"Sinking" the *Caroline*[†]: Why the Caroline Doctrine's Restrictions on Self-Defense Should Not Be Regarded as Customary International Law*

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† *See* Timothy Kearley, *Raising the Caroline*, 17 WIS. INT'L L.J. 325 (1999) (arguing that the Caroline doctrine has been misapplied). Kearley would restrict the *Caroline* to the specific circumstances in that case. *Id.* This Comment will argue that even in its original form, the Caroline doctrine is not useful. Additionally, this Comment will show that the doctrine is dead and should not be applied as custom any longer.

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I. INTRODUCTION

In 1837 there was a Canadian rebellion against British rule. American supporters helped the Canadian rebels by supplying ammunition and new recruits for the rebels' army. A small steamer, called the *Caroline*, was used by the rebels to bring men and supplies across the Niagara River from the American side to the British side. The British discovered the rebels' use of the *Caroline* and attacked it while it was moored to American soil. The Caroline doctrine arose out of the diplomatic correspondence between the United States and Britain that followed the incident, and specifically originated from a quote by Daniel Webster regarding the limitations on the use of self-defense.

One may wonder why an incident from 1837 should have anything to do with the modern international law of self-defense in light of the effect of the United Nations Charter on the way the world views the right of a state to use force against another state. While the United Nations Charter did change the rules on the use of force, it did not change the inherent right of self-defense rooted in customary law.[1] This means that custom is still important despite the new rules of world order created by the United Nations. Because the right of self-defense depends on the limits prescribed by custom, the standard of customary law on the use of force in self-defense warrants a critical analysis of what is truly the correct standard of customary international law.

In recent years, the Caroline doctrine has been extensively quoted as the rule of customary law regarding the limitations of a state's right to use force in situations of self-defense.[2] However, a look into the factual circumstances of the *Caroline* incident shows that the legitimacy of the doctrine is undermined because there was no concrete agreement made on an imminence requirement to assure the legality of the use of force in self-defense under international law. The diplomatic papers of Daniel Webster and Lord Ashburton have been plucked out of their historical context and have been cited by scholars who oppose the use of force in response to terrorist attacks. The true Caroline doctrine has a very strict imminence requirement that cannot be met in the modern type of armed conflict.

Even those scholars who cite to the Caroline doctrine as customary law do not adhere to the true Caroline doctrine. Those who cite the Caroline doctrine emphasize the lesser requirements of necessity and proportionality but ignore its strict imminence requirement, thus

1. U.N. CHARTER art. 51.
2. *E.g.*, ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM 18, 72 (1993).

deviating from the doctrine's original intentions.[3] This Comment will show how the Caroline doctrine came to exist, argue that no real doctrine was created as to an imminence requirement, and show that what is known today as the true Caroline doctrine is really obsolete international law and not a current standard by which to judge the legality of a state's use of force in self-defense.

II. BRIEF INTRODUCTION TO CUSTOMARY INTERNATIONAL LAW

Though there are several sources of international law, this article will focus on custom as the basis of the inherent right of self-defense and the Caroline doctrine's place in custom. Since the basis of common analysis of national self-defense is that the Caroline doctrine is international law, a brief introduction to custom, and its place in international law, is appropriate. Custom is not a static written code. It is forever evolving and changing. Court cases can be helpful in distilling custom; but, unlike the usage in common law, precedent is not binding authority in international law. What states actually do in practice matters more than what a court says. However, some cases may give insight as to what the court will apply as custom.

When defining custom, in addition to state practice, the opinions of scholars and publicists are important.[4] The Statute of the International Court of Justice defines custom as "evidenced by state practice."[5] The Restatement (Third) of the Foreign Relations Law of the United States defines customary law as the general practice of nations followed from a sense of legal obligation.[6] The International Court of Justice, has stated that the substance of customary law must be found primarily in the actual practice and feeling of obligation of states.[7]

Voluntary adherence to the law is a key feature of international law. All states are equally sovereign and no state may deem another to have given up rights without the other state's authorization. That is why a

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3. For purposes of this Comment, I will be focusing only on the Caroline doctrine's imminence requirement in customary international law at the time of the *Caroline* incident and how that effects the current standard by which to judge the legality of self-defense as a response to modern terrorist attacks.

4. *See* S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 25–26 (Sept. 7).

5. Statute of the International Court of Justice art. 38.

6. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1986).

7. Legality of the Threat or Use of Nuclear Weapons 1996 I.C.J. 226, para. 64, at 253 (July 8).

state's practice and its feeling of obligation to follow a given rule are important elements of international law. The mere writings of scholars and publicists will not suffice to define a rule of international law; if state practice shows that a particular rule is not actually followed because the states do not feel an obligation to follow it, then it is not a rule.

III. FACTUAL BACKGROUND OF THE *CAROLINE* INCIDENT

A detailed account of the events that led up to the *Caroline* incident is important in explaining the significance of the doctrine and the assertion that it is customary international law. The facts that follow are included to show the gravity of the situation at the time. Many people had already been killed in altercations before the *Caroline* incident and the nations were on the brink of war. The factual background of the *Caroline* incident will aid in the understanding of the context of the correspondence that led to what became known as the Caroline doctrine.

A. *Events Leading Up to the* Caroline *Incident*

Kenneth R. Stevens sets out a good overview of the events underlying the *Caroline* doctrine in *Border Diplomacy, The* Caroline *and McLeod Affairs in Anglo-American-Canadian Relations, 1837-1842.*[8] For several years before the *Caroline* incident, there was stirring resentment among some Canadians over British rule.[9] In 1837, there was an independence movement led by William Lyon Mackenzie[10] in Canada against British dominance.[11] In November of that year, unsuccessful rebellions broke out in Lower Canada.[12] On November 23, 1837, the rebels won a battle at St. Denis only to lose the next day at St. Charles.[13] At St. Charles, fifty-six rebels were killed and thirty taken prisoner.[14] At St. Eustace, British troops trapped eighty rebels in a church, set it on fire, and shot

8. KENNETH R. STEVENS, BORDER DIPLOMACY: THE *CAROLINE* AND MCLEOD AFFAIRS IN ANGLO-AMERICAN-CANADIAN RELATIONS, 1837–1842 (1989) (providing an account of the *Caroline* incident that appears to be detailed and correct; however, Stevens' conclusion regarding the legality of the British action does not seem factually sound, as discussed below). *See also* 2 JOHN BASSET MOORE, A DIGEST OF INTERNATIONAL LAW § 217 at 409 (1906).

9. STEVENS, *supra* note 8, at 7.

10. *See id.* at 8. William Lyon Mackenzie had arrived in Canada from Scotland in 1820 and established a reform newspaper. He was elected to the provincial assembly in 1928 but was expelled in 1831 for committing libel against opponents. Despite that, he became elected many times and in 1834 became the mayor of Toronto.

