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Rulemaking from the Bench: A Place for Minimalism at the ICTY

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Rulemaking from the Bench: A Place for Minimalism at the ICTY

MEGAN A. FAIRLIE[†]

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“At a time when we are trying to enforce international law and to bring these criminals to account, we are going to end up with the eyes and ears of the world blind on the ground.”

Ed Vulliamy, Reporter for the *Observer of London*
December 11, 2002

I. INTRODUCTION

In January 2002, a former reporter for the *Washington Post* was subpoenaed to appear before Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia (ICTY).¹ In December of that year, the Appeals Chamber tackled his claim for journalistic privilege.² The claim of privilege was one for which there were no guiding provisions in either the Statute of the Tribunal³ or its Rules of Procedure and Evidence.⁴ The Appeals Chamber, unshackled by restrictive rules, was thus required to make the appropriate determination in the case, though an affirmative ruling would likely invite future claims of privilege before the Tribunal.

This article explores the Tribunal’s ability to create and amend its own Rules of Procedure and Evidence. It also focuses on the manner in which the Tribunal addresses issues that arise, throughout the course of its proceedings, for which its statute and rules are silent. This article advances the theory that, when confronted with issues that are controversial, complex, or for which there is a lack of consensus among national legal systems or the judiciary, the Court should decide the case before it rather than create broad and binding rules. This proposition is supported by reference to the case law of the Tribunal, including its handling of the claim of journalistic privilege, with a particular focus given to the fair trial rights of the accused.

II. THE LEGISLATIVE POWERS OF THE ICTY

A. Rulemaking at Plenary Meetings

1. Background

“Continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia” resulted in a decision by the Security Council that an international tribunal ought to be established in order to prosecute

1. Prosecutor v. Brdjanin & Talic, Decision on Motion to Set Aside Confidential Subpoena to Give Evidence, Case No. IT-99-36-T, para. 2 (ICTY Trial Chambers II June 7, 2002) [hereinafter Brdjanin Subpoena Decision], available at <http://www.un.org/icty/brdjanin/trialc/decision-e/t020612.htm> (last visited Feb. 27, 2004).

2. Prosecutor v. Brdjanin, Decision on Interlocutory Appeal, Case No. IT-99-36-AR73.9 (ICTY App. Chamber Dec. 11, 2002) [hereinafter Brdjanin Interlocutory Appeal], available at <http://www.un.org/icty/brdjanin/appeal/decision-e/randall021211.htm> (last visited Feb. 27, 2004).

3. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, annexed to Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993), 32 I.L.M. 1159, 1192 [hereinafter ICTY Statute].

4. International Tribunal for the Prosecution of the Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Rules of Procedure and Evidence, U.N. Doc. IT/32 (1994) [hereinafter ICTY RPE 1994], amended by U.N. Doc. IT/32/REV.28 (2003) [hereinafter ICTY RPE 2003], available at <http://www.un.org/icty/legaldoc/index.htm> (last visited Feb. 27, 2004).

the perpetrators of the violations.⁵ Given the prosecutions that took place in the aftermath of World War II, such a tribunal would not be wholly unique,⁶ with the prosecutions that took place at Nuremberg providing the most well-known precedent.⁷ The post-World War II prosecutions were not without their faults, however, and accordingly, the Security Council was sensitive to the importance of the fact that the new tribunal not be perceived as an example of “victors’ justice.”⁸

In response to the Security Council’s decision in Resolution 808,⁹ the Secretary-General drafted and submitted a report on the potential tribunal.¹⁰ Citing the Security Council’s Chapter VII powers, which provide the Council with the authority to take preventive and enforcement measures in order to maintain international peace and security, the report established a legal basis for the creation of the Tribunal.¹¹ With regard to potential claims that the Tribunal’s prosecutions would run afoul of the principle that “there is no crime without law,” the report provides that the International Tribunal should apply only those laws, “which are beyond any doubt part of the customary law.”¹² The Security Council subsequently adopted the Statute of the International Tribunal, which was annexed to the Secretary-General’s report.¹³ The controlling provision in the Statute regarding trial proceedings before the Tribunal is Article 20, which states:

The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.¹⁴

The rules of procedure and evidence that are to apply to trial proceedings before the Tribunal were not drafted by the Secretary-General, however. Rather, Article 15 of the

5. S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993).

6. Christian Tomuschat, *International Criminal Prosecution: The Precedent of Nuremberg Confirmed*, 5 CRIM. L.F. 237, 238 (1994).

7. Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279, reprinted in 2 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 675 (1995) [hereinafter 2 MORRIS & SCHARF].

8. Natasha A. Affolder, *Tadić, the Anonymous Witness and the Sources of International Procedural Law*, 19 MICH. J. INT’L L. 445, 449 (1998). Although the Tribunal’s success in its attempt to avoid being perceived as the representative of victors’ justice is a matter for debate, it is doubtful whether any amount of international involvement could counter the claim that its existence derives, in part, from the fact that “sovereign equality of states simply does not exist.” Ivan Simonović, *The Role of the ICTY in the Development of International Criminal Adjudication*, 23 FORDHAM INT’L L.J. 440, 454–55 (1999).

9. S.C. Res. 808, *supra* note 5, para. 2.

10. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993), 32 I.L.M. 1159, 1163 (1993) [hereinafter *Rep. of the Sec’y-Gen.*].

11. *Id.* paras. 18–30. The utilization of Chapter VII powers for this purpose was an issue of concern for certain Member States. See Simonović, *supra* note 8, at 445.

12. *Rep. of the Sec’y-Gen.*, *supra* note 10, para. 34. In spite of this decision to prosecute only those crimes that were decidedly part of the pre-existing law, thus codifying customary norms, it has been asserted that the ICTY Statute may actually be creating new law. Tomuschat, *supra* note 6, at 242.

13. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., paras. 1–2, U.N. Doc. S/RES/827 (1993).

14. ICTY Statute, *supra* note 3, art. 20(1).

Statute¹⁵ provides that the Tribunal's judiciary be given the task of crafting the rules; this delegation was subsequently referred to by one critic as "dynamic yet troubling."¹⁶

2. Article 15

Article 15 of the Statute confers upon the Tribunal's judiciary an authority unknown to its domestic counterparts. The Article confers both authority and obligations upon the judges of the Tribunal regarding the drafting of the rules of procedure and evidence that shall apply at all stages of the proceedings at the Tribunal. The Article thus runs awry of the issue of separation of powers, both mandating and enabling the judiciary to draft the rules they will ultimately apply. To aver that this delegation has been deemed dubious by some is likely to understate the matter.¹⁷

Given the exceptional nature of the delegation, the judiciary was confronted with a challenge regarding the creation of relevant rules, particularly in light of the fact that there was no precedent from which it could draw.¹⁸ The judiciary was not wholly alone in its task, however, as it was provided with submissions regarding its potential rules that were made on behalf of interested states and organizations.¹⁹ Some such proposals were very short indeed, though the submission received from the United States was unquestionably comprehensive and, ultimately, "particularly influential."²⁰ The Rules of Procedure and Evidence that were finally adopted in February 1994 were the product of "extensive debate

15. The relevant article reads, "[t]he judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters." *Id.* art. 15.

16. Scott T. Johnson, *On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia*, 10 INT'L LEGAL PERSP. 111, 166 (1998).

17. See, e.g., Gideon Boas, *Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility*, 12 CRIM. L.F. 41, 73 (2001) [hereinafter Boas, *The Principle of Flexibility*] (noting that the union of legislative and judicial functions opened the Tribunal to criticism); Pavel Dolenc, *A Slovenian Perspective on the Statute and Rules of the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 451, 459 (1994) ("A question of principle may be raised . . . as to whether it is appropriate to delegate rulemaking authority to the same body, namely, the judicial organ of the Tribunal, that must apply these rules."); André Klip, *The Decrease of Protection Under Human Rights Treaties in International Criminal Law*, 68 INT'L REV. PENAL L. 291, 302-03 (1997) (asserting that the judiciary's ability to draft and amend the rules it interprets is "disturbing," calls into question its ability to be impartial, and enables it to act arbitrarily). Disapproval has also been expressed about the fact that the rules and amendments made to them are not subject to review. See, e.g., M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 824 (1996) ("Since the Rules have important implications for the fairness of the proceedings . . . a procedure for the review of proposed and amended Rules should be established."); *id.* at 827 ("A brief period for review and comment might enhance the substantive quality of the Rules.").

18. The Nuremberg Rules of Procedure contained a mere eleven rules. Rules of Procedure of the International Military Tribunal (1945), reprinted in 2 MORRIS & SCHARF, *supra* note 7, at 687-91. As a result, the precedential value of the same has been noted to be "minimal." Daniel D. Ntanda Nsereko, *Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 507, 508 (1994). The Rules are "believed to be the first detailed set . . . ever to be drafted for an international criminal tribunal." *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, U.N. GAOR, 49th Sess., Provisional Agenda Item 152, at 7, U.N. Doc. A/49/342-S/1994/1007 (1994) [hereinafter *ICTY First Annual Report*], available at <http://www.un.org/icty/rappannu-e/1994/AR94e.pdf> (last visited Feb. 27, 2004).

19. These were received pursuant to Security Council Resolution 827. S.C. Res. 827, *supra* note 13, para. 3.

20. The submission included commentary for guidance. See *Suggestions Made by the Government of the United States of America, Rules of Procedure and Evidence for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia*, U.N. Doc. No. IT/14 (1993) [hereinafter *U.S. Suggestions*], reprinted in 2 MORRIS & SCHARF, *supra* note 7, at 509.

and revision”²¹ and included only those items for which there was a general consensus, “thus reflecting concepts that are generally recognized as being fair and just in the international arena.”²²

3. Rule 6

At the time of their adoption, however, the judiciary recognized that there would be a need to revise and add to the original set of rules. Accordingly, the possibility for future amendments to the Rules of Procedure and Evidence was addressed in Rule 6.²³ The original version of the Rule provided that a judge, the prosecutor, or the registrar had the authority to submit proposed amendments to the Rules, and that the agreement of at least seven judges at the plenary meeting would be required in order for the amendment to be adopted.²⁴

The annual reports of the Tribunal provide an excellent resource in assessing the Tribunal’s use of its continuing “legislative power.”²⁵ First, a five-judge panel, the Inter-sessional Working Group for the Amendment of Rules, was established. The Working Group deliberated the comments submitted by governments, non-governmental organizations, and individuals, and it presented its report on the same to the fifth plenary session in January 1995.²⁶ As a result of the report, forty-one amendments were adopted;²⁷ the multiple changes implemented arguably set the stage for scores of amendments that

21. *ICTY First Annual Report*, *supra* note 18, para. 55.

22. *Id.* para. 53. Though, early on, substantial interest was shown in the Tribunal’s enumerated crimes and in its jurisdiction, its rules of procedure and evidence did not attract comparable attention. Joseph L. Falvey, Jr., *United Nations Justice or Military Justice: Which is the Oxymoron? An Analysis of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, 19 *FORDHAM INT’L L.J.* 475, 476–77 (1995). Similarly, it has been noted that “[p]rocedural rulings at the international level generally receive less attention than substantive ones.” Affolder, *supra* note 8, at 448.

23. ICTY RPE 1994, *supra* note 4, R. 6.

24. *Id.* R. 6(A). All judges must be given notice of the proposals. *Id.* There were eleven judges at the time of original adoption. *ICTY First Annual Report*, *supra* note 18, para. 1. There are presently sixteen permanent judges. *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991*, U.N. GAOR, 57th Sess., Provisional Agenda Item 45, at 4, U.N. Doc. A/57/379-S/2002/985 (2002) [hereinafter *ICTY Ninth Annual Report*], available at <http://www.un.org/icty/rappannu-e/2002/AR02-e.pdf> (last visited Feb. 27, 2004). Accordingly, the assent of ten judges is now required for a proposed amendment to be adopted. ICTY RPE 2003, *supra* note 4, R. 6(A).

25. Louise Arbour, *The Status of the International Criminal Tribunals for the Former Yugoslavia and Rwanda: Goals and Results*, 3 *HOFSTRA L. & POL’Y SYMP.* 37, 45 (1999); see *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991*, U.N. GAOR, 51st Sess., Provisional Agenda Item 50, para. 3, U.N. Doc. A/51/292-S/1996/665 (1996) [hereinafter *ICTY Third Annual Report*] (noting that the “[j]udges of the Tribunal are obliged by the statute to ‘legislate’ on procedural matters”), available at <http://www.un.org/icty/rappannu-e/1996/AR96e.pdf> (last visited Feb. 27, 2004).

