

Book Review



Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary* (Verlag C.H. Beck, Munich, 2022)

When the new edition of the ‘Triffterer-Ambos Commentary’, henceforth called ‘Ambos Commentary’, landed on my desk, the first thing that struck me was its sheer volume. The *Commentary* now counts over 3000 pages, which is almost 1800 pages more than the first edition (1999). To judge from the extensive bibliographies preceding each entry, there has been a real explosion in scholarly writings about international criminal law. Gone are the days when authors like Georg Schwarzenberger were sceptical about the very existence of the discipline.¹

The Article by Article commentary follows the pattern of the previous editions: each commentary starts with the text of the article, followed by the drafting history, its interpretation in the case law and its relation to other sources of ICC law including the Rules of Procedure and Evidence, the Regulations of the Court, the Judges’ Manuals and the many documents emanating from the Prosecution. The parts are: Establishment of the Court (Part 1), Jurisdiction, Admissibility and Applicable Law (Part 2), General principles of criminal law (Part 3), Composition and administration of the Court (Part 4), Investigation and Prosecution (Part 5), The Trial (Part 6), Penalties (Part 7), Appeal and Revision (Part 8), International Cooperation and Judicial Assistance (Part 9), Enforcement (Part 10), Assembly of States Parties (Part 11), Financing (Part 12) and Final Clauses. The introductions to this edition are by Piotr Hofmànski, president of the International Criminal Court, O-Gon Kwon, former President of the Assembly of States Parties, Bertram Schmitt, judge at the ICC, Karim A.A. Khan QC, Prosecutor of the ICC, and Peter Haynes QC, President of the

1 G. Schwarzenberger, ‘The problem of an international criminal law’, 3 *Current Legal Problems* (1950) 263–296.

ICC Bar Association. The book is dedicated to Otto Triffterer (1931–2015), the founder and father of the *Commentary*.

Professor Kai Ambos, to whom Otto Triffterer has confided the continuation of his magnum opus, is the editor of this 4th edition. I have excellent memories of Otto, who was a good friend of mine in the golden years at the Siracusa International Institute in Sicily, when many of the “first generation” international criminal lawyers gathered to brainstorm and dream about the prospect of an international criminal court, not realising that we would see such a court in our own lifetimes. And then the Court was created, and Otto published the first edition of what would become the ‘Triffterer Commentary’ (1999). Triffterer could not have made a better choice in confiding this task to Kai Ambos. Professor Ambos is not only one of Germany’s most distinguished academics, he is now also a judge, serving in the Kosovo Specialist Chambers and an advisor (*amicus curiae*) to the Colombian Special Jurisdiction for Peace.

Over the years, the *Commentary* has achieved a solid reputation and has become a source of reference for many scholars and practitioners dealing with international criminal law. This new edition, which comes six years after the previous one, will undoubtedly confirm this reputation and be welcomed by all who are working in this fascinating field of the law. The material for this new edition was huge and it must have been a Herculean task to put it all together. As in the previous editions, the commentaries are written by distinguished specialists in the field. Some commentators still belong to the generation of those who took part in the Rome Conference and the Prepcom, but gradually, a new generation of scholars and practitioners is taking over, many of whom have closely followed the life of the Court-in-action, often from inside the institution.

The world has indeed moved on, since the first edition (1999) and even more so since the last one (2015). The Court, which will soon be celebrating its 25th anniversary, has further matured into a full-fledged judicial institution with a rich jurisprudence comprising thousands of pages. Several trials that were still under way in 2015 have now run their full course comprising the appellate stage (including *Bemba*, *Bemba et al.*, *Gbagbo and Blé Goudé* and *Ntaganda*). New situations were opened, new charges were confirmed, and new trials are up and running. Last but not least, reparations proceedings, a unique feature in the architecture of the Court, are – finally – coming up to speed.

The reader will welcome the thorough updates of the commentaries on each of the articles of the Rome Statute. Most of these updates describe a jurisprudence that is gradually developing over the years. Some of the jurisprudence remains, as yet, unsettled. For example, uncertainty pertains as how to interpret the ‘organizational policy’ element in article 7(2)(a) (crimes against

humanity) (Part 2 of the Statute). Likewise, the jurisprudential discussion on articles 25 (individual criminal responsibility) and 28 (responsibility of commanders and superiors) is far from finished (Part 3). Many interesting questions relating to the territorial jurisdiction of the Court (article 12(2)(a) (Part 2) will soon need follow-up commentaries, as the jurisprudence concerning the situations in Bangladesh/Myanmar, Palestine, Venezuela, Afghanistan and the Philippines develops in the coming years. The debate between the proponents of the 'submission model' and those who prefer the 'admission model' in the application of article 69(4) is still there to remain for a while; this has been vividly discussed since the split in the jurisprudence of the Appeals Chamber in the two *Bemba* cases (*Bemba* and *Bemba et al.*)² (Part 6) and the 'truce' reached by the judges on this point during their retreat in November 2022, to be laid down in the Manual, may or may not end the debate. All these topics are minutely discussed in the commentaries. The updates on Part 9, including an overview of the proceedings triggered by the non-surrender of ex-president Al Bashir by various countries, will be an interesting read to many. Other very useful updates concern Part 11 (Assembly of States Parties), which updates the readers on recent developments in the oversight of the court, including the Independent Oversight Mechanism and the 2020 Independent Expert Review.

