

humanity simultaneously serve the needs of justice and those of memory or history? What are the ultimate objectives of trials that deal with crimes against humanity: memory, forgetting, punishing the guilty, setting the historical record straight? One wonders about the ability of criminal trials to achieve all of these.

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Maria Clelia Ciciriello. *L'aggressione in diritto internazionale. Da 'crimine' di Stato a crimine dell'individuo*. Napoli Editoriale Scientifica, 2002. Pp. 156. €12. ISBN: 8888321187.

In recent years, the flourishing — and controversial — jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have captured jurists' attention by bringing the crime of genocide, war crimes and crimes against humanity to the forefront. Aggression as a motif of individual criminal responsibility, however, appeared to have been all but forgotten since the case law of the Nuremberg and Tokyo tribunals.

The future exercise of the International Criminal Court's (ICC) jurisdiction over the crime of aggression provided for by Article 5 of the Rome Statute accounts for the renewed interest in this crime. In this context, the focus on individual criminal responsibility is a departure from the many years during which this question was overshadowed by other related issues, such as Resolution 3314 (XXIX) on the definition of aggression in inter-state relations and the concept of state crime.

The time seems right, therefore, to study anew what some still refer to as the 'crime of crimes' and the volume by Maria Clelia Ciciriello constitutes a timely contribution to the current debate.

Contrary to what the reader might expect from its title, the crime of aggression is not analysed systematically in this book, either as

a wrongful act committed by the state or as an individual crime. In *L'aggressione in diritto internazionale — Da 'crimine' di Stato a crimine dell'individuo* the author limits herself to selecting certain questions related to the definition of the individual crime of aggression and to outlining them in nine brief chapters.

The common denominator running through all of these, however, is that of generality. Although references are made to the Nuremberg and Tokyo trials, the constituent elements (both objective and subjective) of aggression are not thoroughly studied. Even the recent work of the Preparatory Commission for the ICC (PrepCom) is only very summarily analysed, which is disappointing since some of the proposals presented by various delegations deserve careful attention.

The author does attempt to address the status of the individual crime of aggression in the light of customary international law, but her treatment of that question seems to be flawed. Ciciriello's conclusion is that the practice (or, to be more exact, lack of practice) following the Nuremberg and Tokyo trials does not allow for the existence of a consolidated customary rule on this matter. In this connection, the arguments put forward by the author are twofold: first, in the exceptional cases in which the Security Council has labelled an action undertaken by a state as aggression (for instance, in Resolution 387, 31 March 1976 regarding South Africa's aggression against Angola) it has failed to determine the international criminal responsibility of the individuals involved therein. Second, in those cases in which the Council has condemned states — although not labelling them as aggressors — it has shown the same passivity with regard to the responsibility of individuals.

It seems to this reviewer that the author resolves this issue too expeditiously, thus neglecting to take into account abundant practice — which does not consist exclusively in Security Council resolutions — which points in the opposite direction. In particular, General Assembly Resolution 95(I) affirms the Nuremberg Principles and the important Resolutions 2625 (XXV) and 3314 (XXIX) specifi-

cally qualify a war of aggression as an international crime.¹ Furthermore, the discussions within the PrepCom have gone along the lines of *not departing from customary international law*² in the definition of the individual crime, thus implying that general international law already exists on this matter.

The more interesting issue, however, is not so much the precise existence or even definition of aggression, as the complex relationship between its state and individual components. Unfortunately, this relationship, to which the title of the book hints, is only tangentially examined in Ciciriello's book. In this reviewer's opinion, the author should have focused on this question in order to reach a better understanding of the ambivalent nature of this crime, in which state and individual merge with each other and seem — problematically, as it happens — to be one and the same thing.

Some pages are, of course, devoted to aggression as a state crime and to the relationship between state and individual responsibility. This is unavoidable because of the very nature of this kind of crime. Nevertheless, the analysis fails to go beyond general statements or passing references. For example, it is rightly asserted that the responsibility of both the state and the individual arising from aggression are independent of each other, in the sense that they are not mutually exclusive. The author recalls that, at the same time, both crimes are inextricably linked, for the commission of aggression by a state constitutes a *conditio sine qua non* for incurring individual responsibility for this crime. Unfortunately, Ciciriello stops there without elaborating on the key issue of the eventual consequences that different understandings of those specific links might have on the future definition of the crime.³

This question has been raised consistently during the debates within the PrepCom. Thus, the role to be played by General Assembly's Resolution 3314 (XXIX) within the framework of the Rome Statute remains a controversial issue. Whereas some delegations favour the incorporation of the text of that resolution into the definition of the individual crime, others prefer a more synthetic definition along the lines of Article 6 of the

¹ Interestingly, while the last two resolutions were adopted in the context of inter-state relations, the records of the Special Committees dealing with those issues as well as those of the Sixth Committee show that a great number of delegations were thinking of individual criminal responsibility when defining a war of aggression as an international crime. Several pointed to the contents of the Nuremberg Charter as customary international law (indeed, the fact that 'war of aggression' and not any 'act of aggression' is qualified as an international crime by Resolution 3314 is due partly to the insistence of several delegations on reflecting the 'current' status of the law, as embodied in the Nuremberg Charter). In view of the nature of its functions, the passivity of the Security Council in this matter seems in no way conclusive as to the status of the crime of aggression in international customary law. Likewise, its reluctance to pronounce state actions as *aggression* cannot be construed as evidence for the inexistence of a rule of general international law prohibiting the commission of aggression among states.

