DOCKING THE *CAROLINE*: UNDERSTANDING THE RELEVANCE OF THE FORMULA IN CONTEMPORARY CUSTOMARY INTERNATIONAL LAW CONCERNING SELF-DEFENSE

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ABSTRACT

The famous Caroline incident of 1837 has in the United Nations era been repeatedly cited as representing the position of customary international law with regard to the regulation of forcible action taken in self-defense. Over recent years, however, the relevance of the incident to the contemporary legal regime has been questioned by a number of scholars. This article assesses these criticisms and then employs a different methodology to others that have re-appraised the incident: examining State practice and opinio juris to determine the customary international law of today, against which the Caroline formula can then be analyzed. It is concluded that whilst the formula in itself does not represent contemporary customary international law, the total exclusion of the Caroline from scholarly discourse over the current position of the customary international law of self-defense is unhelpful, because the formula is an extremely useful tool to aid our understanding of this area of the law.

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I. INTRODUCTION

The September 11 atrocities in the United States brought the threat of international terrorism sharply into focus for the entire world. Following September 11, States have found themselves faced with the unenviable problem of finding a balance between the need to adequately secure themselves against this threat and the imperative to ensure that any action taken in combating terrorist activities conforms to the principles of international law. Recent controversial uses of force in Afghanistan (2001) and Iraq (2003) have highlighted the extreme difficulties in finding such a balance. One lawful means of responding to international terrorism may, in certain circumstances, be to resort to the inherent right of self-defense, upon which the United States based Operation Enduring Freedom in Afghanistan.[1]

As such, an understanding of the international law regarding self-defense is today more pertinent than ever. This article aims to contribute to that understanding by focusing on a particular issue that relates to self-defense claims: the relevance today, in legal discourse and practice, of the hallowed *Caroline* incident of 1837.

It is clear that the international law concerning self-defense is derived from a number of sources. Arguably the most important

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1 Letter from John D. Negroponte, Permanent Representative of the United States, to Richard Ryan, President of the UN Security Council (Oct. 7, 2001), *available at* http://un.int/usa/s-2001-946.htm.

of these is Article 51 of the United Nations (UN) Charter.[2] However, self-defense is also regulated by customary international law. As the International Court of Justice (ICJ) stated in the *Nicaragua* judgment: "There can be no doubt that the issues of the use of force and collective self-defense raised in the present proceedings are issues which are regulated both by customary international law and by treaties."[3] There are a number of legal aspects of self-defense that are not apparent in Article 51 but rather have their basis solely in the practice and *opinio juris* of States. Therefore, a complete understanding of the law of self-defense, so far as this is possible, obviously requires analysis of legal requirements derived from *both* sources.[4] Indeed, separating these two sources in this context is a somewhat artificial exercise.[5] However, the nature of this article means that its focus is primarily upon customary international law aspects of self-defense. As such, there are essential areas of the contemporary law governing self-defense that are not here discussed in detail, most notably the concept of an "armed attack."

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[2] This Article provides that

> [n]othing 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. Measures taken by Members in the exercise of this right of self-defense 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.

U.N. Charter art. 51.

[3] Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 34 (June 27) [hereinafter Nicaragua].

[4] This is because the content of the law relating to self-defense deriving from custom is not necessarily the same as that originating from conventional sources. As the ICJ has stated "[o]n a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content." *Id.* at ¶ 175. Given this, it would seem that a "complete" picture requires analysis of law from both sources.

[5] For example, the concept of an "armed attack" is to be found in Article 51, yet, this requirement is also arguably an aspect of customary international law. Certainly it is evident that the ICJ has taken this view. This can be seen from the fact that the court applied customary international law exclusively in *Nicaragua*, given the United States multilateral treaty reservation. *Id.* at ¶ 176. Similarly, in the Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶ 51 (Nov. 6), the court stated that for lawful self-defense the attack being responded to must be "of such a nature as to qualify as 'armed attacks' within the meaning of that expression in Article 51 of the United Nations Charter, and *as understood in customary [international] law on the use of force.*" (emphasis added).

The customary international law regarding self-defense has traditionally been identified by reference to the correspondence exchanged between the United Kingdom and the United States in relation to the dispute over the sinking of the *Caroline* by British forces in 1837. It is often held that the legal stance taken during this exchange accurately represents the position of the customary limitations on self-defense actions today.[6] Certainly in the period since the inception of the UN numerous scholars have referred to the incident, and the legal positions taken following it, as representing the law.

Yet in recent years, there has been a measure of academic re-appraisal of the *Caroline* incident and its relevance to international law. The acceptance of the *Caroline* as an aspect of customary international law and its regular invocation by scholars has been criticized. Some have argued that the *Caroline* should be employed in a limited manner and is today only relevant to certain "types" of self-defense claims.[7] Other writers have gone further and have suggested that viewing the incident as representing or relevant to the customary international law of self-defense is misconceived. As such, continued reference to it further confuses the already muddy waters of this area of international law.[8]

These writings have stimulated important debate over the *Caroline* and its relevance today, where in the past the *Caroline* formula was often cited as "the law" without question. Many of the concerns raised regarding the status today of the incident and (or, more accurately, the legal claims made with regard to it) have merit. Nonetheless, it is argued here that none of the approaches taken in this recent wave of scholarly re-appraisal adequately identify the relevance of the incident to the customary international law. In contrast to the other articles that have returned to the *Caroline* incident and discussed its relevance, this paper takes the methodological approach of examining State practice and *opinio juris* from the UN era to determine the content of customary international law today, against which the *Caroline* formula is analyzed.

Thus, as a starting point, Part II provides a brief account of the facts of the *Caroline* incident and the legal claims made by the par-

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6 *See infra* Part III.

7 Timothy Kearley, *Raising the* Caroline, 17 WIS. INT'L L. J. 325 (1999).

8 *E.g.,* Maria Benvenuta Occelli, Comment, "*Sinking" the* Caroline*: Why the* Caroline *Doctrine's Restrictions on Self-Defense Should not be Regarded as Customary International Law*, 4 SAN DIEGO INT'L L. J. 467 (2003).

ties involved. Part III highlights the general invocation of the *Caroline* formula by scholars as embodying elements of the customary international law on self-defense in the UN era. In Part IV, some of the criticisms that have been raised in relation to this general scholarly reverence are explored. It is argued that, whilst these criticisms may be merited, in some respects they actually detract from the issue of the contemporary relevance of the *Caroline* formula. We then turn, in Part V, to an examination of the practice and *opinio juris* of States regarding self-defense in the period since 1945. The *Caroline* formula is compared and contrasted to the conclusions reached in this section as to the content of current customary international law. Based on this, it is argued in Part VI that the *Caroline* formula in itself does not represent contemporary customary international law. Nonetheless, the total exclusion of the *Caroline* from scholarly discourse over the current position of the customary international law of self-defense is unhelpful because the formula is an extremely useful tool to aid our understanding of this area of the law.

II. Facts and Legal Claims

In 1837, the United Kingdom was facing a rebellion in Canada, which at that time was still under British control. It was in the context of this rebellion that British forces attacked and sank a forty-five ton, privately-owned, U.S. steamer, the *Caroline*. A number of the rebel forces acting in support of the Canadian rebellion, (the majority of which being U.S. nationals) were stationed on Navy Island, in British territory. They were supplied in munitions and personnel by the *Caroline*, which was hired for that purpose.[9] On December 29, while the *Caroline* was docked at Schlosser, in U.S. territory, it was attacked by British-Canadian forces that set fire to the steamer and towed it over Niagara Falls.[10] In the process, Amos Durfree, a U.S. citizen, was killed.[11]

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9 Although the owner, William Wells of Buffalo, later denied this. *See* H. Jones, To the Webster-Ashburton Treaty: A Study in Anglo-American Relations, 1783-1843, at 23 (1977).

10 R. Y. Jennings, *The* Caroline *and McLeod Cases,* 32 Am. J. Int'l L. 82, 84 (1938).

11 See the sworn affidavit of Gilman Appleby, Commander of the *Caroline*, as supported by nine other crew members. Gilman Appleby, *Sworn* Affidavit (Dec. 30, 1837), 26 B.S.P. 1373, 1373-75. It should be noted that some more recent accounts refer to the death of the ship's cabin boy, "Little Billy." *See e.g.*, 2 John Bassett Moore, A Digest of International Law § 217, at 409 (1906); Werner Meng, *The* Caroline *in R. Bernhardt*, *in* 3 Encyclopedia of Public International Law: Use of Force, War and Neutral-

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The territorial violation involved in the incident, coupled with the death of at least one American national, caused uproar amongst patriots in the United States, particularly in the State of New York.[12] Indeed, President Van Buren himself, despite a reputation for timidity, referred to the incident as an "outrage."[13] Yet the diplomatic response to these rising tensions between Britain and the United States was fairly muted from both parties.[14] It constituted a brief exchange of letters between the U.S. Secretary of State John Forsyth and the British Minister in Washington, Henry S. Fox,[15] during which Forsyth demanded "redress" on behalf of the United States. In response to this, Fox argued that "the necessity of *self-defense* and self-preservation, under which Her Majesty's subjects acted in destroying [the *Caroline*], would seem to be sufficiently established."[16] In addition, Andrew Stevenson, the American Minister to Britain, sent a letter regarding the incident to Lord Palmerston, the British Foreign Secretary, where he argued that, as there was no imminent danger to British forces, Britain could not claim to have acted in self-defense.[17] Much to the ire of many Americans, it took Palmerston more than three years to respond to this letter.[18]

Despite such diplomatic mismanagement, the tensions over the *Caroline* had calmed somewhat by 1839 only for them to be reignited following the arrest in New York of Alexander McLeod in November 1840. McLeod, a British-Canadian, was apprehended due to his alleged part in the incident.[19] The British responded to

ITY PEACE TREATIES 81-82 (1982); Jennings, *supra* note 10, at 84. However, this may be brought into question, as this death was not mentioned in the various testimonies of the crew. R

12 JONES, *supra* note 9, at 26. R

13 Message from Martin Van Buren, U.S. President, to the U.S. Senate and House of Representatives (Jan. 1838), 26 B.S.P. 1373.

14 KENNETH R. STEVENS, BORDER DIPLOMACY: THE *Caroline* and McLeod Affairs in Anglo-American-Canadian Relations, 1837-1842, at 19 (1989).

15 FO Docs. 5/321-323; Letter from John Forsyth, U.S. Sec'y of State, to Henry S. Fox, British Minister in Washington (Jan. 5, 1838), 26 B.S.P. 1376.

16 Letter from Henry S. Fox, British Minister in Washington, to John Forsyth, U.S. Sec'y of State (Feb. 6 1838), *in* FO Doc. 5/322 (emphasis added).

17 Letter from Andrew Stevenson, American Minister to Britain, to Lord Palmerston, British Foreign Sec'y (May 22, 1838), *in* FO Doc. 5/327.

18 Letter from Lord Palmerston, British Foreign Sec'y, to Andrew Stevenson, American Minister to Britain (Sept. 18, 1841), *quoted in* STEVENS, *supra* note 14, at 126-127. R

19 McLeod was an immigrant Scot, who had held the position of deputy sheriff in the Niagara district of Upper Canada; he had worked as a secret agent for the British against insurrectionists throughout the 1830s. It was alleged that he had participated in the *Caro-*

the arrest by stating that the attack was an official action and thus McLeod could not be held personally responsible.[20] McLeod was eventually found to be not guilty on the evidence and was released.[21]

The correspondence concerning the *Caroline* incident, and particularly that which followed McLeod's arrest and trial, between the new U.S. Secretary of State Daniel Webster and the British special representative to the United States, Lord Ashburton, gave birth to the so called "*Caroline* formula."

The most important extract of these various correspondences comes from a letter sent from Webster to Ashburton, dated 27 July 1842, in which Webster quoted a correspondence he had sent to Henry S. Fox in April 1841:

> [I]t will be for Her Majesty's Government to show, upon what state of facts, and what rules of national law, the destruction of the *Caroline* is to be defended. It will be for that Government *to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.* It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or *excessive*; since the act justified by the necessity of self-defense must be limited by that necessity, and kept clearly within it. It must be shown that admonition or remonstrance to the persons on board the *Caroline* was impracticable, or would have been unavailing; it must be shown that daylight could not be waited for; that there could be no attempt at discrimination, between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her, in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some, and wounding others, and then drawing her into the current, above the cataract, setting her

line raid (under the direction of Captain Andrew Drew, who undoubtedly led it), and was thus guilty of both murder and arson. *See* JONES, *supra* note 9, at 48-49. **R**

20 For example, Fox argued "the transaction on account of which Mr. McLeod has been arrested, and is to be put upon his trial, was a transaction of a public character . . . [therefore he] cannot be made personally and individually answerable to the laws and tribunals of any foreign country." Letter from Henry S. Fox, British Prime Minister in Washington, to Daniel Webster, U.S. Sec'y of State (Mar. 12, 1841), 29 B.S.P. 1126, 1127. *See* MOORE, *supra* note 11, § 179 at 24; *see also* Jennings, *supra* note 10, at 93. **R**

21 ALBERT BICKMORE COREY, THE CRISIS OF 1830-1842 IN CANADIAN-AMERICAN RELATIONS 144-145 (1941); JONES, *supra* note 9, at 65. **R**

> on fire, and, careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate, which fills the imagination with horror. A necessity for this, the Government of the United States cannot believe to have existed.[22]

The United States and the United Kingdom disagreed as to whether the British actions met the requirements that Webster set out. From the above passage, we can see that Webster clearly asserted that: "[a] necessity for this, the Government of the United States cannot believe to have existed." In contrast, Lord Ashburton responded on July 28 with, "I would appeal to you Sir, to say whether the facts which you say would alone justify the act . . . were not applicable to this case in as high a degree as they ever were to any case of a similar description in the history of nations."[23]

Yet, Lord Ashburton also stated that "we are perfectly agreed as to the general principles of international law applicable to this unfortunate case."[24] Indeed, he repeated Webster's terminology (specifically that States must show "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation") on more than one occasion in the correspondence.[25] Thus it would seem that while there was disagreement between the parties as to the factual nature of the episode, they were in agreement as to Webster's statement of the law.[26]

III. A MYTHICAL AUTHORITY

In the *Caroline* exchange, many writers since the time of the League of Nations have found the basis for the customary international law concerning self-defense. Jennings famously referred to the incident as the "*locus classicus* of the law of self-defense."[27]

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[22] Letter from Daniel Webster, U.S. Sec'y of State, to Lord Ashburton, British Special Representative to the U.S. (July 27, 1842), 30 B.S.P. 193, 193-94 (quoting Letter from Daniel Webster, U.S. Sec'y of State, to Henry S. Fox, British Minister in Washington (Apr. 24, 1841), 29 B.S.P. 1126, 1137-38 (emphasis added).

[23] Letter from Lord Ashburton, British Special Representative to the U.S., to Daniel Webster, U.S. Sec'y of State (July 28, 1842), 30 B.S.P. 195, 198.

[24] *Id*. at 195.

[25] *Id*. at 196, 198.

