Indigenous land rights and conflict in Darfur:
The case of the Fur tribe

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Introduction

Land rights in Darfur operate as a central feature of the conflict. Widely regarded as being at the heart of the war, land rights for the different indigenous groups involved in the conflict are complex, confused, sensitive, and volatile (e.g., Abdhalla 2010; Flint and De Waal 2008; Abdul-Jalil 2007; Suiliman 2011; Concordis 2007). Of the six recognized and agreed upon 'root causes' of the war mentioned in the 2011 peace accord between the government and one set of the rebel factions, three dealt explicitly with land rights issues (DDPD 2011). In one of the most acute manifestations of the land rights problem, certain Arab pastoralists of northern Darfur were easily recruited into the *Janjaweed* for two primary reasons, land and money (Flint 2009).

This chapter[1] examines the land rights of the *Fur* indigenous group in Darfur and how these have interacted with those of other indigenous groups in the region and the state's approach to land rights, to become highly contentious. Subsequent to a description of how the *Fur* indigenous land tenure system functions in the region and how it came about, the chapter looks at how indigenous land tenure has intersected with formal statutory tenure and Islamic law, and then focuses on the role and functioning of land rights in the conflict itself. This is done by exploring, 1) the stress, exclusion and resistance involving the indigenous tenure system; 2) the intrusion and confrontation of the statutory system; and, 3) the role of Islamic law regarding land rights.

Land rights in Darfur

Indigenous customary tenure in Darfur

Land in Darfur is divided up into tribal homelands known as *Dar*. As a general rule the *Dar* belongs to (or more specifically is named after or associated with) a major tribe or clan. Such a tribe initially obtained land rights as a result of earlier occupation dating from the pre-Sultanate period. During the Sultanate period the sultan merely recognized the fact of land occupation and control, and reconfirmed the position of the group's leader. The main advantage of this arrangement for the major tribe that it gave it a monopoly over the land - political nexus as well as leadership and revenue collection. Thus Darfur is known historically as the *Dar* or homeland of the *Fur* tribe in recognition of its historical role in establishing what was at the time a thriving state. Thus while the *Fur* tribe did not occupy the entirety of what is today called Darfur, the naming of the region as associated with the *Fur* follows a long history of state formation by the tribe even though other tribes and *Dars* are included within Darfur (O`Fahey and Abu Salim 1983).

[1] Portions of this chapter have previously appeared in Abdul-Jalil and Unruh (2013) and Unruh (2012).

Historically, when Darfur was annexed to Sudan in 1916 the colonial authorities changed very little of the land administration system. The tribal homeland policy of indirect rule adopted by the British in Darfur favored the larger tribes, in that their leaders were confirmed as Paramount Chiefs (otherwise known as *Nazir, Shartay, or Sultan*) to be responsible for managing large areas of land as well as the people within a given boundary (Abdul-Jalil et al 2007). This minimized the colonial oversight that would have been needed to interact with many smaller tribes. It also meant that small tribal groupings and their chiefs came under the administration of the larger tribal chiefdoms with or without their consent. Thus many of the smaller tribes have struggled for their own tribal identity and land for some time. Currently the claim for independent *Dars* by the smaller tribes is linked to their desire for their own 'Native Administration' operating within broader customary law. Such an administration includes formal leadership positions in local and regional state institutions, including local councils and state advisory bodies. The claim for separate *Dar*s by minority tribes was and is usually resisted by the majority tribes because it would lead to the fragmentation of the overall *Dar* and a diffusion of authority away from the larger tribes. This has been a major source of tribal conflict in the region, illustrated by the *Ma'alyia – Rizeigat* conflict in 1968 (Abdul-Jalil et al 2007).

While all *Dars* are connected to a specific group, a parallel issue of critical importance to the current conflict, is that not all groups have *Dars*. This is particularly the case for the camel Arab pastoralist (*abbala*) indigenous groups of northern Darfur such as the northern *Rizeigat* who have historically roamed regions of the Sahara to the north of Darfur and who migrated into Darfur seasonally (Mohammed 2004). This lack of *Dars* among some groups was partially because the granting of tribal *Dars* in the Sultanate era also favored the larger sedentary tribes as British colonial policy did, but also because in the past such permanent claims to land were not an important issue for Arab pastoralists, who instead depended on transient rights of land access (Abdul-Jalil 2008; Babiker 2001).

