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**BEARING WITNESS: SHOULD JOURNALISTS
TESTIFY AT THE INTERNATIONAL WAR
CRIMES TRIBUNAL FOR THE FORMER
YUGOSLAVIA?**

by

Sherri J. Beattie, B.A., B.J.

**A thesis submitted to the Faculty of Graduate Studies and Research in partial
fulfillment of the requirements for the degree of**

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Abstract

The International Criminal Tribunal for the former Yugoslavia has had more than a dozen journalists testify in its proceedings. This thesis explores the role of journalists in reporting from Bosnia, their influence on the public and policy makers, the idea of the journalist as global citizen, the influence of globalization and the human rights movement on conflict reporting, and the ethical questions – including the perceived need for journalists to maintain objectivity and neutrality – that confront war correspondents in deciding whether to testify. The focus of the thesis is the *Randal* decision from the ICTY in which the issue of compelling a journalist to testify through the use of a subpoena was challenged in 2002. The Tribunal's Appeals Chamber granted qualified privilege to war correspondents thus establishing a new precedent within international law. The decision also prompted new thinking about a global concept of media freedom based on a public interest privilege.

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War Correspondents, Bearing Witness, and the Law

Commitment to the story, the desire to bear witness and keep the world informed, the drive to expose a great moral outrage – these become the issues by which a subset of journalists define themselves.¹

Should journalists testify at war crimes tribunals? A direct, closed question but not one easily answered with either a “yes” or “no.” The question – seemingly straightforward – is indeed only a single thread which when pulled even slightly, unravels a complex and finely interwoven conceptual tapestry of human rights, international criminal justice, media globalization and competing visions of journalism ethics. The question brings together in an interconnected – sometimes symbiotic, sometimes fractious – relationship the public, policy-makers, jurists and journalists. The question often leads towards a polarization of ideas relating to professional duties and human values.²

The question – whether journalists should testify at war crimes tribunals – was considered by the International Criminal Tribunal for the former Yugoslavia (“ICTY”) in 2002. Tribunal prosecutors subpoenaed former *Washington Post* correspondent Jonathan Randal to testify in the case against Bosnian-Serb politician, Radoslav Brdjanin. Randal challenged the subpoena. His subsequent court battle, and the Tribunal’s decision, raised a number of legal and ethical issues about the role of journalists as witnesses. This thesis will explore those issues.

This introductory chapter serves several functions. It will begin by exploring several ideas around journalism beginning with the expectation that 21st century journalists will go beyond mere factual reporting of individual events to explain relationships between events

¹ Anthony Feinstein, *Dangerous Lives: War and the Men and Women Who Report It* (Toronto: Thomas Allen Publishers, 2003). P. 83

² Michael Valpy, "Should Reporters Play Stool Pigeon?," *The Globe And Mail* 2002.

and place them in a global context. The chapter will then examine how, in terms of this type of reportage, human rights, international criminal justice and journalism have become intertwined. How has the media heightened awareness in the public about human rights violations, rules of enforcement and a belief that those rules should be enforced? How has globalization changed the role of journalists? Have journalists become moral arbiters of right and wrong in a global context? The chapter will then move from the overview of the general and conceptual to a brief examination of some of the key arguments put forward by journalists in opposition to or support of testifying at war crimes tribunals. How do the arguments asserted in this specific, discrete issue reflect the larger principle of journalists' duties and roles within a global community? Finally, the chapter will move from the international sphere of journalistic ethics and law to the realm of domestic law. In order to understand the arguments – both legal and ethical – put forward in the international debate around journalists testifying it is necessary to examine the development of those legal principles within common law jurisdictions such as Canada, the United States and the United Kingdom. What is the domestic legal context of journalistic evidence against which the international debate takes place?

Beyond Facts: The Changing Nature of Journalism

Traditionally, journalists have relied on the “canonical five Ws and an H” to explain a particular event.³ Journalism seeks to arrive at the “truth” by posing the questions of who, what, when, where, why and how. Academic Robert Manoff describes this journalism as “materialistic (favouring physical evidence, or the evidence provided by the senses)” and as

³ Robert Manoff, Democratic Journalism And The Republican Subject: Or, The Real American Dream And What Journalism Educators Can Do About It, 2002, Available: <http://journalism.nyu.edu/pubzone/debate/forum.1.index.html>.

“positivistic (favouring the observation and collection of discrete facts.)”⁴ Journalists set out to see things with their own eyes, interview witnesses, and report the facts. Classic journalism, says Manoff, is used to discover the “truth of individual events in the here and now.”⁵ However, this notion of classical reporting does not adequately address complex issues because, Manoff argues, truth is not always found in discrete individual events but the connection or links between events.⁶ Journalists must discover relationships between facts and events to find patterns and context that help the public make sense of the world. It is not enough to report on “situational truth” but to “uncover the meanings that emerge from relationships” so that journalists, in the case of international stories such as reporting on the Bosnian conflict, will have reportage informed by an understanding of “Otherness, the role of Force in History, and Equity as well.”⁷ Journalists must take complex fact situations and bring greater context, background and understanding to them. In Bosnia, for example, contextual reporting meant war correspondents had to take individual events happening in the conflict and place them into a wider framework of emerging patterns and relationships incorporating social, political, historical and legal concepts. War correspondents have to both consider and respond to these intellectual demands on their reporting on one hand, while confronting personal risk and fulfilling the expectations of editors and news directors back home, on the other.

These are not the only demands that journalists must juggle. Issues and events are more multifaceted and require greater knowledge and understanding in order to frame and present them to the public. At the same time, journalists must also provide more news, more rapidly, to fill 24-hour news channels and constantly update on-line news coverage.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

Technology is an ever-present and dominant force in how journalism is structured and delivered to the public. However, technology is not a new phenomena that links journalism and conflict. Historically, the first Geneva Conventions⁸ came into being in the 19th century, in response to the growing technological savagery on the battlefield, and the public's ability to obtain information about battles.⁹ With advances in photography, war photojournalist Matthew Brady brought the American Civil War to the public.¹⁰ Similarly, the invention of Morse code and telegraphy "broke down the moral distance that had separated civilians from the realities of slaughter. The new technology created a new moral agent – the war correspondent – and a new moral genre – the war report – both of these, from the 1860s onward, helped to create the distinctive modern sense of dissonance between the myth of glory and its bloody reality.¹¹ War reportage attracts the public, seemingly draws it into the conflict, then repulses people and leaves a feeling of detachment. In further chapters the notion of conflict fatigue in the public as a result of reporting, and its consequences, will be discussed.

Human Rights & International Justice: How Language & Precepts Influence Journalism

It is the emphasis on providing greater context and meaning in reporting on events that has led, in part, to the growing interconnection between human rights, justice and journalism. Geoffrey Robertson argues that throughout the 1980s two things were happening in the West: the public became increasingly aware of the brutality of human rights abuses through the transmission of pictures using satellite dishes and there was

⁸ Society of Professional Journalists, Reference Guide To The Geneva Conventions, 2002, Eugene S. Pulliam National Journalism Center, Available: <http://www.spj.org/>.

⁹ Michael Ignatieff, The Warrior's Honor (New York: Viking, 1998). P. 112

¹⁰ Smithsonian Institute National Portrait Gallery, Matthew Brady's Portraits, 2002, Available: <http://www.npg.si.edu/exh/brady/index2.htm>.

¹¹ Ignatieff, The Warrior's Honor. P. 112

greater knowledge about the existence of human rights and growing acceptance that the rules regarding them should be enforced.¹² War correspondents became part of the larger global campaign for human rights and much of the embrace of human rights by the public was brought about by television. Michael Ignatieff calls television “the instrument of a new kind of politics.”¹³ He describes how non-governmental organizations such as Amnesty International, Care, and Oxfam, among others, have effectively used television to influence and mobilize public opinion on behalf of their various causes, and, in doing so, have created a politics – the politics of human rights – that uses the world rather than the nation as its stage, and the universal as its citizenship, and addresses all humans rather than specific citizenship.¹⁴ War correspondents share this global stage with other actors such as NGOs, governments, international institutions, and the public but they report on the paradox of its politics. If the public sees and hears a politician denying genocide and then sees thousands of people fleeing their homes the effect is immediate. The public is incensed – if only briefly – when it reads or sees media coverage of politics and politicians that ignore or deny human rights abuses. However, this reporting of human rights violations in conflict zones also means, “television’s morality is the morality of the war correspondent, the veteran who has heard all the recurring justifications for human cruelty advanced by the Left and the Right, and who learns in the end to pay attention only to the victims.”¹⁵ This is to say that much of what the public sees and learns about human rights violations in conflict zones comes to them through a small group of individuals, namely war correspondents.¹⁶

¹² Geoffrey Robertson, Crimes Against Humanity: The Struggle for Global Justice (New York: The New Press, 2000). P. 65

¹³ Ignatieff, The Warrior's Honor. P. 21

¹⁴ Ibid. P. 21

¹⁵ Ibid. P. 22

¹⁶ In addition to war correspondents, human rights NGOs are also part of this “small group” that inform the public about human rights violations in conflict zones.

Journalists have become moral arbiters in the world through default, that is not so much through seizing the role as having others – governments, the U.N. and diplomats – refusing to accept the responsibility. Human rights groups want journalists to take on the mantle of moral arbiter because of their ability to influence public opinion. If journalists use strong, unequivocal language in their reportage of conflict there is an increased likelihood they will seize public attention.

The public not only want greater context, background, and understanding brought to reportage but also, paradoxically, they want to know whether something is good or bad, right or wrong, virtuous or evil. For example, Michael Kirkhorn points out that Newsweek magazine described Slobodan Milošević, in 1999, as having ‘the face of evil.’¹⁷ However, journalists, says Kirkhorn, are using a word, in this case “evil” that “stretches the fabric of journalistic vocabulary” and what is worse, they cannot define it.¹⁸ Kirkhorn goes on to argue that regardless of whether a term such as “evil” is properly explained to the public, upon hearing this type of stark moralizing language there is a visceral response and demand for action. It is easy to argue that using such morally definite, unequivocal language should be avoided by war correspondents but this response brings its own set of consequences. Journalists, through the 1930s, in reporting on Hitler tended to underplay and under report his activities, sometimes being forced to by editors: “Edward R. Murrow and his CBS News team knew the truth about the evil roots of the Holocaust but New York headquarters forced them to report with such restraint in terms of emotional content or moral condemnation that the truth never came through.”¹⁹ Kirkhorn believes it is possible the pendulum has swung too far the other way where journalists too readily, too sloppily, and

¹⁷ Michael J. Kirkhorn, "The Journalist As Moral Arbiter: A Consideration of How Reporters Use The Word 'Evil'," Neiman Reports. Summer (1999). P. 17

¹⁸ Ibid. P. 18

¹⁹ Ibid. P. 18

too easily use moral terms. He cautions journalists to be able to support characterizations of evil with evidence of someone's actions.

If journalists do not use moral language and denounce what they believe is evil then they stand accused of silence in the face of egregious crimes and that silence is viewed by human rights activists as complicity and even guilt.²⁰ There is, writes legal scholar Andrew Clapham, "the sense that we could be accused of complicity through our inaction or silence" and this complicity is now "at the heart of contemporary questions of morality and ethics."²¹ The West is, says Clapham, charged with doing something about human rights violations especially those, such as journalists, with access to power and/or the 'sphere of influence.'²² War correspondents are inevitably drawn into the human rights agenda and its principles, which now serve as an overarching framework or structure for how the public understands different individuals and events. In response, war correspondents situate their reportage in terms of human rights conduct, language and values.

Communications scholar, Patrick Lee Plaisance has examined Michael Ignatieff's writing in which Ignatieff identifies and considers the journalist as moral witness.²³ Ignatieff, says Plaisance, "argues that the globalization that has helped spawn modern ethnic conflict demands that mass media assume new roles as sentinels of moral engagement."²⁴ Whereas Michael Kirkhorn calls journalists "moral arbiters," Ignatieff labels them "moral sentinels," so do journalists play the role of judge or guard in communicating questions of morality and ethics in their reporting? What is common between both concepts, be it "moral arbiter" or "moral sentinel," is that the journalist as judge or guard is in a position of authority.

²⁰ Andrew Clapham, "Issues Of Complexity, Complicity And Complementarity: From The Nuremberg Trials To The Dawn Of The New International Criminal Court," *From Nuremberg To The Hague*, ed. Philippe Sands (Cambridge: Cambridge University Press, 2003). P. 59

²¹ Ibid. P. 53

²² Ibid. P. 62

²³ Patrick Lee Plaisance, "The Journalist As Moral Witness," *Journalism* 3.2 (2002).

²⁴ Ibid. P. 205

Journalists bring this authority to their reportage in addressing the moral questions that arise from conflict. It is the moral questions arising from issues rather than the politics or horror of conflict that must propel reportage.²⁵

It is this more fundamental language to which the media, if they are to play a constructive role in preserving and promoting human values, must recommit itself. Ignatieff's image of the journalist as moral witness implies a basic shift in the preconception and practice of news – this new type of journalist would be most concerned with discovering and explaining causes and spend much less energy depicting consequences.²⁶

As Robert Manoff suggests this type of journalism, which grapples with moral questions, goes beyond situational truth to understanding the complexity, links, and emerging patterns of human relationships. Ignatieff calls for a “media system that cultivates ‘civic transformation’ by placing a priority on ‘universal human solidarity.’”²⁷ This civic transformation is one in which individuals become global citizens with their civic duties and obligations extending to all of their fellow global citizens, thus creating a universal human solidarity of shared values and responsibilities. Journalism can be a catalyst for this civic transformation.

There is also a cautionary note from Ignatieff, says Plaisance, in terms of television. Although, as has already been noted, television has the power to convey consequences through stark visual images it is also often guilty of neglecting to take on an explanatory role.²⁸ Without context, explanation, and background in reportage there will be no ethical engagement by journalists with the public, simply a visceral response of disgust to atrocity. These atrocities, be they war crimes, crimes against humanity, or genocide are part of a new global reality that requires a different media response, one in which journalists “uphold what it means to be human” and rethink “their almost religious adherence to the concepts

²⁵ Ibid. P. 207

²⁶ Ibid. P. 209

²⁷ Ibid. P. 210

²⁸ Ibid. P. 210

of autonomy and objectivity.”²⁹ Indeed, “to claim disinterest while simultaneously depending upon the transmitted images of strife invites the same charge of falling into a role of complicity” and instead journalists must engage in introspective journalism that fosters “our human connectedness.”³⁰ In order to do that, journalists must engage the public with journalism that examines complex questions of morality and ethics as they arise from troubled conflict zones and use this journalistic engagement to link global citizens together through shared values and responsibilities. There is then a demand for journalism to move away from strict classical reporting – the canonical five Ws and an H – to providing the public with more than facts but reportage that is contextual and analytical.

Globalization & Technology

Today it is the Internet but at the time of the Bosnian conflict, it was the satellite dish that transformed public understanding of what was happening in the former Yugoslavia. In the West, the public tends to think of the satellite dish in terms of the graphic images transmitted by it from conflict zones around the world. Increasingly, war criminals are also cognizant of those images and their potential influence on the Western public and its policy makers. Journalists reporting on human rights violations have more than one audience for their reportage. It is not just the public sitting at home in the West but also victims and perpetrators who have access to media reports. While journalists struggle to find context and background, reflect human rights principles, and knowledge of international humanitarian law, they also must contend with criminals. Lindsey Hilsum says there was a time when journalists could interview a possible war criminal and that individual would have no knowledge of how a report would be used or have an opportunity to see it.³¹

²⁹ Ibid. P. 213

³⁰ Ibid. P. 214

³¹ "Interview By Sherri Beattie With Lindsey Hilsum, Journalist, ITN News" December 9, 2004

Therefore, they were not aware of the “propaganda value” of what they were saying whereas now everyone – even in remote areas or in the midst of brutal conflicts – has a satellite television. If a journalist sees something or has footage that a leader/war criminal thinks they should not have seen then the reporter is in danger because no one underestimates the power of satellite television and propaganda.³² They are not worried about a journalist possibly testifying against them five years down the road but they are mightily concerned about a report being beamed out for the six o’clock news.³³ Hilsum’s colleague, Jacky Rowland shares this opinion: “Life is dangerous for journalists anyway, and in an era of 24 hour news, people are more likely to demand your tapes and equipment immediately rather than be worried that you might testify against them at some tribunal three years down the line.”³⁴

Martin Bell recounts how Radovan Karadžić – the Bosnian Serb leader – was known to call up the BBC’s *Six O’Clock News* during the program and insist on his right to refute something he had just heard.³⁵ Indicted, tried, and released war criminal Tihomir Blaskic also monitored media coverage of his activities:

In the capital itself, the broadcasts of Sarajevo television regularly included a ‘clip reel’ of the reports of foreign journalists based in the city; they were studied closely in the Presidency, which in the darkest of times was one of the few buildings with emergency power, as the best available barometer of world opinion. And the Croat commander of the HVO forces encircled in central Bosnia, Tihomir Blaskic, regularly sought copies of our accounts of his soldiers in action. Television mattered to all of these people. Communications were fragmentary; diplomacy was distant and ineffective; but the satellite dish was their conduit to the world.³⁶

Bell characterizes the Bosnian conflict as a “television war” not only because its “battles and bloodshed” were seen on nightly newscasts for three years but also because “that other

³² Ibid.

³³ Ibid.

³⁴ Matt Wells, BBC Reporter To Testify At Hague War Crimes Tribunal, August 20 2002, MediaGuardian.co.uk, Available: <http://media.guardian.co.uk/broadcast/story>.

³⁵ Martin Bell, In Harm's Way: Reflections of a War-Zone Thug (London: Penguin Books, 1996). P. 140

³⁶ Ibid. P. 140

campaign, for world opinion and the favour of governments, was waged on television too.”³⁷

It is the immediacy of satellite television that poses problems for journalists and threatens accuracy and substance in reportage. It is a serious challenge for journalists to be able to bring context or background to their reporting when it is happening in real time. Although immediacy, or real time reporting, can have such a profound affect on viewers it puts journalists at risk of both getting the story wrong and getting killed says Jacky Rowland: “We haven’t got to the stage of being able to broadcast war crimes live, but it will happen soon. And because of this, this is why a future war criminal, a future military leader might want to liquidate a journalist because of their footage, their ability to transmit pictures.”³⁸ It is the immediacy of television – viewing events in real time – that is a cause for concern for journalists because editors demand stories immediately and frequently in order to feed 24-hour news channels and constantly update Internet versions of newspapers. The time constraints on reporters increase the likelihood of making mistakes, getting the story wrong, and being unable to adequately interview subjects or attend events. Prior to Jacky Rowland testifying in the Milošević trial she had never seen the man in person although she worked in Belgrade for several years: “As is so often the case in these days of 24 hour television and radio news, with their insatiable appetite for regular updates, I always seemed to be glued to an ISDN line in the BBC Belgrade bureau or hooked up to a live television point at the offices of Serbian television on the rare occasions when

³⁷ Ibid. P. 140

³⁸ NPR "Interview: Jacky Rowland Discusses Her Testimony In The War Crimes Trial of Slobodan Milosevic" All Things Considered (U.S.: National Public Radio, 2002)

Milošević made a public appearance.”³⁹ Martin Bell concurs that 24-hour news is about quantity and not quality reporting:

There are many arguments for a rolling and continuous news service, but quality of reporting is not one of them. More means worse. The multiplication of deadlines takes us away from the real world, and drives us back into our offices and edit rooms... There were days in Sarajevo when my radio colleague, who was already working for a rolling news service, had to broadcast as many as twenty-eight separate reports. Not only did he never leave the Holiday Inn, he hardly had time to pick up the phone and talk to the UN spokesman.⁴⁰

The satellite dish and CNN are part of the globalization of the media. Not only do they bring human rights violations and international humanitarian law into people's homes, they have transformed journalism. Globalization or the “intensification of global interconnectedness” is a phenomenon, which can in part be understood or explained by “the revolution in information technologies and dramatic improvement in communication.”⁴¹ Globalization brings bands of foreign reporters – not just those working in television – into conflict zones along with the global presence of volunteers, non-governmental organization workers, peacekeepers, mercenary troops, and military advisors among others.⁴² Journalists find themselves not only reporting on human rights violations but also surrounded by the personnel structure that supports the movement. It is another aspect of the “intensifying interconnectedness” of globalization and its effect on journalism and journalists.

On one hand, journalists have greater responsibilities and expectations placed on them about how they will report, and on the other hand, they have influences such as the language and structure of the human rights movement, international law, changes in

³⁹ Jacky Rowland, “Grilled By The Butcher: In Three Years Reporting From Belgrade, BBC Correspondent Jacky Rowland Never Once Saw Slobodan Milosevic In The Flesh. Yesterday She Met The Former Dictator For The First Time - As She Testified Against Him In His Trial For War Crimes,” *The Guardian* 2002.

⁴⁰ Bell, *In Harm's Way: Reflections of a War-Zone Thug*. P. 28

⁴¹ Mary Kaldor, “Introduction,” *Old Wars: Organized Violence In A Global Era* (Stanford, CA: Stanford Union Press, 1999). P 3

⁴² Ibid. P. 4

technology and globalization all helping to shape reportage. However, beyond these influences and pressures there is something far weightier: journalists must bear the consequences of their reporting in conflict zones. Ed Vulliamy reflects on how his discovery, with several other reporters, of concentration camps in northern Bosnia had terrible consequences for the men journalists interviewed. Vulliamy wrote about his encounter with Fikret Alic in the Trnopolje concentration camp in August 1992 and then a subsequent conversation he had with Alic several years later after Alic had been released:

With his rib cage behind the barbed wire of Trnopolje, Fikret Alic had become the symbolic figure of the war, on every magazine cover and television screen in the world...

'It was the happiest day of my life when you came. We thought that after you had gone, they would stop beating us. However, the next day a man called Hasan Karabasic was beaten and died. And then some of the people who had spoken to the journalists were killed. From Trnopolje, people were allowed to go to the village to get water, and they let this one group out and killed nine people. Most of them were the ones who had talked to the journalists.' The discovery that our visit cost the lives of nine men was a cruel reminder of how none of us could really be bystanders in this war.⁴³

Reporting on the war in Bosnia was not only physically dangerous, intellectually complex, and buffeted by large external forces, movements, and changing technology, it also clearly illustrated the immense responsibility of conducting good reportage. Journalists were discovering – in some respects for the first time – the power and responsibility that comes with images being transmitted to global audiences. Michael Ignatieff argues that television has become “the principal mediation between the suffering of strangers and the consciences of those in the world’s few remaining zones of safety. No matter how assiduously its managers assert that the medium’s function is merely informative, they cannot escape the moral consequences of their power.”⁴⁴ The frequency of reports, how stories are framed

⁴³ Ed Vulliamy, *Seasons in Hell: Understanding Bosnia's War* (London: Simon & Schuster, 1994). PP 202-203

⁴⁴ Ignatieff, *The Warrior's Honor*. P. 33

and presented from conflict zones, conversely prick the conscience of the public in the West or leave it uninterested and unresponsive because of the lack of reportage or its inability to communicate moral issues. Inadequate or insufficient reportage from conflict zones can prolong human suffering and increased loss of life. Ignatieff declares what Vulliamy already knows through his experience in Bosnia; if there is not great consideration, responsibility and thought about how reportage is conducted through what Ignatieff's calls "the regimes of representation" then "the cost is measured not only in shame, but in human lives."⁴⁵

This responsibility is another "burden" imposed on journalists through globalization, which demands of them, argues Vartan Gregorian, the ability to make sense of "interlocking or interdependent histories, economies, laws, cultures, and conflicts."⁴⁶ Journalists have more information, not less, but it is, says Gregorian, increasingly hard to bring intelligence, discernment, and judgement to that information because of the volume, speed, technology, and interests attached to it. The public wants "journalists to cover the news and provide sophisticated analysis, synthesis and context" but, says Gregorian, "it is clear that the complexities of modern society, global development and the Information Revolution place unprecedented demands on the profession of journalism."⁴⁷

Journalists' Testimony: An Overview of the Arguments

I want to move from the level of the more abstract and theoretical in examining journalism, justice, the human rights movement, international law, and globalization to placing these concepts into the framework of the question being posed: Should journalists testify at international war crimes tribunals? Instead of thinking about theoretical concepts,

⁴⁵ Ibid. P. 33

⁴⁶ Vartan Gregorian, Journalism. The Quintessential Knowledge Profession Has An Information Problem, September 16 2002, NYU, Available: <http://journalism.nyu.edu/pubzone/debate/forum.1.index.html>.

⁴⁷ Ibid.

ideas, or principles, these notions were distilled down into a very personal, individual question for many reporters when they were approached about testifying at the ICTY. The responses, reaction and arguments espoused by various journalists to this request form the backbone of this thesis, and fill many more pages, but I will introduce some of the various lines of reasoning either in opposition to or in support of testifying in this introductory chapter. The purpose is to see the linkage between individual responses to testifying and larger notions about duty, obligation, and the role of journalists arising from law, human rights and globalization. Many journalists framed their decision to testify in terms of a civic duty and moral obligation they felt as global citizens connected to the suffering of human beings in Bosnia and elsewhere. These are notions, as has been discussed, which come out of human rights and international law. BBC correspondent Jacky Rowland explained her decision to testify as arising from a deep personal conviction that it was “her duty to give evidence”⁴⁸ and she did not believe “journalists are exempt from moral obligations or international justice”⁴⁹ or in some “special category.”⁵⁰ Martin Bell said, “I think your duties as a citizen come before your duties as a journalist. If you are the witness to a crime, or to the effects and aftermath of a crime, then what are you supposed to do? Nothing?”⁵¹ Ed Vulliamy insisted, “we must do our professional duty to our papers and public and our moral and legal duty to this new enterprise. Why should journalists of all people – whose information will be of such value – perch loftily above the due process of law?”⁵²

⁴⁸ Dan Milmo, Milosevic Challenges BBC Journalist, August 28 2002, MediaGuardian.co.uk, Available: <http://media.guardian.co.uk/broadcast/story>.

⁴⁹ Julia Day, “BBC Journalists ‘Compromised’ By Appearing As Witnesses,” The Guardian September 17 2002.

⁵⁰ Stephen Castle, “Milosevic Trial Sees BBC Footage Of Prison Corpses,” The Independent August 28 2002.

⁵¹ Wells, BBC Reporter To Testify At Hague War Crimes Tribunal.

⁵² Ed Vulliamy, “An Obligation To The Truth: Journalists Should Be Prepared to Risk Their Safety and Testify at the International Criminal Court,” The Observer May 19, 2002.

Others proposed that in the face of genocide and crimes against humanity, and with the rise of human rights and international law, it was time for journalists to reconsider some of the notions – neutrality and objectivity – to which they clung both in their reportage and as a justification not to testify:

Was it conceivable for American or British journalists during the Second World War to talk in terms of neutrality, objectivity, and “balanced” coverage when it came to “taking sides” between Nazi Germany and their own governments... some in the press, were almost perverse in their insistence on neutrality between genocidal killers and their victims.⁵³

On the other side of the argument, those who oppose journalist testimony relied on principles and ideas arising from the language of human rights and democratic principles. Lawyer Geoffrey Robertson, in defense of his client Jonathan Randal, said, “Coerced testimony of reporters, impairs the news-gathering function which is so important to democracy.”⁵⁴ Others characterized the journalistic relationship with individuals who provide information as one based on trust and “that trust would be threatened if a reporter can be subpoenaed by an international court.”⁵⁵ Later I discuss how this language and reasoning reflects that of the International Committee of the Red Cross and its humanitarian mission throughout the world. Still, others argued in terms of legal rhetoric associated with sources and trials: “The Post argued that news gathering would be made more difficult and dangerous if sources feared that anything they said or did in front of a reporter might be used against them later in a war crimes trial.”⁵⁶ The 34 news organizations that banded together in an *Amici Curiae* brief to support journalist Jonathan Randal in his bid to have the ICTY set aside a subpoena they had issued against him, offered arguments

⁵³ Kemal Kurspahic, *As Long As Sarajevo Exists* (Stony Creek, Connecticut: The Pamphleteer's Press, 1997). P. 236

⁵⁴ Arthur Max, “Post Appeals Subpoena At Hague Court,” *The Washington Post* May 11 2002.

⁵⁵ France-Presse Agence, “Journalist In War Crimes Court For Right to Silence,” October 3 2002.

⁵⁶ Associated Press, “U.N. Prosecutors Insist Reporter Testify; Brief in Milosevic Case Challenges Media Groups, Argues Against Firm Rules,” *The Washington Post* August 30 2002.

that reflected the adversarial language of the courtroom and the tension that often arises between law and journalism: "Forcing journalists to testify against their sources (confidential or otherwise) will make future sources more hesitant to talk to the press, particularly in war zones."⁵⁷

Editorial writer, Mark Fitzgerald shifted the responsibility away from journalists to place an onus on international institutions such as the United Nations and its ad hoc tribunals to protect journalists from war criminals. In his reasoning, journalists move from being part of the observer class to joining a pool of potential victims in conflicts. It is the human rights of journalists that must be protected, portraying them as victims first from war criminals and then international criminal justice:

Well, shame on them. But even if a few Continental journalists irresponsibly blur the line between reporter and cop, the U.N. court must honour the distinction. Local journalists and foreign correspondents in conflict zones already face numerous dangers. If the world's many misbehaving tyrants start seeing reporters as potential witnesses in future war-crimes tribunals, they will doubtless begin to treat journalists with the same cruelty they now reserve for their enemies and subjects. This issue becomes all the more urgent with the United Nations about to open for business its brand-new International Criminal Court.⁵⁸

Arguments in opposition to testifying were also framed in terms of legal and philosophical principles around freedom of speech and the role of journalists in society, including the global community. Geoffrey Robertson urged the court to protect the 'watchdog role of the journalist' and "make the first ruling on freedom of speech."⁵⁹ Robertson linked those ideas – journalist as guardian of democracy and freedom of speech – with journalist as initiator of international justice saying, "Without the work of war correspondents and camera persons bringing home the reality of war atrocities this court and the new permanent international

⁵⁷ Associated Press, "More News Organizations Join Appeal to Court," The Washington Post August 27 2002.

⁵⁸ Mark Fitzgerald, "Reporters In The Dock: Compelling A Former Reporter's Testimony At The U.N. War-Crimes Tribunal Endangers All Journalists In The World's Danger Zones," Editor and Publisher Magazine May 20 2002.

⁵⁹ Marlise Simons, "Paper Fights Subpoena of Journalist By U.N. Court," The New York Times May 11 2002.

criminal court may not have come into being.”⁶⁰ When Jonathan Randal eventually won his legal battle in the Appeals Chamber, Robertson categorized the win in terms of being an important victory for press freedom – again championing freedom of speech as a legal principle and human right – and noting the decision’s weight as precedent for defining “relations between war correspondents and the new International Criminal Court.”⁶¹

When Randal, fought the ICTY subpoena issued against him, the challenge was never about the individual, that is, Randal, but about larger principles and ideas governing justice, society and journalists. Indeed, Fiona Campbell, one of Randal’s English solicitors who helped prepare the case said, “Our client’s concern is for the journalistic community at large.”⁶² Nonetheless, despite the use of – or appeal to – human rights, legal, or moralistic language or precepts, most journalists said the decision to testify was at its core an intrinsically individual one and a separate issue, argued Roy Gutman from being legally compelled: “If a journalist decides to testify on his own, that’s a personal choice, but the court should not compel testimony.”⁶³

The Role of Domestic Law in Establishing Precedent and Principle

The next part of this chapter will introduce and map some of the legal issues and ideas examined throughout the thesis. In particular, I provide a background sketch of the law in three key domestic states – the U.S., Canada and the UK – pertaining to subpoenaing journalistic evidence. The purpose of this discussion to provide a framework within which issues relating to the global dimensions of media freedom, freedom of expression and human rights and notions of legal protection for journalists can be assessed. While the key

⁶⁰ Marlise Simons, "Hague Tribunal Hears Arguments On Exempting Reporters," *The New York Times* 2002.

⁶¹ Marlise Simons, "U.N. Court Grants Special Legal Protection to War Reporters," *Ibid.* December 12.

⁶² Jessica Hodgson, *Journalist Challenges Hague Subpoena*, May 10 2002, Guardian Unlimited, Available: <http://media.guardian.co.uk/presspublishing/story/0,7495,712907,00.html>.

⁶³ Ariel Meyerstein, *The Role Of War Correspondents In International Criminal Justice: ICTY Orders Journalist To Testify*, June 19 2002, Available: <http://www.crimesofwar.org/>.

focus of this thesis is on international law, particularly international criminal, humanitarian and human rights law and journalistic evidence, this broad area necessarily raises a secondary theme: how a society perceives the role and importance of journalism in promoting and serving democratic values. Having said this, however, it is important to keep in mind Louise Arbour's advice on any comparative study:

Some insight may be gained from examining national rules and practices but the international forum, and its very subject matter, is not quite like any national forum, and its very subject matter, is not quite like any national forum and any national forum is not necessarily quite like any other...⁶⁴

Canadian Law

In Canada, there is no formal or categorical privilege – either qualified or absolute – for journalists.⁶⁵ Privilege protects communications in a confidential relationship between two individuals, e.g. a lawyer and client, by providing them with immunity from public legal exposure.⁶⁶ Privilege, although protecting the communications between individuals, is granted to classes of people, e.g., lawyers and their clients. Canadian courts have granted privilege to the communications between journalists and sources but only on a case-by-case basis. However, journalists do find protection from infringement by government or others on their right to report – not specifically as a category of individuals but as members of a democratic institution, i.e. the press – under the Canadian Charter of Rights and Freedoms (“The Charter”). The Charter provides “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”⁶⁷ Generally, the

⁶⁴ Louise Arbour, "Exposing Truth While Keeping Secrets: Publicity, Privacy and Privilege," *The Irish Jurist* 35 (2000). P. 19

⁶⁵ Ibid. P. 27

⁶⁶ "Merriam-Webster's Dictionary of Law," (1996.

⁶⁷ "The Constitution Act, 1982," (1982.)

freedoms noted under this section are weighed and balanced against those under Section 11, which protect an accused involved in criminal or penal proceedings.⁶⁸

In 1991, the Supreme Court of Canada in *Canadian Broadcasting Corp. v. Lessard*⁶⁹ and *Canadian Broadcasting Corp. v. New Brunswick*⁷⁰ issued two decisions, on the same day, pertaining to freedom of the press, its evidentiary role, (in these two cases, the issuance of search warrants for premises of the press) and its role in society as interpreted through the Charter. In *Lessard* a CBC camera crew taped a group of people who were both occupying and damaging a post office building in Pointe-Claire, Quebec. Portions of the video were then broadcast on the 6 and 10 o'clock news that day. The police sought a warrant from a justice of the peace to "enter, search and seize the videotapes at the CBC's head office in Montreal."⁷¹ In *New Brunswick*, the RCMP sought a search warrant to seize tapes after the CBC filmed the burning of a guardhouse during demonstrations against the Fraser Company, a pulp and paper plant in New Brunswick. In both instances, a warrant was issued.

One of the factors, wrote Justice Cory, in determining whether a warrant should be issued to search the premises of the press is whether "there are alternative sources, and if reasonable and alternative sources exist, whether those sources have been investigated and all reasonable efforts to obtain the information have been exhausted."⁷² Justice Cory also noted that when deciding whether to issue a search warrant it must be ensured that "a delicate balance is struck between the competing interests of the state in the investigation and prosecution of crimes and the right to privacy of the media in the course of their news

⁶⁸ Ibid.

⁶⁹ *Canadian Broadcasting Corp. v. Lessard* [1991] 3 S.C.R. 421 1991.

⁷⁰ *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)* [1991] 3 S.C.R. 459 1991.

⁷¹ *Canadian Broadcasting Corp. v. Lessard* [1991] 3 S.C.R. 421. Para 37

⁷² Ibid. Para 47

gathering and news dissemination.”⁷³ However, despite these provisions the Court ultimately said that the crucial factor in *Lessard* was the material in question. The videotapes had already been broadcast and therefore the media had not been hampered in its ability to gather or disseminate the news. The seizure of the tapes after they had been broadcast, said Justice Cory., could not have a “chilling effect on the media’s sources of news.”⁷⁴

In *New Brunswick*, Justice Cory said that the media after having published or broadcast information should then act like any good citizen if it has evidence of a crime:

It seems to me, however, that where the media have fulfilled their role by gathering the news and publishing it, there would seem to be less to be said for refusing to make that material available to the police. At that point, the media have given to the public, by way of picture or print, evidence of the commission of a crime. The media, like any good citizen, should not be unduly opposed to disclosing to the police the evidence they have gathered with regard to that crime.⁷⁵

It is the dissenting opinion of Justice Beverley McLachlin (now Chief Justice) in *New Brunswick* and *Lessard* that merits attention. Unlike Justice Cory, who focuses on whether compelling evidence from journalists impinges on their access to sources, Justice McLachlin’s reasoning reflects broader consideration of media freedom as a critical right in democracies, and the notion that privilege is owed not to individual journalists and their sources but to the public as a whole in order to protect its right to receive information.

In *New Brunswick* and *Lessard*, Justice McLachlin called for a broader and stronger interpretation of freedom of the press under the Charter. She concluded that the press is not like “other citizens or legal entities when its activities come into conflict with the state”⁷⁶ and that the courts, long before the Charter, recognized its unique place within democracies. Justice McLachlin opined on the purpose of the guarantee of press freedom in the Charter:

⁷³ Ibid. Para 47

⁷⁴ Ibid. Para 53

⁷⁵ Canadian Broadcasting Corp. v. New Brunswick (Attorney General) [1991] 3 S.C.R. 459.

⁷⁶ Canadian Broadcasting Corp. v. Lessard [1991] 3 S.C.R. 421. Para 62

The values underlying freedom of the press, like freedom of expression, include the pursuit of truth. The press furthers that pursuit by reporting on facts and opinions and offering its comment on events and ideas – activities vital to the functioning of our democracy, which is premised on the free reporting and interchange of ideas. The press acts as the agent of the public in monitoring and reporting on governmental, legal and social institutions...an effective and free press is dependent on its ability to gather, analyze and disseminate information, independent from any state imposed restrictions on content, form or perspective except those justified under s. 1 of the Charter.⁷⁷

In 2004, Madame Justice Benotto of the Ontario Superior Court in *R. v. National Post*⁷⁸ reiterated many of the ideas on media freedom espoused by Chief Justice McLachlin. Justice Benotto concluded that warrants issued to the RCMP to compel production of documents by a journalist violated the right to freedom of expression under the Charter and that the relationship between a reporter and source was protected by the common law of privilege. Justice Benotto echoed many of the opinions in *National Post* espoused by Justice McLachlin's dissent in *Lessard* regarding the importance of the press to the public, framing s.2(b) as a fundamental freedom not only to journalists but also, perhaps even more significantly, to the public:

Section 2(b) also encompasses the receipt of information by members of the public. Listeners and readers have a right to information pertaining to public institutions. It is only through the press that most individuals can learn of what is transpiring in government and come to their own assessment of the institution and its actions. By protecting the freedom of expression of the press, s. 2(b) thereby guarantees the further freedom of members of the public to develop, put forward and act upon informed opinions about government and other matters of public interest.⁷⁹

What is notable in Justice Benotto's observation about the Charter guarantee is the movement, if even ever so small and slight, towards viewing media freedom as a right by journalists to provide information and the right of the public to receive it, a concept now being protected by a public interest privilege in international law.

U.S. Law

⁷⁷ Ibid. Para 65

⁷⁸ *R. v. National Post* [2004] O.J. No. 178 Ontario Superior Court of Justice 2004.

⁷⁹ Ibid. Para 44

Branzburg v. Hayes, although more than 30 years old, remains the leading decision in U.S. law on constitutional privilege for American journalists.⁸⁰ In *Branzburg*, the U.S. Supreme Court considered three cases all dealing with a reporter's constitutional privilege from testifying in grand jury proceedings. Although the case focuses primarily on granting privilege to protect confidential sources it espouses, especially in the dissenting opinion of Justices Stewart, Brennan, and Marshall, principles underlying media freedom that are reiterated by Justice McLachlin in Canada, and, as I discuss later, in the *Randal* decision at the ICTY.

The basis of the argument of the Appellants in the three cases was that a "reporter should not be forced either to appear or to testify before a grand jury or at trial until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure."⁸¹

Justice White was not persuaded by these arguments. Instead, he wrote that journalists over stated their constitutional rights. The First Amendment did not give them a constitutional right to have access to any place or anyone in search of information and neither did it exempt them from appearing before a grand jury and answering questions about a criminal investigation.⁸²

He also addressed the fact that journalists were accorded statutory privilege of varying degrees by States – then a minority number, only 17 whereas today the number is

⁸⁰ *The Reporter's Privilege*, 2002, The Reporter's Committee For Freedom Of The Press, Available: <http://www.rcfp.org/privilege/index.html>.

⁸¹ *Branzburg v. Hayes*. 408 U.S. 665 Supreme Court of the United States 1972. P. 680

⁸² *Ibid.* PP 684-685

31 plus the District of Columbia⁸³ – but Justice White stressed that no privilege had been (or still is) provided under federal statute and the only privilege he saw in the Constitution was the Fifth Amendment, a privilege against being compelled to incriminate one's self.⁸⁴ Justice White looked at the state of American journalism in 1972 and saw that it was flourishing regardless of the absence of privilege

We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson history teaches us. As noted previously, the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958. From the beginning of our country the press has operated without constitutional protection for press informants, and the press had flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press.⁸⁵

Mr. Justice Powell in his concurring decision stressed that journalists cannot be harassed by the Court, compelled to give testimony that is largely irrelevant to the proceedings, or disclose a source without legitimate need by investigators. He urged journalists to bring motions to quash their subpoenas if they could not be substantiated by the Court.⁸⁶

Mr. Justice Douglas in his dissenting opinion said journalists have absolute privilege from testifying before a grand jury, unless they are implicated in a crime, under the First Amendment.⁸⁷ As to why Justice Douglas believed in the absolutism of the First Amendment he wrote, "effective self-government cannot succeed unless the people are immersed in a steady, robust, unimpeded, and uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal, and re-examination."⁸⁸ His interpretation of media freedom places it as a fundamental freedom, a basic human right

⁸³ The Reporter's Privilege.

⁸⁴ *Branzburg v. Hayes*. 408 U.S. 665. PP 689-690

⁸⁵ *Ibid.* PP 689-690

⁸⁶ *Ibid.* P 710

⁸⁷ *Ibid.* P 712

⁸⁸ *Ibid.* P 715

within a democracy. His interpretation and language finds resonance thirty years later in the cases of the European Court of Human Rights and at the ICTY.

Justices Stewart, Brennan and Marshall also dissented. Justice Stewart, writing on behalf of the three, said the decision “invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government.”⁸⁹ The dangerous notion of journalists becoming thought of as investigators and losing their status as independent, impartial, observers constitutes a key argument against testifying at the ICTY. Justice Stewart embraced the notion of a public interest privilege (although he did not call it that) saying, “We have often described the process of informing the public as the core purpose of the constitutional guarantee of free speech and a free press.”⁹⁰ Justice Stewart, like his colleagues in the Tribunal Appeals Chamber, stressed the necessity of “creating conditions in which information possessed by news sources can reach public attention”⁹¹ That means the press must not be unduly hindered in its ability to gather news so that it can be disseminated to the public. Justice Stewart did not advocate for absolute privilege but a qualified one in which the State would “convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest.”⁹² Justice Stewart called this qualified privilege, “breathing space” and reminded people that often there are no police investigations without the press first exposing crimes and wrongdoing and that subpoenas can have a chilling effect.⁹³

The sad paradox of the Court’s position is that when a grand jury may exercise an unbridled subpoena power, and sources involved in sensitive matters become fearful of disclosing information, the newsman will not only cease to be a useful grand jury

⁸⁹ Ibid. P 725

⁹⁰ Ibid. P 726

⁹¹ Ibid. P 726

⁹² Ibid. P 739

⁹³ Ibid. P 739

witness; he will cease to investigate and publish information about issues of public import.⁹⁴

The United Kingdom

In England, courts are bound by section 2 of the Human Rights Act, which obliges them to treat decisions from the European Court of Human Rights as precedent.⁹⁵

A more thorough examination of the Court and some of its decisions will be undertaken later in the thesis. The Court in *Goodwin* (a British case discussed in chapter 6) upholds Article 10 – the provision for freedom of expression – of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Contempt of Court Act, 1981, provides qualified privilege to journalists:

No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.⁹⁶

There are four criteria, which may be used to deny a journalist privilege: 1) in the interests of justice; and 2) in the interests of national security; and 3) the prevention of disorder; and 4) the prevention of crime.

What does “in the interests of justice” mean? Geoffrey Robertson calls it the “widest” and “most dangerous” of all the exceptions listed in section 10. The Court will ask whether compelling a journalist to disclose a source is of such importance in a particular case that the ban on disclosure should be overridden.⁹⁷ The Court will consider a number of factors including the nature of the information obtained from the source and the

⁹⁴ Ibid. P. 746

⁹⁵ "Human Rights Act: 1998 Chapter 42," (1998.)

⁹⁶ "Contempt of Court Act," (1981.

⁹⁷ Geoffrey Robertson and Andrew Nicol, Robertson & Nicol On Media Law, Fourth ed. (London: Sweet & Maxwell, 2002). P. 262

“legitimate public interest in the information.”⁹⁸ There is a greater interest in protecting sources with information deemed of significant public interest. Another factor is the manner or method in which the source obtained the information: “...if the information was obtained illegally, this will diminish the importance of protecting the source unless, of course, this factor is counterbalanced by a clear public interest in publication of the information, as in the classic case where the source has acted for the purpose of exposing iniquity.”⁹⁹ However, the House of Lords has shown a tendency – at least until *Goodwin* – to allow property rights to prevail over journalist’s ethical claims. In *Goodwin*, the European Court slammed the English Courts and their method of balancing journalist privilege against the other interests in section 10 of the Contempt Act. When the *Goodwin* decision was released in 1996, the British government made no attempt to change the Contempt Act, however with the inception of section 2 of the Human Rights Act in October 2000, the decision has gone from a mixed reception from the Courts to gaining acceptance.¹⁰⁰

Conclusion

What is significant about the state of the law in Canada, the U.S. and Europe is that there is the beginning of a shared understanding of media freedom and its importance as a fundamental human right within democracies. Increasingly jurists are broadening the definition of media freedom from individual journalists and their sources being protected from infringement by government and others on their right to report to a public interest privilege, wherein it is the public’s right to receive information from the media that must be protected. The emerging notion of the importance of a public interest privilege is seen in

⁹⁸ Ibid. P 262

⁹⁹ Ibid. P 262

¹⁰⁰ Ibid. P. 264

the dissenting opinion in *Lessard* and *New Brunswick* of Chief Justice McLachlin in Canada, in the dissenting opinions of Justices Stewart and Douglas in *Branzburg* in the United States, and in the adoption of the European Convention for the Protection of Human Rights and Fundamental Freedoms by Britain. In Canada and the U.S., the concept of a public interest privilege to protect media freedom is not yet established in law.

This shift from the law protecting the individual to the collective public is significant as it both broadens and strengthens media freedom as a critical human right and becomes the underlying principle for establishing qualified privilege in *Randal*. It is conceivable that the notion of a public interest privilege – now established in international law and in the law governing the European Union – will influence court decisions on media freedom in Canada and the U.S.

Human rights principles are influencing the media in numerous ways. Not only is media freedom as a critical human right being broadened in scope and adopted in legal decisions but human rights principles are also influencing how journalists report from conflict zones.

