

Critical remarks on the International Court of Justice's interpretation of Article 3(g) of the “Definition of Aggression” (UNGA Resolution 3314/1974)

REFLEXÕES CRÍTICAS ACERCA DA INTERPRETAÇÃO DA CORTE INTERNACIONAL DE JUSTIÇA SOBRE O ARTIGO 3(G) DA “DEFINIÇÃO DE AGRESSÃO” (RESOLUÇÃO 3314/1974 DA AGNU)

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Abstract

The purpose of this paper is to examine whether and to what extent the Article 3(g) of the General Assembly Definition of Aggression (Resolution 3314/1974 XXIX) can be interpreted using the case-law of the International Court of Justice. Three judgments delivered by the Court are analyzed: Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) and Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro). Special attention is given to the connection between international norms on the use of force and the law of international responsibility, as well as to the meaning and status attributed by the Court to the expressions “sending” and “substantial involvement,” both present in Article 3(g).

Keywords

Aggression; non-state actors; International Court of Justice; international responsibility; attribution of conduct.

Resumo

O objetivo deste artigo é examinar se e em que medida o Artigo 3 (g) da Resolução 3314 (XXIX), da Assembleia Geral das Nações Unidas: Definição de Agressão, pode ser interpretado com base na jurisprudência do Tribunal Internacional de Justiça. São analisados três julgamentos proferidos pelo Tribunal: Atividades militares e paramilitares na e contra a Nicarágua (Nicarágua contra Estados Unidos da América), Atividades armadas no território do Congo (República Democrática do Congo contra Uganda) e Aplicação da Convenção sobre a Prevenção e a Punição do Crime de Genocídio (Bósnia e Herzegovina contra Sérvia e Montenegro). Confere-se especial atenção à conexão entre as normas internacionais sobre o uso da força e a lei da responsabilidade internacional, bem como o significado e o status atribuídos pelo Tribunal às expressões “envio” e “envolvimento substancial”, ambos presentes no Artigo 3 (g).

Palavras-chave

Agressão; atores não estatais; Corte Internacional de Justiça; responsabilidade internacional; atribuição de conduta.

INTRODUCTION

In 1974, the General Assembly of the United Nations adopted the Resolution 3314/1974 (XXIX)¹ on the “Definition of Aggression,”² which was meant to serve as guidance to the Security Council (SC) in its task of “determining, in accordance with the Charter, the existence of an act of aggression” (art. 4). Even though it has “scarcely ever been used for its primary purpose” (WILMHURST, 2008, p. 1), the text, or at least some of its provisions, proved significantly relevant in a few cases brought before the International Court of Justice. Article 3(g) is one of these provisions, that has its own history of interpretation by the Court.

The 1974 Definition of Aggression was established in a combination of an abstract element with an illustrative list of acts that could, accordingly, qualify as acts of aggression. Among these acts, there was Article 3(g), which stated that “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above [such as invasion or attack, bombardment, blockade of ports or coasts, etc.], or its substantial involvement therein” (UNITED NATIONS, 1974) could constitute an act of aggression. Achieving consensus on this non-State actor³ provision was “one of the major difficulties” of the process, which culminated in the narrowing of some earlier proposals in order “to limit the text to ‘sending’ organized groups, rather than organizing and supporting them” (WILMHURST, 2008, p. 2).

In spite of the somewhat successful attempts to restrict the scope of Article 3(g), some of the crucial terms agreed upon still had an open meaning,⁴ in particular expressions such as “sending” and “substantial involvement.” Therefore, the task of interpreting and clarifying the content of Article 3(g) in light of specific cases was left to the judges. The purpose of this paper, hence, is to examine whether the case law of the International Court of Justice (ICJ) can be used to interpret Article 3(g) of the 1974 Definition of Aggression, as well as to what extent it can be done.

This is a relevant legal question in our days. Non-State actors are increasingly playing key roles in contemporary armed conflicts and interacting with States in complex ways in

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1 Available at: <<http://www.un-documents.net/a29r3314.htm>>. Accessed: Oct. 7, 2017.

2 “Aggression is an old concept in international law meaning, in essence, State conduct that either initiates war against another State or brings about a situation in which the victim is (or may be) driven to war” (DINSTEIN, 2009, para. 1). See also: ZEMANEK, 2009; WESTRA, 2007; WRIGHT, 1935.

3 On the concept, see: D’ASPREMONT, 2011; CLAPHAM, 2010.

4 As noted in the Dissenting Opinion of Judge Schwebel in the Case *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Merits, Judgment, I.C.J. Reports 1986. (ICJ, 1986a, para. 168).

these contexts, such as in Syria, Iraq, Libya, Yemen, Ukraine, and others. It is important to know whether the Definition of Aggression can be applied in cases like these, and when it can be applied. Furthermore, the recent adoption of Article 8 *bis* by the International Criminal Court in the 2010 Kampala Conference,⁵ as an amendment to the Rome Statute, explicitly relied on the General Assembly's Definition of Aggression, as the point of reference to determine what kind of acts can qualify as aggression for criminal purposes. Future practice in this area of international criminal law is likely to build on the ICJ's interpretation of the Resolution, making it even more necessary to study and discuss the topic more thoroughly.

