Book Reviews / Recensions de livres

Destroying the Caroline: The Frontier Raid That Reshaped the Right to War. By Craig Forcese. Toronto: Irwin Law, 2018. 369 pages.

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All students of the use of force in international law know — or think they know — the story of the "*Caroline* incident." Readers will be familiar with the essential facts. In 1837, a squad of British officers and Canadian militia sank a small ship named the *Caroline* on the American side of the Niagara River to prevent it from being used by Canadian insurgents operating from within the United States for attacks on Canada.

The incident is famous because it provoked the articulation of a pithy new standard for justifying the use of force in self-defence. In response to British assertions that the attack had been an act of justified self-defence, US secretary of state, Daniel Webster, wrote that such acts are permitted only where the "necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation" and are limited to that which is "reasonable and not excessive."[1] This "*Caroline* test" came to play an outsize role in shaping ideas about the nature of self-defence. In the modern era, it has loomed large in debates over the legitimacy of anticipatory self-defence and, more recently, the use of force against non-state actors (NSAs) in states "unwilling or unable" to prevent attacks being launched from within their territories.

As several scholars have noted, however, the incident occurred at a time when there was no legal prohibition on the use of force and, thus, no need

[1] Craig Forcese, *Destroying the Caroline: The Frontier Raid That Reshaped the Right to War* (Toronto: Irwin Law, 2018) at 104. A selection of these diplomatic notes, with editorial annotation and explanation by Hunter Miller, are available from the Avalon Project, <http://avalon.law.yale.edu/19th_century/br-1842d.asp>.

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for the justification of self-defence.[2] Rather, the diplomatic dispute was over the legitimacy of certain measures short of war. What is more, most later accounts of the incident tend to get the facts wrong. So how and why did this small incident from a bygone era come to play such a disproportionate role in modern thinking about self-defence, and how relevant should it be in current debates on the subject?

Craig Forcese's book is on its way to becoming the seminal work on the subject.[3] It is a masterful effort to not only set the historical record straight and trace the intellectual history of the incident's influence on the development of the *jus ad bellum* regime, but also to address the more important questions of its current relevance and significance. Given the ambitious scope of the work, there will be those who are left feeling that this or that aspect of the analysis is not quite detailed enough, but, overall, it is an important and insightful contribution to the broader literature on the *jus ad bellum* regime. It is also a thoroughly engaging read.

The Factual and Intellectual History

The book is divided into five parts. Parts 1 and 2 provide the history of the incident itself and the diplomatic dispute that simmered for several years thereafter. Forcese clearly relishes the history for its own sake, but, as he emphasizes throughout, this history has a real significance precisely because it has been overly simplified and mischaracterized in the development of the law. Of particular importance is the fact that the insurgents had actually already occupied Navy Island on the Canadian side of the Niagara River, and had for some time been launching attacks into Upper Canada. They were preparing further attacks and were using the *Caroline* to ferry weapons, munitions, and men to the island from upper New York. Asked by the British to suppress local support for the insurgency and prevent the launching of attacks from within American territory, the US government was found to be "unwilling or unable to prevent aggression against Canada."[4] In short, the strike on the *Caroline* was in response to actual armed attacks and an invasion of territory, and to prevent a further escalation of those attacks. This is hugely significant, given that the *Caroline* incident is typically cited in justifications for the validity of anticipatory self-defence.

It is also frequently forgotten that the diplomatic dispute simmered for several years and was only brought to a boil by the American arrest and prosecution of a Canadian for his alleged role in the raid. Remarkably, the

[2] See e.g. Yoram Dinstein, *War, Aggression, and Self-Defence*, 6th ed (Cambridge: Cambridge University Press, 2017) at 225.

[3] The book was awarded the American Society of International Law's Certificate of Merit for Pre-eminent Contribution to Creative Scholarship for 2018.

[4] Forcese, *supra* note 1 at 74.

