

Louis-Philippe ROUILLARD¹:

**The Caroline Case : Anticipatory Self-Defence in Contemporary
International Law**



(The *Carolina* - drawing in a contemporary newspaper)

On June 1st, 2002, the President of the Republic of the United States of America announced to the graduating class of the United States Military Academy at West Point, and to the world at large, that his Government is determined to guarantee the safety of America and that it is determined to wage preventive wars to do so if necessary². The following *National Security*

¹ The author is Captain (ret'd) Louis-Philippe F. Rouillard, Canadian Forces. He has served in Bosnia-Herzegovina in 2001-2002 and has been granted BMASc, LL.L., DEEI, MA War Studies and LL.M. He is a former lecturer in International Humanitarian Law at the Royal Military College of Canada and currently is a Ph.D. candidate at Pázmány Péter Catholic University, Budapest

² White House, News Release, 20020601-3, "President Bush Delivers Graduation Speech at West Point", (1 June 2002) at www.whitehouse.gov/news/releases/2002/06/20020601-3.html : "For much of the last century, America's defense relied on the Cold War doctrines of deterrence and containment. In some cases, those strategies still apply. But new threats also require new thinking. Deterrence -- the promise of massive retaliation against nations -- means nothing against shadowy terrorist networks with no nation or citizens to defend. Containment is not possible when unbalanced dictators with weapons of mass destruction can deliver those weapons on missiles or secretly provide them to terrorist allies. (...) Our security will require transforming the military you will lead -- a military that must be ready to strike at a moment's notice in any dark corner of the

Strategy released in September 2002 reflected this change of policy³. It went from deterrence and containment to first strike against rogue States and terrorists. Its chapter V stipulates that this is rooted in the changes of circumstances, mainly that terrorists and rogue States will not be deterred from using weapons of mass destruction. Therefore, it argues that the United States can rest upon a long-held option of pre-emptive action to counter a threat to national security. In fact, chapter V goes as far as to say that this option has long been recognised under international law and that the United States need not suffer injury before they can take action to defend themselves⁴.

However, the legal basis for such a bold policy has not been clearly stated by the United States' government. And of what has been stated, there has been a very one-sided version of the applicable international law of the use of force prior to the suffering of an armed attack. While the Administration has claim high and mighty its right to use force pre-emptively, most scholars have disputed this notion and minimized the reach of the custom that is currently recognised in international law. While a history of the use of force has existed for centuries, the right of self-defence under the *Charter of the United Nations* does not support a broad right of pre-emptive actions.

The right of self-defence has always been recognised, whether in municipal or international laws. But the right to anticipatory self-defence has not been expressively incorporated. Indeed, the *Charter of the United Nations* makes a very clear point of trying to limit the right to use force to two instances: self-defence, individual and collective after an armed attack under article 51⁵, and collective measures to restore international peace and security under article 42⁶.

world. And our security will require all Americans to be forward-looking and resolute, to be ready for preemptive action when necessary to defend our liberty and to defend our lives. (Applause.)”

³ United States, *National Security Strategy of the United States of America*, (September 2002) at www.whitehouse.gov/ncs/nss.html : “In the 1990s we witnessed the emergence of a small number of rogue states that, while different in important ways, share a number of attributes. These states: brutalize their own people and squander their national resources for the personal gain of the rulers; display no regard for international law, threaten their neighbors, and callously violate international treaties to which they are party; are determined to acquire weapons of mass destruction, along with other advanced military technology, to be used as threats or offensively to achieve the aggressive designs of these regimes; sponsor terrorism around the globe; and reject basic human values and hate the United States and everything for which it stands.”

⁴ *Ibid.*, chapter V : “ For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.

We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.”

⁵ Charter of the United Nations, 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevens 1153, June 26, 1945, (entered into force Oct. 24, 1945) at article 51: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

⁶ *Ibid.*, at article 42 : “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary

Nonetheless, some States have indeed maintained that there remain within the right of self-defence a right to prevent an armed attack from occurring by using anticipatory self-defence. The United States are one such country, and it is the *Caroline* incident with the United Kingdom in 1837 that gave rise to a formal interpretation in international of what anticipatory self-defence consist.

From this case and its subsequent application, the United States' government bases its new "Bush Doctrine". However, the interpretation of the *Caroline* incident today, even if international law had not changed since, remains to be determined. Furthermore, the application of the *Caroline* incident in contemporary international law after the adoption and application of the *Charter of the United Nations* may also very well not be possible.

To determine the validity of the proposed Bush Doctrine, one must therefore review the doctrine of anticipatory self-defence and examine the application from the *Caroline* incident and its subsequent interpretation. This is what this article will do.

I will first look at the facts of the *Caroline* incident of 1837 and the legal conclusions applicable in international law as determined at the time by the parties concerned. I will then analyse the effects on this concept by the League of Nations and the Organisation of the United Nations. I will finally examine the contemporary development and the application of the doctrine to the cases created by the actions of the United States in the past two years.

