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ORIGINAL SIN REAFFIRMED: THE *NICARAGUA* JUDGEMENT'S IMPACT ON THE NOTION OF ARMED ATTACK AS THE MOST GRAVE FORM OF THE USE OF FORCE

Abstract

This article is referenced to the thirtieth anniversary of the ICJ's Nicaragua judgement on the merits of 1986. It acknowledges the significance of this much-debated judgement for the modern international law on the use of force (jus ad bellum). However the text focuses on one aspect of the judgement only, i.e. the definition of the notion of "armed attack" as the most grave form of the use of force. The impact of the judgement in this respect is critically analysed. It is argued that the introduction to the UN Charter text of undefined notions of the use of force, aggression, and armed attack may be labelled as the "original sin" of contemporary jus ad bellum, as it results in conceptual obscurity. It is also claimed that the ICJ reaffirmed this original sin in its Nicaragua judgement because it explicitly argued for the notion of "armed attack" as the most grave form of the use of armed force and, in consequence, distinguished it from the other, lesser forms of the use of force, while failing to introduce any sort of clarity in the conceptual ambiguity of jus ad bellum. The article also offers some remarks de lege ferenda and suggests abandoning the gravity criterion, which would require abandoning the well-established judicial and doctrinal interpretation approaches to jus ad bellum.

Keywords: aggression, armed attack, ICJ, International Court of Justice, jus ad bellum, Nicaragua, use of force

INTRODUCTION

On the twenty-fifth anniversary of the *Nicaragua* judgement,¹ the editors of a special section of the *Leiden Journal of International Law* commented that "the case

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¹ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgement, 27 June 1986, ICJ Rep 1986, p. 14 (*Nicaragua*).

could serve as a textbook for an ‘Introduction to Public International Law’.² This is indeed very true and obviously nothing has changed in this respect in the five years that have passed in the meantime. Still, as every good handbook, the *Nicaragua* judgement provokes continuous assessments, including highly critical ones. Good law handbooks should blaze an intellectual trail but also should leave a reader with open questions, stimulating further study. As such, they are indispensable not only for the freshmen but also – being a kind of an intellectual catalyst – for more experienced researchers, as well as practitioners. The *Nicaragua* case definitely meets these criteria.

Notwithstanding the complexity of the *Nicaragua* case it is no doubt the international law regulation on the use of force – referred to in the present text traditionally as *jus ad bellum* – which is at the core of the 1986 judgement on the merits.³ Leaving aside for the time being the substantive pronouncements of the International Court of Justice (ICJ) in this respect, two important aspects of a more general character seem to be striking from today’s perspective.

Firstly, the thirty years that have passed since 1986 prove that we are still dealing with the same legal problems and questions with respect to *jus ad bellum*. Not much has changed, as we still discuss such fundamental issues as precise definitions of the very basic concepts of use of force, aggression, and armed attack. What’s more, the challenges facing the modern *jus ad bellum* – although undeniable – may seem to be less novel than is often assumed.⁴ In the context of the *Nicaragua* case, the problem of use of force by and against non-state actors serves as the most significant example. The issue that is deservedly labelled as the most prominent debate within *jus ad bellum* in the twenty-first century was already at the heart of the debate thirty years ago.

Secondly, the *Nicaragua* case illustrates the obvious truth that all legal deliberations on use of force are fully dependent on the factual circumstances of a particular conflict, which are regularly and intentionally blurred by the parties. The jumble of facts is the background factor that judges, as well as other legal commentators on use of force disputes, have always been confronted with.⁵ This is especially true when the involvement of States in the actions of non-state actors must be considered. The pending armed conflict in the Ukrainian Donbas is a telling current example. Yet the fact that states regularly obscure the factual circumstances and try to present them in a way which allows them to escape potential legal responsibility for the illegal use of force may

² C. Hoss, S. Villalpando, S. Sivakumaran, *Nicaragua: 25 Years Later*, 25 *Leiden Journal of International Law* 131 (2012), p. 132; see also generally J.R. Crawford, *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford: 2012, p. 173.

³ For a general overview of the *jus ad bellum* issues raised in the *Nicaragua* judgement, see R. Kwiecień in this volume of the Polish Yearbook of International Law.

⁴ M. Kowalski, *The Use of Armed Force: Contemporary Challenges in Light of Professor Skubiszewski’s Legacy*, 18 *International Community Law Review* 109 (2016), p. 112.

⁵ With respect to the ICJ’s competence in receiving and interpreting evidence and in fact-finding in the context of the *Nicaragua* case, see generally P.S. Reichler, *The Impact of the Nicaragua Case on Matters of Evidence and Fact-Finding*, 25 *Leiden Journal of International Law* 149 (2012).

be interpreted – at least to some extent – in a positive sense too. It proves that states tend to play on facts in order to escape legal responsibility rather than to challenge or question the binding legal principles regulating the use of force. Consequently, the status of the prohibition of the use of force as the basis of the modern *jus ad bellum* seems to be consolidated rather than jeopardized.