[26] *See* Meng, *supra* note 11, at 81; Jennings, *supra* note 10, at 92; MOORE, *supra* note 11, § 217, at 411. However, this conclusion has been criticized on the basis that Lord Ashburton agreed with Webster's formulation only as a diplomatic concession and not as a matter of law. Occelli, *supra* note 8, at 475-479. *See also infra* Part IV.C. R R

[27] Jennings, *supra* note 10, at 92. R

This view has, in the majority, continued into the UN era.[28] Indeed, Gray rightly refers to the incident as having obtained a "mythical authority."[29] The general academic position on the *Caroline* incident during the UN era may be summarized by the following:

> [T]he *Caroline* doctrine asserts that use of force by one nation against another is permissible as a self-defense action only if force is both necessary and proportionate . . . [the correspondence relating to the incident] *effectively defined the limits of self-defense*, and in so doing enabled later statesmen and scholars to distinguish that concept, with its constraints, from the largely limitless notion of self-preservation.[30]

The *Caroline* is still consistently referred to by international scholars today as embodying the customary law on self-defense, as can be seen from the response to the U.S. intervention in Afghanistan following September 11. Byers, for example, states that from the *Caroline* incident "the modern law of self-defense was born." He then applies the formula to Operation Enduring Freedom of 2001.[31] Recent reference to the *Caroline* is similarly well evidenced by a document prepared by the Chatham House International Law Programme in 2005, following the consultation of a

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[28] Thus Brierly stated in 1963: "Self-defense, properly understood, is a strictly limited right and the best statement of the conditions for its exercise is commonly considered to be found in the incident of the steamer *Caroline* in 1837. . . . [the *Caroline* formula] has met with general acceptance." J.L BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 405-406 (Humphrey Waldock ed., Clarendon Press 6th ed. 1963). Similarly, Schachter argues that "[t]he Webster formululation of self-defense is often cited as authoritative customary [international] law." Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1635 (1984). More recently, Murphy has pointed out that "when considering the principles of necessity and proportionality . . . the precedent that immediately comes to the mind of the representatives of states, scholars and presumably International Court judges is the 1837 *Caroline* incident . . . . [this remains] the touchstone for most discourse on the subject." Sean D. Murphy, *Self-Defense and the* Israeli Wall *Advisory Opinion: An* Ipse Dixit *from the ICJ?*, 99 AM. J. INT'L L. 62, at 64-65 (2005) (footnotes omitted). *See also*, *e.g.*, I OPPENHEIM'S INTERNATIONAL LAW 420 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); Rosalyn Higgins, *The Legal Limits to the Use of Force by Sovereign States: United Nations Practice,* 37 BRIT. Y.B. INT'L L. 269, 298 (1961).

[29] CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 120 (2d ed. 2004).

[30] Martin A. Rogoff & Edward Collins Jr, *The* Caroline *Incident and the Development of International Law,* 16 BROOK. J. INT'L L. 493, 498 (1990) (emphasis added).

[31] Michael Byers, *Terrorism, the Use of Force and International Law After 11 September*, 16 INT'L RELATIONS 155, 159 (2002). *See also* Thomas Graham Jr., *National Self-Defense, International Law, and Weapons of Mass Destruction*, 4 CHI. J. INT'L L. 1, 6-8 (2003).

number of eminent international legal scholars in the United Kingdom, entitled "Principles of International Law on the Use of Force by States in Self-Defense."[32] As such, it is notable that the *Caroline* exchange is referred to throughout this document as representing the applicable customary international law standard in this context.[33] In addition to this regular invocation it should be noted that some writers have re-affirmed the importance of the *Caroline* and have explicitly defended the relevance of Webster's formula to contemporary self-defense claims.[34]

IV. Recent Re-Appraisal

This acceptance of the *Caroline* by the majority of scholars, however, has faced some criticism in recent years. There are a number of issues that have been raised to suggest that the scholarly reverence the *Caroline* incident and formula have received may be misplaced. The following section briefly examines some of these issues.

A. *The Formula was not Customary International Law in 1837*

Despite the apparent agreement between Ashburton and Webster as to the law covering the *Caroline* incident (if not the application of that law to the particular facts), it is arguable that Webster's formula was not representative of the customary international law in 1837.[35] The formula set out by Daniel Webster was not in conformity with much of the practice of States, which in general employed a wider and more "vague" right of "self-preservation" at the time.[36] Indeed, there is some debate as to what the exact legal argument was made by the British. Daniel Webster clearly referred to the concept of "self-defense" when making his famous statement quoted above but it has been questioned

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32 Chatham House, International Law Programme, Principles of International Law on the Use of Force by States in Self-Defense (2005), *available at* http://www.chathamhouse.org.uk/pdf/research/il/ILPForce.doc. This document was "intended to give a clear representation of the current principles and rules of international law [regarding self-defense]." *Id.* at 2.

33 *Id.* at 5, 8, 10, 11.

34 *E.g.*, Rogoff & Collins, *supra* note 30. R

35 Occelli, *supra* note 8, at 479-482. R

36 Ian Brownlie, International Law and the Use of Force by States 261 (1963).

whether the *Caroline* attack was in fact justified as "self-defense," "self-preservation," or "necessity."[37]

The terms were used interchangeably at the time to justify inter-State use of force during peacetime. Some scholars do take the view that the *Caroline* incident was justified by the British as being an example of self-defense,[38] whilst others hold that the British pleaded "self-preservation" or the virtually synonymous justification of "necessity," as there was no involvement on the part of the U.S. government.[39] Examining the correspondence regarding the incident as a whole, it is evident that the term "self-defense" is employed much more regularly throughout than other related terms. Having said this, whilst Webster spoke of "self-defense," Lord Palmerston apparently saw the British action as one of "necessity."[40] This view of the legal argumentation employed has been adopted by the International Law Commission (ILC), which has twice referred to the *Caroline* formula (in the context of its examination of the law of State responsibility) as representing a plea of "necessity" rather than one of self-defense. For example, in 2001, the ILC stated that "[t]he *Caroline* incident of 1837, though frequently referred to as an instance of self-defense, really involved the plea of necessity at a time when the law concerning the use of force had a quite different basis than it has now."[41]

In any event, it has been argued that Webster's formula did not represent the law as it was; rather, it went beyond the existing legal framework. A good historical example to support this is the British action against the Copenhagen naval fleet in 1807, in response to the supposed threat of Napoleon launching an attack

37 *Id.* at 43; Kearley, *supra* note 7, at 332-33. R

38 BROWNLIE, *supra* note 36, at 261 (in relation to the proportionality requirement). R

39 D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 59-60 (1958).

40 Letter from Lord Palmerston, British Foreign Sec'y, to Andrew Stevenson, American Minister to Britain (Sept. 18 1841), *quoted in* JONES, *supra* note 9, at 29. R

41 Int'l Law Comm'n, *Report of the International Law Commission on the Work of its Fifty-Third Session*, U.N. GAOR, 56th Sess. Supp. No. 10, U.N. Doc. A/56/10 (2001), *available at* http://untreaty.un.org/ilc/reports/2001/2001report.htm. The ILC reached a similar conclusion in 1980: "Although he [Daniel Webster] used the term 'self-defense,' it was to a state of necessity–in the sense in which that expression is used by the Commission–that the American Secretary of State was referring, for he did not make the preclusion of wrongfulness depend on the existence of a prior of threatened aggression by the State whose territory had been violated, or on any kind of wrongful act on its part." *Report of the International Law Commission to the General Assembly*, U.N. Doc. A/35/10 (1980), *reprinted in* [1980] 2 Y.B. Int'l L. Comm'n 44 n.155, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part II), *available at* http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1980_v2_p2_e.pdf.

from Denmark. The British government claimed the action was "necessary for the nation's preservation."[42] It is suggested that based upon the *Caroline* formula, the action would have been considered disproportional (or to use Webster's terminology, "excessive"), particularly given the bombardment of Copenhagen proper.[43] Indeed, the *Caroline* formula was not even in conformity with recent U.S. practice.[44] This is evidenced by two incursions into Spanish territory in 1817: the occupation of Amelia Island and the invasion of Spanish-held Florida.[45] In both cases, the United States claimed it was acting in "self-defense,"[46] but it seems unlikely that either instance would have met the *Caroline* formula.[47]

Therefore, it is certainly arguable that the formula put forward by Daniel Webster was not an expression of the law as it existed in 1837.

B. *A Single Incident Cannot Create Customary International Law*

Acknowledging that the formula set out by Daniel Webster was unlikely to have been an expression of customary international law as it was at the time, Jennings stated in his famous 1938 article that "[i]t was in the *Caroline* case that self-defense was changed from a political excuse to a legal doctrine."[48] In his view, therefore, the exchange of letters following the sinking of the *Caroline* created new customary international law.[49] However, it seems highly problematic to conclude that an exchange of letters between

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42 STEVENS, *supra* note 14, at 25. **R**

43 Indeed, the action was criticized on this basis in the British parliament. *Id.*

44 *See* Occelli, *supra* note 8, at 481. **R**

45 *See* STEVENS, *supra* note 14, at 25-26. **R**

46 *Id.* at 26.

47 In the context of Amelia Island, the intervention was avowedly undertaken to suppress privateers and freebooters operating from the island. However, it seems unlikely that there was an "instant" or "overwhelming" necessity for this suppression, and further the intervention led to an occupation of the island, which would seem in this instance to be "excessive." Similarly, in an epitome of disproportionality, the invasion of Florida involved the full blown occupation of two Spanish towns in response to the killing of two Englishmen in the province by Seminole Indians. STEVENS, *supra* note 14, at 25-26; Occelli, *supra* note 8, at 481. Some writers nonetheless defended these actions as lawful following the *Caroline*. For example, Garner argued that both incidents, along with the *Caroline* itself, were lawful "acts of necessity." James W. Garner, *Some Questions of International Law in the European War,* 9 AM. J. INT'L L. 72, 78 (1915). **R** **R**

48 Jennings, *supra* note 10, at 82. **R**

49 In Jennings' words, "rescuing" international relations from the ill defined self-preservation "doctrine." Jennings, *supra* note 10, at 92. In a similar way, Stevens holds that **R**

two States could create a legal obligation binding upon all. Today, it is generally accepted that for customary international law to form there must be a level of "constant and uniform . . . practi[ce]," to use a statement employed in a classic pronouncement by the ICJ on the formation of customary international law.[50]

Of course, this representation of customary international law formation is a standard of the mid-twentieth century; therefore, it may be seen as dangerous to apply this criterion to an exchange of letters that took place in the mid-nineteenth century. However, the idea of widespread consent as an aspect of customary law formation (or to use the ICJ's term, "constant and uniform . . . practi[ce]") did exist at the time of the *Caroline* incident and, indeed, well before it.[51]

C. *Agreement was Reached for Political, not Legal Reasons*

A related issue is whether the diplomatic exchange regarding the *Caroline* was of such a character as to be able to contribute to the formation of customary international law at all. It has been argued that the "agreement" between the United States and the United Kingdom (or perhaps rather between Webster and Ashburton) was a political one. As such, any apparent legal principles expressed were put forward merely for political reasons. In other words, it has been claimed that Ashburton approved Webster's formula as a diplomatic concession, not as a formal matter of law.[52] Both parties clearly wanted a peaceful resolution to the tension between them over the incident. For example, Lord Ashburton stated his desire that "all feelings of ill-will resulting from these truly unfortunate events may be buried in oblivion."[53]

It is certainly possible that the parties' legal arguments were made, and an agreement reached, for political reasons. This in itself is not a great insight and has little bearing upon the contribution of the diplomatic exchange to customary international law. All State practice (and indeed, *opinio juris*) has political elements

Daniel Webster himself "established a principle–the *Caroline* doctrine–that is still applied today." STEVENS, *supra* note 14. **R**

50 Asylum Case (Colom. v. Peru), 1950 I.C.J. 266, 276 (November 20).

51 For example, Suarez discussed this concept in 1612. FRANCISCO SUAREZ, S.J., DE LEGIBUS AC DEO LEGISLATA *translated in* 2 THE CLASSICS OF INTERNATIONAL LAW: SELECTIONS FROM THREE WORKS OF FRANCISCO SUAREZ 527-529 (Gwladys Williams, Ammi Brown & John Waldron preparers, 1944).

52 Occelli, *supra* note 8, at 476-79. **R**

53 Letter from Lord Ashburton to Daniel Webster, *supra* note 23. **R**

to it. States form the law and respond to it in their best political interests and we would be naive to think otherwise.[54] Underlying political motivation in itself does not diminish the "legal" nature of formal legal claims regarding State practice. If it did, customary international law would not exist at all.

D. *The Formula was not Adopted into Practice*

Even if it is accepted that the *Caroline* correspondence could have unilaterally "created" customary international law, it is evident that in the period *following* the *Caroline* incident, Webster's formulation did not figure prominently in the practice of States. This lack of application of the *Caroline* criteria in the immediate pre-UN period is evidenced, *inter alia*, by the Corfu incident. In 1923, Italy responded to an assassination of an Italian national against Greece by bombing and occupying Corfu. Whilst it did not explicitly invoke "self-defense," Mussolini's government stressed that its intervention in Corfu was a lawful and "pacific" response to the assassination.[55] This action was clearly disproportionate based on any reasonable calculation, yet the League of Nations '"Council of Ambassadors" that dealt with the dispute failed to condemn the actions of the Italian government and the proportionality criterion was left unconsidered.[56] Indeed, the Council held that the occupation was lawful.[57]

Incidents like the occupation of Corfu would suggest that the *Caroline* did not alter the course of customary international law regarding self-defense in the manner that UN era scholars claim.[58]

E. *The Formula was Limited to Certain Types of Self-Defense*

In addition to the above contentions, it has been argued that the factual circumstances of the *Caroline* incident limit the applica-

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[54] *See generally* LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 45-83 (Praeger Publishers 1968).

[55] BROWNLIE, *supra* note 36, at 220-221. **R**

[56] John H. Wigmore, *The Case of Italy v. Greece under International Law and the Pact of Nations*, 18 ILL. L. R. 131, 142-147 (1923-1924). Wigmore also concluded that the actions of Italy were unnecessary as Italy had not given Greece any opportunity to offer reparations for the assassination. *Id*. at 133.

[57] *Id.* at 145.

[58] State practice such as this led Brownlie to conclude in 1963 that "the formula used by Webster has proved valuable in *recent years* but the correspondence made no difference to the legal doctrine, such as it was, of the time." BROWNLIE, *supra* note 36, at 43 (emphasis added). **R**

tion of the formula enunciated by Webster to a specific "type" of self-defense claim.[59] The contention here is that Daniel Webster intended to articulate the legal structure applicable to the facts of the *Caroline* incident itself and not to other claims of "self-defense." However, those who make this criticism do not always agree as to what specific factual instance to which the doctrine was limited. For example, it has been argued that the *Caroline* formula is only relevant to actions of anticipatory self-defense, as the incident can be viewed as being of this character.[60] The rebels on Navy Island had not yet launched an attack against British territory.[61] Therefore, it has been claimed that the requirements set down by Webster need only be met when there has not yet been an attack against the responding State.

Alternatively, as the actions of the *Caroline* and its crew were not imputable to the U.S. government, it has been claimed the *Caroline* formula is only relevant to self-defense actions against non-State actors, and not action taken in self-defense by one State against another.[62] Expanding on this, Kearley takes the view that the *Caroline* exchange was limited to the very specific situation of "extra-territorial uses of force by a State in peacetime against another State which is unable or unwilling to prevent its territory from being used as a base of operations for hostile activities against the State taking action."[63]

This view is supported by the fact that Webster indicated that in circumstances when an action taken avowedly in self-defense "has led to the commission of hostile acts *within the territory of a*

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[59] *See* JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 41-42 (2004).

[60] Judge Schwebel stated in his *Nicaragua* dissent that "[i]t should be recalled that the narrow criteria of the *Caroline* case concerned anticipatory self-defense, not response to an armed attack or to actions tantamount to an armed attack." *See* Nicaragua, *supra* note 3, ¶ 34 (June 27) (Schwebel, J., dissenting). *See also* OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 151-52 (1991). R

[61] However, some commentators take the view that it is a misconception to see the incident as an anticipatory action–at no point in the correspondence was the idea of "anticipatory self-defense" expressed and, factually, it could be argued that the supply of the rebels by the *Caroline* was already underway. *E.g.*, Jordan J. Paust, Symposium, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions,* 79 NOTRE DAME L. REV. 1335, 1345-46 (2004).

[62] This argument has been put forward by Michael Stein. American Society of International Law Internet Forum, Posting of Michael Stein http://www.asil.org/forum.htm (Oct. 30, 2004).

