

RECONCILING RWANDAN RECONCILIATIONS:

INTERNATIONAL CRIMINAL LAW VERSUS NATIONAL POLITICS IN THE MIRROR OF HUMANITY

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The UN Security Council [...]' Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would [...]' contribute to the process of national reconciliation and to the restoration and maintenance of peace [...]'

[...]' Decides hereby, having received the request of the Government of Rwanda (S/1994/1115), to establish an international tribunal for the sole purpose of prosecuting 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 neighbouring States, between 1 January 1994 and 31 December 1994 and to this end to adopt the Statute of the International Criminal Tribunal for Rwanda annexed hereto [...]'

UN Security Council Resolution 955, S/RES/955 (1994) 8 November 1994

INTRODUCTION

By now there is a huge literature surrounding the events of the Rwandan genocide, its genesis and its aftermath, to the extent that a historiography of the genocide has been written which has identified various strands of approach to the topic – often at radical variance from each other.¹ The literature can be divided into various sub-genre categories; those that detail the events of the genocide, those that seek to place the genocide in historical context and those that try to account for the genocide in more thorough sociological, political or anthropological terms. A unifying feature of the field of literature at this point is that the genocide itself is accepted as having been multi-factorial in its causality over

¹ S. Strauss, 'The Historiography of the Rwandan Genocide', in D. Stone (Ed.), *The Historiography of Genocide*, Palgrave Macmillan, Basingstoke 2008.

both the long and short *durée* of history, and that this history was heavily conditioned by complex networks of relations between Rwandan and other regional and global state and non-state actors. The simple story of an outbreak of inexplicable atavistic ethnic murder has been thoroughly debilitated through multiple contextualizations. For most political or historical commentators on the genocide, its historical genesis and its aftermath, the International Criminal Tribunal for Rwanda (henceforth ICTR) process merits little more than passing comment, and often such comment has the derogatory flavour of ‘too little too late’.²

Yet there is also by now an extensive literature surrounding the processes of the ICTR, chiefly regarding the novelty of certain of the convictions, for example the first conviction on an actual charge of genocide, the first international criminal conviction of a serving head of government, the first conviction for rape as a crime of genocide, the likely effect of the ICTR as a forerunner to the permanent International Criminal Court.³ The fact that the ‘Statute’ (constitutional document) of the ICTR limits its remit to ‘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 neighbouring States, between 1 January 1994 and 31 December 1994’ is certainly pertinent here, in that the time limitation imposed is one which cuts out the consideration of contextual factors which form the bulk of any more comprehensive historical or political analysis. Although such factors might be regarded as providing a broad context, it is understandable that the ICTR, in an effort to achieve timely provision of justice, would proceed on the basis that the broad context had only remote relevance to the much narrower category of what would be considered in court because of its specific evidential relationship to a precisely defined crime. This reductive legalism, while perhaps operationally necessary, and while opening up the legal process to standard legal critical attention in terms of the quality of justice produced, in processes such as the ICTR creates a deep paradox. This paradox at times surfaces even within the processes of the Tribunal itself, for example when in *Prosecutor v. Kayishema and Ruzindana*,⁴ the court recognizes a need to contextualize the conflict, but also recognizes the extra-legality of doing so, leading to an uncomfortable compromise position:

2 See, for example, G. Prunier, *The Rwandan Crisis: History of a Genocide*, Hurst, London 1997.

3 C. Bassiouni, *Crimes Against Humanity in International Criminal Law*, Kluwer, The Hague/ London 1999; S. Zappala, *Human Rights in International Criminal Proceedings*, Oxford University Press, Oxford 2003; S. Darcy, *Collective Responsibility and Accountability Under International Law*, Transnational Publishers, Ardsley (NY) 2007; C. de Than and E. Shorts, *International Criminal Law and Human Rights*, Sweet and Maxwell, London 2003; L.J. van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Criminal Law*, Martinus Nijhoff, Leiden 2005.

4 *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, p. 21. See generally p. 21-29, ‘Historical Context of the 1994 Events in Rwanda’.

The Trial Chamber [...] is of the opinion that an attempt to explain the causal links between the history of Rwanda and the suffering endured by this nation in 1994 is not appropriate in this forum and may be futile. It is impossible to simplify all the ingredients that serve as a basis for killings on such a scale. Therefore, the account presented below is a brief explanation of issues relating to the division of ethnic groups in Rwanda, a brief history of Rwanda's post-independence era, including a look at the 1991 constitution, the Arusha Accords, and the creation of militias.⁵

The nature of the crimes and what the international community want to achieve by trying them would seem to rule out the insulation of the legal process from the historical and socio-political issues within which the trial is implicated, yet the paradox is that such insulation is maintained in order for the trial process to function. There is no such operational reason for academic commentary to maintain such a stance, yet what is lacking is a body of literature considering together the broad context of the genocide and the issue of the ICTR and its processes. A notable exception is Mullins and Rothe's *Blood Power and Bedlam: Violations of International Criminal Law in Post-Colonial Africa*,⁶ which, in an attempt to develop a criminology of state crimes, goes some way to a consideration of the ICTR through the same (post-colonial) analytic categories as the genocide itself. A second exception is the account by Kingsley Moghalu in *Rwanda's Genocide: The Politics of Global Justice*,⁷ which offers a fascinatingly detailed account of intertwined legal and political issues in the setting up, ongoing operation and effects of the ICTR, without, however, adopting an overall theoretical explanatory framework. Both of these works are heavily (and understandably) biased towards a retrospective analytic approach.