11. *See* MAURICE G. BAXTER, ONE AND INSEPARABLE DANIEL WEBSTER AND THE UNION 321 (1984).

12. STEVENS, *supra* note 8, at 9.

13. *Id.*

14. *Id.*

those trying to escape even though some were actually trying to surrender.[15] The British troops returning to Montreal, through St. Benoit, came across Canadian citizens who surrendered without incident only to have wild loyalist volunteers pillage and burn the towns of those who surrendered.[16] From all over Lower Canada, rebels made their way across the border into the United States where the Canadian rebels found sympathetic neighbors.[17] Along the border the rebels gathered in what was called "Hunters' Lodges" to prepare for attacks.[18] There was brazen talk of an invasion into Canada in these "Hunters' Lodges."[19]

In Upper Canada, rebellions took place as well. Rebels, mostly unarmed, marched on Toronto the morning of December 6, 1837 but were driven back to the outskirts of Toronto, to Montgomery's Tavern, which served as a rebel base.[20] The next day, the British closed in and fired shots at the tavern as the rebels fled into the woods.[21] The insurgents were forced to flee into western New York where they hoped to recruit American support.[22]

On December 11, 1837, Mackenzie rode into Buffalo, New York and received a hero's welcome.[23] That evening and throughout the next day, Mackenzie and his supporters filled the Buffalo Coffee House and called for American recruits.[24] Mackenzie was successful in gaining American support. With a force of more than 500 he occupied the British Navy Island, a mile north of Niagara Falls, with his American recruits.[25] Here, Mackenzie and his men set up a provisional government and prepared for battle. The British were aware of their presence because the rebels fired a cannon on Chippewa, a nearby shore.[26]

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15. *Id.*
16. *Id.*
17. *Id.*
18. BAXTER, *supra* note 11, at 321.
19. *Id.*
20. STEVENS, *supra* note 8, at 10.
21. *Id.*
22. BAXTER, *supra* note 11, at 321.
23. STEVENS, *supra* note 8, at 10.
24. *Id.* To make the rebellion more attractive, Mackenzie promised the recruits 300 acres and 100 silver dollars each he took over the government. *Id.*
25. BAXTER, *supra* note 11, at 321.
26. *Id. See also* STEVENS, *supra* note 8, at 11 (noting that the cannon put holes in a few houses and killed a horse).

American President Van Buren's policy regarding the conflict was one of strict neutrality.[27] The United States was not willing to get into another war with the British. United States District Attorneys and customs officials were instructed to enforce the nation's neutrality laws, but it was a lost cause.[28] There was too much support for the rebellion and anti-British feelings were too strong. The United States Marshall for northern New York informed Van Buren that only an armed force could stop the supply of Mackenzie's men at Navy Island.[29]

B. The Caroline *Incident and the Trial of Alexander McLeod*

To supply the men at Navy Island, the rebels hired the *Caroline*, a small steamboat, to bring support and more troops.[30] After a couple of trips to the island, the *Caroline* came over to the American side of the Niagara River on December 29 to dock for the night.[31] British intelligence determined that the *Caroline* was a threat.[32] At about midnight, small boats carrying British-Canadian troops launched a surprise attack on the steamer.[33] A brief struggle ensued where several Americans were injured and an American named Amos Durfee was killed.[34] The aggressors then set the *Caroline* on fire and sank it.[35]

Americans were infuriated.[36] The public did not see the incident as an act of war but one of murder. Public outcry demanded that Amos Durfee's murderer be caught and put on trial.[37] The New York authorities arrested several Canadians in connection with the event. This, in turn, infuriated the British because they claimed that the attack on the *Caroline* was an official act, and therefore, the Americans did not have jurisdiction to arrest individuals for the incident.[38] Rumors were that Alexander McLeod had bragged about taking part in the raid and killing Durfee.[39] These rumors led to the prompt arrest of McLeod and his indictment by the New York authorities for murder and arson.[40] The

27. STEVENS, *supra* note 8, at 12.
28. *See id.*
29. *See id.*
30. BAXTER, *supra* note 11, at 321.
31. *Id.*
32. STEVENS, *supra* note 8, at 13 (noting that one of the scouts was Alexander McLeod).
33. BAXTER, *supra* note 11, at 321.
34. *Id.*
35. *Id.*
36. ROBERT V. REMINI, DANIEL WEBSTER: THE MAN AND HIS TIME 499 (1997).
37. *Id.*
38. *Id.*
39. *Id.* at 518.
40. *Id.*

arrests and indictment created severe diplomatic problems with Britain because even if found innocent, McLeod was at serious risk of being lynched by a mob.[41] Under these conditions it was doubtful that McLeod would get a fair trial and Britain felt that the release of McLeod was "indispensable to British honor."[42] Historians recall that British and American relations were delicate and war was a very real possibility.[43] The *Caroline* issue remained unresolved at the end of the Van Buren administration and the United States had no hopes of a British apology or reparation.[44]

Daniel Webster came into office as the Secretary of State with President Harrison's cabinet at this time with an eye to settle the growing tensions. As relations were worsening, Webster was distressed to receive reports of Hunters' Lodges found as far west as Detroit, which meant American rebel support was growing.[45] Though the United States was officially neutral in the Canadian-British conflict, Webster was powerless to enforce the neutrality laws.[46] Instead, Webster turned to his diplomatic skills to diffuse American anti-British resentments.

Webster had several correspondences with Lord Ashburton, who was the British foreign secretary at the time. The British asserted that the New York state courts could not try McLeod and that he should be sent back to Canada because the British readily took full responsibility for the attack. Although the United States federal government agreed, the New York authorities were not willing to cooperate. It was an embarrassment to the young federal government, which sought to gain respect both abroad and at home.[47] The federal government was ashamed

41. *See id.* at 499.
42. STEVENS, *supra* note 8, at 86.
43. *See* SPEAK FOR YOURSELF, DANIEL: A LIFE OF WEBSTER IN HIS OWN WORDS 305 (Walker Lewis ed., 1969). ("Webster took office at the lowest point in British-American relations since the war of 1812. So low that Lord Palmerston, the British foreign secretary, had formally threatened war and had increased British troop strength in Canada to seventeen regiments." *Id.*). *See also* ROBERT F. DALZELL, JR., DANIEL WEBSTER AND THE TRIAL OF AMERICAN NATIONALISM 1843–1852 43 (1973). ("The hoary issue[s] of impressment, international extradition, arrangements for suppressing the African slave trade, the *Caroline* incident, the McLeod case, and the *Creole* affair had all contributed to the steadily worsening state of Anglo-American relations in recent years." *Id.*).
44. BAXTER, *supra* note 11, at 321.
45. *See id.*
46. *See id.* at 321–22.
47. *See* STEVENS, *supra* note 8, at x.

