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KILLING THE MICROPHONE: WHEN BROADCAST FREEDOM SHOULD YIELD TO GENOCIDE PREVENTION

*Carol Pauli**

ABSTRACT

When powerful radio broadcasts exhort listeners to kill their neighbors, may outside nations or international organizations legally interrupt the signals to prevent genocide? International law has no legal framework for assessing and responding to such broadcasts. This Article attempts to create one. The Article draws on empirical research in the field of communication to identify conditions in which media messages become so powerful that they can mobilize audience members. Using this research, it constructs a framework for determining when speech constitutes incitement to genocide such that it loses any protection under international law and perhaps even triggers an affirmative duty on the part of other states to intervene. The proposed framework is unique. Unlike current definitions of incitement to genocide, it is not concerned with convicting the criminal, but aims entirely at preventing the crime. It is also unique in bringing this interdisciplinary approach to this compelling goal.

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INTRODUCTION

As Radio-Télévision Libre des Mille Collines (RTL M)¹ was orchestrating the Rwandan genocide in 1994, the United States considered jamming its broadcast signals but rejected this form of intervention,² citing “international telecommunications law and international conventions regarding the freedoms of information and expression.”³ The virulent broadcasts continued to reach their listeners. In the space of approximately 100

1. *Mille Collines*, in French, means *a thousand hills*, a description of the Rwandan landscape.

2. For further accounts of the United States’ decision, see SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE 370–73 (New Republic 2002) and William A. Schabas, *Hate Speech in Rwanda: The Road to Genocide*, 46 MCGILL L.J. 141, 148 (2000).

3. Jamie Frederic Metzl, *Rwandan Genocide and the International Law of Radio Jamming*, 91 AM. J. INT’L L. 628, 635 (1997). Metzl describes international law as a small, but significant reason for inaction. Other motives were more pragmatic. Among declassified documents obtained by the Washington Post under the Freedom of Information Act, a memo from May 5, 1994, records that Defense Secretary William Perry and National Security Adviser Tony Lake discussed the possibility of jamming, but that the Pentagon found it to be “ineffective and expensive,” requiring \$8,500 per hour to operate a special airplane. Glenda Cooper, *Memos Reveal Rwanda Delay; U.S. Had Early Notice of Genocide; Pentagon Rejected Action*, WASH. POST, Aug. 23, 2001, at A20.

days, in a country of fewer than 8,000,000 people,⁴ an estimated 800,000 were killed.⁵ RTLM is cited as having incited thousands of civilians with no criminal histories to commit acts of unspeakable brutality.⁶

The agony⁷ of Rwanda has prompted calls for a re-examination of the legal arguments against international jamming of broadcast signals,⁸ and for a further development of international norms in order to clarify when broadcast speech constitutes incitement to genocide such that it loses any protection under international law⁹ and perhaps even triggers an affirmative duty on the part of other states to intervene.¹⁰ The current definition of incitement to genocide does not aim at prevention. It aims at determining culpability after the fact and, therefore, includes the element of specific criminal intent. This is the same requirement that has kept the International Criminal Court from including genocide in the charges against Sudan's President Omar Hassan al-Bashir,¹¹ even while accusing him of issuing a general call to Janjaweed militia to attack hundreds of thousands of civilian members of the Fur, Masalit, and Zaghawa groups, systematically subjecting them to rape, torture, and extermination.¹²

Preventing genocide requires, not merely convicting the inciter, but first—and more urgently—interrupting the incitement.¹³ The criteria for one are not entirely suitable for the other. In convicting two leaders of RTLM of incitement to commit genocide,¹⁴ the International Criminal Tribunal for Rwanda (ICTR) laid out criteria determining when broadcast speech may be punished,¹⁵ but some free speech advocates worry that

4. GÉRARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 264 (Columbia Univ. Press 1995).

5. *Id.* at 265.

6. One man, imprisoned for the beating deaths of two six-year-olds, recalled, "Things were strange. . . . Can you imagine the radio saying, 'Go kill these people'? The message got to the local authorities. They mobilized the soldiers and the militias, and they were going to the villages getting civilians to kill people. We accepted. They said we were fighting for the country." Alan Zarembo, *Judgment Day*, *HARPERS MAG.*, Apr. 1997, at 68, 70.

7. The use of the word *agonies*, in René Lemarchand, *Rwanda and Burundi, Genocide*, in 2 *ENCYCLOPEDIA OF GENOCIDE* 508 (Israel W. Charny ed., 1999) helped as the author struggled for the right word.

8. MetzI, *supra* note 3, at 636.

9. Eric Blinderman, *International law and Information Intervention*, in *FORGING PEACE: INTERVENTION, HUMAN RIGHTS AND THE MANAGEMENT OF MEDIA SPACE* 104, 126 (Monroe E. Price and Mark Thompson eds., 2002).

10. Beth Van Schaack, *Darfur and the Rhetoric of Genocide*, 26 *WHITTIER L. REV.* 1101, 1103 (2005).

11. Marlise Simons & Neil MacFarquhar, *Court Issues Arrest Warrant for Sudan's Leader*, *N.Y. TIMES*, Mar. 4, 2009, at A6.

12. Prosecutor v. Bashir, No. ICC-02/05-01/09, Warrant of Arrest (Mar. 4, 2009).

13. For examples of continuing uses of radio to incite ethnic killing see *Crackles of Hatred: Radio Propaganda*, *ECONOMIST*, July 25, 2009, at 60.

14. Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 1033-34 (Dec. 3, 2003), available at <http://www.ictor.org/ENGLISH/cases/Ngeze/judgement/Judg&sent.pdf>.

15. *Recent Cases: International Law—Genocide—U.N. Tribunal Finds that Mass Media Hate*

these criteria, if used for the purpose of prevention, may weaken speech protections in international law.¹⁶ Misapplications already have occurred. For example, in dozens of incidents, African leaders have pointed to the ICTR convictions to justify their own restrictions on political opposition speech.¹⁷

Susan Benesch has enlisted the findings of genocide research to propose a six-prong “reasonably possible consequences” test to distinguish incitement from mere hate speech that qualifies for protection.¹⁸ The test is an improvement over the ICTR criteria, more tightly defining the crime, and its elements overlap and support several that are also proposed here. However, communication research points to additional factors that may prove decisive in distinguishing prospectively whether a broadcast or other mediated speech is dangerous enough to justify intervention.¹⁹ That concern is especially pressing given assessments that disrupting the broadcasts in Rwanda could have curbed the killing²⁰ and that failing even to attempt intervention sent a signal to Rwanda from the international community that the genocide could proceed with impunity.²¹

Speech Constitutes Genocide, Incitement to Genocide, and Crimes Against Humanity, 117 HARV. L. REV. 2769, 2773 (2004).

16. The fear is that the verdicts “could give ammunition to those who think press freedom has gone too far. ‘The currently fashionable phrase is ‘American exceptionalism,’” says Fred Schauer, a Harvard law school professor. ‘Many countries think the U.S. overstates the importance of free speech and free press, and understates the importance of equality.’” Dina Temple-Raston, *Journalism and Genocide*, COLUM. JOURNALISM REV. Sept.–Oct. 2002, at 18, 18–19.

17. See Joel Simon, *Of Hate and Genocide*, COLUM. JOURNALISM REV. Jan.–Feb. 2006, at 9, 9.

18. Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VA. J. INT’L L. 485, 519 (2008).

The following six-prong inquiry will aid in identifying the crime and distinguishing it from hate speech: 1. Was the speech understood by the audience as a call to genocide? Did it use language, explicit or coded, to justify and promote violence? 2. Did the speaker have authority or influence over the audience and did the audience have the capacity to commit genocide? 3. Had the victims-to-be already suffered an outbreak of recent violence? 4. Were contrasting views still available at the time of the speech? Was it still safe to express them publicly? 5. Did the speaker describe the victims-to-be as subhuman, or accuse them of plotting genocide? Had the audience been conditioned by the use of these techniques in other, previous speech? 6. Had the audience received similar messages before the speech?

Id. at 498.

19. See DENIS MCQUAIL, *MEDIA ACCOUNTABILITY AND FREEDOM OF PUBLICATION* 157 (2003) (“[W]e need to consider fairly carefully what purposes are served by trying to establish the responsibility of the media for effects. Several non-exclusive possibilities can be indicated. One purpose is to protect the public in a general way from various (consensually agreed) harms that have been attributed to the media, especially those relating to violence, crime, and disorder. Here precautionary reasoning, based on evidence of risk, plays a part.”)

20. Human Rights Watch, *Rwanda: Lessons Learned*, <http://hrw.org/english/docs/2004/03/29/rwanda8308.htm> (last visited May 14, 2010) (“Silencing the radio broadcasts would not only have ended this particularly effective form of incitement and the delivery of specific orders; it would also have shown that the international community rejected the legitimacy of the genocidal message and those who were delivering it.”).

21. Herman Cohen, Assistant Secretary of State for Africa from 1989 to 1993, told the Council on Foreign Relations that “[w]hat was happening in Rwanda was the type of development which would have stopped very quickly if you just had people who were looking at them. One does not commit

In the wake of the Rwandan genocide, Jamie Metzl, a former official in the White House and also in the United Nations,²² proposed that the U.N. establish an independent information intervention unit responsible for monitoring, countering and, “in extreme cases, jamming” broadcasts.²³ Metzl’s idea, quickly dubbed a “special United Nations ‘jam squad,’”²⁴ was controversial in part because it did not define which messages might be jammed,²⁵ and thus it risked being abused.²⁶ This concern highlights the need for a framework to accurately target incitement to genocide while safeguarding the freedom of other speech.

This Article attempts to accomplish what the ICTR and others have not. It proposes a framework, based on research in the field of communication, to determine when a message constitutes incitement to genocide so as to justify international prior restraint through measures such as jamming of broadcast signals. Part I will review the current criteria for punishing genocide, which have come from past international incitement cases. Part II will propose the framework, drawing on communication research. Part III will use the proposed framework to analyze the cases that were cited as precedents for the ICTR convictions. Part IV will apply the proposed framework to the broadcasts of RTLM. Part V will apply the framework to several hypothetical challenges. Part VI will explore the practical question of how to apply the framework.

The proposed framework is unique in linking the compelling goal of preventing genocide with ongoing empirical research in the field of communication. It is not a test, with a fixed set of criteria, but rather a set of factors to be examined. It is a structured inquiry, sufficiently open-ended to incorporate new insights as research continues to discover the conditions that make media messages exceptionally and dangerously powerful.

genocide against one’s neighbor when you have somebody looking over your shoulder.” Council on Foreign Relations, Chester Crocker, Richard Moose, and Herman Cohen: Three Former Assistant Secretaries of State for Africa on U.S. Policy Toward Africa, Meeting at the Council on Foreign Relations, 19 (May 9, 2000) (transcript available at http://www.web.archive.org/web/20000823232044/http://www.foreignpolicy2000.org/transcripts/t_mclean.html).

22. “Jamie Metzl has served as Director for Multilateral and Humanitarian Affairs on the US National Security Council at the White House, as Senior Coordinator for International Public Information at the US Department of State, and as a human rights officer for the United Nations Transitional Authority in Cambodia.” FORGING PEACE: INTERVENTION, HUMAN RIGHTS AND THE MANAGEMENT OF MEDIA SPACE 395 (Monroe E. Price & Mark Thompson eds., 2002).

23. Jamie Metzl, *Information Intervention: When Switching Channels Isn’t Enough*, FOREIGN AFF., November/December 1997, at 15, 17.

24. Jim Mann, *National Perspective; U.N. Hate-Radio Jamming Would Send Wrong Signal*, L.A. TIMES, Dec. 3, 1997, at 5.

25. *Id.* (quoting the director of Radio Free Asia, Richard Richter, as expressing concern that China would want to jam federally funded broadcasts into repressive Asian countries and saying, “This opens up a Pandora’s box, really.”).

26. Editorial, *Don’t Spread Jamming*, CHRISTIAN SCI. MONITOR, Jan. 5, 1998, at 16 (warning that “[t]here’s too much risk that mission creep could occur.”), available at <http://www.csmonitor.com/1998/0105/010598.edit.edit.2.html>.

Although this Article focuses on broadcast messages, the proposed framework takes account of other channels of communication. In doing so, it provides for targeted intervention decisions, distinguishing the impact of a book from that of a bullhorn, for example. It takes account of the media environment, encouraging a diversity of messages in countries that want to avoid international intervention. It also recognizes the rapid expansion of new communication technologies with new and different effects on audiences, and it invites research into their potential role in the context of incitement.

