

NOTES

IN PURSUIT OF ACCOUNTABILITY: THE RED CROSS, WAR CORRESPONDENTS, AND EVIDENTIARY PRIVILEGES IN INTERNATIONAL CRIMINAL TRIBUNALS

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The International Committee of the Red Cross operates according to a policy of confidentiality, which it claims is necessary for it to carry out its humanitarian mandate successfully. The International Criminal Tribunal for the former Yugoslavia found that, as a matter of customary international law, the Red Cross is permitted to maintain its confidentiality policy at all times. This means that delegates of the Red Cross cannot be called to testify in any international criminal tribunal unless the Red Cross waives its privilege. Based on similar arguments about their need for confidentiality, however, war correspondents were granted a much more qualified privilege against testifying. In this Note, Emily Berman argues that Red Cross delegates and war correspondents are more similarly situated than it initially might seem. The Note uses a comparison of the two as a case study to illustrate that conferring absolute privilege on the Red Cross is unnecessary in the pursuit of humanitarian accountability. Therefore, international criminal tribunals should articulate a narrow, uniform test for privilege that applies to both the Red Cross and war correspondents. Under this test, in which the court retains the final decisionmaking power over who must testify, reluctant witnesses from both groups would be required to present confidential material to the court when the information in their possession both goes to a core issue in the case and is not available from any other source.

INTRODUCTION

In the spring of 2004, the American public was stunned by media reports detailing the abuse of Iraqi prisoners by U.S. soldiers in Abu Ghraib prison. The disturbing stories and photos that emerged in the Abu Ghraib scandal described behavior that most Americans identified more with Saddam Hussein and his regime than with the

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American military. To hear of such acts being performed by Americans came as a shock.

What was almost equally surprising to many, though perhaps less publicized, is that there was one organization that was not at all shocked by the media reports about U.S. abuse in Abu Ghraib. The International Committee of the Red Cross (Red Cross) had written a confidential internal report that indicated that it had known that the abuse had been going on for over a year.¹ During that time, the Red Cross complained repeatedly to U.S. officials² but did not publicize its findings.

Why would the Red Cross, guardian of international humanitarian law,³ fail to expose breaches of that law? Why would it decline to share the story with the international media—thereby creating public pressure on the United States to reform its prison policy in Iraq immediately—and instead wait over a year for the media to learn of the story independently? The answer to these questions is simple. The Red Cross operates according to a policy of confidentiality.⁴ It generally will not publicize its finding of breaches of humanitarian law,⁵ declines requests to give evidence in judicial proceedings,⁶ and

¹ David S. Cloud, *Red Cross Cited Detainee Abuse over a Year Ago; Agency Filed Complaints About Abu Ghraib Prison Months Before U.S. Probe*, WALL ST. J., May 10, 2004, at A1; Neil A. Lewis, *Red Cross Found Abuses at Abu Ghraib Last Year*, N.Y. TIMES, May 11, 2004, at A13; Alexander G. Higgins, *Red Cross Faces Pressure in Abuse Scandal* (May 11, 2004), at <http://www.mindfully.org/Reform/2004/Red-Cross-Iraq11may04.htm>.

² Cloud, *supra* note 1; Lewis, *supra* note 1; Neil A. Lewis & Eric Lichtblau, *Red Cross Says That for Months It Complained of Iraq Prison Abuses to the U.S.*, N.Y. TIMES, May 7, 2004, at A12; Higgins, *supra* note 1.

³ See *infra* notes 99–100 and accompanying text.

⁴ Stéphane Jeannot, *Recognition of the ICRC's Long-Standing Rule of Confidentiality*, 82 INT'L REV. RED CROSS 403, 420–21 (2000).

⁵ The Red Cross will make an exception to its confidentiality policy when the following conditions are met:

[T]he violations are major and repeated; the steps taken confidentially have not succeeded in putting an end to the violations; such publicity is in the interest of the persons or populations affected or threatened; the [Red Cross] delegates have witnessed the violation with their own eyes, or the existence and extent of those breaches were established by reliable and verifiable sources.

Action by the ICRC in the Event of Breaches of International Humanitarian Law, INT'L REV. RED CROSS No. 221, at 76, 81 (1981) [hereinafter *Action by the ICRC*].

⁶ Prosecutor v. Simic, Case No. IT-95-9-PT, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, para. 2 (Int'l Crim. Trib. Yugoslavia, Trial Chamber, July 27, 1999) [hereinafter *Simic*, Decision on Prosecution Motion] (noting Red Cross's position that its personnel should not be called to testify), available at <http://www.un.org/icty/simic/trialc3/decision-e/90727EV59549.htm>; Maria Teresa Dutli & Cristina Pellandini, *The International Committee of the Red Cross and the Implementation of a System to Repress Breaches of International Humanitarian Law*, INT'L REV. RED CROSS No. 300, at 240, 250 (1994) ("The [Red Cross] therefore declines requests . . . to give evidence in court concerning facts linked to its work in the countries

requires that every employment contract contain a pledge of discretion.⁷

In the 1999 case against alleged war criminal Blagoje Simic in the International Criminal Tribunal for the former Yugoslavia (ICTY), this policy of confidentiality was challenged when the ICTY prosecutor attempted to call a former Red Cross delegate as a witness.⁸ The Red Cross, citing its confidentiality policy, refused to allow him to testify.⁹ The ICTY found that, as a matter of customary international law, the Red Cross is permitted to maintain its confidentiality policy by refusing to disclose in judicial proceedings information discovered in the course of its work.¹⁰ This means that delegates of the Red Cross cannot be called to testify in any international criminal tribunal¹¹ unless the Red Cross waives its privilege.

The Red Cross's absolute privilege is unique, contrary to the majority of privilege law around the world, and interferes with the enforcement of international humanitarian law—the very law the Red Cross is charged with protecting. Privileges are limited exceptions to the presumption that, in order to promote accurate fact-finding, all probative evidence should be placed before a court.¹² Despite this presumption against privilege, and despite the Red Cross's own admission that “there may be cases in which [Red Cross] evidence is the only evidence available to convict the guilty,”¹³ the ICTY holding entitles the Red Cross to an absolute privilege as a matter of customary international law.¹⁴ Subsequently, the permanent

where it is present.”); Gabor Rona, *The ICRC's Privilege Not to Testify: Confidentiality in Action*, 84 INT'L REV. RED CROSS 207, 214 (2002) (“Among its personnel, it is commonly understood that ‘the [Red Cross] does not testify.’”).

⁷ *Simic*, Decision on Prosecution Motion, *supra* note 6, para. 55; Jeannet, *supra* note 4, at 414.

⁸ *Simic*, Decision on Prosecution Motion, *supra* note 6, para. 1.

⁹ See *id.* at para. 9 (“[The Red Cross] stresses that it has consistently taken the position that [Red Cross] officials and employees, past and present, may not testify before any court or tribunal on matters which came to their attention in their working capacity.”).

¹⁰ *Id.* at para. 74.

¹¹ This right of nondisclosure applies as a matter of precedent in the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) and was written into the rules of the permanent International Criminal Court (ICC), largely due to the persuasive weight of the ICTY decision. See *infra* notes 53–57 and accompanying text.

¹² See *infra* notes 65–68 and accompanying text.

¹³ Rona, *supra* note 6, at 213.

¹⁴ See *infra* notes 49–52, 95–113 and accompanying text.

International Criminal Court (ICC) included the Red Cross's absolute privilege in its own Rules of Evidence and Procedure (ICC Rules).¹⁵

In contrast to the absolute privilege granted to members of the Red Cross, a subsequent ICTY decision established a more reasonable conditional privilege for war correspondents when Jonathan Randal, a *Washington Post* reporter, refused to testify for the prosecution.¹⁶ The ICTY agreed that, like the Red Cross, war correspondents are entitled to some sort of privilege. But rather than granting an absolute privilege, like the one extended to the Red Cross, the ICTY established a qualified privilege for war correspondents,¹⁷ requiring them to testify when the evidence sought may not be obtained elsewhere and is of direct and important value in determining a core issue in the case.¹⁸

Despite the unusually broad grant of privilege to the Red Cross, there has been surprisingly little opposition to it, either by courts or by commentators. What has been written about it is limited to defenses of the privilege authored by members of the Red Cross's legal team.¹⁹ The assumptions on which these defenses rest have not been ques-

¹⁵ Rules of Procedure and Evidence, Rule 73(4)–(6), ICC Doc. ICC-ASP/1/3 (Sept. 2002) [hereinafter ICC Rules], available at http://www.icc-cpi.int/library/officialjournal/Rules_of_Proc_and_Evid_070704-EN.pdf.

The ICC has jurisdiction over all war crimes, crimes against humanity, and acts of genocide that take place after July 1, 2002, the date of the entry into force of its founding treaty, the Rome Statute. Therefore, including the Red Cross's absolute privilege in the ICC's Rules of Evidence and Procedure (ICC Rules) guarantees that the privilege will apply in all future international criminal prosecutions. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, art. 11, 37 I.L.M. 999, 1010 [hereinafter Rome Statute], available at http://www.icc-cpi.int/library/officialjournal/Rome_Statute_120704-EN.pdf.

¹⁶ See Prosecutor v. Brdjanin, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, paras. 46–50 (Int'l Crim. Trib. Yugoslavia, Appeals Chamber, Dec. 11, 2002) [hereinafter *Brdjanin*, Interlocutory Appeal, <http://www.un.org/icty/brdjanin/appeal/decision-e/randall021211.htm>].

¹⁷ See *infra* notes 58–61, 114–23 and accompanying text.

¹⁸ See *Brdjanin*, Interlocutory Appeal, *supra* note 16, para. 50.

¹⁹ See, e.g., Stéphane Jeannet, *Non-Disclosure of Evidence Before International Criminal Tribunals: Recent Developments Regarding the International Committee of the Red Cross*, 50 INT'L & COMP. L.Q. 643 (2001) [hereinafter Jeannet, *Non-Disclosure*] (analyzing recognition of privilege in *Simic* and ICC Rules and noting Red Cross reputation, commitment to privilege, and unique status as factors behind decision); Jeannet, *supra* note 4 (discussing Red Cross's defense of privilege in *Simic* and noting importance of privilege for Red Cross's continued work); Stéphane Jeannet, *Testimony of ICRC Delegates Before the International Criminal Court*, 82 INT'L REV. RED CROSS 993 (2000) [hereinafter Jeannet, *Testimony*] (discussing Red Cross testimony regarding privilege during adoption of ICC Rules and noting importance of privilege in maintaining relationship of trust with parties to armed conflicts and victims of these situations); Rona, *supra* note 6 (providing foundation for Red Cross's testimonial privilege policy and outlining context for dealing with demands for cooperation from those who seek information regarding Red Cross activities).

tioned, and the similarities between Red Cross workers and war correspondents seem to have been overlooked. This Note attempts to use a comparison of the two as a case study to illustrate that conferring absolute privilege on the Red Cross is not necessary to the pursuit of humanitarian accountability and actually may hinder it. A qualified privilege will not adversely affect the Red Cross's performance of its mandate, so there is no reason to accept blindly the Red Cross's arguments to the contrary.

Despite its lack of academic attention, the issue is not an insignificant one. The international community has determined that international criminal tribunals, through prosecuting the gravest and most heinous transgressions against the laws of war, further the goals of enforcing international law, deterring humanitarian violations, and enabling societies in conflict to reconcile and move towards a peaceful future. In the prosecution of war crimes, witness testimony often plays a crucial role.²⁰ By granting expansive privileges, tribunals undermine the quality of their fact-finding and therefore jeopardize their own ability to bring war criminals to justice.

This Note argues that the ICTY caselaw and the ICC Rules are flawed in that they grant an absolute privilege of nondisclosure to the Red Cross. Because witness testimony is so crucial to securing convictions in international criminal tribunals, those witnesses most likely to have probative evidence must be available. Therefore, international criminal tribunals should articulate a narrow, uniform test for privilege that applies to both the Red Cross and war correspondents. Under this test, in which the court would retain the final decision-making power over who must testify, reluctant witnesses from both groups would be required to present confidential material to the court when the information in their possession both goes to a core issue in the case and is not available from any other source.