[63] Kearley, *supra* note 7, at 325. R

power at peace, nothing less than a clear and absolute necessity can afford a ground of justification."[64] Kearley argues that this indicates that Webster felt that in different circumstances, self-defense may be justified based upon criteria other than those he was expounding.[65] However, this seems a tenuous inference: Webster's intention with regard to the scope of the formula he was articulating can only be guessed.[66] Certainly though, his focus was understandably upon the specific incident of the *Caroline* and the circumstances relevant to that incident: "Under these circumstances, and under those immediately connected with the transaction itself, it will be for Her Majesty's Government to show upon what state of facts, and what rules of national law, the destruction of the *Caroline* is to be defended."[67]

On this basis, it might be argued that the *Caroline* formula as set out by Webster was limited to anticipatory action of an extraterritorial nature, taken against non-state actors (all of which describe the facts of the *Caroline* incident). Alternatively, it may have been intended to be limited to one of, or a combination of, these.

F. *A Different Approach*

When considering the relevance of the *Caroline* formula today, it is important to keep all of the above points in mind. Most of these arguments have merits and are generally overlooked by those who cite the *Caroline* as a convenient expression of customary international law. However, it is here argued that some of the scholars that have re-visited the *Caroline* have been overly concerned with such issues. The status of the law of self-defense (if indeed such a thing existed at all) in 1842 and the question of whether Webster's formula could have "created" customary international law are issues which are in many ways irrelevant to the position of the formula today. It may well be correct to hold that the *Caroline* correspondence, for a number of reasons, *should not* have influ-

[64] Letter from Daniel Webster, U.S. Sec'y of State, to Henry S. Fox, British Minister in Washington (Apr. 24, 1841), 29 B.S.P. 1133.

[65] Kearley, *supra* note 7, at 329. **R**

[66] Dinstein, for example, points out that there is a "lack of evidence that Webster had in mind any means of self-defense other than extra-territorial law enforcement." YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 249 (4th ed. 2005). Whilst this is correct, it is equally true to say that there is little evidence to suggest that Webster had *only* such means in mind.

[67] Letter from Daniel Webster to Henry S. Fox, *supra* note 64, at 1137. **R**

enced customary international law in the UN era. However, the question to be asked is whether the *Caroline* formula *has in fact* been adopted by States in the UN era as an aspect of customary international law. Admittedly, merited concerns regarding the status of *Caroline* formula at the time of the incident have detracted from this essential question. It is argued that the actual status of the *Caroline* formula today is the most pertinent issue here, not what the status of the formula was or "should be" today.

A single incident can in the long term form the basis of customary international law, if it is later applied in practice and supported by additional *opinio juris*. In such instances, though, it is the cumulative effect of any subsequent acceptance of the "legal" claims made in relation to the incident that would give the rules expressed in those claims their normative value, not the individual incident itself.[68] This is essentially the same process as when the provisions of a treaty take on the character of customary international law (and potentially therefore bind States not party to the original treaty) due to the impact of the convention upon subsequent State practice and *opinio juris*.[69]

Whilst the *Caroline* formula is obviously of a very different character to a formal treaty, the same process is possible: if the formula has, in the UN era, been sufficiently adopted in the practice of States, then it will have taken on the status of a binding rule of customary international law, irrelevant of its status when it was first expressed. Similarly, if the formula contained within the *Caroline* exchange is today employed in relation to *all* manifestations or claims of self-defense, then it becomes irrelevant whether the formula was originally intended to apply to certain "types" of that inherent right.

[68] Having said this, it has been suggested that a single incident can in itself be enough to significantly alter customary international law. *See, e.g.*, W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law,* 10 YALE J. INT'L L. 1, 18 (1985). *But see* Derek W. Bowett, *International Incidents: New Genre or New Delusion?,* 12 YALE J. INT'L L. 386, 394-5 (1987) (criticizing this idea).

[69] For example, the ICJ stressed in 1969: "There is no doubt that this process [of treaty based obligations becoming or influencing customary international law norms] is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed," North Sea Continental Shelf Cases (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 41 (Feb. 20). *See also,* Anthony D'Amato, *Custom and Treaty: A Response to Professor Weisburd,* 21 VAND. J. TRANSNAT'L L. 459 (1988).

V. State Practice and *Opinio Juris* in the United Nations Era

The only way, therefore, to adequately assess the contemporary relevance of the *Caroline* is to examine UN era State practice (and *opinio juris*) with regard to the formula. It should be noted here that throughout this Section, examples are given from practice to support the views presented on the current customary international law regarding self-defense. In the majority of cases, these examples are employed to highlight wider practice, not to evidence *in themselves* the existence of customary international law.

A. *State Invocation of the Formula*

In examining State *opinio juris* since the inception of the UN, the most obvious starting point is to identify instances where States have explicitly invoked the *Caroline* incident in the context of their self-defense claims or the self-defense claims of others. Considering the scholarly invocation of the formula, the results here are somewhat arresting. On occasion, States do refer to the *Caroline* incident in relation to their self-defense claims or those of others. For example, Iraq invoked the *Caroline* incident and Webster's formula in regard to its conflict with Iran in 1980.[70] Similarly, Israel referred to the *Caroline* explicitly in relation to its invocation of self-defense to protect its nationals at Entebbe Airport, Uganda, in 1976.[71] In defending its aerial strike against the Iraqi Osiraq nuclear reactor in 1981, Israel again pointed to the *Caroline*, though this was to indicate that it was inapplicable to the facts of the case,[72] whilst Uganda referred to the *Caroline* in the context of condemning the same action.[73] However, despite the claims of some writers,[74] such invocation is rare, certainly in the UN era.

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70 U.N. SCOR, 35th Sess., 2250th mtg. at 6, U.N. Doc. S/PV.2250 (Oct. 15, 1980).

71 U.N. SCOR, 35th Sess., 1939th mtg. at 14, U.N. Doc. S/PV.1939 (July 9, 1976).

72 It is interesting that in this instance, Israel did not quote Webster's formula, nor did it provide much indication as to what it saw the content of "the *Caroline*" as amounting to. U.N. SCOR, 36th Sess., 2288th mtg. at 8, U.N. Doc. S/PV.2288 (June 19, 1981).

73 U.N. SCOR, 36th Sess., 2282d mtg. at 2, U.N. Doc. S/PV.2282 (June 15, 1981).

74 *See, e.g.,* Gray, *supra* note 29, at 120 (referring to United Arab Emirates and the German Democratic Republic as invoking *Caroline* in U.N. Doc. S/PV.2616 and U.N. Doc. S/PV.2677 respectively, when in fact neither State does so explicitly). *See also* W. Michael Reisman, *International Legal Responses to Terrorism,* 22 Hous. J. Int'l L. 3, 48-49 (1999), where Reisman indicates that in relation to its bombings of Sudan and Afghanistan in 1998, the United States invoked the *Caroline* formula in U.N. Doc S/1998/780 (August 20, 1998 Letter from the Permanent Representative of the United States of America to the

Of course, this in itself does not mean that the *Caroline* formula is not part of contemporary customary international law. The mere fact that States do not use the term "the *Caroline*" is not determinative in this respect. States may employ and be bound by Webster's formula without using "the *Caroline*" itself as a term of art.

Yet upon a closer examination, it is also true that States rarely refer to Webster's formula either. Thus the view that the formula itself is a rule of international law is hard to maintain when it is so rarely invoked. Again, of course, there is practice contrary to this; a well-known example being the fact that the representative of Ghana referred to Webster's formula (though not the *Caroline* incident) when addressing the Security Council with regard to the Cuban Missile Crisis in 1962.[75] However, neither the United States nor any other State made mention of Webster's formula in relation to the Crisis. Sierra Leone cited Webster's formula as constituting an aspect of customary international law without referring to the *Caroline* itself in relation to the Osiraq incident.[76] However, as with explicit invocation of the *Caroline* incident, such practice is exceptional.

It is often pointed out that the International Military Tribunal at Nuremburg explicitly referred to the *Caroline* formula.[77] How-

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United Nations Addressed to the President of the Security Council). In fact, the United States did not invoke the *Caroline* in this case, though it did of course make general claims regarding necessity and proportionality. *See also* Rogoff & Collins, *supra* note 30, at 509 (claiming that State invocation of the *Caroline* is "common practice"). **R**

75 U.N. SCOR, 17th Sess., 1024th mtg. at 19, U.N. Doc. S/PV.1024 (Oct. 24, 1962).

76 U.N. SCOR, 36th Sess., 2283d mtg. at 14-15, U.N. Doc. S/PV.2283 (June 15, 1981).

77 International Millitary Tribunal (Nuremburg), Judgement and Sentences, *reprinted in* 41 AM. J. INT'L L. 172, 205 (1947). This was in specific reference to the lawfulness of anticipatory self-defense (what the Tribunal referred to as "preventative action"). *See, e.g.*, BROWNLIE, *supra* note 36, at 252-53; Richard N. Gardner, *Neither Bush nor the Jurisprudes (Agora: Future implications of the Iraq Conflict),* 97 AM. J. INT'L L. 585, 587 (2003); BOWETT, *supra* note 39, at 33; Rogoff & Collins, *supra* note 30, at 504-05. It is also sometimes said that the *International Military Tribunal for the Far East* (Tokyo) applied the *Caroline* formula. *See e.g.*, Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq,* 4 SAN DIEGO INT'L L. J. 7, 13 (2003); A MANUAL OF INTERNATIONAL LAW 150 (George Schwarzenberger & Ed Brown eds., Abingdon Professional Books Ltd. 6th ed. 1976). However, it should be noted that, unlike in the Nuremburg judgment, this was not with *explicit* reference to the *Caroline*. Here, the Tribunal concluded that the Netherlands had lawfully declared war in self-defense against Japan, before it was attacked or had war declared upon it, due to the demonstrable imminence of an attack by Japan. *The Tokyo War Crimes Trial, November 1948* (International Military Tribunal for the Far East), *reprinted in* 2 THE LAW OF WAR: A DOCUMENTARY HISTORY 1029, 1044-1047 (Leon Friedman ed., 1972). **R** **R**

ever, in the UN era, the ICJ has not done so. Throughout the cases where the Court has dealt with self-defense, it at no time refers to the *Caroline* incident.[78] This is particularly interesting in relation to the *Nicaragua* case. Here, the ICJ was unable to apply Article 51, or indeed any multilateral treaty provisions, to the dispute, due to the multilateral treaty reservation of the United States.[79] As such, the court reached its merits decision, ostensibly at least, by reference to customary international law alone. If such law were enshrined in the *Caroline* incident, it would seem logical that the court would have referred to it at some point during its judgment.

Of course, only so much can be read into the fact that the court has not referred to the *Caroline*. The ICJ often refers to rules of "customary international law" without giving supporting State practice.[80] However, the *Caroline* formula is more than another mere example of State practice: it is an expression of a legal standard. It might be argued that the ICJ has applied the *Caroline* formula to the relevant disputes before it *implicitly* but this cannot be said with certainty.[81] Certainly a contrast exists between the explicit reference to the *Caroline* made by the Tribunal at Nuremburg and the fact that the ICJ has not done so. However, what may be inferred from this is open to debate.

Nonetheless, taken together, the lack of invocation by both States and the ICJ indicates *prima facie* that the general scholarly reverence of the *Caroline* is in fact misplaced. The revisionist conception of *Caroline* as an unhelpful and inaccurate representation of international law would therefore seem correct. However, even the fact that States do not employ Webster's formula in the UN era

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[78] It should be noted, however, that Judge Schwebel did make mention of the *Caroline* in relation to anticipatory self-defense. Nicaragua, *supra* note 3, ¶ 200 (Schwebel, J., dissenting). R

[79] Nicaragua, *supra* note 3, ¶¶ 37-56. The U.S. declaration under Article 36, ¶ 2 of the Statute of the ICJ (and the reservation contained within it) are reproduced in MARTIN DIXON & ROBERT MCCORQUODALE, CASES AND MATERIALS ON INTERNATIONAL LAW 589 (4th ed. 2003). R

[80] Again, the *Nicaragua* case provides a good (and contextually relevant) example. In relation to the requirement of an armed attack, the ICJ outlined what it felt constituted such an attack in customary international law. It held that its definition "could be considered to be agreed," presumably meaning that it was supported by *opinio juris*. Nicaragua, *supra* note 3, ¶ 195. However, the ICJ provided no State practice or specific examples of *opinio juris* to support this position, other than the dubious invocation of the Definition of Aggression. G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, Annex, at 143, U.N. Doc. A/9631 (1975). R

[81] However, this idea may be supported by the ICJ's position with regard to the criteria of necessity and proportionality. *See infra* Part V.B-C.

is not enough for us to dismiss the *Caroline* incident as an outdated distraction.

It is undeniable that a response taken in self-defense today must be both "necessary" and "proportional" for it to be legally permissible. There is overwhelming State practice supporting this position; indeed, State reference to necessity and proportionality in invoking self-defense is near universal and States responding to such invocations in general similarly refer to the requirements, either explicitly or through implicit application.[82] The writings of scholars in general concur with the view that this practice is almost universal.[83] Notably, in contrast to the lack of reference to the

[82] In the study of practice undertaken by the author, *every* State that claimed self-defense invoked the criteria of necessity and proportionality to a greater or lesser degree. Even when force is used avowedly in self-defense in controversial circumstances, the invoking State still accepts that its actions are limited by necessity and proportionality, even if it is arguable that it has not in fact applied these criteria. A good example of this is the South African incursion into Angola in September 1985. South Africa itself stressed that the action was limited by necessity and implicitly by proportionality. U.N. SCOR, 14th Sess., 2612th mtg. at 2, U.N. Doc. S/PV.2612 (Oct. 3, 1985). However, the vast majority of States rejected the view that the action was lawful self-defense, and a number of these States specifically referred to the fact that the action was neither necessary, nor proportional (see, e.g., a statement made by a United States State Department spokesperson, Bernard Gwertzman, *Raio by Pretoria Denounced by U.S.*, N.Y. TIMES, Sept. 11, 1985, at A11, and the position taken by the representative of the United Arab Emirates in the Security Council, U.N. SCOR, 14th Sess., 2616th mtg. at 11-12, U.N. Doc. S/PV.2616 (Oct. 7, 1985)). In the conflict between Iran and Iraq, 1980-1988, both States invoked self-defense. Letter from Saadoun Hammadi, Minister of Foreign Affairs of Iraq, to UN Security Council (Sept. 24, 1980), *in* U.N. SCOR, 35th Sess., Agenda Item 50, at Annex, U.N. Doc. S/14191-A/35/483; Letter from Abolhassan Bani-Sadr, President of Iran, to the UN Secretary-General (Oct. 1 1980), *in* U.N. SCOR, at Annex, U.N. Doc. S/14206). But it has been argued that neither State invoked the criteria of necessity and proportionality in relation to this. K.H. Kaikobad, *Jus ad Bellum: Legal Implications of the Iran-Iraq War* , *in* THE GULF WAR OF 1980-1988: THE IRAN-IRAQ WAR IN INTERNATIONAL LEGAL PERSPECTIVE 51, 61-68 (I.F. Dekker & H.H.G. Post eds., Martinus Nijhoff Publishers 1992). On closer examination, however, whilst it is arguable that they did not apply these criteria *in fact* to their actions, nonetheless both parties were careful to refer to the criteria in making their representations regarding their self-defense claims. For example, Iran stressed that it had acted "with necessary force" but no more, and only once "the Iraqi intention and design became actualized." Letter from Abolhassan Bani-Sadr, President of Iran, to the UN Secretary-General (Oct. 1 1980), *in* U.N. SCOR, at Annex, U.N. Doc. S/14206. For its part, Iraq explicitly invoked the *Caroline* formula during Security Council deliberations and argued that it had met the criteria for lawful self-defense as Webster had set them out. U.N. SCOR, 35th Sess., *supra* note 70, at 140. Thus, even where practice regarding necessity and proportionality appears lacking, States invariably provide *opinio juris* indicating that they perceive these aspects of customary international law as being binding upon them. R

[83] For example, Gardam states that "[n]ecessity is nowadays *firmly established* as a component of legitimate self-defense," and "there has been *consistent agreement* ever since the adoption of the United Nations Charter on the need for any forceful action . . . to be

Caroline formula itself, the ICJ has repeatedly and unequivocally endorsed the concepts of necessity and proportionality as elements of the customary international law governing self-defense. For example, the court stated that "[t]he submission of the exercise of the right of self-defense to the conditions of necessity and proportionality *is a rule of customary international law*."[84]

When one begins to examine the criteria of necessity and proportionality as they appear in customary international law today, it soon becomes clear that many parallels exist between these contemporary criteria and the *Caroline* formula. The requirements of necessity and proportionality, uncontroversial aspects of contemporary customary international law, can be "easily" identified in the *Caroline* exchange.[85] Given this, it is difficult to deny the influence of the *Caroline*. Equally, however, the contemporary criteria and the *Caroline* formula *are not synonymous*.

