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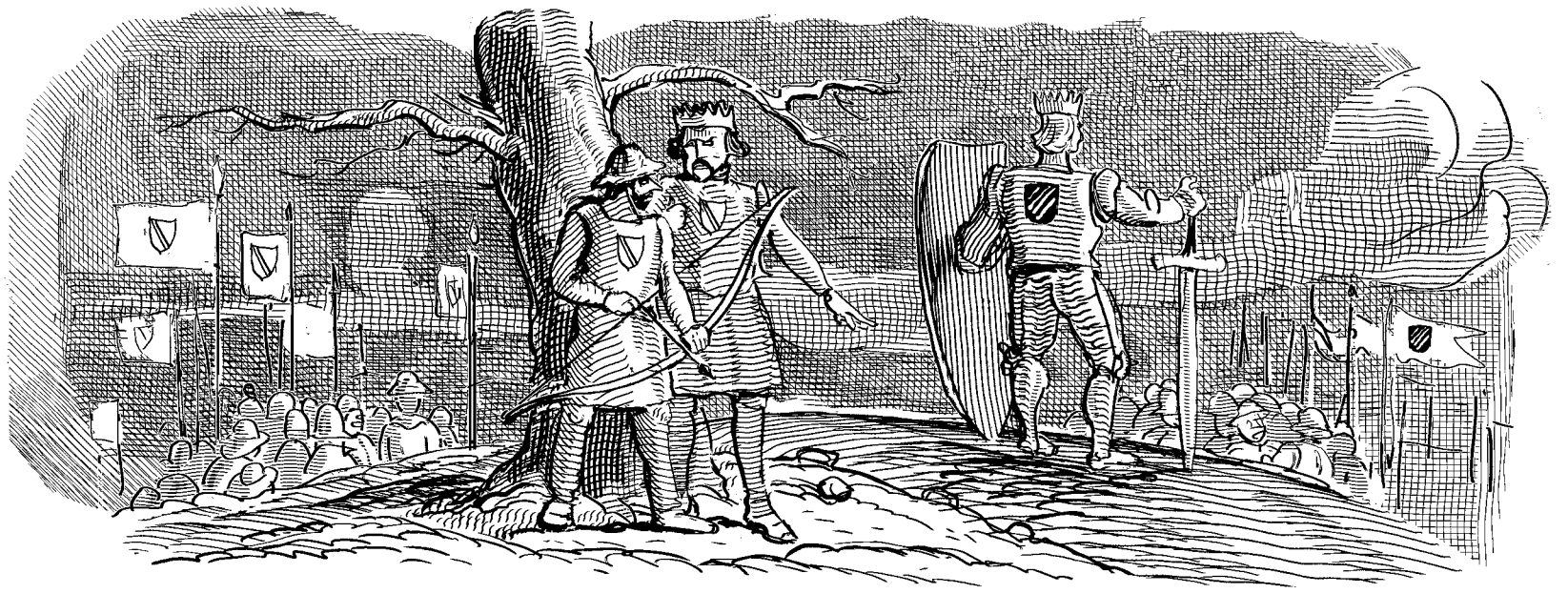
Book Review by Jeremy Rabkin

This Means War

Point of Attack: Preventive War, International Law, and Global Welfare, by John Yoo.
Oxford University Press, 272 pages, $35



Say this for John Yoo: he sticks to his guns. And to America's. Politicians have been flip-flopping, side-stepping, and hem-hawing on foreign interventions for more than a decade now. All that time John Yoo has staunchly defended the "war on terror"—as a war. He did that while serving in the Justice Department under George W. Bush and has continued to do so since returning to his position as professor of law at Berkeley.

Yoo does not express second thoughts in his new book, *Point of Attack: Preventive War, International Law, and Global Welfare*. His argument is broad enough to justify the 2003 invasion of Iraq and any action we might undertake there (or in Syria) today. The book's subtitle captures the high points: Yoo is in favor of "preventive war" and also "global welfare." When it comes to "international law"—not so much.

Yoo covers a lot of ground in 200 pages, but his main arguments can be summed up in three propositions. First, the United Nations Charter—particularly in the academic interpretations that have prevailed in recent decades—is not a suitable guide to the proper use of force in international affairs. I think he's on very solid ground there. Second, "just war theorists" of earlier times offer no better guidance. I'm not so sure he's right about that. Third, he offers his own alternative—that we judge military intervention by a broadly economic view of what would advance global welfare. On that one, I am highly skeptical.

On the inadequacy of the U.N. Charter, Yoo goes right to the point. If the Charter requires that force can only be used in response to an "armed attack," then even a superpower must wait until the attack arrives. Among other things, that means the Kennedy Administration was wrong to deploy a limited naval blockade to force withdrawal of Soviet missiles from Cuba in 1962. The *American Journal of International Law* did publish articles at the time questioning the legality of the so-called "quarantine" of Cuba—though it also published defenses of Kennedy's policy.