That said, in order to answer the proposed question, I will revisit three judgments of the ICJ that directly address the issue, in order to explore possible inconsistencies of the Court's findings on the interpretation of Article 3(g). In analyzing such findings, I intend to show that the Court has developed a restrictive approach to the matter, especially because it resorted to rules of international responsibility⁶ – which possess strict criteria for attribution of conduct – to interpret Article 3(g). I will deal with some questions, which remain unsettled and may require further reflection, such as the relationship between the law of the use of force and the law of international responsibility. Furthermore, I will inspect as whether the support provided by a State to an armed band can amount to an act of aggression, and in what degree it can be done, and, finally, the relevance and applicability of the *substantial involvement* criterion of Article 3(g).

I PRELIMINARY NOTES ON THE DEFINITION OF AGGRESSION

After decades of “fruitless wrangling” (FERENCZ, 1999, p. 347) among States and experts, permeated by numerous commissions and reports,⁷ the UN approved a “generally recognized” (SAYAPIN, 2014, p. 104) definition of aggression in its Resolution 3314/1974 (XXIX). The General Assembly's purpose, since the 1950's, was to define aggression “as accurately as possible,” in order to “formulate essential directives” for the organs that would be called upon to determine which party is guilty of an attack (UNITED NATIONS, 1950, item 72). As directives, they were not to be legally binding, but should serve as guidance, mainly for the work of the Security Council. Nevertheless, as a legal view endorsed by the majority of States, the UN Definition of Aggression would certainly have normative relevance for the International Court of Justice.

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⁵ See: COALITION..., 2010.

⁶ Particularly to Article 8 of the *Articles on State Responsibility for Internationally Wrongful Acts* of the International Law Commission.

⁷ For example: UN Doc. A/2322 (1952).

In the process of searching for a definition, there were different views of what should be legally defined an act of aggression. On the one hand, there were those proposing that every act of war by a State (i.e., any use of military force), if not justified by self-defense or authorized by the Security Council, should be considered an aggression. From this perspective, a general, abstract definition of aggression was the best way forward. Their implicit formula was this: all unlawful exercise of violence is war, and all war is aggression. Scelle (1936, p. 379) upheld this view: “The criterion of war and the criterion of aggression are one.”⁸ This reasoning contributed to the strengthening the general prohibition of the use of force that had been established in international law in the Kellogg-Briand Pact (1928) and, later, in the UN Charter (1945). A “purely objective” criterion of defining war was sought, for “if we introduce here any subjective elements, notably the will to make war, there is no longer [...] any security” (SCELLE, 1936, p. 377). In other words, if a distinction were to be made between acts of war and acts of aggression, it would become too difficult to find a clear criterion to distinguish them.

On the other hand, an enumerative definition was advocated for. Moving away from the idea of a general concept, the thought here was to define in a precise and concrete manner which warfare acts could amount to aggression. An imagined scale of acts, according to their gravity, was behind this view: acts of aggression were supposed to be of greater consequences than the mere use of military force. By describing the specific acts that would fall under the scope of aggression, the expectation was that States would not be able to come up so easily with excuses to avoid the norm. This perspective drew basically on a Convention for the Definition of Aggression⁹ signed in 1933 by the Soviet Union and some other neighboring States, which stipulated that, in a given dispute, the first State to commit one of a list of five specific and grave acts of war¹⁰ should be deemed the aggressor. The Convention also stated that “no political, military, economic or other considerations” (Article III) could serve as an excuse or justification for the acts there forbidden.

This fundamental disagreement illustrates how defining aggression was a complex task, especially because of the ethical, political, and sociological difficulties involved (STONE,

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⁸ For a similar position, see: ALFARO, 1951.

⁹ Available at: <http://heninen.net/sopimus/1933_e.htm>. Accessed: Oct. 2, 2017.

¹⁰ These acts were: “(1) Declaration of war upon another State; (2) Invasion by its armed forces, with or without a declaration of war, of the territory of another State; (3) attack by its land, naval or air forces, with or without a declaration of war, on the territory, vessels or aircraft of another State; (4) Naval blockade of the coasts or ports of another State; (5) Provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take, in its own territory, all the measures in its power to deprive those bands of all assistance or protection” (CONVENTION..., 1933).

1958, p. 91). One of the main dilemmas surrounding the approaches was that, if the definition were drafted too flexibly, it could allow for multiple interpretations by States, creating room for political excuses; however, if were formulated too rigidly, the competent organs could not be able to use it in light of the ever-changing techniques and contexts of aggression. Thus, a delicate balance was needed. In this scenario, despite controversies among countries (STONE, 1958, p. 52 *et seq*), the drafting of the 1974 Definition of Aggression resulted in a blended approach: a combination of an abstract element with an illustrative list of acts of aggression. In this architecture, the general part was “provided to supplement the ‘open ended’ list of aggression situations” (STONE, 1958, p. 57), and the application of the concept would have to consider both aspects.

The resulting text was a set of mutual compromises, which were noticeable in the careful wording of its provisions. Article 1 of the Resolution – the abstract part – established that “aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations” (UNITED NATIONS, 1974). It was essentially a reproduction of Article 2(4) of the UN Charter, except for the word *sovereignty*. Article 2, successively, instituted a principle according to which “the First use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression,” but conceded, at the same time, that the Security Council could conclude differently if justified by “other relevant circumstances” (UNITED NATIONS, 1974). Therefore, a good margin for discretion was left to the competent organ when deciding upon a particular case.

