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To Testify or Not To Testify – Privilege from Testimony at the Ad Hoc Tribunals: The *Randal* Decision[I]

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Abstract
This article considers the *Randal* Decision, in which the ICTY Appeals Chamber established a qualified privilege from testimony for war correspondents before the ad hoc tribunals. It sets out the various arguments advanced by Jonathan Randal in support of such privilege and the privilege as formulated by the Appeals Chamber. Finally, it analyzes the possible impact of the Decision and its possible application by the ad hoc tribunals, other international courts, such as the ICC, and domestic courts.

Key words
evidence; hearsay; privilege from testimony; subpoena; war correspondents

1. Introduction

Jonathan Randal served as a correspondent for the *Washington Post* during the conflict in the former Yugoslavia in 1993. In February 1993 he interviewed Radoslav Brdjanin, the then minister of housing, in Banja Luka. Randal then published an article in the *Washington Post* attributing anti-Bosnian Muslim statements to Brdjanin, who was quoted as advocating the 'exodus' of non-Serbs so as to 'create an ethnically clean space through voluntary movement'.[2] Randal could not speak Serbo-Croat, nor Brdjanin English, so that the interview was conducted through an interpreter. Brdjanin was later indicted and transferred to the International Criminal Tribunal for the former Yugoslavia (ICTY) to stand trial for, *inter alia*, genocide, crimes against humanity, and grave breaches of the Geneva Conventions of 1949.[3] The prosecution sought to have Randal's article on Brdjanin admitted as evidence. The defence for Brdjanin objected, stipulating that if the article were to be admitted into evidence, they would wish to cross-examine its author, Randal.

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1. *Prosecutor v. Brdjanin and Talić*, Decision on Interlocutory Appeal, 11 Dec. 2002 (IT–99–36-AR73.9).
2. 'Preserving the Fruits of Ethnic Cleansing; Bosnian Serbs, Expulsion Victims See Campaign as Beyond Reversal', *Washington Post*, 11 Feb. 1993.
3. Corrected Version of Fourth Amended Indictment (IT–99–36-PT), 10 Dec. 2001.

The prosecution accordingly requested the trial chamber to issue a subpoena to Randal compelling him to testify. The trial chamber issued a subpoena on 29 January 2002.[4] Randal argued that the subpoena should be set aside on the basis that as a conflict zone reporter, he was entitled to a qualified privilege from testimony.[5] The trial chamber refused to recognize any special privilege for conflict zone reporters and held that a qualified privilege for journalists exists only in relation to cases of confidential sources. As no confidential sources arose in Randal's case the subpoena would not be set aside.[6] Randal thereafter appealed to the Appeals Chamber. The Appeals Chamber held that conflict zone reporters or war correspondents do enjoy a qualified privilege and accordingly set the subpoena aside.[7]

2. The ad hoc tribunals' power to order the attendance of witnesses

The ad hoc Tribunals for the former Yugoslavia and Rwanda have the power to order the compulsory testimony of reluctant witnesses.[8] Under the Statutes of both Tribunals and Rules 54 and 98 of their respective Rules of Procedure and Evidence summonses and subpoenas to secure the attendance of witnesses can be issued. The ad hoc tribunals will normally turn to the relevant prosecutorial or judicial agencies of the state in which the witness is located for co-operation in securing the attendance of the witness.[9] The tribunals may enter into direct contact with an individual to secure their attendance where this is authorized by the state concerned or where the state may seek to prevent the attendance of the witness. The individual concerned is considered to be 'within the ancillary jurisdiction of the Tribunal' and 'duty bound to comply with its orders, requests and summonses'.[10]

In situations of non-compliance by a subpoenaed witness, the individual may be prosecuted in domestic courts pursuant to the state's implementing laws.[11] The tribunal will normally turn to the relevant national authorities in cases of non-compliance with a subpoena. Alternatively, the tribunals may seek to prosecute the individuals themselves pursuant to Rule 77 as contempt. Such proceedings may be held *in absentia*.

