



**Search For Transitional Justice In Darfur: The Role of the Traditional  
Mechanisms**

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## ABSTRACT

The ethnic identity that used by the government of Sudan to stoke the conflict, by recruiting local Arab militia (Janjaweed), to fight non-Arab rebel groups created serious ethnic tensions between communities in Darfur and destroyed the social fabric.

Issues related to the criminal justice and other elements of transitional justice still not properly addressed. The formal justice system in Sudan proved to be unable to handle crimes with an international nature. The need for traditional justice mechanisms that could effectively address the root causes of the conflicts, heal the ethnic tensions and ensure safely co-existence and sustainable peace, in fact, become highly needed in Darfur context.

This thesis examines the complementarily role of the traditional justice mechanisms in the context of Darfur conflict.

The study demonstrate that Darfur Traditional Justice mechanism is vital element in justice and reconciliation and has essential role to play in some emerging issues impacted from the conflict such as land tenure, reparation, peace and reconciliation.

*Key words and concepts*

*Traditional justice, Native Administrations, Retributive justice, Restorative justice, IDPs, Refugee, Mediation, Reconciliation, Effective remedy for victims, Escape from Justice, Peace building.*

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## CHAPTER 1 INTRODUCTION

It was ten years since the two Darfur rebel factions, Sudan Liberation Movement Army (SLM) and Justice and Equality Movement (JEM) emerged to fight the government of Sudan (GoS), claiming that Darfur region is totally marginalized and demand better political presentation in Khartoum and equitable share of the national wealth and power. Subsequent to that; Sudan government and its proxy force, the Arab militia who are known locally as the Janjaweed, responded to the rebellion with such systematic and large-scale destruction of people's infrastructures and villages as well as occupation of land plots that are used by civilians for either cultivation or grazing. It has been estimated that more than 300,000 people were killed and 2.5 million displaced to IDPs and refugee camps since the eruption of conflict.

Serious human rights violations have been committed against civilian which included but not limited to killing, rape, torture, recruiting of child soldiers, destroying and burning of homes and property, etc. In response, the UN Security Council declared that situation in Darfur constitutes serious threat to International peace and security, and then referred the case to the International Criminal Court (ICC) in 2005. Following the ICC investigation four arrest warrants and three summonses to appear, two of these arrest warrants were for President Omar al-Bashir for war crimes, crimes against humanity and genocide. All remain at large.

It is worth mentioning that immediately after the ICC Prosecutor of the International Criminal Court (ICC) announced the opening investigations into the events in Darfur in 2005, the government of Sudan established Special Criminal Court for events in Darfur (SCCED), to demonstrate the government ability to handle prosecutions domestically. To date nothing significant achieved to bring perpetrators in to justice. According to the Human Rights Watch Report, there is no genuine willingness of the part of Sudanese authorities to ensure that the perpetrators who committed series of atrocities in Darfur are brought before the SCCED for prosecution.

In addition, there is no evidence that SCCED has the capacity to try these cases effectively even if appropriate cases are brought before it.

Presently, the actual situation in the region is difficultly to be ascertained. Although there has been a diminishment of hostilities, there is certainly no presence of and signs of peace, given the fact that several peace agreements have been signed between the government of Sudan and different factions of rebel groups but unfortunately nothing have been physically achieved on the ground.

This in turn raises serious questions concerning how peace may be actualized and what measures can be undertaken towards the perpetrators of the violence so that the communities can one day live together in coexistence and norm. This takes us to the root causes of the conflict in Darfur, in addition to the political marginalization that the region had gone through for a long while; part of the causes involves ethnic inter-tribal aspect. The ethnic identity of the inter-tribal conflict in Darfur had been dramatically increasing since the year 1980 when drought intensified the competition between Arab tribes who are mainly pastoralists and African tribes who are farmers for scare land and water resources. The tribal identity of the conflict has been used by the government as means to stoke the recent conflict, by motivating and recruiting Arab tribe's militia (Janjweed), to fight against rebels who are the majority of African tribes. The tribal identity that used by the government in Darfur conflict not only resulted in mass atrocities , but also divided and caused defragmentation for the society and created ethnic tension between people in Darfur. Hence, in such situation the literature and experiences show that justice alone could not stand as guarantee to put an end to the atrocities and ensure that it will not happen again in the same communities who are sharing the same land.

In Darfur the situation even more complicated, because the cross marriage between tribes is wide spread, as you may find relative relationships between the perpetrators and victims.

Saying that doesn't mean not to punish those who committed crimes and provide effective remedy to the victims, but rather try to find answers to the difficult questions

concerning justice and reconciliation, what kind of justice we need and how often we can ensure sustainable peace between parties that have lived in positive relationships for a long time. Theoretically, there are two forms of justice, retributive and restorative justice. The first one (retributive justice) is more of focus on the punishment of the perpetrators therefore it is very specific in terms of defining crimes and their punishments, while the restorative justice as has been described by Howard Zehr, Professor of sociology and restorative justice at Eastern Mennonite University's conflict Transformation Program: "In restorative justice, the fundamental questions are entirely different and focus on the restoration of relationship as well as individual and social healing. He adds, the first question is who has been hurt? Once established, the next consideration is what are the needs of victims, offenders, and communities? The last consideration is what are their obligations and who are they? Under such guidelines the aim of justice is to meet the needs and promote recovery of victims, the community, offenders and the relation between them".

In Sudan the retributive justice mainly refers to as the formal justice while the restorative justice known as informal justice or Traditional Justice system that is used by native administration.

With no doubt that in the case of Darfur; the retributive justice is important for the punishment of those who are involved in war crimes and crimes against humanity, but also there is need to expand the justice pot to include restorative mechanism that will give the chance to grass root local justice system to participate and assist in the process of justice and reconciliation. Actually, Darfur has a prolonged history of locally-administered justice, with curtail and characteristic tribal leaders playing a key role in maintaining security and good relations reform within and between different tribes. As it has been pointed out by Ms. Amna Haroun, an expert on Traditional Justice: "Traditional Justice can play a very important role in reconciliation and mending social fabrics because local leaders are embraced and accepted by their communities" One of the important mechanisms of the Traditional justice is also called Jaudia system which is administered by the local leaders who resolve community disputes through dialogues, negotiations and mediation by applying customary law.



This thesis examines the topic that has received a little attention to the date, the role of the Traditional Justice in Darfur case. It focuses on the Jaudia system as a tool of justice and reconciliation. The study argues that Traditional Justice is the safety valve to the reconciliation and sustainable peace.

However, I agree with the argument made by some professionals stating that traditional justice has been weakened by the government political intervention and lost some of its operational aspects, but I disagree with those who claim that Traditional Justice have nothing to offer. I argue that instead of questioning whether or not the Traditional Justice is suitable for Darfur situations, we can ask the question in different way as what can the Traditional Justice offer in Darfur Situations.

#### *Thesis Question*

Based on the above, the main question that guides this thesis is:

**How the Jaudia System Can contribute into Justice and Reconciliation in Darfur Case?**

#### *Working Questions*

The following sub-questions become relevant in answering our main question, and will be addressed through the different chapters of the thesis:

- How does Rwanda Gacaca courts experience be applied to the case of Darfur by using Jaudia system?
- How best we can mix between the formal justice and traditional justice in our search to achieve justice and reconciliations in Darfur?
- How best the Traditional leaders could effectively contribute to the peace agreements and play essential role in mobilizing their communities to participate in peace and reconciliation process?

## 2. METHODOLOGY AND STRUCTURE OF THE THESIS

### *Thesis Methodology*

This study is mainly employs a qualitative method approach. "Qualitative research methods provide more emphasis on interpretation and providing consumers with complete views, looking at contexts, environmental immersions and depth understanding of concepts." (Tweksbur, 2009:39) Tweksbur also states that this approach consolidates the value of how researchers understand experience and operate within a dynamic and social environment in their foundation and structure.

On the base of using qualitative methods to collect the necessary data, both primary and secondary data have been collected. First, secondary data used has been critically evaluated considering relevant literature in the same area, database and internet sources. Concerning the literature, our approach based on the fact that TJ (Transitional Justice) elements are cross cutting issues, hence, in order to understand the central notion and construct theoretical framework, first the topic has been tackled within a broader context of TJ relevant literature, then it is narrowed on the direction of giving more focus and analysis to the chosen case, which in this study "Darfur" case.

Second, primary data is collected by semi-structured qualitative interviews with traditional leaders, academic, humanitarian workers and legal professionals. Actually, the advantage of the semi-structured interview is based on its flexible process that enables the interviewee to respond freely in his/her own words and the role of the interviewer will remain as a guider (Bryman, 2004).

Study interviews' questions were mainly shaped to suite the particular role or position of the interviewee. Overall, fourteen interviews have conducted. Each interview in length takes approximately between fifteen minutes to half of an hour. All interviews carried out either through phone calls or Skype. All interviews were conducted with full informed consent of the interviewees. In addition to the opportunity of checking their interview transcript, all interviewees have been consulted whether or not to identify them by name in the study.

It is worth mentioning here that there are some limitations of this study such as not being able to conduct interviews with the Internally Displaced persons (IDPs), which is attributed to our inability to travel to Darfur and Sudan, considering also the time factor as well. In addition, phone call interviews are not suitable means to use when interviewing IDPs, because it is believed that it is important to have sort of active interaction with them.

### *Thesis Structure*

This study is divided into seven chapters including introduction and conclusion. The introduction highlights the research background, the objective of the study, thesis argument, summarizes the structure of the thesis and introduces main and sup relevant work questions.

The second chapter provides a review of the theoretical framework to the transitional justice. The subchapters divide the theoretical framework into four sections which include: the concept of the transitional justice, the interplay between displacement and transitional justice, summary of the Security Council report on rule of law and transitional justice in conflict and post conflict situation and the notion of the restorative and retributive justice.

The third chapter addresses Darfur conflict by providing background information about the conflict and analyzing the root causes that contributed into its eruption. Then two sections will follow outline consequences of the conflict by addressing nature of the crimes committed and measures that have been taken by the ICC ().

The fourth chapter provides an idea about the criminal justice system within Sudan formal laws. The chapter divided into four sections: the first section examines Sudan criminal act 1991 versus crimes that come under the ICC jurisdiction. The second and third sections discuss the legal capacity of the special criminal court for events in Darfur (SCCED), which was established by the government to handle crimes that committed in the context of Darfur conflict. The last section provides some recommendation for the reformation of the criminal justice system in Sudan.

The fifth chapter addresses peace initiatives that have been taken to stop and tackle the consequences of Darfur conflict by examining two main documents which are Darfur peace agreement in Abuja and the latest Doha peace agreement. This chapter mainly focuses on the participation of the traditional leaders in the peace process and the inclusion of the traditional justice mechanism within the peace agreement texts.

The sixth chapter focuses on the traditional justice system in Darfur. The first three sections provide an idea about the Native Administration in Sudan and how it has been affected by the war. Five sections have been devoted to examine the Jaudia traditional system. The first two sections define the concept of the jaudia and Ajaweed (mediators). Then the following sections present the Jaudia system process, mechanisms to enforce and implement its resolutions and the strength and the weakness of the system. The last three sections of this chapter include: a case study on Gacaca traditional courts in Rwanda, a short comparative study between the two systems, Jaudia and Gacaca and then conclude with a summary of interviews that have been conducted with traditional leaders, academic and law professionals about the Jaudia system.

Finally, the last chapter presents the conclusion of the main findings and provides some recommendations for action. The chapter also highlights the limitation of the research, as well as, suggests open doors for further research in some identified areas.

## CHAPTER 2 THEORITICAL FRAMEWORKS

### 3.1 THE CONCEPT OF TRANSITIONAL JUSTICE

*Violent conflicts destroy the confidence in a social contract ... The process of reconciliation has to ... rebuild trust and confidence. Dan Bar-On<sup>1</sup>*

In the period ranging from late 1980s and early 1990s, as a result of political transitions that took place in Latin America and Eastern Europe some human rights activists and others began to raise critical question about how we can effectively address the systematic abuses of former regimes, without derailing the political transformations that were underway.

The nature of these changes were popularly called “transitions to democracy,” but due to the mixed situation of transition which included systematic or massive abuses, people started calling this new multidisciplinary field “transitional justice” or “justice in times of transition.”

It is worth mentioning that transitional justice measures that were adopted in response to these serious of crimes that are committed included prosecutions for regime leaders; truth telling initiatives, such as opening up state archives and establishing official truth commissions; the creation of reparations programs for victims; and the vetting of public employees. The aim of measures that were undertaken was obviously not only to dignify victims, but also to help prevent similar victimhood in future<sup>2</sup>.

The measures that have been taken earlier it might be successfully responded to some crucial issues in the given communities, but however didn't provide certain criteria about the application of this new emerging field, for instance, the enforcement of

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<sup>1</sup> Beatrix Austin, 'et al', 2012, p.111

<sup>2</sup> UN, Justice Times Transition, 26 August 2008, available at: [https://www.un.org/en/peacebuilding/pdf/doc\\_wgll/justice\\_times\\_transition/26\\_02\\_2008\\_background\\_note.pdf](https://www.un.org/en/peacebuilding/pdf/doc_wgll/justice_times_transition/26_02_2008_background_note.pdf) (consulted on 15 May 2013)

transitional justice measures for political transformation interest raised other questions about the time and situation of transition, which led to the dilemma of understanding the concept of the transitional justice itself. *Amanda Lyons*, argue that the concept of transition in practical terms mainly refers to major political transformation and ruptures from the past. She describes the departure point of the transition by saying that “When a society ‘turns over a new leaf’ or ‘gets a fresh start,’ mechanisms of transitional justice, it can help strengthen this process.” As it has been pointed out by Amanda, the application of transitional justice tools today ; are increasingly called upon in situations where there is no defining moment of transition and no sense of a rupture with the past offering new leaf or fresh start for the society. Applying transitional justice in such manner, makes the only relevance of transitional is to serve as a qualifier of justice, which in fact lead to a modified or altered justice. Other concern contrary to the first scenario that placing transitional justice concepts in such contexts may be much more effective for those aiming to lower human rights standards than for those seeking to defend them<sup>3</sup>.

As a matter of fact, there is no specific formula of transitional justice that could be installed into all situations, simply because each case has its own aspect, even by describing situation as transitional or non-transitional, the variance of these situations in one category still coexist. However, as has been discussed by Amanda who refer to what so called transitional by analogy, where she argue that in spite of the significant differences, the recourse to transitional justice by analogy is useful for pursuing objectives associated with the field—objectives such as guaranteeing victims’ rights to truth, justice, reparation, and non-repetition; promoting a true and just reconciliation; consolidating democracy; and promoting the rule of law<sup>4</sup>.

In spite of the criticisms that directed to this new field, we see it as life document, which in fact has a lot to offer and still there is more to learn from it. The *inevitability* of transitional justice, the term that used by *Filip Gomez*, to describe the fact that in the absence of other concept that we can recourse to, transitional justice

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<sup>3</sup>Lyons, 2010, pp. 15-31.

<sup>4</sup>Idem.

become the only game in the town (de facto); he refers to the fact that both academic and political circles are relying on the transitional justice mechanisms to address the process of democratic transition after an authoritarian or dictatorial period or when emerging from a conflict situation that associated with grave and systematic violations of human rights<sup>5</sup>.

Actually, the concept of transitional justice began to influence the legal, social and political discourse of societies undergoing fundamental social changes. In this regard, it's worth mentioning that some people refer the emergence of the concept into one of the remarkable scholars that early wrote about the transitional justice was **Neil J. Kritz**, Associate Vice President of the Institute's Rule of Law Program, who early wrote a book entitled: *Transitional Justice: How Emerging Democracies Reckon with Former Regime*<sup>6</sup>.

The question that hypothetically comes to the minds is that why Transitional justice is important. As demonstrated by the International Center on Transitional Justice (ICTJ) that systematic human rights violations actually exceeds the direct affect on the victims to include the society as a whole, hence, special measures need to be undertaken to address the impact of these massive abuses, in order to ensure that violations will not recur. It was well proved that unaddressed massive abuses lead to fragmentation in the social fabric, generate mistrust between groups and in the institutions of the State, and hamper or slow down the achievement of security and development goals<sup>7</sup>.

In present, Transitional Justice become one of the UN working agenda, considerable attention has been given to this new field of scholarship through the UN secretary general approach to the rule of law assistant.

For the United Nations, "transitional justice is the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability as well as compliance, serve justice

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<sup>5</sup>Isa, 2010, pp. 144-164.

<sup>6</sup>Villalba, 2011, p. 2.)