The two above-mentioned aspects – although not being particularly ground-breaking in themselves – seem to me important as together they place the current debate over the evolution of *jus ad bellum* in the proper perspective. This perspective mitigates the assumption that modern international law regulation of the use of armed force is fundamentally losing its relevance nowadays. In this article it is claimed that this assumption is wrong. The *Nicaragua* judgement – with its solid inter-state approach to *jus ad bellum* linked with its clear and perceptive statements on the relationship between *jus ad bellum* norms as established under the United Nations Charter (UN Charter)⁶ and under customary international law – still represents an attractive and accurate attempt to deal with modern challenges. The ICJ explicitly declared as parallel binding both the UN Charter norms and customary norms regulating the use of force, being substantively coincident yet not exactly overlapping. Thus the role of customary law in this respect is crucial as it may supplement and modify the existing *jus ad bellum* norms under the UN Charter. The consequence of this approach is the need for a most careful and detailed elaboration of any claimed changes or modifications which are to be introduced to the *jus ad bellum* regime under customary law. This approach thus provides for the modern alignment of the *jus ad bellum* regime vis-à-vis new challenges, while at the same time securing the safeguards of the UN Charter paradigm.⁷

Yet at the same time the legal framework of *jus ad bellum* includes some serious loopholes, which could lead to questioning its systemic character. One of them – as will be argued in this text – may be labelled as the “original sin” of modern *jus ad bellum* because it both underlies and highlights all the other weaknesses. Namely, this is the introduction into the UN Charter text of undefined notions of the use of force, aggression, and armed attack, thereby obscuring the mutual relationship between them. This has resulted in a conceptual uncertainty which persists until today. And it is claimed here that in the *Nicaragua* judgement the ICJ reaffirmed this original sin by explicitly establishing the notion that an armed attack is a grave form of the use of armed force and, in consequence, distinguishable from other, lesser forms of the use of force. At the same time the ICJ’s pronouncements in this respect failed to introduce any sort of order to the conceptual ambiguity of *jus ad bellum*.

⁶ 1 UNTS VXi.

⁷ For more on this issue, see M. Kowalski, *Some Remarks on the Relation of the Jus ad Bellum Regulations under the UN Charter and Customary International Law – Why Does It Matter so Much?*, Wrocław Review of Law, Administration and Economics, Special Issue: Essays in Memory of Professor Karol Wolfke, 2017 (forthcoming). Cf. W. Czapliński, *Customary International Law on the Use of Force*, Wrocław Review of Law, Administration and Economics, Special Issue: Essays in Memory of Professor Karol Wolfke, 2017 (forthcoming).

1. ARMED ATTACKS AND FRONTIER INCIDENTS IN *NICARAGUA* AND AFTERWARDS

The ICJ explicitly pointed out in the *Nicaragua* judgement the necessity “to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms.”⁸ It also stated that some activities of an armed nature (“the dispatch by one State of armed bands into the territory of another State, the supply of arms and other support to such bands” (in the context of the case concerned) “may well constitute a breach of the principle of the non-use of force and an intervention in the internal affairs of a State, that is, a form of conduct which is certainly wrongful, but is of lesser gravity than an armed attack.”⁹ Thus, in the statements quoted above the ICJ unambiguously established that not every illegal use of force amounts to an armed attack, and that the criterion for classification of a particular armed act as an “armed attack” is its gravity. However, the ICJ stopped at this point and did not elaborate on this problem further. Thus the crucial question of a precise determination of what constitutes “the most grave forms of the use of force”, which cause an illegal armed act to be qualified as an “armed attack”, was left open. The only suggestion in this regard that could be detected in the *Nicaragua* judgement was the laconic reference to “*a mere frontier incident*”, classified as distinct from an armed attack due to its “*scale and effects*”¹⁰ – the terms themselves being left open and ambiguous.

The fact that the ICJ abstained from any further elaboration of the notion of an “armed attack” in its *Nicaragua* judgement is all the more regrettable if we take into account its statements on the relationship between *jus ad bellum* under the UN Charter and under customary law. When the ICJ plausibly argued for the supplementary role of customary law towards the UN Charter’s regulation of the use of force it explicitly referred to the notion of an “armed attack”, stating that its definition “is not provided in the Charter, and is not part of treaty law.”¹¹ It is also quite characteristic that the ICJ, while referring to the definition of the concept of an “armed attack”, added – somewhat enigmatically – “if found to exist”.¹² Accordingly, one could expect from the ICJ a more careful elaboration of the issue whether a customary definition of the notion of “armed attack” did in fact exist and – if the answer were affirmative – the scope of the definition. Such elaborations would have obviously demanded a detailed reference to state practice and to the *opinio juris*. Hence the ICJ’s pronouncements

⁸ ICJ, *Nicaragua*, para. 191.

⁹ *Ibidem*, para. 247.

¹⁰ *Ibidem*, para. 195.

¹¹ *Ibidem*, para. 176. Indeed, the *travaux préparatoires* of the UN Charter does not help in this regard. J.A. Green, *The International Court of Justice and Self-Defence in International Law*, Hart Publishing, Oxford: 2009, p. 114; T. Ruys, *Armed Attack and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, Cambridge University Press, Cambridge: 2010, pp. 60-68.

