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# Collective Self-Defense and Armed Attack

**By LJ Howard**

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## Introduction

Sovereign defense and international peace and security are two of the outputs and outcomes of policy and practice conducted throughout the international political order. This order comprises **(1)** states and international organizations, each possessing international legal personality that enables their assuming international obligations in treaty and customary law; **(2)** other parties lacking such personality, e.g., international non-governmental organizations, other non-state actors and transnational movements.

Start-points to diagnosing problematic root issues in defense and security can be grounded in different standards of assessment, e.g., political interests, military doctrine, and technology. However, each of these standards is unique to any one sovereign or weapons system.

In contrast, international law is another standard. By definition, it necessarily incorporates a commonality throughout the international legal order. Sovereign states voluntarily consent to assuming international legal obligations in treaty and customary law. International organizations exercise their powers as delegated by Member States or as implied.[1] Hence, international law becomes a more suitable standard in comparative frameworks of analysis of international obligations framing multi-lateral collective self-defense and collective security.

This brief concerns collective self-defense and attempts to use diagnostic analysis to identify select root issues. The brief first sets out the structure of collective self-defense. It then identifies three select root issues in collective self-defense, namely, **(1)** imminent attacks; anticipatory collective self-defense; pre-emptive collective self-defense; **(2)** evidence; imminence; justifying self-defense; **(3)** legal interpretation; forceful countermeasures not rising to the level of a prohibited use of force. Finally, the brief offers two conclusions.

## Structure of collective defense

Collective defense is the functional output and outcome of multilateral international treaty regimes providing for international organizations to employ force in dispute settlement, each distinguished by hemispheric and regional jurisdiction. They include, the e.g., **(1)** North Atlantic Treaty (1945) and North Atlantic Treaty Organization; **(2)** Southeast Asia Collective Defense Treaty (1954-1977) and South East Treaty Organization; **(3)** Protocol of Amendment to the Inter American Treaty of Reciprocal Assistance (1947) under the Organization of American States; **(4)** Warsaw Pact (1955-1991).

The legal effectiveness of such collective defense regimes rests on UN Charter (1945) Art 51.[2] Art 51 provides "nothing … shall impair the inherent right of individual or collective defense if an armed attack occurs…" This is the one lawful exclusion to Charter Art 2(4), which obliges "…all Members [to] refrain in their international relations from the threat or use of force…" Individual states have often deployed force, both breaching Art 2(4) and comprising the less grave 'forceful countermeasures.' However, illustratively,

[1] Henry G. Schermers and Neils M. Blokker *International Institutional Law* (Martinus Nijhoff 4th ed 2003), §206-§236.

[2] The Charter of the United Nations (892 UNTS 119 concluded 26 June 1945 in force 24 October 1945) https://www.un.org/en/sections/un-charter/un-charter-full-text/.

NATO has only once invoked its collective self-defense clause per Charter Art 51, viz., North Atlantic Treaty Art 5 following Al Qaeda's attacks against US targets on 9/11.

## Select root issues in collective self-defense

**1. <u>Imminent attacks; anticipatory collective self-defense; pre-emptive collective self-defense</u>**

Setting aside (1) the definitional issue of what level of use of armed force rises to the level of a Charter Art 51 'armed attack;'[3] (2) fact-based armed attacks that have occurred in the past, two symbiotic questions arise.

(a) 'To what degree can an expected armed attack be persuasively determined as 'imminent'?

(b) Is the defense posture assumed by the target state in response to such an expected attack to be considered 'anticipatory' or 'preemptive'?

One answer to these questions starts with overviewing the *Caroline* matter (1837).

The *Caroline* matter concerned Britain's attack in 1837 on a supply ship, the *SS Caroline*, which was docked at Fort Schlosser, New York. The ship had been holding personnel and supplies destined to support Wm. Lyon Mackenzie's rebels camped on Navy Island, which is sited due south of Fort Schlosser and on the Canadian side of the Niagara River. The rebels were planning to use force to install a republican government in the British colony of Upper Canada, contrary to the interests of Britain. British forces seized the ship while it was in US territorial jurisdiction, set it on fire, and sent it over Niagara Falls.

