

# PROSECUTOR v BRDJANIN AND TALIC (DECISION ON MOTION TO SET ASIDE CONFIDENTIAL SUBPOENA TO GIVE EVIDENCE) AND (DECISION ON INTERLOCUTORY APPEAL)\*

IN THE PUBLIC INTEREST? WAR CORRESPONDENTS AS WITNESSES  
BEFORE INTERNATIONAL CRIMINAL COURTS

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## I INTRODUCTION

This case note discusses the landmark decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ('ICTY') in the case of *Prosecutor v Brdjanin and Talic (Decision on Interlocutory Appeal)*<sup>1</sup> not to compel a former war correspondent, Jonathan Randal, to testify against the accused, Radoslav Brdjanin, whom he had interviewed in 1993 at the height of the Balkan conflict.

The case represents the first instance that an international court has recognised a qualified privilege for war correspondents, thereby extending the traditional categories of privileged persons.<sup>2</sup> The privilege was recognised on the grounds that compelling a war correspondent to testify against a source may, in some circumstances, imperil the gathering and reporting of news, a task that serves an important public interest.

The Trial Chamber's decision<sup>3</sup> dismissing the motion to set aside the subpoena triggered lively debate among war correspondents as to the relationship between their function as witness bearers and that as potential witnesses in accountability processes, such as trials for mass atrocities. The case for war correspondents to assist in such processes was prominently voiced by Ed Vulliamy, a correspondent who had also covered the war in Bosnia-Herzegovina

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\* *Prosecutor v Brdjanin and Talic (Decision on Motion to Set Aside Confidential Subpoena to Give Evidence)*, Case No IT-99-36-T (7 June 2002); *Prosecutor v Brdjanin and Talic (Decision on Interlocutory Appeal)*, Case No IT-99-36-AR73.9 (11 December 2002).

<sup>1</sup> Case No IT-99-36-AR73.9 (11 December 2002) ('*Appeals Chamber Decision*').

<sup>2</sup> Privilege in relation to attorney-client relations, functional immunity of state officials and the International Committee of the Red Cross ('ICRC') are well established in national and international law.

<sup>3</sup> *Prosecutor v Brdjanin and Talic (Decision on Motion to Set Aside Confidential Subpoena to Give Evidence)*, Case No IT-99-36-T (7 June 2002) ('*Trial Chamber Decision*').

and had testified at the ICTY in 1997. In an editorial in *The Observer* on 19 May 2002, Vulliamy argued that the debate over Randal's testimony was 'not just about "the media" but also the effectiveness of bringing future cases against war criminals and tyrants in an era in which the world community is trying to implement international laws of war and human rights.'<sup>4</sup> For Vulliamy, the argument that journalists should remain neutral is not convincing: 'there are times in history — as any good Swiss banker will tell you — that neutrality is not neutral but complicit in the crime'.<sup>5</sup> The words of Roy Gutman, Diplomatic Correspondent for Newsweek, represent the arguments on the other side of the coin:

If they (the ICTY and other courts) think in the long term, they would realize that journalists can serve as an early warning system against the perpetration of war crimes, but the moment they compel journalists to testify, they will discourage them from doing that job. ... he or she will appear to perpetrators not as a member of the media, but rather, as an agent of the court.<sup>6</sup>

Concern amongst journalists for the consequences of the Trial Chamber decision culminated in the intervention *amici curiae* of 34 media organisations, representing hundreds of news services and media interest groups in the appeal against the subpoena.

## II BACKGROUND

Brdjanin is accused before the ICTY of, amongst other things, crimes against humanity and grave breaches of the *Geneva Conventions* of 1949<sup>7</sup> involving deportation, forced transfer and appropriation of property of Muslims and Croats in the Banja Luka region of north-west Bosnia and Herzegovina.<sup>8</sup> Brdjanin was a prominent member of the Serbian Democratic Party, a deputy to the Council of Municipalities of the Assembly of Bosnia and Herzegovina, and the Vice-President of the Autonomous Region of Krajina Assembly from 25 April 1991. It

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<sup>4</sup> Ed Vulliamy, 'An Obligation to the Truth', *The Observer* (London, UK), 19 May 2002 <<http://www.observer.co.uk/milosevic/story/0,10639,718225,00.html>> at 1 May 2003.