¹² ICJ, *Nicaragua*, para. 176.

that the most grave forms of the use of force constituted an “armed attack” were left unsupported.

It should be noted and acknowledged, however, that the ICJ’s position was in line with some previous doctrinal positions referring to the criterion of gravity. Ian Brownlie wrote in 1963: “The real problem is to determine what is an attack or resort to force as a matter of law. A requirement stated by some writers is that the use of force must attain a certain gravity and that frontier incidents are excluded.”¹³ Krzysztof Skubiszewski was less equivocal when he commented in 1968: “The notion of an armed attack conveys the idea of the gravity of a situation through the amount of force employed. In frontier incidents these elements are usually absent.”¹⁴ In addition he cited a practical example, when “in 1956 the United Nations implicitly refused to regard the intrusions into Israeli territory by the fedayeen units operating from Egyptian territory as an armed attack by Egypt against Israel.”¹⁵ However, the state practice in the UN era prior to the *Nicaragua* judgement is, however, rather modest and seems mostly ambiguous. It was analyzed by James A. Green, who rightly, yet rather euphemistically, stated that the “examination of pre-1986 state practice and supporting *opinio juris* indicates that it is difficult to conclude upon the customary international law status of the ‘armed attack as a grave use of force’ criterion as it existed when the *Nicaragua* merits decision was delivered by the ICJ.”¹⁶ Thus the ICJ’s position in this regard was unsupported and taken *ex cathedra*. Unfortunately, such an approach in declaring the customary status of particular norms turned out not to be an isolated instance in the subsequent ICJ case law, including that on the use of force.

Not surprisingly, the ICJ’s position met with criticism.¹⁷ Nonetheless seventeen years later the ICJ soundly reaffirmed this position in the *Oil Platforms* judgement, including direct references to the *Nicaragua* judgement in this respect.¹⁸ The gravity criterion

¹³ I. Brownlie, *International Law and the Use of Force by States*, Clarendon Press, Oxford: 1963, p. 366; In this respect Ian Brownlie referred only to the opinions of Hassan A.H. Al Chalabi as well as of Mayers S. McDougal and Florentino P. Feliciano. Yet one can also refer to the views of Cornelis Arnold Pompe, with references to pre-war practice: C.A. Pompe, *Aggressive War: An International Crime*, Martinus Nijhoff, The Hague: 1953, pp. 55-56.

¹⁴ K. Skubiszewski, *Use of Force by States. Collective Security. Law of War and Neutrality*, in: M. Sørensen (ed.), *Manual of Public International Law*, Macmillan, London: 1968, p. 777.

¹⁵ *Ibidem*.

¹⁶ Green, *supra* note 11, p. 119.

¹⁷ See the views referred to by Christine Gray: Ch. Gray, *International Law and the Use of Force*, Oxford University Press, Oxford: 2008, pp. 179-180; see also Ruys, *supra* note 11, pp. 143-149.

¹⁸ ICJ, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Merits, Judgement, 6 November 2003, ICJ Rep 2003, paras. 51 and 64. On the other hand, I do not share the opinion that the gravity criterion as pronounced in the *Nicaragua* judgement applied to armed acts by irregular armed bands (non-state actors) only, and that it was later extended in the *Oil Platforms* judgement to acts by regular State armed forces. See e.g. D. Raab, ‘Armed Attack’ after the *Oil Platforms* Case, 17 Leiden Journal of International Law 719 (2004), pp. 724-725; R. Wedgwood, *The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense*, 99 American Journal of International Law 52 (2005), p. 57; cf. A.A. Yusuf, *The Notion of ‘Armed Attack’ in the Nicaragua Judgement and Its Influence on Subsequent Case Law*,

was also acknowledged in the decisions of the Eritrea Ethiopia Claims Commission¹⁹ and the Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG).²⁰ The former stated – when considering armed actions between Eritrea and Ethiopia in the initial period of the conflict – that “localized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for purposes of the Charter” and then concluded that it was “satisfied that these relatively minor incidents were not of a magnitude to constitute an armed attack by either State against the other within the meaning of Article 51 of the UN Charter.”²¹ Similarly, the IIFFMCG accepted – with reference to the ICJ case law – the assumption that “military actions constitute an armed attack in the sense of Article 51 of the UN Charter only if they surpass a certain threshold” and consequently applied the gravity criterion to justify the legal qualification of armed actions taken by all parties to the conflict as armed attacks.²²

The above examples seem to prove that the gravity criterion forms *de lege lata* an element of the definition of the notion of an armed attack, and today this is the legal standpoint prevailing in international law scholarship.²³ The position of the Institut de droit international (IDI) is quite representative in this respect. Its resolution on self-defence of 2007 includes the following explicit statement: “[a]n armed attack triggering the right of self-defence must be of a certain degree of gravity.”²⁴ Nevertheless the distinction between various illegal armed acts based on their gravity, and their respective legal qualification into armed attacks and less grave forms of the prohibition on use of force violation merits serious disapproval.²⁵

25 Leiden Journal of International Law 461 (2012), p. 464. Indeed each of these cases referred to the use of force of a different character. Yet, neither the *Nicaragua* nor the *Oil Platforms* judgements allow for such interpretation. In the former the ICJ referred to the question of qualification of illegal use of force as an armed attack in the broader context of the prohibition on the use of force in general; and in the latter the ICJ directly and unequivocally referred in this respect to the *Nicaragua* judgement without any suggestion whatsoever to an alleged extension of the approach taken. However, since the *Oil Platforms* judgement the discussion on this issue has been negligible.

