INTRODUCTION

Affect, Emotion, and the Law

> *Die formalen Qualitäten des Rechts entwickeln sich dabei aus seiner Kombination von magisch bedingtem Formalismus und offenbarungsmäßig bedingter Irrationalität im primitiven Rechtsgang … zu zunehmend fachmäßig juristischer, also logischer Rationalität und Systematik und damit – zunächst rein äußerlich betrachtet – zu einer zunehmend logischen Sublimierung und deduktiven Strenge des Rechts und einer zunehmend rationalen Technik des Rechtsgangs.*[1]
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> Max Weber, *Wirtschaft und Gesellschaft* (1921)

In May 2017, two and a half years after starting the research project of which this book is the outcome, I approached the headquarters of the International Criminal Court (ICC) in Scheveningen, on the outskirts of The Hague, the capital of the Netherlands. As I had done many times before, I walked along the footpath leading from the bus station to the Court's main entrance. On that particular day, however, for some reason I stopped and looked more closely at the huge sculpture in front of the building (Figure i.1).

Although it is prominently positioned in front of the ICC, I had not paid it any attention before. The artwork, a metal and concrete structure, is several meters wide and at least five or six meters high. At first sight it appears to be an abstract cubist form, made up predominantly of straight lines and sharp angles. Suddenly finding myself curious about this sculpture, I read the small plaque in front of it. It told the visitor that this work of art, called *The Gift* by artist Navid Nuur, was presented by the Netherlands to the ICC to mark the official opening of the new permanent premises of the ICC in 2016. The "powerful and energetic sculpture," the plaque read, "is based on salt crystals found in tears and in the water of the nearby sea. These elements," the explanation

Figure i.1 *The Gift*, a sculpture by Navid Nuur in front of the permanent premises of the ICC in The Hague. (A black and white version of this figure will appear in some formats. For the color version, please refer to the plate section.)
Source: Jonas Bens

continued, "symbolise the universal expression of the emotions of joy and sorrow and the sea that connects all continents." I was astonished. This sculpture claimed to represent precisely those things that I was researching, that is, how international criminal justice as a transnational phenomenon is embedded in affective and emotional dynamics.

From the beginning of my research in 2015, I knew that the workings of international criminal justice could not be observed in one place only. The legalized and politicized processes of coming to terms with a past of large-scale violence, often called *transitional justice* (Teitel 2000; Hinton 2010b; Buckley-Zistel et al. 2013), become manifest in all kinds of different locales. To observe this globalized process I was prepared to go to multiple field sites for my ethnographic work (on multisited fieldwork, see Marcus 1995) and to engage in "deterritorialized ethnography" (Merry 2006b, 28). I decided to start my fieldwork at the most obvious site, the courtroom of the ICC, and to take it from there. I soon became most interested in the case *The Prosecutor* v. *Dominic Ongwen*, in which a former high-ranking commander of

the Lord's Resistance Army (LRA), a rebel militia from northern Uganda, was being tried for war crimes and crimes against humanity. I decided to follow the case back to northern Uganda and to visit the places where the alleged violence had been perpetrated. I wanted to find out how transitional justice would find its way from the courtroom to Uganda and back again. This book recounts my exercise in deterritorialized ethnography in order to come to terms with this transnationally globally legalized process. With its reference to "the sea that connects all continents," Navid Nuur's sculpture was already pointing to that transnational dimension of justice.

The second remarkable aspect of this work of art was that the plaque's text connects this global, even universal, aspiration for international criminal justice to the salty tears of joy and sorrow. I found all this paradigmatic of my entire research project. When I started to investigate the role of affect and emotions in international criminal justice, I had expected it to be an interesting but somewhat difficult thing to do. Affect and emotions are generally seen as antithetical to legal forms and processes. The law demands reason and tries to exclude emotions. Affective dynamics trouble the law. From what I had read in the literature on law-and-emotion research, the law is always keen to obscure its affective and emotional undercurrents (Bandes 2001; Bornstein and Wiener 2010). I had already been to the Court dozens of times to attend proceedings. Spending hours and hours in the public gallery, I was always on the lookout for emotions and where I might find them, wondering how I would be able to recognize the affective elements and dimensions that I assumed must be present. And during all this time there was this unmistakable attempt to represent the universality of emotions directly in front of me, in metal and concrete, meters high and tons in weight, staring me in the face every day as I walked by. I had failed to see it because I was not schooled in where to look for it. Like this sculpture in front of the ICC, affect and emotions in international criminal law are hidden in plain sight. They are everywhere, clearly visible, obtrusive even, but one has to learn how to see them.

