2 The Caroline Incident—1837

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(p. 5) 2 The *Caroline* Incident—1837

I. Facts and Context

Were it not for the 'public and vainglorious'[1] boasting of one Alexander McLeod about his role in the incident, some three years after the event, the world of international law might never have heard of the 'unfortunate case of the *Caroline*' of 1837. It was McLeod's arrest on charges of murder and arson that rekindled the incident, and led to the matter becoming a legal and political cause célèbre between the British and American Governments. The events culminated in correspondence (section II below) that—in retrospect at least—is widely seen as a starting point for discussion of the customary international law on self-defence under the *jus ad bellum*.[2] Even a cursory reading of the correspondence indicates that it covers issues that run like a golden thread through many of the studies in the present volume. A reader of the correspondence will note that both sides took what, on the surface at least, seems to have been a remarkably modern and humane approach, even in the heat of great political controversy. The *Caroline* formula ('a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation') is much quoted today, even while reliance upon it is criticized from all sides. Writings on the incident are extensive and cannot all be referred to here.[3]

Unlike most of the case studies in this volume, the *Caroline* incident itself was not a major event—though it must have been quite spectacular, given the vision of the burning vessel as it descended the Niagara Falls ('a fate which fills the imagination with horror'). The facts are not entirely clear from the correspondence,[4] but it seems that at most two (p. 6) persons died on the night of 29/30 December 1837 (Amos Durfee, and a cabin boy, known as 'little Billy').

The incident took place in the context of a difficult period in British–American relations, not long after the War of 1812.[5] There was an ongoing rebellion in Upper Canada (now Ontario), then a British colony, with some calling (in vain) for it to declare independence from Great Britain and establish a 'Republic of Canada'. American citizens were aiding and assisting the Canadian rebels with arms and men from the American side of the border. In mid-December 1837, two rebel leaders, McKenzie and Rolfe, held public meetings in Buffalo, New York, seeking men, as well as arms and ammunition which were collected at the Eagle tavern. On 13 December 1837, some of the rebels and recruits established themselves on Navy Island, a small island within Ontario just above the Niagara Falls,[6] where they were supplied from the American shore by a small vessel known as *The Caroline*. On the night of 29/30 December 1837, British–Canadian militia set off to capture *The Caroline*. Finding that it had left Navy Island they traced it to Schlosser on the American shore, whereupon they disembarked the crew and passengers, killing in the process Amos Durfee and possibly the cabin boy. They then set fire to the vessel, dragged it into the channel of the Niagara River, and cast it loose over the Falls.

Reports of the number of missing and dead were greatly exaggerated, and Amos Durfee's body was displayed at a tavern in Buffalo, all of which caused 'great excitement' and 'some degree of commotion'. A first exchange of Notes took place between the United States and Great Britain in early January 1838. However, the matter would probably not have been taken further if it had not been for the arrest of Alexander McLeod in New York in 1841. As summarized by Jennings, '[i]n 1841 the condition of Anglo-American relations was such that the desultory correspondence must be replaced by a determined effort for a peace

settlement if war was to be averted'.[7] Lord Ashburton was sent to Washington as special Minister and further and decisive correspondence then took place.

McLeod's arrest and subsequent trial raised the issue of the immunity for official acts of members of foreign armed forces. The United States was not, however, able to prevent the trial going ahead. Following his acquittal by the jury (which—after just 20 minutes retirement—found he had not been present on the night), McLeod eventually brought a claim against the United States, before a US–UK General Claims Commission, for compensation for the undue period he was detained; the claim was disposed of in 1854–55, when the Umpire found that it had been settled by the two governments in 1841–42 and was thus outside the jurisdiction of the Commission.[8] The UK Government then gave McLeod a substantial annual pension.

