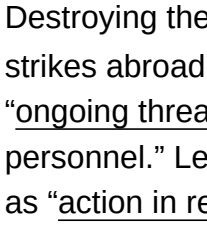
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By Maj. Dimitri J. Facaros

I. Introduction


Destroying the Caroline Book Cover

In the last 18 months, U.S. rhetoric in justifying different military strikes abroad included “imminent and sinister attacks,” “imminent threat,” “American lives at risk,” and “ongoing threats, “proportionate military response,” and an “act to protect American and Coalition personnel.” Letters to Congress and to the United Nations justifying the strikes included phrases such as “action in response to an escalating series of attacks”; “deter…further attacks”, “to protect and defend our [US] personnel and our [US] partners against these attacks and future such attacks [*sic*]”; and “necessary and proportionate action.” Although quite different strikes, the administrations have been consistent in justifying their acts in self-defence by pointing to an escalating series of attacks by Iran and/or militia groups it supports, its intention to deter further attacks, as well as Iran’s/proxies’ ongoing planning for future attacks.

By applying the underlying principles of self-defence to these justifications we can see the US relying on a broad interpretation of self-defence that stands in contrast with the scope of its principles (necessity, imminence and proportionality) as traditionally applied by some international lawyers. This narrower application of principles is associated with a famous 1837 case involving a British-Canadian attack on an American ship, the *Caroline*. Ironically, then it was the United States that demanded justification based on the narrow interpretation of these principles following the Caroline incident, but its demand was the product of the time.

Both the customary and conventional law of self-defence have evolved since 1837, raising the question of how it has changed and what factors can legitimately influence a State’s approach to justifying action taken in self-defence.

Professor Craig Forcese, a Full Professor and Vice-Dean of Graduate Studies at the University of Ottawa, and the author of *Destroying the Caroline: The Frontier Raid that Reshaped the Right to War*, chronicles the story of the Caroline and its impact on the State right to self-defence (i.e. *jus ad bellum*). He describes the folklore that surrounds the *Caroline* test and methodically describes the evolution of both customary and codified international law, as well as highlighting the principles that have become associated with the *Caroline* incident and their application to today's conflicts. The result is a comprehensive analysis of an approach "that can accommodate more flexible standards" and which can be used by modern day practitioners when assessing the scope of a State's right to act in self-defence.

The application of customary international law and codified law, specifically Article 51 of the United Nations Charter, rely on the same principles; however, it is the interpretation of those principles that dictates their application. Professor Forcese's exhaustive analysis of both the facts related to the Caroline event and the response of the State parties about justification in the context of the circumstances of the day highlights the inherent flexibility of the *Caroline*'s principles, something he refers to as a "Goldilocks point"—arguably the reason for the formula's survival. His analysis of the geo-political variables that played into the making of the formula are the same variables that continue to be relied on in the "more comprehensive, consequentialist, and policy-sensitive approach" when justifying a strike. (Forcese, *Destroying the Caroline*, p.246 quoting WM Reisman & JE Baker, *Regulating Covert Action: Practices, Contexts, and Policies of Covert Action Abroad in American and International Law*, Yale UP 1992, p. 48). In this way, Forcese's work provides a useful interpretative technique that might be used to support the longstanding U.S. position that it "rejects the notion that the U.N. Charter supersedes customary international law on the right of self-defence" in favour of "a much broader geopolitical view in order to justify its actions." This interpretation of self-defence principles requires a full assessment of the domestic and international geo-political variables.

II. The Geo-Political Variables

Professor Forcese's thorough analysis of the *Caroline* doctrine provides, by example, geo-political factors that can be used to analyze the legitimacy of a strike in furtherance of self-defence. Each historical period presents various factors influencing the application of self-defence principles. Casting a wide net to collect, consider, and assess additional facts enables a more comprehensive view of the geo-political variables that occur both domestically and internationally thereby increasing the range and usefulness of the principles that can be deployed to defend an action taken in furtherance of self-defence.

