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International Law and the Bush Doctrine

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The Bush doctrine is the common description of an aspect of the post 9/11 American foreign policy package specifically dealing with the strategy of preemptive attack as a means for self defence. This strategy took shape throughout the aftermath of the 9/11 attacks, developing in various speeches by the President and high ranking staff. It was finalised in the 2002 national security strategy. In order to account for its impact on international law a multi layered analysis must be undertaken. Firstly, a concise reading of the applicable international laws that the doctrine collided with must be laid out – both customary and Charter. Secondly, the core tenets of the Doctrine must be established. This will be done chiefly, but not exclusively through a reading of the 2002 national security strategy. Once it is clear what the canvas onto which the Bush doctrine seeks to add its particular interpretation to, and it is similarly clear what that interpretation is, a third layer of analysis can address how the doctrine compliments, or challenges existing international law.

Before the Charter came into effect in the aftermath of World War Two, various strands of customary law defined and regulated behaviour in the international arena. The applicable standard on which to assess the fields of the use of preemptive attack and the acceptable limits of self defence (the core postulates of the Bush doctrine) derived from *The Caroline* incident. Briefly, British troops entered American soil in 1837 and scuttled the ship of a rebel Canadian group who were opposed to British dominion in Canada. Legal proceedings followed in which the standards of self-defence were established that are cited still to this day. Britain had to establish “a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation” (Dixon 2007: 315). All in all, in the customary sense, as demonstrated through this example, the use of force in self-defence is legal if it is done in response to an immediate and pressing threat and such force is exercised proportionately. What is immediately clear is that interpreting such approximations as *immediate* and *proportional* is left wide open. The UN charter sought to clarify this in its exercise of written international law.

It is not possible to examine the depth of the Charter in this study, however examination of **Article 51** and **Article 2 (4)** will provide a sufficient reading of the applicable laws that the Bush doctrine impacts upon. Article 2(4) governs the use of force, generally prohibiting it. However, a certain permissive reading of Article 2(4) implies that if the use of force does not end in the loss or permanent occupation of a territory and/or compromise the target states ability to act independently, it is *not* unlawful (Dixon 2007: 312-313). This will become of importance later in the analysis as the Bush doctrine itself is brought into focus. However the main importance of Article 2(4) in this context, is how it interacts with Article 51. Article 51 allows for the use of force between one state and another, in violation of the general terms of Article 2(4) but only in immediate self-defence. This was clearly intended to overwrite the old customary laws and provide a legal framework for the use of force in those situations where it was the only recourse for a state. To take a restrictionist position, Articles 51 and 2(4) comprehensively govern the use of force.

The language of Article 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” (<http://www.un.org/aboutun/charter/chapter7.htm>).

This is clearly alluding to the reality that states, individually or collectively *will* react to protect their sovereignty, and

International Law and the Bush Doctrine

Written by Stephen McGlinchey

can do so legally. It must be noted that there is only provision for legal self defence *when* there is an *armed attack*. The provision of preemption is not included outwardly, but the use of the phrase *inherent right* can be said to point towards the already established customary laws governing self-defence. That inherent right therefore points to the proportionate use of force in self-defence and as detailed already, allows for preemptive action if the danger is instant and overwhelming – such as a situation where troops are about to cross a border or missiles are launched but have not yet struck their targets. The key however is in the last sentence, where it is made clear that any such action is only permissible *until* the Security Council itself acts. Self-defence is to be immediate and reactionary, done purely for survival until the collective security of the United Nations comes into play. The Security Council therefore assumes the burden of enforcing world peace and settling disputes, in theory. However in reality, this has proven far from the truth. This is the context into which the Bush doctrine entered the legal lexicon as the current administration's answer to the nature of the self-defence America required in the age of trans-national terrorism, and the perceived inability of the Security Council to perform its task of enforcing world peace.

The question of sovereignty is a central issue in how the Bush doctrine challenges existing international law. Firstly it redefines its treatment of the sovereignty of other nations who it deems are harbouring terrorists, or may act as a future haven for terrorist groups. These states are to be treated with no distinction from the terrorists they supposedly harbour, giving the United States the right to invade them, reminiscent of *The Caroline* incident, to remove the threat to its own sovereignty from said terrorism (The National Security Strategy of the United States of America [NSS] 2002: 5). This brings into issue the second aspect of the redefinition of sovereignty. By extending its traditional borders of self defence to the entire globe, in fact to wherever a terrorist or rouge regime may be located, the Bush doctrine redefines both America's own sovereignty and the traditional distinction of what self defence is. This is an important shift in the logic of the international system as international law prohibits the use of military force "to punish", in fact the concept of military punishment is conspicuously absent from the entire canon of international law (Lang 2005: 51). As already detailed, the defence for this change lies in the redefinition of sovereignty. This is defended further due to the changed nature of war highlighted by the comparative ease for terrorists to do mass damage, "we must adapt the concept of imminent threat" to certain situations "even if uncertainty remains" (NSS 2002: 15). Crawford calls this the logic of "they (almost) hit me first" (Crawford 2005: 37) elaborating that this particular logic must be rejected as it throws away all limits to war, allowing for a definition of national interests to be so wide that "the self is potentially under threat everywhere" (Crawford 2005: 41). This reading throws the Bush doctrine into murky water legally. If it removes all traditional limits to war by treating the enemy as if it has no limits, then it concedes that by fighting such an enemy you retain no limits yourself. This is clearly a problem when addressing international law.