This essay attempts to complement such work through suggesting that the differing ways in which the future is tied to the key concept of 'reconciliation', which grounds both the ICTR process and the Rwandan governmental efforts at post-conflict social repair, and of course a vision of the future implies a version of the past, opens up a fruitful territory for investigating certain aspects of the politics of global justice. The idea of 'reconciliation' that lies at the heart of the justification for the legal process is specifically political, indeed might be regarded as having become in recent times 'a regulative ideal in political discourse', in its unassailability constituting the 'telos and closure' of politics.⁸ It is certainly striking

5 *Id.*, p. 21. See generally p. 21-29, 'Historical Context of the 1994 Events in Rwanda'.

6 C.W. Mullins and D. Rothe, *Blood, Power and Bedlam: Violations of International Criminal Law in Post-Colonial Africa*, Peter Lang, New York 2008.

7 K. Moghalu, *Rwanda's Genocide: The Politics of Global Justice*, Macmillan, London 2005.

8 E. Christodoulidis and S. Veitch, 'Introduction', in S. Veitch (Ed.), *Law and the Politics of Reconciliation*, Ashgate, Aldershot 2007.

that the ideal of reconciliation is so strongly promoted in the context of a trial for genocide, where the notion of reconciliation might seem not only alien but potentially unjustifiable; if genocide is evil then could it ever be just to be reconciled with the perpetrators?⁹ It is also striking that national reconciliation is also the acknowledged aim and goal of post-conflict legal and social processes in Rwanda itself, once again raising the issue of ‘telos’ and ‘closure’. It is here, in the contrast between ‘reconciliations’ that this essay finds its point of focus, bearing in mind this question of whether ‘reconciliation’ has come to constitute an arch-politics. Having first laid out a brief context to the setting up of the ICTR, this essay tries to identify the idea structure behind the idea of ‘reconciliation’ as it operates as a feature of the ICTR process, and to contrast this with the idea structure of how ostensibly the same concept of ‘reconciliation’ is brought into play in paradigmatic legal and public policy processes in Rwanda itself. What emerges is that not only are these ‘reconciliations’ different, but they are conflicting. Reconciliation becomes recognizable as a politically mobilized concept with attendant power struggles over its meaning and significance, and which in the context of the ICTR provides a function of insulating ‘the International community’ from more developed forms of practical responsibility under the guise of a gesture of generosity and justice.

CONTEXT TO THE ESTABLISHMENT OF THE ICTR

The most authoritative rendering of the truth is possible only through the crucible of a trial that accords full due process. Such trials can generate a comprehensive record of the nature and extent of the violations, how they were planned and executed, the fate of individual victims, who gave the orders and who carried them out... When the world community fails to prevent genocide from occurring, it should at least seek to ensure the prosecution of the allegedly responsible individuals in an institution that is fair and is seen as fair. In this regard, the Rwanda Tribunal serves as the conscience of the international community. It is the manifestation of the moral outrage of humanity over the transgressions of civilizational norms and ethics.

Statement of Malaysia, U.N. GAOR 51st Sess., at 18, U.N. Doc. A/51/PV.78 (1996)

9 In her report on the Eichmann Trial, Hanna Arendt notes in passing that Eichmann mentioned at times that he would ‘like to make peace with his former enemies’, a sentiment that he shared with many ordinary Germans and a sentiment that was behind proposals to create a ‘conciliation committee’ to bring together Nazi murderers and Jewish survivors. She regarded such ideas as completely fantastic and utterly devoid of reality, serving only to give ‘an extraordinary sense of elation’ to the speaker, as they embarked on this gross adventure in self-deception. H. Arendt, *Eichmann in Jerusalem : A Report on the Banality of Evil*, Penguin Classics, London 2006.

Most reasonably informed people above a certain age have a general idea of what happened in Rwanda in 1994. In that year the hitherto obscure (to a Western audience) African country exploded into the global news with graphic and terrible reports of the mass murder of men, women and children of one ethnicity by the men, women and children of another. The reports were often so horrific as to be practically unbelievable; detailing the torture and slaughter of thousands upon thousands by neighbours armed with crude machetes and farming instruments. Many people will remember that the UN forces present at the time were largely pulled out rather than engaged to try to stop the carnage.¹⁰ As time went on and more diverse reports of the situation emerged, it became more difficult to grasp a simple version of what was going on, and this became even more the case as the genocide gave way to a massive humanitarian refugee crisis as displaced Rwandans flooded into disease ridden camps along the border with Congo and Tanzania and reports emerged of thousands of deaths from preventable diseases such as typhoid and cholera. The displaced people were Rwandan Hutus, while the genocidal campaign had been conducted against Tutsis. The attention paid to the refugee crisis arguably deflected attention from the aftermath of the genocide, in particular the plight of the survivors. The international community, it seemed, was much more ready to intervene to provide humanitarian aid relief than to intervene militarily at an earlier stage when the genocide itself might have been averted and this non-political politics has been the subject of much debate.¹¹ As is the way of things, new global calamities came to grab the headlines and to divert attention from Rwanda and the aftermath to the genocide, and public media reports were replaced gradually by a mass of more considered literature trying to make sense of that period.¹²

The attention of the UN was not so easily diverted. It had been the object of heavy criticism not only from the media but also from many of its own members for its response to the crisis in Rwanda. For example, Kofi Annan, in response to a deeply critical independent report on the conduct of the UN in relation to the genocide – which he himself as Secretary General commissioned – expressed publicly his deep remorse at the UN's failure to prevent or stop the genocides.¹³ Annan, at the time of the genocide, had been the UN High Official

10 R. Dallaire, *Shake Hands with the Devil*, Arrow, London 2004.

11 See, for example, S. Žižek, 'Against Human Rights', *New Left Review*, Vol. 34, 2005; M. Mamdani, 'The Politics of Naming', *London Review of Books*, Vol. 29, No. 5, 2007.

