Different Approaches to Genocide Trials
under National Jurisdiction on the African Continent

Abstract

This paper recapitulates a panel discussion carried out on the 32nd annual conference of the African Law Association. The treatise attempts to illustrate the ongoing domestic endeavours in Rwanda, Ethiopia and Sudan as prime examples in dealing with the mass human rights abuse that occurred on their respective African state territories. Albeit quite different in their de jure procedural approach, as well as their de facto socio-political parameter, all three genocide trials under national jurisdiction on the African Continent are prime examples in dealing with the mass human rights abuse that occurred on their respective African state territories.
trials constitute a judicial trend in the ways that they cope with and administer such trials within their respective national systems. Their efforts, however, have not been sufficiently considered as academic research topics, and have been even less frequently taken into consideration as locations for comparative inner-African analyses. Hence, to address this deficiency the authors offer this disquisition, based on their collective professional and academic fields of research and experience.

I. Introduction

Just as the title indicates, the emphasis of this paper is on national trials dealing with crimes considered “genocide” in each of the aforementioned African states. It certainly would have been easier to deal exclusively with the well-known international examples of Rwanda and Sudan. That scope, however, would oversimplify the ongoing national struggles of judicial systems dealing with these kinds of trials on the African continent. With regard to research on Africa, limited access to national examples of Rwanda and Sudan.

II. Approaches to Genocide Trials under National Jurisdiction on the African Continent

Common to all of the three countries of interest, individual and communal victims, and whole societies, is the need to heal the wounds inflicted upon them by the perpetrators of genocide. Dealing with grieving, accountability and forgiveness, as well as the rehabilitation of victims and governments, is surely a painful and delicate process. With that in mind, Ethiopia, Sudan and Rwanda have all developed different methods of addressing these issues.

1. The Rwandan concept

a. Background Information Leading to the Rwandan Genocide

The Rwandan civil war was more than only tribalism between members of different "ethnic" groups, and more than only a conflict between Hutu and Tutsi. First and foremost, the war should be understood as a political conflict whose roots can be traced back to the colonization of Rwanda predominately by Belgians at the end of the 19th century. Belgium governed the Rwandan populace through a privileged class of Tutsi. Colonial administrators and anthropologists have picked up a mythologem and argued — in what has come to be known as the "Hamitic Hypothesis" — that the Tutsi were conquerors who originated in Ethiopia (closer to Europe) and that the Hutu were members of a conquered and inferior tribe of local provenance. Afterwards, the Tutsi aristocratic process of consolidating domination, even before


6 For information regarding the historical debate and main views among scholars regarding the origins of the conflict in Rwanda, see: Dixon Kamukama: Rwandan Conflict — its Roots and Regional Implications, 2nd edition, Kampala 1997, pp. 5-7.


10 According to early European explorers, such as John Hanning Speke (see his Journal of the Discovery of the Source of the Nile), the Tutsi were viewed as a superior race of people who probably originated in Ethiopia. Speke thought that they were related to the Oromo (formerly “Galla”). Other Europeans traced Tutsi origins to the Egyptians, the Greeks, the Jews, the lost continent of Atlantis, and even to Eden. See: Gérard Prunier: The Rwanda Crisis..., supra, footnote 9, pp. 7-8; cp. also footnote 7 of this paper.
the arrival of European colonists, accelerated and became markedly racist. Shortly before Rwanda gained independence from Belgium in 1959, the persecution of Tutsi people began, which included widespread massacres. For the next several years, in fact, persecution drove many Tutsi people from their homes. A large portion of the Tutsi population fled Rwanda during this period, resettling as refugees in surrounding countries. In subsequent decades, the government of Rwanda prevented their return. Thirty years later, on 1 October 1990, a rebel group - the Front Patriotique Rwandais - composed largely of Tutsi refugees in Uganda, began a military campaign, invading Rwanda from Uganda. The military incursion across the northern border quickly provoked a Hutu reaction of escalating virulence. Intermittent fighting and suspended political negotiations ensued for nearly three years, until, on 4 August 1993, the Arusha Peace Accords were signed by the Government of Rwanda and the Front Patriotique Rwandais. The Accords provided, inter alia, controversial aspects concerning shared political power in Rwanda and refugee repatriation. Extremists, however, refused to accept the Arusha compromise; even President Juvenal Habyarimana's commitment to Arusha seemed to be in question. In a speech in Ruhengeri on 15 November 1992, President Juvenal Habyarimana rejected Protocol I of the Power-Sharing Arrangements. He publicly characterized it as nothing but "a scrap of paper". Then, on 6 April 1994, in an already tense and explosive social and political situation, the airplane carrying the Rwandan President Juvenal Habyarimana and President Cyprien Ntaryamira of neighbouring Burundi was shot down by an unknown assailant while approaching the Rwandan airport of Kigali, after returning from Tanzania. Both men were killed. The assassinations ignited ethnic tensions and marked the beginning of the Rwandan genocide. One must consider, however, that tensions were based primarily on the Hutu power ideology, a conception of history and race that has been combined with novel notions about agriculture and territory in the region. Due to the genocide, an estimated 1,000,000 people died, and more than 2,000,000 people were displaced over the course of about 100 days (between April and July of 1994). The vast majority of victims were Tutsi. Along with the overall destruction of Rwanda in the spring of 1994 came devastation to Rwanda's judicial structures. The majority of judicial and law enforcement personnel were killed or fled the country. Moreover, the basic resources needed to run a legal system, such as books, vehicles, and even paper, were unavailable. Under these circumstances, Rwanda was forced to confront the question of how to pursue justice in the wake of genocide.

11 Robert Melson: Modern Genocide in Rwanda..., supra, footnote 8, p. 327 (Melson's footnote 5 with further references).
12 Gérard Prunier: The Rwanda Crisis..., supra, footnote 9, pp. 48-54.
13 Ibidem, pp. 61-64.
14 Ibidem, p. 93.
17 Negotiations between the Government of Rwanda and the RPF, coordinated by the Organization of African Unity (OAU) and "facilitated" by Tanzania, led to the Peace Agreement. The agreement includes six protocols, concluded and signed as part of the Arusha Peace Talks, namely (I) the N’sele Ceasefire Agreement of 29 March 1991, as amended in Gladolite on 16 September, and Arusha on 12 July 1992; (2) Protocol of Agreement on the Rule of Law, signed in Arusha on 18 September 1992; (3) Protocol of Agreement on Power-Sharing, signed at Arusha on 30 October 1992, and 9 January 1993; (4) Protocol of Agreement on the Reparation of Refugees and Resettlement of Displaced Persons, signed at Arusha on 9 June 1993; (5) Protocol of Agreement on the Integration of the Armed Forces of the two parties, signed at Arusha on 3 August 1993; and (6) the Protocol of Agreement on Miscellaneous Issues and Final Provisions, signed at Arusha on 3 August 1993, by which the parties reached agreement on the appointment of the Prime Minister and the transitional period, which was set at 22 months. Cp. UN-Doc. A/48/S24/S/26915.
18 Katrin Wischer: Der Bürgerkrieg und der Versuch einer Machtteilung: Der Vertrag von Arusha, in: Leonhard Harding (ed.): Ruanda..., supra, footnote 5, p. 111 on (p. 121 et seq.).
b. Rwanda after the Genocide – Establishment of the ICTR

In September 1994, sixteen months after the establishment of the “International Criminal Tribunal for the former Yugoslavia” (ICTY), Rwanda requested the establishment of an international criminal tribunal by the United Nations to adjudicate the genocide. Initially, however, domestic courts were considered, but they were quickly rejected as the Rwandan judicial system was wrecked after 1994, and it lacked the human, financial, and material resources to deal with the massive numbers of perpetrators. Even before the genocide, the judicial system under the Habyarimana regime was corrupt and consisted of a large number of inadequately trained magistrates and prosecutors. After the trials, many feared domestic prosecutions to be emotionally, ethnically, and politically charged – victory as vengeance instead of fair trials and reconciliation. Consequently, in November 1994 the UN Security Council made use of Chapter VII of the UN Charter, establishing the “International Criminal Tribunal for Rwanda” (ICTR) under Resolution 955. This court was established specifically for the prosecution of persons responsible for genocide and other serious violations of International Humanitarian Law committed in Rwanda between 1 January 1994 and 31 December 1994. It may also deal with the prosecution of Rwandan citizens who are responsible for genocide and other such violations of International Law, committed in the territory of neighbouring states during the same period. These instances of prosecution, however, are subject to concurrent jurisdiction with national courts according to Article 8 (1) of the Statute of the International Tribunal for Rwanda.


Also officially designated Urakiko Nshinjabyaha Mpuhamahenge rwagere u Rwanda (in Kinyarwanda) and Tribunal pénal international pour le Rwanda (in French).


The administration of justice in post-genocide Rwanda is rendered particularly complex given that concurrent jurisdiction for the genocide-related crimes are actively exercised by two different entities: the government of Rwanda and the International Criminal Tribunal for Rwanda. This concurrent jurisdiction reveals certain difficult issues that are not the focus of this essay, and are therefore not addressed in detail in this paper. See e.g. in this context, Madeline H. Morris: The Trials..., supra, footnote 23, on pp. 362 et seqq.

c. Coming to Terms with the Past: The Rwandan Judicial System

The International Tribunal for Rwanda was not expected to address the bulk of Rwanda’s staggering volume of genocide-related crimes, despite the contrary wishes of the new Rwandan leadership. Many senior members of the new government insisted that every person who participated in the atrocities should be prosecuted and punished. Since it was clear that the International Tribunal for Rwanda was by no means able to prosecute all perpetrators, Rwandan leaders attempted the task themselves. Consequently, Rwanda was faced with the enormous problem of handling the other over 90,000 criminal cases arising from the Rwandan genocide. The new Government of National Unity initially opted for extensive judicial prosecution. Other options, such as the “Truth and Reconciliation Commission” as seen in South Africa, were deemed inadequate for the Rwandan situation and ruled out. In the case of Rwanda, it was decided that amnesty would amount to granting impunity to the perpetrators of the genocide.

d. Rwanda’s National Approaches Dealing with the Genocide

Rwanda’s method of dealing with the génocidaires and related crimes has been guided by two different approaches: at first by a special law from 1996, and after the turn of the century by the gacaca concept. In September 1994, sixteen months after the establishment of the “International Criminal Tribunal for the former Yugoslavia” (ICTY), Rwanda requested the establishment of an international criminal tribunal by the United Nations to adjudicate the genocide. Initially, however, domestic courts were considered, but they were quickly rejected as the Rwandan judicial system was wrecked after 1994, and it lacked the human, financial, and material resources to deal with the massive numbers of perpetrators. Even before the genocide, the judicial system under the Habyarimana regime was corrupt and consisted of a large number of inadequately trained magistrates and prosecutors. After the trials, many feared domestic prosecutions to be emotionally, ethnically, and politically charged – victory as vengeance instead of fair trials and reconciliation. Consequently, in November 1994 the UN Security Council made use of Chapter VII of the UN Charter, establishing the “International Criminal Tribunal for Rwanda” (ICTR) under Resolution 955. This court was established specifically for the prosecution of persons responsible for genocide and other serious violations of International Humanitarian Law committed in Rwanda between 1 January 1994 and 31 December 1994. It may also deal with the prosecution of Rwandan citizens who are responsible for genocide and other such violations of International Law, committed in the territory of neighbouring states during the same period. These instances of prosecution, however, are subject to concurrent jurisdiction with national courts according to Article 8 (1) of the Statute of the International Criminal Tribunal for Rwanda.

