RAISING THE *CAROLINE*

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I. INTRODUCTION

In recent years it has become commonplace to assert that the general rule stating the conditions under which force legitimately can be used in self-defense under customary international law was set out in a letter written in 1841 by United States Secretary of State Daniel Webster to Henry Fox, the British minister in Washington.[2] Webster wrote to Fox concerning an incident involving the American steamer *Caroline* which had occurred in 1837. The best known accounts of that incident are those of Moore in *A Digest of International Law*[3] and of Jennings in his 1938 article *The Caroline and McLeod Cases*.[4] In response to the British claim that their use of force in U.S. territory was justified as lawful self-preservation and self-defense, one sentence in Webster's letter stated that the use of self-defense should be confined to situations in which a government can show the "necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[5] Together with a requirement of proportionality in the use of force in self-defense, the sentence in question makes up what has become known as the *Caroline* doctrine.

Until the United Nations Charter era, writers on international law discussed the *Caroline* incident in its proper context and limited application of the rule expressed by Webster to similar factual situations; that is, to extra-territorial uses of force by a state in peacetime against another state which was unable or unwilling to prevent its territory from being used as a base of operations for hostile activities against the state taking action. Not until the United Nations Charter era did commentators extract this sentence from its context and apply it to all uses of force in self-defense by states.[6] This transformation of the *Caroline* doctrine is both interesting and unfortunate. It is interesting in that it is an instance in which the interpretation of an historical event and an associated legal concept has been reshaped by changes occurring over a century later in more fundamental

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[2] *See, e.g.*, YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 244 (2nd ed. 1994). Dinstein noted that "[t]he customary law relating to self-defense is often viewed as 'best expressed' in D. Webster's formula in the *Caroline* incident." *See id.* at 182; *See also infra* Part II.

[3] *See* 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW §217, at 409 (AMS Press 1970) (1906).

[4] *See* R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938).

[5] MOORE, *supra* note 3, §217, at 412.

[6] *See infra* Part IV.

legal concepts. It is unfortunate because it seems to be based, at least in part, on a misunderstanding of history, and because applying the doctrine to circumstances to which it was not intended to apply could lead to the creation of undesirable international legal rules.

For example, using the revised version of the *Caroline* doctrine to analyze the lawfulness of using force in a state's own territory in defense of that territory, could lead to the erroneous and counter-intuitive conclusion that the doctrine prohibits nations with sparsely settled or uninhabited territory from using force to counter armed attacks against those areas unless the attacks were an immediate threat to national survival. Under the recent view of the doctrine, one could argue, for example, that the need for counter-force would be neither "instant" nor "overwhelming" if the attacks in question did not threaten the nation's existence. Similarly, two recent commentators have written that "necessity" means "that the resort to force in response to an armed attack . . . is allowed only when an alternative means of redress is lacking."[7] If so, the nation attacked would, arguably, have to appeal to the United Nations Security Council or offer to negotiate with the attacker in order to meet the doctrine's necessity test.

Kenny, one commentator who believes the *Caroline* doctrine applies to all uses of force in international law, has recognized this problem.[8] He addressed it by allowing that, while these alternatives must be lacking:

> Nevertheless, an armed attack creates a strong presumption of a necessity for counterattack. Insistence upon peaceful efforts before permitting counterforce would effectively nullify the right to self-defense by allowing a clever aggressor to consolidate illegal gains through dilatory tactics.[9]

However, if the *Caroline* doctrine were applied only to the circumstances for which Webster intended it, there would be no possibility of it leading to undesired results and no need for such a presumption.

This nineteenth century doctrine remains relevant in the United Nations Charter era for at least three reasons. First, some states are not members of the United Nations; they continue to be bound by customary international law norms, including the right to self-defense as shaped by the *Caroline* doctrine, and not by Charter obligations. Second, there are times when the Charter cannot be applied to a dispute by the International Court

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

[8] *See* Kevin C. Kenny, *Self-Defense*, *in* 2 UNITED NATIONS: LAW, POLICIES AND PRACTICE 1162, ¶ 24, at 1168 (Rüdiger Wolfram & Christine Philipp eds., New Revised English ed. 1995).

[9] *Id.*

of Justice (ICJ) even if it occurs between UN member states (e.g., the dispute between Nicaragua and the United States concerning U.S. support for the Contras).[10] This is so because in submitting themselves to the ICJ's compulsory jurisdiction, states can withhold from the ICJ jurisdiction over certain kinds of disputes, such as those involving the interpretation of multilateral treaties (e.g., the UN Charter) which have as parties states which are not parties to the case before the court. In such cases, however, the ICJ may be able to resolve the dispute by using customary international law as an alternative source of legal rules. In fact, the ICJ did this in the dispute between Nicaragua and the U.S. Thus, the *Caroline* doctrine still is applicable in such cases as a part of customary international law.

Finally, and most importantly, many commentators believe that the "inherent right of self-defense" referred to in Article 51 of the Charter[11] consists of the right of self-defense as it existed in customary international law at the time the Charter was drafted. Under this theory, the *Caroline* doctrine also is part of Charter law and should be applied as such.[12] Moreover, even if the drafters of Article 51 did not intentionally incorporate the *Caroline* doctrine, the doctrine remains influential in the interpretation of Article 51, as customary international law generally influences any interpretation of the Charter. Therefore, the true meaning of the *Caroline* doctrine is of considerable significance.

Part II of this article will describe the *Caroline* incident and the doctrine that resulted from it. Part III will show that, at present, the *Caroline* doctrine is commonly, though not universally, accepted as applying to all forms of self-defense in customary international law. Part IV provides a quick overview of the concepts of self-defense and self-preservation as they were understood in the mid-eighteenth century, while Part V consists of an examination of treatises on international law from the time of the *Caroline* incident to the present. This examination points out when the recent view of the *Caroline* doctrine arose and suggests why it may have arisen. Finally, Part VI suggests that the modern revision of the *Caroline* doctrine should be rejected because: 1) it unnecessarily alters the original doctrine; 2) it

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[10] *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

[11] Article 51 provides, in relevant part, "[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 the measures necessary to maintain international peace and security." UN CHARTER art. 51.

[12] *See, e.g.*, Rogoff & Collins, *supra* note 7, at 506; Werner Meng, *The Caroline, in* 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 537, 538 (Rudolf Bernhardt ed., 1992). Meng, unlike Rogoff and Collins, interprets the *Caroline* doctrine more traditionally, seeing it as applying only to anticipatory self defense. However, Meng believes that anticipatory self-defense is part of the "inherent right" referred to by that article. Anticipatory self-defense may be defined as the "resort to force in order to prevent an expected aggression." 5 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW §22, at 865 (1965). For an excellent discussion on the international law of anticipatory self-defense, see OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 150-152 (1991).

contravenes other accepted principles of international law and could lead to the creation of undesirable legal rules; 3) it becomes illogical when applied to all uses of force in self-defense; and 4) the original version of the doctrine is an appropriate rule of international law that should be retained.

