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THE ART OF REINVENTION: THE ROME STATUTE COMMENTARY IN ITS THIRD DECADE

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A few decades ago, French jurist Georges Scelle wrote: ''Legal rules result from the blending of ethics and power''.[1] International criminal justice is no exception. Academia has an important role. It is more than a restatement of the law or the ''bouche de la loi'' (*Montesquieu*). It has a watchdog function. It serves as the critical conscience of the community of practice. And it serves as inspiration for change – a ''realist utopia'' as Antonio Cassese would say.[2]

The way how this happens is not always visible. The commentary on the Rome Statute of the International Criminal Court[3] (once referred as ''the Triffterer''[4], now edited by Kai Ambos) counts among the most frequently cited legal publications in ICC jurisprudence. Although doctrine itself is not a source of law per se, the commentary is sometimes used as authority. It is used in motions by parties and participants to support arguments and positions. Even more encounters happen behind the scene. Sometimes, the commentary itself becomes an audience of judicial opinions or dissents, or a voice for critiques of jurisprudence or policies. With the Court's developing own case law, the role of the commentary as source itself, i.e. as explanation of the textual meaning of statutory provisions, may be-

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[1] Georges Scelle, *Manuel de droit international public* (Paris: Domat-Montchrestian, 1948) 6.

[2] Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012.

[3] Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary* (4th ed., Munich: Beck, Hart, Nomos, 2022).

[4] Jan Nemitz, ''Book Review: Kai Ambos (ed.), Rome Statute of the International Criminal Court, Article-by-Article Commentary'' (2022) 20 JICJ 772–774. In the Rome process, Otto Triffterer was one of the ''Gang of Four for the ICC'' along with Ben Ferencz, Cherif Bassiouni, and Roger Clark. See Roger Clark, ''In Memoriam: Benjamin Berell Ferencz 1920–2023'' (2023) 34 CLF 141–146, 145.

come less important internally. However, it retains enormous significance to the outside world and the development of the field[5], also in light of the growing numbers of decisions – which sometimes escape the eye of the most devoted scholars and practitioners.

I THE JOURNEY

It is certainly not exaggerated to say that the commentary is one of the crown jewel of practice. It emerged out of the "Club of Rome". In his 1st edition in 1999, Otto Triffterer compared it to preservation of evidence of the Rome Conference. He wrote "It is essential that information about the … conference, which otherwise might be lost, is preserved".[6] The sub-title still referred to "observer's notes". This was dropped in the 3rd edition.

With each edition, the commentary became broader, more detached from Rome. This is unavoidable. The ICC as institution developed its own identity, sometimes beyond the vision of drafters. The Court is a living instrument. It becomes increasingly difficult to argue that participants at the Rome Conference enjoy a privileged position in statutory interpretation, or even special interpretative authority, in light of their knowledge and experience. Drafting history is important to understand context. Even at Rome, there were very different understandings what certain words or compromises ought to mean, and there is no single unified version of drafting history[7] – it is thus more accurate to speak of drafting histories. Former voices from Rome are easily perceived as part of a social elite by those who entered the field later.[8] The professional culture and attitudes associated with status, affiliation, and experiences in the 1990s have opened the field to different types of critiques (e.g., self-

[5] See Kevin Jon Heller, Frédéric Mégret, Sarah M. H. Nouwen, Jens David Ohlin and Darryl Robinson (eds.), *The Oxford Handbook of International Criminal Law* (Oxford: Oxford University Press, 2020).

[6] Otto Triffterer, "Editor's Note", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden: Nomos Verlagsgesellschaft, 1999), v.

[7] Immi Tallgren, "We Did It? The Vertigo of Law and Everyday Life at the Diplomatic Conference on the Establishment of an International Criminal Court" (1999) 12 *LJIL* 683–707.

[8] Mikkel Jarle Christensen, "The Elites of International Criminal Justice: Complementing and Challenging the State", *iCourts Working Paper Series*, No. 333, 11 July 2023, http://dx.doi.org/10.2139/ssrn.4506585.

referentiality, elitism, exclusion etc). The development of the commentary is also an important reflection of the direction of the field itself. It is a refreshing sign that the commentary is becoming more pluralist. The number of authors has grown. Overall, there is a trend towards greater gender balance, and a mix of established and upcoming voices.

