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Sentimentalizing and Legal Language

Affect and Emotion in Courtroom Talk

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Abstract

In *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, the International Criminal Court tried the destruction of UNESCO World Heritage sites as a war crime for the first time. In this case, the value of things in relation to the value of persons became the central issue. Based on courtroom ethnography conducted during the proceedings and informed by affect and emotion research, this article identifies the rhetorical practice of sentimentalizing persons and things as an important process of legal meaning-making. Through sentimentalizing, all parties rhetorically produce normative arrangements of bodies by way of emotionally differentiating the relevant persons, things, and other entities from and affectively relating them to each other. Sentimentalizing provides an affective-emotional frame in which to determine the degree of guilt and innocence, justice and injustice.

Keywords: International Criminal Court (ICC), *The Prosecutor v. Al Mahdi*, UNESCO World Heritage, courtroom ethnography, law and emotion, law and affect

1. Introduction

The Prosecutor v. Ahmad Al Faqi Al Mahdi is the first case to be tried before the International Criminal Court that dealt not with the killing of persons, but with the destruction of things. When insurgent troops from the north of Mali occupied the city of Timbuktu in 2012, the accused oversaw the destruction of ten mausoleums and the door of a mosque;¹ all but one of these were listed as World Heritage sites by the United Nations Educational, Scientific, and

¹ The destroyed sites were: the Sidi Mahmoud Ben Omar Mohamed Aquit mausoleum (16th century); the Sheikh Sidi El Mokhtar Ben Sidi Mouhammad Al Kabir Al Kounti mausoleum (19th century); the Sheikh Alpha Moya mausoleum (16th century); the Sheikh Mouhamad El Micky mausoleum (19th century); the Sheikh Abdoul Kassim Attouaty mausoleum (16th century); the Sheikh Sidi Ahmed Ben Amar Arragadi mausoleum (19th century); the door of the Sidi Yahia mosque (15th century); the two mausoleums adjoining the Djingareyber mosque, namely the Ahmed Fulane mausoleum and the Bahaber Babadié mausoleum (14th century); and the Sheikh Mohamed Mahmoud Al Arawani mausoleum. All but the last mausoleum were listed by UNESCO as World Heritage sites.

Cultural Organization (UNESCO). Al Mahdi was tried for war crimes according to art. 8(2)(e)(iv) of the Rome Statute and sentenced to nine years' imprisonment. It was the shortest trial in the young Court's history and, for the first time, the accused pleaded guilty and signed a plea-bargaining agreement with the Office of the Prosecutor (OTP).² On the day of the pronouncement of judgment and sentencing, the judges gave an account of the scope of the crime constituted by the destruction of these buildings:³

Destroying the mausoleums, to which the people of Timbuktu had an emotional attachment, was a war activity aimed at breaking the soul of the people of Timbuktu. In general, the population of Mali, who considered Timbuktu as a source of pride, were indignant to see these acts take place. ... [T]he entire international community, in the belief that heritage is part of cultural life, is suffering as a result of the destruction of the protected sites (JSH: 12).⁴

The presence of emotion words in this passage is so striking that one cannot help but ask what role emotion and affect play in this case. Hundreds of people died in the Malian civil war of 2012–2013, among them many civilians. Hundreds of thousands were displaced. Nevertheless, it was the destruction of these ten small one-story structures, built out of mud bricks, that found its way first into international news all over the world, then onto the floor of the United Nations Security Council, and finally into the courtroom of the International Criminal Court. The destruction of the mausoleums of Timbuktu, not the killing of civilians, triggered the first and (so far) only conviction regarding the conflict in Mali. There are many different reasons for this – some of them concerning the practical problems of investigating and prosecuting international

² The proceedings consisted only of the initial appearance hearing on 30 September 2015, the confirmation of charges hearing on 1 March 2016, and a three-day trial from 22 to 24 August 2016. Judgment and sentencing were delivered on 27 September 2016. I visited the Court in The Hague and attended personally both the confirmation hearing and the trial proceedings.

³ Apart from English, the participants in the proceedings spoke either French or Arabic. There was simultaneous translation into these three languages in the courtroom. Court transcripts are available in English and French. These documents contain verbatim transcriptions of what the participants said in either English or French and a translation into either English or French when the participants spoke in the respective other language or in Arabic. In the main text of this article, I always present an English translation of what was said in the courtroom. When people spoke in English, I quote from the English transcript. When people spoke in French, I present my own translation of the French transcript (not the transcription of the simultaneous translation in the English transcript, which is not always of sufficient quality). When people spoke in Arabic, I present the transcription of the English simultaneous translation (a court transcript in Arabic is not available).

⁴ All quotations cited as 'JSH' are from the public transcript of the judgment and sentencing hearing on 22 August 2016. ICC-01/12-01/15-T-7-ENG.

crimes – and it would go far beyond the scope of this article to discuss them. This text is concerned with the legal meaning-making in which the relationship of persons to things, paramount in this case, is produced. My central argument is that what I call sentimentalizing persons and things lies at the centre of what the parties must engage in – either to make it plausible that Ahmad Al Faqi Al Mahdi, the destroyer of these mausoleums, must answer for his actions before the International Criminal Court, or to give grounds for his defence.