II. THE *CAROLINE* INCIDENT AND THE *CAROLINE* DOCTRINE

A concise summary of the *Caroline* incident, based on Jennings' description, will suffice for the purposes of this article. The episode occurred during the Canadian Rebellion of 1837. Along the U.S.-Canadian border, many U.S. nationals sympathized with the Canadian rebels and some actively participated in rebel activities. The government of the United States tried to prevent U.S. nationals from assisting the rebellion, but its efforts were largely unsuccessful. In December of 1837 a group of armed men, including many U.S. nationals, took over Navy Island, which is in the Chippewa Channel on Canada's side of the Niagara River, near Buffalo, New York. Men and arms flowed from New York to Navy Island, and that island was used as a base from which to attack mainland Canada. On December 29, 1937, the *Caroline* made trips between Fort Schlosser, New York and Navy Island carrying men and "stores of war."

Colonel McNab, the commander of local British forces, observed the *Caroline's* activity. He decided to destroy the steamer while it was in Canadian territory at Navy Island in order to prevent the rebels from using the steamer to reach the Canadian mainland or further reinforcing their position on the island. However, by nightfall on December 29, the *Caroline* had returned to U.S. territory at Fort Schlosser. (At that point it had aboard, in addition to her crew, twenty-three U.S. nationals who had not been able to find accommodations in town.) Colonel McNab decided to attack even though the *Caroline* was no longer in Canadian territory. Those aboard did not resist, but two were killed, and the *Caroline* was burned and sent over Niagara Falls.

In January of 1838, American Secretary of State Forsyth sent a note of protest about the affair to Mr. Fox. In his reply, Fox denied any wrong doing on the part of the British, and the matter rested amid the generally poor U.S.-British relations of the period. The issue was reopened after a British subject, Alexander McLeod, was arrested in 1840 in New York and charged with murder and arson for his part in the British action against the *Caroline*. The British protest against his trial elicited a response from new U.S. Secretary of State Daniel Webster in which he renewed the U.S. protest against the destruction of the *Caroline*. It is Webster's letter of April 24, 1841, to Fox that set out the concepts now known as the *Caroline* doctrine. However, the document most often quoted for the language of the *Caroline*

doctrine is Webster's letter of July 27, 1842, to Lord Ashburton[13] which contained an excerpt of the key portions of the 1841 letter to Fox.

As published in *The Diplomatic and Official Papers of Daniel Webster while Secretary of State*, the July 27 letter is printed under the heading "Inviolability of National Territory."[14] (The British had defended the destruction of the *Caroline* on the ground of self-preservation and self-defense, but Webster, quite naturally, focused on the right of a state to territorial integrity.) Webster wrote, "The act [the use of force in U.S. territory] is of itself a wrong, and an offense to the sovereignty and dignity of the United States, being a violation of their soil and territory."[15] In a letter to Mr. Fox, Webster wrote, "[B]ut the extent of this right [of self-defense] is a question to be judged of by the circumstances of each particular case; and *when its alleged exercise 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 ground of justification.*"[16]

In the context of this specific incident, and after making clear that his concern was for the territorial integrity of the United States, Webster then went on to include an excerpt of his letter of April 24, 1842, which includes the frequently quoted sentence that is considered to constitute the core of the *Caroline* doctrine, "[I]t will be for [the British] government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[17] He went on to state:

> 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.[18]

Seen in the proper context, it is obvious that Webster directed his highly restrictive conditions only to uses of force by one state within the territory of another state which had violated no international legal obligations to the first state that might have justified that first state's use of

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[13] Lord Ashburton was appointed special minister to the U.S. for the purpose of settling several difficult disputes between the United States and Great Britain, including the dispute over the Caroline and also U.S. - Canadian boundary issues.

[14] *See* THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER WHILE SECRETARY OF STATE 104 (N.Y., Harper & Bros. 1848). This work is referred to here, instead of A DIGEST OF INTERNATIONAL LAW, because the latter work does not include the particular excerpts quoted in this paragraph. In addition, this work was the main source cited by those who first commented on this case.

[15] *Id.* at 104.

[16] *Id.* at 105 (emphasis added).

[17] *Id.* at 110.

[18] THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER WHILE SECRETARY OF STATE, *supra* note 14, at 110.

force.[19] In fact, this view was held by commentators until the Charter era. Jennings characterizes Webster's view of what he and Lord Ashburton had agreed upon as "the importance of the principle of non-intervention and the narrow limits of the exceptions."[20] It is clear that Webster had no intention of creating any general rules for the use of force by a state in self-defense, or in particular for the use of force by a state within its own territory against armed attack. How is it, then, that Webster's *Caroline* doctrine "came to be looked upon as transcending the specific legal contours of extra-territorial enforcement, and has markedly influenced the general *materia* of self-defense?"[21]

III. THE RECENT VIEW OF THE *CAROLINE* DOCTRINE

At present, it seems widely accepted that the narrow restrictions of the *Caroline* doctrine apply to *all* uses of force by a state in self-defense under customary international law. Self-defense is often defined by way of the *Caroline* doctrine. The *Encyclopedic Dictionary of International Law*, for example, defines self-defense in this way: "(1) Under customary international law, it is generally understood that the correspondence between the USA and UK of 24 April 1841, arising out of *The Caroline Incident* . . . expresses the rules on self-defense."[22]

This view seems to have become especially prevalent in the decade of the 90s. In 1990, Rogoff and Collins wrote an article emphasizing this interpretation.[23] In it, they made the broad statement that "[t]his formulation, known as the *Caroline* doctrine, asserts that use of force by one nation against another is permissible as a self-defense act only if force is both necessary and proportionate."[24] Similarly, the 1991 UNESCO-sponsored volume *International Law: Achievements and Prospects* includes a piece indicating that the right to self-defense set out in Article 51 of the Charter includes the *Caroline* doctrine and indicates that the doctrine pertains to a

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[19] With respect to whether or not the U. S. exercised due diligence in preventing its territory from being used to violate that of another state, Jennings wrote, "[t]he United States Government took steps to maintain order and to restrain coöperation with the rebels, but, hampered as they were by the strong partisanship of a large proportion of American citizens, their efforts were not attended by success." Jennings, *supra* note 4, at 82. D.W. Bowett likewise noted that "[w]hatever the merits of the controversy it is clear that at no stage did Great Britain rest her case on the allegation of a prior breach of duty by the United States." D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 59 (1958). In any event, Webster, in his letters to Fox and Ashburton, did not admit to any wrong doing on the part of the U.S. and so intended the statement at issue here to apply to the circumstances as he saw them.

