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United States Department of State
Washington, D.C. 20520



June 21, 1994

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TO: AF - Amb. Moose
AF - Ms. Bushnell

FROM: L/AF - Joan Donoghue (JD)

SUBJECT: Mechanisms for Holding Individuals Accountable for Events in Rwanda

Summary. AF/C asked me to provide some information on mechanisms that could be used to make individuals accountable for their participation in heinous acts in Rwanda. This memorandum summarizes mechanisms that have been discussed in the case of Rwanda or in similar situations (e.g., Yugoslavia and Cambodia). Included here are a number of mechanisms that do not lead directly to prosecution of individuals, but that could promote accountability.

Can America? (1-5)

I offer these thoughts to help AF assess available options, recognizing that others in the Office of the Legal Adviser may have views on the desirability of pursuing some of the options discussed here.

The UN Human Rights Commission's Special Rapporteur. On May 25, the UN Human Rights Commission established a Special Rapporteur for Rwanda. The Commission asked the Special Rapporteur to report on the human rights situation in Rwanda and to make recommendations on bringing violations to an end and preventing future abuses. He is supposed to compile systematically information on possible violations of human rights and international humanitarian law, including crimes against humanity and acts of genocide.

Consideration of the Special Rapporteur's report by the Human Rights Commission will not in itself lead to individual accountability. The Commission does not have any means to bring charges against individuals. However, the Special Rapporteur's report could promote individual accountability. At a minimum, the report may increase the political imperative to devise mechanisms that focus more directly on the actions of

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individuals. Information gathered by the Special Rapporteur could also be shared with officials responsible for any future proceedings that seek to establish individual accountability.

The Commission of Experts. Spain proposed to the UN Security Council a resolution that would establish a Commission of Experts to examine and analyze information on Rwanda "with a view to providing the Secretary-General with its conclusions on the evidence of possible breaches of the Convention on Genocide and other grave violations of international humanitarian law." States are called upon "to collate substantiated information" and to make it available within thirty days. The Commission is charged with preparing a report within ninety days, including recommendations for "possible further appropriate steps in order to ensure that persons responsible for such acts are brought to justice." The Commission is asked to coordinate with the Special Rapporteur.

If the Commission is established, the USG will want to provide information to it. Conceivably, USG personnel could provide first-hand accounts of incidents that they observed while they were in Rwanda. If other U.S. nationals (e.g. missionaries) have information to provide, the USG could facilitate the Commission's collection of information from them. The intelligence community might have information that could be used to build cases against individuals. The possible use of intelligence information in any public proceeding gives rise to a tension between the intelligence community's desire to protect sources and methods and the desire for information that can be used in a prosecution or other proceeding. AF would need to work with the intelligence community to determine what information is available and to encourage it to declassify useful information. (See the related discussion of a U.S. investigation, below).

A War Crimes Tribunal. There is no standing international forum for the resolution of cases involving war crimes, crimes against humanity or genocide. The UN Security Council has the legal authority to create such a body.

On May 25, 1993, the UN Security Council established an Ad Hoc War Crimes Tribunal for the former Yugoslavia. The Commission is charged with the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia. Much of the Commission's first year has been spent on organizational matters, including the UNGA's selection of the eleven judges and hiring of staff. (The position of Chief

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Prosecutor remains vacant). The Tribunal will make use of records developed by a UN Commission of Experts that had been established prior to the Tribunal.

X // A War Crimes Tribunal is expensive and much of the burden for the Yugoslavia tribunal has fallen on the United States. The USG has pledged \$3 million to assist the Tribunal in its work. In addition, for the current fiscal year, the President is authorized to draw down \$25 million in goods and services for the Tribunal. (Note: no additional funds were appropriated for this drawdown.) Pursuant to this authority, twenty prosecutors, investigators and regional experts from the USG have begun to work for the Tribunal (without any reimbursement of their agencies). In addition, the USG has conducted its own investigations, and has provided the results of those investigations to the Tribunal.

If there were a desire to establish a similar tribunal for Rwanda, two options seem evident. First, the mandate of the existing tribunal could be expanded. This might reduce the start-up time for Rwanda-related prosecutions but could be viewed as shifting towards a standing international criminal court, a proposal that the USG has thus far been reluctant to endorse. Second, a free-standing tribunal could be established. From AF's perspective, it would be important to consider which model would be more likely to lead to the use of resources targeted at Rwanda.

