Hastings International and Comparative Law Review

Volume 27
Number 3 *Spring 2004*

Article 6

1-1-2004

The Rule-Outcome Paradox, Madness Cascades and the Fog of Preemption: Seeking the Best Rule for Use of Force

David D. Caron

The Rule-Outcome Paradox, Madness Cascades and the Fog of Preemption: Seeking the 'Best Rule' for Use of Force

By DAVID D. CARON*

I. Introduction

It is argued that today's security threats are different than those facing the world immediately after World War II and that the rules concerning the use of force need to be refashioned to fit that world. More specifically, the Bush Administration has asserted that terrorist organizations and states that support them pose such a new threat, that they justify the adoption by the United States of a doctrine authorizing the use of force to prevent the emergence of threats, a policy often termed the "preemptive use of force doctrine."[1]

The Bush Administration's articulation of a right to use force to address threats as they are emerging has been the subject of intense discussion and, for the most part, criticism. Professor Thomas Franck's remarks in this volume are stunningly critical of the Bush Administration, its policies toward the use of force and multilateral institutions such as the United Nations, and the application of those policies in the case of Iraq. Given that Professor Franck is one of the most distinguished scholars of international law and politics of the last half century, someone who has written extensively on the law

* C. William Maxeiner Distinguished Professor of Law, University of California at Berkeley. I thank David Kaye, Richard Steinberg, John Yoo and Susan Spencer for their valuable comments, errors are mine.

1. Although the doctrine is most often termed as one of the "preemptive" use of force, the National Security Strategy in which it was most formally articulated (and which is at the center of Professor Franck's comments) speaks not only of preempting imminent attacks but also of preventing emerging threats. For this reason, I employ also the phrases that emphasize not only preemption but the prevention of threat emergence. I thank David Kaye for reminding me of the importance of names attached to doctrines.

regulating the use of force,[2] and someone who both recognizes the demands of power and seeks pragmatic solutions, his criticisms need to be considered carefully. His remarks today quickly jump past an assessment of legality. As Franck notes, the Bush Administration's proposed doctrine "stakes out a lot of new ground, legally speaking."[3] Professor Franck instead emphasizes, among other things, that the proposed doctrine, at least as it has been articulated by this Administration, does not propose a new rule of law as much as it simply substitutes unreviewable discretion.[4]

Indeed, Professor Franck's criticisms are so foundational that one might wonder how the Bush preemptive use of force doctrine receives any support. Yet, there certainly are many people that do not find Professor Franck's argument compelling. It is to this group that I seek to listen, and their concerns that I explore, in this brief comment.

Indeed, why should it be surprising that the threat prevention use of force rhetoric is attractive to some? After all, that rhetoric promises immediate outcomes that arguably are consistent with widely held principles and advance national and, in some instances, international interests. The interesting rhetorical maneuver to be observed, however, is the simultaneous denigration of existing processes established and designed to implement the very same principles. The denigration is gained in part by the suggestion that process is something inherently emblematic of a legalistic discussion, which in turn is discredited as naïve in international relations.

This thesis was manifested for me in the comment of a member of the audience to an academic panel I participated in, and which discussed the then possible use of force against Iraq: "how can any of you seriously argue that we should take a course of action that might leave a dangerous criminal and tyrant such as Saddam Hussein, who also possesses weapons of mass destruction, in power?" The

2. For the most recent statement of his views, *see* THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS (2002).

3. Thomas M. Franck, *Preemption, Prevention and Anticipatory Self-Defense: New Law Regarding Recourse to Force?*, 27 HASTINGS INT'L & COMP. L. REV. 425 (2004).

4. *See id.* at 429 (arguing that "what is proposed is a doctrine based not on law and reciprocity but on power, one that frees the superpower while subordinating to its will the rights of everyone else."). This echoes the Hersch Lauterpacht's critique of self judging jurisdictional reservations in a state's acceptance of the jurisdiction of the International Court of Justice in the Interhandel case.

comment reflects a view within which the proposed doctrine on the use of force to prevent emerging threats, despite it flaws or dangers, is embraced by some, viewed as understandable by others, or simply not rejected. The comment is concerned primarily with a present threat, not with the value of reciprocity or long-term and arguably uncertain instabilities. It draws its conviction from American values, such as opposition to the oppression by criminals and tyrants. The comment is also about the concrete result; in this case, does Saddam Hussein remain or not? In this sense, I would emphasize that the sympathetic reaction, as a response primarily to the Iraq situation, is not necessarily likewise sympathetic to the idea of a generalized doctrine. Rather, in concentrating on outcomes and present threats, the comment from the member of the audience focuses on the particular situation presented. The commentator is not concerned so much with what happens next time or whether a similar reaction by another state is desirable. Indeed, the drive to generalize the particular conclusion into a doctrine of general applicability is already a legalistic move that is process-oriented and thus not particularly at the heart of the comment.