There is an increasing demand for reportage that gives the public greater context and analysis – beyond the five W's – so that human rights violations can be properly presented, documented, and understood in reportage. This demand is placed upon journalists at the same time that they must cope with the pressures of reporting for 24-hour news services and the Internet. Nonetheless, I would argue that the public interest privilege in law charges journalists with the task of providing substantive reportage to the public about human rights violations. In return for greater media protection, journalists have an obligation to provide the public with informed, thoughtful, and accurate reporting from conflict zones.

How then are human rights principles and an evolving, global, interpretation of media freedom changing the role of the war correspondent?

The Bosnian Conflict: The Role of the War Correspondent

...freedom of expression should be regarded, like the right to a remedy, as a pivotal right in international law. That is because, quite simply, international attention and action against human rights abuses cannot be aroused without it. Richard Dimbleby's broadcast from Belsen, the sound of gunfire in Tiananmen Square, the television pictures of Omarska prison camp and the agonies of the Kosovo Albanians – reports of atrocities incite people throughout the world to put pressure on governments to do something about them.¹⁰¹

Introduction

Journalists reporting on the war in Bosnia were confronted with a conflict unlike any they had witnessed before. This was a war on European soil without any major super power or one of their armies' involved. The Bosnian conflict was internal, ethnic, neighbour fighting neighbour sometimes as part of an organized army, just as often as members of paramilitary groups, police or simply civilians. Regardless of what "group" people aligned themselves with the violence was directed almost solely at civilians. Men, women and children all fell victim, not to military battles, but torture, rape, starvation, deportation, murder and other crimes. Following the war, psychiatrist Anthony Feinstein interviewed journalists about their experiences to discover many were still haunted by the barbarity of what they had seen and reported¹⁰²:

She began to tell the story of a colleague who, in travelling from one ravaged Bosnian hamlet to another, had come to a clearing in the woods where a local militia had set up camp. Initially there seemed little amiss. It was a typical camp scene: smoke rising from fires, men lazing about, strips of what appeared to be meat being smoked above a flame. And then, to his stupefaction, the journalist realized that the meat was human flesh. Strips of flesh, cut from the bones of men and women, done not as a descent into cannibalism, for there was food enough, but rather as one further despoliation of the dead, mocking, dehumanizing those who had so recently been neighbors.¹⁰³

¹⁰¹ Robertson, *Crimes Against Humanity: The Struggle for Global Justice*. P 105

¹⁰² Feinstein, *Dangerous Lives: War and the Men and Women Who Report It*. P. 197

¹⁰³ Ibid. P. 197

I will argue that despite encountering many obstacles journalists reporting from Bosnia were the first to expose human rights violations in the conflict and alert the global community, in turn mobilizing Western public opinion to demand intervention and action. Furthermore, it was this bearing of witness, through reportage, that spurred the establishment of the ICTY and led to journalists' evidentiary role within it. Journalists covering the Bosnian conflict had to overcome Western government denial and indifference combined with periods of public doubt and fatigue to push for international action to stop the atrocities. They did so as a response to what they witnessed and reported. Genocide, war crimes, and crimes against humanity in Bosnia were aimed at civilians and reporters who witnessed these atrocities or their aftermath were left with indelible memories. Ed Vulliamy testified to this fact in *Blaskic*:

JUDGE RIAD: Excuse me. I want to be a
10 little bit clear. When you spoke of the war between
11 the 28th of October and the siege of east Mostar, is it
12 war with civilians or war-war. The word 'war' has got
13 a meaning. Please use the right words.

ED VULLIAMY: A. Yes, and it is one that we grappled with
15 throughout. I mean, a war one used to think of between
16 armies, rival armies who fight by sort of mutual
17 agreement. Very little of what happened in Bosnia
18 between the Muslims and the Croats or the Serbs and the
19 Muslims and Croats can be really described as war like
20 that. The vast majority of the violence was by
21 soldiers against civilians, and the vast majority of
22 those killed and wounded were civilians, with the
23 exception of some disastrous offensives in various
25 directions.¹⁰⁴

Journalists' witness to horrific events was firsthand and it left a deep impression on them. Their first bearing of witness – in the conflict zone as opposed to in the courtroom – was stark, disturbing and personal. It made them, against formidable and often frustrating

¹⁰⁴ Prosecutor v. Tihomir Blaskic, Transcript of Proceedings, May 11, 1998. IT-95-14 ICTY 1997., See also Institute For War And Peace Reporting, *Blaskic Trial: Reporter Under Crossfire* (1998).

circumstances, crusaders for change. Journalists persisted in reporting from Bosnia even when the public, policy-makers, and sometimes their own editors seemed uninterested.

Historical Background: Pre-World War I

In order to understand the role and importance of war reporting in Bosnia, it is necessary to put the conflict into historical and political context. By 1392, the Islamic Ottoman Empire had taken over all Serbian Orthodox land, apart from the Bosnian ruled “Hum” or Hercegovina.¹⁰⁵ Throughout the early 15th century, Bosnian lands were conquered and then reconquered by Hungarian and Turkish forces.¹⁰⁶ In 1463, a large Turkish army under Mehmet II defeated Bosnian King Stephen Tomašević.¹⁰⁷ Nonetheless, conflict in Bosnia between the Ottoman and Hapsburg empires continued between 1593 and 1606.¹⁰⁸ Still, by the middle of the 16th century half the population of the country was Muslim.¹⁰⁹ The Serb and Croat peasants in Bosnia found themselves dominated by Muslim middle and upper classes but they continued to retain some autonomy.

Although Bosnia was ruled by Muslims, one could hardly call it an Islamic state. It was not state policy to convert people to Islam or make them behave like Muslims; the only state policy was to keep the country under control and extract from it money, men and feudal incomes to supply the needs of the Empire further afield. This meant that Ottoman rule in this period could in some ways be quite light, in that there were areas with which it was simply not concerned. The Christian and Jewish religions were still allowed to function, albeit under various restrictions and they were also permitted to apply their own religious law to their people, in their own courts – at least in civil matters.¹¹⁰

Then during the ‘Great Vienna War’ of 1638-1699 the Ottomans lost control of territory in Hungary, Slavonia and Dalmatia and Muslims living in those areas retreated into Bosnia.¹¹¹ Simultaneously, Serbs began to build an alliance with Russians, and Croats did so with

¹⁰⁵ Noel Malcolm, *Bosnia: A Short History* (London: MacMillan, 1994). P. 20

¹⁰⁶ Ibid. P. 22

¹⁰⁷ Ibid. P. 24

¹⁰⁸ Ibid. P. 44

¹⁰⁹ Vulliamy, *Seasons in Hell: Understanding Bosnia's War*. PP. 30-32

¹¹⁰ Malcolm, *Bosnia: A Short History*. P. 49

¹¹¹ Vulliamy, *Seasons in Hell: Understanding Bosnia's War*. PP. 30-32

Germans, the same alliances that existed in the 1990s. Bosnian Muslims became less influential and increasingly isolated while the Serbs and Croats created powerful and strategic alliances with their neighbours.

In the 18th century, Serbs began rebelling against the Turkish Ottoman Empire, and by the end of the 19th century, the Empire was falling apart. The Austrian Hapsburg Empire moved into the power vacuum and occupied Bosnia for thirty years beginning in 1878.¹¹² Then in 1912, the Serbs started to fight back and commenced battling with Austrians on one side of their border and Bulgarians on the other. In 1914 Serbian, nationalist Gavrilo Princip assassinated Austrian Archduke Ferdinand in Sarajevo.

1918-1980

Scholars have written about the existence of two Yugoslavias during the 20th century – one from 1918-41 and the other from 1945-91.¹¹³ The victorious powers at Versailles constructed a new state they hoped would help bring stability to the region and serve as a buffer between Austria and Serbia, the two countries blamed for starting WWI.¹¹⁴ The nation-state, 'Yugoslavia' was actualized in 1918 and called the Kingdom of Serbs, Croats and Slovene.¹¹⁵ Then, in 1928, Croat secessionists, backed by Italian fascists, established the Ustasha Party to found a separate and independent state.¹¹⁶ In response, King Alexander declared a royal dictatorship and renamed the country the "Land of the South Slavs."¹¹⁷ In 1934, Ustasha members assassinated the King and the country descended into chaos.

¹¹² Ibid. P. 34

¹¹³ Susan L. Woodward, Balkan Tragedy: Chaos & Dissolution After The Cold War (Washington, D.C.: The Brookings Institute, 1995). PP. 22-23

¹¹⁴ Ibid. P. 23

¹¹⁵ Howard Ball, Prosecuting War Crimes and Genocide: The Twentieth Century Experience (Lawrence, Kansas: University Press of Kansas, 1999). P. 123

¹¹⁶ Ibid. P. 123

¹¹⁷ Ibid. P. 123

In April 1941, Nazi and Italian armies invaded Yugoslavia and the Ustasha-led Independent State of Croatia was born. It would subsume Bosnia and declare, “Bosnians were Croats of Muslim faith.”¹¹⁸ Serbia was occupied by the Nazis, and the country gave rise to another partisan group, the royalist and nationalist Serb Chetniks committed to creating a “Greater Serbia.” The Chetniks were determined ethnically to cleanse the region of Jews, Gypsies, Muslims and Croats.¹¹⁹ The Yugoslavian Communists, led by General Joseph Broz Tito, were the only group directly to fight the Nazis.

During the war, the Croatian-based Ustasha set up twenty-seven death camps including Jasenovac where 85,000 people were massacred. More than half a million people – mostly Serbs and Jews – were put to death in these camps.¹²⁰

At war’s end in 1945, 60,000 Jews (there had been 69,000 Jews in Yugoslavia in 1940) and 27,000 Gypsies had died at the hands of the Germans, Chetniks, and the Ustasha. But there were also 400,000 Serbian deaths at the hands of the Ustasha and about 100,000 Muslims and Croat deaths at the hands of the Chetniks. Additionally, Tito’s victorious partisans, after May 1946, murdered over 100,000 Ustasha military prisoners.¹²¹

Tito’s post-war regime swept all of this history under the rug. The Yugoslav communists presented all of the country’s nationalities as equal; with no one to be singled out for either wartime massacres or collaborating with the Nazis.¹²² From 1945 to 1991 Orthodox Serbs, Catholic Croats and Muslims lived together in Yugoslavia. Tito – a nom de guerre, derived from “*ti to*” the Serbo-Croatian words meaning, “you do this”¹²³ – ruled the country with a combination of intimidation and appeals to unity among different ethnic groups.¹²⁴

In 1948, more violence engulfed Yugoslavia as a disagreement between Tito and Stalin

¹¹⁸ Vulliamy, Seasons in Hell: Understanding Bosnia's War. P. 36

¹¹⁹ Ball, Prosecuting War Crimes and Genocide: The Twentieth Century Experience. P. 123

¹²⁰ Ibid. P. 123

¹²¹ Ibid. P. 123

¹²² Gary Jonathon Bass, Stay the Hand of Vengeance: The Politics of War Crime Tribunals (Princeton and Oxford: Princeton University Press, 2000). P. 209

¹²³ Roy Gutman, A Witness to Genocide (New York: MacMillan Publishing Company, 1993). PP. XX-XXI

¹²⁴ Ignatieff, The Warrior's Honor. P. 39

became public, and the country was excluded from the newly forming eastern bloc. The dispute between Russia and Yugoslavia led to the deaths of 51,000 people who were caught up in choosing between the two leaders and their brands of communism.¹²⁵

In post-war Bosnia, the three ethnic groups became intermingled and one in four marriages was intermixed.¹²⁶ Although there was a significant amount of ethnic mixing, it tended toward urban rather than rural Bosnia. In the countryside Serbs, Croats, and Muslims lived much more separate and apart. Nonetheless, the Serbs enjoyed greater power in the Communist party and state apparatus than their numbers warranted creating wariness amongst Muslims and Croats. Muslims, although the largest ethnic group, were considered a “national minority” in Bosnia.¹²⁷ In 1963, in an attempt to address this problem, constitutional reform led to Muslims being deemed a founding people of Yugoslavia – as a political not religious community – along with the original Croats, Macedonians, Montenegrins, Serbs and Slovenes.¹²⁸ These six constituent nations or republics became the beneficiaries of increasing power as the country became more decentralized and each took on greater control of its economy, education and culture.¹²⁹

Throughout the 1950s and 1960s there were two social trends emerging, a growing Muslim intelligentsia located in urban areas as well as Serb and Croat peasants moving from the countryside into cities.¹³⁰ This shift in demographics created economic tensions and brought rural ethnic insularity into cities.

In 1974, there was further constitutional reform. Tito created a collective presidency rotating the top positions through the six republics and the two Serbian provinces. The

¹²⁵ Woodward, Balkan Tragedy: Chaos & Dissolution After The Cold War. P. 25

¹²⁶ Vulliamy, Seasons in Hell: Understanding Bosnia's War. P. 39

¹²⁷ Ibid. P. 38

¹²⁸ Woodward, Balkan Tragedy: Chaos & Dissolution After The Cold War. P. 31

¹²⁹ Ibid. P. 31

¹³⁰ Vulliamy, Seasons in Hell: Understanding Bosnia's War. P. 40

collective presidency was to consist of three Muslims, three Croats and three Serbs with each president sitting for two years as *primus inter pares* (first among equals).¹³¹ However, the system – because of its collective and consensual arrangement – prevented another leader of Tito's stature from coming to power and stifled the emergence of national institutions as power was directed towards this artificial political organization.¹³² Simultaneously, constitutional protections ensured each nationality could use its own language and promote its culture through cultural associations and ethnic media. Where numbers warranted children could be educated in their ethnic language. But while cultural differences were nurtured and protected, political expressions of nationalism were deemed a threat and prosecuted.¹³³ Coinciding with its emerging political philosophy, Yugoslavia experienced increasing rates of unemployment leading to economic divisions and a deepening split between urban and rural culture.¹³⁴

1980 - 1995

In May 1980 Tito died. It was the 'beginning of the end' for Yugoslavia.¹³⁵ The country had depended on Tito's personal charisma and guile to hold it together. Power shifted to the Communist elites in the republics but absent any legitimacy, they were unable to maintain authority.¹³⁶ The problem worsened with the collapse of Eastern European communism in 1989. Yugoslavia lost its leader, its ideology and identity. Still, what was a loss for many citizens, proved an opportunity for at least one.

In 1941 Slobodan Milošević was born to a Montenegrin family, the second son of an Orthodox priest. His father, mother and uncle all committed suicide. Milosevic rose

¹³¹ Ibid. P. 41

¹³² Gutman, *A Witness to Genocide*. P. XXI-XXII

¹³³ Woodward, *Balkan Tragedy: Chaos & Dissolution After The Cold War*. P. 37

¹³⁴ Ibid. P. 44

¹³⁵ Ball, *Prosecuting War Crimes and Genocide: The Twentieth Century Experience*. P. 124

¹³⁶ Ignatieff, *The Warrior's Honor*. P. 40

through the ranks of the Serb national Beobanka, working in New York and Belgrade.¹³⁷ In 1987, the 45-year-old banker became the Serbian Communist Party leader and began calling for the creation of a “Greater Serbia.”¹³⁸ He seized control of the national media and, at first, directed his virulent nationalism against Albanians who outnumbered Serbs in the Serbian province of Kosovo.¹³⁹ Serbs had begun to insist they had been losers in Tito’s Yugoslavia. Milošević staged rallies against Albanians in Kosovo, replaced the Kosovo and Vojvodina members of the rotating presidency, and manipulated elections in Montenegro.¹⁴⁰ He convinced Serbs outside of Serbia that only he could politically protect their rights. The message gained favour and he won a series of elections. Although there were individuals who challenged Milošević’s message, they did not have the instruments and institutions – in particular a liberal press and communications – at their disposal to confront him¹⁴¹

Away from the centre of power in Belgrade, the Slovenian government in 1989 declared a right of self-determination, including the right of secession.¹⁴² The following year the country held democratic elections.¹⁴³ Then in 1991, Milošević used his “stolen votes” on the collective presidency to prevent the election of Stipe Mesic, a Croat, from attaining the position.¹⁴⁴ On June 25, 1991, the Slovenian and Croatian government passed acts of separation and independence and the next day, Belgrade authorized the Yugoslav National Army (“JNA”) to intervene. The war in Slovenia lasted for ten days before the JNA

¹³⁷ Gutman, *A Witness to Genocide*. P. XXII

¹³⁸ Ball, *Prosecuting War Crimes and Genocide: The Twentieth Century Experience*. P. 124

¹³⁹ Gutman, *A Witness to Genocide*. P. XXII-XXIII

¹⁴⁰ Ibid.

¹⁴¹ Woodward, *Balkan Tragedy: Chaos & Dissolution After The Cold War*. P. 77

¹⁴² Franke Wilmer, "What Happened in Yugoslavia," *The Social Reconstruction Of Man, The State & War: Identity Conflict & Violence In Former Yugoslavia* (New York & London: Routledge, 2002). P. 46

¹⁴³ Visiting Arts, *Slovenia Cultural Profile*, 2004, Available:

http://www.culturalprofiles.org.uk/slovenia/Directories/Slovenia_Cultural_Profile/-6793.html.

¹⁴⁴ Gutman, *A Witness to Genocide*.

withdrew. Nonetheless, it was the beginning of the Balkan wars with clashes between Slovenia and Yugoslavia (June 1991), the Serb-Croat war (1991-1992), the Serb-Bosnian war (1992-1995) and Bosnian-Croat clashes in 1993. In 1998, another war developed between Serbia and the province of Kosovo.

The “Greater Serbia” that Milošević pitched to his constituents was a “politics of fantasy.”¹⁴⁵ Instead of dealing with Serbia’s economic problems and continuing backwardness, the country embraced nationalism although this too was fantastic since Serbs were dispersed throughout other republics and could only be reunified if other ethnic groups were forcibly transferred out of regions.¹⁴⁶

As tensions heightened, “nationalism emotions, fomented by what was essentially hate speech broadcast by the Croatian and Serbian controlled media, increasingly polarized people into categories of sameness and otherness based on new rules of obligation *and exclusion*.”¹⁴⁷ In July 1991, Serbs grabbed 25 percent of Croatia’s territory for part of its Greater Serbia. They instituted ethnic cleansing including in Vukovar where Serb soldiers massacred hundreds of patients in the local hospital. In 1992 after 10,000 people had lost their lives and UN troops were on the ground, a peace deal was brokered giving Serbia one-third control over the country.¹⁴⁸ In 1995, the Croatians broke the deal, counterattacked, and forced more than 200,000 Croatian Serbs to flee.¹⁴⁹

In October 1991, following Slovenia and Croatia, Bosnia Herzegovina (“BiH”) declared independence. In response, Milošević ordered the Yugoslav army – a predominantly Serbian institution – to turn over its weapons and artillery to the newly

¹⁴⁵ Ignatieff, *The Warrior's Honor*. P. 43

¹⁴⁶ Ibid. P. 43

¹⁴⁷ Wilmer, "What Happened in Yugoslavia." P. 47

¹⁴⁸ Ball, *Prosecuting War Crimes and Genocide: The Twentieth Century Experience*. P. 127

¹⁴⁹ Ibid. P. 128

formed “Serbian Territorial Defense Forces” in Bosnia creating, in turn, an 80,000-member army.¹⁵⁰ The army, although equipped by Belgrade and largely staffed by non-Bosnian Serb officers, was meant to give the appearance of being a Bosnian, rather than Yugoslavian, or Serbian force. If conflict erupted, it would be seen as strictly internal rather than being directed by Milošević out of Belgrade. With the advent of this new army, Radovan Karadžić, the parliamentary leader of the Bosnian Serbs, responded to the declaration of independence saying, “Bosnian Muslims will disappear off the face of the earth.”¹⁵¹ He, and other Bosnian Serb nationalists, left Sarajevo and established their own government in Banja Luka to run the newly declared Republika Srpska.

The seven-member Bosnian presidency (two Muslims, two Serbs, two Croats, and one Yugoslav) wanted to avoid war. It turned to the U.S. and Europe both of which advised the leadership to offer protections to minorities and hold an independence referendum.¹⁵² More than 99% of voters, in the subsequent referendum, chose to secede from Yugoslavia but Serbs within Bosnia boycotted the referendum. On March 6, 1992, Bosnia reaffirmed its independence. In April, the war of Serbs and Bosnian Serbs against Muslims began with the capture of the Muslim city of Bijeljina and then, on April 5th, the siege of Sarajevo began and would continue for another three years.¹⁵³

In August, the UN passed a Security Council resolution authorizing peacekeepers to deliver humanitarian aid to Bosnians - primarily Muslims – under attack by Bosnian Serbs.¹⁵⁴ By this time, a mere five months after the war had begun, some 1.8 million Bosnians had been forced from their homes, were killed, missing, on the move, imprisoned

¹⁵⁰ Ibid. P. 131

¹⁵¹ Ibid. P. 131

¹⁵² Samantha Power, A Problem from Hell: America and the Age of Genocide (New York: Basic Books, 2002). P. 249

¹⁵³ Ball, Prosecuting War Crimes and Genocide: The Twentieth Century Experience. P. 132

¹⁵⁴ Power, A Problem from Hell: America and the Age of Genocide. P. 281

in concentration camps, or had left the country.¹⁵⁵ In October, the UN set up a commission of experts to assess reports of atrocities and war crimes. The following month the commission noted that there had been more than one hundred violations of its “no fly zone” by the Serbian air force.¹⁵⁶

The UN responded to the Commission’s report in April 1993 by declaring Sarajevo and other Muslim enclaves “safe areas.” Small detachments of UN forces, including some from Canada, were sent to patrol the areas and provide humanitarian aid. The safe areas were anything but safe. Sarajevo was under daily artillery, mortar and sniper fire with up to 1,000 shells landing each day.¹⁵⁷ A year later, in April 1994, NATO began occasional “pinprick” air strikes against Serb positions who retaliated with intensified attacks against Muslims and in several instances took UN peacekeepers hostage.¹⁵⁸

In January 1995, American Senators Joseph Biden and Robert Dole tried to introduce legislation to lift the 1991 arms embargo against Yugoslavia so that Muslims could at least defend themselves.¹⁵⁹ Bosnian Serbs were supplied with arms from Belgrade and Croatia had benefited from European allies, but Bosnian Muslims were largely defenceless. In July 1995 came the massacre at Srebrenica – a UN designated “safe area” – in which Bosnian Serb forces, under General Ratko Mladić, slaughtered some 7,000 Muslim men in a matter of days while Dutch peacekeepers looked on. Then in August, three American diplomats were killed when their vehicle slipped off a mountainous Bosnian road. Later that same month, Serbs gunned down thirty-eight people trying to get bread in Sarajevo’s outdoor market. Finally, in the face of these events attracting media attention,

¹⁵⁵ Vulliamy, *Seasons in Hell: Understanding Bosnia's War*. P. 125

¹⁵⁶ Ibid. P. 24

¹⁵⁷ Ball, *Prosecuting War Crimes and Genocide: The Twentieth Century Experience*. P. 133

¹⁵⁸ Power, *A Problem from Hell: America and the Age of Genocide*. P. 324

¹⁵⁹ Ibid. P. 423

NATO responded with Operation Deliberate Force. Beginning on August 30, 1995 NATO flew three weeks of 3,400 sorties and 750 attack missions against Serb targets.¹⁶⁰ The tide had turned against the Serbs.

In October 1995, under the direction of Assistant Secretary of State, Richard Holbrooke, peace talks began in Dayton, Ohio with President Franjo Tudjman (Croatia), Alija Izetbegovic (Bosnia) and Slobodan Milošević representing Bosnian Serbs.¹⁶¹ An agreement was initialled in November and signed in Paris on December 14, 1995. The Dayton Agreement carved up Bosnia into the Federation of Bosnia and Herzegovina, a Muslim-Croat federation, and Republika Srpska a Bosnian Serb republic. The Serbs would be allowed to retain control of some territory they had ethnically cleansed, including the former “safe areas” of Srebrenica and Zepa.¹⁶² Dayton clearly rewarded Serb aggression:

The agreement left Serbs, 31 percent of the population, with 49 percent of the land. Croats, who made up 17 percent of the population, received 25 percent, and the Muslims, who constituted 44 percent, were allocated just 25 percent.¹⁶³

The Bosnian war killed more than a quarter of a million people, 70 to 75 percent of whom were civilians. More than 35,000 women were raped ranging from children as young as eight to women more than eighty years old.¹⁶⁴ Inside the Serb-run concentration camps, such as Omarska, Muslim men were subjected to sexual abuse and violence.¹⁶⁵ More than half of the women who were raped were then executed. More than a million refugees were displaced from their homes, most of which were destroyed. Thousands died of starvation in

¹⁶⁰ Ibid. P. 440

¹⁶¹ Human Rights Library University of Minnesota, "Press Conference Following The Initialing Of The Balkan Proximity Peace Talks Agreement," (1995.) Note: "This agreement today was the result of agreements between three parties -- Serbia, Bosnia, and Croatia. The Serbian delegation was led by President Milosevic. He came to the negotiation authorized by the leaders of the Bosnian Serbs, a signed authorization for him to negotiate and commit them. So we, hence, find a fixing of responsibility in President Milosevic."

¹⁶² Ball, Prosecuting War Crimes and Genocide: The Twentieth Century Experience. P. 138

¹⁶³ Power, A Problem from Hell: America and the Age of Genocide. P. 440.

¹⁶⁴ Wilmer, "What Happened in Yugoslavia." P. 51

¹⁶⁵ Prosecutor v. Dusko Tadic a/ka/ "Dule," Opinion and Judgment. (IT-94-1) ICTY 1997. Para 398

concentration camps and cities under siege. “The level and scope of torture and brutality in Europe was unmatched since World War II. Testimony in the war crimes tribunal alleges that some men were forced to orally castrate fellow prisoners.”¹⁶⁶

The Role of the War Correspondent in Bosnia

(i) Conflict & International Law

This level of grotesque violence, much of it committed against civilians including women and children, posed numerous challenges for journalists in how to understand, contextualize, and report these atrocities. Reporters in Bosnia knew – or learned very quickly – that they were “operating in uncharted territory”¹⁶⁷ in terms of how to understand events happening in the conflict and being able to adequately and accurately report them.

Understanding what is going on in the midst of all the havoc, confusion, and disinformation is anything but simple. And almost nothing in their training prepares reporters to be able to make the necessary distinctions between legal, illegal, and criminal acts.¹⁶⁸

The wars of the late 20th century are far different – at least in some respects – from those in the first half of the same century. Academic Mary Kaldor argues this new warfare often encompasses a specific type of violence, such as “large-scale violence of human rights (violence undertaken by states or politically organized groups against individuals).”¹⁶⁹ As part of the consequences of war and its violence, there is now the possibility of indictments, prosecuting war criminals, and trying individuals for violations of international criminal law. The public depends upon journalists to understand the complexities of the criminalization of warfare – which demands knowledge of international law – so that it informs their reportage. However, journalists may not be prepared for this task:

¹⁶⁶ Wilmer, “What Happened in Yugoslavia.” P. 49

¹⁶⁷ Roy Gutman and David Rief, eds., Crimes of War: What the Public Should Know (New York & London: W.W. Norton & Company, 1999). P. 11

¹⁶⁸ Ibid. P. 11

¹⁶⁹ Kaldor, “Introduction.” P. 2

I have met relatively few journalists who understand that making war is not a war crime and is no ground for indictment...Humanitarian law is not an everyday subject. It is not easily accessible to the general public...I have come across few journalists who have a sufficient appreciation and working knowledge of the subject.¹⁷⁰

Journalist Lawrence Weschler urges his colleagues to become more knowledgeable about humanitarian law because – if they are not witnesses at war crimes trials – they are witnesses to violations of law and must accurately report them.¹⁷¹

By virtue of their profession, war correspondents may well find themselves among the first outside witnesses on the scene at war crimes. As such, they're going to need to be informed witnesses, and the rest of us are going to have to become a far better informed and engaged public.¹⁷²

(ii) Context and Complexity in Conflict Reporting

Whereas Goldstone and Weschler urge journalists to familiarize themselves with law, correspondent Robert Fisk argues it is not case law or statutes journalists need to inform their reporting but a comprehensive understanding of history:

So what conclusions should we draw from the world we see burning today? Certainly, we journalists must start carrying history books in our back pockets... So the job of journalism, it seems to me, is to go on 'telling it as it is' but to set the narrative of history, to make sure we do not forget what happened before yesterday, before last week, before last year.¹⁷³

Thus for Fisk, journalists need to know history. The historical and political context for the Bosnian war was complex and without a full understanding of it, especially when trying to report in the midst of chaotic violence, reporters were reduced to using clichés such as “ancient ethnic animosities” or “tribal hatreds.”¹⁷⁴ Indeed criticism has been levelled at media reports coming out of Bosnia in the early stages, 1991-1992, of the war as being

¹⁷⁰ Richard J. Goldstone, "The Role Of The Media In Exposing Crimes Against Humanity," Media Studies Journal (1998). P. 109

¹⁷¹ Lawrence Weschler, "International Humanitarian Law: An Overview," Crimes of War: What the Public Should Know, eds. Roy Gutman and David Rief (New York & London: W.W. Norton & Company, 1999). P.22

¹⁷² Ibid. P. 22

¹⁷³ Robert Fisk, "Carleton University Convocation Address," (2004.)

¹⁷⁴ Gutman and Rief, eds., Crimes of War: What the Public Should Know. P. 12

rushed, inaccurate, simplistic and dependent upon stereotypes to describe complex issues and events.¹⁷⁵

(iii) Conflict Reporting: The “Spotlight” as a Catalyst for Change

What do we then expect of reporters and their reportage? The public needs and wants to be informed so that public debate will ensue. Some scholars, jurists, and journalists argue that by “merely turning the spotlight on gross violations of humanitarian law” behaviour can be changed and the quest for answers begun.¹⁷⁶ Others argue the “spotlight” is necessary but not sufficient to change behaviour or arrive at answers. Martin Bell describes the role of the journalist as being the “eyes and ears on the ground” in a conflict zone for the public.¹⁷⁷ Journalists, he says show “who is doing what to whom, and with what effects and why.”¹⁷⁸ Does this accomplish anything? Bell concludes: “It is the lesson of the Bosnian war that precisely when there is a policy vacuum, when governments are without a course to follow or an expedient to clutch at, then television images have a jolting effect, and a political power to move them[governments].”¹⁷⁹

(iv) Conflict Reporting: Influencing the Public and Policy Makers

Richard Goldstone, when asked why a tribunal was established for Yugoslavia but not other countries, lists a number of reasons but near the top of his list: “Images of Bosnia, reinforced by emotive photographs of emaciated Bosnian camp inmates that were seen around the world via satellite, were reminiscent of World War II concentration

¹⁷⁵ James J. Sadkovich, “The Response of the American Media to Balkan Neo-Nationalism,” Genocide After Emotion: The Post Emotional Balkan War, ed. Stejepan G. Mestrovic (London & New York: Routledge, 1996). P. 124

¹⁷⁶ Gutman and Rief, eds., Crimes of War: What the Public Should Know. P. 12

¹⁷⁷ Bell, In Harm's Way: Reflections of a War-Zone Thug. PP. 142-143

¹⁷⁸ Ibid. PP. 142-143

¹⁷⁹ Ibid. PP. 142-143

camps.”¹⁸⁰ Is Goldstone correct in believing the influence of media coverage of the Bosnian conflict is an example of the power of the televised image, or is media power and influence illusory? Could it be that media coverage *only* has an effect on decision makers when there is a policy vacuum? Additionally, is it possible that media “spotlight” coverage distorts reportage by narrowly focusing on some aspects while ignoring others? Whatever the answer to these questions, clearly, there are scholars, journalists and jurists who believe there is a positive correlation between media coverage and stopping human rights violations. Jurist Theodore Meron believes that just as reporting on Bosnian atrocities helped establish the Tribunal, reporting on war crimes trials will influence the behaviour of other war criminals:

...modern media ensures that all actors in the former Yugoslavia know of the steps being taken to establish the tribunal....Even the worst war criminals involved in the present conflict know that their countries will eventually want to emerge from isolation and be reintegrated into the international community....A successful tribunal for Yugoslavia will enhance deterrence in future cases, failure may doom it.¹⁸¹

The media may be able to communicate to potential war criminals that a tribunal has been established which may indict and try them but there is no evidence this deters criminal behaviour. As scholar, Neil Kritz has observed, “trials communicate that a culture of impunity that permitted the abuses is being replaced by a culture of accountability, giving a sense of security to victims and a warning to those who might contemplate future abuses.”¹⁸² Journalists continue to be messengers but the effectiveness of the message, i.e., does media coverage of war crimes trials deter future criminals, is still unknown. There are

¹⁸⁰ Richard J. Goldstone, For Humanity: Reflections of a War Crimes Investigator (New Haven & London: Yale University Press, 2000). P. 79

¹⁸¹ Theodor Meron, War Crimes Law Comes of Age (Oxford: Clarendon Press, 1998). P. 190

¹⁸² Neil J. Kritz, "Where We Are And How We Got Here: An Overview Of Developments In The Search For Justice And Reconciliation," Columbia International Affairs Online (2002). P. 25

limitations as to what journalists and journalism are able to accomplish with respect to human rights violations and international criminal law.

The media can inform and generate debate, sometimes bringing about changes in public policy, but not always and certainly not always immediately. Ed Vulliamy recounts how after he and several other journalists gained access to the Omarska concentration camp in 1992 it was closed by the Serbs and the prisoners were transferred.¹⁸³ At a second camp, Trnopolje, the barbed wired fences were taken down and the camp was renamed “Trnopolje Open Reception Centre” for the hundreds of western reporters who descended on it after Vulliamy had visited.¹⁸⁴ Although people such as Richard Goldstone credit reporting of the camps, by journalists such as Vulliamy, in bringing about the establishment of the ICTY, neither reporting nor the establishment of the Tribunal brought about a swift end to atrocities. Pictures of the camps were flashed around the world in August of 1992 but the war – and its abuses – continued until December 1995. As Samantha Power has noted, there was a swarm of Western journalists supplying graphic, daily coverage of the events in Bosnia and their reportage unleashed “an unprecedented public outcry about foreign brutality” but nothing happened for three years.¹⁸⁵

Is this an inexplicable paradox if you have constant and graphic media coverage of atrocities, an outraged public but no change in policy? No, argue some war correspondents that provided the coverage of Bosnian brutality. They contend the public was both dismayed but also in a state of disbelief, about what was being reported. Ed Vulliamy

¹⁸³ Ed Vulliamy, "Neutrality and the Absence of Reckoning: A Journalist's Account," Journal of International Affairs 52.2 (1999). P. 609

¹⁸⁴ Ibid. P. 609

¹⁸⁵ Power, A Problem from Hell: America and the Age of Genocide.

recalls, "People back home used to ask if it was really as bad as the media makes out."¹⁸⁶

Peter Maass experienced the same reaction:

I have visited America many times since my reporting in Bosnia, and I often faced the same question: Did you visit those camps? Were they really so bad? I still find it hard to believe that Americans and West Europeans are confused about Bosnia and, in particular, confused about the camps. Yes, I visited them, and yes, they were as bad as you could imagine. Didn't you see the images on television? Don't you believe what you see? Do you give any credence to the word of Radovan Karadžić, the Bosnian Serb leader, who said the pictures were fakes?¹⁸⁷

Roy Gutman explains that there was a kind of vicious cycle of events in Bosnia involving foreign journalists, the public and Western governments. After he, like Vulliamy, discovered the existence of concentration camps in Bosnia, he questioned how reporters had found them but spy satellites and U.S. intelligence had not:¹⁸⁸

I began to develop a theory that the Western governments had written off Bosnia and had not bothered to tell the public. Media reports such as mine represented so much inconvenience. The assault against Bosnia had all the earmarks of genocide, but no official would utter the word because it would force them to come up with a policy response. So there was no official confirmation and public interest diminished. Indeed, the acting secretary of state publicly raised doubt about the entire story.¹⁸⁹

For Gutman, Vulliamy, and other reporters the biggest impediment to the effectiveness of their reporting was the response of western governments: denial, obfuscation and indifference.

In addition to questioning journalists' reports, the public also began to show signs of conflict fatigue. Peter Maass describes graphic war reports as a kind of pornography filled with lurid details that repulse most people but some find titillating.¹⁹⁰ While people in the West keenly followed the war through the summer of 1992 and the discovery of the concentration camps public interest then began to fade "not because the atrocities were

¹⁸⁶ Vulliamy, "Neutrality and the Absence of Reckoning: A Journalist's Account." P. 610

¹⁸⁷ Peter Maass, *Love Thy Neighbor* (New York: Alfred A. Knopf, 1996). P. 41

¹⁸⁸ Gutman, *A Witness to Genocide*. P. XIV

¹⁸⁹ Ibid. P. XIV

¹⁹⁰ Maass, *Love Thy Neighbor*. P. 54

declining, but because America was growing tired of hearing about them. Even snuff films get boring after a while.”¹⁹¹

Why did Western reporters continue to report, insisting on coverage, of what was happening in Bosnia when governments were ignoring them and the public was losing interest? If, as Peter Maass argues war reports can become a kind of disaster pornography, how were journalists to engage readers in reportage with something more than graphic images or lurid details. European reporters emphasized the geographical and cultural closeness of the conflict to their audience. The story was unfolding on the European continent and it was critical for European reporters that their citizens understand their role and responsibility in Bosnia. Martin Bell takes issue with those who claim that Bosnia merited coverage because its citizens were white and Rwanda was ignored because its residents are black.¹⁹² Not so, he says, rather it is “a neighbourhood argument, that this is happening in our own backyard. It threatens the security of all of us, and we ignore it at our peril.”¹⁹³

Bell believes it was the responsibility of European reporters to both report the Bosnian conflict and to ensure that it was reported accurately. In a similar vein to his colleague Robert Fisk, Bell says journalists not only need to know history, they have the “privileged view of history in the making.”¹⁹⁴ Journalists, he says, are those who write the first draft of history, otherwise known as news.¹⁹⁵ For Bell, and other Europeans reporters, there was a dual responsibility to alert and inform their citizenry of what was happening on European soil and to do it accurately. If Bosnia was a European problem then European

¹⁹¹ Ibid. P.54

¹⁹² Bell, In Harm's Way: Reflections of a War-Zone Thug. P. 272

¹⁹³ Ibid. P. 272

¹⁹⁴ Ibid. P. 273

¹⁹⁵ Ibid. P. 273

reporters, such as Bell, had a responsibility to record the first draft of this conflict as their history, and their news.

The “neighbourhood” argument can hardly be said to hold the same urgency for North American journalists as Europeans but that does not mean that other universal beliefs did not hold true for all reporters covering the conflict. Why did journalists doggedly pursue Bosnian conflict stories, often putting themselves at risk, if their governments were largely ignoring their reportage? Perhaps because they clung to the words of Joseph Pulitzer: “There is not a crime which does not live in secrecy. Get these things out in the open, describe them, attack them, ridicule them in the press, and sooner or later, public opinion will sweep them away.”¹⁹⁶

Richard Goldstone believes reporting does make a difference even if the effect is not immediate. “Reporters and other observers at the frontline of conflict often voice frustration that their reports and efforts hardly dent the public consciousness and do little to change an intolerable situation; but the fact is that accurate, timely, and thoughtful coverage of war crimes can have an impact far beyond any immediate calculation.”¹⁹⁷ It is, says Sydney Schanberg, never hopeless for journalists to think that through their reporting international law and its enforcement will not be strengthened and improved, even if only slightly.¹⁹⁸ He believes “journalists are by blood and tradition committed to the belief, or at least to the tenet, of trying to keep bad things from getting worse than they already are.”

Nonetheless, journalists pay a high price for their patience and determination. In Bosnia, forty-two reporters and photographers were killed, more than in the prior conflicts

¹⁹⁶ Gutman and Rief, eds., *Crimes of War: What the Public Should Know*. P. 12

¹⁹⁷ Richard J. Goldstone, “Forward,” *Crimes of War: What the Public Should Know*, ed. Roy Gutman and David Rief (New York & London: W.W. Norton & Company, 1999). P. 14

¹⁹⁸ Sydney Schanberg, “Cambodia,” *Crimes of War: What The Public Should Know*, eds. Roy Gutman and David Rief (New York & London: W.W. Norton & Company, 1999). P. 65

of Vietnam and Lebanon put together.¹⁹⁹ Although – as has been argued by people such as Richard Goldstone – it may be useful, even necessary to understand international humanitarian law, journalists find little comfort or protection in it. In Bosnia, six months before the end of the war, Serbs fired a rocket into the courtyard of the Sarajevo television building.²⁰⁰ The bomb destroyed the offices of two international television agencies and the European Broadcasting Union.

Unbeknownst to most television reporters, customary law long ago deemed radio and television stations to be military objectives as are other military-industrial, military research infrastructure, communications, and energy targets. The logic is that they can usually be put to military use and are essential for the functioning of any modern military in time of conflict. Journalists, *per se*, are not a legitimate target but if they are wounded while visiting or working in a legitimate target, it is considered collateral damage.²⁰¹

Still, ITN journalist Gaby Rado (who fell from a rooftop to his death in Iraq in 2003) never shied away from reporting in Bosnia because he was convinced it did force policy makers – in particular Bill Clinton – to take action.²⁰² “I believe that the media, TV in particular, ended the Bosnian War. Bill Clinton woke up in July 1995 to see that 7,000 people had been massacred in Bosnia. TV was screaming ‘This cannot go on.’ It seems to me to be no coincidence that in early August, Operation Storm began.”²⁰³

(v) Motivation to Report: Moral Obligation & Personal Responsibility

Journalists find themselves in the unenviable position of being ignored by their home governments, questioned by the public over the veracity of their reporting and left virtually unprotected by international humanitarian law in conflict zones – so why report? A senior BBC journalist explained it this way to author and psychiatrist Anthony Feinstein:

¹⁹⁹ Vulliamy, *Seasons in Hell: Understanding Bosnia's War*, P. X

²⁰⁰ Gaby Rado, “Legitimate Military Targets,” *Crimes Of War: What The Public Should Know*, eds. Roy Gutman and David Rief (New York & London: W.W. Norton & Company, 1999). P. 226

²⁰¹ Ibid. P. 227

²⁰² BBC, *Profile: Gaby Rado*, March 30 2003, Available: <http://news.bbc.co.uk/1/hi/uk/2900427.stm>.

²⁰³ Ibid.

Bosnia was many things for us. I personally felt it was Europe going back to the past. I felt it was important to understand it and not shut it out. I felt some kind of responsibility as a citizen. I grew up in the 20th century with fine declarations, in an atmosphere in which we all believed there would never be another Holocaust. We all believed that if it happened this time, the world wouldn't stand for it...I was burning with indignation, and I saw a clear injustice. I saw my own country and most of the allies ignoring it. I felt tainted by that. I felt that I had some kind of responsibility to stand up. I couldn't bear the shame of it, and in the end that's why I stopped covering Bosnia. I couldn't bear it.²⁰⁴

The irony is that while many reporters see themselves as impartial, neutral observers, loath to crusade for any cause including Bosnia, they speak of the motivation behind their reporting in intensely personal terms. Ed Vulliamy argues that journalists, as human beings, cannot divorce themselves from the principles and aspirations of war crimes trials and human rights.

I don't think we are at the service of international justice or human rights. To me, this idea of journalism being somehow sort of in an existential cocoon, is where as I said before it not only seems to be a strange logic but also extremely dangerous... We are human beings, we are writing about the human calamity quite often. I think to sort of hermetically seal ourselves off from the language and the notion of human rights, war crimes, and this attempt to build an international system, is at best arrogant and at worst it's pernicious.²⁰⁵

Roy Gutman says, "I want to see justice done. It's one of the reasons I did my stories in the first place."²⁰⁶ War reporters covering Bosnia – regardless of their views on testifying because Vulliamy and Gutman have quite different opinions – felt a personal responsibility and attachment to their reporting. Why did they feel this responsibility? Kemal Kurspahic says, "I just think that certain types of crimes, and genocide is at the top of that list, oblige anyone with power to do so to help prevent it, to stop it, or at least to punish it. Personally, I consider it a higher call of duty than the romantic ideas of pure journalistic objectivity."²⁰⁷ Journalists cannot detach themselves from genocide. It is not like reporting on a city council meeting. It is disturbing and upsetting in the extreme. It goes to the heart of

²⁰⁴ Feinstein, *Dangerous Lives: War and the Men and Women Who Report It*. P. 84

²⁰⁵ "Interview By Sherri Beattie With Ed Vulliamy, Journalist, The Guardian" November 18 2004

²⁰⁶ "Interview By Sherri Beattie With Roy Gutman, Journalist, Newsday" January 21 2005

²⁰⁷ "Interview By Sherri Beattie With Kemal Kurspahic" November 5 2004

personal emotions, moral choices and individual conscience. It does not mean that all reporters will then feel personally compelled to testify but it is the motivation for continued reporting from conflict zones when policy makers are loathe to take action and the public feels media saturated. Journalists' reportage was driven by personal motivations because of the nature of what they were covering, i.e., genocide, war crimes and crimes against humanity but also the way in which they were forced to cover the conflict. War reporting in Bosnia was not like the war in Iraq or the Gulf Wars. Journalists were not given daily briefings or attached to a well-organized army. They drove around, usually with other journalists, often in poor vehicles having to dodge or talk their way through constant checkpoints guarded by roving, undisciplined, sometimes drunken paramilitary groups. Besides the inherent danger involved in this kind of reporting it also meant that the usual protective barriers separating journalist from combatant do not exist, says Peter Maass:

I was learning one of the dirty truths of journalism – reporting on a war can be an adventure. For me, for a while, it was. The journalists who flocked to Bosnia were not watching a movie about a dramatic war, they were in it.²⁰⁸

For war correspondents covering the Bosnian war, says Elizabeth Neuffer, was without precedent in terms of comparable experience, deeply personal, and very risky:

But you have to consider that many of us who covered the Balkan war also did it without satellite telephones and without armoured cars and without a lot of the basic support that perhaps at the higher end of the scale some news organizations were able to afford. The bottom line is to get the story, no matter what it takes. And indeed most of our editors are clueless. Because if they have covered a war, they covered a war that is of a very different nature than the kinds of wars that are happening now. Which are more intimate, more personal, or you tend to be essentially living among the people who are getting bombed, not being behind forces.²⁰⁹

²⁰⁸ Maass, *Love Thy Neighbor*. PP. 33-34

²⁰⁹ Elizabeth Neuffer, Leslie Cockburn, Thomas Goltz, James Nachtwey and Stacy Sullivan, "Dealing With The Trauma of Covering War: Journalists Talk About Ways They Cope With What They See," *Dateline: Hell*, ed. Ann Cooper (New York: Nieman Reports, 1999).

These journalists because of the nature of the conflict could not be detached from it. There was very little space, be it emotional or physical that separated them from the conflict, its crimes and its victims. This is why journalists single-mindedly pursued reporting in Bosnia and tried to convince editors back home to give their stories prominence in newspapers and newscasts. In turn, this persistence chipped away at Western apathy, prompting eventual action by NATO, and may have saved lives by exposing savagery that otherwise would have had no check on it whatsoever.²¹⁰

James Sadkovich argues media coverage in Bosnia tended to “focus on the sensational rather than the substantive.”²¹¹ Martin Bell makes a far different case arguing that conflict is watered down for the ‘folks back home.’ He maintains that most of the television pictures of the mortar bombing of the market place in Sarajevo – what were mass killings – were images left on the cutting room floor, deemed too violent, too graphic.²¹² Not only did Bell leave visual images on the floor but he also exercised extreme caution in reporting the facts of events, often choosing to understate or under-report facts because of this combination of caution and disbelief.²¹³ Journalists, because of this feeling of personal attachment to the Bosnia story, wanted to get it right. They did not want to be accused of exaggerating the situation knowing they would lose credibility and public support if that happened. Reporting the war in Bosnia was not about filing dispatches, just doing a job or collecting a paycheque – there are far easier ways to do all of these things – rather it represented personal choice:

Bosnia also represented clear choices, moral choices, choices about the kind of values you adhered to. At the time the Bosnian war was happening all the Western governments except the United States, which was very much in the background at first, were saying, “It’s a Balkan thing, savages, they’ve been

²¹⁰ Gutman and Rief, eds., *Crimes of War: What the Public Should Know*. P. 9

²¹¹ Sadkovich, “The Response of the American Media to Balkan Neo-Nationalism.” P. 123

²¹² Bell, *In Harm's Way: Reflections of a War-Zone Thug*. P. 216

²¹³ Ibid. P. 217

killing each other for centuries. What can you do – they're all as bad as each other. Those of us who were there knew that wasn't true. We absolutely knew that was a lie those governments used to justify their own inaction. And because we knew that, it involves a kind of responsibility.²¹⁴

Later, when the ICTY was established and it sought the testimony of journalists who had witnessed atrocities in Bosnia they, once again, would be faced with clear moral choices about the kinds of values they adhered to in responding to that challenge.