In the enumerative part of the definition, several specific acts were described.¹¹ One of the most sensitive issues, in this section, was the hypothesis of vicarious aggression – the use of force by a State through irregular groups. It was defined in Article 3, paragraph *g*, as “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which

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11 The acts were: “(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof, (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; [...]” (UNITED NATIONS, 1974).

carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein” (UNITED NATIONS, 1974). *Sending irregular groups or being substantially involved in it* became the criteria to ascertain vicarious aggression by a State. In fact, a similar paragraph was already present in the Soviet definition of 1933. The old document, however, referred to this kind of indirect aggression more broadly,¹² as encompassing the *provision of support* to armed bands or even the *simple refusal* by the host State¹³ to take measures to neutralize them.

In the negotiations at the UN, the three main proposals submitted by States to the Sixth Committee considered indirect aggression in a different way. The Soviet Union submitted a draft, defining vicarious aggression as “the use by a State of armed force by sending armed bands, mercenaries, terrorists or saboteurs to the territory of another State and engagement in other forms of subversive activity involving the use of armed force with the aim of promoting an internal upheaval in another State” (UNITED NATIONS, 1972, p. 8). Another Six-Power proposal¹⁴ included a more open definition, characterizing indirect aggression as:

- (6) Organizing, supporting or directing armed bands or irregular or volunteer forces that make incursions or infiltrate into another State;
- (7) Organizing, supporting or directing violent civil strife or acts of terrorism in another State; or
- (8) Organizing, supporting or directing subversive activities aimed at the violent overthrow of the Government of another State. (UNITED NATIONS, 1972, p. 12).

Lastly, there was a Thirteen-Power draft,¹⁵ which did not include indirect aggression in its list of specific acts. Instead, a separated article was inserted:

7. When a State is a victim in its own territory of subversive and/or terrorist acts by irregular, volunteer or armed bands organized or supported by another State, it may take all reasonable and adequate steps to safeguard its existence and its institutions,

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12 As “the provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take, in its own territory, all the measures in its power to deprive those bands of all assistance or protection” (CONVENTION..., 1933).

13 The “host State” is the one from whose territory irregular groups plan and launch their attacks.

14 The countries were: Australia, Canada, Italy, Japan, United Kingdom, and United States of America.

15 The countries were: Colombia, Cyprus, Ecuador, Ghana, Guyana, Haiti, Iran, Madagascar, Mexico, Spain, Uganda, Uruguay, and Yugoslavia.

without having recourse to the right of individual or collective self-defence against the other State under Article 51 of the Charter; [...] (UNITED NATIONS, 1972, p. 10).

This last draft adopted a more radical perspective: not only did it exclude indirect aggression from the concept of aggression, but also expressly ruled out the right of self-defence against it. It was seen by Julius Stone (1977, p. 89) to be “at odds with the Charter and general international law,” and ended up being rejected. The other two proposals were, in the end, significantly altered. In the final text, the aggression through non-State actors was described in the acts of *sending* an armed group that carries out acts of armed force against another State, or *being substantially involved* in these operations. The introduction of imprecise criteria (“substantial involvement”) created a potential slippery slope for interpreters. Therefore, the task of concretely determining what could or could not be considered indirect aggression was essentially left to the competent organs.

Yet, despite being conceived as a guidance, the Resolution was not visibly incorporated in the practice of the Security Council. The reasons for it are probably more political than legal. After all, the Council’s assessment of an act of aggression is fundamentally influenced by the interests of its Permanent Members, not by legal directives or norms (SAYAPIN, 2014, p. 109) – and, in fact, being a political organ, it is not supposed to be different. However, this is not the situation of the International Court of Justice, which is a judicial body mandated with the application of international legal norms in the handling of disputes. In some of its judgments, Resolution 3314/1974 was thoroughly discussed, and Article 3(g) was even declared by the Court as customary law.

Lately, the Definition of Aggression has recently come to the forefront of international law, in 2010, with the adoption of Article 8 *bis* of the Rome Statute. Having established the parameters for the crime of aggression in international law, the provision made explicit reference to UNGA Resolution 3314/1974. It could certainly be discussed whether the international community spared a good opportunity, in 2010, to review and improve its definition of aggression,¹⁶ after more than thirty years of its adoption. However, the old definition was reaffirmed and is currently stamped on a binding treaty of international law. Thus, it is highly probable that the International Criminal Court, when exercising jurisdiction over this crime, will draw on the ICJ’s interpretations on the issue, or at least establish a dialogue with them.

2 THE COURT’S INTERPRETATION OF ARTICLE 3(G) IN THE NICARAGUA CASE

Twelve years after the adoption of the Definition of Aggression by the General Assembly,

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¹⁶ For a reflection on some of the shortcomings of the Article, see: SCHEFFER, 2017.

the International Court of Justice had its first opportunity to interpret Article 3(g) in its 1986 Judgment on the Merits of the *Nicaragua Case* (ICJ, 1986a). In the occasion, the relevant question put before it, relating to Article 3(g), was the involvement of the United States in the paramilitary activities carried out by the *contras* on the territory of Nicaragua and the legal consequences derived thereof. A twofold approach response was necessary: (i) to assess whether the acts of the *contras* were attributable to the United States under the law of international responsibility, and (ii) to determine the responsibility of the United States for its own acts regarding the support it provided to the Nicaraguan rebels, and whether that conduct could be considered an act of aggression (or armed attack) under Article 3(g).

