

Securing a Journalist’s Testimonial Privilege in the International Criminal Court

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For Brian and Hannah.

I. INTRODUCTION

On December 11, 2002, the appellate panel of the International Criminal Tribunal for the Former Yugoslavia (ICTY) unanimously ruled that war correspondents cannot be compelled to testify, except under certain circumstances. In quashing a trial court order to former *Washington Post* reporter Jonathan Randal to testify about the veracity of his 1993 interview with former Bosnian Serb leader Radoslav Brdjanin, the ICTY set out a two-pronged test for subpoenaing war correspondents: first, that the evidence must be of “direct and important value in determining a core issue in the case,” and second, the evidence sought “cannot reasonably be obtained elsewhere.”¹ The decision marked the first, and only, time an international war crimes tribunal had definitively ruled on the issue of journalistic privilege.

The ICTY’s decision in *Prosecutor v. Brdjanin* was a clear victory for the media and generally is regarded as a significant recognition of press freedom in combat areas.² Especially notable is the potential breadth of the privilege recognized by the ICTY. International and municipal courts previously had held that a journalist cannot be compelled, except in extraordinary circumstances, to reveal identities and information given in confidence.³ Yet Randal’s subpoena was for far less sensitive information, requiring only that he verify quotes and information clearly attributed to Brdjanin and published in a widely-read newspaper. The *Brdjanin* decision goes further than any other decision regarding journalistic privilege in that it allows journalists to invoke the privilege

1. *Prosecutor v. Brdjanin & Talic*, Case No. IT-99-36-AR73.9, ¶ 50 (ICTY Appeals Chamber Dec. 11, 2002) [hereinafter *Brdjanin* Appeals Chamber Opinion]. The appellate panel was made up of five judges from France, Guyana, Turkey, Sri Lanka, and the United States.

2. See Marlise Simons, *U.N. Court Grants Special Legal Protection to War Reporters*, N.Y. TIMES, Dec. 12, 2002, at A10; Stephanie Van Den Berg, *U.N. Court Recognizes War Correspondent’s Right to Silence*, AGENCE FRANCE PRESSE, Dec. 11, 2002.

3. See *Goodwin v. United Kingdom*, App. No. 17488/90, 22 Eur. H.R. Rep. 123, ¶ 46 (1996) (ordering journalist to reveal the source of a confidential company document in violation of Article 10 of the European Convention on Civil and Political Rights); *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972) (Powell, J., concurring). The U.S. Supreme Court refused to recognize an absolute privilege for journalists, but Justice Powell’s concurring opinion offered a narrowing construction recognizing a qualified privilege for when the information sought is “remote and tenuous” to the subject of the investigation or when the testimony would compromise a “confidential source relationship without a legitimate need of law enforcement.” Today, thirty-one states and the District of Columbia have common law or statutory “shield law” protections for reporters. See *infra* note 64.

purely on the basis of their status as journalists, even if confidential information and/or sources are not involved.

With the recent commencement of investigatory actions by the International Criminal Court⁴ (ICC) and the significant media presence in several conflict areas, such as Iraq and Afghanistan, it is virtually certain that international criminal tribunals will again need to balance the unique role of the press in war against other interests, such as prosecuting war criminals and preserving the rights of defendants. *Brdjanin* provides substantial guidance, yet a myriad of ambiguities and unresolved issues surrounding a journalist's wartime testimonial privilege remain. First, with the ease of international travel and communications (particularly the internet), it is increasingly difficult to define what kind of journalist should benefit from a qualified testimonial privilege. Secondly, the ICTY provided little guidance for applying its two-pronged test to compel reporter testimony. This ambiguity stands in stark contrast to the detailed, codified protections that the international tribunals recognize for certain privileged professional communications and, in particular, observations and information gathered by officers and employees of the International Committee of the Red Cross (ICRC).⁵ Lastly, even while the ICC may adopt the holding and reasoning of the ICTY decision the next time it is confronted with a journalist who refuses to testify, it is not bound to follow such case law.⁶

4. The stated mission of the International Criminal Court is to prosecute persons charged with the most serious violations of international law, including war crimes, crimes against humanity, and genocide. It has jurisdiction for offenses committed after July 1, 2002 on the territory of a state which has ratified the treaty, by a citizen of such a state, or on referral by the United Nations Security Council. See Rome Statute of the Int'l Crim. Ct., July 17, 1998, U.N. Doc. A/CONF.183/9, available at <http://www.un.org/icc>. The United States is not a party to the treaty. The ICC opened its first investigations in 2004. See ICC, *Situations and Cases*, at <http://www.icc-cpi.int/cases.html>.

5. See Rules of Procedure and Evidence for the Int'l Crim. Ct., Nov. 2, 2000, U.N. Doc. PCNICC/2000/1/Add.1, available at [http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/rules\(e\).pdf](http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/rules(e).pdf) (last visited Jan. 17, 2005). Rule 73(3) gives specific recognition to privileged communications between persons and their legal counsel, doctor, or clergy. Subsections (4), (5), and (6) lay out a detailed privilege for ICRC officials and employees. In general, ICRC members enjoy complete immunity from testimony. The ICTY recognized an absolute privilege for Red Cross and Red Crescent workers in *Prosecutor v. Simic*, Ex Parte Confidential Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, Case No. IT-95-9-PT, ¶ 73 (ICTY Trial Chamber 1999).

6. While international tribunals often cite their own decisions and those of other international and municipal courts in their rulings, there is no *per se* concept of *stare decisis* in international law. For an example of the evidentiary value of judicial decisions

This article argues that given the unique and significant contribution of journalists to uncovering and documenting war crimes, the ICC should amend its evidentiary rules to recognize a qualified journalist's privilege. In doing so, the ICC should clearly identify who may benefit from such a privilege, clarify a procedure for balancing the need of reportorial testimony against prosecution and defense interests, and, lastly, provide for mandatory consultations between the court and affected news organizations or journalists before allowing the issuance of a subpoena. Such clarity will benefit not only journalists working in war zones and the ICC, but will provide guidance for future ad hoc international tribunals.

Part II of this paper will examine the role of journalists in war zones, discuss the *Brdjanin* case, and consider the challenges of codifying a qualified privilege for reporters working in conflict areas. Part III will analyze the difficulties of defining a journalist. Part IV will examine the municipal and international law bases for recognizing a journalists' privilege and the effects of conflicting legal interests on such a privilege. As a comparison to journalist's privilege, it will consider codified testimonial privileges that are extended by the ICC to traditional confidential communications (such as doctor-patient and priest-penitent) and officials and members of the ICRC. Part V will address the moral dilemmas in granting a journalist protection from testimony in the setting of a war crimes tribunal. Part VI will conclude with a proposed procedural rule for adoption by the ICC.

II. THE WAR CORRESPONDENT'S ROLE AND THE *BRDJANIN* CASE

A. *The War Correspondent*

Because journalists are trained to be neutral observers, they are not only well-suited to report on armed conflicts, but also to serve as valuable witnesses in subsequent criminal prosecutions. In addition to their investigative work, high profile news organizations and reporters working in war-torn countries are sometimes sought out by witnesses to war crimes, and even suspected war criminals themselves, who wish to take advantage of their reach. In a circumstance where the journalist becomes privy to information later deemed critical to a war prosecution, this combination of influence and access can lead to a legal and moral Hobson's Choice. Some journalists will feel obligated to testify in the interests of justice, while others will contend that testifying puts not only

as customary international law in international tribunals, see Statute of the Int'l Ct. of Justice, June 26, 1945, arts. 38 and 59, 59 Stat. 1055, 1060, available at <http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicstatute.htm>.

themselves and other journalists at risk for retaliation, but also degrades the position of a reporter as a neutral observer, thus hampering their ability to report from war zones. This latter category of journalists argue that testifying in court, even merely to facts observed, transforms them into agents of the prosecution, supporters of criminal defendants, or—in the case of civil matters—advocates for one side or the other. They believe that witnesses and sources will be reluctant to speak with them if they believe that their comments will end up not only in a news report, but as evidence in a trial.

To illustrate how a reporter can be in a prime position to uncover and investigate a potential war crime, consider this hypothetical situation. An American television reporter in Iraq receives a tip that coalition soldiers⁷ methodically shot and killed several Iraqi children at close range. The reporter first calls a military official and is told there *was* an incident involving some Iraqi children, but that a bomb planted by terrorists is to blame. The reporter heads out to the scene and, after determining that no other journalists, aid workers, or military representatives are present, begins to interview witnesses. One man, whom the reporter believes is the most reliable eyewitness, claims that around 3 a.m. a group of coalition soldiers patrolling Sadr City, a Baghdad slum, stopped a car carrying a family of five and began firing. Three children and their father were killed.

At the police station, the reporter talks his way into seeing the car—which the Iraqi police say they plan to destroy by the end of the day. It is pockmarked with very large holes and a policeman tells him that more than one hundred bullets were removed from the vehicle. The reporter then speaks with a coalition soldier who says the incident was an accident—that the soldiers only opened fire because the car was too close to a military Humvee and the father ignored orders to stop. The next stop is the hospital, where the wife, who was sitting in the front seat of the car, is recovering from several gunshot wounds. Still in shock, she pours out her version of the night's events through an interpreter: that her family was driving close to the Humvee for safety and that they turned on the interior light so the soldiers would see that only children

7. As mentioned in *supra* note 4, the United States is not a party to the Rome Treaty. However, other coalition nations—such as the United Kingdom—are. U.S. officials have maintained that the court does not have sufficient safeguards to prevent U.S. troops from being the target of politically motivated prosecutions. Iraq is not a signatory to the treaty.

were inside. Then she begins wailing. A crowd starts to form in her room and begins shouting out different versions of the story; some contend the soldiers never said anything before firing, others maintain the soldiers yelled racial epithets at the family and gleefully began shooting. The reporter leaves and returns to the scene, which the U.S. military has now cordoned off.

