

August 24, 1994

This memorandum identifies issues that need to be considered by relevant bureaus in determining the elements of a USG proposal for a UNSC resolution on detention of persons suspected of having committed crimes against international humanitarian law in Rwanda/Burundi. We have focused on issues that need to be addressed for detentions that would occur during an interim period before a UN war crimes tribunal is established and able to bring indictments. It would be appreciated if IO, DRL, AF, EUR, USUN/W and P could comment on aspects relevant to them.

I. Should the USG Support UNAMIR Detention of Persons Suspected of Having Committed Atrocities?

Background

- There has not yet been a clear USG policy decision in support of detention by UNAMIR.
- The USG could not present a compelling case in favor of UNAMIR detentions without addressing a number of technical and practical questions posed by the proposal (see Potential Action Items, below)
- It is assumed here that U.S. forces present in Rwanda and neighboring countries would be unwilling to detain persons suspected of having committed atrocities.

Issue for Decision

- Should the USG actively support UNAMIR detention of persons suspected of having committed atrocities?

Pros

- o Detentions by UNAMIR offer a neutral alternative to detentions by the RPF.
- o Concrete international community response to atrocities could forestall rash actions by the GOR and others who might commit summary executions and other acts of revenge.
- o Detention could prevent suspected persons from escaping justice.

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Cons

- o As in Somalia, UN detentions may lead the local population to see UN forces as non-neutral, increasing risk to them and potentially exacerbating instability.
- o Detention would require UNAMIR to divert resources from other priorities.
- o Detentions by UNAMIR are not feasible unless we and the UN can find places for medium and long-term incarceration for potentially large numbers of persons.

Possible action items:

- What could the USG do to help provide UNAMIR the capacity to detain, including identification of troops trained to detain in accordance with international standards and identification of sources of any necessary equipment/facilities?
- In order to make a compelling case that UNAMIR should detain persons, the USG needs to address a number of issues. For example: What information would be necessary to support detention of an individual? For how long could an individual be detained?

II. Should the USG Seek Express UNSC Authority for UNAMIR To Detain?

Background

- A strong case can be made that UNAMIR and other UN forces already have legal authority to detain persons who interfere with their mandate or attack them. (It is less clear that these forces have authority to search for suspected but unindicted war criminals, although such an argument can be made consistent with U.S. positions on the laws of war). In addition, it is likely that UN forces will be authorized to detain persons indicted by the UN's Rwanda tribunal, once constituted.
- UNAMIR's current mandate includes authority to contribute to the security and protection of displaced persons, refugees and civilians at risk in Rwanda, and to provide security and support for the distribution of relief supplies and humanitarian relief operations. Moreover, the Council recognized that UNAMIR may be required to take action in self-defense against persons or groups who

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threaten protected sites and populations. Given the broad responsibilities UNAMIR has been given for security matters, there is room to argue that UNAMIR has an implied authority to undertake detentions in order to prevent violence, protect populations and promote distribution of humanitarian relief.

- In addition, a UN civilian police unit was authorized as part of UNAMIR to verify that law and order are maintained effectively and impartially. Thus UNAMIR's mandate includes the concept of police activity.

Issues for decision

- Assuming that there is at least some level of implied authority, should the USG seek explicit authority in a UNSC resolution?

Pros:

- o In view of UN Secretariat reluctance to rely on implied authority to detain persons in the former Yugoslavia, UNAMIR may be unwilling to authorize detention without express authority.
- o Legal basis for implied authority is subject to greatest challenge with respect to persons as to whom detention may be a high priority -- suspected war criminals who do not are not currently interfering with UNAMIR's mandate or who do not pose a physical threat to UN forces.

Cons:

- o Express authority could increase risk that UNAMIR troops are seen in Rwanda as non-neutral, possibly heightening the risk of attacks on them.
 - DOD and JCS, while agreeing that UNAMIR has implied authority, object to providing explicit authority on the grounds that these are neutral "Chapter VI" forces (forces deployed with the consent of the host state and other relevant parties to a conflict) which may be placed in danger if they are known to have authority to detain. They fear that, as we saw with the attempt to detain Aideed, persons who believe that they might be a target for prosecution may direct violence against UN forces rather than risk the possibility of arrest. The UN may

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share these concerns. (The DOD and JCS concerns logically apply under any circumstances where UNAMIR detains persons, regardless of whether it has explicit -- as opposed to implied -- authority to do so.)

- One way of dealing with these concerns is to ensure that authority to detain rests with force commanders, who can judge whether timing and circumstances for carrying out a detention are appropriate.

-- If the UNSC gives express authority to UNAMIR, should express authority also be given to UNOMUR?