Thus Darfur's tribes can be classified into land-holding and non-land-holding groups. The first category includes all the sedentary groups plus the cattle-herding tribes of southern Darfur. The second includes the Arab camel nomads of the north and west (including into the Sahara) plus new-comers from neighboring Chad and elsewhere who were either driven by drought and political instability or drawn by opportunity to seek permanent residence in Darfur; or who migrated into Darfur as part of seasonal grazing patterns. The implications of the distinction between land-holding and non-land-holding groups for the current civil war is of fundamental importance. In this regard primary narrative is that many Arab pastoralists of the north justify their participation in the current conflict as part of a 250 year-old quest for land that was provided to others but denied to them. This perspective, while not well aligned with actual history, is so acute that "hakura has become a battle-cry of the Janjaweed" (O'Fahey 2008).

The *Dars* are further subdivided into '*hakura*'. While use of the term varies, essentially *hakura* are forms of land grants or titles given by the *Fur* sultans to chiefly families, religious figures, or court appointees. The *hakura* granted were of two types; an administrative *hakura,* which gave limited rights of taxation over people occupying a certain territory, and a more exclusive *hakura*

of privilege that gave the title holder all rights for taxes and religious dues within the area. The first type was usually granted to tribal leaders. The *hakura* of privilege (which was relatively smaller) rewarded individuals for services rendered to the state and had more limited administrative implications. Both types of estates were managed through stewards acting on behalf of the title-holder (Abdul-Jalil 2009; O'Fahey and Abu Salim 2003).

While a *hakura* exists as a document describing the land grant (including precise boundary definition) and had the Sultan's seal above the text, the term also refers to the land itself, which often comprise significantly large areas (O'Fahey, and Abu Salim 2003). The *hakura* vary in size, and O'Fahey's (2008) research into Dar Aba Diima revealed the existence of about 200 *hakura* in an area of approximately 1500 miles square, resulting in an average *hakura* size of approximately 70 miles square. But *hakura* is also taken to mean as 'tribal land ownership', meaning that the *hakura* became attached to the area originally occupied by a tribal group. In actuality however the tribe of the original *hakura* owner (*hakura* being hereditary) gathered to the area and came to occupy and consolidate itself within the *hakura* (Flint and De Waal 2008. The rights of the *hakura* owner were more akin to a feudal jurisdiction, with rights to collect taxes of various kinds, as opposed to a form of freehold (Flint and De Waal 2008). Currently there is considerable confusion over the term and concept of *hakura*. Some see it as synonymous with *Dar*, others view it as a land tenure system belonging to the *Fur* only, and still others see it as simply a land management system that can be changed or replaced. The various confusing understandings associated with *hakura* are important to Darfur`s current conflict, and will be elaborated upon further below.

Islamic law is fused with customary law in Darfur, as it is throughout the Muslim world (Flint and De Waal 2008). The historical land documents granting the *hakura* to their original holders in the Sultanate era (the earliest dating from approximately 1700) refer to Allah, the Qur'an, Islamic law, and Islamic precepts throughout (O'Fahey and Abu Salim 2003). Some of the land titles (also referred to as deeds or charters) were actual *waqf*-granting documents (*waqf* being a form of Islamic land trust), while many other *hakura* grants were *'waqf*-like' to varying degrees in that they were given to Islamic religious figures and were intended to be continuously held by their descendants. The deeds given to such figures invoked and used religious phrases and words to different extents (O'Fahey and Abu Salim 2003). As a result a particular *hakura* deed with a significant amount of, or more powerful religious phrasing, would be considered more *waqf*-like than others which had less religious phrasing. Thus a certain 'argument' in a legal sense, could be made that a particular *hakura* should be seen as more *waqf*-like given its phrasing, or its mention of certain religious aspects, or the religious figure it was initially given to. Still other land deeds were charters granted to various holy clans (O'Fahey and Abu Salim 2003). Such religious actors were then a primary factor in the further spread of Islam in Darfur (O'Fahey 2008).