<sup>5</sup> *Ibid.*

<sup>6</sup> Quoted in Ariel Meyerstein, *The Role of War Correspondents in International Criminal Justice: ICTY Orders Journalist to Testify* (19 June 2002) Crimes of War Project <<http://www.crimesofwar.org/onnews/news-warcorrespond.html>> at 1 May 2003.

<sup>7</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) ('*Geneva Convention I*'); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked in Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) ('*Geneva Convention II*'); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) ('*Geneva Convention III*'); *Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('*Geneva Convention IV*') (collectively, '*Geneva Conventions*').

<sup>8</sup> Brdjanin is charged with genocide; complicity in genocide; five counts of crimes against humanity (persecutions, extermination, torture, deportation and inhumane acts (forcible transfer)); two counts of violations of the laws or customs of war (wanton destruction of cities, towns or villages or devastation not justified by military necessity, and destruction or wilful damage done to institutions dedicated to religion); and three counts of grave breaches of the *Geneva Conventions* of 1949 (wilful killing, torture, and unlawful and wanton extensive destruction and appropriation of property not justified by military necessity).

is alleged that he played a leading role in the establishment of structures for the takeover of power in the Banja Luka region by the Bosnian Serb authorities in preparation for the creation of the Bosnian Serb Republic in August 1992. Part of the process of establishing the Bosnian Serb Republic involved removing the majority non-Serb population from the area, a process now referred to as ‘ethnic cleansing’.

In January 2002, the prosecution sought to introduce into evidence a newspaper article written in 1993 by war correspondent Jonathan Randal, who was, at the time of publication of the article, a journalist for the *Washington Post*.<sup>9</sup> The article is based on an interview with Brdjanin conducted by Randal through a Serbo-Croatian speaking journalist who acted as an interpreter. In the article, Brdjanin is quoted as saying that the ‘exodus’ of non-Serbs should be carried out peacefully so as to ‘create an ethnically clean space through voluntary movement’ and that Muslims and Croats ‘should not be killed, but should be allowed to leave — and good riddance’.<sup>10</sup> Other statements attributed to him are that the Serb authorities paid ‘too much attention to human rights’ in an effort to please European governments and that ‘[w]e don’t need to prove anything to Europe any more. We are going to defend our frontiers at any cost ... and wherever our army boots stand, that’s the situation.’<sup>11</sup>

The prosecution asserts that these statements are evidence of Brdjanin’s intention to rid Banja Luka and the surrounding areas of its non-Serb population.<sup>12</sup> Intent is an essential element of the crimes with which he is charged. Brdjanin disputes the veracity of the statements attributed to him, asserting that the Serbo-Croatian journalist who interpreted for Randal has a vendetta against him and manipulated what he said to suit his own purposes.<sup>13</sup> Brdjanin objected to the admission of the article and took the position that he would require Randal to appear for cross-examination should the article be entered into evidence.<sup>14</sup> Randal had previously been contacted by the prosecution and gave a statement but refused to appear to give evidence due to his position as a journalist. The Serbo-Croatian journalist who had acted as the interpreter also refused the prosecution’s request to testify.

Faced with Randal’s refusal to testify voluntarily and Brdjanin’s insistence on his right to cross-examine, the prosecution made an oral request to the Trial Chamber for a subpoena to compel Randal to appear and give evidence. The Trial Chamber agreed to the request and issued the subpoena on 29 January 2002

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<sup>9</sup> Jonathan Randal, ‘Preserving the Fruits of Ethnic Cleansing: Bosnian Serbs, Expulsion Victims See Campaign as Beyond Reversal’, *Washington Post* (Washington DC, US), 11 February 1993, A34.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Appeals Chamber Decision*, Case No IT-99-36-AR73.9 (11 December 2002) [4].

<sup>13</sup> *Ibid.*

<sup>14</sup> Brdjanin also objected to the admission into evidence of the article on other grounds, including a general objection that newspaper articles should not be admitted into evidence to prove a fact at issue and an objection based on relevance, arguing that Randal’s article was irrelevant as it referred to statements made outside the period covered by the indictment: *Trial Chamber Decision*, Case No IT-99-36-T (7 June 2002) [4].

pursuant to rule 54 of the *Rules of Procedure and Evidence*.<sup>15</sup> Randal refused to comply with the subpoena. The prosecution then asked Brdjanin to reconsider his request to cross-examine Randal. The parties made further submissions on the admissibility of both the article and Randal's testimony in February and March 2002.

