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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

IN THE MATTER OF THE SURRENDER)
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 OF)
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 ELIZAPHAN NTAKIRUTIMANA)
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Misc. No. L-96-5

DECLARATION OF MICHAEL J. MATHESON

I, Michael J. Matheson, declare and say:

1. I am the Acting Legal Adviser in the Department of State. I have held this position since June 1996, have been Deputy Legal Adviser since 1983, and have been employed by the Department of State as an attorney since 1972. The Office of the Legal Adviser is responsible for providing legal advice to the Secretary of State, including matters relating to the International Criminal Tribunal for Rwanda (the Tribunal). During the course of these responsibilities, I have become familiar with the law relating to the Tribunal and the United Nations. I was personally involved in the establishment of the Tribunal and in the drafting of its Statute. The following is based on my personal knowledge and information available to me as part of my official duties.

2. Authority under Chapter VII of the Charter of the United Nations to create a tribunal. The establishment of the Tribunal to try offenses under international humanitarian law is within the authority of the Security Council under Chapter VII of the United Nations Charter.

Article 39 of the Charter provides that the Security Council shall determine the existence of any threat or breach of the peace, and may decide on measures pursuant to Article 41 "to maintain or restore international peace and security." Article 41 of the Charter provides that the Council "may decide what measures not involving the use of armed force are to be employed to give effect to its decisions" and then gives an exemplary list of actions which the Council may call upon States to take. This list is not an exclusive enumeration of the measures the Council may take and nothing in Chapter VII limits the Council's choice of means. Accordingly, the decision as to the existence of a threat to the peace, and as to what measures are to be taken as a consequence, is given

exclusively to the Council. These determinations are of a policy or political character and are not subject to judicial resolution.

In fact, the Council has resorted to a wide variety of actions under Chapter VII which are not specifically enumerated in the illustrative list in Article 41. This includes, for example, the creation of zones in which overflights are prohibited,¹ the creation of "safe areas"² and humanitarian corridors,³ the granting of compensation to the victims of armed attack,⁴ the delimitation of disputed borders,⁵ and the prohibition of the acquisition or possession of weapons of mass destruction by a particular State.⁶

Further, Article 29 of the Charter provides that the Council "may establish such subsidiary organs as it deems necessary for the performance of its functions." There is no limitation on the character of such organs, and in fact the Council has created a wide variety of bodies under this authority. They include, for example, observer teams and

¹ S.C. Res. 781 (1992), Forty-Seventh Year, 3122nd mtg. at op. para. 1, U.N. Doc. S/RES/781 (1992) (establishing a ban on military flights in the airspace of Bosnia and Herzegovina); S.C. Res. 786 (1992), Forty-Seventh Year, 3133rd mtg. at op. para. 1, U.N. Doc. S/RES/786 (1992) (reaffirming a ban on military flights in the airspace of Bosnia and Herzegovina).

² S.C. Res. 824 (1993), Forty-Eighth Year, 3208th mtg. at op. para. 3, U.N. Doc. S/RES/824 (1992) (designating cities as safe areas); S.C. Res. 819 (1993), Forty-Eighth Year, 3199th mtg. at op. para. 1, U.N. Doc. S/RES/819 (1992) (designating Srebrenica as a safe area).

³ S.C. Res. 918, Forty-Ninth Year, 3377th mtg. at para. 3, U.N. Doc. S/RES/918 (1994).

⁴ S.C. Res. 687, U.N. SCOR, Forty-Fifth Year, 2981st mtg. at op paras. 16, 18, U.N. Doc. S/RES/687 (1991) (reaffirming Iraq's liability for actions against victims and setting up compensation fund).

⁵ S.C. Res. 687, U.N. SCOR, Forty-Sixth Year, 2981st mtg. at op. para. 3, U.N. Doc. S/RES/687 (1991) (eventually establishing the U.N. Iraq/Kuwait Boundary Demarcation Commission).

