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Criminal Law Forum (2023) 34:465–476
https://doi.org/10.1007/s10609-023-09472-w

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IN PRAISE OF COMMENTARIES IN THE AGE OF THE NEOLIBERAL ACADEMY

Accepted: 7 October 2023; Published online: 20 October 2023

I INTRODUCTION

Over the course of the past two decades, the proliferation of learned commentaries on a vast array of international legal instruments has given rise to the emergence of a distinct and evidently thriving genre of international legal scholarship.[1] This is not necessarily an unusual or unexpected development, but rather an inevitable byproduct of codification and the rapid evolution of domestic and international jurisprudence offering authoritative interpretations of treaty provisions. The ubiquity of commentaries is such that they unquestionably form part of international legal culture.[2] As a distinct genre, international legal commentaries are united by shared forms, structures, and teleologies which in themselves are derived and influenced by the tradition of domestic legal commentaries identifiable across legal systems.

The Rome Statute of the International Criminal Court ('ICC') is the subject of a number of single and multi-authored commentaries in

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[1] See Djeffal, C, 'Commentaries on the Law of Treaties: A Review Essay Reflecting on the Genre of Commentaries', *EJIL,* 24 (2013), 1223. As an example, the Oxford Commentaries on International Law Series, at the time of writing has some 37 volumes addressing myriad instruments. See https://global.oup.com/academic/content/series/o/oxford-commentaries-on-international-law-ocils/?cc=us&lang=en&prevNumResPerPage=20&prevSortField=1&sortField=1&resultsPerPage=60&start=0.

[2] *Ibid.*, 1234.

several languages[3]; however, it is fair to say that the Ambos (née Triffterer) *Commentary on the Rome Statute* ('the Commentary') is considered *primus inter pares*. Since the publication of the first edition in 1999, the Commentary has been an important source of legislative history and interpretative guidance. Held in high regard by practitioners, in his Preface to the fourth edition, the current President of the ICC, Judge Piotr Hofmański, remarks that the Commentary will not need a place on his bookshelf, ''because it will always be on [his] desk''.[4] His comment is indicative of the fact that legal commentaries have the potential to have a significant impact on norm development.

In the context of celebrating the publication of the fourth edition of the Commentary, this brief contribution reflects on the evolution of the Commentary over the course of almost a quarter of a century of practice. However, in doing so it laments that in the current age of the neoliberal academy, traditional doctrinal research that forms the backbone of commentary entries is undervalued by academic institutions and funding authorities. It is argued that the inevitable consequence of this is a regrettable distancing of international legal scholarship from international legal practice and a distortion of what is considered 'valuable' or 'impactful' legal research.

II TRIFFTERER'S ROSETTA STONE

In the Anglo-Saxon common law tradition, the notion of a commentary immediately brings to mind Sir William Blackstone's *Commentaries on the Laws of England*. For common law lawyers, ''Blackstone'' and ''commentaries'' are welded together in the form of an all too predictable Jungian word association. Of course, Blackstone's work bears no resemblance to a modern legal commentary; the similarity begins and ends with their title. His work is more representative of an archaic Anglo-American scholarship that sought to bring some modicum of order to legal precedents through which

[3] See for example: Cassese, A, et al. eds., *The Rome Statute of the International Criminal Court: A Commentary* (OUP, 2002); Schabas, W.A.,, *The International Criminal Court: A Commentary on the Rome Statute* (OUP, 2nd edn., 2016); Kim, Y.S., *The International Criminal Court: A Commentary of the Rome Statute* (Wisdom House Publications, 2002); Fernandez, J and Pacreau, X. eds, *Statut de Rome de la Cour pénale international* (Pedone, 2012).

