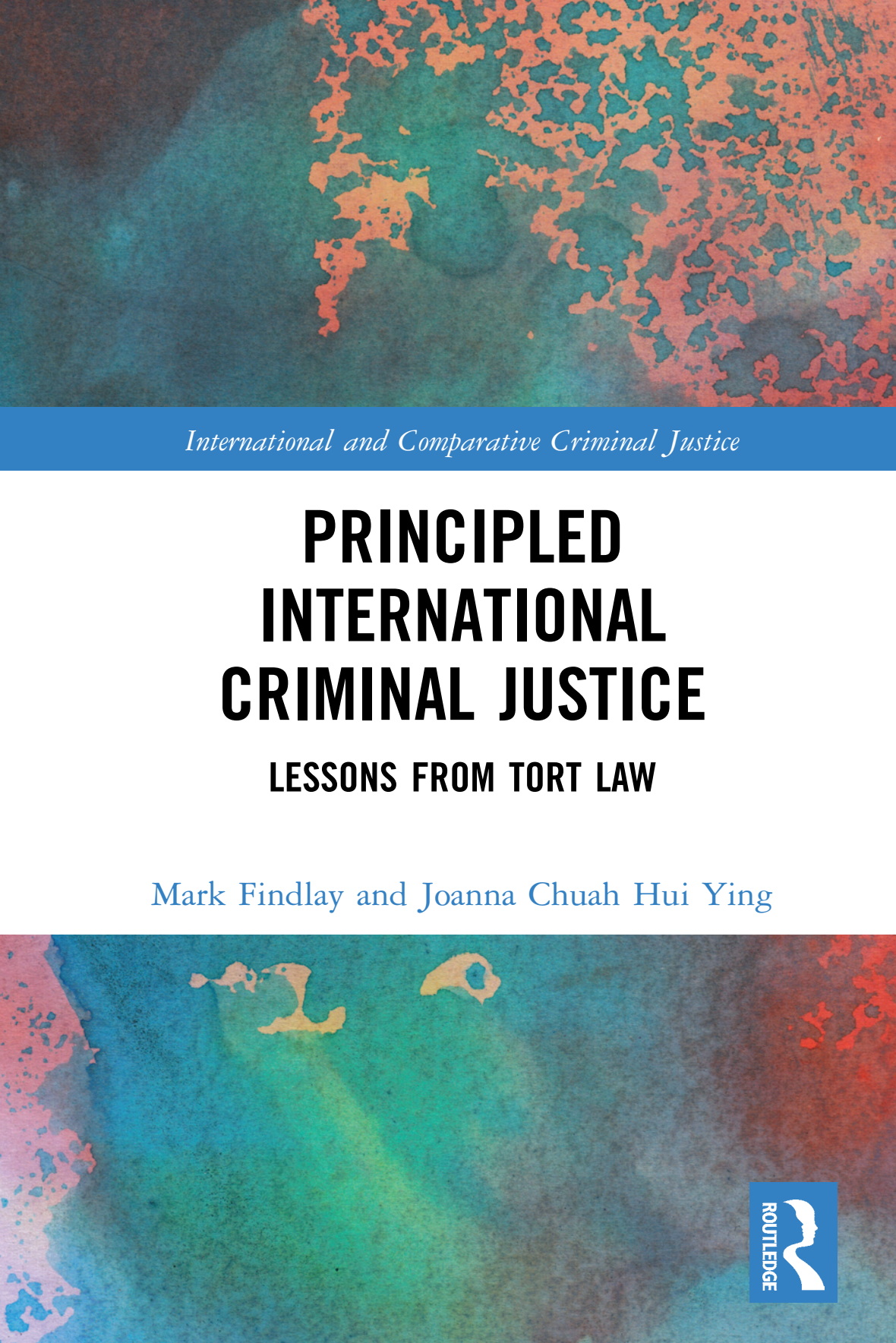




International and Comparative Criminal Justice

PRINCIPLED INTERNATIONAL CRIMINAL JUSTICE

LESSONS FROM TORT LAW

Mark Findlay and Joanna Chuah Hui Ying



Principled International Criminal Justice

Commencing its search for a principled international criminal justice, this book argues that the Preamble to the Rome Statute requires a very different notion of justice than that which would be expected in domestic jurisdictions. This thinking necessitates theorising what international criminal justice requires in terms of its legitimacy much more than normative invocations, which in their unreality can endanger the satisfaction of two central concerns – the punitive and the harm-minimisation dimensions. The authors suggest that because of the unique nature and form of the four global crimes, pre-existing proof technologies are failing prosecutors and judges, forcing the development of an often unsustainable line of judicial reasoning. The empirical focus of the book is to look at JCE (joint criminal enterprise) and aiding and abetting as case-studies in the distortion of proof tests. The substantial harm focus of ICJ (international criminal justice) invites applying compatible proof technologies from tort (causation, aggregation, and participation). The book concludes by examining recent developments in corporate criminal liability and criminalising associations, radically asserting that even in harmonising/hybridising international criminal law there resides a new and rational vision for the juridical project of international criminal justice.

Mark Findlay has written extensively on trial transformation in international criminal justice. For decades he has been a leading global figure in the development of critical global criminal justice and procedure, arguing new ways of perceiving the international trial process. As the author of 28 books and more than 150 refereed publications he has an established reputation in regulation and global governance, international criminal justice, globalisation, and crisis thinking. He is Professor of Law at Singapore Management University and holds honorary chairs at the Australian National University, and the University of New South Wales.

Joanna Chuah Hui Ying reads law at Singapore Management University. Her research and writing interests include international and comparative criminal justice, humanitarian law, corporate and environmental law. Joanna advocates for and contributes articles on human rights and environmental sustainability issues to media and activist civil society organisations in Singapore.

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Preface

The higher order purpose in the analysis to follow is to interrogate justice as conceived in the international criminal trial jurisdiction. Set out in the Preamble to the Rome Statute, the foundation instrument for the International Criminal Court (ICC) are inspirational aims that necessitate justice dispensed by the court to recognise both conventional criminal justice rationales (such as deterrence and retribution) as well as more radical concerns for peace-building and victim satisfaction. The essential focus of the Preamble is the protection of the global community from the destructive consequences of criminal atrocity. As such, international criminal justice (ICJ) is both a legal and a social project. We will argue that the emphasis on harm caused by global crime and the need for its prevention does and should have a unique influence over the processes of legal reasoning in the international courts and tribunals.

