

# NO TRANSITIONAL JUSTICE WITHOUT TRANSITION: DARFUR – A CASE STUDY

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INTRODUCTION.....	476
I. BACKGROUND.....	476
II. INTERNATIONAL LAW AND THE SITUATION IN DARFUR.....	481
III. THE HYBRID COURT FOR CRIMES IN DARFUR.....	488
IV. TRADITIONAL MECHANISMS FOR RESOLVING CONFLICT AND RECONCILIATION.....	489
V. RECONCILIATION.....	493
VI. REPARATIONS.....	495
VII. POTENTIAL SHORTCOMINGS OF THE USE OF TRADITIONAL MECHANISMS.....	497
CONCLUSION.....	498

The Arabs and the government forces arrived on both sides of the village, with vehicles, on horseback and on camels, armed with big weapons. I hid in order to see how many there were. The Arabs cordoned off the village with more than 1,000 horses. There was also a helicopter and an Antonov plane. They shelled the town with more than 200 shells. We counted 119 persons who were killed by the shelling. Then the Arabs burnt all our houses, took all the goods from the market. A bulldozer destroyed houses. Cars belonging to the merchants were burnt and generators were stolen. They said they wanted to conquer the whole territory and that the Blacks did not have a right to remain in the region.

*– Testimony of a local chief in the Abu Gamra area (between Tina and Kornoy), describing the extent of the destruction in his village.<sup>1</sup>*

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As a primary matter, we would like to acknowledge and express our gratitude to Mr. Daniel Solomon, National Advocacy Coordinator for STAND: The Student-led Division of

## INTRODUCTION

Testimony such as that above has generated a global, committed, activist community; diplomatic initiatives; and talk of ending impunity through the use of international law. This paper examines the response options for providing justice and accountability in Darfur as it transitions—hopefully—from war to sustainable peace. In light of the unique cultural and historical characteristics of the conflict examined in this Article as well as developments in international law, the Authors suggest that only a combination of international, national and local, and traditional mechanisms for accountability can bring true peace to the people of Darfur and the greater Sudan.

## I. BACKGROUND

Darfur, a large, isolated region of western Sudan, has sometimes been more closely identified with its geographical neighbors (such as Chad and Libya) than with the Sudanese capital, Khartoum, from which it is detached geographically, politically, economically, and emotionally. Historically, even the British were unable to rule Darfur effectively from Khartoum, as evidenced in a letter from Sir Herbert Kitchener in a proclamation to the Sheikhs of Kordofan and Darfur in 1898: “I write to inform you that it is the intention of the Government to resume its authority in the countries of Kordofan, Darfur, and all the western Sudan; but for the moment I am occupied in organizing the Nile and the eastern Sudan . . . .”<sup>2</sup> This “distance,” accompanied by political and economic disenfranchisement, has come to be referred to as “marginalization,” which continues to define Darfur until today.

The demographics of Darfur are interesting to note, and are important to understanding the region. The region of Darfur has encountered extensive demographic change over the past half-century. The population has increased six-fold since 1973, from 1.3 million to 6.2 million. Nearly half of this population, which is increasingly linked to Darfur’s urban centers, is between the ages of zero and sixteen.<sup>3</sup> Conflict in the Darfur region has

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the Genocide Intervention Network, who provided significant research assistance in support of this article.

1. Amnesty Int’l, *Sudan: Arming the Perpetrators of Grave Abuses in Darfur Testimonies*, AI Index: AFR 54/144/2004 (Nov. 16, 2004) available at <http://www.amnesty.org/en/library/asset/AFR54/144/2004/en/71d39083-fa9e-11dd-999c-47605d4edc46/afr541442004en.pdf>.

2. A.B. THEOBALD, ALI DINAR: LAST SULTAN OF DARFUR 31 (1965).

3. Rep. of the Office of the U.N. Resident and Humanitarian Coordinator, U.N. Sudan, *Beyond Emergency Relief: Longer-Term Trends and Priorities for UN Agencies in Darfur*, 14-15 (Sept. 2010), available at [www.unsudanig.org/docs/Darfur\\_LT\\_100905\\_med.pdf](http://www.unsudanig.org/docs/Darfur_LT_100905_med.pdf); *Political Map of the Republic of Sudan*, NATIONS ONLINE

escalated the process of urbanization and destabilized agrarian communities, largely as a result of migratory flows.<sup>4</sup> The ethnically diverse population boasts between forty and ninety ethnic tribes.<sup>5</sup> Despite the region's ethnic diversity, both the so-called "African" tribes—the Fur, the Tunjur, Meidob, and Zaghawa in the north, the Berti and Birgid to the east, and the Masalit to the west, among others—and the Arab tribes, are almost exclusively Muslim.

Darfur is still largely a traditional region. Cattle-herding and camel-herding nomads or semi-pastoralists coexist with sedentary farmers much as they have for generations. "Rural livelihoods in Darfur are relatively simple to understand, in that all tribes, Arab and non-Arab, cultivate crops and raise livestock to varying degrees."<sup>6</sup> There is no development to speak of outside of El Fashir, Nyala and Geneina, the capitals of North, South and West Darfur, respectively, with life largely unaffected by resources from Khartoum. Even access to education has been extremely limited for Darfurians:

"Entry to schools was very strictly controlled and largely limited to the sons of tribal chiefs," P. Ingleson, the British Governor of Darfur from 1934 to 1941, said at the time: "We have been able to limit education to the sons of chiefs and [N]ative [A]dministration personnel and can confidently look forward to keeping the ruling classes at the top of the education tree for many years to come."<sup>7</sup>

Other aspects of marginalization have included restricting access to health care, jobs, resources, and most importantly, political power; the latter a crucial factor in post-conflict justice and accountability.<sup>8</sup>

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PROJECT, [http://www.nationsonline.org/oneworld/map/sudan\\_map.htm](http://www.nationsonline.org/oneworld/map/sudan_map.htm) (last visited Apr. 27, 2011).

4. *Id.* at 15-16.

5. JULIE FLINT & ALEX DE WAAL, *DARFUR: A NEW HISTORY OF A LONG WAR* 6 (2008).

6. H. Young, A.M. Osman, et al., *Darfur – Livelihoods Under Siege*, FEINSTEIN INT'L FAMINE 2 (2005), available at <https://wikis.uit.tufts.edu/confluence/download/attachments/14553452/Young--Darfur--Livelihoods+Under+Seige.pdf?version=1>.

7. *Id.* at 19 (quoting M.W. DALY, *IMPERIAL SUDAN: THE ANGLO-EGYPTIAN CONDOMINIUM: 1934-1956* (1991)).

8. The installment of one group of proxy rulers drawn from the local population was a common mechanism for local control in European colonial history. In Rwanda, the colonial powers established a myth about the Tutsi people's superiority, in order to establish their right to rule the majority Hutu on behalf of the colonizers. Similarly, in the Belgian Congo, King Leopold II used local groups to subdue and control other tribes in order to expand his control over the vast expanse of his colonial empire. See Jessica Raper, *The Gacaca Experiment: Rwanda's Restorative Dispute Resolution Response to the 1994 Genocide*, 5 PEPP. DISP. RESOL. L.J. 1 (2005) (providing a detailed account of such practices in Rwanda). And, for the Belgian Congo, see A. HOCHSCHILD, *KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA* (1998). Such divisive control mechanisms by Western colonial powers fostered later distrust of the Northern powers, and

This lack of access to political power for Darfurians was documented in the politically motivated publication, *The Black Book: Imbalance of Power and Wealth in Sudan*, published in 2000 by the anonymous “Seekers of Truth and Justice.”<sup>9</sup> The book documents how Darfurians have been restricted from power in all its manifestations, from jobs, to distribution of resources, to the military hierarchy, which had all been kept a closely-guarded commodity by a small, ruling northern elite. Table 10 from *The Black Book* demonstrates the power restrictions described above:

**Table 10: Constitutional / Ministerial Positions, July 1989-December 1999.**<sup>10</sup>

Region	Positions	%
Eastern	6	3%
Northern	120	59.4%
Central	18	8.9%
Southern	30	14.9%
Western	28	13.8%

As the above table shows, representation of the Northern Region was 59 percent for a group that constituted only 12.2% only. As such, the destiny of the remaining 87.8% of the population was subordinate to the will of the 12.2% who came from the Northern region. The Northern Region itself was not (still is not) a homogeneous entity. In fact, the North contained many groups that were subject to same level injustice and marginalization . . . . In fact, the entire Northern Region was dominated by only three ethnic groups<sup>11</sup> which also dominated the whole country.<sup>12</sup>

The current conflict in Darfur ostensibly stems from a joint Sudan Liberation Army (SLA) and Justice and Equality Movement (JEM) attack on April 25, 2003, in which they entered al-Fashir and attacked government

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also exacerbated the current tribal disputes that linger throughout post-colonial Africa. This history of abuse and manipulation contributes to the African Union’s discomfort with the imposition of international justice mechanisms in Sudan.