In an extempore decision in March 2002, the Trial Chamber held that the article and Randal's testimony were admissible. In making this decision, the Trial Chamber took into account that 'in his statement to the prosecution, Randal had affirmed that if compelled to testify, he would be in a position to ascertain that the quotes accredited to Brdjanin were true and accurate'<sup>16</sup> and that 'Randal was able to provide the Trial Chamber with information beyond that which had been provided to him by X [the Serbo-Croatian journalist], as for example information regarding Brdjanin's demeanour during the interview'.<sup>17</sup>

On 8 May 2002 Randal filed a motion to set aside the subpoena. The prosecution filed its motion in response on 9 May 2002.

### III THE ARGUMENTS OF THE PARTIES

In his motion, Randal argued that the ICTY's power to issue a subpoena under rule 54 was not unfettered, but was limited by considerations of public policy. The public interest, he argued, was served by diligent reporting by war correspondents whose stories raise public awareness, often for the first time, of conflicts and atrocities occurring around the world.<sup>18</sup> To emphasise this point, he pointed out that several of the prosecutions before the ICTY were based on information first revealed by war correspondents.<sup>19</sup> This public interest would be threatened if journalists were forced to testify against their sources. He argued that sources, particularly those involved in ongoing conflicts, would be much less likely to agree to be interviewed if they thought the journalist could later be compelled to testify against them.<sup>20</sup> Compelling him to testify, he argued, could set a dangerous precedent as, once it was known that journalists could be compelled to give evidence, sources would dry up, seriously threatening the ability of journalists to gather and report on news in conflict zones.<sup>21</sup> He also raised concerns in his submissions about the physical safety of war

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<sup>15</sup> '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': *Rules of Procedure and Evidence*, r 54, UN Doc IT/32/REV.26 (11 February 1994, as amended 12 December 2002).

<sup>16</sup> *Trial Chamber Decision*, Case No IT-99-36-T (7 June 2002) [5] (citing Transcript of Proceedings, *Prosecutor v Brdjanin and Talic* (ICTY Trial Chamber II, Judges Agius, Janu and Taya, 1 March 2002) 2530).

<sup>17</sup> *Trial Chamber Decision*, Case No IT-99-36-T (7 June 2002) [5] (citing Transcript of Proceedings, *Prosecutor v Brdjanin and Talic* (ICTY Trial Chamber II, Judges Agius, Janu and Taya, 1 March 2002) 2531).

<sup>18</sup> *Trial Chamber Decision*, Case No IT-99-36-T (7 June 2002) [11].

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

correspondents, their families and their sources, if journalists were forced to testify.<sup>22</sup>

The crux of Randal's legal argument is that a qualified journalistic privilege exists. It flows from the public interest inherent in the unimpeded work of war correspondents and prevents the compulsion of testimony unless certain conditions are satisfied. The conditions that Randal submitted must be fulfilled before a journalist can be compelled to testify are:

- 1 The evidence from the testimony must be crucial to determining the accused's guilt or innocence; and
- 2 The giving of the evidence would not put the journalist, their family or sources in any reasonably apprehended personal danger.

There is no provision for such a privilege in the *Rules of Procedure and Evidence* of the ICTY. To support the assertion of the existence of such a privilege, Randal drew an analogy with other recognised privileges such as the lawyer-client privilege contained in rule 97 and other recognised categories of privileged people such as state officials, ICRC officials<sup>23</sup> and ICTY functionaries.<sup>24</sup> He also contended that such a position was supported by various legal safeguards that exist to protect journalists, such as art 79 of *Additional Protocol I to the Geneva Conventions*<sup>25</sup> and art 10 of the *European Convention*

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<sup>22</sup> Ibid [14].

<sup>23</sup> The absolute privilege of Red Cross and Red Crescent workers was recognised by the Tribunal in *Prosecutor v Simic et al (Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness)*, Case No IT-95-9-PT (27 July 1999). The decision recognised the vital nature of the work and the importance of neutrality to the humanitarian work of the Red Cross.

<sup>24</sup> *Trial Chamber Decision*, Case No IT-99-36-T (7 June 2002) [14]. The *Statute of the International Criminal Tribunal for the Former Yugoslavia*, art 30, annexed to *Resolution 827*, SC Res 827, UN SCOR, 48<sup>th</sup> sess, 3217<sup>th</sup> mtg, UN Doc S/RES/827 (1993), reads:

- 1 The *Convention on the Privileges and Immunities of the United Nations* of 13 February 1946 shall apply to the International Tribunal, the judges, the Prosecutor and his staff, and the Registrar and his staff.
- 2 The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.
- 3 The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the *Convention* referred to in paragraph 1 of this article.
- 4 Other persons, including the accused, required at the seat of the International Tribunal shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal.

