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MEDIA MATTERS: REFLECTIONS OF A FORMER WAR CRIMES PROSECUTOR COVERING THE IRAQI TRIBUNAL

*Simone Monasebian**

Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial.

Jeremy Bentham (1748–1832)

The Revolution Will Not Be Televised.

Gil Scott Heron, Flying Dutchmen Records (1974)

I. THE ROAD TO SADDAM

After some four years prosecuting genocidaires in East Africa, and almost a year of working on fair trial rights for those accused of war crimes in West Africa, I was getting homesick. Longing for New York, but not yet over my love jones with the world of international criminal courts and tribunals, I drafted a reality television series proposal on the life and work of war crimes prosecutors and defence attorneys. I called it “The Real World Meets Nuremberg,”¹ and from my prefabricated container office at the Spe-

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¹ *The Real World*, which has been airing on MTV since 1992, was one of the first successful reality television series following the personal and professional lives of a group of diverse individuals forced to live together in a new location for a period of time. See MTV, *The Real World: New York*, <http://www.mtv.com/ontv/dyn/realworld-season1/series.jhtml#/ontv/dyn/realworld-season1/summary.jhtml> (last visited May 21, 2007).

cial Court for Sierra Leone (SCSL), emailed Tim Sullivan, Court TV's² senior vice president, for a meeting in New York. How could this topic not be fascinating to the American public?

A decade earlier, I spent countless hours glued to Court TV's coverage of the *Tadic*³ trial in The Hague—learning more about the world and what I wanted to do in it than I had in law school. Until *Tadic*, I was a criminal defense lawyer in a New York law firm and never considered becoming a prosecutor. It was Court TV's *Tadic* coverage that set me on a path to prosecuting genocidiaries at the United Nation's International Criminal Tribunal for Rwanda (ICTR). I am a firm believer in cameras in the courtroom and the power of the media to educate.

Tim Sullivan and I shared a preoccupation with the infamous “Central Park Jogger” trial. In 1992, Tim, one of Court TV's original anchors, wrote the authoritative account of that case in *Unequal Verdicts: The Central Park Jogger Trials*. It was the same year I wrote my law school thesis on the media coverage of the Central Park jogger and Scottsboro cases. In our writings, we both questioned the coverage of the jogger case and opined on the impact of that coverage. Ten years later, the widely accepted Central Park verdicts were overturned after police discovered the actual perpetrator.

While Court TV's producers seemed amused by the reality TV proposal, they had other ideas: “How about covering the Saddam trial, instead?” Three months earlier, in a training arranged by the Regime Crimes Liaison Office, the Iraqi tribunal judges were advised not to televise the proceedings.⁴ Case Western Reserve University Law Professor Michael Scharf, cautioned the judges about the many risks associated with televising a major criminal trial, citing the Slobodan Milosevic and O.J. Simpson cases as examples of reasons for not televising.⁵ The judges nevertheless favored televising their proceedings.⁶ Rule 50 of the tribunal's Revised Rules of Evidence and Procedure afforded the trial judges discretion to permit cameras in the courtrooms. Just prior to the opening of the trial, Professor Scharf cited the *Media Trial*⁷ (for which I had been a prosecutor at the ICTR) as further reason not to televise, noting: “[i]n the *Media Trial* before the Rwanda Tribunal, the presiding judge had to go to extraordinary

² Launched in 1991, Court TV, is a Turner Broadcasting System, Inc., company, seen in eighty-six million U.S. homes. Court TV Homepage, www.courtstv.com (follow the “about us” hyperlink).

³ Prosecutor v. Tadic, IT-94-I, Opinion and Judgment, (May 7, 1997).

⁴ SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL 90 (Michael P. Scharf & Gregory S. McNeal, Carolina Academic Press) (2006).

⁵ *Id.*

⁶ *Id.*

⁷ Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze, Case No. ICTR-99-52-T, Judgment and Sentence (Dec. 3, 2003).

lengths to suppress the dramatic antics of defense counsel who was playing to the broadcast media.”⁸

The Iraqi judges wanted to reach out to the international and national communities. They understood that television provided such a forum.⁹ They apparently believed Lord Hewart’s maxim that: “it is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”¹⁰ Saddam’s trials were indeed televised.

But there was merit in Michael Scharf’s caution. The media influences the behavior of any subject in front of its lens.¹¹ This reality is all the more amplified in highly-politicized war crimes trials. And while Michael Scharf’s concern may have been defence lawyers and accuseds playing to the camera, I was more concerned about the media’s effect on judges, who in war crimes tribunals sit as both judge and jury. Tribunal judges were observed to sit up straighter when the international press was under foot. I recall one war crimes tribunal judge admitting on the trial record to reading daily media accounts of the case he was judging. One could see indications of judges influenced by trial media accounts in the way they controlled their courtroom. Where the coverage was accurate, this sometimes assisted in the fairness and efficiency of the trials. But where the accounts were distorted, the judges’ responses could reflect the distortion.

Coverage also affected decisions made in war crimes tribunal prosecution offices. With both the ICTR chief prosecutor and her deputy, for several years based in the Netherlands and Rwanda, rather than the court’s seat in Arusha, Tanzania, particular attention was paid by them to media accounts of court happenings in Arusha. One article’s passing reference to my unwieldy hair during the *Media Trial*, had me running to the barber, other criticisms led to immediate (albeit, long overdue) changes in trial team composition, and favorable write-ups afforded me increased leverage to shape prosecution strategy. The media spoke and things happened.

The *Media Trial* judges held: “the power of the media to create and destroy fundamental human values comes with great responsibility.”¹² Prosecuting media executives for irresponsible and incendiary articles and broadcasts that decimated Rwanda, I witnessed the power of a salacious media to misinform, confuse, and incite society. I also found some of the

⁸ Scharf & McNeal, *supra* note 4, at 90–91.