4. Confidential Subpoena to Give Evidence, 29 Jan. 2002.
5. Written Submissions on behalf of Jonathan Randal to Set Aside Confidential Subpoena to Give Evidence, 8 May 2002.
6. Decision on Motion to Set Aside Confidential Subpoena to Give Evidence, 7 June 2002.
7. *Supra* note 1.
8. F. J. Hampson, 'The International Criminal Tribunal for the Former Yugoslavia and the Reluctant Witness', (1998) 47 ICLQ 50.
9. *Blaškić*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Appeals Chamber, 29 Oct. 1997, at para. 54.
10. *Ibid.*, at para. 56.
11. *Ibid.*, at footnote 78 of the Decision. Finland, Germany, Italy, the Netherlands, Spain, and the United Kingdom have implemented such laws.

3. Privilege from testimony at the ad hoc tribunals

Like domestic courts and tribunals, the ad hoc tribunals grant privilege from testimony to certain individuals and classes of people. Some classes or categories of privilege correspond to or are similar to those normally granted before domestic courts. However, due to the extreme nature of the crimes before the tribunals, and due to the extreme circumstances in which potential witnesses to those crimes sometimes have to operate, the tribunals have considered creating and granting new and extended forms of privilege.

As in almost all jurisdictions, the tribunals recognize as privileged the communications between lawyer and client. Rule 97 of the Rules of both the International Criminal Tribunal for Rwanda (ICTR) and the ICTY protect such communications. It seems, however, that Rule 97 may not apply to communications between the client and an investigator acting on a lawyer's behalf.[12]

In *Blaškić*[13] the Appeals Chamber, in considering the issuance of a trial chamber subpoena to the Republic of Croatia and its defence minister, effectively granted an absolute privilege from testimony to state officials acting in their official capacity. First, it was held that states themselves cannot be 'subpoenaed', but instead can only have binding orders or requests issued to them. Second, the Chamber held that under both international law and the ICTY Statute, trial chambers cannot address binding orders to state officials, as such officials are 'mere instrumentalities in the hands of sovereign States' and there is therefore no practical purpose in singling them out and compelling them to produce documents, or in forcing them to appear in court.[14]

The ICTY has held that employees and functionaries of the tribunal should not be called upon by either party to give evidence before the tribunal. In *Delalić*, the trial chamber refused a defence request to subpoena a tribunal interpreter. They held:

> It is also an important consideration in the administration of justice to insulate the interpreter or other functionaries of the International Tribunal from constant apprehension of the possibility of being personally involved in the arena of conflict, on either side, in respect of matters arising from the discharge of their duties.[15]

In another case, the Appeals Chamber held that the former president of the tribunal and an ICTY legal officer could not be called upon to testify on matters relating to their official duties or functions 'because their work is integral to the operation of the tribunal which must be protected by confidentiality'.[16] This immunity from testimony is not supported in the Statutes, Rules, Headquarters Agreement or other regulations. Moreover, there do not appear to be similar provisions before domestic courts. It seems, perhaps, that the tribunal's decision to protect its employees

12. See *Mugiraneza*, Decision on the Defence Urgent Motion for Relief Under Rule 54 to Prevent the Commandant of the UNDF from Obstructing the Course of International Criminal Justice, 19 Sept. 2001.
13. *Supra* note 9.
14. *Ibid.*, at para. 44.
15. *Delalić and others*, Decision on the Motion *Ex Parte* by the Defence of Zdravko Mučić Concerning the Issue of a Subpoena to an Interpreter, 8 July 1997, at paras. 18–20.
16. *Delalić and others*, Decision on Motion to Preserve and Provide Evidence, 22 April 1999.

and functionaries from testimony is based more on policy reasons pertaining to the facts of each of the respective cases than on any sound legal precedent.