[20] Jennings, *supra* note 4, at 91.

[21] DINSTEIN, *supra* note 2, at 244.

[22] ENCYCLOPEDIC DICTIONARY OF INTERNATIONAL LAW 361 (Clive Parry et. al. eds., 1988).

[23] Rogoff & Collins, *supra* note 7.

[24] *Id.* at 498.

state's permissible response to an attack.[25] Tellingly, the ninth edition of the classic English-language treatise in the field, *Oppenheim's International Law*, also adopted this view in 1992, stating that "the basic elements of the right of self-defense were aptly set out in connection with the *Caroline* incident in 1837."[26] Dinstein's observation concerning the *Caroline* doctrine and the use of force in customary international law has already been noted.[27] The 1995 *United Nations: Law, Policy and Practice* stated that, with respect to self-defense,

> In addition to the specific requirements of Article 51 [of the UN Charter], several other elements are universally accepted as required by customary international law: immediacy, proportionality and necessity. These principles were first expressed by American Secretary of State Daniel Webster in correspondence concerning the famous *Caroline* incident in 1837 and have been referred to ever since.[28]

United Nations Legal Order, published in the same year, takes a similar position.[29] Some Charter-era writers have continued to place the *Caroline* doctrine in its proper historical context and to limit the scope of its application. In fact, more have done so than one would think, given the unqualified nature of statements just cited. The opinions of these writers are discussed in Part IV below.

Why have many modern scholars extracted Webster's statement from its context and made it into a rule of general application, even though that general application distorts history and can lead to the development of questionable legal rules? One likely reason is that there has been a substantial shift in the norms concerning the conditions under which it is acceptable to use force in international relations; another is that the very meaning of the term self-defense has changed significantly since the mid-nineteenth century.

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[25] *See* Ronald St. John Macdonald, *The Use of Force by States in International Law, in* INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 717, 721 (Mohammed Bedjaoui ed., 1991).

[26] 1 OPPENHEIM'S INTERNATIONAL LAW 420 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

[27] *See* DINSTEIN, *supra* note 2.

[28] Kenny, *supra* note 8, at 1167.

[29] John F. Murphy, *Force and Arms, in* 1 UNITED NATIONS LEGAL ORDER 247 (Oscar Schachter & Christopher C. Joyner eds., 1995). The author states that "[p]rior to the adoption of the United Nations Charter, the test most commonly cited by commentators for judging whether the use of force was justified as an act of self-defense was that of US Secretary of State Daniel Webster in the *Caroline* case." *Id.* at 257. The discussion that follows revolves around whether in the Charter era the *Caroline* doctrine continues to include the right of anticipatory self-defense; the doctrine is presumed to apply to regular self-defense.

IV. SELF-DEFENSE, SELF-PRESERVATION, AND NECESSITY IN WEBSTER'S ERA

Before tracing the *Caroline* doctrine's treatment by commentators from Webster's time to the present, it is important to remember that the circumstances under which it was necessary to justify the use of force in international law have changed substantially since 1841. As one commentator noted, "[a]s long as recourse to war was considered free for all, against all, for any reason on earth . . . States did not need a legal justification to commence hostilities. The plea of self-defense was relevant to the discussion of State responsibility for forcible measures undertaken in peacetime."[30] The latter was certainly the context of Webster's exchanges with Fox and Ashburton.

Given that states did not need a justification to commence hostilities in general, it was axiomatic and in keeping with the accepted understanding of state sovereignty that there was absolutely no need to justify the use of force by a state on its own territory against the invading forces of another state. David Dudley Field, writing some thirty-five years after the *Caroline* incident, expressed the opinion that had prevailed in Webster's time when he wrote: "[e]very nation is sovereign within its own jurisdiction; that is to say, it is, of right, independent of all foreign interference, and free to express and enforce its will, by action within its jurisdiction, without opposition from any foreign power."[31] He likewise stated that "[n]o nation is bound to tolerate the performance, within the places subject to its exclusive jurisdiction . . . any act, official or unofficial, of any other nation."[32] The powerful negative reaction by other nations to the U.S.-sponsored abduction from Mexico of a Mexican national in the *Alvarez-Machain* case demonstrates the continued validity of this proposition.[33] Given these prevailing views regarding the use of force and the absolute nature of sovereignty, it would have been inconceivable for Webster to have intended the *Caroline* doctrine to have the meaning now attached to it in the *recent view*, i.e., that it applies to all uses of force in self-defense, *including* a state's use of force within its own territory, and thus may limit the ability of a state to lawfully use force against an attacker.

Moreover, at the time, the terms self-defense, self-preservation, and

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[30] DINSTEIN, *supra* note 2, at 176. *See also* Brun-Otto Bryde, *Self-Defense*, *in* 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 212 (Rudolf Bernhardt ed., 1982); Albrecht Randelzhofer, *Article 51*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 661 (Bruno Simma ed., 1994).

[31] DAVID DUDLEY FIELD, DRAFT OUTLINES OF AN INTERNATIONAL CODE 8 (N.Y., Diossy & Co. 1872).

[32] *Id.* at 9.

[33] *See, e.g.*, Jonathan A. Bush, *How Did We Get Here? Foreign Abduction After Alverez-Machain*, 45 STAN. L. REV. 939, 942 & nn. 14-15 (1993).

necessity were not terms of art with clearly defined independent meanings. The term self-defense was used alongside, and sometimes interchangeably with, self-preservation and necessity. As Jennings noted, while Webster used self-defense in his letter, he also used the term *preservation* in discussing how "a just right of *self-defense* attaches always to nations as well as to individuals, and is equally necessary for the *preservation* of both."[34] Greig believes Webster may have used the term self-defense in response to the initial British argument that the persons in Colonel McNabb's attacking force were taking the action because it was necessary for their self-defense as individuals.[35] Another possibility is that Webster used the term self-defense due to the influence of the great American jurist James Kent. Kent used the term in writing on the law of nations in the first volume of his seminal treatise on American law that was published about a decade before the *Caroline* incident.[36] In discussing the justifiable causes of war, he also used words that might well have provided Webster with a basis for the *Caroline* doctrine, "[t]he danger must be great, distinct and imminent, and not rest on vague and uncertain suspicion."[37]

The terms self-preservation and necessity were at least equally commonly used as self-defense in discussing acts of force, short of war, taken by a state to protect itself against an attack or a perceived threat from another state. Vattel, whose *The Law of Nations* was highly influential in the U.S. at the time, described the use of force in protection of the state using the terms *le soin de se conserver*, which was translated as self-preservation[38] and *la defense de soi-meme*, which was translated as self-defense.[39] Wheaton also employed the terms self-preservation and self-defense in the edition of his seminal international law treatise published shortly after the

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[34] Jennings, *supra* note 4, at 91.

