



# Feeling Political Through Law: The Emergence of an International Criminal Jurisdiction, 1899–2019

*Agnes Arndt*

New York, 23 April 2019: Amal Clooney made an urgent appeal to the United Nations Security Council, emphasizing ‘our responsibility’—a diplomatic, political, legal, but above all global and humanitarian responsibility—to the victims of sexual violence in war and civil conflict.

In preparing to deliver these remarks alongside Nadia Murad ... I thought back to a conversation we had when we first met. Nadia told me of her suffering at the hands of twelve different ISIS men who enslaved and brutalized her. She recounted the murder of her mother and brothers. She showed me threatening messages that she had received from ISIS on her phone. And as she did this, it occurred to me that she never expressed fear for life, for her safety. Instead, that day, and ever since, she has spoken of only one fear: that when all this is over, the ISIS men just shave off their beards and go back to their normal lives. That there will be no justice.<sup>1</sup>

‘This is your Nuremberg moment’, the human rights lawyer for Nobel Peace Prize laureate Nadia Murad and other Yezidi women and girls who had been abducted, tortured, and raped by ISIS entreated the Security

<sup>1</sup>‘Amal Clooney (Barrister) on Sexual Violence in Conflict’.

Council. She urged its member states to seize the opportunity to ‘stand on the right side of history’.<sup>2</sup>

Clooney, an expert in defending individuals against states, has worked at the International Court of Justice in The Hague, in the office of the Chief Prosecutor of the Special Tribunal for Lebanon, at the International Criminal Tribunal for the former Yugoslavia and as an adviser on the Syrian conflict to the late Kofi Annan, the seventh Secretary-General of the United Nations. Her speech, delivered at the invitation of the German Presidency of the United Nations Security Council as part of its initiative for the adoption of a resolution against sexual violence,<sup>3</sup> is one of a number of political initiatives that has invoked the motif of the ‘Nuremberg Moment’.<sup>4</sup> Precisely because of its procedural issues—the challenge of dealing with the principle of *nulla poena sine lege*, or the prohibition of retroactivity in criminal law<sup>5</sup>—Nuremberg is still regarded today as a paradigm shift in international criminal jurisdiction and a prime example of how crimes of such a shocking magnitude that they threaten humanity as a whole can be sanctioned.<sup>6</sup> ‘Nuremberg’ was a milestone in the development of international criminal law into an institution—in both the legal and material sense—which, in accordance with the Kantian tenet that the ‘violation of rights in one part of the world is felt everywhere’,<sup>7</sup> understands, treats, and punishes certain criminal offences not only as ‘crimes’ or war crimes, but as ‘crimes against humanity’.

How does an infringement committed in one part of the world turn into a criminal case that affects the international community—and humanity—as a whole? This chapter argues, first, that feelings motivated, authorized, and legitimized legal and political action which, over time, developed into a participatory politics in the field of law and contributed to the emergence of an international criminal jurisdiction. Feelings helped to reconcile diverse ideas about what precisely constitutes law and justice within international jurisprudence and facilitated appeals to an international

<sup>2</sup> ‘This Is Your Nuremberg Moment’.

<sup>3</sup> United Nations Security Council, ‘Resolution 2467 (2019)’.

<sup>4</sup> Mouralis, *Moment Nuremberg*. A number of recent studies analyse the specific French, British, American, and Soviet influence on the International Military Tribunal with a view to their individual and diverging, legal, political, and cultural traditions. See Gemählich, *Frankreich*; Tisseron, *France*; Bloxham, *Genocide on Trial*; Hirsch, *Soviet Judgment*; Crowe, *Stalin’s Soviet Justice*; Schulmeister-André, *Internationale Strafgerichtsbarkeit*.

<sup>5</sup> Douglas, ‘Was damals’.

<sup>6</sup> Priemel and Stiller, *Reassessing*; Heller, *Nuremberg Military Tribunals*.

<sup>7</sup> Kant, *Political Writings*, 107–8.

community of responsibility. Second, feelings shaped the formulation of criminal charges, guided the questioning of witnesses, and structured the conduct of trials and presentation of evidence. By analysing these dynamics in cases of genocide, war crimes, crimes of aggression, and crimes against humanity, it is possible to understand the emergence of international criminal jurisdiction as a political institution that has developed specific—and competing—templates for expressing and appropriating emotions. Lastly, the international criminal justice system was not simply forced to respond to the emotions it was confronted with. It also benefited from them by integrating emotions into a societal narrative about the future world and legal order, thus making them politically effective.

‘Feeling political through law’—this is the main argument of the chapter—meant promoting a form of participatory politics that not only expanded the circle of those pushing for the development of international law, but also produced institutional effects which ultimately led to the establishment of an international criminal jurisdiction and institutions like the International Criminal Court. The political, legal, and institutional enforcement of international criminal law as an instrument implemented by its own (primarily state) subjects, characterized by reciprocal patterns of action, a particular closeness to reality, and the influence of numerous non-legal factors, is unthinkable without feelings.<sup>8</sup> This chapter uses a history of emotion perspective to examine what was perceived to be a neutral, apolitical, and unfeeling international criminal justice system. Tracing the development of ‘crimes against humanity’ from the end of the nineteenth to the early twenty-first century, the chapter illuminates how the law, politics, emotions, and institutions globally intertwined.<sup>9</sup>

The methodological and theoretical approach of the study, which begins with an analysis of the so-called Einsatzgruppen Trial, focuses on emotional templates that communicate between the institution and individuals by providing them with a rough emotional framework, which is organized into a series of signs that arise when an institution works with or on emotions. These emotional templates are understood as key sites of historical change that both cause transformations and also presuppose them.<sup>10</sup> Their importance for the emergence of international criminal justice is twofold: emotional templates introduced emotions to the law, and

<sup>8</sup> Vitzthum and Proelß, *Völkerrecht*, 18–20.

<sup>9</sup> On law and emotions in general, see Frevert, ‘Gefühle der Staaten’; Schnädelbach, *Entscheidende Gefühle*; Shaw, *Law*; Nussbaum, *Political Emotions*; Nussbaum, *Hiding*.

<sup>10</sup> See the introduction by Ute Frevert and Kerstin Maria Pahl in this volume.

they transformed these emotions with the help of the law and thus contributed to the institutionalization of a global justice system.

