

International Tribunal Recognizes Qualified Privilege for War Correspondents

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Jonathan Randal, a former veteran war correspondent for the *Washington Post*, recently engaged in a battle of his own by fighting a subpoena from the International Criminal Tribunal for the former Yugoslavia (ICTY) that sought testimony about his interview with an alleged Serbian war criminal. An international coalition of media companies and press freedom groups supported Randal's challenge, although some respected journalists disagreed with his position. For the first time, the U.N. war crimes tribunal—established after press coverage of atrocities in the former Yugoslavia—was forced to confront an issue of fundamental importance to the international criminal justice system: whether war correspondents can assert a privilege in the public interest to not testify about their newsgathering.

In December 2002, the ICTY's highest court handed Randal and his supporters a resounding victory when a panel of five international judges established a qualified privilege that allows war correspondents to not testify about their newsgathering in conflict zones. The ICTY will compel war correspondents to testify only in those exceptional cases in which the court is satisfied that "the evidence sought is of direct and important value in determining a core issue in the case" and "cannot reasonably be obtained elsewhere."¹ As the case progressed through The Hague tribunal, journalists in Europe and the United States publicly debated their responsibilities with regard

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to the prosecution of war criminals—a debate that is likely to continue as the U.N.'s permanent International Criminal Court opens for business. Whether the permanent court will follow the ICTY's lead remains to be seen.

Background

In early 1993, Randal covered Bosnia for the *Washington Post*. He and a colleague from another newspaper who spoke fluent Serbo-Croat drove through Serb-held territory to Bosnia's second largest city, Banja Luka, where they interviewed housing minister Radoslav Brdjanin about his involvement in expelling non-Serbs from the region. In Randal's *Post* article about the interview, Brdjanin was quoted as advocating the peaceful "exodus" of non-Serbs so as to "create an ethnically clean space through voluntary movement."²

Nearly eight years later, the ICTY's Office of the Prosecutor (OTP) contacted Randal, who was living in Paris after having retired from the *Post*. The ICTY had charged Brdjanin with genocide, crimes against humanity, and war crimes. The prosecution, having seen Randal's article, wanted him to write a statement and testify before the tribunal about the accuracy of Brdjanin's quotations and other aspects of the interview. Randal met with a prosecution investigator and signed a statement, but expressed reluctance as a journalist about testifying. When the prosecution subsequently asked him to appear in court, Randal refused. In January 2002, a French court officer arrived on his doorstep to deliver a subpoena from the ICTY.

Randal's former employer retained lawyers in London and Paris, who promptly raised two evidentiary issues with the OTP. Randal could not give direct evidence that Brdjanin's quotations were accurate because he does not speak Serbo-Croat and relied on an interpreter. Furthermore, the article could be admitted without Randal's testimony because the ICTY admits hearsay. When defense counsel objected to being

denied an opportunity to cross-examine Randal, Judge Carmel Agius (Malta) decided to assess the relevance of the testimony *after* the fact:

[W]hat is important for this Chamber is not whether the document itself ought to be admitted into evidence or not. Rather, it is the probative value that it can receive that is important. We may end up in a situation whereby we would have heard [Randal] but come to the conclusion that for all intents and purposes, his evidence is not going to be of any importance to us. But I would still think that we ought to go ahead.³

Randal then filed a motion to have the subpoena set aside.

Randal Asserts Need for Qualified Privilege

Randal argued that the ICTY should recognize a qualified (rather than absolute) privilege for war reporters to not testify about their newsgathering based on the long-term public interest in the free flow of information from conflict zones.⁴ If war correspondents were routinely made to testify, according to this rationale, potential sources would perceive them as an investigative arm of a judicial system and refuse to talk or grant access. Moreover, the personal safety of war correspondents, who are already endangered, would be further jeopardized if they become identified as potential witnesses.

Randal submitted affidavits from Bo Jones, publisher of the *Washington Post*; Roy Gutman, the Pulitzer Prize-winning reporter from *Newsday* who covered the ethnic cleansing in Bosnia-Herzegovina and provided the first documented accounts of Serb-run concentration camps; Philip Knightley, best known for his 1975 book *The First Casualty: The War Correspondent as Hero, Propagandist, and Myth Maker from the Crime to Kosovo*; and Aidan White, long-time General Secretary of the International Federation of Journalists, the world's largest professional group of reporters.