Conclusion

Reporting on the Bosnian conflict posed a number of challenges for war correspondents. The historical, political, economic, and social factors that led to the conflict were complex and there was no easy way to explain or encapsulate them in news reports. Reporters faced a conflict – from 1993 when the ICTY was established – that was formally criminalized with potential indictments and charges of war crimes, genocide and crimes against humanity against war criminals. The situation on the ground in Bosnia was extremely dangerous and reporters put themselves at risk by moving about the country in order to witness events and interview people. Policy makers in the West largely ignored – at least in public until 1995 – the daily reports coming from journalists reporting from Bosnia. The interest in the conflict by the public in the West tended to wax and wane.

Despite these challenges, war correspondents through their reportage did influence events and outcomes in Bosnia. As former ICTY Chief Prosecutor Richard Goldstone indicated, it was reporting that spurred the establishment of the Tribunal. The discovery of concentration camps in 1992 turned the media spotlight in the West on Bosnia. Although policy makers and even the public only temporarily focused on Bosnia, reporters persisted in their reportage determined to bring about political change and an end to the conflict.

²¹⁴ Feinstein, Dangerous Lives: War and the Men and Women Who Report It. PP. 84-85

Reportage from Bosnia was a catalyst for change and resolution of the conflict.

However, still unanswered is why journalists persisted in their reporting from Bosnia? Why did many journalists bear witness to the conflict in their reporting and then choose to bear witness in the proceedings at the ICTY? How did journalists view themselves, in terms of their role and responsibility, as witnesses? Did the Bosnian conflict usher in a new globalized sense of journalism and journalistic ethics?

The Journalist as Global Citizen

...I'm human, but the way that I contribute, the way that I do my job in marking this tragedy is bearing witness, being accurate, taking down what happened, what I saw, what I heard and publishing it in the largest newspaper in this country. That's what I am doing as a journalist about these kinds of atrocities. I'm not just bearing witness but I'm also transmitting the news of this terrible, evil deed to the wider world.²¹⁵

Introduction

This chapter explores and advances the idea of the journalist as global citizen. It does this through a review of the literature written in response to the question, should journalists testify at international war crimes tribunals. The chapter examines the ethical underpinnings of arguments made in either support or opposition to testifying. The review will analyse the literature, which responds to the central thesis question, from the ideological framework of the journalist as global citizen, exploring how various authors view the moral obligation, civic duty, nature of journalistic neutrality and objectivity, and use of language in defining and determining the emerging role of the journalist as global citizen.

Furthermore, the chapter will focus on particular authors and journalists who have through their own writing, or through interviews, enunciated reasons in either support or opposition to giving evidence and how their arguments reflect their notions and attitudes about global citizenship. When a journalist argues in support or opposition to testifying can his or her reasons be framed or understood from a broader perspective beyond legal obligations or traditional journalism ethics? What characterizes global citizenship for these authors and how does it inform their view of journalism and their role as journalists?

The Global Citizen

²¹⁵ "Interview By Sherri Beattie With Bill Schiller, Foreign Editor, The Toronto Star" March 22 2005

Gil Carlos Rodriguez Iglesias, President of the European Court of Justice provides a definition of what global citizenship strives to be:

...the idea of global citizenship points to an ideal of universal norms and institutions that give shape to a world order based on justice, liberty, and equality: what I would like to call the global rule of law. Certainly a fine ideal, but some would deem it Utopian...Utopian ideas that do not belong to this world, sometimes have an important influence in reality and may help to improve the course of events.²¹⁶

He acknowledges that his ideas spring from Immanuel Kant's writings. He notes that Kant, in his *Philosophical Sketch on Perpetual Peace* wrote, "Since the narrower or wider community of peoples of the earth has developed so far that a violation of rights in one place is felt throughout the world, the idea of a law of world citizenship is no high flown or exaggerated notion. It is a supplement to the unwritten code of the civil and international law, indispensable for the maintenance of the public human rights and hence also of perpetual peace."²¹⁷ The notion of global citizenship is a cornerstone of the United Nations and reflected in the preamble of its Charter:

...to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security...²¹⁸

A series of international treaties, including the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966) and the Rome Statute of the International Criminal Court (1998) all envision and advance a global citizenship. However, Iglesias concedes that the idea of global citizenship remains imperfect and fragile because states, and its citizens, resist pooling "their sovereignty in common

²¹⁶ Gil Carlos Rodriguez Iglesias, "Global Citizenship: Address to Seton Hall University," Seton Hall Journal of Diplomacy and International Relations Winter/Spring (2003). P. 5

²¹⁷ Ibid. P.7

²¹⁸ "Charter Of The United Nations," (1945).

institutions and norms.”²¹⁹ Iglesias points to the success of the European Union and its ability to create a new citizenship that combines the national and supranational levels of duty and obligations. He writes: “This distribution is producing a unique citizenship made of layers that transcend one-directional national allegiances and identities and transforms them into multidimensional ones. Or, to put it in a simpler way: a composite citizenship which allows people to feel European while they also feel French or English or Spanish or Greek and so on.”²²⁰ Iglesias sees citizenship in the EU as a building block for global citizenship and “not simply a redefinition of identities, of circles of inclusion and exclusion, of us and them.”²²¹

Journalism is no longer confined by borders or states but has become a global institution and journalists, citizens of its international domain. This is the reality – both practicable and applicable – for journalists in their role as witnesses at the ICTY. They are no longer only considered citizens of their respective states but global citizens and participants in an international war crimes tribunal. The common institutions – global journalism, international justice, and global citizenship – are still emerging, as are the norms that will define, shape, and regulate behaviour – including how one responds to the central thesis question – within these institutions.

Moral Obligation

By mid-2002, British journalist and *Guardian* reporter Ed Vulliamy had provided more prosecution testimony at the International Criminal Tribunal for the former Yugoslavia than had any other witness.²²² He does not equivocate when asked why he

²¹⁹ Iglesias, "Global Citizenship: Address to Seton Hall University." P. 8

²²⁰ Ibid. P. 11

²²¹ Ibid. P. 12

²²² Vjera Bogati, "Courtside: Keraterm Camp Trial - Guardian Witness," (London: Institute For War And Peace Reporting, 2001).

chooses to testify. For Vulliamy it is about his moral obligation, not as a journalist, but as a citizen. In his writing,²²³ and interviews, Vulliamy expresses no doubts, uncertainty or misgivings about providing prosecutors with days of testimony and subjecting himself to numerous cross-examinations by defence lawyers. Vulliamy, I argue, sees himself more as a global citizen than as a journalist. Further, I argue his obligation as a global citizen is to testify in order to serve justice and victims of war crimes. The obligation is first moral then legal. As a global citizen, not just a British subject, Vulliamy hopes to influence the emerging moral structure of the global community.

Journalist and academic Jeremy Iggers has examined the role of the news media within local and national communities and how it influences the moral structure within those communities. Iggers argues: "There are at least three critical roles news media play in the life of their communities that go beyond merely providing information: they construct a common reality, they bring a public into being, and they are an important vehicle by which the moral values of the community are circulated. The news media play a central role in constructing the picture of the world that people who live in complex modern societies carry around inside their heads."²²⁴

Ed Vulliamy perceives a kind of moral superstructure for the global community. In it, journalists are first citizens whose obligations – moral, political and legal – are to the international community and clearly arise from a sense of global connectedness, responsibility, and human rights. The sense of responsibility, both moral and legal, that a citizen has for a fellow citizen in their own city or town is no different when their

²²³ Ed Vulliamy, "I Must Testify - Why One Journalist Is Giving Evidence Against Alleged War Criminals," The Guardian April 22, 1998., Vulliamy, "An Obligation To The Truth: Journalists Should Be Prepared to Risk Their Safety and Testify at the International Criminal Court." ,Vulliamy, "Neutrality and the Absence of Reckoning: A Journalist's Account.", "Interview With Ed Vulliamy"

²²⁴ Jeremy Iggers, "The Myth Of Neutrality And The Ideology Of Information," Good News, Bad News: Journalism Ethics And The Public Interest (Boulder, Colorado: Westview Press, 1999).

community is half way around the world. Vulliamy argues journalists should not “hermetically seal ourselves off from the language and the notion of human rights and war crimes.”²²⁵ It is these notions that shape the moral precepts of the international community of which he is a member as a citizen and journalist.

Vulliamy wants, through his reporting and ICTY testimony, to clearly define the moral discourse with stark clarity as when he writes, “For some spine-chilling reason, it has become boring to say that right is right, wrong is wrong and evil is evil.”²²⁶ Vulliamy urges journalists to not step away from their role as moral arbiter, nor to confuse it or dilute it with journalistic notions of objectivity or neutrality. For Vulliamy a wrong, is a wrong, is a wrong, and journalists can be neither neutral nor objective about wrongdoings that encompass war crimes, genocide and crimes against humanity. He writes that there “are times in history when neutrality is not neutral at all, but complicity in the crime – as any good Swiss gold banker from the 1940s will tell you. I do not want to be neutral between the camp guard and inmate; the woman raped seven times a night every night, and the beast who rapes her.”²²⁷

What about the possible implication stemming from the arguments advanced by Vulliamy and Bell that journalists who oppose testifying are ignoring their moral obligations or that they bring less humanity to their actions? It is easy to paint them as ‘less than’ those who choose to give evidence. British journalist Robert Fisk has reported from various conflict zones and in his writing²²⁸ and interviews²²⁹ has railed against the “moral obligation” argument put forward by journalists such as Ed Vulliamy:

²²⁵ "Interview With Ed Vulliamy"

²²⁶ Vulliamy, "Neutrality and the Absence of Reckoning: A Journalist's Account." P. 619

²²⁷ Vulliamy, "I Must Testify - Why One Journalist Is Giving Evidence Against Alleged War Criminals."

²²⁸ Robert Fisk, "It Is Not My Job To Provide The Evidence For A War Crimes Tribunal; A Reporter's Job Does Not Include Joining The Prosecution. We Are Witnesses And We Name, If We Can, The Bad Guys," The Independent August 24 2002.

I know, of course, how the arguments go. I may be a journalist, says the reporter as he or she turns up to the court, but I am also a human being. A time must come when a journalist's rules are outweighed by moral conscience. I don't like this argument. Firstly, because the implication is that journalists who don't intend to testify are not human beings; and secondly, because it suggests that reporters in general don't normally work with a moral conscience.

Neutrality

Does Fisk then dismiss the arguments of his colleague Ed Vulliamy? He too is a global citizen living in Lebanon and reporting on the Middle East primarily for a British newspaper. However, it is not the motives of journalists including Vulliamy that Fisk questions but rather that of tribunals. Are they truly global in perspective and do they seek justice for all, or just for some? Are they neutral?

Q: What about colleagues like Ed Vulliamy who has said there is no neutrality for reporters when it comes to war crimes?

A: Well, I know Ed very well. That's his view. I don't think, you see the point is he is right in a sense but unfortunately he's doubly right in the sense that I know war criminals in Lebanon. I know them well; I talk to them. People who have committed atrocious crimes during the Lebanese war. I was at Sabra and Chatila which the Israeli Kahane report in 1993, the massacre was in 92, said Mr. Sharon was personally responsible but Mr. Sharon goes to the White House and is greeted by President Bush as a man of peace. Now, I'm sorry but there's a lot of double standards there. It isn't up to Ed Vulliamy to say, 'we can't be neutral.' I'm not neutral but neither are the war crimes tribunals. That's the problem. They chose the war criminals who they wish us to testify against but they do not decide that all war criminals should be prosecuted and that's the problem.²³⁰

Fisk is correct in asserting that war crimes tribunals are flawed institutions within the international community. It is possible to argue that someone may want to be a citizen of the global community but be critical of one of its institutions in light of its flaws. Flaws in war crimes tribunals originate in their very inception. External forces that affect many bodies including, "interests, ideals, mandarin opinion, public outrage and private pressures"

²²⁹ "Interview By Sherri Beattie With Robert Fisk, Journalist, The Independent" June 11 2004

²³⁰ Ibid.

also shape international tribunals.²³¹ Therefore, factors other than serving justice or advancing human rights influence the creation of tribunals. Indeed some, such as Lt. General and UN Commander Romeo Dallaire view the establishment of the ICTY as being Eurocentric, claiming NATO forces only intervened in Yugoslavia because the conflict involved Europeans.²³² There were no real security interests for Europeans, since it was unlikely the conflict would spread beyond the borders of Yugoslavia, and certainly there was no direct threat to North America. Rather, the discussions among policy makers at the UN and in Washington centred on the moral imperative of intervention in the face of massive human rights violations.²³³ Yet, the United Nations and NATO did not see a moral imperative to intervene in the Rwandan slaughter. The subsequent establishment of a tribunal to investigate war crimes from that disaster may be an attempt to salve the collective Western conscience.

Despite whatever shortcomings either in the motivations of those who established the ICTY, or in its actual functioning, the journalists who have chosen to testify in Tribunal proceedings believe it is something in which they need to participate. They view testifying as a witness as an essential part of being a global citizen. As a citizen, the journalist is an active participant in his or her community and their actions either strengthen and affirm or weaken and obfuscate the community's moral principles and aspirations. Jeremy Iggers views the role of the journalist as being an active participant in the world unlike fellow academic Robert Haiman – former executive director of the Poynter Institute for Media Studies – who describes the role of journalists, using a theatrical metaphor, as being

²³¹ Thomas W Smith, "Moral Hazard and Humanitarian Law: The International Criminal Court and the Limits of Legalism," *International Politics* 39 (2002). P. 178

²³² Romeo Dallaire, "Keynote Address," *Symposium: The Media and the Rwanda Genocide* (Carleton University, Ottawa: 2004.)

²³³ Power, *A Problem from Hell: America and the Age of Genocide*. P. 326

members of the audience and never as actors on stage.²³⁴ However, Iggers does not see an artificial separation between those who report and those who participate on the world stage:

Haiman's stage metaphor represents journalism as something that happens off-stage, outside of the world that journalists are supposed to represent. The plausibility of this metaphor seems to rest upon a model of journalism in which the reporters/observers and the observed exist in separate domains, with reporters observing their subjects as if through a one-way mirror, a situation in which observation and reporting indeed have no impact on the events observed. By locating the journalist off-stage, the myth of neutrality obscures the increasingly powerful role of the news media in society. The role that the news media play in shaping not only political discourse but also political institutions, in defining public agendas, and in setting the terms of moral discourse are rendered invisible.²³⁵

Has the media shaped the ICTY or its agenda? Robert Fisk takes issue with the functioning of the Tribunal and its agenda. Fisk says he may not be neutral as a journalist but then neither are war crimes tribunals. Some crimes and criminals are prosecuted, while others are ignored. Therefore, it is not possible to draw a straight line in the argument that a global citizen, including a journalist, has a moral obligation to testify in a war crimes tribunal when the Tribunal itself has flaws. Fisk cannot participate as a witness because the flaws of international justice, for him, render it impotent to prosecute many war criminals who continue to act with impunity. Ed Vulliamy sees the attempt to gain justice for victims, even if it is only some, a worthwhile endeavour that must be supported. Each journalist wants to distil his opinions into a clear but simplistic proposition; for Fisk it is justice denied to many citizens of the global community and for Vulliamy, it is better that justice be pursued for some in the hope that it will eventually be won for all.

Both Fisk and Vulliamy respond viscerally to what they have witnessed and through their writing and actions attempt to influence the public and policy makers. Vulliamy is angry at the injustices he witnessed in Bosnia and through his writing and testimony is trying to influence the global community. Fisk is angry at the injustices he witnessed in

²³⁴ Iggers, "The Myth Of Neutrality And The Ideology Of Information." P. 109

²³⁵ Ibid. P110

tragedies such Sabra and Chatila. He has written extensively about those injustices and refuses to testify in The Hague because of the inaction by the global community to prosecute those responsible for Sabra and Chatila. Vulliamy and Fisk's actions support their writing and each strives to influence public thinking. Journalism professor and lawyer Philip Seib says this is typical of journalists' behaviour:

Journalists' claims that they have no interest in outcomes are disingenuous. As a practical matter, objectivity is an illusion; choices about what to cover, as well as how to cover are not made in a moral vacuum. Why bother doing journalism if there is no intent to provide the information that will affect how people think about things.²³⁶

If, as Seib argues, the motivation to report is to affect how people think then it leads to the question of whether changing public thinking in fact changes anything at all. One argument against journalists testifying is that compelling testimony may hinder journalists' ability to report incidents of international crimes and atrocities. The question is, does media coverage of conflict alert the public and policy makers to human rights abuses and help stop them? Should journalists put at risk – through testifying at the ICTY – their ability to report atrocities and inform the public and policy-makers who, in turn, are able to stop human rights violations? Ed Vulliamy and Roy Gutman uncovered the existence of concentration camps in Bosnia in the summer of 1992. Their stories shocked the public but only temporarily. The international community did not take decisive action in Bosnia until the summer of 1995. Former ICTY Chief Prosecutor, Richard Goldstone asserts it was media coverage that triggered the creation of The Hague Tribunal. However, Robert Fisk does not share Goldstone's optimism as to the influence of the press. Fisk has less faith in journalists' power to influence behaviour, at least at the source of the problem. He says: "I have to question whether journalists really have the effect – long term – of breaking open

²³⁶ Philip Seib, *The Global Journalist: News And Conscience In A World Of Conflict* (Lanham, Maryland: Rowman & Littlefield, 2002).

those prison doors, or tearing down the scaffolds and dismantling the torture equipment.”²³⁷ Reporting may not change the behaviour of criminals but BBC’s Nik Gowing argues that policy-makers, like torturers, also may not be moved to take action even by graphic television images of conflict.

Certainly news pictures can shock policy makers just as they do the rest of us.... But television’s news power should not be misread. It can highlight problems and help to put them on the agenda but when governments are determined to keep to minimalist, low-risk, low-cost strategies, television reporting does not force them to become more engaged.²³⁸

The purported relationship between news coverage and policy-making is often referred to as the “CNN effect.” In a globalized era, it argues that journalists are able to beam stories and pictures around the world capturing public attention, mobilizing it through their reporting and ultimately pressuring policy-makers to respond to the issues being reported. In this scenario, the press has the upper hand. However as Nik Gowing has pointed out there is not a straightforward cause-and-effect relationship. British scholar Stephen Badsey sees it slightly differently. He argues, “although the CNN effect may happen, it is unusual, unpredictable, and part of a complex relationship of factors.”²³⁹ The relationship between the media and policy makers is neither simple nor straightforward. There may be a “CNN effect” but the cause or causes are, as Badsey argues, complex and perhaps not fully understood. Therefore, the link between media coverage and its influence on policy makers is unclear.

Journalistic Neutrality and/or Objectivity

What then is the role of the individual journalist in influencing either the public or its policy makers? Ed Vulliamy sees the role of the journalist as also incorporating that of

²³⁷ Richard Keeble, "Battling For News: The Dilemmas Of War Reporting," *Ethics For Journalists* (London: Routledge, 2001). PP. 105-106

²³⁸ Ibid. P. 107

²³⁹ Seib, *The Global Journalist: News And Conscience In A World Of Conflict*, P. 27

citizen and advocate. But can a journalist also be an advocate? Is Vulliamy mistaken in merging the roles of citizen, journalist and advocate? Is a consequence of combining those roles, especially journalist and advocate, the loss of neutrality and objectivity or is it necessary in redefining journalism in a global sense? Journalist, author and academic, Samantha Power says, "I still consider myself a human rights advocate, but as a journalist, I use reporting to advance my ends."²⁴⁰ Clearly, Power is more than a member of the audience but a journalist who is an active participant in the global community and brings a particular set of moral principles to her writing and reporting. She is an advocate and journalist and sees the roles as intertwined. However, in respect to journalistic neutrality and objectivity, Power agrees that they can be easily muddled in conflict zones:

...as we learned in Bosnia, there is a difference between neutrality and objectivity. Initially, when people who had been working beats elsewhere went into Bosnia, there was a tendency to try to maintain the appearance of evenhandedness, despite the fact that one side was committing the bulk of atrocities. Reporters would say, "Okay, if I cover a Serb massacre of Muslims one day, then the next day I should go and find a Muslim massacre of Serbs."²⁴¹

CNN's Christiane Amanpour, like Vulliamy, extols a journalism that does not shy away from morality when juxtaposed beside objectivity. She has said about her reporting in Bosnia:

...an element of morality has to be woven into these kinds of stories. I don't think it has anything to do with an agenda. Governments, particularly in the West, were telling their versions of the truth about Bosnia. If we had blindly repeated that in the name of so-called objectivity, and not said: 'But hang on; in fact, that is what we know is going on,' then we would be giving eternal life to lies...What does that word [objectivity] mean? I have come to believe that objectivity means giving all sides a fair hearing, but not treating all sides equally. Once you treat all sides the same in a case such as Bosnia, you are drawing a moral equivalence between victim and aggressor. And from there it is a short step toward being neutral. And from there it's an even shorter step to becoming an accessory to all manners of evil; in Bosnia's case, genocide. So objectivity must go hand in hand with morality.²⁴²

²⁴⁰ Samantha Power, "Reporting Atrocity: War, Neutrality, And The Danger Of Taking Sides," Press/Politics 9.3 (2004). P. 4

²⁴¹ Ibid. P 8

²⁴² Seib, The Global Journalist: News And Conscience In A World Of Conflict. P. 53

In the absence of morality, giving way to the insistence of neutrality, there is the question of complicity in crimes of international law. Ed Vulliamy sees himself as a citizen of a global community in which it is his duty to testify. While many of his colleagues argue there are negative consequences that result from his testimony, Vulliamy counters that there are equal, if not greater negative consequences from not testifying. He says: "Crimes against humanity not reckoned with can only lead to more of the same. I also believe that there are moments in history when neutrality is not neutral but complicit in the crime."²⁴³ Amanpour echoes this sentiment when she says, "When you are neutral, you can become an accomplice and in these kinds of situations you are an accomplice to the most unspeakable crimes against humanity."²⁴⁴

British journalist and former BBC correspondent Martin Bell has testified at The Hague, in his case as a defence witness in the prosecution of Croatian Tihomir Blaskic. In Bell's writing,²⁴⁵ and in interviews with the CBC,²⁴⁶ *The Australian*²⁴⁷ and others²⁴⁸ he supports and expands upon many of the ideas put forth by Vulliamy. Indeed, Bell has coined a phrase or term for the kind of journalism to which he and Vulliamy both ascribe, namely the "journalism of attachment."²⁴⁹ This journalism is not about being a bystander or a member of an audience. Bell writes: "I was trained in a tradition of objective and dispassionate journalism...I don't believe in it anymore. From where I have been and what I have seen, I would describe objective journalism as a sort of bystanders' journalism,

²⁴³ Vulliamy, "Neutrality and the Absence of Reckoning: A Journalist's Account." P. 604

²⁴⁴ Seib, *The Global Journalist: News And Conscience In A World Of Conflict*. P. 53

²⁴⁵ Bell, *In Harm's Way: Reflections of a War-Zone Thug*. Martin Bell, "The Truth Is Our Currency," *Press/Politics* 3.1 (1998).

²⁴⁶ CBC "War Crimes And The War Correspondent's Dilemma" *Dispatches* (Canada: CBC Radio, 2003)

²⁴⁷ Tracy Sutherland, "'Witness to War Crimes - Must A Reporter Testify,'" *The Australian* September 19 2002.

²⁴⁸ "Interview By Sherri Beattie With Martin Bell, Former Journalist, BBC" December 9, 2004

²⁴⁹ Bell, "The Truth Is Our Currency."

unequal to the challenges of the times.”²⁵⁰ Bell says those times are now and, indeed, they have been taking place since he covered the Bosnian conflict in the early 1990s. The journalism of attachment, argues Bell has already come about in response to, at least in part, violations of international criminal law:

In proposing an alternative journalism – one that is both balanced and principled – I am not so much calling for a change as describing one that has already taken place. It has to. How else for instance, were we to report on genocide? Were we to observe it from afar, pass by on the other side, and declare that it was none of our business, perhaps especially ours because we were the independent witnesses. And if genocide would not move us, nothing would move us, and what would that then say of us? ²⁵¹

What then is “journalism of attachment?” Bell begins by describing what it is not: “It doesn’t take sides, any more than the Red Cross takes sides. It doesn’t back one army or people, or faction against another. It is not in the backing business but the truth-telling business.”²⁵² He then proceeds to give “journalism of attachment” its attributes: “It is a journalism that is aware of the moral ground on which it operates, that cares as well as knows, and that will not stand neutrally between good and evil, the victim and oppressor.”²⁵³

What about those journalists who oppose testifying, are they ignoring their moral duties or failing in their obligations as global citizens? Are they only fulfilling part of their role as truth tellers? Are there dangers for journalists, even in conflict zones, if they abandon neutrality? Samantha Power is keenly aware of the power and influence the press can wield with the public and policy-makers and has written extensively about it.²⁵⁴ Power believes there is a danger wherein the “journalism of attachment” can lead to the ‘journalism of prescription.’

²⁵⁰ Ibid. P. 102

²⁵¹ Ibid. P. 103

²⁵² Ibid. P. 103

²⁵³ Ibid. P. 103

²⁵⁴ Power, A Problem from Hell: America and the Age of Genocide, Power, "Reporting Atrocity: War, Neutrality, And The Danger Of Taking Sides."

The flip side to the danger of neutrality is the danger of taking sides. By 'taking sides,' I don't mean rooting for the Tutsis in Rwanda or rooting against Charles Taylor in Liberia. I mean not acting as a stenographer in the face of these injustices, but instead thinking prescriptively, framing coverage around what one would want the desired outcome to be: what one would want one's readers to do, what one would want one's readers to influence their governments to do, how one would want people to think about the crisis and the steps needed to improve conditions. Here, taking sides carries perils. The hubris of even thinking in terms of "What should be done?" is colossal. We can get it badly wrong. We can get it wrong because of language barriers and local ignorance, we can get the facts wrong; we can get the interpretation of the facts wrong; and we can get the implication of the facts wrong. There is so much to get wrong in societies that are not your own. There is so much to get wrong in societies that are your own.²⁵⁵

Power is not suggesting either embracing neutrality or abandoning it, she is simply urging journalists to be proactive cautiously.

A New Language for Reportage

One element Bell and Vulliamy share in describing or characterizing what they are reporting is the term, "criminal." Bell uses the legal term "genocide" to describe what he saw in Bosnia²⁵⁶ and Vulliamy insists that criminal responsibility be assigned to what he saw in the country.²⁵⁷ Both journalists believe that what they witnessed and reported on in Bosnia was criminal conduct. It is a definite legal characterization, not just ugly, deplorable or reprehensible, but criminal. Former UN Ambassador and Secretary of State, Madeleine Albright in an address to journalists in 2000 urged them to not only expose atrocities but also the "criminal conduct that unleashes them."²⁵⁸ However, language is often a challenge for journalists. The language that is used to describe the newly emerging field of international criminal law is, for the most part, unknown to journalists. When something is both unknown, and technical – it is after all part of the legal lexicon – there can be reluctance in using it. Journalists worry they will incorrectly use expert terminology and in

²⁵⁵ Power, "Reporting Atrocity: War, Neutrality, And The Danger Of Taking Sides." P. 9

²⁵⁶ Martin Bell, "The Truth Is Our Currency," Ibid.3.1 (1998).P. 103

²⁵⁷ Vulliamy, "Neutrality and the Absence of Reckoning: A Journalist's Account." P. 604

²⁵⁸ Madeleine Albright, "Prepared Remarks," Conflicts And War Crimes: Challenges For Coverage (Arlington, Virginia: The Crimes Of War Project And The Freedom Forum, 2000.

doing so bring about negative consequences for themselves, their companies or the situation on which they are reporting. Samantha Power writes that newspapers will not independently adopt the word “genocide” to describe much of the human carnage their reporters’ witness. The editorial board of *The New York Times* was still debating whether they should call the 1915 Armenian massacre “genocide” almost 90 years after the event.²⁵⁹ Bell and Vulliamy want to affix to the language of this new globalized conflict reporting decisive terms with moral clarity and their writing reflects this thinking. They want journalists to understand the lexicon surrounding international criminal law and to use it in their reporting.

Roy Gutman is an American journalist who opposes testifying although he champions the work of the Tribunal and has willingly provided it with significant leads and other information. There is probably no more graphic and wrenching journalistic account of the Bosnian conflict than A Witness to Genocide,²⁶⁰ a compilation of Gutman’s dispatches that won him a Pulitzer Prize. He is also a co-editor of Crimes of War: What the Public Should Know,²⁶¹ a book that policy-makers like Madeleine Albright says she is never without.²⁶² However, in interviews²⁶³ and in other articles²⁶⁴ Gutman steadfastly opposes testifying. The role of journalists, he argues, is to alert the public about atrocities and other human rights abuses through reportage. After that has been accomplished, it is up to others – such as prosecutors and policy-makers – to take the next step in either stopping the abuse and/or bringing about post-conflict justice. Gutman does not accept the premise that

²⁵⁹ Power, "Reporting Atrocity: War, Neutrality, And The Danger Of Taking Sides." P. 8

²⁶⁰ Gutman, A Witness to Genocide.

²⁶¹ Gutman and Rief, eds., Crimes of War: What the Public Should Know.

²⁶² Albright, "Prepared Remarks,"

²⁶³ "Interview With Roy Gutman"

²⁶⁴ Roy Gutman, "Consequences Occur When Reporters Testify; A Reporter Urges Journalists to be Better Watchdogs of the War Crimes Tribunal Process," Neiman Reports 57.1 (2003).

journalists should be engaged actors on the world stage but rather – like Robert Haiman suggested – members of the audience who observe and report.

We're the alarm bell. You sound the alarm bell reasonably well and you can go on to your next story without having a sleepless night. It's true you're not going to bring the person back to life that has been killed or unrape a woman but the punishment, or if there is a process, a judicial process, an internationally recognized judicial process, that's stunning. So why not just let me carry on with what I am doing, which is not necessarily the next one but to carry on as long as I can on that story, and then do the aftermath. Why do I have to be a figure in the play?²⁶⁵

Gutman is a believer in international criminal justice as much as Ed Vulliamy or Martin Bell. He may be an American but he is not anti international law or justice. For him, global citizenship is about process. He advocates for a set of guidelines, rules, or a structure that would define the role and relationship of journalists to the Tribunal, and how they might assist it. He supports the Tribunal and says almost every journalist he knows feels the same.²⁶⁶ However, Gutman, in terms of testifying insists on being a member of the audience and refuses to become – what he perceives as – “part of the story.”²⁶⁷ Like his fellow American, Samantha Power, Gutman believes in and brings moral imperative to his writing. It is impossible not to be moved by his dispatches in A Witness to Genocide but he follows the principle set out by Power. She adheres to the idea that journalists write with moral urgency but avoid being moralistic.²⁶⁸ Both journalists ascribe to the journalistic mantra of “show don't tell” wherein the “job as the reporter is to get out of the way and to let the characters that you've encountered take over.”²⁶⁹ Whereas Vulliamy says journalists should directly name actions as evil in their reportage, Power and Gutman contend that the actions they report on speak for themselves.

Competing Notions of the Journalist as Global Citizen

²⁶⁵ "Interview With Roy Gutman"

²⁶⁶ Ibid.

²⁶⁷ Ibid.

²⁶⁸ Power, "Reporting Atrocity: War, Neutrality, And The Danger Of Taking Sides." P. 9

²⁶⁹ Ibid. P. 9

Madeleine Albright as U.S. Ambassador to the UN in the Clinton administration was a champion, proponent, and key policy maker responsible for bringing about the establishment of The Hague Tribunal. She has acknowledged the critical role of journalists in exposing atrocities in Bosnia. However, many policy makers want to keep their distance from journalists. One reason is the supposed link between coverage of conflict, violations of international criminal law, the mobilization of public opinion, and pressure on policy-makers to respond. As discussed earlier the supposed "CNN effect" is disputed among scholars, i.e. whether it occurs, how it happens and what degree of influence, if any, it has on policy makers. Opponents of journalists' testimony in war crimes tribunal often cite the connection between media coverage of war crimes and its impact upon policy makers as part of their argument in opposition to giving evidence. Former ICTY Chief Prosecutor Richard Goldstone in his writing²⁷⁰ and in interviews²⁷¹ has repeatedly expressed reservations about journalists testifying at the Tribunal, which he used to lead. Goldstone views the role of journalists within a global context as the critical, first line of defence against violations of international criminal law because they alert the worldwide public and policy-makers to what is happening. He believes testifying could jeopardize journalists' ability to carry out this function. Goldstone insists that journalists need to be knowledgeable global citizens and argues they cannot adequately report war crimes without a thorough understanding of international humanitarian law. He opposes unnecessarily bringing journalists into courtrooms as witnesses but he does want the law to inform their reporting. Goldstone says he would "support a rule of law to protect journalists from

²⁷⁰ Goldstone, For Humanity: Reflections of a War Crimes Investigator. Goldstone, "The Role Of The Media In Exposing Crimes Against Humanity." Goldstone, "Forward."

²⁷¹ "Interview By Sherri Beattie With Richard Goldstone, Former Chief Prosecutor, ICTY" December 16 2004

becoming witnesses in situations that would place them or their colleagues in future jeopardy.”²⁷²

How do we resolve the writing of Goldstone, Vulliamy, and Bell who all consider themselves global citizens and exponents of international justice and yet diverge on the issue of testifying at war crimes tribunals? Bell and Vulliamy are both British, both long serving war correspondents. Each has written that their response to the conflict in Bosnia was influenced by their own knowledge and interpretation of European history, politics and geography. Vulliamy is appalled that less than 50 years after the Holocaust took place on European soil, mass atrocities against citizens would take place again on the continent. He sees history repeating itself unless journalists – and all global citizens – take steps to intervene: “By remaining neutral, we reward the bullies of history and discard the peace and justice promised us by the generation that defeated the Third Reich. We create a mere intermission before the next round of atrocities.”²⁷³ Bell says, “it was European pusillanimity on Bosnia that allowed this thing to go on much longer than it should have done....”²⁷⁴ Goldstone, on the other hand, is not a citizen shaped by European influences but someone who has come out of apartheid South Africa where no free and independent media existed. For many years, he lived in a society where journalists were not able to report atrocities and that, in part, allowed apartheid to continue for decades. Goldstone is reluctant to have any institution, including an international war crimes tribunal, exert influence over the press or use it as a mechanism for anything other than reporting. He believes foremost that the press must be free and independent because he has seen in South Africa the consequences of not having an independent media. Vulliamy and Bell believe the

²⁷² Clare Dyer, "Court Warned Not To Pressurise Journalists," *The Guardian* May 11 2002.

²⁷³ Vulliamy, "Neutrality and the Absence of Reckoning: A Journalist's Account." P. 604

²⁷⁴ "Interview With Martin Bell"

press can be and should be used to advocate on behalf of international justice. They do not see testifying at the Tribunal as an infringement on their journalistic freedom. Goldstone, Vulliamy and Bell would view themselves as global citizens but because of where they came from – geographically, historically, politically – they do not necessarily agree on how values for that citizenship should be achieved, in particular, the role of the media in global citizenship.

A Libertarian Notion of the Journalist as Global Citizen

Richard Goldstone's experience in South Africa has led him to adopt a libertarian notion of media freedom. Academic Michael Perkins describes this notion of media freedom as one that defines itself in human rights treaties through a "negative liberty that acknowledges the threat to the spread of information and ideas that accompanies the accumulation of political power."²⁷⁵ For Perkins, the principle of media freedom enshrined in various human rights treaties is one that must be protected from other institutions, namely government and its accompanying political power that can threaten to limit or diminish free expression. However, it is also negative liberty in that the right to free expression exists with explicit limitations on that freedom, i.e. there are duties and responsibilities that accompany the right to free expression.²⁷⁶ Richard Goldstone, as a jurist who has seen firsthand the consequences of government infringing on media freedom, asserts that as part of the human rights movement there must be vigilance in protecting media freedom whenever and wherever it is potentially threatened. For Goldstone, compelling journalists to testify at international war crimes tribunals is a potential threat to media freedom. Perkins has analysed this libertarian notion of media freedom as a right,

²⁷⁵ Michael Perkins, "International Law And The Search For Universal Principles In Journalism Ethics," Journal Of Mass Media Ethics 17.3 (2002). P. 200

²⁷⁶ Ibid. P. 196

embedded within human rights treaties, and argues there are ethical principles for journalists, which can be extrapolated from it. He posits that “truth-telling, independence, and freedom with responsibility are universal ethical principles international law envisions for journalists.”²⁷⁷ Perkins claims that one can analyse and examine journalistic practices – therefore, journalists testifying – through the lenses of law and ethics but that each has a different focus.

The old saw is largely accurate in saying that law tells us what we can do and can’t do, whereas ethics tells us what we ought and ought not to do; law sets a minimum standard below which our actions must not fall if we fear the opprobrium that accompanies such a violation, whereas ethics sets a higher standard to which we ought to aspire.²⁷⁸

The Tribunal has identified a legal standard for journalist testimony in the *Randal* decision but who, or what, is to determine the ethical standard? Separate and apart from a journalist being compelled to testify or claiming privilege from testifying – both legal issues – how does a journalist determine what the ethical standard is for deciding whether to testify before a war crimes tribunal? Since the global community and international law are emerging orders, there are no clearly defined ethical standards as of yet. Instead, there are competing visions, such as those put forward by Vulliamy, Goldstone and others, for what the ethical standard should be. And, for the moment, there is no indication of which of these might prevail. As this ethical question, should journalists testify at international war crimes trials, arises in future cases before the International Criminal Court there will be more discussion about the competing visions of the ethical standard. Eventually there may be either be a consensus around one standard or several different standards will emerge to which various scholars, journalists and jurists will align themselves.

²⁷⁷ Ibid. P. 193

²⁷⁸ Ibid. P. 195

There is a paradox at work within the question of whether journalists should testify at international war crimes tribunals. Bell and Vulliamy argue there is a moral and ethical duty as global citizens to testify about human rights violations but human rights treaties “provide for a journalism free of censorship and other forms of governmental intervention.”²⁷⁹ It can be argued, I suggest, that when a U.N. international war crimes tribunal issues a subpoena against a journalist it is a form of intervention that infringes on “media freedom” as defined in human rights treaties. Under these treaties,²⁸⁰ the duty of journalists is first to the public and it is protection of this duty that forms the basis of media freedom:

Under all the international human rights treaties, freedom of the press has a dual nature: The press is protected so that it can report news, information and opinion, and the public is co-equally protected – that is, freedom of the press inheres in the public as much as in the press – because the public has a need to receive the news, information, and opinion that the press publishes.²⁸¹

So have journalists such as Ed Vulliamy and Martin Bell set aside the public’s interest for that of justice? Alternatively, is journalists’ testimony an extension of the universal ethical principle of truth telling that Perkins espouses? He argues that truth telling, which he says arises out of moral philosophy, is also a “foundational assumption of the human rights movement: that each individual intrinsically deserves respect. Truth-telling, in this discussion of journalism ethics under international human rights treaties, certainly includes factual accuracy but it must include more.”²⁸² Perkins believes the “more” is greater context, fuller understanding, and meaning of news for the public. However, is it also possible that “more” may mean testifying? Perkins’ other two universal ethical principles are independence and responsible freedom, meaning media freedom is protected under treaties

²⁷⁹ Ibid. P. 200

²⁸⁰ "Universal Declaration Of Human Rights," (1948.) "International Covenant on Civil and Political Rights," (1966.) "Convention for the Protection of Human Rights and Fundamental Freedoms," (1950.)

²⁸¹ Perkins, "International Law And The Search For Universal Principles In Journalism Ethics." P. 202

²⁸² Ibid. P. 203

for journalists so they can serve the public interest. Journalistic independence is generally interpreted as freedom from government interference or censorship and courts have identified it as a principle in limiting any intrusion into the activities of journalists and journalism. The final ethical principle identified by Perkins is responsible freedom, i.e. journalists must use their media freedom, “in a moral way, primarily in the broad public interest.”²⁸³ If Perkins’ principles are taken together, they might create a fourth principle: journalists should be free from undue interference by war crimes tribunals but equally journalists must consider – in response to a request to testify – their responsibility to human rights, justice, global citizenship and truth telling.

What is remarkable, if not perplexing, about the literature that has been written to date on examining the question of whether journalists should testify at international war crimes tribunals is that the writing of war correspondents evinces a relatively homogeneous group. However, despite their shared values, ethics, and principles war correspondents cannot come to a shared consensus on this question. Most, if not all, support the work of the Tribunal. Most, if not all, have helped prosecutors with leads and information used in compiling indictments and bringing forth prosecutions. They have each been deeply moved as individuals and journalists by what they have witnessed in conflict zones. As journalists, they are committed to bringing detail, accuracy, context, and understanding to their reportage although they do not agree on the function and/or role of neutrality in journalism when the question of testifying is superimposed on it. The question elicits passionate responses from journalists. It is impossible to impugn the motives of any of these journalists, whether they have responded positively or negatively to the question as many of them, noted in this chapter, have risked their lives to expose genocide, war crimes, and

²⁸³ Ibid. P. 204

crimes against humanity. What is clear is that war correspondents with shared values and ethics – as seen through their writing and reporting – act upon them in very different ways. Common goals – be they defining global citizenship or participating as a journalist/global citizen in international justice – do not necessarily lead to common ways of achieving them. Therefore, what remains is a dilemma. If the shared goal is justice what is the ethical way, as a global citizen, to respond to the question: Should journalists testify at international war crimes tribunals? The complexities of this question will continue to be unravelled but first the thesis will take a step back to examine the historical background and legal underpinnings of the Tribunal. Journalists, as discussed in this chapter, have situated their arguments in support or opposition to testifying in the larger framework of global citizenship, its moral structure, civic duties and obligations. The next chapter will trace the origins, and map the current state, of international law in which journalists, as global citizens, have decided to participate as witnesses in war crimes tribunals.

The Establishment of the ICTY

*When I arrived in The Hague as the first chief prosecutor of the tribunal, its credibility was at a low ebb... Many in the international community doubted whether the politicians really intended or wished it to become an effective body. I was keenly aware that without media support the tribunal would have floundered.*²⁸⁴

Introduction

Journalists testifying at the International Criminal Tribunal for the former Yugoslavia are thrust into the newly emerging area of international criminal law and into a war crimes tribunal, only the second ever since the end of World War II. In other words, they find themselves in uncharted territory. This is a legal landscape where journalists are being asked to testify about profoundly disturbing crimes. It is the nature of these crimes that journalists cite as one of the critical reasons in deciding to testify. These are war crimes, grave breaches of the Geneva Conventions, crimes against humanity and genocide.

This chapter explores three ideas in relation to journalists, the development of international criminal law, and the establishment of the ICTY. The first examines the changing nature of international criminal law and conflict. The world now has an international criminal court and two *ad hoc* tribunals that prosecute international crimes.²⁸⁵ War has entered the legal sphere and conflict has become criminalized. Before the 20th century, war was something regulated, controlled and consensual among states. The Hague and Geneva Conventions governed how states conducted themselves in conflict. Then beginning in World War I, there was a shift from states using agreed upon methods and tactics to their employing new strategies and technologies aimed at not just combatants but civilians as well. Today, armed conflict kills more civilians than combatants. That was not

²⁸⁴ Goldstone, "Forward." P. 14

²⁸⁵ The Special Court for Sierra Leone, 2002, Available: <http://www.sc-sl.org/index.html>. Note: The Special Court for Sierra Leone is a hybrid international/national court.

the case in the 19th century. Did this change in tactics serve as an impetus for the criminalization of warfare? The introduction of carpet-bombing, chemical warfare, atom bombs, and nuclear devices among others, meant the idea of sanctioned warfare became obsolete, surpassed by technology. Warfare, by the middle of the last century, was transformed, both on paper and in practice, from agreed upon prescribed forms of violence to criminalized acts. Modern conflicts became the battlegrounds for rogue militias and paramilitary groups often acting as agents of the state in carrying out systematic violence against civilians. Recently, the criminalization of warfare spawned a burgeoning body of law to define these crimes, and generated international tribunals to prosecute them. With criminalized warfare came the rise of individual criminal responsibility, and trials, to prosecute individuals accused of violations. It is this series of events within recent history, and subsequent changes within international criminal law, that has, in part, lead to journalists being called as witnesses at the ICTY.

Secondly, there has been a merging of law and journalism in reportage. Be it nightly newscasts or daily newspapers, journalists are the first to inform the public about international criminal violations. They, rather than lawyers or academics, are the purveyors of information about these “criminal” acts to a global audience. Indeed, the terms “genocide,” “crimes against humanity,” and “war crimes” have entered the public lexicon because of journalists. However, are these crimes understood only in terms of popular meanings conveyed to the public by the press? Do journalists understand the complexities and legal elements of these offenses? Do they have a professional duty to report on these crimes with greater knowledge about international law and its legal system? Finally, would a gap in knowledge become problematic when journalists are drawn into proceedings at the ICTY? This chapter will go beyond popular meanings of genocide, war crimes, crimes

against humanity, and grave breaches of the Geneva Conventions to examine the complexities and legal elements of each violation.

Thirdly, it is the nature of these crimes, which compels some journalists to testify. Genocide and crimes against humanity are criminal acts committed against large numbers of people, often civilians, in a systematic and widespread manner. The crimes are violent, heinous and barbaric. It is the nature of these crimes that journalists often cite as a critical factor in their decision to testify.

The Security Council Creates a War Crimes Tribunal

Cynics argue the birth of The Hague tribunal to investigate and prosecute crimes, arising from the violent dissolution of Yugoslavia in the early 1990s, grew out of political expediency and not a search for justice. American diplomat Richard Holbrooke, who brokered the Dayton Peace Treaty, claimed the Tribunal was “viewed as little more than a public relations device.”²⁸⁶ Others²⁸⁷ believe the Security Council never intended for it to try major criminals like Radovan Karadžić, Ratko Mladić, or Slobodan Milošević, and that it was nothing but an elaborate pretence designed to bolster public confidence in the UN. So how did the Tribunal, regardless of the intentions of the Security Council, come into being?