⁶ S.C. Res. 687, U.N. SCOR, Forty-Sixth Year, 2981st mtg. at op. para. 3, U.N. Doc. S/RES/687 (1991) (recommending the establishment of a special commission to deal with the elimination, under international supervision, of Iraq's weapons of mass destruction).

peacekeeping forces,⁷ investigation commissions,⁸ commissions charged with enforcement of restrictions on weapons and military activities,⁹ commissions charged with demarcation of boundaries,¹⁰ and committees charged with interpreting and administering sanctions regimes.¹¹ In at least two recent cases, the Council has created subsidiary organs with judicial or quasi-judicial functions: the U.N. Compensation Commission, which decides on the compensation to be given to particular

⁷ S.C. Res. 814, Forty-Eighth Year, 3188th mtg. at op. paras. 5-14, U.N. Doc. S/RES/814 (1993) (Council establishes UNOSOM II to facilitate an immediate cessation of hostilities in Somalia); S.C. Res. 758, Forty-Seventh Year, 3083rd mtg. at op. para. 2, U.N. Doc S/RES/758 (1992) (enlarging the mandate and strength of UNPROFOR to allow for the deployment of personnel to Bosnia and Herzegovina); S.C. Res. 687, U.N. SCOR, Forty-Sixth Year, 2981st mtg. at op. para. 5, U.N. Doc. S/RES/687 (1991) (approving a plan for the deployment of a U.N. observer unit to monitor the demilitarised zone between Iraq and Kuwait).

⁸ S.C. Res. 866, U.N. SCOR, Forty-Eighth Year, 3281st mtg. at op. para. 3(a), U.N. Doc. S/RES/866 (1993) (mandating UNOMIL to investigate all reports on alleged incidents of cease-fire agreement violations in Liberia).

⁹ S.C. Res. 687, U.N. SCOR, Forty-Sixth Year, 2981st mtg. at op. paras. 9(b), 10, U.N. Doc. S/RES/687 (1991) (recommending the establishment of a special commission (UNSCOM) to deal with the elimination, under international supervision, of Iraq's weapons of mass destruction); Report of the Secretary-General: Implementation of paragraph 9(b)(i) of Security Council Resolution 687 (1991), U.N. SCOR, Forty-Sixth Year at para. 3, U.N. Doc. S/22508 (1991).

¹⁰ S.C. Res. 687, U.N. SCOR, Forty-Sixth Year, 2981st mtg. at op. para. 3, U.N. Doc. S/RES/687 (1991) (calling upon the Secretary General to make arrangements regarding the demarcation of the boundary between Iraq and Kuwait); Report of the Secretary-General Regarding Paragraph 3 of Security Council Resolution 687 (1991), U.N. SCOR, Forty-Sixth Year at para. 3, U.N. Doc. S/22508 (1991) (describing the creation of the Iraq-Kuwait Boundary Demarcation Commission to carry out paragraph 3 of Resolution 687).

¹¹ S.C. Res. 918, U.N. SCOR, Forty-Ninth Year, 3377th mtg. at op. para. 14, U.N. Doc. S/RES/918 (1994) (Rwanda); S.C. Res. 748, U.N. SCOR, Forty-Seventh Year, 3063rd mtg. at op. para. 9, U.N. Doc. S/RES/748 (1992) (Libya); S.C. Res. 724, U.N. SCOR, Forty-Sixth Year, 3023rd mtg. at op. para. 5(b), U.N. Doc. S/RES/724 (1991) (Yugoslavia); S.C. Res. 661, U.N. SCOR, Forty-Fifth Year, 2933rd mtg. at op. para. 6, U.N. Doc. S/RES/661 (1990) (Iraq).

victims of the Gulf War;¹² and the International Tribunal for the Former Yugoslavia, which has functions closely related to those of the Tribunal.¹³

The establishment of the Tribunal was particularly appropriate in response to the situation in Rwanda. In creating the Tribunal, the Council was acting to deal with a specific urgent situation presenting a serious threat to the peace. An effort to establish the culpability of individuals responsible for genocide and other serious violations of international humanitarian law -- and to deter future violations of international humanitarian law -- is a suitable and important step in removing the threat to international peace and security posed by the conflict.