9. *The Black Book: Imbalance of Power and Wealth in Sudan, Part 1* [http://www.sudanjem.com/sudanalt/english/books/blackbook\\_part1/book\\_part1.asp.htm](http://www.sudanjem.com/sudanalt/english/books/blackbook_part1/book_part1.asp.htm) (last visited May 6, 2007) [hereinafter *Black Book*]. See William Wallis, *The Black Book History or Darfur’s Darkest Chapter*, SUDAN TRIB. (Aug. 21, 2004), <http://www.sudantribune.com/spip.php?article4868> (synopsizing *The Black Book*).

10. *Id.* at tbl. 10.

11. These three ethnic groups, the Shaygia, the Jaalyeen, and the Danagla, are groups from the Northern Region and constitute approximately five percent of the overall population of Sudan.

12. *Black Book*, *supra* note 9.

forces.<sup>13</sup> “Seven hours later, four Antonov bombers and helicopter gunships were destroyed, by government account, and seven by the rebels.’ At least 75 troops, pilots and technicians had been killed and another 32 captured, including the commander of the air base, Maj. Gen. Ibrahim Bushra Ismail.”<sup>14</sup>

However, history demonstrates that the conflict has much deeper roots. An excerpt from a Human Rights Watch report from 2004 clarifies the background of the conflict:

Beginning in the mid-1980s, when much of the Sahel region was hit by recurrent episodes of drought and increasing desertification, the southern migration of the Arab pastoralists provoked land disputes with agricultural communities. These disputes generally started when the camels and cattle of Arab nomads trampled the fields of the non-Arab farmers living in the central and southern areas of Darfur. Often the disputes were resolved through negotiation between traditional leaders on both sides, compensation for lost crops, and agreements on the timing and routes for the annual migration.

In the late-1980s, however, clashes became progressively bloodier through the introduction of automatic weapons. By 1987, many of the incidents involved not only the Arab tribes, but also Zaghawa pastoralists who tried to claim land from Fur farmers, and some Fur leaders were killed. The increase in armed banditry in the region also dates from this period, partly because many pastoralists lost all their animals in the devastating drought in Darfur of 1984-1985 and, in turn, raided others to restock their herds.<sup>15</sup>

In response to the 2003 attacks, the government of Sudan mobilized and armed a proxy militia, called *Janjaweed*, to retaliate for this initial aggression. The term *Janjaweed* requires some clarification:

The label ‘Janjaweed’ is misleading, as it is used differently in Darfur according to tribal affiliation and political viewpoint. The term is generally used to describe ‘additional armed forces,’ the militias mobilised by the government to address the counter-insurgency, whose methods and violations of human rights are infamous . . . in some circles of the international community, however, there is the wrong and dangerous

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13. Greater details of the history of the conflict are available in J. Flint, *Beyond ‘Janjaweed’: Understanding the Militias of Darfur*, 16 SMALL ARMS SURVEY (2009); A. de Waal, *Counter-Insurgency on the Cheap*, 31 REV. OF AFR. POL. ECON. 716, 723 (2004); and MAHMOOD MAMDANI, *SAVIORS AND SURVIVORS: DARFUR, POLITICS AND THE WAR ON TERROR* (2009).

14. MANDAMI, *supra* note 13, at 288.

15. HUMAN RIGHTS WATCH, REPORT 2004: DARFUR IN FLAMES: ATROCITIES IN WESTERN SUDAN 7 (2004), available at <http://www.hrw.org/sites/default/files/reports/sudan0404.pdf>.

assumption that Janjaweed = Arabs = perpetrators of human rights violations. Among pro-government groups, the term 'Janjaweed' is used to describe bandit gangs . . . who are considered to be criminals and outlaws, not under the authority or control of any tribe. The 'additional armed forces,' by contrast, are men mobilised by their tribes to receive military training, who are paid, and who come under the direct control of the government.<sup>16</sup>

Despite the confusion about the nature and role of the *Janjaweed*, the group's attack methods are largely consistent with those used historically in Darfur.<sup>17</sup> A reference to a 1900-1901 expedition against the Bani Halba tribe, states that "Ali Dinar (the last sultan of the Fur tribe in Darfur) has beaten the Bani Halba and plundered all their property."<sup>18</sup> In another example, "[t]he Shaikh of the Zaiadiya stated that 27 villages had been destroyed by fire; 90 men killed; 85 women and children and 70 slaves captured, together with 670 sheep, 250 cattle, 50 donkeys and 40 camels."<sup>19</sup>

Despite this historical context, the current conflict differs from previous iterations of violence in Darfur in a number of ways. First, the scale and scope of the conflict outpaces any previous violence by multiples. A 2005

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16. Young, *supra* note 6, at 23.

17. The "*Janjaweed*" label has been used, often indiscriminately, by media reports and advocacy organizations to describe the loose amalgam of militias armed and mobilized by the Sudanese government. Alex de Waal describes the *Janjaweed* as an integral component of the Sudanese government's "counter-insurgency on the cheap," which allowed the Sudanese government to pursue a relatively inexpensive and unaccountable scorched-earth policy against Darfuri rebels, including the Justice and Equality Movement (JEM) and Sudan Liberation Army (SLA). De Waal, *supra* note 13. The recent *Janjaweed* militias, however, are the latest incarnation of a strategy of militia warfare used consistently throughout the last several decades of civil conflict in Southern Sudan, the Nuba Mountains, and Darfur. Flint, *supra* note 13, at 16. Organized by Sheikh Musa Hilal Abdalla, a Mahamid Arab chief in North Darfur, the *Janjaweed* are closely affiliated with various paramilitary organizations under the command of the Sudanese regime, including the Popular Defense Forces (PDF), the Border Intelligence Guards, and the Central Police Reserve. *Id.* at 18. The PDF began to recruit, train, and arm tribal militias in the aftermath of the April 25, 2003 SLA-JEM attack on the El Fashir airport. The integration of many tribal militias into the PDF command structure and Darfur's various inter-tribal conflicts frequently obscured the identities of various paramilitary and tribal groups in the region, including the *Janjaweed*. Jago Salmon, *A Paramilitary Revolution: The Popular Defense Forces*, 29 SMALL ARMS SURVEY (2007), available at <http://www.smallarmssurveysudan.org/pdfs/HSBA-SWP-10-Paramilitary-Revolution.pdf>. Sudanese military intelligence and National Congress Party officials coordinated cross-border *Janjaweed* mobilization with anti-Déby rebels in Chad, as well as Sudanese military's counterinsurgency operations. However, the organization of *Janjaweed* militias has shifted significantly as a result of a number of factors, including funding concerns (initially, counterinsurgents were compensated through booty, rather than consistent salaries), relations with the PDF, and relations with the Sudanese government in the aftermath of the ICC arrest warrants. Flint, *supra* note 14, at 21. The government forces' control over the *Janjaweed* militias ebbed as the Darfur conflict continued, prompting significant intra-Arab land conflict. *Id.* at 40.

18. THEOBALD, *supra* note 2, at 44.

19. *Id.* at 50.

study of the impact on livelihoods in Darfur found that “the non–Arab population of Darfur has lost between fifty percent and ninety percent of its livestock to the government’s armed forces.”<sup>20</sup>

Second, the commonly repeated misperception in much of the Western media frames the conflict as a religious or racial dispute. As shown previously, the conflict has many roots: marginalization from resources and political power, unresolved solutions from drought–related conflict, and a tradition of revenge and retaliation for raids on villages and livestock, all of which were exacerbated by the government’s brutal response incorporating attacks on civilians as a strategy. All of these root causes impact the feasibility and design of post–conflict justice and accountability mechanisms.

International law has also changed since the time of previous conflicts in Darfur, so that genocide, crimes against humanity, war crimes, and use of atrocities as methods of power and control are no longer acceptable. Beginning in earnest with the Nuremberg and Tokyo Trials and following with the International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the UN–backed Special Court for Sierra Leone, the Ad–Hoc Court for East Timor, and the Extraordinary Chambers in the Courts of Cambodia, the international legal community has made significant efforts to end the global culture of impunity. State leaders have faced charges of human right violations committed while in office.<sup>21</sup> Secondary leaders and organizers of administrative violence have also been brought to justice for violations of international human rights law and violations of domestic criminal law.

## II. INTERNATIONAL LAW AND THE SITUATION IN DARFUR

The concept of an international criminal court was first introduced in UN General Assembly Resolution 95(I) in 1946.<sup>22</sup> It took almost fifty–two years until July 17, 1998 to move the court from concept to reality with the creation of the Rome Statute of the ICC.<sup>23</sup> Mindful of *ex post facto* considerations,<sup>24</sup> and the need for extensive State buy–in to the concept of an international court, the Rome Statute did not enter into force until sixty

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20. Young, *supra* note 6, at 5.