A series of events around the Bosnian conflict in the summer of 1992 brought an unprecedented confluence of four interrelated groups: Bosnian politicians, western governments, non-governmental organizations and the media. These four would, in turn, either influence public opinion or feel pressured by it to respond to the escalating crisis in Bosnia. First, the non-governmental organization Human Rights Watch began calling for the creation of a war crimes tribunal in July 1992,²⁸⁸ about the same time, the Bosnian

²⁸⁶ Ball, *Prosecuting War Crimes and Genocide: The Twentieth Century Experience*. P. 141

²⁸⁷ Robertson, *Crimes Against Humanity: The Struggle for Global Justice*. P. 286

²⁸⁸ Power, *A Problem from Hell: America and the Age of Genocide*. P. 482

Muslim government through its UN Ambassador, Muhammed Sacirbey, asked the United Nations to intervene in the conflict between itself and Belgrade. Attached to their formal written request was a list of ninety-four prisons and concentration camps in Bosnia where Muslims were being held by Serbs.²⁸⁹ By the end of August, global television audiences sat stunned as they struggled to comprehend pictures of skeletal men behind the barbed wire fences of these same concentration camps. Also in August, Germany's foreign minister, Klaus Kinkel joined the chorus of those proposing a tribunal. In the West, public opinion endorsed the proposal.²⁹⁰ As a first step, the United States government, together with the other members of the Security Council, requested that states and international humanitarian organizations provide information and evidence regarding war crimes.²⁹¹

Media coverage continued to keep the Bosnian conflict in the public consciousness and there were growing demands for action. The pressure intensified and in October 1992 Tadeuz Mazowiecki, then the Special Rapporteur for the former Yugoslavia on the UN Human Rights Commission, called for the creation of an expert commission charged with assessing information and evidence of war crimes.²⁹² The commission began collecting evidence: 65,000 pages of documentation, 300 hours of videotape and a CD-ROM database.²⁹³ The commission armed itself with information – it knew of 900 prison camps, 90 paramilitary groups, 1,600 reports of rape and 150 mass graves – and in February 1993 an interim report was presented to the UN secretary general.²⁹⁴ The Security Council could

²⁸⁹ Ball, *Prosecuting War Crimes and Genocide: The Twentieth Century Experience*. P. 140

²⁹⁰ Power, *A Problem from Hell: America and the Age of Genocide*. P. 482

²⁹¹ Ibid. P. 482

²⁹² Ibid. P. 482

²⁹³ Bass, *Stay the Hand of Vengeance: The Politics of War Crime Tribunals*. P. 211

²⁹⁴ Ibid. P. 211

no longer resist the combined pressure from human rights organizations and the public, nor could it hide behind Cold War politics, so it established a court in The Hague.²⁹⁵

On February 22, 1993, the Security Council unanimously passed a resolution giving birth to the court: “The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (ICTY).”²⁹⁶ Still, many questioned why a tribunal was created to prosecute war crimes in Yugoslavia when other mass atrocities in Cambodia and Iraq, among others, were ignored.²⁹⁷ Scholar and former journalist, Gary J. Bass argues a series of factors must converge for countries to support a tribunal. States themselves must hold strong legal beliefs in order to view war crimes tribunals as legitimate.²⁹⁸ If states have military members who might be at risk by a tribunal’s operation, they are unlikely to support one. Conversely, if their own citizens are the victims of war crimes states are likely to champion its mission.²⁹⁹ Finally, two crucial groups bring pressure to bear on states in the creation of war crimes tribunals. NGOs and public opinion, informed by the media, play dominant roles in the formulation of government policy.³⁰⁰ However, these are only general criteria, which may influence the behaviour of states to support war crimes tribunals. The question remains: what specific factors influenced decision-makers in regards to Yugoslavia.

Events in Bosnia were frighteningly close, in both geography and historical memory, for Europeans. As the media embraced the term ‘ethnic cleansing’ to describe the collective violence in Yugoslavia, Europeans were reminded of the atrocities of the

²⁹⁵ Power, *A Problem from Hell: America and the Age of Genocide*. P. 483

²⁹⁶ Bass, *Stay the Hand of Vengeance: The Politics of War Crime Tribunals*. P. 215

²⁹⁷ Goldstone, *For Humanity: Reflections of a War Crimes Investigator*. P. 79

²⁹⁸ Bass, *Stay the Hand of Vengeance: The Politics of War Crime Tribunals*. P. 28

²⁹⁹ *Ibid.* P. 28

³⁰⁰ *Ibid.* P. 28

Holocaust.³⁰¹ Television images only reinforced European guilt and fears. Less than 50 years after the end of World War II, conflict was once again ripping apart a European nation. International human rights groups, Amnesty International and Human Rights Watch openly condemned both the violence and the lack of response by western countries. The NGOs using their own information, plus media reports, mobilized public opinion. The Commission of Experts reported to the UN what most people already knew from nightly newscasts. The UN acting through its Security Council, rather than through the long, laborious method of treaty agreement, established the Tribunal.

However, there were many voices, with varied reasons, calling for its establishment. Beyond law, politics, and public opinion – some, such as Tribunal Judge Theodor Meron argued there was simply a moral imperative to prosecute individuals responsible for egregious violations of human rights.³⁰² Others, like war correspondent Ed Vulliamy called for historical and legal reckoning in the aftermath of the conflict.³⁰³ Still, there were those who criticized the effort as being too little, too late, saying the international community turned its back until the worst crimes had occurred.³⁰⁴ Possibly the only area of consensus around the creation of the tribunal is the role of the media in bringing it about:

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 former Yugoslavia. Visual and written reports of the plight of victims of ethnic cleansing in Bosnia jolted the Security Council into taking the unprecedented step of creating a court as its own sub-organ. Never before had it even been contemplated or suggested that it should use its peacekeeping powers to that end. That ethnic cleansing was happening in Europe and that the Cold War had come to an end were crucial to the endeavour. There can be no doubt, however, that it was media exposure that triggered the decision.³⁰⁵

³⁰¹ Goldstone, *For Humanity: Reflections of a War Crimes Investigator*. P. 79

³⁰² Meron, *War Crimes Law Comes of Age*. P. 189

³⁰³ Vulliamy, "Neutrality and the Absence of Reckoning: A Journalist's Account." P. 605

³⁰⁴ Gutman and Rief, eds., *Crimes of War: What the Public Should Know*. P. 9

³⁰⁵ Goldstone, "Forward." P. 14

What journalists did not contemplate was their unexpected, and ongoing, role in the tribunal and the prosecution of international criminal law. Unquestionably, a key catalyst in the tribunal's creation was media coverage and the public's response to it. Media attention prompted the establishment of the Tribunal but the concept itself, a war crimes tribunal, was not new.

The International Military Tribunal in Nuremberg

In 1945, the undisputed victors of World War II were the Allies. Although clear winners on the battlefield, they had no clear policy with regards to the defeated enemy. The British, under Winston Churchill, wanted war criminals declared "outlaws" and executed.³⁰⁶ The British government and public believed trials would only discredit the legal system and instead urged the adoption of swift, summary execution for war criminals.³⁰⁷ In Russia, the Soviets advocated for the return of show trials. Prosecutor A.J. Vishinsky, who had helped to send thousands of people to their deaths during Stalin's purge, was ready and willing to do the same at Nuremberg.³⁰⁸ Across the Atlantic, Americans were deeply divided over what action to take. Roosevelt wanted to put all of Germany on trial. He held all Germans, not just a few Nazi leaders, responsible for what he called, "a lawless conspiracy against the decencies of modern civilization."³⁰⁹ Within Roosevelt's own cabinet, there was opposition to this thinking. Henry Stimson, the Secretary of War opposed Churchill's call for summary executions and Roosevelt's desire to try a nation. He campaigned for a war crimes tribunal wherein defendants would have the right to know the charges against them, the right to

³⁰⁶ Richard Overy, "The Nuremberg trials: international law in the making," From Nuremberg to The Hague, ed. Philippe Sands (Cambridge: Cambridge University Press, 2003). P. 3

³⁰⁷ Bass, Stay the Hand of Vengeance: The Politics of War Crime Tribunals. PP. 190-191

³⁰⁸ Ibid. P. 202

³⁰⁹ Ibid. P. 154

testify, call witnesses, and have counsel.³¹⁰ Stimson most likely would have lost his battle to prosecute, had it not been for the death of Roosevelt. His successor Harry S. Truman had been a judge and readily embraced the need and feasibility of trying war criminals.³¹¹ He chose Supreme Court Justice, Robert H. Jackson to serve as American Chief Prosecutor at Nuremberg.³¹²

Whereas the public and most legal scholars supported the creation of the ICTY in 1993, the same was not true in 1945. When Americans were polled in 1944 about how the Japanese should be treated after the war's end, pollsters received no shortage of suggestions:

"We should string them up and cut little pieces off them – one piece at a time."
"Torture them to a slow and awful death."
"Kill them in Pearl Harbor and sink them."
"Put them in Siberia and let them freeze to death."
"Turn them over to the Chinese."
"Put them in foxholes and [throw] fire bombs and grenades at them."
"Kill them like rats." ³¹³

If these suggestions seem lawless, legal scholars were not convinced that a tribunal was much better. The American Supreme Court Chief Justice, Harlan Fiske called the Nuremberg tribunal a "high-grade lynching party" saying that although it was "dressed up in the habiliments of the common law" it was still a "sanctimonious fraud."³¹⁴

Then in April 1945, American and British troops entered Dachau and Belsen publicly exposing the Holocaust. Throughout the war, the Allies knew about the existence of concentration camps but did not factor them into their military decisions. Tribunal prosecutors were forced to include the Holocaust in their indictments because of its shocking nature but the "suffering of the Jews was far from the first concern of the

³¹⁰ Overy, "The Nuremberg trials: international law in the making." P. 5

³¹¹ Ibid. P. 5

³¹² Robert H. Jackson Center, Website, Available: <http://www.roberthjackson.org/index.asp>.

³¹³ Bass, Stay the Hand of Vengeance: The Politics of War Crime Tribunals. P. 161

³¹⁴ Ibid. P. 25

American planners of Nuremberg.”³¹⁵ The Allies were prepared to prosecute military leaders for conventional war crimes but not the crimes witnessed in concentration camps. The law did not provide for these violations, nor the prosecution of civilians involved in them.³¹⁶ Despite the scope and severity of these crimes, Henry Stimson pushed for individual criminal culpability, a largely untried legal principle, for these offenses rather than invoking collective criminality against a nation or groups. On October 14, 1945 a formal indictment against 24 defendants was issued. They were charged with conspiracy to wage aggressive war, crimes against peace, war crimes, and crimes against humanity.³¹⁷ Warfare had become criminalized and each of these charges was considered a violation of international criminal law.

The Development of International Criminal Law

The International Military Tribunal (IMT) at Nuremberg proved to be a pivotal turning point for international humanitarian and criminal law but the roots of these go deeper. The ancient origins of humanitarian law can be traced to the philosophical teachings of Aristotle, Cicero, St. Augustine and St. Thomas Aquinas, all of whom espoused principles to distinguish between what they considered just and unjust wars.³¹⁸ The Middle Ages spawned the laws of chivalry whose purpose was to restrict the conduct of knights in battle.³¹⁹ In 1648, the Treaty of Westphalia formally regulated relations amongst states and their conduct in war, and a Swiss businessman, Henry Dunant spearheaded the Geneva

³¹⁵ Ibid. P. 180

³¹⁶ Overy, "The Nuremberg trials: international law in the making." P. 3

³¹⁷ Ibid. P. 23

³¹⁸ M. Cherif Bassiouni, "Crimes against Humanity," International Criminal Law, ed. M. Cherif Bassiouni, 2nd ed., vol. 1 (Ardsley, N.Y.: Transnational Publishers, 1999). P. 527

³¹⁹ Ibid. P. 529

Convention for the Amelioration of the Condition of the Wounded Armies in the Field, the first international treaty to address the sick and injured in war in 1864.³²⁰

This treaty, and its subsequent 20th century offspring, as well as the 1899 and 1907 Hague Conventions form the basis of modern law regulating conflict.³²¹ In the 19th century, states believed war was inevitable; the best to be hoped for was that the law would rein in its excesses. However, as to the legality of war itself, there was little debate. Individuals were not criminally responsible for war crimes and states could only be compelled to pay compensation to other states under certain circumstances:

In fact, with the exception of Hague Convention IV of 1907, no pre-World War I international documents concerning war crimes provided for international sanctions against either individuals or states for violating the rules of war. Article 3 of Hague Convention IV states 'a belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces. Thus, the issue of state responsibility was addressed, but no further references were made to the actual trial and punishment of those guilty of violating the laws of war.'³²²

The Hague laws govern the means and methods employed in warfare whereas the Geneva laws protect victims of conflict.³²³ Although these international conventions prohibited certain methods of waging war, and prescribed treatment for victims, their means of enforcement were circumscribed by national military law. It provided the only forum under which war crimes trials could take place.³²⁴ Compounding the problem of limited enforcement was the absence of criminality. The prohibited military methods outlined in the Hague Convention, although prohibited were not defined as criminal. There was neither an international criminal punishment attached to them nor an international

³²⁰ Ibid. P. 531

³²¹ Chris af Jochnick and Roger Normand, "The Legitimation of Violence: A Critical History of the Laws of War," Harvard International Law Journal 35.1 (1994). P. 52

³²² Pamela D. Alesky, "The Yugoslav War Crimes Tribunal and International Humanitarian Law," International Politics 35 (1998). P. 9

³²³ af Jochnick and Normand, "The Legitimation of Violence: A Critical History of the Laws of War." P. 52

³²⁴ Clapham, "Issues Of Complexity, Complicity And Complementarity: From The Nuremberg Trials To The Dawn Of The New International Criminal Court." P. 31

court where they might be tried.³²⁵ The state of the law in the 19th century – its vagueness and omission of enforcement mechanisms – meant that warfare was not criminalized and conversely acts of war and aggression, some would argue, were facilitated and legitimated by these laws.³²⁶

By World War I, states were manipulating The Hague laws to justify their own behaviour and condemn the enemy's. In reality, each side adopted malicious tactics including "the wholesale bombardment of civilian populations"³²⁷ and it was impossible to justify these acts under the existing conventions. These were criminal offenses. The first attempt to prosecute violations of international humanitarian law, as war crimes, did not go well. The Allies at the Paris Peace Conference following World War I attempted to try war criminals including Germany's Wilhelm II.³²⁸ In January 1919, an Allied and American commission was instituted to investigate the creation of a war crimes tribunal.³²⁹ The *1919 Report of the Commission on the Responsibilities of the Authors of War* enumerated a list of "crimes against civilization and humanity:"³³⁰

- i. murder and massacres
- ii. systematic terrorism
- iii. killing of hostages
- iv. torture of civilians
- v. deliberately starving civilians
- vi. rape
- vii. abduction of girls and women for prostitution
- viii. deportation of civilians
- ix. inhumane conditions of internment for civilians
- x. forced labor of civilians for military purposes
- xi. confiscation of property³³¹

³²⁵ Ibid. P. 31

³²⁶ af Jochnick and Normand, "The Legitimation of Violence: A Critical History of the Laws of War." P. 50

³²⁷ Ibid. P. 77

³²⁸ Bass, *Stay the Hand of Vengeance: The Politics of War Crime Tribunals*. P. 59

³²⁹ Ibid. P. 75

³³⁰ Alesky, "The Yugoslav War Crimes Tribunal and International Humanitarian Law." P.7

³³¹ Ibid. P.7

The attempt proved a disaster. There were no provisions in The Treaty of Versailles for the prosecution of these crimes. Its focus was on conventional war crimes committed by the Germans. The Treaty reflected the American position that “the laws of humanity could not be defined.”³³² Moreover, there were other obstacles to be overcome for war crimes to be prosecuted. Unlike WWII, Germany was not occupied following the first war and the Germans resisted the creation of a tribunal.³³³ The Americans, under Woodrow Wilson, channelled their energies into establishing the League of Nations believing it, rather than a war crimes tribunal, would resolve international conflict.³³⁴ Finally, both victors and vanquished believed states had the prerogative to engage in war, aggression was not criminalized, winners were entitled to dispense swift justice, and legal due process was not part of the package.³³⁵ However, the greatest challenge to war crimes prosecution may have been both the law and mindset of the international community at the time. Prior to World War II international law governed the behaviour of states, not individuals. Indeed, individuals had “no standing” and therefore did not legally exist.³³⁶ It was the London Agreement of 1945, which established the military tribunal at Nuremberg as a trial mechanism for prosecuting war criminals and laid the foundation for individual criminal responsibility, a cornerstone of international criminal law.³³⁷

Individual Criminal Responsibility

There is an interesting parallel between journalism, journalists, and international criminal law. Journalists often use an individual’s personal experience to convey a bigger story, i.e. the conflict and subsequent crimes that took place in Yugoslavia were often

³³² Ibid. P. 7

³³³ Bass, Stay the Hand of Vengeance: The Politics of War Crime Tribunals. PP. 59-60

³³⁴ Ibid. P. 104

³³⁵ Ibid. PP. 59-60

³³⁶ Goldstone, For Humanity: Reflections of a War Crimes Investigator. P. 75

³³⁷ Ibid. P. 75

recounted by stories focusing on what happened to individuals, either victims or perpetrators. In using trials to prosecute war criminals, international criminal law, like journalism, emphasizes the role and responsibility of the individual.

International criminal law as it is currently understood, “addresses individuals that use or abuse a state’s power potential of violence.”³³⁸ However, in 1945 the notion that individuals, rather than states, would be held criminally responsible for war crimes was largely without legal precedent. Individual criminal culpability allowed for distinction and differentiation.³³⁹ Not all Germans were guilty and not all guilty individuals shared the same degree of responsibility. Nuremberg prosecutors did not invent the concept of individual criminal culpability, it existed in the 19th century where it was first used to capture and punish pirates for crimes on the high seas,³⁴⁰ but the military tribunal gave shape and credence to the principle. The IMT rejected the theory that international law governed only states and could not punish individuals. Moreover, individuals would be held responsible for actions they carried out on behalf of the state when it acted outside of international law. Further, the law would not distinguish based on rank or status but hold all individuals – from footsoldier to national leader – criminally responsible.³⁴¹ American Chief Prosecutor, Robert H. Jackson in his opening statement articulated why individuals must be held accountable and given no legal refuge in the state or organizations:

The idea that a state, any more than a corporation, commits crimes, is a fiction. Crimes are always committed only by persons. While it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity.³⁴²

³³⁸ Immi Tallgren, "La Grande Illusion," *The Canadian Journal of Law & Jurisprudence* 15 (2002). P. 297

³³⁹ Goldstone, *For Humanity: Reflections of a War Crimes Investigator*. P. 76

³⁴⁰ Robertson, *Crimes Against Humanity: The Struggle for Global Justice*. P. 208

³⁴¹ *Ibid.* P. 219

³⁴² Robert H. Jackson Center.

When the defence argued international law did not apply to individuals the tribunal judges rejected this proposition:

Many other authorities could be cited, but enough has been said to show that individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.³⁴³

Nuremberg prosecuted individuals under three categories of offences: crimes against peace, crimes against humanity, and war crimes.

War Crimes and International Humanitarian Law

War crimes are serious violations of (i) international customary law; (ii) treaty law; or (iii) an offense is considered a war crime by the Statute of an international tribunal.³⁴⁴ There are five broad classes of war crimes:

1. Crimes committed against persons not taking part, or no longer taking part, in armed hostilities.
2. Crimes against enemy combatants or civilians committed by resorting to prohibited methods of warfare.
3. Crimes against enemy combatants and civilians involving the use of prohibited means of warfare.
4. Crimes against specially protected persons and objects (medical personnel, UN peacekeepers and ICRC workers).
5. Crimes consisting of improperly using protected signs and emblems.³⁴⁵

The IMT Charter defined “war crimes as violations of the laws and customs of war by soldiers and civilians. The criminal acts included murder, ill-treatment, deportation of a civilian population for slave labor or any other purpose; murder or ill-treatment of prisoners of war or persons on the seas; killing of hostages, plunder of public or private property;

³⁴³ Clapham, "Issues Of Complexity, Complicity And Complementarity: From The Nuremberg Trials To The Dawn Of The New International Criminal Court." P. 33

³⁴⁴ Antonio Cassese, International Criminal Law (Oxford University Press, 2003). P. 51

³⁴⁵ Ibid. PP. 55-57

wanton destruction of municipalities; and devastation not military necessity.”³⁴⁶ In 1993, the Statute of the ICTY, building on the legal legacy of Nuremberg, said the Tribunal “shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:”

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.³⁴⁷

The Tribunal’s Statute expands the list of offenses constituting war crimes and gives the crimes greater specificity than what was first detailed at Nuremberg. In a 1995 Appeals Chamber decision, the Tribunal enumerated the necessary elements required for an act to be considered a war crime and for an individual to be prosecuted under Article 3. The *Tadić* (*Interlocutory Appeal*) decision stated:³⁴⁸

- (i) war crimes must consist of a ‘serious infringement’ of an international rule, that is to say ‘must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim;’
- (ii) the rule violated must either belong to the body of customary law or be part of an applicable treaty;
- (iii) ‘the violation must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule’; in other words, the conduct constituting a serious breach of international law must be criminalized.³⁴⁹

³⁴⁶ "Charter Of The International Military Tribunal," The Avalon Project At Yale Law School (1945).

³⁴⁷ "Statute of the International Criminal Tribunal for the Former Yugoslavia," (1993).

³⁴⁸ Prosecutor v. Dusko Tadic a/k/a "Dule", Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction. (IT-94-1) Appeals Chamber ICTY 1995.

³⁴⁹ Cassese, International Criminal Law. P. 47

International Humanitarian Law

War crimes are then serious violations of international humanitarian law, which entail individual criminal responsibility. This has been discussed. What then is (i) customary law and; (ii) what treaty law is applicable?

War crimes fall under the larger rubric of international humanitarian law. Its modern origins stem from two different sources, treaty and customary law. Customary law is not as 'black and white' as treaty law rather it arises out of the general and consistent practice of states and their sense of legal sense of obligation to the practice.³⁵⁰ It is customary law, through its acknowledged and accepted practice by states that gives treaty law greater authority. Many scholars and jurists argue the 1949 Geneva Conventions, as well as significant portions of the Additional Protocols and the 1907 Hague Convention, constitute customary law.³⁵¹ The law enumerated in these treaties thus applies to all states through customary law whether or not they are Conventions.

Another legal source for war crimes is conventions. The applicable treaty law encompasses the vast body of rules known as The Hague and Geneva laws, also referred to as *jus ad bellum* (the circumstances under which states can acceptably wage war) and *jus in bello* (guidelines for fighting fairly once war has begun)³⁵². The Hague Conventions of 1899 and 1907 are rules governing various categories of lawful combatants, the means and methods of warfare, the treatment of individuals not involved in armed conflict such as civilians, wounded and the sick, and those who can no longer take part in hostilities such as prisoners of war.³⁵³ The 'Geneva laws' are made up of the four 1949 Geneva Conventions

³⁵⁰ Theodor Meron, "Customary Law," *Crimes of War: What the Public Should Know*, eds. Roy Gutman and David Rief (New York & London: W.W. Norton & Company, 1999). P.113

³⁵¹ Ibid. P. 114

³⁵² Michelle Maiese, *Jus ad bellum*, Available: http://www.beyondintractability.org/m/jus_ad_bellum.jsp.

³⁵³ Cassese, *International Criminal Law*. P. 48

and the two Additional Protocols of 1977. This body of law regulates the treatment of individuals who do not, or no longer, participate in the conflict.

States also look to the U.N. Charter as a legal source governing warfare.³⁵⁴ Article 2 of the Charter states: "All members shall refrain in their international relations from the threat or the use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations" and in Article 51: "Nothing in the present Charter shall impair the inherent right of the individual or collective self-defense if an armed attack occurs against a Member of the United Nations."³⁵⁵ These broad provisions address the "why" a state may, or may not, enter into armed conflict but the "how" – and it is the "how" which leads to war crimes – is still governed by conventions drawn up a century ago. The 1899, and 1907, Hague Conventions constitute the main rules on how warfare is conducted, and have become part of international customary law.³⁵⁶

The Hague laws are rooted in another century and some scholars have argued it is time to "draw up a revised and up-to-date statement of what the laws are, as distinct from the customs of war."³⁵⁷ Indeed the irrelevance of the law governing war was already plain when Nuremberg prosecutors put forward their case. Distinctions between soldier and civilian, strategic gain and complete victory started to blur in WWI and had almost disappeared by WWII:

For the truth of the matter was that by the end of the Second World War everybody knew that technical developments in the instruments of violence had made the adoption of "criminal" warfare inevitable. It was precisely the distinction between soldier and civilian, between

³⁵⁴ Karma Nabulsi, "Jus ad Bellum/Jus in Bello," *Crimes of War: What the Public Should Know*, eds. Roy Gutman and David Rief (New York & London: W.W. Norton & Company, 1999). P. 223

³⁵⁵ *Charter of the United Nations*, June 26, 1945, Available: <http://www.un.org/aboutun/charter/>.

³⁵⁶ Leslie C Green, "International Regulation of Armed Conflicts," *International Criminal Law*, ed. M. Cherif Bassiouni, vol. Vol. 1 (Ardsley, NY: Transnational, 1999). P. 365

³⁵⁷ *Ibid.* P. 379

army and home population, between military targets and open cities, upon which the Hague Convention's definitions of war crimes rested, that had become obsolete.³⁵⁸

The Hague laws never contemplated atom bombs or concentration camps nor other means and methods of warfare aimed at soldier and civilian, foreigner and citizen.

Just as there is confusion over customs and laws regarding warfare, there is an equal amount of uncertainty over *jus in bello* or the laws governing how civilians and combatants should be treated. There are those, such as the International Committee of the Red Cross, who prefer to see this as the law to protect individuals and lessen the excesses of war. Military leaders, on the other hand, see *jus in bello* as part of the laws of war "drawn directly from the customs and practices of war itself, and intended to serve State armies."³⁵⁹

The impetus to create broadened legal protection for civilians and combatants in conflict grew out of Nuremberg. World War II, with its global reach and lethal military might, wreaked untold havoc on citizens and soldiers alike and the international community responded with the 1949 Geneva Conventions. The four Conventions designate certain war crimes as grave breaches meaning they are subject to universal jurisdiction, individual criminal culpability, and the obligation by states to prosecute or extradite those accused of these violations.³⁶⁰ Each of the four Geneva Conventions governs 'protected persons,' i.e., those wounded or sick on land, at sea, prisoners of war, and civilians. Crimes against protected persons are grave breaches. In summary grave breaches are:

- i. wilful killing;
- ii. torture or inhumane treatment (including medical experiments);
- iii. wilfully causing great suffering or serious injury to body or health;
- iv. extensive destruction or expropriation of property not justified by a military necessity and carried out unlawfully and wantonly;
- v. compelling a prisoner of war or civilian to serve in the forces of the hostile power;

³⁵⁸ Hannah Arendt, *Eichman in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books, 1994). P. 256

³⁵⁹ Nabulsi, "Jus ad Bellum/Jus in Bello." P. 223

³⁶⁰ Steven R. Ratner, "War Crimes, Categories of," Ibid. P. 374

- vi. wilfully depriving a prisoner of war or protected civilian the rights of a fair and regular trial;
- vii. unlawful deportation or transfer of a protected civilian;
- viii. and taking of hostages.”³⁶¹

Additional Protocol I of 1977 expanded this list to include:

- ix. certain medical experimentation;
- x. making civilians and nondefended localities the object or inevitable victim of attack;
- xi. the perfidious use of the Red Cross or Red Crescent emblem;
- xii. transfer of an occupying power or parts of its population to occupied territory;
- xiii. unjustifiable delays in repatriation of POWs;
- xiv. apartheid;
- xv. attack on historic monuments;
- xvi. and depriving protected persons of a fair trial.”³⁶²

These violations are only deemed grave breaches when they happen within international armed conflict. In internal armed conflict, these violations may be deemed war crimes but they are not grave breaches.³⁶³ That legal concept is in the process of changing. The Appeals Chamber in *Tadić (Interlocutory Appeal)* held that “a customary rule is *in statu nascendi* that is in the process of forming, whereby ‘grave breaches’ can also be perpetrated in internal armed conflicts...”³⁶⁴

Crimes Against Humanity

The term “crimes against humanity” dates to 1915 when the governments of France, Great Britain and Russia issued a declaration condemning the Turkish government’s massacre of Armenians calling it “crimes against civilization and humanity.”³⁶⁵ However, they were not prosecuted until Nuremberg when crimes against humanity became an extension of war crimes.³⁶⁶ Today many scholars and jurists believe Nuremberg’s greatest achievement was its prosecution of crimes against humanity because it marked the

³⁶¹ The 1949 Geneva Conventions, Available: <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>.

³⁶² “Additional Protocol I of 1977,” (1977).

³⁶³ Cassese, *International Criminal Law*. P. 56

³⁶⁴ Ibid. P. 54

³⁶⁵ Bassiouni, “Crimes against Humanity.” PP. 536-537

³⁶⁶ Ibid. P. 525

end of absolute state power over citizens and the beginning of the “recognition of individuals’ nascent role in international law.”³⁶⁷

It has been suggested that the Nuremberg Tribunal’s recognition of crimes against humanity as a criminal offense entailing individual criminal responsibility represented the consecration of private individuals on the international scene. Judges in The Hague and in Arusha have given credence to this assumption by addressing individuals directly, by punishing those guilty of serious violations of international humanitarian law in the name of the international community, and by unveiling an area of international law where the state has no role, no status, and no privilege. The judges have identified, with respect to crimes against humanity, a definite schism between the individual, both as victim and perpetrator, and the state.³⁶⁸

The Nuremberg Charter identified crimes against humanity as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds.”³⁶⁹ Under Article 6(c) of the Charter, a crime against humanity was an “inhuman act,” an offense not previously recognized by international or municipal law.³⁷⁰ This absence of written law posed a significant legal challenge: how to prosecute individuals for violating laws which did not exist at the time the acts were committed. Moreover, international law then permitted states to act towards their own citizens in whatever manner they saw fit. In response to this dilemma, the American War Department drafted a charge of “conspiracy to wage aggressive and criminal war” arguing “major war criminals collectively entered into a common plan or enterprise aimed at the establishment of complete domination of Europe and eventually the world.”³⁷¹ Conspiracy, as a legal concept, was thought sufficiently broad to capture everyone whatever his or her role in specific crimes. It is based on the notion that if an organization uses illegal methods or illegal ends then “each member of the group

³⁶⁷ Guenael Mettraux, “Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda,” *Harvard International Law Journal* 43 (2002). P. 237

³⁶⁸ Ibid. P. 315

³⁶⁹ Meron, *War Crimes Law Comes of Age*. P. 193

³⁷⁰ Arendt, *Eichman in Jerusalem: A Report on the Banality of Evil*. p. 257

³⁷¹ Overy, “The Nuremberg trials: international law in the making.” P. 17

is liable for the acts of all other knowing members.”³⁷² Paradoxically, Nuremberg tried individuals by using a type of collective criminality.

As horrific as crimes against humanity were, their prosecution did not stop critics from denouncing Nuremberg as nothing but victor’s justice and conveniently retrospective in nature. The principle of *nullum crimen et nulla poena sine lege* or “no crime and no punishment without law” was, to some, being circumvented by prosecutors.³⁷³ In turn, prosecutors argued the indictment covered acts known to be criminal, and would have been considered criminal in Axis countries except that the law had been distorted by dictatorship.³⁷⁴ American Chief Prosecutor, Robert H. Jackson was blunt in his assessment of the victor’s justice criticism:

Aren’t murder, torture, and enslavement crimes recognized by all civilized people? What we propose is to punish acts which have been regarded as criminal since the time of Cain and have been so written in every civilized code.³⁷⁵

Nuremberg prosecuted crimes against humanity but only when linked to war. The Tribunal pursued those who violated the international law of state sovereignty or “only those crimes against humanity and war crimes committed *after* Hitler crossed an internationally recognized border. Nazi defendants were thus tried for atrocities they committed during but not before World War II...”³⁷⁶ Today there is no need to cross an international border or be engaged in armed conflict for crimes against humanity to be legally recognized. The ICTY ruled that a nexus need not be established between armed conflict and crimes against humanity and this principle is reflected in the 1998 Rome Statute

³⁷² Ball, Prosecuting War Crimes and Genocide: The Twentieth Century Experience. P. 46

³⁷³ Ibid. P. 49

³⁷⁴ Overy, "The Nuremberg trials: international law in the making." P. 23

³⁷⁵ Ball, Prosecuting War Crimes and Genocide: The Twentieth Century Experience. P. 49

³⁷⁶ Power, A Problem from Hell: America and the Age of Genocide. P. 49

of the International Criminal Court.³⁷⁷ Still, it is the Nuremberg Charter, which took the unprecedented step of defining crimes against humanity and in doing so, embedded them within positive international law.³⁷⁸

Unlike torture, genocide or war crimes, crimes against humanity do not have their own specialized convention although there are eleven international texts listing them, including the tribunal statutes for Yugoslavia and Rwanda as well as the International Criminal Court.³⁷⁹ Nevertheless, there are common features to the offenses labelled crimes against humanity:

1. They constitute a *serious attack on human dignity* or a grave humiliation or degradation of one or more human beings
2. They are events which are either *part of a government policy*, or of a *widespread or systematic practice* of atrocities tolerated, condoned, or acquiesced in by a government or a de facto authority.
3. They are *prohibited* and may consequently be punished regardless of whether they are perpetrated *in time of war or peace*.
4. The victims of the crime may be *civilians* or, in the case of crimes committed during armed conflict, *persons who do not take part, or no longer take part in armed hostilities*, as well as under international customary law (but not the ICTY Statute) enemy combatants.³⁸⁰

These are the common features of the crime and then there are the specific acts or omissions, known as *actus reus* that comprise the objective elements of crimes against humanity:

1. **Intentional killing or murder**, which may or may not be, premeditated.
2. **Extermination** be it mass killing or creating a set of conditions such as lack of food or medicine designed to destroy part of a population
3. **Enslavement** meaning exercising the powers of ownership over a person including the power to engage in the trafficking of people
4. **Deportation** or forcible transfer of population

³⁷⁷ William Shawcross, "Persecutions On Political, Racial, Or Religious Grounds," Crimes of War: What the Public Should Know, eds. Roy Gutman and David Rief (New York & London: W. W. Norton & Company, 1999). P. 274

³⁷⁸ M. Cherif Bassiouni, "Crimes against Humanity," Ibid. (W.W. Norton & Company). P. 107

³⁷⁹ Ibid. P. 107

³⁸⁰ Cassese, International Criminal Law. P. 64

5. **Imprisonment** or severe deprivation of personal liberty
6. **Torture**, that is intentional infliction of severe pain or suffering be it physical or mental
7. **Sexual violence** including rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization
8. **Persecution** against any identifiable group or collectivity on political, racial, national ethnic, cultural, religious, gender, or other grounds
9. **Enforced disappearance of persons**, meaning the arrest, detention or abduction of individuals with the support or acquiescence of the State
10. **Other inhumane acts** of a similar character and gravity intentionally causing suffering or injury either physical or mental.³⁸¹

Then there is the accused and the subjective elements, or *mens rea* that must be present to prove an individual has committed a crime against humanity:

(1) intent

- (a) the perpetrator must have intent to commit the underlying offense(s)
- (b) motive is irrelevant
- (c) it is irrelevant whether the accused intended his acts to be directed against the targeted population or merely the victim
- (d) discriminatory intent only required for persecution

(2) knowledge

- (a) the perpetrator must knowingly participate in a widespread or systematic attack, i.e., have knowledge of the attack and the nexus between his acts and that context
- (b) alternatively, the perpetrator must have knowledge of the attack and taken the risk his acts were part of it
- (c) knowledge of the details of the attack not required
- (d) no requirement that the perpetrator must approve of the context
- (e) factors from which to infer knowledge of context³⁸²

Genocide

The word “genocide” has made its way into the contemporary legal lexicon and perhaps more importantly, the public consciousness through the media. Broadly speaking, it is the intentional killing, destruction, or extermination of groups or members of a group.³⁸³

The press uses the word freely. One only has to pick up a newspaper or listen to a newscast to be exposed regularly to the term “genocide.” Over the last 30 years, journalists have

³⁸¹ Ibid. PP. 74-80

³⁸² Human Rights Watch: International Justice Program, Genocide, War Crimes and Crimes Against Humanity: Topical Digests of the Case Law of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia, 2004, Human Rights Watch, Available: <http://hrw.org/reports/2004/ij/index.htm>.

³⁸³ Cassese, International Criminal Law. P. 96

reported on genocides in Cambodia, Iraq, Rwanda, Bosnia, and most recently the Darfur region of Sudan. However, despite extensive reportage, there is still confusion about what is meant by the term “genocide.” There is a significant chasm in meaning between its popular usage by the media and its legal definition. Another problem lies in the alternation by journalists of the terms “ethnic cleansing” and “genocide.” Whereas genocide is a specific crime with its own convention, ethnic cleansing is a generic term and no specific crime goes by that name although the practice covers a range of criminal offenses.³⁸⁴ In 1993 the UN Commission of Experts, reporting to the Security Council on events in Bosnia, defined ethnic cleansing as “rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area.”³⁸⁵ The tactics can include murder, torture, rape, arrest and detention, summary execution, confinement of civilians, military attacks on civilians, destruction of property including cultural property, and using civilians as human shields.³⁸⁶ Perpetrators are not charged with “ethnic cleansing,” rather they could be indicted for crimes against humanity or genocide.

In 1944, Polish scholar and attorney, Raphael Lemkin wrote *Axis Rule In Occupied Europe*, wherein he argued for a seismic change in international law. He pushed for the inclusion of what were then “unarticulated laws of humanity”³⁸⁷ into a new international criminal offense. Lemkin, whose family was destroyed by the Nazis, fled Europe for the United States to begin his life’s mission to have genocide recognized as a transnational offense, one without borders and beyond state jurisdiction. He coined the term ‘genocide’

³⁸⁴ Roger Cohen, “Ethnic Cleansing,” *Crimes of War: What the Public Should Know*, eds. Roy Gutman and David Rief (New York & London: W.W. Norton & Company, 1999). P. 136

³⁸⁵ Ibid. P. 136

³⁸⁶ Ibid. P. 138

³⁸⁷ Matthew Lippman, “Genocide,” *International Criminal Law*, ed. M. Cherif Bassiouni, 2 ed., vol. 1 (Ardsley, New York: Transnational Publishers, 1999). P. 590

to describe “the destruction of a nation or of an ethnic group.”³⁸⁸ Genocide derives from the Greek word *genos*, meaning race or tribe and the Latin *cide*, to kill.³⁸⁹ Lemkin reasoned genocide was not necessarily one swift, decisive act to exterminate a group but could be a slow, methodical, suffocating process. It had two distinct steps in its execution:

1. Destructive action aimed at a group’s culture, institutions, language, religion, and physical integrity.
2. The elimination of a group’s social and cultural life and the imposition of the perpetrators’ values on the persecuted group.³⁹⁰

Nuremberg did not prosecute Nazi leaders specifically for genocide. It was not envisaged as a separate category of crimes but as a subset of crimes against humanity. Although genocide was not a category of crime under the Nuremberg Charter, the term was used in its indictment of major war criminals and in the opening and closing statements by prosecutors. They accused the Nazis of “having conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian population of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups.”³⁹¹

Genocide, as a distinct international crime came into its own when the UN General Assembly passed the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. However, the Convention is an interesting mix of legal strengths and failings. Its merits include:

- i. Setting out a careful definition of genocide;
- ii. Punishing other acts connected with genocide, such as conspiracy and complicity;

³⁸⁸ Ibid. P. 590

³⁸⁹ Ibid. P. 590

³⁹⁰ Ibid. P. 590

³⁹¹ Diane F. Orentlicher, "Genocide," Crimes of War: What the Public Should Know, eds. Roy Gutman and David Rief (New York & London: W.W. Norton & Company, 1999). P. 155

- iii. Prohibiting genocide regardless of whether it happens in war or peace;
- iv. Considering the crime subject to individual criminal responsibility and entailing state responsibility in that a state can be the subject of an international dispute at the ICJ for engaging in genocide.³⁹²

Article I states genocide is not only a crime under international law but parties to the Convention are committed to preventing and punishing it. The charge is repeated in Article VI:

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.³⁹³

However, therein is a problem. Genocide is confusingly enforced. The enforcement mechanism in the Convention envisages trials in the states where genocide has occurred or before an international court. In 1948, there was no international criminal court. Moreover, states that commit acts of genocide are unlikely to prosecute them. Further, Article VIII indicates any party to the convention may call upon the UN to take action to prevent or suppress genocide, but Article IX confers jurisdiction on the ICJ to adjudicate disputes between states over the interpretation, application or fulfilment of the Convention.³⁹⁴

Politicians, diplomats, and policy analysts often debate whether a crisis can be labelled a genocide. The debate becomes a twisted discussion about numbers, i.e. how many people must be killed or expelled from their homes for a crisis to be labelled genocide. There is no number. The Genocide Convention defines the crime as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:”

³⁹² Cassese, *International Criminal Law*. P. 96

³⁹³ "Convention On The Prevention And Punishment Of The Crime of Genocide," (1948.)

³⁹⁴ Cassese, *International Criminal Law*. P. 97

- i. Killing members of the group;
- ii. Causing serious bodily or mental harm to members of the group;
- iii. Deliberately inflicting on the group the conditions of life calculated to bring about its physical destruction in whole or in part;
- iv. Imposing measures intended to prevent births within the group;
- v. Forcibly transferring children of the group to another group.³⁹⁵

To convict an individual for genocide he or she must be found guilty of perpetrating one of these acts with the intent to destroy all or part of a protected group.

Briefly, to distinguish among genocide, crimes against humanity and war crimes there are a few things to keep in mind. To some degree crimes against humanity overlap with genocide and war crimes. However, crimes against humanity, unlike genocide, do not require intent to destroy in whole or in part a protected group, but rather target a given group through carrying out a policy of widespread or systematic violations.³⁹⁶ Although genocide and crimes against humanity share similar physical elements, i.e. the violent acts committed under their respective headings, the former has a mental element of intent, indeed intent to destroy, attached to the crime. Crimes against humanity are distinguishable from war crimes in that they can take place in war and in peace.³⁹⁷

The ICTY's Statute, which defines the operation and jurisdiction of the *ad hoc* tribunal, reflects both the legal legacy of Nuremberg and the subsequent conventions on genocide and war crimes. It was drafted to include only the most well established legal principles so as to avoid the charges of *nullem crimen* levelled against the Nuremberg Tribunal.

Conclusion:

³⁹⁵ "Convention On The Prevention And Punishment Of The Crime of Genocide,"

³⁹⁶ M. Cherif Bassiouni, "Crimes against Humanity," Crimes of War: What the Public Should Know, eds. Roy Gutman and David Rief (New York & London: W.W. Norton & Company, 1999). P. 108

³⁹⁷ Ibid. P. 108

How do journalists, as witnesses and global citizens, understand their place and role within international criminal law and war crimes tribunals? What is their responsibility in bearing witness to war crimes, genocide or other atrocities? Crimes against humanity have achieved a stature that goes well beyond classes of offenses or legal doctrine. They are part of what writer Michael Ignatieff calls modern moral universalism:

If we take it for granted now that suffering strangers are our responsibility, it is because a century of total destruction has made us ashamed of that cantonment of moral responsibilities by nation, religion, or region that resulted in the abandonment of the Jews. Modern moral universalism is built upon the experience of a new kind of crime: the crime against humanity.³⁹⁸

It is within this moral milieu that journalists find themselves when they are asked to testify at the ICTY. International criminal law reflects a new set of tenets embraced by the global community that emphasizes our shared and universal responsibilities to each other. When confronted with the most horrific crimes, recognized by both international law and society, how should journalists weigh their shared responsibilities as global citizens against their professional duty, often undertaken at great personal risk, to alert the public to these atrocities? This is a complex balancing act for journalists. The Tribunal's *Rules of Evidence and Procedure*, as will be seen in Chapter 5, does not provide any help. There are no rules or procedural guidelines that structure the relationships of journalists, as witnesses, to the Tribunal. Although, as discussed in this chapter, there are very particular evidentiary elements that must be met in order to prove war crimes, genocide or crimes against humanity, there does not exist any specific evidentiary or procedural rules to inform, structure, or protect the role of journalists as witnesses. This absence of rules has made some journalists apprehensive about testifying and some prosecutors too hasty in using journalists' testimony before testing the evidence and disregarding journalists' concerns.

³⁹⁸ Ignatieff, *The Warrior's Honor*. P. 19

Evidence & Procedure

*The Randal Case has turned into a test, not only of the relationship of journalists to international justice, but also of the functioning of the first U.N. criminal tribunal set up since the Nuremberg trials. Moreover, it has been a wake-up call to our profession, which put aside its usual anarchy and rallied behind the notion that journalists deserve procedural protection before this court*³⁹⁹.

Introduction

For journalists the indictment and subsequent prosecution of Radoslav Brdjanin is the most important case to come before the ICTY, as it brought the issue of journalist testimony directly before the court. Counsel for the Prosecution in *Brdjanin*, Joanna Korner called 135 live witnesses and used 104 written statements.⁴⁰⁰ However, it was when she submitted a newspaper article by Washington Post correspondent, Jonathan Randal and then sought to subpoena him as a witness that the debate over the role of journalists as witnesses and the evidentiary value of their reportage came to the fore.

In order to understand why the prosecution sought the testimony of Jonathan Randal, and other journalists in other proceedings, it is crucial to understand how cases are tried at the ICTY. There are significant procedural, evidentiary and organizations hurdles that must be overcome throughout the course of each prosecution. There are language barriers, reluctant witnesses, insufficient witnesses because they are dead or traumatized, intimidation of witnesses who do appear, a perception that the court is unfairly tilted towards the prosecution, inadequate documentary evidence and too great a reliance on hearsay. This is only a small sample of the challenges inside Trial Chambers. With so many potential impediments, cases are slow and laborious, taking years from the time of an initial

³⁹⁹ Gutman, "Consequences Occur When Reporters Testify; A Reporter Urges Journalists to be Better Watchdogs of the War Crimes Tribunal Process."

⁴⁰⁰ Brdjanin Case (IT-99-36) Case Information Sheet Trial Chamber II, Section A 1999.

indictment to the conclusion of a trial judgment, let alone an appeals decision. The question then is why would Trial Chambers – and more specifically, the Office of The Prosecution – not work cooperatively with witnesses, such as journalists, to expedite cases and ensure that all possible relevant evidence is made available. My discussion in this case will demonstrate that granting qualified privilege to war correspondents added another obstacle to the marshalling of evidence for either side. The ICTY needs to develop evidentiary and procedural rules, which will facilitate the expeditious and smooth prosecution of cases – and thereby further international criminal justice – without violating due process or risking the rights of the accused.

This chapter will examine *Brdjanin*, and other cases to a lesser extent, focusing on evidentiary obstacles and challenges, including those posed by the use of journalist testimony, to argue that the Tribunal needs to establish a cooperative, defined, and non-adversarial relationship with journalists. War correspondents have valuable, sometimes crucial, information for the prosecution of war crimes but there must be a clear set of guidelines and/or rules for obtaining and using their evidence. Failure to define the evidentiary relationship between journalists and international war crimes tribunals may not only mean justice delayed but potentially justice denied. Journalists do not want to be another evidentiary obstacle in Trial Chambers rather they “want to see these thugs behind bars, just like anybody would...”⁴⁰¹

The Indictment of Radoslav Brdjanin

Radoslav Brdjanin was charged with two counts of genocide, five counts of crimes against humanity, two counts of the violations of the laws or customs of war, and three

⁴⁰¹ "Interview With Roy Gutman"

counts of grave breaches of the 1949 Geneva Conventions.⁴⁰² He was charged based on individual criminal responsibility and superior criminal responsibility. Specifically his charges read as follows:

- Count 1: Genocide
- Count 2: Complicity of genocide
- Count 3: Persecutions as a crime against humanity
- Count 4: Extermination as a crime against humanity
- Count 5: Wilful killing as a grave breach of the 1949 Geneva Conventions
- Count 6: Torture as a crime against humanity
- Count 7: Torture as a grave breach of the 1949 Geneva Conventions
- Count 8: Deportation as a crime against humanity
- Count 9: Forcible transfer as a crime against humanity
- Count 10: Extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly as a grave breach of the 1949 Geneva Conventions
- Count 11: Wanton destruction of cities, towns and villages or devastation not justified by military necessity as a violation of the laws and customs of war
- Count 12: Destruction or wilful damage done to institutions dedicated to religion as a violation of the laws and customs of war.⁴⁰³

The trial commenced on January 23, 2002 with the Prosecution submitting its case, including 2,736 exhibits. In response, the Defence started on October 14, 2003, called only 19 witnesses (compared to the Prosecution's 135 live witnesses and 104 written statements), and filed 314 exhibits. The trial took 284 days in total with the Trial Chamber issuing its judgement on September 1, 2004.