The empirical basis of this chapter is a recently edited collection of hitherto unknown sources from the estate of one of the chief prosecutors of the Nuremberg Military Trials, Benjamin Berell Ferencz.<sup>11</sup> The material, consisting of letters, interviews, films, diary excerpts, blog entries, and press reports—used here in conjunction with other, primarily legal, sources—uniquely documents the emotional patterns and templates that shaped the network of jurists who pushed for the establishment of politically and legally effective institutions of international criminal justice over decades. The emotion work of specialists in this field is showcased by Ferencz, who was not only a role model for lawyers working on international criminal justice but also one of the most important advocates for the establishment of an institution without precursors: the International Criminal Court. Ferencz’s feelings and his way of doing politics with feelings—this is the second argument—formed a particular emotional template which successfully combined rational behaviour with passionate engagement for the cause, and addressed both politics and the public.

#### ‘A PLEA OF HUMANITY TO LAW’: THE EMERGENCE OF AN INTERNATIONAL CRIMINAL JURISDICTION

‘It must have been the spring of 1947’, recalled Benjamin Berell Ferencz,<sup>12</sup>

when one of our many diligent researchers, Fred Burin, burst excitedly into my office. He had come upon some German files while searching through a Foreign Ministry annex located near the Tempelhof airport. He had found a nearly complete set of secret reports that had been sent by the Gestapo office in Berlin to perhaps a hundred top officials of the Nazi regime. Many Generals were on the distribution list, along with high-ranking leaders of the Third Reich. The recipients were among those very many Germans who always denied any knowledge of Nazi criminality. The reports described the daily activities of special SS units ... [and documented] in meticulous detail how many innocent civilians they had deliberately killed as part of Hitler’s ‘total war’. All Jews and Gypsies were marked for extermination, together

<sup>11</sup> Goschler, Böick, and Reus, *Kriegsverbrechen*.

<sup>12</sup> Gut, *Jahrhundertzeuge*; Hofmann, *Benjamin Ferencz*; Earl, ‘Beweise’; Bush, ‘New Dealer’; Ferencz, ‘Einsatzgruppen Trial’.

with others who might be perceived as enemies or potential enemies of the Reich.<sup>13</sup>

Ferencz, a Harvard Law School graduate who as a soldier was commissioned to establish a ‘War Crimes Branch’ for the ‘Judge Advocate Section’ of the US Army, was immediately aware that he had stumbled onto a gold mine: ‘They were reports from special units, disguised by a meaningless name: Task Forces: ... I could see immediately that this ... was a case.’<sup>14</sup>

On a little adding machine, I added up the numbers murdered. When I passed the figure of one million, I stopped adding. That was quite enough for me. I grabbed the next plane down to Nuremberg to report the findings to General Telford Taylor. Taylor, as Chief of Counsel, recognized the importance of the evidence, but he faced an administrative problem. The program for a limited number of prosecutions had been fixed and approved by the Pentagon. Public support for German war crimes trials was on the wane. The prospect of getting additional appropriations for more lawyers or trials was bleak. I countered that we had in our hands clear cut evidence of genocide on a massive scale and a trial of the leading criminals could be completed quickly. It would be unforgivable if we allowed the perpetrators to escape justice. In desperation, I suggested that if no one else was available, I could do the job myself. He asked if I could handle it in addition to my other responsibilities. I assured him that I could. ‘OK’, he said. ‘You’ve got it.’ And so, I became the chief prosecutor in what was certain to be the biggest murder trial in human history.<sup>15</sup>

Ferencz was twenty-seven years old when he became the chief prosecutor in the Einsatzgruppen Trial.<sup>16</sup> ‘I had no experience at all’, he said, ‘I had never been in a courtroom before.’<sup>17</sup> Nevertheless, within a few weeks he had succeeded in bringing twenty-four former commanders of the SS and SD death squads to trial. The aim of the trial, which ran from 15 September 1947 to 10 April 1948 in courtroom number 600 at the Nuremberg Palace of Justice, under the official name ‘The United States of America against Otto Ohlendorf et al.’, was to clarify the crimes committed by the

<sup>13</sup> Ferencz, ‘Making of a Prosecutor’.

<sup>14</sup> *Man Can Make a Difference*, 09:22–11:09; 14:44, 18:15, 25:10.

<sup>15</sup> Ferencz, ‘Making of a Prosecutor’.

<sup>16</sup> Earl, *SS-Einsatzgruppen Trial*; Ogorreck and Rieß, ‘Fall 9’.

<sup>17</sup> ‘Der Ankläger: Benjamin Ferencz im Gespräch mit Daniel Cil Brecher’, unless otherwise noted, all translations by Kate Davison and Daniela Petrosino.

*Einsatzgruppen* in the occupied Soviet Union, including the murder of approximately one million people of Jewish faith between June 1941 and 1943.

Ferencz selected his accused according to ‘rank and educational qualifications’. ‘There were 6 ... generals in the dock, and most of them had a doctorate’, he explained. ‘Perhaps it came out of my own experience as a recruit: they always had to take the rap, while those in the higher ranks got away. Not here!’ said Ferencz. ‘Here we started from the top.’<sup>18</sup> Other restrictions arose, however:

The total number of mass killers to be tried depended upon finances and furniture. No Nuremberg tribunal could try more than 24 defendants in the same trial. The reason was that there were only 24 seats in the dock. Historians may not believe it, but it’s true. It really wouldn’t look nice to have to jam killers together or to have some of them sitting around on the floor during the trial. It was unfortunately inevitable that some fish, including big ones, might escape the net completely. Justice is always imperfect.<sup>19</sup>

The indictment listed three offences: crimes against humanity, war crimes, and membership in criminal organizations. Ferencz opened the prosecution’s case with a ‘plea of humanity to law’:

It is with sorrow and with hope that we here disclose the deliberate slaughter of more than a million innocent and defenceless men, women, and children. This was the tragic fulfilment of a program of intolerance and arrogance. Vengeance is not our goal, nor do we seek merely a just retribution. We ask this Court to affirm by international penal action man’s right to live in peace and dignity regardless of his race or creed. The case we present is a plea of humanity to law.<sup>20</sup>

‘None of us ever raised our voices’, he remembered. ‘To bang on the table—that was more like the Hollywood version. There was none of that. We didn’t exaggerate. These are the facts, these are the crimes, these are the victims—what do you have to say to that?’<sup>21</sup> Nevertheless, the emotional experience, the horror of the crimes against the Jewish population,

<sup>18</sup> *Man Can Make a Difference*, 08:33, 35:03.

