

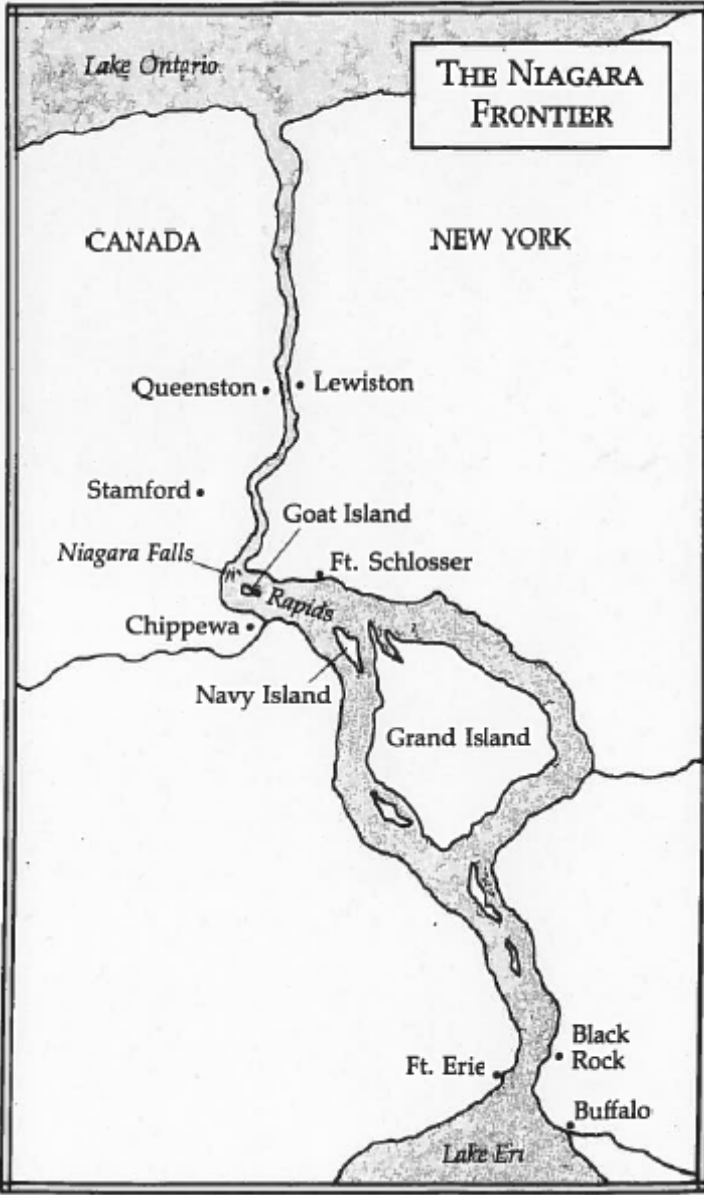
2017 INAUGURAL SIR ELI LAUTERPACHT MEMORIAL LECTURE



A Return to the *Caroline* Correspondence, 1838–1842

First Set of Correspondence, January 1838—June 1838			
	Author	Addressee	
Jan. 4, 1838	Henry S. Fox	John Forsyth	transmission of official <u>despatch</u> of Sir Francis Head, Lt. Governor of Upper Canada (Dec. 23, 1837)
Jan. 5, 1838	John Forsyth	Henry S. Fox	“all the constitutional power vested in the Executive will be exerted to maintain the supremacy of those laws which were passed to fulfil the obligations of the United States”
Jan. 5, 1838	John Forsyth	Henry S. Fox	formal notification, protest, demand for redress; “order [of] a sufficient force on the frontier to repel any attempt of a like character”
Jan. 19, 1838	John Forsyth	Henry S. Fox	transmission of letter from Nathaniel S. Benton, United States Attorney for Northern District of New York (Jan. 8, 1838) “with transcripts of sundry depositions”
Feb. 6, 1838	Henry S. Fox	John Forsyth	communication of letter from Sir Francis Head, Lt. Governor of Upper Canada (Jan. 8, 1838) “with divers reports and depositions annexed” ..... necessity of self-defense and self-preservation “seem to be sufficiently established”
Feb. 13, 1838	John Forsyth	Henry S. Fox	Rebuttal of defense of Minister Fox (of Feb. 6, 1838)
Feb. 16, 1838	Henry S. Fox	John Forsyth	Rejection of factual position of United States Government; referral of matter to Her Majesty’s Government “to form such deliberate resolution thereupon”
March 6, 1838	Andrew Stevenson	John Forsyth	“restrained from taking officially any step in the matter”; “informal conversations” with Lord Palmerston
March 12, 1838	John Forsyth	Andrew Stevenson	transmission of “all the evidence” in relation to “a most extraordinary outrage” in order to “make a fair, full, and frank representation to Her Majesty’s Government, of the facts connected with this most unfortunate transaction” as well as expression of President’s expectation of prompt redress
April 14, 1838	Andrew Stevenson	John Forsyth	Acknowledgment of letter of March 12, 1838; predicted that “whole proceeding ... will not only be attempted to be justified, but that all atonement will be refused”
May 22, 1838	Andrew Stevenson	Lord Palmerston	“Case of the Caroline”
May 24, 1838	Andrew Stevenson	John Forsyth	Copy of letter to Lord Palmerston (May 22, 1838); “[t]heir decision ... may very soon be respected”
June 22, 1838	John Forsyth	Andrew Stevenson	President Van Buren’s “satisfaction with the manner in which you have presented to Her Majesty’s Government the complaint”
June 6, 1838	Lord Palmerston	Andrew Stevenson	Acknowledgment of letter of May 22, 1838, to which “attentive consideration” would be given
June 26, 1838	Andrew Stevenson	John Forsyth	Forwarding of letter from Lord Palmerston (June 6, 1838)