II. The Positions of the Main Protagonists and the Reaction of Third States and International Organizations

As Jennings noted in his celebrated article, published in 1938 just 100 years after the event, 'paradoxically enough, this *locus classicus* of the *law* of self-defence, is a case that turned (p. 7) essentially on the *facts*'.[9] The legal arguments are well set out in advice from the British law officers,[10] and especially in correspondence between the two governments,[11] which were essentially of the same mind as to the law, so much so that the key 'Webster formula' was repeated no less than three times.

It is worth citing at some length the correspondence between US Secretary of State, Daniel Webster, and the British representatives in Washington (resident Minister, Fox, and special Minister, Lord Ashburton, charged with negotiating an agreement on the north-eastern boundary and other outstanding matters, including the *Caroline* and *McLeod* cases), so as to appreciate the context in which the Webster formula was used and repeated.

Secretary of State Daniel Webster sent a Note to the British Minister in Washington, Mr Fox, on 24 April 1841. The Note is lengthy, but deserves to be read in full to understand the context of the frequently cited passage (which is highlighted below). The key passages are reproduced here:

> The Undersigned has now to signify to Mr Fox that the Government of the United States has not changed the opinion which it has heretofore expressed to Her Majesty's Government, of the character of the act of destroying the '*Caroline*'. It does not think that that transaction can be justified by any reasonable application or construction of the right of self-defence under the laws of nations. It is admitted that a just right of self-defence attaches always to nations, as well as to individuals, and is equally necessary for the preservation of both. But the extent of this right 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 …
>
> That on a line of frontier, such as separates the United States from Her Britannic Majesty's North American Provinces, a line long enough to divide the whole of Europe into halves, irregularities, violences, and conflicts should sometimes occur, equally against the will of both Governments, is certainly easily to be supposed. This may be more possible, perhaps, in regard to the United States, without any reproach to their Government, since their institutions entirely discourage the keeping up of large standing armies in time of peace, and their situation happily exempts them from the necessity of maintaining such expensive and dangerous establishments. All that can be expected, from either Government in these cases, is good faith, a sincere desire to preserve peace and do justice, the use of all proper means of prevention, and, that if offenses cannot, nevertheless, be always

> prevented, the offenders shall still be justly punished. In all these respects, this Government acknowledges no delinquency in the performance of its duties …
>
> This Government, therefore, not only holds itself above reproach in every thing respecting the preservation of neutrality, the observance of the principle of non-intervention, and the strictest conformity, in these respects, to the rules of international law, but it doubts not that the world will do it the justice to acknowledge that it has set an example, not unfit to be followed by others, and that by its steady legislation on this most important subject, it has done something to promote peace and good neighborhood among Nations, and to advance the civilisation of mankind.
>
> The Undersigned trusts, that when Her Britannic Majesty's Government shall present the grounds at length, on which they justify the local authorities of Canada, in attacking and destroying the '*Caroline*', they will consider, that the laws of the United States are such as the (p. 8) Undersigned has now represented them, and that the Government of the United States has always manifested a sincere disposition to see those laws effectually and impartially administered. If there have been cases in which individuals, justly obnoxious to punishment, have escaped, this is no more than happens in regard to other laws.

Having asserted that the United States could not be reproached any wrongful conduct, Webster went on to address whether the destruction of the *Caroline* could nonetheless be justified:

> 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. 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 all this, the Government of the United States cannot believe to have existed.[12]

Subsequently, on 27 July 1842, Webster sent a Note to the Special Minister, Lord Ashburton, enclosing a copy of his Note of 24 April 1841. The main paragraph of the Note of 27 July 1842 read as follows:

> The act of which the Government of the United States complains is not to be considered as justifiable or unjustifiable, as the question of the lawfulness or unlawfulness of the employment in which the '*Caroline*' was engaged may be decided the one way or the other. That act is of itself a wrong, and an offense to the

> sovereignty and the dignity of the United States, being a violation of their soil and territory—a wrong for which, to this day, no atonement, or even apology, has been made by Her Majesty's Government. Your Lordship cannot but be aware that self-respect, the consciousness of independence and national equality, and a sensitiveness to whatever may touch the honor of the country—a sensitiveness which this Government will ever feel and ever cultivate—make this a matter of high importance, and I must be allowed to ask for it your Lordship's grave consideration.