<sup>25</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3, art 79 (entered into force 7 December 1978) reads:

- 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*.

on Human Rights.<sup>26</sup> Further, he cited case law from both international and national sources, most notably the decision of the European Court of Human Rights in *Goodwin v United Kingdom*<sup>27</sup> which, in his submission, recognised the public interest role of journalists and therefore supported the proposition of a qualified privilege for journalists.<sup>28</sup>

In the alternative, if the existence of a qualified journalistic privilege were rejected, Randal argued that the subpoena should be set aside on the particular facts of the case. He contended that rule 54 required the party requesting the subpoena to show that the evidence was so crucial that it had to be obtained through compulsion and that the prosecution had not done this.<sup>29</sup> He asserted that the subpoena was issued by the Trial Chamber without proper consideration of its necessity and that, in fact, his testimony was neither crucial nor even significant to the prosecution or the defence.<sup>30</sup> He further argued that any evidence he could give could not be considered probative as required by rule 89(C), as he was not able to testify to the accuracy of the statements attributed to Brdjanin, as the interview was conducted in Serbo-Croatian through an interpreter.<sup>31</sup>

In response to the public interest objections raised by Randal, the prosecution argued that while the physical safety of war correspondents and their continued access to sources could be jeopardised where a confidential source is at peril of being revealed, there was no public interest in protecting evidence concerning published materials and openly identified sources.<sup>32</sup> The article and Randal's testimony, it asserted, clearly fell into the latter category. The prosecution further contended that there was no supporting authority for the existence of a qualified

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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.

<sup>26</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221, art 10 (entered into force 3 September 1953) ('*European Convention on Human Rights*') reads:

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

<sup>27</sup> (1996) II Eur Court HR 483; 22 EHRR 123 ('*Goodwin*').

<sup>28</sup> *Trial Chamber Decision*, Case No IT-99-36-T (7 June 2002) [13].

<sup>29</sup> *Ibid* [15].

<sup>30</sup> *Ibid* [14]–[15].

<sup>31</sup> *Ibid* [15].

<sup>32</sup> *Ibid* [17]–[21].

journalistic privilege, and that the case law advanced by Randal to support the concept related only to cases where the question arose as to whether a journalist could be compelled to reveal the identity of a confidential source.<sup>33</sup> Any privilege that could be distilled from such cases could not be extended to support the existence of a general privilege for journalists in cases such as this, where the source of the information was not in question.<sup>34</sup>

On the facts, the prosecution disputed Randal's assertion that his testimony would not be probative. On the contrary, it argued that 'Randal's article goes directly to the heart of the case against Brdjanin'.<sup>35</sup>

#### IV THE TRIAL CHAMBER DECISION

On 7 June 2002 the Trial Chamber handed down its decision dismissing Randal's motion to set aside the subpoena. It is a strongly worded decision, which not surprisingly provoked a strong reaction from organisations representing media interests worldwide.

As a preliminary note to the discussion, the Trial Chamber outlined its duty to distinguish

what is truly relevant to the subject-matter of the Motion of which it is seised from what may be highly interesting and fundamental to the profession of journalism and the freedom of the media, as well as academically, but completely irrelevant to the question that this Trial Chamber has before it and now needs to decide.<sup>36</sup>

The Trial Chamber did not disagree that it was in the public interest for war correspondents to be able to carry out their function independently and safely. Indeed, it noted the importance of this several times.<sup>37</sup> However, it disagreed that the situation presented by Randal's case raised any issues that could impede the independent and safe conduct of the work of war correspondents. Consequently, there could be no threat to the public interest by compelling Randal to testify.<sup>38</sup> The Trial Chamber stated that

although 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 the Tribunal ... they have been brought forward in what this Trial Chamber considers the wrong case.<sup>39</sup>

According to the Trial Chamber the case did not have the broad implications for freedom of expression and freedom of the media that Randal proposed. In essence, it failed to see how compelling the testimony of journalists regarding published material based on interviews with clearly identified sources could be seen as impinging on the functions of war correspondents and consequently detrimental to the public interest. Only forced disclosure of confidential sources

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<sup>33</sup> Ibid [20].