As will become clear, I do not use the word ‘sentimentalizing’ in its colloquial sense, i.e., ‘to treat, regard, or portray in a sentimental way’ (Stevenson 2010: 1622) or ‘to indulge in sentiment’ (Merriam-Webster 2003: 1134). In everyday language, ‘sentimentalize’ is generally understood to mean that a person uses heightened or even exaggerated emotional rhetoric to achieve a certain effect. Underlying this use of ‘sentimentalize’ is the idea that it would also be possible to speak without ‘sentimentalizing’, that is, without any emotion or affect, and in the presumably neutral atmosphere of the courtroom (and other legal contexts), that is how it should be. In this article, however, I am following the basic insight from social science research on affect and emotion that feeling and thinking are always interwoven, and that one cannot exist without the other (Burkitt 2014; Rosaldo 1984; Röttger-Rössler and Markowitsch 2009). It is my aim to show that the sentimentalizing of persons and things in the way I present it here is always present, in one way or the other, and is an integral part of legal meaning-making, even when the rhetoric used is not ‘emotional’ on the surface.

There is a tradition of interdisciplinary legal studies that takes the role of emotion and affect in legal processes seriously (Abrams and Keren 2009; Bandes 2001; Bandes and Blumenthal 2012; Bens and Zenker 2017; Maroney 2006). The law-and-emotion approach is united in criticizing the notion that – as an ideal – legal processes are free of emotion and affect. The ideal of the rational law is seen as being based on a theoretical foundation biased towards (mostly Western) rationalism and unable to stand up to rigorous empirical investigation. Instead of assuming or even striving for a law that is completely rational in its application, one should acknowledge and systematically explore the role of emotion and affect in legal processes. This article contributes to this strand of research.

As we will see, the most important contentious question in *The Prosecutor v. Al Mahdi* concerns the value of persons in relation to the value of things. Anthropologists are conscious of the fact that attributing personhood to humans as well as non-humans is an endeavor with important consequences (Freire de Andrade Neves 2017; Hirsch 2010; Jansen 2013). Actor-network theory (Latour 2005) and the anthropology of ontologies (Castro 1998; Descola 2005; Kohn 2015) are largely based on this premise. The law, anthropologists have argued, is

fundamental to distinguishing between and hence ‘making persons and things’ (Pottage and Mundy 2004). I believe that the process of sentimentalizing persons and things that I lay out in this article is key to understanding this process.

The findings I present in this article are derived from courtroom ethnography I have conducted during the case proceedings.⁵ The main action that occurs in courtrooms can in very general terms be described as people talking to each other, and an analysis of how this is done has traditionally been at the heart of courtroom ethnography (Brenneis 1988; Conley and O’Barr 2004; Danet 1980; Levi 1990; Mertz 1994). We have learned from the theorists of performative speech in the legal sphere (Austin 1962; Butler 1997; Derrida 1989) that what is said and done in the legal context not only linguistically *represents* the world, but that the language of law has significant performative power to *create* the structures of meaning through which the world is represented. Consequently, the trial (especially the criminal trial) can be analysed as a quasi-theatrical performance (Cole 2009; Diehl et al. 2006; Ertür 2015; Reinelt 2006; Vismann 2011). In this performative space, actors engage in narrative storytelling, and to analyse legal courtroom performances it is fruitful to investigate thoroughly these narratives (Amsterdam and Bruner 2002; Brooks 2006; Cover 1983; Jackson 1988; White 1985).

More specifically, I am interested in analysing what role affect and emotion play in courtroom rhetoric to make the speakers’ arguments appear plausible and believable. It is my argument that, in this case especially, the process of legal meaning-making cannot be properly understood without including how meaning in the legal process is constructed through sentimentalizing persons and things. I see sentimentalizing as a form of performative rhetoric that aims to qualitatively differentiate humans, things, and other entities through the attribution of emotions and to affectively position them in relation to each other. This approach implies that the relevance and value of the different entities in relation to each other are not pre-determined, but emerge in the process of sentimentalizing itself. To understand this phenomenon, I draw from two theoretical lines of thought: first, the anthropological research on the construction of emotion in discourse (Abu-Lughod and Lutz 1990), and second, some ideas that have come about in the course of the ‘turn to affect’ in the social sciences and the humanities (Clough and Halley 2007; Gregg and Seigworth 2010), which has also reached anthropology (Rutherford 2016).

⁵ Legal ethnographers, anthropologists, and other social scientists have investigated what goes on in courtrooms for some time, be it in Western contexts (Bennett and Feldman 1981; Conley and O’Barr 1990; Greenhouse et al. 1994; Merry 1990; Scheffer 2010; Yngvesson 1994), or non-Western or post-colonial contexts (Goldman 1993; Hirsch 1998; Messick 1992; Richland 2008).

First, it is important to differentiate between affect and emotion. Affect can be seen as a phenomenon of feeling and sensing that emerges in the relationality of bodies (Scheve 2017; Slaby 2016). Following Spinoza, many affect theorists conceptualize the body not in biological terms, but more abstractly as every entity that affects and is affected (Massumi 1995). It is therefore not predetermined whether bodies are human or non-human, persons or things, objects or subjects – a theoretical idea that bears some similarity to actor–network approaches (Latour 2004). I believe that talking about bodies in this sense helps us understand legal meaning-making in a context in which the loss of things can be felt at least as intensely as the loss of human life. I also argue that thinking about the relationality of bodies as an important component of affective rhetoric on a semantic level is crucial for understanding sentimentalizing rhetoric.

Emotions differ from affect in that they are characterized by various discrete qualities, while affect is often measured strictly in terms of intensity (Massumi 1995; Wetherell 2012: 57-58). Love is a feeling qualitatively different from hate; they differ in ways that go beyond the mere attribution of strength or weakness of the feeling. Charging bodies (attackers and victims) with different kinds of emotions not only positions them in relation to each other in a certain way, but qualitatively differentiates them as different kinds of bodies. Sara Ahmed (2004) has described how by ‘sticking’ signs to bodies, emotions can be circulated through language and rhetoric – establishing what she calls an ‘affective economy’. The aspect of attributing emotions to bodies in the way I describe in this article is a strategy to make them ‘stick’ and position them in an affective-emotional arrangement of meaning.