The *Caroline* cites the basis for the doctrine of 'anticipatory self-defense' in response to an 'imminent attack.' The doctrine was developed during the diplomatic negotiations between the British Envoy to the USA, The Right Hon. the Lord Ashburton PC (Alexander Baring,


*Figure 1; Map showing Navy Island and Fort Schlosser (map © 2020 Niagara University)*

[3] Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter; Evolutions in Customary Law and Practice* (Cambridge University Press 2010), 511-550, and citing generally e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Merits Judgment ICJ Rep 1986, 14.

with family connections to Barings (merchant) Bank), and the US Secretary of State, Daniel Webster, following the destruction of the *Caroline*. Britain justified its attack as a measure of 'anticipatory self-defense,' in response to what Britain assessed as an 'imminent attack' by Mackenzie. The US responded, "[i]t will be for a Government [Britain] to *show a necessity* of self-defense, *instant, overwhelming, leaving no choice of means, and no moment for deliberation*." Hence, the necessary and sufficient conditions for employing anticipatory self-defense is grounded in time, necessity of use of force, and gravity of expected attack.

*Figure 2; 1st Baron Ashburton (1747-1848)*
*British Envoy to the USA*

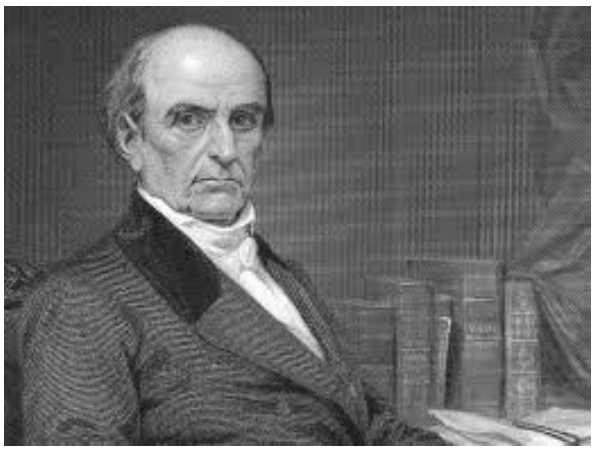

*Figure 3; Daniel Webster(1782-1852)*
*US Secretary of State 1841-1843*

In 1837, anticipatory self-defense arose as a unilateral measure of self-defense, and it remains extant 183 years later. However, from a comparative perspective, is anticipatory self-defense as legally and functionally effective in multi-lateral collective self-defense regimes?

Normatively, criteria to determine whether an attack amounts to a triggering Charter Art 51 'armed attack' includes the (1) gravity and scale of the attack in terms of use of force; (2) degree of planning of the attack; (3) determination of whether the attack is a targeted operation.[4] However, if these criteria are contextualized in terms of time and space, interpretations of these criteria will have changed during the intervening years between 1837 and the 21st century. Hence, while law exists in abstracto, differing modalities of interpretation of law as exercised by different sovereigns (see 3. below) yield different decision cycles in terms of acting under real time constraints and in real space, and of creating battlefield effect.

Contemporarily, in terms of time, the ability of the target state to determine these three criteria before an attack may require coordination of information-gathering assets of all members of the collective self-defense regime. Illustratively, NATO, an international organization, as well as less formal arrangements such as 'five eyes,' 'nine eyes' and 'fourteen eyes,' may normatively enable this coordination, which is essential to effective self-defense. However, the outputs of the US' 9/11

[4] Oliver Corten, *The Law Against War; The Prohibition on the Use of Force in Contemporary International Law* (Hart 2010) 50-125.

Commission expressly cite "… failures in imagination, policy capabilities and management…"[5] and inferentially, failures in intelligence. Yet, US lawmakers suggest otherwise; "… although intelligence agencies may be able to assess security threats, they are rarely able to predict terrorists' intentions."[6] Arguably, if this latter premise is valid, then, from the perspective of information systems, effectiveness in 'diagnostic analysis (vis-à-vis less robust 'descriptive analysis') as employed by the intelligence function may be a necessary condition but not a sufficient condition for effectiveness in subsequent 'predictive analysis.' The latter requires one or more additional elements. What are they?