From an editorial perspective, managing such as a monumental project is a tremendous challenge. Working with authors involves not only coordination, exchange and re-writing, but also openness to new ideas and approaches, including potential departures from previous editions. As editor-in-chief, Kai Ambos has managed to navigate the commentary successfully through these transitions. Some luminaries, such as Triffterer himself or Christopher Hall have left us, others have joined the ship. For purposes of transparency, significant substantives changes are highlighted by authors in the text. Ultimately, what makes the commentary indispensable is the quality of argument, the in-depth engagement with themes and problems, the diversity of perspectives, and a certain timelessness. It keeps the work a primary resource, despite other works[9] or online commentaries[10], which can absorb changes more quickly.

With its coming of age, the commentary itself has become refined. At the same time, this is no reason to stand still. Kai Ambos is the first to admit this, and this symposium is a testimony to it. The 4th edition is also moment to look into the mirror. If we accept that that the commentary is an essential element of professional practices, and a reflection of the field itself, it is timely to reflect on certain macro issues, which easily get sidetracked in scholarly routine and practice, such as modes of knowledge production, blind-spots or political economies of publishing.

II THE ROAD AHEAD: THREE CHALLENGES

Keeping the commentary on top of the game in times of changing epistemic frames and publication cultures requires not only updating and developing, but re-inventing part of the concept itself. This symposium is an attempt to do this. I would like to focus on three

[9] E.g., William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2016); Carsten Stahn (ed.), *The International Criminal Court in its Third Decade* (Leiden: Martinus Nijhoff, 2023).

[10] Mark Klamberg (ed.), *Commentary on the Law of the International Criminal Court*, https://cilrap-lexsitus.org/en.

challenges that are key to the future: (i) epistemic renewal, (ii) reflection on silences and omissions, and (iii) publishing culture.

2.1 *Epistemic renewal*

The first issue concerns the relation between text and context. The concept of the commentary itself is deeply embodied in legal positivism. It has a long tradition as legislative or jurisprudential guide.[11] When the project of commentary started, the focus was placed on the text of the Statute. The entire structure was organized around the Statute, article by article, paragraph by paragraph. This approach enables systematic and in-depth analysis. However, with growing jurisprudence and a greater diversity of opinion, the commentary is no longer simply a means to explain text, list relevant jurisprudence or summarize approaches: It is an instrument mapping the discourse relating to the Statute.[12] Its importance and audience reach far beyond the ICC. With nearly ninety authors, and more than three thousand pages, the project of the commentary itself is an important form of epistemic knowledge production, which frames the field. It is not a neutral or disinterested statement of the law, but involves narrative-building, position-taking and arguing about the law.[13] It tells others what is relevant, how to apply norms and practices, what to read and reference, and what to leave out etc.

This role makes it necessary to engage more thoroughly with contextual issues. In his review of the current 4th edition, Thomas Weigend has drawn attention to certain doctrinal issues, such as coherence and risks arising from differences beyond inquisitorial v. accusatorial mindsets.[14] However, one may go one step further. The project of the commentary raises deeper questions about knowledge production, visibility and power. What does the Commentary say about the field? Is it too Eurocentric? What are the blind-spots? Does it adequately reflect perspectives of the ''Global South''? Should subject-matter expertise or professional experience in relation to

[11] See Christian Djeffal, ''Commentaries on the Law of Treaties: A Review Essay Reflecting on the Genre of Commentaries'' (2013) 24 *EJIL* 1223–1238.

[12] Id., 1235. A compelling example is the discussion of the state-of-the art of immunities by Claus Kress in his entry on Art. 98. See also Antoine Kesia-Mbe Mindua, ''Some Remarks on Immunities'', in this volume.

[13] Tor Krever, ''International Criminal Law: An Ideology Critique'' (2013) 26 *LJIL* 701–723.

[14] See Thomas Weigend, ''Book Review: Kai Ambos (ed.), Rome Statute of the International Criminal Court'' (2022) 33 *CLF* 69, 72–78.

specific aspects of the Rome Statute be the sole criterion in providing voice?

Over the past decade, critical and de-colonial approaches have gained greater attention in criminology[15] and international criminal law[16]. They have pointed out the silences, inequalities or disempowering effects of international criminal law, its "economies of appearance" (*Clarke*)[17] or marketing cultures (*Schwöbel-Patel*).[18] TWAIL and socio-legal scholarship have made it clear that the ICC or international criminal law are not simply the morally uplifting and progressive projects they assert to be. They also carry ambiguities and contradictions which may produce counterproductive effects.[19] What implications does this have for the commentary? Should these strands of thought be left aside since the commentary is predominantly a doctrinal project guiding legal practice?

