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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

PROHIBITION OF AGGRESSION AND USE OF FORCE IN INTERNATIONAL LAW

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I. INTRODUCTION

A. AALCO and the Prohibition of Aggression and Use of Force

1. The prohibition of the threat or use of force is the fundamental principle of the contemporary international legal order, reflecting humanity's collective determination to 'save succeeding generations from the scourge of war'.[1] The Asian-African Legal Consultative Organization (AALCO), as a forum for legal cooperation among the nations of Asia and Africa, has a collective interest in the universal adherence to the prohibition of the use of force. While some Member States have been direct victims of aggression and unlawful force, and all have a joint and vital stake in a stable, rules-based international order.

2. The topic "Prohibition of Aggression and Use of Force in International Law" was formally introduced onto the agenda of the Sixty-Third Annual Session of AALCO at the initiative of the Islamic Republic of Iran, reflecting Member States' deep-seated concerns regarding the erosion of the international legal framework, the reliance on controversial doctrines unsupported in law, and the human costs of unlawful aggression. This brief provides an overview of international law on the topic, charting its fundamental Charter basis, customary and jus cogens status, codified exceptions, and authoritative interpretation by the International Court of Justice.

B. Deliberations at the Sixty-Third Annual Session of AALCO

3. At the Fifth General Meeting of the Sixty-Third Annual Session, held on 11 September 2025, Dr. Ali Hasankhani, Deputy Secretary-General of AALCO introduced the topic and invited Member States to engage with this fundamental legal issue.

4. The Delegate of the **Islamic Republic of Iran**, as the proposing Member State, delivered a statement tracing the contents of the rule through key resolutions of the United Nations General Assembly (UNGA), including Resolution 2625 (XXV), which declares a 'war of aggression' a crime against international peace, and Resolution 3314 (XXIX) on the Definition of Aggression. Controversial doctrines particularly 'pre-emptive self-defense' and 'anticipatory attacks', were rejected while asserting that Article 51 limits self-defense strictly to situations where an armed attack has occurred. Relying on Nicaragua Case[2] and Oil Platforms,[3] it was argued that lawful self-defense requires the victim state to have suffered an 'armed attack' and concluded with a call to uphold the fundamental principles of the UN Charter.

5. The Delegate of **Japan** contributed a legally significant intervention focusing on three principles: good faith compliance with international law, the unacceptability of changing a peacefully established situation by force or coercion, and the duty of states to cooperate to end serious violations. Citing the ICJ's July 2024 Advisory Opinion on the Occupied Palestinian

[1] See Preamble *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter)

[2] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 (Nicaragua Case)

[3] *Oil Platforms (Islamic Republic of Iran v United States of America) (Judgment)* [2003] ICJ Rep 161 (Oil Platforms Case)

Territory,[4] Japan highlighted the prohibition of territorial acquisition by force as a corollary of Article 2(4) of the UN Charter and noted that a fait accompli through sending regular or irregular forces, even without causing casualties, could constitute a prohibited use of force. Japan further emphasised that any use of force in self-defense must be proportionate as a whole to the armed attack invoked. This reflects the analysis found in scholarly work on the dual proportionality assessment.[5]

6. The Delegate of the **People's Republic of China** affirmed the prohibition as a cornerstone of international law, stressing that the right to self-defense under Article 51 must be exercised in strict conformity with international law and not abused. China expressed concern that the use of force against the Islamic Republic of Iran by Israel and the United States on grounds of alleged future threats constituted a dangerous precedent undermining the international nuclear non-proliferation regime, and re-emphasised that no State should abuse the use of force under the pretext of 'preventive self-defense' to infringe upon the sovereignty of other States.

7. The Delegate of **Malaysia** affirmed the *jus cogens* status of the prohibition of the use force and reaffirmed that military action must be legally justified and proportionate. Malaysia stressed that the full body of international law applies to armed conflict, observing that 'there are laws even in war, although war must be avoided by all means.[6] Malaysia condemned the cycle of impunity in the Occupied Palestinian Territory and reaffirmed its commitment to the peaceful settlement of disputes.

8. The interventions of Member States revealed a strong consensus on the foundational character of the prohibition of the use of force, alongside shared concern over the abuse of self-defense, the emergence of legally unsupported doctrines, issues of attribution to non-state actors, and persistent impunity. These statements provide the political and legal context for the analysis that follows.

[4] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Advisory Opinion) [2024] ICJ Rep <https://www.icj-cij.org/case/186> accessed 28 September 2026 (Wall Opinion)

[5] J Gardam, Necessity, Proportionality and the Use of Force by States (Cambridge University Press 2004).

[6] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, para 47 (Nuclear Weapons Opinion)

II. ISSUES FOR FOCUSSED DELIBERATION AT THE SIXTY-FOURTH ANNUAL SESSION OF AALCO, 2026

9. Reflecting on the deliberations at the Sixty-Third Annual Session, this brief focuses on the following key aspects of the prohibition of aggression and use of force:

A. The normative framework of the prohibition: the UN Charter, custom, and *jus cogens* status.

10. The prohibition of the use of force can be found in both customary international law as well as treaties, most notable being the UN Charter. In addition, this prohibition was criminalized at the individual level reflecting further resolve from the international community for its peremptory nature and jus cogens status. The definition of aggression and its various forms have also been subject to elucidation in scholarly work as well as in deliberations reflected in their records, decisions and resolutions of the UN General Assembly and the UN Security Council. The AALCO Member States are invited to take note of the content and normative framework of the prohibition of the use force and address the scope of the topic for deliberations in their statements.

