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COMPELLING WAR CORRESPONDENTS TO TESTIFY: A PREROGATIVE OF INTERNATIONAL CRIMINAL TRIBUNALS?

JENNIFER S. JONES[†]

ABSTRACT

A qualified testimonial privilege for war correspondents was recognized by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the case of Prosecutor v. Brdjanin. This article examines whether war correspondents should enjoy such a privilege in international criminal tribunals.

The author illustrates that, to maintain their legitimacy, international criminal tribunals must be able to make factually accurate findings. She further illustrates that the ability of international criminal tribunals to make factually accurate findings is dependant upon their ability to obtain reliable evidence, including witness testimony. The suggestion is made that, as testimonial privileges reduce the evidence that is available to international criminal tribunals, and thereby impair the tribunals' fact-finding abilities, they should be granted sparingly and construed narrowly.

The author recognizes that it is necessary to protect the public interest in the work of war correspondents and acknowledges that a testimonial privilege may be necessary to protect war correspondents from being compelled to testify about confidential sources and materials. She argues, however, that the qualified testimonial privilege established in Prosecutor v. Brdjanin – which seeks to protect war correspondents from being compelled to testify about non-confidential sources and materials – is unwarranted. In the author's opinion, measures short of a testimonial privilege will suffice to avoid any adverse consequences that might flow from compelling war correspondents to testify about non-confidential sources.

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INTRODUCTION

This paper addresses the issue of whether international criminal tribunals ought to recognize a testimonial privilege for war correspondents.¹ The issue is important because testimonial privileges, when construed too broadly, can threaten the legitimacy of international criminal tribunals. Part I of this article introduces the three existing international criminal tribunals. It describes the roles the international community has assigned to them and some of the goals it is hoped their proceedings might serve. Part I also introduces the idea that the success of international criminal tribunals hinges on their ability to make factually accurate findings. Part II involves a discussion of witness testimony before international criminal tribunals. It illustrates that witnesses are a crucial source of evidence in international criminal proceedings and examines the power that international criminal tribunals have been given to compel witness testimony. Part II also demonstrates that, in order to protect certain interests and relationships, international criminal tribunals have seen fit to grant testimonial privileges to some individuals and classes of people. Part III offers a detailed review of the Randal case, the first and only case to consider whether international criminal tribunals can compel the testimony of war correspondents.² The case is critiqued and consideration is given to whether the qualified testimonial privilege it created should be adopted by the recently established International Criminal Court (hereinafter ICC). Finally, Part IV advances the argument that, while a testimonial privilege is necessary to protect war correspondents from being compelled to testify about confidential sources and materials, measures short of a testimonial privilege will suffice to avoid the adverse consequences that might flow from compelling war correspondents to testify about non-confidential sources and materials.

¹ In this paper the term ‘war correspondents’ will be used to refer to journalists who report, or investigate for the purpose of reporting, directly from conflict zones.

² *Prosecutor v. Brdjanin* (11 December 2002), Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal (ICTY, Appeals Chamber) [Randal Case].

I. INTERNATIONAL CRIMINAL TRIBUNALS

1. Roles Assigned to International Criminal Tribunals

At present, there are three international criminal tribunals: the International Criminal Tribunal for the Former Yugoslavia (hereinafter ICTY), the International Criminal Tribunal for Rwanda (hereinafter ICTR) and the ICC.³ All three tribunals are designed to end impunity, and enhance accountability, for major international crimes.⁴ The ICTY has been charged with the task of prosecuting those “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”⁵ It has jurisdiction to try alleged perpetrators of: grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide and crimes against humanity.⁶ The ICTR has been charged with the task of prosecuting those “persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States” between January 1, 1994 and December 31, 1994.⁷ It has jurisdiction to try alleged perpetrators of: genocide, crimes against humanity and violations of Article 3 common to the 1949 Geneva Conventions and Additional Protocol II.⁸ Finally, the ICC has been charged with the task of prosecuting those responsible for “the most serious crimes of concern to the international community as a whole,” namely: the crime

³ There are also hybrid (national/international) criminal tribunals, like the Special Court for the Sierra Leone, which apply both domestic and international law and involve both domestic and international actors. Such tribunals, however, are beyond the ambit of this paper.

⁴ Judge Richard May & Marieke Wierda, *International Criminal Evidence* (New York: Transnational Publishers Inc., 2002) xiii.

⁵ *Statute of the International Criminal Tribunal for the Former Yugoslavia*, UN SCOR, 48th Sess., 3217th Mtg., UN Doc. S/RES/827 (1993), art. 1 [ICTY Statute].

⁶ *Ibid.* arts. 2-5.

⁷ *Statute for the International Criminal Tribunal for Rwanda*, UN SCOR, 49th Sess., 3453d Mtg., UN Doc. S/RES/955 (1994), art. 1 [ICTR Statute].

⁸ *Ibid.* arts. 2-4.

of genocide, crimes against humanity, war crimes, and the crime of aggression.⁹

2. Goals Served by International Criminal Proceedings

A number of important goals can be served by having perpetrators of major international crimes tried before international criminal tribunals. First, international criminal proceedings “can be highly significant to the victims of atrocities.”¹⁰ By acknowledging the suffering that victims have endured, international criminal proceedings can provide victims, and their relatives and friends, with a sense of justice and closure.¹¹ Second, international criminal proceedings can contribute to the restoration and maintenance of peace by working to repair the damage done to societies “traumatized by massive human rights violations.”¹² International criminal proceedings can legitimize contested facts and thereby make it “difficult for individuals and society to take refuge in denial and avoid the truth.”¹³ They can also individualize guilt and thus preclude the “demonisation of entire nations or groups.”¹⁴ Third, by sending a clear message that the commission of major international crimes will not be tolerated, international criminal proceedings can serve to deter future crimes.¹⁵ Finally, international criminal proceedings can help en-

⁹ *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 3, art. 5 [ICC Statute].

¹⁰ Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2d ed. (New York: Oxford University Press, 2001) at 155.

¹¹ Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (Philadelphia: University of Pennsylvania Press, 2005) at 12.

¹² Ratner & Abrams, *supra* note 10.

¹³ Stover, *supra* note 11.

¹⁴ Kelly Buchanan, “Freedom of Expression and International Criminal Law: An Analysis of the Decision to Create a Testimonial Privilege for Journalists” (2004) 35 V.U.W.L.R. 609 at 636.

¹⁵ Emily A. Berman, “In Pursuit of Accountability: The Red Cross, War Correspondents, and Evidentiary Privileges in International Criminal Tribunals” (2005) 80 N.Y.U.L. Rev. 241 at 249.

sure that those who commit major international crimes are appropriately punished.¹⁶

3. The Importance of Factually Accurate Findings

It is of primary importance that, when adjudicating allegations of major international crimes, international criminal tribunals determine the facts that gave rise to the allegations “with the greatest degree of accuracy possible.”¹⁷ If international criminal tribunals fail to make factually accurate findings, their decisions will most certainly be questioned.¹⁸ Worse, their factually-flawed findings might lead to unjust results or, at the very least, create a perception that justice has not been served.¹⁹ This, in turn, might threaten the legitimacy of international criminal tribunals and forfeit the possibility that they will serve the lofty goals outlined above. In light of the need for international criminal tribunals to make factually accurate findings, it is essential that they have the ability to obtain relevant and truthful evidence.²⁰

II. WITNESS TESTIMONY BEFORE INTERNATIONAL CRIMINAL TRIBUNALS

1. The Importance of Witness Testimony

As in domestic criminal proceedings, witnesses are an important source of evidence in international criminal proceedings.²¹ In fact, witness testimony often plays a crucial role in the prosecution of major international crimes.²² In most cases before the ICTY, for example, the testimony of a substantial number of witnesses has been required to prove that

¹⁶ Ratner & Abrams, *supra* note 10.

¹⁷ Gregory A. McClelland, “A Non-Adversary Approach to International Criminal Tribunals” (2002) 26 *Suffolk Transnat’l L. Rev.* 1 at 5.

¹⁸ *Ibid.*

¹⁹ McClelland, *supra* note 17.

²⁰ Buchanan, *supra* note 14 at 637.

²¹ May & Wierda, *supra* note 4 at 163.

²² Berman, *supra* note 15 at 245.

major international crimes were committed in the territory of the former Yugoslavia.²³ That the ICTY has had to make “lavish use of witness testimony” is supported by statistics.²⁴ Nearly 1,000 witnesses testified before the tribunal between January 1, 1998 and July 1, 2001.²⁵ In the Krstić²⁶ case alone, which involved only a single accused, the testimony of 117 witnesses was required.²⁷ The fact that perpetrators of atrocities in the former Yugoslavia “left few paper trails behind” might explain why witness testimony has proven to be such a vital source of evidence in trials before the ICTY.²⁸ Whatever the explanation, there is no doubt that witnesses are “the lifeblood of ICTY trials.”²⁹

Like the ICTY, the ICTR relies heavily on witness testimony. Witness testimony has been crucial to the determination of the guilt or innocence of accused persons who have been tried before the ICTR.³⁰ While the ICC has yet to try a case, it seems more than likely that it too will have to rely heavily on the testimony of witnesses.³¹

2. The Power to Compel Witness Testimony

Because witnesses are such an important source of evidence in international criminal proceedings, it is essential that “those witnesses most likely to have probative evidence” are available to international criminal tribunals.³² Unfortunately, witnesses are often either unavailable to international criminal tribunals or reluctant to give testimony, and subject themselves to “the rigors of cross-examination,” before interna-

²³ Patricia M. Wald, “Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal” (2002) 5 *Yale Human Rts. & Dev. L.J.* 217 at 219.

