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The *Caroline* Case and American Drone Strikes in Pakistan

NICOLAS J. S. DAVIES

In his first press conference as president on February 9, 2009, Mr. Obama attempted to justify continuing attacks by American Predator and Reaper unmanned aerial drones in Pakistan. These unprecedented air strikes have already killed at least 340 people, and continue unabated under the new U.S. administration. The U.S. Department of Defense has claimed that the attacks have killed leading figures in Al Qaeda and the Taliban, but the dead and wounded have included many innocent men, women, and children living peacefully in their own country. The nature of these attacks raises the specter of a new form of state terrorism: a global technological umbrella of airborne violence that can strike virtually anyone in any country based on secret rationales and suspicions that are beyond public scrutiny or accountability.

Obama explained that the goal of the attacks is to “root out safe havens for terrorists” in Pakistan. But Pakistani Foreign Minister Qureshi delivered a sharp protest to Ambassador Holbrooke the next day, warning him that the drone strikes are actually undermining Pakistan’s own counterterrorism strategy. This controversy is not taking place in a legal vacuum. American exceptionalist arguments have to be viewed in the context of established international law, which provides clear (and binding) rules on such “preemptive” strikes across international borders. The applicable rules are known as the principles of necessity and proportionality, and they were defined by the *Caroline* case, which stemmed from American popular support for an insurgency in Canada in 1837.

Following the American Revolution, Upper Canada (now Ontario) was largely settled by successive waves of immigrants from the United States. The migration began with about 7,000 United Empire Loyalists fleeing the Revolution, but these were followed by “late-Loyalists” attracted mainly by cheap land grants. The “late-Loyalists”
eventually outnumbered the original Loyalists by about ten-to-one. The
doubtful loyalties of this population led American members of
Congress to speculate that the annexation of Upper Canada to the
United States would be a “mere matter of marching.” But the British
government understood the vulnerability of its Canadian possessions,
and kept more troops on the Canadian border than anywhere else in the
British Empire throughout the nineteenth century (including this
writer’s great-great-great-grandfather from 1841 to 1847). The United
States eventually annexed more than half of Mexico, but none of
Canada.

William Lyon Mackenzie emigrated from Scotland to Upper
Canada, where he published a newspaper and won election to the
Colonial Assembly of Upper Canada as a radical reformer, campaign-
ing for Britain to delegate real power to Canada’s Colonial Assemblies.
After being twice expelled from the Assembly, he was elected the first
mayor of Toronto in 1834, and re-elected to his Assembly seat. When
his Reform Party lost the 1836 election, he lost patience with peaceful
reform and began planning an armed rebellion.

In 1837, the British garrison in Toronto was sent to fight a
rebellion in Lower Canada (Quebec), and MacKenzie took the
opportunity to march on Toronto with a rag-tag army of 400 men,
mostly farmers from the surrounding area. The British governor called
out the local militia, and enough men answered his call to outnumber
and defeat the rebels in a bloody battle at Montgomery’s Tavern.

MacKenzie and 200 rebels regrouped on Navy Island in British
territory on the Niagara River, and declared independence as the
Republic of Canada on December 13, 1837. MacKenzie toured Buffalo
and northern New York state, raising men and arms that were ferried
over to Navy Island from Schlosser on an American steamer named the
Caroline. The rebels brought over several cannons, and kept up
sporadic fire on Chippewa, inflicting some damage and a few casualties.

On December 29, 1837, a British boarding party crossed the river
at night in small boats and captured the Caroline at Schlosser, killing at
least one American, Amos Durfee. The British cut the Caroline loose,
towed her out into the current, set her on fire, and left her to drift down
the river. A contemporary newspaper depicted the fiery wreck tipping
over Niagara Falls, but later research suggested that it broke up and
sank before that. Two weeks later, the British attacked Navy Island and
defeated the rebels, but demands for reform forced the British to grant
Canada greater autonomy and led eventually to its post-colonial
dominion status.
The passions aroused by the *Caroline* incident on both sides of the border brought Britain and the United States to the brink of war. Like the American drone attacks in Pakistan and the Israeli attack on Gaza, the *Caroline* incident raised the fundamental question of how a government can legitimately respond to cross-border fire or attacks by irregular forces that the government of the neighboring territory is failing to prevent. The British claimed the right to cross into American territory to conduct a “preemptive” military operation to prevent further men and arms reaching the rebels on Navy Island, while Americans universally viewed this as an act of war and a violation of American sovereignty.