This reporter may find himself at the nexus of competing interests. A war crimes tribunal might wish to investigate whether the soldiers committed a crime by intentionally firing on unarmed civilians. Conversely, the involved soldiers may want the correspondent's testimony to support their contention that they fired by mistake and out of reasonable caution. From the reporter's point of view, he may be concerned that by appearing before a criminal tribunal he will lose his access to sources, and more importantly, become a target. By the time such a case goes before an international tribunal, the car at issue will have been destroyed and eyewitness testimony—tainted by hysteria and/or self-interest—may have morphed into an indecipherable *Rashomon*-like stew. The reporter is the only uninvolved party who has seen all the evidence, spoken to all the parties, and taken the eyewitness statements. Should he or she be forced to testify? What if the reporter does a story on the incident—can he or she be forced to go before a court to confirm details or to provide more information?⁸ These were some of the central questions in the recent controversy surrounding a decision by an ITCY trial court⁹ to force former *Washington Post* reporter Jonathan Randal to testify at the genocide trial of Serbian official Radoslav Brdjanin.

8. This hypothetical is loosely based on an American reporter's experience while reporting on the Iraq war. In a high-profile incident raising similar questions, Kevin Sites, a freelance cameraman working for NBC in Iraq in late 2004, filmed a U.S. Marine killing a wounded Iraqi in Falluja mosque. Sites, who was embedded with the Marine unit, was the only journalist who witnessed the incident and has written a first-person account of what he saw. See Kevin Sites, *What happened in the Fallujah Mosque*, MSNBC NEWS, Nov. 22, 2004, available at <http://www.msnbc.msn.com/id/6556034/>. Human rights groups (including Amnesty International and Human Rights Watch) called for an investigation into whether the shooting was a war crime. At the time of publication, the matter was still under investigation by the U.S. military. See Anthony Shadid, *U.S. Commander in Iraq Calls Shooting 'Tragic,'* WASH. POST., Nov. 17, 2004, at A15.

9. S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993). The U.N. Security Council, acting under its Chapter VII powers, which authorize it to take enforcement measures to "maintain or restore international peace and security," created the ICTY in 1993. Its mandate is to prosecute persons "responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council."

B. The Brdjanin Case

At issue in the case was Randal's 1993 interview with Brdjanin, part of which was used in an article¹⁰ on the forced expulsion of non-Serbs from their homes. Brdjanin was quoted as saying that he was preparing to expel non-Serbs from government housing in the Banja Luka region of Bosnia and that an "exodus" of non-Serbs was necessary to "create an ethnically clean space through voluntary movement."¹¹

Randal initially cooperated with United Nations prosecutors. In August 2001, he voluntarily gave a statement about his interview, but maintained that the article should speak for itself and said he would not appear in court to testify about the accuracy of its contents.¹² After prosecutors attempted to introduce the article into evidence during a pre-trial conference in January 2002, Brdjanin's attorneys objected on the ground that, *inter alia*, the article was inadmissible hearsay.¹³ Prosecutors attempted to call Randal to testify as to contents of the article. Randal refused and swiftly was served with a subpoena.¹⁴

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

11. *Id.*

12. *Prosecutor v. Brdjanin & Talic*, Case No. IT-99-36-AR73.9, ¶ 28 (ICTY Trial Chamber June 7, 2002) [hereinafter *Brdjanin* Trial Chamber I Opinion]. See also Roy Gutman, *Consequences occur when Reporters Testify*, NIEMAN REP., Spring 2003, at 74-75. Gutman explains that ICTY investigators routinely seek interviews with journalists about articles that have appeared in print. Discussions between investigators and journalists, which address the interview's context and subject's demeanor, are then written up in a memo and the journalist is asked to sign it. Randal reportedly admitted signing a memo recounting his debriefing, but claimed that he was not told it would be used in court or that he would be asked to testify as to its contents. Randal, *supra* note 10.

13. *Brdjanin* Trial Chamber I Opinion, *supra* note 12, at ¶ 1. See also Transcript of Proceedings at 5406-5407, 5411-5412, *Prosecutor v. Brdjanin & Talic*, Case No. IT-99-36-AR73.9 (ICTY Trial Chamber III May 10, 2002) [hereinafter *Brdjanin* Trial Chamber Opinion III]. Prosecutors insisted that Brdjanin's comments in the article went "directly to the heart of this case," since they evidenced a motive "to rid the territory of the non-Serbian population." Prosecutors said they would have been content simply to enter the article into evidence and refrain from calling Randal to testify. However, Brdjanin's lawyers argued that the article might be inaccurate because Randal used an interpreter during his interview with the Serb leader. Under rule 70(E) of the ICTY's Rules of Procedure and Evidence, a defendant has the right to challenge evidence presented by the prosecution, unless the information had been provided directly to the prosecution under an agreement of confidentiality. In the *Brdjanin* case, prosecutors did not contest that the defendant had a right to challenge the veracity of Randal's article.

14. S.C. Resolution 827, *supra* note 9, calls upon "all states . . . to take any measures necessary under their domestic law to implement the provisions [of 827 and the statute of the ICTY], including the obligation of states to comply with requests for

In denying Randal's motion to set aside the subpoena, the ICTY trial court agreed with Randal's contention that "[j]ournalists reporting on conflict areas play a vital role in bringing to the attention of the international community the horrors and reality of the conflict." But the panel concluded that the ICTY request would not endanger Randal's objectivity, independence, or effectiveness since he only was being asked to testify about information already released to the public. "The objectivity and independence of journalists, and the media that publish their articles or reports, cannot be taken for granted *a priori* as Randal's argument would have it," the court wrote. "No journalist can expect or claim that once she or he has decided to publish no one has a right to question their report or question them on it."¹⁵

In seeking a reversal of the trial court's decision to enforce the subpoena, Randal argued to the ICTY's appeals panel that a qualified privilege for journalists—which would include a presumption against testifying about published materials—is necessary to safeguard a journalist's ability "to investigate and report effectively from areas in which war crimes take place."¹⁶ Randal cited Rule 73 of the ICC,¹⁷ Article 79 of the 1977 Protocol I Additional to the Geneva Convention,¹⁸

assistance or orders issued by a Trial Chamber under Article 29 [of the ICTY statute]." Article 29 describes five potential requests for assistance by a trial chamber, including, but not limited to:

- (a) the identification and location of persons;
- (b) the taking of testimony and the production of evidence;
- (c) the service of documents;
- (d) the arrest or detention of persons;
- (e) the surrender or the transfer of the accused to the International Tribunal.

Id. Under French law adopted pursuant to S.C. Resolution 827, France commits to extensive judicial assistance to the ICTY and its Prosecutor. Law No. 95-1 of Jan. 2, 1995, J.O., Jan. 3, 1995, p. 71. The United States has not adopted a law pursuant to S.C. Resolution 827, but rather has promulgated an agreement between itself and the tribunal. In it, the United States agrees to surrender, provisionally arrest, or transport persons "charged with or found guilty of a violation or violations within the competence of the Tribunal." It does not include a provision for cooperation. Agreement on Surrender of Persons between the Government of the United States and the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the former Yugoslavia, Oct. 5, 1994, T.I.A.S. No. 12,570, 32 I.L.M. 1159. Randal, a U.S. citizen, resides in France, thus he was more vulnerable to being forced to comply with the ICTY's subpoena than had he been residing in the United States. Randal, *supra* note 10.

15. *Brdjanin* Trial Chamber I Opinion, *supra* note 12, ¶ 26.

16. *Id.* ¶ 11.

17. Rules of Procedure and Evidence, *supra* note 5.

18. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (entered into force Dec. 7, 1978). One hundred sixty-two countries are parties to Protocol I. A complete list of the signatory states is available at Int'l Humanitarian Law, States Parties & Signatories, at <http://www.icrc.org/ihl.nsf/WebNORM?OpenView&Start=1&Count=150&Collapse=52.1#52.1> (last

the European Court on Human Rights' (ECHR) decision in *Goodwin*,¹⁹ as well as U.S. judicial and administrative directives as support for a qualified privilege for journalists.²⁰ He urged the panel to adopt a five-

visited Jan. 17, 2005). The Protocol provides certain measures of protection for journalists:

1. Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1.
2. They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in Article 4 A (4) of the Third Convention.
3. They may obtain an identity card similar to the model in Annex II of this Protocol. This card, which shall be issued by the government of the State of which the journalist is a national or in whose territory he resides or in which the news medium employing him is located, shall attest to his status as a journalist.

Id. at art. 79.