²⁴ *Ibid.* at 217.

²⁵ Wald, *supra* note 23.

²⁶ *Prosecutor v. Krstić* (2 August 2001), Case No. IT-98-33 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I), online: United Nations <<http://www.un.org/icty/>>.

²⁷ Wald, *supra* note 23.

²⁸ Wald, *supra* note 23 at 219-220.

²⁹ Wald, *supra* note 23.

³⁰ Berman, *supra* note 15 at 250.

³¹ Berman, *supra* note 15 at 250.

³² Berman, *supra* note 15 at 245.

tional criminal tribunals.³³ To help alleviate this problem, international criminal tribunals have been granted the formal power to compel the attendance and testimony of witnesses.³⁴

The rules governing both the ICTY and the ICTR specifically grant the tribunals the power to “issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.”³⁵ Similarly, the statute governing the ICC provides that “[i]n performing its functions prior to trial or during the course of a trial,” the ICC has the power to “[r]equire the attendance and testimony of witnesses.”³⁶ The power to compel the attendance and testimony of witnesses is also derived from the “inherent powers” the international criminal tribunals enjoy as courts.³⁷ The Appeals Chamber of the ICTY has held that the ICTY is vested with the authority to compel the attendance and testimony of “individuals who may be of assistance in the task of dispensing criminal justice.”³⁸ No doubt the same can be said of the ICTR and the ICC. Of course, as with most powers enjoyed by courts, the power international criminal tribunals have to compel witness testimony is not absolute.

3. Testimonial Privileges

i. Generally

Although it is generally understood “that justice is best served when all relevant evidence is placed before the fact-finder,” there are eviden-

³³ May & Wierda, *supra* note 4 at xviii.

³⁴ Kate MacKintosh, “Note for Humanitarian Organizations on Cooperation with International Tribunals” (2004) 86:853 Int’l Rev. Red Cross 131 at 132.

³⁵ *Rules of Procedure and Evidence*, IT/32/Rev.36, rule 54, online: United Nations <<http://www.un.org/icty/legaldoc-e/index.htm>> [ICTY Rules] .<<http://65.18.216.88/ENGLISH/rules/070605/070605.pdf>> [ICTR Rules].

³⁶ ICC Statute, *supra* note 9, art. 64(6)(b).

³⁷ May & Wierda, *supra* note 4 at 190.

³⁸ *Prosecutor v. Blaškić* (1997), Case No. IT-95-14, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) at paras. 47-48 online: United Nations <<http://www.un.org/icty>> [*Blaškić Interlocutory Appeal*].

tiary rules, like testimonial privileges, which have the effect of reducing the availability of relevant evidence.³⁹ Testimonial privileges allow witnesses to refuse to testify in spite of the fact that they may possess relevant evidence. Such privileges are typically recognized by domestic courts in circumstances where it appears they will protect “interests and relationships considered sufficiently important to society to warrant the loss of otherwise competent testimony.”⁴⁰ Testimonial privileges exist, for example, to protect: confidential communications between lawyers and their clients, medical practitioners and their patients, and journalists and their sources.⁴¹ When a testimonial privilege is recognized, it signifies that a determination has been made that the purposes served by the privilege outweigh the fact-finding benefits that might be gained if the testimony in issue could be compelled.⁴² Of course, because testimonial privileges can impair a fact-finder’s ability to serve justice, they tend to be disfavoured and narrowly construed.⁴³

A distinction should be drawn at this point between absolute and qualified testimonial privileges. Absolute testimonial privileges cannot be overcome. They guarantee that the witness whose testimony is sought cannot be compelled to testify. Qualified testimonial privileges, on the other hand, can be overcome if it is demonstrated that the need for the testimony sought outweighs the interest that is being protected by the privilege.⁴⁴

ii. Testimonial Privileges in the ICTY and the ICTR

Like many domestic courts, international criminal tribunals grant testimonial privileges to certain individuals and groups.⁴⁵ The rules governing the ICTY and the ICTR, for example, recognize that “all communications between lawyer and client” are privileged and consequently not

³⁹ Berman, *supra* note 15 at 255.

⁴⁰ Anthony L. Fargo, “The Journalist’s Privilege for Non-Confidential Information in States with Shield Laws” (1999) 4 *Comm. L. & Pol’y* 325 at 361.

⁴¹ Berman, *supra* note 15 at 256.

⁴² Berman, *supra* note 15 at 256.

⁴³ Berman, *supra* note 15 at 255.

⁴⁴ Buchanan, *supra* note 14 at 623.

⁴⁵ Steven Powles, “To Testify or Not to Testify – Privilege from Testimony at the Ad Hoc Tribunals: The *Randal* Decision” (2003) 16 *Leiden J. Int’l L.* 511 at 513.

subject to disclosure.⁴⁶ In addition, through its jurisprudence, the ICTY has recognized a number of testimonial privileges. In *Delalić*,⁴⁷ a Trial Chamber held that employees and functionaries of the ICTY should not be called upon to give evidence and refused to issue a subpoena to an ICTY interpreter.⁴⁸ Similarly, on another motion, the Appeals Chamber held that a Senior Legal Officer and the former President of the ICTY could not be “subpoenaed to testify as witnesses on matters relating to their official duties or functions.”⁴⁹ In the *Blaškić* Interlocutory Appeal,⁵⁰ state officials acting in their official capacity were “effectively granted an absolute privilege from testimony.”⁵¹ On another motion, a Trial Chamber considered it necessary to obtain a waiver of immunity from the Secretary-General of the United Nations before it could require the testimony of a former Commander of United Nations Protection Force.⁵² In *Simić*,⁵³ a Trial Chamber determined that the International Committee of the Red Cross (hereinafter ICRC) “enjoys an absolute privilege to withhold its confidential information” and thus has the power to prevent its employees from testifying to information they obtained in the course of their official duties.⁵⁴ And, in the *Randal* case, which

⁴⁶ ICTY Rules, *supra* note 35, rule 97; ICTR Rules, *supra* note 35, rule 97.

⁴⁷ *Prosecutor v. Delalić* (1997), Case No. IT-96-21, Decision on the Motion *Ex Parte* by the Defence of Zdravko Mucic Concerning the Issue of a Subpoena to an Interpreter (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) online: United Nations <<http://www.un.org/icty>>.

⁴⁸ Powles, *supra* note 45.

⁴⁹ *Prosecutor v. Delalić* (1999), Case No. IT-96-21, Decision on Motion to Preserve and Provide Evidence (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) online: United Nations <<http://www.un.org/icty>>.

⁵⁰ *Supra* note 38.

⁵¹ Powles, *supra* note 45.

⁵² *Prosecutor v. Blaškić* (1999), Case No. IT-95-14 Decision of Trial Chamber I on Protective Measures for General Phillippe Morillon, Witness of the Trial Chamber (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I), online: United Nations <<http://www.un.org/icty>>.

⁵³ *Prosecutor v. Simić* (1999), Case No. IT-95-9-PT, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: United Nations <<http://www.un.org/icty>>.

⁵⁴ Gabor Rona, “The ICRC Privilege Not to Testify: Confidentiality in Action” (28 February 2004), online: <<http://www.icrc.org/web/eng/siteeng0.nsf/html/5WSD9Q?OpenDocument>>.

will be discussed in great detail in the next section, the Appeals Chamber granted a qualified testimonial privilege to war correspondents.

Although the author has not researched the issue of whether testimonial privileges have been established by the ICTR, it is likely that the ICTR respects the testimonial privileges the ICTY has created. This is certainly the case with testimonial privileges that have been established by the Appeals Chamber, as the Appeals Chamber is shared by the ICTY and the ICTR.

iii. Testimonial Privileges in the ICC

Like the rules governing the ICTY and the ICTR, the rules governing the ICC recognize that “communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure.”⁵⁵ In addition, the ICC’s rules provide that “communications made in the context of a class of professional or other confidential relationships shall be regarded as privileged, and subsequently not subject to disclosure” when it is determined that:

Communications occurring within that class of relationship are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure;

Confidentiality is essential to the nature and type of relationship between the person and the confidant; and

Recognition of the privilege would further the objectives of the Statute and the Rules.⁵⁶

The ICC’s rules go on to provide that, in deciding whether communications made in the context of a class of professional or other confidential relationships shall be regarded as privileged, the ICC must “give particular regard to recognizing as privileged those communications made in the context of the professional relationship between a person and his or her medical doctor, psychiatrist, psychologist or counselor,

⁵⁵ Rules of Procedure and Evidence, ICC-ASP/1/3, rule 73(1), online: United Nations <http://www.icc-cpi.int/library/about/officialjournal/Rules_of_Proc_and_Evid_070704-EN.pdf> [ICC Rules].