¹⁹ Eritrea Ethiopia Claims Commission, Partial Award, *Jus Ad bellum, Ethiopia's Claims 1-8*, 19 December 2005.

²⁰ Independent International Fact-Finding Mission on the Conflict in Georgia, *Report*, Vol. II, September 2009.

²¹ Eritrea Ethiopia Claims Commission, Partial Award, *Jus Ad bellum, Ethiopia's Claims 1-8*, paras. 11-12.

²² IIFFMCG, *Report*, p. 245; see also pp. 244-246, 256-258, 263, 268-269, 286 and 288.

²³ See e.g. O. Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law*, Hart Publishing, Oxford: 2012, p. 403.

²⁴ Institut de droit international, *Tenth Commission, Present Problems of the Use of Armed Force in International Law, A. Self-defence, Resolution of 27 October 2007, Session de Santiago – 2007*, para. 5; available at: http://www.justitiaetpace.org/idiE/resolutionsE/2007_san_02_en.pdf, (accessed 30 May 2017).

²⁵ See M. Kowalski, *Prawo do samoobrony jako środek zwalczania terroryzmu międzynarodowego* [Right to self-defence as a means of counter-terrorism], Difin, Warszawa: 2013, pp. 133-141.

2. THE GRAVITY CRITERION UNDER CRITICISM

Obviously – as has been already mentioned above – the coherent categorization of armed acts based on the gravity criterion is hardly possible, as the gravity threshold remains most imprecise. Consequently, the qualification of particular armed acts as an armed attack is arbitrary. The problem can be well exemplified by the ICJ's considerations in its *Oil Platforms* judgement, where it went so far as to implicitly accept that a single attack against a merchant ship may constitute an armed attack against the flag state.²⁶ Such a consideration sharply contrasts with the exclusion of frontier incidents from the scope of the notion of an armed attack.

Also, inasmuch as armed actions may take the form of isolated armed strikes that, taken separately, may be of low gravity, the ICJ accepted the so-called “cumulative theory” (or “accumulation of events theory”).²⁷ This theory is aimed at an overall assessment of isolated armed acts of low gravity, that taken cumulatively may amount to an armed attack. Thus dealing with low intensity armed acts is to some extent mitigated by such an approach as it allows for some flexibility in the assessment of armed actions overall. Yet, this approach is itself far from clear and remains as arbitrary as the gravity threshold applied in the assessment of single armed acts.²⁸

Apart from the above arguments there is another seriously problematic consequence of the assumption that an armed attack must be of certain degree of gravity. The occurrence of an armed attack conditions the legality of any military response of the attacked state within the self-defence framework, both under Article 51 of the UN Charter and under customary law. Yet, acceptance of the qualification of some illegal armed acts as below the threshold of an armed attack deprives the attacked state of the right to militarily respond, as an armed attack is absent and thus any forcible countermeasures are nowadays definitely impermissible under international law. Albrecht Randelzhofer suggested that this was “undoubtedly intended by the Charter, since the unilateral use of force is meant to be excluded as far as possible.”²⁹ He claimed that this was a consequence of the intended preference under the UN Charter for security over justice. Yet he considered this as “anything but satisfactory, for it means that there is very little effective protection against States violating the prohibition of the use of force, as long as they do not resort to an armed attack” and doubted “that the current law makes much sense, even from the security point of view.”³⁰

²⁶ For a detail analysis and critique of the categorization of particular armed acts by the ICJ in the *Oil Platforms* case, see Raab, *supra* note 18, pp. 726-732.

²⁷ ICJ, *Oil Platforms*, para. 64; ICJ, *Nicaragua*, para. 146 *in fine*; Tom Ruys notes that already in the *Nicaragua* judgement (para. 231) the ICJ “observed that the lack of information in relation to alleged cross-border attacks against Honduras and Costa Rica made it difficult to decide whether they could ‘singly or collectively’ amount to an ‘armed attack.’” Ruys, *supra* note 11, p. 173. The cumulative theory was also applied – with the direct reference to the ICJ's case law – by the IIFMCG: IIFMCG, *Report*, p. 245.

²⁸ Green, *supra* note 11, p. 44.

²⁹ A. Randelzhofer, *Article 51*, in: B. Simma (ed.), *Charter of the United Nations: A Commentary*, Oxford University Press, Oxford: 2002, pp. 790-792.

³⁰ *Ibidem*.