The affair of the *Caroline* and the *McLeod* Case

The *Caroline* incident concerns a steamboat bearing that name used for revolutionary purposes in the rebellion of Upper Canada, a Province of the Dominion of Great Britain ; nowadays the Province of Ontario, Canada. The rebellion of 1837 was rooted in the political system of cronyism that pervaded colonial politics in the British colonies of the Canadas, both Lower and Upper. It flared because of insensitivities of the British authorities towards the complaints of the inhabitants of the Canada and the confrontationalist attitude of the Crown⁷. While much

to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

⁷ While much has been made of the democratic and nationalistic issues of the Quebeckers, the rebellion had much to do with a non-representative system and underlying patronage. The *Patriots*, under the leadership of Louis-Joseph Papineau, demanded from their solid voice in the assembly of Lower Canada (Québec) changes to the system. In 1832, the *Patriots* sent to London a list of Ninety-Two resolutions demanding among other things the election of the legislative council and that member of the executive are chosen by the members of the assembly. This was made jointly with representatives of the assembly of Upper Canada, of which a member of the Reform Party and former mayor of the city of York (Toronto), William Lyon MacKenzie, was part. All resolutions were denied. MacKenzie was defeated in the 1836 elections and became an advocate of open rebellion. In Lower Canada, Papineau, an ardent defender of nationalistic aspiration for Québec, spoke with such fire that popular sentiment was close to rebellion. In early 1837, Great Britain decided to move against the popular base of the *Patriots* by affirming 10 policies directly opposed to the *Patriots*. The people rose in the spring of 1837 in Lower Canada and continued rebellion throughout the summer of 1837. But, despite a victory at Saint-Denis, they were utterly crushed at Saint-Charles and Saint-Eustache. Meanwhile, in Upper Canada, MacKenzie decided to strike in support of the *Patriots*. His force were easily defeated and dispersed. MacKenzie fled to the United States to recruit new forces while Papineau fled to France via the United States.

have been made of the democratic and nationalistic issues of the Quebeckers, the rebellion had more to do with a non-representative system and underlying patronage. The rebellion of Lower Canada was over by the end of the summer and that of Upper Canada was in disarray by December 1837. At that time, the remnants of the rebels fled to the United States where they tried to raise support for further continuation of the rebellion in Buffalo (New York). This presence and threat caused to international peace between Great Britain and the United States was known to the American authorities. Instructions were issued to the districts attorneys of Vermont, Michigan and New York stating the President's intention to respect its international obligations and abstaining from any intervention in the domestic affairs of another nation⁸.

On December 13, 1837 the rebel MacKenzie issued a proclamation for rebellion and recruited American help for the invasion of Upper Canada. A headquarter was set up on Navy island, a small island part of British territory across the Niagara River where the shores between Canada and the United States are at a very close point. These movements created enough attention on the British side of the river as to have the Lieutenant-Governor of Upper Canada send a message to the Governor of the State of New York to inform him of the situation. No answer came back. Between the 13th and the 28th of December, 1837, up to 300 men under the leadership of an appointed an American 'general' named Van Rausselear were armed and joined the headquarters of the Canadian rebels on Navy Island⁹. By the night of December 29, 1837, this force was seen growing to 1000 armed men. Reinforcements were made through constant movements from the American shore to Navy Island¹⁰, between three in the afternoon and dusk¹¹.

Seeing the use made of the ship, Colonel Allan Napier McNab, the officer commanding the British forces at Chippewa, judged that the destruction of the *Caroline* would prevent further reinforcements to Navy Island and deprive the rebels of their mean of invasion. He therefore ordered an expedition to be sent out for this purpose. According to the master of the *Caroline*, the ship was docked and moored at Fort Schlosser for the night with ten officers and crew on board, as well as twenty-three Americans who asked to be permitted to spend the night as they could not found lodging at the tavern near by. Around midnight, a force of 70 to 80 from several small boats boarded the *Caroline* and commenced warfare with muskets, swords and cutlasses. The vessel was abandoned by all hands, the only efforts of its crew being to flee. Thus captured, the vessel was left to the possession of the British forces that cut her loose, towed her into the current of the river, set her on fire and let her descend the current towards the Niagara Falls, where she was destroyed¹². Twelve persons were initially said to have been killed or disappeared.

⁸ Moore: A digest of international law as embodied in diplomatic discussions, treaties and other international agreements, vol. 3, Washington, Government printing office, 1906 at 919.

⁹ Idem. This was observed by the collectors of customs and the marshal of the United States for the Northern District of New York who had been directed to Buffalo in order to suppress any violations of the neutrality between the US and Great Britain.

¹⁰ Jennings, R.Y: The Caroline and McLeod Cases, (1938) 32 *AJIL* 82 at 85, citing the *Law Officers' of the Crown's Report*, dated February 21, 1838, Public Record Office in London, vols. F.O. 83, 2207-2209.

¹¹ Idem.

¹² Ibid., at 84.

As was established after investigations, it is a force of 45 men in 5 boats under the command of Commander Andrew Drew (Royal Navy), acting upon orders of Colonel McNab, that boarded, set fire to and let the ship descend adrift¹³. The place where the *Caroline* was moored was at Schlosser, a small landing point in the State of New York less than 5 kilometres upstream from the Niagara Falls, rather than Fort Schlosser, an old and abandoned American fort of the War of 1812 between the United States and Great Britain which was higher upstream from the falls.

Contrary to the opinions expressed at first, it is not 12 persons that died during that night, but two: Amos Durfee, killed on the docks by a bullet in the head, and a cabin boy known as "Little Billy", shot while trying to escape the *Caroline*. Two prisoners were made: an American citizen of 19 years old and a Canadian fugitive. Both were let go: the American with enough money to pay for the ferry back to the United States and the Canadian after spending some time in the guard room at Chippewa¹⁴.

On January 5, 1838, President Van Buren sent a message to Congress to ask for full power to prevent injuries being inflicted upon neighbouring nations by unlawful acts of American citizens or persons within the territories of the United States and General Scott was sent to the frontier with letters to the Governors of New York and Vermont, calling the militias¹⁵. The rebels were dispersed, but some continued the struggle within secret societies called Hunters' Lodges. This led to another short-lived rebellion in Canada in 1838, but it was harshly and swiftly dealt with. In Canada, the impact of these rebellions was the *Act of the Union* of both Canadas into a single province of the Dominion, attempting to assimilate French-Canadian to diminish the likelihood of another attempt. The impact on the relations of the United States and the British Crown was one where a true settlement of the North-eastern boundary had to be reached if war was to be averted¹⁶. While the facts of the incident could be made light of were it not for the death of two persons, they are nonetheless of much importance as the whole doctrine of anticipatory self-defence rest upon them.

