THOMAS WEIGEND*

KAI AMBOS (ED.), ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT. ARTICLE-BY-ARTICLE COMMENTARY, 4TH ED., BECK HART NOMOS 2022, 3064 PP

Accepted: 7 February 2022; Published online: 23 February 2022

I. Otto Triffterer, one of the pioneers of international criminal justice, published the first edition of the “Commentary on the Rome Statute of the International Criminal Court” in 1999, shortly after the dream of a permanent International Criminal Court had crossed the threshold toward reality at the Conference of Rome (1998). That volume, consisting of what Triffterer called “observers’ notes”, was an impressive book of 1295 pages. 23 years later, the Commentary’s volume has more than doubled. This phenomenon reflects the increase in published materials on various aspects of the activity of the International Criminal Court (ICC) as well as the growing relevance of international criminal justice. Although the concept as well as the practical operation of the Court have undeniable flaws, the seeds planted before and at the Rome Conference have borne plentiful fruit and have significantly contributed to the realization of justice for international crime. Meanwhile, it is not only the ICC that is actively adjudicating crimes against international law but domestic courts in several countries do so as well. Even where these courts apply domestic law to cases of genocide, crimes against humanity, and war crimes, the ICC Statute – which often served as a model for domestic legislation – and the pertinent case law of the ICC are important guidelines for the interpretation of the relevant rules of international criminal law (ICL). The Commentary thus has an important role to play even beyond the direct application of the Statute by the ICC.¹

79 renowned scholars and practitioners have contributed to the present edition. Most of them are no longer “observers” of the Rome conference, but the name list of authors reads like a current Who’s

*Thomas Weigend, Professor of Law (retired), University of Cologne, Cologne, Germany. E-mail: Thomas.Weigend@uni-koeln.de.

¹ Schmitt, “Introductions”, p. XVI. (Where no other source is indicated, page numbers refer to the 4th edition of the Commentary.)

Who of international criminal justice. Collecting and coordinating high-level contributions from so many authors is an admirable feat for Kai Ambos, who has – after Otto Triffterer’s death in 2015 – taken over sole responsibility for the *Commentary*.

Although only six years have passed since the publication of the third edition, it has been necessary to significantly revise, update and expand the text. This is true although the Statute itself has not been amended beyond the addition of four war crimes in its Art. 8 (2) (b) (xxv) and (xxvii-xxix);² the new Articles concerning the crime of aggression, which became operative in 2018, had already been covered in the previous edition. The main reason for the further expansion of the volume is the activity of the ICC, whose numerous judgments and other decisions needed to be documented and critically assessed. At the same time, the drafting history of each Article, comprising numerous steps leading up to the Rome Conference, remained relevant and thus had to be retained in the *Commentary* (although some of the accounts on legislative history could well be trimmed a bit in future editions).

In the Editor’s Preface to the fourth edition (p. VII), Ambos emphasizes that the *Commentary* “is not meant to be the mouthpiece of the ICC but critically engages, in a constructive spirit, with its case law and its performance in general”. This is as it should be. At the same time, the authors leave no doubt about their general support for the institution of the ICC, which had come under fire from various political sides at the very time when the fourth edition of the *Commentary* was prepared.

The contributions display a broad spectrum of breadth and intensity in dealing with the legal issues covered. Whereas some commentators tend to restrict themselves to restating the contents of the relevant Article in light of its legislative history, others critically engage with opposing views, including those of the ICC chambers, and do not hesitate to unfold their own concept on the issues in question. The amount of literature cited in the comments also varies immensely – some comments list several pages of authorities, whereas others have just a handful of references.

Given the limits of space, I cannot review each of the comprehensive comments on the individual Articles of the Statute. At the

² See the comments on the newly added offenses of starvation of civilians (Art. 8 (2) (b) (xxv)) by Gottier, Richard and Aboueldahab (Art. 8 mn. 746–784) and of using certain prohibited weapons (Art. 8 (2) (b) (xxvii-xxix)) by Geiß and Pies (Art. 8 mn 817–836).

risk of not doing justice to other contributors, I have selected a few Articles that I find of special interest, mostly because of relevant developments in their ambit within the six years since the publication of the previous edition of the Commentary.

