Centre for African Justice, Peace and Human Rights

CAPACITY BUILDING ISSUE 1

# CENTRE FOR AFRICAN JUSTICE

## 5 QUOTES ON INTERNATIONAL JUSTICE

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Shedding perspective on international criminal law with Mr Fadi el-Abdallah

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Photo credit: Yentl Noppen

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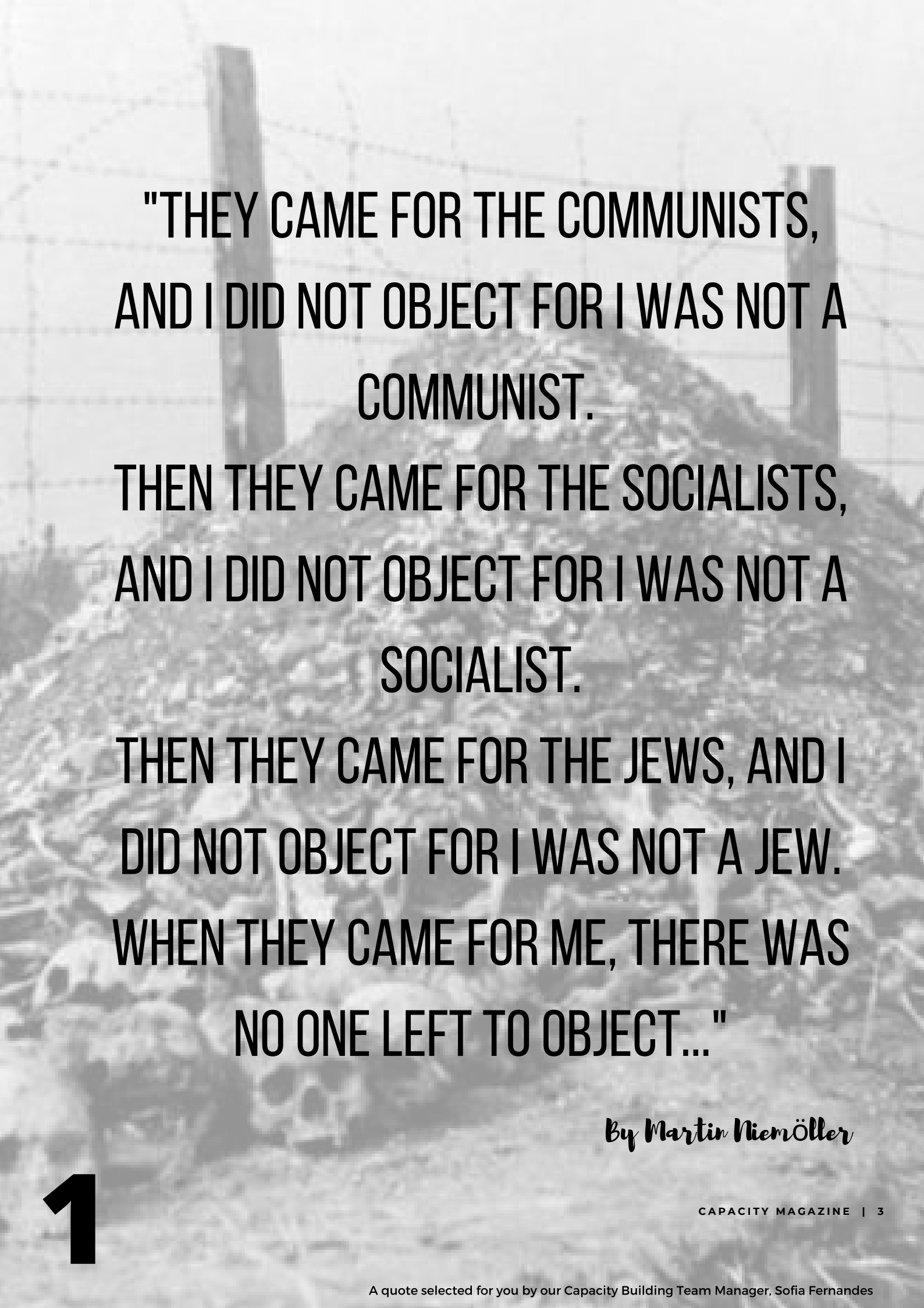
## FIVE INTERNATIONAL JUSTICE QUOTES





"THEY CAME FOR THE COMMUNISTS, AND I DID NOT OBJECT FOR I WAS NOT A COMMUNIST.
THEN THEY CAME FOR THE SOCIALISTS, AND I DID NOT OBJECT FOR I WAS NOT A SOCIALIST.
THEN THEY CAME FOR THE JEWS, AND I DID NOT OBJECT FOR I WAS NOT A JEW.
WHEN THEY CAME FOR ME, THERE WAS NO ONE LEFT TO OBJECT..."

By Martin NiemÖller

1



A quote selected for you by our Capacity Building Team Manager, Sofia Fernandes

We hear a lot of words when it comes to international justice. Lets break down some of the keywords so we have a comperhensive understanding of them.

# KEY TERMS

### IMPUNITY

Impunity means "exemption from punishment or loss or escape from fines". In the international law of human rights, it refers to the failure to bring perpetrators of human rights violations to justice and, as such, itself constitutes a denial of the victims' right to justice and redress.

### EXTRAJUDICIAL EXECUTIONS

An extrajudicial execution is an unlawful and deliberate killing carried out by order of a government or with its complicity. It can also be referred to as a political or "death squad" killing.

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### GENOCIDE

Genocide is any one of a number of acts aimed at the destruction of all or part of certain groups of people; it is this intent that distinguishes genocide from other crimes against humanity.

This definition is considered part of international customary law and, therefore, binding on all states – whether they have ratified the Genocide convention or not.

> "True peace is not merely the absence of tension: it is the presence of justice" Martin Luther King


## WHAT ACTUALLY ARE WAR CRIMES?

- Torture or inhuman treatment, including biological experiments
- Unlawful deportation or transfer or unlawful confinement
- Compelling a prisoner of war or other protected person to serve in the forces of a hostile power
- Wilfully causing great suffering, or serious injury to body or health
- Taking of hostages
- Wilful killing
- Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly
- Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial

## OTHER ACTS WHICH CONSTITUTE A WAR CRIME

The crimes include: intentionally directing attacks without direct participation, intentionally launching attacks, attacking or bombarding villages or towns, killing or attacking a combatant who has surrendered, making improper use of the flag of truce, subjecting others to physical mutilation, scientific or medical experimentation, pillaging, employing poison, bullets, asphyxiating gas, or other weapons of warfare, committing outrages upon personal dignity, committing any other form of sexual violence, intentionally using starvation, enlisting children to participate in hostile activities.