The Trials..., supra, footnote 23, on pp. 357 et seqq.

As a proponent for the establishment of a Truth and Reconciliation Commission in Rwanda, see: Jeremy Sarkin: The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda..., supra, footnote 8, on pp. 799 et seqq.; id: Promoting Justice, Truth and Reconciliation in Transitional Societies: Evaluating Rwanda’s Approach in the new Millennium of using Community based Gacaca Tribunals to deal with the Past, p. 112 (pp. 116 et seqq.).

William A. Schabas: Justice..., supra, footnote 19, on p. 559; Neil J. Kritz: Coming to Terms with Atrocities..., supra, footnote 4, on p. 135.

As e.g. in this context, Madeline H. Morris: The Trials..., supra, footnote 23, on pp. 357 et seqq.

Coming to Terms with Atrocities..., supra, footnote 4, on p. 135.

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Article 1 of the *loi organique d’août 1996* defined the crimes of genocide and crimes against humanity in accordance with three conventions ratified by Rwanda: the 1948 Genocide Convention, the 1949 Fourth Geneva Convention and the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Article 1, however, must be understood solely as an introductory ordinance and a reference to the international agreements. Furthermore, considering that the *loi organique d’août 1996* did not stipulate specific *corpus delicti*, it must be considered guidance without substantive relevance. Instead, the *loi organique d’août 1996* functioned within the structure of the existing Rwandan criminal law. Paragraphs 10 and 11 of the preamble of the *loi organique d’août 1996* underscored this restriction, stating:

Rwanda has ratified these three Conventions and has published them in the Official Gazette, but without having provided for penalties for these crimes.[46] Given that, as a consequence, the prosecutions must be based on the Penal Code.

Penalties for perpetrated crimes were therefore conducted according to the regulations of the penal code.[47]

At the heart of this legislation lied a “confession and guilty plea procedure”.[48] In addition, the main procedural characteristic of *loi organique d’août 1996* was the classification of suspects into four categories according to their degree of culpability in the genocide. The first category (Category I) encompassed the organisers or planners of the genocide, i.e., persons who held positions of authority at national or local levels within the military or civil infrastructure and who committed or encouraged genocide, particularly cruel murders, and persons who committed “acts of sexual torture”. Category 1 offenders were not entitled to receive a reduced sentence under the system of plea agreement and, until recently, were subject to the death penalty. This category accounted for a relatively small percentage of the total detained and might have overlapped considerably with those over whom the International Tribunal for Rwanda attempted to establish jurisdiction.[49] The second category (Category 2) covered other perpetrators or accomplices of intentional homicide or suspected of serious assaults resulting in death. If the perpetrator confesses and pleads guilty before prosecution, he/she received a sentence of seven to eleven years im-

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43 Rwanda

44 Article 1 of the *loi organique d’août 1996*. The social, political and legal issues related to the Rwandan genocide were discussed at an international conference on genocide held in Kigali in November 1995. One of the main objectives of the conference was, on the one hand, to define clear strategies to try this large number of persons involved in the massacres and, on the other hand, to analyse forms of justice alternative to the classical judicial system. Major principles emerged from this conference and largely defined the policy in Rwanda on the matter of prosecution of genocide.

45 Catherine Cissé: The End of a Culture of Impunity in Rwanda..., *supra*, footnote 27, on p. 177.

46 Urs Behrendt: Die Verfolgung des Völkermordes in Ruanda..., *supra*, footnote 31, on p. 166 ex seqq.; Catherine Cissé: The End of a Culture of Impunity in Rwanda..., *supra*, footnote 27, on p. 166; William A. Schabas: Justice..., *supra*, footnote 19, on p. 538.

47 The new legislation has also significantly expanded the judicial infrastructure by setting up specialized chambers of existing courts to handle the genocide cases. The Prosecutors General of the Court of Appeal appointed the prosecutor responsible for the cases. The Prosecutor General of the Supreme Court ensured the supervision of the Prosecution Offices, also known as *parquets*. These measures fell somewhat short of the far-reaching recommendations of the Kigali Conference, which had proposed the creation of a Special Prosecutor’s Office like the one currently in operation in Ethiopia. The original legislation approved by the cabinet provided for a system of lay assessors to assist judges in their deliberation, but the National Assembly failed to enact that stipulation. The scope of the *loi organique d’août 1996* was not entirely sufficient. In particular, it failed to take into account a major problem that evolved out of the mass scale incarcerations after 1994: overcrowded prisons. Rwanda’s prisons were designed to hold a maximum of 15,000 prisoners, but eventually became hopelessly overcrowded with approximately 87,000 detainees by the end of 1996. Some of the prisoners who were arrested for violating international laws were detained for up to seven years without trial.[50] One major function of the *loi organique d’août 1996* was the setting up of specialized chambers of existing courts to handle the genocide cases.
to break the collective silence regarding genocide guilt, and to try many people quickly. In reality, however, very few people confessed (around 7,000 within the first seven years); the number only increased temporarily after 22 persons convicted of genocide were executed in public in 1998. In addition, very few trials took place. By the turn of the century, the courts had only tried about 3,000 people. Moreover, the arrival of jurists allied with the Front Patriotique Rwandais further complicated the legal process. Most of them were trained in the common law system of various East African states, notably Uganda and Kenya, but were unfamiliar with the Rwandan system. They were mystified by the complexity of Rwandan criminal law and procedure, which follow the continental model, and were often handicapped by an inability to speak andread French, the language in which the Rwandan legislation and most legal commentary is written. Thus, prosecutions went very slowly and Rwanda’s legal system seemed unable to complete the task at hand.

**bb. The approach based on the gacaca-concept**

In view of the inability of Rwanda’s justice system to handle the immense number of genocide-related cases in a timely and effective manner, the Rwandan government decided to make use of traditional gacaca-courts in 1999. This step was intended to ease the burden on ordinary courts, and to assist the legal system by dealing with those in detention who were awaiting trial.

However, the gacaca meant different things to different people: a way to ease overcrowding of the jails, a tool of reconciliation, a way of establishing the facts of genocide, and a way of punishing the guilty. Ultimately, however, the gacaca reflects all of these elements. Traditionally, the gacaca focus on dispute resolution. The word is derived from the word for “lawn”, referring to the fact that members of the gacaca sat on the grass when listening to, and considering matters presented to them. Gacaca sessions were informal, non-permanent and ad hoc. They were presided over by community elders known as inyangamugayo. The process was community-based, incorporating the community in dispute resolution processes and acted as a means of healing that was cheap and accessible. Similar to nearly all systems of traditional law, the gacaca can be considered a common custom and, as such, part of the local culture. In the past, the gacaca dealt with issues concerning marriage, divorce, succession, parental authority, injury and land disputes. Their primary goal was to re-establish order in a community, after having sanctioned a violation of shared values, by re-integrating “offender(s)” back into their respective communities.

**یدم: The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda...**

**60** The death penalty has not again been implemented ever since then. In July 2007, Rwanda formally abolished the death penalty. The retention of the death penalty had constituted one of the main obstacles preventing the transfer of detainees held by the ICTR, and genocide suspects living abroad, to Rwanda’s national jurisdiction.

**61** Paul J. Magnarella: Justice in Africa..., supra, footnote 27, on p. 72; William A. Schabas: Justice..., supra, footnote 19, on p. 533.

**62** During the colonial period, a western judicial system was introduced but gacaca remained an integral part of customary practice. With independence, gacaca became more institutionalised with local authorities, sometimes assuming the role of inyangamugayo and

Today, gacaca do not deal with local interfamily or intercommunity disputes, but with cases and suspects related to genocide. They nevertheless aim to incorporate the whole community, instead of focusing a trial on an individual offender. In the gacaca-proceedings, the village people function as witnesses where defendants are tried in front of whole villages whose inhabitants are encouraged to present information about events pertaining to the innocence or guilt of defendants. Not only are perpetrators to be individualized and punished, community-based participation produces a collectively accepted record of the past. Contemporary gacaca-jurisdiction was first established and codified in 2001 and then significantly modified in 2004 and 2007. Gacaca Courts are (competently) equipped to deal with the prosecution of genocide offences and crimes against humanity committed between 1 October 1990 and 31 December 1994. The law’s punishment guidelines are based on the four preexisting categories of genocide crimes as defined in the loi organique d’août 1996. Although Gacaca Courts are, in principle, equipped and able to try all relevant cases, Category 1 suspects covering the organisers of genocide, those in positions of civil, military or religious authority and sexual torturers – may only be prosecuted by the Public Prosecutor of the domestic courts or the ICTR. For these cases, the Gacaca Courts’ role is limited to gathering information and categorizing the suspects.

The amendments in 2004 and 2007 brought about some important changes. Most remarkably, Categories 2 and 3 were combined to form the new, single Category 2-group, thereby abandoning the element of intent as the most important distinction. It was criticized that the 2004 amendments collapsed intentional and non-intentional crimes into the same category. However, since 2007, known killers – who previously came under the jurisdiction of the national courts – now belong to Category 2 as well and are to be tried by the Gacaca Courts.

All Gacaca Courts contain three organs: a General Assembly, a Seat, and a Coordination Committee. In 2004, the Gacaca Courts were reduced from four levels (Cell, Sector, District, Province) to three levels (Cell, Sector, Court of Appeal). There are approximately 10,000 Cells, which are the smallest administrative units in the country. The Gacaca Courts of the Sector and Gacaca Court of Appeal have
jurisdiction over the 1,500 Sectors, each of which consists of a number of Cells. On the Cell level, all adult members of the community meet weekly, forming the General Assembly. Their first task is to elect the Seat, which is a bench of gacaca judges (inyangamugayo). The third and final organ of the Cell is the Coordination Committee, which is composed of a president, two vice-presidents and two secretaries elected from amongst the Seat’s members. The Committee’s role is essentially administrative: coordinate meetings; register complaints, testimony and evidence; and register Gacaca Court judgements and appeals, and forward them to the Gacaca Court of the Sector.

Together, the General Assembly and the Seat create a record of the Cell’s most recently known status: They compile a list detailing the Cell’s residents, those killed inside and outside the Cell, surviving victims, their damaged property and alleged perpetrators. This list contains the basic information upon which all investigations, trials and restitutions are based, and is therefore of crucial importance. The Seat is the investigative and judicial body. On the Cell level, suspects are classified into one of the three categories. The role of the Seat is to hear Category 3 cases, and, if convicted, to determine the compensation for crimes committed. The Seat’s decisions on property offences cannot be appealed.

