SEPARATE OPINION OF JUDGE SHAHABUDDEEN

1. I respectfully agree with the decision of the Appeals Chamber that war correspondents have a qualified privilege; they may only be required to testify in limited circumstances . But I have a difficulty over the operation of part of the test used by the Appeals Chamber for determining whether a subpoena may be issued to them. I shall explain the difficulty below.

A. The general legal scheme

2. The issue raised by Mr Randal is whether a war correspondent has a qualified privilege which exempts him from the "longstanding principle that 'the public … has a right to every man's evidence'",[1] the claim being that the exemption is available even where compulsion to give the evidence does not cause breach of an obligation of confidentiality or disclosure of confidential sources or personal danger to the war correspondent or his sources .

3. Recognising the novelty of the claim, counsel for Mr Randal states that "it is the fact that this case does not directly concern sources that makes it so important , because there is no other international law precedent".[2] On their part, *amici curiae* "urge this Court to establish a set of clear bright-line rules to guide tribunals through the critical balancing of journalists' rights with the needs of a particular case," and they submit, "Whatever the standard applied by this Court is, it will be a precedent, not only in the courts, but also on the battlefield".[3]

4. That there is no international law precedent is not necessarily against Mr Randal's claim. The Tribunal cannot of course legislate a code for the profession , but the circumstance that other war correspondents may be able to draw on the decision of the Appeals Chamber does not render the case academic, a matter which was in debate. What needs to be considered is whether there is any source of law which the Tribunal could tap to establish a "precedent" in the circumstances of this case.

5. The law which the Tribunal is authorised to apply could be the subject of much discussion. For the purposes of this case, the inquiry need not go beyond an implied grant of power by the Security Council. When the Security Council vested judicial power in the Tribunal, that power included power (with a corresponding duty) to act fairly, as a judicial body would, towards all who had business before the Chambers . A subpoenaed war correspondent would be one such person. The responsibility to act fairly to the war correspondent would enable a Chamber to grant or refuse him a qualified privilege as the circumstances might require. For scientific purposes , the Chamber may consult the experience of other judicial bodies and seek guidance from their responses to a corresponding situation, but its responsibility to exercise the power is its own; it may use the power as it sees fit even if its solution is at variance with that in some other legal system.

6. The implications of the duty to act fairly in relation to freedom of expression are spelt out in applicable instruments. Subject to modifications attributable to its peculiar position, it is accepted that the Tribunal has to conform to internationally recognised human rights standards. It is considered that the appropriate principle is set out in article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights ("Covenant"). The former says:

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

7. For present purposes, it may be taken that this provision (on which counsel for Mr Randal relied), is comprehended by Article 19 of the Covenant, which also sets out permissible restrictions. Paragraph

2 of the Covenant provides that "(e (veryone shall have the right to freedom of expression", and the next paragraph then says:

> 3. The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary :
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

8. The Covenant was not constructed with the International Tribunal in view. So far as the Tribunal is concerned, there is no "law" providing for restrictions under article 19(3). But, given that it is acknowledged that the principles of the Covenant apply in relation to the Tribunal,[4] those principles have to be construed to mean that the right to freedom of expression is subject to restrictions on the exercise of it which result from the responsibilities and functions of the Tribunal. This opinion will proceed on the basis that the protection of the public interests which justifies those restrictions includes the protection of the essential elements of the administration of justice;[5] the matter is so understood generally.

9. If a restriction is judged "necessary", no balancing of interests is thereafter required. The balance is made by the provision; the task of the courts[6] is to say whether the particular restriction of freedom of expression is "necessary " on any of the permitted grounds. If the restriction is necessary, the restriction prevails – the testimony is compelled[7]; if the restriction is not necessary, freedom of expression prevails – the testimony is not compelled. But it seems to me that there is a preliminary stage at which some balancing of competing interests has inescapably to be made in the process of determining whether a restriction of freedom of expression is "necessary" for the protection of a public interest.

