



Review Conference of the International Criminal Court

Background Guide

DPS NOIDA MODEL UNITED NATIONS CONFERENCE, 2014

DPSNMUN

Letter from the Executive Board

Greetings Delegates!

Welcome to the ICC Review Conference to be simulated under the aegis of the Delhi Public School, Noida Model United Nations Conference 2014 – the First Session. We look forward towards an exciting and fun-filled two daylong session this summer.

From each one of you, we expect impeccable diplomatic conduct – which includes diplomatic courtesy, effective lobbying and above all compromising on negotiable grounds. Delegates are also expected to be well versed with the MUN rules of procedure and the generic flow of committee proceedings, in order to enhance the level of debate.

This document is aimed at developing a better understanding of the committee and shall provide a brief substantive outlook of the rudiments of the agenda, that is, “The incorporation of a definition and the conditions for the exercise of jurisdiction of the ICC on the Crime of Aggression”.

It must be noted that this document merely provides a very brief and concise insight into the agenda at hand and all delegates are free to explore and deliberate upon avenues beyond the scope of this document. The document has been divided in Three Parts – The First part shall give you a theoretical insight into the Genesis of the ICC, the second part is aimed at developing an overview of the fundamental issues pertaining to the jurisdiction of the ICC and the last section focuses on the crime of aggression and the not-so-recent developments at Kampala, Uganda.

Also find attached an appendix which is aimed at enhancing your overall knowledge about the ICC (You may read it after the conference or may not read it all – as you may wish).

Please feel free to revert to the Executive Board with any queries or extended assistance which you may require.

Milind Sharma- Chairperson

Arindam Som- Vice Chairperson

Millind Agarwal- Rapporteur

Agenda: *The incorporation of a definition and the conditions for the exercise of jurisdiction of the ICC on the Crime of Aggression*

Genesis, Scope and Mandate of the International Criminal Court

In 1762, Jean-Jacques Rousseau proposed the social contract theory which forms the basis of modern legal systems at a national level. The theory advocates the existence of a quid pro quo between the state and its subjects wherein, the latter agrees to allow the state to place certain restrictions in return for extended protection of fundamental liberties and guarantees against third party restriction of these liberties – called rights. By extension, when an individual violates the law of the land, he/she stands in active breach of this social contract and therefore, the state stands at the liberty to relinquish all or a part of the guarantees that it extends to every subject. This ability to impose a punitive action on an individual for acting in contravention to the law of the land serves as a tool for retributive justice – and hence, an effective deterrence against the commission of such contraventions. The contravention of the law of the land is representative of a greater symbolic rebellion against existing social order and more often than not, the indirect collateral supersedes the active harm caused by the same. Such contraventions are known as *crimes*.

As international law developed, it was imperative that such a retributive system be set up in order to deter and bring to justice individuals and nations who threaten global social order. One of the major problems associated with an international justice system is/was the absence of a social contract – arising out of the absence of a superstructure that resembles a state. As a result, following the Second World War and fall of Nazi Germany and the Japanese Empire, the Allied forces had already amassed sufficient political dominance and to this effect, the first international tribunals were set up at Nuremberg and Tokyo in 1945 and 1946, respectively.¹ The objective of these tribunals was to bring to justice the perpetrators of crimes during the Second World War and the horror associated with it.

After the establishment of the United Nations, it was realised that an international justice system is not only desirable as an aftermath of War, rather it is a necessity in upholding international peace and security – the fundamental principles of the United Nations. The reason behind realisation of

¹ International Criminal Court. *Chronology of the International Criminal Court*. Web. 10 November 2012. http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/chronology%20of%20the%20icc.aspx.

this need was two-fold. First, while, there already existed a quid pro quo between individual states and there existed sufficient political and diplomatic means to prevent violations of customary law by member nations, the fragile nature of this consensus ad diem was realised as early as in the mid 1930s when Nazi Germany and Fascist Italy exited the League of Nations without any consequence. Second, it was also realised that not all acts which have deplorable impact on the peoples of the United Nations can be attributed to specific actions by the state – more often than not these actions were carried out by individuals who were either acting outside state control or had overstepped the constitutional and legislative authorities that their respective states had granted – like in the case of the Rwandan Genocide.

