A CRITICAL ANALYSIS OF ONE ASPECT OF *RANDAL*[1] IN LIGHT OF INTERNATIONAL EUROPEAN AND AMERICAN HUMAN RIGHTS CONVENTIONS AND CASE LAW

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INTRODUCTION

On December 11, 2002, an ICTY[2] Appeals Chamber ("Appeals Chamber")[3] decided a unique issue – procedurally, an interlocutory appeal[4] -- having to do with a topic of great import to both the international human rights and the international humanitarian law communities.

The issue in *Randal* – whether the testimony of a journalist[5] could be compelled by subpoena in an international criminal trial, and, if so, under what circumstances and under what legal standard, or, as the Appeals Chambers worded it, "whether this International Tribunal should recognize a qualified testimonial privilege for *war correspondents*, and, if so, whether the privilege requires the quashing of the subpoena"

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[1] See 11 December 2002 Decision on Interlocutory Appeal, filed by Jonathan Randal, in *Prosecutor v. Brdjanin and Talic,* Case No. IT-99-36-AR73.9 (ICTY).

[2] International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia.

[3] The following constituted the panel which decided the case: The Hon. Claude Jorda, President of the Appeals Chamber; The Hon. Mohamed Shahabuddeen; The Hon. Mehmet Guney; The Hon. Asoka deZ. Gunawardana; and The Hon. Theodor Meron.

[4] The appeal was brought pursuant to ICTY Rule 73 which provides for discretionary interlocutory appeals if a trial chamber, upon motion, certifies that its "decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which…an immediate resolution by the Appeals Chamber may materially advance the proceedings." ICTY Rule 73 (B). The Rule 73(B) certification was made in June 2002. In October 2002 the issue was argued before the Appeals Chamber which rendered its decision in December 2002. The trial of Brdjanin and Talic began in January 2002. In September 2002 Talic's case was severed due to a "medical condition" of that defendant. As of March 14, 2003, the OTP was in its thirty-fourth week of trial in its case against Brdjanin.

[5] "Journalist," which is not defined in international conventions, may be "defined as (a) a person who, on a regular or on a temporary basis, creates media news coverage, i.e, a correspondent, a photographer, a camera operator, or a media technician, whose job consists in working with words, images or sound destined for the printed press, radio, film, or television; or (b) a person whose regular occupation is the professional assistance of persons belonging to category (a) above." Mukherjee, Amit, "International Protection of Journalists: Problem, Practice and Prospects," 11 Ariz. J. Int'l & Comp. Law 339 (Fall 1994), at note 1. See also, *infra*, at 26.

[emphasis added][6] -- initially arose in pre-trial proceedings in *The Prosecutor v. Brdjanin and Talic.*[7] Ultimately, the question presented was decided in the "war correspondent's" favor.

It is the view of this writer that the *Randal* court made the correct practical decision in reversing[8] the Trial Chambers' Order to compel the appearance and trial testimony of the *Washington Post* journalist, Jonathan Randal.[9] In doing so, however, the court seems to have unnecessarily missed the international human rights/free expression policy boat.[10] And although it did not need to do so, it failed as well to buttress with any international norms its limiting the journalistic qualified privilege standard it did develop to the narrow category of "war correspondent." In other words, the end destination was right in that this particular journalist was not, in the end, compelled to testify, but for the first time in international law litigation, civil or criminal, the Appeals Chamber chiseled from the internationally generic and generally recognized term "journalist" a discrete category of reporter, that of "war correspondent." As a consequence, there is concern that international courts which may be presented with a similar legal issue in the future may view *Randal's* standard in such a way as to give to war correspondents heightened compelled testimony protections, and to other types of journalists, lesser ones.

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[6] *The Prosecutor v. Brdjanin and Talic,* **Decision on Interlocutory Appeal**, Case No. IT-99-36-AR73.9, para. 2 ("AC Decision").
[7] Case No. IT-99-36, Trial Chambers ("TC Decision"): 21 January 2002 Tr. 651-657; 28 January Tr. 926-927.
[8] AC Decision, para. 56.2 and 56.3.
[9] TC Decision, **IV. Disposition.**
[10] Particularly because this was a case of first impression, policy ought to have been addressed at the outset to give the decision foundational support. In ruling so narrowly, however, on only the facts before it, Appeals Chambers apparently agreed with the Office of the Prosecutor [OTP] which urged the court to reject Randal's argument that the issue he had raised should in fact be decided from a broader perspective: "Although that might be of great interest to academics, lawyers and judges," the OTP argued, Randal's case should be decided only on the factual merits of his case. OTP Response to Written Submissions in Support of Motion to Appeal Trial Chambers Decision on [Randal's] Motion to Set Aside Confidential Subpoena, at para. 2.

War correspondents face grave physical dangers when working in armed conflict environments, dangers which occur, quite obviously, with significantly greater proportionate frequency than those which occur in other venues, so an argument could be made that war correspondents therefore deserve more heightened privilege protections than other types of reporters. Journalists who work elsewhere, however, face dangers nonetheless.[11] In the Inter-American Human Rights Court case of Iver Bronstein,[12] for example, Mr. Bronstein, a naturalized Peruvian citizen, was the majority shareholder in a TV station. One of the station's more popular programs was "Contrapunto" ["Counterpoint"], which, as its name suggests, aired programs created as a result of aggressive, politically-focused investigative journalism. Many programs were antagonistic to the interests of the Fujimoro government and to Peru's military establishment and drug traffickers. Because Mr. Bronstein refused to shut down the program altogether or to change programmatic and editorial content, the government engaged in intimidating actions against him, against his family, and against journalist employees. Among other tactics used, these actions included the revocation of Mr. Bronstein's citizenship, and orchestrating the collapse of his majority ownership status in the station. Holding that Peru's actions were in violation of Article 13 of the American Convention on Human Rights, and that the government's tactics constituted an "indirect

[11] See, for example, Dylan Howard, "Remaking the Pen Mightier Than the Sword: An Evaluation of the Growing Need for the International Protection of Journalists," 30 Ga. J. Int'l. & Comp. L 505 (2002), at 509, n. 1.

[12] *Ivcher Bronstein Case*, I/ACHR, 6 February 2000. See also, IACHR, Annual Report 1994, "Report on the Compatibility of "desacato laws" with the American Convention on Human Rights, OEA/Ser. L/II.88, Doc. 9 Rev (1995). And at para. 11, the Preamble, Inter-American Declaration of Principles on Freedom of Expression, states: "Public officials are subject to greater scrutiny by society. Laws that [criminally] penalize offensive expressions directed at public officials, generally known as 'desacato laws,' restrict freedom of expression and the right to information."

means of restricting his freedom of expression,…"[13] the Inter-American Human Rights Court, taking a policy perspective, held that not a particular kind of journalist but rather journalists as a whole "should enjoy the necessary protection and independence to exercise their functions comprehensively because it is they who keep society informed...."[14] Therein lies what the *Randal* court ignored, but did not have to: that journalists keep the wheels of free expression, and access to and the exchange of information and ideas, moving, and to risk prioritizing one kind of journalist from the other is to risk prioritizing in importance information and ideas themselves.

According to the "Death Watch List" of the International Press Institute, in the years 2000, 2001, and 2002, for example, fifty-six, fifty-five, and fifty-four journalists, respectively, including war correspondents, were killed, many during armed conflicts of some nature, [15] but parenthetically, limiting the journalistic privilege standard to war correspondents, as the Appeals Chamber did, immediately raises another question: what kind of "armed conflict" – international; internal; drug "wars" which take on international flavors such as that in Columbia where paramilitary and U.S. forces are involved; underworld "business" related conflicts, some of which cross international boundaries; terrorist attacks[16] – must be present, and to what degree, for a journalist who is reporting

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[13] *Id.,* para. 162.
[14] *Id.,* paras. 143-164.
[15] For additional statistics regarding the death, injury and disappearance of journalists, see Mukherjee, Amit, "International Protection of Journalists: Problem, Practice and Prospects," 11 Ariz. J. Int'l. & Comp. Law 339 (Fall 1994), at 341-342.

In the first three days of the 2003 U.S./U.K.-Iraq war, four journalists were reported either as having been killed or as missing in action.

[16] As to terrorist attacks, see, for example, Inter-American Commission on Human Rights, "Report on Terrorism and Human Rights," Sec. I.B., *Terrorism in the Context of International Law,* paras. 12-14 ("…[T]errorist attacks such as those occurring on September 11, 2002…suggest that assumptions regarding the characteristics of modern terrorism must be re-evaluated…[and]…these new manifestations of terrorist violence may lead to future developments in international law….").

on or near the scene to be considered a "war correspondent" within the meaning of *Randal*?[17]

Irrespective of how "war" or "armed conflict" is defined, for purposes of setting an international journalist privilege standard it is the thesis here that the conditions under which a journalist's work takes place or which reflect the kind of reporting in which he or she may be engaged ought to be considered as part of the factual circumstances of the case which get filtered through the balancing of interests at stake rather than being the hub of the wheel from which the standard is measured.

Looked at from another side of the coin, does *Randal* run the risk that an international court not trying war crimes, or trying war crimes but compelling testimony of a journalist who does not happen to be a "war correspondent," however "war" is defined, will set the qualified privilege bar lower than the one set for war crimes tribunal-subpoenaed "war correspondents." [18] If it does, this would be a stark departure from well-established international norms and customs which have at least tacitly considered all types of media[19] and the work of all "journalists"[20] as being equal to each other, respectively, within the framework of the fundamental right of free expression. Consequently, unless it is nipped in the bud, the *Randal* standard, insofar as it may be viewed as being applicable to "war correspondents" only, may have profound

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[17] What factors must be present to be considered an "armed conflict," international or otherwise, and related questions, will not be addressed in this article.

[18] In its 22 October 2002 Report on Terrorism and Human Rights, the Inter-American Commission on Human Rights voiced concern that "[a]mong the restrictions of freedom of expression that states are likely to impose in the context of fighting terrorism are…limitations on the right of journalists to protect their sources in order to assist law enforcement efforts…." *Id.,*para. 311.