The task for the judiciary in dispensing international criminal justice is both unique and extraordinary. The Rome Statute requires that individuals should be prosecuted for identified crimes, no matter how expansive these atrocities may be in the combination of perpetrators and victims. The law on which such prosecutions rests is a hybrid of domestic procedural traditions containing technologies of proof often better suited for crimes much more contained in their reach. Adapting these pre-existing criminal proofs to the context of global criminal trials naturally results in distortion and abstraction.

The juridical challenge of ICJ can be dismissively reduced to result-oriented reasoning, or little more than an exercise in hegemonic political pragmatism, but to do so misses two other important critical themes aligned with justice and proofs that the book will interrogate. International Criminal Court judges must, among other concerns, determine an accused's *responsibility*. This evaluation was consciously threaded through the Preamble and the Rome Statute to recognise that international criminal trial deliberations must reflect on the liability of the accused for alleged offenses AND on the harm these crimes caused to victims. In nation-state criminal justice the latter consideration would only surface, if at all, after the verdict was settled, and sentencing issues enabled the consideration of victim suffering and community outrage. In addition to these more expansive responsibility interrogations pre-sentencing, the nature of the crimes coming before the international criminal courts and tribunals are vastly different

from those which are the common concern for domestic criminal courts. These unique crimes, in terms of perpetration, victimisation, and consequent threat to individual dignity and global order, position humanity as the constituency and deliberative focus for international criminal trial decision-making. As such the book suggests the need to explore a new international criminal jurisprudence that will facilitate a radically different mission for international criminal court prosecutors and judges.

A novel direction in public international law is the adoption of a prosecutorial model focusing on individual criminal responsibility such as prevails in the ICC. The profound challenges posed by the individualisation of international criminal justice underpins the book's critical framework. Crimes against humanity, war crimes, genocide and crimes of aggression are no run-of-the mill criminal phenomena necessitating the proof of a single act or an individual's mental state. Along with these more limited liability questions, the collective, organisational and contributory nature of perpetration, and mass victimisation complicate conventional juridical¹ methodologies.

