
SECURITY COUNCIL POWERS IN RELATION TO THE CRIME OF AGGRESSION. INTERNATIONAL SECURITY AND THE ROLE OF ICC.

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Annotation. The perspective of SC and more generally of United Nations in interaction with ICC will not be directly investigated. It will be only incidentally and for the most relevant purposes for the investigation of the SC's powers to affect the content of the Treaty establishing the Court. More generally, any limits to the action of SC will be observed only in light of the repercussions that may have on the jurisdictional activity of ICC. From an internal perspective, so to speak, to the Court itself, it should be emphasized that the autonomy referred to is only that of the ICC with respect to another institution, a political body, the SC. In this perspective, the present work is concentrated on the analysis of the crime of aggression and the role of two organs, which they have fought for years to save peoples and punish those who have committed atrocious crimes such as that of aggression. The method used is that based on sources, in particular on the statute of the ICC and on "restrictive acts" or not of the SC.

Keywords: Security Council of UN, crime of aggression, UN Charter, StICC, international criminal justice, General Assembly of UN, ICJ.

THE CRIME OF AGGRESSION IN STICC. REFERENCE TO UN CHARTER

Another regulatory element contained in Statute of the International Criminal Court (StICC) that expresses the needs to link Security Council (SC) activity and that of ICC, concerns the crime of aggression. It is not possible to retrace here the long and complex path that led to the definition of this crime. However, it can be remembered in general that one of the reasons behind the difficulty of including such criminal conduct among those subject to ICC jurisdiction was precisely the lack of a shared and sufficiently precise definition of the criminally relevant behaviors and of the state acts underlying the individual crime¹.

A further element of complexity, also at the origin of the obstacles to the inclusion of the crime of aggression in the ICC *ratione materiae* competence, concerns the relationships between individual and state responsibility. The crime of aggression, by definition, the expression of a

¹B. Bonafè, "The relationship between state and individual responsibility for international crimes", Martinus Nijhoff Publishers, Leiden, Boston, 2009.

decision taken by the leaders of the political or military apparatus of a State also presupposes a responsibility for the latter. To tell the truth, other international crimes also tend to be committed by an individual-body therefore attributable to the State of belonging of the author of the illegal conduct and in any case present a collective and, so to speak, political dimension: The systematic attack on crimes against the humanity, the planning of war crimes, the intent to target a group as such in the case of genocide. No other international crime has, however, as it will now be better said, a presupposition and condition of the same evidence of individual criminal conduct, a state offense.

The origins of a particularly close relationship between individual and state responsibility for aggression are already clearly visible in art. 16 of the project of crimes against peace and humanity drawn up by International Law Commission in 1996. In light of that provision, in fact, an individual would have been held responsible for the crime of aggression if "as a leader or organizer, participates in or orders the planning, preparation, initiation or waging of aggression committed by a State"³. In this perspective, in short, a necessary condition for the existence of individual crime was the commission of an act of aggression by a State. Moreover, also in light of the aforementioned art. 23 of the draft Statute, drawn up by ILC in 1994, the individual crime of aggression presupposes that a State had been held to have committed aggression⁴.

Given these assumptions it was difficult to imagine that the Rome Statute did not provide for this particular crime a connection with the UN Charter and that the relationship between the two forms of responsibility was not made explicit in any way. It is almost superfluous to remember that art. 39 of the UN Charter grants SC the power to investigate interstate attacks. For this reason, in addition to the need for a general connection with the provisions of UN Charter, the most specific emerged and here it is of extreme interest and importance to connect the jurisdictional activity of ICC inherent in SC.

Since no shared solution was found at the Rome Conference on the modalities of such

²For further details see: D. Liakopoulos, "Complicity of states in the international illicit", Maklu editions, Portland, Antwerp, Apeldoorn, 2020

³Draft Code of crimes against the peace and security of mankind, in Yearbook of the International Law Commission, 1996, vol. II (part two).

⁴Draft Statute of the International Criminal Court with commentaries, in Yearbook of the International Law Commission, 1994, vol. II, part two, 1994, pp. 44ss.

coordination between ICC and SC, art. 5 (2) StICC⁵, after having precisely ordered that the exercise of jurisdiction over the crime of aggression be postponed to the future adoption of a definition of the crime by the determination of the conditions of activation of ICC, limited itself to recommending in completely generic terms, that this provision however, it must be "consistent with the relevant provisions of the UN Charter"⁶. Now, however incidentally it may appear "redundant but not superfluous"⁷, it testifies and anticipates the main question still to be resolved, namely, the need to coordinate the ICC's judicial activity in repressing the individual crime of aggression with the competence of SC to ascertain the commission of a state act of aggression.

Even more than the difficulties related to the definition of the crime of aggression were precisely the conditions of prosecution of the crime, also referred to in art. 5 (2), which led to the decision to postpone the exercise of ICC's jurisdiction over the crime of aggression to a future revision of the Statute⁸. In other words, it was a question of determining to what extent the repression of the crime of aggression by ICC could be conditioned by the powers attributed to SC for the purpose of maintaining peace and in particular of the ascertainment that that body is entitled to in the light of art. 30. All debates relating to the conditions of prosecution of the crime of aggression essentially revolve around the degree of autonomy which with respect to any assessment of SC should have been guaranteed to the Prosecutor for the purpose of opening the investigations and to the other ICC bodies for the purpose of attributing individual criminal liability for this particular criminal conduct⁹.

⁵O. Bekou, *"The International Criminal Court"*, ed. Routledge, London & New York, 2017.

⁶O. Bekou, *"The International Criminal Court"*, op. cit.,

⁷B. Bonafè, *"The relationship between state and individual responsibility for international crimes"*, op. cit.,

⁸Report of the Preparatory Committee on the establishment of an International Criminal Court, vol. I, UN Doc. A/51/22, 1996, p. 19. Many Arab and African States already suggested adopting the definition of aggression contained in Resolution n.3314 of 1974 while other States (such as Germany) suggested a definition that best suited the requirements of penal repression, as far as the role of SC is concerned, however the positions seemed even more distinct. See: Report of the ad hoc Committee on the establishment of an International Criminal Court, A/50/223, 1995, pp. 13-15, it is also evident that some States believed that the crime of aggression was already at least in one of its existing essential nuclei. The fact that the crime of aggression is provided for in the statutes among those subject to ICC jurisdiction *ratione materiae* but that its actual and concrete persecution was postponed to a future revision intended to define its content and conditions of admissibility has usually made the report speak. To this period so to speak of transition of dormant jurisdiction over the crime of aggression see the expression of P. Kirsch, D. Robinson, *"Reaching agreement at the Rome Conference"*, in A. Cassese, P. Gaeta, J.R.W.D. Jones, *The Rome statute of the International Criminal Court. A commentary*, Oxford University Press, Oxford, 2002, pp. 68ss.

⁹D. Liakopoulos, *"The function of accusation in International Criminal Court"*, ed. Maklu, Portland, Antwerp, Apeldoorn, 2019.

THE DEBATES PRECEDING THE ADOPTION OF THE STATUTE

The debates prior to the adoption of the Rome Statute offer some indications of what were the terms of the issue that we intend to address here. In particular, with regard to the repression of the crime of aggression, it can only start from the repeatedly called art. 23 of the Statute of the ILC Project of 1994. Par. 2 of this provision stipulated that a case relating to the crime of aggression could not be subject to ICC jurisdiction "unless SC has first determined that a State has committed the act of aggression which is the subject of the complaint. The initial orientation of ILC was therefore to attribute to SC a preliminary and unavoidable competence to determine the commission of an act of aggression by a State's party in order to proceed with the repression of individual crime¹⁰. Within ILC there were opposite or at least skeptical positions with respect to this solution¹¹. Several States then opposed an exclusive competence of the political body in determining the existence of a state of aggression. States opposed to such an incisive role of SC rather claimed the need to guarantee the autonomy and independence of ICC and therefore to recognize the latter is power to proceed even in the absence of an assessment by the political body¹². It can be said in general terms that the notion of aggression¹³ reflects the inability made by ILC to "divorce form its political nature".

The divergences that emerged during the Commission's work were then repeated in the subsequent Preparatory Commission work, with a clear favor still for a rather marked protection of SC prerogatives with respect to the guarantees of independence and autonomy of ICC (art.10 of the project). A full option included two distinct hypotheses. By virtue of the first, the ICC could not have exercised its jurisdiction only if the SC had expressly denied that the situation brought to the attention of ICC could be classified as aggression. In light of the second hypothesis, however, ICC jurisdiction would always have depended on an explicit assessment made by SC on the basis of Chapter VII of the UN Charter, aimed at determining the

¹⁰See, Report of the international law Commission on the work of its forty-sixth session, UN Doc. A/49/10, 2 May-22 July 1994, pp. 86: "(...) any criminal responsibility of an individual for an act or crime of aggression necessarily presupposes that a state had been held to have committed aggression, and such a finding would be for the Security Council acting in accordance with Chapter VII of the UN Charter to make". For further analysis see: M. Schuster, "The Rome statute and the crimes of aggression. A gordian knot in search of a sword", in *Criminal Law Forum*, 14 (1), 2003, pp. 36ss. T. Meron, "Defining aggression for the International Criminal Court", in *Suffolk Transnational Law Review*, 25, 2001, pp. 13ss.

¹¹See the positions of Pellet and Bennouna, in ILC Yearbook 1994, vol. I, 2358 meeting, p. 209 and 2361, meeting, p. 227.

¹²See in particular Bahrain (UN Doc. A/C.6/49/SR17, p. 4) and the Netherlands (UN Doc. A/C.49/SR/SR.17, p. 18), but also the rather critical attitudes of Greece (UN Doc. A/C.6/49/SR.17, p. 18), France /UN Doc. A/C.6/49/SR.19, p. 9), Israel (UN Doc. A/C.6/49/SR.20, p. 6) and Chile/UNDoc. A/C.6/SR.21, p. 6).

¹³A.C. Carpenter, "The International Criminal Court and the crime of aggression", in *Nordic Journal of International Law*, 64, 1995, pp. 234ss.

commission of an act of aggression by a State¹⁴. In a second proposal, in more general terms, it provided for the compulsory nature of any finding made by SC on the commission or not of an act of aggression by a State. However, it was not clear in this different scenario what would have happened in the absence of SC determinations.

Then there was a paragraph, aimed at protecting the jurisdictional activity of ICC which sanctioned the principle according to which any decision of SC “shall not be interpreted as in any way affecting the independence of the Court in its determination of the criminal responsibility of the person concerned”¹⁵. To tell the truth, this statement appears to be aimed at affirming an obvious principle of independence of the judicial function in ascertaining individual responsibilities. However, it does not seem to guarantee an autonomy of the Court with respect to SC in the event of an overlap of the action of the two bodies. It is quite evident in fact that if SC has the power to limit or initiate the exercise of ICC's jurisdiction over the crime of aggression, then preventing its activation through a negative determination about the existence of an act of aggression by part of a State it wants to subordinating the exercise of jurisdiction to a prior positive assessment regarding the commission of a crime, ICC independence to prosecute criminally responsible individuals is subject to the political assessment made by SC, which has in fact the power to preclude the action of the jurisdictional organ.

The divergences that emerged on the definition of the crime of aggression and on the role that SC should have played in the repression of the same ICC reappeared, as a part mentioned also at the Rome Conference. To mark a decisive moment of the debate was an interesting proposal from Cameroon that while admitting the necessary pre-eminence of SC in ascertaining the crime of aggression was aimed at guaranteeing a margin of discretion to ICC action at least in the case of inertia of the political body. With this proposal it was essentially suggested that before ICC exercises its jurisdiction over the crime of aggression, "SC shall determine the existence of aggression in accordance with the pertinent provisions of the UN Charter"¹⁶.