⁵⁶ *Ibid.* rule 73(2).

[...] or between a person and a member of a religious clergy.”⁵⁷ Finally, the rules governing the ICC recognize the absolute testimonial privilege the ICTY granted to the ICRC in Simić.⁵⁸ It is worth noting at this point that, like the rules which govern many domestic courts, the rules governing the ICC only contemplate that “communications made in confidence between persons holding certain relationships” shall be regarded as privileged.⁵⁹

III. A TESTIMONIAL PRIVILEGE FOR WAR CORRESPONDENTS

In the Randal case, the ICTY was called upon to determine whether international criminal tribunals ought to grant a testimonial privilege to journalists reporting from conflict zones. The ICTY was the first, and is to date the only, international criminal tribunal to consider this issue.

1. The Randal Case

i. Facts

During the armed conflict in the former Yugoslavia, Jonathan Randal (hereinafter Randal) worked as a war correspondent for the Washington Post. As part of the investigative work he did in Banja Luka, Randal interviewed one Radoslav Brdjanin (hereinafter Brdjanin). Because Randal did not speak Serbo-Croatian, and Brdjanin did not speak English, the interview was conducted with the interpretive assistance of a journalist who spoke both languages. Following the interview, Randal wrote an article which was published in the Washington Post.⁶⁰ The article described Brdjanin as a “Bosnian Serb housing administrator”

⁵⁷ ICC Rules, *supra* note 55, rule 73(3).

⁵⁸ ICC Rules, *supra* note 55, rule 73(4).

⁵⁹ Carey Lening & Henry Cohen, *Journalists' Privilege to Withhold Information in Judicial and Other Proceedings: State Shield Statutes* (Congressional Research Service, 2005) at 1, online: <<http://www.fas.org/sgp/crs/secrecy/RL32806.pdf>>.

⁶⁰ Jonathan C. Randal, “Preserving the Fruits of Ethnic Cleansing; Bosnian Serbs, Expulsion Victims See Process as Beyond Reversal” *Washington Post* (11 February 1993) A34.

and “an avowed radical Serb nationalist”.⁶¹ It quoted Brdjanin as having said: (1) “those unwilling to defend [Bosnian Serb territory] must be moved out” to “create an ethnically clean space”; (2) Muslims and Croats “should not be killed, but should be allowed to leave - and good riddance”; (3) Serb authorities are paying “too much attention to human rights”; and, (4) “[w]e are going to defend our frontiers at any cost [...] and wherever our army boots stand.”⁶² The article also claimed that Brdjanin was in the process of “preparing laws to expel non-Serbs from government housing to make room for 15,000 Serb refugees and for Serb combatants’ families.”⁶³

Years after the publication of Randal’s article, the ICTY charged Brdjanin with: genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, and violations of the laws or customs of war.⁶⁴ Brdjanin was subsequently brought before the ICTY to stand trial for the major international war crimes he was charged with. During a pre-trial conference, the Prosecution sought to introduce Randal’s article into evidence on the basis that it was relevant to establishing that Brdjanin possessed the requisite intent to commit the crimes he was charged with. The Defence objected on several grounds arguing, *inter alia*, that the statements the article attributed to Brdjanin were inaccurate. The Defence asserted that, if the article were admitted, they would need an opportunity to cross-examine Randal. In response, the Prosecution requested that a subpoena be issued to compel Randal’s attendance and testimony.⁶⁵ On January 29, 2002, Trial Chamber II of the ICTY (hereinafter Trial Chamber) complied with the Prosecution’s request and issued a subpoena (hereinafter Subpoena) to Randal.

On May 8, 2002, Randal filed a written motion to have the Subpoena set aside.⁶⁶ He argued that, as a war reporter, he should enjoy a qualified

⁶¹ *Ibid.*

⁶² Randal, *supra* note 60.

⁶³ Randal, *supra* note 60.

⁶⁴ *Prosecutor v. Brdjanin* (2003), Case No. IT-99-36-T, Sixth Amended Indictment (International Criminal Tribunal for the Former Yugoslavia) online: United Nations <<http://www.un.org/icty>>; Powles, *supra* note 45 at 511.

⁶⁵ Powles, *supra* note 45 at 515.

⁶⁶ *Prosecutor v. Brdjanin* (8 May 2002), Case No. IT-99-36-T, Written Submissions on Behalf of Jonathan Randal to Set Aside Confidential Subpoena to Give Evidence (ICTY) [Randal’s Trial Chamber Submissions].

privilege from being compelled to testify, “based on the long-term public interest in the free flow of information from conflict zones.”⁶⁷ According to Randal, if war reporters were routinely compelled to testify before international criminal tribunals, they would be perceived as “an investigative arm of a judicial system” and lose access to potential sources.⁶⁸ Randal also argued that the personal safety of war correspondents would be further threatened if they came to be perceived as potential witnesses for international criminal tribunals.⁶⁹ The Prosecution filed their written response to Randal’s motion on May 9, 2002 and on May 10, 2002 the Trial Chamber heard the parties’ oral submissions.⁷⁰

ii. Trial Chamber Decision

On June 7, 2002, the Trial Chamber rendered its decision to dismiss Randal’s motion and uphold the Subpoena.⁷¹ In reaching its decision, the Trial Chamber accepted Randal’s argument that journalists reporting from conflict zones “play a vital role in bringing to the attention of the international community the horrors and reality” of conflicts.⁷² It also acknowledged that “journalists should not be subpoenaed unnecessarily” and that, when compelling the testimony of journalists, international criminal tribunals should ensure that they are not unduly hampering, obstructing or otherwise frustrating journalists’ vital news-gathering role.⁷³ The Trial Chamber even went so far as to suggest that a qualified privilege from testimony might be warranted to protect journalists from having to reveal confidential sources or unpublished materials before

⁶⁷ Eric Lieberman & Fiona Campbell, “International Tribunal Recognizes Qualified Privilege for War Correspondents” (2003) 20:4 Comm. Law. 10 at 10.

⁶⁸ *Ibid.*

⁶⁹ Lieberman & Campbell, *supra* note 67.

⁷⁰ *Prosecutor v. Brdjanin* (9 May 2002), Case No. IT-99-36-T, Prosecution’s Response to Written Submissions on Behalf of Jonathan Randal to Set Aside Confidential Subpoena to Give Evidence (International Criminal Tribunal for the Former Yugoslavia) online: United Nations <<http://www.un.org/icty>>.

⁷¹ *Prosecutor v. Brdjanin* (7 June 2002), Case No. IT-99-36-T, Decision on Motion to Set Aside Confidential Subpoena to Give Evidence (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II) at Disposition online: United Nations <<http://www.un.org/icty>> [Randal Trial Chamber Decision].

⁷² *Ibid.* at 25.

⁷³ Randal Trial Chamber Decision, *supra* note 71 at para. 27.

international criminal tribunals.⁷⁴ In the end, however, the Trial Chamber held that, when the testimony sought from a journalist relates only to identified sources and published materials, its compellability “poses only a minimal threat to the news gathering and news reporting functions” of journalists.⁷⁵ It also held that a published article is like a public statement “and that when such a statement is entered in evidence in a criminal trial and its credibility [is] challenged, the author, like anyone else who makes a claim in public, must expect to be called to defend its accuracy.”⁷⁶ Accordingly, the Trial Chamber concluded that Randal had “no right to pretend” that he could not be questioned on the article he published simply because he was a journalist.⁷⁷

It is worth noting that, in upholding the validity of the Subpoena, the Trial Chamber determined that it was sufficient that the testimony sought from Randal was “pertinent” to the Prosecution’s case against Brdjanin.⁷⁸ It also considered the fact that there was “absolutely no indication” that Randal, a retired journalist residing in Paris and the United States, “could possibly be exposed to [...] harm or risk” if forced to testify.⁷⁹

Randal obtained certification to appeal the Trial Chamber’s decision on June 19, 2002.⁸⁰ On June 26, 2002, he filed written submissions in support of his appeal.⁸¹ The Prosecution filed their response to Randal’s

⁷⁴ Randal Trial Chamber Decision, *supra* note 71 at paras. 29 and 31.

⁷⁵ Randal Case, *supra* note 2 at para. 8.

⁷⁶ Randal Case, *supra* note 2 at para. 8.

⁷⁷ Randal Trial Chamber Decision, *supra* note 71 at para. 32.

⁷⁸ Randal Trial Chamber Decision, *supra* note 71 at para. 32.

⁷⁹ Randal Trial Chamber Decision, *supra* note 71 at para. 28(B).

⁸⁰ *Prosecutor v. Brdjanin* (19 June 2002), Case No. IT-99-36-T, Decision to Grant Certification to Appeal the Trial Chamber’s “Decision on Motion to Set Aside Confidential Subpoena to Give Evidence” (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II) online: United Nations <<http://www.un.org/icty>>.