26. *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991*, U.N. GAOR, 50th Sess., Provisional Agenda Item 49, para. 20, U.N. Doc. A/50/365-S/1995/728 (1995), available at <http://www.un.org/icty/rappannu-e/1995/AR95e.pdf> (last visited Feb. 27, 2004).

27. *Id.* The Tribunal cited five goals for amendments, such as to take into account practical problems that have arisen in implementation of the ICTY Statute or the Rules, broaden the rights of suspects and accused persons, and protect the rights of victims and witnesses. *Id.* paras. 21–26.

were to follow.²⁸ The judiciary went on to refine its practices with regard to amendments; the Judicial Department proved to be a helpful tool, acting as a “channel of communication between the Tribunal and the States.”²⁹ Most recently, the Tribunal formed the Rules Committee, whose cited purpose was to expedite the trial process while preserving the fair trial rights of those accused.³⁰

Significant enhancements to the amendment process arrived later in the workings of the Tribunal when changes were enacted to provide for broader input in terms of amendment proposals and their assessments. In December 1998, Practice Direction IT/143 was issued with the stated purpose of establishing the “efficient processing of proposals and consideration of amendments to the Rules.”³¹ Of particular significance, the Direction allowed for amendment proposals to be received from outside the narrow context prescribed in Rule 6(A).³² This modification made by the directive was seized upon immediately, resulting in the entertainment of external proposals for amendments the following year.³³ Finally, the 2002 annual report of the Tribunal notes the internal reform of the Rules Committee in order to “ensure better representation of the organs of the Tribunal and the defence.”³⁴ This broader representation on the Rules Committee was noted by the Tribunal to buttress the Committee’s advisory role,³⁵ the same was subject to prior criticism for its failure to include the defense bar within the consultative process.³⁶

The Tribunal has not been shy about utilizing its ability to revise its Rules of Procedure and Evidence;³⁷ rather, this is an authority that has been actively used.³⁸ In the

28. Although a smaller number of amendments were noted the following year, this is an anomaly among the Tribunal’s Annual Reports and is arguably tempered by the fact that some amendments made resulted in “a few significant changes.” *ICTY Third Annual Report, supra* note 25, para. 66.

29. *Id.* para. 103.

30. *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991*, U.N. GAOR, 53d Sess., Agenda Item 48, para. 106, U.N. Doc. A/53/219-S/1998/737 (1998), available at <http://www.un.org/icty/rappannu-e/1998/AR98e.pdf> (last visited Feb. 27, 2004).

31. *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991*, U.N. GAOR, 54th Sess., Provisional Agenda Item 53, para. 108, U.N. Doc. A/54/187-S/1999/846 (1999) [hereinafter *ICTY Sixth Annual Report*], available at <http://www.un.org/icty/rappannu-e/1999/AR99e.pdf> (last visited Feb. 27, 2004).

32. *Id.* para. 111; see *supra* note 24 and accompanying text. This change required the amendment of Rule 6: a new subsection (C) was created to allow for amendment proposals to be received in accordance with the Practice Direction. See *ICTY RPE 2003, supra* note 4, R. 6(C).

33. One proposal was submitted by a state, the other by a non-governmental organization. See *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991*, U.N. GAOR, 55th Sess., Provisional Agenda Item 52, para. 287, U.N. Doc. A/55/273-S/2000/777 (2000), available at <http://www.un.org/icty/rappannu-e/2000/AR00e.pdf> (last visited Feb. 27, 2004).

34. *ICTY Ninth Annual Report, supra* note 24, at 4.

35. See *id.* para. 38.

36. See, e.g., Arbour, *supra* note 25, at 45 (discussing the consultative nature of the rule-making process); Johnson, *supra* note 16, at 172–73 (noting the “organizational problem of the ICTY not having an office of defence counsel . . . result[s] [in] the prosecutor ha[ving] an unopposed voice in the rule-making process”).

37. In fact, “the ICTY has pursued a level of flexibility in the process of creating, amending and interpreting its Rules with a frequency unknown to any other jurisdiction before it.” Boas, *The Principle of Flexibility, supra* note 17, at 42. The Tribunal’s use of its amendment ability has been referred to as “prolific.” Gideon Boas, *Developments in the Law of Procedure and Evidence at the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court*, 12 CRIM. L.F. 167, 169 (2001).

38. According to one source, “[o]ne definitely needs a loose-leaf version of the Rules of Procedure and Evidence.” Dirk Ryneveld & Daryl A. Mundis, *The Contribution of the ICTY to the ICC: Procedural and Evidentiary Aspects from a Practitioner’s Perspective*, in *THE CHANGING FACE OF INTERNATIONAL CRIMINAL LAW: SELECTED PAPERS* 51, 61 (2002), available at <http://www.icclr.law.ubc.ca/Publications/Reports/ChangingFace.pdf> (last visited Feb. 27, 2004).

realm of amendments to the Rules, the Tribunal has taken affirmative steps to expand what has been christened a “quasi-legislative”³⁹ process, while at the same time incorporating mechanisms for its streamlining. The value of the amendment process has been noted by the Tribunal as a mechanism that enables the judiciary to react to new and emerging issues experienced by it, in a manner that is consistent with the provision that its proceedings be fair and expeditious and provide due regard for victims and witnesses.⁴⁰ While the amendment process may thus serve well as a reactive tool, allowing the Tribunal to make necessary changes in response to issues that may not have been anticipated, what of problems experienced in the course of proceedings for which there are no provisions in the Statute or Rules of Procedure and Evidence?

B. Procedural and Evidentiary Gaps Experienced in Proceedings

1. Sub-rule 6(B)

Sub-rule 6(B) provides that an amendment to the Rules may be immediately adopted provided that there is unanimous consent among the permanent judges.⁴¹ Arguably, this is a tool that could be used when an unforeseen issue arises during the course of a proceeding. However, the likelihood of its application in such a context is virtually non-existent. As an initial matter, although the Rules, as originally adopted, provided that amendments would enter into force immediately,⁴² the present Rules direct that an amendment enters into force seven days after its official date of issue.⁴³ Further, from a practical perspective, the possibility of the use of unanimous consent to effectuate an amendment during the course of proceedings is an unlikely one, under either version of the provision. The provision is one that has been used sparingly, and only then in the context of emergency situations.⁴⁴

2. Inherent Powers

Another possibility is that the Tribunal may resort to the use of its “inherent powers.”⁴⁵ In determining the applicability of these powers, it is instructive to review both the relevant definition of the same, as well as those situations in which the Trial and Appeals Chambers have utilized the powers. The International Court of Justice, the judicial arm of the United Nations, has stated that it possesses inherent powers in order to enable “it

39. *ICTY First Annual Report*, *supra* note 18, para. 27 (noting the nature of the newly formed Tribunal’s “task of preparing a code of criminal procedure (its rules of procedure and evidence)”); BASSIOUNI & MANIKAS, *supra* note 17, at 270.

40. *See ICTY Sixth Annual Report*, *supra* note 31, para. 107 (noting that “[a]s the Tribunal conducts more trials and begins hearing substantive appeals it will be necessary to review and, where appropriate, amend the Rules in order to ensure the proper administration of justice under the Tribunal’s mandate”).

41. ICTY RPE 2003, *supra* note 4, R. 6(B).

42. ICTY RPE 1994, *supra* note 4, R. 6(C).

43. ICTY RPE 2003, *supra* note 4, R. 6(D). Under either version of this provision, the efficacy of all types of amendments is qualified: amendments “shall not operate to prejudice the rights of the accused or of a convicted or acquitted person in any pending case.” *Id.*

44. *See, e.g.*, Gideon Boas, *A Code of Evidence and Procedure for International Criminal Law? The Rules of the ICTY*, in *INTERNATIONAL CRIMINAL LAW DEVELOPMENTS IN THE CASE LAW OF THE ICTY* 1, 6 (Gideon Boas & William A. Schabas eds., 2003) (noting that Sub-rule 6 has been invoked only three times to date).

45. *See, e.g.*, Michele Buteau & Gabriël Oosthuizen, *When the Statute and Rules are Silent: The Inherent Powers of the Tribunal*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD* 65, 65 (Richard May et al. eds., 2001) (discussing how the Tribunal uses its “inherent powers” when there is not a provision specifically addressing the problem).

to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits . . . shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute.”⁴⁶ The ICTY Appeals Chamber has acknowledged that “‘incidental’ or ‘inherent’ jurisdiction . . . derives automatically from the exercise of the judicial function”⁴⁷ and that it “inures to the benefit of the International Tribunal in order that its basic judicial function may be fully discharged and its judicial role safeguarded.”⁴⁸ The Appeals Chamber further illuminated the concept by providing that these are “powers . . . which accrue to a judicial body even if not explicitly or implicitly provided for in the statute or rules of procedure of such a body, because they are *essential* for the carrying out of judicial functions and ensuring the fair administration of justice.”⁴⁹

In application, the powers have been cited by the Tribunal as authorization to “determine its own jurisdiction”⁵⁰ and, under certain circumstances, to enable it to issue a subpoena or subpoena duces tecum directly to an individual, rather than proceed through a national authority.⁵¹ The Tribunal has also called upon its inherent powers to legitimize its creation and enforce its rules of contempt,⁵² to sanction the relief of a counsel of his duties,⁵³ and to empower it to refuse audience to counsel.⁵⁴ In the *Tadić* judgment, the Appeals Chamber found that the ability to order the disclosure of defense witness statements, after the witnesses had testified, is a function authorized by its inherent powers.⁵⁵

Thus, these examples reveal the use of inherent powers in primarily “technical” situations: the powers have been called upon where the Tribunal needed to act, but could not derive explicit authority for its actions in either its Statute or its Rules of Procedure and Evidence. To assume, however, that the exercise of the powers is so limited would be to adopt an overly restrictive construction of the concept of inherent powers. When the issue of testimonial privilege vis-à-vis the International Committee of the Red Cross was addressed by the ICTY, Judge David Hunt ascribed sweeping relevance to the powers.⁵⁶

46. Nuclear Tests Case (Austl. v. Fr.), 1974 I.C.J. 253, 259 (Judgment of Dec. 20), available at http://www.icj-cij.org/icjwww/icasess/iaf/iaf_ijudgment/iaf_ijudgment_19741220.pdf (last visited Dec. 14, 2003).

47. Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, para. 14 (ICTY App. Chamber Oct. 2, 1995) [hereinafter Tadić Jurisdiction Appeal], available at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm> (last visited Feb. 28, 2004).

48. Prosecutor v. Blaškić, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14-AR108bis, para. 33 (ICTY App. Chamber Oct. 29, 1997) [hereinafter Blaškić Croatian Appeal], available at <http://www.un.org/icty/blaskic/appeal/decision-e/71029JT3.html> (last visited Feb. 28, 2004).

49. Prosecutor v. Tadić, Judgment, Case No. IT-94-1-A, para. 322 (ICTY App. Chamber July 15, 1999) [hereinafter Tadić Appeal Judgment] (emphasis added), available at <http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf> (last visited Feb. 28, 2004).

50. Tadić Jurisdiction Appeal, *supra* note 47, para. 18.

51. Blaškić Croatian Appeal, *supra* note 48, paras. 55–56.

52. Prosecutor v. Tadić, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, Case No. IT-94-1-A-R77, paras. 13, 18 (ICTY App. Chamber Jan. 31, 2000) [hereinafter Tadić Contempt Judgment], available at <http://www.un.org/icty/tadic/appeal/vujin-e/vuj-aj000131e.pdf> (last visited Feb. 28, 2004).

53. Prosecutor v. Delalić, Order on the Motion to Withdraw as Counsel Due to Conflict of Interest, Case No. IT-96-21-A (ICTY App. Chamber June 24, 1999), available at <http://www.un.org/icty/celebici/appeal/order-e/90624DS39408.htm> (last visited Feb. 28, 2004).

54. Prosecutor v. Kunarac, Decision on the Request of the Accused Radomir Kovač to Allow Mr. Milan Vujin to Appear as Co-Counsel Acting Pro-Bono, Case No. IT-96-23-PT, para. 13 (ICTY Trial Chamber Mar. 14, 2000), available at <http://www.un.org/icty/foca/trialc2/decision-e/00314DS212571.htm> (last visited Feb. 28, 2004).