The legal argument concerning the case started with the note sent on January 5, 1838 by the American Secretary of State Forsyth to the British Minister at Washington, Fox, expressing surprise and regret for this incident and warning that this incident would be made the subject of a demand for redress. Mr. Fox replied by letter on February 6, 1838 and stated three defences for the actions of the British forces, namely: 1) the piratical nature of the vessel, 2) the fact that the ordinary laws of the United States were not being enforced at the time, and were in fact overtly overborne by the rebels and 3) self-defence and self-preservation¹⁷. This curt response to the American government marked an attitude of not taking the matter too

¹³ House Document no. 302, 25th Congress, 2d session, serial 329, passim, cited in The Avalon Project at <http://www.yale.edu/lawweb/avalon/diplomacy/britian/br-1842d.htm>.

¹⁴ Jennings, supra, note 9 at 84, citing *N.S. Benton to Hon. John Forsyth*, Buffalo, February 6, 1938, H.Ex. Doc.302, 25th Congress, 2d session as well as a dispatch from Governor Head to Henry S. Fox.

¹⁵ Moore, supra, note 7 at 920.

¹⁶ The leaders of the rebellion were however well treated. Papineau remained in France until 1845, when the amnesty was proclaimed. He came back to Canada and served again in the legislature from 1848 to 1854. MacKenzie served an eighteen months prison sentence in the United States, returned to Canada in 1849 and served in the assembly from 1851 to 1858. Papineau was the grandfather of Henry Bourassa, the nationalist Premier of Quebec during the First World War while MacKenzie was the grandfather of William Lyon MacKenzie King, one of the most long-serving Canadian Prime Minister.

¹⁷ Jennings, supra, note 9 at 85.

seriously by the British Authorities. This exchange prompted the report of the Law Officers, but did not move the British Authorities to recognise any wrong-doing. This being judged unsatisfactory by the American government, the matter was brought up by the American ambassador in London, Stevenson, to the British Foreign Secretary, Lord Palmerston, who promised to look into the matter. The matter was indeed looked upon once more by the Law Officers. But their conclusion of March 25, 1838 and added to their report of February 21, 1838, was while the incident was regrettable, they felt that the actions of the British Authorities were absolutely necessary for the future and not retaliation for the past. As a result, they believed that the conduct of the British force had been, under the circumstances, justifiable by the Law of Nations. Arguments and reminders were made back and forth during the ensuing period, but none led to a satisfactory settlement of the question.

Meanwhile, the relations between the two nations remained difficult. The local population at Buffalo seemed inclined toward retaliation and conflict was quite possible. Also, British nationals in the United States suspected of having taken part in the events of the *Caroline* were made to stand Juridical Examination on charges of participating in the attack. A man named Christie was arrested those charges on August 23, 1838¹⁸. The Queen's Advocate, seized of the case, counselled the British Minister in Washington, Fox, in a dispatch dated November 6, 1838, that such an arrest cannot hold due to the fact that the actions that Mr. Christie is accused of are acts of public persons obeying the orders of superior authorities. Therefore, Mr. Christie could not be held accountable for these acts even if he had taken part in them¹⁹.

Following this, a Canadian deputy sheriff named Alexander McLeod boasted of his part in the events of the *Caroline* during a passage through Lewiston, New York, on November 12, 1840. Acting on his ill-advised words, the American authorities arrested him immediately on charges of the murder of Amos Durfee and arson in connection of the burning of the *Caroline*.

On December 13, 1840, Fox addressed a note to Forsyth taking again the principles laid in the Christie case and by which public persons could not be held accountable for acts of governments. Forsyth replied that the arrest of McLeod was made by the authorities of the State of New York and therefore infringement by the Federal government in the state's sphere of jurisdiction would not be appropriate. It is important to recall that President Van Buren was a former governor of the State of New York and was vying for re-election at the time of the exchange between Fox and Forsyth. The argument about States' jurisdiction and Federal competences was one of the most sensitive political issues in the American Union at that precise moment. Martin Van Buren lost the elections and the new government of William Henry Harrison took a more pragmatic approach to the problem of relations with Great Britain from its inaugural ceremony on March 4, 1841. Apt Minister, Fox felt the change of Administration opportune to demand the release of Alexander McLeod and sent a demand on March 12, 1841 to the new Secretary of State, Daniel Webster, who took a more lenient view than his predecessor on the matter. Indeed, the Harrison administration was of the opinion that while the Constitution of the United States created very clear fields of jurisdiction, the Federal Government was the one concerned with foreign relations and as a result it is most apt to intervene with the State of New York and obtain the release of a foreign national. Webster replied on March 15, 1841 that the American government is guided by the opinion that an

¹⁸ Ibid., at 92.

¹⁹ Ibid., p. 93.

individual who acts as part of a public force cannot answer personally for those acts. This principle applied to criminal lawsuits as well as civil ones²⁰.

Nonetheless, a last hurdle had to be crossed before McLeod could be released: that of judicial process. Since McLeod was accused and confined by reason of judicial process, he could only be released in this manner, this meaning that he had to be brought to courts so the prosecutor could enter a plea of *nolle prosequi* – no prosecution. Webster addressed a letter to Fox on April 24, 1841 explaining that while the laws of Great Britain permitted the prosecutor to enter this measure of *nolle prosequi* at any time during procedure, the laws of the State of New York only permitted this during sessions of the court.

This displeased Fox immensely as he pointed out that the whole point was not that McLeod be found not guilty but that he be not judged at all. Still, the Supreme Court of New York refused leave to enter a *nolle prosequi* and also refused a writ of *habeas corpus*. The only manner in which the court could see this done was by trial by jury. The trial of *The People v. McLeod* took place and no evidence of McLeod's participation could be brought to court. He was acquitted in October 1841²¹.