The second key issue in the Bush doctrine is the use of preemptive force as a legitimate strategy of defence. The language used to describe the emerging strategy began to take shape during the President's address at West Point; "If we wait for threats to fully materialise, we will have waited too long" (Bush 2002: 2). In the 2002 National Security Strategy, the statements; "we cannot let our enemies strike first", and that force will be used "even if uncertainty remains" confirms that there is clearly a problem (NSS 2002: 15). Preemption in this context clearly outstretches its legal definition as it only applies to imminent threats and yet the West Point address and the national security strategy clearly establish that threats will be dealt with *before* they fully materialize. By including this ambiguity, the spectrum between prevention and preemption becomes compressed to the point where it is difficult to distinguish where one begins and the other ends (Crawford 2005: 26). This is important in itself, suggesting that there was a clear avoidance of using the term prevention – near comprehensively interpreted as illegal, whilst preemption is acceptable in both customary law, and through the inherent right of self-defence referenced in Article 51.

It must be noted that prevention in this sense does not originate within the Bush doctrine. President Clinton used 'prevention' on terrorist training camps in 1998 and Israel has long launched such offensives on its neighbours. The importance of the Bush doctrine lies in the fact that this is the first time prevention has been encapsulated into foreign policy in such a concrete manner by a major state in the age of international law. Preventive force is nothing new, but it has always remained in the back pocket of national leaders, something that is done, but usually excused under other legal avenues. The fact that the phrase *preemptive* was used in place of what is essentially a strategy of *preventive* war does indicate that the Bush administration at least recognises the legal issues surrounding such a policy. For international law this is a major challenge and a significant literature has proliferated around this issue.

International Law and the Bush Doctrine

Written by Stephen McGlinchey

Additionally, the European Union produced a security strategy in 2003, in which it openly embraced international law and rejected preemptive self-defence. This highlights something of immense significance to this analysis – the 2002 national security strategy “makes no reference to international law or to the role of the UN Security Council” (Gray 2006: 555). This is an alarming point considering the nature of the doctrine and a damning blow to the credibility of international law as perceived by the Bush administration.

Feinstein and Slaughter suggest that the Bush doctrine does not go far enough. Taking the point of view that whilst usefully highlighting the inadequacy of the Charter, the Bush doctrine represents a chance to remould international law to include a *duty to prevent* which expands upon the *responsibility to protect* consensus, but applies it to such endeavours as permanently diluting sovereignty to allow the removal of weapons of mass destruction from rogue states. This theory is based on collective action however, not unilaterally focused measures and it is the wish of the authors that the United Nations would be expanded to enable it to take on this role (Feinstein 2004: 136-137). This modern revisionism of international law is rife in the literature, and although this particular article supports the institution of the United Nations, it represents a vast consensus amongst the literature surveyed that the existing Charter law governing international affairs, particularly Article 51, is inadequate. It seems the Iraq invasion and the 2002 national security strategy have contributed to, or perhaps ignited a new wave of criticism of the Charter.

The United Nations has reacted to the debate. Kofi Annan, commenting on the Bush doctrine and preemptive force, noted that both were a “fundamental challenge” (Annan 2003: 2) to the post World War Two order. He noted that the Security Council has been “hesitant and tardy” (Annan 2003: 3) at times, but maintained that it was still *the* central instrument of the international system. A 2004 High Level Panel explicitly rejected the Bush doctrine noting that “if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council” (Byers 2005: 62). It is inescapable to a student of international relations that this response is representative of the level to which the debate revolving around this issue ignores the reality of power. The timely wisdom of realism will reveal such simple ‘truths’ such as American leaders will be more concerned with security than with international law, particularly during times of crisis. The present orientation of international relations places America in a unique position of power, and by failing to address this, and by assuming that the Security Council is *the* dominant and capable source of security in the world (and it clearly is not in American security calculations) the High Level Panel’s treatment of this issue misses the point entirely. There is a real problem in global security, brought into focus on 9/11. A key point of this problem is that not all who benefit from global security are prepared to contribute sufficiently to it and the United Nations fails continually to resolve or prevent conflict. The Bush doctrine can perhaps be seen as a unique answer to this problem with America seeking to harness its “exceptional” power by trying to create a Grotian system of mutual respect by eliminating actors who break those rules of respect (Benvenisti 2004: 694-95). The problem remains that in doing so, they violate international law from every angle.