I suppose I had not made the connection between the large sculpture and the emotions it was intended to symbolize mainly because of its outward appearance. The straight lines, the sharp angles, the cubic form, the steel and concrete, the crystalline structure – these features did not express emotionality and affectivity to me. Rather, to my mind this sculpture symbolized the "iron cage" of rationalized modernity, to borrow Max Weber's famous phrase (1905, 108).[2]

In his monumental work *Economy and Society* (1921), Weber provides a grand theory of European modernity and the role of law in it. Modernity, according to Weber, means rationalization. In European modernity, reason increasingly governs all aspects of human life in society: economy, science, politics, bureaucracy, family, personal relationships. The main instrument for realizing this proliferation of reason is the law. To rationalize, and therefore modernize, society means, for Weber, to legalize it. Weber's analysis is certainly intuitive. In the more than one hundred years since Weber published his most celebrated works, modern law has indeed conquered the world. The system of international criminal law, with the ICC at its center, is certainly one important example. But for all the ingenuity and insight with which Weber analyzed and described modernity, he was certainly also afraid of it. His theory of reason is a theory of disenchantment. For Weber, "reasoning" means pure thinking, a thinking purged of magic, of religion, and, most importantly, of passion. Legal reasoning, first and foremost, means thinking *without* feeling. Weber's modernity is steel and concrete – not unlike the sculpture in front of the ICC. He even famously described the future of the modern world as "the polar night of icy darkness and hardship" (1919, 66).[3]

Such a conception of rational modernity can easily amount to a cliché. It has rationality at its core but cannot define it other than by what it is not, namely feeling. In this book, I will deviate from this stereotypical idea of legal reasoning. In the following chapters I will show that rationality – legal reasoning in particular – is not the opposite of affect and emotion, but a culturally and historically specific mode of meaning making that includes thinking *and* feeling. I want to take Weber at his word and explore the emotional and affective undertones implicit in his astute observations of rational law. If the modern world actually amounts to "a polar night of icy darkness" (in itself quite an emotion-evoking metaphor), then this is quite a visceral affair. Modern law is as much felt as it is thought.

This is not only a question of high theory. Thinking of modern law as deeply saturated with affect opens up exciting perspectives on many highly relevant, practical questions in the scholarship on law and society: How can we come to terms with the fact that courtroom performance, rhetoric, and spatial arrangement can so powerfully influence the outcome of a court proceeding? By what means do courtroom spectacles affect audiences, grab their attention, and connect to their senses of justice? How do we come to terms with the fact that legal

reasoning is based on assertions regarding which audiences need to develop a subjective feeling of plausibility? Can we fully comprehend legal objectivity if we limit our conception of it to the lack of passion, or might there be other conceptual options, including the possibility of its affective production? Can we better understand complex legal-political debates such as the crisis of legitimacy of the ICC in Africa if we describe them as a competition of sentiments? All of these questions will be addressed in the following chapters as I shed light on the affective life of international criminal justice by developing and deploying two main analytical concepts: atmosphere and sentiment.

ATMOSPHERE

With my thoughts still on Navid Nuur's evocative sculpture, I continued my way to the entrance building of the ICC. When you want to enter the ICC, you must go through one of three revolving doors, line up at one of two counters, and present your identification papers to one of the ICC's security guards. The feeling is similar to waiting in the passport control line at an airport. You have to declare the purpose of your visit – whether you have an appointment or you simply want to observe one of the hearings that are being held that day – and you are handed a visitor's pass that you wear on a lanyard around your neck. When leaving the building later, you have to use the pass as a kind of key to exit through an automated door that is really quite futuristic. I realized that even after I had done this dozens of times, I still felt a little tense when I waited in line. In my head I would begin to practice what to say to the security guard, how I would go through the metal detector, even in what order I would put my personal effects on the conveyor belt at the security check.

I remembered reading an article by the anthropologist Nigel Eltringham, who has done ethnographic fieldwork at the International Criminal Tribunal in Rwanda (ICTR). In this article Eltringham describes what it feels like to enter the courtroom building of the ICTR, how the architecture of the building is intended to have a certain effect on the visitor, to imprint on him or her the power of the legal institutions, and to show what it means to be a spectator of justice (Eltringham 2012). In terms of social theory, this refers to the Foucauldian notion of *dispositif*, the idea of investigating the workings of power by looking at the apparatuses of governance, that is, ensembles composed of a large number of discursive and nondiscursive elements.[4] Institutions, organizations, and structures of

all kinds produce their subjects by subjecting them to the *dispostif*. The state and its bureaucracy become inscribed in the subjective experiences of the people who are subjected to it – a process anthropologists call *affective governance* (Stoler 2002; Navaro-Yashin 2012; Laszczkowski and Reeves 2017; Freire de Andrade Neves 2018).[5]

People who find themselves in offices, courtrooms, museums, or universities, filled with all kinds of people and things that embody and symbolize the mystical trappings of the "state," feel something. They often experience these feelings not as coming from their deep inner selves, but – at least to a large degree – as the result of the wider arrangement in which they find themselves. Although people are generally aware of these experiences, the feelings are inchoate and difficult to put into words. It is this phenomenon that I am referring to when I use the noun "affect" or the adjective "affective." It is an important contention of this book that the workings of international criminal justice are, in important ways, affective.