<sup>34</sup> Ibid.

<sup>35</sup> Ibid [17] (citing Transcript of Proceedings, *Prosecutor v Brdjanin and Talic* (ICTY Trial Chamber II, Judges Agius, Janu and Taya, 10 May 2002) 5406–7).

<sup>36</sup> Ibid [23].

<sup>37</sup> Ibid [25]–[26].

<sup>38</sup> Ibid [26].

<sup>39</sup> Ibid [28].

could imperil the work of war correspondents as sources dried up or as retribution was sought against the journalist and therefore, only in relation to that issue could any journalistic privilege be claimed. It was this limited right to protection of undisclosed sources that triggered the qualified journalistic privilege recognised by some national courts as well as the European Court of Human Rights in *Goodwin*. Those cases did not support the broader privilege claimed by Randal.<sup>40</sup>

In relation to the concerns about physical safety raised by Randal, the Trial Chamber considered that, as Randal was retired and lived in France, '[t]here is absolutely no indication at all that if forced to testify in this case, Randal could possibly be exposed to physical harm or any other kind of harm or risk.'<sup>41</sup> It criticised in very strong terms what it considered to be Randal's indiscriminate arguments in relation to this issue.

Finally, the Trial Chamber implicitly rejected Randal's submissions in relation to the standard of evidence required under rule 54 before a subpoena could be issued, stating that '[t]here can be no doubt that if proven to be true, the alleged declarations of Brdjanin are *pertinent* to the case of the Prosecution.'<sup>42</sup> Randal had argued that the evidence must be *crucial* to determining the guilt or innocence of the accused.

## V THE ARGUMENTS ON APPEAL

In July 2002 Randal filed an appeal submitting that the Trial Chamber had erred in law by not recognising a qualified privilege for journalists and in determining that pertinence of evidence was a sufficient standard to compel a journalist to testify. He submitted that it had also erred in fact when it found that his testimony was pertinent to the prosecution's case.

In the appeal brief, Randal reformulated his submission relating to the circumstances under which journalists could be compelled to testify, devising a five-pronged test. He submitted that journalists should only be compelled to testify where the admissible evidence:

- 1 Is of crucial importance to determining a defendant's guilt or innocence;
- 2 Cannot be obtained by any other means or from any other witness;
- 3 Will not require the journalist to breach any obligation of confidence;
- 4 Will not place the journalist, their family or their sources in reasonably apprehended personal danger; and
- 5 Will not serve as a precedent that will unnecessarily jeopardise the effectiveness or safety of other journalists reporting from that conflict zone in future.<sup>43</sup>

As the Appeals Chamber noted, this test would severely limit the circumstances in which a court could compel testimony, and amounted to 'a virtually absolute privilege'.<sup>44</sup>

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<sup>40</sup> Ibid [28](A)(v).

<sup>41</sup> Ibid [28](B).

<sup>42</sup> Ibid [32] (emphasis added).

<sup>43</sup> Transcript of Proceedings, *Prosecutor v Brdjanin and Talic* (ICTY Trial Chamber II, Judges Agius, Janu and Taya, 10 May 2002) 5377–80.



On 1 August 2002, pursuant to rule 74, the Appeals Chamber granted the request of 34 media entities and organisations representing hundreds of news publications, programs and media interest groups from around the world to submit a brief *amici curiae* in support of Randal's appeal against the Trial Chamber decision.<sup>45</sup> The *amici* brief was filed on 16 August 2002.

The *amici* challenged strongly the Trial Chamber's characterisation of the issue presented by Randal's motion as 'academic', stating

that this is not an academic question but an intensely real one of the utmost importance to journalists, who put their lives on the line covering war atrocities; the public, which benefits from the free flow of information provided by those journalists; and the Tribunal itself, which has benefited enormously from the work of journalists.<sup>46</sup>

The *amici* brief supported Randal's arguments about the importance of a qualified privilege in ensuring journalists' ability to continue to gather information and report from conflict zones and the benefits of such a privilege from a public interest perspective. They argued that

[e]ven when findings are published and sources are known, the link between the forced disclosure and the loss of journalists' independence is compelling, as it significantly changes the tone of journalists' work and the willingness of sources to comply with reporters' requests for interviews.<sup>47</sup>

They also criticised as vague and unworkable the test of 'pertinence' applied by the Trial Chamber in determining that Randal could be compelled to testify. Such a test, they suggested, will 'inevitably lead to much unease and confusion in the journalistic community'<sup>48</sup> and will 'have the effect of 'practically ensuring that journalists are subpoenaed unnecessarily'.<sup>49</sup> In addition, they argued 'pertinence' of evidence was not a high enough standard against which to balance such an important public interest as that served by the unimpeded work of war correspondents. The *amici* contended that the test to be preferred when deciding whether a journalist should be compelled to testify is that:

- 1 the testimony is essential to the determination of the case; and
- 2 the information cannot be obtained by any other means.<sup>50</sup>

This is a simpler and less restrictive test than the test proposed by Randal.

