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Genocide, Press Freedom, and the Case of Hassan Ngeze

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II. IMPORTANCE OF FREEDOM OF THE PRESS

Freedom of press is guaranteed in the Constitutions of many nation states as well as many international human rights conventions. Press freedom is almost universally seen as necessary for the existence of any real democracy. Justice William Brennan, "Address," 32 *Rutgers L.Rev.* 173 (1979) As the European Court of Human Rights says repeatedly in virtually boilerplate language: "Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress..." E.g., *Öztürk v. Turkey*, ¶ 64, #22479/93 (ECHR, 28 Sept 1999). Increasingly, press freedom is seen as equally essential to the framework needed for economic development. World Bank Institute, *The Right to Tell: The Role of Mass Media in Economic Development* (2002).

These points are so widely accepted that they might seem to require no elaboration. Still, some comments on how a free press is vital to a society's well being, how it not merely a luxury that rich societies can afford, is appropriate in placing the precedential importance of the present case in context. Moreover, since all recognize that there must be some limits on the scope of press freedom, some understanding of its specific democratic roles can be informative in understanding the appropriate scope of those limits.

The importance of a free press for social justice has been most famously illustrated by the claim of Amartya Sen, Harvard's 1998 noble prize winner in economics, that no country with both a democracy and a free press has ever sustained a serious famine. A. Sen, *Poverty and Famines: An essay on Entitlement and Deprivation* (2nd ed. 1994); A. Sen, "The Economics of Life and Death," *Scientific American* 40 (May 1993). Sen emphasizes that famines occur not so much because of lack of food but because of failures of wealth distribution that result in people not being able to pay for food – with countries having famines often exporting food when the starving people have no means to pay. Assuming the empirical accuracy of Sen's claim, the logic is essentially that if there is a free press that can effectively and continually expose the existence of the famine, competitive political parties would be effective enough at exploiting any governmental failure to respond with distributional measures that no government facing competitive democratic elections would fail to respond effectively.

Beyond this dramatic example of how a free press can mobilize pressure for a political response, a free press performs at least three essential features for a democracy. Keeping each of these functions in mind has relevance for the importance of protecting freedom of the press in the context of interpreting the crimes charged in this case. First, the most recognized role of a free press is to serve as a "watchdog" on government and its officials (as well as, hopefully, a watchdog of private centers of power). The press must be able to expose failures of and abuses by government and government officials – with this capacity providing probably the greatest democratic safeguard against both malfeasance and misfeasance by government. Justice Potter

Stewart, "Or of the Press," 26 *Hastings L.J.* 631 (1975); Vince Blasi, "The Checking Value in First Amendment Theory," 1977 *American Bar Foundation Res. J.* 521. Democratic development absolutely depends on the press being permitted to perform this watchdog or "checking" function effectively; the aim of preventing the press playing this role may be the single biggest reason for governments' censoring the press or abridging its freedom. Of course, no government admits that its censorship is undertaken to cover-up governmental wrongdoing. Rather, governments will assert that censorship serves to protect honest reputations, good morals, security, privacy, public harmony and consensus or to prevent destructive social divisions. However, once the legal order givers the government any authority to censor the press when it criticizes or negatively characterizes the government, government officials or government policies or when it strongly advocates alternative approaches to social issues, the press's capacity to perform its crucial watchdog role will be endangered.

Second, people need information relevant to their political concerns. Only the mass media is equipped to provide such information and make it publicly accessible. In doing so, the press inevitably will make errors. Media content will inevitably contain factual inaccuracies and the press will make questionable, sometimes clearly misguided, decisions concerning what information is relevant to the public. However, any hope that a nation will maintain a robust free press must not punish a press for these errors, at least if honestly made. This is the lesson taught by *New York Times v. Sullivan*, 376 U.S. 254 (1964). There the Court held that the press could not be held civilly (or criminally) libel for defaming a public official unless the plaintiff could prove the falsity of what was said and prove that the false statement was made "with knowledge of its falsity or with reckless disregard of whether it was false or [not]." In other words, unless the paper was demonstrably not contributing any real information or viewpoint to the public sphere *and* was not showing any real interest in doing so – that is, unless its legal critics could show that the press' assertions were false and knowingly (or recklessly) false, freedom of the press should protect the media entity (or writer, speaker, or publisher) from liability. After observing, in appropriately understated language, the nation's "profound commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," the Court explained "erroneous statement is inevitable in free debate, and [it] must be protected if the freedoms of expression are to have the 'breathing space' that they need [to] survive.'"

Third, democracy and politics concerns the discussion and choice of values and involves the attempt to channel disagreement or conflict about values so that they can be compete primarily at the level of discussion and advocacy. For people to respond to their differences and conflicts intelligently they need, *both* as a society as a whole and within segmented portions thereof, to explore these differences and try to decide how to respond. Both levels – society as a whole and separate segments of society, e.g. religious, racial, sexual, occupation subgroups – are important here. Not only in the society as a whole but also within any group, there will surely be different viewpoints and uncertainties about both values and strategies. Within a group, there will be disagreement about how to relate to other societal groups and how to define one's own

group. Democracy must mean that people have a right to explore these alternative views. Thus, a free press must mean allowing different media entities to champion one or another view as to issues involving either societal or subgroup identity and about either group or national policies. Media entities must be able to engage in extreme partisan speech directed either to society as a whole or, sometimes, to members of a particular segment of society and to recommend how either that particular societal segment or society as a whole should define itself.

For example, in the United States among the AfricanAmerican population there has consistently been disagreement about the extent that it should assimilate with the rest of the population or should maintain a largely separate and independent existence – with many variations and compromises between these extreme positions. These discussions must allow for those AfricanAmericans who maintain that Caucasians (and/or Jews) are essentially evil, oriented toward domination, not to be trusted, potentially murderous, and sexually problematic (this regularly becomes one of this view's themes). Expressive freedom must encompass those who strive for "black power" either in general or within particular domains. The same can be said for other groups – freedom must be accorded to the expression and the media of Jews who oppose intermarriage and see gentile women as temptresses and gentiles or Germans as potentially genocidally dangerous. Or media of Palestinians or Kurds or, in the United States, media of southern racist whites or Klansmen. Intelligent individual and societal response to contending views about social policy, about the world and about others, has depended on allowing individual media entities – as well as books, drama, movies and other media or cultural mediums – to explore or advocate differing perspectives on these matters. At best, cutting off this discourse essentially means imposing one dominant vision of the correct answer – an overtly undemocratic response that assumes people are incapable of intelligent choices under conditions of freedom. At worst, although cutting off this discourse may temporarily produce peace and temporarily suppress conflicts and issues, the suppression can prevent people from eventually resolving conflicts intelligently and humanely. Predictably – although predictions can never be certain – suppression makes it more rather than less likely that when the unresolved conflicts eventually are brought to the fore the struggle will take the form of violent conflict, and quite probably irrational conflict, rather than peaceful and compromising democratic discourse.

Beyond the contributions of a free press to democracy (and social justice and economic development) as reasons for its high status as a basic human right, there is an additional pragmatic reason why strong legal protection of this freedom – a reason directly relevant to this case – is vitally important. Governments have an almost reflexive tendency to suppress press freedom in ways that undermine democracy and social justice. They have an almost reflexive tendency to blame bad situations on press abuses rather than government failures to enforce decent laws or develop decent and effective policies. The press is an extraordinarily convenient scapegoat and its suppression routinely convenient. This tendency exists in all democracies but possibly most strongly in nations still developing politically and economically, especially when (as is often the case) these governments are looking for quick "fixes" to deeper problems or when they fear political or popular opposition inspired in part by the government's own faults. This tendency suggests the practical importance of avoiding any legal precedent that would

seemingly or rhetorically justify limitations on the press freedom that democratic, economic, and social development depends.

The above suggests the overriding importance of this case not just for Ngeze but for the future of Africa. It could be – I think wrongly – argued that only conviction of Ngeze will send an effective warning to those with racist agendas; that conviction would be a meaningful step toward preventing future genocides. In contrast, if the point above about suppression as usually only dampening conflict until it springs back in its most violent form is correct, this strategy of suppression is misguided as a response to racial hatred. Of course, certainty is not possible here. Justice Oliver Wendell Holmes observed that this choice in favor of freedom of speech and the press "is an experiment" but he added, it is "at any rate the theory of our Constitution." *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, dissenting). As America's leading theorist of freedom of expression argued: "[S]uppression promotes inflexibility and stultification, ... suppression conceals the real problems confronting a society, diverting public attention from the critical issues... Moreover, the state at all times retains adequate powers to promote unity and to suppress resort to force. Freedom of expression thus provides a framework in which the conflict necessary to the progress of a society can take place without destroying society.... Resort to the suppression of anti-democratic groups ... intensifies hostility, drives the opposition underground, and encourages the solution of problems by force rather than by reason. It does not remove doubts or differences, but rather eliminates the procedures by which doubts can be resolved and differences adjusted. It provokes recriminations and reprisals that tend to feed upon each other..." Thomas I. Emerson, *The System of Freedom of Expression* 7, 53 (1970). From this, Emerson concludes that, no matter what the direction the speaker seeks to go or the goals he seeks to obtain, "the rule of full protection for all expression applies without qualification." Id. at 53. In this view of Emerson, the best chance for safety – an effective defense against future genocide – lies not in sending the message that purportedly "extremist' speech will be punished, but that a sharp line will be drawn be speech, which will be protected, and action, including the genocidal actions that should be punished.

People capable of democratic government must be able to hear – and have a responsibility to reject – advocacy of even the most offensive acts or extreme attitudes. Moreover, that advocacy will often serve the important function of indicating real divisions within a society and real problems that society must address. Of course, this view of people capable of democracy also implies that people must be personally responsible for how they respond to suggestions. Conviction of both those who actually commanded genocidal acts and those who actually carried out those orders is surely desirable – both as a matter of justice and as precedent to warn future actors. However, even discourse that can be said to have created the environment or stimulated the beliefs that eventually lead to such acts should be sharply distinguished from the punishable acts themselves if society is to maintain the possibility of people being able to freely and democratically discuss their concerns.

The point about the need to protect press freedom may be even stronger in the current historical context. It is not too extreme that to suggest that even if the journalism of Ngeze and

the content of his paper, *Kangura*, were not only irresponsible and despicable but even approached the limit of acceptability for a free press, a verdict against Ngeze based on this journalism could seriously undermine the political and economic future of Africa . Even if punishment here could be "legally" distinguished in later cases from improper suppression of press freedom – itself a big "if" – the danger is real that such a verdict imposing liability here could and would be rhetorically or politically misused by authoritarian rulers in the future to justify suppression of press freedom in their country. The consequences could be disastrous for both democracy and peaceful advancement of social justice. Africa, and the world as a whole, may need to punish acts of genocide but it vitally needs a freer, less censored press. Any precedent that could be rhetorically or politically used for the opposite result is to be regretted.

III. RELEVANCE OF DOMESTIC U.S. OR OTHER NATIONAL CONSTITUTIONAL NORMS OF PRESS FREEDOM TO CRIMES SUBJECT TO JURISDICTION OF THIS TRIBUNAL

Part IV will discuss U.S. constitutional protection of freedom of expression, which is the area of my expertise and about which I have been asked to testify, as it would relate to charges against Ngeze. I need to say a few words to explain the relevance of such discussion to the matter before this Tribunal. Obviously, one nation's domestic constitutional order does not and should not have any binding force before this Tribunal. Still, there are three reasons why this domestic discussion should have relevance here. Most importantly, this national treatment is appropriately invoked to the extent that the approach it describes proves persuasive as to wisest interpretation of the statute under which this Tribunal operates. For example, in the case of *Ceylan v. Turkey*, #23556/94, (ECHR, Grand Chamber, 8 July 1999), Judge Bonello concurred, expressing the view that the U.S. Constitutional approach to freedom of expression provided a fully persuasive approach to the incitement alleged in that case. Id. at 18 (Judge Bonello, concurring).

Second is a controvertible observation about the juridical/political role of a tribunal such as this. Nuremberg set the still controversial precedent of international jurisdiction to condemn crimes that offend basic standards of humanity. The legitimacy of such intervention of the international community may well depend on the crimes committed being universally condemned by civilized nations. This status certainly applies to the offense of genocide and most if not all of the findings of liability at Nuremberg. (I will discuss the somewhat more specifically the controversial case of Julius Streicher in more detail in Part V.) This status would not apply, however, to activities that, even if clearly offensive to most people, was behavior that some democratic countries not only fail to outlaw but in fact affirmatively protect as a matter of basic constitutional law. No country protects the murder of a category of people identified by their ethnicity or religion or even the unprovoked murder of a single person by another. International treatment of this act, especially in the context of genocide, as an offense subject to either national or international criminal jurisdiction should not be troubling. The situation is different, however, if the alleged act would be protected as a matter of basic constitutional right by some – even if not by all or even most – democratic countries. In that context for the act to be

a basis of conviction by an international tribunal raises serious questions about the legitimacy of the tribunal. To amplify this general premise, there is an additional point to be made here.

Third, this general premise is raised most acutely in the context of the particular issue involved here. Surely being a democratic country and providing the rights essential to the country's democratic nature should never be contrary to international law or lead to an offense before an international tribunal. The problem is that the essential elements of democracy are not universally agreed upon but are overtly subject to serious good faith contestation. Some countries believe, and it would be presumptuous of me to deny the plausibility of their judgment, that various forms of racial hate speech are inconsistent with humane or democratic standards of mutual respect. Others think that, at least in many circumstances, democratic legitimacy requires that people who harbor such hate be able to express those views and that people who believe in offensive race-based practices be able to advocate their views – and it is the responsibility of other people and society as a whole to critically respond and reject those views. In areas such as this where the very meaning of democracy is contested in good faith by generally intelligent and decent people and where different nations take different positions, it would seem particularly wise ultimately to leave the issue to local deliberation rather than to hold that the exercise of rights that some countries view as basic to democracy is a crime under international law.

From this perspective it should give this Tribunal pause to find Ngeze guilty on the basis of behavior if that behavior would be constitutionally protected in the United States under its notion of freedom of the press, a constitutional right whose ultimate significance lies in its essential contribution to democracy. This conclusion provides a reason to consider U.S. constitutional law to see if this characterization applies – to see if Ngeze's publication would or would not be constitutionally protected in the United States. My claim, of course, does not imply any assumption that the American position on the proper meaning of press freedom is the only possible view that a democratic country could take. My only assumption is that the American position is a plausible interpretation of the contested conception of democracy. And then my claim is that an international tribunal should strive to make room for the American approach as one possibility among others.

I should add, that although clearly intelligent disagreement exists, it is my view that on this issue the American position is quite wise – as I will further explain in the next section. I should also note that though my conclusion surely in part reflects my being an American, it is not due to an uncritical acceptance of standard American positions. I would not, for example, claim that the United States is civilized or decent in most of its international interventions, especially those involving the use of military force. I do, however, claim that the United States has generally been thoughtful in its *domestic* consideration of basic constitutional political and civil rights. Even this does not mean it always reaches the right conclusions. I have argued that it often has reached wrong results in its failures to recognize fundamental economic and social rights. Even in respect to the constitutional status of the press, I have been one of the most vocal American critics of some court decisions and have defended an approach to structural regulation of the press that is much closer to the European model than the American. But in respect to the

substance of what the press should have a right to print, in respect to resistence to censorship of content, I find the U.S. Supreme Court convincing in its arguments to protect at least as much as it does.

Thus, my main suggestion is that it should give an international tribunal considerable pause to find a person guilty of the crime of genocide or direct and public incitement of genocide for engaging in behavior that any civilized country could – or that the United States does – recognize as an exercise of a fundamental right upon which democracy depends. For this reason, it should be troublesome to an international tribunal to find a person guilty if the United States (or other countries) would view the condemned behavior as a constitutionally protected exercise of freedom of the press.

IV. US CONSTITUTIONAL STANDARDS FOR PROTECTION OF PRESS FREEDOM

Although most countries and many international agreements state a commitment to both free speech and a free press, no one thinks that these norms protect all communications. Speech can be the sole tool used to commit murder such that no one denies that sometimes a speaker can be charged with murder. For example, murder could be charged if, knowing that a glass of liquid contained a good tasting but deadly poison, someone told another to "drink the refreshing contents of the glass," and the person drank or if someone told a blind person to step to the left in order to avoid danger, knowing that the leftward step would cause the blind person to fall off the edge of the cliff to her death. Early in this century in the United States, someone – reportedly thugs hired by management – went to a crowded Christmas party held for the children of striking workers and yelled "fire," a knowingly false statement that predictably caused a great panic with the result that a number of the children were crushed to death while trying to get out. Surely, if caught, the person who intentionally caused this result could have been prosecuted. Likewise, during concerted action of several people to commit a particular crime, one person's role might be limited to speaking. The role of the head of the group of bank robbers may be merely to give verbal directions to his gang. This merely verbal role would not insulate her from prosecution.

