Book Review

Jarinde Temminck Tuinstra, ***Defence Counsel in International Criminal Law*** (T.M.C. Asser Press, 2009), 342 pp. €73.80 (Hardback) ISBN 978-90-6704-305-2

The proper role of defence counsel and the protection of the rights of the accused are critical issues for examination and debate in international criminal law. An abundance of scholarly work concentrates on procedural and substantive questions related to efforts to hold individuals accountable for extraordinary crimes. Yet, there remains a deficit of defence oriented legal analysis.

With her book, *Defence Counsel in International Criminal Law*, Jarinde Temminck Tuinstra addresses this gap and makes an important contribution to the debate over the role of defence counsel in international criminal law. She raises a number of key issues related to the role of defence counsel such as the tensions between the common and civil law traditions in the hybrid system of international criminal law and the attendant unpredictability it creates for defence counsel; structural problems with the position of the defence within international criminal bodies; the superior status of the registry over the defence; and what form the regulation of defence lawyers should take. Temminck Tuinstra argues that since defence counsel are the only party with an absolute duty, both legally and ethically, to advocate on behalf of the defendant, international criminal law bodies as well as external stakeholders must provide more financial and institutional support to defence counsel to ensure they are permitted to fully and effectively advocate on behalf of their clients. As Professor Otto Triffterer observes in the foreword, 'the defence is the only participant with a duty to be partial on behalf of the accused'.[1]

Temminck Tuinstra divides the book into three parts: first, she analyses the implementation of the right to counsel in international criminal proceedings; second, she offers a procedural perspective on court proceedings; and, third, she examines the role of defence counsel in international criminal practice. Relying on Mirjan Damaška's *The Faces of Justice and State Authority* (1986) to provide an analytical framework to examine and critique this discrete area of law, Temminck Tuinstra probes the hybrid system of international criminal law for lacunae and ambiguities.

Part I provides a solid overview of the right to counsel in the common and civil law traditions. After establishing the conceptual underpinnings for defence counsel in these two traditions, she examines how the defence has been integrated into the international criminal law regime. For example, in this part, Temminck Tuinstra critically examines the role of the registry in coordinating and managing defence counsel at the ad hoc International Criminal Tribunal for Rwanda (ICTR) and the former Yugoslavia (ICTY). She rightly observes that there is an inherent conflict of interest with the registry appointing defence counsel as well as serving as gatekeeper to defence counsel funds and she proposes that the registrar be prohibited from influencing how defence counsel defend their clients. Temminck Tuinstra points out that unlike chambers and the prosecution, the defence is not an organ of court, but is a party whose independence must be preserved for the betterment and legitimacy of the court.

In Part II, Temminck Tuinstra asserts that the hybrid legal regimes at the ICTR, ICTY and International Criminal Court (ICC) are difficult to analyse because they 'lack a clear philosophy' unlike their civil and common law antecedents.[2] Over many centuries, those legal traditions evolved into coherent systems with clear checks and balances of rights and obligations. As a consequence, she employs Damaška's framework which does not adhere to the standard distinctions between the two legal traditions and instead focuses on other institutional characteristics to better deconstruct the strengths and deficits of international criminal law. Using Damaška's model,

1 J. Temminck Tuinstra, *Defence Counsel in International Criminal Law* (T.M.C. Asser Press, 2009), at vii.

2 *Ibid.*, at 103.

Temminck Tuinstra distinguishes and categorizes these international courts' characteristics as either policy implementing or conflict solving. In the policy oriented system, the activist state's interests trump those of the individual. Whereas in the conflict solving system, autonomy is the core value and the state remains neutral during the legal proceedings. In the second tier of Damaška's analysis, Temminck Tuinstra focuses on the structure of power relationships within these courts. In policy implementing tribunals, she observes that there is a hierarchical ideal, as in a classic bureaucracy, which limits the role of defence counsel. In the conflict solving model, there is an expectation that lay individuals will perform official duties: one example is that live witness testimony is preferred over written statements. Temminck Tuinstra observes that there has been a trend toward the policy implementing model at the ICC which has moved away from the conflict solving approach that generally occurred at the ICTR and ICTY. However, according to Temminck Tuinstra, Damaška's system of critique is curtailed in the international criminal law context because these tribunals are not directly tied to a state and, moreover, some trial chambers have been more inquisitorial than others. As a consequence of these procedural ambiguities, defence counsel and the accused are left in a precarious position resulting from inconsistent judicial rulings or trial proceedings as chambers may vary in their interpretations of the appropriate approach to be taken.

In Part III Temminck Tuinstra reaches important conclusions and makes thoughtful policy recommendations. She highlights concerns that the interests of victims, witnesses and their proxies in the international community will grow at the cost of defendants' fair trial rights. In spite of the fact that she finished her review of the case law at August 2007, which was before many of the significant trial and appeals chamber, decisions were rendered in the ICC's first trial in the *Lubanga* case, it is possible that Temminck Tuinstra's instincts have proved correct: victims have been permitted to participate to a much greater extent than the Rome Statute and the ICC Rules of Procedure and Evidence appear to allow.[3] In this respect, Temminck Tuinstra argues that due to the extraordinary nature of the alleged crimes 'it can be necessary to adopt a higher standard regarding the right to an effective defence than the minimum human rights standards required in domestic trials'.[4] She suggests fewer multiple defendant trials and more concise indictments limited to the main offenses. Indeed, in the conclusion, she appeals to the international community to improve funding and awareness of the importance of the rights of defendants in both national and international courts.

International defence counsel, as well as people interested in and responsible for the development of policy at the international criminal bodies, should read this book. Undoubtedly, debates over due process and defendants' rights will continue. This book shows that the ICC and the international criminal law regime as a whole should strive to set a higher standard to assist the efforts of defence counsel as advocates for those accused of extraordinary crimes. Doing so will enhance the legitimacy of criminal proceedings across the spectrum from international to domestic legal systems.

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3 See S.T. Johnson, 'Neither Victims nor Executioners: The Dilemma of Victim Participation and the Defendant's Right to a Fair Trial at the International Criminal Court', 16 *ILSA Journal of International and Comparative Law* (2010) 489.

4 Temminck Tuinstra, *supra* note 1, at 263.