Written evidence before the International Criminal Court Jean Flamme

The fundamental right to a fair and full defence is for the fair trial what a free press means for democracy.

1.There is often a tendency to reduce what some call "justice" to the self declared and "unique truth" of a judicial file.

This is a sad remainder of the centuries of the Inquisition where accused people and witnesses were interrogated in absolute secrecy and tortured to *make* them speak the "*truth*". The continental criminal legal system in Europe is still, very unfortunately, called "***inquisitorial***".

Criminal investigations are still kept secret in many countries there and witnesses are interrogated by police, in the absence of defence. Important investigation actions such as visits of crime scenes are performed without the defence.

This results in criminal files as described higher, presented by the Prosecutor as "*the truth*". **But nothing seldom is what it looks like**, as it should.

In the process of conflicting "truths" an independent and strong defence, with full equality of arms, can become a troublemaker, with very few lovers.

And yet, a strong and independent defence, protected by a strong and **independent** Bar Association, is the last rampart of democracy.[1]

There is no "*unique truth*". There are as many "*truths*" as there are women and men.

A fair trial should be a moment of the ancient Greek concept of "*katarsis*" (" purification"), a moment of several "*truths*", an endeavor of explanation, which makes civilizations advance to reconciliation, which is only possible when all "*truths*" have been told. "Punishment" is not the final goal of a criminal trial.**It is the essential obligation of defence to bring the individual "*truth*" of the accused**.

[1] Jean FLAMME in "Defence Rights, International and European developments - Maklu Antwerpen "The fundamental right to a full and fair defence before the ICC. On the confines ofCommon Law and Roman-German Law : an analysis".

In this quest for the other "truth" it will be of essential importance to try to frame the real origins of the conflict and the complicities which are very often international. Prosecutors and even Judges are very reluctant to go that way. Consequently this burden, which can be a dangerous one, rests on defence. **Defence must be given the proper means to deliver this essential duty.**

2.The Rome Statute has endorsed the fundamental principle of a full defence by determining mostly, as "*minimum guarantees*", what the contents of the rights of the accused are, "*in full equality*", in art. 67.

The Rome Statute has installed "*sui generis*" proceedings, with elements of both Common Law and Roman German Law.

The essential common law institute of cross-examination of witnesses has importantly been safeguarded. It is the best tool to find the truth.

But the Court has also the authority to request the submission of **all evidence** which is considered essential for the determination of the truth (art. 69.3).

Written evidence is, consequently, admissible and the Chamber has very broad powers in ruling about the relevance or admissibility of this kind of evidence, as is the case in Roman German Law (art. 69.4). The main criterion here is twofold :

- *The probative value of the evidence,*
- *And any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness.*

The second part of the last criterion seems to me dangerous, as it may tend to grant a priority to witness statements, which would be very wrong. Witness statements are, by nature, subjective and two witnesses may very well give conflicting statements about the same facts they both witnessed.

There should be no hierarchy between written evidence and witness statements.

It should be equally regretted that there are no general legal guidelines provided for evaluation of written evidence. To leave the evaluation of its probative value entirely to the judges seems to me as opening a door to possible bias, which is not necessarily conscious.

The fact of the matter is, however, that legislators are always very reluctant to elaborate a set of basic principles relating to admissibility and value of evidence in criminal matters. They prefer to stick to the "*principle*" that "***any*"** evidence may be brought and leave full liberty to the judges to assess the evidence brought.

As a matter of example one could observe that "***hearsay***" and the conditions of its admissibility have not been defined, which is damaging.

On the side of the Prosecutor there is a habit to use press-articles and NGO-reports as evidence, also video-taped documents. This kind of evidence is mostly not objective and should be strictly regulated, prohibited in many cases. NGO's often have own interests in a conflict ("*Fictions of Justice, the International Criminal Court and the challenge of legal pluralism in Sub-Saharan Africa" -* ***Kamari Maxine Clarke*** *- Cambridge studies in law and society – Cambridge University Press p. 1-9).*

3.The <u>gathering of evidence</u> and its evaluation is essential for both Prosecutor and Defence.

This of course supposes important "*means*" in cases of this magnitude.

The question of the guiding principle of "*equality of arms*" (art. 67) has been observed here in the texts.

There is no doubt that the means of the Prosecutor are not limited and there are no rules set relating to possible "*limits*".