On the other hand, people would have no real freedom to explore their own views, to advocate changes in their world, or merely to provide useful information or present serious viewpoints if their expression could be the basis of legal liability whenever harm to one or even many people resulted from other people's responses to their communications. This section will briefly describe, in relation to issues that arise in this case, the protection of speech and the press that courts in the United States understand to be constitutionally mandated as well as limits to that protection that these courts think are constitutionally permissible. This section will also make some attempt to describe the major theoretical justifications for the degree of protection given.

The Democratic Premise

Possibly the most central premise of democracy is that a self-governing people must have virtually complete freedom in presenting and hearing ideas and proposals, no matter how venal, offensive, unwise, or inhumane the idea or proposal – otherwise people's capacity to be self-governing would be denied. Moreover, in the real of passionate advocacy of ideas and proposals, the offensive nature of the presentation cannot be a justification for suppression. On the other hand, this same premise of respect for individual decision-making autonomy that requires expressive freedom also means that people can and should be held responsible for their acts. The premise of respect for people's capacity to be self-governing means that a person should seldom be permitted to deflect responsibility for what she does on to another person, for example, because the other person suggested the act in which she subsequently engaged. The distinction between speech – which offers itself for acceptance, rejection, or discussion – and action is fundamental if people are to be treated as free and responsible. As the United States Supreme Court observes: "Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech." *Kingsley Int'l Pictures Corp v. Regents*, 360 U.S. 684 (1959). The converse of this premise is an insult to free adults. The converse suggests that citizens do not have the capability, or will not assume the responsibility, for knowing how to act. The converse assumes that citizens act merely as the puppets of other people's, the speaker's, will. And the converse is improperly paternalistic in not allowing people to hear and hopefully, though inevitably not always, to be revolted by the evil counsel.

Thus, a central requirement for democratic society is that the law recognize, and that people learn, that actions do not follow automatically, and should not be understood to follow automatically, from expression. Action requires the independent decision by the listener to accept the speaker's counsel and then to act on the basis of that counsel. Self-governing individuals must learn to take responsibility for what they do, while democracy must operate on the premise that advocacy of any action, no matter how heinous, merely presents one view for people to consider. In a court case where an extreme right-wing (arguably fascist) speaker "viciously" criticized various political and racial groups, saying that his adversaries were "slimy scum," "snakes," and "bedbugs," and where the atmosphere at the time and place of the speech was extremely tense – about 28 windows were broken and stink bombs were thrown – the Supreme Court overturned the speaker's conviction for even the minor offense of breach of the peace, observing that "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1 (1949).

Of course, the small scale tumult in *Terminiello* cannot be compared to genocidal murders. Still, one reason for allowing expression and punishing action is to emphasize that no self-governing person should be permitted to excuse criminal action on the basis that it was recommended by someone else's speech. Rather, as a self-governing person she should be permitted to offer or to hear any recommendation, no matter how horrendous. Describing an eventuality that when he was writing in the pre-Holocaust days of 1925 may have been his view

of virtually the worst imaginable, the aristocratic Justice Oliver Wendell Holmes argued: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." *Gitlow v. New York*, 268 U.S. 652 (1925). The world's – and the law's – responsibility is not to prevent evil ideas from being expressed but rather is, in the first instance, to prevent them from being acted upon and, eventually, to engage in more speech and teaching that convinces people that these ideas are unpersuasive. In a world filled with unrepentant racial antagonism and beliefs of ethnic superiority, peace and toleration almost surely will not be produced by attempted suppression or by prohibiting the advocacy of such ideas. Rather, as Justice Holmes implies, the only responsible basis for a long term hope of peace and reconciliation is that people – and media and countries – learn to answer other people's objectionable advocacy. Hope lies in learning to effectively present more persuasive, more appealing, views and alternatives.

Clear and Present Danger

The famous judicial test – speech is protected unless it creates a "clear and present danger ... [of] substantive evils that Congress has a right to prevent," *Schenck v. United States*, 249 U.S. 47 470 (1919) – may have originated as the criteria for identifying a criminal attempt carried out with speech. In any event, the authoritative modern interpretation of the so-called "clear and present danger test" occurred in a case involving hooded Ku Klux Klan members who were seen burning a cross (a symbol of criminal terrorism practiced especially against African Americans) and making statements including: "I believe the nigger should be returned to Africa, the Jew to Israel;" and "its possible that there might have to be some revengence taken." In invalidating the statute and overturning the conviction, the Court announced the current legal standard. The State cannot "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."*Brandenburg v. Ohio*, 395 U.S. 444 (1969).

This test makes clear that advocacy or incitement to lawless action is constitutionally protected unless the following elements, each of which is crucial, all coalesce . Before a court can treat the communication as a basis for liability, (i) the communication must be *likely to cause* (i.e., "incite or produce") action to occur; (ii) this likely action is "*imminent*," (iii) the action is "*lawless*;" and (iv) the imminent illegal action is the *speaker's intended aim* – that is, the speech must be "directed to" producing the action. I want here to note explanations, mostly given by the Court, for why each of these requirements must be met before the law is permitted to restrict the speech.

(i) likelihood of causing. Speech that creates a *likelihood* of causing a crime, when combined with intent, potentially constitutes a criminal attempt. Speech that *does* "cause" a crime, when combined with intent to cause, often constitutes participation in the crime itself as the earlier murder examples of directing a person to drink or step to the left illustrate. In any event, the first criterion of "likelihood" (or in Holmes and Brandeis' original formulation, the

criterion of "clear" danger) is obviously necessary if press freedom is to receive any real protection. Mere fear of bad results or tendency to have bad results cannot justify suppression of speech or else virtually any provocative communication could be punished. As Brandeis observed, "[m]en feared witches and burned women... To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced." *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring). Although in retrospect, fear of bad consequences may have been justified by observation of the actual events in Rwanda, that backwards looking conclusion short cuts analysis and can represent, in a sense, an unreasoned attempt to find scapegoats for the almost unimaginably bad events. Still, whether or not the publication of *Kangura* did cause or was likely to cause – both of which on the record I find extraordinarily doubtful and certainly unproven – the issue necessarily is: could the communications actually have been expected at the time they were made to cause the genocide or any other lawless actions. In Part 6 below, where I will further consider the contentions of the Expert Reports, I suggest here that as to the publications of *Kangura*, the Reports present ***absolutely no evidence or even factually-based allegations*** of a direct connection between any article or advocacy published by *Kangura* and any of the later murders that collectively constituted the genocide. Without such a connection – or reason to think there is a high likelihood that the communications would lead to such results – there is no basis in American constitutional law to deny protection to the publications or to find criminal liability.

(ii) immanence. Meeting the second criterion of "immanence" – or "present" – danger is absolutely essential before denying constitutional protection to some speech. Moreover, this *immanence* criterion is conceptually very different from the *causal* (or *likehood)* criterion. Even if the speech can be confidently expected to lead to substantive evils, as long as those evils are not immanent, the democratic premise of respecting agent responsibility means that those opposed to these evil counsels should not suppress the presentation but should answer its claims – they have the responsibility to show, if they can, that the counsels are actually evil and misguided. And the person hearing the evil counsels generally has the responsibility to search out and consider alternative counsels and then take responsibility for whatever she does. As Holmes implied, even if Marx's rhetoric and advocacy creates a "likelihood" of an (illegal and violent) proletariat revolution, free speech means that the advocacy should be given its chance (see supra page 8, *Gitlow v. New York*) But if the objectionable action will occur immediately, the dialogic process on which both democracy and responsible individual action depends does not have time to work. Thus, prefiguring Holmes and Brandeis' test, John Stuart Mill long ago argued: "An opinion that corn dealers are starvers of the poor ... ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn dealer." (J.S. Mill, *On Liberty* (1859)). Arguing that "the fitting remedy for evil counsels is good ones," Justice Brandeis asserted that "even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where ... there is nothing to indicate that the advocacy would be immediately acted on." *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, concurring). Brandeis elaborated: "To courageous, self-reliant men, ... no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before

there is opportunity for full discussion. If there be time ... the remedy to be applied is more speech." Id. What is crucial in any society serious about having a free press, is that the question cannot be merely whether the counsels are evil and whether they will in fact be timely answered – because that depends on the practice of others. The speaker's only responsibility is to speak in a manner that leaves any opposition that exists the opportunity to present their alternatives. The standard of whether the evil counsels will be answered is unsatisfactory because it means the failures of those with more just ideas, with better counsels, could justify cutting short the debate and advocacy on which a democratic society fundamentally depends. Only the immediacy that makes response conceptually impossible justifies short circuiting the system of free expression.

The logic of this constitutional requirement rules out any punishment for advocacy for acts no matter how horrendous – murder or even genocide – as long as the acts are not contemplated to occur the day, maybe the hour, that the advocacy occurs. Although possibly motivated by sympathy for the speaker, in reversing a conviction for a demonstrator who yelled: "'We'll take the fucking street later [or again],'" the Court observed that, "at worst, [the statement] amounted to nothing more than advocacy of illegal action at some indefinite future time." *Hess v. Indiana*, 414 U.S. 105 (1973). To the extent *Kangura* was not publishing at the time of the genocide, to the extent that it was not calling for immediate acts of murder, in the United States it would almost certainly be protected by constitutional norms of press freedom. The last statements published by *Kangura* in the middle of March were not "imminent" in relation to murders that began in April. Certainly, legal responsibility could not be predicated on the many statements quoted in the Expert Reports, that were published much long before, some almost four years before, the genocidal acts occurred.

(iii) lawlessness of the action. No comment needed. Obviously, the press should be allowed to advocate even immediate actions that are lawful. But clearly, if the other elements of the clear and present danger test are meet, the genocidal acts that occurred in Rwanda more than satisfy the "lawlessness" criterion.

(iv) intent of the speaker. The legitimate interest of the state in speech exists whenever it can be expected that the speech will creates an imminent danger of crime or other serious harm. However, the fundamental importance of protecting speech when the speaker is engaged in presenting her own views or participating in public (or private) discourse, suggests the importance of protecting the expression unless the speaker was intentionally using speech to achieve an aim that justifies state prohibition. Possibly for this reason, the Court in *Brandenburg* emphasized an intent requirement. Not only must a speaker "know" that her speech could cause imminent dangers of law violation, but liability cannot be imposed unless creating that danger is also the speaker's "purpose." Thus, the *Brandenburg* Court said the speech must be "*directed to* inciting or producing imminent lawless action."

This requirement has considerable practical importance. Without it, there would be the possibility of what is often described as the "heckler's veto." The imminent danger that those opposed to or offended by a person's speech will attack the speaker could be used to make the

speech illegal and to punish the speaker. Such a possibility would be particularly troublesome because it could result in the denial of protection to dissident or unpopular speakers or advocates of unpopular views. Possibly more relevant here is that, without this requirement of speaker intent, the law could seriously chill speech on touchy, emotionally charged subjects that have the possibility of producing strong reactions – subjects about which speech and discussion can be extraordinarily important in a democracy.

For example, a speaker may believe in the utmost importance of particular issues, of the exposure of particular facts, or the need to act lawfully to change government policies even as she realizes that her critique of existing policies, her exposure of facts, or her advocacy of lawful change will sufficiently enrage some listeners, who then believe that only more violent responses will be effective and are justified, that some of these listeners predictably will engage in illegal acts not desired by the speaker. Despite this real danger created by the speech and known to the speaker, democratic discourse requires that the critic be permitted to make her charges and advocate change, with punishment reserved for the law violators. Thus, I and others might try to make strong arguments about the illegality, immorality and stupidity of President George Bush's foreign policy. Depending on the circumstances (and our rhetorical skill), observers or even the speaker may recognize a high likelihood that this advocacy will inspire some people to be so enraged that they will immediately engage in illegal actions in the hopes of thwarting the President's policies. Even in such circumstances, however, the vital importance of allowing vehement criticism of the President and his policies as part of a democratic process that allows for such challenges to authority means that the law should protect the speech. This result can only be achieved by protecting the speech unless the speaker intentionally directs her speech at stimulating the imminent lawless action. Moreover, the evidence of such intent cannot be merely that the speaker was or should have been aware that her speech would likely have this effect *as long as* it is plausible to understand the speaker as wanting to generate lawful forms of opposition and change. The democratic premise is that people should be able to voice their criticisms, engage in advocacy, and that others should be able to hear this speech, with the listener left with legal responsibility for how she responds. Despite real dangers that violence or other law violation will occur, the fundamental importance of people's speech rights means that the government must respond, even if less effectively, by answering the charges presented by the advocacy and by enforcing the laws against law violation.

Other Speech Issues: Cartoons

At several points, the prosecution's experts either explicitly or implicitly objected to unseemly, offensive, often sexualized cartoons or drawings published in *Kangura* depicting the paper's ideological or political opponents. In the United States, many decisions involving the First Amendment are controversial, often dividing the Court five to four – but there are exceptions. The *Brandenburg* decision described above was one – where the only disagreement on the Court involved the opinions of Justices Black and Douglas who would have given speech even more absolute protection. Another exception relates to editorial cartoons.

In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), a district court had found *Hustler Magazine* liable on the basis of a cartoon, labeled an "ad parody," for its portrayal of Reverend Jerry Falwell, a Christian minister and also prominent conservative political commentator and activist. The "parody" involved a fictionalized "interview" with Falwell and a corresponding illustrative cartoon that followed the format of a prominent series of actual ads for Campari Liqueur. In the fictional interview, Falwell says that his "first time" – a term implying it was his first time to engage in sexual intercourse but which the ad concludes by indicating was his first time to drink Campari – was "during a drunken incestuous rendezvous with his mother in an outhouse." The Supreme Court unanimously found this cartoon to be protected speech under the First Amendment. The opinion of Justice Rehnquist noted the history of political cartoons in the country, beginning with the portrayal of George Washington as an ass and including examples such as the famous Thomas Nast cartoons castigating the Tweed Ring, and Walt McDougall's characterization of presidential candidate James G. Blaine's banquet with the millionaires at Delmonico's as "The Royal Feast of Belshazzar." Rehnquist noted, with approval, that "the art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided." He quoted, again with apparent approval, a cartoonist's view of the nature of the art: "The political cartoon is a weapon of attack, of scorn and ridicule and satire ... It is usually as welcome as a bee sting and is always controversial in some quarters." Rehnquist explained, quoting an earlier Court opinion, that "the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."

Conspiracy

Conspiracy is an area of criminal law that has always troubled civil libertarians, see, e.g., David Filvaroff, "Conspiracy and the First Amendment," 121 *U. Pennsylvania L. Rev.* 189 (1972), but I will not here try fully to outline the appropriate scope of conspiracy law as it might relate to speech or constitutionally protected political association. However, since this is charged in the Indictment and since the prosecutor's experts invoked the notion repeatedly, I should make some common sense observations.

Press freedom obviously does not include a right to engage in criminal conspiracy. Legal liability within a criminal conspiracy could extend to a person whose only act in furtherance of the conspiracy is the publication of content that, except for the conspiracy, would be protected expression. However, this possibility is narrowly limited. For example, in a price fixing conspiracy which would violate a jurisdiction's antitrust or competition law, the signal by the leader to other members of the conspiracy to raise prices could take the form of a message that the publisher purposefully embeds in a newspaper publication in order to aide the conspiratorial ends. If the publisher included the message in knowing furtherance of the conspiracy, that publisher could be found guilty just as would other members of the conspiracy.

Note, however, what is involved in the above hypothetical. Liability does not exist merely because the content of the newspaper's content advanced the aims of the conspirators –

the publisher needed to know that publication was advancing the conspiratorial aims. Certainly, liability cannot be premised on the newspaper publisher's friendship with or personal relations with those engaged in the conspiracy. Liability does not even follow from the fact that the publisher generally sympathizes with and wishes to further the goals held by the conspirators. To put it in terms of this case, assuming there existed a conspiracy among some people to cause genocide, even if Ngeze's publications turned out to contribute to the goals of that conspiracy (a fact not demonstrated by anything in the prosecution's Expert Reports), and even if Ngeze sympathized with the goals of the conspirators (also a fact not proven), and even if he personally knew the conspirators (a fact that would probably be true *if* there was such a conspiracy, but since neither its existence nor the identity of its members were proven, this would also have to seen as not proven), these facts should not suffice to treat Ngeze as a member of the conspiracy or criminally liable. What is required for a legal conviction is at least proof that the publisher – here Ngeze – actually knew of the conspiracy, knew of the role of his publication in advancing the goals of the conspiracy, and participated in the conspiracy by publishing the messages for the purpose of advancing those goals.