# HISTORY IS THERE NOT TO SHAME US, BUT TO REMIND US OF WHERE OUR LIMITS SHOULD BE.

*All atrocities start out not in their end form, but instead they build, from small acts of malice, from turning blind eyes, and pushing our moral limits small bits at a time. Pure evil does not start with genocide, but with unnecessary hatred for one group of people, this is something that must always remember, as stopping yourself plummeting down a hill is much harder on the way down than it is when you are firm footed at the top.*

2

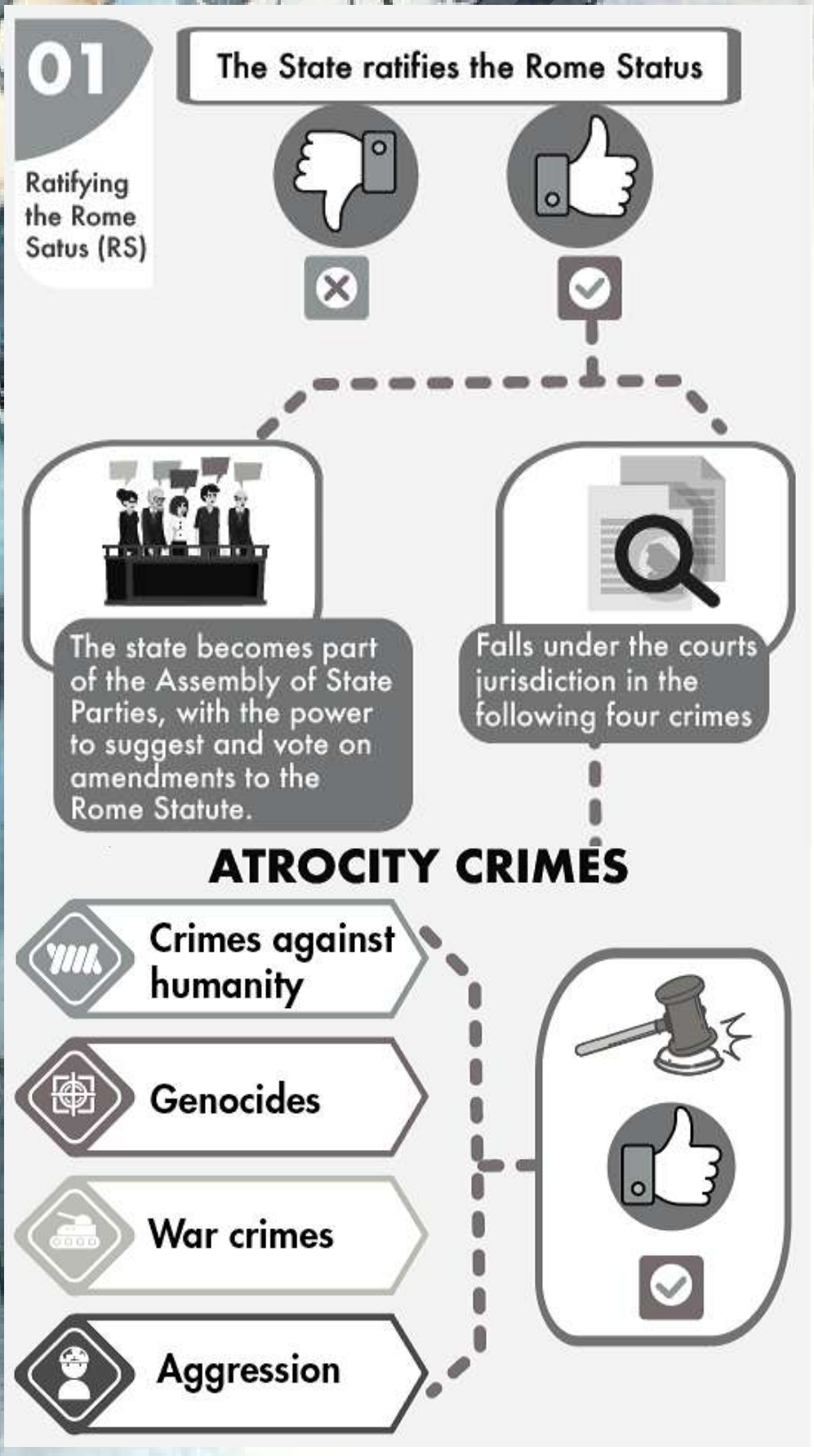


A quote written By Natasha Fothergill, Social Media and External Communications Manager

# UNDERSTANDING HOW THE INTERNATIONAL CRIMINAL COURT (ICC) WORKS

## THE PRINCIPLE OF COMPLEMENTARY

The following is an infographic explaining the nature of the jurisdiction of the ICC. It takes you through the early stages of a state accessing the Rome Statute and becoming a party to the ICC.



## 02 When can proceedings be started?

An attrocity took place in that country and the national authorities were:

**Unable**

- A — No developed police to investigate
- B — No developed juristdiction to litigate
- C — No competent lawyers to prosecute or defend

**Unwilling**

- A — Lack of political will
- B — Corrupted and delayed procedings

## 03 Who determines that?

| | |
|---|---|
| UN Security Council Referral | Votes to refer the case due to its gravity |
| On the prosecutors own accord | The prosecutor initiates procedings and starts preliminary examinations |
| State Party Referral | A State admits its unwillignes or unability to prosecute the crime and refers the case to the ICC Prosecutor |

## 04 The ICC is a court of LAST resort that operates based on the principle of complementary

The following is a hypothetical case:

**ICC** International Criminal Court

vis-à-vis

National courts of Member States (MSs)

1. TRIAL COURTS
2. COURT OF APPEAL
3. SUPREME COURT
4. ICC INTERNATIONAL CRIMINAL COURT

# INSIDE THE ICC

Two of our team members take to the ICC to discuss the importance of the ICC with the Head of Public Affairs


Photo taken at the ICC depicting Omar Al-Qudsi (Left) and Caitlin Tran (Right)

## SPOKESPERSON AND HEAD OF THE PUBLIC AFFAIRS

## *Dr. Fadi el Abdallah*

Photo taken at the ICC depicting Dr Fadi el-Abdullah (Left) and Omar Al-Qudsi (Right)

**Background**

Dr. Fadi el Abdallah is currently the Spokesperson and Head of the Public Affairs Unit at the International Criminal Court "ICC" based in The Hague, Netherlands.

Dr. Fadi earned a PhD degree in Law from the University of Paris II Panthéon-Assas, prior to joining the International Criminal Court in 2008. He taught at both, the Law and International Business Institute "IDAI" in Cairo, Egypt, as well as the University of Paris II Panthéon – Assas respectively.

## "In what sense is the ICC an improvement on the lessons learnt from the Nuremberg, Tokyo, Former Yugoslavia and Rwanda Tribunals?"

After the Second World War, the creation of the Tokyo and the Nuremberg Tribunals allowed the establishment of certain new ideas that vouched for no immunity or prescription with respect to crimes against humanity and other atrocious crimes. This was then transmitted to the tribunals for ex-Yugoslavia and Rwanda.

It was exactly in the 1990s, after the end of the cold war that the discussions about establishing the ICC began including the idea to not wait to act until these horrible crimes happen again, like what happened in Rwanda or the former Yugoslavia, which were fresh examples back then. It was thought necessary that we should establish a permanent court that might have a deterrent effect and would send a clear message to everyone that this will not be accepted. That these horrible crimes like war crimes, genocide, crimes against humanity shall not be accepted in any way anymore.

Having a Permanent Court allows the message to be much stronger than when it is not certain if the international community will or will not create a Court after the conflict has taken place. Additionally, if you have a permanent court, the concept of "victor's justice" won't be applicable, as the victor won't be able to influence the court by setting out the rules prior to its establishment.