that it could not control the borders.[48] Yet, at the same time, there was strong sentiment against Britain's actions.[49] McLeod was eventually acquitted of the charges by the New York court because there were witnesses who confirmed his alibi that he was not even near the *Caroline* at the time of the incident.[50] He was quickly escorted back into Canada.[51]

C. *The Caroline Doctrine*

Webster wrote to Lord Ashburton and stated that regardless of whether the *Caroline*'s actions were unlawful, the violation of national territory was itself a wrong, and thus, the British owed an apology to the United States.[52] In that letter, Webster included an extract of a letter that he had sent to Mr. Fox, dated April 24, 1841, to which Mr. Fox did not respond.[53] It was from a quotation in this letter to Mr. Fox, the Envoy Extraordinary and Minister Plenipotentiary of Great Britain that the Caroline doctrine originated. In this letter, Webster notes that while the British claimed the American supporters had attacked them, the United States government was not at all involved.[54] Thus, the British assertion that the United States somehow "permitted" the American supporters to break neutrality was unfair.[55] Webster also claimed that the British action was unnecessary because the American supporters were actually breaking American law and had been dealt heavy penalties under American law.[56] Webster continued:

> 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-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.* It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that

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48. *See id.* at 36.
49. *See* RICHARD N. CURRENT, DANIEL WEBSTER AND THE RISE OF NATIONAL CONSERVATISM 119 (1955). (After describing several controversies of the day, Current notes that an example of U.S. sentiment at the time was the resolution of a convention of Ohioans sent to the Secretary of State asking him to "press every American grievance 'to the last extremity' that is, to the point of war." *Id.*).
50. STEVENS, supra note 8, at 150.
51. *Id.* at 155.
52. Letter from Daniel Webster to Lord Ashburton (July 27, 1842), *in* DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER WHILE SECRETARY OF STATE 104 (New York, Harper & Brothers 1848) [hereinafter OFFICIAL PAPERS].
53. *See id.*
54. *Id.* at 104–11.
55. *Id.* at 105.
56. *Id.* at 109.

> 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 can not believe to have existed.[57]

Lord Ashburton then gave a reply in which he tacitly apologized for the *Caroline* incident.[58] It is from this letter of apology and Webster's letter that the Caroline doctrine was said to be formed. However, as discussed below, there was no actual agreement under international law and thus no real doctrine actually was formed.

IV. THE CAROLINE DOCTRINE IS NOT THE CORRECT STANDARD TO JUDGE THE LEGALITY OF THE USE OF FORCE IN SELF-DEFENSE

Many scholars have commented that the American and British authorities agreed on the basic principles of the Caroline doctrine.[59] However, this conclusion is not universally accepted.[60] Moreover, merely because Webster and Ashburton declared a supposed agreement on international law for diplomatic reasons in avoidance of war does not mean that a new rule was created. The International Court of Justice has stated that "the mere fact that states declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as such applicable to those states."[61]

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57. *Id.* at 110 (emphasis added).

58. Letter from Lord Ashburton to Daniel Webster (July 28, 1842), *in* OFFICIAL PAPERS, *supra* note 52, at 111.

59. *See* Robert F. Teplitz, Note, *Taking Assassination Attempts Seriously: Did the United States Violate International Law in Forcefully Responding to the Iraqi Plot to Kill George Bush?*, 28 CORNELL INT'L L. J. 569, 577 (1995).

60. *See* D.W. GREIG, INTERNATIONAL LAW 675 (1970). ("The significance of the Caroline incident and of the statement of principle by the U.S. Secretary of State, has been widely exaggerated." *Id.*).

61. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, para. 184, at 87 (June 27).

A. *No Doctrine Was Formed*

Several facts cast doubt on the assertion that the diplomatic letters between Daniel Webster and Lord Ashburton were a declaration of customary international law on self-defense. First, the circumstances of the time were such that both diplomats knew that some sort of compromise was necessary to avert a war. Both Webster and Ashburton wanted to peacefully solve the U.S.-British disputes.[62] Additionally, while tensions were high between the countries, these men were on cordial and almost friendly terms.[63] The letters were written when America was young and the federal government did not enjoy the strength and influence it has today.[64] It was an embarrassment that the federal government could not control the states. Indeed, this added to the British outrage towards the United States.[65] In addition, there were mounting tensions regarding the trial of Alexander McLeod. A serious problem developed as the New York authority refused to yield to the federal government's concerns regarding McLeod's safety.[66]

Second, although McLeod's acquittal saved the nations from war, America still wanted and needed an apology. In his letter to Lord Ashburton, Webster also included an address that President Harrison made to Congress stating that the United States would never cede to a foreign government the right to enter United States' territory to apprehend a criminal under United States' jurisdiction.[67] Lord Ashburton

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62. *See* CURRENT, *supra* note 49, at 199, 120.

63. *Id.* at 121.

> Ashburton was a partner in the firm of Baring Brothers, one of the great English banking houses, with heavy investments in American state bonds. Webster had been in the pay of Baring Brothers, who had looked to him for advice on ways and means to make good the bonds which several of the states had defaulted after the panic of '37. In the summer of 1842 Webster and Ashburton, plenipotentiaries for their respective governments, met in negotiations of the most informal and cozy sort, with nothing to try their tempers except the inevitable Washington heat.

64. *See* STEVENS, *supra* note 8, at x (1989). ("The United States was still trying to establish itself as a member of the community of nations, guided by commonly accepted principles of international law." *Id.*). *See also* HOWARD JONES, TO THE WEBSTER-ASHBURTON TREATY: A STUDY IN ANGLO-AMERICAN RELATIONS 1783–1843 67 (1977). ("Beneath the Americans' furor over the *Caroline* and McLeod affairs had run deep indignation over apparent British reluctance to deal with the United States as an equal." *Id.*).

65. *See* STEVENS, *supra* note 8, at 156.

66. *See* 1 THE WORKS OF DANIEL WEBSTER cxxxvii (Boston, Charles C. Little and James Brown, 1851) [hereinafter WORKS].

67. Extract from the Message of the President to Congress at the commencement of the Second Session of the 27th Congress *in* Letter from Daniel Webster to Lord Ashburton (July 27, 1842), *in* OFFICIAL PAPERS, *supra* note 52, at 111–12.

