
Regulating Resort to Force: A Response to Matthew Waxman from a 'Bright-Liner'

Olivier Corten*

Abstract

This article exposes the difficulties raised by Matthew Waxman's article in correctly assessing what he designates as the 'Bright-Liners' view. Three propositions will be detailed in support of this thesis. First, I will argue that (even) those who are considered as 'Bright-Liners' recognize the existence of 'grey zones' and the necessity to make some 'balance' between different elements in each particular context. It seems therefore incorrect to distinguish the two tendencies according to this criterion. By contrast, it is true that most 'Bright-Liners' will support a more restrictive interpretation of the existing rules prohibiting the use of force. But, as I will try to establish in a second stage, the arguments put forward in this restrictive approach are not always properly described by Matthew Waxman. Lastly, I will emphasize a major characteristic of the restrictive approach which, in my view, is underestimated in Matthew Waxman's article: the quest for a universal inter-subjectivity, which dictates the importance of basing one's analysis on the positions of numerous states and scholars from various parts of the world.

When I received the *EJIL* Editors' invitation to comment on Matthew C. Waxman's article for this symposium, I must confess to having been somewhat surprised after reading the first pages. This article is indeed dedicated to the same subject-matter as an article I wrote in this Journal in 2005.¹ Both articles aim at offering a panorama of the existing literature about *jus contra bellum*, dividing scholarship between two tendencies: Bright-Liners v. Balancers in Professor Waxman's article, Extensive v. Restrictive approach in mine. In those two studies, beneath the substantive disagreement about the content of the existing rules prohibiting the use of force (some tending to condemn military actions more easily than others), the importance of the methodological dimension of the debate is emphasized. To put it briefly, 'Bright-Liners' use a restrictive

* Professor at the Faculty of Law, Centre de droit international, Université Libre de Bruxelles. Email: ocorten@ulb.ac.be.

¹ Corten, 'The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate', 16 *EJIL* (2005) 803.

methodology, based on existing texts and clear manifestations of universal *opinio juris*, whereas ‘Balancers’ prefer an extensive approach integrating law, practice, and values. In the first category, we find authors supporting a rigorous interpretation of the UN Charter; in the second, authors often tend to conceive broadly some classical exceptions to the rule prohibiting use of force in international relations, particularly self-defence.

However, it quickly appeared that the two articles are different in several aspects. In footnote 2 of his article, Matthew Waxman states that ‘to be clear about my own biases, I have argued previously in favour of balancing’. By comparison, at the end of the introduction to my own article, I confessed that I could not ‘claim to be totally exterior to the debate presented here. More specifically, my personal preference is for the restrictive approach’.² In other words, both Professor Waxman and I admit that a presentation of the existing scholarship is always biased by the subjective position of the author. Of course, this has nothing to do with a strategic choice consciously privileging one position against another. The bias can operate more insidiously, causing difficulties in fully understanding the subtleties of the ‘other’ position, and consequently presenting it. I have no doubt that a ‘Balancer’ could show such bias by criticizing the manner in which I presented the ‘extensive’ (this word in itself not being neutral) approach in my article. For my part, as a clearly labelled member of the ‘restrictive approach’, I would like to stress the difficulties raised by Matthew Waxman’s article in correctly assessing what he designates as ‘Bright-Liners’ view’. Three propositions will be detailed in support of this thesis. First, I will argue that (even) those who are considered as ‘Bright-Liners’ recognize the existence of ‘grey zones’ and the necessity to make some ‘balance’ between different elements in each particular context. It seems therefore incorrect to distinguish the two tendencies according to this criterion. By contrast, it is true that most ‘Bright-Liners’ will support a more restrictive interpretation of the existing rules prohibiting the use of force. But, as I will try to establish in a second stage, the arguments put forward in this restrictive approach are not always properly described by Matthew Waxman. Lastly, I will emphasize a major characteristic of the restrictive approach which, in my view, is underestimated in Matthew Waxman’s article: the quest for a universal inter-subjectivity, which dictates the importance of basing one’s analysis on the positions of numerous states and scholars from various parts of the world.