This Note proceeds in three Parts. Part I explains the role of international criminal tribunals and why it is imperative that the procedural rules that govern them do not undermine their ability to bring perpetrators of war crimes to justice. It then explains the sources of the rules of privilege in these tribunals and describes the privileges that currently govern the testimony of the Red Cross and war correspondents respectively. Part II discusses privileges more generally, examining the considerations that lead to the creation of privileges and some of the privilege laws in various national jurisdictions that deal with the Red Cross and war correspondents. Part III analyzes the privileges extended to the Red Cross and to war correspondents.

²⁰ See *infra* note 38 and accompanying text.

It first describes the factors advanced by both the ICTY and the Red Cross itself to justify that organization's absolute privilege. It then compares these factors to those advanced to defend the qualified privilege for war correspondents. This comparison shows that there is no defensible reason to grant the Red Cross special status as compared to war correspondents. Even the fact that the Red Cross possesses legal personality, a fact which makes it unique among nongovernmental organizations (NGOs) and which is cited often in defense of its privilege, does not justify automatically granting absolute privilege to the organization. Next, Part III shows that there are other forces at work to ensure that both the Red Cross and war correspondents will be given access to areas of conflict. Rules of privilege are only one small part of this equation of access; they need not be overly broad. Finally, it argues that the proper test for privilege—for both the Red Cross and war correspondents—is one in which testimony may be compelled when confidential information goes to a core issue in the case and is unavailable through other means.

I

INTERNATIONAL CRIMINAL TRIBUNALS

This Part sets out the role of international criminal tribunals and provides some background on their procedures and evidentiary rules. The first Section discusses the rise and development of the ICTY, ICTR, and ICC from a historical perspective. It then goes on to provide a normative discussion of the roles of these courts. Section B discusses the importance of creating procedures that facilitate those normative objectives. It then outlines the privilege rules within these three courts, and specifically discusses both the Red Cross's and war correspondents' testimonial privilege.

A. The Purpose of International Criminal Tribunals

The second half of the twentieth century witnessed several events that attest to the need for effective means of dealing with war crimes. In Rwanda in 1994, more than one-ninth of the country's population was massacred in the span of just 100 days.²¹ In Yugoslavia between 1992 and 1994, Serbs expelled, killed, or imprisoned ninety percent of the 1.7 million non-Serbs living in Serbian-held areas of Bosnia.²² Most of these were Muslims who were forced from their homes, incar-

²¹ PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* 3 (1998).

²² MICHAEL P. SCHARF, *BALKAN JUSTICE* 28–29 (1997).

cerated in concentration camps, raped, or murdered, as part of a coordinated effort towards "ethnic cleansing."²³

As the national legal systems of the countries in question frequently are unwilling or unable to bring the criminals responsible for such atrocities to justice, international tribunals often are the only means of accomplishing such goals.²⁴ For example, since the conflict in the former Yugoslavia was still ongoing when the ICTY was established, that tribunal was the only forum available to prosecute crimes which arose from that conflict; in Rwanda, the local justice system did not have the capacity to manage the volume of crimes to be investigated and prosecuted by the International Criminal Tribunal for Rwanda (ICTR). In both instances, without an international effort, it is unlikely that war criminals would have faced prosecution.²⁵

There are currently three international criminal tribunals created to ensure that the perpetrators of systematic war crimes are held accountable for their actions.²⁶ The ICTY²⁷ and the ICTR²⁸ are ad

²³ *Id.*

²⁴ See, e.g., M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9, 16–17, 20 (1996) (noting that national legal systems are insufficient to ensure accountability because universal jurisdiction rarely is recognized and leaders and policymakers behind systematic human rights abuses often are beyond reach of local law). Former ICTY Prosecutor Richard Goldstone noted:

The past five decades have witnessed some of the gravest violations of humanitarian law. Those responsible have too frequently escaped trial and punishment by national courts. Indeed, in many cases they have been in positions of leadership and power in their own countries and effectively placed themselves above the law.

There was no mechanism devised by the international community for establishing the guilt of perpetrators and punishing them. Justice was denied to millions of victims of murder, disappearances, rape and torture.

AMNESTY INT'L, THE INTERNATIONAL CRIMINAL COURT: MAKING THE RIGHT CHOICES—PART I, AI Index: IOR 40/01/97, at 10 (1997) (quoting Prosecutor v. Tadic, Case No. IT-94-1, Application for Deferral by the Federal Republic in the Matter of Dusko Tadic, paras. 1–2 (Int'l Crim. Trib. Yugoslavia, Nov. 8, 1994) (opening statement of Richard Goldstone, Yugoslavia Tribunal Prosecutor)), available at <http://www.amnesty.it/campaign/icc/library/aidocs/IOR400197.pdf>.

²⁵ See S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 1, U.N. Doc. S/RES/827 (1993) (noting need for prosecution to put end to ongoing war crimes); Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. INT'L L.J. 163, 172–73 (2000) (explaining why international community determined Rwandan justice system was incapable of handling prosecutions following 1994 genocide).

²⁶ In addition to these, there is currently a hybrid tribunal in Sierra Leone. For a comparison of the Sierra Leonean Court to the ad hoc U.N. tribunals, see generally Nsongurua J. Udombana, *Globalization of Justice and the Special Court for Sierra Leone's War Crimes*, 17 EMORY INT'L L. REV. 55 (2003). For a history of international tribunals, see generally M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11 (1997).

hoc tribunals, charged with prosecuting the crimes committed during Yugoslavia's and Rwanda's recent conflicts.²⁹ The ICC is a permanent tribunal which will have jurisdiction over these types of crimes in the future.³⁰

Preventing these crimes requires accountability, which serves several purposes. As expressed in the Security Council resolutions establishing both the ICTY and the ICTR,³¹ tribunals are meant to hold violators accountable and thus "contribute to ensuring that such violations are halted and effectively redressed."³² These tribunals serve both a desire for retribution and an attempt to deter similar crimes in

²⁷ Following reports of mass killings and "ethnic cleansing" taking place in the former Yugoslavia, the United Nations sent a Commission of Experts to the area to gather "evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law." S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg. at 1, U.N. Doc. S/RES/780 (1992). The information collected by the U.N. Commission and human rights organizations suggested that Serbs were attempting to cleanse the region of Bosnians and Croats through genocidal tactics. SCHARF, *supra* note 22, at 28-29. Upon the Commission's recommendation, the ICTY was established to prosecute these crimes. S.C. Res. 827, *supra* note 25, at 2. For more on the Yugoslavian conflict, see generally M. CHERIF BASSIOUNI, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 1-63 (1996); SCHARF, *supra* note 22; Kellye L. Fabian, *Proof and Consequences: An Analysis of the Tadic & Akayesu Trials*, 49 DEPAUL L. REV. 981, 984-88 (2000). The statute of the ICTY grants jurisdiction for the prosecution of war crimes, crimes against humanity, and genocide. Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended), arts. 2-5, May 25, 1993, 32 I.L.M. 1159, 1171-74 [hereinafter ICTY Statute].

²⁸ The story of the establishment of the ICTR is similar to that of the ICTY. A U.N. Commission of Experts found evidence of grave violations of humanitarian law committed during the Rwandan civil war. The Security Council established the ICTR in response. S.C. Res. 935, U.N. SCOR, 49th Sess., 3400th mtg. at 1, U.N. Doc. S/RES/935 (1994). For more on the Rwandan conflict, see generally GÉRARD PRUNIER, *THE RWANDA CRISIS* (1995); Fabian, *supra* note 27, at 988-93. The ICTR has jurisdiction over genocide, crimes against humanity, and violations of the Geneva Conventions that apply to noninternational conflicts. Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3-5, U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

²⁹ Though the two ad hoc tribunals are located in the Hague and Arusha, Tanzania, respectively, they share a common appeals chamber. Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court*, 5 WASH. U. J.L. & POL'Y 87, 88 (2001).

³⁰ The ICC was created by the Rome Statute, an international treaty which entered into force on July 1, 2002. Recognizing that "during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity," and that "such grave crimes threaten the peace, security and well-being of the world," the ICC was established "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes." Rome Statute, *supra* note 15, at pmbl. The ICC has jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression. *Id.* at arts. 5-8.

³¹ S.C. Res. 780, *supra* note 27, at 1; S.C. Res. 935, *supra* note 28, at 1.

³² S.C. Res. 827, *supra* note 25, at 1; ICTR Statute, *supra* note 28, at 1.

the future.³³ Creating criminal tribunals sends the clear message that war crimes, crimes against humanity, and genocide are intolerable and that the international community will hold those responsible to account.³⁴

Additionally, holding such criminals accountable can “contribute to the process of national reconciliation and to the restoration and maintenance of peace.”³⁵ “Where there have been violent, systematic human rights abuses, a society simply cannot forget. . . . One cannot build a secure and peaceful future upon such a foundation of unacknowledged, unaccounted for human rights violations.”³⁶ By vindicating the interests of the victims through punishing their persecutors and by telling the true story of their ordeal, criminal tribunals pave the way for a future where former enemies can live again as neighbors. At the same time, it allows those who were not victims—members of the criminals’ own ethnic group or citizens of their country—to avoid a feeling of collective guilt. Accountability individualizes guilt, placing blame only on the perpetrators of the crimes, not on an entire nation or ethnic group.³⁷

³³ Bassiouni, *supra* note 24, at 18; Christopher J. Dodd, *Remarks: The Legacy of Nuremberg*, 12 CONN. J. INT’L L. 197, 198, 200 (1997); Mark W. Janis, *The Utility of International Criminal Courts*, 12 CONN. J. INT’L L. 161, 163, 165–66 (1997).

³⁴ Dodd, *supra* note 33, at 198, 200; Janis, *supra* note 33, at 163, 165–66.

³⁵ ICTR Statute, *supra* note 28, at 1. Following periods of massive human-rights violations, which often are carried out along political or ethnic lines, one of the greatest challenges facing the post-conflict governments is effecting a transition that recognizes the atrocities that were committed, but which also allows citizens to progress beyond feelings of animosity toward one another and look toward a peaceful future. See Bassiouni, *supra* note 24, at 26–27 (pointing out that failure to acknowledge and punish large-scale persecution creates risk of future violence). There are several means used to encourage such a transition: truth and reconciliation commissions, criminal prosecution, and lustration laws. For a discussion of the efficacy of various transitional-justice tools, see, for example, RUTI G. TEITEL, 1 TRANSITIONAL JUSTICE (2000); TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 1997); Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 127 (1996).

³⁶ Richard Goldstone, *The United Nations’ War Crimes Tribunals: An Assessment*, 12 CONN. J. INT’L L. 227, 230 (1997); see also Dodd, *supra* note 33, at 199 (arguing that when justice is meted out to guilty parties, it allows process of national reconciliation to begin). An essential part of the process of reconciliation often is establishing the true story of what happened during the period in which the violations occurred. This serves both the victims’ need to have their story told and the world community’s responsibility to recognize what happened in the attempt to protect against the recurrence of such horrors. See Bassiouni, *supra* note 24, at 26 (arguing that to ensure accountability, victimization must be acknowledged, crimes denounced, and perpetrators punished); Janis, *supra* note 33, at 166–67 (pointing out that criminal tribunals create records of underlying events, ensuring that they will be remembered).

³⁷ Goldstone, *supra* note 36, at 229.

B. Privilege in International Criminal Tribunals

1. Establishing Privilege in International Criminal Tribunals

In the ICTY and ICTR, witness testimony is often crucial to establishing the guilt or innocence of the accused.³⁸ It therefore is essential that the rules governing such testimony guarantee optimal fact-finding. While taking into account the pragmatic necessities of conducting a trial, rules of evidence also must ensure that the stringent requirements of due process are met.³⁹ This means that tribunals must attempt to allow all probative evidence to be put before the court, while at the same time evaluating what, if any, adverse effects there may be of doing so.