[4] Hofmański, P., 'Preface', in Ambos, K. ed., *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (Hart/Beck/Nomos, 4th edn., 2022), p. xv.

the common law was given form and substance. While Blackstone was in effect offering a treatise on the laws of England (rather than a structured statutory commentary), the teleology that underpinned his ambitious undertaking is shared and clearly identifiable in the teleology of modern international legal commentaries. In a review published in the Edmund Burke edited *Annual Register* in 1767, Blackstone was commended for having ''entirely cleared the law of England from the rubbish with which it was buried'' and for presenting the law ''to the public, in a clear, concise, and intelligible form''.[5] The scope of his enquiry was praised and eulogized in the following way:

> This masterly writer has not confined himself to discharge the task of a mere jurisconsult; he takes a wider range, and unites the historian and politician with the lawyer. He traces the first establishment of our laws, develops the principles on which they are grounded, examines their propriety and efficacy and sometimes points out wherein they may be altered for the better.[6]The Victorian jurist, Sir James Fitzjames Stephen (who is perhaps better known as a vociferous critic of the liberalism of John Stuart Mill), contended that Blackstone had ''rescued the law of England from chaos''.[7]

While the commentary tradition long predates Blackstone – its origins arguably recognizable in the Roman *pandectae* – when Otto Triffterer set out in the immediate aftermath of the Rome Conference to put together a learned commentary on the nascent Rome Statute, like Blackstone he was seeking to rescue the rapidly fragmenting corpus of international criminal law from chaos. He was also no doubt influenced by his grounding in Austro-German tradition of *Großkommentare* that considers commentaries as a natural locus of legal authority.[8] His Commentary would unite the historian, the diplomat, and the lawyer with a view to elaborating a shared foundational understanding of the Rome Statute. It was an undertaking of the utmost importance and one befitting his status as a member of

[5] Quoted in Dicey, A.V.,, 'Blackstone's Commentaries', *Cambridge Law Journal,* 4 (1932), 286.

[6] *Ibid*., 286–287.

[7] *Ibid*., 295.

[8] For a brief overview, see Djeffal supra note 1, 1233.

"Gang of Four" of ICL elders at the Rome Conference.[9] As the late Robert Cryer reflected, "[i]f there has ever been an international instrument in need of systematic discussion it is the Rome Statute…the hyperbolic rhetoric sometimes employed by the Statute's supporters and opponents only serves to muddy the waters of understanding still further…[w]hat is needed is a comprehensive guide to the statute".[10] Triffterer's introduction to the first edition of the Commentary published in 1999 is heavy with a palpable sense of urgency driven by a desire to communicate with an evolving epistemic community of interested scholars and practitioners. He envisaged the Commentary as fulfilling several purposes, with perhaps the most significant being as a repository of first-hand accounts of the negotiations in Rome.

The importance of the first edition as a repository of historical memory cannot be overstated. The *travaux préparatoires* to the Rome Statute being infamously incomplete,[11] the Commentary became the Rosetta Stone of international criminal justice. Through the voices and recollections of witnesses to, and direct participants in the drafting process, the Commentary set out to decipher the Rome Statute for practitioners and (future) State Parties. Published just over a year after the adoption of the Rome Statute, Triffterer presented his work, consisting of contributions from 47 authors, as a commentary but with the subtitle, "[o]bservers' notes, article- by-article". That the Commentary was authored by those present at Rome and/or directly engaged in the drafting of the Statute was clearly intended to elevate the interpretative authority and persuasiveness of individual contributions. In his "Editor's Note", Triffterer

[9] The "Gang of Four" is the term affectionately coined by the late Benjamin Ferencz to refer to himself, Otto Triffterer, M. Cherif Bassiouni, and Roger Clark, all of whom were active participants in different capacities at the Rome Conference. See Clark, R.,, 'In Memoriam: Benjamin Berell Ferencz (1920-2023)', *CLF,* 34(2023), 141.

[10] Cryer, R., 'Review: Otto Triffterer (ed), Commentary on the Rome Statute of the International Criminal Court', *Journal of Conflict and Security,* 5(2000), 293.

