

STUDENT VOICES

Genocide on the Airwaves: An Analysis of the International Law Concerning Radio Jamming

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ABSTRACT

Using the Rwandan genocide as an example, this article makes a case for allowing the jamming of radios that are broadcasting hate speech in situations in which such hate speech would incite genocide. To this end, it discusses the law relating to freedom of speech and communication in international law and its relative position when applied to genocide. Further, it analyzes the traditional notions of state sovereignty to make a case for humanitarian intervention by radio jamming. Finally, it recommends the establishment of a body under the aegis of the UN with the mandate and equipment to jam incendiary broadcasts in situations that are gravitating toward genocide.

I. INTRODUCTION

The radio is an immensely powerful tool of communication. With relatively cheap equipment, it can reach millions of people in the remotest areas of a country, carrying entertainment, generating opinions, and conveying information. In its most beneficent form, the radio has been used as a tool of education, as a means of communication of danger, and to generate opinions for peace and reconciliation.¹ In contrast, virulent radio broadcasts have been used for propaganda since the time of the Nazis.²

For example, in 1994, nearly 800,000 Tutsis and moderate Hutus were massacred in Rwanda in a span of about four months as the rest of the world stood by and watched. It was later noted that in spite of the so-called “spontaneity” of the killings and the underdevelopment of the Rwandan infrastructure, the massacres were carried out in a highly planned and coordinated manner.³ This was largely done by the use of the radio, particularly the radio station known as Radio-Télévision Libre des Milles Collines (RTL). The French Commander of the UN Forces in Rwanda, General Romeo Dallaire, in fact noted that “many lives would have been saved” if he had been provided with proper jamming equipment.⁴

The most appalling aspect of these massacres was that at this time,

radio technology was sufficiently advanced to provide sophisticated equipment to jam radio broadcasts and thus prevent them from being aired.⁵ However, neither the United Nations nor any developed nation with such technology intervened in the Rwandan crisis. The problems they perceived related to the absence of a framework under international law to enable jamming of communications in another state. Besides, there was no pre-existing UN body to facilitate such a move. In simple terms, the technology was available, but there was no legal protocol in place to ensure its use for the protection of human rights.

In contrast, during the conflict in Bosnia, the role of the media was well identified. Under the Dayton Peace Agreement of 1995, the Organization for Security and Cooperation in Europe (OSCE) was given the mandate to conduct the elections in the region, and as part of the execution of this job, it took upon itself the duty of regulating the media and preventing incendiary broadcasts.⁶ It went to the extent of jamming broadcasts and seizing transmitters to serve this end.⁷ However, in this case, the Dayton Accords, signed by the sovereigns in the region, gave the OSCE (which consisted primarily of NATO powers) the authority to interfere in the affairs in Bosnia and take the steps required to jam broadcasts. Outside such consensual surrender, there is no legal framework in international law to address the issue of hate speech in internal armed conflicts.

Hence, this essay attempts to explicate and fill the lacunae in the theory and practice of international law relating to radio jamming. At the theoretical level, this article will address the questions of sovereignty and freedom of information in international law which were raised as arguments against jamming radios in Rwanda. With regard to the practice, an attempt is made to analyze possible frameworks under the UN by means of which such jamming could be effected.

II. RADIO JAMMING AND INFORMATION INTERVENTION

“Information intervention” is a broad term coined by J.F. Metzler that includes a wide range of international interference in public media activities in a state where genocide is likely to occur.⁸ Radio jamming is just a subset of the range of operations contemplated in information intervention.

International radio frequencies are controlled and coordinated by the International Telecommunications Union (ITU).⁹ By its Radio Communication Sector, it is given the mandate of “ensuring the rational, equitable, efficient and economical use of the radio-frequency spectrum by all radio services.”¹⁰ This Sector develops and adopts the “Radio Regulations” that are a binding treaty governing the use of the radio spectrum.¹¹ As a general policy under the Constitution of the ITU,¹² it does not approve of any form

of harmful interference¹³ with the radio services of another member state.¹⁴ In such circumstances, the jamming of communications of any member state will have to be set out and explained before the ITU, and the requisite clearances will have to be obtained. Though such clearance militates against the mandate of the ITU, it may be seen to be in consonance with the purpose of the ITU under its Constitution¹⁵ when it is required for the jamming of communications used to coordinate genocide.

Radio jamming is a form of negative media intervention. It is defined as “the deliberate emission of electromagnetic (EM) radiation to reduce or prevent hostile use of a portion of the EM spectrum.”¹⁶ Jamming can replace an offensive signal with a disrupting one,¹⁷ causing simply noise, or an overriding one, resulting in a different broadcast.¹⁸

Jamming can be carried out from the ground or from the air. When it is done on the ground, it requires the cooperation of the local authorities of the country or of a neighboring country, a strong power source to run the equipment, and possibly armed troops to guard the equipment. In contrast, jamming from the air, though more practical, is also more expensive.¹⁹ It involves the deployment of an aircraft in the airspace of the nation in question which would put out signals that would jam the broadcasts.²⁰

Along with the jamming of incendiary broadcasts, another effective measure is the positive media intervention that broadcasts messages of peace and reconciliation and counters the misinformation spread by the jammed broadcasts. This can be done by using the same equipment to emit overriding signals. However, this kind of intervention is even more dependent on local cooperation and financial considerations.²¹

