

JOURNALIST OR WITNESS?

Reporters and War Crimes Tribunals

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Abstract / Jonathan Randal, who covered the Balkan Wars for *The Washington Post*, was subpoenaed to testify before the International Criminal Tribunal for the Former Yugoslavia. He challenged the subpoena. The Tribunal Appeals Chamber ruled that war correspondents have a qualified privilege to refuse to testify before the tribunal. The court held that it must balance the interest in free flow of information from war zones against the interest in the fair administration of justice. This article argues that the Appeals Chamber holding was deficient because it omitted the safety of the correspondent, his family and his sources from the equation. The American case of Robert Young Pelton, who interviewed John Walker Lindh in Afghanistan for Cable News Network (CNN), is also reviewed.

Keywords / Former Yugoslavia / International Criminal Tribunal / journalist privilege / war correspondent / war crimes

Radoslav Brdjanin is not the worst of the Balkans thugs, but he is a particularly nasty character who played a key role in the obscene ethnic cleansing in Bosnia. A former deputy prime minister of the Bosnia Serb republic, he was captured by British troops in 1999 and turned over to the United Nations International Criminal Tribunal for the Former Yugoslavia at The Hague. He is convicted of killing, torturing or ousting from their homes more than 100,000 Muslims and Croats while he was in control of the Banja Luka area of north-west Bosnia during the 1992-5 Bosnian War.¹ Patricia Wald, the former US appeals judge who sat on the war crimes tribunal, said of the court:

*Inside our courtrooms the darkest and most brutal tales are told of man's inhumanity to man and woman, including genocide and crimes against humanity involving thousands of victims, systematic rapes of women and girls, prolonged detention under the most barbaric of conditions, merciless beatings, and callous destruction of homes and villages.*²

At the time he was captured, Brdjanin was the most senior Serb official to face the court. Since then, Yugoslav President Slobodan Milosevic has been brought into the dock. On 1 September 2004, the war crimes tribunal convicted Brdjanin of crimes against humanity, including murder and torture, and sentenced him to 32 years in prison.³

One unpredictable outcome of Brdjanin's prosecution was the first recognition under international law of a qualified privilege of war correspondents

not to be compelled to testify in war crimes proceedings. That outcome was sought by a coalition of more than 30 international media organizations who banded together and urged the court to create such a privilege.⁴ The coalition represented what ‘may well be the largest and most diverse group of journalists and journalistic organizations throughout the world ever to join a single brief’.⁵

In 1993, Jonathan Randal, a *Washington Post* correspondent covering the Balkan Wars, wrote a story headlined, ‘Preserving the Fruits of Ethnic Cleansing; Bosnian Serbs, Expulsion Victims See Campaign as Beyond Reversal’.⁶ Randal quoted Brdjanin, then administering government-owned housing, but who in fact was a major political decision-maker, as saying ‘ethnically clean space through voluntary movement’ should be created and Serbs were paying ‘too much attention to human rights’.⁷ Randal does not speak Serbo-Croat, but Brdjanin’s comments were translated for him by a journalist who does.⁸ The war crimes prosecutor introduced the article as evidence against Brdjanin. The Trial Chamber of the tribunal issued a subpoena to compel Randal to confirm accuracy of the article and testify as to the circumstances under which he gathered the information in it.⁹ Without such authentication the article would be hearsay evidence.

Randal, now retired from the *Post* after 29 years and living in Paris,¹⁰ gave an informal statement when originally contacted by the prosecutors. When served with the subpoena, he objected and asked the court to hold that war correspondents have a qualified privilege not to testify about their activities or stories in war zones.¹¹ Randal argued that a public policy of encouraging reporting from war zones, including exposure of war crimes, would be undermined by failure to recognize the privilege. He claimed war zone reporting would diminish because sources would view reporters as arms of the UN or other official bodies and because the danger of physical harm to journalists and their sources would increase.¹² It was the notion that lack of a privilege would put journalists’ lives at risk that resonated within the profession. As *New York Times* columnist William Safire wrote:

*The reason to resist becoming a participant [in court proceedings] is obvious: if dictators see reporters as potential witnesses in prosecutions, tyrants in trouble will be likely to kill those witnesses.*¹³

Paul Greenberg, a Pulitzer Prize-winning columnist, echoed:

*This isn’t so much a subpoena for one reporter as a death warrant for those who will come after. This first rule of war criminals, like the other kind, is: Leave No Witnesses.*¹⁴

War reporting is a dangerous business. From its start to mid-2004 33 journalists and other media workers had died covering the Iraq War.¹⁵ In Afghanistan, nine journalists were killed in 2001. Twenty journalists died in the period 1993–2002 in the Balkans.¹⁶ The International Federation of Journalists observes that ‘there are inherent dangers in obliging journalists to reveal information they have gathered while exercising their professional duties’.¹⁷ The IFJ adds there is:

... the potential threat to the physical safety and welfare of journalists, particularly those working in areas of war and conflict. Each year many journalists are targeted and subject to harassment, intimidation and worse at the hands of one side or another in conflict zones. As non-combatants, journalists are entitled to limited protection under international law, but the work they do is potentially damaging to the public image of any side in a conflict when they are witnesses to crimes of war or violations of human rights and, as a result, journalists are frequently subject to violence and threats of violence. The possibility of such intimidation is greatly increased if it becomes the practice to subpoena journalists to give testimony on what they see in the course of their work.¹⁸