I. DEFINING INCITEMENT TO GENOCIDE

A. History

When the Nuremberg Tribunal heard the case of Julius Streicher, a Nazi publisher of an anti-Semitic weekly, *Der Stürmer*, there was no international law against genocide or incitement to genocide. However, the Nuremberg Tribunal “linked Streicher’s propaganda with the war crimes that had been carried out . . . to establish a parallel to the specific intent requirement in criminal law,”²⁷ and it convicted him of a Crime against Humanity.

On December 9, 1948, the United Nations General Assembly closed the legal gap and unanimously adopted the International Convention on the Prevention and Punishment of the Crime of Genocide,²⁸ which was put in force in 1951.²⁹ It declares genocide to be “condemned by the civilized world,”³⁰ and it requires states to prevent genocide, whether they have signed the convention or not.³¹ The Genocide Convention makes punishable not only genocide, but also conspiracy to commit genocide, attempt to

27. Metz, *supra* note 3, at 636–37 (allowing, however, that this interpretation was disputed by the Russian judge at Nuremberg and directing readers to JOHN B. WHITTON & ARTHUR LARSON, PROPAGANDA TOWARDS DISARMAMENT IN THE WAR OF WORDS 81 (1964)).

28. Genocide had been defined as “a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings.” G.A. Res. 96 (I) (Dec. 11, 1946), available at <http://www.un.org/documents/ga/res/1/ares1.htm> (follow 96 (I) link).

29. Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III) (Dec. 9, 1948) (entered into force Jan. 12, 1951) available at http://www.un.org/documents/instruments/docs_en.asp?year=1969 (follow A/RES/260 (III) link)

[hereinafter “Genocide Convention”]. The Genocide Convention defines “genocide” as:

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.

Id.

30. *Id.*

31. Van Schaack, *supra* note 10, at 1112.

commit genocide, complicity in genocide, and direct and public incitement to commit genocide,³² which the Convention treats as the same as genocide itself.³³

B. *The RTLM Cases*

The ICTR in 2003 convicted three media leaders of genocide, incitement to genocide, and crimes against humanity.³⁴ Two of these were leaders of RTLM: Ferdinand Nahimana, an academic who founded the radio station, and Jean-Bosco Barayagwiza, a station executive.³⁵ The ICTR found that “RTLM broadcasts stereotyped Tutsi . . . as the enemy, promoted contempt and hatred for them, and called on listeners to attack them,”³⁶ and it found a causal link between broadcasts of individual names and the deaths of those individuals.³⁷ Relying primarily on *Nahimana*, the ICTR more recently convicted Rwandan singer and composer Simon Bikindi of direct and public incitement to commit genocide³⁸ for his use of a public address system mounted on a truck³⁹ to exhort Hutu along the road to exterminate the minority Tutsi and to ask later if they had done so—if they had killed the “snakes.”⁴⁰

The *Nahimana* verdict⁴¹ won praise from at least one international human rights scholar, who wrote that “the greatest conceptual breakthrough of the case is its ruling that media committed genocide through instigating it, with media leaders held accountable accordingly.”⁴² Gregory S. Gordon

32. Genocide Convention, *supra* note 29, art. 3(c).

33. Blinderman, *supra* note 9, at 120.

34. Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 1033-94 (Dec. 3, 2003), available at <http://www.ictr.org/ENGLISH/cases/Ngeze/judgement/mediatoc.pdf>.

35. Nahimana was sentenced to 35 years in prison after his life sentence was reduced due to errors that violated his procedural rights. Barayagwiza was sentenced to life in prison. Catharine A. MacKinnon, *Prosecutor v. Nahimana, Barayagwiza, & Ngeze. Case No. ICTR 99-52-T*, 98 AM. J. INT’L L. 325, 327-28 (2004) (citing Nahimana, Case No. ICTR 99-52-T, Judgment and Sentence (Dec. 3, 2003)). The third media leader was Hassan Ngeze, founder, owner, and editor of the newspaper, *Kangura*, who was also sentenced to life in prison. *Id.* On appeal, their sentences were reduced to 30, 32, and 35 years, respectively. Nahimana, Barayagwiza & Ngeze v. Prosecutor, Case No. ICTR 99-52-A, Appeals Judgment, ¶¶ 1052, 1097 & 1115 (Nov. 28, 2007), available at http://ictr.org/ENGLISH/cases/Nahimana/decisions/071128_judgement.pdf.

36. MacKinnon, *supra* note 35, at 326 (citing Nahimana, Case No. ICTR 99-52-T, at ¶¶ 486, 949).

37. *Id.*

38. Prosecutor v. Simon Bikindi, Case No. ICTR 01-72-T, ¶¶ 423-24 (Dec. 2, 2008), available at <http://www.ictr.org/ENGLISH/cases/Bikindi/judgement/081202eJudgement.pdf>.

39. *Id.* ¶¶ 422-23.

40. *Id.*

41. The Appeals Chamber later upheld the ICTR use of these hate-speech cases to derive broad guidelines for interpreting and characterizing media discourse. Nahimana, Case No. ICTR 99-52-A, Appeals Judgment at ¶ 695, available at http://ictr.org/ENGLISH/cases/Nahimana/decisions/071128_judgement.pdf.

42. MacKinnon, *supra* note 35, at 329.

found that the ICTR verdict contained four distinct criteria for the crime of incitement to genocide, punishable under international law: “(1) purpose; (2) text; (3) context; and (4) the relationship between speaker and subject.”⁴³

II. PREDICTING INCITEMENT: A FRAMEWORK BASED ON COMMUNICATION RESEARCH

In convicting the RTLM leaders, the Tribunal for Rwanda recalled the Nuremberg Tribunal, which had characterized Streicher’s writing as a poison “injected in to the minds of thousands of Germans which caused them to follow the National Socialists’ policy of Jewish persecution and extermination.”⁴⁴ This metaphor of the hypodermic needle is consistent with early approaches to understanding the influence of propaganda, particularly following World War I.⁴⁵ Communication, at that time, was seen as a linear, unidirectional activity consisting of four elements: the source of a message, the content of a message, the channel of communication used to convey the message, and the audience.⁴⁶ As it would later be known, the “hypodermic needle,” “magic bullet,” “propaganda,” or “transmission” model assumed that media messages influenced an audience uniformly and that the audience was passive.⁴⁷ For this reason, research focused primarily on message content.⁴⁸

However, this model has been overtaken in communication research⁴⁹ by models that incorporate a wider variety of factors⁵⁰ that may weaken or

43. Gregory S. Gordon, “A War of Media, Words, Newspapers, and Radio Stations”: *The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech*, 45 VA. J. INT’L L. 139, 172 (2004) (adding that “[t]he first two criteria, purpose and text, are lumped together by the Tribunal, but they should be considered separately”).

44. Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 981 (Dec. 3, 2003), available at <http://www.ictor.org/ENGLISH/cases/Ngeze/judgement/Judg& sent.pdf> (quoting Nazi Conspiracy and Aggression, Opinion and Judgment (October 1, 1946), OFFICE OF THE U.S. CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY 56 (1947)).

45. See DENNIS MCQUAIL & SVEN WINDAHL, COMMUNICATION MODELS: FOR THE STUDY OF MASS COMMUNICATIONS 7 (2d ed. 1993).

46. See *id.*

47. For a brief history and critique of this model, see ELIZABETH M. PERSE, MEDIA EFFECTS AND SOCIETY 23–28 (2001) or W. Russell Neuman, *Parallel Content Analysis: Old Paradigms and New Proposals*, in 2 PUBLIC COMMUNICATION AND BEHAVIOR 205, 231–32 (George Comstock ed., 1989).

48. See Clay Calvert, *Hate Speech and Its Harms: A Communication Theory Perspective*, 47 J. OF COMM. 4, 10 (1997) (“The question of harm caused by hate speech, when considered from the perspective of the transmission model, boils down to this: Did communication of a particular message, X, cause a change, Y, in the attitude or behavior of the recipient of the message?”).

49. PERSE, *supra* note 47, at 33 (“Certainly, few mass communication scholars still accept the viability of these models, although the notion of a passive audience helplessly manipulated by enticing media images still invades the writings of popular authors.”).

50. For example, PERSE, *supra* note 47, at 23–52 classifies communication approaches into four fundamental models. The “direct effects” model resembles the “hypodermic needle” approach but focuses on the short-term, unconscious effects of such variables as camera angle or image size in

strengthen the impact of a message. For example, a message is strengthened when the media environment is limited and competing messages are weak or absent.⁵¹ A message may also gain long-term influence when it is repeated over time⁵² and when it is echoed in a variety of media, thus immersing the audience in its content.⁵³ Even an audience that rejects such a message will, at least, have its attention drawn to the subject matter.⁵⁴

Messages in the mass media may have heightened influence in a political context of instability.⁵⁵ The perception of threat during large-scale social disruption has been seen to increase audience “dependency” on the media as well as on interpersonal conversations, both strong predictors of behavior change among audience members.⁵⁶ The power of a message may be increased by variables related to the audience itself, including its demographic characteristics,⁵⁷ degree of selectivity, and level of sophistication.⁵⁸ Relationships among social groups and individuals can magnify the

television. The “conditional effects” model underscores the audience members’ ability to avoid or reject media influence. The “cumulative effects” model, most applicable to repeated messages over ubiquitous media channels, focuses on analyzing content and measuring media exposure. The “cognitive-transactional model” looks at the way a media message may influence an audience member’s “schema,” or mental organization of information. That, in turn, may influence the way the audience member perceives the message or subsequent ones.

51. See *id.* at 109–12. Research on the “spiral of silence” has found media influence to multiply in a kind of feedback loop: if the media marginalize an idea, then audience members feel more wary of expressing it. As a result, the idea is less often heard and, therefore, is further marginalized.

52. Calvert, *supra* note 48, at 6, 11 (The “ritual model” of communication sees “a long-term, cumulative harm that accrues with repeated use of racist epithets directed at targeted minorities. . . . The harm caused by hate speech that the ritual model points to is the production and maintenance of a reality of subordination and discrimination.”).

53. See PERSE, *supra* note 47, at 42–45 (“The effects of this model are generally reality-construction effects. That is, through cumulative exposure, people begin to adopt the media’s framing as their own representation of reality.”). See also, e.g., George Gerbner, *Cultivation Analysis: An Overview*, 1 MASS COMM. & SOC’Y 175, 179 (1998) (“What is most likely to cultivate stable and common conceptions of reality is □ the overall pattern of programming to which total communities are regularly exposed over long periods of time.”).

54. PERSE, *supra* note 47, at 43 (explaining that this phenomenon, termed “agenda setting,” is most often applied to the news media). “The effect is a fairly limited cognitive one: the news media don’t tell us what to think, but what to think about.” *Id.* (citing BERNARD COHEN, *THE PRESS AND FOREIGN POLICY* (1963)).

55. See PERSE, *supra* note 47, at 80–83.

56. Wilson Lowery, *Media Dependency During a Large-Scale Social Disruption: The Case of September 11*, 7 MASS COMM. & SOC’Y 339 (2004).

57. See, for example, Gerbner, *supra* note 53, at 183, noting that, with respect to television, “relationships between amount of viewing and the tendency to hold exaggerated perceptions of violence are . . . more pronounced within those real-world demographic subgroups (e.g., minorities) whose fictional counterparts are relatively more frequently victimized on television.” (citing Michael Morgan, *International Cultivation Analysis*, in *CULTIVATION ANALYSIS: NEW DIRECTIONS IN MEDIA EFFECTS RESEARCH* 225 (Nancy Signorielli & Michael Morgan eds., 1990)).