B. The lawful exception to the prohibition of the use of force

11. While the prohibition of the use of force is a jus cogens norms the law as it developed always made room for certain exceptions. While customary international law had always recognized various form so the "inherent right of self-defense" as an exception to the prohibition of the use of force, the UN Charter added another exception that of forcible measures taken by the UN Security Council. In the past two decades controversial doctrines espousing other exceptions the use of force particularly those expanding the right to self-defense were adopted by some States. The brief highlights some of these doctrines including anticipatory or pre-emptive self-defense which do not have considerable support in law and practice. The AALCO Member States are invited to consider expressing their views on these fundamental principles and ways in which to strengthen their adherence in practice.

C. The Jurisprudence of the International Court of Justice on the prohibition of the use of force

12. The International Court of Justice (ICJ) has been requested to adjudicate issues relating to the prohibition of the use of force on a number of occasions. States have submitted to the Court by a number of jurisdictional means disputes concerning the prohibition of the use of force relating to the UN Charter and customary international law as well as another regional instrument. From one of its earliest cases, the Court has confirmed the wide application of the prohibition to all forms of threat of or use of force under any pretext and a narrow application to its exceptions subject to strict criteria and restrictions. The brief highlights the common principles concerning the law on the prohibition on the use of force and its exceptions emerging from the Jurisprudence of the ICJ through its cases. Members States are invited to the consider the interpretation of the law on the prohibition of the use of force by the ICJ and may consider deliberating on the prevailing practice of States in light of these rulings.

D. The Crime of Aggression and the work of the International Law Commission

13. The International Law Commission has had a long engagement with the concept of aggression. Particularly, since its inception the Commission in fulfilment of its mandate to prepare a code of offences against the peace and security of mankind. Further the Commission has over the years contributed towards building consensus on the definition of aggression, both as involving the responsibility of the States as well as within its work on the Draft Statute of the International Criminal Court. The AALCO Member States are invited to take note of the developments in the Commission which led to the consensus around the definition of aggression attaining wide acceptance and adopted in the Rome Statute of the International Criminal Court and its further amendment. AALCO Member States are invited to consider these thorough deliberations in the Commission that spanned decades and reflect in their statements their views on the relevance of those principles today.

III. THE NORMATIVE FRAMEWORK OF THE PROHIBITION OF THE USE OF FORCE

A. Article 2(4) of the UN Charter: the cornerstone of the prohibition of the use of force in international relations

14. The prohibition of the threat or use of force is codified in Article 2(4) of the Charter of the United Nations, which provides that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[7] This provision constitutes a comprehensive prohibition. It covers not only the actual use of armed force but also the threat to use such force.[8] The phrase 'against the territorial integrity or political independence of any state' is not a limiting clause but an intensifying one, whose scope is completed by the catch-all 'or in any other manner inconsistent with the Purposes of the United Nations'.[9]

15. The prohibition is textually absolute but for two exceptions within the Charter system: actions authorised by the Security Council under Chapter VII to maintain or restore international peace and security, and the 'inherent right of individual or collective self-defense if an armed attack occurs' as preserved by Article 51.[10] This framework was intended to centralise the use of force in the collective security system, a design whose effectiveness was deeply contingent on great-power consensus, a condition that frequently failed to materialise.[11]

B. The Prohibition of the use of force as a *jus cogens* norm in customary international law

16. The status of the prohibition of the use of force extends beyond a conventional treaty obligation. In the landmark Nicaragua case, the International Court of Justice confirmed that the principle of the non-use of force is not merely a codification but constitutes a rule of customary international law.[12] The Court drew a critical distinction between the content of the Charter obligation and its parallel customary status, holding that customary international law continues to exist and apply alongside treaty law.[13]

17. The legal character of the norm was further elevated by the recognition that the prohibition of aggression is a peremptory norm of general international law (*jus cogens*), from which no derogation is permitted. In addition to recognition in other work previously carried out, the International Law Commission (ILC), in its draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens) and the annex[14] explicitly recognised 'the prohibition of aggression' as a jus cogens norm, based on widespread

[7] Article 2(4), UN Charter
[8] ibid 3
[9] O Dörr, 'Use of Force, Prohibition of' in R Wolfrum (ed), Max Planck Encyclopaedia of Public International Law (Oxford University Press 2011) para 16.
[10] UN Charter, arts 42 and 51.
[11] J Stone, Aggression and World Order: A Critique of United Nations Theories of Aggression (Stevens & Sons 1958) 45.
[12] Nicaragua Case, para 190.
[13] ibid, para 176.
[14] UNGA, 'Report on the work of the International Law Commission Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022)' UN Doc. A/77/10 (2022) 11.

and representative State practice, *opinio juris*, and the pronouncements of international courts.[15] This status places the prohibition at the apex of the international legal hierarchy, such that any treaty or unilateral act conflicting with it is void ab initio.[16] The persistent problem is not the normative status of the rule, but the contested application of the exceptions, which create the appearance of derogations when States assert legally invalid justifications.[17]

C. The Definition of Aggression under UNGA Resolution 3314

18. The term 'aggression' denotes the gravest forms of the unlawful use of force, distinct from the broader prohibition in Article 2(4). The Definition of Aggression, adopted by consensus in UNGA Resolution 3314 (XXIX) of 14 December 1974, provides an authoritative though non-exhaustive guide. Article 1 defines aggression as '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.'