At the village and household level within the *hakura* system, customary rights over land were seldom exclusive, hence there was no real 'ownership' of land in the Western legal sense. The basic principle was that there existed a form of land access whereby every adult male in the village was entitled to a piece of land on which to build a hut and establish an enclosure for ani-

mals, in addition to access to farmland outside the village. However there were communal rights that overrode individual user rights on such land. These included access to water for humans and animals; access to livestock routes (for agricultural, transhumant and nomadic animal movements); access to grazing and hunting areas; and the gathering of fodder, wild foods, firewood, and building materials; as well as access to ceremonial and ritual sites (Abdul-Jalil 2006). Although these rights were in principle enjoyed by all, more localized sets of normative rules defined how access and claim in reality occurred. For example, rain-fed farmland (*talique*) had a specific set of rights because it was put under use for only part of the year and left fallow after harvest. There was a Darfur-wide custom with local variations that stipulated unfettered access to *talique* after harvest so that livestock belonging to pastoralists could graze on the remains of harvested crops. Accordingly, the farmer would not allow his own animals to graze while denying access to animals belonging to others. Management of *talique* was communal and access to it was decided by the local Native Administrators concerned.

A significant aspect of customary tenure is the `Native Administration`. Under the colonial policy of indirect rule, tribal leaders were confirmed as part of a Native Administration system and were deemed to be custodians of land belonging to their tribes. Paramount Chiefs, who continue to represent the highest authority in the Native Administration system, performed their duties through a medium level leadership position (*Omda),* and the latter through the lower level leadership of a village headman (*Sheik*). The Paramount Chief was also responsible for allocating land for settlement and cultivation. Any disputes regarding land rights or natural resources first needed to pass through the village *Sheik* who then communicated with the upper level of the Native Administration to resolve it. Thus the Native Administration provided a system of local governance which manages the use of land and natural resources. Native Administrators were (and still are) entrusted with the role of implementing land rights and resource allocation decisions, and regulating the grazing activities of different tribes and outsiders so as to avert conflicts between farmers and pastoralists. This included the enforcement of boundaries that demarcated grazing and farming areas, regulation of the seasonal movement of pastoralists in terms of timing, the routes taken from their dry season grazing areas to wet season areas, containment and resolution of tribal disputes in the grazing areas, and the opening and closing of water points (Abdul-Jalil 2007). It was unfortunate then that the Sudanese government dissolved the Native Administration in 1971, creating a precarious institutional vacuum; then re-instituted it later but with members selected by government instead of local constituencies. The result is that the Native Administration is now highly distrusted and largely ineffective (Elmekki 2009). This has crippled much of the functionality of the customary tenure system, and did away with the primary way for the customary and statutory tenure systems to interact.

Prior to the current war nomadic pastoralists were provided with negotiated transient rights within indigenous sedentary customary tenure, and these were operationalized through special corridors that passed through the tribal lands of sedentary groups. These corridors were established by arrangements made between the traditional leaders of nomadic and sedentary groups, with the customary rights of each group respected. There also existed an arrangement prior to the war whereby if pastoralist groups wanted to cross from Chad or points north into Darfur they would

be linked to a local 'advocate' or sponsor known to the local population, or someone from the incoming pastoralist group that was known locally. Such an advocate would be able to speak for and attest to the good intentions and behaviour of the group in question. In this way the pastoralist group would be allowed to stay and negotiate grazing. But benefits from such an arrangement would flow both ways. Because livestock were one of the few ways to store capital, herders were desired by *hakura* members (O'Fahey 2008).

As a general rule all *Dars* allowed settlement of newcomers both as individuals and groups, provided that they adhered to the relevant existing customary regulations. Farming, grazing, hunting and forest use were included in such arrangements. Historically it was advantageous for a Paramount Chief or *hakura* holder to attract newcomers, in order to till the land and provide taxes to the *hakura* holder (O'Fahey 2008). Agriculturalist newcomers from outside the *Dar* who wished to farm were usually accommodated within uncultivated 'waste-land' areas or fallow-land, according to local customary norms. If the newcomer was an individual or a few families, they would join an existing village and come under the administrative jurisdiction of its *Sheik*. However, if the number of newcomers was large enough to constitute a separate village, they were allowed to have their own village and choose their own *Sheik* who would then be accountable to the *Omda* of the area. In such a case the new *Sheik* would not have jurisdiction over land and so was called '*Sheikh Anfar*' (*Sheik* of people) as opposed to the more powerful and prestigious office of '*Sheikh Al-Ard*' (*Sheik* of the land) which was open only to natives of the Dar.