⁹ See *id.* at 90.

¹⁰ *Rex v. Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259.

¹¹ See, e.g., *Estes v. Texas*, 381 U.S. 532, 549 (1965) (“[W]e cannot ignore the impact of courtroom television on the defendant. Its presence is a form of mental—if not physical—harrassment, resembling a police line-up or the third degree.”).

¹² *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgment and Sentence, ¶ 945 (Dec. 3, 2003).

journalists covering the *Media Trial* unable to get the story right, confounded by a blizzard of exhibits in a foreign language, and conflicting complex testimony. They did not ask the right questions, speak with both sides of the case, or talk to those involved in the case from the beginning.

The day I gave my closing argument in the *Media Trial*, I learned a journalist was writing a book about our case and that a teammate who had joined the case in the eighth month had been speaking to her about goings on, in and out of the courtroom, for many months. I felt other members of the team should have been informed. At the time, I thought the author was too far along in her writing to consider anything the rest of us might have to say. After I left the ICTR, the author and I had several discussions about her first draft. Despite her looming deadline, the conscientious author, made a number of suggested changes and added other pieces of the story to her book.¹³ That experience particularly sensitized me to the importance of seeking as many perspectives as possible, even from the same side, and the responsibility one has to both knowing and unknowing subjects.

I wanted to cover Saddam's trial right, and for me that meant being there. I covered my first, and until Saddam, only courtroom trial as a journalist twenty-two years earlier—*Grandmaster Flash v. Sugar Hill Records*, a federal controversy over whether the artist or the record company owned the moniker Grandmaster Flash. And while that case involved the livelihood of one of hip-hop's first recording artists, as opposed to liberty or death of a twentieth-century tyrant, being there made all the difference. Trial lawyers and journalists are, after all, storytellers, and nothing beats being on the ground where the story is unfolding.

When Court TV covered *Tadic*, the first international war crimes trial since Nuremberg, they had the exemplary Raymond Brown reporting from The Hague, in addition to stellar legal journalists such as Fred Graham and Rikki Kleimann from their New York studio. With Saddam, all coverage would emanate from New York, with only a feed from Baghdad. As Tim Sullivan explained, Court TV was no longer in its infancy when viewers might stay tuned to a slow-paced trial for the novelty of it.¹⁴ A decade after *Tadic*, audiences were accustomed to live televised trial proceedings and with hundreds of channels from which to choose, became increasingly fickle about which trials they might sit through. The ratings made clear that viewers would only tune-in in great numbers to fast-paced, sexy trials. Court TV learned from the *Tadic* trial that trials abroad of non-nationals were not viewer-friendly. Accordingly, less investment in resources and

¹³ See DINA TEMPLE-RASTON, JUSTICE ON THE GRASS: THREE RWANDAN JOURNALISTS, THEIR TRIAL FOR WAR CRIMES, AND A NATION'S QUEST FOR REDEMPTION 264, 281 (2005).

¹⁴ Author's interview with Tim Sullivan, Senior Vice-President, Court TV News, in N.Y. (Sept. 15, 2006).

television hours would go into covering Saddam. I asked Tim, “Why then cover Saddam’s trial at all?” He explained, “We have to cover all historical trials whether viewers are finding them interesting or not. We knew going into it that viewers wouldn’t be interested, and ratings would be poor, so we covered it as much as we could, but not all day, everyday—we are not suicidal.”

Harold Burson was a young U.S. Army soldier in 1945 when he was tasked with covering the Nuremberg trials for the U.S. Armed Services Radio Network. A few days into the trial he snagged the first interview with Chief U.S. Prosecutor Justice Robert H. Jackson. Burson—who after his military service would become the founding chairman of Burson-Marsteller, the world’s leading public relations and public affairs firm—covered the trials from the very first day. He told me that the Palace of Justice was packed to capacity with hundreds of reporters the first week, and dwindled down to a fraction of that as the trial progressed until verdict when interest peaked again.¹⁵ While Burson agreed that television audiences are not ordinarily interested in viewing long stretches of war crimes trials, he thought that Saddam Hussein’s trial might be more interesting to American viewers than usual because of the war.

The U.N. International Criminal Tribunal for the former Yugoslavia (ICTY) was deluged with media coverage requests at the onset of the *Tadic* trial. Registry staff were overwhelmed with press requests and accommodating seating for the overflow. Within a week, however, the frenzy dwindled. Reporting from The Hague, Raymond Brown described what ensued next:

During the second week of the trial prosecutors called Muslims and Croats who had been tortured and who had witnessed rape and murder in northern Bosnia. In the midst of their dramatic testimony, an American reporter in a nearby gallery seat, one of the few from a major daily, appeared to stir impatiently. Finally he muttered, “My readers don’t care about this stuff” and stalked off into the cloudy Dutch afternoon.¹⁶

Whether from the ground or through the airwaves, covering war crimes trials poses unique challenges. In Nuremberg, for example, there were enormous technical problems, and with the exception of CBS News’ Howard K. Smith, a Rhodes Scholar with an unparalleled knowledge of Germany, most of the journalists suffered from a poor understanding of German history.¹⁷ The facilities for journalists were lacking; transportation

¹⁵ Author’s interview with Harold Burson, Founding Chairman, Burson-Marsteller, in N.Y. (Sept. 8, 2006) [hereinafter Burson Interview].

¹⁶ Raymond Brown, *A Fronte Praecipitium A Tergo Lupi: Towards An Assessment Of The Trial Of Dusko Tadic Before The ICTY*, 3 ILSA J. INT’L & COMP. L. 597, 601 (1996–1997).