Background

In 1990, democratic elections were held for the first time in Bosnia and Herzegovina and the electoral race was among three main parties, each representing one of the three key ethnic groups within Bosnia: Muslims, Croats, and Serbs. At the time of the election, there were growing tensions between the various republics, including Bosnia, which comprised the former Socialist Federal Republic of Yugoslavia ("SFRY"). The Party

⁴⁰² Brdjanin Case (IT-99-36) Case Information Sheet.

⁴⁰³ Ibid.

of Democratic Action (“SDA), identified mostly with Bosnian Muslims, won the election. The victory made Serbs apprehensive about their ability to retain political control in Yugoslavia. The Serbian Democratic Party (“SDS”) in Bosnia began the creation of a separate Serbian entity within the republic and in September 1991 formed the Autonomous Region of Krajina (“ARK”).⁴⁰⁴ In October, a separate Serbian Assembly was formed in Bosnia and the geographical region comprising the ARK became the Serbian Republic of Bosnia and Herzegovina, later “Republika Srpska”.⁴⁰⁵ The SDS viewed both Croats and Muslims living within their newly formed state as a threat to its survival and began disseminating propaganda that portrayed the two groups “as fanatics intending to commit genocide on the Serbian people to gain control of Bosnia and Herzegovina.”⁴⁰⁶ Beginning in March 1992, army, paramilitary, territorial defence, police units and civilians armed by these various forces seized control of the municipalities under the ARK governing body. “Crisis Staffs” were created to co-ordinate and carry out ethnic cleansing in the new Republika Srpska. On May 5, 1992, the ARK Crisis Staff named its first President, Radoslav Brdjanin. Brdjanin had gone from being a civil engineer working in the construction industry in 1990 to a key government figure who, before the close of the decade, would find himself indicted by a war crimes tribunal.

Jonathan Randal

On February 11, 1993 Jonathan Randal, a war correspondent reporting on the Bosnian conflict for *The Washington Post*, wrote a story entitled “Preserving the Fruits of Ethnic Cleansing; Bosnian Serbs, Expulsion Victims See Campaign as Beyond Reversal”⁴⁰⁷

⁴⁰⁴ The Prosecutor Of The Tribunal Against Radoslav Brdjanin, Sixth Amended Indictment Trial Chamber II, Section A, ICTY 1999.

⁴⁰⁵ Ibid.

⁴⁰⁶ Ibid.

⁴⁰⁷ Jonathan C. Randal, "Preserving the Fruits of Ethnic Cleansing; Bosnian Serbs, Expulsion Victims See Campaign as Beyond Reversal," *The Washington Post* February 11 1993.

in which he described the ethnic cleansing then underway in Banja Luka. He reported that non-Serbs were being forced from their homes and jobs, and thousands of Muslims were attempting to flee the city. Randal interviewed a number of people for the piece including Bosnian-Serb housing administrator, Radoslav Brdjanin.

In the article, Randal used a number of quotes from Brdjanin to describe the policy being carried out in the region, in which Brdjanin's attitude towards international reaction to the Bosnian Serb policies was clear. Brdjanin was quoted in the article as saying, "those unwilling to defend [Bosnian Serb territory] must be moved out" in order to "create an ethnically clean space," and that Serbia paid "too much attention to human rights" and that "we don't need to prove anything to Europe anymore...we are going to defend our frontier at any cost...and wherever our army boots stand, that's the situation."⁴⁰⁸

In 1999, Radoslav Brdjanin was indicted by the ICTY and the Prosecution sought to admit the article into evidence.⁴⁰⁹ Brdjanin's defence counsel objected and argued it wanted the right to examine Randal if the article was admitted. The Prosecution asked Randal to testify voluntarily. He refused and the Prosecution requested a subpoena from the Trial Chamber. It issued one on January 29, 2002.

The Prosecution argued Randal's evidence was "relevant to establishing that the Accused possessed the intent required for several of the crimes charged."⁴¹⁰ The Defence said it wanted to examine Randal because "the statements attributed to Brdjanin were not accurately reported" and it wanted to "call into question the accuracy of the quotations."⁴¹¹ Legally, Randal's evidence was arguably hearsay. The quotations attributed to Brdjanin were

⁴⁰⁸ Ibid.

⁴⁰⁹ Prosecutor v. Radoslav Brdjanin: Decision on Prosecution's Second Request for a Subpoena of Jonathan Randal. (IT-99-36) Trial Chamber II, ICTY 2003. Para 2

⁴¹⁰ Prosecutor v. Radoslav Brdjanin, Momir Talic: Decision On Interlocutory Appeal. (IT-99-36) ICTY Appeals Chamber 2002. Para 4

⁴¹¹ Ibid. Para 4

not information he received directly but through a third party. Nonetheless, on August 17, 2001, Randal, in a written statement to the Office of the Prosecutor stated that the quotes used in his article were “absolutely accurate.”⁴¹² Furthermore, he said he was “willing to speak with investigators for the Tribunal but I hesitate as a journalist to testify before the court. I would prefer that my statement and article stand for themselves. However, if that were not possible I would be willing to testify that the quotes accredited to Brdjanin are true and accurate.”⁴¹³

Composition and Jurisdiction of the Tribunal

On February 22, 1993 under Resolution 808, the Security Council directed the Secretary General to draft statutes, within 60 days, for the Tribunal. The UN Office of Legal Affairs created a statute with 34 articles enumerating the legal basis, organization, and procedures for it.⁴¹⁴ The Tribunal is charged with prosecuting alleged war crimes committed in the former Yugoslavia.

The Tribunal Statute obliges States to co-operate with the Tribunal and comply with its orders and warrants. If the ICTY issues an arrest warrant to a state, that state must apprehend the accused and turn him or her over to The Hague. Failure to comply can result in the state being reported to the Security Council, which in turn can impose sanctions against it.⁴¹⁵

The ICTY hears cases falling under four broad categories of offenses, including (1) grave breaches of the Geneva Conventions of 1949 and the 1977 protocols, (2) violations of the laws and customs of war (the Nuremberg Charter), (3) genocide (the 1948 Genocide

⁴¹² Prosecutor v. Radoslav Brdjanin and Momir Talic: Decision on Motion to Set Aside Confidential Subpoena To Give Evidence. (IT-99-36) ICTY, Trial Chamber II 2002. Para 28, (A)(iii)

⁴¹³ Ibid. Para 28 (A)(iii)(b)

⁴¹⁴ Benjamin Ferencz, "From Nuremberg to Rome: a Personal Account," Justice for Crimes Against Humanity, eds. Mark Latimer and Philippe Sands (Oxford & Portland: Hart Publishing, 2003). P. 40

⁴¹⁵ Graham Blewitt, "International Criminal Tribunals for Former Yugoslavia and Rwanda," Ibid., ed. Mark Latimer & Phillippe Sands. P. 146

Convention) and (4) crimes against humanity (the Nuremberg Charter).⁴¹⁶ Cases are heard in one of three trial chambers each with three judges or the five-judge appeal chamber. The judges are nominated by their respective countries but officially elected by the UN General Assembly for four-year terms. They are elected 'taking due account of the adequate representation of the principal legal systems in the world and of the experience of the judges in criminal law, international law and human rights law.'⁴¹⁷ There are no juries to determine guilt or innocence; this is done by the Chambers' 11 judges.⁴¹⁸ The President of the Tribunal, selected by the judges, assigns each of the judges to one of the Trial Chambers or to the Appeals Chamber. Only one judge from a country can be a member of any one panel.⁴¹⁹ There are three judges from Asia, two from Europe, two from Africa, two from North America, and one each from Latin America and Australia.⁴²⁰ In 2000, the Security Council responded to the growing backlog of cases at the ICTY by establishing a pool of nine *ad litem*, or part-time judges.

Judges play a much more active role in proceedings at the Tribunal than in common law systems. Under The Rules of Procedure and Evidence, judges can determine how a trial will unfold, what evidence may be presented and by whom:

The Rules of Procedure and Evidence allow chambers to exercise discretion in determining the order of the trial, excluding cumulative witnesses, halting repetitive or irrelevant testimony and requiring the parties to produce particular pieces of evidence. Judges can also stop counsel from harassing or intimidating witnesses. They have the authority to not only request the production of additional evidence by either party, but also to order additional witnesses to appear.⁴²¹

⁴¹⁶ Ball, Prosecuting War Crimes and Genocide: The Twentieth Century Experience. P. 142

⁴¹⁷ Robertson, Crimes Against Humanity: The Struggle for Global Justice. PP. 298-299

⁴¹⁸ Graham Blewitt, "International Criminal Tribunals for Former Yugoslavia and Rwanda," Justice for Crimes Against Humanity, ed. Mark Latimer & Phillippe Sands (Oxford & Portland: Hart Publishing, 2003). P. 146

⁴¹⁹ Patricia M. Wald, "General Radislav Krstic: A War Crimes Study Case," Georgetown Journal of Legal Ethics 16 (2003). P. 451.

⁴²⁰ Ball, Prosecuting War Crimes and Genocide: The Twentieth Century Experience. P. 141.

⁴²¹ Kristina D. Rutledge, "Comment and Note: 'Spoiling Everything'- But for Whom? Rules of Evidence and International Criminal Proceedings," Regent University Law Review 16 (2003). P. 171

War correspondents, who have testified, have noted the active participation of judges in proceedings, sometimes directly questioning journalists and at other times defending them from aggressive and unfair lines of questioning. BBC reporter, Jacky Rowland says she was surprised, during her testimony, when “one of the judges pressed me on whether I could attest to the fairness and objectivity of my news organisation.”⁴²² ITN journalist, Lindsey Hilsum welcomed the intervention of a judge during her cross-examination:

The Defence was slightly hostile towards me at one point...The Defence tried to say that I was a bad journalist and not an eyewitness because I hadn't driven by myself through the roadblocks to the airport. Then the judge stopped them, he said something like, I don't think it is reasonable to suggest that she should have gone on a suicide mission.⁴²³

The Tribunal is a massive organization. It has three parts: the Chambers with more than 400 people, the Prosecutor's Office staffed by over 200 and the Registry with 200 plus individuals.⁴²⁴ Indeed, there are fifty-six different nationalities represented at the ICTY. This is a dramatic change from 1993 when the first official function of the Tribunal, following its launch, was to adjourn because there was no staff.⁴²⁵

The Prosecutor is appointed by the UN Security Council based on the Secretary General's nomination and he or she undertakes investigations and prosecutions. The Tribunal's first chief prosecutor was Ramon Escovar Salom, the attorney general of Venezuela who quickly gave up the position when he was appointed interior minister of his country.⁴²⁶ He was succeeded by Richard Goldstone, a South African judge appointed in 1994. Two years later in 1996, Canadian Louise Arbour who was a judge on the Ontario Court of Appeal and a former law professor became chief prosecutor. The current Prosecutor is Carla del Ponte, a former Swiss attorney-general.

⁴²² Rowland, "Grilled by the butcher."

⁴²³ "Interview With Lindsey Hilsum"

⁴²⁴ Ball, Prosecuting War Crimes and Genocide: The Twentieth Century Experience. P. 141.

⁴²⁵ Ibid. P. 141.

⁴²⁶ Bass, Stay the Hand of Vengeance: The Politics of War Crime Tribunals. P. 218.

Although appointed by the Security Council, the prosecutor must remain independent of both the Tribunal and any government. Richard Goldstone argues that independence is even more crucial for a prosecutor trying international war crimes than a prosecutor operating within a national jurisdiction because of the political controversy surrounding these cases.⁴²⁷ Prosecutors have their indictments reviewed and confirmed by a trial judge, who in turn, cannot then participate in any subsequent proceedings arising from the indictment. Any attempt, argues Goldstone, by prosecutors to carry out a “dishonest or bad faith agenda” – a particular anti-Serb or anti-Muslim stance – would be detected and reported by the media.⁴²⁸ Goldstone, himself, has been critical of other chief prosecutors at the Tribunal and called into question some of their decisions specifically relating to journalist testimony saying, “The attitudes of prosecutors will vary from country to country, and within countries, and mine would be probably the absolute opposite of Carla del Ponte’s. I would not have called an ICRC or an UNHCR or a journalist unless absolute necessary.”⁴²⁹

Issuing an Indictment

The Chief Prosecutor issues indictments. All indictments follow a similar path through the Tribunal. The Prosecutor’s Office employs over 200 individuals and more than 60 of them are war crimes investigators from various countries. Investigative teams compile the evidence against an individual. This often means travelling to the former Yugoslavia to depose witnesses and victims, scrutinize military reports, review press coverage, photographs, maps, charts, autopsy reports and other forensic evidence. It can also mean contacting journalists, interviewing them, and obtaining a formal statement. British

⁴²⁷ Goldstone, *For Humanity: Reflections of a War Crimes Investigator*. P. 132.

⁴²⁸ Ibid. P. 134.

⁴²⁹ "Interview With Richard Goldstone"

journalist, Michael Montgomery wrote to his editor, Charles Moore, *The Daily Telegraph*, to inform him he was being pursued by Hague investigators in relation to the *Brđjanin* case.

I was approached last year by a tribunal prosecutor who said he wanted to send an investigator to my home in San Francisco to discuss my *Telegraph* article. When I realized the prosecutor's office was seeking a formal statement – something that could obligate me to testify – I declined and instructed the tribunal official that my current employer would not allow me to testify (I am a radio correspondent).

Two weeks ago tribunal prosecutors contacted me again (I was in The Hague at the time) to say they might compel me to testify by asking the trial judge to issue a summons.⁴³⁰

Montgomery did not testify in *Brđjanin* – he is the unnamed journalist in the proceedings, referred to as “X,” who translated for Jonathan Randal – but his correspondence raises an important issue as to the methods used by prosecutors and investigators in obtaining journalists' evidence.⁴³¹ Until the Trial Chamber issued a subpoena for Jonathan Randal, journalists had always voluntarily testified at the ICTY. However, journalists like Roy Gutman have expressed reservations about the process by which prosecutors seek evidence:

They come in and they interview you as a reporter and ask you, 'Just put us into the picture of things about these things.' And for a reporter who has seen this horror, and has never seen justice done, it's a very vivid story in your mind and you get really quite intense about it. So you tell them what you know. They take notes and then at the end of the discussion they say, 'By the way, would you mind signing this, so you know we can use it for our own purposes.' Then they come back to you and say, 'We need you to testify, we need you to back this up in court.' Then you're in trouble. Basically, it's a kind of entrapment of a friendly witness. I know that's what happened with the *Randal* case. A reporter trying to be helpful.⁴³²

Journalist Lindsey Hilsum says Hague investigators and prosecutors need to avoid repeatedly calling on the same journalists using multiple interviews to obtain evidence:

The other thing I think is that the Tribunal has a duty not to be sloppy. They called me again and wanted me to go back and testify all over because I knew Kambanda, the Prime Minister. I knew Pauline Nyiramasuhuko, the Minister of Women, who I had interviewed afterwards and they wanted my tapes, and this,

⁴³⁰ "Letter to Charles Moore, Editor, *The Daily Telegraph*" March 11, 2002

⁴³¹ "Interview By Sherri Beattie With Michael Montgomery, Journalist, American Public Radio Works" February 4, 2005

⁴³² "Interview With Roy Gutman"

and that, and I said, 'No.' I partly said no because the tapes had been lost, thank-you BBC, but also I wasn't going to go back and constantly testify. I felt they had one chance to get me and that was that. I think some of their procedures are sloppy. They need to sort that out.⁴³³

Other journalists resent what they view as “fishing expeditions” Hague investigators undertake to elicit information and possible evidentiary leads. CBC journalist Carol Off says after returning from a trip to Croatia in 2004 she was immediately contacted by investigators:

... I will tell you here that just this morning, I had a phone call from The Hague and they said, 'We understand you've just returned from Croatia where you're investigating another story. Can you call us?' I mean the gall.⁴³⁴

However, these tactics are all part of the method of collecting evidence used towards issuing an indictment. As evidence is collected, each investigative team utilizes a “date analyst,” who organizes the evidence to “ensure the chain of custody” and a legal advisor, who works with one of three senior prosecuting trial attorneys to determine what actions of the accused fall under which articles of the Tribunal.⁴³⁵ Following the collection of evidence, senior trial lawyers draft an indictment, which is then scrutinized by all of the lawyers in the prosecutor's office for accuracy and deemed supported sufficiently by the evidence. This process may take days or weeks. The indictment is then submitted to the chief and deputy prosecutors, who may request further investigations or the chief prosecutor may sign the indictment. The indictment is then submitted to a trial judge, who may question the chief prosecutor about it before deciding whether to confirm it.⁴³⁶ After being confirmed, the prosecutor seeks an order for the indictment to be kept confidential. Usually what follows is that the prosecutor serves a warrant for arrest on SFOR – the UN

⁴³³ "Interview With Lindsey Hilsum"

⁴³⁴ CBC "War Crimes And The War Correspondent's Dilemma"

⁴³⁵ Ball, Prosecuting War Crimes and Genocide: The Twentieth Century Experience. P. 142.

⁴³⁶ Goldstone, For Humanity: Reflections of a War Crimes Investigator. P. 108.

force in Bosnia – which has the power and authority to detain indicted war criminals and ship them to The Hague.⁴³⁷

Legal Principle & Theory

Prosecutors indict based on the principle of individual criminal responsibility and two legal theories, which derive from it; superior criminal responsibility and joint criminal enterprise. Radoslav Brdjanin was charged under subsection (1) and (3) of Article 7 of the ICTY Statute. This article pertains to individual criminal responsibility:

(1). A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

(3). The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.⁴³⁸

(i) Command Responsibility

Individual criminal responsibility, as noted in subsection 1, attaches not only to carrying out a crime under international law but also to any act, which aids or furthers the crime.

Subsection 3 refers to the doctrine of command responsibility, i.e. an accused may be held responsible for “for failure to act to control subordinates, or to punish them when they are guilty of war crimes, under the doctrine of command responsibility.”⁴³⁹ Additionally,

⁴³⁷ Blewitt, "International Criminal Tribunals for Former Yugoslavia and Rwanda." P.155

⁴³⁸"Statute of the International Criminal Tribunal for the Former Yugoslavia," (This concept comes out of the Tokyo trial of General Yamashita following WWII. It was later upheld by the U.S. Supreme Court when Yamashita appealed. Military and civilian leaders, such as Brdjanin, have a responsibility to deter war crimes being committed by their subordinates and to punish those who commit such crimes. Indeed, the 1977 Protocols to the Geneva Conventions require military commanders to ensure that their troops are aware of their legal obligations, responsibilities, and subsequent consequences under the principle of command responsibility.

⁴³⁹ Blewitt, "International Criminal Tribunals for Former Yugoslavia and Rwanda." P. 149

obedience to superior orders is not a defense to war crimes although an accused may claim duress arguing their own life was threatened if they failed to carry out an order.⁴⁴⁰

Command responsibility is an issue in the case of Radoslav Brdjanin. It was alleged Brdjanin used state institutions, and directed those who operated them, to carry out a policy of ethnic cleansing:

Radoslav BRDANIN facilitated the ethnic cleansing by securing all instruments of state power (the mass media, state services, state control of housing, medical services, the police, the judicial system, the means of production and employment) into the hands of the governing bodies and those persons committed to an ethnically pure Serb state. Radoslav BRDANIN signed decisions and orders issued by the ARK Crisis Staff, which in turn directed and instigated the action taken in the Crisis Staffs at the municipal level, some members of which had direct involvement in the commission of the offenses alleged.⁴⁴¹

Proving command responsibility is enormously difficult. The Yugoslav conflict was not fought by traditional armies with well-defined command and control structures rather it was carried out by army, police, paramilitary organizations, special forces, militias, and civilians within a loose, sometimes anarchic, structure. Indeed some scholars argue, “proving command responsibility is so difficult that prosecutors have resorted to using war reporters as witnesses, a practice that the tribunal has disapproved due to its problematic free speech implications.”⁴⁴²

War correspondents have also been used to prove that an accused did not have command responsibility. BBC correspondent Martin Bell testified for the Defence in the *Blaskic* case. Tihomir Blaskic was initially a colonel in the Croatian Defence Council (HVO) – later promoted to General and appointed Commander – and charged with crimes against

⁴⁴⁰ Nomi Bar-Yaacov, "Command Responsibility," *Crimes of War: What the Public Should Know*, eds. Roy Gutman and David Rief (New York & London: W.W. Norton & Company, 1999). P. 98

⁴⁴¹ Case No. IT-99-36-T. Par. 17.

⁴⁴² Richard P. Barrett and Laura E. Little, "Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals," *Minnesota Law Review* 88 (2003). P.50

humanity, war crimes, and grave breaches of the Geneva Conventions.⁴⁴³ Amongst other incidents, Blaskic was held responsible for the Ahmici massacre in April 1993 wherein more than 100 villagers – mostly elderly men, women and children – were killed in one morning.⁴⁴⁴ Bell testified the Prosecution's contention, that Blaskic was in charge and therefore criminally responsible because of superior criminal responsibility, was not a reality on the ground:

It was a question of was there a command structure in the normal military sense, was there a chain of command. Well, there wasn't. There was Blaskic in his hotel, wherever he was in Vitez, and there were people, I mean it was a very small pocket and they were outnumbered eight to one and he had his people all on the front-lines and they were in danger of being overrun all of the time...It was very ad hoc.⁴⁴⁵

Despite Bell's testimony, Blaskic was sentenced to 45 years imprisonment, which was later – in a stunning reversal on appeal – reduced to nine years. Bell argues that prosecutors want convictions regardless of the evidence:

Q: Are the goals of prosecutors, at war crimes tribunals, compatible with war correspondents in the sense that both of them want to get at the truth?

Bell: No! The prosecutors want a conviction. This is why I don't like the system. I ran into Louise Arbour when she was the chief of this court and I was appearing for the defence in Blaskic and she was really disappointed, she thought I shouldn't be doing it. She wanted him convicted. It is this adversarial system that we have in British courts that the job of prosecutors is to prosecute whatever the strength of the evidence. ⁴⁴⁶

Joint Criminal Enterprise

In addition to attempting to prove superior criminal responsibility, prosecutors may also attempt to establish guilt based on joint criminal enterprise. Although Article 7(1) of the Statute does not specifically refer to joint criminal enterprise, it has been established and accepted in the jurisprudence of the Tribunal. It is similar to conspiracy doctrine. The

⁴⁴³ Blaskic Case (IT-95-14) Case Information Sheet 2004.

⁴⁴⁴ BBC, Flashback: The Ahmici massacre, 2000, Available: <http://news.bbc.co.uk/1/hi/world/europe/603420.stm>.

⁴⁴⁵ "Interview With Martin Bell"

⁴⁴⁶ Ibid.

theory purports that Brdjanin “entered into a common plan with others to accomplish an illegal objective and could therefore be held responsible for the criminal actions of all other participants in the enterprise advancing that common purpose if he knew or could have reasonably foreseen those actions.”⁴⁴⁷

Radoslav BRDANIN participated in a joint criminal enterprise....The purpose of the joint criminal enterprise was the permanent forcible removal of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian state by the commission of the crimes alleged in Counts 1 through 12. The accused Radoslav BRDANIN, and the other members of the joint criminal enterprise, shared the state of mind required for the commission of each of these offenses, more particularly, each while aware that his or her conduct occurred in the context of an armed conflict and was part of a widespread and systematic attack directed against a civilian population.⁴⁴⁸

Evidentiary Challenges

Journalists’ reports often serve as documentary evidence, something often in short supply at the Tribunal. In terms of the sheer volume of documentary evidence, the ICTY is not Nuremberg. The Nazis were meticulous record-keepers and at the end of the war the Allies gathered, “six freight cars filled with over 300,000 affidavits” to use in their prosecution.⁴⁴⁹ Indeed, only 113 witnesses testified for any of the defendants.⁴⁵⁰ ICTY prosecutors rely on testimony at trial or by deposition to build their cases. Some of these witnesses, including journalists, provide eyewitness accounts of incidents; others give evidence relating to the background and context of events. War correspondents, says Brdjanin’s lawyer, are well regarded as witnesses:

Journalists called to testify in cases are primarily called as percipient witnesses. They are no different than any other eye witness to an event. It is nice to have a journalist testifying for you, however, since judges tend to give them a bit more credibility than other witnesses. They rarely have a bias, or at least no one which would affect the

⁴⁴⁷ Wald, "General Radislav Krstic: A War Crimes Study Case." P. 457

⁴⁴⁸ Case No. IT-99-36-T. Par. 27.1

⁴⁴⁹ Rutledge, "Comment and Note: 'Spoiling Everything'- But for Whom? Rules of Evidence and International Criminal Proceedings." P. 151

⁴⁵⁰ Ibid. P. 152.

credibility of their testimony.⁴⁵¹

War crimes trials are broader in historical context and cover a greater period of time and events, than ordinary criminal trials. As Judge Patricia M. Wald has noted, "A trial at the ICTY is usually more akin to documenting an episode or even an era of national or ethnic conflict rather than proving a single discrete incident."⁴⁵² Lindsey Hilsum provided contextual evidence about the dissent into genocide when she testified at the International Criminal Tribunal for Rwanda ("ICTR"):

I think that my position was less contentious than many others had been because I was not testifying against a particular individual. The case in which I was testifying was the first case at the Rwanda tribunal and one of the things they have to show is that the killings were widespread and systematic and also that they occurred during a state of war. That was what they wanted me to testify to, the general situation, what did you see on day, what did you see on day two, and so on. In that sense, it was a fairly straightforward account. It was slightly peculiar in the sense that I didn't know anything about the defendant Jean-Paul Akayesu. I wasn't saying anything about him.⁴⁵³

Journalist Martin Bell, who spent years extensively covering the Bosnian war, is frustrated by this type of contextual evidence and that the Tribunal should then take weeks or months to prove a conflict happened.

I think it's unfair in its ponderousness, the length of its proceedings. I was appalled, one of my last assignments before I went into politics was in the summer of '96 it was the first case, it was the Tadić case. Well, they started off by getting some professor from the London School of Economics going on about the origins of the conflicts in the Balkans. It would seem to me a total waste of time.⁴⁵⁴

Unquestionably, providing this detailed context is one reason why trials are long and complex, many lasting more than a year.⁴⁵⁵ *Brdjanin* was heard for 284 days.⁴⁵⁶ In *Blaskić* the accused made an initial appearance at the Tribunal in April 1996 and had to wait until July

⁴⁵¹ "Interview By Sherri Beattie With John Ackerman, Defence Counsel For Radoslav Brdjanin" November 18, 2004

⁴⁵² Patricia M. Wald, "To 'Establish Incredible Events by Credible Evidence': The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings," Harvard International Law Journal 42 (2001). P. 537

⁴⁵³ "Interview With Lindsey Hilsum"

⁴⁵⁴ "Interview With Martin Bell"

⁴⁵⁵ Richard May, "The Collection and Admissibility of Evidence and the Rights of the Accused," Justice for Crimes Against Humanity, eds. Mark Latimer and Phillippe Sands (Oxford & Portland: Hart Publishing, 2003). P. 163.

⁴⁵⁶ Brdjanin Case (IT-99-36) Case Information Sheet.

2004 to see most of his judgement overturned.⁴⁵⁷ Martin Bell characterizes this wait as unfair and unjust.⁴⁵⁸

If I hadn't testified, I wouldn't have seen it in action. Because I did testify, the laboriousness of it, the Milošević case, the Blaskic case, and of course what's bound to happen, it happened in Blaskic, it happened in Milošević, they go on so long, these are very elderly judges to start with, so they are either there for it all or die. And then the defendant has a right [See Rules of Procedure 15(c)(d)] to start again from *ab initio* which Blaskic didn't take, maybe he wishes he had.⁴⁵⁹

The way in which these long trials unfold is governed by the Tribunal's Rules of Procedure and Evidence. They combine practices from both civil and common law systems although the preponderance lean towards common law. One of the challenges facing international criminal law was the absence of a set of agreed upon rules for courts. A further difficulty is unlike most national criminal courts, not everyone at the Tribunal speaks the same language. Radoslav Brdjanin is Serbian and, as noted in his interview with Jonathan Randal, speaks no English. His defence lawyer, John Ackerman is an American. The prosecutor Joanna Korner is British and the three judges: Judge Carmel A. Agius is from Malta; Judge Ivana Janu is from the Czech Republic and Judge Chikako Taya is from Japan.⁴⁶⁰ The official languages of the Tribunal are English and French but for the majority of the judges, neither is their first language.⁴⁶¹ They must be able to speak one of the official languages but it presents problems for communicating with each other:

Lack of fluency in both English and French – the two working languages of the Tribunal – and to an extent in the native language of the defendants and witnesses has turned out to be a greater obstacle than I would have anticipated. In court, a bank of simulcast translators and simulcast video screens allow a trial to proceed relatively smoothly even though the defendants and their counsel speak Serbo-Croatian and the prosecutors

⁴⁵⁷ Blaskic Case (IT-95-14) Case Information Sheet.

⁴⁵⁸ "Interview With Martin Bell"

⁴⁵⁹ Ibid.

⁴⁶⁰ Brdjanin Case (IT-99-36) Case Information Sheet.

⁴⁶¹ Patricia M. Wald, "The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court," Washington University Journal of Law & Policy 5 (2001). P. 92

and the judges speak French or English.⁴⁶²

Lack of a common language means judges may be unable to comprehend nuance, verbal cues, or other subtleties in the verbal testimony given by a witness, which poses a challenge in assessing the evidence.⁴⁶³ There have been instances in which translations of statements have been inaccurate or incomplete and lawyers have been surprised by responses from their own witnesses.⁴⁶⁴ Language is a constant source of challenge whether in the daily operation of the Tribunal, interviewing witnesses, or overcoming hurdles in submitting evidence as the Prosecution discovered in *Brdjanin*.

Ms. Joanna Korner: But second, to again raise this question of whether it is required for him, the journalist, to give evidence. The reason I raise it is because I spoke to counsel who has been instructed, and he made again the point that the interview was in fact conducted through the interpreting services of another journalist who spoke the Bosnian language. The journalist who actually wrote the article did not, and therefore his article is based on the translation that was given to him by his colleague. Now, of course, Your Honour that's not uncommon. All the interviews effectively with witnesses that are conducted by investigators or lawyers are conducted through interpreters so to that extent I suppose they could be said to be hearsay.⁴⁶⁵

Beyond rules and procedure, there are other evidentiary challenges in trying war crimes. There are often few surviving witnesses and those who are may be reluctant to testify against their perpetrators and relive the crimes. The documentary evidence, against the accused, often never existed or was destroyed. The passage of time fades memories and many victims want nothing more than to get on with their own lives. For their part, journalists can be asked by the Trial Chamber to testify about stories they wrote more than a decade earlier:

They are coming to the story months, and often years later that we had, in a sense mapped out our coverage. Their needs as a court are rather different from those of

⁴⁶² Ibid. P. 92

⁴⁶³ Rutledge, "Comment and Note: 'Spoiling Everything'- But for Whom? Rules of Evidence and International Criminal Proceedings." PP. 163-164

⁴⁶⁴ Ibid. P. 164

⁴⁶⁵ Prosecutor. v. Brdjanin & Talic, Transcript of Proceedings, February 26, 2002. IT-99-36 ICTY 1999.P. 2283

us who go to cover this as journalists.⁴⁶⁶

Even in a conflict such as Bosnia, widely reported by the media, “there is a world of difference between reliable reports on the events and evidence establishing individual guilt.”⁴⁶⁷ Part of that difference lies in how journalists, as opposed to judges, assess evidence:

The use in court of news reports, including photographs and film that have already found their way into the public domain as evidence of crime is perhaps uncontroversial. A note of caution, however, must be sounded. The very different standards of proof which operate in the courtroom and the news room suggest that the leap from press report to evidence is not one that can be made lightly.⁴⁶⁸

Indeed the finest journalists, including veteran war correspondent Lindsey Hilsum, admit to errors in their reportage, especially when they find themselves writing about situations in a constant state of flux:

...a lot of the journalism that was written at the time, although it provides valuable insights we did get things wrong, that is what happens with journalism when you are doing it at the time.⁴⁶⁹

Richard Goldstone argues there are three different evidentiary standards taken by journalists, prosecutors and a criminal court in assessing information.⁴⁷⁰ Furthermore, he says if journalists “spent the time necessary to indict a suspected war criminal, the news would be stale.”⁴⁷¹ A prosecutor, in contrast, in order to indict a suspected war criminal must present “sufficient admissible and available evidence to constitute a *prima facie* case of guilt.”⁴⁷² For the Tribunal, the standard is even higher. Judges must render final decisions with the facts before them. There must be not just an objective quality about the facts, but finality about them as well. For journalists, the process is more fluid. Louise Arbour notes

⁴⁶⁶ "Interview With Roy Gutman"

⁴⁶⁷ Meron, *War Crimes Law Comes of Age*. P. 190.

⁴⁶⁸ Arbour, "Exposing Truth While Keeping Secrets: Publicity, Privacy and Privilege." P.20

⁴⁶⁹ "Interview With Lindsey Hilsum"

⁴⁷⁰ Goldstone, "The Role Of The Media In Exposing Crimes Against Humanity." P. 108

⁴⁷¹ Ibid. P. 108

⁴⁷² Ibid. P. 109

that psychiatrists, historians, and journalists can listen to the same set of facts and hear different stories. Each has a particular perspective or a prism through which they filter and separate various facts. The law does the same with the added criteria of eliminating human emotion from a set of facts. Still, the judicial approach to evidence is different:

...The most conspicuous difference between the law's problems in determining historical facts and those of other disciplines lies in the procedure of decision...In other disciplines the final conclusions as to key facts...may be changed if they are found later after further inquiry and reflection – to be wrong. The law, in contrast, depends in most formal proceedings upon presentation by the disputants in public hearing before an impartial tribunal...[F]indings of fact by the tribunal are usually final so far as the law is concerned.⁴⁷³

Arriving at this finality of fact is dependent upon establishing and following criminal procedure – a set of rules. In this sense, law may be more analogous to pure science, “where the method of reaching the truth must be pre-established and cannot be subject to changes on a case-by-case basis, in criminal procedure respect for procedural rules is the only way to guarantee a fair and accurate result.”⁴⁷⁴

What then are the criteria for admitting and assessing evidence at the ICTY? The tendency in Trial Chambers is to admit evidence and allow judges to assess its weight at the conclusion of a case.⁴⁷⁵ This liberal approach is unlike the process used in pure common law jurisdictions because there are no juries at the ICTY. The trials are all conducted by professional judges. “The safeguard against a wrong appraisal of the evidence lies in the fact that the judgments are fully reasoned, thus reflecting which evidence the judges have relied on for their findings.”⁴⁷⁶

Hearsay Evidence

⁴⁷³ Stanley A. Schiff, *Evidence in the Litigation Process* (Scarborough: Carswell, 1983). PP. 8-10

⁴⁷⁴ Salvatore Zappalà, *Human Rights In International Criminal Proceedings* (Oxford & New York: Oxford University Press, 2003). PP. 248-249

⁴⁷⁵ May, “The Collection and Admissibility of Evidence and the Rights of the Accused.” P. 165

⁴⁷⁶ Ibid. P. 165.

In most common law systems, hearsay evidence is inadmissible. This is a type of indirect evidence, e.g., an individual, “A,” tells the court what another individual, “B” told him. However, it is generally admissible at the ICTY and has been upheld by the Appeals Chamber. The reasoning behind the rule on hearsay evidence is that these trials are conducted by professional judges not jurors who can expertly assess and weigh evidence.⁴⁷⁷ Common law systems avoid hearsay evidence because – in the absence of trial by judge alone – the evidence is often unreliable and counsel unable to cross-examine declarants.⁴⁷⁸

In *Brdjanin*, the Prosecution subpoenaed Randal following the Defence’s refusal to admit the news article on its own. The Prosecution relied on Rule 89(c) of the Rules of Procedure and Evidence, which provides the Tribunal with its broad discretion for the admission of evidence:

A Chamber may admit any relevant evidence which is deemed to have a probative value.⁴⁷⁹

The Tribunal could admit evidence, even hearsay such as Randal’s article, then decide on its accuracy and weight it accordingly.⁴⁸⁰

The Prosecution viewed the article as crucial evidence in terms of substantiating *mens rea*. Randal had described Brdjanin as radical Serb nationalist; someone who wanted to remove Muslims and Croats forcibly from their homes in Bosnian Serb territory.⁴⁸¹ The Prosecution held that Brdjanin’s intent was to administer a plan of ethnic removal in which he knew violations were likely to result. The Prosecution contended that the article was

⁴⁷⁷ Robertson, *Crimes Against Humanity: The Struggle for Global Justice*. P. 302

⁴⁷⁸ Rutledge, "Comment and Note: 'Spoiling Everything'- But for Whom? Rules of Evidence and International Criminal Proceedings." P. 169

⁴⁷⁹ "Rules of Procedure and Evidence for the International Criminal Tribunal for the former Yugoslavia," (1994).

⁴⁸⁰ *Prosecutor v. Radoslav Brdjanin, Momir Talic: Decision on Interlocutory Appeal* ICTY Appeals Chamber December 11, 2002.Par. 52.

⁴⁸¹ Randal, "Preserving the Fruits of Ethnic Cleansing; Bosnian Serbs, Expulsion Victims See Campaign as Beyond Reversal."

essential because the statements “constitute direct evidence of the intent required for the establishment of some of the offenses with which he is charged.”⁴⁸² Yet not everyone was convinced that the article carried much weight or substance as evidence in the Brdjanin case. Indeed, Randal’s article was admitted eventually as evidence in *Brdjanin* but was not mentioned in the judgement. Brdjanin’s counsel questions the article’s evidentiary worth and Randal’s proposed testimony about it.

I think the Chamber decided the testimony was really unnecessary and contributed little to the proceedings. I think they felt it would be a waste of time to bring Randal to The Hague. They admitted his article and did not mention it in their judgment. That should tell you that they found the issue largely irrelevant.⁴⁸³

Nonetheless, regardless of the evidentiary value of Randal’s testimony, the Defence asserted its right to cross-examine him. Indeed, evidence may come from various sources, in different formats, including three types of live witnesses.

Witness Testimony

Individuals who testify before the Tribunal:

1. Expert witnesses who provide historical or contextual insight;
2. General lay witnesses who were present, but uninvolved, during the conflict (reporters, human rights advocates, etc.); and
3. Victim lay witnesses who suffered firsthand through the conflict.⁴⁸⁴

The average witness at the ICTY spends an entire day on the stand.⁴⁸⁵ War correspondent Ed Vulliamy spent two taxing days on the witness stand giving evidence in the trial of Milan Kovacevic.⁴⁸⁶

...there was no moment of the war quite as lonely and as intimidating as sitting in that witness chair for two days under cross-examination by lawyers who are out to – as one of them told the New York Times – ‘roast Mr. Vulliamy on a

⁴⁸² Prosecutor v. Radoslav Brdjanin, Momir Talic: Decision on Interlocutory Appeal. Par. 28

⁴⁸³ "Interview With John Ackerman" "

⁴⁸⁴ Rutledge, "Comment and Note: 'Spoiling Everything'- But for Whom? Rules of Evidence and International Criminal Proceedings." P. 173

⁴⁸⁵ Wald, "To 'Establish Incredible Events by Credible Evidence': The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings." P. 536

⁴⁸⁶ Vulliamy, "An Obligation To The Truth: Journalists Should Be Prepared to Risk Their Safety and Testify at the International Criminal Court."

spit so that no one ever again believes a word he writes'...Defence lawyers crawled all over my notebooks demanding to know about telephone numbers in the margins and 'context'. A contorted attempt to say I had fabricated the nature of the camps was dragged into open court. Finally, I was discharged; Kovacevic died of a massive heart attack a few days later (on my birthday), and I was accused by a Serbian magazine of his murder.⁴⁸⁷

The vast majority of witnesses are victims. Many of these individuals still reside in Bosnia and other places where war crimes took place. They fear, with justification, intimidation, and/or retaliation by friends, family, or supporters of the defendants.⁴⁸⁸ The danger is a reality for witnesses, not just after they return to Bosnia or Serbia, but even in The Hague recalled Ed Vulliamy when he returned to testify in *Blaskic*:

The atmosphere at The Hague has changed too. A Bosnian government diplomat, Judge Vasvija Vidovic, saw the red light of a sniper's laser sight on her coat one night – her bodyguard pushed her out of the way just in time for the shot to fire wide. There are reports of intimidation of witnesses: their hotels are crawling with Croat secret servicemen, and investigators report "visits" to witnesses' rooms at night.⁴⁸⁹

As a result, the Tribunal has taken a number of steps to protect witnesses:

1. non-disclosure of their identity to the media or in the public record;
2. court orders to defense counsel to keep a log and notify the prosecutor of all contacts with witnesses;
3. facial and voice distortion of the witness on camera since the proceedings are televised to the Balkans; and
4. testimony in closed session which will not appear in the public transcripts.⁴⁹⁰

If these protective measures are not sufficient, then the Tribunal has the resources of its "Victims and Witnesses Unit." It serves as a witness protection program, ensuring safe travel for witnesses to The Hague and possible relocation for them, and their families, to

⁴⁸⁷ Ibid.

⁴⁸⁸ Wald, "The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court." P. 108

⁴⁸⁹ Vulliamy, "I Must Testify - Why One Journalist Is Giving Evidence Against Alleged War Criminals."

⁴⁹⁰ Wald, "The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court." P. 109

other countries.⁴⁹¹ Lindsey Hilsum argues that the danger posed to victim lay witnesses as opposed to general lay witnesses, such as journalists, is not comparable:

...the danger they might encounter is considerable, the risks are far, far, higher for them than for me...There are lots of Rwandans who have been killed because they testified or just because they talked to somebody from the Tribunal who visited them in their village.⁴⁹²

Still, thousands of victims have chosen to testify. Some may feel personally compelled to do while others may feel persuaded by prosecutors and investigators.

Many journalists expressed concern that the Trial Chamber in issuing a subpoena compelling Jonathan Randal to testify would lead to the routine issuing of these orders but John Ackerman believes the fear is not warranted. "Prosecutors are very reluctant to subpoena unwilling journalists – they may not provide the evidence you hope for. That applies to defence also."⁴⁹³ Still, Roy Gutman remains unconvinced. "I just feel that the use of reporters has been kind of frivolous, it's been less than grave, they have not used the criteria that they use for aid workers, they use for diplomats. They've treated reporters as sort of expendable witnesses who can just be called up and used when they need them."⁴⁹⁴

What criteria did the Prosecution apply in *Randal* in deciding to pursue the journalist and his evidence? A serious issue, always for journalists, is confidentiality of sources but this was not an issue in *Randal*. The story had been published and clearly identified as an interview given to Jonathan Randal by Radoslav Brdjanin. The ICTY's Rule 70 however does provide for protection of sources, although not specifically in journalistic terms. In particular, Rule 70(B) provides:

If the prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of generating

⁴⁹¹ Rutledge, "Comment and Note: 'Spoiling Everything'- But for Whom? Rules of Evidence and International Criminal Proceedings." P. 179.

⁴⁹² "Interview With Lindsey Hilsum"

⁴⁹³ "Interview With John Ackerman" "

⁴⁹⁴ "Interview With Roy Gutman" "

new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.⁴⁹⁵

This provision allows prosecutors to ask journalists for information to further investigations while protecting sources of that information. What is critical about Rule 70, however, is that the information obtained from confidential sources can only be used to generate new evidence, not the evidence or information from the sources themselves. Journalists such as Roy Gutman have from the outset, cooperated with the Tribunal and informally assisted investigators and prosecutors with evidentiary information and leads:

...I did a lot of the initial coverage, certainly of the Omarska case, which as you know was the first case to come before the Tribunal. They used both my coverage, then I had very extensive talks with both the investigators and Hanne Sophie Greve, who prepared the indictment. They could not have had more cooperation from me...⁴⁹⁶

Lindsey Hilsum favours informal cooperation and says she would prefer not to formally testify again "if it were possible to avoid it by just providing new information or just doing off-the-record stuff as many journalists do..."⁴⁹⁷

However, as helpful as informal cooperation may be from journalists, the Tribunal still requires formal testimony and evidence in trials. Aside from using *viva voce* testimony, there are other methods of putting evidence before the Tribunal. Counsel may use the transcripts of evidence given by witnesses in other proceedings. Technically, this evidence is hearsay and counsel is unable to cross-examine the witness who provided it but these disadvantages are mitigated by the fact that the witness will have been cross-examined by counsel in the original case.⁴⁹⁸

⁴⁹⁵ "Rules of Procedure and Evidence for the International Criminal Tribunal for the former Yugoslavia,"

⁴⁹⁶ "Interview With Roy Gutman"

⁴⁹⁷ "Interview With Lindsey Hilsum"

⁴⁹⁸ May, "The Collection and Admissibility of Evidence and the Rights of the Accused." P. 166

Additionally, there is Rule 92*bis* which allows for evidence by affidavit or sworn statement. The document must be accompanied by a signed statement by the author attesting to its accuracy. There are three restrictions governing affidavit or written evidence:

1. The written evidence can only be used to prove a matter *other than* the acts and conduct of the accused;
2. The use of affidavits is reserved to corroborating other witnesses who have already testified or to expounding a witness' own testimony;
3. Counsel trying to admit such evidence must provide opposing counsel with seven days to respond, accept the affidavit's admission, challenge its admission or request that the witness be required to attend for cross-examination.⁴⁹⁹

Jonathan Randal agreed to provide a sworn statement as to the accuracy of his article in the Washington Post but defence lawyer, John Ackerman requested that he appear for cross-examination.⁵⁰⁰ BBC journalist, Jacky Rowland testified under rule 92*bis*. The prosecution provided a written summary of her evidence. She made two visits to the Dubrava prison in Istok, Kosovo during the May 1999 NATO air strikes and the Serbs claimed that dozens of prisoners inside were killed by the bombs but she, and other witnesses, were not convinced.⁵⁰¹ The defence lawyer, in this case Slobodan Milošević representing himself, was given the opportunity under Rule 92*bis* to cross-examine Rowland. However, in *Brdjanin* the judges noted in their decision the position of the defence in relation to journalistic evidence:

The Defence objects to all newspaper articles and reports introduced into evidence by the Prosecution, submitting that they are unreliable, that they amount to hearsay, that some of them come from hostile sources prone to propaganda and that the Accused has not been given the possibility of cross-examination or confrontation of evidence.⁵⁰²

Nonetheless, the Chamber did not accept the Defence's position wherein it objected to journalistic evidence arguing, "a newspaper article is a witness statement and is not

⁴⁹⁹ Rutledge, "Comment and Note: 'Spoiling Everything'- But for Whom? Rules of Evidence and International Criminal Proceedings." PP. 184-185

⁵⁰⁰ Steven Powles, "To Testify or Not To Testify - Privilege from Testimony at the Ad Hoc Tribunals: The *Randal* Decision," *Leiden Journal of International Law* 16 (2003). P. 511

⁵⁰¹ Rowland, "Grilled by the butcher."

