Professor Franck's Lament

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It is a delight to participate in HICLR’s round-table on preemption. The review has done a great service by inviting Professor Tom Franck to address this important issue. As Professor Franck makes clear in his paper, all states will inevitably cite the standards and procedures that the United States and its allies assert for using preemptive force, as justifying their own actions. We must expect that. It is also clear that grave dangers accompany the preemptive use of force by states. The institutional danger, so well articulated by Professor Franck, is that such actions will undermine the utility and potential of the United Nations Security Council, and other multilateral bodies, including NATO. The strategic danger is that the threat of preemption will actually cause greater instability. The nature of preemption is such that the state you are threatening to preempt will anticipate that you will attack it before it has actually formed an intention to attack you. The consequence is that both states will tend to regard a first strike as the preferable course of action to waiting for the other to attack at its convenience.

Not only do you have the right subject today, you also have the right person to lead the discussion. Professor Franck is a giant in the field of international law, and one of the few intellectually rigorous scholars in the field. He believes in preserving the Charter and the Charter’s values, not just the claims of international law professors as to its meaning. He understands that some restrictive views of the Charter are simply untenable. He understands that new threats exist to international peace and security that require states to consider using force in their self-defense, or in the defense of human rights.

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1 As used in this article, the word “preemption” is meant to include preventive use of force, not merely uses of force in the face of imminent attack.
He understands that we have failed states in this world, that we have enhanced moral standards in this world, and that there are greater demands on us as a result to prevent genocides and other massive violations of human rights. And he understands, finally, that if a Kosovo, or a Rwanda, presents itself, not only are we justified in acting to prevent those kinds of humanitarian crises, but that it is appropriate to treat our intervention in such situations as precedents; such actions are not simply exceptions to the rules, as most international lawyers interpreted Kosovo, but rather situations in which we acted properly in defense of persecuted Muslims and others, and would do so again if the similarly compelling circumstances arose once more.²

My differences with Professor Franck begin with the hope that his reading of the National Security Strategy (NSS) is wrong. I disagree with him that the most important innovation in the NSS is that the United States is asserting a right to act unilaterally. As he ultimately recognizes, the United States has claimed the right to act without Security Council approval since the Charter was written and ratified. President Truman would have gone into Korea if the Security Council had not given him authority to do so, and every President of the United States since Truman used force without Security Council approval.³ Every President has unilaterally used force, and the U.S. has always retained the right to use force without Security Council approval.⁴ That point is not an innovation of the NSS.

In this regard, it seems fair to point out that not enough credit is given to the Bush Administration by Professor Franck and others for its willingness to work with and through the Security Council and other international bodies. The NSS strongly advocates relying, not only on force, but on all other means for achieving security, including diplomacy, economic development, intelligence, and alliances.⁵ And

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⁴ The NSS states: "While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country." National Security Council, *The National Security Strategy of the United States of America*, available at <www.whitehouse.gov/nsc/nssall.html> (last visited June 16, 2004).

⁵ The NSS states that the US will work for economic progress, and will
the Bush Administration has demonstrated its commitment to this policy through its actions. It has succeeded in bringing Libya to the table without any use of force; it is negotiating effectively to deal with the threat of North Korea, with the help of China and other states; it has contributed to stability between Pakistan and India through the brilliant diplomatic efforts of Deputy Secretary of State Armitage; and, it is working with its allies and the relevant agencies to confront Iran over its nuclear programs. So, a lot of things are being done, apart from the use of force, to deal with the new elements of weapons of mass destruction, terrorists, camps, and other similar challenges.

It is also inaccurate to call the Administration’s actions “unilateral”; Afghanistan was approved by the Security Council, and is a completely multilateral process. In Iraq, we have many allies in the coalition, and military action came only after some 16 Security Council Resolutions finding Saddam Hussein a grave threat to peace and security, as well as to the well being of his own people. Congress approved the action by large majorities of both Houses, and the law authorizing the use of force rested expressly on the purpose of enforcing the United Nations Security Council’s Resolutions concerning Iraq.6

The major innovation in the NSS relates to the other point made by Professor Franck: the possibility that the Strategy means that, not only will we use preemptive force in our self-defense, or in the defense of human rights in egregious cases, but that we will use it to maintain our hegemony. That truly is a shocking and indefensible concept. To claim the right to use preemptive force to prevent even a threat to United States superiority from developing would be an indefensible policy, not just an indefensible position under the Charter. I choose to read the NSS differently, however, and the text lends no support to so reckless a theory.7

The NSS does state that the United States will not let any other state challenge our superior strength. And, yes, the NSS also says we promote the use of alliances, and the use of diplomacy, among other things to achieve its objectives. Id.