¹⁷ Burson Interview, *supra* note 15.

was problematic; there was no library and no Google, and reporters were burdened with making an essentially anti-climatic trial, with a certain verdict, interesting. Even more challenging was the tedious pace of the trial, which often suffered from less than stellar lawyering, a deluge of mind-numbing documents, and recurring translation problems.

Perhaps Nuremberg Judge, Sir Norman Birkett of the United Kingdom, summed up the problems best in three of his 1946 diary entries, which have been described as a diatribe against the lawyers, interpreters, and his more patient colleagues.¹⁸

May 23: When I consider the utter uselessness of acres of paper and thousands of words and that life's slipping away, I moan for the shocking waste of time. I used to protest vigorously and suggest matters to save time, but I have now got completely dispirited and can only chafe in impotent despair. . . .

June 20: When Flachsner [Defendant Speer's counsel] succeeded Kubuschok [Defendant Papen's counsel] at the microphone, it became clear that there were lower depths of advocacy to be reached, unbelievable as it sounds. . . .

June 21: Oscar Wilde began *De Profundis* by asserting that "suffering is one long moment" and the truth of that assertion cannot be better exemplified than in this awful cross-examination, which the Tribunal is compelled to suffer and endure.¹⁹

II. AN INCONVENIENT STORY

Consistent and accurate coverage of the Iraqi tribunal presented its own challenges. Paramount among these challenges were fickle viewers tuning in for the crazed and raging Saddam acting out in court, while tuning out for witness testimony.²⁰ And even a live and raging Saddam cannot compete with a long-deceased Jon-Benet Ramsey.²¹ Decimation of thousands as part of crimes against humanity and genocide does not command the same airtime as the killing of a few. Saddam's trial would have to compete for airtime with other more salacious crimes. CNN's Christiane Amanpour was once challenged at a conference by a co-panelist who said, "You did a great job in Bosnia, why didn't you go to Rwanda where more people

¹⁸ TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 418 (1992).

¹⁹ *Id.*

²⁰ Apparently it is also thought to sell books. See, for example, the cover chosen for the book *Saddam on Trial*, featuring a photograph of Saddam in a rage during his trial. Scharf & McNeal, *supra* note 4.

²¹ Jon-Benet Ramsey is a child beauty pageant contestant who received extensive coverage in the American media after her murder.

died?”²² Amanpour replied, “I was in Rwanda. I did cover it. I knew what was happening but the O.J. Simpson trial was on and I couldn’t get on the air.”²³

The Iraqi tribunal failed to create an effective office for public outreach and media relations, which should have been staffed by an experienced official independent from the prosecutor who could provide reliable and regular briefings on the tribunal’s developments, and post-trial exhibits, transcripts, budgets, annual reports, and other court documents for worldwide viewing. The tribunal’s website was wholly inadequate. Finding answers from the judges was also difficult because many procedural decisions were left unaddressed or unexplained. There was a lack of understanding of civil law proceedings, Iraqi proceedings, and proceedings in international tribunals. Just before the opening of the *Tadic* trial, in a Court TV interview, Chief Prosecutor Justice Richard Goldstone anticipated that this would be a problem, “[The trial’s fairness] is going to be judged by nations and by lawyers and by commentators from countries who are not used to that form of proceedings. All the more reason that it’s going to be very important to explain what we’re doing and why we are doing it.”²⁴ During a training I conducted with the Iraqi tribunal judges late in the proceedings, they acknowledged their failure to effectively explain what they were doing and why they were doing it.

Voiceless as a result of translation, faceless and nameless to ensure anonymity, Iraqi tribunal witnesses were an alphabet soup of pseudonyms, coming across somehow as less compelling, and more difficult to understand. Anonymous judges and prosecutors exacerbated the problem. There were technical problems in sound quality, video feed, and translation.²⁵ Uncertain and erratic court dates made it difficult to schedule coverage and tough for viewers to coherently follow proceedings. There was little explanation going into and coming out of the sessions from which the public and press were excluded. In the Rwanda, Yugoslavia, and Sierra Leone tribu-

²² Richard Holbrooke, *No Media-No War*, 26 PEACE MATTERS: A PEACE PLEDGE UNION PUBLICATION (1999), http://www.ppu.org.uk/peacematters/1999/pm_99sum_media.html, cited in ELISABETH REHN AND ELLEN JOHNSON SIRLEAF, *WOMEN, WAR, PEACE: THE INDEPENDENT EXPERT’S ASSESSMENT 106* (2002).

²³ Saddam’s absence—whether due to boycotting, expulsion, or execution—resulted in less coverage of the trial as public interest waned with Saddam’s disappearances. Another problem in getting the story told was the trial’s anti-climatic nature, the verdict being a foregone conclusion.

²⁴ Interview by Court TV anchor, Terry Moran, with Justice Richard Goldstone, prosecutor for the ICTY and the ICTR, on Court TV (1996), available at <http://www.courtstv.com/archive/casefiles/warcrimes/reports/interview.html>.

²⁵ Since the translation was not meant for those in the courtroom, as in the case of Nuremberg, and the Rwandan and Yugoslav tribunals, the quality of the interpretation was not a priority. Much was lost in translation.

nals, the judges regularly provided explanations for going into these sessions, generally summarized their results, and permitted the release of redacted session transcripts or permitted court monitors from the public to sit in on them.²⁶

Reportage through the fog of war also skewed Iraqi tribunal coverage. An example was the next-to-last adjournment of the verdict reported as due to fears of the insurgency, rather than a more likely and mundane explanation. Such adjournments were also routine in war crimes tribunals where there was no insurgency. Adjournments often occur because judges feel pressure to set ambitious and sometimes unrealistic deadlines that cannot be met or intervening circumstances such as changes in judges, counsel, or the possibility of additional evidence necessitates them.