One more method of eliminating radio broadcasts, used by the NATO forces in Bosnia, is the complete switching off of broadcasts by either seizing or destroying the transmitters of organizations that indulge in hate-mongering.²² However, implementing this strategy would require a strong presence of the invading state on the ground. Such intervention can also be avoided if the broadcaster uses mobile transmitters.²³

III. THE LEGALITY OF JAMMING COMMUNICATIONS IN INTERNATIONAL LAW

Jamming communications in international law runs afoul of two main concepts. The first is the fact that Western nations, and the USA in particular, have consistently supported and promoted freedom of speech and information in international exchanges and taken stands against any form of censorship or media restrictions.²⁴

The second problem relates to the issue of state sovereignty, which is a fundamental principle of international law, recognized under Article 2(7) of

the Charter of the United Nations.²⁵ Generally, no state would have the right to jam communications emanating from and circulating within the internal boundaries of another state, as such interference would amount to meddling with the internal affairs of that country. This section attempts to counter both of these arguments.

A. *Freedom of Speech and Information in International Law*

The hate speech problem was first encountered at the Nuremberg Trials of Major German War Criminals. Two significant trials on the issue were those of an editor, Julius Streicher, and of the Head of the Radio Division of the Propaganda Ministry, Hans Fritzsche.²⁶ Streicher ran an anti-Jewish tabloid called *Der Stürmer* and in its columns provoked hatred against the Jews and called for their extermination. He was an independent operator and formed no part of the government machine.²⁷

In an often-criticized decision, Streicher was found guilty of, and hanged for, War Crimes and Crimes against Humanity.²⁸ The crux of the decision was the presence of inciting words as well as their actual physical realization.²⁹ This was in spite of the fact that Streicher was a private actor and at that time, international law required that to be punishable, crimes against humanity had to be carried out by state actors as a part of consistent state policy of discrimination or persecution.³⁰

In contrast, Fritzsche was acquitted, even though he had made several anti-Semitic broadcasts and was a part of the Nazi government machinery. The Tribunal found no explicit calls for the extermination of Jews in his speeches and was not prepared to hold that his speeches incited atrocities against the Jew.³¹ All that they did was support Hitler and arouse German sentiment in support of the war effort, making him a conduit, rather than a liable participant.

The law that emerged out of the Nuremberg decisions was that there had to be a direct causal link between the inciting speech and the resultant violence. An issue that it did not address, however, was that of pre-emptive action, when a speech is made and the resultant action ought to be prevented.

The Cold War began soon after the Nuremberg Trials and all through its term, the US and the Soviet Union took opposite sides of the divide between the absolute free flow of information on one hand, and censorship and restrictions on the other.³² The US feared, in most cases, that any concession it made on the absolute free flow standard would be used by the USSR and its allies to block US broadcasts into their territory. In contrast, the USSR favored giving greater powers to the state to regulate the information that was broadcasted within its territory.³³ A manifestation of this

position was the fact that the Communist bloc routinely favored strong incitement provisions in human rights treaties,³⁴ while the US supported resolutions in international bodies in the 1950s that proscribed jamming of signals as an impermissible invasion into the freedom of information.³⁵

However, in spite of this conflict, the human rights treaties made in this era had provisions prohibiting incitement in some form or the other. The Genocide Convention, 1948, makes “direct and public incitement” to genocide a crime;³⁶ Article 7 of the Universal Declaration of Human Rights³⁷ has been read as including a prohibition on incitement even though Article 19 of the same provides for freedom of speech and expression;³⁸ similarly, though Article 19 of the International Covenant on Civil and Political Rights provides for the freedom, it is restricted by Article 20(2) of the same by providing “any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”,³⁹ and finally, Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination⁴⁰ disallows incitement to racial hatred.

In balance to this body of law is the right to freedom of expression under both the ICCPR⁴¹ and UDHR.⁴² Several Western countries, notably the USA, strongly favor this freedom and did their utmost to curtail its restriction in international fora. Further, there is a general trend in international radio and telecommunications law that does not look favorably upon the jamming of communication signals. Every resolution of the International Telecommunications Union since 1947 has expressly prohibited jamming by stating that radio broadcasts from one country cannot result in harmful interference to the broadcasts of other members.⁴³ Radio jamming has also been condemned by such organs of the UN as the United Nations Economic and Social Council’s Sub-Commission on Freedom of Information and the Press,⁴⁴ the Economic and Social Council⁴⁵ itself, and the UN General Assembly.⁴⁶

It must, however, be noted that this body of law too developed as a part of the US offensive against the USSR, as at this point, the USSR had been resorting to the jamming of unwanted transmissions from Western countries to its populations.⁴⁷ The issue thus related to a sovereign nation’s right to regulate the information that reached its country from *outside*. In modern civilian armed conflicts, the issue is that of broadcasts emanating from within the country received by the citizens of that country within its borders.

It must be noted here that the prevention of genocide has been recognized as a *jus cogens* norm in international law, and no derogation from it is possible.⁴⁸ A *jus cogens* norm prevails over all others.⁴⁹ This means that if a sovereign nation jams broadcasts to its people on its territory to prevent a

genocide, it is not in violation of any treaty or other obligations under international law.

Further, prevention of genocide has also been recognized as an *obligation erga omnes*.⁵⁰ This means that every member of the international community is under an obligation to prevent genocide. By resultant implication, if other countries were to jam radio broadcasts when genocide is apprehended, they would not fall afoul of the lesser obligations under the international human rights conventions or international telecommunication law.

Weighing these two in balance, it is clear that the duty to jam broadcasts to prevent genocide would prevail over that to protect free dissemination of information.