10. Courts are entrusted by their communities with the task of balancing one public interest against another.[8] Consequently , where, as could be, the public interest in the free flow of information,[9] which underlies freedom of expression, is in conflict with the public interest in the giving of needed evidence for the administration of justice, the courts must weigh one public interest against the other.

11. On what criterion do the courts set about that task? In my view, the criterion lies in this question: is the harm resulting from the withholding of the evidence to the public interest in the administration of justice greater than the harm resulting from the giving of the evidence to the public interest in the free flow of information which underlies freedom of expression? It may be objected that there is a deceptive appearance of mathematical precision in the criterion, and, further, that the criterion involves the making of subjective judgements; but courts are competent to employ principles of this kind and, in the circumstances of this case, they have the responsibility to do so.

12. A certain consequence needs however to be confronted. Although words may be used to obscure the point, the exercise of freedom of expression could be at some cost to the administration of justice, or vice versa, and yet that cost could be acceptable to society if, in the particular circumstances, it is outweighed by the importance of freedom of expression or the administration of justice, as the case may be.[10] Where, as in this case, the level of acceptability of the social cost has not been fixed by legislation, it has to be established by the courts.

13. As indicated above, the courts do this by recourse to the idea of what measure of restriction of the exercise of the right to freedom of expression is "necessary " for the protection of a stipulated

public interest. In search of a meaning to be given to that term, it is helpful to turn to the jurisprudence of the European Court of Human Rights relating to the provisions of article 10(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. That jurisprudence shows that the word "necessary" connotes a "pressing social need".[11] Not only must a restriction of the exercise of the right to freedom of expression be supported by a pressing social need, but the "exceptions … must be narrowly interpreted and the necessity for any restrictions must be convincingly established".[12]

14. There is much in this scheme that would suggest an answer in favour of Mr Randal . Yet, one could see how the Trial Chamber came to the view that his claim to a qualified privilege was not made out. The information furnished by the informant (including his identity) was published to the world, and it is reasonable to infer that the informant knew that it would be so published. The substantial purpose for which the evidence was required was to establish the accuracy of the statements attributed to the informant in the published information. It is understandable that the Trial Chamber found it difficult to appreciate how, in those circumstances, a requirement to testify would disproportionately disturb the exercise of the right to freedom of expression.

15. Further, though there are exceptions (particularly in some instances in the United States of America), the general tendency of domestic jurisprudence does not recognise such a privilege on the part of journalists where, as here, a requirement to testify will not cause a breach of confidentiality or expose the journalist or his sources to personal danger. That accords with the major principle that "evidentiary privileges are generally disfavoured in the law",[13] and that, that being so, the courts will apply a "presumption against the existence of an asserted testimonial privilege".[14]

16. It is true that the press plays an important role in bringing to light serious violations of international humanitarian law in combat zones; that will suggest that, in the public interest in the free flow of information, the journalist be exempted from the duty to testify. However, it is also the case that a domestic court is aided by the full apparatus of detection and enforcement of the state. By contrast, the Tribunal is not; in consequence, it may be more dependent than a domestic court on the evidence of journalists to establish the truth in any particular case. That will suggest that, in the public interest in the administration of justice , the journalist be required to testify before the Tribunal.

17. However, except for an occasional case,[15] national jurisdictions have not considered the special situation of war correspondents . The reasons given by the Appeals Chamber (into which I would not go into detail) persuade me, on balance, that the exercise of the right to freedom of expression will be restricted in such cases. I put it that way because, if compelling testimony will not cause any restriction of the exercise of the right to freedom of expression , *ex hypothesi* the question will not arise whether there is pressing social need for a restriction; that question will only arise where compelling testimony will cause such a restriction**.** But compelling a war correspondent to testify will cause a restriction of the exercise of the right to freedom of expression; that being so, he will not be compelled to testify unless there is pressing social need for his evidence. And so I turn to a consideration of the test for determining whether there is pressing social need in this case.