Despite these difficulties, there was some quality coverage of the trial, some of which came from "the New Media" and hi-tech means, including surfing, blogging, chatting, streaming, "youtubing", and 3G downloading. A Blackberry could be used to check facts and stories on the web during Court TV commercial breaks, and on-air anchors had Internet access via computers beneath their glass-topped desk. The emergence of blogs, particularly Michael Scharf's Case Western Reserve University's Grotian Moment Blog,²⁷ which received 127,919 hits, allowed journalists and the public unprecedented ability to make sense of the trial, access documents, and obtain thoughtful and diverse perspectives. I witnessed producers and anchors checking and even posting questions on the blog. Blog content seeped its way into coverage.

²⁶ But even at the ICTR, ICTY, and SCSL, closed sessions posed problems. During *Tadic*, Raymond Brown wrote:

The greatest fear of journalists covering *Tadic's* trial is that incredibly important testimony will be offered in camera. This fear proved to be well founded when, towards the end of the prosecution case, a redacted transcript of the testimony of witness L was released. It contained shocking eyewitness descriptions of *Tadic's* personal participation in murders, beatings, and rapes [and that he was camp commandant].

Brown, *supra* note 16, at 610. After particularly controversial usage of anonymous witnesses in *Tadic*, war crimes tribunals initially moved towards greater transparency. Tribunals have recently come under increased criticism by journalists, as the pendulum is seen to be swinging backwards. According to journalist Thierry Cruvellier, "Closed hearings and anonymous testimonies before the ICTY and the ICTR have gradually not been based on careful examination of the risks involved, but rather on the institutions' desire to protect themselves. This is one of the most damaging legacies of the ad hoc tribunals: erosion of public hearings." See Thierry Cruvellier, *An Alarming Decision for Freedom of Press*, INTERNATIONAL JUSTICE TRIBUNE, March 27, 2006. With regard to secrecy, the Iraqi Tribunal far surpassed the ICTR, ICTY, and SCSL.

²⁷ Case Western Reserve University School of Law, Grotian Moment: The Saddam Hussein Trial Blog, <http://www.law.case.edu/saddamtrial/> (last visited Apr. 6, 2007).

Court TV hosted frequent expert webchats, allowing the public to ask questions and seek clarification about the proceedings, and also put together an excellent website with the relevant materials. Court TV and CNN websites' streaming of live and uncut proceedings allowed full, remote access to the trial. "Youtubification" also provided unprecedented riveting footage. Be it the professional "suicide" of *Seinfeld's* Michael Richards or the execution of Saddam Hussein, underground citizen journalists equipped with no more than cell phone cameras and internet access, allowed us to bear almost immediate witness to what would otherwise be obscured by "official stories" and disbelief. Soon after Iraqi National Security Adviser Mowaffak al-Rubaie released official statements describing the execution and claiming that "Saddam was treated with respect when he was alive and after his death,"²⁸ websites' grainy cell phone footage showed otherwise. As Samuel Johnson once said, "there's nothing like a hanging to concentrate the mind." While the international press debated how much of this footage to show on television and on their websites, Iraqis were watching the full monty on 3G cell phones.

Sixty-one years ago, Justice Robert H. Jackson, in his Nuremberg opening address, argued, "The record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well."²⁹ There were a number of excellent journalists and commentators, covering the Iraqi tribunal for television and print media, who recognized the historic importance of a fair record and asked the right question, "What kind of chalice was being passed on?"

Court TV, CNN, BBC, and the *New York Times* produced particularly outstanding coverage. That Court TV's anchors were all experienced trial lawyers, as were some of the producers working on the coverage, made a considerable difference. I was impressed with the research and preparation they devoted to covering this trial. That many of the CNN anchors had covered genocide, war crimes, and crimes against humanity—in Bosnia, Rwanda, and Sierra Leone—and that they had a correspondent in the courtroom, also lent to compelling coverage. John Burns's articles in the *Times* were required reading.

Rather than seeking out the usual legal commentators or pundits who lacked real experience in these types of trials, media outlets sought analysts with considerable experience advising, establishing, assisting, and prosecuting at international criminal tribunals. Experts like Mark Ellis, the

²⁸ Christopher Torchia & Quassim Abdul-Zahra, *Breaking News: Iraqis Execute Saddam*, E. BAY DAILY NEWS, DEC. 30, 2006, <http://www.ebdailynews.com/article/2006-12-30-ap-saddam>.

²⁹ II TRIALS OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 51 (1947–49); Taylor, *supra* note 18, at 168.

executive director of the International Bar Association; David Scheffer, former U.S. Ambassador at Large for War Crimes; and Professor Michael Scharf's considerable instincts kicked in when the feed or translation was incomplete or difficult to understand or when bombarded with conflicting and incomplete information coming through the earpieces or a chyron crawls during live appearances.

During regular appearances as Court TV's legal analyst and periodic appearances as CNN's guest commentator, I worked closely with the anchors and producers, on fact-checking, brainstorming, and selecting footage to highlight. Although getting the facts right was my first priority, a close second was telling a compelling story. As the trial went along, ever present in my mind was Nuremberg chronicler Rebecca West's commentary that by the end of that trial, "The courtroom was a citadel of boredom. Every person within its walk was in the grip of extreme tedium."³⁰ At Court TV, where we had longer segments to discuss the trial, we tried to keep the coverage fresh and compelling by focusing not just on the day-to-day proceedings, but also on larger issues, such as prevention of genocide; the challenges and importance of defending clients in a climate of moral outrage; restorative versus retributive justice; the invisibility of women in the Iraqi tribunal; why holding perpetrators of mass violations against women accountable for their acts has been a slow and tortuous process; the importance of an independent judiciary; the inquisitorial versus the adversarial system; why we allow genocide to occur; attorney ethics; the successes and failures of the Nuremberg, Rwandan, Yugoslav, and Sierra Leone courts; the formation of the permanent International Criminal Court; national courts versus international courts, and the purpose of such courts, as well as alternatives such as truth commissions. We also discussed the role of the media in facilitating and suppressing such crimes and covering the resulting trials, as well as why viewers should care about the trial. Much of our coverage mirrored the syllabus of the course on international criminal law I teach each year. I hope I was a good teacher.

