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# Regulating Resort to Force: Form and Substance of the UN Charter Regime

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## Abstract

*Much of the international legal debate about regulating force and self-defence takes place on a substantive axis, focusing on the scope of force prohibitions and exceptions. This article instead focuses on their doctrinal form, or modes of argumentation and analysis through which facts are assessed in relation to legal directives, to illuminate how many of the assumptions about substantive policy goals and risks tend to be coupled with other assumptions about the way international law operates in this field. It shows that the flexible, adaptable standards favoured by some states, scholars, and other international actors and the fixed rules and processes favoured by others reflect not only competing assessments of threats and the policy utility of force wielded beyond the Security Council's authorization, but also different sets of interlocking, foundational assumptions about international law and the conditions for its effectiveness. These include differences over how legal-doctrinal form relates to external enforcement pressures and how it generates compliance pull within states. This article shows that exposing and prising apart some assumptions underlying doctrinal orientations – assumptions that are usually obscured or overshadowed when debates are framed in terms of substantive permissiveness versus stringency – opens and clarifies options for reforming the legal regime regulating force, and it proposes avenues of further analysis of doctrinal form in this area.*

## 1 Introduction

The United Nations (UN) Charter generally prohibits the use or threat of force except pursuant to UN Security Council authorization or in self-defence to armed attacks. It is widely agreed that contemporary threats – such as weapons of mass destruction (WMD) proliferation, non-state terrorism, and large-scale human rights atrocities

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– pose challenges for the UN Charter regime, but it is hotly contested how the law should be interpreted to meet them.

Much of the legal debate – among states, scholars, and other international actors – takes place on a substantive axis, focusing on the scope of force prohibitions and exceptions. Are exceptions to the prohibition on force too tightly drawn or too loosely drawn? Is the UN Charter regime too strict or too permissive to meet new security challenges? Is the Security Council's collective security decision-making capable of dealing with contemporary threats and, if not, is greater authority for unilateralism the answer or is that an even greater threat? Such substantive policy debate tends to dominate discussion.

This article looks at the problem differently. It concentrates less on the substantive policy content of the legal prohibitions and exceptions than on their doctrinal *form*, by which I mean modes of argumentation and analysis through which facts are assessed in relation to legal directives, and it draws on some of the theory and conceptual categorization of doctrinal form in scholarship so common to other areas of law. Focusing on doctrinal form illuminates how many of the assumptions about substantive policy goals and risks tend to be coupled with other assumptions about the way international law operates in this field, and it surfaces questions of whether the structure of legal argumentation in this area merely masks substantive policy agendas or can help in constraining or shaping them.

Within the legal discourse of states, scholars, and other actors in the international system two main orientations emerge with respect to how legal argument and justification of resort to force outside the UN Security Council should be structured. Adherents to one orientation, whom I term 'Bright-Liners', favour governing states' legal authority to use force unilaterally<sup>1</sup> by clear and rigid rules that admit little case by case discretion. Adherents to another orientation, whom I term 'Balancers', argue that the legality of unilateral resort to force should be judged by objective but flexible standards that call for weighing contextual factors, thereby vesting in states some discretion to account for competing values. To take a very timely example as of this writing, if Israel were to take military action against Iran's alleged nuclear weapons programme sites, should that action be judged in relation to a set of fairly fixed points, such as whether Iran is on the immediate verge of attacking Israel (Bright-Liners), or in relation to a standard of reasonableness, further defined in terms of context-sensitive factors like necessity and proportionality (Balancers)?

As explained further below, by 'flexible' standards and 'discretion' associated with Balancers I do not mean an understanding of law as any less binding than that envisioned by Bright-Liners. I mean a legal-doctrinal method that requires appraisal of complex situations in light of principles and criteria, rather than sharp lines. Put another way, it is not to suggest a balancing of legality versus other imperatives, but to suggest that interpreting legal boundaries in a specific case sometimes requires internal balancing of contextual variables and competing principles.

<sup>1</sup> I use the term 'unilaterally' here not in the sense of states acting on their own, rather than as part of a multi-state coalition, but to mean actions outside the UN SC's collective decision-making process.

This is also not to suggest that Bright-Liners' and Balancers' respective preferences for rigid rules versus elastic standards reflect a universal or abstract normative commitment to one particular doctrinal mode or formula. Quite the contrary; framing the issue in these terms exposes something of a puzzle, insofar as when it comes to the UN Security Council's authority, the doctrinal preferences associated with these orientations invert: in that context, Bright-Liners are usually quite comfortable with discretion bounded by flexible standards and Balancers are distrustful of how it will be exercised. As to states' authority to use force beyond circumstances authorized by the Security Council, though, a conceptual cleavage over form emerges with respect to regulating force that is quite consistent across different types of threats.

By dissecting the debate between Bright-Liners and Balancers into its component parts, this article argues that beneath the exterior of substantive disagreements about the proper content and form of the UN Charter regime also lie deep divisions about the very nature of international law in this area and conditions for its effectiveness. It is not to defend one orientation or the other,<sup>2</sup> but instead to map the critical assumptions of each in order better to understand some ways in which legal-doctrinal form matters with regard to regulating force and to explore the normative implications and stakes of this debate.

Institutional setting is critical to this analysis. Legal regulation of resort to force is largely decentralized, relying heavily on individual states and, increasingly, non-state actors (including non-governmental and supranational organizations) for application and enforcement. Sometimes the UN Security Council formally adjudicates on the legality of force, either authorizing it or condemning it, and therefore providing centralized and authoritative appraisal. And occasionally other formal UN organs or international organizations opine on the legality of force. For the most part, however, application and enforcement of international law are decentralized, occur outside formal international institutions, and remain largely the province of states. Legal scholars and political scientists have recently turned their attention to the interaction between the substance, structure, and institutional context of international law,<sup>3</sup> and this article seeks to illuminate those relationships specifically with respect to use of force.

Power politics is also integral to these debates, and this analysis is therefore part of a larger conversation about whether legal method and politics can ever really be prised apart. It is no accident that the United States and those who view its military might favourably – whether in terms of advancing narrow state interests or promoting global order and justice – tend to be Balancers; those who worry about such power and seek to constrain it (or who fear being targets of it) tend to be Bright-Liners. That

<sup>2</sup> To be clear about my own biases, I have argued previously in favour of balancing: see M.C. Waxman, *Intervention To Stop Genocide and Mass Atrocities: International Norms and U.S. Policy* (2009) (advocating the possibility of legal intervention to stop mass atrocities without UN SC authorization); Waxman, 'The Use of Force Against States that Might Have Weapons of Mass Destruction', 31 *Michigan J Int'l L* (2009) 1 (advocating an objective reasonableness approach to precautionary self-defence against WMD threats).

<sup>3</sup> See Abbott *et al.*, 'The Concept of Legalization', 54 *Int'l Org* (2000) 401, at 413–414; Raustiala, 'Form and Substance in International Agreements', 99 *AJIL* (2005) 581, at 589.

is not simply because, as some might assume, bright lines are inherently stricter or more binding than flexible standards, though. They are not. This article helps one better to understand the relationship between power politics and doctrinal form,<sup>4</sup> while in doing so it also shows that form is independently significant.

To be clear, there are many ways to slice analytically the major debates about *jus ad bellum* and the UN Charter regime, and I am not arguing that the choice of doctrinal form is the best or most important. The Bright-Liner-versus-Balancer debate correlates closely with other divides: restrictive-versus-permissive limits on force, collectivism-versus-sovereignty/unilateralism, idealism-versus-realism. My point is that parsing debates in terms of doctrinal form highlights some additional work that proponents believe legal clarity and rigidity or contextualized legal flexibility can do – work that is often obscured by those more common analytical frames. If choices about doctrinal form matter in ways asserted by participants in this *jus ad bellum* sub-debate, then this analysis helps in understanding how legal argumentation may shape international actors' behaviour and in assessing options for legal reform. Even if one remains unpersuaded that doctrinal form matters, then this analysis exposes how proponents of competing legal viewpoints use arguments about doctrinal structure to promote their ideological or policy agendas.

Section 2 catalogues debates between Bright-Liners and Balancers in three highly contested doctrinal areas related to force: anticipatory self-defence against WMD threats, humanitarian intervention to stop mass atrocities, and resort to force against non-state terrorist actors. Section 3 relates doctrinal form to substance, showing that the flexible, adaptable standards favoured by Balancers and fixed rules and processes favoured by Bright-Liners reflect competing assessments of threats and the policy utility of force wielded beyond the Security Council's authorization – competing policy judgements that have tended to dominate debate. This analysis depends heavily on institutional setting, so the debate about doctrinal form and use of force is very different from seemingly similar debates about bright-line rules versus elastic standards in domestic law settings.

Section 4 shows that Bright-Liners' emphasis on clear rules and processes and Balancers' emphasis on flexible standards reflect different sets of interlocking, foundational assumptions about international law and the conditions for its effectiveness. These include differences over how legal form relates to external enforcement pressures and how it generates compliance pull within states.

With those differences in mind, section 5 looks forward and considers the normative implications of these insights. It argues that exposing and pulling apart some assumptions underlying Bright-Liners' and Balancers' orientations – assumptions that are usually obscured or overshadowed when legal debates are framed in terms of substantive permissiveness or stringency – opens or clarifies options for reforming the legal regime regulating force, and this section proposes avenues of further analysis of

<sup>4</sup> Cf. Corten, 'The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate', 16 *EJIL* (2005) 803 (showing that doctrinal analysis of uses of force reflects methodological assumptions that are tied to power relations).

doctrinal form – or reform – in this area. Because institutional setting so powerfully drives debate between Bright-liners and Balancers, this section concludes by predicting that evolution of that setting will in turn shape future debate about doctrinal form.

## 2 Regulating Resort to Force: Contemporary Debates

The UN Charter prohibits ‘the threat or use of force’,<sup>5</sup> but it expressly recognizes two sets of circumstances in which force is permitted. Firstly, Chapter VII directs that the UN Security Council shall have authority to authorize measures, including the use of force, to protect peace and security.<sup>6</sup> Secondly, Article 51 states that ‘[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs’.<sup>7</sup> Debates about the meaning of these provisions often include preferences about doctrinal form.

### A *Bright-Liners Versus Balancers*

Since the Charter’s founding, questions have abounded as to the scope of the self-defence exception and whether other grounds besides armed attacks might justify resort to force.<sup>8</sup> During the Cold War, international legal discourse about force was almost entirely refracted through superpower rivalries, while collective security administered through the UN Security Council was impossible due to East–West enmities and suspicions of unilateralism were largely subordinated to broader geostrategic agendas.<sup>9</sup> Since the UN Security Council’s liberation from Cold War paralysis, most contemporary legal debates about resort to force beyond UN Security Council authorization – that is, as an exception to the presumptive default of collective Charter remedies – include preferences for rigid, codified rules (advocated by Bright-Liners) versus context-adaptive standards (advocated by Balancers).

Institutional setting is crucial to this debate. To a great degree, application and enforcement of international law regarding resort to force is decentralized, occurs outside formal international institutions, and remains largely the province of states.<sup>10</sup>

Arguably, the UN Charter and its drafters originally envisaged much greater centralization and formalization. The self-defence provisions of Article 51 could be read to grant a temporary right of self-defensive action until the Security Council

<sup>5</sup> UN Charter, Art. 2(4), reads: ‘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.’

<sup>6</sup> UN Charter, Arts. 39, 42.

<sup>7</sup> UN Charter, Art. 51.

<sup>8</sup> See Schachter, ‘The Right of States to Use Armed Force’, 82 *Michigan L Rev* (1984) 1620, at 1624.

<sup>9</sup> See Caron, ‘The Legitimacy of the Collective Authority of the Security Council’, 78 *AJIL* (1993) 552, at 553.

<sup>10</sup> See T.M. Franck, *Recourse to Force* (2002), at 6–7; Schachter, ‘In Defense of International Rules on the Use of Force’, 53 *U Chicago L Rev* (1986) 113, at 121–122.

intervenes,<sup>11</sup> and Article 43 seemed to envisage that states would make available to the Security Council significant stand-by military capabilities to fulfil its peace and security duties.<sup>12</sup> This vision went unfulfilled, and during most of the Cold War, East–West rivalries and profligate use of vetoes neutralized the Security Council’s collective decision-making system.<sup>13</sup>

From the 1990s onward, the UN Security Council has either authorized or condemned force in a wide range of situations,<sup>14</sup> thereby providing centralized and authoritative appraisal respected by Bright-Liners and Balancers alike – and breathing new life into normative visions of the Charter regime with a strong collective security component. Such centralized decisions authorizing, disapproving, or condemning force are still infrequent, though, relative to the frequency of security crises and military engagements or threats, and they effectively exclude judgements against all of the five veto-wielding permanent members.<sup>15</sup>

On rare occasions other UN organs, in particular the General Assembly or the International Court of Justice (ICJ), or regional organizations opine on the legality of force, though their authoritative force is limited (in the General Assembly’s case because its Charter mandate does not confer substantial responsibility; in the ICJ’s case because its decisions are advisory or are generally not considered universally binding; and in regional organizations’ case because the UN Charter subordinates their authority to the Security Council).<sup>16</sup> States parties to the Rome Statute of the International Criminal Court (ICC) recently decided to consider operationalizing that tribunal’s jurisdiction over crimes of ‘aggression’, though it remains unclear when, if ever, this will occur and any such jurisdiction would be highly circumscribed.<sup>17</sup>

For the most part, then, law regarding resort to force is applied and enforced outside formal international adjudicative mechanisms, through appraisal by individual states and, to some extent, non-governmental and international organizations that wield informal influence in shaping expectations and opinion among domestic and international audiences. Two major orientations with regard to doctrinal form emerge within this institutional context.

The Bright-Liner approach finds expression among many states<sup>18</sup> and influential, contemporary international law scholars,<sup>19</sup> as well as in some recent decisions of the

<sup>11</sup> Art. 51 reads: ‘Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, *until the Security Council has taken measures necessary to maintain international peace and security*’ (emphasis added).

<sup>12</sup> Art. 43(1) states: ‘All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call ... armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.’

<sup>13</sup> See Franck, ‘Collective Security and UN Reform: Between the Necessary and the Possible’, 6 *Chicago J Int’l L* (2006) 597, at 601.

<sup>14</sup> See Caron, *supra* note 9, at 553.