Lord Ashburton responded, the very next day, with a similarly lengthy and carefully drafted Note. Again, only key extracts can be given here:

> In the course of our conferences on the several subjects of difference which it was the object of my mission to endeavour to settle, the unfortunate case of the Caroline, with its attendant consequences, could not escape our attention; for although it is not of a description to be susceptible of any settlement by a convention or treaty, yet being connected with the highest (p. 9) considerations of national honour and dignity it has given rise at times to deep excitement, so as more than once to endanger the maintenance of peace …
>
> It is so far satisfactory to perceive that we are perfectly agreed as to the general principles of international law applicable to this unfortunate case. Respect for the inviolable character of the territory of independent nations is the most essential foundation of civilization …
>
> Every consideration therefore leads us to set as highly as your Government can possibly do this paramount obligation of reciprocal respect for the independent territory of each. But however strong this duty may be it is admitted by all writers, by all Jurists, by the occasional practice of all nations, not excepting your own, that a strong overpowering necessity may arise, when this great principle may and must be suspended. It must be so for the shortest possible period, during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity.
>
> Agreeing therefore on the general principle and on the possible exception to which it is liable, the only question between us is whether this occurrence came within the limits fairly to be assigned to such exception, whether, to use your words, there was 'that necessity of self-defence, instant, overwhelming, leaving no choice of means' which preceded the destruction of the Caroline, while moored to the shore of the United States …

Having expressed approval at the legal standard put forward by his American counterpart, Lord Ashburton nonetheless contested the account of the incident as hinted at by Secretary of State Webster:

> I have only further to notice the highly coloured picture drawn in your note of the facts attending the execution of this service. Some importance is attached to the attack having been made in the night and the vessel having been set on fire and floated down the falls of the river, and it is insinuated rather than asserted that there was carelessness as to the lives of the persons on board. The account given by the distinguished officer who commanded the expedition distinctly refutes or satisfactorily explains these assertions. The time of night was purposely selected as most likely to ensure the execution with the least loss of life, and it is expressly stated that, the strength of the current not permitting the vessel to be carried off, and it being necessary to destroy her by fire, she was drawn into the stream for the

> express purpose of preventing injury to persons or property of the inhabitants at Schlosser …

The correspondence concluded with Webster's Note to Ashburton of 6 August 1842, the relevant part of which reads:

> The President sees with pleasure that your Lordship fully admits those great principles of public law, applicable to cases of this kind, which this Government has expressed; and that on your part, as on ours, respect for the inviolable character of the territory of independent States is the most essential foundation of civilization. And while it is admitted, on both sides, that there are exceptions to this rule, he is gratified to find that your Lordship admits that such exceptions must come within the limitations stated and the terms used in a former communication from this Department to the British Plenipotentiary here. Undoubtedly it is just, that while it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the 'necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.'
>
> Understanding these principles alike, the difference between the two Governments is only whether the facts in the case of the '*Caroline*' make out a case of such necessity for the purpose of self-defence. Seeing that the transaction is not recent, having happened in the time of one of his predecessors; seeing that your Lordship, in the name of your Government, solemnly declares that no slight or disrespect was intended to the sovereign authority of the United States, seeing that it is acknowledged that, whether justifiable or not, there was yet a violation of the territory of the United States, and that you are instructed to say that your Government (p. 10) considers that as a most serious occurrence; seeing, finally, that it is now admitted that an explanation and apology for this violation was due at the time, the President is content to receive these acknowledgments and assurances in the conciliatory spirit which marks your Lordship's letter, and will make this subject, as a complaint of violation of territory, the topic of no further discussion between the two Governments.

It is worth recalling that, at the same time as laying to rest their differences over *The Caroline*, the two sides reached agreement on the important Webster–Ashburton Treaty, and each regarded the 1842 correspondence as closing the matter.