21. State leaders who have faced charges include Prime Minister Jean Kambanda of Rwanda, President Slobodan Milošević of Serbia, President Hissène Habré of Chad, President Saddam Hussein of Iraq, and, most recently, President Alberto Fujimori of Peru.

22. Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, G.A. Res 1/95, U.N. Doc. A/Res 41/1 (Dec. 11, 1946).

23. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

24. Article 22, Section 1 of the Rome Statute sets forth the basic rule of *nullem crimen sin lege*: that no person may stand charge before the ICC for an act unless the act in question was a crime under the Rome Statute at the time of the commission of the act. *Id.* art. 22(1).

States joined the treaty regime, or more specifically, until “the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.”<sup>25</sup>

The Rome Statute entered into force as per the above procedure on July 1, 2002, after a ceremonial group ratification brought the total number of ratifications to sixty-six.<sup>26</sup> The Rome Statute now enjoys 114 state-parties, including thirty African nations.<sup>27</sup> The ICC’s establishment trumpets the fact that neither governments nor individuals can hide behind cover of state sovereignty when implementing actions that run counter to minimum standards of behavior set forth in international law.<sup>28</sup> The Court has jurisdiction over four crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>29</sup>

Evidence of atrocities in Darfur leaked out to the world and made its way to the ICC, despite limitations due to the government of Sudan restricting access to the region.

In many cases documented by Human Rights Watch, there was little to no rebel or armed presence in the targeted villages at the time of the attacks, and the attacks were clearly aimed at the civilian population. Even in cases where there was a rebel presence, the Sudanese government’s attacks made no attempt to discriminate between combatants and civilians, or disproportionately harmed civilians beyond the expected military advantage of the attack, in violation of international humanitarian law. The rebel groups in Darfur are also responsible for serious abuses, including killings, rape and abductions of civilians, attacks on humanitarian convoys, and theft of livestock, that are war crimes.<sup>30</sup>

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25. *Id.* art. 126(1).

26. JOANNE LEE, INT’L CTR. FOR CRIMINAL LAW REFORM & CRIMINAL JUSTICE SOC’Y, NINTH ICC PREPCOM: 8-19 APRIL 2002, UNITED NATIONS, NEW YORK 7 (2002), <http://www.icclr.law.ubc.ca/Publications/Reports/PrepcomreportApr02-gen2.PDF>.

27. *The State Parties to the Rome Statute*, INTERNATIONAL CRIMINAL COURT (ICC), <http://www.icc-cpi.int/Menus/ASP/states+parties/> (last visited March 12, 2009). Sudan has signed, but has not ratified, the Rome Statute, and thus is considered a non-party to the statute.

28. *See* Rome Statute, *supra* note 23, art. 1 (stating that the International Criminal Court “shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions.”).

29. The scope of the crime of aggression is still at issue, and was recently addressed at the Kampala Conference, which took place in June 2010.

30. HUMAN RIGHTS WATCH, REPORT 2005: ENTRENCHING IMPUNITY: GOVERNMENT RESPONSIBILITY FOR INTERNATIONAL CRIMES IN DARFUR 10 (2005), *available at* <http://hrw.org/reports/2005/darfur1205/darfur1205webwcover.pdf>.

These and similar findings were confirmed in January 2005 with the publication of the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, which stated:

[b]ased on a thorough analysis of the information gathered in the course of its investigations, the Commission established that the Government of Sudan and the Janjaweed (a total of 51 individuals) were responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law and recommended that the Security Council refer the case to the ICC.<sup>31</sup>

Given evidence that atrocities which violated international humanitarian law had occurred in Darfur, the UN Security Council took up the case to determine what action, if any, was to be taken under Chapter VII of the UN Charter. After a series of resolutions and reports,<sup>32</sup> the Security Council, on March 31, 2005 passed UNSCR 1593, in which it “[d]ecide[d] to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the ICC.”<sup>33</sup> In June 2005, the ICC Office of the Prosecutor announced that it was investigating the situation in Darfur for the purpose of determining whether crimes under the jurisdiction of the court had been committed. In July 2008, the Chief Prosecutor of the ICC filed three counts of genocide, five charges of crimes against humanity, and two counts of war crimes against President Bashir, and referred the case to the Pre-Trial Chamber of the ICC for review and the issuance of an arrest warrant under Article 58.<sup>34</sup> On March 4, 2009, the Pre-Trial Chamber issued an arrest warrant for Bashir. The warrant included seven counts of crimes under the jurisdiction of the

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31. Rep. of the Int’l Comm’n of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, established pursuant to resolution 1564 (2004) concerning reports of violations of international law in Darfur, 3, [www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf) (Jan. 25, 2005).

32. See S.C. Pres. Statement 2004/18, U.N. Doc. S/PRST/2004/18 (May 16, 2004); S.C. Res. 1547, U.N. Doc. S/RES/1547 (June 11, 2004); S.C. Res. 1556, U.N. Doc. S/RES/1556 (July 30, 2004); S.C. Res. 1590, U.N. Doc. S/RES/1590 (Mar. 24, 2005); S.C. Res. 1591, U.N. Doc. S/RES/1591 (Mar. 29, 2005).

33. After referral to the ICC, the UN did not cease its action regarding Darfur. Since the passage of Resolution 1593, the Security Council followed up with at least eleven Presidential Statements as well as seven Security Council Resolutions. See S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005); S.C. Res. 1627, U.N. Doc. S/RES/1627 (Sept. 23, 2005); S.C. Res. 1663, U.N. Doc. S/RES/1663 (Mar. 24 2006); S.C. Res 1672, U.N. Doc. S/RES/1672 (Apr. 25, 2006); S.C. Res. 1679, U.N. Doc. S/RES/1679 (May 16, 2006); S.C. Res. 1706, U.N. Doc. S/RES/1706 (Aug. 31, 2006) (authorizing action under Chapter VII of the Charter of the United Nations); S.C. Res. 1713, U.N. Doc. S/RES/1713 (Sept. 29, 2006); S.C. Res. 1714, U.N. Doc. S/RES/1714 (Oct. 6, 2006).

34. Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Prosecutor’s Application for a Warrant of Arrest (July 14, 2008), <http://www2.icc-cpi.int/NR/rdonlyres/64FA6B33-05C3-4E9C-A672-3FA2B58CB2C9/277758/ICCOTPSummary20081704ENG.pdf>. The court had earlier issued arrest warrants for Ahmed Haroun, the Sudanese Minister for Humanitarian Affairs, and Ali Kushayb, a Janjaweed militia leader.

court—five counts of crimes against humanity and two counts of war crimes. In a two-to-one decision, the court declined to issue an arrest warrant on the charges of genocide.

The majority of the Chamber, Judge Anita Ušacka dissenting, found that the material provided by the Prosecution in support of its application for a warrant of arrest failed to provide reasonable grounds to believe that the Government of Sudan acted with specific intent to destroy, in whole or in part, the Fur, Masalit and Zaghawa groups. Consequently, the crime of genocide is not included in the (initial) warrant issued for the arrest of Omar Al Bashir. Nevertheless, the Judges stressed that if additional evidence is gathered by the Prosecution, the decision would not prevent the Prosecution from requesting an amendment to the warrant of arrest in order to include the crime of genocide.<sup>35</sup>

Immediately after its issuance, President Bashir rejected the validity of the arrest warrant and ordered most international aid workers to leave Sudan.<sup>36</sup> The African Union objected to the issuance of the arrest warrant on the grounds that it might frustrate the ongoing peace efforts, noting that “its request to the UN Security Council to delay Mr. Bashir’s indictment had been ignored.”<sup>37</sup> China, keenly interested in Sudanese oil imports and also a major exporter of arms and armaments to Sudan, called for a suspension of the arrest warrant in order to “further the peace process.”<sup>38</sup> The Arab League rejected the arrest warrant outright.<sup>39</sup>

The prosecution subsequently appealed the court’s divided ruling described above, and requested an amendment to the warrant of arrest to include the crime of genocide. On July 12, 2010, the ICC Appeals Chamber reconsidered the Pre-Trial Chamber’s decision and allowed the addition of three counts of genocide to the Court’s arrest warrant for President Bashir. The Appeals Chamber determined that there existed “reasonable grounds” to suggest that he had perpetrated attacks on the Fur, Masalit, and Zaghawa

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35. Press Release, ICC Issues a Warrant of Arrest for Omar Al Bashir, President of Sudan, ICC Press Release ICC-CPI-20090304-PR394 (Mar. 4, 2009), available at [http://www.iccpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2009\)/icc%20issues%20a%20warrant%20of%20arrest%20for%20omar%20al%20bashir\\_%20president%20of%20sudan](http://www.iccpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2009)/icc%20issues%20a%20warrant%20of%20arrest%20for%20omar%20al%20bashir_%20president%20of%20sudan).