<sup>7</sup>International Center for Transitional Justice (ICTJ), what is Transitional Justice, 2009, available at <http://ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf> ( consulted on 16 May 2013)

and achieve reconciliation"<sup>8</sup>. As demonstrated in the UN approach to the TJ, the component of TJ consists of both judicial and non-judicial processes and mechanisms, which include prosecution initiatives, facilitating initiatives in respect of the right to truth, delivering reparations, institutional reform and national consultations. Also, it has been stipulated that application of these components must be in line with the International legal standard and obligations.

The concept of TJ also has been defined by the UN former Secretary General Kofi Annan as: "the full set of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuse, in order to secure accountability, serve justice and achieve reconciliation" (Annan, 2004, p. 4).<sup>9</sup>

Generically, the concept of TJ mainly refers to the set of measures that seek to redress the legacies of massive human rights abuses that occur during conflict and under abusive regimes, primarily by giving force to human rights norms that were systematically violated, by providing recognition for victims, foster civic trust, and strengthen the rule of law.

However, the ultimate goal of the transitional justice is briefly to bring accountability, justice and reconciliation as societies emerge from a period of violent civil conflict and or authoritarian rule. The development of the concept of the transitional justice over the last decades introduced some other mechanisms alongside with the criminal retributive such as: truth commission, reparations, building the rule of law and reconciliations.

- Criminal prosecutions of for the perpetrators who committed grave human rights violations;
- Reparations programs mainly engage in activities that distribute mix of material and symbolic benefits to victims (such as compensation and apologies);

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<sup>8</sup> United Nations, Guidance Note of the Secretary-General-United Nations Approach to Transitional justice, Index: ASPX 2957, March 2010, available at: <http://www.unrol.org/doc.aspx?d=2957> (consulted on 16 May 2013).

<sup>9</sup>Lyons, 2010, pp. 15-31.



Restitution programs to those who were dispossessed of their housing, lands, and properties;

- Truth-telling initiatives that aim to acknowledge periods and patterns of past violations; and
- justice-sensitive security sector reform (SSR) that aim to transform institutions that are responsible for past violations by building institutional accountability, legitimacy, integrity, and the empowerment of citizens (through vetting and the exclusion of perpetrators of abuses from these public institutions).<sup>10</sup>

#### Traditional Justice within the TJ

*“To improve the quality of dispute resolution, justice must be maintained in individuals' daily activities, and dispute resolution mechanisms situated within a community and economic context. Reform should focus on everyday justice, not simply the mechanics of legal institutions which people may not understand or be able to afford”<sup>11</sup>.*

As a matter of fact that most of the transitional and post-conflict societies are home to well practice customary laws and traditions that have operated in large rural populations before, during and after conflict. These customary legal traditions, mainly in developing countries, include traditional conflict resolution and reconciliation mechanisms that have been developed by them to resolve conflict that accrue at small level between individuals or at large level as between clans and tribes. It has been noted that when it comes to tackling the crimes that have destroyed the social fabric of these communities, transitional justice designers often fail to draw upon the systems that are

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<sup>10</sup>United Nations High Commission for Refugee (UNHCR), Transitional Justice and Displacement: Challenges and Recommendations, Index: DOCID/506158 102, June, 2012, available at <http://www.refworld.org/docid/506158102.html> (consulted on 17 May 2013).

<sup>11</sup> International Development Law Organization (IDLO), Traditional Justice: Practitioners prospective, Index: WP2, 2011, available at <http://www.idlo.int/Publications/WP2clarkstephens>. (consulted on 18 May 2013).

most relevant to them. In other word the complementary aspect of their traditional mechanisms not taken into consideration.

However, recently, custom has reserve its seat within the transitional mechanisms. As has been cited by *Amy Senier* that Former young Northern Ugandan rebels are being reintroduced to their home villages through a ritual of “breaking the eggs.”<sup>1</sup> In Papua New Guinea, the principles of *osikaiang* (indigenous nature) guide that country’s effort to reconcile its factionalized leadership; even the South African Truth and Reconciliation Commission was grounded in the African philosophy of *ubuntu* (humaneness). Furthermore, the previous United Nations Secretary General Kofi Annan has advised transitional justice actors to draw upon local practice when crafting a response to mass atrocity.

Actually, the growing of International recognition to traditional justice has been demonstrated in several International instruments, for example the UN Secretary General's Rule of Law and Transitional Justice in Conflict and Post Conflict recommends, due regard must be given to indigenous and informal traditions for administering justice or settling disputes, to help them continue their often vital role and to do so in conformity with both international standards and local tradition. Where these are ignored or overridden, the result can be the exclusion of large sectors of society from accessible justice. In addition, word justice as has been defined in the Secretary General mentioned report to include reference to the traditional justice: justice is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large. It is a concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant<sup>12</sup>." Furthermore, the report asserts the complementary role of the truth commissions as valuable tool in the quest for justice and reconciliation, taking as they do a victim-centered approach and helping to establish a historical record and recommend remedial action

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<sup>12</sup>United Nations, The Role of Law and Transitional Justice in Conflict and Post-Conflict Societies, Index: S/616, 2004, available at: <http://www.unrol.org/files/2004%20report>. (consulted on 18 May 2013).

### 3.2 TRANSITIONAL JUSTICE AND DISPLACEMENT

Term Internal Displaced Persons (IDPs) are defined in the IDP guiding principles to mean "Persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border"<sup>13</sup>.

Unlike refugees, IDPs have not crossed an internationally recognized border, while refugee as has been defined in article 1, 1951 convention as someone who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country. The basic differences between the two instruments, 1951 refugee convention and 1998 IDPs guiding principles that the first one is treaty based document which means is legally binding while the second one IDPs guiding principles is not.

It is worth mentioning that the Convention for the Protection and Assistance of Internally Displacement in Africa which adopted by the African Union and came into force on 6 December 2012 considers the first regional treaty on internal displacement. The relation between the transitional justice and displacement is one of the areas that have cross cutting issues, which impacted in the work of humanitarian field.

However, as a matter of fact in displacement context, humanitarian actors mainly focus their efforts on the immediate need of displaced persons by providing life saving assistance and protection, while in contrast transitional justice actors on the ground in general their work more focus on the long term goals as to promote transitional justice which more or less contribute to the durable solutions. Saying that doesn't mean humanitarian actors don't have long terms goals or there is no link or cross

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<sup>13</sup>Global Protection Cluster Working Group, Hand Book for the Protection of Internally Displaced Persons, Index: 8025708F004CFA06, 2008, available at <http://www.internal-displacement.org/8025708F004CFA06>. (consulted on 20 May 2013).

cutting issues between the two field of work. For example some humanitarian organizations even when they are providing humanitarian assistance they take into consideration that services provided will not affect community peace and reconciliation and self reliance. In addition, some humanitarian organizations such as UNHCR for example, have engaged with criminal tribunals, and a number of tools or protective measures that exist to minimize potential negative effects, including witness confidentiality and nondisclosure of information to the public.

However, in general the humanitarian organizations are very careful about their engagement in issues related to criminal justice, because they worry that their involvement in such sensitive issues may compromise their neutrality, undermine their access to vulnerable populations, and put their staff at risk. For example in March 2009, the government of Sudan expelled 16 organizations from the country, accused them of collaborating with the ICC.

Transitional justice aims to provide recognition for victims, foster civic trust, and strengthen the rule of law.

As already explained in the previous chapter that the objective of transitional justice is to provide recognition for victims, foster civic trust, and strengthen the rule of law through different components namely: Criminal prosecution of perpetrators who involved in serious crimes, reparation program for victims which include distribute of material and symbolic compensation such as momentum or apologies, restitution programs of IDPs housing, land, and property, truth-telling initiatives that investigate, report, and officially acknowledge periods and patterns of past violations and justice-sensitive security sector reform (SSR) that aim to transform government institutions (military, police, and judiciary) who were responsible for past violations through vetting process and in order to exclude perpetrators of abuses from these public institutions .

It is obvious that part of the TJ work is to redress the legacies of massive human rights violation, therefore it's very relevant and has vital role in responding to the displacement, given the fact that resolving displacement in a sustainable manner requires not only to address the present vulnerabilities to human rights violations, but also past human rights abuses.

Although little attention has been paid to how transitional justice measures can be used to address the range of injustice associated with displacement<sup>14</sup>, however, there are various recent international documents have acknowledged the need for societies and actors struggling to resolve large-scale displacement crises to respond to the justice concerns.

These international documents include but not limited to: Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies (2004-2011), the UN Inter-Agency Standing Committee's (IASC) Framework on Durable Solutions for Internally Displaced Persons( 2010) , African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the "Kampala Convention") 2009 , and the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (the "Pinheiro Principles").

#### Transitional Justice and IDPs Durable Solutions

Since the transitional justice is more connected with the long terms objectives, it's logically to contribute into the displacement durable solutions which include return, integration and reintegration. However, it's arguably that the most important long term contribution that transitional justice can make to resolving displacement is in facilitating the integration or the reintegration of the displaced persons. The practice and experiences have shown that return of IDP or refugee to their areas of origin is less complicated than other durable solutions of integration and reintegration which hindered by legacies of past abuses that can affect both individuals and their societies. Saying that, the primary actors working in displacement often not focus on addressing or dealing directly with the impact of the past abuses, therefore TJ can play essential role in supporting (re)integration in different ways:

Criminal justice and justice-sensitive SSR by contributing to the reform of security and justice institutions which include vetting process in order to exclude the

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individuals responsible for such abuses from power, would contribute to the facilitation of the (re)integration by improving the safety and security of formerly displaced persons, and make (re)integration more durable and sustainable solutions by helping to prevent the recurrence of the abuses that led to displacement.

- Reparations and restitution can play vital role in economic (re) integration and rebuilding of sustainable livelihoods. Restitution in general is facilitating (re)integration by increasing access to shelter and land for agriculture or other economic activities, therefore it is often seen by the IDPs as a precondition for their return. Financial compensation by supporting the construction of new homes and businesses can also facilitate the resettlement of displaced persons or local integration opportunities. Reparations and restitution are often seen by the IDPs as pre conditions for their return, however its very important element to the well-being of most vulnerable group within the displaced person, such as households headed by female returnees.

- Truth-telling efforts through its programs of reducing tensions between those who stayed and those who were displaced especially in situation of ethnic tension, that can contribute to the social reintegration. In addition, truth-telling can also bring perpetrators of less serious crimes among the displaced together with communities to decide what steps or measures may lead to their (re)integration.

- In addition to help empower the IDPs through the inclusion of their voices in the national political planning process , transitional justice can also facilitate the political (re)integration of formerly displaced persons at the broad level by reaffirming basic norms that were systematically violated and by strengthening displaced persons' rights as citizens<sup>15</sup>.

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<sup>15</sup> International Center for Transitional Justice (ICTJ), Transitional Justice and Displacement, June 2012, available at: <http://ictj.org/sites/default/files/>. (consulted on 21 May 2013).

## Challenges

As a matter of fact, using transitional justice measures in order to respond to the situation of violations and vulnerabilities associated with displacement actually raises some challenges. Actually transitional justice measures have limited capacity to respond to the complexity and large-scale of displacement. For example in situation where these measures seek to provide financial compensation for lost property and the suffering of thousands of displaced persons, has placed a huge burden on the transitional governments, especially in the developing countries where their resources can simply not afford such responsibility. Another example related to the criminal justice, in situation where wide spread of serious violations committed which resulted in huge backlog of cases, is often unaffordable for the national transitional justice courts. There are some other technical and institutional challenges related to the assessment of the needs and rights of displaced persons and distributing an appropriate range of benefits in an efficient and fair manner. Identifying victims of displacement and classifying them for potential reparations and other benefits is often very difficult, given the fact that there are some IDPs who are even not registered in the database or the existing caseload. However, the experiences show that not all the identified and registered IDPs have received compensation or effective remedy due to the fact that the large numbers of identified victims are beyond the available affordable resources capacity<sup>16</sup>.

Also, it has been noted that victims of displacement face problems of participating in or accessing to the transitional justice, due to the lack of information. Actually lack of information of transitional justice measures affect IDPs decision in very important issues related to them such as on whether to attempt to return, locally be integrated, or be resettled elsewhere. In addition, displaced people often lack identity documents, which can create further difficulties in accessing restitution and reparations programs<sup>17</sup>.

The international center for transitional justice, research unit attributed part of these challenges to the fact that efforts to address the displacement through transitional

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<sup>16</sup>Idem.

<sup>17</sup>Idem.

justice mechanisms are often taken in an ad hoc nature which can obviously not systematically respond to the complexity problem of displacement. They recommend replacing ad hoc approaches by more informed, strategic engagement between transitional justice and displacement actors. Those transitional justice actors, who work in large displacement context, should take into consideration at early stage to develop a strategy for identifying and responding to the concerns of refugees and IDPs alongside other stakeholders. Saying that intertwining displacement and transitional justice should result in development of appropriate, feasible, and coherent context sensitive measures that facilitate and ensure the participation of the right holders (IDPs& refugees) as well as, maximize the positive contributions to transitional justice mechanisms that may consequently lead to make durable solutions.

### 3.3 RETRIBUTIVE JUSTICE AND RESTORATIVE JUSTICE

Retributive justice as defined in Oxford Dictionary means "a system of criminal justice based on the punishment of offenders rather than on rehabilitation. Generally, retributive justice is a legal theory or principle which stands on the principle that punishment for a crime is acceptable as long as it's a proportionate response to crime committed. However, in retributive justice system, a crime is typically seen as being committed against the state or government, rather than against an individual or community. Therefore the punishment against individual who has committed the crime is left to the state to apply the justice. The philosophy of this system based on the argument that when an offender breaks the law, s/he thereby forfeits or suspends her/his right to something of equal value, and justice requires that this forfeit be enacted (Wikipedia). The principle of proportionality in retributive justice means the severity of penalty for misdeed or wrongdoing should be reasonable and proportionate to the severity of the infraction, as the principle aphorism in law says: let the punishment fit the crime, (Wikipedia). However, the application of the proportionality principle can



vary greatly from society to another; therefore this form of justice can significantly be different in other different areas<sup>18</sup>.

### Restorative justice

Unlike the retributive justice, restorative justice is an approach to justice with three dimensions that focus on the needs of the victims, the offenders, and the involved community, instead of satisfying abstract legal principles or punishing the offender (Wikipedia). In his book: the little book of restorative justice, Howard Zehr's defined the restorative justice as a process to involve, the extend possible, those who have a stake in specific offense and to collectively identify and address harms, needs and obligations, in order to heal and put things right as possible.<sup>19</sup> These processes bring all parties with the stake in particular offence in order to come together to resolve collectively how to deal with the aftermath of the offence and implications for future<sup>20</sup>. The departure point of the restorative justice paradigms is that crime is violation of the relationship between people rather than merely a violation of law. Hence, the most appropriate response in order to change criminal behavior is by repairing harm that caused by the wrongful act. Saying that a room of discussion for those most closely affected by the crime namely the victim, the offender and the community, should be provided to reach to some type of understanding about what can be done to provide appropriate reparation<sup>21</sup>.

The important element in the process is that the participation of the parties should be in voluntary basis; the offender needs to accept responsibility for the harm and be willing to openly and honestly discuss the criminal behavior; and the participants should meet in a safe and organized setting to collectively agree on an appropriate method of repairing the harm.

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<sup>19</sup> Zehr & Gohar, 2003, p. 37.

<sup>20</sup> Idem.

<sup>21</sup> Latimer- Dowden- Muise, 2005, p.12.

However, in retributive system crime is an individual act with individual responsibility, victims not fully engaged in the process, while in restorative system crime has both individual and social dimensions of responsibility, where the victims are central to the process of resolving a crime<sup>22</sup>.

Some criticisms are directed to the restorative justice saying that the goal of such program or system is to encourage or even coerce victims to forgive or reconcile with the offenders. Saying that its true restorative justice provides a context where the forgiveness might happen. In addition, the degree of the forgiveness and reconciliation is higher accruing frequently than in the adversarial setting of the criminal justice system. However, the choice of the forgiveness is entirely up to the participants, therefore the decision taken by participants in this process must free be done without any under pressure.

### 3.4 SECURITY COUNCIL REPORT ON THE ROLE OF LAW AND TRANSITIONAL JUSTICE IN CONFLICT AND POST CONFLICT SOCIETIES

The secretary General report on the rule of law and transitional justice in conflict and post conflict societies, issued in 2004 is comprehensive report that highlights key issues and lessons learned from the experiences in the promotion of justice and rule of law in conflict and post-conflict societies<sup>23</sup>.The report examines key elements of transitional justice in mentioned situations such as developing national justice system, ad hoc criminal tribunal, supporting the role of the ICC, facilitating truth telling, vetting the public services and delivering reparation. Herein we will shed light on three of the issues discussed in the report, truth telling, ad hoc criminal tribunal and the role of ICC. These three discussed issues will help enrich our discussion in chapter 4 and 5.

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<sup>22</sup> Conflict Resolution Center, *Retributive vs. Restorative Justice*, 2009, available at <http://www.cscsb.org> ( consulted on 25 May 2013).