⁵⁰² Prosecutor v. Radoslav Brdjanin, Judgement. (IT-99-36) Trial Chamber II, ICTY 2004. par. 33

admissible in accordance with Rule 92*bis*.⁵⁰³ Rather, the Chamber reasoned that such reportage was documentary and served to corroborate and confirm other evidence:

The Trial Chamber, at no time, has treated the newspaper reports and articles as witness statements but merely as newspaper reports and articles admissible as documentary evidence under the procedural practice of this Tribunal, particularly that relating to hearsay evidence but with the limitations set out above. The same applies to several unauthored scripts of what were allegedly radio and/or television news broadcasts. The Trial Chamber considers that, when reliable, newspaper reports and articles and similar items of evidence challenged may be important not only because they originate from the time of the events they report upon but also because they very often corroborate the information provided by other evidence and confirm that the facts referred to are public and generally known. As such, they can be an appropriate instrument for verifying the truth of the facts of a case.⁵⁰⁴

Here, the Trial Chamber clearly acknowledges the importance of journalists' reportage as evidence. The Chamber notes that journalists' evidence can both corroborate information and confirm facts but it also has limitations, i.e., in some instances it may be hearsay and will be treated accordingly. There is undoubtedly a message here for prosecutors to build cases with sufficient evidence – including that from journalists – but not be reliant upon a headline, or hearsay, to make a case.

Conclusion

The ICTY is a complex apparatus that is in its infancy. Despite its youthfulness and inexperience, the ICTY is being judged by the international community on its performance as only the second war crimes tribunal. The Tribunal, in trying war criminals confronts a myriad of evidentiary, procedural, and organizational obstacles. With respect to journalists' testimony, there are no specific evidentiary rules or procedure for providing evidence. Journalists find this absence of procedure and rules frustrating, even unsettling. They do not know what is expected of them as witnesses or what governs their relationship to the

⁵⁰³ Ibid. par. 33

⁵⁰⁴ Ibid. par. 33

Tribunal and its proceedings. Individual prosecutors rather than the Tribunal's Rules of Evidence and Procedure seem to determine how journalists' testimony is used.

The ICTY may itself be *ad hoc* but journalists want some structure and certainty, if not defined guidelines and/or rules, as to their evidentiary role within war crimes tribunals. Cooperative relationships must be built on trust, not subpoenas. Roy Gutman argues the answer is not to define journalistic evidence in terms of the moral obligation of a journalist or his or her role as a citizen, but simply to draw up some guidelines:

...it's not a matter of what I want to do, or what I would do as a citizen, it is that they do not have a procedure for dealing with the press. They did not have any guidelines, they did not have any rules and the prosecutor you know, somebody gets a bright idea, let's call in a reporter...What you really need is procedures written into their own rules of conduct, their own rules of evidence.⁵⁰⁵

Why are some written guidelines or rules framing the evidentiary relationship between journalists and prosecutors important to not only them but also the overall cause of international criminal justice? The Trial Chamber already has more than enough hurdles and evidentiary obstacles in trying cases without provoking, or deliberately creating, more. Roy Gutman wants to "see justice done. It's one of the reasons I did my stories in the first place because of injustice."⁵⁰⁶ Journalists want some consideration given to the implications of their testifying in war crimes tribunals and how, and when their evidence should be used. They want to serve the evidentiary process, not be another obstacle within it.

In the next chapter, I look at some of the consequences of evidentiary obstacles, logistical difficulties, bureaucratic bungling and prosecutorial myopia in the pursuit of and evaluation of evidence. What happens when one journalist declines to testify?

⁵⁰⁵ "Interview With Roy Gutman"

⁵⁰⁶ Ibid.

The Case of Jonathan Randal

*The whole Randal episode was a ridiculous waste of Tribunal time and resources. The matter should have ended at the very beginning by the Trial Chamber refusing the request for a summons. Randal's role in the Brdjanin case was very, very peripheral and really did not establish anything significant in the case.*⁵⁰⁷

Introduction

In previous chapters, I introduced Jonathan Randal and his involvement with the ICTY in the *Brdjanin* case. Here I explore the legal arguments advanced by Randal to have his subpoena set aside as well as those in the supporting *Amici Curiae* brief, of more than 30 international news organizations, which joined Randal's fight. This chapter examines, in terms of the arguments advanced, both the decision by Trial Chamber II and the subsequent overturning of that decision by the Appeals Chamber. The chapter analyses the competing interests that are at play in the Randal case – the public's right to receive information versus the public's right to have all relevant evidence available for international criminal justice. It is these interests the two chambers had to weigh and balance in formulating their respective decisions.

I will argue that the Appeals Chamber has 1) inadvertently expanded the category of those who may claim qualified privilege; and 2) in providing privilege created another evidentiary obstacle for trying cases. Finally, I will argue that the reasoning and decision in *Randal* was appropriate but the case itself was unnecessarily brought before the Tribunal. The decision by prosecutors to subpoena Jonathan Randal exposed some of the evidentiary and procedural problems within the Tribunal.

The public interest in democratic societies to receive information is a fundamental human right and, I contend, takes precedence over the routine administration of

⁵⁰⁷ "Interview With John Ackerman"

international criminal justice. War correspondents do not need qualified privilege to protect the public's right to know nor should they be unnecessarily subpoenaed. The Prosecution presented a weak and ineffectual case for doing so, underestimating the influence of the global media and misunderstanding the important role journalists play in exposing war crimes, alerting the public and changing public policy.

The 1993 Jonathan Randal, *Washington Post* Newspaper Article

The newspaper story ("Preserving the Fruits of Ethnic Cleansing; Bosnian Serbs, Expulsion Victims See Campaign as Beyond Reversal, February 11, 1993") which brought about an international war crimes tribunal subpoena was not front-page news. Randal's story was on page 34 of section A of *The Washington Post*. The focus of the article was not the accused, Radoslav Brdjanin – he is not mentioned until the 11th paragraph - rather Randal was painting a grim picture of the systematic campaign of ethnic cleansing in the Banja Luka region of Bosnia. Radoslav Brdjanin was one of the first Bosnian Serb officials Jonathan Randal interviewed after arriving in the country. He explains why, at least in part, he and his translator, fellow journalist Michael Montgomery, chose to interview Brdjanin:

Anyhow, one of the first trips I made to Bosnia, Michael and I interviewed this guy whose name I have now forgotten...Brdjanin. We sort of set him up because I played the idiotic old fool and Michael played the callow youth and so I asked all the nasty questions and Michael translated. And Brdjanin is a jerk. I don't know if you know but when you cover a war you always think that the spinmeisters have taken over the world but in fact, when you cover a war there's always some fool who shoots his mouth off. So, I don't know if you've seen the piece but as far as I was concerned, he wrote the story for me. He hanged himself.⁵⁰⁸

Randal's colleague, Michael Montgomery who translated the interview and was reporting for *The Daily Telegraph* provides some political context as to what was happening in Bosnia during this time:

This was the first time I interviewed him. I met him several times after that. The

⁵⁰⁸ "Interview By Sherri Beattie With Jonathan Randal, Former Journalist, The Washington Post" March 29 2005

reason we went to Brdjanin is he had a reputation for being forthright publicly. And the fact is we joked, this comes out in the court documents, we called him the 'Ariel Sharon of Bosnian Serb politics' because he was actually the housing minister at the time...I was only really interested in what he had to say about the Vance-Owen plan, would they accept it or would they not and here's why. Because this was a time when the Vance-Owen plan was being discussed, was being forced really hard by the West, right, this was February 93 and what later transpired is all this manoeuvring, they got Milošević to sign off on it and they had this big meeting at the Bosnian-Serb Assembly in May 93. It was all horseshit. There was no way, Brdjanin said there was no way they were going to cede any territory and yet there was this big idea that the Bosnian Serbs were going to finally cave in.⁵⁰⁹

However, neither Montgomery's nor Randal's published stories particularly focused on the Vance-Owen plan or its politics. Instead, Randal portrayed what was happening to Muslims living in Banja Luka. He reported on how Muslims (who asked to remain confidential sources for the story) had told him that non-Serbs were being forced from their homes and land and that more than 20,000 had fled Banja Luka in the previous month.⁵¹⁰ The article went on to discuss how Muslims were fired from their jobs "for refusing to swear allegiance to a self-proclaimed Bosnian State or to serve in its military."⁵¹¹ After refusing to swear allegiance Muslims and Croats were evicted from government housing and could be sent to the frontlines to do labour.

In the article, Randal establishes the realities of ethnic cleansing before introducing one of its architects, Radoslav Brdjanin. He describes Brdjanin as "an avowed radical Serb nationalist" and quoted the housing minister as saying "[he] personally argued that those unwilling to defend [Bosnian Serb territory] must be moved out."⁵¹² Brdjanin is further quoted as saying he wanted to "create an ethnically clean space through voluntary movement"⁵¹³ and that non-Serbs "should not be killed, but should be allowed to leave – and good riddance." Randal wrote that Brdjanin wanted to simplify the documentary

⁵⁰⁹ "Interview With Michael Montgomery"

⁵¹⁰ Randal, "Preserving the Fruits of Ethnic Cleansing: Bosnian Serbs, Expulsion Victims See Campaign as Beyond Reversal."

⁵¹¹ Ibid.

⁵¹² Ibid.

⁵¹³ Ibid.

process for non-Serbs leaving the region and that the housing minister was drafting laws to expel these people from their homes so that 15,000 Serb refugees could move into them.⁵¹⁴

Brdjanin was blunt in his assessment of how other states might respond to Serbian plans:

Brdjanin said he disagrees with authorities in neighbouring Serbia and the new two-republic Yugoslav state it controls, saying they pay “too much attention to human rights” in an effort to please European governments and Western opinion. “We don’t need to prove anything to Europe anymore,” he said. “We are going to defend our frontiers at any cost...and wherever our army boots stand, that’s the situation.”⁵¹⁵

These quotes attracted the attention of Tribunal prosecutors as significant evidence against Radoslav Brdjanin. Brdjanin faced two counts of genocide, five counts of crimes against humanity, two counts of violations of the laws or customs of war and three counts of grave breaches of the 1949 Geneva Conventions.⁵¹⁶

The Defence objected to admitting the article as evidence for several reasons including the fact that Randal, “who does not speak Serbo-Croatian, carried out the interview with the assistance of another journalist, who does speak Serbo-Croatian.”⁵¹⁷ The Defence argued that this other journalist, only referred to as “X” was hostile to Brdjanin and “therefore what was written in Randal’s article did not correspond with Brdjanin’s words.”⁵¹⁸ Further, the Defence argued that it objected to “any newspaper article being admitted into evidence to prove a fact at issue”⁵¹⁹ and this article was inadmissible because “it was irrelevant, as it referred to statements allegedly made by Brdjanin outside the period relevant to the Prosecutor’s Corrected Version of Fourth Amended Indictment.”⁵²⁰ Finally, the Defence submitted it should be “X” rather than Randal who needed to appear and give

⁵¹⁴ Ibid.

⁵¹⁵ Ibid.

⁵¹⁶ Brdjanin Case (IT-99-36) Case Information Sheet Trial Chamber II, Section A 2004.

⁵¹⁷ Prosecutor v. Radoslav Brdjanin, Momir Talic: Decision On Interlocutory Appeal. Para. 3

⁵¹⁸ Prosecutor v. Radoslav Brdjanin and Momir Talic: Decision on Motion to Set Aside Confidential Subpoena To Give Evidence. Par. 3

⁵¹⁹ Ibid. Para. 4

⁵²⁰ Ibid. Para. 4

evidence regarding the Brdjanin interview.⁵²¹ The Prosecution conceded this point but told the court that “he (“X”) refused to testify and that continuing efforts were being made to persuade him to testify.”⁵²² Although “X” might provide the best evidence, the Prosecution argued that the relationship between Randal and “X” was akin to “an investigator seeing a witness and taking a statement through an interpreter.”⁵²³ It urged the Court to consider this problem in terms of weighing Randal’s evidence and his testimony as opposed to admissibility.⁵²⁴ The Defence responded saying it would insist on examining Randal on the accuracy of the quotations in his article.

The Randal Subpoena

The Prosecution then requested that the Trial Chamber issue a confidential subpoena, under Rule 54 of the Tribunal’s Rules of Procedure and Evidence, ordering Jonathan Randal to testify.⁵²⁵ Rule 54 states:

At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.⁵²⁶

Jonathan Randal resides in Paris. He did so in 2002 when the Tribunal issued its subpoena against him. The Tribunal has several different options in carrying out a subpoena. It 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.”⁵²⁷ Had Randal chosen to ignore the subpoena the Tribunal could have taken further steps against him:

⁵²¹ Ibid. Para. 4

⁵²² Ibid. Para. 4

⁵²³ Ibid. Para. 4

⁵²⁴ Ibid. Para. 4

⁵²⁵ Ibid. Para. 2

⁵²⁶ "Rules of Procedure and Evidence for the International Criminal Tribunal for the former Yugoslavia,"

⁵²⁷ Powles, "To Testify or Not To Testify - Privilege from Testimony at the Ad Hoc Tribunals: The *Randal* Decision." P. 512

In situations of non-compliance by a subpoenaed witness, the individual may be prosecuted in domestic courts pursuant to the state's implementing laws. 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*.⁵²⁸

As the Brdjanin trial continued through February and March of 2002, the subpoena against Jonathan Randal was discussed in several sessions with the Prosecution ultimately informing the Trial Chamber that Randal was unwilling to comply with it.⁵²⁹

Randal argues that his position on testifying – despite his agreement to testify in his affidavit and subsequent refusal – never changed from his initial contact with the Tribunal. He first met with a Tribunal investigator – a woman who had been a former New York State police officer – at his Paris home in the summer of 2001.⁵³⁰ After interviewing Randal for a day, she indicated she wished to return for a second day of interviewing. Randal objected and offered to write a formal statement or report if this would bring the interview process to a conclusion. Randal describes what happened:

So, I wrote up the report and I think that in it I made a couple of mistakes. I am the first one to admit it, but I'll go to that in a second. The first thing I did was say, and I think it's in the affidavit, I don't want to testify and I don't believe in it. I thought that would be the end of it. But I made the mistake, just really to get rid of her because it was terribly hot and I wanted to get back to work on my book... It was my fault, I gave her the rope and they tried to hang me.⁵³¹

On August 17, 2001, he gave the following statement to the Office of the Prosecutor:

I think it is important to note that any quotes in my article that are attributed to Mr. Brdjanin are his own words. I covered wars and other nastiness as a calling for more than 40 years and took particular pride in ensuring that all quotes were absolutely accurate. Quotes are the coin of the calling, especially in war situations. I am willing to speak with investigators for the Tribunal but I hesitate as a journalist to testify before the court. I would prefer that my statement and article stand for themselves. However, if that were not possible I would be willing to testify that the quotes accredited to Brdjanin are true and accurate.⁵³²

⁵²⁸ Ibid. P. 512

⁵²⁹ Prosecutor v. Radoslav Brdjanin, Momir Talic: Decision On Interlocutory Appeal. Para. 5

⁵³⁰ "Interview With Jonathan Randal"

⁵³¹ Ibid.

Randal recalls that about six weeks after providing this statement to the Prosecution he received a telephone call from Tribunal prosecutor, Nic Koumjian:

Nic Koumjian called me up about six weeks later and said I want you to testify. I said, look Mr. Koumjian I've walked the extra block for you guys, I helped your investigator but I made it clear to her that was the end of it. He said, no it isn't, I want you to testify. I said, Mr. Koumjian in plain English I'm not going to do it. I told your investigator. He said, ah but I've got this signed affidavit. You signed this affidavit. It was all I could do to say, you little son of a bitch that will teach me to be set up by a bunch of lazy investigators.⁵³³

By May 9, 2002, Randal no longer felt just hesitant but unwilling to testify and he filed a written motion to have the subpoena withdrawn.⁵³⁴ The next day, May 10, the Trial Chamber heard oral argument on the motion.

Privilege from Testimony

Randal's counsel, British barristers Geoffrey Robertson and Steven Powles, stated that Rule 54 – the rule, which gives the Tribunal power to subpoena witnesses – was not absolute and that some individuals and professions were granted privilege from testifying.⁵³⁵ Rule 97 of the Tribunal confers privilege on lawyer-client relationships, a privilege, which exists in many legal jurisdictions. Tribunal decisions have also granted privilege to state officials acting in their official capacity, International Committee of the Red Cross ("ICRC") employees, Tribunal functionaries and the United Nations Protection Force ("UNPROFOR") commander-in-chief.⁵³⁶ In *Blaškić*, the Appeals Chamber considered a subpoena against the Republic of Croatia and its defence minister. The Chamber granted absolute privilege to state officials acting in their official capacity. The Tribunal concluded

⁵³² Prosecutor v. Radoslav Brdjanin and Momir Talic: Decision on Motion to Set Aside Confidential Subpoena To Give Evidence. Para 28

⁵³³ "Interview With Jonathan Randal"

⁵³⁴ Prosecutor v. Radoslav Brdjanin, Momir Talic: Decision On Interlocutory Appeal. Para. 5

⁵³⁵ Powles, "To Testify or Not To Testify - Privilege from Testimony at the Ad Hoc Tribunals: The *Randal* Decision." P. 513

⁵³⁶ Prosecutor v. Radoslav Brdjanin and Momir Talic: Decision on Motion to Set Aside Confidential Subpoena To Give Evidence. Para. 9

that states themselves cannot be subpoenaed but can have “binding orders or requests issued to them.”⁵³⁷ Furthermore, the Appeals Chamber reasoned:

...State officials are mere instrumentalities in the hands of sovereign States, there is no practical purpose in singling them out and compelling them to produce documents, or in forcing them to appear in court. It is the State, which is bound by Article 29 and it is the State for which the official or agent fulfils his functions that constitutes the legitimate interlocutor of the International Tribunal. States shall therefore incur international responsibility for any serious breach of that provision by their officials.⁵³⁸

In *Delalić*, the Defence was denied its request to subpoena a Tribunal interpreter.

The Tribunal held that privilege arises out of public policy considerations, which ensure the transparency of justice, maintain public confidence in it, and protect essential interests.⁵³⁹

Furthermore, interpreters must be independent of any parties in a proceeding and must be free of the worry that they will be drawn into it.⁵⁴⁰ Randal’s counsel argued that the privilege they were seeking for journalists also arose out of a need to protect public interests – the need to protect the free flow of information – and that journalists should not worry that they would be unnecessarily drawn into proceedings.

Also in *Delalić*, the Appeals Chamber held that a former president of the Tribunal and a legal officer could not be compelled to testify. The Appellant, Esad Landzo appealed his conviction saying he had been denied a fair and expeditious trial under Article 20 and 21 of the Tribunal Statute because “the verdict [sic] and sentence had been rendered by a Trial Chamber whose Presiding Judge had been permitted to sleep through much of the proceedings.”⁵⁴¹ The Appeals Chamber did not agree:

⁵³⁷ Powles, “To Testify or Not To Testify - Privilege from Testimony at the Ad Hoc Tribunals: The *Randal* Decision.” P. 513

⁵³⁸ Prosecutor v. Tihomir Blaskic: Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997. (IT-95-14) Appeals Chamber, ICTY 1997. Para 44

⁵³⁹ Prosecutor v. Zejnil Delalic & Others: Decision On The Motion Ex Parte By The Defence of Zdravko Mucic Concerning The Issue Of A Subpoena To An Interpreter. (IT-96-21) Trial Chamber, ICTY 1997. Para. 18

⁵⁴⁰ Ibid. Paras. 19-20

⁵⁴¹ Prosecutor v. Zejnil Delalic, Zdravko Mucic a/k/a “Pavo,” Hazim Delic, Esad Landzo a/k/a “Zenga”: Decision On Motion To Preserve And Provide Evidence Appeals Chamber, ICTY 1999. Para. 1

The Appellant is seeking to rely on the alleged admissions of the former President and Legal Officer in order to establish that there was no waiver of the right to complain and to show the need for access to the video recording. They cannot be subpoenaed to testify as witnesses 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.⁵⁴²

The decision, which has provoked the greatest controversy regarding privilege, relates to the International Committee of the Red Cross. In *Simić*, the Trial Chamber considered whether “a former employee of the International Red Cross (“ICRC”) may be called to give evidence of facts that came to his knowledge by virtue of his employment.”⁵⁴³ The former ICRC employee was an interpreter who had accompanied other staff in visits to detention centres and was involved in exchanges of civilians.⁵⁴⁴ The Prosecution described this employee as an “eye-witness” noting, he “took the initiative to contact the Prosecution and is willing to give evidence before the International Tribunal.”⁵⁴⁵ Furthermore, the Prosecution described his testimony as important in proving the guilt of the accused.⁵⁴⁶

In its submission, the Prosecution argued that the ICRC did not enjoy any immunity or privilege and urged the court to make a decision strictly on a case-by-case basis as to whether an individual should be exempt from testifying.⁵⁴⁷ Additionally, the Prosecution noted that the ICRC does not have immunity from international courts stemming from its functional role, legal personality, treaty, or customary law.⁵⁴⁸

The ICRC argued that its employees – past and present – sign a pledge of discretion and that the organization has always taken the position that its officials and employees may

⁵⁴² Ibid. Para. 3

⁵⁴³Prosecutor v. Blagoje Simic et al: Ex Parte Confidential, Decision on the Prosecution Motion Under Rule 73 For A Ruling Concerning The Testimony Of A Witness. (IT-95-9) Trial Chamber, ICTY 1999. Introduction

⁵⁴⁴ Ibid. Para 1

⁵⁴⁵ Ibid. Para 1

⁵⁴⁶ Ibid. Para 1

⁵⁴⁷ Ibid. Paras 4 -5

⁵⁴⁸ Ibid. Para 6

not testify before any court on issues, which come to their attention as a result of their functional roles.⁵⁴⁹ In arguments that would later be mirrored in *Randah*:

The ICRC submits that the testimony would jeopardise its ability to discharge its mandate in the future, as concerned parties (national authorities or warring parties) are likely to deny or restrict access to prison and detention facilities if they believe that ICRC officials or employees might subsequently give evidence in relation to persons they met or events they witnessed...It places particular emphasis on the importance of respecting the principles of, *inter alia*, impartiality and neutrality, as well as the need for confidentiality in the performance of its functions.⁵⁵⁰

In the alternative, the ICRC argued that should the Trial Chamber not grant it absolute privilege then the test to determine whether testimony should be given must be one satisfying all of these conditions:

1. the crimes charged must be of the utmost gravity;
2. the evidence must be indispensable, in the sense that the case could not be mounted without it; and
3. admitting the evidence would not prejudice the work of the ICRC.⁵⁵¹

The Trial Chamber found that, contrary to Prosecution arguments, the ICRC did enjoy a special status in international law arising from the mandate given it by the international community.⁵⁵² In its decision the Chamber reasoned that the “functions and tasks of the ICRC are directly derived from international law, that is, the Geneva Conventions and Additional Protocols.”⁵⁵³ The Chamber reasoned that one of the tasks of the ICRC, under its Statute is “to promote the development, implementation, dissemination and application of international humanitarian law.”⁵⁵⁴ Furthermore, the primary function of the ICRC is to “protect and assist the victims of armed conflicts” as provided for in the Geneva Conventions and Additional Protocols.⁵⁵⁵ The Chamber noted that the Geneva

⁵⁴⁹ Ibid. Para 9

⁵⁵⁰ Ibid. Para 9

⁵⁵¹ Ibid. Para 19

⁵⁵² Ibid. Para 46

⁵⁵³ Ibid. Para 46

⁵⁵⁴ Ibid. Para 46

⁵⁵⁵ Ibid. Para 47

Conventions are recognized by nearly all States and that the provisions of the Conventions are regarded as customary international law.⁵⁵⁶ Therefore, States have agreed to the “special role and mandate of the ICRC.”⁵⁵⁷ The Chamber found the role and status to be “the unanimously recognized authority, competence and impartiality of the ICRC, as well as its statutory mission to promote and supervise respect for international humanitarian law.”⁵⁵⁸ The Chamber said it agreed with the characterization of the organization by the United States, which stated the “unique mandate of the ICRC...sets the Committee apart from the other international humanitarian relief organizations and agencies.”⁵⁵⁹

The Chamber held that the “*autorité morale*” of the ICRC comes from the fact that it adheres to the basic principles on which it operates to carry out its mandate.⁵⁶⁰ Those principles are humanity, impartiality, neutrality, independence, voluntary service, unity and universality but of “particular relevance to the issue at hand are the principles of neutrality, impartiality and independence.”⁵⁶¹ The Chamber stated, “Neutrality means that the ICRC treats all on the basis of equality, and as to governments or warring parties, does not judge their policies and legitimacy.”⁵⁶² It is this neutrality that allows the ICRC to gain access to detention centres to inspect conditions, observe the treatment of prisoners and provide humanitarian aid to them.

The Trial Chamber ultimately decided *Simić* on narrow grounds. It said the mandate of the ICRC comes from the international community and international law and that the ICRC’s ability to carry out its mandate would be jeopardized if it had to breach its confidentiality and provide information in court. The Trial Chamber did not consider

⁵⁵⁶ Ibid. Para 48

⁵⁵⁷ Ibid. Para 48

⁵⁵⁸ Ibid. Para 49

⁵⁵⁹ Ibid. Para 50

⁵⁶⁰ Ibid. Para 51

⁵⁶¹ Ibid. Para 51

⁵⁶² Ibid. Para 53

weighing the interests of justice against privilege in *Simić* because it found that “the ICRC has, under international law, a confidentiality interest, and a claim to non-disclosure of the information that no question of the balancing of interests arises.”⁵⁶³ Thus, *Simić* is ultimately based on the very specific and peculiar character of the ICRC itself.

The decision, however, was not unanimous. Judge David Hunt issued a strong separate opinion in *Simić* arguing that the ICRC should be granted a qualified, rather than an absolute privilege.

I have considered the submissions of the ICRC with care, and (I confess) with sympathy, but I am not presently persuaded by its arguments, or by the joint decision, that its protection against disclosure is the absolute one which it asserts. Two situations will suffice to demonstrate why, in my view, it may well be necessary in the rare case that the courts (or at least the international criminal courts) should have the final say.⁵⁶⁴

Judge Hunt argued that instead of a blanket, absolute privilege from testimony that ICRC official and employees should have their evidence examined as part of a balancing exercise. The balancing exercise would weigh the competing interests. Judge Hunt described these competing interests as, “the importance of the evidence in the particular trial” versus “the risk that the fact that the evidence has been given by an official or employee of the ICRC would be disclosed” to determine the relative importance of each interest in a case and wherein a balance would be found.⁵⁶⁵ The interests of the ICRC would be weighed against two particular situations:

1. The first situation is where the evidence of an official or employee of the ICRC is vital to establish the innocence of the accused person. Is the accused to be found guilty and sentenced to a substantial term of imprisonment in order to ensure the ICRC’s protection against the risk of disclosure?
2. The second situation where, in my view, it may be necessary that the courts should have the final say is where the evidence of an official or employee

⁵⁶³ Ibid. Para 76

⁵⁶⁴ Prosecutor v Blagoje Simić et al: Ex Parte and Confidential, Separate Opinion of Judge David Hunt on Prosecutor’s Motion for a Ruling Concerning the Testimony of a Witness. (IT-95-9) Trial Chamber III, ICTY 1999. Para 28

⁵⁶⁵ Ibid. Para 32

of the ICRC is vital to establish the guilt of the particular accused in a trial of transcendental importance.⁵⁶⁶

Judge Hunt argued it would be unconscionable for the ICRC not to disclose evidence if it directly led to exoneration or conviction of an accused. In particular argues Steven Powles, British barrister and counsel for Jonathan Randal, there are instances when the ICRC should testify in a prosecution and most importantly for the defence.⁵⁶⁷

...the ICRC is in a privileged position. When they go into a conflict zone, they are taken in by the fighting parties and their privilege, in a way, is owed to those fighting parties that let them into the area, those parties that let them into a camp to see how it is being run. Therefore, the privilege that the ICRC has gotten, I would say, is owed to the people who ran the camps. If someone ran a camp brilliantly, they should be allowed to say, I want the ICRC representative, who came around to my camp and saw how fantastic it was to come and get me out of this hellhole because I am being told that I was killing people, raping people, and I didn't do it and the ICRC know it...I think the parties should have the ability to call that person. The person who ran the camp would waive privilege and say, I let them in and now I want them to testify on my behalf.⁵⁶⁸

Powles believes the *Simić* decision should have been appealed but it "happened during the discussions on the negotiations for the Rules of Procedure and Evidence for the ICC and that decision was relied on by the negotiators for the ICC and has become part of that."⁵⁶⁹

Part of the confusion around the issue of privilege is to whom, and by whom, is it owed. Is privilege owed to the ICRC or to reporters? In the instance of the ICRC, it is individuals, such as prison camp commanders, to whom privilege is owed. Indeed, 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."⁵⁷⁰ Privilege is generally about protecting a source of confidential information be it the client with a lawyer, a patient with a doctor, a penitent with a priest, a camp commander with an ICRC worker or a source with a

⁵⁶⁶ Ibid. Paras 29 & 31

⁵⁶⁷ "Interview By Sherri Beattie With Steven Powles, Junior Counsel For Jonathan Randal" December 3 2004

⁵⁶⁸ Ibid.

⁵⁶⁹ Ibid.

⁵⁷⁰ Powles, "To Testify or Not To Testify - Privilege from Testimony at the Ad Hoc Tribunals: The *Randal* Decision." P. 514

journalist. However, there was never an issue regarding the confidentiality of sources in *Randal*. Randal's interview with Radoslav Brdjanin was on-the-record and had been published years before the trial. If sources were not at issue, then what arguments would be advanced to seek privilege? The critical argument in *Randal*, in support of privilege in the absence of having to protect confidential sources, was the need to protect the public interest in the free flow of information. This argument will be examined in detail later in this chapter.

Randal's counsel, barristers Geoffrey Robertson and Steven Powles as well as solicitors, Mark Stephens and Fiona Campbell, built their case upon the premise of a public interest privilege rather than a reporter's privilege.

According to Randal, therefore, the Tribunal's power to subpoena must be tailored to the recognized public interest privilege of, *inter alia*, journalists to whom a strong presumption against requiring them to testify pursuant to a compulsory process should apply.⁵⁷¹

A public interest privilege is a "concept that is more one from English law than American law," explains U.S. media lawyer Floyd Abrams.⁵⁷² It is a "privilege that is of a general sort, not limited to particular professions or people in particular fields of endeavour, which simply allows courts to make a series of ad hoc decisions, that the public interest is sometimes better served, sometimes but rarely, by preventing questioners from obtaining answers to certain questions because the price tag of doing so is too great."⁵⁷³ Randal's counsel claimed the public interest privilege arose from, in part, the "outstanding benefits for international criminal justice that derive from media coverage in combat zones – namely, that it provides important information about international conflicts, including alerting to the commission of war crimes, and that it provides evidential material for

⁵⁷¹ Prosecutor v. Radoslav Brdjanin and Momir Talic: Decision on Motion to Set Aside Confidential Subpoena To Give Evidence. Para 10

⁵⁷² "Interview With John Ackerman"

⁵⁷³ Ibid.

prosecutorial *investigation* of war crimes.”⁵⁷⁴ The Prosecution may have been surprised to discover the public was the indirect beneficiary of the privilege being claimed and that prosecutors, as agents of international criminal justice serving the public, were the direct beneficiaries. However, media lawyer and *Randal Amici Curiae* counsel, Floyd Abrams, argues that directly or indirectly it is always the public that is served by journalistic privilege. He contends journalists seek legal protection for sources that cannot do so on their own, in order to provide the public with information and thereby serve the public interest:

Journalists’ privilege is one, that although it is not established to benefit journalists is one in which journalists are, the people who have the right to decide whether to waive it or not. One of the reasons for that is that the circumstance in which journalists’ need the privilege tend to be the very circumstances in which sources are subject to the greatest pressures to waive the privilege. So you have with frequency situations in which the source says, I don’t care, it’s all right with me, and the source doesn’t mean it for the same reason that the source needed protection in the first place, the source can’t be found out to be insisting on a privilege because that would reveal him. There is the anomalous sounding quality of the journalist’s privilege, which irritates a lot of judges. That it sounds as if it is some badge of professional status rather than a privilege perhaps better thought of as a public interest privilege, except for the fact that we don’t have that concept in America.⁵⁷⁵

Floyd Abrams maintains that some judges are irritated when they hear about journalistic privilege, believing the profession is seeking special status. However, that was not the response of the Appeal judges in *Randal*. They clearly stated the “important public interest served by the work of war correspondents does not rest on a perception of war correspondents as occupying some special professional category.”⁵⁷⁶ The Appeals Chamber wanted to make the distinction between a category for individuals and their function in society. War correspondents were not being granted privilege in order to set them apart

⁵⁷⁴ Prosecutor v. Radoslav Brdjanin and Momir Talic: Decision on Motion to Set Aside Confidential Subpoena To Give Evidence. Para 11

⁵⁷⁵ "Interview With John Ackerman"

⁵⁷⁶ Prosecutor v. Radoslav Brdjanin, Momir Talic: Decision On Interlocutory Appeal. Para 38

under a special category but to recognize the significance of their work in enabling citizens “of the international community to receive vital information from war zones.”⁵⁷⁷

Although the concept of public interest privilege does not formally exist under U.S. law, it is, in fact, the theoretical imperative on which reporter’s privilege is built.⁵⁷⁸ Information derived from sources – whether confidential or not confidential – must be protected, argued counsel in *Randal*. In the U.S., “non-confidential information is protected in over half of the American state shield laws or court recognized privileges.”⁵⁷⁹ Again, the Appeals Chamber agreed that the distinction between confidential and non-confidential sources was not the important issue at stake but rather the act of testifying against any source. The judges reasoned that any source expects information to be published but they do not expect to have a reporter testify against them.⁵⁸⁰ It is not how the source is characterized, as confidential or non-confidential, that is at issue but rather the ability of journalists to obtain information for the public. The Appeals Chamber ruled there was a reasonable apprehension that testifying against sources could diminish the flow of information to the public and infringe on its right to receive information.⁵⁸¹

The Trial Decision

The Trial Chamber’s decision on journalistic privilege in *Prosecutor v. Radoslav Brdjanin and Momir Talic: Decision On Motion To Set Aside Confidential Subpoena To Give Evidence* was distinctly different from the decision of the Appeals Chamber, although both heard similar arguments. In both chambers, Randal claimed a public interest privilege based on his

⁵⁷⁷ Ibid. Para. 38

⁵⁷⁸ "Interview By Sherri Beattie With Floyd Abrams, Media Lawyer, Lead Counsel For Amici Curiae In *Randal*" December 14, 2004

⁵⁷⁹ Nia Y. McDonald, "Under Fire: The Fight for the War Correspondent's Privilege," *Howard Law Journal* 47 (2003). P. 150

⁵⁸⁰ *Prosecutor v. Radoslav Brdjanin, Momir Talic: Decision On Interlocutory Appeal*. Para 43

⁵⁸¹ Ibid. Paras 43-44

work as a war correspondent, asserting there would be specific consequences for journalists if they were compelled to testify before international criminal courts, including:

1. journalists' independence would be undermined and journalists would have fewer opportunities to conduct interviews with officials with superior authority, particularly in conflicts that are ongoing,
2. journalists would as a collective profession be put at risk of greater harm and danger, including exposing their sources to such risk and, as a result therefore,
3. the amount of information that conflict zone reporters are able to produce, including specifically information about possible crimes against humanity, would tend to dry up.⁵⁸²

Randal argued that the Trial Chamber should both support and recognize the legal protections already in place for journalists by providing them with qualified privilege. He relied on, amongst others, Article 79 of Protocol I to the Geneva Conventions:

1. Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1.
2. They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in Article 4 (A) (4) of the Third Convention.
3. They may obtain an identity card similar to the model in Annex II of this Protocol. This card, which shall be issued by the government of the State of which the Journalist is a national or in whose territory he resides or in which the news medium employing him is located, shall attest to his status as a journalist.⁵⁸³

The designation of journalists as civilians under the Geneva Conventions is important because one of the primary purposes of the treaty is to protect civilians in times of war. The Conventions provide States with the authority to seek out and prosecute individuals who violate its provisions. Violations under the Conventions committed against journalists would be legally pursued just as those against other civilians. The Geneva Conventions

⁵⁸² Prosecutor v. Radoslav Brdjanin and Momir Talic: Decision on Motion to Set Aside Confidential Subpoena To Give Evidence. Para 11

⁵⁸³ "Additional Protocol I of 1977," (Article 79

provide that journalists, although civilians, play a different function in conflict and are accorded certain rights not granted to other civilians:

...few combatants are aware that the Geneva Conventions afford special protections to journalists. The spirit and the letter of international humanitarian law are clear. When accredited by and accompanying an army, journalists are legally part of that military entourage, whether they see themselves that way or not...If captured by opposing forces, they can expect to be treated as prisoners of war. The Geneva Conventions say so quite unambiguously: equating war correspondents with 'civilian members of military aircraft crews' and other integral, albeit non-uniformed, participants in the greater military enterprise. Journalists are legally entitled to greater autonomy than most other civilian non-combatants: reporters can be detained only for "imperative reasons of security," and even then are entitled to be held with the same legal protections as a prisoner of war, including the right not to respond to interrogation (though notebooks and film may legally be confiscated by military personnel).⁵⁸⁴

The provisions of the Geneva Conventions relating to journalists primarily address physical and safety issues, whereas qualified privilege is essentially about who controls information flow to the public. Article 79 does little more than acknowledge that the work of war correspondents is dangerous, and insists that combatants – if they know someone is a journalist – accord them the same rights as a civilian. However, nine times more civilians now die in armed conflicts than do combatants.⁵⁸⁵ Given that bleak statistic, there is little comfort for journalists in the 'full protection' afforded to them under the Geneva Conventions as civilians. Nonetheless, Randal's counsel argued that the Trial Chamber should recognize the legal protections for journalists set out in the Geneva Conventions and build upon them by granting qualified privilege to war correspondents.

Randal also cited Article 10 of the European Convention on Human Rights as a legal authority supporting the concept of a public interest privilege in protecting the free flow of information by the media to the public:

⁵⁸⁴ William A. Orme, *Journalists, Protection Of*, 2003, Available: <http://www.crimesofwar.org/thebook/journalists-protection.html>.

⁵⁸⁵ Barbara Crossette, *Lost Horizon: The World Expected Peace But Got A New Brutality*, 1999, The New York Times, Available: <http://www.globalpolicy.org/reform/lost.htm>.

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. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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 the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.⁵⁸⁶

Randal's counsel argued that the need to protect the public interest was the underlying principle in granting qualified privilege to war correspondents. Article 10 articulates the notion of a public interest privilege, clearly stating the right of the public to receive information and proscribing authorities from interfering with that right except under prescribed circumstances. The second part of Article 10 specifically mentions the protection of sources, albeit confidential ones, and although it talks about maintaining the authority of the judiciary and the need to prevent crime it does not give ascendancy to the right to prosecute over the right of the public to receive information.

Randal also relied on *Goodwin v. United Kingdom*.⁵⁸⁷ In 1989 William Goodwin was a British journalist working for a publication called "The Engineer." He received anonymous information about a company, "Tetra" in which the source claimed that Tetra was trying to raise a £5 million loan because the company was experiencing financial problems "as a result of an unexpected loss of £2.1 million for 1989 on a turnover of £20.3 million."⁵⁸⁸ The information came from a confidential corporate plan and a copy of the plan had disappeared from the company's offices. Tetra moved to stop publication of any

⁵⁸⁶ "Convention for the Protection of Human Rights and Fundamental Freedoms," (Article 10)

⁵⁸⁷ *Goodwin v. the United Kingdom* The European Court of Human Rights 1996. Para 11

⁵⁸⁸ *Ibid.* Para. 11

information coming from the corporate plan. The High Court of Justice ordered Goodwin to disclose his notes and the name of his source. Mr. Justice Hoffman ordered the journalist to identify his source so that Tetra could pursue this individual to recover the corporate plan, stop further publication of it, and seek damages.⁵⁸⁹ Goodwin appealed to the Court of Appeal, was unsuccessful as was an appeal to the House of Lords in 1990. Lord Bridge wrote:

The judge's task will always be to weigh in the scales the importance of enabling the ends of justice to be attained in the circumstances of the particular case on the one hand against the importance of protecting the source on the other hand. In this balancing exercise it is only if the judge is satisfied that disclosure in the interests of justice is of such preponderating importance as to override the statutory privilege against disclosure that the threshold of necessity will be reached.⁵⁹⁰

The Lords were satisfied that the interests of justice were of such importance that Goodwin must disclose his source. He was also held in contempt of court and fined £5,000.

Goodwin then took his case to the European Court of Human Rights ("ECHR") arguing that the order by British courts to disclose the identity of his source violated his right to freedom of expression under Article 10 of the European Convention on Human Rights.⁵⁹¹ The Court overturned the decisions of all three British courts. In reaching its decision, the ECHR posed three questions: 1) Was the interference "prescribed by law?" 2) Did the interference pursue a legitimate aim; and 3) Was the interference "necessary in a democratic society?"⁵⁹² The Court answered the first two questions in the affirmative but flatly rejected the notion that ordering disclosure was necessary in a democratic society. The Court reasoned the Convention "required that any compulsion imposed on a journalist to reveal his source had to be limited to exceptional circumstances where vital public or

⁵⁸⁹ Ibid. Para 15

⁵⁹⁰ Ibid. Para 18

⁵⁹¹ Ibid. Para 23

⁵⁹² Ibid. Paras 28-36

individual interests were at stake. This test was not satisfied in the present case.”⁵⁹³ Instead, the majority opined – and this was embraced by Appeals Chamber in *Randal* – that the press plays a critical public watchdog role that must be protected:

Without such information, 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...the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.⁵⁹⁴

Again, the notion that the public’s right to receive information must not be impeded in any way unless there are exceptional circumstances why the public would be better served by doing so.

Following the reasoning in *Goodwin*, Randal argued at trial that the Tribunal should only compel a journalist to testify in two specific circumstances that might be deemed sufficient to provide an “overriding requirement in the public interest.” Those circumstances are 1) where the evidence is of crucial importance in determining the guilt or innocence of an accused and; 2) that by testifying a journalist, his family, or sources would not be put in danger.⁵⁹⁵

Randal’s secondary arguments highlight some of the weaknesses of the Prosecution’s case against him. He asserted that the Trial Chamber issued the subpoena before determining whether it was necessary to do so.⁵⁹⁶ Furthermore, he argued that his evidence was not being used by the Prosecution to establish the guilt of Radoslav Brdjanin (the Prosecution wanted to use his evidence to help establish the *mens rea* of Brdjanin) and that the evidence was hearsay, because his interview was done through an interpreter, and

⁵⁹³ Ibid. Para 37

⁵⁹⁴ Ibid. Para 39

⁵⁹⁵ Prosecutor v. Radoslav Brdjanin and Momir Talic: Decision on Motion to Set Aside Confidential Subpoena To Give Evidence. Para 14

⁵⁹⁶ Ibid. Para 15

therefore had no probative value under Rule 89(C).⁵⁹⁷ This rule provides that the “chamber may admit any relevant evidence which it deems to have probative value” meaning the Chamber seeks out evidence that will “best favour a fair determination of the matter before it” or the best evidence available.⁵⁹⁸ Indeed, as was earlier discussed, hearsay evidence can be admitted under the Rules and deemed of probative value but it may be weighted differently by judges and is subject to their discretion. Somewhat ironically Randal’s counsel urged the court to subpoena “X,” the journalist who had acted as an interpreter for him in the Brdjanin interview.

...according to Randal, the Prosecution would not be able to surmount the burden of proving that Randal’s evidence is so crucial that it must be obtained through compulsion when it is unable to secure the voluntary testimony of X and declines to apply for the Trial Chamber to issue him with a subpoena pursuant to Rule 54.⁵⁹⁹

The Prosecution responded to all of Randal’s submissions except one. It contended that Randal’s evidence did have probative value and “went directly to the heart of the case against Brdjanin,” and that most of the evidence the journalist could provide was not hearsay but it provided little substantive argument to support its claims.⁶⁰⁰ However, the Prosecution did not address, in written or oral submissions, why it had not requested a subpoena against “X.”⁶⁰¹ However, Michael Montgomery, the journalist/translator referred to as “X” in the proceedings wrote to Randal’s counsel, Geoffrey Robertson, and indicated he was unwilling to testify:

I had several arguments why I would not testify. One, I did not accept it was vital to the case. You can argue whether I should be allowed to make that judgement or not. My position is that journalists should not be compelled to testify unless certain guidelines are set. My initial reluctance was that I didn’t think it was relevant to the case. I had definite misgivings about how the Prosecution was presenting this interview with Brdjanin

⁵⁹⁷ Ibid. Para 15

⁵⁹⁸ "Rules of Procedure and Evidence for the International Criminal Tribunal for the former Yugoslavia,"

⁵⁹⁹ Prosecutor v. Radoslav Brdjanin and Momir Talic: Decision on Motion to Set Aside Confidential Subpoena To Give Evidence. Para 15

⁶⁰⁰ Ibid. Para 17

⁶⁰¹ Ibid. Para 17

based on Jon's account; and I did believe it would put me at risk. On further thinking about it, I came down to the position that this should absolutely be fought. The Office of the Prosecutor ("OTP") had never come up publicly with any guidelines on how to approach testimony from journalists. I decided that in theory once they got me on the stand they could ask me about anything they could say was relevant to the case. There were no guidelines.⁶⁰²

Beyond the evidentiary problems facing the Prosecution in *Brđjanin*, the Prosecution was concerned that a decision in *Randal* would create greater evidentiary problems for Tribunal prosecutors in the future. The Prosecution did not want the decision to extend beyond the present case, i.e. providing privilege to a broad category or class of individuals. Some scholars argue that minimalism from the bench, which "calls for cases to be decided, rather than for the setting of broad rules...reduces the burden of making decisions and decreases the dangers associated with erroneous decisions."⁶⁰³ Other scholars point out that no protection, until *Randal*, existed for war correspondents.

