North⁸⁹ it is important that the GoSS or any other Southern state or actor does not appear to be exercising too much control in the area, or certainly not control that would be seen as prejudicing the outcome or the determination regarding the north-south border or the ownership and distribution of natural resource wealth in the area. This might be difficult, but it is not impossible. If actions are taken transparently and, where needed, prior agreements with stakeholders are negotiated, it is likely that some administrative services can be carried out by one or more governing entities without resulting in breaches of the CPA, the Protocol, or, more importantly, the peace. Consequently, if the SPLM informally exercises control, or if the government of Bahr el Ghazal or Southern Kordofan, or the GoSS informally exercises control over parts of Abyei, the NCP may respond with serious political resistance or even outright violence.

⁸⁸ As of May 2007, the state constitutions of Southern Sudan have not been approved by the federal Ministry of Justice, which has final approval authority.

⁸⁹ ICSS, art. 176(3) (Pursuant to Article 183 (3) of the Interim National Constitution, the residents of Abyei Area shall vote in a separate referendum simultaneously with the referendum of Southern Sudan, which shall present them, irrespective of the results of the Southern Sudan Referendum, with the following choices:- (a) that Abyei Area retains its special administrative status in the north; or (b) that Abyei Area be part of Warrap State).

In order to prevent renewed north-south conflict or disagreement, the Southern governing institutions may wish to declare their intention to provide services *only* for the duration of the implementation gap and with full transparency to all CPA parties relevant stakeholders. As such, the Southern institutions may wish to promise that when implementation of the Abyei provisions occurs, the services they are providing will cease and administrative control will be ceded to the Abyei Council.

As well, prior to taking a more active role in the area the government of Bahr el Ghazal, Southern Kordofan or the GoSS could assure in a formal public statement that no measures will be taken that will prejudice the determining of the north-south border or ownership of resources or infringe or prejudice the grazing rights of Misseriya as well as other rights they have such as the right under the CPA and Protocol to a percentage of oil and national revenue.⁹⁰ If the Misseriya feel that these Southern governing institutions will threaten their traditional rights and wealth sharing rights, they may resist their actions, exercise their political influence with their Arab allies in the North and create a tense situation in Abyei, all of which may lead to renewed hostilities. Accordingly, if southern institutions carry out certain governance efforts, a formal or ceremonial declaration or an actual enforceable agreement may alleviate the fears of the Misseriya. Such an agreement may also make it necessary for international actors (governments, NGOs, etc.) to lend their moral and economic support to these efforts knowing that they are not supposed to breach the CPA or prejudice the rights of others. This allows internationals to play an impartial role when it is convenient for them to do so.

In light of these sections of the CPA, the ICSS, and the INC, all government structures have the legal duty and legal right to perform basic government functions in conflict affected areas. Overall, the governments of Bahr el Ghazal and Southern Kordofan, and the GoSS have the legal right and the legal responsibility to provide administration in the Abyei Area. The provision of these services may create political challenges by the NCP and GNU, which certain transparency and an early and formal declaration of intent may mitigate, especially if endorsed by the international community. Most important, however, may be that both the Dinka and Misseriya of the area endorse the agreement. In fact if properly crafted, this can further weaken the political influence the North is exercising over a few powerful, vocal Misseriya while responding to recent calls by the larger contingency of the Misseriya to have a closer relationship with SPLM and GoSS.

3.5 Engaging the International Community to Bridge Implementation Problems

As demonstrated in the negotiations of the CPA itself, post-conflict regions, the international community often plays a role in fostering peace and encouraging the implementation of agreed upon peace agreements. Foreign countries and international organization such as the United Nations may provide the impartial perspective that will facilitate negotiations and compromise between opposing parties. International actors may be especially relevant during the peace or conflict negotiation phase, where international experts might facilitate, mediate, or support peace negotiations. In particular, the international community in any of these capacities may provide political support, financial assistance, and other resources to the opposing parties to encourage the success of the negotiations and provide the added leverage that one or more parties need to encourage advances toward peace when resistance from others still exists.

In light of the continuing conflict over the boundary of the Abyei Area in between Northern and Southern Sudan and the related absence of a governing administration, this section (i) examines the use of third party transitional administrations as alternative mechanisms for long term development and sustainable recovery in post-conflict states with disputed territories, (ii) identifies common and necessary elements of a successful transitional administration, (iii) considers the current mandates of the United Nations Mission in Sudan (UNMIS) and the African Union Mission in Sudan (AMIS), and (iv) proposes avenues by which the international community may assist the Sudanese in resolving the conflict over Abyei.

3.6 Examples of Third-Party Transitional Administrations

States emerging from conflicts frequently face multiple challenges in order for sustainable recovery and long-term development. Often, because post-conflict states have limited resources, ongoing security limitations, or limited political abilities to successfully implement many necessary measures, the international community previously has set up third party transitional administrations to support the emerging state. Third party transitional administrations also have developed transitional recovery strategies to address the root causes of conflict and minimize the likelihood of its recurrence. This is particularly true when the status of a critical geographic area was still heavily disputed by parties to the conflict and impeding full implementation of peace agreement provisions.

Kosovo, Bosnia and Herzegovina, Eastern Slovenia, East Timor, Afghanistan, and Iraq demonstrate the different gradations within third-party transitional authorities with reference to the level of impact on the administrative, executive, legislative and judicial functions. In a manner that is consistent with the CPA and Protocol, elements of third party and transitional administration over Abyei could be considered by the parties and exercised with their participation and consent.

3.6.a United Nations Interim Administration Mission in Kosovo: On June 9, 1999, after a 78-day bombing campaign, Serbian armed forces and NATO signed a Military Technical Agreement calling for the immediate and complete withdrawal of all Serb forces from Kosovo and the establishment of an international peacekeeping force.⁹¹ On June 10, 1999, the United Nations Security Council issued Resolution 1244 authorizing the United Nations Mission in Kosovo (UNMIK) to provide: an interim administration for Kosovo; the appointment of a Special Representative of the Secretary General (SRSG) who would function as the transitional administrator of Kosovo; a NATO led peacekeeping forces (KFOR); the establishment of an international civilian police force; and the demobilization of the Kosovo Liberation Army (KLA).⁹²

Governed by a Special Representative of the UN Secretary-General, UNMIK is organized into four pillars. Police and justice, and civil administration (pillars one and two) are under the direct leadership of the UN. The Organization for Security and Co-operation in Europe (OSCE) directs institution building and democratization (pillar three). The European Union manages economic development and reconstruction (pillar four). NATO has led the international security presence. UNMIK also is charged with establishing self-government in Kosovo, and facilitating the future status process.

In the absence of sovereign authority, UNMIK exercised executive, legislative and judicial functions to fill the vacuum and provide essential public services.⁹³ UNMIK initially exercised full administrative power because

⁹¹ See Military Technical Agreement between the International Security Force (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, June 9, 1999 *available at* <http://www.nato.int/kosovo/docu/a990609a.htm>.

⁹² S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999).

⁹³ See HO-WON JEONG, *PEACEBUILDING IN POSTCONFLICT SOCIETIES: STRATEGIES AND PROCESS* 81 (Lynne Reiner Publications 2005).

institutions of self-governance had not yet been created.⁹⁴ Civil administrators were put in place to maintain daily operations and implement the policy framework developed by the UN Special Representative of the Secretary General.⁹⁵ UNMIK oversaw the first local election, qualified as the best in the region, on October 28, 2000, with no serious incidents reported.⁹⁶

UNMIK implemented the Framework Constitution for Provisional Self-Government (Framework Constitution), which established the Kosovo Provisional Institutions of Self-Government and defined the Government's authority. The Framework Constitution authorizes the creation of an Assembly, a Government headed by a Prime Minister, and a President elected by the Assembly. The Framework Constitution also establishes a judicial branch with a Supreme Court and an Office of the Public Prosecutor.

KFOR, the NATO-led military force, provides the international security presence for Kosovo. As part of its demobilization, disarmament, and reintegration efforts, it also assisted in the transformation of the KLA guerilla forces into the Kosovo Protection Corps (KPC), a professional civilian emergency service.⁹⁷ Former KLA members not involved in the KPC became a part of the Kosovo Police Service (KPS).⁹⁸ New police models were created to remove old apartheid enforcing propensities.

However, the lack of policing forces during the first five months of the period after the war—viewed by locals to be as big a problem as the lack of electricity or water—highlighted the necessity to keep the two aspects (civilian and military) of the mission integrated.⁹⁹ NATO's lack of a police counterpart led to a slow progress in building a local police force.¹⁰⁰ The Kosovo police mission comprised policemen from more than 50 countries without standardized practices. Furthermore, the professionalization of the international police led to many

⁹⁴ See HO-WON JEONG, *PEACEBUILDING IN POSTCONFLICT SOCIETIES: STRATEGIES AND PROCESS* 81 (Lynne Reiner Publications 2005).

⁹⁵ See HO-WON JEONG, *PEACEBUILDING IN POSTCONFLICT SOCIETIES: STRATEGIES AND PROCESS* 82 (Lynne Reiner Publications 2005).

⁹⁶ See Ylber Hysa, *Kosovo: A Permanent international Protectorate?* in *THE UN ROLE IN PROMOTING DEMOCRACY: BETWEEN IDEAS AND REALITY* 282, 296 (Edward Newmann and Roland Rich eds., 2004).

⁹⁷ See Ylber Hysa, *Kosovo: A Permanent international Protectorate?* in *THE UN ROLE IN PROMOTING DEMOCRACY: BETWEEN IDEAS AND REALITY* 282, 293-4 (Edward Newmann and Roland Rich eds., 2004).

⁹⁸ See Ylber Hysa, *Kosovo: A Permanent international Protectorate?* in *THE UN ROLE IN PROMOTING DEMOCRACY: BETWEEN IDEAS AND REALITY* 282, 294 (Edward Newmann and Roland Rich eds., 2004).

⁹⁹ See Ylber Hysa, *Kosovo: A Permanent international Protectorate?* in *THE UN ROLE IN PROMOTING DEMOCRACY: BETWEEN IDEAS AND REALITY* 282, 291 (Edward Newmann and Roland Rich eds., 2004).

¹⁰⁰ See Ylber Hysa, *Kosovo: A Permanent international Protectorate?* in *THE UN ROLE IN PROMOTING DEMOCRACY: BETWEEN IDEAS AND REALITY* 282, 292 (Edward Newmann and Roland Rich eds., 2004).

criminal cases remaining unsolved because of the lack of local language and police specific training. Learning from these deficiencies would be important if similar models were replicated in Sudan or elsewhere.