## "How is judicial fairness looked after by the Court's system?"

On the judicial level, judges must be independent and impartial. The ICC has its own internal system of checks and balances; you have the work of the ICC Prosecutor that must be submitted to the Pre Trial Chamber. If it is a case that goes to trial, it must go to a different chamber - The Trial chamber. In case there is a controversy concerning a decision, or someone wants to challenge it, then it must go before the Appeals Chamber, which is composed of five other judges.

This system of checks and balances allows that ultimately, the decision of the Court is always the application of the law which has been adopted by the assembly. Yet, it is an impartial and independent application based in accordance to the interpretation of the law given by the judges and the elements of evidence provided by the parties and participants to the proceedings. The judges are expected to give an interpretation of the law in accordance with the legal texts adopted by the ASP and consider elements of evidence that is presented before them by both parties.

Photo taken at the ICC depicting Dr Fadi El-Abdullah (Left) and Caitlin Tran (Right)

## "What makes the Pre-Trial Chamber unique to the ICC system?"

The Pre-Trial Chamber has a specific mandate, while the ICC's Office of the Prosecutor "OTP" investigates both the alleged incidents of atrocious crimes and brings charges respectively. These two functions are often separated in certain countries. Therefore, there was a necessity of a filter for that. That is why Pre-Trial Chamber was given the authority to decide on the issue of the authorization to open an investigation and on the issue of delivering an arrest warrant. The OTP brings charges, but it is on the judges if they approve these charges or not.

There is an additional filter which is called the "confirmation of charges-hearing". Judges issue an arrest warrant, based on the evidence presented by the Prosecutor. But here, we have not yet heard what the defence has to say about this before indulging both parties in trial proceedings which can be lengthy and costly. It is fairer and more efficient to first listen to the defence and then decide. Based on that, we see that maybe the evidence that the Prosecutor is bringing is not solid enough to send this case to a trial, so we should stop it at this early stage. Sometimes, it is solid on certain charges, but not on the totality of the charges. So, the Pre-Trial Chamber does not decide on the merits on the case, but decides on the scope of the case, and on which charges should be put, if any, before the Trial Chamber

## "Can the court prosecute any crime regardless of where it happens?"

The ICC is an international tribunal, but it does not have a universal jurisdiction. Its jurisdiction is related to the states that have decided to ratify the Rome Statute. Meaning that the jurisdiction of the ICC covers crimes that are committed either by citizens of a state that has accepted the ICC's jurisdiction, or if the crimes are committed on the territory of a state that has accepted the Court's jurisdiction.

There are different ways of accepting it; ratification, accession, declaration under Article 12 (3), etc. The jurisdiction of the court is related to the decision of a state to accept the ICC's jurisdiction over its territories and over its citizens.

However, there is only one exception to that. The exception being a, "Referral by the UN Security Council." The UN Security Council can refer a situation to the ICC, even if the criteria of either nationality or territory on which the crimes have been committed are related to a state that has not accepted the Court's jurisdiction. For example, the Security Council has referred the situation in Darfur in Sudan and the matters in Libya to the ICC.

Normally, the ICC will not have jurisdiction over Darfur because Sudan is not a state party to the Rome Statute and the crimes that were alleged to be committed there were committed by Sudanese people on Sudanese territory. So the criteria are not fulfilled, and the Court cannot open an investigation about what happened in Sudan, except only in one case. That is, when the Security Council refers to it.

Photo taken at the ICC depicting Omar Al-Qudsi (Left) and Caitlin Tran (Right)

## "Now, why the Security Council?"

When the States established the Rome Statute, the idea was that it is voluntary for each state to decide to join or not. But, worse scenarios should be expected too. For example, what if a conflict is so dangerous that it threatens the peace, security and stability in other countries? And, this state has not joined the Rome Statute? Maybe, it's a government that has not joined the Rome Statute that is committing the crimes against its population and destabilizing countries? What can we do? We cannot force the ICC jurisdiction on a state that has not accepted the jurisdiction. That would be a violation of the sovereignty of a state.

On the other hand, the Security Council's referral is not a violation of the state's sovereignty. Because, when a state joins the UN, the state has accepted the charter of the UN including chapter VII.

Chapter VII allows the Security Council to adopt binding resolutions to preserve peace and security without restraint. It allows the Security Council to create new obligation over the State; an obligation to accept the Court's jurisdiction.

## "How can states benefit from joining the ICC?"

By supporting the ICC, we believe that it will lead to a stronger international system, while leading to the strengthening of the national judicial system as well. Because of the principle of complementarity, the Court only intervenes when the investigations on a national level are not possible. By supporting the ICC, you are inciting the different national actors to strengthen their own judicial authorities as well. That brings more benefits to the population as a whole.

## "Critics claim that certain state's fight against overthrowing impunity of heads of the state can be thought of as efforts to preserve peace. Is it wise to sacrifice justice in order to achieve peace?"

What we believe in is that you cannot build lasting peace without justice. You will not be breaking the cycle of violence, if you do not get justice. We believe that accountability is necessary and important for the people. You need to have a judicial answer to the conflict.

However, this is just part of the answer; it is not the whole answer. But, it is an important part to recognize the dignity of the victims, to recognize that they were the "victims" and to be able to support them rather than leaving the violence to continue without doing anything about it.

What I believe in, is that there is a need for accountability. Specifically, for the persons who are the most responsible for the crimes. Experiences in most countries show that when there is no accountability, the risks of falling again into violence are quite high. The symbols of the war will always be there in the mind of the people. The victims will not have received the recognition of their status as "victims" and neither will they have received any reparations. The frustration will still be there. The non-understanding, the mutual accusations will all