II. One example of the brief, modest type of comment is the remarks on “Article 53 – Initiation of an investigation” by Morten Bergsmo and Olympia Bekou. Art. 53 is of crucial importance for the role of the Office of the Prosecutor (OTP) in relation to the Court, especially the scope of the OTP’s discretion in starting and closing investigations. In recent years, several problem cases (Kenya, Afghanistan, Comoros) have pitted the OTP against Pretrial Chambers (PTC) especially regarding the question of what amounts to “interests of justice” (Article 53(1)(c) and (2)(c) of the Statute). In the new edition, the authors faithfully report the positions of the OTP as well as those of the PTCs regarding the relevant situations but largely refrain from voicing their own opinion. As to the contested scope of the OTP’s obligation to reconsider a decision to dismiss (Article 53(3)(a)), the authors recount the decisions of the PTC and the Appeals Chamber (AC) in the Comoros case (mn. 51–53) but again do not discuss their persuasiveness. In sum, the reader of this comment is reliably informed of the latest developments and the opinions held by various participants in the process but does not receive any further guidance from the authors.

The comments on “Article 12 – Preconditions to the exercise of jurisdiction” by William Schabas and Giulia Pecorella are of a similar character. The extent and the limits of the ICC’s jurisdiction have been subject to intense debate from the start and have been tested in extensive litigation in recent years. In the new edition, the authors inform the reader of the controversial issues regarding territorial jurisdiction in the situations of Afghanistan, Bangladesh (concerning the deportation of Rohingya from Myanmar), Georgia (with regard to South Ossetia), the Philippines (concerning jurisdiction over a member state’s Exclusive Economic Zone), and the attack on a civilian vessel under the flag of the Comoros (mn. 17–25). The authors restrict themselves, however, to restating the various decisions issued in these litigations without indicating whether (and on what grounds) they agree or disagree with them. The same applies to the equally challenging legal questions raised by the option of non-member states to submit to the ICC’s jurisdiction individual “crimes”, later defined as “situations” by Rule 44(2) of the Rules of Procedure and Evidence (RPE) (Article 12 (3) of the Statute). Most of

the “critical” cases in that regard (especially that of Palestine) were already presented in the previous edition; the authors consequently limit themselves to updating their account of the relevant litigation (mn. 33–34).

III. A recurring problem of commenting on ICL is the role of the author’s personal background, which primarily includes his or her legal education and enculturation but also extends to certain linguistic conventions. Everyone tends to take for granted, or at least is inclined toward, what he or she has learned from an early age about legal principles, concepts, and rules. One of the great challenges of discussing ICL is to distance oneself from such “evident” truths and to approach the relevant issues with an open mind and an empathic understanding of other players’ preconceptions and prejudices. To some degree, this challenge also affects the Commentary, although most authors strive toward an “international” perspective, in line with the “multi-cultural” composition of the ICC chambers.

One contribution that clearly reveals the authors’ common law background is the comment on “Article 66 – Presumption of innocence” by William Schabas and Yvonne McDermott. The authors refrain from offering a general introduction on the meaning and scope of the presumption of innocence in various jurisdictions, but it becomes clear from reading their comments that they – following the lead of the European Court of Human Rights – regard the presumption of innocence as more or less identical with the rule that the defendant’s guilt must be proved beyond a reasonable doubt (mn. 14, 18). Under Article 66 of the Statute, one can however argue that subsection 1 on the one hand and subsections 2 and 3 on the other contain separate procedural guarantees and that subsec. 3 describes the means of overcoming the presumption of innocence “in accordance with the applicable law”. The authors also link the suspect’s right to silence to the presumption of innocence (mn. 12) without explaining how these two are supposed to be interconnected.

The authors’ unquestioning adherence to the wording of Article 66 (1), which seems to terminate the presumption of innocence as soon as a person has been “proved guilty”, makes it difficult for them to explain the situation in appeals proceedings (mn. 14): While they correctly state that the presumption of innocence and the burden-of-proof rule remain intact after the prosecutor has filed an appeal against an acquittal, the resolution of the opposite case is left open: does a finding of guilt by a trial chamber conclusively terminate the presumption of innocence, with the consequence that the defendant

can be imprisoned and that he bears the burden of proving his innocence in appeal proceedings? The authors' reply is somewhat ambivalent but points in the right direction: "To the extent that its principal focus is on evidentiary matters, the presumption of innocence must continue to benefit the convicted person on appeal" (mn. 14). It would be preferable, perhaps, to simply state that the defendant's guilt can be regarded as "proved" only when a finding of guilt is no longer assailable by an appeal.

