

Notes

COUNTERING HATE MESSAGES THAT LEAD TO VIOLENCE: THE UNITED NATIONS'S CHAPTER VII AUTHORITY TO USE RADIO JAMMING TO HALT INCENDIARY BROADCASTS

I. INTRODUCTION

Fervent, fiery speeches draw an audience and excite a crowd. Speeches given by a skilled orator can ignite passions, and just a few spoken words with the correct pizzazz can incite people to take action. Actions inspired by motivating speech can be for good or bad purposes, and the greater the audience, the greater the effect the speech has in producing thought or action. As the audience grows, so does the impact on individuals, communities, and society as a whole.

Because of its ability to pervasively spread a message and its susceptibility to being manipulated, radio is a powerful tool in the hands of a talented orator, a leader with a passionate plea, or a crafty messenger with an inspiring message the people want to hear.¹ Radio heightens the impact speech can have on people because it enables people in a number of different locations to hear the same message at the same time. Control of the radio airwaves is a powerful asset, and misuse of that asset can have disastrous results.

The survivors of the 1994 genocide in Rwanda, who were engulfed by the racist, fervid broadcasts of hate radio, can provide first-hand testimony of these disastrous results.² The primary source of

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1. See generally Jaime F. Metzl, *Rwandan Genocide and the International Law of Radio Jamming*, 91 AM. J. INT'L L. 628, 628-29 (1997) (discussing radio as a powerful tool and instrument in propaganda).

2. See Francois Misser & Yves Jaumain, *Death by Radio*, INDEX ON CENSORSHIP, Sept.–Oct., 1994, at 73 (“Survivors of the massacres say the extent of the killing and the uncontrollable size of the subsequent exodus would not have happened without [the radio broadcasts].”). See generally ARTICLE 19, BROADCASTING GENOCIDE: CENSORSHIP, PROPAGANDA & STATE-SPONSORED VIOLENCE IN RWANDA 1990-1994 (1996) [hereinafter BROADCASTING

hate radio in Rwanda, Radio-Television Libre des Mille Collines (RTLM), was a nominally private radio station created in 1993 with informal connections to high-ranking government extremists.³ The government officials to whom RTLM was connected belonged to the Hutu ethnic group that ruled in opposition to the Tutsi group. Prior to the mass killings in April 1994, RTLM targeted its messages to the *Interahamwe* (“those who attack together”)—a private youth “death squad” set up by the Hutus—who would hear these RTLM criticisms of Tutsis and moderate Hutus who sympathized with Tutsis and then attack them.⁴

The plane crash that killed Rwandan President Juvenal Habyarimana on April 6, 1994, spurred the station’s active role in promoting and assisting the genocide of the Tutsi people in Rwanda.⁵ It remains uncertain who shot down President Habyarimana’s plane,⁶ but RTLM had announced three days earlier that a “little something” would soon occur and was the first source to announce the crash.⁷ After the crash, RTLM advocated the killing of Tutsis by associating them with the opposition political party, the Rwandese Patriotic Front (RPF), which the station claimed had killed President Habyarimana and was invading the country.

There is some disagreement as to whether RTLM support for the killing of civilians was direct or indirect.⁸ However, RTLM clearly

GENOCIDE]; PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA (1998).

3. See BROADCASTING GENOCIDE, *supra* note 2, at 70; Metz, *supra* note 1, at 630; Misser & Jaumain, *supra* note 2, at 74 (“According to the former governor of the National Rwandan Bank, Jean Birara, the radio station received its electricity supply directly from the presidential buildings. Destroyed by RPF bombing around 25 April, RTLM was on the air again three days later, courtesy of the government-owned Radio Rwanda’s second channel.”).

4. See Metz, *supra* note 1, at 631. Cf. Philip Gourevitch, *The Genocide Fax*, THE NEW YORKER, May 11, 1998, at 42.

5. See Metz, *supra* note 1, at 630-31; Misser & Jaumain, *supra* note 2, at 72-73.

6. See Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT’L L. 349, 351 (1997); BROADCASTING GENOCIDE, *supra* note 2, at 110.

7. BROADCASTING GENOCIDE, *supra* note 2, at 109-10 (“The station reportedly broadcast information about the downing of the plane by 9.00 p.m., within an hour of the crash.”).

8. See *id.* at 112. International media attribute RTLM with directly inciting and supporting the murders of Tutsis in Rwanda. See, e.g., Neil Munro, *Infowar: AK-47s, Lies, and Video-tape*, COMMUNICATIONS OF THE ACM, July 1999, at 19 (RTLM’s “hateful radio propaganda spurred the killing of 800,000 Tutsi men, women, and children”). For example, RTLM is attributed with making statements directly calling for murder such as “The grave is only half full. Who will help us to fill it?” BROADCASTING GENOCIDE, *supra* note 2, at 112.

On the other hand, ARTICLE 19 performed one of the most extensive studies of RTLM broadcasts and found no evidence in either broadcast transcripts or witness testimony that linked RTLM with this direct call for murderous action. See BROADCASTING GENOCIDE, *supra*

played a role in promoting the killings as a “final war” or “final battle” in which members of the Hutu majority were made to feel they had to kill all Tutsi “rebels” and “accomplices” (which was interpreted to mean all Tutsis and all Hutus who sympathized with the Tutsis—including civilians) in order to ensure their own survival.⁹ RTLM associated all Tutsis with the RPF and described them as “bloodthirsty monsters, who killed for the sake of killing.”¹⁰ According to RTLM, there was no point in negotiating with the Tutsis because nothing short of their elimination could quench their thirst for blood and neutralize the threat they posed.¹¹

Through these messages, RTLM’s greatest contribution to the genocide may have been convincing the entire Hutu population in Rwanda—men, women, and children—that they had a “duty” to join the war against the Tutsis by committing acts of genocide.¹² For example, RTLM systematically arranged roadblocks, and all able-bodied Hutus were expected to patrol them and execute all Tutsis on the spot.¹³ The station suggested weapons to use for killing,¹⁴ and RTLM broadcasts recited lists of named “enemies” who subsequently were tracked down and executed by militias.¹⁵ Often, these “ene-

note 2, at 112. However, even this study could only be based on witness testimony and broadcast recordings taken during the first two weeks of the genocide by a correspondent in hiding. *See id.* at v, 112. Furthermore, after these recordings were taken, they had to be drafted into broadcast transcripts, translated into French, and then translated into English. *See id.* at v. Given the small timeframe of the recorded broadcasts, the loss of memory by witnesses of the exact wording of RTLM broadcasts, and the difficulties of several translations, it is difficult to tell conclusively what was said during all of the RTLM broadcasts. Therefore, it is not clear whether RTLM’s role in calling for murderous action by Hutus against the Tutsis was direct or indirect.

