

Penn State Journal of Law & International Affairs

Volume 2 | Issue 2

November 2013

Caroline Revisited: An Imagined Exchange between John Kerry and Mohammad Javad Zarif

James W. Houck

Dickinson School of Law & School of International Affairs, Penn State University

Follow this and additional works at: <https://elibrary.law.psu.edu/jlia>



Part of the [Diplomatic History Commons](#), [History of Science, Technology, and Medicine Commons](#), [International and Area Studies Commons](#), [International Law Commons](#), [International Trade Law Commons](#), [Law and Politics Commons](#), [Political Science Commons](#), [Public Affairs, Public Policy and Public Administration Commons](#), [Rule of Law Commons](#), [Social History Commons](#), and the [Transnational Law Commons](#)

ISSN: 2168-7951

Custom Citation

Caroline Revisited: An Imagined Exchange between John Kerry and Mohammad Javad Zarif, 2 Penn. St. J.L. & Int'l Aff. 293 (2013).

The Penn State Journal of Law & International Affairs is a joint publication of Penn State's School of Law and School of International Affairs.

Penn State Journal of Law & International Affairs

2013

VOLUME 2 NO. 2

***CAROLINE* REVISITED: AN IMAGINED EXCHANGE BETWEEN JOHN KERRY AND MOHAMMAD JAVAD ZARIF**

*James W. Houck**

“If you have remonstrated for some time without effect and see no prospect of relief, when begins your right to defend yourself?”¹

Lord Ashburton,
British Minister in America,
July 8, 1842

I. THE NINETEENTH CENTURY STANDARD

Late in the evening of December 29, 1837, a band of British officers conducted a bold raid on the American merchant vessel *Caroline*, which was moored on the Niagara River near Buffalo, New York. After wounding several and killing an American citizen named Amos Durfee, the British set the *Caroline* ablaze, and then adrift. Shortly thereafter, she went over Niagara Falls to a violent demise.

* [James W. Houck](#), Interim Dean and Distinguished Scholar in Residence, Dickinson School of Law and School of International Affairs, Pennsylvania State University.

¹ See Letter from the British Minister to the United States Lord Alexander Baring Ashburton to Secretary of State Daniel Webster, (July 28, 1842), http://avalon.law.yale.edu/19th_century/br-1842d.asp [hereinafter Ashburton Letter].

Within a week, U.S. Secretary of State John Forsyth wrote in protest to Henry Stephen Fox, the British Minister in Washington.² Fox replied that the *Caroline* had been shuttling men, money, and arms to Canadian rebels and that the attack and the *Caroline's* destruction were acts of necessary self-defense.³

The Forsyth-Fox exchange launched a four and one-half year diplomatic, political, and judicial saga that threatened to pull the United States, Great Britain, and Canada, into broader armed conflict. The *Caroline* controversy finally came to rest during the summer of 1842 when U.S. Secretary of State Daniel Webster and British Minister in America Lord Alexander Baring Ashburton exchanged three letters destined for legal history.⁴

In his first letter, Webster wrote that the *Caroline* attack was “a wrong, and an offense to the sovereignty and the dignity of the United States”⁵ Reiterating his comments from an earlier letter, Webster famously placed the burden on Great Britain to show: “[U]pon 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-defen[s]e, instant,

² See *British-American Diplomacy: The Caroline Case*, THE AVALON PROJECT, http://avalon.law.yale.edu/19th_century/br-1842d.asp (last visited October 30, 2013).

³ See *id.*

⁴ See Letter from Secretary of State Daniel Webster to British Minister to the United States Lord Alexander Baring Ashburton (July 27, 1842), http://avalon.law.yale.edu/19th_century/br-1842d.asp [hereinafter Webster Letter #1]. See also Ashburton Letter, *supra* note 1; Letter from Secretary of State Daniel Webster to British Minister to the United States, Lord Alexander Baring Ashburton (Aug 6, 1842), http://avalon.law.yale.edu/19th_century/br-1842d.asp [hereinafter Webster Letter #2]. Although the final Webster-Ashburton exchange is best known, it actually culminated a multi-author correspondence through the years 1838-1842. Others who exchanged letters throughout the *Caroline* affair included Secretary of State John Forsyth, British Foreign Secretary Lord Palmerston, British Minister in Washington Henry S. Fox, and American Minister to the United Kingdom Andrew Stevenson.

⁵ Webster Letter #1, *supra* note 4.

overwhelming, leaving no choice of means, and no moment for deliberation.”⁶

Ashburton quickly replied, affirming that the two statesmen were “perfectly agreed as to the general principles of international law applicable to this unfortunate case.”⁷ Ashburton disagreed with Webster, however, on the application of the principle to the facts before them and also posed a fundamental question:

[I]f cannon are moving and setting up in a battery which can reach you and are actually destroying life and property by their fire, if you have remonstrated for some time without effect and see no prospect of relief, when begins your right to defend yourself . . . ?⁸

Ashburton had no doubt of the answer: the attack on the *Caroline* was a necessary and justified act of self-defense.⁹

The *Caroline* letters’ lasting effect on international law has been profound. Through their exchange, Webster and Ashburton established a principle that has assumed an important place in the international legal canon: a nation need not stand passively by while another prepares to launch an attack. Their failure to agree on the principle’s application to the facts before them, however, foreshadowed a challenge that has vexed diplomats and scholars in successive conflicts to this day.