III. THE PUBLICITY BUSINESS

In the Richmond newspaper case, U.S. Supreme Court Chief Justice Warren Burger spoke of the importance of justice being "seen to be done" and the cathartic and prophylactic effect of observing criminal trials. He wrote:

Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done—or even

³⁰ REBECCA WEST, *Greenhouse with Cyclamens I*, in *A TRAIN OF POWDER: SIX REPORTS ON THE PROBLEM OF GUILT AND PUNISHMENT IN OUR TIME* (1955).

the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is “done in a corner [or] in any covert manner.” It is not enough to say that results alone will satiate the natural community desire for “satisfaction.” A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society’s criminal process “satisfy the appearance of justice” . . . and the appearance of justice can best be provided by allowing people to observe it. . . . People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case.³¹

In the Nuremberg trials, the United States administration understood the importance of insuring that remote trial could be observed by the masses, both inside and outside of Germany. Great effort was made to accommodate reporters from more than twenty nations.³² According to Harold Burson:

the U.S. administration, in the form of President Truman who was following Roosevelt policies, wanted the world to know what happened in Germany. The objective was “never again.” It was thought that that once people found out how debased and degrading to human life it was, that it would never happen again. You also had General Eisenhower, who was Supreme Commander of what went on in Germany at that point, and he wanted the world to know why we went to war and why we were willing to pay the price—he particularly wanted German people to know. . . . He even manned locals to clean up the concentration camps to see for themselves what happened there.³³

Ambivalent about cameras in its own courtrooms, the U.S. actively supported the Iraqi tribunal’s decision to televise. Perhaps it was felt that reminding the public, in detail, how debased and degrading to human life Saddam’s regime was would somehow justify the decision of the U.S. to invade. With genocides in Cambodia, the former Yugoslavia, Iraq, Rwanda, and Darfur occurring in the sixty years after Nuremberg, and in an age of

³¹ *Richmond Newspapers v. Virginia*, 448 U.S. 555, 571–72 (1980) (citations omitted).

³² “Members of the Fourth Estate who covered the Nuremberg trials were billeted under the auspices of the United States Army. . . . [S]everal hundred members of the press were converging on the old city, and there was no other place large enough to accommodate them. . . . In the courtroom 240 seats were reserved for them, and, in a large press room, the trial proceedings could also be followed from loudspeakers.” Taylor, *supra* note 18, at 219–21.

³³ Burson Interview, *supra* note 15.

television, shining klieg lights on such events has failed to turn "never again" into a reality. Some have argued that the more we see genocide televised, the more we become effectively desensitized, accustomed to it as the way of the world. Still, 241 days of trying the owners of Radio-Television Libre Des Milles Collines (RTL) in the *Media Trial*, has left a permanent imprint on my brain as to what the media can accomplish when it puts its mind to it. Whether or not the Rwandan genocide would have occurred absent RTL, undoubtedly it was a powerful accelerant. Genocide is not easy to perpetrate. It requires a specific intent to accomplish, likewise a specific intent to prevent or extinguish.

In a September 5, 1988 *New York Times* Op-Ed piece, William Safire wrote that "[a] classic example of genocide is under way, and the world does not give a damn . . . [T]elevision crews are ignoring Saddam Hussein's genocidal campaign against a well-defined ethnic group that has been friendless through modern history and does not yet understand the publicity business."³⁴ When it comes to the "publicity business," war crimes tribunals must strike a delicate balance. Justice Goldstone, when asked just prior to the *Tadic* trial whether "one of the aims of the tribunal is to affect public opinion" answered in the affirmative.³⁵ Asked about the significance of television cameras in the *Tadic* courtroom, he responded:

I have no doubt that in any country and . . . in any international court, the media is a partner in the whole criminal justice system. If people in the country are not told what their criminal courts are doing, then . . . the deterrent aspect of criminal justice is going to fail. It is just not going to be there.

And in earlier days, public trials [and] executions were held in public. People who were found guilty were flogged in public. And the reasons for that being done . . . punishments have to get round by word of mouth.

Today, fortunately in my view for the criminal justice system, we have television; we have newspapers; we have radio. And people are told . . . if the international community is not told what we are doing here—and particularly if people in the countries where they are victims do not know what we are doing—there is no point in doing what we are doing.³⁶

Revisiting these comments a decade after *Tadic*, he told me, "Deterrence is not an easy thing to prove in international or national courts, but I am confident that even more crimes would have occurred in their ab-

³⁴ William Safire, Op-Ed, *Stop the Iraqi Murder of Kurds*, N.Y. TIMES, Sept. 5, 1988, § 1, at 21.

³⁵ Goldstone Interview, *supra* note 24. In response to a question about the aims of the tribunal, Justice Goldstone answered, "The aim of any criminal justice system . . . [is] to deter people from committing crimes."

³⁶ *Id.*

sence.”³⁷ Regardless of its deterrent effect, Goldstone believes media coverage advances other important values such as official acknowledgement for the victims, diminution of denial, and establishment of a written history of events from which we can learn in the future.