Second Set of Correspondence, December 1840–August 1842			
	Author	Addressee	
Dec. 13, 1840	Henry S. Fox	John Forsyth	United States to take “prompt and effectual steps” for release of McLeod; destruction of <i>Caroline</i> as “the publick act of persons obeying the constituted Authorities of Her Majesty’s Province”
Dec. 26, 1840	John Forsyth	Henry S. Fox	“President unable to recognize the validity of [the] demand”
Dec. 29, 1840	Henry S. Fox	John Forsyth	Expression of “deep regret”; announces forwarding of McLeod correspondence to Her Majesty’s Government; recounting of facts
Dec. 31, 1840	John Forsyth	Henry S. Fox	“opinion” of Fox “would hardly have been hazarded[] had you been possessed of the carefully collected testimony”
Feb. 8, 1841	Henry S. Fox	John Forsyth	regarding McLeod’s reappréhension on Jan. 28, 1841
Feb. 9, 1841	Andrew Stevenson	John Forsyth	report of Parliamentary proceedings
Feb. 10, 1841	John Forsyth	Henry S. Fox	“no other accounts” received of McLeod’s reappréhension “other than those derived from the public newspapers and handbills”
March 3, 1841	Andrew Stevenson	John Forsyth	report of Parliamentary proceedings; misrepresentation of Lord Palmerston
March 9, 1841	Andrew Stevenson	Daniel Webster	report of Parliamentary proceedings
March 12, 1841	Henry S. Fox	Daniel Webster	reissue of demand of “immediate release” of Alexander McLeod
March 18, 1841	Andrew Stevenson	Daniel Webster	reports of “preparations making by the Government at most of their Naval and Military Stations;” developments in Parliament
April 12, 1841	Daniel Webster	Andrew Stevenson	acknowledgement of Stevenson’s letter of March 3, 1841
April 12, 1841	Daniel Webster	Andrew Stevenson	notification of preparation of note to Henry S. Fox (of Apr. 24, 1841)
April 24, 1841	Daniel Webster	Henry S. Fox	<i>Caroline</i> principles of necessity and proportionality
Aug. 18, 1841	Andrew Stevenson	Daniel Webster	re the decision of McLeod by the Supreme Court of New York
Aug. 27, 1841	Lord Palmerston	Andrew Stevenson	response to Stevenson’s Note of May 22, 1838
Aug. 31, 1841	Andrew Stevenson	Daniel Webster	notification of receipt of Lord Palmerston’s Note of Aug. 27, 1841
Aug. 31, 1841	Andrew Stevenson	Lord Palmerston	response to Lord Palmerston’s Note of Aug. 27, 1841
Sept. 2, 1841	Lord Palmerston	Andrew Stevenson	
Sept. 2, 1841	Andrew Stevenson	Lord Palmerston	“the misapprehension which still seems to exist, in relation to the causes which influenced my Government ... in nor pressing upon ... Her Majesty’s Government, an earlier decision on this painful subject”
Sept. 5, 1841	Henry S. Fox	Daniel Webster	response to Stevenson’s letter of May 22, 1838
Sept. 20, 1841	Daniel Webster	Henry S. Fox	response to Fox’s letter of Sept. 5, 1841, informing him that decision of the Supreme Court of the State of New York “not final”
Nov. 20, 1841	Daniel Webster	Edward Everett	
Dec. 28, 1841	Edward Everett	Daniel Webster	“[n]othing has passed on the subject of the <i>Caroline</i> , between this Government and myself”
Feb. 8, 1842	Earl of Aberdeen	Lord Ashburton	instructions
July 27, 1842	Daniel Webster	Lord Ashburton	Extract of letter dated April 24, 1841 Extract from message of President to Congress at commencement of session
July 28, 1842	Lord Ashburton	Daniel Webster	Apology and Justification
July 28, 1842	Lord Ashburton	Lord Aberdeen	Facsimile of letter of July 28, 1842, to Secretary Webster
Aug. 6, 1842	Daniel Webster	Lord Ashburton	