19. *Goodwin*, *supra* note 3, ¶ 39. The ECHR in *Goodwin* specifically recognized a public interest role of journalists and supported the idea of a qualified privilege for journalists who seek to protect the identity of sources. The court grounded its reasoning in the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 10, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter 1950 Convention on Human Rights]. Article 10 reads, in pertinent part:

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

20. *See Branzburg*, *supra* note 3, at 665. For information on the U.S. Department of Justice policy with regard to the issuance of subpoenas to members of the news media, subpoenas for telephone toll records of members of the news media, and the interrogation, indictment, or arrest of members of the news media, *see* 28 C.F.R. § 50.10 (2004). The policy statement for § 50.10 reads: "Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues." The guidelines require, *inter alia*, that "all reasonable attempts" be made to obtain the information from alternative sources before considering the issuance of a subpoena, that negotiations with the media "be pursued in all cases in which a subpoena to a member of the news media is contemplated," and that any subpoena issued to a member of the news media must be expressly authorized by the Attorney General.

part test, asserting that a subpoena should be issued only if the trial court determines that:

[T]he compelled journalist's testimony would provide admissible evidence that: (1) is "of crucial importance" to determining a defendant's guilt or innocence; (2) cannot be obtained "by any other means or from any other witness;" (3) will not require the journalist to breach any obligation or confidence; (4) will not place the journalist, his family, or his sources in reasonably apprehended danger; and (5) will not serve as a precedent that will "unnecessarily jeopardize the effectiveness or safety of other journalists reporting from that conflict zone in the future."²¹

Thirty-four media organizations filed a brief as *Amici Curiae*, voicing the same general concerns as Randal: that forcing journalists to testify against their own sources, "confidential or otherwise," would turn journalists from observers of conflict to participants and thus undermine their ability to uncover and report the news. The group proposed a far less stringent test, arguing that a subpoena should not be issued unless the court determines that the testimony: "(1) is absolutely essential to the case; and (2) the information cannot be obtained by any other means."²² The *Amici Curiae* argued that the test for whether information was "absolutely essential" should be whether it is "critical to determining the guilt of innocence of a defendant."²³ Furthermore, the group argued: "The burden therefore falls upon the party seeking the subpoena, not upon the reporter, to show that it exhausted all other available avenues of obtaining information."²⁴

In its decision to overturn the subpoena, the Appeals Chamber parsed the Randal issue into three subsidiary questions: (1) whether there is a public interest in the work of war correspondents; (2) if yes, whether compelling war correspondents to testify before a tribunal would adversely affect their ability to work; and (3) if yes, what test is appropriate to balance the public interest in accommodating the work of war correspondents with "the public interest in having all relevant evidence available to the court and, where it is implicated, the right of the defendant to challenge the evidence against him?"²⁵ The court answered the first two questions in the affirmative. As to the first question, the panel explained that "a vigorous press is essential to the functioning of open societies and that a too frequent and easy resort to compelled

21. *Brdjanin* Appeals Chamber Opinion, *supra* note 1, ¶ 15. The first two questions in Randal's proposal are clearly derived from U.S. state court tests for the reporter's privilege.

22. Brief of *Amici Curiae* on Behalf of Various Media Entities ¶ 43, *Brdjanin* Appeals Chamber Opinion, *supra* note 1.

23. *Id.* ¶ 44.

24. *Id.* ¶ 45.

25. *Brdjanin* Appeals Chamber Opinion, *supra* note 1, ¶ 34.

production of evidence by journalists may, in certain circumstances, hinder their ability to gather and report the news."²⁶ Its answer to the second question was more tentative; the court explained that it was difficult to quantify the extent to which compelling war correspondents to testify would actually hurt their ability to work. Still, the court held that "compelling war correspondents to testify before the International Tribunal on a routine basis may have a significant impact upon their ability to obtain information and thus their ability to inform the public on issues of general concern."²⁷ As to the third question, the appeals panel refrained from adopting the tests proffered by Randal and *Amici Curiae* and devised its own two-part balancing test, holding that subpoenas to war correspondents may be issued only when the petitioning party can, first, "demonstrate that the evidence sought is of direct and important value in determining a core issue in the case" and, second, "demonstrate that the evidence cannot reasonably be obtained elsewhere."²⁸

III. DEFINING THE PROFESSION

The threshold issue in articulating a qualified journalistic privilege that should prevail in the ICC and other international tribunals is defining exactly who is a "journalist." This is not a simple task.²⁹ In

26. *Id.* ¶ 35.

27. *Id.* ¶ 44.

28. *Id.* ¶ 50. Randal's five part test was rejected outright as an impermissible absolute privilege. The *Amici Curiae* proposal fared much better, although it was substantially softened.

29. See Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371, 1374 (2003). Within the context of trying to articulate a statutory journalist's privilege, Berger explains the difficulty in trying to distinguish the "protected from the unprotected." "[T]he limitation itself may violate the First Amendment principle of neutrality by favoring one kind of speaker, one kind of content, or one medium of communication over all others." *Id.* See also *Branzburg*, *supra* note 3, at 703-04. The court noted the practical difficulties of creating a First Amendment privilege for journalists:

The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. ... Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals.

most Western countries, there are no universal standards for joining the journalism profession—no required degrees, no entrance exam, no mandatory organizational membership.³⁰ While many working journalists have a current or prior association with an established news gathering organization, there are countless persons who work either alone or tangentially with news organizations as stringers, freelancers, independent authors, and bloggers.³¹ The evident problem with trying to confer a privilege on such a loosely-defined profession is finding a balance between covering all those who could and should benefit from such a privilege, while at the same time excluding those who would seek to wrap themselves in the privilege simply to avoid their duty to testify. In *Brdjanin*, the ICTY specifically narrowed its holding to “war correspondents,” which it described as “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.”³² But such a definition may be under-inclusive. While it appears to include the well-known TV or newspaper correspondent reporting from a conflict zone, it is unclear whether it covers the people for whom they work. As a matter of good

It necessarily embraces pamphlets and leaflets. ... The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.’... The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures before a grand jury.

Id. (internal citations omitted).

30. In most Westernized countries, requiring journalists to meet state-set criteria is viewed as an impermissible prior restraint on free expression. Some countries, generally those with authoritarian regimes, require journalists to register with the government. In a landmark 1985 ruling, the Inter-American Court on Human Rights issued an advisory opinion finding that a press licensing scheme in Costa Rica restricted freedom of expression, in violation of Article 13(2) of the American Convention on Human Rights, because it allowed the state to determine how individuals seek, impart, and receive information. It was the first time an international human rights court had held that mandatory licensing of journalists violates human rights provisions. Adv. Op. OC-5/85, Inter-Am. Ct. H.R. (ser. A) (1985). The European Court of Human Rights also has ruled that licensing systems for media, with the exception of ones designed for purely technical matters, are illegitimate. See *Gaweda v. Poland*, 2002 Eur. Ct. H.R. 301.

31. A stringer is a person who acts as a professional information-source for a reporter. Freelancers are journalists who sell their work on a project basis and who are not permanently associated with a news organization. Bloggers maintain Internet websites—either independently or in conjunction with a more established media entity—on which they post their own news reporting and commentary, as well as links to other Internet-published works.

32. *Brdjanin Appeals Chamber Opinion*, *supra* note 1, ¶ 29. It is noteworthy, and will be discussed *infra*, that the ICTY’s use of the term “war correspondent” differs from its use in Geneva Conventions.

journalistic practice, reporters often confide in their editors or supervisors the source of their news, as well as any contextual or background information deemed necessary by the editor or supervisor to ensure the validity and veracity of the report. Thus, to exclude editors and supervisors from a journalist's privilege essentially would vitiate any privilege recognized for a reporter. And what of the lone writer who travels to a conflict zone in the hopes of finding material for a book or for dispatches to his Internet site? If he comes into the possession of information deemed valuable to an international tribunal, should he be forced to testify? An ICC panel seeking information from a reporter that doesn't fit the ICTY's description of a "war correspondent" may well be faced with such questions.

To understand the amorphous professional landscape of journalism, it is helpful to think of the profession as a broad spectrum encompassing a wide swath of standards, protocols, and goals. At one end of the spectrum are those whom most people would think of as reporters—individuals who gather news, which is then vetted by editors and disseminated through an established news outlet (newspaper, internet, television, or radio), which may be either independent³³ (such as *The New York Times* or CNN) or government-funded (such as the British and Canadian Broadcasting Companies). Journalists who work for news outlets must adhere to these organizations' codified standards of news reporting conduct and subject their work to the scrutiny of editors. These editors, who also occupy this area of the spectrum, are charged with vetting and sanctioning the material that appears on their news outlet. Similarly, media executives, though not engaged themselves in collecting and disseminating news, can be held responsible for materials published under their auspices.³⁴ Ultimately, the work of these journalists, editors,

33. The term "independent" in this context refers to financial independence. While news organizations such as the British and Canadian Broadcasting Companies receive government funding, they are not under the editorial control of the government.

34. News media executives have been criminally convicted by international courts for inciting crimes against humanity. In October 1946, Nazi publisher Julius Streicher was sentenced to hang by the Nurbemberg Tribunals for his role in inciting hatred against the Jews. In late 2003, the U.N. *ad hoc* tribunal prosecuting war crimes in Rwanda (ICTR) convicted three Rwandan news media executives of genocide for inciting a killing spree by Hutus against Tutsis in early 1994. The three were sentenced to lengthy prison terms. Critics of the convictions have maintained that verdicts that punish speech inevitably infringes on press freedom. See Dina Temple-Raston, *Journalism and Genocide*, COLUM. JOURNALISM REV., Sept./Oct. 2002, at 18-19; Stephen Kinzer, *In Rwandan Genocide, Words Were Killers, Too*, N.Y. TIMES, Dec. 7, 2003, at 4-3.

and executives is inextricably intertwined with the reputation of the news organization with which they are associated and, in turn, a news organization builds on the collective works of its employees to gather access and influence. Closely related, but distinctly different from those charged with gathering and reporting the news, are commentators and analysts who are not held to standards of objectivity. News outlets often utilize commentators and analysts to add depth or variety to straight news coverage by either presenting alternative points of view on a given subject or using their expertise to explain complicated stories.