Aligned with this individualised justice paradigm are the elaborate and inclusive aims for justice propounded in the Preamble. Their scope, we believe, inextricably directs international criminal jurisprudence to consider the significance and priority of confronting atrocity in a wide realm of responsibility, one which cannot be contained within the present proof realms of nation-state criminal procedure, particularly as they concern participation and secondary parties. Further we will argue that the victim harm focus of ICJ means that damages along with liability lean toward the logical amalgamation of comparable tortious principles of causation and contribution.

It is a consequence of the unique formulation of ICJ, we argue, that in terms of its statutory constitution the ICC has no alternative but to exhibit a more expansive approach to judicial decision-making and concepts of trial justice than would ever be realistically aspired to in the national jurisdictions. To fail this task would significantly jeopardise the legitimacy of the ICC project, at a time when cost/benefit analysis finds its role in ending impunity an adventure in utopian thinking.

Unfortunately, if there currently is originality in international criminal jurisprudence and the proof procedures it exhibits, this seems to degenerate into the difficult and often unconvincing manipulation of techniques in reasoning designed for another world of liability. International criminal law (ICL) is intended to emerge from the harmonisation of national substantive and procedural traditions. Achieving this is a tall order, even if limited to developing as a hybrid of Anglo-American common law, and continental European civil law, with all the compromises this entails. Add to this climate of give-and-take the much contested principle of complementarity, and the concurrency of national

1 Throughout the analysis to follow, where *juridical* is used it is intended to designate the civil law intersection of responsibilities between prosecutors and judges as officers of the court.

and international interests over the manifestation of justice in addressing global crime is fraught with uncertainty and potential partiality.

It is our argument that, while being committed to determining individual responsibility, the international criminal trial (ICT) faces much greater tests than presently are being recognised and resolved in the judicial decision-making coming out of the international criminal courts and tribunals. The collective nature of the crimes within the jurisdiction of the ICC (and their context) have led to difficulties in satisfying the traditional criminal law proof requirements such as *mens rea*, *actus rea*, coincidence and causation. Consequently, the international courts have stretched the principles of participation and association up the chain of command, to accommodate the need realistically to apportion responsibility for international crimes leading to a body of fragile jurisprudence particularly around core concerns of mental state such as knowledge and agreement. This book answers *why* the proofs are being applied in a manner which might be diminished as undermining some of the central traditional requirements for conduct and mental state as they are perceived in domestic jurisdictions. In so doing, we reflect on the unique expectations that could be directed toward the outcome of judicial reasoning in atrocity trials, and propose a logic to underpin a more convincing, rational and principled international criminal jurisprudence. This development will better complement the emergence of a new vision for juridical reasoning shaped by international criminal justice as a notion not so much concerned with individual rights or collective responsibility, but more particularly about systematic abuses of power and the need to have responsibility repositioned through the recognition of obligations and duties not to endanger humanity.

We contend that constructing a stronger and more robust legal reasoning when prosecuting and adjudicating responsibility for the four international crimes within the ICC's jurisdiction will never be possible while the interpretation and application of concepts associated with secondary participation and complicity are dependent on principles and proofs designed for conduct and contexts in the national sphere. Yet, through identifying this potential complication of logical and principled legal reasoning we are not impugning the outcomes that are their product. To a large degree, the judges in international criminal trials are faced with perpetrators whose responsibility can be established, and whose punishment is in line with the aims of ICJ, even if they are not the sole or even the most significant authors of horrendous crimes. Indeed, if the courts were to insist on the strict and narrow application of national criminal law proof requirements, neither liability nor responsibility might be determined and as such the application of a prosecutorial model for achieving international criminal justice would fail. The function of the ICC to protect present and future victims would cloud in the eyes of those whose confidence and faith in justice is crucial to the court's legitimacy.

It is incorrect to read the purpose of the text as an apology for lax reasoning, or as a pragmatic argument that the ends justify the means in ICJ. Our critical lens is turned specifically against the gaps in the process of legal reasoning and the application (or lack thereof) of essential proof requirements resulting from novel situations of criminality which only abstractly mirror traditional criminal

law principles as they may be understood at the national level. Particularly, we will reveal that the use of tort/crime proof hybrids is a creative solution to these gaps, which open a path for new forms of principle and practice much better suited to the exigencies of the four crimes. Up to this point of time there are just too many *exceptional* cases in the international trial jurisprudence demanding flexible interpretation, even contortion, for individual criminal responsibility to be imposed.