III. Questions of Legality

As is apparent from the above correspondence, the United States and the United Kingdom agreed on the applicable law as it stood in 1837 ('we are perfectly agreed as to the general principles of international law applicable to this unfortunate case'),[13] and agreed to differ on the facts ('the topic [was] of no further discussion between the two Governments').[14]

At this distance in time, and with limited access to the facts in what was evidently a very heated matter, there is no point in seeking to assess, by the standards of the time, the legality of the British actions on the night of 29/30 December 1837.[15]

IV. Conclusion: Precedential Value

The *Caroline* incident continues to be cited as authority in at least three fields of international law: (i) the law of international responsibility, in particular with regard to the invocation of necessity (*état de nécessité*) as a circumstance precluding wrongfulness;[16] (ii) the law of international immunities, specifically the immunity of members of armed forces;[17] and (iii) in the *jus ad bellum* law of self-defence. It is also of interest for the interpretation of the principles of necessity and proportionality under international

humanitarian law,[18] and reminds us of the importance of taking account of international humanitarian law whenever there is a use of force.

The present contribution focuses on the *jus ad bellum*. Among the issues for which the *Caroline* correspondence is cited are the right of 'anticipatory' self-defence; the criterion (p. 11) of imminence in the event of anticipatory self-defence; the requirements of necessity and proportionality; and self-defence against non-state actors.

Virtually every author writing in the field of self-defence refers to the *Caroline* incident,[19] including in connection with the modern phenomenon of self-defence against non-state actors.[20] Webster's 1841 formula is often the starting point for debate about the right of self-defence under international law. The issues raised include the use of force in self-defence against non-state actors, anticipatory self-defence, and related questions of imminence and necessity. The former does not seem to have been controversial in the case in question. The latter appears to have been central to the dispute, and remains a matter of pressing concern today.[21]

The *Caroline* incident, together with the closely related *McLeod* case, date from 180 years ago. They are chiefly remembered today for short passages in the correspondence between the US Secretary of State, Daniel Webster, and the British representatives in Washington, which are often considered to encapsulate the requirements for self-defence under international law:

> Undoubtedly it is just, that while it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the 'necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.'[22]

The language used by the Americans and British in the early 1840s is at one and the same time familiar (touching upon contemporary notions such as intervention, necessity, and self-defence) and unfamiliar (given the very different legal background almost 200 years ago[23]). The issues too are strikingly modern. If the words 'unable or unwilling' are not used, the notion seems to be implicit in the communications from the British side.

That the venerable *Caroline* incident was considered to be alive and well in the law applicable in 1940 is clear from the judgment of the International Military Tribunal at Nuremberg; the argument that the German invasion of Norway was justified on the ground of self-defence in the face of an imminent Allied landing was rejected by reference to the *Caroline* criteria.[24] That the *Caroline* survived into the Charter era may be seen inter alia from Waldock's reliance on it in his seminal Hague lectures from 1952,[25] and in the seventh (1952) edition of Oppenheim, volume II.[26] The *Caroline* has also been invoked on (p. 12) several occasions before the UN Security Council, for example in connection with Israel's 1981 attack on Iraq's Osiraq nuclear reactor.[27] The memory of the incident seems to have lost none of its force, as may be seen from the UK Attorney General's January 2017 speech referred to below.[28]

A heated debate continues among states and writers over the permissibility of *anticipatory self-defence* in the Charter era. The central question concerns the meaning of Article 51 of the UN Charter and, in particular, the words 'if an armed attack occurs against a Member of the United Nations' (in French, '*dans le cas où un Membre des Nations Unies est l'objet d'une agression armée*'). Within this debate, the *Caroline* looms large. States and authors differ in their reading of the Webster correspondence and above all in their views of its current significance. Many tend to focus on the actual words used by Webster, and repeated by the British representatives, and indeed on the words used in a short passage read in

isolation from the correspondence as a whole. The *Caroline* formula is too permissive for some, too strict for others.