At the opposite end of this spectrum are individuals who work as sole practitioners, either as stringers or freelancers who collect and produce reportage, commentary, or analysis to be sold to media organizations or to be used in a non-traditional news outlet or book. This is an incredibly difficult field to navigate,³⁵ because of the lack of any common credential or licensing, there really is nothing to stop the individual who writes an article and posts it on the Internet, or in a self-published newsletter, from calling himself or herself a journalist. A journalist working alone does not necessarily benefit from the safety net of established standards and editors to enforce those standards. Additionally, support staff that arrange interviews and provide translation services and travel logistics must also be considered. Such individuals will be privy to a journalist's information and sources and, like a reporter's editor, must be immunized from being used as an end-run around a journalist's privilege.

A. Journalists in International Humanitarian Law

The dilemma of identifying "who is a journalist" has been the subject of much debate in international law, particularly within the context of armed conflicts—international humanitarian law has long struggled to distinguish journalists from the rest of the civilian population during wartime. Some of the earliest recognition of journalists as a distinct class of persons in international humanitarian law can be found in Article 13 of the Regulations Respecting the Laws and Customs of War, appended to The Hague Conventions of 1899 and 1907³⁶ and the Geneva

35. See Robert D. Lystad & Malena F. Barzilai, *Reporter's Privilege: Legislative and Regulatory Developments*, in Media Law Res. Ctr., *White Paper on the Reporter's Privilege*, MEDIA L. RESOURCE CTR. BULLETIN, Aug. 2004, at 97. The authors note that in deciding whether to apply shield laws to freelance journalists, courts generally focus on: (1) whether the freelancer is in a formal arrangement with a media entity or (2) whether the information was gathered with an intent to publish.

36. Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899, Annex, 32 Stat. 1803, T.S. No. 403; Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, 36 Stat. 2277, T.S. No. 539. Art. 13 reads:

Convention of 27 July 1929 Relative to the Treatment of Prisoners of War.³⁷ Under these instruments, the *right* to be treated as a prisoner of war in case of capture was triggered only if the journalist had specific authorization to follow the armed forces. Journalists on the battlefield thus were urged to carry identity cards, issued by the authorizing army, in order to create a presumption of protection. A further refinement of international humanitarian law regarding journalists came with the adoption of the Geneva Conventions of 12 August 1949—Article 4(A)(4) clearly accorded “war correspondents” the *status* of prisoners of war upon capture.³⁸

In the 1970s, the United Nations, realizing that many journalists report from conflict areas without specific authorization from one of the parties to the conflict, commissioned a draft convention for the protection of journalists on dangerous missions.³⁹ The draft version of Article 79 of the Protocol Additional (No. I) to the Geneva Conventions⁴⁰ essentially

Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, . . . who fall into the enemy's hands, and whom the latter thinks expedient to detain, have a right to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army they were accompanying.

37. Convention between the United States of America and Other Powers, Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 2 Bevans 932. Article 81 provides that:

Individuals who follow armed forces without directly belonging thereto, such as newspaper correspondents and reporters . . . who fall into the enemy's hands and whom the latter think expedient to detain, shall be entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the armed forces which they were accompanying.

38. Convention (No. III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Article 4(A)(4) designates “war correspondents” as a distinct category of persons who are to be considered prisoners of war and reads:

Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card

39. G.A. Res. 2673 (XXV), U.N. GAOR, 25th Sess., 1922d plen. mtg., U.N. Doc. A/RES/2673 (XXV) (1971) (directing the Economic and Social Council and, through it, the Human Rights Commission to draft the convention). The resolution states that journalists have an important role in conveying complete information about armed conflicts and, because of their importance, a new humanitarian instrument is needed to protect their interests.

40. Protocol I, *supra* note 18, at art. 79.

recognized journalists not accredited to an armed force as civilians.⁴¹ The term “journalist” in the context of Article 79 was interpreted broadly and included “any correspondent, reporter, photographer, and their technical film, radio, and television assistants who are ordinarily engaged in any of these activities as their principal occupation.”⁴² The draft protocol required journalists to carry an identity card, issued by the journalist’s home country, attesting that the bearer is a journalist, as well as an arm-band “bearing a distinctive emblem, a large black P on a golden disk, in such a way as to be visible at a distance.”⁴³ This gave rise to a spirited debate over the myriad of practical and logistical problems of issuing an identity card, such as whether journalists must indicate their religion and what language should be used on the cards. Concerns were raised about whether such blatant identification would make journalists targets and threaten civilian populations. Another contentious proposal was that all accreditation be processed through an international professional committee set up under the Convention—a condition that journalists warned would grant too much power to an international authority to determine who is and who is not a journalist.⁴⁴

41. The Commentaries to Article 79 explain that the provision does not create new law, but instead “clarifies and reaffirms the law in force regarding persons exercising the functions of a journalist in an area of armed conflict without being an accredited correspondent in the sense of Article 4(A)(4) of the Third Convention.” In sum, Article 79 recognizes two categories of journalists that may be operating in a conflict area: journalists accredited to the armed forces and those who are not. If captured, the former would be prisoners of war, while the latter would be civilians. CLAUDE PILLOUD, ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 920-21 (Yves Sandoz et al. eds., 1987).

A recent example of journalists who probably would be considered “war correspondents” under Article 4(A)(4) are those who participated in the Pentagon’s journalist embed program in Iraq. Press Release, U.S. Secretary of State, Public Affairs Guidance on Embedding Media during Possible Future Operations / Deployments in the U.S. Central Commands Area of Responsibility (Feb. 3, 2002), available at <http://www.defenselink.mil/news/Feb2003/d20030228pag.pdf>. Under this program, journalists are required to receive authorization from the Pentagon to accompany U.S. troops, although there are no official provisions for the issuance of an identity card. Journalists not accredited by the U.S. military would appear to fall under Article 79. Interestingly, during Operations Desert Shield and Desert Storm, the British army required media members to take an oath of office, wear military uniforms, and accept long-term assignments to military units in exchange for battlefield access. See Christopher Walker, *Strong-arm Tactics Used to Curb War Reporting*, THE TIMES (London), Feb. 8, 1991, at 1.

42. PILLOUD, *supra* note 41, at 921 (internal citations omitted).

43. The idea of requiring journalists to register, bear ID cards, and don the black and gold armband was first described in *Human Rights in Armed Conflict: Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflicts: Report of the U.N. Secretary General*, U.N. GAOR, 26th Sess., Provisional Agenda 52(b), U.N. Doc. U.N. Doc. A/8371 (1971). See also PILLOUD, *supra* note 41, at 919 (describing the armband as being a “protective emblem clearly visible from a distance in the shape of a bright orange armband with two black triangles”).

44. Numerous organizations and individuals were asked by the U.N. to weigh in

Ultimately the draft version of Article 79 was made law, though the plan for armbands was dropped and the identity card was made optional. The provision's clear designation of journalists—not falling under Article 4(A)(4)'s protections for “war correspondents”—as civilians has since been ratified by 162 countries.⁴⁵

B. Journalists in U.S. Law

There are no nationwide, uniform standards in the United States for defining who is a journalist, a question that generally comes up when an individual seeks to invoke journalistic testimonial privilege.⁴⁶ Both Congress and federal courts have steered clear of defining the term, instead leaving it to state legislatures, agencies, and governmental organizations to create their own guidelines and policies.⁴⁷ Many federal

on the subject of creating a protected category for journalists. UNESCO submitted a report—“Voix multiples, un seul monde”—which described resistance from the journalistic community to creating any sort of international accreditation. This report is described in Hans-Peter Gasser, *The Protection of Journalists Engaged in Dangerous Professional Missions*, 232 INT'L REV. OF THE RED CROSS 3 (1983). In an earlier report by Claude Pilloud, *Protection of Journalists on Dangerous Missions in Armed Conflict Zones*, 118 INT'L REV. OF THE RED CROSS 3 (1971), the ICRC predicted general resistance in the international community to establishing “privileged categories” of people among the civilian population. In *Brdjanin*, prosecutors argued just this point, stating that giving Randal a qualified privilege not to testify would “give [journalists] a unique status not granted to any other member of the public. And journalists are no more than that. They have a job, but they are just members of the public.” Transcript of Proceedings at 5410, *Brdjanin* Trial Chamber Opinion III, *supra* note 13. There are no minutes of the discussions of the *ad hoc* working group that was set up to draft Article 79. There are some brief Diplomatic Conference texts referring to Article 79 in 4 PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE 1949 GENEVA CONVENTIONS 132, 135 (Howard S. Levie ed., 1981). U.S. and Canadian representatives submitted statements that requiring journalists to wear any kind of distinctive insignia would endanger reporters and the civilian populations they work among. Gasser, *supra* note 44.

45. See Protocol I, *supra* note 18, at art. 79; Int'l Humanitarian Law, *supra* note 18.

46. The bulk of judicial discussion over “who” is a journalist has taken place in the United States within the context of federal agency guidelines and state laws. See *infra* notes 49, 50, 51, and 52. There is a dearth of scholarship on how governments and courts in Europe define journalists—perhaps because the concept of a journalist's testimonial privilege is virtually unique to the United States. See THE REPORTERS COMM. FOR FREEDOM OF THE PRESS, THE REPORTER'S PRIVILEGE COMPENDIUM (Gregg P. Leslie et. al. eds., 2002). In a survey of cases before the European Court of Human Rights that addressed the rights of journalists within the context of Article 10, none has addressed the question of “who” is a journalist.