We will lay out the limitations and indeed the possibly dangerous consequences threatening a credible international criminal law (both in substance and process) resulting from the failure to creatively evolve an international criminal jurisprudence purpose-designed for its novel proof contexts. This critique is intended to move from appreciating the collective nature of crimes within the international jurisdiction, the problems presented by options to prosecute nationally or internationally, the inadequacies of using national proof technologies to address the unique proof challenges in international crimes, and the manner in which fundamental principles of criminal law jurisprudence are at risk along the way.

Some of the specific platforms the analysis will construct in order to seek out a convincing notion of international criminal justice both as a jurisprudential and an actual paradigm will include:

- The need for a purposeful understanding of justice in the global context which recognises the wide goals of the Rome Statute and their victim constituency.
- The unique frame and context of international crimes, both in the collective nature of their perpetration and victimisation, along with the tangential context that deterrence and retribution must have effect within the global community.
- The strains caused by requirements only to prosecute natural persons (literally interpreted) who exhibit individual criminal responsibility in the more collective context of perpetration and victimisation.
- The challenges to central features of justice such as certainty, finality and fairness posed by the operation of complementarity and the possibility of prosecution in parallel jurisdictions.
- The judicial interpretations of proof which seem to be drifting away from the highest levels of mental state when it comes to holding an individual responsible for collective crimes.
- The tendency through conviction-driven justice expedients to see a merging of criminal liability and tortious responsibility in case-by-case rationales rather than a new and cohesive jurisprudence.

This book is a pocket-sized exposé of *some* profound problems. The ICC set sail earlier than most expected and somewhat rudderless, with anything but a sophisticated jurisprudence to guide its initial rocky years. As with its forebears, the Nuremberg and Tokyo military tribunals, the laws and procedures are a work in progress. Even the mode of justice the court was to market seemed big picture and beyond its capacity. The first indictments were tainted with self-interest and

political partiality which would provoke the more recent accusations of continental bias. The court is chronically under-funded and it is small wonder that it took over a decade to resolve its first case. Decisions to investigate and prosecute cannot be broken free from *Realpolitik*. Witnesses recant and prosecutors bungle with ill-conceived applications for non-disclosure. The picture could be accused of cut and paste.

In a minor way, we offer a window through which the court can envision its future. So much is asked of it and so much maligned. Our contention is that with a pathway to a new jurisprudence, the court will break free of nation-state thinking on proof that is designed for another world of criminality. We assert this can be achieved without any violation of the foundation statutes, and conceptualisations of ICL. The court's burden to create and interpret the particulars of international criminal law and procedure without support from any a priori detailed and conventionally evolving codification, or the constant niggling of parliamentary legislative reform, would be heavy even for the best-resourced national court. We propose a simple recipe. Settle the nature of the justice to be delivered, contain the procedural poisoning of those principles that parallel jurisdiction sourcing risk, and take up the possibilities of the tort/crime hybrid but beyond the expedients of case-by-case reasoning.

In summary, Chapter 1 conceptualises international criminal justice relative to the aspirations of the Preamble, differentiates these from national traditions, explores issues such as constituency and conflicts over presumptions, looks at realist interpretations of individual responsibility pitted against peace-making, touches on other jurisprudential interpretations of individual rights against collective responsibility, and speculates on how atrocity trial decision-making might thereby be explained. The enunciation of international criminal justice then governs the critique of ICL as it is developing, of contemporary proof technologies in more collective contexts, and of the potential for new proof technologies through an appreciation of the harm dimension of ICJ and the novel characteristics of global crime to stimulate a more rigorous perspective for juridical reasoning at the global level.

Chapter 2 directs attention specifically to complementarity and discusses how the choice of jurisdiction, preferred offenses, differential punishment regimes, the possibility of double jeopardy, and challenges to certainty represent preliminary procedural impediments to the achievement of ICJ as a predictable project. More than this, the chapter is a brief indictment of the flawed thinking in substantivist local-looking directions for the translation of national procedural traditions into the management of collective responsibility and victimisation. Such approaches to international criminal jurisprudence are the product of political pragmatism and compromise but because of their inapplicability to global criminal responsibility will not thwart exploring the possibilities of tort proofs as they operate in these same procedural traditions. The chapter concludes with an invitation to see complementarity in terms of overarching justice principles, and not more narrowly as struggles over jurisdictional minutiae.