<sup>19</sup> Ferencz, ‘Preparing for Trial’.

<sup>20</sup> *Trials of War Criminals*, vol. 4, 30.

<sup>21</sup> *Man Can Make a Difference*, 12:06, 12:47.

made its way into the legal documents and oral proceedings. Drawing on the efforts of another Eastern European jurist, the Polish Jewish lawyer Raphael Lemkin, who for years had been tirelessly campaigning for ‘genocide’ to be a recognizable crime,<sup>22</sup> Ferencz stated at the trial that ‘the killing of defenceless civilians during war may be a war crime. But these killings are part of another crime, a more serious crime: genocide, or a crime against humanity.’<sup>23</sup>

Ferencz’s wording was adopted by presiding judge Michael Angelo Musmanno in his sentencing, when he stated that ‘crimes against humanity’ were not a new moral concept but ‘an innovation in the empire of the law’. Indeed, there was no precedent in case law, nor any similar procedures,

[b]ut now it has been seen that humanity need not supplicate for a tribunal in which to proclaim its rights. Humanity need not plead for justice with sobs, tears, and piteous weeping. It has been demonstrated here that the inalienable and fundamental rights of common man need not lack for a court to proclaim them and for a marshal to execute the court’s judgments. Humanity can assert itself by law. It has taken on the robe of authority.<sup>24</sup>

Despite the emotional weight of his words, they did not appeal to a timeless notion of empathy but to the role and authority of the law to defend humanity—both in the sense of individual humans and the qualities that made them human. Both judge and chief prosecutor thus pursued a strategy that was emotionally inflected but above all able to be implemented in law. The ‘plea of humanity to law’ was more than just an expression of horror or regret. It was a rhetorical device that transformed emotional consternation over one of the greatest crimes in human history into a legal discourse.

However, this transformation presupposed a critical examination of the emotions that immediately arose in response to the severity of the crimes. First of all, feelings of sorrow, hope, peace, and dignity could only emerge if the temptation for vengeance was overcome. Second, the rhetoric of sorrow, sobs, and tears might have been emotionally stirring, but it was not legally binding and therefore had to be semantically transferred into a discourse on dignity and humanity. This was the only possible way to make

<sup>22</sup> Lemkin, *Axis Rule*; Lemkin, *Genocide*; Irvin-Erickson, *Raphaël Lemkin*; Cooper, *Raphael Lemkin*; Schaller and Zimmerer, *Origins of Genocide*.

<sup>23</sup> *Man Can Make a Difference*, 13:04.

<sup>24</sup> *Trials of War Criminals*, vol. 4, 497–98.

clear that the case was not a question of vengeance or retribution, but of criminal sanctions legitimized by international law:

The essential and inalienable rights of man cannot vary in time and space. They cannot be interpreted and limited by the social conscience of a people or a particular epoch for they are essentially immutable and eternal. Any injury ... done with the intention of extermination, mutilation, or enslavement, against the life, freedom of opinion ... the moral or physical integrity of the family ... or the dignity of the human being, by reason of his opinion, his race, caste, family or profession, is a crime against humanity.<sup>25</sup>

Ever since the Hague Peace Conferences of 1899 and 1907, when the laws of humanity were first considered from a ‘positivist’ rather than a moral perspective, it was no longer simply the case that states could voluntarily conduct themselves in a morally suitable way, but that they were legally obliged to do so—for the reason that customary international law required it of them. A global community based on the rule of law was thus established, as well as a specific crime that affected this community as a whole. The scale of the crimes being reckoned with exceeded anything previously experienced. Therefore, prosecutors and judges alike emphasized that there was more at stake than mere feelings of grief on the part of the victims or the hatred of the perpetrators: ‘Although the principal accusation is murder and, unhappily, man has been killing man ever since the days of Cain’, explained Telford Taylor in his closing remarks,

the charge of purposeful homicide in this case reaches such fantastic proportions and surpasses such credible limits that believability must be bolstered with assurance a hundred times repeated. The books have shown through the ages why man has slaughtered his brother. He has always had an excuse, criminal and ungodly though it may have been. He has ... slain out of jealousy, revenge, passion, lust, and cannibalism. ... But it was left to the twentieth century to produce so extraordinary a killing that even a new word had to be created to define it.<sup>26</sup>

Furthermore, it was impossible to empathize with the suffering experienced by the relatives of the victims, because no human being could conceivably grasp the extent of such crimes. In this respect, the recourse to

<sup>25</sup> *Ibid.*, 497.

<sup>26</sup> *Ibid.*, 411–12.



emotions served more than only one purpose—the political recognition of the magnitude of the crimes alongside the juridical definition of the criminal offence and justification of the sentence:

The loss of any one person can only begin to be measured in the realization of his survivors that he is gone forever. The extermination, therefore, of two million human beings cannot be felt. Two million is but a figure. ... It is only when this grotesque total is broken down into units capable of mental assimilation that one can understand the monstrousness of the things we are in this trial contemplating. One must visualize not one million people but only ten persons—men, women, and children, perhaps all of one family—falling before the executioner's guns. If one million is divided by ten, this scene must happen one hundred thousand times, and as one visualizes the repetitious horror, one begins to understand the meaning of the prosecution's words: 'It is with sorrow and with hope that we here disclose the deliberate slaughter of more than a million innocent and defenceless men, women, and children.'<sup>27</sup>

The trial ended with fourteen death sentences, two life sentences, and five prison terms ranging from ten to twenty years. One after another, the defendants came forward and were sentenced with the same words: 'On the counts of the indictment on which you have been convicted the Tribunal sentences you', but with varying punishments, from 'death by hanging' to 'imprisonment for life' or 'years' imprisonment'.<sup>28</sup>

It was, according to Ferencz, 'very dramatic, very quiet. No crying, no sounds, no applause, no comment. The whole scene was macabre.' At 'no time' did he himself 'have the feeling: yes, I got them! Nothing like that. It was a very grim affair.' He was 'as though numb' and had 'a very bad headache': 'It was customary for the prosecutor to have a party at his home after the trial', he explained, 'no matter how it turned out. I had prepared the party and should have gone home after the trial—but I was really ill. My head was throbbing, and I couldn't go to my own party. I went home and went to bed.'<sup>29</sup>

<sup>27</sup> *Ibid.*, 412–13.

<sup>28</sup> *Ibid.*, 411, 587–89; Schwartz, 'Begnadigung'.