One wonders if the parties in the *Caroline* matter might have averted bloodshed, destruction, and affronts to national honor had they been able to negotiate with the *Caroline* principle in mind *before* the attack. We can only speculate. Once the water (and vessel) was over the dam, so to speak, the parties may have been constrained by immutable facts and found it politically difficult to compromise their respective positions.

⁶ *Id.*

⁷ Ashburton Letter, *supra* note 1.

⁸ *Id.*

⁹ *See id.*

While the British, Canadian, and American governments may not have foreseen the *Caroline* confrontation, the same cannot be said for diplomats involved in today's crisis over Iran's nuclear program. The basic disagreement between Iran and the international community has been well publicized: the International Atomic Energy Agency (IAEA) and United Nations Security Council have declared Iran noncompliant with the Nuclear Non-Proliferation Treaty (NPT), and Iran disagrees.¹⁰ Meanwhile, both President Obama and Israeli Prime Minister Netanyahu have declared that Iran must not be permitted to develop a nuclear weapon, and both have suggested that force might be used to underwrite this commitment.¹¹

Given that most official statements and public discourse to date have focused on the issue of Iran's compliance with the NPT safeguards regime, relatively little attention has been given to the legal issues underlying the potential use of force. While no one should confuse a 19th century dispute on the Niagara River with a 21st century crisis over uranium enrichment in Western Asia, *Caroline* provides the logical place to begin analysis. In addition to serving as the wellspring for relevant legal doctrine, the 19th century Webster-Ashburton letter exchange also provides a convenient model for

¹⁰ See generally Int'l Atomic Energy Agency [IAEA], *Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions in the Islamic Republic of Iran*, Rep. of the Dir. Gen., IAEA Doc. GOV/2012/55 (Nov. 16, 2012), <http://www.iaea.org/Publications/Documents/Board/2012/gov2012-55.pdf> (outlining Iran's nuclear progress, enrichment facilities, possible military dimensions, design information, additional protocol compliance, and other related matters). See also Elaine Sciolino, *Iran is Not Cooperating, Agency Says*, N.Y. TIMES, Apr. 28, 2006, http://www.nytimes.com/2006/04/28/world/middleeast/28cnd-iran.html?_r=3&oref=slogin&; *Iran Defiant in the Face of U.N. Nuclear Sanctions*, FOREIGN POLICY ASSOCIATION, Dec. 24, 2006, http://www.fpa.org/newsletter_info2584/newsletter_info.htm (last visited Oct. 30, 2013).

¹¹ President Barack Obama, State of the Union Address (Feb. 12, 2013), <http://www.cspan.org/SOTU/> (“[W]e will do what is necessary to prevent them from getting a nuclear weapon.”). Israeli Prime Minister Benjamin Netanyahu, Speech to joint session of U.S. Congress (May 24, 2011), <http://www.cfr.org/israel/netanyahus-address-us-congress-may-2011/p25073> (“The more Iran believes that all options are on the table, the less the chance of confrontation . . . When we say never again, we mean never again. Israel always reserves the right to defend itself.”).

framing the current protagonists' radically different perspectives, both of which are critical for an informed understanding of today's crisis. Short of an actual public dialogue about the use of force, there is no better way to capture the competing arguments than to imagine a 21st century letter exchange between the United States' Secretary of State and the Iranian Foreign Minister.

II. A TWENTY FIRST CENTURY IMAGINED EXCHANGE

July 19, 2013

From John Kerry, Secretary of State of the United States of America to Mohammad Javad Zarif, Foreign Minister of the Islamic Republic of Iran:

Despite years of effort, the international community has been unable to persuade your government to be forthcoming on critical aspects of your uranium enrichment program. Given this impasse, the United States must now ensure you do not misunderstand how the international community and the United States view our vital interests.

As always, the United States continues to seek resolution of this matter in accord with current United Nations Security Council resolutions and the Non-Proliferation Treaty regime, which fully account for Iran's right to develop and operate a nuclear energy program for peaceful purposes.¹² However, absent resolution in accordance with these agreements, we view the Iranian nuclear program with grave concern. Your government's willingness to flaunt the existing international safeguards regime¹³ has been, and remains, unacceptable. Today, the United States is unable to confirm the status of either your nuclear enrichment program or any related

¹² See Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

¹³ See IAEA], *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, Rep. of the Dir. Gen., ¶ 32, IAEA Doc. GOV/2003/40 (June 6, 2003), <http://www.iaea.org/Publications/Documents/Board/2003/gov2003-40.pdf>. ("Iran has failed to meet its obligations under its Safeguards Agreement with respect to the reporting of nuclear material, the subsequent processing and use of that material and the declaration of facilities where the material was stored and processed.").

military development you may have undertaken. Your government could put the world at ease simply by allowing IAEA inspectors the access they require and have long sought. Regrettably, your government's actions to date are inconsistent even with agreements you have already signed.

In the absence of such assurances, the United States is left with no choice but to assume the Islamic Republic of Iran is developing a nuclear weapon that may be launched without warning. As more time passes without required access and disclosure, the international community is increasingly threatened and options for resolution are narrowing.

I call upon your government to comply with existing Security Council resolutions and your obligations under the Nuclear Non-Proliferation Treaty and related Safeguard Agreements. I am willing to meet with you personally to discuss further details, as this may be our last, best hope. Thank you for your attention to these concerns.