Concurrently, “direct and public incitement to commit genocide” is also made punishable by the Genocide Convention.⁵¹ The issue of whether there must be a causal link between the genocide and the incitement in question has hitherto been a theoretical one, as prosecutions have taken place only in the aftermath of the genocide. However, J. Wallenstein, after a survey of international and regional conventions, national laws and jurisprudence of international courts, has concluded that there is no requirement of causation in the prosecution of incitement to genocide.⁵² This was supported in the *Akayesu*⁵³ judgment of the ICTR. In this case, the Chamber held that the offense of incitement to genocide can be deemed consummated irrespective of the result achieved by the speaker’s expression. This was because genocide clearly fell within the category of crimes that are so serious that direct and public incitement to commit it must be punished as such, even when such incitement failed to produce the result expected by the perpetrator.⁵⁴

Criminologically analyzed, the *actus reus* of the offense is that the actor must publicly provoke the perpetrator to commit “genocide.” Genocide is defined in Article 2 of the Genocide Convention as follows:

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

The *mens rea* element of the offense is the specific intent to commit genocide—for example, the specific intent to eradicate persons of a given

nationality, ethnicity, race, or religion. This specific intent may be inferred if the speech deliberately and systematically targets a certain group.⁵⁵

The absoluteness of freedom of expression as envisaged in developed countries must necessarily yield to a lesser standard in international law, given that the manner in which the media operate in these countries is very different from the manner in which it operates in developing countries, where democracy and rule of law are weak. For example, in Rwanda, the RTLM had very strong backing from the state.⁵⁶ This meant that it had a wider reach and audience, making an effective and equal counterspeech hard to find. In most African societies, the pace of technological development is much faster than that of societal development, leading to unsteady and imbalanced national frameworks for the exercise of the freedom of expression.⁵⁷

B. *State Sovereignty*

The issue of state sovereignty with regard to radio broadcasts has also divided the West and the Communist bloc. In general, the West supported the practice of the free flow of information, while the Communists, fearing US propaganda, supported a “prior consent” doctrine in which each individual state had the sovereign right to determine which broadcasts would be aired on its territory and which would be jammed.⁵⁸ The rationale of the former was that of non-interference and of the national sovereignty of each nation to develop and control its land and air boundaries and sustain its own cultural and social systems.⁵⁹ This divide would be best illustrated by the international controversy caused by the broadcast of Radio Marti into Cuba by the US and the subsequent jamming of signals by Cuba.⁶⁰

Again, when this body of law is seen in the light of an internal armed conflict like the Rwandan situation, it falls completely out of context. The state sovereignty issue in Rwanda is related to whether any member of the international community or the international community acting as a whole could infringe on Rwanda’s sovereignty to jam its territory radio broadcasts which were being broadcasted with either the consent or the acquiescence of the government.

The suggestion is that such interference would be warranted, especially due to the development of the practice of “humanitarian intervention.” This doctrine carves an exception which allows infringement on the otherwise established acceptance of state sovereignty to stop large-scale human rights violations.⁶¹ Most humanitarian interventions are carried out under the aegis of the Security Council of the UN by virtue of its authority under Chapter VII of the UN Charter.

Yet there are some problems with humanitarian intervention in cases

like that of Rwanda in 1994. Foremost is the fact that the boundaries of the doctrine have not yet been clearly defined. Hence, when a state intervenes for humanitarian reasons in the affairs of another, it may have to justify its actions in international fora.⁶² However, once the conduct of the offending state is defined as genocide, humanitarian intervention is both justified and warranted.⁶³

The situation in Rwanda, however, was again anomalous. Here, what needed to be prevented was the “incitement to genocide” before the genocide itself occurred. International practice, in general, has not seen any interventions to prevent genocide before it occurs. Such practice is in fact viewed with suspicion due to its potential for abuse. In the words of one writer, “By only alleging the possibility or imminence of massacre, the intervening state does not have a substantial basis for invasion.”⁶⁴

Also in cases of a genocide that has not happened, there is reluctance on the part of other states to incur the monetary and military costs of intervention.⁶⁵ This is illustrated by the fact that the US government, which would have been in a position to intervene in Rwanda, consciously refrained from characterizing the events of 1994 as “genocide,” as doing so would have invoked obligations under the Genocide Convention.⁶⁶ Even in the Security Council, the phrase “systematic, widespread and flagrant violations of international humanitarian law” instead of “genocide” was used in a resolution in May of 1994.⁶⁷

The international community also needs to find a threshold standard beyond which the justifications for free speech would fall and incitement to genocide would commence. Though there is no such concrete standard in existence, one can discern some parameters for it by reference to the content and context of the speech. In *Kupreskic*,⁶⁸ the Tribunal used the concept of incitement on “discriminatory grounds.” Hence, the verbal attack must be made on national, ethnic, racial, or religious grounds. The discriminatory intent is what sets genocide apart from other mass mayhem, as in a genocide the target group is specifically identified and the massacres are discriminatorily directed in order to advance a common goal.⁶⁹ Further, the incitement must be a public act or a call to the public at large or made in a public place.