Indeed, introducing the gravity criterion into the definition of the notion of an armed attack leads to an unacceptable situation in which we face – as Tarcisio Gazzini put it – “an unrealistic loophole in the whole normative framework on the use of force, even assuming the effective functioning of the collective security mechanism.”³¹

It should be noted in the above context that in the *Nicaragua* judgement the ICJ – surprisingly – did not unambiguously exclude the possibility of a military response short of self-defence by the attacked state to those attacks not grave enough to be qualified as an armed attack. While stating firmly that “use of force of a lesser degree of gravity cannot (...) produce any entitlement to take collective countermeasures involving the use of force” the ICJ concluded further that such acts “could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts.”³² The interpretations of this statement vary considerably. According to the well-known opinion of John L. Hargrove, the ICJ “strongly suggested” that the countermeasures taken by a victim state “might include acts of force.”³³ Other commentators take more cautious positions, yet they tend to accept the interpretation that the ICJ did not exclude forceful countermeasures.³⁴ Abdulkawi Yusuf commented in this respect that “the Court did not specify the nature of such ‘countermeasures’, but it could perhaps be reasonably assumed that it was referring to military countermeasures.”³⁵ An opposite view however was firmly taken by Dame Rosalyn Higgins, who stated: “[i]n the *Nicaragua–US* case the International Court of Justice introduced a requirement of proportionality into non-forceful countermeasures which were held by the Court to be the appropriate response to low-level uses of force that did not amount to an armed attack.”³⁶ One could have expected that this controversy would have been clarified by the ICJ in its *Oil Platforms* judgement, but it was not even touched upon in this context. This fact was criticised by Judge Bruno Simma in his dissenting opinion, in which he stated that the ICJ in the *Nicaragua* judgement could not mention pacific countermeasures only. Accordingly, Bruno Simma opted for the legal permissibility of forceful defensive measures short of self-defence taken in response to military acts short of armed attack.³⁷

The above position seems hardly acceptable as it diminishes the very prohibition of the use of force under Article 2(4) of the UN Charter by legalizing most obscure

³¹ T. Gazzini, *The Changing Rules on the Use of Force in International Law*, Manchester University Press, Manchester: 2005, p. 138; see also Jochen A. Frowein’s view, who stated: “A State against which forcible intervention takes place may certainly react by the use of force in a similar way”, J.A. Frowein, *Reactions by Not Directly Affected States to Breaches of Public International Law*, 248 *Recueil des Cours de l’Académie de droit international* 372 (1994).

³² ICJ, *Nicaragua*, para. 249.

³³ J.L. Hargrove, *The Nicaragua Judgment and the Future of the Law of Force and Self-Defence*, 81 *American Journal of International Law* 135 (1987), p. 138.

³⁴ See e.g. Gazzini, *supra* note 31, p. 138.

³⁵ Yusuf, *supra* note 18, p. 466.

³⁶ R. Higgins, *Problems and Process: International Law and How We Use It*, Clarendon Press: Oxford 1994, p. 231 (emphasis mine).

³⁷ ICJ, *Oil Platforms, Separate Opinion of Judge Simma*, paras. 12–13.

individual uses of force short of self-defence. Also, it contradicts the rules of state responsibility for internationally wrongful acts as established by the International Law Commission in its Articles.³⁸ According to Article 50(1a) of the Articles, forceful countermeasures are unequivocally excluded.

In this context one should also take note of the IDI's position expressed in its resolution on self-defence of 2007. The IDI claims that in the case of an illegal use of force short of armed attack, the attacked state does not enjoy the right to self-defence, yet, it is entitled to countermeasures "in conformity with international law" – thus, as it should be assumed, all forceful countermeasures are excluded. Nonetheless, the IDI argues further that the state attacked "may also take strictly necessary police measures to repel an attack" (para. 5). The scope of the "police measures" seems rather unclear, but it should be firmly stated that regardless of the term used, all individual, defensive extraterritorial armed actions taken by a state should be qualified – if not taken within the framework of self-defence – as illegal forceful countermeasures.³⁹

The same critical argumentation applies to the reasoning of the IIFFMCG which, while referring to the admissibility of the use of force to protect one's own nationals abroad, opted – although it seems with some hesitation – for the legality of a limited in time and scope use of force within rescue missions. Such action, called a "Blitz-type action" would be legal under international law "if it does not fall under the scope of the prohibition on the use of force, because it remains below the threshold of gravity and/or because it is not 'directed against the territorial integrity or political independence' of a state, as formulated in Article 2(4) of the UN Charter."⁴⁰ This position accepts – groundlessly it is submitted here – that a state's forceful act may, because of low gravity, fall outside of the scope of the prohibition on the use of force, and *ergo* may be legal.

Both above lines of argumentation very well illustrate the attempts to prevent unrealistic legal loopholes as a result of the gravity criterion. These attempts remain highly risky as they result in an unintended (as it may be assumed), yet unavoidable depreciation of the prohibition on the use of force.

The above critique of the gravity criterion as an element of the definition of the notion of an armed attack referred mainly to international norms regulating the use of force by states. Yet one may ask whether it is still reasonable to apply it to the qualification, generally accepted nowadays, of a terrorist act as an armed attack and towards other forcible acts by non-state actors. One may posit that abandonment of the gravity criterion would result in every terrorist act being qualified as an armed attack – a consequence that seems at first glance to be highly dubious. For this reason some authors who generally oppose the gravity criterion still opt for preserving it with respect to the qualification of a non-state actor's act only.⁴¹ And Steven Ratner, in a more nuanced

³⁸ Yearbook of the International Law Commission 2001, Vol. II, Part II, pp. 26-143.

