

# From war to peace and reconciliation in Darfur, Sudan: Prospects for the *Judiyya*

Abdullahi Osman El-Tom

## Introduction

The causes of the current Darfur problem can be justifiably reduced to one word: 'injustice'. Since the independence of Sudan in 1956, the region of Darfur has been under the oppressive hegemony of a ruling elite primarily drawn from the northern region of Sudan. Over the years, Darfur people protested their economic, cultural, ethnic and political marginalisation to no avail. In 2003, some Darfur people took up arms against the Khartoum government (El-Tom, 2009, 2011; Hassan and Ray, 2009).

It is now 10 years since the onset of Darfur atrocities. One does not have to subscribe to clichés of conflict maturity or war fatigue to realise that the Darfur crisis is approaching its end. The internal and external dynamics of recent months have ushered in an air of optimism that the crisis will soon be overcome. On the internal front, numerous processes have progressed to overshadow past obstacles. The divisions and proliferations of Darfur movements that followed the Abuja Darfur Peace Agreement (DPA, 2005) have finally led to the formation of two or three main groups. The Justice and Equality Movement (JEM) seems to have emerged as a clear winner capable of dictating future peace processes. The newly formed Liberation and Justice Movement (LJM) has also come to occupy a prominent role, at least at the political level. The spread of war to the Nuba Mountains and Blue Nile Province and the subsequent formation of the Sudanese Revolutionary Front (SRF) in February 2012 have added another

dimension to the conflict, increasing the likelihood of the collapse of the Khartoum government.

The separation of Sudan into two independent countries has further isolated President Al Bashir, thus paving the way for compromises on the way to a peaceful resolution of the Darfur conflict. The newly independent Republic of South Sudan has already signalled its readiness to play an active role in bringing the conflict to an end. But the new country did not emerge without economic implications. It now includes 80% of Sudan's oil reserves, thus robbing Khartoum of necessary funds for running the war. Khartoum simply has not enough cash to sustain its war in Darfur as can be readily deduced from the near collapse of the Sudanese pound.

The International Criminal Court's (ICC) indictment of Al Bashir on 4 March 2009 and again in July 2009 has certainly shaken the delicate Darfur peace process but has equally sent shockwaves across African and Arab leaderships. The indictment signalled a historic new era that challenges the impunity of sitting dictators against international prosecutions. Much more pertinent here is the impact of the indictment within the ranks of the ruling National Congress Party (NCP) of Sudan. While the indictment gave the hardliners cause to rally around the beleaguered president, dissent has emerged among moderate party members concerned about the future prospects of their party. As an ICC spokesperson indicated on 4 May 2009, some members of the government of Sudan intimated their desire to hand over Al Bashir to the ICC (Alwafd, 2009).

## **Dealing with Darfur war crimes**

Whether peace in Darfur is imminent or not remains open to debate. What is certain is that the sustainability of peace in Darfur and the guarantee of harmonious post-conflict coexistence require careful handling of Darfur war crimes. Despite ample international attention being paid to atrocities committed in Darfur, there is little consensus regarding the number of fatalities, the incidence of rape, the extent of villages burnt and property destroyed or looted. Rough estimates give figures of 200 000 to 500 000 killed, 2.5 million displaced,

5 000 villages destroyed and 10 000 women raped (Suleiman, 2011; El-Tom, 2007). However, and by whatever measures, the atrocities committed involve numbers that far exceed the capacity of formal legal systems to handle. In this regard, we have a great deal to learn from other similar conflicts in the Sudan as well as in other African countries. Thus we have the war of South Sudan, the Rwandan experience, the South African experience and many others.