I would argue that the commentary may benefit from this turn as part of its epistemic renewal. The foundations of international criminal law have been strongly shaped by Western-liberal concep-

[15] Ana Aliverti, Henrique Carvalho and Anastasia Chamberlen, "Decolonizing the criminal question" (2021) 23 *Punishment & Society* 297–316

[16] Antony Anghie and BS Chimni, "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts" (2003) 2 *Chinese Journal of International Law* 77–103, John Reynolds & Sujith Xavier, "'The Dark Corners of the World': International Criminal Law & the Global South" (2016) 14 JICJ 959–983; Kamari Maxine Clarke, "Affective Justice: The Racialized Imaginaries of International Justice" (2019) *42 Political and Legal Anthropology Review* 244–267; Michelle Burgis-Kasthala, "Scholarship as Dialogue? TWAIL and the Politics of Methodology" (2016) 14 *JICJ* 921–937, Morten Bergsmo, Wolfgang Kaleck and Kyaw Yin Hlaing (eds.), *Colonial Wrongs and Access to International Law* (Brussels: Torkel Opsahl Academic EPublisher, 2020), Carsten Stahn, *Critical Introduction to International Criminal Law* (Cambridge: Cambridge University Press, 2018).

[17] Kamari Maxine Clarke, "The Rule of Law Through Its Economies of Appearances: The Making of the African Warlord" (2011) 18 *Indiana Journal of Global Legal Studies* 7–40, Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights" (2001) 42 *Harvard International Law Journal* 201–245.

[18] Christine Schwöbel-Patel, *Marketing Global Justice: The Political Economy of International Criminal Law* (Cambridge: Cambridge University Press, 2021).

[19] For instance, according to TWAIL approaches, gender discourse and doctrine is not and cannot be neutral, but is influenced by power structures. See David Eichert, "Decolonizing the Corpus: A Queer Decolonial Re-examination of Gender in International Law's Origins" (2022) 43 *Michigan Journal of International Law* 557–593.

tions of law and atrocity.[20] De-colonial approaches can bring out a more pluriversal understanding of the foundations of the field. The Rome Statute is not the property of a particular nation or society. But how seriously do we engage with other world views or concepts that are not familiar to us when revising entries?

The commentary might benefit from greater contextualization. De-colonial lenses can introduce a more diverse vision of the histories of international criminal law beyond the holocaust and the different international(ized) tribunals which have shaped contemporary narratives and precedents.[21] Insights from sociology or criminology may be useful to contextualise Northern (and western) theory on crimes, modes of liability or punishment[22] or challenge mainstream doctrinal argument. They may help to re-articulate the traditional notion of ''victims'' or justifications and modalities of punishment.

Article 21 (1) (c) of the ICC Statute allows the Court to consider ''national laws of States that would normally exercise jurisdiction over the crime''.[23] This might provide a window for contextualization. For instance, the *Al Hassan* case, is a test case to what extent Islamic law is taken into account in the interpretation of crimes or expected social standards of behavior.[24] The commentary could make an effort to integrate a wider spectrum of domestic jurisprudence, including from non-Western jurisdictions.[25]

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[20] See Mark Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press, 2007).

[21] Emily Haslam, ''Writing More Inclusive Histories of International Criminal Law: Lessons from the Slave Trade and Slavery'' in Immi Tallgren & Thomas Skouteris (eds.), *The New Histories of International Criminal Law: Retrials* (Oxford: Oxford University Press, 2019) 130–144.

[22] Ilias Bantekas and Emmanouela Mylonaki, *Criminological Approaches to International Criminal Law* (Cambridge: Cambridge University Press, 2014), Ilias Bantekas, ''Explaining Mass Atrocity Through Culture: The Missing Link for International Criminal Justice'' (2023) 40 *Berkeley Journal of International Law* 179–205.

[23] Article 21 (1) (c) ICC Statute.

[24] ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18. See Julie Fraser, ''Exploring Legal Compatibilities and Pursuing Cultural Legitimacy: Islamic Law and the International Criminal Court'', in Julie Fraser and Brianne McGonigle Leyh (eds.) *Intersections of Law and Culture at the International Criminal Court* (Cheltenham: Edward Elgar, 2020), 378–396, id., ''Islam Itself is Not on Trial: Culture and Religion in Al Hassan'', *Articles of War*, 31 July 2023, https://lieber.westpoint.edu/islam-itself-not-on-trial-culture-religion-al-hassan/ .