¹⁴Preparatory Committee Draft Statute n.110, par. 4 in its first option reads: 4. option 1 (Accompanied of or directly related to (an act) (a crime) of aggression (referred to in art. 5) may (not) be brought (under this Statute) unless the SC has first (determined) (and formally decided) that the act of a State is the subject of the complaint (is) (is not) an act of aggression (Chapter VII of the UN Charter).

¹⁵A.C. Carpenter, “*The International Criminal Court and the crime of aggression*”, op. cit., pp. 234ss.

¹⁶UN diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court, Rome, 15 June-17 July 1998, official records, vol. I, UN Doc. A/CONF.183/C.1/L.39.

However, and herein lies the most interesting element especially for the influence it will have in subsequent developments in the matter, it was envisaged that SC had delayed to make its own assessment on the commission of a state act of aggression following a request by the Prosecutor to do so. The latter could have initiated "an investigation for the purpose of establishing whether a crime of aggression within the meaning of the present statute exists"¹⁷.

As mentioned at the Rome Conference, it was decided to postpone the matter to a future revision of the Statute and a special Preparatory Commission was established for this purpose¹⁸. The impression of many was that the ICC's jurisdiction over aggression crime "was still born". And according to some, its birth would never have happened.

THE WORK FOLLOWING THE ENTRY INTO FORCE OF THE STATUTE AND THE FIRST REVIEW CONFERENCE

Starting in 2002, the Assembly of States Parties brought together the work of the Preparatory Commission into a special working group. It was the work of the latter body that laid the foundations for the subsequent debate that took place in the first statute review Conference. It is therefore appropriate to briefly analyze some of the proposals put forward by the States at that time, always naturally with a view to assessing the degree of autonomy that was intended to leave to ICC bodies with respect to SC decisions.

The motions of some States aimed at limiting the role of SC seem to be of particular interest, providing for the possibility of autonomous although limited ICC action or even the involvement of other UN bodies. A first hypothesis put forward by France and Portugal suggested that ICC could exercise its jurisdiction as well as in the event that the SC had already pronounced in this sense pursuant to art. 39 also following a request for assessment from the same Court and addressed to SC, which was disregarded for a period of 12 months¹⁹. An idea that suggested by the two States that took up the Cameroonian proposal and destined as already anticipated to a certain success. Unlike another hypothesis perhaps too ambitious submitted to the working group by Bosnia-Herzegovina, New Zealand and Romania which contemplated in

¹⁷A.C. Carpenter, "The International Criminal Court and the crime of aggression", op. cit.,

¹⁸He was assigned to this body to draw up a series of proposals for a provision on aggression, including the definition and elements of crimes of aggression and the conditions under which the ICC shall exercise its jurisdiction with regard to this crime. See, par. 7 of the Resolution adopted by the UN Diplomatic Conference of plenipotentiaries on the establishment of an International Criminal Court, 17 July 1998.

¹⁹Working group on the crime of aggression, proposal submitted by Greece and Portugal, PCNICC/2000/WGCA/DP.5, 28 November 2000.

an evident attempt to limit the role of SC, the involvement of General Assembly and International Court of Justice (ICJ)²⁰. According to this proposal, always SC had not pronounced on the possible aggression within 12 months from the request of ICC or had not decided to endorse the turnaround of ICC using the power provided by art. 15 StICC²¹, the ICJ could have notified the GA of the situation before the Court and invite it to request to it in accordance with article 96 of the existence or otherwise of an act of aggression by the State concerned²². Only in the event that the opinion of the ICJ recommended an action by ICC, could the latter have proceeded in ascertaining individual liability.

The results of the numerous discussions that took place within the working group²³ then merged into three distinct documents, commonly called chairman's papers. These works highlight a certain convergence of states in relation to the definition of crimes while they still present different options regarding the UN organ to which the competence should have been attributed to carry out this assessment. In other words, discussions continued on whether to allow the Prosecutor to act even in the absence of an assessment, carried out by a body external to the statute system relating to the commission of an act of aggression by a State. In the event that it was wished to preclude this possibility, it remained to be decided which body between SC, GA and ICJ should be invested with this competence²⁴.

The whole debate sheds more light on the real issue being disputed, namely whether the SC should be given a monopoly, so to speak, in assessing the commission of aggression between States or, instead, we can imagine that this task is shared with other UN bodies or even at least for the purposes of the criminal repression left to the decision-making autonomy of an international tribunal established through a treaty. Despite the widespread skepticism about the

²⁰D. Liakopoulos, *“La tutela cautelare nella Corte internazionale di giustizia. Aspetti processuali e comparati”*, ed. Amon, Firenze, 2012.

²¹W.A. Schabas, *“The International Criminal Court. A commentary to the Rome statute”*, Oxford University Press, Oxford, 2010, pp. 302ss.

²²Working group on the crime of aggression, proposal submitted by Bosnia and Herzegovina, New Zealand and Romania, PCNICC/2001/WGCA/DP.1, 23 February 2001.

²³Assembly of States Parties, special working group on the crime of aggression, 30 November-14 December 2007, New York, informal inter-sessional meeting of the special working group on the crime of aggression, ICC-ASP/6/SWGCA/INF.1, 25 July 2007.

²⁴See the diverse options contained in the discussion paper on the crime of aggression proposed by the Chairman, ICC-ASP/5/SWGCA/2, 1st February 2007; Discussion paper on the crime of aggression proposed by the Chairman, ICC-ASP/6/SWGCA/2, 14 May 2008 and discussion paper on the crime of aggression proposed by the Chairman, ICC-ASP/SWGCA/INF.1, Annex, 19 February 2009. For further analysis see: O. Solera, *“The definition of the crime of aggression: Lessons not learned”*, in *Case Western Reserve Journal of International Law*, 42, 2010, pp. 808ss. T. Lavers, *“Aggression, intervention and powerful feminist methodologies on peace and security issues”*, in *Amsterdam Law Forum*, 5 (2), 2013, pp. 127ss.

concrete possibility of reaching a shared solution regarding the conditions for exercising ICC jurisdiction, the first statute review Conference held in Kampala (Uganda) in 2010 marks the historic compromise²⁵, which opens the way for the permanent exercise of jurisdiction over this international crime by the permanent criminal court. The same Resolution adopted at the review Conference in 2010 stipulated that jurisdiction over the crime of aggression could only be activated if after the 1st January 2018, a decision had been taken to that effect in the Assembly of States, part of the majority required to amend the Statute (two thirds). In addition, ICC could have prosecuted the crime only one year after thirty States Parties to the Rome Treaty ratified or accepted the amendment. Thirty ratifications have been reached and in December of the last year, the Assembly of States Parties decided to activate ICC's jurisdiction over this particular crime as of 17 July 2018²⁶. It is necessary to examine what changes were introduced following the review Conference.

The document presented in Kampala, the so-called Conference Room Paper²⁷, proposed the elimination of art. 5 (2) and the inclusion of three different provisions. Art. 8 bis, concerning the definition of the crime of aggression, art. 15 bis relating to the conditions of prosecution against this crime in the event of a referral of a State Party or of an action proper to the Prosecutor and concerning the possibility of the referral being exercised by SC.

It is worth mentioning that art. 8 bis (1) defines the crime of aggression as "the planning, preparation initiation or execution by a person effectively in a position 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 UN Charter"²⁸. The conduct that can generate individual responsibility for the crime of aggression therefore presupposes, as had already emerged in previous attempts to define this criminal case, an act of aggression by the State for which the individual acts²⁹. Art. 8 bis (2) provides for a list of which state conduct may constitute a prerequisite for the suppression of the crime.

²⁵N. Blokker, C. Kress, "A consensus agreement on the crime of aggression: Impressions from Kampala", in *Leiden Journal of International Law*, 20, 2010, pp. 890ss. The revision Conference was convened on par. 1 of art. 121 which provides for the possibility of proposing amendments to the statutes at the end of the seven years from its entry into force.

²⁶Assembly of States Parties, Draft Resolution proposed by the Vice-Presidents of the Assembly activation of the jurisdiction of the Court over the crimes of aggression, ICC-ASP/16/1.10, 14 December 2017.

²⁷Conference Room Paper on the crime of aggression, Doc. RC/WGCA/1, 25 May 2010. P. Webb, "International judicial integration and fragmentation", Oxford University Press, Oxford, 2013. H.H. Koh, T.F. Buchwald, "The crime of aggression: The United States perspective", in *American Journal of International Law*, 109 (2), 2015, pp. 260ss.

²⁸P. Webb, "International judicial integration and fragmentation", op. cit.,

²⁹The amendment to the Statute also provides for a fairly high threshold of severity for the inter-state infringement, as this should represent a manifest violation of the UN Charter.

With regard to the conditions of prosecution, the proposals contained in the document have shown all the complexity and the composite nature of the debate and the positions taken by the States. The final document distinguishes two different situations as just highlighted: The activation of the jurisdiction upon notification of a State Party or on the initiative of the Prosecutor on one side and the referral of SC on the other. It is obvious that the latter case does not pose particular problems in principle. If the SC reports a situation to ICC, the assessment of individual responsibilities is functional and complementary to the action of the political body itself. As for the first two hypotheses, however, the reporting of a State Party or the action proper motu of the Prosecutor element of extreme importance of the historical Resolution adopted on the evening of 11 June 2010 in Kampala is the fact that the assessment of SC is not indispensable condition for ICC to exercise its jurisdiction over the crime of aggression. Such a solution undoubtedly represents a success of the majority of the States towards the permanent members of SC and appeared to the majority to guarantee a greater probability that the crime of aggression will actually be pursued in the future. Even more if we take into account the known reticence of SC to pronounce on the existence of a situation of aggression. Such a solution undoubtedly represents a success of the majority of the States towards the permanent members of SC and appeared to the majority to guarantee a greater probability that the crime of aggression will actually be pursued in the future. Even more if we take into account the known reticence of SC to pronounce on the existence of a situation of aggression. However, we cannot ignore the rather evident fact that this solution presents greater possibilities of generating opportunities for conflict between the judicial and political body.

Specifically, in light of paragraphs 6, 7 and 8 of the new art. 15 bis of the Rome Statute, the Prosecutor before starting an investigation for a crime of genocide proper motu or on the basis of a report by a State must verify that SC has carried out an investigation according to Chapter VIII of the UN Charter, of the Commission of a state act of aggression. If SC does not make this determination during the six months following the notification (and the transmission of all the relevant documents) to the UN General-Secretary on behalf of ICC regarding the situation on which the opening of the procedure is expected, the Prosecutor can independently carry out the investigation, subject to an authorization from the pre-trial division and unless SC decides to use its referral power.

Despite the compromise reached, it is appropriate to recall here some important limits on the exercise of jurisdiction over the crime of aggression by ICC. In fact, when the ICC action

is activated, through the exercise of the referral power of SC there are no distinctions between States that are part or not of the Statute, if instead the investigations are undertaken precisely by the Prosecutor or on the impulse of a State Party, ICC cannot exercise its jurisdiction over a crime committed by a citizen or on the territory of a State not part of the Statute³⁰. Finally, as regards the States Parties, they can decide through a specific declaration filed by the Registrar not to accept ICC competence for the sole crime of aggression³¹.