Not all journalists agree. Ed Vulliamy, a *London Observer* correspondent who voluntarily testified against Croat general Tihomir Blaskic and Serb concentration camp commandant Milan Kovacevic, argued that journalists have a moral duty to take the stand:

The court needs reporters to stand by their stories under oath. The work of some journalists has already had an impact beyond mere 'reporting' in El Salvador, East Timor, Rwanda, the Balkans and elsewhere. Now we are entering a new world that seeks not only to report the legacy of tyrants and mass murderers, but to call them to account. My belief is that we must do our professional duty to our papers, and our moral and legal duty to the new enterprise.¹⁹

Jacky Rowland, the BBC's former Belgrade correspondent, testified against Milosevic. Several Balkan journalists have cooperated with investigators from The Hague. However, the Paris-based journalists' rights group Reporters sans Frontières reflects the majority view within the journalistic community on compelling journalists to testify before the war crimes tribunals. It commented that 'even the best causes do not justify violation of the fundamental principle of protection of journalistic sources'.²⁰

Randal's challenge represented a unique assertion of journalistic privilege. Ordinarily privilege is recognized, if at all, only where journalists are harassed or want to protect the identities of sources or the confidentiality of information. At first neither the identity of Brdjanin as Randal's source nor the confidentiality of the information he supplied was at issue. The subpoena was for testimony about information that had been published. Rather the issue was the access to sources and safety of journalists in war zones. In a later challenge, the prosecutor asserted that even confidential information must be disclosed. In its first decision, involving non-confidential information, the Trial Chamber ruled that Randal must testify,²¹ a decision which Randal appealed. The Appeals Chamber reversed and held that journalists had a qualified privilege not to testify even when the information was not confidential.²² It set aside the subpoena of Randal.²³ In a second decision, relying on the Appeals Chamber ruling, the Trial Chamber ruled that the qualified privilege applied to Randal.²⁴ The Trial Chamber also rejected an odd request of the prosecution – made after the Appeals Chamber decision – to compel Randal to divulge unpublished, and therefore confidential, information.²⁵

This article analyzes the trial and appellate decisions, including their background in international law, of the tribunal. As background to this analysis, it evaluates a similar US case decided on by American constitutional law. It assesses the arguments put forth by the international coalition of media

organizations in their *amici* brief. Finally, it points out the failure of the Randal appeals decision to give adequate weight to the safety of war correspondents, their families and their sources. It also evaluates the precedent set by the appeals decision for international law.

The CNN Pelton and Lindh Interview

Randal's assertion, in an international forum, of journalistic privilege for war correspondents was preceded by that of Robert Young Pelton in a US court.²⁶ Pelton is the CNN freelancer who videotaped an interview with John Walker Lindh, the American member of the Taliban, at Qala-I-Janghi prison in northern Afghanistan. It was probably the most noted journalistic event of the Afghanistan War; but seven months later, Pelton was in peril of losing his credibility as a journalist and of endangering his life if he were to cover future wars. When legal proceedings began in a Virginia federal court to put Lindh on trial for fighting against American forces, Lindh sought to suppress the interview as evidence against him. Lindh claimed Pelton was acting as a US government agent when he conducted the interview.²⁷ Pelton was served with a subpoena to testify, and sought to quash it. Virginia is among the not insubstantial minority of American states that do not have a reporters' shield law.²⁸ Pelton maintained he had a privilege not to testify under the First Amendment.²⁹ Judge T.S. Ellis III framed the issue in the following way:

*Pelton concedes that he cannot invoke the First Amendment privilege on the basis of confidentiality of sources or of government harassment; those factors are simply not present here. Still, he argues that the special circumstances of his role as a war correspondent in Afghanistan is a sufficient factor to trigger application of the privilege. This is a novel claim; no case is cited as direct support for granting First Amendment protection to journalists when they act as war correspondents.*³⁰

Media organizations, including CNN, Fox News, ABC, CBS, Tribune Co., *The New York Times* and *The Washington Post*, filed a brief supporting Pelton's claim.³¹

Judge Ellis noted that the constitutional privilege of journalists to refuse to testify was conditional and was rooted in the US Supreme Court's decision in *Branzburg v. Hayes*.³² In *Branzburg*, a plurality of four justices concluded:

*The only testimonial privilege to unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.*³³

The reach of *Branzburg* was curbed by a concurring opinion of Justice Lewis Powell, who wrote 'to emphasize what seems to me to be the limited nature of the Court's holding'.³⁴ He stated:

If the newsmen is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationship without a legitimate need of law

*enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered.*³⁵

The court's decision, Powell commented, did not mean authorities are free to turn the news media into an investigative arm of government.³⁶

Most federal courts of appeal have concluded that Powell's concurrence plus the opinions of four dissenting justices created a conditional privilege. Others, including the Fourth Circuit Court of Appeals that encompasses Virginia, have decided *Branzburg* calls for courts to balance whether the needs of justice require compelling journalists to testify and thereby rupture confidential relationships.³⁷ To some extent, where source confidentiality is present, the difference between privilege and no privilege but striking a balance is semantics. Its significance is that a court can proceed to balancing only if a journalist presents evidence of source confidentiality or of government harassment. In any event, journalists have a higher hurdle to avoid testifying under case law in the Fourth Circuit than most other jurisdictions.³⁸