For example, after a state court finding of liability against a group of defendants for their role in concerted action – assertedly an ongoing conspiracy – of boycotting some of a town's white businesses and in which some of those involved in the boycott used violence against others (e.g., those who did not join the boycott and, thus, were effectively "accomplices" of the white businesses), the Court unanimously reversed. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). To enforce the boycott, its supporters took the names of those who did not conform and published their names in a local newspaper – a powerfully intimidating form of pressure in a small community. The Court, however said: "The claim that the expressions were intended to exercise a coercive impact on [the boycott violators] does not remove them from the reach of the First Amendment." Although publishing the list of names was "plainly intended to influence [the boycott violators'] conduct ... this is not fundamentally different from the function of a newspaper." Intimidation also occurred because on several occasions shots were fired by boycott's supporters into the houses of those listed and, on other occasions, directed other acts of criminal violence at them. The Court responded that those involved in the joint activity of the boycott "do not lose all constitutional protection merely because some members of the group may have participated in conduct ... that itself is not protected." It elaborated that "the presence of activity protected by the First Amendment imposes restraints ... on the persons who may be held accountable ..." The Court stated that "[f]or liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual [to be held liable] held a specific intent to further those illegal aims" – and the Court further emphasized that in such contexts, "intent must be judged 'according to the strictest law.'" As to a nationally prominent leader, Charles Evers, who reportedly told a large assembly of "black people that any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people," the Court found this "threat" was protected by the *Brandenburg* principle, observing that, with one possible exception, "the acts of violence identified ... occurred weeks or months after the ... speech." Of course, the Court emphasized that those who engaged in violence may be held liable, but held that "[t]he burden of demonstrating that [the taint of

violence] colored the entire collective effort ... is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott."

Thus, robust constitutional protection of press freedom does not necessarily insulate a publisher from legal liability even where the publisher's only act in furtherance of a conspiracy is the publication of messages that, in themselves, would be protected expression. However, for criminal liability to be predicated on such otherwise innocent acts, specific proofs of knowledge and intent are required. Below I will suggest that nothing in the Experts Reports give even the slightest support for the findings necessary to hold Ngeze guilty of conspiracy to commit or of conspiracy to incite genocide. For example, as a matter of historical or sociological investigation, it is interesting to know the extent various journalists knew each other and knew other figures of political consequence in their society. The Chrétein Report unsurprisingly finds such relations in exist in Rwanda. I suspect that evidence of such relations could be found in virtually any capital city around the world – journalists tend to know each other. But such facts provide absolutely no evidence of any criminal conspiracy.

As a final word on conspiracy, I note that one lesson that courts in the United States have learned about the needs of a system of freedom of expression is that not only must the category of unprotected speech be defined very narrowly but also related doctrines of criminal liability must be applied or interpreted very strictly when speech or press freedom is at stake. One example is that the American courts apply the general constitutional prohibition on vagueness in criminal statutes with special rigor in the First Amendment context. Also, administrative agencies are denied discretion to allow or disallow permission, or to grant or deny permits, for expressive or publication activities. In both cases, the concern is that vagueness in statutes or discretion in administrative entities can too easily – even unconsciously – be used to restrict or punish particularly unpopular or offensive speech. (The Court constantly admonishes that if the offensiveness of expression lies in its content or the views that it advances, that is a reason to protect, not to deny protection, to the speech.) The same point should be made in the context of conspiracy. Because conspiracy tends to be an amorphous category, proof of actual, knowing, purposeful involvement in the criminal enterprise should be rigorously required here.

V. OTHER JURISDICTIONS AND INTERNATIONAL LEGAL STANDARDS

Nuremberg: Streicher and Fritzsche

Possibly the most famous prosecution that might be analogized to the charges against Ngeze is the conviction of Julius Streicher, one of twenty-four people charged in the first of the Nuremberg trials. Often not noted, another of the defendants in this trial, Hans Fritzsche, was also charged based on his speech or propagandistic activities but he was acquitted.

Indicted under the first and fourth counts of the general indictment, Streicher was acquitted of the first charge, Crimes against Peace, because there was no evidence that he

participated in the plan to wage war but was convicted under count four, Crimes against Humanity, based entirely on his speeches, articles, and his publication of a magazine *Der Stürmer*. *Trials of the Major War Criminals before the International Military Tribunal* vol. 1, pp. 301-04 (Nuremberg, Germany; 1947). The facts noted in the Tribunal's announcement of a verdict included statements that quoted from *Der Stürmer* such as the following:

> "... The Jews in Russia must be killed. They must be exterminated root and branch."
>
> "If the danger of the reproduction of that curse of God in the Jewish blood is finally to come to an end, then there is only one way – extermination of that people whose father is the devil."

Id. at 303. The record, according to the Court, included "26 articles from *Der Stürmer*, published between August 1941 and September 1944, 12 by Streicher's own hand, which demanded annihilation and extermination in unequivocal terms." Id. In 1943, the verdict noted, "he wrote ... that it was wonderful to know that Hitler was freeing the world of its Jewish tormentors." Id. In his book on the Nuremberg trials, General Telford Taylor quotes the prosecutor ending "his cross-examination by reading from several of Streicher's own articles from a 1944 *Der Stürmer* that referred to 'the most terrible germ of all times, the Jew,' who 'must be destroyed, root and branch' and expressed hope for the time when 'Judaism will be annihilated down to the last man.'" Telford Taylor, *The Anatomy of the Nuremberg Trials* 380 (1992).

Possibly most interesting about the verdict, however, was that the Tribunal emphasized, and apparently considered crucial, first, that "Streicher's incitement to murder and extermination" occurred "at the time when Jews in the East were being killed under the most horrible conditions," *Trials of the Major War Criminals before the International Military Tribunal* at 304; and, second, rejecting on the basis of the evidence Streicher's claims to the contrary, the Tribunal emphasized that Streicher had knowledge of how the "final solution" was progressing at the time he was writing the articles. Thus, the Tribunal found: "With knowledge of the extermination of the Jews in the Occupied Eastern Territory, this defendant continued to write and publish his propaganda of death." Id. at 303.

In contrast, the Tribunal found Hans Fritzsche, indicted under the first, third and fourth counts of the general indictment, not guilty on all counts. Id. at 336-38. Like Streicher, Fritzsche was indicted primarily for his propaganda-oriented activities – including head of the Home Press Division of the Reich Ministry of Popular Enlightenment and Propaganda and later head of the Radio Division. He supervised the German press of 2,300 daily newspapers, delivering "the directives of the Propaganda Ministry to these papers." Id. at 336. Although the Tribunal noted that in many of these roles, Fritzsche was merely a conduit of instructions of others, it also emphasized that in his own broadcasts Fritzsche made statements such as his claim "that the war had been caused by Jews and ... their fate had turned out 'as unpleasant as the Führer predicted." Id. at 338.

Fritzsche's acquittal seemed based primarily on the Tribunal's conclusions that: 1) despite his broadcasts' anti-Semitism, his statements "did not urge persecution or extermination of the Jews," 2) there was no evidence of his awareness of their extermination in the East; and, 3) although his broadcasts "sometimes spread false news, [] it was not proved he knew it to be false." The Tribunal concluded that his propagandistic role for the Nazi regime, even during the period of genocide and despite "evidence from his speeches [that] show definite anti-Semitism on his part", was merely "to arouse popular sentiment in support of Hitler and the German war effort." Id. at 338.

Without endorsing the approach of the International Military Tribunal in finding Steicher guilty, in Part VI of this Report, I will suggest that, contrary to characterizations by the Prosecution's Experts, the evidence against Ngeze and the quoted excerpts from *Kangura* parallel much more closely the case against Fritzsche than that against Streicher. Thus, the Nuremberg precedent should count strongly in Ngeze's favor.

I also might add that the historical judgment about the propriety of the Tribunal's treatment of Streicher has not gone unchallenged. Although asserting that Streicher's conviction seems "legally defensible" and describing Streicher personally as "the least appetizing of the defendants" (Taylor, *Anatomy, supra* at 590, 264 – note that this is the book that, in French translation, the Chrétein Report relied upon for its characterization of Streicher, see 26624-23 / 302-3), Telford Taylor, an assistant to Chief Prosecutor Robert Jackson in the initial Nuremberg trial of twenty-four major Nazi war criminals and subsequently himself the Chief Prosecutor in follow-up trials of another 185 Nazi defendants, asserts that "it is hard to condone the Tribunal's unthinking and callous handling of the Streicher case" and that the "Tribunal's hasty and unthinking treatment of the Streicher case was not an episode to be proud of." Id. at 631, 562. Basically, Taylor thinks the Tribunal did not carefully consider what he thought was "the sole (and difficult) legal issue[:] whether or not 'incitement' was a sufficient basis for conviction." Id. 376. He seemed to doubt that what Streicher did amounted to incitement, id. at 481, implied that part of the problem was inadequate attention to the values involved in "constitutional guarantees of liberty," id. at 562, said that he "(and many others) thought his [Streicher's] case one of the most debatable," id. at 496, and suggested that "the Tribunal's opinion had been superficial, perhaps influenced both by [Streicher's] repulsive appearance and by the likelihood of a negative public reaction if Streicher got anything less than the worst." Id. at 598-99.

In another prominent book on Nuremberg, the author gave "the more troublesome" Streicher case as his first example of the claim that "[t]he wisdom of the individual verdicts can be debated endlessly." Joseph E. Persico, *Nuremberg: Infamy on Trial* 438 (Viking Penguin 1994). Persico explained: "Today, we are still debating whether violence in films and television induces violent behavior in audiences, and we do not have an answer. Was there a path that led from the rabid anti-Semitism of Streicher's *Der Stürmer* to the gas chambers at Auschwitz? Streicher and his works were loathsome. But one can ask, with Francis Biddle [one of the Nuremberg judges], is loathsomeness a capital offense?" Id. Neither Taylor nor Persico make an argument against the result in the Streicher case, but merely raise questions and, in Taylor's

informed judgment, raise the question of how well the Court thought out the result. Thus, my primary suggestion will be that Ngeze's activities are much more analogous to Fritzsche than to Streicher. However, even if that were not true, it would still be wise and appropriate for this Tribunal to reexamine the Streicher precedent with care rather than to rely upon it blindly. This would seem especially true given the *subsequent* international development of both a greater commitment to press freedom and a more developed law of genocide.

The European Court of Human Rights

Holding that certain expression, certain publications, constitute "direct and public incitement to genocide" amounts to saying that a country would act impermissibly in protecting such expression. Such a holding means that all countries have a legal obligation to prohibit such speech. An International Court or Tribunal should be very cautious about holding that expression or a publications are criminal that some countries with long and established democratic credentials not only do not prohibit but treat as protected as a matter of fundamental constitutional principle. For example, some countries might view some speech – possibly racial hate speech or speech advocating crime – as properly prohibited as violative of fundamental norms of human dignity or security while other countries might view this same speech as properly protected as a matter of fundamental speech or press freedom. My suggestion is that, to the extent the interpretative choice is available to an International Tribunal, the Tribunal should hold that ***either*** view is a permissible domestic judgment. This suggestion is one reason that I identified in Part II for considering the Constitutional approach of the United States as relevant. And, of course, the same conclusion would apply in respect to protection of speech or publication by an established democracy.

This decisions of the European Court of Human Rights (ECHR) interpreting Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms have a somewhat different significance. The ECHR's unwillingness to protect a publication charged with advocating political, class, or ethnic based violence does not indicate that this Tribunal would act wisely in treating such speech as criminal. The decision does not show that the ECHR thinks that such expressive content or such a publication should not be protected as a matter of fundamental right but only that an independent sovereign country should be permitted to reach that judgment. In such a holding, the ECHR merely says that, within the margin of appreciation allowed all countries, the country's decision to outlaw such speech is permissible. The ECHR's decision leaves open the possibility that a nation can decide for itself, maybe should decide, that that greater protection of speech or of the press is either good policy or is required by the nation's own constitution. In contrast, for the ECHR to uphold a claim and protect a publication is an assertion that all democracies (subject to its jurisdiction) must allow that speech. Thus, my suggestion is that this Tribunal should certainly avoid finding liability on the basis of speech or publications that the ECHR would protect. That is, although ECHR decisions denying protection provide basically no useful guidance for this Tribunal, those protecting a publications have direct relevance to the discussion here.

In two cases that involve publications that had remarkable similarities to the content of *Kangura*, the ECHR found the convictions unlawful. Even after taking account of the margin of appreciation due to a country's own judgment, the ECHR held that Article 10 of Convention for the Protection of Human Rights and Fundamental Freedoms forbid the country's decision to punish these publishers or authors. I must note that I am not competent to evaluate fully ECHR law on the issues relevant here. Still, I will describe these two cases, *Ceylan v. Turkey*, #23556/94, (ECHR, Grand Chamber, 8 July 1999) and *Sener v. Turkey*, #26680/95 (ECHR, 3rd Sec., 18 July 2000), both of which involve publications whose content can in many ways be analogized to much of the content in Kangura that the prosecution's Expert Reports highlight as objectionable.

In *Ceylan*, the president of worker's union, stressing the urgency of action, wrote an article: "The time has come for the workers to speak out – tomorrow it will be too late;" while condemning the "steadily intensifying State terrorism" or State "genocide" and giving examples of purported State terrorism, the author argued that the "proletariat must stand up against these laws and the 'State terrorism'" and that the proletariat must bring "their political and democratic demands to the fore and play an effective role in this struggle," "must unite in action." In opposing "the bloody massacres and State Terrorism," the author advocated "using all our powers of organization and coordination," and "calling on all our people ... to take an active part in this struggle." ¶ 8. This language, describing what was happening as terrorism, intensifying genocide, and bloody massacres, calling for people to stand up to oppose what was happening and to "struggle" against it and to oppose it with "all our powers," is in many ways very similar to *Kangura*'s characterization of what the Tutsis were doing and what *Kangura* called on its audience – presumably Hutus – to do. The Turkish article might, as the Turkish court and one dissenting Judge in the ECHR proceeding suggested, "be construed as an incitement to hatred and extreme violence." (Dissent of Judge Gölcüklü). Moreover, the Court majority, while noting that "there is little scope under Article 10 § 2 ... for restrictions on political speech or on debate on maters of public interest," agreed that "where such remarks incite to violence ..., the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression." ¶ 34. Still, a State is not free from Human Rights obligations to respect press freedom. The ECHR protected this publication. What is arguably most telling about the Court's approach is that it seemed unwilling to find language as inciting to violence *unless* the language did so explicitly and in circumstances where a violent response seemed to be the likely result of the publication. The Court took note of the tense time during which the remarks were made, but concluded that, "despite its virulence, [the article] does not encourage the use of violence or armed resistence or insurrection." ¶ 36. This fact, plus the severity of the penalty the State imposed – one year and eight months plus a fine – lead the Court, with one Judge concurring and one Judge dissenting, to find Ceylan's conviction a violation of Article 10. ¶ 38.

Interestingly, the concurring opinion of Judge Bonello, while approving of the result, praised the approach of Justices Oliver Wendell Holmes and Louis Brandeis and argued for explicitly adopting the *Brandenberg* standard from the United States, (see Part 3), which would

protect political advocacy unless it "is directed to inciting or producing imminent lawlessness and is likely to incite or produce such action." Judge Bonnell approved Brandeis' view that speech should be protected "unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion." (Concurrence of Judge Bonnell).

A second case, *Sener v. Turkey*, #26680/95 (ECHR, 3rd Sec., 18 July 2000), involved an article that can probably be best read as ridiculing leftist intellectuals for not taking effective action to stop current actions of the government. The article suggested intellectuals were instead merely "watching" "the wholesale extermination of a nation...[,] genocide on such a scale that it is not a mistake to call it unprecedented." ¶ 7. The article claims that "instead of ... smashing the cogwheels [of a dirty war], we are only groaning. We only wail." In a manner that could easily be understood as a call to violent action, the author claims that intellectuals "forget the axiom that the only way to oppose a war is to wage a just war." Lampooning the intellectual's ineffectiveness, she says that "we brazenly preach the necessity of trying peaceful methods to resolve the Kurdish problem ..." The author clearly condemns this intellectual response. She concludes:

> "We are intellectuals... We also make it our rule to serve the State. We consider people stupid. Our many years of ink-licking make us different from them.
> "This is a confession.
> "We are stupid."

Id. This language and the article's reasoning – even its mocking style – could be analogized to much in *Kangura*. Although the quoted language seems clear enough, the dissenting Judge (apparently the only Judge to speak the language in which the article was written) suggests that the translation "leaves a great deal to be desired," implying that actually the article was even more virulent. He argued that the article "constituted manifest incitement to violence." (Dissent of Judge Gölcüklü). Nevertheless, the Court found that fundamental human rights – or, more specifically, Article 10 of the Convention – precludes punishment for this publication. ¶ 45. The Court adopted an approach to "incitement" according to which the views expressed in the "article cannot be read as an incitement to violence, nor could they be construed as liable to incite violence." For this reason, there was no sufficient reason to interfere with the author's right of freedom of expression. ¶ 45.