⁸¹ *Prosecutor v. Brdjanin* (4 July 2002), Case No. IT-99-36-AR73.9, Written Submissions in Support of Motion to Appeal Trial Chamber’s Decision on Motion on Behalf of Jonathan Randal to Set Aside Confidential Subpoena to Give Evidence (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) online: United Nations <<http://www.un.org/icty>> [Randal’s Appeals Chamber Submissions].

written submissions on July 15, 2002.⁸² Randal replied to the same on August 6, 2002.⁸³ In the meantime, thirty-four media companies and associations of journalists obtained permission from the Appeals Chamber of the ICTY (hereinafter Appeals Chamber) to file an *amici curiae* brief in support of Randal's appeal.⁸⁴ The same was filed on August 16, 2002 and on October 3, 2002 the Appeals Chamber heard the parties' oral submissions.⁸⁵

iii. Randal's Position

In advancing his position that the Trial Chamber erred in failing to recognize a qualified privilege for journalists, Randal argued that such a privilege is necessary "to safeguard the ability of journalists to investigate and report effectively" from conflict zones.⁸⁶ He noted that, "[w]ithout a qualified privilege, journalists may be put at risk personally, may expose their sources to risk, and may be denied access to important information and sources in the future."⁸⁷ In Randal's view, a failure on the part of international criminal tribunals to recognize a qualified privilege for journalists would result in "less journalistic exposure of international crimes" and a consequential "hindering of the very process of international justice that international criminal tribunals [...] are designed to

⁸² *Prosecutor v. Brdjanin* (15 July 2002), Case No. IT-99-36-AR73.9, Prosecution's Response to Written Submissions in Support of Motion to Appeal Trial Chamber's Decision on Motion on Behalf of Jonathan Randal to Set Aside Confidential Subpoena to Give Evidence Filed 4 July 2002 (ICTY) [Prosecution's Appeals Chamber Submissions].

⁸³ *Prosecutor v. Brdjanin* (6 August 2002), Case No. IT-99-36-AR73.9, Appellant's Reply to Prosecution's Response to Written Submissions in Support of Motion to Appeal Trial Chamber's Decision on Motion on Behalf of Jonathan Randal to Set Aside Confidential Subpoena to Give Evidence Filed 4 July 2002 (International Criminal Tribunal for the Former Yugoslavia) online: United Nations <<http://www.un.org/icty>>.

⁸⁴ Randal Case, *supra* note 2 at para. 7.

⁸⁵ *Prosecutor v. Brdjanin* (6 August 2002), Case No. IT-99-36-AR73.9, Brief *Amici Curiae* on Behalf of Various Media Entities and in Support of Jonathan Randal's Appeal of Trial Chamber's Decision on Motion to Set Aside Confidential Subpoena to Give Evidence (International Criminal Tribunal for the Former Yugoslavia) online: United Nations <<http://www.un.org/icty>> [*Amici Curiae's* Submissions].

⁸⁶ Randal Case, *supra* note 2 at para. 11.

⁸⁷ Randal Case, *supra* note 2 at para. 11.

serve.”⁸⁸ Contrary to the opinion of the Trial Chamber, Randal argued that, to be effective, a qualified privilege for journalists would have to protect identified sources and published materials as well as confidential sources and unpublished materials.⁸⁹

In his written submissions, Randal drew the Appeal Chambers’ attention to the fact that the ICTY had relied upon policy reasons to recognize testimonial privileges for certain other classes of individuals.⁹⁰ He submitted that comparable policy reasons justified the recognition of a qualified privilege from testimony for journalists.⁹¹ Randal also pointed to international legal materials which seemed to support the qualified privilege he sought.⁹² He noted, for example, that Additional Protocol I to the Geneva Conventions⁹³ recognizes the great dangers journalists are exposed to and acknowledges their special status in conflict zones.⁹⁴ He also noted that, in *Goodwin*,⁹⁵ the European Court of Human Rights recognized journalists’ unique role and the importance of protecting journalistic sources.⁹⁶ Finally, Randal claimed that cases from the United States and the United Kingdom, and the internal guidelines of the United States Department of Justice, supported the creation of a qualified privilege for journalists.⁹⁷

⁸⁸ Randal Case, *supra* note 2 at para. 11.

⁸⁹ Randal’s Appeals Chamber Submissions, *supra* note 81 at para. 41.

⁹⁰ Randal’s Appeals Chamber Submissions, *supra* note 81 at para. 20.

⁹¹ Randal’s Appeals Chamber Submissions, *supra* note 81 at para. 20.

⁹² Randal Case, *supra* note 2 at para. 13.

⁹³ See Article 79 of *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 U.N.T.S. 3 which sets out specific “Measures of protection for journalists”.

⁹⁴ Randal Case, *supra* note 2 at para. 13.

⁹⁵ See *Goodwin v. United Kingdom*, (1996) 22 E.H.R.R. 123 [*Goodwin*], wherein it was successfully argued (in a non-criminal case) that an order requiring a trainee journalist to reveal the identity of a source violated his right to freedom of expression. At para. 39 in *Goodwin*, the European Court of Human Rights recognized journalists’ “vital public-watchdog role” and “the importance of the protection of journalistic sources for press freedom.” It also noted (at para. 39) that compelling journalists to disclose their sources could hinder “the ability of the press to provide accurate and reliable information.”

⁹⁶ Randal’s Appeals Chamber Submissions, *supra* note 81 at para. 46.

⁹⁷ Randal Case, *supra* note 2 at para. 14.

Randal submitted that, in determining whether to compel the testimony of a journalist, it is insufficient for an international criminal tribunal to find, as the Trial Chamber did, that the sought testimony is “pertinent” to the case.⁹⁸ Instead, Randal proposed that a journalist’s testimony should only be compelled if it is shown that the journalist will provide admissible evidence that: (1) is “of crucial importance” to the “determination of a defendant’s guilt or innocence”; (2) “cannot be obtained by any other means or from any other witness”; (3) will not require the journalist to breach any obligation of confidence; (4) will not put the journalist “or his family or sources in any reasonably apprehended personal danger”; and, (5) will not result in the creation “a precedent which would unnecessarily jeopardize the effectiveness or safety of other journalists.”⁹⁹

iv. The Position of the Amici Curiae

A number of the arguments made by Randal were reiterated by the Amici Curiae. They argued that forcing journalists to testify against their sources would make potential sources “less likely to come forward, less likely to speak freely, and more likely to fear that journalists are acting as possible agents of their future prosecutor.”¹⁰⁰ They also claimed that, if compelled to testify, journalists would be robbed “of their status as observers” and transformed “into participants, undermining their credibility and independence and thus their ability to gather information.”¹⁰¹ Like Randal, the Amici Curiae suggested that this would restrict the important benefits international criminal tribunals and the public stand to gain from the work of journalists.¹⁰²

Among other documents, the Amici Curiae relied upon an affidavit sworn by the late Elizabeth Neuffer (hereinafter Neuffer),¹⁰³ an award-winning reporter who covered a number of armed conflicts for The Boston Globe.¹⁰⁴ Neuffer suggested that many journalists, herself included,

⁹⁸ Randal Case, *supra* note 2 at para. 15.

⁹⁹ Randal’s Appeals Chamber Submissions, *supra* note 81 at para. 18.

¹⁰⁰ Randal Case, *supra* note 2 at para. 18.

¹⁰¹ Randal Case, *supra* note 2 at para. 18.

¹⁰² Randal Case, *supra* note 2 at para. 18.

¹⁰³ *Amici Curiae’s* Submissions, *supra* note 85 at Exhibit A.

¹⁰⁴ “Veteran Globe Reporter Elizabeth Neuffer Killed in Car Accident in Iraq” (9

had helped advance the work of international criminal tribunals by informally cooperating with the same.¹⁰⁵ She noted that, while reporting from the former Yugoslavia, she came to know many ICTY investigators and prosecutors and that, on several occasions, she passed information relating to war crimes along to them.¹⁰⁶ By way of example, Neuffer mentioned that it was her and her translator who led those investigating the Srebrenica genocide to the “trail of skeletons” they discovered on Mt. Kamenica.¹⁰⁷ Neuffer also noted that journalists who reported from Rwanda and Zaire in 1997 often found themselves in possession of information that ICTR investigators and prosecutors were incapable of retrieving.¹⁰⁸ According to Neuffer, some of those journalists willingly made the important information they gathered available to ICTR staff.¹⁰⁹

After drawing attention to the fact that journalists try to cooperate with international criminal tribunals when they can,¹¹⁰ Neuffer suggested that it is often the case that journalists are not in a position to cooperate with such tribunals, particularly when they have obtained information from confidential sources.¹¹¹ She was strongly against the ICTY establishing a precedent that would permit journalists to be forced to testify, on a routine basis, about confidential or non-confidential sources.¹¹² In Neuffer’s opinion, if war reporters were routinely compelled to testify before international criminal tribunals, their independence would be compromised and their safety further jeopardized.¹¹³ Implicit in her comments was a warning to the ICTY and other international criminal tribunals that they stand to lose the informal cooperation offered to them

May 2003) *The Boston Globe*, online: The Boston Globe <<http://www.boston.com/news/daily/09/neuffer.htm>>.