The *Caroline* is dismissed as irrelevant by those who reject the right of anticipatory self-defence, irrelevant because the law on the use of force was quite different in 1837 from what it is in the Charter era; and in any event, even if a right of anticipatory self-defence existed under customary international law it could not have survived nor could it override the express language of Article 51.[29]

Others favour a wider right than anticipatory self-defence in the *Caroline* sense (pre-emptive or even preventive self-defence), arguing that Webster's language never contemplated situations such as those faced in the twenty-first century, with the possibility of weapons of mass destruction falling in the hands of terrorist groups.[30]

In other respects, many continue to place great weight on the *Caroline* incident when considering the use of force in exercise of the right of self-defence, relying on Webster's language to identify the strict conditions for the exercise of the right, particularly a right of anticipatory self-defence.[31]

In 2001, the International Law Commission opined that:

> The '*Caroline*' incident of 1837, though frequently referred to as an instance of self-defence, really involved the plea of necessity at a time when the law concerning the use of force had a quite different basis than it now has.[32]

(p. 13) Nevertheless, this rather overlooks the fact that the importance of that language lies not so much in its original use as in its frequent re-use as a precedent. In any event, the notion of necessity in the nineteenth century and self-defence today have a lot in common. That both the facts and the law of the *Caroline* could be seen today as anticipatory self-defence is apparent from the advice given by the British Law Officers in 1839:

> the grounds on which we consider the conduct of the British Authorities to be justified, is that it was absolutely necessary as a measure of precaution *for the future* and not a measure of retaliation for the past. What had been done previously is only important as affording irresistible evidence of what would occur afterwards.[33]

A key issue at stake in the *Caroline* incident was the *imminence* of the attack against which action was taken. If it is accepted that force may be used in self-defence against attacks from non-state armed groups, and if anticipatory self-defence is admitted (which is of course still contested), the question of imminence becomes crucial.

Official statements and declarations by the United States, the United Kingdom, and Australia suggest that, among those that accept the lawfulness of anticipatory self-defence, the imminence criterion is applied more flexibly today, in the face of threats from such non-state armed groups as Da'esh, than in the past in connection with attacks by states. In the case of non-state actors, the planning stages seem to be viewed as closely intertwined with the attacks.

The US, UK, and Australian Governments have recently set out their positions on the law of self-defence in terms that apparently depart from the Webster formula, but which in fact are not so far removed from the spirit of the correspondence when read as a whole. The US position on the two questions, whether anticipatory self-defence is permitted, and, if so, how the criterion of imminence is to be applied in the case of self-defence against non-state

armed groups, was set out, by the Obama Administration, in December 2016 in the following terms:

> Under the *jus ad bellum*, a State may use force in the exercise of its inherent right of self-defense not only in response to armed attacks that have already occurred, but also in response to imminent attacks before they occur. When considering whether an armed attack is imminent under the *jus ad bellum* for purposes of the initial use of force against another State or on its territory, the United States analyzes a variety of factors. These factors include 'the nature and immediacy of the threat; the probability of an attack; whether the anticipated attack is part of a concerted pattern of continuing armed activity; the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action; and the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage.' Moreover, 'the absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of the right of self-defense, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent.' Finally, as is now increasingly recognized by the international community, the traditional conception of what constitutes an 'imminent' (p. 14) attack must be understood in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations.[34]

The UK Government, which had explained its position on imminence under modern conditions in 2004,[35] did so again, in somewhat more detail, in January 2017 along similar lines,[36] as did the Australian Government in April 2017.[37]

In addition to the question of imminence, the *Caroline* correspondence, and the Webster formula itself, retain importance for other aspects of the *jus ad bellum*. In particular, they are often referred to in connection with the customary international law requirements of *necessity* and *proportionality* for a lawful use of force in self-defence under Article 51 of the UN Charter. The *Caroline* incident is sometimes also recalled in connection with the use of force in self-defence against non-state actors, and some of the language in the correspondence may be thought to foreshadow an 'unable and unwilling' test. These are matters that have been brought out above and are addressed in the case studies that follow.