<sup>29</sup> *Man Can Make a Difference*, 1:08:19, 1:09:10.

## ‘WHERE LAW EXISTS A COURT WILL RISE’: THE LEGAL EVOLUTION OF AN INTERNATIONAL CRIMINAL JURISDICTION

Lawyers, whether representing the prosecution or the defence, can act as ‘political lawyers’, that is,

within the framework of a legal procedure, they can make statements about the past or present political order ... which no longer only concern the contextualisation of the accused’s concrete actions or a concrete legal position, but [provide] a contribution to the ‘struggle for a just legal order’.<sup>30</sup>

Chief prosecutor Ferencz had established an emotional framing during the trial that addressed ‘crimes against humanity and civilisation’ and was therefore directed to ‘humanity itself’. Instead of invoking feelings of grief, rage, and anger, he summoned hope based on the possibility of handling these crimes through legal means. However, the template that evolved to deal with these emotions was an ambivalent one. Emotions were repeatedly rhetorically invoked, but simultaneously legally recanted.

This was accompanied by the fact that Ferencz, who was of Jewish descent, delivered the plea for the prosecution but otherwise restrained himself, both from questioning the accused and from calling victims to the witness stand. The feelings of the victims were not to be harmed further during cross-examination from the defence, while the feelings of the accused towards a supposedly ‘Jewish’ prosecution process were not entertained. The impression that this was a political and emotional trial had to be avoided at all costs. And yet this was about more than jurisprudence, something which the dedication of the network around Ferencz in the following decades demonstrates. It was in the realm of participatory politics—shaped by emotion and calculation—that an innovative, albeit not uncontroversial, international criminal law system was championed.

At the centre of this system was the idea of establishing law as a facet of international relations. Cooperation as well as conflict—not only among states, but also between states and individuals—had to be subject to the rule of law. These rules would thus be legally enforceable beyond the borders of the respective states and, if necessary, punishable as well. A central element of this international juridification was the definition of criminal offences and the establishment of courts of law with the aim of punishing

<sup>30</sup> Seliger, *Politische Anwälte?*, 26.

the most serious crimes affecting the international community as a whole.<sup>31</sup> Besides genocide, aggression, and war crimes, these included ‘crimes against humanity’, or acts committed in the context of a widespread or systematic attack against a civilian population.<sup>32</sup>

The concept of ‘crimes against humanity’ referred to the ‘laws of humanity’ inspired by the Hague Peace Conferences of 1899 and 1907 and in particular by the Martens Clause, named after the jurist and diplomat Fyodor Fyodorovich Martens.<sup>33</sup> ‘Until a more complete code of the laws of war has been issued’ the inhabitants, as well as belligerents, remained ‘under the protection and the rule of the principles of the law of nations, as they result[ed] from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience’.<sup>34</sup> This wording adhered to the tenet of international law that the general principles of customary law should apply even in situations which were not legally regulated. Furthermore, it became clear that international law was informed not only by customary process, but also by other norm-creating processes, for example—as the jurist Giuseppe Sperduti called it—the ‘legal recognition of public conscience’.<sup>35</sup> As the humanitarian law expert Antonio Cassese pointed out, the US Military Tribunal also referred to this clause by stating throughout the Krupp case that it was

a general clause, making the usages established among civilized nations, the laws of humanity and the dictates of the public conscience into the legal yardstick to be applied if and when the specific provisions of the [Hague] Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare.<sup>36</sup>

The term ‘crimes against humanity and civilisation’ was first used in the context of the First World War to describe the systematic mass murder of the Armenian population in Turkey, as well as the martial strategy used by the German Empire. Regarding Armenia, the term appeared in a joint

<sup>31</sup> Lingen, *Humanity*; Payk, *Frieden*; Lewis, *Birth*.

<sup>32</sup> Gellately and Kiernan, *Genocide*; Zimmermann and Freiburg-Braun, *Aggression*; Segesser, *Recht statt Rache*; Byron, *War Crimes*.

<sup>33</sup> Mero, ‘Martens Clause’.

<sup>34</sup> ‘Convention (IV) Respecting the Laws and Customs of War on Land’, 509.

<sup>35</sup> Sperduti, *Lezioni*, 68–74, my translation.

<sup>36</sup> *Trials of War Criminals*, vol. 9, 1341; Cassese, ‘Martens Clause’, 191.

declaration by the governments of France, Russia, and the UK on 24 May 1915 to describe that ‘Kurd and Turkish populations of Armenia has been massacring Armenians with the connivance and often assistance of Ottoman authorities’.<sup>37</sup> In a report on German and Allied belligerence written by the so-called Commission of the Fifteen, established at the provisional peace conference in Paris on 25 January 1919, the catalogue of ‘violations of the laws and customs of war’ was supplemented for the first time by a chapter on ‘violations of the laws of humanity’. An innovative approach to this principle was the Commission’s view that criminal offences, even when committed by heads of state, mandated individual criminal liability. No precise definition of the concept was given, but it overlapped with acts generally referred to as ‘war crimes’.<sup>38</sup>

Article 227 of the Treaty of Versailles thus enabled Kaiser Wilhelm II to be tried by an international court only ‘for serious violation of international morals’, while Article 230 of the non-ratified Treaty of Sèvres with Turkey of 10 August 1920 aimed to sanction those responsible for war crimes against the Armenian population.<sup>39</sup> However, it was only in the wake of the Second World War with the Nuremberg Trials and later, the Tokyo Trial against the Japanese political and military leadership, that litigation on the grounds of ‘crimes against humanity’ first took place.<sup>40</sup> On 13 January 1942, representatives of nine occupied European countries called for those guilty of war crimes to be punished in an inter-allied declaration signed at St James’s Palace, London. This was one of their main aims. They demanded the inclusion for the first time of acts that were neither covered by the concept of ‘war crimes’ or political crimes nor directly related to acts of war. Derived from the territoriality principle, those responsible were to be taken to the countries where they had committed the acts and punished according to the respective national law. Major war criminals were excluded from this principle.

The London Agreement of 8 August 1945 and its annexed Statute for the International Military Tribunal defined ‘[c]rimes against humanity’ as

murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or

<sup>37</sup> ‘France, Great Britain and Russia Joint Declaration’.

<sup>38</sup> Carnegie Endowment, *Violation*, 16, 73.

<sup>39</sup> Manske, *Verbrechen*, 37, 40–42, 46–47; Segesser, ‘Dissolve or Punish?’.