The primary conclusion of this investigation is simply that there is no current adequate international scheme for the protection of journalists working in dangerous regions. All too frequently, the perpetrators of these horrible crimes go unpunished. As a result, it appears that many military groups seem to view such violence as a legitimate method to silence criticism and forward their cause.⁶⁰⁴

However, as war correspondent Ed Vulliamy has pointed out, "...to be a war correspondent is to put one's self in harm's way."⁶⁰⁵ Still, Vulliamy's colleague, Roy Gutman argues that protection, in the field, for war correspondents is a different matter from the Tribunal defining a clear set of standards of practice for obtaining information and evidence from journalists:

They've treated reporters as sort of expendable witnesses who can just be called up there and used when they need them...they do not have a procedure for dealing with the press. They do not have any guidelines, they do not have any

⁶⁰² "Interview With Michael Montgomery"

⁶⁰³ Megan A. Fairlie, "Rulemaking from the Bench: A Place for Minimalism at the ICTY," Texas International Law Journal 39 (2004). P. 271

⁶⁰⁴ Dylan Howard, "Remaking the Pen Mightier Than the Sword: An Evaluation of the Growing Need for the International Protection of Journalists," The Georgia Journal of International and Comparative Law 30 (2002). P. 541

⁶⁰⁵ "Interview With Ed Vulliamy"

rules and the prosecutor you know, somebody gets a bright idea, let's call in the reporter.⁶⁰⁶

Ultimately, the Prosecution's arguments all coalesced into one contention: "Randal must appear for testimony, *inter alia*, because Randal offers no substantial interest that would override the powerful public interest that all relevant evidence be available to this Tribunal, and Brdjanin's right to a fair trial."⁶⁰⁷

The Trial Chamber stated it would not consider the broader issue of journalistic privilege but limit its decision to the subject matter presented. The Trial Chamber agreed with Randal that war correspondents were key to informing the international community about conflict. They also agreed it was their reportage that was largely responsible for the establishment of the ICTY. However, the Chamber said that the Tribunal continued to rely on conflict reporting to "bring to justice those responsible for the crimes journalists report on."⁶⁰⁸ Privilege – at least absolute privilege – it argued might make reportage useless:

The Trial Chamber, however, emphasises that these reports would lose much of their weight and relevance for this Tribunal if the ensuing pretended privileges of such journalists in a way so as to render the utility of their reports for the purposes of this Tribunal totally dependent on the wish or sole discretion of the journalist concerned, and therefore potentially useless.⁶⁰⁹

The Chamber said it did not understand how a journalist's objectivity or independence was threatened by testifying when the material at issue had been published. Furthermore, it argued journalists should expect others to exercise their right to question them about their reportage after it is made public. The court said this was an "inescapable truth and a consequence of making public one's finding."⁶¹⁰ More importantly, the judges of the Trial

⁶⁰⁶ "Interview With Roy Gutman"

⁶⁰⁷ Prosecutor v. Radoslav Brdjanin and Momir Talic: Decision on Motion to Set Aside Confidential Subpoena To Give Evidence. Para 22

⁶⁰⁸ Ibid. Para 25

⁶⁰⁹ Ibid. Para 25

⁶¹⁰ Ibid. Para 26

Chamber, unlike those in *Goodwin*, differentiated between freedom of expression and freedom of the media:

Journalism is a form of professional exercise of the right to freedom of expression available to every individual, but freedom of expression and freedom of media, although strictly related, are two distinct fundamental freedoms. Indeed while freedom of expression is in itself a manifestation of individual liberty and is not the exclusive right of the journalist, freedom of the media is a prerogative exercised by that important industry. In the present case, the freedom of the media is only marginally involved.⁶¹¹

The Trial Chamber, looking at the facts in *Randal*, did not see how it was impeding this journalist, or any other, from exercising his or her right to report. Jonathan Randal published his article, he identified Radoslav Brdjanin as the source, and he was only sought by the Prosecution in relation to the published piece.

The Trial judges, although indicating they would not consider the broad issue of journalistic privilege in this case, acknowledged that it was an important issue that the Tribunal needed to address. From the Tribunal's inception and its first case, *Tadić*, journalists had played an important evidentiary role as witnesses but no official guidelines or legal precedent existed to define that role within international law. Cases such as *Simić* had defined the role – and use of privilege – for other witnesses such as employees of the ICRC. However, the Trial judges believed *Randal* presented inappropriate facts for concluding anything about privilege for journalists. A frustrated panel of judges expressed dismay that what the Tribunal needed to consider was qualified privilege but this case was an ill-considered choice for arguing the issue because protection of sources played no role in it:

...it was to be expected that sooner or later the status, the role and the pretended rights of journalists reporting from conflict zones would come up for consideration and decision by this Tribunal and/or the ICTR, they have been brought forward in what this Trial Chamber considers the wrong case...acknowledging and extending protection of journalistic sources, which is the heart-and-soul of the mentioned pretended qualified privilege and the bone of contention is almost the totality of the case-law to which reference

⁶¹¹ Ibid. Para 26

has been made by parties, is conspicuously absent in this case.⁶¹²

Randal wanted his subpoena set aside based on a claim to privilege supported by case law, like *Goodwin*, which when read narrowly is primarily about confidentiality of sources. The judges felt the right issue was being presented but in the wrong case with the wrong law.

The Chamber was not persuaded by Randal's arguments that he would be at risk of physical danger if compelled to testify. Randal had retired by 2002. Apart from his retirement, he admitted that following the publication of his article he returned to Banja Luka several times over the course of four years and pursued more meetings with Brdjanin. The accused never granted him another interview and Randal conceded he never felt at risk upon returning to Bosnia.⁶¹³

The Trial Chamber ruled that the statements attributed to Brdjanin in the article were pertinent to the case and therefore the Prosecution had a right to admit the article as evidence, Randal had an obligation to confirm it, and the Defence had a right to cross-examine him. The subpoena was not set aside; Jonathan Randal appealed the decision.

The Appeal Decision

Randal says the newspaper briefly hesitated in appealing the Trial Chamber decision because they feared that if they lost an appeal the final decision would have even greater weight as precedent.⁶¹⁴ However, the *Washington Post* believed the issue of subpoenaing journalists was sufficiently important to launch an appeal. Indeed, long before the *Randal* decision, American journalists decried the use of subpoenas:

In a 1981 speech, *New York Times*, executive editor A.M. Rosenthal declared that, by enforcing subpoenas against journalists, the courts were telling the press 'what to publish, when to publish, how to operate, what to think.'⁶¹⁵

⁶¹² Ibid. Para 28

⁶¹³ Ibid. Para 28 (B)(ii)

⁶¹⁴ "Interview With Jonathan Randal"

⁶¹⁵ Stephen Bates, "The Reporter's Privilege, Then and Now," *Society* 38.5 (2001).P. 41

In the U.S., journalists as part of the American Constitution and Bill of Rights are provided with both a constitutional function or role and legal protection:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.⁶¹⁶

First Amendment rights are the critical underpinnings to legal and philosophical attitudes about the role of journalists in American society. Former ICTY Chief Prosecutor, Richard Goldstone maintains, in considering the principal of journalists testifying, the difference between the U.S. and every other democracy is that the First Amendment as part of the Constitution takes priority over other human rights.⁶¹⁷ Some journalists have gone so far as to argue, “the First Amendment places them in a constitutionally elite class.”⁶¹⁸ They have consistently contended testifying undermines their ability to inform the public: subpoenas threaten to “transform the independent press into an investigative arm of the government,” silence sources, reduce the flow of information to the public, and violate First Amendment rights.⁶¹⁹

The Appeals Chamber entertained similar arguments about the independence of journalists, the need to protect access to sources, and the importance of providing information to the public. Jonathan Randal advanced his claim for privilege based on five propositions:

1. Journalists inform the public about international conflicts and alert them to possible war crimes being committed. This reportage is essential to the investigation of these crimes and the potential arrest of war criminals.
2. This information is critical to the functioning and success of international criminal justice but it depends upon reporters having access to war zones

⁶¹⁶ "U.S. Constitution, Bill Of Rights," (1791).

⁶¹⁷ "Interview With Richard Goldstone"

⁶¹⁸ Bates, "The Reporter's Privilege, Then and Now." P. 41

⁶¹⁹ Ibid. P. 41

as well as political and military leaders within them.

3. Compelling journalists to testify against individuals about whom they have reported, or who have provided them with information, will lessen their opportunities to interview and report in the future.
4. The routine issuing of subpoenas against reporters will put individual journalists and the collective profession at risk when they enter conflict zones.
5. Compelling reporters to testify will result in less information for the public and the international criminal justice system about possible international crimes.⁶²⁰

Randal held there was a presumption against issuing a subpoena for a journalist based on an international public interest in receiving information, thus a public interest privilege. The privilege, he insisted, should only be set aside in favour of compelling a journalist to testify when:

1. A journalist's testimony will be of 'crucial importance' to a finding of guilt or innocence in the accused.
2. The evidence is not available from any other source.
3. By testifying, the journalist will not breach the confidentiality of a source.
4. By testifying the journalist, or his/her family will not be placed in danger.
5. The testimony will not unnecessarily put other journalists, in conflict zones, at risk or hamper their effectiveness.⁶²¹

The test is very broad and if accepted would have created a demanding standard to meet in order to compel journalists' testimony. If the Appeals Chamber had adopted the five propositions as the standard for privilege, in effect, it would have granted absolute privilege to journalists. There is no scenario – or very, very few – that would enable a prosecutor or defence counsel seeking the testimony of a journalist to meet the five propositions outlined in the test.

⁶²⁰ Powles, "To Testify or Not To Testify - Privilege from Testimony at the Ad Hoc Tribunals: The *Randal* Decision." PP. 515-516

⁶²¹ Ibid. P. 516

In the Appeal, Randal was supported by an *Amici Curiae* led by U.S. media lawyer, Floyd Abrams. An *Amici Curiae* is generally “an adviser to the court on some matter of law who is not a party to the case; usually someone who wants to influence the outcome of a lawsuit involving matters of wide public interest.”⁶²² Abrams represented more than 30 international news organizations including CNN, BBC and The New York Times. The *Amici Curiae* asserted the crux of the argument, against compelling journalists to testify, was 1) it would reduce the flow of information to the public and to international courts; and 2) journalists would lose their status as independent, neutral, observers and be perceived as agents of the courts.⁶²³ The *Amici Curiae* asserted, as its key argument in support of *Randal*, the notion of a public interest privilege arising from the public’s right to receive information.

The *Amici Curiae* test for privilege was less ambitious than that proposed by the Appellant. It argued the Trial Chamber should only issue a subpoena to compel the testimony of a journalist when, 1) “The testimony is essential to the determination of the case; and 2) the information cannot be obtained by any other means. For the testimony to be essential, its contribution to the case must be critical to determining the guilt or innocence of a defendant.”⁶²⁴ The Appellant’s test called for testimony to be of crucial importance in determining guilt or innocence whereas the *Amici Curiae* argued testimony be essential to the determination of the case. Neither proposition was adopted by the Appeals Chamber.

The Prosecution argued there may be a benefit to journalists and international justice in protecting confidential sources and confidential information but this was not the

⁶²² "Merriam-Webster's Dictionary of Law,"

⁶²³ Prosecutor v. Radoslav Brdjanin, Momir Talic: Decision On Interlocutory Appeal. Para 17

⁶²⁴ Ibid. Para 20

case in *Randal*. The Prosecution reminded the Appeal Chamber that Randal's information was contained in a published article with named sources. Furthermore, it said journalists imperilled themselves by publishing information about war crimes and war criminals, not in testifying. The Prosecution asserted the privilege granted to others at the Tribunal, such as ICRC workers and lawyer-client relationships, arose from well-established principles in national and international law. It pointed out privilege for non-confidential matters did not exist in any national or international legal system.⁶²⁵ Finally, it urged the Appeals Chamber to adopt the Trial Chamber's interpretation of the *Goodwin* decision, a case the Trial court read as primarily focusing on confidential sources. The Prosecution focused much of its argument on confidential versus non-confidential sources. Read narrowly, the case would lead the Prosecution to believe sources were the tipping point of the argument; if confidential sources were not at stake then how could privilege be granted? However, this was an international tribunal, the first since Nuremberg, considering the role, importance, and influence of the international media in detecting international crimes and alerting a global audience. Sources, confidential or otherwise, were deemed of secondary importance compared to the larger task of the global media in providing information about international crimes to the public.⁶²⁶ The Prosecution did not address strongly and persuasively the question of public interest privilege in order to protect the flow of information and the right to receive it.

War Correspondents v. Journalists

The first issue the Appeals Chamber addressed in reaching its decision was what group was under consideration. The Chamber rejected the notion this was an issue concerning all journalists but rather only the smaller, specific, subset of war correspondents.

⁶²⁵ Ibid. Para 25

⁶²⁶ Ibid. Para 41

It is not clear why the Appeals Chamber felt compelled to distinguish between the two terms but Defence counsel, John Ackerman believes war correspondents' role in conflict zones, and then as potential legal witnesses distinguishes them from other journalists:

If courts are going to put war correspondents in the position of testifying about their observations, against their will, can they safely do their jobs in the field. If they are there as a witness rather than as a reporter will they be less safe? Or are they always there as a witness? Does it not make any difference? I don't know the answers to these questions. Journalists seem to think that being forced to testify puts them at risk in a war zone. I'm not sure any of us are in a very good position to challenge that assertion, including ICTY judges...I believe there is an issue here specific to war correspondents.⁶²⁷

However, the Appeals Chamber in defining a "war correspondent" did not narrow the group of individuals who might seek qualified privilege but rather, perhaps inadvertently, broadened it. The judges wrote, "By 'war correspondents,' the Appeals Chambers means 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."⁶²⁸ Using this definition many humanitarian aid and human rights workers who visit conflict zones, gather information, and publish reports for their organizations could also seek qualified privilege. They would not have to seek privilege through a legal challenge to the Tribunal but claim it using *Randal* as precedent.⁶²⁹

Counsel, Steven Powles agrees this is how the decision should be interpreted. "They [humanitarian aid and human rights workers] should come under it as well. Without a doubt, NGOs should come under it. I have no doubt about that whatsoever."⁶³⁰ Prosecutors wanted to avoid privilege being granted to journalists and argued against it (initially at the Trial Chamber and again in the Appeals Chamber) because it creates an

⁶²⁷ "Interview With John Ackerman"

⁶²⁸ Prosecutor v. Radoslav Brdjanin, Momir Talic: Decision On Interlocutory Appeal. Para 29

⁶²⁹ Megan A. Fairlie, "Prosecutor v. Brdjanin & Talic," *The American Journal of International Law* 98.4 (2004). P. 809

⁶³⁰ "Interview With Steven Powles"

additional evidentiary hurdle in trying cases. Therefore extending privilege to humanitarian aid and/or human rights workers would present another evidentiary obstacle for prosecutors. However, it is not possible to know what the reaction of any members of the Office of the Prosecution was to the overall *Randal* decision or any specific aspects of it. Prosecutors are prohibited from commenting on the decision or any issue that might arise from it:

As Senior Appeals Counsel [Norman Farrell], it is my policy and the policy of the office, not to comment on Appeals Chamber's Decisions or to pass judgement on their correctness in some respects. As counsel who must represent the Prosecution every day before the Chamber, it is my practice not to comment on issues before the Chamber or matters which may arise...many of the questions you sent essentially require me to address the Chamber's decision, indicate whether I consider it correct in principle and comment on what essentially was the Prosecution's position in the Brdanin appeal when Mr. Randall was called as a witness.⁶³¹

However, it is not only the definition of a “war correspondent” in *Randal* which has created uncertainty and prompted questions as to who is entitled to qualified privilege and how it is to be determined.

Analysis of the Decision

The Appeals Chamber admitted it was in uncharted territory, with little jurisprudential guidance, in making a decision about compelling war correspondents to testify:

The issue of compelled testimony by war correspondents before a war crimes tribunal is a novel one. There does not appear to be any case law directly on point. War correspondents who have previously testified at the International Tribunal did so on a voluntary basis.⁶³²

The Chamber posed three different questions. It asked whether there was a public interest in the work of war correspondents. If so, would compelling them to testify negatively impact upon their ability to work? If this were true, what test should be applied to “balance

⁶³¹ "E-mail Correspondence Between Sherri Beattie and Norman Farrell, Senior Appeals Counsel, ICTY" December 1, 2004

⁶³² Prosecutor v. Radoslav Brdjanin, Momir Talic: Decision On Interlocutory Appeal. Para 30

the public interest in accommodating the work of war correspondents with the public interest in having all relevant evidence available to the court?”⁶³³

The answer to the first question was undoubtedly “yes.” The Appeal judges only had to consider the existence of the Tribunal itself to determine whether there was a public interest in the journalism of war correspondents.

The role of the media and the television, in particular, bringing into our living rooms the intimate, immediate, ‘real-time’ images of crimes as they occur, has been widely referred to as being among the causes for the public moral alert that triggered the chain of political events leading to the establishment of the Yugoslavia Tribunal by the Security Council in 1993.⁶³⁴

Beyond the establishment of the ICTY however, the *Goodwin* decision confirmed the importance of the watchdog role the press plays in democracies.

Goodwin also drew on American jurisprudence citing *Shoen v. Shoen* in which the United States Court of Appeals for the Ninth Circuit considered the case of Ronald Watkins. Watkins was an author writing a book about a bitter family feud over the control of a u-haul company.⁶³⁵ The feud pitted the father, Leonard Shoen against two of his sons, Mark and Edward Shoen. In the midst of the family fight, Eva Berg Shoen, the wife of eldest son Sam Shoen, was found murdered. Leonard Shoen allegedly made defamatory statements, in interviews with Ronald Watkins, about the role of his two sons Mark and Edward in Eva Shoen’s death. At the pretrial discovery the plaintiffs “served Watkins with a subpoena *duces tecum* ordering him to appear at a deposition, testify, and produce any notes, documents, electronic recordings, or any other records in his possession relating to the death of Eva Berg Shoen.”⁶³⁶ Watkins appeared at the discovery but refused to produce the documents or answer questions about his interviews with Leonard Shoen. The plaintiffs

⁶³³ Ibid. Para 34

⁶³⁴ Tallgren, "La Grande Illusion." P. 301

⁶³⁵ *Shoen v. Shoen*. 5 F.3d 1289 United States Court of Appeals for the Ninth Circuit 1993.

⁶³⁶ Ibid. P. 1291

filed a motion to compel and Watkins responded with a motion to quash arguing that “compulsory disclosure of his interviews with Leonard Shoen would violate his qualified First Amendment privilege as a journalist.”⁶³⁷ It was agreed that Leonard Shoen never had any expectation of confidentiality in agreeing to the interviews with Watkins. First, the court asked whether an investigative author could invoke a journalist’s privilege. Second, it asked whether the journalist’s privilege protects non-confidential information. It answered in the affirmative to both questions before posing the third question: “Have the plaintiffs demonstrated a need for Watkins’ information that is sufficient to overcome the interests favoring non-disclosure?”⁶³⁸

It is interesting to note – especially in light of what some see as a broad definition of the term, “war correspondent” in *Randal*, which may extend to humanitarian aid workers – how the court in *Shoen* defined who could qualify for privilege.

In sum, we see no principled basis for denying the protection of the journalist’s privilege to investigative book authors while granting it to more traditional print and broadcast journalists. What makes journalism, journalism is not its format but its content.⁶³⁹

As to how a party overcomes privilege *Shoen* said, “At a minimum, this requires a showing that the information sought is not obtainable from another source” a standard that the Appeals Chamber adopted in *Randal*.⁶⁴⁰ In *Shoen*, the justification for using this standard was rooted in the First Amendment whereas in *Randal* it arose from a public interest privilege:

...the privilege is a recognition that society’s interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public, is an interest ‘of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.’⁶⁴¹

⁶³⁷ Ibid. P. 1291

⁶³⁸ Ibid. P. 1292

⁶³⁹ Ibid. P. 1293

⁶⁴⁰ Ibid. P. 1296

⁶⁴¹ Ibid. P. 1292

The Appeals Chamber in *Randal* found *Shoen* persuasive. *Shoen* served as precedent for the importance of upholding the free flow of information to the public even if when it means obtaining evidence for trials is made more difficult.

The Appeals Chamber in its decision also highlighted *Fressoz and Roire v. France*. The case, from the European Court of Human Rights, involves two French journalists, Roger Fressoz and Claude Roire both of whom worked for the satirical newspaper, *Le Canard enchaîné*.⁶⁴² Roire was anonymously sent the tax forms of Jacques Calvet, the company chairman of Peugeot, the car company. While Peugeot fought pay raises for its employees the tax forms revealed the chairman had given himself a 45.9% raise over two years. When *Le Canard enchaîné* published this information, Mr. Calvet brought a criminal complaint against Fressoz and Roire alleging amongst other things, “misappropriation of documents for the time needed to reproduce them and handling unlawfully obtained documents.”⁶⁴³ The journalists fought the charges but lost in the Paris Criminal Court, the Paris Court of Appeal and in the Court of Cassation before taking their case to the European Court of Human Rights (“ECHR”). The lower courts interpreted this as a criminal case about handling unlawfully obtained information whereas the ECHR focused on whether the conviction against the journalists “constituted a breach of their right to freedom of expression under Article 10 of the Convention.”⁶⁴⁴ The Article is argued to be a legal underpinning for a public interest privilege for journalists, the main thrust of the Appellant argument in *Randal*. Article 10 ensures freedom of expression and any interference with it must be prescribed by law, in pursuit of one or more of the aims enumerated in the Article,

⁶⁴² *Fressoz And Roire v. France* European Court of Human Rights 1999. Para 8

⁶⁴³ *Ibid.* Para 11

⁶⁴⁴ *Ibid.* Para 28

and those aims must be considered necessary in a democratic society.⁶⁴⁵ This is the test for any government trying to encroach upon the rights protected under Article 10. The Court further clarified its position, outlining the fundamental principles derived from case law, in interpreting Article 10:

1. Freedom of expression constitutes one of the essential foundations of a democratic society.
2. The press plays an essential role in a democratic society.
3. As a matter of general principle, the “necessity” for any restriction on freedom of expression must be convincingly established.⁶⁴⁶

The European Court of Human Rights has, and continues to develop strong jurisprudence in the protection of freedom of the press and journalists. It slammed the French courts for their convictions against Fressoz and Roire:

Lastly, the reasoning of the Court of Appeal and the Court of Cassation was transparently artificial and its pernicious effects on freedom of the press immediate. Mr. Calvet had complained solely because his income had been disclosed. The fact that the applicants had been convicted of the purely technical offense of handling photocopies disguised what was really a desire to penalise them for publishing the information, although publication in itself was quite lawful.⁶⁴⁷

The ECHR has unequivocally told European nations not to interfere or infringe upon Article 10 unless they have compelling reasons that satisfy the test set out in it. The Court has identified freedom of expression as a key human right and it has elucidated the principle of media freedom as not just the right of journalists to impart information but equally, if not more importantly, the right of the public to receive that information.⁶⁴⁸ It is this argument that resonated with the Appeals Chamber in *Randal*. The Chamber reasoned it was not elevating war correspondents to a higher status or giving them a special

⁶⁴⁵ Ibid. Para 41

⁶⁴⁶ Ibid. Para 45

⁶⁴⁷ Fressoz And Roire v. France. Para 46

⁶⁴⁸ Ibid. Para 51

professional category but rather ensuring that the international community would continue to receive information from conflict zones as a fundamental right of all citizens.

The Appeals Chamber reinforced this argument in its decision in *Randal* noting Article 19 of the Declaration of Human Rights provides for not only freedom of opinion and expression but also the right of the public to receive information and ideas through the media.⁶⁴⁹

When the Appeals Chamber addressed the second question, whether compelling war correspondents to testify would hamper their ability to report, its focus continued to be the public right to information. It rejected the Trial Chamber's decision that compelling correspondents to testify posed no threat to their newsgathering function. However, the Appeals Chamber conceded it was impossible to know "to what extent the compelling of war correspondents to testifying before the International Tribunal would hamper their ability to work."⁶⁵⁰

If the judges did not know the actual impact upon journalists by testifying, why did they accept the argument? Steven Powles believes it is because the Appeal judges concluded that having reasonable apprehension that something might happen, i.e. compelling journalists to testify would hamper their ability to gather news, is sufficient to provide protection against it:

Sometimes making a decision is not knowing what is going to happen but what might happen, if journalists might be at greater risk by going back into a conflict zone after having testified. Then the right decision is giving them more protection. You don't have to prove it, just the fact that there is the possibility. It seems to me to be common sense. Any person that goes back into the conflict zone is at risk but not everyone who gives evidence has got a role in a conflict zone which is vital to the international community to have that person there.⁶⁵¹

⁶⁴⁹ "Universal Declaration Of Human Rights," (

⁶⁵⁰ Prosecutor v. Radoslav Brdjanin, Momir Talic: Decision On Interlocutory Appeal. Para 40

⁶⁵¹ "Interview With Steven Powles"

Powles believes war correspondents serve the international community and in doing so also serve the Tribunal and international criminal justice. The Trial Chamber concentrated on Randal as an individual journalist and his particular evidence. In the Appeals Chamber, there was a shift in onus from the individual to the collective, from particular evidence to the broader role of the media: privilege is not to protect war correspondents but their function in serving others, primarily the public but also war crime prosecutions. This was the primary argument, part of the public interest privilege argument asserted by the Appellant.

The secondary, or supporting, arguments advanced by the Appellant were not as persuasive. There was, and continues to be, no evidence that testifying in a war crimes trial makes sources less accessible or willing to be interviewed. Lindsey Hilsum is a television journalist for Britain's ITN network. She covered both the Rwandan and Bosnian genocides and testified in the first trial at the International Criminal Tribunal for Rwanda:

It has not restricted my access to conflict zones in any way and I don't believe it has affected journalists' access to talking to war criminals. I understand those arguments but I see no evidence that the fact that some journalists have testified has made a difference on this, although as I say, I do understand the arguments. I don't dismiss the arguments but at the moment, I don't think that they're salient.⁶⁵²

Nonetheless, the notion that journalists testifying makes sources less accessible or willing to be interviewed by the media is an argument that cannot be proven conclusively by either side in the debate. Steven Powles contends it is enough to suggest, without having to prove, that testifying might negatively affect sources for journalists for the Appeal judges to consider it. The *Amici Curiae*, as well as the Appellant, presented this argument:

The connection is straightforward: forcing reporters to testify against their sources (confidential or otherwise) will make future sources more hesitant to talk to the press, particularly in war zones. Much of the war reporting that has been done and the benefits that have been achieved could not have been

⁶⁵² "Interview With Lindsey Hilsum"

possible had the sources of the news (i.e. alleged war criminals, witnesses and others) known that one day in the future the reporter would turn around and testify against them in a war crimes tribunal.⁶⁵³

The Appeals Chamber accepted the Appellant and the *Amici Curiae* arguments that testifying would adversely affect the ability of war correspondents to report the news. The Chamber concluded it would not “unnecessarily hamper the work of professions that perform a public interest.”⁶⁵⁴

In order not to “unnecessarily hamper” the work of war correspondents, the Chamber formulated a test for determining under what circumstances testimony might be compelled from a journalist. How should it balance the right of the public to receive information from war correspondents with the public interest in having all relevant evidence available in war crimes tribunals?

The Appellant had proposed a five-prong test for granting privilege but it created such a high threshold for subpoenaing a journalist that it de facto gave them absolute privilege. The Appeals Chamber sought a more balanced, more moderate test for determining when privilege would be granted. The privilege test outlined by the *Amici Curiae* created a lower threshold, than the Appellant’s test, for subpoenaing journalists:

No journalist should be subpoenaed to testify in front of a war crimes tribunal unless their testimony:

1. is absolutely essential to the case; and
2. the information cannot be obtained by any other means.⁶⁵⁵

Ultimately, both the arguments and the presence of the *Amici Curiae* in *Randal* were influential in the disposition of the case.

The *Amici Curiae*: Its Role and Arguments

⁶⁵³ Prosecutor v. Radoslav Brdjanin: Brief Amici Curiae On Behalf Of Various Media Entities. (IT-99-36) Appeals Chamber, ICTY 2002. Para 28

⁶⁵⁴ Prosecutor v. Radoslav Brdjanin, Momir Talic: Decision On Interlocutory Appeal. Para 44

⁶⁵⁵ Prosecutor v. Radoslav Brdjanin: Brief Amici Curiae On Behalf Of Various Media Entities. Para 43

The *Amici Curiae* was “the largest and most diverse group of journalists and journalistic organizations throughout the world ever to join a single brief.”⁶⁵⁶ Floyd Abrams, counsel for the *Amici Curiae*, believes the *Randal* decision was the result of sound reasoning by the Appeal judges although he concedes they could not ignore the ability of those groups participating in the amicus brief to influence public opinion:

...I wouldn't be surprised if an organization that is so dependent upon international public opinion would at least try hard to accommodate the interests of the press...So I give the court a lot of credit, here you have five judges from extraordinarily diverse countries that have different legal systems all hearing this argument and all agreeing that significant protection is needed.

It was the *Amici Curiae* that directed the Appeals Chamber in how to define a qualified privilege test. The *Amici Curiae* provided the Appeals Chamber with a model of a qualified privilege test for journalists based on proven practice. At the time, there was no case law specifically on point for the judges and the issue of subpoenaing war correspondents for an international war crimes tribunal had never before been addressed. Although case law and conventions existed as authorities for freedom of expression, press freedom, and the right of the public to receive information there was no precedent or

656 Ibid. Para 1

1. The New York Times	19. Centre for Human Rights and Democratic Studies
2. The Dow Jones Company	20. Croatian Journalists Association
3. The Tribune Company	21. The European Publishers Council
4. Belos Corp	22. Express Newspapers (British)
5. Time Inc.	23. Fairfax Australian Papers
6. The Associated Press	24. Free Media Movement (Sri Lanka)
7. Cable News Network (CNN)	25. Greek Helsinki Monitor, NGO
8. U.S.A Today	26. Independent Journalists Association of Serbia
9. ABC Inc.	27. The Media Institute of Southern Africa
10. CBS Broadcasting	28. Radio B92, Belgrade
11. National Broadcasting Company (NBC)	29. Reporters Committee for Freedom of the Press
12. National Public Radio	30. Reporters Sans Frontieres
13. Fox News Network	31. Society of Professional Journalists
14. Fox Television Stations	32. South East Europe Media Organization
15. The Committee to Protect Journalists	33. World Assoc. of Community Radio
16. Association of Electronic Media (Belgrade)	Broadcasters
17. British Broadcasting Corporation (BBC)	34. World Press Freedom Committee
18. Canadian Journalists for Free Expression	

authority in international law defining a qualified privilege test for journalists. The *Amici Curiae* proposed that the Appeals Chamber consider the United States Department of Justice (“US DOJ”) guidelines (“Policy With Regard to the Issuance of Subpoenas to Members of the News Media”) with respect to issuing subpoenas to journalists.⁶⁵⁷ These guidelines were presented as striking the appropriate balance between the public interest in receiving information from the press and the public interest in prosecuting war crimes. The US DOJ Guidelines were the basis of the test put forward by the *Amici Curiae*:

The most significant relevant elements of the US DOJ Guidelines require that the information sought in a reporters’ subpoena be essential, not be available from other sources, and be non-peripheral.⁶⁵⁸

The Appeals Chamber Decision: A Test for Qualified Privilege

The DOJ Guidelines were partially adopted by the Chamber in its ruling. The Appeal judges formulated a two-prong test that would determine the importance of journalistic evidence to a case and its availability from other sources. However, the Appeals Chamber test differs in one significant aspect from the DOJ Guidelines; that is how the evidence of a journalist is characterized as important to a case. The *Amici Curiae* describe the evidence as “essential,” meaning “its contribution to the case must be critical to determining the guilt or innocence of a defendant. It should not be peripheral to the issues or parties of the case.”⁶⁵⁹ The Appeals Chamber responded to this definition saying, “...the criteria proposed by the *Amici Curiae* may be too stringent in that they may lead to significant evidence being left out.”⁶⁶⁰ Therefore, the Chamber adopted different criteria. In order to subpoena a journalist their evidence must be “...direct and important to the core

⁶⁵⁷ "U.S. Department of Justice: Policy With Regard To The Issuance Of Subpoenas To Members Of The News Media, Subpoenas For Telephone Toll Records Of Members Of The News Media, And The Interrogation, Indictment, Or Arrest Of, Members Of The News Media,," (1980.

⁶⁵⁸ Prosecutor v. Radoslav Brdjanin: Brief Amici Curiae On Behalf Of Various Media Entities. Para 49

⁶⁵⁹ Ibid. Para 44

⁶⁶⁰ Prosecutor v. Radoslav Brdjanin, Momir Talic: Decision On Interlocutory Appeal. Para 47

issues of the case” so that Trial Chambers have access to “all evidence that is really significant.”⁶⁶¹

The second part of the test requires that a journalist’s evidence is not reasonably available from any other source. There is more certainty as to what this means and how it should be interpreted, although it might still be subject to challenge. The same cannot be said for the first part of the test. The Chamber did not define “direct and important” except for characterizing the evidence as “really significant.” The majority of Appeal judges opined, in regards to Randal’s hearsay evidence, they did not believe it met the criteria of “direct and important.” John Ackerman, defence counsel for Radoslav Brdjanin, maintains there is no consensus among jurists on what “direct and important” means:

Q: If cases are built on many pieces of evidence – rather than ‘a smoking gun’ – because of the scope and nature of the crimes prosecuted then what is evidence that is of “direct and important value.”

John Ackerman: This question is not answered by the Tribunal at this point. I would surmise that ‘direct and important value’ would question whether the fact alleged could be proved without the journalist’s evidence.

Q: The *Amici Curiae* argued that the testimony should be ‘critical to determining the guilt or innocence of a defendant.’ Is, and how is, that an important difference from evidence of ‘direct and important value?’

John Ackerman: I am not able to parse the difference. It seems they say the same things.⁶⁶²

Steven Powles interprets the Appeals’ test differently:

Q: ...First, the evidence sought must be of ‘direct and important value’ in determining a core issue in the case.” Can you define/explain what this is?

Steven Powles: There is the guilt or innocence of the accused, and obviously, journalists can testify about that, and that would be a step higher probably than a core issue of the case. But in any case, there are issues that arise that are not as serious as guilt or innocence but are nonetheless very important. A core issue is probably as good as saying guilt or innocence. There aren’t many other core issues in a case other than someone’s guilt or innocence but I suspect that the Appeals Chamber wanted to use a less fine language than guilt or innocence because there are other issues arising in cases which don’t relate to guilt or innocence.

⁶⁶¹ Ibid. Para 48

⁶⁶² "Interview With John Ackerman"

Q: But amongst lawyers and judges there would be an accepted understanding of what is a core issue?

Steven Powles: There is no definition of a core issue. A core issue is what we determine on a case by case basis and is decided in the course of a case.⁶⁶³

Jonathan Randal and the media organizations declared victory after the Appeals Chamber decision. The Appeals Chamber asserted – through its written decision – that it both acknowledged, and was prepared to protect, the public interest in receiving the valuable information that war correspondents deliver to the global community. However, beyond this conclusion in the decision by the Appeal judges, what does qualified privilege legally mean for war correspondents? The *Amici Curiae* counsel, Floyd Abrams says it is too early to know, without it being tested, how privilege may be applied by the Tribunal but he hopes it will deter prosecutors or defence lawyers from unnecessarily subpoenaing journalists:

Q: About the Randal decision, it is yet to be tested, until it is tested...do we know what the decision means?

Floyd Abrams: You obviously need to see how it is applied in a variety of circumstances. I had urged the court to go farther and to say that the information had to be essential or central to the case, which is a notion consistent with the Attorney General's guidelines... one beneficial result... [is] to discourage prosecutors and defence counsel alike from seeking to subpoena the press in the first instance or where it really isn't necessary or in circumstances in which it might just be easier. That won't answer the hard questions, how relevant is relevant, how much do you have to need it, but it's a start.⁶⁶⁴

In choosing not to define the terms of qualified privilege, the Appeals Chamber is leaving it to future cases at the ICTY, or in other courts, to identify and characterize what is meant by “direct and important” and what issues may be considered “core issues” in terms of journalists testifying. Until qualified privilege for war correspondents is tested in the courts, it will remain somewhat nebulous.

⁶⁶³ "Interview With Steven Powles"

⁶⁶⁴ "Interview With Floyd Abrams"

Q: ...because this hasn't been tested outside of the Randal case, we really don't know in a sense what is qualified privilege for journalists?

Steven Powles: No. Not yet, although one would hope you would know a core issue when you see one. But yes, it needs to be tested. This isn't over yet. There are going to be more cases, clearly, although I suspect that the prosecution will be less inclined to try and call a journalist to testify now than they would have been before.⁶⁶⁵

John Ackerman argues journalists should not read too much into the *Randal* decision or the qualified privilege granted to war correspondents, at least not yet:

Q: Is qualified privilege for war correspondents still nebulous, if it has not been tested, at least once if not more often, before the Tribunal?

John Ackerman: I think it is very much up in the air. I do not think the *Randal* decision had any impact on the qualified privilege. That does not mean that it exists in international law and does not mean that it does not. I think it is a concept waiting for a taker.⁶⁶⁶

The Appeals Chamber Decision: A Separate Opinion

The confusion as to what is meant by “direct and important” is not confined to lawyers. The judges of the Appeals Chamber could not agree upon what it meant. Judge Mohamed Shahabuddeen issued a separate opinion in *Randal*.⁶⁶⁷ He concurred with his colleagues that war correspondents were entitled to qualified privilege. He also agreed *Randal*'s subpoena should be set aside based on the qualified privilege test but *only* because it did not meet the second requirement, i.e. the evidence could not be obtained elsewhere. He believed the interpreter/journalist could provide the evidence being sought. However, Judge Shahabuddeen thought *Randal*'s evidence was of “direct and important” value and he defined what was meant by the phrase. The Trial Chamber said journalists' evidence, if they were to be subpoenaed, must be “pertinent” to the case. The *Amici Curiae* argued this term was far too broad and vague to be used in a test for privilege:

The Trial Chamber's approach also undervalues free speech rights because it

⁶⁶⁵ "Interview With Steven Powles"

⁶⁶⁶ "Interview With John Ackerman"

⁶⁶⁷ Prosecutor v. Radoslav Brdjanin: Decision on Interlocutory Appeal, Separate Opinion of Judge Shahabuddeen. (IT-99-36) Appeals Chamber, ICTY 2002.

essentially allows journalists to be compelled to provide any testimony that is “pertinent” in any way to the case... This is not nearly a strong enough standard to guide tribunals in the rights of journalists and the interests of the public. Practically every statement a journalist makes can be “pertinent to” a case.⁶⁶⁸

Judge Shahabuddeen submits this is exactly what the Appeals Chamber has decided. The judge says it depends on what definition you attach to the word “pertinent:”

The word ‘pertinent’ can of course mean ‘an appendage,’ and clearly that would not provide any protection. But, as the dictionary shows, ‘pertinent’ can also mean ‘to the point,’ which is what I think it meant here. In my view, there was no difference in substance between ‘to the point,’ as ‘pertinent’ could be understood and ‘direct’ in the test adopted by the Appeals Chamber.⁶⁶⁹

He believes, unlike his colleagues, Randal’s article constitutes direct evidence about the accused. Judge Shahabuddeen contends that the statements attributed to Brdjanin “had important value in determining a core issue in the case, for, if true, they constituted an admission by the accused of his frame of mind in relation to some of the serious crimes charged.”⁶⁷⁰ Therefore, the evidence is compellable. Considering Judge Shahabuddeen’s different interpretation of “direct and important” and how it should be applied gives some credence to John Ackerman’s assertion that qualified privilege is a “concept waiting for a taker.” It will need to be tested, in order to be further defined and determined.

A Second Attempt to Subpoena Jonathan Randal

Following the Appeals Chamber decision, the Prosecution returned to the Trial Chamber to make a second request for a subpoena of Jonathan Randal.⁶⁷¹ The Appeals Chamber established qualified privilege and said Randal’s evidence regarding the statements attributed to Radoslav Brdjanin met the evidentiary standard for privilege, i.e., the testimony could be obtained from another source. They suggested, but did not decide, the evidence

⁶⁶⁸ Prosecutor v. Radoslav Brdjanin: Brief Amici Curiae On Behalf Of Various Media Entities. Para 41

⁶⁶⁹ Separate Opinion of Judge Shahabuddeen. Para 28

⁶⁷⁰ Ibid. Para 28

⁶⁷¹ Prosecutor v. Radoslav Brdjanin: Decision on Prosecution's Second Request for a Subpoena of Jonathan Randal.

was not direct and important. For that finding, the Prosecution was instructed to return to the Trial Chamber. It did so. This time in addition to focusing on the statements attributed to Brđjanin in Randal's article, it sought to submit oral evidence from the journalist about the accused's "demeanour and the context and circumstances in which the statements were made."⁶⁷² The Trial Chamber started with the premise that Randal's proposed testimony – the accuracy of Brđjanin's statements in the article – did go to a core issue in the case because if they were accepted as true than they were evidence as to his criminal responsibility and intent.⁶⁷³ Next, the Trial Chamber considered whether hearsay evidence could be direct and important. The Tribunal does admit hearsay evidence, a practice established in both case law and in the Rules of Evidence and Procedure. Additionally, it defines it as, "testimony that is given by a witness who relates not what he or she knows personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness."⁶⁷⁴ The Trial Chamber noted "a sizeable amount of the evidence that war correspondents in general could provide would, for obvious reasons, constitute hearsay evidence."⁶⁷⁵ However, it said because the Appeals Chamber used the term "direct" did not mean that hearsay evidence could not satisfy the qualified privilege test. Evidence could be both hearsay and direct using Judge Shahabuddeen's definition of equating "direct" with "to the point."⁶⁷⁶ The latter phrase being somewhat more generous and open than "direct," which suggests a specific, causal relationship or link.⁶⁷⁷

The Trial Chamber determined that the Prosecution's case for a second request for a subpoena of Jonathan Randal failed. The Trial Chamber said the "substantial issue" in

⁶⁷² Ibid. Para 15

⁶⁷³ Ibid. Para 17

⁶⁷⁴ Ibid. Para 22

⁶⁷⁵ Ibid. Para 22

⁶⁷⁶ Ibid. Para 22

⁶⁷⁷ "Merriam-Webster's Dictionary of Law,"

question was the accuracy of the quotes attributed to Radoslav Brdjanin in Randal's article. The Chamber said that since Randal spoke no Serbo-Croatian, "his evidence would not be of direct and important value in determining a core issue in the case."⁶⁷⁸ If the issue was accuracy, a man who could not speak the language was not in a position to present direct evidence about the issue. The other evidence sought based on Brdjanin's demeanour and the context, and circumstance in which the interview took place, also failed. Demeanour failed because it was linked to language. How could Randal testify about Brdjanin's physical responses – his body language - to what was being said when he did not understand Serbo-Croatian. As to the context, and circumstances, in which the interview took place that evidence did not meet the criteria of direct and important to determining a core issue. It could be admissible but would be peripheral. Randal's article was submitted as hearsay evidence and weighted accordingly. It was not referred to in the *Brdjanin* judgement.

Conclusion

The *Randal* case, when examined in evidentiary terms of what *The Washington Post* correspondent could provide to the Prosecution was not sufficiently persuasive to merit his being compelled to testify. Randal's article provided potentially useful information about the accused's state of mind and intent but not evidence considered pivotal, crucial, or "direct and important." From the outset, it was known and acknowledged there was another journalist who could provide direct, rather than hearsay, evidence.

The Appeals Chamber knew it could not avoid the issue of how, and under what, if any, circumstances journalist testimony could be compelled at the ICTY. It acknowledged the role of journalists in uncovering war crimes, alerting the public, and providing information to Tribunal investigations. Its reasoning that a public interest privilege was

⁶⁷⁸ Prosecutor v. Radoslav Brdjanin: Decision on Prosecution's Second Request for a Subpoena of Jonathan Randal. Para 39

needed in order to protect the flow of information to the public through the reportage of war correspondents is sound given that there can be no justice for victims if the public is not alerted and crimes are not exposed by journalists. The Tribunal's very establishment was, in part, as a result of the work of war correspondents. They have voluntarily provided both testimony in the courtroom and been generous suppliers of information for investigations. However, had the Office of the Prosecutor acted with greater forethought it would have recognized the importance of journalists' testimony and the need to work cooperatively and establish guidelines for that practice. Pursuing Jonathan Randal, a respected American war correspondent writing for *The Washington Post*, was not a particularly well thought out, strategic decision by the OTP. The folly of its decision would become apparent with the inclusion of the powerful *Amici Curiae* brief in the Appeals Chamber. The international media asserted itself and insisted on some rules to define the relationship between war correspondents and international criminal justice. War correspondents did not need to be granted qualified privilege. It was not necessary but the Appeals Chamber could not draw up informal practice directions or media guidelines for prosecutors. The time had passed for that option. Based on the arguments and case law before the Appeals Chamber, the judges concluded there was sufficient need to protect the public interest and its right to media information by providing war correspondents with qualified privilege. The decision has provided war correspondents with some legal protection against being unnecessarily subpoenaed and helped to define the role of journalists, as witnesses, at international war crimes tribunals. The Appeals Chamber decision has created a potential evidentiary hurdle for counsel in acquiring testimony from journalists but one that can be overcome by fulfilling the requirements of the qualified privilege test or pursuing evidence on a voluntary basis.

Responding to Randal – The Ethical Debate over Journalists Testifying

*It is about one's commitment, not just to the journalistic but to the human tragedy, not the journalistic story but the human tragedy we have the accursed honour to see. It is not enough just to say, I saw it, I write it in the paper, job done. That's not being a human being for me.*⁶⁷⁹

Until 2002, when the Trial Chamber issued a subpoena against *Washington Post* correspondent Jonathan Randal, journalists voluntarily testified at the ICTY. Ed Vulliamy testified for the prosecution in *Tadić*,⁶⁸⁰ *Blaskić*,⁶⁸¹ and *Kovacević*⁶⁸² and journalist Peter Maass was scheduled to testify in *Kovacević* before the accused died of a massive heart attack.⁶⁸³ The *Milošević* trial has seen BBC reporter Jacky Rowland, *Time* Belgrade correspondent Dejan Anastasijević⁶⁸⁴, Nenad Zafirović, for the Voice of America Serbian Service⁶⁸⁵, and Veton Surroi a Kosovo Albanian journalist all testify.⁶⁸⁶ ITN journalist Paul Davie testified in *Strugar*⁶⁸⁷ while fellow British journalists Daniel Damon testified in *Aleksovski*⁶⁸⁸ and Martin Bell in *Blaskić*. Many other journalists – Nina Bernstein,⁶⁸⁹ Roy Gutman⁶⁹⁰, Michael Montgomery⁶⁹¹, Robert Fisk,⁶⁹² Carol Off⁶⁹³, and Bill Schiller⁶⁹⁴ – have been approached about providing information and testifying. Their cooperation, in terms of either providing

⁶⁷⁹ "Interview With Ed Vulliamy"

⁶⁸⁰ Prosecutor v. Dusko Tadić a/ka/ "Dule," Opinion and Judgment.

⁶⁸¹ Blaskić Case (IT-95-14) Case Information Sheet.

⁶⁸² Prosecutor of the Tribunal v. Milan Kovacević: Transcript of Proceedings, July 14, 1998. (IT-97-24-I) ICTY 1997.

⁶⁸³ Peter Maass, "Journalists and Justice at The Hague," *The New York Times* July 5 2002.

⁶⁸⁴ Dejan Anastasijević, "Witness for the Prosecution," *Time International* October 28 2002.

⁶⁸⁵ Hina-Croatian News Agency, "Serbian Journalist Testifies at Milosevic Trial," January 13 2004.

⁶⁸⁶ Hina-Croatian News Agency, "Kosovo Albanian Journalist Continues Testimony in Milosevic Trial," April 19 2002.

⁶⁸⁷ Hina-Croatian News Agency, "British Reporter Testifies In Strugar Trial," March 4 2004.

⁶⁸⁸ IWPR Online, *The Aleksovski Trial: The Prosecution Ends its Case* (London: Institute for War and Peace Reporting, 1998).

⁶⁸⁹ Nina Bernstein, "Testing Different Expectations of Journalism: An American Journalist Wrestles With The Request To Provide Evidence To A War Crimes Tribunal," *Neiman Reports* 54.1 (2003).

⁶⁹⁰ "Interview With Roy Gutman"

⁶⁹¹ "Interview With Michael Montgomery"

⁶⁹² Fisk, "It Is Not My Job To Provide The Evidence For A War Crimes Tribunal."

⁶⁹³ CBC "War Crimes And The War Correspondent's Dilemma"

⁶⁹⁴ Don Sellar, "Why Make Life Worse For War Reporters," *Toronto Star* May 18 2002.

formal testimony or informal discussions, was given freely. There has been little public debate about whether journalists should testify at international war crimes tribunals, and if they do testify what the implications might be for individual journalists or the collective profession.

