

Public Annex B

Rome Statute of the International Criminal Court

A Commentary

edited by
Otto Triffterer†
Kai Ambos

Third Edition

C. H. BECK · Hart · Nomos
2016

inal responsibility to the case at stake (1), the other by allowing the Court to resort to exclusionary grounds (outside of paragraph 1) within the Statute (2), whereas the third way may even lead to exclusions of responsibility outside of the Statute according to paragraph 3 (below D.VII). In this respect, article 31 can indeed be characterized as 'acknowledging its own status as a work in progress'¹⁹². As much understandable this evasive action by the makers of the Statute may have been, it leaves doubts with regard to the principle of legality (3).

1. 'The Court shall determine the applicability' of the (exclusionary grounds) 'to the case before it'

65 In principle, the power given to the Court to 'determine the applicability' of exclusionary grounds must mean more than simply to apply the law, as this function would not need to be proclaimed expressly. Therefore, the Court appears to be empowered to adjust available grounds in such a way that they are applicable to the individual case. On this way, the Court may, for instance, solve cases of provocation or of excessive, yet excusing, use of force¹⁹³ by adjusting self-defence (paragraph 1 (c)) or of self-exposure by limiting duress (paragraph 1 (d)).

66 This power, however, is not unlimited, but determined by the 'case before the court'. This means that the Court may not pronounce new general definitions, but has to restrict itself to a just solution of the case before it. If it sees need and reason to modify existing exclusionary grounds or to create new ones in a general way, it would have to proceed according to paragraph 3 (below D.VII). However, even in as far as the Court merely adapts an existing ground to the case before it, it is not completely free, as already taken into account by the drafters of this provision¹⁹⁴, but bound by the rules of article 21 regarding applicable law¹⁹⁵.

2. Grounds for excluding criminal responsibility 'provided for in this Statute'

67 Beyond or even instead of adjusting an exclusionary ground within paragraph 1, the Court may even go farther to other grounds 'provided for in this Statute'. For by way of this referral, the determining power of the Court is not limited to adjusting exclusionary grounds of paragraph 1, as it had been proposed in an alternative to the present version¹⁹⁶, but relevant for grounds for excluding criminal responsibility outside of article 31 (above B) as well. Thus, the determining power of the Court goes far beyond the reach of this article.

3. Paragraph 2 in the light of the principle of legality¹⁹⁷

68 The plain wording of paragraph 2 suggests that the Court's power to adapt the codified grounds for excluding criminal responsibility to the case before it is *not* necessarily limited to situational patterns that are connected to, but not addressed by the Statute's codification; rather, paragraph 2 provides that the Court may alter, in the interest of justice, each and every of the Statute's codified grounds for excluding criminal responsibility according to the facts of the individual case¹⁹⁸. Obviously, this brings about an inner tension between the

¹⁹² Cf. Sadat, *The International Criminal Court and the Transformation of International Law* (2002) 212.
¹⁹³ Cf. § 33 German Penal Code (granting an excuse if the perpetrator exceeds the limits of proportionate self-defence due to confusion, fear or fright). As to the Rome Statute not addressing excessive self-defence cf. Merkel (2002) 114 *ZStW* [437], 447.
¹⁹⁴ See fn. 11 to article L para. 2 in the Preparatory Committee Decisions Dec. 1997, p. 22. On the other hand regarding the accused, who has no onus of proving the applicability of grounds for excluding criminal responsibility, cf. Roberts (2012) 10 *JICJ* [923], 928.
¹⁹⁵ Cf. below mn 75.
¹⁹⁶ Cf. above note 190.
¹⁹⁷ For drafting this section, I am greatly indebted to *Christoph Burchard*.
¹⁹⁸ Similarly, the Court may easily revoke previous precedents and previous statutory interpretations. Principally disagreeing with such a broad judicial discretion Schabas, *The International Criminal Court* (2010)

attempt of defining liability and the law 2 points to the pro has put it almost applicability to a provided for runs 2 in light of these

First, grounds rules of article 22 provision regulation tion") is not formal theory: because social needs, the defences²⁰¹. On construing a de hardly different national criminal grounds for excluding the legality principle wording of article grounds of entrusted to it granted by the substance of statute

Second, a Court disregard excluding criminal illuminating the may either justice and rational choice codified requirements must not be creativity²⁰² and flexible thus, in fact

491, obviously whereas increased necessarily the International¹⁹⁹ Saland, 200 Cf. Brun 201 Cf. Roud Schröder (edit 202 Cf. Eser 203 As asse 204 Cf. Cr 205 Cf. Kra 206 Cf. Kab seq. 207 Ashwa 208 As a there is no Insofar, re adjudications