9. *See* BROADCASTING GENOCIDE, *supra* note 2, at 112-13. *See also* Bill Berkeley, *Sounds of Violence: Rwanda’s Killer Radio*, THE NEW REPUBLIC, Aug. 22, 1994 at 18.

10. BROADCASTING GENOCIDE, *supra* note 2, at 112. *See also* Berkeley, *supra* note 9, at 18 (RTLM announcer said the RPF was “cheating people with smooth words while it is a wolf which covers itself with a sheep’s skin. They are killing Hutu and lie that they do no harm to them.”).

11. *See* BROADCASTING GENOCIDE, *supra* note 2, at 113.

12. *See id.* at 114. *Cf.* Berkeley, *supra* note 9, at 18 (“‘I did not believe the Tutsis were coming to kill us,’ says Alfred Kiruhara, [an illiterate peasant who has spent most of his life cultivating sorghum and sweet potatoes in . . . eastern Rwanda]. . . ‘but when the government radio continued to broadcast that they were coming to take our land, were coming to kill the Hutus—when this was repeated over and over—I began to feel some kind of fear.’”).

13. *See* Metz, *supra* note 1, at 631; BROADCASTING GENOCIDE, *supra* note 2, at 114-17.

14. *See* BROADCASTING GENOCIDE, *supra* note 2, at 117 (“‘Fight them with the weapons at your disposal; you have arrows, you have spears. . . . Take up your traditional ‘tools.’”); Miser & Jaumain, *supra* note 2, at 74 (“‘Instructions allegedly broadcast by RTLM included information on the handling of grenades and different methods of killing the ‘enemy.’”).

15. *See* Metz, *supra* note 1, at 631; BROADCASTING GENOCIDE, *supra* note 2, at 120.

mies” were civilians or even Hutus mistaken for Tutsis.¹⁶ “Enemies” and “accomplices” attempting to leave Rwanda were also identified on the air to be riding in specific vehicles, and these cars were then stopped and the passengers killed.¹⁷ Along with coordinating these activities, RTLM also cheered the perpetrators, praised their “heroic” actions, and often hosted extremist speakers to encourage listeners in continuing the “war” effort.¹⁸

In effect, RTLM became an arm of the Hutu government in the conflict,¹⁹ and the language used by RTLM to incite genocide indicated that the objective of this armed combat was not simply to win the government’s battle but to utterly destroy the Tutsi race. Although it is impossible to say precisely to what extent media propaganda contributed to the genocide, it can be assumed that RTLM broadcasts assisted in the annihilation of between 500,000 and 1,000,000 Rwandans.²⁰ These killings were committed by neighbors, were performed through hacking to death by machetes and other rudimentary weapons, and were often accompanied by torture and rape.²¹

16. See BROADCASTING GENOCIDE, *supra* note 2, at 120-24; Munro, *supra* note 8, at 19.

17. See BROADCASTING GENOCIDE, *supra* note 2, at 120; Metzl, *supra* note 1, at 631 (“Specific vehicles, such as a red van allegedly ‘full of accomplices,’ were identified, together with license numbers. The red van, which was carrying Francois Ncunguyinka, a former prefect of Gisenyi prefecture, and his family, was halted at a roadblock and all its passengers were killed.”). Georges Ruggio, a voice of hate radio on the RTLM during the genocide, was sentenced to 12 years in prison by a U.N. tribunal in June 2000 for—among other things—using the radio to provide rampaging Hutus with the whereabouts of fleeing Tutsis. See Thomas Ome-stad, *The Voice of Hate Radio*, U.S. NEWS & WORLD REPORT, June 12, 2000, at 34.

18. See BROADCASTING GENOCIDE, *supra* note 2, at 116-17; Metzl, *supra* note 1, at 631-32.

19. See BROADCASTING GENOCIDE, *supra* note 2, at 115.

20. Cf. Misser & Jaumain, *supra* note 2, at 72-74; Berkeley, *supra* note 9, at 19 (“Even Tutsis whose families were attacked blame the radio broadcasts for exploiting Hutu ignorance. ‘The popular masses in Rwanda are poorly educated,’ says a Tutsi businessman whose wife and children are presumed dead. ‘Every time the powers that be say something, it’s an order. They believe someone in political authority. Whatever this person demands, it’s as if God was demanding it.’”). For statistics on the exact total of human losses in Rwanda, see Letter Dated 1 October 1994 From the Secretary-General Addressed to the President of the Security Council, U.N. SCOR, P 43, U.N. Doc. S/1994/1125 (1994); Morris, *supra* note 6, at 350; Metzl, *supra* note 1, at 629 (“[A]n estimated eight hundred thousand people, mostly Tutsi, were killed.”); and Tara Sapru, *Into the Heart of Darkness: The Case Against the Foray of the Security Council Tribunal into the Rwandan Crisis*, 32 TEX. INT’L L.J. 329, 332 (1997) (“The Rwandan crisis left over a half-million Rwandans dead and another 4.5 million displaced—figures that represent nearly two-thirds of the country’s population.”).

21. See Morris, *supra* note 6, at 350.

II. CONTROLLING THIS TYPE OF SPEECH

As the impact of RTLM's broadcasts demonstrates, radio is the most significant means of mass communication throughout all of sub-Saharan Africa.²² Radio control is a particularly powerful asset in Rwanda, where many people live in rural areas with high illiteracy rates, and where most people can speak only the local language—Kinyarwanda—which is broadcast on only a few stations originating in the area.²³ Although there were several radio stations with signals in the Rwandan airwaves prior to and during the genocide, once the fighting escalated, government support provided RTLM with almost complete control of the airwaves.²⁴ While other radio stations, such as Radio Rwanda, suffered severe damages restricting their broadcast range, the government continually repaired RTLM during the fighting.²⁵ As a result of this domination of the airwaves, the powers behind RTLM used their virtually unfettered control to spread messages of hate and murder.²⁶

With this control over such a powerful form of mass communication, what could have been done in order to stop RTLM and possibly discourage the genocide? There are few politically viable answers to this question, but in 1997, Jaime Frederic Metzl explored the possible impact that jamming RTLM's incendiary radio broadcasts would have had on the massacres in Rwanda in 1994.²⁷ Radio jamming occurs

22. See BROADCASTING GENOCIDE, *supra* note 2, at 45 (discussing importance of radio in Africa). On the history and power of radio in “developing” countries, see generally *Cross-Frontier Broadcasting: And Nation Shall Speak Guff unto Nation*, THE ECONOMIST (London), May 2, 1992, at 21.

23. See BROADCASTING GENOCIDE, *supra* note 2, at 45.

24. See BROADCASTING GENOCIDE, *supra* note 2, at 3, 45 (discussing RTLM's “virtual radio monopoly” caused by its connection to the government during the genocide).