Indigenous and Statutory land law interaction in Darfur

The legal environment in Darfur comprising statutory, customary, and Islamic law has evolved over the course of history in Darfur and Sudan, from different sources and historical developments. While there is overlap between the three approaches to legality in land rights, this involves forms of congruence, as well as forms of co-option and opposition. But there are also fundamental incompatibilities. The priority of customary law is social stability, saving face and reconciliation of disputes outside of a winner - loser context. Thus customary law in Darfur is about obscuring individual culpability in favour of one's group compensating another or compensating an individual. Formal law on the other hand is concerned with finding and punishing an individual wrongdoer so as to achieve justice. The issue of evidence is also a fundamental problem for law in Darfur--with statutory law depending on the document and customary law allowing robust use of testimonial and landscape-based evidence. Islamic law as practiced in Darfur allows for yet a different avenue for evidence. In this context a claimant can ask an Islamic judge to have the person suspected of committing the act in question (i.e. damage to land, land and property disputes, etc.), swear on a Qur'an that he is innocent. If the Qur'an is a mass produced printed copy then the exercise is much less powerful than if the Qur'an is old, hand written, has a long religious history attached to it, was written from memory by a famous religious person known in history or who made the Haj, and is kept in a mosque. The reason the latter is more powerful is because to lie while swearing an oath on such a Qur'an is thought to bring calamity. Thus within these three legal domains, overlapping laws belonging to the different legal regimes actively work at cross purposes, creating significant confusion.

Most statutory land laws in Sudan that are relevant to Darfur were initially derived to serve areas in and around towns and on development schemes along the Nile valley, and were not intended for the wider rural areas of the country. Nevertheless such laws were passed as national legislation applicable to the entire country. In practice for much of the history of this legislation (Runger 1987; Gordon 1986) the government did not interfere in the administration of customary rights in many rural areas of the country, and these laws caused little initial concern or problems for the inhabitants of Darfur. However they came to be applied to Darfur when it became advantageous for those from outside the region and/or those not belonging to the customary *hakura* tenure system to do so. Most notable in this regard is the 1970 Unregistered Land Act, which stipulated that all land not registered with the government by the date of its enactment, became by default government land. In addition two other statutory laws were also problematic. The first was Emirate Act of 1995 (GOS 1995) was passed by the state of West Darfur as part of a larger effort to make the Native Administration more responsive to Arab pastoralists. One result of this law was the division of a large area known as '*Dar Masalit*' into 13 estates, five for the native *Masalit* farmers and eight for the Arab camel herders (who in this area are part of the northern *Rezeigat* tribe). Prior to this division all the land in *Dar Masalit* was claimed by the *Masalit* tribe. The *Masalit* viewed the division as a way for the Sudanese government to downgrade or abolish their longstanding customary claims to the land (Abdul-Jalil and Abdal-Kareem 2011). The Act and the resulting division of *Dar Masalit* are thought to have played a major role in the armed conflict in 1997 between the *Masalit* and Arab pastoralists in the area. The recruitment of *Masalit* youth into the present rebel militias can be linked to the problems over land that the Emirate Act brought about (Abdul-Jalil and Abdal-Kareem 2011). The second law was the Investment Act of 1998 (GOS 1998), which opened the door for the allocation of large tracts of land by central decision-making at the federal and state levels, without consultation with local inhabitants or recognition of their rights. This law built upon the 1970 Unregistered Land Act by allocating land for investment which was claimed by government under the 1970 law.

Conflict and *Fur* indigenous land rights

The indigenous hakura tenure system: stress, exclusion and resistance

The *hakura* land system, while historically serving the *Fur* well, has proved to be exclusionary in important ways for those not native to a *Dar* that practices the system. This exclusion is partial, but ultimately quite significant and is a fundamental ingredient in the perpetuation of the current conflict. While the system does allow 'outsiders' to enjoy land access, and pursue various production systems, their representation in the political system is limited to the '*Sheik* of the people' and at the most the mid-level position of *Omda*, with both the much coveted '*Sheik* of the land' and the higher and more politically powerful position of *Nazir* (Paramount Chief) unattainable. The ultimate problem with this partial participation in the *hakura* system is that control over land and political participation are inseparable in Darfur. As well, alliances, loyalties, political gains and the power structures that support these have historically been formed around land (Egemi 2009). As a result political participation is kept away from the growing communities of migrants, such as the *Zaghawa* and the Arab pastoralists--whose communities and in many cases wealth (especially for the *Zaghawa*) have grown considerably over the years. In reaction to the inability

of their growing numbers, wealth, and aspirations to politically participate in the areas in which they resided, the communities of newcomers began to demand their own Native Administration, Paramount Chief, and importantly their own *hakura*. For example, arrivals from Chad were given locations in which to live, but as their numbers increased they wanted their own land, and for it to be administered by them. This became a problem because such land would need to be taken permanently away from the original *hakura* holders. This kind of aspiration became such a widespread issue, that a local conference convened by those native to the *hakura* system determined that land cannot be given to outsiders if it is to be taken from those native to the area. And since all land in Darfur is claimed in some way by individuals and groups native to the *hakura* system, it essentially meant that no land would be available under this construct.