At the Sector level, the operation is nearly identical to that of its Cell counterpart: they investigate testimonies, give judgements, and take confessions. The Sector Gacaca Court is the court of first instance for Category 2 crimes. An appeal is only possible to the relevant territory’s Gacaca Court of Appeal.

The entire Gacaca Tribunal System is under the control of the government’s National Service for Gacaca Jurisdictions (NSGJ), which supervises and coordinates the courts. The Gacaca Courts and the Public Prosecutor work complementarily: While the Gacaca Courts only try Categories 2 and 3 crimes, the Public Prosecutor ensures that Category 1 offences are prosecuted in the national court system.

The nearly 150,000 gacaca judges (inyangamugayo) most likely have, for the most part, no formal legal education, apart from a two-week judicial training before assuming their responsibilities, and many are illiterate. Nevertheless, they play a vital role in the gacaca system in that they have remarkable powers to judge crimes of genocide. The hearings are held in public and judges have extensive powers to compel citizens to participate and assist in their investigations and trials. If a person refuses to cooperate, judges may prosecute him/her with possible prison sentences; people threatening witnesses or judges face sentences of two to three years. Like their judicial counterparts in the ordinary judiciary, gacaca judges deliberate in secret.

An important goal of the Gacaca Courts is to encourage confessions. The procedure was adapted from the “plea-bargain” system of the loi organique d’août 1996. Confessions take place in public, before the Seat of the relevant Gacaca Court and in the presence of an officer of the Public Prosecution. For the accused to benefit from the procedure, he or she must fulfill three requirements: provide a detailed and full description of the crime and events in question, name all accomplices to the crimes, and apologize for the crimes committed. These three specific elements were selected to help uncover the truth about the genocide, to bring all guilty parties to justice, and to reconcile society’s suffering. The unwritten fourth aim of this procedure is the defendant’s repentance, which is an important goal for a survivor to consider forgiveness. Confessions lead to tangible benefits. For example, depending on the moment of confession (before or after completion of investigations, or before or after being listed as a suspect), the penalty for the same Category 2 crime can range from life imprisonment to a mere 3½-year imprisonment term. In fact, for those who confess, half of the sentence may be served by participating in community service instead of imprisonment.

2. The Ethiopian concept

a. Traditional Ethiopian Dispute Resolution Institutions

As described above, disputes formerly brought to the gacaca (courts) dealt with local interfamily or intercommunity disputes, concerning, for example, marriage, divorce, succession, parental authority, injury or land disputes. Similar customary institutions continue to exist in Ethiopia, as well as in other cultures of the Horn of Africa. Those kind of local customary regulations, however, tend to be abandoned and replaced by “modern” law practices of local courts established by the state, or adapted to the demands of the state and a dominant culture of “modernity”. A large complex of those customary legal institutions is related to conflict resolution mechanisms. However, the so-called samagalle(unnait)-concept in the traditional Amaraña and Tagraña context, or, more penologic oriented, according to

Art. 73 of the Gacaca Law.


Described en détail by Johannes Birhane Adige: Conflict and Conflict Resolution among the People of Chihera (Micro-Level Case Studies from six Kebelles in Northern Gondar) [Master-Thesis submitted to the School of Graduate Studies at the Addis Ababa University], Chapter IV, Addis Ababa 1993, pp. 57-139.


Aberra Jembere, the “sanga nenay” in the customary social organisation of the Kunama, and, guma, a traditional peace settlement of the Kambaata with rituals and ceremonies of reconciliation, especially in blood-related matters, haven’t been transferred directly into the criminal justice system of Ethiopia. This transference must be traced back to the development of “modern” law in Ethiopia, devised by Emperor Hāylā-Sālassa I, after 1930. In particular, the modernisation of Ethiopian codification was pursued mainly at the end of the 1950s and throughout the 1960s – a time period in which six law books were created. Title XXI of the yá-beta-xá hagg, the Family Law Code, addressed the issue of reconciliation between modern law and traditional customary law, but not the yá-wiängáláña máqšá hagg (Penal Code). Norms of the customary law were directly applied to criminal matters, along with the yii-wangiiliiiiiia miiq{a hsgg

80 Aberra Jembere: An Introduction to the Legal History of Ethiopia: 1437-1974, Münster 2000, p. 58: “The sanga nenay was a ‘conciliator’ who was entrusted with the responsibility of settling blood feuds. The system of reconciling the contending parties was lasting. Even after a homicide case settled in law courts, the two parties go to ‘sanga nenay’ to secure the final settlement of the case.”


82 Aberra Jembere: An Introduction to the Legal History of Ethiopia..., supra, footnote 80, p. 27.


87 Provisional Military Administration Council (PMAC, yá-gizeyawi wättaddärawi astädädá därg), later entitled Provisional Military Government (yá-gizeyawi wättaddärawi mángätá), simply abbreviated in the following as Därg.
visions safeguarding human rights was not kept and so the country had no constitution at all for the next 13 years.

The first victims of the Därg were figures who represented the face of the ancien régime: the ruling class of the semi-feudal monarchy. This class included members of the royal family, ministers, senior officers of the army, aristocrats and also the clergy, including the then Patriarch of the Ethiopian Orthodox Church (yä-Ityopya ortodoks täwahdo betä-kristiyan, Abund Tewoflos (Tewphilos)). In a single incident, 60 such prominent individuals were summarily executed on 23 November 1974. While Emperor Häşäyl-Sollasse I was not executed along with the 60 other victims, he was allegedly killed by the Därg-Chairman and later Ethiopian President, Mängästu Häşäyl-Maryam on 27 August 1975 at the age of 83. Official records, however, attribute the Emperor's death to respiratory failure caused by complications after an operation for prostate cancer. While the execution of former officials in the Därg's early days could have arguably been motivated by the Därg's desire to appear revolutionary in the face of the leftist movement who had been advocating for radical change, its later actions were clearly geared towards the elimination of all forms of opposition. Still, worse massacres were to come, particularly in the form of a concerted campaign, which came to be known as the gäyy Săbbar ('Red Terror'). The most striking feature of this campaign was that neither the Därg nor its leftist allies tried to make the barbarity a secret. The "Red Terror" campaign was conducted under an authority founded in a special proclamation from 1977, following Mängästu's seizure of absolute power. It was the largest and best-known campaign of systematic violations of fundamental human rights carried out by the Därg. It resulted in thousands of summary executions,

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Art. 5 (b), Proclamation No. 1 of 1974, Någärät Gæzætä, 34th year, September 1974.

98 | 99
Dadimos Hailë: Accountability for Crimes of the Past..., supra, footnote 95, on p. 16.

It is important to note, in this context, that the Därg intimidated a handful of religious groups, but did not zealously extirpate them as the Khmer Rouge did in Cambodia, for example. The objectives of Ethiopia's soldier-revolutionaries were limited to preventing ethnic nationalism from leading to the division of Ethiopia. To that end, the Därg seized the land of the yä-Ityopya ortodoks täwahdo betä-kristiyan in the then secessionist province of Eritrea in northern Ethiopia. The intent was not to impose conditions that would destroy members of the church, but rather to weaken popular support for the secessionist hasbawi ganbar harenndt Ertera (Eritrean People's Liberation Front) by redistributing church property in Eritrea to supporters of the Därg's national unity ideology. In Wälilo, a region in northeastern Ethiopia, local Därg cadres intimidated, but did not kill, the clergy of the Bäa-lyamun-lyawi Church, a Protestant denomination, prevalent primarily in the southern areas of Ethiopia. See also: Edward Kissi: Genocide in Cambodia and Ethiopia, in: Robert Gellately / Ben Kiernan: The Specter of Genocide – Mass Murder in Historical Perspective, Cambridge 2003, pp. 307 et seqq. (pp. 312-313).

99 | 100

100 | 101

101 | 102
See: Andargachew Tiruneh: The Ethiopian Revolution..., supra, footnote 91, pp. 78-79.

102 | 103

103 | 104

104 | 105
Edward Kissi: Genocide in Cambodia and Ethiopia, supra, footnote 98, on p. 316.

105 | 106

106 | 107
Tagrätäna. In Arabic entitled as "al-şābaa li-ša'bāli li-taŷfīr irīryīk".

107 | 108
Dadimos Hailë: Accountability for Crimes of the Past..., supra, footnote 95, on p. 20 & p. 30.

108 | 109

109 | 110
The Ethiopian Revolution claimed the lives of 1,200,000 to 2,000,000 people, out of a pre-revolutionary population of 45,000,000.

After successive losses by the army, a coalition of opposition movements led by the hasbawi wâyynäna harenndt Tagray (Tigray People's Liberation Front - TPLF), and backed by the hasbawi ganbar harenndt Ertera (Eritrean People's Liberation Front – EPLF), finally brought the areas close to the capital Addis Ababa under control. On 21 May 1991, Mängästu Häşäyl-Maryam left the country for Zimbabwe, and on the 28 May, the yä-Ityopya haz ahyotawi dimokrasiyawi ganbar (Ethiopian People's Revolutionary Democratic Front – EPRDF) forces were able to control the capital without facing significant resistance. The EPRDF's military victory also meant that it would frame the terms of the country's political transition. A transitional government headed by the EPRDF was established on 1 July 1991. Four years later, a constitutional government was set up, which eventually adopted the Constitution of the Federal Democratic Republic of Ethiopia.

c. Ethiopia's Approach to Dealing with the Genocide

After coming into power, the government made clear its intention to pursue the process of accountability. To that end, tens of thousands of military and civil officials were imprisoned. A layyqa aqqâbi hagg biro, the Special Prosecutor's Office (SPO), was established, with powers to investigate, arrest and prosecute individuals who were allegedly responsible for gross human rights abuse committed by the previous regime. The SPO created four teams, each of which focused on gathering evidence relevant to a particular abuse committed by the Därg; the "Red Terror", forced relocation, war crimes, and the manipulation of famine relief. A fifth team gathered evidence on the structure of the government, and the government's security and military forces, to explore how structures were used to carry out human rights abuse. Two additional groups provided support to all of these areas: one support group helped obtain government documents relevant to the investigation, and the other created a computer system to catalogue the information collected by the layyqa aqqâbi hagg biro.
The SPO has done an immense amount of work collecting and cataloguing evidence. The Mângastu regime was meticulous about official order and paperwork. As a result, there is clear documentation for many instances of abuse. By the opening of the trials in December 1994, the SPO had gathered 309,215 pages of relevant government documents, many with clear signatures of high-ranking officials. A U.S. attorney who later visited Ethiopia wrote:

Not since Nuremburg has such documentary evidence been assembled suggesting the degree of complicity on the part of senior government officials. In many instances, there was verbatim transcripts made of critical meetings. There are over 200 volumes of these transcripts as well as audio tapes of many of these meetings. In addition to this kind of documentation, forensic teams have been seeking out and exhuming dozens of mass graves containing the bodies of murdered civilians. In all, the Special Prosecutor's Office is reported to have indicate 5,198 suspects on charges of killing 8,752 persons, causing the disappearance of 2,611 people, and torturing 1,837 others. The trials of all suspects implicated in some or all of the crimes committed during the Mângastu era were not conducted as a single case, or in a single venue. Rather, there were several trials going on at different locations throughout the country, at both the yâ-federal kâffistânâ ferd betocî (Federal High Courts) divisions and the yâ-kollo tâqlay ferd betocî (Supreme Courts of the regional states). The latter are handling these cases by virtue of a delegated power, although they would typically fall under the jurisdiction of the yâ-federal kâffistânâ ferd (Federal High Court). Similar to the division of Rwandan defendants as defined by the loi organique d'octobre 1996, the layyâ 'aâqîbe hagg biro in Ethiopia divided the defendants into three groups based on the degree of their responsibility: first, the policy and decision makers; second, intermediary level officials who relayed orders, but initiated some decisions on their own; and third, those directly involved in committing the alleged crimes. According to the SPO, 1,402 defend-


112 Julie V. Mayfield: The Prosecution of War Crimes..., supra, footnote 109, on p. 565.


115 Mehari Redae: Revisiting the Ethiopian "Genocide"..., supra, footnote 108, on p. 7 (at footnote 26); Edward Kissi: Revolution and Genocide in Ethiopia and Cambodia, Oxford 2006, on p. 103; Firew Kebede Tiba: The Mengistu Genocide..., supra, footnote 100, on p. 515; Julie V. Mayfield: The Prosecution of War Crimes..., supra, footnote 109, on p. 567.