[35] *See* D.W. GREIG, INTERNATIONAL LAW 885 (2nd ed. 1976).

[36] "The right of self-defense is part of the law of our nature." 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 46 (N.Y., O. Halstead 1826).

[37] *Id.* at 23. Kent may have, in turn, relied upon Vattel for this formulation. Kent referred frequently to Vattel, and in discussing what we would call anticipatory self-defense, the latter wrote that one nation may even "anticipate his [another state's] machinations, observing, however, not to attack him upon vague and uncertain suspicions lest she should incur the imputation of becoming herself an unjust aggressor." MONSIEUR DE VATTEL, THE LAW OF NATIONS Book II, §50, at 154 (Philadelphia, Abraham Small 1817) (1758) [hereinafter VATTEL 1817].

[38] "In vain does nature prescribe to nations, as well as to individuals, the care of self-preservation . . . if she does not give them a right to preserve themselves from every thing that might render this care ineffectual." *Id.* Book II, § 49, at 154. The modern English-language translation employs the same phrase. *See* E. DE. VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW Book II, §49, at 130 (Charles G. Fenwick trans., 1916) (The Classics of International Law) [hereinafter VATTEL 1916]. In the same paragraph Vattel also refers to this as the *Droit de surete*, which has been translated as *the right to security*. *See* VATTEL 1817, *supra* note 37, §49, at 154. It has also been translated as the *right of self-protection*. *See* VATTEL 1916, *supra*, §49, at 130.

[39] "A state which takes up arms to repel the attack of an enemy carries on a *defensive* war." VATTEL 1916, *supra* note 38, Book III, § 5, at 236. "The purpose of defensive war is simple, namely, self-defense." *Id.*

Caroline incident.[40] He referred to self-preservation as an "absolute international right of states, one of the most essential and important, and that which lies at the foundation of all the rest."[41] He saw self-defense as one of the "incidental rights which are essential as means to give effect to the principle end" of self-preservation.[42]

Although Wheaton differentiated between the two terms, they were more commonly used as synonyms. Jennings, in his article on the *Caroline* case, discussed the distinction between self-defense and self-preservation agreed upon at the time he wrote,[43] and then went on to note that "it is to be doubted whether this distinction . . . was at all appreciated in the earlier stages of the development of international law."[44] Jennings pointed out that "Fox continually used the phrase 'self-defense and self-preservation' as if the two were synonymous terms,"[45] and that the British Law Officers used the term self-preservation exclusively.[46] Jennings further noted that treatise writers into the twentieth century continued to write of self-preservation rather than self-defense.[47] Another modern writer indicates that what Webster was referring to in the *Caroline* doctrine is what twentieth century writers know as self-preservation.[48]

The term "necessity" was used occasionally as a synonym for self-preservation and self-defense. In discussing the U.S. attack on an outlaw fort in the Spanish territory of Pensacola, for example, John Quincy Adams wrote that "[n]ecessity justifies an invasion of foreign territory so as to subdue an expected assailant."[49] President Tyler used similar language in describing the British justification for their actions in the *Caroline*

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[40] HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW (Philadelphia, Lea & Blanchard 3rd ed. 1846).

[41] *Id.* at 101 (emphasis omitted).

[42] *Id.*

[43] *See* Jennings, *supra* note 4, at 91. The distinction in Jenning's day was that "whereas self-defense presupposes an attack, self-preservation has no such limitation." *Id.*

[44] *Id.*

[45] *Id.* Hans Kelsen likewise holds that "[n]o clear distinction appears in Webster's statement between a right of self-defense and a much broader 'right' of self-preservation. If anything, the implication is that Webster was referring to a 'right' of self-preservation." HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 80-81 n.72 (Robert W. Tucker ed., 2nd ed. 1967).

[46] *See* Jennings, *supra* note 4 at 91.

[47] *Id.* at 91. As late as 1965, the *Digest of International Law* had separate sections covering self-preservation and self-defense. *See* WHITEMAN, *supra*, note 12, § 24 (self-preservation) & § 25 (self-defense).

[48] "The term 'self-preservation' has been used, mainly before 1945, to designate a number of different rules authorizing in exceptional circumstances one State's interference or intervention affecting the rights and interests of another. Learned authors and State practice have both invoked the principle (e.g. [The] Caroline . . .)." Karl Josef Partch, *Self-Preservation*, *in* 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 30, at 217.

[49] 1 FRANCIS WHARTON, A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES § 50(b), at 225 (Washington D.C., Government Printing Office 1886).

incident.[50]

It is clear that self-defense, self-preservation, and necessity were more often employed in discussions of uses of force by a state *outside* of its own territory (which today would be covered by the terms anticipatory self-defense or intervention) than to the use of force *within* the state's own territory. The legality of the latter, as we have seen, was assumed as a basic aspect of sovereignty.

V. THE DEVELOPMENT OF THE RECENT VIEW

A. British and American Perspectives

In their discussions of the *Caroline* doctrine, both British and American writers on international law kept the doctrine in its proper context until the Charter era, even though they tended to view it from their different national perspectives until the twentieth century. American publicists tended to fit the *Caroline* doctrine into their treatment of the rights of neutrals, usually not referring to it in their description of the right to self-preservation. British writers, on the other hand, discussed the *Caroline* doctrine in the context of self-preservation.

H.W. Halleck, in the first American international law treatise that mentions the *Caroline* incident, refers to the episode in a section headed *Rights and Duties of Neutrals*, and does not cite it in his chapter on *Just Causes of War* where he describes legitimate self-defense and self-preservation.[51] Likewise, Dana, in his 1866 edition of Wheaton, noted the *Caroline* incident in a chapter on *Rights of War as to Neutrals*,[52] and Woolsey, writing in 1878, recited the *Caroline* doctrine in a chapter entitled *Of the Relationship Between Belligerents and Neutrals*.[53] In the first digest of U.S. practice in international law, Francis Wharton discussed the *Caroline* doctrine in a chapter concerning intervention.[54] Not until the twentieth century did American treatise writers place their treatment of the

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[50] "The letter of the British minister, while attempting to justify that violation upon the ground of a pressing and overruling necessity . . ." *Id.* § 50(c), at 227.