55. Tadić Appeal Judgment, *supra* note 49, para. 322.

56. See Prosecutor v. Simić and Others, Separate Opinion of Judge David Hunt on the Prosecutor’s Motion for a Ruling Concerning the Testimony of a Witness, Case No. IT-95-9-PT, para. 25 (ICTY Trial Chamber III July

According to his separate opinion on the matter, the Tribunal's inherent power exists to "ensure that justice is done" and "it is against this background that [a matter] must be determined."⁵⁷

3. Sub-rule 89(B)

In the alternative, if a gap left by the Statute and the Rules of Procedure and Evidence is of an evidentiary nature, another mechanism for filling the void can be found in Sub-rule 89(B), one of the general provisions of the Rules of Evidence, which provides:

[i]n cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.⁵⁸

Sub-rule 89(B)'s requirement that the rules of evidence, applied pursuant to it, be consonant with the "spirit of the Statute" has been deemed to refer to the Statute's mandate that proceedings be "fair and expeditious."⁵⁹ The Sub-rule's reference to "general principles of law" is arguably less straightforward. Referring to Article 38(1)(c) of the Statute for the International Court of Justice, which cites the "general principles of law recognized by civilized nations," Trial Chamber II noted the same to be construed by one source as "rules accepted in the domestic laws of all civilised States."⁶⁰ Judge Ninian Stephen has further illuminated the concept, indicating that "where a substantial number of well-recognised legal systems adopt a particular solution to a problem it is appropriate to regard that solution as involving some quite general principle of law such as is referred to in Sub-rule 89(B)."⁶¹

It has been observed that Sub-rule 89(B) seems to authorize judicial supplementation of the few enumerated rules with imported standards from domestic systems.⁶² The practice and decisions of the Trial Chambers have certainly confirmed this.⁶³ That there would be

27, 1999) [hereinafter Separate Opinion of Judge Hunt], available at <http://www.un.org/icty/simic/trialc3/decision-e/90727EV59551.htm> (last visited Feb. 28, 2004).

57. *Id.*

58. ICTY RPE 2003, *supra* note 4, R. 89(B).

59. I VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 259-60 (1995) [hereinafter 1 MORRIS & SCHARF]. Ntanda Nsereko, however, notes the requirement to include the entirety of Article 20(1) and thus, in addition to finding that this means that the proceedings be "fair and expeditious," he also includes that the rights of the accused be fully respected and that "due regard . . . [be given to] the protection of victims and witnesses" within the meaning of the "spirit of the Statute." Ntanda Nsereko, *supra* note 18, at 541 (quoting the ICTY Statute, *supra* note 3, art. 20(1)).

60. Prosecutor v. Delalić, Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference, Case No. IT-96-21-T, para. 8 (ICTY Trial Chamber May 28, 1997) [hereinafter Delalić Video-Link Decision], available at <http://www.un.org/icty/celebici/trialc2/decision-e/70528v12.htm> (last visited Feb. 28, 2004).

61. Prosecutor v. Tadić, Separate Opinion of Judge Stephen on Prosecution Motion for Production of Defence Witness Statements, Case No. IT-94-1-T, at 4 (ICTY Trial Chamber Nov. 27, 1996) [hereinafter Separate Opinion of Judge Stephen], available at <http://www.un.org/icty/tadic/trialc2/decision-e/61127WS26398.htm> (last visited Feb. 28, 2004). In the Delalić case, the Trial Chamber subsequently cited this position as explanatory of Sub-rule 89(B). Delalić Video-Link Decision, *supra* note 60, para. 11.

62. Ntanda Nsereko, *supra* note 18, at 541. This is noteworthy due to the fact that Sub-rule 89(A) provides that the Trial Chambers are not bound by national rules of evidence. ICTY RPE 2003, *supra* note 4, R. 89(A).

63. Paragraph 10 states:

evidentiary gaps in the rules was a given.⁶⁴ Not unlike the precedent set at Nuremberg,⁶⁵ the evidentiary rules governing the Tribunal present something akin to a “bare bones” approach. One might say that this is the hallmark of the rules of evidence in the forum of international criminal prosecution, appropriate in light of the fact that professional judges, rather than lay jurors, are assessing the value of the evidence before them,⁶⁶ and is possibly the natural result of uniting dissimilar legal systems.⁶⁷ Of the 125 rules initially adopted for the ICTY, only ten were rules of evidence.⁶⁸

Rule 89 is the primary evidentiary rule; amongst its remaining general provisions are the principles that relevant evidence with probative value is admissible,⁶⁹ with the caveat that such evidence may be excluded “if its probative value is substantially outweighed by the need to ensure a fair trial.”⁷⁰ The Tribunal’s approach to evidence is consistent with what has been deemed a “fundamental principle” with regard to evidence in international proceedings: “*courts are not bound by strict and ‘technical’ rules of evidence but enjoy great flexibility and should be guided, rather than by formal standards, by general principles of fairness.*”⁷¹

Thus, it was anticipated that Sub-rule 89(B), the “residual rule,”⁷² would serve as a useful tool in the operation of the Tribunal.⁷³ The Sub-rule plays an integral role in a forum where “complex factual scenarios” and the potential for extensive numbers of witnesses and exhibits require elastic evidentiary rules.⁷⁴ This concept of flexibility does not exist without criticism, however. It has been noted that with the absence of clearly defined rules comes the potential for uncertainty.⁷⁵ The flexibility principle has been cited by one critic as contributing to the contention that the Tribunal “is a rogue court with rigged rules.”⁷⁶ It has also created a situation wherein “the RPE of each Tribunal is not identical on issues vital to

It seems to the Trial Chamber indisputable, therefore, that the unqualified intention of Sub-rule 89(B) is to enable the Chambers to apply the general principles of municipal jurisprudence in so far as they are applicable to the matter before it and are consonant with the Statute. Accordingly, the Trial Chamber is free to apply such provisions of the law of evidence of major legal systems not inconsistent with the Statute.

Delalić Video-Link Decision, *supra* note 60, para. 10.

64. The Trial Chamber noted that “[t]he Judges of the International Tribunal, in drafting the Rules, were cognisant of their paucity and the evident fact that they cannot conceivably provide for many of the situations that could arise in an international tribunal of this nature.” *Id.* para. 9.

65. See *ICTY First Annual Report*, *supra* note 18, para. 54; Ntanda Nsereko, *supra* note 18, at 508.

66. ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 422 (2003).

67. ARCHBOLD, *INTERNATIONAL CRIMINAL COURTS: PRACTICE, PROCEDURE AND EVIDENCE* 249 (Rodney Dixon et al. eds., 2003) [hereinafter ARCHBOLD].

68. Ryneveld & Mundis, *supra* note 38, at 54.

69. ICTY RPE 2003, *supra* note 4, R. 89(C).

70. *Id.* R. 89(D).

71. CASSESE, *supra* note 66, at 421.

72. I MORRIS & SCHARF, *supra* note 59, at 259.

73. The Sub-rule affords “a golden opportunity to craft a workable and just procedural and evidentiary regime that will foster the interests of international justice.” Ntanda Nsereko, *supra* note 18, at 554.

74. ARCHBOLD, *supra* note 67, at 249.

75. BASSIOUNI & MANIKAS, *supra* note 17, at 950. “There are obvious uncertainties for defendants and their attorneys posed by the wide-open license given to the tribunal to apply ‘rules of evidence which will best favour a fair determination of the matter’ and ‘are consonant with the spirit of the Statute and the general principles of law.’” José E. Alvarez, *Rush to Closure: Lessons of the Tadić Judgment*, 96 MICH. L. REV. 2031, 2066 n.128 (1998) (quoting Rule 89(B) of the ICTY Rules of Procedure and Evidence).

76. John Laughland, *The Anomalies of the International Criminal Tribunal are Legion . . .*, TIMES (London), June 17, 1999, at 24.

the fair administration of justice.”⁷⁷ Another noted difficulty with the “standard” is the resultant inability of counsel to determine the strength of his or her case while in trial.⁷⁸ These observations provide an interesting contrast to the fact that “Sub-rule 89(B) establishes the issue of fairness as the overriding concern in matters not explicitly addressed in the Rules.”⁷⁹

4. Which Authority to Employ?

The ability of the Tribunal to address issues that arise during the course of proceedings, for which there are no controlling provisions in the Statute or the Rules of Procedure and Evidence, thus exists under Sub-rule 6(B), the doctrine of inherent powers, and Sub-rule 89(B). While it is unlikely that Sub-rule 6(B) would be employed in such situations,⁸⁰ the remaining two options are actively engaged by the Tribunal in precisely such circumstances. Undoubtedly, the relevance of the chosen option is enhanced when the alternative choice would result in a different outcome. With regard to the use of either the doctrine of inherent powers or Sub-rule 89(B), it is often not necessarily apparent which tool has been employed by the Tribunal in a given situation, nor is it always clear which authority should be drawn upon by it.

An example of the complexity involved in making such a determination is evidenced in the *Tadić* case, where the appeal judgment addressed the ability of Trial Chambers to order the production of defense witness statements after the witnesses had testified.⁸¹ While the prosecutor asserted that the Trial Chamber had the power to disclose the witness statements pursuant to Sub-rule 89(B),⁸² the Appeals Chamber disagreed with this position. Although acknowledging that “since the Statute and the Rules do not expressly cover the problem at hand, the broad powers conferred by Sub-rule 89(B) may come into play,”⁸³ the Appeals Chamber chose instead to focus on the manner in which prior statements are useful to the Trial Chamber. Noting the benefit of such statements with regard to the Trial Chamber’s ability to evaluate testimony, and thus their function in the Trial Chamber’s quest for truth and its purpose of ensuring a fair trial, the Appeals Chamber found the power

77. Michail Wladimiroff, *Rights of Suspects and Accused*, in 1 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS 419, 450 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000). This, of course, runs contrary to “the right of an accused to have like cases treated alike.” *Prosecutor v. Aleksovski*, Judgement, Case No. IT-95-14/1-A, para. 105 (ICTY App. Chamber Mar. 24, 2000) [hereinafter *Aleksovski Judgement Appeal*], available at <http://www.un.org/icty/aleksovski/appeal/judgement/ale-asj000324e.pdf> (last visited Feb. 28, 2004); see also Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., arts. 7, 10, U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 14, 999 U.N.T.S. 171, 176 (entered into force Mar. 23, 1976); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6(1), 213 U.N.T.S. 221, 228 (entered into force Sept. 3, 1953); American Convention on Human Rights: Pact of San Jose, Costa Rica, Nov. 22, 1969, art. 8(1), 1144 U.N.T.S. 143, 147 (entered into force July 18, 1978); Organization of African Unity, Banjul Charter on Human and Peoples’ Rights, June 27, 1981, art. 7, OAU Doc. CAB/LEG/67/3/Rev. 5, 21 I.L.M. 58, 60 (1982); Universal Islamic Declaration of Human Rights, Sept. 19, 1981, art. III, 4 Eur. H.R. Rep. 433, 435 (1982).

