The challenges of post 9/11 politics to the strict prohibition on the Use of Force found in the UN Charter

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The justification of the use of force has been cited as not being "a weapon to be used to justify a political conclusion or a set of mechanical criteria that automatically yields a simple answer, but a way of moral reasoning to discern the ethical limits of action" (United States Conference of Catholic Bishops, 1993: 6). This essay aims to assess the degree to which the strict prohibition on the Use of Force found in the UN Charter has been weakened or upheld by firstly examining the original text on the Use of Force found in the UN Charter and comparing it with other areas of the Charter which allow for the use of force, for example in self defence, highlighting the ease with which Article 2.4 can be undermined. The United States' National Security Strategy 2002-2006, which is a clear response to the 9/11 terrorist attacks on New York City and Washington DC, will be used as a key text to determine whether the prohibition on the Use of Force found in the UN Charter has been weakened or upheld, or indeed manipulated out of recognition since 2001. To assess this effectively the arguments of various theorists will be used help to determine whether the UN Charter has been illegally weakened to accommodate US and UK military force used in Afghanistan after the 9/11 terrorist attacks in 2001, claimed to be legitimate by the USA and UK, or whether the use of force was indeed justified and legal. Finally this essay will conclude that the prohibition on the Use of Force originally found in the UN Charter has been repeatedly found to be flexible over the last 60 years, which has arguably seen it weakened. The suggested weakening of the prohibition since 9/11 has been essentially due to other Articles in the Charter which act as loop holes for states that wish to use force, effectively allowing powerful states to weaken the prohibition without incurring punishment whilst demanding it be upheld by less powerful states.

The United Nations Charter was created and signed in a period that had recently seen the devastating consequences of the use of force, which facilitated huge numbers of military and civilian casualties, destroyed countless cities and saw the attempted extermination of the entire European Jewish community in the Holocaust. It is understandable that the states were keen to show their rejection of aggression in their relations with one another. It clearly states that "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" (Charter of the United Nations, Article 2.4). The wording of this sentence could not be clearer: a state has no right to use, or threaten to use, force against another state. However, the contradictory nature of Article 51, that "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," (Charter of the United Nations, Article 51) suggests that a Member State is perfectly justified in using force against another state if self-defence is claimed as a reason.

Article 39 claims that "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security" (Charter of the United Nations, Article 39), suggesting that a state cannot choose to define for itself what constitutes as a threat from another state upon its territory, providing a stumbling block in the form of the Security Council for states who may unfairly claim the justification of self defence. Article 41 suggests alternative measures to the use of force that may be

employed against an offending state, for example “complete or partial interruption of economic relations” (Article 41) and takes priority over Article 42, which explains that, should non-military measures from Article 41 prove insufficient, the Security Council can take action “by air, sea, or land forces as may be necessary to maintain or restore international peace and security” (Article 42). Therefore to be considered legitimate the use of force must be authorized by the Security Council and be the last resort, used when economic sanctions and other mechanisms have been exhausted.

The terrorist attacks by the Afghanistan-based group Al-Qaeda on the USA in September 2001 prompted waves of fear the world over. The USA and UK subsequently declared a ‘war on terror’ and used military force to intervene in Afghanistan, undermining and weakening Article 2.4 in the Charter. However, the claim of self defence was used, as found in Article 51, which claims that the Charter contains nothing to undermine the right of a state to defend itself, though of course force was used without Security Council authority. This claim can be justified depending on “how far one wishes to push doctrines of self defence against armed attack to include self defence against imminent attack, to extend that even to an anticipatory right of self defence” (Carty, 2010: 288), which is arguably very much the case when examining the ‘Bush Doctrine’. This US National Security Strategy of 2002 states that the USA “has long maintained the option of pre-emptive actions to counter a sufficient threat to our national security. The greater the threat… the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack… the United States will, if necessary, act pre-emptively.” (United States Government, 2002: 15). Despite conceding that military force is not necessarily always necessary, the Bush Doctrine claims that “the United States cannot remain idle while dangers gather” (United States Government, 2002: 15), suggesting that the use of force is very much a key piece of US self defence strategy and the prohibition on the use of force is rendered useless compared to national doctrine and interests.