Interestingly, the emphasis on outcomes, rather than process, can be seen throughout the National Security Strategy (NSS) mentioned by Professor Franck at the outset of his remarks. For example, the NSS states "[o]ur principles will guide our government's decisions about international cooperation . . ."[5] It is, one would hope, incontrovertible that principles should guide a nation's foreign policy. But the NSS speaks not only of policy and long term objectives, but also of "decisions . . . our actions and our words." The crucial thing to observe is that the straight line jump from principles to present actions and outcomes is the hallmark of an idealistic Wilsonian foreign policy. A foreign policy that works towards the long-term promotion of a nation's principles and interests in realistic measured ways will rely more on rules to accomplish that goal, and, as a consequence, in the short term, or in particular cases, may be viewed as compromising those same principles.

It is to this difference between outcomes on the one hand and rule-based processes on the other that my comments go. On the one hand, there is one archetypical community that constructs and believes in the values of rules supportive of deeply held principles,

5. The National Security Strategy of the United States of America, section II, available at <www.whitehouse.gov/nsc>.

and is accepting of the process which results from those rules, and of the possibility that they may not get what they desire at the moment in a particular case. On the other hand, there is another archetype that sees itself as presented with situations, perhaps dangerous situations, and who believes that the fundamental task presented is to respond to that particular situation effectively and fairly, where fairness is evaluated in terms of their deeply held principles. The latter emphasize the demands placed on the United States in the present, while the former consider also the demands that the United States and others may perceive to be placed on them in the future. The latter's focus on the present leads to an emphasis on outcomes and forcible measures, while the former, by attempting to bridge the demands of the present and the future for us and others, leads it to develop processes and rules whereby the use of forcible measures can be guided.[6]

This difference can be seen in the way the two viewpoints speak about their position. Those who value rules can be somewhat legalistic, emphasizing the process required by the rules before force may be employed. In arguing the technicalities of rules and the costs of departing from the rules, the legalistic and process argument almost necessarily requires an expertise which can exclude the general public from full participation in the debate. Those who seek answers to an apparently dangerous situation can become more action driven in their language. For this group, it makes good sense and good policy that something need be done. Thus one view speaks in terms of law and process and seeks to assess the costs of a proposed move farther into the future, while the other emphasizes the reality of the present moment, the need to act in the face of a threat.

It is this difference in viewpoint that I believe particularly divides reactions to the Bush Administration's use of force in Iraq and, more generally, to its threat prevention use of force doctrine.

6. In fact, these archetypes can and often do exist together in individuals. Those who emphasize rules and process can appreciate that the demands of the present are also important. Likewise, those who emphasize achieving a certain outcome, can value getting to that outcome in a way that also satisfies the rules that we have agreed bind us. But, leaders can also accentuate the difference in view between these two communities. Although these communities are not mutually exclusive, this distinction in views to my mind is a major fault line in the present debate concerning Iraq and the preemptive use of force. And although it would be argued by some that the present Administration was more concerned with simply using force against Iraq rather than dealing with a truly dangerous situation, I stress for this comment that much of the public supporting the action did so in terms of the representations of the Administration as to the grave and immediate dangers posed by Iraq.

II. Outcomes, Process and the "Rule-Outcome Paradox"

My response to the man in the audience was that the rules on force in the U.N. Charter carry within them the inefficiencies of any rule, *i.e.*, a rule designed to guide behavior for a class of situations almost necessarily means that in some particular situations within that class the rule will not yield the best outcome. I will call this situation, the "rule – outcome paradox." Namely, a rule designed to yield the best outcome will not always do so.