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trial threatened to provoke a war, and Daniel Webster's famous dictum was issued almost four years after the raid in efforts to prevent further escalation. The issue was only resolved with the conclusion of the *Webster-Ashburton Treaty*[5] in 1842, with an apparent agreement on Webster's dictum and an agreement to disagree on its application to the facts.

Parts 3 and 4 then explore the intellectual history of the incident. Part 3 examines the merits of the arguments made by each side at the time, with Forcese briefly reviewing the history of international law on war up to the time of the *Caroline* affair. This foundation is used to support two important points: first, that there was at the time no legal prohibition on the use of force to achieve national policy objectives and, second, that there was a broad right of self-preservation to justify uses of force short of war, particularly against neutral states. Ironically, the United States had invoked this broad right of self-preservation to justify its own strikes into then Spanish Florida, in the first Seminole War of 1817–18, on the grounds that Spain was unwilling or unable to prevent attacks on the United States by Indigenous groups operating from within Spanish territory. Thus, Webster's formulation of the concept of self-defence, and particularly its incorporation of the elements of imminence and proportionality, represented a significant narrowing of the scope of this right of self-preservation.

In Part 4, the book examines how the *Caroline* incident came to significantly influence the subsequent development of thinking about the use of force and self-defence. Forcese explores how jurists and scholars treated the *Caroline* incident in their writings, and how these writings influenced the development of the law from the end of the nineteenth century to the emergence of the modern *jus ad bellum* regime. As he notes, the concept of self-defence only becomes truly consequential when the use of force itself has been made unlawful. This general intellectual history will be familiar to many, and Forcese relies on such seminal works as Stephen Neff's magisterial history of the subject.[6] But the account is necessary in order to explain the significance of the *Caroline*. Forcese's examination of how the *Caroline* itself came to influence these developments is both fascinating and instructive, from the drafting history of Article 51 of the *Charter of the United Nations* (*UN Charter*) through to the seminal decisions of the International Court of Justice (ICJ) on the use of force.[7] Forcese's book highlights how accounts of the *Caroline* incident were increasingly shorn

[5] Also available from the Avalon Project, <http://avalon.law.yale.edu/19th_century/br-1842.asp>.

[6] Stephen Neff, *War and the Law of Nations: A General History* (Cambridge: Cambridge University Press, 2005).

[7] *Charter of the United Nations,* 26 June 1945, Can TS 1945 No 7 (entered into force 24 October 1945) [*UN Charter*].

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of significant details over time and how the mischaracterization of events impacted the shaping of the law.

Analysis of the Current Issues

In Part 5, Forcese examines the current controversies over the precise scope of the doctrine of self-defence, and each of its constituent elements, and assesses its significance as a meaningful constraint on state practice. He also explores how the *Caroline* incident continues to be employed in these debates. As important and fascinating as the history is, many readers will likely be most interested in this analysis. Yet, if there is any quibble to be found with the book, it is that here Forcese could have drilled deeper. In particular, his analysis of the issues surrounding the nature of "imminence," "armed attack," and the efforts to expand self-defence with the "unwilling or unable" doctrine, could have benefited from a more detailed treatment — though, to be sure, this would have involved difficult trade-offs.

To explain this quibble, I must skip forward to the book's conclusions as to the *Caroline*'s legacy. Forcese notes that the "constructive ambiguity" of the *Caroline* test has been exploited by states in efforts to broaden the scope of self-defence and even employed in pretexts for the unlawful use of force. There is of course considerable irony here, given that such efforts tend to shift the doctrine of self-defence closer to the broad right of self-preservation that Webster's formulation sought to replace. Forcese thus concedes that the doctrine of self-defence has not been able to constrain the use of force as much as might be ideal. He concludes, however, that this flexibility may nonetheless be a strength. He refutes Antonio Cassese's arguments for a sharper definition as being potentially counterproductive, given that a clarified doctrine would likely be undermined by increased violation.[8] He instead endorses Michael Reisman's New Haven School perspective that "determinations of lawfulness in particular cases must … use a more comprehensive, consequentialist, and policy-sensitive approach," positing that the *Caroline* test has survived so long precisely because it permits such an approach.[9] He concludes that the *Caroline* test and the doctrine of self-defence that it has shaped does indeed constrain state practice, even if it has sufficient flexibility and ambiguity to allow for evolution, which in turn results in debates over the doctrine's scope and application. He frequently refers to Webster's formulation as having been

[8] Forcese, *supra* note 1 at 246, citing Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2001) at 310.