117 Firew Kebede Tiba: The Mengistu Genocide..., supra, footnote 100, on p. 515.


121 Abera Jember: The Impact of the Western Jurisprudence on Traditional Law of Ethiopia..., supra, footnote 83, on p. 312.
bb. The legal basis of the genocide trial in Ethiopia

The charges filed against Māngastu and his co-accused are based purely on the yā-wāngālānha māqū hagg (Ethiopian Penal Code of 1957), which, unlike most other national penal codes, adopted the major rules of the 1949 Geneva Conventions eight years after ratification of the conventions. More precisely, the charges concentrated on genocide in violation of Article 281 of the Penal Code of 1957, or alternatively on aggravated homicide in violation of Article 522. Article 113 of the yā-wāngālānha māqū sōnā-lor' ait hagg (Criminal Procedure Code of 1961) permits filling in alternative charges. Hence, instead of relying on the international law standard, which excludes protection of political groups, Ethiopia uses its domestic law on genocide and crimes against humanity to try the accused, which criminalizes the destruction of groups on grounds of their political beliefs. According to Article 28 para. 1 of the Constitution of the Federal Democratic Republic of Ethiopia, the


Wherever, with the intent to destroy, in whole or in part a national, ethnic, racial, religious or political group, organises, organises, or orders or engages in, be it in times of war or in times of peace:
(a) killings, bodily harm or serious injury to the physical or mental health of members of the group, in any way whatsoever; or
(b) measures to prevent the propagation or continued survival of its members or their progeny; or
(c) the compulsory movement or dispersion of peoples or children, or their placing under living conditions calculated to result in their death or disappearance.

is punishable with rigorous punishment from five years to life, or, in the case of exceptional gravity, with death.

Article 113 of the 1961 Ethiopian Criminal Procedure Code:
Where it is doubtful what offence has been committed: If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed the offence which appears the more probable to have been committed and he may be charged in the alternative with having committed all other offences which the facts which can be proved might constitute.

Where the evidence shows that the accused committed an offence with which he might have been charged in the alternative and the offence is within the jurisdiction of the court, he may be convicted of such offence notwithstanding that he was not charged with it, where such offence is of lesser gravity than the offence charged.


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[...] criminal liability of persons who commit crimes against humanity, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia, such as genocide, summary executions, forcible disappearance or torture, shall not be barred by the statute of limitation. Such offences may not be commuted by amnesty or pardon of the legislator or any other state organ.

In addition, para. 2 of this provision clearly stipulates that

[...] in the case of persons convicted of any crimes stated in sub-Article 1 of this Article and sentenced with the death penalty, the Head of State may, without prejudice to the provisions hereinafter, commute the punishment to life imprisonment.

cc. The court's decision and its dissenting opinion

After postponing the verdict on 23 May 2006, the court issued its judgement on 12 December 2006. The judgement, of nearly 780 pages, focused on whether the prosecutor had managed to prove the commission of crimes beyond reasonable doubt. By a majority vote of two to one, 55 accused were convicted of genocide, homicide and bodily injury in violation of the Ethiopian Penal Code. 25 of those 55 accused, including Māngastu Ḥāyāli-Maryam who was given political asylum in Zimbabwe, were found guilty in absentia. However, although within the scope of possibility, the First Division of the Federal High Court in charge of the high profile case, did not resort to the death penalty. Instead, the court imposed life sentences on 48 accused, two received 25 years of rigorous imprisonment, while five were sentenced to 23 years.

Still, one should recall that the sentence was not a result of a unanimous vote, but instead a product of lengthy debates.

Bā-anānā kōlone Māngastu Ḥāyāli-Maryam lay yā-’aqīqāh hagg yā-yagābah abetū littayaa naw, in: Sūdāg, 2" year, no. 91, rūbu [Wednesday], 29 ganbot [May] 1999 a.m. [= 6 February 2007].
Firew Kebede Tībī: The Mengistu Genocide..., supra, footnote 100, on p. 519.
Firew Kebede Tībī: The Mengistu Genocide..., supra, footnote 100, on p. 519.
Firew Kebede Tībī: The Mengistu Genocide..., supra, footnote 100, on p. 519.
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Firew Kebede Tībī: The Mengistu Genocide..., supra, footnote 100, on p. 519.
Firew Kebede Tībī: The Mengistu Genocide..., supra, footnote 100, on p. 519.

Note bene: Two weeks after they were sentenced, the court placed further restrictions on the civil liberties of the convicted persons: Those who were sentenced to life were barred from taking part in elections and may not be chosen for any public service and honour following their possible release on parole; those sentenced to imprisonment between 23 and 25 years were barred from exercising the same rights for 5 years after their release.

In more detail: Mehari Redae: Revisiting the Ethiopian “Genocide”..., supra, footnote 108, on p. 9; Firew Kebede Tībī: The Mengistu Genocide..., supra, footnote 100, on pp. 519 et seq.
Judge Nuru Säyäd, for instance, found that the accused should have been convicted of homicide and wilful bodily injury, not genocide. He concluded that parts of Article 281 of the 1957 Ethiopian Penal Code were inconsistent with Proclamation 110/1976 and Proclamation 129/1976, which provided government authorities at all levels with the authority to destroy and take any necessary measures against anti-revolutionary and anti-unity political groups. In order to resolve the conflict, the judge invoked Article 10 of Proclamation 1/1974, which established the yà-gigayawi wàntaddarawi asitàddar guba’e (Provisional Military Administration Council – PMAC).

According to this provision, all prior laws, including the 1957 Penal Code, remained in force as long as they were consistent with the laws, regulations and orders that were, or are, to be promulgated by the PMAC. This meant that any law contradicting those proclamations was repealed. By invoking the maxim lex posterior derogate priori, Judge Nuru Säyäd held that more recent laws had to prevail over preexisting laws in cases of conflict. However, he also insisted that this repeal did not affect certain fundamental international commitments that were taken into account and implicitly provided for in Article 281 of the 1957 Ethiopian Penal Code. The government could not have repealed international laws that prohibited genocide. The appeal, according to Judge Nuru Säyäd, therefore only affected genocide targeting political groups. Furthermore, presiding Judge Mädhän Kiros dissented on the grounds that the extenuating circumstances taken into account by the majority were not supported by the Penal Code and that the penalty should have been aggravated rather than mitigated. The aggravating factors included the commission of numerous concurrent crimes, and the fact that the crimes were committed against prisoners and victims who were then in the custody of the accused. Among other issues, he highlighted the inconsistency in rulings that spared Mängästu Häylä-Maryam and his collaborators from the death penalty while subordinates and other low level officials were sentenced to death by other divisions of the same court and regional courts. The Chief Prosecutor, Yosef Kiros, announced right after the sentencing that the prosecution could appeal Mängästu Häylä-Maryam’s sentence facing the death penalty.

dd. The status quo of the Ethiopian trial

All of the cases to be brought by layyu ‘aggiibb hagg biro, the Special Prosecutor’s Office, fall under the jurisdiction of the yà-federal kàffàshàhà fàrd betoè (Federal High Courts), and both the defendants and the prosecutor have a right to appeal to the yà-federal tàglay fàrd bet (Federal Supreme Court).

the yà-federal tàglay fàrd bet (Federal Supreme Court).

The genocide case had been pending and, just recently, was ruled by the Federal Supreme Court on 18 gongot 2000 a.m.a. (= 26 May 2008) in favor of the prosecutor’s appeal. The life sentences of former President Mängästu Häylä-Maryam and the co-accused were converted into death sentences in absentia.

3. The Sudanese concept

As indicated in the introductory section of this chapter, the conditions in contemporary Sudan illustrate a different portrayal than the cases of Ethiopia and Rwanda. There is no national, legal concept in Sudan that is similar to the Ethiopian legal basis on genocide and crimes against humanity, which criminalizes the destruction of groups on grounds of their political beliefs. Crimes against humanity, genocide and war crimes are not included in the Penal Code. The government could not have repealed international laws that prohibited genocide. The appeal, according to judge Nuru Sayed, therefore only affected genocide targeting political groups. Despite the

135 A view shared by Edward Kissi: Revolution and Genocide..., supra, footnote 115, on p. 129.
136 Cited at footnote 124.
137 Cp., in this context, footnote 87.
139 Firew Kebede Tiba: The Mengistu Genocide..., supra, footnote 100, on p. 519 et seq., whereas Firew Kebede Tiba also argues with the dissenting reasoning of Nuru Säyäd.
140 Firew Kebede Tiba: The Mengistu Genocide..., supra, footnote 100, on p. 526 (referring to the court file).
142 Dadamos Haile: Accountability for Crimes of the Past..., supra, footnote 95, on p. 20 and p. 39.
144 Samblà [military rank equivalent to Captain]: Faqër-Sallase Wàg-Dàrràs, Colonel Fassaha-Dàssàta, Colonel Kàshàun-Tafàssà, Śàliṣìla [military rank equivalent to Major]: Barahu Bàyylàh, Śàmbàl Lággga-Asàffàw, Śàliṣìla Hàddàs Tàddàla, Lieutenant Colonel Isàla Tàmmàà, Śàmbàl Gàássàs Wàlî̀dà-Kídan, Major General Wàb-Sàt Dàssà. See: Yà-federal tàglay fàrd bet, Supreme Court Decision, File No. 30181, pp. 85–86; 96.
146 Cp., footnote 40 and 41.
147 Cp. in this context Giday Degef: Mechanisms and Instruments of Managing Regional Conflicts..., supra, footnote 74, on p. 45.
148 A region which is subdivided into three regions – North-Darfur (Samál Dàffàr), West-Darfur (Garb Dàffàr) and South-Darfur (Gàmàb Dàffàr) – which are governed by the al-añàna al-intiqàli li-làmmàr Dàffàr (Transitional Darfur Regional Authority – TDRA), an interim authority since April 2007. Its main headquarters are in Khartoum, with branch offices in Samál Dàffàr, Garb Dàffàr, and Gàmàb Dàffàr. Dàffàr covers an area of some 509,000 km², which is roughly the size of France.
implementation of şari‘a as the law of the land in September 1983, and, despite its repercussions, customs still maintain validity as a source of law and have been powerful instruments used to adapt to diverse local conditions in Darfur. However, those traditional dispute resolutions, originally applied by aqīda, are increasingly incapable of regulating the complex militant, ethnopolitical quarrels of the mainly Islamic-defined tribes, or have been subordinated, or even by-passed, by “tribal conferences” set up by central authorities.