19. Crucially, Article 2 provides that the 'first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression'. Article 3 enumerates a non-exhaustive list of qualifying acts, including: invasion or attack; bombardment; blockade; attacks on another state's armed forces; use of a state's forces within another state in contravention of an agreement; allowing territory to be used for aggression against a third state; and the sending of armed bands or mercenaries carrying out acts of armed force of comparable gravity.[18]

20. Article 5 of the Resolution reinforces the legal consequences by affirming two fundamental principles. Paragraph 1 states that 'no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression'. Paragraph 2 declares that a 'war of aggression is a crime against international peace', giving rise to international responsibility. [13] This absolute rejection of justifications is reinforced by subsequent UNGA resolutions, including Resolution 42/22 of 1987, which explicitly condemns attempts to justify aggression under the guise of self-defense or political necessity. [14]

D. The Crime of Aggression under the Rome Statute

21. The prohibition of aggression has been progressively 'criminalized' at the individual level. Article 5(2) of the Rome Statute of the International Criminal Court (ICC) originally included the crime of aggression within the Court's jurisdiction but deferred its exercise pending the adoption of a definition and conditions for its exercise.[19] This was achieved at the 2010 Review Conference in Kampala, Uganda, which adopted by consensus the amendments to the Rome Statute on the Crime of Aggression (Kampala Amendments).[20]

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[15] ILC, 'Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens)' (2022) UN Doc A/77/10, Draft Conclusion 23.
[16] D Tladi, 'Extraterritorial Use of Force against Non-State Actors: PS to Hague Academy Lectures' (2021) 54 Comparative and International Law Journal of Southern Africa 2, 5.
[17] ibid 4.
[18] UNGA Res 3314 (XXIX) (14 December 1974), art 3.
[19] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 5(2) (Rome Statute).
[20] Review Conference of the Rome Statute, 'The Crime of Aggression' RC/Res 6 (11 June 2010).

22. Resolution RC/Res.6 defines the 'crime of aggression' as the 'planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations'.[21] The act of aggression is defined by replicating the language of UNGA Resolution 3314.[22] The ICC's jurisdiction over the crime was activated on 17 July 2018, creating a parallel avenue of individual accountability alongside state responsibility.[23]

[21] ibid, Annex I, art 8*bis*(1).
[22] See Rome Statute, art. 8(bis)
[23] T Ruys, 'Criminalizing Aggression: How the Future of the Law on the Use of Force Rests in the Hands of the ICC' (2018) 29 European Journal of International Law 887

IV. THE LAWFUL EXCEPTIONS TO THE PROHIBITION OF THE USE OF FORCE

A. Self-defense under Article 51 of the UN Charter

23. The most frequently invoked exception is the right of self-defense. Article 51 provides that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense 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." The exercise of this right is bound by strict conditions in customary international law that have been clarified through State practice and judicial pronouncement.

(i) The "Armed Attack" Threshold

24. The right to self-defense is triggered exclusively by an 'armed attack'. In the Nicaragua case, the ICJ drew a critical distinction between 'the most grave forms of the use of force (those constituting an armed attack) from other less grave forms'.[24] The Court held that an armed attack includes not only the action of 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 against another State of such gravity as to amount to' (inter alia) an actual armed attack conducted by regular forces.[25] However, the provision of weapons, logistical support, or other assistance to rebels does not, in itself, constitute an armed attack, though it may amount to an unlawful use of force or an unlawful intervention.[26] This distinction creates a legal space for proportionate countermeasures short of full-scale self-defense against uses of force below the 'armed attack' threshold.[27]

(ii) The Principles of Necessity and Proportionality

25. A state resorting to self-defense must demonstrate that its response is both necessary and proportionate. The Caroline incident of 1837 established the classic formulation that the necessity for action must be 'instant, overwhelming, leaving no choice of means, and no moment for deliberation'.[28] The ICJ has firmly integrated these twin principles into the corpus of modern jus ad bellum. In the Nuclear Weapons Advisory Opinion, the Court stated that 'the submission of the exercise of the right of self-defense to the conditions of necessity and proportionality is a rule of customary international law'.[29] In Oil Platforms, the Court rigorously applied this test, finding that the United States' attacks on Iranian oil platforms could not be considered proportionate and necessary measures, as they did not constitute a proportionate response to a single missile attack for which Iran's responsibility was not even established.[30] This requires a holistic assessment linking the scale, duration, and target of the defensive action to the initial armed attack.[31]

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[24] Nicaragua case, para 191.
[25] ibid, para 195.
[26] ibid, para 195.
[27] O Corten, *The Law Against War: The Prohibition of the Use of Force in Contemporary International Law* (Hart Publishing 2010) 50.
[28] The Caroline Case (1837) 29 British and Foreign State Papers 1137.
[29] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226
[30] Oil Platforms, paras 72-77.
[31] C Gray, International Law and the Use of Force (4th edn, Oxford University Press 2018) 150.

(iii) Collective Self-defense

26. The right of collective self-defense is subject to additional requirements. In the Nicaragua case, the ICJ ruled that it may only be exercised at the request of the State that has suffered an armed attack, as the absence of such a request would allow third States to presumptuously determine that an attack has occurred, creating significant potential for abuse.[32]

B. Authorisation by the United Nations Security Council under Chapter VII

27. The second lawful exception is the use of force authorised by the UN Security Council under Chapter VII. Article 42 empowers the Council to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security",[33] constituting the central enforcement mechanism of the collective security system. In practice, the Council has authorised Member States or coalitions to use 'all necessary means', subject to a prior determination under Article 39 of a "threat to the peace, breach of the peace, or act of aggression",[34] granting the Council necessary discretion to take decisions.