Randal also garnered legal support for the privilege from a divergent group of international sources:

ICTY Precedent

Although the ICTY had no direct precedent regarding journalists, the tribunal previously had granted an absolute privilege to Red Cross employees for information obtained while performing official duties. The ICTY concluded that the Red Cross could not effectively operate unless its workers were impartial, neutral, and bound by confidentiality.⁵ The tribunal also granted immunity to its own employees and functionaries,⁶ state officials acting in an official capacity,⁷ and the former U.N. Protection Force Commander-in-Chief.⁸

International Law

Article 79 of Protocol I to the Geneva Conventions⁹ and Article 10 of the European Convention on Human Rights¹⁰ outline the special position of war correspondents and the need to protect them. Furthermore, the European Court of Human Rights in *Goodwin v. United Kingdom* had previously emphasized the “vital public watchdog role of the press” and the corresponding need to adequately protect journalists from disclosing their sources pursuant to Article 10.¹¹

Domestic Cases

Randal submitted domestic cases from the United States¹² and the United Kingdom¹³ where courts refused to compel testimony from journalists as well as internal guidelines from the U.S. Department of Justice on media subpoenas.¹⁴ These were not binding on the ICTY.

Former Chief ICTY Prosecutor's Statement

Finally, Randal and his lawyers submitted an earlier statement made by former ICTY Chief Prosecutor Richard Goldstone, now a judge on South Africa's Constitutional Court:

Not infrequently journalists come across evidence of war crimes—as eyewitnesses, in discovering a mass grave, or through being privy to statements made by commanders in the heat of the action. Like aid workers and Red Cross or Red Crescent delegates, if reporters become identified as would-be witnesses, their safety and future ability to be present at a field of battle will be compromised. In my opinion the law takes too little account of that reality.

I would therefore support a rule of law to protect journalists from becoming unwilling witnesses in situations that would place them or their colleagues in future jeopardy . . . They should not be compelled to testify lest they

give up their ability to work in the field, but they may of course testify voluntarily.¹⁵

On May 10, 2002, Randal's motion was argued before the Trial Chamber.

Trial Chamber Upholds Subpoena

On June 7, 2002, the Trial Chamber upheld the subpoena, refusing to recognize a qualified privilege for journalists when the issue of protecting confidential sources was not involved.¹⁶ Although the court cited the *Goodwin* case with approval, it found the privilege request “misconceived” because of the absence of confidential sources in Randal's case. Rather, it upheld the prosecution's right to introduce the article into evidence and to compel his testimony, as well as the defendant's right to challenge the accuracy of Randal's reporting.

The Trial Chamber concluded that “once the decision to publish Brdjanin's alleged declarations was taken and implemented by him, Randal has no right to pretend that he cannot be questioned on what he published, giving as a reason that as a journalist he would rather not testify.”¹⁷ It was enough for the court that Randal's testimony was “pertinent” to the case.¹⁸ Although the court did not foreclose imposing a more rigorous standard under different circumstances, it refused

to indulge in academic exercises or attempt to decide issues that may well be very interesting and related to the so-called journalistic privilege in the multi-facets in which it is presented, but go beyond, and have no bearing on what is really involved in, and truly relevant to, the subject-matter of the Motion.¹⁹

The Trial Chamber granted leave to appeal. The Appeals Chamber consisted of Presiding Judge Claude Jorda (France); and Judges Mohamed Shahabuddeen (Guyana), Mehmet Güney (Turkey), Asoka de Zoysa Gunawardana (Sri Lanka), and Theodor Meron (United States). An international coalition of thirty-four media entities and organizations (from the former Yugoslavia, South Africa, Nepal, France, Canada, Britain, Australia, Greece, and elsewhere) filed an amicus brief in support of Randal's appeal. The appellate court heard argument from the parties and the amici on October 3, 2002.