In conclusion to the most important question of the entire debate on the role of SC with respect to the repression of the crime of aggression, that is whether or not an organ should be recognized as an organ in the assessment of the existence of an aggression must be given a negative answer. From the point of view of ICC this is reflected in a considerable degree of autonomy of the Prosecutor in proceeding even in the absence of an assessment by the political body. On the other hand, it had already been recognized on several occasions that the primary responsibility attributed to SC of art. 24 of the UN Charter for the maintenance of peace and security must not be considered exclusive and that some functions in this area can also be exercised by other political or judicial bodies. A reading in this sense had already emerged in the General Assembly during the adoption of the Resolution uniting for peace. In that particular context, it was found that art. 10 of the UN Charter gives the General Assembly the power to discuss any questions or any matters within the scope of the present Charter in particular if SC does not exercise the powers attributed to it³².

Furthermore, in light of articles 12 and 14 of the UN Charter³³, GA can make recommendations regarding the measures to be adopted for a peaceful settlement of any controversy that could prejudice the peaceful relations between the States except in the case in which SC itself is dealing with the question. In short, a residual and secondary responsibility of the general assembly in matters of maintaining peace and security is now considered well

³⁰See par. 5 of art. 15 bis.

³¹See par. 4 of art. 5 bis.

³²Resolution n.377 (V) (1950), Uniting for peace (3 November 1950) this is the most well-known and relevant step: "if SC because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where appears to be a threat to the peace, breach of the peace, or act of aggression, the GA shall consider the matter immediately with a view to making appropriate recommendations to members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary to maintain or restore international peace and security. If not in session at the time the GA shall therefore meet in emergency special session within twenty-four hours of the request. Such emergency special session may be called if requested by SC on the vote of any members (nine since 1965) or by a majority of the UN members (...)".

³³W.A. Schabas, "The International Criminal Court. A commentary to the Rome statute", op. cit.,

established.

Similar reasoning can be made towards the Courts. The same ICJ as it is known has expressly ruled that the liability provided for by art. 24 "is primary, not exclusive"³⁴ and on more than one occasion recalled the different roles that a Court and a political body play and affirmed the idea and the principle of the possible parallel exercise of their respective functions³⁵. The recognition of an autonomous prerogative of assessment in relation to the Commission of state acts of aggression also seems in line with these reconstructions. On the other hand, while inevitably overlapping the action of SC in the context of the maintenance of international peace and security, the function assigned to ICC maintains its own distinct and precise specificity: The repression of an individual crime.

POSSIBLE COORDINATION PROBLEMS BETWEEN ICC AND SC IN THE REPRESSION OF THE CRIME OF AGGRESSION. PROCEDURAL ISSUES: ARTICLES 15A AND 15B

The fact that an investigation by SC regarding the Commission of a state act of aggression is not an essential precondition for prosecution undoubtedly represents an important guarantee of autonomy for ICC in the repression of the crime of aggression. Compared to other ICC related crimes, however, more and more stringent conditions for exercising jurisdiction are

³⁴International Court of Justice, Certain United Nations expenses (article 117, par. 2 of the charter), opinion of 20 July 1962, in ICJ Reports 1962, pp. 163ss. For further analysis see: M. Ruda, "Nulidad de los tratados", in Y. Dinstein, M. Tabory, "International law at a time of perplexity. Essays in Honour of Shabtai Rosenne", ed. Springer, Dordrecht, Boston, London, 1989, pp. 150ss.

³⁵International Court of Justice (ICJ), Military and paramilitary activities in Nicaragua and against Nicaragua (Nicaragua v. United States), par. 95, "the Council has functions of a political nature assigned to it, whereas the Court exercise purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events"; case concerning the application of the convention on the prevention and repression of the crime of genocide (Bosnia-Herzegovina v. Yugoslavia (Serbia and Montenegro), order of 13 September 1993, in ICJ Reports, par. 33. Armed activities in the territory of Congo (Republic Democratic of Congo v. Uganda), order of 1st July 2000, in ICJ Reports 2000, par. 36. The idea that the ICC could legitimately contribute to determining the situations of aggression, independently of an assessment made by SC, was widely affirmed even before the Rome Conference. See in argument: P. Escarameia, "The ICC and the Security Council on aggression: Overlapping competencies", in M. Politi, G. Nesi, The International Criminal Court: A challenge to impunity, Ashgate Publishing, Aldershot, 2001, pp. 134ss. M.S. Stein, "The Security Council, the International Criminal Court and the crime of aggression: How exclusive is the Security Council's power to determine aggression?", in Indiana International and Comparative Law Review, 16 (1), 2005, pp. 4ss. S. Barriga, C. Kress, "The travaux preparatoires of the crime of aggression", Cambridge University Press, Cambridge, 2012. J.D. Van Der Vyver, "Prosecuting the crime of aggression in the ICC", in University of Miami National Security & Armed Conflict Law Review, 2010-2011, 1, pp. 17ss. M. McCabe, "Balancing aggression and compassion in international law: The crime of aggression and humanitarian intervention", in Fordham Law Review, 83 (2), 2014, pp. 999ss. C. McDougal, "The crime of aggression under the Rome statute of the International Criminal Court", Cambridge University Press, Cambridge, 2013, pp. 215ss.

provided for this particular crime³⁶.

Although not all closely related to the interactions between ICC and SC, these limits to ICC jurisdiction are a clear consequence of the autonomy recognized by the Prosecutor in pursuing the crime of aggression. It is therefore worth mentioning it briefly.

Indeed, as regards the possibility of a report by SC, the changes do not present particular elements of novelty with respect to what is foreseen in relation to the other crimes covered by the ICC's jurisdiction. By virtue of art. 15 ter StICC, SC can exercise its referral power as provided for in art. 13 b) also in relation to the crime of aggression. As emerged during the first chapter, the possibility that SC indicates which crimes it believes have been committed in a given situation does not prevent the ICC bodies from qualifying a certain conduct differently. Similar reasoning can be performed in the event that a SC decision, through which it exercises its power of referral, expressly ascertains the Commission of a state act of aggression. This latter aspect is further highlighted from par. 14 of art 15 ter, which states that the assessment of an act of aggression "by an organ outside the Court shall be without prejudice to its own findings under this Statute"³⁷. In particular ICC could decide not to precede in the repression of the crime, believing differently from what hypothetically stated by SC in its report that there has been no state act of aggression or that despite this act has occurred it is not possible to ascertain a corresponding individual liability³⁸.

As in part anticipated, the differences compared to the conditions of prosecution against the other crimes under ICC jurisdiction emerge instead in the hypotheses of referral of a State Party or of the Prosecutor's action. The amendments made to the Statute provide that ICC cannot exercise its jurisdiction over citizens or crimes committed on the territory of the aggressor State that has previously declare that it does not accept such jurisdictions by lodging a declaration with the register (art. 15 bis (4))³⁹. The ICC cannot exercise its jurisdiction over the crime of aggression perpetrated by an upright citizen against the territory of a State Party to the Statute. Similarly, the exercise of ICC jurisdiction over the aggression committed on the territory of a State not part of the Stature by a citizen of a State Party is excluded. These particular limitations

³⁶It highlights the costs of the choice made in Kampala. C. Stahn, "The "end", the "beginning of the end" or the "end of the beginning"? Introducing debates and voices on the definition of aggression", in *Leiden Journal of International Law*, 23, 2010, pp. 880ss.

³⁷P. Webb, "International judicial integration and fragmentation", op. cit.,

³⁸In this sense the first comments related to ILC Project of 1994 of the Statute already went. For further details see: A.C. Carpenter, "*The International Criminal Court and the crime of aggression*", op. cit., pp. 236ss.

³⁹O. Bekou, "The International Criminal Court", op. cit.,

which distinguish the extent of ICC jurisdiction over the crime of aggression in relation to the other three categories of crimes in a rather incisive way, do not apply in the case of a referral from SC. In practice, if the latter hypothesis is excluded, the ICC can exercise its jurisdiction only when a State Party to the Statute attacks another one.

In general terms, it is evident that with respect to the referral of a State Party or to the own action of the Prosecutor, the activation of ICC by SC envisaged by art. 15b, prefigures exactly as for the other cases of exercise of the power of referral a hypothesis of convergence between the action of the political body and that of the permanent tribunal. It is important to underline, however, that in this case the SC is not required to carry out an assessment of any state aggression that is the basis of its referral. As expected from art. 13 b) in fact, SC can limit itself to reporting a situation in which one of the crimes under ICC jurisdiction has been committed. In short, the time when SC decides to start the Prosecutor's investigations into a specific context of violence, ICC bodies will then ascertain whether the aggression is among the crimes committed.

The main problems of coordination between the SC action and ICC jurisdictional activity evidently arise in the hypotheses provided for by art. 15 bis relating to the referral of a State Party and to the proprio motu of the Prosecutor. As already anticipated, it is clear that having guaranteed an autonomy to ICC in ascertaining the Commission of a state act of aggression as a prerequisite for the corresponding individual crime, is at the origin of possible conflicts between the two organizations in these hypotheses.

In principle, a convergence in the action of the two organs is also possible in the case of referral of a State Part or an action proper to the Prosecutor. The SC could, without exercising its power of referral, explicitly ascertain the Commission of a state act of aggression thus allowing the Prosecutor to proceed with the investigation (art.15 bis (7))⁴⁰. Even in this hypothesis it is possible ICC and SC reach different conclusions. The changes made to the Statute confirm with the same language of art. 15 ter, that ICC is not binding on the assessments made by bodies external to its system (art. 15 bis (9))⁴¹. It can therefore be imagined that despite the assessment made by SC, the Prosecutor decides not to request the opening of the investigations or this is denied by the pre-trial division. In order to avoid such a scenario of

⁴⁰O. Bekou, "The International Criminal Court", op. cit.,

⁴¹W.A. Schabas, "The International Criminal Court. A commentary to the Rome statute", op. cit.,

open contrast between ICC and the political body, SC could then choose to exercise its referral power provided by art. 15 ter⁴². As just noted in the exercise of this power, the SC is not required to make any express assessment of the specific state acts of aggression underlying its reporting. He may prefer to initiate investigations on a particular criminal context without exposing himself to a conflict with the ICC as to whether or not an attack by one State is damaging to another.

Although the hypothesis is unlikely, one can also ask what happens in the event that SC expressly establishes that in a given context no state act of aggression has been committed. Art. 15 bis does not contemplate this hypothesis since the verification that the Prosecutor is called to perform in relation to SC action concerns the possibility that the latter has made a positive assessment about the Commission of an act of aggression by a State. The provision does not seem to preclude the possibility of ICC proceeding against a crime of aggression even in the face of a clear position taken by SC aimed at denying the assumption of the state act of aggression. In other words, the hypothesis of a negative assessment of SC about the conduct of aggression if they believe, unlike the SC, that a state act of aggression was instead committed.

It is worth pointing out that within art. 15 bis⁴³, at least two elements seem to balance to a certain extent the absence of any form of control of SC over the ICC's judicial action on aggression. In the first place even if the wording appears superfluous art. 15 bis (8) reminds that the SC can always request the suspension of the investigation or of a proceeding pursuant to art. 16 StICC⁴⁴. Secondly, always with a view to balancing the absence of a filter by SC with respect to ICC action, then the same art. 15 bis (8) entrusts the task of authorizing the opening of investigations with respect to the crime of aggression to the pre-trial division, rather than as foreseen for the other crimes to one of the preliminary chambers.