A great deal of thought has been given to what is the best outcome in any situation.[7] For the purposes of this brief comment, we need not choose a particular best outcome, but simply assume that an outcome maximizing specified values exists for every instance of a specified class of situations. Ideally, we would seek to design a rule that yields this best outcome over and over as each situation arises. However, it is very hard to design a rule that allows the best outcome over and over again as we move through time because the rule applies to a class of situations that in fact differ in their details. It is not only that a rule may be over or under inclusive in its scope because of poor drafting, but that it is almost unavoidable that there will be specific instances where a rule of law does not yield the best outcome. Inasmuch as the best outcome in complex situations requires a contextual analysis and a case-by-case approach, one "rule" that in theory could yield the best outcome repeatedly would be one that delegates a great deal of discretionary authority to an actor to bring about the best outcome. Arguably, this is what the "threat prevention use of force" doctrine accomplishes. However, as argued by Professor Franck, unlimited discretion coupled with no accountability is not only not much of a rule, it is not a rule at all.[8]

---

7. There are at least two dimensions to the definition of the best outcome. First, there is the efficient outcome which is often discussed in terms of Pareto optimality. Second, there is the outcome which is distributively just and requires a theory of justice.

8. Frank, *supra* note 3. But saying a rule is tantamount to a "non rule," does not in itself necessitate the conclusion that the use of a non rule is the wrong approach. For example, the doctrines whereby a court or tribunal is to take into account all equitable circumstances in the allocation of an international watercourse, or the delimitation of an extended maritime boundary, are bounded non rules in that a large measure of discretion is granted the judges. *See* Separate Opinion of Judge Schwebel to Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. U.S.A.) I.C.J. REPORTS 246, at 353 (1984) (asserting that the law of maritime delimitation allows for a range of acceptable solutions and that although the Chamber's decision is not the one he would have made it also "is not inequitable").

One reason that even a non rule, such as self-judging threat prevention use of force, will not always yield the best outcome is that the implicit delegation of such a substantial degree of discretionary authority means we may not only get the best outcome at a given moment, but that we may also get unintended poor outcomes or even the worst outcome. We may see, for example, a desirable limited use of force to protect a people threatened with genocide. But we may also see an ill-judged and ill-executed use of force to protect an ethnic minority facing an unclear threat that in turn breeds a larger regional conflict. Finally, we may see an aggressive use of force masking itself as an act in self-defense aimed at preventing the emergence of a threat and itself generating significant abuses of human rights.

In rule design, a common response to this best-worst outcome possibility is to design rules that provide a good outcome (not necessarily the best outcome) as much of the time as possible, while simultaneously avoiding the worst outcomes much, but not necessarily all of the time.[9] This design situation is known mathematically as a max-min problem: what equation both maximizes one outcome while simultaneously minimizing another? For law, this problem entails the search for the "best rule." The "best rule" is the solution to the particular "rule-outcome paradox" presented. Unlike mathematics, the imprecision of rules of social control imply that there are likely several solutions that all lie within the range of imprecision and it is probably not possible to point to a preferred one.

It is critical to recognize that we are surrounded by all forms of institutions, significant and mundane, which are founded on rules seeking to solve a rule-outcome paradox.

An example of the mundane is the pedestrian traffic light. I lived in Germany for some time. Once, I was at a street intersection waiting along with many other Germans for the light to change and

9. One might ask whether one shouldn't simply seek the rule that appropriately balances the interests present so as to maximize social welfare. For the purposes of this essay, the rule seeking the best outcome is one which may also be described as the outcome that maximizes social welfare. The text above, however, is aimed at the next step in one's analysis. In particular, rules as they operate over and over again would yield a curve of achieving or failing at resulting in the welfare sought. Indeed, a rule in a particular case may not only fail at achieving the welfare sought, it may bring about great social cost. Thus, although a static image of a rule may suggest the design of a rule need only maximize social welfare, a dynamic image of the same rule operating again and again requires the design of a rule that provides a good outcome (not necessarily the best outcome) as much of the time as possible, while simultaneously avoiding the worst outcome much, but not necessarily all, of the time.

for my turn to cross the street. I was in rush. No cars were coming. I walked against the light. And, as with President Bush crossing into Iraq, I felt the condemnation of a community focused upon me. Let us define a 'best outcome' for this class of situations as that allowing pedestrians to cross whenever it is possible to do so safely. Surely, a basic shared principle is that our time is valuable. Yet we live in societies with rules that require we wait for lights to change even though there is no traffic on the road. To get the best outcome, we might authorize pedestrians to cross the road whenever they believe it is safe to do so, even if the traffic light indicates they should not.[10] Yet, we hesitate to grant such authorization because to do so may generate not only the best outcome, but also horrific ones.