B. Whether there was pressing social need for the evidence

18. The Appeals Chamber has adopted a two-pronged test for determining whether a Trial Chamber may issue a subpoena to a war correspondent. Both prongs must be satisfied before a war correspondent can be deprived of the benefit of his qualified privilege. As set out in paragraph 50 of the decision, the first prong is that " the petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case".[16] The Appeals Chamber considers that this test was not met by the Trial Chamber when it referred to the proposed evidence of Mr Randal as "pertinent". In addition, Mr Randal criticised the Trial Chamber's decision for

referring to the evidence as "useful". I have difficulty with these views.

19. It is recognised that some limitation is called for by the requirement that there should be a pressing social need for any restriction of the exercise of the right to freedom of expression resulting from compulsion to testify. A test of relevance cannot supply such a limitation, since it applies to all evidence. If relevance is what the Trial Chamber meant by its use of the words "pertinent" or "useful", it was in error; but I do not think that that was meant. The other extreme entails risks of prejudgement. By this I mean that a Trial Chamber has to be watchful of criticism of prejudgement of the weight of the evidence, more especially as it sits as a trier of fact. The point is illustrated by the course of judicial thinking in one jurisdiction.

20. *Attorney-General v. Mulholland*[17] concerned a claim by journalists to non-disclosure of their sources. Lord Denning , M.R., considered that, where there was an element of confidentiality, a judge would not direct witnesses "to answer unless not only it is relevant but also it is a proper and, indeed, necessary question in the course of justice to be put and answered". So a test of necessity was put forward. However, in the same case, after holding that "the question has to be relevant to be admissible at all," Donovan, L.J., held that "it ought to be one the answer to which will serve a useful purpose in relation to the proceedings in hand – I prefer that expression to the term 'necessary' ".[18] That view had the support of Scarman, L.J., in *Senior v. Holdsworth, Ex parte Independent Television News, Ltd.*[19] He said that "*Mulholland's* case reveals how far the courts can go – no further, in my judgment, than Donovan L.J.'s gloss on the words of Lord Denning M.R."

21. Since these cases were decided, there has been forward movement in human rights legal thinking in the jurisdiction to which those cases belong, and so the cases may have lost some part of their value in relation to that particular subject;[20] but their general juridical substance remains. Though it is a matter of judgement – and the judgement here is fine - it is necessary to bear that consideration in mind in deciding how far a judge may properly go.

22. It was contended for Mr Randal that the applicable words were "necessary", or "essential", or "absolutely essential", or "crucial", or "critical", or "vital ". These, or similar words, have been used in some cases but, correctly, they have not been reproduced in the Appeals Chamber's decision. As the Appeals Chamber stated in paragraph 47 of its decision, "the test proposed by the Appellant … would amount to a virtually absolute privilege". They exceed the formula adopted by the Appeals Chamber. I apprehend that they involve an element of prejudgement of the weight of the proposed evidence. One appreciates that relevance is judged on an assumption that the evidence is true. The weight to be given to the evidence is another matter ; this, including its actual credibility, may depend on all the other evidence in the case – already given or still to be given**.** Not surprisingly it was said in one case, "Until the source of information Si.e., the proposed evidence in that caseC is disclosed, it cannot be known for certain how necessary it will prove to be. Although it may seem in advance to be very likely to be of the highest importance , it may in fact prove fruitless".[21]

23. Therefore, the Presiding Judge of the Trial Chamber in this case is not to be criticised – as he was on behalf of Mr Randal - for saying, "We may end up in a situation whereby we would have heard [Mr Randal] but come to the conclusion that for all intents and purposes, his evidence is not going to be of any importance to us". [22] The end of the process does not dictate the beginning. Nor was the Presiding Judge in error – as he was said to be - in saying, "I think that the evidence could throw a light on the possible frame of mind that the accused may have had in 1992, April to December. If that is not the case, obviously I'm going to throw this witness out".[23] The only thing that the Trial Chamber could properly regard at that preliminary stage for the purpose of determining whether Mr Randal was entitled to an exemption was whether his evidence *could* throw light on the frame of mind of the accused at the material time - not whether it *would* necessarily throw light on the frame

of mind of the accused at the material time.