78. Ryneveld & Mundis, *supra* note 38, at 56.

79. Cristian DeFrancia, Note, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA. L. REV. 1381, 1413 (2001).

80. See discussion *supra* Part II.B.1.

81. See, e.g., *Tadić Appeal Judgment*, *supra* note 49 paras. 306-26.

82. See *id.* para. 309.

83. *Id.* para. 320.

to order the production of statements within the Tribunal's inherent jurisdiction.⁸⁴ Critically speaking, it appears that this type of analysis could be made under virtually any set of circumstances; thus, the Appeals Chamber's position on this matter leaves one with no clear indication as to when a situation should be subject to an examination of this kind rather than a reference to the authority of Sub-rule 89(B). To further muddy the waters, it is interesting to note that Judge Gabrielle Kirk McDonald, in her dissenting Trial Chamber opinion on the matter, appears to unite the doctrine of inherent powers with Sub-rule 89(B) in order to bring about the Tribunal's ability to order the production of the statements.⁸⁵

Thus, with regard to the use of the doctrine of inherent powers versus that of Sub-rule 89(B), it seems likely that there may be both a lack of unanimity and a lack of clarity among the judiciary with regard to which power should be employed in a given situation. To refer to the issue as uncertain would likely understate the matter. However, it does seem clear that under either provision the Tribunal should be guided by fairness in making its determination. This is true in the general sense that, as a derivative of the Security Council, the Tribunal attempts to "practice what the United Nations preaches" and thus provide "fair criminal proceedings that may be emulated by member states."⁸⁶ It is also an intrinsic aspect of the principle of flexibility enjoyed in an international forum⁸⁷ and takes into account the right to a fair hearing as articulated in Article 21 of the Statute.⁸⁸ Further, it is consistent with the Tribunal's interpretation of inherent powers⁸⁹ and the actual wording of Sub-rule 89(B).⁹⁰

III. THE RULES AND POWERS IN OPERATION

A. Testimonial Privilege

The capacity of the Tribunal to fill evidentiary lacunae throughout the course of its proceedings, either through the use of its inherent powers or Sub-rule 89(B), is relevant with regard to a claim of testimonial privilege. Though the evidentiary rules of the Tribunal address the issue of privilege in the contexts of self-incrimination⁹¹ and lawyer-client,⁹² they remain silent as to the existence of any other privileges. While the judges considered including additional privileges during the drafting process of the Rules, the decision was

84. *Id.* para. 322.

85. Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 COLUM. J. TRANSNAT'L L. 725, 760–61 (1999) (citing Prosecutor v. Tadic, Separate and Dissenting Opinion of Judge McDonald, Decision on Prosecution Motion for Production of Defence Witness Statements, Case No. IT-94-1, paras. 6, 45–46 (ICTY Trial Chamber Nov. 27, 1996)).

86. Ntanda Nsereko, *supra* note 18, at 510.

87. *See supra* note 66 and accompanying text.

88. ICTY Statute, *supra* note 3, art. 21. The right "implies that, in a given situation, even if there are no express provisions that regulate it, the interpreter should prefer the solution that ensures the concrete realization of a fair trial." Salvatore Zappalà, *The Rights of the Accused*, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1319, 1329 (Antonio Cassese et al. eds., 2002).

89. *See, e.g.*, Separate Opinion of Judge Hunt, *supra* note 56, para. 25 ("The Tribunal . . . has an inherent power, deriving from its proceedings in such a way as to ensure that justice is done."); *see also* Tadić Appeal Judgment, *supra* note 49, para. 322 ("Rather than deriving from the sweeping provisions of Sub-rule 89(B), this power [to ensure a fair trial] is inherent in the jurisdiction of the International Tribunal, as it is within the jurisdiction of any criminal court, national or international.")

90. "In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law." ICTY RPE 2003, *supra* note 4, R. 89(B) (emphasis added).

91. *Id.* R. 90(E).

92. *Id.* R. 97.

made to affirmatively identify “only the two most widely-recognized privileges.”⁹³ The possibility remains, however, for subsequent amendments to the Rules to include other privileges.⁹⁴ It has also been noted that witnesses “should be given the opportunity to raise a privilege[;]” thus, the limitation of the Rules to the two noted privileges does not rule out the prospect that other classes of individuals may be relieved of their testimonial obligations.⁹⁵

B. *The Simić Case*

In fact, a claim of testimonial privilege was made before the Tribunal with regard to information known to a former employee of the International Committee of the Red Cross (ICRC).⁹⁶ In the *Simić* case, the Trial Chamber was asked to decide whether the former employee might come forth to give evidence of facts, ascertained by him, through his employment with the ICRC.⁹⁷ Though the individual in question was willing to testify, he had signed a “pledge of discretion” in his employment contract.⁹⁸ According to the ICRC, this contract requirement was consistent with its internal policy and necessary to carry out its mandate.⁹⁹ The ICRC also maintained that the Tribunal has the inherent authority, upon a sufficient showing regarding principle and public policy, to order that certain evidence be excluded.¹⁰⁰ The organization proposed that the Tribunal use this authority to exclude the evidence sought to be introduced without the consent of the ICRC.¹⁰¹

Although the Trial Chamber ultimately found that the ICRC has the right to non-disclosure of information related to its activities, it did not accept the offer to so decide by virtue of its inherent authority. Rather, the Trial Chamber found that the ICRC has a right under customary international law to non-disclosure of the information.¹⁰² The Trial Chamber came to this conclusion based upon the history of the ICRC, finding that the same reveals that parties to the Geneva Conventions assumed a conventional obligation to ensure non-disclosure in judicial proceedings of information relating to the work of the ICRC, including that which is in the possession of its employees.¹⁰³ Thus, the Trial Chamber did not have to address the issue of the Tribunal’s authority to grant the privilege, rather it

93. 1 MORRIS & SCHARF, *supra* note 59, at 266–67. In a like manner, the U.S. proposal indicates in its commentary to Rule 25.11 that “[o]ther privileges recognized in various jurisdictions were considered and specifically rejected.” *U.S. Suggestions*, *supra* note 20, at 549.

94. 1 MORRIS & SCHARF, *supra* note 59, at 267.

95. *Id.* at 266–67.

96. Prosecutor v. Simić, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, Case No. IT-95-9-PT, para. 1 (ICTY Trial Chamber July 27, 1999) [hereinafter *Simić Witness Decision*], available at <http://www.un.org/icty/simic/trialc3/decision-e/90727EV59549.htm> (last visited Feb. 28, 2004).

97. Buteau & Oosthuizen, *supra* note 45, at 74.

98. *Simić Witness Decision*, *supra* note 96, para. 55.

99. *Id.* para. 56.

100. *Id.* para. 19.

101. The ICRC, however, only maintained that this would be the result absent a showing of an “overwhelming need” on behalf of the party seeking to proffer the evidence. *Id.* This differs from its alternative contention that its protection is absolute. Separate Opinion of Judge Hunt, *supra* note 56, para. 10.

102. *Simić Witness Decision*, *supra* note 96, para. 74.

103. *Id.* para. 73. According to the Trial Chamber, the ratification of the Geneva Conventions by 188 states can be considered as reflecting the *opinio juris* of the State Parties, which, in addition to the general practice of states, creates the right to non-disclosure under customary international law. *Id.* para. 74.

found the Tribunal bound by customary international law, whose effect, quite simply, served to bar the admission of the testimony.¹⁰⁴

Though this approach enabled the Trial Chamber to circumvent the need to determine the relevant authority controlling its ability to recognize claims of testimonial privilege, as well as avoid a potential analysis of the appropriate balance between the confidentiality interest at issue and the need to ensure that all relevant and probative evidence be available to the Trial Chamber, the same cannot be said of Judge Hunt's separate opinion. In his concurring opinion, Hunt clearly states that he is not convinced that the answer to the ICRC's claim of testimonial privilege is supplied by customary international law.¹⁰⁵ Hunt then analyzes the issue and, in so doing, appears to take into account both Sub-rule 89(B) and the doctrine of inherent powers. Noting the Tribunal's obligation to ensure fair and expeditious trials to those indicted before it,¹⁰⁶ Hunt also addresses the issue of general principles of law.¹⁰⁷ The opinion then goes on to speak to the inherent power that the Tribunal has to control its proceedings in such a way as to ensure that justice is done.¹⁰⁸ Hunt cautions against the issuance of an absolute privilege. In particular, he implies that a blanket privilege may very well impede the Tribunal's mandate to ensure a fair trial.¹⁰⁹ Hunt avers, "I do not accept that it is necessarily for the greater good to sacrifice the liberty of an innocent person in order to ensure the ICRC's protection against disclosure, yet this is the inevitable consequence of the ICRC's claim."¹¹⁰ Noting that "[i]t is impossible to foresee every situation which may arise," Hunt contends that the court should be able to weigh the competing interests in every case.¹¹¹ Hunt then engages in a balancing exercise with an eye towards the assurance of a fair trial¹¹² and, noting that the evidence in question is not essential to the prosecution's case, finds that the balance lies in favor of keeping the information confidential.¹¹³

Judge Hunt's separate opinion is worthy of remark for a number of respects. The opinion creates some concern due to its lack of clarity as to whether it finds its authority in the inherent powers of the Tribunal, Sub-rule 89(B), or both.¹¹⁴ In light of the fact that the Tribunal has been given wide latitude in adopting and adapting the Rules of Procedure and

104. *Id.* para. 76.

105. Separate Opinion of Judge Hunt, *supra* note 56, para. 23.

106. *Id.* para. 25. Sub-rule 89(B) requires that the rules of evidence, applied pursuant to it, be consonant with the "spirit of the Statute." ICTY RPE 2003, *supra* note 4, R. 89(B). The latter has been deemed to refer to the ICTY Statute's mandate that proceedings be fair and expeditious. See *supra* note 59 and accompanying text.

107. It is also a requirement of 89(B) that the rules of evidence be applied in accord with the general principles of law. ICTY RPE 2003, *supra* note 4, R. 89(B). Judge Hunt states, however, that it is not easy to discover general principles of law with regard to the issue of confidentiality due to the fact that such provisions would be codified in civil law systems and subject to a balancing of interests in common law systems. Separate Opinion of Judge Hunt, *supra* note 56, para. 24.

108. Separate Opinion of Judge Hunt, *supra* note 56, para. 25. The requirement that justice be done is akin to 89(B)'s requirement that the rules applied "best favour a fair determination of the matter before it." ICTY RPE 2003, *supra* note 4, R. 89(B).

109. The first example given for this is when the evidence sought is vital to establish innocence: "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?" Separate Opinion of Judge Hunt, *supra* note 56, para. 29. The second situation noted is where the evidence withheld is vital to establish the guilt of an accused in a case of "transcendental importance." *Id.* para. 31.

110. *Id.* para. 30.

111. *Id.* para. 32.

112. The test applied is whether the evidence in question is so essential to the case of the relevant party as to outweigh the risks associated with the breach of confidence in the case. *Id.* para. 35.

113. *Id.* paras. 40-41.

114. Hunt's approach in this regard is similar to that of Judge McDonald in the Tadić Decision on Prosecution Motion for Production of Defence Witness Statements. See *supra* note 85 and accompanying text.

Evidence, a failure on its behalf to identify the authority for its decisions in this regard serves only to intensify the criticisms of its custom of flexibility. A clear citation of authority also decreases the likelihood that some of the problems attendant to flexibility will be exacerbated, such as its consequent degree of uncertainty. Of seminal importance, if the Tribunal clearly cites the authority for its action, it is also less likely to act, or be criticized for acting, in a manner that is *ultra vires*. A clear articulation of the authority that empowers its decisions, along with a cogent analysis of its application, would do much to address this potential difficulty.

However, Judge Hunt's opinion is worthy of commendation in that it highlights the overriding importance of the fact that decisions made by the Tribunal regarding procedural matters be motivated by the requirement that trials proceed fairly. Obviously, this is a primary concern in his analysis of the claim by the ICRC. Another noteworthy and encouraging aspect of Hunt's opinion is its recognition that the Tribunal should be wary of the dangers inherent in creating a blanket exception to testimonial obligations. By so stating, Hunt evidences an appreciation of the fact that the importance of the Tribunal's procedural decisions should not be underestimated; in fact, some have suggested that they serve to develop "the common law of international [criminal] evidence and procedure."¹¹⁵ This makes practical sense both in light of the fact that an element of *stare decisis* is present within the workings of the Tribunal¹¹⁶ and that its decisions will undoubtedly be viewed as persuasive in the context of other international tribunals. Hunt's opinion advocates a method of judicial decision-making that is the antithesis of the majority's broad decision; he limits his query to the matter before the Trial Chamber¹¹⁷ and cautions against the risks associated with expansive pronouncements.

C. *Decisional Minimalism*

This separate opinion, thus, advances a form of decision-making that has been christened by Cass Sunstein as "decisional minimalism."¹¹⁸ Arguably, this method of judicial decision-making is ideally suited to the Tribunal's resolution of problems, experienced during the course of proceedings, for which there are no provisions in its Statute or Rules of Procedure and Evidence.¹¹⁹ Minimalism calls for cases to be decided, rather than for the setting of broad rules; as a result, it reduces the burden of making

115. DeFrancia, *supra* note 79, at 1399. "[T]he combined roles of *stare decisis* and analogical reasoning ensure that cases, once decided, will have a certain impact on the future." Cass Sunstein, *Leaving Things Undecided*, 110 HARV. L. REV. 6, 35 (1996).