¹⁰⁵ *Amici Curaie’s Submissions*, *supra* note 85 at para. 8 of Exhibit A.

¹⁰⁶ *Amici Curaie’s Submissions*, *supra* note 85 at paras. 5 and 6 of Exhibit A.

¹⁰⁷ *Amici Curaie’s Submissions*, *supra* note 85 at para. 7 of Exhibit A.

¹⁰⁸ *Amici Curaie’s Submissions*, *supra* note 85 at para. 9 of Exhibit A.

¹⁰⁹ *Amici Curaie’s Submissions*, *supra* note 85 at para. 9 of Exhibit A.

¹¹⁰ *Amici Curaie’s Submissions*, *supra* note 85 at para. 10 of Exhibit A.

¹¹¹ Richard Byrne, “Don’t Ask, Don’t Tell” *The Boston Phoenix* (26 September - 3 October 2002), online: The Boston Phoenix <www.bostonphoenix.com/boston/news_features/top/features/documents/02452089.htm>.

¹¹² *Amici Curaie’s Submissions*, *supra* note 85 at paras. 17 and 20 of Exhibit A.

¹¹³ *Amici Curaie’s Submissions*, *supra* note 85 at para. 19 of Exhibit A.

by war correspondents if they fail to grant war correspondents adequate protections from having to testify.¹¹⁴

The test the *Amici Curaie* proposed for determining whether a subpoena can be issued to a journalist was simpler and less burdensome than that proposed by Randal.¹¹⁵ They took the position that a subpoena should only be issued to compel the testimony of a journalist when: (1) the testimony is “absolutely essential to the case” and (2) the information sought “cannot be obtained by any other means.”¹¹⁶ The *Amici Curaie* noted that for testimony to be “essential” it would have to be critical to the determination a defendant’s guilt or innocence.¹¹⁷

v. The Prosecution’s Position

Not surprisingly, the Prosecution took the position that the Trial Chamber was correct in refusing to create a qualified privilege which would protect Randal from having to testify. The Prosecution noted that the testimony sought from Randal only concerned non-confidential information.¹¹⁸ They argued that, whatever benefits might be gained from a privilege protecting testimony concerning confidential sources and materials, “no such benefits accrue from a privilege protecting testimony concerning published materials and openly identified sources.”¹¹⁹ Contrary to the views expressed by Randal and the *Amici Curaie*, the Prosecution suggested that it is the publication of information obtained by journalists – rather than the possibility that journalists might be called upon to testify about what they have published – which threatens their future news-gathering ability.¹²⁰ The Prosecution also maintained that, if journalists were granted the testimonial privilege sought by Randal, the ICTY’s ability to reach accurate judgments would be undermined because essential evidence would be unavailable to it.¹²¹

¹¹⁴ Byrne, *supra* note 111.

¹¹⁵ Randal Case, *supra* note 2 at para. 20.

¹¹⁶ *Amici Curaie’s* Submissions, *supra* note 85 at para. 43.

¹¹⁷ *Amici Curaie’s* Submissions, *supra* note 85 at para. 44.

¹¹⁸ Prosecution’s Appeals Chamber Submissions, *supra* note 82 at para. 6.

¹¹⁹ Randal Case, *supra* note 2 at para. 23.

¹²⁰ Prosecution’s Appeals Chamber Submissions, *supra* note 82 at para. 8.

¹²¹ Randal Case, *supra* note 2 at para. 24.

The Prosecution distinguished the testimonial privileges the ICTY extended to other classes of persons from the qualified privilege proposed by Randal and the Amici Curaie.¹²² They also noted that a privilege protecting journalists from having to testify about non-confidential sources and materials “would be unprecedented in international or national legal systems.”¹²³ Specifically, the Prosecution argued that the decision in *Goodwin*, and the cases from the United States and the United Kingdom that were relied upon by Randal, were either largely, or exclusively, concerned with the protection of confidential sources and materials.¹²⁴

The Prosecution submitted that the tests proposed by Randal and the Amici Curaie would unduly hinder the ability of international criminal tribunals to achieve justice by restricting the relevant and probative evidence available to them and potentially interfering with the fair trial rights of accused persons.¹²⁵ In the opinion of the Prosecution, the Trial Chamber adopted the correct approach to determining the validity of the Subpoena when it balanced the legitimate interests of journalists against the interests of the international community, the victims of crime and accused persons.¹²⁶

vi. Appeals Chamber Decision

The Appeals Chamber began its decision by noting that, while the parties and the Amici Curaie had framed the issue before it as one concerning journalists, the issue was really one concerning war correspondents, a much narrower group.¹²⁷ According to the Appeals Chamber, at stake was the type of work done, and the risks faced by, individuals reporting from conflict zones.¹²⁸ Thus, the Appeals Chamber held that its decision would only concern “war correspondents,” who it defined as “individu-

¹²² Prosecution’s Appeals Chamber Submissions, *supra* note 85 at paras. 28-33.

¹²³ Randal Case, *supra* note 2 at para. 25.

¹²⁴ Randal Case, *supra* note 2 at para. 26.

¹²⁵ Prosecution’s Appeals Chamber Submissions, *supra* note 85 at para. 26.

¹²⁶ Prosecution’s Appeals Chamber Submissions, *supra* note 85 at para. 58.

¹²⁷ Randal Case, *supra* note 2 at para. 29.

¹²⁸ Randal Case, *supra* note 2 at para. 29.

als who, for any period of time, report (or investigate for the purpose of reporting) from a conflict zone on issues relating to the conflict.”¹²⁹

The Appeals Chamber acknowledged that it was dealing with a novel issue, as there was no decided case law on the question of whether a war correspondent can be compelled to testify before a war crimes tribunal.¹³⁰ It noted that the war correspondents who had previously testified at the ICTY had done so on a voluntary basis.¹³¹ The Appeals Chamber tackled the issue before it by posing itself the following three questions:

- (1) Is there a public interest in the work of war correspondents?
- (2) If yes, would compelling war correspondents to testify before a tribunal adversely affect their ability to carry out their work?
- (3) If yes, what test is appropriate to balance the public interest in accommodating the work of war correspondents with the public interest in having all relevant evidence available to the court and, where it is implicated, the right of the defendant to challenge the evidence against him?¹³²

a. Public Interest in the Work of War Correspondents

Without hesitation, the Appeals Chamber determined that there is a public interest in the work of war correspondents. It recognized the important role war correspondents play in ensuring that the public receives vital information from conflict zones.¹³³ It also recognized that information gathered by war correspondents might assist those responsible for preventing or punishing major international crimes.¹³⁴ The Appeals Chamber went on to hold that the fact that there is a public interest in the work of war correspondents is evidenced in international human rights instruments, which provide that everyone has the right to freedom of expression.¹³⁵ It stated that, in addition to granting journalists the right to

¹²⁹ Randal Case, *supra* note 2 at para. 29.

¹³⁰ Randal Case, *supra* note 2 at para. 30.

¹³¹ Randal Case, *supra* note 2 at para. 30.

¹³² Randal Case, *supra* note 2 at para. 34.

¹³³ Randal Case, *supra* note 2 at para. 38.

¹³⁴ Randal Case, *supra* note 2 at para. 36.

¹³⁵ Randal Case, *supra* note 2 at para. 37.

freely communicate information, the right to freedom of expression “incorporates a right of members of the public to receive information.”¹³⁶

b. Consequences of Compelling War Correspondents to Testify

After considering the arguments advanced by Randal and the Amici Curaie, the Appeals Chamber concluded that it was “impossible to determine with certainty” whether, and to what extent, compelling war correspondents to testify before international criminal tribunals would “hamper their ability to work.”¹³⁷ The Appeals Chamber did acknowledge, however, that, if war correspondents were routinely compelled to testify before international criminal tribunals, their ability to obtain important information and to provide the same to the public might be significantly impacted.¹³⁸ This was said to be true whether the testimony sought from war correspondents related to confidential or non-confidential sources and materials.¹³⁹ According to the Appeals Chamber, “[w]hat really matters is the perception that war correspondents can be forced to become witnesses against their interviewees.”¹⁴⁰ The Appeals Chamber accepted that, if perceived as potential witnesses, war correspondents might lose their ability to gather significant information and become targets, rather than observers, of those who commit major international crimes.¹⁴¹

c. The Appropriate Test

The Appeals Chamber held that an international criminal tribunal must employ a balancing exercise when deciding whether to compel the testimony of a war correspondent.¹⁴² Specifically, it held that the interest of justice in having all relevant evidence put before the international criminal tribunal must be balanced with the public interest in the work of war correspondents.¹⁴³ Although the Appeals Chamber agreed with

¹³⁶ Randal Case, *supra* note 2 at para. 37.

¹³⁷ Randal Case, *supra* note 2 at para. 40.

¹³⁸ Randal Case, *supra* note 2 at para. 44.

¹³⁹ Randal Case, *supra* note 2 at para. 42.

¹⁴⁰ Randal Case, *supra* note 2 at para. 43.

¹⁴¹ Randal Case, *supra* note 2 at para. 43.

¹⁴² Randal Case, *supra* note 2 at para. 46.