With the goal of creating this balance in mind, the international criminal tribunals are governed by evidentiary rules which grant them

³⁸ Prosecutor v. Tadic, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, para. 23 (Int'l Crim. Trib. Yugoslavia, Trial Chamber, Aug. 10, 1995) [hereinafter *Tadic*, Decision on Prosecution Motion] (noting that "prosecutions would, to a considerable degree, be dependent on eyewitness testimony" (citation omitted)), available at <http://www.un.org/icty/tadic/trialc2/decision-e/100895pm.htm>; Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 COLUM. J. TRANSNAT'L L. 725, 744 (1999) (arguing that, as compared to Nuremberg trials, "witnesses are . . . likely to be eyewitnesses, and the [ICTY] is much more dependant on testimonial evidence"); Patricia M. Wald, *Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal*, 5 YALE HUM. RTS. & DEV. L.J. 217, 219 (2002) ("[I]n most cases [the ICTY] needed substantial numbers of eyewitnesses to prove crimes had occurred . . ."); Kristina D. Rutledge, Note, "Spoiling Everything"—But for Whom? *Rules of Evidence and International Criminal Proceedings*, 16 REGENT U. L. REV. 151, 173, 178 (2003) ("In most [ICTY] trials, the testimony of lay witnesses proves to be an important part of both parties' cases."); see also Wald, *supra* note 29, at 107–08, 113 ("Even in the most monstrous war crimes involving executions and massacres of thousands there may be no evidence of written orders to execute, bury, or rebury the victims, nor sure identification of the senior commanders who actively planned, approved, or ordered the slaughter."). The ICC has not yet tried a case, but the same considerations are likely to apply there.

The ICTR and ICTY have relied much more heavily on victim-witness testimony than war-crimes tribunals in the past. Rutledge, *supra*, at 152. Between 1996 and early 2001, nearly one thousand victim-witnesses testified in the ICTY. Wald, *supra* note 29, at 108; see also May & Wierda, *supra*, at 743 (noting relative importance of witnesses in modern tribunals as compared to Nuremberg).

³⁹ Wald, *supra* note 38, at 220 ("Given that the goal of all international criminal proceedings is to bring perpetrators of war crimes to justice in as fair a manner as possible, it is essential that serious consideration be given to the problem of witness testimony in war crimes trials."); see Jacob Katz Cogan, *The Problem of Obtaining Evidence for International Criminal Courts*, 22 HUM. RTS. Q. 404, 405 (2000) (noting that "[i]nternational criminal courts will be judged by their fairness to defendants as well as to victims"); Rod Dixon, *Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 81, 82 (1997) ("The fundamental fairness of the trials, and, ultimately, the reputation and legacy of the Tribunals will depend on how evidence proving the guilt or innocence of the accused is presented and evaluated.").

considerable discretion.⁴⁰ For example, Rule 89 of the Yugoslav and Rwandan tribunals' Rules of Procedure and Evidence⁴¹ states that "a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law."⁴² This rule allows the tribunal to create privilege rules which seem appropriate. In addition to the lawyer-client privilege explicitly provided for in the tribunal's rules of procedure, the ICTY has used its discretion to recognize five judge-made privileges.⁴³

The tribunal—recognizing the importance of witness testimony—also has used its flexibility to create procedures designed to protect witnesses who are reluctant to testify for fear of retaliation at home.⁴⁴ Protective measures include nondisclosure of identity, orders to defense counsel to notify the prosecutor of all contact with the witness, facial and voice distortion, and taking testimony in closed session.⁴⁵ While these measures often are taken to ensure the safety of victim-witnesses,⁴⁶ there is nothing in the rules to prevent the tribunal from using such protections for other reluctant witnesses as well.

⁴⁰ In the prosecution of Dusko Tadic, while discussing the power of the Trial Chamber to grant protective measures to victims and witnesses, the court stated that the tribunal "was able to mold its [r]ules and procedures to fit the task at hand." *Tadic*, Decision on Prosecution Motion, *supra* note 38, para. 23; *see also* Megan A. Fairlie, *Rulemaking from the Bench: A Place for Minimalism at the ICTY*, 39 TEX. INT'L L.J. 257, 258–68, 271–73 (2004) (arguing that tribunals should show restraint in their use of discretion by merely deciding case at hand, rather than creating broad rules that may imperil due process rights of defendants in future cases); Wald, *supra* note 29, at 90–91, 110–13 (describing latitude that judges have in ICTY in deciding whether to admit evidence).

⁴¹ Article 14 of the ICTR Statute indicates that the ICTR will use the procedural rules adopted by the ICTY "with such changes as they deem necessary." ICTR Statute, *supra* note 28, at 9. Therefore, the procedural rules of the two tribunals are ostensibly the same.

⁴² INT'L CRIM. TRIB. FORMER YUGOSLAVIA, RULES OF PROCEDURE AND EVIDENCE, Rule 89(B) (Feb. 1994) [hereinafter ICTY RULES], available at <http://www.un.org/icty/legaldoc/index.htm>.

⁴³ In addition to the privileges of the Red Cross and war correspondents, the ad hoc tribunals have established privileges for functionaries and employees of the tribunal, state officials acting in their official capacity, and the commander-in-chief of U.N. Protection Forces. *See infra* notes 72–74 and accompanying text. Because the decisions of the ICTY are binding precedent for the ICTR, these same privileges apply in that tribunal.

⁴⁴ Wald, *supra* note 29, at 108–09.

⁴⁵ *Tadic*, Decision on Prosecution Motion, *supra* note 38, para. 24; Wald, *supra* note 29, at 109. There are some commentators who are concerned that these protection techniques are a violation of the minimum due process rights of the accused. For examples of this argument, see Robert Christensen, *Getting to Peace by Reconciling Notions of Justice: The Importance of Considering Discrepancies Between Civil and Common Legal Systems in the Formation of the International Criminal Court*, 6 UCLA J. INT'L L. & FOREIGN AFF. 391 (2001); Wald, *supra* note 38, at 220–21.

⁴⁶ Wald, *supra* note 38, at 221–23; Wald, *supra* note 29, at 109; Rutledge, *supra* note 38, at 187–88.

So although the only privilege explicitly recognized in the ICTY Rules is that of lawyer-client,⁴⁷ the tribunal is free to create rules of privilege that further the dictates of Rule 89 and ensure a fair determination of the matter before the court. Given the wide array of means to conceal witness identities and the crucial role of witness testimony, a narrow recognition of testimonial privilege seems appropriate in the international tribunal setting.

In the ICC, testimonial privilege is governed by Rule 73.⁴⁸ Because there have been no prosecutions in the ICC as yet, it is uncertain how that rule will be applied or interpreted.

2. *The Red Cross's Privilege*

Despite the need for eyewitness testimony to bring war criminals to justice in international criminal tribunals, the ICTY held in 1999 that the Red Cross and its delegates shall not be compelled to testify under any circumstances regarding information acquired in the course of the Red Cross's work.⁴⁹ The privilege was established in the ICTY proceedings against Blagoje Simic. In *Simic*, the prosecutor for the ICTY called a former interpreter for the Red Cross as a witness. The witness was willing to give evidence—which had come to his attention while employed by the Red Cross and which was important in proving the guilt of the accused—before the tribunal.⁵⁰

The Trial Chamber of the ICTY accepted the Red Cross's argument that compelling its workers to testify would jeopardize the organization's ability to carry out its mandate and found, as a matter of customary international law, that the Red Cross has an *absolute right* of nondisclosure of information.⁵¹ The organization cannot be required to share information discovered in the course of its work or to allow employees to testify before the ICTY.⁵²

The ICC codified the ICTY's imprudent decision regarding the Red Cross's privilege in its own procedural rules. Rule 73(4) of the ICC Rules of Evidence and Procedure (ICC Rules) provides that "[t]he Court shall regard as privileged, and consequently not subject to disclosure . . . any information, documents or other evidence which [the Red Cross] came into the possession of in the course, or as a

⁴⁷ ICTY RULES, *supra* note 42, Rule 97.

⁴⁸ The aspects of this rule relating to the Red Cross and war correspondents are discussed *infra* notes 53, 62–64.

⁴⁹ *Simic*, Decision on Prosecution Motion, *supra* note 6, paras. 73–74 (noting that Red Cross workers *may* testify or supply information in their possession, but court cannot compel them to do so).

⁵⁰ *Id.* at para. 1.

⁵¹ See *infra* notes 95–113 and accompanying text.

⁵² *Simic*, Decision on Prosecution Motion, *supra* note 6, paras. 73–74.

consequence, of the performance by [the Red Cross] of its functions.”⁵³

Though the decision of the ICTY was not binding on the ICC, it is likely that the outcome of the *Simic* case greatly influenced the ICC’s adoption of the identical rule. The Red Cross presented the same arguments that swayed the ICTY to a meeting of the ICC Rules’ Preparatory Commission (PrepCom) in the summer of 1999.⁵⁴ While the PrepCom was debating the merits of the Red Cross’s argument, the *Simic* decision was made public.⁵⁵ The fact that the ICTY found the Red Cross’s absolute privilege a matter of customary international law may have overcome any remaining will in the opposition to reopen the debate at subsequent meetings. PrepCom adopted the

⁵³ ICC Rules, *supra* note 15, Rule 73(4). The rule includes exceptions to this policy if the Red Cross waives the privilege, or the information is contained in the Red Cross’s public documents or statements. *Id.* The ICC Rules also make an exception when the same evidence is acquired from a source other than the Red Cross or its employees. ICC Rules, *supra* note 15, Rule 73(5). In addition, Rule 73(6) provides that if the Court determines that Red Cross information is of great importance for a particular case, the Court and the Red Cross should consult with one another in an attempt to resolve the matter. ICC Rules, *supra* note 15, Rule 73(6).

It was only through strong lobbying efforts on the part of the Red Cross that this provision was included in the ICC Rules. While the ICC Rules were being developed, the Red Cross, concerned that an absolute privilege would not be granted in the permanent ICC, began an internal discussion about finding a way to ensure that its practice of refusing to testify would be honored. Jeannet, *Testimony*, *supra* note 19, at 994. To that end, the Red Cross contacted government representatives who were involved in the development of the ICC Rules and found that an overwhelming majority of them supported a provision that would protect information in certain categories of professional relationships. *Id.* at 995. Many nongovernmental organizations (NGOs) also supported the creation of a testimonial privilege for the Red Cross. *See, e.g.,* AMNESTY INT’L, THE INTERNATIONAL CRIMINAL COURT: DRAFTING EFFECTIVE RULES OF PROCEDURE AND EVIDENCE CONCERNING THE TRIAL, APPEAL AND REVIEW 17–18, AI Index: IOR 40/12/99 (1999). Others, however, find the Red Cross’s adherence to the principle of confidentiality to be inconsistent with a humanitarian mandate and advocate the public exposure of all breaches of international humanitarian law as soon as they are discovered. *See, e.g.,* MÉDECINS SANS FRONTIÈRES, THE MSF ROLE IN EMERGENCY MEDICAL AID (2003) (“MSF acts as a witness and will speak out, either in private or in public about the plight of populations in danger for whom MSF works.”), at <http://www.msforg/about/index.cfm> (last updated Dec. 12, 2000).

The same government representatives that supported a confidentiality provision, however, did not necessarily want a broad, general provision that would open the floodgates to requests for nondisclosure by an infinite number of organizations and individuals. Jeannet, *Testimony*, *supra* note 19, at 995. So the disagreement was not over whether the Red Cross’s confidentiality policy would receive some deference; instead, it was about who should have the final word in the decision whether the Red Cross would have to share information—the Court or the Red Cross itself. *Id.* at 998.

⁵⁴ Jeannet, *Testimony*, *supra* note 19, at 995.

⁵⁵ *Id.* at 998–99 n.8 (noting that ICTY decision was made public “several weeks after the end of the second session of the PrepCom” and that debate on draft rules did not continue in subsequent sessions).

final version of the ICC Rules less than a year later.⁵⁶ Thus, in the ICC, as in the ICTY, the Red Cross's position won the day, despite misgivings on the part of some parties to the treaty that established the ICC.⁵⁷ The final word on whether information in the possession of the Red Cross or its employees will be submitted to the Court lies with the Red Cross.

