

PREFACE

The complementary nature of the International Criminal Court (ICC) is one of the fundamental principles of the Rome Statute for the International Criminal Court. It is laid down in the Preamble and in Article 1 and further defined in the form of admissibility requirements set forth in Articles 17 to 20. The principle of complementarity is the parameter, which defines the relationship between States and the ICC. It denotes that cases are admissible before the ICC if a State remains wholly inactive or is ‘unwilling’¹ or ‘unable’² to investigate and prosecute genuinely cases of genocide, crimes against humanity and war crimes as defined in Articles 5-8 of the Rome Statute.

Through the principle of complementarity, the system of international criminal justice established by the Rome Statute creates a presumption in favour of the repression of ICC crimes on the *national* level. National criminal jurisdictions are endowed with the primary task to investigate and prosecute these crimes. In contrast to the ‘primacy over national courts’ of the two *ad hoc* tribunals for the former Yugoslavia (ICTY)³ and Rwanda (ICTR)⁴ as well as the Special Court for Sierra Leone (SCSL),⁵ complementarity entails that States can bar the ICC from investigating and prosecuting cases, by adequately adjudicating them in their domestic jurisdiction. To that end, the Rome Statute sets forth the substance of complementarity⁶ and the procedure for its application⁷ in the form of a regime of admissibility.

Complementarity raises a myriad of questions, a discussion of which is widely held to stand central in understanding the ICC. What role does

¹ For a definition of ‘unwillingness’, see Art. 17(2).

² For a definition of ‘inability’, see Art. 17(3).

³ Art. 9 ICTY Statute.

⁴ Art. 8 ICTR Statute.

⁵ Art. 8 SCSL Statute.

⁶ Art. 17 and 20(3).

⁷ Art. 18, 19 and 53(1)(b).

complementarity play in ascertaining States' consent to the Rome Statute? What is the relationship between complementarity and State sovereignty? What is the effect of complementarity on national repression of ICC crimes? What room, if any, does complementarity leave for non-criminal responses to ICC crimes, such as truth commissions and amnesties? How should complementarity be conceptualised in order to make the ICC a success? These are only a few of the questions, which, as often with crucial questions, have proven controversial. At the same time, a number of academics and practitioners are actively engaged in making sense of complementarity, not the least some Ph.D. researchers who address complementarity from various angles.

These developments have prompted the *Amsterdam Center for International Law* and the Department of Legal Philosophy at the Law Faculty of the Free University of Amsterdam to hold an international expert roundtable on the 'Complementarity Principle of the Rome Statute of the International Criminal Court' on 25 and 26 June 2004. The roundtable provided a forum for high-level exchange between Ph.D. researchers and a limited number of experts on the subject. As a framework for that exchange, five Ph.D. researchers presented papers, which were commented upon by an expert, before the floor was opened for discussion. The papers and comments form the basis of the present book.

The first chapter, by Frédéric Mégret, University of Toronto, explores the question why States would join the ICC from a theoretical angle and addresses what role complementarity fulfils in States' decision to become party to the Rome Statute. The second chapter by Gerben Kor, Free University of Amsterdam, addresses the fundamental relationship between State sovereignty and complementarity. The commentator on the first two chapters is Dr. Bardo Fassbender, Humboldt University Berlin.

The third chapter, by Jann K. Kleffner of the *Amsterdam Center for International Law*, conceptualises complementarity as a catalyst for compliance of States with their obligation to investigate and prosecute ICC crimes. The comments were provided by Dr. Federica Gioia, International Criminal Court.

Dr. Claudia Cárdenas, at the time at the Humboldt University Berlin, wrote the fourth chapter on the question whether and to what extent complementarity provides room to respond to ICC crimes by means of an

amnesty or truth commission. Darryl Robinson from the International Criminal Court provided comments.

Last but not least, Rod Jensen, University of British Columbia, presents his chapter which concentrates on the word ‘genuinely’ in the definition of complementarity and assessed the ways in which an understanding of that word will have a bearing on the effective functioning of the ICC. His chapter is commented upon by Judge Bert Swart, ICTY.

The editors wish to thank in the first place all the authors in this book, all chairs of the various sessions and all participants who made the roundtable on complementarity a great success. In all organisational and practical matters surrounding the conference, which is more than we could fathom, the invaluable assistance of Helen Klann is gratefully acknowledged. For her excellent work of language-editing of the present book, we thank Susan Park. And last but not least, we would like to thank Professors Arend Soeteman, Bert Swart, André Nollkaemper and Erika de Wet for their support.

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