[25] The CLICC online commentary has recently been translated into Arabic.

The focus on English as "lingua franca" of academia and practice limits engagement with scholarship and practice in other languages. One way to enrich diversity would be to foster collaborations with scholars from the Global South, or to stimulate greater exchange among authors to accommodate challenges to established concepts or world views in the preparation of the next edition.

2.2 *Reflecting on absences or invisibilities*

A second macro issue is critical reflection on absences and omissions, i.e. what is not there.[26] The focus on statutory interpretation and doctrines places the emphasis on the existing status quo. From the view of critical methodology, it may be interesting to inquire what sites, topics or geographies are dis-narrated through the commentary?

Placing the ICC and its practice at the center comes with constraints and limitations. It reflects, and perpetuates, the limited temporalities and jurisdiction of the Court in the coverage of legal regimes, and may thus conceal a broader story. For instance, historical and colonial crimes are not presented as part of the treatment of genocide, crimes against humanity or war crimes, since they precede post-World War II Conventions and fall outside the jurisdiction of the Court. This absence contributes to a perception (e.g., in reparation or restitution discussions[27]) that they occurred outside the law, even though they may have contravened legal principles or non-codified sources of law.[28]

Another problem is the link between global inequalities, race, and criminalization. It is only gradually gaining attention.[29] The practice of the ICC produces ethnicized and gendered forms of knowledge. For instance, the use of certain notions or labels in legal decisions and writing, such "warlord", "rebel" or ethnic group, comes with certain

[26] Daniel Litwin and Sophie Schiettekatte, "Practising reflexivity in international law: introducing a concept and the working paper series", Working Paper, EUI LAW, 2022/03, https://cadmus.eui.eu/bitstream/handle/1814/74502/LAW_WP_2022_03.pdf?sequence=1&isAllowed=y.

[27] See Carsten Stahn, *Confronting Colonial Objects: Histories, Legalities and Access to Culture* (Oxford: Oxford University Press, 2023).

[28] Andreas von Arnauld, "How to Illegalize Past Injustice: Reinterpreting the Rules of Intertemporality" (2021) 32 *EJIL* 401–432.

[29] Randle C. DeFalco & Frédéric Mégret, "The invisibility of race at the ICC: lessons from the US criminal justice system" (2019) 7 *London Review of International Law* 55, Rachel López, "Black Guilt, White Guilt at the International Criminal Court", SSRN Paper, 4 October 2022, http://dx.doi.org/10.2139/ssrn.4237581.

cultural classifications, which may be open to challenge from an anthropological perspective.[30] Their replication in the commentary may continue to entrench epistemic forms of violence.

There may be merit in pointing out gaps more systematically, i.e. not only in areas where legal provisions make this discussion necessary, such as ''other inhumane acts'', prohibited weapon categories or amendments relating to ''treaty crimes''. For instance, the conception of enslavement struggles to accommodate acts of slave trade which precede acts of slavery and further enslavement. This issue is of both, historical and contemporary importance. Sierra Leone has recently raised this gap in the discussion of the ILC Crimes against Humanity project in the UN General Assembly. The Sierra Leonean delegate, Ambassador Michael Imran Kanu, noted:

> Regrettably and critically, the Rome Statute does not contain provisions for the slave trade, which governs the intent to bring a person into – or maintain them in – a situation of slavery. Given Sierra Leone's experience, particularly on the prohibitive act of forced marriages and the notion of the so called 'bush wife which in our view are acts of slavery and slave trade in the repeated distribution to fighters, we are in the process of submitting proposals to amend the Rome Statute to enumerate, inter alia, 'the slave trade under crimes against humanity in Article 7 of the Rome Statute'. We would therefore put forward the same proposal for any future crimes against humanity treaty.[31]

Of course, the commentary cannot cover everything. However, it may be helpful to provide context to newly emerging areas which have received less attention in existing ICC practice, but are of great importance, such as cyber-crime or environmental crime.

The focus on formal legal instruments, such as the Statute, Rules or Regulations, provides lesser visibility and attention to the crucial

[30] Richard Gaskins, *The Congo Trials in the International Criminal Court* (Cambridge: Cambridge University Press, 2020); Gerhard Anders, ''Testifying about 'Uncivilized Events': Problematic Representations of Africa in the Trial against Charles Taylor'' (2011) 24 LJIL 937–959; Nancy Combs, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge: Cambridge University Press, 2010).