Footnotes:

1 Citations in these early paragraphs are taken from the correspondence reproduced in section II below.

2 (1837–38) 26 British and Foreign State Papers (BFSP) 1372–77; (1837–38) 29 BFSP 1126–42; 30 BFSP 82–99; see also John Bassett Moore, Digest of International Law vol 1, 681.

3 See, among many, R Y Jennings, 'The *Caroline* and *McLeod* Cases' (1938) 32 American Journal of International Law 82; Jaroslav Žourek, 'La notion de légitime defense. Aperçu historique et principaux aspects du problème' Rapport provisoire (1975) 56 Annuaire de l'Institut de Droit International (Session de Wiesbaden) 52; K R Stevens, *Border Diplomacy: The Caroline and McLeod Affairs in Anglo-American-Canadian Relations, 1837–1842* (University of Alabama Press 1989); Martin A Rogoff and Edward Collins, 'The *Caroline* Incident and the Development of International Law' (1990) Brooklyn Journal of International Law 493; Abraham Sofaer, 'On the Necessity of Pre-emption' (2003) 14 European Journal of International Law 209; Michael C Wood, 'Nécessité et légitime défense dans la lutte contre le terrorisme: quelle est la pertinence de l'affaire de la *Caroline* aujourd'hui?' in Hubert Thierry and Jean-Pierre Quéneudec (eds), *Société française pour le*

droit international, Colloque de Grenoble, La Nécessité en droit international (Pedone 2007) ; Christopher Greenwood, 'Caroline, The' in Rudiger Wolfrum (ed), Max Planck Encyclopedia of Public International Law (2012); Andrew Clapham, *Brierly's Law of Nations* (7th edn, OUP 2012) 468–71.

4 The facts, such as they are, are well described by, among others, Jennings (n 3) and Sofaer (n 3). An Ontario Archaeological and Historical Sites Board plaque reads thus: 'On the night of December 29–30, 1837, some 60 volunteers acting on the orders of Col. Allan Napier MacNab, and commanded by Capt. Andrew Drew, R.N., set out from Chippawa in small boats to capture the American steamer "Caroline". That vessel, which had been supplying William Lyon Mackenzie's rebel forces on Navy Island, was moored at Fort Schlosser, N.Y. There she was boarded by Drew's men, her crew killed or driven ashore, and after an unsuccessful attempt to start the engines, her captors set the ship afire and left her to sink in the Niagara River. This action almost precipitated war between Britain and the United States.' <http://ontarioplaques.com/Plaques/Plaque_Niagara59.html>.

5 A B Corey, *The Crisis of 1830–1842 in Canadian-American Relations* (Yale University Press 1941); Howard Jones, *To the Webster-Ashburton Treaty: A Study in Anglo-American Relations, 1783–1843* (University of North Carolina Press 1977).

6 In 1945, an 'international committee' proposed that the headquarters of the United Nations should be located on Navy Island: see International Committee to promote Navy Island as permanent headquarters for the United Nations, *Proposed United Nations Headquarters, Navy Island at Niagara Falls on the International Boundary between Canada and the United States* (Baker, Jones, Hausauer, Inc 1945).

7 Jennings (n 3) 88.

8 Jennings (n 3) 96–99.

9 Jennings (n 3) 92. Emphasis in original.

10 Quoted by Jennings (n 3) 87–88.

11 The correspondence may be found in various publications, including 26 BFSP 1372–77; 29 BFSP 1126–42; 30 BFSP 82–99; J B Moore, Digest of International Law vol 1, 681; Yale Law School, Lillian Goldman Law Library, The Avalon Project, *The Caroline*, <http://avalon.law.yale.edu/19th_century/br-1842d.asp>.