36. *Sudan Orders Aid Agency Expulsions*, CNN (Mar. 4, 2009), <http://www.cnn.com/2009/WORLD/africa/03/04/sudan.expel/>.

37. *Africa Move on Bashir Dismissed*, BBC NEWS (July 5, 2009), <http://news.bbc.co.uk/2/hi/africa/8134718.stm>.

38. Igalliot, *African Union to Call for Suspension of Bashir Arrest Warrant*, FRANCE 24 (June 3, 2009), <http://www.france24.com/en/20090305-african-bashir-arrest-sudan-darfur-ICC-au-agencies-aid-relief>.

39. *Arab League Rejects ICC Bashir Warrant*, SUDAN WATCH (Apr. 1, 2009), <http://sudanwatch.blogspot.com/2009/04/arab-league-rejects-icc-bashir-warrant.html>.

ethnic groups in Darfur with the intent to destroy in part these civilian populations.<sup>40</sup>

The ICC's reconsideration of genocide charges against President Bashir have proved controversial. The U.S. State Department and National Security Council both expressed the United States' support for the ICC's decision and general accountability in Darfur. However, Scott Gration, the U.S. special envoy to Sudan at the time, said that the ICC decision would make the process of conflict resolution in Darfur and Southern Sudan "more difficult."<sup>41</sup> China established a neutral position on the new genocide charges. Jean Ping, the chairman of the Commission of the African Union, criticized the genocide charges against Bashir, noting the potentially damaging effects of the ICC's decision on the "democratic transformation of the Sudan."<sup>42</sup> The Gulf Cooperation Council expressed similar concern about the status of the peace process in the aftermath of the ICC's decision. Since the July 12 decision, the African Union has repeatedly described the genocide charges as damaging to the peace process in Sudan and a demonstration of the Prosecutor's anti-African bias. At the July 2010 AU summit in Kampala, the heads of states passed a draft resolution emphasizing non-cooperation with the ICC and condemning Moreno-Ocampo's conduct as prosecutor.<sup>43</sup> According to the *Sudan Tribune*, South Africa, Botswana, and Uganda successfully advocated for a less forceful resolution on the ICC. Where the original resolution had included a non-cooperation clause, the new draft simply expressed concern over the prosecutor's conduct.<sup>44</sup> Repudiating the AU resolution, South Africa reiterated its support for the ICC and intent to arrest Bashir if he visits the country.

In addition to the complexity of dealing with an indicted war criminal as president of a sovereign state, the ICC's role in Darfur faces other challenges. The court can only try a very small number of cases, and therefore will by necessity limit itself to only the highest level of perpetrators (the decision-makers and orchestrators of large-scale

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40. For an excellent critical analysis of the ICC's genocide charges against Bashir, please see, A. T. Cayley, *Recent Steps of the ICC Prosecutor in the Darfur Situation: Prosecutor v. President: The Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide*, 6 J. INT'L CRIM. JUST. 829 (2008).

41. *U.S. Special Envoy Unhappy About ICC Genocide Ruling Against Sudanese President*, SUDAN TRIB., July 14, 2010, <http://www.sudantribune.com/U-S-special-envoy-unhappy-about,35657>.

42. *African Union Chief Criticizes Genocide Charges Against Sudan President*, SUDAN TRIB., July 18, 2010, <http://www.sudantribune.com/African-Union-chief-criticizes,35693>.

43. President Bashir did not attend the summit.

44. *African Union Moves Aggressively to Shield Bashir from Prosecution*, SUDAN TRIB., July 29, 2010, <http://www.sudantribune.com/African-Union-moves-aggressively,35786>.

atrocities).<sup>45</sup> In addition, trials are a time-intensive process, taking years to complete, delaying justice to a significant degree.<sup>46</sup> Another critique of the court is that The Hague is significantly remote from Darfur, geographically, politically, and emotionally, that justice in the Hague will not be tangible for the very destitute people in Darfur for whom an old newspaper is a luxury.<sup>47</sup> Many advocates of justice see the court as a side-show to real justice, which they say must be conducted closer to the scene of the crime.

Despite the inherent challenges, with the considerable amount of international buy-in and State commitment to the ICC, it seems likely that the ICC prosecutions of President Bashir and other Sudanese defendants will continue, despite calls for the court to withdraw or defer its indictment and arrest warrant of Bashir under Article 16 of the Rome Statute.<sup>48</sup> Neither the UN Security Council nor Chief Prosecutor Moreno-Ocampo has shown

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45. See MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS ATROCITIES 31 (1998) (discussing case selectivity and international criminal courts).

46. Since the ICC has not yet conducted any trial proceedings, we can look to the ad hoc tribunals for an example of the time-frames involved in an international criminal trial. As one example, the Slobodan Milošević trial had taken a total of five years when Milošević died in custody in the Hague. Prosecutor v. Milošević, Case No. IT-02-54-T, Public Transcript of Hearing, (Int'l Crim. Trib. For the Former Yugoslavia Mar. 14, 2006), available at <http://www.icty.org> (follow "Legal Library" hyperlink; then follow "ICTY Court Records" hyperlink; then register your email/sign in; then from the drop down menu select "English" in the language box; then select "Milosevic Slobodon" for name of the accused; then select "transcripts" for type of document; then select "14/03/2006" as the date to search; then click search). As another example, Colonel Theoneste Bagosora's trial in front of the ICTR took over a decade from initial appearance in front of the court in 1997 to his conviction on December 18, 2008. See Sukhdey Chhatbar, *Planner of Rwandan Massacres Convicted of Genocide*, NY DAILY NEWS (Dec. 18, 2008), [www.nydailynews.com/news/national](http://www.nydailynews.com/news/national).

47. For a discussion of the limitations of physically distant criminal justice systems, see, E. NEUFFER, KEY TO MY NEIGHBOR'S HOUSE: SEEKING JUSTICE IN BOSNIA AND RWANDA 266 (2001). Neuffer's example of the International Criminal Tribunal for Rwanda, which was based in Arusha, Tanzania, and justice in the aftermath of the Rwandan genocide is certainly applicable in the context of Darfur.

48. Such calls have been made by members of AU, the Arab League, the greater international community, and the United States activist community. Scholar and Sudan expert John Prendergast and activist-actor George Clooney published an opinion piece in an early June 2010 issue of *USA Today*, in which they argued for the inclusion of Article 16 within a set of policy incentives towards Sudan. George Clooney & John Prendergast, *U.S. Must Help Stop Sudan's Slow-Motion War*, USA TODAY, June 8, 2010, at 8, available at [http://www.usatoday.com/news/opinion/forum/2010-06-09-column09\\_ST1\\_N.htm](http://www.usatoday.com/news/opinion/forum/2010-06-09-column09_ST1_N.htm). Under the power of Article 16, "[n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions." Rome Statute, *supra* note 23, art. 16. As per Article 16, the Security Council could adopt a resolution under the power of Articles 39 and 41 of the United Nations Charter (Chapter 7), declaring a halt to the Bashir prosecution as a means to restore international peace and security.

any inclination to deviate from the present course. In addition, Sudan's president Bashir has shown no inclination to accept the court has any jurisdiction over crimes in Darfur, and in fact has recently boldly flaunted the risk of arrest by traveling to several African countries.<sup>49</sup> Thus, barring a dramatic change in course, international justice will continue to be part of the equation in the fight against impunity in Sudan. However, international trials, on their own, cannot deliver justice and reconciliation in Darfur. In order to achieve the tripartite goals of truth, justice, and reconciliation, there is a need for the establishment and implementation of additional tiers of Sudanese truth and justice mechanisms that are complementary to the ICC. The following pages will discuss these Sudanese justice and dispute resolution mechanisms and will assess their ability to seek peace and justice in the region. These domestic mechanisms will be assessed from the perspective of the humanitarian and legal concerns of the international community, who will surely keep a watchful eye on any domestic justice proceedings for due process and other human rights standards. Without the

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49. The indictment, both initial and amended, has not halted President Bashir's ability to conduct international relations. He began the year in talks with Saudi Arabian King Abdullah bin Abdelaziz, during which the two heads of state discussed agricultural cooperation and food security. He traveled to Addis Ababa, Ethiopia, in January for the African Union summit. There, he met with UN Secretary General Ban Ki-Moon, as well as Chadian President Ibris Deby. On July 4, 2010, he arrived in Addis Ababa for an extraordinary summit on Somalia of the Intergovernmental Authority on Development (IGAD). He met with IGAD heads of states on the sidelines of the summit to discuss bilateral and regional relations.

