

# THE BORDERS OF DISCLOSURE AND COOPERATION

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|-----------------------|----------|
| <i>INTRODUCTION</i>   | <i>1</i> |
| <b>1. Disclosure</b>  | <b>1</b> |
| <b>2. Cooperation</b> | <b>4</b> |
| <i>CONCLUSION</i>     | <b>8</b> |

## INTRODUCTION

When the Tribunal was created and the Statute and tools adopted, the goal was to gather the best from every law system and try to implement it in this *ad hoc* Tribunal. By trying to reach and implement a high standard that could guarantee the accused persons the respect of their fundamental rights the Tribunal was faced by its own limits: politics, bureaucracy, sovereignty of states and no man's land. Those standards, once in practice, will face borders that will significantly affect the fundamental rights of the accused.

### *1. Disclosure*

Disclosure of previous statements and records regarding Prosecutor's witnesses is one of the main tools to insure the accused the right to a fair trial and a full Defence. Full disclosure enables the Defence to cross-examine the prosecution's witnesses in an efficient way as well as to conduct its investigation in order to rebut the prosecution's allegation. A breach in the disclosure obligation could eventually result, to a stay of proceedings<sup>2</sup>. Disclosure of judicial records is not

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<sup>2</sup> *R. v. Stinchcomb*, [1995] 1 R.C.S. 754, 96 C.C.C. (3d) 318

merely for the benefit of the preparation of the defence but it is also required to assist the Trial Chambers in their assessments of witness credibility.<sup>3</sup>

In a National jurisdiction, as well as before the ICTR, the disclosure rule has its limits. The borders where the crimes were allegedly committed will create a great obstruction to the defence. Before the ICTR as well as before national jurisdiction who exercise universal jurisdiction, such as the Canadian authorities did with Desire Munyaneza, the prosecution has the obligation to disclose every document related to its witnesses as long as they are in his possession.

The word possession is the border that the Defence is forced to face. The word possession is the unfair limit that doesn't take into consideration the nationality of the witnesses and the territory where the crimes were committed.

At the ICTR, even though prosecution witnesses advised defence counsel that they had signed statements for the prosecution which had not been disclosed, and the prosecution averred that it did not have such statements, the prosecution would be presumed to act in good faith and no remedy would be afforded to the defence.<sup>4</sup>

When the Canadian authorities decided to prosecute Desire Munyaneza for genocide, crimes against humanity and war crimes, they called prosecution witnesses with previous criminal records. They called prosecution witnesses who had already testified in ICTR cases or in Gacaca trials. However, because those witnesses didn't testify in Canada, because they didn't have any previous Canadian immigration requests and statements, because they didn't have previous criminal records before the Canadian authorities the Canadian Prosecutor was not in possession of any previous material that could be used by the defence to cross-examine the said witness. However, the Rwandan Prosecution had previous records, statements, and testimonies of those witnesses. The ICTR Prosecutor also had previous statements and testimony of those witnesses.

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<sup>3</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Request for Cooperation to Government of Rwanda to Obtain Statements of Witnesses ADW and AJY* (1 November 2007) at para. 4

<sup>4</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Notice of Violation of Rule 66(A)(ii) for Witnesses ALZ and AMC and Motion for Remedial and Punitive Measures* (11 July 2007) at para. 8

The border imposed to the Defence was: *they are not in the possession of the Canadian prosecutor but they are in the possession of the Rwandan authorities and the ICTR Prosecutor.*

The same scenario occurs when conducting a case before the ICTR. The ICTR prosecution will disclose material that's in their possession. However, most of the time the material sought and which would be useful for a proper cross-examination is in the possession of the Rwandan authorities.

The main problem is that the Security counsel created an *ad hoc* Tribunal in order to indict alleged responsible of the Rwandan genocide. National jurisdiction such as Canada adopted a universal jurisdiction enabling them to indict suspects of crimes such as genocide, crimes against humanity and war crimes committed outside the Canadian territory. The Canadian war crime act is an exception to the extra-territorial Rule. The ICTR and the Canadian authorities expand the territorial limits to indict without expanding the territorial limits of cooperation and disclosure obligations. The Prosecutor at the ICTR or before a National jurisdiction, will always use the excuse of "*the said material is not in my possession*" when disclosure requests are made.