With such partial political participation for the non-natives over time, land tenure insecurity became a serious problem, with the result being that fears about losing land access then drove the search for alternatives to the *hakura* system--such as statutory law, Islamic law, and forms of resistance and armed confrontation. Widespread pursuit of these alternatives within *hakura* administered areas then eventually degraded the *hakura* system itself, so that it began to have trouble functioning in a cohesive manner. Not surprisingly those native to the *hakura* system resisted this degradation, also in a confrontational way. Thus what began as a fairly benevolent approach towards 'guests' by those native to the *hakura* system, changed into a severe problem that has become widely recognized as a primary factor contributing to the persistence of the current armed conflict. The United Nations Office for the Coordination of Humanitarian Affairs in Darfur notes that the *hakura* system is one of the major stumbling blocks to the peace process, "due in large part because the landless camel herders and to some extent the landless *Zaghawa* are always against customary law" (author's field notes). In this regard the original *hakura* granting documents became a target for destruction by the *Janjaweed*, in an attempt to reduce the customary legal basis for *hakura* claims. These documents, once only of historical interest, “today they are weapons of war” (O’Fahey 2008). Thus from their perspective, the Arab pastoralists saw an opportunity to correct a long-standing injustice of landlessness caused by the indigenous sedentary tenure system together with the colonial and independence era statutory legal land regimes, by pursuing their acutely felt need for land and hence greater political participation in Darfur.

The failure to adapt to newly emerging realities on the part of *hakura* indigenous law also has had repercussions and points of confrontation with statutory law—which itself has failed to adapt to *hakura* law. This mutual incompatibility has led to further problems regarding outside investment and the development this has the potential to bring. With no way for such investment (and the needed tenure security for large land areas that this requires) to occur within the *hakura* system, together with the inability of the statutory system to effectively connect with the *hakura* system, exclusively statutory approaches were and continue to be pursued in a ‘forced’ manner instead, because this is what outside investors and government have access to. One study notes that large allocations of land in Darfur have gone to investors from Jordan, Egypt, China, and the Gulf States, as well as Sudanese investors from outside Darfur in this manner (Pantuliano 2007). With the appearance of such outsiders claiming land access via statutory law to large areas with-

in *hakura* administered lands, significant resistance and animosity has emerged on the part of those operating within the *hakura* system.

A related issue regarding outsiders and land, is the role of *hakura* law in any potential peace process. In this regard a hypothetical scenario was put to a local Paramount Chief during the fieldwork—'if the problem outsiders now acting as secondary occupants were de-militarized, and promised to abide by local rules, would they be allowed to stay on unused land according to the old rules of allowing guests onto land?' The answer was an emphatic `no`, under no circumstances would such an arrangement be allowed. This is because good relations are critically important to obtaining land access in the *hakura* system as an outsider. And since the initial intention of the outsiders was belligerent, such a proposal would not be acceptable under *hakura* law. The Paramount Chief noted that even within the old *hakura* title documents it is stated 'do no harm to neighbours', and 'with good neighbourly relations', and that such statements are still taken very seriously. Thus arriving in an area in an aggressive manner is the opposite of what is needed to access land. The Paramount Chief noted further that even when an individual or group arrives with good intentions, it usually takes three years of good behaviour to obtain firm land rights as guests.

A compounding problem with *hakura* tenure, is that in the decades prior to the war the increasing importance of cash in order to purchase food and consumer goods turned some indigenous *Fur* land into a commodity even though the legal status of such land was not clear. Those who were not able to cultivate their land year-around, found they could sell or lease it as individuals on a cash or share-cropping basis. This appeared to occur without engaging any customary process or practice that transferred land rights from *hakura*-based holdings to individual holdings. This was a relatively new phenomenon for Darfur, which did not exist prior to the 1970s except in very limited occasions involving outsiders who wanted to establish gardens on land near small towns. But the practice has since grown considerably over time, and has spread to a number of larger areas, angering those who adhere to traditional *hakura* tenure and its authorities and structures. Currently, in areas where land purchase is now common, there is a good deal of resistance by some to going back to the old ways of *hakura* land tenure. Such that those who try to invoke the *hakura* system in order to evict others or solve problems, can severely opposed.