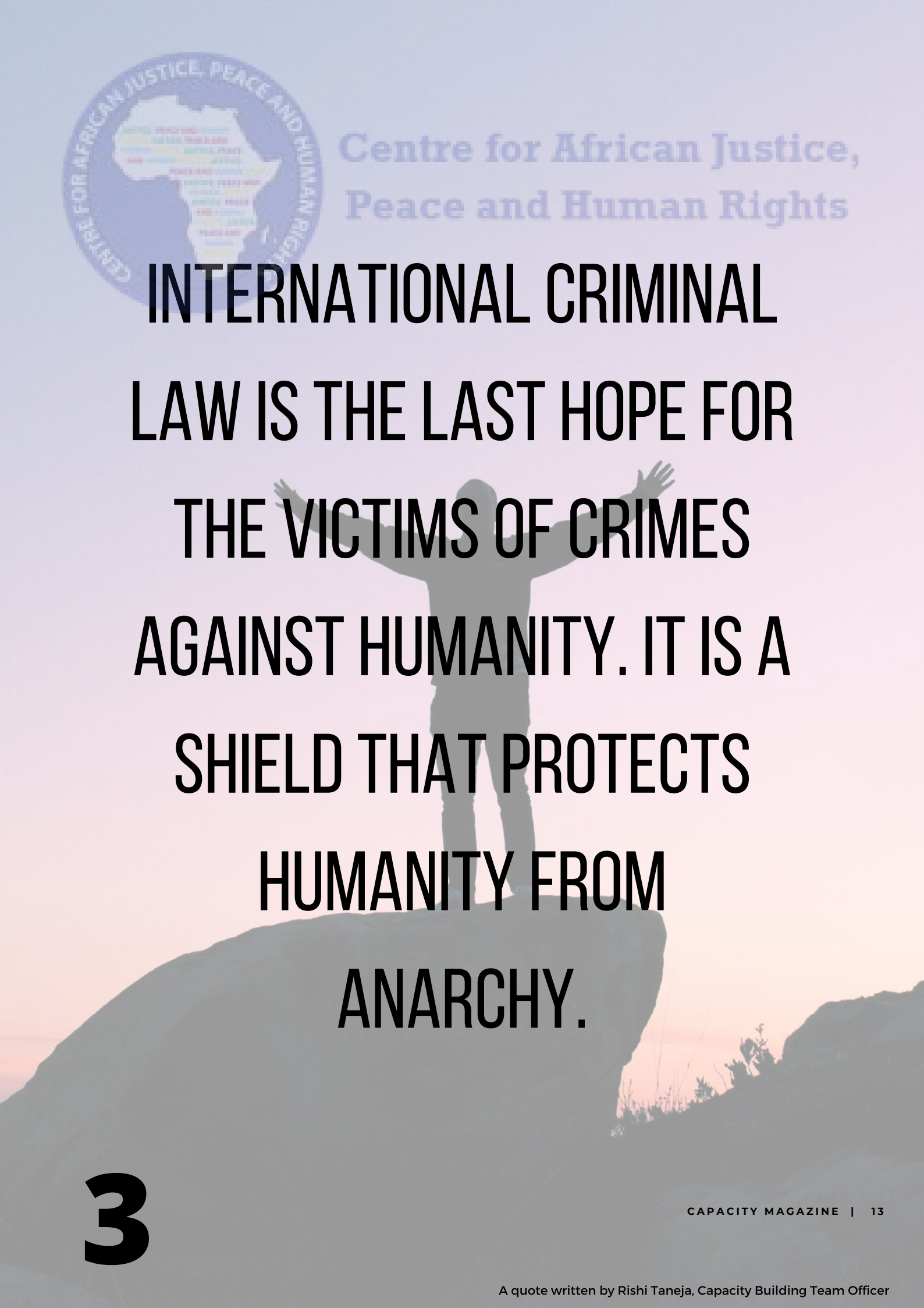
still be there. What justice does is it allows the victims to feel recognized, and it allows the society to have a kind of a mirror in which the truth about what actually happened is revealed. That way, we create a common understanding.

So, justice does not only take away the frustration of the victims, but it also gives them a truth on which they can build reconciliation. In many countries, they have built a committee of truth and reconciliation, because truth is the key in order to be able to have a common narrative for the society for what has happened so that we all can go forward and build a future together. It also sends a clear message that you cannot retain the benefits from the violence. This message is not only for the perpetrators, but also for the future so that no one should think that they can use violence, get away with it or even benefit from it.

**From this interview we gained a better grasp on the operation of the ICC, but on a personal level Mr el-Abdullah is an inspirational figure of international criminal law and we thank him for the time he dedicated to us in the pursuit of educating others on international justice.**

Interview conducted by Omar Al-Qudsi & Caitlin Tran

Photo credit: Ehsan Qaane (2016)




# INTERNATIONAL CRIMINAL LAW IS THE LAST HOPE FOR THE VICTIMS OF CRIMES AGAINST HUMANITY. IT IS A SHIELD THAT PROTECTS HUMANITY FROM ANARCHY.

3



A quote written by Rishi Taneja, Capacity Building Team Officer

# Addressing the Elephant in the Room: The Controversial "Gravity Threshold" for Admissibility of Cases by the ICC

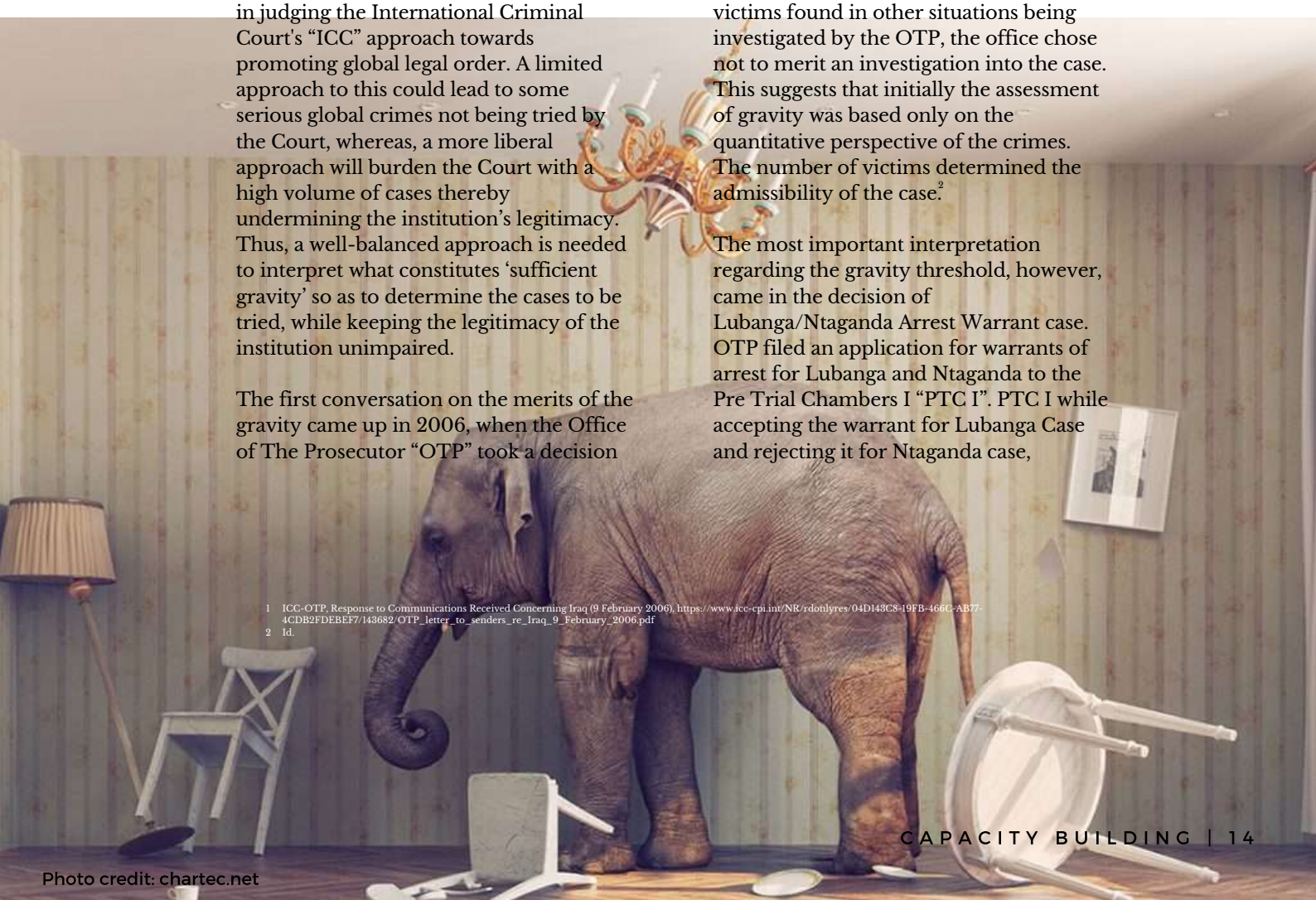
This article throws light upon the debate of the gravity threshold for admissibility of cases by the ICC. Through a scrupulous examination of chronological sequence of cases, the article sets to bring out the factors that constitute "sufficient gravity", which have been interpreted by the Courts and been put to use either for initiating investigations suo moto or when a particular case is referred to them.