This long delay of releasing McLeod and the still precarious relations between the North American neighbours led Great Britain to send a Special Minister to Washington to negotiate both issues in the person of Alexander Baring, 1st Baron of Ashburton. During the course of their negotiations, both he and Secretary of State Webster exchanged a number of letters that formed the root of anticipatory self-defence.

The first such recorded instance is in the letter of July 27, 1842 where Webster expresses the notion that the principle of non-intervention is of a salutary nature and that simple neutrality is not sufficient for the government of the United States²², and that it has therefore actively sought to prevent injury to Great Britain in its North American Provinces²³. Webster position therefore was that since the United States had respected its obligation under the Law of Nations, it was for Great Britain to justify its actions by demonstrating 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 strewn that admonition or remonstrance to the persons on board the "*Caroline*" was impracticable, or would have been unavailing; it must be strewn that daylight could not

²⁰ Ibid., p. 93-94.

²¹ *The People v. McLeod*, 1 Hill (N.Y.) at 375.

²² Letter of Secretary of State Daniel Webster to Special Minister Ashburton, dated 27 July 1842, reproduced at <http://www.yale.edu/lawweb/avalon/diplomacy/britian/br-1842d.htm>

²³ Moore, *supra*, note 7 at 920. Those active measures are indeed numerous even though they have failed to reign in American support. They included the issuing of warrants to be served by Marshals of the United States for arrest of persons aiding and abetting rebels, the dispatching of collectors of customs to help the marshals, the placing of revenue cutter *Erie* at the disposal of the collector of Buffalo for the purpose of seizing any vessel carrying arms, ammunition or nay supplies to help forces against the Canadian government as well as statements of intention by the Federal government to remain neutral and decline to help the rebels.

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.”²⁴

It was clearly the belief of Webster that Ashburton could not demonstrate this and that the terms were too strict to be interpreted in such a way as to justify the British actions, therefore preparing the way for reparations to be given to the United States. In this, he was sorely disappointed with the ingenious response of Lord Ashburton in his letter of July 28, 1842. Ashburton assented to the conditions presented by Webster as general principles of international law applicable to the case. He fully recognised the inviolability of the territories of independent nations for the maintenance of peace and order amongst nations. However, he adds that there are occasional practices, including that of the United States, where this principle may and must be suspended.

Ashburton sets such instances as those where, for the shortest possible time and due to an overruling necessity and within the narrow confines of such a necessity, self-defence may be invoked. He firstly states that self-defence is the first law of nature and is recognised by every code that regulates the condition and the relations of man. Doing so, he recognises fully the general principles laid down by Webster and set his argument upon them but establishes a difference between expeditions across national border and the case of the *Caroline*. He presents the example of a situation where a man standing on grounds where you have no legal rights to chase him presents himself with a weapon long enough to reach you. He then asks how long one is supposed to wait when he has asked for succour and asked for relief and none are forwarding. By doing so, he recognised the efforts made by the United States to prevent American taking part in the Canadian rebellion, by underlines the inefficiency of its attempts²⁵.

Furthermore, Ashburton includes in his version of the events that the initial efforts to capture the *Caroline* was to seize her in British waters at Navy Island, and not on the American side but that since the orders of the rebel leaders were disobeyed, the *Caroline* went, docked and was moored at Schlosser point. It is only as he passed the point of Navy Island that Commander Drew did not see the ship there but on the American shore and that pursuant with his mission forged ahead. This statement addressed the question by which not a moment was left to deliberation, that the expedition was not planned with the intent of invading American territory from the outset by those circumstances and that the necessity of preventing the rebels from further use of the ship as a mean of invasion overwhelmed the normal respect of national territory²⁶.

²⁴ Letter of Secretary of State Daniel Webster to Special Minister Ashburton, supra, note 21.

²⁵ Curtis, R. E.: The Law of Hostile Military Expedition as Applied by the United States, II, (1914) 8 *AJIL* 224 at 242: “It was in part the failure of the United States that justified the destruction of the *Caroline* in American waters by the British forces.”

²⁶ Letter from Special Minister Ashburton to Secretary of State Webster, dated 28 July 1842, reproduced at <http://www.yale.edu/lawweb/avalon/diplomacy/britian/br-1842d.htm> : “It appears from every account that the expedition was sent to capture the *Caroline* when she was expected to be found on the British ground of Navy island, and that it was only owing to the orders of the rebel leader being disobeyed, that she was not so found.

Having recognised the general principles and explained the particulars of the overwhelming immediacy of the decision, Ashburton then turns toward the notion of necessity to answer the claims of Webster that nothing could justify the attack in the middle of the night against men asleep, killing and wounding some, then drawing the ship into the current, setting her on fire and letting her adrift into the current to be destroyed in the falls without knowing if guilty or innocents were on board.

Ashburton responded that the time of the night was purposely selected to ensure that the mission would result in the least loss of life possible and that it is the strength of the current that did not permit the vessel to be carried off to the Canadian side. For this reason, it became necessary to set her on fire and drawn into the stream to prevent injury to persons or property at Schlosser²⁷. He finishes the letter by recognizing that Her Majesty's Government should have apologised nonetheless for the matter, but that it does not make it wrongful in itself. And further continues to support that the treatment of individuals made personally responsible for acts of government was as unacceptable.

Webster responded to this note on August 6, 1842. In his letter, he further reaffirms the criterion laid in his letter of July 27 and while agreeing with the matters of apologies still recognised the general principles debated but still did not corroborate the facts of the case. Nonetheless, satisfied with the apologies, the President stipulated through Webster that this matter would not be brought forward again²⁸.