Note might be made of third case in which, though not quite as analogous to the content of *Kangura*, the Court found a member state had violated the Convention by punishing expression or publications. In *Erdogdu v. Turkey*, #25723/94 (ECHR, 4th Sec., 15 June 2000), Turkey had convicted (but deferred imposition of any penalty on) a newspaper editor for publishing an article that the Turkish government asserted did "not propose a peaceful solution, but was limited to *advocating* the[violent] methods of the PKK..." during a time in which violence initiated by the PKK was occurring in south-east Turkey. ¶¶ 55, 57 (my emphasis). The Turkish Government questioned how the Commission could have been satisfied that the article ... did not incite to violence..." ¶ 56. The Court agreed with Turkey that "State authorities enjoy

a wider margin of appreciation when examining the need for an interference with freedom of expression" in respect to "remarks [that] incite to violence." ¶ 62. But "the Court [did] not find anything which can be construed 'as an appeal for bloody revenge' and/or to communicate to the reader 'the message that recourse to violence is a necessary and justified measure of self-defense' in the face of the Turkish State." ¶ 67. The Court concluded that where, as here, "a publication cannot be categorized as inciting to violence," the State acts improperly in applying the criminal law to the media. ¶ 71.

Direct and Public Incitement to Commit Genocide

Both the International Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (hereinafter Genocide Convention) and the statute creating this Tribunal, The Statute of the International Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994) (hereinafter the Rwanda Statute) provide for punishing "direct and public incitement to commit genocide." Whether this standard is consistent with the scope of press freedom that, as I argued above (Part 2), is needed by a democratic nation or is consistent with freedom of the press as understood by the United States Supreme Court (Part 4) or by the European Court of Human Rights depends entirely on how the phrase is understood. The Chrétien and Kabanda Expert Reports, although not discussing legal issues, seem to understand criminal liability to follow from newspaper content that *tends* to promote genocide or that tends to make genocide appear acceptable – or, as the Reports sometimes imply, that creates a climate favorable to genocide. However, in the process of drafting the Genocide Convention, a proposal precisely along these lines was entertained and rejected. In an early draft proposed by the Secretary General, an Art. III would have made punishable "all forms of public propaganda tending by their systematic and hateful character to promote genocide, or tending to make it appear as a necessary, legitimate or excusable act." Draft Convention on the Crime of Genocide, U.N. Secretary-General, U.N. Doc. E/447 (1947). By rejecting this language, the Ad Hoc Committee of the General Assembly can be understood as rejecting this "bad tendency" standard. That standard, often proposed by people or governments paranoid about freedom, was also once popularly advanced in the United States for the domestic crime of criminal incitement but has been consistently rejected by courts as inconsistent with speech and press freedom. See, e.g., Masses Publishing Co. v. Patten, 244 Fed. 535 (S.D.N.Y. 1917); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

This interpretation is made even clearer by looking further at the Drafting Committee's deliberations. The Soviet Union's delegate, Mr. Morozov, stated his understanding of public incitement during these deliberations on Oct 26, 1948 and was cited by this Tribunal in *Prosecutor v. Akayesu*, ICTR-96-4-T ¶ 551. Two days Mr. Morozov tried to get the committee drafting the Convention to accept his views as embodied in two amendments that he offered, one on acts in preparation and the second on public propaganda. *Summary Records of the Meetings of the Sixth Committee of the General Assembly, 21 September - 10 December 1948, Official Records of the General Assembly, 86th mtg*. at 234. As to public propaganda, he explained that

he wanted "the inclusion, among the punishable acts, of propaganda aimed at instigating the perpetration of crimes of genocide" and that this required "tak[ing] into account the important part played in inciting racial, national or religious hatreds by such powerful means of disseminating ideas as the Press, the radio and the cinema." Id., at 244. He argued that "forms of public propaganda aimed at inflaming racial, national or religious hatred ...were the cause of acts of genocide, in that they spread the idea of committing the crime and tended to give the criminals a kind of justification for their actions on the ideological plane" -- giving Hitler's *Mein Kampf* as an example of material "intended to convince the Germans of their right, as a so-called superior race, to destroy the so-called inferior races." Id. at 245. What would be covered by this Mr. Morozov's notion of an offense, as covered by his amendment or his analysis of the problem as quoted in the *Akayesu* case, is basically what the Prosecutor's Experts accuse Ngeze of having produced – propaganda that purportedly creates the climate in which genocide could be imagined. The key point, however, is that the Committee decisively rejected the Soviet proposal the next day by a vote of 30 to 8, with 6 abstentions. Id. at 253. Statements of other delegates suggest that concerns about the limits on freedom of speech and the press apparently ranked high as at least part of the reason for rejecting this approach.

Thus, direct public incitement as understood by the drafters apparently something more than a tendency to produce genocide, something more than mere advocacy and more than inciting the racial hatred that might make genocide imaginable. Instead, "direct and public incitement to commit genocide" was arguably something quite similar to the incitement test as described by the U.S. Supreme Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), as discussed in Part 4, supra. There the U.S. Supreme Court clearly distinguished "advocacy," even advocacy of law violation – which the Court held to be constitutionally protected speech – from "incitement to imminent lawless action." Basically, advocacy should be understood as describing what the speaker thinks would be a good behavior or a good result – what the speaker, writer, or publisher wishes would occur. In contrast, "incitement" suggests speech directed at actually causing something to happen and causing it to happen now – an actual attempt to get the recipient of the message to take *immediate* action. This is the interpretation, for example, that the U.S. Congress attributed to the Genocide Convention when Congress interpreted the Convention's term "incite" to mean "urg[ing] another to engage imminently in conduct in circumstances under there is a substantial likelihood of imminently causing such conduct." Genocide Implementation Act of 1987, 18 U.S.C. 1093 (2001). (Although this, I think, appropriately interprets the Convention, the Senate in ratifying the Convention also included a "reservation[] ... [t]hat nothing in the Convention requires or authorizes legislation or other action by the Unites States of America prohibited by the Constitution of the United States...")

Any serious conception of what a free press requires must include the right of the press to "advocate" – to put before the public – any and all responses to the circumstances of the day. Only after receiving all the contending recommendations that anyone wishes to advocate would the public be able fully to debate how to proceed. On the other hand, democratic governments could prohibit expression that goes beyond the advocacy role of the press and amounts to an actual immediate attempt to carry out some action – namely, incitement as so defined. If that

incitement pertains to action that is illegal, the incitement amounts either to participation in the crime or, if the incitement is not acted upon, to a criminal attempt. If the Genocide Convention's or the authorizing statute for this Tribunal's category of "direct and public incitement to genocide" is interpreted in this way, as suggested by its language, by the rejection of the Soviet proposals (or the rejection of the Secretary General's early proposal), punishing the incitement is fully consistent with robust protection of press freedom. But the point must be emphasized. This is true only if "incitement" is given this narrow interpretation – an interpretation suggested to be proper by the drafting history of the Genocide Convention.

Prosecutor v. Jean-Paul Akayesu, No. ICTR 96-4-T

Prosecutor v. Akayesu, Case No. ICTR-96-4-T, is of obvious relevance here because there this Tribunal interpreted "direct and public incitement of genocide." ¶¶ 549-562. The Tribunal's statements, however, must be understood in the context of the very different factual situation that the *Akayesu* case presented – verbal directives issued orally to a crowd immediately prior to acts of murder.

Akayesu, a bourgmestre of the Taba commune, was convicted of direct and public incitement to genocide on the basis of a charge that at a meeting which he lead, he "urged the population to eliminate accomplices of the RPF" and to kill certain specific, named Tutsis, under circumstances where the killing "began shortly after the meeting." Id. at ¶6, point 14-15. The Trial Chamber found that Akayesu "clearly urged the population ... to eliminate ... the accomplices of the Inotanyi," which was understood, as he was aware, as a call "to kill the Tutsi;" that Akayesu read a list of names that he identified as RPF accomplices; and that there was a "causal relationship between Akayesu's speeches ... and the ensuing widespread massacres of Tutsi in Taba." Id. at ¶673; see also ¶361, 362, 384, 709. The Chamber found that Akayesu had the requisite intent and his acts constituted "direct and public incitement to commit genocide" that was "successful and did lead to the destruction of a great number of Tutsi in the commune of Taba." Id. at ¶674, 675.

As the necessary *mens rea*, the Tribunal required that the perpetrator have "the intent to directly prompt or provoke another to commit genocide." ¶ 560. The Tribunal interpreted "direct" to "specifically provoke another to engage in a criminal act," ¶557, and, in a footnote in support of this interpretation, quoted from the Draft Code of Crimes Against the Peace and Security of Mankind, art 2(3)(f), the requirement that the inciter "specifically urg[e] another individual to take *immediate* criminal action rather than merely mak[e] a vague or indirect suggestion." Id. at fn. 128 (emphasis added).

The Tribunal further explained that "direct" means that the inciter must "specifically provoke another to engage in a criminal act, and that more than mere vague or indirect suggestion" is required. ¶557. It noted that the Civil Law systems view provocation "as being direct where it is aimed at causing a specific offense to be committed."

Certainly, there can be no quarrel with the Tribunal's observation that the directness of incitement can only be understood in context and that this requires examination of its "cultural and linguistic content." Id. Still, I suggest care should be taken with the Tribunal's view that direct incitement may be "implicit" given that the Tribunal also appears to hold to the requirements that the incitement "specifically provoke another" and be "aimed at causing a specific offense to be committed" and not be a "mere vague and indirect suggestion." That is, even if implicit, the incitement must be quite explicit about what specific act it is directed toward. The Tribunal at this point of noting the possibility of implicit incitement quoted the statement of the Polish delegate to the Convention drafting the Convention on Genocide, who described the very real dangers that can be created by what must be described as indirect incitement (or what might be said not to be incitement at all). *Summary Records of the Meetings of the Sixth Committee of the General Assembly, 21 September - 10 December 1948, Official Records of the General Assembly, 86^{7h} mtg*. at 251. The Polish delegate's view, however, was apparently rejected by the drafters of he Genocide Convention. He made his statement in support of the Soviet proposal that aimed at "penaliz[ing] all forms of public propaganda aimed at provoking genocide," id. at 248, but as noted earlier, this Soviet proposal, and thus presumably the Polish delegate's view in support, was decisively rejected (28 to 11, with 4 abstentions) as being inappropriate content for the prohibition on "direct and public incitement." Id. at 253.

The Tribunal in *Akayesu* also apparently concluded that for direct and public incitement to genocide to occur, the "prosecution must prove a definite causation between the act characterized as incitement, or provocation in this case, and a specific offence." ¶557; see also ¶349 (requiring "proof of a possible causal link between the statement made by the accused ... and the beginning of the killings"); ¶362 (finding a causal link); ¶673 (same). At first, this causation requirement may appear in conflict with the Tribunal's conclusion that conviction is possible without the incitement being successful – i.e., "genocide clearly falls within the category of crimes so serious that direct and pubic incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator." ¶562. Though there appears to be some tension between these statements of the Tribunal, the conflict evaporates if the incitement done with intent to directly prompt another to commit genocide does lead the other to commit an offense, e.g. murder, but that murder may not constitute genocide, that is, criminal acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."

Finally, I want to comment briefly about the citation of the Ashworth treatise, Andrew Ashworth, *Principles of Criminal Law*, for purposes of describing the common law notion of incitement. ¶555 n.122. Historically, criminal law scholars have been notoriously slow to appreciate the relevance of principles of free speech and free press, developed mostly in the twentieth century and often as matters of constitutional law, to traditional common law offenses such as incitement. The conception of incitement as broadly stated by Ashworth would be considered constitutionally unacceptable, at least in the United States, for inadequately protecting freedom speech. The relevance of an Ashworth type understanding of incitement may

still have legal relevance in the context of private speech or where the speech relates to garden variety criminal activity that is not in any way political. At present, legal academics and courts seem divided in the United States on this issue. Some conclude that no role remains for the traditionally broad conception of incitement described by Ashworth. Others disagree, and would apply it in the restricted domain described above of non-political advocacy. Both groups, however, seem to recognize that any broad conception of incitement must be rejected in the realm of political speech, a category where more stringent protections of speech and the press apply. That is, although I will argue below that Ngeze's publications would not come close to being incitement even under Ashworth's approach, both groups of scholars, at least in the United States, would reject the applicability of broad conception of incitement to the political expression of Ngeze and his *Kangura*.

In sum, the Tribunal in the context of the Akayesu case, held "direct and public incitement to genocide" requires: 1) "intent to directly prompt or provoke another to commit genocide;" 2) expression that "specifically provoke[s] another to engage in a criminal act;" 3) possibly "immanence" (see fn 128); 4) apparently proof of a causal connection between the incitement and a crime; and 5) the incitement be more than vague or indirect suggestions. These requirements become very close to those required by United States courts for the alleged incitement to be unprotected by freedom of speech. See Part IV. The Brandenburg decision required an "intent," a real danger (which certainly is meet by the require that the speech "caused" a crime), and that the danger be imminent. Moreover, the facts in *Akayesu* would justify criminal liability under the Brandenburg standard. Akayesu's behavior comes close to being a paradigm example of unprotected speech – saying to an excited group that they should kill under circumstances where the speaker wants and can reasonably expect that his audience will immediately do as directed. Part VI, however, will suggest that not only do the Expert Reports point to nothing published by *Kungura* that comes close to these facts, they point to nothing that meets any of the legal requirements for direct and public incitement to genocide – intent, cause, or immanence.

VI. NGEZE AS DESCRIBED AND *KANGURA* AS EXCERPTED IN EXPERT REPORTS

This section is based on the extensive quotations from *Kangura* over a multiple year period found in the Expert Reports of Jean-Pierre Chrétein and Marcel Kabanda. Since presumably these Reports focus on that content of *Kangura* which best supports the prosecution's charges made against Ngeze, these quotations may present a distorted, overall unfairly negative, view of *Kangura*. However, since my goal is to see if, in relation to its most offensive content, the content of *Kangura* can support the charges made against Ngeze, examination of the objectionable content seems appropriate. (Unless otherwise indicated, views and expression attributed to *Kangura* can, for purposes of this discussion, be assumed to be properly attributed to Ngeze. A legal issue could be raised about this attribution, but I do not want to dispute its propriety here.) I should also note that there also may be questions raised about the translation of *Kangura* into French or of the French of the Expert Report's into

English. (To the extent that I am lead, on the basis of questionable translations, to unfairly criticize the Expert Reports, I apologize.) Nevertheless, for purposes here I am assuming the accuracy of the interpretations. Thus, based on the quoted excerpts found in the Expert Reports, I advance the following as an appropriate characterization of *Kangura* and its editor, Hassan Ngeze, as shown by these excerpts.

What Was Shown

The long quotations in the Reports show a publication strongly committed to the welfare (as understood by *Kangura*) of Hutus and, as the "majority ethnic group," to the Hutus' properly dominant role in Rwanda. The paper viewed itself as and was highly partisan. On the basis of both history and the recent invasion by the RPF (Rwanda Patriotic Front) and, at times, also on the basis of its apparent perception of innate characteristics of Tutsis, *Kangura* portrays the Hutu majority to be in danger of political and economic domination by the Tutsis, who have historically ruled in Rwanda. It forecasts that Tutsis, in the process of regaining power, are likely to murder (exterminate) large numbers of individual Hutus as well as to enslave many remaining Hutus. The newspaper clearly exhibits great *paranoia* concerning Tutsi domination and massacres. (I use "paranoia" to denote the extreme degree of fear exhibited and the tendency to interpret events in a manner that supports that fear. Since paranoia generally denotes "irrational" as well as extreme fear, more historical information would be needed to determine whether the term is technically appropriate, that is, whether the fears were in fact irrational. Since much of what was feared – the victory of the RPF, which finally stopped the genocide, and the murder of many Hutus, did occur, maybe the fear was not so completely irrational. In any event, it should be noted that the degree of fear exhibited in *Kangura* is not uncommon, especially among traditionally subordinated groups, although the United States is a case study of even a dominant entity's ability to become paranoid about relatively weaker entities that do not overtly threaten it.)

Kangura viewed itself as the most "aware" advocate of Hutus interests. It also clearly viewed the "enemy" almost entirely in racial or ethnic terms. Kangura's articles regularly embodied racist assumptions and caricatures. It regularly advocated more aggressive government action against the Inkontanyi (roughly, the foreign and largely Tutsi invading fighting force) as well as against domestic accomplices of the Inkontanyi. *Kangura* raised questions about the loyalty of various named people and officials (although, from what the Reports describes, not in a manner any different from the way any investigative or partisan newspaper should). It clearly advocated unity of Hutus and negotiation with the Tutsis from a position of strength. *Kangura* clearly opposed various peace agreements in the form they were reached, especially the Arusha Agreement of 1993. *Kangura* argued the Arusha Agreement would not produce real peace, at least in part because in its view the negotiators did not address the issue of ethnic struggle and, thus, did not negotiate terms by which the different ethnic groups could live in peace. It took various hard line positions – such as opposing acceptance of the peace accords without a referendum through which the people of the country could indicate whether they agreed with the Accords; and it favored use of military tribunals for the trial of

people suspected either of being traitors or of supporting the invading RPF – arguing that this approach is appropriate during times of war – and advocated the use of the death penalty against those found to be traitors. (In these last points, Kangura took positions remarkably similar to those taken – in my view unjustifiably – by President George Bush after September 11, 2001.)

