

SYMPOSIUM ON ART, AESTHETICS, AND INTERNATIONAL JUSTICE

ARISTOTLE IN THE HAGUE: ARTISTIC PLEADING AND EMOTIONAL THEATRICALITY IN INTERNATIONAL CRIMINAL PROCEEDINGS

*Emiliano J. Buis**

This essay contends that emotions provide an extralegal framework that can contribute to a better comprehension of international legal justice and the ways in which it works. The examination of two cases brought before the International Criminal Court (ICC)—namely *Ongwen* (ICC-02/04-01/15) and *Al Mabdi* (ICC-01/12-01/15)—identifies how the parties in the process attempt to harness the power of emotion in their pleadings and arguments. This examination fosters a better understanding of the dramatic nature of international trials.

Reassessing the Role of Performance

In ancient Athens, both theater and tribunals were social rituals deeply structured to include a performative dimension. In the courts and on the stage, Athenians employed their persuasive skills to appeal to the public and to judges: by a lively interplay between word and gestures, the actors and litigants were involved in a dialectical interaction with judges and the public that has been identified as a process of self-dramatization.¹

Given this theatricality of justice, examining the nature of tragedy can help us understand the logics of criminal trials. According to Aristotle's *Poetics* (VI 1449b 2–3), “tragedy . . . is enacted, not [merely] recited, and through pity (*eleos*) and fear (*phobos*) it effects relief (*katharsis*) to such [and similar] emotions.”

Tragedy then includes an artistic use of language that produces emotions giving rise to a sort of purification, purgation, and intellectual clarification.² The representation of tragic drama therefore implies, in metaphorical terms, a cure or relief of the state of mind and feeling by means of an emotional and aesthetic experience. As if it were a remedy, when watching tragedy, the audience learns how to feel these emotions at proper levels, reinstating a lost balance.³

Aristotle's lesson could also be applied to forensic oratory, where speakers were expected to behave like trained actors playing a role in front of an audience that ought to be convinced. This dramatic nature of legal pleading, however, has been mostly ignored in modern times.⁴ Law is conceived today as a domain of reason, separated

* *Professor in Law and Classics at the University of Buenos Aires and Permanent Researcher at CONICET.*

¹ Edith Hall, *Lawcourt Dramas: The Power of Performance in Greek Forensic Oratory*, 40 BULL. INST. CLASSICAL STUD. 39–58 (1995); see also RICHARD GARNER, *LAW AND SOCIETY IN CLASSICAL ATHENS* 97 (1987).

² Cf. ARISTOTLE, *POETICS* 276–79 (Donald William Lucas ed., 1977).

³ Leon Golden, *Catharsis*, 93 TRANSACTIONS & PROC. AM. PHILOLOGICAL ASS'N 51–60 (1962).

⁴ Cf. ANTOINE GARAPON, *L'ANE PORTANT DES RELIQUES: ESSAI SUR LE RITUEL JUDICIAIRE* (1985); KATHY LASTER ET AL., *THE DRAMA OF THE COURTROOM* (2000). On the ways in which sensational trials capture the public imagination, see LAWRENCE M. FRIEDMAN, *THE BIG TRIAL: LAW AS PUBLIC SPECTACLE* (2015).

from the more subjective features of art and dramatic representations in which a *katharsis* of emotions takes place. In law there seems to be little or no place for sentimental considerations, since the legal realm is regarded as a technical tool to overcome the passions of violence and restrain the effects of emotional retribution. In contemporary international justice, the absence of emotions is even more noticeable and seems to be flagged as one of its advantages: criminal procedures at the ICC have created a myth of rationality that conceals the rhetorical recourse to an affective machinery and rejects the open display of emotions. I believe, however, that international law cannot be fully understood without paying attention to the emotions that permeate it.

An Emotional International Criminal Law?