[11] In this regard, Antonio Cassese stated that: "unlike most multilateral treaties concluded under the auspices of the United Nations, in the case of the Rome Statute there hardly exist preparatory works reflecting the debates and negotiations that took place at the Rome Diplomatic Conference. The need for informal off-the-record discussions clearly arose out of the necessity to overcome major rifts in a smooth manner and in such a way as to avoid states losing face by changing their position" - Cassese, A., 'The Statute of the International Criminal Court: Some Preliminary Reflections', *EJIL* 10(1999) 144, 145.

remarks that, "[i]t appeared desirable to present information from participants at the Preparatory Committee and the Rome Conference to all interested persons in order to inform them about this process of international 'legal codification' and supply them with an interpretation of the Statute which takes into account the history of its evolution".[12] The Chairman of the Rome Conference Drafting Committee, M. Cherif Bassiouni, underlined the significance of this approach in his Preface to the first edition:

> The delegations had scant opportunity to review the entire text or to assess the interrelationship between its various parts and between provisions of connected subject matter. Consequently, only those who had worked on specific provisions of the Statute could draft a legislative history to interpret those provisions; more particularly, only those who worked on the Drafting Committee and the Bureau of the Committee of the Whole could draft a legislative history to interpret those provisions of the Statute. They were the people who delved into the meaning of each article, its relationship to other articles within a given part, and how they relate to other provisions in other parts.[13]Thus, the first edition of the Commentary was much more than a collection of observations and doctrinal interactions. In truth, it was a unique legislative history, whose ultimate utopian ambition was to "contribute to the protection of 'the peace, security and well-being of the world' and thus, hopefully, lead to peace through justice".[14]

III SHIPS PASSING IN THE NIGHT

Almost a quarter of a century on from the publication of the first edition, the Commentary, now under the stewardship of Kai Ambos following the passing of Otto Triffterer in 2015, is in its fourth edition. Once a rural hamlet, the landscape of international criminal justice is today redolent of a vibrant urban environment. As the jurisprudence of the ICC has evolved, so too has the scope, tenor, and ambition of the Commentary. The third edition published in 2016,

[12] Triffterer, O., 'Editor's Note', in Triffterer, O., ed, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Hart/Beck/Nomos, 1st edn., 1999), p. v.

[13] Bassiouni, M.C., 'Preface', in Triffterer, O., ed, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Hart/Beck/Nomos, 1st edn., 1999), p. xx.

[14] Triffterer, O., 'Editor's Note to the Second Edition', in Triffterer, O., ed, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Hart/Beck/Nomos, 2nd edn., 1999), p. vi.

dropped the subtitle, "[o]bservers' notes, article-by-article", thereby formally signifying a shift in both the teleology of the Commentary and the make-up of its contributors. The Commentary continues to provide valuable insights into the legislative history of the Rome Statute, but necessarily also fulfills a more orthodox function as a site of doctrinal analysis and critique of the ICC's burgeoning caselaw. As a source of interpretative enlightenment and guidance, the Commentary, like the Rome Statute itself, is a living, vibrant document. This is most immediately obvious from the growth of the Commentary in terms of contributors and page numbers from edition-to-edition. As mentioned, the first edition published in 1999, brought together contributions from 47 authors amounting to some 1,295 pages of material. The second edition, published in 2008, consisted of 53 contributors with the page total increasing to 1,953. The publication of the third edition in 2016, saw a dramatic increase in the number of contributors to 83, with the page total growing to 2,352. The most recent fourth edition, published in 2022, includes contributions from 88 authors for a total of 3,064 pages. In basic terms, this shows that in just under 25 years, the number of contributors is slightly less than twice that of the original cohort, and the page total is well in excess of twice that of the first edition.

The profile of contributors continues to evolve and is refreshingly diverse compared to the heterodoxy of the first edition, and it is hoped that progress in this regard will continue in future editions. As the family of contributors has expanded, entries have been passed on and been inherited by a new generation such that the Commentary is now akin to a Dworkinian chain-novel truly reflecting the ephemeral temporality of international criminal law's evolution.[15] Crucially, the Commentary represents an essential alliance of international criminal law scholars and practitioners. While for many contributors the binary scholar/practitioner distinction is simplistic and unrepresentative, it is nonetheless worth highlighting the epistemic significance of scholar/practitioner collaboration. All too frequently, international legal scholarship is divorced from practice, and in many instances has no desire or ambition to speak to or influence practice as such. In this sense, the relationship of scholarship to practice is often akin to that of ships passing in the night. There are of course sound

[15] See Dworkin, R., *Law's Empire* (HUP, 1986) 229: "In this enterprise a group of novelists writes a novel seriatim; each novelist in the chain interprets the chapter he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on".

disciplinary and methodological reasons for this, and scholarship can and must be addressed to diverse communities and audiences. However, it must also be acknowledged that one factor influencing the segregation of international legal scholarship from international legal practice is the observable decline in the value attached to straightforwardly doctrinal legal research.