Although more than a century has passed since the *Caroline* affair, Professor Forcese showcases its relevance for a modern legal argument relying on the same variables and factors: constitutional and international authority, domestic and international politics, and practical considerations when assessing the use of lethal force in an anticipatory defensive response. Professor Forcese helps the reader understand those variables in the context of the sinking of the *Caroline*.

a. Understanding the *Caroline*

In 1837, a Canadian militia, commanded by a British officer, raided, and sank the *Caroline*, an American-flagged and owned steamboat, moored in U.S. waters. Although the U.S. was neutral, it had failed to prevent a few Americans from using the *Caroline* to support a Canadian rebellion. The sinking was controversial, but, by 1842, the parties reached consensus regarding the legal bounds of self-defence. The *Caroline* test authorizes lethal force in self-defence when justified by three principles: imminence, necessity, and proportionality. Those principles were established as part of customary international law and became integral to the interpretation of the right to self-defence as codified in Article 51 of the Charter. The same principles apply to these bodies of law, both finding their genesis in the *Caroline* case. However, some international lawyers argue that the *Caroline* incident results in a narrow reading of Article 51. This results from the very restrictive wording used by the U.S. Secretary of State at the time of *Caroline* incident, Daniel Webster. He indicated that it "will be for that [British] Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."

b. To Strike or Not to Strike Considerations

The benevolent U.S. response to the *Caroline* incident was influenced by a number of domestic factors: constitutional law, the economy, politics, and military engagement. A review of these domestic factors helps expose the broader impact the *Caroline* Case can have on the application of the principles governing contemporary self-defence. It helps unmask the factors influencing State justification in the legal categories of necessity, imminence, and proportionality and their acceptance by the offended State. In the *Caroline* incident, these factors included: a weak exercise of the Federal constitutional role in national security decision making; a national economy indebted to the United Kingdom; a U.S. political landscape of the 1800s, with limited influence being exercised by the Federal system of government; and its commitment of military forces in other campaigns.

In the 1800s, the U.S. and its Constitution were young. Even by 1837, the Constitutional authority exercised by the Federal government over national defence had little influence (Forcese, *Destroying the Caroline*, p.60). Thus, the projection of force outside the U.S. hinged on the President's actual or perceived domestic legal authority. Economically, the United States government was indebted to its British counterpart, which affected its willingness to respond militarily to such a limited incursion. Politically, there was a lingering resentment concerning the 1812 war with Britain, and with it, a willingness of some Americans to support rebellion in Canada. At the same time, a focus on States rights, and the relatively weak influence exercised by the Federal government, served to limit the option of a military response. Finally, the existing commitment by the United States military on its southern and western frontiers impacted on the willingness of the government to seek a military as opposed to a political response. It is consideration of these factors, both for and against a military response, that determined why the United States response to the *Caroline* Case was framed in the way that it was.

III. International Law

Destroying the Caroline's description of the history of international law describes the evolutionary complexities surrounding the *Caroline* principles. Codified international law, which provides a degree of clarity, is a creature of post-World War II society. For centuries, war was a right. While that right has been abolished, there remains a right to State preservation. This principle, based on natural law, predated the *Caroline* but continues to play a pivotal part in the current state of the law of self-defence. Additionally, platforms such as blogs and social media help anchor, legitimize, and communicate the bases upon which self-defence is claimed. This can ultimately impact our understanding of how those principles are applied, whether as part of codified or customary international law or both. The process of accepting and communicating international norms is not always clear.

a. The Evolution of the *Caroline* Test

Professor Forcese gives the reader an appreciation of the malleable aspects of customary law—recorded recollections, arguments, and analyses by scholars contemplating issues of their day and rooting their analysis in historic works. Ancient Greece and Rome rooted their justifications in natural law. (Forcese, p. 130) For centuries, the prevailing theory of war found its justification in a universal set of moral principles: "just" wars were legitimate. Embedded in this principle was the right of self-preservation. Although "just war" was long outdated by the time of the sinking of the *Caroline*, the right to self-preservation encompassed the right to self-defence. (Forcese, p. 144)

The shift away from justifying war in natural law to legal positivism changed the course of international law (Forcese, p. 169). Instead of a moral basis, states now rely on treaties as well as custom. As Professor Forcese explains, although the law justifying war has changed drastically, the underlying basis of self-defence has not. (Forcese, p. 131) In fact, an underlying current of international law is the right to self-defence. Earlier justifications rooted self-defence in necessity. The imminence of an attack created a necessity to respond. The response then had to be proportionate. It is these bedrock principles that help to create the Caroline test and are the same principles at work in Article 51.

b. The *Caroline* Test and Beyond

Daniel Webster synthesized his formula for justifying self-defence from ancient texts. The underlying analysis of those texts, as well as Webster's letter to the U.K. diplomat, Lord Ashburton, acknowledged the existence of anticipatory self-defence, which justifies a State to act prior to suffering an armed attack. This is now accepted as customary practice. In 1840, its restrictive application was defined by the constitutional, economic, political, and military factors existing at that time; however, analyzing those same factors today may change the result. For example, the application of this formula to codified law is complicated by an increasingly technologically advanced battlefield.