President Van Buren sent Major General Winfield Scott to Buffalo to discourage Americans from joining further attacks on Canada, but Britain and the United States remained at a diplomatic impasse for more than four years. To complicate matters further, American authorities arrested a Canadian named Alexander McLeod who claimed to have taken part in the raid, and a court in New York State put him on trial for the murder of Amos Durfee.

But powerful interests in both countries were eager to resolve the dispute. British bankers wanted to invest in the United States, and American land developers wanted British capital. Important matters like the border of Maine and New Brunswick and the disposition of Oregon also remained unresolved due to the diplomatic stand-off. Finally, in 1842, the British government sent Lord Ashburton, a senior partner in Barings Bank, to Washington to negotiate with the new U.S. Secretary of State, Daniel Webster. They exchanged several letters, and Ashburton eventually expressed his government’s regrets for the incident based on a definition of the relevant customary international law that Webster had included in a letter to the British government in 1841. Webster’s definition went as follows:

(The U.S. Government) does not think that that transaction can be justified by any reasonable application or construction of the right of self-defence under the laws of nations. It is admitted that a just right of self-defence attaches always to nations as to individuals, and is equally necessary for the preservation of both. But the extent of this right is a question to be judged of by the circumstances of each particular case, and when its alleged exercise has led to the commission of hostile acts within the territory of a Power at peace, nothing less than a clear and absolute necessity can afford ground of justification...

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

“All will see that if such things be allowed to occur, they must lead to
bloody and exasperated war.” Webster’s words defined what have since
been recognized in international law as the principles of necessity and
proportionality. His precise wording has been cited in subsequent cases,
in particular the “necessity of self-defense, instant, overwhelming,
leaving no choice of means, and no moment for deliberation,” and that
the action taken “must be limited by that necessity, and kept clearly
within it.” Perhaps most notably, the International War Crimes
Tribunal at Nuremberg cited the Caroline case as an established legal
precedent in rejecting the defendants’ claim that Germany’s invasion of
Norway was an act of preemptive self-defense. The judges also rejected
the claim that “Germany alone could decide … whether preventive
action was a necessity, and that in making her decision her judgment
was conclusive.” The Tribunal ruled that this “must ultimately be
subject to investigation and adjudication if international law is ever to
be enforced.”

The Caroline principles were also instrumental in the outcome of
the Fur Seal Arbitration case in 1893. The United States had seized and
confiscated fourteen British schooners that were illegally hunting seals
in the Bering Sea. The British government protested and the two
governments agreed to take the case to the international Tribunal of
Arbitration. The British representative to the Tribunal, Sir Charles
Russell, recounted the history of the Caroline case, and asserted that,
on that basis, the only circumstances in which such aggressive acts of
self-defense can be legitimate “are occasions of emergency … when there is no time for deliberation, no time for contrivance, no time for warning, no time for diplomatic expostulation. That is the very idea at the bottom of all these exceptional acts of self-defense or self-preservation.”

Russell went on, “…in such a case as the present, where there was no such instant overwhelming necessity of self-defense, where there was time for device of means, where there was time for deliberation, where there was time for diplomatic expostulation and representation … it is idle to try to treat this case as a case of necessary self-defence…” The Tribunal of Arbitration accepted his arguments and ordered the United States to pay $473,151.26 in compensation for the loss of the schooners.

On the other hand, there have been cases in which international bodies have ruled in favor of countries that took preemptive military action because they concluded that the conditions stipulated in the Caroline case had been met. Israel justified its raid on Entebbe Airport in Uganda in 1976 to the U.N. Security Council entirely on the basis of the Caroline principles. Israeli Ambassador Herzog told the Council, “The right of self-defense … can be applied on the basis of the classical formulation, as was done in the well-known Caroline case, permitting such action where there is a ‘necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation.’” Invoking the principle of proportionality, Herzog added, “… the means that were used were the minimum necessary to fulfill the purpose.” The Security Council accepted his arguments and took no action against Israel.