<sup>15</sup> See Murphy, ‘Protean *Jus Ad Bellum*’, 27 *Berkeley J Int’l L* (2009) 22, at 37–38.

<sup>16</sup> See *ibid.*, at 47–49.

<sup>17</sup> See Crook, ‘U.S. Delegation Active in ICC Negotiations to Define Crime of Aggression’, 104 *AJIL* (2010) 511.

<sup>18</sup> See C. Gray, *International Law and the Use of Force* (3rd edn, 2008), at 118.

<sup>19</sup> See *infra* sect. 2B and accompanying text for examples of such academic viewpoints; see also Y. Dinstein, *War, Aggression and Self-Defense* (3rd edn, 2001), at 166–168 (arguing that the Charter’s drafters intended



ICJ and the report of the UN High-Level Panel on Threats, Challenges, and Change.<sup>20</sup> While giving broad discretion to the UN Security Council – a process that although internally quite unconstrained can yield clear directives – Bright-Liners generally argue that any use of force beyond that authorized by the UN Security Council should be regulated by sharp lines, or rules that admit very little discretionary balancing by individual states (whether those contemplating or using force or those judging it).<sup>21</sup>

To Bright-Liners, the legality of resort to force by individual states or groups of states should operate as an on–off switch, flipped by the manifestation of readily identifiable factual preconditions, not shaded or uncertain assessments. Their preferred doctrinal formulas are ‘bright’ in several senses.<sup>22</sup> First, authority to use force is triggered by specific and easily recognizable factual or procedural conditions (that is, either some pre-defined contingency occurs or the UN Security Council authorizes force). Secondly, the legality or illegality of an action at any given time is quite clear and widely recognized and agreed upon among states and other international actors.<sup>23</sup> Even though the UN Security Council’s mandate is broad and substantively flexible, its outcomes – like satisfaction of a rule – are externally bright in these respects: to states contemplating force or to actors judging the legality of force, a Security Council vote is easily identified without resorting to weighing various factors and principles, and it is universally recognizable and authoritative. Those of this orientation want authorized exceptions to Security Council approval, such as self-defence contemplated by Article 51, to be similarly bright – and therefore ‘subject to the discipline of quick fact-checking by the rest of the world’.<sup>24</sup>

Balancers, by contrast, view legality of resort to force as more like a dimmer knob than an on–off switch. This approach finds favour today among some powerful states (especially, but not limited to, the United States), whose practice and expressions of

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Art. 51 as a restrictive rule); Lobel, ‘American Hegemony and International Law: Benign Hegemony? Kosovo and Article 2(4) of the U.N. Charter’, 1 *Chicago J Int’l L* (2000) 19, at 19 (‘The drafters of the U.N. Charter attempted to create a bright-line rule limiting the use of force’).

<sup>20</sup> The Secretary-General, *A More Secure World: Our Shared Responsibility: Report of the High-Level Panel on Threats, Challenges and Change*, para. 190, UN Doc A/59/565 (2 Dec. 2004), available at: [www.un.org/secureworld/report.pdf](http://www.un.org/secureworld/report.pdf) (hereinafter UN High-Level Panel).

<sup>21</sup> See Kaye, ‘Adjudicating Self-Defense: Discretion, Perception, and the Resort to Force in International Law’, 44 *Columbia J Transnat’l L* (2005) 134, at 145–146 (discussing efforts by international lawyers to portray the UN Charter regime as a set of clear rules). Bright-Liners’ differences with Balancers is reflected in the ICJ’s *Oil Platforms* judgment, in which it explained, ‘the United States claims that it considered in good faith that the attacks on the platforms were necessary to protect its essential security interests, and suggests that “A measure of discretion should be afforded to a party’s good faith application of measures to protect its essential security interests”’. The ICJ disagreed and went on to state that ‘the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any “measure of discretion”’: *Oil Platforms (Iran v. US)* [2003] ICJ Rep 161, at para. 73.

<sup>22</sup> This is also not to suggest that Bright-Liners’ and Balancers’ respective preferences for rigid rules versus elastic standards reflect a universal or abstract normative commitment to one particular doctrinal mode or formula. Among scholars, e.g., adherents to these orientations usually do so in the context of fuller theory of law or international law in which the advantages of bright-line rules or flexible standards are only one consideration and might be outweighed by others in any given context.

<sup>23</sup> See Henkin, ‘Use of Force: Law and U.S. Policy’, in L. Henkin *et al.* (eds), *Right v. Might* (1991), at 37, 62.

<sup>24</sup> Franck, *supra* note 13, at 607.

*opinio juris* reflect this perspective,<sup>25</sup> as well as some influential American scholars.<sup>26</sup> Objective reasonableness is the touchstone for Balancers.<sup>27</sup> Although recognizing that UN Security Council authorization is always *per se* reasonable – indeed, they generally insist that it remains the preferred form of legal authority for both strategic reasons and added legitimacy stemming from collective action – they believe additional, exceptional legal authority and discretion is needed, and they are sceptical that clear rules governing those exceptions are viable or desirable.

Instead, Balancers believe that use of force beyond that authorized by the Security Council should be regulated by flexible standards that take account of contextual factors and the various policy interests animating international law, and that this approach better reflects state practice.<sup>28</sup> Abraham Sofaer argues, for example, that the United States and its allies should – and do – assess the legality of force in terms of reasonableness, taking into account factors such as the magnitude of the threat, its probability of occurring, exhaustion of peaceful alternatives, and consistency with the underlying purposes of the UN Charter.<sup>29</sup> Formulations like these are not ‘bright’ in either sense demanded by Bright-Liners: they require balancing of value judgements rather than reliance on readily identifiable factual or procedural conditions, and they produce conclusions that may be highly contestable in good faith (e.g., Balancers disagree among themselves about whether the 2003 Iraq war could be defended as reasonable self-defence, especially in light of differing assessments of the likelihood that WMD threats from Iraq would materialize<sup>30</sup>).

To be clear, these two orientations – Bright-Liners and Balancers – actually represent segments along a spectrum of possible views, rather than two discrete and dichotomous points, and they do not reflect a general normative commitment to one particular doctrinal mode across all areas of law. As illustrated further in the next section, no one adopts the most extreme position of absolute, rigid, and fixed rules or

<sup>25</sup> See Mathias, ‘The United States and the Security Council’, in N. Blockker and N. Schrijver (eds), *The Security Council and the Use of Force* (2005), at 173, 187; Taft IV and Buchwald, ‘Preemption, Iraq, and International Law’, 97 *AJIL* (2003) 557, at 557.

<sup>26</sup> See *infra* sect. 2B and accompanying text for examples of such academic viewpoints; see also Coll, ‘The Limits of Global Consciousness and Legal Absolutism: Protecting International Law from some of its Best Friends’, 27 *Harvard Int’l LJ* (1986) 599, at 608–609; Reisman, ‘Assessing Claims to Revise the Laws of War’, 97 *AJIL* (2003) 82, at 82.

Among an earlier generation of scholars, Julius Stone expressed scepticism about efforts to define aggression with bright-line rules, referring to such efforts as a mechanistic, ‘push-button’ approach: J. Stone, *Aggression and World Order* (1958), at 11–12. Myres McDougal and Florentino Feliciano agreed that the lawfulness of coercion should turn on variable factors and policies that, depending on context, rationally bear upon state decision-making: M.S. McDougal and F.P. Feliciano, *Law and Minimum World Public Order* (1961), at 151–153.

<sup>27</sup> See McDougal and Feliciano, *supra* note 26, at 217 (calling for context-based reasonableness analysis in regulating resort to force).

<sup>28</sup> See J. Brunnée and S.J. Toope, *Legitimacy and Legality in International Law* (2010), at 290.

<sup>29</sup> Sofaer, ‘International Security and the Use of Force’, in R.A. Miller and R.M. Bratspies (eds), *Progress in International Law* (2008), at 541.

<sup>30</sup> Compare Sofaer, ‘On the Necessity of Pre-Emption’, 14 *EJIL* (2003) 209, at 224, with M. Doyle, *Striking First: Preemption and Prevention in International Conflict* (2008), at 90–92.



exclusive reliance on flexible standards – in the end, each incorporates some elements of the other’s preferred form. Bright-Liners ultimately admit some discretionary balancing in their analysis: even once a bright line of self-defence is tripped, for example, states are bound by fluid necessity and proportionality standards. Balancers generally give great, even if not dispositive, weight to satisfaction of bright-line rules in their assessments, and they may ultimately desire to see refinement of specific legal criteria to bring standards closer to bright-line rules.

Furthermore, there are important differences and subtle variations within each orientation,<sup>31</sup> as well as other doctrinal formulations and prominent accounts, including that doctrinal form is largely irrelevant altogether.<sup>32</sup> Those coming from a viewpoint strongly rooted in realist international relations theory or in Critical Legal Studies, for example, might dismiss distinctions in doctrinal form as essentially immaterial, either because they believe neither meaningfully constrains state security policy or because either one is very linguistically and argumentatively malleable. The Bright-Liner and Balancer orientations represent, however, the most influential doctrinal form viewpoints among those who take international legal regulation of force seriously, and the following examples illustrate how the two idealized orientations compete across several major international legal disputes about resort to force and contemporary security threats.

## B Contemporary Debates

Disagreements between Bright-Liners and Balancers have manifested themselves recently in many strands of doctrine regarding resort to force. Both agree that WMD proliferation, large-scale and brutal deprivations of human rights, and powerful non-state actors pose challenges for a UN Charter regime designed with conventional, interstate military threats in mind. They disagree not only about appropriate boundaries for responding to these types of threats with force but how those boundaries should be articulated and assessed doctrinally.

### 1. Anticipatory Self-defence and WMD

As a textual matter, Article 51 of the Charter reads as a bright-line rule: ‘[n]othing in the present Charter shall impair the inherent right of ... self-defence if an armed attack occurs’.<sup>33</sup> An armed attack is often (though not always) an easily identifiable trigger

<sup>31</sup> Franck, e.g., sees the UN Charter as more adaptive than many other Bright-Liners do: see generally Franck, *supra* note 10. Some scholars’ preference of form depends on the specific type of force at issue. Harold Koh, e.g., has argued in favour of bright-line rules with regard to self-defence but is sympathetic to flexible standards with regard to humanitarian intervention: see Koh, ‘Comment’, in Doyle, *supra* note 30, at 101, 106–107.

<sup>32</sup> See, e.g., M.J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism After Kosovo* (2001) (arguing that international law in this area fails to constrain power politics); M. Koskeniemi, *From Apology to Utopia* (2nd edn, 2005), at 590–595 (critiquing international legal doctrine and argumentation in this area as manipulable).

<sup>33</sup> UN Charter, Art. 51.

that should, at least in theory, eliminate uncertainty as to its application in specific circumstances.<sup>34</sup>

It is widely agreed, however, that resort to force is also permitted in anticipation of an imminent attack – a formula in which imminence derives from the principle of necessity. The classic formulation drawn from US Secretary of State Daniel Webster's 1830s exchange with his British counterparts over *The Caroline* incident holds that resort to force is permitted without waiting to suffer a first blow, so long as a threat is 'instant, overwhelming, and leaving no choice of means, and no moment for deliberation'.<sup>35</sup> In recent years, the strict anticipatory self-defence formula has come under strain in light of WMD proliferation, especially nuclear arsenals.

Historically, conventional military threats often manifested themselves with visible signals of enemy mobilization, giving threatened states some time to take forceful action in advance. By contrast, WMD threats, especially nuclear ones, pose a different array of dangers. These include very low-probability but very high-magnitude dangers of an aggressive strike, as well as the very high-probability but difficult to measure risk of their implicitly threatened use, which may allow states possessing them more aggressively to wield other forms of violence and coercion such as terrorism.<sup>36</sup> Both dangers pose significant threats to other states, but neither need be accompanied by visible signals of mobilization, providing a last clear opportunity window to respond. Combined with these weapons' catastrophic potential and the limits of protective means after an attack has commenced, that feature of some WMD arsenals severely restricts the opportunities for self-defence afforded by the traditional concept of imminence. How, if at all, should international law adjust in regulating anticipatory self-defensive force?

Bright-Liners argue for retaining the strict temporal imminence requirement, which one might point out involves some weighing of contextual factors but is still relatively clear-cut.<sup>37</sup> A strict imminence requirement, they argue, not only filters out cases in which self-defensive force is unnecessary but it avoids the need to weigh competing imperatives (including each state's right to remain free from threat or attack), and it is susceptible to relatively straightforward factual determination *ex ante* and adjudication *ex post*.<sup>38</sup> Unless a military threat – even a nuclear one – is temporally specific and

<sup>34</sup> See Weiner, 'The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?', 59 *Stanford L Rev* (2006) 415 (arguing that the UN Charter was drafted specifically to replace state discretion based on flexible standards with bright line rules); see also Glennon, 'The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter', 25 *Harvard J L & Public Policy* (2002) 539, at 546 ('Drawing the line at the precise point of an armed attack, an event the occurrence of which could be objectively established, served the purpose of eliminating uncertainty').

<sup>35</sup> Letter from Daniel Webster, US Sec'y of State, to Lord Ashburton, British Plenipotentiary (6 Aug. 1842), quoted in J.B. Moore, *A Digest of International Law* (1906), ii, s. 217, at 412.

<sup>36</sup> See Waxman, *supra* note 2, at 9–10.

<sup>37</sup> See, e.g., Lobel, 'Preventive War and the Lessons of History', 68 *U Pittsburg L Rev* (2006) 307, at 312; Joyner, 'Jus Ad Bellum in the Age of WMD Proliferation', 40 *George Washington Int'l L Rev* (2008) 233, at 256 ('The strength of Article 51 as currently textually constructed is its clarity, in establishing a "bright line" rule for unilateral self-defense'); see also O. Corten, *The Law Against War* (trans. C. Sutcliffe, 2010), at 435–443 (denying the expansion of the self-defence doctrine to deal with WMD threats).