These conclusions can only be elucidated upon further by reference to the criteria of today as identified by the State practice and *opinio juris*.

B. *Necessity*

The scope of the contemporary necessity criterion is notoriously indeterminate.[86] This is largely due to the fact that, along

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proportionate," GARDAM, *supra* note 59, at 6, 11 (emphasis added). *See also*, *e.g.*, Oscar Schachter, *Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity: Remarks*, 86 AM. SOC'Y INT'L L. PROC. 39 (1992); C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law,* 81 RECUEIL DES COURS 455, 463-64 (1952); STANIMAR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 20 (1996); GRAY, *supra* note 29, at 20; Christine Gray, The Use of Force and the International Legal Order, *in* INTERNATIONAL LAW 589, 599 (Malcolm D. Evans ed., 2d ed. 2006). Though, it should be noted that there is an alternative view doubting the validity of the principles of necessity and proportionality as customary international law. *See* Joseph L. Kunz, *Individual and Collective Self-Defense Under Article 51 of the Charter of the United Nations,* 41 AM. J. INT'L L. 872, 878 (1947). R

[84] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 1 I.C.J. 226 (1996), ¶ 41 (emphasis added). *See also* Nicaragua, *supra* note 3, ¶¶ 176, 194, 237; Case Concerning Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶¶ 51 at 186-87, 76 at 198-99 (Nov. 6); Armed Activities on the Territory of the Congo (Dem. Rep. of the Congo v. Uganda), 2005 I.C.J. 116 (Dec. 19). A notable exception is the *Israeli Wall* advisory opinion, where the court briefly discussed the law on self-defense but did not refer to the requirements of necessity and proportionality. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 138-42 (Jul. 9). R

[85] DINSTEIN, *supra* note 66, at 249. R

[86] As Schachter has put it, "[t]he devil is in the details." Schachter, *supra* note 83, at 39. R

with proportionality, application of the requirement is highly context specific.[87] Thus any attempt to find a general scope to the criterion is difficult.

As noted, the concept of "necessity" can easily be identified as an aspect of the *Caroline* formula. Daniel Webster, in the letter to Lord Ashburton, held that there must be "a necessity of self-defense."[88] The *Caroline* formula further indicates that the need to respond in self-defense must be "overwhelming" and "leaving no choice of means."[89] It has been argued that the formula therefore indicates that the attack being responded to must be of a nature as to threaten fundamentally the survival of, or at least the vital interests of, a State.[90] Such an interpretation is supported by Webster's statement, elsewhere in the same letter, that "nothing less than *a clear and absolute necessity* can afford a ground of justification."[91] This would mean attacks that have a detrimental effect upon a State would not necessitate a response unless they impinge upon the continued existence of the State. It is true that States sometimes refer to a particular use of force in self-defense as being necessary to "protect its vital interests"[92] or something similar, but these are not the only circumstances where self-defense is claimed and accepted. In practice, nothing as devastating as "survival" is required before a response can be seen as legally necessary: "The reality of self-defense in inter-State relations is much more prosaic: it transcends life-or-death existential crises and impinges on a host of commonplace situations involving the use of counter-force."[93]

For example, in relation to the Falklands conflict of 1982, the military response of the United Kingdom was generally accepted as

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[87] *See* Richard R. Baxter, *The Legal Consequences of the Unlawful Use of Force under the Charter,* 62 AM. SOC'Y INT'L L. PROC. 68, 74 (1968); D.P. O'CONNELL, THE INFLUENCE OF LAW ON SEA POWER 64 (1975); GARDAM, *supra* note 59, at 21. **R**

[88] Letter from Daniel Webster to Henry S. Fox (Apr. 24, 1841), *supra* note 22, at 1138. **R**

[89] *Id*.

[90] Georg Schwarzenberger, *The Fundamental Principles of International Law,* 87 REC. DES COURS 9, 97 (1955); Kearley, *supra* note 7, at 326; DINSTEIN, *supra* note 66, at 175 (though Dinstein makes the point to rebut it). **R**

[91] Letter from Daniel Webster to Henry S. Fox (Apr. 24, 1841), *supra* note 22, at 1133 (emphasis added). **R**

[92] This was the position taken by El Salvador with regard to its conflict with Honduras in 1969. *See* Letter from Reynaldo Galindo Pohl, Permanent Representative of El Salvador to the U.N., to President of the U.N., *in* U.N. Doc. S/9330 (July 15, 1969).

[93] DINSTEIN, *supra* note 66, at 175. **R**

a lawful self-defense action,[94] yet it could hardly be claimed that the occupation of the Falklands posed a significant threat to the infrastructure or survival of the United Kingdom. Another example is the responses of Zambia, Botswana, and Zimbabwe in repelling South African forces that launched a series of attacks avowedly against African National Congress (ANC) operation centers in those States in 1986. These responses were all seen as necessary by other States.[95] Indeed, this was so accepted that it was hardly brought into question.[96] This was despite the fact that the attacks were of a comparatively minor nature and did not fundamentally threaten the stability of any of the responding States.

Therefore, the criterion of "necessity" in customary international law is not to be viewed as a requirement of "absolute necessity" or "do-or-die." Nonetheless, it can still be said that necessity is only established if the action is to be considered a "last resort."[97] A State can use force in self-defense only if there is no other option open to it to defend itself, yet this need not be to defend itself from total destruction.

However, the idea of "last resort" has two distinct interpretations. One is procedural while the other is more abstract. These are not often distinguished in the literature and are certainly not explicitly distinguished in State practice. This leads to confusion as to what is required of States when the necessity criterion is applied to particular incidents.

94 The Security Council determined that the Argentinean invasion was a "breach of the peace," S.C. Res. 502, U.N. Doc. S/RES/502 (Apr. 3, 1982), which only Panama voted against (this resolution was re-affirmed by S.C. Res. 505, U.N. Doc. S/RES/505 (May 26, 1982)). On the general acceptance by third party States of the legality of the actions of the United Kingdom in relation to the Falklands, see M.J. Levitin, *The Law of Force and the Force of Law: Grenada, the Falklands, and Humanitarian Intervention,* 27 HARV. INT'L. L. J. 621, 638 (1986). However, support for the position of the United Kingdom was not unanimous. *See* A.M. WEISBURD, USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II 52-55 (1997).

95 *See generally* U.N. SCOR, 41st Sess., 2684th mtg., U.N. Doc. S/PV 2684 (May 22, 1986); U.N. SCOR, 41st Sess., 2686th mtg., U.N. Doc. S/PV. 2686 (May 22, 1986).

96 *See generally* U.N. Doc. S/PV2684, *supra* note 95; U.N. Doc. S/PV 2686, *supra* note 95. R R

97 Thus Quigley states: "Armed force is a means of last resort." John Quigley, *The Afghanistan War and Self-Defense,* 37 VAL. U. L. REV. 541, 546 (2003). *See also* Robert Ago, *Addendum to the Eighth Report on State Responsibility*, [1980] Y.B. Int'l L. Comm'n. I.1, 65-66, U.N. Doc. A/CN.4/318, Add. 5-7; OPPENHEIM'S INTERNATIONAL LAW, *supra* note 28, at 422; 660 PARL. DEB., H.L. (5th ser.) (2004) 370 (statement made by the Attorney General of the United Kingdom to the House of Lords in 2004, at least in relation to anticipatory self-defense). R

First, it is concluded by some writers that necessity requires an *exhaustion* of means: "[T]he action must be by way of a last resort after all peaceful means *have* failed."[98] Second, it could be argued that a State must show *either* that it resorted to peaceful measures before using force or that it was not reasonable or "feasible"[99] to turn to peaceful measures at all.

Taking the first interpretation, a State would have to *demonstrate* that it has actively sought peaceful resolution prior to using force. This would imbue the necessity criterion with a procedural or administrative element,[100] akin to the oft used compromissory clause in a treaty providing the ICJ with jurisdiction over a dispute only after diplomatic negotiations have failed.[101] It has been argued that the phrase "no choice of means" from *Caroline* embodies such an interpretation of the concept of "necessity," and this has been criticized on the basis that it requires a State to exhaust all peaceful means (such as referring the matter to the Security Council) before using any force, even while a State *is being attacked*.[102]

States do at times refer to a failed attempt to negotiate when stressing that the actions that they have taken are necessary,[103] or

98 The view that force should not be employed before an exhaustion of other possible measures can be traced back to a period in which the concept of necessity had little or no legal content at all in international relations. For example, the idea appeared in the writings of Vattel, though he saw this as desirable, or what he termed "voluntary law," 3 EMMERICH DE VATTEL, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS A LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS, *translated in* THE CLASSICS OF INTERNATIONAL LAW 305 (James Brown Scott ed., Carnegie Institution of Washington 1916). Dinstein stated more recently that "reliance by the victim State on counter-force is contingent on its *first seeking in vain a peaceful solution* to the dispute," DINSTEIN, *supra* note 66, at 225 (emphasis added) (it should be noted however that elsewhere Dinstein has taken an entirely contrary view, *infra* note 99). *See also* GARDAM, *supra* note 59, at 5; Rogoff & Collins, *supra* note 30, at 498; THOMAS MANN FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 132 (2002) (here, Franck indicates that this view can be taken of necessity, though he does not explicitly subscribe to it himself). R R

99 Yoram Dinstein, *Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity: Remarks,* 86 AM. SOC'Y INT'L L. PROC. 54, 57 (1992).

100 Dino Kritsiotis, Rules on Self-Defense in International Law, Memorandum for the Royal Institute of International Affairs, London Chatham House International Law Programme 15 (Dec. 8, 2004) (unpublished memorandum, on file with author).

101 *See*, *e.g.*, Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, art. XXI ¶ 2, Aug. 19, 1955, 8 U.S.T. 899 (providing the ICJ with the basis for jurisdiction in the *Oil Platforms* case).

102 Kearley, *supra* note 7, at 326. R

103 For example, at the beginning of the 1980-1988 Iran/Iraq Gulf war, Iraq contended in a letter to the Security Council that it had "exhausted all the peaceful means at its disposal" prior to acting, as it claimed, in self-defense against Iran. Letter from Saadoun Ham-

conversely States are sometimes condemned for not having exhausted peaceful means prior to acting in self-defense.[104] On initial inspection, such practice would suggest that a peaceful means of resolution *must* first be sought before force can be lawfully employed. However, upon closer examination, it is clear that such attempts are not always taken and a failure to negotiate does not automatically lead to an action being condemned as unnecessary by third party States.[105] Further, when States refer to the fact that they have attempted to negotiate they do not indicate that they were legally bound to do so. For example, in relation to the 2001 intervention in Afghanistan, the United States made a number of demands of the Taliban regime prior to the use of force, offering

madi, Minister of Foreign Affairs of Iraq, to UN Security Council (Sept. 24, 1980), *in* U.N. SCOR, 35th Sess., Agenda Item 50, at Annex, U.N. Doc. S/14191-A/35/483 (Sept. 24, 1980). References to a prior failure of a negotiation attempt, such as this, are fairly common in practice.

104 The intervention of South Africa into other southern African States in 1986 offers a useful example: South Africa was heavily condemned for these attacks, and one of the reasons continually cited by other States demonstrating the illegality of the South African actions was that they occurred during negotiations directed by the Commonwealth Group, aimed at facilitating a peaceful resolution between the ANC, South Africa and the "frontline States." *See supra*, note 95 and accompanying text. As such, these attacks were unnecessary, as peaceful alternatives had not been exhausted. *See*, *e.g.*, U.N. SCOR, 41st Sess., 2685th mtg. at 4-6, U.N. Doc. S/PV 2685 (May 23, 1986) (quoting statements of the representative of Australia to the Security Council). *See also,* Edward Kwakwa, *South Africa's May 1986 Military Incursions into Neighboring African States*, 12 YALE J. INT'L L. 421, 432, 440 (1987); Alan Cowell, *Pretoria's Forces Raid 3 Neighbors in Move on Rebels*, N.Y. TIMES, May 20, 1986, at A1. Similarly, a number of States criticized Israel's action in Uganda in 1976 on the basis that negotiations were underway, and making progress, for the release of the hostages. *See, e.g.*, U.N. SCOR, 31st Sess., 1943d mtg. at 1-5, U.N. Doc. S/PV 1943 (July 14, 1976) (quoting statement of the Libyan representative in the Security Council).

105 This can be demonstrated by the action of the Seychelles in repelling from its territory mercenaries directed by South Africa. This action was commended by all members of the Security Council in 1981. For example, the representative of Tanzania stated: "We cannot conclude this statement without paying special tribute to the gallant people of Seychelles for what they have done on behalf of Africa. South Africa's defeat at the hands of the revolutionary forces of Seychelles is the act of a courageous people who love their independence and are willing to defend it." U.N. SCOR, 37th Sess., 2365th mtg. at 9140, U.N. Doc. S/PV 2365 (May 24, 1982). This unanimous support was given without any question being raised as to whether the Seychellois response was necessary, see generally, U.N. SCOR, 36th Sess., 2314th mtg., U.N. Doc. S/PV 2314 (Dec. 15, 1981); U.N. SCOR, 37th Sess., 2359 mtg., U.N. Doc. S/PV 2359 (May 20, 1982); U.N. SCOR, 37th Sess., 2631st mtg., U.N. Doc. S/PV 2631 (May 21, 1982); U.N. SCOR, 37th Sess., 2637th mtg., U.N. Doc. S/PV 2367 (May 25, 1982), despite the fact that no means other than forcible action were employed, or seemingly even considered, see, e.g., Letter from Jacques Hodoul, Foreign Minister of the Rep. of Sey., to the Security Council (Nov. 26, 1981), *in* U.N. SCOR, 36th Sess., U.N. Doc. S/14769/Corr.1 (Nov. 27, 1981).

ultimatums if these were not met. The Taliban rejected these demands.[106] Yet, there was no indication that the United States felt itself required to resolve the matter without the use of force, or that it saw these ultimatums as anything other than politically or strategically relevant. Indeed, it has been argued that the United States had a number of possible non-forcible options open to it with regard to Afghanistan, which it failed to explore, meaning that Operation Enduring Freedom was unnecessary.[107]

As such, the failure to exhaust all peaceful means is not legally determinative as to whether a response was necessary or unnecessary. It is not a requirement that a State attempt negotiation prior to launching a forcible response or wait for the Security Council to conclude a debate on an issue before acting.[108] These factors are merely evidence, albeit strong evidence, of necessity. Indeed, such a requirement of peaceful negotiation seems unrealistic in the reality of international disputes involving force. There may not be the time for negotiation or even complaint on the part of a defending State before force in defensive response is necessary.[109]

Therefore, we turn to the second interpretation of whether an action was taken as a "last resort": a State must show *either* that it resorted to peaceful measures before using force or that it was not reasonable for it to do so. It may be that, in the case of a large scale attack or an invasion of the defending State's territory, this is proved *per se*.[110] Whether this is the case or not, the requirement of "last resort" will be met so long as it may be established that it

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[106] *See* Rajiv Chandrasekaran, *Afghan Clerics Suggest Exit for Fugitive; Taliban Leader is Encouraged to Seek Bin Laden's Voluntary Departure*, WASH. POST, Sept. 21, 2001, at A1; Rajiv Chandrasekaran, *Taliban Rejects U.S. Demand, Vows a 'Showdown of Might,'* WASH. POST, Sept. 22, 2001, at A1.