Chapter 3 looks at the mystification of individualism through comparative empirical case-law analysis emerging from the international criminal tribunals. Targeting joint criminal enterprise and aiding and abetting first as national proof constructs and then developed now in the international criminal trial practice, the analysis exposes the fissures and distortions in technologies of proof through a method of case-law deconstruction emerging from the international court and tribunals. This chapter is the essential precursor to the tort/crime hybrid enunciation in Chapter 5.

Chapter 4 notes the unique nature of the four crimes over which the ICC has jurisdiction so that the importance of atrocity context can further explain the manner in which proofs engage with collective perpetration and victimisation. Focusing on genocide, the analysis suggests that the unsatisfactory and often unrealistic application of a prosecutorial model to events of this nature which evolve historically and are congenitally contested and contingent, pose a genuine risk to the legitimacy of ICJ in the eyes of victims, and fuel the derision that the ICC is only a process of the powerful. Unless these issues are met through a more robust and creative trial procedure the fragile emergence of a new mission for international criminal jurisprudence, and more particularly for the global juridical project, is conjectural.

Chapter 5, our second empirical exercise, takes up the exposé of proof in Chapter 3, and the contextual justifications for a new approach beyond strained purpose and constructed knowledge in Chapter 4, naturally then revealing how tort/crime hybrids around the proofs of causation and contribution offer a better path to satisfy extensive and endemic requirements of responsibility rather than employing the more limited reasoning in domestic criminal liability determinations.

Building on this, Chapter 6 speculates a case for a new jurisprudence by looking at corporate criminal responsibility and criminalising organisations through association, as case-studies for how in national jurisdictions, new crimes invited unique proof technologies which exceeded the limits of contemporary criminal liability thinking. From there we invite a visionary judicial reasoning where both perpetrators and victims surpass the individual locked in space and time, and where uniquely conceived international criminal justice and global criminal responsibility receive principled and logical interpretation.

In the words of a reviewer, the book tells the story of a trial frustrated by the imperative to assess collective violence through individuated lenses. Story-telling such as we rehearse throughout the text, the stories of horror and hope, are personal, historical, and actual, specifically intended to add to the analysis of the structural and the systemic. Judges adjudicate stories with tools of reasoning designed to determine responsibility and manage its consequences. For ICJ this is an instrumentalist pursuit more than any rarified game of legal interpretation. International criminal justice needs to prohibit *and* protect. Our commitment to the realisation of such justice without sacrificing reasoned principle, interrogates rather than supplicates international criminal trial justice and in so doing strengthens its resolve.



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1 Conceptualising international criminal justice

Introduction – the aspirations of the Preamble

In searching for a convincing notion of international criminal justice (ICJ), the Preamble to the Rome Statute of the International Criminal Court (ICC)¹ is an obvious starting point. The Preamble initially paints its justice constituency as the ‘delicate mosaic’ of the global community,² which atrocity crimes³ can shatter at any time, and anywhere. With these considerations in mind, the core foci for international criminal justice⁴ are the communitarian consequences of atrocity.

Unfortunately, while identifying such grave crimes threatening the peace, security and well-being of the world, the Preamble consciously down-plays the role of the nation-state in such endangerment, preferring to locate responsibility⁵ on individualised perpetrators. This approach is consistent with the deterrent goal of ending impunity,⁶ however we will argue in Chapters 3 and 4 as a perspective for justice in such formidable crime settings it presents a fundamental tension within the ‘mass’ nature of atrocity crimes, in terms of victimisation and perpetration. This tension plays out in a potential and prevailing crisis of legitimacy, one where recognition of legitimate victim interests can lead to outcome-oriented trial reasoning and the attendant risks for due process.

1 UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, Preamble.

2 As will be indicated throughout this book, the term ‘global community’ is so ill defined in the literature as to have reached the state of metaphor. Consistent with the purposes of the analysis to follow we represent community not in terms of temporal or spatial location but rather through bonds of trust. In a global context, to speak of community we reject the duality determined by hegemonic legitimacy (see Findlay, Mark, *International and Comparative Criminal Justice: A Critical Introduction*, Routledge: Oxford, 2013, Chapter 5). Global community should be an inclusive phenomenon central to considerations of justice which gives political, economic and social form to ‘humanity’.

3 Stover, Eric, *The Witness: War Crimes and the Promise of Justice in The Hague*, University of Pennsylvania Press: Philadelphia, 2005, p. 51.