The ICTY has also held that the International Committee of the Red Cross (ICRC) has a relevant and genuine confidentiality interest such that its present and former employees have an absolute privilege and bar from testimony. In *Simić*,[17] the majority of the trial chamber held: the right to non-disclosure of information relating to the ICRC's activities in the possession of its employees in judicial proceedings is necessary for the effective discharge by the ICRC of its mandate. The trial chamber therefore finds that the parties to the Geneva Conventions and their Protocols have assumed a conventional obligation to ensure non-disclosure in judicial proceedings of information relating to the work of the ICRC in the possession of an ICRC employee, and that, conversely, the ICRC has a right to insist on such non-disclosure by parties to the Geneva Conventions and the Protocols. In that regard, the parties must be taken as having accepted the fundamental principles on which the ICRC operates, that is impartiality, neutrality and confidentiality, and in particular as having accepted that confidentiality is necessary for the effective performance by the ICRC of its functions.[18]

Judge Hunt, however, issued a strong separate opinion in *Simić*,[19] arguing that the ICRC should be granted a qualified, but not absolute, privilege. He identified two situations in which it may be necessary to override the ICRC's decision not to testify: (i) where the evidence of an official or employee of the ICRC is vital to establish the innocence of the accused person; and (ii) where the evidence is vital to establish the guilt of the particular accused in a trial of transcendental importance.[20] Judge Hunt's view must be right. It would be unconscionable for the ICRC to be permitted to stand by and allow an individual to be convicted of a crime, in circumstances where they knew that an ICRC official could provide exculpatory evidence. Moreover, it could be said that the duty of confidentiality that the ICRC has is in part owed to the prison camp commanders who, for instance, allow them access to detention facilities. As with the lawyer–client privilege, it is the person to whom the privilege is owed who has the right to waive it rather than the person or organization seeking to claim the privilege.

4. Qualified privilege for war correspondents

Prior to the *Randal* case the question of a qualified privilege for war correspondents had arisen in neither domestic nor international proceedings. This is perhaps not surprising. The demand for testimony from war correspondents has always been most likely to arise in proceedings concerning the prosecution of individuals for international crimes. There have been few prosecutions to date before domestic courts

17. *Prosecutor v. Simić and others, Ex parte Confidential* Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999.
18. *Ibid.*, at paras. 73–74.
19. *Simić*, Separate Opinion of Judge David Hunt on Prosecutor's Motion for a Ruling Concerning the Testimony of a Witness, 27 July 1999.
20. *Ibid.*, at paras. 28–31.

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and, thus far, at the ad hoc tribunals the Office of the Prosecutor (OTP) appeared to act according to an unwritten agreement with potential war correspondent witnesses that they would only be called upon to testify with their agreement. Certain war correspondents have agreed to testify voluntarily, sometimes with unfortunate results for the correspondent concerned.[21] Notwithstanding certain unpleasant experiences for war correspondents who chose to testify, the unwritten agreement seemed to work well, with the OTP acting responsibly by only seeking the testimony of war correspondents when such testimony was important to their case, and with war correspondents willingly testifying when the importance of their testimony was clear and if, by testifying, they would not compromise themselves or their sources. In the *Randal* case this unwritten agreement was ignored.

In 2001, nearly eight years after Randal's assignment with the *Washington Post* as a war correspondent in the former Yugoslavia, the OTP contacted him. He was by this time living in Paris. Having seen his article in the *Washington Post*, the OTP wanted Randal to write a statement and testify at the ICTY about the accuracy of Brdjanin's quotations and other aspects of the 1993 interview with Brdjanin. Randal met with an OTP investigator and signed a statement about the interview, but expressed reluctance as a journalist to testify. Notwithstanding Randal's concerns, the OTP called him to testify. Randal refused and the OTP accordingly applied for a subpoena. The trial chamber obliged, issuing the subpoena on 29 January 2002. Soon afterwards a French court officer arrived on Randal's doorstep to deliver a summons from the ICTY. Randal sought legal advice and the *Randal* proceedings began.

5. The claimed privilege

Randal advanced five propositions:

(i) Media coverage in combat zones serves to:
  (a) provide important information to the world about international conflicts, and alert the world to the commission of war crimes; and
  (b) provide evidential material for prosecutorial *investigation* which if followed could lead to the arrest of war criminals.

(ii) These outstanding benefits for international criminal justice only accrue if journalists are allowed to enter war zones and to conduct interviews with officials in political or 'command responsibility' positions.

(iii) If journalists are routinely compelled to give evidence subsequently to international criminal courts against those they have been permitted to observe or to interview, journalists will have fewer opportunities in the future.

(iv) Routine compellability will put journalists on the whole, as a collective profession, at risk of greater harm and danger in conflict zones.

