CONTENTS

Acknowledgments page xii
Foreword by HE Judge Sang-Hyun Song xiv
Foreword by Patricia O'Brien xvi
Foreword by Silvia A. Fernandez de Gurmendi xviii
List of abbreviations xxi

Introduction: bridge over troubled waters? 1
CARSTEN STAHN

1 Introduction 1
2 Objectives and institutional dimensions 4
3 Origin and historical heritage of complementarity 5
4 Theorization and analytical dimensions of complementarity 6
5 Interpretation and application of the Rome Statute 8
6 Complementarity in perspective 12
7 Complementarity in practice 13
8 Not a conclusion 15

PART I General reflections 19

1 A positive approach to complementarity: the impact of the Office of the Prosecutor 21
LUIS MORENO-OCAMPO

1 The Rome Statute as the foundation of a global criminal justice system 21
2 The meaning of complementarity 23
CONTENTS

3 Policy and practice of the Office of the Prosecutor 24
4 Maximizing impact 29
5 Conclusion 32

2 Justice and prevention 33
JUAN E. MÉNDEZ
1 Introduction 33
2 Prevention in international law 34
3 Conditions for justice to have a preventive effect 35
4 Prevention in recent international practice 38
5 Practice of the ICC 40
6 Prevention and complementarity 46
7 Conclusion 50

3 Proactive complementarity: a Registrar’s perspective and plans 52
SILVANA ARBIA AND GIOVANNI BASSY
1 Introduction 52
2 The legal framework 53
3 Proactive versus passive complementarity 54
4 Opportunities for the Registry 57
5 Conclusion 66

PART II Origin and genesis of complementarity 69

4 The genesis of complementarity 71
MOHAMED M. EL ZEIDY
1 Introduction 72
2 World War I peace treaties 78
3 Post-World War I complementarity models 90
4 Conclusion 137
<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td>Reflections on complementarity at the Rome Conference and beyond</td>
<td>142</td>
</tr>
<tr>
<td></td>
<td><strong>Mauro Politi</strong></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>Introduction</td>
<td>142</td>
</tr>
<tr>
<td>2</td>
<td>Complementarity at the Rome Conference</td>
<td>143</td>
</tr>
<tr>
<td>3</td>
<td>Complementarity beyond the Rome Conference</td>
<td>146</td>
</tr>
<tr>
<td>6</td>
<td>The rise and fall of complementarity</td>
<td>150</td>
</tr>
<tr>
<td></td>
<td><strong>William A. Schabas</strong></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>Introduction</td>
<td>150</td>
</tr>
<tr>
<td>2</td>
<td>'Positive complementarity'</td>
<td>155</td>
</tr>
<tr>
<td>3</td>
<td>Inactivity: the unwritten criterion for complementarity</td>
<td>158</td>
</tr>
<tr>
<td>4</td>
<td>Inactivity and inappropriate selection of cases</td>
<td>161</td>
</tr>
<tr>
<td>5</td>
<td>Concluding remarks</td>
<td>163</td>
</tr>
<tr>
<td>PART III</td>
<td><strong>Analytical dimensions of complementarity</strong></td>
<td>165</td>
</tr>
<tr>
<td>7</td>
<td>Complementarity as global governance</td>
<td>167</td>
</tr>
<tr>
<td></td>
<td><strong>Christoph Burchard</strong></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>Introduction</td>
<td>168</td>
</tr>
<tr>
<td>2</td>
<td>Problems and solutions to why regulatory policies fail to meet their goals</td>
<td>171</td>
</tr>
<tr>
<td>3</td>
<td>Actor openness</td>
<td>186</td>
</tr>
<tr>
<td>4</td>
<td>Characteristics, quality and structure of the milieu of complementarity</td>
<td>189</td>
</tr>
<tr>
<td>5</td>
<td>Outlook</td>
<td>195</td>
</tr>
<tr>
<td>8</td>
<td>Policy through complementarity: the atrocity trial as justice</td>
<td>197</td>
</tr>
<tr>
<td></td>
<td><strong>Mark A. Drumbl</strong></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>Introduction</td>
<td>198</td>
</tr>
<tr>
<td>2</td>
<td>The treaty framework: text and effect</td>
<td>200</td>
</tr>
<tr>
<td>3</td>
<td>Complementarity and state behavior</td>
<td>211</td>
</tr>
</tbody>
</table>
4 Towards qualified deference 222
5 Conclusion 231

