

THE UNITED STATES ROLE IN THE  
ESTABLISHMENT OF THE UNITED NATIONS  
INTERNATIONAL CRIMINAL TRIBUNAL  
FOR RWANDA

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*Introduction*

Following Schabas's introduction to the United Nations International Criminal Tribunal for Rwanda (ICTR), this chapter discusses the history of the establishment of that tribunal, setting the stage for Jallow's and Ngoga's evaluation of its performance in later chapters. This chapter is the first publication to report on detailed "elite interviewing," especially of current and former United States Government (USG) officials, and recently declassified documents on this topic. The origin of the ICTR is complicated and controversial because of the number, attractiveness and precedence of alternative transitional justice mechanisms, and the pitfalls of establishing such a tribunal for investigating, prosecuting and punishing the suspected perpetrators of the 1994 Rwandan genocide. This chapter focuses on the role of the USG in the establishment of the ICTR for two reasons. First, the USG was one of the primary—if not the most important—actors in the establishment of the ICTR. Second, for better or worse, the USG's reaction to international crises often significantly shapes the

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global response, owing to the US's preponderance of resources in the post-Cold War era. Because of space constraints, this chapter will not analyse the rationale for the USG's support for the ICTR, concentrating instead on the mechanics of creating the institution.

Much of this chapter includes a detailed historical account of the USG's involvement in establishing the ICTR. This narrative is important because, as Schabas discusses, the ICTR is critical to transitional justice in post-genocide Rwanda specifically, and, as Jallow notes, to the development of both international criminal law and war crimes tribunals more generally. The reader will learn several key facts from this chapter. First, the USG exercised leadership, perhaps more so than any other state, in the development of the ICTR. Second, two other permanent members of the United Nations Security Council (UNSC), Russia and France, played leading roles, especially in opposing the USG on its optimal preference for a transitional justice institution for post-genocide Rwanda. Finally, two non-permanent members of the UNSC at that time, Spain and New Zealand, also played critical roles in the establishment of the ICTR.

### *Background*

During the Rwandan genocide, besides the United Nations Assistance Mission for Rwanda (UNAMIR) and the controversial French-initiated *Opération Turquoise*, neither the UN nor the world's sole superpower, the United States, intervened, despite evidence of mass atrocities and the likelihood that even minimal efforts would have mitigated the scope of the genocide.<sup>2</sup> After the genocide, however, the UN, acting through the UNSC, where the USG took a proactive role, and on which the Government of Rwanda (GoR) coincidentally held a non-permanent seat during 1994, actively engaged in the post-conflict transitional justice process in Rwanda. Some USG officials involved in deliberations claim that the idea to establish the ICTR originated in late July 1994 within the USG<sup>3</sup> and that "the primary initiative for the action was that of the United States and we were the ones who moved it through the [UN Security] Council."<sup>4</sup> Indeed, among all states, the USG played the most significant role in all phases of the establishment of the ICTR—from being the first

2 Organization of African Unity (7 July 2000), Rwanda: The Preventable Genocide, <http://www.visiontv.ca/RememberRwanda/Report.pdf>.

3 See: Interview with Michael Matheson, former Deputy Legal Advisor to the US Department of State (11 Nov. 2005); Interview with David Scheffer, former US Ambassador for War Crimes Issues (18 Nov. 2005); Interview with John Shattuck, former US Assistant Secretary of State for Democracy, Human Rights, and Labor (9 Oct. 2003); Interview with Gregory Stanton, former Political Officer, Office for United Nations Political Affairs, US Department of State (26 June 2003).

4 Interview with Matheson (11 Nov. 2005).

state to publicly declare its support for the idea, to lobbying the international community for its acceptance, to lobbying the UN Independent Commission of Experts on Rwanda to issue an interim report including a recommendation to that effect, to playing a leading role in drafting the UNSC resolution that would create the ICTR, and, finally, to contributing the most financial support for its establishment.<sup>5</sup>

Several other states also played important roles in the establishment of the ICTR. First, the Spanish government proposed the establishment of the UN Independent Commission of Experts on Rwanda. Second, the French and Russian governments objected to the USG's initial proposal to expand the jurisdiction of the UN International Criminal Tribunal for the Former Yugoslavia (ICTY) to include the Rwandan genocide (what I call the "ICTY-Expanded" option), favouring instead the creation of a separate *ad hoc* UN international criminal tribunal (ICT) for Rwanda (what I call the "ICT-Separate" option). Finally, the New Zealand government proposed the compromise design of the creation of an *ad hoc* UN ICT for Rwanda (established by the UNSC's Chapter VII powers) that would share some bureaucracy, such as an appeals chamber and/or chief prosecutor, with the ICTY (what I call the "ICT-Tied" option), which is the option that would become the ICTR. These three ICT options—ICTY-Expanded, ICT-Separate and ICT-Tied—were the three main options discussed for the establishment of an ICT for Rwanda and are therefore critical to the following history of the etiology of this institution.

### *Sources*

My research draws upon three sets of sources. First, I researched primary sources, including published and unpublished USG documents, UNSC resolutions and reports, statements by USG and other state and inter-governmental officials reported in the press, and documents from the GoR. Most importantly, through submitting Freedom of Information Act requests to the USG, I successfully obtained—and, here, am the first to publicly report on—relevant documents regarding the USG role in the establishment of the ICTR. In total, the USG declassified and released to me several hundred pages of documents comprising 125 cables in whole or in part.<sup>6</sup> This is a gold mine of specific information about the USG decision-making process on the establishment of the ICTR. Such primary sources provide vital and unfiltered insight into the evolution of

5 The USG has also claimed to be the largest single government contributor of humanitarian assistance to the Rwanda crisis. See United States Department of State (3 August 1994), Cable Number 207687, "Press Guidance – August 3, 1994."

6 Where cables are cited in this chapter, they should be assumed to be declassified to and on file with the author.

the USG decision-making process, including the perspectives of key individuals. That said, one problem with such a declassification process is that, because the USG withholds some documents in whole or in part, it presents a self-selective portrait of USG internal discussions and decision-making.

Second, I conducted personal interviews with current and former USG officials involved in, or familiar with, US foreign policy regarding suspected *génocidaires*. I also interviewed other individuals who are knowledgeable about USG policy-making, including those from NGOs (human rights organisations, think tanks, etc.), academia, other state governments and the ICTR itself. Such elite interviewing provides additional information not available through existing primary or secondary sources, especially the views of those involved in making these decisions. However, like declassification, elite interviewing is not without its potential problems. For example, information derived from interviews may be biased because of accessibility only to certain individuals. Furthermore, intentionally or not, a decade or more after certain events, USG officials might not tell the whole truth or be completely thorough: first, being involved in a decision may inherently prevent impartiality; second, there may be incentives to exaggerate or lie, such as the desire to self-aggrandise, to make oneself appear more of a visionary, or to avoid criticism; third, these individuals may not remember or know (or both) why they supported a particular decision.<sup>7</sup> I obtained primary sources and conducted interviews in Oxford, Washington DC, New York City, The Hague, Arusha and Kigali. Furthermore, I attempted to correct potential problems with these sources by using, where possible, triangulation to corroborate events or explanations with more than one source, whether through interviews or by surveying the declassified documents or secondary literature on this topic. Finally, I consulted secondary sources to review the existing literature on the USG role in the establishment of the ICTR and other transitional justice institutions. Such documents provide crucial information on the background on and theoretical framework through which USG policy on transitional justice can be analysed.

### *Establishment and design of the ICTR*

On 8 November 1994, acting under Chapter VII of the UN Charter, the UNSC adopted Resolution 955 to establish the ICTR.<sup>8</sup> The statute constituting the ICTR is annexed in this UNSC resolution. The *ratione materiae* (subject-matter jurisdiction) of the ICTR is limited to genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions of 12 August

7 For a discussion of elite interviewing, including its potential pitfalls, and further information on the author's research methodology on this topic, see Kaufman (2004), 8-14.

8 UNSC Res 955 (1994).

1949 for the Protection of War Victims and of the Additional Protocol II thereto of 8 June 1977. The *ratione tempore* (temporal jurisdiction) is limited to crimes committed between 1 January and 31 December 1994. The *ratione personae et ratione loci* (personal and territorial jurisdiction) are limited to crimes committed by Rwandans in the territory of Rwanda or of neighbouring states, as well as by non-Rwandan citizens for crimes committed in Rwanda. UNSC Resolution 977, adopted on 22 February 1995, located the seat of the ICTR at Arusha.<sup>9</sup>

When established, the ICTR shared an appeals chamber and chief prosecutor with the ICTY and was endowed with UNSC Chapter VII powers to compel state compliance with, *inter alia*, the arrest and extradition of suspected *génocidaires*. The ICTR marks a watershed in the development of international law and justice because, in contrast to the ICTY, which treated the Balkans crisis as an ongoing international armed conflict, it is “the first international court having competence to prosecute and punish individuals for egregious crimes committed during an *internal* conflict.”<sup>10</sup>

In the case of Rwanda, the USG therefore chose to support a judicial process that would deal with only a few dozen *génocidaires*, be relatively expensive compared to other transitional justice options, be located outside the victimised country, create the precedent of establishing an ICT for a purely civil conflict, share some resources and bureaucracy with an existing transitional justice institution (the ICTY) and affirm the precedent (established by the ICTY) of the UNSC’s use of its Chapter VII powers to investigate selectively and to prosecute alleged atrocity perpetrators.

### *The history of USG support for the establishment of the ICTR*

The following narrative describes the development of USG support for the creation of the ICTR, from the date on which the Rwandan genocide began, 6 April 1994, to the date on which the UNSC voted to establish the ICTR, 8 November 1994.

*During the genocide: April – July 1994.* USG support for the creation of the ICTR began both publicly and privately before the genocide had even concluded. Publicly, immediately after the killing started on 6 April 1994, the USG began issuing general statements denouncing the atrocities and declaring a need for accountability for the genocide.<sup>11</sup> Indeed, the day after the genocide began, President Clinton declared that he was “shocked and deeply saddened...