[107] Quigley, *supra* note 97, at 546-48. **R**

[108] Indeed, Article 51 provides that self-defense can be taken "until the Security Council has taken measures necessary to maintain international peace and security," implying that there is no need to wait in the hope that the Security Council may resolve the matter peacefully. U.N. Charter art. 51.

[109] Schachter, *supra* note 28, at 1635. This would appear to have been the case in the above example of the mercenary intervention in the Seychelles, *supra* note 105. **R** **R**

[110] Indeed, Schachter concludes that in cases where the territory of a State is attacked in this manner necessity will *always* be established *per se*. SCHACHTER, *supra* note 60, at 152. The author takes the more cautious position adopted by Kenny, which is that an attack on the territory of a State creates the "strong presumption" that a forcible response will be necessary. Kevin C. Kenny, *Self-Defence, in* 2 UNITED NATIONS: LAW, POLICIES AND PRACTICE 1162, 1168 (Rudiger Wolfrum & Christiane Philipp eds., 1995). Similarly Dinstein states: "When a war of self-defense is triggered by an all out invasion, the issue of necessity *usually* becomes mute," DINSTEIN, *supra* note 66, at 237 (emphasis added). **R** **R**

would have been unreasonable to expect the defending State to attempt to employ means other than force to resolve the situation. Thus the statement from the *Caroline* exchange arguing that there must be "no choice of means" should be interpreted to mean that the criterion of necessity requires that the defending State has "no *reasonable* choice of means."[111] If an attack is of such a character that it would not be reasonable to expect a State to seek alternative non-forcible means of defensive response, then it would appear that the responding State does not need to do so. This was phrased in the "Principles of International Law on the Use of Force by States in Self-Defense" document prepared by the Chatham House International Law Programme in 2005: "There must be no *practical* alternative to the proposed use of force that is likely to be effective in ending or averting the attack."[112]

It should be noted that this is not an alteration of the famous phrase from the *Caroline* as such. By looking more closely a Webster's formula, we see that he envisaged the possibility of it not being reasonable for a State to first resort to peaceful measures: "It must be shown that admonition or remonstrance to the persons on board the *Caroline* was *impracticable*, or would have been *unavailing*."[113]

However, having examined the way necessity has been applied in the UN era, it is perhaps too stringent to hold that the need to respond must be "overwhelming" (to use Webster's terminology), unless "overwhelming" is taken to be a bland synonym for "necessary." Interpreting "overwhelming" to mean "fundamental" or "total" we see that this aspect of the *Caroline* formula may paint an inaccurate picture of the contemporary necessity criterion, at least in relation to self-defense taken in response to an actual attack. Instead, it is more accurate to conclude that there must be a "reasonable" need to respond with force based upon a balancing of States' rights and interests against the general prohibition of the use of force.

Therefore it can be seen that in the case of the necessity requirement, there are, at the very least, differences in emphasis between the criterion as it is applied today and the phrases used by

[111] Here "means" is used to refer to *military force* generally, as opposed to, for example, the specific type of weapon employed.

[112] CHATHAM HOUSE, *supra* note 32, at 7 (emphasis added). R

[113] Letter from Daniel Webster to Henry S. Fox (Apr. 24, 1841), *supra* note 22, at 1138 (emphasis added). R

Daniel Webster. However, the criterion of necessity itself is to be found in the *Caroline* correspondence and its content still remains similar to the *Caroline* formula in many respects.

C. *Proportionality*

If anything, the proportionality requirement is even less well defined in the context of the *jus ad bellum* than the necessity criterion.[114] The difficulty here is in establishing to what the response taken must be proportional. In other words, how does one calculate proportionality?

There are two distinct but related possibilities. Is the use of force taken in response to be commensurate with (1) the scale and means of the attack being responded to (in terms of destruction of life and property)[115] or (2) the defensive requirements of the defending state (meaning that the measures taken are proportional to the ultimate goal of abating the attack suffered)? These methods of assessing proportionality cannot be neatly separated, and in reality both of them affect whether a use of force in self-defense will be considered "proportional" to some degree.

In this context, the *Caroline* correspondence offers little guidance as to how proportionality is to be assessed, with the key phrase being "excessive;" whether this means excessive in the context of the nature of the attack or the goal of ending the attack is hard to determine. Closer analysis of Webster's formulation suggests that the proportionality question is related to the right of the victim State to defend itself, rather than to the specifics of the particular attack that it is defending itself against: 'the act justified by

[114] There are a number of possible reasons for this. It may be that once force has been initiated, States regard the proportional nature of action as being regulated by the *jus in bello*, where the proportionality requirement is much more strictly defined. Alternatively, it may be that there is a reluctance on the part of States to engage with the proportionality requirement in the context of self-defense, in that it places an unfair burden upon the defending State: in theory, the attacking State is already in breach of international law, and therefore has no incentive to act in a proportionate manner in the context of the *jus ad bellum*, in contrast to the situation in international humanitarian law, whilst the defending State does. Thus the criterion is given little elucidation by States. GARDAM, *supra* note 59, at 24-25. **R**

[115] This method of assessing proportionality has also been referred to as a determination based upon "a strictly symmetric reaction". TARCISCIO GAZZINI, THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW 148 (2005).

the necessity of self-defense must be limited *by that necessity*, and kept clearly within it."[116] Yet, this interpretation is not conclusive.

An analysis of practice does offer some guidance as to how the proportionality criterion is to be applied. In the majority of cases, States appear to refer to proportionality as requiring equivalence between the response and the level of force required to abate the attack being responded to, not as an equivalence of scale or means between the response and the attack being responded to. In other words, a response in self-defense must be both necessary and proportional *to that necessity*.

For example, in the Indo-Pakistani conflict over Kashmir in 1947-1948, Pakistan made it clear that it was responding with a degree of force necessary to protect its security, and saw itself as limited to not going beyond this level.[117] It seemingly accepted that this may go beyond an equivalence of scale or means with regard to the deployment of Indian forces. It should be noted, however, that Pakistan's action was not accepted as lawful by all third party States.[118] In the same conflict, India's initial response was taken to combat irregular Pathan tribesmen, apparently directed by Pakistan.[119] In combating this with a full-scale regular armed response (which itself was similarly responded to by Pakistan), India appeared to take action that was disproportionate in terms of scale and means, given the comparatively limited number of Pathan tribesmen located in Kashmir. However, this action may be viewed as being commensurate to the goal of abating the tribal forces, in that the sporadic and targeted attacks of the tribesmen would have been difficult to respond to with a force of an equivalent size. The members of the UN Security Council implicitly accepted India's action.[120]

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116 Letter from Daniel Webster to Henry S. Fox (Apr. 24, 1841), *supra* note 22, at 1138 (emphasis added). R

117 U.N. SCOR, 5th Sess., 464th mtg. at 29, U.N. Doc. S/PV.464 (Feb. 8, 1950). It should be noted that this position was not put forward in a clearly legal context, thus it should be treated with care.

118 See, for example, Statements of China in the Security Council, U.N. SCOR, 5th Sess., 471st mtg. at 13, UN Doc. S/PV.471 (Apr. 12, 1950).

119 Rathnam Indurthy, *Kashmir Between India and Pakistan: An Intractable Conflict, 1947 to Present* 2-3, *available at* http://www1.appstate.edu/~stefanov/Kashmir%20Between%20India%20and%20Pakistan.pdf; *see generally*, SISIR GUPTA, KASHMIR: A STUDY IN INDIA-PAKISTAN RELATIONS 1-439 (1996).

120 As shown by S.C. Res. 47, ¶ 12, U.N. Doc. S/RES/726 (Apr. 21, 1948), which allowed India to maintain its presence in Kashmir, while demanding a Pakistani withdrawal.

By invoking self-defense in the context of its clashes with Tunisia on Tunisian territory in 1958, France stressed that its forces were legally entitled to use "all means at their disposal" to abate the "attacks" its troops had suffered.[121] More recently, it was in general accepted that the British action in the Falklands conflict was proportional to the incursion of its territory by Argentina.[122] Here the Security Council passed Resolutions demanding that Argentina withdraw from the islands.[123] It has been argued that the action taken by the United Kingdom was designed to be proportional to securing this goal, given the Security Council's implicit acceptance of its position.[124] A similar point has been made regarding the Gulf conflict of 1991, following Resolutions 660 and 661.[125] In this case the action of the coalition can be seen to be an attempt to achieve compliance with these Resolutions, and the Security Council accepted that "all necessary means" could be employed in self-defense to secure an Iraqi withdrawal from Kuwait.[126] Thus the representative of the United Kingdom to the Security Council during the Gulf conflict of 1991 stated "the nature and scope of military action is dictated not by some abstract set of criteria but by the military capacity of the aggressor, who has refused all attempts to remove him from Kuwait."[127]

This suggests that the question was seen as being an assessment of what was necessary to liberate Kuwait, given the capacity of Iraq.

Finally, the Israeli action directed at the militant group Hezbollah, in Lebanese territory, in 2006, offers a useful example, not least because this action was far from universally accepted as a proportional one taken in self-defense. Indeed, it may be said that the main basis for legal criticism of that action was the disproportionate nature of the response taken.[128] Interestingly, when the

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121 U.N. SCOR, 13th Sess., 819th mtg. at 16, U.N. Doc. S/PV.819 (June 2, 1958).

122 *See supra* text accompanying note 94. **R**

123 S.C. Res. 502, ¶ 2, U.N. Doc. S/RES/501 (Apr. 3, 1982).

124 GARDAM, *supra* note 59, at 159. **R**

125 *Id*.

126 This language is used in S.C. Res. 678, ¶ 6, U.N. Doc. S/RES/678 (Nov. 29, 1990).

127 U.N. SCOR, 46th Sess., 2977th mtg. at 73, U.N. Doc. S/PV. 2977 (Part II) (Feb. 14, 1991).

128 For example, in a speech to the Security Council, the UN Secretary-General affirmed Israel's right to use force in self-defence given the attacks upon it and its nationals by Hezbollah, but argued that the Israeli response was "excessive." *See* U.N. SCOR, 61st year, 5492d mtg. at 3, U.N. Doc. S/PV.5492 (July 20, 2006).

Russian Federation argued that the Israeli action did not meet the test for proportionality in self-defense, it implicitly indicated how it perceived that test should be calculated. The Russian representative in the Security Council argued that the "scale of the use of force" went well beyond that necessary for "achieving this purpose . . . [of] a counter-terrorist operation."[129] For its part, Israel stated in an official release of its Ministry of Foreign Affairs that:

> One important principle established by international law. . .is that the proportionality of a response to an attack is to be measured not in regard to the specific attack suffered by a state but in regard to what is necessary to remove the overall threat.[130]

As such, Russia and Israel took the same position as to the method by which the proportionality aspect of self-defense is to be calculated, despite reaching different conclusions based on the facts as to whether the criteria had been fulfilled in the case of the Lebanon conflict.

These incidents indicate to some degree that in application, the proportionality criterion requires an equivalence between the response taken in self-defense and the goal of abating the attack being responded to.[131] However, an understanding of the proportionality criterion is not this simple. There is equally practice that would seem to run contrary to this idea. In the context of the East Pakistan conflict of 1971, Pakistan clearly viewed India's actions as disproportionate given the scale of their activity. The Pakistani ob-

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129 U.N. SCOR, 61st year, 5493d mtg. at 2, U.N. Doc. S/PV.5493 (Resumption 1) (July 21, 2006).

130 Israel Ministry of Foreign Affairs, Responding to Hezbollah Attacks from Lebanon: Issues of Proportionality, July 25, 2006, http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Responding+to+Hizbullah+attacks+from+Lebanon-+Issues+of+proportionality+July+2006.htm. Further, in its letter invoking self-defense sent jointly to the Secretary-General and the President of the Security Council, Israel was careful to set out the 'goals' of its action in Lebanon, although it did not explicitly link these to the issue of proportionality. Letters from Dan Gillerman, Ambassador and Permanent Representative of Israel to the UN Secretary-General and President of the Security Council (July 12, 2006), *in* U.N. Doc. A/60/937-S/2006/515.

131 In addition to this, it has been argued that the discussion of the proportionality criterion by the ICJ in the *Nuclear Weapons* advisory opinion supports this interpretation, *see Nuclear Weapons*, *supra* note 84, particularly ¶ 42; Christopher Greenwood, Jus ad Bellum *and* Jus in Bello *in the Nuclear Weapons Advisory Opinion*, *in* INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 247, 259 (Laurence Boisson de Charzournes & Philippe Sands eds., 1999) though this cannot definitely be said to be the case. Judge Higgins certainly interpreted the requirement this way in her dissenting opinion to the decision, *Nuclear Weapons*, *supra* note 84, at ¶ 5 (Higgins, J., dissenting). However, Judge Weeramantry appeared to take a contrary view. *Id.* at 514-16 (Weeramantry, J., dissenting).

jection was based upon the fact that India's action was disproportional to the attacks it claimed Pakistan had instigated against it in terms of the scale of those attacks, not in relation to what was required to abate them.[132] In relation to the Israeli incursions into Lebanon in February 1972, Argentina argued that this conduct was disproportionate "in terms of the scale of the action."[133] Similar points were made by the representatives of France[134] and Sudan.[135] In relation to the 2002 Korean naval clash, North Korea indicated that it had acted in self-defense, as evidenced by the fact that it had responded in kind to an attack by the South, in terms of *means* and *scale*.[136]

On analyzing the practice, it seems that, in the main, States refer to equivalence between the response taken and the goal of restoring security, rather than the *scale* employed. Thus Wedgwood has pointed out that "in the exercise of self-defense, a country is not limited to a predetermined ratio or exact relation between the acts of provocation and the force used in response."[137] This is the position taken by several scholars.[138] However, in many cases, States do also refer to the scale or means of the response as being relevant to proportionality. This makes sense, as the two methods of assessing proportionality are necessarily linked. A response that is disproportionate in scale to the initial attack is also likely to be disproportional to the goal of abating that attack.

132 *See* U.N. SCOR, 26th Sess., 1606th mtg. at 9, U.N. Doc. S/PV.1606 (Dec. 4, 1971), and particularly U.N. SCOR, 26th Sess., 1607th mtg. at 13, U.N. Doc. S/PV.1607 (Dec. 5, 1971).

133 U.N. SCOR, 27th Sess., 1644th mtg. at 3, U.N. Doc. S/PV.1644 (Feb. 28, 1972).

134 U.N. SCOR, 27th, Sess., 1650th mtg. at 2, U.N. Doc. S/PV.1650 (June 26, 1972).

135 *Id.* at 19.

136 *North and South Korea Trade Accusations*, BBC NEWS, June 29, 2002, http://news.bbc.co.uk/1/hi/not_in_website/syndication/monitoring/media_reports/2074074.stm

137 Ruth Wedgwood, *Proportionality and Necessity in American National Security Decision Making,* 86 AM. SOC'Y INT'L L. PROC. 58, 59 (1992).

138 *See, e.g.,* AGO, *supra* note 97, at 69; ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 232 (1994); MYERS S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 242 (1961); O'CONNELL, *supra* note 87, at 64; Edward Miller, *Self-Defense, International Law and the Six Day War,* 20 ISRAELI L. REV. 49, 71 (1985); GARDAM, *supra* note 59, at 142, 161; Christopher Greenwood, *New World Order or Old? The Invasion of Kuwait and the Rule of Law*, 55 MOD. L. REV. 153, 164 (1992) (This is implicit. It is argued that an armed attack continues until it is repulsed, indicating that abatement is what is to be considered in relation to the proportionality requirement). This is also the view taken in the CHATHAM HOUSE, *supra* note 32, at 10.