25. See *id.* at 3, 136.

26. See Munro, *supra* note 8, at 19.

27. See Metzl, *supra* note 1, at 636, 651; Jaime F. Metzl, *Information Intervention: When Switching Channels Isn't Enough*, FOREIGN AFFAIRS, Nov. 1997, at 16. The United States considered whether it should radio jam RTLM, but it initially refused, claiming that it would have been too technologically difficult to jam and that such jamming would have violated international law. See BROADCASTING GENOCIDE, *supra* note 2, at 144. The United States later claimed that it could not find the frequency on which the station was broadcasting and that RTLM had stopped broadcasting by the time the United States was ready to jam. See *id.* at 144-45. Instead of jamming, the United States supported a pro-peace radio station broadcasting into Rwanda from Burundi. See Munro, *supra* note 8, at 20.

In contrast to the United States, France failed to consider the possibility of jamming RTLM. France did not consider radio jamming when it entered Rwanda in July 1994, because jamming was not part of the French government's mandate for what the French sent troops to do in Rwanda as agreed to by the United Nations. See BROADCASTING GENOCIDE, *supra* note 2, at 145.

when an outside source sends a disrupting radio signal to overtake and consume all or some of the available radio frequencies. The issue of radio jamming does not appear to have been brought before the United Nations during the Rwandan genocide,²⁸ but Metzl believed that jamming RTLM's frequency might have "mitigated this catastrophe" of genocide in Rwanda.²⁹

Since broadcasts promoting murderous action against the Tutsi people have reemerged in the Democratic Republic of Congo and Tanzania,³⁰ the United Nations's role in either radio jamming or otherwise countering these broadcasts needs to be assessed. Metzl proposed that the United Nations create a "specialized international force" to counter incendiary communications by either jamming such signals or broadcasting other signals promoting peace.³¹ Metzl's proposal for a "specialized international force" is a step in the right direction. However, his discussion only briefly touches on the United Nations's authority to take such an action to radio-jam these broadcasts. This Note will assess the United Nations's role in radio jamming to counter these broadcasts, including the legality and feasibility of such an action. First, this Note will briefly explain what radio jamming is and how the United Nations can jam the broadcasts in the Democratic Republic of Congo and Tanzania, as well as other incendiary broadcasts in the future. Second, this Note will examine the Security Council's legal authority to jam broadcasts under Chapter VII of the U.N. Charter, international treaties, and international law. Finally, this Note will develop a workable standard delineating what types of speech the United Nations can jam and the mechanisms through which jamming should occur. This standard and these mechanisms must still allow and carry a presumption for the free expression of opinions and ideas. However, they must not allow this expression to incite genocide and other breaches of international peace.

28. See generally BROADCASTING GENOCIDE, *supra* note 2, at 145-46 (describing the U.N. discussions immediately prior to the end of the genocide surrounding RTLM but not addressing the possibility of radio jamming).

29. Metzl, *supra* note 1, at 636.

30. See Stefan Lovgren, *The Resurgence of Hate Radio: Rwanda*, U.S. NEWS & WORLD REPORT, May 18, 1998, at 44; Philip Gourevitch, *Comment: Waking up to the next war*, THE NEW YORKER, Oct. 26 & Nov. 2, 1998, at 51.

31. Metzl, *supra* note 27, at 18-19.

III. COUNTERING INCENDIARY BROADCASTS

As the Rwandan genocide in 1994 demonstrates, radio's ability to shape a person's mind and behavior can have catastrophic results. To help prevent a recurrence of a similar atrocity, the United Nations needs a method to prevent incendiary radio broadcasts. Radio jamming the hate broadcasts reemerging in the Democratic Republic of Congo and Tanzania would allow the United Nations to either silence the airwaves or replace broadcasts calling for the elimination of the Tutsis with broadcasts that advocate peace.

Radio jamming is defined as "the deliberate emission of electromagnetic (EM) radiation to reduce or prevent hostile use of a portion of the EM spectrum."³² In other words, radio jamming fills the airwaves by placing either a disrupting signal (causing just noise or "fuzz") or an overriding signal (a different broadcast) into a specific frequency on the electromagnetic spectrum.³³

The jamming of radio broadcasts in the Democratic Republic of Congo and Tanzania could be conducted through a variety of different methods. One possibility is "spot jamming." Through spot jamming, the United Nations would use a receiver to find the signal frequency transmitting the incendiary broadcasts and then tune a jamming signal to that frequency.³⁴ Although hostile Hutu broadcasters could change their frequency ("frequency hopping") or use other measures to avoid this pinpoint technique of jamming, they would not be able to do so with great ease, since the technology used by these mobile, Hutu refugee broadcasters is probably not highly advanced.³⁵

Another radio jamming alternative is "barrage jamming." This type of jamming operates over a large number of frequencies, rather than just one.³⁶ Barrage jamming would prevent hostile broadcasters from frequency hopping and would allow for the simultaneous jamming of several transmitters.³⁷ However, there are a number of

32. Don Herskovitz, *A Sampling of RF Jammers*, 17 J. OF ELECTRONIC DEF., Aug. 1994, at 60. For a general discussion of radio jamming methods and uses, see generally LAWRENCE W. MYERS, *IMPROVISED RADIO JAMMING TECHNIQUES: ELECTRONIC GUERRILLA WARFARE* (1989).

33. See Don Herskovitz, *Come, Whisper in My Ear*, J. OF ELECTRONIC DEF., June 1995, at 48.

34. See generally Herskovitz, *supra* note 32, at 60; MYERS, *supra* note 32, at 25.

35. See Herskovitz, *supra* note 33, at 47. Given the rebuilding of the Rwandan nation and the instability in the surrounding states, it is unlikely that broadcasters would have the technological capabilities to "hop" between signal frequencies with any speed, if at all.

36. See Herskovitz, *supra* note 32, at 60.

37. See generally *id.*

problems with this type of jamming. First, barrage jamming requires a large amount of technological equipment that is costly, weighty, and takes up immense space.³⁸ It may be also be inappropriate because the United Nations would be forced to interfere with and disrupt a large number of other radio frequencies in the Democratic Republic of Congo and Tanzania. Interfering with several of these nations' radio frequencies would be less appealing politically than interfering with the single frequency of incendiary broadcasts. Since the Hutu broadcasters are unlikely to frequency hop, the United Nations would probably prefer spot jamming.

The actual apparatuses used for jamming the Democratic Republic of Congo and Tanzania broadcasts could be placed in several different locations. The jamming could be done from an outpost inside Rwanda, from a position in a neighboring country, or from a mobile unit either in the air or on land. Given the political instability in Rwanda, jamming from a planted base within the country or from a mobile unit on Rwandan soil would be the most dangerous strategies. Thus, jamming would probably be most feasible from just inside a neighboring ally's borders or from the air.