9 UNSC Res 977 (1995).

10 R. S. Lee, “The Rwanda Tribunal”, *Leiden Journal of International Law*, 9 (1996), 37-61, at 37 (italics added).

11 Interview with Scheffer (24 June 2003).

horrified that elements of the Rwandan security forces have sought out and murdered Rwandan officials... condemn[ed] these actions and... call[ed] on all parties to cease any such actions immediately....”<sup>12</sup> That same day, the UNSC president for April 1994, Colin Keating, New Zealand’s permanent representative to the UN, issued a statement supported by the USG (as UNSC presidential statements are unanimous), condemning “these horrific attacks and their perpetrators, who must be held responsible.”<sup>13</sup> A week and a half later, the US National Security Adviser Anthony Lake called on “the leadership of the Rwandan armed forces, including Army Commander-in-Chief Col. Augustin Bizimungu, Col. [Léonard] Nkundiye, Capt. Pascal Simbikangwa and Col. [Théoneste] Bagosora, to do everything in their power to end the violence immediately.”<sup>14</sup> According to the historian and Human Rights Watch senior adviser Alison Des Forges, that statement “was the first by a major international actor to publicly assign responsibility for the ongoing killing to specific individuals, but it stopped short of calling the slaughter genocide.”<sup>15</sup> Perhaps the most forceful early public statement by the USG concerning accountability for the Rwandan genocide came on 28 April. That day, the US Department of State spokesperson Christine Shelly read a prepared statement that the USG “strongly condemns the massacres” and said that the USG was in touch with all parties to the conflict and would be “working very strongly through the United Nations”. During that press briefing, Shelly also indicated that there were four general transitional justice options for promoting justice and accountability: domestic prosecutions within Rwanda, the use of an ICT, referral to the UN, and the use of the International Court of Justice (ICJ).<sup>16</sup>

Private USG efforts to condemn and seek accountability for the genocide started at approximately the same time. On 26 April, the US Department of State decided that Prudence Bushnell, Principal Deputy Assistant Secretary of State for African Affairs, would make telephone calls to GoR officials leading the genocide and to rebel leaders. Bushnell spoke to Bagosora on 28 April, Bizimungu and Rwandan Patriotic Front (RPF) Major General Paul Kagame on 30 April, and Kagame again on 1 May. She tried unsuccessfully to call Bagosora again that week, but spoke to Bizimungu several more times in early

12 “100 Days of Slaughter: A Chronology of U.S./U.N. Actions.” (1999). Frontline, <http://www.pbs.org/wgbh/pages/frontline/shows/evil/etc/slaughter.html>.

13 UN Doc. S/PRST/1994/16 (7 April 1994).

14 Press Release, Office of the Press Secretary, The White House, “Statement by the Press Secretary”, 22 April 1994. Non-classified. Online. United States National Security Archive. Internet. Available: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB53/rw042294.pdf>.

15 Des Forges (1999), 284.

16 United States Department of State (29 April 1994). Cable Number 112290. “Daily Press Briefing of Thursday, April 28, 1994.”

May.<sup>17</sup> Bushnell told Bizimungu, “I am calling to tell you President Clinton is going to hold you accountable for the killings.”<sup>18</sup> In her conversation with Bagosora on 28 April, Bushnell urged him to “end the killings,” emphasising that “in the eyes of the world, the Rwanda military engaged in criminal acts” and stressing that “it would behoove [*sic*] the GoR military to show some responsible leadership and a willingness to compromise... we were looking to him personally to do the right thing.”<sup>19</sup> The US Assistant Secretary of State for African Affairs, George Moose, also repeatedly spoke by telephone to representatives of various sides of the conflict.<sup>20</sup> The implication of these discussions was that the USG was watching the genocide and taking note of its perpetrators, with the intention of eventually holding them individually accountable for their crimes.

The USG was not alone in calling for perpetrators to be brought to justice. Some Rwandans also did so, though they were much more specific (and, as it would turn out, accurate) about the precise form the accountability mechanism should take. Rwandans opposed to the genocidal Hutu regime, though not in power, almost immediately began demanding that the UN apprehend and try *génocidaires*. One week after the genocide began, Claude Dusaidi, the RPF representative to the UN, wrote to the UNSC president that a “crime of genocide” had been committed in Rwanda and requested that the UNSC immediately establish a UN ICT and apprehend those responsible for the killings.<sup>21</sup> After the genocide, the five reasons cited by the RPF-led GoR for its request for an ICT were: “to involve the international community, which was also harmed by the genocide and by the grave and massive violations of international humanitarian law” and “to enhance the exemplary nature of a justice that would be seen to be completely neutral and fair”; “to avoid any suspicion of its [the GoR’s] wanting to organize speedy, vengeful justice”; “to make it easier to get at those criminals who have found refuge in foreign countries”; to

17 Interview with Prudence Bushnell, former Principal US Deputy Assistant Secretary of State for African Affairs (2 January 2004).

18 S. Power, “*A Problem from Hell*”: *America and the Age of Genocide* (New York: Basic Books, 2002), 370.

19 United States Department of State (29 April 1994), Cable Number 113672.

20 United States Department of State (20 July 1994), Cable Number 194391, “Press Guidance – Wednesday, July 20, 1994.”

21 Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda. S/1999/1257, “Annex: Letter Dated 15 December 1999 from the Members of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda addressed to the Secretary-General.” 16 December 1999; Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda. S/1999/1257. “Enclosure: Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda.” 16 December 1999.

emphasise that “the genocide committed in Rwanda is a crime against human-kind and should be suppressed by the international community as a whole”; and “above all... to teach the Rwandese people a lesson, to fight against the impunity to which it had become accustomed since 1959 and to promote national reconciliation.”<sup>22</sup>

Two weeks later, on 30 April, the UNSC suggested that responsibility for atrocities in Rwanda should take the form of prosecution, but did not endorse a specific forum. The UNSC president’s statement called “on the leadership of both parties... to commit themselves to ensuring that persons who instigate or participate in such attacks are prosecuted and punished” and recalled that “persons who instigate or participate in such acts are individually responsible. In this context, the Security Council recalls that the killing of members of an ethnic group with the intention of destroying such a group in whole or in part constitutes a crime punishable under international law”; the Council president requested the UN Secretary-General “to make proposals for investigation of the reports of serious violations of international humanitarian law during the conflict.”<sup>23</sup> Without employing the word “genocide,” this statement alluded to its definition under international law.

RPF officials were not satisfied, however, with the progress being made in the UN and therefore lobbied publicly for an ICT using the tactic of alleged racism and regionalism. In May, the RPF prime minister designate Faustin Twagiramungu posed a rhetorical question at a press conference: “[i]s what is happening different from what happened in Nazi Germany? Was a war crimes court not set up in Germany? Is it because we’re Africans that a court has not been set up?”<sup>24</sup>

The same month, the USG began daily inter-governmental agency briefings on Rwanda.<sup>25</sup> Many of these discussions occurred in the US Interagency War Crimes Working Group, which had been founded in response to the Balkans crisis. The US Department of State led this interagency working group, which included representatives from the US National Security Council and the US Departments of Justice and Defense. From the US Department of State, represented were the Bureau of Democracy, Human Rights and Labor; the Bureau of International Organization Affairs; the Office of the Legal Adviser; and the US Mission to the UN. The US Interagency War Crimes Working Group was chaired or co-chaired during the genocide and immediately afterwards

22 UN Doc. S/PV.3453 (1994), 14, 16.

23 UN Doc. S/PRST/1994/21 (30 April 1994).

24 E. Neuffer, *The Key to My Neighbor’s House: Seeking Justice in Bosnia and Rwanda* (New York: Picador, 2001), 129.

25 “100 Days of Slaughter: A Chronology of U.S./U.N. Actions.” (1999).

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(leading up to the 8 November UNSC resolution 955) by John Shattuck,<sup>26</sup> David Scheffer,<sup>27</sup> and/or Michael Matheson.<sup>28</sup> Other members of this inter-agency working group included Conrad Harper,<sup>29</sup> Crystal Nix,<sup>30</sup> and Gregory Stanton.<sup>31/32</sup> The product of one meeting was a classified internal discussion paper, outlining goals, tactics and options for the daily USG taskforce on Rwanda. On the topic of “Genocide Investigation: Language that calls for an international investigation of human rights abuses and possible violations of the genocide convention,” the paper cautions, “Be careful. Legal at State was worried about this yesterday – Genocide finding could commit USG to actually ‘do something.’” On the topic of “Pressure to Punish Organizers of Killings,” the paper also cautions, “NO. Hold till Ceasefire has been established—don’t want to scare off the participants.”<sup>33</sup> Political considerations about automatic USG involvement and the disruption of the potential ceasefire agreement prevented the USG at this point from calling for the investigation of, and punishment for, the massacres.

Two weeks later, on 16 May, Joan Donoghue, US Department of State Assistant Legal Adviser for African Affairs, prepared a legal analysis for Christopher finding that “[t]here can be little question that the specific listed acts [of genocide] have taken place in Rwanda.”<sup>34</sup> Shortly thereafter, Toby Gati, Assistant Secretary of State for Intelligence and Research, sent a memorandum to Moose and Harper, concluding that “[t]here is substantial circumstantial evidence implicating senior Rwandan government and military officials in the widespread, systematic killing of ethnic Tutsis, and to a lesser extent, ethnic

26 Assistant Secretary of State, Bureau of Democracy, Human Rights, and Labor, US Department of State.

27 Senior Adviser and Counsel to Ambassador Albright, US Mission to the United Nations, US Department of State.

28 Deputy Legal Adviser, Office of the Legal Adviser, US Department of State.

29 Legal Adviser, US Department of State.

30 Counsellor, Bureau of Democracy, Human Rights, and Labor, US Department of State.

31 Political Officer, Office for UN Political Affairs, Bureau of International Organization Affairs, US Department of State.

32 Interview with Matheson (26 Aug. 2003). See also: Interview with Stanton (26 June 2003); Interview with Scheffer (24 June 2003).

33 Discussion Paper, Office of the Deputy Assistant Secretary of Defense for Middle East/Africa Region, Department of Defense, 1 May 1994, Secret, United States National Security Archive, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB53/rw050194.pdf>.

34 Draft Legal Analysis, Office of the Legal Adviser, Department of State, drafted by Assistant Legal Adviser for African Affairs Joan Donoghue, 16 May 1994, Secret, United States National Security Archive, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB53/rw051694.pdf>.