3. *War Correspondents' Privilege*

The privilege established by the ICTY for war correspondents is an appropriately qualified one, unlike the Red Cross's privilege. The test which determines whether war correspondents must testify has two prongs: "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."⁵⁸

A war correspondents' privilege became an issue for the ICTY when the prosecution called Jonathan Randal of *The Washington Post* to testify regarding statements he attributed to Bosnian Serb housing administrator Radoslav Brdjanin in one of his articles.⁵⁹ The statements were relevant to the crimes with which Brdjanin was charged by the ICTY—inter alia, crimes against humanity and breaches of the Geneva Conventions.⁶⁰

When called to testify in the case, Randal refused to comply, filing a motion to set aside the subpoena. The Trial Chamber refused Randal's motion, but the Appeals Chamber established the two-prong test quoted above, relieving Randal of his duty to testify.⁶¹

The status of the war correspondents' privilege in the ICC is less clear than that of the Red Cross. It is possible that Rule 73 of the ICC

⁵⁶ *Id.* at 996.

⁵⁷ *Id.* at 996–99.

⁵⁸ *Brdjanin*, Interlocutory Appeal, *supra* note 16, para. 50.

⁵⁹ Jonathan C. Randal, *Preserving the Fruits of Ethnic Cleansing: Bosnian Serbs, Expulsion Victims See Campaign as Beyond Reversal*, WASH. POST, Feb. 11, 1993, at A34.

⁶⁰ *Brdjanin*, Interlocutory Appeal, *supra* note 16, para. 4. The Geneva Conventions and their Additional Protocols, adopted following World War II, are the principal instruments laying out the rules of international humanitarian law in times of war. INT'L COMM. OF RED CROSS, THE GENEVA CONVENTIONS: THE CORE OF INTERNATIONAL HUMANITARIAN LAW (2004), at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions> (last visited Jan. 24, 2005). They are designed to protect people who do not take part in the fighting (civilians, medics, aid workers) and those who can no longer fight (wounded, sick and shipwrecked troops, prisoners of war). See PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 344 (7th ed. 1997). The Conventions are considered customary international law, so that even countries which have not signed and ratified them are bound by the obligations they create. See *Simic*, Decision on Prosecution Motion, *supra* note 6, para. 48.

⁶¹ *Brdjanin*, Interlocutory Appeal, *supra* note 16, paras. 42, 44–54.

Rules also will protect communications between war correspondents and their sources. In addition to its provisions regarding the Red Cross, Rule 73 creates privileges for communications between attorneys and their clients⁶² and for communications made in the context of a professional or confidential relationship.⁶³ It is possible that communications between war correspondents and their sources will be regarded as communications made in the context of a professional or confidential relationship. Whether such communications qualify under this provision will be up to the ICC as it considers cases that arise in the future.⁶⁴

II

RELEVANT PRIVILEGE LAW

This Part first will look at the considerations which lead to privilege rules, laying out the factors that international tribunals should consider in determining whether to create any particular privilege. It then will look at the privileges that have been granted to journalists and Red Cross workers in national courts around the world. National practice, while not binding on international criminal tribunals, can be instructive in indicating what evidentiary rules are appropriate. The Part concludes that war correspondents' need for some form of privilege is just as universally recognized as that of the Red Cross.

A. *Considerations Leading to Creation of Privileges*

Most evidentiary rules are created to improve the accuracy of fact-finding.⁶⁵ The common understanding is that justice is best served when all relevant evidence is placed before the fact-finder in any particular case.⁶⁶ Privileges, on the other hand, have the opposite effect. They reduce the amount of relevant evidence that may be placed before the fact-finder in light of policy considerations that outweigh the interest in optimal fact-finding.⁶⁷ Because evidentiary privileges have the effect of potentially leading to less-than-perfect results, they generally are disfavored and construed narrowly.⁶⁸

⁶² ICC Rules, *supra* note 15, Rule 73(1).

⁶³ *Id.* Rules 73(2)–(3).

⁶⁴ The Rome Statute is currently in effect, but the ICC has yet to prosecute a case.

⁶⁵ 1 MCCORMICK ON EVIDENCE § 72 (John W. Strong ed., 5th ed. 1999).

⁶⁶ *Brdjanin*, Interlocutory Appeal, *supra* note 16, para. 46.

⁶⁷ *Id.*; Charles T. McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447, 447–48 (1938). Even the Red Cross acknowledges that “[e]videntiary privileges reflect acceptance of a small risk of imperfect justice,” but insist that its absolute privilege is necessary nonetheless. *Rona*, *supra* note 6, at 213–14.

⁶⁸ See 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2192 (John T. McNaughton ed., 4th ed. 1961).

The utilitarian theory of privilege⁶⁹ posits that privileges should be recognized in circumstances where such recognition will advance policies that outweigh the resulting risk of injustice.⁷⁰ These policy considerations are most frequently described as the encouragement of communications within certain professions.⁷¹ Recognition of privilege signifies that the state has determined that the availability of the functions served by the privileged relationship is more important than the incremental improvement to the fact-finding abilities of the criminal-justice system that would result if such private communications were subject to subpoena. With these considerations in mind, in addition to the Red Cross's and war correspondents' privileges, the tribunals also have established forms of privilege for functionaries and employees of the tribunal,⁷² state officials acting in their official capacity,⁷³ and the commander-in-chief of the United Nations Protection Forces.⁷⁴

In determining what privilege, if any, to extend to the Red Cross or war correspondents, the heart of the inquiry should be whether the decreased accuracy of fact-finding caused by extending such privilege is less harmful to the international community as a whole than the detrimental effects that denial of privilege may have on the work of the Red Cross or war correspondents.

⁶⁹ This is the most commonly used justification for the recognition of evidentiary privilege. The other justification for privilege is that the state should not intrude into the privacy of certain human relationships. 1 MCCORMICK ON EVIDENCE, *supra* note 65, § 72. This alternate justification often is advanced, for example, in relation to the spousal privilege rule.

⁷⁰ *Id.*; R. Michael Cassidy, *Sharing Sacred Secrets: Is It (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?*, 44 WM. & MARY L. REV. 1627, 1632–34 (2003).

⁷¹ Examples of these relationships include attorney-client, doctor-patient, priest-penitent and reporter-source. See WIGMORE, *supra* note 68, § 2197; Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 600 n.10 (1980).

⁷² Prosecutor v. Delalic, Case No. IT-96-21, Decision on the Motion *Ex Parte* by the Defence of Zdravko Mucic Concerning the Issue of a Subpoena to an Interpreter, para. 20 (Int'l Crim. Trib. Yugoslavia, Trial Chamber, July 8, 1997), <http://www.un.org/icty/celebici/trialc2/decision-e/70708SP2.htm>.

⁷³ Prosecutor v. Blaskic, Case No. IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, para. 43 (Int'l Crim. Trib. Yugoslavia, Appeals Chamber, Oct. 29, 1997), *available at* <http://www.un.org/icty/blaskic/appeal/decision-e/71029JT3.html>.

⁷⁴ Prosecutor v. Blaskic, Case No. IT-95-14, Decision of Trial Chamber I on Protective Measures for General Philippe Morillon, Witness of the Trial Chamber, paras. 24–32 (Int'l Crim. Trib. Yugoslavia, Trial Chamber, May 12, 1999), <http://www.un.org/icty/blaskic/trialc1/decisions-e/90512PM113178.htm>.

B. Privilege Laws Around the World

1. Journalists

The ICTY decision to grant a qualified privilege to war correspondent Jonathan Randal is in line with practice in many national and regional jurisdictions around the world. Although the considerations are discussed below in relation to journalists generally, they are even more relevant to war correspondents, who report on issues of life and death, where the stakes are higher.

In *Goodwin v. United Kingdom*, the European Court of Human Rights (ECHR) established a journalist privilege similar to the one articulated by the ICTY.⁷⁵ In this case, a journalist appealed an order from England's highest court which required him to reveal confidential sources.⁷⁶ The ECHR overturned the British court's decision, holding that, absent an overriding need for disclosure in the public interest, the disclosure of journalists' sources cannot be compelled.⁷⁷ The court recognized that otherwise, "the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected."⁷⁸

The holding of *Goodwin*, which is binding on all states party to the European Convention on Human Rights,⁷⁹ is consistent both with other E.U.-wide articulations of the appropriate standard and with national law across Europe. For example, the Council of Europe's Committee of Ministers adopted a resolution recommending that domestic law and practice in member states should "provide for explicit and clear protection of the right of journalists not to disclose information."⁸⁰ In addition, Austria, France, Germany, the Netherlands, Norway, and Sweden all have laws which provide some

⁷⁵ *Goodwin v. United Kingdom*, App. No. 17488/90, 22 Eur. H.R. Rep. 123, 145-46 (1996).

⁷⁶ *Id.* at 126-31.

⁷⁷ *Id.* at 145-46.

⁷⁸ *Id.* at 143.

⁷⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *European H.R. Convention*], available at <http://conventions.coe.int/Treaty/en/Treaties/Word/005.doc>.

⁸⁰ COMM. OF MINISTERS, COUNCIL OF EUROPE, RECOMMENDATION NO. R (2000) 7 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON THE RIGHT OF JOURNALISTS NOT TO DISCLOSE THEIR SOURCES OF INFORMATION, princ. 1, Mar. 8, 2000, at <https://wcd.coe.int/ViewDoc.jsp?id=372907&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679>; see also Council of Europe, 4th European Ministerial Conference on Mass Media Policy, Res. 2 (Dec. 7-8, 1994) (declaring that protecting confidentiality of sources "enables journalism to contribute to the maintenance and development of genuine democracy"), available at [http://www.coe.int/t/e/human_rights/media/5_Documentary_Resources/1_Basic_Texts/4_Ministerial_Conferences/PDF_DH-MM\(2000\)004%20E%20European%20Conference.pdf](http://www.coe.int/t/e/human_rights/media/5_Documentary_Resources/1_Basic_Texts/4_Ministerial_Conferences/PDF_DH-MM(2000)004%20E%20European%20Conference.pdf).

level of privilege for journalists when it comes to compelling disclosure of confidential information.⁸¹

The United States, too, has recognized that protecting journalists from disclosing confidential information is a necessary precondition for the effective functioning of the free press.⁸² In the executive branch, the Department of Justice (DOJ) guidelines create a balancing test similar to the ICTY's. The DOJ should not request a subpoena in a criminal case unless the information is essential to the case and is not available from any other source.⁸³ Notably, this regulation applies not just to sources, but to subpoenas regarding any information in the possession of a member of the media.⁸⁴

U.S. courts also have recognized the need for a qualified privilege for journalists. Justice Powell, concurring in *Branzburg v. Hayes*, noted that a subpoena calling for information bearing "only a remote and tenuous relationship to the subject of the investigation" should be quashed.⁸⁵ Since that case, almost all federal courts have recognized a qualified privilege for journalists to resist compelled discovery.⁸⁶ At the state level, rules vary by jurisdiction, but forty-eight states and the District of Columbia have either judicial or statutory shield laws that protect reporters from compelled disclosure to varying degrees.⁸⁷

The cumulative effect of these decisions and policies is overwhelming international support for the proposition that, absent compelling reasons to the contrary, journalists should be permitted to maintain confidentiality. Each of the sources cited above notes that the reason to allow journalists to withhold information is to avoid compromising their ability to report effectively on issues that, as a matter of public interest, should be made public. While many of these laws and policies around the world are tailored specifically to prevent compelled disclosure of sources, the same logic applies to any confidential information that journalists may discover in the course of their work.

⁸¹ FREEDOM OF EXPRESSION LITIG. PROJECT, ARTICLE 19 & INTERIGHTS, BRIEFING PAPER ON PROTECTION OF JOURNALISTS' SOURCES § 2.3 (May 1998), at <http://www.article19.org/docimages/638.htm>.