> This government can never concede to any foreign government the power, except in a case of the most urgent and extreme necessity, of invading its territory, either to arrest the persons or destroy the property of those who may

made a reference to Webster's not-so-subtle hint that it was imperative that the United States receive some kind of concession from the British. Lord Ashburton wrote that he understood that no matter how the government took the British explanation of what happened with the *Caroline*, the public sentiment required a more substantial record of the correspondence.[68] In other words, he understood that Webster needed some compromise from the British to show to the Americans in order to quell the calls for war with Britain and prevent the proliferation of the Hunters' Lodges.[69]

After acknowledging the need for compromise, Ashburton diplomatically stated that he and Webster agreed on the principles of international law, and that respect for sovereign territory is of the utmost importance.[70] He did not state that he agreed with the principle unconditionally, nor did he agree with Webster's definition of imminence. He skillfully cut away from his concession stating:

> It is useless to strengthen a principle so generally acknowledged by any appeal to authorities on international law, and you may be assured, sir, that her majesty's government set the highest possible value on this principle, and are sensible of their duty to support it by their conduct and example, for the maintenance of peace and order in the world.[71]

He further posited that while this important principle of territorial sovereignty is to be respected, it is a principle of law that may be violated upon a "strong, overpowering necessity."[72] Ashburton continued, "[i]t must be so for the shortest possible period, during the continuance

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> have violated the municipal laws of such foreign government, or have disregarded their obligations arising under the law of nations. The territory of the United States must be regarded as sacredly secure against all such invasions.

68. Letter from Lord Ashburton to Daniel Webster (July 28, 1842), *in* OFFICIAL PAPERS, *supra* note 58, at 113.

> The note you did me the honor of addressing me on the 27th instant reminds me that, however disposed your government might be to be satisfied with the explanations which it has been my duty to offer, the natural anxiety of the public mind requires that these explanations should be more durably recorded in our correspondence, and you send me a copy of your note to Mr. Fox, her Britannic majesty's minister here, and an extract from the speech of the President of the United States to Congress at the opening of the present session, as a ready mode of presenting the view entertained on this subject by the government of the United States.

69. *See id.*
70. *Id.*
71. *Id.*
72. *Id.*

of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity."[73] Although he later used Webster's own words in his reply, quoting the lines, "that necessity of self-defense, instant, overwhelming, leaving no choice of means,"[74] it was not meant to be a firm statement of international law but a clever diplomatic ploy. He continued the ploy by stating:

> Give me leave to say, sir, with all possible admiration of your very ingenious discussion of the general principles which are supposed to govern the right and practice of interference by the people of one country in the wars and quarrels of others, that this part of your argument is little applicable to our immediate case.[75]

As Ashburton proceeded to tell Webster that the British action was fully justified he added:

> I believe I may take it to be the opinion of candid and honorable men that the British officers who executed this transaction, and their government who approved it, intended no slight or disrespect to the sovereign authority of the United States. That they intended no such disrespect I can most solemnly affirm.[76]

Ashburton, like Webster was under pressure to have this matter resolved. He ended his letter by stating:

> I trust, sir, I may now be permitted to hope that all feelings of resentment and ill-will resulting from these truly unfortunate events may be buried in oblivion, and that they may be succeeded by those of harmony and friendship, which it is certainly the interest, and, I also believe, the inclination of all to promote.[77]

In Webster's final letter, he stated that he accepted Ashburton's agreement on the principles of law, and because he agreed, the United States would not press the matter any further and the matter would be considered resolved.[78]

Understanding the importance of this compromise for the safety of both nations, it would have been foolhardy to press the matter further and fight over the semantics of a principle of international law.[79]

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73. *Id.*
74. *Id.* at 114.
75. *Id.*
76. *Id.* at 115–16.
77. *Id.* at 118.
78. Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), *in* OFFICIAL PAPERS, *supra* note 52, at 119.
79. *See* GRIEG, *supra* note 60, at 676–77.

> Being reluctant to exacerbate matters by alleging a breach of a duty of prevention by the American authorities (which might have enabled the authorities in Canada a more general power to take preventive action across the border), the Foreign Office was content to justify the attack within the terms of the American formulation of the law and to add an apology with a view to facilitating a final settlement.

Webster wrote the letter to have the last word and to have concrete proof of the salvation of American pride. Furthermore, compromise was in the best interest of Webster's career. He hoped to gain favor for his role in the peacemaking.[80] Ashburton was relieved that the matter had come to an end and did not press over technicalities and definitions in international law. Ashburton also had what he needed: concrete proof that he did not admit British guilt and that he fully justified the action.

It is from this friendly correspondence that modern international scholars have attempted to extract a custom of international law. However, these concessions by Ashburton and Webster were "merely dicta" to the real problem of McLeod and the possible outbreak of war.[81] Reciting and agreeing on principles of international law were not at the top of the agenda for the two men,[82] as they wanted to avoid war. In the end, the apology and the so-called "agreement" were nothing more than an attempt to placate the American government, with whom relations were rocky at the time. This fact, coupled with the reality that the statement was not even correct international law, supports the contentions that the Webster and Ashburton letters were hardly a strong basis for the creation of a doctrine of customary law.[83] These diplomatic actions should be distinguished from real intentions to create a custom.

B. *The Caroline Doctrine Was Not Correct Customary Law at the Time of the* Caroline *Incident*

The Caroline doctrine was not even a correct recitation of international law at the time of the *Caroline* incident and must be viewed in the

80. *See* CURRENT, *supra* note 49, at 120. ("He welcomed the task of putting Anglo-American relations on a new and happier basis and, at the same time, winning for himself and the Tyler administration the blessedness that presumably would attach to the peacemakers." *Id.*).

81. *See* MALCOLM N. SHAW, INTERNATIONAL LAW 58–59 (4th ed., Cambridge University Press 1997) (writing that one must be careful to distinguish between acts done because of an obligation of law and acts done from a variety of other factors such as action taken from reasons ranging from "goodwill to pique, and from ideological support to political bribery").

82. *See* Kearley, *supra* note †, at 330. ("It is clear that Webster had no intention of creating any general rules for the use of force by a state in self defense. . ." *Id.*).

83. *See* Mark B. Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 HOUS. J. INT'L L. 25, 32 n.46 (1987). ("Also note that there has not been complete agreement among commentators that Webster's definition is or has ever been completely accepted as the definitive statement in this area." *Id.*).

context of the political events taking place.[84] At the time of the *Caroline* incident, customary international law allowed an absolute right to self-preservation.[85] Emerich de Vattel maintained that a country could use all necessary means for self-preservation because a state was allowed to use force as a legitimate means of redress.[86] Therefore, even though two states may not be at war, if a state threatens another's existence, force may be used. Because Americans were helping the Canadian rebels attempt to overthrow British rule, this principle could be used to show that the British existence was threatened, making the use of force proper. Vattel's ideas were important in American political theory.[87] Although Webster was aware of Vattel's influential theories, he could not concede this point, for the *Caroline* incident was now a cause for national honor.[88] Instead, Webster created a definition more suited to the American political climate at the time.