Nevertheless, the *Lindh* court assumed without deciding that a journalist's status as a war correspondent required balancing. It declared:

*. . . it is clear on this record that the balance at this point weighs in favor of Pelton's duty to testify. This is so because Lindh's Sixth Amendment right to prepare and present a full defense to the charges against him is of such paramount importance that it may be outweighed by a First Amendment journalist privilege only where the journalist's testimony is cumulative or otherwise not material.*³⁹

The court said the journalist's testimony was material to Lindh's claim that Pelton was acting as a government agent at the time of the interview. Moreover, Pelton appeared to have had a 'unique opportunity to observe the conditions of Lindh's confinement and the circumstances under which he gave the CNN interview, factors which bear directly on the voluntariness of Lindh's statements'.⁴⁰

The judge dismissed Pelton's argument that his personal safety would be placed in jeopardy if he testified. The court claimed any danger 'arises not from the subpoena, but rather is a result of Lindh's argument that Pelton was acting as a government agent at the time of the December 1, 2001 interview. . . . In the circumstances, therefore, it is arguably in Pelton's best interests to appear and testify, as he alleges, that he was not acting as a government agent at the time of the interview.'⁴¹ The court failed to perceive that the persons or groups that would represent a threat to Pelton are inherently suspicious of government institutions and are as likely as not to disbelieve any testimony that he was not a government agent.

Judge Ellis held that later testimony could make it unnecessary for Pelton to testify. As it turned out, Lindh pleaded guilty to criminal charges and Pelton thereby avoided being forced to testify or to defy a court order. The danger to Pelton became real in 2003 when he was kidnapped and held for 10 days by Colombian guerrillas.⁴²

Background to Randal Case

When Randal challenged the effort to compel his testimony, the International Criminal Tribunal said it ‘is not bound by the laws and judicial pronouncements of any State, [but] it has a duty to keep itself abreast with developments in the field of international human rights’.⁴³ In that regard, the Trial Chamber looked to the European Court of Human Rights and to *Goodwin v. United Kingdom*,⁴⁴ a decision that established a qualified privilege of journalists to protect confidential sources. Press rights are found under Article 10 of the European Convention on Human Rights. The article reads:

1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.*
2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for prevention of disorder or crime, for the protection of health or morals, for the protection of reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*⁴⁵

The convention permits restrictions on press freedom, but only if they are ‘prescribed by law’⁴⁶ and ‘necessary in a democratic society’.⁴⁷ In deciding whether a restriction is necessary, the human rights court has ruled that it must be more than reasonable or desirable. It must meet a ‘pressing social need’⁴⁸ and must be ‘proportionate to the legitimate aim pursued’.⁴⁹ National legislatures and courts are permitted a margin of appreciation in interpreting their obligations under the convention, but the margin is not unlimited and must be exercised in a manner ‘reconcilable with freedom of expression’.⁵⁰ Since passage of the Human Rights Act 1998 the decisions of the human rights court have become part of UK case law unless in direct conflict with an Act of Parliament.⁵¹

Goodwin stemmed from the pursuit of a story by William Goodwin, a journalist with *The Engineer*, a trade magazine. Goodwin received confidential information about the troubles of Tetra, a computer software company, and its plans to seek new financing. Intent on writing an article about the financing plans, he sought comment from Tetra and its bankers. Tetra obtained a High Court order prohibiting publication of any information about its financing plans. The High Court also ordered Goodwin to disclose the identity of the source of the financial information about Tetra. The journalist refused to name his source and was found in contempt. The House of Lords eventually heard an appeal by Goodwin and upheld his contempt conviction.⁵² The lords reasoned that disclosure was necessary to assist Tetra in identifying the leak and thereby preventing damage to the company as a result of future disclosures.⁵³

The European Court of Human Rights found the contempt conviction was an unjustified violation of Article 10. Goodwin argued that the information ‘about Tetra’s mismanagement, losses and loan-seeking activities was factual, topical and of direct interest to customers and investors in the market for computer software’.⁵⁴ He asserted there was no pressing social need for

punishing him ‘for refusing to disclose the source of the information, which Tetra had been unable to keep secret’.⁵⁵ The court said:

*Protection of journalistic sources is one of the basic conditions for press freedom as is reflected in the laws and professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedom. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potential chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 unless it is justified by an overriding requirement in the public interest.*⁵⁶

The court said much of the damage Tetra had sought to avert had been accomplished by the gag order on publication.⁵⁷ The court conceded that Tetra had legitimate interests in uncovering the identity of a disloyal employee and preventing him from using non-press channels for disclosure of confidential information.⁵⁸ However, it found these interests did not ‘outweigh the vital public interest in the protection of [Goodwin’s] source’.⁵⁹ Therefore, the court concluded there was no

*... reasonable relationship of proportionality between the legitimate aim pursued by the disclosure order and the means deployed to achieve that aim. The restriction which the disclosure order entailed on [Goodwin’s] exercise of his freedom of expression cannot therefore be regarded as having been necessary in a democratic society... for the protection of Tetra’s rights under English law, notwithstanding the margin of appreciation available to the national authorities.*⁶⁰

The court awarded Goodwin £15,000 damages for ‘mental anguish, shock, dismay and anxiety’.⁶¹ The court agreed with Goodwin’s contention that he had been in danger of going to prison ‘for up to two years as punishment for obeying his conscience and living up to his ethical obligations as a journalist’.⁶² It also awarded him £37,595 in legal costs.⁶³