This is, however, **<u>not the case for defence</u>**.

The Registry has elaborated a set of rules relating to the legal aid system (*Single policy document 2013)* **which restricts severely the means offered to defence under that system.**

As such the document contradicts its own first guiding principle of "*equality of arms" (p.4).*

This is not only the case towards the Prosecutor, but also towards cases which are conducted outside the legal aid system.

In particular, but not only, as to the gathering of evidence, the legal aid system is extremely restricting and installs a situation of **inequality of arms**.

In cases of this magnitude the basic gathering of evidence, which will have primarily to be done in the regions where the conflicts occurred, will clearly have to be done by professional investigators who are :

- Native speakers,
- Familiar with the region and the conflict,
- Familiar with legal issues.

Language is often the enemy of justice and we know trial situations (f.e. Lubanga) where the Registry assumed wrongly that there is only "*one*" *Swahili* spoken on the whole territory of the Congo. *Swahili* is, by essence, a *lingua franca* formed on the East coast of Africa.

Defence knew that "*Swahili*" mixes up with the many local languages and is, in Ituri, called "*Kingwana*", and is very different from the Swahili spoken in Kenya, where the interviewer came from.

The result had been that on video's of interrogation of would be former child soldiers, the children did not understand fully what the interviewer asked and vice versa.

A correct understanding and speaking of the local language during investigations is consequently of the essence.

Before the ICTR defence under legal aid was entitled to **two full time investigators for the whole duration of pre-trial and trial** and one legal assistant or one investigator and two legal assistants.

Under the single policy and even before, at the time of the Lubanga case, the investigation's budget was and is limited to 73.006 euros for the entirety of the case.

At a monthly gross rate fee of 8.965 euros this means **8 months of investigation**. **Knowing that cases at the ICC can last for years this is absurd and means organizing inequality of arms.**

One has to realize that when defence starts the prosecutor's teams have been investigating often since several years, which means OTP has an enormous advance in terms of time on defence.

Rule 20.1 (e) of the Rules of procedure and evidence provide that the Registry shall "***provide the defence with such facilities as may be necessary for the direct performance of the duty of the defence****".*

Regulation 83.1 of the Regulations of the Court provides :

"*Legal assistance by the Court shall cover all costs reasonably necessary as determined by the Registrar for an* ***effective and efficient defence*** *including the remuneration of counsel, his or her assistants as referred to in Regulation 68 and staff,* ***expenditure in relation to the gathering of evidence****, administrative costs, translation and interpretation costs, travel costs and* ***daily subsistence allowances."***

The refusal of the Registry to grant a full time investigator for the complete duration of the Lubanga case to defence has been the reason why I have had to leave the case after the pre-trial, my allowed investigation time being almost fully spent. It was for me, legally and ethically, impossible to go on, knowing that I would not get the means to do so.

A defence investigation is not limited to find evidence. It also must examine the evidence brought by the Prosecutor and/or the Victims, reason why the

presence of the investigator on the hearings (pre-trial, trial, appeal) is of the essence. The single policy of the Registry consequently violates regulation 83.1.

This discussion about the limited scope of legal aid should be extended to other parts such as the level of gross fees, wrongly presented as “net” fees, which are completely insufficient for experienced lawyers having to respond to the criteria set by the Court.

Also is the obligation to enter an “action plan” (and the approval of an action report) a blatant violation of the duty of confidentiality of counsel, who never should reveal her/his judicial strategy and certainly not to the Court. These rules tend to impose a “***control*” on counsel**.

Approval is even needed to free an amount of fees, held “in trust” by the Registry until approval of the actions. This is conflicting with the duty of independence of counsel and with the international rule that one should be paid for the work performed.

These rules, set up by the Registry, are not acceptable. They reflect a fundamental mistrust in defence, which is a violation of the principles set by the Rome Statute. **They also exist only for defence, not for the Prosecutor and, consequently, organize, again, inequality of arms**.

Equally they mean that defence is severely mortgaged and not fully paid during months, even years. Also do these rules impact consequently on the means of defence to gather essential evidence.

A full analysis of the Registry’s single policy would bring us too far today. The defence section of ICCBA however has studied this document and has produced a paper which criticizes the Registry’s legal aid system and its legality. This document should soon be made available on the site of ICCBA.

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