<sup>38</sup> See Gray, *supra* note 18, at 215 (arguing that widening the concept 'deprives the requirement of "imminence" of any content'); cf. Posner and Sykes, 'Optimal War and Jus Ad Bellum', 93 *Georgetown LJ* (2005)

immediate, so discretion is tightly constrained, the Security Council should retain a monopoly of legal resort to force.<sup>39</sup>

Balancers, on the other hand, argue that the legal requirement of imminence must be replaced with more flexible standards<sup>40</sup> or should be interpreted more elastically to account for the security context of proliferated WMD.<sup>41</sup> They seek to adapt use of force rules to the unique challenges of WMD threats and proliferation, while maintaining fidelity to the imminence requirement's core purposes of constraining the use of force except when other options have been exhausted and when waiting poses an unacceptable risk that opportunities to eradicate the threat will close. Even if continuing to frame their self-defence inquiry in terms of 'imminence', most Balancers would consider relevant at least such factors as the nature and magnitude of threat in determining reasonableness.<sup>42</sup>

In sum, both Bright-Liners and Balancers recognize that WMD proliferation poses new security threats, but Bright-Liners seek to contain legal resort to force to narrow and readily-identifiable instances of temporally imminent threats or UN Security

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993, at 1000 (explaining rationales behind imminence requirement as helping to ensure that force is only used as a last resort and to guard against false positives).

<sup>39</sup> See UN High Level Panel, *supra* note 20, at paras 189–191; Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium', 100 *AJIL* (2006) 88, at 104; see also Henkin, 'War and Terrorism: Law or Metaphor', 45 *Santa Clara L Rev* (2005) 817, at 825 (arguing that 'measures of preventive, preemptive self-defense are not permitted under the U.N. Charter, however reasonable the fear – except if authorized by the U.N. Security Council').

<sup>40</sup> See, e.g., Doyle, *supra* note 30, at 17–25; Feinstein and Slaughter, 'A Duty to Prevent', 83 *Foreign Affairs* (2004) 136.

<sup>41</sup> See, e.g., Slocombe, 'Force, Pre-Emption and Legitimacy', 45 *Survival* (2003) 117, at 125; Elizabeth Wilmshurst, Chatham House, *Principles of International Law on the Use of Force by States in Self-Defense* (2005), at 9, available at: [www.chathamhouse.org/publications/papers/view/108106](http://www.chathamhouse.org/publications/papers/view/108106). Michael Reisman and Andrea Armstrong argue that this balancing view is more reflective of contemporary practice among some major states than Bright-Liners usually credit: see Reisman and Armstrong, 'The Past and Future of the Claim of Preemptive Self-Defense', 100 *AJIL* (2006) 525, at 538–544. See also 21 Apr. 2004, Parl. Deb., HL (2004) 370 (statement of Lord Goldsmith, explaining the British government's position that '[t]he concept of what constitutes an "imminent" armed attack will develop to meet new circumstances and new threats'), available at: [www.publications.parliament.uk/pa/ld200304/ldhansrd/vo040421/text/40421-07.htm](http://www.publications.parliament.uk/pa/ld200304/ldhansrd/vo040421/text/40421-07.htm); Tange, 'Netherlands State Practice for the Parliamentary Year 2004–2005', [2006] *Netherlands Yrbk Int'l L* 233, at 328 (reporting the Dutch government's view, agreeing with that of the US government, that emerging threats including WMD and terrorism require the adjustment of the concept of imminence with respect to legal pre-emptive self-defence).

Many developing states take a very negative view of expanded anticipatory self-defence doctrine. In 2004, the Organization of the Islamic Conference, e.g., 'condemned once again the principle of pre-emptive military strikes against any country under any pretext whatsoever': Final Communiqué of the Thirty-First Session of the Islamic Conference of Foreign Ministers, at para. 41 (16 June 2004), reprinted in UN Doc A/58/856-S/2004/582.

<sup>42</sup> See, e.g., Sofaer, *supra* note 30. As Christopher Greenwood puts it, in assessing imminence 'it is necessary to take into account ... factors that did not exist at the time of the *Caroline* incident', including the quantum of harm posed by WMD and the impossibility for a state 'to afford its population any effective protection once the attack has been launched': see Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq', 4 *San Diego Int'l LJ* (2003) 7, at 16. Therefore, he concludes, a WMD threat 'can reasonably be treated as imminent in circumstances where an attack by conventional means would not be so regarded': *ibid.*; see also Bethlehem, 'International Law and the Use of

Council-sanctioned action, whereas Balancers weigh contextual factors including the special characteristics of WMD and their delivery mechanisms. Sometimes the insistence by both Bright-Liners and some Balancers that the necessary condition remains ‘imminence’ allows them to paper over differences at the surface, but one orientation views imminence as a fixed point while the other views it elastically to account for context.

## 2. Humanitarian Intervention

Human rights law sits in tension with strict notions of state sovereignty, and the idea that the international community has an interest in how states treat their own people within their own borders raises questions as to whether military intervention to save populations from mass atrocities is ever legal. In recent decades it has become generally accepted – especially after UN-authorized interventions in Haiti, Somalia, Bosnia, and, recently, Libya – that widespread atrocities occurring within states may pose threats to peace and security warranting Security Council action.<sup>43</sup> Is that the only legal ground upon which armed humanitarian intervention may rest, in the absence of a state’s consent?

Bright-Liners argue yes, that humanitarian intervention is prohibited absent UN Security Council authorization.<sup>44</sup> ‘Under the UN Charter system ... respect for human rights and self-determination of peoples, however important and crucial it may be, is never allowed to put peace in jeopardy’, they generally argue.<sup>45</sup> ‘One may like or dislike this state of affairs, but so it is under *lex lata*.’<sup>46</sup> This flat prohibition outside the UN Security Council operates as a bright-line rule, admitting no legal discretion otherwise on the part of individual states to intervene to combat mass atrocities.<sup>47</sup>

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Force: The Law As It Is and As It Should Be’, written evidence submitted to the UK Parliamentary Select Committee on Foreign Affairs, 7 June 2004, at para. 35, available at: [www.publications.parliament.uk/pa/cm200304/cmselect/cmcaff/441/4060808.htm](http://www.publications.parliament.uk/pa/cm200304/cmselect/cmcaff/441/4060808.htm) (‘it would in my view be appropriate to begin to think beyond imminence to reasonable foreseeability, ie, away from temporal notions of threat and towards action required to neutralise the risk of catastrophic harm’).

<sup>43</sup> See G. Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (2008), at 134.

<sup>44</sup> See Dinstein, *supra* note 19, at 85–86; A. Cassese, ‘Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community’, 10 *EJIL* (1999) 23; Goodman, ‘Humanitarian Intervention and Pretexts for War’, 100 *AJIL* (2006) 107, at 108; Schrijver, ‘Challenges to the Prohibition to Use Force: Does the Straitjacket of Article 2(4) UN Charter Begin to Gall to Much?’, in Blockker and Schrijver (eds), *supra* note 25, at 31, 39.

At their 2000 ministerial conference, the Non-Aligned Movement states declared, ‘We reject the so-called “right” of humanitarian intervention, which has no legal basis in the UN Charter or in the general principles of international law’: Movement of the Non-Aligned Countries, XIII Ministerial Conference, Cartagena, Colombia, 8–9 Apr. 2000, Final Document, at para. 263, available at: [www.nam.gov.za/xiiminconf/final4.htm](http://www.nam.gov.za/xiiminconf/final4.htm).

<sup>45</sup> Cassese, *supra* note 44, at 25.

<sup>46</sup> *Ibid.*; Corten, *supra* note 37, at 548–549 agrees; Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’, 10 *EJIL* (1999) 1, at 5.

<sup>47</sup> Some Bright-Liners would say that in extreme humanitarian emergencies, military intervention might be morally justifiable even if not legal, and that it is preferable that the law be broken in such cases than to stretch the law: see Franck, *supra* note 10, at 174–191. Bruno Simma also argues that ‘a careful

Balancers argue that humanitarian intervention is permissible under certain circumstances even absent Security Council authorization.<sup>48</sup> Again, the touchstone is usually objective reasonableness, judged in terms of such factors as magnitude of danger, proportionality of response, and lack of alternative means.<sup>49</sup> This view gained some short-lived momentum during the 1999 Kosovo crisis, during which NATO intervened militarily to stop wide-scale Serbian atrocities in the face of a deadlocked UN Security Council, as Russia and China had threatened to veto resolutions that authorized force.<sup>50</sup>

The debate between Bright-Liners and Balancers on this issue played out in the 2005 UN debate about Responsibility to Protect, and the final outcome statement adopted by consensus reflected major concessions to Bright-Liners:

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian, and other peaceful means ... to help protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations.<sup>51</sup>

This formulation acknowledges flexible standards for striking policy balances, but it recognizes no legal authority to intervene in any humanitarian crisis absent the bright-line procedural trigger of Security Council authorization.<sup>52</sup>

### 3. *Non-state Threats*

The growing capacity of non-state actors, including terrorist groups, to wield violence on a massive scale across territorial borders increasingly poses questions about states' authority to use force in response. Debates about resort to force against non-state actors and legal form do not break down as neatly as do the other examples just discussed.<sup>53</sup> In this context even some Bright-Liners acknowledge the need for some discretionary balancing, perhaps because the factual circumstances of these cases

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assessment will have to be made of how heavily such illegality weighs against all the circumstances of a particular concrete case, and of the efforts, if any, undertaken by parties involved to get "as close to the law" as possible': *supra* note 46, at 6.

<sup>48</sup> See Brunnée and Toope, 'The Use of Force: International Law After Iraq', 53 *Int'l & Comp LQ* (2004) 785, at 800; Wood, 'Towards New Circumstances in Which the Use of Force May Be Authorized?', Blockker and Schrijver (eds), *supra* note 25, at 75, 82.

<sup>49</sup> See, e.g., Reisman, 'NATO's Kosovo Intervention: Kosovo's Antinomies', 93 *AJIL* (1999) 860, at 862; Sofaer, 'International Law and Kosovo', 36 *Stanford J Int'l L* (2000) 1, at 16.

<sup>50</sup> See Stromseth, 'Rethinking Humanitarian Intervention: The Case for Incremental Change', in J.I. Holzgrefe and R.O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (2003), at 232, 234–237; Roberts, 'NATO's "Humanitarian War" Over Kosovo', 41 *Survival* (Sept. 1999) 102.

<sup>51</sup> UN World Summit Outcome Document (2005), GA Res. 60/1, at para. 139.

<sup>52</sup> But see Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?', 101 *AJIL* (2007) 99, at 120 ('states did not categorically reject the option of (individual or collective) unilateral action in the Outcome Document. This discrepancy leaves some leeway to argue that the concept of responsibility to protect is not meant to rule out such action in the future').

<sup>53</sup> See Murphy, *supra* note 15, at 38–41.

tend to be so messy and unique. However, even in their acceptance of doctrinal standards, Bright-Liners try to 'brighten' their formulas while Balancers prefer formulas that admit contextualized discretion.

As a threshold matter, at one extreme some Bright-Liners argue that self-defensive force is not permitted at all against non-state actors because non-state actors cannot commit armed attacks.<sup>54</sup> The ICJ has taken this view, for example in its Advisory Opinion on the Israeli Wall,<sup>55</sup> though in the 2005 case concerning *Armed Activities on the Territory of the Congo*, the Court seemed to take a half-step back and more tentatively note that there was 'no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defense against large-scale attacks by irregular forces'.<sup>56</sup> Following the September 2001 al-Qaeda attacks, Antonio Cassese lamented that forceful responses risked undermining bright-line self-defence rules:

So far, self-defence has been justified only against states.... As a consequence, the target was specified: the aggressor state. The purpose was clear: to repel the aggression. Hence also the duration of the armed action in self-defence was fairly clear: until the end of the aggression. Now, instead, all these conditions become fuzzy.<sup>57</sup>

This fuzziness is what bright-line rules and processes are designed to avoid.<sup>58</sup>

Other Bright-Liners, however, acknowledge that formalistic views of self-defence must give way to the reality that non-state actors today can wage violence of massive intensity, and that the UN Security Council recognized a corresponding right of self-defence in resolutions following the September 2001 al-Qaeda attacks.<sup>59</sup> Balancers, meanwhile, agree that force is sometimes allowed against non-state actors, especially when they commit or threaten actions that would probably be characterized as armed attacks if perpetrated by a state.<sup>60</sup>

<sup>54</sup> See, e.g., Corten, *supra* note 37, at 126–197; Myjer and White, 'The Twin Towers Attack: An Unlimited Right to Self-Defence?', 7 *J Conflict & Security L* (2002) 5, at 7.

<sup>55</sup> [2004] ICJ Rep 136, at 194; Randelzhofer, 'Article 51', in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2nd edn, 2002), at 788, 802 agrees ('Acts of terrorism committed by private groups or organizations as such are not armed attacks in the meaning of Art. 51 .... But if large scale acts of terrorism of private groups are attributable to a State, they are an armed attack in the sense of Art. 51').

<sup>56</sup> *Armed Activities on the Territory of the Congo (Congo v. Uganda)* [2006] ICJ Rep 168, at 223, para. 147. For a critique of the ICJ's decision on this point in the Israeli Wall case, arguing that it is not in line with contemporary state practice see Tams, 'Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case', 16 *EJIL* (2005) 963, and for a discussion of narrow constructions of self-defence consistent with the ICJ's see Tams, 'The Use of Force Against Terrorists', 20 *EJIL* (2009) 359, at 367–371.

<sup>57</sup> A. Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law', 12 *EJIL* (2001) 993, at 997.

<sup>58</sup> See Gray, *supra* note 18, at 203; see also Bothe, 'Terrorism and the Legality of Pre-Emptive Force', 14 *EJIL* (2003) 227, at 240 ('recourse to a Security Council mandate is the only acceptable solution, both as a matter of law and policy, where, in the light of threats of terrorism ..., military action which cannot be construed as constituting self-defense seems to be required'); Henkin, *supra* note 23, at 62 ('The exceptions in article 51 were limited to cases of armed attack that are generally beyond doubt; a state's responsibility for acts of terrorism is rarely beyond doubt and difficult to prove to international satisfaction').

<sup>59</sup> See Franck, 'Terrorism and the Right of Self-Defense', 95 *AJIL* (2001) 839, at 840. See also SC Res 1368 (2001) (recognizing the right to individual or collective self-defence in the wake of attacks by non-state actors).

<sup>60</sup> Greenwood, *supra* note 42, at 17; Schmitt, 'Responding to Transnational Terrorism under the Jus Ad Bellum: A Normative Framework', 56 *Naval L Rev* (2008) 1, at 8; Wood, *supra* note 48, at 84.



