international law on self-defence, it will be examined here in some detail.

I. THE CAROLINE INCIDENT: 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


4 Though, as we will see in chapter three, in reality an image of two competing ‘conceptions’ of self-defence is overly simplistic.

5 Nicaragua v United States of America merits (n 1) esp paras 176, 194 and 237.

6 Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America) merits (2003) ICJ Reports 161, esp paras 51 and 76.


8 Legality of the Threat or Use of Nuclear Weapons advisory opinion (1996) ICJ Reports 226, para 41.

9 Ibid.
rebellion that British forces attacked a privately owned US steamer, the Caroline. A number of rebel forces acting in support of the Canadian rebellion were stationed on Navy Island, in British territory. They were supplied with munitions and personnel by the Caroline. On 29 December, whilst the Caroline was docked at Schlosser, in US territory, it was attacked by British-Canadian forces, which set fire to the steamer and towed it over Niagara Falls. In the process at least one US citizen was killed.

The territorial violation involved in the incident, as well as the death of an American national, caused uproar in the United States. Yet the diplomatic response to these rising tensions between Britain and the United States was fairly muted from both parties. It constituted a brief exchange of letters between the US Secretary of State, John Forsyth, and the British Minister in Washington, Henry S Fox, during which Forsyth demanded ‘redress’ on behalf of the United States. In response, Fox argued that ‘the necessity of self-defence and self-preservation, under which Her Majesty’s subjects acted in destroying [the Caroline], would seem to be sufficiently established.’ In addition, Andrew Stevenson, the American Minister to Britain, sent a letter regarding the incident to Lord Palmerston, the UK Foreign Secretary, in which he argued that, as there was no imminent danger to UK forces, Britain could not claim to have acted in self-defence.

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. The UK responded to the arrest by stating that the attack was an official action, and thus McLeod could not be held.

---

11 RY Jennings, 'The Caroline and McLeod Cases' (1938) 32 American Journal of International Law 82, 84.
12 See the sworn affidavit of Gilman Appleby, Commander of the Caroline, as supported by nine other crew members, British and Foreign State Papers, vol XXVI (1837–1838) 1373–75. It should be noted that some more recent accounts additionally refer to the death of the ship’s cabin boy (eg. JB Moore, A Digest of International Law, Vol II (Washington, Government Printing Office, 1906) section 217, 409; W Meng, ‘The Caroline’ in R Bernhardt (ed.), Encyclopedia of Public International Law, Vol 3: Use of Force, War and Neutrality Peace Treaties (A–M) (Amsterdam, North-Holland Publishing Company, 1982) 81, 81; and Jennings (n 11) 84). However, this may be brought into question, as this death was not mentioned in the various testimonies of the crew.
13 Jones (n 10) 26.
15 FO Docs 5/321–23; and British and Foreign State Papers, vol XXVI (1837–1838) 1376.
16 Letter dated 6 February 1838 from Henry S Fox to John Forsyth, FO Doc 5/322.
17 Letter dated 22 May 1838 from Andrew Stevenson to Lord Palmerston, FO Doc 5/327. It took Palmerston more than three years to respond to this letter: letter dated 18 September 1841 from Lord Palmerston to Andrew Stevenson, extract in Stevens (n 14) 126–27.
18 Jones (n 10) esp 48–49.
personally responsible. McLeod was eventually found to be not guilty on the evidence.

Correspondence concerning the Caroline incident, and particularly that which followed McLeod’s arrest and trial, between the new US Secretary of State, Daniel Webster, and the UK special representative to the United States, Lord Ashburton, gave birth to the so called ‘Caroline formula’. Embodied in this formula are concepts of necessity and proportionality that still govern the lawfulness of self-defence actions today.

The most important extract of these various exchanges came 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:

[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. It will be for that Government to show a necessity of self-defence, 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-defence 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 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 (emphasis added).]

The United States and the United Kingdom disagreed as to whether the British actions met these requirements as Webster set them out. From the above passage, we can see that Webster clearly asserted: ‘A necessity for this, the Government of the United States cannot believe to have existed.’

In contrast, Lord Ashburton responded on 28 July with:

---

19 See, eg, letter dated 12 March 1841 from Henry S Fox to Daniel Webster, *British and Foreign State Papers*, vol XXIX (1840–1841) 1127. Moore (n 12) s 179, 24; and Jennings (n 11) 93.
20 AB Corey, *The Crisis of 1830–1842 in Canadian–American Relations* (New Haven, Yale University Press, 1941) 144–45; and Jones (n 10) 65.
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.22

Yet Lord Ashburton also stated that ‘we are perfectly agreed as to the general principles of international law applicable to this unfortunate case’.23 Indeed, he repeated Webster’s terminology (specifically that states must show ‘a necessity of self-defence, instant, overwhelming, leaving no choice of means’) on more than one occasion in the correspondence.24 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.25

II. THE APPLICABILITY OF THE CAROLINE FORMULA

A. 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-defence. Robert Jennings referred to the incident as the locus classicus of the law of self-defence.26 This view has, in the majority, continued into the UN era.27 Indeed, Christine Gray rightly refers to the incident as having obtained a ‘mythical authority’.28 The general academic position on the Caroline incident during the UN era may be summarised by the following:

The Caroline doctrine asserts that use of force by one nation against another is permissible as a self-defence action only if force is both necessary and proportionate.