In approaching Darfur war crimes, Sudan must learn from mistakes committed at the Naivasha negotiations that led to the Comprehensive Peace Agreement (CPA), which paved the way for independence of the South. In Naivasha, the negotiators adopted the dictum of 'forgive and march on' and opted for a blanket amnesty for all north-south civil war criminals. Eminent Sudanese lawyer Magdi Algazouli maintains that the 'failure to probe into atrocities committed in the GoS-SPLM war encouraged a repeat of the same crimes in Darfur and a blanket amnesty in the Darfur war is simply untenable' (Algazouli, 2009). While it was difficult to account for every atrocity committed during the Sudanese north-south conflict, failing to raise the issue of justice has come with a considerable price. As Amnesty International aptly put it, 'peace depends not only on absence of war but also on the existence of both justice and truth, with both justice and truth depending on one another' (Amnesty International, 2002b). The ICC has already issued arrest warrants for seven individuals: President Al Bashir, Minister Abdel Rahim Husain, Governor Ahmed Haroun, Janjaweed leader Kushayb and three rebel leaders, one of whom was later cleared by ICC judges. This number is small compared to the unofficial list of 55 culprits whom Human Rights Watch wants investigated (HRW, 2005). The government itself has followed suit and claims it has commuted death sentences on 36 soldiers charged with committing atrocities and armed robberies in Darfur. Thus the process of accountability has already started and it is difficult and perhaps undesirable to reverse. Given the scale of crimes committed in Darfur, the ICC and Sudan's National Justice System (NJS) will not have the capacity to deal with all cases within a time frame that is fair and just for victims and culprits alike. It is here that Darfur must learn from the Rwandan experience. Needless to say, the current NJS is not fit to deliver justice. This embarrassing fact is also highlighted by the AU High-Level Panel on Darfur (AUPD), headed by Thabo Mbeki, the former President of

South Africa. The High-Level Panel Report recommends use of Hybrid Courts, a revamped NJS with the participation of foreign judges (AUPD, 2009).

In attempting to make use of the Rwandan experience in Darfur, one must pay close attention to similarities and commonalities between the two cases. To begin with, there is clear difference of scale whereby the Rwandan case dwarfs the level of crimes committed in Darfur. While the Rwandan case presents a clear case of genocide, the legal definition of Darfur atrocities as genocide is fraught with controversies and will remain so until the final ruling of the ICC. Suffice to say that Al Bashir is charged on 11 counts including genocide in the ICC rulings of 4 March and 20 July 2010.

The Rwandan case involved a massacre of close to one million victims out of a population of 10 million (Hansen, 2005:1). In Darfur, confusion still reigns regarding the number of casualties, with fatalities falling anywhere between 200 000 and 500 000 out of a population of 7.5 million (Suleiman, 2011). The government of Sudan reduces this estimate even further to no more than 10 000. Needless to say, few outside government circles take this last estimate with any degree of seriousness.<sup>1</sup>

In the Rwandan case, killing and other atrocities were predominantly executed by community members known to their victims. In sharp contrast, Darfur war crimes are predominantly perpetuated by the official army aided by militia allies locally known as Janjaweed. While many of the Janjaweed are local and hence known to their victims, some are imported from outside Sudan and cannot be easily identified by survivors. Army soldiers implicated in Darfur war crimes are much more difficult to identify as they are imported from outside the region. The government of Sudan has also used intensive aerial bombardment carried out by pilots who cannot be easily identified.

At a different level, both the Rwandan case and its Darfur counterpart have been driven by the motive of effecting a population reshuffle, involving varying degrees of ethnic cleansing. The Hutu *génocidaires* of Rwanda, alluding to their so-called Hutu Ten Commandments, declared their Tutsi fellow citizens as

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1 For the Rwandan genocide see: Gourevitch, 1998; Dallaire, 2004; Prunier, 1995.

*inyenzi*, meaning ‘cockroaches’, ‘which could only be cured by extermination’. Darfur gangsters declared their victims as slaves, mercenaries and agents of Christian crusaders. Dehumanisation of would-be victims has been central to genocides, ethnic cleansing and massacres across the world. In Brazil, street children destined for killing are referred to as vermin. In other countries from Asia to Europe and Latin America, those who are destined for annihilation are referred to variously as infidels, enemies of the nation, nits, garbage, beasts, vagabonds, or subhumans (Jones, 2006:334). These terms are used in an effort to reduce the assailants’ guilt, galvanise support, ‘humanise’ and ‘glamorise’ killings of people and deprive victims of any chance for sympathy and humane treatment.