¹⁴³ Randal Case, *supra* note 2 at para. 46.

Randal and the Amici Curaie that the test of “pertinence” applied by the Trial Chamber did not adequately protect the public interest in the work of war correspondents, it thought that the alternative tests proposed by Randal and the Amici Curaie were too stringent.¹⁴⁴ Accordingly, the Appeals Chamber came up with its own test. It held that a subpoena can only be issued to a war correspondent if the party seeking the subpoena demonstrates that the testimony sought from the war correspondent: (1) “is of direct and important value in determining a core issue in the case” and (2) “cannot reasonably be obtained elsewhere.”¹⁴⁵

d. Validity of Subpoena Issued to Randal

In light of the test it established for determining whether a war correspondent can be compelled to testify before an international criminal tribunal, the Appeals Chamber reversed the decision of the Trial Chamber and set the subpoena aside.¹⁴⁶ It refused, however, to determine whether, on the facts of the case, Randal could be compelled to testify before the ICTY.¹⁴⁷ The Appeals Chamber held that this determination should be left to a trial chamber and that, if the Prosecution still wished to compel Randal’s testimony, they would have to submit a new application for a subpoena.¹⁴⁸

Although it did not resolve the issue of whether Randal himself could be compelled by the ICTY, the Appeals Chamber did make a number of observations that related to this issue. It noted, for example, that, even if a trial chamber were to decide that Randal could not be compelled to testify, the article he published might still be admitted into evidence.¹⁴⁹ The Appeals Chamber suggested that admitting the article into evidence, without compelling Randal’s testimony, would not necessarily prejudice Brdjanin as: (1) the Defence would still be able to question its accuracy and (2) the weight accorded to it by a trial chamber would take Randal’s unavailability into account.¹⁵⁰ The Appeals Cham-

¹⁴⁴ Randal Case, *supra* note 2 at para. 47.

¹⁴⁵ Randal Case, *supra* note 2 at para. 50.

¹⁴⁶ Randal Case, *supra* note 2 at Disposition.

¹⁴⁷ Randal Case, *supra* note 2 at para. 51.

¹⁴⁸ Randal Case, *supra* note 2 at paras. 51 and 54-55.

¹⁴⁹ Randal Case, *supra* note 2 at para. 52.

¹⁵⁰ Randal Case, *supra* note 2 at para. 53.

ber also noted that, irrespective of the evidentiary value of the article, a trial chamber determining whether to issue a subpoena to Randal would have to consider whether his testimony, in and of itself, would be of direct and important value to determining a core issue in the case.¹⁵¹ The Appeals Chamber expressed the view that, in light of the fact that Randal did not speak Brdjanin's language (and thus that he relied on another journalist for interpretation), it was "difficult to imagine" how his testimony could reach that threshold.¹⁵²

vii. Second Request for a Subpoena Compelling Randal's Testimony

In light of the observations offered by the Appeals Chamber in the Randal case, it is not surprising that, when the Prosecution made its second request for a subpoena to compel Randal's testimony, the Trial Chamber: (1) refused the request and (2) admitted Randal's article into evidence "without prejudice to the weight to be ascribed to it."¹⁵³ In reaching its decision, the Trial Chamber admitted that it found it difficult to depart from the Appeals Chamber's reasoning.¹⁵⁴

2. Critique of the Randal Case

Much credit ought to be given to the Appeals Chamber for its recognition of the need for international criminal tribunals to give heed to the public's interest in the work of war correspondents when exercising their power to compel witness testimony. The Randal case, however, is not without its flaws. The debate it sparked among journalists, for example, suggests that the qualified testimonial privilege it created may unnecessarily protect war correspondents from having to testify about sources they have identified and materials they have published. In addition, there is a concern that the privilege the Randal case granted to war correspondents may: (1) open the floodgates to new testimonial privi-

¹⁵¹ Randal Case, *supra* note 2 at para. 54.

¹⁵² Randal Case, *supra* note 2 at para. 54.

¹⁵³ *Prosecutor v. Brdjanin* (30 June 2003), Case No. IT-99-36-T, Decision on Prosecution's Second Request for a Subpoena of Jonathan Randal (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II) at Disposition online: United Nations <<http://www.un.org/icty>> [Randal Trial Chamber Decision 2].

¹⁵⁴ *Ibid.* at para. 29.

lege claims and (2) allow groups other than journalists reporting from conflict zones to claim access to it. It is also disconcerting that the Randal case overlooked the option of granting witness protective measures, rather than a qualified testimonial privilege, to war correspondents. Finally, by contemplating that the work product of a war correspondent can be admitted into evidence, notwithstanding the fact that its creator cannot be compelled to testify, the Randal case did not adequately consider the fair trial rights of an accused.

i. Disagreement About Whether War Correspondents Require (or Deserve) a Qualified Testimonial Privilege

The significant public attention the Randal case received sparked a debate among journalists regarding what their responsibilities are in the prosecution of perpetrators of major international crimes.¹⁵⁵ Although Randal had the support of a coalition of media companies and press freedom groups, there were a number of respected journalists who expressed their disagreement with the arguments he advanced in the ICTY.¹⁵⁶

For example, Randal was harshly criticized by Ed Vulliamy (hereinafter Vulliamy), a prize-winning war correspondent for the Guardian.¹⁵⁷ Like Randal, Vulliamy covered the conflict in the former Yugoslavia. Unlike Randal, however, Vulliamy elected to testify before the ICTY – in 1997, he voluntarily gave evidence in the case of Milan Kovačević.¹⁵⁸ Vulliamy’s experience testifying before the ICTY was by no means enjoyable.¹⁵⁹ Despite this, he expressed the view that the arguments advanced by Randal were “dangerously wrong.”¹⁶⁰ Vulliamy suggested that, by seeking to ensure that the testimony of journalists was unavailable to international criminal tribunals, Randal was threatening the ef-

¹⁵⁵ Lieberman & Campbell, *supra* note 67.

¹⁵⁶ Lieberman & Campbell, *supra* note 67.

¹⁵⁷ Lieberman & Campbell, *supra* note 67 at 12.

¹⁵⁸ Ed Vulliamy, “An Obligation to Tell the Truth” *The Observer* (19 May 2002), online: The Observer <<http://observer.guardian.co.uk/milosevic/story/0,10639,718225,00.html>>.

¹⁵⁹ See Ed Vulliamy, “‘Neutrality’ and the Absence of Reckoning: A Journalist’s Account” (1999) 52:2 *J. Int’l Affairs* 603 at 617-618.

¹⁶⁰ Vulliamy, *supra* note 158.

ficacy of such tribunals.¹⁶¹ In Vulliamy's opinion, war reporters have a professional, moral and legal obligation "to stand by their stories on oath" before international criminal tribunals.¹⁶² He suggested that journalists, who often possess valuable information, should not be able to "perch loftily above the due process of law."¹⁶³ Regarding Randal's suggestion that compelling journalists to testify before international criminal tribunals would turn them into targets, Vulliamy simply stated that "[g]ood reporters put themselves in danger, whether they testify or not."¹⁶⁴

While Randal's appeal was pending, Jacky Rowland, a journalist who covered the conflict in the former Yugoslavia for the BBC, voluntarily testified before the ICTY in the case of Slobodan Milošević.¹⁶⁵ Rowland said that she felt she had a duty to testify and that she did not "really buy the argument" that testifying before international criminal tribunals "makes life more dangerous for journalists".¹⁶⁶ Martin Bell, another journalist who covered the conflict in the former Yugoslavia for the BBC, and who voluntarily testified before the ICTY,¹⁶⁷ took the position that a journalist's "duties as a citizen," which include the duty to testify before international criminal tribunals when one witnesses a crime or the aftermath of a crime, come before his or her "duties as a journalist."¹⁶⁸

Lindsey Hilsum, a freelance journalist who covered the conflict in Rwanda, made similar comments when she described why she agreed to testify before the ICTR in the case of Jean-Paul Akayesu.¹⁶⁹ According

¹⁶¹ Vulliamy, *supra* note 158.

¹⁶² Vulliamy, *supra* note 158.

¹⁶³ Vulliamy, *supra* note 158.

¹⁶⁴ Vulliamy, *supra* note 158.

¹⁶⁵ Lieberman & Campbell, *supra* note 67 at 12.

¹⁶⁶ Matt Wells, "BBC Reporter to Testify at Hague War Crimes Tribunal: Correspondent Faces Questions About Deaths in Kosovo Prison" *Guardian* (20 August 2002), online: The Guardian <<http://www.guardian.co.uk/yugo/article/0,2763,777381,00.html>>.

¹⁶⁷ Martin Bell testified in the case of Tihomir Blaškić.

¹⁶⁸ Wells, *supra* note 166.