Professor Forcese supplies insight into the UN Charter drafter's analysis for including self-defence. (Forcese, p.197) The drafters were concerned with limiting States' right to self-defence by supplying

granularity to their definition. Without referring to the principles underpinning an inherent right of self-defence "jurists reached for the obvious reference point: the inter-war understanding of self-defence, one that had itself repeatedly made use of the Caroline" (Forcese, p. 202). Article 51 relies on those principles. With that said, the scope of anticipatory self-defence under Art. 51 is just as disputed under customary self-defence. Part of this dispute is the inherent conflict between acting in self-defence and respecting State sovereignty; however, it's the interplay between self-defence and a violation of State's sovereignty that becomes complicated in a technologically advanced battlefield.

Modern war changes the conceptual dynamics of imminence, necessity, and proportionality of the past. Although it is clear the advancement of technology has significantly broadened the concept of imminence, more problematic is the application of these principles when considering those technological advancements. For example, at a press of a button, a State can fire a ballistic missile at a target located a few hundred miles away. Although geographically distant, it is the speed of the harm that may simultaneously trigger necessity for a response, leaving States to likely to forego an analysis of necessity. As the speed of an attack outpaces the ability of humans to react with a detailed assessment of the threat, it is then hard to discern proportionality. What is the fix? The *Caroline* formula can be adapted to the times. What enhances a more consistent approach is the "constructive ambiguity" and nature of *Caroline's* formula, which can justify a broader interpretation in the assessment of whether the strike followed the underlying principles.

Professor Forcese provides insight into the modern application of the *Caroline's* principles. Although each conflict is unique, the utility in the *Caroline* principles is in their flexibility and adaptability. However, the application of those characteristics under customary law has drawn criticism. There is also a long-standing question as to whether an authority to act defensively exists outside the strict wording of Article 51. For example, in the Nicaragua case, the majority opinion takes a stricter view. The dissenting opinion however, rejected the idea that the right to use defensive force only exists when an "armed attack" occurs. The issue to be settled is whether force can be used when there is no armed attack. In any unsettled debate, there is a constant—the principles derived from the *Caroline* case remain relevant in geo-politics because of their flexibility and adaptability.

IV. The Soleimani Strike and The *Caroline*

What does this mean regarding contemporary action taken in self-defence? Major General Qasem Soleimani was an officer in the Iranian Armed Forces who led the Quds Forces of the Islamic Revolutionary Guard Corps (IRGC). He rose to prominence as both a military tactician and public figure who was revered as a hero in his native Iran. However, in the United States his notoriety earned him a 2011 designation as a terrorist. On 8 April 2019, President Trump declared the IRGC a foreign terrorist organization. As U.S. alleges, Soleimani, leveraging Iraqi non-state proxy forces, orchestrated attacks on U.S. bases in Iraq, including an attack on 27 December 2019 resulting in the death of an American contractor. The United States conducted a drone strike killing Soleimani in Iraq on 3 January 2020.

We can contextualize Professor Forcese's insight into the *Caroline* principles to see how the U.S. justified its strike. The strike—a state use of force against a general officer of another state outside the context of an armed conflict—prompted considerable debate concerning its legality. Days after the attack, leaders and pundits discussed the international legal authority for the strike. The U.S. administration's public response shared some commonality: "imminent and sinister attacks," "imminent threat," and, "American lives at risk." Its official response stated that the strike was taken in "national self-defence, as recognized in Article 51," which aligns with the U.S. Ambassador's official letter submitted to the UN. That letter states the exercise of self-defence was "in response to an escalating series of armed attacks (and) in order to deter…further attacks."

Invoking Article 51 raises the issue of how principles developed in the *Caroline* incident can be applied. This analysis links the codified regime of the UN Charter with the bedrock *Caroline* principles justifying lethal force through the anticipatory self-defence framework. This needs to reconcile the Charter and the concept of self-defence highlights the utility of Professor Forcese's analysis. The assessment of the factors such as those applicable to the *Caroline* incident in a contemporary context results in a helpful interpretative methodology to assess whether the US strikes were justified as acts of self-defence in the context of venerable and flexible arguments. An informed reading of the *Caroline* Case can be used to justify a broader interpretation of Article 51 than is the case adopted by some international lawyers.