28. The Security Council's role as the sole multilateral body empowered to authorize the use of force gives its proceedings particular legal significance, with Member States' statements in emergency sessions contributing to State practice and *opinio juris*.

29. The 2025-2026 conflict involving the United States, Israel, and the Islamic Republic of Iran highlighted both the Council's importance and its limitations. Following the joint United States-Israeli strikes on the territory of the Islamic Republic of Iran under Operation Epic Fury on 28 February 2026, the Council convened an emergency meeting on "The Situation in the Middle East" at the request of several members, including the French Republic and the Republic of Colombia, which focused on the attacks. [35]

30. The Islamic Republic of Iran formally invoked its rights under the Charter by issuing a letter to the Security Council (S/2026/106) asserting its right to self-defense under Article 51 of the UN Charter and requesting an emergency meeting to address what it described as acts of aggression and breach of the peace, calling upon the Council to 'take the necessary and immediate measures to halt this unlawful use of force and to ensure accountability'.[36]

31. At the emergency session, it was highlighted by the Islamic Republic of Iran that the attacks carried out against it 'satisfies none of the criteria of lawful self-defense' and rejected the invocation of pre-emptive attack and claims of imminent threat and pointed to its own active participation in diplomatic negotiations as evidence that force was not a last resort.[37]

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[32] Nicaragua case para 199.
[33] UN Charter, art. 42.
[34] Ibid, art. 39
[35] Security Council Report, 'Emergency Meeting on the Military Escalation in the Middle East' (What's in Blue, 28 February 2026) <https://www.securitycouncilreport.org/whatsinblue/2026/02/emergency-meeting-on-the-military-escalation-in-the-middle-east.php> accessed 2 June 2026; UNSC Verbatim Record (28 February 2026) UN Doc S/PV.9605.
[36] Islamic Republic of Iran, Letter to the Security Council (1 March 2026) UN Doc S/2026/106; UNSC.
[37] UNSC, 'Emergency Meeting on Military Escalation in the Middle East' (28 February 2026) UN Meetings Coverage SC16307 (statement of Iran's delegate).

C. Controversial and Rejected Doctrines

(i) Pre-emptive and Anticipatory Self-defense

32. A central controversy is whether Article 51 preserves a right of anticipatory self-defense against an imminent but as-yet-uncommitted attack. Proponents rely on the Caroline formula, arguing the inherent right of self-defense pre-dates the Charter and that a state need not, in the words of one scholar, 'wait to absorb the first hit' in an age of weapons of mass destruction.[38] Conversely, a strict textualist reading of Article 51, powerfully advanced by scholars like Olivier Corten and powerfully articulated in the AALCO session by the delegates of Iran and China, limits self-defense to situations where an armed attack 'occurs'.[39] The ICJ has consistently avoided ruling definitively on the lawfulness of anticipatory self-defense, though in Armed Activities (DRC v Uganda), it rejected Uganda's argument that it was acting to pre-empt an imminent threat from armed groups, finding the factual premise unproven.[40] The broader doctrine of 'pre-emptive' self-defense, which is a response to a mere latent or non-imminent threat, finds virtually no hold in the language of Article 51 of the UN Charter.[41]

(ii) Humanitarian Intervention and the Responsibility to Protect (R2P)

33. The doctrine of unilateral humanitarian intervention concerns the use of force on the territory of another state to protect civilians from gross human rights violations, without Security Council authorisation. Most controversially invoked by NATO states during the 1999 Kosovo campaign, the ICJ did not rule on the legality of the action in the Legality of Use of Force cases due to lack of jurisdiction, though a significant number of judges in separate opinions cast doubt on the existence of such a right.[42] The 2005 World Summit Outcome Document endorsed the 'Responsibility to Protect' (R2P) populations from genocide, war crimes, ethnic cleansing and crimes against humanity, but explicitly stated that forceful intervention must be taken through the Security Council, on a case-by-case basis.[43] The prevailing view is that a doctrine of unilateral humanitarian intervention is not part of positive international law and is inconsistent with the Charter's structure.[44]

(iii) The Unwilling or Unable Doctrine

34. The 'unwilling or unable' doctrine concerns the use of force against non-state actors from another state's territory where that state cannot or will not suppress the threat, invoked to justify operations without territorial consent. The ICJ's jurisprudence provides no support for this doctrine. In the Armed Activities case, the Court held that Uganda's operations could not be justified as self-defense because the rebel attacks were not attributable to the DRC.[45] The Court

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[38] M N Schmitt, 'Preemptive Strategies in International Law' (2003) 24 Michigan Journal of International Law 513, 534.
[39] Corten supra note 28, 407.
[40] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, para 143. (Armed Activities case)
[41] Ibid para. 148; M. Wood, 'International and the Use of Force: What happens in practice?" (2013) 53 Indian Journal of International Law 345, 357.
[42] *Legality of Use of Force (Yugoslavia v United Kingdom) (Provisional Measures)* [1999] ICJ Rep 826.
[43] 2005 World Summit Outcome, UNGA Res 60/1 (16 September 2005), paras 138-139.
[44] Gray (n 26) 59.
[45] Armed Activities case paras 146-147.

did not accept the argument that the mere fact of a non-state actor operating from a state's territory and the host state's inability to control them triggers a right of self-defense against the host state itself. In the Wall Advisory Opinion, the Court further constricted this space by observing that Article 51 'recognizes the existence of an inherent right of self-defense in the case of armed attack by one State against another State', implying that the right does not exist against non-state actors in a territory under the control of the defending State.[46] The legal status of this doctrine remains highly controversial and lacks definitive endorsement from the international community or the ICJ.

