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## FOREWORD

Jarinde Temminck Tuinstra's work 'Defence Counsel in International Criminal Law' is the first comprehensive analysis of the subject matter. It is well-documented, covering more than one hundred relevant publications and about an equal number of court decisions of various international criminal courts within the last years. Her considerations of this and additional material such as the Codes of Professional Conduct and other legal provisions concerning the defence result in detailed proposals on how to improve the present situation of defence counsel, in particular before the International Criminal Court (ICC). For various reasons, the position, rights and duties of defence counsel at international criminal courts are arguably insufficiently established and not yet transparently defined. These lacunas may diminish the independence of defence counsel, which is an indispensable part of their fundamental duty when representing suspects or accused in criminal proceedings. Furthermore, this book compares the position of defence counsel in international criminal proceedings with the position of criminal defence attorneys in domestic criminal proceedings. It illustrates how the different starting positions of defence counsel in common law and civil law systems may lead to differing functions of defence counsel and therefore differing rights and duties.

The subject matter as such is not new. After the Second World War, the Allied Forces established the International Military Tribunal in Nuremberg. At first, the Allied Forces considered preventing German defence counsel from representing defendants. They wanted to ensure that this international judicial forum for major war criminals would not be abused to 'defend' the Nazi regime *ex post*. However, being aware that the world was looking critically at Nuremberg and taking due notice of the acknowledged civil rights of the defendants, the Nuremberg Statute granted each of them the unrestricted opportunity to 'conduct his own defence or to have the assistance of counsel'. The Allies admitted '[c]ounsel professionally qualified to conduct cases before the courts of [their] own country or when specially assigned by the Tribunal'. No additional requirements, such as familiarity with the specialities of defending in common law systems, were required of counsel.

Since then, the principle of a fair trial, including an effective defence, rapidly developed along the lines of Article 6 of the European Convention on Human Rights and corresponding documents all over the world. However, as convincingly documented by Dr Temminck Tuinstra, the scope and notion of what constitutes an effective defence remains until today disputed, both on a national and international level. Nonetheless, when establishing the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993, the Security Council included the right for suspects and accused to be assisted by counsel of their choice or to have counsel assigned to them

without payment when lacking financial means in the ICTY Statute, following the lead of the Nuremberg Statute.

The 'Rules of Procedure and Evidence' (RPE) of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) that were adopted by the judges contained more detailed regulations on the defence. These provisions were soon extensively amended and extended, for instance, as a result of the experiences in the first ICTY case, *Tadić*. The current ICTY RPE require counsel to be a member of an 'association of counsel practicing at the Tribunal recognized by the Registrar'. They also provide for an 'Advisory Panel', a 'Directive on the Assignment of Defence Counsel adopted by the Registrar' and a 'Code of Professional Conduct for Defence Counsel appearing before the International Tribunal'.

The current generation of international criminal courts generally require defence counsel to meet particular qualification requirements. Before the ICTY and the ICTR, both defence attorneys qualified in domestic courts and lawyers who are university professors, whatever their field may be, are eligible to become defence counsel. On a national level however, even where highly complex and specialist fields, like environmental criminal law, or tax law are concerned, no additional qualification requirements apply to defence counsel. The ordinary practice of the ICTY is to assign two defence counsel per accused, one from the home country of the accused and often one from a common law country. Rather than requiring each defence counsel representing an accused to meet all qualification requirements, different counsel whose qualifications complement each other should be assigned to defence teams at international criminal courts. This would be in line with the practice of assigning judges with different legal backgrounds on each chamber composed of three judges.

For all disputed aspects surveyed above, the book of Dr Temminck Tuinstra offers valuable assistance. Her clarification and structuring of defence issues are particularly helpful as international criminal courts are not always consistent when taking decisions on these issues. Also with respect to the admission and assignment of defence counsel her suggestions detailed in the book help to find more homogeneous solutions, thus guaranteeing an accused's freedom of choice of counsel and assisting in the maintenance of the independence of the defence Bar.

A preface is of course not the right place to discuss such pending issues. But before I conclude with the view that the book will inspire all persons involved in reviewing the present defence regulations of international criminal courts, I want to call attention to the following aspects:

Specific information as to the country where counsel is admitted to practice or as to the languages he speaks, should merely benefit accused when choosing a counsel. Free choice implies 'free' replacement of counsel by the accused – as long as it does not seriously violate the interests of justice, for instance by causing considerable delay. The Court handling the case in whatever stage of proceedings must acknowledge this and react, for instance, by providing more preparation time for a replacement counsel to continue the defence case. Where there is a risk that changing counsel might interfere

with the interests of justice, the burden of proof that 'good cause' exists for such a replacement is on the accused. The wish of an accused to have his counsel replaced may be based on personal 'aversions' which appear understandable, but also on a lack of effective defence or incorrect information in the list of counsel, only then becoming obvious.

With all due respect for the regulations of international criminal courts concerning the defence, the book calls to have all of them critically reviewed. The original idea, to have some species of public defender organized with the financial backing of the ICC, has been, for good reasons, rejected.

Notwithstanding the importance of being independent, formalized contacts with an exchange of ideas between the Court's organs and the defence appear desirable, but undue influence should be avoided. The challenge is not only to be independent, but to demonstrate to all involved and to the public that there is no reason to suspect that counsel would not be dedicated to the interests of his client. Though the defence is generally not an organ of an international criminal court, but a constituent independent part of the criminal justice system, it has to fulfil an equally responsible task. Counsel have to preserve their independence as much as possible and therefore should not overdepend on the Court, in particular the Registry.

The Registry, the administrative organ of international criminal courts, should not have fundamental influence on how the defence handles its case. I see no problem with the Registry being involved in the admission and registration of defence counsel. However, the crucial question is whether and if, to what extent, the Registry may choose or 'select' counsel, for instance, for indigent accused. Whatever modality is chosen, this should not be at the discretion of the Registry or any other organ of the Court. Rather, a transparent selection process with well publicized and accepted requirements is needed to ensure that indigent accused receive quality representation.

I conclude with the most important message of the book: in all criminal justice systems, including the international criminal justice system, the defence is the only participant with a duty to be partial on behalf of the accused. This is the basic principle to be respected not only in the interest of suspects or accused, but also with regard to the interest of society to establish justice. Obviously, it is in everyone's interest that criminal proceedings are conducted according to the Rule of Law, which involves the principle of a fair trial as well as the principle of equality of arms.

Defence counsel may not present evidence that is not favourable to their client or to argue to the detriment of their client, unless expressly empowered by professional standards of conduct and upon the accused's specific instructions. Thus, defence counsel contribute to truth-finding. However, counsel have to make sure that the presumption of innocence is strictly adhered to, which means that they cannot present a witness who may incriminate a client. Defence counsel must endeavour not to influence, either directly or indirectly, any aspect of the evidence while conducting investigations.

This same rule applies to all organs of the Court and to all investigators. In particular those who determine the admissibility of evidence must respect the unique position

of the defence. It is in the interests of justice to have a strong and powerful defence. The principle of *presumptio innocentiae*, that every accused will be deemed innocent unless proven guilty beyond a reasonable doubt, should be carefully observed. It is more generally acceptable that a guilty person should escape conviction, rather than that an innocent person should be wrongfully convicted.

To achieve this aim the book is a must-read for all counsel eager to contribute to the interests of justice, as well as for future authors on this issue. I commend the author in the work she has produced. It contributes greatly to the mandate, shared by defence counsel, prosecution counsel, judges and staff of international criminal courts, to ensure that the independence of defence counsel and all the rights of the accused are preserved in international criminal law.

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