July 29, 2013

From Minister Zarif to Secretary Kerry:

Thank you for your letter. The Islamic Republic of Iran is committed to constructive resolution of the issues between us. I respectfully submit, however, that if there is a crisis, it is brought about by the United States' refusal to respect the sovereign right of the Islamic Republic to develop nuclear energy for peaceful purposes, a right which is expressly permitted in the Non-Proliferation Treaty.

Iran might be more receptive to your concerns if they were not so self-serving. You have nuclear weapons with enough destructive power to destroy the world within hours. Indeed, you provided the best evidence of their power by annihilating Hiroshima and Nagasaki.

You seem quite willing to accept the "unacceptable" from other nations when your interests dictate. Other nations that actually possess nuclear weapons have not joined the Non-Proliferation Treaty and some have even declared their intention to use nuclear

weapons against you.¹⁴ Yet, you remain fixated on the Islamic Republic. The government of Iran can only conclude that your concerns arise not from your fear of nuclear weapons, but, rather, from your fear of an assertive Islamic state.

The Islamic Republic will not be threatened or bullied. We will continue our peaceful nuclear program without your permission, supervision, or interference. I remain hopeful that your current administration will walk away from the United States' traditional approach vis-à-vis my country. Confrontation certainly is not the way.

August 9, 2013

Secretary Kerry to Minister Zarif:

In response to your letter of [45 days before JLIA], let me reassure the people of Iran that the United States has no quarrel with Islam nor any desire to interfere with a peaceful and transparent nuclear energy program that complies with international safeguards. You must understand, however, that Iran's assurances alone cannot provide the sole basis for its neighbors' security. The following facts are well known to you, but are recounted here to ensure there is no doubt about why your government's actions are viewed with such grave concern by the entire international community.

In 2002, the IAEA substantiated allegations that the Islamic Republic conducted secret nuclear activities. When the IAEA requested additional access to Iran's nuclear facilities, your government refused. In 2007, rather than provide required disclosure, your government announced instead that you would no longer adhere to the Additional Protocol to your IAEA safeguards agreement.¹⁵ Your government has consistently failed to notify the

¹⁴ See *Nuclear Weapons: Who Has What?*, CNN.COM, <http://www.cnn.com/interactive/2013/03/world/nuclear-weapon-states/> (last visited Aug. 29, 2013). See also *Nuclear Nonproliferation Treaty*, U.S. Department of State, <http://www.state.gov/t/isn/npt/> (last visited Aug. 29, 2013).

¹⁵ See IAEA, *supra* note 10, at ¶ 49 ("Iran is not implementing its Additional Protocol. The Agency will not be in a position to provide credible assurance about the absence of undeclared nuclear material and activities in Iran unless and until Iran provides the necessary cooperation with the Agency . . .").

IAEA of nuclear reactor design information and of your decision to enrich uranium to 20 percent uranium-235.¹⁶ Finally, in February 2006, the IAEA Board of Governors was forced to refer the matter of Iran's non-compliance to the United Nations Security Council.¹⁷

Since becoming seized of the issue, the Security Council has passed six resolutions demanding compliance with the Islamic Republic of Iran's IAEA safeguards agreements.¹⁸ Resolution 1696 demanded that your government suspend all enrichment-related and reprocessing activities.¹⁹ When your government failed to comply, the Security Council passed Resolution 1737, making IAEA compliance mandatory and imposing sanctions that banned the supply of nuclear-related materials and technology and froze assets of key individuals and companies.²⁰ These sanctions were later expanded in four subsequent Security Council resolutions.²¹ In addition, the European Union has imposed restrictions of its own.²² Finally, as a sign of both the United States' resolve and abiding desire to settle this matter peacefully, our Congress passed the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA)²³ in the hope that the Islamic Republic would respond sensibly.

¹⁶ See *id.* at ¶ 51.

¹⁷ See *id.* at ¶ 2 n.3.

¹⁸ See S.C. Res. 1696, U.N. Doc. S/RES/1696 (July 31, 2006); S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 23, 2006); S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007); S.C. Res. 1803, U.N. Doc. S/RES/1803 (Mar. 3, 2008); S.C. Res. 1835, U.N. Doc. S/RES/1835 (Sept. 27, 2008); S.C. Res. 1929, U.N. Doc. S/RES/1929 (June 9, 2010).

¹⁹ S.C. Res. 1696, U.N. Doc. S/RES/1696 (July 31, 2006).

²⁰ See S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 23, 2006).

²¹ See S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007); S.C. Res. 1803, U.N. Doc. S/RES/1803 (Mar. 3, 2008); S.C. Res. 1835, U.N. Doc. S/RES/1835 (Sept. 27, 2008); S.C. Res. 1929, U.N. Doc. S/RES/1929 (June 9, 2010).

²² See European Union: Restrictive Measures (Sanctions) in Force, updated Feb. 21, 2013, http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf.

²³ Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195, 124 Stat. 1312, <http://www.gpo.gov/fdsys/pkg/PLAW-111publ195/pdf/PLAW-111publ195.pdf>.

