

## BOOK REVIEW

*The Rome Statute of the International Criminal Court: A Commentary*, Antonio Cassese, Paolo Gaeta and John R W D Jones (eds) (Oxford: Oxford University Press, 2002) 2 volumes, 2355 pages (with materials volume, 184 pages). Price US\$265.00 (hardcover). ISBN 0198298625.

Very few developments seem to excite the international law community as much as the negotiation of a global multilateral treaty forming the constitutive instrument of a new international organisation — particularly when the new institution is an international court or tribunal. The conclusion of negotiations for the *Rome Statute of the International Criminal Court*<sup>1</sup> in 1998 and the entry into force of that treaty in 2002, leading to the establishment of the new International Criminal Court ('ICC') in 2003, are the most recent facilitators of this admittedly unusual form of excitement. These new developments have already spawned a huge amount of academic literature.<sup>2</sup> The two-volume commentary on the *Rome Statute* published by Oxford University Press ('OUP') in 2002 is one of the more recent contributions to the literature and, in my view, a most welcome addition indeed. This work is seminal. It is unsurpassed in the existing literature in its depth of analysis and its comprehensive coverage of international criminal law following the entry into force of the *Rome Statute*. It is probably too soon after publication for this work to have assumed an authoritative mantle as the leading work on the *Statute* but, in my view, that status will certainly come. I do not mean to suggest that this work leaves no room for others. However, I do believe that anyone serious about studying the *Rome Statute* and its impact on international criminal law will need to have ready access to a copy of the complete work.

One of the first observations to make about what is advertised as a two-volume set is that a third volume is included in any purchase of the work. This third volume is no set of free steak knives offered to induce the compulsive shopper. Instead, volume 3 includes the texts of the three key instruments of the ICC — the *Rome Statute* itself, the *Elements of Crimes*<sup>3</sup> and the *Rules of Evidence and Procedure*.<sup>4</sup> I am an avid fan of printed collections of documents and have already used this particular volume of primary source documents

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<sup>1</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, [2002] ATS 15 (entered into force 1 July 2002) ('Rome Statute').

<sup>2</sup> Other major works include M Cherif Bassiouni, *The Statute of the International Criminal Court: A Documentary History* (1998); Roy Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (1999); William Schabas, *An Introduction to the International Criminal Court* (2001); Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (1999).

<sup>3</sup> *Report of the Preparatory Commission for the International Criminal Court: Addendum 2 — Finalized Draft Text of the Elements of Crimes*, UN Doc PCNICC/2000/1/Add.2 (2000).

<sup>4</sup> *Report of the Preparatory Commission for the International Criminal Court: Addendum 1 — Finalized Draft Text of the Rules of Procedure and Evidence*, UN Doc PCNICC/2000/1/Add.1 (2000).

extensively. From my personal point of view it would have been ideal to have Australia's implementing legislation — the *International Criminal Court Act 2002* (Cth) and the *International Criminal Court (Consequential Amendments) Act 2002* (Cth) — included in the primary source materials of volume 3. However, OUP could hardly have been expected to produce country-specific volume 3s — especially for a country like Australia where only a relatively small number of the commentaries are likely to be sold. I do think though that OUP has made the correct judgment in advertising the work as a two volume set rather than potentially misleadingly as a three volume set. Volumes 1 and 2 each run to just over 1000 pages whereas volume 3 is more than just the runt of the litter at 145 pages. OUP might have had some irate purchasers actually demanding free steak knives if those purchasers thought they were ordering three volumes only to discover 2.15 volumes in the parcel.

A second observation is that the title 'Commentary' is something of a misnomer. The editors certainly do not claim that the work is a systematic article by article analysis of the *Rome Statute* along the lines, for example, of the other OUP publications — Bruno Simma's commentary<sup>5</sup> on the *Charter of the United Nations* or the forthcoming commentary on the *UN Convention on the Rights of the Child*<sup>6</sup> by Philip Alston and John Tobin. The promotional blurb on the dust jacket of this work claims that 'this two-volume Commentary takes a thematic look at the whole of international criminal law'. That is quite a claim. Having read through much of the two volumes, I do not consider the statement an exaggeration. However, the accuracy of the claim raises a niggling question: why the title 'A Commentary'? Perhaps the title of the work would have been more accurate if it had referred to the impact of the *Rome Statute* on the development of international criminal law.