7. The NSS states: “We must build and maintain our defenses beyond challenge.” But it calls for the use of force only to defeat an adversary “if deterrence fails.” And in discussing preemption, the NSS states: “The purpose of our actions will always be to eliminate a specific threat to the United States or our allies and friends.” National Security Strategy of the United States, supra note 4.
are going to defend ourselves preemptively when we are threatened. But those two concepts, if they are separate (as they are written), are both defensible. The notion that the United States wants to stay strong enough to be beyond the challenge of other states in the world is one that is, I think, sound. The United States does more to defend morality and freedom in the world than any other state, and keeping America strong will serve the interests of the world and the values of the Charter. The NSS is also defensible in claiming the right to use preemptive force in the face of real threats. So, I am hoping that Professor Franck’s lament is needless, in that the NSS was not meant to connect the two propositions he cites.

I wish Professor Franck had given you more of a flavor of his other works and taken you through some of the steps that he has so ably laid out, that would help create a set of Charter rules that truly would be viable in the world. I don’t agree with him that Article 2(4) of the Charter is properly read as representing an agreement by all states to “abjure autonomous recourse to violence,” in all situations that do not fall within the narrowest reading of the self-defense clause. I wish he would reject that view and join me in affirming that the Charter provisions related to the use of force were essentially hijacked by international lawyers in the Charter’s early days, and that their positions have made the Charter seem unworkable. The Charter’s language is, in fact, far more flexible than international lawyers are yet prepared to admit. Article 2(4) does not absolutely prohibit the use or threat of force; it says that all Members shall refrain 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.” Professor Franck notes the ambiguity of this language in his recent book, but he refuses to acknowledge that this implies that the Charter does not absolutely prohibit using force to preserve the territorial integrity or political independence of a state, or in a manner consistent with the purposes of the United Nations.

I do not claim, and the United States has never claimed, that a state can unilaterally decide that it is using force consistent with the purposes of the United Nations, and therefore that every such use of

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force is lawful. But the United States has always held that the use of force in support of freedom, or to prevent genocide or otherwise protect recognized human rights, is more justifiable than uses of force that lack such circumstances. But international law is claimed not to permit taking such factors into consideration. International lawyers have a cubbyhole approach: one must establish that a use of force meets the requirements of self-defense or was approved by the Security Council, or by some other particular rule, or the use of force is illegal. Under this approach, the fact that international law does not support a rule allowing uses of force for humanitarian interventions renders irrelevant the fact that an intervention prevents a humanitarian disaster. A recent article, for example, argues that one should judge the propriety of any preemptive use of force in part by whether it is attempting to change the status quo.\textsuperscript{10} That is a consistent position of international lawyers, allegedly because we cannot legitimately distinguish between right and wrong when it comes to force; all force is presumptively evil.\textsuperscript{11} This marginalization of those values that mean the most to us as human beings is wholly artificial and gives international law a bad name.

The other Charter provision central to use of force issues, Article 51, is also treated by most international lawyers as unambiguously limiting uses of force to the defense of state territory from an armed attack, some claim by the military forces of another state. Yet, the words of Article 51 are that “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.” The provision is ambiguous at best, and it is questionable to assume that an “inherent” right that cannot be limited by anything in the Charter is limited by the very Article in which it is affirmed. Professor Franck concedes that this provision should not be read narrowly, and that world leaders need greater flexibility in dealing with the very real threats they face.\textsuperscript{12} But he has not yet accepted the logical conclusion: that uses of force in self-defense must be judged by whether they are reasonable in the circumstances (including whether they are necessary and proportionate), not solely by whether they are

\begin{itemize}
  \item \textsuperscript{10} Thomas Graham, Jr., \textit{National Self-Defense, International Law, and Weapons of Mass Destruction: Is International Law Relevant to Arms Control?} 4 \textit{CHI. J. INT’L L.} 1.
  \item \textsuperscript{11} See the critical evaluation of this idea in Robert H. Bork, \textit{The Limits of International Law}, The National Interest, Winter 1989/90, at 3, 10.
  \item \textsuperscript{12} \textit{FRANCK, supra} note 9, at 53-108.
\end{itemize}
responses to attacks by conventional forces against the territory of a state.

Despite the fact that Professor Franck fails to join me in rejecting some untenable claims of international lawyers, he and I end up agreeing on the most important issues. We look at the actions of the United Nations and of individual states as precedents, upon which the United Nations and states can properly thereafter rely, where evidence of their acceptance exists. We agree that the Charter is a living constitution. Professor Franck's recent book, *Recourse to Force*, explains how the Charter has gradually been read and applied in creative ways to make the United Nations and the Security Council more effective.\(^\text{13}\) He finds several precedents for using force, especially collectively, based on prior Security Council and some unilateral actions. My preference would be to adopt an approach to the use of force based on the rule of reason, that gives weight to the factors relied upon and the actions taken by the Security Council, even if those resolutions don't amount to an explicit grant of power to use force.\(^\text{14}\) If that approach is unsatisfactory, then we should work on some other approach that has the potential to bring national security officials and diplomats to the table to argue rationally about the use of force. The current, artificial rules understandably lack credibility with national security professionals. Government officials – at their best – rest their judgments on an overall appraisal of all the factors relevant to uses of force. Lawyers need to accept that sound reality and help ensure that all the proper factors are in fact considered, that traditional protections (such as necessity and proportionality) are applied, and that the process is as honest and comprehensive as possible.