47. In 2005, two bills were introduced to create a federal reporter's privilege. See *infra* note 48.

Justice Byron White expressed the High Court's reluctance to define journalists in his

administrative agencies have promulgated regulations for dealing with the media, which vary widely in their breadth and inclusiveness.⁴⁸ Some

majority opinion in *Branzburg*. See *Branzburg*, *supra* note 3. There is scant federal litigation on this issue, however the Circuit Court of Appeals for the District of Columbia twice has refused to examine the definition of “journalist” established by Congressional news galleries. See *Consumers Union of U.S., Inc. v. Periodical Correspondents’ Ass’n*, 515 F.2d 1341, 1351 (D.C. Cir. 1975) (stating that Congressional Press Gallery’s refusal to grant a non-profit consumer periodical access to the “Periodical Press Galleries of the Congress” presents a nonjusticiable issue because it involved a challenge to acts “within the sphere of legislative power committed to the Congress and the legislative immunity granted by the Constitution”); *Schreibman v. Holmes*, 1997 U.S. Dist. LEXIS 12584, *1-3, 5, 6, 7 n.6 (D.D.C. 1997) (refusing to review denial of credentials for editor (and sole employee) of Federal Information News Syndicate, a free news service that reports on federal legislation and governmental policies, because it was a nonjusticiable question). See also *In re Grand Jury Subpoenas*, No. 01-20745 (5th Cir. Aug. 17, 2001) (unpublished) (per curiam). In that case, a freelance writer, Vanessa Leggett, was slapped with a federal subpoena for interview notes she collected during research for a book on a man sentenced to death in Texas for murder. While the U.S. Justice Department is supposed to approve all subpoenas to reporters, it did not get involved in the Leggett case because, under Justice Department guidelines, an unpublished author is not a journalist. Prosecutors maintained that Leggett, who had never published a book or any news articles, was not entitled to invoke a journalist’s privilege. Leggett, who spent 168 days in prison resisting the subpoena, argued that she was a journalist merely because she possessed an “intent to publish.” In denying her appeal of the subpoena, the Fifth Circuit Court of Appeals noticeably did not address the issue of whether Leggett was a journalist. See also Julie Hinden, *Who Counts As a Journalist for First Amendment Purposes?*, Jan. 10, 2002, available at <http://us.cnn.com/2002/LAW/01/columns/fl.hilden>. journalists (last visited Jan. 20, 2005). Leggett was released when the grand jury panel before which she was supposed to testify expired.

48. For example, the U.S. Department of Justice has several regulations regarding the media, see e.g. 28 C.F.R. 50.10, *supra* note 20, but does not expressly define which individuals and entities are considered media. By comparison, the National Capital Planning Commission has an extensive definition of media in its Freedom of Information Act provisions, 1 C.F.R. 456.3 (2003):

Any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term “news” means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of “news”) who make their products available for purchase or subscription by the general public. In the case of “freelance” journalists, they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for a commercial use.

In early 2005, two bills were introduced to create a federal reporter’s privilege. The Free Flow of Information Act of 2005, sponsored in the Senate by Sen. Richard Lugar (R.-Ind.), and in the U.S. House of Representatives by Rep. Mike Pence (R.-Ind.) and Rep. Rick Boucher (D.-Va.) would cover persons working for traditional media outlets (including newspapers, magazines, radio, television and cable). S. 340, 109th Cong. (2005) and H.R. 581, 109th Cong. (2005). The second bill, the Free Speech Protection Act of 2005, sponsored by Sen. Christopher Dodd, D-Conn., would extend the privilege to a much broader category of journalists. The proposed law would cover, “[A] person who—[A] engages in the gathering of news or information; and [B] has the intent, at the beginning

of the most useful descriptions of journalists can be found in state reporter shield laws, which set out testimonial privileges for journalists.⁴⁹ Likewise, some state courts have also recognized a fairly wide field of potential

of the process of gathering news or information, to disseminate the news or information to the public." S. 369, 109th Cong. (2005).

49. There is no national reporters' shield law. One of the most thorough state shield laws is New York's, which reads in pertinent part:

- (1) "Newspaper" shall mean a paper that is printed and distributed ordinarily not less frequently than once a week, and has done so for at least one year, and that contains news, articles of opinion (as editorials), features, advertising, or other matter regarded as of current interest, has a paid circulation and has been entered at United States post-office as second-class matter.
- (2) "Magazine" shall mean a publication containing news which is published and distributed periodically, and has done so for at least one year, has a paid circulation and has been entered at a United States post-office as second-class matter.
- (3) "News agency" shall mean a commercial organization that collects and supplies news to subscribing newspapers, magazines, periodicals, and news broadcasters.
- (4) "Press association" shall mean an association of newspapers and/or magazines formed to gather and distribute news to its members.
- (5) "Wire service" shall mean a news agency that sends out syndicated news copy by wire to subscribing newspapers, magazines, periodicals, or news broadcasters.
- (6) "Professional journalist" shall mean one who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for a newspaper, magazine, news agency, press association or wire service or other professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public; such person shall be someone performing said function either as a regular employee or as one otherwise professionally affiliated for gain or livelihood with such medium of communication.
- (7) "Newscaster" shall mean a person who, for gain or livelihood, is engaged in analyzing, commenting on or broadcasting, news by radio or television transmission.
- (8) "News" shall mean written, oral, pictorial photographic, or electronically recorded information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare.

N.Y. CIV. RIGHTS LAW § 79-h (2003).

By way of contrast is California's statute, which applies to a "publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service," or "a radio or television news reporter or other person connected with or employed by a radio or television station." CAL. EVID. CODE § 1070 (Deering 2004). California courts have held that a freelancer is not sufficiently "connected" to benefit from the privilege, unless they have a contractual agreement with a specific publisher. *In re Van Ness*, 8 Med. L. Rptr. 2563 (Cal. Super. Ct. 1982).

journalist privilege claimants. Courts have allowed employers,⁵⁰ academics,⁵¹ and bloggers⁵² to claim the privilege.

IV. LEGAL AUTHORITY FOR A QUALIFIED TESTIMONIAL PRIVILEGE FOR JOURNALISTS

Precedent for a qualified testimonial privilege for journalists in the ICC lies not only in the *Brdjanin* case, but may also be drawn from norms of freedom of expression and analogies to privileges extended to other professions which demand that their practitioners keep confidences and remain outside the judicial process.

A. European Law

In the 1996 case of *Goodwin v. United Kingdom*,⁵³ the ECHR⁵⁴ addressed the significance of allowing journalists to protect certain kinds of information from courts. The case involved confidential documents that were provided to William Goodwin, a staff writer for *The Engineer*, a London-based weekly magazine covering science and technology. The documents referred to the financial travails of Tetra, Ltd., a U.K. company that produces laboratory equipment. A judge ordered, on an application by the company, that the reporter disclose the source's identity so the

50. *Bauer v. Brown*, 11 Med. L. Rptr. 2168 (W.D. Va. 1985). In *Bauer*, the plaintiff, a former teacher pursuing a section 1983 claim against several former colleagues, subpoenaed a reporter to testify and to produce documents relating to interviews with the defendants. The reporter—who had since resigned his job as a journalist—agreed to testify, but the documentation was in the possession of the newspaper, which asserted the privilege. The district court quashed the subpoena on other grounds, but left open the question of the publisher's standing.

51. *In re Grand Jury Subpoena*, 750 F.2d 223, 225 (2d Cir. 1984). A PhD candidate, who witnessed a suspicious fire while collecting information for his dissertation, may argue on remand that the information is covered by a qualified privilege for scholars when “a serious academic inquiry is undertaken pursuant to a considered research plan in which the need for confidentiality is tangibly related to the accuracy or completeness of the study.”

52. *Blumenthal v. Drudge*, 186 F.R.D. 236, 244 (D.D.C. 1999). In his defamation lawsuit against Internet blogger Matt Drudge, the plaintiff was required to demonstrate that he had exhausted every reasonable alternative source for the information. The *Blumenthal* court did not question whether Drudge was a journalist.

53. *Goodwin*, *supra* note 3.

54. Established in 1953, the ECHR serves as a type of appellate court for European legal systems, and its decisions are binding on the forty-five member states in the Council of Europe. Member states are bound to uphold their obligations under the European Convention on Human Rights. If an individual believes their rights have been violated, and they have exhausted domestic remedies, they can take their case to the ECHR. Responsibility for supervising the execution of judgments lies with the Committee of Ministers of the Council of Europe. See European Ct. of Human Rights, *Historical Background, Organization and Procedure* at <http://www.echr.coe.int/Eng/EDocs/HistoricalBackground.htm> (last visited Jan. 20, 2005).

company could sue for damages and recovery of the documents. Relying on the United Kingdom's shield law,⁵⁵ Goodwin appealed to the Court of Appeal, contending that disclosing the notes of his discussions with his source were not necessary "in the interests of justice" and that the public interest in publication outweighed the interest in preserving confidentiality.⁵⁶ Goodwin lost two rounds of appeals before the Court of Appeal and the House of Lords.⁵⁷

Goodwin next turned to the ECHR, claiming that the court's order requiring him to reveal the identity of his source violated his right to freedom of expression under Article 10 of the European Convention on Human Rights, which prohibits restrictions on free expression—including the disclosure of information given in confidence—unless the state can prove the action is "necessary in a democratic society."⁵⁸ The ECHR agreed that the U.K.'s court order was in pursuit of a legitimate aim, namely to protect Tetra's rights, but concluded that the action was not "necessary in a democratic society." Specifically, the ECHR determined that Tetra's interests in unmasking the disloyal employee did not outweigh the "vital public interest" in the protection of a journalist's source.⁵⁹ The court emphasized that the question of whether to compel a reporter to reveal information given to him by a source could not be determined by the degree of public interest in the information. The court wrote: "A source may provide information of little value one day and of great value the next; what mattered was that the relationship between the journalist and the source was generating the kind of information which had legitimate news potential."⁶⁰

The court stated that withholding such a privilege might deter sources from speaking to the press about matters of public interest and thus hobble the press' "vital public-watchdog role."⁶¹ The court further noted

55. Section 10 of the Contempt of Court Act 1981 provides:

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

Contempt of Court Act, 1981, c. 10 (Eng.).