12 G. Prunier, *The Rwandan Crisis: History of a Genocide*, Hurst, London 1997; A. Des Forges, *Leave None to Tell the Story: Genocide in Rwanda*, Human Rights Watch 1999; P. Gourevitch, *We Wish To Inform You That Tomorrow We Will Be Killed With Our Families*, Picador, London 2000; M. Mamdani, *When Victims Become Killers; Colonialism, Nativism and the Genocide in Rwanda*, Princeton University Press, Princeton 2001; L. Melvern, *Conspiracy to Murder: The Rwandan Genocide*, Verso, London 2004; L. Melvern, *A People Betrayed; The Role of the West in Rwanda's Genocide*, Zed Books, London 2000.

13 See UN Security Council, *Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda*, 15 December 1999.

in charge of the Rwandan mission. In the autumn of 1994, just a few months after the mass killings had stopped, authorized under UN Resolution 935, the UN sent in a team of investigators to make an initial report on what had happened. The investigators found that there was widespread evidence of a genocidal campaign against the ethnic Tutsis of Rwanda, and evidence of the mass-killing of ethnic Hutus on the basis of their real or supposed opposition to the exterminations, or because they were mistaken for Tutsis. The report found that Tutsis had been targeted as a group, the Hutus as individuals. On the basis of this report the UN concluded that genocide had occurred, and an International Criminal Tribunal for Rwanda was set up, through a similar *ad-hoc* process and along similar lines to the recently established International Criminal Tribunal for Former-Yugoslavia, to try those most responsible for the outrage. The ICTR was set up under the mandate of UN Resolution 955 of 8 November 1994, in the preamble to which was stated: ‘Expressing once again its grave concern at the reports indicating that genocide and other systematic, widespread, and flagrant violations of international humanitarian law have been committed in Rwanda [...]’.

The juridical response to trying those responsible for the genocide in Rwanda has come in two forms; the domestic Rwandan response, based on the Rwanda legal system, and the international response, based on International Law. Rwanda has adopted a twin-track process for trying those accused of genocide. Those accused of the most serious crimes, for example organizing and fomenting the original scheme are tried through a formal court process and may be awarded prison sentences (up until the abolition of capital punishment in 2007, the death penalty was also available and applied).¹⁴ Those accused of more minor crimes, for example crimes against property, are tried through the *gacaca* process,¹⁵ where local justices adjudicate through more informal processes and award compensation or require imprisonment. The ICTR tries those that it regards as being most seriously implicated in the genocide, and awards prison sentences up to a maximum of life imprisonment. To some degree the functioning of both these structures of justice complements each other. For example, the participation of the international community under the auspices of the UN in the body of the ICTR carries sufficient weight to have persuaded many countries throughout the world to extradite accused persons – amongst whom were some of the chief architects of the genocide – who had fled into exile on their territory after the genocide, something which the government of Rwanda was unable to do. For example ex-prime minister Jean-Paul Kambanda was extradited to the ICTR from Kenya in 1997 to face trial in Arusha and in 1998 became the first ever head of government

14 The abolition of the death penalty was undertaken in order to facilitate the eventual transfer of accused from the ICTR, as part of the completion strategy, which the ICTR would not countenance while the death penalty stood.

15 To be discussed in further detail below.

to be convicted of genocide. However, the ICTR could only ever be an instrument to administer justice in relation to a very limited number of accused due to the complex and expensive nature of its processes (some trials have now been running for more than five years) so that the administration of justice in relation to the mass of those involved was necessary as a feature of domestic Rwandan legality. Despite the seeming complementarity of the processes, however, the initial support of the Rwandan government for an international tribunal quickly gave way to an attitude of reservation as to the proposed form and location of such a tribunal, and the relationship between the actual ICTR since its inception and the Rwandan government has often deteriorated to something approaching mutual hostility.¹⁶ There have been diverse reasons for this breakdown in relations, most notably the Rwandan government's ongoing annoyance that the massive expenditure disbursed to fund the ICTR was not allocated to reconstruction and reconciliation efforts on its own soil, either as direct grant or by virtue of the Tribunal having its seat there. Beyond matters of resources there have been three chief objections by the Rwandan government to the actual legal processes of the ICTR; the first is the notion that the formal criminal legal structure as instituted places too much emphasis on the perpetrators rather than the victims, the second that the maximum penalty for those found guilty did not extend to the death penalty, and the third that at certain points the idea of trying members of the Rwandan Patriotic Front (the invading 'Tutsi army' which militarily defeated the then Rwandan government to end the genocide) for involvement in crimes against humanity was mooted.¹⁷

The two different patterns of juridico-political response to the genocide exist, of course, within two different worlds of possibility. The international response is a product of the entire gamut of international structures that both compose and influence the conduct of the UN, while the Rwandan response is entirely local and with regard for wider geopolitical or global developmental ideas only insofar as these are perceived to serve the national interest at present – that national interest having to bend itself to the pressing concerns of national reconciliation and reconstruction. And it is on this ground of 'reconciliation' that the conceptual programmes of both the ICTR and the Rwandan justice system ostensibly find their common ground. This term has gained particularly prominence within international humanitarian thinking as a result of what seems the more or less successful transition of South Africa away from the Apartheid regime to a multi-cultural democratic polity, aided by the novel justice mechanism of a 'truth and reconciliation commission'. This is not the only arena in which 'reconciliation' has been mobilized as a basic idea within which justice processes should be organized, in obvious contrast to more classical (Kantian) ideas of justice mechanisms serving a higher form of ideal abstraction of itself; the purity

16 K. Moghalu, *Rwanda's Genocide: The Politics of Global Justice*, Macmillan, London 2005.

17 *Id.*, p. 125-153.