[19] See, e.g., Article 19, Universal Declaration of Human Rights (December 1948); Article 19, International Covenant on Civil and Political Rights (March 1976).

[20] See, e.g., Council of Europe's Explanatory Memorandum to Recommendation No. R (2000) 7 on Mass Media Policy, where at para. II.10, "the protection of the confidentiality of sources of information is limited to 'journalists.'"

implications in regard to international freedom of expression cases down the road, regardless of whether subsequent cases arise in the context of international human rights or humanitarian cases.[21]

The intent of this article is to critically examine in light of existing international European and Inter-American conventions[22] and of three relevant cases *Randal's* deliberate application of its otherwise reasonable qualified privilege standard to "war correspondents" only. In so doing, it is the hope that what is addressed here will enlighten future international courts, civil and criminal, *ad hoc* and permanent, when they confront a similar journalist privilege question, and that such courts will consider that all journalists, no matter what their "beat," are essential to preserving freedom of expression in particular and to ensuring the stability and preservation of international human rights in general.

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[21] The interdependence and interplay of international human rights and international humanitarian law is evident in such cases as *Abella v. Argentina,* Case No. 11.137, Report No. 5/97, Annual Report of the IACHR 1997, paras. 157-166 and *Coard et al,v.United States,* Case No. 10.951, Report No. 109/99, Annual Report of the IACHR 1999, paras. 39-44. See also, for example, Inter-American Commission on Human Rights, "Report on Terrorism and Human Rights," 22 October 2002, Executive Summary, para. 29: "Also included in the Commission's analysis is the right to freedom of expression which exhibits a lesser degree of convergence between international human rights and humanitarian law, but which nevertheless prescribes fundamental controls upon states' counter-terrorism initiatives…."

[22] Free expression guarantees are also contained in Article 9 of the African Charter on Human and Peoples' Rights. The African Charter was adopted in June 1981. It entered into force in October 1986. In 1998 the OAU of Heads of State adopted the Protocol establishing a Human Rights Court, but, to date, this Court has not reached the stage of hearing cases. At least in part this may be because the reconciliatory approach as opposed to the adjudication system has not lost its appeal to African leaders. Yemi Akinseye-George, "Africa at the Crossroads: Current themes in African Law: VI, Conflict Resolution in Africa: New Trends in African Human Rights Law: Prospects for an African Court of Human Rights," 10 U. Miami Int'l. & Comp. L. Rev. 159, 175, 2001/2001. The importance of freedom of expression on the African Continent, however, is reflected in the October 2002 Declaration of Principles on Freedom of Expression in Africa, drawn up at the 32nd Session of the African Commission on Human and Peoples' Rights. Article I, *The Guarantee of Freedom of Expression*, states in para. 1: "Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy."

I. THE UNDERLYING INDICTMENT[23]

The Facts - In November 1990, in what had become Bosnia-Herzegovina[24] which was still at that time part of Yugoslavia, democratic elections took place between primarily three factional political parties: the Party of Democratic Action which was made up of the majority Bosnian-Muslims; the Serbian Democratic Party which was made up of Serbs and which constituted the Serbian national party; and the Croatian Democratic Union which was the Croatian national party. By the following summer, in June 1992, Slovenia and Croatia declared independence from Yugoslavia and fighting broke out, respectively, and eventually successfully by the end of that year, between these two new states and the Yugoslav People's Army.

In Spring 1991, when the Serbian national party ("SDS") realized it would not be able to dominate Bosnia-Herzegovina democratically, it began to organize and set up several regional governing associations[25] in discreet areas. One of these separate entities, all of which were, politically, uniquely[26] dominated by Serbs, was centered within the Banja Luka region inside of Bosnia-Herzegovina. Later, in the Fall of that year, the associations, including the one centered in Banja Luka, became more formal, centralized

[23] When the free expression issue was first raised at the beginning of 2002, the Office of the Prosecutor ("OTP") had recently charged Brdjanin and his co-defendant, Momir Talic, in a "Corrected" Version of a Fourth Amended Indictment, and that Indictment was pending when the Trial Chamber issued its decision on the free expression issue in June 2002. By December 2002, when the Appeals Chamber issued its decision and Order on the interlocutory appeal of the issue, the OTP had filed in October 2002 a Fifth Amended Indictment only as to Brdjanin. The facts alleged in both Indictments, and the Counts charged, are fundamentally the same from start to finish, Indictment to Indictment. Therefore, for the sake of clarity and expedience, reference here will be made only to the Fifth Amended Indictment. It should also be noted that this free expression issue first arose in pre-trial proceedings and it continued to be a question after the start of trial in January 2002 and until final resolution of the journalistic privilege issue in December 2002. See *OTP v. Brdjanin and Talic,* Case No. IT-99-36-AR73.9, 11 December 2002, paras. 1, 4, 5, 6, 7.

[24] How the break-up of the former Yugoslavia and the formation of independent States occurred is beyond the scope of this paper.

[25] These structures were organized "through the concept of 'Associations of Municipalities' which existed under the 1974 Yugoslav constitutional regime." Fifth Amended Indictment, *OTP v. Brdjanin*, Case No. IT-99-36-T, para. 2.

[26] Ethnically, Serbs were in the minority in Bosnia-Herzogovenia as a whole.

"Serbian Autonomous Districts." The one centered in Banja Luka was known as "ARK."[27]

In October 1991, a separate Serbian legislature was established within Bosnia-Herzegovina, one that politically was controlled by the SDS,[28] and in early 1992, by proclamation, the new Assembly declared that the Serbian territory within Bosnia-Herzegovina, officially called the Serbian Republic of Bosnia-Herzegovina, was part of what remained of the Yugoslav republic. By summer, that official name was changed to Republika Srpska.[29]

The creation of Republika Srpska did not come without enormous cost to the majority Muslim and Croat populations who were unlucky enough to live in the Serbian regions of Bosnia-Herzegovina. Using tactics reminiscent of 1930's anti-Semetic German propaganda,[30] the SDS leadership composed and disseminated information which was geared to softening up and manipulating the Serb population into thinking that because the Muslims and Croats among them, their literal neighbors, were a threat to their very existence, it was necessary that Bosnian Serb officials pre-emptively "cleanse" Muslims and Croats from the areas.

By the end of the year and into 1992, all levels of republic, regional and municipal Bosnian Serb leadership, primarily affiliated with the SDS party, issued edicts and were able to takeover and control the municipalities with military, paramilitary and

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[27] Not quite half of the sixteen municipalities that made up the Autonomous Region of Krajina, "ARK," had a minority Serb population. Fifth Amended Indictment, *OTP v. Brdjanin,* Case No. IT-99-36-T, para. 4.

[28] *Id.,* para. 5.

[29] *Id.*

[30] See, e.g., *Judicial Decisions, International Military Tribunal (Nuremberg), Judgement and Sentences (October 1, 1946)* , 41 Amer. J. Intl. L., No. 1 (1947), at 293-296 (defendant Julius Streicher). See also, Telford Taylor, "The Anatomoy of the Nuremberg Trials," (New York 1992); Randall Bytwerk, "Julius Streicher: the Man Who Persuaded a Nation to Hate Jews," (New York 1983).

civilian police forces, and they simultaneously lulled and activated civilian cooperation. Organizationally, this leadership included regional and municipal "Crisis," or "War," Staff which served the same function in Republika Srpska that it had on the national Yugoslav level: to take over the executive functioning of government when the country was at war or was in some other state of emergency. [31]

In early May 1992, Radoslav Brdjanin became President of the ARK Crisis Staff.[32] Through a series of declarations and orders, the ARK Crisis Staff became ARK's "highest organ of authority,"[33] took over the media, and continued the propaganda that was critical to the ethnic cleansing of Muslims and Croats from the area. During that ominous month of May the Yugoslav Army which was still in the area came under the command of and metamorphed into the Bosnian-Herzegovina Serbian Republic's Army although, according to the Indictment, that Army "retained strong links to" the Yugoslav Army.[34] Brdjanin, as President of the ARK Crisis Staff,[35] actively participated in making the ARK region a part of the national Serbian state within Bosnia-Herzegovina. As part of his policy implementation duties, he allegedly[36] helped to orchestrate the "cleansing," a catch-all euphemism for killings, torture and forced deportation, of Muslims and Croats from the area, deliberately destroying in that process their respective centuries-old cultures.

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[31] Fifth Amended Indictment, *OTP v. Brdjanin*, Case No. IT-99-36-T, paras. 7, 8.

[32] Brdjanin's original co-defendant, Momir Talic, was a member of the ARK Crisis Staff. *Id.,* para. 10.
[33] *Id.*
[34] *Id.*
[35] *Id.* at 13. Talic had become commander of the ARK regional corps, but it is Brdjanin who is of interest here because it was he with whom Randal spoke during his news gathering duties, and it was Brdjanin's reported admissions that became the pre-trial focus of the OTP.
[36] See note 4, *supra*..

The Criminal Charges –Brdjanin was charged individually and as a superior[37] in each Count of the amended twelve count Indictment in regard to events that occurred in 1992. Substantively, he was charged with:

(a) Genocide and Complicity to Commit Genocide[38]for establishing military and civilian "camps" and "detention facilities" and rounding up and marching non-combatant Muslim and Croat civilians to these places, some killed and tortured along the way, where many of those who survived the marches were killed and otherwise mistreated so that serious physical and mental harm resulted. The Genocide charges also encompassed Brdjanin's individual and superior authority in maintaining such inhumane and brutal conditions in these concentration camps that their establishment and maintenance were also deemed under the Indictment to be deliberately calculated to bring about the physical destruction of the Muslim and Croat populations, as such, in the region;[39]

(b) Crimes Against Humanity[40] for (1) persecutions, (2) exterminations, (3) torture, (4) deportations, and (5) inhumane acts [forcible transfer] of Muslims and Croats on political, racial or religious grounds;[41]

(c) Grave Breaches of the 1949 Geneva Conventions[42] for (1) willful killings, (2) torture, and (3) unlawful, wanton destruction and appropriation of Muslim and Croat property not justified by military necessity. These charges also alleged acts bent on destroying

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[37] Article 7(1), ICTY Statute: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5…shall be individually responsible for the crime." Article 7(3), ICTY Statute: "The fact that any of the acts referred to in articles 2 to 5…was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators…."