As the ''dominant ideology of this historical moment'', neoliberalism continues to have a profound impact on the academy.[16] Scholars are under ever increasing pressure to produce academic outputs that conform to opaque bureaucratic institutional notions of 'research excellence'. The seemingly arbitrary and inherently subjective criteria via which research excellence is judged by university bureaucracies directly influences the outputs that academics choose to invest time and energy in. Evaluative criteria differ from jurisdiction to jurisdiction and institution to institution, and while it is certainly the case that this is a predominately Eurocentric phenomenon[17] (the UK's Research Excellence Framework is a particularly prominent model),[18] it is nonetheless worth highlighting how neoliberal notions of 'value' and 'impact' directly affect academic outputs.

Common models for evaluating research excellence instituted by universities, or funding authorities, assess and silo individual research outputs in hierarchical categories. Speaking from my own personal experience (and it is in no sense suggested that my own experience is representative of other jurisdictions or institutions), at the top of the

[16] Mintz, B., 'Neoliberalism and the Crisis of Higher Education' *Marxist Sociology Blog* (27 October 2021), available at: https://marxistsociology.org/2021/10/neoliberalism-and-the-crisis-of-higher-education/; Mintz,B., 'Neoliberalism and the Crisis in Higher Education: The Cost of Ideology', *The American Journal of Economics and Sociology,* 80(2021), 80.

[17] For an overview of trends in this regard, see generally, Grant, J., et al., *Capturing Research Impacts: A Review of International Practice* (Rand, 2010), available at https://www.rand.org/content/dam/rand/pubs/documented_briefings/2010/RAND_DB578.pdf ; Kraemer-Mbula, E., et al. eds, *Transforming Research Excellence: New Ideas from the Global South* (African Minds, 2020), available at: https://library.oapen.org/bitstream/handle/20.500.12657/23441/AMT%20Research%20Excellence%20FINAL%20WEB%2002012020.pdf?sequence=1 ; Ni Mhurchu, A., et al., 'The Present and the Future of the Research Excellence Framework Impact Agenda in the UK Academy: A Reflection from Politics and International Studies', *Political Studies Review* 15 (2016), 60.

[18] Watermeyer, R., and Derrick, G., 'Why the Party is Over for Britain's Research Excellence Framework' *Nature* (8 July 2022), available at: https://www.nature.com/articles/d41586-022-01881-y.

hierarchy sit outputs that are considered 'scholarly'. A separate distinction is made within this 'scholarly' category between those outputs have been published following a rigorous blind peer-review process and those that appear in non-blind peer-reviewed publications, such as contributions to edited volumes. Additional value may be attached to those outputs that are interdisciplinary or forge connections between disciplines. Those outputs identified as scholarly speak predominately, but not necessarily exclusively, to a scholarly audience. In a separate category sit what are referred to as 'professional' publications. The purpose of this category is to essentially capture outputs whose primary audience is non-scholarly. There is a presumption that outputs in this category will not be methodologically innovative and will communicate the state of the art rather than contribute to it as such. In the specific context of legal research, it is in this category that will be found contributions to textbooks, practice manuals, blogposts, case-notes, and crucially for present purposes, contributions to academic commentaries. It stands to reason that publications in the 'professional' category will be predominately doctrinal in their orientation.