We must therefore readily admit that dealing with Darfur war crimes presents a daunting problem that requires an unconventional response at the post-conflict phase of crisis. The Rwandan case provides a template that can be followed in Darfur in the near future. Like Rwanda, and if the wise option of prosecution is to be pursued, Darfur culprits will far exceed the capacity of Sudan’s NJS and the ICC put together. The UN Security Council’s trials formed for Rwanda came to be known as the International Criminal Tribunal of Rwanda (ICTR). In the case of Rwanda, and with nearly one million killed, it was estimated that the country had 125 000 suspected killers, forming 6% of its population. That number computes at eight to nine victims per killer. Other crimes like rape, looting, injuries and the burning of property also entered into the equation. Thus, when the genocide ended, Rwanda had 130 000 prisoners awaiting trial for alleged serious crimes only, but the options were limited.

The ICTR concerned itself with what has come to be referred to as Category One criminals, namely those who were allegedly implicated at the organisational level of the genocide. Altogether, 400 suspected *génocidaires* were identified. Many of them fled and remained in western countries with little or no chance of repatriation. The dubiously slow pace of ICTR trials provided another problem. By 2012, the ICTR listed 69 cases completed with 10 acquittals (ICTR, 2012). Different sources credit the ICTR with a mere 33 cases after 14 years of investigation, ending in 2008. However, the restricted mandate of the ICC relegates the institution to a limited role in the overall post-conflict justice

system (Lawson, 2005; Gusongoirye, 2008). According to some critics, the ICTR was plagued with corruption, nepotism, mismanagement and malfunctioning (Power, 2003:495; Shawn, 2006).

As for the Rwandan national legal system, it is certainly more efficient in comparison to the ICTR but equally hopeless in the face of the genocide. From 1996 to 2006, the national courts were able to handle a mere 10 000 trials. With that rate, the national courts would require over 100 years to prosecute all prisoners (Gusongoirye, 2008; Kasaija, 2009). Rwanda has been most unfortunate with regard to near decimation of its legal system during the genocide. It experienced a loss of over 80% of its legal officials and many legal facilities were damaged during the genocide. For example, only 244 judges survived the genocide from a total number of 750 (Hansen, 2005:2). Darfur fares much better in this regard. There is no summary execution of judges in Darfur and the region can, if necessary, draw on legal officials from outside Darfur. But the Rwandan case was different. The country simply had no choice but search in its traditional system for a solution. *Gacaca* seemed to be a logical path for the country to follow.

*Gacaca*, meaning 'sitting on grass' or also 'lawn-justice' is a quintessential traditional Rwandese institution for conflict resolution. By its very nature, a *Gacaca* court can be formed in any community to mediate and impose penalties on wrongdoers. *Gacaca* depends on moral force to implement its rulings. However, these are heavily backed by the threat of the much harsher national legal system. This often remains open for the plaintiff in cases where the *Gacaca* rulings are rejected. Recognising the vastness of the number of prisoners awaiting trial following the 1994 genocide, the Government of Rwanda adapted the *Gacaca*, with some modification, to serve as an alternative legal system. *Gacaca* was to deal with the milder but more numerous crimes committed during the genocide. Four categories of crimes were identified, with *Gacaca* restricted to categories 2-4:

**Table 1: Genocide Crime Categories**

|                |  |
|----------------|--|
| Category One   | Planning, organisation, instigation, supervision of genocide |
| Category Two   | Physical attacks resulting in death                          |
| Category Three | Physical attacks not resulting in death                      |
| Category Four  | Looting, theft, property damage                              |

Source: Adapted from Musoni (2009).

*Gacaca* is constituted of four hierarchical levels. Starting from the lowest, *Gacaca* has cell, sector, district and provincial tribunals. Cell tribunals deal with property offences, sector tribunals with injuries, and district tribunals with killing but not its organisation. Provincial tribunals are reserved to act as final appeal courts for *Gacaca* cases.

The power of *Gacaca* resides in its capacity for speedy constitution. This is demonstrated by the appointment of 266 000 *Gacaca* judges in 2001, the same year the *Gacaca* Act was issued (Amnesty International, 2002a). By the time *Gacaca* heard its last case in July 2010, it had examined over 1.5 million cases. Some estimated 5 000 remaining prisoners who were too old or sick to stand trial and were implicated in minor offences were pardoned (Musoni, 2009; Vesperini, 2010).