<sup>23</sup> United Nations, *The Role of Law and Transitional Justice in Conflict and Post-Conflict Societies*, Index: S/616, August 2004, available at: <http://www.unrol.org/files/2004%20report>. P. 3( consulted on 18 May 2013).

## Facilitating truth telling

Truth commissions are important complementary mechanisms that play vital role in addressing past human rights abuses. Basically, they are official temporary non-judicial fact finding bodies that aim to investigate a pattern of abuses of human rights or humanitarian law committed over a number of years. In these bodies the victims are the central part of the process (victim centered approach). These bodies take a victim-centered approach and conclude their work with a final report of findings of fact and recommendations. Approximately, more than 30 truth commissions over the world have been established which mentioned but not limited to: South Africa, Peru, Ghana, Morocco, El Salvador, Guatemala, Timor-Leste and Sierra Leone. Some of the mentioned commissions have seen significant UN involvement such as El Salvador, Guatemala, Timor-Leste and Sierra Leone.

The report assert the positive potential role of the truth commissions in helping societies establish the facts about past human rights violations, foster accountability, preserve evidence, identify perpetrators and recommend reparations and institutional reforms. In addition, the victims centered approach that these bodies follow will give a room to the victims in which they can address the nation directly with their personal stories and can facilitate public debate about how to come to terms with the past.

The report named some negative factors that could limit these potential benefits which include political instability, a weak or corrupt justice system, weak civil society, victim and witness fears about testifying, insufficiency of time to carry out investigations, lack of public support and inadequacy of funding in addition to the independence and the credibility of commissioner in the selection criteria and process, in order to have successful formed truth commissions, we need to adopt participatory approach that actively incorporates public views on their mandates and on the commissioner selection. Saying that strong public information and communication strategies are very essential in advancing credibility and transparency, as well as it will help to manage public and victim expectations. Also, among other international human rights standard, the commission's rules and regulations must be gender sensitive and responsive to the victims of the sexual and gender based violence (SGBV).

Lastly, many such commissions will require strong international support to solidify function, as well as respect by international partners for their operational independence<sup>24</sup>.

#### Learning lessons from the ad hoc criminal tribunals

In situation where the country is unable or unwilling to adjudicate serious human rights violations that took place in its territory, the international jurisdiction will rise up and take the responsibility. Based on that the UN in the past two decades actively contributed in the establishment of a wide range of special criminal tribunals which include ad hoc tribunals, in purpose and objectives of bringing to justice those responsible for serious violations of human rights and humanitarian law. Doing so will help to put an end to such violations and preventing their recurrence, securing justice and dignity for victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law and contributing to the restoration of peace.

These notions have included ad hoc international criminal tribunals established by the Security Council as subsidiary organs of the United Nations for the former Yugoslavia (International Criminal Tribunal for the Former Yugoslavia) and Rwanda (International Criminal Tribunal for Rwanda); a mixed tribunal for Sierra Leone, established as a treaty-based court; a mixed tribunal for Cambodia, proposed under a national law specially promulgated in accordance with a treaty; a mixed tribunal (structured as a court within a court.) in the form of a Special Chamber in the State Court of Bosnia and Herzegovina; a Panel with Exclusive Jurisdiction over Serious Criminal Offences in Timor-Leste, established by the United Nations Transitional Administration in East Timor; the use of international judges and prosecutors in the courts of Kosovo, pursuant to the regulations of the United Nations Interim Administration Mission in Kosovo; and a Commission for the Investigation of Illegal Groups and Clandestine Security Organizations in Guatemala, to be established by agreement between the United Nations and Guatemala, as an international

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<sup>24</sup>idem, p.17.

investigative/prosecution unit operating under the national law of Guatemala. The details of the agreement are currently under discussion.

#### Supporting the role of the International Criminal Court

As a matter of fact, the establishment of the ICC considers the most significant recent development in the international community's long struggle to advance the cause of justice and regulate rule of law. Currently, as of May 2013, there are 122 countries ((Wikipedia) have ratified the Rome Statute of the court, which entered into force on 1<sup>st</sup> July 2002. The establishment of international permanent court with resource and capacity will help to investigate, prosecute and bring to trail those who bear the greatest responsibility for war crimes, crimes against humanity and genocide in situations where the national authorities are unable or unwilling to do so. The UN Security Council can refer situation to the ICC, even in cases where the country concerned is not state parties to the statute of the court. It is worth mentioning here that Darfur case was referred by the UNSC to the ICC under the mentioned mandate<sup>25</sup>.

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<sup>25</sup>Idem, p16-17.

## CHAPTER 3 DARFUR CONFLICT

### 4.1.2 BACKGROUND OF THE CONFLICT

Darfur conflict, has been described by the international community as the worst humanitarian disaster in the century, with an estimated 1.9 million people displaced, more than 240,000 people forced into neighboring Chad and an estimated 450,000 people killed<sup>26</sup>.

The conflict was erupted when the two Darfur rebel factions, Sudan Liberation Movement Army (SLM) and Justice Equality Movement (JEM) emerged to fight against the government of Sudan (GoS) protesting that Darfur region is totally marginalized and demand better political presentation in Khartoum and a share of national wealth .

Actually, in 2001 and 2002 the two rebel movements began organizing themselves in opposition to Khartoum Government, which they believed that it's the main cause of the problem in Darfur. At the beginning their main manifesto of opposition based on the socio-economic and political marginalization of Darfur and its people, and then subsequently, both rebel groups expanded their manifesto to include entirety Sudan demanding more equal participation in government by all groups and regions of Sudan. However, the Justice and Equality Movement which is considers more politically organized than SLM, its agenda based on a type of manifesto- the Black Book, published in 2001 which provide statistics indicates disparities in the distribution of power and wealth, by highlighting that Darfur and its populations, as well as some populations of other regions, have been consistently marginalized and not included in the influential positions in the central Government in Khartoum<sup>27</sup>.

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<sup>26</sup>Dagne, 2011, p.2.

<sup>27</sup> United Nations, Report of the International Commission of Inquiry on Darfur, S/2005/60, 1 February 2005, available at <http://www.securitycouncilreport.org/atf/cf/>. (consulted on 25 May 2013).

It is worth mentioning here that despite the fact that majority of the rebel members belong to the African tribes mainly Four, Zhagawa and Massalit, the two movements did not represent themselves or claim their case from a tribal point of view, but rather spoken on behalf of all Darfurian, and mainly directed their attacks at Government installations.

The first military operation conducted by the rebels was in 2003 when the rebels attacked Government installations in Kutum, Tine and Elfasher in North Darfur. The attack resulted in Destruction of Sudanese Air force base in Elfasher where the rebels destroyed four Military Gunship Helicopters on the ground and killed many soldiers. The attack and threat that made by rebels, came in time where the government was facing serious deficit in terms of military capabilities on the ground in Darfur, given the fact that most of the government military soldiers are from Darfur and were not willing to fight against their own people. In response to such situation, the government called upon local Arab tribes to assist in the fighting against the rebels.

Noting that, the government exploited the existing tensions between tribes in Darfur by motivating Arab nomadic tribes mostly without traditional homeland, in promises of more land and better Native Administration position in the region<sup>28</sup>. In the same direction, the International Commission of Inquiry on Darfur states in its report that: "one senior government official involved in the recruitment informed the commission that tribal leaders were paid in terms of grants and gifts on the basis of their recruitment efforts and how many persons they will provide for recruitment". The Commission reports continue to explain that the government paid some of the popular Defense Forces (PDF) salaries through their tribal leaders, with the state budget lines that are being used for these purposes.

Furthermore, the government recruitment policy was confined to Arab tribes, as indicated before in the report that one Massalit leader told the Commission that his tribe was willing to provide approximately one thousand persons to the PDF but the government refused, in assumption that the recruits could use this as an opportunity to acquire weapons and then turn against the government.

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<sup>28</sup> Idem.

In addition, according to the Commission report that some foreigners, from Chad, Libya and other states said to have responded to this call and that the government was more than willing to recruit them. It worth noted that these new recruits were known to local population as Janjaweed. The term Janjaweed is an Arabic word which literally means ghostly riders or evil horsemen<sup>29</sup>. It is difficult to define them as the word means people who commit crimes against innocent civilians ( Local traditional description for the word perpetrators) , but however some Janjaweed belong to Organized Security Forces such as the Popular Defense Forces, the Border Intelligence Unit and Central Reserve Police as well as Popular Police Force. These has not refrained them from burning villages, killing of innocent civilians and commit other serious human rights violations<sup>30</sup>.

In the light to the above mentioned explanations , the reason why those militias group were integrated by GoS in to organized National armed forces of Sudan is because the government was following the general trend of their violations and the adverse Human rights watch reports that are globally shared and intended to do that to allegedly legalize their status as GoS National force as by then the GoS speculation is that all the human rights violation reports about Darfur could have been abolished in such a way that there will no longer be an entity called Janjaweed on the ground and by then all the report could be considered false .

However, regardless of who is fighting opposed who and why the most significant element of the conflict has been embodied in the attacks of civilians that has led to a huge destruction and burning out entire villages in to destitution and displacement of large influx of the civilian population from their areas of origin to the IDP camp that are still existing in Darfur. Hottinger

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<sup>29</sup>United Nations, Report of the International Commission of Inquiry on Darfur, S/2005/60, 1 February 2005, available at <http://www.securitycouncilreport.org/atf/cf/>. (consulted on 25 May 2013).

<sup>30</sup>Hottinger, 2006, p.46.



#### 4.1.3 THE ROOT CAUSES OF THE CONFLICT

One of the most valuable and deeper analysis about the root causes of the conflict in Darfur was made by Professor Mohammed, Director of Public Administration and Federalism Studies at University of Khartoum, Sudan, who argue that the simple way that followed by the world media in describing the causes of the conflict does not contribute to either analyzing the phenomenon or solving the problem.

He explained that most of the analysis made limit the causes of the crisis as conflict between the central government on one hand and the Darfurian rebels on the other, who are protesting over the marginalization of their region by the central National government. Professor Mohammed believes that this is part of the conflict causes but not all. He argues that the nature of the conflict is more complicated, in addition to the widely reported conflict between the government in Khartoum and the Darfur region over the wealth and power sharing, the second conflict concern tribal competition over the limited resources of cultivated and pasture lands. The third conflict is attributed to the conflict between the identity groups, those who are particularly farmers or pastoralists at the grassroots level<sup>31</sup>.

On the same direction of the last factor mentioned by Professor Mohammed, It is worth mentioning here that the suffering of the region and the violent conflict had been dramatically increasing since the 1980 when drought intensified the competition for scarce land and water resources<sup>32</sup>. As a result of that Arab and African identities were invoked and used incite violence, given the fact that Arab are mainly pastoralists , while African tribes are farmers. Actually, the aspect of the tribal identity of the conflict has been used by the government both as means to stoke the conflict and to suggest that a solution can be found through traditional mechanisms based discussions between communities and clans.

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<sup>31</sup>Mohammed, 2007, pp. 14-18

<sup>32</sup>Hottinger, 2006, p.47.

However, Professor Mohammed asserts that the key element that underlying the three mentioned causes is relative underdevelopment. In order to prove his argument about how Darfur is less than other regions, he refers to Data from the International Labor Organization (ILO) report (1976) and National house hold survey (1973). The available household income data 1967/68 and the 1982/83 for the annual family income by region in Sudanese pounds, both show that Darfur has the lowest income of the all regions, with considerable differential statistics. Furthermore, in 1982/83 survey, registered very greater disparity, where the Khartoum house hold income was almost three times much more than the House Hold in Darfur<sup>33</sup>.

Other indicator of Darfur marginalization that Professor Mohammed refers to is the government expenditures which indicate the government activities in Sudan's regions. He selected two periods based on the availability of data. The first period selected 1971-1980, where the country received flow of foreign currency into its treasury from the oil rich Arab countries, and the second period 1998-2002, was the beginning of Sudan to exporting of oil, therefore both period witnessed availability of fund that could have enabled the government to allocate many development projects for Darfur regions.

In the first period, the data indicates that the Central region was the most advantaged with (+0.949), followed by the Northern region (+0.652), Khartoum (+0.473), and the East (+0.220). Western regions Darfur and Kordofan with minus sign respectively (-1.064) and (-1.309), which means they had less than their due share. In the second period, the ratio of advantage for the North region was the highest (+1.036), followed by Kordofan ( +0.317), the Eastern region ( +0.018), the central region (-0.162), Darfur (-0.521) and Khartoum (-0.7). It was obvious that Darfur region was disadvantaged in both periods, backward behind all regions<sup>34</sup>.

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<sup>33</sup>Mohammed, 2007, pp. 14-18

<sup>34</sup>Idem.

#### 4.1.4 CRIMES COMMITTED IN DARFUR

On 18 September 2004, the UN Security Council acting under chapter VI of the UN Charter adopted resolution 1564 in which requested the SG to establish an international commission of inquiry to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties to the conflict, to examine also if genocide have occurred and to identify the perpetrators behind such violations<sup>35</sup>.

The commission report reach to conclusion that the government of Sudan in response to the direct insurgency or through proxy armed groups has committed gross violation of human rights and humanitarian law against civilian populations.

Regarding the criminal responsibility of rebel groups, despite the less information some sources reported that such violations also committed by rebel groups. The report also indicates that some armed elements abused the collapse of the law and order to settle scores in the context of traditional tribal feuds, or to simply loot and raid livestock<sup>36</sup>.

The report asserts that the majority of attacks on civilian were committed by the military, Government proxy militia (Janjaweed) or a combination of the two. Violations against civilian include, killing, massacres, summary executions, rape and other forms of sexual violence, torture, abduction, looting of property and livestock, as well as deliberate destruction and torching of villages infrastructures such as deliberate burying of hand dug wells or eradication of trees after burning the village to discourage future second inhabitation . The consequences of these incidents resulted in massive displacement of large parts of the civilian population within Darfur as well as to neighboring countries such as Central Africa (Available but unconfirmed) and Chad<sup>37</sup>.

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<sup>35</sup>United Nations United Nations, Report of the International Commission of Inquiry on Darfur, S/2005/60, 1 February 2005, available at <http://www.securitycouncilreport.org/atf/cf.> ( consulted on 25 May 2013).

<sup>36</sup>Idem.

<sup>37</sup>Idem.

The commission refers to some reports that indicate the involvement of the rebel groups in indiscriminate attacks resulting in civilian deaths and injuries and destruction of private property such as the SLA attack in May 2006 against the Native Administration of Massalit tribe in Greida town (small town 106 Km far south east of Nyala in South Darfur) where they abducted the Umda Mohammed Azrag and some youth from the Town in side a container up to death and they buried them in a group grave on the way to Nyala ( apparently in an area called Donkey Draisa) actually the son of Umda Azrag ( Anwar) has been working with Oxfam GB as Driver in Grieda and he has been given leave ( Emergency personal business Leave) for that reason as when they brought th he dead bodied they were already decayed and he was difficultly recognizing the his father's body by the Uniform and his Swiss watch that he was wearing before he dies.

In addition, there are further reports of violations committed by the rebel groups which include killing of wounded and imprisoned soldiers, attacking or launching attacks from protected buildings such as hospitals, Telecom stations in rural areas such as Greida and Shengle Tobaya in South and North Darfur respectively, abduction of civilians and humanitarian workers, enforced disappearances of Government officials, looting of livestock, commercial vehicles and goods. However, the commission report noted that the number of reported violations allegedly committed by the Government forces and the Janjaweed is far exceeds the number of cases reported on rebels<sup>38</sup>.

#### 4.1.5 ICC ACTIONS AGAINST CRIME COMMITTED IN DARFUR

Determining that the situation in Sudan continued to constitute a threat to international peace and security, the Security Council on 31 March 2005, acting under Chapter VII of the Charter, adopted Resolution 1593 (2005), by referring the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court.

It worth mentioning that Since the adoption of Resolution 1593 (2005) the Prosecutor of the ICC has presented fourteen reports to the UN Security Council, describe the Court's judicial activities pursuant to the Rome Statute. Part of the preliminary reports refers to

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<sup>38</sup>Idem.

the refusal of cooperation by those individual charged by the court who have taken advantage of their position of power, within Sudanese government.

In order to determine whether crimes within the jurisdiction of the court had been committed, the office of the Prosecutor of the ICC conducted a preliminary examination of the situation in Sudan. Part of the Office assessment findings was relied on the conclusion of the Sudanese National commission of Inquiry, which reached to conclusion that crimes against humanity of murder and the war crime of willful killing have been committed by the government forces in each of the state of Darfur. However, many official Sudanese authorities' reacting against the National Commission report by saying, no judicial proceedings was conducted in relation to those crimes.