Finally, the *amici* submitted that if the proper test were applied to the facts, Randal could not be forced to testify, as any evidence he could give would not

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<sup>44</sup> *Appeals Chamber Decision*, Case No IT-99-36-AR73.9 (11 December 2002) [45].

<sup>45</sup> *Brief Amici Curiae on Behalf of Various Media Entities and in Support of Jonathan Randal's Appeal of Trial Chamber's 'Decision on Motion to Set Aside Confidential Subpoena to Give Evidence'* (17 August 2002), provided to ICTY Trial Chamber II in the case of *Prosecutor v Brdjanin and Talic* (copy on file with author).

<sup>46</sup> *Ibid* [7].

<sup>47</sup> *Ibid* [36].

<sup>48</sup> *Ibid* [5].

<sup>49</sup> *Ibid* [39].

<sup>50</sup> *Ibid* [43].

be essential to the prosecution's case and the prosecution had not demonstrated that no other source of information was available.<sup>51</sup>

The prosecution submitted that the Trial Chamber was correct in not recognising a qualified journalistic privilege and in determining, on the facts, that Randal should be compelled to testify.<sup>52</sup>

## VI THE MAJORITY APPEAL CHAMBER DECISION

The Appeals Chamber unanimously upheld Randal's appeal. Judge Shahabuddeen delivered a separate opinion in which he agreed with the majority's decision but diverged significantly in his reasoning.<sup>53</sup>

In a preface to the decision, the Appeals Chamber was careful to limit the application of the ruling to war correspondents only, as opposed to journalists in general. War correspondents are distinguished by the 'particular character of the work done and the risks faced by those who report from conflict zones'.<sup>54</sup>

The Appeals Chamber utilised a three-step approach to analyse the legal problem. First, it considered whether there was a public interest in the work of war correspondents. Next it considered whether, if such a public interest existed, compelling war correspondents to testify before a tribunal would adversely affect their ability to carry out their work. Finally, if adverse impact could be shown, it considered what test was appropriate to balance the public interest in accommodating the work of war correspondents with the public interest in having all the relevant evidence available to the court.<sup>55</sup>

In relation to the first question — whether there was a public interest in the work of war correspondents — the Appeals Chamber answered resoundingly in the affirmative. The Appeals Chamber, like the Trial Chamber, readily recognised the important role of war correspondents and reaffirmed that they should not be unnecessarily subpoenaed.<sup>56</sup> The Appeals Chamber also referred to the right to receive information outlined in art 19 of the *Universal Declaration of Human Rights*<sup>57</sup> and reflected in several of the main international human rights instruments, to underscore the public interest aspect of war correspondents' work.<sup>58</sup>

However, the Appeals Chamber departed from the Trial Chamber findings in relation to whether compelling testimony of published sources could adversely affect the news-gathering function. While they noted it was

impossible to determine with certainty whether and to what extent the compelling of war correspondents to testifying before the International Tribunal would

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<sup>51</sup> Ibid [55]–[57].

<sup>52</sup> *Appeals Chamber Decision*, Case No IT-99-36-AR73.9 (11 December 2002) [20]–[21].

<sup>53</sup> See below part VII.

<sup>54</sup> *Appeals Chamber Decision*, Case No IT-99-36-AR73.9 (11 December 2002) [29].

<sup>55</sup> Ibid [34].

<sup>56</sup> Ibid [35].

<sup>57</sup> *Universal Declaration of Human Rights*, GA Res 217A, UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/RES/217A (III) (1948).