21. See E. Vulliamy, '"Neutrality" and the Absence of Reckoning: A Journalist's Account', (1999) 52 (Spring) *Journal of International Affairs, 603*.

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(v) The result of routine compellability would be less valuable information obtained and communicated by conflict zone reporters (specifically information about possible international crimes).

In order to avoid these adverse consequences, Randal argued that international criminal courts should apply a presumption against any subpoena (whether sought by the prosecution or defence), such presumption being based on the international public interest. Randal argued that war correspondents should only be compelled to testify where

(i) the correspondent's testimony will be of 'crucial importance' to determining the guilt or innocence of an accused;

(ii) the evidence is not available from any other source;

(iii) the testimony would not entail the correspondent breaching any obligation of confidence;

(iv) the testimony would not place the journalist or his family in danger; and

(v) testimony would not unnecessarily jeopardize the effectiveness or safety of other journalists reporting from conflict zones.[22]

Thus Randal claimed a qualified privilege similar to that proposed by Judge Hunt in his Separate Opinion in the ICRC decision in the *Simić* case (see above).

The thrust of Randal's argument was that war correspondents should enjoy qualified immunity from testifying about their newsgathering before any international criminal tribunal because they are subject to extreme danger when reporting from such conflict zones. It is often as a result of media exposure of the facts of a conflict that the international community has been moved to intervene and respond to the conflict. Indeed, as was recognized by Judge Richard Goldstone, former ICTY Chief Prosecutor, it was the invaluable and brave efforts of conflict zone reporters during the Yugoslav crisis that in part led to the establishment of the ICTY.

> Perhaps the most dramatic recent example of the impact of that kind of reporting is the establishment of the United Nations International Criminal Tribunal for the former Yugoslavia. Visual and written reports of the plight of the victims of ethnic cleansing in Bosnia jolted the Security Council into taking the unprecedented step of creating a court as its own sub-organ . . . There can be no doubt . . . that it was media exposure that triggered the decision.[23]

War correspondents, by the very nature of their work, are exposed to great risk. A large number of journalists are killed in conflicts every year. The International Press Institute estimates that in 2002, 54 journalists were killed while covering conflicts and wars.[24] It is sadly not the case that journalists are merely caught in crossfire. They are themselves targeted because of their very position as journalists reporting on the

22. See 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.
23. Judge Goldstone's foreword to R. Gutman and D. Rieff (eds.), *Crimes of War* (1999).
24. Figures given by the International Press Institute, *Death Watch* (2002).

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conflict.[25] It has even been suggested that journalists may have been deliberately targeted by US forces during the recent Iraq conflict.[26] Such is the danger faced by journalists in conflict zones that they are afforded special protection under the Geneva Conventions.

Article 79 of the 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949 sets out the special position of journalists under the Protocol. The ICRC Commentary on Article 79 provides:

> The circumstances of armed conflict expose journalists exercising their profession in such a situation to dangers which often exceed the level of danger normally encountered by civilians. In some cases the risks are even similar to the dangers encountered by members of the armed forces, although they do not belong to the armed forces. Therefore special rules are required for journalists who are imperilled by their professional duties in the context of armed conflict.[27]

The risk of compulsory testimony by a war correspondent before an international criminal tribunal is that it will make conflict zone reporting far more perilous for present and future conflict zone reporters, a fact recognized by Judge Goldstone, prompting him to support immunity from testimony for war correspondents. He stated:

> Not infrequently journalists come across evidence of war crimes – as eyewitnesses, in discovering a mass grave, or through being privy to statements made by commanders in the heat of the action. Like aid workers and Red Cross or Red Crescent delegates, if reporters become identified as would-be witnesses, their safety and future ability to be present at a field of battle will be compromised. In my opinion the law takes too little account of that reality. I would therefore support a rule of law to protect journalists from becoming unwilling witnesses in situations that would place them or their colleagues in future jeopardy . . . They should not be compelled to testify lest they give up their ability to work in the field, but they may of course testify voluntarily.[28]

A further consequence of compulsory testimony from war correspondents will be, as for members of the ICRC, a loss of independence and impartiality. The effect of testifying for either the prosecution or defence could be a loss of the appearance of neutrality. As noted by one war correspondent, Ed Vulliamy, after his experience in the witness box at the ICTY:

> In the winter of 1996 I was asked if I would testify in the case against Dusko Tadic before the International Criminal Tribunal for the Former Yugoslavia at The Hague . . . Some colleagues who had also worked in Bosnia and whom I greatly admire refused to testify and advised that it was an unwise and perilous course of action. 'Our job was to report', they advised, and if possible, to prompt others to do something that would end the suffering. But justice – the acquittal of the innocent and the imprisonment of the guilty – was the business of others. If I testified I would certainly lose any claim to neutrality, if I ever wanted to stake one. The rules are not unlike those of the Mafia; you

25. M. Kudlak, 'Caught in the Crosshairs: The Deliberate Targeting of Journalists', *ibid.*
26. R. Fisk, 'Did the US Murder Journalists?', *Daily Times* (Pakistan), 28 April 2003.
27. ICRC Commentary to Protocol I Additional to the Geneva Conventions of 12 August 1949, at para. 3245.
28. *Supra* note 23.

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> can say whatever you like about them and they don't care, but you cross a line once you go into the courtroom.[29]

In addition to loss of neutrality, journalists in the witness box face the prospect of exposing and risking the safety of confidential sources. Again, the experience of Ed Vulliamy highlights this problem. On his testimony at the ICTY he writes:

> In many ways, those three days under intense, but inept, cross-examination were more testing – and certainly lonelier – than any moment of the war itself. At one point during this intended 'roasting alive', I was instructed by the judges to read aloud my notes from the interview with Kovacevic. That seemed perfectly reasonable, but then the lawyers demanded to see all my establish 'context'. They dove at an address and telephone number written in the margin demanding to know whose details I had jotted down. My colleagues' warnings echoed in my ear. The number was extremely sensitive, indeed – its owner in clear danger from these vultures.[30]

6. Randal's secondary argument

Randal's secondary argument was that, even if he were not a journalist, the evidence he could provide the court was of such little evidentiary value that he should not be compelled to give evidence. Testifying before an ad hoc tribunal entails unique pressures for any witness and is unlike appearing before a domestic court. There are great pressures as a result of the intense public interest and scrutiny that this entails, especially in view of the gravity of crimes under consideration. Moreover, testifying before an ad hoc tribunal for most witnesses entails leaving their home and family, not just for a matter of hours, but sometimes many days. It involves travelling from one country to another, to perhaps the other side of the world and staying in unfamiliar surroundings. Finally, there is the cost of securing attendance, both for the witness in terms of lost time, but also for the tribunal, which must pay for travel expenses. Accordingly, Randal argued that before *any* witness is brought before the tribunal, especially those reluctant to testify, consideration should be given to the value and usefulness of the evidence they may be able to provide. Randal argued that his testimony would be of little or no evidentiary value at all.

Randal's interview in 1993 with the defendant was conducted through an interpreter, thus Randal could not actually testify to the accuracy of the quotes that he attributed to Brdjanin in his article as he could not speak Serbo-Croat, the language of the interviewee. Thus Randal's evidence would effectively amount to hearsay evidence of what he was told by the interpreter.

Hearsay evidence is admissible at the ad hoc tribunals, and trial chambers have a broad discretion under Rule 89(C) of the Rules to admit such evidence. Rule 89(C) provides:

> A Chamber may admit any relevant evidence which is deemed to have a probative value.

29. Vulliamy, *supra* note 21.
30. *Ibid.*

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However, as stated by the Appeals Chamber in *Aleksovski*:

> it is acknowledged that the weight or probative value to be afforded to [hearsay] evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined.[31]

Moreover, in *Kordić and Čerkez* the Appeals Chamber held that it would be an abuse of discretion of the trial chamber to attach any probative value to hearsay evidence lacking various *indicia of reliability*. These criteria include whether the hearsay statement:

(i) was given under oath;

(ii) was subject to cross-examination by anyone;

(iii) is corroborated by other evidence;

(iv) is 'first-hand' or more removed;

(v) was made contemporaneously with the events in question; and finally

(vi) was made under formal circumstances that might increase its reliability, such as in a hearing before an investigating judge.[32]

Randal argued that his potential testimony lacked any of these requisite *indicia of reliability*.