Almost twenty years ago, Susan Bandes argued that domestic law is pervaded with emotions, especially in criminal law.⁵ Nonetheless, many assume that judges should refrain from displaying any sort of emotional bias. There is a conventional image of a judge acting as a composed and unemotional person, a “persistent cultural script of judicial dispassion.”⁶ This view is not innocent. It masks that emotion and reason are not opposite but rather depend on each other. It also hides the existence of a conscious adjustment of feelings and expressions in the judiciary, an operation that Arlie Hochschild has called “emotion management.”⁷

This debate has not extended to the international field. Very few scholars have discussed the emotional bias of judges sitting in international tribunals, and then only to perpetuate the denial of emotional display.⁸ Such is the case in international criminal law, where the ICC from the very beginning has cultivated a rationalized image based on legal legitimacy, due process, and institutionalized complementarity in order to avoid the allegedly political nature of the military tribunals of Nuremberg and Tokyo and of the ad hoc tribunals for the former Yugoslavia and Rwanda.⁹ Yet it seems crucial to address the way in which emotions, as well as the cultural values related to their display,¹⁰ infiltrate the realm of the ICC, which can be better achieved if we understand the theatrical and artistic background of criminal trials.

To this end, Aristotle becomes a useful source, since he was among the first to understand the role that emotions (*pathe*) could play in the pragmatics of judicial performances. In his *Rhetoric*, Aristotle identified three “artistic” proofs (*pisteis entekhnai*) to persuade the audience through well-built speeches (*Rhet.* I.3, 1358a37ff). These pieces of evidence, which the orator had to provide, included the character of the speaker (*ethos*), the emotional state of the hearer (*pathos*), and the argument itself (*logos*). In Aristotelian terms, then, the arousal of emotions was one of the strategies that could be used by an orator when trying to engage his audience. Judicial trials manipulate affection in order to restate an emotional balance before the audience, producing an effect which could be qualified as cathartic. Through the release of *pathos*, a forensic speech plays a didactic role, since it can teach the desired social ways of behavior and inculcate the value of justice, punishment, and acceptance.

⁵ Susan Bandes, *Introduction*, in *THE PASSIONS OF LAW* 1 (Susan Bandes ed., 1999).

⁶ Terry Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CAL. L. REV. 629–81 (2011).

⁷ Arlie Russell Hochschild, *Ideology and Emotion Management: A Perspective and Path for Future Research*, in *RESEARCH AGENDAS IN THE SOCIOLOGY OF EMOTIONS* 117–42 (Theodore D. Kemper ed., 1990).

⁸ Vesselin Popovski, *Emotions and International Law*, in *EMOTIONS IN INTERNATIONAL POLITICS: BEYOND MAINSTREAM INTERNATIONAL RELATIONS* 184, 185 (Yohan Arriffin et al. eds., 2016).

⁹ Robert Nozick has stressed the idea that revenge is opposed to the disinterestedness and “dispassion” that are typical to just punishment. ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 366–67 (1981).

¹⁰ On emotions as cultural construct in recent scholarship, see LISA FELDMAN BARRETT, *HOW EMOTIONS ARE MADE: THE SECRET LIFE OF THE BRAIN* (2017).

The ICC, the Circulation of Emotions, and Judicial Katharsis: Ongwen's Childhood, Al Mahdi's Apology

Two contemporary examples of ICC proceedings are useful to examine how the Aristotelian theory on the theatrical role of emotions can contest the alleged dispassion of justice. In both case studies, we can perceive a construction of *ethos* based on emotional rhetorical arguments.

When indicted in December 2016, Dominic Ongwen was a brigade commander of the Lord's Resistance Army, a group of armed insurgents that were fighting the Ugandan government. The strategy of the defense was to appeal to the manipulation of shared emotions in order to suppress his negative image. The defense presented a detailed account of Ongwen's past experiences as a child soldier and argued that Ongwen suffered from a psychological disability as a result of victimization during his youth. At the confirmation of charges hearing, the defense argued that at the moment of his recruitment, he was an "innocent child who lacked the slightest tendency to violence or illegality."¹¹ The rhetorical strategy of the defense attorneys was to draw a parallel between Ongwen and his actual victims, generating a flow of emotions in order to convince judges and spectators that it would be unjust to hold him responsible. The defense also employed this affective tactic during the trial. In its opening statement, the defense revisited the idea that the accused was a victim himself, a child who had grown up in an environment of extreme brutality,¹² thereby emphasizing that it was a mistake to consider him a perpetrator when in fact he had been victimized by a violent system that shaped his code of conduct without him knowing about it. The rhetorical effect had a clear aim: Ongwen deserved to be pitied, since anyone could have experienced a similar tragic destiny after suffering from the same dramatic incidents he lived.