The institution of publication hierarchies, including the distinction between scholarly and professional publications is not inherently indefensible, but whether an academic output is scholarly or professional should not be determinative of its value or how its impact is to be measured. The reality, however, is that significantly less weight, in terms of prestige and credit, attaches to professional publications compared to scholarly publications. For example, I am required to meet a minimum threshold number of publications every three years (the precise number is irrelevant). If I publish a scholarly article in an academic journal, or a chapter in an edited volume, this will count as one publication. However, if I author an entry in a commentary, this will be classified as a professional publication, and will count as 1/3 of a publication. This classification is based purely on the presumed publication type and does not take into account in any way the potential normative impact of commentary entries, or their importance in forging links between scholarship and practice. While admittedly predicated on my own experience I am firmly of the view that it is emblematic of the decline within European universities of regard for doctrinal legal research outputs. It is simply the case that doctrinal outputs are unlikely to be viewed as reflecting research excellence. As I see it, the inevitable consequence of this irreversible decline is that legal scholars, under pressure to satisfy institutional or

funder-imposed output quotas and to establish or reinforce their own 'research excellence', will think carefully before producing or agreeing to contribute to 'professional' publications.

The limited value that attaches to doctrinal legal outputs is in stark contrast to the regard and esteem in which they are held by practitioners. This is especially evident with the respect to the Triffterer and Ambos Commentaries whose normative impact has been noted through their successive editions. In his introduction to the third edition, former President of the ICC, Judge Sang-Hyun Song, referred to the Commentary as "a further brick in the solidifying wall of the evolving system of international justice".[19] Former President of the ICC and former President of the Assembly of States Parties, Judge Silva Fernandez De Gurmendi, lauded the Commentary as "a book of great authority" that "has been immensely helpful and influential in the early jurisprudence of the Court".[20] Judge Bertram Schmitt – himself the co-author of the leading commentary on the German Criminal Procedure Act (*Strafprozessordnung*) – has referred to the Commentary as "a book of great authority", and noted its contribution "to the emergence of a homogenous interpretation of key notions on a global scale".[21] In his introduction to the most recent edition, former President of the International Criminal Court Bar Association, Peter Haynes KC was outspoken in his regard for the Commentary:

> At the risk of being accused of hyperbole, I regard the invitation from Professor Ambos to write a few words of introduction to the fourth edition of the Commentary on the Rome Statute as one of the greatest honours of my professional career…It is not just essential reading for independent practitioners, it's the tome they must have in their amoury, the book that that prosecutor will cite in his filings, and to which the judges and their ALOs will resort in their decisions…I happily commend this single volume to all those who practice independently at the Court – it is the paddle that may keep you

[19] Song, S-Y., 'Introductions to the Third Edition', in Ambos, K., and Triffterer, O., eds, *The Rome Statute of the International Criminal Court: A Commentary* (Hart/Beck/Nomos, 3rd edn., 2016), p. xv.

[20] Fernandez De Gurmendi, S., 'Introductions to the Third Edition', in Ambos, K., and Triffterer, O., eds, *The Rome Statute of the International Criminal Court: A Commentary* (Hart/Beck/Nomos, 3rd edn., 2016), p. xvi.

[21] Schmitt, B., 'Introductions to the Fourth Edition', in Ambos, K. ed, *Rome Statute of the International Criminal Court: A Commentary* (Hart/Beck/Nomos, 4th edn., 2022), p. xvi.

afloat in turbulent waters''.[22]Haynes' remarks reflect the fact that the Commentary has had a significant impact on the interpretative evolution of the Rome Statute.

The role of commentaries in law-making, and in particular judicial law-making, is worthy of detailed enquiry; however, as highlighted by Christian Djeffal commentaries fulfill five core functions: ''textual, systematic, contextual, discursive and quasi-legislative''.[23] Djeffal argues further that commentaries ''structure the discourse'', and can ''decide disputes about questions of law in a way that courts would give advisory opinions''.[24] The status and profile of contributors as established figures in scholarship and/or practice lends commentaries a level of authority that can have a quasi-legislative effect.[25] This holds true for the Triffterer/Ambos Commentary. A brief search through the ICC Court Records shows that the Court regularly cites the Commentary as either a quasi-authoritative, or at least a corroborative, source of interpretative guidance.[26] Thus, the Commen-

[22] Haynes, P., 'Introductions to the Fourth Edition', in Ambos, K., ed, *Rome Statute of the International Criminal Court: A Commentary* (Hart/Beck/Nomos, 4th edn., 2022), p. xx.

[23] Djeffal *supra* note 1, 1234.

[24] *Ibid.,* 1235.