[51] *See* H.W. HALLECK, INTERNATIONAL LAW 520 (N.Y., D. Van Nostrand 1861). Henry Wheaton's *Elements of International Law*, which appears to have been the first treatise written by an American after the *Caroline* incident, does not refer to the incident. *See* WHEATON, supra note 40. This may be because Wheaton was in Berlin as a U.S. diplomat when he wrote this edition.

[52] *See* HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW §430, at 526-27 n.208 (Richard Henry Dana ed., London, Sampson Low, Son, & Company 8th ed. 1866).

[53] *See* THEODORE WOOLSEY, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW 291 (N.Y., Charles Scribner & Sons 5th ed. 1878).

[54] Wharton, *supra* note 49, § 50(c), at 227.

Caroline doctrine in the context of self-preservation.[55]

From the very beginning, British treatise writers examined the *Caroline* doctrine within the confines of self-preservation. Examples include Phillimore in 1854,[56] Hall in 1895,[57] and Oppenheim in 1912.[58] Later, self-defense became the rubric under which British writers discussed the doctrine.[59]

B. Discussion in Context

Despite this difference in approach to the *Caroline* doctrine, both American and British commentators kept the doctrine in its proper context until the U. N. Charter era. Only then did some commentators begin to describe Webster's famous sentence as being applicable to self-defense in general, as opposed to being applicable to circumstances in which one state desired to use the concept of self-defense or self-preservation to justify violating the territorial integrity of another state which had not first violated any relevant international legal obligation to it.

It appears as if the British writer Robert Phillimore, writing in 1854, was the first to note the *Caroline* incident in a treatise.[60] In reference to the incident he wrote:

> It may happen that the same Right [the right of self-preservation] may warrant her in extending precautionary measures without these limits [i.e., the state's own boundaries] and even in transgressing the borders of her neighbor's territory. For International Law considers the Right of Self-Preservation as prior and paramount to that of Territorial Inviolability, and, where they conflict, justifies the maintenance of the former at the expense of the latter right.[61]

He went on to state that the British use of the self-preservation

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[55] *See, e.g.*, GEORGE GRAFTON WILSON & GEORGE FOX TUCKER, INTERNATIONAL LAW 71 (2nd ed. 1901); COLEMAN PHILLIPSON, WHEATON'S ELEMENTS OF INTERNATIONAL LAW 89 (1916); CHARLES STOCKTON, OUTLINES OF INTERNATIONAL LAW 104 (1916); CHARLES FENWICK, INTERNATIONAL LAW 130, 143-44 (1924).

[56] *See* 1 ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW ¶ 228, at 189 (Philadelphia, T. & J. W. Johnson 1854).

[57] *See* WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 283 (Oxford, Clarendon Press 4th ed. 1895).

[58] *See* 1 LASSA OPPENHEIM, INTERNATIONAL LAW 187 (Ronald F. Roxburgh ed., 3rd ed. 1920).

[59] *See, e.g.*, BOWETT, *supra* note 19, at 31; GEORG SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 172 (4th ed. 1960); J.G. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 404 (1963).

[60] *See* PHILLIMORE, *supra* note 56, ¶ 228, at 189.

[61] *Id.*

defense "was a sufficient answer, and a complete vindication," if the British version of the facts were correct.[62] While he did not quote Webster, Phillimore clearly discussed the incident in its proper context. He noted the specifics of the situation and indicated that it was a case in which two rights were in conflict--the right of self-preservation and that of territorial inviolability--rather than one in which only the parameters of one right was at issue.

Although Halleck did not write of a *Caroline* doctrine when he mentioned the *Caroline* incident in his 1861 treatise, he did describe Webster's assertion on behalf of the United States with reference to the facts of the case and quoted the crucial words, "Mr. Webster, while claiming absolute immunity of neutral territorial against aggression from either of the belligerents, admitted that the necessity of self-defense might justify hostility in the territory of a neutral power; but that it was required of the English government, as the aggressor in this case, 'to show a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation.'"[63]

As noted, British and American writers consistently grounded their discussions of the *Caroline* it its proper context throughout the nineteenth century and into the twentieth century, until the United Nations Charter era. They did not employ the *Caroline* doctrine as a statement applying generally to the use of force in self-defense. Examples of the positions of earlier writers include Dana (in his 1866 edition of Wheaton) -- "Mr. Webster contended that, *for such an infringement of territorial rights*, the British government must show 'a necessity of self-defense instant . . .'"[64]; Woolsey (1878) -- "Mr. Webster said that *such a violation of neutrality* could be justified only by a 'necessity of self-defense instant, overwhelming, having no choice of means, and no moment of deliberation'"[65]; Davis (1900) -- "Mr. Webster contended that *for such an infringement of territorial rights*, the British government must show 'a necessity of self-defense instant . . .'"[66]; Oppenheim (1912) -- "The United States complained of this British *violation of her territorial supremacy* [the *Caroline* incident], but Great Britain was in a position to prove that her act was necessary in self-preservation . . ."[67]; Fenwick (1924) -- "The right of self-defense may justify, as in the case of the *Caroline*, *the temporary*

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[62] *Id.* at 190.

[63] *Id.* Halleck cited *The Diplomatic and Official Papers of Daniel Webster* as the source for Webster's language.

[64] WHEATON, *supra* note 52, § 430 at 527 n.208 (emphasis added).

[65] WOOLSEY, *supra* note 53, at 291 (emphasis added).

[66] GEORGE DAVIS, OUTLINES OF INTERNATIONAL LAW 100-101 (1900) (emphasis added).

[67] OPPENHEIM, *supra* note 58, at 218 (emphasis added).

invasion of the territory of a neighboring state";[68] and Brierly (1928) --

> Perhaps the clearest of legal justifications for intervention is self-defense . . . A state, like an individual, may protect itself against an attack, actual or threatened. Moreover, *the security of a state may be threatened by another*, either of set policy, or *by the latter's impotence or misgovernment*; . . . *A particularly clear example of an intervention justified on this ground is afforded by the incident of the steamer Caroline.*[69]

Even in the Charter era, many writers have continued to define the *Caroline* doctrine as applying to extraterritorial uses of force only and have not expanded its application to all uses of force in self-defense. Cheng (1953), for example, characterized the rule as being, "[i]n case of an 'instant and overwhelming necessity,' a State is thus allowed to take defensive measures against hostile acts of private individuals in the territory of a friendly foreign State, when the latter is unable to afford the necessary protection to its rights."[70] Bowett (1958),[71] O'Connell (1965),[72] Greig (1965),[73] and Franck (1995)[74] are similarly faithful to Webster's original version in their descriptions of the *Caroline* doctrine. Others, such as von Glahn (1965),[75] describe the doctrine rather more generally as outlining the right of intervention in self-defense, while Schachter (1991)[76] refers to it as indicating the limits placed by international law on anticipatory defense. In fact, one could argue that the traditional view of the *Caroline* doctrine was still the majority view until this decade, despite recent assertions to the contrary.