58. See, e.g., Maurice Vergeer et al., *Exposure to Newspapers and Attitudes toward Ethnic Minorities: A Longitudinal Analysis*, 11 HOWARD J. OF COMM. 127, 140 (2000) (finding, in a study of Dutch readers, that “people exposed to more than one newspaper perceive ethnic minorities as less threatening than others do. . . . A possible explanation for this finding is that exposure to a larger number of different opinions about ethnic minorities, as articulated in different newspapers, leads to a more sophisticated attitude than does just being exposed to the messages of a single newspaper.”).

effect of a message.⁵⁹ For example, a study conducted in Tanzania found that radio messages were more likely to affect people's behavior if the messages were later discussed in interpersonal conversations among informal networks of audience members who shared the same gender, religion, and tribal membership.⁶⁰

The content of the classic genocide propaganda message dehumanizes the target group and tries to justify killing.⁶¹ Its impact may be heightened if the message is associated with enjoyment and if it is emotionally arousing, seems realistic,⁶² offers characters that the audience can identify with,⁶³ or expands upon ideas that already enjoy sympathy among audience members.⁶⁴ Furthermore, different channels of mass communication affect audiences in different ways.⁶⁵

Using communication research, it is possible to construct a framework for determining when incitement to genocide warrants prior restraint through such means as jamming broadcast signals. The proposed framework would provide first for monitoring the external factors that can intensify the power of media messages: (1) media environment, (2) political context, and (3) characteristics of the audience. If these factors indicated

59. See PERSE, *supra* note 47, at 32–42. See also Elizabeth Levy Paluck, *Reducing Intergroup Prejudice and Conflict Using the Media: A Field Experiment in Rwanda*, 96 J. PERSONALITY & SOC. PSYCHOL. 574 (2009) (finding that radio listeners changed their behavior as they changed in their perception of social norms, even though their personal beliefs remained the same). *But see* Ervin Staub & Laurie Anne Pearlman, *Reducing Intergroup Prejudice and Conflict: A Commentary*, 96 J. PERSONALITY & SOC. PSYCHOL. 588 (2009) (arguing that radio does affect personal beliefs).

60. Shaheed Mohammed, *Personal Communication Networks and the Effects of an Entertainment-Education Radio Soap Opera in Tanzania*, 6 J. OF HEALTH COMM. 137 (2001).

61. Benesch, *supra* note 18, at 503–06.

62. PERSE, *supra* note 47, at 30–33. What seems realistic to audience members, however, may be influenced by their interaction with prior media messages. See, e.g., Gerbner, *supra* note 53, at 185 (explaining the “mean world syndrome,” in which long-term, heavy television viewers tended to see the world as mean and dangerous).

63. See PERSE, *supra* note 47, at 49.

64. *Id.* at 25–27. The ability of broadcast messages to reinforce the pre-existing beliefs and attitudes among audience members was acknowledged in research funded by American media industries in the 1940s to 1960s, which found that the media had minimal effects otherwise. See also L.J. Shrum, *The Relationship of Television Viewing with Attitude Strength and Extremity: Implications for the Cultivation Effect*, 1 MEDIA PSYCHOL. 3, 17 (1999) (supporting a hypothesis that television viewing influences audience attitudes by reinforcing and updating audience beliefs), and JACQUES ELLUL, *PROPAGANDA: THE FORMATION OF MEN'S ATTITUDES* 36 (1965) (observing that “propaganda cannot create something out of nothing. It must attach itself to a feeling, an idea; it must build on a foundation already present in the individual.”).

65. See MARSHALL McLuhan, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 326 (Routledge Classics 2001) (1964) (writing that “TV is a cool medium. It rejects hot figures and hot issues Had TV occurred on a large scale during Hitler's reign he would have vanished quickly. . . . Radio, however, is a hot medium and takes cartoon characters seriously.”); see also ELLUL, *supra* note 64, at 10 (“A movie does not play on the same motives, does not produce the same feelings, does not provoke the same reactions as a newspaper. . . . A word spoken on the radio is not the same, does not produce the same effect, does not have the same impact as the identical word spoken in private conversation or in a public speech before a large crowd.”). See generally WALTER J. ONG, *ORALITY AND LITERACY: THE TECHNOLOGIZING OF THE WORLD* (Methuen 1982) (contrasting written against oral culture and communication).

an environment in which messages would have exceptional power to change behavior on a large scale, then the framework would examine the messages themselves for the three operative “hypodermic needle” factors: (4) authority of the source of the message, (5) content of the message, and (6) channel of communication.⁶⁶ Additionally, the framework would take account of one more factor, (7) evidence of an overt act, bridging the gap between words and actions, such as organizing, arming, or otherwise preparing for violence against a targeted group.

The framework that this Article proposes differs from earlier approaches in several ways. It refines and clarifies the ICTR examination of “context,” dividing it into two categories—media environment and political context—both separate from the content of the message.⁶⁷ By looking separately at the media environment, the framework encourages the international community to pay special attention to governments that limit the diversity of views in the media. For this reason, leaders cracking down on political opposition voices would no longer find a pretext for their actions in incitement law, but instead would find their own messages subjected to the glare of heightened international scrutiny. The framework also addresses political context, treating political instability as a separate warning sign because it heightens audience dependence on media messages.⁶⁸ In addition, the proposed framework invites an assessment of the characteristics of the audience as part of its analysis. International intervention would be more strongly indicated where an inflammatory message was disseminated to an unsophisticated audience or one that consists of a network with a strong ethnic or religious identity.

Unlike earlier approaches, the proposed framework includes an examination of the channel of communication. Communication technologies differ in their impact on audiences. By taking the channel of communication into account, the framework allows for distinctions. It also invites continuing research into the impact of new technologies, including Internet

66. See MCQUAIL & WINDAHL, *supra* note 45.

67. The precedent cases have used “context” to refer to a number of distinctly different features of communication, including the pre-existing attitudes of an audience that might see Holocaust denial as an excuse for anti-Semitism, the external political reality of ongoing massacres, and the relative strength or weakness of the chosen channel of communication. See, e.g., Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-T, Judgment and Sentence, ¶¶ 1004–06 (Dec. 3, 2003), available at <http://www.ictor.org/ENGLISH/cases/Ngeze/judgement/Jud&sent.pdf>.

68. The danger of high media dependency might also be found where an audience is forced to listen to broadcasts, as has been reported in Pakistan. See, e.g., Richard A. Opiel Jr. & Pir Zubair Shah, *In Pakistan, Radio Amplifies Terror of Taliban*, N.Y. TIMES, Jan. 25, 2009, at A1:

Every night around 8 o’clock, the terrified residents of Swat . . . crowd around their radios. They know that failure to listen and learn might lead to a lashing—or a beheading.

Using a portable radio transmitter, a local Taliban leader . . . reveals names of people the Taliban have recently killed for violating their decrees—and those they plan to kill.

“They control everything through the radio,” said one Swat resident, who declined to give his name for fear the Taliban might kill him. “Everyone waits for the broadcast.”

Id.

sites, mobile telephones, and text messages.⁶⁹ Finally, because the framework focuses on prevention rather than culpability, it does not require violence already to have begun against a target population nor does it include the criminal element of purpose or intent.

The framework incorporates several features of other approaches. It includes two of the “hypodermic needle” factors that were also used by the ICTR: the relationship of the speaker to the audience and the content or “text” of the message. In the latter category, the ICTR specified that “speech constituting ethnic hatred results from the stereotyping of ethnicity combined with its denigration”⁷⁰ followed by the targeting of victims based on ethnicity alone.⁷¹ However, as the RTLM broadcasts illustrated, incitements to genocide have even more specific hallmarks, which can serve to flag the most dangerous content.⁷² Before justifying intervention, the proposed framework requires the presence of an overt act⁷³ such as organizing or otherwise equipping audience members “to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”⁷⁴

Use of the framework would provide a way to target jamming carefully, limiting it not only to a particular kind message by a particular kind of speaker, but also to a specific channel of communication in a particular, restrictive media environment at a particular, volatile time in the political life of a particular, susceptible audience while hostile overt acts were also present. Furthermore, use of the framework would allow for less extreme media interventions. If neighboring states or international agencies were able to broadcast effective anti-incitement messages into a country, for

69. See Kevin Sullivan, *In War-Torn Congo, Going Wireless to Reach Home*, WASH. POST, July 9, 2006, at A1 (reporting that armed rebel groups were said to use cell phones and text messages to coordinate operations in eastern Congo); Scott Baldauf, *Freedom of Speech Suffers in Tense Ethiopia*, CHRISTIAN SCI. MONITOR, Dec. 13, 2006, at 4 (reporting the use of text messages in Ethiopia to urge attacks on ethnic Tigreans).

70. Nahimana, Case No. ICTR 99-52-T, Judgment and Sentence, at ¶ 1021, available at <http://www.w.ictor.org/ENGLISH/cases/Ngeze/judgement/Judg&sent.pdf>.

71. Nahimana, Case No. ICTR 99-52-T, Summary, at ¶ 95, available at <http://www.ictor.org/ENGLISH/cases/Barayagwiza/judgement/Summary-Media.pdf>.

72. Benesch, *supra* note 18 (noting that past incitements to genocide have included media messages portraying the target group as subhuman and falsely accusing it of plotting to exterminate the audiences).

73. Nahimana, Case No. ICTR 99-52-T, Judgment and Sentence, at ¶ 952, available at <http://www.ictor.org/ENGLISH/cases/Ngeze/judgement/Judg&sent.pdf> (“The nature of media is such that causation of killing and other acts of genocide will necessarily be effected by an immediately proximate cause in addition to the communication itself.”).

74. Genocide Convention, *supra* note 29. Under the proposed framework, it would not be necessary that an inciter share an organizer’s intent to destroy a national, ethnic, racial, or religious group. For example, a commercial radio station might simply find it highly profitable to broadcast incitements against a target group at the same time that others were organizing to attack that group. The framework could justify disrupting the broadcasts even though the station’s indifference to the fate of the target group presumably would frustrate a later genocide prosecution.

example, their efforts might shift the “media environment” analysis enough to obviate the need for jamming.⁷⁵

The factors used in this proposed framework have emerged from differing models of communication; however, the models do not oppose, but overlap and augment each other.⁷⁶ As will be seen, in addition to structuring an analysis of threatening messages in the future, the framework also offers a systematic way to view the reasoning about incitement that underlies the precedent cases cited by ICTR.

III. USING THE FRAMEWORK TO ANALYZE THE PRECEDENT CASES

In convicting the radio leaders in Rwanda, the ICTR was guided primarily by three cases from the United Nations Human Rights Committee (UNHRC) and six cases from the European Court of Human Rights (ECHR) in which communication media had been implicated in incitement to violence and incitement to discrimination, so that the fundamental right of freedom of expression had to be balanced in the appeals.⁷⁷

In the UNHRC cases, appeals from national court decisions were brought under Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which provides that “[e]veryone shall have the right to freedom of expression,”⁷⁸ but which also notes that this right may be limited in order to serve such goals as protecting the rights of others, public order, or public health.⁷⁹

The ECHR cases were brought under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that “[e]veryone has the right to freedom of expression”⁸⁰ but which also notes that there are “duties and responsibilities”⁸¹ in the exercise of that freedom.

In applying either the European Convention on Human Rights or ICCPR, courts use a three-part test, which asks whether the government

75. See Gordon, *supra* note 43, at 146 (pointing out that international law requires interventions in speech to be “proportionate to the legitimate aims pursued”).

76. PERSE, *supra* note 47, at 52 (“The most complete explanations for media effects are those that combine explanations from each model.”).

77. As the ICTR noted, there was only one direct precedent for the crime of direct and public incitement to genocide: the ICTR’s own 1998 conviction of Jean Paul Akayesu, a mayor whose speeches had urged crowds to kill Tutsi.

78. International Covenant on Civil and Political Rights art. 19 (2), Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR]. Article 2 embraces mediated speech. It continues: “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.”

79. Nahimana, Case No. ICTR 99-52-T, Judgment and Sentence, at ¶ 984, available at <http://www.ictor.org/ENGLISH/cases/Ngeze/judgement/Judg&sent.pdf> (citing ICCPR, *supra* note 78, at art. 19(3)).

80. Convention for the Protection of Human Rights and Fundamental Freedoms art. 10(1), Sept. 3, 1953, Europ. T.S. No. 005 [hereinafter European Convention on Human Rights].

81. *Id.* art. 10(2).

restriction on speech is prescribed by law, serves a legitimate purpose, and is “necessary” in a democratic society.⁸² All of the precedent cases turned on the last question, requiring courts to balance the value of free speech against incitement to racial hatred or violence.