Hutus who supported power-sharing between the two groups.”<sup>35</sup> On 21 May, several US Department of State officials, including Moose, Shattuck, Douglas Bennett<sup>36</sup> and Harper, sent a memorandum, “Has Genocide Occurred in Rwanda?” to Christopher, recommending that he authorise US Department of State officials to use the formulation “acts of genocide have occurred,” noting that “[t]his is the same formulation that we use with respect to Bosnia.” The memorandum, which had the file name of “nonamerwandakillings,”<sup>37</sup> also notes that such a statement

would not have any particular legal consequences. Under the [Genocide] Convention, the prosecution of persons charged with genocide is the responsibility of the competent courts in the state where the acts took place or an international penal tribunal (none has yet been established); the US has no criminal jurisdiction over acts of genocide occurring within Rwanda unless they are committed by US citizens or they fall under another criminal provision of US law (such as those relating to acts of terrorism for which there is a basis for US jurisdiction).<sup>38</sup>

Publicly and internally, the USG was careful not to describe the conflict as “genocide”, in part for fear of what using that term might legally oblige the USG to do, such as apprehending and prosecuting the perpetrators.<sup>39</sup> While Rwandan men, women and children were being slaughtered by the hundreds of thousands, the US Department of State, which literally placed them in a category apart from American casualties, continued wrestling with what precisely to call the killings.<sup>40</sup>

During this same month (May), the USG began to urge the UN to take a more proactive role in responding to the genocide.<sup>41</sup> Human rights advocate Holly Burkhalter implies that Shattuck’s pressure on UN officials resulted in

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35 Memorandum from Assistant Secretary for Intelligence and Research Toby T. Gati to Assistant Secretary of State for African Affairs George Moose and Department of State Legal Adviser Conrad Harper, “Rwanda – Geneva Convention Violations”, circa 18 May 1994. Secret/ORCON (originator controlled), United States National Security Archive, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB53/rw051894.pdf>.

36 US Assistant Secretary of State, Bureau of International Organization Affairs.

37 See also: Power (2002), 362.

38 United States Department of State (21 May 1994). See also US DoS (20 and 21 May 1994). “Has Genocide Occurred in Rwanda?” Action Memorandum to the Secretary of State, through P – Mr. Tarnoff and G – Mr. Wirth, from AF – George E. Moose, DRL – John Shattuck, IO – Douglas J. Bennett, and L – Conrad K. Harper.

39 See e.g.: Jared A. Cohen and Zachary D. Kaufman (15 July 2005), “A Genocide by Any Other Name: Debating Genocide in Rwanda and Sudan,” Opinion Editorial, *Broward Times* (South Florida newspaper), 6; “100 Days of Slaughter: A Chronology of U.S./U.N. Actions.” (1999)

40 See e.g., US DoS (13 May 1994): “White House Press Guidance”, US DoS (26 May 1994), Office of the Spokesman, “Taken Question.”

41 Ibid.

the appointment of a special rapporteur on Rwanda.<sup>42</sup> The UN also responded to such pressure in other ways, such as by sending the UN High Commissioner for Human Rights, José Ayala Lasso, to Rwanda to investigate allegations of serious violations of international humanitarian law and to publish a report on his 11-12 May trip. Thus, even before the Rwandan genocide had ended, various agencies of the UN, such as the UN Office of the High Commissioner for Human Rights, the UN Commission on Human Rights, and the UNSC (including the USG), with the imprimatur of the RPF, had launched investigation of crimes and made known that their perpetrators would be held individually responsible.<sup>43</sup>

Also in May, the USG held bilateral meetings with relevant non-state actors to explore issues concerning pursuing transitional justice for Rwanda. Among other efforts, the US Ambassador to Belgium, Alan Blinken, met the ICJ Judge, Raymond Ranjeva, to explore “the notion of an international inquiry into gross violations of human rights in Rwanda.”<sup>44</sup> USG officials consulted NGOs, such as the International Committee of the Red Cross, on the possibility of creating an ICT for Rwanda and recruiting witnesses to testify.<sup>45</sup> The USG would later consult and lobby UN officials, including Lasso, on creating an ICT for Rwanda, specifically through the ICTY-Expanded structure.<sup>46</sup>

The following month, in June, momentum developed within the UN to establish a “commission of experts to gather evidence related to breaches of the genocide convention and other violations of international humanitarian law in Rwanda.” This commission would eventually become the UN Independent Commission of Experts on Rwanda. On 10 June, Spain circulated a draft resolution calling for the establishment of such a commission.<sup>47</sup> Spain’s initiative

42 H. J. Burkhalter, “The Question of Genocide: The Clinton Administration and Rwanda,” *World Policy Journal*, Volume 11, Issue 4, (Winter 1994/95), 44-54, at 52.

43 UN/HCHR. E/CN.4/S-3/3. (19 May 1994). Annex; UNSC Res 918 (1994); UN/HCHR. E/CN.4/S-3/3. (19 May 1994). Paragraphs 10, 20, and 32.

44 United States Department of State (16 May 1994). Cable Number 05416. “International Jurist Comments on Human Rights Inquiry in Rwanda.”

45 United States Department of State (24 May 1994). Cable Number 137577. “Under Secretary for Global Affairs Wirth’s Meeting with Director of Operations for ICRC, Jean de Courten, May 17, 1994.”

46 United States Department of State (5 August 1994). Cable Number 06844. “Meeting with High Commissioner for Human Rights: Rwanda, Cuba, China, and Other Issues.”; United States Department of State (27 September 1994). Cable Number 08272. “Meeting with High Commissioner for Human Rights: Burma, Rwanda, Cuba.”; United States Department of State (27 September 1994). Cable Number 08273. “Meeting with High Commissioner for Human Rights: Burma, Rwanda, Cuba.”

47 United States Department of State (15 June 1994). Cable Number 02491. “Rwanda: Bringing the Guilty to Justice.” See also: United States Department of State (9 July 1994). Cable Number 182529. “Africa Bureau Friday Report, 07/8/94.”

prompted further internal USG discussion about whether and how to support the commission and whether to propose or at least support a transitional justice option. Specifically, at this time, the USG was considering at least three options: ICT-Separate, ICTY-Expanded, and the establishment of a permanent international criminal court.<sup>48</sup> Later that month, the USG decided to co-sponsor a UNSC resolution establishing a commission of experts for Rwanda.<sup>49</sup>

At approximately the same time, from 9 to 20 June, the UN conducted another investigation in Rwanda. René Degni-Ségui, who had been appointed the UN Commission on Human Rights Special Rapporteur on the human rights situation in Rwanda on 25 May, visited Rwanda and its neighbouring countries, Burundi, Zaire (now the Democratic Republic of Congo) and Kenya. He was accompanied by Bacre Waly Ndiaye, the UN Commission on Human Rights Special Rapporteur on extrajudicial, summary or arbitrary executions, and Nigel Rodley, the UN Commission on Human Rights Special Rapporteur on the question of torture. Their mission was to investigate allegations of violations of human rights, particularly crimes against humanity and genocide.<sup>50</sup> After their return, on 28 June, Degni-Ségui issued a report that “recommends, *inter alia*, the establishment of an ad hoc international criminal tribunal or, alternatively, the extension of the jurisdiction of the [ICTY].”<sup>51</sup> This report was the first time that specific transitional justice options for Rwanda were publicly proposed. Degni-Ségui mentioned ICTY-Expanded or a new ICT, which implicitly included ICT-Tied and ICT-Separate. During this same period, the USG continued to publicly characterise the atrocities in Rwanda as “acts of genocide,” denied that it had any legal obligation to act, and stressed that it was supporting an active UN role to help stop the massacres.<sup>52</sup> Midway through the June investigation, the USG had still not determined whether it would support an ICT for Rwanda.<sup>53</sup> On 1 July, the UNSC took a further step in pursuing transitional justice for Rwanda: it adopted UNSCR 935, declaring that atrocity perpetrators would be held individually accountable, and requesting the UNSG to establish the UN Independent Commission of Experts

48 United States Department of State (15 June 1994). Cable Number 02491. “Rwanda: Bringing the Guilty to Justice.”

49 United States Department of State (2 July 1994). Cable Number 177024. “Press Guidance – Friday, July 1, 1994.”

50 UN/HCHR. S/1994/867 (25 July 1994). Introduction, Annex Paragraph 26.

51 UN/ICER. S/1994/1125 (4 October 1994). Article II, Section B, Paragraph 27. See also: United States Department of State (7 July 1994). Cable Number 05974. “Human Rights Commission: Special Rapporteur Concludes Genocide has Occurred in Rwanda.”

52 United States Department of State (13 June 1994). “L Press Guidance.”; United States Department of State (14 June 1994). “L Press Guidance.”; United States Department of State (16 June 1994). “To Prudence Bushnell for Hill Briefing.”

53 United States Department of State (14 June 1994). “L Press Guidance.”

on Rwanda to collect evidence of those crimes, which would later serve as the basis for seeking the creation of an ICT for Rwanda.<sup>54</sup>

The USG supported or supplemented these UN efforts, including the UN Independent Commission of Experts on Rwanda. Responding both to pressure and to overwhelming evidence, on 10 June Secretary of State Christopher for the first time called the slaughter in Rwanda “genocide.”<sup>55</sup> On 30 June, Christopher testified before the US Senate Committee on Foreign Relations that “it’s clear that there is genocide, acts of genocide in Rwanda, and they ought to be pursued...” and also stated that, even though the USG had no unilateral responsibility, the international community had a collective obligation under the Genocide Convention to punish acts of genocide. Christopher also made an unsolicited comparison with Bosnia, stating, “I have no hesitation in saying that there was genocide in Rwanda and had been genocide, is genocide, in Bosnia as well.” Christopher publicly stated for the first time during this testimony that the USG supported “the creation of an international war crimes tribunal” for Rwanda and that he had recently met with the ICTY’s deputy prosecutor to discuss the matter.<sup>56</sup> At this point, the USG envisaged that the ICT could take one of two forms: an ICT specifically for Rwanda (although Christopher did not suggest whether this would occur outside or through the UN) or a permanent international criminal court.<sup>57</sup> In doing so, Christopher led the US to become “the first country to go on record in favor of the establishment of an international tribunal for Rwanda.”<sup>58</sup>

Shortly after the vote to establish the UN Independent Commission of Experts on Rwanda, the US representative on the UNSC, Edward Gnehm, Jr., stated, “[o]ur goal must be individual accountability and responsibility for grave violations of international humanitarian law in Rwanda. We must fix responsibility on those who have directed these acts of violence. In so doing, we can transform revenge into justice, affirm the rule of law and, hopefully, bring this horrible cycle of violence to a merciful close.”<sup>59</sup> Also around that

54 UNSC Res 935 (1994), Preamble, Paragraph 3; Interview with Scheffer (24 June 2003).

55 William Ferroggiaro, ed., “The US and the Genocide in Rwanda 1994: Evidence of Inaction,” United States National Security Archive (20 August 2001), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB53/press.html>.

56 “Christopher Urges Trial Over Genocide in Rwanda.” *Washington Post* (1 July 1994), A29. See also: Julia Preston, “U.N. to probe genocide in Rwanda.” *Washington Post* (2 July 1994), A15; US/SCFR (30 June 1994); United States Department of State (30 June 1994). “June 30, 1994 Appearance of Sec. Christopher before the Senate Foreign Relations Committee.”