# Excerpt from the *Caroline* Correspondence

... Under these circumstances, and under those immediately connected with the transaction itself, it will be for Her Majesty's Government to show, upon what state of facts, and what rules of national law, the destruction of the '*Caroline*' is to be defended. **It will be for that Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada,—even supposing the necessity of the moment authorized them to enter the territories of the United States at all,—did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.** It must be shown that admonition or remonstrance to the persons on board the '*Caroline*' was impracticable, or would have been unavailing; it must be shown that daylight could not be waited for; that there could be no attempt at discrimination, between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her, in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some, and wounding others, and then drawing her into the current, above the cataract, setting her on fire, and, careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate, which fills the imagination with horror. A necessity for all this, the Government of the United States cannot believe to have existed. ...

—*U.S. Secretary of State Daniel Webster (to Lord Ashburton, British Minister at Washington D.C.)*

*April 24, 1841*

## ***Case Concerning Military and Paramilitary Activities in and against Nicaragua: Nicaragua v. USA (1986) ICJ Rep. 14, p. 122***

237. Since the Court has found that the condition *sine qua non* required for the exercise of the right of collective self-defence by the United States is not fulfilled in this case, the appraisal of the United States activities in relation to the criteria of necessity and proportionality takes on a different significance. As a result of this conclusion of the Court, even if the United States activities in question had been carried on in strict compliance with the canons of necessity and proportionality, they would not thereby become lawful. If however they were not, this may constitute an additional ground of wrongfulness. On the question of necessity, the Court observes that the United States measures taken in December 1981 (or, at the earliest, March of that year - paragraph 93 above) cannot be said to correspond to a 'necessity' justifying the United States action against Nicaragua on the basis of assistance given by Nicaragua to the armed opposition in El Salvador. First, these measures were only taken, and began to produce their effects, several months after the major offensive of the armed opposition against the Government of El Salvador had been completely repulsed (January 1981), and the actions of the opposition considerably reduced in consequence. Thus it was possible to eliminate the main danger to the Salvadorian Government without the United States embarking on activities in and against Nicaragua. Accordingly, it cannot be held that these activities were undertaken in the light of necessity. ...

<b>Armed attack</b>	<b>+</b>	<b><u>Necessity</u></b> <b>Proportionality</b>	<b>=</b>	<b>Lawful Self-Defence</b>
Armed Attack → Necessity + Proportionality			<b>=</b>	<b>Lawful Self-Defence</b>





## **Article 51 of the 1945 United Nations Charter**

Nothing in the present Charter shall impair 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. Measures taken by Members in the exercise of this right of self-defence 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.

# The Relationship Between Necessity and Proportionality

<b>Necessity</b>	√	<b>Proportionality</b>	√	=	<b>Lawful Self-Defence</b>
Necessity	√	Proportionality	x	=	Unlawful Self-Defence
Necessity	x	Proportionality	x	=	Unlawful Self-Defence

## ***Case Concerning Oil Platforms: Islamic Republic of Iran v. USA*** **(Judgment) (2003) ICJ Rep. 161, p. 198**

76. The Court is not sufficiently convinced that the evidence available supports the contentions of the United States as to the significance of the military presence and activity on the Reshadat oil platforms; and it notes that no such evidence is offered in respect of the Salman and Nasr complexes. However, even accepting those contentions, for the purposes of discussion, the Court is unable to hold that the attacks made on the platforms could have been justified as acts of self-defence. The conditions for the exercise of the right of self-defence are well settled: as the Court observed in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, 'The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law' (*I.C.J. Reports 1996 (I)*, p. 245, para. 41); and in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court referred to a specific rule 'whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it' as 'a rule well established in customary international law' (*I.C.J. Reports 1986*, p. 94, para. 176). In the case both of the attack on the *Sea Isle City* and the mining of the *USS Samuel B. Roberts*, the Court is not satisfied that the attacks on the platforms were necessary to respond to these incidents. In this connection, the Court notes that there is no evidence that the United States complained to Iran of the military activities of the platforms, in the same way as it complained repeatedly of minelaying and attacks on neutral shipping, which does not suggest that the targeting of the platforms was seen as a necessary act. The Court would also observe that in the case of the attack of 19 October 1987, the United States forces attacked the R-4 platform as a 'target of opportunity', not one previously identified as an appropriate military target (see paragraph 47 above).