The National (Sudanese) Judiciary was the body in charge for the judicial system in Darfur. Article 103 of the 1998 Constitution defined that the National Judiciary consists of a High Court, Appeal Courts and Courts of First Instance. This structure has been shaped by, inter alia, Article 10 of the qanun al-qadid (National Judiciary Act of 1986). Concerning the structure of Criminal Courts, Article 6 of the qanun al-ğirda‘ (Criminal Procedure Act of 1991) also included al-mahkama al-iyahia (People’s Criminal Courts) and any Special Criminal Court (al-mahkama al-ğindia al-ba‘asa) that the Chief Justice of Sudan may deem necessary to establish (Art. 6 (h)). In the 1998 Constitution there is no explicit basis for Article 6 (h) of the Criminal Procedure Act of 1991; however, this Article might be subsumed under the second sentence of Article 103 of the 1998 Constitution. On the basis of Article 6 (h), the Sudanese authorities established Specialized Courts (al-mahkama al-ğindia‘a).

The introduction of Islamic law led to the dissolution of the regional assembly and the reorganization of the southern provinces. Consequently, this progress led to the infringement of the Addis Ababa Agreement on the Problem of Southern Sudan, which sparked, anew, a civil war after 11 years of peace; see: Hatem Layish: The Reinstatement of Islamic Law in Sudan under Numairi: An Evaluation of a Legal Experiment in the Light of its Historical Context, Methodology, and Repercussions, Leiden et al. 2001, p. 141. In September 1983, former President Ga‘far Muhammad an-Numairi issued several decrees, known as the September Laws, that made the şari‘a the law of the land. In November of the same year the People’s Assembly approved his presidential decree legislation without debate to facilitate the implementation of the şari‘a. For details see: Mohamed S.M. Eltayeb: A Human Rights Approach to Combating religious Persecution: Cases from Pakistan, Saudi Arabia and Sudan, Antwerpen et al. 2001, p. 147; Olaf Koenig: Das islamisierte Strafrecht des Sudan: von seiner Einführung 1983 bis Juli 1992, Hamburg 1992, p. 40; Carolyn Fluehr-Lobban: Islamic Law..., supra, footnote 149, p. 51.

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Lionel Cliffe / Philip White: Conflict Management and Resolution in the Horn of Africa..., supra, footnote 79, on p. 61.


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maḥākīm al-ba‘asa), arguably in order to expedite the hearing of certain cases. Those al-mahākīm al-ba‘asa were established by Sudan’s Chief Justice’s decrees in 2003, and replaced the Special Courts established by decrees under the state of emergency in Darfur 2001. Al-mahākīm al-ba‘asa are in charge of bringing those responsible for committing crimes and acts of violence in Darfur to trial.

a. (Some) Events Leading to the Humanitarian Crisis in Western Sudan

Although the Darfur conflict is often said to have begun in February of 2003 (the year al-mahākīm al-ba‘asa were established), the following account of some events leading to the humanitarian crisis in the westernmost provinces of Sudan will illustrate that the violence of the “opening genocide of the twenty-first century” started much earlier.

a. Major causes of the conflict in Darfur

As historical analysis makes apparent, the lack of traditional dispute resolutions and the ongoing mass human rights abuse that is occurring today in the region of Darfur can be traced back to the Chadian-Libyan boundary dispute of the Aouzou Strip. Libyan troops and armed groups of Chadian civil war parties, such as the Front de Libération Nationale du Tchad (FROLINAT), used Darfur as a retreat, springboard and combat zone for their own national ambitions. Libya, on the other hand, used the northwestern corner of Darfur as a backdoor to attack Chad. Libya’s leader, Mu’ammar al-Qaḍāfī, had equipped and sent out the so-called al-faylaqa al-islāmīa (Islamic Legion) first to Chad, and then to Sudan’s northwestern region. In his mind, the al-faylaqa al-islāmīa was to be a tool for the revolutionary unification and arabization of the region. Thus, Libya was not orchestrating a simple border raid on a poor country; it was pursuing a new strategy of pan-Arabism couched in an emotionally charged ideology. For that reason, Colonel Mu’ammar al-Qaḍāfī supported the creation of the taǧamma‘a al-arabi (Arab Union), a militantly racist and pan-Arabist organization, which stressed the “Arab” character of the province. This racial salience led to a realignment of the non-“Arab” defined groups in Darfur (the Zagāwa and Fār in particular). The extent to which Libya’s Islamic Legion and missionary da‘wa were inspired by a racist ideology is less important than the effect of that ideology, which rationalized the Sahelian chaos of the 1970s and 1980s by reducing it to “Arabs” versus “Africans”. The sharp distinction between Arabs and Africans in the ethnically mixed Darfur region had not been incorporated into a
broader discourse until Libya produced an ideology of pan-Arabism. 162 This led to anamnoses based on racial and ideological polemics, including the idea of 'al-rib or Arabization, which were comparable to the Huta power ideology in Rwanda. 163, 164, 165 Combined with the social tensions resulting from a failed land reform in the same-decade, 166 the spiral of violence spun increasingly faster. Given the deficiency of effective governance in the region, the possession of firearms soared 167 and, due to direct and indirect military confrontations, 168 local conflicts increased. Tribes that defined themselves primarily by their local context were now increasingly involved in a militant ethno-political conflict of an even more complex structure between Tripoli, N'Djamena and Khartoum. 169


163 A conception of history and race that has been combined with novel notions about agriculture and territory. Cq. again in this context, footnote 22.


165 The qānin al-ʾarāḍi gār al-musaggala (Unregistered Land Act of 1970) declared that all waste, forest and unregistered land belongs to the state. Before the act’s passage, the central government had avoided interfering with customary rights to unregistered land, and in the late 1980s again adhered to this policy; John D. Uren: Postwar Resource Tenure Issues in the Settlement of Sudan’s Dislocated Population, in: North East African Studies, volume 9, number 1, East Lansing 2002, pp. 1 et seqq. (on p. 5).


167 Chad’s civil war had been internationalized in the 1980s as a battleground for the indirect confrontation between Libya and the United States. The United States and its ally, the then-president of Sudan Čaťar Muḥammad an-Nuṣairi, bolstered Ḥissēne Ḥabre’s government in Chad against Libya’s expansionist policies. While US-military assistance flowed into southern Chad through Darfur, the Libyan leader Muʿammar al-Qaḍāfi formed the aforementioned Islamic Legion first to take control of northern Chad, and then to push southward. The recruits to this Islamic Legion came from many Arabic-speaking groups of the Sahel and the Sudan, including pastoralists who straddled the Chad-Darfur border. The ideology they were inculcated with was not just pan-Islamic, but pan-Arabic, stemming from al-Qaḍāfi’s political vision of creating an “Arab belt” across the Sahel. With the dismantling of the Islamic Legion following Libya’s defeat in 1988, many former members - armed, trained, and imbued with a new ideology - crossed into Darfur; Douglas H. Johnson: Darfur: Peace, Genocide and Crimes Against Humanity in Sudan, in: Preben Kaarsholm (ed.): Violence, Political Culture and Development in Africa, Oxford et al. 2006, pp. 92 et seqq. (on p. 94).

Maryam’s regime, Dr. John Garang de Mabior, the former leader of the Sudan’s People’s Liberation Army/Movement (SPLA/M),17 lost his major backing in his power struggle against neo-secessionist trends within his own ranks as well as in the confrontation with the central Government of Sudan (GoS).17 Even before the military-coup d’état in Sudan in 1989, former Prime Minister Sadiq al-Mahdi’s regime backed the first militia conducting operations in the region Bahr al-Gazal, located along the southern border of Darfur, against the ethnic group of the Dinka, which dominated the SPLA. Most members of that militia were recruited out of the Arabic-speaking ethnic group of the Baghara, based in Darfur and southern Kordofan.179 This specific group, also known as murâhilin, were militia horsemen who, to this day, have not been disarmed in spite of the escalating virulence. On the contrary, the tribal group of Baghara, based in southern Darfur, known as the Risayqâli, were victorious in their armed struggle for scarce resources in northern Darfur.177 They formed a structurally non-coherent alliance with like-minded tribes – the so-called Gânnâwîd. These tribes were originally referred to as fursin or muqâhidin, and characterized themselves as Arabic descendants.181,182 The formation in its current form consists of three main categories. The first category includes militias that are only loosely affiliated with the government and which received weapons and other supplies from the state and at the request of state authorities. These militias are thought to operate primarily under a tribal management structure, but also acted on their own initiative to undertake small-scale actions to loot property of personal gain.183 A second category includes militias that are organized in paramilitary structures and act in parallel to regular forces. Officers in the regular army may head some of these militias, even while they are also controlled by senior tribal leaders. Although militias in this category are thought to operate within a defined command structure, they do not act on legal grounds.184 Finally, the third category of militia includes members of the border intelligence and the guwârât al-âdâb al-musallaha (Popular Defence Force – PDF).185 The existence of the PDF is granted by Sudanese Law.186 There also appear to be links existing between all three categories.187

**bb. National responses to the root causes of the conflict**

Even before 2003, the social, economic and political marginalization of the westernmost provinces led to the formation of groups opposing the regime in Khartoum to various degrees.188 However, especially after the deterioration of the situation in Darfur, an armed group referred to as Darfur Liberation Movement was formed on 26 February 2003 aiming to overthrow the GoS and to end underdevelopment as well as negligence of the region. On the occasion of the adoption of its political charter on 14 March 2003, the movement renamed itself to haraka li-tahrir as-südân (Sudan Liberation Movement – SLM)189 due to its overall Sudanese objective. Its current manifesto states that it does not aim to form an independent state, but rather calls for a federal system, equal distribution of wealth and power, and the restoration of democracy predicated on full acknowledgement of Sudan’s ethnic, cultural, social and political diversity. Viable unity, therefore, must ultimately be based on the right of self-determination.190 Its manifesto bears striking resemblances to the SPLM’s ori-

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17\* John Garang de Mabior Grang died on 30 July 2005 in a helicopter crash returning from a meeting in Kuchitira with long-time ally President Yoweri Kaguta Museveni of Uganda. The accident with the Ugandan Presidential helicopter resulted in massive rioting in cities on both northern and southern Sudan. His position as Sudanese First Vice President and the Leader of the SPLM/A were transferred to Salva Kiir Mayardit, his second in command.