UNMIK also developed a comprehensive strategy aimed at improving the security and quality of life for both Kosovo Albanian and Kosovo Serbian communities. This includes the creation of confidence building measures to focus on multi-ethnic initiatives such as Kosovo Albanian access to hospitals in the north, and the creation of a communal marketplace as well as targeted economic development through programs like the EU-funded Village Economic Rehabilitation Programme (VERP).¹⁰¹

United Nations Resolution 1244 also established a framework through which UNMIK competencies would gradually transfer to the Kosovo Government. Although the transfer of competencies is nearly complete, most of the real decision making authority during the last six years resided with the office of the Special Representative and UNMIK officials, not with elected Kosovar officials. Currently the reserved powers of Special Representative of the Secretary General include those relating to law and order (international police and Kosovo Police Service), appointing judiciary, ensuring and protecting the rights of minorities, UNMIK Customs Service, monetary policy, external relations, concluding agreements with states and international organizations, administering public, state and socially owned property, adjudicating disputed residential property and administering abandoned residential property, and supervision of Kosovo Protection Corps.¹⁰² This level of third party control may be too much for Sudan, particularly given the NCP's hesitancy with respect to the UN, but important elements can still be extracted, modified and applied to Abyei.

3.6.b Bosnia and Herzegovina: After Bosnia and Herzegovina (BiH) declared independence from the Socialist Federation of Yugoslavia in March 1992, BiH was swept by violence that finally came to an end on October 11, 1995. From that date until December 20, 1995, forces of the United Nations Protection Force (UNPROFOR) monitored a ceasefire put in place to allow for peace negotiations that occurred in Dayton, Ohio, USA.

¹⁰¹ See Report of the Security Council Mission on the Implementation of Security Council resolution 1244 (1999) 16 June 2001, S/2001/600, *available at* <http://www.un.org/Docs/sc/missionreports/600e.pdf>.

¹⁰² See United Nations Mission in Kosovo Fact Sheet, October 2006 *available at* http://www.unmikonline.org/docs/2006/Fact_Sheet_Oct_2006.pdf.

Through the Dayton Agreement, the parties requested designation of a High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina, who was to mobilize and coordinate all civilian activities and be the final authority regarding civilian implementation of the peace settlement which was granted through Security Council Resolution 1031 (1995). Resolution 1035 (1995) subsequently established the United Nations International Police Task Force (IPTF) and a United Nations civilian office, brought together as the United Nations Mission in Bosnia and Herzegovina (UNMIBH).

While the NATO-led SFOR took over military activities from the UN, UNMIBH continued with its mandate to contribute to the establishment of the rule of law in Bosnia and Herzegovina by assisting in reforming and restructuring the local police, assessing the functioning of the existing judicial system and monitoring and auditing the performance of the police and others involved in the maintenance of law and order.

UNMIBH also coordinated other UN activities in the country relating to humanitarian relief and refugees, de-mining, human rights, elections, and rehabilitation of infrastructure and economic reconstruction.¹⁰³ UNMIBH completed the most extensive police reform and restructuring project the UN had ever undertaken.¹⁰⁴ It established mechanisms and institutions to participate fully in the regional and international fight against organized crime and terrorism. Additionally, the newly created State Border Service dramatically reduced the flow of illegal migrants, helped deter narcotics and human trafficking and reduce smuggling. The increase in security also encouraged the return of over 250,000 refugees to their pre-war homes.¹⁰⁵ Since 1995, through the efforts of the World Bank, USAID, the EU, and individual donor nations in addition to the UN, BiH has also benefited from the construction and restoration of roads, schools, hospitals, bridges, houses, and power-lines – and as a result, much of the wartime damage in Sarajevo and Mostar has been repaired.¹⁰⁶

¹⁰³ See SIMON CHESTERMAN, *YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING 77* (Oxford University Press 2004).

¹⁰⁴ See The Secretary General, *Report of the Secretary General on the United Nations Mission in Bosnia and Herzegovina*, U.N. Doc. S/2002/1314 (December 2, 2002) available at <http://daccessdds.un.org/doc/UNDOC/GEN/N02/706/20/IMG/N0270620.pdf?OpenElement>.

¹⁰⁵ See The Secretary General, *Report of the Secretary General on the United Nations Mission in Bosnia and Herzegovina*, U.N. Doc. S/2002/1314 (December 2, 2002) available at <http://daccessdds.un.org/doc/UNDOC/GEN/N02/706/20/IMG/N0270620.pdf?OpenElement>.

¹⁰⁶ See James Lyon, *Overcoming Ethnic Politics in Bosnia?* in *TEN YEARS AFTER DAYTON: PEACEBUILDING AND CIVIL SOCIETY IN BOSNIA-HERZEGOVINA*, 49, 51 (Martina Fischer ed., 2006).

UNMIBH was terminated on December 31, 2002, following the successful conclusion of its mandate, in accordance with Resolution 1423; the European Union Police Mission (EUPM) took over from UNMIBH on January 1, 2003.

3.6.c UN Transitional Administration for Eastern Slovenia, Baranja, and Western Sirmium: The UN Transitional Administration for Eastern Slovenia, Baranja, and Western Sirmium (UNTAES) exemplifies international administration in the form of direct governance.¹⁰⁷ Following Croatia's declaration of independence from the Socialist Federal Republic of Yugoslavia in 1991, three areas with significant Serbian populations within Croatia in turn declared themselves independent of the new entity. In late 1991, due to heavy fighting, these areas fell under the control of Serbs and almost all the Croatian inhabitants fled the area. Two of the three areas were recaptured by Croatian forces. However, the Region of Eastern Slovenia continued to remain under Serbian rule.

On November 12, 1995, the Republic of Croatia and the local Croatian Serb authorities in Eastern Slovenia signed the *Basic Agreement on the Region of Eastern Slovenia, Baranja and Western Sirmium*, providing for a peaceful reintegration into Croatia of this region. However, when the Basic Agreement was signed, Sector East remained under Serb control. The Agreement requested the United Nations Security Council to establish a Transitional Administration to govern and to maintain peace and security in the region during the transitional period of 12 months, and to authorize an international force to maintain peace and security during that period and to otherwise assist in the implementation of the Agreement.¹⁰⁸

UNTAES was established in January 1996 to oversee the peaceful reintegration of Eastern Slovenia, Baranja and Western Sirmium into Croatia. The UN Security Council extended UNTAES' mandate through January 15, 1998 by adopting Resolutions 1079¹⁰⁹ and 1120.¹¹⁰ The Council also endorsed the plan for restructuring UNTAES and the drawdown of its military component. The mandate of UNTAES included the facilitation and supervision of demilitarization; monitoring the return of refugees; the maintenance of peace and security; the establishment of a temporary police force; undertaking tasks relating to civil administration and public service; and organizing elections and other activities

¹⁰⁷ See RICHARD CAPLAN, *INTERNATIONAL GOVERNANCE OF WAR-TORN TERRITORIES: RULES AND RECONSTRUCTION* 18 (Oxford University Press 2005).

¹⁰⁸ Basic Agreement on the Region of Eastern Slovenia, Baranja and Western Sirmium (The Erdut Agreement) November 12, 1995 available at <http://www.reliefweb.int/rw/RWB.NSF/db900SID/MHII-68JC6Z?OpenDocument>.

¹⁰⁹ S.C. Res. 1079, U.N. Doc. S/RES/1079 (July 15, 1997).

¹¹⁰ S.C. Res. 1120, U.N. Doc. S/RES/1120 (January 15, 1998).

relevant to the Basic Agreement.¹¹¹ UNTAES' mandate was completed on January 15, 1998.

Although UNTAES' authority was extensive, it did not perform many of the tasks of the administration itself. Serbs continued to administer the territory with UNTAES overriding their decisions as necessary.¹¹² With regard to demilitarization, the Basic Agreement also committed the parties to its accomplishment within 30 days after full deployment of UNTAES, including all military forces, weapons and police, except for UNTAES forces and for police operating under the supervision of, or with the consent of the Transitional Administration.¹¹³ UNTAES achieved this successfully by June 1996.

Shortly after demilitarization, UNTAES established the Transitional Police Force with local involvement. A year later, UNTAES facilitated the holding of local and regional elections with no recorded security incidents.¹¹⁴ In 1997, approximately 6000 Croats and 9000 Serbs returned to their original homes. Towards the end of the year, UNTAES military engineers and the mine action center had also de-mined more than 150 kilometers of railroad, 75 kilometers of high-voltage lines and 10 villages.¹¹⁵

Among UNTAES initiatives to support economic development of the region were the reopening of the Zagreb-Belgrade highway; reconnection of the Adriatic Oil Pipeline between Croatia and the Federal Republic of Yugoslavia; turn-over to UNTAES of the Djelatovci Oil fields by the Scorpion paramilitary unit; reconnection of telephone lines between Osijek and Beli Manastir; support in preventing the illegal removal of resources from the region, including the interdiction of the transport of illegally cut timber by train.¹¹⁶

In addition, throughout its mandate, UNTAES enjoyed a fully integrated mission structure that unified military, civil and humanitarian components under a

¹¹¹ See UNTAES mandate available at http://www.un.org/Depts/dpko/dpko/co_mission/untaes.htm.

¹¹² See RICHARD CAPLAN, *INTERNATIONAL GOVERNANCE OF WAR-TORN TERRITORIES: RULES AND RECONSTRUCTION* 19 (Oxford University Press 2005).

¹¹³ Basic Agreement on the Region of Eastern Slovenia, Baranja and Western Sirmium (The Erdut Agreement) November 12, 1995 available at <http://www.reliefweb.int/rw/RWB.NSF/db900SID/MHII-68JC6Z?OpenDocument>.

¹¹⁴ See The Secretary General, *Report of the Secretary General on the United Nation Transitional Administration for Eastern Slovenia, Baranja and Western Sirmium*, U.N. Doc. S/1997/953, page 5 (December 4, 1997) available at <http://daccessdds.un.org/doc/UNDOC/GEN/N97/342/64/PDF/N9734264.pdf?OpenElement>.

¹¹⁵ See The Secretary General, *Report of the Secretary General on the United Nation Transitional Administration for Eastern Slovenia, Baranja and Western Sirmium*, U.N. Doc. S/1997/953, page 5 (December 4, 1997) available at <http://daccessdds.un.org/doc/UNDOC/GEN/N97/342/64/PDF/N9734264.pdf?OpenElement>.

