Interview Mr. Jean Flamme is the Secretary-General of the International Criminal Bar and a renowned defence lawyer. Mr. Flamme is also the owner of Flamme Lawyers in Gent, Belgium.

ICLN: Firstly, I would like to have your perspective, as a lawyer, on the Rome Statute. The Rome Statute created a judicial system "sui generis", with elements originating from both the Common Law and the Roman-German Law traditions. How difficult is it for practitioners coming from one of these two traditions to appropriately adapt to this hybrid system? Do they have a role in ensuring the system's coherence and consistency?

The Rome Statute is to be considered as a monument on which the new international criminal 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, indeed, as you very rightfully put it.

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, however, not very obvious whether the international legislator has made a good "mix". Some examples may illustrate this.

Let us begin with the positive results.

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 and only 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 , in an unwritten way, it 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”.

Defence-counsels will thus have to fight to keep the rights under cross-examination, as granted by the Common Law, intact.

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 way this has been “organized” amounts to wishful thinking, and I am already also answering your second question here.2

ICLN: According to article 54.1 of the Rome Statute, the Office of the Prosecutor has an obligation to investigate incriminating and exonerating circumstances equally. This is clearly inspired by the Roman-German tradition. Do you think one can realistically expect the Prosecutor to fully commit to this level of neutrality? If not, what changes could be made to the Office of the Prosecutor so as to enable a neutral and objective investigation?

An investigation examining both incriminating and exculpatory elements of the case has to be considered, in many ways, as a beautiful and ideal world, that exits only in the heads of the legislators, even in the Roman-German tradition. The question must, in any case, be asked whether this kind of “neutral” investigation is possible for a Prosecutor who finds him- or herself in an essentially “accusing” role. I believe that the answer is negative.

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, or is supposed to do so - the investigating judge - although today this institution is coming under frightening threat, as is the case in France.

It has appeared already in the first case before ICC, the Prosecutor v/ Thomas Lubanga, that the Prosecutor had not fulfilled his obligation to investigate equally exonerating circumstances, and, even worse, had not disclosed exonerating elements, which were 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. The legacy of the great French philosopher Montesquieu in that other monument “ l’esprit des lois” tends to belong to history. The essential principle of the separation of powers has not been respected in the Statute.

The powers of the Security Council, nl the right to intervene in ongoing proceedings and to get them suspended have to be regretted. 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 and who may be brought to press for intervention each time the Court would come close to threaten global interests of the so-called “greats” of this world.

The Prosecutor also reports to the Security Council.

It is clear that, with this right of intervention in the back of his/her head, the Prosecutor may be brought to be very “cautious” in revealing certain truths and will, in any event, not be independent in his investigating duties, as the Statute tried to impose.

What it does mean then again is that the Defence will not be in a position to trust the Prosecutor’s file and will be bound to constitute its own file and to conduct its proper investigations, which is

not the culture in Roman-German law, and which was certainly meant to be limited, by adopting the said obligations for the Prosecutor.

This means time and money to be awarded in a sufficient way to the Defence to enable it to act accordingly with the said needs.

Court-officials, however, are using the legal obligations of the Prosecutor as an argument to limit the funds made available to the Defence under the legal aid, under the assumption that the Prosecutor's duty to examine exonerating elements equally will be complied with and will thus create a "reliable" investigation.

That this is not the case has already been said and was revealed from the very early beginnings in the Lubanga-case, where the Defence – with very limited means – succeeded in finding major evidence that was in the possession of the Prosecutor and had not been disclosed to the accused or his counsel.3

The problem for Defence was made even more difficult insofar it was refused access to the data-base of the Prosecutor, also in the situation-file, which is, in my opinion, highly questionable.

The conclusion of this all is, undoubtedly, that much more time and money will have to be made available for Defence than is the case today. 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 - worldwide, one might say -, 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.

Practitioners at the ICC come from various legal traditions and cultures, which, of course has to be considered as enriching, in the great tradition of the library of Alexandria. But it also means that these lawyers have to be made familiar with the traditions of another legal heritage through trainings and seminars.

The practice before the international criminal courts has learned that the ideal defence-team is constituted also of a "mix" of practitioners coming from various legal traditions, who then, in a spirit of full openmindedness towards each other's different cultures can come to test the Statute and to push it towards the "brave new" system it was meant to become.

And does it have to be reminded that " ce sont les avocats qui font les procès" ?

