

“DISILLUSIONED WORDS LIKE BULLETS BARK”:¹ INCITEMENT TO
GENOCIDE, MUSIC, AND THE TRIAL OF SIMON BIKINDI

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¹ BOB DYLAN, *Its Alright, Ma (I’m Only Bleeding)*, on *BRINGING IT ALL BACK HOME* (Columbia Records 1965).

I. INTRODUCTION

I hate these Hutus, these de-Hutuized Hutus, who have renounced
their identity, dear comrades.

I hate these Hutus, these Hutus who march blindly, like
imbeciles.

This species of naïve Hutus who join a war without knowing its
cause.

I hate these Hutus who can be brought to kill and who, I swear to
you, kill Hutus, dear comrades.

And if I hate them, so much the better.²

Simon Bikindi sang and people died. At least this is what the International Criminal Tribunal for Rwanda (ICTR) alleges in its indictment of Rwanda's most famous singer.³ Once referred to as his country's Michael Jackson,⁴ Bikindi now stands accused of inciting genocide through his music.⁵ Although Bikindi is also charged with directly taking part in the killings, his music and lyrics most likely generated the charges against him.⁶ The international community is divided over the propriety of putting a musician on trial for songs that did not directly call for murder. John Floyd, a United States defense lawyer who has worked on other incitement cases before the ICTR,⁷ claims that putting Bikindi on trial for genocide was like "putting Bob Dylan on trial for protest songs."⁸ Others are not so kind, stating that, "Bikindi was driven

² SIMON BIKINDI, *Nanga Abahutu (I Hate These Hutus)* (1992).

³ Prosecutor v. Bikindi, Case No. ICTR 01-72-1, Amended Indictment, ¶¶ 31-41 (June 15, 2005).

⁴ Donald G. McNeil, Jr., *Killer Songs*, N.Y. TIMES, Mar. 17, 2002, at 58.

⁵ *Bikindi*, Case No. ICTR 01-72-1, Amended Indictment, ¶ 40.

⁶ McNeil, *supra* note 4 (noting that "[h]ad [Bikindi] only killed, he would not be a target of the International Criminal Tribunal, according to a United Nations official . . . 'He's a big fish because of his musical compositions'").

⁷ See, e.g., Prosecutor v. Ngeze, Case No. ICTR 99-52-T, Judgment (Dec. 3, 2003).

⁸ Dina Temple-Raston, *Journalism and Genocide*, COLUM. JOURNALISM REV., Sept./Oct. 2002, at 18. Arguably one of the most famous musicians in the world, Bob Dylan has never been accused of causing deaths through his music, although he did once sing:

And I hope that you die,
and your death'll come soon,
I will follow your casket
In the pale afternoon,
and I'll watch while you're lowered
down to your deathbed,

by pure ideological hatred,” and that, “[m]ost Rwandans now feel that if his music had been banned earlier, the tragedy would not have assumed such catastrophic proportions.”⁹ Regardless of personal feelings about Bikindi’s actions, he is the first person to be charged with inciting genocide through music. This raises interesting issues regarding when it is appropriate to hold an artist accountable for the effect his art has had on the world. Jurisprudence related to the incitement of genocide is limited. In fact, on an international level, only the Nuremberg trials and the ICTR have convicted persons for the crime of incitement to genocide.¹⁰

This Note will consider the history of the crime of incitement to genocide from its birth at the Nuremberg trials after World War II,¹¹ its inclusion in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention),¹² the interpretation given it under the statute and decisions of the ICTR,¹³ and the propriety of its application to Simon Bikindi’s case.

Part II will focus on the history of the conflict in Rwanda and the role played by both Bikindi and his music. Part III will discuss the incitement trials of Julius Streicher and Hans Fritzsche at Nuremberg. Part IV will cover the Convention on the Prevention and Punishment of the Crime of Genocide and the debate over the inclusion of incitement to genocide. Part V will consider the previous decisions of the ICTR relating to incitement. Part VI will focus on the application of these precedents to Bikindi’s case. Part VII will discuss possible implications of a conviction and possible broader reaching effects of convicting an artist for incitement to genocide through music.

and I’ll stand o’er your grave
 ‘til I’m sure that you’re dead.

BOB DYLAN, *Masters of War*, on THE FREEWHEELIN’ BOB DYLAN (Columbia Records 1963).

⁹ *Rwanda; . . . no Love Song in Kigali*, AFR. NEWS, July 3, 2002.

¹⁰ See 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, 143 (2004) (discussing the dearth of international law in relation to incitement to genocide and how it had its genesis at Nuremberg).

¹¹ See *id.*

¹² Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

¹³ Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 2(3)(c), U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

II. "DARKNESS AT THE BREAK OF NOON":¹⁴ THE 100 DAY GENOCIDE IN RWANDA

In the 100 days between April 6 and June 17, 1994, somewhere between 500,000 and one million people were killed in Rwanda.¹⁵ It is worth discussing the history leading to this extreme bloodbath because it informs the debate over whether Bikindi's songs could have incited the genocide. Incitement as a crime is contextual; it can only be understood as the way words functioned at the time they were uttered, or in this case sung.¹⁶

Rwanda is one of the smallest countries in Africa, but according to the 1991 census, it had the highest population density on the continent.¹⁷ Rwanda is made up of three primary groups: the Hutus, the Tutsis, and the Twa pygmies.¹⁸ Prior to the nineteenth century, there was little ethnic connotation associated with the labels Tutsi or Hutu; rather, the labels were primarily related to class or lineage.¹⁹ In the pre-colonial period, Tutsis owned cattle, the Hutu were primarily farmers, and it was possible to move from one classification to another.²⁰ Until 1959, Rwanda was ruled by monarchs from the Tutsi minority.²¹ Hutus took part in the leadership but were limited to middle to lower levels of administration.²²

¹⁴ DYLAN, *supra* note 1.

¹⁵ There is debate over the number of people who died in the 100 days genocide with conservative estimates putting the number at 500,000 and the higher end being over one million. See *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 111 (Sept. 2, 1998).

¹⁶ *Id.* ¶ 557 ("[T]he direct element of incitement should be viewed in the light of its cultural and linguistic content. . . . [A] particular speech may be perceived as 'direct' in one country, and not so in another, depending on the audience."); see also WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES* 276-80 (2000) (explaining the difference between public and direct incitement).

¹⁷ Rwanda is approximately 26,000 square kilometers, and in 1991, it had a population of 7.15 million, which equals 271 people per square kilometer. J. TEBBS, *RWANDA WAR AND PEACE?! 15-16* (1999).

¹⁸ Hutus represented 90.4% of the population, with the Tutsi and Twa representing 8.2% and 0.4% respectively. *Id.* at 17.

¹⁹ There is some debate about this, but the ICTR officially adopted this position. See *Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 81.

²⁰ L.J. VAN DEN HERIK, *THE CONTRIBUTION OF THE RWANDA TRIBUNAL TO THE DEVELOPMENT OF INTERNATIONAL LAW* 14-15 (2005).

²¹ TEBBS, *supra* note 17, at 29.

²² *Id.* at 30.

The Tutsi domination of power continued under first German, and then Belgian, colonial rule.²³ In the 1920s and 1930s, the Belgian ruling power pursued several policies that have had a long, lasting effect on Rwandan society. First, in order to consolidate their own power and to avoid any conflict with the local populace, the Belgians officially began to remove Hutus from even the low ranking positions previously available to them in the administration.²⁴ Second, the Belgians introduced a national identification card that officially, though often arbitrarily, labeled every citizen of Rwanda as Hutu, Tutsi, or Twa.²⁵

In the 1950s, the Belgian leadership of Rwanda began to allow for democratic processes, leading to the takeover of the Hutu majority.²⁶ The period of 1959–1962 saw the consolidation of Hutu power under Belgian rule, and in 1962, Rwanda became an independent country under the rule of the Hutu president, Grégoire Kayibanda.²⁷ In the three years leading up to independence, there were numerous armed conflicts between the Hutu majority and the Tutsi minority resulting in the death of tens of thousands of Tutsis.²⁸ The political unrest and the violence against Tutsis also caused a large number of Tutsis to leave Rwanda for neighboring countries.²⁹ Some of these Tutsi refugees, later referred to as *Inyenzi* (cockroaches), led armed incursions into Rwanda resulting in backlashes against the Tutsis who remained behind.³⁰

The government of President Kayibanda instituted strict quotas on the number of Tutsis that could occupy public positions.³¹ President Kayibanda

²³ VANDEN HERIK, *supra* note 20, at 17. Germany acquired Rwanda in 1899, and then ceded control to the Belgians after World War I. Both countries allowed, for the most part, indirect rule, which meant reinforcing the existing power structure of Tutsi domination. *Id.*; TEBBS, *supra* note 17, at 31.

²⁴ TEBBS, *supra* note 17, at 31–34. The Belgians may have accepted a racial theory of the origins of the Tutsi and Hutu that theorized that the Tutsi were more advanced, physically and mentally, than the Hutu, and thus better able to rule. *Id.*

²⁵ VAN DEN HERIK, *supra* note 20, at 18. The ICTR noted the role that the identification cards played in the selection of victims during the 100 days genocide. See Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 83 (Sept. 2, 1998).

²⁶ VAN DEN HERIK, *supra* note 20, at 19–20.

²⁷ *Id.*

²⁸ *Id.*; see also Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 89.

²⁹ TEBBS, *supra* note 17, at 38. The diaspora of Tutsis led to an environment of unrest along the borders with neighboring countries where large numbers of Tutsis with a feeling of Rwandan citizenship resided. *Id.*

³⁰ VAN DEN HERIK, *supra* note 20, at 20.