¹¹⁶ See UNTAES website available at http://www.un.org/Depts/DPKO/Missions/untaes_e.htm.

single UN command ensuring effective coordination between UN military forces, the UN Civilian Police, and the local involvement of the Transitional Police Force.¹¹⁷

3.6.d United Nations Transitional Administration in East Timor: A number of external events shaped East Timor's path to independence: rapid de-colonization after WWII, the Portuguese Revolution of 1974, the end of the Cold War, the Asian economic crisis of 1997 and the eventual decision of Indonesian President Habibie to offer autonomy or independence to the region.¹¹⁸ After twenty-four years of Indonesian rule, Habibie's 1999 announcement led to agreements between Indonesia, Portugal and the UN for a UN-supervised ballot, or Popular Consultation. The tripartite members agreed to allow the East Timorese to select whether the region would become a special autonomous region within Indonesia or an independent state.¹¹⁹ The agreement further stipulated that the UN would bear the responsibility for the transition of the non-self-governing territory if the East Timorese chose independence. After the vote in favor of independence, a wave of violence and devastation by the departing Indonesian forces left the new state with a dislocated population, practically no infrastructure, and an uncertain security situation.¹²⁰

In late 1999, East Timor emerged into a transition period under the United Nations administration for two and a half years. The United Nations Transitional Administration in East Timor (UNTAET) was established on October 25, 1999, through UN Security Council Resolution 1272, as an integrated, multidimensional peacekeeping operation fully responsible for the administration of East Timor during its transition to independence.¹²¹ Resolution 1272 mandated UNTAET to provide security and maintain law and order throughout the territory of East Timor; to establish an effective administration; to assist in the development of civil and social services; to ensure the coordination and delivery of humanitarian assistance, rehabilitation of humanitarian assistance, rehabilitation and development

¹¹⁷ See John Cockell, *Joint Action on Security Challenges in the Balkans*, in THE UNITED NATIONS AND REGIONAL SECURITY: EUROPE AND BEYOND 115, 119 (Michael Pugh and Waheguru Pal Singh Sidhu eds., 2003).

¹¹⁸ See MICHAEL SMITH with Moreen Dee, PEACEKEEPING IN EAST TIMOR: THE PATH TO INDEPENDENCE 52 (Lynne Reinner Publications, 2003).

¹¹⁹ See MICHAEL SMITH with Moreen Dee, PEACEKEEPING IN EAST TIMOR: THE PATH TO INDEPENDENCE 42-43 (Lynne Reinner Publications, 2003).

¹²⁰ See MICHAEL SMITH with Moreen Dee, PEACEKEEPING IN EAST TIMOR: THE PATH TO INDEPENDENCE 43 (Lynne Reinner Publications, 2003); See also Caitlin Reiger, *Hybrid Attempts at Accountability for Serious Crimes in Timor Leste*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE 143, 143 (Naomi Roht-Arriaza and Javier Mariezcurrena eds., 2006).

¹²¹ S.C. Res. 1272, U.N. Doc. S/RES/1272 (October 25, 1999).

assistance; to support capacity-building for self-government; and to assist in the establishment of conditions for sustainable development.¹²²

UNTAET consisted of a governance and public administration component, a civilian police component of up to 1,640 civilian police and an armed United Nations peacekeeping force. In addition, humanitarian assistance and rehabilitation components were incorporated within the structures of the Transitional Administration.

The Transitional Administrator in consultation with East Timorese political leadership established the National Consultative Council (NCC), a political body consisting of 11 East Timorese and four UNTAET members, to oversee the decision-making process during the transition period leading to independence. The NCC was consulted on and consented to a series of urgent regulations required to establish effective administration in the Territory. These included setting up a legal system, re-establishing a judiciary, setting an official currency, creating border controls, taxation, and creating a first consolidated budget for East Timor.

In February 2000, after the transfer of military operations command to the United Nations Peacekeeping Force, UNTAET also began reorganizing itself to resemble more closely the future government of East Timor and to increase the direct participation of the East Timorese. UNTAET created eight portfolios, including internal administration, infrastructure, economic affairs, social affairs, finance, justice, police and emergency services, and political affairs. East Timorese headed the first four and senior UNTAET officials headed the other four. The process of transformation and institution building would later lead to the establishment, in August 2000, of the East Timor Transitional Administration (ETTA) headed by the Transitional Administrator. On August 30, 2001, a Constituent Assembly election was held peacefully and the all Timorese Second Transitional Government was confirmed on September 20, 2001. Chief Minister Mari Alkatiri led the Council of Ministers that presided over the transitional government and supervised the East Timor Public Administration (replacing ETTA). On May 20, 2002, East Timor became a fully independent nation.

Over the last two years of UNTAET's mandate, it successfully incorporated many administrative functions through its executive powers. These included the establishment of a border regime for the passage of people and goods between East Timor and Indonesia, cooperation on legal matters and continued support for East

¹²² S.C. Res. 1272, U.N. Doc. S/RES/1272 (October 25, 1999).

Timorese students wanting to study in Indonesian universities. Additionally, East Timor's Police Training College, a diplomat training program, and the National University of East Timor were opened. UNTAET also worked with the World Bank to alleviate poor economic and health conditions throughout the region.

3.6.e Afghanistan and the Bonn Agreement: The US-led military intervention in Afghanistan aimed at the dismantling of the Taliban and dislodging of al-Qaeda in the country provided an opportunity for the United Nations to play the central role in helping the Afghans settle their internal differences and build a lasting, popularly legitimate political structure. On October 3, 2001, the United Nations Secretary-General appointed Lakhdar Brahimi as his special representative to begin transforming Afghanistan from a theocratic state to a democratic state. Brahimi was authorized to oversee the activities of the United Nations Special Mission to Afghanistan (UNSCMA), and the Office for the Coordination of Humanitarian Assistance and develop plans for the reconstruction and rehabilitation of Afghanistan and its transition to post-conflict peace-building.¹²³ To this end, Brahimi convened talks between representatives of four Afghan groups, the United Front (Northern Alliance), Rome group, and two small Pakistan based Pashtun groups resulting in the Bonn Agreement Pending the Re-establishment of Permanent Government Institutions, signed by the parties on December 5, 2001¹²⁴.

The Bonn Agreement endorsed the institution of an Interim Authority, presided over by a chairman, to be inaugurated by December 22, 2001 as the repository of Afghan sovereignty. The agreement provided for the urgent formation of a central power sharing authority and a set of procedures and mechanisms.¹²⁵ It also provided for a timetable for the institutionalization of a culturally relevant political order to insure the transformation of Afghanistan into a peaceful, secure, and stable democratic state within the shortest period of time possible.¹²⁶

¹²³ See UN Press Release BIO/3397, 5 November 2001 available at <http://www.un.org/News/Press/docs/2001/bio3397.doc.htm>.

¹²⁴ Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions (Bonn Agreement), available at <http://www.afghangovernment.com/AfghanAgreementBonn.htm>.

¹²⁵ See Amin Saikal, *The United Nations and Democratization in Afghanistan*, in *THE UN ROLE IN PROMOTING DEMOCRACY: BETWEEN IDEAS AND REALITY* 320, 320 (Edward Newmann and Roland Rich eds., 2004).

¹²⁶ See Amin Saikal, *The United Nations and Democratization in Afghanistan*, in *THE UN ROLE IN PROMOTING DEMOCRACY: BETWEEN IDEAS AND REALITY* 320, 320 (Edward Newmann and Roland Rich eds., 2004).

The establishment of the Interim Authority as the nucleus of the central government is the first essential element of the Bonn Agreement. The Agreement also established the second essential element: providing broad parameters within which processes and mechanisms of government and state formation were to be enacted to legitimize and institutionalize the Interim Authority. These processes and mechanisms included instruments rooted in Afghan tradition, such as a Loya Jirga, and others such as a constitution and elections. Finally, the United Nations was empowered to play a “particularly important role” in the transitional government as an internationally recognized impartial institution. In essence, the Bonn Agreement endorsed Brahimi as the overall UN supervisor of Afghanistan during its transition.

As stipulated in the Bonn Agreement, the interim government was in government six months before giving way, with international support, to a transitional administration as decided upon by the Loya Jirga convened in June 2002. Assisted by the United Nations, Hamid Karzai, elected the head of the transitional administration, oversaw a Constitutional Loya Jirga in 2003 that ratified a new constitution and led to national elections in 2004.¹²⁷

The UN’s approach emphasized the intertwining of governance, development and security as a basis for state building. Adopting a ‘light footprint’ approach, the UN mission adopted the guiding principle to bolster Afghani capacity to govern itself, requiring Afghan’s taking charge of their situation whenever possible.¹²⁸ At the same time, the UN and the Karzai government spent much of their time and energies on humanitarian emergencies with the return of about 2 million Afghan refugees in 2002 and other reconstruction projects. The main reconstruction projects began on modest levels, starting with the Kabul-Kandahar-Herat highway.¹²⁹ Security initiatives included the establishment of various bodies and Afghanistan signed agreements with other states to expedite the process of establishing an Afghan police force and national guard and army, and to disarm local militias.¹³⁰

¹²⁷ See Milan Vaishnav, *Afghanistan: The Chimera of the “Light Footprint”*, in *WINNING THE PEACE: AN AMERICAN STRATEGY FOR POST-CONFLICT RECONSTRUCTION* 244, 253 (Robert C. Orr ed., 2004).

¹²⁸ See SIMON CHESTERMAN, *YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING* 89-90 (Oxford University Press 2004).

¹²⁹ See Amin Saikal, *The United Nations and Democratization in Afghanistan*, in *THE UN ROLE IN PROMOTING DEMOCRACY: BETWEEN IDEAS AND REALITY* 320, 331 (Edward Newmann and Roland Rich eds., 2004).

¹³⁰ See Amin Saikal, *The United Nations and Democratization in Afghanistan*, in *THE UN ROLE IN PROMOTING DEMOCRACY: BETWEEN IDEAS AND REALITY* 320, 331 (Edward Newmann and Roland Rich eds., 2004).

In addition to the United Nations, the United States and NATO also were involved in the process of transition of power. The US was instrumental in ensuring the success of the anti-Taliban forces and in facilitating the UN's role.¹³¹ NATO, in conjunction with the European Union, contributed in the US-led military campaign and subsequent participation in the International Security Assistance Force (ISAF) and provided significant aid to assist in Afghanistan's reconstruction.¹³² Much of the development in Afghanistan would not have been possible if it were not for the considerable foreign aid amassed.