[46] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 (Wall Opinion), para 139

V. THE JURISPRUDENCE OF THE INTERNATIONAL COURT OF JUSTICE (ICJ) ON THE PROHIBITION OF THE USE OF FORCE

The Corfu Channel Case

35. One of the earliest cases before the International Court of Justice (ICJ), the *Corfu Channel* case, affirmed the importance of the prohibition of the use of force, albeit in the context of intervention. The case concerned an attempt to justify a minesweeping operation as an act of self-help or self-protection. The Court rejected that argument and held:[47]

> "Between independent States, respect for territorial sovereignty is an essential foundation of international relations. The Court recognizes that the Albanian Government's complete failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes, are extenuating circumstances for the action of the United Kingdom Government. But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty."[48]

36. The Court also warned against the dangers of expanding the right of intervention based on loosely defined justifications. It observed:

> "The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States and might easily lead to perverting the administration of international justice itself."[49]

37. It is also significant that the respondent State argued that its measures fell short of the conduct prohibited by Article 2(4) of the United Nations Charter. The Court nevertheless rejected the justification advanced and characterised the operation as a manifestation of a policy of force.

38. The judgment therefore demonstrated that conduct may violate the principles of territorial sovereignty and non-intervention even where it is not presented as a conventional act of war. Recognising the consequences of the unlawful use of force, the Court established a restrictive framework for the exercise of self-defense.[50] It understood that an expansive interpretation of that right could facilitate abuse, particularly by more powerful States. Subsequent decisions of the Court developed this framework and clarified the conditions governing the legality of self-defense.

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[47] *Corfu Channel (United Kingdom v Albania)* (Merits) 1949 ICJ Rep 4, 34–35
[48] Ibid 35
[49] Ibid 35
[50] Ibid 35

The Nicaragua Case

39. The case concerning *Military and Paramilitary Activities in and against Nicaragua* remains one of the most comprehensive judgments on the use of force and self-defense. Although the Court examined customary international law, it observed that the relevant customary rules had been given expression in the United Nations Charter and had developed under its influence.[51]

40. In defining the scope of self-defense, the Court held:

> "In the case of individual self-defense, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defense of course does not remove the need for this."[52]

41. However, the question whether self-defense could be exercised in response to an imminent armed attack was left and the Court stated:

> "In view of the circumstances in which the dispute has arisen, reliance is placed by the Parties only on the right of self-defense in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised. Accordingly, the Court expresses no view on that issue."[53]

42. The Court nevertheless made clear that force could not lawfully be used in response to conduct falling below the threshold of an armed attack.[54] It stated:

> "The Court has recalled above that for one State to use force against another, on the ground that that State has committed a wrongful act of force against a third State, is regarded as lawful, by way of exception, only when the wrongful act provoking the response was an armed attack. Thus, the lawfulness of the use of force by a State in response to a wrongful act of which it has not itself been the victim is not admitted when this wrongful act is not an armed attack. In the view of the Court, under international law in force whether customary international law or that of the United Nations Charter States do not have a right of self-defense in response to acts which do not constitute an 'armed attack'."[55]

43. The Court further explained that, in order to establish the legality of collective self-defense, it would first be necessary to determine whether the State allegedly responsible had committed an armed attack against the State claiming protection or against another State on whose behalf collective self-defense was invoked.[56]

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[52] Ibid 93
[53] Ibid 103
[54] Ibid 127
[55] Ibid 110
[56] Ibid 120

Reporting to the Security Council

44. The *Nicaragua* judgment also addressed the procedural obligation contained in Article 51 of the Charter. That provision requires States exercising the right of self-defense to report the measures taken immediately to the Security Council.[57]

45. In assessing the circumstances of the case, the Court noted that the States concerned had not behaved as though an armed attack had occurred at the time when the alleged activities were at their most serious. Instead, they acted in that manner only at a later stage, when the relevant conduct fell furthest short of the threshold required for an armed attack.[58]

46. This observation indicates that reporting conduct under Article 51 may assist in assessing whether a State genuinely regarded itself as the victim of an armed attack. The failure to report does not necessarily determine the legality of a claim to self-defense, but it may constitute relevant evidence concerning the State's understanding of the situation and the basis on which it acted.

47. The Court also distinguished between an armed attack and less serious forms of unlawful force. It held that an armed attack could give rise to an entitlement to collective self-defense, whereas a use of force of lesser gravity could not generate an entitlement to collective countermeasures involving force.

48. The requirements of necessity and proportionality were treated as additional conditions. They could not substitute for the prior existence of an armed attack. The Court explained:

> "Since the Court has found that the condition sine qua non required for the exercise of the right of collective self-defense by the United States is not fulfilled in this case, the appraisal of the United States activities in relation to the criteria of necessity and proportionality takes on a different significance. As a result of this conclusion of the Court, even if the United States activities in question had been carried on in strict compliance with the canons of necessity and proportionality, they would not thereby become lawful. If however, they were not, this may constitute an additional ground of wrongfulness."[59]

49. Thus, necessity and proportionality operate cumulatively with the requirement of an armed attack. Compliance with those requirements cannot render force lawful where the essential precondition of an armed attack is absent.