Let us examine some of the geo-political variables (e.g., federal authority, politics, economics, and military engagement) that, in the *Caroline* incident, led the US to acknowledge a meager British justification while recognizing the concept of anticipatory self-defence, which, in this modern context, could support a broader claim to be acting within the law. First, as compared to 1837, the President was in a better position to exercise his federal constitutionally based authority to defend the country and its interests. As compared to the 1800s, the evolution and current state of the President's constitutional power has strengthened when directing force abroad. The *Caroline* case reflects the linkage between the self-defence principles and domestic decision making. Second, unlike in the 1800s, there was the political will for a strong response. Although a number of politicians did not support the strike, the President and likeminded politicians did. The willingness to exercise political will in this case highlights the distinction between a reserved response in the *Caroline* case and a bold response against Iran. Third, there were no economic ties with Iran that might function as a restraint as happened with the *Caroline* incident. Last, and unlike the 1800s, current advances in technology and overall military capability provided the decisionmaker with the option to strike with little to no impact in terms of resource and time. For example, managing an armed drone requires coordination and allocation of assets, but that does not raise to the logistical burden of employing the military as it did in the 1800s.

In its broad interpretation of Article 51, the U.S. position can be linked to these contemporary factors. Professor Forcese's analysis establishes that the principles governing the right to self-defence can

accommodate more flexible standards and the legal test should not be limited to those based on factors applicable to a 19th Century conflict. The result is a comprehensive analysis of an approach, " that can accommodate more flexible standards," and which can be used by modern day practitioners when assessing the right to act in self-defence. Today's world is different than the 1800s. Applying a holistic view of the facts and context as a tool to interpret the principles common to both customary international law and codified law can seemingly generate broader or more restrictive applications of force and justifications. Customary international law embodies a certain degree of flexibility and is established by "a pattern of claim, absence of protest by States particularly interested in the matter at hand and acquiescence by other States." (Shaw, *International Law*, 6th Ed., p. 89) For some international lawyers, the *Caroline* principles of necessity, proportionality and imminence seem settled. However, the reality is that their application is still in dispute, which can result in broader interpretations of anticipatory self-defence.

V. Conclusion

The recent US strikes sparked intense debate concerning the international legal basis for them. The U.S., either through press statements or official notifications, used the underlying principles of self-defence that apply both in Article 51 and customary international law. Although the application of the terminology—imminence, necessity, proportionality—is well settled, those words have more elastic boundaries than are often suggested, requiring a proper accounting of the geo-political and domestic variables of the day. International law is dynamic and continues to evolve and requires assessment of contemporary geo-political considerations. Those considerations provide the context and clues about State actions in self-defence. Ultimately however, it is a State's interpretation of the "shared grammar for understanding" that exposes its reasons for expanding or limiting its use of force (Forcese, p. 246). *Destroying the Caroline* is an important book for those State legal advisors, military lawyers, policy makers and academics who want to study how various factors can help resolve the legal, ethical, moral, and textual challenges facing them on today's omnipresent battlefield.

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About the author

Major Dimitri J. FacarosMajor Dimitri J. Facaros, a U.S. Army Judge Advocate, is currently a training officer and teaching fellow at the International Institute of Humanitarian Law (IIHL) where he teaches the legal aspects of International Humanitarian Law (IHL), human rights, and advanced topics in the law of war. Dimitri earned his Bachelor of Arts (BA) degree from The State University of New York (SUNY) at Buffalo, Buffalo, New York and his Juris Doctor (JD) from the University of Pittsburgh School of Law, Pittsburgh, Pennsylvania. Dimitri also earned his Master of Laws (LLM) from The United States Army Judge Advocate General's Legal Center and School, Charlottesville, Virginia. Dimitri's passion to teach IHL grew from the story of his family. During the Greek military junta in 1967, his paternal grandfather was imprisoned, which forced his father to flee, and during WWII, his

maternal grandmother fled occupied Greece.

The views and opinions expressed here are his and do not necessarily reflect the official policy or position of the U.S. Army, the Judge Advocate General's Corps, the Department of Defense, or any other agency of the U.S. government.

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