1 Recognizing the Existence of ‘Grey Zones’

In his article, Professor Waxman defines ‘Bright-Liners’ as those who believe in the existence of ‘clear and rigid rules that admit little case by case discretion’. According to them, ‘bright line rules and rigid processes are capable of independent and objective determination’. I am not sure that there is any ‘Bright-Liner’ author who would support such a radical and, to be frank, naïve view. Rather, I am convinced that every contemporary international lawyer (including those characterized as ‘Bright-Liners’ by Matthew Waxman) is aware of the irreducible indeterminacy of the

² *Ibid.*, at 805.

interpretation of existing rules. An assessment of the literature commonly characterized as 'restrictive' in its interpretation of the UN Charter clearly shows that the existence of 'grey zones' is universally admitted. Many examples could be given in support of this assertion. First and foremost, the scope of application of the *jus contra bellum* depends on the interpretation of two ambiguous notions: 'threat' and 'force'. The 'threat of force' according to Article 2(4) of the Charter is considered distinct from the 'threat to the peace' according to Article 39, the former being more difficult to establish than the latter. However, determining the existence of an illegal 'threat' in a given situation is a particularly difficult task. No conventional or universal text offers a definition of this notion, and the existing jurisprudence remains unclear. In its *Armed Activities* judgment on the merits, the ICJ found that there was no threat of force by the US against Nicaragua in violation of Article 2(4), even though the declarations by President Reagan urging the Sandinista government to change its political regime could have appeared as such.³ By contrast, in a recent award, a tribunal found Suriname guilty of a threat in violation of the Charter despite the rather equivocal terms used in that particular case.⁴ Against this background, all the authors (including those who could be characterized as 'Bright-Liners') who have written on this subject admit the absence of a 'clear cut' rule the determination of which would be 'independent and objective'.⁵ In the same perspective, the threshold between a 'use of force' prohibited by Article 2(4) of the UN Charter and a mere 'enforcement measure' regulated by other rules has never been clearly defined. This issue was addressed by the ICJ in the *Fisheries (Spain v. Canada)*⁶ case as well as by the arbitral tribunal in the Suriname/Guyana award mentioned above.⁷ In view of the existing case law, it remains difficult to determine which set of rules (*jus contra bellum* or other rules regulating violence at a lower level) is applicable. Of course, some problems are easy to solve: the operation against bin Laden in Pakistan was not considered to be governed by Article 2(4), whereas the military intervention against Libya was. But there are many other precedents (like the Columbian incursion in Ecuador in 2008 and some limited Turkish actions in Iraq in recent years) which can give rise to serious difficulties.⁸ As far as I know, no author has ever denied this difficulty by invoking a clear-cut rule or an objective determination. In the same perspective, one could evoke the difficulties surrounding the notion of self-defence as an exception to the prohibition to use force. Even if 'Bright-Liners' generally refer to existing texts, like Article 51 of the UN Charter and GA Resolution 3314, this is not the end of the matter. For example, Article 2 of the GA definition requires that the act of aggression be of a

³ ICJ, *Military and Paramilitary Activities* [1986] ICJ Rep. 118, at para. 227.

⁴ Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII of the UN Convention on the Law of the Sea (*Guyana and Suriname*, 17 Sept. 2007), at para. 439, available at: www.pca-cpa.org.

⁵ See, e.g., Dubuisson and Lagerwall, 'Que signifie encore l'interdiction de recourir à la menace de l'emploi de la force?' in K. Bannelier *et al.* (eds), *L'intervention en Irak et le droit international* (2004), at 83–104.

⁶ [1998] ICJ Rep 443, at paras 19 ff.

⁷ *Guyana and Suriname*, *supra* note 4, at paras 441 ff.

⁸ Corten, 'Self-defence Against Terrorists: What Can be Learned from Recent Practice (2005–2010)?', 109 *Kokusaiho Gaiko Zasshi (J Int'l L and Diplomacy)* (2010) 164.