24. This was why the Presiding Judge said that the proposed evidence "may be useful ,"[24] and that "whether it is essential or not is another matter". [25] Mr Randal has objected to the word "useful"; he prefers the word "necessary" or "essential " or some such stronger term. Speaking of the word "necessary" in the freedom of expression provisions in article 10(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights said that –

> … whilst the adjective "necessary" … is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", reasonable" or "desirable" and that it implies the existence of a "pressing social need". [26]

25. But a fortress is not to be made of the dictum. The word "useful" could mean "advantageous, profitable";[27] though colloquial, it could also mean "highly creditable or efficient".[28] It is the context which will indicate the appropriate meaning. In selecting the appropriate meaning, account has to be taken of judicial propriety. Here, the question was not as to the need, for example, for some form of state control of a publication or some form of compulsory licensing of journalists. In such matters there is no judgement to be made as to the admissibility of proposed evidence in a criminal case and no risk of prejudgement of the weight of the proposed evidence; the restraint exerted by these factors would not operate. By contrast, in this case such a judgement had to be made and there was such a risk: the Presiding Judge could not use language which suggested that he was prejudging the weight of the proposed evidence.

26. The word "necessary" also occurs in article 19(3) of the International Covenant on Civil and Political Rights, but the context is whether a restriction of the exercise of the right to freedom of expression is "necessary" for the protection of a stipulated public interest. The question whether the restriction is "necessary" is not the same thing as the question whether the evidence is evidentially "necessary". The example usually given is that of a piece of evidence in a trivial case: the evidence may be very necessary – critically necessary - for the public interest in the administration of justice in the particular case, but that necessity may lead to a disproportionate restriction of the public interest in freedom of expression. Thus, the fact that the word "necessary" is used in those provisions of the Covenant is not justification for transposing the word to the juridical significance of the evidence in a case .[29]

27. Next, there is the word "pertinent". The Trial Chamber did not question the prosecution on its statement that "the quotes attributed by Randal to Brdanin go directly to *the heart of its case*";[30] those words mean something more than mere relevance.[31] More cautiously, the Trial Chamber used the word "pertinent". But paragraph 47 of the decision of the Appeals Chamber says that the "word 'pertinent' is so general that it would not appear to grant war correspondents any more protection than that enjoyed by other witnesses".

28. The word "pertinent" can of course mean "an appendage", and clearly that would not provide any protection. But, as the dictionaries[32] show, "pertinent" can also mean "to the point", which is what I think it meant here . In my view, there was no difference in substance between "to the point", as "pertinent " could be understood, and "direct" in the test adopted by the Appeals Chamber. So regarded, the statements attributed by the article to the accused were "direct "; and they had important value in determining a core issue in the case, for, if true, they constituted an admission by the accused of his frame of mind in relation to some of the serious crimes charged – a point of capital significance which, as has been noticed above, the Trial Chamber had otherwise made.[33]

29. Mr Randal's evidence was intended to help to prove that the statements ascribed by the article to the

accused were true. Hence, there being a public interest in the prosecution of crimes, any restriction of the exercise of the right to freedom of expression which resulted from compulsion to testify was attributable to a pressing social need for Mr Randal's evidence to be given in a serious criminal matter.

30. There is not of course a need to recite a particular formula; the test is one of substance. When the words "useful" and "pertinent" are regarded in context, and particularly in the light of what the Presiding Judge said about the capacity of the published article to prove the frame of mind of the accused in relation to some of the charges, it is reasonably clear that the Trial Chamber considered that the proposed evidence was "advantageous" and "to the point" in determining core issues in a serious criminal case; that satisfied the substance of the test now adopted by the Appeals Chamber.

31. Focusing on the use by the Trial Chamber of the word "pertinent", the Appeals Chamber stated in paragraph 47 of its decision that the "test of 'pertinence' applied by the Trial Chamber appears insufficient to protect the public interest in the work of war correspondents". That was the only word in the Trial Chamber's decision which the Appeals Chamber specifically queried. For the reasons given, I consider that the Trial Chamber did not err in its use of that word. But for what follows , the proposed evidence was compellable.

