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A Historical Survey of Aggression as an International Crime

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Introduction

World War I (hereinafter called WWI) brought the worst disaster in history to humanity with deaths of up to 18 million soldiers and civilians. In the Peace Preliminary Conference in Paris where it was discussed how to handle that disaster, it was first proposed to establish an international court for the punishments of individual war crimes, which include war crimes in a narrow sense, crimes against humanity and crimes against peace.[1] The result of this, from Article 228 to 230 of the Treaty of Versailles, was the decision that an international military tribunal for the punishments of individual war crimes should be established. Germany turned down the terms, however, and its establishment was abandoned resulting in Germany holding the so called "Leipzig Trial".[2] Furthermore, Article 227 was the provision which

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(1) Hisakazu Fujita, *What are War Crimes?* (Iwanami-Shinsho, 1995) pp. 61-63. Taiko Ando, *A Principle of an International Criminal Court* (Seibundoh, 2002) pp. 8-11.

An international court for the punishments of individual war crimes includes the ICTY, ICTR and ICC that will be discussed later.

(2) In this domestic trial, only 12 people out of the 900 that should be prosecuted have come to trial, and half was to be found not guilty and the other

obliged the trial of the previous German Emperor Wilhelm II in the international tribunal as the leader of committing WWI. This punishment meant that punishing the head of a state which acted the aggression also meant punishing the state itself.(3)

However, the Netherlands refused the request to extradite Wilhelm II. Therefore the punishment wasn't realized. After WWI, the realization of the establishment of an international court for the punishments of individual war crimes was considered to be difficult. In actuality, in 1937, the Convention for the Prevention and Punishment of Terrorism was adopted by the League of Nations, which includes the articles providing the establishment of an international court for the punishments of individual war crimes.(4) Nevertheless in the end, this treaty ended up not coming into force, so an international court for the punishments of individual war crimes was left unestablished.

I. The emerging concept of "International Crime of State" as a result of the outlawry of war

In the Paris Peace Conference of WWI, it was first suggested to punish sovereigns and leaders who started a war by an international court, but international punishments of such persons were not realized because it was during this time that the outlawry of war was about to begin; that is, war of

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sentences were quite lenient. So, it is said that the necessity of the establishment of an international court for the punishments of individual war crimes to judge war criminals was strongly felt. *Ibid*, Fujita, pp. 45-49.

(3) Cf. Masaki Kihara, "Aggression as an International Crime of State- A Historical and Theoretical Study of its Codification" *Ritsumeikan Law Review*, 2000. No. 5 (2001), pp. 484-485.

(4) Cf. "Convention for the Prevention and Punishment of Terrorism, Nov. 16 1937", *American Journal of International Law*, Vol. 16. No. 1 (1937), pp. 58-59. Fujita, *supra* note (1), pp. 35-39. Ando, *supra* note (1), pp. 14-16.

aggression was not yet outlawed under the international law. This kind of situation progressed rapidly after WWI.

When the Covenant of the League of Nations concluded in the Paris Peace Conference, a historic movement toward the outlawry of war began and the collective security system was materialized. From then, aggression began to be labeled as "international crime".

First, provisions which classify aggression as "international crime" in draft treaties, like the Text of the Treaty of Mutual Assistance, started to be included.(5) Nevertheless, none of these referred to specific legal effects of an act of aggression, and they were indistinct about the recognition of international crime and the subsequent punishment.(6) Still, they had a wide influence and from the 1920's to 1930's theoretical arguments which labeled aggression as "international crime" were introduced. Moreover, based on these arguments, the codifications of "international crime" were proposed in various academic conferences. All of these included the provisions that labeled aggression as "international crime" and defined the contents of "international crime of state". Furthermore, these suggestions provided the lists of sanctions applicable to states which started aggression as the special legal effects of starting aggression; in other words, they specifically listed the sanctions as "punishment" against the state. When looking at it historically, influenced by state practices like the Text of the Treaty of Mutual Assistance which was led by the historic movement toward the outlawry of war, theoretical arguments which called aggression "international crime" and the suggestion of the codification of "international crime" appeared. Thus, the concept of aggression as an international crime of state took root.(7)

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(5) League of Nations, *Official Journal, Special Supplement*, No. 16 (1923), p. 203, No. 21 (1924), pp. 21, 25-26, No. 54 (1923), pp. 155-156.

(6) C. Schmitt, *Der Nomos der Erde* (1950), pp. 245-247.