³⁹ *But cf.* Corten, *supra* note 23, pp. 52-66.

⁴⁰ IIFFMCG, *Report*, p. 286.

⁴¹ See especially E. Wilmshurst (ed.), *The Chatham House Principles of International Law on the Use of Force by States in Self-Defence*, 55 *International and Comparative Law Quarterly* 963 (2006), pp. 966, 971.

approach, proposes to abandon the gravity criterion with respect to a terrorist act that may be attributed to a particular state, and to sustain the criterion with respect to terrorist acts that may be not attributed to a state.⁴²

It seems that the above propositions stem from a concern about a too broad scope of self-defence measures taken in response to terrorist acts or to other non-state actors' forceful actions. The gravity criterion appears to be a means to limit the scope of self-defence in such situations to large scale actions only, i.e. ones that are approximated to inter-state armed conflicts. Yet this concern is equally valid for the scope of self-defence with respect to both inter-state relations and non-state actors. In addition, it does not seem to give proper appreciation to the other limits on self-defence, i.e. the principles of necessity and proportionality. These principles – if applied correctly – would exclude any military actions of a punitive character. What's more, there are serious grounds to believe that concerns about broadening the scope of self-defence too excessively are more justified with regard to the acceptance of the admissibility of self-defence against a non-state actor (including a terrorist organization) in cases in which its forceful act may not be attributed to any state (the concept of a non-state actor as an autonomous source of an armed attack).⁴³ And it may be claimed that the ideas of keeping the gravity criterion with respect to the acts of non-state actors are aimed exactly at minimizing the consequences thereof.

3. ABANDONING THE GRAVITY CRITERION – REMARKS *DE LEGE FERENDA*

Taking into account all that has been written above, one may state that *de lege lata* the conceptual inconsistency within the very foundations of *jus ad bellum* is deplorable. Alas, the ICJ's approach, as enunciated in the *Nicaragua* judgement and upheld in its subsequent case law, has very much contributed to this highly unsatisfactory state of legal affairs. So the question arises whether conceptual consistency within *jus ad bellum* is possible to achieve at all. As I have already argued elsewhere,⁴⁴ the answer seems to

The line of argumentation used by the authors of the Principles goes back to the position that the gravity criterion as pronounced in the *Nicaragua* judgement applied to armed acts by irregular armed bands (non-state actors) only; see *supra* note 18.

⁴² S. Ratner, *Self-Defense Against Terrorists: The Meaning of Armed Attack*, in: N. Schrijver, L. van den Herik (eds.), *Counter-terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges*, Cambridge University Press, Cambridge: 2013, pp. 334 et seq.

⁴³ This concept is definitely gaining ground in the modern scholarship on *jus ad bellum*. See e.g. R. Kwiecień, in this volume of Polish Yearbook of International Law. *Contra* Corten, *supra* note 23, pp. 126-197; M. Kowalski, *Armed Attack, Non-State Actors and a Quest for the Attribution Standard*, 30 Polish Yearbook of International Law 101 (2010), pp. 118-125.

⁴⁴ M. Kowalski, *Jus ad bellum a systemowy charakter prawa międzynarodowego* [Jus ad bellum and the systemic nature of international law], in: R. Kwiecień (ed.), *Państwo a prawo międzynarodowe jako system prawa* [The state and international law as a system of law], Wydawnictwo UMCS, Lublin: 2015, pp. 182-184.

be positive and it is determined by the systemic approach to international law and to *jus ad bellum* – especially insofar as their completeness in its qualifying aspect is concerned. This regards the key questions whether every instance of the usage of armed force may be legally qualified as not indifferent,⁴⁵ and whether binding international law – as Krzysztof Skubiszewski once put it – “makes it possible to determine the lawfulness of any resort to force and thus to distinguish between legal and illegal categories of the use of force”.⁴⁶ Yet, such conceptual consistency would require abandoning the gravity criterion in the legal qualification of a particular armed act. This indeed seems extremely difficult, as it would necessitate overcoming and recasting the interpretation which is established and dominating in both international case law and in the doctrine.

The interpretation submitted here is based on the following presuppositions. Firstly, the prohibition on the use of force – under both the UN Charter and the parallel binding customary law – is of a comprehensive character and makes every resort to armed force illegal, save for two still binding exceptions: the use of armed force authorized by the UN Security Council; and the right to self-defence. Thus, every usage of armed force beyond the mentioned exceptions would amount to an illegal use of armed force, ergo as an act of aggression, if the latter is understood exactly as every illegal use of armed force by a State and distinguished from the crime of aggression. Simultaneously, an act of aggression would be equated with the notion of an armed attack (at least in this aspect it would be in line with the ICJ’s approach in the *Nicaragua* judgement). Accordingly, an act of aggression and the notion of an armed attack would be legally equal and would constitute violations of the prohibition on the use of force of the same kind. Note that such an approach is fully consistent with the principle of peaceful settlement of international disputes, with the non-intervention principle, as well as with the secondary rules on international responsibility of States (the latter leaving aside the question of the intent of a State violating its legal obligation).