Despite its limitations, some of which are outlined later in this article, the achievements of *Gacaca* courts have been impressive. A pertinent question here is how can Darfur replicate its success while at the same time avoid its limitations?<sup>2</sup> Like Rwanda, Darfur has traditional systems of conflict settlement which can be activated in its post-conflict work. In the following paragraphs, I will draw on the experience of the Berti, my own ethnic group, and use it as a convenient model for Darfur. The reader must allow for minor variations among other ethnic groups (for the Berti see Holy, 1974, 1991; El-Tom, 2008).

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2 For a critique of *Gacaca* see Amnesty International, 2002a, 2002b; Haile, 2008.

## **Darfur's legal system of traditional administration**

Across the Sudan, local administration operates a sophisticated judicial system premised on traditional wisdom but equally informed by a modern state's legal ethos. Courts of local administration are structured around their administrative role. The village sheikh constitutes the lowest level of local administration presiding over 10 to 40 households. The village sheikh has no physical court but is mandated to settle minor disputes. In addition, the village sheikh combines assisting traditional courts run by his superiors in the local administration and government legal courts.

Above the village sheikh is the *Omda* (Mayor) who presides over up to 100 sheikhs. Depending on the size of the territory under his administration, the *Omda* may or may not have a physical court. Like the village sheikh, the *Omda* settles minor disputes among sheikhs as well as individuals. The absence of a court also means the absence of a mandate to impose prison sentences. Minor fines and compensation may be imposed during arbitration although implementation of the ruling depends on the disposition of the conflicting parties.

Above the *Omda* is the *Shartay* who presides over three to six *Omdas*. The *Shartay* has a court and mandate to impose jail sentences to be served in government prisons. He receives a salary from the government and maintains court records for future examination by the government if required. Above the *Shartay* is the *Nazir* or king in some areas. Both the *Nazir* and king run courts that are endorsed and supervised by the government.

Despite its history and experience, the traditional administration is unlikely to be suitable for post-crisis trials in Darfur. To begin with, this system is ethnically based and always headed by a chief of the dominant ethnic group in the area. Although the court might include juries drawn from ethnic minorities in the area, the position of the chief belongs to the dominant ethnic group. This makes adapting such a court to run trials of Darfur war criminals a risky affair. Moreover, many of these chiefs have also been politicised and above all implicated in one way or another in the Darfur dispute. Removing them in favour of other judges might create a dilemma regarding other functions for which they have been



appointed in the first place. For these reasons, it would be unwise to solicit their involvement in post-crisis trials.

### **Collective compensation (*Diya*)**

*Diya* is a traditional system of collective compensation employed across Sudan and other African countries such as Somalia and Chad. In Darfur, it is restricted with some flexibility to unintentional homicide, injuries and damage to property. In order to seek the assistance of the kinship group to pay *Diya*, the compensation required must be too large for a single household to muster. In effect, this is a collective responsibility for individual offences. Nonetheless, and like many other traditional systems of conflict resolution, *Diya* constitutes a process for collective action and periodic consolidation of group solidarity.

A network of permanent officers is elected to administer *Diya*. They form hierarchical lines of personnel chosen on a hereditary basis with the sole role of operating the *Diya*. Ethnic groups are divided into lineages (*Khashim biout*) and sub-lineages (*Warrayat*) with a person in charge of the collection of contributions for each division or sub-division.

The Berti, whose system is described below, is a good example. It is a system common in Darfur but not without some variations. At the apex of the structure of *Diya* sits the *Farsha* who covers a large territory for the group. Below the *Farsha* is the *Duwana* who is responsible for the mobilisation and collection of contributions of several lineages. Up to 50 lineages could come under a *Duwana* consisting of more than 10 000 households. Each lineage is under a *Dimlig* who is appointed for the same purpose. The *Farsha*, *Duwana* and *Dimlig* have deputies spread across all areas where they have relatives, including in the capital Khartoum. *Diya* representatives may seek assistance from the local administration to execute their work as the latter recognises and fully supports the *Diya* system as a legitimate course of conflict settlement.

Payment of *Diya* is worked out by dividing the amount of imposed compensation by the number of contributing households. Due to the spread of population, the collection of money is an arduous and inefficient task requiring several years to

complete. Payments are relatively small due to the large number of contributors. For example, homicide triggers a levy of as low as LS100 (Sudanese Pound), approximately 0.30 Euro per household, with only married people eligible for contribution. Payment of *Diya* is seen as an honourable deed, symbolic of belonging to the group. Few are prepared to endure the shame of not meeting the obligation.