182 Contrary to what has often been written, these militia groups are no more a “popular” and “organic” expression of all the tribes in Darfur characterized as of Arab(ic) descent than the dreaded Rwandese Hutu paramilitary Interahamwe (Kinyarwanda, meaning “those who stand together” or “those who work together” or “those who fight together”). In both cases what we have are organized, politicized and militarized groups which, though recruited among people of a (prettended) certain “ethnic origin”, do not “naturally” represent them. See also: Gérard Prunier: Darfur – The Ambiguous Genocide, supra, footnote 160, p. 97.

183 Hatem Elliesie: Die Darfur-Krise im Sudan und das Völkerrecht..., supra, footnote 3, on p. 203.


186 President ‘Umar Hasan Ahmad al-Bârî confirmed that in order to rein the Gânnâwîd, they were incorporated in “other areas”, such as the armed forces and the police. See: Interview on CNN on 31 August 2004, transcript at http://edition.cnn.com/2004/WORLD/africa/08/31/amaanpour.bashir/index.html, accessed on 15 August 2008.


ginal vision of a united "New Sudan". Aside from the military wing of the SLM, the Sudanese Liberation Army (SLA), other guerrilla movements arose, such as the at-tabiiluf as-sidani al-dimagh (Sudan Federalist Democratic Alliance - SFDA). These groups were mainly composed of people belonging to the Fār tribe fighting for the rights of the Fār and the development of Darfur. Following the same concept of a "New Sudan", people affiliated with the Ta‘āmiluf tribe established the harakat al-adl wa-l-mu'awāt as-sidani (Sudan Justice and Equality Movement - SJEM or JEM). In comparison to the other two movements, which were perhaps more militant, the harakat al-adl wa-l-mu'awāt as-sidani considered themselves a "pathfinder" of a political party. JEM situates the struggle within a wider context: the marginalized majority against the hegemony of the three ethnic groups - Sāyila, Gā'fin, and Danāqli - and the neglect of development of the regions as demanded by the kutub al-aswād (Black Books), published in 2000 and 2003.192

b. Implications of the Mass Human Rights Abuse

aa: ...from an international point of view

While foreign governments, conflict-resolution experts, and international media focused on southern Sudan and the ongoing peace progress, as well as on the Middle East, Darfur received scant attention.200 While foreign governments, conflict-resolution experts, and international media focused on southern Sudan and the ... as well as on the Middle East, Darfur received scant attention. Sporadic foreign media attention in Sudan concentrated on the north-south peace negotiations in Naivasha, Kenya. Although it was clear that violence and displacement were increasing across Darfur, the precise nature and extent of the events remained unknown. Sudanese authorities denied any criminal acts, while the flow of oil from Sudan (which by late 2003 already amounted to 300,000 barrels per day).201

Given their interest in Chad, the French media were among the first to give a separate picture of the Darfur situation. UN Undersecretary-General for Humanitarian Affairs and Emergency Relief Coordinator, Jan Egeland, the Security Council that the situation amounted to "ethnic cleansing" - a term with uncertain legal meaning, if any.202 Widespread crimes committed by Sudanese government forces and the Gā'fin tribe included targeted killings, summary execution and rape of thousands of civilians, destruction of hundreds of villages, theft of millions of livestock and the forced displacement of the aforementioned estimated number of people.203 Victims of attacks by the Gā'fin tribe described regularly that GoN military assisted the Gā'fin tribe by bombing villages and attacking civilians by helicopters. The rebel movements, on the other hand, were responsible for attacks on civilians and humanitarian aid workers, as well as summary executions of captured combatants, which may amount to war crimes.204

203 Andrew S. Natsios: Moving Beyond..., supra, footnote 162, p. 33.
Throughout the following summer of terror, flight, and survival, events in Darfur were characterized by a massive outcry in the international media demanding that governments come to the aid of the people of Darfur, and asking how to best protect and aid the hundreds of thousands of IDPs and refugees. The GoS was slow to allow any outside presence in Darfur. In addition, international organizations and NGOs faced numerous obstacles trying to reach victims of the conflict with humanitarian assistance.

...from a national point of view

The continued unwillingness of the Sudanese government to prosecute serious abuse reflects a broader failure to reverse “ethnic cleansing” in Darfur. Instead of acknowledging state responsibility for the scale and gravity of the crimes committed, senior Sudanese officials continue to obfuscate, deny and evade responsibility for the atrocities.

The International Commission of Inquiry on Darfur stated that al-mahiikim al-haṣṣa (Specialized Courts) failed to ensure that confessions extracted under torture or other forms of duress were excluded from evidence. Thus, Jakob Pichon concludes that “these courts were incompatible with the rule of law”.

In May 2008, a report by the Fact-Finding Committee of the UN High Commission for Human Rights stated that there was a “reign of terror in the Sudan”, recommending that, “given the gravity of the allegations of human rights violations in Darfur and the failure of the national legal system to address the problem”, an international commission of inquiry should be established. Given this report, the President of Sudan, ‘Umar Hasan Ahmad al-Bashir, instituted al-laḥnā al-watani al-haṣṣa (Commission of Inquiry Act of 1954), with power to investigate human rights violations committed in connection with the conflict in Darfur, aside from al-mahiikim al-haṣṣa. However, human rights violations by government authorities or by the army were not mentioned as part of the mandate. Moreover, the decree failed to promise to accumulate the commission’s findings and to actualize provisions regarding the protection of witnesses.

The National Commission of Inquiry, which was under enormous pressure to present a view that, “given the gravity of the allegations of human rights violations in Darfur and the failure of the national legal system to address the problem”, an international commission of inquiry should be established. Given this report, the President of Sudan, ‘Umar Hasan Ahmad al-Bashir, instituted al-laḥnā al-watani al-haṣṣa (Commission of Inquiry Act of 1954), with power to investigate human rights violations committed in connection with the conflict in Darfur, aside from al-mahiikim al-haṣṣa. However, human rights violations by government authorities or by the army were not mentioned as part of the mandate. Moreover, the decree failed to promise to accumulate the commission’s findings and to actualize provisions regarding the protection of witnesses.

The National Commission of Inquiry, which was under enormous pressure to present a view compatible with the government’s position, concluded that, although there were incidents of serious abuse, there were no widespread or systematic crimes.

205 Darfur has at times dominated headlines, then disappeared when some other issue (Iraq, Iran, Lebanon) or “humanitarian disaster” (the Indian Ocean Tsunami, Hurricane Katrina) grabbed the headlines, M.W. Daly: Darfur’s..., supra, footnote 159, p. 293. See also: Robert O. Collins: Disaster in Darfur..., supra, footnote 190, p. 17.

206 Andrew S. Natsios: Moving Beyond..., supra, footnote 162, p. 34.

207 Cp. Chapter III. 3.


The ICC does not base its jurisdiction solely on the “Security Council’s Chapter VII power”, as do the ad hoc tribunals for former Yugoslavia and Rwanda, nor on “Special Agreements”, such as the Special Court of Sierra Leone. The Preamble and Article 1 of the Rome Statute refer to the ICC as an international institution that “shall be complementary to national criminal jurisdiction”. This complementary relationship between the ICC and national criminal jurisdictions means that, contrary to the ad hoc tribunals, the ICTR and the ICTY, the ICC does not have primary jurisdiction over national authorities. The ICC plays a subsidiary role and only supplements the domestic investigation and prosecution of the most serious crimes of international concern. The ICC is only meant to act when domestic authorities fail to take necessary steps during the investigation and prosecution of crimes enumerated under Article 5 of the Rome Statute. According to Article 17 of the Rome Statute, this might be the case when “[a] state is unwilling or unable genuinely to carry out the investigation or prosecution” [emphasis added] or, when “[a] state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute” [emphasis added].

Thus, following the referral from the United Nations Security Council of 31 March 2005, the prosecutor received the document archive of the International Commission of Inquiry on Darfur. After thorough analysis, the prosecutor, Luis Moreno-Ocampo, concluded that the statutory requirements for initiating an investigation were satisfied. On 6 June 2005 he announced his intention to open an investigation into the events that took place in Darfur.

(aa) The Special Criminal Court on the Events in Darfur

The day after Moreno-Ocampo’s announcement, the Chief Justice and President of the Supreme Court, Galal ed-Din Muhammad “Urmân, announced the creation of al-mahkama al-hâṣṣa bi-l-ahdâd fi Dârâfûr, a special national criminal court in Sudan focused on the events in Darfur. The development of this court is quite logical given the ICC’s complementary relationship to the Sudanese judiciary and Article 17 of the Rome Statute.

(1) Legal basis of al-mahkama al-hâṣṣa bi-l-ahdâd fi Dârâfûr (SCCED)

The Special Criminal Court on the Events in Darfur (al-mahkama al-hâṣṣa bi-l-ahdâd fi Dârâfûr – SCCED) was established by decree (qarâr anšâd al-al-mahkama al-hâṣṣa bi-l-ahdâd fi Dârâfûr) of Chief Justice Galal ed-Din Muhammad “Urmân, pursuant to Article 10 (e) of the qânûn al-qadâ’ (Judiciary Act of 1986), and in conjunction with Article 6 (h) and Article 14 of the qânûn al-l-rîfâ’ al-qâlin‘ (Criminal Procedure Act of 1991). The decree was based on Article 127 of the Interim National Constitution (INC), which now forms the explicit basis for Article 10 (e) of the National Judiciary Act of 1986 and Article 6 (h) of the Criminal Procedure Act of 1991.

As outlined by the 1998 Constitution, the National Judiciary is the entity responsible for the judicial system in Darfur. According to Article 124 of the INC, the National Judiciary is comprised of al-mahkama al-‘ulîyâ (Supreme Court), al-mukällâm al-l-ištî’în (Courts of Appeal) and, in conjunction with Article 127 of the INC, “other national courts or tribunals as deemed necessary to be established by law”. Since both the National Judiciary Act of 1986 and the Criminal Procedure Act of 1991 are still applicable “unless new actions are taken in accordance with the provisions of this Constitution”, as dictated by Article 226 (5) of the INC, the INC has brought no relevant change with regard to the structure of the National Judiciary.

Art. 8 (2) ICTR Statute and 9 (1) ICTY Statute.


Elliesie / Behrendt / Aynamel: Genocide Trials in Africa

Pichon:

The Principle of Complementarity..., supra, footnote 155, p. 216.

Introduction of chapter II. 3. (The Sudanese Concept).


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Art. 10
of the National Judiciary Act of 1986 arranges the courts into seven different layers.