Obviously, the gravity of a particular armed act maintains its legal significance, however it does so in different dimensions and in different contexts. Firstly, the assessment of an armed act’s gravity remains crucial for the UN Security Council in its discretionary competence to determine the existence of an act of aggression under Article 39 of the UN Charter, which triggers its powers under Chapter VII of the Charter. In this (discretionary) regard, the UN General Assembly Resolution 3314(XXIX) defining aggression⁴⁷ retains its full relevance. Thus, not every act of aggression, understood as any illegal use of armed force, necessarily constitutes an act of aggression under Article 39 of the UN Charter, and in this instance imprecise criterion of gravity assessment proves to be compatible with the discretionary powers of the UN Security Council.

Secondly, not every act of aggression, once again understood as any illegal use of armed force, necessarily constitutes an act of aggression under Article 8bis of the Rome

⁴⁵ *Ibidem*, p. 168.

⁴⁶ Skubiszewski, *supra* note 14, p. 752.

⁴⁷ Definition of Aggression, Resolution adopted by the General Assembly on 14 December 1974, 3314 (XXIX), UN GAOR 29th Sess., Supp. No. 31 (1974).

Statute of the International Criminal Court (ICC) and accordingly does not necessarily activate the ICC's jurisdiction *vis-à-vis* the international penal responsibility of an individual for the crime of aggression. Note that paragraph 1 of Article 8bis refers to "an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations." These criteria are ambiguous *par excellence*. As such they are left to the ICC's assessment. Simultaneously, paragraph 2 of Article 8bis, when defining an act of aggression, refers directly to Article 3 of the Resolution 3314 (XXIX), including the catalogue of acts of aggression. However, the catalogue under paragraph 2 of Article 8b is of an enumerative character, whereas the catalogue under Article 3 of the Resolution 3314 (XXIX) is not. It is crystal clear that the catalogue of acts of aggression under Article 3 of the Resolution 3314 (XXIX) is not exclusive and acts of aggression may nowadays take other forms as well. This difference clearly demonstrates that Article 8bis.2 of the ICC Statute defines an act of aggression for the purpose of determining the ICC's jurisdiction only.

Thirdly, the gravity of a particular illegal armed act can be decisive in assessing whether the attacked State is entitled to invoke the right to self-defence and to respond militarily. The gravity criterion should not, however, be taken into account in the context of the legal qualification of an armed act as an armed attack, as – in the approach submitted here – every illegal use of force would constitute armed attack. Instead, the gravity criterion would be crucial for the assessment of the necessity and proportionality of defensive military actions, *ergo* the admissibility of self-defence. Thus while a less grave form of use of armed force still constitutes an armed attack, due to its low intensity the admissibility of self-defence might be excluded totally or partially, its substantive scope being limited to that which is proportionate to the scale of the armed attack. Such an approach would not leave the State attacked without an option to respond militarily, if such a response is necessary and is done in a proportionate way. The state practice proves that States take such a right for granted, however they do not necessarily have to exercise it. Again, the assumption that a State attacked militarily is not entitled to respond militarily in self-defence due to the small scale of the attack is simply wholly unrealistic. The imprecise gravity criterion would, in the approach submitted here, constitute an element of the principles of necessity and proportionality. While the latter two are undeniably somewhat imprecise themselves and subject to a margin of appreciation, nevertheless their appropriate conceptualization within *jus ad bellum* generally, and within the self-defence framework specifically, as well as an essential, careful reference to the particular factual circumstances in each case, would help to avert arbitrariness in their application.⁴⁸ Indeed, the modern judicial and doctrinal debates on self-defence should abandon counter-productive considerations on the definition of the notion of an armed attack and concentrate on the potential and application of the principles of necessity and proportionality instead.⁴⁹

⁴⁸ Cf. O. Corten, *Necessity*, in: M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law*, Oxford University Press, Oxford: 2015, p. 861 et seq.

⁴⁹ Kowalski, *supra* note 4, pp. 120-128. For more on the conceptualization of the necessity and proportionality principles within *jus ad bellum* generally and within the self-defence framework specifically, see

It is also important to note that the understanding submitted here of the prohibition on use of force – based on equating the notions of aggression and armed attack, i.e. meaning any illegal use of armed force – has an additional merit. Namely, it makes it possible to escape the serious inconsistencies in framing the prohibition on the use of force as a *jus cogens* norm.⁵⁰ Accordingly, it is the prohibition of aggression (any illegal use of force) which gains a peremptory status. The prohibition of aggression, understood as any illegal use of force, remains unequivocal and provides for no exceptions. However, the scope of the prohibition of the use of force, i.e. the scope of the exceptions, would be formed by the *jus ad bellum* norms, which could undergo modifications and which would not have peremptory status themselves.⁵¹