In the arguments of aggression as an "international crime of state", the state which committed the crime was to be imposed by a special legal effect called "punishment", which is different from the regular international responsibility. From the sanctions for the punishments found in the following Tables 1 to 5 and carrying out the sanctions for the punishments in the following Tables 6 to 10, it was clear that the contents of the punishments were just measures of the collective security system. That is to say, when the political organization, namely the League of Nations, politically recognized that the sanctions for the punishments were needed for the purpose of the organization, namely international peace, the sanctions for the punishments were carried out. The flaw of the arguments and the proposals of the codification of aggression as an "international crime of state" is that there was confusion between the creation of "punishment" for aggression as an "international crime of state" and the strengthening of the collective security system.

Sanctions applicable to States are as follows in Tables 1 to 5:

Table 1. Inter-Parliamentary Union, "Resolution of the Inter-Parliamentary Union", 8. A.(8)
a) Diplomatic sanctions: warning that diplomatic relations will be broken off; revocation of the exequatur granted to the consuls of the guilty State; withdrawal of the right to benefit by international agreements;
b) Legal sanctions: sequestration of property belonging to nationals of the

(7) Cf. Kihara, *supra* note (3), pp. 481-486.

(8) Resolution of the Inter-Parliamentary Union on the Criminality of Wars of Aggression and the Organization of International Repressive Measures" (*Union Interparlementaire,compte rendu de la XXIII Conference*, 1925 (Washington)), cited in Historical Survey of the Question of International Criminal Jurisdiction (Memorandum submitted by the Secretary General), United Nations (1949), pp. 70-74.

guilty State in the territory of the other States; withdrawal from these nationals of the rights of industrial, literacy, artistic, scientific and other property; prohibition to appear as a party in the Courts of the associated States; deprivation of civil rights;

c) Economic sanctions: application to the guilty State of measures depriving it of the advantages resulting from the economic solidarity means of blockade, boycott, embargo, refusal to furnish foodstuffs or raw material, increased customs duties on products coming from the guilty State. to be quoted on the Stock Exchanges, prohibition to use means of communication;

Table 2. International Law Association, "Statute of the Court" Art. 22.(9)

If the Court finds that a charge against a State is proved, the Court may order such State to pay to the complaining State

a) a pecuniary penalty;
b) indemnity for any damage done;
c) a sum by way of indemnity to any subject or citizen of the complaining State who proves any loss or injury caused by the act or default of the defendant State or of any subject or citizen of such State.

Table 3. Association internationale de Droit pénal, "A Proposed Code of International Criminal Law", Article Nine. Sec. 1.(10)

a) Breaking off of diplomatic relations.
b) Warning that diplomatic relations will be severed.
c) Withdrawal, in whole or in part, of diplomatic privileges and immunities of officials and agents.
d) Revocation of exequatur granted to consuls.
e) Curtailment in whole or in part, of the right to benefit under international agreements.
f) Sequestration of property belonging to the guilty State which may be

(9) International Law Association, "Statute of The Court", in *Report of the Thirty Fourth Conference* (1926), pp. 113-125.

(10) A. Levitt, "A Proposed Code of International Criminal Law", *Revue Internationale de Droit Pénal* (hereinafter cited as *RiDp*), Vol. 6 (1929), pp. 18-32.

found in the other States.

g) Sequestration of property belonging to the nationals of the guilty State which may be found in the territories of the other States.

h) Withdrawal from the nationals of the guilty State of the rights of industrial, literary, artistic, scientific and other property.

i) Depriving the nationals of the guilty State of right to sue and be sued in the courts of the other States.

j) Depriving the nationals of the guilty State of all civil rights in the other States.

k) Economic boycott of the guilty State by the other States.

l) Embargo against the guilty State by the other States.

m) Refusal to furnish raw materials to the guilty State by the other States.

n) Refusal to furnish loans to the guilty State by the other States.

o) Increasing customs duties on the products coming from the guilty State by the other States.

p) Prohibiting the nationals of any State from giving financial assistance of any sort or in any manner to the guilty State.

q) Withdrawing from the guilty State, or the nationals of the guilty State, facilities of communication, transportation and commerce within the territories of the other States.

r) Imposing upon the guilty State the duty of making reparations for any injury it may have caused another State or the nationals of another State.

Table 4. Association internationale de Droit pénal, "Plan d'un code répressif (1935)", TITRE QATRIEME Chapitre premier.[11]

1. Les différentes fonctions que peuvent remplir les sanctions: mesures de police, mesures de contrainte, mesures répressives proprement dites.