Your government's record of obfuscation and delay on nuclear matters is especially alarming in light of its recent history. The world remembers your government's role in the 444-day American Embassy hostage crisis, the 1983 bombing of Marine Barracks in Beirut that killed 299, the 1992 attack on the Israeli Embassy in Buenos Aires that killed 29 and injured another 242, as well as its consistent support of Hezbollah.²⁴

Your government's consistent refusal to abide by IAEA regulations and U.N. Security Council Resolutions and its well-documented history of state-sponsored terrorism provides no confidence that Iran is enriching uranium solely for peaceful purposes or that your government will show restraint if it acquires a nuclear weapon.²⁵ Iran's conduct, both past and present, is creating an immediate threat that, as I noted in my letter of [55 days before JLIA], is rapidly narrowing options for resolution. Accordingly, the United States calls on the Islamic Republic of Iran yet again to take the required verifiable steps before it is too late.

August 19, 2013

Minister Zarif to Secretary Kerry:

The Islamic Republic cannot accept the threats implicit in your correspondence. You lecture us about international law, but you

²⁴ See CASEY L. ADDIS & CHRISTOPHER M. BLANCHARD, CONG. RESEARCH SERV., R41446, HEZBOLLAH: BACKGROUND AND ISSUES FOR CONGRESS (2011), <http://www.fas.org/sgp/crs/mideast/R41446.pdf> (noting the strong connection between Iran and Hezbollah). See also U.S. Dep't of Def., Report of the DoD Commission on Beirut International Airport Terrorist Act, October 23, 1983, <http://www.fas.org/irp/threat/beirut-1983.pdf> (noting that Hezbollah is considered a terrorist organization according to the U.S. Department of State and is on the Foreign Terrorist Organization and Specially Designated Terrorist lists); U.S. Department of Defense, Imposition of Sanctions With Respect to the Financial Sector of Iran, Section 1245 of the FY2012 National Defense Authorization Act, Jan. 2012 (stating that Iran financially supports international terrorism and proliferation).

²⁵ See Marcus George, *Iran has new rocket site, ballistic missile tests possible: report*, REUTERS, Aug. 8, 2013, <http://www.reuters.com/article/2013/08/08/us-iran-space-idUSBRE9770A920130808?feedType=RSS&feedName=worldNews> (noting that Iran has constructed a rocket site that may be used for ballistic missiles).

know that a preemptive attack would be a gross violation of international law. The United Nations Charter prohibits states from using armed force in self-defense unless “an armed attack occurs.”²⁶ Given that Iran has not, and will not, attack anyone first, you would be acting illegally in express violation of the Charter. Your own scholars have said as much.²⁷

Furthermore, the International Court of Justice has ruled that the mere possession of nuclear weapons does not violate the Charter or general principles of international law.²⁸ Thus, even if Iran did possess nuclear weapons, any attack would be blatant aggression.

As a peace-loving nation, Iran hopes you will abandon any further consideration of an illegal, immoral, and foolish preemptive strike.

August 29, 2013

Secretary Kerry to Minister Zarif:

I am encouraged by your mention of international law. If we act within international law, our chances for a satisfactory solution increase. Our discussion of international law must, however, be accurate and complete. Article 51 simply reaffirmed the right nations already possessed: the inherent right of self-defense. Article 51 includes not only the right to *respond* to an armed attack, but also the

²⁶ See U.N. Charter art. 2, para. 4 (stating: “All Members 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 Purposes of the United Nations.”). See also U.N. Charter art. 51 (stating: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed occurs against a Member of the United Nations . . .”).

²⁷ See Mary Ellen O’Connell & Maria Alveras-Chen, *The Ban on the Bomb—And Bombing: Iran, the U.S., and the International Law of Self-Defense*, 57 SYRACUSE L. REV. 497, 497 (2007) (“The use of force [against Iran] should ‘come off the table,’ as diplomats search for a constructive way forward.”).

²⁸ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

inherent right to *prevent* an imminent attack.²⁹ A nation's right to defend itself through preventative measures is well established when circumstances present an immediate threat and no alternative means are available for guaranteeing the safety of its people or territorial integrity. Your ability to launch a nuclear weapon at a regional target without detection would present such a threat to our allies as well as U.S. citizens and property lawfully in the region.

September 9, 2013

Minister Zarif to Secretary Kerry:

Your position on the preemptive use of force is intriguing, particularly given that the Islamic Republic has lived in the shadow of nuclear weapons, most notably those possessed by the United States and Israel, for many years. If Iran were so inclined, we could apply your criteria as justification to strike each of your nations. Obviously, we have not.

Iran would never execute a policy that has already been deemed illegal by the international community. Have you forgotten how the United States, and the rest of the world, condemned Israel's attack on the Iraqi nuclear program in 1981?³⁰ Have you forgotten the 2005 World Summit, where the General Assembly, including the United States, reaffirmed the Charter's text and with it, the principle that unilateral first use of force outside the express text of the Charter is not permitted?³¹

²⁹ The French text of Article 51 refers to "le droit naturel," that is, "the natural right." Charte des Nations Unies art. 51. This is a very expansive view of preemptive action, permitting more preemptive attacks than the U.N. Charter.

³⁰ See S.C. Res. 487, ¶ 1, U.N. Doc. S/RES/487 (Jun. 19, 1981) (stating that the Security Council "strongly condemns the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct . . .").