56. *Goodwin*, *supra* note 3, ¶ 17.

57. *Id.* ¶ 18.

58. *See* 1950 Convention on Human Rights, *supra* note 19.

59. *Goodwin*, *supra* note 3, ¶ 45.

60. *Id.* ¶ 37.

61. *Id.* ¶ 39.

that allowing journalists to keep the confidentiality of their sources is a vital element of press freedom and has been recognized by numerous international instruments.⁶²

While *Goodwin* clearly establishes a reporter's prerogative to protect sources under European human rights law, its recognition of the value of relationships between journalists and their sources, and the importance of journalism to the public, is the foundation of a broader concept of qualified journalistic privilege. In short, journalists serve a critical role in society by disseminating information to the public. Fulfillment of these obligations requires that journalists be allowed to establish and foster relationships with sources, confidential or not, without the threat that this relationship will be used for other purposes. The decision recognizes that when people speak to and confide in journalists, they generally do so with the expectation that the information will end up as news, not as evidence in a trial. While *Goodwin* deals solely with the issue of confidential sources, its logic arguably can be extended to non-confidential information collected by journalists, both reported and unreported. The argument is that turning journalists into "investigators" for the courts obliterates the trust between journalists and their sources of information and thwarts the journalist from fulfilling his or her "public-watchdog role."

B. U.S. Law

There is no national reporter's shield law in the United States.⁶³

62. The court cites as examples of international instruments recognizing protection of journalistic sources: Resolution on Journalistic Freedoms and Human Rights, European Ministerial Conference on Mass Media Policy, 4th Conf. (1994); and Resolution on the Confidentiality of Journalists' Sources and the Right of Civil Servants to Disclose Information, 1994 O.J. (C 44) 34. See also *Rights of Journalists not to Disclose their Sources of Information*, Eur. Cmte. of Ministers, 701 mtg., Rec. No. R (2000) 7 (2000). The latter is the COE's attempt to reinforce the principles articulated by the ECHR in the *Goodwin* case and to harmonize European municipal law on journalist's privilege.

63. See *supra* note 48. Sen. Sen. Dodd's Free Speech Protection Act of 2005 sets out a three-pronged test that must be met by a Federal entity seeking to compel disclosure of news or information. The seeking party must show "by clear and convincing evidence that: 1) the news or information is critical or necessary to the resolution of a significant legal issue before an entity of the judicial, legislative, or administrative branch of the Federal Government that has the power to issue a subpoena; (2) the news or information could not be obtained by alternative means; and (3) there is an overriding public interest in the disclosure." S. 369, 109th Cong. (2005). The Free Flow of Information Act of 2005 requires a showing by "clear and convincing evidence" that the seeking party has "unsuccessfully attempted" to acquire the information from another source. If the information is being sought for a criminal investigation or prosecution, there must be a showing that a crime has occurred and the information is "essential" to the investigation, prosecution, or defense. In a matter other than a criminal investigation or prosecution, the information must be shown to be "essential to a dispositive issue of substantial importance to that matter." S. 340, 109th Cong. (2005) and H.R. 581, 109th Cong. (2005). See also 28 CFR § 50.10, *infra* note 21. Some commentators argue the Justice

Federal courts, however, have recognized a qualified privilege for journalists from being compelled to testify about their news-gathering, and thirty-one states and the District of Columbia have enacted reporter's shield laws.⁶⁴ The laws differ in their scope of protection,⁶⁵ but in general, reporters may not ignore attempts to compel their testimony. Rather, they must make an appearance or motion to quash the subpoena by proffering a basis for their objection to disclosure.

The wellspring of a First Amendment-based qualified journalist's privilege is Justice Powell's concurring opinion in *Branzburg v. Hayes*.⁶⁶ The journalists in *Branzburg* were held in contempt for failing to appear before grand juries investigating criminal conduct that the reporters had learned of through their reporting. In a 5-4 decision, the Court refused to recognize an absolute privilege for journalists,⁶⁷ but Justice Powell's concurring opinion offered a limited qualified privilege for information "remote and tenuous" to the subject of the investigation or when the

Department regulation has operated as an informal shield law when the government seeks to compel a journalist's testimony. See Lystad, *supra* note 35, at 133-34.

64. The states are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Rhode Island, and Tennessee. See WENDY TANNENBAUM, THE REPORTERS COMM. FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 2001 (Lucy A. Dalglish & Gregg P. Leslie eds., 2002); and REPORTER'S PRIVILEGE COMPENDIUM, *supra* note 46.

65. All shield laws cover information given to a reporter in confidence. Eighteen states and the District of Columbia provide some protection for journalists' non-confidential information, yet even in these states, protection for non-confidential information is not uniform. See Anthony L. Fargo, *The Journalist's Privilege for Nonconfidential Information in States with Shield Laws*, 4 COMM. L. POL'Y 325, 349 (1999). See also Lystad, *supra* note 35. The authors describe three general categories of shield laws in the United States: (1) "absolutist" laws, enacted before 1950, that provide full protection for journalists from testifying before legal or governmental proceedings, (2) "transitional" statutes, passed directly before and after the *Branzburg* decision, that require a finding that compelling the reporter to name her sources (and in some cases, protection is extended to unpublished information) is essential to the public interest or to prevent injustice, and (3) "modern era" laws, passed in the 1990s, which grant the privilege to keep confidential both sources and information after a finding that the information sought is essential to the underlying proceeding and cannot be obtained elsewhere, and clearly classifies as unprivileged any information gleaned as an eyewitness to criminal or tortuous conduct.

66. *Branzburg*, *supra* note 3. This is the only case where the U.S. Supreme Court has ruled directly on the issue of testimonial privilege for journalists.

67. *Id.* at 693. Indeed, the court was skeptical that forcing reporters to testify would actually hinder their access to sources.

testimony would compromise a “confidential source relationship without legitimate need of law enforcement.”⁶⁸

In the thirty years since *Branzburg*, federal courts addressing the issue of journalists’ privilege have focused on Powell’s concurrence. Today, almost all circuits recognize a qualified privilege against compelling journalists to disclose information learned through their reporting—even when non-confidential material is involved.⁶⁹ Again, as in the ECHR’s decision in *Goodwin*, the underlying rationale for recognizing a qualified privilege for journalists is that reporters must not be viewed as being potential agents of the courts, lest they lose their status as impartial observers and, in turn, their ability to provide information to the public.⁷⁰

C. Privileges Recognized by the ICTY and the ICC

In considering a privilege for journalists, it is instructive to consider the existing testimonial privileges recognized by the ICTY and the ICC, all of which are grounded in the belief that the independence of certain professionals is critical to their work. The ICTY has a single category of

68. *Id.* at 710.

69. Nonconfidential information includes things such as the reporter’s observations, as well as notes, photographs, and videotapes that were not used because of editorial decisions. *See e.g.*, *Schoen v. Schoen*, 5 F.3d 1289, 1292 n.5 (9th Cir. 1993) (noting that almost all federal courts recognize a qualified privilege for journalists to resist compelled discovery). Examples of courts applying the privilege to protect nonconfidential material include: *Church of Scientology International v. Daniels*, 992 F.2d 1329, 1335 (4th Cir. 1993) (affirming a district court’s refusal to compel discovery of nonconfidential material from an editorial meeting at *USA Today*); *U.S. v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988) (“[W]e discern a lurking and subtle threat to journalists and their employers if disclosure of outtakes, notes, and other unused information, even if non-confidential, becomes routine and casually . . . compelled.”); and *Loadholz v. Fields*, 389 F. Supp. 1299, 1303 (M.D. Fla. 1975) (“The compelled production of a reporter’s resource materials is equally as invidious as the compelled disclosure of his confidential information.”). But *see McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003). In *McKevitt*, U.S. District Judge Richard Posner argues that federal circuit courts have stretched the import of *Branzburg*, noting that the “approaches that these decisions take to the issue of privilege can certainly be questioned.” *See also In re: Grand Jury Subpoena*, No. 04-3138, slip op. at 15 (D.C. Cir. Feb. 15, 2005). A three judge panel of the U.S. Court of Appeals for the District of Columbia rejected an attempt by *New York Times* reporter Judith Miller and *Time* magazine reporter Matthew Cooper to refuse to testify before a federal grand jury investigating the leak of an undercover CIA operative’s identity to reporters. In refusing to adopt a broad reading of *Branzburg*, Judge David B. Sentelle wrote for the court that, at least in cases of criminal grand juries, there is no evidence that Justice Powell’s concurrence intended to “elevate the journalistic class above the rest.”

