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Resistance to Genocidal Governments: Should Private Actors Break Laws to Protect Civilians from Mass Atrocity?

by Chad J. Hazlett*

ONE MONTH INTO the 1994 Rwandan genocide, U.S. President Bill Clinton's National Security Advisors considered options to jam, destroy, or counter Radio Télévision Libre des Mille Collines (RTLM), the radio station used by Hutu extremists to incite and direct machete-wielding mobs. The administration ultimately decided not to take any action against RTLM. The primary reason — doing so would violate international communications law.¹

Now suppose that where the U.S. government declined to act, a wealthy individual hired private contractors to jam RTLM's transmissions, in violation of communications law and other laws. Such an action may arguably be legal, perhaps on the grounds that the *jus cogens* norm prohibiting genocide supercedes international communications law.² It is possible that no legal action would have been taken against the actor involved.³ For private donors and contractors, however, taking this action in real time would have required a decision to willfully break laws and take aggressive, invasive action normally thought to be the sole right of states.

This article explores the conditions under which private actors — individuals or organizations acting without government authority — are justified in breaking the law to protect civilians from mass atrocity. Such actions could range from training civilians to evade danger to destroying or disabling equipment, to hiring “mercenaries” to use deadly force. The article posits that while states should remain the “protectors of choice,” there are cases where laws that would prevent private actors from protecting civilians are unjust and can be broken with caution. The article also proposes a set of “just-case criteria” drawn from civil disobedience theory and the Responsibility to Protect, offered as a starting point to determine when such actions are justified.

CIVIL DISOBEDIENCE AND A PRIVATE ROLE IN THE RESPONSIBILITY TO PROTECT

The Responsibility to Protect (R2P), Chapter VII of the United Nations Charter, and the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) address the need for governments to take otherwise illegal measures to halt the worst crimes. Private actors, however, have no

such guidance for acting when governments fail to. According to the R2P doctrine, when sovereign governments fail to uphold their duty to protect civilians, that responsibility falls to other nations, preferably under authority of the United Nations (UN). Where the intervention must occur without consent of the host government, R2P suggests that states have the right (indeed, responsibility) to intervene so long as 1) the situation is dire enough; 2) non-military options have been exhausted; and 3) the intervener has the proper intent, uses proportional means, and has reasonable prospects of success.⁴

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Presumably states have become the subject of international norms and laws regarding intervention against mass atrocities because they are most capable of marshalling the resources, engaging in diplomacy, levying sanctions or offering incentives, coordinating amongst each other, and acting as guarantors of settlements. But when the state-based chain of responsibility proposed by R2P or called for by other instrument fails to protect civilians from atrocities, what role should private actors have in taking up this responsibility?

Unfortunately, no parallel to R2P (or the Genocide Convention, or Chapter VII of the UN Charter) exists to guide the actions of private individuals who endeavor to protect civilians when states fail. The absence of regulations for such

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Children who fled the fighting in Rwanda rest in Ndosha camp in Goma.

actions is not a positive indication of international consensus that individuals *cannot* participate in such actions. Indeed, private actors have important attributes such as fewer political constraints, flexibility and agility in making decisions, and the ability to deny having national interests. Moreover, where states fail to take sufficient actions — as with the Rwanda RTLM case — private actors may be a victim's only remaining source of protection.

In cases where private actors can help protect civilians without violating any laws, there is nothing to prohibit them from doing so. The question then is what to do in cases where a private actor would have to violate laws to protect civilians. The bodies of international law cited above discuss the permissibility of or the duty to violate such laws to protect civilians but only with respect to state actors; however, the cornerstones of these laws — the “right to life” and the prohibition of genocide — do not lose their significance when private actors uphold them rather than states.