Drawing on the anthropology of emotions, the anthropology of affect, and the courtroom ethnography literature, the aim of this article is to show how sentimentalizing performances occur in the courtroom of the Al Mahdi proceedings. All of the parties involved – the prosecution, the defence, the representative of the victims, and the judges – engage in this affective and emotional meaning-making by charging bodies (persons as well as things) with emotions and relating them to one another in a certain way. To better understand the context of this courtroom talk, I will introduce some background on the armed conflict in Mali, the occupation of Timbuktu, and the criminality of the actions of the accused, Ahmad Al Faqi Al Mahdi, in destroying the mausoleums protected as UNESCO World Heritage sites. Then I will engage in an ethnographic description of the courtroom rhetoric during the legal proceedings before the ICC in The Hague to shed light on how the sentimentalizing of persons and things operates in practice.

2. The Armed Conflict in Mali and the Destruction of the Mausoleums of Timbuktu

In January 2012, violence broke out between forces of the national government in Bamako and insurgents in northern Mali. The international media painted the conflict as a struggle of Islamists to overturn the government in Bamako and erect a califate. While the increasing importance of identification with Islam in Mali is an important part of the story (Loimeier 2016; Soares 2006), to understand the conflict it is key to have a clear picture of the longstanding antagonism between Tuareg separatists in the north and the government in Bamako (Lecocq et al. 2013).

Even before Mali's independence in 1960, many Tuareg communities had struggled for an independent *Azawad* (a Tuareg homeland in the Sahara) that would include northern Mali and parts of Algeria, Mauritania, and Niger. In the pursuit of this political project, Tuareg groups have undertaken several rebellions in northern Mali (Lecocq 2010). To a large degree, the violence in 2012 was the result of yet another Tuareg uprising against the Bamako government. The main actor in the rebellion was the National Movement for the Liberation of Azawad (MNLA), which had started mustering Tuareg separatists in October 2011. What added to this Tuareg rebellion, however, was the involvement of both international and local jihadist Salafist movements with ties to the Tuareg community, including Ansar Dine and Al-Qaeda of the Islamic Maghreb (AQIM) (Lecocq et al. 2013). While AQIM is seen as a 'foreign organization' in Mali (although for the Tuareg and their trans-Sahara project, such labels do not carry much meaning), Ansar Dine has a more localized history.⁶ In this field of actors, tribal loyalty and jihad are closely intertwined factors, and the differences between the different insurgency groups remain subtle and are dependent on shifting tribal, economic, and religious alliances (Lecocq 2013).

In early 2012 the insurgents launched attacks on garrisons of the Malian army in the Sahara and had some military success, and by April 2012 the insurgents had occupied all major cities in the north, including Timbuktu. Azawad declared its independence from the southern part of Mali. But it soon became apparent that the mainstream Tuareg and the jihadist groups had very different visions of the future of the newly emerging state. This resulted in an internal conflict in northern Mali in which the Tuareg separatists of the MNLA began to fight against the jihadists of Ansar Dine, AQIM, and others. Beginning in July 2012, the United Nations Security Council

⁶ Ansar Dine was founded by Iyad ag Aghali, a key figure of the Tuareg rebellion in the 1990s who had broken with the idea of national independence and favored greater integration with the global Muslim world.

condemned the violence and finally authorized a military intervention.⁷ On 15 January 2013, France (the former colonial power in Mali) intervened militarily – after formally being invited to do so by the government in Bamako. In *Opération Serval*, 2,500 French soldiers took back the north of Mali from the armed groups. The one-year conflict in Mali displaced about 400,000 people, and the resulting humanitarian crisis far surpassed that of any of the previous conflicts.

Beginning in early April 2012, the two jihadist groups, Ansar Dine and AQIM, occupied Timbuktu for about ten months. In the early days of the occupation the leading body of the occupying forces approached Ahmad Al Faqi Al Mahdi, later accused before the ICC, and asked him to become head of the *Hisbah*, a morality brigade. Al Mahdi, at the time in his thirties, worked as a teacher and was considered an expert in Islamic law. He was a key figure in the occupation of the city for two reasons: not only was he ideologically close to AQIM and Ansar Dine but, more importantly, he was a local (unlike the leaders of the occupation), and it was hoped that he would be more trusted by the population of Timbuktu when the drastic new Islamic rules had to be implemented.

The purpose of the morality brigade was to prevent vice and promote virtue according to a fundamentalist interpretation of sharia law. In a televised interview, which was shown during the confirmation of charges hearing, Al Mahdi explained what kind of ‘visible vices in the streets’ should be punished by the *Hisbah* in an effort to eradicate them: ‘not wearing the veil, revealing one’s physical appearance, gender mix, smoking, photos, posters showing, for instance, forbidden slogans’ (CoCH: 45–46).⁸ Playing music of any kind was also forbidden in Timbuktu during the occupation. The members of the *Hisbah* under Al Mahdi patrolled the streets, organized radio broadcasts, and preached on Fridays. It was also their task to announce and justify the sentences of the Islamic tribunal, usually by reading them out through a megaphone in public. Among those ‘visible vices’ to be eliminated, the *Hisbah* also counted a widespread local religious practice: visiting the mausoleums of Islamic saints that are scattered throughout the city.