[38] Articles 4(3)(a) and 4(3)(e), ICTY Statute.

[39] Counts 1 and 2, Fifth Amended Indictment.

[40] Articles 5(h) and 5(b), ICTY Statute.

[41] Counts 3, 4, 6, 8, and 9, Fifth Amended Indictment.

[42] Articles 2(a), 2(b), and 2(d), ICTY Statute.

Muslims and Croats themselves as part of an extermination campaign in the regions in which they had lived, in camps and during forcible transfers, and as part of a campaign of terror designed to drive them from their homes;[43]

(d) War Crimes[44] for the systematic and wanton destruction and looting of Muslim and Croat property, including that of religious institutions and sacred sites.[45]

I. THE *RANDAL* SUBPOENA

In January 2002, during pre-trial proceedings, the OTP noted that it planned to introduce as evidence a 1993 newspaper article.[46] The article had been written by Jonathan Randal, a reporter employed by the Washington Post. It was based on an interview Randal had conducted with Brdjanin in 1993[47] with the assistance of a Serb-speaking newsman who had acted as translator.[48] The article, and a statement Randal made to the OTP during its pre-trial investigation,[49] attributed to Brdjanin inculpatory statements about what had happened to non-Serbs in the Banja Luka area in 1992.[50] Counsel to Brdjanin objected to the article's being introduced without opportunity for cross-examination, and thus was raised for the first time in this *ad hoc* international

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[43] Counts 5 and 7, Fifth Amended Indictment.

[44] Articles 3(b) and 3(d), ICTY Statute.

[45] Counts 11 and 12, Fifth Amended Indictment.

[46] *OTP v. Brdjanin,,* Case No. IT-99-36, January 21, 2002 Tr. 651-657.

[47] Appeals Chamber 11 December 2002 Decision on Interlocutory Appeal, para. 3.

[48] *OTP v. Brdjanin,,* Case No. IT-99-36, 26 February 2002 Tr. 2283-2284. As urged by Brdjanin in Trial Chambers, the OTP acknowledged that the in-court testimony of the translator would provide the "best evidence" and that he, and not Randal, should therefore be the one to testify, but, according to the OTP, the translator, like Randal, "refused to testify" despite its persuasive efforts. *Id Tr. 2285.* None of the briefs to which this writer had access and that were filed in any of the proceedings by the parties, including Amici's, state why "translator X" was not strenuously pressed by the OTP into testifying as Randal had been. The failure of the OTP to subpoena the translator remains, therefore, a mystery.

[49] *Id., 2*1 January 2002 Tr. 651.

[50] According to the OTP, the statements attributed to Brdjanin showed his intent to engage in ethnic cleansing. 7 June 2002 TC Decision on [Randal's] Motion To Set Aside Confidential Subpoena, para. 4; see also *Prosecutor v. Brdjanin and Tadic,*Case No. IT-99-36-AR73.9*,* [Randal's] Written Submissions in Support of Motion To Appeal Trial Chambers Decision on [Randal] Motion To Set Aside Confidential Subpoena to Give Evidence, 3 July 2002, para. 15.

criminal tribunal, or in any international criminal tribunal, a classic clash between fair trial and free expression rights.[51] Accordingly, upon the OTP's filing a summons for Randal's appearance,[52] Trial Chambers issued the following day a "confidential" subpoena for Randal's appearance in court,[53] and hearings on the issue ensued a month later.[54] At their conclusion, Trial Chambers directed Randal to appear and give testimony, having decided that his Washington Post article was "pertinent"[55] and that it was therefore admissible. In rendering its opinion and despite its ultimate decision, Trial Chambers considered the import of protecting journalists and their sources, [56] but the journalistic "source" in this case, of course, was not "confidential,"[57] a fact which became the very centerpiece of Trial Chambers' rationale. Rather, as all were aware, the source was the defendant himself, and, therefore, in Trial Chambers' view, any journalistic privilege played second fiddle to the right of the defendant to cross examine Randal.

In May 2002, after Trial Chambers rendered its oral decision to compel

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[51] *OTP v. Brdjanin,,* Case No. IT-99-36, 21 January 2002 Tr. 653-654; 28 January 2002 Tr. 926-927. Art. 21 of the ICTY Statute provides for fair trial rights of the accused; the sole testimonial privilege recognized by the Rules of thatTribunal is that of attorney and client. See ICTY Rule 97. As to the right of freedom of expression, see, e.g., Article 19, Universal Declaration of Human Rights (1948); Article 10, European Convention on Human Rights and Fundamental Freedoms (1950); Article 13, American Convention on Human Rights (1969); Article 4, American Declaration of the Rights and Duties of Man (1948). As to fair trial rights, see, e.g., Article 11, Universal Declaration of Human Rights (1948); Article 6, European Convention on Human Rights and Fundamental Freedoms (1950); Article 8, American Convention on Human Rights (1969); Article 18, American Declaration of the Rights and Duties of Man (1948).
[52] *Id*.,, 28 January 2002 Tr. 927.
[53] The subpoena was issued pursuant to ICTY Rule 54. Appeals Chamber 11 December 2002 Decision on Interlocutory Appeal, para. 2.
[54] Appeals Chamber 11 December 2002 Decision on Interlocutory Appeal ("AC Decision"), para. 5.
[55] AC Decision, para. II (a).
[56] 7 June 2002 TC Decision on [Randal's] Motion To Set Aside Confidential Subpoena, para. 5.
[57]Appeals Chamber 11 December 2002 Decision on Interlocutory Appeal, para. 5. See also, e.g., Appendix, Principle1, Right of Non-disclosure of Journalists, Recommendation No. R (2000) 7, Committee of Ministers, Council of Europe (adopted March 2000): "Domestic law and practice in member states should provide for explicit and clear protection of the right of journalists not to disclose information identifying a source in accordance with Article 10, [European] Convention for the Protection of Human Rights and Fundamental Freedoms…."

Randal's appearance, Randal filed a Motion to Set Aside the Confidential Subpoena.[58] The OTP responded, and a day later Trial Chambers heard oral argument. On 7 June 2002 it dismissed Randal's Motion, determining, in essence, that there was no qualified testimonial privilege for journalists "when no issue of protecting confidential sources was involved."[59] Moreover, Trial Chambers held that under circumstances where the material was already published and when the source was already known, a "pertinency" standard was sufficient for compelling testimony. Accordingly, it ruled that the news article was admissible,[60] and that Randal must testify if called by the defense. Randal appealed the decision and order,[61] oral argument was heard in October 2002, and the Appeals Chamber issued its opinion two months later.

II. APPELLATE ARGUMENTS OF PARTIES[62]

Randal - Claiming that Trial Chambers erred when it failed to recognize a qualified privilege for journalists, Randal, the interlocutory appellant, urged Appeals Chamber to adopt a five-part test for determining under what circumstances testimony ought to be compelled from a journalist: (1) is the testimony of "crucial importance" to the issue of guilt or innocence? (2) can the evidence be alternatively obtained? (3) will a journalistic breach of confidentiality occur if the testimony is compelled? (4) will compelling the testimony place the journalist and/or her/his family in danger? (5) will

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[58] Randal argued that the journalist's qualified privilege is recognized by Article 79, Protocol I to the1949 Geneva Conventions; by Article 10, European Convention on Human Rights; by ICC Rules; by the holding in *Goodwin v. United Kingdom, (1996) 22 EHRR 123; inter alia.* AC Decision, para. 13.

[59] *OTP v. Brdjanin and Talic,* AC Decision on Interlocutory Appeal, 11 December 2002, para. 5.

[60] *Id.*

[61] Randal's request that the decision be certified for interlocutory appeal was immediately granted by Trial Chambers, pursuant to ICTY Rule 73(b).

[62] In August 2002, the Appeals Chamber granted over 30 media organizations and journalist associations leave to file an amicus brief.

compelling the testimony in an instant case serve as precedent in future cases that may place other journalists "reporting from that conflict zone"[63] in danger?

Amici - Arguing both broad policy and the pragmatics of reporting, *amici* hit the "confidentiality" nail squarely on the head: a qualified privilege should be adopted for journalists regardless of whether a source is confidential or not, because to do otherwise would chill the mutual relationship of source and reporter which, in turn, would severely interfere in the crucial and fundamental interest of informing the public.[64] *Amici* also urged a "less demanding"[65] standard than that proposed by Randal. That standard more or less coincides with his first two criteria: (1) is the testimony "essential," that is, is it "critical" to determining guilt or innocence? (2) can the testimony alternatively be obtained?[66]

OTP – The OTP urged Appeals Chamber to affirm Trial Chambers' decision to not create a "precise" journalistic privilege[67] where the source is not confidential. To do otherwise, the OTP argued, would run the risk of excluding "essential" evidence against a defendant and impinge on a defendant's fair trial rights.[68] It argued, in other words, that international courts should balance the interests of the competing parties: the journalists; the State vis a vis "the international community, and the victims…";[69] and the defendant. Finally, the OTP urged that because Randal's article and testimony were "essential" in

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[63] AC decision, para. 15. Unlike Amici's submission, Randal's arguments were tied to his particular factual situation: he was a war correspondent reporting in a "combat zone." See, e.g., *Prosecutor v. Brdjanin and Tadic,*Case No. IT-99-36-AR73.9, [Randal's] Written Submissions in Support of Motion To Appeal Trial Chambers Decision on [Randal's] Motion to Set Aside Confidential Subpoena To Give Evidence, 3 July 2002, para. 17. However, see also, *infra*, note 76.
[64] "Compelling journalists to testify against their own sources, confidential or otherwise, will make news sources less likely to come forward, less likely to speak freely, and more likely to fear that journalists are acting as possible agents of their future prosecutor." AC Decision, para. 19.
[65] AC Decision, para. 20.
[66] *Id.,* para. 20.
[67] *Id.*, para. 22, 27.
[68] *Id.,* para. 24.
[69] *Id.,* para. 27.

that they directly demonstrated Brdjanin's "intent"[70] to commit international crimes, and because the information was not otherwise available – albeit there existed the newsman-translator[71] -- the balance should tip in this case in favor of compelling Randal's appearance at trial.[72]

IV. APPEALS CHAMBERS' DECISION

Without analysis and with no reference whatever to international conventions, cases, or norms, in seven brief lines Appeals Chamber limited to war correspondents reporting on issues relating to the conflict they were covering[73] the qualified privilege standard that court ultimately developed.[74] Thus, it created in the process an evidentiary situation that has the potential to wreak havoc on future journalists who do not fit into this very narrow category, or on those who may be called upon to testify in international human rights and in other international courts. That is, Appeals Chamber ignored whether distinguishing one type of journalist from others had even tenuous connections to international doctrines and principles as reflected in international declarations or conventions. Instead, constructing its decision on a foundation never before recognized in international human rights jurisprudence, it simply set apart "war correspondents" from the universally-recognized "journalist" and went from there.