12 For the earlier correspondence dated 5 January and 6 February 1838, see Jennings (n 3) 88.

13 Lord Ashburton to Webster, 28 July 1842.

14 Webster to Lord Ashburton, 6 August 1842. See Vaughan Lowe, *International Law* (OUP 2007) 275–76.

15 Though no less an authority than Waldock, writing in 1952, could say that '[i]t is commonly accepted today that the proper limits of the pleas of self-defence are correctly stated in the above principles *and that, in the particular circumstances, the destruction of the Caroline fell within these principles*'. C H M Waldock, 'The Regulation of the Use of Force by Individual States in International Law' (1952) 81 Recueil des Cours 463 (emphasis added).

16 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) UN Doc A/RES/56/83, Annex, Art 25; commentary in ILC, Yb 2001 vol II(2), 80.

17 Secretary of State Webster to the US Attorney General, 'that an individual forming part of a public force, and acting under the authority of his Government, is not to be held answerable as a private trespasser or malefactor, is a principle of public law sanctioned by

the usages of all civilized nations': J B Moore, *A Digest of International Law*, vol 2 (US Government Printing Office 1906) 25.

18 Such considerations are apparent from the correspondence. Webster's Note of 24 April 1837 is redolent of international humanitarian law considerations: '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 …'. The British response will be familiar to anyone involved in modern targeting: 'The time of night was purposely selected as most likely to ensure the execution with the least loss of life …'.

19 Except perhaps in France, where authors seem to prefer to ignore this Anglo-Saxon precedent. A leading French manual, Patrick Daillier, Mathias Forteau, and Alain Pellet, *Droit international public* (8th edn, LGDJ 2009), contains a single brief reference to the *Caroline* incident (at [481]), in the context of state responsibility (self-defence as precluding wrongfulness).

20 This can be seen from the many references to the *Caroline* incident in the present volume, as in other recent collective works such as Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015). For recent studies, see Institut de Droit International, 'Tenth Commission, Present Problems of the Use of Armed Force in International Law: A Self-defence' Resolution 10A (Session de Santiago, 27 October 2007) <http://www.idi-iil.org/app/uploads/2017/06/Roucounas.pdf>; Pemmaraju Sreenivasa Rao, 'Non-state Actors and Self-defence: A Relook at the UN Charter Article 51' (2017) Indian Journal of International Law (published online 23 February 2017).

21 'Five Country Ministerial and Quintet of Attorneys General Joint Communiqué' (US Department of Homeland Security, 18 February 2016) included the following: 'The Attorneys General agreed to continue to discuss the application of the international law requirements for self-defense, including imminence.' Australia, Canada, New Zealand, UK, USA: US Department of Homeland Security release, <https://www.dhs.gov/news/2016/02/18/five-country-ministerial-and-quintet-attorneys-general-joint-communique>.

22 Webster to Ashburton, 6 August 1837.

23 On the important distinction between self-preservation and self-defence, which may not have been clear to the participants in 1841–42, see Jennings (n 3) 91–92.

24 (1947) 41 American Journal of International Law 205.

25 Waldock (n 16) 462–64.

26 Hersch Lauterpacht (ed), *Oppenheim's International Law* vol II (7th edn, Longmans 1952).

27 See, eg, UNSC Verbatim Record (15 June 1981) UN Doc S/PV.2282 [15]–[16]; UNSC Verbatim Record (15 June 1981) UN Doc S/PV.2283 [148] (Sierra Leone). See also UNSC Verbatim Record (9 July 1976) UN Doc S/PV.1939 [115] (Israel with regard to the 1976 Entebbe raid).