After the United National Security Council established the International Criminal Tribunal for Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994, the world had now realised that it was not only inconvenient but also an extremely resource consuming process. In order to streamline processes and optimise resource allocation, the International Law Commission submitted the first draft of the Rome Statute to the United Nations General Assembly in 1994. After that, an ad hoc committee met twice in 1995 and created the Preparatory Committee to work towards a "widely acceptable consolidated draft text." From 1996 to 1998, the committee had six plenary sessions in order to debate and negotiate the potential court.²

"Four major issues arose in the negotiations for creating the ICC. "First, the role of the [United Nations] Security Council, second, the level of independence granted to the prosecutor, third, the method by which states would accept the Court's jurisdiction, and fourth, the preconditions that needed to be met in order for the Court to exercise that jurisdiction." Some States remained uncomfortable with the amount of power that was eventually granted to the Court, particularly the United States. While the ICC is a fully independent body from the United Nations, the UN Security Council can delay investigations and prosecutions by passing resolutions supported by at least nine of the UNSC members, as long as no permanent member of the UNSC vote against the delay resolution. If a permanent member of the UNSC does not support the resolution, but does not wish to vote against it either, they may abstain from the vote, therefore not affecting the outcome. This delay that the UNSC can enact by passing a resolution is for a period of 12 months that can be renewed annually, and could be viewed as a potential stalling tactic. The power that the UNSC has to delay cases makes the ICC's independence somewhat questionable.

² <http://www.beyondintractability.org/essay/international-criminal-court-overview>

Finally, the Rome Statute was completed on 17 July 1998, creating the ICC and establishing how the Court would be governed. The ICC has been in operation since 1 July 2002. The four years between the completion of the Statute and the operationalization of the ICC was due to the delays of countries ratifying the Statute. In order for it to be put into force, at least 60 governments needed to ratify the Statute, which finally happened on 11 April 2002. During the months between April and July 2002, a 5-person advance team was put in place to begin the process of setting up the Court. Over the next year, the Assembly of States Parties elected the judges, prosecutors, and a registrar. The States also established the first approved budget for the ICC of approximately €53 million euros for the year 2004. By 2011, the budget nearly doubled to over €103 million.

There is a limited scope as to the types of cases the ICC tries and where the Court may assert jurisdiction. The ICC tries cases against people accused of genocide, crimes against humanity, war crimes, or crimes of aggression. Jurisdiction can be complicated in some situations, but generally, the Court may only assert jurisdiction in states that have signed the Rome Statute. Interestingly, the ICC cannot try cases for crimes committed before a State signed on to the Statute. As of 1 July 2012, 121 countries signed and ratified the Rome Statute.” (Heidi Bucheister, December 2012)



DPSN **MUN**

Jurisdiction of the Court

Jurisdiction is the right, authority or power to deal with and make pronouncements on legal matters and, by implication, to administer justice within a defined area of responsibility.

“One of the most fundamental questions of law is whether a given court has jurisdiction to preside over a given case. A jurisdictional question may be broken down into three components:

- *whether there is jurisdiction over the person (in personam),*
- *whether there is jurisdiction over the subject matter, or res (in rem), and*
- *whether there is jurisdiction to render the particular judgment sought.*

The term jurisdiction is really synonymous with the word "power". Any court possesses jurisdiction over matters only to the extent granted to it by the Constitution, or legislation of the sovereignty on behalf of which it functions. The question of whether a given court has the power to determine a jurisdictional question is itself a jurisdictional question.”³

It is hence, reasonable to argue that jurisdiction is a necessary criterion for establishing the competence of the court over a subject matter – in this case being the crime of aggression. Therefore, it is imperative that two questions with regard to the jurisdiction of the ICC be answered before it is prudent to hold any deliberations over the nature, definition and scope of a ‘Crime of Aggression’:

1. What are the sources of Jurisdiction for the ICC?
2. Who defines the jurisdiction to determine the jurisdiction of the International Criminal Court?

Throughout the course of debate in the committee, it is important that these questions be answered **first** - before any extended deliberations are undertaken.

³ <http://www.law.cornell.edu/wex/jurisdiction>

There are three different contexts across which jurisdiction of the ICC or any court must be understood⁴.

- jurisdiction *ratione materiae*, “Which Crimes to be Tried?”
- jurisdiction *ratione personae*, “Who Can be Tried?”
- jurisdiction *ratione temporis*, “When might the crimes have been committed for the court to try them?”