[25] *Ibid.*

[26] A full history of the for Court citation of the Commentary is far beyond the scope of this contribution, however, for a very modest sample see the following: *Prosecutor v Germain Katanga and Matthieu Ngudjolo Chui* (Decision on the Confirmation of Charges) ICC-01/04-01/07-717 (30 September 2008), fn 582, 598, and 609; *Prosecutor v Jean-Pierre Bemba Gombo* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-424 (15 June 2009), fn 60, 61 and 79; *Prosecutor v Bahar Idriss Abu Garda* (Decision on the Confirmation of Charges) ICC-02/05-02/09-243-Red (8 February 2010), fn 58; *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09-19 (31 March 2010), fn 36 and 77; *Prosecutor v Thomas Lubanga Dyilo* (Judgment Pursuant to Article 74 of the Statute) ICC-01/04-01/06-2842 (14 March 2012), fn 1628, 1635 and 1652; *Prosecutor v Thomas Lubanga Dyilo* (Decision on Sentence Pursuant to Article 76 of the Statute) ICC-01/04-01/06-2901 (10 July 2012), fn 45 and 53; *Prosecutor v Germain Katanga* (Judgment Pursuant to Article 74 of the Statute) ICC-01/04-01/07 (7 March 2014), fn 2120, 2124, and 2125; *Prosecutor v Jean-Pierre Bemba Gombo* (Judgment Pursuant to Article 74 of the Statute) ICC-01/05-01/08-3343 (21 March 2016), fn 265, 361 and 364; *Prosecutor v Ahmad Al Faqi Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15-171 (27 September 2016), fn 39; *Prosecutor v Bosco Ntagnada* (Jugment) ICC-01/

tary is far from simply being a doctrinal digest of practice, but rather an important tool of judicial law-making.[27]

If 'impact' is a central criterium of research excellence, it is difficult to think of a more impactful output than a piece of legal scholarship that is regularly cited by decision-makers, advances the evolution of the law, and leaves an observable normative imprint. It is all the more galling therefore, that while commentaries are directed primarily at practitioners, and may be classified as 'professional' in orientation, university policymakers frequently consider them less 'valuable', or less prestigious than their apparently hierarchically superior 'scholarly' counterparts.

IV CONCLUDING REMARKS

Clearly, the hierarchical classification of legal research outputs is influenced by trends in the hard sciences and the social sciences more generally. However, it is equally clear that rigid adherence to such classifications is unsuitable to legal research and does a disservice to traditional doctrinal outputs that, while perhaps methodologically orthodox, nonetheless play an important role in norm development. The value of a piece of research cannot simply be judged on the basis of where it is published or the primary audience it is seeking to communicate with. As the co-author of five entries in the third and fourth editions of the Commentary, I can appreciate first-hand the time and effort that goes into the authorship and frequent updating of commentary entries. Entries are written in the knowledge that they may influence decision-making and are likely to be relied upon by practitioners before the ICC and potentially domestic courts as well. They are far more likely to be cited in court judgments than any scholarly article I might publish in a prestigious peer-reviewed journal, or chapter I contribute to an edited volume. To contribute to an international legal commentary is an opportunity to influence the

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Footnote 26 continued
04-02/06-2359-tFRA (9 June 2019), fn 2183. *Prosecutor v Dominic Ongwen* (Trial Judgment) ICC-02/04-01/15-1762 (4 February 2021), fn 6921, 7164, 7165, and 7166.

[27] Jean-Marie Henckaerts argues that commentaries can also play a role in rule compliance: ''commentaries are a tool to increase compliance. Writing commentaries ultimately serves to seek better compliance with a respect for the treaties they deal with'', Henckaerts, J-M., 'The Impact of Commentaries on Compliance with International Law', *ASIL, Proceedings of the 115th Annual Meeting* (2021), 55.

development of the law, it is an opportunity rarely possible in other forms of academic output.

Practitioners hold commentaries in high esteem, it is an esteem that should be matched by academic institutions. But alas, in this neoliberal age my plea is likely to fall on deaf ears. It is a bitter irony worthy of further reflection that this brief cadenza is likely to be viewed as worth significantly more in research terms than an entry in a commentary of such universal significance as that of the Ambos *Commentary on the Rome Statute*.

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