Furthermore, it is essential to the establishment and maintenance of a lasting peace that there be some impartial mechanism to bring to justice those responsible for the atrocities committed during the conflict. Thus, providing for the surrender and trial of those accused of atrocities raises important foreign policy issues.

Moreover, it is not the case that the authority of the General Assembly has been infringed by the creation of the Tribunal. The Assembly does not have the Council's Chapter VII authority to deal with threats to the peace or to obligate Member States to comply with Tribunal decisions. But even if the Assembly had all the necessary authority, this would not preclude the Council from exercising its own powers under Chapter VII. In fact, Article 12 of the Charter requires that the Assembly defer to the Council when the latter is exercising its Chapter VII authority in a particular situation.

The Assembly has in fact expressed its full support for the Tribunal, has elected its judges and has acted to provide financial support for its operations.¹⁴

¹² S.C. Res. 687, U.N. SCOR, Forty-Fifth Year, 2981st mtg. at op. paras. 16, 18, U.N. Doc. S/RES/687 (1991) (reaffirming Iraq's liability for actions against victims and setting up compensation fund); S.C. Res. 692, U.N. SCOR, Forty-Sixth Year, 2987th mtg. at op. para. 3, U.N. Doc. S/RES/692 (1991) (establishing the United Nations Compensation Commission); Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687 (1991), U.N. SCOR, Forty-Sixth Year at para 20, U.N. Doc. S/22559 (1993) ("[t]he Commission is not a court or an arbitral tribunal...it is a political organ that performs an essentially fact-finding function of examining claims,...., and resolving disputed claims. It is only in this last respect that a quasi-judicial function may be involved").

¹³ S.C. Res. 827, U.N. SCOR, Forty-Seventh Year, at op. para. 2, U.N. Doc. S/RES/827 (1993) (establishing the International Tribunal for the Former Yugoslavia).

¹⁴ G.A. Res. 51/215, U.N. GAOR, 51st Session, 89th mtg at op. para. 2, U.N. Doc. A/RES/51/215 (1996) (appropriating funds to the Tribunal); G.A. Res. 213, U.N. GAOR, 50th Session, 100th mtg at op. para. 1, U.N. Doc. A/RES/50/213 (1995) (appropriating funds to the Tribunal).

The fact that the Council is a body of limited membership, while the Assembly includes all U.N. Members, has no relevance to whether the Council has authority to create the Tribunal. The composition of the Council was specifically designed with a view toward its exercise of the broad powers of Chapter VII to ensure the restoration and maintenance of the peace.

Moreover, the Tribunal is not otherwise in violation of international law. The establishment of the Tribunal is not inconsistent with the International Covenant on Civil and Political Rights (ICCPR) 6 International Legal Materials 368 (1967), 999 UNTS 171 and the Universal Declaration of Human Rights (UDHR), G.A. Res. 271 A, U.N. Doc. A/819 (1948). Indeed, the Statute and the Rules of Procedure and Evidence of the Tribunal of 29 June 1995, ITR/3/Rev.1 provide full due process for the accused that are fully consistent with the ICCPR and the UDHR.

These various issues have been considered and resolved with respect to the International Criminal Tribunal for the Former Yugoslavia by the Appeals Chamber of that Tribunal (which, under the Statute for the Rwanda Tribunal, also has jurisdiction over appeals from the Trial Chambers of the Rwanda Tribunal). In the case of Prosecutor v. Dusan Tadic, the Appeals Chamber held that the Security Council did have authority to create an ad hoc tribunal to prosecute persons accused of genocide, war crimes and crimes against humanity, and that international norms concerning fair trial and due process were fully satisfied by the Yugoslav Tribunal's Statute and Rules (which are essentially identical for this purpose with those of the Rwanda Tribunal).

Furthermore the UDHR is not a treaty and thus bestows no rights on litigants in U.S. courts. While the ICCPR is a treaty, to which the United States is party, a declaration filed with its instrument of ratification clearly conveyed the U.S. intention that it not be self-executing and as a result confers no rights directly on U.S. litigants which can form the basis for relief in U.S. courts, 31 International Legal Materials 648 (1992).