<sup>40</sup> Osten, *Tokioter Kriegsverbrecherprozess*.

persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>41</sup>

The separation of the term from the requirement of an active state of war was formalized in Act No. 10 of the Allied Control Council, which was passed on 20 December 1945 as the basis for the criminal prosecution of acts in occupation zones in accordance with the London Statute:

Those who are indicted under this provision, however, are not responding alone to the nations which have approved the principles expressed in the London and Moscow Agreements, they are answering to humanity itself, humanity which has no political boundaries and no geographical limitations. Humanity is man itself. Humanity is the race which will go on in spite of all the fuehrers and dictators that little brains and smaller souls can elevate to platforms of tinsel poised on bastions of straw.<sup>42</sup>

This additional development allowed a practice that, in the German post-war context, specifically would previously have been impossible (due to the country's unclear position under international law), on the grounds that interference in the internal affairs of a sovereign state must be prohibited.<sup>43</sup> Nuremberg had shown that '[w]here law exists a court will rise'.<sup>44</sup>

Building on the groundwork laid by the governments in exile in London and by the United Nations War Crimes Commission (UNWCC), founded in October 1943, the concept of 'crimes against humanity' was successfully implemented for the first time in the 1940s. Though it would be another half-century before the permanent International Criminal Court was established, the question of whether and how states could be held accountable for crimes against foreign and domestic civilian populations had been answered both legally and politically—using arguments that both appealed to the emotions of those involved in the criminal proceedings and instituted formative emotional templates for future efforts in the struggle for durable international criminal law. The feelings of the victims, the witnesses, and the survivors, but also the judges and prosecutors, had been adapted to a legal tradition that valued a certain emotional style in

<sup>41</sup> United Nations, 'Charter of the International Military Tribunal'.

<sup>42</sup> *Trials of War Criminals*, vol. 4, 498.

<sup>43</sup> Manske, *Verbrechen*, 46, 59, 69, 81, 86, 107–8, 149–53, 172–74; Lingen, *Humanity*, 193.

<sup>44</sup> *Trials of War Criminals*, vol. 4, 499.

the courtroom: rational, sober, but nevertheless rousing. This template proved to be highly effective, because those practising it—above all Ferencz—had very strong feelings about the court cases they brought forward, yet they aligned their emotional style with the ascribed emotional temperature of the law and included both politics and the public in their address.

In this respect, the emotional history of international criminal law contradicts conventional readings of human rights history, at least if it is understood—as Samuel Moyn, for example, understands it—as a ‘utopian programme’ that only achieved a breakthrough in the 1970s due to the fading appeal of other utopian ideals such as socialism and anti-colonialism.<sup>45</sup> The dedication of the network around Ferencz shows that long before the founding of non-governmental organizations like Amnesty International, the criminal sanction of human rights crimes was at the centre of legal disputes and political activities. Nevertheless, enforcement of these sanctions was not a foregone conclusion. The repeated demand for ‘human standards’ and ‘human behaviour’ in canonical legal texts and during the Nuremberg trials thus contradicts Lynn Hunt’s teleological view that an ‘order of feeling’ based on ‘imagined empathy’ had already existed since the eighteenth century, according to which ‘you know the meaning of human rights because you feel distressed when they are violated’.<sup>46</sup>

Incidentally, the centrepiece of this argument—the question of whether ‘crimes against humanity’ were offences against ‘humanity per se’ or rather contraventions of a minimum standard of what it meant to be ‘human’—is still highly controversial. At the International Criminal Tribunal for the former Yugoslavia (ICTY), in the ruling against Dusan Tadić, the view was expressed that ‘the proper meaning of a crime against humanity is not that it is a crime against the whole of humanity, but rather that it is a crime which offends humaneness, i.e. a certain quality of behaviour’.<sup>47</sup> This is exactly what Hannah Arendt had disputed a few decades earlier when she highlighted the shift in meaning that accompanied the imprecise translation of the English term ‘crimes against humanity’ into the German *Verbrechen gegen die Menschlichkeit*—instead of *Menschheit*, the German

<sup>45</sup> Moyn, *Last Utopia*.

<sup>46</sup> Hunt, *Inventing*, 214.

<sup>47</sup> International Tribunal, *Prosecutor v. Du[sko Tadi]*, 4. See also Manske, *Verbrechen*, 3.

term for the human race—‘as though the Nazis had simply been lacking in human kindness, certainly the understatement of the century’.<sup>48</sup>

‘TO SUPPLEMENT SYMBOLISM WITH SUBSTANCE’:  
THE POLITICAL DEVELOPMENT OF AN INTERNATIONAL  
CRIMINAL JURISDICTION

Hannah Arendt’s famous objection aligned with the journalistic and political commitment of numerous lawyers to further develop international criminal law in the twentieth century. Benjamin Berell Ferencz (born 1920 in Nagysomkút) contributed significantly to this development, alongside René Cassin (born 1887 in Bayonne), Jacob Robinson (born 1889 in Seirijai), Hersch Lauterpacht (born 1897 in Żółkiew), Bohuslav Ečer (born 1893 in Hranice), Raphael Lemkin (born 1900 in Bezwodne), and M. Cherif Bassiouni (born 1937 in Cairo). More recently, younger, female experts in the field of international criminal law have taken their place, including Amal Ramzi Alamuddin Clooney (born in Beirut, 1978), Fatou Bom Bensouda (born in Bathurst, 1961), and Carla Del Ponte (born in Bignasco, 1947). This global and intergenerational network of lawyers, prosecutors, university lecturers, activists, and lobbyists have shaped the development of the law and its institutions, but they have also influenced which emotions can be expressed and negotiated in this context. In a deliberate departure from other political fields, such as diplomacy, for example, this network has had a distinctly emotional and emotionalizing effect on the supposedly neutral and ‘unemotional’ arena of international criminal law. This is particularly apparent in the example of Ferencz and his legal lobbying. ‘It was clear to me’, he said,

that we need an international court to punish international crimes. I thought I would draw on the Nuremberg model and see where it took me. I was admitted to various NGOs, which gave me access to the United Nations. I sat in all meetings—nobody was serious. They kept telling me: Ben, stop it! There will never be an international court. The major powers will never accept that. To which my answer was: but I will try!<sup>49</sup>

<sup>48</sup> Arendt, *Eichmann in Jerusalem*, 275.