Webster's definition was divergent from the ideas of other international law scholars at the time. While Henry Wheaton's 1846 treatise on international law recognized an absolute right to self-defense as an extension of the absolute right and duty of a state for self-preservation, he never once mentioned the *Caroline* incident as an example of customary international law.[89] John Westlake wrote in 1894 that Webster's quote was a correct recitation of the law except for the element of no deliberation.[90] Robert Phillimore, writing in 1854, stated that if the British version of the facts were correct, the British excuse of self-defense "was a sufficient answer, and a complete vindication."[91] Others agreed. Lord Campbell wrote:

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84. *See* Lieutenant Colonel James P. Terry, *Countering State-Sponsored Terrorism: A Law-Policy Analysis*, 36 NAVAL L. REV. 159, 172 (1986).

85. *See* M.D. VATTEL, THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE; APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, A WORK TENDING TO DISPLAY THE TRUE INTERESTS OF POWERS 63–64 (S. & E. Butler, Northampton, Mass., Thomas M. Pomroy, *trans.*, 1805).

86. *See* STEVENS, *supra* note 8, at 103–04 (quoting Vattel: "If an unknown man takes aim at me in the middle of a forest I am not yet certain that he wishes to kill me; must I allow him time to fire in order to be sure of his intent? Is there any reasonable casuist who would deny me the right to forestall the act?").

87. *See id.* at 104.

88. *See id.* at 104 (noting that Webster's letter of April 24 indicates agreement with Vattel's reasoning). However, Stevens writes that "it seems unlikely that he anticipated accepting similar arguments in relation to the *Caroline* raid." *Id.*

89. *See* HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 101–02 (3d ed. Philadelphia, Lea and Blanchard, eds 1846).

90. JOHN WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW 116 (Cambridge, University Press 1894). ("This was a correct statement of the law, except so far as concerns the emergency's leaving no moment for deliberation, which is an unnecessary condition if the emergency is such that deliberation can only confirm the propriety of the act of self-preservation." *Id.*).

91. 1 ROBERT PHILLIMORE, M.P., COMMENTARIES UPON INTERNATIONAL LAW para. 215, at 189–90 (Philadelphia, T & J W. Johnson, Law Booksellers 1854).

> But assuming the facts that the *Caroline* had been engaged, and when seized by us was still engaged, in carrying supplies and military stores from the American side of the river to the rebels in Navy Island, part of the British territory; that this was permitted, and could not be prevented, by the American authorities, I was clearly of opinion that, although she lay on the American side of the river when she was seized, we had a clear right to seize and destroy her, just as we might have taken a battery erected by the rebels on the American shore, the guns of which were fired against the Queen's troops in Navy Island.[92]

Hannis Taylor's 1901 treatise on international law discussed the *Caroline* in the context of the rule that a belligerent state may not invade a neutral state except in cases of extreme necessity.[93] Taylor suggests that the British invasion into American territory was necessary, but since the Americans insisted otherwise, no agreement was formed.[94] Taylor writes that in Ashburton's responding letter, the British had no trouble showing that the imminence of an attack made the invasion into American territory necessary, although an apology was due.[95]

Webster's formulation did not even coincide with American state practice at the time. In 1817, the United States twice forcibly entered into Spanish territory. In one incident, pirates had taken over the Spanish Amelia Island.[96] President Monroe said that because Spain failed to assert their authority over the island, the United States was justified in occupying the island.[97] Later that same year, the United States entered Spanish Florida to end problems with the Native Americans.[98] Though Spain protested, the United States maintained that the Indians were an immediate threat and claimed they were acting in self-defense.[99] Even though the United States claimed the tensions presented an immediate threat, it was not the type of an overwhelming emergency with no time for deliberation.

Other modern writers have noted that the Caroline doctrine is not a correct statement of international law. Abraham Sofaer, legal advisor at the U.S. Department of State, argues that Webster's statement is an exaggeration of the requirement of necessity because that issue was

92. *See* AUTOBIOGRAPHY OF LORD CAMPBELL, 19 (Life 2d ed. 1881) *reprinted in* MOORE, *supra* note 8, at 414.
93. *See* HANNIS TAYLOR, A TREATISE ON INTERNATIONAL PUBLIC LAW § 632, at 688 (Callaghan & Co. 1901).
94. *See id.*
95. *Id.* § 403.
96. STEVENS, *supra* note 8, at 25.
97. *Id.* at 26.
98. *Id.*
99. *Id.*

merely peripheral to the real problem of dealing with the McLeod issue.[100] D.W. Grieg states that the traditional rules on the use of force are wide enough that a plea of self-defense is less restricted than the views expressed by Webster in regards to the *Caroline* incident.[101] He argues that the Webster rule is limited to the situation where the state whose territory has been violated has committed no wrong itself.[102]

Ian Brownlie describes Webster's statement in the *Caroline* case as an attempt to restrict the right to go to war, though making no legal difference to the doctrine of self-defense at the time of the *Caroline* incident.[103] This argument was set in the context of an illegal invasion into the United States. John Basset Moore concurs, "the attack on the *Caroline* was an invasion of the territory of a neutral power—at peace with the invader. That is a liberty not allowed by the laws of nations—not allowed by the concern which any nation, even the most inconsiderable, feels for its own safety, and its own self respect[.]"[104]

C. *Modern Scholars Do Not Adhere to the Caroline Doctrine's Strict Imminence Requirement*

The Caroline doctrine's limitation of the use of force in self-defense only to situations where there is "no moment for deliberation" indicates a very small window of time in which a state may respond to an attack. This restrictive imminence requirement of the Caroline doctrine is illogical in light of today's modern problems with terrorism.[105] In the

100. *See* Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, The Law, and the National Defense*, 126 MIL. L. REV. 89, 97 (1989).

101. *See* GREIG, *supra* note 60, at 677.

102. *See id.*

103. *See* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 42–43 (1963).

> Webster's Note was an attempt to describe its limits in relation to the particular facts of the incident. The statesmen of the period used self-preservation, self-defence, necessity, and necessity of self-defence as more or less interchangeable terms and the diplomatic correspondence was not intended to restrict the right of self-preservation which was in fact reaffirmed. Many works on international law both before and after the *Caroline* case regarded self-defence as an instance of self-preservation and subsequently discussed the *Caroline* under that rubric.

104. *See* MOORE, *supra* note 8, at 413 (quoting BENTON, THIRTY YEARS' VIEW II, 290).