More importantly, the ICTR has held that the provocation in question should be determined in light of the linguistic and cultural context of the country and of the audience.⁷⁰ This should be enough to protect free speech in Western democracies, where free speech is countered by opposing free speech. In contrast, in several developing countries, the media is state-controlled, and opposing voices have neither the resources nor the power to be heard. This makes hate speech a particularly dangerous phenomenon. When such state-supported hate speech is backed by discriminatory content and

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promotes the killing or dismemberment of an ethnic group within the state, it would clearly constitute incitement to genocide. Additionally, most such situations occur in times and places where the minorities have already been oppressed or denied rights, and in even worse cases, where massacres of minorities have already started. Hence, any international body that decides to act against hate speech in a particular country must take into consideration the past history of the country, the situation at the time of the action, and the particular cultural context of the state.

The important questions that seem to be required to be answered before deciding that there is a case of incitement to genocide are those of the power backing the broadcasting authority; the extent of control or power it has over the group being targeted; and the extent of free speech protection in the country—whether contrary voices have space and resources to be heard and the past treatment of the targeted group in the country. In most international situations, these would have been covered in resolutions by bodies like the General Assembly, the Human Rights Committee, the Security Council, or some other treaty-based body.

Given these circumstances, it is difficult to expect states to act unilaterally and jam broadcasts to prevent incitement to genocide. It is therefore necessary to set up a multilateral framework, preferably under the United Nations, to facilitate such measures. A worthy example is the measures toward media intervention taken by the forces of the North Atlantic Treaty Organisation in their operations in Bosnia, to ensure successful implementation of the Dayton Accords.⁷¹

IV. OPTIONS AND SOLUTIONS

The above sections have established that the jamming of offensive media signals is legal in terms of international law and also that there is technology available to effect such jamming. This section seeks to identify legal frameworks in which the existing media technology can be used to prevent occurrences such as those in Rwanda. The main problems that such frameworks must address are those of arbitrariness of the action, timeliness, financial consideration, and ensuring willingness on the part of other countries to supply the resources for such an action.

A. *Prevention*

A recommended action, even before radio jamming, is that of preventive media intervention. According to one report, in Rwanda, this should have been done by “promoting pluralism in privately-owned media and supporting attempted reform of the state broadcasting system as a means of

marginalizing extremist propaganda and developing the middle ground.”⁷² The idea is that more speech can counter hate speech. The absence of a strong voice of opposition was one of the reasons for the popularity of RTLM. Western nations, which have long been broadcasting information across sovereign borders, could easily have harnessed their resources to project impartial news to Rwanda.

After the Rwandan genocide, such measures were successfully adopted to broadcast messages of peace in sensitive areas. For example, UN radio stations were used to provide impartial and reliable information to counter propaganda in Cambodia, Namibia, and eastern Slovenia.⁷³ In Liberia, Burundi, and Bosnia, non-governmental organizations organized broadcasts that brought together leaders from opposite sides of the conflict, thus ensuring a discussion of contentious issues and evolution of strategies to resolve them.⁷⁴

However, in countries that are already in conflict, such impartial broadcasts are not easy to organize, given that the voices of the opposition are already stifled. Also, there exists an anomalous situation in which there is a government-controlled licensing regimen which must be followed to obtain permission to broadcast, and much of the propaganda is sponsored or supported by the government.⁷⁵ Also, the effect and reach of such broadcasts may not be enough to counter other misinformation that reaches the population in times of conflict.

B. *Measures by the Security Council*

Chapter VII of the Charter of the United Nations allows the United Nations to interfere with the domestic matters of the state under the authority of the Security Council when there is a threat to international peace and security. For actions under this Chapter, wide discretion⁷⁶ is given to the Security Council to determine what situations would constitute a threat to the peace, breach of the peace, or act of aggression, and also to determine what action would be appropriate in the circumstances.⁷⁷ Such a determination is final and discretionary and is not reviewable by any other organ of the UN.⁷⁸ The only requirement is that it should be consistent with the principles and purposes of the UN Charter.⁷⁹

Traditionally, this power of the Security Council was generally confined to actions in international armed conflicts. However, after the Cold War, its use has been extended to the intervention even in internal armed conflicts in which violations of humanitarian law have taken place. For example, the repression of Kurds in Iraq and ethnic cleansing in Bosnia were considered threats to international peace.⁸⁰ The idea is that such inci-

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dents have sufficient transboundary effects, thus internationalizing them and making them liable to the intervention of the Security Council.⁸¹

Under Article 41 of the UN Charter, the Security Council has the power to call upon member states to take measures not involving the use of force in the interests of maintaining international peace and security. It states that these can include “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication.”⁸²

This Article must be distinguished from Article 42 of the UN Charter, which allows for collective use of force under Security Council authorization. When the action involved is radio jamming, it would clearly be within the parameters of Article 41. Given the current reluctance of nations to get into unnecessary armed invasions in foreign countries, such a measure under Article 41 would be a viable alternative.

There are, however, the traditional issues that are involved with any action under the aegis of the Security Council. First of all, it is necessary to have a consensus from the five permanent members and an agreement that they will not exercise their veto power. In the Cold War years, such a consensus was nearly impossible to achieve, and even in recent times, it has not been very easily forthcoming.⁸³ For example, neither the NATO intervention in the former Yugoslavia⁸⁴ nor the current war against Iraq⁸⁵ has received the approval of the Security Council, though the leaders of the coalition forces in both cases tried their best to pass their actions through as humanitarian interventions.⁸⁶

This issue is also closely linked with the fact that many member states will be reluctant to join in a humanitarian intervention to restrict speech on the grounds of differing standards concerning what are considered acceptable restrictions on the right to free speech.⁸⁷ This issue is complicated even in domestic jurisdictions, and most democracies that allow this right have had much domestic litigation around it.⁸⁸ The problem becomes even more complex in the Security Council, where the USA, the nation with perhaps the strongest free speech presumptions, is a permanent member with veto power and looks with suspicion on any international action to restrain free speech. One author has suggested that the US standard, being a common minimum, highly liberal standard, be accepted as a benchmark by the Security Council.⁸⁹ However, this measure clearly would not be acceptable to most other nations.