Many countries have the technological capabilities to carry out radio jamming,³⁹ and the United States has the technology to jam broadcasts from the air.⁴⁰ The U.S. Air Force has a \$70-million plane with a fuselage filled with hi-tech electronic equipment that allows an eleven-man crew to jam a radio or television broadcast and replace it with a substitute message.⁴¹ Although slow and propeller-driven, this aircraft can fly beyond the range of potentially hostile ground troops in the Hutu refugee camps and can replace messages of hate with messages of peace.⁴²

The technology for radio jamming is available for the United Nations to use. The question is whether the Security Council can and will use this power to halt the hate broadcasts in the area surrounding

38. *See id.*

39. For discussions about the radio jamming capabilities of countries other than the United States, see, for example, *Radio Comes Down from the Mountains in Search of Listeners*, IPI REPORT, Sept. 1992, at 10 (El Salvador) and Steve Forbes, *Lifting the Electronic Curtain – for Now*, FORBES, Dec. 26, 1988, at 27 (former Soviet Union). For a discussion of radio jammers made by companies outside the United States, see Herskovitz, *supra* note 33, at 48-50 (Australia, England, Germany, Italy, and Israel).

40. *See* Herskovitz, *supra* note 33, at 48; Metzl, *supra* note 27, at 19.

41. *See* Douglas Waller, *America's Persuader in the Sky*, TIME, Aug. 21, 1995, at 43.

42. *See id.*; Metzl, *supra* note 27, at 18.

Rwanda and to avoid future incendiary messages broadcast throughout the world.

IV. AUTHORITY TO ACT

Article 2, Paragraph 7 of the U.N. Charter prohibits the United Nations from interfering in matters essentially within the domestic jurisdiction of states.⁴³ However, broadcasts in the Democratic Republic of Congo and Tanzania calling for the elimination of the Tutsi race could probably be characterized as dealing with more than a domestic matter, since the effects of the violence between the Hutus and Tutsis have extended into several countries surrounding Rwanda.⁴⁴ On the other hand, the violence between these ethnic groups could be seen as a civil war in Rwanda—a domestic matter—regardless of how far the violence has spread. Also, if these new incendiary broadcasts are actually emerging from the Democratic Republic of Congo or Tanzania, then these nations may argue that the United Nations—which is based on the principle of the sovereign equality of all states—would be violating the spirit of the U.N. Charter because the radio jamming interferes with their sovereignty.⁴⁵

This prohibition in Article 2 is not absolute. In order to avoid the legal questions arising from further involvement in these Rwandan conflicts, it is likely that the United Nations would act through the Security Council, which has “primary responsibility for the maintenance of international peace and security.”⁴⁶ Under Chapter VII of the U.N. Charter, the United Nations, by the authority of the Security Council, can interfere in purely domestic situations, as long as those situations are threats to international peace and security.⁴⁷ This chapter is the only section of the U.N. Charter that directly empowers the

43. See U.N. CHARTER art. 2, para. 7 (“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; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”).

44. See generally GOUREVITCH, *supra* note 2, at 166 (discussing the establishment of Rwandan refugee camps in Zaire, Burundi, and Tanzania).

45. Cf. Sapru, *supra* note 20, at 352-53 (arguing that the U.N. decision to create the International Criminal Tribunal for Rwanda interfered with Rwandan sovereignty, violated Article 2, paragraph 7 of the U.N. CHARTER, and was therefore unconstitutional).

46. U.N. CHARTER art. 24, para. 1.

47. See U.N. CHARTER art. 2, para. 7 (stating that the U.N. principle of not interfering with “matters which are essentially within the domestic jurisdiction of any state. . . shall not prejudice the application of enforcement measures under Chapter VII”).

Security Council to make decisions that are binding on all Members of the United Nations.⁴⁸

Under Chapter VII, Articles 39, 41, and 42 would give the Security Council authority to jam the broadcasts of the Hutu extremists.⁴⁹ Article 39 requires the Security Council to make two determinations prior to taking action: (1) the Security Council must determine that a threat to peace, breach of peace, or act of aggression has occurred, and (2) the Security Council must make recommendations or select measures to maintain or restore international peace and security that are “in accordance with the Purposes and Principles of the United Nations.”⁵⁰

The Security Council has exclusive authority to decide what constitutes a breach of peace, threat to peace, or act of aggression.⁵¹ The drafters of the U.N. Charter intentionally provided the Council with wide discretion “to decide freely when a threat to the peace, a breach of the peace, or an act of aggression exist[s].”⁵² In evaluating this discretion, the trial chamber of the International Criminal Tribunal for Rwanda (ICTR) said the Security Council’s decision on what constitutes a breach of peace, threat to peace, or act of aggression is not reviewable by another organ of the United Nations. The reason for this decision was that “discretionary assessments . . . involve the consideration of a number of social, political and circumstantial factors which cannot be weighed and balanced objectively” by the trial chamber.⁵³ As a result, the Council’s decision determining whether a situation is a threat to the peace, breach of the peace, or act of aggression is generally considered discretionary and final.⁵⁴

The Security Council has found a wide variety of situations that constitute breaches of peace, threats to peace, or acts of aggression.⁵⁵

48. See Faiza P. King, *Sensible Scrutiny: The Yugoslavia Tribunal’s Development of Limits on the Security Council’s Powers Under Chapter VII of the Charter*, 10 EMORY INT’L L. REV. 509, 516 (1996).

49. Cf. Sapru, *supra* note 20, at 339 (discussing the authority given to the Security Council in Articles 39, 41, and 42).

50. U.N. CHARTER art. 39; see Sapru, *supra* note 20, at 339; King, *supra* note 48, at 517. See generally, U.N. CHARTER, art. 24, para. 2.

51. Decision on Jurisdiction, Case No. ICTR-96-15-T [hereinafter Kanyabashi]; King, *supra* note 48, at 517.

52. David Wippman, *Change and Continuity in Legal Justifications for Military Intervention in Internal Conflict*, 27 COLUM. HUM. RTS. L. REV. 435, 466 (1996) (quoting THE CHARTER OF THE UNITED NATIONS) (Bruno Simma ed., 1994).