2. Nature des sanctions, notamment:

   a) sanctions diplomatiques (l'avertissement, la rupture des relations diplomatiques, la révocation de l'exéquatur accordé aux consuls de l'Etat coupable, la suppression du droit de bénéficier des accords internationaux, etc.);

   b) sanctions juridiques (la mise sous séquestre des biens appartenant aux ressortissants de l'Etat coupable, etc.);

   c) sanctions économiques (blocus, boycottage, etc.);

(11) V. Pella, "Plan d'un code répressif", *RiDp*, Vol. 12 (1935), pp. 366-369.

d) autres sanctions (retrait des mandats coloniaux, recours à la force armée, etc.).

Table 5. V. Pella, "Plan d'un code répressif (1946)", TITRE QATRIEME Chapitre premier.[12]

1. SANCTIONS PÉNALES, notamment:

a) sanctions diplomatiques (l'avertissement, la rupture des relations diplomatiques, la révocation de l'exequatur accordé aux consuls de l'Etat coupable, la suppression du droit de bénéficier des accords internationaux, etc.);

b) sanctions juridiques (la mise sous séquestre des biens appartenant au ressortissants de l'Etat coupable, la suppression, frappant les mémés nationaux, des droits de propriété industrielle, littéraire, artistique, scientifique, etc., l'interdiction d'ester en justice devant les tribunaux des Nations Unies, la privation de l'exercice des droits civils);

c) sanctions économiques (l'application à l'Etat coupable de la privation des avantages qui découlent de la solidarité économique internationale, en l'isolant de la vie économique mondiale, moyennant: le blocus, le boycottage, l'embargo, le refus de fournir les denrées ou les matières premières, l'augmentation des droits de douane sur les produits provenant de l'Etat coupable les refus d'accorder des emprunts le refus d'admettre à la cote des Bourses les valeurs de l'Etat délinquant, l'interdiction partielle ou totale des moyens des communication);

d) autres sanctions telles que l'admonestation l'amende, l'interdiction, pour un temps déterminé, d'être représente à certaines institutions internationales ou d'exercer le droit de vote au sein des organes principaux de l'O.N.U. ou autres conseils, commissions, etc., la révocation des mandats coloniaux la suspension ou l'exclusion de l'Organisation des Nations Unies, l'occupation temporaire (totale ou partielle), la perte de l'indépendance.

2. MEASURES DE SÙRETÉ, notamment:

a) la destruction des voies ferrées stratégiques, le démantèlement des forts, etc.;

b) la suppression des usines d'armes et de toutes usines destinées à

(12) V. Pella, "Plan d'un code répressif", in *La guerre-crime et les criminels de guerre* (1946), pp. 145-156.

produire du matériel de guerre ou pouvant être rapidement transformées à cet effet, ainsi que l'exercice d'un contrôle industriel permanent;

c) la confiscation des armements dont disposerait l'Etat condamné;

d) la réduction, à l'avenir, de manieré que les sommes inscrites dans les budgets futurs de l'Etat coupable ne soient plus employées en vue de l'augmentation des effectifs et de l'armement;

e) le désarmement complet;

f) la fixation de zones neutralisées au point de vue militaire;

g) le contrôle de l'enseignement;

h) la répartition, sur différents points du territoire de détachements chargés de contrôler, au nom des Nations Unies, l'activité de l'Etat condamné.

The executions of Sanctions to States in the international criminal law proposal after WWI are as follows in Tables 6 to 10:

Table 6. Inter-Parliamentary Union, "Resolution of the Inter-Parliamentary Union", 16.(13)
In the case of violent aggression, the Council of the League of Nations will take urgent counter police measures. The Council of the League of Nations shall also have jurisdiction in regard to the execution of the decisions of the Permanent Court of International Justice. It will indicate the methods by which these decisions are to be executed.

Table 7. International Law Association, "Statute of the Court", Art. 37.(14)
Execution of Sentences and Orders of Court. In case of a judgment given against a State or of orders of the Court each contracting State shall upon request execute the judgment or orders.

(13) Resolution of the Inter-Parliamentary Union on the Criminality of Wars of Aggression and the Organization of International Repressive Measures" (*Union Interparlementaire compte rendu de la XXIII Conference*, 1925 (Washington)), cited in Historical Survey of the Question of International Criminal Jurisdiction (Memorandum submitted by the Secretary General), United Nations (1949), pp. 70-74.

