FORWARD INTO THE PAST: AN ASSESSMENT OF OTHER POSSIBLE JUSTIFICATIONS FOR INVADING IRAQ

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FORWARD INTO THE PAST: AN ASSESSMENT OF OTHER POSSIBLE JUSTIFICATIONS FOR INVADING IRAQ.

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Introduction.

The United States and its allies based their legal basis for the 2003 war against Iraq on Security Council authorisation. Over time, the principal justifications originally given for the war have lost much of their force. The United States and their allies have toyed with the idea of other possible factors on which this war could be justified. They are: self-defence, the war on terrorism and Humanitarian Intervention. It is important to note that as the allies justification is based on United Nations Security Council authorisation, and not the other issues discussed below, they cannot be held legally liable under any of the below[1].

The dispute about the legitimacy of the Iraq war is not just an academic issue. It is quite possible that serious political problems could emerge for a number of Governments. This analysis will seek to elucidate and weight up all the salient issues and arrive at a rational and objective view.

The Right of Self-Defence.

Historically, self defence was put in the United Nations Charter under Article 51 as a result of demands by the South American Countries. This was so they could use their Rio Treaty

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[1] perhaps the United States to a lesser extent!!!

which provides that an attack on one of the States is an attack on all the States. As such, it is collective self defence and not the more important aspect of individual self defence that led to Article 51.

Consistent with Customary International Law and Article 51 of the Charter, a State may use force in self-defence. The right of self-defence is an inherent right under Customary International Law which the Charter upholds. Self-defence can be either individual or collective. Since 1945, self-defence has been the excuse for about 90% of the Worlds conflict.

Article 51 states:

> 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. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Article 51 seems to draw a distinction between the use of force for the general good which is the duty of the Security Council and for your good which is your duty until the Security Council takes over. Self defence is both an emergency and a temporary right. This is because the right elapses once the Security Council takes over. Bound to that is a procedural duty to report measures taken by a State to the Security Council. The main criticism of Article 51 is that proportionality and necessity which are at the heart of self defence are not mentioned. You have to look in Customary International Law for this. Weapons of mass destruction are important considerations for self-defence issues.

There are three main issues with regard to the right of self-defence. Firstly, what constitutes an 'armed attack'? There is very little guidance on this. In the *Nicaragua*[2] case, the International Court of Justice determined with reference to the United Nations General Assembly's Resolution on the Definition of Aggression 1974[3], which it said may be taken to reflect Customary International Law, that an armed attack must be understood as not merely action by regular armed forces across an international border, but also:

> The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to' (*inter alia*) an actual armed attack conducted by regular forces.

In light of the types of force used in conflict, this conclusion has been considered to be a rather restrictive interpretation and has been the subject of criticism. Rosalyn Higgins states, for example, that according to the International Court of Justice:

> An armed attack could take place directly, through the use of one's own forces, or indirectly, through armed bands or irregulars. The key is the scale of the activity. If it is not very substantial, it may still be an unlawful use of force, but will not be an armed attack-hence no self-defence may be used against it. That finding has occasioned a torrent of criticism, the critics contending that it is encouragement for low-grade terrorism because the state against whom it is directed cannot use force in self-defence against it[4].

Thus, could the war against Iraq be justified under the armed attack doctrine of self-defence? Clearly, as Iraq has not attacked any one of the allies or any other State the answer must be no.

The second issue is whether there is a right of anticipatory self-defence in Article 51. This is an area of controversy. There are two views of this. The first is that anticipatory self-defence

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[2] *Nicaragua v. United States of America I.C.J Reports 1986*, at para 195.
[3] See, Article 3 paragraph (g).
[4] R. Higgins, *Problems* & Process, International Law & How We Use It, (1994) pg250-251.

existed under Customary International Law before 1954 and the Charter does not remove it whilst the second view is that an armed attack has to take place first. Textually, the Charter represents the restrictive view. The International Court of Justice has not really determined what the exact position is. It docked the question in the *Nicaragua*[5] case on the basis that it is not necessary.