Nuclear Weapons Advisory Opinion

50. These established principles followed by the ICJ were reaffirmed in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons.*[60] The Court stated:

[57] Ibid 121
[58] Ibid 132
[59] Ibid 132
[60] Nuclear Weapons Opinion 136

> "The submission of the exercise of the right of self-defense to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the case concerning Military and Paramilitary Activities in and against Nicaragua: there is a 'specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law' (I.C.J. Reports 1986, p. 94, para. 176). This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed."[61]

51. This statement confirms both the customary character of necessity and proportionality and their applicability under Article 51, irrespective of the type of weapon employed. It also reaffirms that self-defense must be linked to an armed attack.

52. The Court further reiterated the reporting requirement:

> "Beyond the conditions of necessity and proportionality, Article 51 specifically requires that measures taken by States in the exercise of the right of self-defense shall be immediately reported to the Security Council; this article further provides that these measures shall not in any way affect the authority and responsibility of the Security Council under the Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. These requirements of Article 51 apply whatever the means of force used in self-defense."[62]

53. With respect to threats involving nuclear weapons, the Court explained that the legality of a threat depends on the legality of the use of force contemplated. It stated:

> "Whether this is a 'threat' contrary to Article 2, paragraph 4, depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations or whether, in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality. In any of these circumstances the use of force, and the threat to use it, would be unlawful under the law of the Charter."[63]

54. Accordingly, the mere possession of nuclear weapons or the maintenance of a nuclear capability does not, by itself, establish an unlawful threat or constitute an armed attack. The relevant inquiry concerns the use of force contemplated and whether that use would comply with the Charter, including the requirements of necessity and proportionality.

[61] Ibid 245
[62] Ibid 245
[63] Ibid 247

The Oil Platforms Case

55. The *Oil Platforms* case,[64] although principally concerned with the interpretation of essential-security provisions in a treaty, reaffirmed the central requirements governing self-defense. Relying on its earlier jurisprudence, the Court held:

> "Therefore, in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defense, the United States has to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as 'armed attacks' within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force."[65]

56. The Court recalled the need to distinguish:

> "the most grave forms of the use of force, those constituting an armed attack, from other less grave forms."[66]

57. It further stated that the State invoking self-defense must establish that its measures were necessary and proportional to the armed attack and that the object against which force was directed constituted a legitimate military target.[67]

58. The judgment therefore emphasised three interrelated requirements: responsibility for the alleged attack, sufficient gravity to qualify as an armed attack, and compliance with necessity and proportionality.

59. The Court also elaborated upon the gravity threshold. Even when considered cumulatively, the incidents before it did not amount to an armed attack of the kind previously identified as constituting the most grave form of the use of force. This demonstrates that not every unlawful use of force reaches the threshold required to activate Article 51.[68]

Attribution and Non-State Actors

60. Attribution is another important condition in the law of self-defense. In the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[69] the Court stated:

> "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defense in the case of armed attack by one State against another State."[70]

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[64] Oil Platforms Case
[65] Ibid 186-187
[66] Ibid 187
[67] Ibid 187, 194
[68] Ibid 187, 192
[69] Wall Opinion
[70] Ibid 194

61. This formulation links the right of self-defense to an armed attack attributable to one State against another. It therefore reflects the traditional inter-State structure of Article 51.

62. The issue arose again in the *Armed Activities on the Territory of the Congo* judgment[71] where military operations were sought to be justified as self-defense against attacks allegedly carried out by non-State armed groups. The Court observed that the State had not claimed that it had been attacked by the armed forces of the neighbouring State. Rather, the alleged attacks had been carried out by an armed group, and the Court found no satisfactory evidence of the neighbouring government's direct or indirect involvement.[72]

63. The Court also concluded that the attacks did not emanate from armed groups or irregular forces sent by, or acting on behalf of, the neighbouring State within the meaning of the relevant rules on aggression. It therefore rejected the invocation of self-defense.[73]

64. At the same time, the Court recognised that the victim State was entitled to use force to repel the unlawful military operation directed against it. It held that, following an illegal military operation, the victim State was entitled to use force in order to repel the attacks. Since the proportionality of that defensive action had not been challenged and could not be rejected on the evidence, the Court concluded that the military action could not be regarded as wrongful because it was justified as self-defense under Article 51.[74]

65. This judgment illustrates that self-defense may be available to a State subjected to an unlawful armed attack, but that the existence of attacks by non-State actors does not automatically establish a right to use force against another State. The necessary connection between the attack and the State against which force is used must be demonstrated in order for it to constitute a violation of the principles of the prohibition of the use of force.

Conclusions

66. The jurisprudence of the ICJ concerning Articles 2(4) and 51 of the United Nations Charter yields several principal conclusions.

67. First, the lawful exercise of self-defense requires an armed attack. This follows from the wording of Article 51 and has been repeatedly affirmed by the Court. Conduct falling below that threshold may constitute an unlawful use of force or an internationally wrongful act, but it does not ordinarily generate a right to use armed force in self-defense.

68. Secondly, an armed attack must possess a sufficient degree of gravity. The Court has distinguished the gravest forms of the use of force, which qualify as armed attacks, from less serious forms of force that do not activate the right of self-defense.

[71] Armed Activities Case
[72] Ibid 222-223
[73] Ibid 268
[74] Ibid 264

69. Thirdly, the armed attack must be attributable to the State against which defensive force is used. The mere fact that an attack was carried out by a non-State armed group does not, without more, establish the right to use force against another State.

70. Fourthly, necessity and proportionality are cumulative requirements. Defensive action must be necessary to respond to the armed attack and proportionate to it. These requirements are additional to, and cannot replace, the prior existence of an armed attack.

71. Fifthly, Article 51 requires measures taken in self-defense to be immediately reported to the Security Council. Although the absence of a report may not be conclusive in every case, it may provide relevant evidence concerning the State's own characterisation of the events and its intention to rely on self-defense.