of judgement and punishment in relation to the existential and deontological matter of the crime. The reasons for the ascendancy of reconciliation are based in the marriage of political uncertainty of both conceptual and practical hue.¹⁸ The conceptual uncertainty that has taken hold of international systems of justice is everywhere evident, as to the value of an over-riding Western notion of justice provision and justice mechanisms that gain global prominence because of the historical and actual pre-eminence of Western nations within international governmental and non-governmental agencies, but which are increasingly conceded to be inappropriate for local circumstances in particular areas of the world. In terms of practical politics the requirement for reconciliation in the wake of situations of conflict is generally dictated by the fact that the foundational structure, the nation-state, on which international relations is based cannot be regarded as a flexible entity, so that there is generally no option but that the citizens of a territory that has gone through conflict must somehow be reconciled to each other at least to the extent that they can inhabit the same national territory. Whatever the efficaciousness of either the ICTR or the Rwandan justice system in relation to the genocide, there is no doubt that they both aim to facilitate reconciliation. The question opens up of what particular reconciliation is being constituted in each site.¹⁹

THE ICTR AND RECONCILIATION

Political and social stabilization in Rwanda depends on whether all citizens, regardless of their ethnic origin, can be reconciled. Such national reconciliation would imply the due administration of justice, first of all to ensure that the guilty parties no longer feel they can act with impunity, which would act as a deterrent. Secondly, it would enable victims and their families to feel that justice was being done and that the real perpetrators were being punished, which would dampen any feelings of revenge. If justice is not done, there may be no end to hatred, and atrocities could go on and on, with the executioners believing they were immune to prosecution and the victims' thirst for revenge fuelled by a sense of injustice and the idea that an entire ethnic group was responsible for the atrocities committed against them. In this regard it is of paramount importance that justice be done, because this will help replace the idea of collective political responsibility with the idea of individual criminal responsibility.

18 A. Schaap, *Political Reconciliation*, Routledge, London 2005.

19 For an introduction to the multiplicity and generality of debates on reconciliation see Schaap 2005 and S. Veitch 2007.

First ICTR President (Judge) Laity Kama, addressing U.N. GAOR, 51st Session:
5, U.N. Doc. A/51/PV.78 (1996)

It is a gauge of just how successful has the idea of reconciliation become in recent times that in the quote given above from the (then) leading judge at the International Criminal Tribunal for Rwanda, a court trying ‘an ideal type case of violations of international criminal law’,²⁰ justice, rather than simply proposed as good, correct and necessary in its own right, is cast as a support player in relation to the leading role given to national reconciliation. Criminal prosecutions are presented in quite classical legal terms as necessary to guard against impunity and so to have a deterrent effect, but also are presented, in much less classical terms, as necessary to serve the role of replacing ‘collective political responsibility with individual criminal responsibility.’ The role of the criminal law, in other words, is explicitly cast as being less about punishing the guilty few because they are guilty, but because by punishing the guilty few the implication is to recognize the innocence of the many. Law is proposed as a vital vector instrument to provide an escape from a corrosive politics and to ground a new future. Through this gesture the many who might have seemed to bear some political responsibility because of some perhaps minimal involvement which may have been thrust upon them – they, after all, escaped the violent maelstrom and also failed to stop it – thus come to constitute a decontaminated political community, and we might further say, translating a vocabulary of political responsibility into a more personal language but without violence to ideas at play, is that an aspect of this decontamination is to take away their shame.

Such emotional language does enter into the judge’s statement, but from another direction and to another end. There are repeated references to the idea of ‘feelings’, in particular to the feelings of the victims. The judge seems to be willing to ascribe to the court the responsibility of ensuring not alone that justice be done, but also that the victims should *feel* that justice has been done. This feeling of justice having been done is linked on one side to the attribution of guilt to the responsible criminals, and on the other side to the prospect of national reconciliation: the victims will feel that justice has been done if they can come to understand that the responsibility lies not with an entire ethnic group but with a small group of individuals, and when they come to this realization then they will be in a position to reconcile with the innocent majority as opposed to the ‘real perpetrators’. This realization will be enough to diffuse the ‘thirst for revenge’ harboured by victims and replace it with a sense of justice having been done. Once again law here is portrayed as the purifier of politics, except this purification process is directed to the victims (rather than

20 D. Rothe & C.W. Mullins, *Symbolic Gestures and the Generation of Global Social Control: The International Criminal Court*, Lexington Books, Lanham 2006, p. 5.

those who might be thought politically responsible) and is directed forward in time, the purging of feelings of revenge that they might carry forward, rather than the purging of, for those potentially to be held politically responsible, the notion of previous culpability. The law is a double filter of social process and social affect; it transforms perverse politics into law, leaving the ground ready for a new politics, and it transforms grand negative social emotions into positive emotions, leaving the ground ready for a new community. The double sense of its operation is captured by the term 'reconciliation', a concept from which the judge does not shy in the slightest.

A third element that undergirds those two already mentioned, and which has entered obliquely into the discussions above, is that of time, or more precisely the relationship between reconciliation and time. The law deals with the past and opens the way to the future. In classical legal terms this two-directional quality is heavily biased towards an attention on the past; the law deals with the past and there is an implicit assumption that the future will take care of itself as a matter of society and politics. The statement from the judge is a statement of recognition that the weight of attention has shifted much more towards the future, to the idea of the importance of reconciliation in the grand scheme of things and the relative putting in perspective of the past, that is, the crimes which have been committed in the past. To the extent that the past has a value there is an inference that it has a value in order to ground a positive future; the idea is re-conciliation, the projection backwards in time of a notion of conciliarity, of being in council, in order to ground the supernormative 'reconciliation'. Politics in the sense of social practice is purified, politics in the sense of affect is purified, politics in the sense of previous structures of social meaning is purified (through an imaginary projection of a natural order of 'conciliation' backwards and forwards in time). The law as simple process of adjudication, how could it not in the face of such power, prostrate itself before reconciliation.