105. *See* Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT'L L. J. 145, 166 (2000). ("[T]his window of opportunity, under the traditional criteria for self-defense, will almost never exist in the context of terrorist attacks. The traditional requirements for self-defense are simply too restrictive to reasonably respond to the threat posed by international terrorism." *Id.*). *See also* Major Philip A. Seymour, *The Legitimacy of Peacetime Reprisal as a Tool Against State-Sponsored Terrorism*, 39 NAVAL L. REV. 221, 229–30 (1990).

nineteenth century, writers were not using the Caroline doctrine as a source of customary law on self-defense. Its use was limited to the *Caroline* incident's particular facts. Theodore Woolsey, in 1879, limited the Caroline doctrine to the right of neutral states to not be invaded during war.[106] T.J. Lawrence cites the Caroline doctrine for the proposition that only in great necessity may a belligerent state invade a neutral state but that it would be a "technical offense" that should be apologized for, not an offense for which great reparations should be paid.[107]

Taking the doctrine out of its context can lead to illogical results. Today, unlike during the time of the *Caroline*, states may not blatantly use force as aggressors because of the new proscriptions against that in international law.[108] Instead, the modern aggressor is more likely to be a group of individuals acting not under official orders of the government, but rather without fear that the host country will stop them. When Daniel Webster wrote the letter to Lord Ashburton, he could hardly have envisioned a situation in which terrorists acting under the protection of a state would conduct brutal attacks on innocent civilians leaving the identity of the aggressors and their location in doubt.[109]

Before a state can reasonably respond to an attack, time must be spent identifying the terrorist group and their location and determining whether a state has supported the terrorists and their actions.[110] However, by the time this information is gathered, under the Caroline doctrine, an attack to stop the terrorists from executing further attacks would not be permissible.[111] Once the imminence is gone, any attack to stop future

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106. *See generally* THEODORE D. WOOLSEY, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW. DESIGNED AS AN AID IN TEACHING, AND IN HISTORICAL STUDIES (5th ed. New York, Charles Scribner's Sons 1878).

107. *See* T.J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 609–10 (6th ed. 1911).

> The incident may be held to show that temporary violations of neutral territory, resorted to under stress of great emergency, and limited in point of time and magnitude to the warding off of the danger which caused them, are but technical offences, to be apologised for one the one hand and condoned on the other, but not regarded as serious wrongs for which substantial reparation is due.

108. *See* U.N. CHARTER art. 2(4).

109. *See* Travalio, *supra* note 105, at 165.

110. *Id.* at 165. For purposes of this Comment, I am limiting the scope to the Caroline doctrine. It is noted that there is a substantial amount of debate regarding what acts constitute *state sponsorship.*

111. *Id.*

threats would be too remote in time and not true self-defense.[112] Today, terrorist attacks are characterized by continuing, but intermittent, acts.[113] When one attack is completed, the threat does not end.[114] With this in mind, Gregory M. Travalio concludes that while the use of force should be necessary and proportional, it does not have to be in response to an imminent threat, with no chance for deliberation like the Caroline doctrine requires.[115] Travalio instead asserts that "there must be a substantial likelihood that the threat will become manifest before it can be eliminated by means other than the use of military force."[116]

Due to the problems of applying the Caroline doctrine outside of its specific facts, it appears that the current scholarly practice is to cite to the Caroline doctrine ignoring its imminence requirements and instead focusing on the established customary law principle that self-defense requires necessity and proportionality.[117] In fact, most authors have interpreted the Caroline doctrine this way. For example, after quoting the restrictive language of the Caroline doctrine,[118] Stanimir Alexandrov opines:

> It can thus be concluded that self-defense has three main requirements: (i) an actual infringement of the rights of the defending state; (ii) a failure or inability on the part of the other State to use its own legal powers to stop or prevent the infringement; (iii) acts of self-defense must be strictly confined to the object of stopping the infringement and have to be reasonably proportionate to what is required for achieving this object.[119]

This bears no resemblance to Webster's words of "instant," "overwhelming," and "no moment for deliberation." Instead, Alexandrov concentrates on the necessity of the action, not the imminence. Alexandrov is not the only scholar to gloss over the Caroline doctrine's restrictive limitations on the use of self-defense. Those writers who do not explicitly express their disapproval of the Caroline doctrine interpret it broadly so its application does not have absurd results.[120] For example, one author

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112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 172.
116. *Id.*
117. *See* Leah M. Campbell, Comment, *Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan*, 74 TUL. L. REV. 1067, 1081 (2000). This Comment is typical of the analysis. While the Caroline doctrine is mentioned, in an analysis of customary law of self-defense, only necessity and proportionality are discussed.
118. "[N]ecessity of self-defense instant, overwhelming, leaving no choice of means, and no moment of deliberation . . .", *quoted in* STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 20 (1996).
119. *Id.*
120. *See* PHILIP C. JESSUP, A MODERN LAW OF NATIONS, 163–64 (1948) (stating that the Caroline doctrine is a correct interpretation of international law in that the use of

argues that the Caroline doctrine allows action if either of two conditions are met: 1) the host state could not respond in time to the danger; or, 2) even if the host state had time, they still could not stop the action.[121] These elements focus on minimizing the damage suffered by the host state. The imminence requirement is not mentioned. Instead, the author focuses on a host state's duty. Others have argued that the doctrine should be interpreted in light of modern realities.[122] In fact, one interpretation actually creates a "new" theory of self-defense to get around the Caroline doctrine's useless restrictions.[123] These measures appear pointless. Taking the doctrinal analysis to its logical conclusion, it would seem that if in order for self-defense to be justified a nation must only defend itself in the situation where there is no time for deliberation, states would be discouraged from consulting with allies or the Security Council before acting. Therefore, although frequently cited, the Caroline doctrine's imminence requirement is left out of the analysis and the concentration of scholars is on the less strict requirements of necessity and proportionality. Despite a long history of application, this doctrine was

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force should be a last resort). However, he did not expand on this idea. Despite his favor for the doctrine, he would probably also modify the definition not to require a total lack of deliberation. *Id. See also* W. Michael Reisman, *Legal Responses to International Terrorism: International Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 46–47 (1999) (quoting the restrictive language as well, Reisman concludes:

> [T]he Caroline doctrine, as agreed by Webster and Ashburton, would allow a target state to act unilaterally against a planned a terrorist attack emanating from the territory of the other state, if it were clear that either of two conditions obtained: (1) the state from whose territory the action was emanating could not, even with the information supplied to it by the target, respond in a timely fashion to prevent the terrorist act because of a shortage of time; or, (2) the state from whose territory the action was emanating could not, even with adequate notice, act effectively to arrest the terrorist action.

Again, the Caroline doctrine's inconvenient requirements were left out).

121. *See* Reisman, *supra* note 120, at 46–47.