Nevertheless, the *Caroline*[6] case is held to legitimate the right of anticipatory self-defence, so long as there exists, 'a necessity of self-defence, instant and overwhelming, and leaving no choice of means, and no moment for deliberation'[7]. Israel's attack upon Egypt in 1967 is often cited as an example of anticipatory self-defence. Israel stated that it had convincing intelligence that Egypt was about to attack Israel and that Egyptian preparations were underway. In actuality Israel legitimated its actions not in terms of anticipatory self-defence but rather that Egypt's preparations for war-its mobilisation and blockade of Israeli ports, constituted a use of force and legitimated Israel's response.

However, with regards to Iraq, there was no information indicating that Iraq presented an imminent threat of attack against any State thus the United States and its allies cannot rely on this exception. Certainly, Iraq was not about to invade the United States or even Kuwait where thousands of American and British soldiers have patrolled the border since the Gulf War. As the United Kingdom Prime Minister stated in his Sedgefield Speech (5 March 2004) 'had we believed Iraq was an imminent threat to Britain, we would have taken action in Sept 2002; we would not have gone to the United Nations'. Hence, surely the action against Iraq cannot be because of an anticipatory self-defence.

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[5] *Nicaragua* case, *supra*, note 2, para 195.
[6] *Caroline* case *(1837).* 2 Moore's digest, Vol.II at pg. 409.
[7] Letter from Daniel Webster to Henry S. Fox (Apr 24, 1842), quoted in LORI DAMROSCH, INTERNATIONAL LAW: CASES AND MATERIALS 923 (2001).

The third issue is that of the United States pre-emptive strike doctrine. In the United States National Security Strategy[8], 'the concept of imminent threat, it was argued, must be adapted to the potential use of weapons of mass destruction'[9]. It holds that pre-emptive action is legal against terrorist groups and States that are trying to develop weapons of mass destruction. The Bush Doctrine seems to focus on the principle of regime change as the most effective means of defeating threats posed by rogue and terrorist-hosting States. However, actual regime change not only entails considerable even unacceptable, military and political risk depending upon local, regional and international circumstances it is also illegal under the Charter.

As there is no intelligence report indicating an imminent threat posed by Iraq, the fear of the allies rests on the future threat posed by Iraq. Thus, it could be held that an aspect of the war against Iraq is on pre-emptive self-defence. However, should a State regard itself as threatened by another State, although no hostilities have taken place, the threatened State is obliged to call on the Security Council which is the only body authorised to legitimise military action in such a case. This is evident from the drafting of the Charter which gives the Council pre-emptive powers to deal with threats of peace that might take several years to take effect[10].

An example of a pre-emptive action is Israel's attack on Iraqi nuclear reactor in 1981. Here, the United Nations Members held that Israel had failed to exhaust all peaceful means before

[8] President George W. Bush, *The National Security Strategy of the United States of America*, (Sept. 17, 2002), at: http://www.whitehouse.gov/nsc/nss.pdf.
[9] Susan Breau, '*Pre-emptive Self Defence and the Axis of Evil: The Legality of the Bush Doctrine'*, pg1.
[10] However, the Council does not use this power although; the trade-off inherent in the Charter is the veto power of one of the permanent five.

carrying out its strike and as such the strike was not necessary. Israel was overwhelmingly condemned by the Security Council as being in clear violation of Article 2(4) of the Charter.

William Taft[11] argued that the right of self-destruction must include a pre-emptive right 'otherwise the original purpose is frustrated'. The focus of the description in the *Caroline* case 'was on urgency rather than just the timing of the response and, above all, on the necessity of using force to protect against future harm'. He concludes that any pre-emptive action taken must meet the test of necessity.

'Vagueness and the possibility of abuse of any broader definition requires [the maintenance of] the traditional strict approach. To face so-called new threats, recourse to the Security Council is preferable to unilateral pre-emptive strikes'[12]. Breau criticizes the Bush doctrine as 'a failed attempt to push the limits of self-defence into pre-emptive self-defence with an expansion of the concept of imminence'[13].