3.6.f Coalition Provisional Authority, Transitional Administrative Law, and the Iraqi Interim Government: In many ways the Iraq experience demonstrates more examples and mechanisms to avoid. As such it is worthy of mention. Iraq was invaded in March 2003 by a United States-organized coalition. The United States established the Coalition Provisional Authority (Provisional Authority) to govern Iraq. Resolution 1483 adopted by the UN Security Council on May 22, 2003 recognized the United States and Britain—the Provisional Authority—as occupying powers in Iraq, calling on them to comply with their obligations under the Geneva Conventions and the 1907 Hague Regulations.¹³³ The Resolution also required the Provisional Authority to promote the welfare of the Iraqi people through effective administration of the territory, including the restoration of security, stability, and the creation of self-governance for the Iraqi people.¹³⁴

In July 2003, the Provisional Authority, in conjunction with the United Nations, set up the Iraqi Governing Council (IGC), selecting politicians believed to represent the ethnic and religious make-up of Iraq. The IGC endorsed the US plan for a 'fundamental law' to be in place by February 2004, followed by the creation of a transitional assembly of between 200 and 500 delegates. The Transitional Assembly, scheduled for the spring of 2005, was to select a cabinet and leader for Iraq and to guide the country through elections. This plan drew criticism for a lack of direct nationwide elections—most notably from the senior Shia cleric Ayatullah al-Sistani.¹³⁵

¹³¹ See Amin Saikal, *The United Nations and Democratization in Afghanistan*, in *THE UN ROLE IN PROMOTING DEMOCRACY: BETWEEN IDEAS AND REALITY* 320, 328 (Edward Newmann and Roland Rich eds., 2004).

¹³² See Amin Saikal, *The United Nations and Democratization in Afghanistan*, in *THE UN ROLE IN PROMOTING DEMOCRACY: BETWEEN IDEAS AND REALITY* 320, 328 (Edward Newmann and Roland Rich eds., 2004).

¹³³ See SIMON CHESTERMAN, *YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING* 96 (Oxford University Press 2004).

¹³⁴ S.C. Res. 1483, paras 4 & 5, U.N. Doc. S/RES/1483 (May 22, 2003).

¹³⁵ See TOBY DODGE, *INTERNATIONAL INSTITUTE FOR STRATEGIC STUDIES, IRAQ'S FUTURE: THE AFTERMATH OF REGIME CHANGE* 35-37 (Routledge 2005).

Despite alternative proposals from the United Nations and Special Adviser to the UN Secretary General Lakshmi Brahimi, the IGC adopted the Transitional Administrative Law (TAL) in March 2004, and the transfer of sovereignty to the Iraqi Interim Government—full of party placements—was completed on June 30, 2004.¹³⁶ Following the ratification of the Iraqi Constitution on October 15, 2005, the permanent election for the Iraqi Council of Representatives was held on December 15, 2005.

The U.S. driven policies in the first year of reconstruction saw few successes. During this time, the responsibilities of the United Nations in Iraq were ambiguous and the powers given to the Special Representative were intentionally vague.¹³⁷ Considerable progress was made by the CPA and coalition forces in setting up municipal and provincial political processes. However, unclear roles and a lack of resources caused the councils to falter. Security concerns also kept CPA civilian personnel from carrying out political, social and economic transformational tasks that were then largely carried out by coalition military forces, including the training and oversight of Iraqi police officers.

The CPA also attempted to provide for the economic and social well-being of Iraqis. Unfortunately, US planning for basic needs such as restarting Iraq's power system after the war fell short.¹³⁸ U.S. private contractors, many without relevant post-conflict experience, were given the responsibility for electricity and most other services. Private contractors were also engaged for police training. However, overworked coalition military forces retained the responsibility for training and overseeing Iraqi police until the contractors were able to move forward on their plan in October 2003.¹³⁹ In addition, postwar unemployment levels remained high and most enterprises remained closed for many months after the end of the war.

The IGC implemented sweeping economic reforms, including the allowance of direct foreign ownership of Iraq's assets aside from oil and other natural resources. Other areas of economic reform included the establishment of a new Iraqi currency, and an Iraqi central bank. However, the lack of a functioning

¹³⁶ See TOBY DODGE, INTERNATIONAL INSTITUTE FOR STRATEGIC STUDIES, *IRAQ'S FUTURE: THE AFTERMATH OF REGIME CHANGE* 34-38 (Routledge 2005).

¹³⁷ See SIMON CHESTERMAN, *YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING* 96 (Oxford University Press 2004).

¹³⁸ See Bathsheba Crocker, *Iraq: Going it Alone, Gone Wrong*, in *WINNING THE PEACE: AN AMERICAN STRATEGY FOR POST-CONFLICT RECONSTRUCTION* 263, 277 (Robert C. Orr ed., 2004).

¹³⁹ See Bathsheba Crocker, *Iraq: Going it Alone, Gone Wrong*, in *WINNING THE PEACE: AN AMERICAN STRATEGY FOR POST-CONFLICT RECONSTRUCTION* 263, 282 (Robert C. Orr ed., 2004).

regulatory framework for the financial sector, security concerns and political instability stifled economic activity.¹⁴⁰

3.6.g Third Party Transitional Administration in Brcko, Bosnia and Herzegovina: Another interesting example of third party administration which may offer less than UN control and something more complimentary to the councils contemplated by the Abyei Protocol is the situation in the Brcko District of Bosnia and Herzegovina. The Brcko District is a single administrative unit of local self-government under the sovereignty of Bosnia and Herzegovina. The District sits on the border between the Republika Srpska and the Federation of Bosnia and Herzegovina,¹⁴¹ across a “corridor” linking the two portions of Republika Srpska.¹⁴² However, both entities have devolved all of their powers of governance to the District Government.¹⁴³ The District was created by statute after three arbitral awards, partly because it proved too contentious to be decided at the peace talks in Dayton in 1995. Brcko became a demilitarized, international administration. It is administered by a Supervisor appointed by the international community, but it retains a governing council.

The Statute of Brcko, agreed to by the Federation of Bosnia and Herzegovina and the Republika Srpska in a UN-organized arbitration process, governs the administration of the District of Brcko and lays out the basic element of its self-governing institutions.¹⁴⁴ The District has a single, unitary, multiethnic, democratic government, a unified and multiethnic police force operating under a single command structure, and an independent judiciary. It has a District Assembly, a District Government, and District Courts.

The Brcko District Assembly is the legislative body of the District and is responsible for adopting the budget, adopting District laws, and monitoring the District Government.¹⁴⁵ The Assembly is composed of twenty-nine Councilors, elected in general, free, fair, and direct elections. The Assembly elects the Mayor

¹⁴⁰ See Bathsheba Crocker, *Iraq: Going it Alone, Gone Wrong*, in WINNING THE PEACE: AN AMERICAN STRATEGY FOR POST-CONFLICT RECONSTRUCTION 263, 279 (Robert C. Orr ed., 2004).

¹⁴¹ The Republika Srpska and the Federation of Bosnia and Herzegovina are the entities that comprise Bosnia and Herzegovina. They were established by the Dayton Peace Agreement of 1995 available at http://www.usip.org/library/pa/bosnia/dayton_gfa.html.

¹⁴² Norman Cigar and Paul R. Williams, *Reward Serbs With the Town of Brcko? Don't Do It*, CHRISTIAN SCIENCE MONITOR, March 11, 1998, at 19.

¹⁴³ Statute of the Brcko District of Bosnia and Herzegovina, 7 December 1999, Article 1, Paragraph 2, available at http://www.ohr.int/ohr-offices/brcko/default.asp?content_id=5367.

¹⁴⁴ Statute of the Brcko District of Bosnia and Herzegovina, 7 December 1999, available at http://www.ohr.int/ohr-offices/brcko/default.asp?content_id=5367.

¹⁴⁵ Statute of the Brcko District of Bosnia and Herzegovina, Article 23.

of the District. The District also has its own Police Service. The Courts of the District have jurisdiction to decide whether the District's law are inconsistent with the Constitution, the laws of Bosnia and Herzegovina or the Statute of the Brcko District.

The Brcko District is also empowered to enter into cooperative agreements with the Republika Srpska, the Federation of Bosnia and Herzegovina, or national or international associations of municipalities.¹⁴⁶ Any such agreement must benefit all District residents equally and must be in accordance with the Statute. Under the Statute, the Bosnian, Croatian and Serbian languages and the Latin and Cyrillic alphabets are on equal terms for all official purposes.

The Brcko Statute does not mention ethnicity or offer any specific entitlements or protections based on ethnicity. The Assembly and departments are to "reflect the composition of the population" and some legislation requires either a three-fifths or a three-quarters majority for passage.

The Brcko District was placed under international supervision with the objectives of facilitating the return of refugees to Brcko, enhancing democratic government and multiethnic administration, ensuring freedom of movement, and promoting economic revitalization.¹⁴⁷ The Supervisor is appointed by the UN Office of the High Representative, which the international community charged with overseeing the implementation Dayton Peace Agreement throughout Bosnia and Herzegovina.

The Brcko Supervisor has the authority to promulgate binding regulations, which prevail against any conflicting law passed by the Brcko District Assembly. The Brcko Supervisor also coordinates and cooperates with the Organization for Security and Co-operation in Europe, the United Nations High Commissioner for Refugees, the International Monetary Fund, and others.¹⁴⁸

An individual who is a citizen of Bosnia and Herzegovina and who permanently resides in Brcko is considered a Brcko District Resident. Permanent residents of Brcko under the 1991 census who have not established a permanent

¹⁴⁶ Statute of the Brcko District of Bosnia and Herzegovina, Article 10.

¹⁴⁷ Brcko Implementation Conference, Chairman's Conclusions, March 7, 1997 (First Award), *available at* http://www.ohr.int/ohr-offices/brcko/default.asp?content_id=5327.

¹⁴⁸ It should be noted that experts believe that Brcko's success is due in part to the extensive international aid invested in the District. Not counting United States Agency for International Development projects, the U.S. Embassy in Sarajevo estimates that American assistance to Brcko has averaged U.S.\$2 million a year from 1997 - 2003.

residence in another municipality of Bosnia and Herzegovina are also citizens. District residents also retain citizenship of the Entity they had citizenship with before the creation of the District—that is, the Federation of Bosnia and Herzegovina or the Republika Srpska.

Success in the Brcko District could potentially serve as a model for third-party administration of the Abyei region. However, any transitional administration would necessarily have to work with the region's traditional leadership structure and respect the traditional governance roles of the Dinka and the grazing rights of the Misseriya.

3.7 Essential Elements of Third Party Administrations

In reviewing the examples described above, one could observe that international state practice demonstrates that, despite some differences, there are certain elements that are important and essential to transitional administrations. While every state's transitional process is unique, comparative analysis illustrates that third parties generally contain certain elements in transitional administration that increases their chances of success, cooperation, and perceived legitimacy by local elements. Without regard to any potential international involvement in Abyei, these elements reflect best practices in interim administrations, and *any* interim administration in Abyei could provide for these elements.