³¹ The quota system was based on the percentage representation in the population. It allocated 9% of the public jobs to Tutsis. *Id.*

also banished political parties from Rwanda.³² Despite the consolidation of power, President Kayibanda lost his hold on the presidency and was eventually deposed by General Juvénal Habyarimana in a military coup in 1973.³³ Habyarimana continued to consolidate power, officially establishing a one-party state under the leadership of the *Mouvement Révolutionnaire National pour le Développement* (MRND).³⁴ From 1973–1990, Rwanda increased its Gross National Product dramatically, and, despite some human rights abuses, President Habyarimana's rule was marked with little of the ethnic violence that preceded his rule.³⁵

The relative peace and prosperity was shattered in 1990 when Rwanda was invaded by a group of refugee Tutsis known as the Rwandan Patriotic Front (RPF).³⁶ The attack by the RPF led to a destabilization of the Habyarimana government, and the president was forced to ostensibly open up the political process to other political parties.³⁷ It also led to the arrest of thousands of Tutsis, and in attacks that foreshadowed the 1994 genocide, Tutsis were targeted and killed all over the country.³⁸

After the invasion, President Habyarimana began negotiations with the RPF in 1992.³⁹ The negotiations resulted in the Arusha Accords of August 1993.⁴⁰ The Accords were to allow for power sharing between the RPF and Habyarimana's government and for a repatriation of Tutsi refugees.⁴¹ In order to oversee the cease fire between the RPF and the Rwandan government, the United Nations (U.N.) sent a delegation to Rwanda.⁴² Radical Hutus were

³² *Id.*

³³ *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 91. General Habyarimana used the coup to kill many political opponents, including the former president who starved to death while in prison. *Id.*

³⁴ *Id.* ¶ 92.

³⁵ TEBBS, *supra* note 17, at 41–43.

³⁶ *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 93. The RPF was formed in Uganda from Tutsi exiles. *Id.*

³⁷ *Id.* ¶ 94.

³⁸ VAN DEN HERIK, *supra* note 20, at 22–23.

³⁹ *Id.* at 24. Members of Habyarimana's own party, the MRND, and the newly formed *Coalition pour la défense de la République* (CDR) party, were opposed to the peace process. *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² S.C. Res. 872, ¶ 3, U.N. Doc. S/RES/872 (Oct. 5, 1993). The United Nations (U.N.) resolution set up the United Nations Assistance Mission for Rwanda (UNAMIR), whose limited mandate of monitoring the cease fire and reporting violations would prove to be a crippling deficiency when it came time to intervene during the 100 days. See SCOTT PETERSON, ME

virulently against the Arusha Agreement, and the tension between Hutu and Tutsi increased to a fever in the final months of 1993.⁴³

The media played an increasingly important role in the spread of anti-Tutsi sentiment in the time leading up to the 1994 genocide. In 1990, the paper *Kangura*, founded by Hassan Ngeze, published a series of articles that essentially called for the full destruction of the Tutsi people within Rwanda.⁴⁴ In 1993, the *Radio Télévision Libre des Mille Collines* (RTL), a radio station founded by President Habyarimana's political party with him as its primary shareholder, began broadcasting vitriolic attacks on Tutsis.⁴⁵ Throughout the 100 days, RTL continued to broadcast attacks on Tutsis, including the names of Tutsi and Hutu political opponents who were subsequently killed.⁴⁶ As will be discussed later, RTL was the key promoter of Simon Bikindi's music, and he was a frequent guest on its programs.⁴⁷

Against this backdrop of centuries of conflict, growing political unrest and war, and the subsequently controversial Arusha Accords, Rwanda was headed for disaster.⁴⁸ The final spark that ignited the 100 days came on April 6, 1994. After traveling to Tanzania to discuss the Arusha Accords, President Habyarimana, along with Burundian President Ntaryamira, was killed when his plane crashed.⁴⁹ Debate continues over whether the crash was an accident or an assassination, but regardless the result was clear.⁵⁰

Within twenty-four hours of President Habyarimana's death, the military had seized power, erected roadblocks throughout the capitol, Kigali, and executed the prime minister, along with the ten Belgian soldiers who were sent to protect her.⁵¹ In the days that followed April 6, chaos engulfed the capitol

AGAINST MY BROTHER: AT WAR IN SOMALIA, SUDAN AND RWANDA 290–93 (2000).

⁴³ PETERSON, *supra* note 42, at 271–73.

⁴⁴ Prosecutor v. Nahimana, Barayagwiza & Ngeze (*Media Case*), Case No. ICTR 99-52-T, Judgment Summary, ¶¶ 10–19 (Dec. 3, 2003); *see also infra* Part VI.

⁴⁵ *Media Case*, Case No. ICTR 99-52-T, Judgment Summary, ¶ 30.

⁴⁶ *Id.* ¶ 28; *see also* Temple-Raston, *supra* note 8, at 18 (noting how RTL broadcast the license plates of cars carrying Tutsis or Tutsi sympathizers and urged them to be hunted down).

⁴⁷ Prosecutor v. Bikindi, Case No. ICTR 01-72-1, Amended Indictment, ¶ 40 (June 15, 2005).

⁴⁸ PETERSON, *supra* note 42, at 290–92. The director of UNAMIR sent several urgent requests to the U.N. asking for more troops and for permission to investigate reports that Rwandans were stockpiling arms, but was denied based on the limited mission of the U.N. delegation. *Id.*

⁴⁹ Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 106 (Sept. 2, 1998).

⁵⁰ There is speculation that the president was killed by a missile launched by the RPF, but the investigation into the crash is ongoing. *See* VAN DEN HERIK, *supra* note 20, at 70.

⁵¹ *Id.* at 25–26.

and mass killing of Tutsis, and of Hutus who supported the Arusha Accords, began.⁵²

In the weeks after the president's death, the killing spread throughout the country. All over the country, Tutsis were killed while they huddled in houses of worship, schools, and government buildings, in many cases after being officially ordered there.⁵³ The southern region of the country remained relatively peaceful until the interim prime minister visited and exhorted the local Hutus to violence against the Tutsis.⁵⁴ Within days, the south was also engulfed in all out genocide.⁵⁵ Throughout the 100 days, in addition to murder, large numbers of Tutsi women were sexually assaulted and humiliated by Hutu men.⁵⁶

The killing continued until July 18, when the RPF was able to take control of Kigali.⁵⁷ The estimates of the number dead ranged from 500,000 to one million.⁵⁸ In the aftermath of the genocide, over two million Hutus fled Rwanda in fear of retribution for their complicity in the killings.⁵⁹

In response to the widespread violence in Rwanda, the U.N. acted quickly to establish a criminal tribunal to punish wrongdoers.⁶⁰ Seeking to redress the

⁵² *Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 107. Most of the killing was perpetrated by the *Interahamwe*. The *Interahamwe*, a word literally meaning to come together to work or kill, was originally the youth wing of the MRND, but in the years leading up to the genocide, became an organized militia. See *id.* ¶ 151; VAN DEN HERIK, *supra* note 20, at 25–26 n.108.

⁵³ PETERSON, *supra* note 42, at 263.

⁵⁴ VAN DEN HERIK, *supra* note 20, at 26.

⁵⁵ *Id.*

⁵⁶ See generally HUMAN RIGHTS WATCH, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH (1996), available at <http://www.hrw.org/reports/1996/Rwanda.htm>.

⁵⁷ *Akayesu*, Case No. ICTR-96-5-T, Judgment, ¶ 111.

⁵⁸ Compare VAN DEN HERIK, *supra* note 20, at 26 (stating that the number dead was 937,000), with MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA 5 (2001) (putting the number dead at around 500,000 Tutsis and between 10,000 and 50,000 Hutus).

⁵⁹ MAMDANI, *supra* note 58, at 234. The Hutus fled almost equally to neighboring Congo and Tanzania. *Id.*

⁶⁰ The Security Council adopted a resolution establishing the International Criminal Tribunal for Rwanda on November 8, 1994. See ICTR Statute, *supra* note 13. The U.N.'s quick response to establish a criminal tribunal is puzzling considering the limited role that it played in attempting to quell the genocide while it occurred. During the actual conflict, the U.N. reduced its force from 3,000 to 200 and, along with the international community, recognized the provisional government that was responsible for directing much of the carnage. This reactionary response is a testament to the fundamental limitations of the law and prevention of genocide. See Theogene Rudasingwa, Keynote Address, *Fifty Years After the Universal Declaration of*

grave wrongs committed during the 100 days,⁶¹ the Statute for the International Criminal Tribunal for Rwanda lists three types of punishable offenses: genocide,⁶² crimes against humanity,⁶³ and violations of common Article 3 of the Geneva Convention.⁶⁴

The Statute also lists several inchoate genocide offenses including conspiracy to commit genocide, attempted genocide, and, the focus of this Note, direct and public incitement to commit genocide.⁶⁵ The charge of incitement to commit genocide is taken verbatim from the Genocide Convention,⁶⁶ and its inclusion reflects the U.N.'s recognition of the significant role that radio, public exhortations to violence, and, potentially, Bikindi's music played in the violence.⁶⁷

Human Rights and the Genocide Convention: Lessons Learned, 26 SYRACUSE J. INT'L L. & COM. 173, 188–90 (1999).

⁶¹ The main goals of the ICTR are to deter future genocide, provide accountability for misdeeds, encourage reconciliation, and to foster peace in Rwanda. See Kingsley Chiedu Moghalu, *International Humanitarian Law from Nuremberg to Rome: The Weighty Precedents of the International Criminal Tribunal for Rwanda*, 14 PACE INT'L L. REV. 273, 278 (2002).