In its reasoning, the Court detached the question of the attribution to the United States of the acts of the *contras* (violations of humanitarian law, for example) from the question of the responsibility of the United States “for its own conduct vis-à-vis Nicaragua, including conduct related to the acts of the *contras*” (ICJ, 1986a, para. 165). Regarding the first issue, the judges considered that if the United States were to be responsible for any violation of international law committed by the *contras*, “it would in principle have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed” (ICJ, 1986a, para. 115, emphasis added). Thus, the Court relied on general rules of international responsibility, particularly a principle of attribution of conduct,¹⁷ to establish a link between *contra*’s acts and the United States. The threshold that had to be met for this attribution to happen was, in the view of the Court, the *effective control* of the *contras* by the United States. However, the judges found that, on the basis of the available evidence, the State did not have the sufficient control (*effective control*) over the insurgents and, therefore, the violations committed by the *contras* could not be attributed to it.

Nevertheless, regarding the second question, the criteria used by the Court to determine the degree of involvement of a State with armed groups that could amount to an act of aggression, were those established in Article 3(g). These criteria would serve to determine the responsibility of the United States for its own conduct, regarding the support they gave to these groups and whether it could be considered an act of aggression (or an armed attack). At that stage, the Court mentioned Resolution 3314 (XXIX):

[...] an armed attack must be understood as including not merely action by regular armed forces across an international border, but also “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force

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17 On the principle, see the Article 8 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts. Available at: <http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf>. Accessed: Oct. 11, 2017.

against another State of such gravity as to amount to” (inter alia) an actual armed attack conducted by regular forces, “or its substantial involvement therein.” This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the Court does not believe that the concept of “armed attack” includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States. (ICJ, 1986a, para. 195)

There are two important remarks to be made on that passage. The first is that the Court expressly recognized that the text of Article 3(g) of the Resolution “may be taken to reflect customary international law.”¹⁸ In theory, the General Assembly Resolution is non-binding; it has been strengthened by the Court recognition, though. The reasons of this conclusion are not clear in the judgment, but are probably related to the wide acceptance and endurance of the respective Resolution, already perceived in 1986. Although the customary character of a norm does not depend on its recognition by the Court, it cannot be denied that an express declaration like this made the case for it far more compelling. Accordingly, in the

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18 A finding with which Judge Schwebel disagreed: “The significance of the Definition of Aggression – or of any definition of aggression – should not be magnified. It is not a treaty text. It is a resolution of the General Assembly which rightly recognizes the supervening force of the United Nations Charter and the supervening authority in matters of aggression of the Security Council. The Definition has its conditions, its flaws, its ambiguities and uncertainties. It is open-ended. [...]. At the same time, the Definition of Aggression is not a resolution of the General Assembly which purports to declare principles of customary international law not regulated by the United Nations Charter. The legal significance of such resolutions is controversial, a controversy which is not relevant for immediate purposes. This resolution rather is an interpretation by the General Assembly of the meaning of the provisions of the United Nations Charter governing the use of armed force – the use of armed force ‘in contravention of the Charter.’ As such, of itself it is significant. [...] In substance, however, the Court’s Judgment – while affirming that the Definition of Aggression reflects customary international law – does dismiss both the import of the Definition of Aggression and the State practice and doctrine which on this paramount point is reflected by the Definition.” Dissenting Opinion of Judge Schwebel in the Case *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 1986. (ICJ, 1986a, para. 168).

Nicaragua case, the Definition of Aggression, or at least its Article 3(g), took a relevant step in the way from soft law to hard law.

The second remark, however, is that the meaning of the expressions of Article 3(g) remained unclear. According to the Court, it was necessary to distinguish between “the most grave forms of the use of force (those constituting an armed attack) from other less grave forms” (ICJ, 1986a, para. 191). It made a distinction between the simple use of force and armed attack (or aggression). At the end of the judgment, the provision of weapons and the logistical support provided by the U.S. were recognized as a mere unlawful intervention in the affairs of another State – and could eventually be, at maximum, an illicit use of force, but not an act of aggression. According to Dinstein (2009, p. 24), the Court made a “sweeping statement” when it said that it did “not believe” that “assistance to rebels in the form of the provision of weapons or logistical *or other support*” (emphasis added) could qualify as an armed attack. Indeed, the broad expression “*or other support*” seems to suggest that a State would never be responsible for committing an armed attack as long as it “limits itself” to providing (any kind of) support to rebels. Judge Jennings contested the *dictum* in his dissenting opinion, and wrote that the Court went “much too far” (ICJ, 1986b, p. 543) when it said that the provision of arms *coupled with logistical or other support* could not be an act of aggression. And he concluded: “[i]f there is added to all this ‘other support’, it becomes difficult to understand what it is, short of direct attack by a State’s own forces, that may not be done apparently without a lawful response in the form of collective self-defence [...]” (ICJ, 1986b, p. 543).¹⁹

Furthermore, in the above-mentioned passage the Court seems to have avoided analyzing the criterion of “substantial involvement” present in Article 3(g). According to the norm, not just the sending of armed bands by a State would qualify as aggression, but also the State’s “substantial involvement therein.” Then, it resulted unclear why the degree of support provided by the United States to the *contras* could not be considered – or what degree could be considered – a “substantial involvement” for purposes of Article 3(g). As Judge Schwebel pointed out in his dissenting opinion, quoting Professor Julius Stone, while Article 3(g) “requires there to have been a ‘sending’ into the target State, it inculcates the host State not merely when that State did the sending, but also when it has a ‘substantial involvement therein’” (STONE, 1977, p. 75-76). At the end of the day, if providing arms and logistical support to rebels did not meet the threshold of substantial involvement, it is hard to say what would.²⁰ The Court apparently understands that, even under Article 3(g), the conduct

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¹⁹ See also: AREND, A. C.; BECK, 2013. p. 198.