Kangura was undoubtedly sometimes factually wrong in its Reports. Whether these inaccuracies were intentional, so that they could be said to constitute lying and fabricating events, or whether these mistakes resulted from necessarily hurried reading of events through partisan lens, a practice common among many media, is unclear. More often, however, *Kangura* raised pointed questions about people and places and asked for more investigation – a generally appropriate approach for a partisan press and a necessary approach for a media entity without the resources to fully investigate all issues itself. Many statements and arguments published by *Kangura* – possibly most famously the Hutus Ten Commandments – could reasonably be described as expressing hatred and contempt for, as well as fear of, Tutsis as a group. *Kangura* often categorily demonized Tutsis and used offensive sexual commentary as part of that demonization. Moreover, Ngeze explicitly supported and was to some degree a leader of CDR, the most militant anti-Tutsi, Hutu-power political faction. And Ngeze and *Kangura* strongly supported the existence of, and as long as *Kangura* was being published – that is, until the middle of March, 1993 – apparently agreed with much of the editorial line of, the RTLM, the radio station whose broadcasts during the genocide are also a subject to examination here.

Moreover, as the Reports observe, *Kangura* was extraordinarily fearful of the Tutsi (see, e.g., 25106-25103) and it saw issues through a pro-Hutu ethnic lens. *Kangura* frequently forecast the possibility of severe, possibly genocidal, attempts by the Tutsi to kill and subordinate Hutus – what the prosecution's Experts call "mirror propaganda." It warned of the danger of killings of both Tutsi and Hutu. Some articles could be seen as threats to Tutsi that, if they continued in their aggressive ways, many of them would be killed. These, the most aggressive of *Kangura*'s articles, were certainly not on their face incitement.

The above characterization of *Kangura* is supported by the quotations in the two Expert Reports. This characterization does not describe a paper that I find appealing or that in my view, given my political outlook, could be said to be good either for Rwanda or for Hutus. But this characterization also does not describe a paper that is beyond the protection of principles of freedom of the press. And it does not show a paper (or publisher) that can be described as legally (or otherwise) responsible for genocide. Of course, the prosecution's Expert Reports assert that their examination of the content of *Kangura,* combined with an awareness of the political context, show much more. I will more specifically (and negatively) comment on the reasoning of these Reports in Part 7. However, on the basis of my reading of the excerpts they extracted, combined with undisputed contextual facts that they note, I could find little evidence of any content that went beyond the description that I have offered in the above paragraphs.

Of course, it is possible, as the prosecution's Experts suggest, that *Kangura*'s portrayals Tutsis and their accomplices presenting real dangers were cynically intended to prepare its

readers for violent action against innocent Tutsis as a whole. Even if true, this possibility would not turn the articles into "direct and public incitement." More than that, although the Experts repeatedly suggest this characterization, they provide no evidence for it. Morever, I suggest that in the circumstance of Rwandan history, another understanding of the articles, one that sees them as honestly expressing real and not inexplicable fear, is more plausible.

Any thoughtful attempt to comprehend *Kangura*'s view of the world should remember that this view existed against a complex historical background, which I am incompetent fully to describe and in any event is much contested, but which includes by almost all accounts at least four important facts. First, there was a colonial legacy of relatively rigid political domination of the most of the populationjass of people, with the Tutsi identified as the dominant class to which service was owed, with a consequent political change (a revolution) beginning in 1959 through which Hutus became politically dominant. Second, the huge mass killings (on the order of 200,000 in most reports) of mostly Hutus, including especially school children and intellectuals, in neighboring Burundi by Tutsis in 1972. Third, the largely Tutsi domination in Burundi that existed until the introduction of one-person one-vote brought the first Hutu president and a Hutu dominated government there in 1993, which lasted until late in the year when this president was murdered by elements of the Tutsi dominated army, producing possibly 200,000 Hutu refugees going to Rwanda. (See, e.g., Mahmood Manmdani, *When Victims Become Killers* 215-16 (Princeton University Press, 2001). Fourth, Rwanda faced from 1990 an invasion by the RPF, a primarily Tutsi military entity reflecting the fact that large portions of the prior Tutsi population of Rwanda had since 1959 become refugees. Of course, none of this in any way, any way what so ever, justifies what happened in Rwanda after the plane crash killing the Rwandan president in April 6, 1994. And it may not justify the extent of *Kangura*'s paranoia about the Tutsis or the RPF. However, I think this background helps show that in a country were partisan political processes occur, that the presentation of views such as most of those offered by *Kangura* could not only be predicted but they would have enough coherence that they legitimately considered – with hopefully the ethnic focus ultimately rejected. But that is merely to say that *Kangura*'s racism and many of positions were misguided. Holding such positions does not provide evidence of a goal of genocide, a plan of genocide, or a conspiracy to cause or incite genocide. Rather, this background suggests that *Kangura*'s articles are best understood more at face value, as expressing fear, making warnings and threats, but hoping for peace.

What Was Not Shown.

Possibly most important, **I found no quotation in which *Kangura* called for the murder of either Tutsis as a group or individual Tutsis**. *Kangura* never claimed that the killing of Tutsis was a good thing in itself. It never offered praise of people for killing innocent Tutsis or of killing people merely because they were Tutsi. These facts should create difficulty for any charge that Ngeze publicly and directly incited or participated in genocide. In *Ceylan v. Turkey*, #23556/94, (ECHR, Grand Chamber, 8 July 1999) and *Sener v. Turkey*, #26680/95 (ECHR, 3rd Sec., 18 July 2000), the ECHR seemed to require that press freedom prevail absent something close to explicit calls to engage in criminal violence. See Part V. Warnings that,

under certain circumstances, Tutsis would be killed by Hutus (as well as Hutus being killed by Tutsis) is in many ways the opposite of advocacy, often explicitly or implicitly presenting the view that efforts should be made to avoid the deaths which, if they occurred, would be a bad thing.

To the extent that the Experts Reports purport to describe a factual basis for the conviction of Ngeze, there are a variety of additional holes in their evidence. I will note these absences in the form of examining whether the expression of Ngeze or the content of *Kangura* meets American constitutional standards for identifying publications that do not merit protection on grounds of press freedom. I will also consider whether the Reports showed content of *Kangura* that meets various international standards for direct and public incitement. (Which, if any, of these standards should guide this Tribunal is a matter of judgment about which I expressed views in earlier Parts of this Report. Here my goal is to consider whether, given whatever standards are accepted, Ngeze could be properly convicted – and my claim is that as to any reasonable standard, the answer is "no.")

Cause. There was no evidence that *Kangura* articles lead to genocide or to any specific genocidal action. There is no evidence that the articles lead to any murders of any sort. To the extent proof of "cause" is required for conviction, there is no adequate evidence. Of course, one could speculate that *Kangura* had some vague causal influence through creating an environment conducive to thinking genocide is acceptable – although *Kangura* never suggested that genocide was acceptable and, to the extent that it offered views on the subject, was critical of the only genocide that it imagined, that of Hutus killed by Tutsis. In any event, such speculation is an inadequate premise for criminal conviction. It would be inconsistent with this Tribunal's rejection of conviction on the basis of "mere vague and indirect suggestion[s]," *Akayesu*, ¶557, or the drafters' of the Convention on Genocide rejection of the Soviet proposal to include a prohibition on "public propaganda aimed at provoking genocide." *Summary Records of the Meetings of the Sixth Committee of the General Assembly, 21 September - 10 December 1948, Official Records of the General Assembly, 86th mtg*. at 248, 253. It would be like arguing that Marx's Communist Manifesto "caused" the Russian revolution, which may in some sense be true but which clearly does not meet the *legal* standard for cause. Moreover, this speculation about *Kangura*'s causal role seems doubtful empirically. *Kangura* was a relatively small circulation paper. (Although the Chrétein Report claims that *Kangura* exercised "great influence between 1990 and 1993" – note that it does not allege this influence continued to exist at the time of the genocide and it observes that, after the first few issues, *Kangura* only published between 2000 and 3000 copies. Chrétein Report, at 27187. Not only did *Kangura* operate in an environment where most people were illiterate, but also it was also only one, and not close to the largest, of dozens papers being published in Rwanda during this period (the Report noted that after Rwanda allowed press freedom, the number of papers published increased from six in 1990 to at least forty-two in 1991. Id. at 27030.) Nor is there any evidence that the paper's content even created any special "danger" of genocidal acts. The Report provided circumstantial (but believable) evidence that stories published in *Kangura* caused some people to lose their jobs (whether they *should have lost their job* probably depends on whether the facts *Kangura*

suggested turned out to be true), there was no evidence to connect the paper to any particular act of genocide.

Imminence. Since there was no evidence that the press caused murders or created a danger of murders, there obviously was no evidence that it imminently caused illegal acts or created any *imminent* danger of murders or other acts of genocide. At least in American Constitutional law, this requirement of imminence is absolutely essential for speech to lose constitutional protection. On the facts, imminence existed in *Akayesu* and this Tribunal suggested there in footnote 128 that immediacy may be a requirement for finding "direct" incitement. Thus, even if there had been evidence that *Kangura'*s publication stirred people – or was likely to so stir them – to *eventually* engage in the murderous acts in the genocide that began April 6, 1994, it would be impossible to provide evidence that the "imminence" requirement was meet. The legal requirement of imminence calls for illegal acts to occur immediately – within in minutes or maybe hours after the call for acts of violence. The idea is that danger must occur before anyone with an opposing view would have any chance to attempt a verbal challenge to the speech creating the danger. *Kangura* was not being published at the time the genocide occurred, its last issue being in the middle of March. (It later started up again, published outside Rwanda, and after the genocidal period was over – but this is obviously irrelevant to this case .) For that reason, there is an impossibility to claim the existence of the necessary imminence.

Intent. Crucial to finding *Kangura'*s content is unprotected as a mater of press freedom (or that it constitutes direct and public incitement) is evidence that the publication was made with the intent to create an imminent danger of lawless action or an intent to incite immediate genocidal acts. The Reports does not allege any factual basis for finding such intent on the part of Ngeze and nothing in the published content of *Kangura* itself suggests such an intent.

Of course, overt evidence of intent will often not be available and a legal fact finder must be permitted to infer intent from overt acts and context. However, if there are plausible alternative explanations of all the overt acts, an inference of illegal intent fails. In the case of the content of *Kangura*, virtually everything it published could be explained by a combination of fear of Tutsis gaining power, a desire to oppose that eventuality by peaceful legal or by military means, a desire to warn that various forms of aggression would result in widespread blood shed, and a racially-based desire to maintain Hutu power. None of this implies a desire for genocide, much less an attempt to incite either its immediate or even its eventual occurrence. Moreover, given the history of Rwanda and the related history of Tutsi/Hutu relations both within and outside Rwanda, especially in Burundi, the political fears and goals that provide the legally benign explanation for the content of *Kangura* seem very plausible.

Conspiracy. The Indictment charges conspiracy and the Expert Reports make many claims that the "extremist media" was used as part of a plan to create the conditions needed to carry out the planners' goal of genocide. To show that Ngeze engaged in such a conspiracy to commit genocide through his publication of *Kangura* presumably would require evidence of at least the following: 1) that such a plan to create the conditions necessary for genocide existed

among a group of people during the time that *Kangura* was being published; 2) that the plan involved the use of the media; 3) that Ngeze knew of such a plan; 4) that Ngeze knowingly contributed to or participated in the plan. Despite many assertions, the Reports provided no evidence to support *any* of these points. Moreover, everything the Reports show about Ngeze's behavior or the content of *Kangura* can be as easily or more easily explained as involving more benign goals.

First, the Reports provided no evidence such a "plan" or conspiracy existed nor evidence that indicated who the planners were. Though many reasonable observers now assert that such a plan did exist, such assertions should not substitute for proof before a court of the plan's existence. It is easy in retrospect to conclude that those involved in some horrific events, or at least some set of their leaders or instigators, were planning it all along, especially if in retrospect one can see how some of their earlier acts contributed to the eventual deadly outcome. However, as noted in the comments about intent, direct proof of such a plan should be required, especially if other plausible explanations of the earlier acts are available. Certainly, vigilance against the RPF and its internal supporters and distrust and opposition to Tutsi's influence figured as major components of the Hutu-power vision of the world, a vision shared and promoted by Ngeze and *Kangura*. However, at least given any facts asserted in the Expert Reports, a plausible view is that the decision to attempt genocide did not occur until later, possibly not until after the April 6 plane crash. Although anti-Tutsi, Hutu-power proponents had developed as a significant political faction during the period before the genocide, it is entirely plausible that until April 6, they (or at least most of them including Ngeze) did not contemplate participating in or encouraging genocide. In other words, although Ngeze's paper attempted to promote Hutu power and the CDR, there is no reason to think that at that time this promotion was intended to promote any goal of genocide. Everything presented in the Reports about Ngeze or *Kangura* is consistent with the likelihood that the decision to instigate or provoke genocide did not occur until after the plane crash. Certainly, during the period that Ngeze was publishing *Kangura*, there is no evidence that he was involved in any plan to help instigate or prepare the ground work for genocide.

Second, the Reports allege no facts that any plan to commit genocide or create the conditions necessary for genocide included an intent to use the media – although if there were such a plan, use of the media would be likely. It certainly seems quite clear that supporters of Hutu-power favored creation of RTLM radio precisely to advance the cause of "power." But Hutu-power did not require, and at least before April 6, had no obvious or public commitment to genocide. (Again, without evidence of the time at which portions of "Hutu-power" became committed to genocide – with predicable result that then some former supporters stopped supporting "power" – makes it unclear at what point RTLM broadcasts could be seen as consciously participating in genocide or inciting genocide, but is very plausible to conclude that too did not occur before April 6.) Thus, even if there was evidence of a joint plan to use the media to advance Hutu power, that would be a far cry from evidence of a plan to use the media to advance the cause of genocide.

Third and fourth, there is absolutely no reference in the Reports to factual evidence showing that Ngeze knew of any plan to commit genocide or to create the conditions necessary for genocide or that he knowingly acted as a participant in such a plan or published articles with the intent to advance such a plan. Descriptions of such evidence might have been expected in the long Chapter 4 of the Chrétein Report, 27140-27074, presented under the title: "Network of various journalists and personalities suspected of being implicated in the genocide conspiracy within the Rwandan media." The chapter title is misleading. No such evidence is described. Rather, the Chapter is basically a short biographical profile of a large number of journalists. The only apparent reason for "genocide conspiracy" in the chapter heading is that Chrétien appears to like the word. What is missing from the chapter is obvious. It describes no evidence of any conspiracy, no evidence of any agreement about concerted illegal action, much less any evidence that the aim of any or all of the journalists was genocide. Apparently, the only reason for the word "conspiracy" in the chapter heading was that, although unable to find a shred of evidence of such a conspiracy, the Experts believed that by showing that journalists and media professionals in Rwanda, like those everywhere in the world, tend to know each other and, especially when their viewpoints were compatible, tend to be friends, their acquaintance with each other and in some cases friendships show a conspiracy. And since genocide did occur, those journalists most allied with political factions most implicated in the eventual genocide *must* have long been in a conspiracy to accomplish such a result. Such vague, ungrounded speculation is simply not evidence. If the authors of the Report considered this to be evidence, the main significance of the chapter may be reinforce the notion that a legal order should require evidence rather than preconceived, unsupported hypotheses.

It would be extremely dangerous to developing countries or ideologically or ethnically divided countries' need for legal protection of robust press freedom to accept a charge of conspiracy without unambiguous evidence of media actor's actual agreement to be a joint participant in a plan and evidence that this press participant had knowledge of the group's intent to achieve specific illegal ends, here genocidal, ends. Although conspiracies are real, imagining conspiracies where they do not exist is even more common. Imagined conspiracies is often the easiest way to explain events that are otherwise difficult to comprehend. The belief in a conspiracy often merely articulates a person's preconceived view of opponents or of strangers. This danger of imagined conspiracies is particularly dangerous – and probably common – in respect to the media, whose power and influence are often imagined to be greater than they are.

Any properly operating democracy will have a partisan press, at least some of whose units will be supporting the ideological views of the most extreme political tendencies. This state of affairs is what "press freedom" means. Hopefully, the discourse that this media stimulates within the extremist group will lead the group to choose lawful, non-violent forms of political activity. Nevertheless, the journalism of these media entities will inevitably support that political faction in whatever it does. This fact cannot be the criterion to show criminal "conspiracy." To the extent the media entity's leadership joins in and contributes to a specific plan that this media leadership – publishers or editors or broadcasters – know involves criminal (here, genocidal) aims, a conspiracy charge would be appropriate. But the fact that an editor or

publisher, for example, generally supports a political faction and is acquainted with the leaders of that political faction does not mean that the editor or publisher participates with them in a conspiratorial plan. Anything less than clear proof of knowledge and participation in a criminal plan, however, would potentially subject any media representing the views of oppositional elements in a society to punishment by the government in power whenever those in power fear violence from the opposition, a basically ubiquitous situation in much of Africa if not the world as a whole. Press freedom – and any democratic future for Africa – cannot live with such a legal standard. Such imagined conspiracies are to be alleged in the press, maybe fantasied by experts, but not accepted by a court.