While any deterrent effect resulting from publicizing the existence and work of war crimes tribunals may be difficult to measure, genocidaires are now keenly aware of the likelihood of being held accountable. Two weeks before the RPF liberated Rwanda from one hundred days of genocide, and a year before the ICTR was established, RTLM broadcaster Kantano Habimana, a close observer of international media before and during the genocide, uttered the following words on his radio program:

If we fight and finally defeat the *Inyenzi*³⁸ nobody will try us, because we will be considered as triumphant warriors. But if we are defeated, it goes without saying that even if you hide in the bottom of Lake Kivu, they will do everything possible to fish you out and try you and finally hang you. . . . I don't know where they will hang you, but when you're a loser, everybody will take swipes at you. . . . as the saying goes, when the cow is down, every other cow tries out its horn. We have no other way of defeating these people who want to discourage us by threatening to bring us before the international tribunal, or wherever . . . We have to fight all these people who are trying to demoralise us . . . so as to pursue our set objective.³⁹

Genocidaires in the making, as well as those in the act, watch and evaluate us—sadly, closer than we monitor them.

From the beginning of his term as prosecutor of the ICTY and ICTR, Justice Goldstone considered the impact of tribunal media coverage locally and globally. He devoted about twenty-five percent of his time to media background briefings for press from all over the world and asked the Rwandan government to broadcast filmed proceedings via huge television screens in national stadiums.⁴⁰ While there were initial efforts by Goldstone and others to reach out to the public and establish positive relations with the media, on the whole, war crimes tribunals' efforts in this area were seen to be insufficient. The ICTY eventually launched a public outreach program in late 1999, and soon after the ICTR adopted similar efforts—both only after much criticism that they did not reach out to the populations for whom they

³⁷ Author's interview with Justice Goldstone, Prosecutor, International Criminal Tribunal for Yugoslavia and International Criminal Tribunal for Rwanda, (Feb. 5, 2007).

³⁸ *Inyenzi* was a code word for Tutsi or cockroaches.

³⁹ Prosecutor v. Ntagerura, Bagambiki, & Imanishimwe, Case No. ICT 99-52-T, P. Exhibit P103/214B (July 1, 2002).

⁴⁰ Author's interview with Justice Goldstone, *supra* note 37.

primarily exist. One senior ICTY court official put it this way to journalist Samantha Power:

In Western countries, courts automatically have a certain respect. They are recognized in the community. People understand their role; they are covered in the press; citizens may serve in juries. They simply don't need to promote themselves. But if you are doing what we are doing, hundreds of miles away, in a different language under a different system, you have to do things that courts don't ordinarily do. . . . If you just sit here and hear cases, you simply won't get the job done.⁴¹

Can war crimes tribunals go too far when they believe they "have to do things that courts ordinarily don't do"? Is there a danger when their officials understand the "publicity business" too well? Yes, on both accounts.

As the first war crimes tribunal since Nuremberg to be based in the country where the atrocities occurred, the SCSL was determined to make public outreach and publicizing of justice a priority. Particular effort was paid to conducting press briefings and town hall meetings held by the prosecutor all over Sierra Leone, at the pre-indictment and pre-trial stages. The court's first prosecutor, appointed in June 2002, arrived in Freetown in August. A Special Court Outreach Office was immediately set up and located in the Office of the Prosecutor. With no defence counsel yet hired, or any figure yet appointed as counterbalance to the overwhelming power of the prosecutor, defence outreach issues were not a court priority. In January 2003, the outreach office was re-located from the Office of the Prosecutor to the court's registry section, but even this move could not level the playing field.⁴² The prosecution already had a huge head start in shaping public opinion in the media and at the grassroots level. Better resourced and better staffed, the prosecution could afford to devote more attention to outreach than could the defence. Although the Court created a principal defender position in early 2003 to counterbalance the prosecutor and serve as a "fearless advocate" for the defence, over a year went by before they appointed anyone to that position. In the interim, the office was staffed by two or three extremely devoted Sierra Leoneans and two different, hardworking acting heads of the defence office.

⁴¹ SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 207 (2002).

⁴² While the efforts of the outreach office were noble and highly valuable, they were not without problems. For example, they produced and widely disseminated a pamphlet in English and Krio, titled "The Special Court Made Simple" with language suggesting the guilt of the accused and drawings of the accused in handcuffs standing before the judges. However, it should be noted that the outreach coordinator, a dynamic and extremely conscientious individual, was receptive to concerns expressed by both sides of the court and agreed to revise the pamphlets when objections were brought to her attention, albeit long after the initial distribution.

When I was appointed that court's principal defender in March 2004, over a year and a half after the chief prosecutor's appointment, and only three months before the first trial began, the staffing and resources for the defence had already been decided, and it was rather late in the game for any real counterbalancing. On my last day of the job, the judges passed a code of conduct for defence and prosecution counsel containing a rule on "contact with the media" providing, *inter alia*, that "[c]ounsel shall not comment on any matter which is sub judice in any case in which he is involved."⁴³ Other tribunals had no such rule. I argued unsuccessfully that this would compound the head start the prosecution already had. But the judges adopted this rule after expressing concerns about the media poisoning the well. In their view, justice was best served if both sides could no longer speak on pending matters. But I felt their antidote to be more prejudicial impact-wise on the defence. To be fair to the judges, a few months earlier, they took the unprecedented step to rule—over the prosecution's objection—that any code of conduct for counsel would equally apply to the prosecution. At the other tribunals, the code of conduct for counsel applied only to defence counsel.⁴⁴

Prosecutors' notions of justice, and its being seen to be done, can be as different as night and day. In one war crimes tribunal, the accused and their counsel reported that a chief prosecutor was heard to utter in a public outreach forum "may [the accused] never see the light of day," among other such comments. Justice Goldstone consistently spent his time reminding the public that "whether there are convictions or whether there are acquittals will not be the yardstick of the ICTY. The measure is going to be the fairness of the proceedings."⁴⁵

⁴³ Code of Professional Conduct for Counsel with the right of Audience before the Special Court for Sierra Leone, Art. 13(b), *adopted on* May 14, 2005, <http://www.sc-sl.org/Documents/counselcodeofconduct.pdf>.

