WHY JOURNALISTS SHOULD BE WORRIED BY THE RWANDA TRIBUNAL PRECEDENTS

By Thierry Cruvellier*
For Reporters Without Borders
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The contempt of court proceedings against several Croatian journalists before the International Criminal Tribunal for the former Yugoslavia (ICTY) are a new development in the history of the international courts that were created in the early 1990s to try senior officials suspected of war crimes or crimes against humanity. Nonetheless, there have been at least two attempted prosecutions of a similar kind before the International Criminal Tribunal for Rwanda (ICTR), an identical court set up in Arusha, Tanzania, to try crimes committed during the 1994 Rwandan genocide. And these precedents are a disturbing illustration of the dangers of arbitrariness and perversion when journalists are accused of violating orders issued by these courts.

1. The attempted prosecution of the online newspaper *Diplomatie Judiciaire*

The *Diplomatie Judiciaire* case is the only real precedent for the current proceedings against several Croatian journalists. An online newspaper then based in France and specialising in the coverage of international justice (especially the ICTY and ICTR trials), *Diplomatie Judiciaire* published an article on 26 April 2002 entitled "The Karangwa trap" revealing that a potential key prosecution witness in the most important trial scheduled to be heard before the ICTR – the trial of Col. Théoneste Bagosora – was himself now suspected by prosecutors of participating in the Rwandan genocide[1].

This development was disturbing for two reasons, the article said. Firstly, the witness, Maj. Pierre-Claver Karangwa, had until then had a reputation for good behaviour during the genocide, which explained why investigators had approached him about become a prosecution witness. Despite his high-level responsibilities in the former Rwandan army, no suspicion had ever emerged, not even on the part of the Rwandan authorities, of his having played any criminal role during the preceding eight years.

Secondly, ICTR administrators were confidentially notified that their own prosecutors were investigating Karangwa only eight days before he was due to arrive at ICTR headquarters in Tanzania, this time not to work on the case against certain Rwandan senior officers but, on the contrary, as an investigator for the defence of another Rwandan general accused before the ICTR – a development that clearly had not pleased some of the senior prosecutors.

The *Diplomatie Judiciaire* article revealed the danger of the situation in which the prosecutor's office now found itself, suddenly suspecting one of its own witnesses of being a criminal. It said the initiation of a prosecution against Karangwa by the interim chief prosecutor caused serious

[1] The article was written by Thierry Cruvellier. It is available at the website of the International Justice Tribune newspaper (www.justicetribune.com).

problems within the prosecutor's office, then headed by Carla del Ponte. The article also questioned that the office was being run in a coherent fashion, describing its leadership as "fragmented."

Less that two weeks after the article came out, the chief prosecutor sent the newspaper a confidential letter telling it to withdraw the article at once because it "flagrantly violates" a witness protection order issued by the ICTR (presumably protecting Karangwa as a prosecution witness) and warning that this "violation" would be brought to the tribunal's attention "in an appropriate fashion." The prosecutor's office did indeed ask the tribunal on 22 May to initiate contempt of court proceedings against *Diplomatie Judiciaire* for revealing that Karangwa was a witness.

Contrary to the most elementary rules of due process, the prosecutor's request was sealed and was filed with the utmost secrecy without the newspaper ever being told and, consequently, without it ever being given the right to defend itself. It was only several days after the tribunal had ruled on the request on 5 July 2002, rejecting it in its entirety, that the newspaper discovered that it had been threatened by a prosecution. The newspaper was never officially notified about either the public ruling or the prosecutor's confidential request, learning about them indirectly afterwards.

The case is significant for several reasons, some of them relevant to the case of the Croatian journalists, even if *Diplomatie Judiciaire* is completely apolitical and innocent of any misconduct while the Croatian journalists are politically engaged and – formally at least – did commit a violation.

The circumstances surrounding the prosecution

The 2002 offensive against *Diplomatie Judiciaire* came at time when it had published a number of reports highlighting the ICTR's shortcomings. It ran an article in November 2001 about a hearing in which the three judges had joked in the presence of a witnesses who was a rape victim while she was being aggressively cross-examined by the defence. The report caused a stir and sparked a crisis between the tribunal and organisations representing Rwandan genocide survivors. One the judges involved stopped one of the article's authors in a corridor of the court building and insulted him. The defence lawyer mentioned in the articles announced his intention during a public hearing to accuse the newspaper of contempt of court, but did not make good on his threat.

In March 2002, the newspaper ran an article giving the inside story on a deadlocked internal UN investigation into presumed corruption involving defence lawyers and the section of the office of the clerk of the court that deals with the defence. As a result, one of its reporters was interrogated by UN internal investigators and persons close to him were subjected to intimidation. Finally in May 2002, two days after a prominent former Rwandan general was arrested at the behest of ICTR prosecutors, *Diplomatie Judiciaire* began publishing a series of investigative articles that played a decisive role in his release and the withdrawal of all the charges against him three months later.