Pros:

- o If UNAMIR is given express authority, extension to UNOMUR would avoid implication that UNOMUR lacks implied authority. All UN forces in the region would have the same basic law enforcement authority.

Cons:

- o UNOMUR, much more so than UNAMIR, may lack capacity to detain or to react to any heightened tensions that could result from an express mandate to detain.

-- If UNAMIR is given express authority to detain, should such authority be pursuant to Chapter VII of the UN Charter?

Pros:

- o Chapter VII authority could imply that UN forces have greater latitude to use force to obtain custody of suspects.
- o Chapter VII would provide authorization without the need for consent of relevant governments (Rwanda for UNAMIR; also Uganda for UNOMUR).

Cons:

- o May imply to RPF and others that UNAMIR is not a neutral force; may have PDD 25 ramifications.

Possible action items:

-- Should we demarche the Secretariat on whether UNAMIR should be willing to detain?

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- Should P-5 (or P-4) be consulted on whether they would support detention based on implied authority and/or would agree to a resolution that provided express authority?
- Should GOR views be sought on the prospect of UNAMIR detention and the choice of express or implied authority?
- Should GOU views be sought on UNOMUR?
- III. Should the USG support a UNSC resolution authorizing states to detain persons suspected of committing atrocities in Rwanda?

Background

- Some neighboring states, such as Tanzania, have told us that they lack sufficient legal authority to detain persons for these crimes.
- As a general rule, the United States lacks domestic legal authority to detain persons charged with committing atrocities in Rwanda. Moreover, a UNSC resolution (even a resolution under Chapter VII) would not take precedence over the Constitution.
- The Council could (1) urge states to detain persons consistent with their domestic laws; or (2) authorize detentions under Chapter VII. The latter option, an unusual step for the Council, has less utility than might at first appear because a mere "authorization" still leaves detentions up to states, and it is not clear whether this "authorization" in fact will give states that want it the ability to detain. It may have some marginal benefit for states which need a reason to seek implementing legislation from their legislatures.

Issues for Decision

- Should the USG seek a UNSC resolution authorizing detention by states of persons charged with committing atrocities in Rwanda?

Pros:

- o If resistance to detention reflects genuine legal concerns, a resolution might overcome them.
- o If assertion of lack of legal authority is primarily an excuse for a lack of political will, a resolution might strengthen political resolve.

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- o To the extent war criminals are making troubles in the refugee camps, their detention may have a stabilizing influence on the camps and the repatriation process.

Cons:

- o Attempts to detain persons (e.g. in refugee camps) could be resisted with violence by those persons and their followers, and could have a destabilizing effect.
- o Some countries, including the United States, would still need domestic legislation in order to detain persons.

-- Should the resolution extend only to states in the region?

Pros:

- o Would not apply to United States (so long as it is not drafted to apply to states with troops in the region), avoiding DOD-JSC concerns and constitutional problems.

Cons:

- o Would not apply to France and other states in the territories of which perpetrators might be found.
- o Might be more difficult to persuade states of the region to detain if states like the United States and France were not willing to take on the same obligation.

-- Should the resolution apply also to Burundi?

Pros:

- o Would provide for equivalent treatment for persons accused of atrocities in Burundi, which should be equally of concern to the world community.

Cons:

- o Implies that the UN tribunal should also concern itself with crimes in Burundi; may establish linkage between Rwanda and Burundi political situations that we do not find advantageous.

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Potential Action Items:

- Apart from or in addition to a resolution, are there other ways to induce governments in the region to detain persons suspected of committing atrocities?
 - o We could explore with states in the region whether they would be more willing to detain upon receipt of information from another government about particular charges against an individual or upon a request by the GOR with supporting documentation (something akin to a provisional arrest request).
 - o We could ask whether they would be more willing to arrest persons if those persons were to be detained elsewhere (e.g., by UNAMIR, outside the region).

IV. Additional questions

- Additional questions for regional governments, the UN and ourselves include:

What information would be necessary to support detention? What would be the legal basis for detention (e.g., violation of domestic laws, request by GOR)? Would persons have a right to challenge their detention before a court, if so what court, and on the basis of what legal standards? Would persons be detained prior to the handing down of indictments by the Rwanda tribunal (a process that will have taken more than a year in the case of Yugoslavia)? Could states try persons detained under this authority if the tribunal has not acted? Where would persons be detained, and if by national authorities, can persons be transferred freely between states, or between states and the tribunal without judicial involvement? Could the tribunal accept custody of persons who have not been indicted? How will states, the tribunal and/or the Council handle a situation involving large numbers of persons in custody?

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