With growing consensus that non-state attacks could give rise to self-defence, a significant parallel debate concerns under what conditions may attacks by non-state actors be attributed to a state for self-defence purposes or under what conditions may a state take self-defensive action against a non-state actor inside the territory of another state. On these issues, it is widely regarded among Bright-Liners and Balancers alike that a state may exercise self-defensive force against a state that sufficiently supports or controls a terrorist or insurgent group, and that it may do so against terrorist targets within a state that is sufficiently unwilling or unable to eradicate the threats emanating from within its borders.<sup>61</sup> However, when it comes to assessing sufficiency of support/control or unwillingness/inability, divergent preferences re-emerge with respect to doctrinal form.

Balancers emphasize that these cases often involve complex weighing of self-defence rights against sovereignty rights,<sup>62</sup> which necessarily involves assessing a number of interlocking, contextual factors, such as a territorial state's capacity and readiness to take preventive action against non-state groups within its borders, the likelihood that its action will alleviate the threat, the magnitude of the threat, and the availability of other defensive options or means of mitigating the threat.<sup>63</sup> Reasonable necessity is especially difficult to define in advance with precision in cases involving terrorist groups because they tend to operate with stealth and unpredictability.<sup>64</sup>

While recognizing the difficulties of crafting clear rules for the complexities of non-state threats, some Bright-Liners remain reluctant to cede as much discretion as Balancers do, so they look for ways to cabin it as rules would, such as by emphasizing formal procedures for validating assessments or placing great weight on readily identifiable and visible factual conditions. For example, although Thomas Franck recognizes that '[i]t is becoming clear that a victim-state may invoke Article 51 to take armed countermeasures ... against any territory harboring, supporting or tolerating activities that culminate in, or are likely to give rise to, insurgent infiltrations or terrorist attacks',<sup>65</sup> he insists that the victim state of such threats or attacks cannot be trusted with applying the law unilaterally.<sup>66</sup> Rather, these standards are subject to a 'quasi-jury' or UN organs, namely the UN Security Council, General Assembly, and ICJ.<sup>67</sup> Yoram Dinstein takes a different tack in recognizing that self-defence (or, in his words, 'extra-territorial law enforcement' using force) against terrorist targets within another state is legal when the host state is 'unable or unwilling' to prevent terrorist

<sup>61</sup> See Brunnée and Toope, *supra* note 28, at 296. For a thorough examination of this issue see generally Deeks, 'Unwilling or Unable': Toward a Normative Framework for Extra-Territorial Self-Defense', 52 *Virginia J Int'l L* (2012) 483.

<sup>62</sup> See Harold Hongju Koh, Legal Adviser, US Department of State, 'The Obama Administration and International Law, Remarks at the Annual Meeting of the American Society of International Law, Washington, DC', 25 Mar. 2010, available at: [www.state.gov/s/l/releases/remarks/139119.htm](http://www.state.gov/s/l/releases/remarks/139119.htm); Matheson, 'Terrorism and the Laws of War', *Crimes of War Project*, 21 Sept. 2001, available at: [www.crimesofwar.org/expert/attack-math.html](http://www.crimesofwar.org/expert/attack-math.html).

<sup>63</sup> See Brunnée and Toope, *supra* note 28, at 310; Schmitt, *supra* note 60, at 21–27.

<sup>64</sup> See Schmitt, *supra* note 60, at 15–20; Sofaer, 'Sixth Annual Waldemar A Solf Lecture in International Law: Terrorism, The Law, and the National Defense', 126 *Military L Rev* (1989) 89, at 95.

<sup>65</sup> Franck, *supra* note 10, at 67.

<sup>66</sup> See *ibid.*

<sup>67</sup> See *ibid.*, at 67–68.

attacks.<sup>68</sup> Although embracing that relatively flexible standard, he goes on to brighten it in ways that severely limit discretion with a combination of more specific rules and sub-standards that come close to rules, including imposing requirements that a terrorist attack have already occurred and be likely to occur again; that the absence of alternative means for preventing those attacks must be ‘demonstrated beyond reasonable doubt’; and that any self-defensive force must take place soon after the terrorist attack ‘so that the cause (armed attack) and effect (self-defence) are plain for all to see’.<sup>69</sup> Whether through strict procedural review or through attaching tight conditions to multi-factor assessment, these doctrinal formulations reflect Bright-Liners’ efforts to check individual state evaluation and discretion – among those contemplating or using force and those judging it, alike.

### 3 Doctrinal Form and Substantive Policy

As the previous section illustrated, many contemporary debates about resort to force may be understood as choices about substantive policy (how permissive of unilateral force should the regime be?) or they may be framed as choices about legal doctrinal form (should exceptions to UN Security Council authorization be regulated mostly by clear-cut rules or by binding yet flexible standards?). This section considers in more detail the relationship between substance and form in this area. It shows and explains a natural correlation between those choices – indeed, such a high correlation that the issue of doctrinal form often receives little independent attention.

#### *A Choice of Doctrinal Form: Rules, Standards, and Institutional Context*

Although bearing some superficial resemblance, the doctrinal form debate between Bright-Liners and Balancers is not simply the international law version of the rules-versus-standards debate so common in domestic law. Institutional setting is critical to the functioning of any legal form, and with respect to force this means that doctrinal rules or standards must operate in a largely decentralized system lacking unitary adjudication and enforcement mechanisms.<sup>70</sup>

In the domestic law context, rules are generally thought to confine the decision-maker to adjudicating facts in relation to fixed lines, whereas standards involve weighing or balancing various values and factors on a case-by-case basis. In the rich body of scholarship in this area, legal theorists often credit rules with, among other things, predictability: the lines are clear, actors can easily plan accordingly, and observers

<sup>68</sup> Dinstein, *supra* note 19, at 217.

<sup>69</sup> *Ibid.*, at 220; see also Bothe, *supra* note 58, at 233 (calling it ‘doubtful’ that a state’s failure to stop terrorist attacks launched from its territory could give rise to self-defence authority in response).

<sup>70</sup> In some domestic settings this distinction is not always so stark. See generally Goldsmith and Levinson, ‘Law for States: International Law, Constitutional Law, Public Law’, 122 *Harvard L Rev* (2009) 1791 (mapping the commonalities of institutional structure between international law and some aspects of US domestic law).

or judges can readily determine whether actions complied with or violated them. Standards, and the adjudicative discretion that goes with them, have the potential to strike better case-by-case policy balances through flexible adaptation to circumstances, but at some cost to predictability.<sup>71</sup>

Contemporary international legal debates between Bright-Liners and Balancers echo these familiar tropes to a degree, but the choice about form is quite different from the domestic context for several reasons. Most important, in domestic law the rigid rules or flexible standards are often applied by formal, structured, and authoritative adjudicators (e.g., courts or administrative agencies) whereas, as explained above, the international legal system with regard to force outside the Security Council's authorization is mostly decentralized and unstructured.<sup>72</sup> Formal and universally authoritative legal judgments are the exception, not the norm, with respect to Bright-Liners' rules and Balancers' standards.

Additionally, though, Bright-Liners' rules and Balancers' standards operate as exceptions to a baseline prohibition of force with a formal legal authorization process – the UN Security Council and its mandate – that both orientations regard as well-founded and that is sometimes capable of producing bright outcomes. With both sides agreeing that this process is one way – indeed, usually the preferred way (especially for Bright-Liners) – to authorize exceptions to the prohibition of force, the bulk of the debate is over what *supplemental* authorities to use force exist, and whether those exceptional authorities are defined by rigid rules or flexible standards.<sup>73</sup>

One resulting difference from the usual rule-versus-standard comparison in the domestic context is that the addition of a collective UN Security Council process offers Bright-Liners a way to mitigate a common concern with rigid rules: that they give inadequate consideration to case-specific contextual factors.<sup>74</sup> Normally, hard and fast rules, by striking a balance among competing values in advance, produce results that are under- or over-protective of one or another value in many individual

<sup>71</sup> This is a gross simplification of an extensive debate, and my purpose here is to draw on some of its major strands and conceptual categories, but not to reinvent it. On choices between rules and standards, especially in American law, see generally F. Schauer, *Playing by the Rules* (1991); Kennedy, 'Form and Substance in Private Law Adjudication', 89 *Harvard L Rev* (1976) 1685; Sullivan, 'Foreword: The Justices of Rules and Standards', 106 *Harvard L Rev* (1992) 22. Oscar Schachter developed a similar theory about choices between 'rules', 'principles', and 'policies' in international law: see O. Schachter, *International Law in Theory and Practice* (1991), at 18–31, and applied it to his study of international law regulating force: see *ibid.*, at 136–175; Schachter, *supra* note 10, at 131–142. David Kennedy situates related distinctions among doctrinal forms in a larger set of propositions about different theoretical approaches to international law: see Kennedy, 'When Renewal Repeats: Thinking Against the Box', 32 *NYU J Int'l L & Politics* (2000) 335.

<sup>72</sup> See Raustiala, 'Form and Substance in International Agreements', 99 *AJIL* (2005) 581, at 589.

<sup>73</sup> As mentioned at the outset, Bright-Liners' and Balancers' preferences for clear-cut rules versus discretionary standards are specific to this Charter regime, which carves authorized exceptions to a baseline prohibition on force; they do not reflect a general normative commitment to legal stringency v. flexibility. One could imagine the respective preferences looking quite different if the Charter were reformulated, e.g., to *require* force in a set of circumstances, or if there were a presumption that force is permitted *unless* the UN SC decides otherwise. Other formulations are considered below in sect. 5A.

<sup>74</sup> See Weiner, *supra* note 34, at 427.

circumstances. This may not be such a problem when the costs of individual adjudication of lots of cases are very high or when the stakes of poor legal tailoring to any particular case are not very dire, but in the *jus ad bellum* context the application of this law is (thankfully) infrequent and the consequences of poor fit between law regulating force and any particular security crisis can be catastrophic to peace, a state or people's survival, or other interests. Were bright-line rules governing resort to force operating alone, of particular concern would be under-protection of defence against threats to security or vulnerable populations, which vary considerably and evolve as technology and other features of the international system change. But the UN Security Council process promises – in optimistic assessments – to remedy that under-inclusiveness of inflexible rules, because its broad mandate allows it to take account of those varying and evolving factors.<sup>75</sup>

Put another way, in domestic law a choice between rules and standards usually determines whether a formal adjudicator should have flexible discretion or not.<sup>76</sup> In the international arena, because they define exceptions to the UN Security Council's otherwise broad authority and because law regarding force then exists in a decentralized and informal institutional context, a choice between Bright-Liners' rules and Balancers' standards regarding force determines not just whether there should be any discretion but where it should be lodged: rules shift discretion to the Security Council while standards leave more of it in the hands of states and other actors that may be judging it.

### B *Correlations of Form and Substance: Balancing Risk*

It should be apparent by now – especially in light of the role doctrinal form plays in allocating legal discretion – that the debate between rules and standards for regulating resort to force is heavily laden with opposing views of risks and how best to address them.<sup>77</sup> It is also heavily laden with politics, insofar as any actor's risk assessment depends on its power and vulnerability to power – not just in the narrow sense of how much military might a state has but also how military power or concerns about it fit within a state's foreign policy strategy. States like the United States, with strength to defeat or deter developing threats and a willingness to pursue interventionist policies, will incline towards doctrinal formulas that permit discretion; those who may be targeted with power or who fear its abuse or the consequences of its use incline toward formulas that restrict it.<sup>78</sup>

<sup>75</sup> See Bothe, *supra* note 58, at 239–240; Falk, 'What Future for the UN System of War Prevention', 97 *AJIL* (2003) 590, at 597–598.

<sup>76</sup> See Schauer, *supra* note 71, at 159.

<sup>77</sup> Compare, e.g., A. Cassese, 'Return to Westphalia? Considerations on the Gradual Erosion of the Charter System', in A. Cassese (ed.), *The Current Legal Regulation of the Use of Force* (1986), at 505, 516 ('the risks of abuse should lead us to interpret [the self-defense provision in] Art. 51 very strictly and consider it as giving only very exceptional licence'), with Glennon, *supra* note 34, at 552–553 ('Mistakes may be made. It is better, however, that the price of those mistakes be paid by states that so posture themselves than by innocent states asked patiently to await slaughter').

<sup>78</sup> Compare Corten, *supra* note 4, at 821–822 (concluding that doctrinal-analytical methodology with respect to use of force and custom reflects power relations); Okafor, 'Newness, Imperialism, and

Generally speaking, Bright-Liners favour stringent limits on force and favour collective decision-making, while Balancers are more tolerant of unilateral action and have more limited confidence in collective decision-making. Indeed, the doctrinal preference for cabining force outside the UN Security Council process with either rules or standards correlates so highly with preference for very narrow versus more permissive licence that choice of doctrinal form – rules or standards for defining those exceptional authorities – is almost never considered much of an independent variable.

In practice, Balancers' flexible standards approach tends to be more permissive than Bright-Liners' strict rule approach, because satisfaction of the latter (either satisfying a rule or gaining UN Security Council approval) will virtually always satisfy Balancers' criteria for reasonableness. Balancers' standards usually treat satisfaction of Bright-Liners' preferred rules as *per se* reasonable – for example, an actual or temporally imminent attack would meet the standard of reasonable necessity – but then also admit some additional discretion.

Bright-Liners tend to have greater confidence than do Balancers in the UN Security Council's capacity to serve as a backstop against new threats, so they are comfortable drawing lines that leave little additional discretion beyond that process.<sup>79</sup> That UN Security Council voting system at the heart of Bright-Liners' approach contains a strong structural inclination averse to force. A supermajority of Security Council member states and no vetoes from the five permanent members are required to authorize a military action or threat, demanding consensus among a diverse group of states.

At the same time as Bright-Liners view this collective decision-making mechanism as adequate for determining when most specific threats have grown to the point that forceful measures are necessary,<sup>80</sup> they also believe that individual state legal discretion or auto-interpretation outside that process or beyond narrowly drawn bright-line rules poses too high a risk of needless war, whether due to bad faith exploitation of legal standards or good faith but unchecked and misguided assessments of threats.<sup>81</sup> Some Bright-Liners go further, and believe that categorical rules are necessary to reinforce the fragile idea that war is evil, at least when it is exercised outside the UN Charter's collective security mechanisms.<sup>82</sup> They worry that structuring the law on resort to force in terms of flexible standards – standards that require balancing the harms of war against other values like protection of vital state interests and human

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International Legal Reform in Our Time: A TWAIL Perspective', 43 *Osgoode Hall LJ* (2005) 171, at 172–173 (arguing, from a developing world perspective, that arguments about adapting international law to account for 'new' threats reflect powerful states' political ambitions).