57 “Christopher Urges Trial Over Genocide in Rwanda.” (1 July 1994).

58 V. Morris and M. P. Scharf, *The International Criminal Tribunal for Rwanda*. Vol. 1. (Irvington-on-Hudson, NY: Transnational Publishers, 1998, 2 Vols.), 64-5.

59 UN Doc. S/PV.3400 (1994), 4.

time, as Scheffer notes, the US Interagency War Crimes Working Group began collecting its own evidence of the genocide, in part to assist the UN Independent Commission of Experts on Rwanda.<sup>60</sup> On 15 July, the White House joined the US State Department in publicly supporting the establishment of an ICT for Rwanda, expressing the hope “that the United Nations would act swiftly... to create a War Crimes Tribunal.”<sup>61</sup> At approximately that time, the USG was pressuring individual states, such as Tanzania and France, to begin detaining certain suspected *génocidaires*,<sup>62</sup> and the USG also began curtailing diplomatic relations with the GoR, refusing to recognise it, closing its embassy in Washington DC, and freezing its assets in the US.<sup>63</sup>

A parallel development was the selection of the ICTY Chief Prosecutor, who would ultimately also become the ICTR Chief Prosecutor, though this broadened mandate was not decided at the time. On 6 July, at a meeting in Moscow, Shattuck and Russia’s deputy foreign minister Sergey Lavrov agreed to appoint Richard Goldstone, a prominent South African jurist, as the ICTY Chief Prosecutor.<sup>64</sup> On 8 July, UNSC Resolution 936 formalised that decision,<sup>65</sup> and Goldstone began serving as the ICTY Chief Prosecutor on 15 August.<sup>66</sup>

*After the genocide: July – September 1994.* The genocide stopped in mid-July 1994, when the RPF defeated the remaining GoR troops. The RPF then gave Dégni-Ségué a list of 55 people it considered to be the core group of *génocidaires*.<sup>67</sup> Meanwhile, Rwanda’s new government was sworn in on 19 July, after which it lobbied for the establishment of an ICT for Rwanda, and France began withdrawing its forces (deployed under *Opération Turquoise*) later that month.<sup>68</sup> Also around this time, the Government of Tanzania declared its will-

60 Interview with Scheffer (24 June 2003).

61 The White House (15 July 1994). See also: United States Department of State (20 July 1994). Cable Number 194391. “Press Guidance – Wednesday, July 20, 1994.”

62 United States Department of State (7 July 1994). Cable Number 180972. “Human Rights Violations: Detention of Gatete and Associates.”; United States Department of State (9 July 1994). Cable Number 183627. “Gatete Departure from Benaco.”; United States Department of State (11 July 1994). Cable Number 184429. “Gatete.”

63 United States Department of State (15 July 1994). Cable Number 190358. “Non-Recognition of Interim Government of Rwanda.”

64 J. Shattuck, *Freedom on Fire: Human Rights Wars & America’s Response* (Cambridge, MA: Harvard University Press, 2003), 325.

65 UNSC Res. 936 (8 July 1994).

66 R. J. Goldstone, *For Humanity: Reflections of a War Crimes Investigator* (New Haven, CT: Yale University Press, 2000), 74, 81.

67 L. Melvern, *A People Betrayed: The Role of the West in Rwanda’s Genocide*. (New York: Zed Books, 2000), 60 (footnote 20).

68 United States Department of State (20 July 1994). Cable Number 002972. “Rwanda: 19 July Security Council – Rwanda Absent; French Intent on Leaving by August 21.”; United

ingness to cooperate “fully” with the international community in bringing *génocidaires* to justice,<sup>69</sup> a pledge that would later prove important both for apprehending suspected *génocidaires* and also for establishing the ICTR in that state.

Notwithstanding the White House’s public and apparently unconditional support for an ICT for Rwanda, the US Department of State remained only conditionally supportive. In a response three and a half weeks after Tony Hall, a senior member of Congress, had sent a letter on 1 July to Christopher, advocating the immediate establishment of an ICT for Rwanda,<sup>70</sup> one of Christopher’s deputies, Wendy Sherman, stated that “[w]e will support the creation of an international tribunal if the Commission of Experts confirms that violations of international humanitarian law have occurred.”<sup>71</sup>

In the immediate aftermath of the genocide, the US Interagency War Crimes Working Group was actively considering two of the options outlined in Degni-Ségui’s 28 June report to prosecute genocide leaders: ICT-Tied and ICTY-Expanded. At this point, according to Scheffer, and as made clear by internal US State Department documents, the USG favoured the latter option, which Matheson recommended, in part to facilitate the expansion of the ICTY into a permanent international criminal court.<sup>72</sup> The USG proposed that any ICT for Rwanda would not only share “common resources and registry staff with the ICTY, but would also share with the ICTY a common statute, trial and appellate chambers and chief prosecutor.”<sup>73</sup> The USG also decided then to declare its preference and to commit itself to support domestic criminal justice efforts to prosecute other *génocidaires*.<sup>74</sup> Also at this time, as it could not assume that the ICTY and the ICTR would share a chief prosecutor, the USG was actively researching and considering candidates for the position of ICTR Chief Prosecutor, including Leopoldo Torres Boursault, a Spanish attorney.<sup>75</sup>

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States Department of State (23 July 1994). Cable Number 197812. “Rwanda: 22 July Security Council Meeting.”

69 United States Department of State (3 August 1994). Cable Number 004940. “Rwanda War Crimes – Tanzania’s Position.”

70 United States Department of State (1 July 1994). “Letter from Tony P. Hall, Member, House of Representatives, to Warren Christopher, Secretary of State.”

71 United States Department of State (27 July 1994). Letter from Wendy R. Sherman, Assistant Secretary, Legislative Affairs, United States Department of State, to Tony P. Hall, Member, House of Representatives.

72 Interview with Scheffer (24 June 2003).

73 United States Department of State (28 July 1994). Cable Number 202027. “Rwanda War Crimes.”

74 Interview with Matheson (26 Aug. 2003). See also: Interview with Stanton (26 June 2003).

75 United States Department of State (19 July 1994). Cable Number 07697. “Leopoldo Tor-

The USG made at least six attempts to lobby the international community to support the establishment of an ICT for Rwanda, especially as ICTY-Expanded. First, on 26 July, the USG informed its embassies around the world “to advise their host governments of the US support of an international tribunal to prosecute violations of the Genocide Convention and other grave violations of international humanitarian law in Rwanda and to seek their support as well,” and also to advise them that the “present thinking” of the USG was in favour of ICTY-Expanded or ICT-Tied; that the USG requested them to begin detaining suspected *génocidaires*; and that the new ICTY Chief Prosecutor, Goldstone, “seems ready to supervise both the Yugoslav and Rwanda prosecutions” and had South African President “[Nelson] Mandela’s personal endorsement for this position.” The cable also requested its embassies to begin identifying African prosecutors and judges who could serve on an ICT for Rwanda.<sup>76</sup>

As part of the second lobbying effort, from mid-July to 8 November (the date the ICTR was established), USG officials conducted frequent and detailed bilateral meetings with various governments, including those of France, Spain, the UK, China, Ireland, Belgium, the Netherlands, Tanzania, South Africa, Kenya and Uganda, to lobby them to support the establishment of an ICT for Rwanda, and specifically through ICTY-Expanded.<sup>77</sup>

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res Boursault for Rwanda War Crime Tribunal.”; United States Department of State (19 July 1994). Cable Number 192051. “Rwanda War Crimes Tribunal.”

76 United States Department of State (26 July 1994). Cable Number 198848. “Rwanda War Crimes.”

77 See the following sources: United States Department of State (13 July 1994). Cable Number 19216. “Consultations with France on Rwanda War Crimes Issues.”; United States Department of State (15 July 1994). Cable Number 188919. “Next Steps in Addressing War Crimes in Rwanda.”; United States Department of State (18 July 1994). Cable Number 07165. “Rwanda: War Crimes, Non-Recognition, and APC’s.”; United States Department of State (19 July 1994). Cable Number 11339. “British Response Muted in Considering Next Steps in Addressing War Crimes in Rwanda.”; United States Department of State (27 July 1994). Cable Number 08330. “Human Rights Tribunal - Rwanda.”; United States Department of State (28 July 1994). Cable Number 04815. “Rwanda War Crimes Demarche: Minister of Home Affairs Reaction and Pitch for Financial Aid.”; United States Department of State (29 July 1994). Cable Number 04148. “Irish Reaction to President Clinton’s and AID Administrator Atwoods’ Letters on Rwanda.”; United States Department of State (29 July 1994). Cable Number 08418. “Human Rights Tribunal - Rwanda.”; United States Department of State (29 July 1994). Cable Number 10774. “South Africa: Goldstone Involvement in Yugoslavia War Crimes Tribunal Should Insure South African Support for Concept.”; United States Department of State (29 July 1994). Cable Number 202705. “Human Rights Tribunal - Rwanda.”; United States Department of State (1 August 1994). Cable Number 205480. “Human Rights Tribunal – Rwanda.”; United States Department of State (2 August 1994). Cable Number 08559. “Human Rights Tribunal – Rwanda.”; United States Department of State (5 August 1994). Cable Number 210227. “Visit of A/S John Shattuck.”; United States Department of State (6 August 1994). Cable Number 211528. “Talking Points for AF A/S Moose’s Use with GOF and GOB Officials.”; United States Department of State (8 August 1994). Cable Number

## THE UNITED STATES ROLE IN ESTABLISHING THE ICTR

The USG's bilateral communication with the Russian, French, South African and Chinese governments is particularly noteworthy. The USG focused on lobbying the Russian and French governments because, as two of the five permanent members of the UNSC, their support was critical to establishing an ICT for Rwanda, and to varying degrees they both opposed the USG's preference for ICTY-Expanded, instead preferring to establish the ICTR as a legally separate ICT. Reaching agreement with France was of particular concern to the USG because of the French government's history and relationship with Rwanda, which was seen as, *inter alia*, logistically critical to establishing a successful transitional justice mechanism. As one internal US Department of State document states,

France is a key player on this issue, not only because of its current involvement in Rwanda, but because it may have the most complete information of any western government on war crimes in Rwanda and access to witnesses, evidence and even perpetrators. France's support for the work of the Commission [of Experts] may be critical to