An example of a significant institution embodying a best rule solution is democracy itself. There will be numerous instances within a democracy in which it is difficult to achieve a particular best outcome. A legislature, for a variety of reasons, may be unable to respond to a problem facing the nation. In such situations, the processes of the legislature and the constitutional limitations on executive action are barriers to achieving a particular best outcome. The best outcome in theory could be pursued by a benevolent and wise leader vested with substantial powers and discretion. But history tells us that such powerful leaders can, at least as often as not, abuse such powers and discretion. This tension between best outcome and process as a protection against the worst of outcomes underlies Churchill's remark that "democracy is the worst form of government until one considers all the alternatives." Indeed, one can view the whole institution of individual rights as a best rule in the sense that, by protecting the one, it indirectly carves a path to protect the many.

In thinking about 'best rules' and the fact that any rule carries within it the possibility that the best outcome will not be realized in a

10. The reader should be aware that there is literature looking generally at the question of the design of rules. One strand of this literature draws a distinction between rules and standards and has sought to understand the dynamics of both. In this literature an example of a rule would be a speed limit of 55 mph while a standard would be the authority to drive at a speed reasonable to the conditions present. For a review of the literature concerning the use of rules as opposed to standards in the law generally and the application of that literature to the use of force specifically, *see* John C. Yoo, *Using Force,* 71 UNIV. CHICAGO L. REV 729 (2004). The distinction employed in this essay is not between rules and standards as understood in this literature. In this essay both rules and standards are types of rules. Rather the main distinction in this essay is between rules and absolute discretion (i.e., no rule at all, not even a standard).

particular case, we need next recognize that the yield of 'best outcomes' may be increased by rule iteration, that is the nesting within the primary rule of secondary rules which serve as exceptions. Each nested rule iteratively chops away a little more at the difference between the resultant average outcome and the repeated best outcomes. For example, in the pedestrian traffic light scenario, a short wait at the light for many persons will be acceptably close to the best outcome. However, if the person wishing to cross has an urgent need to do so, then even a short wait will not be an acceptable outcome for that particular person. This situation is the consequence of a rule that, although the 'best rule' overall, not a rule that results in the best outcome for this particular situation. Rule iteration suggests that this group of situations where the best rule will be at its weakest should be treated as a new problem to which a new rule will apply. For example, a nested rule in this case might be: (1) a person faced with what the community would regard as an urgent need to cross against a light may so cross; (2) the decision to cross will be taken by the person involved, although a court may review it later; (3) prior to actually crossing, the person must announce they are doing so on the basis of an urgent need, and; (4) the person shall not cross if doing so creates a significant danger to the community.

It is important to note the components of this nested rule. The rule is created to address the urgency of the pedestrian's need to cross the street. The nested rule operates by virtue of a delegation of discretion to the pedestrian involved to assess both the urgency of his crossing and whether that crossing will create a significant danger to the community. For such a nested rule to work in practice it is necessary that (1) the actor be competent, (2) the actor possess adequate information about the circumstances which justify application of the nested rule and (3) the actor, in exercising his discretion, not be subject to conflicting interests. The parallels of this nested rule example to the structure of the Bush Administration's threat prevention use of force doctrine are quite clear. The implications are discussed in Part IV.

In sum, a rule, and any set of nested rule exceptions, should be designed to maximize the average best outcomes over time, while minimizing the worst outcomes in terms of the abuse of the very same authority granted to achieve the best outcome.

As a practical matter, the design of a rule is approached with the fears and hopes of the time: fears as to the worst of outcomes and hopes as to the best. In the context of the use of force, we must bear in mind that the rules of the U.N. Charter were drafted following the Second World War, and the costs of worst outcomes were first and

foremost. The Charter opens "[w]e the peoples of the United Nations determined to save succeeding generations from the scourge of war which twice in our lifetime has brought untold sorrow to mankind."[11] It was with that determination in mind that their search for a 'best rule' was heavily shaped by the goal of minimizing worst outcomes that could result from a grant of authority to use force. The Charter does this by prohibiting "the threat or use of force against the territorial integrity or political independence of any state"[12] unless that threat or use is a consequence of the "inherent right of individual or collective self defense,"[13] or is authorized by the Security Council under Chapter VII of the Charter. The basic rule is a substantial prohibition on the use of force so as to avoid the worst outcomes. The exceptions of self-defense and Security Council authorization are the mechanisms whereby some good outcomes, possibly best outcomes, may also be realized. But are the exceptions sufficient to make this system the 'best rule'? Can the exceptions be enlarged without making the worst outcomes more likely? As Judge Sofaer has written:

> [C]an the concept of self-defense accommodate a role for pre-emption that satisfies the need of leaders to protect their people, without providing a ready basis for states to use pre-emption as an excuse for aggression?[14]

III. Stopping a Madness Cascade: The Utility of a 'Best Rule' in Security Situations

A fair question is whether it makes sense to use a 'best rule' approach in a situation where the potential costs of anything less than the best, or at least a very good, outcome could be enormous. Are all situations, domestic or international, equally amenable to legalization? How are we to think about the dangers of adhering too strongly to a best rule solution when the costs of less than a best outcome are enormous? Likewise, how are we to think about the dangers of abandoning our commitment to a best rule solution when the costs of a poor, not to mention worst, outcome also are enormous?

---

11. U.N. CHARTER preamble.

12. *Id.* at art. 2, para. 4.

13. *Id.* at art. 51.

14. Abraham D. Sofaer, *On the Necessity of Pre-emption,* 14 EUR. J. INT'L L 209, 211 (2003).

In approaching such a difficult set of appraisals, we must acknowledge and incorporate into our thinking an uncertainty as to the degree that rules matter in any event. Professor Franck, for example, writes that the threat prevention use of force doctrine "emancipates government from *any* inhibitions" on its right to use force.[15] More accurately, such a doctrine would free states from the majority of their *legal* inhibitions. The assertion that governments would be free from *any* inhibitions suggests that it is the legal inhibitions that stop them from using force. The removal of the legal inhibitions, however, does not mean there are not other inhibitions. Rather, the interstate discussion would revert to politics, the main system for the regulation of force historically. In terms of Professor Franck's legitimacy analysis, norms have some force on behavior.[16] But, we need to make their weaknesses also a part of our evaluation.

One particularly relevant criticism of the search for a best rule in the use of force area asks whether the rules do much to prevent the worst outcomes. Judge Sofaer asserts that "states prepared to use force in bad faith are undeterred by restrictive legal rules."[17] If this assertion is true and worst outcomes are not avoided (at least in the sense of the State prepared to act in bad faith), then shouldn't we move toward a rule that emphasizes the best outcomes?

To consider this critique, we need to do two things. First, let us assume there are three groups of states: those for whom the normative value of the rule is very great, those for whom the normative value of the rule varies and is difficult to predict, and those for whom the rule is irrelevant Second, what precisely do we mean by "worst outcome?" In historical terms, a worst outcome is a use of force that cascades uncontrollably into a much larger conflict, occupying the attention of a region or the world for several years, and resulting in the death of tens of millions and incalculable economic loss. In these terms, the terrorists acts on September 11, 2001, the more recent Madrid bombings, or indeed, the long onslaught of deaths in Kashmir, seem less. Yet, no one can doubt the deep national repercussive effect of all three of these tragedies. Moreover, although most terrorist acts do not compare with the horrors of the two world wars, a terrorist in possession of a weapon of mass destruction, particularly a nuclear or biological weapon, could come

15. Franck, *supra* note 3, at 426.
16. THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990).
17. Sofaer, *supra* note 14, at 225.

very close to doing so. In this sense, there is both an objective and a threshold quality to the worst outcomes we guard against. Objectively, we can quantify an outcome and say one is worse than another. However, we also can recognize that any very significant loss can pass a socially and politically contingent threshold that leads us to regard that loss as a 'worst outcome.' Yet, in placing a large spectrum of horrific outcomes above a 'worst outcome' threshold level, I think it is still important to bear in mind that a large cascading inter-state conflict or a terrorist use of a weapon of mass destruction are a magnitude of horror greater than an isolated terrorist attack.