Although the *Diya* is theoretically restricted to unintentional offences, it is often extended to cater for crimes of collective aims that are deliberately committed. Crimes committed to advance the cause of a group constitute a breach of national legal codes but there are always ways around these. In ethnic disputes where intentional killings are committed, the government itself ignores national justice codes and resorts to *Diya* to settle conflicts. The sophisticated outreach of the *Diya* institution coupled with sanctioned flexibility makes it a perfect candidate for use in the post-Darfur conflict.

### **Traditional councils of mediation (The *Judiyya*)**

When thinking of *Gacaca*, nothing comes to mind in Darfur other than its traditional mediation council, locally referred to as the *Judiyya*. It is a grassroots system of arbitration that focuses on reconciliation and resurrection of social relationships in the community. Unlike other judicial systems such as government and *Shartay* courts, the *Judiyya* is distinguished by the impermanency of its membership, informality and accessibility to all in the community.

The *Judiyya* session can be initiated by a plaintiff, a defendant or their concerned neighbours and relatives. The meeting is open to all including passing guests and is not restricted to any defined number of mediators. In general, a *Judiyya* session attracts a minimum of five jurors who join and depart at will to carry out other activities. The disputants have the right to veto participation of potential mediators but only prior to commencement of the *Judiyya*.

The *Judiyya* has no overt power to enforce its ruling. Its power over disputants is moral. A disputant who defies the ruling of the *Judiyya* is castigated as a *Kassar Khawatir* (consensus breaker) who is anti-social, uncooperative and a threat

to community harmony. The opposite of that is *Jabbar Khawatir* (consensus builder), reflecting civility and ideal citizenship in the community. In a social environment where survival requires cooperation, the label of ‘consensus breaker’ is hard to sustain. Furthermore, the ruling of the *Judiyya* is often endorsed by the much harsher *Shartay* court should the case go further. What is important here is the consensual nature of *Judiyya* ruling. In effect, it is a community attempt to combine individual interests with community ideals.

The *Judiyya* is free and no penalties are imposed other than compensation for loss or damage incurred in the conflict. An oath on the Koran may be employed to prevent further offences between the disputants.

### **The *Judiyya* versus the *Shartay* court**

As mentioned above, the *Shartay* runs a court that is endorsed by the state. The *Shartay* court deals with intermediary conflicts and is subordinate to government courts. The *Judiyya* then occupies the lower level of jurisprudence and is confined to lower level crimes that may not require intervention by the *Shartay* court. In contrast to the *Judiyya*, the *Shartay* court mimics its superior government courts. It is informed by a modern ethos, literate and with permanent members. It is also punitive and dependent on external tools like bailiffs, police and prisons to enforce its verdicts. Its sessions are formally planned and held in modern buildings in the form of mud rooms as distinct from grass cottages.

The *Judiyya* contrasts sharply with this. It is grassroots-based, spontaneous, with an open jury and focussed on reconciliation. Its meetings are convened in any suitable place, like the shade of a tree, and it relies on the goodwill of the parties involved to enforce its rulings (see Tables 2 and 3).

**Table 2: The Judiyya and the Shartay Court**

| <i>Judiyya</i>         | <i>Shartay Court</i>     |
|------------------------|--------------------------|
| Tree                   | Mud room                 |
| Oral/traditional-based | Literate/modern-based    |
| Spontaneous            | Formally arranged        |
| Open jury              | Restricted jury          |
| Restitutive            | Punitive                 |
| Moral enforcement      | External enforcement     |
| Ruling consensual      | Ruling imposed by judges |

**Table 3: Traditional System of Conflict Resolution**

|                | <b>Domain</b>                         | <b>Mandate/Powers</b>  | <b>Election/<br/>Appointment</b> |
|----------------|---------------------------------------|--|----------------------------------|
| <i>Judiyya</i> | Neighbourhood conflicts               | Restitution and reconciliation   | Spontaneous                      |
| <i>Sheikh</i>  | Single village or residential quarter | Small fines, communal work, tax  | Locally elected                  |
| <i>Omda</i>    | Several sheikhs, up to 100            | Small fines, tax   | Elected/appointed                |
| <i>Shartay</i> | Several <i>Omdas</i>                  | Up to two years jail sentence; extension of official legal system, tax | Elected/appointed                |
| <i>Farsha</i>  | An area or sub-tribe; <i>Duwanas</i>  | Collection of compensation fund only                                   | Elected                          |