[9] Forcese, *supra* note 1 at 246, citing W Michael Reisman and James E Baker, *Regulating Covert Action: Practices, Contexts and Policies of Covert Coercion Abroad in American and International Law* (New Haven, CT: Yale University Press, 1992) at 48.

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a pragmatic "Goldilocks formula," and one is left thinking that Forcese similarly believes that, while not as effective as one might like, it is probably as effective as it can be. The problems created by its constructive ambiguity are the price we have to pay for this modest success.

A deeper analysis of some of these problems might have led to a less sanguine conclusion or, alternatively, to stronger normative arguments about the illegitimacy of recent efforts to distort aspects of the doctrine. To look at the element of imminence as one example, Forcese re-emphasizes how ironic and misguided it is that the *Caroline* test has come to be associated with anticipatory self-defence given the actual history of the incident. Recognizing that the language of Webster's formulation does imply the permissibility of anticipatory action, he explains how it has been used to "lever open the scope of the 'armed attack' 'occurs' standard in Article 51" of the *UN Charter*.[10] He traces this evolution through to the debates surrounding the so-called "Bush Doctrine" of 2002, and the development of the more "elastic and flexible" treatment of imminence in the "global war on terrorism," describing how the *Caroline* test has been deployed by all sides.

Yet, while emphasizing that imminence is the element that has been most misunderstood and exploited, Forcese does not explore in detail the full extent of that distortion. The Bush Doctrine has been widely rejected by the international community, but in the context of targeted killing and the unwilling or unable doctrine, the United States and several like-minded countries have embraced an interpretation of imminence that has gutted the concept of all temporal meaning. This reality is reflected in the US justifications for the killing of Anwar al-Awlaki, notably that "the condition that an operational leader present an 'imminent' threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future."[11] The so-called "Bethlehem Principles," which have come to embody the source and legitimate articulation of the unwilling or unable doctrine, take this distortion further, suggesting that imminence can mean something other than "immediate" or "impending" and, indeed, that there need be no specific evidence of where an attack

[10] Forcese, *supra* note 1 at 229.

[11] Department of Justice White Paper: Lawfulness of a Lethal Operation Directed against a US Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force (undated), obtained by NBC News, <https://www.scribd.com/document/123883608/Lawfulness-of-a-Lethal-Operation-Directed-Against-a-U-S-Citizen-who-is-a-Senior-Operational-Leader-of-Al-Qa-ida-or-An-Associated-Force>; see also the David J Barron, Office of Legal Counsel, Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations against Shaykh Anwar al-Aulaqi, Memorandum for the Attorney General (16 July 2010), online: <https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-07-16_-_olc_aaga_barron_-_al-aulaqi.pdf>.

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will occur or the precise nature of the attack for it to be imminent.[12] In other words, the concept is something not only entirely divorced from the essential meaning of the word "imminence" but also very far from Webster's "instant, overwhelming, no choice of means, no moment for deliberation."[13] Bethlehem's five factors for assessing imminence conflate the concept of imminence with the magnitude of risk; replace the immediacy of the threat with windows of opportunity for response; and confuse the overall issue with considerations from international humanitarian law.[14] While this distortion of imminence is designed to help justify the unwilling or unable doctrine as a narrow application of the broader doctrine of self-defence, there is a risk that its wider acceptance will alter the concept of imminence, and thus the principle of necessity more generally, and thereby lower the threshold for the use of force in all applications of the right of self-defence.[15]