A subsequent investigation file was opened on 6 June 2005, after finding that the statutory criteria were met. The first case investigated in the Darfur situation covering period between March 2003 to 2004. The investigation findings demonstrated that GoS forces with its proxy militia/Janaweed under the command of the Army attacked civilian population, mainly Fur, Masalit and Zaghawa tribes, surrounded and bombed their villages , as well as, troops on the ground killed, raped and pillaged the civilian population, forcing the displacement of 4 million people. As result of that on 27 April 2007, the Pre-Trial Chamber of the Prosecutor Office issued arrest warrants against Ali Kushayb, a militia commander, and Mr. Ahmad Harun, State Minister of Interior and responsible for the Darfur Security Desk during the relevant period for war crimes and crime against humanity. In relation to the same incidents, on 1 March 2012, the above mentioned chamber , issued another arrest warrant against Mr. Abdel Raheem Muhammad Hussein, then Minister for the Interior and current Minister of Defence for 51 counts of crimes against humanity and war crimes.

Following the first case and based on the additional evidence that have been collected, the prosecutor office had announced that there are reasonable ground to believe that President Omar Al Bashir had planned and ordered war crimes, crimes against humanity as well as genocide in Darfur region. The Prosecutor investigation Actually, Prosecutor office criminal procedure against President Omar Al bashir started on 4 March 2009 by issuing an arrest warrant for crimes against humanity and war

crimes, then a new decision taken by Pre-Trial Chamber on 12 July 2010 decided to issue a second arrest warrant for President Al Bashir for genocide.

The Prosecutor Office's also included investigated situation related to the attack of the African Union base in Haskanita by rebel group. The investigation findings resulted in identifying three individuals belong to the rebel groups, as those most responsible for crimes against AU peacekeepers. In response to the Prosecutors charges the three rebel leaders voluntarily appeared before the Court hearing. However, on 8 February 2010, the Pre-Trial Chamber decided that charges against Mr Abu Garda's personal responsibility for the crimes was not proven and refused to confirm the charges against him. Following Mr. Abu Garda case, on 7 March 2011, the Pre-Trial Chamber confirmed charges against the other two alleged commanders of the rebel forces, Mr Abdallah Banda and Mr Saleh Jerbo. The two accused rebel member's trials have been scheduled by the ICC to be held on 5 May 2014<sup>39</sup>.

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<sup>39</sup>International Criminal Court, Situation and Cases (situation in Darfur-Sudan), available at <http://icc.org>. (consulted on 30 May 2013).

## CHAPTER 4

### 4.2 CRIMINAL JUSTICE WITHIN SUDAN FORMAL LAWS

#### Introduction

Sudanese criminal law witnessed a number of significant developments that positively and negatively affected the justice process. It is needless to say that the political instability represented in military coups and popular uprisings left back deep impact on penal laws in Sudan owing to the different political backgrounds of the different ruling regimes.

The state of Mahdia for instance imposed Islamic Sharia as the sole reference of law. Then the condominium Anglo-Egyptian power ousting the Mahadists, revoked sharia law and enacted new law derived from British and Indian law named Law NO 464. This new law has been effective since August 1925 up to the independence of Sudan in 1956.

The national regime that took over from the colonialism could not enact a new law until it was ousted in November 1958 following a coup commanded by General Ibrahim Aboud. The latter was overthrown by a popular uprising in October 1964. Subsequently, second democratic regime took over. It was ousted in its turn by a military coup in 25 may 1969.

It was till 1974 that Law NO 464 was replaced with president Nemeiri's penal code which remained applicable till the regime of 25 May made a 180 degree turn by annulling the penal code and reintroducing sharia law in 1983, as Nemeiri declared Sudan an Islamic state ruled by sharia (idiomatically called the law of September by Nemeiri's opponents to disassociate it from sharia).

In 1985 , the regime of May was surprisingly demised by an uprising .It was followed by a transitional government .During the transitional period the military was apparently declined to annul September law on grounds that it is Islamic , therefore it can't be replaced with any worldly law .One year later , the third democracy government took over .A new law was in the pipeline but the regime fell by a coup in

June 1989. Again an Islamic state was declared but the law of 1983 was annulled and the Sudanese criminal law of 1991 was substituted by a constitutional decree. This law is still in effect in north Sudan but it was not applicable in the south (before separation) because it was exempted from sharia laws owing to the interim constitution of 2005 and the secular penal law of 1974 was adopted there instead.<sup>40</sup>

#### 4.2.1 THE INTERNATIONAL CRIMES VERSUS THE SUDANESE CRIMINAL LAW

We can say that the Sudanese nation along their long history never recognized what is today called international crime, and hence the different regimes gave no heed to it. Lately, certain crimes that can be labeled as international ones started to emerge. So the state endeavored to enact laws incriminating them, like the money laundering law of 2003. Before that the terrorism combat law was set up in 2001, regardless of the international standards.

However, the Sudanese state has not gone ahead further to incriminate the most serious international crimes such as genocide, war crimes and crimes against humanity. The state's procrastination as regards these crimes led to lack of the law provisions that punish them.

It was only when the conflict of Darfur erupted in 2003 that the fact that Sudanese penal code doesn't include punishment to these crimes was uncovered. This was a difficult test to the Sudanese justice as it rendered it incompetent to prosecute the crimes committed in Darfur. Of course this incompetence is represented in the non presence of the paragraphs that stipulate the incrimination and punishment. Surely this situation differs from the incompetence in the presence of the law incriminating text.

The Sudanese criminal code and the judiciary as well were subject to significant criticism from the various national and international jurists due to the mentioned incompetence that led to impunity of criminal's. Its pretty known that serious crimes committed in Darfur are of an international character such as crimes against humanity and war crimes.

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<sup>40</sup>Adooma, 2006, p.1



In spite of the fact that Sudan criminal act 1991 includes some crimes like rape and murder which consider components of war crimes and crimes against humanity, but the prosecution of individual ordinary crimes does not adequately take into account the large and systematic context in which the crimes occur.

This legal obstacle prompted the state to go ahead with amending the criminal act in 2009, to incriminate international crimes so as to catch up with the international justice standards. Actually, this step fall out with the legal principle of non-retroactivity of law, which means the new laws incompetence to retrospectively prosecute crimes committed in the past, giving the fact that most of the crimes committed in Darfur were during the period between 2003 and 2004. This amendment in law was perceived in different ways by the Sudanese legal professionals. For example, Dr. Amin Mekki Madani, Sudanese human rights expert, comments on the government step of amending the criminal act by saying that "The obvious assumption for taking this step is a possible attempt to absorb the strong world reaction to the brutal human and humanitarian rights violations that have been taking place in the region of Darfur since early 2003, as well as, to send a signal that its laws are comprehensive and it is capable to try violations in accordance with its competent Legal system"<sup>41</sup>.

Another legal obstacle is that members of the Security Organization enjoy impunity by not being accountable for their actions while fulfilling their "tasks". Same impunity is also granted to the Armed Forces and the Police in their respective laws.<sup>42</sup>

Of course war crimes and crimes against humanity are not part of their official work, but the long process of lifting their immunity is one of the big challenges that most of the human rights lawyers are complain about.

#### 4.2.2 SPECIAL CRIMINAL COURT FOR EVENTS IN DARFUR (SCCED)

Just one day after the Prosecutor of the International Criminal Court (ICC) announced he was opening investigations into the events in Darfur, the Sudanese

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<sup>41</sup>Medani, 2010, p. 26.

<sup>42</sup>Medani, 2010, p. 24.

authorities established the Special Criminal Court on the Events in Darfur (SCCED) On June 7, 2005; the step which has been described by both international and national legal institutions as attempt to avoid the ICC jurisdiction, as well as, to demonstrate the government's ability to handle prosecutions domestically.<sup>43</sup>

However, decree establishing this court gives jurisdiction over the following:

- (a) Acts considered crimes according to Sudan criminal law and other penal laws
- (b) Any charges submitted to it by the Committee established pursuant to the decision of the Minister of Justice No.3/2005 of 19 January 2005 concerning investigations into the violations cited in the report of the [Sudanese government's] Commission of Inquiry;
- (c) Any charges pursuant to any other law, as determined by the Chief Justice.

It is worth mentioning that it has become a norm during the last two decades that the chief of justice incline to establish special courts to prosecute certain crimes like murder, money laundering, tribal conflict, army and ammunition crimes...etc, according to certain evidence rules.

However, the establishment of the first court in Elfasher, North Darfur was followed by other two courts in west and south Darfur, so that each state in Darfur would have its separate special court.

The special courts also face the dilemma of which law is applicable? Which criminal and evidence procedural laws to be adopted?

We can summarize from what is previously mentioned that the special courts established by the chief of justice are quite incompetent to prosecute international crimes because they are established to rule according to Sudan criminal law of 1991 that we have already described as incompetent to live up to international standards despite the fact that the chief of justice on 16/11/2005 granted the special courts of Darfur the mandate to apply the international humanitarian law.

Surely involving the international humanitarian law in the special courts of Darfur in such way will make no effect .on the contrary , this can cause impunity

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<sup>43</sup>Human Rights Watch, Lack of Conviction: The Special Criminal Court on the Events in Darfur, No. 1, 2006, available at <http://www.hrw.org/sites/default/files/reports/Sudan>.

because the chief of justice is not mandated to enact laws in Sudan and the criminal and evidence proceeding are not clear<sup>44</sup>.

#### 4.2.3 WHY THE SCCED IS NOT SUITABLE TO ADDRESS CRIMES COMMITTED IN DARFUR

The Human Rights Watch (HRW) report 2006 about the SCCED explains the court case load and the nature of the cases that brought before the court. The report states that although the Sudanese authorities shortly after the establishment of the court, had announced that a number of 160 accused will be tried before the court, actually only 13 cases has been brought before the SCCED.

For example, one of the cases cited in the report, three civilians and three low-ranking military soldiers have been prosecuted by the SCCED for the theft and slaughter of a herd of sheep, which has been explained by the HRW an event unrelated to the extensive attacks and widespread killings that engulfed Darfur in 2003 and 2004 and which continue to this day<sup>45</sup>.

Another case adjudicated by the SCCED Elfasher court, August, 2005; involve four members of Military intelligence who tortured to death 60 years old man. The elderly man was detained by the Military Intelligence at the Kutum town military camp, on suspicion of collaborating with the rebels, and has been subjected to torture with led to his death at the custody on the same day as his arrest. Two military intelligence low ranks convicted of murder, and sentenced them to death. The third accused, the Chief of Military Intelligence at Kutum military base was acquitted of the charges<sup>46</sup>.

It is obvious that cases brought before the SCCED did not address issues of accountability in the region, as well as the nature of cases are marginally related to the serious and widespread violations committed in Darfur.

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<sup>44</sup>Aldooma, 2006, p.3.

<sup>45</sup>Human Rights Watch , Lack of Conviction: The Special Criminal Court on the Events in Darfur, No. 1, 2006, available at <http://www.hrw.org/sites/default/files/reports/Sudan>.

<sup>46</sup>Idem.

However, in addition to obstacles concerning immunity, irrelevancy of criminal law and political will, the HRW report highlighted some other facts which include: Absent of provisions in Sudan laws for prosecuting leaders on the basis of command responsibility, which means local state or national leaders are unlikely to be held accountable for the acts of their subordinates unless direct involvement of the leaders in the crimes can be demonstrated., given the fact that prosecution of leaders is essential to enforcing accountability in Darfur. Some other concerns related to gender justice such as the high burden of proof for rape cases, as well as the threat of prosecution for adultery, makes it difficult for rape victims to bring their cases to the police.

In addition, Sudanese law does not provide an absolute prohibition on admission of statements obtained as a result of torture, which raises serious concerns about the ability of the courts to conduct trials consistent with international fair trial standards.

In short, in order to tackle such problems, embarking on such huge tasks would, first, require a genuine determination and political will and, secondly, the legal framework and the institutional infrastructure necessary to deliver those tasks<sup>47</sup>.

#### 4.2.4 PROPOSALS FOR THE WAY OUT

It is indisputable that what we have mentioned identifies clearly the dilemma the justice and legislative establishments of Sudan are doomed with due to failure to get updated to the international developments.

Most of the law professionals that we have interviewed do agree with the fact that the (SCCED) is incompetent to deal with international serious crimes such as war crimes and crimes against humanity. Furthermore, some of them stated that even for less serious crimes the court failed to adequately investigate and bring the perpetrators before the court.

Ahmed Suleiman, Sudanese lawyer, states that "the court applies Sudan evidence law 1994 which in fact is not in line with the international standard of collecting and examining the evidence for international serious crimes".

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<sup>47</sup>Medani, 2010, p. 29

A Female human rights activist, explains her concern about the protection of the victims who give their testimony before the court, specially victims of rape and other sexual abuse, she asserts that there is no specific program provides protection for such victims.

Mohammed Aldoma, Sudanese lawyer, who also agreed with what mentioned above, he explains his view and made some recommendations by saying:

"What concerns us is the prompt way out of this deadlock. Law reform should be implemented so that the conflict between the Sudanese different laws and the interim constitution of 2005. Actually, article 7\27 of the constitution stipulates that ( all right and freedoms included in the international agreements and conventions of human rights endorsed by Sudan are considered inseparable part of the constitution )<sup>48</sup> .

If we refer back to these international agreements and conventions , we uncover that Sudan signed and endorsed parts of them while in only signed but didn't endorsed others .the significant parts of the agreements related to our topic are : the agreement of prevention of genocide and the crimes against humanity and the war crimes .

Based on what mentioned above, we see the the following recommendation will be relevant:

a- Law reforms:

1. The endorsement of the agreement of prevention of genocide and the crimes against humanity and the war crimes and inclusion of this agreement in the penal law
2. If the immunity granted to officials of higher political and military ranks is a key way to impunity, it is recommended that immunity privilege to facilitate fair justice.
3. A new evidence law that rejects evidence gained by illegal ways is necessary
4. The annulment of all laws conflicting with the interim constitution
5. The chief of justice should not be granted the authority to establish special courts because justice stipulates that all people should be tried at general formal courts

b- Justice reform

1. Judges need continuous capacity building trainings in all the areas, notably the international penal law

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<sup>48</sup>Sudan interim constitution, 2005, p. 13.

2. The Sudanese justice system should be adapted to the international standards in terms of administration, judge selection and ouster. Justice should be independent of the political and executive authorities.
3. Prosecutors, lawyers and police personnel need capacity building training courses.

To sum up, the Sudanese laws need radical reforms to update with the international laws .it is urgently necessary that to promulgate new legislation that includes major international crimes like genocide, war crimes and crimes against humanity. To accomplish that, it is paramount to endorse the various unendorsed agreements together with structural and legal reforms on the Sudanese justice to enable it to accomplish its solemn task in full fairness, impartiality, integrity and independence.

## CHAPTER 5 JOURNEY OF SEEKING PEACE IN DARFUR

### 5.1. BEFORE DARFUR PEACE AGREEMENT (DPA)

In Darfur context where mass atrocities have incredibly been committed, peace is considerably needed for the protection and security of civilians, accountability and justice for victims and restoration of the destroyed livelihoods of Darfurians people<sup>49</sup>.

Actually, at the early stages of the conflict eruption, the first initiative searching for peace in Darfur was initiated by governor of North Darfur, General. Ibrahim Suleiman, who called for the negotiation with rebels but it was so unfortunate that his initiative was not welcomed by the central government, and as result he was soon removed from his post by Khartoum. It's worth mentioning here that at the beginning, the government underestimated the rebels and did not take them seriously. However, after the rebel groups defeated the government troops and took control over large part of the region, then journey of search for peace began<sup>50</sup>.

The first international initiative was led by Chadian President Idriss Déby, at one of the Chadian border towns called Abéché in September 2003. Debi initiative was based on his relation with both parties to the conflict; actually, the government of Sudan helped him achieve power, and Zaghawa leaders within the SLA to whom Debi ethnically belong. In addition, he was also concerned about the effects of conflict-induced displacement on Chad. He mediated a 45-day ceasefire between the GoS and the SLM/A, however, it was so unfortunate that the ceasefire soon disintegrated and further Abéché meetings collapsed, with Déby blaming the failures on the demands of the SLM/A and JEM.

This statement has deeply compromised Debi credibility as an impartial mediator and led the rebels to demand international observer presence at any further talks.

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<sup>49</sup> Elgak, 2006, p.1

<sup>50</sup> Hottinger, 2006, p.47

However, in April, 2004, at N'Djaména, Chad, with African Union (AU) assistance, Chad mediated a ceasefire agreement between the GoS and a joint SLM/A and JEM delegation to allow humanitarian access in Darfur<sup>51</sup>.

Noting that the position of the government of Sudan was objecting on the participation of the US, EU and UN, and eventually compromised on the AU as mediators, with international observation only for talks on humanitarian issues. Following N'Djaména meeting that was held in May, 2004, at Addis Ababa an agreement on the Modalities for the Establishment of the Ceasefire Commission and Deployment of Observers was signed, with acknowledgement of the AU as lead international body in Darfur<sup>52</sup>.