In line with English law, the authors regard as unproblematic "factual presumptions" that permit proving the defendant's guilt by proving certain facts that are typically connected with conduct meeting the definition of a crime (mn. 19). However, in the situations cited by the authors (for example, a person is found in the possession of a stolen object) the presumption of innocence and the burden of proof remain intact, but the trier of fact can be persuaded of the defendant's guilt through indirect evidence – which is not anything extraordinary. Still taking some common law traditions for granted, the authors claim that "it would wreak havoc with the work of the Prosecutor" to impose on him or her the burden of proving the defendant's sanity (mn. 21). Yet, the fact that the prosecution must bear this burden can be regarded as a regular consequence of the principle that the defendant's guilt (including his having a mind that functions normally) must be proved beyond a reasonable doubt. In the same vein, the authors propose that a superior charged under Article 28 ICC Statute would have to testify "in order to rebut the presumption of negligence" once the commission of a crime by his or her subordinate was proved (mn. 22). But it remains unclear what the source of such a presumption of negligence should be and how the authors' suggested rule could be squared with Article 67(1)(i) of the Statute, which describes as a minimal guarantee to any accused "not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal". It is also far from clear in what way the introduction of evidence on other unlawful acts committed by the defendant should interfere with the presumption of innocence, as the authors discuss at length (mn. 31). The presumption of innocence concerns, after all, only the question of guilt as to the offense charged, not the defendant's blameless life in general. I am aware that the points that the authors make might well sound familiar to readers encultured in English or United States evidence law – but a broader perspective might nevertheless have shed more light on this sensitive topic.

In a commentary founded by a German scholar, the typical German approach to interpreting ICL is likely to make its appearance. One example in point is the comment on “Article 32 – Mistake of fact or mistake of law”, originally written by Otto Triffterer and since the third edition co-authored by Jens Ohlin, who left the founder’s extensive remarks largely intact, albeit shortening the text and inserting new ideas here and there. Due to differing approaches in national legal systems, the legal consequences of various mistakes remained contested throughout the negotiations on the Statute (see mn. 9–10). The formulation finally agreed upon bears the hallmark of an uneasy compromise and calls for an interpretation that seeks to reduce possible internal conflicts and to fill the provision’s lacunae. In his comments, Triffterer sought to perform this task by introducing legal concepts prevalent in Austrian and German doctrine. In the German-speaking countries, “theories” on mistakes in criminal law received an inordinate amount of scholarly effort throughout the 20th century. Triffterer tended to read the results of these debates (or rather those that he preferred) into Article 32 of the Statute and asked the Court to adopt certain solutions of Austrian law. As a result, the reader is invited to engage with quaint constructs such as the “layman’s parallel evaluation test” (mn. 16, 23)³ and to differentiate between “normative” and “legal” elements of a crime definition (mn. 17, 18). In line with Austro-German doctrine, the authors deal extensively with the erroneous assumption of factual elements underlying grounds of justification or excuse. On this issue (not mentioned in the ICC Statute), Triffterer recommends the Austrian solution which provides for negligence liability if the actor was at fault in making a wrong factual assumption (mn. 28). However, there are hardly any crimes of negligence in ICL, so that this solution would generally lead to impunity.

A comparison of the comments in the previous and the present editions shows that Jens Ohlin’s accession has had a beneficial impact. He discretely deleted Triffterer’s interesting but hardly persuasive idea that the word “may” in Article 32(2)(2) of the Statute leaves it to the discretion of the Court whether a defendant influenced by a

³ The authors even claim that the ICC PTC in *Lubanga* adopted the “layman’s parallel evaluation test” and that it “will help structure future international decisions on mistake of law” (Article 32 mn. 48). Yet, even if it were accurate that a layman’s views decide upon the correct interpretation of certain (“normative”) elements of a crime definition, this concept would affect factual elements and would not concern “mistakes of law” as mentioned in the first sentence of Article 32(2) of the Statute.

mistake of law will be acquitted or convicted (mn. 39). Ohlin also clarifies the meaning(s) of “mistake of law” in Article 32(2) (mn. 12). His conclusion that the virtue of the compromise formulated in Article 32 consists in “focus[ing] on result” and “paper[ing] over the differences between different legal cultures regarding their treatment of mistakes of fact and law” (mn. 13) may not convince every reader but adequately reflects the character of the provision. In the next edition, it might be worthwhile to add a few remarks on the issue of reconciling the irrelevance of even an honest and unavoidable mistake on whether a particular type of conduct is a crime with the general principle of blameworthiness (now only briefly mentioned in mn. 48 with fn. 66).