Such an attitude is not, of course, without its critics. Take, for example, the following:

Reconciliation has too often come to signify in the political discourse of our times the call not just to put the trauma's of the past behind us but also, in a sense, to put behind us the very politics of the past. Against this our main concern has been to emphasise that 'reparation of historical injustices' requires that we face up to these injustices. That is what it means to do justice to them and reconciliation can only, properly, be the contingent response, not the unconditional outcome, of how societies face up to precisely that task.²¹

21 Christodoulidis and Veitch 2007, p. 1.

This marks out distinctly a latent theoretical danger of the kind of instrumentalization of (criminal) justice in relation to a projected future that lies at the heart of the discussion in the text above: namely that past injustices of a political nature by their conversion into tamer legal problems are swept under a carpet rather than resolved. What if, in other words and to respond directly to the quotation from Judge Laity Kama, the more true pattern of the past has been precisely ‘collective political responsibility’ for massive crimes against humanity, and the transference of criminal responsibility to the few in the service of reconciliation is an instance of over-determining an outcome which flies in the face of justice in a broader sense than that narrowly encompassed by criminal notions of intent and guilt? In this reading the new ‘decontaminated’ political community envisaged by the judge takes the paradoxical form of a legally constituted non-political political community, in the sense of a political community which must forget the conditions of its own coming into being in accepting the status of *tabula rasa*. Furthermore, the deep imbrications of law within politics, even if the particular events seem to warrant a generous and helpful intervention, has perhaps the effect of destroying the most valuable qualities of law as standing above a fray and adjudicating from a point of objectivity. The idea that the law must find people criminally responsible in order to create a political effect takes on a pattern of circularity; if the legal process has been set up on the basis that genocide occurred and the criminal law of genocide presumes an intent to commit genocide, and the future good of the political community requires reconciliation, and reconciliation requires the translation of ideas of political responsibility to those of individual criminal responsibility, and the court recognizes its own function as providing reconciliation, then the legal process will find that genocide has occurred and it will find individuals who will fulfil the conditions to be convicted of it.

But perhaps it is unwise to treat this matter too categorically, in the sense of assuming that perceived paradoxes of logic and circularities of argument are enough to ground fundamental objections. The judge’s statement under examination is an extract from a speech by a lawyer (the chief lawyer) from the ICTR and certainly made various claims about the legal process, but it was made to the General Assembly of the United Nations, and thus perhaps it was not only fitting that the speech should have blurred the boundaries between politics and law, but also that a certain amount of rhetorical excess might have been expected. Furthermore, as is well known and frequently acknowledged, the nature of international law in its current course of development is still such that its nature as law (with expected ‘rule of law’ characteristics of clarity and consistency of operation) is fre-

quently called into question, and its close links to politics are frequently and unavoidably apparent.²²

Finally, one might well claim that the focus on reconciliation as prior to (in importance) and post (in time) legal process creates a field of considerations (conceptual, practical, temporal) that is appropriate to the subject matter and in its complexities and paradoxes appropriately recalls profound theorization around questions of justice, rather than presumes justice as a simple function of law.²³ In this light one might say that the ICTR, and legal processes like it which self-consciously span the boundary of law and politics, are in a sense rescuing law (or attempting to do so) from a frequently perceived – and perhaps characteristically Modern – sterility,²⁴ to return to paying attention to considerations of justice (including affect²⁵) that are, after all, the *raison d'être* of law.

Adopting a slightly different vocabulary we might say that on certain liminal occasions law and politics approach each other to constitute 'transitional justice' which as a term is perhaps rescued from accusations of being either self-contradictory (logically paradoxical) or axiomatic (logically circular) by its usual modest employment as a rough and ready generic term to cover transition to liberal democracy, the deeper theorization of which (along with more profound questions of justice) is usually bracketed out.²⁶ Such a transitional justice optic through such a bracketing out or assumption of the basic ameliorative qualities of rule of law/democracy, open an opportunity for more detailed attention to the 'constructivist' qualities of legal process.²⁷ That is to say, what forward directed social effect is produced by the operation of diverse ostensibly legal processes, even if these processes recognizably do not contain all the elements that they would within a settled sphere of the operation of normal democratic politics. In this light statements and attitudes such as those quoted from Judge Laity Kama and Kofi Annan, which highlight the role of the ICTR

22 See Rothe & Mullins 2006; and, in particular, Mullins & Rothe 2008, for discussion and bibliography. See also K. Moghalu, *Global Justice: The Politics of War Crimes Trials*, Prager, New York 2006. For further discussion, see P. Zumbansen, 'Transnational Law and Societal Memory', in Veitch 2007. For comparison, see R. Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics and Diplomacy*, Oxford University Press, Oxford 2004.

23 See, paradigmatically, J. Derrida, 'Force of Law: The "Mystical Foundation of Authority"', in Gil Anidjar (Ed.), *Acts of Religion*, Routledge, New York/London 2002.

24 C. Douzinas, *The End of Human Rights*, Hart, Oxford, 2000; S. Motha 'Reconciliation as Domination', in Veitch 2007.

25 P. Goodrich, *Languages of Law*, Weidenfeld Paperbacks, London 1990.

26 R. Teitel, *Transitional Justice*, Oxford University Press, Oxford 2000; C. Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria*, Oxford University Press, Oxford 2008; C. Bell, 'Transitional Justice, Interdisciplinarity, and the State of the 'Field' or 'Non-Field'', *International Journal of Transitional Justice*, Vol. 3, 2009, p. 5-27.