(14) International Law Association, *supra* note (9), pp. 113-125.

Table 8. Vœux adoptés par le congrès de Bruxelles (1928)[15]”.
9° Les arrêts de condamnation prononcés contre des Etats seront exécutés par les soins du Conseil de la Société des Nations;
10° Le Conseil de la Société des Nations aura le droit de suspension et de commutation des peines;

Table 9. Association internationale de Droit pénal, “Projet de Statut pour la création d’une Chambre criminelle au sein de la Cour permanente de justice international (1928)[16]”.
PROJET DE STATUT POUR LA CRÉATION D’UNE CHAMBRE CRIMINELLE ART. 68. – Les décisions de la Cour auront un caractère obligatoire.
Elles seront communiquées au Conseil de la Société des Nations, auquel est confié le soin de prendre les mesures internationales nécessaires pour l’application des sanctions prononcées contre les Etats.

Table 10. V. Pella, “Projet de Statut pour la création d’une Chambre criminelle au sein de la Cour permanente de justice internationale (1946)[17]”.
ART. 68. – Les décisions de la Cour auront un caractère obligatoire, Elles seront communiquées au Conseil de la Société des Nations, auquel est confié le soin de prendre les mesures internationales nécessaires pour l’application des sanctions prononcées contre les Etats.

(15) V. Pella, ‘Vœux adoptés par le congrès de Bruxelles’, *RiDp*, Vol. 5, pp. 275-277 (1928).

(16) Association internationale de Droit pénal, “Projet de Statut pour la création d’une Chambre criminelle au sein de la Cour permanente de justice internationale”, *RiDp*, Vol. 5 (1928), pp. 293-307.

(17) V. Pella, *supra* note (12), pp. 145-156.

II. The Ago Proposals about Article 19 of the ILC Draft Articles on the Responsibility of States

In 1976, the special reporter Ago submitted the “5th Report”[(18)] and, as the respondent of this, in the same year the International Law Commission drafted Article 19 of the Draft Articles on the Responsibility of States.

This Article 19 classified internationally wrongful acts into two categories, which had two different kinds of obligations. One was “international crime of state”, and the other was merely “internationally wrongful act”. The purpose of the Article was to codify the definition of “international crime of state”. Then with the Article, in the United Nations General Assembly (hereinafter called UNGA) 6th committee, many countries agreed on the codification of the special system of international responsibility of “international crime of state”.[(19)]

Nevertheless, in the 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts, this Ago proposal had not been accepted and the Article itself had not been adopted. The main reason was that it became clear after various arguments that there was no suitable organization for judging international crimes of states and carrying out the punishments against the states. As a result of this, it became clear that the creation of the system for the Article 19 of the Ago proposal was impossible.

For example, why couldn’t the United Nations Security Council (hereinafter called UNSC) be the suitable organization? It was argued that, assuming the Ago proposal, if the UNSC determined an international crime of state and a punishment for it, the process of determining and punishing would be-

(18) R. Ago, 5th Report, *Yearbook of International Law Commission* (hereinafter called cited as *YbILc*), 1976-II, Part One, p. 24, para. 72.

(19) UN. Doc. A/C. 6/31, A/C. 6/38

come very similar to the process of taking measures for sanctions in the collective security system. There would be a double standard, however, in the decision making between member states of the UNSC and the other countries. The determining and punishing of international crimes of states by the UNSC was thusly criticized for ignoring such a flaw, and it was difficult and dangerous to materialize.[(20)]

Next, why couldn't the UNGA be the suitable organization? Surely, Article 10 of the Charter of the United Nations states "UNGA may discuss any questions or any matters within the scope of the present Charter". But, due to the large number of countries within the UNGA, if the UNGA had the authority to discuss recognizing or punishing international crimes of states, there would be many more conflicts of interest between those countries than in the case of the UNSC. Therefore, it was thought that the UNGA was not suitable to recognize or punish an international crime of state.