⁶² Genocide is defined as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group," and includes killing members of the group as well as attempting to prevent births or to move children of one group to another group. ICTR Statute, *supra* note 13, art. 2(2).

⁶³ Crimes against humanity are defined as murder, torture, rape, or enslavement (among others) when committed as part of a widespread attack against a particular group. *Id.* art. 3. The inclusion of rape as a charge under international law is new and was developed under the ICTR and its judgments. See Moghalu, *supra* note 61, at 282–83 (noting the development of rape as a crime of genocide and the subsequent adoption of this definition by other international courts); Llezlie L. Green, Note, *Gender Hate Propaganda and Sexual Violence in the Rwandan Genocide: An Argument for Intersectionality in International Law*, 33 COLUM. HUM. RTS. L. REV. 733 (2002) (noting the role that propaganda and incitement played in the sexual violence that accompanied the 100 days).

⁶⁴ The Statute lists several possible violations including collective punishments and the passage of death sentences without a properly constituted court. ICTR Statute, *supra* note 13, art. 4.

⁶⁵ ICTR Statute, *supra* note 13, art. 2(3).

⁶⁶ Genocide Convention, *supra* note 12, 102 Stat. at 3046, 78 U.N.T.S. at 280.

⁶⁷ See Green, *supra* note 63, at 741–47; McNeil, *supra* note 4 ("In Rwanda, almost no one reads newspapers or owns a television, and radio is king."); Temple-Raston, *supra* note 8, at 18 (noting that the first thing an African buys when he or she gets a job is a radio).

III. "THE GERMANS NOW TOO HAVE GOD ON THEIR SIDE":⁶⁸ THE
BEGINNING OF THE CHARGE OF INCITEMENT TO GENOCIDE AT THE
INTERNATIONAL MILITARY TRIBUNALS AT NUREMBERG

The Nuremberg trials that followed World War II marked the first charge and conviction for incitement to genocide by an international tribunal.⁶⁹ The International Military Tribunal (IMT) at Nuremberg was set up at the end of World War II to deal with the most egregious offenders from the German command.⁷⁰ The IMT had jurisdiction over four crimes: crimes against humanity, war crimes, crimes against peace, and conspiracy to commit all three.⁷¹ Two of the defendants, Julius Streicher and Hans Fritzsche, were charged not for their role in giving or carrying out official orders of the Third Reich, but for the role they played in disseminating hateful ideas.⁷² Both were

⁶⁸ BOB DYLAN, *With God on Our Side, on THE TIMES THEY ARE A-CHANGIN'* (Columbia Records 1964).

⁶⁹ See Gordon, *supra* note 10, at 143.

⁷⁰ Franklin Roosevelt singled out Hitler's atrocities during the war and vowed to bring those responsible for crimes against humanity back to their home countries for prosecution after the war. See Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 ARIZ. J. INT'L & COMP. L. 415, 424-25 (1998). The United States, Great Britain, the Soviet Union, and France came together in London in the summer and fall of 1945 and drafted the Charter for the International Military Tribunal for Nuremberg. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal, Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280 [hereinafter Nuremberg Charter]. The twenty-one defendants were selected from the living Nazis who arguably had held high profile leadership roles in the Third Reich. See Donna E. Arzt, *Nuremberg, Denazification and Democracy: The Hate Speech Problem at the International Military Tribunal*, 12 N.Y.L. SCH. J. HUM. RTS. 689, 699 (1995) (reviewing TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (1992)).

⁷¹ Crimes against humanity were defined as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds." Nuremberg Charter, *supra* note 70, § 2, art. 6(c). Crimes against peace were defined as "planning . . . a war of aggression, or a war in violation of international treaties." *Id.* § 2, art. 6(a). War crimes were described as "violations of the laws or customs of war." *Id.* § 2, art. 6(b).

⁷² See International Military Tribunal v. Goering, Indictment, App. A, available at <http://www.yale.edu/lawweb/avalon/imt/proc/counta.htm> (last visited June 19, 2007). Even though the Nuremberg Charter did not set out incitement to commit crimes against humanity or war crimes as a separate offense, the International Military Tribunal (IMT) had little trouble convicting Streicher of the charge. His conviction set the stage for the future use of incitement as a substantive charge. See Arzt, *supra* note 70, at 715 (discussing the cursory debate that surrounded the propriety of convicting Streicher without proof of any actual involvement in the crimes against humanity); Gordon, *supra* note 10, at 140-42 (discussing the role of the Fritzsche

charged with conspiracy to commit crimes against peace and crimes against humanity.⁷³ Streicher was found guilty and executed, while Fritzsche was acquitted and released.⁷⁴ The precedent set by both of these cases is informative when considering the factual circumstances necessary for finding a person guilty of incitement to genocide.

Julius Streicher was a native of Nuremberg who for more than twenty years published the rabidly anti-semitic paper, *Der Stuermer*.⁷⁵ Streicher joined the Nazi party in 1921, and after Hitler seized power, held the rank of *Gauleiter* in the northern region of Bavaria.⁷⁶ However, Streicher's disturbing personality and personal life led the Nazi Party to distance itself from him in any sort of official capacity.⁷⁷ Hitler and the Nazi Party, however, continued to support Streicher's publication of *Der Stuermer*.⁷⁸ The paper was filled with "obscene cartoons, . . . lists of Jewish dentists, doctors, and shopkeepers, whom 'Aryans' were advised to avoid," and consistent, repetitive calls for the annihilation of the Jewish race.⁷⁹ *Der Stuermer*'s anti-semitism was so rabid that even Nazi officials were forced to distance themselves from it publicly.⁸⁰ Streicher's calls for the annihilation of the Jewish race continued well into the war and long after he had knowledge that Germany had begun to execute the "final solution."⁸¹

and Streicher opinions in ICTR cases).

⁷³ Arzt, *supra* note 70, at 701.

⁷⁴ International Military Tribunal v. Goering, Sentences, available at <http://www.yale.edu/lawweb/avalon/imt/proc/judsent.htm> (last visited June 19, 2007). Fritzsche was released soon after his acquittal. He lived in Nuremberg for four months before he was arrested by German authorities and convicted of being a "major offender" by the Denazification Court. He was sentenced to nine years of hard labor, but only served four. See TAYLOR, *supra* note 70, at 612.

⁷⁵ See Arzt, *supra* note 70, at 708.

⁷⁶ *Id.* at 109. *Gauleiters* were political heads of provinces under Nazi rule. Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/gauleiter> (last visited June 19, 2007). In his capacity as *Gauleiter*, Streicher oversaw the appropriation of Jewish property and the destruction of the Nuremberg synagogue on *Kristallnacht*. Arzt, *supra* note 70, at 709.

⁷⁷ Streicher was the only person charged at the Nuremberg trials who had previously served prison time. In 1940, Streicher was convicted of corruption and sentenced to house arrest for the remainder of the war. Arzt, *supra* note 70, at 710, 713.

⁷⁸ Streicher was allowed to continue dictating articles to *Der Stuermer* over the phone while he served the term of his house arrest. *Id.* at 713.

⁷⁹ *Id.* at 710-11. See also BRADLEY F. SMITH, REACHING JUDGMENT AT NUREMBERG 200-03 (1977).

⁸⁰ SMITH, *supra* note 79, at 200.

⁸¹ International Military Tribunal v. Goering, Judgment, Streicher, available at <http://www.yale.edu/lawweb/avalon/imt/proc/judstrei.htm> (last visited June 19, 2007) [hereinafter Streicher

Because the calls for mass execution continued beyond 1939, Streicher's actions were within the temporal jurisdiction of the IMT.⁸² In its judgment, the IMT noted that Streicher's exhortations for the extermination of the Jews acted as a poison that infiltrated the German mentality.⁸³ The court concluded that "Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with war crimes as defined by the Charter, and constitutes a crime against humanity."⁸⁴

The Streicher judgment has been criticized for the way that the court sidestepped the lack of a direct causal link between Streicher's statements and genocide.⁸⁵ Many commentators have surmised that Streicher was executed more for his repulsive personality and notorious personification of all the things evil about Nazism than for any causal link between his statements and the execution of Jews.⁸⁶

When compared to Streicher's rabid and obscene anti-semitism, Hans Fritzsche's public statements pale in comparison.⁸⁷ Fritzsche, the host of *Hans Fritzsche Speaks*, was Germany's most famous radio announcer and a subordinate in the propaganda ministry of Josef Goebbels.⁸⁸ Fritzsche, however, did not directly control the content of his radio broadcasts, but served

Judgment].

⁸² See Diane F. Orentlicher, *Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana*, 21 AM. U. INT'L L. REV. 557, 585 (2006) (describing how although the IMT considered activities that predated the 1939 jurisdiction of the court, Streicher's conviction was based on his activities between 1939–1945).

⁸³ Streicher Judgment, *supra* note 81.

⁸⁴ *Id.* The court concluded guilt despite finding that Streicher should be acquitted of the charge of conspiracy to commit crimes against peace because he lacked any real contact with the inner circles of the Third Reich. *Id.*

⁸⁵ See, e.g., TAYLOR, *supra* note 70, at 590 (stating that he could not "justify the Tribunal's failure to mention . . . that publication of a newspaper, however maddening and unconscionable it may be, should be touched with criminal accusations only with the greatest caution"); Arzt, *supra* note 70, at 714–16 (noting that the prosecutor barely touched on the contentious issue of incitement as a substantive charge).

⁸⁶ See SMITH, *supra* note 79, at 202 ("Streicher's terrible reputation obviously prejudiced the Court against him."); Arzt, *supra* note 70, at 717 (claiming that Streicher was selected because he "was a reminder of what the German people at its worst had been capable of producing").