How do these two observations assist our appraisal of whether it makes sense to search for a best rule in a situation, such as security, where the cost of any worst outcome is arguably unacceptable? If by worst outcome we mean a large inter-state conflict cascading out of control, then a rule like that in the Charter, broadly prohibiting the use of force, seems appropriate even though (indeed, perhaps particularly because) the states most likely to aggressively use force are the group of states for whom the rule is not relevant. I take it that Judge Sofaer would argue that a rule that prevents some states from achieving best outcomes while not preventing other states from initiating a worst outcome chain of events is not the best rule. Without denying the importance of this point, it also is important to recognize that it does not fully capture the dynamic and complexity of the chain of events that lead to a worst outcome chain of events. It is true, for example, that international law did not stop Saddam Hussein from invading Kuwait in August of 1990, but it made possible a resolution condemning that invasion the very same afternoon. The rules of international law shape the way the many nations of the world digest an event; they shape the way an event is discussed – which arguments are in and which are out. Iraq could offer no permissible justificatory argument for its actions. Thus, while it is true that the rule did not stop the Iraq invasion of Kuwait, the rule delegitimated the act, facilitated political initiatives that denied Iraq any ally and kept the possible start of a worst outcome chain of events from continuing down that chain. In other words, our test should not only be whether a rule stops a state prepared to act in bad faith. Rather, the test is whether the rule can interrupt, by its normative force and pull, a disastrous chain of events, whether it can help check the cascade of madness that so characterized the First World War.

If by worst outcome we mean a terrorist's attack involving weapons of mass of destruction, then we are faced with a different

situation because the attack is itself the worst outcome. There is no subsequent chain of events to interrupt. Rather, the madness has been at work for some time already. My reaction to this situation is threefold. First, although I agree with some commentators that the security risk posed by terrorists with weapons of mass destruction requires a different analysis than that suggested by the risk posed by interstate conflict, I find it imprudent to think that the age of interstate conflict is past. It is often argued, I believe with some force, that the record of interstate violence since the World War II shows a decline of the risk and incidence of interstate conflict such as that of the First World War. But given how so much of defense and security planning is risk averse, I do not understand when such a still emerging trend is extrapolated, and then cited, to reach the conclusion that we need not be concerned any longer with the checking of cascades of violence. Such conclusions seem particularly inappropriate when such cascading violence does not seem implausible in regions such as the Middle East or South Asia. We should not rush to sacrifice the rules of the Charter which have the value of potentially interrupting a madness cascade on the assumption that the only remaining risk of concern is that of terrorists with weapons of mass destruction. Second, as Professor Franck notes in his remarks, "[n]o one in the international community expects a state in that position to allow itself to become a sitting duck."[18] Third, the more precise question posed by such a possible terrorist risk therefore is how we might design a rule that (1) does not disturb the existing rules in the Charter that basically prohibit the use of force and thereby help guard against a madness cascade worst outcome, while (2) simultaneously going beyond Article 51 of the Charter to guard against a different type of worst outcome, that is, terrorists with weapons of mass destruction. The Bush Administration proposal in my view does not succeed because the self judging discretion it claims both (1) undermines the Charter's main rules and thereby resurrects intentional worst outcomes, and (2) discounts the difficulty of any unilateral assessment of the necessity of preventing the emergence of, not to mention the preemption of, an existing threat thereby inviting unintentionally poor, if not worst, outcomes.

IV. The Fog of Preemption and Unintended Outcomes

As already stated, one avenue for promoting the possibility of

18. Franck, *supra* note 3, at 432.

best outcomes in case after case is to delegate a substantial degree of discretion. However, that very same discretion also gives rise to the possibility of both unintended and intended worst outcomes. There are some possible additions to the rule's structure that may mitigate the likelihood of such worst outcomes.

First, the discretion granted, as noted by Professor Franck, need not be unlimited or unreviewable. The difficulty in international relations is identifying bodies that are both capable of providing oversight of the use of discretion and have the trust of the states most affected by such oversight. But, it is important to also recognize that that difficulty does not mean oversight control does not exist already, albeit imperfectly, in the international system. The Security Council, in its power to authorize or not authorize the use of force, implicitly reviews the claim of a state as to its need to employ discretionary force. Likewise, other states called upon to join in a state's use of force implicitly review that state's claim as to its need to employ force. Finally, there may be domestic institutions, such as the U.S. Congress, whose concurrence is sought in an executive's assessment that it is necessary to employ force. All of these oversight mechanisms have their limitations, but they clearly also play an important political role limiting the use of available discretion. And although many supporters of the Bush Administration's doctrine are critical of the Security Council's integrity to exercise an oversight check, pointing to, among other things, the refusal of the Security Council to authorize the use of force against Iraq, Professor Franck interestingly turns that argument on its head. He does so by arguing that in fact, subsequent events have shown it was the Council that was right; that the Bush Administration's turn to a unilateralist use of military action was because it "suspected that the case for invading Iraq was unlikely to convince other states."[19]