The statutory tenure system: intrusion and confrontation

The land registration problem

In a significant change in the state's approach to land tenure, the government of Jafar Numeiri enacted the 1970 Unregistered Land Act, bringing into government ownership all land not registered by that date. The Act paved the way for subsequent developments to take place regarding land tenure in Darfur which have since contributed significantly to the current conflict. Most importantly, migrants from northern Darfur who settled further south, began to claim land rights under the Act, ignoring the *hakura* approach to guest accommodation for migrants. Instead they argued that such land now belonged to the government, and so could be given to them by the government. Such claims would have been impossible in the past when newcomers were expect-

ed to remain as `guests` of the host tribe and abide by local customary rules regarding land rights.

When non-native interests (individual, group, and commercial) sought to gain access to lands in Darfur via the 1970 law instead of the *hakura* system, it became clear that there was never any real opportunity to register land in Darfur according to the 1925 Land Settlement and Registration Act, due to the lack of services for surveying and institutions for registration. Nevertheless in 1970 all unregistered land in Darfur became state land for the state to allocate. Thus the 1970 law asserted government ownership over lands already claimed by the *hakura* system. The potential for using `guiding principles' within the 1970 Act for recognizing customary land rights acquired through occupation, were rendered meaningless by court decisions and thus a significant opportunity for statutory and customary law to become mutually accommodating was missed.

A number of large-scale mechanized agricultural projects, which required large tracts of land with statutory tenure arrangements, have been introduced in southern Darfur (mainly in *Um Ajaj*) using the 1970 Act. With the 1970 Act the government was also able to distribute large plots of farmland to urban merchant elites from outside Darfur (primarily from central and riverine Sudan). This process of land allocation by the state caused considerable animosity among many within the Darfur population. The customary user of unregistered land became completely subjected to the government who could exercise its legal rights at will, thus significantly undermining the ability and authority of indigenous customary tenure structures, and decreasing tenure security over indigenous *Fur* land. And while some local inhabitants now want to register their land to protect it from being reallocated by the state, the government indicates that it is too late, and that they should have registered their land earlier by the time the Unregistered Land Act was enacted.

The lack of opportunity to register land in Darfur according to the Act was not the only problem with the law. Even if there was the possibility of registering land between the 1925 and 1970 Acts and many individuals had done so, it would not have alleviated the animosity that would have emerged when the government moved to officially own and allocate the remaining unoccupied and hence unregistered areas of *hakura* and *Dars*. As well, if the farmers would have had the opportunity to register their occupied land and did, it would have been interpreted as acknowledgement that they concurred with the law that all unoccupied *Dar* land should rightly go to the government; thus there would still have been considerable resistance to the Act. And because under customary law lands are not regarded as property (i.e., a commodity), but are instead a form of homeland, engaging in survey, demarcation and registration based on occupation would have had the effect of converting them to property, allowing government to locate and transact them, thus further creating discord. As a result any remedies based on this law, with the presumption that the primary problem was lack of an opportunity to register, would still not have resolved the broader nature of the problem regarding the Act, which is essentially that all land in Darfur is already indigenously claimed. In this context those encountered during the fieldwork noted that it is the flexibility and ambiguity of customary tenure, not clarity, that allows for the

elasticity needed in the tenure system to accommodate livestock migrations, pursue options in drought years, and importantly allow for local derivation of 'on the spot' solutions to tenure problems as they emerge. All of these are constrained by registration, demarcation and government imposition of statutory laws.