Finally, why couldn't the International Court of Justice (hereinafter called the ICJ) be the suitable organization? Surely, Article 92 of the Charter of the United Nations states "the ICJ shall be the principal judicial organ of the United Nations". However, due to the ICJ not having compulsory jurisdiction, even if the ICJ was the judicial organ for recognizing or punishing international crimes of states, almost none of the cases would be tried. Moreover, if a trial began, it would take too long until a judgement was to be reached. It was therefore thought that the ICJ was not suitable to recog-

(20) The number of criticisms made by countries, including those in the United Nations General Assembly Sixth Committee and International Law Commission, grew. Japan, UN. Doc. A/C. 6/31/SR. 21, para. 8. Austrailia, UN. Doc. A/C. 6/31/SR. 27, Para. 20. Spain, *YbILc*, 1982-II, Part One, p. 17. United States of America, UN. Doc. A/C. 6/31/SR. 17, para. 9. Portugal, UN. Doc. A/C. 6/31/SR. 23, Para. 17. Greece, UN. Doc. A/C. 6/31/SR. 23. Paras. 11-12. Sweden, *YbILc*, 1981-II, Part One, p. 78.

nize or punish an international crime of state.

Now as a result, the Ago proposal had not been accepted and Article 19 had not been adopted. Due to this failure, the focus of the discussion shifted to "crime of aggression" as an international crime of the individual.[21]

III. The creation of the definition for "crime of aggression" in Article 8 *bis* of the ICC statute

Following the historic movement toward the outlawry of war after WWI, the necessity for an international court for the punishments of war leaders for war crimes became more recognized. This is because even if we impose a punishment on a state, it wouldn't be a direct sanction against the state which is only an abstract entity, and it wouldn't be effective. On the other hand, when we impose a punishment on a criminal under domestic law, it is a direct sanction against the criminal who is a specific entity, so it is most effective. Consequently, at the end of WWII, as to crimes against international law, the provisions of international law are to be enforced by punishing not abstract entities, that is states, but individuals. The necessity of punishments of such individuals had thus come to take priority over traditional ways of thinking, namely, "international law cannot be applied to individuals, because it is the law of nations." Therefore, the main war criminals in WWII were punished for "crimes against peace", "crimes against humanity" and "war crimes" in the International Military Tribunals (hereinafter called IMT) at Nuremberg and Tokyo.[22] Before holding trials, the IMT at

(21) P. M. Dupuy, 'Observations sur le crime international de l'Etat', *Revue generate de droit international public*. Vol. 84 (1980), p. 486. Cf. Kihara *supra* note (3), pp. 533-540.

(22) Kisaburo Yokota, *War Criminal Theory* (Yuhikaku, 1947) p. 29. Ando, *supra* note (1), pp. 26-30.

Nuremberg declared the following:

> *"Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."*[23]

Based on this declaration, the so called Nuremberg Principle, the individuals who committed the war crimes were condemned in IMTs.[24] Then nearly 50 years later, the following three international courts for the punishments of individuals for war crimes were established.

First, the exacerbation of the ethnic cleansing in Former Yugoslavia became an impetus for the establishment of one of them, the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter called ICTY). In the beginning, the resolutions of the UNGA were adopted, in which the ethnic cleansing from 1991 was called "Genocide". On the one hand, according to this resolution, in 1993, the Government of the Republic of Bosnia and Herzegovina (hereinafter called Bosnia and Herzegovina) filed in the Registry of the Court an Application instituting proceedings against the Government of the Federal Republic of Yugoslavia (hereinafter called Serbia) in respect to a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter called

(23) Office of United States of Counsel for Prosecution of Axis Criminality, Nazi Conspiracy and Aggression, Opinion and Judgment (United States Government Printing Office, 1947), p. 53.

(24) Kanae Taijudo, "Kokusaihanzai-no gainen-to kokusaihoh-no tachiba (The Concept of International Crime under International Law)", *Jurist*, No. 720 (1980), pp. 67-72.

Genocide Convention). Then, a merits judgment was handed down in February 2007. In this judgment, the ICJ imposed state responsibility on Serbia, which was based on the breach against Article 1 of the Genocide Convention.[25]

On the other hand, according to that resolution of the UNGA, as mentioned above, Resolution 827 of the UNSC was adopted in 1993. Based on this resolution, the ICTY was established and individuals were punished for "the crime of genocide", "crimes against humanity" and "war crimes" there.[26]

In addition to the ICTY, "the International Criminal Tribunal for Rwanda (hereinafter called ICTR) was also established by Resolution 955 of the UNSC and individuals were punished for "the crime of genocide", "crimes against humanity" and "war crimes" there.[27] Through these punishments, a permanent court for the punishment of individuals for such crimes came to be thought of as preferable to an ad hoc court such as the ICTY or the ICTR, which were established by the UNSC resolutions.