After passing through the metal detectors, I would leave the small entrance building of the Court through an automatic door. To get to the main building where the courtrooms are located, one must cross a bridge over a waterway that surrounds the main building. To my mind, the arrangement evoked the image of a medieval castle with a moat around it, a traditional symbol of power and security with specific reference to the European past. To enter the main building, one must go through yet another revolving door. I became aware of how many doors one must pass through to get to the courtrooms. With each boundary that I crossed I became more and more immersed in the affective workings of the ICC. It seems that the power of affect is, to an important degree, "immersive power," as Rainer Mühlhoff (2018) has put it. All the different arrangements composed in the context of international criminal justice, of which the courtroom is but the most obvious example, have the effect of immersing those who venture within. The "overall feel" that these affective arrangements create and that affect people I call *atmospheres*. I contend that it is important to investigate this atmosphere making in order to understand how international criminal justice works, which is why the first part of this book is devoted to examining how the system of international criminal justice and its actors create atmospheres.

Chapter 1 will take us into the ICC courtroom in The Hague to observe the Dominic Ongwen trial. Law and society scholars have generally analyzed courtroom performances as speech events, focusing

on how orators verbally discuss the law and mobilize the art of rhetoric to influence their audiences. I broaden the perspective by including audio, visual, spatial, and discursive material and components in my analysis of atmosphere to assess the workings of courtroom performance. Actors carefully arrange and rearrange these courtroom elements into an "affect-ctive arrangement." Challenging the widely held assumption that a courtroom is designed to cast out affect and emotion, I argue that courtrooms are actually designed to create affect and emotion and to regulate them in specific ways. Legal proceedings depend to a large degree on lawyers' ability to create courtroom atmospheres and manage affective arrangements. How they curate these atmospheres is often decisive for the outcome of a court case.

Chapter 2 takes us to a rural village in northern Uganda where the Dominic Ongwen proceedings are shown in a public screening – one of the outreach activities the ICC regularly conducts. Although not a legal setting in the narrow sense, these outreach events are carefully curated in order to create a specific transitional justice atmosphere. Sometimes these attempts succeed, other times they do not. I argue here that the production of atmosphere is a vital aspect of the success or failure of transitional justice projects. Transitional justice research has often focused on matters of translation between global norms and local politics. In these analyses, the translation of international criminal law either succeeds because it allows the participants "on the ground" to follow its reasoning or it fails because the cultural mismatch between the global and the local is too great. In the latter case, the explanations tend to create analytical dissonance leading to oversimplifications that often take the form of dichotomies – Western justice/African justice, law/politics – which sometimes cloud an analysis instead of providing clarity. I argue that focusing on the creation of atmospheres in transitional justice allows for fine-grained, ethnographically grounded analyses of why transitional justice succeeds or fails – and for whom. From this perspective, one cannot assume that transitional justice is only, or even mainly, about translating concepts from one legal context into another; rather, it is about creating a relational arrangement in which certain ways to bring about justice feel more just than others.

SENTIMENT

After I had entered the ICC's main building on this day in May 2017, waited in line before the large front desk, and presented my credentials,

I turned to the right and walked down the corridor to a small cafeteria where one can have a cup of coffee and a piece of cake, something I did regularly during my fieldwork. This is the one place where everyone who works at the Court – judges, prosecutors, administrators – and all those who visit the court – students, tourists, anthropologists – can encounter one another. As I looked out of the large windows – the whole building is of steel and glass – I was reminded of the first interview I conducted for this research project, right in this very cafeteria.

The conversation took place in January 2016. It was with a member of the ICC's outreach unit, which is responsible for connecting the Court's activities to the outside world. They do this by talking to the press, disseminating information leaflets and videos, and conducting outreach events of various types. The public screenings in northern Uganda that I describe in Chapter 2 are one example of this outreach work. We were not long into our conversation when we began to discuss the political context that largely structures the whole project the ICC is conducting – what some rather brusquely call "the ICC's Africa problem" (Dersso 2016) and what one could also call, conversely, "Africa's ICC problem." When the ICC began its work in 2002, it was the first institution of its kind: an international court set up to prosecute "the most serious crimes of concern to the international community as a whole," as it says in the Rome Statute, the international treaty that established the legal foundation for the ICC's work.[6] Before the ICC was established, there were only ad hoc international criminal tribunals for specific situations of large-scale violence. The military tribunals of Nuremberg and Tokyo following the Second World War in the 1940s and the two large international criminal tribunals on the genocidal violence in Yugoslavia and Rwanda in the 1990s are prominent examples. The ICC is intended to be a permanent institution for bringing individuals, mostly military and political leaders, ideally from all over the world, to trial. They should be prosecuted for war crimes and crimes against humanity in situations so extreme that a single state is not able or not willing to handle the criminal process.[7]