Finally, even if such an action were passed by the Security Council, the Council would then have to gather the equipment, technology, and personnel to carry out the jamming operation. Much of this is very costly and available in only a few countries.⁹⁰ For example, the USA is one of the only countries that can jam broadcasts from the air, and this is done by means of

a \$70-million plane with a fuselage filled with high-tech electronic equipment requiring an eleven-person crew.⁹¹ The operation would also require intelligence from on the ground as to the nature of the broadcasts and the kind of counterinformation required to be aired in. After this, to make the action completely legal in terms of international law, the requisite clearances would have to be gotten from the ITU to jam particular frequencies. When the situation is an emergency and requires rapid action, all this may take too long and lose its effectiveness. The operation would also depend a lot on the will of the state supplying the equipment.

C. *An "Information Intervention Unit" under the UN*

As noted above, the idea of "information intervention" was first coined by J.F. Metzler. In his model, an independent information intervention unit would be set up under the United Nations, with three main responsibilities—monitoring, broadcasting peace, and jamming radio and television broadcasts as a last-attempt measure.⁹²

The advantage of setting up such an independent unit is that it may effectively do away with the disadvantages of action under the Security Council.

Foremost, the Unit should be politically independent, and its decisions should be made either by a Committee of Legal Experts, or by an independent officer of the UN whose functions will be analogous to those of the Prosecutor in the International Criminal Court.⁹³ The Unit must be given standing authority by the Security Council to act in situations in which its intervention is required. The mechanism of Reverse Consensus as evolved in the operations of the World Trade Organization⁹⁴ would be a possible check on the powers of the Unit. By a modified application of this mechanism, the Unit would normally have the powers to act in situations it deems fit, and if any permanent member of the Security Council wishes to restrict its powers, it can exercise its veto to do so. This is in contrast to the normal procedure, in which the votes of the Security Council members are required to enable an action and not to stop it.

The other problem of gathering equipment after the emergency has arisen will also be resolved by ensuring that being a standing Unit, it has the equipment at its disposal from the outset, procured from the funds of the UN and independent of the will of any donor country. The monitoring function of the Unit will require that it be on the alert even before the occasion to act has arisen. For this, it must be given access to the major radio translation services, communications from embassies and UN offices in troubled regions, and reports from NGOs in those regions.⁹⁵ In places where such information is not available, the Unit must be provided access to satellite-

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and airplane-based listening equipment. Further, the peace broadcasting function of such a Unit will require that it be provided sufficient translation personnel and equipment to relay information even to areas where the state is acting in a hostile manner.

According to Metzl, jamming should be a measure of last resort. However, given the nature and complexity of such an operation, it would be the one requiring the most attention by the Unit. The Unit must first of all have all the requisite clearances from the ITU for blocking of particular frequencies. Other technical expertise of the ITU will also be of much use to the Unit to ensure that no other neighboring frequencies are interfered with.

If the jamming is to take place from the air, the Unit should be provided with the latest flying machines and electronic technology. It should also have some fighter planes to escort the jamming aircraft and protect it from hostile attacks of the combatants on the ground. If the jamming is to be implemented from the ground, it should be executed as a UN operation, by UN blue beret soldiers, who are generally not targeted by combatants in a civil war. Also, the UN should make available to the Unit all its ground facilities, ranging from electric power and premises to the diplomatic ties it may have with local NGOs in the troubled area.

As a final measure to allay the fears of arbitrary action, this Unit must be made judicially accountable to some international legal authority. Currently, the most preferred such authority would be the International Court of Justice (ICJ). For this, it is necessary that the Information Intervention Unit be recognized as an international organization under the UN,⁹⁶ giving it international legal personality.⁹⁷ This would mean that at minimum it is bound by customary international law and general principles of international law as under Article 38 of the Statute of the ICJ. This international legal personality would mean that the Unit could seek Advisory Opinions from the ICJ and be bound by its decisions. The body of law thus developed would be of great help in identifying norms and standards for the Unit to observe in its operations.

In internal armed conflicts, the Unit would take care of all aspects of the virulence of such broadcasts—by identifying it early to prevent it from reaching too many people, countering it with unbiased, neutral information, and finally, stopping signals that seem to be causing too deleterious an effect on the population. The providing of unbiased and neutral information comes from the ideal that hate speech must be countered by equally powerful, yet opposing free speech. A report from the NGO Article 19 recommends that in situations in which internal armed conflicts are being fomented by media reports, “the international community should encourage radio stations and other media which promotes tolerance and a variety of viewpoints, whether these broadcast from within the country or from

outside in vernacular languages.”⁹⁸ In Bosnia, the NATO forces attempted to do this by issuing a set of rules and regulations the media was expected to follow that included “providing true and accurate information” and “refraining from broadcasting incendiary programming,” and the three television systems controlled by the ruling parties in Bosnia were made to provide opposition political parties with the same amount of advertising time as the ruling nationalist parties.⁹⁹

Hence, the essence of providing neutral information is that facts should be reported accurately and incendiary material must be omitted. It is well known that in several conflict situations, figures on the progress of the campaign of the broadcaster are routinely fudged in a bid to goad the populace into action. Similarly, the perceived enemy is credited with causing all sorts of evil plaguing the state, in a bid to justify the actions of the state.¹⁰⁰ While these actions may be acceptable in international armed conflicts, their effect in internal armed conflicts is clearly much worse, as the enemy is both within the country and accessible to the recipient of the broadcast. It is hence important that figures of casualties, areas of operation, and danger zones be accurately broadcasted. Voices of the opposition also need to be given space, and those of activists and NGOs concerned with promoting peace and amity, such as the UNESCO or Amnesty International, need to be advanced. All this would be impossible with media that is within the control of the aggressor government.