The wording in this document is immensely significant, as what the Bush Doctrine calls “pre-emptive” to align with existing doctrine, stretches the concept of pre-emptive self defence to the effect that one must distinguish between pre-emptive and preventative use of force, which are both anticipatory but quite separate. The idea of new threats starting to “gather” with no immediately known “time and place of the enemy’s attack”, as outlined in the Bush Doctrine, contrasts sharply with the idea of the “Supreme Emergency” required to justify a pre-emptive attack in the work of Michael Walzer, featuring the claim that “danger makes only half the argument; imminence makes the other half” (Walzer, 1977: 252-5). Bell goes on to claim that “The attacks of 9/11… do not constitute such an emergency for the United States” (Bell, 2010: 108), as there is no imminent danger or urgency to use force, creating such difficulties as distinguishing between threats yet to materialise and acting on suspicion. Buchanan and Keohane claim that preventive self defence is sometimes justified, but that it risks undermining “existing beneficial institutional norms constraining the use of force”, for example the UN Charter, which is “worrisome since predictions that violence may occur are generally more subject to error and bias than observations that it is already occurring” (Buchanan and Keohane, 2004a: 9). A clear problem is that the USA, in signing and agreeing to the Articles of the UN Charter, appear to be subject to the same set of expectations as the rest of the international society, yet many people “believe that in the current era a double standard is appropriate, in which the United States is simply not bound by any rules of general applicability across all states. The United States gets to do things, like launch preventive wars or insist on its own military pre-eminence, that other states do not get to do.” (Luban, 2004: 210), suggesting that the USA is free to undermine and weaken the prohibition on the Use of Force found in the UN charter (though under intense criticism), though other states are not and will be held accountable for failing to uphold it.

Walzer’s early claim that the proverbial dirty hands of politicians are “a central feature of political life” (Walzer, 2007: 280), where ‘wrong actions “may be exactly the right thing to do” (Walzer, 2007: 279) suggests a fairly Machiavellian view that sometimes even what is wrong (for example undermining the prohibition on the use of force found in the UN Charter) can be right (for example intending to protect the lives of one’s citizens). However, Walzer later revised his claim, citing the need for the alleged danger to be no “less than communal death” (Walzer, 1988: 46) for dirty hands to be permissible. This revision in Walzer’s claims could be partly due to the fact that actors are starting to be held more accountable for actions, for example the creation of the International Criminal Court, which has most recently seen former Liberian leader Charles Taylor on trial for war crimes. Perhaps the hypothetical situations presented by philosophers have been seen as “comically remote from the reasoning and psychology of the spooks and the politicians that actually get their hands, arms and shoulders dirty” (Coady, 2008a: 87).

Humanitarian claims as a legitimate reason for the use of force were rejected in the 1970s but during the 1990s arguably a new norm of Humanitarian Intervention emerged, which cited supreme humanitarian emergencies as a just cause for intervention in another state. However, as Wheeler maintains, "Even if a new norm of humanitarian intervention is emerging… in international politics states can always find a justification for their actions because the rules are sufficiently indeterminate. They can be stretched to provide enough legitimacy for practically any action" (Wheeler, 2000: 8-9). Since 9/11 there have been huge concerns regarding the human rights of Afghan citizens, the casualties of which have been highly publicized and used to criticize the difficulties of fighting an enemy such as a terrorist when arguably "there are no military solutions to terrorism" (Bloom, 2007: 39-40), suggesting that the prohibition on the use of force is being weakened unnecessarily, or, as Walzer might claim, "dirty hands aren't permissible (or necessary)" (Walzer, 1988: 46) if the positive ends are not being achieved by the negative means.

Article 2.4, containing the prohibition on the use of force found in the UN Charter, clearly states that "All Members shall refrain… from the threat or use of force against the territorial integrity or political independence of any state" (Charter of the United Nations, Article 2.4). This has arguably been weakened since the terrorist attacks of 9/11 2001 and the subsequent actions of states such as the USA, who used (and still use) military force in Afghanistan under the claim of self defence, found in Article 51 of the UN Charter. This contradictory element of the UN Charter naturally becomes problematic in such an instance as this "which the critical school would use to show the dangerous malleability and core ambiguity which lies at the heart of… international law on the use of force" (Carty, 2010: 288). A problem arises in that, though it is clear the USA and its allies have undermined Article 2.4 in the Charter by using Article 51, no punishment (except perhaps the general disapproval of the international society) has been issued yet neither has the prohibition on the use of force been pronounced redundant and removed from the Charter. As Luban professes, there really does appear to be "a double standard" (Luban, 2004: 210) applying especially to the United States, which is arguably "not bound by any rules of general applicability across all states" (Luban, 2004: 210). As Wheeler points out, due to the anarchical nature of the international state system "The key point about notions of international legitimacy is that [states] are not within the control of individual agents" (Wheeler, 2000: 6) and therefore powerful states cannot be held to account for undermining the UN Charter. Until all states can be held to account for failing to uphold the Charter, which itself needs to be less open to interpretation by states, the prohibition on the use of force will be weakened to a large degree. However, the prohibition on the use of force found in the UN Charter remains a highly respected and valued Article which, though arguably weakened since 9/11, was hugely significant at the time of its drafting.

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