President Bashir has also traveled since the ICC released its reconsideration of the indictment on July 12. He traveled to the Community of Sahel-Saharan States (CENSAD) meeting in N'djamena, Chad in late July. Chad assured President Bashir that he would not face arrest while in the country, and did not effectuate any arrest. On August 3, President Bashir departed for a two-day visit with Libyan President Muammar al-Qaddafi, where the two leaders discussed bilateral ties. On August 27, 2010, he traveled to Kenya and attended a highly public political celebration commemorating the recent national constitutional referendum, but Kenyan authorities declined to arrest him.

However, President Bashir's ability to affect international relations with the Republic of South Africa has been significantly affected. In early June, South African Foreign Minister Maite Nkoana-Mashabane stated South Africa's intent to adhere to its Rome Statute obligations and arrest President Bashir, were he to visit South Africa. President Jacob Zuma had previously invited President Bashir, along with other African leaders, to attend the FIFA World Cup Finals.

Also, President Bashir's ability to travel outside the region has been significantly impacted. In March, French President Nicolas Sarkozy personally invited Bashir to the 25th France-Africa summit in Nice, only to later withdraw his invitation. Egypt cancelled its original hosting of the summit in December 2009, after France insisted that President Bashir be excluded. Sudan will still participate in the France-Africa summit next May, but will send a high-level delegation in the president's stead. In a March interview with the German magazine *Der Spiegel*, President Bashir indicated his intention to visit Venezuela, an ICC state party, after receiving a personal invitation from Venezuelan President Hugo Chavez. According to the SUDAN TRIBUNE, the Brazilian government is "preparing for the possibility of Bashir's plane passing through its airspace on its way to Venezuela and having to intercept it and take him into custody."

combined international, domestic, and regional efforts of all interested parties, justice and peace for Darfur will remain unrealized goals.

### III. THE HYBRID COURT FOR CRIMES IN DARFUR

Recognizing the limitations of international courts, advocates for justice continue searching for other mechanisms for accountability. The October 2009 report of the African Union High-Level Panel on Darfur (AUPD), led by former South African President Thabo Mbeki, recommended the establishment of a hybrid court for Sudan, which would rely on national *and* international administrators, as well as a “fusion of domestic and internationally recognised criminal justice procedures,” to investigate and prosecute crimes in Darfur.<sup>50</sup> The panel recommended the Hybrid Court for Crimes in Darfur as a complementary and intermediary tier between the domestic Sudanese judicial system, which confronts low confidence levels among the Sudanese population, traditional forms of Sudanese justice and dispute resolution (see *infra*), and the International Criminal Court.<sup>51</sup> Sudan’s Interim National Constitution, which came into force in 2005, provides for the inclusion of ratified international human rights treaties in the Sudanese Bill of Rights. However, as the interim constitution came into force in 2005, the Sudanese criminal justice system’s temporal jurisdiction does not extend to crimes committed in Darfur between 2003 and 2004.<sup>52</sup> The establishment of a Hybrid Court for Crimes in Darfur could provide for the investigation and prosecution of crimes committed during that period.<sup>53</sup>

Such a hybrid court, as is clear in the Mbeki report, can provide a necessary link between strict international and domestic justice, and increase accessibility and provide transparency of the court proceedings to ordinary citizens. Surely, the example of the Special Court for Sierra Leone has not been without its challenges, and the Hybrid Court for Crimes in Darfur would need to consider such lessons learned, but another level of justice, more accessible and comprehensible to the people of Sudan, could only improve the prospects for peace in the nation. However, given that Bashir remains the president of Sudan, and therefore controls the Sudanese

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50. African Union [AU], *Report of the African Union High-Level Panel on Darfur (AIPD)*, at 64, PSC/AHG/2(CCVII) (Oct. 29 2009) [hereinafter *Report of the African Union*, available at <http://blogs.ssrc.org/sudan/wp-content/uploads/2009/10/AUPD-Report-Final-October-2009.pdf>].

51. *Id.* at 66.

52. *Id.* at 58-59.

53. Antonio Cassese’s *Report on the Special Court for Sierra Leone* provides another example of the potential and possibilities of the hybrid court, specifically the community outreach provisions of the court structure. Cassese’s full report is available at A. Cassese, *Report on the Special Court for Sierra Leone*, SPECIAL COURT FOR SIERRA LEONE, (2006), <http://www.sc-sl.org/LinkClick.aspx?fileticket=VTDHyrHasLc=&>.

judiciary, it seems unlikely a hybrid court could function with the independence needed for true justice.

#### IV. TRADITIONAL MECHANISMS FOR RESOLVING CONFLICT AND RECONCILIATION

Yet even this hybrid mechanism could remain far removed from the lives of average Darfurians. The search continues for mechanisms to bring justice and accountability even closer to home. Traditional mechanisms of conflict resolution and customary law have been performed by traditional leaders and used for resolving conflict in Sudan for generations. In Sudan, “[c]onflict itself, when it occurs, and its containment and settlement, are seen as a collective responsibility, drawing the participation of leaders and members of the community to participate. Most importantly, the resolution of conflict may take the form of forgiveness and reconciliation instead of punishment.”<sup>54</sup>

The British colonial administration in Sudan created a structure utilizing the traditional tribal chiefs and assigning them specific tasks. This so-called “Native Administration” required chiefs to:

- assure good management of tribal and local community affairs
- maintain security
- allocate land for agriculture and grazing (under the hakura system)
- settle conflicts over land tenure
- provide communication, at local council and provincial and state levels
- collect taxes and other levies
- mobilise communities, and
- chair tribal/sub-tribal local courts (*judiyya*).<sup>55</sup>

This basic structure remained in place until the Nimeiry regime of the early 1970’s replaced the Native Administration with a new system.

Some say this reorganisation was the prime factor in triggering tribal conflicts on a wider scale in Darfur, as it meant that a locality belonging to one tribe could be controlled by another. Up to 16 different rural council border disputes and conflicts occurred in southern Darfur alone soon after it was implemented . . . .<sup>56</sup>

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54. Khalid Ali El Amin, *Tribal Conferences and Conflict Resolution Experiences Under British and Sudanese Rule* 7 (House of Nationalities Draft, 2005), available at <http://www.houseofnationalities.org/contribution%20by%20Khalid%20alAmin%20on%20the%20Tribal%20Conferences%20in%20Sudan%20April%2016%202005.asp>.

55. Young, *supra* note 6, at 29. Authors’ Note: This term *judiyya* refers to a key mediator (called *ajaweed*) role played by the tribal chiefs; see *infra* Section V. See *infra* text accompanying note 60.

56. *Id.* at 29.

Since then, the Native Administration system has been changed several other times. Prime Minister Sadiq al Mahdi reinstated it in 1987, only to have it significantly modified after the 1989 coup in which President Bashir and the National Islamic Front came to power.<sup>57</sup>

One of the major underlying root causes of the conflict relates to the Native Administration and their traditional control of land. The *hakura*, or land grant system, was administered by the Native Administration, and the allocation of this land and land usage disputes became their responsibility although government frequently intervened. The *hakura* system means that some tribes have a *dar*, or homeland, while others do not.<sup>58</sup> The landless tribes that joined the *Janjaweed* were told that they would be given land if they fought on behalf of the government.<sup>59</sup> Yet the traditional leaders who would adjudicate disputes over land tenure and access are the same leaders who have a vested interest in maintaining the status quo.

Despite changes to the Native Administration system and the roles of traditional leaders, these men have continued to play a role in resolving conflicts. “The basis of reconciliation systems in Darfur is *judiyya*, a grassroots process whereby belligerents agree to mediation by wise and respected men—the *ajwadi* (plural: *ajaweed*)—consider well versed in traditional rules for ending disputes.”<sup>60</sup> These traditional conflict resolution mechanisms have also been disrupted and face many challenges.<sup>61</sup> The payment of blood money, or *diya*, is a crucial conflict resolution technique in Darfur. It constitutes both a form of accountability as well as reparations (reparations meaning to *repair* the social fabric damaged by conflict). It is part of a process through which traditional leaders come together to discuss a situation, assess individual or collective guilt, and come to consensus on the amount of *diya* to be paid and by whom. According to customary law, the *diya* is reserved for certain crimes, including cases of unintentional killing. In cases where a single perpetrator cannot be determined or there is group accountability, the payment becomes a collective responsibility. This payment, called “dusty *diya*” because it settles over the entire village like dust, serves a critical reconciliatory function. The village comes together to gather the resources to pay the *diya* (which also plays a deterrent function:

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57. *Id.* at 30.

58. See *id.* at 29-30 for an explanation of the relationship between the *hakura* system, changes to the native administration, and conflict.

59. E. Rubin, *If Not Peace, Then Justice*, N.Y. TIMES (Apr. 2, 2006), <http://query.nytimes.com/gst/fullpage.html?res=9C02E1D61430F931A35757C0A9609C8B63&sec=&spon=&pagewanted=4> (providing that “[u]neducated, destitute and landless, they are motivated mainly by promises made by Sudanese government officials of land and loot.”).