<sup>79</sup> Compare *European Union Security Strategy, A Secure Europe in a Better World* (2003), at 9 (emphasizing the primacy of the UN SC in a rule-based international order that adapts to new threats).

<sup>80</sup> See Falk, 'What Future for the UN Charter System of War Prevention?', 97 *AJIL* (2003) 590, at 598; O'Connell, 'The United Nations Security Council and the Authorization of Force: Renewing the Council Through Law Reform', in Blockker and Schrijver (eds), *supra* note 25, at 47, 55–56; Schrijver, *supra* note 44, at 44; Weiner, *supra* note 34, at 448–490.

<sup>81</sup> See Koh, *supra* note 31, at 108; Weiner, *supra* note 34, at 494; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US)* [1986] ICJ Rep 14, at paras 187–200, 227–232 agrees.

<sup>82</sup> See Cassese, *supra* note 44, at 25.

rights – risks undermining fundamental prohibitions of war as an instrument of policy, by treating it as just one among many policy objectives in the mix.<sup>83</sup> Bright rules do not eliminate war as a contingency, but they help to suppress it from the policy menu. Resort to flexible standards, Michael Bothe argues, puts international law on ‘a slippery slope, one which would make us slide back into the nineteenth century when war was not illegal’.<sup>84</sup>

To Bright-Liners, then, clear and determinate rules help steel the international system against dangerous pressures towards use of force.<sup>85</sup> To those ‘impatient’ with the resulting decision-making formula, the UN High-Level Panel report responds that, ‘in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted’.<sup>86</sup> For Bright-Liners, the fact that the contemporary world poses new types of risks far beyond those contemplated by the UN Charter’s drafters makes it more, not less, important that the UN Security Council retain a tight monopoly over the use of force; new types of threats – or perceptions of them – make individual state discretion about the use of force not more necessary but more dangerous.

Balancers worry that, notwithstanding the broad consensus that sometimes these threats might reach a point at which armed intervention is appropriate, the UN Security Council will rarely arrive at that conclusion quickly enough, if at all.<sup>87</sup> To them, there are worse horrors than unilateral war, sometimes including failure to protect against security threats or to stop mass atrocities.<sup>88</sup> Balancers’ reasonableness formulas reflect limited confidence in the Security Council’s capacity for dealing with such threats of WMD proliferation, massive humanitarian catastrophes, and transnational terrorism, as described above.<sup>89</sup> Flexible standards are a way of lodging legal discretion in states (again, not just those who would use force but those who would judge them) sometimes needed to deal with threats that the Security Council cannot or will not deal with.<sup>90</sup>

In other words, Balancers believe Bright-Liners have the risk assessment backwards: inflexible rules combined with the slow and rigid Security Council process still fail to constrain the most dangerous aggressors, because they are determined to violate the law whatever its form; in the meantime, however, that approach unduly constrains the ability of those who oppose aggression to deal with it. ‘The underlying problem’,

<sup>83</sup> The ICJ has referred to the prohibition on the use of force as ‘a conspicuous example’ of *jus cogens*: *ibid.*, at 100, para. 190; see also Gray, *supra* note 18, at 27 (‘The rules of international law in this area clearly also serve a declaratory function; they set out the goal to be aimed at, the ideal that states adhere to’).

<sup>84</sup> Bothe, *supra* note 58, at 238; Koh, *supra* note 31, at 102–103 agrees (arguing that standards for anticipatory or pre-emptive self-defence lead to a slippery slope erosion of norms against force).

<sup>85</sup> See Cassese, *supra* note 77, at 516; Schrijver, *supra* note 44, at 39–44.

<sup>86</sup> See UN High-Level Panel, *supra* note 20, at para. 191.

<sup>87</sup> See Wedgwood, ‘The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense’, 97 *AJIL* (2003) 576, at 577.

<sup>88</sup> See Sofaer, *supra* note 49, at 201–221.

<sup>89</sup> See *supra* sect. 2B.

<sup>90</sup> See Taft, IV, ‘Self-Defense and the Oil Platforms Decision’, 29 *Yale J Int’l L* (2004) 295, at 298.



writes Sofaer of Bright-Liners' rules, 'stems from the premise that self-defense must be restricted in order to enhance international peace and security. To the contrary, self-defense is a key element in any sensible program to supplement the inadequate, collective effort of the Security Council.'<sup>91</sup> Setting substantive criteria by which to assess legality of force is a way of calibrating appropriate equilibria among widely shared policy objectives such as individual state security, international stability, and humanitarian values.<sup>92</sup>

In sum, the relationship between form and substance tends to look like [Figure 1](#). Bright-liners occupy a position of strict prohibitions on force while Balancers occupy a position of relative permissiveness. The flexible standards approach of Balancers is virtually never pressed by those who want extremely stringent proscriptions of force, and the doctrinal rules approach of Bright-Liners is virtually never pressed by those more accommodating of force as a necessary evil.

Why not? In theory, the choice between rules and standards should be substance-neutral with respect to competing policy values. That is, there is no inherent substantive valence to the doctrinal form of exceptions to a prohibition like Article 2(4), because, whatever policy values would be balanced by a flexible standard, a corresponding rule could theoretically be crafted broadly or narrowly.<sup>93</sup>

One could imagine, to illustrate, very permissive exceptions to the prohibition of resort to force structured as bright-line rules – much more permissive than the standards usually advocated by Balancers. For example, a right of self-defence might be recognized against any state from which a specified category of terrorist attacks was carried out (that is, a self-defence rule based on factual circumstances of an attack and its links to particular territory). Or UN Security Council voting rules might be amended to eliminate the Permanent-5 members' vetoes in cases of genocide or mass atrocities and to authorize preventive force if a bare majority of the UN Security Council assents. Such bright-line rules would be significantly more permissive than even most Balancers would prefer.

One could also imagine very stringent standards, yet still retaining some elasticity, that essentially approximate the strict rules usually advocated by Bright-Liners. For example, anticipatory self-defence might be deemed legally permissible as necessary only when no reasonable state could conclude otherwise – in other words by setting an extremely high discretionary bar or burden of persuasion.

These notional options could populate the empty quadrants of [Figure 1](#). I return in section 5 to this issue and consider why those quadrants tend to remain unfilled in international legal discourse. For now the point is to observe the high correlation between policy judgements about the utility or dangers of force and advocacy of legal rules or standards, which prompts questions whether that correlation really is related

<sup>91</sup> Sofaer, *supra* note 29, at 561.

<sup>92</sup> See Reisman, 'Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects', in L.F. Damrosch and D.J. Scheffer (eds), *Law and Force in the New International Order* (1991), at 26, 43.

<sup>93</sup> See Kaplow, 'Rules Versus Standards: An Economic Analysis', 42 *Duke LJ* (1992) 557, at 588–589.

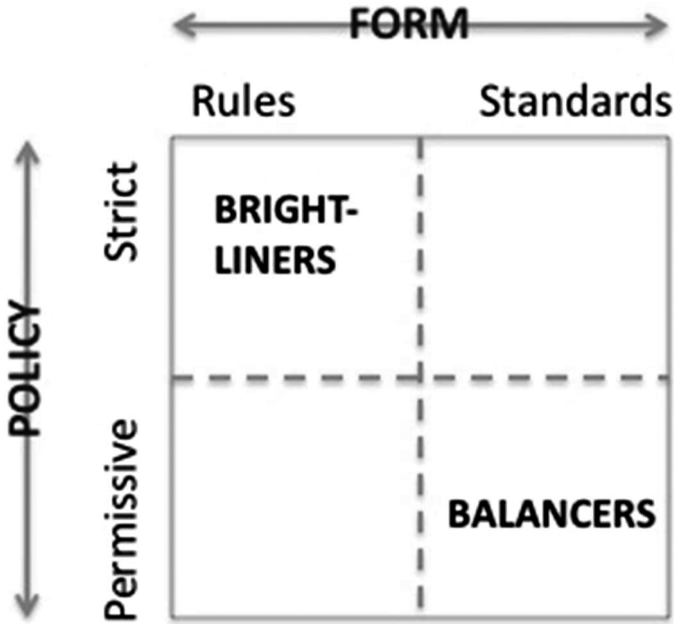


Fig. 1. Doctrinal Form and Policy

to doctrinal form or is only related to the specific substantive content that tends to go with each form. In other words, does doctrinal form do any ‘work’ on its own? The next sections take up these issues and suggest that it does.

#### 4 Doctrinal Form and Force in the International Legal System

Because debate about doctrinal form tends to correlate with substantive policy views about force – very limited use of force in a narrow set of conditions or collectively versus more flexibility for states or groups of states to respond to a larger set of contingencies – it is easy to neglect other ways in which form might matter. Aside from competing policy views about the utility and danger of force, Bright-Liners’ and Balancers’ preferences with respect to doctrinal form also reflect different understandings of how international law operates and the necessary conditions for its effectiveness. Specifically, debate about doctrinal form reflects differences over how law affects enforcement pressures, or the way legal argumentation speaks to audiences external to a state. It also reflects closely-related differences over how doctrinal form generates compliance pull within states, or the way legal argumentation speaks internally to state decision-makers.

##### A Form and Enforcement Pressures

Both orientations assume that in the absence of centralized enforcement mechanisms, much enforcement of international law regarding force depends on the costs

(political, military, economic, etc.) that other states and international actors impose on law-breakers, based in part on their own legal appraisal.<sup>94</sup> Bright-Liners tend to regard both *ex ante* clarity of rules and processes themselves as well as *ex post* clarity of legal judgments of force generated by rules as critical to effective and just international legal enforcement. Balancers view the decentralized international legal system as capable of distinguishing legally appropriate and inappropriate force based on more flexible standards weighted with objective criteria, and in ways also capable of effectively and justly constraining state behaviour.

For Bright-Liners, determinacy – that is, the ability to generate understanding of what the law permits and what it does not – is a critical element of enforcement; without it, they believe, law collapses into unconstrained state discretion.<sup>95</sup> Of particular concern to Bright-Liners is the risk of pretextual aggression, or states' representing a use of force as justified by legitimate considerations when in fact it is rooted in impermissible motivations. If the law is flexible, it is too easy for states to mask aggression behind claims of legality and avoid sanction.<sup>96</sup>

According to Franck, '[r]ules that each member of a community is free to interpret for itself, without fear of definitive contradiction, are truly rules lacking in determinacy, for they leave each member free to assert that "the rules are whatever I say they are." They then have no objective content whatsoever.'<sup>97</sup> Bright-line rules and rigid processes are capable of independent and objective determination by other states and third parties when applied to a given set of facts, whereas the more flexibly a standard can be interpreted the more difficult it is for them to adjudge compliance.<sup>98</sup> Indeed, it was in part *because* flexible standards were too malleable in the hands of would-be aggressors, Bright-Liners sometimes argue, that the UN Charter's architects codified a bright-line exception in Article 51 as the only alternative to UN Security Council process.<sup>99</sup>

Bright-Liners might be especially concerned about the slide from objective standards to unrestrained subjectivity with respect to international legal regulation of military force because there is no single 'reasonable state' akin to the hypothesized 'reasonable

<sup>94</sup> See Murphy, 'The Doctrine of Preemptive Self-Defense', 50 *Villanova L Rev* (2005) 699, at 702–705.

<sup>95</sup> See Franck, *supra* note 39, at 95–96.

<sup>96</sup> See Lobel, 'The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan', 24 *Yale J Int'l L* (1999) 537, at 557. Harold Koh argues that flexible 'standards are just too easily manipulated by those who want to use military force'. Therefore, he concludes, 'If we want to create a meaningful default position against unwarranted use of force, in these emergency situations, we need bright-line rules': Koh, *supra* note 31, at 112–113.

<sup>97</sup> Franck, *supra* note 39, at 102.

<sup>98</sup> See Joyner, *supra* note 37, at 256–258; see also Franck, *supra* note 13, at 606–607 (arguing that Art. 51 is 'self-executing' because 'the facts pertaining to an armed attack – "who attacked whom?" – are readily adduced and falsified claims ... can usually be exposed').

<sup>99</sup> See Henkin, 'The Invasion of Panama Under International Law: A Gross Violation', 29 *Columbia J Transnat'l L* (1991) 293, at 312 (arguing that aggressors have always justified their actions in terms of defending 'just' causes, and it was because the flexibility of standards allowed them to do so – or '[b]ecause the "common law" on the use of force failed' – that 'the law was codified, established clearer, firmer prohibitions, designed to leave few loopholes and little room for distortion').

person' of many domestic law contexts.<sup>100</sup> Vast disparities in power, wealth, prestige, interests, and political systems make it impossible to discern a single, universal standard. Instead the question becomes: how would a reasonable state in the position of the one claiming a right to use force act? That is hard to answer without delving into the complex strategic calculus of individual state decision-making.<sup>101</sup>

Not only do vast power disparities make it difficult to apply context-balancing standards in establishing violations, and therefore to subject violators to costs, but Bright-Liners contend that any flexible discretion will result in arbitrary or unjust enforcement that discredits law. In their view, clear rules help to prevent phoney or unprincipled enforcement, because they are more difficult for strong states to pervert in pursuit of their own national interests. Black and white rules are less susceptible to manipulation – which strong states are better capable of doing with impunity – and therefore they will be used more appropriately and responsibly than flexible standards.

It must be pointed out that, in practice, UN Security Council decisions do not always produce the determinative clarity Bright-Liners seek – and Bright-Liners should acknowledge this limitation. Take, for example, the 2003 Iraq war, which two of the five Permanent Security Council members argued was authorized by prior Security Council resolutions dating back to the first Gulf War, while the other three regarded it as legally unsanctioned.<sup>102</sup> Some humanitarian interventions – such as NATO's 1999 intervention in Kosovo, regarded widely as at least 'legitimate', if not strictly legal, because it lacked Security Council approval, and earlier military actions by West African regional forces in Liberia and Sierra Leone, implicitly approved by the Security Council after the fact<sup>103</sup> – show that reality is often less tidy than Bright-Liners might hope. Moreover, bright rules and processes do not necessarily produce universally acknowledged interpretations because there is often disagreement about key facts, or states contort facts to fit within bright lines.<sup>104</sup> But on the whole, UN Security Council voting or bright-line exceptions to the prohibition of force tend to yield relatively clear and widely recognizable and respected answers for at least a wide swathe of cases.