<sup>49</sup> *Man Can Make a Difference*, 1:14:33.

Ferencz and other advocates of so-called liberal legalism used every available opportunity to stress the necessity of consolidating a strong international criminal justice system.<sup>50</sup> The opportunities were plentiful, even though in the ongoing East-West conflict it was no longer Germany but the Soviet Union that had been declared the enemy, and the foreign policy momentum established during the Nuremberg trials was initially diminished. However, domestic political disputes took Nuremberg's place, triggered among other things by internal debates in the US over the Vietnam War.<sup>51</sup> The creation of new organizations such as the 'Foundation for the Establishment of an International Criminal Court', the 'Committee for an International Criminal Court of the World Association of Lawyers' (chaired by Ferencz himself), the 'World Peace Through Law Center', and the 'United States Institute of Peace' became milestones in the development of international criminal law, supplementing older organizations such as the 'Association Internationale de Droit Pénal', whose president M. Cherif Bassiouni would later to play a decisive role in the establishment of an 'International Criminal Tribunal for Yugoslavia'.<sup>52</sup>

Following the motto of 'Law, not War', Ferencz founded a 'one-man lobby',<sup>53</sup> participated as an accredited non-governmental observer in the meetings of the UN 'Special Committee to Define Aggression' in New York and Geneva and created his—notoriously underfunded and therefore somewhat unsuccessful—'Pace Peace Center' in 1987. He wrote several books on the definition and criminalization of wars of aggression, on the establishment of an International Criminal Court, and on the enforcement of international law.<sup>54</sup> He wrote to professors, senators, and US presidents.<sup>55</sup> He gave interviews and lectures. He made critiques and

<sup>50</sup> Goschler, 'Einleitung', 52.

<sup>51</sup> Taylor, *Nuremberg*; Ferencz, 'War Crimes Law'.

<sup>52</sup> Goschler, 'Einleitung', 70–71, referring to document 168. See also documents 173, 179–80, 186–87, 190, 223 in Goschler, Böick, and Reus, *Kriegsverbrechen*, 576–78, 586–89, 597–600, 603–5, 659–63.

<sup>53</sup> *Man Can Make a Difference*, 1:15:38.

<sup>54</sup> Ferencz, *Defining International Aggression*; Ferencz, *International Criminal Court*; Ferencz, *Enforcing International Law*; Ferencz, *World Security*; Ferencz, *Global Survival*.

<sup>55</sup> Benjamin B. Ferencz to M. Cherif Bassiouni, 12 September 1978 (document 178); Benjamin B. Ferencz to Gerhardt Grebing, 9 October 1979 (document 181); Benjamin B. Ferencz to Hans-Heinrich Jescheck, 29 May 1978 (document 176); Benjamin B. Ferencz to Edward M. Kennedy, 1 May 1972 (document 170); Benjamin B. Ferencz to Bill Clinton, 21 January 1993 (document 230), all in Goschler, Böick, and Reus, *Kriegsverbrechen*, 584–86, 589–90, 681–82, 573–74, 674–75.



appeals. Most of all, he managed to transform his experience as chief prosecutor in the Einsatzgruppen Trial into a kind of symbolic and emotional capital.<sup>56</sup>

When *The New York Times* published parts of the Pentagon Papers in 1971, thereby making public that the government of the US had deceived the American people about the reasons for the Vietnam War, Ferencz reacted with a letter to the editor signed ‘Benjamin B. Ferencz, Former Executive Counsel, Nuremberg War Crimes Trials’. He wrote:

The Pentagon Study of the Vietnam War (June 13) is a disclosure of Machiavellian duplicity. We have sent our young people to die in battle, we have devastated vast areas and we have slaughtered countless civilians on the pretense that we were defending allies from aggression. The record now seems clear that we betrayed our ideals as we arrogantly applied our power to further our political goals.<sup>57</sup>

This narrative was as disruptive as it was appealing: the US, once the pioneer of a just and possibly also judgemental world order, would not only have to sustain the ‘Nuremberg legacy’ but also apply it to its own policies. Ferencz’s approach was one of the well-controlled provocations. He called for a ‘more rational world order’ with a view to ‘replac[ing] the prevailing international anarchy with international law and order and the rational management of this little planet’.<sup>58</sup> In response to the Pentagon Papers, Ferencz went even further, suggesting that William Laws Calley Jr, the US Army officer responsible for the massacre in My Lai, be prosecuted under civil law.<sup>59</sup> ‘You will recall’, he wrote to colleagues and friends,

that at our luncheon meeting on June 14th, we considered the possibility of bringing a civil suit against Lieut. Calley and all of his superiors for

<sup>56</sup> Benjamin B. Ferencz to The Foundation for the Establishment of an International Criminal Court, 18 June 1970 (document 163); Benjamin B. Ferencz to Harold E. Hughes, 5 April 1971 (document 165), both in Goschler, Böick, and Reus, *Kriegsverbrechen*, 561, 564–65. See also Goschler, ‘Einleitung’, 16–17, 52.

<sup>57</sup> Benjamin B. Ferencz to The New York Times, ‘Comment on Pentagon Study’, 18 June 1971 (document 166), in Goschler, Böick, and Reus, *Kriegsverbrechen*, 566.

<sup>58</sup> Benjamin B. Ferencz to Robert Pickus, 22 June 1988, (document 211); Benjamin B. Ferencz to Samuel W. Lewis, 23 June 1988 (document 212), both in Goschler, Böick, and Reus, *Kriegsverbrechen*, 638, 640.

<sup>59</sup> On 16 March 1968, American soldiers killed over 500 civilians in My Lai. See Greiner, *Krieg ohne Fronten*; Jones, *My Lai*.

compensation to the My Lai victims. ... This would also be in line with the latest direction indicated by the Chairman of the ASIL Panel on the Human Rights Implementation that we try to concentrate on test cases as a specific technique for emphasizing various human rights points.<sup>60</sup>

Sentenced to life imprisonment in 1971, in 1974 Calley was pardoned by President Nixon, who had also immediately commuted his sentence to house arrest.