⁸² See *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) (noting that journalists' privilege is "a recognition that society's interest in protecting the integrity of the newsgathering process" is of great social importance); 28 C.F.R. § 50.10 (2003) ("[T]he prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues.").

⁸³ 28 C.F.R. § 50.10(f).

⁸⁴ *Id.*

⁸⁵ *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972) (Powell, J., concurring).

⁸⁶ See *Shoen*, 5 F.3d at 1292 & n.5.

⁸⁷ Nia Y. McDonald, Comment, *Under Fire: The Fight for the War Correspondent's Privilege*, 47 How. L.J. 133, 135 (2003).

2. *The Red Cross*

Using national practice regarding the Red Cross as a guide for international standards is more problematic. The form of testimonial privilege for Red Cross delegates in national courts is based on treaties,⁸⁸ rather than on the individual judgments of each nation on what (if any) form of privilege best serves the public interest. Since the Red Cross makes signing a “headquarters agreement” granting testimonial privilege to its delegates a precondition of its presence in any given national jurisdiction, if a country wants the Red Cross to have a presence there, its officials must agree to the Red Cross’s conditions. As granting the Red Cross access to areas of conflict is an obligation of international law,⁸⁹ most nations will agree to the organization’s conditions, including its refusal to testify in national courts. This acquiescence may indicate many things: a desire for a Red Cross presence in their national territory, a desire to conform to international legal norms, or agreement with the principle that the Red Cross needs the confidentiality privilege in order to carry out its mandate.

However, the simple fact that a country is willing to bargain away its right to compel Red Cross delegates to testify in its courts does not mean necessarily that it has made any sort of judgment about whether that privilege is essential for the Red Cross to be effective. It means only that, for whatever reason, it has decided to grant the Red Cross’s request to that effect.

Nor does it mean that it has granted such a privilege on the basis of some perceived obligation of international law. For an obligation to become part of customary international law, it must have two elements: 1) state practice and 2) *opinio juris*.⁹⁰ In other words, in order for a particular norm to be part of customary law, it not only must be a matter of general state practice, but states must follow that practice because of a conviction that it is *required* by international law, not merely out of courtesy or convenience. It is this subjective element, this feeling of obligation, which is known as *opinio juris*.⁹¹ The Red Cross’s “headquarters agreements” may satisfy the element of state practice, but, according to one of the judges on the *Simic* panel, the

⁸⁸ Rona, *supra* note 6, at 211–12. The Red Cross negotiates what is known as a “headquarters agreement” with each nation in whose territory it operates. This agreement establishes the organization’s privileges and immunities in that jurisdiction, including protection against the requirement to give evidence. *Id.*

⁸⁹ See *infra* Part III.A.1.

⁹⁰ MALANCZUK, *supra* note 60, at 39.

⁹¹ See *id.* at 39–46 (defining *opinio juris* as “a conviction felt by states that a certain form of conduct is required” or permitted by international law).

Red Cross failed to establish any *opinio juris* as to the obligation to extend a right of nondisclosure in international criminal tribunals.⁹²

This brief look at privilege law as it applies to the Red Cross and to war correspondents is instructive. It indicates that, as a matter of nearly universal practice, both groups are extended testimonial privilege in some form. However, it does not define what the exact contours of that privilege should be. The international criminal tribunals, therefore, should craft a privilege for both the Red Cross and war correspondents that is based on sound policy.

III

UNIFYING PRIVILEGE THEORY IN INTERNATIONAL TRIBUNALS

The disparate treatment accorded to the Red Cross and war correspondents in international criminal tribunals is not based on any relevant practical or legal considerations and therefore should be eliminated. Instead, international tribunals should adopt a uniform privilege rule that serves the international community's interest in justice and allows both groups effectively to carry on with their valuable work.

This Part examines the justifications advanced for both the Red Cross's and war correspondents' privilege. It then compares the two, showing that the justifications for the two privileges are essentially identical and thus should result in identical privileges. Furthermore, this Part questions some of the assumptions made when defending the Red Cross's privilege, showing that an absolute right to nondisclosure is unnecessary to protect the Red Cross's ability to carry out its mandate and therefore is unwarranted.

Finally, this Part lays out the appropriate standard for extending privilege to both the Red Cross and war correspondents:⁹³ Reluctant witnesses should be required to present confidential material when the information in their possession both goes to a core issue⁹⁴ in the

⁹² Prosecutor v. Simic, Case No. IT-95-9-PT, Separate Opinion of Judge Hunt on Prosecutor's Motion for a Ruling Concerning the Testimony of a Witness, para. 23 (Int'l Crim. Trib. Yugoslavia, Trial Chamber, July 27, 1997), available at <http://www.un.org/icty/simic/trialc3/decision-e/90727EV59551.htm>.

⁹³ This test differs from the current test for war correspondents in the ICTY in that it applies only to confidential information. If, for example, a war correspondent identifies a source in his/her article or news report, the war correspondent cannot later claim that that information is privileged. The ICTY test does not speak to the issue of confidentiality. See *Brdjanin*, Interlocutory Appeal, *supra* note 16, para. 50.

⁹⁴ Future courts will be left to determine the definition of what constitutes a "core issue" since the *Brdjanin* tribunal failed to define it when they articulated it as part of the current war correspondent's test. *Id.*

case and is not available from any other source. The decision on whether those mandatory disclosure requirements are met should be made by the court, not the individual or organization in possession of the information.

*A. The Justifications for the Red Cross's and
War Correspondents' Privileges*

1. The Red Cross's Privilege

In recognizing an absolute privilege for the Red Cross,⁹⁵ the *Simic* tribunal proceeded in three steps: 1) It recognized the Red Cross's unique mandate,⁹⁶ 2) it reasoned that the Geneva Conventions must be interpreted so that the Red Cross can discharge this mandate effectively,⁹⁷ and 3) it concluded that the right of nondisclosure is necessary for the Red Cross to carry out its mandate.⁹⁸

The mandate of the Red Cross includes the obligation to "work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law; . . . to ensure the protection of and assistance to military and civilian victims," and to work for the dissemination of knowledge about international humanitarian law.⁹⁹ Although the Red Cross's statutes identify its responsibilities, most of them can be traced back to the Geneva Conventions of 1949.¹⁰⁰ Thus,

⁹⁵ Because PrepCom accepted the legal arguments endorsed by the ICTY, this Note's analysis of the Red Cross's privilege will rely on the reasoning advanced by the *Simic* court. See *supra* note 54 and accompanying text.

⁹⁶ *Simic*, Decision on Prosecution Motion, *supra* note 6, paras. 46–47 & n.9.

⁹⁷ *Id.* at para. 72.

⁹⁸ *Id.* at para. 73.

⁹⁹ *Statutes of the International Committee of the Red Cross*, art. 4, June 24, 1998, in INT'L REV. RED CROSS NO. 324, at 537, 538 (1998) [hereinafter *Red Cross Statutes*]. Humanitarian law is the law that applies in times of armed conflict. This protection and assistance includes visiting prisoners, caring for the sick and wounded, distributing food and clothing, tracing missing persons, and reuniting families. 5 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 250 (1983); Dutli & Pellandini, *supra* note 6, at 249; Jean-Philippe Lavoyer, *The International Committee of the Red Cross—How Does it Protect Victims of Armed Conflict?*, 9 PACE INT'L L. REV. 287, 288–89 (1997).

¹⁰⁰ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, arts. 3, 9, 6 U.S.T. 3114, 75 U.N.T.S. 31 (granting Red Cross permission to offer services in caring for sick and wounded and noting that Red Cross shall have access to all places where prisoners of war may be located); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 3, 9, 126, 6 U.S.T. 3316, 75 U.N.T.S. 135 (providing Red Cross permission to offer services to prisoners of war and noting that organization should have access to such persons); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 3, 10, 143, 6 U.S.T. 3516, 75 U.N.T.S. 287 (granting Red Cross permission to offer services, as well as, access to civilian persons); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea,

it is fair to say that the purposes served by the work of the Red Cross have been entrusted to it by the international community through the ratification of the Geneva Conventions.

The Red Cross maintains the position that, absent absolute privilege, it would not be able to gain access to war zones, prison camps, etc.¹⁰¹ It argues that if its delegates are seen as potential enforcers of criminal sanctions, they will be denied access to victims of armed conflict and therefore be unable to carry out the functions that the organization is intended to fulfill.¹⁰² To avoid such a situation, the Red Cross adheres to the principles of neutrality, impartiality, and independence, which preclude it from becoming involved in any controversy between parties to a conflict.¹⁰³

In order to maintain this impartiality, the Red Cross has adopted a practice of confidentiality.¹⁰⁴ When the Red Cross encounters violations of humanitarian law in the course of its work, its delegates bring the violation to the attention of the responsible state in an attempt to effect compliance.¹⁰⁵ While it will confront privately the offending state with its breaches of international humanitarian law, the Red Cross will not make that information public in the attempt to enforce international law.¹⁰⁶

Adopting the Red Cross's argument,¹⁰⁷ the *Simic* tribunal reasoned that, in order to perform its functions, the Red Cross must be

Aug. 12, 1949, arts. 3, 9, 6 U.S.T. 3717, 75 U.N.T.S. 85 (allowing Red Cross to provide care for and have access to members of armed forces at sea); *Red Cross Statutes*, *supra* note 99, at 538 ("[T]he role of the [Red Cross] shall be . . . to undertake the tasks incumbent upon it under the Geneva Conventions . . .").

¹⁰¹ *Simic*, Decision on Prosecution Motion, *supra* note 6, para. 13.

¹⁰² Jeannet, *Non-Disclosure*, *supra* note 19, at 644-47 (arguing that allowing courts to require Red Cross testimony would make it more likely that warring parties would deny or restrict Red Cross access to prisons); Jeannet, *supra* note 4, at 414-15 ("The [Red Cross] stressed that disclosure would have a negative impact on the organization's ability to carry out its mandate . . ."); Rona, *supra* note 6, at 212 (arguing that allowing court to compel Red Cross testimony "would mean the end of the [Red Cross's] long-standing ability to give warring parties the assurances upon which [Red Cross] access to the victim of armed conflict depends").

¹⁰³ The Red Cross adheres to seven principles that are seen as being of paramount importance: humanity, impartiality, neutrality, independence, voluntary service, unity, and universality. *Red Cross Statutes*, *supra* note 99, at 538; 5 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, *supra* note 99, at 248.

¹⁰⁴ See *Simic*, Decision on Prosecution Motion, *supra* note 6, para. 59 ("A consequence of the fundamental principles of neutrality and impartiality, and of the working principle of confidentiality, is the [Red Cross's] policy not to permit its staff to testify before courts and, in particular, not to testify against an accused.").

¹⁰⁵ *Action by the ICRC*, *supra* note 5, at 77; Dutli & Pellandini, *supra* note 6, at 246.

¹⁰⁶ *Action by the ICRC*, *supra* note 5, at 77.

¹⁰⁷ According to the *Simic* tribunal, the Red Cross supported this claim with affidavits. The Red Cross submitted these affidavits to the ICTY, but they are not available to the public. Email from Gabor Rona, Legal Advisor at the International Committee of the Red

able to gain access to camps, prisons, and places of detention. In order to be granted that access “it must have a relationship of trust and confidence with governments or the warring parties [T]he disclosure of information gathered by its employees while performing official duties would destroy the relationship of trust”¹⁰⁸ Furthermore, there is concern that “warring parties are likely to deny or restrict access by the [Red Cross] . . . if they believe that [Red Cross] staff may be collecting evidence for use in future criminal proceedings.”¹⁰⁹

Therefore, because nondisclosure is deemed necessary for the Red Cross to carry out its mandate effectively, the parties who ratified the Geneva Conventions—which created this mandate—have bound themselves to ensure nondisclosure.¹¹⁰ Thus, the Red Cross has a right to insist on such nondisclosure in judicial proceedings.¹¹¹

Additionally, because the Geneva Conventions’ requirements are recognized as binding by 188 States, the tribunal found that the right of nondisclosure for the Red Cross exists as a matter of customary international law.¹¹² Since the ICTY is bound by customary international law as well as its own rules of procedure,¹¹³ it held that it must recognize this right of nondisclosure as binding in ICTY proceedings.