Those expecting a systematic article by article analysis of the *Rome Statute* may be disappointed. Despite the impressive breadth of issues covered by the stellar list of contributors, the volumes do not provide an exhaustive analysis of the *Statute*'s provisions. One practical example is illustrative. Late in 2002 when the United States first announced its intention to negotiate the so-called 'article 98(2) agreements' with states parties to the *Statute*, Australian government lawyers, like many of their colleagues within the bureaucracies of other states parties, tried to find written analyses of art 98. Two different Australian Government lawyers called me on the off chance that I might have the only copy of this two-volume work known by them to exist in Australia at the time. I did not. We all knew that the work had been published but no-one we knew had yet taken delivery of a copy. They, like me, assumed from the advertised title that there would be an article by article analysis. When my copy did arrive, one of the first things I searched for was an analysis of art 98(2). As it happens, there

<sup>5</sup> Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (1994).

<sup>6</sup> Opened for signature 20 November 1989, 1577 UNTS 44 (entered into force 2 September 1990).

are just two passing references to the provision.<sup>7</sup> All the written work for this publication was completed before the US ‘article 98(2) agreements’ initiative was implemented. Not surprisingly, the relevant section of volume 2 does not focus in any detail on the then potential utilisation of the provision by an overly anxious non-state party like the US. However, I am unable to stop myself speculating as to whether an article by article analysis of any comparable detail to these two volumes might provide more comment on the intention of the drafters of the *Rome Statute* to provide for existing status of forces agreements, for example, in negotiating art 98(2) in the first place. The one article by article commentary on the *Rome Statute* that exists certainly does contain an analysis of art 98(2), despite the fact that that particular commentary is a significantly slimmer work than Antonio Cassese and his colleagues.<sup>8</sup>

It is not my intention to offer this observation as a criticism of the work itself. As we have already seen above, the editors state explicitly that they are providing a thematic commentary on the impact of the *Rome Statute* on the whole of international criminal law and, in my opinion, they have achieved their objective very successfully indeed. By not restricting themselves to the terms of the *Statute*, the editors have been able to include contributions on a range of topics that otherwise might have been excluded. The first section, entitled ‘The Path to Rome and Beyond’, for example, contains an excellent article by Antonio Cassese: ‘From Nuremberg to Rome: International Military Tribunals to the International Criminal Court’.<sup>9</sup> Here Cassese introduces the more recent historical background to the emergence of the *Rome Statute* and other authors such as James Crawford, Adriaan Bos, Philippe Kirsch and Alain Pellet provide a succession of contributions explaining much of its key legislative history.<sup>10</sup> This is a valuable addition to the literature written by the individuals directly responsible for the negotiations and the drafting, and the line-up could not possibly be more authoritative. It is particularly pleasing also to have a chapter on the role of non-governmental organisations (‘NGOs’) included in this section

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<sup>7</sup> Bert Stewart, ‘Arrest and Surrender’ in Antonio Cassese, Paolo Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1639, 1687; Gennady Danilenko, ‘ICC Statute and Third States’ in Antonio Cassese, Paolo Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1871, 1886.

<sup>8</sup> See Triffterer, above n 2.

<sup>9</sup> In Antonio Cassese, Paolo Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 3.

<sup>10</sup> James Crawford, ‘The Work of the International Law Commission’ in Antonio Cassese, Paolo Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 23; Adriaan Bos, ‘From the International Law Commission to the Rome Conference (1994–1998)’ in Antonio Cassese, Paolo Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 35; Phillippe Kirsch and Darryl Robinson, ‘Reaching Agreement at the Rome Conference’ in Antonio Cassese, Paolo Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 67; Phillippe Kirsch and Valerie Oosterveld, ‘The Post Rome Conference Preparatory Commission’ in Antonio Cassese, Paolo Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 93; Alain Pellet, ‘Entry into Force and Amendment of the Statute’ in Antonio Cassese, Paolo Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 145.

and written by Bill Pace and Jennifer Schense<sup>11</sup> — themselves at the forefront of the sustained and, ultimately, successful attempts by the NGO community to influence the course of the negotiations prior to, during and following the Rome Diplomatic Conference.