R R R R

For example, during the Falklands conflict the United Kingdom took the decision not to attack mainland Argentina.[139] How far this was a decision based on the legal restraints of proportionality and how far it was due to political prudence is debatable.[140] Nonetheless, in this context, such an attack, had it occurred, could potentially be seen to be disproportionate both in terms of the scale of force *and* in terms of what was necessary to abate the attack on the islands.[141]

Therefore, the question is not merely one of balancing the response with the legitimate defensive aims of responding: it would seem that there is also a need for States to ensure a level of equivalence in terms of the scale of their activity to that of the initial attack. Dinstein suggests that both methods of assessing proportionality are employed but in different contexts. For him there is a distinction between single uses of force in self-defense, what he terms "defensive armed reprisals," and a "full scale war of self-defense."[142] In the former case, the question is simply one of scale; in the latter proportionality is to be assessed with regard to the general goal of abatement.[143] Such a distinction is hard to support in practice. Instead, States employ a combination of the two methods in assessing proportionality, whether their self-defense action constitutes a solitary response or the entrance into full-blown conflict. However, from our study above it would appear that the *primary* equation is based upon the defensive goal to be achieved.

This combination of methods one and two above provide a dual aspect to the proportionality criterion.[144] It is under this complex construction of proportionality that the goal of securing against future attacks may be acceptable, even if the action taken to ensure this is in some measure disproportionate in scale to the initial attack (thus allowing States to cross the border into the terri-

139 21 PARL. DEB., H.C. (6th ser.) (1982) 1045.

140 Christopher Greenwood, *Self-Defense and the Conduct of International Armed Conflict*, *in* INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE 69, 277 (Yoram Dinstein & Mala Tabory eds., 1989).

141 HIGGINS, *supra* note 138, at 232. R

142 Dinstein, *supra* note 99, at 57. R

143 *Id*. (using Pearl Harbor as an illustration).

144 This idea of a dual method of calculating proportionality by reference to both scale *and* the goal of the self-defense action appears to have been advanced by the Attorney General of the United Kingdom, at least in relation to anticipatory self-defense. 660 PARL. DEB., H.L. (5th ser.) (2004) 370.

tory of the invading State to repel them beyond the frontier).[145] However, some equivalence of scale must be taken into account, meaning that attacks that are wholly disproportionate in terms of scale (such as regime change) are unlikely to be legally proportional.[146]

This lengthy discussion of the proportionality criterion has been undertaken specifically to highlight the complexity of the requirement and the inherent difficulty in applying it. Even following an in-depth appraisal of practice, the scope of the proportionality criterion is far from clear. In contrast, *Caroline* is clear but offers no insight into how to calculate or apply proportionality; it does little more than identify the requirement that action of self-defense should not be "excessive." Thus simply invoking the *Caroline* is of limited practical use in terms of the application of the proportionality criterion to self-defense actions today. Nonetheless, the *Caroline* formula is a useful *starting point* for understanding this area of the law.

D. *Imminence and Immediacy*

It is convenient for a number of reasons to examine the temporal elements of imminence and immediacy under a separate heading from either "necessity" or "proportionality." However,

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145 For example, the reaction to the U.S. led forces crossing the 38th Parallel into North Korea during the 1950 Korean conflict. Here, this action was in general accepted as lawful, despite seeming disproportionate in terms of scale, *see*, *e.g.*, U.N. SCOR, 5th year, 496th mtg. at 5, U.N. Doc. S/PV 496 (Aug. 22, 1950) (statement of Mr. Blanco, Cuban representative to Security Council). However, there was some dissent to the action, *see*, *e.g.*, U.N. SCOR, 5th year, 489th mtg. at 3, U.N. Doc. S/PV 489 (Aug. 22, 1950), and of course, it is highly debatable whether the legal basis of the action taken in Korea was UN authorized collective security or a self-defense action on the part of the United States and its allies. Some scholars certainly take the latter view. *See*, *e.g.*, JULIUS STONE, AGGRESSION AND WORLD ORDER 189 (1958); T.H. YOO, THE KOREAN WAR AND THE UNITED NATIONS: A LEGAL AND DIPLOMATIC HISTORICAL STUDY 104-5 (1965).

146 This is well-evidenced by the international reaction to India's 1971 intervention into East Pakistan, the U.S. action in Grenada in 1983, and the U.S. action in Panama in 1989, all of which were condemned as disproportional. However, there is contrary practice. For example the acceptance of the 2001 coalition intervention in Afghanistan, *infra*, note 176, or Tanzania's intervention in Uganda in 1971. Here, the reaction of third party States was in general supportive of Tanzania's action, and if not it was at least neutral. For example, the United States, the United Kingdom, the PRC, India, Botswana, Ethiopia, Mozambique and Zambia all recognized the new Ugandan regime almost immediately upon its constitution, *see* WEISBURD, *supra* note 94, at 41, and even the USSR, the main supplier of arms to the Amin regime, and its staunchest supporter in the international arena, defined Tanzania's action as a "countermeasure." GARY KLINTWORTH, VIETNAM'S INTERVENTION IN INTERNATIONAL LAW 51 (1984); KEESING'S WORLDWIDE ONLINE, June 22, 1979, at 25. R

these elements should perhaps not be viewed as being "separate" as such from the criteria already discussed, but rather are better seen as forming elements of the general requirement that any self-defense action be necessary and proportionate.[147]

Returning to Webster's formula, it will be recalled that he held that self-defense can only be exercised in situations where the need to respond is "instant . . . leaving . . . no moment for deliberation."[148] This phrase obviously indicates that Webster viewed temporal proximity as being relevant to the question of self-defense in the *Caroline* episode. It is also worth noting Andrew Stevenson's letter to Lord Palmerston, where he stated that, for self-defense, "the necessity must be *imminent* and extreme."[149]

In examining the temporal elements of the customary international law regarding self-defense, it is important to keep in mind that the correspondences regarding the *Caroline* concerned a claim of what would today be classed as "anticipatory" self-defense.[150] The *Caroline* was supplying rebels who were yet to attack Canadian territory. Therefore, the terms employed by Webster and Stevenson indicate a need for a temporal connection between the *threat* of attack and the response to it: a threat must be "imminent."

147 For example, when the idea of immediacy forms part of State practice, this is often done in the context of the requirement of necessity. Thus, the South African attacks of 1986 against alleged ANC bases were criticized as being *unnecessary* because there had been no attacks by the ANC in or against South Africa in the weeks preceding the action. *See* Alan Cowell, *Pretoria's Forces Raid 3 Neigbors in Move on Rebels*, N.Y. TIMES, May 20, 1986, at A1. The *Nicaragua* case supports this view; here, the ICJ reached the conclusion that the actions of the United States could not be seen as necessary upon the facts. One reason given by the Court for this brief finding was that the measures taken *vis-à-vis* the contras were only instigated months after the armed opposition in El Salvador had been repulsed. Nicaragua, *supra* note 3, ¶ 237. In so doing, the Court linked the necessity criterion to the speed of the response taken following an actual attack. However, it should be noted that some scholars have identified an "immediacy" or "imminence" criterion as being *separate* from necessity and proportionality. DINSTEIN, *supra* note 66, at 237-44; DINSTEIN, *supra* note 99, at 57; Kenny, *supra* note 110, at 1167-68; AVRA CONSTANTINOU, THE RIGHT OF SELF-DEFENSE UNDER CUSTOMARY INTERNATIONAL LAW AND ARTICLE 51 OF THE UN CHARTER 157 (2000). R R R

148 Letter from Daniel Webster to Henry S. Fox (Apr. 24, 1841), *supra* note 22, at 1138. R

149 Letter from Andrew Stevenson to Lord Palmerston (May 22, 1838), *supra* note 17 (emphasis added). Of course, Stevenson's letter is not referred to by either States or scholars as representing contemporary customary international law in the way that Webster's has been but it is a useful corroboration of the U.S. legal position regarding the *Caroline* and the importance of an idea of temporality in relation to self-defense. R

150 Having said this, the idea that the *Caroline* incident was an instance of anticipatory self-defense has been questioned. *See supra* note 61. R

It is beyond the scope of this paper to reach a conclusion upon lawfulness of a forcible action taken in response to a *threat*, rather than an actual attack. However, at this juncture, it is necessary to briefly refer to the idea of "imminence" with regard to such self-defense claims. This is because the concept of temporal proximity in self-defense claims made where no attack has yet occurred stems from the *Caroline* formula, and forms an aspect of the criterion of necessity and proportionality, which should not be ignored in the current analysis.

For our purposes it is useful to make a distinction at this point between claims of "anticipatory self-defense" (where a threat is claimed to be imminent) and "pre-emptive-self-defense" (where the perceived threat is more temporally remote).[151] By looking at State practice since 1945, it is apparent that neither type of claim is made often.[152] Nonetheless, in cases where self-defense has been

[151] The terminology with regard to claims of self-defense where no actual attack has occurred is somewhat confused in the literature, with the terms "anticipatory" and "pre-emptive" self-defense sometimes used synonymously and at other times used to express different meanings. For clarity, the present author employs the following method in treating these phrases as terms of art: "anticipatory self-defense" is used to refer to action taken in response to an *imminent* threat, whilst "pre-emptive self-defense" is employed in reference to action taken in response to a perceived threat that is more temporally remote. This distinction is noted *but not employed* by Greenwood, *supra* note 77, at 9. In addition, the term "*preventative* self-defense" is used to refer to *any* self-defense claim made in relation to a threat rather than an actual attack (meaning either anticipatory or pre-emptive claims). R

[152] Gray discusses this point, and rightly indicates that many of the incidents cited by writers as amounting to examples of anticipatory self-defense were not in fact justified as such by the States involved. GRAY, *supra* note 29, at 130-32. For example, the actions of Israel during the 6 Day War, despite in many respects having the appearance of preventative action, were in general justified as responses to actual attacks: certainly this was Israel's *primary* argument, however divorced from the facts such an argument might have been. *See*, *e.g.*, U.N. SCOR, 22d Sess., 1348th mtg. at 71-92, U.N. Doc. S/PV.1348 (June 6, 1967). Gray similarly identifies the Cuban Missile Crisis as an example of this. GRAY, *supra* note 29; *see also* Gardner, *supra* note 77, at 587-88. Having said this, it might be suggested that there are some genuine examples of anticipatory self-defense claims that Gray does not refer to in this context (an example being the intervention by the United Kingdom in Jordan in 1958, *infra*, text accompanying note 154). Additionally, it is worth noting here that it is often the case that when States make a claim regarding anticipatory self-defense, they couple this with a claim in relation to attacks that have already occurred, so as to strengthen the argument. The most recent and prominent example of this is the United States led intervention in Afghanistan in 2001; here, the United States put forward the dual claim that action was taken "[i]n response to these attacks [of 11 September 2001]" and also was "designed to prevent and deter further attacks on the United States," Letter from Permanent Representative of the United States to the United Nations addressed to the President of the Security Council (Oct. 7, 2001), *in* U.N. SCOR, 5th Sess., U.N. Doc. S/2001/946. However, it is worth noting that this is not a new practice. For R R

argued in relation to a threat, States refer to the concept of a threat, which was *imminently* apparent, much as Webster outlined.

The classic example is the Israeli attack upon the Iraqi Osiraq nuclear reactor in June 1981. Here, Israel explicitly justified its action as self-defense in response to a threat.[153] In doing so, it stressed that the danger posed by the Iraqi reactor was imminent, in that if it had not been destroyed at that time, it would have been impossible to destroy it at all.[154] States almost universally condemned the action.[155] However, it is notable that a number of States did so on the basis that the threat to Israel was not imminent.[156] Of course, many other States argued that the action was unlawful because self-defense against a threat was unlawful *per se*.[157]

In 1958, well before the Osiraq incident, the United Kingdom justified its military operation in Jordan with what amounted to a fairly unique claim of *collective anticipatory self-defense*, in that it argued it was there to protect Jordan against an attack that was yet to manifest itself.[158] In support of this claim, however, Jordan was very clear to stress that the threat against it was an imminent

example, Pakistan justified its Kashmir operation of 1948 as both a preventative action and as a response to an alleged Indian "act of aggression." U.N. SCOR, 5th Sess., 464th mtg., at 1-31, U.N. Doc. S/PV.464 (Feb. 8, 1950).

153 *See*, *e.g.*, U.N. SCOR, 36th Sess., 2288th mtg. at 32, U.N. Doc. S/PV.2288 (June 12, 1981).

154 Israel apparently argued that even though an *actual nuclear strike against it* was not imminent, a state of affairs whereby Israel would not be able to stop such an attack *was* imminent. U.N. SCOR, 36th Sess., 2280th mtg. at 44-48, U.N. Doc. S/PV.2280 (June 12, 1981) [hereinafter U.N. SCOR 2280].

155 For example, this was pointed out by the representative of Bulgaria during the course of its own condemnation of Israel in the Security Council. U.N. SCOR, 36th Sess., 2281st mtg. at 8-9, U.N. Doc. S/PV.2281 (June 13, 1981). Twenty-five individual States addressed letters of condemnation regarding the attack to the President of the Security Council (these documents can be found within the symbol range U.N. Doc. S/14531-S/14560).

156 *E.g.*, Ireland, U.N. SCOR, 36th Sess., 2283d mtg. at 8-11, U.N. Doc. S/PV.2283 (June 15, 1981) [hereinafter U.N. SCOR 2283d]; Niger, U.N. SCOR, 36th Sess., 2284th mtg. at 5, U.N. Doc. S/PV.2284 (June 16, 1981); Sierra Leone, U.N. SCOR, 2283d mtg. at 53-56; China, U.N. SCOR, 36th Sess., 2282d mtg. at 32, U.N. Doc. S/PV.2282 (June 15, 1981). *See also,* Anthony D'Amato, *Israel's Air Strike against the Osiraq Reactor: A Retrospective,* 10 TEMP. INT'L & COMP. L. J. 259, 261 (1996) (pointing out that the Osiraq attack could never qualify as an action meeting the *Caroline* formula's temporal restriction).

157 See the statements made in the Security Council by the representatives of Brazil, U.N. SCOR, 36th Sess., 2281st mtg. at 21, U.N. Doc. S/PV.2280 (June 13, 1981); the Soviet Union, which referred to such actions as "the law of the jungle"; U.N. SCOR 2283, *supra* note 156; and Pakistan, U.N. SCOR 2281, at 32. **R**

158 U.N. SCOR, 13th Sess., 831th mtg. at 12-15, U.N. Doc. S/PV 831 (July 17, 1958).

one.[159] The United Kingdom itself made a similar point, though less explicitly.[160] In the same way, so far as Pakistani action in Kashmir in 1948 was justified as a preventative action,[161] that State made it clear that this was in response to "imminent danger that threatened the security of Pakistan."[162]

Therefore, whilst anticipatory self-defense is far from being universally accepted as lawful, those States that do support the doctrine in general employ the concept of imminence as a vital part of establishing the lawfulness of such action.[163] This idea of imminence links directly to the *Caroline* formula. Following the atrocities of September 11, however, the concept of self-defense against a *non-imminent* threat (or to use the terminology previously employed, "pre-emptive self-defense") has been put forward, particularly by the United States. The infamous National Security Strategy of 2002 made the arguable claim that "[f]or centuries, international law recognized that nations need not suffer an attack before they can lawfully take action themselves against forces that present an imminent danger of attack."[164] However, the document then went further, arguing that:

> We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. . . . The greater the threat, the greater is the risk of inaction–and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack.[165]

This so called "Bush Doctrine" of pre-emptive self-defense (which seeks to abandon the "imminence" criteria) is somewhat novel[166] and has generally not been accepted.[167] Although Operation Iraqi

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159 *Id*. at 16.

160 While Jordan actually used the term "*imminent* foreign armed aggression," the United Kingdom merely stated that the situation was one of "extreme urgency." *Id*. at 16.