3.7.a Defined and Limited Mandate: The creation of a definite and limited mandate avoids many problems in transitional administrations. The clear mandate of UNTAES provided for a smooth integration of the regions into Croatia. Similarly in East Timor, UNTAET was responsible for specific areas of administration and were able to complete the transition to independence efficiently within two and a half years while supporting conditions for sustainable self-governance. In contrast, the UN's responsibilities in Iraq for the first year of reconstruction were ambiguous and vague leading to few advances for the state and delaying the transition process. Forming a transitional authority in Abyei with a defined and limited mandate, including a timeline with short term goals and benchmarks and mechanisms to support enhancement of local governance, may ensure effective progress towards the region's self-governing administration and allay fears on all sides of any permanent international presence.

3.7.b Development of Governing Structures: The development of governing structures and the capacity to govern is also included in each of the

studied mandates. Establishing strong foundations of governance, including executive, legislative and judicial processes as necessary, enables the third-party administration to enhance the long-term development for the state and pave the way for a strong governing structure to emerge from within the traditions culture, customary norms and practices of the residents of the area. In addition to political capacity building, the governing structures may also set up election procedures and work to ensure voter safety.

3.7.c Maintenance of Security: Another essential element of third party administration is the establishment and maintenance of security. Iraq's recent experience demonstrates this need. Implementing comprehensive security services and including policing forces to train and build a local professional police force (in addition to military aspects) within the mandate may serve to avoid problems similar to those faced by UNMIK's (Kosovo) professionalization of international police where the absence of language abilities and standardized procedures undermines its efforts. The establishment of the Transitional Police Force in Eastern Slovenia, Baranja and Western Sirmium lead to safe local and regional elections and the return of a significant number of displaced Croats and Serbians. Because Abyei is a flashpoint for the return of refugees and internally displaced persons because it is already experiencing the build-up of armed forces by both CPA parties, and because it is subject to security-sensitive oil fields, it is essential that the parties establish a well-functioning local policing force and other security measures. This also provides a mechanism to demobilize and disarm the area while successfully reintegrating soldiers in professional law enforcement focused on security, peace-building and stability needed for economic development.

3.7.d Assisting with Returnees: Assisting with the rights of returning refugees and internally displaced people to the administered area is another important element. Abyei is a critical juncture area for refugees and internally-displaced persons, and the political impact of returnees on local elections and the 2011 referendum is not underestimated by any of the parties. Incorporating humanitarian assistance and rehabilitation components within the structure of the transitional administration may minimize the likelihood of problems. In addition to security and humanitarian relief for refugees and IDP's, transitional administrations generally implement other critical services including water, housing, roads and medical assistance through the establishment and rehabilitation of hospitals. Providing a mechanism by which the transitional administration works in consultation and with the consent of local leaders to liaison with NGOs and international bodies who can provide essential services such as these is critical.

3.7.e Cooperation with the International Community: Cooperation from the international community may be useful to integrate changes on all aspects of public administrative functions. UNTAET's (East Timor) cooperation with the World Bank for health and economic issues demonstrates inter-organization collaboration that can address specific state needs. Similar to the constructions of roads, schools, hospitals, house and power lines in BiH (Bosnia and Herzegovina), Abyei could work with the international community to benefit from resource sharing. This avenue would also avoid the mistake made by the Coalition Provisional Authority in the first year after the war in Iraq, and, similar to Afghanistan's experience, and lead to increased foreign aid for specific reconstruction projects. Abyei's needs are varied. Any interim administration in Abyei could cooperate with the international community to obtain funding for or directly receive basic and necessary services, including road-building, the provision of wells, housing, hospitals, medical clinics and schools.

3.7.f Participation by Indigenous and Local Populations: Prior international third-party administrations have not limited the indigenous and local populations from participation. UNTAES (Croatia), with an extensive (but clear) mandate, did not perform many of the tasks itself. Instead the territory was administered by the Serbs. The inclusion of indigenous populations and local traditions may increase the likelihood of a successful administration which is respected and seen as legitimate by locals, as demonstrated through the convening of the Loya Jirga in Afghanistan. Furthermore, like the National Consultative Council in East Timor, the creation of a political body integrating local members and third parties may ease the transition leading to the establishment of the administration contemplated by the Abyei Protocol and eventually the 2011 referendum. In a similar fashion, a transitional administration in Abyei may incorporate the Dinka and Misseriya in membership, participation and/or oversight in a way that respects the indigenous rights of the Dinka as affirmed by international law, while also protecting Misseriya interests in the area.

3.7.g Lessons Learned: Within a defined mandate, Abyei's transitional administration could include elements present in other transitional administrations including attention to governing structures, critical services such as security, homes, water, roads, and humanitarian relief for IDP's and refugees. By appropriately representing Dinka and Misseriya interests, Abyei's transitional administration may work towards long term development and capacity building for the Sudanese, while also reducing some local tensions. Working with international organizations could provide guidance through past experiences of implementing

and assisting transitional authorities and may also limit the financial and personnel strain on Abyei's limited resources.

3.8 Potential International Involvement in the Resolution of the Abyei Conflict

The international community continues to play an on-going role in the peaceful resolution of conflict in the Sudan. Since the UN and the Africa Union both presently have peacekeeping missions in Sudan, they may be able to assist the establishment of an administration in Abyei, as well as a number of the other countries heavily involved in the peace process such as the IGAD countries of Britain, US, Italy and Norway.

3.8.a Utilizing the UN Mission in Sudan and the African Union Mission to provide a Third Party Transitional Administration in Abyei: On June 11, 2004, UN Security Council Resolution 1547 established the UN Advance Mission in Sudan (UNAMIS), tasked with providing peace support during the Interim Period following the signing of the Comprehensive Peace Agreement (CPA).¹⁴⁹ The UN Security Council adopted Resolution 1590 on March 24, 2005, which transformed UNAMIS into the UN Mission in Sudan (UNMIS), with a mandate to support the Government of Sudan (GoS) and the Sudan People's Liberation Movement/Army (SPLM/A) in the implementation of the CPA.¹⁵⁰ UNMIS has deployed up to 10,000 military personnel, including 715 civilian police personnel.

Additionally, the specific language of the UNMIS mandate suggests that the security force might foster a resolution to the Abyei conflict. Section (a) paragraph (x) requires UNMIS "to promote guidance and technical assistance to the parties to the Comprehensive Peace Agreement, in cooperation with other international actors, to support the preparations for and conduct of elections and referenda provided for by the Comprehensive Peace Agreement."¹⁵¹ This could logically be applied to include local elections in Abyei under the Protocol as well as the 2011 referendum in Abyei.

Determining the boundary lines of Abyei and establishing the region as a special administrative area are specifically called for by the CPA. Although the Presidency bears the burden of establishing the special administrative status of

¹⁴⁹ See United Nations Mission in Sudan: Background, available at <http://www.unmis.org/english/background.htm>.

¹⁵⁰ See United Nations Mission in Sudan: Background, available at <http://www.unmis.org/english/background.htm>.

¹⁵¹ UN Security Council Resolution 1590 (2005), available at <http://www.unmis.org/english/documents/resolutions/res1590.pdf>.

Abyei, UNMIS' mandate allows it to facilitate the implementation of the CPA, insofar as it will support the pending elections and referenda in Sudan, including Abyei Area. Since the mandate needs to promote guidance and assistance to the parties, to operate legally and in good faith, UNMIS must collaborate with a government organ. However, it is unlikely that UNMIS would go around the GNU and work separately with Southern Kordofan or Bahr el Ghazal.

In addition to UNMIS, the African Union has also deployed a Mission in Sudan (AMIS) to monitor the ceasefire and assist with peacekeeping. The African Union established AMIS in July 2004, with 150 troops. The strength of the peacekeeping force was soon expanded to 600, and by April 2005, the force had reached its current strength of nearly 7,000 troops.¹⁵² While AMIS has encountered hostility from opposition forces, the GoS is more receptive to African Union forces than UN forces. In August 2006 the GoS¹⁵³ rejected a UN Security Council resolution that would have authorized 22,500 troops to be deployed to Sudan.

The primary role of AMIS is to provide humanitarian support and monitor compliance with the ceasefire, as well as promote the return of internally displaced persons and refugees to their homes. The citizens and residents of Abyei and returnees passing through Abyei are lacking the provision of necessary services, including humanitarian support. Thus, under its current mandate, UNMIS may provide humanitarian support and necessary services, so long as they “promote the return of internally displaced persons and refugees.” Creating administrative services in Abyei, including the provision of water, food depots, basic housing and basic education, certainly promotes the return of refugees and internally displaced persons.

Although this narrow mandate does not necessarily indicate that AMIS has an express role in fostering a resolution to the Abyei conflict, the African Union and the GoS may broker an expansion or reasonable interpretation of the mandate to include these additional functions.¹⁵⁴ If done properly, such a temporary solution may be politically tenable if it allows the National Congress Party and GoS to avoid criticism from their constituencies. .

¹⁵² See “The situation in the Darfur region of the Sudan,” *African Union*, December 2004-October 2005; see also Henri Boshoff, “The African Union Mission in Sudan: Technical and operational dimensions,” *Institute for Security Studies* (2005).

¹⁵³ More specifically defined as the NCP component of the GNU.

¹⁵⁴ AMIS Mandate, available at <http://hrw.org/reports/2006/sudan0106/annex1.pdf>.

The establishment of a third party transitional administration in the Abyei Area may address the lack of the mandated government administration in Abyei. This transitional administration could also limit the strain on Abyei's limited resources and provide guidance through past experiences of implementing and assisting transitional authorities.