C. The Interpretive Shift

The first treatises to refer to the *Caroline* doctrine as a rule applying generally to uses of force in self-defense were published in the 1960s,[77] although the stage for such a use probably was set by Jennings' much quoted article of 1938[78] and by other gradual blurrings of its contours.

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[68] FENWICK, *supra* note 55, at 130 (emphasis added).

[69] J.L. BRIERLY, THE LAW OF NATIONS 157 (1928) (emphasis added).

[70] BIN CHENG, GENERAL PRINCIPLES OF INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 87 (George W. Keeton & Georg Schwarzenberger eds., 1953).

[71] *See* BOWETT, *supra* note 19, at 31.

[72] *See* 1 D.P. O'CONNELL, INTERNATIONAL LAW 343-44 (1965).

[73] *See* GREIG, *supra* note 35, at 883-886.

[74] *See* THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW 273 (1995).

[75] *See* GERHARD VON GLAHN, LAW AMONG NATIONS 162 (1965).

[76] *See* SCHACHTER, *supra* note 12, at 151.

[77] *See infra* text accompanying notes 98-106.

[78] *See* Jennings, *supra* note 4.

1. Ambiguity

Jennings' entire discussion of the *Caroline* incident was very much grounded in the appropriate context. The first sentence of his article indicates that he understood the incident foremost as a case of intervention, and he states that "there is no more potentially dangerous ground of intervention than that which is variously described as 'self-preservation' and 'self-defense.'"[79] Jennings went on to point out the usefulness of the *Caroline* doctrine in limiting the instances in which states can justify intervention on the grounds of self-defense.

Unfortunately, in the course of his article, Jennings employed a felicitous phrase, often repeated since, that lends itself to misunderstanding when quoted out of context. In summing up the significance of the *Caroline* case, he referred to it as "the *locus classicus*[80] of the law of self-defense."[81] However, in the first sentence of the paragraph in which this often quoted phrase occurs, Jennings wrote that "The *Caroline* was the first important case of *intervention in self-defense* where the intervention was suffered by a strong state,"[82] (emphasis added). Hence, he was using *self-defense* as shorthand for *intervention in self-defense* here and elsewhere in the article.[83] Nevertheless, some later writers (and perhaps even Jennings himself)[84] began to apply the *Caroline* doctrine to all uses of force in self-defense, even those undertaken by a state in its own territory.

Other well-known scholars writing shortly after the UN Charter went into effect may have contributed to the recent view of the *Caroline* doctrine without actually having held it themselves. In 1947, Georg Schwarzenberger wrote: "Nevertheless, it must be emphasized, as was done by the Nuremberg Tribunal, that a State may justify its action on the ground of self-defense only if it can show that there was an instant and overwhelming necessity for such action."[85] On its face, this may seem to be an application of the *Caroline* doctrine to self-defense in general. However, *its action* in the quoted sentence refers to the preemptive invasion of another

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[79] *Id.* at 82.

[80] *Locus classicus* is defined as the "standard passage which is authoritative on a subject." 1 THE SHORTER OXFORD ENGLISH DICTIONARY 1231 (C.T. Onions ed., 1973).

[81] Jennings, *supra* note 4, at 92 (emphasis omitted).

[82] *Id.*

[83] In the opening paragraph of the *Caroline* article, for example, Jennings wrote, "there is no more potentially dangerous ground of intervention than that which is variously described as 'self-preservation' and 'self-defense.'" Jennings, *supra* note 4, at 82. In the next sentence, Jennings proceeded to state that "[i]t was in the *Caroline* case that self-defense was changed from a political excuse to a legal doctrine." *Id.* "Self-defense" in the second sentence surely means "self-defense used as the 'ground of intervention.'"

[84] As an editor of *Oppenheim's International Law*, Jennings seems to have begun applying the doctrine to self-defense generally. *See* OPPENHEIM'S INTERNATIONAL LAW, *supra* note 26.

[85] GEORG SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 79 (1947).

state, in this case the German invasion of Norway which Germany justified as lawful based on its allegedly reasonable belief that the Allies were planning to use Norway for military action against Germany. Thus, Schwarzenberger applied his statement of the *Caroline* doctrine only to uses of force employed by a state outside its own territory on the grounds of self-defense, not all uses of force in self-defense.[86]

Philip Jessup, in his 1948 treatise, wrote somewhat ambiguously of Webster's statement in the *Caroline* case.[87] He believed it was based on the right of self-defense in domestic law and would rarely apply in an international situation. He wrote, "[i]t is an accurate definition for international law, however, in the sense that the exceptional right of self-defense can be exercised only if the end cannot be otherwise obtained."[88] This seems to imply both that the *Caroline* doctrine applies to self-defense generally and that self-defense is always a last resort, even in response to an armed attack on a state's own territory. This would be in accord with the Rogoff and Collins definition of necessity.[89] However, in using the domestic self-defense analogy, Jessup noted that when someone is subject to a life-threatening attack by an armed bandit, "instantaneous action is clearly requisite and it can be said that there is no moment for deliberation."[90] Moreover, the domestic law of self-defense in the U.S. does not require a defender to retreat from an attack in his or her home (and did not when Jessup wrote, either).[91] Thus, it is reasonable to infer that Jessup's view was similar to that of Kenny[92] in that he may have accepted the doctrine as applying to all uses of force in self-defense, but believed that its conditions are always met by a state responding to an armed attack on its own territory and possibly to uses of force in another state's territory.

Like Jennings, Bowett, in his 1958 treatise *Self-Defense in International Law*, made statements about the *Caroline* doctrine that are subject to misconstruction. Following Jennings, he twice referred to the *Caroline* case as "the *locus classicus* of the right of self-defense."[93] However, again like Jennings, Bowett indicated in the accompanying discussion that he did not believe the *Caroline* doctrine applied to basic self-

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[86] In a later work Schwarzenberger altered his position on this somewhat, stating with respect to the German action in Norway, "[a]ctually, the plea was not one of self-defense, but of necessity." 2 GEORG SCHWARZENBERGER, INTERNATIONAL LAW 30 (1968). In this Schwarzenberger is in accord with Bowett. *See infra* note 96 and accompanying text.