The *Goodwin* decision did not address the issue of the safety of journalists or their sources in war zones. Arguably, the Northern Ireland High Court did so in *Reavey and Others v. Century Newspapers, Ltd.*⁶⁴ A newspaper published a story that Eugene Reavey was a member of a Provisional Irish Republican Army (IRA) terrorist group and had planned the murder of 10 Protestant workmen. The newspaper claimed its story was based on police documents.⁶⁵ Denying that he was a terrorist, Reavey asked the court to order the newspaper to divulge its sources. The court held that Reavey’s interests are not ‘so important they outweigh the public interest in the protection of the [newspaper’s] “confidential sources”’.⁶⁶

Both the Provisional IRA and Protestant terrorist groups in Northern Ireland have a history of killing informers. Reavey’s request if granted could have put the newspaper’s source in harm’s way. The court did not comment on the safety issue nor elaborate on what it meant by the public interest in protecting sources. While the decision allowed the newspaper to protect its source, the court’s paucity of reasoning is disappointing. There is a suspicion that the

court believed Reavey had motives other than a legal action against the source and decided to dispose of the case without much comment.

Trial Chamber Decision on Randal

In January 2002, before the Trial Chamber, the Brdjanin prosecutor sought to introduce Randal's 1993 interview of Brdjanin in *The Washington Post* as evidence that Brdjanin intended to rid the Banja Luka area of its non-Serb people. The prosecutor said that Randal had refused voluntarily to personally testify. Brdjanin insisted that he be given the opportunity to cross-examine Randal. Brdjanin claimed the journalist whom Randal used to translate was hostile to him and did not accurately translate his comments to Randal. The court ruled that the article could illuminate Brdjanin's mindset and issued a subpoena ordering Randal to personally give testimony. Randal challenged the order.⁶⁷

Randal asserted a qualified journalistic privilege. He maintained the privilege should be voided by an international criminal court only if a journalist's testimony were crucial to determining the guilt or innocence of a defendant and if giving testimony would not put the journalist, his or her family or sources in reasonably foreseeable danger.⁶⁸ Consequences of forcing war correspondents to testify, Randal argued, are: (1) journalists' independence would be undermined and their opportunity to interview key figures in wars would decrease; (2) journalists and their sources would be put at physical risk; and (3) the amount of information, including that of war crimes, reported by journalists would be reduced.⁶⁹ For legal authority Randal relied on *Goodwin* and US and UK domestic law on journalistic privilege. In particular, he cited the comments in *Goodwin* on the public watchdog role of journalists.⁷⁰

The prosecution claimed Randal had no legal basis for asserting a privilege of war correspondents not to testify and had presented no factual evidence that 'publicly important information will become unavailable'.⁷¹ Moreover, it maintained *Goodwin* provided no legal support because it dealt with confidential sources. The interview with Brdjanin 'had been conducted on the record with no expectation of confidentiality, and the information gained in the interview was subsequently published'.⁷² The prosecution asserted the tribunal routinely admitted statements obtained through interpreters.⁷³

The Trial Chamber acknowledged the persuasive authority of decisions of international courts.

*Of particular interest are the decisions of the European Court of Human Rights amongst others, and the decision of that Court in Goodwin v United Kingdom is one which certainly sets a standard in the sphere of journalistic privilege for years to come. Indeed, it would be a step in the wrong direction, a step backward, and a severe blow to the freedom of expression of journalists and the freedom of the media, if this Trial Chamber were to accept a standard lower than that upheld in the Goodwin case.*⁷⁴

Then the court distinguished *Goodwin* from Randal's claim. *Goodwin* 'can only be of help in Randal's case if he has confidential information that he has not published and which he is asked to disclose, or in case he claims to have an

undisclosed confidential source that he wishes not to disclose'.⁷⁵ Even if those circumstances existed, the court said, any privilege under *Goodwin* 'is always subject to an overriding requirement to disclose in the public interest'.⁷⁶ The court noted that Randal was retired and there 'is absolutely no indication at all that if forced to testify in this case, Randal could possibly be exposed to physical harm or any other kind of harm or risk'.⁷⁷ The court did not deal with Randal's contention that denial of privilege would endanger other war correspondents.

The Trial Chamber said weighing the needs of justice against freedom of expression dictated that the tribunal engage in a 'delicate balancing exercise'.⁷⁸ However, the tribunal made clear that it believed that press rights were subordinate to routine needs of the court. It said that 'some of the aspects of the right to freedom of expression as they relate to journalists reporting from combat areas . . . inevitably need to be considered within the context of the overriding principle that the course of justice is not duly impeded by the withholding of evidence'.⁷⁹ In ruling that Randal must testify, the Trial Chamber said the 'freedom of the media is only marginally involved'.⁸⁰ Unlike the law of the European Court of Human Rights, where a restriction on press freedom must be necessary in a democratic society, the tribunal's standard was 'pertinent to the case'.⁸¹

Reversal by the Appeals Chamber

On appeal Randal, represented by Geoffrey Robertson, one of the UK's premier media advocates, argued anew that failure to grant war correspondents privilege would adversely affect the public interest.