Certainly, there is no doubt that circumstances have changed since 1945 when the United Nations Charter was adopted. The threat of large-scale terrorism with weapons of mass destruction is undoubtedly a serious one but as the new United States policy reserves the right to act in self-defence even when the threat is not imminent, the *Caroline*[14] test will not be met. For self-defence to be legal, the attack must be imminent if not already underway. Nevertheless, Customary International Law is not static. If other States acquiesce to the new United States strategy, it could affect the rule of the *Caroline*[15] case but State practice today

[11] William H. Taft, Speaker at the First Meeting of '*Old Rules, New Threat'* Nov, 18, 2002. Washington, D.C.
[12] Micheal Bothe, 'terrorism and the legality of Pre-emptive Force' at:
http://www.ejil.org/journal/vol14/No2/art2.html.
[13] Breau, *supra,* at note 9.
[14] Caroline case, *supra,* at note 6.
[15] Caroline case, *supra,* at note 6.

is not in favour of this. As Iraq was on the receiving end of the threat of war from the United States, it seems that Iraq had more grounds to use this doctrine in March 2003 than the United States had.

The United Nations High Level Panel Report seems to take largely for granted the United Kingdom view that anticipatory self-defence is allowed but disagree with the United States view of a unilateral right of pre-emptive self-defence. Only the Security Council can act pre-emptively via Articles 39 and 42 of the United Nations Charter. However, it seems that the Council does not act on its pre-emptive right. Perhaps this is because the States that make up the Council have shown no interest in pre-emptive action.

The doctrine of pre-emptive self-defence remains outside International Law and could potentially prove quite dangerous. This is because aggression could be justified under the guise of pre-emption. For example, regional powers fearing the rise of neighbouring rivals could decide that it is better to act against their future enemies before the threat fully materialises. Thus, the United States administration's attempt to expand the concept of self-defence to authorize preventive attacks against States, based on potential future threats has the potential to enormously destabilize the present system of United Nations Charter restraints on use of force.

The War on Terrorism.

There was a reluctance to rely on the war on terrorism because of uncertainty surrounding the available evidence. Had the United Kingdom relied on this ground, the governments ‘forty-

five minute' claim would have caused a disastrous situation for them on the issue of the legality of the war.

Historically, the term 'terrorism' was coined during France's Reign of Terror in 1793 to 1794. Originally, the leaders of this systematized attempt to weed out 'traitors' among the revolutionary ranks praised terror as the best way to defend liberty, but as the French Revolution soured, the word soon took on grim echoes of State violence and guillotines[16].

There are definitional problems with the word terrorism. Governments use the term to describe the actions of their enemies but not their allies.

Israel and Syria accused each other of terrorism, and Cuba levelled the same accusation at the United States on Thursday in a United Nations session reflecting how far apart nations are on defining the scourge. Syria said Israeli occupation of Palestine territories is terrorism. Israel called suicide bombers 'murderers and not martyrs'. Colombia and Iran stressed the links between terrorism and drug trafficking. And Australia said the greatest danger was that terrorists would get hold of weapons of mass destruction[17].

In addition to the problems of definition, the terms 'terrorism' and 'terrorist' are inflammatory and politicised. Amnesty International does not use the term 'terrorism'[18]

The war on terrorism is not a new one. There are two main angles to this. The first is the issue of weapons of mass destruction with the second being terrorist organisations such as Al-Qaeda. It is clear that a 'threat to peace and security' under Article 39 of the Charter can come from terrorism and 'there is no doubt that terrorist acts by States can constitute an armed attack and thereby justify a military response'[19]. An example of this is the Lockerbie case in which a Pan American airliner blew up over the Scottish town of Lockerbie in

[16] Council on Foreign Relations: http://cfrterrorism.org.
[17] US wages war against it, yet it remains undefined', The (Toronto) Globe & Mail, 21 February 2003
[18] http://www.amnesty.ca/sept11/faq2.htm
[19] Christopher Greenwood, '*International Law and Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 San Diego Jnl Int 7.

December 1988. Two hundred and eighty people (280) were killed in the explosion, most of them passengers aboard the plane including some residents of Lockerbie, whose homes were struck by falling debris.