An undeniably German perspective also characterizes the comments on “Article 31 – Grounds for excluding criminal responsibility”. The previous comments by German law professor Albin Eser have in the latest edition been revised by Kai Ambos, who slightly shortened and linguistically improved Eser’s remarks. But the comments have retained their generally critical stance, based on the reproach that “Article 31 appears to have been phrased along common law propositions of a rather broad and undifferentiated concept of ‘defences’, largely ignoring the recognized classifications” to be found in continental-European jurisdictions (mn. 6).⁴ The authors warn that “particular heed must be paid to the wording of the relevant provisions, thus avoiding both an uncritical adoption of the ambiguous and controversial drafting at the Rome Conf. and an unreflected transplant from national criminal justice systems” (mn. 7). In several instances, they nevertheless advocate a “Germanic” interpretation of the Article. The most striking example can be found in mn. 17 (left unchanged from the 3rd edition): “When speaking of ‘excluding criminal responsibility’ without further differentiation, however, the Statute leaves open the question as to whether a given ground is justifying the wrongful act or merely excusing the perpetrator, or even only negating punishability for some other substantive reason. In abstaining from such further differentiation, the Statute remains behind jurisprudential developments achieved particularly in the Germanic and, to some degree, in the Romanic jurisdictions as well. While this distinction proves to be helpful to properly differentiate between exclusionary grounds, in particular with regard to necessity

⁴ Ambos did however drop Eser’s derogatory statement that “it is not to be ignored that article 31 is not yet in the very best of shape, both from substance and format” (3rd ed., Article 31 mn. 78).

and duress, the absence of this distinction does not necessarily exclude its application given that it is generally recognized”.

Regarding individual grounds for excluding responsibility, Ambos has left most of Eser’s earlier assessments untouched. This pertains, for example, to the problem of voluntary intoxication (Article 31(1)(b)), where the authors understand the words “disregarded the risk” to mean that the actor may be punished if he was “reckless” as to the risk of committing, in the state of intoxication, an offense within the jurisdiction of the Court. According to the authors, recklessness means that “the perpetrator is nothing more and nothing less than mentally aware of running the risk of committing a crime” (mn. 30) – which is a somewhat circular restatement of the words of the Statute, selecting just one of several possible interpretations of the elusive term “reckless”.

With regard to self-defense (Article 31(1)(c)), Ambos has deleted Eser’s lengthy remarks on the alleged indefensibility of killing an enemy soldier in an armed conflict (3rd ed., Article 31 with fn. 120). As to the subjective element in self-defense, Ambos was in a somewhat awkward position since he had earlier written that the actor’s mere knowledge of the circumstances giving rise to self-defense is sufficient for justification,⁵ whereas Eser in the previous edition had claimed that justification by self-defense requires an additional “volitional” element (3rd ed., Article 31 mn. 48). Ambos now rejects the need for a volitional element but nevertheless agrees with Eser’s compromise demand⁶ that “the defensive reaction is, albeit not exclusively, at least partially (also) motivated by defensive ends” (mn. 45).

Regarding duress (Article 31(1)(d) of the Statute), Ambos sticks to Eser’s harsh judgment that this subparagraph “is an ill-conceived and ultimately failed attempt to combine two different concepts: (justifying) ‘necessity’ and (merely excusing) ‘duress’”, thus leaving aside the various possible distinctions proposed between these two “defenses” in Anglo-American law (mn. 46). Ambos has inserted a paragraph in which he references the arguments of the ICC Pretrial and Trial Chambers in the *Ongwen* case, both declining on evidentiary grounds to grant the defendant a duress defense. In Ambos’ view, this still leaves open the question of whether Article 31(1)(d)

⁵ Ambos, in: Brown (ed.), *Research Handbook on International Criminal Law* (2011), pp. 299, 308 et seq.

