

I would like to thank the President of the Tribunal of Bruges and the Bar of Bruges for the opportunity that is given to me, on this historic day and in this historic town, to talk to you about a subject which, from the old Low Countries, makes judicial history being written worldwide every day.

The establishment of the International Criminal Court, first permanent Court with universal competence, called upon to judge about genocide, war-crimes, crimes against humanity and the crime of aggression, if and from the moment onwards when the Assembly of State Parties will have had the courage to determine the constitutive elements of this last crime, raises enormous expectations as to the punishment of the heaviest international crimes, when national justices cannot or do not want to intervene.

The Rome Statute is to be considered as a monument on which this new international justice is based and in which the great universal principles of criminal law and human rights are stated.

The Statute also imposes the compliance with the rights of defence and with the right on a fair trial.

It, equally, has to be considered as creator of a judicial system “sui generis”, with elements both of the Common Law as the Roman-German law.

This has been, certainly intellectually, a very noble enterprise even more so knowing that both systems can rely on techniques which are better.

It is in this sense that, out of the common law-tradition, art. 67 of the Statute provides for the right of the accused to examine the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her, whereas art. 140.2 of the rules of procedure and evidence provides for the right to question the witness of the prosecutor about relevant matters relating to the witness's testimony, its reliability and the credibility of the witness.

The method of cross-examination is the best technique to find the truth.

The interrogation of a witness should not be done by the President of the Chamber, because he or she does not have at his or her disposal all factual elements the defence-counsel has in his or her possession.

And it is of essential importance that the witness would be confronted with these elements if one wants to know whether he or she speaks the truth or not.

The intellectual mistake of the Roman-German system is that it, in an unwritten way, presupposes the good faith of the witness, who has sworn to tell the truth, and that the President of the Chamber tends to take the witness into his or her protection against questions that would be too “intrusive”.

From the Roman-German tradition then again comes the obligation for the Prosecutor, as stated in art. 54.1 of the Rome Statute, to investigate incriminating and exonerating circumstances equally.

The question must be asked though whether this is possible for a Prosecutor who finds him- or herself in an essentially “accusing” role.

The international legislator has forgotten that in the countries of Roman-German tradition the investigation is usually entrusted to an organ that has to keep neutral, the investigating judge, although today this institution is coming under frightening threat, as is the case in France.

However, it has appeared already in the first case before ICC, the Prosecutor v/ Thomas Lubanga, that the Prosecutor has not fulfilled his obligation to investigate exonerating circumstances, and, even worse, has not disclosed exonerating elements in his possession to the defence.

That the Prosecutor may be brought to do so makes, in a very unlucky way, inherently part of the system, as we shall see. The legacy of the great French philosopher Montesquieu in that other monument “ *l’esprit des lois*” tends to belong to history.

Another danger of the “ideal” “hybrid” system is, moreover, that certain of its components will necessarily been put into practice by judges who come from another legal tradition and who are not familiar with the often old applicable principles and precedents related to them.

It is evident that in this system, where the court decisions themselves are a source of law, the voice of defence will be crucial in order to insist that the Court, at any time, would apply the basic rights of defence.

It is indeed not because laws or treaties make these principles applicable that judges and/or prosecutors will observe them.

As already has been said, it did appear in the first case before ICC that the defence could not rely on the Prosecutor’s obligation to investigate exonerating circumstances equally and to disclose exonerating elements in his possession.

The cases that are brought before the ICC are, as such, very political and may touch considerable international interests of important states and financial groups.

In the Lubanga-case the defence had proved, via mails, that the political opponents of Mr. Thomas Lubanga had, at the time when he came to power, prepared mass killings against his ethnical group, the Hema.

The Prosecutor, who did not contest the authenticity of this evidence and who had even himself examined the concerned mailbox, had not disclosed it to the defence and had not undertaken any action relating to it against the concerned persons, who had in the meanwhile climbed up the political steps in DRC.

What it does mean is that Defence before ICC has to constitute itself its defence-file, equally as in the Common Law, and has to go “on the field” to carry on its own investigations and find its own witnesses.

It is, quite commonly, ignored that the role of a defence-counsel, equally as the Prosecutor’s and the Chamber’s, consists in the quest for truth and that it is thus, particularly, Defence that makes the trial possible, trial in the meaning of a search for “truth” in the most wide sense of the word.

Also because defence-counsels are in the best position to know that there are as many “truths” as there are men and women.

Our social role lays mainly there.