In November 1991, the Americans and the British investigation indicated two suspects from Libya who planted the bomb in a Toshiba brand radio-cassette recorder and exploited their aviation connections to ensure that their bag would be on board Pan Am Flight 103, leaving from Frankfurt. When the passengers changed flights in London, the bag followed. The two suspects were indicted and the United States demanded their extradition in order to stand trial in the United States, and threatened to impose International sanctions upon Libya. Under United States and British pressure, the United Nations Security Council adopted Resolution 731[20] calling upon Libya to extradite the two suspects. In Resolution 748[21] the Security Council found Libyan support for International terrorism a threat to International peace and security. Eventually, this case was settled out of Court with Libya agreeing to pay compensation to the victims' families.

Further examples of terrorism are the assassination attempts on President Mubarak of Egypt, the 1985 bombing of an Air India jet and the August 1998 bombings of the United States embassies in Kenya and Tanzania which, before the September 11 attack are the largest attacks on major buildings- 224 people were killed; these attacks have been linked to al-Qaeda.

The terrorist attacks on September 11 2001 of the Twin Towers in the United States changed the face of terrorism. The attacks are the deadliest terrorist attack in history. As the *Caroline*

[20] S.C Res. 731 (Jan, 12, 1999), U.N. Docs S/RES/731 (1991).
[21] S.C Res. 748 (Mar, 31, 1992), U.N.Docs S/RES/748 (1992).

case had found that terrorist acts by non-State groups could amount to an armed attack, there was no problem of finding Al-Qaeda a non-State group guilty of an armed attack under international law.

In the United Kingdom Prime Minister's Sedgefield speech (5 March 2004), Tony Blair held that September 11th 'altered crucially the balance of risk as to whether to deal with (the threat posed by Saddam Hussaine)'. He talks of two phenomena. The first is 'Islamic extremism and terrorism with the second being attempts by States some of them highly unstable and repressive to develop nuclear weapons programmes, chemical weapons and biological weapons materiel, and long range missile'.

In his speech to the United Nations on September 12, 2002, President Bush described Saddam Hussein's regime as 'a grave and gathering danger', he further detailed the regime's persistent efforts to acquire weapons of mass destruction and spoke of an 'outlaw regime' providing such weapons to terrorists. Under International Law a State must not allow its territory to be used as a base for terrorist attacks.

Clearly, the development of more sophisticated weapons in the twentieth century allows terrorists to kill from a distance. Thus, it is important to eliminate the threat posed. This was done by first taking out Al-Qaeda bases in Afghanistan after the attack on the Twin Towers and then launching a global war against terror primarily after President Bush's axis of evil- Iraq, Iran and South Korea.

Iraq has been continuously linked with Al-Qaeda and the September 11 attacks even though the CIA, FBI and the MI6 all disagree[22]. Thus, surely an attack against Iraq has no logic connection to the tragic events of September 11. Rather than diminishing terrorism the action against Iraq will further inflame anger against the United States and may well lead to more terrorist attacks[23]. Care must be taken with the war on terrorism. This is because it has the potential to give States the power to take away Human Rights that were given over the years[24]. Are we sacrificing Human Rights for security or is this a false paradigm?

Israel has nuclear weapons. Pakistan and India also have them and have come close to using them. The United States has by far the largest store of weapons of mass destruction in the world and has used them with deadly consequences in Hiroshima and Nagasaki with two generations continuing to suffer from the effects. Iraq may possess or be developing weapons of mass destruction, nevertheless, the possession of such weapons if not used or not deemed to be an imminent threat will not constitute a clear and present danger justifying war based on terrorism via weapons of mass destruction.

The Doctrine of Humanitarian Intervention.

More than seven months after the declared end of major hostilities, weapons of mass destruction have not been found. No significant pre-war link between Saddam Hussein and International terrorism has been discovered[25]. In so stressing the so-called 'moral' case for

[22] Paul Lashmar & Raymond Whitaker, '*MI6 &CIA: The New Enemy Within*', The Independent, Feb 9, 2003; James Risen & David Johnston, '*Split at CIA and FBI on Iraqi Ties to Al-Qaeda*', New York Times, Feb 2, 2003. Barnaby Mason, 'Analysis: *Danger of Spinning Iraqi Case*', BBC, Feb 5, 2003.
[23] See for example, the terrorist attacks in Spain(2003), United Kingdom (2005) and the continuing spate of terrorist attacks in Iraq since the war.
[24] For example the UK Terrorism Act 2000 which allows groups to be added to Schedule 2 (terrorist groups) not via an Act of parliament but by mere ministerial power
[25] Human Rights Watch World Report 2004 http://www.hrw.org/wr2k4/3.htm#_Toc58744952

the war against Iraq, the United States may be attempting to invoke the disputed premise of Humanitarian Intervention.