United States investigation. The USG has conducted its own investigations of war crimes in Yugoslavia, with a view towards providing information to the Commission of Experts and the War Crimes Tribunal. USG teams (including State, DOD, Justice and intelligence community personnel) have interviewed hundreds of refugees and have prepared reports on those interviews.

My understanding is that this initiative has required State to exert considerable pressure on other agencies, which have much of the expertise necessary to conduct such investigations, but do not regard them as part of their normal work.

The fruits of a U.S. investigation could be shared with a number of entities, including the Special Rapporteur, the Commission of Experts (if it is established) and (potentially) with any tribunal that is established.

United States prosecution. With a few narrow exceptions, U.S. criminal jurisdiction normally does not extend to actions

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committed by foreign nationals in foreign countries, particularly if the victims are also foreign nationals. U.S. law implementing Articles II -VI of the Genocide Convention provides the United States with jurisdiction only over defendants who are nationals of the United States or who committed genocidal acts in the territory of the United States. Depending on the facts of a particular situation, it is conceivable that certain U.S. statutes could provide jurisdiction for U.S. prosecution with respect to a small number of incidents that may have occurred in Rwanda, e.g., the killing of any internationally protected persons and hostage taking.

Domestic prosecution in Rwanda. Numerous individuals have undoubtedly committed acts that violate Rwandan law. Apart from common crimes (e.g., murder) the Genocide Convention requires Rwanda to enact laws making genocide a crime and to prosecute perpetrators of acts of genocide committed in its territory. In the near future, however, prosecution in Rwanda may only be a theoretical option. (Ultimately, however, any reconciliation process in Rwanda could include UN or bilateral assistance to improve the judicial system and/or to assist in domestic prosecution of war criminals).

The International Court of Justice. The Genocide Convention provides, in Article IX, that --

"Disputes between the Contracting Parties relating to the interpretation, application, or fulfillment of the present Convention, including those relating to the responsibility of a state for genocide or for any other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of the parties to the dispute."

Under this provision, the International Court of Justice (ICJ) would have jurisdiction if an action were brought by another state that is a party to the Convention. Only states can bring cases in the ICJ. Rwanda, not its officials, would be the defendant. Because an ICJ case would focus on Rwanda's actions as a state, it would only indirectly address individual accountability.

The ICJ would be likely to conclude that it does not have jurisdiction in a case brought by the United States against Rwanda under the Genocide Convention. The United States became a party to the Genocide Convention subject to a reservation that it could be sued in the ICJ only with its consent. Because such reservations are applied reciprocally, Rwanda

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could invoke the U.S. reservation against the United States. Other states could bring a case against Rwanda (unless Rwanda or the other state in question has taken a relevant reservation, which we would need to examine).

Civil actions in the United States. U.S. statutes provide a potential basis for civil actions by victims against Rwandan nationals for violations of human rights committed in Rwanda. The statutes (the Alien Tort Statute and the Torture Victims Protective Act) are complex and much of the law relating to them is controversial. Under the right circumstances, however, a U.S. court might conclude that it has jurisdiction to hear a case brought by one Rwandan against another Rwandan for acts that occurred in Rwanda, e.g., allegations of torture or extrajudicial killing by a Rwandan who is present in the United States.

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Human rights groups could work with a victim to bring such a suit against a perpetrator. (We understand that one such suit has already been filed, but have not seen the court papers). Absent careful consideration of specific proposals, it would be unwise to encourage human rights groups to file such cases or to suggest that the USG would support them. Given the complexity of the legal issues, there is a risk that a court would ask the USG, through the Justice Department, for its views on a particular case and that USG views on a legal point might be unfavorable to a particular plaintiff.

A Commission of Inquiry. The parties to the civil war in El Salvador agreed, in their peace accords, to establish certain structures for the resolution of allegations against both sides. The "Truth Commission," established by the Security Council and staffed by non-Salvadorans, was a key part of this process. The Commission examined incidents and reported its conclusions and recommendations, including recommendations for prosecutions within El Salvador's national system.

At the very beginning of the Rwanda conflict, this model offered some appeal. At this point, however, there seems no prospects of the parties agreeing to such a mechanism.

Cleared:

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cc: AF/C - Reed Fendrick ✓

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