In 1992, Randal had been assigned by the Washington Post to report on the war in

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[70] *Id.*
[71] See note 47, *supra*.
[72] AC Decision, para. 27.
[73] "…[T]he case really concerns…war correspondents….[,]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. This decision concerns only this group." AC Decision, para. 29.
[74] "…[I]n order for a Trial Chamber to issue a subpoena to a war correspondent a two-pronged test must be satisfied. First, the petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case. Second, it must demonstrate that the evidence sought cannot reasonably be obtained elsewhere." AC Decision, para. 50.

what was still Yugoslavia, so the circumstances surrounding his journalistic duties of course included reporting from war zones. Accordingly, when in 1993 he interviewed Brdjanin, Randal was in fact a "war correspondent," and no one takes issue with this. But as Appeals Chamber recognized, neither the parties -- the OTP and Randal -- nor *Amici* suggested that "the issue before the Appeals Chamber"[75] should be concerned with anything but "journalists in general."[76] In proposing its standard for a presumptive journalist qualified privilege,[77] *Amici* used the terms "journalist," "war correspondent" and "reporter" very much interchangeably,[78] addressing the matter of reporting or investigating in a war zone as a factual circumstance which is part of the "critical balancing of journalists' rights with the needs of a particular case."[79] Consequently, Amici's suggestion that its proposed standard was to be used when journalists are "subpoenaed to testify in front of a war crimes tribunal…."[80] was simply another circumstance of the *Randal* case. Nevertheless, at the very outset of its "preliminary considerations,"[81] Appeals Chamber determined that "the case really concerns a smaller

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[75] *Id.*
[76] *Id.* As noted, see *supra*, note 63, Randal tied his arguments to the fact that he was a war correspondent, but he did not suggest that any qualified journalist privilege that the court might develop should apply only to journalists who were reporting from combat zones.
[77] *Id.,* paras. 43-44: (1) is the journalist's testimony absolutely essential, that is, "critical to determining guilt or innocence," and (2) can the information be obtained by any other means.
[78] For example, c*f.* paras. 7, 18, 20, 25, 26, 28, *Prosecutor v. Brdjanin and Tadic,*Case No. IT-99-36-AR73.9, Brief *Amici Curiae* On Behalf of Various Media Entities and In Support of Jonathan Randal's Appeal of Trial Chamber's Decision on Motion To Set Aside Confidential Subpoena To Give Evidence.
[79] *Id.*, para. 20. With one exception (see *id.,* para. 22(2), "The Dow Jones Company" ("business and financial news")), none of the thirty-four media entities which joined as *Amici* identified itself in narrow and particular terms. See, e.g., *id..,* paras. 22(1) "The New York Times ('media company"); 22(6)"The Associated Press" ("news cooperative"); 22(15)"The Committee To Protect Journalists;" 22(17)"BBC"("public service broadcaster"); 22(26)"Independent Journalists Association of Serbia"; 22(30) "Reporters Sans Frontieres; 22(24) "Free Media Movement" ("media freedom organization of media professionals in Sri Lanka"); *inter alia*. Some if not all of these entities have journalists on their staff or among their membership who report from combat zones.
[80] *Id.,*para. 43.
[81] AC Decision, section III (a).

group [of journalists], namely, war correspondents."[82] As the following demonstrates, from international human rights and humanitarian law perspectives, there are no international legal bases for this approach to this important free expression question.

V. HUMAN RIGHTS CONVENTIONS

The sole reference made by Appeals Chamber to human rights conventions was in the context not of how the term "journalist" was viewed internationally but rather in the context of discussing whether there was "a public interest in the work of 'war correspondents,'" an important consideration, of course. That is, it was Appeals Chamber's view that the issue before the Tribunal – whether "war correspondents had a qualified testimonial privilege" – was based on "three subsidiary questions,"[83] one of which was whether war correspondents' work served the public.[84] In its discussion of this secondary issue, and in answering in the affirmative,[85] Appeals Chamber found support to its conclusion in Article 19 of the Universal Declaration of Human Rights which states:

> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

This basic principle of international human rights law, Appeals Chamber recognized within the subsidiary question context, was "reproduced in all the main

[82] *Id.,* para. 29.
[83] *Id.,* para. 34.
[84] *Id.* The other two questions, neither of which will be addressed or analyzed here, were whether compelling war correspondents to testify before a tribunal would adversely affect their ability to do their work, and what the appropriate test is to balance the public interest in accommodating the work of war correspondents with the public interest inherent in a fair trial. *Id.*
[85] *Id.,* para. 37.

international human rights instruments,"[86] and the court went on to note that freedom of expression includes the right of "journalists and media organizations…" freely to communicate information.[87] Thus, on the one hand Appeals Chamber wrapped its arms around the notion that the work performed by "any media" and by "journalists" in general do merit fundamental human rights protections, but on the other, it took what appears to have been a myopic approach as to whom its journalist qualified privilege standard should apply.

Had it dwelled even briefly on human rights conventions and cases, if only to inform, Appeals Chamber may have broadened its view in applying an otherwise acceptable standard, albeit not a presumptive one,[88] to the internationally-recognized broad array of persons who gather and disseminate information for the public interest.

A. Universal Declaration of Human Rights:

The struggle to achieve a citizenry right of freedom of information, which was "re-labeled after World War II from freedom of the press,"[89] began in earnest in the 17th century.[90] For example, Article 11 of the 1789 French Declaration of the Rights of Man and The Citizen states:

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[86] *Id.* Included among the noted conventions were Article 10, Convention for the Protection of Human Rights and Fundamental Freedoms (September 1953); Article 19, International Covenant on Civil and Political Rights (March 1976); Article 13, American Convention on Human Rights (July 1978); Article 19, African Charter on Human and Peoples Rights (June 1981).

[87] *Id.* Chambers also recognized that freedom of expression includes the public's right to receive information.

[88] *Prosecutor v. Brdjanin and Tadic,* Case No. IT-99-36-AR73.9, [Randal's] Written Submissions in Support of Motion To Appeal Trial Chamber's Decision on [Randal's] Motion To Set Aside Confidential Subpoena To Give Evidence, 3 July 2003, para. 16.

[89] Eide, Asbjorn (ed.), "The Universal Declaration of Human Rights: A Commentary," (Oxford 1992), at 275.

[90] *Id.* See, e.g., English Bill of Rights (1688); First Amendment to the United States Constitution (1791); Article 11, French Declaration of the Rights of Man and The Citizen (1789).

"The unrestrained communication of thoughts or opinions being one of the most precious rights of man, every citizen may speak, write and publish freely, provided he be responsible for the abuse of this liberty, in case determined by law."[91]

By the end of the 19th century, freedom of the press was almost universally accepted,[92] and so crucial had the free flow of information become to the political process in the early decades of the 20th century that it was no accident that the first "emergency" decree in 1933 issued by Hitler after the dissolution of Germany's Reichstag was to "shut down the presses…"[93] of political parties antagonistic to the Nazis. As early as 1941, in his State of the Union address, President Roosevelt spoke of "the need to protect four essential freedoms,"[94] the first of which was "freedom of speech and expression."[95] Thus, after the war, which "reinforced…[the Universal Declarations' drafters'] beliefs that the cluster of the rights spelled out in Articles 18, 19, 20, and 21…were universally the first ones dictators will seek to deny and destroy,"[96] Article 19[97] of the Universal Declaration of Human Rights was drafted "without any significant [substantive] disagreement."[98]

In early 1945, twenty-one American countries met and determined that they wanted the U.N. Charter itself to contain a Bill of Rights.[99] At the first meeting of the

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91 Eide, Asbjorn (ed.), "The Universal Declaration of Human Rights: A Commentary," (Oxford 1992) at 275.
92 *Id.*
93 Morsink, Johannes, "The Universal Declaration of Human Rights: Origins, Drafting and Intent," (Philadelphia 1999), at 65.
94 *Id.*, at 1.
95 *Id.*
96 *Id.,* at 69. Article 18, Freedom of Thought, Conscience & Religion; Article 19, Freedom of Opinion and Expression; Article 20, Freedom of Peaceful Assembly and Association; Article 21, Right to Participate in Government.
97 Article 19 was originally Article 17. Eide, Asbjorn, et al. (eds.), "Universal Declaration of Human Rights," (Oxford 1992), at 278.
98 Morsink, Johannes, "The Universal Declaration of Human Rights: Origins, Drafting and Intent," (Philadelphia 1999), at 66.
99 *Id.,* at 3.

General Assembly in 1946, Phillipine General Carlos Romulo, himself a "professional newsman and head of a chain of newspapers,"[100] moved, in Resolution 59(1), that freedom of information was a fundamental human right.[101] Instead of having the Charter itself contain the Bill of Rights, however, pursuant to the Charter's Article 62 it was determined that the Economic and Social Council was to make recommendations "for the purpose of promoting…human rights and fundamental freedoms,"[102] and Article 68 mandated the establishment by that Council of a Human Rights Commission to submit drafts for this purpose.[103] Its first Chair was Eleanor Roosevelt.