Elsewhere, however, Ferencz's aggressive strategy could be used in exactly the opposite manner, although the goal—to remind both the US public and its administrative elites of their traditional role in peacekeeping and upholding the rule of law—always remained the same. 'Dear Mr. [John] McCloy', Ferencz wrote to the former US High Commissioner in occupied Germany, hoping to promote his cause,

I am writing on a matter that I know is of deep concern to you—that of world peace. ... I would like to carry forward the great tradition of such outstanding Americans as Elihu Root and John McCloy .... If you are so inclined and can have a word with someone at the White House, or elsewhere, it would be much appreciated.<sup>61</sup>

Alternating between provocation and adoration, Ferencz's appeal to the feelings of his interlocutor was unpredictable and changeable in style and tone. The only thing that remained a constant was his lack of articulation of personal concern. The motto, 'humanity need not plead for justice with sobs, tears, and piteous weeping', formulated during the Einsatzgruppen Trial, characterized the journalistic and political work of the people around Ferencz, even when they were dealing with experiences of violence in the twentieth century which they themselves had witnessed or had lost loved ones to.<sup>62</sup> 'Should anyone want a troublemaker and iconoclast to foment a riot, I am available—in a nonforceful way', wrote Ferencz self-mockingly.<sup>63</sup>

<sup>60</sup> Benjamin B. Ferencz to Andrew F. Loomis, Bruce Rabb, Don Harkleroad, and Hope Eastman, 11 August 1971 (document 167), in Goschler, Böick, and Reus, *Kriegsverbrechen*, 568.

<sup>61</sup> Benjamin B. Ferencz to John J. McCloy, 1 March 1985 (document 193), in Goschler, Böick, and Reus, *Kriegsverbrechen*, 609–10.

<sup>62</sup> *Trials of War Criminals*, vol. 4, 497–98.

<sup>63</sup> Benjamin B. Ferencz to Ved P. Nanda, 16 December 1982 (document 189), in Goschler, Böick, and Reus, *Kriegsverbrechen*, 603.

It is also striking that within the available source material Ferencz neither mentioned nor reflected on his Jewish ancestry. Overall, the question must be asked whether the Jewishness of the ‘exile lawyers’ who contributed significantly to the development of international law in the twentieth century played any role at all, either conceptually or emotionally. Ferencz, for his part, decided to use other strategies for personal survival and political influence.<sup>64</sup> In addition to his other pursuits, he found kinship in a discourse in the 1980s that focused on the well-being of humanity from a (leftist) alternative perspective, linking individual self-realization to a collective responsibility for the environment and the economy, and thus also to questions of global humanity and solidarity.

His resulting collaboration with the New Age author Ken Keyes was by Ferencz’s own admission more effective and useful than his specialist publications.<sup>65</sup> After publishing a 129-page plea in 1985 for a rational world order and the peaceful regulation of conflicts, he and Keyes devised a utopian blueprint for a democratic world republic with a constitution and a court of justice.<sup>66</sup> Ferencz’s envisaged a civil society alternative to the UN Security Council—a Permanent Council of Peace composed of ‘renowned thinkers, spiritual, community and business leaders’. Such an institution would ideally be able to transcend all ideological conflicts by being guided by ‘common sense’, an explicit reference to Thomas Paine’s 1776 pamphlet of the same name and thus to the founding history of the US.<sup>67</sup>

As Constantin Goschler has pointed out, Ferencz’s initiatives, for all their pretension to global values, read like an attempt to ‘extend the constitutional model of the United States to the whole world’, presuming as he did that the rest of the world would be willing to adopt this model.<sup>68</sup> With a print run of around one million copies, Ferencz and Keyes’ book reached a wide audience, especially in the growing peace movement. It was, as Ferencz wrote, ‘a simple “outreach book”. It did more to educate the general public than all of my heavy tomes.’<sup>69</sup>

<sup>64</sup> A similar phenomenon can be observed for intellectuals of Jewish descent in East-Central Europe; see Arndt, *Rote Bürger*, 60.

<sup>65</sup> Ferencz, ‘Reaching Out’.

<sup>66</sup> Ferencz, *Common Sense Guide*; Ferencz and Keyes, *PlanetHood*.

<sup>67</sup> Goschler, ‘Einleitung’, 41–42.

<sup>68</sup> *Ibid.*, 42–43.

<sup>69</sup> Ferencz, ‘Reaching Out’.

The turning point for an international criminal jurisdiction finally came with the rape of 10,000 women in the former Yugoslavia. ‘American women ... were outraged. ... It was essentially a women’s movement that put enough pressure on Washington and the politicians to do something.’<sup>70</sup> This was followed by the genocide in Rwanda: ‘In the 1990s, we had made a promise that this would never happen again. And it did happen again, in front of our very eyes.’<sup>71</sup> ‘The time has come to supplement symbolism with substance’, wrote Ferencz in *The New York Times*:

Shocked by the disclosures at the Nuremberg trials, the first assembly of the United Nations declared genocide to be a crime under international law. A convention was drafted in 1947 requiring punishment of guilty individuals, regardless of rank. Recognizing that genocide usually involves connivance by state, the draft provided that if a national tribunal was not prepared to try the offense, the accused was to be handed over to an International Criminal Court. When the convention was adopted by the U.N., that enforcement provision was removed. There exists no international criminal court to try those guilty of genocide, terrorism, drug-trafficking, apartheid or other crimes against humanity. Little wonder that such crimes have continued unabated. The United States must stand for more than symbolism if it is to remain the leader of the free world.<sup>72</sup>

Ferencz became the voice of a worldwide movement calling for the establishment of an International Criminal Court, a movement in which representatives of various governments and non-government organizations alike had taken part since the end of the Cold War. Following the establishment by the United Nations Security Council of an ad hoc Criminal Court for Yugoslavia in 1993 and for Rwanda in 1994, negotiations on a statute for an International Criminal Court finally took place in 1998 at a diplomatic conference in Rome.<sup>73</sup> Ferencz was invited to speak at the event:

I have come to Rome to encourage your noble efforts. A great deal more needs to be done before the causes of international crimes are removed. But

<sup>70</sup> *Man Can Make a Difference*, 1:16:18.

<sup>71</sup> *Ibid.*, 1:16:52.

<sup>72</sup> Benjamin B. Ferencz to *The New York Times*, 18 October 1988 (document 213), in Goschler, Böick, and Reus, *Kriegsverbrechen*, 641–42.