Publication of lists of names. The Indictment alleges that between January and December 1994, *Kangura* published lists of Tutsis and moderate Hutus "to be eliminated" and from "7April to late July 1994, military and militiamen massacred [Tutsis and moderate Hutus] by means of pre-established lists ... published in *Kangura* newspaper." Amended Indictment, §§ 5.25, 5.26. Likewise, the popular press during the time this Tribunal has operated has made much of the role of published lists of names, often including the residence of the people named, with the lists being immediately used by the Interahamwe to identify people whom they promptly murdered. At least assuming intent for such a use of the list could be shown – and it could possibly be implied in certain circumstances, for example where the media entity knows that such use of the lists is occurring or where the media entity directs that such a use of the list be made – such behavior likely meets even the international standard for direct and public incitement and, if different, the American *Brandenburg* test for unprotected speech. Although such evidence may be available in respect to some RTLM broadcasts, this charge cannot be logically or properly made in respect to Ngeze and *Kangura*.

First, to the extent the Indictment implies that genocidal massacres followed immediately upon publication of lists of names, it is outright wrong. Though the Indictment says such lists were published from January to December (a time that encompasses the period – April 7 to late July – during which the Indictment says the massacres occurred), in fact the last issue of *Kangura* was published in the middle of March, weeks before the time that the Indictment says the massacres began. Thus, no list published by *Kangura* could have immediately led to these massacres.

Second, by saying that *Kangura* published lists of people "to be eliminated," the Indictment implies that *Kangura* "wrote" that these people should be eliminated. As far as I could find from the Chrétien and Kabanda Reports, this claim has absolutely no support. Nothing in *Kangura* says that these people should be or will be eliminated. Alternatively, maybe the claim that it published lists of people "to be eliminated" does not mean that the publication advocated their elimination but only that Ngeze so intended and the readers so understood the role of the lists. There is, however, nothing described in the Reports to support this possibility either. In the examples provided by the Expert Reports, when *Kangura* published lists, *Kangura* stated what it described as suspicions concerning the people listed and called on the government or the security forces to investigate the suspicions. *Kangura* recommended that, if the suspicions

proved correct, the government or security forces then should make arrests. For example, Chrétien quotes a 1991 article where *Kangura* sought to have security services investigate the named people, which the article suggests "[i]n many cases are not out-rightly guilty of complicity with the *Inkotanyi* or of other violations of the law." 27057.

Moreover, the Report does not allege that the listed people were massacred then or even later or that Ngeze intended that result or that readers perceived that as the purpose of the listing. Rather, the Report claims that Ngeze "succeeded however to send people to prison." Id. And at a later point, the Report quotes a book that, that without giving details, claimed that when Ngeze publishes a list of persons that he alleges are accomplishes of the *Inkontanyi*, the people listed find themselves the next day in prison. 27145. The Report never denies that the people sent to prison were properly sent after an investigation, but even if they were improperly imprisoned, sending people to prison is hardly equal to genocide. In another place, Chrétien quotes an unnamed source apparently from the early 1990s who claimed that "persons indicted by *Kangura* ... [were] the next day removed [from the posts]," had their jobs "transferred," or were "sacked." 26726. Certainly, firing people based on unproven (assuming they were unproven) suspicions is objectionable but it is equally clear that being fired from a job is not the equivalent of being massacred by militiamen. At another point, the Report notes that "*Kangura* had accustomed its readers to personal attacks and denunciation, to publication of lists of 'accomplices." 26637. Interestingly, nothing here suggests that "accustoming" people to these denunciations either did or were intended to lead to death for those named.

Third, the Indictment charged that these publications of list and subsequent massacres occurred during the January to December. Although this point might be less important (except as related to the jurisdiction of the Tribunal), I could not find references in the Reports for any lists being published during this period. The Chrétien Report's Chapter 15: "Propaganda between the conclusions of Arusha agreements and the outbreak of the genocide," does not note any publication of a list of Tutsis or accomplishes. Since *Kangura* did not publish after the outbreak of the genocide, it would appear that the Indictment's charge in this respect simply has no factual basis. (I have not independently examined *Kangura* for this period and it is, of course, possible that I missed a notation of such a publication within the Expert Report.) However, even if such publication during this time occurred, it would be essential, first, to examine to the article to see what behavior the article actually advocated in relation to the listing – the second point above – and, second, determine whether listing did lead or could have been expected lead and was intended to lead to an imminent massacre.

More generally, the issue of publishing lists of purported wrong doers in a political context deserves more comment. Such a practice is often the outcome of investigative reporting and can illustrate journalism at its best. A "watchdog" press ought to publish the names of those whose behavior it has reason to believe are injuring the welfare of the community. This effort can often stir prosecutors or others into *appropriate* action. Of course, prosecutors and others have a responsibility to know that the press may have made a mistake. More than this, however, the practice of publicizing lists of people allegedly engaged in objectionable practices has had an

often odious history. In the United States, the practice immediately suggests the "McCarthy period." Senator Joseph McCarthy periodically named lists of people whom he considered – with no proof and often wrongly – to be communists or communist sympathizes (cf. Tutsis accomplices) and his lists – and related witch-hunt investigations – caused people to loose jobs and influence, unfairly damaging their lives. These events constitute a major disgrace in American history. However, to my knowledge, none of the historical criticism suggests that McCarthy did not or should not have had a constitutional right to engage in such expression or that the press did not have a constitutional right to publish these lists. (Part IV, supra p. 13, observed that the U.S. Supreme Court unanimously protected publishing lists of boycott violators even in a context where some of those identified where then subject to criminal intimidation.) Rather the criticism of McCarthy has been a political condemnation of him and of the country for following his lead; the disgrace is that the public and other politicians did not reject McCarthy's demagogic allegations as unfounded or irrelevant. The same criticism might be appropriately made about the lists published by *Kangura*. On the other hand, unlike McCarthy who asserted that he had a clear factual basis for the charges he leveled against the people he listed, the typical form of *Kangura*'s publication was that *Kangura* had suspicions about the listed people and that it sought further investigation. Moreover, the Reports did not claim or show that it was wrong. As noted, one valuable and important function of a watchdog press is to raise issues, to suggest matters, and to indicate suspicions concerning *people* who ought to be further investigated. Given the media's inevitably limited resources for investigation, the press must be able to raise matters merely on the basis of suspicion. The line between a proper and abusive journalistic role is a fine one and which side *Kangura*'s lists fall is unclear on the basis of the information offered in the Expert Reports. However, *both* sides of the line should be and are (at least in the United States, absent both falsity and either knowledge of the falsity or a high degree of recklessness in making the listing) within the realm of press freedom.

In sum, the Expert Reports provide no support for the charges in the Indictment concerning the publication of lists of people to be eliminated.

Falsity. No conception of press freedom protects all publication of knowingly false information. On the other hand, no conception of press freedom is adequately protected by a standard that allows liability for all falsity, despite lack of knowledge. Moreover, often times even knowingly false content, while subject to condemnation as bad journalism, is not and should not be illegal. The requirement that the falsity is made with knowledge of the falsity is certainly required when the falsity itself is treated as evidence that the speaker/publisher was attempting to achieve a criminal end as opposed to merely informing people about the world. Both Expert Reports make charges that the *Kangura* published false, fabricated news. In most cases, the Reports do not specific which articles or claims it views as false. In the occasional case where it does indicate particular assertions in particular articles, the Reports seldom demonstrate the falsity that they assert. In addition, and possibly even more important, the Reports do not show that the inaccuracies where knowingly made by Ngeze. Finally, the Report does nothing more than make broad allegations about why any falsity, even if knowingly made,

could constitute a basis to view *Kangura* as involved in carrying out any genocidal or otherwise illegal plan, as opposed to merely pursuing political ends.

VII. COMMENT ON EXPERT REPORTS CONDEMNING NGEZE AND *KANGURA*

My conclusions about Ngeze and *Kangure* summarized in Part VI differ radically from those offered by the Reports of Jean-Pierre Chrétien and Marcel Kabanda. For this reason, I find it incumbent on me to comment on the nature of the reasoning in these Reports.

Many if not most of the Reports' claims concerning of Ngeze's "intent," characterizations of the "content" of *Kangura*, or assertions about what Ngeze and *Kangura* "cause" are not supported by the quotes that come immediately before or after these claims or characterizations or by any other facts alleged in the reports. At least, that is what I found. If I am right, this should be sobering to anyone inclined to place any reliance on these reports. Although I cannot demonstrate my claim unambiguously, to support it as well as possible in brief fashion, I will examine a substantial number of illustrations of their reasoning. Obviously, my sampling could be unfair, but if anything I think it understates the lack of sound reasoning. The Reports constantly make defamatory claims without support or logic. To the extent that I am right, their reasoning process in relation to evidence, cause, and proof are so fundamentally flawed, so inadequate, that any use by a legal Tribunal of these Reports' conclusions or characterizations about cause or intent would be seriously objectionable.

The Reports also showed a severely inadequate appreciation of the proper role of the press – a point I will also develop at the end of the review of each Report. Possibly, the Reports' willingness to make unestablished allegations about Ngeze's intent, about his purported participation in a conspiracy, and about the consequences of *Kangura*'s articles reflected their understandable desire to identify people to be held responsible for the genocide that occurred. But the Expert Reports' essentially make *Kangura* a scapegoat – and scapegoating the media is often convenient and almost always easy in popular imagination. I suggest, however, that for these Reports, the readiness to scapegoat the press reflects their under appreciation or misappreciation of the media's role.

Chrétein Report

As the apparently major report, this subsection will primarily comment on the Chrétein Report. In Chapter1, Chrétein asserts that his Report will prove the widely admitted view "that the architects of genocide did, on a monthly and yearly basis, skilly combine a group of media and extremist political parties to work together so as to insure the success of their endeavor [– to commit genocide]." 27201. He claims that the Report will prove that architects of genocide "*made* the Rwandan population believe that extermination of Tutsis ...was the solution to all their problems." 27200 (my emphasis). Several observations about this agenda are appropriate. First, the Report never identifies any evidence that genocide was contemplated or desired by any

Hutu – by any "architect of genocide" – before April 6, 1994 and certainly it does not show that Hassan Ngeze had any such plan or desire. He offered nothing to prove the widely admitted view other than to state it and rely upon it himself. Second, although the supposition that propaganda can "make" people believe whatever the skillful propagandists want them to believe was a widely accepted theory in the field of communications theory fifty or sixty years ago, that view, implicityly assumed by Chrétein, has been widely rejected by virtually all modern communications theorists, at least as a general proposition. Research about "audience reception," resistant readings," and "media effects" now see a much more complicated process that recognizes both a major role for listener agency and for frequent variability of responses. This point is not only important for social science research purposes, but failure to recognize the modern social science may also explain the Chrétein Report's almost complete insensitivity to the needs of a free press. An elite commentator who sees people so subject to manipulation is not likely to be sympathetic to press freedom (or to people's capacity for democratic self-government).

In Chapter 2, Chrétein quotes an article in *Kungura* whose point was to claim that Tutsis "were fairly represented in all the sectors." 27185. The article listed as examples of prominent Tutsis twenty people in government and the economy, but Chrétein responds that more than two of these are in fact Hutus. So what does this error – assuming Chrétein is right about the facts, which would be difficult to assess since ethnic identity was often contested – show? To begin, Chrétein provides no basis to believe that the purported error made by Ngeze whose a knowing falsehood. Most importantly, Chrétein does not show that Ngeze's primary claim, which concerned fair or even over representation of Tutsis, was false. Still, without clearly showing falsity and certinaly not knowing falsity, Chrétein could conclude that this article showed *Kangura* had embarked on a "campaign of disinformation" and that the mistakes "proved that the 'ethnic' denunciations was just a mere pretext for settling of scores." Possible interpretations of the article – but certainly not claims that were in any way proven or even particularly probable.

Chapter 3's central claim seems to be that "propaganda on genocide is fundamentally backed by ideology presented as undebatable. It upholds the priority of 'ethnic' identifications and the existence of a real protracted war between Hutus and Tutsis." 27181 And this propaganda is Kangura's "fundamental message." Id. The problem with the claim that this ethnic lens shows that media content constitutes propaganda on genocide is that an emphasis on the priority of ethnic identification is common occurrence around the world and is widely believed to be a legitimate, although in the view of many including myself, a very misguided, political stance. Belief in the priority of ethnic identity is certainly not the equivalent of incitement of genocide. And although the characterization of there having been a protracted war basically between Hutus and Tutsis is not the only way to characterization the Rwandan (and maybe Burundi) history, it is certainly a plausible characterization and, again, hardly a call for genocide – as opposed to call for negotiations to end the conflict, a call that *Kangura* explicitly made. Cf. 26832-26831. To reveal that *Kangura* is "obviously racist," 27180, Chrétein excerpts an article that observes that "[it is enshrined in all constitutions world-wide that before

the law, all men are equal without any distinction of sex, race or religion" but that then observes that this does not mean these differences do not exist; and proceeds to say that "[the Hutu-Tutsi issue is a reality in Rwanda even though people are cutting each other with machetes;" and, finally argues that "[we can build this country only when everyone is aware of himself and of the party to which he belongs." 27179. Again, a controversial view but plausible, a view analogous to ones held by many decent people, and hardly an obvious "propaganda on genocide."

The chapter is filled with similar mischaracterizations of the articles quoted. According to the Report, an (unidentified) author of an article in *Kangura* "suggests cynically that ... the extermination of Tutsis should be envisaged since they are in the minority." 27175. There is nothing in quotations in the paragraph making this claim that even remotely supports this characterization unless it is the language: "We should not allow our small beautiful Rwanda to become another Liberia or a new Somalia." Id. Alternatively, the Report might have been referring to an article excerpted in the paragraph preceding this claim (the Report was unclear about which article it though made this claim). In this article describing events of the 1959-61, the language best supporting Chrétein's characterization is the following: "The population fell on the Tutsi chiefs who had been tormenting them over the years. Although they were so annoyed, Hutus have never planned to kill Tutsis except in the event of legitimate defense." 27176. Even noting that the words "so annoyed" are used in contexts to excuse (but not exactly to justify) murders, this quotation hardly argues that Tutsis *should be* exterminated *because they are a minority*.

Chrétein accuses Ngeze of initiating anti-Tutsi hatred by publishing claims that Tutsis were dominant in commerce and otherwise for constantly seeing a Hutu-Tutsi issue, 27175-27174, but Chrétein does not show that Ngeze's facts were wrong or that, if they were, that Ngeze knew they were wrong. At least without such a showing of knowing falsity, surely the choice to publish such claims should not be legally objectionable. For example, it should not be illegal to publish a claim that capitalists are rich even if the publication would produce anti-capitalist hatred. Chrétein then says that "*Kangura* stated that banks gave loans *only* to Tutsis." What is curious here is that he then quotes the article which says "the Rwandan Banks grant *more* loans to Tutsis than to Hutus." 27174-27173 (my emphasis). Although the Chrétein Report criticizes *Kangura* for "*promis[ing*] 'mob justice,'" the quoted article's assertion that the "only solution is mob justice" hardly constitutes a "promise," much less an incitement, but a debatable conclusion. 27148 (my emphasis). But even more curious, the Report did not consider what *Kangura* apparently meant by "mob justice." The sentence following this "promise" is: "The people will make them [the Tutsis or the traitors] pay dearly for their crimes *by refusing to vote for them*." Id. 27148 (my emphasis). That is, contrary to Chrétein's characterization, review of the whole article really suggests something more general – that *Kangura* adopts a journalistic style using dramatic life/death terminology to describe political, but not necessarily violent or genocidal, conflict.

Chapter 3 also illustrates Chrétein's continual use of extreme and unsupported headings to describe subsections of the Report. For example, he introduces the next section: "The

enforcement of a logic of genocide: ..." 27148. However, *nothing* in that section suggests anything about genocide, certainly not that genocide has any logic. And the Report seems merely hysterical in suggesting that the media's use of words could constitute the "enforcement" of anything. This worst the section can show is an except from *Kangura* that makes a number of bad arguments that sound a lot like those George Bush periodically offers in the United States, such as the view that during times of war the decision about whether to release people arrested for purportedly aiding the enemy, in the Rwandan context meaning the invading *Inkotanyi*, should be tried by military rather than civilian tribunals and that they should be subject to the death penalty. 27147. This section also shows that *Kangura* campaigned to have "accomplices" identified and arrested, did some tentative identifications itself, although *Kangura* noted that more accurate information should be developed by the country's security services. 27146. As noted in Part VI, this listing of names should be troublesome in some respects, although it also could be viewed as good journalism to the extent its identifications are accurate. Moreover, there is no evidence that the call was for anything more than investigation and the most that the Report even suggests the listings "caused" was people losing their jobs or being arrested. In any event, the listing of names and call for investigation is not "the *enforcement* of a logic of *genocide*."