²⁰ According to Judge Schwebel, “The Court’s reasoning is open to criticism, in terms of the definition of Aggression and under customary international law – not to speak of the realities of modern warfare.

of the State itself has to go far beyond supporting and organizing groups, i.e., has to be directly involved in the attacks, to constitute itself a “grave form” of the use of force, namely, an act of aggression.

In sum, looking at these two crucial aspects of the judgment, it can be concluded that the Court, in spite of recognizing the customary status of Article 3(g), took a strict interpretation of it. The judges did so by resorting to a broad expression (“or other support”) to refer to what would *not* constitute an act of aggression under the provision and by establishing a distinction between the most and the less grave forms of the use of force. This narrowed the scope of application of Article 3(g), instituting a threshold of gravity or involvement that may exclude from indirect aggression the larger part of State acts – a threshold referred by some as “unduly high” (AREND; BECK, 2013, p. 198).

Lastly, on a side theoretical note, I must say that I would hardly classify Article 3(g) as a rule of attribution of conduct, as is Article 8 of the ILC Articles on State Responsibility for Internationally Wrongful Acts. I do not ignore that there is relevant opinion in favor of it.²¹ However, the object of Article 3(g) is that which the Court made clear in the *Nicaragua Case*: the responsibility of the State for *its own conduct* towards armed bands, not the attribution of their acts to the State. It focuses on State conduct. This perspective is in line with the requirement of Article 1 of the 1974 Definition of Aggression, namely, that the act of aggression must be the “use of armed force *by a State*.” Thus, the *sending* of an irregular armed group by a State, or the State’s *substantial involvement therein* is one of the categories, among others in Article 3, of use of armed force *by a State*. This is why there is no attribution of conduct here. What matters, for the Definition of Aggression, is the act of the State: whether it sent the group or got substantially involved in the action. This note is important because the State that limits itself to *sending* an armed group to another State – whatever that means – should, in theory, be held accountable only for its own act of *sending*. In the absence of “effective control” (attribution test) over the acts of the specific group, the State could not be responsible for the breaches of international law committed by the group

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Article 3 (g) does not confine its definition of acts that qualify as acts of aggression to the sending of armed bands; rather, it specifies as an act of aggression a State’s ‘substantial involvement’ in the sending of armed bands. That provision is critical to the current case. [...] It is one thing to send; it is another to be ‘substantially involved’ in the sending.” Dissenting Opinion in the Case *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986. (ICJ, 1986a, para. 170).

21 For example: “[...] the ‘sending by or on behalf of a State of armed bands..., or...substantial involvement therein’ in paragraph (g) must be interpreted as a *lex specialis* threshold for attributing the acts amounting to aggression carried out by the armed bands to the state sending them, thereby maintaining the Article 1 requirement that an act of aggression be a ‘use of armed force *by a State*’” (TRAPP, 2015, p. 682-683, emphasis added). See also BRENT, 2009.

members. Nonetheless, as we will see, rules of attribution do have a role in the interpretation of Article 3(g).

3 THE COURT'S INTERPRETATION OF ARTICLE 3(G) IN THE *DRC vs. UGANDA* CASE

The second relevant judgment, rendered by the Court in 2005, related to acts of “armed aggression” allegedly perpetrated by Uganda on the territory of the Democratic Republic of the Congo (DRC) (ICJ, 2005a, para. 1). Uganda sought to justify the use of armed force by arguing it was acting in self-defence. The Court, then, had to consider this argument to decide whether the attacks carried out by Uganda on the territory of the DRC violated Article 2(4) and Article 51 of the UN Charter. According to the latter, a prerequisite for the exercise of the right of self-defence is the occurrence of an armed attack.²² However, these “armed attacks” against which Uganda claimed to have acted in self-defence did not come directly from the armed forces of the DRC, but from an armed group called Allied Democratic Forces (ADF), operating in Congolese territory. Therefore, the situation required an interpretation of Article 3(g) of the Definition of Aggression.

To decide on the self-defence, the Court would have to find whether the government of the DRC had *sent* (or had had a *substantial involvement therein*) the ADF to Uganda, in whose territory the irregular group perpetrated armed attacks. If this could be proved, the argument of self-defence would be accepted, given that the armed attack on Uganda could be legally linked by Article 3(g) to an act of indirect aggression by a State (the DRC). However, the Court found that, despite some documents presented by Uganda, there was no “satisfactory proof” of the involvement of the DRC in these attacks and concluded that “[t]he attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX)” (ICJ, 2005a, para. 146). In fact, the Court’s position was that there was no sufficient evidence to say that the DRC was really providing any form of support to the ADF.

Reversely, the DRC had accused Uganda of financing and offering military and logistical support to irregular armed groups acting in Congolese territory. In fact, the situation was described by the DRC not as mere support, but a “massive engagement of Ugandan troops

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22 The Article reads as follows: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence *if an armed attack occurs* against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security” (UNITED NATIONS, 1945, emphasis added).

in favor of irregular forces” (ICJ, 2000, p. 174), especially because both regular troops and irregular groups were stationed, at the same time, on Congolese territory. Thus, in the DRC’s viewpoint, Uganda was violating Article 3(g) through its “substantial involvement” with the irregulars. In response, the Court acknowledged that Uganda, in 1998, had “launch[ed] an offensive together with various factions which sought to overthrow the Government of the DRC” (ICJ, 2005a, para. 160), and, in this process, had trained and offered military support to irregular groups. However, the Judges concluded that, on the basis of the available evidence, Uganda did not exercise direction or control over the armed groups, and, therefore, their actions were not attributable to that State (ICJ, 2005a, para. 160). In these circumstances, the Court ruled that Uganda did not perform an act of aggression, but only violations of “certain obligations of international law” (ICJ, 2005a, para. 161), such as the non-use of force.