7. The trial chamber Decision

On 8 May 2002 Randal filed written submissions to set aside the subpoena.[33] On 9 May the prosecution filed its response.[34] On 10 May the trial chamber heard oral argument from the parties and on 7 June it rendered its decision.[35]

The trial chamber acknowledged that journalists should not be subpoenaed unnecessarily and that the summoning and examination of journalists should be conducted and regulated in a way which will 'not unduly hamper, obstruct or otherwise frustrate the vital role of news gathering of the journalist and/or the media'.[36] The trial chamber took the view that such protection should only arise in cases where a journalist's confidential sources are at stake. The trial chamber held that, whatever the proper approach when confidential materials or sources are at issue, when the testimony sought concerns already published materials and already identified sources, compelling the testimony of journalists poses only a minimal threat to the news gathering and news reporting functions.[37] The trial chamber found that

31. *Aleksovski*, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 Feb. 1999, at para. 15.
32. *Kordić and Čerkez*, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000.
33. Written Submissions on Behalf of Jonathan Randal to Set Aside Confidential Subpoena to Give Evidence, 8 May 2002.
34. Prosecution's Response to Written Submissions on Behalf of Jonathan Randal to set aside Confidential Subpoena to Give Evidence, 9 May 2002.
35. *Brdjanin and Talić*, Decision on Motion to Set Aside Confidential Subpoena to Give Evidence, 7 June 2002.
36. *Ibid.*, at para. 27.
37. *Ibid.*, at para. 31.

a published article is the equivalent of a public statement by its author 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 public claim, must expect to be called to defend its accuracy.[38] In relation to Randal's secondary argument, the trial chamber held that 'if proven to be true, the alleged declarations of Brdjanin are *pertinent* to the case of the Prosecution'.[39] The trial chamber held that it would not deprive the prosecution of bringing forward the evidence and that it would be unfair not to allow the defence to challenge it. Thus, the subpoena was not set aside.

8. The Appeals Chamber Decision

On 14 June 2002 Randal sought certification for leave to appeal from the trial chamber,[40] which it granted on 19 June.[41] Randal filed written submissions in support of the Motion to Appeal on 4 July[42] and the prosecution responded on 15 July; Randal replied on 6 August.[43] The Appeals Chamber granted the request of 34 media organizations and associations of journalists to file a brief as *amici curiae*. The *amici* brief was filed on 16 August.[44] On 3 October the Appeals Chamber heard oral argument from the parties and issued its Decision on 11 December.[45]

In its Decision the Appeals Chamber posed three questions:[46]

(i) Is there a public interest in the work of war correspondents?

(ii) Would compelling war correspondents to testify to a war crimes tribunal adversely affect their ability to carry out their work?

(iii) 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?

(i) The Appeals Chamber held that there is a clear public interest in the work of war correspondents. The Appeals Chamber defined war correspondents as 'individuals who, for any period of time, report (or investigate for the purposes of reporting) from a conflict zone on issues relating to the conflict'.[47] The Appeals Chamber agreed with the European Court of Human Rights decision in *Goodwin* v. *UK*[48] that

38. *Ibid.*, at para. 26.
39. *Ibid.*, at para. 32.
40. Application for Certification from Trial Chamber to Appeal 'Decision on Motion to Set Aside Confidential Subpoena to Give Evidence', 14 June 2002.
41. Decision to Grant Certification to Appeal the Trial Chamber's 'Decision on Motion to Set Aside Confidential Subpoena to Give Evidence', 19 June 2002.
42. 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', 4 July 2002.
43. 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, 6 August 2002.
44. Decision relative à la requête aux fins de prorogation de delai et autorisant a comparaitre en qualité d'*amici curiae*', 1 Aug. 2002.
45. *Brdjanin and Talić*, 'Decision on Interlocutory Appeal', 11 Dec. 2002.
46. *Ibid.*, at para. 34.
47. *Ibid.*, at para. 29.
48. *Goodwin v. UK*, (1996) 22 EHRR 123.