## From *Gacaca* of Rwanda to the *Judiyya* of Darfur

Like pre-genocide *Gacaca*, the *Judiyya* is a quintessential institution and a repository of a traditional system evolved for tackling day-to-day conflicts during peaceful times. As in post-genocide Rwanda, the Darfur crisis introduced fresh nuances and new realities that transcend the traditional competence of the *Judiyya*. Hence, there is a need for some modification to *Judiyya* with the aim of its transformation into an institution capable of contributing to justice and reconciliation in post-war Darfur. Fortunately *Gacaca* provides an impeccable template whereby a basically similar institution has been called upon to play a role analogous to what is demanded of the *Judiyya*. In revising the *Judiyya* to suit the new context of post-war Darfur, caution is necessary to avoid the pitfalls of the *Gacaca*. The new *Judiyya* will undoubtedly be a hybrid, defying purists of traditional customs and disappointing those who aspire to an unadulterated modern judicial system.

Navigating through the complexities of the number of perpetrators of Darfur atrocities represents a major challenge. Even if we are able to gauge a reasonable margin of error, the number of those implicated in the atrocities will still be affected by local considerations peculiar to Darfur. By June 2009, *Gacaca* had already delivered over 1.5 million cases (Musoni, 2009). Roughly speaking, and assuming that many of Darfur offenders cannot be identified, the *Judiyya* will still probably have to deal with a fourth to fifth of that number (200 000 to 375 000). This number is further reduced by removing those involved in homicide/fatal injuries, as will be proposed later. The challenge is formidable but not insurmountable.

In the *Gacaca* case, 266 000 judges were appointed to sit in 10 000 courts. While this number may seem vast, the courts had to deal with a colossal amount of work with an adverse effect on performance, enthusiasm and availability for economic activities. The *Judiyya* must avoid this pitfall. If the number of *Gacaca* courts is used as a template, Darfur will require 2 000 to 2 500 courts. The problem of excessive work experienced in *Gacaca* can be eliminated by doubling the number of *Judiyya* courts to 4 000 to 5 000. This will also speed up

the work, fast-track the reduction of the number of detainees and lead to a more efficient reconciliation and reconstruction of communities.

The poor training of judges that accompanied the work of the *Gacaca* courts must not be repeated in Darfur. As reported, *Gacaca* judges received an average of 36 hours of training each (Haile, 2008:20; Hansen, 2005:2; Amnesty International, 2002b:6). Moreover, judges sitting on *Gacaca* Appeal Tribunals did not receive better or longer training than other trainees. This deficiency must be overcome in Darfur. The quality of training must not be sacrificed for expediency.

Amnesty International was justified in raising the issue of the failure of *Gacaca* to adhere to the principle of a fair trial in its proceedings (Amnesty International, 2002a). Like many traditional legal systems, *Gacaca* lacked what is akin to the modern principle of 'presumption of innocence'. This principle must be enshrined into the revamped *Judiyya* if it is to deliver justice that is worthy of pursuit.

The *Judiyya* also lacks a space for lawyers, a pitfall experienced in *Gacaca*. While it may not be feasible to include lawyers in the *Judiyya*, this shortcoming can be addressed by boosting the role of counter witnesses. Defendants should be allowed to commission relatives who are more articulate and with a better command of the intricacies of local jurisprudence to represent them in courts. It is perhaps unrealistic and albeit unnecessary to replicate Rwanda's employment of 'judicial defenders' in trials. Judicial defenders are pseudo-lawyers with six months of training. Nonetheless, some form of training for 'traditional judicial defenders' with the aim of improving their sense of justice should be considered (Amnesty International, 2002b).