*Such a privilege is warranted . . . in order to safeguard the ability of journalists to investigate and report effectively from areas in which war crimes take place. Without a qualified privilege, journalists may be put at risk personally; may expose their sources to risk, and may be denied important information and sources in the future.*⁸²

One result, Randal asserted, 'will be less journalistic exposure of international crimes and thus the hindering of the very process of international justice'.⁸³

Randal said a higher standard than the Trial Chamber's pertinence of evidence should be required before a war correspondent was forced to testify. He maintained that privilege should be overridden only if the correspondent's evidence (1) is crucial to determining the defendant's guilt or innocence, (2) cannot be obtained from other sources, (3) will not require the journalist to break any promise of confidentiality, (4) will not place the journalist, his or her family or sources in reasonably foreseeable personal danger and (5) will not unnecessarily jeopardize the effectiveness or safety of journalists reporting from war zones in the future.⁸⁴ Randal relied for legal support on *Goodwin* and on the special status accorded war correspondents by the Geneva Conventions.⁸⁵

More than 30 media organizations, represented by attorney Floyd Abrams, probably the top First Amendment attorney in the US, filed an *amici curiae* brief. While supporting Randal, the *amici* argued for a less demanding test for the qualified privilege to be granted. To compel testimony, the *amici* said, there must be a determination that the war correspondent's evidence is absolutely

essential to the case and the evidence cannot be obtained by other means.⁸⁶ Absolutely essential was defined as ‘critical to determining the guilt or innocence of a defendant’.⁸⁷ Risk of harm to the correspondent or his or her sources was not part of the *amici*’s test. The *amici* claimed the Trial Chamber’s test of pertinence was ‘so vague that it will inevitably lead to unease and confusion in the journalistic community and result in journalists being subpoenaed unnecessarily’.⁸⁸ While the safety of journalists and their sources was not part of the test urged by the *amici*, they said there was a deep concern ‘about any ruling that could result in compelling journalists – particularly war correspondents – to become witnesses against their sources, thus imperiling their access to information, their objectivity and even their safety’.⁸⁹

As persuasive authority for the tribunal to adopt their test, the *amici* cited similar US Department of Justice guidelines.⁹⁰ The guidelines require government attorneys to exhaust efforts to obtain information from non-media sources before issuing a subpoena to a journalist. Moreover, in criminal cases, they require the government to have reasonable grounds to believe a crime has occurred and that the journalist’s information is essential to a successful investigation, particularly in relation to establishing guilt or innocence.⁹¹ The *amici* noted the guidelines are not limited to confidential information sought from the press. They apply to any subpoena issued to a journalist.⁹²

The *amici* presented the testimony of Elizabeth Neuffer, the *Boston Globe* correspondent who discovered and led investigators to the trail of skeletons that marked the infamous massacre of Muslims at Srebrenica. Neuffer said she could not have written her stories about the Srebrenica massacre if her sources knew that she would in the future testify against them at a war crimes trial.⁹³ She particularly cited a 1996 story linking Radislav Krstic, a commander, to the men who carried out the massacre and one documenting efforts to conceal the mass graves. Neuffer said she ‘never would have been able to systematically piece together either story’ if she had not been able to promise confidentiality to her sources.⁹⁴

The prosecution only argued before the Appeals Chamber that no privilege should be granted where confidentiality is not present.

*... whatever beneficial effects a privilege for the protection of confidential sources and confidential information may have in promoting vigorous reporting and thus ultimately the cause of international justice, no such benefits accrue from a privilege protecting testimony concerning published materials and openly identified sources.*⁹⁵

What produces risk for journalists in war zones, the prosecution said, is publication of information in the media and not the possibility of later testimony about what has become public information.⁹⁶

The Appeals Chamber framed the legal issue in terms of journalistic privilege for war correspondents only. It is the ‘particular character of the work done and the risks faced by those who report from conflict zones that is at stake in the present case’.⁹⁷ It noted that the issue was one of first impression.⁹⁸ In its analysis, the Appeals Chamber posed and answered three questions. First, it asked whether the work of war correspondents was in the public interest. If so,

the court said, then the second query is whether compelling correspondents to testify in war crimes trials would harm their ability to carry out their work. Then, if so, what test should be used to balance the public interest in aiding the work of correspondents against the public interest in ‘having all relevant information available to the court and where it is implicated, the right of a defendant to challenge the evidence against him?’⁹⁹

In finding that the work of war correspondents is in the public interest, the court stated that ‘international and national authorities support the related propositions that a vigorous press is essential to the functioning of open societies and that a too frequent and easy resort to compelled production of evidence by journalists may, in certain circumstances, hinder their ability to gather and report the news’.¹⁰⁰ The jurists noted that stories and pictures of the carnage of war and the horrors of concentration camps awakened the world to the violations of human rights in the Former Yugoslavia.¹⁰¹

*The Appeals Chamber is 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. Wars necessarily involve death, destruction, and suffering on a large scale and, too frequently, atrocities of many kinds, as the conflict in the former Yugoslavia illustrates. In war zones, accurate information is often difficult to obtain and may be difficult to distribute or disseminate as well. The transmission of the information is essential to keeping the international public informed about matters of life and death. It may also be vital to assisting those who would prevent or punish the crimes under international humanitarian law that fall within the jurisdiction of this Tribunal.*¹⁰²

The court said more than the right of the press to gather news was at stake. Also involved was the public’s right to receive the information.¹⁰³