Michael Glennon concludes that the entire international system of law has failed following the 2003 invasion of Iraq. By going ahead with the invasion outside of the framework of the Security Council, America and its allies demonstrated that geopolitics and its forces are too strong to be legally bound by an international organisation with no effective enforcement mechanism. “The grand attempt to subject the use of force to the rule of law had failed” (Glennon 2003: 16). The system has failed because unipolarity has rendered it obsolete, not because post 9/11 American foreign policy undermines international law (Glennon 2003: 18). This article, written in the immediate aftermath of the rupture the Iraq invasion caused in the Security Council, may be premature in its conclusion – as after all, the United Nations survived that crisis and perhaps emerged stronger in a certain way after the Iraq invasion became a disaster. However, it does raise a key point in assessing the impact of the Bush doctrine on international law. By pursuing an aggressive unilateral Manichean stance in its War on Terror, rather than embracing the collective security of the international system, America displayed to the world its apathy and lack of confidence towards that system. Glennon’s conclusion condemns the foundations of the United Nations charter as idealistic and unrealistic, reminiscent of E.H Carr’s famous dressing down of the League of Nations. Clearly, he has reason to do so. He notes the fact that the written laws governing force, such as Article 51 are “voluntarist” (Glennon 2003: 31). The Iraq case, perhaps more than any other case before it, showed the ease with which a powerful state could sidestep that voluntary adherence to law. Glennon also notes in passing that laws ought to be based on how states actually behave, rather than how they ought to behave (Glennon 2003: 31). With that in mind, it is important to point out that written laws are not the only ones that govern states.

International Law and the Bush Doctrine

Written by Stephen McGlinchey

Customary law cannot be forgotten in this analysis. The Charter has clearly not replaced these more established and unwritten practices. As already explained, there are clear customary principles regarding the use of force that are deeply set in governing state behaviour. An empirical study into recorded uses of preemptive force since 1945 showed that “across the board, empirical patterns of preemptive force in the U.N. era provide undeniably consistent evidence that customary law governs state behaviour” (Schildkraut 2004: 225). By this estimation, the Charter does not govern the use of force, and never has. It may then be worth considering if the Bush doctrine has had any effect on customary law. As the inescapable hegemon, American actions clearly reflect on others. But, as already noted, and reinforced by the study cited, the use of preemptive force is not new, nor did America set a new precedent by pursuing it. The heated debates that raged over the Bush doctrine may lead one to surmise that it is unlikely that it would set a precedent, as any nation pursuing openly a preventive doctrine of their own would receive the same level of negative attention – if not more. Nevertheless, “the power and influence of the United States is such that, even when it fails in a law-making effort, it still leaves a mark on international rules” (Byers 2005: 63). If, going by the cited empirical study, there has been no effect on state behaviour then there has certainly been an effect on the perception of United Nations and the Charter. Perhaps in time this will in itself modify state behaviour and set in motion new developments in customary law.

In conclusion, the Bush doctrine has clearly had an immense impact on international law as expressed in the United Nations Charter. It has undermined the stature of the Security Council and demonstrated viscerally the deep fissures that plague its daily operation and effectiveness. The doctrine has demonstrated that the World’s foremost state and the provider of much of the global security burden does not have the faith in the international system to protect its own security, and has therefore to act outside the framework of the Security Council in certain instances to meet its perceived security needs. This is the inescapable logic that defines this issue, and the United Nations must adapt and respond to this if it is to have any chance of being the “precious” instrument “to save succeeding generations from the scourge of war” (Annan 2003: 4). Further damage to the Charter, displayed through Schildkraut’s empirical study, shows that it has never ruled over the use of force. Instead a long established customary set of principles has done so. If this is true, then it makes for the rather sombre conclusion that sixty years of Charter ‘law’ has changed nothing regarding state behaviour regarding the use of force and the emergence of the Bush doctrine as a heavyweight contender has highlighted this fact for all to see. It also points to the fact that if one views international law as governed by customary law borne out of state behaviour, then the Bush doctrine has had little effect. It is simply representative of timely honoured state behaviour. If any other nation had been in America’s position today, and held similar power to America, they would have reacted in a similar way, regardless of the Charter.

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International Law and the Bush Doctrine

Written by Stephen McGlinchey

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