Many experts including Hansen (2005), Haile (2008) and Emmanuel (2007) have raised concerns about the low, if not totally defective, standard of evidence employed in *Gacaca*. The result was that many defendants were convicted on the basis of hearsay and circumstantial proof. Care must be given to this issue in the training of *Judiyya* judges. *Judiyya* appeal tribunals in particular must be empowered and perhaps augmented with modern judges to attenuate this tendency in the *Judiyya*. Alternatively, a supreme appeal tribunal can be created

within a reorganised national justice system to act as a final stop for contested *Judiyya* verdicts. Variations in standards of the law of evidence are not peculiar to traditional legal systems. As the trials of O. J. Simpson have shown, modern courts are also inconsistent in their application of the law of evidence. Simpson was pronounced 'not guilty' in a criminal court but later convicted in a civil court. Simpson's case is said to have inspired relatives of the 29 victims of the Omagh bombing in Northern Ireland by the Real IRA in 1998. Having failed to secure a conviction in a criminal court in 2001, the plaintiffs renewed their case under a civil court, leading to a successful conclusion on 8 June 2009. Four of the five defendants were found responsible for the Omagh atrocities. The civil court prosecution highlights the marked differences where 'in a civil case, the burden of proof is on the balance of probabilities rather than the higher burden of a criminal case of beyond reasonable doubt' (Coulter and Keenan, 2009; Coulter 2009a, 2009b).

Improving the justice potential of the *Judiyya* presupposes some degree of modernisation, bringing the institution closer to international justice system. In so doing, efforts must be made to avoid converting the *Judiyya* into a retributive system akin to modern courts. The value of the *Judiyya* lies in its drive for restitution and reconciliation. Pushing the *Judiyya* too much into the realm of modern courts with their emphasis on punishment would be imprudent and counterproductive (Shema, 2009). The challenge is how to improve the justice delivery of *Judiyya* while maintaining at least some of its traditional ethos.

Despite the scale of atrocities in Darfur, it is anticipated that the *Judiyya* will face less work as compared to *Gacaca*. Hence, overseers of the *Judiyya* can afford to limit its deliberations to relatively minor offences. All crimes leading to fatalities can be removed from *Judiyya* jurisdiction and be transferred to the NJS. Cases of rape should also be taken out of the *Judiyya*. The gravity of war rape is demonstrated by its historic classification as a war crime in the ICTR. As such, the *Judiyya* will then be mandated to deal with damage to property including theft and looting, non-fatal injuries, and the terrorising and intimidation of civilians.

There is no doubt that the Darfur crisis represents a conflict between the centre and the periphery. Nonetheless, the crisis manifested itself in the region pitting one broad coalition of groups against another. This division is bound to resonate in the constitution of the *Judiyya* tribunals. More often than not, an administrative territory which constitutes a base for a *Judiyya* court may coincide with a single dominant ethnic group. *Judiyya* courts must be prevented from acting as mechanisms for forwarding the narrow interests of a dominant ethnic group to the detriment of others. Hence, modalities guaranteeing a fair ethnic mix of *Judiyya* courts must be envisaged prior to the constitution of these courts. This will increase fairness and pre-empt the possibility of the *Judiyya* falling into what Hansen (2005:4) refers to as 'victor's justice'.

Blatant interference by the post-genocide Rwandan government is widely reported. The government intervened in the mandate of *Gacaca*, its deliberation process, in the availability and release of detainees to be tried and intimidation of its judges (Hansen, 2005; Amnesty International, 2002b:6-7). This scenario is likely to be attempted by the post-war government in Darfur. Insulation of the *Judiyya* from negative government interference must be ensured and clearly embedded in *Judiyya* rules.

As alluded to before, the *Judiyya* has evolved to deal with conflicts of peacetime. The war in Darfur creates a new context that presents the *Judiyya* with new challenges. One of those is the challenge of having to deal with unconventional clients including minors, rape victims and sufferers of post-war trauma. *Judiyya* judges must be trained to isolate these cases and accommodate them in their deliberations. But the mere sensitivity of judges to these cases alone is not sufficient. A mechanism whereby the *Judiyya* can make use of trained personnel in the areas of post-war trauma, rape problems and minors must be provided.

Like many traditional settings in Africa, the *Judiyya* has always been a male battlefield. Women feature in it as victims, defendants and witnesses but rarely as judges. This patriarchal aspect of the *Judiyya* must be remedied. The war in Darfur did not spare women and there is no reason why they should not make a prominent presence in its justice process. *Gacaca* provides a good template in that the participation of women was as high as 30%.