In order to maintain a proper standard the Prosecution should have been considered as being one and the same. If material is in the possession of the Rwandan government, the Canadian prosecution or the ICTR prosecution should have the obligation to disclose. Of course, the material is not in the possession of the Canadian prosecution or the ICTR prosecution, the witnesses are, most of the time, Rwandan citizens. When witnesses testified in Rwandan trials or were themselves tried before the Rwandan authorities the material should automatically be disclosed to the Defence, moreover since all the documents regard the same events,--the 1994 events. Expecting them to find the material sought puts an unfair burden on the Defence because Rwandan authorities don't cooperate with the defence especially when conducting a defence before a National jurisdiction. The Prosecution should have minimum requirements, such as systematically asking its witnesses if they've testified before or if they've given statements or confessions.

If the Rwandan authorities' goal is to be able to conduct trials and receive detainees would it be a normal request to sign treaties and agreements with National Jurisdictions and with the ICTR insuring them that previous records and statements, as well as gacaca documents, will systematically be served to the prosecutor when the latter sends his/her witness list?

## ***2. Cooperation***

As you all know, the Statute of the Tribunal indicates through its article 28 that states shall comply without undue delay with any request for assistance. When a Rwandan is tried before a national jurisdiction such as Canada the equivalent tool would be the International Treaty. Most of the international treaties don't consider the rights of the Defense. However, cooperation and negotiation can sometimes be accomplished without a treaty. Canada-Rwanda are an example of such a situation. No international treaty exists between Canada and Rwanda on the topic of judicial cooperation. Nevertheless, Canada and Rwanda both signed the Convention on the Prevention and Punishment of the Crime of Genocide<sup>5</sup>. The convention states that the signatory countries have a duty to cooperate in investigations and prosecution of offences.

In the treaties, the conventions or in the Mutual Legal Assistance in Criminal Matters Act the Defense rights are not represented. The Mutual Legal Assistance Act covers situations such as requests for documents or information. However, those requests can be presented by a state or entity and can be provided to the competent authorities<sup>6</sup>. In the definitions provided in the Act Entity or Competent authorities are either states or Attorneys General.

There have been a number of exciting developments in international criminal courts and there have been many more important developments at the national level, both with regard to universal and other forms of jurisdiction.

More and more states with legislation defining crimes under international law as crimes under national law have demonstrated the willingness to implement it. In the past years, there have

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<sup>5</sup> Adopted by Resolution 260 (III) A of the U.N. General Assembly on 9 December 1948 Entry into force: 12 January 1951.

<sup>6</sup> See Article 2 and 17, 18 of the Mutual Legal Assistance in Criminal Matters Act, R.S., 1985, c. 30 (4th Supp.)

been numerous examples of states investigating and prosecuting persons for crimes committed in territory subject to their jurisdiction or by their own nationals.

Canada is part of those states that implemented the War Crime act with universal jurisdiction. However, there is some criticism that could be made. Since Canada implemented its war crime act and that before indicting Mr. Munyaneza, who was a Rwandan citizen, the Canadian authorities should have adopted a treaty with the Rwandan authorities in order not to reduce standards well implemented in Canada. The Defense has no rights whatsoever to the different international legislation tools. A treaty between Canada and Rwanda regarding disclosure requests, regarding subpoena's would have at least covered some of the means the Defense has the right to use during a national trial. All the evidence is in Rwanda, most of the witnesses are in Rwanda, however, the defense has no means of summoning a witness, even during a rogatory commission in Rwanda. The defense is not in a position to request disclosure and is only entitled to request the Canadian authorities for disclosure of material that they possess. The Canadian authorities should have negotiated a treaty in order to insure the accused persons of a right to a fair trial and a full defence by giving them a minimum guarantee. Because it's a trial covered by universal jurisdiction, the standards should not be reduced. The contrary should apply.

If the different countries that adopted acts giving them universal jurisdiction didn't sign treaties in which the right of assistance to the Defence is foreseen, the ICTR Statute did plan such a situation. Indeed article 28 of ICTR Statute indicates that "States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to a) identification and location of persons, taking of testimony and production of evidence, service of documents, etc.

That being said, the Defense is represented under the ICTR Statute and is able to make cooperation requests. However, if States are bound by cooperation with the Court all States jib and delay. They serve the documents drop by drop, they demand more time, they oppose the secret defense, they require protection.

The Republic of France is an example of such limits imposed to the Defence. In the year 2000 the Republic of France, through the Ministry of foreign affairs, informed the ICTR that a procedure had to be followed during auditions with French civil servants or officials. Among the list of requests in the said procedure, the Republic of France could limit the questions put to a witness and invoke National Security.