In June 1947, the Drafting Committee of the Human Rights Commission's Sub-Commission on the Freedom of Information[104] actually adopted two separate Articles on freedom of thought and expression as proposals for the Universal Declaration:[105]

> (1) Everyone is free to express and import opinions, or to receive and seek information and the opinion of others from sources wherever situated; and
> (2) There shall be freedom of expression either by word, in writing, in the press, in books, or by visual, auditory or other means. There shall be equal access to all channels of communication.[106]

These two Articles – and, more particularly, the phrases "from sources wherever situated" and "access to all channels of communication" – constitute "the origin"[107] of

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[100] Eide, Asbjorn, et al. (eds.), "The Universal Declaration of Human Rights: A Commentary," (Oxford 1992), at 276.
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] Tangentially, the sub-Commission on Freedom of Information met in Geneva for a month, in March 1948, to discuss and draft three other information-related conventions: a Convention on "Gathering and International Transmission of News;" a Convention on the "Institution of an International Right of Correction;" and a Convention on "Freedom of Information." The Convention on the "International Right of Correction" is the only one of the three which actually bore fruit and which remains in force. Eide, Anbjorn, et al. (eds.), "The Universal Declaration of Human Rights: A Commentary," (Oxford 1992), at 276.
[105] Morsink, Johannes, "The Universal Declaration of Human Rights: Origins, Drafting and Intent," (Philadelphia 1999), at 67.
[106] *Id.*

what became the final rendition of the Declaration's Article 19's phrase "through any media and regardless of frontiers:"[108]

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[109]

The Human Rights Commission as a whole[110] wended it way through seven drafting stages in all for the actual Declaration, and, on 10 December 1948, the Council recommended to the General Assembly that it "adopt and proclaim the Universal Declaration of Human Rights."[111] The General Assembly did, in an overwhelming vote of 48-0, with 8 abstentions.[112] So important an idea was the right to the free flow of information to the drafters that in addition to its being contained in Article 19, "freedom of speech and belief" is contained in the second paragraph of the Declaration's Preamble itself.[113]

As evidenced by Article 19's plain words, as finally drafted by the Human Rights Commission, the "watch dog"[114] over international human rights, the Commission made no mention of one type of media having or being entitled to greater protections, or being

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[107] *Id.*
[108] *Id.*
[109] Article 19, Universal Declaration of Human Rights.
[110] Commission on Human Rights of the Social and Economic Council, Summary Record of Meetings, 30 April 1946, E/HR/9, at 3: "…[T]he nuclear Commission should not draft a[n international] bill of rights, but …the complete Commission must draft such a bill…."
[111] *Id.*
[112] *Id.,* at 6-8.
[113] *Id.* Article 19, as well as other Articles, must be read in conjunction with the "especially-the-conditions-and-limitations" principle articulated in Article 29…." Eide, Asbjorn, et al. (eds.), "The Universal Declaration of Human Rights: A Commentary," (Oxford 1992), at 278. ("In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." Article 29(2), Universal Declaration of Human Rights).
[114] Commission on Human Rights of the Social and Economic Council, Summary Record of Meetings, 30 April 1946, E/HR/9, at 3.

delineated as being more important, than any other type of media. In fact, Article 19[115] suggests just the opposite: "all media" means what it says, that all media were considered as equals, so it follows, with that as a starting point, that all journalists are also equal, in terms of import of function, as to the type of news they cover and disseminate to the public, and in regard to international judicial protections that may be formulated to enable them to engage in their important work. Thus, it seems reasonable to expect that any court with the issue of journalist protections before it would have referred to this particular international human rights Article and its history before crafting for the first time an international journalist privilege standard. Had the court proceeded in this manner, it may have enunciated a single privilege standard for "journalists" as a whole.

B. The American Convention and Two Free Expression Cases:

Approved by the Ninth International Conference of American States in 1948, the American Declaration of the Rights and Duties of Man contains in Article IV a provision that is similar in wording and meaning to Article 19 of the Universal Declaration. Article IV states:

> "Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever."

Thus, the plain meaning of the provision suggests that "any medium" puts each on the same footing as the next, that all media are equally important to the concept of

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[115] See also Article 19, International Covenant on Civil & Political Rights. The ICCPR was adopted & opened for ratification by U.N. General Assembly Resolution 2200A(XXI) of 16 December 1966. It entered into force on 23 March 1976. Article 19.2, ICCPR states, "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." And see Article 6, Declaration on the Rights & Responsibilities of Individuals, Groups & Organs of Society to Promote & Protect Universally Recognized Human Rights & Fundamental Freedoms, U.N. General Assembly Resolution 53/144, 8 March 1999.

international human rights, and that all who are engaged in working in "any medium whatsoever" should be entitled to identical standards of protections.

The American Declaration, initially viewed as "non-binding,"[116] now constitutes a "source of international obligations for OAS member states…."[117] Indeed, this document -- the first international human rights instrument which was actually adopted seven months prior to the adoption of the Universal Declaration,[118] and simultaneous to twenty-one countries' signing at the Ninth International Conference of American States of 1948 in Bogota[119] the OAS Charter itself , has been described as "an authoritative interpretation of the provisions on fundamental rights in the OAS Charter."[120]

With the American Declaration as a foundation, two facets of human rights protections developed in The Americas. One level consisted of the OAS Charter and its Inter-American Commission on Human Rights which was created in 1959 pursuant to the Charter's Chapter XVI, Article 111, as amended, and which ten years later was given life through Chapter VII of the American Convention on Human Rights.[121] The Charter itself does not specifically address the right of freedom of expression. Rather, the fourth paragraph of its Preamble refers to the creation of "a system of individual liberty and

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[116] Brems, Eva , "Human Rights: Universality and Diversity," (The Hague 2001), at 430-31.
[117] *Id.*
[118] *Id.*
[119] Emermacora, *et al.* (eds.) , "International Human Rights: Documents and Introductory Notes," (Vienna 1993), at 282. The 1948 Ninth International Conference was a continuation of international American hemispheric meetings. The first had been held in 1826 at the Congress of Panama. In 1890, at the First International Conference of American States, the International Union of American Republics was established, and in 1910 the International Union of American Republics was renamed the Pan American Union, the predecessor to the Organization of American States. See http://mwcs.neric.org/clubs/modeloashistory.htm, at 1.
[120] *Id.* See also Inter-American Court of Human Rights, Advisory Opin. OC-10/89, 14 July 1989, "International Legal Materials," 379-390, secs. 43-47.
[121] The American Convention on Human Rights also established the Inter-American Court of Human Rights. See Chapter VIII, American Convention.

social justice based on respect for the essential rights of man.…" Those rights are not defined. [122]

These and other provisions articulated in the Charter, and the processes established by the Inter-American Commission on Human Rights to "monitor…the observance of fundamental rights,"[123] apply to all OAS-member States. On the other hand, the American Convention on Human Rights binds only the States which ratified that Convention.[124]

The American Convention, adopted in 1969,[125] in some ways reflects the Universal Declaration, see, *supra,* and the European Convention on Human Rights, see, *infra,* although the American Convention "contains a more comprehensive list of human rights…."[126] One of those rights is contained in Article 13(1) of the Convention, which is entitled "Freedom of Thought and Expression." It states:

> "Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice."

The egalitarianism reflected in the phrases "…ideas of all kinds," and "through any…medium…." suggests, here, too, that distinguishing one kind of medium from

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[122] Emermacora, *et al.* (eds.), "International Human Rights: Documents and Introductory Notes," (Vienna 1993), at 282. Chapter II [Principles, Article 3(k) of the Charter, as amended by the 1988 Cartegene Protocol], states that the "American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex…."

[123] *Id.*: "In 1965, the Second Special Inter-American Conference authorized the Inter-American Commission to receive and act on individual petitions and in 1970…the Commission became a formal organ of the OAS….The Commission has various functions, such as…country studies and on-site investigations, and to receive and act on individual petitions. In this function the Commission bases its work on the American Declaration of the Rights and Duties of Man, which, though adopted as a non-binding resolution, is today seen as constituting a normative instrument."

[124] "The two systems overlap and often function as one." Emermacora, *et al.* (eds.) , "International Human Rights: Documents and Introductory Notes," (Vienna 1993), at 282.

[125] *Id.* In July 1978 it entered into force, and by 1993, twenty-four States had ratified this Convention.

[126] *Id.*

another for purposes of implementing international human rights protections has no roots internationally. Article 13 also suggests that applying different standards of protections to journalists, depending upon their "beat," likewise lacks any international connections. That this premise is more fact than academic fancy is strongly supported by the holding in the following case, decided in 1985 by the Inter-American Court of Human Rights.

Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29,[127] American Convention on Human Rights), Advisory Opinion OC-5/85, November 13, 1985, Inter-Am. Ct. H.R. (Series A) No. 5 (1985)

In 1985, pursuant to a commitment it had made to the Inter-American Press Association,[128] and the Inter-American Commission on Human Rights having already ruled in its favor,[129] Costa Rica submitted to the Inter-American Court of Human Rights a request for advise as to whether Costa Rica's Law No. 4420[130] was in "conflict or contradiction"[131] with Articles 13 and 29[132] of the American Convention on Human Rights.