In all three of its cases, the UNHRC supported the government restrictions on speech.⁸³ In *Ross v. Canada*, a schoolteacher had been re-assigned to nonclassroom work⁸⁴ due to his off-duty anti-Semitic remarks and publications.⁸⁵ The UNHRC upheld the restrictions on him, pointing to a causal link between the teacher’s statements and a “poisoned” atmosphere in the school.⁸⁶ In *J.R.T. and the W.G. Party v. Canada*, the UNHRC refused to hear a case that arose when Canada barred public telephone service and handed a one-year prison sentence to a Toronto man who repeatedly used recorded messages to warn those who dialed in that “international Jewry” would lead the world into wars and moral and economic collapse.⁸⁷ In *Faurisson v. France*, the UNHRC upheld the conviction and fine imposed against a literature professor who told a monthly magazine that he had “excellent reasons not to believe” in the existence of “magic gas chambers” for extermination purposes at Nazi concentration camps.⁸⁸

In its six cited precedent cases, the ECHR both upheld and overturned government restrictions on speech. In *Jersild v. Denmark*, the ECHR overturned the conviction, under Danish law, of a television journalist whose *Sunday News Magazine* had broadcast several minutes’ worth of interviews with members of a racist youth group.⁸⁹ In *Incal v. Turkey*, the ECHR unanimously overturned the conviction of a Turkish lawyer⁹⁰ who had been sentenced to more than six months in prison⁹¹ because of his role in publishing an opposition party leaflet that had been barred as inciting hatred and hostility through racist words.⁹² In *Arslan v. Turkey*, the ECHR

82. Gordon, *supra* note 43, at 146.

83. Nahimana, Case No. ICTR 99-52-T, Judgment and Sentence, at ¶¶ 986–89, available at <http://www.ictor.org/ENGLISH/cases/Ngeze/judgement/Judg&sent.pdf>.

84. International Covenant on Civil and Political Rights, Communication No. 736/1997: Canada (Jurisprudence) ¶ 2.1, U.N. Docs. CCPR/C/70/D/736/1997 (2000) (*Ross v. Canada*).

85. *Id.* ¶ 11.5.

86. *Id.* ¶ 11.6.

87. International Covenant on Civil and Political Rights, Communication No. 104/1981: Canada (Jurisprudence), U.N. Docs. CCPR/C/18/D/104/1981 (*J.R.T. & the W.G. Party v. Canada*) (declared inadmissible Apr. 6, 1983).

88. International Covenant on Civil and Political Rights, Human Rights Committee, *Communication No. 550/1993: Faurisson v. France*, ¶ 9.5., U.N. Doc. CCPR/C/58/D/550/1993 (November 8, 1996) (*submitted by Robert Faurisson*).

89. *Jersild v. Denmark*, App. 15890/89, Eur. Ct. H.R. (1994) available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search *Jersild v. Denmark* in “Case Title” field).

90. *Incal v. Turkey*, App. No. 22678/93, Eur. Ct. H.R. ¶ 84 (1998), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search *Incal v. Turkey* in “Case Title” field).

91. *Id.* ¶ 16.

92. *Id.*

overturned the conviction of a journalist who had been sentenced to more than a year in prison⁹³ because his prizewinning⁹⁴ book, *History in Mourning, 33 bullets*,⁹⁵ had called the Turks invaders who had massacred peasants and who had intended to exterminate the Kurds.⁹⁶ In *Sürek and Özdemir v. Turkey*, the ECHR overturned the convictions of the editor and the major shareholder in a weekly newspaper, the *Truth of News and Comments*,⁹⁷ which had published an interview with an opposition leader⁹⁸ of the Kurdistan Workers' Party or PKK, an illegal organization.⁹⁹ In a companion case, *Sürek v. Turkey (No.1)*, however, the Court upheld a conviction of the same publication for printing volatile letters to the editor.¹⁰⁰ In *Zana v. Turkey*, the Court upheld the conviction of a former mayor, already serving several sentences in a military prison,¹⁰¹ who told journalists that “[a]nyone can make mistakes, and the PKK kill women and children by mistake.”¹⁰²

The proposed framework provides a systematic way to consider the factors taken into account when these international bodies balanced media freedom against speech posing a danger of violence and discrimination. The framework offers further refinement and development of those factors.

A. Media Environment

The proposed framework begins by considering the media environment of a potentially dangerous message. Signs of a coercive media environment include an absence of competing messages and the frequent repetition of a message so that it fills the airwaves or is echoed across different media platforms. Using the framework to analyze the precedent cases reveals that, although the media environment was not explicitly identified as a factor, it did play a role in several decisions in which the ECHR recog-

93. Arslan v. Turkey, App. No. 23462/94, Eur. Ct. H.R. ¶ 19 (2001), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search Arslan v. Turkey in “Case Title” field, follow first result).

94. *Id.* ¶ 8.

95. *Id.*

96. *Id.* ¶ 10.

97. Sürek and Özdemir v. Turkey, App. Nos. 23927/94 and 24277/94, Eur. Ct. H.R. ¶ 8 (1999), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search Sürek and Özdemir v. Turkey in “Case Title” field).

98. *Id.* ¶ 9.

99. *Id.*

100. Sürek v. Turkey (No. 1), App. 26682/95, Eur. Ct. H.R. (1999), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search Sürek v. Turkey in “Case Title” field, follow “CASE OF SÜREK v. TURKEY (No. 1)” (second result)).

101. Zana v. Turkey, App. No. 18954/91, Eur. Ct. H.R. (1997), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search Zana v. Turkey in “Case Title” field, follow first result).

102. *Id.* ¶ 12.

nized the importance of diverse viewpoints as a protection against incitement. In *Jersild*, the Court overturned the fine that Denmark imposed on a television journalist, in part, because of the “context in which [his program] was broadcast.”¹⁰³ Despite the Danish station’s broadcast monopoly, the ECHR tacitly relied on viewers’ access to diverse sources of news, as it indicated confidence in the “well-informed audience.”¹⁰⁴ The ECHR also noted the journalistic context of the youth group interview, as it described the weekly television news magazine as a “serious television programme . . . dealing with a wide range of social and political issues.”¹⁰⁵

In three of the Turkish cases, the ECHR supported those who were promoting a diversity of views in the media environment, repeating a formula favoring out-of-power voices over the official ones, stating that the “limits of permissible criticism are wider with regard to the Government than in relation to a private citizen or even a politician.”¹⁰⁶ In *Incal*, the ECHR upheld publication of the opposition party leaflet, which complained of government hostility towards citizens of Kurdish origin.¹⁰⁷ Although the government argued that the leaflet was likely to incite an anti-government reaction by Kurdish people,¹⁰⁸ the ECHR supported the free speech rights of the government opponent.¹⁰⁹ In *Arslan*, the ECHR upheld the publication of a book describing Turkey as an aggressor against Kurds.¹¹⁰ In *Sürek and Özdemir v. Turkey*, the ECHR upheld the right of the weekly review to publish an interview with the leader of the PKK, and it warned states not to use such concerns as national security or the prevention of disorder to restrict the right of the public to be informed.¹¹¹ Overall, the precedent decisions refer only obliquely to the media environment, a key factor in the proposed framework, but concern for a diversity of views runs through several of the decisions and is a unifying factor among them.

B. Political Context

The proposed framework considers separately the political context in which a message is sent because political instability heightens audience dependence on the communication media and, in that way, strengthens the influence of messages on audience members. Only one of the precedent

103. *Jersild v. Denmark*, App. 15890/89, Eur. Ct. H.R. ¶ 31 (1994).

104. *Id.* ¶ 34.

105. *Id.* ¶ 9.

106. *Incal v. Turkey*, App. No. 22678/93, Eur. Ct. H.R. ¶ 54 (2000).

107. *Id.* ¶ 50.

108. *Id.* ¶ 44.

109. *Id.* ¶ 46 (noting that “interferences with the freedom of expression of a politician who is a member of an opposition party, like the applicant, call for the closest scrutiny on the Court’s part”).

110. *Arslan v. Turkey*, App. No. 23462/94, Eur. Ct. H.R. ¶ 50 (2001).

111. *Sürek and Özdemir v. Turkey*, App. 23927/94 and 24277/94, Eur. Ct. H.R. ¶ 61 (1999).

decisions approached this rationale. In *Jersild*, dissenters in the 12–7 decision would have upheld sanctions against the Danish television reporter because “[l]arge numbers of young people today, and even of the population at large, finding themselves overwhelmed by the difficulties of life, unemployment and poverty, are only too willing to seek scapegoats who are held up to them.”¹¹²

When political instability played a role in other decisions, the reasoning appeared to be, not that audience members relied more on the messages, but that the political context lowered any practical barriers to audience members acting on those messages. In upholding convictions by Turkey’s National Security Court in *Zana* and in *Sürek (No. 1)*, the ECHR noted that volatile remarks had been made in southeast Turkey, an area under widespread emergency rule in an “already explosive situation,”¹¹³ which had claimed the lives of more than 7,000 people. These same conditions were noted in *Sürek and Özdemir v. Turkey*. Although the ECHR found that the remarks in question were not sufficient to justify a conviction by the Istanbul National Security Court,¹¹⁴ a concurring opinion by five judges sought to put more emphasis on “context” in future cases, to assess whether there was “a real and genuine risk” that specific words might actually inflame or incite to violence.¹¹⁵ Dissenting judges did emphasize political context, finding that the interview in question could encourage further violence especially given “the sensitivity of the political and security situation in south-east Turkey.”¹¹⁶

The proposed framework explicitly takes account of political instability, viewing it as a separate kind of context that can lend power to messages. The framework would take up separately the overt acts that bridge the gap between messages and violence.

112. *Jersild v. Denmark*, App. 15890/89, Eur. Ct. H.R. (1995) (joint dissenting opinion of judges Gölcüklü, Russo, and Valticos).

113. *Zana v. Turkey*, App. 18954/91, Eur. Ct. H.R. ¶ 61 (1999). “[T]he interview coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey, where there was extreme tension at the material time.” *Id.* ¶ 60; *Sürek v. Turkey (No. 1)*, App. 26682/95, Eur. Ct. H.R. ¶ 62 (1999) (“[S]erious disturbances have raged between the security forces and the members of the PKK involving a very heavy loss of life.”).

114. *Sürek and Özdemir v. Turkey*, App. 23927/94 and 24277/94, Eur. Ct. H.R. ¶ 61 (1999).

115. *Id.* (joint concurring opinion of judges Palm, Tulkens, Fischbach, Casadevall, and Greve). The judges called for “a measured assessment of the many different layers that compose the general context.” The layers suggested are all addressed separately by the proposed framework: the language of the message, the authority of the speaker, the prominence of the publication (the “channel of communication” in the framework) and the proximity of the message to the center of violence (a measure of “political context” in the proposed framework).

116. *Id.* (joint partly dissenting opinion of judges Wildhaber, K̄ris, Str̄áznická, Baka, and Traja).

C. *Characteristics of the Audience*

The impact of a message may be stronger where the audience is young or unsophisticated, already inclined toward prejudiced views or highly networked along such lines as tribal membership and religion.

In *Ross v. Canada*, the UNHRC held that the “duties and responsibilities” that accompany freedom of speech, under Article 19 of the ICCPR¹¹⁷ have “particular relevance within the school system, especially with regard to the teaching of young students.”¹¹⁸ Although the ECHR decisions did not systematically address the characteristics of the audience as a criterion, such factors nonetheless played a role in several of its decisions. In upholding a Turkish conviction in *Sürek (No.1)*, the Court pointed to the “embedded prejudices” which already existed in the audience and which might be hardened by exposure to angry, published letters from fellow newspaper readers.¹¹⁹ By contrast, in overturning the conviction of the Danish television journalist in *Jersild*, the ECHR majority accepted the television journalist’s explanation that broadcasting the racist statements held them up to ridicule so as “to counter them through exposure.”¹²⁰ Dissenters in *Jersild* differed on the question of audience characteristics. One group warned that “[n]obody can exclude that certain parts of the public found in the television spot support for their racist prejudices.”¹²¹ While the early hypodermic-needle theory of communication saw audiences as passive and uniform, the proposed framework, based in more recent research, recognizes that audience members differ in their responses to messages.

D. *Authority of the Source*

Where the three externally observable factors—media environment, political context, and audience characteristics—indicate conditions ripe for incitement to genocide, the proposed framework examines the classic “hypodermic needle” factors. The first consideration is the authority of the source. This was a key concern, also, in the ICTR precedent cases.

117. ICCPR, art. 19 (3) provides in part:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Id.

118. International Covenant on Civil and Political Rights, Communication No. 736/1997: Canada (Jurisprudence), ¶ 11.6, U.N. Docs. CCPR/C/70/D/736/1997 (2000) (*Ross v. Canada*).

119. *Sürek v. Turkey* (No. 1), App. 26682/95, Eur. Ct. H.R. ¶ 62 (1999).

120. *Jersild v. Denmark*, App. 15890/89, Eur. Ct. H.R. ¶ 28 (1995).