4 International criminal justice is a governance frame which recognises political, economic and social entities distinct from public international law’s conventional intercourse between nation states.

5 As within the Rome Statute, and across the analysis to follow, ‘responsibility’ may incorporate liability, but more importantly recognises the significance of duty and obligation which attend on harm and damage.

6 Rome Statute, Preamble.

Atrocities are committed against communities of humanity.⁷ The perpetrators predictably act in organised groups exhibiting cultures of violence way beyond the culpability of the individual. It is not hard to understand in such contexts, when charged with protection and peace-making⁸ as well as proportional punishment, judges in the international criminal jurisdictions are moved by the widest outcome-oriented deliberations (see Chapter 3).

The Preamble particularises victims⁹ of atrocity over the centuries (in order of significance – children, women and men) having suffered so as to ‘shock the conscience of humanity’. Therefore, justice has a broad and inclusive moral audience. Peace-building is a primary higher-order consequentialist priority for international criminal justice. This notion will be guaranteed through the inculcation of a ‘lasting respect for and the enforcement of international justice,’ however determined (discussed in Chapter 6).

The Preamble returns to more conventional aspirations for criminal justice in affirming that such serious crimes *as a whole* must not go unpunished. Effective prosecution is identified as the medium for punishment.¹⁰ The domain of punitive justice is seen first as national, enhanced through international cooperation. How jurisdictional (and we later argue, principled) integration and cooperation is to evolve remains unclear, and as the empirical focus of the next chapter evidences, often through politicisation proves contentious. In theory at least, the admissibility of jurisdiction functions within and if necessary beyond the conventional international law adherence to state supremacy, overlaid by the jurisdiction of a permanent international criminal court in relationship with the United Nations system,¹¹ having jurisdiction over ‘the most serious crimes¹² of concern to the international community as a whole’. When considering the punitive dimension of international criminal justice it might be argued that the unique features of global crime¹³ necessitate a novel understanding of the penal personality beyond

7 At the invitation of the Rome Statute we adopt humanity as the constituency for international criminal justice.

8 Peace-making is also read in light of the Preamble as a legitimate aim for international criminal justice, linked to retribution, through the protection of humanity against harm and the prosecution of those who harm humanity. So defined, justice has protective and preventative ends.

9 Victimisation in the context of the Preamble is inclusive, not exclusive, and as such the legitimacy of victim interests are not to be determined against hegemonic authority, but rather within the vast scope of humanity.

10 Stahn, Carsten, and Sluiter, Goran, *Emerging Practice of the International Criminal Court*, BRILL: Leiden, 2009, Vol. 8 of Legal Aspects of International Organization, Part III Prosecutorial Policy and Practice.

11 Maogoto, Jackson, “A Giant without Limbs: The International Criminal Court’s State-Centric Cooperation Regime,” *U. Queensland Law Journal*, 23, 2004, pp. 102, 133.

12 Security Council Press Statement on the contribution of courts and tribunals in the fight against impunity, 2012, SC/10700.

13 For the purposes of this analysis, distinctions between global and international are conscious. Global is a dynamic metaphysical which refers to the interconnection of humanity beyond time and space. International, on the other hand requires the ‘national’ as its referent.

the penal state,¹⁴ and certainly adopting humanity as the constituency for international criminal justice challenges the link between crime and punishment in this sphere, back to the nation-state. The harm prevention paradigm for ICJ exacerbates the strain between national and international justice considerations, while at the same time offering new opportunities for international criminal law (ICL) and procedure to create a novel and more fit-for-purpose global criminal jurisprudence.

The potential for inconsistent understandings of justice and its aims between nation-state and emerging international criminal justice traditions is much more than a simple consequence of the procedural compromise that is complementarity, or the artificial sourcing of international criminal law tied to some influential domestic criminal law traditions (see Chapter 2). International criminal law is anticipated to emerge from the harmonisation of the major procedural traditions world-wide. In fact the process of constructing an international criminal jurisprudence is more of a hybridisation of rules and procedures ill-suited to the proof of global crimes (Chapter 4), and not purpose-designed to recognise the peace-making, victim-oriented aims in the Preamble.