(FOLLOWS): SUBSTANTIAL ISSUES: ART. 8 BIS

The definition of crime of aggression contained in art. 8 bis largely follows the Resolution n.3314 of 1974, adopted by the UN General Assembly. However, the basic approach of the changes prepared through the review conference and some specific editorial choices mark important differences compared to the definition drawn up at the general meeting.

⁴²S. Barriga, N. Blokker, "Conditions for the exercise of jurisdiction based on state referrals and proprio motu investigations", in C. Kress, S. Barriga, "The crime of aggression: A commentary", Cambridge University Press, Cambridge, 2017, pp. 662ss.

⁴³O. Bekou, "The International Criminal Court", op. cit.,

⁴⁴See in argument: C. Wenaweser, "Reaching the Kampala compromise: The chair's perspective", in *Leiden Journal of International Law*, 23 (4), 2010, pp. 888ss.

Art. 8 bis (2) StICC reports with identical letter only art. 3 of the definition contained in Resolution n.3314 of 1974. However, while in the Resolution of GA, state behavior was considered as presumptively constituting aggression in art. 8 bis every single conduct constitutes an act of aggression. In fact, an attempt was made at GA to protect as much as possible the role of SC that could have considered those same conduct not sufficiently serious to configure a hypothesis of state aggression⁴⁵. In the Rome Statute, on the other hand, the assessment of the seriousness of the violation of the rules on the use of force as a constituent element of the definition of aggression contained in art. 8 bis (1) is remitted to ICC bodies.

Art. 8 bis also does not contain a provision similar to art. 4 of Resolution n.3314 which recognizes SC power to ascertain that other acts constitute aggression beyond the terms expressly contained in the definition. The inclusion of this part of Resolution n.3314 of 1974 in the Rome Statute would have posed many compatibility problems with the principle of legality. It would have opened the way to the possibility of punishing an individual on the assumption of state conduct qualified by SC as an act of aggression only at a time after the entry into force of the rule⁴⁶. In art. 8 bis, there are also no references to the irrelevance of political, economic, military or other reasons that can be justified by the act of aggression (art. 5 of Resolution n.3314 of 1974) nor is the need to preserve the principle of self-determination of peoples. All these choices mark the attempt to adapt the definition elaborated by the general assembly to the jurisdictional function of ICC. No longer essentially the typical language of the policy-contextual mode of decision making of SC but rather the textual rule based on ICC decision⁴⁷. In other words, the editorial choices made at the review Conference reflect the need for legal certainty and to reduce, as far as possible, the space for political evaluations by the ICC bodies.

Precisely because of the different nature of the functions that perform the assessment that ICC and SC are called to perform in the matter of aggression, it is based on partially distinct legal bases. The DSC, as the Resolution n.3314 of 1974 well points out, enjoys an extremely wide discretion in establishing state acts that may fall into the category of aggression. ICC is

⁴⁵S.D. Murphy, "The crime of aggression at the International Criminal Court", in M. Weller, *The Oxford handbook of the use of force in international law*, Oxford University Press, Oxford, 2015, pp. 542ss. E.P. Reale, "Chronicles from Kampala amending the Rome statute", in *Revue Internationale de Droit Pénal*, 82, 2011, pp. 258ss. C. McDougall, "The crime of aggression under the Rome Statute of the International Criminal Court", *op. cit.*, pp. 258ss.

⁴⁶F.P. King, "The crime of aggression: Is it amenable to judicial determination?", in B.S. Brown, "Research handbook on International Criminal Court", Edward Elgar Publishers, Cheltenham, 2011, pp. 128ss.

⁴⁷W.M. Reisman, "Reflections on the judicialization of the crime of aggression", in *The Yale Journal of International Law*, 39, 2014, pp. 72ss.

required to verify the implementation of one of the specific conduct envisaged by its statutes. This does not detract from the fact that art. 8a StICC is couched in open-ended, valutative language⁴⁸. In this regard, it may be sufficient to remember that the act of aggression underlying the individual crime must by its character, gravity and scale constitute a manifest violation of the UN Charter. These are rather flexible regulatory parameters that are not easy to define and that ultimately imply a judicial choice that can have very significant political repercussions. The point is essentially that as far as art. 8 bis attempting to frame the crime of aggression in a list of determinable conduct the prerequisite for repression in a list of determinable conduct the prerequisite for the criminal repression of that individual behavior remains a state conduct likely to be implemented in the context of hugely important political-military events.

Beyond these general considerations on the particularly complex role that the ICC will be called upon to play in the suppression of the crime of aggression, a series of coordination problems between the exercise of jurisdiction and SC action can more concretely emerge in the light of the specific content of the assessment and possibly made by SC and the meaning that ICC bodies intend to attribute to that determination.

Some problematic aspects may concern the subjects involved in the act of aggression. It can be imagined that SC, as already happened, condemns an act of armed aggression towards a State without identifying the aggressor State or the relationship existing between the mercenary groups responsible for those conducted with a specific state entity⁴⁹. Art. 8 bis (2) (g) StICC states that in relation to the sending of irregular groups to the territory of a State there must be at least a substantial involvement of the aggressor State. In the absence of a clear assessment of SC relating to the attribution to a State of the illegal conduct configuring the act of aggression it could then be the ICC in full autonomy recognized by the Statute to proceed in this delicate work of identification of the aggressor State and the individuals responsible for the illegal act⁵⁰. Similar difficulties may also arise in relation to the victim of the attack. Art. 8 bis establishes that aggression must be directed against a State. Even in this case, it may happen that SC does not identify the State of these attacks in its assessment of the Commission of a series of acts of aggression. Once again, ICC having satisfied the assumption relating to the determination of

⁴⁸D. Scheffer, *“Amending the crime of aggression under the Rome Statute”*, in C. Kress, S. Barriga, *The crime of aggression: A commentary*, Cambridge University Press, Cambridge, 2012, pp. 1480ss.

⁴⁹See in particular the resolutions relating to the situations in Benin and the Seychelles: Resolutions 405 of 14 April 1977 and 496 of 15 December 1981.

⁵⁰N. Strapatsas, *“The practice of the Security Council regarding the concept of aggression”*, in C. Kress, S. Barriga, *The crime of aggression: A commentary*, Cambridge University Press, Cambridge, 2012, pp. 184ss.

SC regarding the Commission of a state act of aggression, could find itself having to identify the victim of aggression in order to be able to determine its jurisdiction over illegal conduct.

Another series of problems can arise in relation to the content of the specific illegal state conduct subject to the assessment made by the political body. No question if SC uses the terms contained in art. 8 bis (2) by explicitly qualifying a state conduct such as invasion, military occupation, bombardment or any of the illegal conduct listed in the provision. This, moreover, has already occurred in the past. In resolution n.424 of 1978 SC condemned for example the invasive armed of Zambia by Rhodesia of Sud as a consequence of the continuance of its acts of aggression. On another occasion through Resolution n.546 of 1984 SC condemned South Africa "for its renewed, intensified, premeditated and unprovoked bombing, as well as the continuing occupation of parts of the territory of Angola"⁵¹. The following year, for example, SC again stigmatized "South Africa's (...) unprovoked and unwarranted military attack on the capital of Botswana as an act of aggression"⁵². Israel's air raid on Tunisian territory of 1st October 1985 was also classified by SC as an act of armed aggression⁵³ and could fall under the letter of art. 8 bis (2) (g), as an attack by "(...) the armed forces of a State on the land (...) or of another State"⁵⁴. As expressly clarified in the amendments made to the elements of the crimes, in fact each of the conduct listed from art. 8 bis (2) represents an act of aggression. In these cases, the prosecutor should not have particular problems in considering the SC's assessment in relation to the Commission of a state act of aggression satisfied. More problematic is the hypothesis in which SC does not use a terminology corresponding to the statutory data. In the past, for example, SC condemned the economic blockade or military threats from Rhodesia of South to Zambia as provocative and aggressive acts⁵⁵. State deeds that are not contained in art. 8 bis (2) of the articles of association and against which the ICC may therefore decide not to exercise its jurisdiction as state conduct irrelevant to the detection of the crime of aggression⁵⁶.

⁵¹Strapatsas, N., "The practice of the Security Council regarding the concept of aggression", in C. Kress, S. Barriga, *The crime of aggression: A commentary*, op. cit., pp. 188ss.

⁵²Resolution of Security Council 568 of 21 June 1985. For further analysis see: T. Ruys, O. Corten, A. Hofer, "The use of force in international law: A case-based approach", Oxford University Press, Oxford, 2018, pp. 397ss.

⁵³Resolution of Security Council 573 of 4 October 1985. Ruys, T., Corten, O., Hofer, A., "The use of force in international law: A case-based approach", op. cit., pp. 400ss.

⁵⁴N. Strapatsas, "The practice of the Security Council regarding the concept of aggression", in C. Kress, S. Barriga, "The crime of aggression: A commentary", op. cit.,

⁵⁵Resolution of Security Council 326 of 26 February 1976. T. Ruys, O. Corten, A. Hofer, "The use of force in international law: A case-based approach", op. cit.,

⁵⁶N. Strapatsas, "The practice of the Security Council regarding the concept of aggression", in C. Kress, S. Barriga, "The crime of aggression: A commentary", op. cit., pp. 184ss.

Furthermore, SC could limit itself to ascertaining in general terms the Commission of an act of aggression without however specifying the state conduct attributable to that particular violation of the use of force. For example in Resolution n.386 of 31 March 1976 the SC condemned in general "the acts of aggression committed by South Africa against Angola in violation of its sovereignty and territorial integrity"⁵⁷. In these hypotheses, the Prosecutor would certainly be entitled to start its investigation activities without waiting for the six-month period foreseen in the event of failure to ascertain by SC and the subsequent authorization of the pre-trial division. The ICC bodies will then have to identify the specific conduct, among those provided by art. 8 bis (2) which is attributable to that specific aggression. Vice versa, SC could establish that one of the specific conduct contained in art. 8 bis (2) without expressly qualifying those behaviors as acts of aggression. The most obvious case concerns the invasion of Kuwait by Iraq. In that context, in fact, while condemning the invasion, the armed attack and the illegal occupation of the territory of Kuwait, SC has never used the term aggression or acts of aggression with respect to those conducted and considering them rather as violations of use of force⁵⁸. The situation is in this more complex hypothesis. It could be considered that the condition relating to the determination of SC is not satisfied. In this case, the Prosecutor may wait for the six-month period required to obtain an explicit assessment of SC and failing that, ask the pre-trial division to be able to proceed with the investigation activities. ICC could therefore qualify the behaviors identified by SC as true state acts of aggression in light of art. 8 a (2).

THE PROPOSALS PUT FORWARD REGARDING THE INVOLVEMENT OF UN BODIES REGARDING THE DEFINITION OF THE CONDITIONS OF PROSECUTION TOWARDS AGGRESSION

The problem of SC role for the purpose of exercising ICC jurisdiction in the matter of aggression concerns only the hypotheses of activation of the criminal proceeding on the initiative of a State Party of StICC or of the Prosecutor proprio motu, given that SC action based on Chapter VII of the UN Charter, it is generally competent to submit to the ICC any situation

⁵⁷N. Strapatsas, *"The practice of the Security Council regarding the concept of aggression"*, in C. Kress, S. Barriga, *"The crime of aggression: A commentary"*, op. cit.,

⁵⁸See the resolutions of SC n. 660 of 2 August 1990, 661 of 6 August 1991, 662 of 8 August 1990, 665 of 25 September 1990, 674 of 29 October 1990. For further analysis see: T. Ruys, O. Corten, A. Hofer, *"The use of force in international law: A case-based approach"*, op. cit.,

in which it believes that crimes within the scope *ratione materiae* of the same have been committed⁵⁹. In both situations indicated above on the basis of the proposals that emerged in the context of the working group on the crime of aggression set up by the Preparatory Commission, when an accusation of aggression comes to the fore, ICC would be required and recognize a right of precedence to SC evaluations in relation to the existence of a state act of aggression. Starting from this common premise, the advanced solutions suggest, alternatively, several options regarding the hypothesis in which SC, after a certain period of time, does not take a position⁶⁰. In this context, the crucial point is therefore given by the determination of the value to be attributed to SC silence⁶¹.