On the other hand, the Kingdom of Belgium also adopted a procedure in which they indicated that they wouldn't cooperate unless a court Order is rendered.

At first hand those limits seem reasonable but in reality cooperation is never really fully obtained and considerably affects the rights of the Defense. In the Ngirabatware case the Defence followed the procedure adopted by the French authorities and sent a list of questions that they intended to put to the ambassador. More than 66% of the questions were withdrawn by the French authorities without any indication to the reasons for such a withdrawal request<sup>7</sup>. In the Nzabonimana case the order to the Republic of France was obtained, however, even after such an order was rendered by the Trial Chamber the French Republic was still holding the information and the documents requested. The Defence had to go through an additional procedure where it requested the Trial Chamber to report the French behavior to the Security Council. Of course such a request was denied on the grounds that it had to be a remedy of a last resort<sup>8</sup>. The Defence of Nzabonimana is still waiting for the French authorities to answer the questions asked and serve the Defence with the documents requested.

The problem is that when requests are made to civil servants, ambassadors or diplomats, the general answer is that they don't remember and they can't recall the details. When documents are required the problem is different and they try to postpone, as much as possible, the delivery of documents knowing very well that the ICTR is in a completion strategy and that the Defence will be forced, by the Trial Chamber, to proceed. The States are indeed trying to gain some time by

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<sup>7</sup> *The Prosecutor v. Ngirabatware*, Ngirabatware defence's urgent motion requesting an order directed to France, October 26th 2009. (awaiting for Decision)

<sup>8</sup> *The Prosecutor v. Nzabonimana*, Decision on Nzabonimana's motion asking the Chamber to request the President to report the matter of France's refusal to cooperate to the Security Council, October 19th 2009; *The Prosecutor v. Nzabonimana*, Decision sur la requête urgente de Callixte Nzabonimana demandant à la Chambre d'ordonner à la France coopération et assistance, 2 juillet 2009

forcing the Defence to go through the heavy bureaucracy and all the red tape. Instead of sending a clear message to the States who are bound by the cooperation Rule, the Trial Chambers sticks to its positions and renews the Requests made to the states without any sanctions. One would think that those breaches in the cooperation obligation would result in a postponement of the trial or to a Stay of proceedings. The answer is negative. The Trial chambers is so obsessed by the completion strategy that no postponement is granted. It is withheld even when the cooperation requests are directly related to accusations such as diversion of funds or directly related to an alibi Defence. The Trial Chamber even went as far as saying that because the Defence didn't request those civil servants, ambassador and diplomats, who are potential defense witnesses, to be present during the prosecution evidence and that because such effort of their presence in Arusha during the prosecution's case was not made the Defence can conduct an adequate defense<sup>9</sup>. This position by the Trial makes no sense; since when did the Rule of "exclusion of witness in the courtroom" change?" The Defence needed the documents in possession of the States before cross-examination of the prosecution witnesses on diversion of funds but the Chamber concluded that that need was not strong enough because the defence didn't request those potential witnesses to be present in Arusha.

That being said, the ICTR will make every effort to deny the practical implementation of the cooperation rule and will very strongly focus on the completion strategy. Even if the ICTR, contrary to National jurisdictions, adopted a Rule bounding states with cooperation, the reality is that most of the time the Defence can't fully use that Rule because sanctions are never imposed<sup>10</sup>. The different states will always take advantage of that non-official position by the ICTR, especially by keeping in mind the importance of the completion strategy.

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<sup>9</sup> *The Prosecutor v. Ngirabatware*, Decision on defence urgent motion for an order directed at the Kingdom of Belgium pursuant to article 28 of the Statute, 16 September 2009, para. 11

<sup>10</sup> *The Prosecutor v. Ngirabatware*, Decision on Defence extremely urgent motion on issues related to the preparation of the trial, 17 September 2009; *The Prosecutor v. Nzabonimana*, Decision on Defence Motion for the Postponement of the Start of Trial, 30 October 2009

## CONCLUSION

Finally, by creating *ad hoc* Tribunals and National Jurisdiction with a universal competence to prosecute crimes for which the gravity takes a punishment for life the proper procedure would have been to insure the accused persons of a fair and full defence. Instead, the different tools that the Defence has in a National Jurisdiction, are now obstructed by bureaucracy and sovereignty of states. The result is that the standards are reduced despite the fact that international law should be an example and the consequences are that the accused are undergoing prejudice.