[31] Statement by HE Dr Michael Imran Kanu, Ambassador and Deputy Permanent Representative, Resumed Session of the Sixth Committee of the United Nations General Assembly, Agenda Item 78: ''Crimes Against Humanity'', New York 11 April 2023, at https://www.un.org/en/ga/sixth/77/pdfs/statements/cah/40mtg_sierraleone_2.pdf.

role of managerial practices (*Clements*),[32] including hierarchies, role of networks or organizational culture (*Fraser and McGonigle Leyh*).[33] These factors are an integral part of decision-making processes. They are essential to understand why and how certain legal or procedural choices (e.g., selection and prioritization of situations and cases, outreach, detention, resource allocation). They might deserve additional attention, beyond coverage of existing policy initiatives, such as OTP Policy Papers.

2.3 *The political economy of publishing: Commodity or public good?*

A third macro issue is the culture of publication itself. From a sociological perspective, the project of the commentary itself is not only an academic endeavor, but a form of epistemic power. It raises issues of inclusion/exclusion, access to knowledge, use of resources or distributive justice. With the growing importance of the commentary, it becomes more difficult to strike a balance between its role as commercial commodity and is function as public scientific good.

Ideally, it should be available open access in citable format. Academic contributors, whose research is often funded by public resources, are increasingly under pressure to publish their work open access. As Joseph Powderly has argued in his comment[34], commentary entries already get limited scientific recognition. Limiting access through the paywall makes it even less attractive to academic authors to invest time and put their best work forward. Many users depend on in it, but may lack access, including those who might most urgently need it (e.g. actors in ICC situation countries or conflict situations). Ultimately, knowledge of ICC decisions and the critical discourse surrounding the jurisprudence of the Court, as reflected in the commentary, is an essential part of the functioning of complementarity and intergenerational knowledge-sharing. Moot Court competitions, such as the IBA ICC Moot Court Competition[35] or the Nuremberg Moot Court[36], serve as a powerful illustration. Each

[32] Richard Clements, *The Justice Factory: Management Practices at the International Criminal Court* Cambridge: Cambridge University Press, 2023).

[33] See Fraser and McGonigle Leyh, *supra* note 23.

[34] See Joseph Powderly, "In Praise of Commentaries in the Age of the Neoliberal Academy", in this volume.

[35] See IBA ICC Moot Court, organized by the Grotius Centre for International Legal Studies, https://iccmoot.com/.

[36] For further information, see Nuremberg Moot Court, https://www.nuremberg-moot.de/index.php?id=283.

year, participants dig deep into libraries to search for one of the rare copies, as if they were on the hunt for the "holy grail". And yet, they often remain unsuccessful.

It is fair to raise the question to what extent greater open access availability, reflecting the nature of the commentary as common good, would indeed affect the market value and sales in a way that would make it no longer viable as a commercial product. For instance, many professional users or public libraries might still want a hard copy or access to a digitally advanced version, with interactive links to decisions or sources.

Overall, we see some modest moves in the right direction. The fourth edition of the commentary is now – finally – also available online[37] and as an e-book.[38] Partly as a follow-up of discussions at the Hague launch of the fourth edition, the publisher has also allowed free access to the digital file of the third edition.[39] However, the pressure to increase and diversify access will grow in the future.

III NOT A CONCLUSION

Over the years, each edition of the commentary has brought its own new insights and innovations. This journey will continue in future years. In this brief comment, I have tried to set out a few ideas to think ahead and consider possible avenues of re-invention. The core of my argument is a plea for more diverse epistemologies and access. In my view, this is not only an ethical imperative, but an opportunity for greater dialogue, theoretical innovation, and scientific advancement. The commentary is not only a repertory of practice, but a living encyclopedia of knowledge. It has a critical educational function. Its story is part of the development of the field. It is an ongoing conversation. It continues to be written on a daily basis by a collectivity which is much broader than the contributors themselves.

[37] Via Hart/Bloomsbury (https://www.bloomsburycollections.com/monograph?docid=b-9781509944064) or Beck (https://www.beck-elibrary.de/10.17104/9783406779268/rome-statute-of-the-international-criminal-court?hitid=00&search-click)

[38] See the website of C.H. Beck, https://www.beck-shop.de/ambos-rome-statute-of-international-criminal-court/product/35859376.

[39] It is available at https://www.department-ambos.uni-goettingen.de/data/documents/Veroeffentlichungen/Triffterer_Ambos_Rome_Statute_Commentary_3rd_ed_2016.pdf.

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