While responsibility might be individualised in ICL, the determination of harm through international criminal justice is required in adopting the most expansive vision of actual and potential victims. Victim-focus beyond their obvious interests in punishment and penalty means that in determining responsibility, judges and prosecutors must be moved by the massive injury caused and damage inflicted through perpetration.¹⁵ This approach we later argue (see Chapter 3) presents the necessary predisposition for augmenting proof technologies in international criminal trials, while presenting possibilities to engage comparable proof challenges from other fields of law such as tort (delict) where harm determination predominates (see Chapter 5).

Consistent with nation-state primacy, the Preamble calls on every State to fulfill its duty in exercising criminal jurisdiction over ‘those *responsible* for international crimes’. The document re-iterates that in so doing, states cannot challenge the territorial integrity of another state. So the pursuit of ICJ is foremost in the hands of states and the sectarian security interests of national governments (which should be subsumed by duties to action criminal responsibility) will only be trumped where the ‘ends’ of international criminal justice, and ‘for the sake of present and future generations,’ necessitate that the ICC should intervene. The discourse of public international law resonates in this inculcation, but the operational problems it invites plague the consistent realisation of ICJ.¹⁶

14 In this regard, one may draw an analogy to corporate criminal liability and its unique task of penalising entities which have no soul or body on which to inflict punishment, but can be made responsible for harm: Bucy, Pamela, “Corporate Ethos: A Standard for Imposing Corporate Criminal Liability,” *Minnesota Law Review*, 75, 1991, pp. 1095–1184; Bucy, Pamela, “Trends in Corporate Criminal Prosecutions,” *Am. Crim. L. Rev.*, 44, 2007, pp. 1287–1306.

15 Ciorciari, John and Heindel, Anne, “Victim Testimony in International and Hybrid Criminal Courts: Narrative Opportunities, Challenges, and Fair Trial Demands,” *Virginia Journal of International Law*, 56 2, 2016, pp. 236–338.

16 Drumbl, Mark, “Pluralizing International Criminal Justice,” *Michigan Law Review*, 103 6, 2005, pp. 1295–1328.

Clearly espoused by the Preamble, prevention is the guiding purpose for punishment. It is, but not only, to be achieved through an end to impunity for the perpetrators. Both individual and general deterrence are stipulated as the influences on individual, collective and possible perpetrators to realise the Preamble's retributive and protective functions.

Within the body of the Rome Statute, Article 22 locates the exercise of justice against persons determined by the court to be criminally responsible. Article 25 specifies (in summary) that:

The Court shall have jurisdiction over *natural persons*¹⁷ pursuant to this Statute . . . A person who commits a crime within the jurisdiction of the Court shall be individually *responsible and liable*¹⁸ for punishment in accordance with this Statute . . . if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.¹⁹

In this light the processes and consequences of justice are dependent on the actions and mental states of individual persons, whether operating independently or in certain contexts, collectively.²⁰ An obligation of the court in determining

17 Regarding the apportioning of criminal responsibility, the analysis to follow does not operate under an assumption that this term is limited only to individuals. Natural persons comprise culpable collectives and organisations, even giving life to the body corporate; Krings, Britta, "The Principles of 'Complementarity' and Universal Jurisdiction in International Criminal Law: Antagonists or Perfect Match?," *Goettingen Journal of International Law*, 4 3, 2012, pp. 737–763.

18 The determination here, we read as consciously requiring responsibility for victimisation, necessitating punishment. Liability is relevant, therefore, in apportioning and calibrating punishment. Other consequences for the harm caused can be visited on the convicted party through punishment and other nominated means consistent with the aims of ICJ.

19 Interestingly, intention in respect of common purpose is determined in the article as the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or the knowledge of the intention of the group to commit the crime. At this level, the proof platform for secondary participation and complicity sits at the broadest end of comparable nation-state traditions and challenges a literalist interpretation of subjective mental state.

20 Jain, Neha, "Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes," *Journal of International Criminal Justice*, 13 4, 2015, pp. 896–897.

justice is to consider the *responsibility* of the individual for the commission and the consequences of atrocities. International criminal trial procedures reveal a growing trend toward the proof of conduct and causation above the intricacies of subjective mental state.²¹ The importance of foreseeability and risk of consequential harm drawn from the purposes, knowledge and behavior of other connected criminal actors, and the organisational context of the criminal enterprise resonates with the tortious applications of negligence as sufficient proof of liability (Chapter 5).