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21685. "A/S Moose Briefs Quai on his Rwanda Trip."; United States Department of State (8 August 1994). Cable Number 14073. "Visit to Kenya of A/S Shattuck."; United States Department of State (9 August 1994). Cable Number 06337. "Interim Trip Report - Kigali and Goma."; United States Department of State (11 August 1994). Cable Number 12721. Draft reporting cable of A/S Shattuck meeting with British officials for Shattuck's comment/approval; United States Department of State (12 August 1994). Cable Number 22245. "A/S Shattuck's Meeting with French on Rwanda War Crimes Tribunal and Burundi."; United States Department of State (13 August 1994). Cable Number 22398. "DRL/MLA Director Rosenblatt's Meeting with Belgian Official on Rwanda Tribunal and Monitors."; United States Department of State (15 August 1994). Cable Number 23223. "Demarche to Russian MFA on UN War Crimes Tribunal for Rwanda."; United States Department of State (15 August 1994). Cable Number 12901. "A/S Shattuck's Discussion on the Proposed Rwanda War Crimes Tribunal with HMG."; United States Department of State (20 August 1994). Cable Number 224856. "Establishment of UN War Crimes Tribunal for Rwanda."; United States Department of State (20 August 1994). Cable Number 224672. "Establishment of UN War Crimes Tribunal for Rwanda."; United States Department of State (25 August 1994). Cable Number 24407. "UN War Crimes Tribunal for Rwanda: Russian Position."; United States Department of State (25 August 1994). Cable Number 09371. "Assistant Secretary Moose's 8/23 Discussions with Belgian Foreign Minister on Rwanda, Burundi, Zaire."; United States Department of State (30 August 1994). Cable Number 234040. "Establishment of a War Crimes Tribunal for Rwanda: Dutch Views."; United States Department of State (31 August 1994). Cable Number 005510. "Rwanda War Crimes Tribunal Demarche to GOT."; United States Department of State (16 September 1994). Cable Number 251046. "UN War Crimes Prosecutions for Rwanda."; United States Department of State (19 September 1994). Cable Number 25531. "French Perspective on Rwanda War Crimes Tribunal."; United States Department of State (19 September 1994). Cable Number 26935. "UN War Crimes Prosecutions for Rwanda."; United States Department of State (15 October 1994). Cable Number 280506. "Resolution Establishing War Crimes Tribunal for Rwanda."; United States Department of State (21 October 1994). Cable Number 286662. "Rwanda War Crimes."; United States Department of State (24 October 1994). Cable Number 006900. "Tanzanian Views on War Crimes Tribunal."; United States Department of State (27 October 1994). Cable Number 008705. "Rwanda War Crimes Tribunal."

the success of its efforts, and France's views on next steps will be critically important in the [Security] Council.<sup>78</sup>

As a result, the USG focused much of its lobbying efforts on these two governments. By mid-September, when both continued to oppose ICTY-Expanded, the USG began employing new tactics, other than just appealing to the merits of its preferred option. To the Russian government, to which it privately referred as having "stubbornly defended" its opposition to ICTY-Expanded,<sup>79</sup> the USG offered to support a Russian candidate for one of the new judges of an expanded ICT. This tribunal would have jurisdiction over cases arising from the conflict in the former Yugoslavia, which was of cultural and emotional concern to Russians, as it involved their historic Orthodox Christian Slavic brethren, the Serbs. Specifically, the USG argued to the Russians,

One of the advantages of expanding the current tribunal to include Rwandan offences is that in doing so, additional judges would be added, giving the tribunal a broader geographic base. In particular, the USG would be prepared to support a qualified Russian candidate, who would, if elected, thereby be able to participate in the handling of both Yugoslav and Rwandan cases. On the other hand, if a separate tribunal is created for Rwanda, there would be no opportunity to bring a Russian judge into the handling of the Yugoslav cases.<sup>80</sup>

The USG simultaneously made a similar appeal to the French government: "the USG would welcome the appointment of a Deputy Prosecutor and staff prosecutors from other French-speaking countries to handle the Rwandan cases, as well as the election of an additional French-speaking judge to deal with both Rwandan and Yugoslav cases."<sup>81</sup>

The USG believed that having South Africa's support for an ICT for Rwanda and, in particular, that of its president, Mandela, and its foreign minister, Alfred Nzo, would "lend great credibility and momentum for this important effort."<sup>82</sup> In bilateral discussions with the South African Government, including directly with Mandela (in which the USG addressed him as "Africa's most

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78 United States Department of State (12 July 1994). Cable Number 184612. "Consultations with France and Others on Rwanda War Crimes Issues." See also: United States Department of State (23 July 1994). Cable Number 197812. "Rwanda: 22 July Security Council Meeting."; United States Department of State (5 August 1994). Cable Number 210227. "Visit of A/S John Shattuck."

79 United States Department of State (19 September 1994). Cable Number 26935. "UN War Crimes Prosecutions for Rwanda."

80 United States Department of State (16 September 1994). Cable Number 251046. "UN War Crimes Prosecutions for Rwanda."

81 Ibid.

82 United States Department of State (3 August 1994). Cable Number 206761. "Rwanda War Crimes."; United States Department of State (6 August 1994). Cable Number 211529. "AF A/S Moose's Talking Points for His Meeting with President Mandela."

respected leader”), the USG further argued that lending its support was in South Africa’s interest: “South Africa could and should play a prominent role in this effort, thereby promoting human rights and furthering its moral leadership in the international community. This will be particularly true if, as we hope, Justice Goldstone will oversee both Yugoslav and Rwanda war crimes.”<sup>83</sup> Indeed, several African states, including South Africa, eventually provided support for an ICT for Rwanda, specifically through ICTY-Expanded. The USG suspected that staffing selection, not the merits of the proposal, provided part of the motivation: “We have received favorable preliminary reactions from key African governments for expanding the current tribunal to include Rwanda. This is probably due, at least in part, to the fact that the current head of one of the two trial chambers (Judge Karibi-Whyte) is from Nigeria, and the current chief prosecutor (Judge Goldstone) is from South Africa and has the personal support of President Mandela.”<sup>84</sup>

The USG also specifically focused on lobbying China to support the establishment of an ICT for Rwanda, since by mid-August China was the only one of the five permanent members of the UNSC that still resisted the idea. China explained that it was hesitant because it did not want the international community to violate the GoR’s sovereignty. In order to lobby China, the USG made direct bilateral appeals and also enlisted the support of other states, including Burundi, Congo, Uganda, Kenya, Tanzania, Djibouti, Ethiopia and Nigeria.<sup>85</sup> On 30 August, the Chinese government informed the USG that it would support the USG’s proposal for ICTY-Expanded.<sup>86</sup>

A third lobbying effort by the USG occurred in early August, when USG officials secured support from Goldstone for the ICTY-Expanded option.<sup>87</sup> Then, in a fourth effort, the USG convened meetings (on 4 and 9 August) of the legal advisers of the five permanent members of the UNSC, to discuss establishing an ICT for Rwanda, and to lobby specifically for ICTY-Expanded. On 4 August, according to the USG, Russia “strongly supported” and France “generally supported” the USG proposal, whereas China and the UK remained non-commit-

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83 Ibid.

84 United States Department of State (16 September 1994). Cable Number 251046. “UN War Crimes Prosecutions for Rwanda.”

85 United States Department of State (20 August 1994). Cable Number 224856. “Establishment of UN War Crimes Tribunal for Rwanda.”

86 United States Department of State (30 August 1994). Cable Number 03594. “War Crimes Tribunal for Rwanda.”

87 Interview with Matheson (26 Aug. 2003). See also: Interview with Graham Blewitt, former Deputy Prosecutor, ICTY (11 June 2003).

tal.<sup>88</sup> By 9 August, only China remained non-committal.<sup>89</sup> Another meeting of the legal advisers of the five permanent members of the UNSC was convened later, on 18 August, by UN Legal Counsel Hans Correll. During that meeting, the USG continued lobbying for its preference for ICTY-Expanded, and Correll stated that transitional justice options for Rwanda included ICT-Separate established through either Chapter VI or Chapter VII of the UN Charter, the USG proposal (ICTY-Expanded), or an augmentation of the GoR's national courts with foreign judges.<sup>90</sup> At this meeting, France (seconded by the UK) restated its preference for legally separate ICTs for Rwanda and the former Yugoslavia, but, from the USG's perspective, was "not, however, adamantly opposed to US approach."<sup>91</sup> A few days later, UN Deputy Legal Adviser Ralph Zacklin told USG officials that he personally preferred two legally separate ICTs for Rwanda and the former Yugoslavia. He also said that while he believed they could share an appeals chamber, he preferred separate trial chambers and chief prosecutors, and he suggested that whatever part of an ICT for Rwanda was to be located in Africa should be in Nairobi, as a first choice, or alternatively in Addis Ababa.<sup>92</sup>

A fifth USG lobbying effort occurred from 4 to 10 August, when four USG officials (Shattuck, Nix, Josiah Rosenblatt,<sup>93</sup> and Frederick Barton<sup>94</sup>) travelled to Uganda, Rwanda, Burundi, Zaire and France for bilateral discussions about various USG objectives relating to post-genocide Rwanda.<sup>95</sup> In Rwanda, part of the delegation's objective was to convey that the USG strongly supported an ICT for Rwanda, without specifying whether it should be ICTY-Expanded or ICT-Tied, and also to persuade the GoR to support such a tribunal, in part by requesting that the UNSC establish it.<sup>96</sup> In Rwanda they met with Kagame, who

88 United States Department of State (5 August 1994). Cable Number 03237. "Rwanda War Crimes."

89 United States Department of State (10 August 1994). Cable Number 215074. August 10 Daily Rwanda/Burundi Sitrep Prepared by U.S. Department of State Bureau of African Affairs Office of Central African Affairs (AF/C).

90 United States Department of State (19 August 1994). Cable Number 03437. "Rwanda – Crimes Tribunal – Meeting with UN Legal Counsel."

91 Ibid.

92 United States Department of State (24 August 1994). Cable Number 03495. "Rwanda War Crimes Tribunal UN Sect. Views."

93 Director, Office of Multilateral Affairs, Bureau of Democracy, Human Rights, and Labor, US Department of State.

94 Director, Office of Transition Initiative, US Agency for International Development.

95 United States Department of State (4 August 1994). Cable Number 207893. "Travel of A/S Shattuck to Uganda, Rwanda, Burundi, Zaire and France."