122. *See* Alberto R. Coll, *The Legal and Moral Adequacy of Military Responses to Terrorism*, 81 AM. SOC'Y OF INT'L LAW PROC. 287, 302 (1987) (stating that Webster's key words "deserve a more expansive meaning today than they had in 1837.").

123. *See* Major Michael Lacey, *Self-Defense or Self-Denial: The Proliferation of Weapons of Mass Destruction*, 10 IND. INT'L & COMP. L. REV. 293, 296–308, (2000) (arguing that under the Caroline doctrine the U.S. action against the Sudan and Afghanistan in 1998 was inappropriate because it could not meet the standard of "instant," "overwhelming," and "no moment for deliberation.") Lacey then criticizes the strict interpretation stating that it is an unrealistic view to require a state to take the first blow when they could avoid the attack. Instead, he introduces a justification of *juris ad vitae* (right to life). *Id.* This concept is based on the premise that the state has a responsibility to protect the lives of its citizens.

actually misapplied.[124] The diplomatic gesture should not be used as a declaration of international law.[125] Lord Ashburton only agreed to avoid conflict in diplomatic relations.[126] These letters from which the doctrine was crafted could not have been intended to result in a customary law. The diplomatic gestures were not a correct recitation of international law at the time of the *Caroline* incident. As a result, the doctrine created from the incident is actually not a useful doctrine.[127] Because the Caroline doctrine is not useful, international law scholars and practitioners should not be forced to adhere, or pretend to adhere, to a dead law.[128]

The Caroline doctrine's restrictive imminence requirement can lead to some illogical interpretations. An example is Kenneth Stevens' assertion that the *Caroline* was not an immediate threat to the British because the *Caroline* only had 150 Patriots on board and the British had 2500 Canadians to repel the attack.[129] The argument is not persuasive because the *Caroline*'s crew was armed and would have been capable and ready to use deadly force if needed, and in fact were planning to do just that with the rebels at Navy Island.[130] It is doubtful that even an army of 2500 would feel comfortable letting an army of 150 fire the first shots at them, merely because they outnumbered them. Additionally, Stevens also criticized the British because they observed the *Caroline* for

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124. For example, the application of the Caroline doctrine has led to absurd results. *See* Maureen F. Brennan, Comment, *Avoiding Anarchy: Bin Laden Terrorism, The U.S. Response, and the Role of Customary International Law*, 59 LA. L. REV. 1195, 1200–03 (1999) (adhering to the strict rules of the Caroline Doctrine). Brennan argues for the absolute strict interpretation and quotes Professor Jordan Paust for espousing the view that the ten day period between the bombing at the Berlin nightclub and the U.S. response in bombing Libya in 1986 was inappropriate because the immediacy was gone. The fact that terrorism continues to be an on-going problem would suggest that this application to terrorist situations is not appropriate. *Id.*

125. *See* GREIG, *supra* note 60, at 676. ("Nor should too much be read into the fact that the British Government accepted the formulation of the law put forward by the U.S. Secretary of State." *Id.*).

126. *Id.* at 676–77.

127. *See id.* at 675. *See also* BROWNLIE, *supra* note 103, at 429. ("In isolation Webster's test is no more informative than the crude formula that there must be a necessity to act: there is the advice that there must be a necessity to act in self-defence but no definition of the latter concept." *Id.*).

128. *See* Commander Byard Q. Clemmons and Major Gary D. Brown, *Rethinking International Self-Defense: The United Nations' Emerging Role*, 45 NAVAL L. REV. 217, 221 (1998) (stating that while the Caroline is a starting point in analyzing self-defense, it has been "creatively sculpted. . .beyond recognition.") The authors state that the modern interpretation requiring necessity and proportionality without the limiting time restrictions of no opportunity for deliberation is a better standard. *Id.*

129. *See* STEVENS, *supra* note 8, at 35–36.

130. Accounts are split whether the *Caroline* was armed. Americans criticized the British for attacking an "unarmed vessel," however, the *Caroline* was transporting supplies and ammunition. *See id.* at 13. It would seem that if they were carrying supplies and ammunition that the people on the boat could have used the supplies if needed.

hours before attacking.[131] They carefully surveyed the boat and after deliberation concluded it was a serious threat.[132] Instead of being criticized, such deliberation should be applauded.[133] The decision to use force against another nation should be deliberated.[134] This is not a domestic criminal law context in which public policy is served by outlawing the premeditated revengeful use of force.[135] This policy leaves strict interpretation of little use.[136] In the context of international law, the use of force should be thought out thoroughly and scrutinized for other possible solutions.[137] At least the British did not hastily attack the *Caroline* without determining whether such action was necessary. In repelling an attack from those who plan to harm a state, the state should not be required to conduct the operation in such a way as to lose advantage. The element of surprise employed by the British was not illegal, but instead a clever strategy in asserting the right of self-defense.

When the doctrine is correctly quoted, it is usually plucked out of its original context to be used when convenient to the agenda of the expounder. An example is Oscar Schachter's conclusion that the standard does include imminence.[138] He argues that it cannot be said that the Caroline

131. *See* STEVENS, *supra* note 8, at 35–36.

132. *See id.* at 35–36.

133. See Major Michael N. Schmitt, *The Resort to Force in International Law: Reflections on Positivist and Contextual Approaches*, 37 A.F. L. REV. 105, 116–17 (1994) (arguing that the Caroline rule is inadequate). Schmitt notes that with the prevalence of weapons of mass destruction, waiting for the absolute last second to repel an attack is not smart military policy. *Id.*

134. *See* Lieutenant Commander Michael Franklin Lohr, *Legal Analysis of United States Military Responses to State-Sponsored International Terrorism*, 34 NAVAL L. REV. 1, 17 (1985). ("It is often stated that the language used by Secretary Webster in referring to 'no choice of means, and no moment for deliberation' is misleading in that a state using force in self-defense is required to deliberate prior to using such force." *Id.*). Lohr also notes that the deliberations can take place over a short period of time and that the requirements of necessity and proportionality are less rigid in response to an armed attack rather than anticipatory self-defense. *Id.*

135. *See* Judith A. Miller, *NATO's Use of Force in the Balkans*, 45 N.Y.L. SCH. L. REV. 91, 95 (2001) (stating that Webster articulated a principle like the domestic principle on international law, but unlike the international law principle).

136. *See* JESSUP, *supra* note 120, at 163–64 (noting that Webster's definition of necessity is drawn from domestic law, and that it is a rare case that it would be useful in an international law situation).

137. *See* Miller, *supra* note 135, at 95. ("The customary law of self-defense is not that demanding, and most international legal practitioners agree that the use of force in self-defense does not require that there be a preceding or even simultaneous armed attack." *Id.*).