⁸⁷ The prosecutor stated at the end of the trial that Fritzsche's statements "were no stronger than [the] statements of American war correspondents in Washington during the war." See SMITH, *supra* note 79, at 294.

⁸⁸ *Id.* at 292.

more as a conduit of information from Goebbels to the public.⁸⁹ Fritzsche at times even clashed with his superiors and twice tried to ban Streicher's *Der Stuermer*.⁹⁰ Commentators surmise that Fritzsche was only charged by the IMT because the Soviets, who had captured him, wanted some of their prisoners tried.⁹¹

The weak evidence against Fritzsche, his relative obscurity, and the fact that his superior, Otto Dietrich, who worked closely with Goebbels but was not charged by the IMT, led to Fritzsche's acquittal.⁹² The Tribunal stated that even though Fritzsche made strong statements of a propagandistic nature, the statements were not meant to incite Germans to commit atrocities.⁹³ The Tribunal concluded that instead of inciting genocide, “[Fritzsche's] aim was rather to arouse popular sentiment in support of Hitler and the German war effort.”⁹⁴

The conclusions that can be drawn from the conviction of Streicher and the acquittal of Fritzsche have a great bearing on the decision of whether it is appropriate to find criminal liability in the *Bikindi* case. First, the IMT was not afraid to impose liability for incitement to genocide even with no proven direct link between the communications and the atrocities.⁹⁵ Second, the IMT was hesitant to impose liability for a low-level bureaucrat whose statements were directed from above. Finally, the IMT appeared to draw a distinction between direct calls for genocide and statements that could be characterized as calls for support of the government in the time of war.⁹⁶

⁸⁹ *Id.*

⁹⁰ See *id.* at 294; Gordon, *supra* note 10, at 144.

⁹¹ SMITH, *supra* note 79, at 293.

⁹² *Id.*

⁹³ International Military Tribunal v. Goering, Judgment, Fritzsche, *available at* <http://www.yale.edu/lawweb/avalon/imt/proc/judfritz.htm> (last visited June 19, 2007).

⁹⁴ *Id.*

⁹⁵ Although, the theory that Streicher was punished for his repulsive personality and not his actions would seem to undercut this conclusion. See *supra* note 86 and accompanying text.

⁹⁶ See Ameer F. Gopalani, *The International Standard of Direct and Public Incitement to Commit Genocide: An Obstacle to U.S. Ratification of the International Criminal Court Statute?*, 32 CAL. W. INT'L L.J. 87, 100–01 (2001) (discussing how the Fritzsche case supports the contention that the IMT thought that a “conviction for incitement requires explicit calls to commit genocide, not general arousalment”).

IV. "THERE MUST BE SOME WAY OUT OF HERE":⁹⁷ THE DEVELOPMENT
AND ADOPTION OF THE CONVENTION ON THE PREVENTION AND
PUNISHMENT OF THE CRIME OF GENOCIDE

In the wake of the Nazi atrocities, the worldwide community came together to address the newly recognized problem of genocide.⁹⁸ One of the first resolutions passed by the fledgling United Nations dealt with genocide. Resolution 96(I) declared genocide to be a crime under international law and requested the Economic and Social Council to perform studies necessary to draft a convention on the crime of genocide.⁹⁹ At the behest of the General Assembly, the Secretary General gathered a group of scholars to draft and review the proposed Convention.¹⁰⁰ The proposal was reviewed by several nations and then resubmitted to the General Assembly for debate.¹⁰¹ After another round of revisions, the final language of the Convention was adopted on December 9, 1948 by a vote of fifty-six to zero.¹⁰² The Convention went into international effect on January 12, 1951 and has been ratified by at least 130 countries.¹⁰³

⁹⁷ BOB DYLAN, *All Along the Watchtower*, on JOHN WESLEY HARDING (Columbia Records 1967).

⁹⁸ The term genocide had been coined in the 1943 work, *Axis Rule in Occupied Europe*, a work written by the international criminal law scholar, Raphael Lemkin. Lemkin, himself a Jew who fled Poland in 1939, would later become instrumental in spearheading the international movement for the Genocide Convention. See SCHABAS, *supra* note 16, at 24-26.

⁹⁹ G.A. Res. 96(I), U.N. Doc. A/RES/96/I (Dec. 11, 1946).

¹⁰⁰ The scholars included international law scholar, Raphael Lemkin; former Nuremberg judge, Henri Donnedieu de Vabres; and Romanian law professor, Vespasian V. Pella. SCHABAS, *supra* note 16, at 52.

¹⁰¹ *Id.* at 58.

¹⁰² *Id.* at 80.

¹⁰³ Even though the Convention has been ratified by 130 nations, its status is questionable when considered in light of reservations made by parties to the Convention. Many of the countries (including the United States) acceded to the treaty with reservations. Most of these reservations were in relation to Article IX (giving jurisdiction to the International Court of Justice in disputes between nations) and to Article VI (creating an international penal tribunal under the Convention). In most international treaties, a country can only ratify a treaty with reservations when those reservations have been accepted by the other signatories, but the Convention has been construed more liberally. Under the Convention, a state may be considered a signatory even if its reservations have not been agreed to by the other members so long as the reservations are considered compatible with the object and purpose of the treaty. However, a party who objects to another state's reservations does not have to regard the objectionable party as a signatory of the treaty. This awkward reservation process has led to political posturing when it comes to recognizing another state as a signatory and a substantial amount of confusion when

The adopted Convention on the Prevention and Punishment of the Crime of Genocide defines genocide as the performing of certain enumerated acts¹⁰⁴ that are undertaken with the specific intent to destroy, in whole or in part, a national, ethnic, racial, or religious group.¹⁰⁵ In an attempt to broaden the application of the Genocide Convention beyond the temporal limitations of the Nuremberg trials, the final draft did not limit genocide to acts that occur during war, but stated that genocide could be perpetrated in times of peace as well.¹⁰⁶ The Convention includes several punishable offenses including genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempted genocide, and complicity in genocide.¹⁰⁷ One of the most controversial aspects of the Convention is the placement of jurisdiction for trials related to genocide within the country where the killings took place.¹⁰⁸

During the drafting process, several issues were debated by the member states,¹⁰⁹ not the least of which was the United States' hesitation concerning

it comes to deciding which states are parties to the treaty in reference to each other. See STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 28, 39–41 (2d ed. 2001).

¹⁰⁴ Killing or causing serious bodily injury or mental harm to members of a protected group, as well as other acts are listed. See Genocide Convention, *supra* note 12, art. II.

¹⁰⁵ The original resolution, Resolution 96(I), included political groups in its list of protected groups. However, the term was deleted from the final adopted draft of the Convention. This omission was one of the reasons that the United States did not ratify the Convention until almost forty years after its passage by the General Assembly and included in its ratification a call to seek an amendment to include political groups in the Convention. See Lippman, *supra* note 70, at 482 n.435; see also Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law: Protection of Human Rights*, 80 AM. J. INT'L L. 612 (1986) (discussing the rest of the reservations and understandings adopted by the Senate with the ratification of the Convention).

¹⁰⁶ Genocide Convention, *supra* note 12, art. I. Ad hoc tribunals enforcing the Genocide Convention, like the IMT Nuremberg, tend to limit their jurisdiction to specific dates. See, e.g., ICTR Statute, *supra* note 13, art. 7 (limiting jurisdiction to crimes committed between January 1, 1994 and December 31, 1994); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, art. 8, U.N. Doc. S/RES/827 (May 25, 1993) (limiting temporal jurisdiction to events that occurred after January 1, 1991).

¹⁰⁷ Genocide Convention, *supra* note 12, art. III.

¹⁰⁸ *Id.* art. VI (stating that people who are charged with genocide shall be tried by a "competent tribunal of the State in the territory of which the act was committed").

¹⁰⁹ A series of debates occurred between member nations concerning several aspects of the final draft of the Genocide Convention. Among those were (as mentioned above) the failure to include political groups among those protected, the placement of jurisdiction within the countries where the genocide took place, and the inclusion of the crime of cultural genocide. See SCHABAS, *supra* note 16, at 51–81; see also Matthew Lippman, *Genocide: The Crime of the*

the inclusion of the crime of incitement to genocide.¹¹⁰ The United States has possibly the most expansive protections of the freedoms of speech and expression, and during the drafting process, expressed several concerns about the inclusion of incitement as a punishable offense.¹¹¹ Initially, the United States proposed an amendment that provided incitement only be punishable when, as under its domestic law, the statement poses a clear and present danger of interfering with the rights of others.¹¹² However, the United States later changed its position and sought to have the incitement provision eliminated totally from the Genocide Convention.¹¹³ The U.S. delegation feared that the inclusion of incitement would interfere with the freedom of the press.¹¹⁴ The United States was supported by several other nations, but it faced strong opposition from countries such as Poland, which argued that the incitement charge was necessary for the Convention to have any sort of preventive effect.¹¹⁵ The Polish position eventually carried the day, and the United States abstained from the ratification vote for Article III in protest of the inclusion of the incitement charge.¹¹⁶

The United States' fears concerning the chilling effect on the press caused by inclusion of the charge of public incitement have been highlighted by its use in the ICTR. Although the convictions in the *Media Case* might well have stood up under the United States' proposed clear and present danger standard,

Century. The Jurisprudence of Death at the Dawn of the New Millennium, 23 HOUS. J. INT'L L. 467, 471–84 (2001) (discussing the various debates that were concurrent with ratification of the Convention).

¹¹⁰ See SCHABAS, *supra* note 16, at 266–71.

¹¹¹ *Id.*

¹¹² *Id.* at 267. The Soviet Union sought the exact opposite goal and argued for the inclusion of any propaganda that incited hatred of any protected group, but the committee rejected this position along with the United States' request for the reasonableness/clear and present danger standard. *Id.*

¹¹³ *Id.* at 268.