## Concluding remarks

The use of the *Judiyya* in post-war Darfur is dictated by necessity. The *Judiyya* constitutes the best avenue for generating ownership of justice, achieving reconciliation and avoiding the undesirable dilemma of keeping detainees, many of whom are innocent, in jail for prolonged periods. Supporters of the South African rival 'Truth and Reconciliation' model may be content with the fact that the main principles of that model are already enshrined in the *Judiyya*. These include the establishment of truth, bringing contenders to face-to-face dialogues, the airing of grievances, forgiveness, the moral punishment of wrongdoers and above all social rehabilitation (Emmanuel, 2007; Graybill, 2004).

No matter how the *Judiyya* is improved, it will not match the fairness of 'best practice' in modern courts. It is perhaps neither logical nor desirable to adopt different processes and expect the same result. Limitations of the *Judiyya* can, however, be compensated for by what the *Judiyya* delivers for peace and reconciliation. I hasten to add here that we have little choice in this regard. Replication of the modern justice system under the mantle of the *Judiyya* serves no purpose. Among the other problems that it may create is that it transforms the *Judiyya* into another punitive system with little or no contribution to community restitution. Moreover, one should not assume that alternative justice systems, in the form of either the national justice system or the international justice system, are perfect. Both of these systems have demonstrated their limitations across the globe. However, this is not a ground for deciding not to use them (Jones, 2006).

This chapter glosses over several theoretical issues in the study of conflict and peacebuilding. Chief amongst these is the legitimacy of armed conflicts instigated by both the state and rebel groups. International conventions abhor armed conflicts but do not criminalise them as long as they stay clear of non-combatants, observe the rules of engagement and refrain from the use of excessive force. At a theoretical level in anthropology and related disciplines, armed conflicts are not seen as inherently negative or positive. In the structural-functionalist approach, armed conflicts can be interpreted as negative only if they do not reinforce the status quo. In the Marxist perspective, physical violence

is seen as positive if it leads to progressive change. To this, one may cite Fanon and others who take armed violence aimed at decolonisation as necessarily positive (Sluka, 1992:30).

The armed conflict which is the subject of this article is aimed at changing the status quo and not at upholding it. As the rebels claim, raising arms is by far not their preferred choice and has come only after prolonged failures of peaceful means of addressing their grievances. Tragically, as Sluka puts it, 'the rich and the powerful are almost never persuaded to change through reasoned argument or moral persuasion' (Sluka, 1992:31). Surprisingly, Al Bashir himself declared publicly that he would 'only negotiate with those with a gun in hand, for that was how he took over power in Khartoum' (El-Tom, 2009:99; Suleiman, 2011).

There can be no doubt that the current armed conflicts in Darfur resulted in a colossal loss of life. However, armed conflicts, including Darfur's, come as a desperate attempt to put an end to structural violence. In Darfur as well as in other marginalised regions of Sudan, structural violence perpetrated by the Khartoum government since independence has been responsible for millions of deaths. People there continue to die due to poverty, disease, famine and neglect (Nordstrom and Martin, 2006:8). It is no wonder that Cramer emphasises this point by employing the phrase 'Civil war is not a stupid thing' as the title of his book. He rightly calls for taking wars as central to the process of modernisation and away from viewing them as indicative of 'development in reverse' (Cramer, 2006).

While successful civil wars may deliver a reprieve from structural violence, peace and the peacebuilding process may come at a high cost to their major stakeholders. In the currently interconnected world, civil wars often call for international sponsored peace initiatives, the details of which are developed from afar, away from conflict zones and behind closed doors (MacGinty, 2010:350). This is what is also referred to as 'liberal peace', a process that remains firmly in the hands of the European-North American axis. It aims at articulation of conflict zones in the sphere of the western liberal world. Invariably, such liberal peace erodes the agency of major stakeholders and weakens their self-determination. Richmond refers to this process as 'dispossession in which agency is taken away from those who receive peace' (Richmond, 2010:4). Over the past few years, Darfur rebel

groups have already signed dozens of international charters in the course of negotiations, training and consultation with diverse United Nations, INGO and civic society institutions. Issues that the rebels signalled their commitment to include liberal democracy, human rights, prisoners of war, proscribing child soldiers, the equality of women, freedom of speech, and property rights. While many of these issues conform to the ideals of the rebel groups, the charters nonetheless privilege the Eurocentric self and endorse the otherisation of the rest of the world.

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