CONCLUSION

Abdulawi Yusuf commented in 2012 that the ICJ's dictum in the Nicaragua judgement

despite scholarly criticism, will continue to serve as a basic standard for evaluating what constitutes an 'armed attack', and any further elaboration and fine-tuning of the concept of 'armed attack' will necessarily have to be undertaken on the basis of the gravity standard specified by the Court.⁵²

This statement is all the more significant as it was made by the present vice-president of the ICJ. Still, the criticism directed at the gravity criterion is severe and should be taken into consideration. The present State practice should be analysed thoroughly as it seems to show that States consider themselves entitled to respond militarily any time they are attacked if the collective security system remains ineffective. The limitations on this right should be considered within the self-defence framework, with the crucial role of the necessity and proportionality principles accompanying the other conditions of the admissibility of self-defence (a State being actually attacked; the armed character of the attack; attribution). In this respect, the gravity criterion as an element of the notion

e.g. D. Akande, T. Lieflander, *Clarifying Necessity, Imminence and Proportionality in the Law of Self-Defense*, 107 *American Journal of International Law* 563 (2013). *See also* Ruys, *supra* note 11, pp. 91-125; D. Kretzmer, *The Inherent Right of Self-Defence and Proportionality in Jus Ad Bellum*, 24 *European Journal of International Law* 235 (2013); G. Nolte, *Multipurpose Self-Defence, Proportionality Disoriented: A Response to David Kretzmer*, 24 *European Journal of International Law* 283 (2013); Corten, *supra* note 23, pp. 470-494; Ch.J. Tams, J. Devaney, *Applying Necessity and Proportionality to Anti-Terrorist Self-Defence*, 45 *Israel Law Review* 91 (2012); T. Christodoulidou, K. Chainoglu, *The Principle of Proportionality from a Jus Ad Bellum Perspective*, in: Weller (ed.), *supra* note 48, p. 1187.

⁵⁰ For more on the inconsistencies see J.A. Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, 32 *Michigan Journal of International Law* 215 (2011); A. de Hoogh, *Jus Cogens and the Use of Armed Force* in Weller (ed.), *supra* note 48, p. 1161 et seq.

⁵¹ Kowalski, *supra* note 7.

⁵² Yusuf, *supra* note 18, p. 470.

of an “armed attack” is superfluous. What’s more, it is counter-productive as it reasserts the UN Charter’s approach based on differentiating various forms of the use of force, which makes *jus ad bellum* incoherent and diminishes its significance.

Inasmuch as this article’s reference point is the *Nicaragua* judgement, it has focused only on the gravity criterion in the context of the notion of an armed attack. Yet, it should be noted that this criterion may be used – and indeed is used – towards other *jus ad bellum* notions with equally devastating effects. It is for example exactly this approach which is taken to argue that the scope of the prohibition on the use of force is limited, as it does not cover instances of use of military force which does not reach a certain minimal level, i.e. are not grave enough. Such a line of argumentation should be dismissed as it remains contradictory to binding international law,⁵³ and it clearly contributes to depreciation of the prohibition on the use of force. It is both symptomatic and paradoxical that the gravity criterion appears to be two-edged. When invoked in the context of the definition of the notion of an ‘armed attack’, it is aimed at limiting the scope of the legal use of force by excluding the right to self-defence in response to less grave forms of the use of force; whereas when invoked in the context of a limitation on the prohibition of the use of force, it is aimed at expanding the scope of the legal use of force to include minor armed actions.

Thus – as it has been argued above – the *jus ad bellum* regulation as provided in the UN Charter should be perceived as marred by the original sin of having introduced undefined notions of use of force, aggression and armed attack, whose mutual relations have thus been obscured. Hence in fact we witness a continuous legal juggling of these notions. This juggle resembles – at least to some extent – the lines of argumentation present in the pre-UN Charter era aimed at proving that particular armed actions by States fell short of (undefined) war under the Kellogg-Briand Pact of 1928.⁵⁴ After all, abandoning the notion of war in the UN Charter’s text was not coincidental - it was aimed exactly at avoiding this kind of legal obscurity. Alas, unsuccessfully.

Yet it should be noted that in the *Nicaragua* judgement the ICJ itself pointed out that the role of customary law may supplement and modify the existing *jus ad bellum* norms under the UN Charter. Consequently, modifications to the interpretation of the above-mentioned notions and their mutual relationships, aimed at obtaining conceptual consistency of *jus ad bellum*, are possible if demonstrated through a careful and detailed elaboration of state practice and *opinio juris*. Such changes would require abandoning the well-established judicial and doctrinal approaches to *jus ad bellum* and, as such, may seem unrealistic. Yet, they are possible. Hopefully, the original sin in international law may yet be removed.

⁵³ For a detailed analysis, with extensive references to state practice and doctrinal positions, see T. Ruys, *The Meaning of “Force” and the Boundaries of the Jus ad Bellum: Are “Minimal” Uses of Force Excluded from UN Charter Article 2(4)?*, 108 *American Journal of International Law* 159 (2014).

⁵⁴ *General Treaty for Renunciation of War as an Instrument of National Policy of 27 August 1928*, 94 LNTS 57; S.C. Neff, *War and the Law of Nations. A General History*, Cambridge University Press, Cambridge: 2005, pp. 293-296.