60. MAMDANI, *supra* note 13, at 288-89.

61. See Rift Valley Institute report, *Local Peace Processes in Sudan: A Baseline Study* accessed at [http://www.riftvalley.net/documents/Local\\_Peace\\_Processes\\_in\\_Sudan\\_-\\_May\\_2006.pdf](http://www.riftvalley.net/documents/Local_Peace_Processes_in_Sudan_-_May_2006.pdf) “page 88 for details on the distinction between locally run *judiyya* processes and government-run *judiyya* processes.

cows are valuable commodities, and for an entire village to come up with sufficient numbers of cows or the money to buy them as compensation is a tremendous collective gesture of the intention not to let this happen again).<sup>62</sup> Environmental stresses (including periodic drought) and pressures related to the conflict have caused large numbers of cow deaths, which put further pressure on the *diya* payments.<sup>63</sup>

These traditional systems have broken down when the government intruded in the tribal system. The government manipulated the selection of tribal leaders, circumventing the traditional selection by consensus. In the 1990's:

the government introduced 'emirates,' or principalities, in every dar,<sup>64</sup> appointing its own supporters as emirs and essentially creating a parallel Native Administration. As one source explained, the objective behind appointing 'princes' is to weaken the structure of the Native Administration because the regime failed to mobilise [its] support and loyalty.<sup>65</sup>

The government has also "encouraged" tribal leaders to pay the *diya* in cases of intentional killing or murder that should legitimately be referred to the formal justice sector. In cases that qualify for *diya*, the government has also at times paid the *diya* on behalf of some tribes and some villages. Although the government's intentions could be well-meaning to help stop disputes from escalating, the fact that killing without having to pay *diya* amounts to killing with impunity is an important factor in the failure to restrain acts of violence and revenge.

Given the upheaval within the Native Administration structure and challenges to their traditional mechanisms for resolving conflict, the question then becomes whether these traditional leaders can play a role in processes geared toward truth, justice and accountability. As a starting point, the High Level Panel on Darfur has called for, along with the aforementioned hybrid court, a truth and reconciliation commission for Darfur.<sup>66</sup>

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62. Interview by Jacqueline Wilson, Darfur (Mar. 2006) [hereinafter Wilson Interview].

63. Young, *supra* note 6, at 5.

64. The "dar" (pl. diyaar) in the Arabic language has numerous meaning such as the halting place (mahallu), the house, abode, residence and the land (balad). See *Clarifying the Meaning of Dar al-Kufr and Dar al-Islam*, KHILAFAH (Mar. 28, 2007), <http://www.khilafah.com/index.php/the-khilafah/foreign-policy/225-clarifying-the-meaning-of-dar-al-kuft-a-dar-al-islam>.

65. Young, *supra* note 6, at 30.

66. *AU: Back Mbeki Panel Call for Darfur Prosecutions*, HUMAN RIGHTS WATCH, (Oct. 29, 2009), <http://www.hrw.org/en/news/2009/10/28/au-back-mbeki-panel-call-darfur-prosecutions>.

It was apparent to the Panel that there is still tremendous denial, on all sides, within Darfur and in Sudan, and unwillingness to concede culpability for the serious abuses which have so profoundly marked the people of Darfur. It is not possible, for either Darfur or Sudan, to make a break with the past without a collective examination of the root causes and background to the war, the conduct of the war itself and its manifest consequences. The Panel therefore believes that an independent Truth, Justice and Reconciliation Commission (TJRC), mandated to probe and scrutinise all aspects of the relevant events between 2003-2009, would make an important contribution to healing the wounds of Darfur and the divisions in Sudan over Darfur. To persuade perpetrators to make full and truthful confessions, or to accept responsibility for their crimes, there must be incentives for them to appear before the TJRC and disclose their actions, in order to disown the past and move forward.<sup>67</sup>

Whether the timing of a truth commission is yet at hand remains to be seen. Perhaps it is too early, as the conflict is still ongoing and over two million people are displaced. That being said, there is potential for some so-called Native Administration to play a positive role with respect to a mechanism to facilitate sharing the truth of what has happened in Darfur. Some would say that because of the power dynamics between the federal government and the Native Administration in general, that as long as the current federal government remains in power, it is highly unlikely that tribal leaders would be able to make a positive, and unbiased, contribution to peace.

On the other hand, the situation remains fluid and could go in many directions. The ongoing changes in places like Egypt and Tunisia are being watched carefully by all sides in Sudan. There is a renewed sense that the final stages of implementing the north/south Comprehensive Peace Agreement, the January, 2011 vote for secession by the south and impending independence of Southern Sudan expected in July, 2011,, recent calls by opposition figures for constitutional reform, and the lack of progress from peace talks in Doha, Qatar, are all factors which could eventually result in a transformed Sudanese government, which could find a way to make use of tribal leaders who maintain legitimacy with their communities to help facilitate justice and reconciliation.<sup>68</sup> Most importantly, a truth commission for Darfur must not be government-run or sponsored. Archbishop Desmond Tutu's leadership of South Africa's Truth and Reconciliation Commission could be a positive example for Darfur—and could provide a model for establishing a role for some of the still-

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67. *Report of the African Union*, *supra* note 50, at 73.

68. For example, Ibrahim Musa Madibo, Nazir (paramount chief) of the Baggara (cattle-herding) Rezeigat tribe, has resisted government attempts at manipulation and remains a respected tribal leader. Greater details of the history of the conflict are available in Flint, *supra* note 13; De Waal, *supra* note 13.

respected tribal chiefs in addition to respected individuals. In order to be successful, however, this process should be largely run by local community-level councils. Local ownership will allow community leaders to regain their pride, rebuild relationships, and more accurately reflect the will of the people with respect to justice and accountability.

Historically, as evidenced by its negative reactions to the *gacaca* process in Rwanda, the West has given little credence to African solutions to African conflicts.<sup>69</sup> However, the overall success of the *gacaca* process, in that mass violence has not erupted in Rwanda,<sup>70</sup> as well as the success of the Truth and Reconciliation Commission in South Africa in supporting the peaceful transition from an apartheid regime to a democratic system of governance, has demonstrated to the West the merit of African solutions to African problems.<sup>71</sup> Thus, it remains possible that the ICC, and the UN as a whole, would welcome any Sudanese alternative dispute resolution mechanism that is actually designed to heal the nation, instead of simply shield alleged perpetrators from international or domestic legal scrutiny.

As stated earlier, such a truth and reconciliation process in Sudan is far from a reality, and might not be able to operate without regime change in Khartoum. However, if the will of the people of Sudan, including women, is expressed in a domestic dispute resolution process, the international community will embrace such a process as a reflection of the reality that domestic solutions are preferable to external solutions that may lack adequate context and cultural competence. So, whether Sudan opts for a return to traditional Native Administrations, a return to traditional forms such as *judiyya* and/or *diya*, or a novel, hybrid approach to truth and reconciliation in Darfur, the international community should welcome its appearance, as long as the chosen process is reflective of the will of the people of Darfur specifically, and the people of Sudan in general.

## V. RECONCILIATION

Reconciliation, in the sense of the word as used in a context of transforming relationships from a past of conflict and atrocities to a shared future, possibly involving truth-telling, forgiveness, and a symbolic ritual to

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69. Raper, *supra* note 8, at 34-35.

70. While the performance of the *gacaca* courts are not, of course, solely responsible for the relative stability of the Third Republic of Rwanda since the 1994 genocide, the *gacaca* courts have released thousands of genocidaires back into society without a return to significant numbers of revenge killings or the mass violence attendant to the genocide. Such a return to violence was envisaged by many in Rwanda and the international community. See Raper, *supra* note 8, at 2 n.5 (discussing the return to societal violence upon release of prisoners from the *gacaca* jurisdictions).

71. This is not to say that the South African TRC does not have its problems. The issues of reparations and land redistribution remain contentious, and numerous legal hurdles remain. In that the transition from an apartheid regime to a post-apartheid regime did not result in mass atrocities, the South African TRC can be considered a success.

bring closure and perhaps memorialize lost loved ones—might be considered a foreign concept in Darfurian society. The government has conducted reconciliation conferences, but one gets the sense that the expectation is that communities will be “reconciled” after a single day of meetings and dancing, whereas reconciliation can often be a gradual process that happens over time. The agreement and payment of *diya* is related to the concept of reconciliation in that it includes a sense of bringing closure and stopping the cycle of revenge, and an attempt to leave the past behind. The concept requires greater understanding in terms of the extent to which it creates a sustainably transformed relationship between aggrieved parties.