28 At n 36 below.

29 Olivier Corten, *Le droit contre la guerre* (2nd edn, Pedone 2014) 666–69; Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (CUP 2010) 255–59. According to Crawford, '[r]eference to the period 1837–1842 as the critical date for the customary law said to lie behind the UN Charter is anachronistic and indefensible': James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 751. (The language is taken over from the previous edition by Brownlie, which contains a virtually identical sentence: Ian Brownlie, *Principles of Public International Law*

(7th edn, OUP 2008) 734.) '[R]eliance on [the *Caroline*] incident is misplaced': Yoram Dinstein, *War, Aggression and Self-Defence* (6th edn, CUP 2017) 225.

30 Sofaer (n 3) 219: 'The historical setting of *The Caroline* incident makes clear that Webster's formulation for determining the legality of self-defence was based on his assumption that the attack was unnecessary because the US was both willing and able to satisfy its obligation to prevent and punish attacks from within its borders. On that assumption, Webster reasonably claimed that the British could use force within the US if the need to act was "instant, overwhelming, leaving no choice of means and no moment for deliberation".'

31 'It is generally accepted that the customary requirements are authoritatively formulated in correspondence between the USA and the UK following the British attack on an American ship, the schooner *Caroline,* in 1837' in Jan Klabbers, *International Law* (CUP 2013) 193.

32 Commentary to ARSIWA Article 25 in ILC, Yb 2001 vol II(2), 81 [5]. It will be recalled that Crawford was the ILC's Special Rapporteur who brought the articles and commentary to a successful conclusion. For a near contemporaneous reference to necessity not involving a use of force, see the *Anglo-Portuguese* dispute of 1832, cited by the International Law Commission ibid, at 81 [4] ('The extent of the necessity, which will justify such an appropriation of Property, of British Subjects, must depend upon the circumstances of the particular case, but it must be imminent and urgent').

33 Opinion of 25 March 1839: A D McNair (ed), *International Law Opinions*, vol 2 (CUP 1956) 228. Emphasis in original.

34 The quotations are from Principle 8 of the 'Bethlehem Principles': see Daniel Bethlehem, 'Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106(4) American Journal of International Law 769. For comment see Notes and Comments in (2013) 107(2) AJIL 378–95 and Dapo Akande and Thomas Liefländer, 'Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense' (2013) 107(3) American Journal of International Law 563–85. For earlier collective attempts to set out principles, see Elizabeth Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence' (2006) 55 International and Comparative Law Quarterly 963; Institut de Droit International (n 20); 'Leiden Policy Recommendations on Counter-Terrorism and International Law' (2010) 57(3) Netherlands International Law Review 531; also published, with background studies, in Larissa van den Herik and Nico Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (CUP 2013) 706.

35 The then Attorney General, Lord Goldsmith, explained in the House of Lords that the 'concept of what constitutes an "imminent" armed attack will develop to meet new circumstances and new threats … It must be right that States are able to act in self-defence in circumstances where there is evidence of further imminent attacks by terrorist groups, even if there is no specific evidence of where such an attack will take place or of the precise nature of the attack': Lords Sitting of 21 April 2004, vol 660, cc 370–71.

36 On 11 January 2017, the British Attorney General, the Rt Hon Jeremy Wright QC MP, delivered a speech entitled *The Modern Law of Self-Defence*, available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/583171/170111_Imminence_Speech_.pdf>. Among other things, the Attorney General endorsed the factors included in Principle 8 of the 'Bethlehem Principles': see Michael Wood, 'The Use of Force against Da'esh and the *Jus Ad Bellum*' (2017) 1 Asian Yearbook of Human Rights and Humanitarian Law; Michael Wood, 'Self-Defence Against Non-State

Actors—A Practitioner's View' (2017) 77 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 75–77.

37 On 11 April 2017, the Australian Attorney General, The Hon George Brandis QC, delivered a speech entitled 'The Right of Self-Defence against Imminent Armed Attack in International Law', available at <https://law.uq.edu.au/files/25365/2017%2004%2011%20-%20Attorney-General%20-%20Speech%20-%20The%20Right%20of%20Self-Defence%20Against%20Imminent%20Armed%20Attack%20in%20International%20Law%20-%20for%20publication.pdf>