<sup>58</sup> *Appeals Chamber Decision*, Case No IT-99-36-AR73.9 (11 December 2002) [37].

hamper their ability to work ... it is not a possibility that can be discarded lightly.<sup>59</sup>

They found compelling the arguments of Randal and the amici as to the detriment that could flow from war correspondents being forced to testify. They stated:

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 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.<sup>60</sup>

Having determined that compelling a war correspondent to testify may hamper the news-gathering function and consequently the public interest it serves, the Appeals Chamber considered the appropriate test for balancing the public interest served by the work of war correspondents with the public interest in having all relevant evidence available to the court. In the Appeals Chamber's opinion, the test of 'pertinence' of evidence applied by the Trial Chamber was not sufficient to protect the public interest in the work of war correspondents.<sup>61</sup>

The Appeals Chamber proceeded to lay down its own two-pronged test for the circumstances in which a subpoena may be issued to compel a war correspondent to testify:

First, the petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case. Second, it must demonstrate that the evidence sought cannot reasonably be obtained elsewhere.<sup>62</sup>

In obiter dictum, the Appeals Chamber remarked that while it was not its task to apply the law to the facts, it 'finds it difficult to imagine how the Appellant's testimony could be of direct and important value to determining a core issue in the case'.<sup>63</sup> This indicates that in the Appeals Chamber's opinion, on these facts, the qualified journalistic privilege would prevail.

#### VII JUDGE SHAHABUDEEN'S SEPARATE OPINION

Judge Shahabuddeen rendered a separate opinion on appeal.<sup>64</sup> While his Honour's conclusion was the same as the majority of the Appeals Chamber, his Honour disagreed that the test proposed by the Trial Chamber was wrong. Judge Shahabuddeen's decision also used a different reasoning from that adopted by the majority. His Honour attempted to identify the legal sources relevant to the

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<sup>59</sup> Ibid [40].

<sup>60</sup> Ibid [43].

<sup>61</sup> Ibid [47].

<sup>62</sup> Ibid [50].

<sup>63</sup> Ibid [54].

<sup>64</sup> *Appeals Chamber Decision*, Case No IT-99-36-AR73.9 (11 December 2002) (Separate Opinion of Judge Shahabuddeen).

question at hand and used these sources to build the argument. By contrast, it could be argued that the majority of the Appeals Chamber used public policy considerations to shape the argument and legal sources to support it.

Judge Shahabuddeen's inquiry began by looking at the law which the ICTY was authorised to apply. His Honour concluded that the power vested in the ICTY by the Security Council included the duty 'to act fairly, as a judicial body would to all who had business before Chambers', including war correspondents.<sup>65</sup> Having established the ICTY's responsibility to act fairly, his Honour turned to the international instruments which spell out the substance of that duty in relation to freedom of expression. For Judge Shahabuddeen, freedom of expression is the right which is threatened by the subpoena, and any derogation from that right must be based on an allowable limitation as set out in the relevant international instruments and elucidated through case law.

Consequently, Judge Shahabuddeen's analysis started with a consideration of the right to freedom of expression and the limitations thereto as articulated in art 19 of the *International Covenant of Civil and Political Rights*.<sup>66</sup> Paragraph 3 of art 19 provides for such restrictions 'as are provided by law and are necessary ... for the protection of national security or of public order (*ordre public*), or of public health or morals.' His Honour noted that the term 'public order' has been interpreted to include restrictions necessary for the protection of the 'essential elements of the administration of justice'.<sup>67</sup>

This construction provided the anchor point for Judge Shahabuddeen's reasoning. For his Honour, a restriction on the right to freedom of expression could only be justified if it were considered necessary for the protection of the essential elements of the administration of justice.<sup>68</sup> The next problem posed by this construction was how to determine whether a given restriction was 'necessary'. The criterion to be considered in making this determination, according to Judge Shahabuddeen, can best be represented by the following question:

is the harm resulting from the withholding of the evidence to the public interest in the administration of justice greater than the harm resulting from the giving of the evidence to the public interest in the free flow of information which underlies freedom of expression?<sup>69</sup>

The determination in this case, then, came down to measuring what level of restriction on freedom of expression was 'necessary' for the protection of the public interest in the administration of justice.

Judge Shahabuddeen turned to the jurisprudence on art 10(2) of the *European Convention on Human Rights* for guidance as to how to interpret the word 'necessary' in the context of the restriction of freedom of expression. The

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<sup>65</sup> *Appeals Chamber Decision*, Case No IT-99-36-AR73.9 (11 December 2002) (Separate Opinion of Judge Shahabuddeen) [5].