27 Teitel 2000.

in furthering reconciliation, could well be regarded as legitimate in that they are not descriptive but performative; connecting reconciliation to criminal justice as a means to promote this as an idea not to make verifiable claims as to its truth. To push this idea a little further one might recognize the parameters of the acknowledged force of law as connected not just to physical force, but to its symbolic power, this power in itself having some qualities of the mystical, in other words to remark that the repetition of 'reconciliation' is more than performative in a secular sense, but also performative in a more basic sacred sense, it is incantatory to an idea of reconciliation in the sense of reaching out for shared humanity. The reconciliation in question, in other words, is also that between the global community and the Rwandan victims, an acknowledgement of a deep sense that the court process constitutes a species of atonement for (a general political) shameful abandonment.²⁸ The legal process is a formal prayer to justice, not its accomplishment.

RECONCILIATION AND RWANDA

Reconciliation is not just one of the many other options for us Rwandese, it is rather a non-negotiable obligation. An obligation to give ourselves hope for our old age; an obligation to leave to our children a better Rwanda to grow and live in. Statement from Antoine Rutayisire, Vice-President of the Rwandan National Unity and Reconciliation Commission, on the NURC website

On 1 October 2010 the UN released the official version of its 'Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003'. The Report, widely leaked in advance of its official release, accused the RPA, the Rwandan Army, of having committed numerous crimes against humanity in the course of its pursuit of ethnic Hutus who had refused repatriation into Rwanda during the RPA incursions into DRC in 1996-7, ostensibly carried out with a view to closing refugee camps which had become bases for hostile attacks on Rwanda. Such crimes against humanity were alleged to have included activities that could, if fully investigated and confirmed under more stringent evidential requirements, constitute acts of genocide. The impact of the report, and perhaps even more so of the numerous leaks of the draft report, was profound. President Paul Kagame made a speech to the General Assembly of the UN in which he condemned the draft report, protesting that:

28 N. McMillan, "Our Shame: International Responsibility for the Rwandan Genocide", *The Australian Feminist Law Journal*, Vol. 28, 2008, p. 3-29.

‘it has become clear that the UN has evolved into a two-tier organization, reflecting a world that seems to be divided into two major categories: one with inherent laudable values, rights and liberties, and another that needs to be taught and coached on these values.’²⁹

Foreign Minister Louise Mushikiwabo rubbished the report as ‘flawed and dangerous from start to finish’, ‘a moral and intellectual failure as well as an insult to history’, and ‘a threat to regional stability’³⁰ and threatened to withdraw Rwandan troops from their roles in UN international peace-keeping missions, including in the Sudan where the majority of the UN force and the force commander were Rwandese. Further developments in the shape of an International Tribunal to investigate further the issues raised, or recommendations for criminal prosecutions through the ICC or some *ad-hoc* process are to be expected (although note there that Rwanda is not a signatory to governing protocols of the ICC and thus not subject to its jurisdiction).

While any state might be expected to react angrily to allegations that its forces had been involved in crimes against humanity up to and including genocide, the allegations, and the reason why the foreign minister could refer to the report as an ‘insult to history’ were particularly galling and worrying to the Rwandan government in that its own version of history is that it managed to stop a genocide when the international community stood idly by, and that, furthermore, it was forced into its excursions into the DRC because of the inactivity of the UN to protect Rwanda from further aggression from genocidal forces even in the wake of all that happened in 1994. The international prestige of the Rwandan government, and the internal legitimacy of its governance has relied heavily on this version of events, in the face of periodic but persistent claims (and the power interests here are clear) that the situation in Rwanda in 1994 was not as black and white as it has been presented, and that, in fact, could more accurately be portrayed as a situation of mass civil strife with random atrocities on all sides and, to the extent that there was planning of genocide, that what occurred was a ‘double genocide’ of fanatical extremist Hutus against Tutsi, but also of RPA Tutsi military against Hutu civilians. The allegation of potential acts of genocide in the Congo therefore has a much deeper resonance with internal issues of legitimacy in Rwanda itself.

These issues of legitimate governance are particularly sensitive for the Rwandan government because of the policies that it has put in place to reconstruct the country in the aftermath of the genocide. The policy of ‘National Unity and Reconciliation’ put in place in 1999

²⁹ Speech to the General Assembly, 24 September 2010.

³⁰ Quoted in C. McGreal, ‘Delayed UN Report Links Rwanda to Congo Genocide’, *Guardian*, 1 October 2010.

and confirmed by the Rwandan constitution in 2003 in effect delegitimizes (and this has been instituted into various legal measures against 'divisionism') the idea of ethnic identity in favour of the strong promotion of national identity, predicated on the promotion of an accordant national historical narrative of relatively benign pre-colonial conditions that were corrupted and racialized by colonial intervention to the extent that the conditions for genocide were sown years in advance and subsequently aggravated by various extreme material conditions on the ground; unemployment, poverty, mis-governance, malign foreign interventions.³¹ The issue of the framing of the historical narrative of the most recent UN report is then also an issue, in that it fails to acknowledge what the Rwandan government has promoted as its core story of responsibility; that of the colonial powers, chief amongst which form the core membership of the UN Security Council. In adopting such a strong historical narrative the Rwandan government has drawn the implication that the narrative of the future must be equally strictly controlled, hence the authoritarian attitudes towards what are regarded as 'revisionist' tendencies, chiefly either a questioning of the core story of the genocide, which, while attaching immediate responsibility to Hutu genocidaires, does contain the mitigating elements for the Rwandan population as a whole of attaching overall historical responsibility to colonial powers (both in terms of immiseration of Rwanda and of the inculcation of destructive oppositional identity patterns along a 'divide and rule' axis, both sides of which were subjugated to dominant white colonial power). The categories of Hutu and Tutsi are, in current legislation, abolished, not just as a matter of formal identification through state bodies, but also as a matter of public discourse and political representation, to the extent that any such public or political discourse might be legally judged to have 'divisionist' effect and to result in criminal prosecution and stiff penalties.³² In practical terms, it is often alleged, what this means is that an ostensibly democratic government is in fact an elite clientelist Tutsi authoritarian plutocracy, centred around the charismatic President Paul Kagame, leader of the invading Tutsi forces into Rwanda at the time of the genocide and since then two-term President, on the most recent occasion ostensibly elected with over 90% of the popular vote – a noted and active proponent of this theory is Paul Rusesabagina, hero of the popular fact-based film 'Hotel Rwanda'.³³ The shield that the Rwandan government uses against such attacks is the moral authority it has garnered through its having stopped the 1994 genocide, and the idea that such measures which may seem to have an authoritarian tang of suppressing freedom of

31 S. Buckley-Zistel, 'Nation, Narration, Unification? The Politics of History Teaching After the Rwandan Genocide', *Journal of Genocide Research*, Vol. 11, No. 1, 2009, p. 31-53.