The solution that this silence should in any case be interpreted as an obstacle for ICC jurisdiction does not seem to be acceptable⁶². The practice demonstrates how the inertia of SC, precisely in light of the predominantly political criteria, which oversee the functioning of the body, can be explained in widely different terms depending on the situations that arise with the consequence that it would be unreasonable and arbitrary to attribute to it, in the context currently under examination a univocal meaning, even more so when the chosen meaning leads to such drastic consequences as the paralysis of criminal proceedings against crimes of exceptional gravity⁶³.

As far as the subject of this work is concerned, it is interesting to note that as part of the attempts to identify a more suitable balance in the relations between SC and ICC in order to ensure a balanced division of labor in terms of assessing the aggression in its dual configuration respectively of state and individual crime, some States have penalized the usefulness of

⁵⁹Art. 13, lett. b) StICC.

⁶⁰In the sense in which SC does not rule in relation to ICC's request to ascertain the existence of an act of aggression pursuant to art. 39 of the Charter. The options suggested in par. 5 of the consolidated proposal can thus be established: "1. The ICC could in any case exercise its jurisdiction; 2. The ICC would find itself in the impossibility of exercising its jurisdiction; 3. The ICC could ask the General Assembly to rule in the institution of the Security Council being able to exercise its jurisdiction only in case of ascertaining the existence of an act of aggression by this last one; 4. The ICJ could be called in a consultative manner to rule in the substitution of the Security Council enabling in the event of a positive reply, the ICC at the jurisdiction of the jurisdiction; 5. The ICJ could exercise its jurisdiction after verifying that the ICJ has previously ascertained, in the context of its concurrent competition, the existence of an act of aggression".

⁶¹R. Kherad, "La question de la définition du crime d'agression dans le statute de Rome. Entre pouvoir politique du Conseil de sécurité et compétence judiciaire de la cour pénale internationale", in *Revue Générale de Droit International*, 109 (2), 2005, pp. 355ss.

⁶²G. Gaja, "The respective roles of the ICC and the Security Council in determining the existence of aggression", in M. Politi, G. Nesi, "The International Criminal Court: A challenge to impunity", Ashgate Publishing, Aldershot, 2001, pp. 124ss.

⁶³This solution is supported by the statement contained in the opinion on Namibia for which: "le fait que telle ou telle proposition n'ait été adoptée par un organe international n'implique pas nécessairement qu'une décision collective inverse ait été prise. Le rejet ou la non-approbation d'une proposition peut tenir à de nombreux motifs (...)" (par. 69)

attributing precisely to ICJ a role of intermediation between the two instances, given that the latter would be called to intervene in order to verification of the existence of acts of aggression, not to correct the assessment of SC but to replace the latter to remedy its possible inaction, when it does not pronounce, within the terms established upon ICC solicitation.

We refer in this case to a proposal submitted to the attention of the Preparatory Commission from Bosnia and Herzegovina, New Zealand and Romania⁶⁴ (tripartite proposal). The proposal is structured as a cascade system of competences if a case of aggression is brought to the attention of ICC (ex artt. 14 and 15 of the Statute)⁶⁵, the latter must notify SC, which in turn has six months to take a position on the matter⁶⁶. In the event of inertia, after the indicated deadline has elapsed, CC may invite GA to refer the question of the existence of an act of aggression in the present case to ICJ⁶⁷. If ICJ responds positively to the question, then the ICC can proceed against the alleged perpetrator of the crime⁶⁸.

In its version, the proposal from Bosnia Herzegovina, New Zealand and Romania in par. 6, lett. b) also allows ICC to exercise its jurisdiction over a case of assault even in the event that the attempt to obtain the assessment required by art. 39 of the Charter, this assessment is made by ICJ during a litigation procedure. The project in question was also accepted in the latest version of the coordinator's discussion paper⁶⁹, not the further variant that the intervention of

⁶⁴UN Doc. PCNICC/2001/WGCA/DP.2/Add. 1, 27 August 2001. This is the reworking of a proposal already advanced by these States in February 2001 (UN Doc. PCNICC/2001/WGCA/DP.1, 23 February 2001) and which in its substance maintains its original layout, with the exception of a few exceptions. T. Dannenbaum, *"The crime of aggression, humanity and the soldier"*, Cambridge University Press, Cambridge, 2018.

⁶⁵O. Bekou, *"The International Criminal Court"*, op. cit.,

⁶⁶Note that the six-month limit set in the proposal in question (UN Doc. PCNICC/2001/WGCA/DP.2/Add.1, par. 5) raised in the first version to twelve months (UN Doc. PCNICC/2001/WGCA/DP.1, par. 4).

⁶⁷O. Deleau, *"L'examen du rôle de la CIJ par l'Assemblée générale des Nations Unies"*, in *Annuaire Français de Droit International*, 16, 1970, pp. 4ss.

⁶⁸In the original formulation the proposal provided that once the ICJ activated the procedure before ICC (UN Doc. PCNICC/2001/WGCA/DP.1, par. 5). In the second elaboration this intermediate phase is instead eliminated foreseeing directly to the competence of ICC once the investigation of the aggression by ICJ has taken place (UN Doc. PCNICC/2001/WGCA/DP.2/Add.1, par. 6, letter a)). In the comment to the indicated provision the proposing states raised the question of the attribution to ICC of a permanent authorization by GA regarding advisory questions to ICJ, a solution that would allow to simplify and depoliticize the whole procedure but the whose possibilities of realization are in the State canceled by the circumstance that art. 96, par 2 of the UN Charter expressly restricts the circle of potential beneficiaries of this authorization to the organs and organizations of the UN system. The attribution to ICC of a direct competence with regard to the request for advisory opinions to CJ is also the subject of some proposals put forward as part of the work on the draft agreement on relations between ICC and UN organization. For further analysis see: T. Dannenbaum, *"The crime of aggression, humanity and the soldier"*, op. cit.

⁶⁹As you can see, the tripartite proposal is based on two main assumptions: 1. The primary, but not exclusive, nature of the role of SC in terms of ascertaining aggression; 2. The incompetence of ICC to express assessments pertaining to the responsibility of the States. D.N. Nsereko, *"Aggression under the Rome statute of the International Criminal Court"*, in C. McDougall, *"The crime of aggression under the Rome Statute of the International Criminal Court"*, Cambridge University Press, Cambridge, 2013, pp. 517ss.

ICJ in the consultative session could be solicited as well as by GA, on the basis of a Resolution with a majority of nine votes, excluding the application of the veto right of permanent members⁷⁰.

The solution briefly described presents unquestionable with respect to the other proposals put forward regarding the definition of the trigger mechanism to be applied in the matter of aggression. In particular, the options that tend to attribute to political bodies, especially to SC and GA an exclusive role in the activation of ICC jurisdiction over the crime of aggression, despite the formal assurances that the decisions of these bodies: "Shall not be interpreted as in any way affecting the independence of the Court"⁷¹, are in no way suitable for safeguarding the autonomy and independence of the criminal jurisdiction⁷². ICJ intervention would allow to define the conditions of prosecution in the matter of aggression on the basis of legal parameters, evidently more suited to the type of issue dealt with. Furthermore, taking into account the fact that the individual crime of aggression necessarily implies the existence of a state crime, the referral in case of inertia of SC to ICJ would have the merit of avoiding the direct involvement of ICC in an interstate dispute and at the same time would make it possible to better guarantee the uniqueness and coherence of the international legal system, attributing to a single judicial body the task of ruling on matters relating to the responsibility of states for serious injuries to the essential values of international society⁷³.

On the contrary, the objection raised against the described proposal does not convince,

⁷⁰The solution to request for the approval of the opinion by SC a majority of nine votes originates from a proposal formulated by the Netherlands (UN Doc. PCNICC/2002/WGCA/DP.1 of 17 April 2002). The opportunity of introducing the described modification has raised some doubts: It has been argued in this regard that it would include an element of doubtful legitimacy in the tripartite proposal, but above all it would regret meeting the strong, if not insurmountable, opposition of the permanent members. C.E. Escobar Hernández, "*Corte penal internacional, consejo de seguridad y crimen de agresión un equilibrio difícil e inestable*", in F.M. Mariño Mèndez, "*El derecho internacional en los albores del siglo XXI. Homenaje al profesor Juan Manuel Castro-Rial Canosa*", ed. Trotta. Fundaciòn Juan March, 2002, Madrid, pp. 262ss. C. Mcdougall, "*The crime of aggression under the Rome statute of the International Criminal Court*", op. cit., In reality the perplexity highlighted does not appear completely justified. With this precision, the proposing delegation intended to resolve the controversial issue a priori to be applied to the adoption of requests for opinions. Since the setting therein coincides in fact with the general solution, not only do the doubts of the above mentioned doubts lose consistency from our point of view, but rather it is clear in the greater clarity that results from the modification indicated (in order to determine the activation modalities) of the advisory procedure) an element to be evaluated in positive terms.

⁷¹The solution is taken from the text of art. 10 of StICC project presented by the Preparatory Commission to the Rome Conference.

⁷²J. Trahan, "*Defining "aggression": Why the Preparatory Commission for the International Criminal Court has faced such a conundrum*", in Loyola of Los Angeles International and Comparative Law Review, 24, 2002, pp. 462ss, which is affirmed that "the credibility of ICC regarding prosecutions for aggression would very much depend on the way the SC and/or GA make determinations as to state responsibility".

⁷³D.N. Nsereko, "*Aggression under the Rome statute of the International Criminal Court*", in C. Mcdougall, "*The crime of aggression under the Rome Statute of the International Criminal Court*", op. cit., pp. 522ss.

which essentially hinges on the risk of politicization of the ICJ's activity which could result from its participation in the definition of the conditions of prosecution towards the crime of aggression. In this regard, apart from the completely inconsistent thesis in our opinion that the determination of an act of aggression far from configuring a legal question would be solely "a question of fact"⁷⁴, it was highlighted how ICJ would be in substance called to pronounce in a consultative session on a bilateral dispute (between the attacked and the aggressor State) and that it would be unlikely that the States involved (especially the accused State) would accept that ICJ itself will deal with it⁷⁵. The objection indicated actually confuses advisory and contentious jurisdiction and can be easily dismissed in light of the constant ICJ jurisprudence which clearly shows that ICJ has never attributed decisive importance, for the admissibility of a request for an opinion, to the the politicity of the question, let alone the fact that this concerned an interstate dispute with respect to which the parties had not both consented to its jurisdiction. On the other hand, the same configuration of the issues related to the Commission of acts of aggression in terms of purely bilateral disputes (which is at least implicitly apparent from this objection) lends itself, in the light of the considerations developed previously regarding the obligations of erga omnes and international crimes he has been to considerable criticism.