³¹ See 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 79, U.N. Doc A/RES/60/1 (Sept. 16, 2005) (stating: "We reaffirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We stress the importance of acting in accordance with the purposes and principles of the

Likewise, Iran would never execute a policy that is based on so many flawed premises. Preemptive attacks rely on suppositions, which, in turn, depend on information and intelligence that may be wrong. Recall how your country invaded Iraq based on the false intelligence that Iraq posed “a continuing threat to the national security of the United States [by] continuing to possess and develop significant chemical and biological weapons.”³² Recall how your predecessor, General Colin Powell, lectured the United Nations Security Council in 2003, claiming that Saddam Hussein was concealing weapons of mass destruction.³³ As the world has since learned, your information was either grossly mistaken or deliberately misleading. In either case, your misplaced invasion led to needless suffering and death. Your calamity in Iraq shows the folly of substituting paranoia and deception for actual facts.

For all these reasons, Iran will never attack first, and we categorically deny your right to do so. Iran has shown discipline and patience in the face of an actual, as opposed to imaginary, threat. Iran has chosen the path of peace over the path of mob violence. However, do not be mistaken: the Islamic Republic will defend itself if you are so foolish as to launch an armed attack first. Your bombers will fall from the sky, your ships will sink, and your sailors and soldiers will die. If the deaths of your young people are an insufficient deterrent, know also you will watch your gas lines grow, your freeways lie empty, and your fading economy wither even more quickly. Most ironically, your attack will be wasted because our nuclear facilities are invulnerable. If you attack them, you will fail.

September 13, 2013

Secretary Kerry to Minister Zarif:

Your most recent letter is deeply disappointing. Even so, because the stakes are so high, I invite you, on behalf of the President

Charter.”) This is important as Article 51 of the U.N. Charter only permits military action in self-defense “if an armed attack occurs.”

³² Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498.

³³ Colin Powell, U.S. Sec’y of State, Presentation to the U.N. Security Council on the U.S. Case Against Iraq (Feb. 6, 2003), <http://www.cnn.com/2003/US/02/05/sprj.irq.powell.transcript>.

of the United States, to meet with me in Geneva as soon as possible to continue this discussion. I extend this offer in good faith and in the sincere hope that we might yet find a way to preserve the peace. I look forward to your reply.³⁴

III. ASSESSING THE EXCHANGE

Aside from demonstrating that “fantasy diplomacy” is as intractable as real diplomacy, who has the better legal argument?³⁵

As the imagined Zarif letter suggests, some international lawyers would argue that nothing would justify a preemptive strike on Iranian nuclear capabilities.³⁶ They argue that possession of nuclear

³⁴ See Thomas Erdbrink, *Iran's New President Calls for Nuclear Talks Without Rejecting Direct U.S. Role*, N.Y. TIMES, Aug. 6 2013, <http://www.nytimes.com/2013/08/07/world/middleeast/irans-new-president-says-nuclear-talks-could-succeed.html?partner=rss&emc=rss&r=0> (noting that Iran's new President, Hassan Rouhani, has called for serious negotiations with the United States on Iran's nuclear program but calling for the United States to take the first step).

³⁵ Some contend that legal arguments contribute little to the use of force debate. See, e.g., Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 717 (2005) (“[Some] see the rules on the use of force embedded in the [U.N.] Charter as completely devoid of any legally significant normative value.”). See also Jeremy Rabkin, *American Self-Defense Shouldn't Be Too Distracted by International Law*, 30 HARV. J.L. & PUB. POL'Y 31, 43 (“When one appeals to higher claims . . . one should keep in mind that among the very highest claims is the claim of the people to security.”).

³⁶ See YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE, 199, para. 525 (5th ed. 2011) (“U.N. Member States are barred by the Charter from exercising self-defense[] in response to a mere threat of force”). See also THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1422, para. 50 (Bruno Simma et al. eds., 3d ed. 2012) (“[A]n anticipatory right of self-defence would be contrary to the wording of Art. 51 (‘if an armed attack occurs’). . .”); Rep. of the U.N. Secretary-General's High-level Panel on Threats, Challenges, and Change, *A more secure world: Our shared responsibility*, ¶ 190, U.N. Doc. A/59/565 (Dec. 2, 2004), <http://www.un.org/secureworld/report.pdf> (“If there are good arguments for preventative military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to.”); Murphy, *supra* note 35, at 708 (stating that some “hew[] closely to the language of Article 51. . . . Neither anticipatory self-defense nor preemptive self-defense can be lawful because such forms of self-defense envisage action prior to an armed attack actually occurring.”).

weapons, *per se*, does not violate international law, that the U.N. Charter permits the use of force only in response to an armed attack, and, that the Security Council (including the United States) has condemned past acts of preemption against nuclear programs. Within this view, force is permitted only if Iran launches a nuclear attack; although, some may acknowledge the necessity of preemptive force in rare circumstances. Concerned that endorsing any aspect of the preemption doctrine would encourage its use, this group would ban the first use of force but rely on the international community to judge the circumstances of an attack in hindsight, and impose severe or minimal sanctions as appropriate.³⁷

Another group, in the Webster-Ashburton tradition, would allow anticipatory force against an enemy who is clearly preparing to attack. This view requires evidence that the attack be “imminent,” i.e., that the potential target state demonstrates that its adversary is making tangible preparations to attack and that the only way to prevent the impending attack is to damage or destroy the adversary’s capability to launch the attack.³⁸

Despite the differences in these legal positions, neither position would justify an attack on Iran today.³⁹ As the imagined Kerry letters suggest, these legal restrictions leave some uneasy, including the actual leaders of the United States and Israel. To the extent the Obama Administration has discussed the issue publicly, official statements have described the potential Iranian threat not as “imminent,” but “existential.”⁴⁰ While “existential” has not been

³⁷ See ANTONIO CASSESE, INTERNATIONAL LAW 310-11, quoted in Murphy, *supra* note 35, at 711.