Then the table of peace negotiation moved to the Nigerian capital Abuja where the protocols on security and the humanitarian situation, both signed in the Nigerian capital Abuja in November 2004, and the Declaration of Principles, signed in May 2005, which led to negotiations of the peace agreement.

#### 5.1.2. NEGOTIATING DARFUR PEACE AGREEMENT

Under the auspice of the African Union, Abuja negotiations started shortly after the N'Djamena Agreement. Actually, the aim was to move from a ceasefire to negotiating a comprehensive agreement, including political dimensions. The involvement of the AU as key player in all the process from the beginning, actually, resulted from two main factors: first, African leaders had promoted the idea “African solutions for African problems”, and wanted to establish the newly founded AU as an effective conflict manager in Africa. Hence, Darfur was an opportunity for the AU to achieve such objective. Second factor, was related to the strategy of the Government of Sudan (GoS) to prevent Western powers from interfering in the Darfur conflict, which the GoS worried would happen if the UN got involved; the AU was the least bad alternative and therefore acceptable for the GoS as a mediator<sup>53</sup>.

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<sup>51</sup> Idem.

<sup>52</sup> Idem.

<sup>53</sup> Lanz, 2008, pp.78-84



In Abuja negotiations participants were, on the one side, the military and political elite of Darfur and, on the other side, senior members of the National Congress Party (NCP), who were also members of the GoS<sup>54</sup>.

Darfur rebels were represented by the Justice and Equality Movement and two ethnically divided factions of the Sudan Liberation Movement that formally split in 2005 due to the internal divisions among the leadership<sup>55</sup>.

The first faction of SLM was led by Minni Arko Minawi, who had support from the Zaghawa. The rival faction was led by Abdel Wahid Mohamed Nur, who had support of the Fur ethnic group<sup>56</sup>.

However, after months of talks there was no progress in Abuja, the African Union and its international partners – particularly the United States – lost their patience, and decided to use “deadline diplomacy” as their main negotiation tool. Under this pressure final draft of the peace agreement was produced in April 2006<sup>57</sup>.

The Darfur Peace Agreement consisted of three main protocols which include: power sharing, wealth sharing, security arrangements, in addition to chapter that address the framework for a Darfur-Darfur Dialogue and Consultation.

### 5.1.3. THE MAIN COMPONENTS OF THE (DPA)

Wealth-sharing provisions:

Establishment of a Darfur Reconstruction and Development Fund in which Sudan’s government would contribute US\$300 million for 2006 and US\$200 million for 2007 and 2008. The main purpose of this body is to manage rehabilitation, reconstruction, and development in the region. Establishment of two commissions, first, for land issues, to arbitrate title disputes and develop policies for land use management and natural resource development; the second is a compensation commission with guidelines for determination and payment of compensation and other remedies to the

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<sup>54</sup> Idem, p.82

<sup>55</sup> Helta, 2008, p.6.

<sup>56</sup> Idem , p.7.

<sup>57</sup> Idem , p.8.

affected victims of the conflict, in which the government should make an initial \$30 million contribution to the Compensation Fund. In addition, granting refugees and internally displaced persons the right to restitution or adequate compensation for property loss<sup>58</sup>.

Power-sharing provisions:

As stipulates in the DPA text, at the national level, rebels would get the fourth highest position within the government, the Senior Assistant to the President, who is also the chairperson of a new Transitional Darfur Regional Authority (TDRA), as well as, twelve seats in the National Assembly for the representatives of the Darfur rebel groups. Regarding the Transitional Darfur Regional Authority (TDRA), rebels to nominate eight members out of ten. At the regional level, rebels would fill the position of one governorship, two deputy governorships, and 30 percent of the seats in the regional legislatures, until national and regional elections. The text also mentioned that a referendum should be held in Darfur, no later than 2010, to determine whether the three regional states should be consolidated into one region<sup>59</sup>.

Security-related provisions:

The security provision set five months as timeline for disarming the pro-government Janjaweed militia, as well as, incorporating members of the rebel groups into the Sudanese military forces or assisting their integration into civilian life, and returning principal responsibility for law enforcement in Darfur to a reformed civilian police force. The government of Sudan with the verification of African Union Mission in Sudan and the Ceasefire Commission has the responsibility of disarming the Janjaweed. In addition to that prior condition to the demobilization of the rebel forces, Janjaweed must be confined to their camps and would have to relinquish all heavy weapons. The provisions also pursued to maintain the humanitarian character of the IDP camps, by prohibiting armed forces from displaced persons camps and other civilian areas, including humanitarian supply routes.

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<sup>58</sup> Idem, p.9

<sup>59</sup> Idem

It has been mentioned that these Security arrangements would be monitored by the African Union peacekeeping forces, which are to be strengthened by the United Nations peacekeepers<sup>60</sup>.

#### 5.1.4. DARFUR-DARFUR DIALOGUE AND CONSULTATION (DDDC)

It was so unfortunate that , Darfurian civil society was mostly excluded while Abuja talks was on going , only few members of civil society were present ( allegedly pro NCP). Actually, those few members were not representing the diversity of Darfurian society as a whole, given the fact that some of them were politically compromised. Furthermore, there were insufficient channels for them to make their voices heard in the negotiations. There were even rumors that people were intimidated and beaten during the talks. However, the mediators and parties strategy was to include civil society to ensure popular ownership *ex post facto*, therefore, they created what so called the Darfur-Darfur Dialogue and Consultation (DDDC), in purpose of providing a platform for different segments of Darfurian society in the implementation phase of the DPA. However, as has been commented by David Lanz "Popular support for peace talks requires consultation and participation *during* and not only after peace talks"<sup>i</sup>.

However, Darfur–Darfur Dialogue and Consultation comes under chapter 4 of the DPA that creates a platform in which representatives of all Darfur stakeholders can meet to discuss the challenges of restoring peace to their land, overcoming the divisions between communities, and resolving existing problems to build a common future. The intended purpose of the DDDC is to build a support for the DPA, through this consultative mechanism which in fact designed to mobilize critical support among the people of Darfur for the expected peace agreement. Dr. Adam Azzain commented on the created body by saying that "the DPA does not clearly define the DDDC specific objectives, the process for achieving them and the mechanisms for implementing its outcomes"<sup>ii</sup>. However, the main features or the major provisions of the DDDC are mentioned as follow:

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<sup>60</sup> Idem, p.10

it commence by recognizing the fact that many stakeholders in Darfur were not represented by the negotiating parties in Abuja, and set timeline of 60 days after the peace agreement comes into force to begin the community-based reconciliation process in Darfur. In addition, Peace and Reconciliation Council also tasked to finding ways and means in order to ensure that all armed groups become part of region-wide peace agreement. This part mainly targeted those rebel groups who rejected the peace agreement (Non Signatories factions).

As stipulated in the DDDC section, chapter 4, the process of the created body will be chaired by an “African of independence and integrity” and assisted by a team of elders from Darfur, and shall have between 800 and 1000 delegates, including sheiks and tribal leaders, refugees, internally displaced persons, women, rebel groups, militias, civil society, and other local parties. The composition of the DDDC members, clearly explains the fact that without the inclusion of the mentioned categories, implementation of any peace agreement will not be possible. The reference to the traditional leaders (sheikhs and tribal leaders), demonstrates the fact that in traditional or semi-traditional society such as Darfur, customary law and traditional leaders is the key player for the success and sustainable peace.

In addition, understanding the root causes of the conflict also important for negotiating peace process. As explained earlier in chapter 2 of this thesis, part of the conflict causes involve ethnic identity which used by the government to stoke the conflict by using Arab militias (janjweed) as proxy militia. Furthermore, according to the international commission of inquiry report states that the government paid their salaries through the tribal leaders. It should be noted that the tribal leaders that the commission report's referring to are those who have been politicized and whose subordinates were militarized by the government of Sudan for the same purpose , in other side there are also some Arab leaders who refused to engage in such game. However, we see the participation of both of them was very important.

It was so unfortunate that the leaders of Janjaweed militia were not present at the Abuja negotiations, although reference to word Janjaweed has been mentioned several times in the DPA text.

Describing exclusion of the Janjweed leaders, we cite from what has been said by Pruitt and Kim "the success of a peace agreement often depends on the ability to control potential "spoilers" – people or groups who may seek to overturn an agreement." As one of the key players in the conflict and potential "spoilers" of a peace agreement, the Janjaweed leaders needed to be involved in negotiations since their disarmament and cooperation are crucial for lasting peace and security in Darfur"<sup>61</sup>.

Adam Azzain Mohammed, in his valuable book *Call for an Alternative Approach to Crisis Management*, highlights important fact by saying that "Darfur's rural communities, remaining basically, tribally affiliated, can only be administered through their tribal leadership systems, hence, in reconciliation conferences, native administrators play a dominant role not only as mediators, when their groups are not involved, but much more importantly as responsible for holding their groups committed and accountable to the implementation of conference resolutions"<sup>62</sup>.

#### 5.1.5. NEGATIVE CONSEQUENCES: FRAGMENTATION ON THE REBEL GROUPS AND FURTHER DIVISION FOR THE ALL READY DIVIDED COMMUNITY

The Darfur Peace Agreement (DPA) was signed only by the GoS and Minni Minnawi's faction of the SLM/A (SLA/ MM faction ) in Abuja in May 2006, JEM and the other faction of SLM led by Abdel Wahid Mohamed Nur refused to sign off. Two of the rebel members, who refused to sign the peace agreement, commented on the agreement's text as a "product of intimidation, bullying, and diplomatic terrorism, as well as, they claimed that the agreement did not "address the root causes of the conflict and was not the result of negotiations between the parties."<sup>63</sup>

Some International observers like Kriesberg comments on the peace agreement by saying that reaching an agreement between the parties in a conflict is not enough, in order to be respected and implemented on the ground the agreement needs to be regarded as a good one by the disputants and stakeholders.

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<sup>61</sup> .Heleta, 2008, p.7

<sup>62</sup> Mohammed, 2009, p.25.

<sup>63</sup>Helta, 2008, p.11

In contrary, others like Alex de Waal, who was an adviser to the African Union mediation team in Abuja, believes that the rebels should have signed the DPA since the agreement offered mechanisms for realization of rebels' central demands. He refers to the power sharing component by saying that rebels would have substantial representation at all levels of Darfur's state and local governments, and if they won the elections scheduled for 2009, "Darfur would be theirs to rule.

Rebel groups who did not signed off the peace agreement attributed their refusal to some reasons that they perceive reasonable. Firstly, they wanted a "greater financial commitment to compensate victims and clearer engagement by Khartoum to transfer wealth to Darfur, secondly, they strongly opposed preserving the status quo of three Darfur states, wanting to return Darfur as a single Darfur region instead of three Darfur states which has been divided by the current government, thirdly, they asked to be given the position of the national vice-president; fourthly, regarding the security arrangements, the rebel groups that rejected the agreement demanded a greater role in security institutions in Darfur and nationally and participation in supervising the disarmament of the Janjaweed and other militias ((Hottinger 2006).

In addition, they strongly argue that the DPA did not provide clear cut details about some key issues which they believe that triggered conflict in Darfur, such as "land tenure and use, grazing rights, compliance with the existing corridors by Nomads and the role and reform of local government and administrative structures. Actually, these issues were not solved by the DPA but left to the Darfur-Darfur Dialogue and Consultation process<sup>64</sup>.

This different of positions, actually resulted in the fragmentation within the forces fighting for Darfur. The SLA/M split into two groups, one led by Mini Arko Minnawi and another one led by Abdul Wahhid El Nuur. In addition, a number of well known commanders of the rebel group were disoriented. It's worth mentioning that Mini Minnawi is from Zaghawa great tribe, while, Abdulwahid's group is mostly from Fur great tribe, constituting more than quarter of the Darfurians.

However, the DPA created kind of antagonism amongst the rebel groups to the advantage of the Government of Khartoum. Not like before, after the fragmentation, the

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<sup>64</sup> Heleta, 2008, p.11.

Government of Sudan is effectively manipulating the DPA to 'divide and rule' Darfurians. It is worth mentioning here that the fragmentations of the rebel groups become as phenomenon, from two main groups, now a days we have approximately 7 splintered groups that are basically spearheaded by SLA commanders who were militant with SLA before the DPA as that became a golden opportunity for NCP to individually encourage and snap those faction leaders to come and sign individually after they send their NCP negotiators to present the motivation plan to those rebel leaders.

It's worth mentioning here that this fragmentation has negatively created sort of division between community, particularly among IDPs who live in Darfur IDP camps. For example, after the signature of the peace agreement, we witnessed, IDPs in Zamzam camp in which the majority belong to Zaghawa tribe, (the same tribe of Minawi), were celebrating the DPA, while IDP in Abushouk camp in which the majority are Fur (Abdu-alwahid tribe), were demonstrating against the DPA. This created new ethnic tension between Fure and Zaghawa. Actually, Fure accusing Zaghawa of being pro-government since their leader accepted such agreement and become part of the government.

As has been described by Maru, "the more fragmented the political forces, the more difficult dispute settlement becomes". That explains why the DPA failed to bring stability to Darfur. This phenomenon of fragmentation within rebel groups is clearly constitutes one of the most binding obstacles for sustainable and durable peace agreement and implementation in Darfur. Therefore broad based public consultations are highly needed to remove the accumulated obstacles that have reached the bottleneck, because in such situation rebel groups will not sufficiently legitimize any future peace process.

In this regard, the DPA has been criticized seen as against the united interest of the Darfur people, and served as an incentive for the government of Sudan to disregard the DPA. In addition, it victimizes Darfurians and benefits the government of Sudan, by exacerbated existing divisions and created new differences among the rebel groups, as well as, weakened the unity of rebel groups and led to shifting in alliance of forces.

#### 5.1.6. DOHA DOCUMENT FOR PEACE IN DARFUR

Regardless of its failure to mobilize different parties to the conflict, Doha document which signed by the Sudan government and a splinter faction of the rebel Justice and Equality Movement (JEM) on July 14, 2011 in Doha, the capital of Qatar has included some references to the Native Administration and traditional justice.

The document acknowledge the fact that Local Government and the Native Administration have been adversely affected by the conflict in Darfur and shall therefore, be empowered to address the impact of the conflict, including environmental degradation, deforestation and induced desertification.

Reference has also been made to the Darfur Internal Dialogue and consultation (DDDC), as mechanism of enhancing and promoting the capacity of the native administration, by mentioning that DDDC's role in enhancing the status of Native Administration including restoring its authority and building its capacity and enhancing time tested traditional practices regarding settlement of local disputes, land ownership, pastures, transhumance, water and natural resources.

Another reference also made to the native administration under article 85 by stating that " Native Administration shall respect, where appropriate, the established historical and community traditions, customs and practices that have played vital roles in the community (Native administration inherited legacy).

In the same direction, under truth and reconciliation section, the parties agree to address different "causes of the conflict," among which the "weakness of the Native Administration," saying that also it has been mentioned one of the reconciliation process objectives is to strengthening the Native Administration system. Strangely, traditional justice and reconciliation mechanisms are not mentioned here. In this regard, Nouwen, comments by saying that "The DDPD gives little attention to what traditional justice in Darfur actually entails"<sup>65</sup>.

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<sup>65</sup> Tubiana-Tanner & Abdul-Jalil, 2012, p.84



In addition, under the general principle in particular in relation to the reconciliation, the document makes reference to the Native Administration and Ajaweed, without giving an explanation to the role that *Judiya* or other traditional mechanisms could play in reconciliation processes, only states that *Ajaweed* councils “shall be strengthened. However, the text only defines the Ajaweed council as mediation council of the Native Administration and community leaders; otherwise, it reiterates the terms *traditional* and *customary mechanisms* without defining them, explaining their role and how practically can pursue their work<sup>66</sup>.

Despite the fact that the main provisions on the Native Administration and the need to strengthen its role remain vague and confusing, however, we believe that to acknowledge the need of independent and impartial traditional mechanisms in Darfur reconciliation process that could have considered/ granted success and a foot on the right direction.

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<sup>66</sup>Idem.

## CHAPTER 6

## TRADITIONAL JUSTICE SYSTEM IN DARFUR

## 6.1 THE CONCEPT OF NATIVE ADMINISTRATIVE

Over the last ten decades, Native Administration has actually been a key institution in the classic history of Sudan governance. For instance, the concept of the Native Administration In Darfur existed since the Sultanate time, (in Sudanese terms Sultan literally means the governor who entirely controls over the whole of the region. However, the concept has been developed and to modernized relatively during the British colonial times that had ruled most of Darfur since the middle of the seventeenth century. Its noted that British newly created Native Administration had introduced new functions to be carried by the traditional leaders and that included administrative powers ( involvement in the delivery of new services such as education and health), judicial functions through the what so-called native courts, the management of land and natural resources (including pastures, water, wood, and migratory routes), tax assessment and collection, community labor conscription for roads and other infrastructure, the oversight of markets, and border control<sup>67</sup>.