The Report then quoted various articles from *Kangura* under the Report's heading: "Obvious persistent threats of genocide." The characterization is bewildering. The most extreme of the many, many quoted statements were: "Hutus have never sought to provoke Tutsis; we have never had the intention of killing them; but know that we shall not continue to tolerate your acts of provocation. *If* you maintain your positions, know that we are watching you. Agapfa Kaburiweni impongo 'The person who dies even after being warned is an antelope.'" 27142 (my emphasis). And: "Tutsis will always pay for the death of [President] Ndadaye [of Burundi, a Hutu who was murdered by Tutsi soldiers] whether they like it or not." 27142. And: "If war had to broke out again [sic], many Tutsis would die."[*] 27140. Although these statements are most plausibly seen as an attempt at journalistic vividness, they also could be described as "warnings" – concerning the potentially violent consequences of Tutsis aggression or that Tutsis should be careful in their behavior. However, even if these were more than warnings, even if they were "threats" of violent responses to specific acts, that hardly constitutes "threats of genocide." In many ways the quoted language resembles that which was the basis of a conviction under a criminal syndicalism statue of a leader of the Klu Klux Klan in *Brandenburg v. Ohio*, 395 U.S. 444 (1969): "[I]f our President, our Congress, our Supreme Court, continue to suppress the while Caucasian race, it's possible that there might have to be some revengence taken." In that case, the U.S. Supreme Court unanimously reversed the conviction as a violation of the First Amendment. Another *Kangura* article exhibited an obvious fear of an attack by the *Inkotanyi* and warned that Tutsis as well as Hutus would be killed if the attack occurred. About this article, the Expert Report says that Ngeze "gives the impression that the threat of genocide was

[*] I have no way to know whether, in general, the translations improve or corrupt the grammar.

looming over the Tutsis." 27140. Well, maybe. But certainly the type of view explicitly expressed in the article – that war would result in deaths of both Tutsis and Hutus – is the type of view that people should have a right to print, consider, and debate and to determine how they will respond. The most obvious characterization of the article is that it is a criticism of war.

This chapter also makes specific ir curious allegations against Ngeze as a journalist. To say that Ngeze is "virtually illiterate" and "could not write a coherent article"(27097), like the Reports earlier charge that he is "not able to draft a real article nor even detect any typing or spelling mistakes" (27194) and is "confused and incompetent." 27184. Maybe Chrétein merely wants to indicate his contempt for Ngeze's professional capacities. These assertions, however, make the Report's claim that Ngeze's writings were a cause of genocide somewhat curious – illiterate but that rhetorically powerful? – and seem somewhat incongruous given the Report's suggestion that Ngeze wrote 80% of the articles in *Kangura*. 27094. The suggestion that Ngeze had dealings with RTLM, published excepts from some of their programs, verbally supported RTLM, ran advertisements for *Kangura* in RTLM, and was friends with people at RTLM also do not point to anything legally objectionable about Ngeze's behavior.[*]

The conclusion of Chapter 4of the Chrétein Report is a disgrace. Largely innuendo; its basically defamatory content makes virtually no attempt at supplying evidence. The Chapter asserts that it has provided "biographical information on the journalists involved in the *genocide conspiracy*" and "show[n] varying degrees of involvement." 27077 (my emphasis). The trouble is that the chapter shown no degree of involvement. It gives absolutely no evidence of either the existence of a conspiracy or any genocidal aim or any involvement in such a plan by the journalists described. The chapter describes Ngeze as one of the "chiefs" of the genocidal conspiracy, apparently on the basis of introducing himself on RTLM as being an adviser to the CDR. 27077. Of course, the Report elsewhere suggests that Ngeze regularly claims greater importance than he in fact has – so I wonder why the Report so quickly accepts Ngeze's claim here. But assume that Ngeze's claim to be an adviser of CDR is true – this fact would show absolutely nothing about the existence of a conspiracy nor provide any evidence of an intention to incite genocide. Even if the CDR is found to have later been a sponsor of genocide – something not demonstrated or even alleged by the Report – that would not show that this sponsorship was something Ngeze recommended or knew of; in fact, it would not show when CDR began to sponsor genocide and whether Ngeze was involved with it at that point. Similarly, the Report offers "[a]s proof of the link between the various protagonists of the genocide conspiracy within the media" (27076) two cases: a journalist that was both a "chairman of the information committee of the CDR party" and "one of the most active and influential

[*] The section did make several other charges which do not relate to whether liability should exist for Ngeze's role as a journalist but rather whether he committed illegal acts independent of publishing *Kangura*. As I noted in Part I, despite doubts about the accuracy of these assertions, they are beyond the scope of my report which is limited to evaluating the charges based on publication of *Kangura.*

members of the editorial board of *Kangura*" and the example of another CDR committee member who signed articles in *Kangura*. 27075. The Report never mentions how these "links" provide proof – or even relevant evidence – of any "conspiracy" of any sort, much less one involving Ngeze and related to inciting genocide. Although evidence is again lacking, the Report suggests that "many of these extremist journalists were tribalistic individuals, alcoholics and/or delinquents" (27075), making them, as "historians generally know," like those recruited by "the Nazi movement." 27074. The defamatory claim of the Report's otherwise irrelevant assertion has more relevance to whether one would want to invite these journalists to dinner than to whether they should be prosecuted by an international tribunal.

Chapter 6's critiques Ngeze for "standardizing racism." 27066. The Report quotes Ngeze asserting that "all ethnic groups should be equal before the law" (27066) and arguing that "the nation is above the ethnic group but is composed on them." 27065. Although excerpts in this section contain considerable criticism of Tutsis, the excerpts' primary point seems to be an assertion that ethnic groupings are natural and that a person should be proud of his or her ethnic identity *whatever it is*. This view is, of course, controversial and may even be implicitly racist, but not only is this view common around the world but more importantly nothing in this view suggests genocide or even denial of equality. In fact, Ngeze asserts and seems to believe peace can only be built on explicitly negotiated relations between the different ethnic groups. At worst, the quotations sound much like Black Nationalist (or white racist) publications in the United States (and I suspect similar views can be found in most countries) that are recognized as clearly protected by the constitutional protection of freedom of the press.

At many points, Chapter 6 makes characterizations and factual assertions about Ngeze and *Kangura* without showing their basis. For example, the Report claims Ngeze published an article in order "[t]o succeed in destroying essential moral values." 27064. Yes, that would be a bad thing to do, but the Chapter gives no basis for so thinking that was Ngeze's reason for publishing. The Report's characterization applied to an article, noted earlier, that claims that Tutsis occupy particularly high percentages of various occupation and get bank loans, tax exemptions and import/export licenses; the article proceeded to suggest: "[i]f we refuse these hard facts, is it possible to promote reconciliation, unity and peace in Rwanda?" Id. The Chrétein Report also says this article "*endeavored* ... to distort facts," id. (my emphasis), but the Report here, as in many places, neither shows these factual claims are wrong nor offers any evidence of what the real facts are, nor any evidence that any mistakes by Ngeze were intentional (and hence amounted to an *endeavor* to distort). The Report did not even seems interested in these crucial matters. Instead, Chrétein immediately moves to characterizing the article as "outrageous and frenzied" in a manner that Chrétein says "recalls diatribes of Adolf Hitler against Jews in *Mein Kampt* or the anti-Semetic pamphlets of Julius Streicher..." Id.

In a section of the Chapter entitled: "Words of death and impunity," [27053], the Report claims "to illustrate the role of Hassan Ngeze and his newspaper *Kangura* in the murders which preceded the genocide." 27053. The Report quotes an article in which *Kangura* warns – maybe threatens – Tutsis that if they start a conflict, the Hutus will defend themselves and Tutsis will

have "sacrificed" themselves for nothing. Specifically, the article tells Tutsis that they are hardly "foresighted" if they "provoke a conflict in which [they] will be 'macheted'..." Id. Warnings (or threats) are usually made to prevent something from happening. However, the Report characterizes this statement as "*Kangura* openly appeal[ing] for the massacre or extermination of Tutsis." Id. That characterization is quite a stretch. Surely in any conflict, one side should be able to warn the other side of dire consequences if it is aggressive. It is hard to see that *Kangura* has done anything more.

Chrétein concludes this chapter by claiming both that "the project on the genocide plan had been conceived long in advance" and that "Ngeze revealed, popularized and vulgarized [the plan] in *Kangura* by conditioning the Hutus who were urbanites to accomplish it or allow its accomplishment so that Tutsis should not escape the genocide." 27049. The conclusion is dramatic and condemning, The trouble is not only that nothing in this chapter (or anything else in the Report) provides any basis for believing that the genocide plan was conceived long in advance of April 6, 1994, but also, even if the right about the first point, the Report provides no basis for concluding that Ngeze had any role in conceiving or carrying out such a plan or even that he had any knowledge of such a plan or that *Kangura* conditioned urbanites to carry it out. It is as if Chrétein believes by sufficient repetition of unsubstantiated claims that they will be accepted as true.

After a number of chapters mostly focused on radio media, Chapter 14 described links between the print media and RTLM. The claimed subject of chapter is to determine whether in six months prior to genocide the "extremist press and RTLM defended similar causes." 26874. Putting aside the results of the investigation, the most striking thing about the topic is it almost complete irrelevance to any issue before this Tribunal. Even extensive, formal cooperation of *Kungura* and RTLM is of no relevance unless the cooperation is shown to relate, for example, to inciting genocide or some other criminal activity. That crucial issue was largely avoided. Some articles showed that *Kangura* supported the existence of RTLM and others suggested that they had similar ideological agendas, though at least the examples from *Kangura* hardly related to advocating genocide or law violation. Moreover, I have argued that "advocacy" by *Kungura* legally would not constitute "public incitement" without (the non-existent) evidence that the advocacy was contemporaneous with the genocide or created an imminent danger of the genocide. Still, on some legal theories, *Kangura* articles in the six months immediately preceding the genocide may have significance. However, despite the chapter's proclaimed goal, the chapter relies mostly on excerpts from *Kangura* come from earlier periods, almost none after the middle of 1993.

For example, Chrétein quotes for three page an excerpt from a February 1992 issue of Kangura that charges that Tutsis have largely taken over legal education (such as in law), mostly by having Tutsi instructors improperly favor Tutsi students. 26859-56. The article then warns of future Tutsi domination, including by taking control of military, and of massacres unless the Hutus are prepared. The most inciting aspect of the article was in the final paragraph: "Wake up Hutus... There is a dispute between you and the Tutsis. You have been fighting since 1959. You

now see that they have encircled you and nothing stops your being exterminated. Hurry; correct your mistakes, if any, before it is too late. You have been warned. Disappoint the Tutsis... Better still, learning to 'copy' is also a great art." 26856. Strong language, but of what is this excerpt evidence? The article's speculative predictions are opinion – not lies. The advocacy is general – mainly for Hutus to be vigilant and organized like the Tutsis – advice that may have increased tension and even made violent action more likely but also advice that, given the time, was surely reasonable (*and legal*). Absent showing both that the factual description of the educational context was factually inaccurate and that its author should have known the inaccuracy, that part of the story constitutes clearly proper partisan journalism. For Chrétein, however, this article plus an RTLM broadcast accusing students of the law faculty of strategically aiding the Inkotanyi, constitutes "***proof*** that this press was not born fortuitously, but was the fruit of an orderly and planned process, with goals, methods and people who had patiently imbibed an ideology of death and had openly preached it unscrupulously." 26856 (my emphasis). On the contrary, if this constitutes proof of (or is even remotely relevant to proving) "a planned process...," then *proof* has no meaning. If anything, Chrétein's claim suggests that he needs remedial education in elementary logic. In addition, although the Report is not quite as explicit on this point, Chrétein also seems to think the correspondence of editorial position is evidence of a "well-organized system." Id. But organized similarity of editorial position is simply not illegal as long as all that the separate media entities were "jointly" doing was advocating the views that appear in the articles described here. Equally important, Chrétein provides no evidence that the similarity was a "organized system." The suggestion of such flies in the face of the almost universal phenomenon of ideologically similar editorial voices taking ideologically similar positions even without any organized coordination.

Chapter 15 describes "propaganda" in the period between July 1993 and April 1994 (which the Report describes as about six months but many people would think encompasses either eight or ten months depending on whether July and April are counted). 26855. The Chapter finds articles during this period showing militant opposition to the Arusha accords on the part of *Kangura* and quotes an article in *Kangura* that called for ideological opposition to the accords and recommending "demonstrations" "to expose treachery of [the] government," but emphasizing that "everything will be done in accordance with rules of democracy" – a statement that the Report reads as calling on Hutus "to take to the streets." 26850.

Chrétein willingness to overdramatize or overstate the facts is even more evident further on. He says that a statement by a CDR leader published in *Kangura* "*completely* rejected the Arusha agreements." The leader's statement actually says: "the CDR feels that parties should have been given the opportunity to discuss instead of being forced to sign. It is for this reason that the CDR does not accept these agreements. They are incomplete and contain points which support authoritarianism. The CDR party *is ready to sign these agreements* on condition that they are reviewed and corrected by the parties on which they are binding." 26847 (my emphasis).

At another point, Chrétein says a *Kangura* article "justified" the killing of 10 Belgian

peacekeepers and shows that the killing "was not fortuitous" but rather "the result of a decision taken long before and probably involving Hassan Ngeze." The relevant article was a strong condemnation of the failure of the Arusha agreement, claiming that its failure lay in refusing to address the ethnic problem. The article argues that the ethnic issue should have been addressed directly and suggests a solution would have been to provide for 60-40 Hutu-Tutsi split in positions in the administration and army. It predicts that failing to address "the real problem" will eventually result in some of the UN soldiers being killed and the rest leaving, but the article hardly could be said to have wished for or approved of this result. Rather, the article argued that the consequence will be that "the country will be completely torn apart and ruined" and that both the "stupid Hutus and Tutsis," the "illiterate" population, will be "brutally massacred." "All of this," the article asserts, will be "as a result of poorly negotiated accords."26841-40. This prediction hardly "justifies," advocates, or directly and publicly incites the killing. Rather this editorial reads as a partisan condemnation of the Arusha agreements; and although the article predicts the killing of the Belgian peacekeepers, it claims this would be a catastrophe in which both "Hutus and Tutsis will be exterminated." Id. In contrast, Chrétein presents this editorial apparently to support his claim in the next paragraph that "[the destabilization of MINUAR was undoubtedly a component of the genocide plan." Again, he may be right. However, the crucial matters are what he has not shown: any genocide plan, any reason to think Ngeze is a part of any genocide plan, any connection of this article to such a plan, or even any relation of the article to the postulated goals of such a plan.

Many statements in Chapter 17, although not involving Ngeze and *Kangura,* continue to show Chrétein overstating his case. For example, he says "RTLM even offered to supply the youth with arms" and gives as an example a broadcast that said: "I have just been told the [arms] will soon be available... [Y]ouths ... will receive arms tomorrow or after tomorrow." 26749. To the extent giving these youth arms would constitute participation in genocide, it should make a big difference whether a particular person was reporting that it will happen or was offering to do it, a vital distinction that Chrétein erased or is enable to comprehend. A section titled" "Genocide: the equation Inyenzi/Inkotanyi = Tutsi," was apparently designed to show that RTLM equated Inkotanyis with Tutsis. To support the claim, Chrétein quoted a passage that says: "that vanity and that pride which have often characterized the Tutsi ethnic group ... have brought a great misfortune on the *Inyenzi-Inkotanyis* and also <u>a misfortune on their Tutsi kind (*benewabo)* who have been exterminated</u> (underlined by Chrétein) and now, they themselves *(Inyenzi-Inkotanyis*) are being exterminated..." 26743. Quite clearly, this language at most treats Inyenzi and Inkotanyi as a subgroup of Tutsi, but if Tutsi are "their Tutsi kind," not all Tutsis could be Inyenzi and Inkotanyi. The RTLM is asserting a relation between the two, not the equation of the two.