The future of the ICC will, consequently, also depend on superior levels of competence, professionalism and experience of defence-counsels appearing before the Court.

In this sense it has to be strongly regretted that the Rome-Statute did not institutionalize Defence as a third pillar, as is the case in any democratic system today.

The non providing for an independent Bar-association is remarkable because many international texts describe the need for this as an essential component for an independent justice.

The declaration of Montreal on the independence of Justice and many other international texts demand that the authorisation to practice as a lawyer or to accede to this profession, should be taken by an independent body and that bar-associations should be self-governing bodies, independent of the authorities and the public.

History, moreover, has shown that Bar-associations can play an important role in protecting human rights.

This is the reason why several important Bars, international professional organizations and individual attorneys have created in 2002, in Montreal, International Criminal Bar ( ICB ).

This Bar-association however, will, by lack of legal recognition, only be able to play an advisory and lobbying role, without any real powers.

One of the consequences of this, among many, is that, in the absence of a regulating Bar-association, hearing-incidents between or with counsels are to be “arbitrated” by the President of the Chamber, who can, in this regrettable role, be party and judge at the same time.

Likewise, the “list of counsel”, habilitated to appear in Court at the ICC, and the legal aid – which is the rule – are managed by the Registrar, which is extremely unlucky.

A case before the ICC or one of the “ad hoc”-Tribunals is often a full-time occupation for the defence-counsel, which makes of the Registrar de facto his “employer” .

The Registrar also demands that the defence-counsel would “report” on a regular basis on his or her activities, which is a violation of the rule of the independence of counsel.

There are cases known where, before the “ad hoc”- tribunals defence-counsels were “sacked” by the Registrar.

These, very serious, problems for Defence are, however, not the only ones at the ICC.

The Rome-Statute guarantees fully the principle of equality of arms after having stated in art. 66 that everyone shall be presumed innocent until proved guilty before the Court and that the onus is on the Prosecutor to prove the guilt of the accused.

More specifically art. 67.1 requires that the accused shall be entitled, **in full equality**, to have adequate time and facilities for the preparation of defence.

The Office of the Prosecutor employs, roughly speaking, about 250 people, among them lawyers, computer-analysts, translators, investigators, experts of different sorts, etc.

The defence in each case faces an OTP- team of about twenty people working constantly on the related file.

The lawyers who attend the hearings are usually not the ones who draft the filings, and a separate team takes care of the appeal-proceedings.

In each case, along with the proceedings before the trial-chamber, several appeals can be running, which means that the defence has to be present on more than one front at the same time.

The defence-council has, on top of that, also to face the counsels of the victims.

A calculation was made and led to the conclusion that, from a certain moment onwards at the pre-trial stage in the Lubanga-case, something more than two filings were made per day.

The defence had to cope with all this with one counsel, one legal assistant, and only from about six weeks before the commencement of the pre-trial, an additional assistant, an investigator and a few non-paid interns.

The defence-counsel is not entitled to a co-counsel at this stage.

This is absolutely insufficient, given also the fact that the Prosecutor has the benefit of the time, having worked on this file since several years.

If the Assembly of State Parties and the Registrar do not urgently want to see the necessity

of a sufficiently equipped defence the ICC will face the danger of unfair trials.

I have tried, in this short time, to give you a few examples of the difficulties experienced by defence before ICC.

It has to be regretted that ICC did not learn from the lessons taught by what had earlier happened before the ad hoc-Tribunals.

The good thing of course is that the creation of the International Criminal Court as such has to be considered as an enormous step in history of mankind, this at a stage where, in the field of human rights, nothing yet can be considered as acquired, and where, on too many places in the world extremely bloody wars are being fought, as often initiated and/or continued because of “superior international interests” in presence of which local populations are of no concern whatsoever.

The in the meanwhile more than 6 million dead in the perfectly avoidable Congolese war, that has spread as an oil-stain over part of the territory of the Great African Lakes, from the also perfectly avoidable Rwandan drama, should be for us, Belgians, a daily pre-occupation, aware as we ought to be of the role we have played in this and still play.

The recent shocking books of Madame Carla del Ponte, former Prosecutor of ICTR and ICTY, and of Madame Florence Hartmann, her spokeswoman, give rise to considerable fear about the real nature of international criminal justice.

More specifically Hartmann writes, quoting del Ponte :

*“ It is wrong that politics undermine our work. I feel hurt to state that we have come to ridicule the principles of international justice...because Kagame of Rwanda has convened upon a bi-lateral agreement with the United States. “*

She speaks here about the manipulation of ICTR.