*By Rishi Taneja*

The term 'sufficient gravity' is enlisted in Article 17(1)(d) of the Rome Statute that provides for issues of admissibility of cases in the Court. This has long been a point of issue for the Courts as the Rome Statute does not define what actually constitutes 'sufficient gravity'. This perhaps is also the most important subject in judging the International Criminal Court's "ICC" approach towards promoting global legal order. A limited approach to this could lead to some serious global crimes not being tried by the Court, whereas, a more liberal approach will burden the Court with a high volume of cases thereby undermining the institution's legitimacy. Thus, a well-balanced approach is needed to interpret what constitutes 'sufficient gravity' so as to determine the cases to be tried, while keeping the legitimacy of the institution unimpaired.

The first conversation on the merits of the gravity came up in 2006, when the Office of The Prosecutor "OTP" took a decision not to initiate an investigation concerning the situation in Iraq. The Prosecutor justified his decision by explaining that in assessing gravity "a key consideration is the number of victims of particularly serious crimes, such as willful killing or rape."[1] Since the number of victims were of lesser number than the number of victims found in other situations being investigated by the OTP, the office chose not to merit an investigation into the case. This suggests that initially the assessment of gravity was based only on the quantitative perspective of the crimes. The number of victims determined the admissibility of the case.[2]

The most important interpretation regarding the gravity threshold, however, came in the decision of Lubanga/Ntaganda Arrest Warrant case. OTP filed an application for warrants of arrest for Lubanga and Ntaganda to the Pre Trial Chambers I "PTC I". PTC I while accepting the warrant for Lubanga Case and rejecting it for Ntaganda case,



1 ICC-OTP, Response to Communications Received Concerning Iraq (9 February 2006), https://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf

2 Id.

Photo credit: chartec.net

# Addressing the Elephant in the Room: The Controversial "Gravity Threshold" for Admissibility of Cases by the ICC

*By Rishi Taneja*

concluded that to meet the gravity threshold, three questions must be answered affirmatively:

1. Is the conduct which is the object of a case systematic or large-scale? And, the social alarm caused by the conduct in question.
2. The position of the relevant person in the State entity, organisation or armed group to which he belongs, can it be considered that such a person falls within the category of most senior leaders of the situation under investigation?
3. If the accused is amongst those most responsible for the crimes alleged? [3]

The Prosecutor appealed this decision to the Appeals Chamber and the Chamber overturned it by rejecting almost all the aspects of the PTC I's decision.

With regards to the first condition, Chambers concluded that PTC I blurs the distinction between war crimes and crimes against humanity. While war crimes could be systematic or large scale, the crimes against humanity dont need to satisfy these conditions. It was further held that the criterion of "social alarm" depends upon subjective and contingent reactions to crimes rather than upon their objective gravity.

The subjective criterion of social alarm, therefore, is not a consideration that is necessarily appropriate for the determination of the admissibility of a case pursuant to article 17(1)(d) of the Statute.[4] And, with regards to the second and the third condition, the Chambers was of the view that the perpetrators should not be categorised and that all the perpetrators irrespective of position or rank must be brought before the Court. [5] The application for an arrest warrant against Ntaganda was thus remanded to the Pre-Trial Chamber.[6]

In the Abu Garda case, PTC I had a much more liberal approach in assessing the gravity of the case. It also emphasised that threshold requires something additional to the gravity inherent in the Courts subject matter jurisdiction.[7] The Chamber agreed with the prosecution's view that issues of the nature, manner and impact of the alleged attack are critical. Further, the gravity of the case must be addressed in both qualitative as well as quantitative perspective.[8] The Chamber also stressed importance on the factors enlisted in Rule 145(1)(c) of Rules and Procedures related to the determination of sentence.[9] These factors spoke about the extent of the damage and harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to do the same.

The next time the question of 'sufficient gravity' arose was when Prosecutor

2 Prosecutor v. Lubanga (ICC-01/04-01/06-8-US-Corr) Pre-Trial Chamber I (24 February 2006)
3 Case No. ICC-01/04-169, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest,"
4 (July 13, 2006), Paras 71-72, http://www.icccpi.int/iccdocs/doc/doc183559.pdf
5 Id. Para 73
6 Id. Para 92
7 Prosecutor v Bahar Idriss Abu Garda, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, Para 30 (Feb. 8, 2010), http://www.icc-cpi.int/iccdocs/doc/doc819602.pdf.
8 Id. Para 31
9 Id. Para 32

Photo credit: chartec.net

GUEST BLOG

# Addressing the Elephant in the Room: The Controversial "Gravity Threshold" for Admissibility of Cases by the ICC

*By Rishi Taneja*

requested Pre Trial Chambers II "PTC II" for authorisation of an investigation into the situation of post election violence in Kenya. This was the first time wherein the Court had to assess the gravity threshold for a 'Situation' instead of a particular case in question. PTC II followed a somewhat different approach while assessing the gravity here. The Chamber held that when assessing the gravity of a situation in order to merit investigation, the Court should focus on the gravity of the cases likely to arise out of the investigation of the situation rather than focussing on the gravity of the situation as a whole[10]. While, it stuck to taking into consideration, the qualitative and quantitative implications, the chamber also stressed on taking into consideration the groups of persons involved likely to be the object of an investigation, and the crimes that are allegedly committed within the jurisdiction of the Court, for the purposes of shaping potential cases[11].

This was the first time after the Lubanga/Ntaganda case decision that the Chambers took into consideration the element of suspect's rank or role[12]. Using these assessments, PTC II held that situation brought before it was sufficiently grave to merit investigation. The latest case to touch upon the gravity threshold is the Gaza Flotilla Raid case.

The Prosecutor declined to open an investigation stating the lack of gravity of the situation at hand. In assessing gravity, the prosecutor took into consideration the nature, scale, manner and impact of the crimes and also the group of persons likely involved to be the object of the investigation and the crimes allegedly committed. Based on these, it was concluded that though war crimes had been committed, there was no reasonable basis to believe that the crimes were committed on a large scale or as part of a plan or policy and that the cases that will likely arise from the situation at hand shall not meet the gravity threshold to be admissible in Court. In an appeal to the prosecutor's decision, PTC I held that prosecutor considered the appropriate factors in assessing the gravity of the situation, but had applied them incorrectly.

Therefore, PTC I asked the prosecutor to reconsider its decision on not initiating an investigation in the case. The tug of war over this case is still going on. But, it should be observed that this was the first time when the debate was not on determining the factors that constitute 'sufficient gravity' but on the method of applying those factors.