The core objectives of the Native administration compromise both of the state, in the various and diverse parts of the territory inhabited by diverse communities, and the interests of those constituencies to the authorities, land management, and to render justice. The two functions, managing the land and administering justice, are deeply interrelated, given the fact that many disagreements or conflicts in the past and today between individuals or tribes was attributed to dispute over land use and land ownership.

The justice function has been continuously one of the main pillars for reconciliation components, land administration including management of natural

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<sup>67</sup>Jérôme Tubiana-Victor Tanner-Musa Adam Abdul-Jalil, 2012, p.8

resources (water resources, pasture land, farm land and wood) as well as migratory routes (Corridors). The third function which is defending the area against outside attackers or invaders, in particular livestock raiders was the particular role of the *agid* (war leader). However, this function nowadays became increasingly problematic under statutory law because it falls within the jurisdiction of other official institutions mostly.

In terms of management structure, the Native Administration consists of hierarchical system. The *sheikhs* (village or nomadic camp headmen) report to *omdas* (mid-level administrators). However, the number of each constituencies varies greatly from place to place, for example, an *omda* can preside over many hundreds of sheikhs. *omdas* report to *shartays*, *nazirs*, *maliks*, *sultans*, *furshas*, or *amirs*; the variance of reporting channels depends on the location and the community as well, the number of *omdas* under each is considerably varying. In principle, those *shartays*, *nazirs*, and so on can be paramount leaders, or in some areas report to other, more important paramount leaders, such as the *magdum* or the *dimangawi*.

The corner stone of the Native Administration understandability is to know the difference between territorial and tribal leaders. Territorial leaders refer to those who have control over a territory possessed by them. Generally, this territory is a multi-ethnic composition, where many tribes live in it, in addition to the leader's tribe, which is not necessarily the majority of tribe. Thus, various leaders in the same territory which include tribal leaders, should submit to the territorial leader, who often but not always belongs to the dominant tribe. Saying that the territorial leader is the paramount chief, but that does not necessarily mean that the territorial leader own any of the land of the territory, however, other leaders along with other landowners who might have had much more land plots than he has, must have also submitted to him. In addition, he is the overall responsible for land allocation of relatively large sizes to the leaders of communities, who are looking for resettlement, while he only sanctions the allocation of smaller plots to individuals or families. On the other hand, tribal leaders, have authority over people, but cannot allocate/ endow land plots.

Therefore, it's obvious that Native Administration is extensively connected with the land-tenure system. Saying that historically, most of the leaders in Darfur with their different hierarchy dispositions were territorial leaders, where most of the territory was

divided into entities administered by them. In addition, they also play essential role in resolving land disputes that involve intercommunity conflict over large territories, often in the context of reconciliation conferences, as well as, individual conflicts over smaller plots of land, directly or through the customary courts.

However, the power of territorial leaders over the land control in Darfur became increasingly problematic for both communities that had migrated to Darfur from other countries, in particular from Chad, and the nomadic *abbala* (camel-herders) or (pastoralists) from Arab tribes, whose leaders only administered a tribe or a clan, and had to submit to territorial leaders from other tribes along with their migratory routes. Nevertheless it has recently, witnessed that Arab tribes acquired positions in the Native Administration hierarchy which enabled them to legally challenge the authority of territorial leaders.

#### 6.1.2 CUSTOMARY COURTS

Sudan is one of the poorest countries where governmental services does not exist mostly in the rural/ remote areas and relatively present in the urban .That is why the successive governments used to assert their presence in the rural through the native administration which help the state resolving several problems in the country side notably those related to justice .that is the reason why the government encouraged the presence of traditional justice as the primary problem-resolving system, if failed then the state would intervene through the formal justice system. This trend is less expensive cost-wise. It also offers the government a chance to give the native administrators a window to amicably resolve their problems .In certain cases, the magistrate himself refer a certain case to the customary courts to rule on it because the complexity of Darfur communities and the ethnical overlaps in addition to the lack of the state's experience to resolve communal disputes render it difficult for the state to resolve most of Darfur community-based problems.

The legal basis of the current customary courts in Sudan is the Town and Rural Courts Act of 2004, which has been adopted by Sudan National Legislative Council. In Darfur there are seventy-two town and rural courts in North Darfur, South Darfur has

ninety-four, and West Darfur forty-one. However, according to the latest update, only thirty-two were functioning in North Darfur, sixty-nine in South Darfur, and twenty in West Darfur. It is worth mentioning that Sudan Judiciary has prolonged experiences with such customary courts since the colonial period, where the British ruling authority introduced the Native Courts Ordinance of 1932, which came as result of a series of ordinances passed in the 1920s, formalized the customary justice system and gave a legal base to it in the official law.

In terms of structure, the 2004 Act places the customary court within the formal court system as a lowest tier. The customary court members are appointed by the chief of justice based on the recommendations of the district judge whose recommendations come as result of close consultations with the Native Administration and the governor of the respective area. However, within the court members there are some Native Administrators who have been appointed by the government. The work of the court is under the supervision of the local statutory courts, therefore their decisions have to be endorsed by statutory judges. In addition, parties in customary court cases can appeal these cases in the formal courts. Basically, the courts use customary law in adjudicating cases, but only if those customs does not contradict either statutory law or SHARIA (Islamic Law). Mainly, cases present before the customary courts are cases involve personal matters and minor criminal cases which included but not limited to : conflicts over land, disputes over farming, grazing or watering agreements, and claims for damage to farms (commonly by migrating pastoralists), pasture and livestock; family matters (inheritance disputes, domestic violence, divorce), minor violent offenses that include no serious injury (a market brawl, fisticuffs between neighbors), minor financial or commercial issues (an unpaid debt, a dispute over a lease), and petty crime.

The Act of the year 2004 has granted the customary courts certain power to practice which include: power to issue summons and arrest warrants, including when someone fails to reply to a court summons, they can sentence convicted parties provided the sentences contradict neither formal statutes nor Sharia, fines as punishment that can go to a maximum of 400,000 Sudanese Pounds, a maximum of twenty-five lashes,

(forty lashes for the consumption of alcohol), and imprisonment in government prisons for period not exceed seven years<sup>68</sup>.

Concerning the chair of the customary court, the 2004 rural and town courts states that: "the president and vice president shall be aware of the customs and traditions of the citizens who are resident in the area. However, in practice a member of the Native Administration oftenly chairs the court. The function of the courts varies from place to another, some of courts have an established rotation system, while other courts has it on ad hoc basis with whomever showing up constituting the court that day. The advantage of rotation system is to ensure tribal diversity of the represented areas. In general, a court can operate with only two-thirds of its members present and without the head, for instance, El Fasher's *traditional court* operates with three members (including its chair, *malik* Rahamtallah), chosen among some twenty-five potential members, all traditional leaders. Court members in traditional courts, are working as group during the session where everyone can talk and at the end decision will be taken by consensus.

### 6.1.3 POLITICIZATION OF NATIVE ADMINISTRATION

It is definitely that Native administration is not part of civil service, however, Native Administrators become virtual government employees, since colonial times. One of their important functions at that time was collection of taxes. In order to discourage them from plundering the taxes they collected, *omdas* and *sheikhs* were allowed to continue paying themselves proportions on shares of the taxes collected, then later on the colonial administration began to pay fixed salaries to high-rank native administrators.

However, after independence, traditional leaders continue to support government to ensure continued/ maintained political and material support is obtained. During the National Congress party (NCP) government ruling intervals ,the situation even become more politicized, and that is only under the current regime as it has

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<sup>68</sup>Idem, p.38.

become acceptable to hold Native Administration (*idara ahliya*) position and government office at the same time, though it remains unclear what the law is.

In addition, the current regime authorizes the state's commissioner (*wali*) to appoint or approves traditional leaders, which was not the case in the past (Acceptance and power surrender by the community). Furthermore, after Darfur war erupted in 2004, in order to put hand of control over the Native Administration, the government of North Darfur began to pay leaders salaries, 1,500 Sudanese pounds (SDG) for a senior leader (*shartay*, *malik*, *nazir*) and SDG 300 for an *omda*. in addition to the salaries, some other largess which include (vehicle, fuel, a Satellite phone (*thuraya*), Air time , travel costs) and intangible (connections, opportunities for education and health care (insurances) , business and per diem prospects, jobs for family members, and so on), which made the positions worthwhile at personal level. Noting, the regime is the one who gives these perks and withdraw them at its will.

Another important feature is that the permission to employ a small retinue of armed men (sing. *ghafir*, pl. *ghufara'*), who (in addition to serve as bodyguards) are playing an important role in Native Administrative judicial functions by: deliver summons, keep order during mediation meetings, and on occasion help enforce the traditional leader's judgments; they were officially incorporated into the civil service under Nimeiri regime (1969-1984). This power was limited to the employment of very view number of armed men to perform duties mentioned above, however, and due to uncertainty during those times, leaders increasingly feel that they need *ghufara'* to demonstrate authority and get their decisions enforced . In 1990, leaders supported by the NIF/NCP regime were allowed to employ larger number of *ghufara*, who formally organized as Native Administration guards. These increased numbers, actually, paved the road for recruiting militias during the war.

As consequences of the increment; the situation has been described by *Shartay* Suleiman Hasaballah of Kidingir who said: "in east Jebel Marra, all the traditional leaders have armed guards, but Juma'a Dagolo [a new Mahariya Arab *omda* recently arrived from North Darfur who had set up in the *shartay's* land] had sixty of them, much more than normal, armed with G3 and AK 47 [assault rifles], and horses and camels. He adds I only had three guards, with *garabina* [old bolt-action rifles]. He

continues to say, in the early 1990s, the Mahariya started attacking us (Fur tribe) at the time when they committed several crimes such as: raping women, looting our camels, and taking our land.<sup>69</sup>”

Those leaders who are anti NCP confronting situation of accusation of being as rebel members or supporting rebels ideologically (rebel aligners ), many of them including some of the most important ones, were sacked and replaced by clear NCP members.

#### 6.1.4 THE IMPACT OF WAR ON THE NATIVE ADMINISTRATION

Another negative impact of Darfur conflict is that the increased politicization of the Native Administration that is triggered by the government National Congress Party (NCP).

Genuine traditional leaders who condemned the atrocities that is being done by the government and its proxy militias against their own people, become unwelcomed by the government and confront with different types of accusations.

Actually, after the attack of Darfur rebellion the government started to classify people in Darfur to with-or against, no third option remained. . Describing this situation, one of the non-Arab chief regretfully said: "We are chiefs because are ancestors were chiefs, but with this government, we cannot say what we are thinking, or they would destitute us<sup>70</sup>

Noting that at the beginning of the conflict, some traditional leaders suspected of pro-rebel sympathies were imprisoned. One of those traditional leaders *shartay* Sherif Adam Tahir of Dar Sueini in North Darfur, who had complained of the destruction of his *dar* and his town of Dor, including his own house.

Houses and possessions of Non-Arab traditional leaders were targeted by government forces, in particular *abbala* Arab militias. The attack of the house of the Zaghawa *malik* of Dar Tuer, and the destruction of the symbols of the traditional power

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<sup>69</sup>Jérôme Tubiana-Victor Tanner-Musa Adam Abdul-Jalil, 2012, p.19.

<sup>70</sup> Idem , p.25.



(royal drums, swords, and archives), have been perceived by the victims as designed to collectively humiliate the community and to erase its history<sup>71</sup>.

In addition, many traditional leaders are suspected of pro-rebel sympathies, sacked, and replaced by pro government leaders; given the fact that those who have been sacked either they are anti-NCP or simply non-NCP leaders.

Saying that there some examples included but not limited to: *magdum* Ahmad Abder-Rahman Adam Rijal, who often received international visitors and was very critical of government violence; *shartay* Mohammed Siraj of Shattaya, displaced since 2004 and a member of the opposition Islamist Popular Congress Party (PCP), was replaced in 2011 by Omar Ganduli, who is pro-NCP but not from the dynasty; *dimangawi* Fadul Sese Mohammed Atim of Zalingei was sacked after the 2010 elections for lending his support to the DUP candidate. Its worth mentioning that some sacked leaders remained more respected by the communities than their official replacements, people describe these new traditional leaders as government leaders.

## 6.2 JAUDIYA AS MEANS OF JUSTICE AND RECONCILIATION

Darfur is situated in west Sudan with a population of over 6 million divided between Arab and non-Arab communities'. Islam is the common denominator of the population. In terms of trade, they practice both farming and animal breeding. Arabs are mostly pastoralist while the majority of non-Arabs are farmers. Intermingle of both communities took place hundreds of years ago to the extent that one can't distinguish between Arabs and non-Arabs by physical feature. The majority of Darfur people live in the country in overt agricultural and pastoralist rural communities, this fact explains why social activities like judia find popularity. We find that both Arab and non Arab communities resort to this system to resolve intertribal and intra-tribal disputes<sup>72</sup>.

Back to history, centuries ago, the Sultanate of Darfur established different systems and methods to resolve conflicts and realize justice among people in Darfur. The Fur sultans used to have various types of courts and judicial systems, in addition to

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<sup>71</sup> Idem.

<sup>72</sup> Abu-rafaas, 2009, p.2.

another mechanism that emerged in Darfur to resolve and put an end to conflicts among individuals and groups. It has proved to be a big success over time in realizing justice and strengthening the social fabric. This mechanism is known as Judiya and it remained in operation effectively and competently<sup>73</sup>.

### 6.2.1 THE JAUDIA AND AJAWEED

Judia is an old Sudanese term denoting the action of amicably resolving disputes that arouse among the community members at all levels within a local native institution framework without any need to refer to formal or customary courts of justice. The word Judiya derived from Arabic word "Joud", which literally means generosity and giving. An Ajwad (plural-Ajaweed), the generous is the one who spends his/her money or time for others.

The *ajaweed* are prominent personalities and dignitaries of the community who reached higher social posts owing to their high rate of commitment to the social standard designed by their community references. They are wise, shrewd and well mindful of the traditions and customs of their respective communities. Most importantly they are impartial and neutral and keen of maintaining good relationships among the community members without leaning on any party's side. Communities in Darfur offer huge sanctity to judia and put *ajaweed* in high and respectful ranks; their rules are only breached by the outlaws, no others. These outlaws are often sanctioned in their own communities by depriving them of social reach out and solidarity as well as psychological punishment<sup>74</sup>. Ajaweed, whilst assuming their task are sticking to Islamic teachings that admonish followers to resolve communal disputes through reconciliation and advisory to do good and guard against evil, following the rule stipulated by the Quranic verse: (no good of the most of what they whisper to each other unless their whisper call for charity or favor or reconciliation of people, for that who does those, we surely will duly reward)-chapter 4. also the verse (and if two parties of the believers started fighting each other, you should reconcile between them if one of them assaulted the other anew, then you should

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<sup>73</sup>Fadul, 2008, p.10.

<sup>74</sup>Abu-rafaas, 2009, p3.

fight the attacker until they succumb to Peace, if they succumbed to peace then reconcile between them and do justice .for Allah like justice makers .believers are fraternal . therefore reconcile between them .Prophet Mohammed(pbuh) also says reconciling between people is a charity . Most importantly, the ajaweed (reconciliatory) are volunteer judges who receive no payment in return of their jobs , all that receive is commandment and prestige .

### 6.2.2 JAUDIA PROCESS

To ensure the success of Judiya, it is important to properly select the place and time, as these two factors greatly affect the course of the Judiya deliberations, hence, a better reconciliation could be reached.

It is preferable to hold the Judiya in a place far away from the area of conflict, particularly those conflicts which result in loss of lives and properties. The holding of the Judiya in or near the area of the incident might stimulate sentiments among the conflicting parties and consequently affect their waiver of demands.

The appropriate time for convening Judiya depends on the type and the magnitude of the conflict. In the cases where conflicts turn into violence, thereby resulting in gross injuries or loss of lives, it is better to postpone the Judiya procedures, until the tensions and anger subsided and some of the stances are forgotten<sup>75</sup>.

The procedure of Jaudia starts with the selection of the chairman and Rapporteurs amongst the Ajaweed. Then prior to hearing their statements, both parties will be asked to accept the judgment and decision reached by the Ajaweed, as well as to name their speakers during the proceedings of the case. Noting that, others are not allowed to intervene at all during the course of Judiya. Then the oppressed, the affected party or his/her representative is requested to present his/her case and address its aspects without interruption by others. During the session, parties are requested not to point to, look at, or insult their opponent while talking. After hearing the statements made by the conflict parties, the Judiya session would be adjourned and the Ajaweed would remain alone to discuss the case and agree on the ruling, or decisions. Following an agreement

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<sup>75</sup>Fadul, 2008, p.18

on the ruling, the Judiya session re-convenes and the rulings and decisions of the Ajaweed on the case are read, then the oppressor/perpetrator would be asked to accept the ruling and the oppressed to waive a part of the compensation he/she is receiving as a result of the ruling, in order to subside the bitterness felt by the oppressor and make him/ her feel better<sup>7677</sup>.