Beyond international law, another useful framework in analyzing this problem is civil disobedience. Henry David Thoreau's essay *Civil Disobedience* advocates breaking laws that are supportive of unjust policies.⁵ Is it also appropriate for private actors to selectively pose “resistance to *genocidal* governments” by taking actions to protect civilian targets, even when doing so requires breaking laws? This article does not attempt to prove that private citizens not party to a given atrocity have a moral duty to take any action, legal or illegal, to protect civilians abroad. Instead it attempts to prompt discussion and propose conditions under which private citizens who believe they do have that duty can justifiably claim the right to violate laws, particularly those regarding state sovereignty, to protect civilians from atrocities.

WHEN IS IT NECESSARY TO VIOLATE LAWS TO PROTECT CIVILIANS?

This section addresses a number of past cases where law-breaking was, or is, thought to be necessary to protect civilians from mass killing. Illegal protective actions are generally treated

as rare exceptions for which there is no legal framework.⁶ The existence of these precedents is not necessarily sufficient to argue that such actions are justified, but is helpful in framing the types of actions that have occasionally been employed.

Large-scale covert or non-consensual aid operations have been conducted in Afghanistan, El Salvador, South Africa, Ethiopia (for Tigray and Eritrea), Iraq, Kosovo, Burma, North Korea, and Sudan, as well as in Guatemala and Cambodia.⁷ While this is not “protection” aimed at halting atrocities, such actions do help to keep alive those affected by mass atrocities. For example, in Biafra, the Nigerian government used starvation as an indiscriminate weapon against a secessionist rebel movement and its civilian base. The International Committee of the Red Cross (ICRC), which normally operates only with consent, joined with non-governmental organizations and donors to fly 5,314 (illegal) missions in privately rented planes dropping food into the besieged area.⁸

Illegal activities have also been used to help people escape from imminent harm. Oftentimes, these have been conducted by individuals, using guile and trickery, sometimes acting with the support of private and government donors. For example, during the Holocaust, private actors frequently created false documents and bribed Nazi officials to secure the release of their victims.⁹ Raoul Wallenberg saved as many as 100,000 Jews from Nazi extermination by “deception, bribery, blackmail, bogus documents, false front safe houses, and more.”¹⁰ Chiune Sugihara, a Japanese diplomat in Shanghai, issued illegal transit visas that saved the lives of some 10,000 Jews.¹¹ Covert aid and protection activities continue today, in Burma where medical assistance is provided across the Thai border, and in North Korea where a large networks of organizations and individuals have helped thousands of civilians escape through an underground railroad that includes at least nine other countries.¹²

OPTIONS FOR PRIVATELY SUPPORTED PROTECTION AND THE LAWS THEY BREAK

Despite precedent, sizable opportunities for private funding in support of protection activities have gone untapped. There are no examples akin to private citizens jamming radio broadcasts, as could have been done to slow the slaughter in Rwanda in 1994. Little is done to use private resources and organizations to prepare vulnerable civilians for atrocities before they occur — e.g., through training and early warning networks. These activities may be prohibited by many governments, particularly when they plan on attacking those civilians.

Privately hiring unmanned aerial vehicles to “spy” on or deter perpetrators, or to warn civilians of incoming danger, has been considered quietly but never employed. Privately-employed intelligence contractors could obtain information on perpetrators, their plans, their weaknesses, and opportunities to counter them politically or otherwise. These options are moderate compared to the possibility of privately hiring security contractors to utilize electronic countermeasures (e.g., disrupting radio communications), or to destroy or disable transportation or communications equipment. At the extreme, security contractors willing to violate laws could be hired to use armed force to deter



Japanese Diplomat Sugihara Chiune (left) and Swedish Raoul Wallenberg (right) saved 110,000 Jews from Nazi extermination by creating and issuing false documents.

perpetrators from attacking civilians or even to actively pursue, kill, or scatter perpetrating forces. Whatever the current legal hurdles, might private support for some of these action sometimes be justified when governments fail to protect civilians?