3.8.b Challenges to a Third Party Transitional Administration: In Sudan, UNMIS's mandate and mission is frustrated by the GoS's lack of trust in the UN and reluctance to have the international community playing a large role in peace negotiations.¹⁵⁵ The government has gone as far as calling the UN a "colonizing force," and has, in the past, rejected UN resolutions to increase the troop size and presence throughout the Sudan.¹⁵⁶ Among these, fear has been expression that UN forces will be used to arrest government officials for trials at the Hague for crimes against humanity. However, new, tentative agreements between the international community and the GoS to boost troop numbers in the Sudan and in particular Darfur suggest that the UN might be positioned to play a more significant role in fostering peace and security throughout the region. As of July, 2007, Khartoum has accepted a joint United Nations-African Union peacekeeping force consisting of 20,000 troops and police to bolster the existing African Union force of 7,000 in Darfur. The renewed acceptance of the GoS to an international presence in the Sudan is promising. Previously, the GoS has only been receptive to the UN forces providing technical support to the African Union forces already deployed in the region.¹⁵⁷

There are additional challenges to formulating a larger international role in peace negotiations and the resolution of the Abyei conflict. For instance, the parties and the international community thought that the parties would accept the findings of the ABC because a number of impartial, international experts were involved. The ABC convened in 2005 to demarcate a border in Abyei in light of historical and conflicting claims over the land.¹⁵⁸ Despite intense study,

¹⁵⁵ See e.g. Opheera McDoom, "UN's Egeland blocked in Darfur by government," *Reuters AlertNet* (Nov. 17, 2006), available at <http://www.alertnet.org/thenews/newsdesk/L17168573.htm>; see also Jonathan Steele, "Sudan expels UN official for blog revealing Darfur military defeats," *The Guardian* (Oct. 23, 2006) available at <http://www.guardian.co.uk/frontpage/story/0,,1929130,00.html>.

¹⁵⁶ See e.g. Opheera McDoom, "UN's Egeland blocked in Darfur by government," *Reuters AlertNet* (Nov. 17, 2006), available at <http://www.alertnet.org/thenews/newsdesk/L17168573.htm>; see also Jonathan Steele, "Sudan expels UN official for blog revealing Darfur military defeats," *The Guardian* (Oct. 23, 2006) available at <http://www.guardian.co.uk/frontpage/story/0,,1929130,00.html>.

¹⁵⁷ Agence France-Presse, "Sudan denies agreeing to mixed force in Darfur," *Sudan Tribune* (Nov. 18, 2006) available at <http://www.sudantribune.com/spip.php?article18759>.

¹⁵⁸ See Dorina Bekoe, RESOLVING THE BOUNDARY DISPUTE IN SUDAN'S ABYEI REGION, United States Institute for Peace (Oct. 2005) available at http://www.usip.org/pubs/usipeace_briefings/2005/1026_sudan.html.

negotiation, and the drafting of the final report, the GoS has been reticent to adopt and implement the boundary proposed by the ABC. This has occurred despite the care taken in selecting presumably neutral experts and the prior agreement that the determination of the ABC would be binding on all parties, the report's determination remains without effect.¹⁵⁹

The GoS appears to be more hospitable to an African Union troop presence in the country; however, African Union initiatives to foster peace in the Darfur region have not been entirely successful. In 2004, the GoS, SPLM/A, and the Justice and Equality Movement (JEM) signed an African Union-mediated ceasefire agreement. Within weeks, however, all parties were in breach of the agreement, and the ceasefire negotiations failed to lead to a lasting peace agreement between the opposing parties.¹⁶⁰ Renewed efforts to reach a peace agreement between the parties in 2006 have likewise yielded few results, as violence continues to escalate in the Darfur region and has even spilled into neighboring Chad.¹⁶¹

The Sudanese government's open hostility towards the United Nations and resentment of the international community at large may complicate the role that foreign states and international actors may play in facilitating and supporting a resolution to the conflict over the Abyei Area through the establishment and support of a third party transitional administration. Even so, UNMIS could collaborate with a government institution and assist the establishment of an administration, without violating its mandate. In addition, AMIS and the GoS could broker an expansion of its mandate to assist in the implementation of the administration in the Abyei Area.

Furthermore, because the GoS is more receptive to African Union forces, a transitional administration implemented through both the UN and AU could be most effective. This multi-state approach was highlighted in the Afghan Interim Authority and the Coalition Provisional Authority. The establishment of a unified process for each level of the mission could avoid the problems encountered by UNMIK and NATO led KFOR in Kosovo. Dividing responsibilities between more than one international organization and including key assistance of critical centers

¹⁵⁹ See Dorina Bekoe, RESOLVING THE BOUNDARY DISPUTE IN SUDAN'S ABYEI REGION, United States Institute for Peace (Oct. 2005) available at http://www.usip.org/pubs/usipeace_briefings/2005/1026_sudan.html.

¹⁶⁰ See Human Rights Watch, SUDAN: IMPERATIVES FOR IMMEDIATE CHANGE: THE AFRICAN UNION MISSION IN SUDAN, (Jan. 2006) available at <http://hrw.org/reports/2006/sudan0106/>.

¹⁶¹ See Opheera McDoom, "Darfur rebels say army launches major offensive," *Reuters AlertNet* (Nov. 19, 2006) available at <http://www.alertnet.org/thenews/newsdesk/L19409567.htm>; Opheera McDoom, "Darfur conflict spreads as Annan announces deal," *Reuters AlertNet*, (Nov. 17, 2006) available at <http://www.alertnet.org/thenews/newsdesk/L17104684.htm>.

can also provide greater comfort to the parties in terms of perceiving fears or biases with respect to one or more interested actors. Increased involvement of several of the IGAD countries (Britain, US, Italy and Norway) — even perhaps involvement of one or more countries perceived by Khartoum friends such as China or Russia — can address the issues of distrust and impartiality. In the end, any UN or AU single or joint transitional authority could be limited in duration and scope and focused on providing for basic administrative assistance and necessary services such as the establishment of schools and health clinics, construction of necessary infrastructure, training of police forces, meeting needs of returnees and demobilized soldiers, as well as maintaining previously-mandated peacekeeping functions.

3.8.c Lessons Learned: A third-party transitional administration in Abyei may reduce the impact of the current lack of a mandated government administration and offers stability to the region. Wholesale application of prior examples of such administrations may not be politically tenable. However, with sufficient modifications to address the particularities of the Sudan and Abyei realities, such an administration is potentially viable and can be done within the context of the CPA and the Abyei Protocol or with slight amendment to this framework with consent of the parties. Nonetheless, prior international transitional administrations demonstrate the importance of including certain elements in any interim administration, to increase its chances of success. The Abyei administration could include these necessary elements.

3.9 Utilizing Civil Society to Provide an Administration

The establishment of an administration in the Abyei Area by civil society organizations could also be politically tenable. Presently, some civil society organizations and other actors are providing basic infrastructure and social services. In particular, the Peace and Development Council already provides basic administrative services, on an ad hoc basis. The fact that the peace agreement and constitutions mandate a government administration in Abyei does not preclude civil society from providing necessary services and administration in a manner consistent with the CPA and Abyei Protocol. In fact, the continuing functioning of these civil society organizations would support the other, more formal, solutions to provide an administration in Abyei and perhaps be seen in theory and in fact as less controversial or threatening to the CPA parties' interests in the region.

Until the other solutions are finalized, civil society would be the only provider of these services. However, the continuing functioning of these

organizations is subject to substantial legal and political difficulties. For instance, the Peace and Development Council has funding, but no revenues, and could not provide its services permanently. Moreover, there are limitations to what some international and national organization can do with civil society organizations absent direct agreements, consent or working relationships with recognized governing entities.

Until a formal solution creates an interim administration in Abyei, civil society organizations, domestic nongovernmental organizations and international nongovernmental organizations will continue to service the emergency needs of Abyei residents and returnees passing through Abyei. Accordingly, there is a need for the authorization and coordination for the assistance of civil society. Presently, international actors must get approval from the national government. Because of the multitude of domestic actors and the necessity for approval of international assistance on a local level, an entity whose purpose is to approve the work of donors and coordinate donor assistance will improve the quality of administrative services in Abyei.

If no formal structure is in place to handle donor coordination in Abyei (i.e., the previously discussed Abyei Fund, see section 2.6), an ad-hoc Governing Council of Dinka and Misseriya could be formed to fulfill these functions, respecting Dinka rights to determine their own development in accordance with their own values, traditions, and norms and consent to actions that affect their rights. As well, the Peace and Development Council can fulfill this function with consent and negotiated supervision of the CPA parties. A coordinative entity whose establishment can be agreed upon by the parties with an affirmation that its establishment does not prejudice the rights of the respective parties under the CPA can determine what kind of approval, if any, is necessary before the provision of essential services, and can create an integrated environment in which these donors can work. Improving donor coordination and creating a planned donor framework will increase the efficiency of the provision of necessary administrative services to people in the Abyei Area.

3.9.a Legal Challenges: To the extent these civil society organizations are providing local administration, there may be a challenge that they are acting in contravention of the CPA and the constitutions, which already provide for an administration in Abyei and detail the type and extent of permissible local governance. There may also be complaints that select civil society organizations and international organizations are conducting programs that favor one group or party over another. This has already arisen in Abyei. For these reasons, a

mechanism by which these organizations must consult with relevant stakeholders and rights holders and act transparently could mitigate this threat.

3.9.b Political Challenges: Politically-sensitive organizations and states support these civil society organizations. There is a serious risk that the National Congress Party (NCP) is apprehensive that the Abyei Area will vote to join the South in the 2011 referendum, and possibly take its oil fields. As well, the Misseriya may be uneasy that their traditional grazing rights will be limited or rescinded by civil society organizations comprised of special interest groups, if they are allowed to provide for an administration in Abyei or at least assume certain tasks often carried out by governing institutions. Thus, the NCP or Misseriya may act as spoilers, and either legally challenge the validity of these organizations on the basis that they are engaged in political work or politically challenge the exercise of administrative functions by creating substantial roadblocks. This has already happened in the North with organizations assisting Southern IDPs living in camps in and around Khartoum. The GoSS and Dinka leadership may also challenge an increased role of certain internal organizations that either deliberately or inadvertently appear to be favoring Misseriya interest in land and resources over their own. Addressing these roadblocks could avoid making the environment in Abyei hostile and uncertain.

3.9.c Legal Solutions: There are counterarguments to any legal challenge. For instance, the ICSS stipulates that the objectives of local governance shall be to “encourage the involvement of communities and community-based organizations in the matters of local government, and promote dialogue among them on matters of local interest”¹⁶² As such the increased role of civil society organizations can be seen as consistent with the CPA.

However, it may be more appropriate to create an agreement with the potential spoilers, rather than rely on legal arguments. An agreement could be made which specifies that no party will attempt to sanction any actions of a civil society organization or other private entity that conflicts with the CPA or constitutions. Creative and balanced mechanisms will need to be in place to ensure that determinations as to what conflicts with the CPA and constitutions are not made by one interest group nor are needed programs of civil society organizations held hostage by one interest group. This would allow for the implementation of the needed administration in Abyei without prejudicing rights or arrangements affirmed in the CPA.

¹⁶² ICSS, art. 173(6)(c).