In its separate opinion, Judge Elaraby criticized this conclusion. He pointed out the customary nature of Article 3(g), which was declared by the Court in the *Nicaragua* case. He also affirmed that the Court should have acted coherently, embarking on “a determination as to whether the egregious use of force by Uganda falls within the customary rule of international law as embodied in General Assembly resolution 3314 (XXIX)” (ICJ, 2005b, para. 17). Considering “the gravity of the factual circumstances” of the case, he could not “appreciate any compelling reason for the Court to refrain from finding that Uganda’s actions did indeed amount to aggression” (ICJ, 2005b, para. 20). It is doubtful, however, whether his conclusion would be the same if there were only irregular groups in Congolese territory, i.e., if Ugandan regular troops were not present too.

Hence, in the interpretation of Article 3(g), the Court seems to have overlooked the “substantial involvement” criterion, restricting the interpretative exercise only to the “sending” of armed groups by a State — exactly as it had done in the *Nicaragua* Case. Besides avoiding DRC’s allegations to that effect, the judges also sidestepped Uganda’s argument that, in Article 3(g), “the phrase ‘or its substantial involvement therein’ strongly indicates that the formulation extends to the provision of logistical support” (ICJ, 2005c, p. 30)²³ to armed bands. The lack of specific response by the Court can be viewed as an approximation of the two criteria of Article 3(g), meaning that the “sending by or on behalf of” would have the same practical meaning of “substantial involvement therein”. In this context, as Trapp has noticed, Article

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23 Uganda had argued even further, speaking of a “super-added” pattern of responsibility with regard to non-State actors: “[...] armed attacks by armed bands whose existence is tolerated by the territorial sovereign generate legal responsibility and therefore constitute armed attacks for the purpose of Article 51. And thus, there is a separate, a super-added standard of responsibility, according to which a failure to control the activities of armed bands, creates a susceptibility to action in self-defence by neighbouring States” (ICJ, 2001, p. 194).

3(g), “having been interpreted restrictively by the Court,” would “not admit very much less than actual sending” (TRAPP, 2015, p. 683). Indeed, the Court would hardly omit the analysis of the “substantial involvement” criterion – for the second time – due to a lack of diligence. It seems that the test of “substantial involvement” was not (well) received in its case law.

The judgment was also not immune from criticisms in the individual opinions of Judges Kooijmans and Simma. Judge Kooijmans declared that the Court has “missed a chance to fine-tune the position it took 20 years ago in spite of the explicit invitation by one of the Parties to do so,” regarding the question “whether the threshold set out in the Nicaragua Judgment is still in conformity with contemporary international law in spite of the fact that that threshold has been subject to increasingly severe criticism ever since it was established in 1986” (ICJ, 2005d, p. 313). Judge Simma, in its turn, criticized the lack of consistency in the Court’s interpretation of the use of force by non-State actors, saying that its pronouncements “are problematic less for the things they say than for the questions they leave open, prominently among them the issue of self-defence against armed attacks by non-State actors” (ICJ, 2005e, p. 172-174) – which is inextricably related to the problem of defining vicarious aggression.

Furthermore, in his contribution, Judge Koroma recalled the *Nicaragua* (1986) and *Oil Platforms* (2003) cases and highlighted the Court’s view on the differentiation between the gravest forms of the use of force – armed attacks – and less grave acts. His declaration contained a relevant interpretation of that distinction. He argued that it was “necessary to distinguish between a State’s massive support for armed groups, including deliberately allowing them access to its territory, and a State’s enabling groups of this type to act against another State” (ICJ, 2005f, para. 9). Accordingly, the first hypothesis “could be characterized as an ‘armed attack’ within the meaning of Article 51” (ICJ, 2005f, para. 9), while the second could not. His Declaration, in this sense, may be a hint of what, short of direct attack or effective control, the Court could eventually consider as an act of aggression in terms of providing support for rebels. In fact, a situation of *massive support* could fall under the scope of Article 3(g), especially because it could be seen as a “substantial involvement” by a State in the actions of an armed group. However, although worth noticing, it is necessary to keep in mind that this is only an individual opinion.

Another topic that should not go unnoticed is the use, by the Court, of the word (non)-“attributable” while interpreting Article 3(g):

The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, *they still remained non-attributable to the DRC*. (emphasis added) (ICJ, 2005a, para. 146)

The use of this expression raises some hesitations to what seemed already settled by the *Nicaragua* Case. In that judgment, the problem of the *attribution* of the *contras'* conduct to the U.S. was correctly separated from the examination of that State's *own conduct* regarding the support it gave to the *contras*. As said earlier, the former question involves a principle of the law of international responsibility,²⁴ while the latter is a situation to be assessed under Article 3(g) (i.e., the law of the use of force). In the passage quoted above, however, it seems that Article 3(g) was deemed a norm of attribution. This subtle misinterpretation of the Article's nature, in my opinion, can have deep implications: it can ultimately blur the boundaries between the law of the use of force and the law of international responsibility. As Nicholas Tsagourias (2011, p. 499) has pointed out:

It is important [...] to elaborate more on the relationship between the law of state responsibility and that on the use of force. [...] [T]he law of state responsibility and the use of force are distinct regimes with different rationales; the former is about the legal consequences that arise from violations of international obligations whereas the latter prescribes the conditions for the lawful use of force. As a result, the use of force regime applies its own set of criteria as to when force can be lawfully used and against whom, which are pertinent to said regime. Even if the use of force regime borrows terms and concepts from the law of state responsibility, such loans are interpreted in the context within which they apply.