Nor could an obstacle to the involvement of ICJ at the request of GA be identified in hypotheses of this kind in art. 12 of the Charter. The problem of the value to be attributed to the rule indicated for the purpose of determining GA's competence to activate the consultative procedure has already been addressed and resolved (also in the light of the clear stance taken on this point by ICJ in the opinion on the legal consequences of the construction of a wall in the occupied Palestinian territories) in negative terms so there is no need to go back to the issue here again⁷⁶. It is sufficient to note here that the objections that the participation of GA in the

⁷⁴J.N. Boeving, "Aggression, international law and the ICC: An argument for the withdrawal of aggression from the Rome Statute", in *Columbia Journal of Transnational Law*, 43 (2), 2005, pp. 538ss. The author argues that the involvement of ICJ in the issues currently under examination would be excluded from the Rome Statute itself, which would provide for the latter only to resolve, to the sense of art. 119, the disputes between States Parties relative to the interpretation of the same Statute. Indeed, this argument seems even weaker than the one we criticized in the text, as well as being absolutely unfounded from a logical point of view, given that the attribution of a specific competence in a given field is not at all apt to exclude further exceptions attributions in different sectors. Nor does it make any sense to censor the proposal in question on the absence of the relief that the defendant would have no way of defending his position before ICJ. This objection, in addition to lending itself to a similar use also with regard to the eventual assessment opted from SC, has no real value, however it concerns an assessment that in the context currently under examination has only a procedural and not substantial scope.

⁷⁵D.N. Nsereko, "Aggression under the Rome statute of the International Criminal Court", op. cit., pp. 520ss. D.S. Mathias, "Remarks on the definition of aggression and the ICC", in *ASIL Proceedings*, 96, 2002, pp. 182ss.

⁷⁶M. Schuster, "The Rome statute and the crimes of aggression. A gordian knot in search of a sword", op. cit., pp. 36ss.

indicated proceeding could constitute a violation of the division of responsibilities for the maintenance of international peace and security outlined by the Charter are not in our opinion absolutely relevant⁷⁷.

Also the argument, undoubtedly of greater interest, according to which GA's intervention (but these observations are valid *mutatis mutandis* also with regard to SC role in the version presented in the consolidated proposal of the coordinator of the crime working group of aggression of the Preparatory Commission), resolving itself in the discretionary decision of the latter to activate or not the consultative procedure before ICJ would not however be suitable to neutralize the risks of politicization of the procedure and to adequately safeguard the independence of ICC⁷⁸, in our opinion not it must be dramatized, given that the influence on the criminal proceeding with regard to the crime of aggression of political elements probably constitutes an absolute factor that cannot be eliminated, but whose scope can only be mitigated, what the proposal currently under consideration seems to us to actually achieve⁷⁹.

On the other hand, the question of the relationship between ICC and SC in this area has been framed by us from the outset in terms of harmonization and balancing of potentially conflicting needs, i.e. peacekeeping (in a perspective mainly inspired by considerations of a political nature) and repression of international crimes (in a perspective on the contrary of strict respect for legality and law enforcement).

The compatibility of the six-month limit within which SC should respond to the request of ICC with respect to the charter rules pertaining to its functioning and competences, that are based on the widest discretion in favor of the latter. The rule could be partially correct by providing for an extension in favor of SC in the event that the latter or the Secretary General decides to start an investigation to shed light on the facts in question. On the contrary, no delay in the expected times would seem to be justified in the case of simple negotiations or other

⁷⁷M. Schuster, *"The Rome statute and the crime of aggression. A gordian knot in a search of sword"*, op. cit., pp. 46ss.

⁷⁸J. Trahan, *"Defining "aggression": Why the Preparatory Commission for the International Criminal Court has faced such a conundrum"*, op. cit., pp. 462ss, the risk of politicization of the issue would be linked in practice to the fact that GA "apparently would retain the option of referring the issue (...)".

⁷⁹With a view to resizing the possibilities of politically motivated determinations, the modification of the present proposal is to be placed, which in its second formulation neutralizes the risk inherent in the first version that following the pronouncement of the ICJ attesting to the existence of acts of aggression, the General Assembly arbitrarily decides not to refer the matter to the ICC. The original formulation actually attributed to the appeal to the ICJ a purely instrumental character with respect to the competences of the General Assembly. In the version currently under examination, instead, once the ICJ has taken up the question, it has ruled on the existence of an act of aggression, the ICC can proceed immediately with the case. In this way, the role of filter of the General Assembly (and *mutatis mutandis* of the Security Council) is limited only to the activation phase of the ICJ advisory procedure.

diplomatic dispute resolution procedures, and this in consideration of the seriousness of the crime and its consequences. In any case, SC would always have the power attributed to it, pursuant to art. 16 StICC to block the exercise of jurisdiction of the latter⁸⁰.

As for the effects to be linked to the involvement of UN bodies in the determination of the conditions of prosecution in the matter of aggression, is discussed whether these should be merely procedural or even substantial. If this second perspective prevails, the determination made in the first instance by the indicated bodies would also condition the conduct of the criminal trial on the merits, as ICC cannot deviate from the assessment expressed in terms of state liability. In this way, the indicated assessment would constrain the decision regarding the existence of the individual crime by ICC itself, limiting the latter's margin of judgment to the assessment and determination of the degree of involvement of the accused in the participation, planning and organization of the aggression⁸¹.

Although it is undeniable that a prior determination of the existence of a state act of aggression is likely to produce a tremendous impact on the criminal trial⁸², the first solution is certainly favored in our opinion⁸³. It allows to guarantee the application of some fundamental principles that must inspire the criminal trial before ICC. We refer above all to the presumption of innocence, expressly provided for by art. 66 StICC, which would be disregarded in the event that the determination made by UN bodies also constrained the merits of ICC assessments⁸⁴. By adopting the solution of the merely procedural nature of the intervention of UN organs instead, the procedural guarantees in favor of the accused would be reserved and ICC would be recognized the possibility of pronouncing in total independence regarding the existence of the crime and the degree of the accused's responsibility⁸⁵. The consideration that the standard of

⁸⁰O. Bekou, *"The International Criminal Court"*, op. cit.,

⁸¹I.K. Müller-Schieke, "Defining the crime of aggression under the statute of the International Criminal Court", in *Leiden Journal of International Law*, 14 (2), 2001, pp. 428ss.

⁸²S.A. Fernández De Gourmendi, "The working group on aggression at the preparatory commission for the International Criminal Court", in *Fordham International Law Journal*, 25, 2001-2002, pp. 606ss.

⁸³D. Sarooshi, "Aspects of the relationship between the International Criminal Court and the United Nations", in *Netherlands Yearbook of International Law*, 32, 2001, pp. 28ss.

⁸⁴In this orientation see: W.A. Schabas, *"Follow up to Rome: preparing for entry into force of the International Criminal Court Statute"*, in *Human Rights Law Journal*, 20, 1999, pp. 158ss, "(...) an accused could arrive before the court with the central factual issue in the charge already determined and not subject to change (...)"

⁸⁵V. Gowlland-Debbas, "The relationship between political and judicial organs if international organizations: The role of the Security Council in the new International Criminal Court", in L. Boisson De Chazournes, C.P.R. Romano, R. Mackenzie, "International organizations and international dispute settlement. Trends and prospects", Martinus Nijhoff Publishers, 2002, pp. 108ss.

proof in the criminal trial is notoriously higher than that required for state liability⁸⁶ also supports the thesis accepted here. Nor is the objection that, in the event that SC has previously ascertained the existence of an act of aggression, the determination made on the basis of art. 39 would be binding on Member States under the terms of art. 25 of the Charter, for which the latter would be required to accord the evaluation of SC prevalent character with respect to ICC judgment and this by virtue of the provisions of art. 103 of the Charter⁸⁷. In our opinion, it does not make sense to extend the scope of application of art. 103 also to the activity of mere verification carried out by SC pursuant to art. 39⁸⁸. This activity is essentially procedural in Chapter VII of the Charter, constituting a necessary precondition for the adoption of coercive measures aimed at peacekeeping⁸⁹, therefore it does not impose any legal obligation in the proper sense on Member States, likely to enjoy the prevalence granted by the aforementioned provision⁹⁰.

For the sake of completeness, it should be noted that the indicated solution, favorable to the independence of the ICC's assessments with respect to those made in terms of state liability, lends itself to raising very difficult consequences to be regulated in the event that these are made by ICJ, according to the model proposed by the tripartite proposal. If accepted as a solution of general application, the idea of the merely procedural nature of the prior determination of an act of state aggression is clear that the risk of conflicts between the assessments of ICJ and those of ICC presents extremely serious profiles⁹¹. In this regard, a situation of connection would appear to arise between proceedings in progress before international courts, with respect to which international practice is not currently able to provide adequate answers, given the absolute novelty of a situation of this kind. In this regard, the above question is immediately closely linked to the highly discussed issue, at a purely theoretical level, in the configurability of a hierarchy of dispute resolution procedures at international level. It must be said that in a more general perspective, the risk of contradictory solutions regardless of the choices made regarding the involvement of other bodies in defining the conditions of

⁸⁶A. Nollakaemper, "Concurrence between individual responsibility and state responsibility in international law", in *International and Comparative Law Quarterly*, 52 (3), 2003, pp. 616ss.

⁸⁷M. Schuster, "The Rome statute and the crime of aggression. A gordian knot in a search of sword", *op. cit.*, pp. 40ss.

⁸⁸O. Bekou, "The International Criminal Court", *op. cit.*,

⁸⁹S. Yee, "A proposal to reformulate article 23 of the ILC draft statute for an International Criminal Court", in *Hastings International and Comparative Law Review*, 19, 1995-1996, pp. 534ss.

⁹⁰D.N. Nsereko, "Aggression under the Rome statute of the International Criminal Court", *op. cit.*, pp. 508ss.

⁹¹C.E. Escobar Hernández, "Corte penal internacional, consejo de seguridad y crimen de agresión un equilibrio difícil e inestable", in F.M. Mariño Mênendez, "El derecho internacional en los albores del siglo XXI. Homenaje al profesor Juan Manuel Castro-Rial Canosa", *op. cit.*, pp. 262ss.

prosecution towards the crime of aggression, already exists at present due to the existence to which we have previously referred a plurality of international bodies authorized, albeit with regard to different purposes and in specific institutional contexts, to ascertain the existence of acts of aggression.

CONCLUDING REMARKS

Several proposals have been made with a view to involving the UN bodies in SC first in determining the existence of the crime of aggression, in order to avoid a dangerous overlap in such a sensitive and politically sensitive matter of UN activity to protect peace and that of ICC in the field of repression of the most serious crimes under international law⁹².

The initial idea is that since the crime of aggression necessarily presupposes the existence of an act of aggression, that is to say a particularly serious offense attributable to a State⁹³, a SC definition regarding the ascertainment of the existence of such this case would in principle always be desirable for ICC to exercise its jurisdiction over the alleged offender.