Appellate Court Establishes Qualified Protection

On December 11, 2002, the Appeals Chamber overturned the lower court decision and issued the first ruling from a

modern war crimes tribunal granting protection (albeit qualified) to war correspondents. The court initially established the “particularly clear and weighty” public interest in protecting the free flow of information to war correspondents:

Wars necessarily involve death, destruction and suffering on a large scale and, too frequently, atrocities of many kinds, as the conflict in the former Yugoslavia illustrates. In war zones, accurate information is often difficult to obtain and may be difficult to distribute or disseminate as well. The transmission of information is essential to keeping the international public informed about matters of life and death. It may also be vital to assisting those who would prevent or punish the crimes under international humanitarian law that fall within the jurisdiction of this Tribunal. In this regard, it may be recalled that the images of the terrible suffering of the detainees at the Omarska Camp that played such an important role in awakening the international community to the seriousness of the human rights situation during the conflict in Bosnia Herzegovina were broadcast by war correspondents.²⁰

The court next concluded that compelling war correspondents to testify on a routine basis “may have a significant impact upon their ability to obtain information and thus their ability to inform the public on issues of general concern.”²¹ In perhaps the most critical paragraph of the opinion, the Appeals Chamber explained:

What really matters is the perception that war correspondents can be forced to become witnesses against their interviewees. Indeed, the legal differences between confidential sources and other forms of evidence are likely to be lost on the average person in a war zone who must decide whether to trust a war correspondent with information. To publish the information obtained from an interviewee is one thing—it is often the very purpose for which the interviewee gave the interview—but to testify against the interviewed person on the basis of that interview is quite another. The consequences for the interviewed persons are much worse in the latter case, as they may be found guilty in a war crimes trial and deprived of their liberty. If war correspondents were to be perceived as potential witnesses for the prosecution, two consequences may follow. First, they may have difficulties in gathering significant information because the interviewed persons, particularly those committing human rights violations, may talk less freely with them and may deny access to conflict zones. Second, war correspondents may shift from being observers of those committing human rights violations to being their targets, thereby putting their own lives at risk.²²

To protect the free flow of information to war correspondents as well as their safety, the court established a two-part test that must be satisfied before a subpoena is issued: “First, the petitioning

party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case. Second, it must demonstrate that the evidence cannot reasonably be obtained elsewhere.”²³ Because the Trial Chamber did not apply the correct legal standard, the Appeals Chamber set the subpoena aside. The full text of the opinion is available online at www.un.org/icty.²⁴

Not All Reporters Agree

As the tribunal considered the case, several high-profile journalists in Europe who had covered the Yugoslav conflict publicly took issue with Randal’s position. On May 19, 2002, nine days after the Trial Chamber heard Randal’s argument, the London *Observer* published a comment from Ed Vulliamy, prize-winning correspondent for the *Guardian* who testified in an earlier prosecution at The Hague. Defense lawyers grilled Vulliamy over two-and-a-half days of

testimony, poring over his notebooks, and demanding to know about “telephone numbers in the margins and ‘context.’”²⁵ Nonetheless, Vulliamy roundly criticized Randal’s position:

The court needs reporters to stand by their stories on oath . . . Now we are entering a new world that seeks not only to report the legacy of tyrants and mass murderers, but to call them to account. My belief is that we must do our professional duty to our papers and 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?²⁶

Months later, while Randal’s appeal was pending, Jacky Rowlands, the BBC’s former Belgrade television correspondent, testified in the trial of Slobodan Milosevic about what she saw at Dubrava prison in Kosovo in May 1999. Of her decision to testify, she said:

I just regard it as a duty and not something to be shirked from. What puts us in some kind of different ethical category from everyone else?

And I don’t really buy the argument that it makes life more dangerous for journalists. Life is dangerous for journalists anyway, and in an era of twenty-four-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.²⁷

On the other hand, major American newspapers such as the *Wall Street Journal*,²⁸ *Boston Globe*,²⁹ and *New York Times*³⁰ published editorials and op-eds supporting Randal’s position. Columnist William Safire, for example, wrote that “[t]he central issue goes to the heart of protecting human rights: will courageous journalists be able to gain access to war zones as objective observers—not just to tell which side is winning, but to bear witness to the murder and rape of innocents?”³¹ The debate within the journalistic community about testifying in war crimes trials will no doubt continue in the aftermath of the *Randal* decision.

STATUS OF WAR REPORTERS

Both the Geneva Conventions and the European Convention on Human Rights specifically address the protection of journalists:

Geneva Conventions

Article 79—Measures of protection for journalists

- 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.¹

European Convention on Human Rights

Article 10—Freedom of expression

- 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.²

1. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

2. Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (as amended by Protocol No. 11).

What Happens Now?

As a result of the decision, war correspondents will enjoy qualified immunity from testimony before both the ICTY and the International Criminal Tribunal for Rwanda, where the decision is precedential. It is hoped, but by no means certain, that the permanent International Criminal Court (ICC), whose mandate started on July 1, 2002, and other international criminal courts, such as the Special Court of Sierra Leone, will follow the *Randal* decision.