VI. THE CRIME OF AGGRESSION AND THE WORK OF THE INTERNATIONAL LAW COMMISSION

72. The International Law Commission's work on aggression must be understood as part of its various mandates to formulate the Nürnberg principles, codify crimes against the peace and security of mankind, and design a permanent international criminal court. Acting under General Assembly resolution 177 (II) of 21 November 1947, the Commission was directed both to formulate the principles recognised in the Charter and Judgment of the Nürnberg Tribunal and to prepare a draft code indicating the place to be accorded to those principles.[75]

73. The point of departure was therefore the Nürnberg conception of crimes against peace: the planning, preparation, initiation or waging of a war of aggression, or participation in a common plan or conspiracy for its accomplishment. The Commission's central difficulty throughout was to connect two particular issues i.e. the unlawful conduct of a State and the derivative criminal responsibility of the individuals directing it.

74. The first sustained consideration occurred in 1951, following General Assembly resolution 378 B (V), which referred a Soviet proposal and the First Committee's records to the Commission.[76] Special Rapporteur Jean Spiropoulos doubted that aggression was susceptible to a comprehensive legal definition because its objective and subjective elements, including *animus aggressionis*, depended upon the circumstances and methods of aggression continually evolved.[77] The Commission rejected an exhaustive enumeration as necessarily incomplete and potentially restrictive of the competent United Nations organs, preferring a general, abstract formula. Its proposed definition covered the threat or use of force by one State or Government against another, except in self-defense or pursuant to a resolution of the Security Council was nevertheless rejected by seven votes to three, with one abstention. A proposal to continue drafting was also defeated.[78]The Commission still incorporated aggression into the 1951 draft Code whereby any act of aggression, including specified unlawful uses of armed force, and any threat of aggression were classified as offences against the peace and security of mankind.[79]

75. The 1954 Draft Code retained and refined this approach. Article 1 declared offences under the Code to be crimes under international law entailing punishment of responsible individuals. Article 2 treated as offences any act of aggression, threats of aggression, and preparations by State authorities for an unlawful use of armed force; it also covered armed bands, fomenting civil strife, State-supported terrorism and unlawful annexation.[80]This was deliberately non-exhaustive. The Commission did not provide a complete definition of aggression but identified the employment of armed force outside self-defense or United Nations authority as an included case and treated the authorities of the State as the persons capable of committing it. The resulting scheme preserved

[75] UNGA Res 177 (II) (21 November 1947) UN Doc A/RES/177(II); International Law Commission, 'Report of the International Law Commission on the Work of its Third Session' (16 May–27 July 1951) UN Doc A/1858, paras 54-59.
[76] UNGA Res 378 B (V) (17 November 1950); International Law Commission, 'Report of the International Law Commission on the Work of its Third Session' (16 May-27 July 1951) UN Doc A/1858, paras 35-38.
[77] Ibid para. 39
[78] Ibid para. 45
[79] Ibid para. 53
[80] International Law Commission, 'Report of the International Law Commission on the Work of Sixth Session' (3 June-28 July 1954) 9 UN Doc. A/2693

the Nürnberg principle of personal accountability while recognising that aggression is institutionally mediated through the State.

76. The topic remained dormant until the General Assembly, by resolution 36/106 of 10 December 1981, invited the Commission to resume its work on the draft code of offences against mankind.[81] The Commission appointed Doudou Thiam Special Rapporteur. In this regard the adoption by consensus of General Assembly resolution 3314 (XXIX), on the Definition of Aggression, was decisive.[82] Its article 1 described aggression as a State's use of armed force against another State's sovereignty, territorial integrity or political independence, or otherwise inconsistently with the Charter. Articles 2 and 3 addressed first use, gravity and provided a non-exhaustive list of invasions, bombardment, blockade, attacks on forces, misuse of stationed forces, territorial facilitation and armed bands. These provisions supplied the State-act component around which the Commission could construct the individual criminal liability for crime of aggression.

77. On first reading in 1991, draft article 15 made a leader or organiser criminally responsible for planning, committing or ordering an act of aggression. It substantially reproduced resolution 3314: paragraph 2 contained the general definition, paragraph 3 treated first unlawful use as *prima facie* evidence subject to the Security Council's assessment of all circumstances and gravity, and paragraph 4 listed the specified acts. A bracketed paragraph 5 stated that a Security Council determination of aggression would bind national courts.[83] The text revealed unresolved institutional questions. Some members considered a prior Council determination indispensable under Article 39 of the Charter; others objected that conditioning judicial action upon a political organ might frustrate accountability, especially where the veto operated. The first-reading draft nonetheless represented a significant progress whereby it separated the conduct of the State from the conduct and status of the individual perpetrator, imposed a leadership limitation, and placed reliance on the General Assembly definition.

78. The Commission's 1994 Draft Statute for an International Criminal Court retained aggression within the Court's subject-matter jurisdiction but supplied no self-contained definition. It considered resolution 3314 helpful but designed primarily to guide the Security Council concerning State conduct, rather than to define individual criminality for judicial application. Draft article 23(2) accordingly prevented an aggression complaint unless the Security Council had first determined that a State committed the relevant act; the Court would thereafter determine the accused's position and individual participation.[84]This accommodation respected the Security Council's primary responsibility under Chapter VII of the UN Charter but made prosecution vulnerable to political inaction. The Statute thus exposed the persistent tension between independent legal determination of the crime of aggression and the role of political organs of the UN particularly the UN Security Council.