121. *Id.* (joint dissenting opinion of Ryssdal, Bernhardt, Spielmann, and Loizou).

Where the source of a volatile statement was a person of authority in the eyes of the audience, the ECHR was more willing than otherwise to restrict speech as dangerous. In upholding a conviction in *Zana*, the Court pointed out that the prisoner who warned of the potential for inadvertent killing of women and children was not merely a supporter of the opposition party, PKK,¹²² but also a person of influence, “the former mayor of Diyarbakir, the most important city in south-east Turkey.”¹²³

In *Ross v. Canada*, the UNHRC emphasized the authority of a teacher in the context of the school system,¹²⁴ and the danger of lending the legitimacy of the school system to discriminatory views.¹²⁵

Where inflammatory views were not endorsed by an authoritative speaker, the ECHR either overturned the conviction or explained that the restriction on speech was compelling due to other factors. In *Jersild*, the ECHR pointed out that the television program disassociated itself from the racist remarks of the interviewees,¹²⁶ thereby not lending its authority to the offensive messages. In *Sürek v. Turkey (No.1)*, Sürek was convicted for publishing two angry letters from readers of his weekly review.¹²⁷ Although, like the journalist in *Jersild*, he did not personally associate himself with the readers’ views against the military actions of Turkish authorities, the ECHR pointed to other reasons to uphold his conviction, primarily the volatility of the audience and the force of the content of the letters. In *Incal* and in *Arslan*, the voices were not those of powerful authorities.

E. Content of the Message

As the primary hypodermic needle factor, the content (or the “text”) of the message was the focus of the ICTR cases and also its cited precedents. In upholding a conviction in *Sürek (No. 1)*, the ECHR noted the pointed content of published readers’ letters. It said that the letters attempted to appeal to base emotions and to stigmatize authorities by using such words as “massacres” and labels such as “the fascist Turkish army,” communicating to the reader that “recourse to violence is a necessary and justified measure.”¹²⁸ One of the letters identified individuals by name to

122. *Zana v. Turkey*, App. 18954/91, Eur. Ct. H.R. ¶ 10 (1999).

123. *Id.* ¶ 60.

124. Canada’s Supreme Court had put it even more pointedly, stating that “[t]eachers occupy positions of trust and confidence, and exert considerable influence over their students as a result of their positions.” International Covenant on Civil and Political Rights, Communication No. 736/1997: Canada (Jurisprudence) ¶ 4.7, U.N. Docs. CCPR/C/70/D/736/1997 (2000) (*Ross v. Canada*).

125. *Id.* ¶ 11.6.

126. *Prosecutor v. Nahimana, Barayagwiza, & Ngeze*, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 993 (Dec. 3, 2003), available at <http://www.ictt.org/ENGLISH/cases/Ngeze/judgment/Judg&sent.pdf>.

127. *Sürek v. Turkey (No. 1)*, App. 26682/95, Eur. Ct. H.R. (1999).

128. *Id.* ¶ 62.

be targets of violence.¹²⁹ That message was similar to the one in *Zana*, where the mention of “mistakes” that might kill women and children was also seen as a threat.¹³⁰

Where the content of a volatile message consisted of accurate information, however, the ECHR supported publication. In *Sürek and Özdemir*, the publication of an interview with a PKK leader was upheld as having “newsworthy content.” Although the publication included such comments as, “The war will go on until there is only one single individual left on our side,” the ECHR credited the publication with giving the public insight into the conflict and into the personalities of opposition leaders.¹³¹ In *Incal*, the Court upholding the opposition party leaflet noted that its relevant passages depicted “actual events.”¹³² It found that, despite “virulent remarks”¹³³ about the Turkish government, the leaflets called for nothing more than the establishment of “neighbourhood committees.”¹³⁴ It found no evidence that this language had any hidden meaning.¹³⁵

Content that the UNHRC judged not to deserve protection consisted of threats, accusations, and assertions contrary to historic fact. In *J.R.T. and the W.G. Party v. Canada*, the messages dialed up via public telephone warned “of the dangers of international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles.”¹³⁶ The UNHRC found, in fact, that Canada had an obligation under Article 20(2) of the ICCPR to prohibit the speech as advocacy of racial or religious hatred.¹³⁷ In *Ross v. Canada*, the disciplined school teacher had “call[ed] upon true Christians . . . to hold those of the Jewish faith and ancestry in contempt as undermining freedom, democracy and Christian beliefs and values.”¹³⁸ The provincial board of inquiry, which initially heard the case, stated that “Ross continuously alleges that the Christian faith and way of life are under attack by an international conspiracy in which the leaders of Jewry are prominent.”¹³⁹ The UNHRC concluded that

129. *Id.*

130. *Id.*

131. *Sürek and Özdemir v. Turkey*, App. Nos. 23927/94 and 24277/94, Eur. Ct. H.R. ¶ 61 (1999), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search *Sürek and Özdemir v. Turkey* in “Case Title” field).

132. *Incal v. Turkey*, App. No. 22678/93, Eur. Ct. H.R. ¶ 50 (1998), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search *Incal v. Turkey* in “Case Title” field).

133. *Id.*

134. *Id.*

135. *Id.* ¶ 51.

136. *Prosecutor v. Nahimana, Barayagwiza, and Ngeze*, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 987 (Dec. 3, 2003), available at <http://www.ictor.org/default.htm> (follow “Cases” link, follow “Status of Cases” link, and follow “NAHIMANA, Ferdinand (ICTR-96-11)” link).

137. *Id.*

138. International Covenant on Civil and Political Rights, Communication No. 736/1997: Canada (Jurisprudence), ¶ 4.2, U.N. Docs. CCPR/C/70/D/736/1997 (*Ross v. Canada*) (Oct. 18, 2000).

139. *Id.*

Ross called on Christians “to hold those of the Jewish faith and ancestry in contempt.”¹⁴⁰ In *Faurisson v. France*, the publication doubted the existence of gas chambers for extermination at Nazi concentration camps.¹⁴¹ In assessing the content of the message, the UNHRC paid attention not only to words but also to tone. In *Faurisson*, the French government had noted cynical references, such as one to a “magic gas chamber.”¹⁴² Such language, it said, “incites . . . readers to anti-semitic behaviour.”¹⁴³ A concurring opinion noted that, in some cases, “those interested in spreading hostility and hatred adopt sophisticated forms of speech that are not punishable under the law against racial incitement, even though their effect may be as pernicious as explicit incitement, if not more so.”¹⁴⁴

In *Jersild*, by contrast, the ECHR took into account that the television program in question was a “serious” one and presumably, therefore, less volatile in tone.¹⁴⁵ These ICTR precedent cases appear to have expanded the definition of “text” to include the additional persuasive factor of tone. This is a legitimate consideration given research findings that factors such as emotionality and realism in the content of a message may heighten its force.

One exception to the pattern above occurred in *Arslan*. The Court acknowledged that the book was not a neutral history, and it noted “the undeniable virulence of the style.”¹⁴⁶ It also acknowledged a troublesome political context in the wake of the Gulf War when a large number of Kurds “were thronging at the Turkish border.”¹⁴⁷ In overturning Arslan’s conviction, however, the ECHR pointed to an important distinguishing factor, which the proposed framework calls the “channel of communication.”

F. Channel of Communication

A channel of communication may be anything from a book or newspaper to a radio or television broadcast. Although this factor has a place in

140. *Id.*

141. International Covenant on Civil and Political Rights, Communication No. 550/1993: France (Jurisprudence), U.N. Docs. CCPR/C/58/D/550/1993 (Robert Faurisson v. France) (Nov. 8, 1996) [hereinafter Communication No. 550/1993].

142. *Id.* ¶ 2.6.

143. Prosecutor v. Nahimana, Barayagwiza, and Ngeze, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 988 (Dec. 3, 2003), available at <http://www.ictor.org/ENGLISH/cases/Ngeze/judgement/Judg&sent.pdf>.

144. Communication No. 550/1993 (Individual opinion by Elizabeth Evatt and David Kretzmer, cosigned by Eckart Klein, ¶ 4).

145. Nahimana, Case No. ICTR 99-52-T ¶ 992.

146. Arslan v. Turkey, App. No. 23462/94, Eur. Ct. H.R. ¶ 45 (2001), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search Arslan v. Turkey in “Case Title” field, follow first result).

147. *Id.* ¶ 47.

the classic “hypodermic needle” model, it was articulated as a consideration in only two of the precedent cases cited by the ICTR. In *Arslan*, the Court was more forgiving toward a book than it apparently would have been toward other channels of communication. It found a literary work to be less likely than the mass media (presumably meaning the broadcast media) to disturb national security and public order. In this case, the Court overturned speech restrictions placed on a book that painted a negative picture of Turks and their treatment of Kurds.¹⁴⁸ In *Zana*, the ECHR noted that it was a major national daily newspaper that carried the volatile statement at issue.¹⁴⁹ The resulting prominence of the statement was a factor as the Court upheld the speaker’s conviction.

Different channels of communication have different capabilities and limitations. They engage audiences in different ways. Still, courts examining restrictions on speech have paid little attention to the implications of these differences. The proposed framework would require examining this factor separately when evaluating potential incitements to genocide.

G. Overt Act

Since speech does no physical harm, the ICTR convictions required a finding of an additional proximate cause in order to link incitements to genocide.¹⁵⁰ In the precedent cases, the ECHR upheld convictions where violence against a target group was ongoing. Where such violence was speculative or sporadic, the ECHR upheld the speech instead. In upholding a conviction in *Sürek (No.1)*, the ECHR noted that audience prejudices already had “manifested themselves in deadly violence.”¹⁵¹ In *Zana*, the Court noted that the remarks of the former mayor “coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey.”¹⁵²

In the school setting that was the basis of *Ross v. Canada*, the UNHRC found that the teacher’s statements contributed to a “poisoned atmosphere” in the school.¹⁵³ Witnesses had given evidence of “repeated

148. Nahimana, Case No. ICTR 99-52-T ¶ 996.

149. *Zana v. Turkey*, App. No. 18954/91, Eur. Ct. H.R. ¶ 60 (1997), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search *Zana v. Turkey* in “Case Title” field, follow first result).

150. Nahimana, Case No. ICTR 99-52-T ¶ 952. (“The nature of media is such that causation of killing and other acts of genocide will necessarily be effected by an immediately proximate cause in addition to the communication itself.”).

151. *Sürek v. Turkey (No. 1)*, App. 26682/95, Eur. Ct. H.R. ¶ 62 (1999), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search *Sürek v. Turkey* in “Case Title” field, follow “CASE OF SÜREK v. TURKEY (No. 1)” (second result)).

152. *Zana*, App. No. 18954/91 ¶ 59.

153. Human Rights Comm., on International Covenant on Civil and Political Rights, Communication No. 736/1997: *Canada (Jurisprudence)*, ¶ 11.6, U.N. Doc. CCPR/C/70/D/736/1997 (2000) (*Ross v. Canada*).

and continual harassment in the form of derogatory name calling of Jewish students, carving of swastikas into desks of Jewish children, drawing of swastikas on blackboards and general intimidation of Jewish students.”¹⁵⁴

By contrast, in *Incal*, upholding an antigovernment leaflet urging Kurds to band together politically, the Court explained that it found no evidence of “any concrete action which might belie” the authors’ stated intent only to criticize official discrimination.¹⁵⁵ In *Jersild*, even the dissenters acknowledged that there was “no evidence that the statements in question provoked any acts of racist persecution.”¹⁵⁶ Establishing a clear link between words and actions was an important factor in several of the precedent cases.

To meet the goal of preventing genocide, the proposed framework ideally would be used at an early enough stage to ask not whether massacres already were taking place, but rather whether overt acts were taking place that could bridge the gap between incitement and genocide. Such acts would be examined not to test the criminal intent of an inciter, but rather to gauge the immediacy and degree of physical danger posed by the inflammatory speech. Although it is beyond the scope of communication research and this Article to propose specific guidelines for this criterion, it seems reasonable that overt acts would gain weight where taken on a large scale, such as the stockpiling of weapons, or where taken against a target group that was particularly vulnerable, for example because of its minority status or the unwillingness or inability of the government to protect target group members.

IV. APPLYING THE FRAMEWORK TO THE CASE OF RWANDA, 1994

Had the proposed framework been applied to the broadcasts of RTLM, the international community would have had the strongest possible case for disrupting the radio signals. The facts surrounding the RTLM broadcasts would signal extreme danger in response to every element of the framework, justifying international intervention. An analysis of the Rwandan situation follows, applying each factor of the proposed framework.