Second, in the consideration of a use of force doctrine aimed at threat prevention, there is a particularly great danger that the assessment of a threat is incorrect. When the assessment is incorrect, a use of force might unintentionally lead to a worst outcome situation. To return to the traffic light scenario described above, the question of whether to authorize pedestrians to cross the road when there is no traffic should take into account the fact that in particular locations there is often poor visibility, that is, poor intelligence as to the circumstances under which the discretion granted should be

19. *Id.* at 433.

exercised. The oversight mechanisms just cited, and other more specialized institutions such as the International Atomic Energy Agency or *ad hoc* inspection groups, can aid in unilateral risk assessments. The truth of the matter, however, is that an emerging threat prevention doctrine and an attack preemptive doctrine require a very sophisticated, perhaps impossible, task of assessment. This difficulty is all the more greater if, as Professor Franck stresses, one is attempting to assess the existence of such a risk even before the possible threat is fully realized.

In this sense, the Bush administration's preemptive use of force doctrine is a nested rule exception to the primary rule contained in the U.N. Charter. And, as asserted earlier, a prerequisite for such an exception to work in practice is that the actor who possess discretionary authority under the nested rule also possess knowledge of the circumstances that are required to justify the use of such discretionary authority.

Sometime such knowledge is objective and personally verifiable. I look both ways and see no cars at all on straight roads vanishing into the distance. The presence or absence of a car is an objective fact; I can personally ascertain whether cars are present. However, it may not be personally ascertainable. There may be a mist on the road. Or, more dramatically, I may be blind and therefore need to ask someone else to look for me. It is essential to recognize that on a question such as circumstances justifying the need for threat prevention or attack preemption, the policy-maker is most likely blind. Take, for example, the weapons of mass destruction claimed to be held by President Hussein's regime, that were said to pose such a threat that action in that moment was required. A New York Times editorial, written after the release of the interim report by the U.S. official leading the hunt for weapons of mass destruction in Iraq and finding none, observes:

> "But even the best intelligence can turn out to be mistaken, and the likelihood that this was the case in Iraq shows why pre-emptive war . . . is so ill conceived as a foundation for security policy. If intelligence and risk assessment are sketchy – and when are they not? – using them as the basis for pre-emptive war poses enormous dangers."[20]

20. *See, e.g.*, Editorial, *The Failure to Find Iraqi Weapons*, N.Y. TIMES (Sept. 26, 2003) at A24. *See also* Chaim Kaufmann, *Threat Inflation and the Failure of the Marketplace of Ideas: The Selling of the Iraq War* 29 INT'L SECURITY 5 (2004).

Similarly, the question may not only be an objective one, but also one with subjective aspects. I might be able to cross if there was only one car in the distance. But perhaps I should not cross if the make of the car and the distant noise of its engine racing lead me to believe that the driver is irresponsible and dangerous. In the case of Iraq, we needed to know not only that Iraq possessed weapons of mass destruction, but that it was sufficiently irresponsible, immoral and evil, that it might use such weapons or make them available to those who would.

Taken together, the likelihood that a decision-maker would both lack the accurate information necessary in the objective realm while subjectively leaning toward suspicion poses a serious question as to whether a use of force in order to prevent an emerging threat is more likely than not to result in a good, not to mention, best outcome rather than in an unintentionally poor, if not worst, outcome.

V. Conclusion

There is a rhetorical attractiveness to a policy that emphasizes immediate outcomes and denigrates the value of working through the process devised to reach that same outcome more thoroughly, but perhaps as a consequence at the price of not always yielding that desired outcome. For those attracted by claims of discretionary authority, it need be remembered that such discretion, both in the case at hand and in its future invocations, offers not only the siren call of best outcomes but also resurrects the possibility of both unintentional and intentional worst outcomes.

The tendency of the Bush Administration to accumulate discretionary authority is consistent with its tendency to privilege the present and its implicit denigration of humanity's efforts to understand and thereby shape its future. In large part, I have argued there are ways to think about alternative 'best rules' for the use of force in a world with additional threat scenarios. There are ways to design rules that appropriately maximize our yield of best outcomes while avoiding the worst ones, thereby promoting long term stability. The Bush Administration's articulation of a use of force doctrine to preempt the use of force or to prevent the emergence of threats is not an example of such a best rule in my view. Rather, it is basically a move toward unchecked discretionary authority to act. There is a need to be able to act. But it is hubris to shun estimations of how a proposed doctrine may lead to horrific outcomes. The Siren often

extracted a heavy price.