32 E. Zorbas, 'What Does Reconciliation After Genocide Mean? Public Transcripts and Hidden Transcripts in Post-Genocide Rwanda', *Journal of Genocide Research*, Vol. 11, No. 1, 2009, p. 127-147.

33 I am grateful to Nesam McMillan for pointing out the irony that both Kagame and Rusesabagina are feted as heroes in the West, with little or no acknowledgement of their incompatible historical and political analyses and visions of the future.

thought and expression, are in fact entirely necessary as an accelerated programme of re-education that is up against the clock of potential re-lapse back into an available, deep-rooted through colonial imposition, pattern of ethnic division, mutual hatred and violence. The idea that they were themselves responsible for genocide calls all this structure of legitimation into question, melts it down into a relativist 'two sides to every story' quagmire. That is no basis on which to build a future.

The institutional structures which have been set up in Rwanda to counter the potential of a relapse into what it would regard as negative and incorrect understanding of the genocide both in its immediate operation and in its historical (determining) context and which are most generalized in the country, are the *gacaca* legal process and the *ingando* re-education process. Each of these processes finds an antecedent in the pre-colonial history of Rwanda. The former is a community legal process adjudicated by trained local personnel who take the role of the 'elders' in more traditional practice and who pass judgement on the less serious cases in relation to genocide, passing sentence that may run to incarceration but which may also be limited to or include reparation or community or victim oriented work.³⁴ The focus is not alone on the passing of judgement, but on the opening up of a public forum for the expression of public accounts of what happened, and of instituting a space where there is a sense of community involvement in the provision of justice and therefore of opening a space for a shared reconciliation. The degree to which this functions efficiently is highly contested, and there are obvious plausible difficulties even from a theoretical point of view in that many victims are dead and so there may be few available witnesses to particular events, the witnesses may feel intimidated from speaking, opportunists might take the chance to accuse innocent people with a view to gaining some unwarranted revenge or personal advantage and so forth.³⁵ Nevertheless, the attempt is to create this process as a site for reconciliation through general expression and coming to terms with truth as personal testimony as well as with the truth of the eventual result. *Ingando* is a mass re-education process, originally conceived as a tool specifically for former combatants and released prisoners (of whom at one stage there were well over 100,000 imprisoned in relation to genocide crimes) but which has been broadened into a much more comprehensive civics programme for genocide survivors, community leaders, university students, women's groups and youth groups. Topics are covered under five central themes: analysis of Rwanda's problems; history of Rwanda; political and socioeconomic issues in Rwanda; Africa, rights, obligations and duties; leadership.

34 P. Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda*, Cambridge University Press, Cambridge 2010; D. Temple-Raston, *Justice on the Grass*, Free Press, New York 2005.

35 Clark 2010; Temple-Raston 2005; Buckley-Zistel 2009; Zorbas 2009.

What is evident in the two institutions described briefly above is that there is a coherent promulgation of the core narrative of the fundamental danger of ethnic divisionism, the roots of such divisionism in the colonial period, and the remedy for such divisionism in the recovery of a more pure pre-colonial period of community relative harmony which can be brought up to date and used to invigorate a sense of common Rwandan identity. The contrast with the implicit and sometimes explicit understandings which ground the ICTR process is very distinct. For the ICTR the route to reconciliation is to transform collective political responsibility into individual criminal responsibility. For the Rwandan government there is no question but that there was collective political responsibility and mass participation. However, the roots of this political responsibility are located in a perverse Rwandan sociality that itself was the result of the colonial period. The prosecution and conviction of those considered most responsible in the sense of having positions of leadership and responsibility or having participated actively in murder is a matter of justice and not particularly related to reconciliation. The contemporarily innovative but historically based community restorative and mass education programmes of *gacaca* and *ingando* are designed to construct and promote a strong national narrative, a shared sense of history, a plausible responsible 'Other' that displaces the potential re-emergence of Tutsi-Hutu rivalry and conflict and a sense of shared future on the basis of common understanding of the past.

This programme of reconciliation is itself situated within a wider social project of economic development along the pattern of standard indices of development; health, education, infrastructural development, sanitation, transport, good governance. In 2000 the Rwandan government released its 'Vision 2020' document, including a foreword by President Kagame in which he stated:

The Vision 2020 is a reflection of our aspiration and determination as Rwandans, to construct a united, democratic and inclusive Rwandan identity, after so many years of authoritarian and exclusivist dispensation. We aim, through this Vision, to transform our country into a middle- income nation in which Rwandans are healthier, educated and generally more prosperous. The Rwanda we seek is one that is united and competitive both regionally and globally. To achieve this, the Vision 2020 identifies six interwoven pillars, including good governance and efficient State, skilled human capital, vibrant private sector, world-class physical infrastructure and modern agriculture and livestock, all geared towards national, regional and global markets.