Balancers respond that flexible standards are capable of retaining more objective and informative content than Bright-Liners acknowledge. Requirements of reasonable necessity and proportionality are on the one hand elastic, in that they adjust to accommodate new threats and particular circumstances, yet they are on the other hand capable of external evaluation.<sup>105</sup> Other players in the international system, including third party states and non-governmental actors, can assess uses of force

<sup>100</sup> See S. Brown, *The Illusion of Control: Force and Foreign Policy in the Twenty-First Century* (2003), at 113; G.P. Fletcher and J.D. Ohlin, *Defending Humanity: When Force Is Justified and Why* (2008), at 173–174.

<sup>101</sup> See generally Kaye, *supra* note 21 (discussing the difficulties of judging the reasonableness of state decision-making, especially amid crises).

<sup>102</sup> See Taft IV and Buchwald, 'Preemption, Iraq, and International Law', 97 *AJIL* (2003) 557. More recently, debates have arisen among coalition partners engaged in operations against Libya as to the extent of authority to use force contemplated by SC Res 1973: see Totaro, 'Europeans at Odds Over How Far They Can Go', *Sydney Morning Herald*, 23 Mar. 2011, at 7.

<sup>103</sup> See Franck, *supra* note 10, at 155–170.

<sup>104</sup> See Coll, *supra* note 26, at 616–617.

<sup>105</sup> See Brunnée and Toope, *supra* note 28, at 300.

against widely recognized standards and criteria that comprise reasonableness, and they can react accordingly, whether approvingly of good arguments or disapprovingly of bad ones.<sup>106</sup> Such analysis is not open-ended; it is routine in many domestic law settings, they point out, where self-defence and other uses of violence are often judged according to contextualized reasonableness.<sup>107</sup>

In contrast to Bright-Liners' insistence on clear lines likely to give rise to broad consensus as to the lawfulness or unlawfulness of specific instances of force, Balancers are comfortable with a legal regime that does not always, or even often, produce black and white answers.<sup>108</sup> They recognize that many uses of force may fall within some grey area, but that the shade of grey matters quite a lot. As Abram Chayes, who was essentially a Balancer as US State Department Legal Adviser during the height of the Cold War, explained in his volume on resort to force and the Cuban Missile Crisis, '[i]f [law] cannot divide the universe into mutually exclusive blacks and whites, it can help in differentiating the infinite shades of grey that are the grist of the decision-process'.<sup>109</sup> Even in the absence of legal determinations commanding near universal consensus, international law still exerts enforcement pressures, among other reasons because the relative strength of legal arguments affects internal deliberations (considered further below) and the ability to justify actions abroad (and therefore affects costs associated with options).<sup>110</sup>

Of course, Balancers concede, flexible standards allow aggressors to assert claims of self-defence or other justifiable force, but that does not mean they will pay no price for weak claims that other actors deny. The relative persuasiveness of legal justifications in light of context matters greatly.<sup>111</sup> The United States and United Kingdom justified their 2003 invasion of Iraq as necessary to enforce prior UN Security Council resolutions dating back to the first Gulf War, and while many states were convinced by those arguments, others were not, and the latter's opposition or scepticism proved costly to the coalition's war effort and post-war diplomacy.<sup>112</sup> Russia argued that its 2008 use of force against Georgia was justified on a range of grounds including humanitarian protection, but most states discarded those analytical reasonings as weak and unpersuasive, and Russia suffered diplomatic and economic costs as a result.<sup>113</sup>

True, powerful states may be more able to resist or tolerate approbation and the costs of weak justification for their actions – and Balancers should acknowledge this disparity. But powerful states are also more likely to worry about the precedential

<sup>106</sup> See Reisman, *supra* note 92, at 46.

<sup>107</sup> See Sofaer, *supra* note 29, at 561.

<sup>108</sup> This is similar to what Sean Murphy describes as 'Protean Jus Ad Bellum': see Murphy, *supra* note 15, at 23.

<sup>109</sup> A. Chayes, *The Cuban Missile Crisis* (1974), at 102–103.

<sup>110</sup> See *ibid.*, at 103–104.

<sup>111</sup> Compare Johnstone, 'Security Council Deliberations: The Power of the Better Argument', 14 *EJIL* (2003) 437 (analysing why legal arguments, while not decisive, often shape UN SC debates because of their persuasive value and have an impact on positions taken).

<sup>112</sup> See Murphy, 'Assessing the Legality of Invading Iraq', 92 *Georgetown LJ* (2004) 173, at 251–257.

<sup>113</sup> See 'A Deal, for Now: Russia and the West', *Economist*, 9 Sept. 2008; Bernard, 'Georgia and Russia Nearing All-out War', *NY Times*, 10 Aug. 2008, at A1.

value of their actions and inclined to avoid arguments that, to the extent that they are taken seriously, could be exploited by others.<sup>114</sup> And, true, vast disparities in power mean there is no single ‘reasonable state’ by which to judge actions, but that is a reason to adopt criteria that account for different states’ capabilities and vulnerabilities, not for adopting inflexible formulas.

To Balancers, Bright-Liners’ efforts to promote just and principled enforcement through clear and rigid rules, and thereby strengthen the justificatory potency of law, actually perverts the justness of *jus ad bellum*. If we lived in a world of black and white violations, then bright-line legal rules and enforcement would make sense. But if we live a world of grey, then we need a flexible enforcement regime; it would be equally unjust to apply a bright-line regime to a grey-shaded world as to apply a grey-shaded regime to a black and white world.<sup>115</sup> And, indeed, we do live in such a grey world. Balancers argue: contexts like humanitarian intervention to stop mass atrocities or efforts to prevent ungoverned territories from being used by hostile groups to launch attacks cannot fit neatly into legal boxes, and the UN Security Council’s actions and inactions with respect to authorizing force are themselves often capricious.

Both Bright-Liners and Balancers recognize that enforcement of use-of-force law remains very decentralized, but they draw different conclusions about what that means for doctrinal form. Bright-Liners emphasize legal clarity or determinacy as necessary to compensate for the lack of centralized enforcement, as one would find in domestic legal settings: ‘[t]he more indeterminate a norm, the more essential the process by which, in practice, the norm can be made more specific’.<sup>116</sup> Flexible standards may retain their objective content in domestic law settings because there are mechanisms like courts for reviewing them and providing authoritative meaning. However, ‘reasonableness and proportionality are concepts which are difficult to operationalize in the context of a decentralized system. They open the door to arbitrariness and subjectivity.’<sup>117</sup> According to Louis Henkin:

In our decentralized international political system with primitive institutions and underdeveloped law enforcement machinery, it is important that Charter norms – which go to the heart of international order and implicate war and peace in the nuclear age – be clear, sharp, and comprehensive; as independent as possible of judgments of degree and of issues of fact; as invulnerable as can be to self-serving interpretations and to temptations to conceal, distort, or mischaracterize events.<sup>118</sup>

<sup>114</sup> See Chayes, *supra* note 109, at 65; Schachter, ‘Self-Defense & the Rule of Law’, 83 *AJIL* (1989) 259, at 266.

<sup>115</sup> See M. Walzer, *Just and Unjust Wars* (4th edn, 2006), at 80, 85.

<sup>116</sup> Franck, *supra* note 39, at 102; see also Dinstein, *supra* note 19, at 168 (arguing that flexible standards require close supervision by the UN SC); Franck, *supra* note 13, at 608 (‘the problem of the abuse of exceptions is particularly evident in a system like that established by the UN Charter, where there is no automatic recourse to a judiciary with authority to determine authoritatively whether, in the circumstances, an exception has been validly invoked’).

<sup>117</sup> Bothe, *supra* note 58, at 239; see also Dinstein, *supra* note 19, at 185–188 (arguing that lack of a competent international forum empowered to review the legality of force opens self-defence standards to abuse); T. Ruys, ‘Armed Attack’ and Article 51 of the UN Charter (2010), at 324.

<sup>118</sup> Henkin, *supra* note 23, at 60.



In other words, the international legal system lacks formal adjudicative processes necessary to make flexible standards operate effectively – unless, that is, the law provides those formal processes, such as by requiring UN Security Council adjudication.

Balancers are more sanguine about a diffuse and informal legal system to check state discretion, or at least they are resigned to it. Michael Reisman notes, too, that '[i]nternational law is still largely a decentralized process, in which much lawmaking (particularly for the most innovative matters) is initiated by unilateral claim, whether explicit or behavioral'. Rather than seeing it as something to be remedied with bright-line legal forms, he and other Balancers view that decentralized enforcement structure as capable of nuanced assessment based on persuasiveness of arguments and widely shared values, standards, and goals.<sup>119</sup>

Furthermore, Balancers view that decentralized structure as well adapted to meeting shifting security challenges.<sup>120</sup> Over time, determining legality 'through appraisal of the factors that justify or undercut proposed uses of force, and a sharing of that evaluation with other states and the public ... enables international law to develop incrementally and under a healthy, collective scrutiny'.<sup>121</sup> Application of standards induces continuous exploration and deliberation of potentially relevant contextual factors. That is, rather than compensating for lack of centralized enforcement with legal rules and processes that promise clarity and consensus, Balancers accept some legal doubt and the fluid processes by which flexible standards are applied as necessary to account for unpredictable contingencies and exceptional circumstances, especially amid uncertainty as to future threats.

## B Form and Compliance Pulls

Closely related to divergent assumptions about external enforcement pressures are assumptions about compliance, or the degree to which states internalize international norms in their decision-making. Compliance is probably especially difficult (and especially necessary) to promote with respect to force because it implicates states' core national security interests.<sup>122</sup> To Bright-Liners, compliance depends on the capacity of law to instruct. To Balancers, it depends on its capacity to inform and persuade.

For Bright-Liners, the sharpness of rules is important to compliance in ways similar to enforcement: '[i]ndeterminate normative standards not only make it harder to know what conformity is expected, but also make it easier to justify noncompliance. Put conversely, the more determinate the standard, the more difficult it is to resist the pull of the rule to compliance and to justify noncompliance.'<sup>123</sup> Clear lines help to

<sup>119</sup> Reisman, *supra* note 92, at 90; see also Johnstone, *supra* note 111, at 448–450, 475–476 (arguing that legal norms are capable of objective application and in ways that are important to justifying actions).

<sup>120</sup> See Reisman, *supra* note 92, at 90; Taylor, 'The End of Imminence?', 27 *Washington Q* (2004) 57, at 59.

<sup>121</sup> Sofaer, *supra* note 49, at 21; see also Stromseth, *supra* note 50, at 244 (arguing that ambiguity as to the legal status of humanitarian intervention is 'fertile ground for the gradual emergence of normative consensus, over time, based on practice and case-by-case decision-making').

<sup>122</sup> See Murphy, *supra* note 94, at 702.

<sup>123</sup> Franck, 'Legitimacy in the International System', 82 *AJIL* (1988) 705, at 714.

internalize norms and hold in check some natural tendency of state decision-makers to seek latitude with respect to force, especially in crises.<sup>124</sup>

Whereas Bright-Liners are concerned that the same indeterminacy of flexible standards that undermines external enforcement pressures will undermine the seriousness states will attach to them, Balancers see a greater danger that inflexible rules will fail to match policy-makers' perceived needs, particularly amid security or humanitarian crises, and will therefore lose their legitimacy.<sup>125</sup> While sharing some roots, this goes beyond the familiar realist or rational choice theory argument that states' compliance with international law derives from congruence with states' narrow self-interest;<sup>126</sup> it accepts that legitimacy and fairness may matter and exert independent pull but holds that those features depend on the persuasive strength of law in meeting contingencies more than its directive clarity. Sufficient consonance with the method of policy analysis that national security decision-makers use when contemplating forceful options is also critical, Balancers believe, to true internationalization of law regulating force.

As Sofaer explains, '[s]tatesmen acting in good faith to protect their nations do not take artificial rules seriously', but instead 'they are more likely to respect standards rationally related to concerns they recognize as appropriate'.<sup>127</sup> The vitality of the law governing self-defence is especially dependent upon the ability of this law to adapt to contemporary challenges in a manner that decision-makers and security professionals view as sensible. For this task, flexible standards of the sort applied by Balancers are promising because they directly address the same judgments these governmental actors are forced to make and assess them in recognizable terms.<sup>128</sup> Balancers prize deliberation about the use of force, and objective criteria stimulate and guide it.

Bright-Liners acknowledge a weak spot here, that continued respect for the Security Council's authoritative primacy depends on states' confidence that it will wield it responsibly.<sup>129</sup> While recognizing the need for any legal regime to meet states' perceived security needs, however, Bright-Liners are not sympathetic to Balancers' arguments that rigid rules and processes are too much in tension with the way individual states view protection of their interests. They are *supposed* to be in tension – they are designed to constrain the tendencies of states that might otherwise dictate forceful responses. The answer lies not in reformulating their preferred norms, however, but in redoubling states' commitment to them.<sup>130</sup> Balancers' alternative approach is a self-fulfilling prophecy, Bright-Liners might argue, because if states plan and organize for future contingencies as though Security Council authorization will not be required

<sup>124</sup> See Koh, *supra* note 31, at 114.

<sup>125</sup> P. Bobbitt, *Terror and Consent* (2008), at 452; Coll, *supra* note 26, at 613, 616; Reisman, *supra* note 92, at 82; Sofaer, *supra* note 29, at 549.

<sup>126</sup> J.L. Goldsmith and E.A. Posner, *The Limits of International Law* (2005), at 9.

<sup>127</sup> Sofaer, *supra* note 30, at 225.

<sup>128</sup> See Glennon, *supra* note 34, at 557; Stromseth, 'Law and Force after Iraq: A Transitional Moment', 97 *AJIL* (2003) 628, at 637.

<sup>129</sup> See Joyner, *supra* note 37, at 256–257; Slaughter, 'Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform', 99 *AJIL* (2005) 619.

<sup>130</sup> See Charney, 'Editorial Comments: The Use of Force Against Terrorism and International Law', 95 *AJIL* (2001) 835, at 837.

for force beyond certain narrow exceptions, they have little incentive to work towards ensuring that the process will operate dependably.

Note that both orientations harbour biases about state decision-making processes and their regard for international law, and those biases underlie some of their relative confidence in mechanisms for generating compliance. Bright-Liners argue that rules are needed because individual states cannot be trusted to apply and abide by flexible standards in good faith. Flexibility becomes manipulability or objective assessment of contextual factors becomes subjective opinion, they contend, because states are tempted to mask their self-interested designs behind stretched legal cloth. Clear rules and rigid processes cannot be so easily manipulated, making states more likely to abide by them.