C. But another source of the evidence was reasonably available

32. The second prong of the test adopted by the Appeals Chamber, as set out in paragraph 50 of its decision, requires an applicant for a subpoena against a war correspondent to "demonstrate that the evidence sought cannot reasonably be obtained elsewhere". That, with respect, is correct: if the evidence was reasonably available from other sources, this suggests that there was no pressing social need for the restriction of the exercise of freedom of expression resulting from compulsion to testify.[34] As the cases show, whether the evidence was reasonably available turns on the circumstances of the case; consequently , availability of the evidence from other sources is not always a bar.[35] In this case, however, I think it was.

33. The issue whether it was necessary to exhaust other possible sources was raised by counsel for Mr Randal before the Trial Chamber, when he submitted that "the Court has to be satisfied that the particular evidence can't be obtained by any other means or by any other witness".[36] So what was in issue was the particular evidence expected of Mr Randal. The particular evidence expected of Mr Randal related to the accuracy of statements allegedly made by the accused in the course of an interview on a specified occasion. – that was the substantial issue before the Trial Chamber. The record shows that, apart from the accused and Mr Randal, a Mr "X" was present at the interview. Unlike Mr Randal , Mr "X" understood the language of the conversation; it was he who did the necessary interpretation. Consequently, in Mr "X" there was a reasonable alternative source for the evidence. True, Mr "X" was himself a war correspondent and so was also entitled to a qualified privilege. But, in respect of the evidence to be given, there was , on the present showing, no reasonable alternative source so far as he was concerned .

34. A war correspondent loses the benefit of his qualified privilege only if both prongs of the Appeals Chamber's test are satisfied by the party asking for the subpoena . In this case, the first prong was satisfied but not the second. I agree that Mr Randal's qualified privilege prevailed.

D. Conclusion

35. Privilege assumes that the evidence is relevant and therefore prima facie admissible ; notwithstanding its relevance, the evidence is excluded on the ground of privilege . If it is said, as the Appeals Chamber suggests in paragraph 54 of its decision , that Mr Randal could give no evidence as to the accuracy of the quotes, that goes to the relevance of his evidence, and not to the

question whether compelling his testimony breaches his qualified privilege. Evidence which is not relevant is excluded on the ground of irrelevance alone; no privilege needs to be asserted.

36. There is some doubt as to whether Mr Randal's evidence was relevant. He could give little evidence as to the accuracy of the quotes: he could only speak of the demeanour of the accused during the interview. There was a claim that his testimony was needed for the purpose of examining the context in which the accused spoke. The claim was not substantiated and was not pressed; as recalled in paragraph 7, footnote 10, of the decision of the Appeals Chamber, defence counsel, who made the claim, did not attend the hearing by the Appeals Chamber on 3 October 2002, although he was afforded an opportunity to do so. If Mr Randal's evidence was not relevant , the subpoena against him could be set aside on the ground of irrelevance alone ,[37] without reaching the question of privilege.

37. However, I am prepared to assume the relevance of Mr Randal's evidence, and thus the question of a qualified privilege would arise. He could only be deprived of the benefit of the privilege if there was pressing social need for his evidence ; I do not think there was. So far as the contextual aspects of the quotes were concerned, the proposed evidence was not of direct and important value in determining a core issue in the case: the substantial issue raised concerned the accuracy of the quotes. So far as the accuracy of the quotes was concerned, the proposed evidence , on the assumption that it was relevant, was of direct and important value in determining a core issue in the case, but there was a reasonable alternative source of the evidence . For these reasons, I respectfully agree with the decision of the Appeals Chamber to set aside the subpoena and allow the appeal.