As a result the affair of the *Caroline* in 1837 and the subsequent case of *The People vs. McLeod* have established principles now firmly entrenched in *ius ad bellum* and *ius in bello*. In the case of the laws of armed conflicts, McLeod's case has confirmed the separation between public acts and individual responsibility. With regards to the right to use force in international law, the affair of the *Caroline* case has once again confirmed the right of self-defence and, more importantly, has established clear criterion for its invocation and that of anticipatory self-defence.

The Continuity of the doctrine

The right of self-defence has been invoked countless times since this affair; sometimes rightfully, many times as an excuse for aggressive actions. But there is no denying that the right of self-defence has existed prior to this affair and exists since. The difference is that there

When the British officer came round the point of the island in the night, he first discovered that the vessel was moored to the other shore. He was not by this deterred from making the capture, and his conduct was approved. But you will perceive that there was here most decidedly the case of justification mentioned in your note, that there should be "no moment left for deliberation". I mention this circumstance to show also that the expedition was not planned with a premeditated purpose of attacking the enemy within the jurisdiction of the United States, but that the necessity of so doing arose from altered circumstances at the moment of execution."

²⁷ Idem.

²⁸ Resulting in the Webster-Ashburton Treaty of 1842, see The Avalon Project, *supra*, note 12. It must be remembered that President Harrison died of pneumonia on April 4, 1842, 30 days after his inauguration. Vice-President John Tyler was sworn in as President on April 6, 1842 and adopted a more conciliatory approach with Great Britain.

existed no international institution with a mandate to limit the use of force and to determine whether there existed circumstances to invoke the right of self-defence²⁹. The *Covenant of the League of Nations* changed this state of affairs as it introduced not only a notion preventing the use of aggression at its article 10³⁰, but also organs whose function were to determine and adjudicate on the right to use force³¹. The League of Nations obviously failed in its attempt to regulate the use of force and the International Military Tribunal for major war criminals in Europe was provided with a test case for the idea of anticipatory self-defence.

Despite a treaty of non-aggression between Denmark and Germany on May 31st, 1939 and a solemn assurance given to Norway on September 2, 1939 to respect their neutrality and inviolability, the Third Reich's armed forces invaded both countries on April 9, 1940. The responsibility for these invasions was laid at the feet of Admirals Raeder and Dönitz as well as *Reichsleiter* Rosenberg, in charge of the Foreign Affairs Bureau of the NSDAP³². The defence

²⁹ Waldock, C.H.M.: *The Regulation of the Use of Force by Individual States in International Law*, (1952) 81 *Recueil des Cours de l'Académie de Droit International* 451at 456-457.

³⁰ *Covenant of the League of Nations*, L.N.T.S. 1 at article 10: "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled."

³¹ Kervarec, G.: *L'intervention d'humanité dans le cadre des limites au principe de non-intervention*, (1998) 32 *Revue juridique Thémis* 77 at 81.

³² Judgement concerning *The Invasion of Denmark and Norway*, International Military Tribunal, Nuremberg, reproduced at <http://www.yale.edu/lawweb/avalon/imt/proc/juddenma.htm>: "On the 3rd October, 1939, Raeder prepared a memorandum on the subject of "gaining bases in Norway," and amongst the questions discussed was the question: "Can bases be gained by military force against Norway's will, if it is impossible to carry this out without fighting?" (...) three days later, further assurances were given to Norway by Germany, which stated: "Germany has never had any conflicts of interest or even points of controversy with the Northern States, and neither has she any to-day." (...) Three days later again, the defendant Dönitz prepared a memorandum on the same subject, (...) On the 10th October, Raeder reported to Hitler the disadvantages to Germany which an occupation by the British would have. In the months of October and November Raeder continued to work on the possible occupation of Norway, in conjunction with the "Rosenberg Organisation." (...) Early in December, Quisling, the notorious Norwegian traitor, visited Berlin and was seen by the defendants Rosenberg and Raeder. He put forward a plan for a coup d'état in Norway. On the 12th December, the defendant Raeder and the naval staff, together with the defendants Keitel and Jodl, had a conference with Hitler, when Raeder reported on his interview with Quisling, and set out Quisling's views. On the 16th December, Hitler himself interviewed Quisling on all these matters. In the report of the activities of the Foreign Affairs Bureau of the NSDAP for the years 1933-1943, under the heading of "Political preparations for the military occupation of Norway," it is stated that at the interview with Quisling Hitler said that he would prefer a neutral attitude on the part of Norway as well as the whole of Scandinavia, as he did not desire to extend the theatre of war, or to draw other nations into the conflict. If the enemy attempted to extend the war he would be compelled to guard himself against that undertaking; however he promised Quisling financial support, and assigned to a special military staff the examination of the military questions involved. (...) On the 27th January, 1940, a memorandum was prepared by the defendant Keitel regarding the plans for the invasion of Norway. (...) On the 28th February, 1940, the defendant Jodl entered in his diary: "I proposed first to the Chief of OKW and then to the Fuehrer that "Case Yellow" (that is the operation against the Netherlands) and Weser Exercise (that is the operation against Norway and Denmark) must be prepared in such a way that they will be independent of one another as regard both time and forces employed." (...) On the 1st March Hitler issued a directive regarding the Weser Exercise which contained the words: "The development of the situation in Scandinavia requires the making of all preparations for the occupation of Denmark and Norway by a part of the German Armed Forces. This operation should prevent British encroachment on Scandinavia and the Baltic; further, it should guarantee our ore base in Sweden and give our Navy and Air Force a wider start line against Britain . . . The crossing of the Danish border and the landings in Norway must take place simultaneously . . . It is most important that the Scandinavian States as well as the Western opponents should be taken by surprise by our measures." (...) On the 24th March, the naval operation

made by the accused was that of preventive action. The Court fully rejected this based on the words of the exchange of letter between Webster and Ashburton during the negotiations concerning the *Caroline*. Based on the notion of such self-defence being justified only in cases where “an instant and overwhelming necessity for self-defence leaving no choice of means, and no moment of deliberation” exist, the Court rejected the contention that the wars with Norway and Denmark were defensive in nature and not acts of aggression³³. The preparatory nature of the actions taken by the German Reich against the Kingdoms of Denmark and of Norway, involving military considerations and planning as well as political and covert subservience of governments clearly indicated that the German government was ready and prepared to use force while professing intention of peace. Therefore, the right of preventive action to justify a war and the occupation of a country was flatly rejected by an international court on the basis of Anglo-Saxon generally, and American particularly, jurisprudence.