Finally in 1998, the Statute of the International Criminal Court (hereinafter called the ICC Statute) was concluded at the UN Diplomatic Conference of Plenipotentiaries in the Establishment of an International Criminal Court in Rome (hereinafter called the Rome Conference).[28] Based on this, the

(25) ICJ: Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) (hereinafter cited as Genocide Case), Judgment, 26 February 2007, paras. 297, 459, 471. I. C. J. Reports 2997, pp. 166, 229, 237.

(26) Cf. U. N. Doc. S/RES/827, 25 May 1993, pp. 1-3. Masaki Kihara "Can the provisions of International Crime of Genocide be enforced by punishing individuals and imposing state responsibility?", *Kobe Gakuin Hogaku*, Vol. 38 No. 1 (2008), pp. 263-299.

(27) U. N. Doc. S/RES/955, 8 November 1994, pp. 44-70.

(28) U. N. Doc. A/CONF. 183/9 of 17 July 1998, pp. 1-82.

International Criminal Court (hereinafter called ICC) was established and became constantly active, not ad hoc. Thus, as far as "the crime of genocide", "crimes against humanity" and "war crimes", it was confirmed that individuals who commit one of these crimes are to be punished based on international criminal law.

In contrast to these three crimes, regarding "the crime of aggression", the ICC cannot exercise its jurisdiction until we define "the crime of aggression" and a provision is adopted "setting out the conditions under which the ICC shall exercise jurisdiction with respect to this crime". Still, "the crime of aggression" is provided as a crime within the jurisdiction of the ICC (paragraph 1 (d) of Article 5 of the ICC Statute), in place of "crimes against peace" created after WWII. Thus, the international society regards "the crime of aggression" as one of the crimes within the jurisdiction of the ICC; however the ICC cannot punish the crime of aggression until a provision concerning the crime of aggression is adopted.

Now, the possibility of resolving the problem of preventing the punishment for crimes of aggression has been found. This is because the definition of "crime of aggression" was agreed upon in the Conference of the Contracting Parties of the ICC Statue in Kampala, Uganda in 2010, which was 12 years after the ICC Statute was adopted. Thus, the following definition was made[29]:

Article 8 *bis*

Crime of aggression

1. For the purpose of this Statute, "crime of aggression" means the plan-

(29) RC/Res. 6, "The Crime of Aggression," 11 June 2010, in *Review Conference Official Records*, Annex I, "Amendments to the Rome Statute of the International Criminal Court on the Crime of aggression," p. 18.

ning, 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.

2. For the purpose of paragraph 1, “act of aggression” means 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. Any of the following acts, regardless of a declaration of war, shall in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of on State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating

an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

There are two main features when comparing this definition to those of the other crimes within the jurisdiction of the ICC. The first feature is that the word "commit", which is provided in definitions of the other crimes, is not provided in Article 8 *bis*. The reason for this is to avoid identifying those who commit a crime of aggression, be it a person or a state. Within this point, surely in paragraph 1 of the article, "the execution of an act of aggression" is provided as a type of a crime of aggression. But, it is understood that an act of aggression consists of many crimes of aggression, and one type of these is "the execution of an act of aggression" by a person. Thus, "the execution of an act of aggression" does not mean the committing of a crime of aggression. The second feature of Article 8 *bis* is that only "a person in a position effectively to exercise control over or to direct the political or military action of a State" may plan, prepare, initiate or execute an act of aggression. In other words, Article 8 *bis* provides that the ICC may apply the crime of aggression to the actions of a person who pushes a State further towards an act of aggression.

These characteristics show that, even though a State has committed an act of aggression, the persons who forced the State to commit the act of aggression are to be punished for the crime of aggression. This is because the idea that a State which has committed an act of aggression is to be punished has already been abandoned. The two reasons for this abandonment are as follows: the first is with regards to who decides whether the state commit-

ted an act of aggression or not, and the second is with regards to difficulty of carrying out the punishment of the State which committed an act of aggression.

Concluding Remarks

The above two arguments have been altered and yet still remain. The first new argument is over who decides whether there is a State's "act of aggression" required as a fundamental premise of "crime of aggression"; and the second argument is who is to be singled out as "a person in a position effectively to exercise control over, or to direct the political or military action of a State" whom is to be punished for a "crime of aggression" because of the persons forcing the State to commit the act of aggression. Now, eight years after the 2010 Kampala Conference, it is still necessary to argue these points and clarify how much we have agreed on them and the challenges that are still left.