96 United States Department of State (5 August 1994). Cable Number 209882. "A/S Shattuck Visit to Rwanda: Objectives."

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had become Vice-President and Minister of Defence, Alphonse-Marie Nkubito,<sup>97</sup> Twagiramungu, and Jacques Bihozagara.<sup>98/99</sup> The USG delegation arrived in Kigali on 5 August, where they were joined by the US Ambassador to Rwanda, David Rawson, and General John Shalikashvili.<sup>100/101</sup> According to Shattuck, the purposes of the trip were to “seek Kagame’s support for a Security Council resolution to establish an international criminal tribunal for Rwanda to investigate the genocide and bring its leaders to justice... [and to] urge Kagame to work with the United States to rebuild the country’s shattered justice system...”. Shattuck also delivered a letter (drafted by himself, Scheffer and Nix) to Nkubito and Kagame, endorsing the establishment of an ICT for Rwanda, which he asked the GoR to send to the UNSC.<sup>102</sup> On behalf of the GoR, Nkubito submitted the letter to the UN Secretary-General on 8 August,<sup>103</sup> and the UNSC issued a presidential statement on 10 August welcoming the letter.<sup>104</sup>

The USG then took a sixth step to lobby for an ICT for Rwanda (specifically as ICTY-Expanded). On 1 September, the USG began circulating a draft resolution and annex, including a statute to create an ICT for Rwanda through ICTY-Expanded.<sup>105</sup> The USG followed up by circulating another draft document to UNSC members on 20 September, arguing that prosecution of the Rwandan cases “can be most effectively done by adding this responsibility to the mandate of the [ICTY].”<sup>106</sup>

After Shattuck, Nix, Rosenblatt and Barton returned from their multi-state trip, the US State Department increased its focus on Rwandan criminal justice issues. On 12 August, the US Department of State established a separate US In-

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97 Rwandan Minister of Justice.

98 Rwandan Minister of Rehabilitation and Social Integration.

99 United States Department of State (11 August 1994). Cable Number 06441. “A/S Shattuck Urges Support for War Crimes Tribunal.”

100 Chairman of the Joint Chiefs of Staff.

101 United States Department of State (8 August 1994). Cable Number 212243. “Press Guidance – August 8, 1994.”

102 Shattuck (2003), 59-66; United States Department of State (9 August 1994). Cable Number 06337. “Interim Trip Report – Kigali and Goma.”

103 United States Department of State (9 August 1994). Cable Number 213680. “Press Guidance – August 9, 1994.” NOTE: For the full text of the letter, see: United States Department of State (9 August 1994). Cable Number 02676. “International Tribunal for Rwanda – Further Thoughts.”; United States Department of State (20 August 1994). Cable Number 224856. “Establishment of UN War Crimes Tribunal for Rwanda.”

104 United States Department of State (11 August 1994). Cable Number 03310. “Rwanda: SC Statement Issued August 10.”

105 United States Department of State (1 September 1994). Cable Number 237220. “Resolution Establishing War Crimes Tribunal for Rwanda.”

106 “Try Rwandan War Cases in Hague, Says U.S.” (21 September 1994). *The Record*. A17.

teragency War Crimes Working Group on Rwanda and indicated that it would press for a rapid completion of the UN Independent Commission of Experts on Rwanda's work.<sup>107</sup> Almost two weeks later, Shattuck published an editorial in *The Washington Post*, stating, "it is vital that the international community rapidly create a war crimes tribunal for Rwanda that will hold the perpetrators of genocide and other atrocities accountable to their victims and to the international community."<sup>108</sup> Also in mid-August, the USG, through Albright and in other ways, began pressuring the UN Independent Commission of Experts on Rwanda and the UN High Commissioner for Human Rights to support the establishment of an ICT for Rwanda, and especially for the UN Independent Commission of Experts to issue an interim report including a recommendation to that effect.<sup>109</sup> The idea of the UN Independent Commission of Experts on Rwanda issuing an interim report apparently arose from this USG pressure, after an 18 August meeting between Spiegel, Matheson and three members of the Commission, including its chairman, Atsu-Koffi Amega.<sup>110</sup> The USG made several offers of assistance to the Commission at this point, offering for example to provide legal staff and urging the UN to provide adequate office equipment.<sup>111</sup>

Soon thereafter, President Clinton sent a high-level mission, co-chaired by Congressman Donald Payne and C. Payne Lucas of Africare, to Central Africa, including Rwanda, to investigate post-genocide issues in the region. Upon their return, mission members briefed the White House, the US National Security Council and the US Department of State, and appeared on various news programmes and were quoted in the media. According to the US Department of State, their conclusions and recommendations "track closely with U.S.G. policy," including the recommendation for quick establishment of an ICT for Rwanda.<sup>112</sup> One mission member, Aspen Institute president S. Frederick Starr,

107 Interview with Matheson (26 Aug. 2003).

108 J. Shattuck, "War Crimes First," *Washington Post* (23 August 1994), A19.

109 United States Department of State (17 August 1994). Cable Number 221084. "Rwanda: Pending Meetings in Geneva with Ayala Lasso and the Commission of Experts."; United States Department of State (24 August 1994). Cable Number 228408. "Demarche for International Tribunal in Rwanda."; United States Department of State (12 September 1994). Cable Number 245815. Summary of [illegible]'s meeting with Assistant Secretary Moose.

110 United States Department of State (18 August 1994). Cable Number 07233. "Rwanda: Initial Meeting with Commission of Experts."

111 Ibid.

112 United States Department of State (9 September 1994). Cable Number 243592. "Presidential Mission Returns from Central Africa; Recommendations Track Closely with U.S.G. Policy."

published an op-ed in *The Washington Post* on 6 September recommending, *inter alia*, the establishment of such an ICT.<sup>113</sup>

That same month, the USG sent another team to Rwanda—an inter-agency evidence-gathering team to assist the efforts of the UN Independent Commission of Experts on Rwanda, which had completed its preliminary work in Rwanda on 5 September.<sup>114</sup> Nix, Assistant US Attorney Stephen Mansfield, Major General Patrick O’Hare and about three other officials travelled to Rwanda to conduct an assessment of the political and security climate, to collect evidence, and to interview witnesses, all data and findings of which they provided to the Commission.<sup>115</sup> The Commission acknowledged these contributions in its 1 October Interim Report, stating that the US Department of State “forwarded to the Commission documents... that prove the existence of a plan for genocide against Tutsis and the murder of moderate Hutus.”<sup>116</sup> The USG sent yet a third mission to Rwanda later that month. In mid-September the Undersecretary of State for Global Affairs, Timothy Wirth, made a four-day visit to Rwanda to investigate developments on the ground and further lobby for the establishment of an ICT for Rwanda.<sup>117</sup>

The UN Independent Commission of Experts on Rwanda’s interim report made recommendations on the form the prosecutions should take. The report recommended prosecution by an international rather than a municipal tribunal and, like Degni-Ségui’s 28 June report, discussed only two options for dealing with suspected *génocidaires*: ICTY-Expanded and a new ICT, either ICT-Tied or ICT-Separate.<sup>118</sup> The Commission stated its preference for ICTY-Expanded, arguing that “[t]he alternative of creating an *ad hoc* tribunal alongside the al-

113 S. Frederick Starr, “It’s up to us to Defuse the Rwandan Time Bomb,” *Washington Post* (6 September 1994), A17.

114 United States Department of State (7 September 1994). Cable Number 01509. “Visit by UN Commission of Experts; Recommendation for U.S. Assistance.”

115 Interview with Scheffer (24 June 2003); Interview with Scheffer (18 Nov. 2005); United States Department of State (12 September 1994). Cable Number 246554. “USG Interview Trip to Rwanda.” Also see: Interview with Alison Des Forges, author of *Leave None To Tell the Story: Genocide in Rwanda* (24 May 2003); Interview with Shattuck (9 Oct. 2003); United States Department of State (17 September 1994). Cable Number 008006. “UN Human Rights Program: Getting it all Together.”

116 UN/ICER. S/1994/1405 (9 December 1994), Article II, Section A, Paragraph 35.

117 United States Department of State (23 September 1994). Cable Number 259321. Updated Press Guidance – September 23, 1994; United States Department of State (24 September 1994). Cable Number 259570. “Press Guidance – September 23, 1994.”; United States Department of State (26 September 1994). Cable Number 260743. “Press Guidance – September 26, 1994.”; United States Department of State (27 September 1994). Cable Number 261704. “Press Guidance – September 27, 1994.”

118 UNSG. S/1994/1125 (4 October 1994), Annex, paragraphs 133-45; 149-52. Also see: L. G. Sunga, *Human Rights Law Journal*, 121-4.

ready existing international criminal tribunal in The Hague would not only be less efficient from an administrative point of view of staffing and use of physical resources, but would be more likely to lead to less consistency in the legal interpretation and application of international criminal law.”<sup>119</sup> According to Stanton, he was seconded to the Commission in August, wrote the first half of this interim report, and consulted on the second half.<sup>120</sup> A cable from the US Embassy in Kigali states, “IO/UNP Stanton was a most effective liaison to the Commission. He was instrumental in ensuring the Commission’s commitment to an early interim report recommending an international tribunal.”<sup>121</sup>

The GoR remained dissatisfied with the progress of the international community in bringing *génocidaires* to justice. On 28 September, the permanent representative of Rwanda to the UN sent a letter to the UNSC president, noting “evident reluctance by the international community to set up an international tribunal.”<sup>122</sup> On 4 October, the GoR publicly declared its preferences: that proceedings take place in Rwanda and that convicted *génocidaires* receive the death penalty.<sup>123</sup> Two days later Rwanda’s President, Pasteur Bizimungu, stated to the UN General Assembly,

it is absolutely urgent that this international tribunal be established. It will enable us to prosecute in a completely open setting those responsible for the genocide. Since most of the criminals have found refuge in various corners of the world, what we seek is a tool of justice that knows no borders. Moreover, the very nature of the events—considered to be crimes against humanity—warrants the international community’s joining forces to prevent their reoccurrence.

Bizimungu also stated the GoR’s preference for an ICT created by the UNSC’s Chapter VII powers, so that the ICT could compel state compliance.<sup>124</sup> However, none of these GoR statements indicated its preference for either ICTY-Expanded, ICT-Tied, or ICT-Separate.

*The narrowing option: ICT-Tied: September – November 1994.* Between the 26 July cable indicating USG preference for ICTY-Expanded and 28 September, USG preferences shifted from ICTY-Expanded to ICT-Tied. Although the UN Independent Commission of Experts on Rwanda endorsed ICTY-Expanded in its interim report, several UNSC member states, most notably Russia and France, preferred ICT-Tied (China and the UK did not have a preference either

119 UNSG. S/1994/1125 (4 October 1994), Annex, paragraph 140.

120 Interview with Stanton (26 June 2003).

121 United States Department of State (7 September 1994). Cable Number 01509. “Visit by UN Commission of Experts; Recommendation for U.S. Assistance.”