‘sufficient gravity’. In the same vein, Article 3(g) considers a ‘substantial involvement’ in some irregular activities as an act of aggression. Here again, no-one denies the existence of a broad margin of appreciation in assessing those terms in each particular case.⁹ The same can obviously be said about the elements of necessity and proportionality which are recognized as conditioning the legality of a particular act of self-defence. Some ‘Bright-Liners’ argued that the war against Afghanistan was not ‘necessary’ because the Security Council could have given an authorization to use force if such authorization had been requested.¹⁰ This interpretation was not based on any ‘objective’ determination of a ‘clear-cut’ rule. It was rather the result of a general assessment of the various elements of law and fact that were considered relevant in the particular circumstances of this case. To give a similar (and final) example, the authors who consider that the military intervention aiming at overthrowing the Ghadafi regime in Libya was not consistent with the limited mandate given by the Security Council (the protection of civilians) do not rely on any *sens clair* of the resolution. They do it by ‘balancing’ different elements: the text of SC Resolution 1973, the evolution of the situation on the ground, and, in this context, the credibility of the justifications given by some of the intervening powers. In other words, it seems excessive to characterize those who support a restrictive interpretation of *jus contra bellum* as old-fashioned positivists who would believe in any ‘bright-line’ (rule?) able to address a problem without arriving at a balance between relevant texts, facts and values. This is why it appears preferable to use the ‘restrictive’/‘extensive’ dichotomy rather than the ‘Bright-line’/‘Balance’ one. That must constantly be borne in mind when assessing the ‘restrictive’ approach in the contemporary debates about the regulation of the use of force.

2 Supporting Restrictive Interpretations in Contemporary Debates

If we turn to Professor Waxman’s presentation of the substantive disagreements between the two tendencies, two examples can be given of what could be viewed as misunderstandings of the ‘restrictive approach’. As we will see, the misunderstanding is not neutral, as it (unconsciously but surely) results either in confining the debate in tendentious terms or in discrediting the restrictive view by caricaturing it.

The first danger denounced here can be deduced from the presentation of the anticipatory self-defence question. In the article, we read that ‘it is widely agreed, however, that resort to force is also permitted in anticipation of an imminent attack’. Accordingly, the debate would oppose, on the one hand, the ‘Bright-Liners’, who limit anticipatory self-defence to the conditions laid down in the *Caroline* incident, and, on the one hand,

⁹ See Nollkaemper, ‘Attribution of Forcible Acts to States: Connections Between the Law on the Use of Force and the Law of Responsibility’, in N. Blokker and N. Shrijver (eds), *The Security Council and the Use of Force. A Need for Change?* (2005), at 170.

¹⁰ Corten and Dubuisson, ‘L’opération “liberté immuable”: une extension abusive du concept de légitime défense’, 106 *RGDIP* (2002) 51, at 74–75.

the 'Balancers', who argue that more general or indirect threats would also trigger the right enshrined in Article 51 of the UN Charter. This, in my view, induces a radical shift of the debate in favour of an extensive interpretation of self-defence. The only genuine restrictive conception of self-defence confines it to a riposte to an *effective* armed attack, as can be deduced from the ordinary meaning of Article 51 ('if an armed attack occurs'). This position is shared by many authors¹¹ and states,¹² who succeeded in precluding the inclusion of some form of anticipatory self-defence (which otherwise would have been extended to a situation of 'imminent threat') in the World Summit 2005 Declaration. The UN High Level Panel¹³ and the Secretary-General¹⁴ made such a proposition in their respective reports, but this gave rise to so many protests that the controversial part of the text was deleted in the final version of GA Resolution 60/1.¹⁵ This episode attests to the existence of a dominant restrictive position about the interpretation of self-defence. In sum, the current debate is not between accepting or rejecting any broad conception of pre-emptive war, as suggested by Matthew Waxman. It is focused on the opportunity to admit any form of anticipatory self-defence, even in case of an 'imminent' threat, whatever this expression could mean in a particular case.

