

## **Arusha Trial Raises Freedom of Speech Questions**

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Dilemma for judges in trial of musician charged with inciting genocide in Rwanda.

The trial of a well-known African singer-songwriter on genocide charges has raised controversial questions about where the line should be drawn between freedom of speech and expression, on the one hand, and incitement to gross human rights violations, on the other.

Simon Bikindi, a 52-year-old Hutu, famous in Africa for his development of a unique ballet company, has gone on trial at the International Criminal Tribunal for Rwanda, ICTR, in the northern Tanzania town of Arusha, for inciting mass murder through song during Rwanda's 1994 genocide.

He faces six charges, including genocide directed against the country's Tutsi people.

Bikindi, born in Rwere, near Gisenyi, in northwestern Rwanda, stands accused of composing and singing songs, which incited the Interahamwe, a Hutu militia, and Hutu civilians to kill Tutsis. The counts are conspiracy to commit genocide; genocide; complicity in genocide; direct and public incitement to commit genocide; murder; and persecution.

Bikindi has been in custody for more than five years. After the 100-day genocide in Rwanda in 1994, in which an estimated 800,000 people were killed, he fled to the Netherlands. He was arrested on July 12, 2001 and sent to Arusha.

At an initial hearing in 2001, Bikindi pleaded not guilty to all charges. After each count was read to him, he said rather quixotically, "Loyally and honestly, I plead not guilty."

According to the charge sheet, Bikindi in the prelude to the genocide worked closely with the then-president Juvénal Habyarimana, former minister for youth and culture Callixte Nzabonimana and other government and military leaders to plan the execution of Tutsis.

Bikindi - the founder of the Irindiro Ballet, a company renowned for its blend of traditional music and dance - is alleged also to have worked with Habyarimana and Nzabonimana in composing lyrics to songs urging Hutus to kill Tutsis and Hutus who sympathised with Tutsis, so-called moderate Hutus. The songs were played many times a day over the radio station Radio Télévision Libre de Mille Collines and over a public address system as Bikindi drove around in his vehicle in Gisenyi.

According to a report by the Hironnelle news agency, which reports extensively on Rwandan affairs, Bikindi incited the Hutu population with the words, "The majority population, it's you, the Hutu. I am talking to. You know the minority population is the Tutsi. Exterminate quickly the remaining ones."

Bikindi's trial resumed in September this year. A witness, a former member of the Interahamwe, identified only as "AHB", told the tribunal that Bikindi had performed in an Interahamwe uniform before at least one meeting of the former ruling party. AHB, serving a life sentence for his role in the genocide, said that although Bikindi's songs were full of allusions their meaning was clear to any Rwandan - that Tutsis should be slaughtered.

Bikindi's lawyers argue that the trial is an infringement of his rights of freedom of speech and expression and a denial of his artistic liberty. But prosecutor Hassan Bubacar Jallow told the tribunal that Bikindi used his artistic talent for criminal ends.

What has caused particular interest is that this is the first time that a creative artist has been brought before an international criminal court and charged with using that creativity to incite genocide.

The question being wrestled with is: how can legal minds determine when the line between freedom of speech and expression, on the one hand, and the dark aim of incitement to genocide, on the other, has been crossed?

Luis Franceschi, media lecturer at the Strathmore University in Nairobi, Kenya, said every person has the right to inform and to perform. But the performer has no right to infringe on the rights of another party. "The media is extremely powerful," he told IWPR. "Negative messages can spread rapidly through a community when such media of mass communication as radio or television are used. If people are exposed to a negative image over and over again, they internalise that message."

Professor Anton Harber, director of the journalism and media studies programme at the University of the Witwatersrand in Johannesburg, said that if the message of the artist is one of hate against an individual or group, or an act of incitement to commit violence against an individual or group, the line between what is acceptable and what is reprehensible has clearly been crossed.

Harber, former editor of the Mail and Guardian newspaper, a thorn in the flesh of both the pre-1994 apartheid government of South Africa and the current African National Congress administration, said, "Although a message on radio or television cannot in itself lead to murder or genocide, it can feed into a situation where the conditions to commit genocide are in place."

Jane Duncan, executive director of the Johannesburg-based Freedom of Expression Institute, said that hate speech is defined differently in different countries. Certain basic components must be present to justify limiting a person's freedom of expression. The most important element of hate speech is obviously that it advocates hatred. Secondly, the hatred has to be in relation to particular social characteristics, such as religion, race, gender or ethnicity. Thirdly, there must be an element of incitement towards particular attitudes or actions.