The Appeals Chamber found that compelling war correspondents to testify before the war crimes tribunal 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’.¹⁰⁴ The court said it would ‘not unnecessarily hamper the work of professions that perform a public interest’.¹⁰⁵ It declined to dismiss Randal’s case because the information had been published in *The Washington Post* and was not based on confidential sources. To do so would risk great harm to the newsgathering function and the safety of war correspondents.¹⁰⁶ The court found reasonable the claim of Randal and the *amici* that correspondents must be seen as independent observers rather than potential witnesses. Otherwise, they would face severe threats to their safety and the safety of their sources even if their testimony did not relate to confidential information.¹⁰⁷

*What really matters is the perception that war correspondents can be forced to become witnesses against their interviewees. Indeed, the legal differences between confidential sources and other forms of evidence are likely to be lost on the average person in a war zone who must decide whether to trust a war correspondent with information. To publish the information obtained from an interviewee is one thing – it is often the very purpose for which the interviewee gave the interview – but to testify against the interviewed person on the basis of that interview is quite another. The consequences for the interviewed person are much worse in the latter case, as they may be found guilty in a war crimes trial and deprived of their liberty.*¹⁰⁸

The court said two consequences might follow if correspondents are viewed as potential prosecution witnesses. First, potential sources – particularly those committing war crimes – may refuse to provide significant information and may bar entry to combat areas. Second, correspondents may ‘shift from being observers of those committing human rights violations to being their targets, thereby putting their own lives at risk’.¹⁰⁹

The Appeals Chamber found the Brdjanin’s tribunal test of pertinence on whether a war correspondent should be compelled to testify ‘is so general that it would not appear to grant war correspondents any more protection than that enjoyed by other witnesses’.¹¹⁰ That test ‘while supposedly accounting for the public interest in the work of war correspondents, would actually leave that interest unprotected’.¹¹¹ However, the court held that the five-part test urged by Randal was the equivalent of an absolute rather than qualified privilege.¹¹² Even the test suggested by the *amici* media organizations was deemed overly stringent.¹¹³

The court, in what it described as a balancing of the public interests at stake,¹¹⁴ adopted a two-part test to determine whether a war correspondent must testify.

*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 reasonably obtained elsewhere.*¹¹⁵

While it is difficult to predict how tribunals will apply the test, it arguably weighs in favor of journalists because the burden of proof rests with the party wanting the testimony. The test is not as strong as the *amici* urged because ‘direct and important value in determining a core issue’ is not as restrictive as ‘essential to determination of the case’. Still, on the face of it, the Appeals Chamber adopted a test that will prevent war correspondents from being compelled to testify routinely. The appeals tribunal set aside the subpoena of Randal.¹¹⁶ It did suggest, however, that the trial court could admit the *Washington Post* article as evidence without Randal’s testimony.¹¹⁷

The two-part test was adopted four-to-one by the Appeals Chamber. Judge Mohamed Shahabuddeen handed down an opinion concurring in the conclusion that war correspondents have a qualified privilege, but disagreeing with the test. He said there should be a presumption in favor of compulsory testimony and privilege granted only if it is demonstrated the harm to free flow of information outweighs the harm to the fair administration of justice.¹¹⁸

Second Trial Court Decision

After the Appeals Court had set aside the subpoena of Randal, the Trial Chamber found Randal’s testimony on the *Washington Post* article ‘would not be of direct and important value in determining a core issue in the case’.¹¹⁹ The reason given was that Randal did not speak Serbo-Croat and had relied on a journalist who did for the accuracy of his quotes. Thus, he could not give reliable evidence of the accuracy of what Brdjanin said.¹²⁰ Since the first leg of

the test mandated by the Appeals Chamber was not met, there was no need to consider whether the information was available from other sources.¹²¹

Then the prosecution strangely sought to compel Randal to testify about Brdjanin's 'demeanour and the context and circumstances in which the statements were made'.¹²² Unlike anything said about the content of the *Post* article, demeanor and the context and circumstances were unpublished and therefore confidential information. Apparently, the prosecution learned in its informal discussion with Randal that his colleague who spoke Serbo-Croat had compared Brdjanin with Israeli Prime Minister Ariel Sharon¹²³ and had mentioned the Nazi 'final solution'. The prosecution asserted that Randal could testify that Brdjanin expressed pleasure at being compared with Sharon and knowingly smiled when the 'final solution' was mentioned.¹²⁴ The prosecution claimed such testimony would show discriminatory intent against Muslims 'and in fact suggests further the intent to commit genocide'.¹²⁵

The court said that Randal's lack of knowledge of Serbo-Croat weighed against any value attached to any testimony about the meaning of Brdjanin's alleged pleasure at being compared with Sharon and a knowing smile about the 'final solution'. Thus, the court concluded, any testimony would be unreliable and 'could not be of direct value in determining a core issue'.¹²⁶ The court rejected the prosecution's request to force Randal to testify about unpublished information.¹²⁷

In a separate opinion, Judge Chikayo Taya concluded that the Appeals Chamber test concerned published information¹²⁸ and 'war correspondents can be compelled to become witnesses against their interviewees on unpublished matters only in the most limited of circumstances'.¹²⁹ Judge Taya said testimony on unpublished material should be compelled only when it 'is crucial to determine guilt or innocence and there is no alternative means to accommodate the public interest in the free flow of information and in having all the evidence before the Tribunal'.¹³⁰ Thus, Judge Taya would adopt for unpublished information, including in particular the identification of confidential sources, the test proposed by the media organizations in their *amici* brief to the Appeals Chamber.