A further disruptive aspect of the law involved the Arab pastoralists and *Zaghawa* newcomers who sought to claim land under the law that was not already physically occupied. Historically they respected local customs regarding being 'guests' on others' land, including paying the local *Sheik* one-third of any crop they cultivated. But in reaction to the growing prominence of the Unregistered Land Act over time, they started to reason that if the government actually owns the land, why should they pay the local *Sheik* in order to acknowledge that the land belongs to the *hakura* system. Further aggravating the situation, was a widely known case whereby a Darfur state governor (appointed by Khartoum) allowed, on his own initiative, an Arab pastoralist group headed by their own *Omda* to have their own land with no consultation with the local agriculturalist natives, because presumably the government owned the land through the 1970 Act. This has now set a form of precedent, with other nomad groups asking for similar arrangements. The many conflicts that the resettled *Zaghawa* have had with the *Fur* in the eastern *goz* (areas of stabilized sand dunes that are preferred for agriculture), south of El-Fasher in the mid-1980s, were due to the repercussions of the 1970 law. Thus the law asserted government ownership over lands already claimed by the *hakura* system, allowing outsiders to gain control (in a highly contested manner) over significantly large areas. To this day the legacy of the law's interaction with the *hakura* system facilitates confrontation between the *Fur*, the *Zaghawa*, Arab pastoralists and government.

Land disputes, Native Administration and the '*land sheik*'

A primary manifestation of the legal incompatibility regarding land in Darfur was the inability to resolve land disputes, and the subsequent aggravation of these over time into violent trends. When the major droughts hit the region in the 1970s (Leroy 2009) and pastoral groups started to move south into the Jebel Mara area, serious land conflicts with the local sedentary groups emerged. While the Native Administration was traditionally responsible for dispute resolution, the abolishment of official government recognition of the Native Administration in 1971 caused significant problems. The institutional vacuum created had a direct effect on land disputes, particularly between tribes and between pastoralist vs. agriculturalist groups. Land conflicts became acute and unresolvable in the absence of the Native Administration's dispute resolution mechanisms, particularly with the inability of the government to replace these with viable, legitimate mechanisms based on statutory law. As a result claimants resorted to violence to deal with disputes. While in-group dispute resolution mechanisms such as the *judiya* (a mix of arbitration and mediation supervised by respected persons), and dispute resolution through local *Sheiks* by and large were able to continue to work on their own—attesting to their resilience--this occurred (and continues) only at the local level between those of the same tribal affiliation. But this was not the case when the dispute involved people over larger areas or between tribes, or pastoralist vs. agriculturalist groups. Such larger-scale disputes became unresolvable in the absence of an effective

Native Administration, and turned severe, feeding into the developing narratives of injustice, victimization, and retribution which aligned with different sides in the current conflict. In place of such mechanisms many groups and individuals attempted to pursue (apart from violence) dispute resolution within various statutory laws, and different interpretations of Islamic law. However these suffer from interpretation, enforcement, compatibility and personnel problems, and in the case of statutory law, legitimacy problems. This led to a situation of 'forum shopping' for land dispute resolution mechanisms among the incompatible sets of law. While such forum shopping could be beneficial for disputants who agree on a single fora, for the more volatile group-based disputes, attachment to different fora became part of the larger tribal political problem.

An additional important cause of land disputes has resulted from a change in the duties of the 'land *sheik*'. The land *sheiks* were particularly important in the rain-fed areas and had a number of responsibilities, including negotiation with nomads regarding the timing of the use of livestock migration corridors which ran through cultivated areas. But perhaps the most important issue for the land *Sheiks* was to manage the timing and use of the post-harvest fields for grazing while livestock were progressing through the migration routes. Historically the land *sheik* would inform local farmers of the date by which they needed to have their harvested crops and possessions out of their fields, otherwise they could not complain about any livestock damage that might occur. This was an important role because in different years and in different areas, crops would be harvested at different times. However in 1990 the government bypassed the land *Sheiks*, and simply announced the date by which livestock would be allowed into rain fed crop areas Darfur-wide. This occurred without negotiation between farmers and herders, or an appreciation of the variation in harvest times across space and time or the role of the land *Sheiks*. The position of the land *Sheik* was thus undermined significantly. In many areas this meant that livestock entered cultivated areas prior to harvest and destroyed crops. The reason for the government intervention appears to have been that in years of drought some areas were congested with livestock waiting to enter post-harvest fields, and pastoralists asked farmers to harvest quickly so as to allow grazing. Some pastoralists complained to government about the timing and access problem, and also claimed that farmers were expanding their cultivated areas. As a result the government decided on its own calendar as to when pastoralists could enter cropped lands, instead of supporting the negotiated approach of the land *Sheiks*. This weakened the flexibility of indigenous tenure and its ability to manage relationships in a stable manner between agriculturalist and pastoral groups. The farmers reacted to this government intervention and the large increase in crop damage, especially near Jebel Mara where rainfed crops are harvested later (and where the war began), by burning the bush grazing areas around their crops so as to discourage entry into the overall area by pastoralists. The nomads then reacted by taking their herds directly into the unharvested standing crops to graze, and burning farming villages. The farmers then reacted to this by killing livestock.