[87] *See* PHILIP JESSUP, A MODERN LAW OF NATIONS 163-69 (1948).

[88] *Id.* at 164.

[89] *See* Rogoff & Collins, *supra* note 7.

[90] *Id.*

[91] *See, e.g.*, 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW §5.7(f), at 660 (1986).

[92] *See* Kenny, *supra* note 8.

[93] *See* BOWETT, *supra* note 19, at 58-59.

defense. In fact, he believed that, with respect to the United States, Great Britain was not acting in self-defense at all in the *Caroline* incident. Following one of the *locus classicus* statements noted above, he pointed out that Great Britain did not rely on an allegation of a prior breach of duty by the U.S. to justify its actions in the *Caroline* incident and that, "[s]trictly speaking, therefore, vis-à-vis the United States the action taken by Great Britain was taken by virtue of its right of necessity."[94]

Moreover, earlier in the work, Bowett differentiated between the "external application" of self-defense (or "active self-defense") and the "internal application" of self-defense (or "passive self-defense"). With respect to external self-defense, he indicated that "the necessity of the case will have to conform to extremely strict standards and it is submitted that the standard will be higher in the case of action within another state's jurisdiction than upon the high seas."[95] Regarding the application of internal self-defense, Bowett believed that "it does so as sovereign and in the exercise of its sovereign rights," and that "[i]t is possible to contend that here the right of self-defense under international law is not relevant at all."[96] Thus, Bowett accepted Jennings' description of the *Caroline* doctrine as the *locus classicus* of self-defense to the extent that he saw it as an "external application of self-defense" or "active self-defense" which was subject to the same strict limitations that should be applied to uses of force based on necessity. This explains why, after stating that British actions in the *Caroline* case were based on necessity, Bowett went on to write that "the principles governing the actual exercise of the right, as stated by Webster, were applicable both to necessity and self-defense."[97]

2. Clear Use of the Doctrine as a General Rule

In the early 1960s, however, two British treatise writers clearly described the *Caroline* doctrine as applying to all uses of force in self-defense. In his sixth edition of Brierly's well-respected *The Law of Nations*, published in 1963, Waldock rewrote the former's chapter on the use of force.[98] In that work, Waldock stated that "[s]elf-defense, properly

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[94] *Id.* at 59-60. In Bowett's schema, the 'rights' of self-preservation and necessity have a legitimate, but limited use in "justifying conduct which, though not lawful (and therefore distinct from self-defence) is yet excusable." *Id.* at 10. However, Bowett believed that Great Britain's use of force *with respect to the rebels* could be "justified by reference to the right of self-defense." *Id.* at 60-61 (emphasis added).

[95] *Id.* at 21.

[96] *See* BOWETT, *supra* note 19, at 22.

[97] *Id.* at 60.

[98] *See* Sir Humphrey Waldock, *Preface* to J.L. BRIERLY, THE LAW OF NATIONS i, xi (Sir Humphrey Waldock ed., 6th ed. 1963). The preface states that the chapter in question "has been written by the present editor and takes the place of Brierly's brief chapter on this subject." *Id.*

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."[99] The context of this description of the right of self-defense in the pre-League era indicates it is intended to apply to all uses of force in self-defense; thus, Waldock does not appear to be using the term as short hand for "intervention in self-defense." Verification of this is found later in the chapter. In discussing Article 51's effect on the right of self-defense under the Charter, Waldock stated that "What can be said with confidence is that under the Charter, as under general international law, a minimum condition of resort to armed force in self-defense is 'an instant and overwhelming necessity for self-defense, leaving no choice of means, and no moment for deliberation.'"[100]

This differs from the approach of prior editions. In the first edition, Brierly discussed the *Caroline* incident in a chapter on intervention and referred to it only as an instance of *intervention* in self-defense. He wrote:

> Perhaps the clearest of legal justifications for intervention is self-defense, provided that the term is understood in its proper sense. A state . . . may protect itself against an attack, actual or threatened. Moreover, the security of a state may be threatened by another, either of set policy, or by the latter's impotence or misgovernment . . . . A particularly clear example of an intervention justified on this ground is afforded by the incident of the steamer *Caroline* in 1837.[101]

The second through fifth editions of *The Law of Nations* maintained this view of the *Caroline* case.[102] However, Brierly, like Jennings, proceeded to write one loose sentence which may have helped provide a basis for the errant view of the 1960s. In the course of his discussion of the *Caroline* incident in the second edition of *The Law of Nations*, Brierly wrote: "[t]he formulation of the principle of self-defense in this case by the American Secretary of State, Daniel Webster, has met with general acceptance."[103] However, this was written in the context of a discussion of the lawful justifications for intervention, one of which was self-defense. A page before the passage just quoted, Brierly wrote that "a particularly clear example of an *intervention* justified on this ground is afforded by the incident of the

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[99] *Id.* at 405. No references are given to other writers sharing this "common view."

[100] *Id.* at 420.

[101] BRIERLY, *supra* note 70, at 157.

[102] *See, e.g.*, J.L. BRIERLY, THE LAW OF NATIONS 253 (2nd ed. 1936); J.L. BRIERLY, THE LAW OF NATIONS 253 (3rd ed. 1942); J.L. BRIERLY, THE LAW OF NATIONS 291 (4th ed. 1949); J.L. BRIERLY, THE LAW OF NATIONS 315 (5th ed. 1955).

[103] J.L. BRIERLY, THE LAW OF NATIONS 254 (2nd ed. 1936).

steamer *Caroline* in 1837."[104]

Rosalyn Higgins took the same broad approach as Waldock in her 1963 treatise, writing "[u]nder traditional international law it has long been accepted that self-defense is justified only when the necessity for action is 'instant, overwhelming, and leaving no choice of means and no moment for deliberation.'"[105] Higgins referred only to Moore's description of the *Caroline* incident as support for this proposition, and the context indicates that she was referring to self-defense in general, rather than "intervention in self-defense." She defined self-defense broadly as "forcible self-help in reply to a forceful wrong."[106]

While some Charter era writers have continued to use the *Caroline* doctrine in its original form,[107] others have accepted the notion that the *Caroline* doctrine applies to all instances of self-defense, as was shown in Part II above. The view of the revisionists has seemed to dominant in the 1990s.

D. Reasons for the Recent View

Why did the recent view of the *Caroline* doctrine arise, and why did it arise when it did, about a century after the doctrine's creation? Is it simply a combination of forgetting the doctrine's factual and historical context and accepting out-of-context statements at face value, or was a deeper doctrinal shift involved? The answer seems to be that all of these factors played a role.