Conclusions

The Appeals Chamber decision is a victory for the free flow of news from war zones, but it fails to adequately protect the safety of war correspondents, their families and their sources. The two-pronged test adopted by the court does not include the likelihood of physical harm to the journalist whose testimony is sought, his or her family and sources or the likelihood of harm in the future to persons similarly situated. Those brought before war crimes tribunals are dangerous people. They also may be influential people with followers willing to kill to either revenge their patron or shield him or her from war correspondents' evidence. Unlike most other witnesses, war correspondents will be returning to combat areas, which also may be killing fields for human rights violators. Not long after his journalistic coup in Afghanistan, Robert Young Pelton was seized by guerillas in Colombia. Sometimes evidence may be so crucial to giving justice

to the victims of human rights violations that the calculus tilts in favor of risking harm to correspondents, their families and their sources, but that peril should be weighed and only rarely risked by the tribunals.

The adoption of a qualified testimonial privilege for war correspondents, particularly one that is not restricted to confidential sources and confidential information, is binding only on the International Criminal Tribunal for the Former Yugoslavia. But it will have a significant impact as persuasive authority in other international courts and in national courts. In all likelihood, it will be recognized by the war crimes tribunals for Rwanda, East Timor and Sierra Leone and any such future courts established by the United Nations. At the same time, the decision in Randal's case is a narrow one. It applies only to war correspondents. Not many judges of international or national courts are likely to consider it persuasive for extending privilege to other journalists who want to avoid testifying about non-confidential sources or information. Even the European Court of Human Rights decision in *Goodwin* will probably not prove helpful for non-confidential information. Because the Appeals Chamber did not address the issue of confidential information, Judge Taya's separate opinion in the Trial Chamber that advocated a stiffer test for compulsory disclosure of confidential information may prove persuasive in international courts.

Notes

1. *International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Prosecutor v. Radoslav Brdjanin*, Judgement, 1 September 2004 ('Judgement'); see also Sixth Amended Indictment, at: www.un.org/icty
2. Patricia M. Wald (2001) 'The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court', *Washington University Law and Policy Journal* 5: 88.
3. 'Judgement', Summary Delivered by Trial Chamber, 1 September 2004.
4. *International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Prosecutor v. Radoslav Brdjanin*, Brief *Amici Curiae* on Behalf of Various Media Entities and in Support of Jonathan Randal, 17 August 2002 ('Media Brief'); at: www.greekhelsinki.gr
5. 'Media Brief', para. 1. The organizations were New York Times Co., Dow Jones Co., Tribune Co., Belo Corp., Time Inc., Associated Press, Cable News Network, USA Today, ABC Inc., CBS Inc., National Broadcasting Co., National Public Radio, Fox News Network, Fox Television Stations, Committee to Protect Journalists, Association for Independent Electronic Media, British Broadcasting Corp., Canadian Journalists for Free Expression, Center for Human Rights and Democratic Studies, Croatian Journalists' Association, European Publishers' Council, Express Newspapers, Fairfax, Free Media Movement for Sri Lanka, Greek Helsinki Monitor, Independent Journalists' Association of Serbia, Media Institute of South Africa, Radio B92 Belgrade, Reporters' Committee for Freedom of the Press, Reporters sans Frontières, Society of Professional Journalists, South East Europe Media Organization, World Association of Community Radio Broadcasters, World Press Freedom Committee.
6. *The Washington Post*, 10 February 1993.
7. *Id.*
8. *International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Prosecutor v. Radoslav Brdjanin*, Decision for Interlocutory Appeal of Jonathan Randal, 11 December 2002 ('Appeals Decision'), para. 3.
9. *International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Prosecutor v. Radoslav Brdjanin*, Decision on Motion of Jonathan Randal to Set Aside Confidential Subpoena to Give Evidence, 7 June 2002 ('Trial Decision I'), para. 2. The tribunal has