But the reality looks quite different. At the time of writing this book, the Court had only managed to prosecute Africans for international crimes perpetrated in Africa.[8] For some time now, many African politicians and public intellectuals have painted the Court as

a neocolonial institution. Although most African nation-states had initially been in favor of the establishment of the ICC, the winds started shifting when the ICC put out an arrest warrant for Omar Hassan Ahmad al-Bashir, the then-sitting president of Sudan (Jalloh, Akande, and Plessis 2011; Cole 2013). Since then, the African Union has been critical of the indictment practices of the ICC. Its member states have argued in several decisions and resolutions that the ICC was specifically targeting African leaders and purposefully ignoring the international law principle of sovereign immunity, that is, the principle that state officials such as heads of state and government cannot be brought before the courts (see Chapter 6 for a critical discussion of this principle).[9] This discussion on the legitimacy of the ICC's transitional justice interventions in Africa forms a larger discursive frame for much of the work that the ICC does on an everyday basis.

When I asked my conversation partner from the ICC's outreach unit about the "Africa problem," she readily admitted that there was indeed a problem and that it stemmed from the fact that the ICC had thus far only tried perpetrators from Africa. A few days earlier, the chief prosecutor, Gambian lawyer Fatou Bensouda, had announced that her office would start a preliminary investigation into possible war crimes and crimes against humanity committed during the conflict between Russia and Georgia in and around South Ossetia in 2008. The ICC outreach officer said that this announcement came as a bit of a relief because it would be the first formal investigation in Europe and could alleviate some of the criticism that the ICC was targeting Africans. She complained that African politicians were mobilizing enormous resources to campaign against the ICC, while her unit only had very limited capacity to rebut the criticism and influence these debates.

I asked her quite directly what role she thought emotion played in her work in the context of these debates on the ICC's legitimacy in Africa. Her immediate reaction was to insist that, of course, it was her job and that of her colleagues to objectively inform the public, especially the victims in the African "situation countries," and to "put the emotions aside." She went on to say that, naturally, all actors would be highly emotionally involved in these kinds of cases, but the ICC's outreach work must try to inform people without getting into emotional discussions; it was important to stick to the facts: how the process before the ICC works, what happens when, who has what rights, and so on.

Our conversation went on for a little while longer, and I asked the outreach officer what she personally thought about the criticism that

the ICC was a neocolonial institution. She acknowledged the problem and noted that the structure of the global legal order did not allow for complete equality before international criminal law.

There are three ways of bringing a case before the ICC. The standard way is used when crimes are committed in a member state of the Rome Statute. In this case, the chief prosecutor can first open an investigation and then apply for an arrest warrant. The problem is that there are a number of countries that are not members of the Rome Statute. The United States, China, Russia, and India have not ratified the treaty, nor have most of the countries in Asia and the Pacific region, with the notable exceptions of Australia, Bangladesh, New Zealand, and Japan. That means that the standard way of bringing a case before the ICC is mainly limited to countries in Europe, the Americas, and Africa.

A second way of bringing a case before the ICC is for one of the member states of the Rome Statute to refer a case to the ICC, but there is only a limited number of situations in which this is a realistic option. In the case of the LRA, the Ugandan government referred the situation in northern Uganda to the ICC at a time when the government under President Yoweri Museveni thought that doing so would be an effective way to solicit international help in his government's fight against the LRA.

A third option is for the United Nations Security Council (UNSC), the most powerful body of the UN, to refer a situation to the ICC for investigation, which can be done even for crimes that were committed in countries that are not parties to the Rome Statute. This has, for example, been done in the case of Sudan. But three of the five veto members of the UNSC are themselves not signatories to the Rome Statute, and they tend to block investigations against themselves and their allies.

These structures have resulted, as the ICC outreach officer conceded, in severe limitations on the ICC's efficacy in prosecuting international crimes. Nevertheless, she still found the campaign of African politicians against the ICC to be unjustified. Her main argument was that most of the cases that were now being tried before the ICC had been initiated by precisely those governments that were now criticizing the ICC's trials as illegal interventions into their internal affairs, Uganda among them.

While my conversation partner was explaining these things, she said something that did not strike me as remarkable at the time but jumped out at me later when I reread the notes I had taken. Summing up her