It is likely that Jennings' characterization of the *Caroline* doctrine as the "*locus classicus* of the law of self-defense"[108] and the subsequent repetition of this characterization by Bowett[109] had a substantial impact on how the doctrine was viewed, given the prominence of these writers. It is also probable that the remoteness in time of the incident itself permitted modern writers to approach its meaning in a way different than writers closer to it in time.

Nevertheless, while these factors may have been necessary, they

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[104] *Id.* at 253 (*emphasis added*).

[105] ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 198 (1963). In 1961 Higgins made the same statement in an article upon which her book was in part based. *See* Rosalyn Higgins, *The Legal Limits to the Use of Force by Sovereign States United Nations Practice*, 1961 BRIT. Y. B. INT'L L. 269, 298.

[106] *See* HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS, *supra* note 105, at 199. Higgins wrote that the *Caroline* doctrine *includes* a right of anticipatory self-defense, further indication that she saw the doctrine as applying to the entire right of self-defense as well. *See id.*

[107] *See supra* notes 71-77 and accompanying text.

[108] Jennings, *supra* note 4, at 92.

[109] *See* BOWETT, *supra* note 19.

probably were not sufficient to create the recent view. The necessary element probably was the limitation on the previously accepted customary international law right of states to use force unilaterally that was put into effect by the United Nations Charter. The Charter clearly was designed to substitute collective, UN-sanctioned force for the unilateral use of force by states in most instances and to reduce the use of force in international relations generally.[110] However, the extent to which the Charter restricts the use of force by states in self-defense is disputed.

Many commentators believe that Article 51 substantially narrows the right of self-defense as it existed under pre-Charter customary international law. Those who take this view look at the qualifying phrase "if an armed attack occurs," along with other Charter restrictions on the use of force, and conclude that self-defense under the Charter is much more restricted than that under traditional customary international law.[111] Others understand "the inherent right of self-defense" reserved to states in Article 51 as the right of self-defense as it existed in customary international law at the time the Charter was drafted.[112]

For those who believe the Charter limits significantly the unilateral use of force in self-defense under international law, it would seem logical to apply the highly restrictive conditions of the *Caroline* doctrine to all uses of force in self-defense. The literal, out-of-context sense of Webster's statement is that force should be used in self-defense *in all cases* only as a last resort, when absolutely no other options are available; this comports well with a broadly restrictive view of Article 51's meaning. Thus, a combination of convenient quotes from authoritative commentators, remoteness in time from the event, and a shift in thinking about the unilateral use of force in international law are likely to have combined to create the modern majority view of the *Caroline* doctrine.

VI. REASONS FOR RETAINING THE TRADITIONAL VIEW OF THE *CAROLINE* DOCTRINE

There are sound reasons, however, for rejecting the recent view of the *Caroline* doctrine and for retaining the traditional view. The first of these is that the modern revision of the doctrine implies a misunderstanding

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[110] The first purpose of the U.N. given in the first article of the UN Charter is "[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace." U.N. CHARTER art. 1, para. 1. The Charter further states that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state." U.N. CHARTER art. 2, para. 4.

[111] *See, e.g.*, Randelzhofer, *supra* note 30, at 661; HANS KELSEN, THE LAW OF THE UNITED NATIONS 797-800 (1950).

[112] *See, e.g.*, Meng *supra* note 12, at 538; BOWETT, *supra* note 19, at 184-193.

of history and alters the intention of its creator. 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.

Second, the recent view of the *Caroline* doctrine runs contrary to other accepted principles of international law and could lead to the creation of undesirable legal rules, as noted earlier.[113] Beleaguered as the traditional concept of sovereignty is, to suggest that a state cannot immediately use force against an armed attack on its own territory runs contrary to most understandings of that principle. It is undesirable to suggest that international legal rules so restrict the unilateral use of force in self-defense that "clever aggressors" might be tempted to use such rules as a shield.[114]

Third, the *Caroline* doctrine loses its validity and becomes illogical when it is viewed as applying to such diverse situations as: (a) interventions in self-defense (as intended by Webster); (b) anticipatory self-defense; and (c) the use of force by a state in its own territory against an armed attack. It is not in keeping with the logic of the law to apply the same restrictive standards of the doctrine to situations in which a state that is wielding the self-defense force is doing so (a) against a third party, within the territory of a state which has violated no legal obligation to it; (b) within and against a state that probably is about to use force illegally against it; and (c) within in its own territory against a state that clearly has violated its legal obligations to it by invading it. As early commentators noted, a state's obligation to another that has not breached a legal obligation toward it is surely higher than it is toward a state that has breached an obligation toward it by launching an armed attack against it. The *Caroline* doctrine should be applied only to interventions in self-defense and to anticipatory self-defense, situations in which a state is seeking to justify the use of force outside its own territory.

Finally, the *Caroline* doctrine, properly understood, is an appropriate rule of international law. International law should not be interpreted as forbidding absolutely all interventions in self-defense or all instances of anticipatory self-defense. Given the continued inability of the Security Council to take effective action to eliminate "threat[s] to the peace, breach[es] of the peace or act[s] of aggression," it is preferable to interpret Article 51 as including the rights of intervention in self-defense and of anticipatory self-defense, as narrowly defined in the *Caroline* doctrine, than to interpret it as eliminating these rights. States that truly are the victims of armed harassment by forces operating out of another state, or that are threatened by imminent and grave aggression from another state, should not

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[113] *See supra* notes 7-8 and accompanying text.

[114] *See* Kenny, *supra* note 8 and accompanying text.

be forced to act outside the law.[115]

However, it is important to remember that Webster himself thought that the criteria established in his doctrine *were not met* by Great Britain in the *Caroline* incident and that they are very strict indeed. After setting out the basic rule of the *Caroline* doctrine, Webster went on to detail what he believed the British would have to prove to justify their use of force in U.S. territory under the rubric of self-defense.

> 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 night, killing some and wounding others, and then drawing her into the current, above the cataract, setting her on fire... A necessity for all this the government of the United States cannot believe to have existed.[116]

Thus, retaining and reinvigorating the *Caroline* doctrine in its original form would not be an invitation to aggression under the guise of lawful self-defense. On the contrary, it would appropriately balance the right of a state to prevent other parties from using force within its territory with its obligation to abstain from using force in the territory of other states in all but the most urgent circumstances.

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[115] For a more detailed discussion of the lawfulness of anticipatory self-defense, see SCHACHTER, *supra* note 12, at 150-152.

[116] THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER WHILE SECRETARY OF STATE, *supra* note 14, at 110.