53. Kanyabashi, *supra* note 51, at 6.

54. See Oscar Schachter, *United Nations Law*, 88 AM. J. INT’L L. 1, 12 (1994).

55. See King, *supra* note 48, at 518; Wippman, *supra* note 52, at 462-63, 466-68.

For example, serious violations of humanitarian law and human rights, such as the repression of Kurds in Iraq, famine in Somalia, and ethnic cleansing in Bosnia,⁵⁶ have been considered threats to international peace.⁵⁷ However, except for the situation in Bosnia, none of these situations leading to U.N. action has involved the kind of “aggressive use of force across a boundary” which traditionally constitutes a threat to international peace.⁵⁸ Critics of the United Nations actions claim that the United Nations’s recent involvement in humanitarian emergencies has come without the actual existence of a threat to peace.⁵⁹ Regardless of whether this criticism is accurate or not, there has been an expansive interpretation by the United Nations of what constitutes a threat to international peace.⁶⁰ It appears that the Security Council’s expansive view of its legal authority to act under Chapter VII of the U.N. Charter would provide the Council with authority to intervene in virtually any large-scale internal conflict.⁶¹ The “sufficient transboundary effects” found in these types of conflicts would allow the Council to interpret these conflicts as threats to international peace and to therefore intervene in the conflict pursuant to the Council’s Chapter VII authority.⁶²

If the Security Council finds that a threat to peace, breach of peace, or act of aggression took place, then the Council shall choose measures to maintain or restore peace that are “in accordance with the Purposes and Principles of the United Nations.”⁶³ Since the Security Council has found more situations as threatening international peace, Security Council actions under Article 41 of the U.N. Charter have increased since the end of the Cold War.⁶⁴ For example, most of the previously mentioned interventions for human rights abuses entailed measures consistent with Article 41, which provides that “[t]he Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions.”⁶⁵ It furnishes a non-exhaustive list of such measures, including the com-

56. See Wippman, *supra* note 52, at 462-63.

57. See King, *supra* note 48, at 518-19.

58. Wippman, *supra* note 52, at 463.

59. See Richard A. Falk, *The United Nations and the Rule of Law*, 4 TRANSNAT’L L. & CONTEMP. PROBS. 611, 630 (1994).

60. See Wippman, *supra* note 52, at 438.

61. See *id.* at 463-64.

62. See *id.*

63. U.N. CHARTER art. 24, para 2; see generally U.N. CHARTER art. 39.

64. See Schachter, *supra* note 54, at 12.

65. U.N. CHARTER art. 41.

plete or partial interruption of economic relations and the severance of diplomatic relations.⁶⁶ Although this list is considered non-exhaustive, there is disagreement about exactly what types of actions under Article 41 are permissible.⁶⁷ The general requirement is that the action taken must be consistent with the “Purposes and Principles of the United Nations.”⁶⁸ However, it remains unclear what level of consistency is required. Some legal scholars say that this provision provides the Security Council with all powers necessary to fulfill its primary responsibility for the maintenance of international peace and security as it sees fit, so long as the Council acts in accordance with the purposes and principles of the United Nations.⁶⁹ Others say that the measure to be pursued by the Security Council must be among, or at least of the nature of, those listed in Article 41. They claim that previous actions taken by the Security Council, such as creating judicial bodies (International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR)), exceed the Council’s authority under the U.N. Charter because they are “too far removed from the economic and political nature of the measures expressly contemplated in Article 41.”⁷⁰ Regardless of which interpretation is correct, the Security Council enjoys great discretionary authority under Article 41 to choose measures it finds appropriate to restore or maintain international peace and security.⁷¹

Like Article 41 of the U.N. Charter, Article 42 empowers the Security Council to take action in order to restore or maintain international peace and security. However, Article 42 deals exclusively with measures that incorporate the use of force. These measures involving military force are only to be used if the measures adopted under Article 41 are considered to be, or have proven to be, inadequate to maintain or restore international peace. The radio jamming proposed in this article is a measure without the use of force, so it would not fall within the ambit of Article 42 but would instead qualify as an Article 41 measure.

66. *See id.* *See also* VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 42; Sapru, *supra* note 20, at 340.

67. *See generally* Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Int’l Crim. Trib. Former Yugo. App. Ch., Oct. 2, 1995), reprinted in 35 I.L.M 32, 44-45 (1996) [hereinafter Tadic Appeals Decision].

68. U.N. CHARTER art. 24, para 2.

69. *See* MORRIS & SCHARF, *supra* note 66, at 42-43.

70. Sapru, *supra* note 20, at 340.

71. *See* Tadic Appeals Decision, *supra* note 67, at 43.

It was previously stated that the Security Council's decisions about what constitutes a threat to peace, breach of peace, or act of aggression under Article 39 were *generally* final and discretionary. The reason these decisions were only *generally* final and discretionary is due to the ICTY's decision in *Prosecutor v. Tadic*.⁷² The *Tadic* decision established the standard of review to be given to the Security Council's discretionary determinations under Chapter VII.⁷³ The two Chambers of the Yugoslavia Tribunal, the Trial and Appeals Chambers, provided different standards, but they both expressed a reluctance to examine closely the Council's Chapter VII decisions.⁷⁴

The Trial Chamber said that the Security Council's decisions on Chapter VII measures should not be "arbitrary" or for an "ulterior purpose."⁷⁵ Evaluating whether a Council decision about the existence of a threat to peace is arbitrary entailed merely a procedural review—inquiring whether the Security Council made a fully informed and carefully considered judgment, regardless of whether the decision was substantially correct in the Trial Chamber's opinion. However, evaluating whether the choice of a measure to respond to this threat—under either Article 41 or 42—is arbitrary entailed determining whether the Security Council's decision was reasonable in light of the threat to peace identified.

In contrast, the Appeals Chamber's standard of review was even more deferential and focused on the "Purposes and Principles of the [U.N.] Charter."⁷⁶ According to the Chamber, there merely had to be some basis for the conclusion that a threat to the peace existed, and

72. See *generally* *Tadic Appeals Decision*, *supra* note 67, at 42-45; *Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on the Defence Motion on Jurisdiction 8 (Int'l Crim. Trib. for the Former Yugo. 1995) [hereinafter *Tadic Trial Chamber*]. See also *King*, *supra* note 48, at 556-57 ("With respect to the stringency of review of these two discretionary determinations, the Appeals Chamber's position could be characterized as the reverse of that advanced in the Chamber's decision."). These decisions involved a challenge to the creation of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia. See *id.* at 513. This Tribunal was created by the U.N. Security Council pursuant to its Chapter VII authority. See *id.* at 511.

73. See *King*, *supra* note 48, at 555.

74. Compare *Tadic Appeals Decision*, *supra* note 67, at 42-45 (expressing a reluctance to review Chapter VII decisions and establishing the standard of review for Chapter VII decisions to be whether the decision was in accordance with the Purposes and Principles of the U.N. Charter) with *Tadic Trial Chamber*, *supra* note 72, at 8 (suggesting that review of Chapter VII decisions should involve only an examination to make sure the decisions were not "arbitrary" or for an "ulterior purpose."). See also *King*, *supra* note 48, at 557.

75. See *Tadic Trial Chamber*, *supra* note 72, at 8; *King*, *supra* note 48, at 555.

76. *Tadic Appeals Decision*, *supra* note 67, at 43; *King*, *supra* note 48, at 556.

the choice of measures to restore or maintain peace was left entirely to the Council's discretion.⁷⁷ As a result, although repudiation by a Tribunal of the Council's decision to use its Chapter VII powers could occur, the *Tadic* decision still leaves great discretion and trust in the hands of the Council in making its Chapter VII decisions.