V. CONCLUSIONS

This article started out by noting that technology is available to jam hate radio broadcasts and prevent incitement to genocide. The failure of the international community lies in the absence of a framework to use such technology to prevent massive violations of human rights.

In December of 2003, the Trial Chamber of the International Criminal Tribunal for Rwanda (ICTR) found three media leaders in Rwanda guilty of genocide, incitement to genocide, and crimes against humanity (extermination and persecution).¹⁰¹ They included Ferdinand Nahimana, the founder and principal ideologist of RTLM, and Jean-Bosco Barayagwiza, executive and second in command at RTLM.¹⁰² After the Streicher and Fritzsche trials at Nuremberg, this was the first “Hate Speech” trial in international adjudication. Part of its novelty lay in the fact that the defendants were not held liable for what they said, but for the effect that their words had on other people.¹⁰³ Importantly, the Tribunal firmly delinked incitement to genocide from the actual occurrence of the genocide, though it found that actual occurrence would be significant evidence of the genocidal intent.

The decision also made a detailed legal analysis of the crime of direct

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and public incitement to genocide. The Tribunal discussed cases from jurisprudence under the ICCPR¹⁰⁴ and the European Convention on Human Rights¹⁰⁵ and isolated four criteria through which speech about race or ethnicity could be analyzed as either legitimate expression or criminal advocacy. The first is the purpose of the speech—for example, race-related speech for purposes of research may be legitimate, but explicit calls to violence would clearly be illegitimate.¹⁰⁶ The second consideration is the text of the speech—this would help in finding the object of the speech.¹⁰⁷ The third requirement is that the context of the speech must be considered.¹⁰⁸ This would involve taking into account factors extraneous to the text to understand the significance of the speech. Finally, the examiner must note the relationship between the speaker and the subject. It found that speech aligned with state power rather than in opposition to it deserved less protection to ensure that minorities without equal means of defense are not endangered.¹⁰⁹

The guidelines laid out in this decision may be used as markers in the future to determine what speech is actionable and what speech calls for immediate suppression.

Though the decision came in for criticism from some quarters for its effect on freedom of speech,¹¹⁰ it finally marked recognition of the fact that hate speech inciting genocide is as serious and actionable as genocide. Since prevention of genocide is an *obligation erga omnes*, incitement to genocide, now considered a part of genocide, would also be an obligation flowing to all, putting all states under an obligation to prevent it.

This decision bodes well for the idea of setting up an Information Intervention Unit, by lending radio jamming measures a certain amount of legality. The available information technology can thus be harnessed to protect human rights, by identifying incendiary broadcasts, jamming them, and replacing them with peaceful ones.

However, the scope of this article was confined to issues arising from radio broadcasts, an issue more relevant to developing countries in which the chief medium of public entertainment and communication is the radio. In the rapidly advancing world of information technology, much bigger threats are posed by communication media like the Internet and television. Given their potential for spreading abuse and misinformation, censorship and regulation of these media is an issue that needs to be addressed by international law on a war footing.

NOTES

1. See, e.g., Website of the Radio for Peace International, <http://www.rfpi.org> (accessed December 25, 2005).

2. See generally Donna E. Arzt, "Nuremberg, Denazification and Democracy: The Hate Speech Problem at the International Military Tribunal," *New York Law School Journal of Human Rights* 12 (1995): 689-757.

3. See generally, Gerald Prunier, *The Rwanda Crisis: History of a Genocide* (Columbia: Columbia University Press, 1997).

4. Jamie F. Metzl, "Rwandan Genocide and the International Law of Radio Jamming," *American Journal of International Law* 91 (1997): 636 (hereafter "Metzl").

5. *Ibid.*, 629, noting that the media and nongovernmental organizations had appealed to the United States and other governments to jam the broadcasts.

6. See generally Monroe E. Price, "Information Intervention: Bosnia, the Dayton Accords, and the Seizure of Broadcasting Transmitters," *Cornell International Law Journal* 33 (2000): 67-112.

7. *Ibid.*, 74.

8. Jamie F. Metzl, "Information Intervention: When Switching Channels Isn't Enough," *Foreign Affairs* 76(6) (1997): 15-21.

9. *Id.*

10. International Telecommunication Union, *Final Acts of the Additional Plenipotentiary Conference*, 1992, 11.

11. The International Telecommunications Union: Radio Communications Sector, www.itu.int/publications (accessed December 25, 2005).

12. Constitution of the International Telecommunication Union, <http://www.itu.int/aboutitu/basic-texts/constitution> (accessed December 25, 2005).

13. *Id.* Annex para. 1001 defines "harmful interference" as "Interference which endangers the functioning of . . . seriously degrades, obstructs or repeatedly interrupts a radio communication service operating in accordance with the Radio Regulations."