Although the ICC’s rules specifically address only the question of whether confidential relationships are privileged, its implementing statute provides justification for granting, at a minimum, a qualified privilege to reporters, even for nonconfidential sources.

The ICC Rules of Procedure and Evidence are likely to allow journalists to refuse to testify about confidential sources. Rule 73(2) provides that “communications made in the context of a class of professional or other confidential relationships shall be regarded as privileged, and consequently not subject to disclosure.” Rule 73 does not set out an exhaustive list of relationships to which the privilege should attach. Instead, it calls upon the ICC to evaluate professional and confidential relationships against the following criteria:

- (i) Whether communications occurring within that class of relationship are made in the

course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure;

- (ii) Whether confidentiality is essential to the nature and type of relationship between the person and the confidant; and
- (iii) Recognition of the privilege would further the objectives of the Statute and the Rules [of the ICC].³²

Rule 73(3) specifically covers several classes of relationships, including those with physicians, psychiatrists and psychologists, other therapists, and the clergy. It also provides for a virtually absolute privilege for the International Committee of the Red Cross. Although journalists were considered during the negotiation process, the rule's drafters could not reach an agreement and decided to leave the question to the ICC.³³ Nevertheless, the language of the rule itself suggests that the confidential source relationship would and should be protected. Rule 73 is not as expansive as the *Randal* decision, which protects the relationships between reporters and all sources, even nonconfidential ones.

However, nothing in the ICC rules prohibits the provision of a qualified privilege to war reporters. On the contrary, as an international criminal tribunal, the ICC will be affected by the same considerations with respect to journalists as the tribunals on the former Yugoslavia and Rwanda. Under Article 21 of the Rome Statute of the ICC, the ICC is to apply its own statute and rules and then turn to "the principles and rules of international law." Thus, the ICC can—and should—follow the ICTY's *Randal* decision in accordance with its statutory mandate to apply "the principles and rules of international law."

Finally, the *Randal* proceedings highlighted the lack of domestic jurisprudence on testimonial privileges for war reporters. This is not surprising given that the need for testimony from such reporters is most likely to arise in "war crimes" trials before international tribunals. However, the amount of war crimes litigation in domestic courts is expected to increase. The ICC has jurisdiction only where a nation has proved "unwilling" or "unable" to prosecute crimes that fall under the court's jurisdiction. The strong opinion in *Randal* provides persuasive authority for domestic courts to grant war correspondents the kind of protection that they now enjoy before the international criminal tribunals. 

Endnotes

1. Prosecutor v. Brdjanin and Talic, Decision on Interlocutory Appeal ¶ 50, 11 Dec. 2002 (Appeals Chamber), available at www.un.org/icty/brdjanin/appeal/decision-e/rrandall021211.htm.

2. Jonathan C. Randal, *Preserving the Fruits of Ethnic Cleansing; Bosnian Serbs, Expulsion Victims See Campaign as Beyond Reversal*, WASH. POST, Feb. 11, 1993, at A34.

3. Prosecutor v. Brdjanin and Talic, Transcript of March 1, 2002 Hearing (Trial Chamber II) at 2533.

4. Specifically, in paragraph 13 of his brief to the Trial Chamber, Randal argued that the only circumstances in which a subpoena should issue are

- 1) When the journalist indicates clearly and positively to the Court that he intends to waive his privilege so as to testify, but wishes to do so under subpoena.
- 2) Where the Court is satisfied that the unwilling journalist, if forced to testify, will provide admissible evidence that is of crucial importance to its determination of a defendant's guilt or innocence; and
 - a) which evidence cannot be obtained by any other means or from any other witness; and
 - b) that the giving of this evidence by the journalist will not require him to breach any obligation of confidence; and
 - c) that the giving of this evidence will not put him, or his family or sources in any reasonably apprehended personal danger and will not unnecessarily jeopardise the effectiveness or safety of other journalists reporting from conflict zones in the future.

5. Prosecutor v. Simic and others, Ex Parte Confidential Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999 (Trial Chamber).

6. Prosecutor v. Dalic and others, Decision on Motion Ex Parte by the Defence of Zdravko Mucic Concerning the Issue of a Subpoena to an Interpreter, 8 July 1997 (Trial Chamber).