116. With regard to whether the Appeals Chamber is bound to follow its previous decisions, "the normal rule is that previous decisions are to be followed, and departure from them is the exception." Aleksovski Judgment Appeal, *supra* note 77, para. 109. According to the Appeals Chamber, "a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on Trial Chambers." *Id.* para. 113. However, "the decisions of Trial Chambers . . . have no binding force on each other." *Id.* para. 114.

117. Separate Opinion of Judge Hunt, *supra* note 56, para. 6.

118. Sunstein, *supra* note 115, at 6–7. In the short period of time that has passed since Sunstein isolated this form of judicial decision-making and introduced his assessment of it, Sunstein's theories have received significant academic attention, along with approval from such figures as Richard Posner and Abner Mikva. For an overview, including references to Sunstein's "stunningly prolific body of work," see Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1455 (2000).

119. "Minimalism's virtues depend on the context." Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-but-shallow*, 43 WM. & MARY L. REV. 1, 4 (2001). According to Sunstein, "[i]t would be foolish to be a thoroughgoing minimalist; the case for breadth is strong in too many cases." Sunstein, *supra* note 115, at 16.

decisions and decreases the dangers associated with erroneous decisions.¹²⁰ It is the opposite approach to maximalism, whose inherent attributes are broad, binding rules and deep, theoretical justifications for outcomes.¹²¹ According to Sunstein, “good judges try to minimize the sum of decision costs and error costs.”¹²² Decision costs include those costs associated with reaching a decision, as in the *Simić* case, where the majority was required to go to great lengths to establish that customary international law provides the ICRC with the right to non-disclosure.¹²³ In the same case, Hunt’s concerns about the effect that the decision may have on the fair trial rights of the accused reflect an appreciation for error costs.¹²⁴

While some may argue that decisional minimalism, an Anglo-American tradition¹²⁵ often associated with a judicial approach to difficult constitutional questions, is an inadequate fit with regard to the unique workings of the Tribunal, a review of the rationale behind and in support of the concept reveals the fallacy of this position. In the domestic context, it is argued that minimalism usually makes sense when the Court is addressing a complex issue about which people are divided.¹²⁶ This parallels nicely with procedural issues for which there is a lack of consensus among national legal systems or among the judges in the Tribunal. Mindful of the fact that the Rules adopted by the Tribunal in accord with the rule-making process represent only measures upon which there was broad agreement, it is logical to anticipate that some of the gaps addressed by the Trial Chambers, throughout the course of proceedings, relate to issues upon which the opinions of judges differ. Employing minimalism, judges who cannot agree on the implementation of a particular rule “might well be able to agree on how a particular case should be handled.”¹²⁷ This method of decision-making has an added benefit in that it leaves the adoption of broad and binding rules to the confines of the rule-making process, where such proposals will receive input from all organs of the Tribunal and the defense and will be addressed by the whole of the Tribunal’s judiciary. When minimalism is practiced, a majority of two judges in the Trial Chambers, or three judges in the Appeals Chambers, will not be able to “legislate from the bench” on contentious procedural issues.

The importance of this becomes increasingly apparent when a second parallel is drawn with regard to minimalism on the national level. Minimalism is said to be “democracy forcing,” specifically, in that it leaves issues open for democratic deliberation and promotes reason giving on the part of the judiciary.¹²⁸ While at first blush this invites the perception that minimalism is a singularly domestic concept, again there is a clear place for this model within the workings of the Tribunal. The legislative aspects associated with the rule-making process should not be ignored. The report of the Secretary-General specifies that “the judges of the International Tribunal *as a whole* should draft and adopt the rules of procedure and evidence.”¹²⁹ After recently altering the manner in which it deals with amendments, the Tribunal itself noted that “proposed amendments to the Rules will now be the result of in-depth discussions which take into consideration the opinions and

120. Sunstein, *supra* note 115, at 16.

121. *Id.* at 15.

122. *Id.* at 16. “Decision costs are the costs of reaching judgments.” *Id.* “Error costs are the costs of mistaken judgments as they affect the social and legal systems as a whole.” *Id.* at 18.

123. See *Simić* Witness Decision, *supra* note 96, paras. 45–64.

124. See generally *supra* notes 109–110 and accompanying text.

125. “Anglo-American courts often take small rather than large steps, bracketing the hardest and most divisive issues.” CASS SUNSTEIN, ONE CASE AT A TIME, at ix (1999).

126. Sunstein, *supra* note 115, at 8.

127. *Id.* at 21.

128. *Id.* at 7.

129. *Rep. of the Sec’y-Gen.*, *supra* note 10, para. 83 (emphasis added).

interests of the Office of the Prosecutor and representatives of the defence counsel.”¹³⁰ In a manner akin to domestic lawmaking, rules that have been subject to the Tribunal’s amendment process have, at times, been the result of “significant compromise.”¹³¹ Actions taken in the absence of this amendment process will not benefit from this exchange and deliberation; rather, such activity, which circumvents the rule-making process, may enable a set of judges to create a rule that would not have garnered the requisite support for its adoption. Such an action would likely not give due regard to the ramifications of the decision. With minimalism in place, detailed reasoning will be supplied for the decisions that are rendered and broad reaching rules will have the benefit of having gone through the consultative, rule-making process. Arguably recognizing the importance of this method of judicial decision-making, minimalism was again employed by the Trial Chamber in a later case involving a claim of testimonial privilege.

IV. THE RANDAL MATTER

A. *Factual and Procedural History*

In January 2002, in the case of *Prosecutor v. Brdjanin and Talic*, the Office of the Prosecutor sought to introduce into evidence a newspaper article written by journalist Jonathan Randal, along with a written statement also made by him.¹³² The article, which had been published in the *Washington Post* in February 1993, was the result of the journalist’s interview of the accused, Brdjanin.¹³³ The piece in question contains numerous statements attributed to the accused, Brdjanin, who “was charged in a 12-count indictment with, among other things, crimes against humanity and grave breaches of the Geneva Conventions,” including deportation and forced transfer.¹³⁴ In the article, the quotations attributed to Brdjanin contain such statements as “[w]e are going to defend our frontiers at any cost” and that certain authorities “pay too much attention to human rights.” The quotes also indicate that Brdjanin, at that time a housing administrator, was drafting laws whose purpose was “to expel non-Serbs from government housing.”¹³⁵ Randal’s written statement, provided to the Office of the Prosecutor, confirms the accuracy of the quotations attributed to the accused and also conveys the journalist’s initial, albeit hesitant, willingness to testify before the Tribunal.¹³⁶

Brdjanin objected to the attempt to admit the article and statement into evidence and maintained that if they were to be admitted he would require Randal’s presence for cross-examination.¹³⁷ Brdjanin would later allege that the interview with Randal was tainted, in that Randal utilized the translation services of a fellow journalist (“X”) who was hostile to

130. *ICTY Ninth Annual Report*, *supra* note 24, at 4.

131. Boas, *The Principle of Flexibility*, *supra* note 17, at 83.

132. Brdjanin Subpoena Decision, *supra* note 1, para. 1. Randal, a long-time journalist, was then retired, sixty-nine years of age, and living in Paris. *Prosecutor v. Brdjanin & Talic*, Written Submission on Behalf of Jonathan Randal to Set Aside Confidential Subpoena to Give Evidence, Case No. IT-99-36-T, para. 5 (ICTY Trial Chamber II May 8, 2002) (on file with author) [hereinafter Randal Trial Submission].

133. Brdjanin Subpoena Decision, *supra* note 1, para. 4.

134. Brdjanin Interlocutory Appeal, *supra* note 2, para. 4.

135. Brdjanin Subpoena Decision, *supra* note 1, para. 28(A)(ii) (quoting Jonathan Randal, *Preserving the Fruits of Ethnic Cleansing: Bosnian Serbs, Expulsion Victims See Campaign as Beyond Reversal*, WASH. POST, Feb. 11, 1993, at A34).

136. *Id.* para. 28(A)(iii).

137. *Id.* para. 1.

Brdjanin and, therefore, failed to adequately represent Brdjanin's statements to Randal.¹³⁸ In light of Brdjanin's need to cross-examine Randal, the prosecution requested that a subpoena be issued for the journalist; the Trial Chamber issued the subpoena the following day.¹³⁹

Further submissions regarding the admission of the article and statement, as well as Randal's testimony, were made in February and March 2002. At issue, among other concerns, was Brdjanin's position that X's testimony, rather than that of Randal, would provide the best evidence. Finding the article relevant with regard to Brdjanin's mens rea, and noting Randal's affirmation that he could support the quotations as accurate, along with Randal's ability to testify regarding such additional matters as Brdjanin's demeanor during the interview, the Trial Chamber found the evidence admissible.¹⁴⁰ Randal then filed a motion to set aside the subpoena in May 2002.

B. *The Motion to Set Aside Confidential Subpoena to Give Evidence*

Before the Trial Chamber, Randal maintained that the subpoena in question should not have been issued, either as a matter of law or in light of the facts presented to the Court.¹⁴¹ Specifically, Randal submitted that journalists should have a qualified privilege not to testify about their newsgathering,¹⁴² and that Randal's evidence cannot be probative in the absence of testimony from the translator, X.¹⁴³ In support of his argument for privilege, Randal observed that the Tribunal's power to compel testimony is not absolute, citing, among other examples, the lawyer-client privilege per Rule 97 and the *Simić* ICRC decision.¹⁴⁴ Noting the valuable service provided by media coverage in combat zones,¹⁴⁵ Randal proposed that the benefits provided by journalists reporting from these situations would be curtailed if journalists were "routinely compelled" to give evidence.¹⁴⁶ As a result, Randal contended that either a qualified privilege for journalists or a rebuttable presumption against the provision of their testimony, with very limited exceptions, should be applied.¹⁴⁷ Although Randal's written submission to the Trial Chamber referenced no authority for the implementation of a qualified privilege, the authority, according to Randal's counsel, derives from the Trial Chamber's "inherent power to regulate its own proceedings."¹⁴⁸

138. *Id.* para. 3.

139. *Id.* paras. 1–2.

140. *Id.* para. 5.

141. Randal Trial Submission, *supra* note 132, para. 3.

142. *Id.* paras. 13, 23. In support of this claim for privilege, Randal cited a case decided by the European Court of Human Rights, along with domestic case law from the United States and the United Kingdom. *Id.* paras. 31, 34–39.

143. *Id.* para. 46.

144. *Id.* paras. 16, 18.

145. According to Randal, journalists reporting on these situations provide the world with important information about international conflicts, alert the world to the commission of war crimes, and foster the investigation of war crimes. *Id.* para. 12.

146. Randal Trial Submission, *supra* note 132, para. 12.

147. Under Randal's proposal, an unwilling journalist may only be compelled to testify when the Court has been satisfied that his testimony is of crucial importance to the determination of the defendant's guilt or innocence, the evidence cannot be obtained from another source, the provision of the testimony does not require the journalist to breach an obligation of confidence, and the testimony will not put the journalist, his family or sources in danger and will not jeopardize the effectiveness or safety of other journalists reporting from conflict zones in the future. *Id.* para. 13.

148. Prosecutor v. Brdjanin, Official Trial Transcript, Case No. IT-99-36-T, at 5368 (ICTY Trial Chamber May 10, 2002), available at <http://www.un.org/icty/transe36/020510MH.htm> (last visited Feb. 28, 2004).

While the prosecution agreed that whether a journalist should be compelled to testify before the Tribunal was a matter that should be assessed by the Court in each case, it proffered that such an assessment should involve a balancing of the competing public interests at issue,¹⁴⁹ rather than involve the application of a rebuttable presumption against journalist testimony.¹⁵⁰ The prosecution maintained that the article goes directly to the heart of the case against Brdjanin and that the Trial Chamber routinely allows the admission of statements made through the services of an interpreter without requiring the interpreter to testify.¹⁵¹ Stressing the fact that Randal's article had already been published¹⁵² and that Randal had retired from the field of journalism, the prosecution maintained that "Randal offers no substantial interest that would override the powerful public interest that all relevant evidence be available to [the] Tribunal, and Brdjanin's right to a fair trial."¹⁵³

C. *The Trial Chamber Decision*

In rendering its decision the Trial Chamber neither employs the test offered by Randal, nor chooses to craft a test of its own. Fundamentally, this is due to the fact that the Trial Chamber made the determination to be guided by minimalism in its assessment of the matter. Almost immediately, the Trial Chamber so establishes the parameters of its inquiry, noting that:

[I]n its role as a Trial Chamber it has a duty to limit itself to what is strictly necessary for the purpose of deciding the issue of which it seised and not to . . . 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.¹⁵⁴

Thus, Judge Carmel Agius confines the inquiry to the matter appearing before the Trial Chamber. As a result, the ensuing analysis does not engage in a theoretical discourse about the right to, or potential benefits of, journalistic privilege in general; rather, the decision limits its assessment strictly to the facts appearing before it.¹⁵⁵ In addressing the issue of Randal's subpoena, the Trial Chamber acknowledges that journalists should not be subpoenaed unnecessarily, and that they should only be called before tribunals in a manner

Randal's counsel addressed the issue an additional time, stating that "this Court can put that protection into Tribunal law . . . by creating from its inherent power a presumption against compulsory process against journalists." *Id.* at 5402.