Pursuant to art. 5, par. 2 StICC the definition of the conditions under which ICC can exercise its jurisdiction over the crime in question must be in harmony with the relevant

⁹²It is clear that the question of the relationship between ICC and SC in this area is intimately linked to the problem related to the definition of the crime of aggression itself. Suffice it to note the aspects that are likely to strongly encapsulate the solution to be attributed to the question of the involvement of UN organs in determining the conditions of transferability in relation to the crime under consideration. On the one hand the idea that the rape of aggression necessarily concerns individuals that are at the political and military levels of a state (M. Politi, G. Nesi, *"The international court and the crime of aggression"*, ed. Routledge, Burlington, 2004) and, on the other, that for which aggression could only be prosecuted if actually carried out thereby excluding the criminalization of mere preparatory acts. With regard to the definition of the case to be included in this notion, various principal orientations have emerged up to now, depending on whether a formulation is privileged in general and abstract terms of the case, centered on the prohibition of the armed force supported by art. 2, par. 4 of the UN Charter; or an example of cases similar to the same model based on Resolution n. 3314 (XXIX) of 1973 of GA; or finally a narrow definition of crime, limited only to the war of aggression. For further details see: R.S. Clark, *"Rethinking aggression as a crime and formulating its elements. The final work-product of the preparatory commission for the International Criminal Court"*, in *Leiden Journal of International Law*, 15 (4), 2002, pp. 860ss.

⁹³I.K. Müller-Schieke, *"Defining the crime of aggression under the statute of the International Criminal Court"*, op. cit., pp. 410ss, "(...) the crime of aggression is inherently a state crime. Although the idea of initiating an armed conflict originates and develops in the minds of individuals the aggressive act emanates as an act of the State, not of its intellectual initiators (...)" See also in argument: C.E. Escobar Hernández, *"Corte penal internacional, consejo de seguridad y crímenes de agresión un equilibrio difícil e inestable"*, in F.M. Mariño Mènendez, *"El derecho internacional en los albores del siglo XXI. Homenaje al profesor Juan Manuel Castro-Rial Canosa"*, op. cit., pp. 244ss, which correctly highlights how the determination of the existence of a state act of aggression would necessarily be configured as "condición de procedibilidad básica de toda actuación de la CPI (...)". This consequence would be derived neither from the UN Charter nor from StICC, but from the "proper conception and internal development" of the crime. The same jurisprudence of individuals for acts of aggression always presupposes a state responsibility state to which the acts in question should be imputed. In this direction see art. 2, par. 2 of the project of the code of crimes against peace and security of humanity, in *Annuaire de la Commission de Droit Internationale*, 1996, II, 2, p.15ss and par. 4 of the comment of art. 16 of the same project. The described approach that is established in the works on the definition of ICC jurisdiction in relation to the crime of aggression excludes the possibility of criminalizing in these same terms certain devastating forms of terrorism, planned and implemented by non-state entities and not connected to a State on the basis of the traditional criteria of imputation due to international law (but which in terms of size and effects, can be equated with real aggressions).

provisions of the UN Charter. The dominant opinion is that this clarification was intended precisely to safeguard the prerogatives of SC of ex chapter VII of UN Charter and highlight the absolutely pre-eminent role⁹⁴. On the other hand, this statement constitutes an essential starting point if it wants to develop a proposal that is politically acceptable and in consideration of the very stringent conditions required for its adoption, it can count on a substantial support from the States.

Given that therefore a certain role to SC in this matter must be ensured and guaranteed, given the logical link in terms of aggression between state responsibility and criminal liability of the individual, the next step is to determine specifically what this role consists of and what consequences it leads to ICC operation. It is clear that the involvement of SC in the functioning of the court mechanism poses a serious threat to the independence and autonomy of the Court. Essential requirements for the correct and effective performance of judicial functions. The same principle of equality of individuals before the law would risk undergoing unacceptable compressions, given that SC members of exercising their right of veto could remove from ICC jurisdiction cases involving their own citizens or in which their interests result in various title involved⁹⁵.

The definition of the conditions of prosecution towards the crime of aggression requires a delicate work of harmonization between the competences and the operating methods of ICC and SC⁹⁶. In other words, a difficult balance must be found between the objectives of promoting international criminal justice and protecting the peace. While in a first phase (which we can temporarily place in the context of the negotiation that preceded the Rome Conference), the need for involvement in this area of SC was mostly motivated on the basis of the assertion of

⁹⁴M.H. Arsanjani, "The Rome statute of the International Criminal Court", in American Journal of International Law, 93, 1999, pp. 22ss. H.A.M. Von Hebel, D. Robinson, "Crimes within the jurisdiction of the court", in S.K. Lee, "The International Criminal Court. The making of the Rome statute. Issues, negotiations, results", Martinus Nijhoff Publishers, The Hague, Boston, London, 1999, pp. 80ss. L. Yee, "Not just a war crimes court: the penal regime established by the Rome statute of the International Criminal Court", in Singapore Academy of Law Journal, 10, 1998, pp. 322ss., the engraving contained in art. 5, par. 2 of StlCC intends to guarantee against any pronouncements of ICC in contrast with previous assessments of SC pursuant to art. 39 of the UN Charter.

⁹⁵C. Carpenter, "The International Criminal Court and the crime of aggression", op. cit., pp. 224ss. I.K. Müller-Schieke, "Defining the crime of aggression under the statute of the International Criminal Court", op. cit., pp. 426ss. R. Pierce, "Which of the preparatory commission's latest proposals for the definition of the crime of aggression and the exercise of jurisdiction should be adopted into the Rome Statute of the International Criminal Court?", in Brigham Young University Journal of Public Law, 15, 2000-2001, pp. 282ss. G. Gaja, "The long journey towards repressing aggression", in A. Cassese, P. Gaeta, J.R.W.D. Jones, "The Rome statute of the International Criminal Court. A commentary", Oxford University Press, Oxford, 2002, pp. 434ss.

⁹⁶I.K. Müller-Schieke, "Defining the crime of aggression under the statute of the International Criminal Court", op. cit., pp. 424ss.

the absolute exclusivity of competences of this body regarding the assessment of the case in question (for which a prior assessment pursuant to art. 39 of the Charter was indicated as an indispensable condition for the exercise of ICC jurisdiction)⁹⁷, from the proposals subsequently discussed in the context of the tendency to reduce the centrality of the SC role emerged from the Preparatory Commission and the working group on the crime of aggression, thus favoring the independence of the functions assigned to ICC itself in this matter⁹⁸.

This approach appears undoubtedly preferable. It is based on the widely acceptable

⁹⁷The draft of the Statute of 1994 (in *Rapport de la Commission du droit international*, quarante-sixième section (2 mai-22 juillet 1994), in *Annuaire de la Commission de Droit Internationale* proposing a scheme followed already by the provisional version of the project of crimes against the peace and security of humanity adopted in 1991 guaranteed the SC exclusive competence by establishing in article 23, paragraph 2 that "une plainte ne peut être déposée en vertu du présent statut pour un acte d'agression ou en liaison directe avec un tel acte que si le conseil de sécurité a constaté au préalable qu'un État a commis l'acte d'agression faisant l'objet de la plainte". Paragraph 3 of the same provision further strengthens the board's position with respect to ICC by providing that: "aucune poursuite ne peut être engagée en vertu du présent statut à raison d'une situation dont le Conseil de sécurité traite en tant que menace contre la paix ou rupture de la paix ou acte d'agression aux termes du chapitre VII de la Charte des Nations Unies, à moins que le Conseil de sécurité n'en décide autrement". In line with this first formulation strongly defended above all by the SC permanent members the project of the Statute elaborated in the Preparatory Commission of 1998 confirmed in principle slightly attenuating the scope, this same approach. Article 10 provided that no provision could be initiated in the event that SC was exercising its functions under the terms of Chapter VII of the UN Charter unless expressly authorized by it, with the consequence that the exercise of ICC jurisdiction to the crime of aggression was allowed only in the hypothesis in which it had determined that the relative state action integrated the extremes of an act of aggression (Report of the Preparatory Committee on the establishment of an International Criminal Court, UN Doc. A/CONF.183/2/Add. 1, 14 April 1998). Already in the phase preceding the Rome Conference the question began to be more controversial. The related debate soon resulted in an open and clear opposition between SC permanent members and other States. Also in the light of these contrasts, the proposals relating to the aspects indicated began to present far more articulated schemes while continuing to essentially preserve a leading role for SC. In this sense, see also the proposal of Cameroon during the Rome Conference in which, although recognizing the priority of SC role in assessing the crime of aggression, the possibility for ICC to initiate an investigation was admitted on a subsidiary basis. If SC within a reasonable period of time had not responded to the request, addressed by the Court to express its opinion regarding the existence of the case in question (UN Doc. A/CONF.183/C.1/L.39, 2 July 1998, Option B, par. 4) and similarly that presented by Algeria, Saudi Arabia, Arab Emirates, Iraq, Kuwait, Lebanon, Libya, Oman, Syria, Sudan, Tunisia and Yemen (A Doc. A/CONF.183/C.1/L.56, 8 July 1998). The prospect favorable to the importance of SC political role continued to find expressions of support even after the approval of the Statute of Rome emblematic results were put forward in the Preparatory Commission by the Russian Federation (UN Doc. PCNICC/1999/DP.12, 29 July 1999) and of Germany (UN Doc. PCNICC/1999/DP.13, 30 July 1999). For further details see also: R. Wedgwood, *The International Criminal Court: An American view*, in *European Journal of International Law*, 10, 1999, pp. 94ss. D.S. Mathias, J.N. Boeving, *Aggression, international law and the ICC: An argument for the withdrawal of aggression from the Rome Statute*, in *Columbia Journal of Transnational Law*, 43, 2005, pp. 576ss. N. Koursami, *The contextual elements of the crime of genocide*, ed. Springer, Berlin, 2018, pp. 126ss.

⁹⁸In this direction the text proposed by Greece and Portugal according to which ICC jurisdiction in matters of aggression should be subordinated to a prior determination made by SC pursuant to art. 39 of the Charter but this determination could be solicited directly by ICC itself with the result that, if SC does not pronounce itself within 12 months from the request (in favor or against as to the existence of an aggression or by issuing a Resolution, ex art.16 of the ICC Statute), ICC could proceed with the examination of the case (UN Doc. PCNICC/1999/2000/WGGA/DP.2, 7 December 1999). For similar solutions see the proposal of Colombia (UN Doc. PCNICC/2000/WGCA / DP.1) and (UN Doc. PCNICC/2000/WGGA/DP.2, 17 March 2000) and the one developed by Bosnia and Herzegovina, New Zealand and Romania (UN Doc. PCNICC/2001/WGCA/DP.2/Add. 1, 27 August 2001). This is the reworking of a proposal already put forward by these same States in February of 2001 (UN Doc. PCNICC/2001/WGCA/DP.1, 23 February 2001) and that in substance it maintains the original plan except for a few exceptions. For a comment see: R. KHERAD, *La question de la définition du crime d'agression dans le statut de Rome. Entre pouvoir politique du Conseil de sécurité et compétence judiciaire de la cour pénale internationale*, op. cit., pp. 358ss. The trend highlighted in the text is also confirmed also in the work of the special working group on the crime of aggression established by the Assembly of States Parties. The proposal made by Cuba foresees in par. 2 that: "The lack of a determination shall not impede the exercise of the court's jurisdiction with respect to a case referred to it", ICC.ASP/2/SWGCA/DP.1, 4 September 2003.

assumption of the denial of the exclusivity of SC assessment powers in the matter of aggression⁹⁹. The validity of this solution, on the other hand, is largely supported, in relation to the division of competences within the UN system from the examination carried out so far, especially in light of the role that in this regard is attributed to ICJ itself and to the autonomy of the functions of the latter compared to those of the other bodies of the Organization. In fact, the main judicial UN body can without a doubt also have a say in the matter of aggression, both in the context of the consultative function (being able to pronounce on any legal issue) and in the context of the contentious function (by virtue of the broad definition of the notion of legal disputes resulting from art.36 of the Statute). Far from remaining purely theoretical, this competence has actually been recognized and exercised by ICJ in practice: The Nicaragua case¹⁰⁰, the appeals of Yugoslavia against some NATO countries regarding the lawfulness of the use of force or even the cases brought by the Democratic Republic of Congo against neighboring states accused of committing acts of armed aggression on the applicant's territory.