(2) Structure, composition and procedure of the SCCED

The SCCED “shall be presided by a Supreme Court judge and its members shall have the rank of public court judge at least.” These judges have been appointed by the Chief Justice’s Decision No. 702 of 2005 on the 5th day of ’umâdâ l-’awwâlî 1426 a.h. (= 11 June 2005): Mahmûd Muhammad Sa’îd Abkam (Judge of the Supreme Court), Inshârî Ahmad Mu’ûtîr and ‘Awâd el-Karîm ’Ummân (Judges of the Court of Appeal). This new structure of the SCCED, which did not exist for al-mahkâmât al-bii‘a (Specialized Courts), improved the procedural conditions of criminal trials in Darfur. Moreover, Article 20 has made it such that appeals are permitted against any decision of the SCCED before a mahkamat al-isti’iîf al­hâsâ (Special Court of Appeals). Appeals to quash a sentence of the mahkamat al-isti’iîf al­hâsâ may be filed with a chamber of five judges of the National Supreme Court (al-mahkama al-qawmîya al-‘ulûmî) to be appointed by the ra’îs al-qa’adâ (Chief Justice), as well as the mahkamat al-isti’iîf al­hâsâ. Art. 20 (c) in connection with Article 184 of the Criminal Procedure Act of 1991 now grants 15 days to appeal. Thus, the SCCED decrêes expand the possible time frame open to appeal, in contrast to al-mahkâmîn al-hâsâ. The SCCED is obliged to adhere to the qa’nîn al­-îlghîrát al­-îdîn’îya (Criminal Procedure Act of 1991) and the rules of evidence stipulated in qa’nîn al-îltîbî (Law of Evidence of 1994) while the appeals authority shall follow the rules of procedure stipulated in qa’nîn al­-îlghîrát al­-îdîn’îya (Criminal Procedure Act of 1991).

(3) Forum rei sitae and the jurisdiction of the SCCED

The SCCED was originally established as a single court that would be seated in al­Fâshir, the capital of North Darfur, “where it would hold its sessions. However, the court may travel and hold its sessions in any other place which it specifies.” Its jurisdiction covers, according to the aforementioned decree, acts which constitute crimes in accordance with the qa’nîn al­-îdîn’îya (Criminal Act of 1991) and other penal codes.

Decrees amended in November and December 2005 established three permanent seats for the court in Nyâlî, Fâshir and Gînya, the capitals of South Darfur, North Darfur and West Darfur respectively. It broadened the Special Court’s jurisdiction to include “international humanitarian law”, thus making it possible to prosecute alleged perpetrators not only because of “ordinary crimes”, but also because of international crimes. With this amendmend came the implication that the SCCED does have the capacity to prosecute crimes over which the ICC has jurisdiction.

(4) The SCCED in process

When first established, the Sudanese authorities announced that 160 accused were to be tried before the SCCED. The identity of these 160 people is still unclear. A year later, however, a small number of people have been brought before the SCCED. Moreover, it remains unclear whether those few people are subject to the broadened jurisdiction of the SCCED. According to the resources and literature available at the time of writing this article, all SCCED cases have relied on the Criminal Act of 1991, which limits authority to “ordinary crimes”, such as robbery and murder, rather than on “international humanitarian law”, which would extend authority to investigate crimes including war crimes, crimes against humanity or genocide. Only one of the cases before the SCCED dealt with international crimes—an October 2005 attack on Tâmâ in South Darfur—and only nine cases have become known to the international community. Nonetheless, the institutional framework of the Sudanese judiciary has been enriched through the establishment of the SCCED. The work of the SCCED is endorsed by a number of new ad hoc mechanisms, including a laţna al-taqasîît al-qa’dî’î (Judicial Investigations Committee) and liţâţ hâsâ li-muddâ’i’î al-‘umûm (Special Prosecutions Commissions), which observe offences


259 Ibidem: Art. 20 (a).
260 Ibidem: Art. 20 (a) & (b).
263 Ibidem: Art. 20 (c).
264 Ibidem: Art. 3.
265 Ibidem: Art. 4.
266 Ibidem: Art. 5 (a).
that have occurred after the investigations of the International and National Commissions of Inquiry. 254

III. Final Analysis and Future Considerations

The preliminary events leading up to the three genocide trials undoubtedly represent horrible, systematic human massacres. Prosecutions by national courts following internal armed conflict remain exceptional in Africa. 255 For that reason, ending a “culture of impunity” constitutes a major challenge for the relevant African countries’ national criminal justice systems, as well as for the broader international criminal justice system. As the data in this paper has demonstrated, one can identify a tendency among African countries to try war crimes under their own national judicial systems, rather than under international tribunals, even if their legal approaches differ due to their respective social and political state of affairs.

1. Delay of court proceedings

The protracted trial of Dârgr-officials has been referenced as an important attempt to uphold the principle of accountability, particularly laudable in light of the many examples of impunity in the rest of the continent. Excessive delays in charging the large majority of the detainees have, however, greatly damaged the credibility of the trial process. Delays in general criminal proceedings, and particularly in proceedings related to genocide, may be caused by: the complexity of the case, the conduct of the accused and the conduct of the authorities. 256 With regard to Ethiopia, for example, it took almost five years for the prosecution to finally come up with a charge of genocide against the majority of the defendants, many defendants were held in pre-trial detention for almost six years before they were brought to court, and, as of 2001, some cases had been first brought to court after 10 years. In violation of Articles 9 and 10 of the Universal Declaration of Human Rights (UDHR), Articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR) as well as Principles 2, 4, 9, 10, 11, 12, 32, 37, and 38 of the Body of Principles for the

2. Accountability of perpetrators

Considering the scenario in Sudan, the Comprehensive Peace Agreement (CPA) and the Interim National Constitution (INC) ignore the question of accountability. 261 Apart from the fact that Sudanese law does not exhibit an equivalent to Ethiopia’s domestic law on genocide and crimes against humanity, 262 doubt remains whether the authorities are willing to conduct trials to hold perpetrators accountable in Darfur. Not only does Sudanese law lack a provision allowing for prosecution on the basis of command responsibility, Sudan has enacted many immunity provisions that impede the prosecution of those in the military, police, and security agencies who are responsible for crimes in Darfur. Immunity for members of national security forces was enshrined in the qânum al-amn al-watani (National Security Forces Act of 1999). Article 33 of that act states that

No civil or criminal proceedings shall be instituted against a member, or collaborator, for any act connected with the official work of the member, save upon approval of the Director [...].

Similar language can be found in other acts and decrees regulating government actors as well. Article 46 of the qânum quwwât al-ḥurta as-südânîa (Police Forces Act of 1999) stipulates that

No criminal procedure will be taken against any police officer for a crime committed while executing his official duty or as a consequence of those of official duties without permission of the Minister of the Interior.

Furthermore, Criminal Decree No. 3/95 sets forth requirements for bringing charges against members of the armed forces in criminal courts and specifies that criminal courts have no authority to pursue charges without approval by the armed forces or a decree from the Chief Justice. In addition, a temporary decree issued by the President on 4 August 2005 attempted to extend immunity of the armed forces by amending the qânum al-quwwât al-musulîma (People’s Armed Forces Act) with the following provision:

There shall not be taken any procedure against any officer, ranker [sic] or soldier who committed an act that may constitute a crime done during or for the reason of the execution of his duties or any lawful order made to him in this capacity and he shall not be tried except by the permission of the General Commander or whoever authorized by him.
This decree extended protection for the armed forces by including the PDF militia and "Ganngāwīd in protection from prosecution without government consent.263

Moreover, Article 11 of the ḡanīn at-tanfūg al-ḡīnāʾī? (Criminal Act of 1991) appears to provide a defence of following lawful orders for those who committed offences. This norm states:

No act shall be deemed an offence if done by a person who is bound, or authorized to do it by law, or by a legal order issued from a competent authority, or who believes in good faith that he is bound or authorized so to do.

This provision appears to be inconsistent with standards of international law, such as Article 33 of the Rome Statute,264 which state that superior orders are not a defence for crimes against humanity and genocide. Even though Sudan signed the Rome Statute on 8 September 2000, it has not ratified the instrument. Although not directly bound by the treaty, however, Sudan must refrain from acts that could defeat the object or purpose of the treaty according to Article 18 of the Vienna Convention on the Law of Treaties,265 to which Sudan is a party.

3. The question of genocide

Half a century ago, Ethiopia had already defined the term “genocide” and thus set clear rules for its legal application. In modern Ethiopian law, genocide includes the murder of people on the grounds of their political belief or due to their opposition to the state. Under the UN Genocide Convention, on the other hand, the crimes of the Darfur would not constitute genocide.266 Consequently, the Ethiopian example raises a problem in the definition and prosecution of genocide.

Avoidance of using the word “genocide” to describe the events in Sudan and Rwanda, however, indicates an international political reluctance to respond to the atrocities in both countries. With regard to Darfur, reluctance to utilize the term also represents a consciousness of the need to ensure protection of civilians in Darfur.

263 Human Rights Watch: Lack of Conviction: The SCCED, supra, footnote 211, p. 18.
264 Article 33 Rome Statute:
1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
   (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
   (b) The person did not know that the order was unlawful; and
   (c) The order was not manifestly unlawful.
2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.
265 Article 18 of the Vienna Convention on the Law of Treaties:
A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
   (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
   (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.
266 Edward Kissi: Genocide in Cambodia and Ethiopia, supra, footnote 98, p. 308.

despite a need to exert diplomatic pressure on the GoS. Certainly, condemning the actions occurring in western Sudan necessitates the use of the term "genocide", but diplomats anticipate that the use of the term would jeopardize the government's cooperation with the African Union and the United Nations, thus hindering their ability to protect civilians. This is particularly critical given the harsh security conditions in Darfur today.

4. Reconciliation, judicial transparency and national justice

Irrespective of its neo-normative character, the (potential) moral and pragmatic benefit of the Rwandan gacaca-concept is quite obvious: Based on its customary root, it is widely believed that the reconciliatory nature of gacaca may lead to social harmony and peaceful co-existence. However, the slogan uburi burakiza ("the truth heals") is questionable. Fieldwork, for example, has rendered sobering findings.267 Indeed, the healing power of truth depends on whose truth is established, and how, as well as what kind of justice is established, and how.

Beyond the Rwandan context, the dispensation of justice in Darfur is adversely affected by the frequent lack of official Sudanese information, in particular with regard to the conduct of the "mystified" al-mahkama al-huṣra bi-l-adliyya fi Darfur (SCCED). In contrast to the situations in Rwanda and Ethiopia, this lack of information is surely based on the fact that the regime responsible for the atrocities is still in power. Similarly, whereas the genocide trial in Ethiopia seems to be transparent, access to judicial decisions in Sudan is not easy.