Cases of crop damage in the past had the nomad and farmer in question going to a Native Court headed by a Paramount Chief to negotiate damage payment. But with the new government calendar the nomads no longer felt obliged to go to these courts or negotiate for damage payments, further undermining the customary tenure system and aggravating relations between the two

groups. This meant that if a farmer wanted to get damage payment for his crops he would need to go to a statutory court, which was expensive, and where statutory law meant that a different burden of proof was needed. Farmers regarded such courts as pro-Arab pastoralist and so did not engage them. With no widely legitimate institutional way to resolve such problems, farmers instead began to burn more grazing areas, arm themselves, and take matters into their own hands. The pastoralists then armed themselves in response.

The role of land-related Islamic law in the conflict

As noted above Islamic law is used in three distinct ways to justify claims to land for three different sectors of society--government, the *Fur* indigenous group (*hakura*), and the indigenous Arab pastoralists together with the *Zaghawa*. Although Islamic scholars agree that according to Islamic law the state can hold land in trust for the universal Muslim community, irrespective of national boundary, it applies only to `plain land` (in its natural state) as opposed to land that is clearly occupied and used (Sait and Lim 2006). However a primary effect, if not purpose, behind the Sudanese state's use of Islamic law, is to relieve other forms of claim—tribal, autochronous, private, and even that based on customary law fused with Islamic law. According to the view of some in Darfur, the purpose of the Ministry of Religious Affairs and *Waqf* is in fact to co-opt Islamic law and take control of lands away from local people. Alternatively the Arab pastoralist/*Zaghawa* use of Islamic law to gain land access facilitated dislocating people from lands that were clearly already claimed and used by other Muslims. Both approaches are at odds with lands designated as *waqf or waqf*-like by the *hakura* granting deeds. And both approaches seek to discount the establishment of such *waqf*—the state by no longer honouring the *hakura* deeds as it once did, and the *Janjaweed* by attempting to destroy the deeds. Such selectivity regarding use of Islamic law is not new to the conflict. O'Fahey (2008) reports that in 2003 and 2004 the *Janjaweed* burned mosques, desecrated Qur'ans and killed Imams in an apparent attempt at creating a divide regarding Islam between themselves and the agriculturalists. Thus these three uses of Islamic law (*hakura*, state, Arab pastoralist/*Zaghawa*) became set against one another, justifying claims in different ways to separate sets of people.

Conclusion

The case of indigenous land rights and conflict in Darfur illustrates two distinctions from the usual state vs. indigenous land rights scenario. The first is that one set of indigenous rights can become opposed to a neighbouring set of indigenous rights. In this case the land rights system of the *Fur* group became opposed to the land rights (and aspirations) of the northern nomadic pastoralists. This was (and continues to be) a lingering confrontation which was exploited by the state for their own political objectives. Second, while the state is often the focus of recommendations regarding the need to adapt to and/or accommodate indigenous land rights, indigenous tenure systems also need to find ways to accommodate the rights of other indigenous groups, as well as those of the state, if they are to maintain or enhance their role in protecting and administering indigenous lands. In the Darfur case the inability of the indigenous *hakura* tenure system to allow full participation by nomadic pastoralists, significantly aggravated the divisions between the two indigenous groups, and allowed these divisions to be exploited by the government in the

creation of the *Janjaweed.* Such a lack of adaptation on the part of indigenous land-related law to other indigenous groups' laws and state law, is not unique to Darfur. Unruh (2008) observes a similar situation among local chieftaincies in Sierra Leone. While a valuable feature of any land-related law, such adaptation is particularly difficult in cases where armed conflict has prevailed for some time, causing indigenous groups to withdraw into themselves for protection and survival, thus minimizing interaction with other forms of law (Unruh 2008).

The Darfur case also illustrates that even in cases where there is logical and functional affinity between an indigenous system and the statutory system (both functioned off of documents and precise boundaries and possessed robust institutions that interfaced well with each other and the *hakura* system was recognized in the colonial and independence era governments), the state can nevertheless act to subvert the relationship if it is not maintained in an ongoing way.

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