¹¹⁴ The U.S. delegation argued that,

[i]f it were admitted that incitement were an act of genocide, any newspaper article criticizing a political group . . . or suggesting certain measures with regard to such group . . . might make it possible for certain States to claim that a Government which allowed the publication of such an article was committing an act of genocide; and yet that article might be nothing more than the mere exercise of the right of freedom of the press.

Id. at 268–69.

¹¹⁵ *Id.* at 269.

¹¹⁶ SCHABAS, *supra* note 16, at 270.

Bikindi's case may be an illustration of the possible chilling effect feared by the U.S. delegation.

V. "A TREMBLING DISTANT VOICE UNCLEAR":¹¹⁷ THE *MEDIA CASE*, *PROSECUTOR V. AKAYESU*, AND INCITEMENT UNDER THE ICTR

In the almost sixty years since the passage of the Genocide Convention, it has been rarely invoked and subsequently has a limited jurisprudence.¹¹⁸ The Convention's limitations have led the United Nations to set up ad hoc tribunals in both the former Yugoslavia, International Criminal Tribunal for the Former Yugoslavia (ICTY), and Rwanda (ICTR) in order to deal with the problem of genocide.¹¹⁹ These ad hoc tribunals provide, along with the IMT, the only relevant precedents that could be applied in the Bikindi case.¹²⁰

The ICTR has faced three major incitement cases and handed down convictions in all three.¹²¹ In the *Kambanda* case, the ICTR convicted the

¹¹⁷ DYLAN, *supra* note 1.

¹¹⁸ See U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, ¶ 71, U.N. Doc. E/CN.4/Sub.2/1985/6 (July 2, 1985) (prepared by Benjamin Whitaker) ("The fact remains that although the Convention has been in force since 12 January 1951, any ascertainable effect of it is difficult to quantify, whereas all to (sic) much evidence continues to accumulate that acts of genocide are still being committed in various parts of the world."). The self-executing jurisdictional elements and the limitation on protected groups may account for the Convention's rare invocation despite several instances of genocide in the years since its ratification. See Lippman, *supra* note 70, at 465.

¹¹⁹ See ECOSOC, *supra* note 118, ¶ 76 (noting that, "although the Convention concentrates on punishment of the crime, this is nearly meaningless at the international level in the absence of an International Penal Tribunal").

¹²⁰ Because the International Criminal Tribunal for the Former Yugoslavia (ICTY) has not convicted anyone for the crime of incitement to genocide, the discussion of relevant precedents will be limited to the ICTR. For an interesting argument that a Serbian general should have been convicted of incitement to genocide and war crimes because of his activities as a poet, see Jay Surdukowski, Note, *Is Poetry a War Crime? Reckoning for Radovan Karadzic the Poet-Warrior*, 26 MICH. J. INT'L L. 673 (2005).

¹²¹ See *Prosecutor v. Nahimana, Barayagwiza & Ngeze (Media Case)*, Case No. ICTR 99-52-T, Judgment Summary, ¶¶ 86-106 (Dec. 3, 2003); *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgment, ¶ 40(3) (Sept. 4, 1998); *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶¶ 549-562 (Sept. 2, 1998). The Tribunal has also convicted and sentenced to twelve years Georges Ruggiu, a Belgian national who worked as an announcer for RTLM, for incitement to genocide. However, the judgment adds little to the jurisprudence of the Tribunal other than to show the Tribunal's belief in the inherent role that radio played in inciting the genocide. See *Prosecutor v. Ruggiu*, Case No. ICTR 97-32-I, Judgment, ¶¶ 38, 41-43 (June 1, 2000); Gordon, *supra* note 10, at 153.

interim prime minister of incitement for his role in promoting the RTLM radio station and for certain inflammatory statements.¹²² In *Prosecutor v. Akayesu*, the Tribunal convicted a provincial mayor who directly exhorted locals to violence, and in the *Media Case*, the court found liability for journalists who used print and radio media to escalate violence against the Tutsis.¹²³ All three of these cases are illustrative of the process for finding liability for incitement and will be considered in turn.¹²⁴

Jean Kambanda served as the interim prime minister of Rwanda from April 8 to July 17 of 1994.¹²⁵ As the de facto head of the government, Kambanda took direct part in the commission of genocide.¹²⁶ However, his conviction for incitement to genocide was based on his role in promoting RTLM and for certain incendiary statements that he made.¹²⁷

Specifically, Kambanda was a direct supporter of RTLM while it was broadcasting incendiary rhetoric about Tutsis and moderate Hutus, stating on the air that RTLM was "an indispensable weapon in the fight against the enemy."¹²⁸ Kambanda's conviction for incitement was also based on speeches that he gave during the 100 days, most specifically the statement, "you refuse to give your blood to your country and the dogs drink it for nothing," in reference to Hutus who refused to join in the massacre of Tutsis.¹²⁹ In light of

¹²² *Kambanda*, Case No. ICTR 97-23-I, Indictment, ¶¶ 3.12–.14, 3.19 (Oct. 28, 1997).

¹²³ *Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶¶ 549–562; *Media Case*, Case No. ICTR 99-52-T, Judgment Summary, ¶¶ 86–106.

¹²⁴ A Canadian court has also found liability for incitement to genocide in a case to determine if Leon Mugesera (a former *bourgmestre* in Rwanda) could remain in Canada. Canadian law states that a person can not remain in Canada if he or she is guilty of committing crimes against humanity or war crimes. The ICTR rejected charges against Mugesera because his act of incitement fell outside the temporal jurisdiction of the Tribunal, but the Canadian court nevertheless found liability for incitement based on a speech Mugesera gave in 1992. In the speech, Mugesera stated that the Tutsi should be sent back to Ethiopia via the river Nyabarongo, which the court interpreted to be a coded call to kill Tutsi and throw their bodies in the river. Following the speech, Tutsis in the area were killed. See SCHABAS, *supra* note 16, at 273–74, 277–78.

¹²⁵ *Kambanda*, Case No. ICTR 97-23-S, Judgment, ¶ 39(ii).

¹²⁶ Among the many things that Kambanda acknowledged in his guilty plea were promoting the *Interahamwe* militia, who were committing the majority of the killings, through training and armament, ordering the setup of roadblocks throughout the country, and even refusing to help Tutsi children whose parents had been murdered, an omission which led directly to their deaths. See *id.* ¶ 39.

¹²⁷ *Id.*

¹²⁸ *Id.* ¶ 39(vii).

¹²⁹ *Id.* ¶ 39(x).

Kambanda's position of power in the interim government, his conviction for incitement was no surprise. Kambanda's words and material support led directly to the death of Tutsis, and his conviction seems in line with the true spirit of the Genocide Convention, although his direct actions essentially make his conviction for incitement superfluous.

Because Kambanda pled guilty to the charges against him, the ICTR included scant discussion of the incitement charge;¹³⁰ therefore, his conviction did little to advance the jurisprudence of incitement. However, the case is worth noting because Kambanda's support of RTLM and his one statement were enough for the ICTR to justify a conviction for incitement.

In contrast to the *Kambanda* case, the case of Jean Paul Akayesu did significantly advance the jurisprudence of incitement. Akayesu was a *bourgmestre* of the Taba commune.¹³¹ On April 19, 1994, Akayesu gave a speech to a crowd of people, which included members of the *Interahamwe* militia.¹³² In the speech, Akayesu exhorted the crowd to unite to eliminate the common enemy, which he referred to as the accomplices of the *Inkotanyi*.¹³³ Akayesu also read a list of names of people believed to be supporters of the RPF.¹³⁴ Within hours, the killing of Tutsis in Taba commenced.¹³⁵

In finding Akayesu guilty of incitement to genocide, the Tribunal defined several key concepts that will bear on the disposition of Bikindi's case.¹³⁶ First, the Tribunal found it necessary to define the term "incitement." The Tribunal defined "incitement" as "directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats . . . or through the sale or dissemination, offer for sale or display of written material . . . or through the public display of placards or posters, or through any other means of audiovisual communication."¹³⁷ Next, the Tribunal looked to a French

¹³⁰ See *id.* ¶ 40(3).

¹³¹ Prior to his exhortation to violence, Akayesu was considered an excellent public official. See Jamie A. Williamson, *The Jurisprudence of the International Criminal Tribunal for Rwanda on War Crimes*, 12 NEW ENG. J. INT'L & COMP. L. 51, 62 (2005).

¹³² The crowd had formed around the dead body of a young *Interahamwe* member. See *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 673 (Sept. 2, 1998).

¹³³ *Id.* The term *Inkotanyi* literally meant resistance fighter, and like *Inyenzi*, was a derogatory term for supporters of the RPF and Tutsis in general. *Id.* ¶¶ 147-149.

¹³⁴ *Id.* ¶ 673.

¹³⁵ *Id.* ¶ 675.

¹³⁶ The Tribunal began its discussion of incitement by mentioning the conviction of Julius Streicher at the IMT for Nuremberg and noting that incitement was included in the Genocide Convention because of its crucial role in the planning of genocide. *Id.* ¶¶ 550-551.