The mausoleums of Timbuktu are small, modest constructions made of mud bricks, no larger than a few square meters in area. They are built over the tombs of Islamic scholars who had distinguished themselves during their lifetimes through their intellectual and spiritual achievements. Believers often go to the mausoleums to pray and ask the dead ancestors for help

⁷ S.C.Res.2056, U.N.Doc. S/Res/2056 (Jul. 5, 2012); S.C.Res.2071, U.N.Doc. S/Res/2071 (Oct. 12, 2012); S.C.Res.2085, U.N.Doc. S/RES/2085 (Dec. 20, 2012).

⁸ All quotations cited as ‘CoCH’ are from the public transcript of the confirmation of charges hearing on 1 March 2016. ICC-01/12-01/15-T-2-Red2-ENG.

and counsel. The buildings must be regularly maintained by *crépissage*, a process similar to roughcasting, during which people climb up the walls to manually plaster them with mud. This upkeep is conducted by masons who come from families that traditionally care for certain mausoleums. Community members assist the masons in their work, turning *crépissages* into public events with many participants.

The worship of saints is considered an un-Islamic religious practice in Wahabi Islam – a mere superstition not rooted in the teachings of the Qur’an. In an effort to discourage people from praying to the deceased, Islamic law prohibits the building of structures on graves. Al Mahdi had been trying to discourage the people of Timbuktu from conducting religious practices at the site of the mausoleums for some time through his Friday sermons and radio broadcasts. After some time the decision was taken to destroy some mausoleums as a way of sending a powerful message to the locals regarding the new religious policy. Al Mahdi thoroughly researched which sites were most frequently visited by believers, wrote a Friday sermon in which the destruction was theologically justified, organized the tools for their destruction, and oversaw the operation, which took place from 30 June to 11 July 2012.

This act of destroying the mausoleums brought a new dynamic into the conflict. Immediately after the attacks – on 12 July 2012 – the government in Bamako referred the situation to the International Criminal Court, which formally opened an investigation on 18 September 2012. The UN Security Council referred explicitly to the destruction of the World Heritage sites in two resolutions in October and December 2012 and declared that ‘such acts may amount to crimes under the Rome Statute and that the perpetrators must be held accountable.’⁹ In January 2013, the ICC Chief Prosecutor submitted a report on war crimes in Mali in which the destruction of the mausoleums featured prominently. The report notes that ‘The destruction of religious and historical World Heritage sites in Timbuktu appears to have shocked the conscience of humanity.’¹⁰

Al Mahdi left Timbuktu with the occupying forces when French troops took back the city for the government in Bamako in January 2013. He was arrested by French forces in the desert of Niger in October 2014. In his confirmation of charges hearing in March 2015, Al Mahdi made a full confession as part of his a plea-bargaining agreement with the prosecution. The

⁹ U.N. S.C. Res. 2071 (2012); UN S.C. Res. 2085 (2012).

¹⁰ The Office of the Prosecutor, *Situation in Mali: Article 53(1) Report*, 13 January 2013, para. 157. See www.icc-cpi.int/itemsDocuments/SASMaliArticle53_1PublicReportENG16Jan2013.pdf

proceedings, therefore, were short, and arguments exchanged referred generally to the degree of the accused's guilt as a basis for his sentencing.

3. The Destruction of Cultural Heritage as a War Crime

The jurisdiction of the International Criminal Court is quite limited. Art. 5(1) of the Rome Statute, the multilateral treaty that establishes the Court and determines the kinds of proceedings it can conduct, restricts the jurisdiction of the ICC to 'the most serious crimes of concern to the international community as a whole'. There are currently only three kinds of criminal acts enumerated in the Rome Statute that meet this qualification: genocide (art. 6), crimes against humanity (art. 7), and war crimes (art. 8).¹¹ In 2010 the member states of the Rome Statute agreed on the definition of a fourth crime, the crime of aggression (going to war against international law), but it applies only to ratifying states, and only a few member states have thus far ratified the amendment.

Art. 8(2)(e)(iv) of the Rome Statute lists as a war crime 'intentionally directing attacks against buildings dedicated to religion ... [and] historic monuments ... provided they are not military objectives'.¹² The rule not to destroy religious buildings and historic monuments was already included in the first Hague Conventions in 1899 and was reaffirmed several times in multilateral treaties.¹³ There is also jurisprudence from the International Criminal Tribunal for the Former Yugoslavia (ICTY) relating to the bombardment and siege of Dubrovnik.¹⁴

As one can see from the provision, the Rome Statute does not specifically define as a war crime the destruction of an item listed as a UNESCO World Heritage. The act only qualifies as

¹¹ All articles not otherwise attributed refer to the Rome Statute.

¹² This provision only refers to the destruction of protected buildings in 'armed conflicts not of an international character', namely civil wars and other 'irregular' wars in which the fighting parties are not the armies of two or more warring states. Its mirror provision applicable in international armed conflicts (i.e., the 'classical war' between state armies) is Art. 8(2)(b)(ix) of the Rome Statute.