By applying the Caroline principles to the American drone attacks in Pakistan, it becomes clear that President Obama is not faced with an “instant” or “overwhelming” necessity of self-defense. Like the danger that the rebels on Navy Island posed to Canada in 1837, or that an independent Norway posed to Germany in 1940, the danger to the United States from terrorists in the Hindukush mountains is not “instant” or “overwhelming” but relates, as President Obama suggested, to what they may do in the future if they are allowed to maintain “safe havens” there. Far from having “no moment for deliberation,” the U.S. government has taken seven years since bin Laden and Al Qaeda allegedly fled into Pakistan to develop and deploy a “choice of means” that it did not even possess at that time. As with Guantanamo, the tragic fact that the U.S. government has spent seven years and billions of tax-payers’ dollars developing this illegal and deadly policy does not provide any legal justification for continuing it
now. The American “necessity of self-defense” is neither instant nor overwhelming, and it has permitted ample time for deliberation and a broad “choice of means” that includes diplomacy, intelligence sharing, and international cooperation between police forces. The present policy appears to fail not just one condition of Webster’s necessity test but every single part of it.

Cases of illegal detention at Guantanamo, Bagram, and CIA prisons have demonstrated that U.S. intelligence agents are often unable to distinguish terrorists from innocent civilians, even when they are shackled to the floor right in front of them and their mental capacity to resist interrogation has been methodically broken down by ruthless and sophisticated forms of torture. The drone pilots who fire missiles in Pakistan from computer terminals at Nellis Air Force Base (AFB) in Las Vegas operate at an infinitely greater remove from their victims and cannot possibly know for sure who they are firing at. Nellis AFB has been turned into a macabre casino, where grounded Air Force pilots gamble with the lives of unknown men, women, and children on the other side of the world. Using consoles modeled on Xbox and Playstation video game systems, they consign their unsuspecting victims to “a fate which fills the imagination with horror” with the push of a button.

During the U.S. invasion of Iraq, Rob Hewson, the editor of the arms trade journal *Jane’s Air-Launched Weapons*, assessed the accuracy of U.S. “precision” weapons at 75–80 percent, meaning that another 20–25 percent miss their targets by at least 10 meters. The impression created by the U.S. Department of Defense and corporate media outlets that these weapons can be used to surgically “zap” one house in a civilian area without harming innocent people is therefore an artful blend of propaganda and science fiction. Even if the United States could somehow show a necessity for some sort of preemptive military action in Pakistan, the means it has chosen would appear to fail Webster’s proportionality test by a very wide margin, to say nothing of more general prohibitions against the use of military force in predominantly civilian areas.

The remarkable thing about Mr. Bush’s and now Mr. Obama’s efforts to ignore the Caroline principles in their response to insurgency and terrorism is that these principles were originally formulated in that very context, as the history of the Caroline incident demonstrates. The argument that terrorism, which led to the establishment of these principles in the first place, has now rendered them obsolete or inadequate is a non-sequitur, and officials who
make this argument are either tragically ignorant of history and international law or cynically intent on deceiving the public, or some combination of both.

In its recent report on terrorism, counterterrorism, and human rights, a panel convened by the International Commission of Jurists (ICJ) and headed by former UN Human Rights Commissioner and president of Ireland Mary Robinson explained that the U.S. government has confused the public by framing its counterterrorism activities within a “war paradigm.” A legal state of war between nations, in which the laws of war apply, is quite different from the rhetorical use of the term “war,” as in the “war on terror,” the “war on drugs,” or the “war on obesity,” which does not provide a legal basis for indefinite detention, let alone torture or the illegal use of military force across international borders.

The ICJ Eminent Jurists Panel found that,

The U.S.’ war paradigm has created fundamental problems. Among the most serious is that the U.S. has applied war rules to persons not involved in situations of armed conflict, and in genuine situations of warfare, it has distorted, selectively applied and ignored otherwise binding rules, including fundamental guarantees of human rights laws.

These “binding rules” and “fundamental guarantees” include the Caroline principles of necessity and proportionality, as well as the Third and Fourth Geneva Conventions, the International Covenant on Civil and Political Rights, the U.S. War Crimes Act and Uniform Code of Military Justice, and the entire body of international law governing war and human rights.

The ICJ panel concluded that, contrary to the claims of the U.S. government, the established principles of international law “were intended to withstand crises, and they provide a robust and effective framework from within which to tackle terrorism.” Any effort to “root out safe havens for terrorists” in Pakistan must therefore be governed by the same principles of necessity and proportionality that U.S. Secretary of State Daniel Webster stipulated to the British government in 1841, and which have since gained universal recognition as binding customary international law. These principles require the United States to end its campaign of illegal drone strikes against Pakistan, and to find less dramatic and more effective means of tackling the crisis that its reliance on inappropriate military action has created and continues to exacerbate in that part of the world.
RECOMMENDED READINGS


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