122 UN Doc. S/1994/1115 (29 September 1994). Also see: Shraga and Zacklin (1996), 504.

123 Haq, Farhan (4 October 1994). “Rwanda: Government Scorns U.N. Proposal for Outside Trials.” *Inter Press Service*.

124 UN Doc. A/49/PV.21 (1994), 5.

way).<sup>125</sup> According to Matheson and internal US Department of State documents, one reason why Russia and France favoured ICT-Tied was to avoid creating the institutional framework for a permanent international criminal court, which these two governments did not support at that time.<sup>126</sup> According to Matheson and Scheffer, because the USG had only a *weak* preference for ICTY-Expanded over ICT-Tied, and given the value of French and Russian support, the USG revised its own position to reflect the shifting preferences of those states among the five permanent UNSC members that had voiced opinions.<sup>127</sup> The USG characterised its new position as “the latest USG proposal for the [Rwanda] war crimes tribunal, based on the New Zealand approach.”<sup>128</sup> That decision occurred on 28 September, as reflected in an internal US Department of State cable that stated:

In light of continuing opposition from Russia and France to the expansion of the jurisdiction of the current tribunal for the former Yugoslavia, we have decided to pursue the New Zealand approach of creating a separate tribunal for Rwanda, but providing that the appeals judges and prosecutor for the former Yugoslavia would serve also as the appeals judges and prosecutor for Rwanda.... You should emphasize that we are making this compromise in the interest of quick Council action on Rwanda prosecutions, which is essential in light of the situation in Rwanda.<sup>129</sup>

The GoR advised the USG that it agreed with the “New Zealand approach” and wanted trials to take place in Kigali.<sup>130</sup> The French, British, and Belgian governments also advised the USG that their group “agrees to pursue the New Zealand approach of creating a separate tribunal for Rwanda, and additionally agrees that the appeals judges and prosecutor for the former Yugoslavia

125 United States Department of State (27 July 1994). Cable Number 03089. “Rwanda War Crimes Tribunal – Russian Demarche.”; United States Department of State (28 July 1994). Cable Number 202027. “Rwanda War Crimes.”; United States Department of State (14 August 1994). Cable Number 218325. “Establishment of UN War Crimes Tribunal for Rwanda.”; United States Department of State (23 September 1994). Cable Number 004014. “Rwanda War Crimes.”

126 Interview with Matheson (26 Aug. 2003); United States Department of State (30 August 1994). Cable Number 003604. “War Crimes [*sic*] Tribunal for Rwanda.”

127 See: Interview with Matheson (26 Aug. 2003) and Interview with Scheffer (24 June 2003).

128 United States Department of State (29 September 1994). Cable Number 04101. “A/S Shattuck Discussions with Secretariat, ICRC, and Missions Regarding Haiti, Rwanda, Burundi, China, Turkey, and Funding for UN Human Rights Activities.”

129 United States Department of State (28 September 1994). Cable Number 262739. “Resolution Establishing War Crimes Tribunal for Rwanda.” See also: Interview with Matheson (26 Aug. 2003).

130 United States Department of State (29 September 1994). Cable Number 04101. “A/S Shattuck Discussions with Secretariat, ICRC, and Missions Regarding Haiti, Rwanda, Burundi, China, Turkey, and Funding for UN Human Rights Activities.”

would serve also as the appeals judges and prosecutor for Rwanda.”<sup>131</sup> Scheffer reports that, in addition to offering the “New Zealand approach,” which ultimately produced the ICTR, the New Zealand government was crucial to the establishment of the ICTR in other ways: “New Zealand... was a key negotiating partner in the establishment of the ICTR. New Zealand often hosted in its UN Mission in New York our negotiating sessions with various UNSC members, including Rwanda that year, concerning creation of the ICTR. They served as an honest broker and were critical to the ultimate success of the venture.”<sup>132</sup> On 28 September, the USG and the New Zealand government circulated among Zacklin and the five permanent members of the UNSC a draft UNSC resolution for the establishment of the ICTR, which they then circulated to all UNSC members the following day.<sup>133</sup> A revised text was then introduced by the USG, the New Zealand government and the British government two weeks later, in mid-October.<sup>134</sup> Despite an initial USG preference for ICTY-Expanded, the USG shifted its support to ICT-Tied, because of its desire and perceived need to seek consensus among the five permanent members of the UNSC. Also at this time, the USG decided to establish a ministerial-level operational support group, entitled “The Friends of Rwanda,” to coordinate further efforts to assist post-genocide Rwanda.<sup>135</sup>

Even after the decision to support ICT-Tied emerged among the five permanent members of the UNSC and some other critical states, such as New Zealand, Uganda and Tanzania (the last of which, in October, offered Arusha as a venue for any ICT for Rwanda<sup>136</sup>), some other states and other parties raised concerns. For example, the UN Secretary-General Boutros Boutros-Ghali objected to Goldstone as chief prosecutor, preferring instead a Francophone

131 United States Department of State (29 September 1994). Cable Number 26809. “French Confirm Concurrence on Rwanda War Crimes Tribunal.” See also: United States Department of State (29 September 1994). Cable Number 04101. “A/S Shattuck Discussions with Secretariat, ICRC, and Missions Regarding Haiti, Rwanda, Burundi, China, Turkey, and Funding for UN Human Rights Activities.”

132 Interview with Scheffer (18 Nov. 2005).

133 United States Department of State (30 September 1994). Cable Number 04112. “Resolution and Statute Establishing War Crimes Tribunal for Rwanda.”

134 United States Department of State (15 October 1994). Cable Number 280506. “Resolution Establishing War Crimes Tribunal for Rwanda.”

135 United States Department of State (29 September 1994). Cable Number 04101. “A/S Shattuck Discussions with Secretariat, ICRC, and Missions Regarding Haiti, Rwanda, Burundi, China, Turkey, and Funding for UN Human Rights Activities.”; United States Department of State (19 October 1994). Cable Number 28295. Evening Notes 10/18/94 Eyes Only for A/S Douglas Bennett W/ Strobe Talbott Party from George F. Ward.

136 United States Department of State (24 October 1994). Cable Number 006900. “Tanzanian Views on War Crimes Tribunal.”

African.<sup>137</sup> Furthermore, in mid-October, Japan's government expressed its concern that the UNSC was apparently engaged in the proliferation of *ad hoc* ICTs, a practice to which it objected.<sup>138</sup>

Most notably, though, the GoR continued lobbying for the establishment of an ICT for Rwanda (without stating a preference for a particular version) and some of its details. GoR representatives voiced objections to Matheson and other USG officials regarding the draft ICTR statute, concerning for example the temporal jurisdiction, the number of judges, the seat of the tribunal and the text of Articles 3 (on crimes against humanity), 4 (on war crimes), 26 (on sentencing) and 27 (on pardon or commutation of sentences). Specifically, the GoR stated, *inter alia*, that it wanted a voice in the selection of tribunal staff and a veto over all releases and pardons, and insisted all convicted *génocidaires* to be incarcerated only in Rwanda.<sup>139</sup> The GoR demanded more control over a process perceived as crucial to the development of its state and also that atrocities committed before 1994 should be included in the ICT's jurisdiction, as the GoR argued they were inextricably linked to the genocide and should also be punished. At this time, Twagiramungu again publicly demanded the establishment of an ICT for Rwanda: "[w]hy do we have to beg for the international court to be set up?"<sup>140</sup> USG officials continued meeting with their GoR counterparts in mid-October through early-November, including a phone meeting between Wirth and President Bizimungu on 19 October,<sup>141</sup>

137 United States Department of State (19 October 1994). Cable Number 28295. Evening Notes 10/18/94 Eyes Only for A/S Douglas Bennett W/ Strobe Talbott Party from George F. Ward; United States Department of State (19 October 1994). Cable Number 283000. "Rwanda War Crimes."

138 United States Department of State (21 October 1994). Cable Number 004514. "Rwanda War Crimes Tribunal – Japanese Views."

139 Interview with Matheson (26 Aug. 2003); United States Department of State (15 October 1994). Cable Number 280506. "Resolution Establishing War Crimes Tribunal for Rwanda."; United States Department of State (19 October 1994). Cable Number 283000. "Rwanda War Crimes."; United States Department of State (19 October 1994). Cable Number 01872. "Rwandan Position on Rwanda War Crimes Tribunal."; United States Department of State (4 November 1994). Cable Number 004749. "Rwanda War Crimes Tribunal – Meeting of Co-Sponsors."; United States Department of State (5 November 1994). Cable Number 004783. "Rwanda War Crimes Tribunal."; United States Department of State (19 October 1994). Cable Number 28295. Evening Notes 10/18/94 Eyes Only for A/S Douglas Bennett W/ Strobe Talbott Party from George F. Ward; United States Department of State (20 October 1994). Cable Number 04459. "Rwandan Views on War Crimes Tribunal."; United States Department of State (20 October 1994). Cable Number 01883. "Follow-up Demarches on Rwanda War Crimes Tribunal Resolution: Prime Minister and Justice Minister."; United States Department of State (22 October 1994). Cable Number 06331. "Rwanda War Crimes."

140 Morris and Scharf (1998), 67.

141 See e.g.: United States Department of State (19 October 1994). Cable Number 283000. "Rwanda War Crimes."; United States Department of State (19 October 1994). Cable

but according to Scheffer did not discover “until the last day or so prior to the vote in the Security Council that the Rwandan government would not budge on their objections to the ICTR statute.”<sup>142</sup> Part of the problem may have been communication difficulties that the GoR delegation at the UN claimed to be having with its home government in Kigali, which prevented the former from receiving timely and thorough guidance.<sup>143</sup>

On 3 November, the USG convened a meeting of the co-sponsors (France, New Zealand, Russia, Spain, the US and the UK; Argentina would join later as a co-sponsor) of a resolution to establish an ICT for Rwanda. According to an internal US Department of State cable, the group decided at that meeting to confer with GoR officials the following day to try to persuade them “to vote in favor or not participate” in the resolution; to bring the resolution to a vote on 7 November, “irrespective of Rwandan position”; and “that no changes would be made in text of resolution or statute unless Rwanda indicated one or another minor cosmetic change would enable them to vote yes on the resolution.” Members of the group varied in terms of their strict adherence to these positions: French and Russian representatives urged no further amendments to the resolution and insisted a vote should be taken on 7 November, US and Spanish officials supported the French/Russian position, and the government of New Zealand was willing to both negotiate further with the GoR and delay any vote on the resolution.<sup>144</sup>

As planned, on 4 November the co-sponsors of the resolution met with GoR officials, including the GoR’s permanent representative to the UN, Manzi Bakuramutsa. They conveyed to the Rwandan delegates the decisions they had made the previous day, including their intention to vote on the proposed resolution on 7 November, and said they hoped the GoR would vote yes or abstain. GoR officials responded that they had not yet received instructions from more senior officials in their government back in Kigali, in part because, according to a US Department of State cable, “time was differently perceived

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Number 01872. “Rwandan Position on Rwanda War Crimes Tribunal.”; United States Department of State (20 October 1994). Cable Number 04459. “Rwandan Views on War Crimes Tribunal.”; United States Department of State (20 October 1994). Cable Number 01883. “Follow-up Demarches on Rwanda War Crimes Tribunal Resolution: Prime Minister and Justice Minister.”; United States Department of State (22 October 1994). Cable Number 06331. “Rwanda War Crimes.”; United States Department of State (22 October 1994). Cable Number 286781. “Rwanda War Crimes Tribunal: Zero Hour.”