In short, the legal offensive against *Diplomatie Judiciaire* was launched at a moment when the ICTR, and its prosecutor's office in particular, were being wrong-footed by its critical coverage. And the person responsible for initiating the legal proceedings against the newspaper, the head of the prosecutor's office, had just been directly criticised in the 26 April article. So the legal grounds for the proceedings – contempt of court for violating an ICTR witness protection order – were clearly not what really motivated it. The prosecutor's office was in no way concerned about Maj. Karangwa's safety. On the contrary, it was threatening to prosecute him for genocide in reprisal for what it considered to be a lack of loyalty. Furthermore, he was living legally in the Netherlands and had agreed to be interview by *Diplomatie Judiciaire* before the article came out. The contempt of court procedure was just a way to silence a newspaper that had become very critical of the court.

The case of the Croatian journalists accused of contempt of court before the ICTY is different. The openly partisan and political nature of the publications involved is clear, as was their ill-will towards the tribunal. But the ICTY prosecutor's office decided to initiate proceedings at a fraught moment, which raises questions about its real motives. They were not initiated at the time of the first alleged violations of the court protection order but much later, at a particular moment in the Gotovina case. This did not escape the attention of one of the ICTY judges who, in a separate opinion issued on 20 June of this year, stressed that it "could be important to explain during the trial why [Josip Jovic] was not charged until 2004 for an action dating back to 2000."

The witness protection argument

In their decision of 5 July 2002 rejecting any proceedings against *Diplomatie Judiciaire*, the ICTR judges noted that the confidential request from the prosecutor's office had argued that the disputed article was evidence not only of "a clear case of ill-considered contempt towards the tribunal but also a deliberate readiness to embarrass it or to obstruct the course of justice in this tribunal." The judges thereby highlighted the fact that the request contained the seed of a desire to restrict the work of the media.

According to this ruling, the prosecutor's office had asked that no one should be allowed to reveal "any information to the public, media or any other party not directly involved about the drafting of the request, the chamber's decision on the request or any other impact the request might have." This implied not only that the newspaper would be forced to withdraw the offending article from the public domain but that it should have to do so secretly, without talking about it or giving any explanation. It is yet further evidence that the aim of the prosecutor's office was to suppress the article's subject matter rather than punish an alleged violation of a court order that had put a witness in danger.

Significantly, the grounds for the very few cases of prosecutions of this kind so far initiated has always been the disclosure of the identity of a protected witness or witnesses. The offending articles have never posed any objective danger to their security. Even the protection of their identity as witnesses has at the very least been questionable *at the time when these proceedings were launched*. There was never any threat to the security of either Maj. Karangwa in the 2002 case before the ICTR nor to the security of Croatian President Stipe Mesic or UN peacekeeper

Johannes van Kuijk in the case of the Croatian journalists before the ICTY.

This means the very grounds for these prosecutions are tainted by suspicion. It is acknowledged that none of the witnesses named by the news media were endangered by the disclosure of their identity at the time it occurred. Also, the safety of the witness or witnesses was not the first and only concern of those who initiated the prosecutions in the 2002 case before the ICTR and the 2005 case before the ICTY. This is disturbing because it implies in practice that the prosecutions were brought by officials whose motives were revenge or the protection of their own interests rather than a strict and scrupulous concern for the interests and safety of people who could have been put in danger for being their witnesses. The motives and context surrounding these prosecutions are decisive in determining their legitimacy. In both cases, however, the motives and context are deeply disturbing.

Just as the prosecutors in the *Diplomatie Judiciaire* case in 2002 gave a disturbing indication of the extent of the silence they wanted to impose on the media, today there is reason for concern about the potential scope of the proceedings against the Croatian journalists before the ICTY. One of the prosecutions concerns not only the disclosure of a witness's identity but also the disclosure of confidential court documents including records of closed hearings and confidential interrogations by one of the tribunal's investigative branches. Here there is a clear danger of an attempt to prevent the press from doing its job. It is the duty of the media to expose the functioning of the courts created by the international community to public debate, especially when their functioning – at the very least – raises questions. An essential part of a journalist's work is to seek information that some of the parties in a trial want to keep secret.

The concern is not just theoretical. The international criminal courts have gradually become extremely extensive in their use of witness protection, resulting at the ICTR in particular in its almost systematic application to people who come forward as witnesses. This has clearly resulted in Arusha in abuses in which the aim is to conceal questionable or shaky aspects of the trials from the public rather than to protect witnesses as such. (It is worth noting that the protection accorded witnesses in both Rwanda and the Balkans is purely theoretical after they have returned to their communities.)