149. This position is markedly similar to the assessment made by Judge Hunt in the Simić case. Ironically, this is precisely the reference made by Randal in support of a qualified privilege. *See* Randal Trial Submission, *supra* note 132, para. 24.

150. Brdjanin Subpoena Decision, *supra* note 1, para. 21. The prosecution maintained that Randal's interest was not sufficiently substantial to prevail over the defendant's "right to cross-examine witnesses against him[,] and the Tribunal's core fact-finding function." *Id.* para. 22.

151. *Id.* para. 17.

152. *Id.* para. 18.

153. *Id.* para. 22 (citing Prosecution's Response to Written Submission on Behalf of Jonathan Randal to Set Aside Confidential Subpoena to Give Evidence, paras. 30–32 (May 9, 2002)).

154. *Id.* para. 23.

155. Arguably, it is for this reason that the decision is critical of Randal's attempt to "[put] into one basket" potentially non-analogous case law and fact patterns simply because the same relate in some manner to journalistic privilege. Brdjanin Subpoena Decision, *supra* note 1, para. 29.

that will not frustrate the role of newsgathering.¹⁵⁶ It is within this framework that the Trial Chamber addresses Randal's status, focusing on the facts that Randal did not obtain his information upon condition of confidentiality, subsequently published the information obtained, cited the accused as his source in the published information, retired from the field of journalism, and was, at the relevant point in time, residing far from the conflict area. These relevant factors became a part of the "delicate balancing exercise" between some of the aspects of the right to freedom of expression as they relate to journalists reporting from combat areas and the overriding principle that the course of justice is not unduly impeded by the withholding of evidence.¹⁵⁷ Thus, the Trial Chamber, noting particularly that "[n]o journalist can expect or claim that once he or she has decided to publish no one has a right to question their report or question them on it,"¹⁵⁸ found that Randal's claim of journalistic privilege could not stand.¹⁵⁹

It is worth noting, however, that the decision intentionally leaves open the issue of journalistic privilege. Remarking that the issue of journalistic privilege was expected to appear before the Tribunal, the Trial Chamber asserts that the matter was simply raised in the wrong case.¹⁶⁰ The Trial Chamber observes that the fundamental question of source protection, at the heart of almost the entirety of the case law relied upon by Randal, was absent in the case, as was the issue of unpublished material. Distinguishing the matter before it from the European Court of Human Rights case put forth by Randal, the Trial Chamber strongly implies that if the case before it was on point with that decision, and involved confidential information, the decision would be otherwise.¹⁶¹ However, the decision then stresses the need not to digress into an area that is not relevant to the matter before it.¹⁶² Put another way, the decision leaves the matter of journalistic privilege undecided.

However, not unlike Judge Hunt's separate opinion in the *Simić* case, the Trial Chamber decision also fails to refer to the authority employed by it in making its determination. Although the decision clearly fulfills the Trial Chamber's responsibility to ensure the realization of a fair trial and be consistent with general principles of fairness, the oversight is remarkable for reasons outside of the decision itself. Not only would such a reference have been beneficial for the reasons noted in the context of Hunt's separate opinion, it also could have served to force the matter to the fore for discussion on appeal, enhancing the accountability and credibility of the next decision.

D. *The Interlocutory Appeal*

Following the Trial Chamber decision, Jonathan Randal petitioned for, and was granted, an appeal; the Appeals Chamber also allowed thirty-four media companies and associations of journalists to file an *amici curiae* (*amici*) brief in support of Randal's

156. *Id.* para. 27.

157. *Id.*

158. *Id.* para. 26. This position is consistent with most U.S. jurisprudence. U.S. publishers do not routinely challenge the practice known as "authentication." See James C. Goodale, *Washington Post Reporter Wins Big at The Hague*, 229 N.Y.L.J. 3 (2003).

159. *Brdjanin Subpoena Decision*, *supra* note 1, paras. 30–31.

160. *Id.* para. 28.

161. In an attempt to illustrate the narrowness of its ruling, the decision steps outside the confines of minimalism by stating, "it would be a step in the wrong direction, a step backward, and a severe blow to the freedom of expression of journalists . . . if this Trial Chamber were to accept a standard lower than that upheld in the [European Court of Human Rights] case." *Id.* para. 31.

162. The Trial Chamber subsequently limits its discussion because "this would not be strictly necessary for the proper determination of the issue before it." *Id.*

position.¹⁶³ Randal submitted that the Trial Chamber erred, both in not recognizing a qualified privilege for journalists, and in not finding, based on the facts, that Randal should not be compelled to testify.¹⁶⁴ With regard to the claim for a limited privilege, Randal offered the same test submitted by him to the Trial Chamber.¹⁶⁵ Randal proffered that in the absence of such a privilege, journalists and their sources may be put at risk and journalists “may be denied access to . . . information and sources in the future,”¹⁶⁶ thus creating a “chilling effect.”¹⁶⁷ The amici, essentially in agreement with Randal, proposed a slightly less stringent test for a qualified privilege, asserting that journalist testimony should not be compelled absent a showing that it is essential to the determination of the case and that it cannot be obtained from an alternative source.¹⁶⁸

The Appeals Chamber decided that oral argument should be heard in light of the importance of the case and out of fairness to the parties and the amici curiae.¹⁶⁹ At the outset of the motion hearing, there was arguably a manifest difference in the approach of the Appeals Chamber to the issue before it, as opposed to that of the Trial Chamber. The Appeals Chamber made it clear that it was sitting to determine whether war correspondents enjoy immunity against the obligation to testify before the Tribunal.¹⁷⁰ It stated that, if such a privilege exists, the Chamber’s next inquiry would involve establishing the criteria for the privilege’s application.¹⁷¹ As a matter of course, then, the assessment of Randal’s status was dependent upon these first two issues and was consequently not the primary focus of the Appeals Chamber’s inquiry.¹⁷² This dramatic shift away from the minimalism that controlled the inquiry at the Trial Chamber likely served as a harbinger of things to come.

E. *The Decision on the Interlocutory Appeal*

The inconsistency in the approach to Randal’s claim from the lower to the higher court is only rivaled by the variation in the Appeals Chamber’s focus from the motion hearing to the delivery of its decision on the interlocutory appeal. In a radical departure

163. Brdjanin Interlocutory Appeal, *supra* note 2, paras. 6–7.

164. *Id.* para. 10.

165. *Id.* para. 15; *see supra* note 147.

166. Brdjanin Interlocutory Appeal, *supra* note 2, para. 11.

167. These assertions are matters of dispute among journalists. *See, e.g.*, Abigail Levene, *Reporter Testifies Against Milosevic, Stoking Debate*, WASH. POST, Aug. 29, 2002, at A26 (noting that BBC reporter Jacky Rowland, who testified before the ICTY, “rejected the suggestion that her testimony might put journalists at risk during future conflicts”); *see also All Things Considered: International Court Grants Partial Subpoena Exemption for Journalists in Trials of War Criminals* (N.P.R. radio broadcast, Dec. 11, 2002) [hereinafter *All Things Considered*] (representing that it is the opinion of Ed Vulliamy, a reporter with the Observer of London, that “forcing journalists to testify isn’t going to affect what combatants in far off places say to them”).

168. Under the test, testimony is essential when it is “critical to determining the guilt or innocence of a defendant.” Brdjanin Interlocutory Appeal, *supra* note 2, para. 20 (quoting *Prosecutor v. Brdjanin & Talic*, Brief Amici Curiae on Behalf of Various Media Entities and in Support of Jonathan Randal’s Appeal of Trial Chambers “Decision on Motion to Set Aside Confidential Subpoena to Give Evidence,” Case No. IT-99-36-T, para. 44 (Aug. 17, 2002) [hereinafter *Amici Brief*]). This proposal is nearly identical to standards embodied in the U.S. Department of Justice Guidelines, which “require that the information sought in a reporter’s subpoena be essential, be unavailable from other sources, and be non-peripheral.” *Amici Brief, supra*, para. 50.

169. *Prosecutor v. Brdjanin & Talic*, Interlocutory Appeal Transcript, Case No. IT-99-36-T, at 10,160 (Oct. 3, 2002) (on file with author) [hereinafter *Brdjanin Interlocutory Appeal Transcript*].

170. Included in this inquiry is the public interest served by the work of war correspondents and whether compelled testimony of war correspondents would adversely affect their ability to carry out their work. *Id.* at 10,160.

171. *Id.* at 10,161.

172. “If there is any form of immunity for war correspondents, does it apply to the facts of this case?” *Id.*

from the manner in which the appeal was addressed at the motion hearing, the Appeals Chamber frames its decision as one that “will address the factors that need to be considered before the issuance of a subpoena to war correspondents.”¹⁷³ This is certainly a marked transmutation from what the President of the Tribunal defined as the “core issues” of the appeal at the motion hearing.¹⁷⁴ Though the driving force behind this shift is a matter that will later be addressed, it is sufficient at this point to recognize that, under either methodology, the Appeals Chamber was setting the stage for maximalism.

Just as minimalism is not wholly good, maximalism is not without its virtues. When, among other necessary factors, “judges have considerable confidence in the merits of [a] solution,” it is useful to endeavor to craft a solution that is broad and deep.¹⁷⁵ Indeed, this form of judicial decision-making can have a positive effect on the resolution of issues that have not been successfully addressed on a case-by-case basis. In such situations, particularly when the Court consequently acquires a great deal of familiarity with a problem and the issue has not been addressed legislatively, maximalism can prove quite beneficial.¹⁷⁶

Applying these attributes in the context of the Tribunal, however, is another matter. In light of the fact that the judiciary is responsible for drafting its Rules of Procedure and Evidence, the benefit of the approach vis-à-vis legislative inactivity is lost. Further, the likelihood that the Tribunal would have acquired the requisite familiarity in its own unique context or one like it is marginal at best.¹⁷⁷ One could also argue, at least with regard to those situations anticipated by the judiciary, that confidence in a particular solution would likely result in its inclusion in the Rules. In the absence of such confidence the dangers associated with maximalism emerge: namely, the difficulties inherent in dealing with problems in the abstract and the unanticipated consequences of the decisions rendered.

In its move away from the facts of the case before it, the Appeals Chamber decision reveals the onus of dealing with theoretical abstractions. Attempting to assess whether the compelled testimony of war correspondents would adversely affect their ability to carry out their work, the higher court quite rightly acknowledges that “it is impossible to determine with certainty *whether* and to what extent the compelling of war correspondents to testifying [sic] before the International Tribunal would hamper their ability to work.”¹⁷⁸ How the Appeals Chamber proceeds with the task at hand thus defies logic, in light of the fact that it then “considers that the amount of protection that should be given to war correspondents from testifying being [sic] the International Tribunal is directly proportional to the harm that it may cause to the newsgathering function.”¹⁷⁹ The decision, accepting the arguments of Randal and the amici, states that “[w]hat really matters is the perception that

173. Brdjanin Interlocutory Appeal, *supra* note 2, para. 33.

174. The President of the Tribunal stated, “it would appear, that the core issues raised in this appeal are the following. First of all, war correspondents, do they enjoy any kind of immunity which would protect them against the obligation to testify in certain cases before this Tribunal?” Brdjanin Interlocutory Appeal Transcript, *supra* note 169, at 10,160.

175. SUNSTEIN, *supra* note 125, at 57.

176. See, e.g., Dripps, *supra* note 119, at 13–23 (noting, in a sub-section titled *Miranda v. Arizona: When and How to Do Maximalism*, that the jurisprudential history of confessions and the consequent legislative inactivity on the issue created the ideal environment for a maximalist approach).