The role of Defence is crucial and it should be a major concern for the ICC, to make certain that only experienced defence-counsels of known quality are representing the accused in cases which are bound to take the lead in international criminal jurisprudence.

The guarantees for such a "high quality" – defence are certainly not present as today.

ICLN: Referring to the choices made as regards investigations, you once asked if the Prosecutor of the ICC was not "Saint Nicholas of impunity, rather than the Prosecutor of the

ICC". Can you please elaborate on this comment?

Coming back to the Prosecutor, I have indeed suggested in an article that he could become the "Saint Nicolas of impunity" rather than the Prosecutor at the International Criminal Court.

Let me elaborate on this as briefly as possible.

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 a daily pre-occupation for the West, who is co-responsible.

The recent quite 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 word 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.

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 childsoldiers and use of them in combat, without wanting

to diminish the nature of this crime.

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, warlords 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 becoming the "Saint Nicolas" of impunity, rather than the Prosecutor of the International Criminal Court ?

It will be interesting to see what is position is going to be regarding the crimes committed in Gaza and on the West-bank, in Palestine.

ICLN: You are a well-renowned international Defence lawyer. Why did you choose this career path? Would you say that what drove you to choose this career is still what is driving you today? Or has your perception of this profession changed?

I came to international criminal law by chance, as things do happen so often in life. The tragedy in Rwanda opened my eyes on a very "twisted" world, where politicians try to write history their own way and do not hesitate to manipulate justice for their means, regardless of the suffering they have imposed on millions to whom this justice is denied, bluntly.5 It is my conviction that there is only the defence as a counter-power. It is the reason why I am saying that everything has to be set in motion to press the ICC to give to this defence the place and means it deserves.

What drove me, back at the end of the last century, drives me even more today.

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, often since years. 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-counsel 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 motions were filed per day. This is massive.

The defence had to cope with all this with one sole 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 nonpaid 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 a long time.

If the Assembly of State Parties and the Registrar do not urgently want to see the necessity of a well staffed and equipped defence, we shall face unfair trials.

The future of the ICC will 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, and among them the principles of the UN itself, 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.6 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 defencecounsel, which makes of the Registrar de facto his "employer" . The defence-counsel has left his office for years and has, thus, become vulnerable.

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, when their speech had become too "embarrassing"….

It has happened to me and to others, and I shall never accept it. It is a breach of the most fundamental human rights, namely the right of free access to counsel and the right of the latter to speak freely, in full immunity from being sued for his or her words. This, and nothing else, is the only way to find the truth. And is that not what Justice is all about ?

ICLN: You represented Mr. Lubanga before the ICC. In light of this experience, how would

you describe the role of a Defence counsel before the ICC? What are the main challenges you faced, personally; and what are the challenges Defence in general faces at the ICC?

I have already spoken about the main challenges I have faced in the Lubanga pre-trial. My main frustration was that we were not ready, that we had not had the time nor the means to study the file of the Prosecutor fully, that we wanted more time to enable us to bring our witnesses I spoke to in Congo two weeks before the commencement of the pre-trial (I was only then permitted to travel to RDC).

Even the Prosecutor acknowledged the fact that we were not well prepared and that we could not be ready with the human resources available in the restricted amount of time granted. The amount of work was just too enormous for the people available to do. He agreed with our demand for postponement.

And yet, the demand , made according to art. 121.7 of the rules of procedure and evidence, was rejected. The direct result, among others, was that the basic right of the accused to call witnesses was denied.

The main role of a defence-counsel is to demand that the basic rights of his client be granted, to press for application of the fundamental texts.

What was there left for me to do in such a state of affairs, seeing that I did not get what was granted by the Statute and the rules ?

My biggest problem was that I had to abandon my client. But he agreed with it, reluctantly.

Getting no guarantees about a substantial increase of means for the trial-phase, I wanted to give a signal to the Court, and the only way that was left was to leave the case, which I did, reluctantly also, as I can assure you, because I was and still am convinced that Mr. Thomas Lubanga Dyilo is innocent.

The Registrar knew what I was asking for and why. It was not excessive. What I was asking for amounted to the same human resources as before ICTR, where there are no victims present as parties in the trial. It was refused.

And also here, it is something I should never have needed to ask for. My crusade for more human resources and additional time kept obliging me to put energy in claiming something that should have been there from the very beginning and kept me away from the basic issues.7

ICLN: If you were to give three steps to be taken for the ICC to be more efficient, what would they be?