3.9.d Political Solutions to the Problem of Spoilers: The parties could establish an explicit agreement that calms potential critics and permits space for further implementation of the Abyei Protocol. For instance, the parties could create agreements to limit or condition the activities and authorities of civil society organizations. The necessary parties could agree that in exchange for a promise of no interference, the civil society organizations will limit their activities to only the administrative work necessary to provide critical services related to infrastructure development, water, health and basic needs. As well, the parties could agree to preserve the grazing rights of the Misseriya while not prejudicing the right of the Ngok Dinka to their ancestral lands. Given the controversy that surrounded the development and adoption of the Organization of Humanitarian and Voluntary Work Act 2006 (NGO Law), great creativity would need to be brought to the elaboration of such agreements to guarantee that the rights of Sudanese citizens are protected in these agreements and not limited.

Another method to limit the influence of spoilers is for civil society organizations to forge partnerships with the international community. Achieving the support of influential international organizations prevents or creates a higher cost for spoilers to act against the interests of the civil society organizations.

3.9.e Funding Solutions: If the civil society organizations can provide necessary services and an ad-hoc, yet limited administration, it will need sustainable funding sources. The Constitutions and the CPA provide funding for the Abyei Area. If the parties can agree, the civil society organizations that provide the administration can utilize the same funding resources. The civil society organizations probably would need to operate together through a framework agreement, so that only one organization or a few appointed representatives may draw down the funds. The CPA parties can approve such a framework agreement. It may even be expanded to address other actors in the area (including oil companies) to ensure that their activities are also not prejudicing the rights arrangements of the respective parties and residents of Abyei- Dinka and Misseriya included.

This solution is practicable if the NCP or GoS is resistant to being forced to provide an administration through political influence or legal challenges. In this case, the NCP or GoS will not affirmatively have to act, but merely will have to abstain from preventing the civil society organizations from providing necessary services. Thus, the NCP or GoS can provide for the necessary services of the Abyei Area without having to overcome great political obstacles. Nonetheless, the

provision of administrative services by civil society organizations is not an adequate substitute for a valid government administration, which should be instituted as soon as possible.

3.10 *Calming Spoilers by Preserving Traditional Land and Grazing Rights*

There is resistance to instituting the required administration in Abyei. As discussed, there are various legal and practical solutions that can overcome the failure of implementing the Abyei administration. However, as mentioned above, these solutions are subject to the possibility that spoilers will prevent their success.

One of the key issues regarding the boundary dispute is that the Misseriya fear that the boundary will infringe on their traditional grazing rights to certain areas. The Northern elements wishing to influence the outcome of the 2011 referendum and the eventual North or South ownership of the natural resources (particularly oil) exploit these fears to their benefit. The Misseriya will dispute any administration that does not affirm the CPA and Abyei Protocol's respect for these grazing rights. Indeed, Douglas Johnson, an expert on the Abyei Boundary Commission declared that:

from the point of view of imposing a new political boundary in that area, it is naturally going to cause concern for people who are going to be on the other side of the boundary. And if they feel that that boundary is a prelude to withdrawing their access and their right to use, they naturally are going to resist it.¹⁶³

Section 1.1.3 of Abyei Protocol legally preserves the rights of nomadic tribes, any proposed solution once again could affirm this provision and ensure the continuation of these rights.¹⁶⁴ The Misseriya communities could receive assurances that their grazing rights will be guaranteed irrespective of the definition of the border and the outcome of the referendum.¹⁶⁵ Public or more formal reminders of the content of the ICSS can also be made. Article 180(5) of the ICSS already declares respect for “[c]ustomary seasonal access rights to land....” Consideration can even be given to ensuring that their portion of the oil revenues will continue to be received regardless of the outcome. There are a number of

¹⁶³ See “Interview with Douglas Johnson, expert on the Abyei Boundary Commission,” available at <http://www.irinnews.org/report.asp?ReportID=53574>.

¹⁶⁴ CPA, ch. IV, art. 1.1.3, providing that “[t]he Misseriya and other nomadic peoples retain their traditional rights to graze cattle and move across the territory of Abyei.”

¹⁶⁵ See Crisis Group Report, Sudan's Comprehensive Peace Agreement: The Long Road Ahead (Mar. 31, 2006) available at <http://www.crisisgroup.org/home/index.cfm?l=1&id=4055>.

ways this can be done without either party conceding that the distribution arises from a right of ownership. The experts noted in the ABC Report that they wanted to “stress that the boundary that is defined and demarcated will not be a barrier to the interaction between the Misseriya and the Ngok Dinka communities.”¹⁶⁶ They also noted that they would like the Presidency to take measures to ensure that this feature of the report is widely disseminated to avoid hostility to the boundary report unnecessarily.¹⁶⁷

Communication and participation at the local level and at the outset could allay fears that the administering authority will infringe traditional rights of the Misseriya or Ngok Dinka for that matter. Any solution to create a formal or informal administration in Abyei must factor in Misseriya and Dinka participation. As well, ceremonial assurances that all actors will respect the defined traditional land and grazing rights, and if necessary, declarations of the interim nature of that administration (even if informal) could mitigate mistrust between the administering authority and the Misseriya and Ngok Dinka. A formal, written agreement between the administering authority in Abyei and the Misseriya and Ngok Dinka may prevent any spoilers from disturbing the provision of services in Abyei.

3.11 Calming Spoilers by Providing a Natural Resource Sharing Framework

There is resistance to instituting the required administration in Abyei as all parties believe that depending on the nature, mandate, and composition of this administration, its actions, successes, and failures can influence the final determination of Sudan’s north-south border, the outcome of the 2011 referendum and ultimately who takes ownership of the oil in Abyei. Some believe that the political delays around Abyei can be resolved if the root cause of the problem can be addressed. In this case, the root cause is considered oil ownership post-referendum 2011. The question is how can each sovereign— the Government of Sudan and the newly formed Government of Southern Sudan (regardless of the outcome in 2011) can live as peaceful neighbors where dispute over a North-South border and the oil with it keeps the two as adversaries.

One option for the two is to establish a national resource-sharing framework that can be either permanent — each one retaining their claim of ownership — or temporary. Under the latter option, through a resource agreement, the revenues can be divided in a way that does not decide the issue of ownership but clearly

¹⁶⁶ Abyei Boundary Commission Report, Summary of Experts Report and Decision.

¹⁶⁷ Abyei Boundary Commission Report, Summary of Experts Report and Decision.

provides proportional shares. It could also be agreed that the lion's share of the revenues go to some kind of local development council in Abyei that enjoys support and perhaps some participation of the CPA parties and is tasked with providing, without prejudice, development and services for all the residents of the area to the north and the south. This would further affirm the area's historical role as a gateway between the north and south. It could also be decided that the resource sharing is temporary and establish a timeline and set of duties and obligations leading to final status negotiations.

One solution that international experts and members of the Abyei Border Commission (ABC), have proposed is the negotiation of a separate oil sharing agreement between the North and the South where oil revenue could be shared for 8 to 10 years between Juba and Khartoum, if the 2011 referendum results in the independence of the South.¹⁶⁸ Douglas Johnson, an expert on the ABC noted two major concerns present in the Commission's work — if the Commission had accepted the GoS's claim regarding boundaries, there would have been no oil revenue to share with the South — and if the boundary defines Abyei in another way that includes the oil, and Abyei subsequently joins the South in a referendum, the oil would become part of the South completely.¹⁶⁹

A natural resource sharing framework with appropriate mechanisms for joint supervision and full transparency in production rates and revenue disbursement would alleviate the North's fears that Abyei would join the South immediately and annex the oil reserves and revenues derived from them. If the National Government had a natural resource sharing framework in place with the Government of Southern Sudan, then the determination of the Abyei boundaries and the North-South boundary would be less politically charged. A temporary agreement that preserves an independent South's right to ownership of the resources while still providing a stream of revenue to the North could be beneficial to all parties. This temporary arrangement may also buy sufficient time for Khartoum to finalize oil exploration in other areas in the North. As well, once Abyei's boundaries are fixed and final, then the required administration in Abyei should be less difficult to implement. Overall, an agreement to share natural resources would create an environment that is conducive to implementing the administration in the Abyei Area.

¹⁶⁸ See Crisis Group Report, Sudan's Comprehensive Peace Agreement: The Long Road Ahead (Mar. 31, 2006) (proposing various solutions for compromise) *available at* <http://www.crisisgroup.org/home/index.cfm?l=1&id=4055>.

¹⁶⁹ See "Interview with Douglas Johnson, expert on the Abyei Boundary Commission," *available at* <http://www.irinnews.org/report.asp?ReportID=53574>.

3.11.a Current Constitutional Provisions: Implementation of the CPA's wealth sharing provisions thus far has not yet been fully accomplished despite the fact that the CPA establishes a National Petroleum Commission and despite the fact that the parties reached a final agreement on outstanding issues relating to the National Petroleum Commission in November of 2006.

According to the CPA, 48% of oil revenues from Southern Sudan are allocated to the GoSS, 2% of revenues to the producing state, and 50% to the national government. Additionally, the parties agreed to staff the commission with equal numbers of permanent members from the national government and the GoSS, as well as up to three non-permanent members from the oil producing state or region in which development is being considered. The CPA also allows the GoSS to access all current contracts and calls for all revenues to be held in public accounts as an accountability measure. Implementing these provisions is critical to making unity attractive, and unsatisfactory implementation continues to distress the GoSS and the international community.

However, boundary disputes remain one of the major factors that continue to stall the full implementation of these provisions. The Abyei Boundaries Commission presented its final report in July 2005, yet the national government has not recognized its findings or implemented needed provisions. This standstill is mainly due to disputes over the Heglig field, the Melut Basin, and the Abyei Area, which currently produce at least 37% of Sudan's oil.¹⁷⁰ Oil projections for countries at an early stage of development of a natural resource like oil tend to be conservative, due to a vast number of uncertainties at this stage.¹⁷¹ The potential for these fields to possess much greater production capacity further frustrates boundary negotiations between the GoSS and the national government.

3.11.b Post-Referendum Alternatives: In light of the possibility that Southern Sudan may vote for independence from Sudan in 2011, division of the Abyei oil fields will be a continuing contentious issue. Joint Development Zones and cross-border unitizations are two possible methods for oil management in the region if the South chooses independence.

¹⁷⁰ David Goldwyn, CSIS: AFRICA POLICY FORUM, SUDAN: IMPLEMENTING THE WEALTH-SHARING PROVISIONS OF THE CPA IS VITAL, *available at* <http://forums.csis.org/africa/?p=10>.

¹⁷¹ INTERNATIONAL MONETARY FUND, GUIDE ON REVENUE RESOURCE TRANSPARENCY, *available at* <http://www.imf.org/external/pubs/ft/grrt/eng/060705.htm>.