The danger of caricature can be illustrated by the debate about the role of non-state actors. Matthew Waxman contends that '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'. The corresponding footnote refers to my own work as illustrating this 'extreme' position. Yet I am not sure I have ever supported such a reasoning.¹⁶ Actually, the problem is not to know whether non-state actors can commit armed attacks: they can, as should be deduced from a reading of Article 3(g) of the GA definition of aggression which states that those actors can 'carry out acts of armed force against another State', as well as from SC Resolution 1368, recognizing the applicability of Article 51 after the 9/11 attacks perpetrated by a terrorist group. Against this background, it is self-evident that a state can retaliate against such a group by using coercive means. Actually, as the *jus contra bellum* prohibits only the use of force against a state, it does not, as such, preclude any police or military operation against a group of criminals. The problem, however, arises when a victim state begins to retaliate not only against a private actor, but also against a state sponsoring it. In this case, *jus contra bellum* becomes relevant and, consequently,

¹¹ See, e.g., the text signed by some 300 international lawyers from various parts of the world in the context of the Iraqi War, according to which '[s]elf defence presupposes the existence of a prior armed attack; consequently, "preventive self-defence" is not admissible in international law' (reproduced in XXXVI *Revue belge de droit international* (2003) 272).

¹² See, e.g., the position of the NAM, *Comments on the Non-Aligned Movement on the Observations and Recommendations Contained in the Report of the High-Level Panel on Threats, Challenges and Change* (A/59/565 and A/59/565CORR.1), New York, 28 Feb. 2005, at paras 23–24.

¹³ *A More Secured World: Our Shared Responsibility*, Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, UN (2004), A/59/565, at paras 188–189.

¹⁴ *In Larger Freedom: Towards Development, Security and Human Rights for All*, A/59/2005, 24 Mar. 2005, at 33, para. 124.

¹⁵ *2005 World Summit Outcome*, A/RES/1, 24 Oct. 2005, at paras 77–79.

¹⁶ O. Corten, *The Law Against War* (2010), at 160–197.

according to Article 51 of the Charter, the intervening state must justify the use of force against another state by proving that the latter is itself responsible for an ‘armed attack’. Following the existing texts and jurisprudence, this implies either the attribution of the acts of the private group to the targeted state or the establishment of the ‘substantial involvement’ of that state in the activities of the group. In other words, since using force against a non-state actor is not in itself prohibited, the reference to ‘self-defence’ (i.e., an exception to a general prohibition) is useless. By contrast, self-defence against a non-state actor cannot justify a use of force against any state beyond the conditions laid down in the Charter. This can undoubtedly be characterized as a ‘restrictive’ interpretation, even if it is supported by many authors, as well as by the ICJ. To qualify it as an ‘extreme’ one appears to be, however, indeed rather tendentious.

3 A Quest for Universal Inter-subjectivity

Lastly, a core characteristic of the ‘restrictive’ approach must be emphasized. As there is no possible *objective* determination of the rule, the quality of a legal interpretation cannot be deduced from its ‘intrinsic’ characteristics. It rather lies in its ability to convince – and consequently to be supported by – as numerous and different actors as possible. Such a philosophical approach leads those authors to prefer the *inter-subjective* validity of an SC resolution representing a common view of states with different political and cultural backgrounds, rather than to focus on particular and *subjective* qualifications made by ‘democratic’, ‘leading’, or ‘major’ states.¹⁷ More generally, ‘Bright-Liners’ tend to use instruments representing a multilateral view as universally as possible, like GA Resolutions, Non-Aligned Movement (NAM), or G77 declarations, etc., whereas ‘Balancers’ will usually prefer to cite US or Western states’ positions, as the extensive use of the *Caroline* incident (diplomatic correspondence between the US and the UK in the beginning of the 19th century) reveals. To give a specific example, Matthew Waxman writes that there was an ‘international opinion that the 1999 Kosovo intervention was legitimate’, an assertion that is presented as self-evident. Actually, this is highly questionable, as the intervention was condemned by numerous states like Russia and China, but also India, Brazil (and other Latin-American states members of the ‘Rio Group’), Namibia (and other African States).¹⁸ But it probably reveals the influence of some Western dominant view which seems strongly to weigh on the ‘Balancers’ writings on use of force. It must be added, in the same perspective, that the selection of the authors who compose the material used to characterize ‘Bright-Liners’ is rather sparse. Professor Waxman refers to only a limited sample of English-speaking literature. The result is the omission of various authors from Switzerland (Kolb¹⁹), Belgium (Klein²⁰), Germany (Nolte²¹), Greece

¹⁷ Corten, *supra* note 1, at 810–812, 816–821.