177. Gideon Boas, *Admissibility and Evidence Under the Rules of Procedure and Evidence of the ICTY: Development of the “Flexibility Principle,”* in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE* 263, 265 (Richard May et al. eds., 2001) (noting “the dearth of experience of evidentiary procedure in such a jurisdiction as the ICTY”).

178. Brdjanin Interlocutory Appeal, *supra* note 2, para. 40 (emphasis added).

179. *Id.* para. 41.

war correspondents can be forced to become witnesses against their interviewees[;]”¹⁸⁰ inexplicably, the decision then proceeds to create a test that would allow precisely such an event to occur.¹⁸¹

In the final analysis the Appeals Chamber decides that, in order for a Trial Chamber to compel the testimony of a war correspondent, it must find that the evidence sought is “direct and important to the core issues of the case.”¹⁸² A two-pronged test is specifically delineated: (1) “[t]he petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case,” and (2) “it must demonstrate that the evidence sought cannot reasonably be obtained elsewhere.”¹⁸³ Although the Appeals Chamber maintains that it is for the Trial Chamber to apply this new test to the case, it sets aside the subpoena and unquestionably signals that the facts do not support a finding that the first prong of the test has been met.¹⁸⁴

1. The Authority for the Decision

The rationale behind the mutation from the issue being one of privilege at the motion hearing to a question of the considerations that need to be given before the issuance of a subpoena is likely associated with the powers available to the Tribunal to render its decision on the matter. It is clear that the Appeals Chamber intended to address the issue of journalistic privilege, an approach consistent with the desires of Randal and the amici.¹⁸⁵ However, if the Appeals Chamber were to address the appeal as one which turns on the presence of a privilege, absent a finding that war correspondents enjoy testimonial privilege as a matter of customary international law, it is difficult to discern any appropriate authority for such a broad determination. No such privilege exists in either the Statute of the

180. *Id.* para. 43.

181. The only way that war correspondents could not be perceived as potential witnesses against the people they interview is to provide the journalists with an absolute privilege from testifying. Judge Mohamed Shahabuddeen alludes to this fact at the motion hearing. Pointing out that a qualified privilege provides for the possibility that even confidential information could be produced in court, he asks:

[d]o we have here a problem of the particular leading to the general, or shall I say the narrow leading to the universal? . . . [N]arrow as the case might be, does it produce a general influence, the effect of which is to dissuade other interviewees from being interviewed at all by a journalist?

Brdjanin Interlocutory Appeal Transcript, *supra* note 169, at 10,220.

182. Brdjanin Interlocutory Appeal, *supra* note 2, para. 48.

183. *Id.* para. 50.

184. Though acknowledging Randal’s initial claim that he could support the accuracy of the statements, the Appeals Chamber focuses on his inability to so authenticate due to the fact that he does not speak Serbo-Croatian. *Id.* paras. 54, 56. The effect of the Appeals Chamber’s commentary regarding the application of the test it crafted cannot be denied. Indeed, in rejecting a subsequent motion on behalf of the prosecution to subpoena Randal, the Trial Chamber notes that it is “difficult to depart from the reasoning of the majority of the Appeals Chamber without having to anticipate an evaluation of evidence and facts which cannot be done at this particular stage of proceedings.” *Prosecutor v. Brdjanin, Decision on Prosecution’s Second Request for a Subpoena of Jonathan Randal*, Case No. IT-99-36-T, para. 29 (ICTY Trial Chamber II June 30, 2003), available at <http://www.un.org/icty/brdjanin/trialc/decision-e/030630.htm> (last visited Feb. 26, 2004).

185. In the period of time leading up to the appeal, it was reported that those involved in the amicus campaign were troubled by the fact that the Trial Chamber “rejected a chance to formulate a qualified privilege for journalists.” Richard Byrne, *Don’t Ask, Don’t Tell*, BOSTON PHOENIX, Sept. 30, 2002, available at http://www.bostonphoenix.com/boston/news_features/top/features/documents/02452089.htm (last visited Feb. 28, 2004).

Tribunal or its Rules of Procedure and Evidence, although other privileges were considered during the drafting of the Rules.¹⁸⁶

Sub-rule 89(B) would not be the appropriate source of authority for the issuance of a blanket privilege. The Sub-rule requires that the rules of evidence applied pursuant to it “best favour a fair determination of the matter before it.” Thus, the use of the Sub-rule is inseparably bound to the facts of the case under the consideration of the Tribunal. The Sub-rule’s language of limitation, wholly consistent with the concept of minimalism, would certainly not justify the creation of a broad privilege. Additionally, the creation of a qualified privilege through the use of the Tribunal’s inherent powers would be difficult to defend. Not only would such an attempt noticeably be dissimilar to the Tribunal’s prior use of its powers, it would also not fit seamlessly within the parameters of that which is “*necessary* for the full discharge and safeguarding of the Tribunal’s judicial function.”¹⁸⁷

The Appeals Chamber’s shift in its approach also makes sense in light of the fact that the creation of a rule that bestows testimonial privilege upon an entire class of individuals would rightly be seen as an exercise in legislating from the bench. Clearly, matters of privilege should be put before the Tribunal as a whole. In this manner, with the benefit of the written comments of ad litem judges¹⁸⁸ and input from the representatives of the Offices of the Prosecutor, Registrar, and defense bar,¹⁸⁹ the issue would then be decided pursuant to the opinions registered by the sixteen permanent judges.

However, in spite of the manner in which the issue is couched at the outset of the decision, it is clear that the Appeals Chamber, at the very least, established the functional equivalent of a qualified privilege. Indeed, most of the commentary regarding the Randal appeal contends that the decision did in fact create a qualified privilege.¹⁹⁰ Various members of the legal community, including one of the counsel who appeared on Randal’s behalf, espouse the position that the case-in-fact establishes “a qualified journalistic privilege for conflict zone reporters.”¹⁹¹

2. The Ramifications of the Decision

a. *Equality of Arms and the Fair Trial Rights of the Accused*

The test put forth by the Appeals Chamber thus places a burden upon the petitioning party, requiring it to provide the Trial Chamber with a showing that the evidence sought relates to a core issue in the case in a direct and important manner. The effect of such a test calls into question the fair trial rights of the accused as articulated in Article 21 of the

186. 1 MORRIS & SCHARF, *supra* note 59, at 266–67.

187. Buteau & Oosthuizen, *supra* note 45, at 81.

188. See *Practice Direction on Procedure for the Proposal, Consideration of and Publication of Amendments to the Rules of Procedure and Evidence of the International Tribunal*, U.N. Doc. No. IT-143-Rev.2, para. 1(b) (ICTY Jan. 24, 2002), available at http://www.un.org/icty/basic/rpe/IT143_rev2.htm (last visited Feb. 28, 2004).

189. *Id.* para. 2.

190. See, e.g., Toby Sterling, *Former Washington Post Reporter Will Not Have to Testify at U.N. War Crimes Trial*, *Court Rules*, ASSOCIATED PRESS, Dec. 11, 2002 (noting that “[t]he five judge appellate court said war correspondents should be allowed a limited exemption from being compelled to testify”); Stephanie Van Den Berg, *UN Court Recognises War Correspondents Right to Silence*, AGENCE FRANCE-PRESSE, Dec. 11, 2002.

191. Barrister Details of Steven Powles, at http://www.doughtystreet.co.uk/data/special_a/data/viewBarristerDetails.cfm?iBarristerID=71 (last visited Feb. 28, 2004); see also Bruce D. Brown, *Foreign Aid for Free Press: Reporter Beat Back Subpoena from War Crimes Court*, *LEGAL TIMES* (Washington, D.C.), Dec. 23, 2002, at 44 (stating that the “unanimous ruling establish[es] a qualified reporter’s privilege for its proceedings”). In the opinion of the author, these restrictive assessments of the decision are inaccurate. See *infra* Part IV.E.2.b.

Statute.¹⁹² This arguably was an issue appreciated by counsel for the amici at the motion hearing who proposed a test which differed from the one ultimately adopted by the Court only in that it required that the evidence be “essential” rather than “direct and important.” According to the amici, there is a potential difference in the application of the test to the defendant, in that “there is probably more that would fall there [within the realm of something which is essential] more easily on the defendant’s side than the Prosecution’s side.”¹⁹³

Such a statement, however, reveals a lack of appreciation for the case law of the Tribunal with regard to equality of arms. Although Judge Lal C. Vohrah did espouse early on the position that “the equality of arms principle especially in criminal proceedings should be inclined in favour of the Defence acquiring parity with the Prosecution,”¹⁹⁴ this position has since been rejected by both Trial Chamber II and the Appeals Chamber. According to Trial Chamber II, such an approach “is tantamount to procedural inequality in favour of the Defence and against the Prosecution, and will result in inequality of arms.”¹⁹⁵ Weighing in on the matter, the Appeals Chamber noted that the “application of the concept of a fair trial in favour of both parties is understandable because the Prosecution acts on behalf of and in the interests of the [international] community.”¹⁹⁶

To complete the context that was set by the Appeals Chamber, it is important to note, however, that the Court went on to add that “this principle of equality does not affect the fundamental protections given by the general law or [s]tatute to the accused.”¹⁹⁷ Arguably, these protections are difficult to reconcile with the test put forth by the Appeals Chamber in the Randal matter. The test places a burden upon the petitioning party, defense or prosecution, to justify its need for the evidence sought. Article 21(4)(e) bestows upon the accused the right to examine witnesses, “a *minimum* guarantee under the Statute and under international law.”¹⁹⁸ Rule 85(B) confers the right of cross-examination. “If the right[s] are inverted so that the accused must justify why he or she wishes to [examine or] cross-examine a witness, then it might be argued . . . that an accused’s fundamental rights have been violated”¹⁹⁹

192. Article 21(4)(e) provides:

In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: . . . (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

ICTY Statute, *supra* note 3, art. 21(4)(e).

193. Brdjanin Interlocutory Appeal Transcript, *supra* note 169, at 10,215.

194. Prosecutor v. Tadić, Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness Statements, Case No. IT-96-1 (ICTY Trial Chamber Nov. 27, 1996), *available at* <http://www.un.org/icty/tadic/trialc2/decision-e/61127ws21.htm> (last visited Feb. 28, 2004).

195. Prosecutor v. Delalić, Decision on the Prosecutor’s Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence, Case No. IT-96-21-T, para. 49 (ICTY Trial Chamber Feb. 4, 1998), *available at* <http://www.un.org/icty/celebici/trialc2/decision-e/90204WG25378.htm> (last visited Feb. 28, 2004).

196. Prosecutor v. Aleksovski, Decision on Prosecutor’s Appeal on Admissibility of Evidence, Case No. IT-95-95-14/1-AR73, para. 25 (ICTY Appeals Chamber Feb. 16, 1999), *available at* <http://www.un.org/icty/aleksovski/appeal/decision-e/90216EV36313.htm> (last visited Feb. 28, 2004).

197. *Id.*

198. Boas, *The Principle of Flexibility*, *supra* note 17, at 69.

199. *Id.* at 57.

b. *Who Is Covered by the Test?*

At the motion hearing the prosecution recognized the enormous difficulties associated with creating and applying a legal test. In particular, the prosecution pointed out the inherent difficulties in determining and establishing who would fall within the definition of “war correspondent” for the purpose of a privilege, should one be established.²⁰⁰ This concern was all but dismissed by the counsel for the amici²⁰¹ who noted that the term might include a person who gathers information for dissemination or may require that the person be a paid employee of a newspaper or publication.²⁰² Counsel for the amici further stated he did not want to “minimise the task of making some of the decisions, but they are all solvable problems and they are all dealt with routinely in any jurisdiction that has adopted a qualified privilege.”²⁰³ Randal’s counsel gave the issue equally little concern, citing the Geneva Convention’s reference to “ordinary etymological meaning.” The counsel stated, “[t]he use of the word . . . covers the circle of people working for the press and so forth.”²⁰⁴

But the definition of the class of individuals who may qualify for a privilege is a seminal matter. Armed with the aforementioned arguments, the Appeals Chamber rejects the suggestion of Randal and the amici that the issue before it is “one concerning journalists in general.”²⁰⁵ Highlighting that “[i]t is the particular character of the work done and the risks faced by those who report from conflict zones that is at stake,”²⁰⁶ the Appeals Chamber makes clear that its decision concerns only the compelled testimony of “war correspondents.”²⁰⁷ This term is defined by the Chamber to mean “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.”²⁰⁸ According to the Appeals Chamber, the term war correspondents, thus, refers to a “smaller group” of individuals than does the category of journalists.²⁰⁹ The validity of this assertion, however, is far from certain.

