

CORRESPONDENCE

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TO THE EDITORS IN CHIEF:

By emphasizing protection of criminal defendants' rights, Megan A. Fairlie's summary and analysis of the ICTY's interlocutory appeal decision concerning an international privilege standard for journalists (98 AJIL 805 (2004)) overlooked, in my view, the peril to the flow of information that may be caused as a result of that tribunal's analysis (*see* Prosecutor v. Brdjanin, No. IT-99-36-AR73.9 (Dec. 11, 2002)).

Slicing off "war correspondents" from the general category of "journalists" in order to develop and apply a journalist standard, as the *Brdjanin* appeals chamber did, is fraught with serious hazards. That is, categorizing a journalist into a particular type, in this case as a "war correspondent," and then applying a standard in light of the dangers inherent in that role impliedly invites other international tribunals, state courts, and legislative bodies to develop and apply lesser standards to journalists who, though not facing such obvious physical dangers on the literal battlefield, may face dangers on the figurative ones as they investigate and report on corrupt governments and commercial enterprises, or who may face no dangers whatsoever when reporting on issues with more limited impact. In all of these roles, the journalist serves precisely the same constituency in precisely the same way: contributing to the free flow of information in order to ensure a democratic society. One type of journalist, in other words, is no more or less important than any other in the scheme that is "democracy," and, therefore, a single privilege standard ought to be applied across the journalist board.

There will always be, as there always has been, an inherent tug-of-war between fair trial rights and the need to protect journalist sources. Since courts and legislative bodies, rightly or wrongly, overwhelmingly believe that a qualified rather than an absolute privilege should be applied to journalists, this conflict may be resolved by applying a single privilege standard to the particular facts of each case instead of changing the standard in reliance on the type of story written or on the nature of the hurdles that a journalist may have had to surmount to get a story.

International norms support this view.¹

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¹ See Nina Kraut, *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 (2004).

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