⁴⁴ The prosecution opposed my proposal to the judges, that they be covered by any code of conduct, arguing that they did not need one overseen by judges, because they were UN employees bound by the UN's internal general staff rules (i.e. rules that applied to UN electoral monitors, drivers, cooks, librarians, and doctors, but did not in any way deal with legal ethics, courts, or trial conduct). The prosecution further argued that if those rules were not enough, the prosecutor would be responsible for any further disciplining in his office. Once the judges made it very clear that one would be imposed on them, whether or not they agreed, they quickly began participating in the process of creating the joint code of conduct.

⁴⁵ Goldstone put his money where his mouth was—when approached by CEELI soon after his appointment and asked how they could assist his office, he responded, "the most important form of assistance would be to ensure the defendants were adequately represented." RICHARD J. GOLDSTONE, *FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR* 119 (2000). Perhaps his experience in South Africa provided unique sensitization about the importance of the rights of accused persons.

A few months into Saddam's trial, a highly esteemed journalist suggested that war crimes courts have an affirmative moral duty to enter the publicity business even before trials:

I told the ICC Prosecutor that I know he has a enormous vault of photographic and video images of the atrocities in Darfur and that he really should release the evidence to the public and the press. If we had those visual images we would cover Darfur and the ICC more, and this would put needed pressure on the international community to stop the genocide. I do not understand why he is not doing this.

I responded to his lament with the possible reasons why the prosecutor might not do so, such as confidentiality and integrity of evidence or that it might be frowned upon by the pre-trial chamber. The journalist responded, "But people are raped and dying as we speak." He was right about the unique power media images could have on policy-makers. Explaining the reversal of her opposition to lifting an arms embargo, to allow vulnerable Muslims some measure of self-defense, California Senator Dianne Feinstein told the *New York Times*: "for me the turning point was the attack on Srebrenica, that weekend with all the missing people . . . one image punched through to me: that young woman hanging from a tree. That to me said it all."⁴⁶

When I was at the SCSL, the Press and Public Affairs Office regularly produced videos that it publicized on its website, among other outlets. Some of the videos were quite good, others were problematic—unidentified footage of the conflict, injured persons, mutilated bodies, and the like, interspersed MTV-style with images of witnesses testifying in the courtroom, and the accused observing the proceedings. Hi-tech and compelling on one hand, but prejudicial on the other. Court staff with legal training found the videos troubling and expressed their concern, but those without legal training did not always appreciate the concern expressed.

The desire to protect innocent lives, a climate of moral outrage over heinous acts, and the bright hot lights of fifteen minutes of fame make for an intoxicating cocktail capable of dulling inhibitions and easily propelling one to cross the line. Just how far is too far is not always an easy call. What is "crossing the line" when it comes to media matters? As U.S. Supreme Court Justice Potter Stewart indicated trying to explain the meaning of "obscenity": "I shall not today attempt further to define the kinds of material I understand to be embraced . . . [b]ut I know it when I see it."⁴⁷

⁴⁶ Elaine Sciolino, *Senate Vote to End Embargo May Prove a Pyrrhic Victory*, N.Y. TIMES, July 28, 1995, at A1.

⁴⁷ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

IV. INCONVENIENT TRUTHS

In the absence of sufficient traditional media coverage of war crimes tribunals, another type of reportage has filled the vacuum. Those seeking news about such courts increasingly rely on daily or periodic reports by human rights groups, rights NGOs, and rights-related university centers (hereinafter collectively referred to as “rights groups”). They are humanity’s conscience, and the world would be a much more frightening place without these organizations and their committed staffs. However, rights groups oftentimes are not disinterested parties. Their perspective, orientation, and training, is very different. While their reportage may be more comprehensive, benefiting from access to information outsiders in the traditional press may not, their reportage can also be plagued by conflicts of interest and incestuous relationships.

Rights groups may serve as prosecution advisors or expert witnesses; they may vvy for contracts from funders inside and outside the court, to train court staff and officials; and they may engage in other projects that would require the prosecutor or registrar’s blessing. I found it interesting that one rights group, while reporting on one tribunal, organized a training session for judges that was to be conducted by judges and *prosecutors* at another tribunal. When I asked the organizer why no defence counsel were included as trainers, the organizer replied that it just never came to mind. To their credit, they immediately agreed to add two defence lawyers to the training. But this is just one of many examples of their orientation. Hearts in the left place and on the side of the angels, rights groups are sometimes in the business of hunting those they believe to be war criminals, waging vociferous media and political campaigns aimed at apprehending and indicting individuals who may be prosecuted by these courts.

Rights group reporters tend to be inexperienced. So many of them cover these tribunals as a means to attaining their ultimate goal, a post in the prosecution or registry. Better to say certain things and not say other things, if your dream is to work at the place you are covering. The advocacy efforts of some of these groups has led to the creation of the particular court they cover, and the indictment of the particular accuseds to be tried. Like any proud parent, they desperately want to see their offspring succeed. While there is, to a certain extent, a belief that criticism makes these courts stronger, and they have issued some very strong and useful criticisms of these courts, there are those who feel uneasy telling the whole truth and letting the chips fall where they may.

Rights reporters are more likely than traditional journalists to have personal relationships with the subjects of their reportage.⁴⁸ Perhaps most

⁴⁸ When young rights reporters go to far-away places for long periods of time, with little recreation, and only other tribunal people with whom to socialize, things happen. Of course

troubling is that they have insufficient or no journalistic training. For example, a draft report circulating about one tribunal, contained false and defamatory claims made about a former court official. Just before its planned publication, the former official happened to come across a copy and wrote to the principal of that group requesting that the material be withdrawn. Fortunately, the former official had documents proving the false nature of the claim, and the principal immediately offered a written apology. The young reporter on the ground never bothered to check the accuracy of the claims with the former official or consider the reasons why a confidential source might make such claims. Problematic reports about court proceedings were circulated by that same rights group on an earlier occasion. The principal of that group confessed to the former official that they would seriously rethink the way their staff was going about these reports.