There are two general modalities by which private actors can support protective activities. In the ideal case, state actors are already trying to protect civilians through authorized missions and activities, for example through UN peacekeeping or peace enforcement missions. In this case, missions may need assistance with training and equipment, which private donors could help provide if appropriate mechanisms were put in place. This could be done legally. Where there is not an authorized mission or that mission is severely hampered — e.g., by the requirement of acting within the consent of the host government — private actors must instead consider the option of supporting these activities through non-governmental agencies, private contractors, and local groups as appropriate.

The types of laws that these actions would break generally fall into four categories that reflect different levels of potential harm associated with breaking the law. Thus, they may require differing levels of justification. Each of these categories is discussed below.

1. VIOLATIONS OF THE PERPETRATOR'S SOVEREIGN CONTROLS

By far the most common legal violations caused by protection activities relate to the sovereignty of the country in question. In some cases, laws that would be broken while protecting civilians fall under international conventions — for example, regarding communications or access to airspace. In the majority of cases, the laws in question are domestic, however, and are used by governments to prevent entry of people and supplies that would provide aid or security to civilians. Domestic measures falling in this category include strict regulation of visas and travel permits; licenses to operate as a business or non-profit entity; licenses to hire workers; licenses to import goods; access to land; and licenses to own or operate equipment such as vehicles, radios, and generators. Airspace can also be restricted, preventing the

use of manned or unmanned aircraft for observation, early warning, and delivery of aid. Restrictions on freedom of speech also apply: training individuals in tactics that will help them survive or providing information regarding violent threats to them may be viewed by the host government as prohibited discussion of security or political issues, or as libel against the government. Altogether, laws in this category are the most evidently “unjust” when they are clearly used to further a government’s efforts to kill large numbers of civilians and prevent outside intervention to protect or care for civilians.

2. VIOLATIONS OF SOVEREIGN CONTROLS IN OTHER COUNTRIES (NON-PERPETRATORS)

Restrictive laws may also be imposed by countries other than the one where violence is occurring. First, neighboring countries may prevent access to their borders. For example, technologies such as unmanned aerial vehicles may be deployed from or radio transmissions may originate in these countries. Equipment may also need to be transported through countries, requiring permission or licenses. Hence, borders may need to be crossed illegally.

Countries where equipment or finance for these projects originates may also have applicable laws. Protected technologies, such as night vision goggles, may require export licenses. Financial sanctions preventing operations in a country may be in place. Anti-terrorism laws may also apply. In the current form of the USA Patriot Act and Real I.D. Act, for example, any group in armed opposition to a government may be considered a terrorist organization, and support for those associated with these groups — even those who are clearly the victims of terror or have fought alongside U.S. forces — can be considered material support to a terrorist organization.¹³ Finally, “underground railroads” that issue false travel documents, bribing border guards, or other means of moving people illegally may violate laws of several countries. At first glance, these laws may not be deeply unjust as those employed directly by governments perpetrating atrocities with the intent of harming civilians. They may, however, be equally unjust in consequence.

“So long as private citizens have resources to offer for protection of civilians when states fail to protect them, we should consider how such citizens can act in a manner consistent with the supreme importance of the right to life and the prohibition of genocide, even when doing so requires breaking laws that otherwise ought to be respected.”

3. DESTRUCTION OF PROPERTY OR INTERFERENCE IN ITS USE

Destroying or disabling the property of perpetrators may aim to limit the capability of the perpetrator or impose a cost in hopes of altering the perpetrator's actions. The case of Rwanda's RTLM radio broadcasts falls in this category: the antenna could be permanently destroyed, or one could interfere in the equipment's normal operation by jamming it electronically¹⁴ with the hope that doing so would hamper the Interahamwe's ability to continue their genocide.

Beyond interfering with civilian radio broadcasts, this category involves numerous other possible efforts to protect civilians. Military equipment such as weapons, vehicles, or communications gear could be destroyed, sabotaged, jammed, or even temporarily disabled. Other examples where governments have used or considered these options include proposals to bomb railroad tracks leading to Nazi-run concentration camps during World War II, or the use of targeted financial sanctions against individuals responsible for planning or executing mass violence.