2. *The War Correspondents’ Privilege*

In determining whether or not a privilege should be established for war correspondents,¹¹⁴ the tribunal found that both international and national authorities support the claim that “a vigorous press is essential to the functioning of open societies” and therefore clearly a

Cross’s Legal Division, to Emily A. Berman (Oct. 22, 2003, 09:14am EST) (on file with the *New York University Law Review*).

¹⁰⁸ *Simic*, Decision on Prosecution Motion, *supra* note 6, para. 65.

¹⁰⁹ Jeannet, *Non-Disclosure*, *supra* note 19, at 645.

¹¹⁰ *Simic*, Decision on Prosecution Motion, *supra* note 6, paras. 72–74.

¹¹¹ *Id.* at para. 73.

¹¹² *Id.* at para. 74.

¹¹³ *Id.* at para. 42.

¹¹⁴ The panel made a point of noting the narrow scope of the war correspondents’ inquiry. The privilege would apply not to all journalists, but only to war correspondents, defined as “individuals who, for any period of time, report (or investigate for the purposes of reporting) from a conflict zone on issues relating to the conflict.” *Brđjanin*, Interlocutory Appeal, *supra* note 16, para. 29. One commentator fears that this distinction, which grants war correspondents greater protection than other journalists, is inconsistent with international law regarding the free flow of information. See Nina Kraut, Comment, *A Critical Analysis of One Aspect of Randal in Light of International, European, and American Human Rights Conventions and Case Law*, 35 COLUM. HUM. RTS. L. REV. 337, 374 (2004).

matter of public interest.¹¹⁵ The ICTY pointed out that these concerns are heightened in the context of war, since “[t]he transmission of that information is essential to keeping the international public informed about matters of life and death.”¹¹⁶ In these situations, the work of war correspondents can be the means by which the presence of serious human-rights violations is made a matter of public information, thereby mobilizing the international community to address the situation.¹¹⁷

The next step in the tribunal’s analysis was to determine the effect of compulsory testimony on the ability to carry out that important work. The argument, articulated both by Randal and amici curiae who submitted a brief on his behalf,¹¹⁸ is similar to that of the Red Cross. The argument is as follows:

[I]n order to do their jobs effectively, war correspondents must be perceived as independent observers rather than as potential witnesses for the Prosecution. . . .

. . . If war correspondents were to be perceived as potential witnesses for the Prosecution, two consequences may follow. First, they may have difficulties in gathering significant information because the interviewed persons . . . may talk less freely with them and may deny access to conflict zones. Second, war correspondents may shift from being observers of those committing human rights violations to being their targets.¹¹⁹

As the Red Cross argues, the Appeals Chamber noted that “[w]hat really matters is the perception that war correspondents can be forced to become witnesses against their interviewees.”¹²⁰ Therefore, the tribunal concluded that “compelling war correspondents to testify before the International Criminal Tribunal on a rou-

¹¹⁵ *Brdjanin*, Interlocutory Appeal, *supra* note 16, para. 35. In so holding, the ICTY referred to the many international conventions and decisions of local courts discussed below, pointing out that the importance of the work of war correspondents has been recognized by the international community of states. See *infra* notes 127–33 and accompanying text. On the national level, the ICTY quoted U.S. jurisprudence stating that “‘society’s interest in protecting the integrity of the newsgathering process, and ensuring the free flow of information to the public, is an interest of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.’” *Brdjanin*, Interlocutory Appeal, *supra* note 16, para. 35 (quoting *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) (internal quotations omitted)).

¹¹⁶ *Id.* at para. 36.

¹¹⁷ See *id.*

¹¹⁸ 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” at 21–23, *Brdjanin* (No. IT-99-36-T) [hereinafter *Brdjanin*, Amicus Brief].

¹¹⁹ *Brdjanin*, Interlocutory Appeal, *supra* note 16, paras. 42–43.

¹²⁰ *Id.* at para. 43.

tine basis may have a significant impact upon their ability to obtain information and thus their ability to inform the public on issues of general concern,"¹²¹ as well as put them in danger.

Having found that war correspondents should be allowed to invoke some sort of privilege, the tribunal went on to balance the competing interests: ensuring justice by having all the relevant evidence before the tribunal while also serving the public interest by allowing war correspondents to do their work effectively.¹²² The resulting test is the two-step inquiry requiring the party advocating that the evidence be admitted to demonstrate that the evidence sought is of direct and important value in determining a core issue in the case and that it cannot reasonably be obtained elsewhere.¹²³

B. The Red Cross's and War Correspondents' Privileges Compared

This Section looks at the justifications advanced for the Red Cross's and war correspondents' privileges. It compares them to one another through the lens of the reasoning in the *Simic* case in order to show that there is no principled reason advanced by the ICTY that would lead to different treatment of the two groups.

1. International Mandate

The first component of the justification of absolute privilege advanced by the *Simic* court is that the Red Cross has been given a mandate to promote compliance with international humanitarian law on behalf of the international community by several articles of the Geneva Conventions.¹²⁴

The Red Cross is not the only group who has been given a mandate by the international community, however. The same argument that is made for the Red Cross—that those states who are parties to these treaties have an obligation to ensure that its mandates can be carried out—applies to war correspondents as well. The ICTY acknowledged as much,¹²⁵ but did not replicate the Red Cross's absolute privilege for them.¹²⁶

The Geneva Conventions themselves include provisions designed to protect war correspondents, recognizing that they constitute a

¹²¹ *Id.* at para. 44.

¹²² *Id.* at para. 46.

¹²³ *Id.* at para. 50.

¹²⁴ See *supra* notes 99–100 and accompanying text.

¹²⁵ *Brđjanin*, Interlocutory Appeal, *supra* note 16, paras. 35–38.

¹²⁶ See *supra* notes 58–61 and accompanying text.

group whose presence in areas of conflict is valued.¹²⁷ Several other international instruments declare the right to freedom of expression, to hold opinions, and to seek, receive, and impart information.¹²⁸ These agreements represent a determination by the international community that ensuring the success of the work of war correspondents is an obligation.

The vital role of war correspondents also manifests itself when it comes to ensuring accountability for violations of humanitarian law in situations of armed conflict. War correspondents' reporting provides the public with information about wars and the actions of the parties involved, "bringing to the attention of the international community the horrors and reality of conflict."¹²⁹ One commentator noted that, "[i]n the last two decades, the media consistently has relayed to an ever-widening world audience the numerous tragedies that have occurred in almost every region of the world."¹³⁰ Such coverage is an essential part of the fight against impunity on several levels. First of all, bringing the perpetration of war crimes to the attention of the world community can inspire action against it. Several officials

¹²⁷ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 79, 1125 U.N.T.S. 3, 40. Not only does this convention recognize that war correspondents will be present in war zones, but it requires them to remain impartial by not taking any action that might adversely affect their status as civilians. *Id.*

¹²⁸ See African Charter on Human and Peoples' Rights, June 27, 1981, art. 9, 1520 U.N.T.S. 217, 247 (recognizing right to receive information and to express and disseminate opinions); European H.R. Convention, *supra* note 79, art. 10, 213 U.N.T.S. 222, 230 (recognizing freedom to hold opinions and to receive and impart information and ideas without interference); American Convention on Human Rights, art. 13, Nov. 22, 1969, 1144 U.N.T.S. 143, 148-49 (recognizing right to "hold opinions without interference and to seek, receive and impart information and ideas"); International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 19, 999 U.N.T.S. 171, 178 (same); Universal Declaration of Human Rights, art. 19, G.A. res. 217A (III), U.N. GAOR, 3rd Sess., at 71, U.N. Doc. A/810 (1948) (same), available at <http://unhchr.ch/udhr/lang/eng.pdf> (last visited Jan. 24, 2005).

As these various treaties illustrate, the international community recognizes that "a vigorous press is essential to the functioning of open societies." *Brdjanin*, Interlocutory Appeal, *supra* note 16, para. 35. One commentator goes so far as to say that, by virtue of its inclusion in all of these fundamental human-rights instruments, the protection of the free flow of information is a matter of customary international law, just as the *Simic* tribunal found the Red Cross's right of nondisclosure to be. Amit [NMI] Mukherjee, *International Protection of Journalists: Problem, Practice, and Prospects*, 11 ARIZ. J. INT'L & COMP. L. 339, 354-55 (1994).

¹²⁹ *Brdjanin*, Interlocutory Appeal, *supra* note 16, para. 36 (quoting Prosecutor v. *Brdjanin*, Case No. IT-99-36, Decision on Motion to Set Aside Confidential Subpoena to Give Evidence, para. 25 (Int'l Crim. Trib. Yugoslavia, Trial Chamber, June 7, 2002) [hereinafter *Brdjanin*, Decision on Motion], <http://www.un.org/icty/brdjanin/trialc/decision-e/t020612.htm>).

¹³⁰ M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COL. L. REV. 409, 416 (2000).

involved in the operation of the ICTY credit pressure from reporting on the events in Yugoslavia with generating the political will to begin prosecuting the violators.¹³¹ The tribunal itself recognizes that without the work of war correspondents, the support for the creation of the ICTY would not have been as strong.¹³² Second, information gathered in the course of reporting a story can provide essential evidence that can lead to the arrest and prosecution of criminals. Examples are legion.¹³³ These benefits will accrue to the international community only if war correspondents are not just *permitted* in areas where potential war crimes may occur but also *protected* in such a way that their ability to report accurately is not compromised. For reasons discussed below, the appropriate means of providing this protection is through a qualified privilege, similar to the one the ICTY recognized in the *Brdjanin* case.

2. Confidentiality

The next aspect of the justification of the Red Cross's privilege involves its practice of confidentiality.¹³⁴ The argument is that Red Cross workers will not be granted access to the places and people that need their services if warring parties do not believe that the Red Cross will practice neutrality and confidentiality. A similar argument can be made in the case of war correspondents: If they expect sources to whom they promise confidentiality to agree to speak to them or to allow them access to areas where war crimes may be taking place, they

¹³¹ Richard Goldstone, *Exposing Human Rights Abuses—A Help or Hindrance to Reconciliation?*, 22 HASTINGS CONST. L.Q. 607, 616 (1995) (arguing that creation of ICTY was due, in part, to “access to the atrocities by television cameras and journalists”); Wald, *supra* note 38, at 218 (“In large part, it was courageous reporters, who, by exposing the seemingly continuous stream of unbelievable tales of brutalities committed on innocent civilians, helped make the ICTY a reality.”); see also Bassiouni, *supra* note 130, at 417 (arguing that only obstacle to political compromise in former Yugoslavia that would have precluded criminal liability for Serb war criminals was “the daily media coverage of ethnic cleansing, systematic rape, reports of torture, and the systematic destruction of personal and cultural property”).

¹³² See *Brdjanin*, Decision on Motion, *supra* note 129, para. 25.

¹³³ Elizabeth Neuffer, reporter for *The Boston Globe*, led investigators in Bosnia to a trail of skeletons she and a colleague had discovered. *Brdjanin*, Amicus Brief, *supra* note 118, at 20. Richard Goldstone, appointed by then-South African President de Klerk to investigate an incident where police shot into a crowd of demonstrators, received a videotape of the event from a reporting team. Richard Goldstone, *Foreword* to CRIMES OF WAR 15 (Roy Gutman & David Rieff eds., 1999). In Northern Ireland, the judicial inquiry into the Bloody Sunday killings was significantly aided by evidence collected by journalists. *Brdjanin*, Amicus Brief, *supra* note 118, at 21. In the first prosecution in the ICTY, *The Guardian*'s Ed Vulliamy's testimony provided the tribunal with its “first real look inside” the concentration camps created during the Bosnian conflict. SCHARF, *supra* note 22, at 135–36.