Professor Franck is also properly critical of the United States for failing to use and support the Security Council in Iraq after the initial stages of the war. I fully supported the war in Iraq, but the Administration made its task there far more difficult than was necessary for our defense by the manner in which it conducted its post-war activities. The Security Council had for some time been prepared to come in and cooperate with us in a regime change that would have been far less expensive, far less traumatic. But we insisted, not only on keeping the lead; we had to be the occupying power, with all the responsibility and alienation that posture was

\(^{13}\) *Id.* at 20-44.

\(^{14}\) *Sofaer, supra* note 2, at 11.
certain to provoke. President Bush had successfully created an excellent multilateral model for post-conflict administration in Afghanistan, and we learned a lot in Kosovo and Serbia. We could have put all that into practice in Iraq. Trained police forces all over the world were ready to join in. India at one point was ready to send many thousands of troops if we were only willing to give up occupying power status. But a different strategy was adopted, one based on a greatly exaggerated view of our ability to control events in a hostile environment.

So, I share Professor Franck's concern about the NSS insofar as it reflects an attitude among those who wrote it that is overreaching and unrealistic. The President's policies with regard to uses of force, both during the campaign and in all areas other than Iraq, called for humility and realism. Those who shaped the post-invasion policy for Iraq seriously failed the President, in my view, and adopted ends and means that do not reflect his sober warnings issued prior to being elected and thereafter.

The facts that ease my concerns about this over-ambitious agenda in Iraq are the very substantial costs of the Iraq operation; it has been so staggering in terms of lives, injuries, dollars and good will, that we are unlikely for some time at least to replicate this approach again, anywhere. In fact, it is very much to the President's credit that, when he became convinced that those planning the reconstruction of Iraq had made serious miscalculations and could no longer be trusted to complete the job, he ordered that occupying status end on June 30, 2004. While many complain that this is a politically driven decision, I celebrate that fact; the President is determined to limit the costs of Iraq, while ensuring that the fundamental purpose of the operation—the security of the United States and Iraq's neighbors—is achieved.

In conclusion, and in the spirit of Tom's focus on what can be done to enhance the future utility of the United Nations, I would make the following suggestions about what our options are globally to deal with the problem of the use of force. Tom's excellent new book on the use of force quotes from Kofi Annan the statement that "the problem in the world today is as much the failure to use force as it is the uses of force." This is a profound insight and the key to


16. Kofi Annan, Adoption of Policy of Preemption Could Result in Proliferation of Unilateral, Lawless Use of Force, Secretary General Tells General Assembly,
progress. The Security Council has not been effective in dealing with many situations that require the use of force, or the protection of international forces. We must make the multilateral use of force, through the Council, into a workable, viable option in taking on challenges. Tom’s book describes the history of Article 43 of the Charter. This provision was supposed to result in international commitments from Council members to provide armed forces for United Nations approved operations. We need this sort of arrangement, as the Charter intended. If the Council could call upon multilateral forces ready to deal with situations like Rwanda, or Liberia, or Haiti, it would be more inclined to act effectively, and sooner. This change to enhance the capacity of the Security Council to deal with international crises, could be made without any need to amend the Charter, and it would lessen the need for actions by states without Council approval.

In the process of making this change, moreover, the Military Committee contemplated in Article 43 should be brought to life in a form and with responsibilities that do not disrupt existing capacities. The United Nations has developed an effective and experienced leadership in the area of peacekeeping that should be protected from unwarranted experimentation. In addition, creating the Committee could facilitate the enhanced involvement of leading contributors to international security. United Nations Members that agree to contribute significant forces to be used to implement decisions of the Security Council should be added as standing members of the Military Committee, along with representatives of Permanent Members of the Council. This change would make available the opportunity for states such as Argentina, Germany, India, Japan, South Africa and others to play an ongoing and significant role in international security through permanent and equal membership in the Military Committee. The Security Council should agree to delegate international security issues to the Military Committee for its consideration and recommendations. Though the veto would remain in the Council itself, this sort of structural change could significantly expand the scope of United Nations operations and enhance the


17. Article 43 obliges all Members to enter into “special agreements” with the Security Council to make available “on its call... armed forces, assistance and facilities” to carry out mandates related to maintaining international peace and security. FRANCK, supra note 9, at 22.
effectiveness of the Council by increasing the roles of many major states. This is precisely the result that Secretary General Anan and Professor Franck favor, and the most likely way to convince the United States and other Members to rely more heavily on multilateral measures in many more situations than is currently possible.