¹³⁷ *Id.* ¶ 559. The tribunal cobbled together this definition from both common and civil law

definition and defined the word "public" as words that are "spoken aloud in a place that [is] public by definition."¹³⁸

The Tribunal also undertook the important task of defining the word "direct." According to the Tribunal, in order to be direct incitement, the statement must be more than a "mere vague or indirect suggestion," and there must be definite causation between the incitement and a specific offense.¹³⁹ However, the Tribunal noted that the directness of the statement can only be considered in light of its linguistic and cultural content.¹⁴⁰ In order to prove the directness of Akayesu's statements, the prosecution called a linguistics expert, Dr. Mathias Ruzindana, who testified that Akayesu's reference to exterminating the *Inkotanyi* would be understood as a call to kill all Tutsis.¹⁴¹ The prosecution also called lay witnesses who testified that the statement was understood by the average person to be a call to commit genocide.¹⁴²

The final important discussion in the *Akayesu* case came in the Tribunal's treatment of the mens rea necessary to support a charge of incitement.¹⁴³ In order to be guilty of incitement to commit genocide, the Tribunal reasoned that the inciter must have the intent to destroy the group and a desire "to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging."¹⁴⁴ This definition of mens rea mirrors the one set out in Article II of the ICTR Statute, and confirmed the need for specific intent with the crime of incitement.¹⁴⁵

definitions of incitement, as well as relevant Rwandan law. See *id.* ¶ 555.

¹³⁸ *Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 556.

¹³⁹ *Id.* ¶ 557. This statement seems to be in line with the conviction of Streicher and the acquittal of Fritzsche. See *infra* Part III.

¹⁴⁰ *Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 557. The Tribunal noted that the inciting remark could be implicit and that "a particular speech may be perceived as 'direct' in one country, and not so in another, depending on the audience." *Id.*

¹⁴¹ *Id.* ¶ 673(iv).

¹⁴² Gopalani, *supra* note 96, at 105. Akayesu himself stated that the audience would take his statements to mean all Tutsis, not merely RPF sympathizers. See *Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 709.

¹⁴³ It should be noted that the Tribunal did address the issue of whether an incitement charge could be supported when genocide in fact did not occur. See *Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 561. However, the issue of whether incitement is an inchoate offense was merely rhetorical given the scope of the Rwandan genocide. The Tribunal's cryptic discussion of this topic is beyond the scope of this Note.

¹⁴⁴ *Id.* ¶ 560.

¹⁴⁵ See ICTR Statute, *supra* note 13, art. II (stating that in order to be guilty of genocide a person must act with the intent to destroy all or part of a national, ethnical, racial, or religious group).

The final important case for the purposes of this Note is the case of Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze, commonly referred to as the *Media Case*.¹⁴⁶ The *Media Case* represented the first time since the conviction of Julius Streicher that members of the media were convicted of incitement to genocide.¹⁴⁷

Hassan Ngeze was the founder and publisher of the paper *Kangura*, which literally translates to “wake others up.”¹⁴⁸ *Kangura* was responsible for the publication of the Hutu “Ten Commandments,” which called for Hutus to “cease feeling pity for the Tutsi!”; for publishing an issue with a drawing of a hand holding a machete with the caption, “[w]hat weapons shall we use to conquer the *Inyenzi* once and for all?”; and for numerous other anti-Tutsi articles.¹⁴⁹ *Kangura* was not published during the 100 days, but the Tribunal found direct links between the paper and RTLM that continued throughout the 1994 genocide.¹⁵⁰

Ferdinand Nahimana and Jean-Bosco Barayagwiza were both involved with RTLM. Nahimana was a former history professor and head of the Rwandan Office of Information who was dismissed from that post because of falsely reported information that led to a massacre of Tutsis in 1992.¹⁵¹ After his dismissal, Nahimana started a steering committee in order to establish a radio station that reflected his radical ideals.¹⁵² With the help of President Habyarimana and other officials, Nahimana founded RTLM and began broadcasting vitriolic attacks on Tutsis.¹⁵³ Barayagwiza was a lawyer and government official who acted as legal counsel for RTLM and as a liaison between Nahimana and Ngeze who reportedly did not work well together.¹⁵⁴

¹⁴⁶ Prosecutor v. Nahimana, Barayagwiza & Ngeze (*Media Case*), Case No. ICTR 99-52-T, Judgment Summary (Dec. 3, 2003).

¹⁴⁷ See Recent Case, Prosecutor v. Nahimana, Barayagwiza, and Ngeze (the *Media Case*), Case No. ICTR-99-52-T (*Int'l Crim. Trib. for Rwanda Trial Chamber I Dec. 3, 2003*), 117 HARV. L. REV. 2769, 2769 (2004).

¹⁴⁸ Gordon, *supra* note 10, at 156.

¹⁴⁹ See *Media Case*, Case No. ICTR 99-52-T, Judgment Summary, ¶¶ 10–17. The similarity between *Kangura* and *Der Stuermer* should not be overlooked.

¹⁵⁰ *Kangura* and RTLM co-sponsored a competition calling on listeners of RTLM to identify their favorite past issues of the paper. The competition was initiated in order to reacquaint listeners with ideas expressed in past issues of the paper. See *id.* ¶ 19.

¹⁵¹ Gordon, *supra* note 10, at 159.

¹⁵² *Id.*

¹⁵³ DINA TEMPLE-RASTON, JUSTICE ON THE GRASS: THREE RWANDAN JOURNALISTS, THEIR TRIAL FOR WAR CRIMES, AND A NATION'S QUEST FOR REDEMPTION 29–30 (2005).

¹⁵⁴ Gordon, *supra* note 10, at 166.

In the time leading up to the 100 days, RTLM broadcast several brands of hateful rhetoric, including statements equating the terms *Inyenzi* and *Inkotanyi* with Tutsis, as well as direct attacks on specific members of the Tutsi community.¹⁵⁵ During the massacre, RTLM became more direct, calling for the extermination of all Tutsis and sending out a call for the recruitment of 100,000 Hutus to kill all of "one ethnic group," a call which, at the time, was understood to mean the destruction of all Tutsis living in Rwanda.¹⁵⁶ RTLM continued to broadcast throughout the 100 days and, once the RPF took back Kigali, moved its base of operations to stay on the air.¹⁵⁷

The *Media Case* established several new guidelines for incitement cases. First, in trying to strike a balance between the inherent freedom of speech and the desire to stop future genocides, the Tribunal rejected a speech-friendly American model and embraced what it called the international jurisprudence on incitement, a standard more sensitive to the prevention of discrimination.¹⁵⁸ After surveying other cases interpreting the legality of hate speech, the Tribunal adopted a four-part test to determine when a communication had exceeded the limits of acceptable speech. The Tribunal looked to the purpose of the communication, the actual text of the communication, the context in which the communication occurred, and the relationship between the communicator and the subject.¹⁵⁹

In applying the test to the defendants in the *Media Case*, the Tribunal found that not all of the communications rose to the level of incitement.¹⁶⁰ The Tribunal noted that a speech given by Barayagwiza in which he described discrimination that his parents faced at the hands of Tutsis did not rise to the

¹⁵⁵ *Id.* at 161.

¹⁵⁶ *Id.* at 162.

¹⁵⁷ *Id.* at 164.

¹⁵⁸ The tribunal surveyed international decisions based on several other international treaties that deal with inflammatory speech, such as the International Covenant on Civil and Political Rights and the European Convention on Human Rights. *See id.* at 171–72; Recent Case, *supra* note 147, at 2772. For a critique of the Tribunal's use of other treaties to determine standards for incitement, see Orentlicher, *supra* note 82, at 562–75 (arguing that it was inappropriate for the Tribunal to look to hate speech treaties in order to set the standard for incitement because those treaties are controversial and the Convention specifically rejected a ban on hate speech when it set the standard for incitement).

¹⁵⁹ Prosecutor v. Nahimana, Barayagwiza & Ngeze (*Media Case*), Case No. ICTR 99-52-T, Judgment Summary, ¶¶ 86–88 (Dec. 3, 2003); Gordon, *supra* note 10, at 172–73. The relationship between the communicator and the subject referred to whether the speaker was a member of a political minority or a repressed group.

¹⁶⁰ Gordon, *supra* note 10, at 174.

level of incitement because it was spoken before the beginning of the genocide, it was not spoken with the intent to incite, and it was an expression of a politically powerless group.¹⁶¹ However, the Tribunal did find that there were numerous specific instances offered by the prosecution that did rise to the level of incitement.¹⁶²

The Tribunal departed from its previous precedent when it came to the discussion of the necessity of a direct connection between the inciting remark and an act of genocide. In the *Akayesu* trial, the Tribunal made a direct finding of causation between his speech and the resulting killings.¹⁶³ However, in the *Media Case*, the Tribunal stated unequivocally that in incitement cases there was no need to make a finding of a direct effect in order to find incitement.¹⁶⁴ In reaching this conclusion, the Tribunal mentioned the Streicher case, noting that the IMT did not require a direct connection between *Der Stuermer*'s anti-semitic rhetoric and particular instances of violence.¹⁶⁵

Finally, the Tribunal concluded that it could exercise jurisdiction over the broadcasts of RTLM and editions of *Kangura* that preceded its temporal jurisdiction because of its view of incitement as an inchoate offense.¹⁶⁶ The Tribunal reasoned that since inchoate offenses are not completed until the acts are completed, inciting statements that preceded January 1, 1994 could be considered because the inciting act did not conclude until the genocide was completed.¹⁶⁷

The *Media Case* marked a watershed moment in the jurisprudence of incitement. The conclusions drawn by the ICTR in the *Media Case* will be considered and studied extensively as future courts attempt to grapple with the

¹⁶¹ *Id.* Similarly, the Tribunal found that an article published in *Kangura* entitled, *A Cockroach Can Not Give Birth to a Butterfly*, was not incitement even though it was filled with hatred for Tutsis because it did not call for action by its readers. *Media Case*, Case No. ICTR 99-52-T, Judgment Summary, ¶ 104.

¹⁶² *Id.* ¶¶ 98–106.

¹⁶³ See *supra* notes 132–35 and accompanying text.