Although largely theoretical, the distinction is important and can have practical effects. Article 3(g) is a rule pertaining to the regime of the use of force (primary rules), which applies its own criteria to determine “when force can be lawfully used and against whom.” Even if some criteria could have been borrowed from the secondary rules of the responsibility regime,²⁵ this does not make Article 3(g) a rule of attribution. The threshold for attribution of acts for purposes of responsibility is, in theory, higher than the one required for

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²⁴ See Article 8 of the ILC Draft on State Responsibility: “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct” (ARTICLES..., 2001).

²⁵ Although a large number of scholars (like, for example, TSAGOURIAS, 2011, p. 498) say that the criterion of *effective control* was borrowed from responsibility law to be applied in the determination of the existence of an act of aggression in the *Nicaragua* case, I am not sure I can agree with this view. The Court made a clear division between these norms, applying, on the one hand, the *effective control* when dealing with attribution and, on the other hand, not clarifying the applicable criteria, or rather making use of the *sending* criterion, when determining the existence of the act of aggression.

the constitution of an act of aggression according to Article 3(g). This is so because of the very nature of the legal regime.

Thus, on the one hand, in order to determine the existence of an act of indirect aggression, Article 3(g) should be analyzed to consider if there is a State that *sent* or was *substantially involved* with the respective armed group. In the affirmative case, there will be an act of aggression, perpetrated by the State itself through its *sending* or *substantial involvement therein*. On the other hand, when one is assessing the attribution of *every act* of a non-State actor to a State, be it acts that can amount to aggression or not (like violations of humanitarian law), it is necessary to look at the rules of attribution and, accordingly, to the *effective control* test. If a State exercises *effective control* over a group, *every act* of that group, including an armed attack, can be attributed to that State. On the contrary, if a State does not retain *effective control* but only *sends* the group or involves itself *substantially* in it, there would be no attribution of conduct. In this case, this State would still theoretically be responsible for its own act of aggression according to Article 3(g), materialized in its own conduct of *sending* the group who perpetrated the attack or its *substantial involvement therein*.

In sum, regarding the judgment in question, the Court one more time followed a strict line of interpretation of Article 3(g), avoiding the recognition of any act of aggression by a State without a convincing proof that it has effectively sent or held effective control over the respective non-State actor. The Court's interpretation, in other words, tends to bring the threshold of Article 3(g) closer to the *effective control*.

4 THE GENOCIDE CASE: INTERPRETING RULES OF ATTRIBUTION IN RELATION TO ARTICLE 3(G)
Even though Article 3(g) is not a rule of attribution, it is argued that it must be interpreted “in relation to responsibility” (CORTEN, 2010a, p. 21).²⁶ After all, when the higher threshold of attribution (*effective control*) is met, every act of the group will be attributable to the State and, consequently, an armed attack perpetrated by the controlled group will also be attributable to the controlling State. From a theoretical viewpoint, once the effective control test (higher threshold) is satisfied, one does not have to look at Article 3(g) (lower threshold) to conclude that a State which effectively controlled a group that perpetrated an armed attack committed an act of aggression.

The discussion about the *Genocide* case (2007) is not directly related to the subject of acts of aggression. Rather, the discussion was whether and under which criteria the genocide perpetrated in Srebrenića by an armed group (the Republika Srpska), which was not an organ of a State, could be attributed to the Former Republic of Yugoslavia (FRY), due to its

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²⁶ See also CORTEN, 2010b.

alleged involvement therein. This case is relevant due to the fact that it apparently settled an issue that had arisen between the ICJ and the International Criminal Tribunal for the Former Yugoslavia (ICTY) with respect to the applicable criteria of attribution concerning acts of non-State actors.²⁷

In 1986, the ICJ had established the *effective control* test in the *Nicaragua* case to determine the (non-)attribution of the *contra*'s acts to the U.S., as explained earlier. In the *Tadić* case judged in 1995 (ICTY, 1995), while deciding upon the (international or non-international) nature of a conflict for purposes of application of international humanitarian law, the ICTY relied on a different test as the relevant criterion for its decision, namely the *overall control* test. In fact, the ICTY recognized and accepted the *effective control* requirement, but only with regard to acts of individuals and not in the case of an organized group or a military or paramilitary unit, for which it considered that an *overall control* should be sufficient in terms of attribution of conduct.²⁸ Nevertheless, the ICJ revisited the question in 2007 and rejected this proposition.

In the *Genocide* case, the Court relied on the *Nicaragua*'s precedent and decided that, in order to attribute the genocide perpetrated in *Srebrenića* by the Republika Srpska's army (VRS) to the FRY, it would have to be proved that the latter held *effective control* over the former (ICJ, 2007, paragraphs 398-412).²⁹ After having carefully considered the *Tadić* judgment, the Court rejected the conclusion there established. For attribution to happen and responsibility to arise, ruled the Court, the link between the State and the respective conduct had to be significantly strong:

[...] the "overall control" test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. [...]. Apart from these cases, a State's responsibility can be incurred for acts committed by persons or groups of persons — neither State organs nor to be equated with such organs — only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 cited above (paragraph 398). This is so where an organ of the State gave the instructions or provided the direction pursuant to which

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²⁷ See CASSESE, 2007.