Done in English and in French, the English text being authoritative

_____
Mohamed Shahabuddeen

Dated this 11th day of December 2002
At The Hague
The Netherlands

---

1 - *Branzburg v. Hayes*, 408 U.S. 665 at 688 (1972).
2 - Mr Randal's Written Submissions, 3 July 2002, para. 42.
3 - Brief *amici curiae*, dated 16 August 2002, paras. 20 and 23, respectively.
4 - Paragraph 106 of the Secretary-General's Report (S/25704 of 3 May 1993) said that it "is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of the proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights". In the context in which the Secretary-General was speaking, his reference to the rights of the accused was understandable; it does not limit the applicability of the Covenant to other matters.
5 - There is argument about the scope of "public order (*ordre public*)". See Manfred Nowak, *U.N. Covenant on Civil and Political Rights*, CCPR Commentary (Strasbourg, 1993), pp. 355ff. There seems to be a basis for the view that the expression includes the essential structure of the administration of justice as part of the apparatus for maintaining public order (*ordre public*). See, generally, David Harris and Sarah Joseph, The *International Covenant on Civil and Political Rights and United Kingdom Law* (Oxford, 1995), p. 427; Dennis Lloyd, *Public Policy, A Comparative Study in English and French Law* (London, 1953), p. 24, stating that "the *Cour de Cassation* decided in 1843 that the competence of judicial tribunals was a matter of public order" (footnote omitted); and Philippe Pascanu, *La notion d'ordre public par rapport aux transformations du droit civil* (Paris, 1937), p. 198, stating: "La fonction et le rôle du juge sont d'ordre public, car ces deux points tiennent de l'organisation politique".
6 - *In re An Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] A.C. 660, Lloyd, L.J., at p. 682, and Lord Griffiths at p. 703. And *see Secretary of State for Defence v. Guardian Newspapers Ltd.* [1985] A.C. 339, H.L., Lord Roskill, concurring, at 369, and Lord Scarman, dissenting, at 362.
7 - There is a view that, even at this stage, the courts retain a discretion to refuse disclosure in exceptional cases, as where, "for instance, the crime was of a trivial nature or, at the other end of the scale, the journalist's life might be imperilled if he revealed his

source". See Lord Griffiths in *Re an Inquiry under the Company Securities (Insider Dealing) Act 1985*, [1988] A.C. 660, H.L., at 703. But I am not persuaded that that factor is not admissible in determining whether disclosure would be necessary for the protection of public order within the meaning of the formula being considered above. A non-common law reader would just look at the text of the international instrument and not expect it to be subject to variation by the courts outside of the instrument. Any discretionary power can and should be exercisable under the instrument.

8 - *British Steel Corporation v. Granada Television Ltd*. [1981] A.C.1096, H.L. at 1170, per Lord Wilberforce, recalling Lord Denning's statement in *Attorney-General v. Mulholland* [1963] 2 Q.B. 477 at 489-490.

9 - The idea that there is a "right to know" was criticised by Lord Wilberforce in *British Steel Corporation v. Granada Television Ltd.* [1981] A.C. 1096, H.L., at 1168. At p. 1174 he said: "There is a public interest in the free flow of information, the strength of which will vary from case to case".

10 - See paragraph 35 of the decision of the Appeals Chamber referring to *Schoen v. Schoen*, 5 F. 3d 1289 at 1292 (1993), where the United States Court of Appeals for the Ninth Circuit stated "that society's interest in protecting the integrity of the newsgathering process, and in 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'".

11 - See *Handyside v. UK* (1979-80) 1 EHRR 737 at 748, para. 48, and *The Sunday Times v. UK* (1979-80) 2 EHRR 245 at 275, para. 59. The question was considered in paragraph 8 of Mrs Evatt's dissenting opinion in *Faurisson v. France*, decided by the Human Rights Committee in 1996, CCPR/C/58/D/550/1993 of 16 December 1996. The opinion considered that the "requirement of necessity implies an element of proportionality. The scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. It must not exceed that needed to protect that value". In my opinion, "value" here refers to social value and is not synonymous with the juridical value of evidence in a case.

12 - See *Association Ekin v. France*, Eur. Ct. of H.R., Judgment of 17 July 2001, para. 56.

13 - *United States v. Smith*, 135 F. 3d 963 at 971 (1998).

14 - *Branzburg v. Hayes*, 408 U.S. 665 at 686 (1972).