¹⁶⁴ *Media Case*, Case No. ICTR 99-52-T, Judgment Summary, ¶ 89. The court did note that a finding of actual direct effect could go to a finding of the speaker's purpose. Confusingly, it states, “[t]hat the media intended to have this effect is evidenced in part by the fact that it did have this effect.” *Media Case*, Case No. ICTR 99-52-T, Judgment, ¶ 1029 (Dec. 3, 2003).

¹⁶⁵ *Media Case*, Case No. ICTR 99-52-T, Judgment Summary, ¶ 89. The Tribunal noted that Streicher's words had acted as a “poison” that infected the minds of Germans, although unlike *Kangura*, *Der Stuermer* continued publication after the killing of Jews had commenced. See *supra* text accompanying note 81.

¹⁶⁶ *Media Case*, Case No. ICTR 99-52-T, Judgment, ¶ 1017.

¹⁶⁷ *Id.*

intricacies of the balance between free speech and incitement to genocide. The defendants in the *Media Case* are currently appealing the decision.¹⁶⁸

With the history of the incitement charge adequately described, the question of Simon Bikindi's potential liability will now be considered.

VI. "ONE WHO SINGS WITH HIS TONGUE ON FIRE":¹⁶⁹ THE RISE AND (POTENTIAL) FALL OF SIMON BIKINDI

Simon Bikindi was born in a small village in the mountainous Gisenyi region of Rwanda.¹⁷⁰ He came to music early in his life and became a prodigy on the traditional instruments, the *inanga* and *iningiri*.¹⁷¹ As a performer, Bikindi celebrated the music and dance of Rwanda.¹⁷² His performances, and those of his group, the *Irndirio Ballet*, often blended traditional Rwandan melody and dance with modern themes.¹⁷³

Bikindi began work for the government at the early age of twenty-two in the Ministry of Youth and Sports.¹⁷⁴ His work for the Ministry continued until after the government fled into Zaire in July of 1994.¹⁷⁵ As a government official, he was a member of President Habyarimana's political party, the MRND.¹⁷⁶ According to the indictment against him, Bikindi was also one of fifty original shareholders of RTLM.¹⁷⁷

¹⁶⁸ See International Criminal Tribunal for Rwanda, Status of Cases, <http://www.ictr.org> (follow link to "Cases," then "Status of Cases") (last visited June 20, 2007).

¹⁶⁹ DYLAN, *supra* note 1.

¹⁷⁰ McNeil, *supra* note 4.

¹⁷¹ *Id.*

¹⁷² Bikindi supplemented his work with the government by performing at weddings. His first released cassette featured traditional Rwandan wedding songs. *Id.*

¹⁷³ *Id.*

¹⁷⁴ His post with the ministry involved organizing song and dance displays for visits from honored guests. *Id.*

¹⁷⁵ Prosecutor v. Bikindi, Case No. ICTR 01-72-I, Amended Indictment, ¶ 17 (June 15, 2005).

¹⁷⁶ See *id.* § II. The indictment alleges that Bikindi was a member of Habyarimana's MRND party, and as such, participated in membership drives and training for the *Interahamwe* militias. *Id.* ¶ 7. The indictment also alleges that the MRND instigated a "campaign to defeat the enemy," which included the use of Bikindi's music to sensitize Hutus to the slaughter of Tutsis. *Id.* ¶¶ 7, 10.

¹⁷⁷ See *Rwanda; The Genesis of a Killing Voice—RTLM*, AFR. NEWS, Apr. 24, 2006. The indictment also alleges that Bikindi conspired with President Habyarimana, Ferdinand Nahimana, and Jean-Bosco Barayagwiza to launch RTLM as an avenue for his music. *Bikindi*, Case No. ICTR 01-72-I, Amended Indictment, ¶ 9.

In the years leading up to the genocide, Bikindi was the most famous musician in Rwanda, and many of his compositions called for Hutu solidarity.¹⁷⁸ These compositions, among them *Nanga Abahutu* (*I Hate These Hutus*), *Bene Sebahinzi* (*Sons of the Father of the Farmers*), and *Twasezereye* (*We Said Good Bye to the Feudal Regime*), were very popular both in Rwanda and on the airwaves of RTLM.¹⁷⁹ Prior to the genocide, the songs were broadcast a few times a day, but during the 100 days, RTLM repeatedly broadcast the songs on an almost continuous loop.¹⁸⁰ In fact, Bikindi's voice dominated the airwaves at a time when radio was one of the few ways for Rwandans to receive any news.¹⁸¹ Bikindi himself was out of the country when President Habyarimana was assassinated and did not return to Rwanda until the 100 days was nearly over.¹⁸²

The prosecution alleges that Bikindi conspired with President Habyarimana to compose music in order to desensitize the Rwandan public to the slaughter of Tutsis.¹⁸³ Bikindi's most virulent song, *Nanga Abahutu*, calls out Hutus who break rank to fight with Tutsis, and the prosecution alleges that this message, like coded references in speeches given all over the country, was a call to slaughter Tutsis.¹⁸⁴ In the song, Bikindi sings, "I hate these Hutus, . . . who have renounced their identity, . . . and if I hate them, so much the better."¹⁸⁵ There is no denying that the perpetrators of the genocide adopted Bikindi's music and that his songs were broadcast on RTLM at a time when it was advocating the slaughter of all remaining Tutsis in Rwanda.¹⁸⁶ Under

¹⁷⁸ Bikindi has been called the Michael Jackson of Rwanda. See McNeil, *supra* note 4.

¹⁷⁹ *Bikindi*, Case No. ICTR 01-72-I, Amended Indictment, ¶ 14; McNeil, *supra* note 4. Nowhere in the indictment does the prosecution say that Bikindi called for the extermination of the Tutsi in his music, although there are allegations that Bikindi made statements on the radio to that effect. See *Bikindi*, Case No. ICTR 01-72-I, Amended Indictment, ¶¶ 33–40 (alleging that Bikindi exhorted gatherings of *Interahamwe* to "work" (a coded reference to kill); that he stated at a rally, "[s]ee how the Tutsi are exterminating you, the Hutu. If you do not react right away it's your fault"; that he called RTLM and reported on Hutus who were stopping attacks on Tutsis; and that he drove a vehicle with a public address system exhorting locals to "exterminate quickly the remaining ones.").

¹⁸⁰ *Bikindi*, Case No. ICTR 01-72-I, Amended Indictment, ¶ 14.

¹⁸¹ McNeil, *supra* note 4.

¹⁸² Bikindi was in Europe to arrange a tour for his troupe, the *Irndirio Ballet*. *Id.*

¹⁸³ The indictment alleges that Bikindi would compose and record a song with the financial backing of the government, and then the song's content would have to be accepted by the government. *Bikindi*, Case No. ICTR 01-72-I, Amended Indictment, ¶¶ 12–13.

¹⁸⁴ *Id.* ¶¶ 16, 40–41.

¹⁸⁵ BIKINDI, *supra* note 2.

¹⁸⁶ McNeil, *supra* note 4.

Rwandan law, an artist can request that his song not be played on the air; the prosecution alleges that Bikindi's failure to request that RTLM stop playing his songs was a de facto acceptance of the radio station's genocidal program.¹⁸⁷ Bikindi's failure to stop the songs from being broadcast is at least circumstantial evidence of his intent to incite genocide. During the time leading up to the 100 days, Bikindi also performed the musical compositions at rallies of the *Interahamwe* militias and at other government sponsored events.¹⁸⁸

The singer responds to these allegations by arguing that the prosecution is taking his songs out of context and that the songs were merely expressions of his patriotic beliefs in Hutu solidarity.¹⁸⁹ As far as performances at *Interahamwe* rallies and government functions, Bikindi argues that as a government official he was obliged to perform at those functions, and also, he could not stop people from taking his musical expressions and turning them into something that he did not intend.¹⁹⁰ Bikindi's former mistress claims that he was not animated by hatred, but more by an opportunistic attempt to please his bosses.¹⁹¹ However, if the allegations of direct conduct during the genocide contained in Bikindi's indictment prove to be true, then his argument that he lacked genocidal intent will be seriously undercut.¹⁹²

In order to obtain a conviction, the Tribunal will consider the factors elucidated in the *Media Case*: the purpose and content of the communication, the context of the communication, and the relationship between the speaker (here singer) and the subject. For the purpose analysis, the prosecution will argue that Bikindi composed the songs with the intent and purpose of

¹⁸⁷ *Bikindi*, Case No. ICTR 01-72-I, Amended Indictment, ¶ 41.

¹⁸⁸ In addition to desensitizing the populace to murder, the prosecution also argues that Bikindi's performances were used as a recruitment tool for the *Interahamwe*. *Id.* ¶ 16 (alleging that as a result of "the mobilizing effect" of Bikindi's music, a member of his dance troupe was recruited into the *Interahamwe* and participated in killing Tutsis).

¹⁸⁹ Bikindi's lawyer has stated that "Bikindi was only doing his citizen's duty. The country had been invaded and as a good patriot, Bikindi urged people to mobilize against the invaders. . . ." *Simon Bikindi, Extremist Singer*, INT'L JUST. TRIB.—ENGLISH, Sept. 11, 2006.

¹⁹⁰ McNeil, *supra* note 4.