¹⁶⁹ See Lindsey Hilsum, "Deciding to Testify About Rwanda" (2003) 57 *Nieman Reports* 78.

to Hilsum, “[r]eporting matters, but sometimes justice matters more.”¹⁷⁰ Hilsum said that the horror she witnessed in Rwanda was sufficient to make the rules protecting journalists from having to testify seem inapplicable.¹⁷¹ Although Hilsum acknowledged that, as a journalist, she could have argued against testifying, she said that, as a human being, she could not.¹⁷² Hilsum did not believe that by testifying before the ICTR she put herself and other journalists in danger.¹⁷³ In her opinion, “[a] war correspondent’s job is more dangerous than it used to be because 24-hour satellite television has made combatants aware of the media,” not because a handful of war correspondents have testified before international criminal tribunals.¹⁷⁴

It is important to note that, like the testimony sought from Randal, the testimony sought from the above-noted war correspondents related only to information that was already in the public domain. It is quite possible that the views expressed by Vulliamy, Rowland, Bell and Hilsum would have been different had they been called upon to reveal confidential sources or unpublished materials before an international criminal tribunal. In any event, at least with respect to identified sources and published materials, their comments call into question whether the work of war correspondents will be significantly hampered if their testimony is too easily compelled by international criminal tribunals. Consequently, one must question whether it is necessary to have a qualified privilege to protect war correspondents from having to testify before international criminal tribunals about non-confidential sources and materials.

ii. Opening the Floodgates to Other Testimonial Privilege Claims

Some have expressed concern that the qualified testimonial privilege created for war correspondents in the Randal case might “spur a rash of claims for the creation of similar privileges” for other individuals who do important work in conflict zones.¹⁷⁵ This concern is valid. It

¹⁷⁰ *Ibid.* at 78.

¹⁷¹ Hilsum, *supra* note 169 at 78.

¹⁷² Hilsum, *supra* note 169 at 79.

¹⁷³ Hilsum, *supra* note 169 at 78.

¹⁷⁴ Hilsum, *supra* note 169 at 78-79.

¹⁷⁵ Megan A. Fairlie, “Evidentiary Privilege of Journalists Reporting in Areas of Armed Conflict – Evidence in War Crimes Trials – Rule-Making Process of ICTY”

has already been suggested, for example, that members of humanitarian organizations should, at a minimum, be able to claim the qualified testimonial privilege that has been afforded to war correspondents.¹⁷⁶

Like war correspondents, humanitarian organizations “are in a privileged position to observe what happens in war.”¹⁷⁷ As a consequence, they are often contacted by those tasked with bringing perpetrators of major international crimes to justice to see what information they can offer.¹⁷⁸ Notwithstanding the fact that many humanitarian organizations support the idea of having perpetrators of major international crimes tried before international criminal tribunals, they are often reluctant to have their members testify in international criminal proceedings.¹⁷⁹ This is because they worry about compromising their perceived neutrality, forfeiting their access to victims, and putting the safety of their staff at risk.¹⁸⁰ As such, it will be surprising if humanitarian organizations do not jump at the chance to rely upon the Randal case to claim that, like war correspondents, their members deserve a privilege from testifying before international criminal tribunals.

In light of the line of reasoning adopted by the Appeals Chamber in the Randal case, it is not unlikely that such claims would be successful. It is certainly arguable that there is at least as great a public interest in the work of humanitarian organizations, which provide food, shelter and medical treatment to victims of armed conflicts, as there is in the work of war correspondents.¹⁸¹ In addition, it is conceivable that routinely compelling members of such organizations to testify before international criminal tribunals would have the same adverse effects on their ability to carry out their work as those the Appeals Chamber sought to avoid by creating a qualified testimonial privilege for war correspondents.¹⁸²

In addition to the concern that the qualified testimonial privilege created for war correspondents in the Randal case might open the floodgates to new testimonial privilege claims, there is a concern that the

(2004) 98 Am. J. Int'l L. 805 at 809.

¹⁷⁶ MacKintosh, *supra* note 34 at 137.

¹⁷⁷ MacKintosh, *supra* note 34 at 131.

¹⁷⁸ MacKintosh, *supra* note 34 at 131.

¹⁷⁹ MacKintosh, *supra* note 34 at 131.

¹⁸⁰ MacKintosh, *supra* note 34 at 131.

¹⁸¹ MacKintosh, *supra* note 34 at 137.

¹⁸² MacKintosh, *supra* note 34 at 137.

existing privilege could be relied upon by groups other than journalists reporting from conflict zones. It has been suggested, for example, that the privilege might protect individuals employed by human rights monitors like Amnesty International and Human Rights Watch, who, like war correspondents, are sent into conflict zones to gather information which they subsequently report on.¹⁸³ It is certainly arguable that because the definition of ‘war correspondents’ articulated by the Appeals Chamber in the Randal case is not tied to the terms ‘journalist’, ‘media’ or the ‘press’, it may be broad enough to open the door “for a substantial class of individuals to claim access to the privilege.”¹⁸⁴

The potential the Randal case has to (1) trigger new testimonial privilege claims and (2) cause unforeseen individuals to claim access to the privilege that has been created for war correspondents is problematic. The interlocutory proceedings necessary to deal with the potential wave of testimonial privilege claims would undoubtedly affect the efficacy of international criminal tribunals.¹⁸⁵ If international criminal tribunals find themselves “occupied by privilege-based litigation,” rather than the adjudication of cases brought against alleged war criminals, they will be in danger of losing much of the support they have gained from the international community.¹⁸⁶ In addition, and perhaps more importantly, if international criminal tribunals make a habit of granting testimonial privileges to all those individuals who can claim to be in a situation analogous to that of war correspondents, they will seriously impair their fact-finding function and their ability to serve the purposes for which they were created.

iii. An Option Overlooked in the Randal Case

Existing international criminal tribunals have a range of measures at their disposal which they can use to ensure that a witness’ identity is not

¹⁸³ Fairlie, *supra* note 175, at 809; Francoise J. Hampson, “The International Criminal Tribunal for the Former Yugoslavia and the Reluctant Witness” (1998) 47 I.C.L.Q. 50 at 65.

¹⁸⁴ Fairlie, *supra* note 175, at 809; Megan A. Fairlie, “Rulemaking from the Bench: A Place for Minimalism at the ICTY” (2004) 39 Tex. Int’l L.J. 257 at 283.

¹⁸⁵ Fairlie, *supra* note 175, at 809.

¹⁸⁶ Fairlie, *supra* note 175, at 809.

disclosed to the public.¹⁸⁷ Among other things, they can: (1) allow witnesses to use a pseudonym; (2) delete witnesses' names or identifying information from public records; (3) hold closed session hearings; and, (4) use voice or image-altering devices on the television recordings of their proceedings.¹⁸⁸ Although these measures are typically employed "to ensure the safety of victim-witnesses," there is nothing preventing them from being used to protect "other reluctant witnesses."¹⁸⁹ Notwithstanding that the written submissions of both Randal and the Prosecution discussed the ICTY's ability to grant protective measures to war correspondents, no mention was made of this option in the Randal case.¹⁹⁰

That the Appeals Chamber overlooked the ICTY's ability to employ protective measures to keep the identity of war correspondents confidential is problematic. If, as the Appeals Chamber suggested, what really matters is avoiding the perception that war correspondents can be forced to become witnesses against their interviewees, it seems that it might be sufficient to grant protective measures, rather than a qualified testimonial privilege, to war correspondents.¹⁹¹ It is certainly arguable that protective measures could be used to ensure that the public remained unaware of the fact that a war correspondent testified before an international criminal tribunal. A war correspondent could, for example, be issued a confidential subpoena and offered the "particularly stringent protective measures"¹⁹² that were offered to reluctant witnesses in *Blaškić*.¹⁹³ Those measures included the use of *in camera* testimony, a redaction of the witnesses' names (and any information that might iden-

¹⁸⁷ May & Weirda, *supra* note 4 at 180.

¹⁸⁸ May & Weirda, *supra* note 4 at 181; ICTY Rules, *supra* note 35, rule 75; ICTR Rules, *supra* note 35, rule 75; ICC Statute, *supra* note 9, art. 68.

¹⁸⁹ Berman, *supra* note 15 at 251.

¹⁹⁰ Randal's Appeals Chamber Submissions, *supra* note 81 at para. 44; Prosecution's Appeals Chamber Submissions, *supra* note 82 at para. 11.

¹⁹¹ Randal Case, *supra* note 2 at para. 43.

¹⁹² May & Wierda, *supra* note 4 at 195.

¹⁹³ *Prosecutor v. Blaškić* (10 July 1997), Case No. IT-95-14, Decision of Trial Chamber I on the Prosecutor's Request of 5 and 11 July 1997 for Protection of Witnesses (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I) online: United Nations <<http://www.un.org/icty>>.

tify them) from all public documents and a prohibition against divulging any information about the witnesses and their testimony.¹⁹⁴

The fact that the Appeals Chamber overlooked the option of granting protective measures to war correspondents does not necessarily lead to the conclusion that war correspondents should never enjoy a privilege from testifying before international criminal tribunals. It does, however, suggest that the test proposed by the Appeals Chamber needs to be reworked. In determining whether to compel the testimony of a war correspondent, an international criminal tribunal should at least consider whether the employment of protective measures might be sufficient to avoid any adverse consequences that could flow from compelling the war correspondent's testimony.

iv. Inadequate Attention Paid to the Rights of the Accused

In the Randal case, the Appeals Chamber sought to create a qualified testimonial privilege for war correspondents that would fairly balance the interest of justice in having all relevant evidence put before a court and the public interest in the work of war correspondents. Unfortunately, insufficient attention was paid to the effect the resulting privilege might have on the fair trial rights of an accused. The fair trial rights of an accused include the right of an accused to examine, or have examined, the witnesses against him. That this right "is fundamental to the fairness"¹⁹⁵ of international criminal proceedings is evidenced by the fact that it is provided for in the statutes governing the ICTY, the ICTR and the ICC.¹⁹⁶ The right of an accused to examine, or have examined, the witnesses against him does not always equate to a right of cross-examination. However, it is clear that, when a statement is admitted into evidence in the absence of cross-examination, an accused is deprived of the opportunity to confront a witness against him and the international criminal tribunal hearing his case is deprived of the opportunity to assess the witness' credibility.¹⁹⁷

¹⁹⁴ May & Wierda, *supra* note 4 at 195.