Law No. 4420 mandated that in order to "practice journalism in general, and reporting, in particular…"[133] in Costa Rica, a journalist was first required to become a

[127] Article 29 of the American Convention restricts States, inter alia, from interpreting human rights provisions so as to suppress their protections, or from excluding or limiting the effects of these rights.
[128] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29, American Convention on Human Rights)***,** Advisory Opinion OC-5/85, November 13, 1985, Inter-Am. Ct. H.R. (Series A) No. 5 (1985)(hereinafter "Adv. Opin."), para. 1. Although the government of Costa Rica agreed to petition the Court on behalf of the IAPA, the two entities were diametrically opposed as to the substance of the issue raised in this case. Adv. Opin., para. 15.
[129] Resolution No. 17/84, Commission. This paper will not address the American human rights procedures and its policy and political nuances.
[130] Organic Law of the Costa Rican Association of Journalists (September 1969). Adv. Opin., para. 15.
[131] Adv. Opin., para. 11.
[132] Article 29 of the Convention addresses the suppression and restriction of rights and guarantees, *inter alia,* but because Article 13(2) itself addresses circumstances where certain restrictions of free expression are permitted, the Court confined the majority of its discussion of restrictions to 13(2).
[133] Adv. Opin., para. 11.

member of a professional association, of a "colegio."[134] Thus, under Costa Rican law and on pain of prosecution should the law be violated,[135] journalist "functions…[could] only be carried out by duly registered members of the Association."[136] In order to gain membership into the Association, and to engage in journalist functions, a person had to hold a "degree in journalism from the University of Costa Rica or from a comparable university abroad."[137] Moreover, under the law, a "practicing professional journalist" was narrowly defined as being a "person whose principal, regular or paid occupation it is to practice his profession in a daily or periodic publication, or in a radio or television news media, or in a news agency, and for whom such work represents his or her principal source of income.…"[138] Also, Law No. 4420 specifically prohibited "columnists and…commentators" from engaging in any kind of activity but that of writing their columns and comments since they were otherwise restricted from working as "specialized or non-specialized reporters."[139] That is, according to Costa Rica's law, they were not "reporters" or "editors."[140]

In 1983, Stephen Schmidt, a United States citizen and journalist who had been working for a decade in Costa Rica as a reporter for an English language weekly, and as a stringer for Costa Rica's leading daily,[141] and who was not a member of the Costa Rican

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[134] See Michael Perkins, "International Human Rights and the Collegiation of Journalists: The Case of Costa Rica," 4 Comm. L. & Pol'y 59 (Winter 1999), and especially note 2 for a definition of "collegiation," which, the author notes, implies self-regulation and peer review rather than government regulation or licensing.

[135] See the facts of the *Compulsory Membership* case, at 25, *infra*. See also, *Ajun v. Article 22 of the Organic Law of the College of Journalists*, CSJ, Const. Chamber (Costa Rica), No. 2313-95, 9 May 1995, discussed in detail at 31, *infra*.

[136] Adv. Opin., para. 82.

[137] Adv. Opin., para. 82.

[138] Adv. Opin., para. 82..

[139] Adv. Opin. para. 82. See also Michael Perkins, "International Human Rights and the Collegiation of Journalists: The Case of Costa Rica," 4 Comm. L. & Pol'y 59, Winter 1999.

[140] *Id*., at 66.

[141] *Id*., at 71.

colegio for journalists, was convicted[142] for "the illegal exercise of the profession of journalism..."[143] in violation of Law No. 4420 and was sentenced to three months in prison.[144] With support from his editor, from other journalists opposed to the journalist colegio system, and from the Inter-American Press Association,[145] he petitioned the Inter-American Commission for Human Rights, challenging his conviction under Article 13 of the American Convention. Over a strong dissent by one of its members, the Commission held that the law under which Schmidt had been prosecuted was not in violation of Article 13. As noted, *supra,* the case then went to the Inter-American Court.

The primary question presented to the Inter-American Court for Human Rights was whether the compulsory licensing requirement of Law No. 4420 was "compatible" with Article 13 of the American Convention on Human Rights.[146] The Court's answer to this question was two-tiered in that "Article 13 may be violated under two different circumstances….":[147] (1) where the violation by Schmidt of Law No. 4420 resulted in a "denial of free expression;"[148] or (2) under circumstances by which the violation occurred

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[142] *Id*. Schmidt was acquitted by a Costa Rican trial court on grounds that the charges which had been lodged violated Article 19 of the Universal Declaration and Article 13 of the American Convention. His acquittal was reversed by a Costa Rican appeals court which held that all colegios, including those for journalists, were constitutional.
[143] Adv. Opin. para. 15, citing the Commission's Resolution No. 12/84 on Schmidt's international human rights challenge.
[144] *Id.*
[145] Michael Perkins, "International Human Rights and the Collegiation of Journalists: The Case of Costa Rica," 4 Comm. L. & Pol'y 59, Winter 1999, at 72.
[146] Adv. Opin., para. 81. A secondary issue raised concerned the compatibility "between the Convention and the relevant aspects of Law No. 4420." *Id.,* para. 82. Article 29 of the Convention was raised in the petition because it contains "the relevant rules for the interpretation of the Convention…." Adv. Opin., para. 52. The substantive crux of the Court's Advisory Opinion as to restrictions concerns those contained in Article 13(2) itself.
[147] Adv. Opin., para. 53.
[148] Adv..Opin., para. 53.

from the "imposition of [13(2)'s] restrictions that…[were] not authorized or legitimate"[149] under the Convention's Article 13.

The Court examined the first tier by comparing the compulsory licensing of journalists to what it considered to be "extreme violations of expression"[150] such as "prior censorship, the seizing or barring of publications and, generally, any procedure that subjects the expression or dissemination of information to governmental control…."[151] and it held, simply, that the compulsory licensing requirement did not "fall into this category."[152]

It was through its analysis of the second circumstance under which Article 13 could be violated, through restrictions that were broader than authorized under the Convention or which were unauthorized by it altogether, that convinced the Court that the licensing requirement involved impermissible government control over the "right to seek, receive and impart information and ideas…."[153] Significantly, this analysis, alone and in combination with the plain meaning of related Convention and other international treaty terminology crystallizes the notion that "journalism" in the broadest sense of the word, and regardless of the nature of any journalistic specialty, "is the primary and principal manifestation of freedom of expression…"[154] which itself is the "cornerstone upon which the very existence of a democratic society rests…."[155]

In determining under this second tier whether the licensing requirement constituted an internationally unlawful restriction, the American Court of Human Rights

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[149] Adv. Opin., para. 53.
[150] Adv. Opin., para. 54.
[151] Adv. Opin., para. 54.
[152] Adv. Opin., para. 54.
[153] Adv. Opin., para. 55.
[154] Adv. Opin., para. 71.
[155] Adv. Opin., para. 70.

considered whether the law was "based on considerations that are legitimate under [Article 13(2) of] the Convention…."[156] That is, as specifically provided by Article 13(2), were "the ends sought to be achieved…necessary to ensure a) respect for the rights or reputations of others; or b) the protection of national security, public order, or public health or morals…"[157]

Costa Rica's arguments -- that compulsory licensing was the way any profession is organized;[158] that the requirement helps to achieve the legitimate community goal of ensuring professional ethics;[159] and that licensing helps to "guarantee the independence of journalists in relation to their employers"[160] – did not, the Court found, "directly involve…respect for the rights or reputations of others,"[161] or national security protections,[162] or issues of public health or morals.[163] Rather, the Court found, the State's arguments addressed issues of "public order" as a "just demand of the general welfare in a democratic society."[164] Thus, the Court examined Law No. 4420 within this context.

In so doing, the Court defined "general welfare" as constituting "conditions of social life that allow members of society to reach the highest level of personal

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[156] Adv. Opin., para. 58.
[157] Adv. Opin., para. 59. As suggested in Article 13(2) itself, only the criteria noted in that provision may justify a lawful restriction of the rights guaranteed by Article 13(1) although a generic general welfare standard, see note, *infra,* while having to be considered "in general" in regard to "the exercise of the rights guaranteed by the Convention," Adv. Opin., para. 65, need not be "equally applicable" to those Convention rights, such as those contained in Article 13, which have their own enumerated restrictions. Adv. Opin., para. 65.
[158] Adv. Opin., para. 60.
[159] Adv. Opin., para. 61.
[160] Adv. Opin., para. 62.
[161] Adv. Opin. 63. Article 13(2) states: "The exercise of the right provided for in [13(1)]…shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: (a) respect for the rights or reputations of others; or (b) the protection of national security, public order, or public health or morals."
[162] Adv. Opin., para. 62.
[163] Adv. Opin., para. 62.
[164] Adv. Opin., para. 62. See also Article 32(2), ACHR, which states: "The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society."

development and the optimum achievement of democratic values,"[165] and the Court assumed that the arguments raised by Costa Rica to justify compulsory journalist licensing rested on one[166] or both of these concepts. [167] When either of these ideas are invoked to support a limitation of a Convention right, the Court stated in unequivocal terms, it is mandatory that these concepts be strictly construed in light of the "just demands of a democratic society,"[168] which, in turn, hinges on "the need to balance the competing interests involved and the need to preserve the object and purpose of the Convention"[169] as a whole.

Under this configuration, the Court found, professional licensing requirements generally as a method of regulation and control fell under the notion of public order, but because of journalism's essential role in the freedoms contained in Article 13, the practice of "journalism cannot be equated"[170] with any other profession because what "journalists do"[171] involves precisely what Article 13 guarantees: the "seeking, receiving and imparting of information…."[172] Similarly, under the notion of "general welfare," rationales which may support licensing requirements for other professions in order to promote professional integrity and ethics,[173] for example, or to support a "guild" of professional journalists to ensure that diverse views are publicly heard, do not apply to licensing for journalists. This is because "…it is the full exercise of the right of

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[165] Adv. Opin., para. 66.
[166] Adv. Opin., para. 66.
[167] Adv. Opin., para. 67. "Public order" encompasses "conditions that assure the normal and harmonious functioning of the institutions on the basis of a coherent system of values and principles…." Adv. Opin., para. 68.
[168] Adv. Opin., para. 67.
[169] Adv. Opin., para. 67.
[170] Adv. Opin., para. 71.
[171] Adv. Opin., para. 72.
[172] Adv. Opin., para. 72.
[173] Adv. Opin., para. 77.

expression that benefits… general welfare....”[174] Moreover, a guild-related mass media must be balanced with the essential need to ensure that “*journalists and, in general*, *all those who dedicate themselves professionally to the mass media”* are given free reign to practice their profession in order to guard against corrupt governmental and corporate control of what informs the public and of concomitant public debate.[175] [Emphasis added]. Consequently, the Court held, the compulsory licensing of journalists was incompatible with the restrictions contained in Article 13(2). The requirement was therefore “in violation…[of] the right of each individual to seek and impart information and ideas through any means of his choice…[and of] the right of the public at large to receive information without any interference”[176] as guaranteed by Article 13(1).

Had the *Randal* court considered this important international human rights Advisory Opinion together with Article 13 of the American Convention, it is almost inconceivable that it would have so narrowly limited the standard it developed to “war correspondents.” And it is even more surprising that Appeals Chamber acted as it did in light of the following related case, the holding of which suggests even more directly that all those who engage in imparting information to the public[177] should be entitled to the same judicial protections.