This appeal to pity is extremely interesting and rhetorically efficient. When referring to *pathe* as a structural element of argumentative speech, Aristotle defined pity (*eleos*) as "a feeling of pain caused by the sight of some evil, destructive or painful, which befalls one who does not deserve it, and which we might expect to befall ourselves or some friend of ours, and moreover to befall us soon" (*Rhet.* II.8.2-5, 1385b13–16). What is meaningful here, for the purpose of our reading of the manipulation of compassion in a criminal courtroom, is that Aristotle's conception implies undeservingness, since only those who are good citizens and have fallen into a situation of vulnerability are considered to be unjustly affected and therefore deserving of pity.

In the final part of the statement, nevertheless, Ongwen's defense returned to rationality by appealing to the professionalism of judges in asking them to analyze evidence impartially despite the highly emotional context of the case. The crimes at stake, including sexual violence, were so emotional and controversial that the intense and immediate reactions that those crimes could generate needed to be restrained by the work of objective and dispassionate judges. At this crossroads between producing specific feelings and calling for a rational response, the defense pleading promoted a cathartic reaction, since the function of judging ends up being assimilated to a tragic mechanism of relief in which a careful emotional balance is necessary to ensure justice.

On the basis of these considerations, the defense raised two grounds for the exclusion of criminal responsibility: the suffering of a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct or capacity to control his or her conduct to conform to the requirements of law (Article 31(1)(a) of the Rome Statute); and, alternatively, duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, if the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided (Article 31(1)(d) of the Rome Statute).

¹¹ Prosecutor v. Dominic Ongwen, Case No. ICC-02/04-01/15, [Transcript of the Confirmation of Charges Hearing](#), 41, lines 16–17 (Jan. 25, 2016).

¹² Prosecutor v. Dominic Ongwen, Case No. ICC-02/04-01/15, [Transcript of the Trial Opening Statement](#), 6 (Sept. 18, 2018).

Emotional references were also present in the statements made by the Office of the Prosecutor, especially when discussing the gravity of the crimes. However, in this case, the sentimental input was restrained by the need to strike a balance with the objectivity required to protect the Office's institutional credibility. In his opening statement, the Prosecutor explained that those who would follow the case with interest would "experience shared feelings": whereas they might be "horrified" by those acts committed by Ongwen, at the same time they could feel sympathy.¹³ Rejection and understanding, disgust and mercy interacted in the speeches by the defense and the Prosecutor's Office. The value of emotions dealing with guilt or mercy cannot be underestimated when examining the strategies displayed at the ICC. Manipulating affection can have a rhetorical effect on how others perceive a crime. The display of emotions by the Prosecutor and the defense helps to release the strong or repressed passions involved in the trial, therefore providing cathartic relief for judges, the public, and counsel alike.

The defendant in the second case, *Ahmad Al Faqi Al Mahdi*, was a member of the armed movement Ansar Eddine in Mali. The ICC issued an arrest warrant for him at the end of 2015 for the commission of the war crime of directly attacking cultural property. Between June and July 2012, Al Mahdi destroyed nine mausoleums and a mosque in Timbuktu, perhaps the most famous historical and religious monument in the Islamic Maghreb. After his referral to the ICC in September 2015, Al Mahdi negotiated with the Prosecutor's office a guilty plea in accordance with Article 65 of the Rome Statute. At the beginning of the trial, he acknowledged his responsibility in a heavily emotional confession.¹⁴

His admission of guilt was complemented by the persuasive aspect of apology, which had a practical effect; when the trial ended two days later, Al Mahdi was only sentenced to nine years of imprisonment. Although many victims who had felt "humiliated" by the destruction of cultural property strongly contested his acts,¹⁵ it seems clear that empathy played an important role in the determination of punishment.¹⁶ This case shows that the theatricality of an admission of guilt, based on the persuasive implications of forgiveness and repentance, serves an emotional purpose in achieving a legal goal in criminal proceedings. Unlike many local residents in Timbuktu, the ICC judges seemed to have taken into account his expression of deep remorse and grief, in which he placed himself as a repented victim next to his family, the community of Timbuktu, his country, and the international community. The Court also emphasized the solemn promise made by Al Mahdi that it would be the first and the last illegal act he would commit and that he was willing to accept the Court's decision.¹⁷ In fact, the judges rejected the submissions of some victims and found that Al Mahdi's sense of empathy for the victims was real, for example, by pointing out that he had offered the Imam of the mosque of Sidi Yahia to refund the cost of the destroyed door.¹⁸ In fact, the nine-year sentence he received shows the successful emotional effect of his plea in the jurists' mind.