The aforementioned *judiyya* could prove useful in healing the relationships between the tribes. “Since their introduction by the British in the 1920’s and to the present day, this tribal forum, whether *judiyya* or other similar process of consensus building, has been adopted as a mechanism to achieve inter-tribal peace.”<sup>72</sup> These conferences have been administered differently depending upon leadership, and their format makes a tremendous difference in the outcome. Under the British, the conferences were convened by a council of notables comprised of tribal leaders, religious leaders, and other wise men, but the council was no more than about sixteen men. British government officials sometimes attended the conferences, but their role was to offer support and also to help assure any agreement would be implemented and respected. During the conferences, the notables took several days for intense consultation with their lower ranking tribal leaders, and often with community members interested in or with knowledge of the situation, in order to gain a consensus outcome that would allow all parties to the conflict to achieve their interests as much as possible.<sup>73</sup>

This traditional form of tribal conference is contrasted with the way the present-day government reconciliation conferences have been conducted, when the participants often number over 100.<sup>74</sup> Due in part to the large number of attendees, it is impossible to reach consensus, so the participants are broken into committees, each to handle a specific topic. The final agreement is a composite of the outcomes of each of these committees—and does not represent true consensus. This means that agreements are not implemented, and eventually the conflict revives—requiring a next conference to respond to the conflict. In addition, in some of these conferences, rather than playing a role of neutral guarantor, the government takes the side of one or another participant, a flagrant violation of the standards for *judiyya* and a disruption of the entire conference process.<sup>75</sup> Therefore these conferences “have as a consequence been turned from an adapted form of an indigenous conflict resolution mechanism that functions

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72. El Amin, *supra* note 54.

73. *Id.* at 1-8.

74. *Id.*

75. *Id.*

bottom-up into a semi-formal governmental ad hoc organisation that functions top-down.”<sup>76</sup> For all of these reasons, any such mechanisms would require careful preparation and management in order to be successful.

Even so, the traditional process of *judiyya* conducted by wise community leaders seems to hold great promise for future application in Darfur.<sup>77</sup> However, where the tribal leaders have become biased, or where the government has intervened in or controlled the process—and are guarding against these future outcomes in new cases—are situations which present an ongoing challenge. Once again, the *judiyya* process would be virtually impossible to make effective if there is no transformation in the relationship between the federal government and the local leadership. In addition, the process is not a community-level process, leaving women and youth, for example, to have been “reconciled” by others on their behalf. The concept of reconciliation in Darfur likely requires a process uniquely suited to the experiences of the people of Darfur.

## VI. REPARATIONS

Historical references indicate the important role played by tribal leaders with respect to restoring a balance of resources after conflict. In the 1901 battles in Darfur, victims claimed, “we are unjustly oppressed and appeal to you, oh promoter of justice, to return to us what has been looted.”<sup>78</sup> In addition to discovering the truth, the question of reparations, of some sort of compensation, financial or otherwise to “make the victims whole” is challenging in the context of Darfur.

There seems to be consensus that the *janjaweed* were motivated by the guarantee of keeping looted goods.<sup>79</sup> In addition to looted goods, there is the important issue of restoring livestock. According to the 2005 Tufts University study, *Darfur: Livelihoods Under Siege*, those who have had livestock stolen are demanding government compensation, although there does not seem to be any mechanism or process for providing this remedy.<sup>80</sup>

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76. *Id.*

77. Similar to the growing Western acceptance of the traditional Rwandan dispute resolution mechanism of *gacaca*, *judiyya*, with its significant roots in Sudanese legal history, will be accepted and embraced by the international community. *Judiyya* will be embraced especially if it is inclusive of the concerns of all Sudanese, regardless of geography, gender, and religion. Formal justice mechanisms, whether international or domestic, can only administer limited numbers of trials, and often do not foster considerable societal reconciliation. Consequently, the vast majority of reconciliation in a post-conflict society must be meted out by alternative forums. With its grounding throughout Sudan, *judiyya* seems best able to address the concerns and viewpoints of all parties to the conflict in Darfur. See MAMDAMI, *supra* note 13, at 288-91, for a further discussion of *judiyya*'s historical origins in Darfur.

78. THEOBALD, *supra* note 2, at 48.

79. See Flint, *supra* note 13.

80. See Young, *supra* note 7.

The study gives four reasons why restocking with donor funds would be problematic:

First, the scale of the restocking programme will be unprecedented, involving more than 250,000 households, each requiring a foundation stock of some 20 sheep and goats. Funding and organisational capacity may not be available on this scale. Second, the fact of donors sponsoring restocking would send the wrong signal to the perpetrators. During restocking, there is a danger that donors may inadvertently buy stolen animals for distribution (even, perhaps, to their rightful owners), thereby rewarding those who looted them. This may in turn encourage further looting. Third, an externally funded process of restocking would not allow for reconciliation processes to occur between the various parties through resolution of the livestock issue. Fourth, replenishing looted and lost assets will not solve the issues of mobility and safe access to trade and migration routes, which are an essential part of the livestock livelihood system for all groups.<sup>81</sup>

Further, even if the perpetrators can be asked to pay reparations, they may not have the resources to do so. The *ajaweed* role performing the *judiyya* function may provide the solution to this issue, as this function can also be used to determine reparations. Just as a council of leaders can come to consensus on an issue of punishment or *diya*/blood money, so too could they use this technique to compensate those whose goods or livestock were gone. This issue will not be an easy one, however, as noted in the previous caveats on group size and government intervention. In addition, the process is different when perpetrators pay reparations from their own stocks versus outsiders or government paying it on their behalf. That being said, the issue demands attention. "Conflict and peoples' livelihoods are inextricably linked. Livelihoods are integral to the causes of the conflict and the impact it has had, and therefore will be central to any lasting solutions to the conflict."<sup>82</sup> The conflict will start to look much different to the displaced when they are back to their villages in time for a planting season, the annual Darfurian time of rebirth.<sup>83</sup>

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81. *Id.* at 110.

82. *Id.* at 109.

83. Reparations to victims are also a significant part of the justice of the ICC. *See* Rome Statute, *supra* note 23, art. 75(1-2) ("The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation."). To assist in the administration of reparations, Article 79 of the statute establishes a trust fund "for the benefit of victims of crimes within the jurisdiction of the Court, and the families of such victims." *Id.* art. 79.

## VII. POTENTIAL SHORTCOMINGS OF THE USE OF TRADITIONAL MECHANISMS

Before closing, a word must be said about some shortcomings of these traditional mechanisms. As already mentioned, the extent to which the ruling regime intervenes to prevent truth telling and justice which might hold themselves—among other parties—accountable, remains probably the most challenging hurdle. There is a question about the extent to which there can be transitional justice without a transition in terms of governance. But other significant challenges remain. These councils are composed of wise men, which means there is a dearth of wise women present. Despite the fact that it runs counter to tradition, there must be a way to involve women in the process. One idea that has been promulgated is to create “sheikha” counsels, or groups of wise women who can perform the same kinds of functions as men but for women’s issues. Particularly in Darfur, where eighty percent of the displaced are women and children, it is imperative that women have a voice in the solutions that will impact the rest of their lives.

Another concern relates to the use of rape as a tool of war. Prosecutions for rape in Darfur under customary law could be problematic under international law or by contemporary western standards. According to Physicians for Human Rights, women who come forward to report rape are often themselves charged with adultery.<sup>84</sup> In addition, there are other challenges related to requirements of shari’a law. “Because of extremely high levels of proof required (under customary law)—4 male or 8 female witnesses—rape is extremely difficult to prosecute in Sudan.”<sup>85</sup> A Darfurian expert on customary law has stated that the traditional solution for rape cases is for the victim to marry the rapist or into the rapist’s family, thereby circumventing the social norms that would ostracize the woman completely were she to be tried for adultery.<sup>86</sup> A locally-owned process, one that could accommodate public issues yet keep such sensitive other issues private, is a requirement in a context such as Darfur, where the status of women is compromised by their historic lack of participation in local justice systems.<sup>87</sup> Clearly this type of issue will require all the creativity that Darfurians, men and women, can muster.

Finally, the sheer scope of the conflict in Darfur means that any efforts at truth, justice, accountability, compensation, reparations or reconciliation will be extremely challenging. The conflict has affected all tribes. Few geographic localities remain untouched. Any processes will need to

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84. *Darfur Survival Campaign: Darfur Fact Sheet*, PHYSICIANS FOR HUM. RTS., <http://www.physiciansforhumanrights.org/students/darfuration/darfur-fact-sheet.pdf>.

85. *Id.*

86. Wilson Interview, *supra* note 61.

87. Raper, *supra* note 8, at 53.

accommodate millions of victims who have experienced all variety of losses.