Ajun v. Article 22 of the Organic Law of the College of Journalists, CSJ, Const. Chamber (Costa Rica), No. 2313-95, 9 May 1995

Ten years after the “Schmidt” case had been decided by the Inter-American Human Rights Court, and drawing on that case’s analysis and holding, the Costa Rican

[174] Adv. Opin., para. 77.
[175] Adv. Opin., para. 78.
[176] Adv. Opin., para. 81.
[177] See note 5 and pages 26, *supra*, for definitions of “journalism.”

Supreme Constitutional Court found the "commentator" provisions of Law No. 4420[178] to be contrary to provisions of the Costa Rican constitution, and to Article 13 of the American Convention. Even though the case arose and was decided in a national court, much of the *Ajun* decision was tied to international free expression convention standards. *Ajun* therefore sheds considerable light on the issues of whether all journalists are created equal, and to whom, regardless of international fora, international journalist legal standards ought to be applied.

Ajun, a national TV sports announcer and commentator, interviewed sports figures, and edited and aired taped sporting events. Because he was engaged in journalistic work, according to the prosecuting authority,[179] he was prosecuted for the "unauthorized practice of journalism" in violation of Law. No. 4420 on grounds that he was practicing journalism but was not a member of the Costa Rican journalist colegio. The Costa Rican trial court agreed, finding that Ajun's work was not "that of announcer, but rather [was] that of a professional journalist, given that he gathers and develops the informational material that he later broadcasts to the public on his program…."[180] In his defense, of course, Ajun had argued that he was a commentator and was therefore exempt from being colegio-affiliated.[181]

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[178] "Permanent or occasional columnists and commentators in all types of communication media, whether paid or not, shall be able to carry out their work freely, without the obligation of being members of the College. But the scope of their activity shall be limited to that, without being able to work as a reporter, whether specialized or not." Article 25, Law No. 4420.

[179] Ajun and the journalist colegio had "co-existed peacefully" for years. His prosecution was "instigated by a disaffected business partner who got the ear of the local prosecutor." Michael Perkins, "International Human Rights and the Collegiation of Journalists: The Case of Costa Rica," 4 Comm. L. & Pol'y 59, Winter 1999, at 67.

[180] *Id*.; *Ajun v. Article 22 of the Organic Law of the College of Journalists, CSJ, Const. Chamber (Costa Rica), No. 2313-95, 9 May 1995,* at 1.

[181] See note 176, *supra*; *Ajun v. Article 22 of the Organic Law of the College of Journalists, CSJ, Const. Chamber (Costa Rica), No. 2313-95, 9 May 1995,* at 1; Michael Perkins, "International Human Rights and the Collegiation of Journalists: The Case of Costa Rica," 4 Comm. L. & Pol'y 59, Winter 1999, at 67.

On appeal,[182] the Court agreed with Ajun, that he was in fact covered by Article 25, but it also found that the exemption itself imposed impermissible restrictions on free expression, [183] particularly under Article 13 of the American Convention. In rendering its decision, and relying on a "key part"[184] of the Inter-American Court's decision in "Schmidt," the Court linked 13(1)'s "thought and expression" clause -- "the first would have no meaning without the second,…."[185] – and held that the journalist colegio itself violated Article 13(3)'s limited restrictions on expression[186] since the very activities protected by the American Convention for all people can be pursued or carried out only by a limited number of people in Costa Rica, those who are members of the colegio:[187]

> "The critical issue is that the law assigns as proper labor of the journalist precisely those that the American Convention establishes as a freedom for every person, that is, to seek, receive and disseminate information."[188]

Emphatic in its view that Law No. 4420 was "illegitimate and violates the freedom of expression in the full sense it is developed by Article 13…,"[189] the *Ajun*

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[182] Seeking to have Article 22 of Law No. 4420's enabling statute declared unconstitutional (obligatory colegio membership provision), Ajun's appeal was based on what he had argued at trial, that under Article 25 , his work was covered by the "commentator exemption" which, the prosecuting authority urged, resulted in Ajun's "not being injured by the obligation of membership in the colegio because he was exempted from it." *Id*., at 68; *Ajun v. Article 22 of the Organic Law of the College of Journalists, CSJ, Const. Chamber (Costa Rica), No. 2313-95, 9 May 1995,* at 2.

[183] *Id*., at 3-4, 7-8; Michael Perkins, "International Human Tights and the Collegiation of Journalists: The Case of Costa Rica," 4 Comm. L. & Pol'y 59, Winter 1999, at 68.

[184] Michael Perkins, "International Human Rights and the Collegiation of Journalists: The Case of Costa Rica," 4 Comm. L. & Pol'y 59, Winter 1999, at 73.

[185] *Id*., at 70-71; *Ajun v. Article 22 of the Organic Law of the College of Journalists, CSJ, Const. Chamber (Costa Rica), No. 2313-95, 9 May 1995,* at 6.

[186] Article 13(3) states that the "right of free expression may not be restricted by indirect methods or means, such as the abuse of official or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions."

[187] *Ajun v. Article 22 of the Organic Law of the College of Journalists, CSJ, Const. Chamber (Costa Rica), No. 2313-95, 9 May 1995*, at 6; Michael Perkins, "International Human Rights and the Collegiation of Journalists: The Case of Costa Rica," 4 Comm. L. & Pol'y 59, Winter 1999, at 70-71.

[188] Michael Perkins, "International Human Rights and the Collegiation of Journalists: The Case of Costa Rica," 4 Comm. L. & Pol'y 59, Winter 1999, at 71; *Ajun v. Article 22 of the Organic Law of the College of Journalists, CSJ, Const. Chamber (Costa Rica), No. 2313-95, 9 May 1995,* at 7.

Court, relying on "Schmidt," stated that "freedom of expression requires, in principle, that…there be no individuals or groups that are excluded from access to such media…."[190]

The Costa Rican court's view that Law No. 4420 imposed a "prior restraint"[191] on the Inter-American concept of free expression is arguably more severe than that impact which may potentially result should other international courts do what the *Randal* court did, apply its journalist qualified privilege standard to war correspondents alone, or, as the case may be, develop separate and lesser privilege standard for other types of 'journalists." Nevertheless, there is a lesson to be extrapolated from *Ajun* and "Schmidt:" that because free expression is so fundamental to the notion of a democratic society, national and international courts owe all journalists – sports commentators and war correspondents alike -- "a special responsibility,…"[192] which may be reflected in one legal testimonial standard which should be applied to them all.

That journalists of every stripe need the identical standard of testimonial protection is also shown by the European view of free expression.

C. The European Convention and A Free Expression Case

In May 1949, on the heels of the end of World War II and to help to

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[189] *Id*., at 14; Michael Perkins, "International Human Rights and the Collegiation of Journalists: The Case of Costa Rica," 4 Comm. L. & Pol'y 59, Winter 1999, at 78.
[190] *Id*., at 73; *Ajun v. Article 22 of the Organic Law of the College of Journalists, CSJ, Const. Chamber (Costa Rica), No. 2313-95, 9 May 1995,* at 10, citing *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29, American Convention on Human Rights)***,** Advisory Opinion OC-5/85, November 13, 1985, Inter-Am. Ct. H.R. (Series A) No. 5 (1985), at 102.
[191] Michael Perkins, "International Human Rights and the Collegiation of Journalists: The Case of Costa Rica," 4 Comm. L. & Pol'y 59, Winter 1999, at 79.
[192] Report on Terrorism and Human Rights, 22 October 2002, para. 297.

"strengthen…democracy, human rights, [and] the rule of law…,"[193] ten European countries joined together to sign a treaty which created the Statute that formed the Council of Europe.[194] Eighteen months later, in November 1950 and to "meet the goals of the…Universal Declaration,…"[195] the Council's member states signed the Convention for the Protection of Human Rights and Fundamental Freedoms[196] which contains "the classic human rights and…freedoms,…"[197] including, in Article 10, "the right to freedom of expression."[198] This freedom explicitly includes the "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…."[199] Somewhat[200] like Article 13 of its Inter-American counterpart, Article 10 also contains restrictions, but under the European Convention, such restrictions must be both "prescribed by law," and be "necessary in a democratic society,…."[201] and the interests which the Article 10 restrictions serve -- national security, territorial integrity, public safety, preventing disorder, crime, and the disclosure of confidential information, protecting health, morals, and the reputation and rights of

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[193] Guide to Researching the Council of Europe, www.llrx.com/features/coe.htm, at 2.
[194] *Id.* The Council of Europe currently consists of forty-one member states.
[195] Emermacora, *et al.* (eds.) , "International Human Rights: Documents and Introductory Notes," (Vienna 1993), at 195.
[196] The European Convention on Human Rights, as it has come to be known, was ratified three years later, in September 1953. *Id.* Over the years, several Protocols have been added to the ECHR. None have impacted substantively on Article 10, Freedom of Expression. *Id.*
[197] *Id.*
[198] Art. 10.1, ECHR.
[199] *Id*.
[200] "The guarantees contained in the American Convention regarding freedom of expression were designed to be more generous and to reduce to a bare minimum restrictions impeding the free circulation of ideas." *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29, American Convention on Human Rights),* Advisory Opinion OC-5/85, November 13, 1985, Inter-Am. Ct. H.R. (Series A) No. 5 (1985), para. 50.

[201] Article 10.2, ECHR. See also ECtHR, *The Handyside Case,* judgment of December 1976, Series A, no. 24, paras. 45-59.

others, and maintaining judicial authority and impartiality[202] -- are considerably broader, or more pervasive, than are those served under the American Convention.[203] While this could suggest that protections for journalists may be less stringent in the European international human rights system than that provided for in Article 13, and even that certain journalists, depending upon the nature of the work in which they are engaged, deserve less heightened standards of protections under Article 10, when push comes to shove, as it did in the *Goodwin* case,[204] little of the sort has taken place.