²⁸ As clarified by Antonio Cassese (2007, p. 659-663) who also suggests that the *overall control* test can prove to be helpful in "legally appraising new trends in the use by States and International Organisations of Armed Groups or Military Units" (CASSESE, 2007, p. 665).

²⁹ See also: AZAROV, 2009.

the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the “overall control” test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State’s organs and its international responsibility (ICJ, 2007, para. 406).

In light of the above, the 2007 *Genocide* judgment reaffirmed the Court’s tendency to apply strict criteria for attribution of acts regarding responsibility. Therefore, if a State holds *effective control* over an armed band, which carries out an armed attack against another State, this attack will be attributable to the former State. Consequently, the controlling State will bear responsibility for it. It is implied in this reasoning that a State that retains effective control over an armed group, which perpetrates an armed attack, commits vicarious aggression. This will not be the case, however, if the degree of control is looser (*overall control*).

Still, to be theoretically precise, it seems that this form of attribution through *effective control* would not fall exactly under Article 3(g), which, as already stated, is not a rule of attribution. Rather, it would have to be considered as an armed attack attributed to the State *ex vi* of Article 8 of the ILC Draft on State Responsibility (i.e., through the effective control criterion). Once attributed to the State, the attack by the armed group would be subsumed in the other paragraphs of Article 3 of the Resolution 3314 (XXIX), not in paragraph *g*, because, due to the high threshold of control, the action would be legally treated as a direct aggression committed by the State. In other words, the level of State control required by the “effective control” test is so high that, once that kind of link is proved, the attack perpetrated by the controlled armed group is attributed to the controlling State and, then, legally viewed as a direct attack by that State. In this sense, it is not an indirect aggression anymore.

In light of this, it can be said that the *Genocide* case reinforces the restrictive approach that the Court is developing when it comes to link non-State actors’ acts to States. It shows that this standpoint is not restricted to acts of aggression, but is applied to every indirect or vicarious violations of international law. The Court’s interpretation does not suggest that, when it comes to the use of force, different criteria should be used – although there would be some normative basis for doing so, like Article 3(g). Therefore, *lex lata*, the Court would hardly concede that the “sending” criterion present in Article 3(g) would mean something looser than *effective control* of the sent group by the sending State. That is probably why the *substantial involvement* threshold, despite being part of the same Article, has so far been solemnly neglected.

CONCLUSION

More than 40 years after the General Assembly has adopted the Resolution 3314 (XXIX), the interpretation of its Article 3(g) by the International Court of Justice calls for a restrictive

approach on the issue. Although not being a norm of attribution, the interpretation of Article 3(g) has been associated to the law of international responsibility, the criteria of which push for a strict understanding of the said provision. Thus, when one reads the *sending* or the *substantial involvement* tests laid down in Article 3(g), one has to keep in mind that, in practice, a stronger link than the suggested *prima facie* by these expressions, probably the *effective control*, would have to be proved in order to apply the norm.

Apart from this general remark, however, some questions remain open. The first is the necessity of clarifying the relationship between the regime of the use of force and the general rules of the law of international responsibility, especially regarding non-State actors' conduct. Borrowing criteria from the law of international responsibility – especially from rules of attribution – for purposes of interpretation, should not affect a proper comprehension of the nature of Article 3(g), which is not a rule of attribution (a secondary norm), but a rule of the law on the use of force (a primary norm). The mixed interpretation carried out by the Court can either contribute to the separate consolidation of the respective norms or, if ambiguous, provoke a blur on their mutual implications. Although largely theoretical, the distinction can have significant importance in practice and be relevant for future cases.

Secondly, there is the difficult question of what would be the level of support provided by a State to armed groups, if any, that could be taken into account to assess the responsibility of that State under Article 3(g) specifically. The Court's case law, despite referring to this question, did not throw sufficient light on it. Accordingly, what can be said so far is that, for responsibility to arise, the degree of connection between the State and the non-State actor has to be very strong, since the supplying of arms coupled with logistical support to armed groups does not seem to be sufficient to qualify as aggression by the State. In fact, it is probable that no form or degree of support, *per se*, short of effective control, could fall under the scope of Article 3(g). The State would seemingly have to be directly involved in the very armed attacks – committing, by its own conduct, a *grave* violation of the use of force, or specifically directing and controlling it – to be held responsible under Article 3(g). However strong this position may be, it seems to be narrower than the original intent of the Article, since the main proposals that were discussed in the *travaux préparatoires* of GA Resolution 3314 pushed for a less restrictive characterization of vicarious aggression. Moreover, although slippery, the criterion of “substantial involvement” did find its way into the text and was declared customary law. The question lingers, therefore, whether the Court has not been pushing too hard on the applicable criteria for vicarious aggression. In any case, however, it is important to have in mind that an amplification of the Article's scope could estimate the abuse of the invocation of self-defence against non-State actors.³⁰

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³⁰ On the issue, see: ZIMMERMANN, 2016.

Lastly, the absence of reference to the “substantial involvement” criterion of Article 3(g) left open the problem of its relevance. Even though the Court has recognized the customary law character of Article 3(g), it is unclear whether this specific criterion has been afforded the same *status*. An explicit reference to the expression would have been helpful to clarify its proper, concrete meaning, and elucidate whether it actually has no *effet utile* – as the Court’s silence suggests –, possessing the same meaning of *sending*, or whether it should be relevant as a separate criterion of involvement for purposes of determining the existence of an act of aggression under Article 3(g) – as its wording and early proposals suggest. At the end of the day, the sound of silence appears to be louder.

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