9 Taking complementarity seriously 233
CARSTEN STAHN
1 Introduction 233
2 The normative embedding of complementarity 236
3 Classical complementarity and its variations 251
4 'Positive' complementarity 260
5 Constraints 273
6 Conclusions 281

10 International criminal justice in the era of failed states: the ICC and the self-referral debate 283
PAYAM AKHAVAN
1 Introduction 284
2 The self-referral revolution in global justice 286
3 Necessity of the self-referral mechanism 292
4 Scenarios where self-referral is vital 299
5 Conclusion: cooperative global justice in a world of extremes 302

11 The quest for constructive complementarity 304
MICHAEL A. NEWTON
1 Introduction 305
2 Early precedents eroding the law of command responsibility 309
3 Is the Court corroding complementarity? 313
4 Is the Prosecutor warping the gravity threshold? 329
5 Recommendations for revitalizing a constructive complementarity 333
6 Conclusion 339
12 Reframing positive complementarity  341
WILLIAM W. BURKE-WHITE

1 Introduction  341

2 Positive complementarity in the first eight years: theory, policy and practice  343

3 Reframing positive complementarity: the US federal criminal justice system as a possible model  353

13 Too much of a good thing?: implementation and the uses of complementarity  361
FRÉDÉRIC MÉGRET

1 Introduction  361

2 Scope of implementation  364

3 Implementation as a Trojan horse?  367

4 The reality of complementarity  376

5 Some illustrations  380

6 Conclusion  386

PART IV Interpretation and application  391

14 The application of the principle of complementarity to the decision of where to open an investigation: the admissibility of situations  393
HÉCTOR OLÁSOLO AND ENRIQUE CARNERO-ROJO

1 Introduction  394

2 Distinction between situations and cases  396

3 The notion of admissibility of situations  402

4 Assessing the admissibility of situations  412

5 Conclusion  419

15 Situation and case: defining the parameters  421
ROD RASTAN

1 Introduction  421
CONTENTS

2 What is a situation? 422
3 What is a case? 437
4 Investigation and prosecution 445
5 Between situation and case 454
6 Impact of prosecutorial policy 458

16 The inaction controversy: neglected words and new opportunities 460
DARRYL ROBINSON
1 Introduction 461
2 Textual demonstration: Article 17 expressly requires national proceedings 463
3 Enduring grip of the slogan version 475
4 Factors contributing to the interpretive disconnect? 489
5 Implications 498

17 The admissibility procedures 503
JO STIGEN
1 Introduction 504
2 Admissibility at the different stages of the ICC proceedings 504
3 Admissibility and the Prosecutor’s preliminary examination 506
4 Preliminary rulings regarding admissibility 511
5 Challenges to the admissibility of a case 532

18 The evolution of the ICC jurisprudence on admissibility 558
BEN BATROS
1 Introduction 558
2 A brief history of admissibility proceedings before the ICC 560
CONTENTS

3 Test for admissibility determinations under the Rome Statute 569
4 Basis for an admissibility determination 578
5 How and when admissibility determinations can be made 583
6 Purpose and focus of complementarity 589
7 Conclusion: complementarity in context 596

19 Interpretative gravity under the Rome Statute 603
IGNAZ STEGMILLER
1 Introduction 604
2 Interpreting the ICC’s notion of gravity 606
3 Common criteria for the (legal) gravity threshold 621
4 Conclusion 637

20 Complementarity and burden allocation 642
MEGAN A. FAIRLIE AND JOSEPH POWDERLY
1 Introduction 643
2 Necessity of determining proof allocation 645
3 Potentially applicable burdens and standards of proof 648
4 Application of complementarity in the context of Security Council referrals: Darfur 661
5 Challenges to admissibility under Article 19 667
6 Conclusion 681