⁶ Eser had based his conclusion on the insight that “the complexity of motivations in a given situation is a human phenomenon” (3rd ed., Art. 31 marg. no. 48).

might grant an “excuse” if soldiers kill innocent civilians to save their own lives (mn. 47). However, given the subjective requirement of Article 31(1)(d) that the actor must not intend to cause a greater harm than the one he seeks to avoid, this defense under the Statute would not normally cover the shooting of groups of victims, as happened in the ICTY *Erdemovic* case.⁷

Article 31(2) of the Statute (“The Court shall determine the applicability of the grounds for excluding criminal responsibility...”) is a puzzling provision which inherently conflicts with the principle of legality enshrined in Article 22 of the Statute. Under an extensive construction, the clause could mean that the Court may simply declare that, for example, the defense of self-defense will not be applied to a particular defendant’s conduct although all prerequisites of Article 31(1)(c) were fulfilled. The comment on this clause in the 4th edition repeats almost *verbatim* Eser’s remarks in the previous edition, which however fail to provide clear guidance on the problem. The authors claim that the Court’s powers “would be overstretched if in a given case an exclusionary ground was fully disregarded or narrowed to such an extent that its very substance would disappear” (mn. 67); but they don’t explain how the “substance” of a defense could “disappear” by the way it is applied in an individual case. The authors recommend the criterion of foreseeability as a limit to the Court’s discretion (mn. 68). This sounds like a good idea, but if Article 31(2) is deemed to give the Court, in principle, *plein pouvoir* in dealing with defenses, anything is foreseeable, and the defendant can hardly claim surprise if his case today is treated differently from a similar case the month before. It might be useful, in the next edition, to reconsider this interpretation in light of Article 22 (1) of the Statute, which imposes criminal responsibility only if a person’s conduct constitutes a crime within the jurisdiction of the Court. I submit that it is not sufficient for “constituting a crime” that the person’s conduct is covered by the abstract definition of a criminal statute; a “crime” exists only if the person acts under circumstances that do not provide grounds for excluding his or her criminal responsibility.⁸

⁷ Pros. v. Erdemovic, ICTY, IT-96-22, AC Judgment of 7 Oct. 1997.

⁸ Eser and Ambos claim that the wording of Art. 22 of the Statute is “contradictory: while para. 1 (‘shall not be criminally responsible’) suggests a broader approach, para. 2 (referring only to the ‘definition of a crime’) suggests a narrower one” (Art. 31 marg. no. 67). But subparagraphs 1 and 2 of Art. 22 concern different issues: While subpara. 1 states the principle of legality (*nullum crimen sine lege*), subpara. 2 imposes a rule of strict construction of the Statute’s crime definitions in favour of the defendant. There is hence no contradiction whatsoever between these two provisions.

“Article 25 – Individual criminal responsibility” has recently been at the center of intensive debates. Kai Ambos has accordingly expanded both the (impressive) list of readings and his comments from the previous edition. He discusses new developments and arguments at length in the footnotes – which makes it a bit difficult to follow the flow of the argument. It would be helpful for readers if the author could in the next edition re-write the main text in light of new case law and literature; at the same time, the extensive discussion of ICTY and ICTR jurisprudence (see, e.g., mn. 10, 25–30) could be abridged.