Comparatively and beyond western states, fewer enduring collective self-defense regimes or coordination measures appear to exist concerning states in Asia or eastern Europe. This may be due to historically rooted ambivalence towards international law arising from e.g., 'unfair treaties'[7] and experience with western states' colonization. Alternatively, it may be due to deeper understanding of the limitations in the effectiveness of any collective measure at the sovereign to sovereign level, whether in e.g., defense, peace and security, or socio-economic cooperation.

Lastly, concerning collective 'pre-emptive self-defense,' the 9/11 attacks by non-state actors prompted this problematic doctrine. It reaches farther into the time and space of future armed attacks. However, it does not necessarily identify as specifically an identified threat as might anticipatory self-defense. The lawfulness of pre-emptive self-defense is arguable, as Chris Bordelon notes in The Illegality of the U.S. Policy of Preemptive Self-Defense Under International Law (2005).[8]

Matthew Waxman's The 'Caroline' Affair in the Evolving International Law of Self-Defense (2018)[9], Sean Murphy's The Doctrine of Preemptive Self-defense (2005)[10] and Mary Ellen O'Connell's The Myth of Pre-emptive Self-Defense [11] make further interesting reading.

## 2. Evidence; imminence; justifying self-defense

Attribution of a breach of an international legal obligation, e.g., breach of Charter Art 2(4), necessarily follows from identification of the breach. Without attribution, mere determination of the existence of

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[5] *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (2004) 339-360, https://www.9-11commission.gov/report/911Report.pdf.

[6] PBS Frontline, *why did us intelligence miss the 9/11 plot?* citing Senator Warren Rudman, Chairman, President's Foreign Intelligence Advisory Board (1997 to 2000) as interviewed https://www.pbs.org/wgbh/pages/frontline/shows/terrorism/fail/why.html and https://www.pbs.org/wgbh/pages/frontline/shows/terrorism/interviews/rudman.html.

[7] Simon Chesterman, *Asia's Ambivalence About International Law & Institutions: Past, Present, and Futures* 27 (4) European J International Law 945-978 (2016) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2694408#.

[8] Chris Bordelon, *The Illegality of the U.S. Policy of Pre-emptive Self-Defense Under International Law*, 9 Chapman Law Review 111-146 (2005), https://www.chapman.edu/law/_files/publications/CLR-9-1-chris-bordelon.pdf.

[9] Matthew Waxman, *The 'Caroline' Affair in the Evolving International Law of Self-Defense*, Lawfare blog (28 August 2018), https://www.lawfareblog.com/caroline-affair.

[10] Sean Murphy, *The Doctrine of Pre-emptive Self-defense*, 50 (3) Villanova Law Review 699-748 (2005), https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1215&context=vlr.

[11] Mary Ellen O'Connell, *The Myth of Pre-emptive Self-Defense*, The American Society of International Law Task Force on Terrorism (August 2002), https://www.nyccriminallawyer.com/wp-content/uploads/2014/07/oconnell.pdf.

an armed attack is less legally effective. The Articles on Responsibility of States for Internationally Wrongful Acts (2001)[12] set out the relevant customary law; no treaty law exists. Hence, to what degree does persuasive evidence exist in order to attribute an armed attack to a particular party?

Illustratively, difficulty arises in convincingly sourcing a cyber-attack amounting to an armed attack. Anonymity and secrecy is essential to the intended force-multiplier effect of cyber weapons systems, such as the Stuxnet cyber-attack against Iran's Natanz nuclear facility in late 2009 and early 2010.[13] Due to secrecy surrounding the composition of an aggressor state's cyber capability and intentions and the absence of persuasive evidence, the attack has not been attributed to any state. While inductive reasoning may suggest possible aggressors in this attack, e.g., US and Israel, international tribunals often set their own standards of proof and require fact-based evidence.

Yet, exceptions to this norm in evidence exist. Less persuasive circumstantial evidence was admissible by the International Court of Justice in the *Corfu Channel case* (1947). While patrolling the Corfu Channel between Greece and Albania during the 1946 Greek civil war, two British destroyers, *HMS Samurez* and *HMS Volage*, struck mines laid by Albania, resulting in loss of life and material destruction of property.[14] While one issue in this case was (Britain's) right of innocent passage in the high sea, the relevant point in this case is that Britain provided only circumstantial evidence in its claim against Albania, and was partially successful in doing so.