14. *Id.* Article 45 [197 1.] "All stations, whatever their purpose, must be established and operated in such a manner as not to cause harmful interference to the radio services or communications of other Members or of recognized operating agencies, or of other duly authorized operating agencies which carry on a radio service, and which operate in accordance with the provisions of the Radio Regulations."

15. *Id.* Article 1 "The purposes of the Union are . . . [7 (e)] to promote the use of telecommunication services with the objective of facilitating peaceful relations."

16. Robert V. McGahan, "A Sampling of RF Jammers," *Journal of Electronic Defense* 25(2) (2002): 62.

17. *Id.* noting the two technologies of jamming—"Spot jamming" involves jamming just one frequency, and it can be escaped if the broadcaster changes his frequency. "Barrage jamming," though involving more expensive and bulkier equipment, involves the jamming of a whole range of frequencies, thus targeting a number of transmitters.

18. Alexander C. Dale, "Countering Hate Messages That Lead to Violence: The United Nations's Chapter VII Authority to Use Radio Jamming to Halt Incendiary Broadcasts," *Duke Journal of Comparative and International Law* 11 (2001): 115.

19. Radio Netherlands Media Network, "Reacting to Hate Radio," <http://www2.rnw.nl/rnw/en/features/media/dossiers/intervention.html> (accessed December 25, 2005).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Supra* note 4, 632, noting that in mid-April, the Tutsi-led Rwandese Patriotic Front

shelled the transmitters of RTL M but within a few hours, RTL M began broadcasting from a mobile transmitter and continued doing so till July.

24. See generally Ameer F. Gopalani, "The International Standard of Direct and Public Incitement to Commit Genocide: An Obstacle to U.S. Ratification of the International Criminal Court Statute?" *California Western International Law Journal* 87 (2001).

25. Article 2 (7), Charter of the United Nations, <http://www.un.org/aboutun/charter/chapter1.htm> (accessed December 25, 2005) (hereafter "UN Charter"): "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter."

26. Supra note 4 at 636.

27. Supra note 2, 707-21.

28. *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg* 548 (1947).

29. Supra note 2, 715, noting the Prosecution's submission: "Without Streicher and his propaganda, the Kaltenbrunners, the Himmlers, the General Troops would have had nobody to do their orders."

30. M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (The Hague: Kluwer Law International, 1992), 318.

31. Supra note 4, 637.

32. Supra note 4, 638-40.

33. Id.

34. See generally, UN GAOR, 6th Comm., 3rd Sess., 87th mtg., at 253 (1948) noting the rejection of a Soviet proposal to define "incitement" in the Genocide Convention in the broadest possible terms.

35. For example, GA Res. 424 (V), UN GAOR, 5th Sess., Supp. No. 20, UN Doc. A/1775 (1950), sponsored by the US, that proclaimed radio jamming "constitutes a violation of the accepted principles of freedom of information."

36. Article 3, Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 UNTS 277.

37. Article 7, Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217 A(III), U.N. Doc. A/810, p. 71 (1948) (hereafter UDH) reads, "All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

38. Stephanie Farrior, "Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech," *Berkeley Journal of International Law* 14 (1996): 17.

39. Article 20(2) International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 (hereafter ICCPR).

40. Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 UNTS 195.

41. Article 19(2), ICCPR reads: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

42. Article 19, UDHR reads: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

43. Stephen D. Bayer, "The Legal Aspects of TV Marti in Relation to the Law of Direct Broadcasting Satellites," *Emory Law Journal* 41 (1992): 566.

44. UN ESCOR, 11th Sess., Supp. No. 5A, ch. 2, p. 2 (1950).

45. Supra note 4, 639.

46. GA Res. 424 (V), UN GAOR, 5th Sess., Supp. No. 20, UN Doc. A/1775 (1950).

47. Supra note 43, 565.

48. Advisory Opinion of the International Court of Justice on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 *I.C.J. Reports* 15.

49. Article 53, Vienna Convention on the Law of Treaties, 1155 *UNTS* 331: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

50. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment (*Bosnia v. Yugoslavia*), 1996, *I.C.J. Reports*, 616 at para. 31.

51. Art. 3 (c), Convention on the Prevention and Punishment of the Crime of Genocide, http://www.unhchr.ch/html/menu3/b/p_genoci.htm (accessed November 29, 2005).

52. Joshua Wallenstein, "Punishing Words: An Analysis of the Necessity of the Element of Causation in Prosecutions for Incitement to Genocide," *Stanford Law Review* 54 (2001): 397.

53. *Prosecutor v. Akayesu*, Int'l Crim. Trib. for Rwanda, Case No. ICTR-96-4-T.

54. *Id.* at paras. 61-62.

55. Supra note 52, 394-5.

56. Supra note 4 at 630.

57. Jean M. Kamatali, "Freedom of Expression and Its Limitations: The Case of the Rwandan Genocide," *Stanford Journal of International Law* 38 (2002): 71.

58. Supra note 4, 643.

59. *Ibid.*, 642.

60. See generally, Omar J. Arcia, "War over the Airwaves: A Comparative Analysis of U.S. and Cuban Views on International Law and Policy Governing Transnational Broadcasts," *Journal of Transnational Law and Policy* 5 (1996): 199-226.

61. Thomas M. Franck and Nigel S. Rodley, "After Bangladesh: The Law of Humanitarian Intervention by Military Force," *American Journal of International Law* 67 (1973): 277; see also U. Beyerlin, "Humanitarian Intervention," in *Encyclopedia of Public International Law* (3), ed. Rudolf Bernhardt (Amsterdam: Elsevier Inc., 1981), 200-31.