3.11.c Joint Development Zones: Joint Development Zones (JDZs) have become a common tool for states to use when encountering boundary disputes, especially when a profitable natural resource is involved.¹⁷² JDZs involve an attitude of cooperation between states to develop and share resources within a defined zone, within which both states claim rights.¹⁷³ Although JDZs are commonly located off-shore, they may also be implemented on land. Although neither state in a bi-lateral JDZ is able to exercise full rights over the designated area, JDZs do allow both states to collect the benefits of exploitation of the natural resource sooner rather than later.

JDZs are international agreements typically between two states, and governed by international law, specifically the Vienna Convention on the Law of Treaties. Implementing a JDZ will involve compromises on a variety of issues. These may include defining the geographical definition of the zone, the division of profits and costs, the duration of the agreement, health and safety issues the laws applicable to the zone, and several others.

One of the central elements the participating states may need to decide is the management structure of the JDZ. The structure will determine what oversight body is empowered to authorize development activity, including the terms of exploration and exploitation. Based on state practice, there are generally three categories for management structures: a single state structure; a two state or joint state structure; and a joint authority structure.¹⁷⁴

3.11.c (i) Single State Structure:

In a single state structure, the states agree that only one of them is responsible for managing the development of the zone. The managing state will generally administer the zone according to its own regulations and laws, for example in the collection of revenue. The revenue will then be distributed according to the agreed upon proportions. This structure is favored for its simplicity and is often used when a degree of trust exists between the non-

¹⁷² See David M. Ong, *Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice of Customary International Law?*, 93 Am. J. Int'l L. 771 (1999).

¹⁷³ In the case of Sudan, the JDZ model could still apply if independence is not chosen in 2011 and the southern region does not become a "state." The JDZ model can apply to two governments within a state — one being the national government and one being a government or a relatively autonomous region such as the GoSS.

¹⁷⁴ David Lerer, KENDALL FREEMAN, JOINT DEVELOPMENT ZONES: HOW TO NEGOTIATE AND STRUCTURE A JOINT DEVELOPMENT AGREEMENT, *available at* <http://www.kendallfreeman.com/kf-pdf/how%20to%20negotiate%20and%20structure%20a%20joint%20development%20agreement%20%20-%20Sept%202003%20-%20Kendall%20Freeman%20article.pdf>.

managing and managing states. Given the history of distrust between the North and South, a single state structure may not be possible.

3.11.c (ii) Two State / Joint Venture Structure:

In the joint venture model, each state nominates concessionaires to develop a part of the zone on their behalf. States then are responsible for their concessionaires to enter into a joint operating agreement with one another. Concessionaires divide the oil retrieved by the joint venture in the established shares, as per the agreement between the states. The shares are generally subject to financial laws and regulations of the concession agreements as opposed to the laws of a single state.

The main issue encountered with joint venture models is determining the laws and regulations that apply to the zone. South Korea and Japan faced this problem in 1974 and decided that the law in each share would be the law of the state who chose the concessionaire working in that share. Other options may be to develop an independent body of law to apply just to that zone or choose one of the state's laws to apply throughout the zone.

3.11.c (iii) Joint Authority Structure:

States implementing a joint authority structure choose to delegate the power of management and administration of the zone to a single body referred to as the joint authority. The more successful joint authorities have clearly delineated functions and are empowered with the authority to carry out those functions. Some states have chosen to give joint authorities a legal personality, whereby it may initiate legal action for enforcement or remedial measures. The role of the joint authority may vary, as well as the ability of the states to influence or supervise the authority. These issues may all be negotiated when defining the functions and powers of the joint authority.

In 2001, Nigeria and Sao Tome and Principe (STP) established a joint venture structure to develop the petroleum between their two states. The Treaty¹⁷⁵ establishing their JDZ also creates a Council of Ministers to ensure that representatives of both states have overall responsibility of decisions made in the

¹⁷⁵ Treaty between the Federal Republic of Nigeria and the Democratic Republic of Sao Tome and Principe on the Joint Development of Petroleum and other Resources, in respect of Areas of the Exclusive Economic Zone of the Two States, Feb. 21, 2001, *available at* <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/STP-NGA2001.PDF>.

JDZ. The Council of Ministers has the ultimate power to veto or approve any of the joint authority's decisions and regulations. This Treaty therefore relegates the joint authority to a more administrative role. In Sudan, the challenge would be to ensure that such an authority was established in such a way as to avoid the problems and delays that have plagued entities such as the National Petroleum Commission. Depending on the political context, states could also agree to joint control structures in the short term as part of a broader agreement or to move the process forward incrementally. A short term JDZ between the GoSS and the national government may be particularly appropriate for Sudan post-2011 referendum.

3.11.d *Cross-border unitization*

Unitization involves the pooling of multiple wells to produce from a single reservoir. This generally is used to apply only to a single oil field that crosses national borders. The two party states¹⁷⁶ may collaborate on issues relating to the development and exploitation of the zone, but each maintains certain sovereign rights of their territory.¹⁷⁷

The licensees granted by the state or states develop a single development plan and a unit operating agreement. Each licensee has a share of production, or a proportionate share, of the oil field. The amount of production and the costs each licensee incurs is based on their proportionate share.¹⁷⁸

Australia and the Democratic Republic of Timor-Leste entered into a unitization agreement regarding the Sunrise and Troubadour Fields.¹⁷⁹ These states already had initiated a joint development zone, but the very profitable Sunrise field only lies 20 percent in the treaty area and 80 percent in Australian waters. The states negotiated a unitization agreement for the Greater Sunrise oil fields, which includes provisions on how tax revenue will be divided as the sections of the field are developed. In signing the agreement, both sides still maintained their

¹⁷⁶ Again this model can also be loosely applied between a state and government of an autonomous region such as GoSS in the event of a 2011 outcome disfavoring full independence.

¹⁷⁷ Alan Perry and David Lerer, KENDALL FREEMAN, JOINT DEVELOPMENT ZONES AND CROSS-BORDER UNITIZATIONS: LIVING WITH IMPERFECTION, *available at* <http://www.kendallfreeman.com/kf-pdf/Joint%20Development%20Zones%20and%20Cross%20Border%20Unitisations%20Nov%202003%20-%20Kendall%20Freeman%20Article.pdf>.

¹⁷⁸ Jacqueline Lang Weaver and David F. Asmus, *Unitizing Oil and Gas Fields Around the World: A Comparative Analysis of National Laws and Private Contracts*, 28 Hous. J. Int'l L. 3 (2006).

¹⁷⁹ Agreement between the Government of the Democratic Republic of Timor-Leste and the Government of Australia relating to the Unitisation of the Sunrise and Troubadour Fields, March 6, 2003, *available at* <http://www.timorseaoffice.gov.tp/uaa.htm>.

conflicting positions on a permanent maritime boundary.¹⁸⁰ The agreement therefore is a temporary revenue sharing agreement to develop the petroleum deposits as a unit for beneficial legal, fiscal, and administrative purposes. Once a permanent maritime boundary is established, the unitization agreement will expire.

Conclusion

The Abyei Area is a highly contested region in the Sudan, and the Government of Sudan and the Government of Southern Sudan do not agree on the boundary lines of this region. The Interim National Constitution (INC), the Interim Constitution of Southern Sudan (ICSS), the Comprehensive Peace Agreement (CPA), which includes the Abyei Protocol on the Resolution of the Abyei Conflict (Abyei Protocol), each address the issue of Abyei Area, and call for the National Government to establish an interim special administration. In a 2011 referendum, the people of Abyei shall determine whether the region will remain a special administrative state of the North, or transfer to the South.

Despite the clear requirements of the INC, ICSS, CPA, and the Abyei Protocol, the Abyei area's special administrative status has not yet been established by the Presidency. Consequently, necessary reconstruction and development of the region has stagnated, and the area cannot meet the critical needs of the returning refugees and IDPs.

The CPA and the Abyei Protocol recognize the special sensitivity of Abyei Area. The implementation of the required provisions will facilitate the peace process in the Sudan by supporting both the Southern Sudan and Abyei Area referendum process. Failure to guarantee the security and safety of the Abyei region could otherwise threaten future peace.

Both practical and constitutional solutions will assist the establishment of the administration in the Abyei Area. In the first instance, it is the duty of the Presidency to establish and appoint the interim administration of Abyei Area. However, the National Legislature and the Southern Sudan Legislative Assembly each maintain oversight capabilities that may be used to influence the presidential fulfillment of these obligations. As well, since all levels of governments have the duty to provide services and administration in conflict affected areas, the Government of Southern Sudan or the government of the state of Bahr el Ghazal

¹⁸⁰ See TIMOR SEA OFFICE FACT SHEET: THE GREATER SUNRISE FIELDS, *available at* <http://www.timorseaoffice.gov.tp/iuafacts.htm>.

and Western Kordofan may also provide interim services and an interim administration in the Abyei Area. Civil society organizations, the United Nations Mission in Sudan (UNMIS), the African Union Mission in Sudan (AMIS), or other international organizations may also occupy certain roles which can provide practical solutions to the failure to implement an administration. The respect for Dinka rights to manage and control their land and resources as well as the preservation of Misseriya interests in grazing rights must be factored into any solution. A natural resource sharing framework agreement also could prevent any spoilers from negatively impacting these solutions.

It is important to note that these solutions are not mutually exclusive, but rather some can be pursued at the same time. For instance, while civil society organizations could increase the provision of necessary services, the National Assembly could issue a resolution that formally accepts their work and mandates their continuing assistance, by providing them a budget. Conversely, should the NCP no longer dominate the National Assembly, that body might be able to pass resolutions expressing disagreement with the Presidency's failure to appoint members of the councils while UNMIS or AMIS could begin negotiating partnerships with government agencies, to provide for necessary services in Abyei. Any combination of solutions could pressure the Government of Sudan to implement the administration in Abyei. In addition, with any of the alternatives suggested above, increased support for community-based dialogue and local dispute resolution efforts between the Dinka and Misseriya can be pursued.

As well, certain solutions allow the national government, particularly the National Congress Party, a way to provide an administration in Abyei without any political fallout with their constituencies as might occur with other solutions. The enlargement of the spheres of activity of UNMIS and AMIS and the expansion and formalizing of the activities of civil society organizations are politically feasible without creating great political costs to the ruling party.

Inevitably, administration must be brought to Abyei. The notable absence of governance there has too many implications. While state practices in other countries can inform these solutions, a final framework must consider the particularities of Sudan and the interest of ensuring a stable and peaceful future for all Sudanese and for the region.

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