¹⁸ See, e.g., S/PV.3988, 24 Mar. 1999 and GRI0/SPT-99/10; A/53/884-S/1999/347, 26 Mar. 1999.

¹⁹ R. Kolb, *Ius contra bellum. Le droit international relatif au maintien de la paix* (2nd edn, 2009).

²⁰ Klein, ‘Le droit international à l’épreuve du terrorisme’, 321 *Hague Recueil* (2006) 368.

²¹ G. Nolte, *Eingreifen auf Einladung: Zur völkerrechtlichen Zulässigkeit des Einsatzes fremder Truppen im internen Konflikt auf Einladung der Regierung* (1999).

(Sicilianos,²² Christakis²³), Africa (Kamto,²⁴ Laghmani²⁵, Bannouna²⁶), Asia (Mani²⁷), Latin America (Kohen²⁸), to give but a few characteristic examples. By contrast, in his article, Matthew Waxman frequently cites Yoram Dinstein and Thomas Franck as 'Bright-Liners'. This choice appears surprising, to say the least. Yoram Dinstein is an author supporting a very broad interpretation of self-defence, extending to the possibility of adopting armed counter-measures or reprisals. In his seminal book, one finds undoubtedly the clearest (and often subtle) expression of a position corresponding to the – rather radical – Israeli doctrine on use of force.²⁹ Turning to Professor Franck, his position after the 9/11 attacks was often perceived, in Europe, as being unequivocally in support of the American war against terrorism. In his book published in 2002, he constantly pleads in favour of the necessity to contextualize the evaluation of a use of force in each particular case, and supports the concept of 'mitigation' when an intervention would be illegal but legitimate.³⁰ Given the choice of such material (excluding numerous significant authors but including supporters of an opposite view) to describe the restrictive approach, it is not surprising that some misunderstandings have resulted, as shown above.

Finally, we must return to the main point. There is no possible 'objective' or 'neutral' interpretation of *jus contra bellum*. And there is no possible 'objective' or 'neutral' presentation of the existing scholarship relating to *jus contra bellum* either. A representative of the restrictive approach (like myself) will interpret rules and authors differently from a representative of the extensive approach (like Matthew Waxman). Of course, it could be possible to reflect more generally on those two possible presentations by comparing, for example, Professor Waxman's article and mine. But, invariably, this reflection would itself be influenced by some personal and subjective position.

²² Sicilianos, 'Entre multilatéralisme et unilatéralisme: l'autorisation par le Conseil de sécurité de recourir à la force', 239 *Hague Recueil* (2009) 9 and L.A. Sicilianos, *Les réactions décentralisées à l'illicite: des contre-mesures à la légitime défense* (1990).

²³ Christakis, 'Existe-t-il un droit de légitime défense en cas de simple "menace"? Une réponse au "groupe de personnalités de haut niveau" de l'ONU' in SFDI, *Les métamorphoses de la sécurité collective* (2005), at 197–222.

²⁴ M. Kamto, *L'agression en droit international* (2010).

²⁵ Laghmani, 'La doctrine américaine de la *preemptive self-defense*', in R. Ben Achour and S. Laghmani (eds), *Le droit international à la croisée des chemins. Force du droit et droit de la force* (2004), at 137–140.

²⁶ M. Bannouna, *Le consentement à l'ingérence dans les conflits internes* (1974).

²⁷ Mani, 'Humanitarian Intervention Today', 313 *Hague Recueil* (2005) 9.

²⁸ Kohen, 'The Use of Force by the United States after the End of the Cold War, and its Impact on International Law', in M. Byers and G. Nolte (eds), *United States Hegemony and the Foundation of International Law* (2003), at 197–231.

²⁹ Y. Dinstein, *War, Aggression and Self-Defence* (4th edn, 2011).

³⁰ T. Franck, *Recourse to Force. State Action Against Threats and Armed Attacks* (2002).