10 Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Para 58 (Mar. 31, 2010), https://www.refworld.org/cases,ICC,4bc2fe372.html
11 Id. Para 59
12 Id. Para 198

Photo credit: chartec.net

# Addressing the Elephant in the Room: The Controversial "Gravity Threshold" for Admissibility of Cases by the ICC

*By Rishi Taneja*

**Conclusion**

ICC has come a long way since the beginning of the debate on what constitutes 'sufficient gravity'. With the thorough examination of ICC case laws over the years, it has come to light that the gravity threshold need not just be applied in 'Cases' but in 'Situations' as well. Initially, the Court focussed only on the quantitative perspectives in assessing what constitutes "sufficient gravity". Now the factors assessing the gravity include both "quantitative as well qualitative perspectives"."Nature, scale, manner and impact of the crime" have also become important indicators in determining the gravity and these factors are relevant to both the assessment of the gravity of the case and the gravity of a situation respectively.

Another factor that has become an accepted norm lately is "the position or rank of the person involved in the crime". Though, this factor was outrightly rejected in the Lubanga/Ntaganda case, it was considered relevant in the situation of post election violence in Kenya and the Gaza Flotilla Aid case.

The above mentioned factors formulated by the Courts have definitely laid out the foundation for judging the gravity threshold for the cases and the situations brought before them but there still lies some scope in conceiving a proper definition as to what constitutes 'sufficient gravity'. A well established principle in assessing the gravity threshold is yet to be designed.

Another question that has arisen and has become a subject of debate, as recently seen in the Gaza Flotilla Aid case, is the method of applying these factors in a particular case or a situation. While the factors have been laid out, the method to apply them still varies between the Courts.

Everything considered, I am optimistic that in the years to come, our International Court jurisprudence would continue to evolve and not only address, but cut through the gordian knot and interpret clearly what seems to be complex at the moment, thereby paving the way for ambiguity in law.

Photo credit: chartec.net

I STAND FOR INTERNATIONAL JUSTICE ! BUT HOW DO WE ACHIEVE JUSTICE? THE FIRST STEP HAS TO BE EDUCATION! CAPACITY BUILDING IN INTERNATIONAL CRIMINAL LAW IS THE FIRST STEP IN HOLDING THOSE ACCOUNTABLE FOR BREACHING THE MOST SERIOUS CRIMES AGAINST HUMANITY ! WORKING TOWARDS THIS IS MY GREATEST SATISFACTION!

4



A quote written by Marvin Lindijer Capacity Building Team Officer

Work for the Centre occurs from all parts of the globe with use of Focal Persons. We are very lucky to have two focal people working from Nigeria but what it is like for each person is very different.

# AN INTERVIEW WITH OUR NIGERIAN FOCAL PERSON:

## Chinwe Enzewa

Photo credit: croatiatourisminfo

## You are like the dark horse of the organisation. Tell us briefly about your role and what you bring to the table for the organisation?

My role is that of a legal researcher/fundraiser. Basically, it is about bringing the Capacity Building Project home (Nigeria/Africa). About getting organisations to partner with us so that we can enlighten our legal actors here on the administration of international criminal justice system and the job opportunities that come with it.

## Talk to us about the organisation's presence and contributions in Abuja.

Right now we are in touch with a number of organizations (public and private) in Abuja and environs with the aim of achieving the goals (vision) of the organisation with respect to the capacity building project. Hopefully, as the year runs through we will make tremendous progress.

## What are the biggest challenges that come your way in discharging the organisation's functions there in Nigeria?

Our biggest challenge here is getting audience with the right persons that we ought to work with. Secondly, we need funds to put things together to ensure that this project sees the light of day.

## What do you expect as an outcome of the capacity building projects in Africa?

I actually expect that in no distant time, the legal actors in Nigeria/Africa will be knowledgeable on the workings of the international criminal justice system and be seized with the opportunities that may arise from same.

## What do you wish for 2020?

For 2020, I sincerely wish that we are able to bring our goal of organising a capacity building project for legal practitioners to limelight here in Nigeria and to solidify the organisations presence in the country.

# FACTSHEET: HISTORY OF AFRICAN ATROCITY



Africa has had a long tradition of impunity. From the colonialists who brutalized villagers as a result of the attempt to optimize the flow, from Africa to the European economies, to modern-day dictators who continue to brutalized their fellow citizens to maintain a monopoly on power. Numerous cases that exemplify the atrocities occurring in the continent such as the institutionalized racial segregation in South Africa called the apartheid in 1948, characterized by extremely high levels of impunity.

As part of the efforts for the development in the fight against impunity and the progress in Human Rights normative framework, some commissions have emerged as the most important instrument for addressing the causes of conflict and providing recommendations on how affected societies can deal with impunity; i) The Truth Commission and Impunity in Africa established in 1974 by the President of Uganda, Idi Amin, to investigate "enforced disappearances" under his regime. This commission is a mechanism that can be used to administer justice, address the root causes of conflict and provide policymakers with recommendations on how to deal with impunity. ii) South Africa's Truth and Reconciliation Commission, which was tasked with "establishing as complete a picture as possible of the causes, nature, and extent of the gross violations of human rights which were committed during 1960 to the cut-off date." iii) The International Criminal Tribunal for Rwanda, that was established in 1994 by the United Nations Security Council and empowered to prosecute the perpetrators of the Rwandan Genocide and other serious violations of international humanitarian law. The International Criminal Court (ICC) since its inception in 2002, began to fight impunity through human rights advocates, especially in Africa. The ICC opened 25 cases concerning 25 individuals committed in six Africa states.

1 Intl' Peace Institute IPI, African Union Panel of the Wise, Peace, Justice, and Reconciliation in Africa: Opportunities and Challenges in the Fight Against Impunity (February 2013), https://www.ipinst.org/2013/01/peace-justice-and-reconciliation-in-africa.
2 Id. art. 3(1)(a). The cut-off date was 1994; that is, the TRC was to investigate human rights violations committed during the period 1960–1994.
3 International Criminal Tribunal for Rwanda (Ictr) Special Bibliography 2015 (2015); Yusuf Aksar, Implementing International Humanitarian Law: From The Ad Hoc Tribunals To A Permanent International Criminal Court (2004). See also U.N. Security Council, S.C. Res. 955 (Nov. 8, 1994).
4 International Criminal Court Cases in Africa: Status and Policy Issues (September 12, 2008 – July 22, 201) https://www.everycrsreport.com/reports/RL34665.html
5 Id.