³⁸ See Murphy, *supra* note 35, at 711-15.

³⁹ See Cristian DeFrancia, *Enforcing The Nuclear Nonproliferation Regime: The Legality of Preventative Measures*, 45 VAND. J. TRANSNAT’L L. 705, 780 (2012) (“The concept of an ‘imminent’ attack remains confined in nineteenth century conceptions, as articulated in the *Caroline* case.”). See also Gregory E. Maggs, *How the United States Might Justify a Preemptive Strike on a Rogue Nation’s Nuclear Weapon Development Facilities under the U.N. Charter*, 57 SYRACUSE L. REV. 465, 476-78 (2007) (arguing that the *Caroline* case does not justify an attack on nuclear capabilities).

⁴⁰ See Ron Kampeas, *Obama Tells U.N.: Nuclear Iran poses existential threat to Israel*, JTA (Sept. 25, 2012, 3:24 PM), <http://www.jta.org/news/article/2012/09/25/3107926/obama-nuclear-iran->

precisely defined in this context,⁴¹ it seems intended to capture the increased diplomatic leverage a nuclear-armed Iran would enjoy as well as the possibility that Iran might feel emboldened to act more aggressively, either directly or as a state-sponsor, under cover of a nuclear umbrella.

As unsettling as the proposal of a nuclear-armed Iran may be, a hostile state's possession of nuclear weapons capability has never been sufficiently threatening, per se, to prompt a preemptive armed attack by an opposing state. Aside from Israel's strikes on Iraq and Syria, which elicited varying degrees of condemnation from the international community,⁴² the closest example is the U.S. blockade of Cuba (or "quarantine," as it was called) during the Cuban Missile Crisis. These events contrast with decades of restraint by the Soviet Union and the United States vis-à-vis each other, as well as other mutual adversaries confirmed or believed to have nuclear weapons. To date, the Obama Administration has done little to compare or distinguish these precedents.

[poses-existential-threat-to-israel](#) (quoting President Obama as saying, "Make no mistake, a nuclear-armed Iran is not a challenge that can be contained. It would threaten the elimination of Israel, the security of Gulf nations and the stability of the global economy."). See also *Weighing Benefits and Costs of Military Action Against Iran*, THE IRAN PROJECT 42 (Sept. 13, 2012), <http://www.scribd.com/doc/106806148/IranReport-092412-Final#fullscreen> (noting that Prime Minister Netanyahu describes a nuclear-capable Iran as an "existential threat" and many members of the U.S. Congress and other political leaders agree with the Israeli position); Ivo H. Daalder, *Beyond Preemption: An Overview*, in BEYOND PREEMPTION: FORCE AND LEGITIMACY IN A CHANGING WORLD 1, 8 (Ivo H. Daalder ed., 2007) (stating "the very possession of weapons of mass destruction by some countries can pose an existential threat, whether or not their actual use is truly imminent.").

⁴¹ Israel typically defines "existential" as meaning a threat to Israel as a nation-state.

⁴² Israel's attack on the Iraqi facilities at Orsak was widely condemned. See *supra* note 30. But see Andrew Garwood-Gowers, *Israel's Airstrikes on Syria's Al-Kibar Facility: A Test Case for the Doctrine of Pre-emptive Self-Defence?*, 16 J. CONFLICT & SECURITY L. 263, 290 (2011) ("Israel's failure to offer any legal justification for its airstrike, and the muted international reaction to the Al-Kibar episode, appear to be part of a recent trend in state practice indicating a broader lack of concern over the legality of relatively minor uses of force.").

To be fair, the timing is not good for the Obama Administration to engage in detailed justifications for using force against Iran. In addition to the potentially toxic effect such discussion might have on ongoing negotiations, it could highlight potential differences between the United States and Israel regarding the appropriate threshold for using preemptive force, undermining whatever deterrent value the current vaguely defined threat may provide. In addition, there are undoubtedly military and intelligence capability issues the Obama Administration is unwilling to discuss publicly. Reticence is understandable, at least for the moment. Ultimately, however, if anticipatory self-defense as traditionally understood is insufficient to protect against the “existential” Iranian threat, the President might reasonably be expected to offer a more precise rationale and afford Congress the opportunity to consider the issue as well.

Even if the Iranian crisis abates, questions surrounding the use of preemptive force against weapons of mass destruction are likely to persist, and any complete analysis will implicate three fundamental questions. First, does a state or non-state actor have the capability to use a nuclear weapon? Second, does the potential nuclear actor have a strong propensity to use the weapon? Third, at what point does a potential target state lose its capability to prevent the weapon’s use?

The answers to each of these questions have important implications for the use of preemptive force, and traditional *Caroline* analysis has tended to focus predominantly on the first two. If an actor has the *capability* to use force, then the actor’s *intent* becomes critical. In traditional conflict scenarios, knowing an actor’s intent may be difficult, but the limited destructive capacity of the actor’s capability will often make erring on the side of caution an acceptable risk. To a large degree, traditional international law adopts this approach.⁴³ However, when the capability portends mass destruction, the risk calculation changes and the third factor above becomes especially relevant.