Jurisdiction Ratione Materiae

With respect to the Jurisdiction *ratione materiae*, the crimes which can be tried before the International Court are four in number: Genocide, Crimes against humanity, War crimes and the crime of Aggression⁵:

- **The crime of genocide** (Article 6 of the Rome Statute) means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group by methods such as : Killing members of the group; Causing serious bodily or mental harm to members of the group; Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; Imposing measures intended to prevent births within the group; Forcibly transferring children of the group to another group;
- **Crimes against humanity** (Article 7 of the Rome Statute) means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Murder; Extermination; Enslavement; Deportation or forcible transfer of population; Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; Torture; Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity; Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court Enforced disappearance of persons; The crime of apartheid; Other inhumane acts

⁴ <http://www.trial-ch.org/en/resources/tribunals/international-criminal-court/the-iccs-jurisdiction.html>

⁵ <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>

of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

- **War Crimes** (Article 8 of the Rome Statute) means grave breaches of the dispositions of the Geneva Conventions of 1949 as well as other serious violations of the laws and customs of war. It should be noted that a war crime can be committed within the framework of both national and international conflicts.
- **Crime of Aggression** (Article 5 of the Rome Statute): The Definition of this crime is the primary question under this agenda.

Jurisdiction Ratione Personae⁶

With respect to the jurisdiction rationae personae, the Rome Statute provides that the ICC only has jurisdiction over natural persons (Art. 25 of the Statute) at least eighteen years of age at the time the crime was allegedly committed (Art. 26 of the Statute). There is no immunity under the Statute due to the official rank of the accused person. It should be noted that the question of pursuing moral persons was raised during the Rome conference. Nevertheless the discussion on this subject raised disagreements amongs so many States, that it was decided not to integrate this competence into the ICC.

Jurisdiction Ratione Temporis

Insofar as the jurisdiction rationae temporis is concerned the ICC has jurisdiction only for crimes committed after the entry into force of the Rome Statute (1st of July 2002). Furthermore, for States which become Parties subsequently, the competence of the ICC only holds for the crimes committed after the Statute comes into force for that State. But it would suffice that either the State where the crime was committed or that the nationality of the author of the crime be party to the Statute for the competence of the ICC to be acknowledged.

⁶ http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/jurisdiction%20and%20admissibility.aspx

Crime of Aggression

Article 8 of the Rome Statute defines crimes of aggression, however the Court is not yet able to prosecute individuals for the crimes. The Statute originally provided that the Court could not exercise its jurisdiction over the crime of aggression until such time as the states parties agreed on a definition of the crime and set out the conditions under which it could be prosecuted.⁷ Such an amendment was adopted at the ICC's first review conference in Kampala, Uganda, in June 2010. However, this amendment specified that the ICC would not be allowed to exercise jurisdiction of the crime of aggression until two further conditions have been met: (1) the amendment has entered into force for 30 states parties and (2) on or after 1 January 2017, the Assembly of States Parties has voted in favour of allowing the Court to exercise jurisdiction.

The Statute, as amended, defines the crime of aggression as "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."⁸ The Statute defines an "act of aggression" as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations." The article also contains a list of seven acts of aggression, which are identical to those in United Nations General Assembly Resolution 3314 of 1974 and include the following acts when committed by one state against another state:

1. Invasion or attack by armed forces against territory
2. Military occupation of territory
3. Annexation of territory
4. Bombardment against territory
5. Use of any weapons against territory
6. Blockade of ports or coasts
7. Attack on the land, sea, or air forces or marine and air fleets

⁷ <http://www.un.org/News/facts/iccfact.htm>

⁸ Rome Statute, Article 8(1)

8. The use of armed forces which are within the territory of another state by agreement, but in contravention of the conditions of the agreement
9. Allowing territory to be used by another state to perpetrating an act of aggression against a third state
10. Sending armed bands, groups, irregulars, or mercenaries to carry out acts of armed force

Outcome of the Kampala Review Conference

On 12 June 2010 the Review Conference of the Rome Statute concluded in Kampala, Uganda. One of the main developments during the conference was an agreement on a mechanism by which the crime of aggression could be prosecuted at the International Criminal Court (ICC). Before the Review Conference began, the issue of the crime of aggression looked to be the most controversial, and many were sceptical of whether there would be agreement on the issue. The crime of aggression already exists under article 5 of the Rome Statute along with the crime of genocide, Crimes against humanity and War crimes. However, the Rome Statute states that the Court will only exercise jurisdiction over the crime of aggression when provisions are adopted to define the crime and to set out the conditions under which the Court would exercise its jurisdiction over the crime.