An important political consideration that should be mentioned to conclude this analysis is the United Nations's desire to use measures other than military action to achieve its objectives. After the murders of U.N. soldiers in Somalia in 1993, U.N. Member States, particularly the United States, have been reluctant to send their citizens to serve as peacekeepers in U.N. military actions.⁷⁸ The United Nations has the ability to use force, but this use is supposed to be the last resort. U.N. action is not intended to wage war but to bring peace and "save succeeding generations from the scourge of war."⁷⁹ As a result, intermediate measures short of military force are favored methods of U.N. action, and radio jamming would, therefore, be looked upon favorably as a method to prevent the United Nations from having to take military action in the future.

V. INCITEMENT

The Security Council must first decide whether the incendiary broadcasts originating from the Democratic Republic of Congo and Tanzania constitute a threat to international peace and security, and if radio jamming would be an appropriate measure with which to respond. However, in making this decision, the Council must give substantial weight to free expression concerns. Although these broadcasts in the Democratic Republic of Congo and Tanzania may provide an example of when radio jamming is appropriate, hate speech broadcasts and racist commentary may not always rise to the level of a threat to international peace and security that warrants censorship.

A general international presumption exists which supports the free flow of ideas and information.⁸⁰ However, the force of this presumption was tempered by the precedents set in the Nuremburg tri-

77. See *Tadic Appeals Decision*, *supra* note 67, at 42-43.

78. See Gourevitch, *supra* note 4, at 46 (According to assistants to U.N. Secretary-General Kofi Annan, the United Nations's reluctance to act in Rwanda can be attributed to the U.N. Member States, particularly the United States, "los[ing their] appetite[s] for peacekeeping operations after Somalia.").

79. Falk, *supra* note 59, at 635, quoting U.N. CHARTER preamble.

80. See Metz, *supra* note 1, at 649-50.

als, which established that certain forms of propaganda leading to violence are violations of international law.⁸¹ “Incitement” is the term frequently used to define this form of illegal propaganda, but it has been used and defined differently by various nations in the international community throughout history.⁸² Speech rising to the level of incitement is generally susceptible to regulation in some fashion under international law. Incitement would be a useful and politically viable standard for the United Nations to use as its benchmark for when broadcasts constitute a threat to international peace and security.

How incitement is defined determines what speech can be censored and what speech is criminally actionable under international law. In the Nuremburg trials, actionable incitement required both words inciting people to violence and the actual physical realization of those words.⁸³ The words had to call specifically for the type of violence later accomplished, and a direct link from the speech to the actions had to be established. However, the Nuremburg trials did not address how to deal with these types of speech before the physical act of violence occurs.

Following Nuremburg and throughout the Cold War, the United States and the Soviet Union took opposite positions at international conventions on what standard should be adopted for determining when speech rises to the level of incitement.⁸⁴ The United States always supported virtually absolute freedom of speech and expression, because it feared any exception to this freedom would enable the Soviet Union to censor U.S. broadcasts promoting democracy in com-

81. *See id.* at 636.

82. *See generally* Metzler, *supra* note 1, at 638 (explaining how “incitement to commit genocide” in the final wording of the 1948 Genocide Convention was interpreted differently by different countries following the Convention).

83. *See id.* at 637.

84. *See* Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT’L L. 1, 14-16 (1996). For example, in drafting the Universal Declaration of Human Rights, the U.S. and Soviet representatives disagreed about what type of actions rose to the level of incitement in the context of racial, political, and religious discrimination. *See id.* A Soviet representative to the Commission drafting the Declaration proposed an amendment to Article 7 of the Declaration (the equal protection provision) that would declare advocacy of racial or religious hatred as incitement to discriminate. *See id.* at 15-16. However, Eleanor Roosevelt, Chair of the Commission on Human Rights, declared that the United States would not support the Soviet amendment, and in the end, it failed. *See id.* Article 7 of the Universal Declaration states that “[A]ll are . . . entitled to equal protection against . . . any incitement to [] discrimination.” *Id.* at 17. However, the incitement to discrimination provision “may be interpreted as allowing restrictions on hate speech, if such speech is deemed to advocate discrimination.” *Id.*

unist-controlled countries. In contrast, the Soviet Union wanted to stop these same U.S. broadcasts, and therefore supported a standard that allowed for more censorship. In the end, however, tenuous compromises were achieved, and several conventions ended with treaties generally promoting free speech but condemning inciting speech.⁸⁵

Crafting a specific limitation on freedom of speech that is acceptable to all international parties involved is a complex and difficult process.⁸⁶ However, international conventions with a free speech provision frequently allow this freedom to be overcome by speech that can be characterized under some definition of incitement.⁸⁷ The 1948 Genocide Convention ended with a treaty declaring that speech that is a “[d]irect and public incitement to commit genocide” is punishable under international law.⁸⁸ Other treaties followed with similar provisions. Article 7 of the Universal Declaration of Human Rights guarantees equal protection by declaring that “[A]ll are . . . entitled to equal protection . . . against any incitement to . . . discrimination,” and this provision has been interpreted as allowing restrictions on speech advocating discrimination.⁸⁹ Article 19 of the International Covenant on Civil and Political Rights protects freedom of expression, but it also allows speech to be restricted under certain circumstances.⁹⁰ One such circumstance is spelled out in Article 20(2) of this Covenant, which provides that “any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”⁹¹ Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination prohibits incitement to racial hatred in an effort to “prevent[] rather than

85. *See id.* at 14-17. It should also be mentioned that U.S. officials—on their own accord following the Rwandan genocide—drafted a new President Decision Directive (PDD) on International Public Diplomacy which gives the State Department the task of harnessing all federal tools—including radio jamming equipment—to counter future hate radio with radio messages promoting peace. *See* Munro, *supra* note 8, at 20. However, the PDD does not give instruction on what standard should be used to evaluate whether speech is “hate radio” or on who should make the decision to jam these “hate radio” broadcasts.

86. *See* Farrior, *supra* note 84, at 5.

87. *See, e.g.*, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, Dec. 16, 1966, art. 20 para. 2.

88. Metzl, *supra* note 1, at 638; Farrior, *supra* note 84, at 87.

89. Farrior, *supra* note 84, at 17.

90. *See* Metzl, *supra* note 1, at 640-41. Restrictions are allowed under Article 19 when they are “necessary . . . for respect of the rights or the reputations of others.” Farrior, *supra* note 84, at 21.

91. Farrior, *supra* note 84, at 4; Metzl, *supra* note 1, at 641.

cure” racism and racial discrimination.⁹² The American Convention on Human Rights also contains an article that protects free speech but also limits this freedom by declaring that “propaganda for war and advocacy of hatred that constitute incitements to violence are punishable by law.”⁹³

Although all of these international agreements contain incitement provisions, they differ in what constitutes actionable incitement. For instance, in the context of racism and hate speech, the disagreement surrounds the question of what speech should be restricted—speech that incites ideas of racial hatred, speech that incites acts of non-violent discrimination, or only speech that incites violence based on racism and hatred. Obviously, these different standards for what constitutes actionable incitement restrict speech in different ways. For example, restricting speech that incites ideas of racial hatred will include restricting messages of racial superiority, but it will also obviously include restricting speech that incites violence based on racism. However, restricting speech that constitutes an incitement to violence will allow speech promoting only the ideas of racial hatred to continue.