When it comes to defending the UN Security Council's authoritative monopoly to authorize force beyond bright-line exceptions, however, Bright-Liners have more confidence in member states' good faith decision-making and willingness to subordinate their individual self-interest to the common good.<sup>131</sup> In the halls of individual defence and foreign ministries, the argument seems to go, decision-makers often operate in bad or at least questionable faith, but in the UN Security Council chamber – where Bright-Liners want to channel processes of persuasion – state representatives often (though certainly not always<sup>132</sup>) operate in good faith, or at least better faith.

Arguments by Balancers reflect similar, but reversed, assumption asymmetries about states' decision-making. They often argue that the UN Security Council cannot be trusted effectively and dispassionately to adjudicate on reasonable necessity of force, because member states' strategic interests dictate their voting.<sup>133</sup> That scepticism fuels Balancers' unease with placing exclusive discretion beyond narrow bright-line exceptions in the Security Council's hands.

At the same time as they doubt the Security Council's tendency to exercise responsible judgement, however, Balancers argue that individual states should be entrusted to apply flexible standards. States – or at least some states – will faithfully apply flexible standards based on shared international goals by incorporating them into their unilateral deliberative processes about force.

In sum, Bright-Liners tend to be worried that legal regimes regulating use of force are highly susceptible to abuse, because states will be inclined to stretch or manipulate exceptions to prohibitions. Balancers also worry that the legal regime regulating force is fragile, but their solution is to incorporate more bend rather than to fortify rigidity.

Both orientations towards doctrinal form begin with a basic recognition that the international legal system lacks strong, centralized enforcement structures. Bright-Liners, distrustful of individual state discretion, seek to compensate for that institutional weakness with doctrinal form that produces at least some of the same outputs

<sup>131</sup> See Franck, 'Reflections on Force and Evidence', 100 *Proceedings Annual Meeting American Society Int'l L* (2006) 51, at 54.

<sup>132</sup> Bright-Liners often acknowledge that SC members sometimes cast votes and vetoes for self-interested, strategic ends: see Dinstein, *supra* note 19, at 283–284. This was certainly true during the Cold War, when bloc rivalries usually produced deadlock: see Franck, *supra* note 10, at 3.

<sup>133</sup> See Sofaer, *supra* note 29, at 547.

that centralized enforcement structures would: authoritative judgements that are capable of easy interpretation and generating broad consensus. Balancers, more confident in individual state discretion and inclined to protect it, view that institutional weakness as inevitable in this area, seeing decentralization as still capable of nuanced and context-dependent assessment. Within that institutional context, flexible standards can generate enforcement pressures while also promoting adherence to legal analysis that guides deliberation.

## 5 Looking Forward and the Future of Force Regulation

Now that the previous sections have shown that many debates about regulating resort to force reflect arguments and assumptions about doctrinal form as well as substance, this section looks forward to the future of these debates and their normative implications. It argues that if doctrinal structure and legal argumentation matter in ways besides reinforcing substantive policy agendas, new combinations of legal form, substance, and institutions may be possible, and it recommends some further lines of inquiry for examining them.

### A *Options for Legal Re-Form*

Section 3 showed that the doctrinal preference for cabining force outside the UN Security Council process with either rules or standards correlates so highly with preference for very narrow versus more permissive licence that choice of doctrinal form – rules or standards for defining those exceptional authorities – is almost never considered an independent variable. If doctrinal form is separately meaningful in some of the ways discussed in section 4, however, then one might expect there to be more consideration of proposals that match strict constraints on force with standards or match looser constraints with rules. Why, in other words, is international legal discussion about force almost entirely restricted to only two diagonal quadrants in the matrix, above, of [Figure 1](#)?

For example, if Bright-Liners are correct that sharply-drawn, determinate, and universally authoritative rules promote enforcement, and if Balancers are also correct that the UN Security Council process is ill-suited to deal with contemporary threats, why do we so rarely hear proposals to broaden states' authority to use force outside the Security Council with a set of codified rules that delineate additional exceptions to Article 51 from Article 2(4)? Imagine that in addition to a right of self-defence in the event of actual or temporally imminent attacks, states had a right to use force, say, against sites from which a defined category of terrorist attacks were planned and logistically supported, or against nuclear weapons facilities of those states who had been found by the UN Security Council to have violated their non-proliferation treaty obligations. A variant might codify some pre-determined exceptions to the use of force that, while perhaps including some standard-like flexibility, would spell out more precisely in a series of additional rules the specific categories of threatening activities that would trigger authority to use force. For instance, the UN Charter regime might deem

force authorized even without Security Council approval to neutralize terrorist groups operating on the territory of other states when those other states fail to discharge specific international legal obligations to suppress them; to prevent a state from transferring WMD to terrorist groups; or by regional organizations to prevent genocide or other specifically-defined categories of mass atrocities.<sup>134</sup>

If, on the other hand, Balancers are correct that objective criteria can effectively guide deliberation about force in ways that promote legal compliance and Bright-Liners are also correct that broad authority to use force is destabilizing, why do we not see proposals to restrict tightly states' authority to use force with very exacting standards that, while flexible and adaptable, are exceedingly difficult to meet? Imagine tightening the sort of reasonable necessity analysis often used by powerful states and advocated by Balancers by requiring that assessments of threats and necessity be 'beyond reasonable doubt' or something akin to that threshold. In the 1999 Kosovo crisis, for example, the United Kingdom articulated the view that military action without UN Security Council authorization might be legal to prevent an 'immediate and overwhelming humanitarian catastrophe' – a standard which perhaps might be read to require a higher threshold of magnitude and urgency than would most 'reasonable necessity' humanitarian intervention formulas.<sup>135</sup>

With regard to the first possibility, of codifying more permissive rules, serious proposals are almost non-existent, probably in part because amending the UN Charter or reaching UN Security Council agreement in advance on a set of contingencies warranting force would be practically impossible. Such 'legislative' processes require such a high degree of consensus among states and all permanent members of the Security Council (members of which stand to lose power by diluting the Council's authority) that they are effectively out of reach<sup>136</sup> – even more so if there were a need periodically to update the rules to account for changing threats, technologies, and so on. In other words, an orientation among those who support broad state authority to use force toward Balancers' flexible standards is heavily determined by an institutional context in which expanding the substantive scope of rules is extremely difficult. It is likely, too, that even among academic Bright-Liners who may not be deterred by those practical or political constraints, the near absence of proposals in this space comes back again not only to general policy preferences about military force but also more specific concerns that the enforcement and compliance advantages of clear lines that Bright-Liners tout with respect to a narrow interpretation of Article 51 might not be so effective were more and more exceptions to Article 2(4) added.

The second possibility, of formulating more demanding standards, may be promising and warrants greater attention. Whereas codifying more permissive rules would probably require UN Charter amendment or legislation through the Security

<sup>134</sup> Similar UN Charter amendments were proposed by Richard N. Gardner, who argues that the US under President George W. Bush too easily manipulated flexible standards but that current bright-line exceptions to Art. 2(4) are too narrow: see Gardner, 'Neither Bush nor the "Jurisprudes"', 97 *AJIL* (2003) 585, at 590.

<sup>135</sup> See Wood, *supra* note 48, at 82.

<sup>136</sup> See Franck, *supra* note 10 at 5; Murphy, *supra* note 15, at 42.

Council, a process for promoting more constraining standards could at least be initiated by state declarations and practice, whether unilaterally or through a group of like-minded states. If, as Balancers claim, flexible but objective standards can generate enforcement pressures, promote compliance pulls, and shape and guide deliberative processes within and among states, then those who view the substantive formulas applied by Balancers as too permissive should engage their content and criteria more vigorously and directly. Standards could be clarified to make them less open-ended and more informative to curb discretion.

This might include proposed legal formulas that narrow the types or magnitudes of threats, elevate the standards of certainty, or weight the proportionality requirements that go into a policy-appropriate legal balancing calculus.<sup>137</sup> Anticipatory self-defence against incipient nuclear threats, for example, might presumptively require at a minimum clear and convincing assessments as to that state's will and capability to carry out threats, and that the danger of waiting be vastly disproportionate to the anticipated harms of the contemplated self-defensive force. Especially in an era of strategic uncertainty, in which power relations and threats are shifting in ways difficult to predict, a flexible standard with high evidentiary burdens on states using force invites exploration of potentially relevant contextual factors but conditions action on demonstration that those findings can withstand searching scrutiny internally and by other actors in the international system.

Besides highlighting the possibilities for recalibrating doctrinal form and policy substance, the analysis of section 4 also casts additional light on some prominent structural reform proposals. Those proposals are usually considered in terms of their institutional features or their substantive policy choices. They can also be understood, however, as efforts to make bright-line regimes more standard-like or to make balancing regimes more rule-like by 'brightening' their outcomes.

Moving from one end, some scholars have proposed mechanisms for subjecting forceful actions based on flexible standards to *post hoc* adjudicative processes. Michael Doyle, for example, urges that any proposed force beyond Bright-Liners' rules should be brought to the Security Council, but if the Security Council declines to act against threats, then in exceptional circumstances states should have discretion to act unilaterally. In such cases, the legitimacy of states' actions should be assessed by reference to the lethality of the threat, the likelihood of its materialization, the legitimacy of the proposed action (determined by reference to traditional just war principles), and the legality of the target state's behaviour and the threatened state's response.<sup>138</sup> If a state bypasses the Security Council in resorting to pre-emptive or preventive force, it also ought to submit a public report after the fact to the Security Council, which would then investigate and assess the justifiability of the action subject to a majority vote without vetoes.<sup>139</sup> This approach would permit discretion based on flexible but

<sup>137</sup> See Waxman, *supra* note 2, at 67–72 (arguing that advocates of objective reasonableness standards for regulating force should examine more thoroughly issues of proof burdens).

<sup>138</sup> See Doyle, *supra* note 30, at 46–62.

<sup>139</sup> See *ibid.*, at 62.



objective standards (very similar to those generally pressed by other Balancers), and over time would generate a 'common law' of precedent for guiding future actions. Allen Buchanan and Robert Keohane propose several variant models for improving accountability for uses of force, including Security Council-appointed impartial bodies to determine whether an intervener's *ex ante* justification is confirmed *ex post* and to assess penalties for improper judgements, or the adoption of such mechanisms by a separate coalition of democratic states that would judge the legitimacy of uses of force outside the Security Council.<sup>140</sup>

These proposals share a goal not only of creating a more policy-appropriate balance of risk but also, through deliberative and adjudicative processes, of exposing and subjecting to external scrutiny the specific substantive strands of use-of-force legal analysis.<sup>141</sup> In both cases the idea is to 'brighten' the outcome of Balancers' application of flexible standards through greater *ex post* crystallization of propriety or impropriety judgements that command widespread, authoritative respect – and thereby capturing some of the enforcement and compliance advantages usually associated with bright-line rules.

Moving from the other end, some prominent international groupings have proposed incorporating flexible but objective criteria used by Balancers more directly into 'bright' UN Security Council processes, in ways that might gain some of the virtues claimed by Balancers. The UN High-Level Panel recommended that the UN Security Council and General Assembly adopt a set of principles – seriousness of threat, proper purpose, last resort, proportionality, and balance of consequences – to guide Security Council deliberations. In endorsing the Panel's report, former UN Secretary General Kofi Annan similarly recommended that, in considering whether to authorize force, the Security Council should 'come to a common view on how to weigh' these five factors.<sup>142</sup> Structuring Security Council deliberations in this way would enhance decision-making transparency and facilitate analytical comparison across cases. The International Commission on Intervention and State Sovereignty (ICISS), a panel of respected international legal and diplomatic figures convened by the Canadian government following the 1999 Kosovo crisis, proposed that the UN General Assembly adopt a declaratory resolution calling for UN Security Council authorization of humanitarian intervention pursuant to a similar set of informative standards: right authority, just cause, right intention, last resort, proportional means, and reasonable prospects of success.<sup>143</sup>

Note that these factors are almost identical to those usually relied upon by Balancers – the difference lies in institutional structure for applying them. Such efforts seek to make collective decision-making processes more deliberatively principled through

<sup>140</sup> See Buchanan and Keohane, 'The Preventive Use of Force: A Cosmopolitan Institutional Proposal', 18 *Ethics & Int'l Affairs* (2004) 1.

<sup>141</sup> See Doyle, *supra* note 30, at 33; Buchanan and Keohane, *supra* note 140, at 9.

<sup>142</sup> Report of the Secretary-General, 'In Larger Freedom: Towards Developments, Security and Human Rights for All', UN Doc A/59/2005 (2005), available at: [www.un.org/largerfreedom](http://www.un.org/largerfreedom).

<sup>143</sup> See The International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001), at 32–37; see also Brunnée and Toope, *supra* note 48, at 800–804 (endorsing this approach).

objective criteria, thereby reclaiming some of the advantages claimed by Balancers, that standards generate greater compliance and respect through the persuasiveness of argumentation and justification rather than relying on their ready conclusiveness.<sup>144</sup>

None of these radical legal-structural reforms is remotely likely for the foreseeable future, because the costs of formal restructuring of the Charter system are too high, and the legal, political, and strategic divides among parties too great and complex.<sup>145</sup> That said, viewing them in this light helps in understanding more clearly the inter-relationships of form, substance, and institutional context – and the challenge of manipulating one without effects on the others. These possibilities also reinforce the earlier point that Bright-Liners' and Balancers' approaches are not dichotomous but are points along a spectrum between pure rules and standards, with many possible formulas in between.

### B Threats of Force and Doctrinal Form

One area where both Bright-Liners and Balancers fall short analytically concerns the regulation of *threats* of force, by which I broadly mean wielding inchoate force to deter or compel another state's behaviour. Recall that Article 2(4) prohibits the 'threat' as well as 'use' of force. However, legal doctrine is not well developed in this area beyond prohibiting the most blatantly aggressive threats,<sup>146</sup> nor is the regulation of threats of force well theorized in legal scholarship by either Bright-Liners or Balancers<sup>147</sup> (though it is thoroughly theorized and researched in political science scholarship<sup>148</sup>).