---

23 Ibid, 195.
24 Ibid, 196 and 198.
25 Meng (n 12) 81; Jennings (n 11) 92; and Moore (n 12) s 217, 411. However, this conclusion has been criticised on the basis that Lord Ashburton agreed with Webster’s formulation only as a diplomatic concession and not as a matter of law: MB Oceili, ‘Sinking the Caroline: Why the Caroline Doctrine’s Restrictions on Self-Defence Should not be Regarded as Customary International Law’ (2003) 4 San Diego International Law Journal 467, 475–79.
26 Jennings (n 11) 92.
28 Gray, International Law and the Use of Force (n 3) 149.
... [The correspondence relating to the incident] effectively defined the limits of self-defence.  

The *Caroline* is still consistently referred to by scholars today as embodying the customary international law on self-defence. Michael Byers, for example, states that from the *Caroline* incident ‘the modern law of self-defence was born’. He then applies the formula to Operation Enduring Freedom. 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 thirteen eminent international legal scholars in the United Kingdom, entitled ‘Principles of International Law on the Use of Force by States in Self-Defence’. It is notable that the *Caroline* exchange is referred to throughout this document as representing the applicable customary international law standard in this context.

B. Limited Applicability to Certain Types of Self-Defence

First, it has been argued that the factual circumstances of the *Caroline* incident limit the application of the formula enunciated by Webster to a

31 Ibid.
33 Ibid, 965, 967, 969 and 970.
specific 'type' of self-defence claim. The contention here is that Webster intended to articulate the legal structure applicable to the facts of the Caroline incident itself and not to other claims of 'self-defence'. For example, it has been argued that the Caroline formula is relevant only to actions of preventative self-defence, as the incident can be viewed as being of this character. The rebels on Navy Island had not yet launched an attack against British territory.

Alternatively, as the actions of the Caroline and its crew were not imputable to the US government, it has been claimed that the Caroline formula is only relevant to self-defence actions against non-state actors and not action taken in self-defence by one state against another. Expanding on this, Timothy 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'.

This view is supported by the fact that Webster indicated that when an action taken avowedly in self-defence 'has led to the commission of hostile acts within the territory of a power at peace, nothing less than a clear and absolute necessity can afford a ground of justification' (emphasis added). Kearley argues that this indicates that Webster felt that in different circumstances, self-defence may be justified based upon criteria other than those that he was expounding. However, this seems a tenuous inference: Webster's intention with regard to the scope of the formula he was articulating can only be guessed. Certainly though, his focus was

---

34 See Gardam (n 3) 41–42.
35 Indeed, Judge Schwebel stated in his Nicaragua dissent, 'It should be recalled that the narrow criteria of the Caroline case concerned anticipatory self-defence, not response to an armed attack or to actions tantamount to an armed attack.' Nicaragua merits (n 1) dissenting opinion of Judge Schwebel, para 200. See also O Schachter, International Law in Theory and Practice (Dordrecht, Martinus Nijhoff, 1991) 151–52.
36 Though some commentators take the view that it is a misconception to see the incident as an anticipatory action: at no point in the correspondence is the idea of 'anticipatory self-defence' expressed, and factually it could be argued that the supply of the rebels by the Caroline was already underway. See JJ Paust, 'Post-9/11 Overreaction and Fallacies regarding War and Defence, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions' (2003–04) 79 Notre Dame Law Review 1335, 1345–46.
37 This argument has been put forward by M Stein in postings (30 October 2004) on the internet forum of the American Society of International Law, www.asil.org/forum.htm.
38 Kearley (n 2) 325.
39 Letter of 27 July 1842 (n 21) 1133.
40 Kearley (n 2) 329.
41 Eg. Dinstein points out that there is a 'lack of evidence that Webster had in mind any means of self-defence other than extra-territorial law enforcement.' Y Dinstein, War, Aggression and Self-Defence, 4th edn (Cambridge, Cambridge University Press, 2005) 249. 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.
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.'

Notwithstanding the possible intentions of Daniel Webster in setting forward his formula, it is evident from even a cursory glance at state practice in the UN era that the criteria of necessity and proportionality are not restricted to specific 'types' of self-defence in this way. For example, they are not restricted to actions taken in preventative self-defence (assuming, of course, that such actions are permissible under the Charter system at all). Nor do they apply only to actions against non-state actors (again assuming that such actions are permissible today). Therefore, even if it is accepted that the *Caroline* formula was originally intended to apply only to certain categories of state self-help, such as a response against non-state actors, the criteria of necessity and proportionality have since been applied more widely, to the point that it can now be said that *all* actions of self-defence are limited by these requirements.