15 - A claim by a war correspondent to privilege was denied in *United States of America v. Lindh*, 210 F. Supp. 2d 780 at 783 (2002).

16 - See also para. 54 of the decision.

17 - [1963] 1 All ER 767, CA, at 771C.

18 - *Ibid*., p. 772.

19 - [1976] Q.B.23, C.A., at 42.

20 - In the submission of counsel for Mr Randal, earlier British cases were now "dead cases". Transcript, Trial Chamber, 10 May 2002, p. 5435. However, he said , "Of course Senior v. Holdsworth has survived from that era because it was a progressive decision …". *Ibid*., p. 5437.

21 - In re An Inquiry under the Company Securities (Insider Dealing) Act 1985 [1988] A.C. 660 at 684, per Lloyd, L.J.

22 - Transcript, Trial Chamber, 1 March 2002, p. 2533.

23 - *Ibid*., p. 2535.

24 - *Ibid*.

25 - Transcript, Trial Chamber, 26 February 2002, p. 2289.

26 - Eur. Court H.R., *The Sunday Times Case*, judgment of 26 April 1979, Series A no. 30, pp. 35-36, para. 59. And see *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Inter-American Court of Human Rights, Series A, Judgments and Opinions No. 5, 13 November 1985, p. 109, para. 46, expressing the view that the European Court of Human Rights had concluded, in *The Sunday Times Case*, that "for a restriction to be 'necessary' it is not enough to show that it is 'useful', 'reasonable', or 'desirable'".

27 - *Oxford English Dictionary*, 2nd ed., Vol. 19 (Oxford, 1989), p. 356.

28 - *Concise Oxford Dictionary of Current English*, 8th ed. (Oxford, 1990), p. 1353.

29 - In paragraph 31 of its decision, the Appeals Chamber referred to the fact that Rule 54 of the Rules of Procedure and Evidence of the Tribunal empowers a Trial Chamber to "issue a subpoena if it finds that doing so is 'necessary for the purposes of an investigation or for the preparation or conduct of the trial'". Notwithstanding that, the Appeals Chamber correctly did not find that the proposed evidence could only be compelled if it was "necessary".

30 - Decision of the Trial Chamber, para. 32, emphasis added. See also, *ibid*., para. 17.

31 - See *Garland v. Torre*, 259 F. 2d. 545 (1958), where similar words were used to distinguish the case from one involving relevance in the ordinary way.

32 - See, for example, *The Concise Oxford Dictionary of Current English*, 8th ed. (Oxford, 1990), p. 890.

33 - Transcript, Trial Chamber, 1 March 2002, p. 2535, where the Presiding Judge said, "I think that the evidence could throw a light on the possible frame of mind that the accused may have had in 1992, April to December".

34 - See *Secretary of State for Defence v. Guardian Newspapers Ltd* [1985] A.C. 339, H.L., Lord Scarman, dissenting, at 367.

35 - Availability of the evidence from other sources could be a bar, as in *Baker v. F. & F. Investment*, 470 F. 2d 778 at 783 (1972), and *John and others v. Express Newspapers plc and others* [2000] 3 All ER 256, C.A., at 264, para. 27. But not necessarily so. See *Secretary of State for Defence v. Guardian Newspapers Ltd* (1985(A.C. 339, H.L., Lord Roskill, concurring, at 370, Lord Bridge of Harwich, concurring, at 373, and Lord Scarman, dissenting, at 367; and *In re an Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] A.C. 660, Lloyd, L.J., at p. 683.

36 - Transcript, Trial Chamber, 10 May 2002, p. 5378, Mr Robertson. And see, *ibid*., at p.5399, Mr Robertson; pp. 5408 and 5426, Ms Korner; and p. 5433, Mr Robertson.

37 - A person who has received a witness summons has a right to move to set aside the summons on the ground of irrelevance. *See Senior v. Holdsworth, Ex parte Independent Television News Ltd*. [1976] Q.B. 23, C.A., Orr, L.J. at 35, and Scarman, L.J., at 42-43.