154. *Id.* ¶ 4.3.

155. Nahimana, Case No. ICTR 99-52-T ¶ 995 (quoting *Incal v. Turkey*, App. No. 22678/93, Eur. Ct. H.R. ¶ 51 (1998), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search *Incal v. Turkey* in “Case Title” field)).

156. *Jersild v. Denmark*, App. 15890/89, Eur. Ct. H.R. (1993) (Commission report), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search *Jersild v. Denmark* in “Case Title” field of HUDOC Collection and select second result—Commission (Plenary)) (Mr. Gaurur Jo rundsson, dissenting).

A. Media Environment

The Rwandan media environment was dangerous. Illiteracy rates were high,¹⁵⁷ so radio broadcasts in Kinyarwanda, the indigenous language, were the only meaningful mass media in rural villages.¹⁵⁸ This limited listeners' access to any competing messages.¹⁵⁹ Additional factors also restricted the range of voices in the media. As RTLM hired away journalists and announcers, some competing media outlets ended publication.¹⁶⁰ After issuing RTLM's radio license, the government "denied licenses to . . . other applicants."¹⁶¹ From 1990–1994, several journalists were arrested, intimidated, and killed after publishing articles against the government.¹⁶² RTLM, relayed across the country on transmitters owned by the government,¹⁶³ had no serious competition from the other two Kinyarwanda-language stations. Although the station objected at trial that it had included opposition views on its airwaves, the ICTR found that the tone of these rare broadcasts only held the Tutsi up to further contempt.¹⁶⁴ Overall, RTLM was more entertaining than both the staid broadcasts of the government's Radio Rwanda¹⁶⁵ and the amateurish propaganda of the rebel radio station, Radio Muhabura.¹⁶⁶ Furthermore, the debut of RTLM in

157. PRUNIER, *supra* note 4, at 133 ("In a country like Rwanda where more than 60% of the population could not read or write, the existence of a free press only had meaning for the literate sector of the population, who were already politically aware anyway. The audiovisual scene was a tremendously important battlefield and here the government still reigned supreme: its version of events was the one carried out to the hilly countryside by radio. The license given to 'free' extremist radio RTLMC (and to nobody else who might have supported a more moderate line) only made things worse.").

158. Christine L. Kellow & H. Leslie Steeves, *The Role of Radio in the Rwandan Genocide*, J. OF COMM., Sept. 1998, at 107, 117.

159. BBC broadcasts in Rwanda, for example, were in English.

160. Kellow & Steeves, *supra* note 158, at 118.

161. See Kevin W. Goering, Damion K. L. Stodola & John C. Knapp, *Why U.S. Law Should Have Been Considered in the Rwanda Media Convictions*, COMM. L. 12, Spring 2004, at 10, 12 (citing Dina Temple-Raston, *Three Rwandan Media Executives Are on Trial for Inciting Genocide. Their Case – the First of Its Kind Since Nuremberg – Will Pressure International Courts to Crack Down on Free Speech*, LEGAL AFF., Sept.–Oct. 2002, at 29). Goering et al. write that, given the lack of a marketplace of ideas to counter RTLM, even U.S. free speech doctrines would not have protected the defendants from conviction for incitement. *Id.*

162. Jean Marie Kamatali, *Freedom of Expression and Its Limitations: The Case of the Rwandan Genocide*, 38 STAN. J. INT'L L. 57, 66 (2002).

163. Morand Fachot, Survey of "Hate" and "Humanitarian" Broadcast Media Operating in Zones of Conflict (Apr. 30, 2000), <http://www.hirondelle.org/hirondelle.nsf/0/c584cdc24a63e9e6c12568e4005f1463?OpenDocument>.

164. Gordon, *supra* note 43, at 176 n.214.

165. Radio Rwanda did add to the fearful atmosphere by accusing the RPF of "an ideology of 'ethnic purification.'" Bill Berkeley, *Sounds of Violence*, NEW REPUBLIC 211, Aug. 22, 1994, at 18 (quoting a March 31, 1994, transcript compiled by the United Nations Assistance Mission to Rwanda).

166. ARTICLE 19, BROADCASTING GENOCIDE: CENSORSHIP, PROPAGANDA & STATE-SPONSORED VIOLENCE IN RWANDA 1990–1994, 49 (1996), <http://www.article19.org/pdfs/publications/rwanda-broadcasting-genocide.pdf> [hereinafter ARTICLE 19]. Radio Muhabura did not call on listeners to kill, however. Interview with Paul Rusesabagina, former manager of the Hotel Mille Collines, in Poughkeepsie, N.Y. (Apr. 27, 2005).

1993 had been promoted in the popular, inflammatory newspaper *Kangura*,¹⁶⁷ and RTLM journalists, in turn, unfailingly commented on *Kangura*'s articles.¹⁶⁸ Several witnesses testified to hearing the same information emanating from both media,¹⁶⁹ an echo that could heighten audience acceptance of RTLM's framing of reality. As the killing began, RTLM's control of the Rwandan media environment expanded, eliminating other sources of information: telephone lines were cut, roadblocks were set up to stop internal movement, and foreign journalists were expelled.¹⁷⁰ Finally, RTLM used its on-air influence to discredit opposing views, repeatedly telling listeners to ignore any conflicting accounts of events.¹⁷¹ Of course, the genocide itself silenced potential opposing voices.

B. Political Context

The political context of the RTLM broadcasts was dangerously unstable, a second indication of the potential for incitement.¹⁷² The late 1980s had been marked by economic decline in Rwanda. In 1990, the Rwandan Patriotic Front (RPF), consisting of Tutsis who had been exiled in Uganda since Rwandan independence, attempted to invade the country. Over the following three years, they gained control of a sliver of land along the Ugandan border. The RPF signed a peace accord with the government of President Juvenal Habyarimana in 1993, but in the meantime, the Rwandan army had vastly expanded. Weapons had flooded into the country, and anti-Tutsi extremists had mobilized an armed youth wing. When an airplane carrying the president crashed on April 6, 1994, the news was shocking. RTLM broadcasts blamed the rebels and used the uncertain political environment to signal the start of the killing by calling on the Hutu majority to destroy the rebels and other Tutsi.¹⁷³

C. Characteristics of the Audience

The audience of RTLM was ideal for manipulation. Although listeners were so varied as to include even Tutsi rebel leaders,¹⁷⁴ the disc jockeys'

167. Prosecutor v. Nahimana, Barayagwiza, and Ngeze, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 932 (Dec. 3, 2003), available at <http://www.ictor.org/ENGLISH/cases/Ngeze/judgement/Judg&sent.pdf>.

168. *Id.* ¶ 933.

169. *Id.* ¶ 935.

170. Kellow & Steeves, *supra* note 158, at 123.

171. *Id.* at 119.

172. *See generally id.*

173. PRUNIER, *supra* note 4, at 224. Radio Rwanda blurred any line between rebel soldiers and civilians by reporting that RPF members often changed their clothes, "trying to be confused with ordinary people who till the soil and go to the market." Berkeley, *supra* note 165, at 19 (quoting a May 23, 1994, transcript).

174. ARTICLE 19, *supra* note 166, at 49 ("Sources close to the RPF [the Tutsi-led rebel Rwandan

irreverence and crude tone especially appealed to disaffected youth.¹⁷⁵ RTLM had built a large following by offering popular music and obscene jokes,¹⁷⁶ upbeat disc jockeys,¹⁷⁷ Rwanda's first call-in program,¹⁷⁸ and blunt talk. Most listeners were unemployed.¹⁷⁹ They belonged to large social networks that identified primarily according to religion and tribal membership. To the extent that Hutu listeners had felt wronged or oppressed by Tutsis, the RTLM audience was already sympathetic to a message that portrayed the Tutsi as a looming threat. Moreover, audience members came from a strong tradition of deference to authority and generally responded to directives according to a norm of rote obedience.¹⁸⁰

D. Authority of the Source

RTLM had authority over listeners. Although it was not the official government station, RTLM was supported by Rwanda's "ruling inner circle," including the wife of President Habyarimana.¹⁸¹ It had the cooperation of the government station, and eventually it used Radio Rwanda's transmitters and airwaves to reach all of the country.¹⁸² As the ICTR noted, free speech claims are typically brought to court by minorities or opposition groups fighting suppression by governments.¹⁸³ In Rwanda, however, the broadcast speech in question represented the majority population,¹⁸⁴ and it coincided with its Hutu-power movement, aimed against the minority group.

Patriotic Front] claim that RTLM was extremely popular with the rebel soldiers Even Alexis Kanyarengwe, RPF President, is reported to have been an avid listener and, before the genocide, is said to have found the station very amusing.").

175. ARTICLE 19, *supra* note 166, at 50 (citing an interview with Gérard Prunier: "RTLM was geared to people on street corners – if it was beamed to peasants, it was for the young ones. Their parents would have disapproved. It was for 20-year-olds and under. . . . RTLM's target was gangs, young thugs.").

176. PRUNIER, *supra* note 4, at 189.

177. Francis Rolt, *More Media, Not More News*, CONFLICT PREVENTION NEWSL. (Eur. Platform for Conflict Prevention & Transformation), May 2003, at 14.

178. Internews, Media in Conflict: Case Study—Rwanda, http://www.internews.org/pubs/mediainconflict/mic_rwanda.shtm. For a description of early broadcasts and their appeal to Rwandan audiences, see DINA TEMPLE-RASTON, JUSTICE ON THE GRASS 2–3 (Free Press 2005).

179. Kamatali, *supra* note 162, at 69.

180. Kellow & Steeves, *supra* note 158, at 116.

181. *Id.* at 117–18.

182. *Id.* at 118.

183. Prosecutor v. Nahimana, Barayagwiza, and Ngeze, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 1008 (Dec. 3, 2003), available at <http://www.ictor.org/ENGLISH/cases/Ngeze/judgement/Judg&sent.pdf>.

184. *Id.*

The dangers of censorship have often been associated in particular with the suppression of political or other minorities, or opposition to the government. The special protections developed by the jurisprudence for speech of this kind, in international law and more particularly in the American legal tradition of free speech, recognize the power dynamic inherent

E. Content of the Message

The content of RTLM broadcasts incited genocide directly and indirectly, both in words and in tone. RTLM did not offer factual news reports¹⁸⁵ but instead repeated anti-Tutsi messages portraying the Tutsi as inherently evil¹⁸⁶ and as enemies of the state by virtue of their ethnicity alone.¹⁸⁷ Following well established propaganda techniques, RTLM placed all Tutsi (as well as moderate Hutu) into one category¹⁸⁸ and dehumanized them, referring to the Tutsi as *inyenzi*, or cockroaches.¹⁸⁹ This ethnic stereotyping promoted contempt and hatred for Tutsi.¹⁹⁰ RTLM warned listeners that the Tutsi minority planned to take over the land of the Hutu majority.¹⁹¹ It claimed that the Tutsi-led Rwandan Patriotic Front (RPF), a rebel group that was engaged in peace talks with the government, actually planned to dominate the country, just as Tutsis had during Belgian colonial rule.¹⁹² RTLM directed the audience to kill and gave instructions on how to do it.¹⁹³ Broadcasts directed specific audiences to attack at specific locations.¹⁹⁴

In addition, RTLM's emotional content heightened its effectiveness. From its first broadcast, on July 8, 1993,¹⁹⁵ RTLM associated its broadcasts with the pleasure of hearing popular African music.¹⁹⁶ The fast-paced, urgent content of the RTLM messages was emotionally arousing.¹⁹⁷ RTLM's messages seemed realistic, although the station falsely reported atrocities committed by Tutsis.¹⁹⁸ Its themes were repeated and also were

in the circumstances that make minority groups and political opposition vulnerable to the exercise of power by the majority or by the government.

Id.

185. *Id.* ¶ 949.

186. *Id.* ¶ 963.

187. *Id.* ¶ 969.

188. Kellow & Steeves, *supra* note 158, at 121.

189. *Id.* at 120 (citing AFRICAN RIGHTS, RWANDA: DEATH, DESPAIR, AND DEFIANCE (1995)). The word *inyenzi* had also been applied to Tutsi guerrillas during the years immediately following Rwandan independence from Belgium. PRUNIER, *supra* note 4, at 54.

190. "[T]he reason we will exterminate them is that they belong to one ethnic group." Nahimana, Case No. ICTR 99-52-T ¶ 396.

