Journalists, War Crimes and International Justice

Howard Tumber

In recent years globalisation and changes in international policy have put issues of global governance, universal principles of human rights and internationalism in trade, social and security policies on the agenda (International Council on Human Rights Policy, 2002). Both awareness and prosecution of war crimes has become widespread (see Gutman and Rieff, 1999; Robertson, 2002) and the advent of the International Criminal Court, which entered into force in July 2002, has put the issue centre stage (see Schabas, 2003).

It was after the Nuremberg and Tokyo trials following the end of World War 11 that pressure for the creation of an international court to deal with prosecuting people for crimes against humanity began to gain momentum. However, it was not until the forty-fourth session of the General Assembly in 1989, that work began on drafting proposals for the creation of a permanent international court to deal with the international drug trade. In the interim, the UN Security Council created several ad hoc tribunals to try war criminals in the former Yugoslavia and Rwanda setting up the International Criminal tribunal for the former Yugoslavia (ICTR) in 1993 and the International Criminal tribunal for Rwanda (ICTR) in 1994. Their brief was to try individuals for grave breaches of the Geneva conventions of 1949 including genocide and crimes against humanity. Despite many countries opposition to the setting up of an International Criminal Court on the grounds of potential political prosecutions, interference with national sovereignty, and insufficient checks and balances on the authority of judges and prosecutors, there was comparatively little resistance to the setting up of the ad hoc tribunals. The USA, for example, strongly opposed to the IIC has contributed financially to the ICTY and ICTR.

Some journalists took a moral stance towards their reporting of the conflicts in Bosnia and Rwanda. Journalists such as the National Public Radio's Tom Gjelten, CNN's Christine Amanpour and the BBC's Martin Bell made a distinction between objectivity and neutrality arguing that accurate reporting demands determining responsibility.

According to their detractors, reporters such as Amanpour and Bell often demonised the Serbians, underreported atrocities by the Muslims and Croats and their partisan reporting

on Bosnia did a disservice to the public. Reports subsequently showed, though, that the Serbians carried out 90% of the aggression (Moeller 1999: 261)

Critics of the media coverage of Bosnia and later Kosovo condemn the 'journalism of attachment' claiming that is it part of the broader human rights discourse which legitimises barbarism. Hammond, for example, argues: 'Instead of truthful reporting, the agenda of advocacy journalism has sometimes made reporters highly selective, leading them to ignore inconvenient information. Rather than exercising critical independence, advocacy journalism has frequently coincided with the perspectives and policies of powerful Western governments. In addition, despite claims to be pursuing a moral, human rights agenda, the journalism of attachment has led to the celebration of violence against those perceived as undeserving victims'. Hammond accuses the 'advocacy' journalists covering Bosnia of helping 'to create a climate in which NATO bombing and a US-sponsored Croatian offensive against Serb civilians were seen as a welcome change from neutral humanitarianism and a helpful step toward a resolution of the conflict. Their colleagues did something very similar in Rwanda' (Hammond 2002: 9).

These critics have in turn been accused of historical denial presenting itself in terms of historical revisionism a commonplace stance in relation to the wars that accompanied the collapse of Yugoslavia. Campbell, for instance, suggests that this 'is part of an overall argument which attempts to revise the understanding of the Bosnian war by denying the nature, extent and purpose of the violence in the Bosnian Serbs' ethnic-cleansing strategy' (Campbell 2002: 164)

Though the term 'journalism of attachment' emerged in the 1990s during the period of these conflicts, debate about 'participatory' journalism has raged for decades (see Knightley 2003; Morrison and Tumber 1988). However, the decision whether to testify is not a determining factor of commitment since other constraints such as employment restrictions and legal restraints may be operating. Journalistic engagement, though, can take other forms.

A number of European journalists and documentary film makers willingly testified before the war crimes tribunals for Yugoslavia and Rwanda in contrast to US journalists who it was assumed tended to see the subpoena power of the tribunals as a threat to first

Amendment freedoms. The case of Jonathan Randal refusing to appear before the ICTR epitomised the apparent differences between the two occupational groups. However, from discussions and interviews with investigators and lawyers involved in both the ICTR and ICTY; and with journalists and lawyers from news organisations involved, the divide – at least between journalists - is not so apparent. It is fairly safe to assume that news organisations in the US are more concerned about their employees involvement in testifying in tribunals than their UK counterparts but journalists' willingness to engage with, and in some cases assist, investigators indicates little, if any, difference between journalists on the two sides of the Atlantic.

The differences are not about assisting the tribunals but about appearing to do so in public by appearing and testifying as witnesses. Some US journalists aided the investigators who contacted them, answering questions and providing information, and agreed verbally to testify if necessary. Most of them though, were not called upon to do so.