¹³ Art. 27 ('edifices devoted to religion') and art. 56 ('historical monuments') of the Convention with Respect to the Laws and Customs of War on Land (The Hague, 1899); art. 27 ('buildings dedicated to religion' and 'historic monuments') of Convention Respecting the Law and Customs of War on Land (The Hague, 1907); art. 53 ('historic monuments ... or places of worship which constitute the cultural or spiritual heritage of peoples') of the Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977; art. 16 ('historic monuments ... or places of worship which constitute the cultural or spiritual heritage of peoples') of the Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

¹⁴ *Prosecutor v. Jokic*, Judgment, IT-01-42/1, Trial Chamber, 19 Mar. 2004, at para. 51; *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-A, Judgment, Appeals Chamber, 17 Dec. 2004, paras. 359 *et seq.*; *Prosecutor v. Strugar*, IT-01-42-T, Judgment, Trial Chamber, 31 Jan. 2005;

a war crime if the World Heritage site includes a ‘building dedicated to religion’ or a ‘historic monument’ in the sense of Art. 8(2)(e)(iv). However, the ICTY decided in *The Prosecutor v. Strugar* and *The Prosecutor v. Jokic* that being listed as a UNESCO World Heritage site is a strong indicator that the site would also qualify as a ‘historic monument’ according to the Additional Protocols to the Geneva Convention.¹⁵ In its Al Mahdi judgment, the ICC has now strengthened this connection between the UNESCO list and the indication and qualification of such an act as a war crime.

This is not unproblematic. Anthropological scholarship has shown that cultural heritage is the result of complex ‘fabrications’ in legal regimes (Murphy 2004). We know that, from an anthropological viewpoint, UNESCO’s engagement in cultural heritage is not merely that of a detached protector of humanity’s cultural values; UNESCO is in fact deeply involved in *creating* these values in the first place (Meskell and Brumann 2015). UNESCO protects only the ‘right kind of culture’ as determined by certain actors (Nielsen 2011). In the case of Mali, the inclusion of the sites on the UNESCO list in 1988 is the result of longstanding negotiations between the Malian political elites in Bamako and the international community about what has and what does not have cultural value (Joy 2012, 2016).

4. Sentimentalizing Cultural Heritage and its Counter-Narratives

In a criminal trial, it is most obvious that there are competing parties with different interests. The prosecution, the defence, and the representatives of the victims all engage in the same type of activity: they talk. But what they talk about and how they talk about it aim at describing different versions of the facts. The different actors in a criminal trial produce and construct reality by performing competing narratives of the events constituting and contextualizing the perpetrator’s criminal act in an effort to persuasively substantiate their claims. I argue that one important aspect of this performative meaning-making in the courtroom is connected to the deployment of affect and emotion in order to charge and arrange bodies in a certain way that sentimentalizes persons and things.

4.1 The Prosecution: ‘Not a Crime of Stones’

The ICC’s chief prosecutor, Fatou Bensouda, gave two opening statements during the proceedings, one in March 2016 during the confirmation of charges hearing and another at the

¹⁵ Additionally, the ICTY decided in *The Prosecutor v. Prlic* that buildings not listed as UNESCO World Heritage sites can also enjoy that protection if they have ‘great importance for the cultural heritage of peoples’.

first day of the trial in August 2016. There are several levels of what I call sentimentalizing persons and things in her courtroom rhetoric.

The first level of sentimentalizing is very clear and up-front from a linguistic point of view. Bensouda and the other members of the prosecution team use a number of emotion words to attribute certain emotions either to the attackers of the buildings or to the victims, whether they be the inhabitants of Timbuktu, the citizens of Mali, the inhabitants of the continent of Africa, or humanity as a whole. The attackers are described as ‘coldblooded’ (CoCH: 12), ‘callous’, and full of ‘destructive rage’ and ‘contempt for these buildings’ (CoCH: 13). The victims are attributed with such emotions as ‘desperation’, ‘despair’, ‘dismay’ (CoCH: 12), ‘shock’, ‘anger’ (CoCH: 15), ‘outrage’ (CoCH: 16), and ‘humiliation’ (Trial Day 3: 7).¹⁶

Arlie Russell Hochschild (1979, 1983) has shown how all domains of life are governed by *feeling rules* – propositions regarding how people should feel in certain situations and contexts. Feeling rules go beyond mere display rules – the idea that it is inappropriate to show certain emotions in certain contexts. Feeling rules are not only about what emotions one is expected to *express*, but what emotions one is expected to *feel*. When the prosecution attributes certain emotions to different bodies (in this case the victims and the attackers), they do so in the context of the implicit feeling rules that apply to an international criminal trial (although these specific feeling rules might not be accepted or shared by all participants in the same way). These rules are implied and at the same time created by the rhetoric of the parties. By feeling, expressing, and acting on contempt, hate, or rage against mausoleums that are important to other people, the attackers of the mausoleums violated these implicit feeling rules. One should feel respect, humility, or even admiration.¹⁷ Victims, on the other hand, who are dismayed, shocked, and angered about the destruction of their cultural heritage, are in complete accord with the implicit feeling rules. Attributing certain qualitatively different emotions to bodies in such a way that some bodies appear to be in accordance with feeling rules and others do not is a way of arranging these bodies in a normative way. Their feelings and actions appear either justified or unjustified.

A second level of sentimentalizing regards specifically the non-human bodies – the buildings itemized on the UNESCO World heritage list – which play a major role in the case of Al Mahdi. They are the bodies violated, and to determine the degree of Al Mahdi’s guilt, it is

¹⁶ All quotations cited as ‘Trial Day 3’ are from the public transcript of the third day of the trial proceedings on 24 August 2016. ICC-01/12-01/15-T-6-ENG.

¹⁷ In other contexts, feeling rules are different. From the perspective of the jihadist groups, the appropriate feelings against the mausoleums might be contempt and righteous indignation in light of the religious abomination they represent.

crucial rhetorically to position them in the right place. When it comes to these kinds of bodies, the prosecution did not attribute emotions to them *semantically* – that is, through the use of emotion words. Rather, they attributed emotions to the buildings by way of metaphor and metonymy.