⁴³ See Barry E. Carter & Allen S. Weiner, INTERNATIONAL LAW, 931-1083 (6th ed. 2011).

In the contemporary Iranian context, the third question is this: given the ultimate difficulty of knowing Iranian *intent*, at what point does Iran's *capability* to deliver a weapon of mass destruction exceed the United States' or Israel's *capability* to prevent the weapon's use? Given uncertainty about both Iran's intent and capability, when does the United States or Israeli capability-based window of prevention close, thereby creating an unacceptable risk given the first two uncertainties?

This question raises a series of subordinate questions. For example, will a potential target state know *where* an attack will originate? If yes, will the target state know *when* the attack will originate? If yes, will the target state have sufficient *reaction time* to respond? If yes, will the target state have sufficient *capability* of its own to respond? If the answer to each of these questions is confidently and consistently yes, then the justification for a preemptive strike is presumably reduced. The potential target state can wait, *Caroline* style, for indications that a real-time attack is about to begin and put a stop to it.

If, however, the answer to any of the questions above is something less than a confident and consistent yes, are policymakers in the potential target state required to rest and accept the risk that an adversary will be able to launch an attack that cannot be stopped? If the answer is yes, then the inquiry ends. If, however, the answer is no, and we are unwilling to mandate that states (and their inhabitants) accept the resulting risk, we must challenge the classic understanding of self-defense and revisit *Caroline*.

IV. REVISITING *CAROLINE*

Revisiting *Caroline* in the context of Iran's alleged pursuit of nuclear weapons requires another series of questions. If a potential target state is not confident in its ability to prevent a possible nuclear weapons attack, is it at least confident in its ability to locate and destroy a weapon after it has been created but before an attack sequence is imminent. If so, then a revised *Caroline* doctrine might justify a preemptive strike on the weapon itself. If, however, the potential target state lacks confidence in its ability to destroy the weapon in its crib, is the target state able to prevent the weapon from

being built by stopping or impeding development of one or more of its critical components, i.e., the fissile material, the nuclear trigger, or the delivery system? If so, is this the last, best, objective chance to ensure a nuclear attack will not occur? Is this where the potential nuclear aggressor's activities are best illuminated and least dangerous? If so, should a potential target state be permitted to take action before this window of maximum insight and minimal danger closes?

Asking these questions in the current Iranian context does not assume the answers. The United States or Israel may well have the ability to prevent Iran's "imminent" use of a nuclear weapon as imminence is understood in the traditional *Caroline* context. If a potential target state has confidence that it can destroy the weapon immediately before launch, then the potential target state ought arguably to wait for that moment to give transparency or disarmament the fullest opportunity. If, however, an earlier preemptive attack is the last realistic chance before the preemption window closes, should international law deny the right to use preemptive force?⁴⁴

There are a host of potential responses. Diplomacy may be more effective if states do not have a sanctioned "off ramp" to use force; states operating in bad faith may manipulate a preemptive right;⁴⁵ and, states operating in good faith may make honest mistakes about the other side's intentions or capabilities. Each of these responses is plausible, but none answers the ultimate question: what does a nation do, after negotiating unsuccessfully and in good faith, to defend itself or an ally against a catastrophic threat its elected leaders reasonably and honestly believe may occur?

In the age of terror and potential mass destruction, the answer cannot be to negotiate tirelessly, accept the risk, and hope for

⁴⁴ Cf. *Weighing Benefits and Costs of Military Action Against Iran*, *supra* note 40, at 42, 8, 29 (concluding that the United States would have at least a month to make a military decision once Iran makes a "dash for the bomb" and that a military strike would delay Iran's ability to build a nuclear weapon "for up to four years").

⁴⁵ See 1986: U.S. Launches Air Strikes on Libya, BBC NEWS, http://news.bbc.co.uk/onthisday/hi/dates/stories/april/15/newsid_3975000/3975455.stm (noting that the 1986 Libya incident was an instance of one state provoking the threat and then used it to justify the exercise of force).

the best. Likewise, the answer cannot be to ignore international law: to assume that the United States may impose its will oblivious to both the constraints and legitimizing power of international law in the 21st century is naïve and dangerous. Ultimately, however, a ban on preemptive action—however aspirational and legally pristine—does not meet the needs of officials charged with protecting actual populations.⁴⁶ International legal theory notwithstanding, an official facing a perceived threat that poses an unacceptable risk will act to defeat it.⁴⁷ In light of this reality, is it not preferable to provide criteria

⁴⁶ See, e.g., President John F. Kennedy, Radio and Television Address to the American People on the Soviet Arms Build-up in Cuba (Oct. 22, 1962), <http://www.jfklibrary.org/Asset-Viewer/sUVMCh-sB0moLfrBcaHaSg.aspx> (“We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation’s security to constitute maximum peril. Nuclear weapons are so destructive and ballistic missiles are so swift, that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded as a definite threat to peace”). See also Transcript of the Interview at the World Economic Forum in Davos, The Clinton Foundation, January 27, 2005, <http://www.youtube.com/watch?v=SLqEQyyVNzI&t=1658> (quoting President Clinton: “Everybody talks about what the Israelis did at Osirak in 1981, which, I think, in retrospect, was a really good thing. You know, it kept Saddam from developing nuclear power”); THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 13-16 (2002), <http://www.state.gov/documents/organization/63562.pdf> (claiming that the President must prevent nations that assist terrorists from possessing nuclear weapons). This position was reiterated in: WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2006).