191. TEMPLE-RASTON, *supra* note 178, at 50.

192. *Id.*

193. Kellow & Steeves, *supra* note 158, at 107. Kellow and Steeves write that the instructional steps were portrayed as detailed accounts of alleged Tutsi aggression. They cite the example of a May 20, 1994, broadcast, which reported Tutsi to be "gathering guns, killing Hutu families and burning down their houses." *Id.* at 120.

194. *Id.* at 121. It is worth noting, however, that Kellow and Steeves found no support for the common reports, including the ICTR's assertion, that RTLM broadcast the names of individuals targeted for killing, although some people were identified in indirect ways, which were understood by the audience. *Id.* at 121-22 (citing Berkeley, *supra* note 165, at 18).

195. ARTICLE 19, *supra* note 166, at 41.

196. Kellow & Steeves, *supra* note 158, at 118.

197. *Id.*

198. *Id.* at 120.

echoed in other inciting media.¹⁹⁹ Once the killing began, the lurid messages abandoned the most fundamental norms.²⁰⁰

F. Channel of Communication

RTLTM used the channel of communication that was the most powerful in Rwanda. Radio remains a powerful medium there and throughout most of Africa, where it has been described as the continent's "central nervous system."²⁰¹ In Rwanda, radio use had grown rapidly over the course of 20 years. In 1970, there had been just one radio receiver per 120 people. By 1990, the ratio was one radio receiver per 13 people.²⁰² Radios, bought during the 1980s with foreign aid funds and distributed for free during election campaigns,²⁰³ penetrated into even remote villages.²⁰⁴ Culturally, radio has been described as a continuation of Africa's oral tradition.²⁰⁵ In Africa, it still offers millions of people an inexpensive way to overcome such communication barriers as illiteracy and a lack of transportation for newspaper delivery.²⁰⁶ It also provides African leaders with "a kind of political megaphone."²⁰⁷ Furthermore, radio is an intimate medium, accompanying listeners in their daily activities, joining speaker and listeners in a moment in time.²⁰⁸ Radio has the power to draw on a listener's experience and imagination to create vivid pictures of events—even events which have not, in fact, occurred.²⁰⁹

199. ARTICLE 19, *supra* note 166, at 53–59. A leading example was *Kangura*, the newspaper of the third media official to be convicted of incitement by the ICTR. ARTICLE 19, *supra* note 166, at 53–59.

200. PRUNIER, *supra* note 4, at 189. ("[P]eople went on listening to it with a kind of stupefied fascination, incredulous at the relaxed joking way in which it defied the most deeply cherished human values. The fascination extended to the RPF fighters in the battle . . .").

201. John Balzar, *The Power of Africa's Airwaves*, L.A. TIMES, Oct. 22, 1995, at A1.

[O]n a continent that is crushingly poor, undereducated, rural and remote, only radio can truly be called the medium for the masses.

Radio also is power, an extension of Africa's oral tradition in which each important idea is amplified dozens of times over by village chitchat and campfire gatherings.

. . . .

And that's why a mud-hut peasant family buys batteries before it buys shoes.

Id.

202. Kellow & Steeves, *supra* note 158, at 115 (citing JEAN-PIERRE CHRÉTIEN, RWANDA: LES MÉDIAS DU GENOCIDE 57 (1995)).

203. Frank Chalk, *Radio Propaganda and Genocide* (Montreal Inst. for Genocide & Human Rights Studies Occasional Paper, 1999), http://migs.concordia.ca/occpapers/radio_pr.html.

204. PRUNIER, *supra* note 4, at 133.

205. Kellow & Steeves, *supra* note 158, at 115.

206. *Id.* at 116.

207. *Id.* at 115 (quoting LOUISE MANON BOURGALT, MASS MEDIA IN SUB-SAHARAN AFRICA 80 (1995)).

208. See, e.g., MCLUHAN, *supra* note 65, at 327 ("The subliminal depths of radio are charged with the resonating echoes of tribal horns and antique drums. This is inherent in the very nature of this medium, with its power to turn the psyche and society into a single echo chamber.").

209. Kellow & Steeves, *supra* note 158, at 109 (citing HADLEY CANTRIL, ET AL., THE INVASION FROM MARS vii (1940) (describing Orson Welles' famous October 30, 1938, *War of the Worlds* radio broadcast, which frightened more than one million listeners, out of an audience of six million, with

G. Overt Act

Additional acts linking incitement to killing were evident in Rwanda before the genocide. Private militias were being created, trained, and armed in the years between 1990 and 1994.²¹⁰ Violent attacks occurred repeatedly, first against small minority communities²¹¹ and then against Tutsi.²¹² In 1992, a Rwandan human rights publication reported that more than two dozen members of the president's circle were involved in death squads.²¹³ Amnesty International reported that 2,300 people had already been killed before the president's plane crashed.²¹⁴ Within days after the crash, the *New York Times* reported "'tens of thousands' of deaths."²¹⁵ By May of 1994, United States officials realized that civilians were being killed systematically.²¹⁶ The ICTR, in convicting Nahimana of incitement, found it significant that his expression of happiness about "awakening the majority people" took place on April 25, 1994, "while the genocide was underway; the massacre of the Tutsi population was ongoing."²¹⁷

V. HYPOTHETICAL APPLICATIONS OF THE PROPOSED FRAMEWORK

The inadequacy of current international law to identify incitement to genocide has been illustrated by supposing a hypothetical speaker in New York City's Times Square shouting "any of the most explicit rants that were broadcast over Rwandan radio."²¹⁸ Such a speaker could have the

realistic news reports that Martians had invaded New Jersey)).

210. CHRISTIAN P. SCHERRER, *GENOCIDE AND CRISIS IN CENTRAL AFRICA: CONFLICT ROOTS, MASS VIOLENCE, AND REGIONAL WAR 79-81* (Praeger 2002).

211. *Id.* at 23. Scherrer lists attacks beginning in 1990 against Hima and Gogwe ethnic minority communities. *Id.*

212. *Id.* at 69 ("Pogroms against the Tutsi began again in March 1992 in the Bugesera regions of Kigali prefecture. These pogroms were viewed as the final rehearsal for the genocide.").

213. Rick Orth, *Four Variables in Preventive Diplomacy: Their Application in the Rwanda Case*, J. CONFLICT STUD., Spring 1997, <http://www.lib.unb.ca/Texts/JCS/bin/get.cgi?directory=SPR97/articles/&filename=orth.html>.

214. *Id.* (citing Alan Rake, *Operation Genocide*, NEW AFRICAN, July-Aug. 1994, at 12, 13).

215. Jeff Jacoby, *Commentary: Our Indifference to Rwanda Genocide*, BOSTON GLOBE, Aug. 30, 2001, at A19. The *New York Times* also described "'bodies littering the streets and, outside the main hospital, a pile of corpses six feet high.'" *Id.*

216. A May 9, 1994 report by the Defense Intelligence Agency read,

Multiple sources indicate that the violence by the Presidential Guard and various youth militias was not spontaneous but was directed by high-level officials within the interim government

It appears that in addition to random massacres of Tutsis . . . there is an organized, parallel effort of genocide being implemented by the army

Glenda Cooper, *Memos Reveal Rwanda Delay: U.S. Had Early Notice of Genocide; Pentagon Rejected Action*, WASH. POST, Aug. 23, 2001, at A20.

217. Prosecutor v. Nahimana, Barayagwiza, and Ngeze, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 974 (Dec. 3, 2003), available at <http://www.ictor.org/ENGLISH/cases/Ngeze/judgement/Judg&sent.pdf>.

218. Benesch, *supra* note 18, at 494.

required content—and intent—for conviction under international law but still would pose no real risk.

Applying the proposed framework would distinguish this speech from a real incitement to genocide that would justify intervention. (A) The media environment in Times Square could hardly be more diverse, with competing messages emanating from newsstands, billboards, conversations, broadcasts, and even rants on other corners. (B) The larger political context is stable. (C) The audience, consisting of ethnically diverse listeners in a highly individualistic culture, already hardened to impromptu speeches, would be unlikely candidates for action. (D) The speaker, presumably unknown to the crowd, would have no authority. (E) The weak channel of communication—voice—would reach only a relatively small number of listeners. At this point, no matter what the speaker said or what he planned, the framework would not justify international intervention.

By contrast, an argument for international intervention might be imagined under extraordinary conditions in New York City, such as a hypothetical variation on the aftermath of the destruction of the World Trade Center on September 11, 2001. That event heightened the dependence of New Yorkers on the news media.²¹⁹ If the attack had also crippled the news media, reducing the available voices to a handful, and if these combined to immerse the audience in repeated, emotional directives by authoritative speakers seeking to justify extermination of the city's Muslim minority, and if the audience members were networking along ethnic and religious lines to plan attacks on Muslims, then outside intervention might well be justified.²²⁰

It has been objected that any system of jamming radio broadcasts might risk censoring less pointed content; for example, a soldier's solitary remark directed against some group.²²¹ But again, the proposed framework would not support prior restraint of harmless remarks. Under the framework, even the broadcast of the soldier's remark could not legitimately be jammed if the remark were broadcast to an audience with many other information sources or if it occurred in a time of political stability, where there was no indication of real violence or plans for violence against the target group. Justification for jamming would arise only with evidence (A) that the soldier's statement filled the airwaves by repetition or by the elimination of other sources of information, (B) that the soldier was speaking during a time of political instability that heightened public dependence on broadcasts, (C) that the audience members had sympathy for or were oth-

219. Lowery, *supra* note 56, at 40.

220. Under U.S. law, such speech would likely lose First Amendment protection since it would be seen as a call to imminent lawless action and as likely to result in such action, satisfying the test of *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

221. Editorial: *Don't Spread Jamming*, *supra* note 26.

erwise inclined to act upon the soldier's words, (D) that the channel of communication was widespread and effective, (E) that the soldier had persuasive authority in the eyes of his audience, (F) that the content of his message demonized all members of a group solely because of their membership in that group and called for their destruction, and (G) that preparation for killing members of the group was under way.

By contrast, had Julius Streicher been broadcasting rather than printing in Germany, the framework would indicate conditions justifying intervention, and—unlike his conviction at Nuremberg—the silencing of his message would not depend on his knowledge of the killing of Jews in Eastern Europe. To justify the censorship, the fact that killing was even planned would have been enough.

Finally, under the framework, if Sudan's President Bashir were to use the immediacy of radio and his authority over compliant Janjaweed militia to urge extermination of specific ethnic groups, the international community would be justified in interrupting the broadcasts, whether or not the president's intent to commit genocide could be shown in a later criminal proceeding.

VI. JAMMING BROADCASTS

Disrupting broadcast messages violates a foundational law of telecommunications.²²² Radio is regulated internationally by the International Telecommunications Union (ITU),²²³ which became a U.N. specialized agency following World War II.²²⁴ It has authority to allocate bands of the radio-frequency spectrum to the different nations and to promote the efficient development of radio technology worldwide.²²⁵ The ITU constitution prohibits harmful interference to radio signals of other states or recognized broadcast agencies, whether from competing radio signals²²⁶ or other "electrical apparatus."²²⁷

222. For a description of jamming techniques, see Alexander C. Dale, Note, *Countering Hate Messages That Lead to Violence: The United Nations's Chapter VII Authority to Use Radio Jamming to Halt Incendiary Broadcasts*, 11 DUKE J. COMP. & INT'L L. 109 (2001).

223. This body predates the United Nations, having been formed in 1865 to link telegraph systems on the European Continent. From the start, its work was primarily technical. Its first conference standardized Morse code and set a rate structure. JAMES G. SAVAGE, *THE POLITICS OF INTERNATIONAL TELECOMMUNICATIONS REGULATION 10* (Westview 1989).

224. *Id.* at 38.

225. CONST. OF THE INTERNATIONAL TELECOMMUNICATION UNION art. 1 (Purposes of the Union).

226. CONST. OF THE INTERNATIONAL TELECOMMUNICATION UNION art. 45, ¶ 197 (requiring that "[a]ll 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 Member States or of recognized operating agencies . . .").