On numerous occasions, the chief prosecutor, Fatou Bensouda, described the destroyed buildings in metaphorical terms: the mausoleums ‘embodied Timbuktu’s image and identity’ (CoCH: 15); they were the ‘lifebloods’ of the Malian people (CoCH: 15-16) and ‘very important to the hearts of people’ (Trial Day 1: 16); they represented a ‘living testimony to Timbuktu’s glorious past’ (Trial Day 1: 17), ‘the embodiment of Malian history’ (Trial Day 1: 17), and a ‘living symbol of the city’ (Trial Day 1: 19).¹⁸ Speaking more generally about the nature of cultural heritage, Bensouda explained that ‘our ancestors’ have ‘put their hearts and their souls into the creation of such cultural heritage’ (Trial Day 1: 19). She also asserted that all international crimes, including the destruction of cultural heritage, have one common denominator, namely that ‘they inflict irreparable damage on the human person in his or her body, mind, soul, and identity’ (CoCH: 12).

In these descriptions there is a striking prominence of metaphors that refer directly to the biological body (‘body’, ‘embodied’, ‘incarnation’, ‘lifeblood’, ‘hearts’) or at least to living things, painting them as animate rather than inanimate bodies. Emotion research in the social sciences has highlighted the importance of metaphorical and metonymical speech for emotionalizing discourses (Ahmed 2004; Burkitt 2014; Hochschild 2016; Lakoff and Johnson 1980). When speakers use metaphorical language that refers directly to the physical or biological body, listeners are reminded of embodied experiences that are connected to certain emotions (Kövecses 2000).¹⁹

When we read metaphor as a means of sentimentalizing persons and things (hence qualitatively differentiating and relationally positioning bodies), an additional normative aspect becomes important: the act of describing the destroyed objects as living rather than as inanimate bodies arranges them closer to the human bodies involved in the proceedings. This links the

¹⁸ All quotations cited as ‘Trial Day 1’ are from the public transcript of the first day of the trial proceedings on 22 August 2016. ICC-01/12-01/15-T-4-Red-ENG.

¹⁹ Based on insights from linguistic studies on how certain forms of language such as metaphor (but also grammar (e.g., syntax), word combinations, ideophones, etc.) can be conveyed through language, a growing field of research is developing in computing. In what is called ‘sentiment analysis’, natural language use is analysed, typically in ‘big data’ settings (Liu 2010; Ravi and Ravi 2015; Taboada et al. 2011). Although such research is a very different endeavour in many ways from the one I undertake in this article, some of the underlying assumptions about the interplay of discourse and emotions are similar.

destruction of the things more immediately to the human victims of the crime. The prosecution tries rhetorically to arrange the destroyed non-human bodies and the involved human bodies in a way that they appear similar, close, and inextricably bound up with one another.

A third level of sentimentalizing prevalent in the prosecution's speech is analytically further away from traditional emotion research and comes closer to affect theory. On this level, the analytical focus is not on the use of emotion words or certain metaphorical language, but on the way bodies are semantically arranged and related to each other. In his closing remarks, the senior trial lawyer for the OTP, Jean Dutertre, summarized the relationship of the people of Timbuktu to the destroyed structures:

As Madam Prosecutor said to you in her opening statement, heritage is not a luxury item; it is not superfluous. Heritage is part of who we are; it is an extension of ourselves. Its destruction transforms us into travelers without any belongings, into beings without soul, history, or memory. The ten sites in Timbuktu that were targeted, attacked, and destroyed were an incarnation of the city and closely linked to the life of the inhabitants (Trial Day 3, French: 7).²⁰

This statement also has some sentimentalizing metaphors ('incarnation'), but more striking is the way the human and non-human bodies are arranged and related to each other. The heritage sites are described as a 'part of who we are', an 'extension of ourselves' without which people are 'travellers without belongings', 'beings without soul'. The things and the persons are arranged and related as bodies on the same level; sometimes they are even described as merging and becoming the same body ('part of who we are', 'extension of ourselves').

This arranging of bodies is not neutral. The way bodies are related and arranged makes listeners remember the affective intensity generated by the closeness to or distance from certain other bodies. Along with emotion attribution and emotionalizing metaphor, the relating and positioning of bodies is part of a rhetorical strategy to create an arrangement of bodies that feels plausible and within which the claims of certain normative statements appear just. If certain buildings are seen as bodies similar and close to ourselves, then the perpetrators are seen as bodies that we feel are not in the right position with their actions, while the victims are felt to

²⁰ All quotations cited as 'Trial Day 3 French' are from the public transcript of the third day of the trial proceedings on 24 August 2016, ICC-01/12-01/15-T-6-FRA ET WT 24-08-2016 1-76 NB T (translations from the French by the author).

be in exactly the right position. In this case, it also feels just to punish the perpetrator and compensate the victims.

After the prosecution had laid out its rhetoric, its specific version of sentimentalizing of persons and things, Bensouda uses it as a background for explicitly framing her argument in terms of affect and emotions:

I ask all of us to imagine, if only for a second, what it must have felt like, then, on that fateful day in 2012, that fateful period, to witness the wanton destruction of this cherished cultural heritage, a deliberate assault on one's identity, spiritual beliefs and prized cultural possessions (Trial Day 1: 20).

This question, like all rhetorical questions, now answers itself. It must have felt horrible. The people of Timbuktu must have felt desperate and humiliated; the destruction of the mausoleums must have induced dismay and rage. And that is also what the victims are actually feeling – at least according to the rhetorical representation of the prosecution. This rhetorical question only works, however, because it is posed against the background of a specific form of sentimentalizing that has been brought about by carefully deployed rhetorical strategies. All bodies are arranged in the right way and distinguished from another in such a way that the punishment of the perpetrator feels just. Key to this arrangement of bodies is the elevated status of the destroyed objects. 'Let us be clear', Bensouda brings home her point in her opening statement, 'what is at stake here is not just walls and stones' (CoCH: 13).