70. For a discussion of the early debate over journalists’ privilege in the United States, which was largely sparked by efforts by U.S. Attorneys and local district attorneys investigating anti-war and social activist groups in the 1960s and 1970s, *see* Karl H. Schmid, *Journalist’s Privilege in Criminal Proceedings: An Analysis of United States Courts of Appeals’ Decisions from 1973 to 1999*, 39 AM. CRIM. L. REV. 1441, 1449–51 (2002).

codified privilege, which is for attorney-client communications.⁷¹ In contrast, the ICC has several codified privileges in its rules of evidence, including protections for ICRC employees, as well as members of certain professions, including lawyers, doctors, and priests.⁷² A catch-all provision covers privileged communications in other professions, so long as the court determines that: (1) the communications were made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure, (2) that confidentiality is essential to the nature and type of relationship between the person and the confidant, and (3) that the recognition of the privilege would further the objectives of the statute and the rules.⁷³

Members of the ICRC receive, by far, the clearest and most solid privilege from both the ICTY and the ICC. The privilege was first recognized by the ICTY in *Prosecutor v. Simic*—the only case other than *Brdjanin* where the ICTY considered the issue of testimonial privilege.⁷⁴ In that case, the ICTY prosecutor sought to call an ICRC employee as a witness to testify about information he had obtained during visits to detention centers. This employee voluntarily had approached the ICTY with his information and was willing to testify; however the ICRC objected and was granted permission by the trial court to appear as *Amicus Curiae*.⁷⁵ In its submission to the court, the ICRC argued that its employees may be denied access to persons protected by the Geneva Conventions if there was a chance that they could be called to testify in criminal proceedings.⁷⁶ The prosecution countered by arguing that the ICRC did not, as a matter of law, enjoy an immunity or privilege allowing it to unilaterally prevent its employees from testifying.⁷⁷

In its decision, the ICTY trial panel analyzed whether ICRC members should enjoy a “common law” testimonial privilege before the panel by examining three questions: (1) whether the ICRC has a confidentiality interest under conventional or customary international law that would entitle it to prevent disclosure of information; (2) if there is such an

71. Rules of Procedure and Evidence, *supra* note 5, ¶ 97.

72. *Id.* ¶ 73.

73. *Id.*

74. *Prosecutor v. Simic*, Case No. IT-95-9-PT (ICTY Trial Chamber July 27, 1999).

75. *Id.* ¶¶ 3, 7, 34. The court noted that the issue of admissibility of the testimony of a witness may involve third party interests. *See also* *Prosecutor v. Simic*, Case No. IT-95-9-PT (ICTY Trial Chamber Mar. 16, 1999).

76. *Id.* ¶ 4.

77. *Id.*

interest, whether it should be balanced against the need for disclosure in the interests of justice, on a case-by-case basis; and (3) whether protective measures exist that could adequately protect this interest and meet the ICRC's concerns.⁷⁸ In addressing the first question, the court noted that the ICRC, an independent humanitarian organization centered around the principles of neutrality, impartiality, and independence, occupies a "special status" in international law since its existence is "directly derived" from the Geneva Conventions and Additional Protocols.⁷⁹ The court emphasized that in order to carry out its mandate, the ICRC required relationships of trust and confidence with various parties to an armed conflict.⁸⁰ Further, the court noted that since World War II, the ICRC had not allowed its employees to testify before courts without securing permission from ICRC management. Then, having determined that the ICRC has "a confidentiality interest and a claim to non-disclosure of this information" under customary international law, the court concluded that discussion of any balancing of interests or the feasibility of other protective measures was precluded.⁸¹ Thus, the ICTY established a binding recognition of the customary legal right of the ICRC not to disclose information before the tribunal.

Less than a year later, the holding of *Simic* was adopted and codified in the ICC's Rule 73. Under the rule, ICRC members are not required to reveal "any information, documents or other evidence which it came into the possession of in the course, or as a consequence, of the performance by the ICRC of its functions." If a court decides that certain information is "of great importance to a particular case," it must initiate consultations between the court and the ICRC to "resolve the matter by cooperative means."⁸²

V. MORAL DILEMMAS

The question of whether a journalist should take the stand in a criminal trial generally centers around two related issues, both of which focus on the affirmative duty to assist judicial bodies to reach a just result. The first is the importance of preventing criminals from impunity. It asks whether a journalist's obligation to testify against those who commit war crimes surpasses their duty to collect and report the news. The second is protecting individuals from suffering a miscarriage of justice. Does a journalist who possesses exculpatory or mitigating evidence

78. *Id.* ¶ 44.

79. *Id.* ¶ 46.

80. *Id.* ¶¶ 65-68.

81. *Id.* ¶¶ 76-80.

82. Rules of Procedure and Evidence, *supra* note 5, ¶ 73.

have a duty to come forward when this information could be critical to an individual's defense?⁸³

There are several examples that illustrate the former situation. To date, two British journalists have taken the stand at ICTY trials. Ed Vulliamy, a journalist with the *London Observer* and one of the most vocal critics of Jonathan Randal's stance against appearing before international tribunals, testified before the ICTY against Serbian leader Milan Kovacevic, the first man ever to be accused of genocide by an international court. In an editorial, Vulliamy warned that establishing a testimonial privilege for journalists would threaten the efficacy of the ICC. "I believe there are times in history—as any good Swiss banker will tell you—that neutrality is not neutral but complicit in the crime," he wrote. "My belief is that we must do our professional duty to our papers and public, and our moral and legal duty to this new enterprise. Why should journalists of all people—whose information will be of such value—perch loftily above the due process of law?"⁸⁴ The second journalist, BBC reporter Jacky Rowland, testified against Yugoslav President Slobodan Milosevic, who is currently charged with genocide and crimes against humanity. "I don't buy the argument that testifying will make our work in wars more dangerous or difficult than it already is," Rowland told *The New York Times* after testifying about the scores of dead inmates she saw in 1999 at the Dubrava prison in Kosovo.⁸⁵ "A journalist is a witness, and coming to the court is an extension of bearing witness. We are not superior beings, exempt from the moral duties of other citizens."⁸⁶ In justifying her decision to take the stand, Rowland emphasized she had not testified about any information from confidential sources and that the information in her answers was already in the public domain.⁸⁷

83. To put these arguments in the context of the U.S. judicial system, prosecutors have argued that reporters should be treated as citizens, who are obligated by law to provide relevant evidence concerning the commission of a crime. A criminal defendant may argue that when a reporter possesses evidence critical to their defense, the Sixth Amendment right to a fair trial outweighs any First Amendment right of the reporter. Civil litigants may make a related argument, not rooted in the Constitution, but on the basis that they are entitled to evidence relevant to their case.

84. Ed Vulliamy, *Comment: An Obligation to the Truth: Journalists should be Prepared to Risk their Safety and Testify at the International Criminal Court*, THE OBSERVER [London], May 16, 2002, at 30.

85. Marlise Simons, Reporter Testifies in Milosevic Case, Fueling Debate on Witnesses, N.Y. TIMES, Aug. 29, 2002, at A7.

86. *Id.*

87. *Id.*

In an example of the latter justification for testifying, former BBC correspondent Martin Bell took the stand to testify in defense of Tihomir Blaskic, head of the Croatian defense force in central Bosnia during the Bosnian war who was accused of helping to plan the systemic persecution of Bosnian Muslims in 1993. Bell defended his decision to testify by explaining that journalists “are a citizen first and a journalist second. . . . If I hadn’t testified in [Blaskic’s] defense I would have blamed myself for not having tried to save him.” Blaskic eventually was found guilty by the ICTY and sentenced to forty-five years in prison.

Notably, there appears to be a distinct divide between European and American journalists as to whether reporters should testify for or against defendants in court. Such generalizations, of course, risk oversimplifying the issue. Nonetheless, the sentiment articulated by Vullimany, Rowland, and Bell—that a journalist’s work is secondary to their responsibilities as a citizen—is certainly not the prevailing view of the American media, which led the charge as *Amici Curiae* in the *Brdjanin* case.⁸⁸ American reporters and news outlets—protected by the First Amendment, which guarantees far greater press freedoms than are recognized elsewhere in the world—clearly view themselves as being a distinct counter-weight to other branches of government. While this perspective may be idealistic, and to some extent self-serving, it is nonetheless the case that U.S. media in general find anathema the prospect of involvement in judicial proceedings. Reporters and news organizations routinely resist subpoenas and tirelessly lobby legislatures and argue to courts that they should be protected from involvement in judicial proceedings, save perhaps an extremely compelling need that cannot be met by another alternative.

Randal’s position in the *Brdjanin* case is an example of how extreme this resistance to journalistic involvement in judicial proceedings can be.⁸⁹ In explaining his decision to fight the ICTY trial court’s subpoena, Randal explained later that it was unrealistic to expect journalists to testify without compromising their roles as neutral observers. “We talk to the bad guys, we talk to the good guys and we try to inform the public,” he said.

Our job is not to be moralists. Our job is to try to explain very complicated and quite often very nasty violent situations. . . . [T]o get the news, one has to gain the confidence of the people who are doing the fighting. And if those people feel that the first thing a correspondent is going to do is testify before a war crimes tribunal, one of two things are very likely to happen. Either the correspondent will not be able to talk to anybody or he’ll be killed.⁹⁰

88. The majority of *amici* were U.S. news organizations or U.S.-based media interest groups. They were represented by U.S. attorney Floyd Abrams of Cahill, Gordon & Reindel.

89. See discussion in Part II of the *Brdjanin* case. The ICTY rejected Randal’s proposed test for compelling journalist’s testimony as an impermissible absolute privilege.

90. *Talk of the Nation: Interview with Jonathan Randal* (National Public Radio,

It is noteworthy that when presented with exactly the same situation—testifying about information not involving confidential sources and already made public—Rowland and Randal come down on exactly opposite sides.