On the other hand, during the 1980-1988 Iran-Iraq War, Iran had mined the Persian Gulf to prevent Iraq from exporting its oil in US-re-flagged ships to finance its war effort against Iran. Clearly attributable to Iran was its 16 October 1987 Silkworm missile strike against the US reflagged tanker MV *Sea Isle City* and the 14 April 1988 mine strike on the *USS Samuel B. Roberts*. Equally clear was attribution to the US of its 19 October 1987 OPERATION NIMBLE ARCHER that destroyed two oil platforms in the Rashadat oil field and 18 April 1988 OPERATION PREYING MANTIS that damaged one oil platform in the Sassan oil field. The US alleged the abandoned oil platforms were employed by Iranian armed forces for command and control purposes.

[12]UN doc A/Res 56/83 (12 December 2001) International Law Commission, *Responsibility of States for Internationally Wrongful Acts* https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.

[13] Kim Zetter, *An Unprecedented Look at Stuxnet, the World's First Digital Weapon* (Wired 11 March 2014) https://www.wired.com/2014/11/countdown-to-zero-day-stuxnet/.

[14] Michael P. Scharf and Margaux Day, *The International Court of Justice's Treatment of Circumstantial Evidence and Adverse Inferences* 13(1) Chicago Journal of International Law 123 (2012) https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1500&context=cjil.

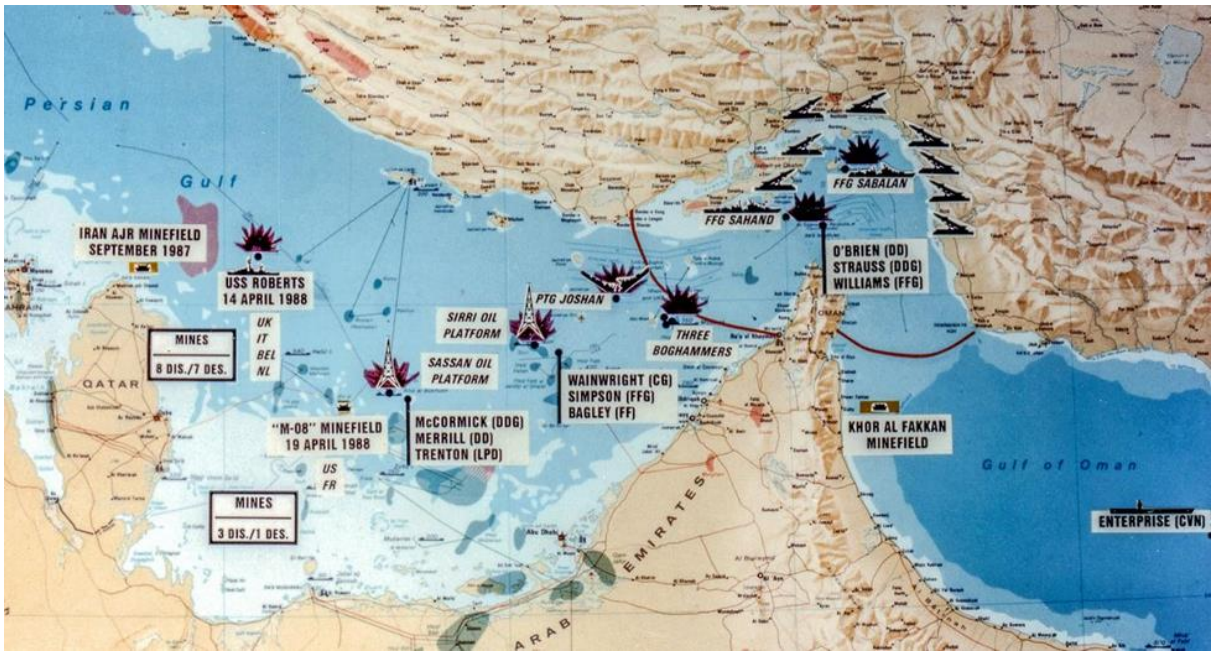


*Figure 2; map showing (i) location of USS Samuel B. Roberts' mine strike; (ii) the Sassan Oilfield.*[15]

Subsequently, Iran and the US both consented to their respective claims' and counterclaims' being brought to the International Court of Justice. With attribution clearly clarified, the Court found sufficient fact-base evidence that the scale and gravity, planning and intended targeting by the US amounted to its breaching Charter Art 2(4), i.e., an unlawful use of force.[16]

Lastly, whether the Stuxnet cyber-attack amounts to anticipatory or pre-emptive self-defense is undetermined.