Concerning the contested question of the structure of Article 25(3)(a)-(d) of the Statute, Ambos follows the majority opinion which assumes that letters (a) through (d) represent a hierarchy of modes of responsibility (mn. 2). He also supports the ICC’s “control theory” and regards as unproblematic the recognition of (various forms of) “indirect co-perpetration” (mn. 17, citing the latest case law in point). Following the lead of German-speaking authors Friedrich Dencker and Hans Vest, Ambos suggests that “the system of individual attribution of responsibility, as used for ordinary criminality, must be modified in ICL aiming at the development of a mixed system of individual-collective responsibility in which the criminal enterprise or organisation as a whole serves as the entity upon which attribution of criminal responsibility is based (so-called *Zurechnungsprinzip Gesamttat*)” (mn. 19). From this starting point, Ambos develops the idea that several types of perpetrators can be distinguished. At the lowest level, there are “the accomplices who merely execute the crimes” (mn. 19). It remains unclear, however, why these persons are mere “accomplices” (which seems to revive the long-defunct jurisprudence of the German Federal Court of Justice of the 1960s according to which all participants in NS genocide and mass murders were mere “aiders and abettors” of Adolf Hitler). On a more general level, it is questionable whether attribution theory might add anything of substance to the relatively clear description of the types of responsibility listed in Article 25(3)(a)-(d). Regarding the various forms of assisting in the commission of a crime (Article 25(3)(c) of the Statute), Ambos follows the majority view that demands for liability a “substantial effect” of the assistant’s act for the completion of the crime (mn. 32). In his attempt to interpret the words “substantial effect”, Ambos again marshals various theoretical concepts stemming from German “attribution theory” and combines them with the vague idea of a *Gesamttat* (overall crime) (mn. 33). In my view, this is theory overkill for explaining a relatively simple concept.

Regarding the regulation on attempts (Article 25(3)(f) of the Statute), Ambos knowledgeably explains the redundant (double) rule on abandonment by the mixing of French and American definitions of attempt in one subparagraph (mn. 49–51). I also share his criticism of the extension of criminal liability beyond generally recognized limits through the broad concept of superior responsibility in Article 28 of the Statute (mn. 64).

In sum, the extensive comments (which cover no less than 57 pages with 434 footnotes) on Article 25 provide the reader with a plethora of information both on international jurisprudence and various aspects of German criminal law theory. The comments might however benefit from a somewhat greater concentration on the main substantive points.

IV. In the last part of this review, I will briefly mention three comments that I regard, for different reasons, as outstanding. The first of these is the comment on “Article 98 – Cooperation with respect to waiver of immunity and consent to surrender” by Claus Kreß. In the previous edition, Kreß and Kimberly Prost had jointly commented on this Article on 29 pages. The authors then provided an extensive and detailed discussion on the question whether immunity *ratione personae* as generally recognized by public international law had been abandoned by customary international law for proceedings before the ICC (3rd ed., mn. 23–39). In the 4th ed., Kreß (now writing by himself) presents a monographic dissertation on the (remaining) scope of immunity *ratione personae* and *ratione materiae* in proceedings on international crimes before national and international courts, spanning no less than 86 pages. Kreß’s basic thesis is fairly simple: It is the very purpose of international criminal law to punish leaders for crimes they committed, ordered, or tolerated; hence granting these leaders immunity would undermine the purpose of the law (mn. 32). This *ratio legis* extends, in Kreß’s opinion, to citizens of states that have not ratified the ICC Statute (mn. 37), because the “international community” has a general *ius puniendi* concerning international crimes, and this right to punish may be executed by international and national courts that act on behalf of that community (mn. 127–128). In order to explain this expansive (and certainly debatable) view of international criminal law, the author presents a host of materials ranging from historic sources to the latest pronouncements of the International Court of Justice, the ICC, and other international criminal tribunals, from which he often quotes long passages *verbatim*.

Article 98(2) of the Statute provides that the ICC is bound to respect “international agreements” that preclude the surrender of certain persons. Concerning the contested issue of whether this clause also covers agreements concluded after the entering into force of the ICC Statute, Kreß maintains that only previously existing agreements must be respected, thus declaring irrelevant the efforts of the United States to conclude agreements that purport to protect American citizens from surrender after American diplomats had signed the Rome Treaty (mn. 170–174). Kreß’s main argument is this: “One cornerstone of the so hard-fought final compromise solution contained in Article 12(2) provides the Court with a limited jurisdiction over nationals of non-party States. The broad interpretation of Article 98(2) would allow States Parties to renegotiate, on a bilateral basis, this cornerstone of the compromise on jurisdiction (...). Obviously, such a possibility was not contemplated in the course of the negotiations leading to the adoption of Article 98” (mn. 171). The author was himself present at the negotiations in Rome, hence his view on the legislative history carries special weight. Still, his argument is mainly functional, claiming that a broad interpretation of the exception clause in Art. 98 (2) would counteract the purported extension of the Court’s jurisdiction to citizens of non-party states – which may be just what some of the negotiators intended. Be that as it may, the author’s vast scholarship remains impressive, although it may well overflow the conventional limits of a commentary.