There is an argument that forcing Randal to merely confirm what he'd already reported publicly would not threaten confidences, his safety, or his standing as an objective reporter. In response, Randal would argue that the overriding concern is of descending a slippery slope where journalists are routinely haled before courts without a demonstration that their presence is of a highly compelling need. The argument is that the ebbing away—no matter how seemingly innocuous—of a journalist's preferred position of being entirely outside the judicial process can, in the long-run, threaten the journalist's role as neutral observer and perhaps put members of the profession in danger.

While the ICTY did not totally agree with Randal's argument, it did tacitly agree that routinely seeking journalists' testimony in international tribunals could hinder their effectiveness.⁹¹ In its decision in *Brdjanin*, the ICTY attempted to balance Randal's concerns with the countervailing issues of assisting prosecutors in the pursuit of justice and providing defendants with a tool to compel dispositive evidence of their innocence. The two-part test articulated in the *Brdjanin* decision—that evidence sought be of “direct and important value in determining a core issue in the case” and “cannot reasonably be obtained elsewhere”⁹²—does an adequate job of sketching out the rough parameters of a testimonial privilege for journalists working in conflict areas. An effective ICC rule for journalists' privilege, however, must clearly articulate to whom it will apply and must provide concrete benchmarks for determining when a journalist may be compelled to testify and the steps necessary to compel that testimony.

VI. A PROPOSED CODIFIED RULE FOR THE ICC

Rule 73 of the ICC's “Rules of Procedure and Evidence” should be amended to codify and clarify the testimonial protection for war correspondents recognized by the ICTY in the *Brdjanin* case.⁹³ Such a

Dec. 12, 2002).

91. See *supra* note 27.

92. *Supra* note 1.

93. Under Article 51 of the Rome Statute, see *supra* note 4, amendments to the ICC's Rules of Procedure and Evidence may be proposed by any state party to the

codification will assist and protect journalists working in conflict areas and guide prosecutors, defendants, and courts in subsequent proceedings. An argument could be made that journalists are protected under subsections two and three of Rule 73—catch-all provisions that make communications made in the context of a class of professional or other confidential relationships privileged.⁹⁴ Journalists, however, are not explicitly covered by the provisions—reporter-source is not included in the list of professional relationships clearly covered under subsection two (i.e., communications between persons and their legal counsel, doctor, or clergy). Furthermore, unlike the enumerated professional relationships in Rule 73’s subsection three—all of which have generally accepted professional guidelines regarding confidential communications that are recognized in rules of evidence around the world—there is still significant international debate regarding whether such a privilege exists for journalists. Thus, a journalist may have difficulty arguing that their communications fall under the rule. Rule 73 should incorporate the important principle recognized by the *Brdjanin* court—that journalists presumptively are protected from testifying based upon their status as journalists. Journalists must be able to communicate freely, without the threat of being forced to testify, if they are to be of value in facilitating the free flow of information.

statute, the sitting judges acting in absolute majority, or the prosecutor. New rules must be adopted by 2/3 of state parties.

94. See Rules of Procedure and Evidence, *supra* note 5. Subdivisions 2 and 3 read:

2. [C]ommunications made in the context of a class of a class of professional or other confidential relationships shall be regarded as privileged, and subsequently not subject to disclosure, unless under the same terms as in sub-rules 1 (a) and 1 (b) [which allows disclosure when the speaker consents, or has voluntarily disclosed the content of the communication to a third party] 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.
3. In making a decision under sub-rule 2, the Court shall give particular regard to recognizing as privileged those communications made in the context of the professional relationship between a person and his or her medical doctor, psychiatrist, psychologist or counselor, in particular those related to or involving victims, or between persons and a member of a religious clergy; and in the latter case, the Court shall recognize as privileged those communications made in the context of a sacred confession where it is an integral part of the practice of that religion.

A. Step 1: Articulate the Policy

The first step in codifying an amended Rule 73 is for the ICC to clarify the policy reasons for recognizing a testimonial privilege for journalists working in conflict areas. The value of journalism in facilitating the free exchange of ideas and information has been discussed in international law at length by the ICTY in the *Brdjanin* case and by the ECHR in the *Goodwin* case. The value in the privilege is not to serve as a personal "benefit" to journalists or a "shield" to protect their sources from prosecution, but rather to foster and protect journalistic independence and the process of gathering news.

B. Step 2: Define who is to Benefit from the Rule

In amending Rule 73 to include a codified protection for journalists, the ICC must clearly define who is to be covered by the privilege. In so doing, it should expand on the functional approach used by the ICTY in *Brdjanin*. Although the *Brdjanin* approach provides a basis for an amended Rule 73, its definition of who is covered by the provision is too narrow. In *Brdjanin*, the ICTY specifically narrowed its holding to "war correspondents," which it described as "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."⁹⁵ There are several problems with this definition. First, "war correspondent" is a term of art under international humanitarian law,⁹⁶ referring specifically to a journalist working under the specific authorization of a party to an armed conflict. To avoid confusion and under-inclusiveness, the ICC should make clear that this rule applies to journalists working not only under approval of one of the parties to the armed conflict, but those who are reporting independently. This would be done by explaining that the law applies to "war correspondents" as used in both Article 4(A)(4) of the Third Geneva Convention and Article 79 of Protocol I.

A second problem with the definition adopted by the ICTY in *Brdjanin* is that it is directed at individuals who "report, or investigate for the purpose of reporting." This logically suggests that a journalist is included for protection so long as their work is reported, and it could be interpreted as

95. *Brdjanin* Appeals Chamber Opinion, *supra* note 1, ¶ 29.

96. See Convention (No. III) Relative to the Treatment of Prisoners of War, *supra* note 38.

excluding journalists such as freelancers and book authors, who may be working without a contract for their work and have no guarantee that their labors will eventually result in any reported news. For the amended Rule 73, the ICC should make clear that protection will be extended to any individual working as a journalist for gain or livelihood and is collecting news “intended” for use by a news outlet or in publication. If necessary, the court can hold an evidentiary hearing on whether the individual claiming the privilege qualifies and may consider factors such as the individual’s previous published works and efforts to secure publication of the work now under dispute.

In addition to the above expansion of the *Brdjanin* holding, the proposed rule also should include protections for individuals who are assisting or supervising the journalist and are privy to the information obtained during their work. This group would include editors who supervise the reporter, as well as translators and other support staff who facilitate the collection of news. If these individuals are not included, a party easily could bypass the protections extended to the journalist.

C. Step 3: Define the Scope of the Privilege

The ICC should be clear that the journalistic testimonial privilege extends not only to confidential communications between a journalist and their source, but also to non-confidential communications that are part of a journalist’s everyday work. The rule should make clear that it is not the information itself that is being protected, but a policy goal to protect the journalist from being viewed as an agent of the court, the prosecution, or the defense.

D. Step 4: Establish a Pre-Trial Procedure

Before the court is faced with potentially having to order a reporter to testify, there should be mandatory consultations between the court, the journalist (and her employer where applicable), and the party seeking the disclosure (prosecution or defense). In these consultations, every effort should be made to determine whether the matter can be resolved by some cooperative means or by obtaining the information from another source.

E. Step 5: Apply a Three-Part Balancing Test

In *Brdjanin*, the ICTY set out a two-part test for whether a reporter should be compelled to testify. First, the prosecution must demonstrate that the information is of “direct and important value in a core issue of the case” and second, that the information “cannot reasonably be obtained

elsewhere.” Under the amended Rule 73, the ICC should require that the information sought also be of “essential or vital” importance to the guilt or innocence of the defendant. This wording adds necessary precision to the first prong of the ICTY test. To say that something is “direct and important to a core issue” is so ambiguous as to allow virtually anything proffered by the prosecution or defense to be compelled.

In addition, the *Brdjanin* test should be revised to add that the requesting party must demonstrate that the information cannot be obtained from any other source. To require only a showing that the information cannot “reasonably” be obtained elsewhere is again too lenient, particularly since the ICTY gave no indication of what kind of efforts it would deem reasonable. To require a reluctant journalist and a requesting party to quibble over whether other “reasonable” efforts could be made to secure the information elsewhere also is not an efficient way to resolve the problem. The requesting party must be required to demonstrate to the court that the information it seeks can be obtained from one person alone—the journalist. Conversely, defendants would be allowed to argue that the information is essential or vital to their innocence or guilt, protecting their right to a fair trial, and insuring all relevant information to their defense is introduced at trial.

Finally, the new third prong of the amended Rule 73 test should be that the court consider the risks to the journalist, as well as other reporters working in the region, if the journalist is forced to testify. The court would be required to make a finding of whether, in light of the risks to the journalist, he or she should be compelled to take the stand in the interest of justice.

VII. CONCLUSION

The job of a journalist is to bear witness—to be the eyes of the public. There are few times when this work is more important than in times of armed conflict. News coverage—from the film footage of Serbian concentration camps, to newspaper stories of massacres in Rwanda, to investigative reports on prisoner mistreatment in Iraqi prisons—has led to changes in countries' foreign policies, interventions on behalf of oppressed peoples, and the investigation and prosecution of war crimes. Certainly most journalism is not so heroic, yet the profession's value in ensuring the world learns about events that might otherwise go unnoticed is clear. Journalists are best able to fulfill the important role of witness when they are able to move among and talk freely to all

parties to a conflict. To do so, they must work outside of the control of any government, international organization, or party to a conflict. This should mean that journalists cannot be compelled to testify before international criminal tribunals except in extraordinary circumstances. Consequently, the ICC should amend its rules of procedure to protect the important role that is played in bearing witness by clearly establishing a testimonial privilege for journalists.