If ICJ is a UN organ, it retains its own autonomous competence in the matter, but is not clear how the powers attributed by SC of Chapter VII of the UN Charter can determine an overall barrier for the jurisdiction of an organ competence on the repression of individual crimes¹⁰¹, and established on the basis of a treaty formally completely independent from the UN Charter¹⁰². On the other hand, the same relations¹⁰² between SC and ad hoc tribunals set up

⁹⁹In the sense that SC is not accorded pursuant to the same UN Charter, the monopoly of ascertaining acts of aggression. S.M. Yengejeh, "Reflection on the role of the Security Council in determining an act of aggression", in M. Politi, G. Nesi, "The International Criminal Court and the crime of aggression", Ashgate Publishing, 2001, pp. 128ss.

¹⁰⁰M. Schuster, "The Rome statute and the crime of aggression. A gordian knot in a search of sword", op. cit., pp. 48ss, who draws from it the incompetence of ICJ to decide issues that fall within the discretionary competences of SC, ex Chapter VII. On the other hand, the competences of SC regarding the verification of acts of aggression pursuant to art. 39 of the UN Charter is justified exclusively in view of the potential assumption of concrete measures aimed at restoring peace and internal security. On the contrary, SC does not at all have the power to decide on the basis of the aforementioned assessment, the conditions for the exercise of criminal jurisdiction against individuals. Emblematic in the perspective described are the observations of dissident judge Scwebel on the sidelines of the sentence of 1986 on military and paramilitary activities in Nicaragua, ICJ Reports, 1986, p. 290, par. 60, "(...) while SC is invested by the Charter with the authority to determine the existence of an act of aggression, it does not act as a Court in making such a determination. It may arrive at a determination of aggression-or, as more often is the case, fail to arrive at a determination of aggression (...) for political rather than legal reasons (...)".

¹⁰¹G. Gaja, "The long journey towards repressing aggression", in A. Cassese, P. Gaeta, J.R.W.D. Jones, "The Rome statute of the International Criminal Court. A commentary", op. cit., pp. 124ss. G. Gaja, "The respective roles of the ICC and the Security Council in determining the existence of aggression", in M. Politi, F. Nesi, "The International Criminal Court and the crime of aggression", op. cit., pp. 124ss. L.J. Springrose, "Aggression as a core crime in the Rome statute establishing an International Criminal Court", in Saint Louis-Warsaw Transnational Law Journal, 99, 1999, pp. 152ss. I.K. Müller-Schieke, "Defining the crime of aggression under the statute of the International Criminal Court", op. cit., pp. 426ss.

¹⁰²The considerations developed in the text confirm the possibility at least in principle of involving ICJ in the process of defining the conditions of admissibility with regard to the crime of aggression on a concurrent basis, at the most subsidiary to the role attributed to SC in this scope. At the same time they highlight the risk of inconsistencies and contrasts between ICJ's jurisprudence on the subject and the future ICC positions. C.E. Escobar Hernández, "Corte penal internacional, consejo de seguridad y crímenes de agresión un equilibrio difícil e inestable", in F.M. Mariño Ménéndez, "El derecho internacional en los

by it are not expressive of an absolute primauté of the former with respect to the latter, as in the jurisprudence relating to the Tadić and Kanyabashi cases amply testifies.

The non-exclusive nature of SC competences in the matter of ascertaining the case in question is further confirmed by the powers exercised in this area by GA. Finally, it was found that pursuant to art. 51 of the Charter any State (not only the one that suffers the aggression, but also all the other States, acting in collective legitimate defense) would in fact be empowered to operate this qualification¹⁰³.

A further consideration is necessary: The SC has traditionally shown that it is not very inclined to express itself in favor of the existence of an act of aggression, preferring to refer rather to the politically more neutral notion of threat to peace¹⁰⁴. This choice must be ascribed to the type of variables that SC takes into consideration when carrying out this type of evaluation and to the crucial role that realpolitik factors play between them. Qualifying the conduct of a State in terms of aggression is the most serious condemnation that a State can be imposed. It follows that a determination of this content may in many cases even be incompatible with the pacification effort carried out by SC through the conduct of negotiations and good offices, as well as further stiffen the position of the aggressor State¹⁰⁵.

The absolutely central (if not preponderant) relevance of the methods of political management of the aggression would find its rationale in the reversibility of the crime in question, reversibility which constitutes a completely peculiar and specific characteristic of the case in question compared to the other crimes falling within the ICC competence¹⁰⁶. Add to this the SC Member States themselves may have an interest in not compromising their relations with the responsible state for which they could prevent avoiding the reference to the notion of aggression.

It is therefore evident that subordinating the exercise of ICC jurisdiction in the matter of aggression to a prior assessment by SC would generally end up making the application of the

alores del siglo XXI. Homenaje al profesor Juan Manuel Castro-Rial Canosa, op. cit., pp. 250ss.

¹⁰³For these conclusions see also the document on the historical analysis of the facts concerning the aggression, drawn up from the UN General Secretary (PCNICC/2002/WGCA/L.1, 24 January 2001).

¹⁰⁴G. Gaja, "The long journey towards repressing aggression", in A. Cassese, P. Gaeta, J.R.W.D. Jones, *The Rome statute of the International Criminal Court. A commentary*, op. cit., pp. 124ss. P. Escarameia, "The ICC and the Security Council on aggression: Overlapping competences?", in M. Politi, F. Nesi, "The International Criminal Court and the crime of aggression", op. cit., pp. 133, 140ss.

¹⁰⁵C. Antonopoulos, "Whatever happened to crimes against peace?", in *Journal of Conflict and Security Law*, 6 (1), 2001, pp. 33ss.

¹⁰⁶C. Antonopoulos, "Whatever happened to crimes against peace?", op. cit., pp. 38ss.

provisions of the Statute relating to this crime completely uncertain¹⁰⁷, making it ultimately dependent analysis from purely political considerations¹⁰⁸.

The idea of involvement of the main UN judicial bodies in this field appears in principle to be assessed in positive terms, and meets with some favor in doctrine¹⁰⁹. Its main limitation is linked to the duration of the consultative procedure before ICJ, whose participation in the determination of the conditions of prosecution towards the crime of aggression could effectively lead to an excessive dilation of the criminal trial¹¹⁰. On the other hand, we do not want to deny that the proposal indicated also has further weaknesses and therefore needs to be properly corrected and enhanced.

An overall judgment cannot be separated from some more general reflections: The question of the definition of aggression has always been one of the thorniest and most controversial issues of international law¹¹¹.

The problems raised by this situation have therefore led some to believe that it was even preferable to eliminate any reference to the crime of aggression from StICC¹¹². In support of this perspective, it was stressed that ICC is already competent under the Statute to prosecute

¹⁰⁷C. Antonopoulos, "Whatever happened to crimes against peace?", op. cit., pp. 48ss. G. Gaja, "The respective roles of the ICC and the Security Council in determining the existence of aggression", in M. Politi, F. Nesi, "The International Criminal Court and the crime of aggression", op. cit., pp. 124ss. D.N. Nsereko, "Aggression under the Rome statute of the International Criminal Court", op. cit., pp. 515ss. On the contrary, it seems rather naive to expect that the attribution of the power to activate ICC jurisdiction against the material perpetrators of aggression can determine in itself a greater propensity of SC to refer to the notion indicated in the context of the assessment, ex art. 39 of the Charter. I.K. Müller-Schieke, "Defining the crime of aggression under the statute of the International Criminal Court", op. cit., pp. 424, which is affirmed that "(...) it would be illusory to believe that the court might serve as a catalyst for a clear pronouncement by the Council on the concept of aggression". M. Schuster, "The Rome statute and the crime of aggression. A gordian knot in a search of sword", op. cit., pp. 42ss.

¹⁰⁸C. Antonopoulos, "Whatever happened to crimes against peace?", op. cit., pp. 49ss. I.K. Müller-Schieke, "Defining the crime of aggression under the statute of the International Criminal Court", op. cit., pp. 426ss. D.N. Nsereko, "Aggression under the Rome statute of the International Criminal Court", op. cit., pp. 514ss.

¹⁰⁹S.M. Yengejeh, "Reflection on the role of the Security Council in determining an act of aggression", in M. Politi, G. Nesi, "The International Criminal Court and the crime of aggression", op. cit. pp. 130ss, which believes that the option described has at least two advantages: "(...) First it is based on the Charter provisions. Second, ICJ is the judicial organ of the organization and has the competence to provide an impartial and independent advisor opinion (...) seems to be the best equipped for that, as the principal judicial organ of UN" and more laconically J.F.E. Escudero Espinosa, "Los poderes del Consejo de Seguridad y la corte penal internacional en el estatuto de Roma", in Anuario de Derecho Internacional, 19, 2003, pp. 257ss, it should be noted that a part of the doctrine can deny the opportunity of introducing the system described with regard to ICC jurisdiction in terms of aggression, it also believes that the tripartite proposal contains interesting ideas that should be valued rather in the management of the possible issues of legitimacy of SC action pursuant to articles 13, lett. b) and 16 StICC, which could be highlighted in the course of a criminal investigation. I. Petculescu, "The review of the United Nation Security Council decisions by the International Court of Justice", in Netherlands International Law Review, 52 (2), pp. 194ss.

¹¹⁰M. Schuster, "The Rome statute and the crime of aggression. A gordian knot in a search of sword", op. cit., pp. 50ss.

¹¹¹W.A. Schabas, "The unfinished work of defining aggression: How many times must the cannonballs fly, before they are forever banned?", in D. Mcgoldrick, P. Rowe, E. Donnelly (ed. by), "The Permanent International Criminal Court. Legal and policy issues", Hart Publishing, Oxford & Portland, Oregon, 2004.

¹¹²J.N., Boevig, "Aggression, international law and the ICC: An argument for the withdrawal of aggression from the Rome Statute", op. cit., pp. 542ss.

other crimes that are committed in the course of armed conflicts due to their characteristics, so even if the jurisdiction of the same towards aggression is not foreseen directly those responsible for this crime could always be prosecuted on the basis of other charges.

This is actually a very dangerous idea in itself: As it has been pointed out, giving up the ICC's jurisdiction over aggression would create the very serious feeling that "individual perpetrators of aggression may act with impunity"¹¹³ and would mean repudiating the inheritance of Nurmberg with serious damage to the credibility and prestige of ICC itself. On the other hand, the inclusion of aggression in ICC *ratione materiae* powers retains a fundamental and not negligible symbolic value and in reflecting the will of the majority of States to pursue this crime, produces a deterrent effect that should not be underestimated¹¹⁴. Furthermore, the fact that the most serious abuses are committed in the course of arm conflicts does not justify but rather sets against any attempt to remove the aggression from the criminal cases to which the ICC's jurisdiction extends. This elimination "should be tantamount in many cases to treating mere symptoms while ignoring the pathogenic cause"¹¹⁵.

As far as this investigation is concerned more directly, the perspectives examined in the previous paragraphs regarding a more articulated division and work between the organs of UN and ICC in the persecution of the crime of aggression are once again expressive of an attempt aimed at identifying a as balanced as possible solution to the eternal conflict between the reasons of legality and justice on the one hand and the logic of politics and power on the other and it is above all with a view to the aim assumed that this effort must be evaluated and in our opinion encouraged.

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