161 U.N. Doc. S/PV.464, s*upra* note 152. **R**

162 U.N. SCOR, 5th Sess., 464th mtg. at 30, U.N. Doc. S/PV.464 (Feb. 8, 1950).

163 Thus, whilst Gazzini does not conclude upon the lawfulness of preventative self-defense one way or another, he does hold that such action may be lawful once the point is reached where there is a "concrete and immediate threat." GAZZINI, *supra* note 115. **R**

164 THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (Sept. 2002), http://www.whitehouse.gov/nsc/nss.pdf.

165 *Id.*

166 Though it is not entirely novel, see GAZZINI, *supra* note 115. **R**

167 Miriam Sapiro, *Iraq: The Shifting Sands of Pre-emptive Self-Defense,* 97 AM. J. INT'L L. 599 (2003); Greenwood, *supra* note 77, at 12-16. Though, of course, some scholars have argued that Operation Iraqi Freedom was a lawful action of preventative self-defense (or more accurately, that it could have been argued as such), *e.g.*, John Yoo, *International Law* **R**

Freedom was ultimately justified on the basis of Security Council authorization,[168] pre-intervention indications that the United States may attempt to justify the action as self-defense[169] were met with negative responses from States. One of the main objections to this was that Iraq posed no imminent threat. For example, Iran stated in March 2003 that:

> [t]he unilateral war against Iraq does not meet any standard of international legitimacy. It is not waged in self-defense against any prior armed attack. Nor, even by any stretch of the imagination, could Iraq, after 12 years of comprehensive sanctions, be considered an imminent threat against the national security of the belligerent Powers.[170]

Similarly, Yemen condemned the concept of "[l]aunching war against others solely on the basis of reading their intentions . . . ."[171] Such statements echo the concerns raised by States regarding a lack of imminence with regard to Israel's action in 1981.

Indeed, the terminology employed in the National Security Strategy itself indicates that customary international law as perceived by the United States in 2002 required that responses against threats could only be taken if such threats were "imminent." The United States was arguing in that document that imminence was a requirement that should be revised[172] (and would, if the United

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and the War in Iraq, 97 AM. J. INT'L L. 563, 571-74 (2003). Yoo makes the claim that imminence *is* required for preventative action to be lawful, but that "imminence" does not in customary international law refer to "temporal proximity." *Id*. at 572; *see also* A.D. Sofaer, *On the Necessity of Pre-Emption,* 14 EUR. J. INT'L L. 209 (2003).

168 The U.S. formal legal justification for Operation Iraqi Freedom was contained in a letter dated 20 March 2003 addressed to the President of the Security Council. Letter from John D. Negroponte, to Pres. of the Security Council (Mar. 21, 2003), *in* U.N. Doc. S/2003/351. The arguments of the United Kingdom, Letter from Jeremy Greenstock to Pres. of the Security Council (Mar. 21, 2003), *in* U.N. Doc. S/2003/350, and Australia, Letter from John Dauth to Pres. of the Security Council (Mar. 20, 2003), *in* U.N. Doc. S/2003/352, made to the Security Council mirror this argumentation.

169 *See*, *e.g.*, Authorization for the Use of Military Force against Iraq, H.J. Res. 114, 107th Cong., 116 Stat. 1498, 1499, 1501 (2002).

170 U.N. SCOR, 58th Sess., 4726th mtg. at 33, U.N. Doc. S/PV.4726 (Mar. 26, 2003) [hereinafter U.N. SCOR 4726].

171 U.N. SCOR, 57th Sess., 4625th mtg. at 14, U.N. Doc. S/PV.4625 (Oct. 16, 2002). *See also Id.* at 8 (statements made on the issue by Malaysia); *Id.* at 32 (statements made on the issue by Vietnam).

172 Or as it was put in the document, "adapted." THE NATIONAL SECURITY STRATEGY, *supra* note 164, at 15. R

States felt it necessary, be ignored),[173] *not that it was one that did not exist*.

Therefore, leaving aside the arguable lawfulness of anticipatory self-defense, it is apparent that when such claims are put forward, accepted or not, they are generally accompanied by assertions that the threat being responded to was of an imminent nature. In contrast, recent claims regarding pre-emptive self-defense have not in fact been advanced with regard to any actual State practice,[174] but have *nonetheless* been criticized by other States. In other words, it would seem that anticipatory self-defense is controversial but *arguably* lawful, whereas pre-emptive self-defense is in general regarded by States and scholars as unlawful. It is the issue of temporal connection, or *imminence*, which distinguishes these two claims: this aspect of the *Caroline* formula has a fundamental position with regard to distinguishing between controversial "anticipatory self-defense" and patently unlawful "pre-emptive self-defense."

It is not just in cases where the controversial claim of self-defense is made that temporal restrictions (as aspects of necessity and proportionality) are relevant to assessing the lawfulness of a forcible action. In the uncontroversial situation of an action in self-defense taken in response to an actual attack, State practice indicates that there is still a need for a temporal proximity. Here, "immediacy" is a better term than "imminence." A criterion of "immediacy" differs from that of "imminence," in that the former refers the temporal proximity of *the response* to the attack being responded to. The latter, in contrast, refers to the temporal proximity of the *threat being responded to* itself. It should be noted that this distinction is one made by the author to ensure clarity and is not prevalent in the pronouncements of States or in the legal literature. In any event, these two concepts are closely linked.

Indeed, the phrase "instant, overwhelming" necessity, "leaving . . . no moment for deliberation" as employed in the *Caroline* formula can refer to either the concept of imminence *or* the concept of immediacy. Although the *Caroline* itself seemingly involved a claim of anticipatory self-defense, it certainly may be argued that the need to respond to an *actual attack* must be "in-

173 *Id.* at 6. ("[W]e will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting pre-emptively . . . . ").

174 A fact highlighted by the decision by the United States to justify the 2003 intervention in Iraq based upon Security Council authorization rather than the Bush Doctrine.

stant" and "overwhelming": "action in self-defense must immediately follow upon the start of an attack."[175]

Reference to contemporary State practice indicates that there should be some temporal link between the response taken to an actual attack (as opposed to a threatened attack) and the attack itself. However, application of this restriction is highly fact-specific. In the case of the Falklands, due to the geographical location of the islands[176] and the scale of the necessary response, a period of twenty-three days was seen as an acceptable time delay following the Argentine invasion.[177] Of course, the continued occupation of the Falklands may be seen as a continuation of the attack; thus the need to respond remained compelling.[178] Assuming that Operation Desert Storm was an action taken in collective self-defense, a period of five months elapsed between the initial attack against Kuwait and the response in self-defense.[179] Again, though, there was continued occupation of Kuwait during this period.[180] In the context of the coalition intervention in Afghanistan in 2001, so far as this may be seen as a response to the 11 September atrocities and not as an action of anticipatory self-defense,[181] a delay of slightly under a month appears to have been acceptable,[182] in spite

175 Gamal Moursi Badr, *The Exculpatory Effect of Self-Defense in State Responsibility,* 10 GA. J. INT'L & COMP. L. 1, 25 (1980).

176 As Higgins rightly points out, geographical location will necessarily affect how quickly a State responds. HIGGINS, *supra* note 138, at 241. In this context, it is worth noting that in *DRC v. Uganda*, the ICJ stated, albeit rather equivocally, that "the taking of airports and towns *many hundreds of kilometers from Uganda's border* would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defense, nor to be necessary to that end." Armed Activities on the Territory of Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J 116, ¶ 147 (Dec. 19) (emphasis added). Therefore, it would seem that the Court has linked the *locality* of the response to the criteria of necessity and proportionality in some measure. Supporting this is the fact that Judge Kooijmans made this point more strongly in his individual opinion. *Id*. at ¶ 34 (Kooijmans, J., dissenting in part, concurring in part). **R**

177 Levitin, *supra* note 94, at 638. **R**

178 Eric P.J. Myjer & Nigel D. White, *The Twin Towers Attack: An Unlimited Right to Self-Defense?*, 7 J. CONFLICT & SEC. L. 5, 8 (2002).

179 Kenny, *supra* note 110, at 1167. **R**

180 This is noted as a contributing factor to the acceptance of the operation by Kenny. *Id*.

181 The United States put forward a dual claim with regard to its action in Afghanistan. Letter from John D. Negroponte to President of the Security Council (Oct. 7, 2001), *in* U.N. SCOR, 56th Sess., U.N. Doc. S/2001/946 (Oct. 7, 2001).

182 States in general accepted Operation Enduring Freedom as constituting a lawful self-defense action. *See* Michael J. Kelly, *Understanding September 11th–An International Legal Perspective on the War in Afghanistan*, 35 CREIGHTON L. REV. 283, 285 (2002); Sean D. Murphy ed., *Contemporary Practice of the United States Relating to International Law*, 96

of the fact that the attack had abated.[183] This may have been due to difficulties over intelligence gathering with regard to the perpetrators and the attempt to engage the Taliban diplomatically prior to the use of force.[184]

It therefore seems that some measure of temporal connection is required between the attack and the response to it: identifying a general principle as to what that connection should be, however, is more difficult. The need for an "immediate" response appears to be extremely flexible, perhaps even more so than the general criteria of necessity and proportionality. Certainly it may be said that the requirement to act promptly is not absolute, and will depend on the context of the situation.

Indeed, given that an attempt to negotiate goes a long way to establishing necessity[185] (not to mention the fact that such action is a desirable alternative to force on a moral level), if a State first tries to negotiate and then must resort to force following the failure of those negotiations, the time delay will not mean that the State falls foul of the temporal element of the necessity requirement: "If serious attempts are made to resolve the conflict through amicable means, surely the State that has pursued these alternative avenues cannot be faulted for having lost time unduly before it unleashes its armed forces."[186]

Thus, it is argued that there must be an immediate *need* to respond, but not that there must necessarily be an immediate *response*.[187] Rather, the response must be taken within reasonable temporal proximity, taking into account all the circumstances of

AM. J. INT'L L. 237, 248 (2002); Mark A. Drumbl, *Judging the 11 September Terrorist Attack*, 24 HUM. RTS. Q. 323, 329 (2002). However, Myjer and White indicate that there are a number of problems with categorizing Operation Enduring Freedom as an action of self-defense, and they also point out that while there was indeed widespread State support for the action, it is notable that much of this support (at least outside of the framework of the United Nations organs) was from western States. Myjer & White, *supra* note 182, at 6-11. **R** Similarly, it has also been argued that the acceptance of the Afghanistan intervention by other States was political, not legal. *See* Quigley, *supra* note 97, at 554. **R**

183 This has been contrasted with the Falklands situation and thus viewed as arguably amounting to a reprisal, despite being justified by the parties as being an action in self-defense. Myjer & White, *supra* note 182, at 8. **R**

184 As was noted above, in 2001 the United States made a number of demands of the Afghani Taliban regime, which were rejected. Rajiv Chandrasekaran, *Taliban Rejects U.S. Demand, Vows a 'Showdown of Might,'* WASH. POST, Sept. 22, 2001, at A1; *supra* text accompanying note 110. **R**

185 *See supra* Part V.B.

186 Dinstein, *supra* note 99, at 57. **R**

187 *Id.*

the particular case: the difficulty of evidence gathering, the delay incurred though the mobilization of the responding State's own forces, the time taken in attempts at negotiation, and so on.

Therefore, as with the other aspects of necessity and proportionality, the *Caroline* formula identifies, and offers an insight into, the temporal elements of the customary international law regarding self-defense. However, the formula itself does not indicate the complexity and inherent flexibility of these restrictions. Certainly, in the case of the required temporal proximity between actual attacks and the responses taken, it would seem that this is a more flexible test than that of an "instant, overwhelming" necessity, "leaving . . . no moment for deliberation."

It has been argued that ideas of both immediacy and imminence in relation to self-defense are illogical in the context of the modern world.[188] This argument is not exactly new: it has been stressed in relation to the unique nature of nuclear weapons since the inception of such armaments.[189] Recently, however, this claim regarding the temporal aspects of the customary international law on self-defense has been restated in the context of twenty-first century terrorism. This is on the basis that an inability to detect imminent terrorist threats, the need to gather information with regard to terrorist activities and the difficulties of mounting an instant response to such attacks mean that such temporal requirements should no longer be a requirement of self-defense. This argument has been taken further: the suggestion has been made that a concept of temporality is no longer an aspect of the customary international law on self-defense.[190] In fact, the temporal aspects of the *Caroline* formula and the potential impact of these upon the so-called "war on terror" may be seen as the primary reason for the recent scholarly "attacks" upon the *Caroline*. The formula is no longer seen as relevant to customary international law because it restricts anti-terrorist operations.

188 *See*, *e.g.*, Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT'L L.J. 145, 164-66 (2000). Travalio does not distinguish between ideas of immediacy or imminence here, but his arguments clearly refer to both concepts. *Id.*

189 Israel stressed this point before the Security Council with regard to its action against the Osiraq reactor. *See* U.N. SCOR 2280, *supra* note 154, at 53-55. As Higgins has phrased this, with specific reference to the *Caroline* formula, "in a nuclear age, common sense cannot require one to interpret an ambiguous provision in a text in a way that requires a State to passively accept its fate before it can defend itself . . . ." HIGGINS, *supra* note 138, 242. *See also* BOWETT, *supra* note 39, at 191-92. **R**

190 Occelli, *supra* note 8, at 483-88. **R**

Away from such polemic conclusions, for good or ill, State practice clearly requires a level of imminence (or immediacy) in relation to self-defense: States still acknowledge the need for some kind of temporal link between a response in self-defense and the attack being responded to. It may be arguable that these restrictions upon self-defense have become more flexible. Since the advent of nuclear weapons, some level of flexibility with regard to the temporal proximity required is the only logical way that self-defense can be understood. This "flexibility" has arguably increased still further since September 11, 2001, in terms of what States will deem to be legally acceptable. However, it is not the case that such temporal safeguards have disappeared from customary international law altogether. Moreover, the general reaction of States to the Bush Doctrine indicates that the majority does not desire that this state of affairs change. In this context, therefore, the *Caroline* formula could in fact act as a timely reminder of the need for some kind of temporal proximity in actions taken in self-defense.

VI. CONCLUSIONS: DOCKING THE *CAROLINE*

The above examination of State Practice and *opinio juris* indicates that the customary international law criteria of necessity and proportionality of today differ in some respects from the traditional *Caroline* formulation. Although there are many similarities between them, the contemporary criteria of necessity and proportionality are not *synonymous* with Webster's formula. Admittedly, most of these alterations are subtle, and have as much to do with emphasis as substantive alterations, but they are present, nonetheless. A good example of this is the idea of "instant, overwhelming" necessity, "leaving . . . no moment for deliberation."[191] This phrase may be seen as too strict in the contemporary context of "necessary" self-defense. This is true both in that this phrase suggests the need for the very survival, or at least *vital* interests, of the State to be at risk and that responses in self-defense must be literally *immediate*. In fact, as we have seen, the necessity criterion has developed in a less fundamental form.

Due to such differences between Webster's formula and the contemporary criteria, it would appear to be incorrect to refer to the *Caroline* formula as if it represents customary international law today. Similarly, it is inaccurate to use the term "the *Caroline*"

[191] Letter from Daniel Webster to Lord Ashburton (July 27, 1842), *supra* note 22. R

while actually applying the contemporary criteria, as opposed to the *Caroline* formula itself.[192] It is true that a number of writers invoke *Caroline*, while they in fact only apply it selectively. This is obviously unhelpful: "While it is perfectly acceptable to suggest that a doctrine has outlived its usefulness, it is not sound practice to alter its meaning without clearly flagging the change."[193]

More importantly, the *Caroline* formula is too simplistic in many respects to be used as a label for the contemporary law of self-defense. Of course, the *Caroline* only refers to some of the various aspects of the contemporary legal regulation of self-defense in international relations.[194] However, even in the context of the "necessity and proportionality" aspect of self-defense, the varied and complex application of these criteria today goes way beyond Webster's formula. As is evident from the above examinations of necessity and proportionality, they are extremely complex criteria. They are highly flexible and difficult to apply. Reference to the neat and compact *Caroline* formula may risk placing an unhelpful veil over this complexity.