The Report carefully shows that Ngeze and *Kungura* were severely criticized by other Rwandan papers, which described Ngeze or *Kangura* as "neo-Nazi," as being "a factory of lies and below-the-belt punches," as "killing" (apparently including "murdering the job of journalism [and] murdering concord among Rwandans and murdering people"), and "murdering the profession." The opposing media ask: "Ngeze, do you intend to 'kill' all newspapers... so as to

remain alone on the scene," and demands that "*Kangura,* stop thinking that you'll frighten me," calling *Kangura* "the Mafia [and having] its tentacles, its designs, its mode of operation ... [i]n evil, of course." 26730-25, 26715-14. The Report apparently presents this to show that "Rwandan public opinion was quite informed of the nature of the propaganda used by *Kangura* and its dangers..." 26725. I suggest that the import of this evidence is the opposite of what Chrétein supposes. One of the assumptions about when advocacy arguably can be restricted is when there is no possibility of opposing voices answering the charges. The fact that *Kangura* and Ngeze were strenuously answered provides strong reason to conclude that *Kangura* and Ngeze were participants in journalistic debates rather than being an instrument so situated as to give uncontested orders to a brainwashed public. In addition, the very language of the critiques – murdering the job of journalism and killing newspapers – suggests that hyperbola apparently plays a routine role in the Rwandan media, which gives added reason to read with caution many statements in *Kangura.*

In Chapter 19, Chrétein claims that "the extremist media officials" at Kangura and RTLM "in full awareness" resorted to the rhetoric of Hutu self-defense, "[knowing] that their words would be followed by [Tutsi] death." 26685. Again, he gives no basis for assuming either that these words were routinely followed by death or that the extremist media officials knew that would this would happen – in the case of *Kangura,* whose last issue came considerably before the start of the genocide, it appears that rhetoric did not, at least quickly, produce this result. Finally, given a war with the RPF which was reasonably seen in largely ethnic terms, surely many newspaper around the world would engage in rhetoric of ethnically-based self-defense. Even if Ngeze knew this would increase explosive ethnic tensions, surely one cannot automatically assume that was his prime motive (and even then, this would not be impermissible under appropriate conceptions of freedom of the press and would make him much more like Fritzsche than Streicher in the Nuremberg trials). But flaws are characteristic of Chrétein's over-reading whatever is included in *Kangura*. In a 1964 statement reprinted in *Kangura*, Makuza wrote: "I acknowledge that in one of the ten divisions ... the inhabitants were angry and this led them to do more than what was necessary to defend themselves." Although Makuza's statement amounts to a rather weak, after-the-fact attempt to explain, and maybe partially to justify murders, Chrétein apparently reads this statement as "the *a priori* justification of the killings." 26682.

Chrétein claimed that the "demonization of Rwandan Tutsis in the 1990's, just like that of the German Jews in the 1930's, was *prepared with a view of justifying the extermination* of this group of people." 26625 (my emphasis). And he argued that "[t]he efforts to shape public opinion were a vital dimension of the preparations for the genocide." 26621. As I have noted numerous times, though this reason for the "demonization" may have existed, ant the "efforts" may have had this as their goal, Chrétein points to absolutely no facts, offers absolutely no shred of evidence, to provide even a circumstantial case for this characterization. He claims that "chapters 2, 4, 5, 6, 7, 8. 9. 10, 11, 12, 13, 14, and lastly chapter 20" "shed light on what we attempted to call a 'media conspiracy.'" Id. Actually, what these chapters shed light on is Chrétein's constant willingness to allege a genocidal plan without any evidence of it other than

his constant repetition of the claim. He has said it enough to convince himself but more is required for a legal conclusion. (The only fact that I could find offered by Chrétein that even purports to show a conspiracy is that different members of the media knew each other.) And since there is no evidence that a media conspiracy existed, there was equally a complete absence of evidence of the content or goals of that conspiracy or any reason to think its aim was to cause or prepare for genocide.

Chrétein also seems incapable either of accurately understanding the power or the responsibility of the press or of appreciating the freedom required by a democratic press. Chrétein analogizes *Kangura*'s caricatures of people who Ngeze was attacking journalistically, often pictured in physically mutilated or objectionable sexual positions – see my discussion of the *Falwell* case in Part III – to Julius Streicher's portrayals of Jews in *Der Stürmer.* After describing these caricatures and other journalism as the way the "'war'" was "prepared and waged by the ideological promoters of the 1994 genocide who were in charge of ... *Kangura* and RTLM," Chrétein concluded that "[the way Tutsis [or the Jews in Nazi Germany] were portrayed as evil ... was enough reason for these groups to be exterminated." 26737. (If Chrétein is confessing that he thinks he has good reason to exterminate people because he sees them so portrayed, all I want to say is that most people are not like him.) Of course, Chrétein again fails to show that the publisher, Ngeze, ideologically promoted or favored genocide, to show that at the time of their publication these articles would imminently produce genocide, or to show that there was any promotion of genocide by Ngeze (or by others at the time this article was published). But what is truly scary about Chrétein's analysis is that he seems to think that such caricatures provide "reason" to exterminate these groups. If he means by "enough reason" that portrayals provide an acceptable justification, his position is both absurd and offensive. Presumably he means by "enough reason" a causally effective intervention. But to attribute to these cartoons the capacity to cause genocide denies agency of the audience. It also implies people are not fit for self-government and debate, assuming that these activities require that people be allowed to hear or read all viewpoints, because his claim asserts that people are unable to read or see or hear extreme negative portrayals and then still reject the characterizations and decide how to appropriately – that is, peacefully and legally – respond. And this causal account seems to attribute a power to the media – that mere exposure to media content can lead the typical reader/viewer to act in the recommended immoral/illegal way – that virtually no modern communications scholar accepts as empirically true. Moreover, the analogy to Streicher is unpersuasive. The circumstances in which the cartoons and other negative portrayals that Chrétein describes – before the genocide had began – as well as the related content is much more analogous to the case of Hans Fritzsche, acquitted at Nuremberg in part because he did not know that his speech was contributing to an on going genocide, than of Julius Streicher who knew his characterizations was supporting the genocide that was *then* occurring (see Part V). Despite "evidence from his speeches" that show Fritzsche show "definite anti-Semitism on his part," including his claim that "that the war had been caused by Jews," the Nuremberg Tribunal concluded that Fritzsche was merely trying "to arouse popular sentiment in support of Hitler and the German war effort." Similar characterizations could be made of Ngeze's caricatures. Certainly, Chrétein's conclusion would leave little room for press freedom, and would condemn

many of the most effective and powerful journalistic cartoons the world over. Chrétein's analysis is almost the exact opposite of the unanimous conclusion of the United States Supreme Court, expressed in an opinion by Chief Justice Rehnquist, that such slashing, disrespectful, sexually belittling caricatures should be fully protected as a matter of constitutional rights of free expression and a free press.

According to Chrétein, "in just nine months" the broadcasts by RTLM eroded "individual and collective conscious to such an extent that listeners became more used to the voice of their emotions than that of their moral and rational selves," 26628, and "lead to real brain-washing of the masses." 26629. This interpretation should never be acceptable to a people who claim the capacity to govern themselves or to a world committed to freedom of speech and of the press. Chrétein's view of the power of the media, common fifty or sixty years ago but long since rejected by communications scholars, basically denies people's capacity for agency and would turn press freedom from being an essential ingredient of a just society into being something much too dangerous to allow. True, an emotional element is an important part of most effective communications, but for most people, most of the time, it is only one element. The premise of human rights notions of free speech and national and international protections of press freedom is that legal liability requires something much more than appeals to the "emotional self" and this sort of "brain-washing." Chrétein's view merely represents a complete absence of any appreciation of either the role of the press or the proper scope of press freedom.

Possibly the underlying intellectual and ideological flaw in Chrétein's Report is that not only did he appear predisposed to attribute responsibility to the media for the horrendous events that occurred, but also such a predisposition reflects his incredibly rigid, misguided conception of what is acceptable in the media. Namely, he implies a view that the function is "to provide rigorous information and organize the exchange of ideas through debate." 26620. In contrast, although there is nothing wrong with a media entity doing that, a really democratic media is much more likely to be, as described by the United States Supreme Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964), "uninhibited, robust, and wide-open, and ... [it] may include vehement, caustic, and sometimes unpleasantly sharp attacks..." Many academics and other commentators in and outside the United States consider the *Sullivan* case as possibly the greatest of the American first amendment decisions. There, while protecting the paper from legal liability for its admittedly false statements, the Court, quoting an earlier decision, explained:

> "To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

Id. at 271. And the Court quoted John Stuart Mill's *On Liberty*:

> ". . . To argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion . . . all this, even to the most aggravated degree, is so continually done in perfect good faith, by persons who are not considered, and in many other respects may not deserve to be considered, ignorant or incompetent, that it is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere with this kind of controversial misconduct."

From the perspective of Chrétein's view of the press, there is little reason to be worried about punishing Ngeze for his publication of *Kangura*. From the perspective of Mill or Justice Brennan in *New York Times v. Sullivan,* there is every reason to be concerned with his punishment

Kabanda Report

The Expert Report of Marcel Kabanda focuses specifically on Ngeze and *Kangura,* quotes long sections of *Kangura* articles, but often refrains from making extensive characterizations on its own. Basically, however, it differs little from that of Chrétein in what is not shown, in unjustified characterizations and poor reasoning, and lack of sensitivity for the role of the press. Moreover, most of what it contains – except for often longer excerpts from the articles – is also found in the Chrétein Report. For this reason, I will not offer as an extensive commentary as I did on the first report. Still, examination of a few passages from the Report will illustrate my claim concerning similar deficiencies.

Although the Kabanda Report starts with strong praise of the pragmatic importance of press freedom, on the same page it then implies that *Kangura* may not be a "newspaper even if it bears the name" and that it "is not reflective of freedom of opinion," but instead "[e]thnicity was clearly its dominant feature" and its "source of inspiration." 25154. From this opening remark, the Report continues to exhibit the same lack of appreciation of press freedom found in the Chrétein Report. A free press certainly has room for the possibility of papers with such a ethnic focus – in fact around the world, often such papers both have been particularly targeted for suppression by dominate groups and, when available, have played a valuable, contributing role to democratic pluralism.

In its opening page, the Report quotes a 1991 article from an opposing local paper that calls Ngeze a "'nazi symphasizer' who came into the world half a century late" (a popular charge – Ngeze uses the Nazi epitaph against some of his opponents, which suggests Ngeze must have been a rather strange sort of "sympathizer" given that he thought the characterization was so discrediting) – and claims that Ngeze has a master plan of genocide, 25153, a claim Kabanda takes seriously. However, Kabanda then gives no evidence of the reality of such a plan. Thus, rather than as proof of such a conspiracy, this article from this opposing paper seems more reasonably presented as a demonstration of the high pitched rhetoric of Rwandan media.

The Report observes that when *Kangura* believed it had evidence of disloyalty or other problems, "instead of confirming [sic - confining(?)] itself to providing such information to appropriate services of the State, Kangura also made the information available to the public." 25141. The Report seemed to believe that this shows how bad *Kangura* is. Of course, there is nothing wrong with turning information over to the State, but Kabanda appears to think this is what should be and only this should be done. He appears to have no clue about the role of a free press or the nature of journalism to the extent he is suggesting that a good investigative or "watchdog" press would not publish but simply turn information over to an untrusted state.

Kabanda frequently quotes *Kungura* claims such as that Tutsi are dominant in various business and governmental sectors. 25132. What the Report does not assert or provide grounds for knowing have to do with the truth or falsity of these various factual claims. There are at least three possibilities: 1) the claims are true (in which case they were of obvious political relevance and printing them would be proper); 2) they were false but Kangura held the plausible belief that they were true, in which case the notion of a free press should still protect their publication (*NYT v. Sullivan*); or 3) they were false and Kundura knew them to be false (or at least should have known that under the circumstances). Even in the last case, although publication could be properly characterized to be an abuse of press freedom, a lie about such facts could hardly be said to equate to genocide, incitement to genocide, or evidence of a commitment to genocide. A recurrent problem with the Report is that, in respect to many of "factual claims" that it implicitly condemns *Kangura* for reporting, it seldom even gives reason not to believe that it is true, including any reason to think publication is objectionable, and never even attempts to demonstrate that it is knowingly false, which would be necessary for making any sound criticism of Kangura.

What is more interesting than what the Report shows about *Kangura* is what it thinks it shows. The Report begins Chapter II, "Refusal to negotiate peace with the RPF," with the claim that "it is on this issue that one can truly see the conspiracy to commit genocide." 25109. At this point, the Report noted a number of policy or advocacy positions that *Kangura* took, which it characterized as "incit[ing] his readers." Id. That characterization merely cheapens the word "incite," using it in a way that should no legal relevance. Generally, partisan perspectives on the issues that the Report identified should be predicted among differing newspaper, each of which would strongly "advocate" its views – a much better characterization than saying that it "incited" its readers. Moreover, the articles that the Report proceeds to excerpt are often much more nuanced than his characterization suggests. For example, in the first article excerpted, a 1991 critique of proposals for refugee repatriation, the author of the story in *Kangura* claims that he is "not against repatriation," but primarily emphasizes that the program must be more carefully studied and drafted in consultation with the majority people (the Hutus). 25108-25107. However, the larger problem with this chapter is that, even if one reads the excerpts from *Kangura* again and again, it is impossible to find any support for the Report's basic claim. The articles never call for genocide or anything remotely like it – they do not call for murder or anything much beyond self-defense during a time of war. They do not imply that genocide or murders would be justified. And as for seeing "conspiracy" in these articles, that is only possible

for one who sees conspiracy in everything. I, of course, do not claim that there was no conspiracy but only that if there was, no evidence of anything about it offered.

Possibly the most explicit suggestion by *Kangura* of violence in either report was in two January 1994 articles quoted by Kabanda. These articles said such things as "we will start cleaning up the enemy" and "blood will be spilled." 25067-25066. However, the Report presented these articles to show much more than can be sustained by reading the full articles after placing them both in historical and legal context. Given *Kangura*'s other calls for negotiations and its regular expressions of fear of war – e.g., in its next issue, *Kangura* asserts "that any war is bad" 25066 – at worst these articles read, as they are presented, as "predictions" of violence. Alternatively, the articles can be taken as a "warning" to both the accomplices and the Inkotanyi, as well as to the Hutu majority – that these events will predictably occur if the Inkotanyi do or do not do certain things. The Hutu are warned that "[w]hen the Inkotanyi will have encircled the capital ... [i]t will obviously be necessary for the majority and its army to defend themselves." 25067. The enemy is warned that "[o]n that day, blood will be spilled." Id. As *Kangura* said in the next issue, "[i]f the war were to resume, numerous Tutsis would die." 25065. Thus when examined, despite the violent imagery in these articles, the articles contain no language suggesting that *Kangura* is directly or implicitly attempting to incite or advocate genocide. Warnings, characterizations of events, predictions – these are forms of expression for which a country needs a free press. Moreover, mostly what Kabanda next quotes of *Kangura* from the February and March issues are articles doing such things as praising the Arusha Accords for "put[ting] an end to the war, [giving] the people a break, [letting] the protagonists have [] the time to sit together and to look for ways of achieving peace" 25064, but criticizing the Accords for giving power to the wrong people, not allowing elections, and not facing the real problem, "the question of ethnic groups." And one article proposed more a specific form of division of jobs and posts in the army and the administration, and finally predicted disaster is such measures are not taken. 25064-25060. These articles, I suggest, show a possibly vigorous press, developing various possible scenarios, advocating results that it believes desirable, but not inciting any form of law violation, much less genocide.

As noted above, like Chrétein, Kabanda manifests an inadequate appreciation of press freedom or of the role of a press in a democratic society. He writes that "journalists are entitled to express views on legislative of judicial decisions. However, the question is whether it is *legitimate for them to explicitly incite the public against such decisions*," 25097 (my emphasis) – "incite" meaning in the context of these articles, strong criticism and, in a January 1991 article, an assertion that "people should mobilize to prevent the implementation of this decision." 25098. Here, Kabanda indicates no sensitivity to the proper scope of a democratic press – for which this is no question that this type of "incitement" is fully legitimate.

Kabanda's Report says: "Abusing the freedom of the press, *Kangura* had proposed, as from 1993, recourse to civil war as means of resolving the problem of war." 25070. To prove this description, Kabanda quotes a 1993 article in *Kangura* that says, in part: "The war with the *inyenzi-inkotanyi* has lasted too long... Negotiations are necessary if we do not want our country

to be always at war. But we can only speak of negotiations when the latter are sincere and fair...." 25070-25069. And from this, the article goes on to propose negotiations, naming at least some of the leaders from the different ethnic groups, including Tutsi leaders such as Paul Kagame of the RPF. Finally, at its end, the article warns the *Inyenzi* that without some solution, if they "preserve in their arrogance," the Hutu will militarily break their resistence. This call for negotiations was forceful, with the article ending "[we must stop dithering." 25069. It is quite a distortion to claim this is a call for civil war. And, again, to say that the article is an "abuse of press freedom" suggests the author has no conception of such freedom.

CONCLUSION

On the basis of my evaluation of the excerpts of *Kangura* in the prosecution's Export Reports and any further claims in these Reports about Hassan Ngeze's role as a publisher or journalist, I would conclude that Hassan Ngeze's acted more like Hans Fritzsche than Julius Streicher; that Ngeze and his publications would be protected under the First Amendment in the United States; that Ngeze would likely be protected by the European Court of Human Rights for his exercises of press freedom; and that Ngeze has not committed the crime of "direct or public incitement of genocide" as this offense was understood by the drafters of the Convention of Genocide or as this offense was interpreted by this Tribunal in the *Akayesu* case. Furthermore, although admitting that historical speculation is always problematic, I suggest that an acquittal in this case will contribute much more to the future welfare of Africa and the world by establishing a precedent for strong protection for press freedom, on which both democracy and human development depends, and by affirming a sharp distinction between words and criminal acts, than a contrary verdict would contribute in the hope of deterring future genocidal acts.

C. Edwin Baker