In the reparation order, the Court took into account the emotional and symbolic value of the destroyed buildings, asserting that their destruction had conveyed a message of terror and vulnerability.¹⁹ Given this feeling, the judges acknowledged that some victims of his acts considered that the apology which accompanied his plea was insufficient. As a measure of satisfaction, the Court gave an order to broadcast the video of apology in the local

¹³ Prosecutor v. Dominic Ongwen, Case No. ICC-02/04-01/15, [Transcript of the Prosecutor's Statement](#), 36, lines 5-7 (Dec. 6, 2016).

¹⁴ Cf. Prosecutor v. Dominic Ongwen, Case No. ICC-02/04-01/15, [Transcript of the Admission of Guilt](#) (Aug. 22, 2016).

¹⁵ This is shown in Karima Bennoune's [expert brief](#) in the reparations phase of the case. Prosecutor v. Ahmad Al Faqi Al Mahdi, Case No. ICC-01/12-01/15, [Brief by Ms. Karima Bennoune](#) (Apr. 27, 2017).

¹⁶ Cf. Jonas Bens, [Sentimentalizing and Legal Language Affect and Emotion in Courtroom Talk](#) (SFB 1171 Affective Societies Working Paper 04/17, 2016).

¹⁷ Prosecutor v. Ahmad Al Faqi Al Mahdi, Case No. ICC-01/12-01/15, [Judgment and Sentence](#), para. 103 (Sept. 27, 2016).

¹⁸ *Id.* at para. 104.

¹⁹ Prosecutor v. Ahmad Al Faqi Al Mahdi, Case No. ICC-01/12-01/15, [Reparations Order](#), para. 22 (Aug. 17, 2017).

language so that the people of Timbuktu could access its content.²⁰ If victims of international crimes needed to feel that judicial measures existed in order to help them overcome their emotional trauma,²¹ then disseminating the image of a repentant convicted person was an efficient technique to support the efforts of justice by generating a sentimental impact related to the role of conviction.

The Court's final decision considered "the emotional distress and prejudice suffered by the whole community of Timbuktu,"²² and therefore recognized a general sentimental connection that allowed for collective reparations and did not require proof of specific or direct damage.²³

The *Al Mahdi* case shows that judges did not exclude emotions such as hatred, disgust, compassion, or clemency, despite the fact that this sentimental influence is often perceived as contrary to the antiseptic work that many expect from the activities of an international tribunal. Emotions not only define the perceptions that judges, prosecutors, the accused, and defense attorneys have of themselves, but also influence others by awakening certain reactions. As in tragic *katharsis*, the affective exchange between those who participate in the judicial process serves to endorse expressions of positive values and purge the negative effects related to the commission of grave crimes.²⁴

Conclusion

The theatrical manipulation of emotions and the strategic use of affect in the courtroom demonstrate the desire to exercise control over the shared subjective experiences and lead us to the need to identify the "sentimental education" that can arise during ICC proceedings. A more comprehensive vision of court experiences requires considering the dramatic operations related to the endorsement of empathy or repulsion. The emotional component, which has been traditionally concealed in legal studies, becomes, in my opinion, an essential tool for understanding the verbal and physical interactions that define—as Aristotle could have put it—the cathartic role of trials and the rhetorical and "theatrical" staging of international justice.

²⁰ *Id.* at paras. 68–70.

²¹ Susanne Karstedt, *The Emotion Dynamics of Transitional Justice: An Emotion Sharing Perspective*, 8 EMOTION REV. 50–55 (2016).

²² Prosecutor v. Ahmad Al Faqi Al Mahdi, Case No. ICC-01/12-01/15, [Reparations Order](#), para. 86 (Aug. 17, 2017).

²³ *Id.* at para. 88.

²⁴ In this sense, the emotional dimension can complement the expressivist perspectives that others have recently acknowledged in international criminal justice, since it provides relevant inputs on how to understand the strategic agendas of different legal actors who legitimate their role in the context of international criminal courts. Cf. Barrie Sander, *The Expressive Turn in International Criminal Justice: A Field in Search of Meaning*, 32 LEIDEN J. INT'L L. 1–22 (2019).