### 6.2.3 THE NATURE OF DISPUTES IN DARFUR

As life is that simple in Darfur, their problems are also comparatively simple and recurrent .this feature of dispute generates huge experience of dispute resolving.

Darfur disputes could be categorized into three parts:

1. The disputes between two persons, commonly personal status cases like marriage, divorce, debts, sales, land, etc.
2. The intra-tribal disputes like clan conflicts within the very tribe on land possession or pastures...etc.
3. Inter-tribal disputes on water and greasing resources .In this case, ajaweed are selected from a third tribe administrators and dignitaries in order to maintain impartiality and neutrality.

Most of Darfur people are either mobile nomads of sedentary farmers .This fact is one reason behind the conflicts taking place because both parties are practicing living within common land and limited water resources .As the farmed land and animal quantities are on the rise , the rate of disputes increases .In Darfur and other parts of Sudan , the leaders of the various communities assemble and take oath that they would resolve any potential dispute that might arouse in amicable judiya system without referral to courts of justice. This oath is binding even to the upcoming generations<sup>78</sup>.

However, in the recent years the concept of Jaudia has been developed to include new types of cases or methods. This development has been explained by Dr. Adam Azzain in his book, Darfur from insecurity to social peace 2008, where he divides the Judiya into two main types, popular Jaudia and formal Jaudia. Popular

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<sup>76</sup> Idem, p.19

<sup>77</sup>Mohammed, 2011, p.4.

<sup>78</sup>Abu-rafaas, 2009, p.5.

Judiya consists of a well-known traditional popular Judiya, and tribal educated elite's Judiya that emerged recently and gained importance in the eyes of the region's populace.

The second one formal Judiya and this mainly refers to the conferences which are always organized by State agencies from time to time, in order to reconcile conflicting tribes and clans. It's worth mentioning here that the formal type of Judiya has played essential role in resolving a number of tribal problems in Darfur. As indicated by Dr. Adam Azzain, a number of 39 inter-tribal reconciliation conferences were conducted in Darfur. For example from 1924 to 1957, four reconciliation conferences were held between the Dinka and Rezaighat, Kababeesh and Kawahla against the Beriti and Midob. Period from 1960 to 1969, only one conference was held, from 1970 to 1979 (13) conferences, from 1980 to 1989, and (14) conferences from 1990 to 1999.

At present, during the current Darfur conflict context some tribal conflicts took place in many areas in Darfur particularly among Arab clans; Mahria and Tarjam in South Darfur (2007), Taálba and Saáda in Kas (2009), Rezeigat and Messeriya in South Darfur (2010), Birgit and Zaghawa in Shaeria (2009), Gimir against Dorrok in Saraf Omra (2008) and Tunjur against Zaghawa in Shungil Tubie (2011). Noting that the nature of these conflicts mainly related to conflict over land and natural resources, which resulted in lost of lives. However, this formal type of Jaudia, people in Darfur called it *Musalha*, Arabic word which means reconciliation. It should be noted that most of the formal conferences failed to accomplish the reconciliation due to the fact that the government did not pay its contribution of blood money to the victim's families.

#### 6.2.4 MECHANISMS TO ENFORCE AND IMPLEMENT JAUDIA RESOLUTIONS AND RECOMMENDATIONS

Since the Judiya is a mean to resolve conflicts and disputes among individuals and groups, it is imperative to establish mechanisms for executing its provisions and recommendations, which include the following:

The enforcement of the Jaudia resolutions takes three ways: social mechanisms, native administration and its court, and through the formal courts. The social mechanisms consider the community tradition method, where the resolutions actively enforced through the heads of families, clans or tribal communities. In this method, heads or chief are responsible to apply their society's heritage, culture, customs and tradition to their relations with others. Hence, outlaws are often sanctioned in their own communities by depriving them of social reach out and solidarity as well as psychological punishment. One of the effective conflict resolution mechanisms is what so called "Rakuba" system. Rakuba is a Sudanese word which means an umbrella that accommodates all community members coexisting in peace. Explaining Rakuba we can take an example: if a perpetrator from tribe (A) killed a person from tribe (B), the Judiya reviews the old records of such cases between the two tribes and considers how they were resolved. If the members from tribe (A) forgave a similar case against one of its members committed by tribe (B) some years ago, then tribe (B) must forgive the current case also. But, if blood money was paid in the previous case the same approach will be applied in the current incident.

Disputing tribes keep records of previous conflict resolution activities between them and others for hundreds of years for future reference. If it happened that there were no previous cases between disputing tribes to refer to, then the Ajaweed apply flexible approaches to resolve the new incidents, appealing for concessions from rival parties to ensure peaceful co-existence in the future.

In some tribes, like four, Tonjur and Zaghawa for instance, they appoint one of their members with wide knowledge of local norms and customs and the historical relations of his tribes with others to manage the relationships of his tribe/clan with others. This person named as "Dimilij", a position that found centuries ago since Darfur Sultan period. The main responsibilities of Dimlij are: to keep the tribe's/clan's records regarding the resolution of disputes with others, Collection of members' contributions for blood money, lead the reconciliation of disputes among tribe's members and Representation of the tribe/clan to reconcile with other conflicting tribes.

The second mechanism is Native Administration and its customary courts which already explained in the previous sections, is judicial authority. However, the prominent tribal elites are members of the native administration courts, thus they all cooperate under the direction of local courts to urge rival parties to comply with Judiya resolutions. To avoid contradiction, it should be noted that some Ajaweed are members of the customary court, but that doesn't mean Jaudia and customary court is one body.

Customary courts are judicial body, while Jaudia doesn't. However, both referring cases to each other and maintaining good relation in applying the customary law. From jurisdiction prospective and the nature of the cases, Jaudia and Ajaweed has wider jurisdiction than the customary court members. For example, Jaudia involves in cases concerning murder through Rakuba system, while customary court members don't. (Please, refer to the customary court's jurisdiction in section 1 of this chapter)

The third enforcement mechanism is indirect through the formal legal system. Actually, Jaudia is well recognized within the Sudan legal system. From the reading of the substantive and procedural laws, we find that all public courts are authorized to deal with Jaudia resolutions as appropriate mechanism to achieve social stability and justice. The interim constitution of Sudan 2005, under article 5, para 3 (source of legislation), recognizes customs as source of legislation which gives the courts the authority in a situation of the absence of text to recourse to the customary law. In the criminal procedure act 1991, due regard has been given to the reconciliation. For example, among other principles, article 4, para (h), states that " reconciliation or pardon may be made in every offence involving a private right".

Sudan civil act 1984, allow reconciliation in all civil transactions, since it's not in contrary with law. Article 286 of the mentioned law stipulates that reconciliation is a contract that ends the conflict and cut the rivalry between the parties by the mutual consent. Furthermore, article 139 from civil procedure act 1983, gives both judge and the parties the right to suggest for referring the case to the reconciliation outside the court. In the same direction, article 141, explains the process of the reconciliation by the court, which includes the selection of the Ajaweed (mediators), by the parties, the approval of the mediators by the court and timeline for the mediators to submit their

resolution to the court. If the mediation reached to an agreed resolution, the court's judge will issue his /her judgment based on the mediation resolution, which is considered binding to the parties.

#### 6.2.5 ADVANTAGES AND DISADVANTAGES OF JUDIA SYSTEM

Judia as a simple voluntary social system has a number of advantages:

1. A speedy tracking dispute resolving system, because the disputes exist within the community and the Ajaweed live within the community too, they are both available and insiders. Thus, surely they would have had a sufficient background about the case in issue. These advantages of course would expedite the solution before the problem aggravates.
2. It is a norm that the disputing parties would respect the rules of the Ajaweed because Judia is a part and parcel of their community system; the rivals decline to disobey it. Thus, peacefully resolves tensions and disputes amongst the community with the agreement of the conflicting parties and maintaining social stability and peaceful coexistence
3. In Darfur, we find that public services are concentrated on the key towns only, including the justice facilities. Therefore it is tiresome to make it to town for complaint. Moreover, sometimes, notably during the rainy season, the towns are cut-off from villages by rain. The local Judia system would be the only means of dispute resolving. This fact of course mitigates the burden on formal courts
4. As it is said before, Ajaweed are more cultured about the complexities of rural life and more cognitive of the psychology of the country-siders. Thus their ruling is always fair and convincing.

As for the disadvantages of Judia system, we can sum them up in the following points:

1. Judiya system does not adhere to some human rights principles and due process especially, issues related to the gender equality and the presumption of innocence.
2. Judiya is one grade adjudication system hence; there is no opportunity for appeal.



3. Judiya does not have a proper standard system of documenting evidences. All jurisdictions are made on the basis of words and circumstantial proofs.

4. Judiya does not have capacity to address challenges of wide scale unconventional clients including minors, rape victims and victims of post-war trauma.

#### 6.2.6 CASE STUDY: GACACA COURTS, RWANDA

Rwanda genocide has been described as the worst crime in the century. It has been estimated that approximately 800,000 men, women and children were brutally massacred within 100 days. Also, it is estimated that in four months, 1.75 million people, or a quarter of the country's pre-war population, had either died or fled the country. Actually, the massacre which escalated into Genocide was started on April 7, 1994 resulting in the death of up to one million people.<sup>79</sup>

After almost seven years of Rwanda genocide the government of Uganda in 2001 enacted what so called Gacaca law in order to give indigenous or Traditional courts a mandate to handle cases of individuals who had committed atrocities in their communities during the genocide period. Gacaca is a conflict resolution traditional mechanism that has long period of practice in Uganda by Banyarwanda who effectively use it to resolve disputes at the grassroots level through dialogue and a community justice system. The process of the Gacaca is basically based on customs, traditions, and social norms<sup>80</sup>. Gacaca is one of the largest community-based restorative justice processes in post-genocide period in Rwanda.

The consequences of atrocities and the ethnic tension made the post-genocide Rwandan society and politics to reach to strong ground to believe that needs for reconciliation is essential element to heal ethnic tensions. In addition, from practical point of view, Rwanda's courts were overwhelmed with backlog of more than 120,000 accused perpetrators known as *génocidaires*, given the fact that both the national court

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<sup>79</sup>Batware, 2012, p.2.

<sup>80</sup>Mutisi, 2009, pp.17-26.

system as well as the UN-sanctioned International Criminal Tribunal for Rwanda proved inability to process these cases fast enough. It was very obvious that the Gacaca courts were established to serve two main purposes, to administered justice at community level and to promote culturally relevant or endogenous approaches to reconciliation. After the enactment of the mentioned law in 2001, capacity building training to the judges began in April 2002 for period of six weeks, then the Gacaca system officially launched in June 2002<sup>81</sup>.

### The Gacaca System

The concept of Gacaca is literally means justice on the grass. Basically, the traditional judges when they held a court session, they are sitting outside on the grass, to settle their disputes in the presence of the community members. The types of cases that presented before these traditional courts, mainly involve disputes concerning land use right, cattle ownership, marriage, inheritance rights, and petty theft, among other interpersonal disagreements.

Generically, Gacaca system did not address or deal with complicated issues, such as mass murder. Its methodology approaches consists of voluntary confession, demonstration of remorse, apology, and request for forgiveness by perpetrators, given the fact that traditionally, Gacaca system established morality as the basis for adjudication. Hence, Gacaca courts were administered by members from the community known as the *Inyangamugayo*, or ‘persons of exemplary conduct’, who are characterized by courage, honor, justice and truth. Therefore, based on their high moral and ethical standards, the *Inyangamugayo* were given this role. In traditional Rwanda, when a dispute had been resolved, a ritual or ceremony would be held to reflect the symbolic and practical importance of the process. Traditionally the *Inyangamugayo* ended Gacaca sessions with sort of social activity, often the parties sharing a traditional libation and a meal as a signal of reconciliation.

However, for serious crimes often would result in the offender being isolated or ostracized from the community.

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<sup>81</sup>Idem , p.18

## The Gacaca Process

The process of new established Gacaca courts, starts with first hearing session involves local residents giving their testimony for and against suspects, who are basically tried in the communities where they are accused of having committed crimes. Noting that the most of the individuals brought before Gacaca courts are prisoners who prepared to confess to the crimes they may have committed and freely willing to engage in community adjudication. It is worth mentioning that each Gacaca court consists of a panel that comprises nineteen judges.

Those judges, actually work without salaries, however, they have been granted free access to education and medical care to their families. In order to conduct a Gacaca session, a minimum of fifteen judges must be present as well as 100 witnesses and members of the community.

The authorization that given to the Gacaca courts enabled them to try and sentence anyone suspected of carrying out or being an accomplice to crimes committed during the genocide. However, the courts is not authorized to try army personnel or impose death penalty, given the fact that serious cases, involving perpetrators with responsibility for organizing and executing genocide-related atrocities, are deemed to be under the formal judicial system jurisdiction.

From legal and practical prospective, the key principle of the Gacaca process is truth telling, where the survivors, witnesses, and alleged perpetrators have convened to witness justice in action. Hence, the process requires the participation of all parties in a debate on what happened in order to establish the truth. The evaluation of the validity of the evidence provided is cross checked by the numbers of witnesses in the community who can testify to the crime that allegedly committed.

The Gacaca process commence with identifying the victims' families who were affected by atrocities during the civil war and genocide. Then identifying the suspects of these crimes and classified them based on four distinct categories of génocidaires: The first category comprises of the planners, organizers, and leaders of the genocide and those who used their position of authority to orchestrate murders. This category cannot

be tried by Gacaca because it falls under the jurisdiction of the national courts. The second Category consists of people accused of homicide or other acts against persons resulting in death. Third category involves individuals who committed violent acts without intent to kill. Last category consists of people who committed property crimes. After finished from the categorization, a summon order will be issued to the perpetrators to participate in the courts in their local community, where local witnesses speak for or against them.

Following the witness's testimony and the satisfaction of the evidence by the court, the Inyangamugayo passes judgment. The fundamental aspects of soliciting genuine confessions, repentance, and apologies in the Gacaca system, actually, helps in confronting the culture of impunity that had overwhelmed Rwanda during the genocide. In principle, during the process of truth telling, the defendant and witnesses should provide detailed descriptions of the crime, which includes how and where it was committed, confirm the victims, and in some cases if applicable, provide information about the location of the victims' bodies. Noting, perpetrators who give full confessions of their crimes often receive lesser sentences or punishment.

The element of confession within Gacaca system has been described by Peter Uvin, as one of the most innovative and important aspects of this mechanism, which can lead to substantially more 'truth' than conventional justice systems elicit. Also, the inclusion of apology deemed to be an important element in promoting reconciliation<sup>82</sup>. Notable advantage of Gacaca process is that its participatory approach which offers a visible form of justice in which community members has a voice and opportunity to participate in solving their country's problems.

It has been acknowledged that Gacaca system has essential psycho-social role to address the emotional concerns of the Rwandan community in the aftermath of the 1994 genocide and facilitating reconciliation and healing.

And that exactly what has been expressed by, Vamik Volkan who said: "if painful memories about past atrocities are not adequately dealt with by one generation, they will contaminate future generations with cycles of violence and counter violence".

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<sup>82</sup>Mutisi, 2009, pp.17-26.

By integrating culture and modern approaches in peace building and healing, Gacaca system reflects harmony of hybrid approaches to peace and reconciliation. Mixing restorative justice principles with the retributive western legal model that has created a uniquely Rwandan model of post conflict reconstruction (Toran Hansen).

As a matter of fact; Gacaca courts traditionally dealt with minor, relatively uncomplicated, and local-level civil disputes, therefore the nature and number of genocide-related cases can be quite overwhelming to the system.

Saying that one of the related challenges is the short period of judges training that was definitely insufficient. Another critic, the reliance on evidence of eyewitness's which can be challenging because some witnesses may be guided by self-interest, fear, or error. Hence, there is no guarantee that all eyewitness accounts and confessions are accurate, as the case in the formal courts.

Another concern rose by some observers is that the tribunals seemingly focus on crimes committed by the Hutus against the Tutsis which could be perceived as one-sided and ethnically biased, given the fact that Gacaca does not deal with the atrocities committed by the Rwandan Patriotic Front (RPF), then-Tutsi-based rebel movement that mobilized in Uganda. As has been reported by Human Rights Watch, before 1994 genocide, RPF had systematically committed serious human rights violations which resulted in displacement of thousands of people.