Photo credit: The Institute for Security Studies

Moreover, on July 1 The Statute of the ICC, also known as the Rome Statute, entered into force and established a permanent, independent Court to investigate and bring to justice individuals who commit war crimes, crimes against humanity, and genocide. As of July 2011, 116 countries, including 32 African countries, the largest regional block were parties to the Statute. The ICC remains an important part of Africa's legal architecture for combating impunity in the continent. Nevertheless, there are other institutions dedicated to fighting or had fought impunity in Africa, such as; i) Charles Taylor and The Special Court for Sierra Leone In 2000, the Government of Sierra Leone requested the United Nations to provide the country with a "special court" to address serious crimes that had been committed against civilians and U.N. peacekeepers during the country's civil war, which took place from 1991 to 2002.[6] ii)The Case Against Habré Hissène served as President of the Republic of Chad from 1982 to 1990. During his tenure as president, there were estimated about 40,000 people killed and another 200,000 people tortured by Habré's Directorate of Documentation and Security ("DDS").[7] It was On May 30, 2016, Habré was found guilty of crimes against humanity, summary execution, torture and rape by the Extraordinary African Chambers.[8] Meanwhile, the continental legal mechanisms can be used to deal with impunity and improve the institutional environment for the recognition and respect of human rights, as the ICC remains a court of last resort since it can only be called upon to intervene and assume jurisdiction where African countries are either unwilling or unable to bring to justice the perpetrators of human rights violations.[9]

Patterns of violence in Africa are changing, and better peacekeeping provision may be one of the reasons (UN photo library).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(Guy Oliver/IRIN)



6 Special Court for Sierra Leone/Residual Special Court for Sierra Leone, Freetown (Sierra Leone) and The Hague (The Netherlands), The Special Court for Sierra Leone: Its History and Jurisprudence, http://www.rscsl.org/ (last visited Oct. 9, 2018).

7 Commission of Inquiry into the Crimes and Misappropriations Committed by exPresident Habré, His Accomplices and/or Accessories, 1990–1992, http://www.icla.up.ac.za/images/un/commissionsofinquiries/countries/Chad-Commission-of-Inquiries.pdf. In French, DDS stands for "la Direction de la Documentation et de la Sécurité."

8 International Law and the Struggle Against Government Impunity in Africa, 42 Hastings Int'l & Comp. L. Rev. 73 (2019), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1832&context=hastings_international_comparative_law_review

9 Id.

MAKING CERTAIN THAT ALL AFRICAN COUNTRIES HAVE LEGAL AND JUDICIAL SYSTEMS THAT ARE CAPABLE OF BRINGING TO JUSTICE ALL INDIVIDUALS WHO COMMIT INTERNATIONAL CRIMES IN THEIR JURISDICTIONS IS THE FIRST LINE OF THE FIGHT AGAINST IMPUNITY IN AFRICA, IT IS IMPORTANT TO ACKNOWLEDGE THE IMPORTANT ROLE THAT INTERNATIONAL LAW CAN PLAY IN THE ANTI-IMPUNITY EFFORT".

- JOHN MUKUM MBAKU, 2009

5



A quote chosen by Ana Cristina, Capacity Building Team Officer

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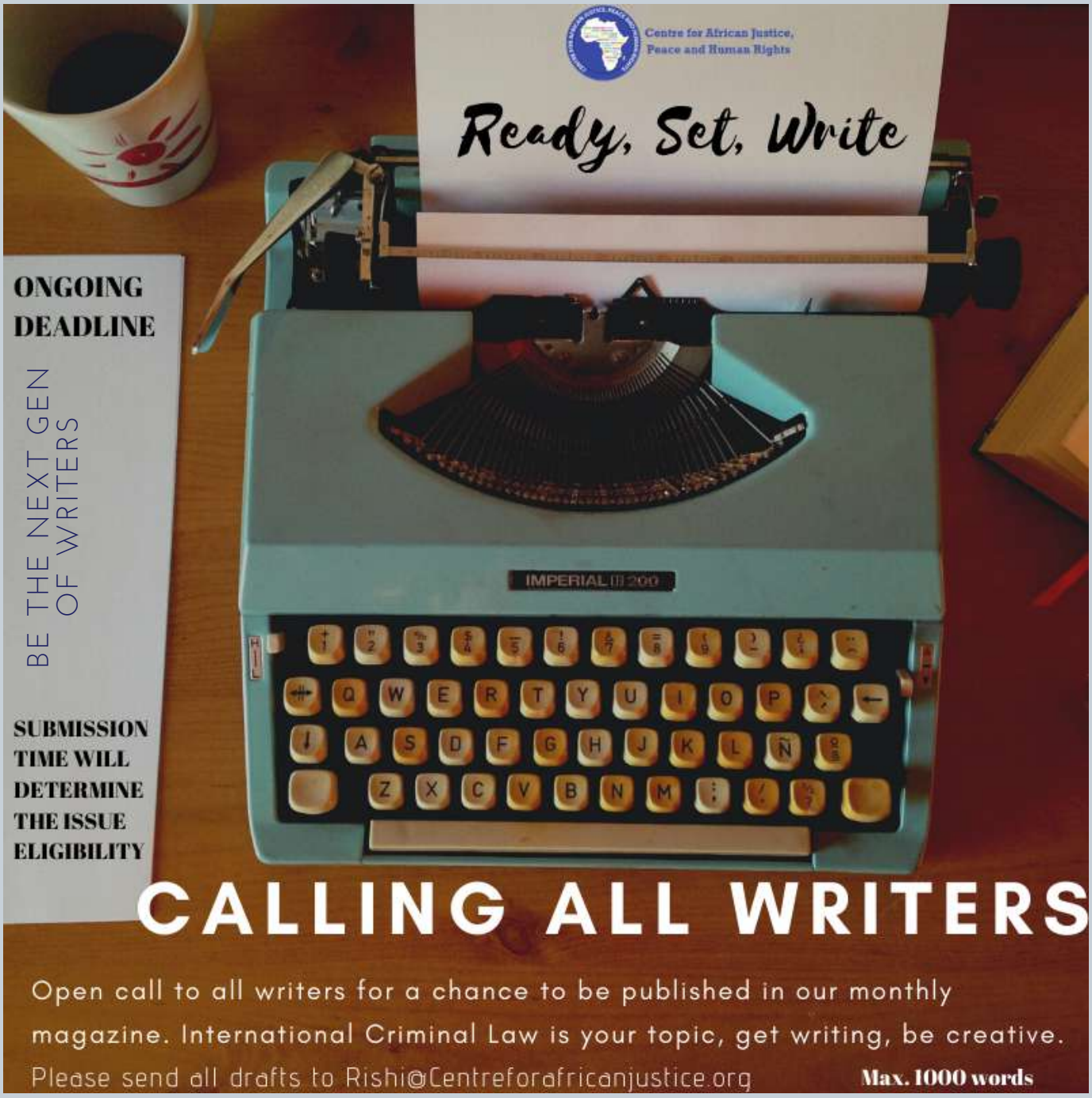


**ALL ENTRIES WELCOME**

BE INSPIRED, BE CREATIVE, PROVOKE OTHERS

# DENYING A FUTURE ITS IDENTITY

## Individual Criminal Responsibility for the Destruction of Cultural Heritage under International Criminal Law

Centre for African Justice, Peace and Human Rights

A Guest Article by:

**Luuk Lars Breebaar**

International & European Law Student, The Hague University of Applied Sciences, The Netherlands

Image Credit: John Hilton

### INTRODUCTION

Culture is the bond that connects people in solidarity, and its heritage is the ancestral link that sustains it. Cultural heritage matters, it is the legacy of humanity that has manifested itself over time, be it through ways of life, literature, language, religion, customs and traditions, or other forms of expression.[1] While the destruction of cultural heritage is not only an attempt to erase a peoples' identity, it also serves as a source of funding those that facilitate it. The raiding of museums or plunder of historic sites such as Palmyra have shown to be profitable operations in connection to the artefact trade on the black-market.[2] Those that seek to destroy cultural heritage, irrespective of their intent, ought to be held criminally liable at the international level.