The best method of demonstrating this is to refer to our discussion of the proportionality requirement. Applying this criterion to any given dispute requires a complex calculation involving the use of the very minimum of force necessary to secure the defensive goal to be achieved by the action, as well as some equivalence between the scale of the attack and the response taken. This requires assessments of the means of attack, the duration of the response in relation to the defensive necessity, indeed, all manner of strategic calculations. Essentially, the *Caroline* holds that actions in self-defense must not be "excessive" and must be "limited by . . . necessity, and kept clearly within it." These phrases are hardly adequate in identifying the problems with regard to the actual application of proportionality to self-defense claims today.[195]

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[192] Occelli, *supra* note 8, at 482; Kearley, *supra* note 7, at 345. R

[193] Kearley, *supra* note 7, at 345. R

[194] For example, as was noted at the start of this article, the armed attack requirement (apparent in U.N. Charter art. 51 and firmly endorsed by the ICJ) is a more modern aspect of the law and is not present in the *Caroline* conception of self-defense at all. The same may be said for the requirement in Article 51 that measures taken in self-defense be reported to the Security Council. U.N. Charter art. 51.

[195] It has been argued that the *Caroline* formula can be seen as "more rhetorical than substantive." WILLIAM V. O'BRIEN, THE CONDUCT OF JUST AND LIMITED WAR 133 (1981).

Given these conclusions, and of course the notable fact that States themselves rarely invoke the *Caroline* formula,[196] it may seem as though one should concur with the revisionist view that the *Caroline* should be removed from scholarly discourse on the contemporary law of self-defense, as its invocation is legally inaccurate and merely confuses the issue. As Occelli has put it, the *Caroline* needs to be "sunk."[197]

Certainly, it must be concluded that the *Caroline* formula *in itself* does not represent the customary international law of today. However, as we have seen, the criteria of necessity and proportionality are undeniable aspects of the law of self-defense today.[198] The great similarity between the content of these criteria and Webster's formula certainly suggests that the *Caroline* has markedly influenced their development.[199] Therefore, the *Caroline* correspondence can be very useful in aiding the understanding of the law governing the use of force in self-defense.

Reference to the incident can be very helpful in tracing the development of the customary international law governing self-defense. Far more importantly, however, the *Caroline* formula is relevant to an understanding of much of the *current* law on self-defense, entirely *because* of the complexity of the contemporary State practice regarding necessity and proportionality. Webster's formula offers a simplistic but surprisingly accurate guide to the minefield of States' legal claims regarding self-defense in the UN era, which this article has in some measure attempted to negotiate. An investigation of the requirements of necessity and proportionality in contemporary customary international law produces a pic-

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196 *Supra* Part V.A.

197 Occelli, *supra* note 8, at 490. **R**

198 *Supra* Part V. As Gray puts it: "irrespective of the status of the *Caroline* incident as a precedent, necessity and proportionality have played *a crucial role* in State justification of the use of force in self-defense and in international responses." GRAY, *supra* note 29, at 121 (emphasis added). **R**

199 Ryan C. Hendrickson, *Article 51 and the Clinton Presidency: Military Strikes and the United Nations Charter*, 19 B.U. INT'L L. J. 207, 209 (2001); Rogoff & Collins, *supra* note 30, at 493, 501. However, the "influence" of the *Caroline* can never be assessed with certainty, because as noted, States themselves do not in general refer to the *Caroline* formula itself. It should be noted that some writers have concluded that "Webster's definition, while widely quoted, has had little influence on political conduct or legal theory." M.A. Weightman, *Self-Defense in International Law*, 37 VA. L. REV. 1095, 1106 (1951). Nonetheless, the similarities between the *Caroline* formula and the law as it is applied today by States clearly support the view that the current customary position is derived from the *Caroline* incident. This is the position taken by the present author. **R**

ture of criteria that has a remarkable resemblance to the conception of self-defense set out in the *Caroline* correspondence, and as such, the formula is a most useful *starting point* for an investigation of this kind. Having said this, reference to the *Caroline* correspondence alone is *not an adequate substitute for such an investigation*.

The *Caroline* is an invaluable tool in aiding any understanding of the contemporary criteria, due to its similarities to, and influence upon, them. Yet it is a tool which must be employed with care, and not referred to as representing customary international law in itself: "This standard has since [1837] been creatively sculpted, sometimes almost beyond recognition, but it is still the *reference point* for cases of national self-defense."[200] At a time when the threat of international terrorism looms large and the lawfulness of possible responses to this threat is shrouded in confusion, we need all the legal reference points we can get.

It can been seen from the examination of UN era practice in Part V how useful the *Caroline* formula can be in helping to form an understanding of the way certain aspects of the law on self-defense are applied today. Indeed, if one delves somewhat deeper into the correspondence, there are other elements that can be of use in the context of contemporary self-defense claims. For example, Webster offers insight into the elastic nature of his formula, which is very relevant to understanding the inherent flexibility of necessity and proportionality as they are today.[201] Another interesting, and largely overlooked, element of Webster's formula is the suggestion that targets attacked in self-defense must be military in nature. The *Caroline* correspondence indicates that "[i]t must be shown . . . that there could be no attempt at discrimination, between the innocent and the guilty."[202]

[200] Commander Byard Q. Clemmons & Major Gary D. Brown, *Rethinking International Self-Defense: The United Nations' Emerging Role*, 45 NAVAL L. REV. 217, 221 (1998) (emphasis added).

[201] Webster argued that "the extent of this right [self-defense] is a question to be judged of by the circumstances of each particular case." Letter from Daniel Webster to Henry S. Fox (Apr. 24, 1841), *supra* note 22, at 1113. R

[202] Letter from Daniel Webster to Hendry S. Fox (Apr. 24, 1841), *supra* note 22, at 1138. R
It is not entirely clear how this statement should be read. It would seem that there are two ways of looking at it. The first is to conclude that the *Caroline* formula suggests that non-military targeting in self-defense is acceptable, although only in cases where "there could be no attempt at discrimination." Based on this interpretation, the *Caroline* provides us with a presumption that the target attacked *should* be "guilty," but not a requirement that it must be. In other words, military targeting is required unless it is "necessary" to attack

Whilst such a criterion is a clear part of the contemporary *jus in bello*,[203] a "military targeting" requirement is not often discussed in the context of self-defense actions.[204] However, in the *Oil Platforms* case, the Court indicated that such a requirement existed as an aspect of the necessity and proportionality criteria for lawful self-defense.[205] A requirement that actions taken in self-defense must target military objectives is evident in State practice also, although whether this stems from the traditional international humanitarian law requirement or is in some manner specific to the *jus ad bellum* concerning self-defense is unclear.[206] In any event, such

non-military targets. The second way to view the passage is to conclude that States must only attack military targets in self-defense, but it is acceptable that *in targeting* military personnel or installations, some non-military casualties may occur, and this ancillary damage is legally acceptable if it was unavoidable. In any event, it must be concluded that some element of "legitimate military targeting" is present in the *Caroline* formula.

203 A discussion of this goes beyond the scope of this article. In brief, the imperative to avoid direct attacks upon civilian targets had its basis in customary international humanitarian law. *See*, *e.g.*, W.T. Mallison, *The Humanitarian Law of Armed Conflict Concerning the Protection of Civilians,* 11 INT'L LAW. 102, 105 (1977). Elements of this requirement are also evident in the Hague Conventions. *See*, *e.g.*, Hague Convention II art. 27, July 29 1899, *available at* http://www.icrc.org/ihl.nsf/FULL/150?opendocument. However, in 1977, this fundamental principle of the *jus in bello* was more thoroughly codified by the Protocol Additional to the Geneva Conventions of August, 12 1949, and relating to the Protocol for the Protection of Victims of International Armed Conflicts, June 8, 1977. *See* Geneva Convention relative to the Treatment of Prisoners at War art. 48, Aug. 12, 1949, *available at* http://www.unhchr.ch/html/menu3/b/91.htm. As such, in the context of the *jus in bello* the requirement to only attack military targets can be seen as an aspect of both conventional and customary international law.

204 Greenwood, *supra* note 140, at 278-79; GARDAM, *supra* note 59, at 173. **R**

205 *See* Case Concerning Oil Platforms (Iran v. U.S.), 2003 I.C.J. 27, ¶¶ 51, 74. *See also*, J.A. Green, *The* Oil Platforms *Case: An Error in Judgment?*, 9 J. CONFLICT & SEC. L. 357, 380-81 (2004). It has also been argued that a similar position may be inferred from the *Nicaragua* merits judgment of 1986, in that the Court found that the actions of the United States with regard to the mining of, and attacks upon, the Nicaraguan ports were disproportional because they were not legitimate military targets. CONSTANTINOU, *supra* note 147, at 170. **R**

206 This is not the place to explore the State practice on this issue in any detail and as such a few examples will have to suffice. In 1981, one of these reasons advanced by third party States for their condemnation of Israel's attack upon the Iraqi Osiraq nuclear reactor was that this did not constitute a valid military target. *See* U.N. SCOR, 36th Sess., 2284th mtg. at 22, U.N. Doc. S/PV.2284 (June 16, 1981) (Syria's views); U.N. SCOR, 36th Sess., 2285th mtg. at 11, U.N. Doc. S/PV.2285 (June 15, 1981) (Cuba's views). Israel, in contrast, stressed that this *was* a military target, and that civilian casualties were avoided so far as possible in the attack. U.N. SCOR, 36th Sess., 2280th mtg. at 56, U.N. Doc. S/PV.2280 (June 12, 1981). From either perspective, it appears that the issue of military targeting was relevant to the legality of the action. Returning to the South African incursions into neighboring States in 1986, South Africa stressed that it was only targeting ANC bases and not the civilian populations of the three States concerned (E.g., South Africa stressed that "[i]n the actions of 19 May the greatest care was taken not to involve local citizens." U.N.

issues demonstrate that a more detailed examination of the *Caroline* can further elucidate upon the nature of the law of self-defense today, beyond the traditional reading of the "key" sentence from Webster's letter.

Moreover, this role for the *Caroline* formula is not one that is restricted to the margins; it is not merely applicable to controversial "anticipatory" claims of self-defense. It will be recalled that the argument was raised above that the *Caroline* formula was intended to apply only to specific instances of self-defense.[207] Irrespective of the accuracy of this claim, it is clearly evident from an analysis of State practice that the *contemporary* criteria of necessity and proportionality are not restricted to specific instances in this way. For example, they are not restricted to actions against non-State actors (assuming that such actions are permissible as actions of self-defense).[208] Necessity and proportionality are also clearly relevant to actions other than those taken in anticipatory

SCOR, 41st Sess., 2684th mtg. at 26, U.N. Doc. S/PV.2684 (May 22, 1986).). As such it saw these bases as justifiable targets to be attacked in self-defense. The action was widely condemned, and there were various reasons for this, as we have seen. It has been suggested that one of the reasons why States failed to accept the lawfulness of the action was that the attacks were unnecessary, because the targets were not of a military nature, despite South Africa's assertions to the contrary. Kwakwa, *supra* note 104, at 440. Notably, **R** the representative of Tanzania at the Security Council stressed that the actions were unlawful because the targets were not military ones. However, he implied that if they *had been* ANC bases, South Africa's action may have been lawful. U.N. SCOR, 41st Sess., 2684th mtg. at 45, U.N. Doc. S/PV.2684 (May 22, 1986). Thus it would seem, for Tanzania at least, that the military target issue was a determining factor. More recently, with regard to its 2001 intervention into Afghanistan, the United States made it clear that it only targeted military objectives, and further that all care was taken to ensure the minimum loss of civilian life. *See*, *e.g.*, Address made by President Bush to the UN General Assembly, *in* U.N. GAOR, 56th Sess., 44th mtg. at 9, U.N. Doc. A/56/PV.44 (Nov. 10, 2001). *See also* Murphy ed., *supra* note 182, at 247-50. Operation Enduring Freedom was justified as self-defense, **R** and was generally accepted as such by third party States. *Supra* note 182. Indeed, when **R** the United States reported to the Security Council that it was acting in self-defense against Afghanistan by way of a communication dated October, 7 2001, it specifically highlighted that it was "committed" to minimizing civilian casualties, as part of its actual self-defense claim. Letter from President of the UN Security Council (Irelend), Permanent Representative of the U.S. to John D. Negroponte, President of the Security Council (Oct. 7, 2001), *in* U.N. SCOR, 956th mtg., U.N. Doc. S/2001/946 (Oct. 10, 2001). However, it should be noted that the contention of the United States that it was "committed" to this course of action cannot necessarily be viewed as an acknowledgement that it saw itself as being legally bound by it. *Id.*

207 *Supra* Part IV.D.

208 This is borne out by the conclusions reached in Part V. To highlight the point again here, one of many examples supporting this is that Tunisia consistently stressed that the actions it took *within its own territory* against French troops in 1958 were necessary. *See*, *e.g.*, U.N. SCOR, 13th year, 819th mtg. at 9, 12, U.N. Doc. S/PV.819 (June 2, 1958).

self-defense. Indeed, even though the temporal restriction of "imminence" is specific to anticipatory self-defense, its twin criterion (that of "immediate" response) can also be found in the *Caroline* formula.[209] This restriction is still apparent in State practice regarding response to actual attacks.[210] The *Caroline* is useful in understanding *all* claims of self-defense, not merely specific types.[211]

The development of the criteria of necessity and proportionality in self-defense from the original *Caroline* formula, as with the majority of customary international law, has been a slow but steady process. It is not a startling new occurrence that the criteria as applied today are no longer identical to those contained in Daniel Webster's letter. Rather this comes from a process that began before the *Caroline* incident took place: the gradual development of the law on the use of force as it is today. Undoubtedly, in the decades to come, as new challenges emerge and as new perceptions of international relations surface from both States and scholars alike, the applicable legal criteria will continue to change. Indeed, this process is already underway, given an arguable shift in the international community's perception of the law on the use of force following September 11.[212] An appreciation of the *Caroline* incident and the way that customary international law has developed since 1837 will help us to keep pace with such changes to the regulation of force in international law and meet the challenges posed by international terrorism, without loosing sight of the fundamental criteria of lawful self-defense.

Ultimately, the *Caroline* formula emerges as both an extremely valuable tool that may be employed to aid understanding

209 *Supra* Part V.C.

210 Although it does appear to manifest itself in a less strict form than it appears in the *Caroline* formula. *See supra* Part V.C.; O'BRIEN, *supra* note 195, at 133. **R**

211 Thus, Dinstein rightly concludes that the *Caroline* formula "came to be looked upon as transcending the specific legal contours of extra-territorial law enforcement, and *has markedly influenced* the general *materia* of self-defense. This has happened despite the lack of evidence that Webster had in mind any means of self-defense other than extra-territorial law enforcement . . . . Although Webster's prose was inclined to overstatement, the three conditions of necessity, proportionality and immediacy can easily be detected in it. *These conditions are now regarded as pertinent to all categories of self-defense.*" DINSTEIN, *supra* note 66, at 249 (emphasis added). **R**

212 For example, Brown holds that September 11 and the forcible responses to it "represent a new paradigm in the international law relating to the use of force." Davis Brown, *Use of Force against Terrorism after September 11th: State Responsibility, Self-Defense and Other Responses*, 11 CARDOZO J. INT'L & COMP. L. 1, 2 (2004). Similarly, Gray argues that September 11 "led to a fundamental reappraisal of the law on self-defense." GRAY, *supra* note 29, at 159. **R**

of the contemporary criteria of necessity and proportionality and as an erroneous form of shorthand employed by some scholars to refer to customary international law as it is today. It is undeniable that necessity and proportionality form the basis of customary international law on self-defense, and further, it is undeniable that they would not be part of the law today (at least in the same form) were it not for influence of the *Caroline* formula on thinking and practice. As such, "sinking" the *Caroline* without a trace is dangerous and unhelpful. Equally, citing the *Caroline* formula more than 160 years after the incident itself took place as if it, and it alone, accurately represents the state of customary international law in the twenty-first century is perhaps even more negligent. The only solution is to divorce the custom from its origins: we have the contemporary criteria of necessity and proportionality and we have the *Caroline* from which those criteria originated. We, as international legal scholars, must keep the *Caroline* afloat, for a better understanding of the lawfulness of contemporary self-defense actions. At the same time, we need to dock the *Caroline* at port, and no longer pretend that it still sails the seas of contemporary customary international law.