<sup>73</sup> United Nations Security Council, ‘Resolution 827 (1993)’; United Nations Security Council, ‘Resolution 955 (1994)’; United Nations, *Rome Statute of the International Court*.

one thing is sure—without clear international laws, courts and effective enforcement there can be no deterrence, no justice and no world peace. Justice, reconciliation and rehabilitation are needed to bind up the wounds of humankind. Hope is the engine that drives human endeavor. It generates the energy needed to achieve the difficult goals that lie ahead. Never lose faith that the dreams of today for a more lawful world can become the reality of tomorrow. Never stop trying to make this a more humane universe. If we care enough and dare enough, an international criminal court—the missing link in the world legal order—is within our grasp. The place to act is here and the time to act is now!<sup>74</sup>

Once again, Ferencz succeeded in establishing an emotional template which—besides all of the cruelty and horror which the new court would have to deal with in the future—put hope and faith centre stage. However, his appreciation for the noble efforts of the international community to create a more lawful world did not prevent him from observing subsequent developments with scepticism. In 2003, when Ferencz was again asked to deliver a speech, this time to mark the ceremonial opening of the International Criminal Court, he was far more critical. Referring to his time in Nuremberg, he attacked his own government head-on for its opposition to international criminal jurisdiction and indirectly for the war against Iraq, which the US initiated in 2003 together with its ally Britain. ‘Let me close’, he concluded,

by citing only two very distinguished Americans. On May 15, 1958, my Supreme Commander in war, General Dwight Eisenhower, after he became President of the United States warned: ‘If civilization is to survive, it must choose the rule of law.’ Another distinguished Republican President said: ‘We have before us the opportunity to forge for ourselves and for future generations, a new world order, a world where the rule of law, not the law of the jungle, governs the conduct of nations.’ These words came in the Address to the Nation on Jan. 16, 1991 by US President George Bush. I think the current President would do well to listen to his papa.<sup>75</sup>

<sup>74</sup> Ferencz, ‘Ferencz Addresses Rome Conference’.

<sup>75</sup> Ferencz, ‘Remarks Made at the Opening of the ICC’.

## CONCLUSION

As stated in the preamble to the Rome Statute, the International Criminal Court addresses the violation of the values and rights held by the international community as a whole, '[m]indful that during this [twentieth] century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity'.<sup>76</sup> Its chief prosecutor since 2012, Fatou Bom Bensouda, has described just how challenging this work is in political, legal, and emotional terms: 'Nothing prepares you for the brutality of the crimes we face at international level. It is as if it sucks you in. It stays with you. You carry it inside you every day.' Nevertheless, she believes that the most important thing is to 'listen [to the victims of the crimes], formulate solid evidence from their stories and present it to the judges. So that they can act'.<sup>77</sup>

Bensouda and Ferencz represent not only 'the tension between individual and international law', but also 'the liberal antithesis to the concept of the sovereign state taken to extremes by the German constitutionalist Carl Schmitt in the 1930s'.<sup>78</sup> While Ferencz as chief prosecutor always remained factual and sober, as a former chief prosecutor he exhibited very different behaviour. Emotionalize, escalate, excite—he tried everything, precisely because he was no longer performing a legal duty but 'felt political' as part of a larger participatory politics which promoted international law. Because the courtroom called for a different template than the public sphere, he changed the register and the template too. This changed template was just as successful as the one he had practised in Nuremberg in the 1940s.

In the development of international criminal jurisdiction, emotions have been and continue to be both a motive and a driving force. They have enabled laws to become legally enforceable, and they have been used to push for the establishment of institutions and instruments whose task is to uphold fundamental human rights in times of peace and war. As the authors of bills of indictment, lawyers such as Ferencz, Clooney, or Bensouda were and are entrusted with investigating the crimes prior to the trial and with representing the prosecution during the trials. It was and

<sup>76</sup> 'Rome Statute of the International Criminal Court'.

<sup>77</sup> *Man Can Make a Difference*, 1:20:50.

<sup>78</sup> Goschler, 'Einleitung', 16.

still is the task of chief prosecutors to identify and collect the statements of witnesses and victims, to prove perpetrators' guilt, to transform this guilt into statements of claim, and in doing so, adequately address the mental and physical state of the parties involved, as well as to adhere to international law and agreements. Chief prosecutors thus have unique access to the emotional expressions of all parties involved, but at the same time they themselves are confronted with the task of constantly reflecting on and regulating their own feelings in the face of the most serious crimes.

In this multi-layered situation, advocates of international criminal jurisdiction developed a very specific emotional template, which shaped their attitudes and actions both in the courtroom and outside of it, and in this way has had an impact on international criminal law. While the ICC may have been new, the court as an institution was not, which meant that the emotional template could, on the one hand, adopt the legal tradition of rational habitus in the courtroom and, on the other, make strong political appeals to a wider international public. This became even more effective as the enormous crimes which had to be sectionized could not be captured by emotions. Just as feelings of vengeance should not be in the foreground, feelings like sadness and despair could scarcely be put into words and only with difficulty translated into law. Thus the emotional template resulted from a paradoxical situation: the allegedly unfeeling court needed compassion to come into being and to do its work, but simultaneously it had to strictly avoid any hint of emotional interference.

Feelings played a role in this context in that they have typically been understood as something both universal and individual, something that is distinctive to all people and yet can express itself in very different ways. Because of this, it was possible to place violations of the dignity of humanity itself, rather than of individuals, at the centre of the international criminal law debate. Just as Benjamin Berell Ferencz largely refrained from questioning witnesses in the Einsatzgruppen Trial, fearing that they would not survive the trial emotionally, when speaking to the Security Council Amal Clooney did not mention the fear and horror that Nadia Murad must have felt in the face of the suffering inflicted on her, but the fear 'that when all this is over, the ISIS men just shave off their beards and go back to their normal lives'. In terms of emotional history, this shift—away from the affected individual and their feelings of rage, anger, desperation, and grief, and towards collective responsibility, care, and hope—was a lynchpin in the development of international jurisdiction and its institutions.

International criminal jurisdiction was thus informed and institutionalized by emotions, while emotions themselves were given legitimacy and material weight. Horror, disgust, indignation, hatred, anger, revenge, remorse, and retribution were not acted out, however, and often were not even openly articulated, but were politically and legally transformed—into an international legal framework that addressed the community of nation-states as a whole, enabling them collectively to constitute a subject within international law. This community of states is tasked with protecting those rights in which humanity has a general interest and punishing serious violations against the peaceful coexistence of states and peoples, as well as ensuring elementary standards of humane treatment. Law, and international law in particular, is and remains political.<sup>79</sup>

AGNES ARNDT  
(arndt@mpib-berlin.mpg.de)

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<sup>79</sup> Schabas, *Frieden*.



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