Forcese does devote a full chapter to the unwilling or unable doctrine for, as he rightly emphasizes, the *Caroline* incident was in many ways the first modern articulation of this idea — that is, justifying the use of force against NSAs operating from within the territory of another state based on the host state being unable or unwilling to prevent the NSAs' attacks.[16] But, while he questions the validity of recent claims that the doctrine's current formulation has become customary international law, and gives voice to concerns about the risks of relying on a "fuzzy doctrine" such as the unwilling or unable doctrine, Forcese does not explore in detail the more specific and significant problems raised by the Bethlehem Principles or engage directly with the significant scholarly debate on the subject.[17] This is reflected again in his examination of the element of "armed attack" as a trigger for the exercise of self-defence. He does explore how the "gravity" threshold for an "armed attack" has come under pressure, and he does an admirable job of defending the established view. But he only notes in

[12] Daniel Bethlehem, "Self-Defense against Imminent or Actual Armed Attack by Nonstate Actors" (2012) 106 Am J Intl L 770 [Bethlehem, "Self-Defense against NSAs"]; see also Daniel Bethlehem, "Principles of Self-Defense: A Brief Response" (2013) 107 Am J Intl L 579.

[13] Forcese, *supra* note 1 at 104.

[14] See Bethlehem, "Self-Defense against NSAs," *supra* note 12 at 775–76 (Principle 8).

[15] I cannot do justice to these arguments in this short review, but I have explored them in much more detail in Craig Martin, "Challenging and Refining the 'Unwilling or Unable' Doctrine" (2019) 52 Vand J Trans L 387.

[16] It has an older pedigree within the law of neutrality and can be traced back to Vattel, but this involved the use of force against the forces of other belligerent states operating from within neutral state territory. See further Ashley Deeks, "'Unwilling or Unable': Toward a Normative Framework for Extraterritorial Self-Defense" (2012) 52 Va J Intl L 483.

[17] Bethlehem, however, is cited in chapter 26 of Forcese, *supra* note 1 at 206. For a discussion of the debate, see Martin, *supra* note 14.

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passing the "misgivings" created by the unwilling or unable doctrine claim that a number of small strikes, none of which are separately of sufficient gravity or scale, may cumulatively constitute an armed attack justifying a use of force in response.[18] What is more, the unwilling or unable doctrine creates an attribution problem for the element of armed attack. The ICJ has consistently held that a state may only use force in self-defence against NSAs within the territory of another state if the NSA attacks can be sufficiently attributed to that state, for which the state's "substantial involvement" in the operations of the NSA must be established.[19] But the unwilling or unable doctrine effectively abandons this attribution requirement, thus creating further pressure for broadening the doctrine of self-defence; an issue that the book does not address.

Final Thoughts

These comments on the level of detail with which current controversies might have been addressed are mere quibbles with what is an altogether magnificent book. What is more, given that Craig Forcese is one of Canada's pre-eminent scholars on the law relating to the use of force, armed conflict, and national security, we can be sure that the level of scrutiny was a considered choice rather than any oversight. It was likely a trade-off in an effort to balance the goals of recounting a rich factual and intellectual history of the *Caroline* incident, exploring the significance of its influence on the development of international law, and analyzing its continued operation as an effective constraint within the *jus ad bellum* regime. And Forcese achieves that balance wonderfully, all within a coherent narrative. It clarifies the history in ways that should help reduce the misuse of the *Caroline* incident and clearly demonstrates the continued significance and relevance of the *Caroline* test. As such, the book may play some role in making the doctrine that much more effective. What is more, the blend of history, theory, and analysis, makes it a true pleasure to read — an important work of international law theory and intellectual history wrapped up in a military and diplomatic history of a swashbuckling affair.

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[18] Bethlehem, "Self-Defense against NSAs," *supra* note 12 at 775 (Principle 4).

[19] On attribution for purposes of self-defense, see Tom Ruys, "*Armed Attack" and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge: Cambridge University Press, 2010) at 489–93; see also *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)*, Judgment, [1986] ICJ Rep 14 at paras 194–95; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Merits, [2005] ICJ Rep 1 at paras 106–47.

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