In addition to this disagreement about what kinds of speech constitute actionable incitement, there is also disagreement about what should be done when speech falls under the respective treaty’s definition of incitement.⁹⁴ For example, the International Convention on the Elimination of All Forms of Racial Discrimination requires speech rising to its defined level of incitement to be a criminal offense.⁹⁵ In contrast, Article 20 of the International Covenant on Civil and Political Rights only mandates that incitement is punishable by law, which could include civil or administrative remedies in addition to a criminal penalty.⁹⁶

Despite these disagreements in the various treaties, international law provides no impediment for the United Nations to regulate speech, via its Chapter VII authority, under an appropriate incitement theory. The appropriate incitement theory is one that only restricts speech that incites *violence*. An incitement to violence standard under this theory is the least restrictive form of an incitement standard found in international law under the aforementioned trea-

92. See Farrior, *supra* note 84, at 48.

93. *Id.* at 77.

94. See *id.* at 48.

95. See *id.* at 49.

96. See *id.*

ties. There is disagreement about whether an international incitement standard should extend so far as to restrict speech inciting *hatred*, but in all the international treaties previously discussed, regulating speech that rises to the level of inciting *violence* is clearly permissible. Under an incitement to violence standard, speech that merely espouses racist tenets or calls for non-violent racial discrimination would still be allowed, leaving freedom of expression still strongly entrenched. However, speech that incites violence, like the broadcasts of RTLM in Rwanda in 1994, would be subject to regulation under this standard.

Since incitement has been defined differently by various countries throughout history, a definitive standard for what constitutes incitement to violence must be clearly established. This standard must stop speech that incites violence, but it still must be narrow enough to prevent other non-violent forms of speech from being subject to regulation. The U.S. government has historically been one of the most ardent supporters of free speech, both internationally and domestically. However, U. S. courts have conceded that in certain situations freedom of expression must give way to conflicting social interests.⁹⁷ One of these instances, when freedom of expression can be overcome in the United States, is when the speech falls under the U.S. domestic version of an incitement standard. This standard was originally articulated in the 1969 case *Brandenburg v. Ohio*, when the Supreme Court said that speech that “is directed to inciting or producing imminent lawless action and is likely to incite or produce such actions” can be restricted.⁹⁸ This incitement standard still remains as precedent for such issues in the United States, despite judicial urgings to abandon it.⁹⁹

97. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (allowing for the restriction of speech that is likely to incite and does incite imminent lawless action); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (allowing for the restriction of free expression to protect citizens from unwanted noise); *Haig v. Agee*, 453 U.S. 280 (1981) (allowing the President to revoke a passport for national security reasons because the former passport holder’s expression of opinions and information placed CIA agents in danger); *United States v. Progressive*, 467 F.Supp. 990 (1979) (relying on national security interests to prevent publication of information about how to make a nuclear weapon); *Ginsberg v. New York*, 390 U.S. 629 (1968) (allowing for restriction of speech in order to protect the “well being” of children and to support “parents’ claim to authority in their own household”). See also KENT R. MIDDLETON ET AL., *THE LAW OF PUBLIC COMMUNICATION* 38 (4th ed. 1997).

98. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). See also MIDDLETON, *supra* note 97, at 41.

99. See Paul E. Kostyu, *The First Amendment in Theory and Practice*, in *COMMUNICATION AND THE LAW* 21, 34 (W. Wat Hopkins, ed., 2000).

A slight variation of the U.S. version of an incitement standard should be applied by the United Nations. The United Nations's definition of incitement should include speech that is directed to inciting or producing imminent violence and that is likely to incite or produce such actions. This standard has not been chosen merely because the U.S. definition was easily attainable or because it was used by the U.S. court system. The U.S. courts have wrestled with how to define incitement, and applying it internationally will by no means be easy. However, this definition of incitement is assumed to be the best standard, because if it has been tweaked throughout the years by the courts to satisfy the U.S. government, which has one of the strongest legal regimes for the protection of free speech,¹⁰⁰ then it should be sufficiently narrow to protect free speech as much as possible without sacrificing the goal of preventing speech leading to violence. The slight variation in the U.S. language (from "imminent lawless action" to "imminent violence") should also be even more accommodating to the United States and other ardent protectors of free expression because it restricts free speech less than the original *Brandenburg* standard.¹⁰¹ In addition, the international standard for incitement promoted by the United States during the Cold War was even more protective of free speech than the U.S. domestic incitement standard enunciated in *Brandenburg*.¹⁰² In other words, the *Brandenburg* standard restricts speech more than the incitement standards promoted by the United States internationally. This inconsistency suggests the United States may be willing to allow more international regulation of inciting speech, if the international regulation does not rise above the level of regulation under the U.S. domestic incitement standard.

100. See Metz, *supra* note 1, at 644.

101. Although *Brandenburg* allows for restrictions on speech that incites imminent "lawless action," incitement to imminent *violence* is chosen as the standard for Security Council action under Article 39 of the Charter. *Cf. Brandenburg v. Ohio*, 395 U.S. 444, 447 (1967). This shift from "lawless action" to violence was taken to make the Security Council's actions restrict freedom of expression only as much as is needed to help prevent future atrocities like those in Rwanda in 1994. A standard of imminent violence restricts free expression much less than a standard that allows for regulation and censorship when the speech only incites imminent lawless action. In developing this standard for the Security Council to act upon, a balance had to be reached between the competing interests of protecting freedom of expression and of preventing human rights violations and other threats to or breaches of international peace and security. This author feels that this balance is best achieved by an incitement to imminent violence standard. Under this standard, serious international atrocities committed with the assistance of the broadcast media will be deterred, but most expression will remain free from U.N. regulation.