The Case of Goodwin v. United Kingdom (Article 10, *inter alia,* Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms,* 4 November 1950, *as amended*)

As luck would have it, three months after beginning work as a "trainee journalist"[205] at The Engineer, a commercial publication with corporate ties to a larger publishing entity, William Goodwin received an unsolicited call from a source at Tetra, Ltd., a large UK corporation. According to the source, Tetra had significant financial problems, was expecting to register a loss for the year, and was in the process of trying to obtain a loan. With an eye towards writing an news article about Tetra, Goodwin, who had no reason to believe that the information he had obtained from the source was stolen or confidential,[206] contacted the company to check the source's facts, and for comment. As it turned out, according to Tetra, the information with which Goodwin had been

[202] Art. 10.2, ECHR.
[203] Procedurally, the ECHR itself both establishes the bodies and contains the mechanisms to address human rights issues, including those concerning state versus state and individual/groups/NGO versus state conflicts. Emermacora, *et al.* (eds.) , "International Human Rights: Documents and Introductory Notes," (Vienna 1993), at 196. See, e.g., ECHR, Sec. II, Art. 19, and Sec. III, Arts. 20-37 (European Commission of Human Rights); ECHR, Sec. IV, Arts. 38-56 (European Court of Human Rights). Exactly how a human rights case reaches the Commission or the Court is beyond the scope of this paper.

[204] ECtHR, *Case of Goodwin v.United Kingdom,* Judgment of 22 February 1996 ("*Goodwin.*").
[205] *Goodwin*, para. 11.
[206] *Id.*

supplied came from “a draft of…[a] confidential corporate plan.”[207] One of just eight published copies of the draft, which had last been seen on the afternoon of the day before Goodwin received his call, was missing.

Six days later, Tetra successfully enjoined The Engineer from publishing any information derived from the confidential plan, claiming that publication might result in a “complete loss of confidence”[208] in the company, resulting, *inter alia*, in “severe damage to their business and consequentially to the livelihood of their employees….”[209] One week later, Tetra sought from Goodwin and from his employer Goodwin’s notes from his telephone conversation with the source as well as the identity of the source. Goodwin, supported by his employer, refused to comply with the court’s Orders to disclose.[210] Tetra’s application and the Orders were based on section 10 of the U.K.’s Contempt of Court Act of 1981.[211] As such, the court found that Goodwin’s failure to comply violated Section 10 in that disclosure was “necessary in the interests of justice….”[212] Goodwin unsuccessfully appealed the Orders to produce and disclose through the U.K. courts, as well as appealing his 5,000 pound fine for contempt.[213]

Less than a year after receiving the source’s call, Goodwin filed an application with the European Commission on Human Rights. He argued that “the imposition of a disclosure order requiring him to reveal the identity of a source violated his right to

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[207] *Id*.
[208] *Id.*, para. 13.
[209] *Id.,* para. 18.
[210] *Id.,* para. 14. The court actually gave Goodwin several chances to disclose his source and produce his notes. He refused each time. *Id.,* paras. 14, 15. For unknown reasons, Goodwin and his employer did not oppose the order of prior restraint.
[211] Section 10 provides that “[n]o 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….” *Id.,*para. 20.
[212] *Id.,* paras.15-22.
[213] *Id.,* para. 19.

freedom of expression under Article 10 of the [European Human Rights] Convention."[214] The Commission agreed,[215] and the United Kingdom, while acknowledging that the Order to reveal his sources and the consequential fine imposed did "constitute…an interference with …[Goodwin's] right of free expression"[216] under that provision, brought the case to the European Court of Human Rights,[217] claiming that Article 10 had been violated nonetheless.

The Court upheld the Commission's decision, finding that the restriction on freedom of expression that had been imposed in this case had not under Article 10 been "convincingly established."[218] In rendering its opinion, the Court found that "freedom of expression constitutes one of the essential foundations of a democratic society,...[219] that "safeguards to be afforded to the press are of particular importance,…"[220] and that "[p]rotection of journalistic sources…was one of the basic conditions for press freedoms…."[221] Calling an order to disclose "potentially chilling,"[222] the Court held that

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[214] *Id.,* para. 23. Three years later, the Commission admitted Goodwin's application. *Id*., para. 24. Article 10 of the European Convention provides:

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…restrictions…as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[215] *Id.*

[216] *Id.,* para. 28.

[217] The U.K. argued that although the Order did interfere with Goodwin's right of free expression, the interference was "necessary in a democratic society" in that, *inter alia*, the information at issue "did not possess a public-interest content which justified interference with the rights of a private company…." *Id.,*para. 38.

[218] *Id.,* para. 40. See also *Sunday Times v. The United Kingdom (*no. 2*)*, judgment of 16 Nov. 1991, Series A, no. 217, para. 50.

[219] *Id.,* para. 39.

[220] *Id.*

[221] *Id.*

[222] *Id.*

such an order could only be justified “by an overriding requirement in the public interest,"[223] and that no such requirement under the facts of this case met that standard or the explicit Article 10.2 “necessity in a democratic society” test.[224]

In rendering its judgment, the European Court provided an excellent window into why limiting the enunciated standard developed in *Randal* to “war correspondents” was both unnecessary and potentially dangerous within the context of international human rights. That is, the *Goodwin* court recognized the fundamental importance of giving all journalists, including “trainee journalists,”[225] as much free reporting rein as possible because, even in the context of a purely commercial case, “a source may provide information of little [public interest] value one day and of great value the next….”[226] In other words, it was the principle of “generating the kind of information which had legitimate news potential” via the journalist-source conduit that the Court viewed as essential to free expression in spite of the fact that it was commercialism, not the fundamental international human right of a fair criminal process,[227] that was the focus of the case.[228]

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[223] *Id.*

[224] *Id.* See also*, id.,* paras. 40-46.

[225] See text, at 35, *supra.*

[226] *Goodwin,* para. 37.

[227] See, e.g., Article 6, ECHR; Article 8, ACHR; Article 7, African Charter on Human and Peoples Rights.

[228] See also, e.g., ECtHR, 27 Jan. 1997 Judgment, *In the Case of De Haes and Gijsels v. Belgium,* (No. 7/1996/626/809), where the Court found under Article 10 of the Convention in a case concerning a journalist and his editor versus members of the Belgium judiciary, that the duty of the press was to “impart…information and ideas on *all* matters of public interest….” This broad and deep view of the press’s obligation is consistent with the thesis put forth in this article: that standards which are applied to journalists should not be dependent on the subject matter of their work or on the type of legal process in which a journalist may be enmeshed.

CONCLUSION

Among the documents attached to *Amici's* brief in *Randal* was an Affidavit from the International Federation of Journalists, ("IFJ"), "the world's largest journalist group."[229] In his Statement, the IFJ's Secretary General pointed to two "inherent dangers in obliging journalists to reveal information …gathered while exercising their professional duties."[230] The threat to physical safety, particularly regarding journalists working in "areas of war and combat,"[231] is the "first and most serious"[232] of those dangers. The second danger inherent "if it becomes the practice to subpoena journalists to give testimony on what they see in the course of their work"[233] is the threat to "the public's right to information under Article 19 of the Universal Declaration of Human Rights."[234] It is this second danger that would surely occur with greater frequency should a lesser journalist testimonial privilege standard be applied to journalists who are not reporting from "areas of war and combat" or who are not being asked to testify in a war crimes tribunal.

This view jibes with that of United Nations Educational, Scientific, and Cultural Organization's (UNESCO0 Director-General, Koichior Matsuura, who recently[235] expressed grave concern that more journalists were killed in 2003 than in any year since

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[229] May 6, 2002 "Statement [of Aidan White] on Issue of Journalist, Jonathan Randal (Washington Post) Facing Subpoena to Appear Before the International Criminal Tribunal for the Former Yugoslavia," para. 1.
[230] *Id*., para. 3.
[231] *Id*., para. 4.
[232] *Id.*
[233] *Id*., para. 7.
[234] *Id*., para. 9.
[235] Statement of Director-General Koichiro Matsuura, UNESCO Press Release No. 2004-02 (8 Jan. 2004), *at* http://portal.unesco.org/ci/ev.php?URL_ID=13980&URL_DO=DO_Topic&URL_Section=201 (last visited 8 Jan. 2004).

1995, and that "766 were arrested in 2003, and 124 were reported to be in jail in late 2003…."[236] Among those killed while carrying out their journalist duties were those from Indonesia, Costa Rica, Colombia, Gabon, and the Ukraine.[237] And in the last decade, more journalists were "murdered because of differences of opinion with the authorities or for having denounced official corruption"[238] than were killed covering zones of combat.[239]

The IFJ, UNESCO, and Reporters Without Borders perspectives find their roots in, and are consistent with, the Universal Declaration of Human Rights, the American Convention on Human Rights, European Conventions, and related cases[240] which contain essentially the same broad view on what constitutes "journalism." It may even be argued that this view has evolved into customary international law. Together, the declarations, treaties, and cases demonstrate why those who engage in even the most seemingly inconsequential way in causing information and ideas to flow freely across all channels of communication should be regarded in equal light. "Schmidt," *Ajun* and *Goodwin* make clear that the bedrock principles upon which Articles 19,[241] 13[242] and 10[243] stand mandate that international courts, regardless of their bailiwicks, must apply to each and

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[236] *Id.*
[237] *Id.*
[238] *Id.; see also supra* note 18.
[239] Pierre Lemoione, Reporters Without Borders, *Impunity Is Not Inevitable,* 14 May 2003, *available at* http://unesco.org/ci/ev.php?URL_ID=9492&URL_DO=DOTopic&URL_. According to Lemoine, in the last decade, 260 journalists were killed in war zones; 284 were killed while carrying out their duties in other reporting venues. *Id*.
[240] As indicated, see note 22, *supra,* to date there have been no cases decided under Article 9 of the African Charter on Human and Peoples Rights. The plain meaning of the Article, however, together with the Charter's Preamble, strongly suggest that when legal standards are developed as to the right of free expression, they will be consistently applied to journalists regardless of the nature of their work.
[241] Article 19, Universal Declaration of Human Rights.
[242] Article 13, American Convention on Human Rights.

[243] Article 10, European Convention on Human Rights and Fundamental Freedoms.

every journalist identical standards of judicial protections, and that standard must be one which will not interfere with the essential work that all “journalists” do.