3. Members of the United Nations have an obligation to comply with Security Council Resolutions. The duty of Members of the United Nations to comply with resolutions of the Security Council is made expressly clear in the U.N. Charter. For example, under Article 24(1) of the Charter, Members "confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf." Pursuant to Article 25, Members "agree to accept and carry out the decisions of the Security Council in accordance with" the Charter. Article 103 provides, further, that "[i]n the event of a conflict between the obligations of the Members... and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

Security Council Resolution 955 of November 8, 1994, which created the Tribunal, was a valid exercise of the Council's authority under Chapter VII of the Charter. It decided that "all States shall cooperate fully with the International Tribunal and its organs . . . and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 28 of the Statute" Article 28 of the Statute, which was adopted by the Council in Resolution 955, provides that "States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to . . . the arrest or detention of persons" and "the surrender or the transfer of the accused to the International Tribunal for Rwanda." Accordingly, the United States has an obligation under the Charter to comply with the order of the Tribunal to surrender the accused to the Tribunal.

4. Report of the Office of Internal Oversight Services on the audit and investigation of the International Criminal Tribunal for Rwanda.¹⁵ In response to a request by the United Nations General Assembly, the Office of Internal Oversight Services conducted an audit and investigation of the Tribunal. The report stated that the judicial independence of the Tribunal is ~~unquestioned~~. The integrity of the judges and the fairness of trials have not been questioned in the report. Moreover, there is nothing in the report which indicates that the accused would not be able to retain adequate counsel, or otherwise put forward a vigorous defense, under rules which provide due process. Indeed, none of the shortcomings cited in the report bear on the validity of the charges against the accused. However, mismanagement was found and recommendations were made to address the shortcomings identified. The Secretary General has moved promptly to institute necessary changes. The Registrar and the Deputy Prosecutor have been removed from their positions. A new Registrar has been hired. An active search is underway for a Deputy Prosecutor. Attention is being given to witness protection. The other areas where shortcomings were reported, particularly those of a management and administrative nature, are being addressed.

¹⁵ Report of the Secretary General on the Activities of the Office of Internal Oversight Services Regarding General Assembly Resolution 213C (1996).

5. The alleged conduct of the accused was a criminal offense at the time and place it occurred. The United States Embassy in Rwanda has advised the Department of State that the laws of Rwanda at the relevant time in 1994 provided, in section 312 of the Codes and Laws of Rwanda, Penal Code, that premeditated murder was punishable by the death penalty. Moreover, Rwanda is, and was in 1994, party to the Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, the Fourth Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War, 6 UST 3516, TIAS 3365, 75 UNTS 287, and the 1977 Geneva Protocol II Additional to the 1949 Geneva Conventions Relating to the Protection of Victims of Non-international Armed Conflicts, 16 International Legal Materials 1442 (1977). Each of these instruments treat the alleged conduct of the accused as international criminal offenses. Therefore, it cannot be argued that the accused is being prosecuted for conduct that was not criminal at the time and place it occurred, or that the accused could not reasonably have foreseen that he could be liable to prosecution for murder, genocide and other serious violations of international humanitarian law.

6. Other matters dealt with in the Memorandum in Opposition to the request for surrender of March 6, 1997. Detention facilities under the supervision of the Tribunal have been provided in Arusha, Tanzania for indictees awaiting trial. Imprisonment after conviction shall, in accordance with Article 26 of the Tribunal Statute, be subject to the supervision of the Tribunal. The Tribunal cannot impose a sentence of death. The Tribunal has a sufficient budget for the conduct of trials. Two trials have commenced and additional trials are scheduled to begin in 1997. The Tribunal judges are jurists chosen from worldwide nominations, and elected by the UN General Assembly by the same procedures used to elect judges of the International Court of Justice, Some have been members of the highest courts in their countries of origin.

I declare under penalty of perjury that the above declaration is true and correct.

Michael J. Matheson

Michael J. Matheson
Acting Legal Adviser
Department of State

Executed at Washington, D.C.
April 4, 1997