4.2 The Defence: 'What Crime is More Grave: Blowing up Buildings or Shooting Down People?'

The prosecution's strategies of sentimentalizing persons and things are of course designed to serve a specific purpose and are not the only ones possible. The defence is aiming for a different arrangement of bodies in which Al Mahdi's actions appear in another light and in which the idea of punishing him is not felt as passionately.

The rhetorical attribution of emotion can be found in the defence's speech as well, but the emotions are attributed differently than by the prosecution. Mohamed Aouini, Al Mahdi's lead defence lawyer from Tunisia, describes the emotional state of his client:²¹ 'Mr Al Mahdi had no

²¹ Mohamed Aouini spoke in Arabic; the quotations are from the transcription of the English simultaneous translation.

grudges, had no hatreds, had no ill feelings against any members of the community’ (Trial Day 3: 36). This statement is an initial step towards refuting the prosecution’s claim that Al Mahdi destroyed the buildings out of hatred or rage. In other words, Al Mahdi’s feelings towards the buildings and the people attached to them were neither inappropriate nor in violation of the implied feelings rules. Moreover, the defence contends that the accused has ‘regret’ and ‘remorse’ for his actions (Trial Day 3: 36) – feelings that are in accordance with the feeling rules expected in a situation where a confessed perpetrator tries to make up for what he has done.

The qualities of the destroyed buildings as bodies are again at the centre of the argument. One of Al Mahdi’s defence lawyers, the Belgian Jean-Louis Gillisen, takes issue with Fatou Bensouda’s argument directly and declares, ‘There has been *mens rea* for – and this is not to reduce the scope of the crime – there has been *mens rea* for a crime against stones. But this shall not downplay anything in any way’ (Trial Day 3 French: 56). At this point, the key difference in the competing arrangements of bodies becomes visible: either the World Heritage sites are merely a collection of stones or they are something more, something much closer to humans. The defence must try its best to convince the court of the former, and therefore does not engage in any metaphorical rhetoric regarding the destroyed World Heritage buildings. The defence’s goal of attaining a more lenient sentence made it necessary to argue that the destroyed objects are not like human bodies, not the living incarnations the prosecution had argued – at least not to the same degree.

When the International Criminal Tribunal for the Former Yugoslavia heard the cases relating to the siege of Dubrovnik (an operation in which 114 persons, including many civilians, were killed and many buildings designated as UNESCO World Heritage were destroyed), it handed down sentences of between six and seven years’ imprisonment for the commanders of the attack – significantly less than the nine years the prosecution was demanding in the Al Mahdi case. Jean Gillisen, Al Mahdi’s lawyer, comments on this obvious disparity:

In addition to the loss and destruction of cultural and religious values, as in this case, there were then also victims with severe injuries, permanent handicaps, and – as I said – also deaths: mourning families, wives who lost their husbands, husbands who lost their wives, children who will never see their parents again. All of this, we don’t have in this case. Yes, the crime is severe, but I call for reason, common sense, and moderation. At times today I had the impression that I was dealing with the opening of a concentration camp (Trial Day 3 French: 57-58).

Gillisen argues instead for arranging the human and non-human bodies so that they are not so close to one another and, most importantly, not on the same level:

There is a hierarchy of protected values. There is one supreme value. Is it necessary to repeat it here? It seems that I must. It is human life that supersedes all. That is the supreme value. ... The question that presents itself can be summarized like this: What is more serious, ... shattering objects or torturing humans, destroying walls or destroying lives, attacking buildings or attacking people? (Trial Day 3 French: 75).

The sentimentalizing of persons and things by the defence is strikingly different from the prosecution's. In the defence's normative arrangement, human and non-human bodies are further apart from each other. The non-human bodies of the mausoleums are not described as animated (which would relate them more closely to human bodies). Human bodies are clearly elevated above non-human bodies to underline that they, for all intents and purposes, are more important and valuable than things.

4.3 Representatives of the Victims: 'By Attacking the Dead They Actually Attacked the Living'

In the Al Mahdi case, a third party also engages in the sentimentalizing of persons and things. The victim group came to the proceedings relatively late and was composed of several citizens of Timbuktu who, in one way or another, were involved with the destroyed buildings, whether as masons, pilgrims, or in some other capacity. Their desired normative arrangement of bodies was similar to the one the prosecution was keen to establish, although there were also marked differences.

The representative of the victims, the Congolese lawyer Kassongo Mayombo, also engages in attributing emotion, most strikingly by questioning the sincerity of Al Mahdi's apology two days before. He asks, 'Is it sincere and does it flow from a genuine desire to repair the prejudice arising from the crimes?' (Trial Day 3 French: 30). He presents this question to dismiss the defendant's claim that he feels in accordance with the expected feeling rules, that is, regretful and remorseful.

In reference to his clients he attributes emotions similar to those mentioned by the prosecution and in line with what is implicitly expected from them. He describes them as 'depressed' (*abattu*), having 'vertigo' (*avoir des vertiges*), and 'feeling powerless' (*rester impuissant*), and he reports of 'their shame and suffering' (*leur honte et leur souffrance*) (Trial

Day 3 French: 20–21). He also deploys emotionalizing metaphors similar to the prosecution to describe the destroyed buildings:²² ‘Timbuktu is not only a mass of stones and tombs, a resting place for 333 saints and other mausoleums; it is indeed an incarnation of African civilization and its grandeur. Timbuktu is an incarnation of African Islamic intelligence and the science, philosophy, and spirituality it has developed’ (Trial Day 3 French: 25).