I would, from a certain stage onwards, take away the investigation from the Prosecutor and entrust it to an investigating judge.

I would limit the intervention of victims to the trial-phase. Their presence, already at the pre-trial stage, is slowing down the process seriously.

I would increase the means of the Office of the Public Counsel of Defence (OPCD). It is not acceptable that the human resources of the Office of the Public Counsel for the Victims (OPCV) almost doubles the ones of OPCD.

I would create an independent Bar-Association at the ICC, that would have to manage the list of Counsel, organize the ways a defence-counsel is designated, be it as counsel ad hoc, duty counsel or defencecounsel.

I would also create the function of an elected council of the Bar and a Head or Dean of the Bar at the ICC in The Hague, who would have specific authority to intervene in case of problems between or with defence-counsels, going up to being able to interdicting a defence-counsel to go on defending a case and who could also intervene in the course of hearings, in case of ethical problems.

I would increase the human resources of the defence-teams, accordingly to their needs, and certainly entitle them to have at least one investigator for the full and total duration of the trial.

These are more than three steps, I fear, and there are certainly others.

ICLN: Lastly, you are currently Secretary General of the International Criminal Bar, which was created in 2002. Eight years after its creation, do you think this structure has served the purposes it was created for? How could it, or should it evolve in the future? The International Criminal Bar has certainly not served the purposes it has been created for yet. One must not forget that the attempts of the legal profession to get an independent Bar-association created by the Assembly of State Parties failed, mainly because of the opposition of the Spanish-speaking world.

This is surprising given the international recognition of the need of independent Bar-associations for the independence of Justice (Montreal Universal Declaration on the Independence of Justice and UN “Basic Principles on the Role of Lawyers” para. 24).

International Criminal Bar was created, indeed in 2002, to try to fill the gap.

Also the development of such a Bar association was anticipated in rules 20 and 21 of the ICC rules of Procedure and Evidence, which direct the Registrar “to cooperate with any independent representative body of counsel and legal associations…”

In 2002 the UN Preparatory Commission recognized the results of the Montreal Conference in its report and announced that the Commission “welcomes this development and encourages the process of creating an independent body of counsel and legal associations”.

And yet, we are almost 10 years later, and nothing has been done about this crucial issue. At the review conference in Kampala there was a failure to consistently address issues related to Defence (See Lorraine Smith “What did the ICC Review Conference achieve ?” IBA Equality of arms review – November 2010). A missed opportunity, once more, I would say.8

ICB, in the meanwhile, has achieved some of its goals. It has played a preponderant role in the draftingprocess of the ICC professional Code of Conduct. It meets with the Court-officials on a regular basis to give advice and intervene in counsel-related issues. It has created a study-committee where practitioners in international criminal law and academics debate on important court-decisions . Their comments are meant to be published in periodic news-letters.

It organizes conferences on specific topics and prepares presently a conference on functional immunity for counsel to be held in Paris and a congress on international criminal law and the ICC in Koweit.

It organizes trainings in international criminal law and procedure and outreaches to parts of the

world where the idea of international criminal law is not yet well understood, advocates also for the support to be given to ICC and its recognition by non State-parties.

It has, on several occasions, intervened in ongoing proceedings and filed requests for leave to submit amicus observations.

The last request was, quite exceptionally, filed in Arusha/Tanzania, at the ICTR, and related to the arrest and incarceration of one of its members in Kigali/Rwanda, Me. Peter Erlinder. ICB thought that the fundamental issues raised by this arrest and criminal proceedings were of general interest for the whole of the profession worldwide and related to one of the key-principles of an independent defence: functional immunity for defence-counsel which was violated by the said arrest.

ICB has also taken the lead in an international campaign aimed at freeing Me. Peter Erlinder, intervened also at UN-level in different ways in this respect.

We have some of our members who are involved as members of the Disciplinary organs at the ICC and the Committee on legal texts.

ICB, finally, has been recognized by the Dutch Ministry of Foreign Affairs as a representative association of counsel for purposes of the Host State agreement for the ICC.

For the future I would say that ICB wants to be more present in parts of the world where this is not yet the case, such as Latin-America, Asia, Australia, the Arab world, etc.

The main achievement ICB can hope for is of course the creation of an independent Bar-Association at the ICC, with full competence, according to the quoted international instruments.

We have to realize that there will be no full fair trials without such a body.

The Hague, 10th January 2011.

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