This concern has been pointed out by (Mamdani) who said that: "during the Gacaca sessions, victims are almost solely seen as 'Tutsi genocide survivors', which leads to his conclusion that *Gacaca* courts impose a victor's justice"<sup>83</sup>.

In addition, also it has been noted that the majority of indigenous women were not included in the primary structure of decision making.

In order to overcome the mentioned challenges, some suggestions have been provided. Concerning the challenges of the truth-telling process, dealing with the risks confronting witnesses and those who confess to crimes, it has been suggested that without adulterating the process of transitional justice, the government of Rwanda to adopt measures that protect the personal safety of witnesses and victims. Also, it's important to ensure that accused person have a right to fair trial, therefore, a chance to

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<sup>83</sup>Mutisi, 2009, pp.17-26.

appeal Gacaca judgment before the formal courts should be guaranteed, especially for those defendants who are facing long period of imprisonment; noting that Gacaca has no appeal process. Regarding, Gacaca judges, ongoing capacity building programs should be provided to them, to ensure that they are handling cases before them in effectively and efficiently. Challenges related to the perception that Gacaca courts impose a victor justice, it has been suggested that government of Rwanda should give the system a mandate for trials involving atrocities committed by all Rwandans, regardless of their official or unofficial status.

#### 6.2.7 GACACA VERSUS JAUDIA SYSTEM

Both Gacaca system and Jaudia system are endogenous method of conflict resolution; similar to other traditional mechanisms exist in Africa, such as Mato Oput in northern Uganda, the Gadaa system among the Oromo of Ethiopia, and the Guuirt of Somaliland. However, Gacaca system has been typically developed and modernized in the context of the Rwanda genocide. In principle, all the mentioned endogenous methods come under the restorative justice, however, recently as mentioned above Gacaca system has introduced with repetitive justice aspect. The development of Gacaca system raises valid question about the capacity of the traditional justice mechanisms in dealing or intertwining with repetitive justice. In addition it has opened the door for other countries with similar situation to use and learn from Gacaca experience.

The impact of the conflict in Darfur, Sudan, seemed to be more or less identical with Rwanda case. General facts about the two Rwanda and Darfur region; in terms of population Rwanda has approximately 12 million persons (2 main tribes, Hutu and Tutsi) , while Darfur is a region of over 6 million people, (inhabited with approximately 40 tribes). The root cause of the conflict in Darfur as explained in chapter two of this thesis, in addition to the political and development marginalization, part of the conflict include inter-tribal conflict, in Rwanda the causes more or less similar to Darfur case, the colonial power contributed to the creation of ethnic division and tension between Hutu and Tutsi by supporting one side politically and marginalizing the other side. As

has been pointed out by Bond Patrick that" before the independence Belgium switched allegiance from supporting Tutsis to supporting Hutu's right, even further more, helping to create a Hutu political party (PARMETHU).; this actually led to confusion and lust for power along ethnic divisions"<sup>84</sup>.

Although situation of Rwanda has been proved as genocide, however, both of them witnessed mass of atrocities, which included but not limited to killing, rape, torture, recruiting of child soldiers, destroying and burning of homes and properties, etc. In Rwanda, it has been estimated that 800,000 Tutsis and Hutus were killed and 2 million refugees fled the country, while in Darfur, approximately more than 300,000 people were killed and 2.5 million displaced to IDPs and refugee camps since the eruption of conflict.

The key purpose of the establishment of the Gacaca courts is based on the need for reconciliation to heal ethnic tensions that resulted from the mass atrocities. In Darfur, as we explained before the Arab-Non-Arab identity that used by the government to stoke the conflict not only resulted in mass atrocities , but also divided and caused defragmentation for the society and created ethnic tension between people in Darfur, therefore in this regard situation and the need is typical.

Conceptually, the two systems refer to any effort exerted by an individual or a group, based on principles and rules, to resolve a conflict within the community's individuals or groups. In Gacaca, the courts administered by members of the community known as the *Inyangamugayo*, or 'persons of exemplary conduct', who are characterized by courage, honor, justice, truth and punctuality. Therefore, based on their high moral and ethical standards, the *Inyangamugayo* were given this role. In Jaudia, the system administered by the *Ajaweed*, prominent personalities and dignitaries of the community who reached higher social posts owing or their high rate of commitment to the social standard designed by their community references .They are wise, shrewd and well mindful of the traditions and customs of their respective communities. It's obviously that the character and the selection of *Inyangamugayo* and *Ajaweed* are typically resembled. Its worth mentioning that both *Ajaweed* and *Inyangamugayo* are volunteer judges who receive no payment in return of their jobs, all that receive is

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<sup>84</sup>Patrick, 2006, page. 111.

commandment and prestige. The nature of the cases that is handled by both systems not including serious crimes, mainly involved in disputes concerning land use rights, cattle ownership, marriage, inheritance rights, and petty theft, among other interpersonal disagreements. However, Jaudia involves in resolving murder crime between individual and tribes as well by using what so called Rakuba rule.

In terms of the enforcement mechanisms for their orders and judgments that mainly rely on the social punishment. For example one of the means available is by isolating or boycotting of an individual or a group that does not abide by or respect the enforcement of their society's rulings. Certain kind of punishment could be perceived by westerner as strange and ineffective, but in African societies where the concept of community is very strong; such punishment is proved to be effective. However, the modernized Gacaca courts as explained earlier in this chapter, has been given judiciary authority mandate and their judgment is enforced by the formal law enforcement bodies.

Generically, the corner stone of such indigenous justice system (Jaudia, Gacaca), is to serve as complementary mechanism by adopting participatory approaches that include all parties to the debate, in order to come up with decision that is not only focusing on the punishment of the perpetrators but also maintaining social fabric and peaceful relation between victims and perpetrators which has been destroyed by the conflict before.

There are some shortcomings that encompass the endogenous systems mainly related to non-alliance with some human rights principles in their due process such as gender equality; however the Gacaca modernized courts is evidence that the system is able to accept the modern human rights movement.

In spite of the criticisms and some shortcomings that encompass Jaudia and Gacaca, both remain a key factor in maintaining social relations and social fabric and peaceful coexistence inter-tribally and intra-tribally.

## 6.2.5 SUMMARY OF INTERVIEWS

Based on our main thesis question, a number of interviews have been carried out with different categories that include academic, legal professional, humanitarian



workers and traditional leaders. The interviews either conducted through the phone, Skype or email. Herein the summary of the interviews:

A group of traditional leaders whom we have conducted interviews with, believe that in current Darfur conflict, Jaudia and Ajaweed can play important role in justice, peace and reconciliation.

For example, one of the traditional leaders states that "Jaudia and native administrators have the capacity not only to punish the criminals but also to reconcile between tribes and maintain the social fabric". Another one refers to the reparation by saying that, "Jaudia can effectively engage issues related to the compensations of victims of war; for example, Ajaweed with the assistance of the native administrators and tribal leaders, have their own methods in identifying the perpetrators, qualifying the damage and order the compensation. In cases of murder, damages and injuries, there is well known tradition method called Rakuba, which most of the tribes in Darfur adhere to it and they have trended records and agreement between them". It's worth mentioning here that some other interviewees also refer to what so called Rakuba and other tradition methods of compensation such as "Jabbar Khatir" which is an Arabic word, literally means compensation for the psychological damage and satisfaction of the oppressed party.

Describing the magnitude of complementary Jaudia roles, one of the legal professionals demonstrates that "With no doubt, the sustainability of peace in Darfur and the guarantee to harmonious post-conflict co-existence requires a careful handling of the atrocities that took place in the conflict. Given the fact that the atrocities committed in course of the conflict involve numbers that far exceed the capacity of formal legal systems to handle, therefore the Jaudia system can be introduced to fill such gap, by handling less serious cases. However, this also implies the need to learn from other conflicts in African countries, such as the Rwandan example of the Gacaca courts".

One of the Academic link between the root causes of the conflict and the role of the Jaudia in current conflict by stating that "in order to ensure justice with peace we need to give a room to the traditional leaders which include Ajaweed, native administrators and even Janjweed leaders, to sit and discuss the root causes of the

problems whereby they can develop a reconciliation mechanism that would be enforced by both the native administrators and the formal justice. More specific, another Academic states that "Jaudia can offer truth telling process thereby handling less serious cases that committed in the context of Darfur conflict.

One lawyer, discuss the issue of IDPs land tenure which have been occupied by pro-government tribes, by saying that " most of land in Darfur are unregistered, people in Darfur often recourse to the Ajaweed and customary law in their land disputes. Ajaweed can easily determine to whom land belongs, through what so called Hakura tradition system. However, in Darfur current case, where the IDPs left their land for more than 10 years and their land actually have been occupied by some newcomers and pro-government tribes, the customary law and Ajaweed become more relevant than the formal law which in fact will create serious problems. Sudan land act gives the right to the person who occupies the unregistered land for more than 10 years to possess it. Thus, in such situation I see that the Jaudia and Ajaweed have essential role to play in issues related to the land restitution, by applying the customary law".

Another Sudanese National staff who had been working with the NGOs and UN agencies since the eruption of Darfur conflict and scale up of emergency situation in the area, states that " development projects that would be implemented by development organizations in the region need to be associated with peace building projects, to ensure that conflicting tribes share the provided service in safely manner. Hence, the Ajaweed and traditional leaders have important role to play in peace building projects".

## CHAPTER 7

### CONCLUSION

From what mentioned above, we could strongly say that Traditional Justice system is highly needed as a complementary mechanism in the context of Darfur conflict. Form the main components of TJ; we can highlight some essential areas that Jaudia could contribute to its process, which include: reparation, truth commission, peace and security.

As we have already seen how the exclusion of the traditional leaders from Darfur peace process has negatively affected the outcomes to achieve sustainable peace. A real participation for traditional leaders that build from grassroots level where the peace negotiation initiated from the local communities with full participation of the most effected people such as IDPs and other war affected victims, then the reprehensive could participate in the formal shape of peace, based on the recommendation of their communities. Thus, we can develop the notion of community led peace which will constitute strong grantor to the success of the peace process and its implementation stages.

As has been said by Adam Azzain Mohammed, explaining the exclusion of the traditional leaders from the DPA by saying that "two undesirable outcomes resulted from the absence of native administrators at the negotiating table, first was losing the opportunity to come to grips with the regional heritage of conflict resolution, second, was losing the mechanism that would traditionally disseminate conference resolutions among grassroots populations and ensure their effective implementation".<sup>85</sup>

In addition, as we have seen the inclusion of the Janjweed leaders in any peace negotiation is very important to achieve security and sustainable peace. Saying that their participation will also give room to the different tribal traditional leaders to interact and come up with agreement that would facilitate the process of the reconciliation.

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<sup>85</sup> Mohammed, 2009, p.32.

Once peace is achieved and security restored, the issue of compensation for victims of war will come out. Traditional mechanisms and customary law could provide some frames of reference for the development of a comprehensive and effective program of reparations for Darfur".<sup>86</sup>

The advantages or the strengths of the traditional mechanisms is that they provide well trusted forum to address the issue of reparation at a collective and community level, taking into consideration the large numbers of victims and potential claimants.<sup>87</sup>

Hence, we strongly believe that traditional leaders of the native administration and Ajaweed who are specialized in the custom of blood money (Diyas) and possess wisdom and thought, could effectively contribute into the process by determining what compensation do those who were affected by the war in their areas ought to receive. Thus, these local leaders could be accommodated, in order to realize justice, within the reparation committees, follow up of blood money and reconciliations, due to their knowledge of the inner aspects and affected individuals, as well as the magnitude of the damage occurred to them.

Going back slightly to the atrocities that have been committed by the pro-government Arab militia (Janjweed), as a consequence we found that has incredibly intensified the ethnic identity and divided the community in Darfur region. Hence, in such situation, reconciliation or truth telling component become very important in order to heal this ethnic tension and to rebuild the destroyed social fabric. In respect to Jaudia traditional justice system as we explained earlier in this thesis it has prolong experiences in resolving tensions and disputes amongst Darfur communities, hence, based on the evident that provided by the interviewed traditional leaders, we believe that it could play similar role to what Rwanda Gacaca court had accomplished before.

However, in addition to learn from the experiences of other conflicts in African countries, some challenges that encompass the Jaudia system need to be addressed and accordingly tackled.

First concern related to the human rights standard, in particular issues related to the representation of women and children before the Jaudia. The system need to be

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Baldo, 2007, p.3.<sup>86</sup>

Idem, 2007, p.22<sup>87</sup>

developed in such a way it could be more sensitive to gender and child friendly as well. In addition, some due process such as presumption of innocence it appears that Jaudia not completely adhere to it. However, to overcome such challenge, native administrators and Ajaweed need to be well trained on the basic human rights standard which undoubtedly include the principles of fair trial and case management. Saying that doesn't necessarily mean to convert the Ajaweed to formal judges, but rather to ensure their adherence to the human rights standards in their traditional court process.

The second challenges concerning the government political interference by using the native administration and some Ajaweed to acquire political advantages. This need to isolate the political ambitious from Jaudia system and the government role must be limited to the preparation of the reconciliation conferences and serve as grantee to ensure the implementation of the Jaudia provisions.

Another issue also need to be addressed and that is the legal bases of the potential traditional courts. In Rwanda as an example; the establishment of Gacaca courts was based on law, which enacted in 2001. We raise this issue because in Sudan there is a norm during the last two decades that the chief of justice incline to establish special courts, as the case of the establishment of the Special Criminal Court on the Events in Darfur (SCCED) On June 7, 2005. In our case of the assumed traditional Jaudia courts, we prefer its law to be enacted by the parliament. In addition to fact that the parliament is the legal body that responsible for enacting laws in the democratic societies, the process itself constitute consultation which will give the opportunity to the different categories of Darfur communities to participate and raise their concerns and opinions about the law proposal through their parliament representatives.

In this regard we believe that independent national civil societies have important role to play in terms of facilitating consultations at the grassroots level, as well as, advocating for the impartiality and neutrality of the process.

On the other hand, as we have explained previously in chapter 3 of this thesis that Sudan legal system has failed to properly respond to the crimes that are committed in Darfur, and the international jurisdiction become inevitably applicable to Darfur context.

This actually, raise a valid question about what kind of international tribunal that we need, do we need pure or hybrid international tribunal?

Generically, we do prefer hybrid tribunal to be located in Darfur for three main reasons. Firstly, it will give the opportunity to the victims to access / participate and see the justice physically in front of their eyes, secondly, it will enable the traditional justice system to serve as complementary mechanism, and lastly, the hybrid system will enhance the capacity of the National judiciary system, as well as, the national judges. However, this just general thought, hence; we do recommend further research in this regard.

Finally, there are some limitations that accompanied this study such as inability to conduct interviews with the right holders (IDPs and Refugees), as well as the incapability of having face to face interview, which believe that would be more informative than phone based interviews.

ANNEX

8. LIST OF INTERVIEWS

Interview Question: What Can Jaudia Traditional Mechanism Offer into the Process of Justice, Peace and Reconciliation in Darfur Transitional Justice process?

Interview ( in Arabic) with Abdul-Jabbar Abdullah Fadul, Senior lecturer in Environmental Sciences and Natural resources , University of al Fashir, Elgenaina, 15 May 2013.

Interview (in Arabic) with Dr. Ahmed Adam Yousuf , Retired Local Government Officer in the Sudan Civil Service and a Former Commissioner of Mellit, Northern Darfur, Elfasher, 5 June 2013.

Interview (in Arabic) with Abdu-alatti Edriss Mohammed, Lawyers Representative's, North-Darfur Bar Association, Elfahser, 17 May 2013.

Interview with Hussam-Eldin Mekki Elbakri , Protection Officer, UNHCR, Tindouf, 2 May 2013.

Interview with Mohammed Ibrahim Ahmed, Legal Consultant, Private Law Firm, Doha, 2 June 2013.

Interview (in Arabic) with Anwar Edriss Ali, Lawyer, Private law Firm, Elfasher, 17 May 2013.

Interview (in Arabic) with Ahmed Suleiman Takas, Human Rights Officer, United Nations, Geneva, 20 May 2013.

Interview (in Arabic) with Ibrahim Mohammed Al-zubair, Customary Judge, Elfahser Customary Court, Elfasher, 1 June 2013.

Interview (in Arabic) with Mohammed Ibrahim Mohammed, Civil Affairs Officer, United Nations, Elfasher, 2 June 2013.

Interview (in Arabic) with Ibrahim Abdalla, the Head of Ajaweed& Reconciliation Committee, Native Administration, Nyala, 17 June 2013.

Interview (in Arabic) with Abass Aldooma, Tribal Leader, Native Administration, Nyala, 17 June 2013.

Interview with Mohammed Alnour, Humanitarian Worker, Oslo, 20 June 2013.

Interview with Hamid Abaker, Humanitarian Worker, Nyala, 10 June 2013.

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