The holding of closed hearings with the stated aim of protecting witnesses has also been seriously abused by both prosecutors and defence lawyers for their own tactical interests, significantly reducing the number of public hearings. In one recent example, an entirely secret hearing was held before the ICTR in Arusha on 15 March to let Joseph Serugendo, the former technical editor at the notorious *Radio-Télévision Libre des Mille Collines (RTLM)*, plead guilty after agreeing to cooperate with prosecutors. This was the first time ever that it was decided not only that such a hearing should be closed but also that it should be omitted from the tribunal's published calendar. The grounds given for these exceptional measures in the absence of any protected witness were simply "security," with no further explanation. No reason for the closed hearing emerged when Serugendo was sentenced at a public hearing two months later, on 2 June.

Even more disturbing is the threat of prosecution that is now used by tribunal officials against journalists covering its work. Asked to explain his refusal to write about the Serugendo case, a journalist who covers the trials in Arusha told us on 22 March: "Whenever I ask a question I am

warned: you will incur the sanctions envisaged in the tribunal's regulations if you violate the confidentiality of a closed hearing." A coincidence? This was 12 days after the ICTR ruling of 10 March finding a journalist in contempt of court for the first time. On the basis of the rulings being issued by the ICTR, there is clearly reason to fear that there will be more and more intimidation and harassment of journalists covering these tribunals at one point or another, especially those who are isolated and not linked to major news organisations.

Sanctions

The ICTR's judges discreetly and wisely terminated the 2002 proceedings against *Diplomatie Judiciaire* by throwing out the prosecutors' request. So it is impossible to know how far the prosecutor's office would have gone with its request for sanctions against this newspaper. At the point where the proceedings came to a halt, the prosecutor's office had requested the withdrawal of the offending article and a ban on its publication in any form, without mentioning a fine.

Four years later, the ICTY sentenced Croatian journalist Ivica Marijavic on 10 March 2006 to a fine of 15,000 euros. For the judges who issued the ruling, this represented about a month's salary. But by Croatian standards, the fine was much heavier.

2. The case of the Radio Rwanda journalist

A defence team accused *Radio Rwanda*'s Arusha correspondent, Jean-Lambert Gatare, before the ICTR in June 2005 of naming two protected witnesses on the air. In this case the accusation was made publicly. The tribunal ruled three days later that Gatare was not in contempt of court because the witnesses' names "had been disclosed in a public hearing" by one of the parties and there was therefore no case against him. The presiding judge concluded by inviting the parties to be more prudent.

There are interesting aspects to this case although it did not get very far. Firstly, it confirmed that the parties to a trial – the prosecution and defence – may try to have a journalist sanctioned when they dislike his coverage for reasons that are much more than just legal in nature. In this case, the defence lawyer described the journalist as "an agent" of the ruling Rwandan Patriotic Front. So his accusation seems to have *also* been targeted at a news organisation regarded as being linked to a hostile political tendency.

Secondly, the judges' ruling was surprising and smacked of arbitrariness as well as a possible concession to an influential news media. The argument that the naming of the witnesses by one of the parties in a public hearing sufficed to absolve the journalist of any responsibility is completely contradicted by many other tribunal rulings that insist that journalists have a permanent responsibility in this respect, even if a witness's identity is disclosed during a trial by mistake or inadvertently or as a result of the incompetence of one of the parties, as has happened many times.

Thirdly, it is impossible not to suspect the tribunal of being swayed by the impact that a warning or sanction against a Rwandan public radio journalist would probably have had on its already extremely fraught relations with the Rwandan government. The danger of arbitrariness is

therefore far from being excluded in the proceedings against journalists covering the work of the international criminal courts. And it could mean that only the least prominent news media are exposed to sanctions.

Journalists' organisations have for the most part said little about the of the proceedings against the Croatian journalists. Aside from the nature of the alleged offences, the silence of these organisations has clearly been sustained by the poor reputation of the media and journalists involved, the nationalist politics that motivated them and their openly partisan character. All these factors have also encouraged human rights groups to steer clear of the case. But there is a danger that it will set a judicial precedent that will apply to all journalists covering the work of these courts.

* Thierry Cruvellier is a journalist who covered the work of the International Criminal Tribunal for Rwanda from 1997 to 2002, the Special Court for Sierra Leone in 2003 and the start of the trials before the War Crimes Chamber for Bosnia-Herzegovina in 2005-2006. He has been the editor of the *International Justice Tribune*, a specialised newspaper, since 2004. His book, *Le Tribunal des Vaincus, un Nuremberg pour le Rwanda?*, was published by Calmann-Lévy this year.