The purpose of Humanitarian Intervention is to prevent a large threat of life actual or conceived. Humanitarian Intervention can take the shape of two different actions. Firstly, it can be non-military such as when China was not allowed into the World Trade Organisation or the breaking off of diplomatic relations with Countries. Secondly, it can take the form of either a military action or other coercive actions such as economic sanctions which trample on existing contractual rights[26].

The Security Council acting under Chapter VII can authorise Humanitarian Intervention via resort to force. Up to the 1990's, there is no doubt that military intervention for humanitarian reasons is illegal without Security Council authorisation. The main issue of debate is whether pre 1990 Customary International Law has evolved so that Humanitarian Intervention can be impliedly or retrospectively allowed. The issue of retrospective authorisation such as in the Kosovo case is an uncomfortable one. Implied authority is usually referred to in 'Operation Haven' where the United Kingdom justified the 1993 Iraqi invasion via implied authorisation from Resolution 688[27] and Humanitarian Intervention. Liberia in 1990, Iraq in 1991-1992 and Kosovo in 1999[28] are the main disputed Humanitarian Intervention cases.

The United Kingdom has taken a leading role in the development of the doctrine. The then Foreign Secretary Jack Straw set out a framework to guide intervention in response to massive violations of Humanitarian Law and crimes against humanity. The framework was

[26] Please note, if there has been consent given by the host State, then it cannot be a humanitarian intervention action. Rather, it is a legal military action.
[27] S.C. Res 688 (April, 5, 1991), U.N.Docs, S/RES/688 (1991).
[28] It is highly arguable whether the situation in Kosovo was more peaceful after the intervention!

built on six principles. They are: Firstly, a strengthened culture of conflict prevention is needed. There must be the right authority to go in via the United Nations[29]. Secondly, there must be a just cause either as a result of large scale loss of life actual or anticipated or large scale ethnic cleansing actual or anticipatory. Force should be used only as a last resort. Thirdly, having the right intention which is, halting suffering has to be the main reason although not necessarily the only reason. Fourthly, intervention in internal affairs is a sensitive issue. It must be objectively clear that there is no practicable alternative to the use of force to save lives. Fifthly, there should be a proportionate use of force. Thus, the situation in Kosovo will be avoided and sixthly, a State cannot intervene if the situation is going to get worse from the intervention. Any use of force in such situations should be collective[30].

However, there is not enough State practise to prove Customary International Law has acquiesced to a doctrine of Humanitarian Intervention. It has been rejected by a large number of the world's nations and has not acquired a place in Customary International Law. This is because such a principle would give powerful nations carte blanche to declare a 'humanitarian emergency' and impose their will on weaker countries thereby jeopardising International order and putting the currently fragile state of the United Nations collective security system at risk. The legal foundations of Humanitarian Intervention are shaky. The best that can be made in support of Humanitarian Intervention is that it cannot be said to be unambiguously illegal[31].

In addition, States have always talked of Humanitarian Intervention in acute terms and not chronically hence the reason why Humanitarian Intervention was not originally a factor in the

[29] The General Assembly might put a burden on the Security Council so also could Regional Organisations.
[30] United Kingdom Foreign Office Policy Document No. 148
[31] United Kingdom Foreign Office Policy Document No. 148, reprinted in 57 BYBIL (1986) 614.

Iraq war because it was not felt that Saddam Hussein was going to massacre his people. Thus, atrocious as it may be, the fact that the Saddam regime may have used chemical weapons as a repressive measure against internal rebellion (Kurdish rebels) fifteen years ago, would not and should not qualify as justification for a forceful fifteen years later[32].