The scarcity of doctrinal development with respect to threatened force probably stems in part from measurement difficulties, since threatened force and its effects often involve unobservable factors (e.g., parties' intentions, perceptions, and implicit signalling). It also stems in part from the fact that threats of force – especially implied threats – are ever-present features of interstate diplomacy,<sup>149</sup> and some level of threatened force, especially as a deterrent, is necessary to maintain stability. Oscar Schachter speculated that Article 2(4) is so rarely invoked against implied threats because of 'the subtleties of power relations and the difficulty of demonstrating coercive intent' as well as 'the general recognition of and tolerance for disparities of power and of their effect in maintaining the dominant and subordinate relationships between unequal states'.<sup>150</sup> The scarcity of legal scholarship, unlike political science, with respect to threatened force probably stems in part from methodological orientation, too. Lawyers study precedent, and to do so they train to analyse 'cases', or past fact patterns matched with

<sup>144</sup> See Johnstone, 'Security Council Deliberations: The Power of the Better Argument', 14 *EJIL* (2003) 437, at 480.

<sup>145</sup> See Murphy, *supra* note 15, at 42.

<sup>146</sup> See Sadurska, 'Threats of Force', 82 *AJIL* (1988) 239.

<sup>147</sup> See Roscini, 'Threats of Armed Force and Contemporary International Law' [2007] *Netherlands Int'l L Rev* 229, at 231–232 (discussing the dearth of such scholarship).

<sup>148</sup> See D. Byman and M. Waxman, *The Dynamics of Coercion: American Foreign Policy and the Limits of Military Might* (2002), at 3–18 (surveying scholarship).

<sup>149</sup> See *ibid.*, at 32–33.

<sup>150</sup> Schachter, *supra* note 8, at 1625.

legal outcomes. Such an approach tends to neglect or undercount the most common ways in which force is used: to coerce or deter behaviour without, optimally, having actually to use any of it – the better it works, the less observable ‘case’ there is to study.

A related problem with so much study of law regulating force is that it is unilateral in perspective. It focuses on how law regulating force might affect State A’s decision-making whether to use force against State B, without focusing on how State B’s behaviour and decision-making might, in turn, also be shaped by that legal regime. To the extent that law affects State A’s decision-making about force, though, it also affects State B’s perceptions and discounting of costs and benefits associated with its own actions – in particular, the risk of threatened force by State A it incurs by its actions.

If one thinks about the major legal debates about resort to force in the usual substantive terms – strict limits versus permissive flexibility – an agenda for further study of threats might feature such questions as: on the one hand, to what extent do more permissive standards regulating force help to deter hostile behaviour – such as developing offensive WMD programmes, conducting systemic atrocities, or harbouring terrorist groups – by lowering the barriers to combating those threats with force? On the other hand, to what extent does greater permissiveness to use force spur some of those very threats, perhaps by causing smaller powers to develop WMD or ties to terrorist groups as their own deterrents? In other words, if the legal debates about resort to force are framed in terms of managing competing risks of allowing too much aggressive force versus over-constraining defensive force against threats, key policy questions centre on how effectively a given level of permissiveness to use force affects some states’ ability credibly to threaten it and, in turn, other states’ risk assessments of various courses of action.<sup>151</sup>

Analysis of legal-doctrinal form points to additional avenues of inquiry, though: perhaps whether legal prohibitions and authorities are structured as bright-line rules and processes versus flexible standards also shapes perceptions about threatened force. In addition to the constraining influence, what effects, one might ask, does the choice between Bright-Liners’ and Balancers’ doctrinal formulas for regulating force by State A have on State B’s threat perceptions, especially if a policy goal is to deter certain hostile conduct (again, say developing offensive WMD programmes, perpetrating atrocities, or harbouring terrorist groups)?

In one of the most important theoretical works of the last century on the strategy of threats, Thomas Schelling posited the importance of ‘focal points’ – ‘each [side’s] expectation of what the other expects [it] to expect to be expected to do’ – to international negotiations in the shadow of threats.<sup>152</sup> Building on Schelling’s work, Alexander George and William Simon’s influential empirical work on the strategy of threatened force concludes that clarity of objectives and terms of settlement are important positive factors in successful coercive diplomacy, or diplomacy backed by threats including

<sup>151</sup> These issues amid the contemporary international security environment are widely debated in the political science and strategic studies literature: see, e.g., Litwak, ‘Regime Change 2.0’, 32 *Wilson Q* (Autumn 2008) 22; Moran, ‘Review: Beyond Deterrence’, 7 *Int’l Studies Rev* (2005) 285; Nichols, ‘Anarchy and Order in the New Age of Prevention’, 22 *World Policy J* (Autumn 2005) 1.

<sup>152</sup> T.C. Schelling, *The Strategy of Conflict* (1960), at 57.

force.<sup>153</sup> Perhaps the clear lines and processes favoured by Bright-Liners – to the extent that their substantive contours match critical, desired policy outcomes – can bolster the effectiveness of coercive diplomacy or help to prevent unwarranted escalation by clarifying the conditions under which force would or would not be used. At least with respect to self-defence exceptions to the Charter's prohibition on force or demands set out in UN Security Council resolutions authorizing force, the same clarity that Bright-Liners insist upon to enhance enforcement and compliance with *jus as bellum* norms might also help to resolve ambiguity as to terms for peaceful settlement or continued diplomacy.

Alternatively, perhaps Balancers' approaches allow for more strategic ambiguity and greater flexibility to mix carrots and sticks in ways important to coercive diplomacy. It might be argued that Bright-Liners' approaches to doctrinal form undermine deterrent threats because bright-line rules, accompanied by slow UN Security Council process, allow bad actors to operate right up to a clear line without fear of force.<sup>154</sup> The clarity of rules that Bright-Liners seek to harness in enforcing compliance puts both sides on notice of the precise conditions precedent to legal force (whether UN Security Council authorization or the crossing of the bright-line self-defence triggers), but those actors posing the menace have other strong informational advantages, including about their next moves and the truth or falsity of their claims. That is, under a Bright-Line regime, those who perpetrate menaces can plan their actions with a good deal of legal certainty about what will or will not be likely to trigger forceful responses (especially given that the Security Council tends to move very incrementally towards authorizing force), while those seeking to combat those dangers through calibrated strategies of coercion and deterrence must do so under significant uncertainty as to whether and when force might be authorized, thereby providing menacers with opportunities to play the system.<sup>155</sup>

As to future research, if doctrinal form is important to setting policy balances of force and restraint as well as to promoting enforcement pressures and compliance pulls of the UN Charter regime, then legal scholars should widen their lens to include its effects on threatened force, including subtle and tacit threats. In considering both the substance and form of legal regimes, scholars should take into account that threatened or inchoate force affects the course of events, the moves and counter-moves by multiple actors, and states' trust in collective security arrangements long before crises materialize as 'cases'.

<sup>153</sup> See George and Simons, 'Findings and Conclusions', in A.L. George and W.E. Simons (eds), *The Limits of Coercive Diplomacy* (2nd edn, 1994), at 267, 280, 286.

<sup>154</sup> In his seminal article on rules v. standards in private law, Duncan Kennedy argues that a problem with bright-line rules is that the unscrupulous actor can go right up to them – that they signal to actors exactly how far they can operate without negative legal repercussion, and therefore encourage them to push to that boundary: see Kennedy, *supra* note 71, at 1742–1745, 1773–1774.

<sup>155</sup> For a discussion of this phenomenon in the context of mass atrocities see Genocide Prevention Task Force, *Preventing Genocide: A Blueprint for U.S. Policymakers* (2008), at 69. For a discussion in the context of WMD threats see Waxman, *supra* note 2, at 70–75.

### C Doctrinal Form and Future Institutional Context: Jus ad Bellum and Beyond

This article started with an observation that any meaningful discussion of legal doctrinal form takes place within an institutional context, in this area one that is largely decentralized and heavily reliant on individual states for legal application and enforcement. Recall, too, that it was only with the end of the Cold War – and the emancipation of the UN Security Council from paralysis – that Bright-Liners could advocate a serious case based on collective security decision-making. This article then proceeded to analyse the debate about doctrinal rules or standards for regulating force as though that institutional context is fixed.

Looking over the horizon, however, there are alternative institutional futures – as well as changes in global power politics<sup>156</sup> – that could again drive changes in doctrinal form, or at least shuffle the matrix of virtues and drawbacks of rigid rules or flexible standards:

- The UN Security Council's authority could one day erode, especially if its composition remains fixed to outdated distributions of state power or it fails to meet adequately emerging security and humanitarian challenges.<sup>157</sup> This would weaken Bright-Liners' argument that the Charter's collective security arrangements are adequate to deal with many threats, but if it means devolving more discretion to individual states it could also amplify calls to contain that discretion with clear rules.
- The Security Council's authority might be challenged increasingly in the future by regional bodies, such as NATO or the African Union, or by new blocs of states tied together by ideology, such as a concert of democracies, whose pronouncements on the legality of force might be given great weight among international audiences.<sup>158</sup> On the one hand, regionalism or the rise of other blocs might provide a way to break the legislative deadlock of UN Charter reform, offering a route to expand rule-bound exceptions to prohibited force. On the other hand, it would promote alternative multilateral venues capable of applying flexible standards.
- Non-state actors, including NGOs and expert groups, might gain an increasingly influential voice in this arena, as they have in other areas of international law. Their efforts could galvanize public opinion with respect to the legality of force, thereby diminishing the power of states but in some cases providing influential judgements in applying flexible standards.<sup>159</sup> Consider, for example, the influence of ICISS and the International Independent Commission on Kosovo in shaping international opinion that the 1999 Kosovo intervention was legitimate.<sup>160</sup>

<sup>156</sup> An obvious example is a rising and increasingly militarily powerful China.

<sup>157</sup> See Thakur, 'Law, Legitimacy and United Nations', 11 *Melbourne J Int'l L* (2010) 1, at 18; see also Caron, *supra* note 9, at 562–566 (discussing challenges to the SC's authority).

<sup>158</sup> See Franck, *supra* note 39, at 100 (regional bodies); Princeton Project on National Security, *Forging a World of Liberty Under Law* (2006), at 25–26 (concert of democracies).

<sup>159</sup> Some argue that this is already the case: see, e.g., I. Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (2011), at 60–63 (arguing that non-governmental actors play a strong role in UN SC deliberative processes).

<sup>160</sup> See Murphy, 'Criminalizing Humanitarian Intervention', 41 *Case Western Reserve J Int'l L* (2009) 341, at 349–350.

- The United States and some other powerful states opposed expanding the ICC's jurisdiction to include aggression crimes, and the ICC is unlikely to emerge as a major actor in this field (in part because it has proven so difficult to negotiate clear rules to define offences).<sup>161</sup> Ironically, though, a powerful, supranational judicial arbiter of the legality of force might help to answer arguments against the flexible standards approach advocated by Balancers and generally employed by the United States, because it could provide centralized, formal judgements and its authority might counter Bright-Liners' worry that flexible standards are uncontrollable in the hands of individual states.

These are just several among the many possible institutional dimensions that could feed back into future debates about doctrinal form.

Law regarding resort to force is unique in many respects, among them its implication of the most vital state interests, including sometimes state survival; its peculiar institutional context, pairing the centralized and formalized UN Security Council system with a heavy reliance on decentralized legal interpretation and enforcement; and its (fortunately) relatively infrequent application. However, some of the sub-debates between Bright-Liners and Balancers may be generalizable or trans-substantive, such as the extent to which the clarity of rules or the persuasiveness of standards is likely to promote compliance.<sup>162</sup> Some broad issues from above, such as the need to consider doctrinal form in the context of institutional mechanisms for applying it and enforcing it, are of course relevant across other areas of international law.

Some scholars have observed, in that regard, that the choice of rules or standards in international law is likely to depend on the 'thickness' of institutional context, including the availability of judicial or administrative authorities,<sup>163</sup> though they draw a wide range of conclusions as to which ways greater institutionalization cuts regarding the precision of rules or vagueness of standards.<sup>164</sup> One might expect, for example, that the development and institutionalization of World Trade Organization dispute resolution mechanisms would affect design choices of legal rules versus standards with regard to trade law, another area of international cooperation, competition, and conflict.<sup>165</sup>

<sup>161</sup> See V. Padmanabhan, *From Rome to Kampala: The U.S. Approach to the 2010 International Criminal Court Review Conference* (2010), at 12–17.

<sup>162</sup> More common than scholarly discussion of doctrinal form is discussion of legal 'precision' and compliance with international law. See, e.g., Goodman and Jinks, 'How to Influence States: Socialization and International Human Rights Law', 54 *Duke LJ* (2004) 621, at 675–687 (discussing theories of precision and compliance in the context of human rights law).

<sup>163</sup> See Abbott *et al.*, 'The Concept of Legalization', 54 *Int'l Org* (2000) 401, at 413–414.

<sup>164</sup> See Finnemore and Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics', 55 *Int'l Org* (2001) 743, at 747–750.

<sup>165</sup> See Trachtman, 'The Domain of WTO Dispute Resolution', 40 *Harvard Int'l LJ* (1999) 333, at 350–375; see also Abbott *et al.*, *supra* note 3, at 414 n.34 ('agreements administered by the WTO can, with similar legitimacy and effectiveness, specify detailed rules on the valuation of imports for customs purposes and rely on broad standards like "national treatment"'). For a similar discussion of rules v. standards in the international investment treaty context see Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States', 104 *AJIL* (2010) 179.



Section 4's mapping of assumptions about doctrinal form and legal enforcement and compliance then raises broader lines of inquiry about international regulation. Future analysis should look across areas of international law for evidence about the way legal-doctrinal form affects state decision-making or appraisal processes. It should also ask to what degree is choice of doctrinal form in the use of force arena especially necessary to account for the unique features of decision-making about security and the distinctive institutional context in which it takes place.

## 6 Conclusion

Most debate about regulating resort to force focuses on substantive questions, including how tightly or loosely to regulate force and what types of contingencies or threats should give rise to legal force options outside the collective decision-making process of the UN Security Council. These debates can also be recast in terms of doctrinal form, and doing so exposes how many of the assumptions about balancing substantive policy goals and risks are usually coupled with other important and divergent assumptions about the way international law operates in this field. In seeking to understand the roles doctrinal form and legal argumentation play besides setting substantive policy balances, this analysis helps in understanding the merits and limits of UN Charter regime reform proposals – including options obscured by the usual framing of debate – as well as how reform possibilities are currently limited by institutional architecture.