The States parties agreed upon a **resolution** defining the crime of aggression and setting out the mechanism by which a prosecution would be brought before the ICC. The final resolution represents a compromise after states disagreed on several issues, including the role of the UN Security Council in identifying an act of aggression. Under the agreement, the UN Security Council would have the main role in determining whether an act of aggression had taken place, acting under Chapter VII of the UN Charter. However, in the absence of Security Council action, proceedings could also be initiated by the Prosecutor on its own initiative or by referral by a state party. The Security Council may halt an investigation of the crime of aggression by resolution, but this must be extended every twelve months. The exercise of jurisdiction is subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.⁹

During the Review Conference, 112 pledges with the purpose of strengthening the Rome Statute system were made by 37 states parties, as well as the United States and the European Union. In

⁹ <http://www.haguejusticeportal.net/index.php?id=11779>

addition, the Conference adopted the Kampala Declaration¹⁰, reaffirming states' commitment to the Rome Statute and its full implementation, as well as its universality and integrity. The Review Conference further adopted a resolution on strengthening the enforcement of sentences. In parallel, the ICC signed three agreements, with Belgium, Denmark, and Finland, on the enforcement of sentences. The Coalition and its global membership are committed to work to maintain the momentum with States, the UN, other regional bodies and the Court to ensure commitments made in Kampala result in concrete actions.¹¹

The key Purpose of Convening this Meeting to is to deliberate upon the road forward from the Kampala Conference over matters related to the definition, composition and exercise of jurisdiction over crimes of aggression.



DPSN **MUN**

¹⁰ http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Decl.1-ENG.pdf

¹¹ <http://www.iccnw.org/?mod=review>

Appendix: More About the International Criminal Court

Structure of the ICC

There are 18 judges in the ICC. The Presidency is comprised of three judges, who are elected from within the 18 judges in the ICC and who each serve 3-year terms. The Presidency is comprised of The President of the Court, a First Vice-President, and a Second Vice-President. Once elected, in accordance with the Statute, these judges oversee the overall management of the ICC, including "judicial/legal functions, administration and external relations."¹²

- **The Judicial Divisions** are the Appeals Division, the Trial Division, and the Pre-Trial Division. The President sits on the Appeals Division, along with four other judges. The Trial and Pre-Trial Divisions consist of no less than 6 judges each, though their proceedings consist of three judges. A single Judge may carry out many of the functions of the Pre-Trial Chamber. The judges are placed in the Divisions based on their qualifications and expertise for a 3-year term, which may be extended for trials they preside over that continue beyond their term.¹³
- **The Office of the Prosecutor** receives referrals for cases and information on crimes within the Court's jurisdiction from States, UN Security Council (UNSC), or based on their own initiatives.¹⁴ It then examines what it receives, potentially conducts investigations, and potentially prosecutes cases before the Court. The Office consists of the Deputy Prosecutor, the Investigations Division, and the Jurisdiction, Complementarity and Cooperation Division.¹⁵
- **The Registry**, headed by the Registrar, is responsible for judicial and administrative support of all divisions of the ICC, specifically in matters of defense, victims and witnesses, outreach, and detention. The Office of Public Counsel for Victims and the Office of Public Counsel for

¹² International Criminal Court. *The Presidency*. Web. 10 November 2012. http://www.icc-cpi.int/EN_Menus/ICC/Structure%20of%20the%20Court/Presidency/Pages/the%20presidency.aspx.

¹³ International Criminal Court. *Chambers*. Web. 10 November 2012. http://www.icc-cpi.int/EN_Menus/ICC/Structure%20of%20the%20Court/Chambers/Pages/chambers.aspx.

¹⁴ International Criminal Court. *Frequently Asked Questions*. Web. 10 November 2012. http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/faq/Pages/faq.aspx.

¹⁵ International Criminal Court. *Office of the Prosecutor*. Web. 10 November 2012. http://www.icc-cpi.int/EN_Menus/ICC/Structure%20of%20the%20Court/Office%20of%20the%20Prosecutor/Pages/office%20of%20the%20prosecutor.aspx.

Defence also technically fall under the Registry, but they essentially function independently and are semi-autonomous.¹⁶

The Nature of the ICC – Opinions, Debate and Controversy

The ICC has been a controversial issue since people began talking about its possible existence. Now that it has been an international judicial entity for 10 years, the consequences seem to be becoming real and some countries continue to avoid ratifying the Rome Statute. For example, though the United States signed the Statute, they have not ratified it because it is viewed as giving up an important piece of state sovereignty.

However, it may be the states that have ratified the Statute that should be the most worried about their sovereignty, as people are beginning to wonder if the investigations are biased, looking at only some parties to a conflict rather than all of them. Another controversy involves the fact that most of the investigations being conducted are in Africa and the Middle East. Some people suggest that this implies a bias or unfair focus on those regions and/or the Court taking advantage of weak states.