4. ACTUAL, THREATENED, OR RISKED PHYSICAL HARM TO INDIVIDUALS

The most contentious and worrisome, but also perhaps still justifiable, ways in which laws might be broken include cases where physical force or the threat of force is used to alter the capabilities of perpetrators. These may include defensive acts, such as providing armed deterrence to protect civilian groups and areas, or offensive attacks, such as intentionally destroying or scattering the perpetrating force. This category also includes any action which might unintentionally result in physical harm to individuals.

WHEN ARE PRIVATE ACTORS JUSTIFIED IN BREAKING LAWS?

Without the law as ultimate guidance, where can private actors look for authority and restraint? As a first approximation, I propose a set of criteria and conditions for illegal action by private citizens, somewhat similar to R2P's criteria for military intervention by states:

1. Conditions: While there has been much debate over which conditions (conflicts) justify military intervention under R2P, a nascent consensus may be emerging that R2P applies to the “worst” cases, specifically, genocide, crimes against humanity, and war crimes.¹⁵ The same conditions could be considered requirements for justification of private actors' breaking of laws in order to protect civilians.
2. Precautionary principles: R2P lists four precautionary principles to limit actions that violate sovereignty — right intention; last resort (i.e. peaceful methods have been reasonably exhausted); proportional means; and reasonable prospects of success.¹⁶ Similar principles could apply to action by private actors when they believe they must violate laws to protect civilians. The following may be a useful starting point for applying these concepts to private actors :
 - *Right intention*: As with military intervention by states, any illegal protection act undertaken by private citizens must be done for the right reasons, i.e. with a moral interest in protecting those civilians being targeted.
 - *Last resort (states first, legal options first)*: Private actions violating laws are not yet justifiable when other realistic options exist, such as (1) waiting for governments to protect civilians or advocating for governments to do so more effectively; (2) changing the laws that must be broken or obtaining a waiver to do so; or (3) protecting civilians just as effectively without breaking any laws. If reasonable analysis suggests, however, that these options are unlikely to provide protection in time, then private actions that break laws may be justified. Applying this criterion requires considerable judgment, and thus it may not be sufficiently operationalized. Nevertheless, in cases where mass killing is occurring at a high rate, and states are showing reluctance to halt it immediately, there is a strong argument that states are failing to fulfill their responsibilities in time, and actions akin to the jamming of RTLM by private civilians may be justified.
 - *Least harmful, most beneficial option*: Four categories were presented for the types of laws that may need to be broken to protect civilians: those involving sovereign controls used by the perpetrator to further policies of

mass killing; those involving sovereign controls of non-perpetrating states; those that damage or interfere with property; and those that harm, threaten to harm, or kill individuals. These categories are ordered by increasing degree of harm caused or risked by the protective actions. Therefore, actions should be taken as near to the first category and as far from the last as possible.

Nevertheless, is not an absolute rule: if actions can be taken that are vastly more effective but come with a greater actual or potential harm, they may be more justified than a less harmful action with a lesser benefit in terms of civilians protected. This somewhat resembles both “proportional means” and “reasonable prospects of success” under the R2P model in that it turns on an estimate of the consequences.

The calculation is also similar to an assessment of whether the law being broken is consequentially “unjust.” If following a law allows mass killing, whereas violating that law causes little harm but protects civilians, the law is unjust in consequence. The “least harmful, most beneficial” criterion further specifies that “more unjust” laws — those causing the greatest harm for the least benefit — should be broken rather than “less unjust” ones, which cause less harm or have greater benefits if kept it in place.