What differs markedly from the prosecution’s normative arrangement of bodies is that Kassongo introduces a third kind of body into the courtroom. Not only are human bodies and the bodies of the mausoleums as things arranged and related to each other, but the dead ancestors whose graves had been attacked are also brought into the equation: ‘By attacking the dead, Mr Al Mahdi and his group actually attacked the living’ (Trial Day 3 French: 22). In this normative arrangement, different kinds of bodies – the persons, the buildings, and the dead – are arranged in a way that they are similar and close to each other: attacking the dead means attacking the living.

The victims’ emotions are at the centre of their claim that their rights had been violated. The mausoleums were not their property, but their emotional attachment connected and related them to the World Heritage buildings. The violation of their religious feelings coincides with the violation of their rights: ‘Mr President, your Honours, it is the victims’ sentiment I want to bring to your attention: the sentiment that things are irreparable, the sentiment of suffering that has brought them to shouting and crying rather than to praying’ (Trial Day 3 French: 27).

4.4 The Chamber: ‘A War Activity Aimed at Breaking the Soul of the People of Timbuktu’

For the destruction of buildings dedicated to religion and historic monuments, Ahmad Al Mahdi was found guilty of war crimes according to Art. 8(2)(e)(iv) of the Rome Statute and sentenced to nine years in prison. In the judgment and sentencing hearing on 27 September 2016, the judges engaged in a sentimentalizing of their own. In the proceedings, they had been presented with very different normative arrangements of bodies that were designed to prompt very different assessments of the degree of Al Mahdi’s guilt. One either evaluates Al Mahdi’s actions within an arrangement in which buildings are inanimate bodies – inherently different from and of less worth than human bodies – whose destruction will not and should not be felt as deeply

²² There is an indigenous tradition in West Africa of anthropomorphizing architecture (Prussin 1974, 1986), which indicates that there is a pre-colonial practice of normatively arranging bodies in such a way that certain buildings are highly valued. It is important to clarify that sentimentalizing is not unique to the International Criminal Court or the World Heritage Regime of UNESCO, and cannot, even in this context, be easily dismissed as a ‘Western’ or (neo-)colonial imposition. I tend to argue that sentimentalizing is an integral part of many different processes of meaning-making.

as the loss of persons, or one evaluates Al Mahdi's action within an arrangement in which these mausoleums are in a way animate bodies like humans, incarnating the collective identity of the people of Timbuktu (and of all of humankind) such that their destruction should be felt as deeply as the loss of persons. Depending on how the relevant bodies are affectively arranged and how the emotions are distributed among them, the degree of the accused's guilt will be assessed radically differently.

Consequently, the judges commented on the normative arrangement of bodies that underpinned their judgment. They directly addressed the relationship of human and non-human bodies by clarifying:

As regards the gravity requirement, the Chamber first notes that, unlike other accused convicted by this Court, Mr Al Mahdi is not charged with crimes against persons but with a crime against property. In the view of the Chamber, even if inherently grave, crimes against property are generally of a lesser gravity than crimes against persons (JSH: 11).

In the Court's sentimentalizing, human and non-human bodies are clearly arranged in a hierarchical way. However, human bodies and the destroyed buildings are related to each other by attributing emotions to them. The Chamber considered 'that the fact that the targeted buildings ... had a symbolic and emotional value for the inhabitants of Timbuktu is relevant in assessing the gravity of the crime committed' (JSH: 12).

Key to the Court's relational positioning of bodies is that they see the human and non-human bodies connected by 'an emotional attachment' (JSH: 12). The population of Mali 'considered Timbuktu as a source of pride' and 'were indignant to see these acts take place' (JSH: 12). Because of these affective relations and emotional attachments, 'the entire international community, in the belief that heritage is part of cultural life, is suffering as a result of the destruction of the protected sites' (JSH: 12).

The Chamber produced yet another version of sentimentalizing persons and things, a version that had to engage with and react to – at least to some degree – the sentimentalizing of the various parties. The judges ultimately produced a normative arrangement of bodies that clearly differentiates between persons and things, but sees them as closely connected by an emotional attachment; breaking this attachment in an armed conflict constitutes a war crime.

5. Conclusions

Some bodies (be they human or non-human) are dearer, more important, and more valuable to us than others. In some cases, the destruction of certain bodies is considered an act so heinous that it qualifies as one of ‘the most serious crimes of concern to the international community as a whole’. The perpetrator of such a crime has to answer before the International Criminal Court. Which bodies are that dear, that important, and that valuable for all of humanity is obviously not dependent on the question of whether those bodies are human or not. Such an assessment and the legal process that brings it about seem to be far more complex. I have argued in this article that determining the meaning of persons and things as a basis for assessing the severity of a crime is embedded in a process of legal meaning-making that I have called *sentimentalizing persons and things*.

As has become clear, in the courtroom (and, of course, outside of it) there will never be only one normative arrangement that governs all the meaning-making regarding the value of different bodies. All parties in a debate engage in sentimentalizing and compete to impress upon the court the most plausible frame for assessing guilt or innocence, justice or injustice. Examining the process of meaning-making in the courtroom with a focus on the attribution of emotion and the semantic arrangement of bodies opens an analytical space to explore why some facts, some stories, some versions of reality are more plausible to some actors than others and why, therefore, certain legal outcomes and certain punishments for a crime feel more justified than others. Including affect and emotion in the analysis of courtroom performance can be a way to add an important dimension to exploring the categories of plausibility, legal decision, and perception of justice.

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