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journalists play a 'vital public watchdog role' that is essential in democratic societies and that, in certain circumstances, compelling journalists to testify may hinder 'the ability of the press to provide accurate and reliable information'.[49] The Appeals Chamber was of the view that society's interest in protecting the integrity of the newsgathering process is particularly clear and weighty in the case of war correspondents. The Appeals Chamber, like the trial chamber, noted that war correspondents 'play a vital role in bringing to the attention of the international community the horrors and reality of conflict'.[50]

The Appeals Chamber found that the public's interest in the work of war correspondents finds additional support in the right to receive information that is gaining increased recognition within the international community. Article 19 of the Universal Declaration of Human Rights provides:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[51]

The Chamber noted that the right to freedom of expression includes not only the right to communicate information, it also incorporates the right of members of the public to receive information.[52] In *Fresso and Roire* v. *France* the European Court of Human Rights held:

> Not only does the press have the task of imparting information and ideas on matters of public interest: the public also has a right to receive them.[53]

(ii) The Appeals Chamber held that it is impossible to determine with any certainty whether and to what extent the compelling of war correspondents to testify before the international tribunal would hamper their ability to work.[54] However, the possibility of so hampering their work could not be discarded lightly. The Appeals Chamber recognized that the potential impact upon the newsgathering function and on the safety of war correspondents is great and that in order to do their jobs effectively, war correspondents must be perceived as independent observers rather than as potential witnesses for the prosecution, otherwise they may face more frequent and grievous threats to their safety and to the safety of their sources.[55] The Appeals Chamber held that compelling war correspondents to testify on a routine basis may have a significant impact upon their ability to obtain information and thus their ability to inform the public on issues of general concern. The Chamber held that they would not unnecessarily hamper the work of professions that perform a public interest.[56]

49. Appeals Chamber Decision, at para. 35.
50. *Ibid.*, at para. 36.
51. This principle is reproduced in all the main human rights instruments.
52. Appeals Chamber Decision, at para. 37.
53. Judgement of 21 Jan. 1999, at para. 51.
54. Appeals Chamber Decision, at para. 40.
55. *Ibid.*, at para. 43.
56. *Ibid.*, at para. 44.

(iii) The Appeals Chamber held that in order to decide whether to compel a war correspondent to testify before the international tribunal, a trial chamber must conduct a balancing exercise between the differing interests involved in the case. On the one hand there is the public interest of justice in having all relevant evidence put before the trial chambers for a proper assessment of the culpability of the individual on trial. On the other hand, there is the public interest in the work of war correspondents, which requires that the newsgathering function be performed without unnecessary constraints so that the international community can receive adequate information on issues of public concern.[57] Accordingly, the Appeals Chamber held that in order for a trial chamber to issue a subpoena to a war correspondent a two-pronged test must be satisfied:

> First, the petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case. Second, it must demonstrate that the evidence sought cannot be obtained elsewhere.[58]

The Appeals Chamber accordingly allowed the appeal and set the subpoena aside.

The Appeals Chamber decided not to address Randal's secondary argument or indeed apply the proper legal test formulated by them to the facts of the case. Having formulated the principles governing the testimony of war correspondents, the Appeals Chamber held it was the role of the trial chamber to apply those principles to the facts of the case. The Appeals Chamber did, however, offer a number of observations on the facts of the case.[59] First, the Appeals Chamber stated that the flexible rules on hearsay evidence at the ICTY meant that Randal's article could be admitted as evidence in and of itself without the need for Randal himself to testify. It would then be for the trial chamber to determine what weight to attribute to the article.[60] With regard to Randal's testimony itself the Appeals Chamber stated that given that Randal speaks no Serbo-Croat, and that he relied on an interpreter, they found it difficult to imagine how his testimony could be of 'direct and important value to determining a core issue in the case'.[61]

9. Privilege at the International Criminal Court

The Appeals Chamber Decision will act as a precedent for both the ICTY and the ICTR. Thus, conflict zone reporters will enjoy the protection from testimony set out in the *Randal* Decision before both tribunals. It is hoped, but by no means certain, that the Decision will be followed by the permanent International Criminal Court, whose jurisdiction commenced on 1 July 2002. Rule 73(2) of the ICC's Rules of Procedure