102. See Metz, *supra* note 1, at 645.

The Security Council should fulfill its duties under the U.N. Charter by using its discretionary powers under Article 39 to establish that speech rising to this incitement standard is a threat to or breach of international peace and security. By utilizing this version of the standard articulated in *Brandenburg*, speech that is “directed to inciting or producing imminent [violence and that] is likely to incite or produce such actions” would be a threat to or breach of international peace and security. Under Article 39 and the *Tadic* decisions, the Security Council has virtually unlimited discretion to establish this language as the standard for determining when a threat to or breach of international peace and security has occurred. Although the United Nations should continue to promote free speech, those limited forms of speech constituting incitement under this standard should be regulated by the Security Council pursuant to its Chapter VII authority and its “responsibility for the maintenance of international peace and security.”¹⁰³

If the Security Council adopts this form of incitement as a threat to or breach of international peace and security, as it should, then the Council will need to clarify the language in this standard. For example, what qualities of speech make it “likely to incite or produce” imminent violence? What is *imminent* violence? The Security Council needs to clearly define these terms in order to avoid repeating the inconsistent application of incitement restrictions within the aforementioned international treaties.¹⁰⁴ “Likely to incite or produce” could require an element showing that these messages have been used before to incite or produce violence in the same audience, or a showing that an average audience member receiving the messages would, under the audience member’s present circumstances, be led to act violently upon hearing the message. However, the process of defining these terms should be left to the discretion of the Security Council, as Chapter VII allows. The Security Council should still have discretion, in order to allow it to take into account all of the social, political, and economic impacts of its decision. However, as a base line, the terms in this incitement standard should be defined at all times in a way that is consistent with international law and the purposes and principles of the U.N. Charter.¹⁰⁵

103. U.N. CHARTER art. 24, para. 1.

104. *See supra* text accompanying notes 80-93.

105. There has been some disagreement about how the Security Council’s actions should be bounded. Some argue that the Council must act in accordance with international law. *See King, supra* note 48, at 563. However, the Appeals Chamber in the *Tadic* decision established that the

Once “incitement constituting a threat to or breach of international peace and security” is clearly defined, the Council arguably has even wider discretion under Article 41 of the Charter in choosing what methods to take in order to eliminate speech falling under this incitement standard.¹⁰⁶ In all situations where speech rises to the level of being actionable incitement, the Council should consider radio jamming as an appropriate Article 41 measure to eliminate this threat to or breach of international peace and security. The technology to make radio jamming an effective measure to stop the broadcasts is available, and radio jamming arguably offers less interference in the affairs of the sovereign nations and has fewer side-effects stemming from its use than other Article 41 measures. Radio jamming may not necessarily be the best Article 41 measure to utilize at all times when speech falling under this incitement standard arises. However, radio jamming should be considered a favored choice to employ when incitement to violence occurs.

After incorporating this new incitement standard into its Chapter VII authority, the Council’s first action should be to evaluate the broadcasts originating from the Democratic Republic of Congo and Tanzania that call for renewed efforts to exterminate Tutsis. Should the Council find these broadcasts to constitute incitement as defined and proposed above, then the Council should declare the inciting broadcasts a threat to or breach of international peace and security. The Council could use these broadcasts as the benchmark for defining the language in its new incitement standard. These broadcasts are precisely the form of speech this proposed international incitement standard should regulate, and the Security Council should define the terms of this new incitement standard to cover these forms of broadcasts. In the past, messages from these same broadcasters have caused the same audience members to take violent action. Therefore, these new broadcasts are “likely to incite or produce” violence. Also, the targeted Hutu audience members for these incendiary broadcasts calling for elimination of the Tutsis are currently living in exile from their homes while the Tutsi-led regime remains in power in the

Security Council’s determinations under Article 39 of the Charter were limited by the Purposes and Principles of the United Nations. *See id.* at 582-83. As a result, restricting the Council’s discretion in defining the terms in this proposed definition within these two boundaries should protect the Council’s determination from being overturned if ever placed under review.

106. *See generally* King, *supra* note 48, at 554-55 (discussing how the Tadic Appeals Chamber was reluctant to review the Security Council decision on what measure to use in response to threats to international peace and security, since this choice involves “political evaluations of highly complex and dynamic situations”).

Rwandan government. Many of these Hutu refugees are living in unclean accommodations with limited food and unsanitary water. As a result, violence should be perceived to be imminent, since these potential aggressors, targeted by the radio broadcasts, are in situations in which a violent response would appear to be the only solution to their current problems. These broadcasts constitute incitement and are a threat to or breach of international peace and security under Article 39 of the U.N. Charter. As a result, the Security Council should act pursuant to its Article 41 authority and radio jam these incendiary broadcasts.

VI. CONCLUSION

Free speech proponents may cringe at the suggestion of allowing the United Nations to engage in radio jamming under the suggested standard. However, creating a clearly defined standard for when radio jamming is appropriate would enable international interests, like preventing genocide, to be taken into account, and the limited standard proposed here would not detract significantly from the ideal of freedom of expression. As Metzl said:

[W]hile forming an exception to the general rule of nonjamming still creates some danger of establishing a loophole that might be misapplied in other contexts, changes in the global political environment and humanitarian and political disasters like the situation in Rwanda strongly suggest that new issues like the prevention of genocide need to be factored into policy considerations.¹⁰⁷

With this proposal for U.N. action, a strong presumption against using radio jamming would still remain to generally protect free speech and expression. However, a narrowly defined and precisely outlined exception for broadcasts rising to the level of incitement would enable the international community to place value where value should be placed—on protecting human life, regardless of incidental restrictions on human expression. Although both freedom of expression and the right to life are crucial human rights concerns, they should not be given equal weight. The protection of human life internationally through the prevention of genocide can be encouraged by allowing the United Nations to have this small power to limit freedom of speech.

The answer frequently given for how to respond to hate speech is to provide more speech to counteract the messages of hate.¹⁰⁸ How-

107. Metzl, *supra* note 1, at 646.

108. See BROADCASTING GENOCIDE, *supra* note 2, at 1.

ever, in many nations, including Rwanda in 1994,¹⁰⁹ more speech cannot be provided to counter hate speech because of tight licensing regulations and other restrictions imposed by the national government. In these nations, there is no current method for responding to hate speech. However, even in nations where additional speech can be provided, hate speech that incites audience members to violence cannot always be remedied by merely promoting messages of peace and non-discrimination. As a result, there needs to be an alternative answer when hate speech incites audience members to violence, regardless of whether a nation allows hate speech to be counteracted by words of reconciliation.

Allowing the United Nations to radio jam hate speech that rises to the level of incitement is the appropriate and possibly only solution for stopping this destructive speech. The U.N. Security Council can act pursuant to its discretionary authority under Chapter VII of the U.N. Charter to establish that speech rising to an incitement standard is a threat to or breach of international peace and security. The Security Council can define incitement based on the definition pronounced by the U.S. Supreme Court in *Brandenburg*. This definition will provide a standard that comports with international law and that only restricts free speech to the smallest extent necessary in order to allow the United Nations to fulfill its duty to maintain peace and security. Under this limited standard, the United Nations can fulfill its duty of maintaining international peace and security without sharply limiting free speech and thereby offending the nations that most zealously protect free speech. Although granting the United Nations this authority somewhat curtails free speech throughout the world, this is a small concession to make to stymie a recurrence of the killings in Rwanda, to prevent future genocide throughout the world, and to protect all human life in the international community.

Alexander C. Dale

109. See BROADCASTING GENOCIDE, *supra* note 2, at 3.