## CONCLUSION

Given the unique nature of each country, each situation in which war crimes, crimes against humanity, or genocide can occur, there is no single formula that can be applied in every circumstance. That said, the international community is developing a more robust toolkit with which to respond to these situations. The ICC, with its burgeoning maturity, is attempting to tackle the issue of justice and reconciliation in Darfur, and only time will tell how successful it will be when faced with intransigence, obfuscation and impediments of the most creative kind. As put in an address by Judge Philippe Kirsch, President of the ICC at the Third Session of the Assembly of States Parties in The Hague, "the investigation and prosecution of cases will not only require the active participation of those countries where the investigations take place, but will also call upon all states which may be able to assist by providing information, evidence, or other forms of cooperation."<sup>88</sup>

At present, this cooperation is sorely lacking in Sudan, and a significant number of its neighbors, allies, and other member states of the UN. This lack of a unified international response threatens the ability of the court to function in the interests of ending impunity in the wake of serious crimes of international concern. Even if the ICC's search for justice in Darfur is not derailed by the intersection of law, diplomacy, and geo-strategic politics, the international community must be aware of the serious limitations on the capacity of the court to prosecute large numbers of cases, and therefore challenge the Sudanese jurisprudential community with filling the gap between international measures and impunity.

This gap will be filled with some unique and culturally appropriate mechanism that meets the needs of the affected population to learn the truth, hold people accountable, forgive as they are able, reconcile if possible, but most certainly to choose a path of looking toward the future. In a country where a responsible party remains in power and the traditional mechanisms of reconciliation have been manipulated, as is the case in Darfur, this challenge is all the more complex. This Article has offered one possible set of options designed to achieve the goals of holding those responsible for directing atrocities accountable through international law, transform the

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88. Philippe Kirsch, President of the ICC, Address to 3rd Sess. of the Assembly of States Parties to the Rome Statute of the International Criminal Court (Sept. 6, 2004) (transcript available at [http://www.iccnw.org/documents/KirschAddress\\_ASP06Sept04\\_as\\_delivered.pdf](http://www.iccnw.org/documents/KirschAddress_ASP06Sept04_as_delivered.pdf)).

Sudanese judiciary, and empower citizens to both learn the truth and practice justice in partnership with legitimate, trusted traditional leaders.<sup>89</sup>

89. For additional resources, see Lisa Clifford, Lisa, *Sudan: Executions “Cynical” Attempt to Hinder ICC*, INST. FOR WAR & PEACE REPORTING (May 5, 2007), <http://iwpr.net/report-news/sudan-executions-%E2%80%9C cynical%E2%80%9D-attempt-hinder-icc>; M.W. DALY, *IMPERIAL SUDAN: THE ANGLO-EGYPTIAN CONDOMINIUM: 1934-1956* (1991); *Darfur, Sudan – UN Security Council Resolutions and Presidential Statements*, U.S. MISSION TO THE UN (May 6, 2007), [http://www.usunnewyork.usmission.gov/Darfur\\_in\\_the\\_UNSC.pdf](http://www.usunnewyork.usmission.gov/Darfur_in_the_UNSC.pdf); ALAIN DESTEXHE, *RWANDA AND GENOCIDE IN THE TWENTIETH CENTURY* (1995); ALEX DE WAAL, ALEX, *DARFUR: A SHORT HISTORY OF A LONG WAR* 84 (2006); Khalid El Amin & Ali El Amin, *Eastern Sudan Indigenous Conflict Prevention, Management and Resolution Mechanisms: Effectiveness, Continuity and Change*, 13 *AFRICAN SECURITY REV.* 2, 7 (2004); Khalid El Amin & Ali El Amin, *Lessons in Governance: Tribal Conferences for Conflict Prevention and Resolution Under British and Sudanese Rule* (2004) (unpublished manuscript); Jérémie Gilbert, *Nomadic Territories: A Human Rights Approach to Nomadic Peoples’ Land Rights*, 7 *HUM. RTS. L. REV.* 4, 681 (2007), available at <http://hrf.oxfordjournals.org/cgi/content/abstract/ngm030v1>; ADAM HOCHSCHILD, *KING LEOPOLD’S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA* (1999); Human Rights Watch, *Lack of Conviction: The Special Criminal Court on the Events in Darfur*, 1 *BACKGROUNDERS* (2006); *Entrenching Impunity: Government Responsibility for International Crimes in Darfur*, 17 *HUMAN RTS. WATCH* 17(A) (Dec. 2005), available at <http://hrw.org/reports/2005/darfur1205/darfur1205webwcover.pdf>; Human Rights Watch, *Sudan: Darfur in Flames: Atrocities in Western Sudan*, 16 *HUMAN RIGHTS WATCH* 5(A) (Apr. 2004); *International Humanitarian Law: The Essential Rules*, INT’L COMM. RED CROSS (Apr. 6, 2004), available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5ZMEEM>; Philippe Kirsch, President of the ICC, Address to 3rd Sess. of the Assembly of States Parties to the Rome Statute of the International Criminal Court (Sept. 6, 2004) (transcript available at [http://www.iccnw.org/documents/KirschAddress\\_ASP06Sept04\\_as\\_delivered.pdf](http://www.iccnw.org/documents/KirschAddress_ASP06Sept04_as_delivered.pdf)); Interview with Majoub Mahmoud, in Washington, D.C. (Sept. 20, 2006); MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* (1998); *Darfur Survival Campaign: Darfur Fact Sheet*, PHYSICIANS FOR HUM. RTS., <http://www.physiciansforhumanrights.org/students/darfuraction/darfur-fact-sheet.pdf>; Press Release, ICC, ICC Issues a Warrant of Arrest for Omar Al Bashir, President of Sudan, (Apr. 24, 2009), <http://www.icc-cpi.int/NR/exeres/0EF62173-05ED-403A-80C8-F15EE1D25BB3.htm>; ICC Press Release ICC-CPI-20090304-PR394 (Mar. 4, 2009), available at [http://www.iccepi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2009\)/icc%20issues%20a%20warrant%20of%20arrest%20for%20omar%20al%20bashir\\_%20president%20of%20sudan](http://www.iccepi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2009)/icc%20issues%20a%20warrant%20of%20arrest%20for%20omar%20al%20bashir_%20president%20of%20sudan); *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Prosecutor’s Application for a Warrant of Arrest (July 14, 2008), <http://www2.icc-cpi.int/NR/rdonlyres/64FA6B33-05C3-4E9C-A672-3FA2B58CB2C9/277758/ICCOTPSummary20081704ENG.pdf>; Jessica Raper, *The Gacaca Experiment: Rwanda’s Restorative Dispute Resolution Response to the 1994 Genocide*, 5 *PEPP. DISP. RESOL. L.J.* 1 (2005); *Ratification Status of the Rome Statute of the International Criminal Court*, UN.ORG (May 6, 2007), <http://www.un.org/law/icc/statute/status.htm>; Report of the Int’l Comm’n of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, established pursuant to resolution 1564 (2004) concerning reports of violations of international law in Darfur, 3, [www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf) (Jan. 25, 2005); Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) available at <http://www.un.org/law/icc/statute/romefra.htm>; Amnesty Int’l, *Sudan: Arming the Perpetrators of Grave Abuses in Darfur Testimonies*, AI Index: AFR 54/144/2004 (Nov. 16, 2004) available at <http://www.amnesty.org/en/library/asset/AFR54/144/2004/en/71d39083-fa9e-11d1dd-999c-47605d4edc46/af541442004en.pdf>;

Even this relatively simple mix of solutions will be amazingly challenging to implement, and this process could take years from the time a comprehensive peace is reached in Darfur. Even beyond justice, reconciliation is a process of transforming hearts, a process that can take generations. For the displaced and abused citizens of Darfur, this process cannot start too soon.

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*The Black Book: Imbalance of Power and Wealth in Sudan, Part 1* [http://www.sudanjem.com/sudanalt/english/books/blackbook\\_part1/book\\_part1.asp.htm](http://www.sudanjem.com/sudanalt/english/books/blackbook_part1/book_part1.asp.htm) (last visited May 6, 2007) 1 A.B. THEOBALD, *LAST SULTAN OF DARFUR* (1965); U.N. S.C. Charter ch. VII, available at <http://www.un.org/aboutun/charter/chapter7.htm>; Conflict Resolution Training Workshop, United States Institute of Peace, Nyala, Sudan (Mar. 13-15, 2006); *Briefing on the ICC Indictments*, WAGING PEACE (Apr. 24, 2009), <http://www.wagingpeace.info/?q=node/192>; H. Young, A.M. Osman et al., *Darfur – Livelihoods Under Siege*, FEINSTEIN INT’L FAMINE 2 (2005), available at <https://wikis.uit.tufts.edu/confluence/download/attachments/14553452/Yong--Darfur--Livelihoods+Under+Seige.pdf?version=1>; H. Young, A.M. Osman et al., *Livelihoods, Power and Choice: The Vulnerability of the Northern Rizaygat, Darfur, Sudan*, FEINSTEIN INT’L CTR. (Jan. 2009); H. Young, Abdul Monium Osman, Ahmed Malik Abusin, Michael Asher & Omer Egemi, *Livelihoods, Power and Choice: The Vulnerability of the Northern Rizaygat, Darfur, Sudan*, Feinstein Int’l Ctr. (2009).