Yet, with only one conviction in the 10 years of the ICC's existence, these consequences may seem unreal or unlikely to many still. With the first conviction coming down, and Lubanga only serving eight more years from when the trial finished, the consequences for committing these crimes do not seem to be as harsh as some might think they should or could be for those who are found guilty. Additionally, the amount of time that the investigations and trials take, can allow the suspects to find ways to remain at large, even after a warrant is issued for their arrest.

“Another controversial issue regarding the ICC is the role of the UNSC. The two have signed an agreement that lays out how the two bodies will cooperate with one another, largely through administrative procedures and information sharing. However, the UNSC's ability to delay indefinitely any case (as described above) is controversial. Particularly the permanent members of the UNSC have a great power because they can use their veto power to deny the progression of a referral to the ICC, even if other members of the UNSC want to pass such a resolution. With the UNSC's two referrals to the ICC so far, regarding Darfur and Libya, was the Council's motivation pure in achieving justice for the people of those states or did they have other motivations in seeing these situations investigated and potentially prosecuted by the ICC?” (Alex Krafchek, 2013)

¹⁶ International Criminal Court. *The Registry*, Web. 10 December 2012. http://www.icc-cpi.int/EN_Menus/ICC/Structure%20of%20the%20Court/Registry/Pages/the%20registry.aspx.

Severn Non-Governmental Agencies and Human Rights Organisations have often expressed apprehensions over the working of the International criminal Court. Here is an extract from a Report Published by the Human Rights Watch in 2011:

“(we) believe its mission to be, which they describe as bringing “to trial those most responsible for the gravest crimes representative of underlying patterns of ICC crimes.” HRW criticizes the ICC for not conducting thorough enough investigations to go up the chain of command to reach the true leaders who are committing heinous crimes against humanity.”¹⁷

The Investigation Process

There are three ways for the ICC to receive a situation to investigate. The first way is that a State Party of the Rome Statute refers a situation to the Prosecutor. The second way is for the UN Security Council to request an investigation of a situation in any State that is a member of the UN. Even if the State to be investigated has not ratified the Rome Statute, they may still be investigated because all member states of the UN are bound by UN resolutions. The third way is on the Office of the Prosecutor's own initiative. Under this course of action, the Prosecutor must request authorization to proceed with an investigation from a Pre-Trial Chamber.¹⁸

Following the initiation of the investigation, a situation is assigned to a Pre-Trial Chamber. The Prosecutor may decide before or after the initiation of an investigation that there is no basis to proceed. However, if a State or the UNSC has referred the situation to the Prosecutor, the Pre-Trial Chamber may request that the Prosecutor reconsider their decision to end the investigation. Additionally, if the Prosecutor decides not to move forward based on a determination that it would not be in the interest of justice, the Pre-Trial Chamber could choose to review this determination. If the Pre-Trial Chamber chooses to conduct a review, it has to affirm the determination in order for it to stand.

However, if an investigation proves fruitful, the Prosecutor may apply to the Pre-Trial Chamber for a warrant of arrest or a summons to appear for the person suspected of committing a crime or crimes that fall under the scope and jurisdiction of the ICC. If the Pre-Trial Chamber issues the warrant or summons, it is the hope that the wanted person will be surrendered to the Court or appear voluntarily, at which point a hearing to confirm the charges is held. Of the ICC's suspects which there

¹⁷ Human Rights Watch. "Unfinished Business: Closing Gaps in the Selection of ICC Cases." 2011. Web. http://www.iccnw.org/documents/hrw_unfinished_business.pdf.

¹⁸ International Criminal Court. *How the Court Works*. Web. 10 November 2012. http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/how%20the%20court%20works.aspx.

have been warrants issued, three were arrested by their governments and transferred to The Hague, while two were arrested by foreign authorities and also transferred to The Hague. Ten of the ICC's suspects appeared before the Court voluntarily.

Once the charges are confirmed, the case is then assigned to a Trial Chamber. During the trial, the Prosecutor must prove the defendant guilty beyond a reasonable doubt. The accused can act as his or her own defense or be represented by counsel. Decisions made by Chambers can be appealed throughout the Pre-Trial and Trial phases, which are reviewed by the Appeals Chamber. Victims can also participate in the proceedings either directly or through legal representation. When the proceedings have concluded, the Trial Chamber decides if the accused is to be acquitted or convicted. If convicted, there will be a sentencing, which can include imprisonment and even reparations to victims.



DPSN **MUN**