Justice is individualised, responsabilised and potentially contributory. As we will argue later (in Chapters 3 and 5), the use of the notion of responsibility instead of the commonly understood (in criminal law parlance) *liability* is much more than a drafting preference.²² As such, responsibility can be determined through parallel legal disciplines like tort, recognising contribution to the harmful act and focusing on the nature of damages caused rather than more narrowly on the subjective fault of the perpetrator.

The role of peace-building and security

To draw the threads of justice from the Preamble it is necessary to make some simple but no less profound connections. The first mentioned peace-building aims link in with the end to impunity and on to victim's interests. These objectives can be viewed at the individual level (child, woman, man) as offering protection from the harm caused by crime which an end to the perpetrator's impunity is intended to secure. The difficulty with this subjective paradigm is that the crimes, their perpetrators and victims are uniquely contextualised in collective action and authority. Therefore, proof principles such as joint criminal enterprise and aiding and abetting (see Chapters 3 and 5) are borrowed and extended even further from their tenuous subjective determinations at the nation-state level, in order to suit the unique situations of global crime (Chapter 4). What we are witnessing as a result is the development of a sporadic and sometimes-unpredictable international criminal jurisprudence, crafted to fit the collective peculiarities case-by-case for proving atrocity allegations (Chapter 3).

Communities of victims are also offered protection from crime's potential to shatter common bonds, cultures and shared heritage. Aligned to this aspiration for security is the spirit of compensation which is taken up in the body of the Rome Statute.²³

21 There are several judgements out of the international criminal tribunals that might be seen as indicating a return to the vaunted common law maxim that 'a man might be seen as intending the natural consequences of his actions'.

22 There is no mention of liability in the Rome Statute.

23 Rome Statute (1998), Article 75 states: 'The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.'

At this point, with the focus on protection from identified harms, and the restoration of peace, security and world well-being, justice is assuming much more than that for which conventional criminal justice at the national level would lay claim.²⁴ Our contention, forming a recurrent analytical theme through the text to follow, is that such expectations of justice might be more at home in a tort claim, rather than a criminal trial. Add to the interest in harm, damage and restitution,²⁵ the ICC's facility to award reparations, and the tortious analogy is strengthened. So saying we are not suggesting that the international criminal jurisdiction would be abandoned in favor of some civil damages paradigm. The strong retributive dimension of justice as declared in the Preamble would not countenance such a transformation, and nor do we. Rather our argument is for a rational, predictable and principled international criminal jurisprudence that:

- recognises the unique features and circumstances of global crimes; and
- adopts proof technologies particularly related to causation and complicity which are not reliant on the already-stretched calculations of secondary liability in nation-state procedural traditions.

Procedurally (see Chapters 3 and 5), justice is to be achieved within a trial context where the victim voice is strong, independent and recurrent. Victim participation in an ICC trial may extend well before the sentencing stage which usually provides the limited arena for victim participation in national jurisdictions.²⁶

Differentiating international criminal justice from national traditions

Common to principles of criminal justice as generally understood in national jurisdictions is individual deterrence through ending the perpetrator's impunity. It is not drawing the bow too long by assuming that general deterrence is also envisaged in ending impunity, certainly if the proactive protection emphasis of the Preamble is recognised, and the hierarchical nature of criminal conduct is understood. Therefore, international criminal prosecutions are meant to punish perpetration, satisfy legitimate victim interests for restitution, and to prevent future victimisation though the deterrent impact of ending impunity (or more realistically increasing its random likelihood).

24 Rome Statute (1998), Preamble states: 'Recognizing that such grave crimes threaten the peace, security and well-being of the world.'

25 Klass, Alexandra, "Punitive Damages and Valuing Harm," *Minnesota Law Review*, 92, 2007, pp. 83; Rabin, Robert L., "The Pervasive Role of Uncertainty in Tort Law: Rights and Remedies Symposium: The Limits of Predictability and the Value of Uncertainty: Sixteenth Annual Clifford Symposium on Tort Law and Social Policy," *DePaul Law Review*, 60, 2011, pp. 431–1229.

26 Garbett, Claire, "The Truth and the Trial: Victim Participation, Restorative Justice, and the International Criminal Court," *Contemporary Justice Review*, 16 2, 2013, pp. 193–213; Tibori-Szabo, Kinga, and Hirst, Megan, *Victim Participation in International Criminal Justice: Practitioner's Guide*, T.M.C. Asser Press: Heidelberg, 2017.