138. *See* Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1634–35 (1984).

doctrine was state practice at the time, but it reflects a desire to restrict force when no armed attack occurred.[139] Schachter then uses as the example of the U.N. Security Council's use of the Caroline doctrine in rejecting Israel's claims that it was justified in bombing nuclear reactors in Iraq in self-defense.[140] Here, Schachter's example only refers to threats posed by a reactor—not an actual armed attack. The problem is necessity. Because the plant was not used for an attack, it was blown up prematurely. However, if it were used, it could hardly be said that Israel would have had time to deliberate.

Those in favor of the use of the Caroline doctrine as international customary law have stated that the International Court of Justice (I.C.J.) approved of its requirements in *Nicaragua v. United States.*[141] The credibility of this position is left in doubt because the I.C.J did not explicitly mention the Caroline doctrine in its holding.[142] The only time the Caroline doctrine is explicitly mentioned is in Judge Stephen Schwebel's dissenting opinion in which he states: "It should be recalled that the narrow criteria of the *Caroline* case concerned anticipatory self-defense, not response to an armed attack or actions tantamount to an armed attack."[143] Furthermore, it has been argued that the I.C.J. is in no position to impose standards that would require states to act in the best interests of their citizens and restrain the better judgment of military officials on the assumption that another armed attack will not occur when the enemy still has the capability to support an attack.[144]

D. Lack of State Practice Suggests that the Caroline Doctrine is Not Customary International Law

The continued reliance on the Caroline doctrine is another example of the tendency to discover new customary law based on a statement that a legal rule has now been recognized without showing a general practice.[145] The Caroline doctrine is no longer customary law because it does not reflect current state practice.[146] Although some countries have recently

139. *See id.* at 1634–35.
140. *See id.*
141. *See* Teplitz, *supra* note 59, at 579 n.77.
142. *See* Military and Paramilitary Activities (Nicar. v. U.S.), *supra* note 61, para. 184, at 87.
143. *Id.* at 362 (Schwebel, J., dissenting).
144. *See* Sofaer, *supra* note 100, at 97. Note also that other authorities mention the Nuremberg Military Court's approval of the doctrine in denying Nazi Germany's claim of self-defense for invading Norway. GEORG SWARSCHZENBURGER, 2 INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 30 (1968) (stating that the plea was not one of self-defense but one of necessity).
145. *See* DAMROSCH, ET. AL, INTERNATIONAL LAW CASES AND MATERIALS 96 n.4.
146. *See* Schachter, *supra* note 138, at 1634–35. ("It cannot be said that the formulation reflects state practice (which was understandably murky on this point when

quoted the Caroline doctrine in the United Nations to condemn certain uses of force,[147] in practice, most countries that were able to ward off a threat of impending attack used military action and justified it as self-defense without the limits of imminence. It has also been noted that the proscription against reprisals in the Charter era may be rapidly degenerating because of the lack of actual state practice concerning the rule prohibiting forcible actions against terrorist bases.[148] From the years 1969 through 1988, there averaged about one such forcible action per year.[149]

The United States and Israel have both been popular targets for terrorists in recent years and both countries use force in response to terrorist attacks. In 1986 the U.S. conducted a raid on Libya in response to terrorist activity. Though slightly criticized, Britain sided with the U.S. and declared that it was valid self-defense.[150] Israel attacked Palestinian Liberation Organization (PLO) headquarters in Tunisia in retaliation after the PLO had attacked Israel.[151] Israel argued that Tunisia had allowed itself to be a target and that the action was proper. In 1998, the United States attacked terrorist bases in Afghanistan and the Sudan after Osama Bin Laden sponsored and organized attacks on the U.S. Embassies in Kenya and Tanzania where more than two-hundred people were killed.[152] The United States defended the action on the basis of necessity and proportionality.[153] The emphasis was on the continuing threat that necessitated action, not immediacy. The United States justified the action stating: "the targets struck, and the timing and method of attack used, were carefully designed to minimize risks of collateral damage to civilians and to comply with international law, including the rules of necessity and proportionality."[154] Most recently,

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war was legal), but it is safe to say it reflects a widespread desire to restrict the right of self-defense when no attack has actually occurred." *Id.*).

147. *See* U.N. SCOR, 17th Sess., 1024th mtg. at 51, U.N. Doc S/PV.1024 (1962). The delegate from Ghana uses the Webster formulation to address the U.N. Security Council regarding the incident that came to be known as the *Cuban Missile Crisis. Id.*

148. *See* AREND & BECK, *supra* note 2, at 153.

149. *See id.*

150. *See id.*

151. *See* Robert J. Beck & Anthony Clark Arend, *"Don't Tread On Us": International Law and Forcible State Responses to Terrorism*, 12 WIS. INT'L L. J. 153, 182 (1994).

152. *See* Walter Gary Sharp, Sr., *The Use of Armed Force Against Terrorism: American Hegemony or Impotence?*, 1 CHI. J. INT'L L. 37, 44–45 (2000).

153. *See id.*

154. Letter from Bill Richardson to President of the Security Council (Aug. 20, 1998) at 1, U.N. Doc S/1998/780 (1998).

the United States used force in Afghanistan and bombed the terrorist bases of Osama Bin Laden in response to the terrorist attacks of September 11, 2001.

According to the Caroline doctrine, state practice indicates that there is no feeling of obligation to adhere to its precepts. The lack of obligation prevents the doctrine from being true custom.[155] Instead, the "doctrine" is actually just a peculiar little quote that has been taken out of context for the purposes of criticizing the validity of a state's assertion of the right of self-defense in protecting its nationals and its territory from the violence of terrorism.

V. CONCLUSION

The Caroline doctrine was no more than an exchange of polite diplomatic letters in order for both Britain and the United States to keep honor, while at the same time smoothing tensions between the two states. The political climate was such that a compromise was necessary to keep both nations away from the prospect of war. Both diplomats knew this and used the letters for their own advantage at home without thought or implication of any principle of international law.

Scholars note that Webster's recitation of what he called "international law" was not even correct in its time. At the time of the *Caroline* incident, there was an absolute right to self-preservation and the use of force was an extension of that right. In fact, Webster's imminence requirement was never really followed. What has become custom are the requirements of necessity and proportionality. These principles are often cited as the Caroline doctrine even though they only represent a portion of the doctrine. Scholars and state actors do not follow the imminence requirement, and thus do not adhere to the doctrine in its entirety. Although some scholars and state actors may still try to pluck the imminence requirement out of its historical context for political advantage, it is only that out-of-context quote that leads to absurd results if actually applied.

Referring to the requirements of necessity and proportionality as the Caroline doctrine is misleading because it ignores the imminence requirement. The Caroline doctrine should not be quoted as the standard for the limitations on self-defense but instead be remembered as a part of history.

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155. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1986).