There are a few topics that could perhaps have been addressed more thoroughly, in view of the important debates that have arisen from the recent practice of the Court. For example, the commentary of article 15 mentions, but does not discuss the article 15 decisions relating to the situations in Georgia (2016), Burundi (2017), Bangladesh/Myanmar (2019) and Afghanistan (2020), nor the Prosecutor's 2020 decision *not* to seek an investigation concerning Iraq. Some of these decisions are discussed from another angle (notably article 12(2)(a) and article 53), but the reader would probably have expected a more thorough commentary in the update of article 15 concerning the Prosecutor's *proprio motu* investigations, which is indeed a crucial article in the Statute. I also miss a discussion of Regulation 55 in the commentary of article 76. Since the *Katanga* case, the application of Regulation 55 has been raised in almost all later cases. The topic is briefly mentioned in the commentary of article 76, but

2 ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute', ICC-01/05-01/08-3636-Red, 8 June 2018 and ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, ICC-01/05-01/13, Appeals Chamber, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute', ICC-01/05-01/13-2275-Red, 8 March 2018.

not analysed (Part 6). A further topic that would have deserved more attention is the jurisprudence concerning the ‘no case to answer’ decisions (article 74) which has haunted the Court since the *Ruto* case³ and which was first dealt with on appellate level in the *Gbagbo and Blé Goudé* case.⁴ It is mentioned in the commentaries (and more extensively in the footnotes) of article 74 (Part 6) and article 81 (Part 8) but not further discussed in the text. Finally, I believe that it would have been worthwhile, in the commentary on article 69 (evidence), to reference the trial judgment in the *Gbagbo and Blé Goudé* case and the extensive discussion of the evidence by the judges of the Majority in that case (Part 6).⁵

As observed by previous reviewers, an inherent shortcoming of an article-by-article commentary is that it loses sight of the big picture by the self-contained discussion of each of the provisions of the Statute. While this may have been true for the first editions, this void has now been amply filled by the numerous recent ‘big picture’ books on the subject, such as Carsten Stahn’s *Critical Introduction*,⁶ Guénaél Mettraux’ three volumes on the core crimes⁷ or Elies van Sliedregt’s books on individual criminal responsibility.⁸ This makes an Article-by-Article Commentary even more useful than it was before, as a complement to the ‘big picture’ books.

In sum, I am persuaded that this edition, like the previous ones, will be a great success. For many, like president Hofmànski in his introduction, it will be one of the books that, despite its large size, will not need a place on their bookshelves but on their desk. It will help current and future judges to ‘write the book’ that judge Aharon Barak of the Israeli Supreme Court had in mind when

3 ICC, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Trial Chamber V(a), Decision on Defence Applications for Judgments of Acquittal, ICC-01/09-01/11-2027-Red-Corr, 5 April 2016.

4 ICC, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15, Appeals Chamber, Judgment on the appeal of the Prosecutor against Trial Chamber I’s decision on the no case to answer motion, ICC-02/11-01/15-1400, 31 March 2021.

5 ICC, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15, Trial Chamber I, Reasons for oral decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu’un jugement d’acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, ICC-02/11-01/15-1263, 16 July 2019.

6 C. Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press, Cambridge, 2019).

7 G. Mettraux, *International Crimes: Law and Practice, Volume I, Genocide* (Oxford University Press, Oxford, 2019); *Volume II (Crimes against Humanity)* (Oxford University Press, Oxford, 2020); *Volume III (War Crimes)* (Oxford University Press, Oxford, forthcoming).

8 E. Van Sliedregt, *Individual Criminal Responsibility in International Criminal Law* (Oxford University Press, Oxford, 2012).

he said: 'Judicial activity (...) is like several authors taking turns in writing a book, one after another. Judges no longer on the bench wrote the earlier chapters. We must now write the continuation of the book'.⁹ This *Commentary* will help judges, and those who follow their jurisprudence closely, to fulfil this task.

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9 A. Barak, *The Judge in a Democracy* (Princeton University Press, Princeton, NJ, 2009), p. 12.