Duncan said there is a great deal of debate internationally on how hate speech should be defined - even if all three elements are present. Many hate speech laws recognise exemptions for "artistic and scientific speech", even if the speech may be considered to be hateful and inciting.

"Governments tend to introduce legislation that is too broad," she said, leading to censorship of what is merely controversial speech. In the process, governments use such legislation to shield themselves or powerful social interests from criticism. They can also use it against individuals and groups deemed to threaten authority. "Selective application - determined by those in power - is the main problem with hate speech legislation," she said.

The International Covenant on Civil and Political Rights, which was adopted by the United Nations General Assembly in 1976, states that any "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." Duncan said that this covenant sets three different standards for judging hate speech, from a weak test to a strict one - and

these present many advocates of free speech with problems.

The weakest tests are incitement to discrimination and hostility. But these terms are very subjective, making it difficult to prove a link between speech and the formation of an attitude.

The stronger and more objective test is incitement to violence. "However, even within this approach towards hate speech, there are nuances," Duncan told IWPR. "Many free expression advocates, including my own institute, argue that the most objective test for defining hate speech involves advocacy of hatred on the basis of race, gender, ethnicity or religion to imminent violence.

"The insertion of the word 'imminent' is important because there needs to be proof that the speech actually caused the violence, rather than there being an extremely vague and insubstantial link between the speech and a violent act."

She identified the Rwanda tribunal's "tendency to adopt a broader rather than a narrower approach towards defining hate speech" as a source of difficulty. "As a result, in prosecuting offenders the Rwanda tribunal has set potentially controversial international precedents for freedom of expression," she said.

Because of the horrendous nature of the Rwandan genocide, said Duncan, "many free speech advocates have found these problems difficult to bring up, but raise them we must. If we do not, we may land up with international precedents being set that may be used in censorious ways in other contexts".

In earlier judgments, the ICTR convicted three major media players. They were Ferdinand Nahimana and Jean- Bosco Barayagwiza, who were in charge of Radio Télévision Libre de Mille Collines, and Hassan Ngeze, director and editor of the newspaper Kangura. They were convicted on charges of genocide, incitement to genocide and crimes against humanity. Nahimana and Ngeze were imprisoned for life and Barayagwiza for 35 years. Ngeze was prosecuted for articles written years before the genocide began.

In its report "Leave None to Tell the Story: Genocide in Rwanda", Human Rights Watch described Kangura as "one of the most virulent voices of hate". The newspaper began its hate campaign as early as 1990, soon after the invasion of the Rwandan Patriotic Front, RPF, army from neighbouring Uganda. The RPF was formed by Tutsis in exile and was headed by the charismatic Paul Kagame who became president of Rwanda after his rebels stopped the genocide. He holds this position to this day.

"The legal reasoning for these prosecutions has been questioned for being over-broad," said Duncan. "While these media certainly propagated hate-filled messages, they were but one element in the genocide, and it is difficult to argue that the genocide was a spontaneous reaction to the broadcasts, which would need to be the case for the 'imminent violence' test to be met."

The problem created by these judgments can be seen in the fact that many governments have since cited them as legal precedent and used them to impose various legal restrictions on freedom of expression, arguing that hate speech in their countries may lead to violence similar to that experienced in Rwanda. "As the [New York-based] Committee to Protect Journalists [which promotes international press freedom] has noted, the misuse of hate speech laws by repressive African governments may well be a greater threat right now than hate speech itself," said Duncan.

She said similar dilemmas and unfortunate consequences may arise if Simon Bikindi is convicted. "While there is no doubt that his songs fed into the general hysteria that fuelled the genocide, it may be difficult

to prove a causal link between his songs and the genocide," she said. "Songs, by their very nature, are metaphorical. This came out in testimony in his trial where one witness referred to his songs as 'full of allusions and images, the meaning of which was clear to any Rwandan'.

"Direct incitement of particular violent acts would need to be proved, which may not be possible given the artistic nature of his songs. If he is convicted, it may lead to repressive governments using this as an excuse to ban musicians who are critical of the status quo."

It seems that the chamber judges in the Bikindi case are caught between a rock and a hard place. If they find him not guilty of inciting genocide with his songs, victims of the 1994 slaughter are certain to cry foul. But if they convict him, the unintended consequence might be repression elsewhere of legitimate forms of political and artistic expression. In reaching their verdict, they will clearly need the wisdom of Solomon.

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**Focus:** ICC - International Criminal Court

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