¹³⁴ See *supra* notes 101–09 and accompanying text.

must be able to guarantee that such a promise will be honored. In fact, just such an argument was advanced by media and journalist organizations in the amicus brief submitted to the ICTY in Randal's case.¹³⁵

As discussed above, most of the international community has established, either judicially or through statute, laws allowing journalists a qualified privilege to keep confidential sources secret, even if such information is relevant to a criminal prosecution, in the interests of encouraging the free flow of information.¹³⁶

The need for confidentiality in the case of war correspondents—just like in the case of the Red Cross—creates a legal obligation for all states party to those treaties recognizing that the work of journalists is in the public interest: They must ensure that journalists' confidentiality is honored to the extent necessary to allow them to carry on with their work.¹³⁷ It is hard to see—from a practical standpoint—how a court could reach a conclusion regarding war correspondents that is different from the one that they reached in the case of the Red Cross. If you accept both that the work of war correspondents, like that of the Red Cross, is recognized as vital by the international community, and that in order to carry out that work, their promises of confidentiality must be honored, then the logic used in the *Simic* case regarding the Red Cross would apply to war correspondents as well.¹³⁸

This comparison of the factors taken into account by the ICTY indicates that there is no practical reason for treating information discovered by the Red Cross and information provided to journalists with the promise of confidentiality any differently. War correspondents and the Red Cross, therefore, should receive equal treatment. Because war correspondents have performed their jobs effectively

¹³⁵ *Brđjanin*, Amicus Brief, *supra* note 118, at 21–23.

¹³⁶ See *supra* Part II.B.1.

¹³⁷ It is important to note that Randal did not make a promise of confidentiality. In fact, he identified his source by name in *The Washington Post*. Randal, *supra* note 59. Clearly, Randal had made the determination that confidentiality was unnecessary in carrying out his function. In such circumstances the court should not afford the source more protection than he found necessary to negotiate from his interviewer.

¹³⁸ Some may argue that the work of the Red Cross and that of war correspondents is fundamentally different; that the Red Cross performs humanitarian relief while war correspondents simply report on what they see. However, this Note argues that the work of war correspondents is not so different from that of the Red Cross. The international community relied on war correspondents to inspire the political will to create the ICTY, and it continues to rely on them to expose breaches of humanitarian law when they occur, thus allowing the world community to mobilize in aid of the victims. Through international instruments and the decisions of courts, this rights-based function of war correspondents has been affirmed by the international community over and over again. While the Red Cross may address these issues in a more direct manner, the work of both groups frequently furthers the same goals.

with the protection of only a qualified privilege, there is no reason the Red Cross cannot do the same.

C. *The Role of Legal Personality*

There is one unique aspect of the Red Cross that commentators and judges often use to justify its special treatment in international law—it possesses international legal personality.¹³⁹ While it is true that the possession of legal personality does make the Red Cross unique among nongovernmental organizations, it should have no bearing on the decision to grant it an absolute privilege in international criminal tribunals. Possession of legal personality simply allows an entity to conclude treaties, enter into diplomatic relations, and bring international legal claims in court,¹⁴⁰ none of which should affect its rights or duties when it comes to testifying in international criminal tribunals.

The Red Cross's legal personality was not an essential element of the *Simic* tribunal's analysis. It noted that the Red Cross was unique in two ways: its legal personality¹⁴¹ and its mandate.¹⁴² Yet, it went on to point out that the parties to the Geneva Conventions had agreed that the Red Cross must be allowed to carry out its *mandate* and the Conventions therefore must be interpreted in such a way as to ensure that can happen. The key analysis of the *Simic* panel was based on the commitment of the international community to allow the Red Cross to perform its functions, which allegedly requires the practice of confidentiality. This would be true whether or not the Red Cross possessed legal personality.

D. *Other Reasons Why the Red Cross and War Correspondents Have Access*

This Section questions whether confidentiality is really what ensures access to conflict zones, and therefore if an absolute privilege truly is necessary to advance the public interest. While it may be true that the promise of confidentiality *contributes* to the Red Cross and war correspondents being granted access to conflict areas, the guar-

¹³⁹ *Simic*, Decision on Prosecution Motion, *supra* note 6, paras. 24, 46 n.9; Rona, *supra* note 6, at 208. An entity is considered to have an international legal personality if it has the capacity to enter into legal relations and to have legal rights and duties. MALANCZUK, *supra* note 60, at 91. This is a status usually reserved for sovereign states. 1 OPPENHEIM, INTERNATIONAL LAW, A TREATISE 19 (2d ed. 1912).

¹⁴⁰ Christian Dominicé, *La Personnalité Juridique Internationale du CICR*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES 663 (Christophe Swinarski ed., 1984).

¹⁴¹ *Simic*, Decision on Prosecution Motion, *supra* note 6, para. 35.

¹⁴² *Id.* at paras. 46–50.

antee of total confidentiality is not necessary to ensure this access. Indeed, humanitarian groups operating without a confidentiality policy often gain access to war zones. It is not simply an absolute privilege which guarantees access; rather, access is the result of a combination of forces. While conceding that a confidentiality policy is helpful in gaining access, there is no reason to think that making the Red Cross's privilege conditional instead of absolute would affect this access adversely.

1. *Confidentiality Is Not Uniformly Necessary*

a. The Red Cross's Confidentiality Policy

The Red Cross itself does not always adhere to its policy of confidentiality, raising questions about just how essential the policy is in guaranteeing access. For example, it allowed its delegates to provide information to the Nuremburg tribunals in 1946.¹⁴³ More recently, the Red Cross publicized complaints about the treatment of Afghan prisoners in U.S. custody in Guantanamo.¹⁴⁴ And while the Red Cross reports about Abu Ghraib were not released intentionally to the media, there were many people inside the organization who advocated going public before the U.S. abuses were exposed.¹⁴⁵

The fact that the Red Cross does not maintain that it will *never* release information to international criminal tribunals, only that it and not the courts should be the one to decide when it will do so, implies that confidentiality is *not* always necessary. Extending such an extraordinary privilege should be done on the basis of necessity, not on the basis of convenience or the Red Cross's desire to avoid relinquishing control to the courts.

b. Other NGOs

Other humanitarian organizations do not find silence a necessary component of accomplishing their mission and have criticized the Red Cross's adherence to silence in the face of breaches of humanitarian law.¹⁴⁶ In fact, organizations equally committed to neutrality and

¹⁴³ *Id.* at para. 60; Jeannet, *supra* note 4, at 420.

¹⁴⁴ Farnaz Fassihi & Steve Stecklow, *Finding U.S. Abuse in Iraq Left Red Cross Team in a Quandary*, WALL ST. J., May 21, 2004, at A1; Richard Waddington, *Red Cross Says Repeatedly Warned U.S. on Iraq Jail*, REUTERS, May 6, 2004, at <http://www.commondreams.org/headlines04/0506-04.htm>.

¹⁴⁵ Fassihi & Stecklow, *supra* note 144.

¹⁴⁶ Michael Ignatieff, *International Committee of the Red Cross (ICRC)*, in *CRIMES OF WAR*, *supra* note 133, at 202, 204. In addition to its silence about the torture at Abu Ghraib, there have been other occasions when the Red Cross has failed to act in the face of atrocity. For example, the Red Cross gained access to German concentration camps and information about the Nazi plan to exterminate the Jews as early as 1935 but failed to

impartiality,¹⁴⁷ and that also require access to conflict areas in order to carry out their aims, are able to operate effectively even though they have missions which explicitly require them to speak out against any human rights violations they discover. Médecins Sans Frontières (MSF) is one such organization.¹⁴⁸ While its practice of treating its medical attention and vocal opposition to human rights violations as “two inseparable elements of providing relief to endangered people” has been controversial, both within the organization and among NGOs in general,¹⁴⁹ it is recognized globally as one of the most effective NGOs in existence.¹⁵⁰ The experience of MSF shows that reasonable minds could differ as to whether the Red Cross’s adherence to silence and confidentiality is the only way to provide humanitarian aid while remaining impartial.¹⁵¹

c. Journalists

Even journalists, who often work under similar conditions as Red Cross delegates, question whether maintaining confidentiality is nec-

divulge this information to the public. *Id.* at 203. And in 1992 in the former Yugoslavia, Red Cross delegates did corroborate—off the record—information journalists had gleaned from other sources about starvation, torture, and summary executions taking place in Serb concentration camps, but they again maintained public silence. *Id.*

¹⁴⁷ MÉDECINS SANS FRONTIÈRES, THE CHARTER OF MÉDECINS SANS FRONTIÈRES, (“Médecins Sans Frontières observes neutrality and impartiality in the name of universal medical ethics and the right to humanitarian assistance . . .”), at <http://www.msf.org/about/index.cfm?indexid=76997B7B-BA3E-11D4-B1FA0060084A6370> (last modified Mar. 8, 2002).

¹⁴⁸ Part of its work is “to address any violations of basic human rights encountered by field teams, violations perpetrated or sustained by political actors.” MÉDECINS SANS FRONTIÈRES, THE MSF ROLE IN EMERGENCY MEDICAL AID, *supra* note 53. The organization refers to this aspect of its work as “témoignage,” which “is a French term that encompasses the [organization’s] commitment to testimony, open advocacy, and outright denunciation when working with endangered populations throughout the world.” MÉDECINS SANS FRONTIÈRES, TÉMOIGNAGE AND THE MSF MOVEMENT, at <http://www.msf.org/about/index.cfm?indexid=B439CEF3-BFBB-11D4-B1FD0060084A6370> (last modified June 19, 2001).

¹⁴⁹ See Françoise Bouchet-Saulnier, *Between Humanitarian Law and Principles* (2000) (describing Médecins Sans Frontières’s (MSF’s) view of its mission as including dual responsibilities of humanitarian action and denunciation of rights violations), at <http://www.msf.org/content/page.cfm?articleid=6589C8A5-DC2C-11D4-B2010060084A6370>.

¹⁵⁰ MSF was awarded the Nobel Peace Prize in 1999 “in recognition of the organization’s pioneering humanitarian work on several continents.” Press Release, The Norwegian Nobel Committee, The Nobel Peace Prize 1999 (Oct. 15, 1999), <http://nobel-prize.org/peace/laureates/1999/press.html>.

¹⁵¹ Perhaps the global enforcement of humanitarian law and the protection of victims are best served by having groups which act in varying manners and use diverse methods. That is to say, perhaps the NGO community is better off with both organizations that insist on a policy of confidentiality and those that denounce it. Regardless of whether this is true, however, MSF’s experience is a valuable example because it shows that effectiveness in conflict areas may not require a practice of nondisclosure.

essary to guarantee access. While the Red Cross has refused to share information almost without exception, journalists have been less likely to resist a tribunal's subpoena.¹⁵² One argument for testifying is that war correspondents are in danger whether they testify or not. Therefore, they might as well help to hold war criminals to account if they can.¹⁵³ Others simply see it as a duty.¹⁵⁴ A similar argument can be made regarding Red Cross delegates. Both groups, after all, are working in war zones where the rule of law cannot be relied upon to protect individual safety.

In the case of Ed Vulliamy, a journalist who testified in the first prosecution in the ICTY, it seems that the promise that he would publicize his findings in the Yugoslavian concentration camps was the *basis* of his access, rather than a barrier to it. Vulliamy was one of the first journalists allowed inside Omarska prison camp, invited to visit by Radovan Karadzic, who thought the visit would disprove reports that the camp's inhabitants were being mistreated.¹⁵⁵ In this case, had Vulliamy not been willing to tell his story to the world, Karadzic never would have allowed him to see Omarska.

This lack of consensus even among those who most heavily rely on privilege to guarantee access illustrates that absolute privilege may not be necessary, so the qualified privilege established in the ICTY is more appropriate for the groups working under these conditions.

2. *International Political Considerations*

The argument that the Red Cross will be barred from areas to which they would like to have access rests on the unproven assumption that the authorities who decide whether or not to grant this access are more concerned about potential future criminal proceedings than they are motivated by countervailing forces which provide pressure for access. In fact, there are forces in international law and international relations which call this assumption into question. Moreover, the hypothesis that any decision is ever made on the basis of fear of future international prosecution for war crimes is questionable.