227. CONST. OF THE INTERNATIONAL TELECOMMUNICATION UNION art. 45, ¶ 199.

This prohibition is far from absolute, however. Broadcast interference has occurred since the 1930s,²²⁸ and it has taken a variety of forms,²²⁹ the most common being one nation's blocking of international short wave broadcasts from other nations.²³⁰ In 1948, the Universal Declaration of Human Rights, in Article 19, articulated a "free flow norm"²³¹ of international telecommunications. It specified a right "to seek, receive and impart information and ideas through any media and regardless of frontiers."²³² Nevertheless, the ITU has refrained from censuring countries for blocking incoming foreign broadcasts as long as the effect of jamming has been limited to the country's own territory.²³³

Furthermore, in 1971, the ITU reversed its free-flow philosophy in the area of a new television technology, direct-to-receiver broadcasting by satellite (DBS). The Soviet Union and developing nations pressed to establish a duty on the part of a DBS broadcaster to limit its own reach, effectively censoring itself, to avoid the "spillover" of its signal as much as technically possible, into any country that had not agreed in advance to allow the signal.²³⁴ The restriction, approved the following year as General Assembly Resolution 2916, came to be known as the "Jammer's Charter."²³⁵

The free-flow principle also yielded in the late 1970s to developing countries' concern about Northern Hemisphere dominance of information on the international airwaves. Calling for a "new world information order" (NWIO), the countries again emphasized the state sovereignty norm over the free flow of information norm.²³⁶ The ITU responded to these tensions between speech and sovereignty with a 1982 recommendation incorporating elements of the developing nations' concerns. It portrayed the mass media as contributing "to strengthening peace and international understanding, to the promotion of human rights and to countering . . .

228. The first successful jamming is thought to have been used by Austria in 1934, to block out Nazi propaganda. SAVAGE, *supra* note 223, at 138.

229. Interference in the free flow of radio signals can employ technology in unusual ways or can avoid technology completely. In Southern Africa in the 1960s, domestic radio stations switched to FM in order to attract audiences to the FM band, where signals travel shorter distances and are therefore more controllable locally. This was meant to reduce the impact of foreign programs, which arrived on the longer-distance AM band. In Albania and North Korea, listening to international broadcasts is against the law, as it was in Nazi Germany and occupied territories. SAVAGE, *supra* note 223, at 133.

230. This form was particularly prevalent in the early 1980s as the then-Soviet Union continuously jammed Western broadcasts. SAVAGE, *supra* note 223, at 135. See also Monroe Price, *Public Diplomacy and the Transformation of International Broadcasting*, 21 CARDOZO ARTS & ENT. L.J. 51, 56 (2003).

231. SAVAGE, *supra* note 223.

232. G.A. Res. 217A (III), U.N. Doc. A/810 at 75 (1948).

233. SAVAGE, *supra* note 223, at 157.

234. *Id.* at 148.

235. The vote was by a 102-1 margin, with seven abstentions. The opposing vote was the United States. SAVAGE, *supra* note 223, at 149-50.

236. *Id.* at 155.

incitement to war.’”²³⁷ These deviations from the free-flow principle illustrate that international broadcasting norms are not unequivocal. Broadcast jamming has been allowed, at least tacitly, in service to other international interests, including the Cold War security concerns of the Soviet Union and the cultural preservation interests of developing nations.

The question of jamming broadcast signals within another state in order to prevent genocide is unlike the previous debates, however, because such jamming would violate both of the international norms that were previously at odds. To jam a nation’s own signal—rather than a foreign signal—is to disrupt the free flow of broadcasting while also infringing on national sovereignty. Still, where large scale loss of life is at risk, even outside action to override a nation’s internal transmissions may find legal basis.

The Genocide Convention empowers states to bring their concerns to the U.N. Security Council.²³⁸ An intervention into a nation by the Security Council would be *prima facie* legal.²³⁹ In addition, some scholars argue that the norm of sovereignty is not absolute²⁴⁰ and that there is support for some kinds of intervention by other international or regional organizations of states,²⁴¹ pointing out that collective action has been endorsed in cases of genocide, among other crises.²⁴² Individual intervention by a neighboring state may be legitimate under a “protective principle,”²⁴³ as that state attempts to avert a flood of refugees coming across the border.²⁴⁴ One scholar even proposes that if faced with convincing evidence of genocide in the future, states need not refrain from jamming inciting broadcasts since judicious action may be exactly the step needed to further the development of international intervention norms.²⁴⁵

237. *Id.* (internal citation omitted).

238. Genocide Convention, *supra* note 29, at art. 8.

239. Blinderman, *supra* note 9, at 125.

240. David A. Lake & Donald Rothchild, *Ethnic Fears and Global Engagement: The International Spread and Management of Ethnic Conflict* 31 (Inst. on Global Conflict and Cooperation, Policy Paper No. 20, 1996), available at <http://igcc.ucsd.edu/pdf/policypapers/pp20.pdf>. (“The principle of sovereignty has never been articulated or respected in the clear-cut manner often assumed by scholars of international relations.”).

241. *Id.* at 38.

242. *Id.* at 31 (quoting ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 12 (Lori Fisler Damrosch ed., Council on Foreign Relations 1993)).

243. See Gregory S. Gordon, *From Incitement to Indictment? Prosecuting Iran’s President for Advocating Israel’s Destruction and Piecing Together Incitement Law’s Emerging Analytical Framework*, 98 J. CRIM. L. & CRIMINOLOGY 853, 893 (2007) (discussing, in a criminal prosecution context, several theories for international response to public statements by Iranian President Mahmoud Ahmadinejad).

244. More than one million Rwandan Hutu are reported to have fled to Congo. Kisangani N. F. Emizet, *The Massacre of Refugees in Congo: A Case of U.N. Peacekeeping Failure and International Law*, 38 J. OF MODERN AFR. STUD. 163, 163 (2000). Another million or more fled to Tanzania. Charles David Smith, *The Geopolitics of Rwandan Resettlement: Uganda and Tanzania*, 23 ISSUE: A J. OF OPINION 54, 54 (1995).

245. Blinderman, *supra* note 9, at 125–26. (“Law is sometimes subject to modification. As cir-

Moreover, sovereign states do not own the airwaves. The ITU defines the spectrum of broadcast frequencies as a nonterritorial “common heritage resource,” preserved for the entire world and required to be used for peace.²⁴⁶ The ITU did not involve itself in the Rwandan genocide, however. As a rule, for reasons of both mission and organizational personality,²⁴⁷ the ITU focuses not on broadcast content, but on technical advancement, on the belief that telecommunication is increasingly important for “the preservation of peace and the economic and social development of all States.”²⁴⁸ The ITU addressed the use of radio in Rwanda only in its technical sense: ITU Resolution 34 granted special assistance to rebuild the telecommunication network after the genocide.²⁴⁹ Still, the founding values of the ITU offer another legal theory for disruption of genocide-inciting broadcasts: The ITU constitution requires that international services give “absolute priority” to telecommunication related to saving lives, in cases ranging from maritime emergencies to urgent epidemiological messages.²⁵⁰ It also requires radio stations to accept and reply to distress calls and to take action as required in response.²⁵¹ In January 2005, the lifesaving priority of broadcasting was reinforced with the ratification of the Tampere Convention on Emergency Telecommunications.²⁵² The treaty calls on states to streamline access to broadcast frequencies during emergency situations for a defined group of humanitarian agencies.²⁵³

An argument for jamming broadcasts that incite genocide seems clear: Genocide, the “crime of crimes,”²⁵⁴ warrants exceptional treatment. Since genocide usually does not occur without the involvement, or at least the complicity, of a government,²⁵⁵ it will be extremely rare for a sovereign state to prevent genocide within its own borders. Therefore, the Genocide

cumstances change and indicate that pre-existing rules are no longer capable of coping with existing challenges, new norms must be formulated . . .”).

246. The ITU views the spectrum as having the same attributes as the ocean floor: “1. Such areas are not subject to appropriation by states; 2. All states must share in the management of them; 3. There must be an active sharing of the benefits reaped from the exploitation of their resources; and 4. The areas must be dedicated exclusively to peaceful purposes.” SAVAGE, *supra* note 223, at 20–21.

247. *Id.* at 16. (“[D]elegates to [world administrative radio conferences] . . . tend to be skilled technicians who are averse to talking about issues of equitability in telecommunication use or greater non-technical principles of ‘justice’ or ‘democratization.’”).

248. CONST. OF THE INTERNATIONAL TELECOMMUNICATION UNION, preamble.

249. ITU Res. 34, Oct. 30, 2008 (“Assistance and support to Burundi, Liberia, Rwanda and Somalia for rebuilding their telecommunication networks”).

250. CONST. OF THE INTERNATIONAL TELECOMMUNICATION UNION, art. 40.

251. CONST. OF THE INTERNATIONAL TELECOMMUNICATION UNION, art. 46.

252. Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, June 18, 1998 2296 U.N.T.S. 5.

253. *Id.*

254. Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence, ¶ 16 (Sept. 4, 1998), available at <http://www.ictor.org/default.htm> (follow “Cases” link, follow “Status of Cases” link, and follow “KAMBANDA, Jean (ICTR-97-23)” link).

255. See Hans-Heinrich Jescheck, *Genocide*, in 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 541, 541 (Peter McCalister-Smith, ed., 1995).

Convention's requirement that states prevent genocide will be virtually meaningless without the possibility of international action. Genocide involving public participation requires mass communication in order to coordinate its machinery.²⁵⁶ Where that communication takes place on the broadcast airwaves, the international community has a potential avenue of preventive action²⁵⁷ that is less coercive than armed intervention.²⁵⁸

CONCLUSION

Definitions of incitement to genocide have aimed primarily at convicting criminals after they already have stirred audiences to kill. Such definitions do not enable the international community to identify which messages may legally be blocked before genocide begins. To answer the latter question, this Article has drawn on communication research, which offers empirical findings as to which factors make media messages powerful enough to mobilize audiences. This Article has proposed a framework of seven factors that can be used to determine when media messages constitute incitement to genocide and may legally be disrupted.

The framework is a systematic inquiry. It would look first at externally observable factors that can heighten the impact of a media message. It would assess (A) whether the media environment limits competing messages and repeats a suspect message so as to immerse the audience in it; (B) whether the political context in the region is unstable, thereby heightening audience dependence on media messages; and (C) whether the audience is particularly vulnerable to messages of incitement, considering such factors as whether it is unsophisticated, volatile, or highly networked along such lines as ethnicity and religion. Where these factors indicate a high degree of danger, the framework would examine (D) whether the source of the message is authoritative in the eyes of the audience and (E) whether the content of the message calls for killing and justifies it by de-

256. See Susan Benesch, *Inciting Genocide, Pleading Free Speech*, WORLD POL'Y J., Summer 2004, at 62, 64. See also Schabas, *supra* note 2, at 171. ("A well-read and well-informed *genocidaire* will know that at the early stages of planning of the 'crime of crimes', [sic] his or her money is best spent not in purchasing machetes, or Kalatchnikovs, or Zyklon B gas, but rather investing in radio transmitters and photocopy machines.")

257. Jamming a radio station may not be easy, however. Jamming of FM broadcasts requires producing signals locally, through nearby transmitters or aircraft. Thus, it requires the cooperation of local or neighboring authorities in addition to electric power or aircraft. It may also require forces to protect the operation from attack. Radio Netherlands Media Network, *Reacting to Hate Radio* (Jan. 8, 2004), <http://www.rnw.nl/realradio/dossiers/html/intervention.html>. Jamming may not always be successful. In August of 1994, after the defeat of the Hutu-dominated government ended the Rwandan genocide, spy satellites of the U.S. National Security Agency reportedly tried unsuccessfully to find a propaganda radio station that apparently was still broadcasting sporadically from some mobile platform, perhaps on a truck. Paul Quinn-Judge, *U.S. Tries to Find Rwanda Radio: Bid to Mute Ousted Government*, BOSTON GLOBE, Aug. 27, 1994, at 2.

258. Blinderman, *supra* note 9, at 126.

humanizing the target group or warning that the target group poses an imminent threat. The framework would also consider whether the content of the message is enjoyable or highly emotional or exhibits other traits shown to enhance its power. The framework would assess (F) to what degree the channel of communication being used is immediate and powerful. Additionally, the proposed framework would consider (G) whether overt acts toward killing are under way.

The proposed framework, if applied to the RTLTM broadcasts, would have permitted international intervention. RTLTM dominated a media environment that was extremely limited, where repetition immersed the audience in its messages. The political context was highly unstable, heightening audience dependence on the radio. The audience was largely young and unemployed, angry and malleable. In that volatile atmosphere, an authoritative source transmitted classic propaganda messages, combined with highly emotional content, through the country's most powerful channel of communication. Finally, preparation for killing was under way.

Once identified, a broadcast incitement to genocide could be disrupted legally under several theories. Among them is that the constitution of the International Telecommunications Union gives "absolute priority" on the broadcast airwaves to telecommunications related to saving lives.