The effect of the Charter of the United Nations

While the war provided examples, political and legal development during the war led to the creation of a new international legal standard through the United Nations. The initial United Nations of 1942 were 26 countries united in their fight against the Axis by a joint declaration signed in Washington on January 1, 1942. They stood against savage and brutal forces seeking to subjugate the world. As the war was fought and won, it further developed into a more structure organisation seeking to prevent the scourge of war from being inflicted upon humanity once more. From August 21 to October 7, 1944, a growing membership met at Dumbarton Oak for a conference aiming at the *Establishment of a General International Organization under the title of the United Nations*. The instrument it created, the *Charter of the United Nations*, stipulated a prohibition of the right to use force in international relations, providing only two exceptions: the right of self-defence and collective security actions.

The case for collective security actions arises only under article 42, where the Security Council has determined a situation to be a threat to international peace and security under article 39³⁴, does not concern the case of self-defence, therefore the only concern for this essay is the exception of article 51.

The question that arises from article 51 is to know when the right of self-defence begins. Its wording speaks of “the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security”³⁵. From this, the explicit recognition of the right to self-defence as affirmed in the *Caroline* affair is recognised as inherent to a State. But this right is conditional to the occurrence of an armed attack.

orders for the Weser Exercise were issued, and on the 30th March the defendant Doenitz as Commander-in-Chief of U-boats issued his operational order for the occupation of Denmark and Norway. On the 9th April, 1940, the German forces invaded Norway and Denmark.

³³ Ibid., in fine.

³⁴ Charter of the United Nations, supra, note 4 at article 39 : “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

³⁵ Ibid., supra, note 4 at article 51.

Some commentators have argued that the expression “an armed attack occurs” must be construed in the contemporary international and technological context of limited reaction time. In particular, there is a growing tendency amongst American jurists to support exceptions to the principle of non-intervention because of failures of government to act on their international obligation, a need for protecting civilians against terrorist attacks and a need to uphold their sovereignty by striking first against those who menace the international community³⁶. Those changes are not new.

Twenty years ago, Dr. Polebaum published an article arguing for a broad interpretation of article 51 to include the right of anticipatory self-defence on the basis that technological advances in nuclear armaments and their means of delivery made a case for a policy of first strike³⁷. She presented three criteria to be respected on the basis of the *Caroline*.

Firstly, all alternative means must have been exhausted by attempting to avert war or the threat of war until it is unavoidable and immediate. Secondly, the exercise of the anticipatory right of self-defence must be proportional to the provocation. She defined this as “alternatively as either inflicting no more damage than that inflicted by the initial injury of the offending state, or as remaining within the confines of moral notions of human rights”³⁸. Finally, there is a need to demonstrate the immediacy of the threat³⁹.

To support the application of these criteria in the contemporary context, she asserted that the broader interpretation of article 51 is far more convincing than a restrictive view because, according to her interpretation, the *Charter of the United Nations* was drafted in a way as to either expressly prohibit a behaviour or to preserve rights. Since article 51 states that nothing shall impair the right to self-defence and that there is no prohibition expressly stated on the matter of anticipatory self-defence, it cannot be said to have been extinguished by the *Charter*⁴⁰.

She argued that the French version of the *Charter* is more carefully drafted than the English one and that the expression “agression armée”, instead of “armed attack”, permits anticipatory self-defence in response to threats of the use of force as an aggression can exist separately from armed attack⁴¹. She continued by saying that the silence of the *Charter* on the matter of anticipatory self-defence should create a presumption of its existence in international law. Finally, she declared that even if the intention of the drafters had been to prohibit the use of anticipatory self-defence, such a prohibition would be meaningless today as advancement in weaponry have made immediacy paramount to other concerns⁴². These arguments have been taken in many forms since but have always been rejected by the international community and for good juridical reasons.

³⁶ Murphy, S.M.: Contemporary Practice of the United States: US Adoption of New Doctrine on the Use of Force (2003) 97 *AJIL* 203 at 204-205.

³⁷ Polebaum, B.M.: National Defense in International Law : An Emerging Standard for a Nuclear Age, (1984) 59 *New York University Law Review* 187 at 200.

³⁸ *Idem*.

³⁹ *Idem*.

⁴⁰ *Idem*.

⁴¹ *Ibid.*, at 202.

⁴² *Idem*.

Concerning the argument of the French version of the *Charter of the United Nations*, this interpretation was clearly erroneous. The expression “*agression armée*” in French is as restrictive as “armed attack” in English. The etymology of the French word *agression* comes from the Latin *aggredi*, which translates into the verb “to attack”. While an aggression may be verbal or physical, the expression “*agression armée*” clearly indicates the physical form: no verbal aggression is equipped with a weapon⁴³.

The rejection of the subsequent arguments is also based on proper juridical sense. Article 51 does write expressively that an armed attack must occur. This has been interpreted as situation where an “armed attack has begun or is about to begin”⁴⁴. Even the question of the existence of a customary right has been answered in the *Corfu channel* and the *Nicaragua* cases⁴⁵. As such, it has been found that the right of self-defence was to be narrowly interpreted.