[81] UNGA, 'Draft Code of Offences against the Peace and Security of Mankind' UN Doc. 36/106 (10 December 1981)
[82] Definition of Aggression, UNGA Res 3314 (XXIX) (14 December 1974)
[83] International Law Commission, 'Report of the International Law Commission on the Work of its Forty-third Session' (29 April – 19 July 1991) 95 UN Doc A/46/10
[84] International Law Commission, 'Draft Statute for an International Criminal Court with Commentaries' (1994) II (2) *Yearbook of the International Law Commission*, commentary to draft art 20, 38.

79. While adopting the Draft Code of Crimes against the Peace and Security of Mankind on second reading in 1996 the Commission adopted a definition of the crime aggression in Article 16. It states that "An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression."[85]

80. The commentary further clarified a number of crucial elements. First, article 16 addressed individual responsibility and intentionally did not define State aggression. Secondly, the definition referred to 'leader or organizer' which was broad enough to include persons in government and high-level military, diplomatic, political-party and industrial positions who possessed authority or power enabling a decisive role. Thirdly, providing for the element of *mens rea* the definition specified that participation had to be intentional and knowing, as part of a plan or policy of aggression. Fourthly, aggression by a State was a *sine qua non* of the individual crime, and State conduct had to constitute a sufficiently serious violation of Article 2(4) of the Charter.[86] Article 16 covered each phase of the crime planning, preparation, initiation and waging and active participation in any one sufficed. The Commission therefore codified aggression as a leadership crime, derived from the General Assembly's definition from but legally distinct from State responsibility.

81. The jurisdictional provisions in the 1996 draft were equally important developments. Draft article 8 assigned aggression to an international criminal court, subject to the limited possibility that the State referred to in article 16 might try its own nationals. The commentary reasoned that one State's courts should not adjudicate on aggression particularly due to the State element in the crime, embodied in the maxim *par in parem non habet imperium* and because such determinations could gravely disturb international relations and peace.[87] The Assembly appreciated completion of the Code, invited governmental comments and expressly drew the Preparatory Committee's attention to its relevance for the International Criminal Court.[88]

82. The Commission's work materially shaped the later Rome Statute even though it did not itself resolve every controversy. The 1998 Rome Statute included aggression among the Court's four core crimes but postponed jurisdiction pending agreement on a definition and conditions consistent with the Charter.[16] The Kampala Amendments of 2010 ultimately reflected the Commission's architecture: article 8 *bis* distinguishes the individual crime from the predicate State act, confines liability to persons effectively controlling or directing the State's political or military action, covers planning, preparation, initiation or execution, draws the State-act list from resolution 3314, and requires a 'manifest' Charter violation assessed by character, gravity and scale.

83. However, notably the Assembly of State Parties while adopting the amendment of the Rome Statute in 2010 departed from the Commission's 1994 insistence on a prior determination by the Security Council and allowed for State referrals and *proprio motu* investigations. Therefore, it is

[85] International Law Commission, 'Draft Code of Crimes against the Peace and Security of Mankind with Commentaries' (1996) II (2) *Yearbook of the International Law Commission* 17, UN Doc A/51/10, 42.
[86] Ibid 43
[87] Ibid 27
[88] UNGA Res 51/160 (16 December 1996) UN Doc A/RES/51/160

understood that the Prosecutor may seek authorisation from the Pre-Trial Division under article 15 *bis* to commence an investigation for the crime of aggression.[89]

[89] Review Conference of the Rome Statute, 'The Crime of Aggression' Res RC/Res.6 (11 June 2010), annex I, arts 8 bis and 25(3) bis

VII. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

84. The deliberations at the Sixty-Third Annual Session and the preceding legal analysis confirm that the prohibition of aggression, while universally affirmed as a foundational and peremptory norm, is under considerable strain. The challenges are not primarily normative but systemic and operational, arising from divergent interpretations of the scope of exceptions, a persistent lack of accountability, and the exploitation of legal grey zones. The AALCO Secretariat offers the following observations for the consideration of Member States.

(i) The primacy of the UN Charter Framework and Good Faith Interpretation: Articles 2(4) and 51 constitute the primary legal standard governing the prohibition of the use of force and self-defense. Article 42 permits the use of pursuant to the resolution by the UN Security Council. The prohibition of the use of force forms the cornerstone of the UN Charter, permits no further exceptions to the prohibition other than those it provides for. i.e. collective or individual self-defense and Security Council authorisation. The Secretariat invites the Member States of AALCO to consider addressing in their statements the continued relevance of the well-established principles on the prohibition of the use of force.

(ii) The Role of International Judicial Jurisprudence: The ICJ's jurisprudence, from Corfu Channel to the Wall Advisory Opinion, has developed a coherent body of law establishing that the 'armed attack' threshold is high, necessity and proportionality are strict standards, and exceptions to the prohibition are to be narrowly construed. The Court's consistent rejection of unilateral intervention, unreasoned expansions of self-defense, and the acquisition of territory by force provide a stable judicial anchor for the international rule of law.

(iii) Accountability: The cycle of impunity for illegal acts of aggression deepens the occurrence of further violations, and the prohibition's effectiveness is ultimately determined by the certainty of accountability. The Secretariat welcomes the activation of the ICC's jurisdiction over the crime of aggression and commends the work of the International Law Commission in developing some of its core principles. Member States may consider expressing their views on strengthening the commitment to fundamental norms governing the use of force including the non-recognition of territorial acquisitions resulting from aggression and cooperation to ensure accountability at both the State and individual levels.