A much shorter but at least equally useful comment has been provided by Fabricio Guariglia and Gudrun Hochmayr on “Article 65 – Proceedings on an admission of guilt”. In a crisp and sober style, the authors present the relevant information on the compromise solution that the Statute provides for shortening the process by permitting the defendant to admit guilt. The authors not only present an overview of the legislative history (mn. 1–3) and the main theoretical challenges of “plea bargaining” at an international criminal tribunal (mn. 4–7) but also inform the reader on the latest (and so far, only) case of an admission of guilt in *Al Mahdi* (mn. 8, 13, 18, 31). They also share information on the practice of both the ICTY and the ICC with regard to honoring negotiated admissions of guilt (mn. 45). The authors make useful suggestions for the interpretation of some ambivalent passages of the Article but refrain from overwhelming the reader with their own “grand theory” on the subject matter. Their comments will undoubtedly be of the greatest value for judges and practitioners at the Court.

A most remarkable text is the commentary on “Article 28 – Responsibility of commanders and other superiors” by Roberta Arnold and Miles Jackson. The authors have radically changed the prior comments by Otto Triffterer, deleting his (much too) extensive historical account and replacing some of his more speculative views by consistent argument. The authors’ discussion of command responsibility plausibly begins with the *Yamashita* case and quickly turns to the case law of the last few decades, which is discussed at appropriate length and intensity. A special emphasis is placed on the various opinions delivered in the *Bemba* case of the ICC (mn. 13–16).

The authors’ understanding of command responsibility starts from the assumption that “the justification for the criminal law doctrine of superior responsibility in general, and for its inclusion in the Rome Statute in particular, is straightforward: it centres responsibility on those who have a particular capacity to ensure compliance with international law” (mn. 4). One may well question whether criminal responsibility can be legitimized exclusively by a person’s “capacity” to ensure compliance, but the authors’ approach is probably shared by many judges and writers. The authors then concisely present the multitude of views on the “nature” of command responsibility (mn. 6–13). Their take on the “nature” of command responsibility differs from the mainstream view (also propounded by the ICC in *Bemba*) that the commander’s responsibility is a special form of complicity in the subordinate’s crime. Instead, the authors regard Article 28 of the Statute as creating an independent offense of endangering the legal interests of other persons (mn. 49–50). The mysterious “as a result” clause in Article 28(a) is interpreted as referring to the commander’s liability, not to the commission of crimes by forces under his command (mn. 47–48). This view is said to be in line with the French and Chinese versions of the Statute (mn. 47), and it certainly makes sense regarding the liability for failing to submit the case for investigation and prosecution (Article 28(a)(ii)). However, if the commander is punished for endangering the interests of actual or future victims by failing to intervene or to report, the question arises why the Statute requires that subordinates must actually have committed an offense – a question that the authors mention but do not answer (mn. 50). Beyond the well-reasoned and innovative explanation of the character of command responsibility, the authors carefully comment on each word of the Article, including the elusive term “effective command and control” (mn. 27–33), the possible link of the term “committed by forces...” to Article 25(3) of the Statute (mn. 35–36),

and the contested mental element of command (and civilian superior) responsibility (mn. 52–64). In sum, this comprehensive comment is exemplary both in its depth of thought and its clarity of language.

V. A short review certainly cannot do justice to the efforts of the 89 authors whom the Editor brought together to paint a huge and colorful panorama of many aspects of international criminal law and procedure. The result is a most impressive collective work characterized by intellectual rigor and an active engagement with the purpose – as the Preamble to the Statute puts it – “to guarantee lasting respect for and the enforcement of international justice”. In the coming years, new cases will come before the ICC and many novel legal issues will arise. It is good to know that the Commentary will continue to be a reliable guide through the cliffs and abysses of international criminal law and justice.

FUNDING

Open Access funding enabled and organized by Projekt DEAL.

OPEN ACCESS

This article is licensed under a Creative Commons Attribution 4.0 International License, which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons licence, and indicate if changes were made. The images or other third party material in this article are included in the article’s Creative Commons licence, unless indicated otherwise in a credit line to the material. If material is not included in the article’s Creative Commons licence and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder. To view a copy of this licence, visit <http://creativecommons.org/licenses/by/4.0/>.

Publisher’s Note Springer Nature remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.