In *Nicaragua*, the United Nations’ *Definition of Aggression* provided the foundation to establish the threshold for an armed attack and of the *Declaration on Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*⁴⁶. The Court concluded that self-defence could not be invoked if the threshold of actual armed attack was not reached. In the *Nicaragua* case, the provision of weapons and ammunition to El Salvador rebels by Nicaragua was not sufficient to reach that threshold. Therefore, it is clear that the words “an armed attack occurs” speak of the actual commencement of physical violence by armed forces. However, it is true that this does not address the issue of when an attack is about to begin.

There appears to be a very limited right for States to anticipate self-defence that would set the beginning of an attack to a period of time prior to actual physical hostilities. This type of situation is based on the criterion of the *Caroline* affair. But such a right can only be invoked in

⁴³ Éditions Larousse, *Le petit Larousse*, Larousse, Paris, 2003 at 47.

⁴⁴ Murswiek, D.: *The American Strategy of Preemptive War and International Law*, *Albert-Ludwigs Universität Freiburg, Institute of Public Law*, March 2003, at <http://www.jura.uni-freiburg.de/ioeffr3/papers/papers.htm>.

⁴⁵ *Corfu channel case* (United Kingdom v. Albania), [1949] I.C.J. Rep. 4 and *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. U.S.), [1986] I.C.J. Rep. 14. In the case of *Nicaragua*, the court addressed the issue of the extend of the customary right viz that of treaty law and came to the conclusion that there was not a disparity permitting an extension of the interpretation of the concept of self-defence. See O’Connell, M.E., “The Myth of Preemptive Self-Defence”, *The American Society of International Law, Task Force on Terrorism*, August 2002 published at <http://www.asil.org/taskforce/index.htm>. See also Farer, T.J., “*Nicaragua v. United States (Merits)*”, (1987) 81 *AJIL* at 113: “... anything other than a high and conspicuous threshold between an armed attack justifying the exercise of self-defense and lesser forms of intervention that transiently threaten freedom of choice but not the long-term territorial integrity or political independence of the state, would invite internationalization of essentially civil conflicts.” These cases are therefore not self-defence but intervention.

⁴⁶ *Definition of Aggression*, GA Res. 3314, UN GAOR, 29th Sess., Supp. No. 31, UN Doc. A/9631 (1974). Article 3 provided clear cases : “Article 3 Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof, (...) (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.” This was interpreted in conjunction with the *Declaration on Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, GA Res. 2625, UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8028 (1970), especially with regards to the *Principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purpose of the United Nations* and the *Principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter*.

situations of convincing and overwhelming evidence of an attack being mounted. The evidence must be so clear as to leave no doubt that it is about to occur even if it is still in the territory of another State⁴⁷. In the facts of the *Caroline*, the decision of Commander Drew to cross into American territory to accomplish his mission was based upon a change in circumstances. Only because he was already engaged in his activities did he contravene the principle of non-intervention. Therefore, the criterion of immediacy and necessity must be based upon the very fact that there is no other course available to prevent the threat from being executed. By nature, this excludes planning.

In conventional warfare, this is clearly the case when an invasion force is discovered and a counter-attack is made to prevent it from gaining the advantage of surprise, although it is clear that only tactical surprise may be recovered since strategic surprise has been lost as well as initiative. In the case of nuclear warfare, the signs of preparedness would have to be so overwhelming and generalised that only the definitive intention to use them would logically explain the actions being undertaken. The fuelling of one missile or even of a region's missiles would hardly be enough to justify an attack on the basis of anticipatory self-defence as no country would use a limited amount of nuclear weapons on a first strike: this would leave it open to utter destruction upon a retaliatory strike. Only a full force first strike can give a glimmer of hope to the attacker and that glimmer is much more likely to take the form of giant balls of exploding gases.

In fact, with respect to the criterion of the *Caroline*, very few cases of anticipatory self-defence can be made. Some have stated that the case of the 1967 Six-Days War between Israel and the Arab countries surrounding it is a clear case of self-defence. Israel attacked Egyptian airfields in what it claimed to be an anticipatory self-defence manner. It was clearly stated by numerous governments of Arab countries that they were intended upon the destruction of Israel and that a military alliance existed. But this situation goes more into one of actual belligerency than that of anticipatory self-defence⁴⁸. Israel struck first to gain the initiative as well as the strategic and operational surprise. War already existed *de facto* if not *de jure*. In a war, the choice of the moment of attack is simply a matter of military expediency. And this case was mostly so. At best, the value of the Six-Days War as a test case is arguable.

As for the American bombing of Tripoli in 1986, it hardly meets the tests of necessity and immediacy set forth in the *Caroline* affair. There may have been a necessity for sending a strong message to Libya for continuous support of terrorism and the killing of US service personnel in a Berlin discotheque, but this is retaliation, not self-defence. There is no value trying to justify a doctrine of anticipatory self-defence in what is clearly an act of vengeance and an assassination attempt. The bombings were strongly criticised by the international community and no support of State practice can be found in this instance⁴⁹.

The case that is most interesting with regards to anticipatory self-defence is that of the Osirak nuclear reactor in Iraq in 1981. Some argue that the weight of evidence and the stated intention of Iraq to use it only against Israel make for a compelling argument to justify its

⁴⁷ O'Connell, *supra*, note 44 at 8 and 9, citing Waldock, *supra*, note 31 at 498.

⁴⁸ Reisman, M.W.: Assessing Claims to Revise the Laws of War, (2003) 97 *AJIL* 82 at 87.

⁴⁹ Beard, J.M.: America's New War on Terror : The Case for Self-Defense in International Law, (2002) 25 *Harvard Journal of Law and Public Policy* 2 at footnote 93.

destruction. Yet, the Security Council and the world at large condemned the Israeli raid⁵⁰ – even though subsequent actions of the Iraqi regime during the 1991 Gulf War have vindicated claims of both the proponents and opponents of this raid⁵¹. But, under the eye of the criterion established in the *Caroline* case, was there a case for necessity and for immediacy? The answer is absolutely negative.