3. **Authority:** The options examined here are those that remain when the legal system produces an unjust outcome. One means of retaining legitimacy while taking these actions would be to attempt to change these laws. While this may be wise in the long-run, it is not a reliable strategy because governments using domestic laws as a shield against interventions do not want to change, and because changing laws

can take too long. The Rwandan genocide lasted only 100 days. It is unlikely that a group of private citizens could have changed international communications law in time to jam RTLM transmissions and have a meaningful impact.

Legitimacy in taking these actions rests then on the integrity with which the above principles (or other principles for this purpose) are employed, and the consensus of voices standing behind them. When possible, illegal protective activities and the determination of how and why they are justified should be conducted in a fully transparent manner. Most importantly, the mandate to take on these activities should come from the populations in harm’s way, through focus groups, surveys, conferences with civil society, public statements by civilians in harm’s way, or other means of obtaining a fair assessment of their wishes and protection needs. We must, however, acknowledge that obtaining such a mandate in a meaningful way is difficult both due to the challenges of getting quality information in conflict areas and the possibility of being misled by vocal minorities, including those with their own agendas (such as resistance movements).

CONCLUSION

JUSTIFYING OR ADVOCATING actions that break some laws is difficult, and should remain difficult. But the importance of protecting civilians from mass atrocities requires exploring every option. So long as private citizens have resources to offer for protection of civilians when states fail to protect them, we should consider how such citizens can act in a manner consistent with the supreme importance of the right to life and the prohibition of genocide, even when doing so requires breaking laws that otherwise ought to be respected.

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ENDNOTES: Resistance to Genocidal Governments

¹ Based on private interview with a former White House official. See also SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 371–72 (2002).

² See Meghna Rajadhyaksha, *Genocide on the Airwaves: An Analysis of the International Law Concerning Radio Jamming* 5 JOURNAL OF HATE STUDIES 99 (2006).

³ See Ruth Abril Stoffels, *International Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps*, *International Review of the Red Cross* No. 86, Sept. 2004, available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/66DCUX/\\$File/irrc_855_Stoffels.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/66DCUX/$File/irrc_855_Stoffels.pdf) (last visited June 13, 2008).

⁴ Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, FOREIGN AFFAIRS, Nov. 2002, at 99–110.

⁵ HENRY DAVID THOREAU, *CIVIL DISOBEDIENCE* (1849).

⁶ See Casey A. Barrs, the Cuny Center, *Locally-Led Advance Mobile Aid* JOURNAL OF HUMANITARIAN ASSISTANCE, Nov. 2004 (unpublished manuscript on file with author) (discussing precedent for clandestine humanitarian aid activities, many of which are illegal).

⁷ *Id.*

⁸ Hugh McCullum, *Biafra Was the Beginning* at 1, cited in *id.*

⁹ RESISTERS, RESCUERS AND REFUGEES: HISTORICAL AND ETHICAL ISSUES (John J. Michalczyk ed. 1997), cited in *Locally Led Advance Mobile Aid*, The Cuny Center.

¹⁰ John Bierman, *RIGHTEOUS GENTILE: THE STORY OF RAOUL WALLENBERG, MISSING HERO OF THE HOLOCAUST* (1981), cited in *id.*

¹¹ Diane Paul, *Protection in Practice: Field-Level Strategies for Protecting Civilians from Deliberate Harm*, Relief and Rehabilitation Network (RRN) Paper No. 30, Overseas Development Institute, 1999, cited in *id.*

¹² George Wehrfritz & Hideko Takayam, *Riding the Seoul Train*, NEWSWEEK INTERNATIONAL, March 5, 2001.

¹³ Testimony of Michael J. Horowitz before the Subcommittee on Immigration, Border Security, and Citizenship of the Senate Judiciary Committee (Sept. 27, 2006).

¹⁴ See POWER, *supra* note 1, at 371–72.

¹⁵ G.A. Res 60/1, *World Summit Outcome*, ¶ 138, U.N. Doc. A/Res/60/1 (Sept. 16, 2005).

¹⁶ Evans & Sahnoun, *supra* note 4.