² See, for instance, page 2 of the German proposal contained in document PCNICC/2000/WGCA/DP.4.

³ The chapter devoted to the historical evolution of the principle of international criminal responsibility rightly points to some important features of the crime of aggression, such as its limited scope *ratione personae* (leadership crime). The author also recalls that the first instruments criminalizing aggression were elaborated with a view to reinforcing the weak collective security system of the League of Nations and did not aim at punishing individuals. Nevertheless, the author does not comment on the shortcomings of projecting into the individual sphere rules conceived to apply to inter-state relations.

Nuremberg Charter.⁴ During the 2002 session, attention also turned to new issues, such as the relationship between the circumstances precluding wrongfulness of state action and the defences available for individuals accused of aggression: Should the legitimate self-defence of the state feature among the defences of individuals or does it operate on a different level?

Finally, another extremely interesting issue that the author only manages to briefly touch on is the relationship of the ICC and the Security Council as regards aggression. How might the ICC's exercise of jurisdiction fit with the responsibilities of the Security Council under Chapter VII of the Charter? The proposals submitted on this subject are all the more interesting since they reveal very different conceptions not only in relation to the peace–justice dichotomy and the desirable role of the Court, but also as regards the actual system of collective security designed by the Charter and the attributions of the principal organs therein. For instance, according to the view of the permanent members of the Security Council, the prior determination by this organ (and solely by it) of an act of aggression under Article 39 of the Charter is a *conditio sine qua non* for the exercise of jurisdic-

tion by the ICC.⁵ On the contrary, other delegations either defend the absolute independence of the ICC from the Security Council⁶ or envisage more complex institutional relationships, with both the General Assembly and the International Court of Justice playing a prominent role.⁷

In sum, this book may well be seen as a reminder of the obstacles on our path towards a generally acceptable definition of the crime of aggression for the purposes of the ICC. It is a good starting point for a first approach to this crime as it provides an overall outline of the topic and contains very pertinent bibliographical references. Nevertheless, the generality of the terms and lack of analysis with which the relevant issues are tackled results in a modest contribution to a subject on which so much has already been written.

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⁴ Among the first group, see for instance the proposal submitted by Egypt and Italy to the Preparatory Committee on the Establishment of an ICC (A/AC.249/1997/WG.1/DP.6); the proposal by Bahrain and others to the Preparatory Commission (PCNICC/1999/Dp.11). Among the second group, see the proposal by Algeria and others to the Rome Conference (A/CONF.183/C.1/L.37); the proposal by Cameroon (A/CONF.183/C.1/L.39); the Russian proposal of 1999 (PCNICC/1999/DP.12), the German proposal (PCNICC/1999/DP.13); the proposal by Bosnia and Herzegovina, New Zealand and Romania (PCNICC/2001/WG.A/DP.2). The German discussion paper submitted to the Preparatory Committee on the Establishment of an ICC (A/AC.249/1997/WG.1/DP.20) is particularly enlightening on this question.

⁵ See, for instance, the Russian proposal (PCNICC/1999/DP.12), which goes so far as to subject the very existence of the crime of aggression to the prior determination of the Security Council.

⁶ In this respect, the proposal by Greece and Portugal (PCNICC/2000/WGCA/DP.5) is particularly interesting. In case of lack of determination of aggression under Article 39 by the Security Council (which, in the view of these delegations is not vested with an exclusive power to this effect), the ICC would request the Council to make such determination. If the Council failed to do so within 12 months following the request, the Court should proceed with the case.

⁷ The proposal by Bosnia and Herzegovina, New Zealand and Romania (PCNICC/2001/WGCA/DP.1) attaches a key role to the General Assembly. In the absence of any determination by the Council, the ICC is supposed to invite the General Assembly to request the International Court of Justice to deliver an Advisory Opinion. If the latter concludes that there has been aggression and the General Assembly so recommends, the Prosecutor should proceed with the case. In the proposal by the Netherlands (PCNICC/2002/WGCA/DP.1), the Security Council is the organ which would request (on the vote of any nine members) an Advisory Opinion from the International Court of Justice.