Is it indeed not remarkable that not one of the many war-crimes and crimes against humanity committed by the RPF, the army of General Kagame, has been brought to Justice ? Is this not a justice of “victors”, for whatever this term may have to mean ?

Does the same danger threaten the ICC ?

The head of the department of sociology of the prestigious Columbia University in New York, Mahmood Mamdani, answers this question as follows :

*“ In spite of its name, the ICC is becoming quickly a Western court that judges about African crimes against humanity. It has targeted governments that are considered as US hostile and ignored actions that are not disapproved by the US, such as these of Uganda and Rwanda,*

*thus conferring impunity to these countries.”*

Mamdani speaks here with good cause about the war in Eastern Congo, which is a colonial and imperialistic war for raw materials.

The most important danger threatening the ICC is that it would be manipulated in favour of goals of international politics. I am talking here about the Office of the Prosecutor, not about the Seat, which has already delivered some very hopeful decisions.

But the Seat can only judge about what is presented to it.

The powers of the Security Council, nl the right of initiative and the right to intervene in ongoing proceedings – that it can get suspended – have to be regretted as constituting profound breaches of the principle of separation of powers.

The Security Council is, essentially, a political body which is, furthermore, composed, among others, of important permanent members who have not recognized the new international judicial institutions.

Not only must this be considered as a fundamental contradiction in the core itself of the Court, but also as a permanent motion of mistrust, each time the Court could only come close to threaten global interests of the so-called “greats” of this world.

Mr. Thomas Lubanga Dyilo had been the President of Ituri, then separated from the DRC.

In this part of the Congo millions of people had already been killed and he was constantly depicted as the “war-lord” he had never been.

He was never sued, though, for these mass-killings, only for allegedly enrolment and conscription of child-soldiers and use of them in combat.

This can count as a symbol : the first accused before ICC is not to be held responsible for the millions of killings and rapes, but is a political leader, who had, in a few months time, obtained a “disturbing” peace in Ituri, and who is sued for a crime for which the totality of military leaders in DRC can be prosecuted, war-lords and officials in the Congolese army without distinction.

And is it not very obvious that all accused before ICC are Africans ?

What must be thought about the decision of the Prosecutor at ICC not to investigate Mr. Tony Blair, notwithstanding the numerous and well funded demands as to this and notwithstanding the well studied advices of eminent lawyers ?

Is the Prosecutor thus not rather the “Saint Nicolas” of impunity, rather than the Prosecutor of the International Criminal Court ?

I want to finish this exposé by stating that the Rome Statute has not vested the Court with competence towards corporate bodies.

Art. 25 limits its competence to natural persons.

The principle of criminal liability of corporate bodies though, as introduced nowadays in many national legislations, would be an extremely efficient instrument in the fight against the heaviest international crimes.

One has, indeed, to state that the most important liabilities, much more important than the ones of individual persons, are situated at the not so seldom anonymous, secret and even multi-national level of corporate bodies, often making part of larger conglomerates, even at state-level, corporate bodies that sell the weapons that must serve to commit the crimes of aggression and genocide, the war-crimes and the crimes against humanity to the militia and other actors.

Even banks sometimes finance secretly this kind of transactions.

These secrete transactions serve very often the very considerable interests of states that want to preserve their influence and economic presence in the concerned regions and related battle-fields and that, via secret services and intermediaries, run sordid international politics following the old adage “*divide et impera*”.

It goes without any doubt that, if the competence of the Court were to be complete and would include this kind of liability, the meant corporate bodies and states would think twice before engaging in the said actions.

On top of that the International Criminal Court would be able to exercise a non negligible control of the economic behaviour in the frame-work of international relations. The stigma which is constituted by international criminal proceedings is such that it could be of a decisive importance.

Finally the victims, and it in the end comes to them, could find in this a much more efficient way to claim and, more important, obtain damages by means of freezing of assets as ordered by the Court.

These are, distinguished assembly, some burning questions that demand for an answer. One cannot at the same time set up a justice and refrain from fully rendering it, because of so-called “financial” reasons. One cannot with one hand give hope for justice to whole populations and take it away with the other hand.

These are, moreover, questions on which the legal profession has to take position worldwide and make her voice well heard, if she wants, in the short term, still to be taken seriously in the essential social role which is hers since centuries and for which she has had to fight so often.

I want, again, to thank the Tribunal and the Bar of Bruges to have been willing to take advantage of this historic day to bring this problematic under your kind attention.

Bruges, 15 th april 2010,

Jean Flamme.