Although rights organizations have been an enormous asset to the cause of justice, and the principals of rights groups are persons of immense integrity and experience, they have, for the most part, utterly failed to address these problems or provide adequate supervision of their charges continents away. Some because they are unaware of the problem, others because they are not sure what to do about it. While rights reporters serve an important purpose filling in for their phlegmatic brethren in the traditional media, “task-oriented” traditional media serve a unique honest broker objective function “mission-oriented” activist “rights reporters” too close to their subject often cannot.

When I approached Radioscope, a nationally-syndicated U.S. radio program in 1983 with a proposal to cover a relatively new phenomenon called “hip-hop”, it was because I felt the media was neglecting an important story. I believed that much could be learned about ourselves and the way of the world from what hip-hop artists were saying—if we listened. I felt very much the same about the story of international criminal tribunals (ICTs) when I approached Court TV in 2005—that the media was not sufficiently covering these new courts, and that much could be learned if we paid better attention. Before knocking on Radioscope’s door, a handful of other radio programs turned me away. Hip-hop made them nervous; they

relationships between journalists and their subjects can occur in the traditional media, but the likelihood is less so. Traditional journalists either are open about their relationships in their articles, or they move onto another story to cover. Their goal is not to work for the tribunal, but rather to progress in their career as a journalist, and conflicts of interest can destroy any such career. An ugly war between two divisions of one tribunal almost ensued when official X in one branch of the tribunal, became incensed about Y’s, in another branch, relationship with a talented, but compromised, author of reports about that court. When Y tried to hire the reporter, X sent an anonymous email to the reporter threatening to blow the whistle on the whole matter if the reporter took the job. Y used court resources to trace the emails back to X and made it very clear to X that there would be consequences if X blew the whistle. Y then abandoned hiring the reporter, who continued to be involved in covering that court.

did not understand it or see its value, so encouraging media outlets to cover it was difficult. ICTs, like hip-hop, are not easy on the ear; they make us uncomfortable but offer essential, unspeakable, and inconvenient truths.

Reflecting on his experience covering the *Tadic* trial, Raymond Brown struggled with the traditional media and the American public's particular lack of interest in ICTs, despite the value obtained from such coverage. He found some insight from one of the *Tadic* trial judges, Gabrielle Kirk McDonald, an American:

We ourselves in the United States I think still have a problem dealing with ethnic differences, and what has happened in the former Yugoslavia, of course, is nothing that we would ever expect to occur in the U.S. but is an example of what can happen when you don't resolve your ethnic divisiveness. When you cannot come to respect people for their difference and accept the differences and yet live together and respect each other, that is what happens. So it seems to me that to the extent that we in America have not come to grips with our kind of aspirational assertions of equality and non-discrimination—and with the reality of discrimination—that there are some parallels, and so perhaps we can learn something.⁴⁹

As to the “American disconnect”, Justice Goldstone, attributes this in part to the negative approach of U.S. politicians to international criminal law: “This does have a very important negative effect on public perceptions and especially with regard to the ICC,” he argues.⁵⁰

“The so-called CNN Effect—the way in which CNN's coverage can define a story—has become so pervasive that former UN Secretary-General Boutros Boutros-Ghali called CNN the ‘16th member of the Security Council.’”⁵¹ The media is an important partner in serving the cause of international justice, and there are a few simple things ICT's can do that may better engage them. Increasing the efficiency of proceedings increases the ease and likelihood of its coverage, as does putting further effort into appointing media savvy heads of ICT press and public affairs offices and resorting to closed sessions only when truly warranted. Better storytelling by prosecutors would also be helpful, not only to the media, but to the judges and defence counsel who must struggle to coherently follow case-in-chiefs that are sometimes disorganized, whether the fault of the prosecuting trial attorneys or the result of the poorly-conducted investigations they inherit. More than once I have seen judges and defence counsel scratch their heads wondering

⁴⁹ Brown, *supra* note 16, at 612 (citing Judge McDonald's May 3, 1996 Court TV interview with Terry Moran).

⁵⁰ Author's interview with Justice Goldstone, *supra* note 37.

⁵¹ WOMEN, WAR, PEACE, *supra* note 22, at 106, cited in LARRY MINEAR, COLIN SCOTT, & THOMAS G. WEISS, THE NEWS MEDIA: CIVIL WAR AND HUMANITARIAN ACTION (1994) at 4 (quoting Boutros-Ghali).

what the heck is the prosecution's theory today? Prosecution offices would do well to build the art of storytelling into their training repertoire. Good storytelling and "playing to the media" are, however, two very different things and ought not be confused. Of course all of these suggestions should be taken with serious consideration for the rights of the accused *at the outset*.

In the months leading up to the Rwandan genocide, hate media journalists sometimes began their heavily-coded broadcasts with the words: "those for whom this message is intended will understand" or "I speak to those who listen well." It was a boastful recognition of the power of messaging and their success in communicating their ideas to their intended constituencies. It was also a nuanced warning that if you ignored the message, you did so at your peril. Although more can be done, ICTs have made vast improvements in their messaging to those where the conflicts occurred. However, few strides have been made in messaging to the international community, international media, and Americans in particular. Few, if any, stories are as important as genocide, crimes against humanity, and war crimes. Few, if any, venues provide a better opportunity to learn about ourselves and the state of our planet than ICTs. We ignore their messages at our own peril, among others.