¹⁹¹ Bikindi's former mistress, herself a Tutsi, stated that when asked why he wrote *Nanga Abahutu*, Bikindi replied, "[t]he government obliges me to write these songs. If I hear the R.P.F. is coming to Kigali next month, I'll write a song for them." *Id.*

¹⁹² In addition to alleging incitement to genocide through music, the indictment alleges that Bikindi ordered the killing of several Tutsis and oversaw the killing of many more at the end of the 100 days. *See Bikindi*, Case No. ICTR 01-72-I, Amended Indictment, ¶¶ 42–47. Bikindi continued his support for the MRND after they fled to neighboring Zaire. *Id.* ¶ 17.

inflaming the blood lust of the Hutus. As discussed earlier, the Tribunal does not require a showing of direct consequences from the inciting remark in order to convict, but will consider any direct effects in order to infer intent on the part of the remarking party.¹⁹³ Here, however, the songs had been composed and popularized for quite some time before the genocide occurred, and unlike Akayesu's speech, it will be hard to find a direct link between the playing of a song and an immediate act of genocide. It is necessary for the Tribunal to find that Bikindi shared the genocidal intent of those committing the direct acts.¹⁹⁴ However, if the prosecution proves that Bikindi took part in the genocide, the Tribunal will likely infer Bikindi's intent to incite genocide through his music.

It is likely that the court will reference the “poison” theory espoused in the Streicher and *Media Cases*. Under this theory, the prosecution would argue that like Streicher's anti-semitism and *Kangura's*/RTLM's inflammatory attacks on Tutsis, Bikindi's music helped create an atmosphere conducive to genocide that infected the minds of Rwandans. However, in both the Streicher and *Media Cases*, the inciting remarks were much more direct, calling specifically for the genocide to occur. Here, Bikindi at least has an argument that his songs only rose to the level of Hans Fritzsche's news casts, merely patriotic reflections of a country at war.¹⁹⁵

Application of the “poison” theory would also help the Tribunal answer any argument by Bikindi that the only act of incitement that he committed during the temporal jurisdiction of the Tribunal was failing to request that RTLM stop playing his songs. As the court noted in the *Media Case*, it can consider inciting remarks that fall outside the temporal jurisdiction of the court because incitement is an inchoate offense that is not completed until the genocidal acts occur.¹⁹⁶ This makes it likely that the court would consider the songs that were written and recorded before January 1, 1994. Considering songs that were written and performed before 1994 raises an interesting question regarding the timing of intent. The prosecution must either argue that Bikindi had a genocidal intent when he wrote or recorded the songs, or fallback on the theory that Bikindi's main act of incitement was failing to request that RTLM stop playing his music. However, it seems unlikely that Bikindi could have known

¹⁹³ Prosecutor v. Nahimana, Barayagwiza & Ngeze (*Media Case*), Case No. ICTR 99-52-T, Judgment Summary, ¶ 89 (Dec. 3, 2003); see also *supra* notes 164–65 and accompanying text.

¹⁹⁴ See *supra* text accompanying note 144.

¹⁹⁵ This theory might explain why Bikindi has been defending his songs as patriotic expressions. See *supra* note 189 and accompanying text.

¹⁹⁶ See *supra* text accompanying notes 166–67.

at the time he wrote this music what the climate in Rwanda would be in the time immediately preceding and during the 100 days. The final spark that ignited the genocide was the death of President Habyarimana, and it is questionable if it would have been as widespread and deadly without this occurrence. Nevertheless, the prosecution has alleged that Bikindi conspired with Habyarimana on lyrics in an effort to desensitize the Hutu.¹⁹⁷ If the prosecutor can prove this allegation, Bikindi's intent may be inferred.

The text of Bikindi's songs will also be a point of contention at his trial. The prosecution alleges, and has experts to testify, that Bikindi's songs of Hutu solidarity were essentially coded calls for the destruction of the Tutsi.¹⁹⁸ However, unlike Akayesu, Kambanda, or Mugesera's comments, Bikindi's songs could have more than one reasonable interpretation and do not seem under any interpretation to directly call for the killing of anyone. It will be up to the Tribunal to determine if a song of Hutu solidarity would be understood to be a coded reference to killing Tutsis.¹⁹⁹ Alison DesForges, a Rwandan specialist for Human Rights Watch, in speaking about the *Bikindi* case, noted that many things in Rwanda have a hidden subtext and pointed out a Rwandan proverb that states, "[a] message is given to many, but those who are meant to understand, understand."²⁰⁰

The Tribunal will also have to consider, as it did in *Akayesu* and the *Media Case*, the context in which Bikindi's music was heard. The atmosphere in Rwanda at the time of the composition of Bikindi's music was incredibly unstable. Bikindi's songs, although potentially innocuous in a vacuum, were often broadcast following or preceding calls for attacks on Tutsis.²⁰¹ The context of composition seems to favor the prosecution's case, although Bikindi argues that the context is what inspired him to compose the songs. Bikindi claims that songs like *Nanga Abahutu* were merely reflections of the times in which he was living, and their misuse or appropriation by those committing the genocide was beyond his control.²⁰²

Finally, the Tribunal must consider the viewpoint of the speaker of the inciting remark and will give more deference to an expression of a minority or oppressed group. A song like *Nanga Abahutu* seems to be an expression of a

¹⁹⁷ *Bikindi*, Case No. ICTR 01-72-I, Amended Indictment, ¶ 13.

¹⁹⁸ See *Simon Bikindi, Extremist Singer*, *supra* note 189.

¹⁹⁹ As in the *Akayesu* and *Media Case*, the prosecution intends to call experts to testify that the songs were in fact coded references to killing Tutsis. *Id.*

²⁰⁰ McNeil, *supra* note 4.

²⁰¹ *Bikindi*, Case No. ICTR 01-72-I, Amended Indictment, ¶ 41.

²⁰² McNeil, *supra* note 4.

majority group. However, Bikindi could argue that, like Jean-Bosco Barayagwiza's speech describing the discrimination faced by his parents at the hands of the then Tutsi ruling class, Bikindi's music is merely an expression of the frustration felt by Hutus because of their past discrimination, and therefore more deserving of protection. This argument would certainly seem to be a stretch as Bikindi's music, while reflective of past discrimination, focused on the current role that the Hutu played in Rwandan culture, that of the controlling majority group.

Based on the considered precedent and the context in which Bikindi performed and composed his music, it seems likely that Bikindi will be convicted of incitement to commit genocide through his music. Bikindi's trial is ongoing and a verdict could come 2007, although any appeal of the case would certainly take years.

VII. “SOMETHING IS HAPPENING HERE BUT YOU DON'T KNOW WHAT IT IS”.²⁰³ REVERBERATIONS FROM A MUSICIAN'S TRIAL

This Note has endeavored to trace the evolution of the charge of incitement to genocide and its potential application in the case of Simon Bikindi. Neither of these paths reach the ultimate question that was posed at the beginning of this undertaking: whether it is appropriate to charge a musician for inciting genocide through his music. In Bikindi's case, it seems unlikely that anyone would argue that he is an individual who should be lauded for his actions. At best, Bikindi's behavior smacks of nearly criminal short-sightedness, and at worst, reflects a calculated attempt to wipe an ethnic group off of the planet.

Considering the question of Bikindi's guilt illustrates the grey areas that are present in almost all incitement cases. The case raises the issues that underlie every incitement case: at what point can a person's statement be considered to have caused another's actions, and how direct must those statements be so that society as a whole feels comfortable in finding culpability. In Diane Orentlicher's critique of the *Media Case*, she notes that since the *Media Case* was decided in 2002, the Committee to Protect Journalists has documented close to fifty cases of governments using claims of ethnic divisionism to silence journalists.²⁰⁴

The mere fact that Bikindi has been charged in this case could lead to a backlash against musicians who arguably support one ethnic, political, or

²⁰³ BOB DYLAN, *Ballad of a Thin Man, on HIGHWAY 61 REVISITED* (Columbia Records 1965).

²⁰⁴ Orentlicher, *supra* note 82, at 593.

social group over another. Considering that Bikindi's songs are characterized by the prosecution as only songs of Hutu solidarity and not direct calls for the killing of Tutsis, a large range of potential music could be affected.

However, the ICTR has the opportunity to craft its decision in the Bikindi case in a way that would protect freedom of expression. By stressing the context in which Bikindi wrote and performed these songs and his position of influence with Rwandans, the Tribunal can limit the potential impact of any conviction. It was not the fact that Bikindi merely wrote and performed this music that made his actions potentially criminal. Rather, it was the message of the songs, combined with their presentation amidst calls for outright genocide on the airwaves of RTLM and at gatherings of the *Interahamwe* that made Bikindi's music so deadly.

Furthermore, the ICTR should reconsider the necessity of a direct link between the inciting remark and an act of genocide when the remarks are indirect. All of the ICTR's previous convictions for incitement presented direct links between the inciting remark and acts of genocide, yet the Tribunal in the *Media Case* chose to state that no direct link was necessary between the remark and the genocidal act. Also, in all previous cases, the inciting remarks were clearly understood to be references to the killing of Tutsis. In cases where the remarks are ambiguous, and therefore more likely to be misinterpreted by a pro-censorship government, it may be necessary to re-incorporate the direct effects test that was adopted in *Akayesu* and disregarded in the *Media Case*. This holds true in the case of most forms of artistic expression. If the Tribunal finds that Bikindi's music was understood to be a call for the murder of Tutsis, then the lower standard should be applied in his case; but it is important for the Tribunal to note the potential effect that Bikindi's conviction could have on the freedom of expression and temper its jurisprudence accordingly.

In the final analysis, it seems clear that there is a difference between Bob Dylan's songs of protest and Simon Bikindi's songs of Hutu solidarity. While Dylan wrote songs that called for change in an atmosphere of political unrest, America in the 1960s was a far cry from Rwanda in 1994. Dylan's music protested injustice and suffering and plead for positive change while Bikindi was an opportunistic exploiter of hatred and animus. Any conclusion to the contrary would downplay the deaths of close to one million people.