7. Prosecutor v. Blaskic, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997 (Appeals Chamber).

8. Prosecutor v. Blaskic, Decision of Trial Chamber I on Protective Measure for General Philippe Morillon, Witness of the Trial Chamber, 12 May 1999 (Trial Chamber).

9. Article 79, Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (establishing measures of protections for journalists) [see text of Art. 79 on page 12]. See also ICRC Commentary on Art. 79, ¶ 3245 ("The circumstances of armed conflict expose

journalists exercising their profession in such a situation to dangers which often exceed the level of danger normally encountered by civilians. In some cases the risks are even similar to the dangers encountered by members of the armed forces, although they do not belong to the armed forces. Therefore special rules are required for journalists who are imperilled by their professional duties in the context of armed conflict"); Recommendation No. R(2000) 7 of the Committee of Ministers to Member States on the Rights of Journalists not to disclose their sources of information (and the Explanatory Memorandum); Council of Europe, Committee of Ministers, Declaration on the Protection of Journalists in Situations of Conflict and Tension, adopted by the Committee of Ministers on 3 May 1996, at its 98th Session; Recommendation No. R (96)4 of the Committee of Ministers to Member States on the Protection of Journalists in Situations of Conflict and Tension, adopted by the Committee of Ministers on 3 May 1996.

10. Article 10(1) of the European Convention of Human Rights provides in pertinent part: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart ideas without interference by public authority and regardless of frontiers" [see text of Art. 10 on p. 12].

11. (1996) 22 EHRR 123.

12. See, e.g., *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980); *Zerilli v. Smith*, 656 F.2d 705, 713 (D.C. Cir. 1981); *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988); *Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993); *United States v. Blanton*, 534 F. Supp. 295, 297 (S.D. Fla. 1982).

13. See, e.g., *Senior v. Holdsworth, Ex parte Independent Television News Ltd*, [1976] QB 23; *R (Bright) v. Central Criminal Court* [2001] 1 WLR 662.

14. 28 C.F.R. § 50.10.

15. Richard Goldstein, *Foreword, in CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW* (Roy Gutman & David Rieff eds. 1999), at www.wwnorton.com/catalog/spring99/crimes1.htm; also available at www.crimesofwar.org/thebook/forword.html.

16. Prosecutor v. Brdjanin and Talic, Decision on Motion to Set Aside Confidential Subpoena to Give Evidence ¶ 32, 7 June 2002 (Trial Chamber), available at www.un.org/icty/brdjanin/trialc/decision-e/t020612.htm.

17. *Id.*

18. *Id.*

19. *Id.* ¶ 23.

20. Prosecutor v. Brdjanin and Talic, Decision on Interlocutory Appeal ¶ 36, 11 Dec. 2002 (Appeals Chamber), available at www.un.org/icty/brdjanin/appeal/decision-e/rrandall021211.htm.

21. *Id.* ¶ 44.

22. *Id.* ¶ 43.

23. *Id.* ¶ 50.
24. Judge Shahabuddeen filed a separate concurring opinion. See www.un.org/icty/brdjanin/appeal/decision-e/sep-op.htm
25. Nina Bernstein, *Should War Reporters Testify Too?*, N.Y. TIMES, Dec. 14, 2002.
26. Ed Vulliamy, *An obligation to the truth*, OBSERVER (London), May 19, 2002, available at www.observer.co.uk/milosevic/story/0,10639,718225,00.html.
27. Matt Wells, *BBC Reporter to testify at Hague war crimes tribunal: Correspondent faces questions about deaths in Kosovo prison*, GUARDIAN, Aug. 20, 2002, available at www.guardian.co.uk/yugo/article/0,2763,777381,00.html.
28. *Washington Post vs. International Law*, WALL ST. J., June 18, 2002, at A16.
29. *A Threat to Journalists*, BOSTON GLOBE, June 15, 2002, at A14.
30. Peter Maas, *Journalists and Justice at The Hague*, N.Y. TIMES, July 5, 2002, at A21.
31. William Safire, *Enter the Globocourt*, N.Y. TIMES, June 20, 2002, at A[tk].
32. International Criminal Court, Rules of Evidence and Procedure, available at www1.umn.edu/humanrts/instree/iccrulesofprocedure.html (contains complete text of Rule 73, Privileged Communications and Information).
33. THE INTERNATIONAL CRIMINAL COURT—ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 360 (Roy S. Lee ed. 2001).