<sup>66</sup> Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>67</sup> *Appeals Chamber Decision*, Case No IT-99-36-AR73.9 (11 December 2002) (Separate Opinion of Judge Shahabuddeen) [8].

<sup>68</sup> *Ibid* [9].

<sup>69</sup> *Ibid* [11].

jurisprudence interpreted a ‘necessary’ limitation to mean a limitation that was ‘supported by a pressing social need’.<sup>70</sup> Further, the jurisprudence elucidated that the pressing social need must be ‘convincingly established’ and ‘narrowly interpreted’.<sup>71</sup>

His Honour next considered whether the exercise of the right to freedom of expression would be restricted by compelling the testimony of war correspondents and agreed, for the same reasons as the majority in the Appeals Chamber, that it would be restricted.<sup>72</sup>

Having established that compelling testimony does restrict freedom of expression, Judge Shahabuddeen applied the analytical framework he established and considered whether the restriction was ‘necessary’, or in other words, whether there was a ‘pressing social need’ for the evidence that required the restriction.<sup>73</sup> This exercise involved an analysis of the various tests proposed by the parties, the Trial Chamber and the Appeals Chamber, as to the value of evidence required before a subpoena could be issued. His Honour noted that the requirement to demonstrate that the evidence was crucial or vital to the prosecution’s case, as urged by the Appellant, could connote an element of prejudice of the weight to be given to the evidence. His Honour noted that the weight to be given to evidence ‘may depend on all the other evidence in the case — already given or still to be given’,<sup>74</sup> and that the Trial Chamber, as the trier of fact, must be very careful not to prejudice any proposed evidence. In his Honour’s opinion, this meant that

[t]he only thing that the Trial Chamber could properly regard at that preliminary stage for the purpose of determining whether Mr Randal was entitled to the exemption was whether his evidence *could* throw light on the frame of mind of the accused ... not whether it *would* necessarily throw light on the frame of mind of the accused.<sup>75</sup>

Given this, Judge Shahabuddeen determined that the use of the term ‘pertinent’ was not inappropriate and, when construed in the context of other expressions used by the Trial Chamber in discussing the value and purpose of the proposed evidence, was substantially the same as the term ‘direct and important value’ preferred by the Appeals Chamber.<sup>76</sup> Thus his Honour concluded that the Trial Chamber had not erred in formulating a test of pertinence and that but for another source of evidence being available ‘the proposed evidence was compellable’.<sup>77</sup>

Judge Shahabuddeen then turned to the second prong of the test laid down by the Appeals Chamber, namely whether the petitioning party had demonstrated that the evidence could not reasonably be obtained elsewhere. In his Honour’s

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<sup>70</sup> *Appeals Chamber Decision*, Case No IT-99-36-AR73.9 (11 December 2002) (Separate Opinion of Judge Shahabuddeen) [13].

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid* [17].

<sup>73</sup> *Ibid* [18].

<sup>74</sup> *Ibid* [22].

<sup>75</sup> *Ibid* [23] (emphasis in original).

<sup>76</sup> *Ibid* [28].

<sup>77</sup> *Ibid* [31].

opinion, because evidence as to the accuracy of the statements attributed to Brdjanin could also be obtained from the Serbo-Croatian speaking journalist who had interpreted for Randal, this prong of the test was not satisfied.<sup>78</sup> His Honour concluded therefore that Randal's privilege prevailed.

In his conclusion, Judge Shahabuddeen noted that the purpose of seeking Randal's testimony had never been settled.<sup>79</sup> Two alternate purposes had been advanced. The first was that Randal could testify as to the accuracy of the statements attributed to Brdjanin. This purpose was questioned in argument for the appellant given that Randal could not speak Serbo-Croatian and therefore could not verify the translation of statements attributed to Brdjanin. In response, the defence argued that even if this were the case, it was still relevant as Randal could give evidence as to Brdjanin's demeanour which could assist in providing a context that could throw a more favourable light on Brdjanin's comments. The Trial Chamber's analysis and conclusion were based on the first purpose only. For the sake of completeness, Judge Shahabuddeen applied the test to the defence's second stated purpose and concluded that evidence of demeanour did not represent a pressing social need which could overcome the privilege flowing from freedom of expression.<sup>80</sup> Therefore, the privilege prevailed over evidence sought for either of these purposes.

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<sup>78</sup> *Ibid* [33].

<sup>79</sup> *Ibid* [36].

<sup>80</sup> *Ibid* [36]–[37].

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