The international community has not remained silent in this regard. Some notable developments, which fall under the International Human Rights regime, have been the 1954 Hague Convention on the 'Protection of Cultural Property in the Event of Armed Conflict',[3] its 1999 Second Protocol,[4] the Geneva Conventions,[5] as well as Customary International Humanitarian Law. Additionally, the 1970 UNESCO Convention, 1972 World Heritage Convention, 2003 Intangible Cultural Heritage Convention, and the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which are all worth being discussed in greater detail. However, this article will be limited to individual criminal responsibility before the International Criminal Court ("ICC") and the significance of cultural heritage.

Image Credit: Shutterstock

1 CESCR 'General comment No. 21: Right of everyone to take part in cultural life (Art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights' (21 December 2009) UN Doc. E/C.12/GC/21 para 13.
2 Alessandro Chechi, 'Plurality and Coordination of Dispute Settlement Methods in the Field of Cultural Heritage' in Francesco Francioni and James Gordley (eds), Enforcing International Cultural Heritage Law (OUP 2013) p 177.
3 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict (14 May 2019) CLT.2010/WS/5.
4 Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999, entered into force 9 March 2009) 2253 UNTS 172 (protocol).
5 ICRC Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 2019) 1125 UNTS 3; ICRC Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 2019) 1125 UNTS 609.

Image Credit: John Hilton

**The Destruction of Cultural Heritage as a Crime at the ICC**

The destruction of cultural heritage can amount to either a war crime under Article 8(2)(e)(iv)[6] or a crime against humanity under Article 7(2)(g)[7] ICC Statute – invoking individual criminal responsibility.[8] The distinguishing factor between the two crimes depends on whether the crime is committed during an armed conflict or peacetime; a war crime requires a nexus to an armed conflict whereas a crime against humanity does not.[9] Additionally, even though the term 'genocide', coined by Raphael Lemkin, was intrinsically connected to culture, whether the destruction of cultural heritage could also amount to genocide remains speculative.[10] The International Criminal Tribunal for the former Yugoslavia ("ICTY") has also disputed this, arguing that it could only demonstrate genocidal intent.[11]

The first conviction against an individual at the ICC for the destruction of cultural heritage occurred in September 2016 in the trial of Al Mahdi.[12] Between the 30th of June 2012 and the 11th of July that same year, a series of attacks were launched against eleven protected World Heritage sites in Mali.[13] Roughly two years after the ICC Prosecutor opened formal investigations into the matter in January 2013, the ICC Pre-Trial Chamber issued an arrest warrant on 18 September 2015 against Al Mahdi for his involvement in the destruction of these historical monuments.[14] The accused was captured and handed over to the ICC by Niger's authorities on 26 September 2015, he was then held at the ICC Detention Centre until his trial commenced on 22 August 2016. Al Mahdi was sentenced to nine years in prison after

6 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 art 8(2)(e)(iv).
7 Ibid art 7(2)(g).
8 Ibid art 25.R
9 Cryer, H. Friman, D. Robinson, E Wilmshurst, An Introduction to International Criminal Law and Procedure (2nd edn, CUP 2010) p 234, 279.
10 Raphael Lemkin, 'Genocide' (1946) 15(2) AS 227.
11 The Prosecutor v. Krstić (judgment) ICTY- 98- 33- T (2 Augustus 2001) para 580.
12 The Prosecutor v. Al Mahdi (judgment) ICC-01/12-01/15 (27 September 2016).
13 Ibid para 10.
14 Ibid.

Image Credit: John Hilton

the ICC Trial Chamber found him guilty of committing a war crime under Article 8(2)(e)(iv) as a result of his involvement in the destruction of cultural heritage.[15] In addition to this, the defendant was also given a pecuniary sentence amounting to €2.7 million in reparations.

While the Al Mahdi Case is a positive development in respect to the prosecution of criminals that resorted to the destruction of cultural heritage, there are still many hurdles that must be overcome. This is predominantly reflected in, but not limited to the way in which the ICC exercises its jurisdiction. It is a concerning observation that many of the vulnerable sites bearing historical and cultural significance are located in countries that are yet to ratify the Rome Statute.[16] Additionally, the principle of complementarity under Article 17(1) ICC Statute makes it more likely that such cases are dealt with at the national level instead.[17] Whether this is a positive or negative aspect deserves further scrutiny.

It remains to be seen whether the current legal framework suffices to actively prosecute those that seek to destroy cultural heritage. Prospects, however, do seem optimistic. To get a glimpse of what the future may have in store, it is worth looking into what the ICTY achieved in its jurisprudence on the basis of Article 3(d) of its Statute.[18] The provision extended the court's jurisdiction in relation to "seizure of, destruction, or wilful damage done to [...] historic monuments [...]" which resulted in several convictions, including those of Miodrag Jokić and Pavle Strugar for their involvement in the shelling of Dubrovnik's

15 Ibid.
16 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.
17 Ibid art 17(1).
18 UNSC, Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993) art 3(d).

Image Credit: John Hilton

Old City.[19] This is an important precedent. In the case that other prospective Ad Hoc tribunals are set up, the destruction of heritage will surely make it into its list of prohibited acts. The destruction of cultural heritage has already been noted in the reports by the Independent International Commission of Inquiry on the Syrian Arab Republic; if a dedicated court is established to deal with the current conflict in the Middle-East, its jurisprudence will surely expand upon the already existing legal framework.[20] But this, too, remains to be seen.

## CONCLUSION

Cultural heritage is under threat, and while it may seem that it should mainly concern historians, this could not be further from the truth. Its destruction does not only cut the physical ties that people have with certain historical sites, psychological ties are also severed, which in turn creates legacy issues and diminishes a peoples' sense of belonging. When the roots of a tree begin to decay, it spreads death to its branches. Destroying the roots of a society is exactly what the destruction of cultural heritage results in. The convictions regarding the destruction of cultural heritage as a war crime has been an important development in safeguarding the cultural roots and a sense of identity for future generations. Awareness relating to the importance of cultural heritage and its protection must continue to be promoted.

19 The Prosecutor v. Pavle Strugar (judgment) ICTY-01-42-T (31 January 2005); The Prosecutor v. Miodrag Jokić (judgment) ICTY-01-42/1 (18 March 2004) para 51.

20 OHCHR 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (11 February 2016) UN Doc A/HRC/31/68 p 13.

# Our Staff.

**Team Leader** Sofia Fernandes

**Senior Officers** Omar Al-Qudsi & Rishi Taneja

**Project Officer and Fundraiser** Marvin Lindijer & Marianne Allam

**Strategist and Project Officer** Nadine Hafez

**Content Designer and Project Officer** Ana Cristina

**Focal Persons in Nigeria** Chinwe Enzewa & Chika Nnanna

**Magazine Chief Editor and Designer** Natasha Fothergill

**Guest Writer** Luuk Lars Breebaart

**Office Address:**
Laan van Meerdervoort 70, 2517 AN Den Haag

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Rishi@centreforafricanjustice.org
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