62. See generally, cases concerning "Legality of the Use of Force" filed by Serbia and Montenegro against USA, Canada, Belgium, France, Portugal, UK, Italy, Netherlands, Germany and Spain, <http://www.icj-cij.org/icjwww/idecisions.htm> (accessed December 30, 2005).

63. See generally, Alan J. Kuperman, *The Limits of Humanitarian Intervention: Genocide in Rwanda* (Washington: Brookings Institution Press, 2001).

64. Nikolai Krylov, "Humanitarian Intervention: Pros and Cons," *Loyola International and Comparative Law Journal* 17 (1995): 392.

65. See supra note 4, 629, noting the impact of the death of eighteen US soldiers in humanitarian intervention in Somalia at around that time, as an important reason for the reluctance of the US to interfere in the affairs of distant African countries.

66. Clinton Administration Avoids Definition of "Genocide," *Human Rights Watch/Africa Press Release* (June 10, 1994).

67. SC Res. 918 (May 17, 1994).

68. *Prosecutor v. Kupreskic*, Int'l Crim. Trib. for Yugoslavia, Case No. IT-95-16-T.

69. Supra note 52, 395.

70. Supra note 53 at paras. 557-8.

71. See supra note 6.

72. Article 19, "Broadcasting Genocide: Censorship, Propaganda and State-Sponsored

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Violence in Rwanda 1990-1994" (London: Article 19, 1996) Article 19, www.article19.org/pdfs/publications/rwanda-broadcasting-genocide.pdf (accessed November 25, 2006).

73. *Supra* note 8, 17.

74. *Id.*

75. *Supra* note 18, 131.

76. *Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on the Defence Motion on Jurisdiction 8 (ICTY 1995).

77. Article 39, UN Charter.

78. See generally, Faiza P. King, "Sensible Scrutiny: The Yugoslavia Tribunal's Development of Limits on the Security Council's Powers under Chapter VII of the Charter," *Emory International Law Review* 10 (1996): 509-91; David Wippman, "Change and Continuity in Legal Justifications for Military Intervention in Internal Conflict," *Columbia Human Rights Law Review* 27 (1996): 435-85.

79. *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (ICTY App. Ch., Oct. 2, 1995), reprinted in 35 *I.L.M.* 32, 44-45.

80. King *supra* note 78, 518.

81. Wippman *supra* note 78, 563-4.

82. Article 41, UN Charter.

83. See generally, United Nations Security Council Veto Power, http://en.wikipedia.org/wiki/United_Nations_Security_Council_veto_power (accessed February 2, 2007).

84. Frederic Kirgis, "The Kosovo Situation and NATO Military Action," *ASIL Insights*, March 1999, <http://www.asil.org/insights/insigh30.htm> (accessed February 4, 2007).

85. The UN Security Council and the Iraq war, http://en.wikipedia.org/wiki/The_UN_Security_Council_and_the_Iraq_war (accessed February 4, 2007).

86. Walden Bello, "Humanitarian Intervention: Evolution of a Dangerous Doctrine," *Global Policy Forum*, January 19, 2006, <http://www.globalpolicy.org/empire/humanint/2006/0119humintbello.htm> (accessed February 4, 2007).

87. See *supra* note 24.

88. See generally, Official website of Article 19: Global Campaign For Free Expression, www.article19.org (accessed December 23, 2005).

89. *Supra* note 18, 126.

90. *Ibid.*, 116, noting Australia, England, Germany, Italy and Israel have some level of jamming capability from the ground.

91. *Id.*

92. See *supra* note 8.

93. See generally, Dan Sarooshi, "Prosecutorial Policy and the ICC: Prosecutor's Proprio Motu Action or Self-Denial?," *Journal of International Criminal Justice*, 2 (2004): 940-2.

94. See generally, Donald McRae, "What Is the Future of WTO Dispute Settlement?," *Journal of International Economic Law* 7 (2004): 3-21.

95. *Supra* note 8, 16.

96. *Ibid.*, 19.

97. *Ibid.*, 18.

98. *Supra* note 72, 109.

99. *Supra* note 6, 7.

100. See generally, Robert L. Ivie, "The Complete Criticism of Political Rhetoric," *The Quarterly Journal of Speech* 73 (1987): 98-107.

101. "International Law—Genocide—U.N. Tribunal Finds That Mass Media Hate Speech Constitutes Genocide, Incitement to Genocide, and Crimes Against Humanity," *Harvard Law Review* 117 (2004): 2769-75.

102. *Prosecutor v. Nahimana, Barayagwiza, & Ngeze*, Case No. ICTR 99-52-T, Judgment and Sentence, December 3, 2003.

103. Catharine A. MacKinnon, "International Decision," *American Journal of International Law* 98 (2004): 329.

104. *Ross v. Canada*, U.N Docs. CCPR/C/70/D/736/1997 (2000); *Robert Faurisson v. France*, U.N Docs. CCPR/C/58/D/550/1993 (1996).

105. *Jersild v. Denmark*, 19 Eur. Ct. H.R. 1, 27 (1995); *Zana v. Turkey*, 27 Eur. Ct. H.R. 667, 670 (1999).

106. *Supra* note 102 at 1001.

107. *Id.*

108. *Id.*

109. *Ibid.*, 1008.

110. See generally D. Temple-Raston, "Radio Hate," *Legal Affairs* 29 (2002).