This document has been followed up by series of detailed policy documents and programmes which pursue the market based development principles laid out in Vision 2020,

the latest of which is the 'Economic Development and Poverty Reduction Strategy 2008-2012' document of 2007 which charts the progress up to that point and lays out the pathway for projected future development. This is not the time and place for an assessment of the plausibility of the projections in this and similar documents, but simply an occasion to remark that the Rwandan government explicitly models Rwandan development on Asian tiger economic development and seeks the transformation of the Rwandan economy from a subsistence agrarian economy to a 'knowledge-based' 'middle-income' economy by the year 2020. It recognizes the absolute necessity of such development given that the population is projected to double from eight to sixteen million people by then, and given that the lack of resources has been acknowledged as a co-factor in the development of the genocide. In other words, the Rwandan government seems clear-eyed about the very serious social trouble that lies ahead if there is not sufficient economic development. The very clear sub-text to many documents such as the two mentioned is that reconciliatory practices have to be read in the context of this most basic of objectives, hence the extremely hard line on what might be regarded as 'divisionist' in the sense of creating obstacles to a unified population working to progress economically with a shared understanding of past and potential (brighter) future.

CONCLUSION

The International Criminal Tribunal for Rwanda delivered the first ever judgment on the crime of genocide by an international court. This judgment is a testament to our collective determination to confront the heinous crime of genocide in a way that we never have before. I am sure that I speak for the entire international community when I express the hope that this judgment will contribute to the long term process of national reconciliation in Rwanda. For there can be no healing without peace; there can be no peace without justice; and there can be no justice without respect for human rights and the rule of law.

Kofi Annan, preamble message to ICTR document, *Challenging Impunity*

The ICTR, which began operating in 1997, is still on-going, although subsequent events elsewhere guarantee that it has a low profile in global news coverage. To date forty nine people have been tried to completion at first instance, with forty one of those having been found guilty of crimes of genocide and/or crimes against humanity, of whom nine are currently pursuing appeals. Eight people have been acquitted. Twenty cases are currently in progress and two people are detained awaiting trial. Ten named accused are still at

large.³⁶ A 'completion strategy' for the Tribunal has been finalized, which envisages the possible end of trials in Arusha by the end of 2011, and the subsequent timely completion of any appeals processes (heard in The Hague). This is undoubtedly a rather slender tally of results in relation to an event of genocide wherein the estimates as to those killed generally vary between half a million to one million people. The legitimation of such a paucity of trials, as discussed above, is that only those considered *prima facie* most responsible and who have escaped the jurisdiction of Rwanda are indicted at the ICTR, and that the ICTR must be understood as complementary to the domestic Rwandan justice system in producing an adequate overall justice process. This essay has focused on the somewhat confusing further attempts to go beyond the legitimation of the ICTR on the grounds of justice considerations in relation to heinous crimes and further legitimation on the grounds of a contribution to an undoubtedly desirable outcome, some form of 'reconciliation' for Rwanda itself, with all due caution to the flexibility of such a concept. The claims as to this further contribution to Rwandan reconciliation rest, as discussed above, on a notion of the symbolic power of the law in a transitional context to create reconciliation by virtue of the repeated annunciation of the same, a form of exemplary justice, and a recognition that the legal process is part of a larger social imperative. However, as this essay has gone on to detail, the symbolic power of law in this context is reliant on its ability to convert mass political responsibility into individual criminal responsibility. This is a conversion process which is directly counter to the reconciliation paradigm which operates inside Rwanda itself, where the story is of mass political responsibility where ultimately such responsibility comes to rest with the structuring force of colonial relations. To read this contrast in another direction, the claim can be made that the translation by the ICTR of political responsibility to criminal responsibility is the structural feature of the court itself which has the effect of pre-absolving colonial political structures from any consideration as potentially culpable (and potentially neo-colonial persistent structures and even persons) in favour of making sure that guilt will be located within Rwandan itself and a limited group of people at that. The incapacity of the legal forum to attend to wider notions than individual criminal intent serves as an insulation from consideration as pernicious to the very features on which the Rwandan government focuses its attention as the root of the genocide.

Putting this argument bluntly, it is that the legal institution itself, whatever the outcome of the trials, displays, reproduces and rests on a structure of ideas, a political form, that is closely related to the structure of the long term colonial relations between Rwanda and the colonizing Western powers and which persists in the post-genocide period. In this reading the attitude displayed by Judge Laity Kama in the quotation on page nine above

³⁶ Accurate as of 1 June 2011. For up-to-date information see <www.unictr.org/Cases>.

is approved to the extent that the court is recognized as not principally a legal institution, but rather an exhibition of a deep political structure which happens to take the form of a court, although the political quality of the court is read in much more negative fashion than the interpretation offered by the judge. The political structure is that which seems to be given as a gift or paid as a debt due, actually operates as a gift to self. Specifically in relation to the ICTR, the gift of the international community to the Rwanda people in recognition of their loss and its own inability to act sooner, is the gift of a kind of mirror within which the West finds its own returned humanity. The ICTR acts as ‘the conscience of the international community’.³⁷ It did not act in time to stop the genocide but has the ability to destroy the impunity of the responsible and so to contribute to reconciliation. Except that the structures of meaning within which it wants to frame the genocide in order to make this gift, have the effect of directly countering the basic narrative of responsibility on which the Rwandan government has based its entire programme of reconciliation. Reconciliation for Rwanda is nominally a principal goal of the ICTR, but is structurally secondary to the West’s reconciliation with its own sense of itself as benign, a sense of self which allows to emerge intact an idea of genocide, of the Rwandan genocide, as having its roots in the evil conduct of a limited cohort of Rwandan citizens. Whatever the questions which hang over the good faith and good conduct of the Rwandan government in regards the issue of reconciliation, it is important that the structural inadequacies of the UN justice response through the ICTR should not be allowed to be hidden by the idea that domestic criminal processes can be translated onto a transnational sphere and somehow become in politics but not of it. This clumsy translation can only function to let the International Community see what it wants to see, itself staring back in pious self-satisfaction.

³⁷ *Id.*