In fact, it took a very short period of time for actual events relating to a conflict to challenge this opinion of the definition. A change in circumstance is something that, if not foreseen, is nevertheless anticipated by a minimalist, and it can prove to be the bane of a maximalist. The ink was barely dry on the Appeals Chamber decision before a whole new class of war correspondents, falling clearly within the Appeals Chamber definition, emerged. After the 2003 invasion of Iraq, “webloggers” became an integral cog in the wheel of saturation war coverage. “Web logs” find their historical base as “cyberspatial diaries” but have developed over time as a medium for journalism.²¹⁰ The relationship of “blogging” (on-line commentary) with the latest conflict in Iraq has been likened to that of cable news vis-à-vis the first Gulf War.²¹¹ As a result the recent conflict has been characterized as “the first true Internet war,” with private individuals, including soldiers and residents in the area of the conflict, “using the medium’s lightning speed to cut through the

200. Brdjanin Interlocutory Appeal Transcript, *supra* note 169, at 10,233–34.

201. “It is not always easy, but it is possible and has been done, to define who is a journalist for purposes of making a determination of who receives the benefit, as it were, of such a privilege.” *Id.* at 10,238.

202. *Id.*

203. *Id.*

204. *Id.* at 10,246.

205. Brdjanin Interlocutory Appeal, *supra* note 2, para. 29.

206. *Id.*

207. *Id.* para. 30.

208. *Id.* para. 29.

209. *Id.* Although this statement is obiter dicta, it is nevertheless germane to an assessment of the intent of the Appeals Chamber in the crafting of its decision.

210. Tim Rutten, *Online Commentators Are Seizing the Moment*, L.A. TIMES, Mar. 19, 2003, at E1.

211. *Id.*

fog of war.”²¹² This new group of individuals was clearly not anticipated by the Appeals Chamber, and its numbers are staggering. Arguably, it would take very little for an individual who chose to avail of the benefits of the Appeals Chamber decision to become established as a weblogger. The “Pandora’s Box effect” of the Appeals Chamber definition, however, does not stop here.

In the aftermath of the decision, concern has been expressed that it creates a “slippery slope,” in that it will invite claims from other entities, such as non-governmental organizations, that they too should be partially relieved of their testimonial obligations.²¹³ However, a careful reading of the Court’s decision reveals that, contrary to what is likely the popular view, many individuals working for these organizations will already qualify within the parameters of the term “war correspondents.” By not tying the definition of the same to the terms “journalist,” “media,” or the “press,” the decision arguably encompasses persons employed by such entities as Amnesty International and Human Rights Watch—organizations that “equally send people into areas of danger to gather information which they then publish.”²¹⁴ Thus, regarding the testimony of people so employed by such entities, it appears that there will be no need to request that the Tribunal recognize a separate category of individuals deserving of special treatment. Allowing some room for hyperbole, in light of the combined effect of the unwittingly broad definition employed by the Appeals Chamber and the mushrooming status of webloggers, one might wonder whether there will be any witnesses left who can be compelled to testify.²¹⁵

c. *The Randal Decision and the International Criminal Court*

Much has been made of the precedential value of the Randal decision,²¹⁶ particularly with regard to the newly-formed International Criminal Court (ICC).²¹⁷ While some observers have merely noted that the decision “will provide jurisprudence for the future judges of the ICC,”²¹⁸ others have ascribed to the point of view that it could likely affect the

212. Howard Kurtz, ‘Webloggers,’ *Signing on as War Correspondents*, WASH. POST, Mar. 23, 2003, at F4.

213. *All Things Considered*, *supra* note 167 (quoting journalist Ed Vulliamy as stating, “[t]he next thing is that a big crowd of NGOs, non-governmental organizations, who do aid and humanitarian work, are also now going to try and jump aboard this bandwagon pleading their special category status”).

214. Ironically, this statement was submitted at the motion hearing by the prosecution in an attempt to establish that journalists are no more worthy of a privilege than other entities, in similar situations, who are also acting in the public interest. Brdjanin Interlocutory Appeal Transcript, *supra* note 169, at 10,229.

215. Journalist Ed Vulliamy perhaps articulates the dangers of this point best, stating that “at a time when we are trying to enforce international law and to bring these criminals to account, we are going to end up with the eyes and ears of the world blind on the ground.” *All Things Considered*, *supra* note 167.

216. Of the benefits attendant to an Appeals Chamber crafted standard regarding journalistic privilege, the amici noted,

it will avoid unnecessary conflicts between journalists and this Tribunal or other War Crimes Tribunals. And I deliberately speak, incidentally, of other tribunals as well because I think it fair to say that whatever this Tribunal does is likely to have enormous precedential weight in other tribunals around the world as they make their determinations as to what the rule of law should be on this subject.

Brdjanin Interlocutory Appeal Transcript, *supra* note 169, at 10,192.

217. Created pursuant to the Rome Statute of the International Criminal Court. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, available at [http://www.un.org/law/icc/statute/english/rome_statute\(e\).pdf](http://www.un.org/law/icc/statute/english/rome_statute(e).pdf) (last visited Feb. 28, 2004).

218. Van Den Berg, *supra* note 190 (stating the opinion of Robert Menard, director of Reporters Without Borders).

rules of the new court.²¹⁹ There has even been the suggestion that the United States' well-noted antipathy for the ICC may have fueled the fire of the amici campaign in favor of Randal.²²⁰ For his part Randal proposed that the decision of the Appeals Chamber should offer at least persuasive guidance before other international criminal courts.²²¹

However, one might question whether the decision should be so persuasive with regard to the functioning of the ICC. It is true that, as noted by Randal, the Rules of the ICC do not preclude the possibility of a qualified journalistic privilege.²²² However, Rule 73, the ICC's rule regarding privileged communications, has as its prerequisite the existence of confidentiality.²²³ The ICC's requirement of confidentiality is far from insignificant; it is the hinge upon which privilege turns and the result of much discussion and debate throughout the negotiations of the Rome Statute.²²⁴ Within these parameters, further negotiations were conducted with regard to the adoption of the Rules of Procedure and Evidence with the resultant Rule 73 being the product of numerous proposals and extensive informal discussions.²²⁵ Consequently, it seems that, even setting aside the problematic issues associated with the Randal decision, the matter is one best left for determination by

219. See, e.g., Marlise Simons, *Hague Tribunal Hears Arguments on Exempting Reporters*, N.Y. TIMES, Oct. 4, 2002, at A10; Don Sellar, *Why Make Life Worse for War Reporters?*, TORONTO STAR, May 18, 2002, at H6 (questioning whether the Randal decision will "have implications for the way war correspondents will be treated by the [ICC]").

220. See Dušan Babić, *Randal Case: Ethical, Professional and Political Context*, MEDIA ONLINE, at 4 (2003), available at http://www.mediaonline.ba/mediaonline/attach_eng/7806.pdf (last visited Feb. 28, 2004). This accusation seems unlikely, particularly in light of the fact that the vast majority of American jurisprudence in this area is the result of conflict between the press and the government. Further, this accusation was dismissed out of hand by Carmel Agius, presiding judge at Trial Chambers in the Brdjanin case and representative of Malta at the Rome Conference. When asked if he felt that Amici were motivated by U.S. anti-ICC sentiment, Judge Agius responded, "I don't think so. I think they just rallied in support of one of their colleagues . . . and in a matter which they feel very strongly about." Interview with Judge Carmel Agius, Presiding Judge, Trial Chamber II, International Criminal Tribunal for the Former Yugoslavia, in Galway, Ir. (Mar. 30, 2003) (on file with author).

221. Prosecutor v. Brdjanin & Talic, Written Submission in Support of Motion to Appeal Trial Chamber's "Decision on Motion on Behalf of Jonathan Randal to Set Aside Confidential Subpoena to give Evidence," Case No. IT-99-36-T, para. 6 (ICTY App. Chamber July 2002) (on file with author).

222. *Id.* para. 29.

223. Sub-rule 73(2) provides in relevant part:

Having regard to rule 63, sub-rule 5, 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, under the same terms as in sub-rules 1 (a) and 1 (b) if a Chamber decides in respect of that class that: (a) 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; (b) Confidentiality is essential to the nature and type of relationship between the person and the confidant; and (c) Recognition of the privilege would further the objectives of the Statute and the Rules.

Rules of Procedure and Evidence, R. 73(2), Doc. No. ICC-ASP/1/3 [hereinafter ICC RPE], available at [http://www.icc-cpi.int/library/basicdocuments/rules\(e\).pdf](http://www.icc-cpi.int/library/basicdocuments/rules(e).pdf) (last visited Feb. 28, 2004).

224. Helen Brady, *The System of Evidence in the Statute of the International Criminal Court*, in 1 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 279, 296 (Flavia Lattanzi & William A. Schabas eds., 1999). Arguably, of particular relevance to the Randal issue, it has been noted that:

if something so nebulous as 'public policy' is to be accepted as a ground on which to relieve a witness of the duty to testify, the Rules must clarify its scope so as not to unduly compromise the right of the defence to cross-examine witnesses or unduly hamper the right of the Prosecutor to present its case fairly."

Id. at 299.

225. See Donald Piragoff, *Evidence*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 349, 360-65 (Roy S. Lee ed., 2001) (discussing the debate as to privileged communications among professional relationships other than attorney-client).

the Assembly of States Parties as provided for in Rule 3.²²⁶ Not only does this seem to be procedurally appropriate, it is also preferable in that it will expose the matter to discussion and debate, and thus will more likely result in a workable outcome, taking into account all relevant interests, including the rights of the accused.

V. CONCLUSION

The judiciary of the Tribunal has been given a power that could very well make it the envy of domestic judges. The Tribunal is not subject to a legislature that has the potential to be unresponsive to its needs or unfamiliar with the best ways in which to deal with difficulties experienced throughout the course of its proceedings. Benefits seldom come without burdens, however. The broad leeway bestowed upon the Tribunal in its rulemaking capabilities requires the utmost caution in its application. When addressing issues for which there are no controlling provisions in either its Statute or its Rules of Procedure and Evidence, the Tribunal ought to clearly cite the controlling authority for its decision, providing a cogent analysis regarding its utilization of the same.

Of decisive significance, when presented with issues that are complex and upon which domestic solutions or the opinion of the judiciary differ, the integrity and effectiveness of the Tribunal would be best served by limiting its decision to the facts of the case under consideration. In so doing, theoretical abstractions would not cloud that which is truly at issue; and, by the very nature of its exercise, the Tribunal would have, as its primary objective, the assurance of a fair criminal proceeding. By employing decisional minimalism in precisely these situations, the Tribunal would not only limit the potential for unforeseen and unfortunate consequences; it would also reserve the solution of complicated matters for rulemaking at plenary meetings, assuring both the input of the entirety of the judiciary as well that of the relevant actors in the Tribunal.

The case of Jonathan Randal illustrates the important role that decisional minimalism can perform at the Tribunal. The Randal appeal decision circumvented the rulemaking process, thereby denying the remaining members of the judiciary their right to weigh in on the issue of journalistic/war correspondent privilege. It also foreclosed the benefits of debate, discussion, and compromise inherent in the legislative function. Allowing itself to be drawn far afield from that which was at issue, the Appeals Chamber wandered into unknown territory, making an unnecessary decision. As a result, it imparted a test whose definition arguably opens the door for an enormous class of individuals to claim access to the quasi-privilege it established. The effect of the same on the Tribunal's truth-finding function and the statutory requirement that it provide fair and expeditious proceedings will only be known in time. In the aftermath of its rulemaking with a broad brush, however, the Tribunal should likely be prepared to find itself painted into a corner.

226. ICC RPE, *supra* note 223, R. 3. It has been implied that the active involvement of the Assembly of States Parties pursuant to Article 51 of the Rome Statute is, in fact, a reaction to the ICTY's failure to provide for a mechanism to hold its judiciary's rule-making in check. See Johnson, *supra* note 16, at 166.