¹⁵² Ed Vulliamy, *An Obligation to the Truth*, OBSERVER, May 19, 2002, at 30 (discussing his decision to testify in ICTY); Matt Wells, *BBC Reporter to Testify at Hague War Crimes Tribunal*, GUARDIAN, Aug. 20, 2002, at 9 (noting that BBC reporter Jacky Rowland regarded testifying against Slobodan Milosevic in ICTY as duty).

¹⁵³ Vulliamy, *supra* note 152.

¹⁵⁴ Vulliamy, *supra* note 152; Wells, *supra* note 152.

¹⁵⁵ SCHARF, *supra* note 22, at 136. In fact, the video of Vulliamy's visit and his reports accompanying it created the international pressure that resulted in the camp's closing a few weeks after his visit. *Id.*

a. Countervailing Forces

The forces of reciprocity in international relations provide strong incentives for regimes in conflict areas to grant access to both Red Cross delegates and war correspondents. Reciprocity is one of the fundamental premises of international law. Nations enter into agreements, such as the Geneva Conventions, and adhere to international norms because they have decided that ceding the freedom to act in certain ways is worthwhile because it may prevent future harms.¹⁵⁶ While there are no immediate rewards for adherence, there may be adverse consequences for noncompliance.¹⁵⁷

The prominence of the concept of reciprocity in international relations means that governments feel pressure to allow the Red Cross and members of the free press to access conflict areas. If they do not allow such access, they are in breach of their international obligations.¹⁵⁸ Any nation in breach of an international obligation faces several potential consequences. These consequences could be specific, targeted countermeasures—for example, a nation whose POWs have been denied visits by the Red Cross could similarly deny access to the offending government's POWs. Or they could be more general means of retaliation, such as exclusion from trade agreements or denial of international aid.¹⁵⁹

b. Fear of Prosecution Not a Factor

Finally, it is important to inject common sense into the discussion. The likelihood that people in positions of power make decisions based on their fear of a potential international criminal prosecution in the future seems small. It would require, first, that they consider what they or their colleagues are doing to be a war crime. Second, they would have to assume that their activities would be discovered by the world community and that the decision would be made to prosecute. Finally, they would have to assume that this person or group to whom

¹⁵⁶ See Robert O. Keohane, *The Demand for International Regimes*, in INTERNATIONAL REGIMES 158 (Stephen D. Krasner ed., 1983). For example, State A may agree to show restraint in its treatment of the citizens of State B with the understanding that State B will show the same restraint when it comes to treatment of citizens of State A in the future. See *id.*

¹⁵⁷ See ROBERT O. KEOHANE, *Reciprocity in International Relations*, in INTERNATIONAL INSTITUTIONS AND STATE POWER 132–34, 146 (1989).

¹⁵⁸ See discussion of Geneva Conventions and free press obligations *supra* notes 99–100, 127–28 and accompanying text.

¹⁵⁹ The Bush administration has, for example, earmarked \$5 billion of U.S. foreign aid to go to nations that display, among other things, respect for the rule of law. U.S. DEP'T OF STATE, THE UNITED STATES AND AFRICA: A GROWING PARTNERSHIP (2004), available at <http://www.state.gov/documents/organization/34409.pdf>.

they may deny access would be the only source of any particular type of evidence against them.

There are several sources that indicate that the fear of prosecution is not a factor in decisions about granting access. Jacky Rowland, a former BBC correspondent in Belgrade who agreed to testify against Slobodan Milosevic, opines that the immediate dissemination of information may concern potential defendants, not the concern "that you might testify against them at some tribunal three years down the line."¹⁶⁰ This sentiment is echoed by others. According to Peter Maass, "The prospect of a war-crimes indictment several years down the road is very low on the list of concerns for such people."¹⁶¹ And there is the example of Ed Vulliamy, discussed above, who was granted access to the Yugoslavian concentration camps *because* he was a journalist, not in spite of it.¹⁶²

Moreover, potential war crimes defendants know that neither the Red Cross nor war correspondents are entering conflict areas for the purpose of collecting evidence of war crimes; they are performing their legitimate functions. If they are exposed to information that later may be used in the prosecution of war crimes, that exposure is simply a byproduct of their legitimate activity. It seems unlikely that a host government would exclude them, given all the other pressures to allow access, simply out of fear that they may encounter damning evidence that one day may be subpoenaed and which may pass the narrow privilege test articulated in this Note.

Finally, if the fear of prosecution truly was a motivating factor in decisions about access, it is unlikely that access would be granted even with a confidentiality policy in place. As one Red Cross inspector puts it, "It's very rare that the authorities of any country will allow us to be the direct witnesses of any situation When they allow you in, it's probably because they've already cleaned up their act."¹⁶³

The factors discussed above seem strong enough to overcome whatever small hesitations the possibility of Red Cross delegates testifying in international criminal tribunals might create in granting them access. Certainly, there are times when this logic may not apply and there are regimes that may ignore the pressures discussed above, but the ICTY erred in its analysis of the Red Cross's need for an absolute right of nondisclosure by failing even to acknowledge these countervailing forces when determining what the appropriate privilege would be.

¹⁶⁰ Wells, *supra* note 152.

¹⁶¹ Peter Maass, *Journalists and Justice at The Hague*, N.Y. TIMES, July 5, 2002, at A19.

¹⁶² See *supra* note 155 and accompanying text.

¹⁶³ Fassihi & Stecklow, *supra* note 144 (internal quotations omitted).

E. *The Appropriate Privilege Standard*

This Note has established that the need for confidentiality is not absolute. The Red Cross and war correspondents should be extended the same narrowly drawn qualified privilege. The ideal rule for both the Red Cross and war correspondents would look very similar to the two-pronged test currently in effect for war correspondents in the ICTY. It should be modified, however, to require that the information was attained only after a promise of confidentiality to the source of the information. The test should be as follows: There should be a presumption of privilege for information gleaned from sources that have been promised confidentiality. The party seeking to compel testimony can overcome this presumption by demonstrating two things: 1) The evidence sought is of direct and important value in determining a core issue in the case, and 2) the evidence sought is unavailable from any other source.

This test creates a privilege that permits Red Cross delegates and war correspondents to carry out their mandates effectively, while not opening the floodgates to endless claims of privilege for nonconfidential material or by organizations not in need of such protection. The Red Cross's and war correspondents' demand for privilege may enhance their reputation as independent, nonpartisan entities. This reputation may assist in their professional effectiveness. And as long as the information that they possess is not essential to the prosecution's case or is available elsewhere, there is no reason to endanger these entities' ability to do their work.

The privilege, however, should be narrowly drawn to avoid potential problems noted both by the ICTY¹⁶⁴ and by the PrepCom for the ICC Rules.¹⁶⁵ If too many situations are allowed to fall under a privilege, too many witnesses called by the tribunal in question will claim privilege and the tribunal will not be able to function effectively.¹⁶⁶ The existence of this risk argues not only for narrow qualified privileges, but against the existence of any absolute privileges.

F. *ICC Rules Revisited*

The ICC Rules, while they may result in similar treatment for both the Red Cross and war correspondents, still should be modified because they allow for absolute rather than qualified privilege. As

¹⁶⁴ *Simic*, Decision on Prosecution Motion, *supra* note 6, para. 72 n.56.

¹⁶⁵ Jeannot, *Non-Disclosure*, *supra* note 19, at 651.

¹⁶⁶ It should be noted, however, that the existence of a privilege does not mean that all of those eligible will demand its protection. Whether journalists such as these will maintain this attitude now that a privilege has been recognized for them, especially as to sources to which they have promised confidentiality, remains to be seen.

discussed above, these Rules codify the ICTY's finding that the Red Cross has an absolute right of nondisclosure as a matter of customary international law.¹⁶⁷ The ICC Rules should be changed¹⁶⁸ to remove the special provision granted to the Red Cross and instead apply to all organizations the same narrowly drawn privilege described above.

It is unclear whether the ICC Rule regarding communications made in the context of a confidential or professional relationship will be extended to provide some sort of privilege for journalists. If so, this rule has the same flaw as the one which applies to the Red Cross. Once a communication is identified as privileged, its protection is absolute.¹⁶⁹ So while it is laudable that Rule 73 may allow for the protection of journalists' confidential communications in the ICC, it, like the rule regarding the Red Cross, should be modified to allow compelled testimony when the confidential evidence sought is of direct and important value in determining a core issue in the case and is not available from any other source.

CONCLUSION

Because this Note adopts the admittedly unorthodox position that the Red Cross is, in this regard, a barrier to the enforcement of international humanitarian law,¹⁷⁰ it is important to be clear about what is at stake in this discussion. The international community, through the United Nations and the Rome Treaty, has determined that international criminal tribunals are essential elements in

¹⁶⁷ ICC Rules, *supra* note 15, Rule 73(4); *see also supra* notes 53–57 and accompanying text.

¹⁶⁸ Amendments to the Rules of Procedure and Evidence may be proposed by:

- (a) Any State Party;
- (b) The judges acting by an absolute majority; or
- (c) The Prosecutor.

Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

Rome Statute, *supra* note 15, art. 51(2).

¹⁶⁹ The only exception is when the person consents in writing to the disclosure, or has disclosed the information to a third party, and that third party gives evidence of that disclosure. ICC Rules, *supra* note 15, Rule 73(1)(a), (b).

¹⁷⁰ It is important to note that the Red Cross is an avid supporter of international criminal tribunals in general and the ICC in particular. *See* Dutli & Pellandini, *supra* note 6, at 244 ("The [Red Cross] considers the establishment of [the ICTY] as an important step towards effective compliance with the obligation to punish war crimes."); Jeannet, *supra* note 4, at 424 (noting Red Cross's support for creation of ad hoc tribunals and ICC); Jeannet, *Testimony*, *supra* note 19, at 993–94 (same); Rona, *supra* note 6, at 213 ("[T]he [Red Cross] enthusiastically supports the existence of mechanisms for the repression of criminal violations of humanitarian law."). It is only in the specific instance when information in its possession is requested by these courts that the Red Cross's interests diverge from that of attempting to ensure accountability for violations of humanitarian law.

enforcing international law, deterring major humanitarian violations, and enabling societies in conflict to move towards a peaceful future. Crimes that are prosecuted in these venues necessarily will be the gravest, most heinous transgressions against the laws of war and international humanitarian law. Practitioners and commentators agree that the availability of witnesses is essential to the effective functioning of these tribunals.¹⁷¹ It is not unreasonable, in this context, to require that those organizations and individuals most likely to be in possession of probative evidence put the information they have before these tribunals. In addition, the narrow scope of the privilege articulated in this Note means that the concern for “opening the floodgates” expressed both by the PrepCom and the *Simic* tribunal is baseless.

It is also important to note, despite the Red Cross’s assertions to the contrary, the minimal impact that this requirement actually will have on the operations of organizations working in conflict zones. First of all, the evidence in question must go to a core issue in the case and it must not be available through any other source. The frequency with which these factors will converge is unlikely to be high. In the small minority of cases where they do, however, the interest of justice demands that the final determination of whether the admission of the evidence outweighs the pledge of confidentiality must belong to the court. Secondly, there are numerous protective measures available to witnesses in these institutions.¹⁷² Measures such as anonymous witness testimony can be used to ensure that the parties involved in the conflict never are aware that the Red Cross has testified against them. Given the fact that the narrow scope of the exception to the presumption of privilege advocated here rarely will allow it to be overcome, and the fact that, when it is overcome, there are means available to conceal the participation of the particular witness in the proceedings, there is no justification for the creation of such absolute privilege.

¹⁷¹ See *supra* notes 38–39 and accompanying text.

¹⁷² See *supra* notes 44–45 and accompanying text. The ICC also has established a special Victims and Witnesses Protection division, charged with providing “protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses.” Rome Statute, *supra* note 15, art. 43(6).