A Perpetual Possibility? The International Criminal Tribunal for Rwanda’s Recognition of the Genocide of 1994

What might have been is an abstraction
Remaining a perpetual possibility
Only in a world of speculation.

– T.S. Eliot, “Burnt Norton”, from The Four Quartets

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I. Introduction

On 8th November, 1994, the Security Council of the United Nations adopted Resolution 9551 in its 3454th meeting. By this time, reports from the Special Rapporteur for Rwanda of the United Nations Commission on Human Rights and the Commission of Experts established pursuant to Resolution 935 had already established that there had been grave breaches of international humanitarian law in Rwanda in 1994.2 Resolution 955 explicitly recognized that such violations had taken place; the Security Council was quick to use the first few sentences of the Resolution to state that the situation constituted a “threat to international peace and security”3 and to register its “grave concern”4 regarding reports of genocide in Rwanda.

After affirming its determination to “put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for
them”, the Security Council went on to order the establishment of the International Tribunal for Rwanda for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law in Rwanda between 1 January 1994 and 31 December 1994. In the same paragraph, the Security Council adopted the Statute of the International Criminal Tribunal for Rwanda and then went on to request the Secretary General to implement Resolution 955 urgently and make arrangements for the functioning of the Tribunal.

It is interesting to note that Resolution 955 uses the word “genocide” twice in the paragraph establishing the International Tribunal. The Preamble to the Statute of the International Tribunal for Rwanda names the Tribunal as the “International Criminal Tribunal for the Prosecution of Persons responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994” before proceeding to abbreviate this to “the International Tribunal for Rwanda”. No trepidation here either in using “genocide” twice in the same sentence.

By contrast, the Tribunal itself appears to have been less direct in its approach to the fact of the Rwandan genocide of 1994. This piece seeks to show that acknowledgment of the existence of the genocide has prompted some amount of judicial discomfiture, if not clear contradictions, in the working of the Tribunal. This discomfiture and the occasional distortions in judicial technique that it causes are all the more undesirable since they are unnecessary, a conclusion that I seek to prove through an examination of several judgments as well as interlocutory decisions of the Tribunal. In particular, decisions given by the Tribunal in relation to the doctrine of judicial notice amply illustrate how frequently the Tribunal has been asked to acknowledge the existence of a genocide in Rwanda and how varied and ambiguous its answers have been. The net result seems to have been to throw an unintended shadow of doubt on the most fundamental fact before the Tribunal, that of the genocide itself.

5 Id.
6 Para. 1 of the Resolution.
7 Hereinafter referred to as “the Tribunal”.
8 Para. 5 of the Resolution.
9 Para. 1 of the Resolution.
10 Preamble to the Statute of the International Tribunal for Rwanda (“the Statute”).