¹⁹⁵ May & Wierda, *supra* note 4 at 284.

¹⁹⁶ ICTY Statute, *supra* note 5, art. 21(4)(e); ICTR Statute, *supra* note 7, art. 20(4)(e); ICC Statute, *supra* note 9, art. 67(1)(e).

¹⁹⁷ May & Wierda, *supra* note 4 at 284-285.

It is disconcerting that the Randal case contemplates, and has been relied upon to find, that the work product of a war correspondent (e.g. a newspaper article) can be admitted into evidence notwithstanding the fact that the war correspondent cannot be compelled to testify.¹⁹⁸ When this occurs, there is a real possibility that, because the accused will be denied an opportunity to cross-examine the war correspondent, the fairness of the international criminal proceedings will be brought into question.¹⁹⁹ It might be alleged, for example, that the international criminal tribunal has undermined the accused's right to confront his accuser.²⁰⁰ This problem is compounded by the fact that it appears that the rationale behind the qualified testimonial privilege recognized in the Randal case is that war correspondents "serve a public interest in providing accurate information from a conflict-torn area."²⁰¹ It thus looks as though the evidentiary value of the work product of war correspondents is being pre-judged to the accused's detriment.²⁰²

The suggestion made by the Appeals Chamber in the Randal case – that admitting the work product of a war correspondent into evidence in the absence of cross-examination will not necessarily prejudice the fair trial rights of an accused – is less than convincing. It is based upon the assumption that a Trial Chamber can be relied up to assign an appropriate amount of weight to an unsworn statement that the accused has not had an opportunity to challenge. This is a problematic assumption, particularly when one considers that the facts of a case before an international criminal tribunal are typically drafted by a legal assistant who has not been provided with "detailed instructions from the judges as to their assessment of the reliability of each piece of evidence and how it relates to the others."²⁰³

In light of the above, it is clear that the work product of a war correspondent who is protected by the privilege created in the Randal case should not be admitted as evidence. The fact that an accused will be denied the opportunity to cross-examine a war correspondent should be

¹⁹⁸ Buchanan, *supra* note 14 at 649.

¹⁹⁹ Buchanan, *supra* note 14 at 649.

²⁰⁰ Fairlie, *supra* note 175 at 806.

²⁰¹ Randal Trial Chamber Decision 2, *supra* note 153 at para. 28.

²⁰² Fairlie, *supra* note 175 at 807.

²⁰³ Patricia M. Wald, "Rules of Evidence in the Yugoslav War Tribunal" (2003) 21 *Quinnipiac L.Rev.* 761 at 772.

enough to deprive the war correspondent's work product of "so much of its probative value as to render it inadmissible."²⁰⁴ Accordingly, in order to protect the fair trial rights of an accused, the testimonial privilege created in the Randal case should come with the proviso that the work product of any war correspondents it protects will not be admitted into evidence.

3. Extension of the Testimonial Privilege for War Correspondents Created in the Randal Case

Because the Appeals Chamber is shared by the ICTY and the ICTR, its decision in the Randal case will serve as a precedent for both tribunals.²⁰⁵ Accordingly, the qualified testimonial privilege created in the Randal case will be respected by the ICTR as well the ICTY. It is not at all certain, however, that war correspondents will be offered any protection from having their testimony compelled by the ICC. Although it is likely that the Randal case will be relied upon in proceedings before the ICC, it will have no binding effect on the permanent tribunal.²⁰⁶

The issue of whether journalists, including war correspondents, should enjoy a privilege from testifying before the ICC was considered by those who drafted the ICC's rules.²⁰⁷ Unfortunately, no consensus was reached on the issue.²⁰⁸ As outlined earlier, the ICC's rules regarding testimonial privileges in their present form seek only to protect communications made in the context of confidential relationships. The qualified testimonial privilege granted to war correspondents in the Randal case is thus much more expansive than any testimonial privilege contemplated by the ICC's rules.²⁰⁹ If the ICC judges opt to create a testimonial privilege for war correspondents within the confines of the ICC's existing rules, the privilege will only protect confidential communications between war correspondents and their sources. Accordingly, it will be of little assistance to war correspondents like Randal, who are

²⁰⁴ May & Weirda, *supra* note 4 at 286.

²⁰⁵ Powles, *supra* note 45 at 522.

²⁰⁶ Buchanan, *supra* note 14 at 651.

²⁰⁷ Lieberman & Campbell, *supra* note 67 at 13.

²⁰⁸ Lieberman & Campbell, *supra* note 67 at 13.

²⁰⁹ Powles, *supra* note 45 at 523.

reluctant to testify about sources they have identified and materials they have published.

Of course, there is nothing in the rules governing the ICC that specifically prohibit it from adopting of the qualified privilege for war correspondents recognized in the Randal case.²¹⁰ Although ICC judges are much more restricted in their ability to create new rules than judges of the ICTY and the ICTR are, they have been granted the power to develop new rules where the ICC's existing rules "do not provide for a specific situation" that comes before them.²¹¹ In light of the decision that was rendered in the Randal case, the issue of whether war correspondents should be protected by a testimonial privilege will likely be raised proceedings before the ICC at some point in the future. As this issue is not addressed in the ICC's existing rules, it is within the power of the ICC judges to create a new rule to address it. Whether the ICC judges should adopt the qualified testimonial privilege created in the Randal case, however, is up for debate.

In light of the flaws in the Randal case, it would be less than ideal if the qualified testimonial privilege it created was simply adopted by the ICC. As it is uncertain that a testimonial privilege is needed to protect war correspondents from being compelled to testify about non-confidential sources and materials, it might very well be sufficient for the ICC to recognize a testimonial privilege for war correspondents within the confines of its existing rules. Unlike the testimonial privilege recognized in the Randal case, such a privilege (which would only protect confidential communications between war correspondents and their sources) would be in keeping with the theory that testimonial privileges should be narrowly construed. In addition, so long as it appropriately defined who 'war correspondents' are, such a privilege would be sufficiently restrictive to prevent the floodgates being opened to a host of new testimonial privilege claims.

In order to avoid the adverse consequences that might flow from routinely compelling war correspondents to testify before the ICC about non-confidential sources and materials, the ICC judges could develop guidelines to assist them in exercising their discretion to subpoena war correspondents. Rather than imposing a strict test, as the Appeals

²¹⁰ Lieberman & Campbell, *supra* note 67 at 13.

²¹¹ See ICC Statute, *supra* note 9, art. 51.

Chamber did in the Randal case, such guidelines could set out a variety of factors to be considered by an ICC judge contemplating compelling the testimony of a war correspondent. These factors might include: (1) the importance of the testimony sought from the war correspondent; (2) whether the information sought to be obtained from the war correspondent might be obtained elsewhere; (3) whether protective measures could be provided to the war correspondent to alleviate some of the concerns raised in the Randal case; and, (4) whether the fair trial rights of the accused would be sufficiently respected if the war correspondent's testimony was not compelled. Parallel guidelines could be created for the ICC prosecutors to assist them in exercising their discretion to seek subpoenas to compel the testimony of war correspondents.

CONCLUSION

The Randal case drew attention to the need to ensure that war correspondents are not routinely compelled to testify before international criminal tribunals. The qualified testimonial privilege it created, however, overshot the mark and has the potential to give rise to many more problems than it sought to resolve. It is clear that international criminal tribunals should recognize a testimonial privilege that seeks to protect war correspondents from a compulsion to testify about confidential sources and materials. This was acknowledged by all of the parties to the Randal case and is supported by the efforts made by domestic and regional tribunals to protect confidential journalistic sources. What is not clear is whether a testimonial privilege is necessary to protect war correspondents from being compelled to testify about non-confidential sources and materials. As this paper illustrates, it seems that measures short of a testimonial privilege might be sufficient to avoid the adverse consequences that could flow from routinely compelling war correspondents to testify about such matters. Because testimonial privileges undermine the ability of international criminal tribunals to make factually accurate findings, they should only be recognized in the clearest of cases. Accordingly, while international criminal tribunals should be leery of issuing subpoenas to war correspondents when their testimony is unnecessary, they should not recognize a testimonial privilege to protect war correspondents from being compelled to testify about non-confidential sources and materials.