The debate, as to whether journalists should testify and what the implications might be, is not simply defined along lines of those who favour testifying and those who oppose it. There are gradations of commitment and opposition. There are numerous arguments along the ideological spectrum – total opposition to testifying to unqualified support for it – or from “always” to “never.” Nonetheless, there is also some common ground amongst journalists in the debate: They oppose journalists being compelled to testify. Equally, they agree that if a journalist is the only witness with evidence, which goes directly to an accused’s guilt or innocence, then he or she should testify. Many journalists view the decision to testify as a personal one that should be discussed with employers but not prescribed by them.⁶⁹⁵

I will argue that despite the arguments against testifying – some of which are valid and persuasive – journalists should bear witness in war crimes tribunals and, in turn, international courts must respond to journalists’ concerns by observing the qualified privilege standard set out in the *Randal* Appeals Chamber decision and use it as precedent. In seeking testimony from journalists, international criminal justice must not be solely dependent upon voluntary testimony neither must it depend on subpoenas. International criminal justice needs to establish guidelines and principles for using journalists’ testimony.

⁶⁹⁵ Note: Roy Gutman was the only journalist I interviewed, or about whom I read, that indicated he believed employers should set a policy regarding testifying for journalists. However, he also indicated that he thought the decision should also be a personal one. His employer, Newsday, opposed him testifying at the ICTY.

This chapter will assess the arguments advanced by journalists and jurists in both support of and opposition to testifying. It will consider whether the arguments advanced by opponents outweigh the civic and moral obligations to justice and human rights advocated by proponents of testifying. Is there merit in the objections raised about testifying or does the qualified privilege afforded to journalists in *Randal* provide them with a workable framework for establishing their evidentiary role within international criminal law and international war crimes tribunals?

Journalistic Independence

When Floyd Abrams, representing the *Amici Curiae* addressed the Appeals Chamber in *Randal* he told the court that reporters have three attributes, “neutrality, impartiality and independence.”⁶⁹⁶ The remark drew snickers from the gallery.⁶⁹⁷ However, these three notions form the basis of much of the criticism against journalists testifying. Journalists repeatedly expressed concerns about being linked, in any way, with international courts and prosecutions because they feared it would jeopardize their independence. For Jonathan Randal, this loss of independence would hinder journalists’ ability to report:

If those involved in conflict think that war correspondents are going to make a beeline to the war crimes tribunal and tell all, this would curtail the ability of journalists to do good reporting and thus fulfill the function of informing the public.⁶⁹⁸

Robert Menard of Reporters Sans Frontieres supported Randal’s position saying, “If people start thinking that behind every reporter stands an international judge that will be the end of our profession.”⁶⁹⁹ He contends that testifying undermines journalists’ credibility and

⁶⁹⁶ Simons, "Hague Tribunal Hears Arguments On Exempting Reporters."

⁶⁹⁷ Ibid.

⁶⁹⁸ NPR "Profile: International Court Grants Partial Subpoena Exemption For Journalists In Trials of War Criminals" *All Things Considered* (U.S.: National Public Radio, 2002))

⁶⁹⁹ Agence France-Presse, "Journalist In War Crimes Court For Right To Silence," October 3 2002.

independence.⁷⁰⁰ Randal's lawyer, Geoffrey Robertson said forcing journalists to testify would more than just associate them with the court; they would be regarded "as spies who operate on the side that is favoured by the UN."⁷⁰¹ Peter Shaw, the newsroom editor of the BBC World Service from 1990 to 1993 wrote a letter, co-signed by three colleagues, to the *Times* (London) asserting Jacky Rowland's testimony in *Milošević* jeopardized the BBC's independence and tainted its word.⁷⁰² Shaw asked why BBC reporters were becoming "court informants" and urged them to "remain above and beyond the action at all times and in all ways. To be seen colluding with authority – any authority – risks credibility, damages hard-won reputations, and may even put correspondents' lives in danger."⁷⁰³ Shaw concluded saying, "Rowland and her colleagues, by reporting the facts, have already done their job as 'witnesses.' Testifying makes them participants."⁷⁰⁴ Another British journalist, Robert Fisk argues if journalists intend to be participants in war crimes tribunals they need to declare their intentions in the field:

...when they were on the ground as correspondents talking to the people whom they now wish to testify against, did they say to them, oh hello, I'm from the BBC or I'm from Reuters, or wherever and if you lose the war I may testify against you. No, they did not. They just said they were correspondents. Later it turns out they choose to testify. So I don't think you can approach a person in a conflict, whatever you think of their behaviour, or if they're a criminal or not, and come up to them as a reporter with a notebook working solely for a news institution and suddenly turn around when the war is over and say, I'm going to nail you for what you said to me... I work for a newspaper, not a court and equally the newspaper doesn't work for the court.⁷⁰⁵

Are journalists who testify sacrificing journalistic independence and placing themselves as agents of the tribunal, or in league with prosecutors? When asked why they chose to testify, journalists do not respond that they felt pressured or coerced by the

⁷⁰⁰ Reporters Sans Frontieres, "Court Says Journalist Does Not Have To Testify," [Statement By RSF](#) (2002.)

⁷⁰¹ Ciar Byrne, "War Crimes Tribunal Will Not Call Reporter To Give Evidence," [The Guardian](#) October 4 2002.

⁷⁰² Julia Day, "BBC Journalists 'Compromised' By Appearing As Witnesses," *Ibid.* September 17.

⁷⁰³ "Journalists In Court" September 17 2002

⁷⁰⁴ *Ibid.*

⁷⁰⁵ "Interview With Robert Fisk"

Tribunal. In no way do they see themselves as its agents or dupes. Most were motivated by feelings of personal conviction and responsibility.

Dejan Anastasijevic is a Serbian journalist who reported on wars in Yugoslavia for *Time* magazine. After meeting with investigators in 1999, he agreed to testify against Milošević, even though the Serbian president was still running Serbia. Anastasijevic had his day in court:

After the bailiff finally ushered me into the courtroom, my memory becomes somewhat scattered. I was surprised that Milošević looked so much smaller than I remembered him, like a grumpy old man – and evil...He spent a lot of time trying to prove that my story was nothing but irrelevant hearsay. I tried to describe what I had seen in Vukovar as simply and clearly as possible. It may have been the most important thing I will ever do. After my testimony was over I felt as if a great burden had been lifted. For me, the Balkan wars were finally over. Now I could go home.⁷⁰⁶

Jacky Rowland framed her reasons for testifying, also in *Milošević*, in much the same way. She saw it as an intensely personal decision although she concedes that in testifying she became part of the story.⁷⁰⁷ However, Rowland also says she simply “felt this was something I ought to do, that I had to do.”⁷⁰⁸ That sentiment is echoed by Lindsey Hilsum who says, “I decided to testify simply because, whatever the faults of the tribunal and whatever the normal role of a reporter, I thought it was the right thing to do.”⁷⁰⁹

American Peter Maass agreed to testify against Milan Kovacevic. He never did take the stand because Kovacevic died of a massive heart attack during the trial. However, Maass says when he weighed the arguments he was not swayed by the notion that testifying would degrade journalistic independence.⁷¹⁰ He believes war criminals view journalists, regardless as to whether they testify, as less-than-independent and indeed as agents of their own

⁷⁰⁶ Anastasijevic, "Witness for the Prosecution."

⁷⁰⁷ BBC "Rowland v Milosevic" *BBC Newsnight* (U.K.: BBC, 2002)

⁷⁰⁸ Tracey Lawson, "On Camera Or In Camera," *The Scotsman* August 30 2002.

⁷⁰⁹ Lindsey Hilsum, "A Genocide That Must Never Be Denied," *The Observer* January 19 1997.

⁷¹⁰ Maass, "Journalists and Justice at The Hague."

governments. War criminals, however, have a particular perspective on the world and they often try to manipulate the foreign press to their own advantage knowing that Western governments are often influenced by what they read and see in their own media. Ed Vulliamy testified about such an attempt at manipulation by Radovan Karadžić in the *Kovacevic* trial:

11 A man called Roy Gutman had been writing
12 similar material in a newspaper called News Day which
13 is published in New York. Dr. Karadzic was challenged
14 on television about this, on ITN, and said that these
15 reports were lies and exaggerations, that no civilians
16 were being held prisoner, and he wrote a letter to The
17 Guardian, my paper, to that effect as well, and both
18 his -- which was published later, a couple of days
19 later.

20 His rejection of these allegations was
21 accompanied by a challenge to journalists,
22 specifically, I think, ITN on whose network he was
23 speaking and in The Guardian where the Omarska
24 allegations had appeared, a challenge to come and see
25 for ourselves. He said, "These are untrue, they're

1 fabrications," and I'll paraphrase him - you can get
2 the exact words - "Come and see for yourselves." My
3 boss, my foreign editor, said, "Well, all right, we
4 will, if that's okay," and so did ITN.
5 I don't know quite what kind of time frame he
6 had in mind for our visit, but my foreign editor, a man
7 called Paul Webster, phoned Dr. Karadzic on a mobile
8 phone when he was going to the airport and said, "Well,
9 we're on our way," and I think there was some talk
10 about two weeks, but he said, "No, I've got a reporter
11 ready to go now," and that was me. So that's how --
12 well, we got to Loznica because Loznica was the first
13 one on the list, but that's how we ended up in Belgrade
14 and in a position to visit Loznica. It was the result
15 of Dr. Karadzic's challenge/invitation.⁷¹¹

As for journalists assisting the state, Mike Jempson, the Director of The PressWise Trust in England unequivocally states that providing information to authorities to arrest and convict a wrongdoer is not colluding:⁷¹²

⁷¹¹ Prosecutor of the Tribunal v. Milan Kovacevic: Transcript of Proceedings, July 14, 1998. PP 655-656

⁷¹² "Journalists Giving Evidence In Court" September 19 2002

In most judicial proceedings eyewitnesses are regarded as 'participants' since they have material evidence which can help to ascertain the truth. As a journalist for more than 30 years, I have always thought we were supposed to be interested in getting at the truth.⁷¹³

Increased Danger

What if "getting at the truth" is already dangerous and testifying might make it more so? The argument that testifying heightens danger for war correspondents in conflict zones is made by critics who oppose the process. Jonathan Randal argues journalists have to gain the confidence of the individuals they interview, including war criminals. He contends that if war criminals believe correspondents might testify at a war crimes tribunal, then "one of two things is very likely to happen. Either the correspondent will not be able to talk to anybody or he'll be killed."⁷¹⁴ Indeed Randal viewed his Appeals Chamber win in securing qualified privilege as most important in terms of providing protection to journalists against the "growing dangers of war reporting," arguing these dangers justified "this kind of special dispensation."⁷¹⁵

When the Tribunal approached Nina Bernstein, then at *The New York Times*, about testifying she asked colleagues for their opinions. War correspondent John Kifner advised her not to testify arguing she should not even speak informally off-the-record with investigators.⁷¹⁶ Kifner claimed that should Bernstein cooperate with prosecutors, this would put Kifner at greater risk when he next approached a war criminal.

Canadian journalist and filmmaker, Garth Pritchard was asked to testify for the defence in *Milošević*. He refused saying, "when we journalists start showing up routinely at

⁷¹³ Ibid.

⁷¹⁴ NPR "Interview: Jonathan Randal Discusses Winning His Appeal Against A Subpoena To Testify Before the UN War Crimes Tribunal In The Hague" Talk Of The Nation (U.S.: National Public Radio, 2002))

⁷¹⁵ Ibid.

⁷¹⁶ Bernstein, "Testing Different Expectations of Journalism: An American Journalist Wrestles With The Request To Provide Evidence To A War Crimes Tribunal."

these trials, which we're doing more and more now, then we, in my opinion, we jeopardize other journalists who go and attempt to come home with the truth. I will not do that."⁷¹⁷

War correspondent Alan Dawson, who covered wars in Vietnam and Cambodia, has written that compelling journalists to testify would lead to their murder.⁷¹⁸ He says war criminals "will go out of their way tomorrow to eliminate journalists who can be compelled to testify against them, and on any matter, even beyond what the journalists actually witnesses."

Lawyer Floyd Abrams told the court in the *Randal* Appeal that if war criminals "start seeing journalists as a threat they will start taking less pacific means to prevent them testifying against them."⁷¹⁹ The International Federation of Journalists ("IFJ"), a member of the *Amici Curiae* brief in *Randal* led by Abrams, opposed the subpoena against Randal citing its primary argument as the threat to the "physical safety and welfare of journalists" in conflict zones.⁷²⁰ The IFJ contends journalists have only limited protection under international humanitarian law and "the work they do is potentially damaging to the public image of any side in a conflict when they are witness to crimes of war or violations of human rights and, as a result, journalists are frequently subject to violence and threats of violence."⁷²¹ Thus, the IFJ argues that subpoenaing journalists and denying them their "independent observer status" would make life for them "ever more dangerous and intolerable."⁷²² Columnist Paul Greenberg writing in the *Washington Times* about Jonathan Randal's subpoena said: "This is not so much a subpoena for one reporter as a death

⁷¹⁷ CBC "Interview with Garth Pritchard" *The Current* (Canada: CBC Radio, 2004))

⁷¹⁸ Alan Dawson, "Analysis: War Crimes Tribunal - UN Actions Place Reporters At Risk," *Bangkok Post* July 12 2002.

⁷¹⁹ BBC, "War Crimes Tribunal Hears Media Plea," *BBC News* (2002.

⁷²⁰ Aidan White, "Should Journalists Testify? The IFJ Position," (Brussels, Belgium: International Federation of Journalists, 2002.)

⁷²¹ Ibid.

⁷²² Ibid.

warrant for those who will come after. The first rule of war criminals, like the other kind, is: Leave no witnesses.”⁷²³ William Safire is equally blunt: “The reason to resist becoming a participant is obvious: if dictators see reporters as potential witnesses in prosecutions, tyrants in trouble will be likely to kill those witnesses.”⁷²⁴ The reporter at the centre of the controversy, Jonathan Randal, called his subpoena “ill-considered jurisprudence” likely to endanger the lives of other war correspondents:⁷²⁵

War correspondents should not become auxiliaries of the courts by being compelled to testify. Why? Wars are becoming more, not less, dangerous as the nature of conflict changes from conflicts pitting states against each other to those often involving warring segments of society within nation states. Combatants increasingly distrust war correspondents, refuse to talk to them and even kill them because they fear the witness they bear. Forcing war correspondents to testify will increase those dangers and ill serve the public’s right to know.⁷²⁶

The Consequences of Testifying

The ICTY is the first war crimes tribunal to have a journalist testify. With any new venture, it is difficult to posit what the ramifications will be of a decision or an act. War correspondents are a small, select group within journalism and those who have testified at a war crimes tribunal are a tiny fraction. Nonetheless, correspondents such as Ed Vulliamy testify and continue to report from conflict zones:

This idea that journalists are going to be more vulnerable, if they testify, sort of presumes that we are not vulnerable already. I mean look at the number of journalists that have been killed in Iraq, look at the number killed in Bosnia... I mean to be a war correspondent is to put one’s self in harm’s way. So you are asking essentially do we all go around sort of protected until we testify after which we are at risk. That strikes me as a rather bizarre argument, I’m afraid. We are at risk.⁷²⁷

Vulliamy argues that war correspondents are at risk by the nature of their work. Reporting from conflict zones is a very dangerous job and testifying does not make it better or worse.

⁷²³ Rohan Jayasekera, *Freed To Bear Witness...Or Not*, 2003, Available: www.indexonline.org, November 12.

⁷²⁴ William Safire, “Enter The Globocourt,” *The New York Times* June 20 2002.

⁷²⁵ Mark Stephens, “Witness Ruling Is ‘Tour De Force’,” *Press Gazette* December 19 2002.

⁷²⁶ Ibid.

⁷²⁷ “Interview With Ed Vulliamy”

His colleague Martin Bell points out that war correspondents have safety valves that they can choose to use:

Journalists can come and go. We had UN accreditation. We were the masters of our destiny. If we wanted to go home, we went home...I don't buy into journalistic, pity me, I am a poor, helpless hack. We are there of our own choice. We are well paid. We have interesting jobs, sometimes it gets dangerous but you knew that when you started.⁷²⁸

Lindsey Hilsum agrees that testifying does not put reporters at increased risk in conflict zones. She thinks war reporting is more dangerous today than in the past but she attributes the increased risk to satellite television.⁷²⁹ Warlords, wherever they are located, all have satellite televisions and are acutely aware of the power of propaganda in any conflict:

Now everybody has seen satellite television and therefore they are aware of the propaganda value of what you might see and film. Therefore, if they feel you happened to have seen something you shouldn't have seen and you happened to have filmed it, you are in danger because they know the value and importance of it. That is what makes our lives dangerous, not the fact that some of us testified in war crimes tribunals.⁷³⁰

Jacky Rowland, like her fellow British colleagues who testified, says "I just regard it as a duty and not something to be shirked from...I don't really buy the argument that it makes life more dangerous for journalists."⁷³¹

Florence Hartmann, spokeswoman for the Office of the Prosecutor at the ICTY, is a former war correspondent who wrote for *Le Monde*. She argues testifying is dangerous but she questions the meaning of testifying. For Hartmann, the first stage of testifying is publishing an article or broadcasting a story:

Testifying puts journalists in danger. But testifying, in the first stage, is the writing of the article. Then let's stop journalism. It's also testifying to write an article. Being a witness of some events is always dangerous. But testifying in court, especially to corroborate what you've already written in the newspaper, doesn't put journalists in danger.⁷³²

⁷²⁸ "Interview With Martin Bell"

⁷²⁹ "Interview With Lindsey Hilsum"

⁷³⁰ Ibid.

⁷³¹ Ciar Byrne, "Journalist To Appeal Against War Crimes Tribunal Ruling," *The Guardian* October 3 2002.

However, the Appeals Chamber considered the issue of danger to journalists, in relation to testifying, and came to a different conclusion from Ms. Hartmann. In *Randal*, the Chamber judged that it was sufficient for the Tribunal to take steps to protect journalists through privilege based on a perceived, if not real, threat to them should they testify. They were also persuaded that journalists might lose access to sources in conflict zones by being compelled to testify.

Sources

It is necessary for journalists to be able to gain access and interview both victims and perpetrators of war crimes so they can expose the atrocities and alert the public. Robert Fisk maintains “if journalists give evidence at war crimes trials, in future they simply will not be allowed to get anywhere near the story. And then none of us will ever know the truth of the terrible things that happen in the world.”⁷³³

Bill Schiller, Foreign Editor at the *Toronto Star* who reported the Balkan wars, was approached by Hague investigators who flew to Toronto to verify one of his stories.⁷³⁴ He declined an invitation to testify saying: “To agree to be called as a witness would put my fairness and impartiality at risk, and I would never again be able to move freely in a war zone.”⁷³⁵ Even jurists, such as Louise Arbour, a former Chief Prosecutor at the ICTY has acknowledged, “the international media is often able to gain access to areas where investigators at the tribunals are unable to go. On the other hand, press access might be cut off if war criminals in positions of power perceived that the international media was pressed

⁷³² Alexandra Poolos, "Yugoslavia: U.S. Journalist Battles Summons To Testify At Hague War Crimes Tribunal," *Radio Free Europe/Radio Liberty* 2002.

⁷³³ Lawson, "On Camera Or In Camera."

⁷³⁴ Sellar, "Why Make Life Worse For War Reporters."

⁷³⁵ Ibid.

into the service of law enforcement.”⁷³⁶ However, CNN Chief International Correspondent Christiane Amanpour has not seen this happen: “All I can say is that journalists have testified in front of this tribunal before, and it doesn’t seem to have according to the colleagues that I know and who have testified, it hasn’t had repercussions on their ability to go back and work in those areas.”⁷³⁷ It is difficult to assess or determine, at this stage, what if any effect testifying may have on access except to say it has not adversely affected journalists who have participated as witnesses. Although it is still uncertain what the consequences might be for journalists in regards to providing oral testimony, there is somewhat more known about providing documentary evidence. There was a disturbing case of ITN journalists providing documentary evidence to the Tribunal only to see it mismanaged with serious resulting consequences.

Mishandling of Evidence

The case of Thomas Deichmann is a fascinating, if not frightening, lesson for journalists and the Tribunal. Deichmann, a freelance journalist was hired as an expert witness by the defense to provide the court with a report on German media coverage of Duško Tadić.⁷³⁸ As to exactly what the Tribunal wanted to realize from this report is unknown except that Duško Tadić had been living in Germany prior to his arrest and “it was a German reporter (not Deichmann) who uncovered both his role and whereabouts with the result being the arrest and prosecution of the first defendant before The Hague

⁷³⁶ Nina Bernstein, "Should War Reporters Testify, Too?; A Recent Court Decision Helps Clarify The Issue But Does Not End The Debate," The New York Times December 14 2002.

⁷³⁷ CNN "A Look At The Use of Journalists As Witnesses At The Hague" Insight (U.S.: Cable News Network, 2002)

⁷³⁸ Eric Alterman, "Bosnian Camps: A Barbed Tale," The Nation July 28 1997.

Tribunal.”⁷³⁹ It may be that the Tribunal wanted to satisfy itself that Tadić’s trial was not prejudiced by the press coverage he had received in Germany.

The Tribunal provided Thomas Deichmann with tapes, initially supplied by Britain’s ITN television including untelevised video.⁷⁴⁰ These tapes contained shocking pictures of both Omarska and Trnopolje concentration camps, made by Penny Marshall and Jeremy Irvin in 1992, when the world first became aware of the camps’ existence. Deichmann became convinced that the video was a fake because the barbed wire fences were nailed from the inside rather than the outside. He supported his argument by interviewing a former Serbian guard at the camps who insisted his role was to protect Muslims from Serbian extremists and that the infamous Trnopolje was neither a prison nor a concentration camp.⁷⁴¹ Deichmann began publishing articles in *Novo*, a small German publication that were later republished in England in *Living Marxism*, alleging that ITN had ‘set up,’ or staged, its famous images of starving detainees.⁷⁴² ITN’s tapes also made their way – perhaps through Deichmann – into the hands of George Kenney, a former U.S. State Department official in the first Bush administration, who also wrote stories alleging the tapes were fakes and that the ITN journalists and Ed Vulliamy were lying and engaged in a cover up.⁷⁴³ Kenney submitted a story on the subject to the *Columbia Journalism Review* and may have shared the tapes with the *Review*.⁷⁴⁴ The *Review* however chose not to publish the story. ITN “filed suit against Two-Ten Communications, the British Press Association’s subsidiary that syndicated the story, demanding a published retraction, and in the case of

⁷³⁹ Gutman, "Consequences Occur When Reporters Testify; A Reporter Urges Journalists to be Better Watchdogs of the War Crimes Tribunal Process."

⁷⁴⁰ Ibid.

⁷⁴¹ Alterman, "Bosnian Camps: A Barbed Tale."

⁷⁴² Gutman, "Consequences Occur When Reporters Testify; A Reporter Urges Journalists to be Better Watchdogs of the War Crimes Tribunal Process."

⁷⁴³ Alterman, "Bosnian Camps: A Barbed Tale."

⁷⁴⁴ Ibid.

LM (*Living Marxism*) asked to have the magazines containing the article pulped.”⁷⁴⁵ Two Ten Communications immediately apologized and called Deichmann’s allegations unfounded and untrue.⁷⁴⁶ However, a lengthy and expensive libel suit was pursued against LM magazine and ITN was eventually successful. What began as a voluntary undertaking by ITN to provide documentary evidence to an expert witness in Tadić turned into a nightmare scenario in which evidence was mismanaged leading to libelous allegations and a lawsuit. The experience by ITN illustrates the fact that the Tribunal has been slow to recognize and respond to journalists’ concerns about evidence:

The court had turned the tape over to the defense for discovery purposes, and from there it made its way into defense witness Thomas Deichmann’s possession. The fact that Deichmann, and now Kenney and perhaps CJR, all reviewed copies of what was a confidential ITN document cannot be seen as encouraging to journalists who are considering cooperating with tribunals of any kind in the future, regardless of the worthiness of the cause.⁷⁴⁷

It is precisely this kind of situation that leads war correspondents like Jonathan Landay to declare: “Prosecutors get to read our stories; that’s it.”⁷⁴⁸ However, not all journalists believe the obligation ends there.

Moral Obligation And The Citizen’s Duty

Many journalists who testify speak of their own moral obligation and civic duty in choosing to provide evidence. Journalists traditionally are associated with the impartial, neutral recording of facts, which are then distilled into stories. However, that notion of journalism is changing:

The larger question we need to address is the role of the media in an increasingly complex and socially inter-connected world where the old notions of “divisions of labour” have become blurred. The traditional image of the ubiquitous reporter with notebook in hand diligently taking

⁷⁴⁵ Ibid.

⁷⁴⁶ Ibid.

⁷⁴⁷ Ibid.

⁷⁴⁸ Bernstein, "Should War Reporters Testify, Too?; A Recent Court Decision Helps Clarify The Issue But Does Not End The Debate."

down dictation and faithfully reproducing it in the next day's newspaper has become an anachronism.⁷⁴⁹

Kemal Kurspahic was the editor-in-chief of the Bosnian daily *Oslobodjenje* in Sarajevo from 1988 – 94. He managed to survive the city's three-year siege by Bosnian Serb forces and produce a daily newspaper while facing a constant threat of death.⁷⁵⁰ Kurspahic brings passion but also moderateness to the discussion of a journalist's obligation to testify to war crimes:

...the crimes prosecuted at The Hague are of the sort that we – as humankind have promised would not be allowed ever again. We are talking about genocidal 'ethnic cleansing,' with tens of thousands of people driven from their homes just because of their nationality or religion. We are talking about mass slaughter and rape; systematic destruction of cultural and religious heritage; barbaric siege and bombardment of the cities. If, as a journalist, you can shed some light on who was responsible for crimes of that magnitude, I think your obligation to mankind here is even larger than your profession. But even strongly feeling that way, I would leave it to the journalists to decide whether to testify or not.⁷⁵¹

Martin Bell says he is "not in favour of subpoenas."⁷⁵² He wants journalists to make their decisions about testifying but he is equally adamant that "you're a citizen first and a journalist second."⁷⁵³ For Bell, being a journalist does not absolve an individual of his or her responsibilities as a citizen. However, Aidan White, Secretary General of the IFJ, suggests there are different ways for journalists to be both good citizens and true to their profession: "No one's saying that journalists should be outside the law and they shouldn't be good citizens. But you prove your citizenship by the quality of your journalism, and a good journalist who says I want to protect...the ability of media to function in the public interest is being just as good a citizen as somebody who says he's ready to help the police."⁷⁵⁴ Mike Jempson sees it differently. He contends journalists have a professional duty to report on an

⁷⁴⁹ Hasan Suroor, "Observer Or Activist," *The Hindu* September 7 2002.

⁷⁵⁰ Kurspahic, *As Long As Sarajevo Exists*.

⁷⁵¹ "Interview By Sherri Beattie With Kemal Kurspahic"

⁷⁵² "Interview With Martin Bell"

⁷⁵³ Ibid.

⁷⁵⁴ Sutherland, "'Witness to War Crimes - Must A Reporter Testify.'"

accident, crime or atrocity for their news outlet but they also have a civil obligation to supply information to authorities.⁷⁵⁵ That does not mean handing over the names of sources or details about contacts but it does not preclude voluntarily providing information because “when engaged in their professional duties journalists do not cease to be human beings or citizens.”⁷⁵⁶ Still, there is the thorny issue of when does a journalist move from being a citizen to an activist or advocate and is this a problem:

To oppose media activism on the ground that journalists should confine themselves to doing what they are trained to do is to ignore their social responsibility as any other citizen – which is what they were before they became journalists.⁷⁵⁷

Certainly, there are journalists who believe that it is not possible to distance oneself – to be neutral or detached – in the face of genocidal crimes. If testifying means being an activist or advocate then so be it.

Neutrality and Objectivity

Whatever the traditional journalistic notions about objectivity and neutrality are for purveyors of the craft, many war correspondents argue that these conventional notions do not exist in conflict zones. When Lindsey Hilsum is asked whether she felt she was sacrificing her neutrality as a journalist by testifying she responds:

I was not neutral. I am not neutral on the subject of genocide. I think it's a bad thing. I have seen many people killed. It's nonsense to talk about neutrality in such a situation...it doesn't make any sense. It's crap.⁷⁵⁸

Kemal Kurspahic pleads in his writing that war correspondents can be objective, i.e., accurately record facts and disseminate information but not be neutral.⁷⁵⁹ Neutrality leads to distortion in the press wherein victims and perpetrators are seen as somehow equally

⁷⁵⁵ "Journalists Giving Evidence In Court"

⁷⁵⁶ Ibid.

⁷⁵⁷ Suroor, "Observer Or Activist."

⁷⁵⁸ "Interview With Lindsey Hilsum"

⁷⁵⁹ Kemal Kurspahic, "Neutrality Vs. Objectivity In Bosnia," Media Studies Journal (1995). P. 93

responsible for genocidal crimes.⁷⁶⁰ Kurspahic recounts how following the Srebrenica massacre in 1995 in which General Ratko Mladić took over a UN “safe zone” and killed 8,000 men in the town some western television networks brought in “representatives” of both sides and Serbian spokespersons claimed the slaughter was nothing more than the Muslim government trying to blame innocent Serbs.⁷⁶¹

Peter Maass, who worked as a stringer for *The Washington Post* while reporting on Bosnia says: “The rules that they teach you in journalism school, when you’re in a war zone they just don’t apply, whatever the nice ideas are back home about objectivity.”⁷⁶² There are few, if any, situations in domestic western reporting that are analogous to a society undergoing genocidal conflict. Still, the western media insist on repeating their usual refrain says Ross Howard of the Institute for Media, Policy and Civil Society:

We are supposed to remain clinically neutral in our work – taking no sides, and being professionally and personally non-involved. And thus we report on conflict without motive, as if it were a football game. This practice used to be called objectivity. It is, of course, a myth.⁷⁶³

Howard urges journalists to take responsibility for “the impacts of their professed objectivity.”⁷⁶⁴ He says it is time to face facts:

Journalism can be destructive of a community, or it can be powerfully constitutive. But it cannot be both. As institutionalized bystanders which is what they are, traditional journalists are contributing to the violence of the world. Those who profess so-called objective journalism insist they cannot intervene in events they are covering, nor take any responsibility for what happens. But does anyone believe that the professional norms of journalism rate higher than fundamental human, moral obligations to end conflict.⁷⁶⁵

⁷⁶⁰ Ibid.

⁷⁶¹ Kemal Kurspahic, "Objectivity Without Neutrality: A Bosnian Journalist Reflects On The Value Of Testifying About The Crimes Of Genocide," *Neiman Reports* 57.1 (2003).

⁷⁶² Nina Bernstein, "Testing Different Expectations of Journalism: An American Journalist Wrestles With The Request To Provide Evidence To A War Crimes Tribunal," Ibid.54.

⁷⁶³ Ross Howard, "Mediate The Conflict," *Role Of Media In Peacebuilding* (The Hague: Institute For Media, Policy And Civil Society, 2002.)

⁷⁶⁴ Ibid.

⁷⁶⁵ Ibid.

Ed Vulliamy says neutrality has been embraced by the West, in government and media, as a philosophy for doing nothing in “response to calamity and genocide.”⁷⁶⁶ Instead, Vulliamy urges his fellow reporters to “distinguish between neutrality and objectivity: the first is moral; the second is fact-specific – we describe what we see objectively and that is sacrosanct. But what we objectively report need not lead us to neutral conclusions.”⁷⁶⁷ As to what reporters should do with the conclusions they draw from their reporting, Scott Taylor argues that journalists must stand by what they publish and broadcast, regardless of the circumstances. The Milošević defence team has asked Taylor to testify for them:

I am not a character witness for him. I am being asked to stand by what it was I wrote and what it was I published...I would like to think that every journalist would be under such circumstances able to stand by their work in an international court of law.⁷⁶⁸

Bearing Witness In A New Legal Order

Many journalists reason that bearing witness in the courtroom is simply an extension of what they do in their reporting. Jacky Rowland says of her decision to testify: “I believe that journalists are essentially witnesses to the events they report on. My testimony to The Hague tribunal was an extension of this.”⁷⁶⁹ Judith Armatta, a lawyer with the Coalition for International Justice says: “We feel very strongly, as do many journalists, that they have a moral responsibility to come forward and bear witness in cases where their testimony is important.”⁷⁷⁰ Those comments are echoed by Bosnian journalist Senad Avdic who says it “is a moral and professional duty of reporters to cast light on events.”⁷⁷¹ It is, for these reporters, part of their role in a new international legal order. In this system, says

⁷⁶⁶ Vulliamy, "Neutrality and the Absence of Reckoning: A Journalist's Account."

⁷⁶⁷ Vulliamy, "An Obligation To The Truth: Journalists Should Be Prepared to Risk Their Safety and Testify at the International Criminal Court."

⁷⁶⁸ CBC "Interview With Scott Taylor" *The Current* (Canada: CBC Radio, 2004)

⁷⁶⁹ Jacky Rowland, *Rowland: Why I Testified Against Milosevic*, 2002, BBC, Available: <http://news.bbc.co.uk>.

⁷⁷⁰ Glenn Frankel, "Reporter Wins Tribunal Appeal; Judges Back Journalist's Refusal To Testify In War Crimes Trial," *The Washington Post* December 12 2002.

⁷⁷¹ Amra Kebo, *Regional Report: Randal Testimony Dispute* (Institute For War Peace Reporting, 2002).

Ed Vulliamy, it is not enough to report on tyrants and mass murderers but to go to the next step and hold them accountable.⁷⁷² Elizabeth Neuffer, who covered the Bosnian war for *The Boston Globe* and was subsequently killed in a car accident in Iraq, believed prosecutors, investigators and journalists share common goals. She led Hague investigators to a mass grave in Bosnia and never felt it compromised her as a journalist.⁷⁷³ She knew that her reporting, and that of other journalists, helped the Tribunal and said, "...you know we end up often chasing the same things."⁷⁷⁴ However, Neuffer acknowledged that her employers might not share this viewpoint.

Media Companies & Journalist Associations

Where do media companies and journalist associations stand on the issue of journalist testimony? It depends. Elizabeth Neuffer thought it was up to her company whether, or not, she should testify or turn over information.⁷⁷⁵ Her paper, *The Boston Globe* has no policy on journalists cooperating with the Tribunal.⁷⁷⁶ *The Washington Post* had no policy on testifying when Jonathan Randal found himself the target of a subpoena. After being asked about it, the *Post's* managing editor, Steven Coll said the paper would "spend more time policing the interaction of reporters with investigators, just as we do with [reporters who work] with the police."⁷⁷⁷ The paper's assistant managing editor for foreign news, Phillip Bennett said: "We believe in journalism as a medium for laying out the facts of a story...When you use journalists' work outside of journalism, you introduce a series of questions that I think can be difficult."⁷⁷⁸ *The New York Times* also has no formal policy on

⁷⁷² CNN "A Look At The Use of Journalists As Witnesses At The Hague"

⁷⁷³ NPR "Profile: Remembering An Interview With Elizabeth Neuffer" *Fresh Air* (U.S.: National Public Radio, 2003)

⁷⁷⁴ Ibid.

⁷⁷⁵ Ibid.

⁷⁷⁶ Richard Byrne, *Don't Ask, Don't Tell*, 2002, Available: www.alternet.org/story/14194, September 30.

⁷⁷⁷ Ibid.

⁷⁷⁸ S. Austin Merrill, "Witnesses For The Prosecution," *Columbia Journalism Review* (1999).

journalists testifying. Assistant managing editor, Stephen Engelberg says: "If we are seen as the auxiliary arm of prosecutors, it becomes problematic. But if there is no other way to get some criminal, then editors are going to have to really think hard and weigh things, as we already do."⁷⁷⁹ *Newsday* editor, Anthony Marro opposed his employee, Roy Gutman testifying.⁷⁸⁰ The paper's counsel, Stephanie Abrutyn said: "We told Roy we didn't want him to do it and told investigators we'd fight any subpoena."⁷⁸¹ In the U.K., the BBC embraced quite a different policy. When Jacky Rowland testified, the company supported her decision but said, "...we would never ask our journalists to go into the witness box."⁷⁸²

The BBC will consider each case on an individual basis. In cases such as this one, where the evidence was based on a first-hand eyewitness account, we would sanction a journalist's decision to give evidence and offer advice and support. However, the final decision must be down to the individual, and we would never force anyone to give evidence.⁷⁸³

CNN Correspondent Christiane Amanpour says she would give evidence if her testimony made a difference between exoneration and conviction or "if it was so compelling as not to have been available anywhere else, and especially in cases of the highest criminal order, such as genocide, then perhaps, you know, one would testify."⁷⁸⁴ CNN says it is one thing for their correspondents voluntarily to testify but another thing to be compelled:

CNN believes it would undermine both the safety and the independence of its journalists to allow any court to have the unqualified power to force them to testify about their reporting against their will. CNN strongly supports the qualified privileges available in the United States that protect journalists from the exercise of such power, and supports efforts to have these protections adopted elsewhere in the world.⁷⁸⁵

⁷⁷⁹ Ibid.

⁷⁸⁰ Bernstein, "Testing Different Expectations of Journalism: An American Journalist Wrestles With The Request To Provide Evidence To A War Crimes Tribunal."

⁷⁸¹ Ibid.

⁷⁸² BBC "BBC's Credibility 'Tainted' In Milosevic Trial" (U.K.: BBC, 2002)

⁷⁸³ CNN "A Look At The Use of Journalists As Witnesses At The Hague"

⁷⁸⁴ Ibid.

⁷⁸⁵ Ibid.

In Canada, the CBC does not have a policy on journalists testifying either domestically or internationally.⁷⁸⁶

Media organizations, such as The International Federation of Journalists oppose compelling journalists to testify. The Federation believes “journalists should be free to decide themselves whether or not they should give evidence.”⁷⁸⁷ Alex Lupis of the Committee to Protect Journalists says: “We support journalists who decide to testify before the tribunal...when there’s no other evidence available.”⁷⁸⁸ The Serbian Journalists’ Association has urged journalists not to testify voluntarily in courts, including the ICTY, arguing it turns “their professional mission into a judicial-investigative one.”⁷⁸⁹ However, the president of the Independent Association of Serbian Journalists, Milica Lucic-Cavic told his members they should testify, if they want to, because “they were eye-witnesses, they saw what was being done in the field, and can contribute to the finding of the right answers to questions being posed in connection with the accused and with the crimes that took place in this region.”⁷⁹⁰

Still there are others, including Jacky Rowland, who see this debate over whether, or not, to testify as a “kind of trans-Atlantic breakdown” between American and European journalists.⁷⁹¹

The Great Divide

What sets these reporters apart in their attitude toward testifying? Mark Stephens, one of Jonathan Randal’s English lawyers, says of British journalists and their willingness to

⁷⁸⁶ "E-mail Correspondence Between Sherri Beattie and Don Knox, CBC" June 16 2004

⁷⁸⁷ IFJ, "IFJ Welcomes Breakthrough For Journalists In War Crimes Tribunal Test Case," Media Release (International Federation of Journalists, 2002.)

⁷⁸⁸ Mark Jurkowitz, "Media Notes: At The Hague, A BBC Reporter Takes The Stand," The Boston Globe September 4 2002.

⁷⁸⁹ Hina-Croatian News Agency, "Serbia - Journalists Disagree As To Testifying At Hague Tribunal," October 12 2002.

⁷⁹⁰ Ibid.

⁷⁹¹ Mark Jurkowitz, "War Trials Post Dilemma For Press," Times Union Albany September 5 2002.

testify that it is “peculiarly the English approach. I think there’s this stiff upper lip with British journalists.”⁷⁹² That is not how Americans see it. There were those in the U.S. press who viewed the Trial Chamber’s decision to issue a subpoena for Jonathan Randal as flagrant anti-American behaviour:

The European judges – from countries without a First Amendment – just don’t get this, and are furious that Randal, a mere journalist and an American to boot, would dare defy them.⁷⁹³

Diane F. Orentlicher, a law professor at American University in Washington sees the two different viewpoints in perspective: “American journalists tend to see the tribunal’s subpoena power as a threat to First Amendment freedoms. Many European journalists see testimony before the tribunal as an extension of the journalistic enterprise.”⁷⁹⁴ For American journalists, “the Constitution matters a lot” and creates “explicitly spelled-out roles.”⁷⁹⁵ That role is to be a watchdog of democratic institutions and to always remain separate and apart from them, says Floyd Abrams:

Journalists are raised in a tradition in which journalists hold themselves out as watchdogs of the system and not players in the system. Journalists here are taught that at their best, the journalistic role is to ensure that government, and other large institutions are abiding by their obligations to the public, and the role of the journalist is to gather information and where possible to print it and let the world make of it what it chooses.⁷⁹⁶

Roy Gutman agrees and goes one step further. He believes American journalists report in order to raise awareness and prompt policy change but that the British press engage openly in advocacy:

I’d like to think of American journalism, or journalism, as a way of exposing things so that other people can do the job. So that you awaken the conscience of, if you are really lucky, of enough people in crucial places that they will go out and do the politicking, do the policy changing. And I am convinced it

⁷⁹² Ibid.

⁷⁹³ Editorial, “When The World Courts Abuse,” *New York Post* June 24 2002.

⁷⁹⁴ Bernstein, “Should War Reporters Testify, Too?; A Recent Court Decision Helps Clarify The Issue But Does Not End The Debate.”

⁷⁹⁵ Byrne, *Don't Ask, Don't Tell*.

⁷⁹⁶ “Interview With Floyd Abrams”

works and convinced it works if you don't cross the line into advocacy. Whereas I think in the British press there is more of a willingness to go at that line and even cross that line. I think there is a cultural difference...⁷⁹⁷

Across the Atlantic, Ed Vulliamy agrees that there is a cultural difference and that European journalists are much more woven into the fabric of their society. The cherished distance and separateness from society that American reporters embrace – at least philosophically if not always in practice – is seen as unnecessary in Europe:

I think it's a fundamental question that pertains to the media's image of itself in each country. I think the American media does see itself as very much a fourth estate in society, separate from society. My colleague and indeed friend, Roy Gutman suggested we were even parallel to the law. In Europe, I think journalism is seen as more, something more artisan, we are more stitched into society. It is more opinionated than in America. Hearts are worn on sleeves rather more in European journalism than they are in America...⁷⁹⁸

Martin Bell agrees it is about the media's image of itself within each country, which distinguishes American and European journalism and their attitude towards testifying. He always refers to himself as a “hack” and as he notes a “hack” without a constitutional role in his society.

I think European journalists tend to have less lofty and highfalutin notions of the trade they're in. Yes, we know it's a trade, you know you do your best, it's not really like being a lawyer, or a judge, or a cabinet minister, it's a trade. Americans they...well, of course it's in the constitution. We don't even have a constitution let alone with journalists in it...So journalists are more important there, they have a constitutional role, which they've hopelessly sort of resiled from...⁷⁹⁹

Lindsey Hilsum, like Martin Bell, says European journalists do not see their role in society as being as “precious” as Americans.⁸⁰⁰ She sees what she does as a “sort of proximate skill or craft” whereas in the U.S. “journalists are very self-conscious about the importance of their roles to the extent of being extremely precious and pompous at times.”⁸⁰¹ This sense

⁷⁹⁷ "Interview With Roy Gutman"

⁷⁹⁸ "Interview With Ed Vulliamy"

⁷⁹⁹ "Interview With Martin Bell"

⁸⁰⁰ "Interview With Lindsey Hilsum"

⁸⁰¹ Ibid.

of importance and consciousness about their role in society influences their decision making:

This consciousness means that when it comes to something like this where you have a formal decision on testifying in a formal court of law they come over all extremely proper about it. Whereas I think that in Europe we do things in a much more ad hoc way, which has its strengths and weaknesses.⁸⁰²

There may be hope in bridging the great divide between American and European journalists in their response to testifying within war crimes tribunals. First, that means more thought and discussion on the topic. When Canadian journalist Carol Off was approached about testifying her first thought was, "I have to take this seriously...I have to figure out what responsibilities I have."⁸⁰³ The role of journalists as witnesses within international criminal law is not going to go away, argues Off: "There's no way out of here. We have to figure out, we have to decide as individuals and as professionals what we are going to do about it."⁸⁰⁴ While the Tribunal itself and many journalists argue "they have a larger societal responsibility...than just filing dispatches"⁸⁰⁵ others worry they will lose their independence and become seen as agents of the courts, or "advocates of change, in effect, rather than observers."⁸⁰⁶ However, journalists as professional observers will unquestionably find themselves part of proceedings that may put them at risk. Two things must always be protected; neither journalists' sources nor the free flow of information to the public should be compromised by testifying. Nonetheless, journalists are witnesses. When they voluntarily testify they need to be supported in that decision. If they have evidence that is absolutely essential and not available from another source they must choose to testify or be compelled. Journalists must serve truth as it, in turn, serves justice:

⁸⁰² Ibid.

⁸⁰³ CBC "War Crimes And The War Correspondent's Dilemma"

⁸⁰⁴ Ibid.

⁸⁰⁵ Editorial, "War-crimes Tribunals And Journalism's Role," The Globe and Mail September 26 2002.

⁸⁰⁶ Ibid.

Truth serves justice; justice is unthinkable without truth. For the media to oppose in all instances the subpoenaing of their reporters by a war-crimes tribunal is to say truth can be divorced from its chief purposes. Such a stand would undermine reporter's claims to care about truth. News organizations would lose credibility, and their reporters would be devalued as witnesses.⁸⁰⁷

Despite real and perceived risks, journalists must shine their lights into dark places in search of the truth, then report and bear witness to it.

Conclusion:

What has been learned about the importance of journalists testifying at war crimes tribunals? In terms of an ethical standard, there is no consensus among journalists as to whether they should testify. Will there ever be a consensus? It is not likely since how journalists respond to the question of whether they should testify is largely a reflection of how they view the role of journalists in society. Some see the role of journalists as advocates for international criminal law, victims and justice. These journalists view their place in society as being closely interwoven with their fellow citizens; others view the role of journalists as watchdogs of society and societal institutions. These journalists believe they must be separate and apart from society to be watchdogs and maintain journalistic neutrality and independence. Since journalists may be witnesses in future prosecutions at the ICC, or other UN tribunals, the discussion on their evidentiary role will continue and evolve. Future research might track and monitor the role of journalists in other conflicts, e.g., the Darfur crisis in Sudan, from an initial stage where journalists alert the public to violations of international criminal law to proceedings against war criminals within an international court.

Randal is an important legal decision for journalists. Qualified privilege is a significant legal protection for journalists against being unnecessarily subpoenaed in

⁸⁰⁷ Ibid.

international criminal proceedings. However, because the *Randal* decision has not been tested (except for the second attempt by prosecutors to subpoena *Randal*) it is impossible to know how the qualified privilege test may be interpreted in future proceedings. Nonetheless, the decision does send a clear signal that journalists' evidence must be evaluated before a journalist is compelled to testify. Not only has *Randal* provided a degree of protection to journalists, and helped to structure their evidentiary role within international criminal law, the decision has also, I suggest, given momentum to agreeing upon a global concept of media freedom. Significantly, this notion of media freedom is rooted in a public interest privilege. Media freedom is being extended from protecting journalists' confidential sources to protecting, more broadly, the public's right to receive information. *Randal* has helped shift legal thinking about media freedom from protection of the individual – the journalist and his or her source – to the collective, the public.

International human rights principles and globalization are two influential factors in shaping how journalists report from conflict zones. Globalization, in terms of technology, means there is quantitatively more media coverage of conflict although not necessarily qualitatively better coverage. Further, journalists are increasingly adopting the language and principles of the human rights movement in their reportage and the human rights movement is influencing the direction of international criminal law. Future research might consider the adequacy of journalists' response, in terms of reportage, to the pressures of globalization. Another research question might consider how journalists should balance human rights principles with journalistic independence, objectivity and neutrality. There is, I suggest, a growing, interconnected relationship among journalists reporting from conflict zones, the response of the public and the human rights movement to conflict reportage, and finally the response of international law and its institutions. This relationship merits

much more exploration and research. In the meantime, journalists will continue to bear witness to atrocities in their reportage and, I believe, in their testimony at war crimes tribunals.

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