⁴⁷ See Daniel Joyner, *Jus Ad Bellum In The Age of WMD Proliferation*, 40 GEO. WASH. INT’L L. REV. 233, 247 (2008) (“[A]t the heart of the current crisis in international use of force law is a continuing, and likely increasing gap between the provisions of existing law and the perceptions of a significant number of important states of realities of the international political issue area that law is meant to regulate - a classic gap between law and reality caused by the law simply lagging behind the dynamics of technological and geo-political change.”). See also Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT’L L. 770, 773 (2012) (“There is little intersection between the academic debate and the operational realities. . . . The reality of the threats, the consequences of inaction, and the challenges of . . . operational decision making in the face of such threats frequently trump a doctrinal debate that has yet to produce a clear set of principles that effectively address the specific operational circumstances faced by states. This situation is unsatisfactory. Particularly in this area of law, it is important that principle is sensitive to the practical realities of the circumstances that it addresses”) Sir Daniel Bethlehem QC was the former

to guide decision-making before conflict occurs? If conflict does occur, is it not preferable to have criteria available to enhance the objectivity, and thereby, the credibility of post-hoc accountability assessments? To deny the right of preemptive self-defense is to create a dangerous vacuum: a legal doctrine so restrictive that nations cannot realistically comply creates a category of potential actions that are prospectively ungoverned and retrospectively standard-less.

It is easier to justify a right to preemption in theory than to develop a set of workable criteria upon which to measure whether a particular use of force is justified. This difficulty, however, should not deter continued attempts to perfect preemptive criteria. Sir Daniel Bethlehem and Professor Matthew Waxman have made recent, substantial efforts in this regard. Bethlehem stresses factors such as:

... (a) the nature and immediacy of the threat, (b) the probability of an attack, (c) whether the anticipated attack is part of a concerted pattern of continuing armed activity, (d) the likely scale of the attack and injury, loss, or damage likely to result therefrom in the absence of mitigating action, and (e) the likelihood that there will be other opportunities to undertake effective action in self-defense. . .⁴⁸

Professor Waxman notes factors such as the exhaustion of peaceful alternatives, the unacceptable risk of losing the opportunity to eradicate the threat, the magnitude of the threat, and the consistency with the purposes of the U.N. Charter.⁴⁹

principal legal advisor of the U.K. Foreign & Commonwealth Office from May 2006 to May 2011; ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 242 (1994) (“[I]n a nuclear age, common sense cannot require one to interpret an ambiguous provision in a text in a way that requires a state passively to accept its fate before it can defend itself.”); Matthew C. Waxman, *The Use of Force Against States That Might Have Weapons of Mass Destruction*, 31 MICH. J. INT’L L. 1, 49 (2009) (“The vitality of the law governing precautionary self-defense is dependent upon the ability of this law to adapt to contemporary challenges. . . . in a manner that decision-makers and security professionals perceive as sensible.”).

⁴⁸ See Bethlehem, *supra* note 47, at 775.

⁴⁹ See Waxman, *supra* note 47, at 28.

An obvious place to start, and possibly develop the preemption criteria, is with the parties who hold the information indispensable for resolving disputes: the state and non-state actors who raise suspicions about their capabilities and intentions through their failure to cooperate with transparency regimes. Here too, a host of objections might be raised. To begin, the NPT allows countries to develop nuclear energy and then withdraw to build weapons; does not require the big five nations to reduce their nuclear weapons;⁵⁰ and has no mechanisms to enforce and penalize nations for withdrawing or violating the treaty. One might add to the list the inherent difficulty of a suspected state proving a negative.

Regardless how one evaluates these particular objections to the status quo, the international community must do more to resolve the standoff between states who violate international transparency standards and states contemplating the use of preemptive force against those potentially in possession of weapons of mass destruction.⁵¹ A party's violation of rigorously vetted transparency norms—whether status quo or progressively developed in the future—should be expressly included in the calculation of revised *Caroline* criteria.

When Daniel Webster and Lord Ashburton were making legal history through their exchange of letters, ships were built from wood, combatants wore uniforms, and lethality was measured by the range of a smooth bore cannon shot. The world has changed. When diplomacy fails in the current era—one characterized by terrorism, non-state actors, and the potential for mass destruction—nations must have legal authority to remove threats before they are fulfilled. Preemptive actions must be governed by criteria carefully drawn to

⁵⁰ Although the NPT does not require reductions of nuclear weapons from the big five nation signatories, Article VI encourages them to actively consider making such moves. ("Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a Treaty on general and complete disarmament under strict and effective international control.").

⁵¹ See, e.g., O'Connell, *supra* note 27, at 498 ("Iran is obligated under international law to comply with Council resolutions. By the same token, those states concerned with Iran's nuclear program must also comply with international law and its prohibition on the use of force in how they respond to Iran.").

redefine our understanding of *Caroline's* “no choice of means, no moment for deliberation,”⁵² in the face of the extraordinary risks posed by weapons of mass destruction in the age of terror.

The development of a set of preemption criteria is difficult but essential. To say otherwise means the law remains silent in the face of a potentially dangerous actor who would develop, possess, and possibly use a massively destructive weapon. Until states like Iran are willing to offer more cooperation in demonstrating they are not “actual” threats, such states can expect others to consider them “existential” threats with the risk that entails for all concerned.