Furthermore, one must consider Dadimos Hailé's critical observation:

One principal limitation is that it only targets crimes committed by the previous regime. Consequently, those in the opposition, including [some members of the current ruling group, are excluded.]268

Even more to the point, Edward Kissi stated:

If political killing (politicide) is included in the rubric of genocide as Ethiopian law does, then the study and prosecution of politicides of the kind that occurred in Ethiopia, in which other non-state groups (guerrilla movements and liberation fronts) also participated in the killing of people, would require examination of both sides of the situation that produced mass murder.269

5. Peculiarities of the convictions under scrutiny

In the Rwandan genocide trials, punishment for the accused who have appeared before the ICTR has been, at most, life imprisonment, whatever role they may have played in the commission of genocide, while many of their subordinates who executed their plans have been condemned to death by the Rwandan national courts. It is a legal paradox to see that masterminds are being penalised to a lesser extent than their subordinates.270 The Ethiopian Judge Mādīḥn Kiros highlighted this inconsis-

267 See e.g. Susanne Buckley-Zistel: "The Truth Heals?" Gacaca Jurisdictions..., supra, footnote 115, p. 61.
269 Edward Kissi: Revolution and Genocide..., supra, footnote 115, p. 61.
270 Madeline H. Morris: The Trials..., supra, footnote 23, p. 357.
tency, for example, in his dissenting opinion in the decision of the yá-federal käffe-táňna fard bet (Federal High Court), where Măngstu Hāyáli-Maryam and his collaborators were spared the death penalty while subordinates and other low level officials were sentenced to death by other divisions of the same court and regional courts. Ultimately, however, the final ruling of the yá-federal täqlay fard bet (Federal Supreme Court) on 18 gombor 2000 a.m. (= 26 May 2008)271 reconciled the discrepancy by converting the life sentence of former President Măngstu Hāyáli-Maryam, and of co-accused,272 into a death sentence in absentia.

As of 2002, the Rwandan national courts that were entrusted to try the genocide cases had sentenced 682 of the accused to death, and out of these, only 23 were executed.273 Similarly, the Ethiopian Federal High Court responsible for the genocide trials in Ethiopia had rendered capital punishment upon only 16 of the accused as of 22 September 2003.274 Unlike in Rwanda, however, Ethiopian officials have not carried out any of the assigned death penalties.

The death penalty allocated to former Ethiopian President Măngstu Hāyáli-Maryam by the Federal Supreme Court on 26 May 2008 was conducted in absentia.275 Yet, to be tried in absentia contravenes Article 14 (3) (d) of the ICCPR, which guarantees the defendant the right to be tried in presence. A defendant, on the other hand, can waive the right to be present, and proceedings against the defendant may go forward “in the interest of the proper administration of justice”.276 However, a waiver may only occur when the defendant has been “sufficiently” informed in advance about the case against him/her. Although the absent defendants would most likely know about the proceedings against them from the press, if not from their contacts inside Ethiopia, the SPO can obviously not rely on the press to notify absent defendants of the verdict.277

The prosecution of mass atrocities before domestic courts may serve some important purposes, distinct from those that underlie international trials. For example, these trials might enhance the legitimacy and credibility of a government, demonstrating its determination to hold individuals accountable for their crimes. The national approaches explored in this paper attempt to bring justice and reconciliation to their immediate impact. For both practical and policy-related reasons, the ICTR and the ICC are limited in their scope of prosecutions to a relatively small number of people. Even if the international bodies realize their maximum effectiveness, thousands of relevant cases of war crimes and related atrocities will be left untouched. Above all, one must emphasize that the value of the ICC principle of complementarity is that the system effectively creates a presumption in favour of action at the state-level. The ICC does not enjoy primacy over national courts but only steps in when the competent domestic prosecutors or courts fail, or are unwilling or unable to act. The Rome Statute makes it clear that states’ judicial authorities have the primary responsibility of prosecuting and punishing international crimes. This should be their normal task, and the ICC can only deal with the cases where national judicial systems do not prove to be up to this assignment.278

6. International affairs; social and political challenges; constitutional objections

Reality has demonstrated that the power politics of permanent UN Security Council veto-bearing member states with economic interests in Sudan impede the determination of a proper balance between the domestic and international treatment of the Darfur conflict. Fully aware of this situation, the GoS has done little to demonstrate its alleged intent to ensure justice for the crimes committed in Darfur, despite the establishment of the new court and a prosecutor’s office. These efforts are certainly not enough.

The function of the ICC principle of complementarity is not to allow states to frustrate the prosecution of individuals by using their primary jurisdictions as shields. Article 17 (1) of the Rome Statute expressly prevents such a scenario.279 The balance between state sovereignty and the need for the ICC to step in as agent of the international community, where the effective prevention of the core crimes is not guaranteed, is, of course, a delicate one.280 This balance may be criticized for being “overly concerned with a protection of the sovereignty of states”.281 However, without a reversal of policy and real political will from within the GoS and the UN Security Council, the SCCED will continue to fail to provide substantial justice and accountability. As this paper demonstrates, this failure is all the more stark given that the ICC will only prosecute a limited number of cases and cannot provide justice to the thousands of victims by itself. It remains unclear whether it would be a step in the right direction to issue a warrant against the President of Sudan, ‘Umar Ḥasan Aḥmad al-BAṣīr,282 The indictment against ‘Umar Ḥasan Aḥmad al-BAṣīr,

271 On file with the authors. See also: Abraham Bāgīzaw: Yá-dārg ba-salḥat guyyay bā-sābbār čalot li-tayy naw, supra, footnote 143. For more details on the trial see: ḋayy ‘aqqāibe bāgī bār-ma Kionen Māngstu Hāyāli-Maryam, supra, footnote 143.

272 See: Yá-federal täqlay fard bet: Supreme Court Decision, File No. 30181, p. 96.

273 Amnesty International: Gacaca: A question of Justice, supra, footnote 61, p. 17.

274 Debebe Ḥaligebr: Prosecution of Genocide, supra, footnote 256, p. 37.

275 Yá-federal täqlay fard bet: Supreme Court Decision, File No. 30181, pp. 96 et seqq.


who is, unlike the former Ethiopian President Mângêstu Hâylâ-Maryam, still in office, was strongly contested by Antonio Cassese, the first President of the ICTY and later the Chairperson of the United Nation's International Commission of Inquiry on Darfur, by Professor William Schabas, and by members of the Oxford Transitional Justice Research Group. It remains to be seen what kind of further policies and legally assured measures will be envisaged and implemented.

The extent to which the SCCED will play its assigned role depends significantly on domestic and international treatment of Darfur's issues. The principle of complementarity between the SCCED and the ICC must not weaken criminal justice.

Thus, the lašna al-murâṣa al-qanûna (Law Review Committee), established by the Sudanese Government within the National Ministry of Justice, brings domestic legislation in line with the provisions of the INC, and initiates a reform process to harmonize a number of laws with international standards as provided for in the INC. These laws include, inter alia, the qânûn al-‘igra’at al-qânanîya (Criminal Procedure Act of 1991); the qânûn al-qawwâl al-musâllâhâ (People’s Armed Forces Act of 1986); the qânûn quwwat as-surra as-sûdânîya (Police Forces Act of 1999); and the qânûn al-‘âmî (Judiciary Act of 1986). In doing so, it remains to be seen whether the Ministry of Justice addresses the issue of the crucial and controversial status of the office of the Chief Public Prosecutor (an-nâ‘ib al-l’âmîn), which was set up according to Article 197 of the National Constitution of 1973. By virtue of his office, the an-nâ‘ib al-l’âmîn should be an independent organ of the judiciary. Due to the


Opening Remarks delivered by the Sudanese Minister of Justice at a Law Reform Workshop in September 2006 in Khartoum organized by the United Nations Mission in Sudan. constitutional separation of powers, the office should neither be constrained by directives of the executive branch of the state, nor should it be mixed with their authority. In Sudan, however, this is not the case: The an-nâ‘ib al-l’âmîn is, by virtue of his office, Minister of Justice.

Moreover, the international community engages in a comprehensive programme that aims to assist building the capacity of the judiciary to support judicial awareness of international human-rights norms, etc. Specific programmes focusing on capacity building for the legal profession are well under way. For instance, the United Nations Development Programme (UNDP) and the United Nations Mission in Sudan (UNMIS) continue to provide capacity-building support to legal professionals, including paralegals, lawyers, police, prosecutors and judges.

Henceforward, in Rwanda, the impact of gacaca on the society will be enormous. At its best, the public discussions will achieve a commonly accepted truth, which would help victims feel like victims, and would assist perpetrators see themselves as perpetrators. In fact, the development of an objective truth is one key concern. Another concern is the rapid processing of more perpetrators. In this respect, gacaca may be the necessary, although imperfect, solution that Rwanda so urgently needs. Both approaches, however, face a long and challenging path.
IV. Conclusion

Protracted endeavours in Rwanda plainly show that the process of retribution is not an easy one. Rwanda still has a long way to go in order to come to terms with the events of 1994.

It is not a surprise that the genocide trials in Sudan, Ethiopia and Rwanda have been met with problems that have no easy solutions.

The Gacaca Courts, for example, finally began national operation in 2005, just over a decade after the genocide. The first Gacaca Courts began a pilot phase that started in 2002, which was preceded and accompanied by a large campaign to create public awareness and readiness to cooperate. In order to increase the number of sessions and rulings, the jurisdiction of Gacaca Tribunals was extended to murderers in 2007, and the number of judges required to sit on a Gacaca Tribunal was reduced. While the provisions of the 2007 law accelerated the gacaca trials, some say that quality suffered as a result, and that the gacaca process did not always guarantee fair trials. However, according to others there have not been widespread complaints of the judges' incompetence. Considering the difficult situation in Rwanda, contradictory statements should come as no surprise. While it has always been the government's stated intention to close down the Gacaca Courts as soon as possible, it is clear that a lot of work remains to be done.

The same applies all the more to the challenges of the SCCED's work ahead. So far, the SCCED has only considered the cases of low-ranking individuals charged with relatively minor charges: Two low-ranking members of the military intelligence, who had been convicted of murder in Fashir in 2005 for their role in the death in custody of a 60-year-old rebel suspect, were hanged on 22 April 2007. However, the trials do not address the large scale attacks on civilians in Darfur documented by UN experts and NGO's involving the killing of civilians, torture, enforced disappearance, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, conducted on a widespread and systematic basis. On the contrary, the SCCED has not charged any of the senior commanders for their part in the atrocities: For instance, two members of the military intelligence, who had been convicted of murder in 2005 for their role in the death in custody of a 13-year-old adolescent while in their custody, were granted amnesty under Presidential Decree No. 114 in June 2007. As shown, Sudan's tangled web of legal complexity seems to hamper any efforts for transparency in the SCCED prosecutions.

Even the Ethiopian trials are not entirely concluded. For example, under Ethiopian law, the current president must approve by signature death sentences before an execution date is set. Secondly, with no extradition treaty, President Robert Gabriel Mugabe's government is unlikely to act on the decision to extradite former President Mångåstu Häylä-Maryam from Zimbabwe, who fled there after he was deposed in 2002, which was preceded and accompanied by a large campaign to create public awareness and readiness to cooperate. In order to increase the number of sessions and rulings, the jurisdiction of Gacaca Tribunals was extended to murderers in 2007, and the number of judges required to sit on a Gacaca Tribunal was reduced. While the provisions of the 2007 law accelerated the gacaca trials, some say that quality suffered as a result, and that the gacaca process did not always guarantee fair trials. However, according to others there have not been widespread complaints of the judges' incompetence. Considering the difficult situation in Rwanda, contradictory statements should come as no surprise. While it has always been the government's stated intention to close down the Gacaca Courts as soon as possible, it is clear that a lot of work remains to be done.

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