The BBC reporter Jackie Rowlands was the first journalist to appear as a witness at Milosevics's war crimes tribunal. The BBC was criticised by some of its former journalists for allowing its reporters to become 'informants'. In response Rowlands issued a statement saying that 'it was her strong wish to testify' arguing that 'I lived through so many momentous events with the people of the Balkans and felt this was something I ought to do – had to do… I don't accept the argument that giving evidence will make life significantly more dangerous for journalists in the future.. I don't believe that journalists are exempt from moral obligations or international justice (Day, 2002).

Another high profile journalist to cooperate was Ed Vulliamy who covered the conflict in Bosnia for the *Guardian* newspaper. He testified against Tihomeir Blaskic, a former commander of Croatian forces in Bosnia. In relation to another case, Vulliamy gave the prosecution all his notebooks and told them everything he knew, as he wrote: 'I threw aside any pretence of neutrality and went to The Hague. 'The court needs reporters to stand by their stories under oath. The work of some journalists has already had an impact beyond mere 'reporting' in El Salvador, East Timor, Rwanda, the Balkans and elsewhere. Now we are entering a new world that seeks not only to report the legacy of tyrants and mass murderers, but to call them to account. My belief is that we must do our

professional duty to our papers, and our moral and legal duty to the new enterprise.' *(*(Vulliamy, 1999: 605).

The most high profile case of a journalist refusing to appear before an international court was that of Jonathan Randal of *The Washington Post*. In 2002, The ICTY subpoenaed Randal to testify in the trial of Radoslav Brdjanin, a Serb nationalist charged with genocide and deportation of non-Serbs during the 1992-95 war in Bosnia. Randal had interviewed Brdjanin in 1993 whilst on assignment in Bosnia and prosecutors for the tribunal wanted to introduce Randal's article as evidence in the trial. Brdjanin's attorneys told the tribunal that they would accept the article as evidence only if they could cross-examine Randal.

The Washington Post, Randal's former employer took over responsibility for the case telling him to say nothing and not to appear. In rejecting Randal's plea not to appear before the tribunal, the court argued that the 'objectivity and independence of journalists could not be hampered or endangered by their being called upon to testify, when this is necessary, especially in those cases where they have already published their findings. 'No journalist can expect or claim that once she or he has decided to publish no-one has the right to question their report or question them on it. This is an inescapable truth and a consequence of making public one's findings." The tribunal also rejected the 'safety argument' about compromising Randal and other correspondents in combat zones. However on the question of protection of sources the Tribunal was sympathetic to journalists agreeing that subpoenaing a reporter to reveal confidential sources would be 'a step in the wrong direction, a step backward, and a severe blow to the freedom of expression of journalists and the freedom of the media' (Dias, 2002).

Following this ruling, Randal appealed and was supported in his action by 34 international news, organisations, coordinated by the Committee to Protect Journalists. They filed an *amici curiae* brief which while supporting Randal, argued for a less demanding test for the qualified privilege to be granted. To compel testimony, the *amici* said, there must be a determination that the war correspondent's evidence is absolutely essential to the case and the evidence cannot be obtained by other means (Spellman 2005: 132). The *amici* claimed the Trial Chamber's test of pertinence was 'so vague that it will inevitably lead to unease and confusion in the journalistic community and result in journalists being subpoenaed unnecessarily' (Media Brief para 5 quoted in Spellman 2005:

132). While the safety of journalists and their sources was not part of the test urged by the *amici*, they said there was a deep concern 'about any ruling that could result in compelling journalists – particularly war correspondents – to become witnesses against their sources, thus imperiling their access to information, their objectivity and even their safety' (Ibid: 132). Randal's attorneys argued that lawyers, priests and workers for the International Committee of the Red Cross are protected from testifying and the same protection and privilege accorded to these groups should be extended to journalists in order to give them a greater degree of safety while they are gathering information in war zones.

The appeal judges ruled that Randal did not have to testify to the Court and that war correspondents should be given a limited exemption from being compelled to testify. Before calling a journalist to appear, the court must be convinced that the 'evidence has a direct and important value in determining a core issue in the case' and that there is no reasonable alternative for obtaining evidence (ICTY, 2002).

There are few rules of journalism as sacrosanct as the protection of a confidential source. Protecting a confidential source is the one standard held sacred on both sides of the Atlantic. Despite the threat of fines or imprisonment, journalists will often, as a matter of principle, refuse to disclose their sources. The ability of whistle-blowers and other secret sources to tell their stories to the media, safe in the knowledge that their identities will never be revealed is seen as fundamental to the existence of a free press (see Trench, 2004). Any decision therefore on the part of the journalist to testify has implications for the source - journalist relationship.