142 Interview with Scheffer (24 June 2003).

143 United States Department of State (20 October 1994). Cable Number 01883. “Follow-up Demarches on Rwanda War Crimes Tribunal Resolution: Prime Minister and Justice Minister.”

144 United States Department of State (4 November 1994). Cable Number 004749. “Rwanda War Crimes Tribunal – Meeting of Co-Sponsors.”

in Rwanda... it simply took weeks for them fully to grasp” the proposal. Bakuramutsa also reiterated some of the GoR’s objections to the draft resolution. The co-sponsors responded that they were amenable to increasing the number of judges but not to increasing the involvement of the GoR in their selection because the ICT “could not be seen as in any way prone to bias.” The meeting concluded with an agreement to meet as a group as soon as the GoR delegates received instructions. Members of the co-sponsoring group continued to vary in terms of their resolve, with the French and Russians insistent on voting on the current version of the resolution on 7 November and New Zealand most willing to compromise with the GoR and delay the vote. USG officials present at the meeting added that, although no agreement with the GoR had been reached, the meeting had been productive in conveying the “message to Rwandans that time had come to make their decision and slight firming up of New Zealand and UK resolve to act on Monday.”<sup>145</sup>

Scheffer reports that further meetings among GoR, USG and UN officials on this topic did occur between 5 and 7 November, but in Kigali, not New York City. Scheffer further recalls that, during this time, GoR officials in Kigali sent instructions to their representatives at the UN to vote against the proposed tribunal statute. Finally, Scheffer believes that the delay from 7 November to 8 November in ultimately voting on the UNSC resolution on the tribunal statute is not significant. Instead, he suggests that such delays are common and, in this case, probably reflected the last-minute meetings occurring in Kigali and the time it took to relay messages from there to New York.<sup>146</sup>

*The decision to create the ICTR: 8 November 1994.* On 8 November, the UNSC adopted Resolution 955, establishing the ICTR through the UN Charter’s Chapter VII authority. The vote was 13 in favour, one abstention (China), and one—Rwanda—against. Along with the US, those voting in favour of the resolution were: Argentina, Brazil, the Czech Republic, Djibouti, France, New Zealand, Nigeria, Oman, Pakistan, Russia, Spain and the UK.<sup>147</sup> China abstained from the vote, as explained by its Permanent Representative to the UN Li Zhaoxing, both because it was opposed, in principle, to overreaching the UNSC’s authority by invoking Chapter VII to establish an ICT through a UNSC resolution and because China believed that the UNSC should have consulted the GoR further.<sup>148</sup>

145 United States Department of State (5 November 1994). Cable Number 004783. “Rwanda War Crimes Tribunal.”

146 Interview with Scheffer (18 Nov. 2005).

147 UN Doc. S/PV.3453 (8 November 1994).

148 *Ibid.*, 11.

After issuing broad public statements condemning *génocidaires* and calling for their accountability, and privately and directly threatening the genocide's leaders, the USG decided to act only after the genocide. Specifically, the USG decided to support prosecutions through ICT-Tied after abandoning its initial position of favouring ICTY-Expanded.

### *Puzzles*

The case of USG support for the ICTR presents a series of puzzles, which should be investigated in future research on this topic. First, why, given the USG decision not to intervene in the Rwandan genocide, did the USG not only decide to “do something” about the transitional justice process, but also choose to support and to lead a relatively expensive (compared to other transitional justice options), labour-intensive and resource-draining transitional justice option?

Second, the precise form of the transitional justice option is itself puzzling. There was, at least theoretically, a vast array of other non-prosecutorial and prosecutorial options outside or through the UN, including the only other option that the USG seriously considered, ICTY-Expanded. Why, then, did the USG initially favour expanding the ICTY to eventually become a permanent international criminal court if it subsequently opposed the ICC? In addition, why did the USG support ICT-Tied, given apparently contradictory developments, such as the division of the ICTY/ICTR chief prosecutor into two separate offices? Moreover, why did the USG ultimately favour ICT-Tied, considering that it and the UN Independent Commission of Experts on Rwanda initially preferred ICTY-Expanded? Furthermore, why did the USG support an option that could not employ the death penalty, a punishment implemented in the US and one which the GoR sought? Finally, why did the USG support any option that would be an expansion of, tied to, or based on the ICTY, given the valid reasons the USG had to be sceptical of that model?

Third, it is curious—given the GoR's vote against UNSC resolution 955—that the USG supported the ICTR but cited the GoR's preferences in making other decisions leading up to that vote. Fourth, why did the USG support the ICTR, given that in other post-conflict situations the USG employed alternative options, such as amnesty, exile, assassination, and prosecution in a court established by multilateral treaty outside the UN? Fifth, given the UN's failure to prevent, stop, or even mitigate the Rwandan genocide, why did the USG rely upon the UN to facilitate and then administer the transitional justice solution for Rwanda? Finally, considering the enormous number of suspected *génocidaires*, why did the USG pursue an option that would focus on a limited number of them, even if they were the genocide's suspected leaders?

These puzzles bear directly on evaluating the USG's motives in supporting the establishment of the ICTR, and therefore merit further investigation. Conclusions about these puzzles can be drawn by considering the logic, necessity and persuasiveness of arguments put forth in interviews with USG officials involved in, and others knowledgeable about, USG decision-making on transitional justice issues; by analysing events since the ICTR's establishment; and by consulting the international law, institution creation and transitional justice literatures.

### *Conclusion*

The establishment of the ICTR, in which the USG played a leading role, was a momentous advance in international relations. The creation of the ICTR marked a significant development in international cooperation, especially among Great Powers. The creation of the ICTR (and the ICTY), including the bilateral cooperation between the US and Russia on the appointment of Goldstone as ICTY and then ICTY/ICTR chief prosecutor, serve as a barometer for how far international cooperation had developed by 1994. Previously, during the Cold War, the US-USSR superpower rivalry paralysed the UNSC and otherwise prevented effective collaboration on international issues, including transitional justice. On the other hand, it is ironic that, whereas in 1994 some states objected to the USG's plan to establish a permanent international criminal court, just four years later those same states objected to the USG's opposition to doing so.

The establishment of the ICTR also represents a significant development in transitional and international justice. The ICTR established the precedent of the international community's response to crimes limited to an internal conflict. It also affirmed the power and legitimacy of the UNSC to use its Chapter VII powers to create *ad hoc* tribunals to prosecute suspected offenders of atrocities. Most important, the establishment of the ICTR presented the opportunity to identify, try and punish *génocidaires*; to document the history of, and responsibility for, the Rwandan genocide; to deter future atrocities and to provide reconciliation for the people of Rwanda. As Jallow notes in the following chapter, the ICTR has already established significant international legal precedents: it was the first ICT to receive a guilty plea for genocide,<sup>149</sup> it handed down the first genocide conviction,<sup>150</sup> it indicted and subsequently convicted a head of government for genocide for the first time,<sup>151</sup> it defined

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149 Prosecutor v. Kambanda, Case No. ICTR-97-23, Judgment (4 Sept. 1998).

150 Prosecutor v. Akayesu, Case No. ICTR-96-4, Judgment (2 Sept. 1998).

151 Prosecutor v. Kambanda, Case No. ICTR-97-23, Judgment (4 Sept. 1998).

rape in international law and held that it could constitute genocide,<sup>152</sup> and it passed the first genocide conviction of journalists.<sup>153</sup>

The hope is that “genocide”—what the ICTR has called the “crime of crimes”<sup>154</sup>—and other atrocities will cease to occur in the future. Sadly, we have little reason to believe that this will be the case. As long as such crimes persist, the international community will be forced to make difficult choices like the ones described in this chapter, regarding whether and how to deal with their perpetrators.<sup>155</sup>

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152 Prosecutor v. Akayesu, Case No. ICTR-96-4, Judgment (2 Sept. 1998).

153 Prosecutor v. Barayagwiza, Case No. ICTR-97-19, Judgment (3 Dec. 2003); Prosecutor v. Nahimana, Case No. ICTR-96-11, Judgment (3 Dec. 2003); Prosecutor v. Ngeze, Case No. ICTR-97-27, Judgment (3 Dec. 2003).

154 Prosecutor v. Kambanda, Case No. ICTR-97-23-S, Judgment and Sentence (4 September 1998), Paragraph 16; Prosecutor v. Serashugo, Case No. ICTR-98-39-S, Sentence (2 February 1999), Paragraph 15.

155 For an analysis of some case studies (e.g. people’s tribunal in Japan, exile in Nigeria, prosecution in Darfur) outside the scope of this chapter that reflect the breadth of problems and controversies involved in choosing among various transitional justice options, see: Zachary D. Kaufman, “Transitional Justice Delayed Is Not Transitional Justice Denied: Contemporary Confrontation of Japanese Human Experimentation During World War II.” *Yale Law & Policy Review*. Volume 26, Issue 2 (Spring 2008), 645-59; Zachary D. Kaufman, “Sudan, the United States, and the International Criminal Court: A Tense Triumvirate in Transitional Justice for Darfur” in Ralph Henham and Paul Behrens (eds), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Ashgate, 2007), 49-60; Zachary D. Kaufman, “Justice in Jeopardy: Accountability for the Darfur Atrocities”, *Criminal Law Forum*. Volume 16, Issue 4 (April 2006), 343-60; Zachary D. Kaufman, “The Future of Transitional Justice.” *St. Antony’s International Review* (University of Oxford Journal of International Relations). Volume 1, Number 1 (March 2005), 58-81.