Other examples abound of excellent material that almost certainly would have been omitted in an article by article analysis of the *Statute*. Giorgio Gaja, for example, has contributed an excellent piece entitled ‘The Long Journey to Repressing Aggression’<sup>12</sup> which achieves far more than simply explaining the compromise approach to the crime of aggression in art 5 of the *Rome Statute*. Similarly, Patrick Robinson has contributed an extremely helpful piece on ‘The Missing Crimes’<sup>13</sup> in which he explains the decisions to omit existing international crimes such as drug-related offences, terrorism and mercenariness from the *Rome Statute*. In section 3 on jurisdiction, in addition to the piece by John Holmes on the principle of complementarity,<sup>14</sup> Michael Bohlander has written on possible conflicts of jurisdiction between the ICC and the ad hoc international criminal tribunals,<sup>15</sup> while John Dugard has contributed on possible conflicts between the ICC and Truth Commissions.<sup>16</sup> Both of these pieces are welcome supplements to the multiple contributions on various aspects of the complexities of the ICC’s exercise of its jurisdiction, and reaffirm the advantages of the broad approach taken by the editors to the impact of the ICC generally. Other useful contributions included on the basis of the particular expertise of the editors include Pierre-Marie Dupuy’s piece, ‘International Criminal Responsibility of the Individual and International Responsibility of the State’;<sup>17</sup> Gennady Danilenko’s piece on the ‘ICC Statute and Third States’;<sup>18</sup> Robert Badinter on ‘International Criminal Justice: From Darkness to Light’;<sup>19</sup> and the

<sup>11</sup> William Pace and Jennifer Schense, ‘The Role of Non-Governmental Organisations’ in Antonio Cassese, Paolo Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 105.

<sup>12</sup> Giorgio Gaja, ‘The Long Journey to Repressing Aggression’ in Antonio Cassese, Paolo Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 427.

<sup>13</sup> Patrick Robinson, ‘The Missing Crimes’ in Antonio Cassese, Paolo Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 497.

<sup>14</sup> John Holmes, ‘Complementarity: National Courts *versus* the ICC’ in Antonio Cassese, Paolo Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 667.

<sup>15</sup> Michael Bohlander, ‘Possible Conflicts of Jurisdiction with the *Ad Hoc* International Tribunals’ in Antonio Cassese, Paolo Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 607.

<sup>16</sup> John Dugard, ‘Possible Conflicts of Jurisdiction with Truth Commissions’ in Antonio Cassese, Paolo Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 693.

<sup>17</sup> Pierre-Marie Dupuy, ‘International Criminal Responsibility of the Individual and International Responsibility of the State’ in Antonio Cassese, Paolo Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1085.

<sup>18</sup> Danilenko, above n 7.

<sup>19</sup> Robert Badinter, ‘International Criminal Justice: From Darkness to Light’ in Antonio Cassese, Paolo Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1931.

joint contribution of the Board of Editors, entitled 'The *Rome Statute*: A Tentative Assessment'.<sup>20</sup>

The general approach of the editors has facilitated a second advantage in addition to the inclusion of contributions on topics beyond the strict confines of the *Statute* itself. The overwhelming majority of the contributions to the two volumes follow the articles and parts of the *Statute*. In preparing those chapters though, it is clear that the authors were directed not to focus exclusively on the terms of the *Statute* provisions relevant to their particular contributions. Instead, authors have engaged in often far ranging accounts of the historical development of the relevant principles, analyses of post-World War II jurisprudence, subsequent developments in international criminal law, jurisprudence of the two ad hoc international criminal tribunals, legislative history of the negotiation of the *Rome Statute* provisions and the extent to which those particular provisions restrict, are consistent with, or extend prior customary international criminal law. This approach explains, in substantial part, the size of the two volumes and it also underscores the significance of the resource that the volumes represent.

A most impressive list of contributors has compiled a monumental 69 chapters covering a vast array of issues in international criminal law. The 2000 plus pages of text are supported by an excellent index, an extremely useful table of cases, both national and international (including all the International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda cases referred to in the text), and a comprehensive table of legislation, both national and international. It includes all treaties, agreements and other instruments referred to and — critical to navigation around the two volumes when seeking comment on specific *Statute* provisions — page numbers for all references to each of the separate provisions of the *Rome Statute*. The price for the two volume set will preclude it from ever being prescribed as a textbook for an undergraduate (or graduate for that matter) student course on international criminal law. But I am not arguing that the set is overpriced. On the contrary, my view is that it represents great value because of the quality and the breadth of the resource it represents. I am delighted to own a copy and already know that it will not be for display purposes only. I have hauled one or other volume off the shelf regularly and am sure I will continue to do so for many years to come.

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<sup>20</sup> Antonio Cassese, Paolo Gaeta and John Jones, 'The *Rome Statute*: A Tentative Assessment' in Antonio Cassese, Paolo Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1901.

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