The Human Rights Watch World Report in its 2003 report held:

> In our view, as a threshold matter, humanitarian intervention that occurs without the consent of the relevant government can be justified only in the face of ongoing or imminent genocide, or comparable mass slaughter or loss of life…Brutal as Saddam Hussein's reign had been, the scope of the Iraqi government's killing in March 2003 was not of the exceptional and dire magnitude that would justify humanitarian intervention. To justify the extraordinary remedy of military force for preventive humanitarian purposes, there must be evidence that large-scale slaughter is in preparation and about to begin unless militarily stopped. But no one seriously claimed before the war that the Saddam Hussein government was planning imminent mass killing, and no evidence has emerged that it was.

It then concluded that:

> In sum, the invasion of Iraq failed to meet the test for a humanitarian intervention. Most important, the killing in Iraq at the time was not of the exceptional nature that would justify such intervention. In addition, intervention was not the last reasonable option to stop Iraqi atrocities. Intervention was not motivated primarily by humanitarian concerns. It was not conducted in a way that maximized compliance with international humanitarian law. It was not approved by the Security Council. And while at the time it was launched it was reasonable to believe that the Iraqi people would be better off, it was not designed or carried out with the needs of Iraqis foremost in mind[33].

Clearly, current circumstances do not bring this doctrine into play. What evidence there is of Saddam's reported mass killings took place over a dozen years ago thus; the situation in Iraq

[32] It is pertinent to note that, as at the time of this atrocity the United States was a staunch financial, military and logistical supporter of the saddam Hussein regime both in the repressive measures it took against internal rebellion and its war against Iran. Very little in the way of 'Humanitarian' disquiet was in evidence either in the United States or the United Kingdom at the fate of the victims.

[33] Human Rights Watch World Report 2004 http://www.hrw.org/wr2k4/3.htm#_Toc58744952

in March 2003 does not fit the necessary criteria. As such Humanitarian intervention cannot be a justification for invading Iraq[34].

Conclusion.

To a certain extent, the Rule of Law has been damaged by this war. Attacks on the Rule of Law are in some ways as much a danger to our society as terrorism.

First, the Rule of Law actors-the righteous-and the villains are increasingly indistinguishable. The Rule of Law States may take the initiative in resorting to force either on dubious legal grounds or on grounds wholly unconnected with the law as in the case of the shock and awe action against Iraq. Second, there is the apparent readiness of the Security Council to provide specious legal cover for illegal conduct by leading members of the international community. Who needs Munich when we have the Security Council?[35]

Abandoning the rule of law seems too insignificant an objection.

A prominent German professor of State and International Law, Dietrich Murswiek, wrote in the *Süddeutsche Zeitung* that the United States is establishing a precedent with far-reaching repercussions.

When Bush says he is not required to ask anybody's permission, this cannot just be attributed to the arrogance that comes with power. There is a legal issue at stake...if this standpoint becomes established and becomes a new rule of international law, then the general ban on force will have been done away with in a practical sense... either, every state can wage war against any other state that it regards as 'rogue,' which means there will be no more international security, or the right to wage a preventive war is regarded as the exclusive right of the United States, which puts an end to the principle of equal national sovereignty of all States[36].

[34] See also, the International Commission on Intervention and State Sovereignty published report on: 'The *Responsibility to Report*', December 2001. www.idrc.ca.
[35] Ian Brownlie's lecture in memory of Lauterpatch on November, 2004. 'The Rule of Law in International Affairs'
[36] Quoted in:Peter Schwarz, 'International legal experts regard Iraq war as illegal', http://www.wsws.org/articles/2003/mar2003/ilaw-m26.shtml.

In summation, it is the writer's firm conclusion that there has to be explicit authorisation for the use of force. Implied authorisation cannot be used to bypass the general ban on force stipulated in the Charter of the United Nations, for which there are just two exceptions: self-defence and Security Council authorization. Otherwise, the question of International legality will be at stake. Attempts to justify the war under self-defence, the war on terrorism and Humanitarian Intervention clearly do not suffice. The war against Iraq is illegal and the legal position taken by the United States and their allies is incorrect and poses a grave danger for the future of International Law, the United Nations, and a peaceful stable International Order.