- a trial court, called the Trial Chamber, and an appeals court, called the Appeals Chamber.
10. Randal is author of *Osama: The Making of a Terrorist* (2004).
 11. ‘Trial Decision I’ at para. 12.
 12. *Id* at para. 11.
 13. *The New York Times*, 21 June 2002.
 14. Tribune Media Services, 18 June 2002.
 15. Committee to Protect Journalists, ‘Journalists Killed in Line of Duty 2004 and 2003’, New York: 2004; at: www.cpj.org
 16. Committee to Protect Journalists, ‘Journalists Killed in the Line of Duty: Statistics for 1993–2002’, New York: 2003.
 17. International Federation of Journalists, ‘Should Journalists Testify? The IFJ Position’, 5 June 2002; at: www.ifj.org
 18. *Id*.
 19. *London Observer*, 19 May 2002.
 20. Statement of Secretary-General Robert Menard, ‘A Constrained Journalist to Testify’, 2 October 2002; at: www.rsf.org
 21. ‘Trial Decision I’ at para. 31.
 22. ‘Appeals Decision’ at para. 56.
 23. *Id* at para. 55.
 24. *International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Prosecutor v. Radoslav Brđjanin*, Decision on Prosecution’s Second Request for a Subpoena of Jonathan Randal, 30 June 2003 (‘Trial Decision II’) at para. 39.
 25. *Id*.
 26. *United States v. John Walker Lindh*, 210 F.Supp.2d 780 (EDVa 2002).
 27. *Id* at 781.
 28. The Federal Rules of Evidence require that a federal court follow the privilege law of the state in which the court is located.
 29. *Lindh* at 781.
 30. *Id* at 783.
 31. ‘News Media Fight Subpoena of Lindh Interviewer’, Associated Press, 12 July 2002.
 32. 408 US 665 (1972).
 33. *Id* at 689–90.
 34. *Id* at 709.
 35. *Id* at 710.
 36. *Id* at 709.
 37. See collected cases and analysis thereof in *United States v. Marshall*, 194 FRD 569 (EDVa 2000). See also *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003) (courts which recognize privilege ‘may be skating on thin ice’).
 38. *United States v. Steelhammer*, 561 F.2d 539 (4th Cir. 1977) (en banc); *In re Shain*, 978 F.2d 850 (4th Cir. 1992).
 39. *Lindh* at 783.
 40. *Id* at 783–4.
 41. *Id* at 784 n. 8.
 42. ‘Captives Safe after Jungle Ordeal’, *Sunday Mail*, 26 January 2003.
 43. ‘Trial Decision I’ at para. 30.
 44. 22 EHRR 123 (1999)
 45. European Convention on Human Rights, Art. 10. The treaty was originated in 1950 by the nations of Western Europe. With the end of the Cold War, almost all the nations of Eastern Europe have adhered to the convention. The treaty created the European Court of Human Rights which sits in Strasbourg, France.
 46. *Handyside v. United Kingdom*, 1 EHRR 737 (1976), at para. 44.
 47. *Id* at para. 48.
 48. *Sunday Times v. United Kingdom*, 2 EHRR 245, 275 (1979).
 49. *Id* at 277–8.
 50. *Handyside* at 754.

51. The Human Rights Act took effect in October 2000. If a decision of the human rights court is in direct conflict with an Act of Parliament, Parliament is obligated under the convention to pass legislation bringing the UK into compliance with the court's decision.
52. *X Ltd v. Morgan-Grampian (Publishers)*, (1990) 2 All ER 1.
53. *Id* at 10 (Lord Bridge of Harwich).
54. *Goodwin* at 142.
55. *Id.*
56. *Id* at 143.
57. *Id* at 144–5.
58. Of course, it is difficult to discern why the public – Tetra's customers – don't have as much or more of an interest in the company's financial condition.
59. *Id* at 145.
60. *Id* at 145–6.
61. *Id* at 146.
62. *Id.*
63. *Id* at 147.
64. (2001) NIEHC 40.
65. *Id* at paras 2 and 3.
66. *Id* at para. 31.
67. 'Trial Decision I', paras 1–7.
68. *Id* at para. 14.
69. *Id* at para. 11.
70. *Id* at para. 12.
71. *Id* at para. 16.
72. *Id* at para. 19.
73. *Id* at para. 17.
74. *Id* at para. 31.
75. *Id.*
76. *Id.*
77. *Id* at para. 28.
78. *Id* at para. 27.
79. *Id.*
80. *Id* at para. 26.
81. *Id* at para. 32.
82. 'Appeals Decision' at para. 11.
83. *Id.*
84. *Id* at para. 15.
85. *Id* at para. 13.
86. *Media Brief* at para. 43.
87. *Id* at para. 44.
88. *Id* at para. 5.
89. *Id* at para. 18.
90. 28 CFR 50.10.
91. *Id.*
92. 'Media Brief' at para. 49.
93. *Id* at para. 28.
94. *Id* at para. 29.
95. 'Appeals Decision' at para. 23.
96. *Id.*
97. *Id* at para. 29.
98. *Id* at para. 30.
99. *Id* at para. 34.
100. *Id* at para. 35.
101. *Id* at para. 36.
102. *Id.*
103. *Id* at para. 37.

- 104. *Id* at para. 44.
- 105. *Id*.
- 106. *Id* at para. 40.
- 107. *Id* at para. 42.
- 108. *Id* at para. 43.
- 109. *Id*.
- 110. *Id* at para. 47.
- 111. *Id*.
- 112. *Id* at paras 45, 47.
- 113. *Id* at para. 47.
- 114. *Id* at para. 46.
- 115. *Id* at para. 50.
- 116. *Id* at para. 55.
- 117. *Id* at para. 52.
- 118. ‘Appeals Decision’, Separate Opinion of Judge Shahabuddeen, at paras 11 and 15.
- 119. ‘Trial Decision II’ at para. 39.
- 120. *Id*.
- 121. *Id*.
- 122. *Id* at para. 15.
- 123. This was a reference to the 1982 Israeli invasion of Lebanon during which Sharon served as defense minister and Lebanese Christian militia entered Palestinian refugee camps and murdered civilian men, women and children. Charges were made that Sharon intentionally engineered the massacres. After *Time* claimed an Israeli quasi-judicial panel found Sharon intentionally planned the massacres, the magazine was sued for libel by Sharon. The charge was found to be false by an American jury. Anti-Israeli groups have continued to spread the charges.
- 124. ‘Trial Decision II’ at para. 30.
- 125. *Id* at para. 31.
- 126. *Id* at para. 33.
- 127. *Id* at para. 39.
- 128. ‘Trial Decision II’, Separate Opinion of Judge Chikayo Taya.
- 129. *Id* at para. 6.
- 130. *Id* at para. 8.

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