Following the Randal case, the adoption of a qualified testimonial privilege for war correspondents, particularly one that is not restricted to confidential sources and confidential information, is binding only on the ICTY. It will though, potentially have a significant impact as persuasive authority in other international courts and in national courts (Spellman 2005: 136). It is probable that it will be recognized by other war crimes tribunals and other future courts established by the United Nations (ibid: 136). The decision in the Randal case applies only to war correspondents and it is highly unlikely that judges of international or national courts are likely to consider it persuasive for

extending privilege to other journalists who want to avoid testifying about non-confidential sources or information (ibid: 136).

The legacy of the Randal case is an interesting one in that its notoriety and end 'result' undoubtedly made prosecutors reluctant to subpoena journalists in other cases.

Verification and the problems of engagement

A particular line of attack on journalists who testified in the tribunals comes from defence lawyers who questioned their credibility as witnesses. In the ICTR trial of Kayishema and Rzindana, defence counsel, Andre Ferran accused Guardian reporter Chris McGreal and le Figaro journalist Patrick de Saint Exubery of exaggeration, sensationalism and second hand reports. Ferran accused Exupery of misquoting the number of militiamen and the population of the town in his articles and that the stories contained factual errors: 'If he's a war correspondent, if he wants to tell us the victims and the perpetrators of the crimes, then he should not be playing with the facts'. Ferran accused McGreal of taking 'crude testimony' and attacked his journalism stating ' ..he did not have the luxury, the desire or the time to cross check'. (see www.hirondell.org 1998). These kinds of accusations are hardly surprising coming from a defence attorney. In turn, journalists, including McGreal are vigorous in defending their roles. The problem for the journalistic profession is that it opens itself up to wider scrutiny. Journalists who testify not only have to stand up to interrogation by lawyers with regard to their own stories, testimony and witness statements, but also have to defend their profession. Defence lawyer Ferran, for example, stated in the above case 'Journalism has never been the basis for justice and we are fortunate for this… judges should be aware of the gap between the truth and journalistic fabrications' (www.hirondell.org 1998).

Journalists' engagement with survivors and witnesses of killings is an important issue and the setting up of war crimes trials and tribunals is altering the context in which journalists report on conflict.

At war crimes trials, the testimony of witnesses interviewed previously by reporters is open to contestation. There is a paradoxical problem. On the one hand, journalists may be the first people to arrive at the scene of a killing and therefore vital in informing and alerting the world to what had transpired. The problems arise when different journalists ask the same questions to the same victims and witnesses. Investigators arriving on the

scene following the journalists then ask further questions. Witnesses become tired of relating their story to so many different people and often do not want to tell it again.

A further problem exists alongside that of the reluctant witness. The difference in the manner of a journalist questioning of a witness compared to that of an investigator can hamper a successful prosecution. Statements can then look inconsistent, and when the witness takes the stand, their testimony can be totally discredited by defence council. The more people who ask the same question, or even different questions, the greater the risk of contamination, and the undermining of a witness's credibility.

Without journalists calling attention to an issue, a potential war crime could remain hidden. The tribunals need the pressure put on by journalists to provide the stories to the international community who in turn can put pressure on the courts to take action. Journalists in this respect are extraordinarily useful, as are the NGOs, but maintaining the delicate balance between reporting and potentially interfering with a criminal investigation is a difficult task.

Recommendations and guidelines for future trials and tribunals

Richard Goldstone, first chief prosecutor of the United Nations ICTY for the former Yugoslavia acknowledges that the relationship between war correspondents and international courts has created a tension. He supports a law to protect journalists from becoming unwilling witnesses in situations that would place them or their colleagues in future jeopardy. 'Not infrequently journalists come across evidence of war crimes - as eyewitnesses, in discovering a mass grave, or through being privy to statements made by commanders in the heat of the action.. if reporters become identified as would-be witnesses, their safety and future ability to be present at a field of battle will be compromised' (Goldstone, 1999: 16)

Human rights and news organisations are increasingly responsive to the need for awareness training regarding criminal investigations for journalists covering war crimes.

They highlight two areas: first, awareness of a potential crime scene and the need to photograph, film and record potential evidence and second, awareness of the complex problems associated with reporting victim and witness testimony.

Achieving agreement amongst journalists on the issue of appearing as witnesses is not an easy task. The grid below sets out the scenarios.

Yes to testifying	**No to testifying**
As an expert witness – for prosecution and defence?	Journalist has to appear, to all sides of a conflict, to be objective, independent and determined to publish what he/she believes to be the truth.
If a journalist had witnessed a war crime- but they should only appear as a witness to confirm what had already been published. The problem with this scenario is that journalists' notes are not protected, and sources are not protected, There is no protection for journalists in the statutes of the tribunals.	If correspondents appear as witnesses, there is the potential for sources to dry up, refusals for interviews with protagonists, and increase in danger if they or other journalists return to the area.

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