The existence of a potential right of anticipatory self-defence can be supported. But such a right can only be invoked to support actions in reaction to a first use of force or a clear and imminent threat of such use. In the *Osirak* case, Iraq was clearly not within a month or even a year of completing a nuclear weapon. Nothing could have prevented Israel from going through the Security Council to address this issue. Evidently, the Security Council would have been deadlocked and Israel would have been caught at its starting point, but then, it would have exhausted all alternative recourses and would have been justified to meet the criterion of the *Caroline* and destroy the reactor.

The simple fact is that anticipatory self-defence has extraordinarily harsh criterion to meet for the simple reason that otherwise it becomes a very convenient vehicle to justify any action supporting national interests against those of the international community.

There is no reason to change the criterion established more than a century and a half ago. They remain absolutely valid. The existence of a right to anticipatory self-defence can be established and there certainly are clear and imminent dangers that must be pre-emptively addressed. But they must be so addressed within the strict and narrow confines of the exhaustion of all alternative means, the necessity of its actions being established by the immediacy of the danger, and must be proportional to the threat. Regardless of the excuses given so far toward the extension of this right, none have either been conclusive or even remotely convincing. None have been accepted so far by the international community and certainly none should be. Which leads the analysis of this concept of anticipatory self-defence toward its latest leap: the Bush Doctrine.

The Bush administration is currently trying to adapt the concept of immediacy to that of mere possession of weapons of mass destruction to justify intervention. It proposes to change international law very rapidly by the weight of practice and *opinio juris*⁵².

This is very efficient because it uses the doctrine of anticipatory self-defence to have a theory of pre-emptive self-defence recognised in international law. The difference is not evident at first, but becomes very important due to its scope and implications. As we have seen, the doctrine of anticipatory self-defence is one that is punctual, answering the threat of the moment immediately.

⁵⁰ Glennon, M.J.: The fog of law : Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter, (2002) 25 *Harvard Journal of Law and Public Policy* 539 at 552.

⁵¹ The Scud missiles used by Iraq against Tel Aviv certainly vindicate the hostility of Iraq toward Israel. However, it vindicates also the view that while a Nuclear, Bacteriological or Chemical capacities may have been available to Iraq, it did not use any during the conflict against Coalition forces nor against Israel.

⁵² Murswiek, supra, note 43 at 10.

The theory of pre-emptive self-defence is a much wider concept, aiming at eradicating the source of the problem. The whole theory of regime change is based upon this approach but is neither recognised nor even remotely assented as being somehow part of international law⁵³.

Conclusions

The destruction of the *Caroline* and the *McLeod* case that resulted from it have confirmed the existence of a right to anticipatory self-defence in international law in the 19th century. The criterion laid in the exchange of letters between the American Secretary of State Webster and the British Special Minister, Lord Ashburton, leading to the Webster-Ashburton Treaty, has clearly established the use of such a right and the very strict and narrow confines within which it can be invoked.

This right has been invoked at the end of the Second World War as a defence and rejected on the weight of evidence proving it to be inapplicable in the cases of the invasions of Norway and Denmark. It has further been argued in post-*Charter* time without any measure of success. In fact, there appears to be no clear example meeting the requirements expressed in the affair of the *Caroline* since the adoption of the *United Nations Charter*. The cases presented as examples for its application are arguable at best, and disingenuous misrepresentations in some cases.

The argument that there has been a substantial change in circumstances since 1837 has not been proven nor even remotely established. No case has demonstrated the need for necessity, proportionality immediacy and the exhaustion of all recourses to justify its use. Not even the American invasion of Afghanistan, though sanctioned by the United Nations, represents a case of anticipatory self-defence. It is no doubt a case of self-defence, but one of continuing self-defence after being victims of a terrorist attack, in respect of article 51 of the *United Nations Charter* and supported by United Nations resolutions. As for the invasion of Iraq, it has nothing to do with anticipatory self-defence but rather is the result of a doctrine of pre-emptive self-defence, which has neither basis nor support in international law.

There is no indication of the extinction of the concept of anticipatory self-defence in international law. However, it is to deceive on the basis of a misconception of international law to contend that such a concept supports a doctrine of pre-emptive self-defence and authorises to invade a country. For this, a government may invoke other reasons, but anticipatory self-defence is not a broad concept that permits such an interpretation.

Louise-Philippe Rouillard: The Caroline Case: Anticipatory Self-Defence in Contemporary International Law

La nouvelle doctrine américaine d'actions préventives en contravention au principe de non-intervention s'appuie sur une doctrine élargie d'une légitime défense préventive. Cette doctrine résulte d'une action militaire britannique contre des rebelles canadiens et américains sur le

⁵³ Reisman, *supra*, note 47 at 87. In fact, as Pr. Reisman points out, this may well backfire as regimes are then set upon acquiring weapons of mass destruction to protect themselves and will try harder until they succeed.

territoire des États-Unis d'Amérique en 1837, lors de laquelle un navire américain fut mis à feu et deux personnes furent tuées.

Dans l'échange de missives diplomatiques suivant cette affaire, la notion d'un droit à la légitime défense préventive fut établi en droit international. Le présent article examine la base factuelle et juridique de ce droit, ainsi que son caractère contemporain et son étendu.

L'auteur conclut que le droit à une légitime défense préventive existe effectivement en droit international, mais que ses critères d'application sont si sévères qu'il n'existe pas d'exemple contemporain qui peut servir à étayer ou étendre ce droit à la doctrine américaine que l'on tente de développer aujourd'hui. Par conséquent, l'auteur conclut à l'illégitimité de la doctrine américaine d'actions préventives.