57. *Ibid.*, at para. 46.
58. *Ibid.*, at para. 50.
59. *Ibid.*, at para. 51.
60. *Ibid.*, at para. 52.
61. *Ibid.*, at para. 54. It should be noted that on this point Judge Shahabuddeen rendered a Separate Opinion in which he stated that Randal's evidence could be of direct and important value in determining a core issue in the case. However, as, in his view, the evidence was available from another source, namely the interpreter, the second prong of the Appeals Chamber's test was not satisfied as the evidence could reasonably be obtained elsewhere.

and Evidence provides that 'communications made in the context of a class of professional or other confidential relationships shall be regarded as privileged, and consequently not subject to disclosure'. Rule 73 does not set out an exhaustive list of professional or confidential relationships which are to be regarded as privileged. Instead, the Court is to consider whether the following criteria are satisfied in relation to each class of relationship:

(i) whether 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;

(ii) whether confidentiality is essential to the nature and type of relationship between the person and the confidant; and

(iii) recognition of the privilege would further the objectives of the Statute and the Rules (of the ICC).

Rule 73(3) stipulates that in deciding whether to regard a particular class of professional or confidential relationship as privileged, the Court shall give particular regard to recognizing as privileged communications made in the context of a professional relationship between a person and his doctor, psychiatrist, psychologist, or counsellor, and between a person and a member of a religious clergy. Rule 73 also provides for a virtually absolute privilege for the International Committee of the Red Cross. Consideration was given during negotiations on Rule 73 to specifically citing journalists as a class of professionals to be regarded as privileged. There was no consensus on this issue and it was accordingly decided to leave it to the Court to consider as and when the matter arises.[62]

It would appear that the privilege granted by the Appeals Chamber in *Randal* is more far reaching than the sort of privilege contemplated by Rule 73. Rule 73 is limited to 'professional or other confidential relationships'. Thus, a journalist's confidential sources would most probably be protected pursuant to Rule 73. However, in a case of no confidential sources, such as Randal's, it seems that Rule 73 may be of little assistance.

This is not to say, however, that the *Randal* Decision will not be followed by the ICC. On the contrary, the ICC, as an international criminal tribunal with a mandate similar to that of the ICTY and the ICTR, will be affected by the same considerations with regard to conflict zone reporters as the two ad hoc tribunals. Article 21 of the Rome Statute of the ICC provides that the ICC shall in the first place apply the Statute and its Rules of Procedure and Evidence of the ICC and in the second place 'the principles and rules of international law'. Rule 73 does not prohibit the provision of a privilege to conflict zone reporters and it is therefore submitted that the ICC will be able to and should follow the ICTY *Randal* Decision as a 'principle of international law'. Failure to do so will present the same tensions for the ICC as were highlighted during the *Randal* proceedings.

62. R. S. Lee (ed.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (2001), 360.

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10. Conclusion

The *Randal* Decision is the first instance where a qualified privilege for war correspondents has been recognized by any tribunal, national or international. This is perhaps not surprising, given that the testimony of a conflict zone reporter would most likely be sought in relation to proceedings for war crimes and other international crimes. Until recently there have been few, if any, prosecutions for such crimes before domestic courts.

It is hoped that the *Randal* Decision will be followed by the ICC and other international criminal tribunals such as the Special Court for Sierra Leone. Moreover, it is likely, especially given the requirement of 'complementarity' in the ICC Statute (which gives jurisdiction to the ICC only where a state has proved 'unwilling' or 'unable' to prosecute crimes within the jurisdiction of the Court), that there will be an increasing amount of domestic war crimes litigation in the future. Again, it is hoped that in such cases domestic courts will follow and apply the *Randal* Decision and afford conflict zone reporters a similar protection to that which they enjoy before the international criminal tribunals.

Finally, the importance of this decision is perhaps not limited to war correspondents and reporters reporting from conflict zones. It may be possible to apply the Appeals Chamber's recognition of the 'public watchdog role' played by the media in conflict situations, and the importance of bringing the horror of such matters to the attention of the international community, to the invaluable work of the media in bringing other crimes and human rights abuses to the public's attention, irrespective of whether committed in conflict zones or not. Where compulsory testimony could hamper the work of such reporters, the *Randal* Decision could serve as a useful precedent of the caution and care that should be undertaken before forcing testimony from such media sources.