## 3. Interpretations: forceful countermeasures not rising to the level of a prohibited use of force

Do forceful countermeasures undertaken by a state in response to an earlier unlawful act attributed to another party amount to a prohibited use of force per Charter Art 2(4)? Whether a use of force amounts to a prohibited use of force *vis-à-vis* to a lesser 'forceful countermeasure' is a matter of choice of modality of legal interpretation.[17] Different states adopt different models of interpretation of law. Illustratively, **(1)** law is an instrument of policy ('instrumentalism'); **(2)** law is whatever it has to be to

[15] Map courtesy of Bud Langston and Don Bringle, *The Air View: Operation Praying Mantis*, 115(5) US Naval Institute Proceedings 1035 (May 1989), https://www.usni.org/magazines/proceedings/1989/may/air-view-operation-praying-mantis accessed 13 October 2019.

[16] Pieter H.F. Bekker, *The World Court Finds that U.S. Attacks on Iranian Oil Platforms in 1987-1988 Were Not Justifiable as Self-Defense, but the United States Did Not Violate the Applicable Treaty with Iran*, 8(1) Insights (American Institute of International Law 11 November 2003) https://www.asil.org/insights/volume/8/issue/25/world-court-finds-us-attacks-iranian-oil-platforms-1987-1988-were-not.

[17] Georg Nolte and Albrecht Randelzhofer, *Article51* in Bruno Simma et al, eds, Vol. II *The Charter of the United Nations, A Commentary* 1404 ¶13 nn 33- 34 (Oxford 3d ed 2012), citing Christine Gray, *International Law and the Use of Force* 118 (Oxford 3d ed 2008) citing *Nicaragua* ¶ 237.

preserve the state from existential threats ('statism'); **(3)** 'rule of law' is to be interpreted with a level of pragmatism that advances the state's vital national interests ('legal pragmatism'), advanced earlier by Oliver Wendall Holmes Jr, Associate Justice of the US Supreme Court during the pre- to post- WWI years 1902 to 1932,[18] when the US was an arguably reluctant leader in the international order.

NATO operations in Bosnia, Libya and Afghanistan would appear to be more than such countermeasures, and perhaps amounting to preventive self-defense in the case of Afghanistan.[19]

## Conclusions

1. The UN Charter provides for initial use of force in 'going to war,' distinct from other treaty (e.g., Geneva) and customary international law that provides for use of force 'during war, after war has started.' The Charter is one useful start-point for assessing the commencement of collective self-defense measures.
2. Collective defense is not a substitute for collective security, nor are they mutually exclusive. Collective security serves different objects and purposes and will be briefed in RAUSI Research Brief Issue 1 Volume 2, December 2020.

## About the Author

LJ Howard. PhD (international law, 中国政法大学, Beijing), LL.M. (Leiden), MA (diplomacy, School of Oriental and African Studies, U/London), CPA. Trained at NATO Cooperative Cyber Defence Centre of Excellence (Estonia), US Naval Postgraduate School Centre for Civil-Military Relations (California), UN Office for Coordination of Humanitarian Affairs (Geneva). Deployed w/ Standing High Readiness Brigade for UN Operations and NATO to Sudan, Bosnia, Congo. Consulted to UN Department of Peacekeeping Operations, Office of Internal Oversight Service, US Department of Defence in west Africa, eastern Europe. Offering contract services in policy/operational research and planning, oversight, defense & security, humanitarian operations, geopolitics.

Mr. Howard is an active member of RAUSI and serves on the Board as Secretary/Treasurer and Finance Committee Chair.

LJ (Joe) Howard

ljosephhoward@gmail.com

[18] Michael J. Glennon, *The Fog of Law, Pragmatism, Security, and International Law* (Stanford UP 2010). See Michael Glennon.

[19] Supra n 11.