By the same reasoning, as Yoo notes, Israel was wrong to attack the Iraqi nuclear facilities at Osirak in 1981. In fact, the United States and most other countries voted for a U.N. resolution condemning Israel's action—though there was no disposition to impose any sort of penalty for Israel's air strikes. By 2007, when Israel attacked a nuclear reactor in Syria, the United Nations did not even demand clarification of what had happened.

What is true for such "preventive" interventions would, as Yoo emphasizes, be equally true for humanitarian interventions. It would have been contrary to the restrictive reading of the Charter to intervene in Rwanda in 1993, since the Hutu government, while slaughtering unarmed Tutsis within the country, was not engaged in "armed attack" on outside states. By the same reasoning, it was wrong for NATO to unleash a bombing campaign against Serbia in 1999, to protect Muslim civilians in Kosovo against the Milosevic government. The latter had sponsored brutal ethnic cleansing in neighboring Bosnia over the previous decade, but Kosovo was within Serbia's internationally recognized boundaries.

Yoo hammers the point that the Charter does not restrain great powers in practice. He may be a bit too quick to dismiss its relevance, since it still seems to restrain what governments say about their interventions and perhaps also what they think they can do afterwards. Until Russia annexed Crimea earlier this year, none of the permanent members of the U.N. Security Council had annexed foreign territories.

Still, no one can dispute Yoo's general claim that restrictive readings of what the Charter permits (regarding resort to force) don't comport with actual state practice over the past 70 years. A standard that is so regularly violated—and usually with no adverse consequence to the purported violator—does not have strong claim to the status of "law," even by the usual loose reckonings of international lawyers.

Yoo sensibly devotes some attention to just war theories of earlier times, as an obvious alternative to contemporary legalism. He skates over a lot of different theories in very broad strokes, however, rushing from Thucydides

to the 20th century in all of 20 pages. It is unfortunate that he gives very little attention to works—like Swiss diplomat Emmerich de Vattel's 18th-century treatise, *The Law of Nations*—that influenced the first generations of American statesmen. If, prior to the 20th century, American statesmen found adequate latitude in such doctrines, why be sure they are no longer sufficient for our current needs?

At any rate, having cleared away the alternatives, at least to his own satisfaction, Yoo advances his own guiding principle: resort to force should be regarded as acceptable when it is likely to enhance overall global welfare. It is easy to see the logic in a particular case. Won't the world be better off if we remove the weapons program of a rogue state? Or remove a brutal tyrant? Or stop a mass slaughter of civilians?

But there are obvious objections. We don't always know even the immediate facts. The Bush Administration believed that Saddam Hussein was making weapons of mass destruction, but after our invasion in 2003—when inspectors had an American occupation force to protect them—they found no clear evidence of WMDs in Iraq. Nor did international inspectors find evidence of mass killing of civilians in Kosovo, when the entry of NATO forces after 1999 allowed thorough investigation.

Then there is the problem of extrapolating effects into the future. Yoo acknowledges that the intervention in Libya in 2011, ostensibly to protect civilians in Benghazi, ended up unleashing chaos. He argues that an intervention not tied to a limiting U.N. resolution might have allowed Anglo-French and American forces to establish a stabilizing presence of international peacekeepers. But were these states really prepared to risk their own troops on the ground in Libya in 2011, after years of unhappy experience in Iraq and Afghanistan? If a different American president had been prepared to deploy American soldiers, what would have happened if they were attacked by terrorists? Even President Reagan, having deployed American peacekeepers to Beirut in 1982, hastily withdrew them when terrorists bombed their barracks. That episode, as we later learned, was a great inspiration to Osama bin Laden.

Such far-reaching consequences are hardest of all to calculate. While we may think the Kosovo intervention was worthwhile, even if the trigger for it was not actual genocide, that intervention into the affairs of a sovereign state, historically under Russian protection, inflamed suspicions in Moscow. And it seems to have been regarded by Vladimir Putin as ample precedent for his own interventions in Ukraine, where he claims fascists and neo-Nazis threaten the Russian minority. On the face of it, that claim is as plausible as NATO's claim to be averting mass slaughter in Kosovo. If we misjudge situations, why imagine that rivals will accept the validity of our stated rationales?

Yoo tries to limit such problems by urging that interventions carry a duty to provide clear evidence for the stated rationale, to act transparently on the ground, then to compensate victims—in the affected country—for collateral damage. But the premise of the larger argument is that great powers must act on their own initiative, because the U.N. Security Council is usually deadlocked by great-power rivalries. If the U.N. is paralyzed, who enforces the compensation obligations and other limiting conditions? And if we can't rely on limiting conditions, do we really want to encourage interventions by Putin's Russia or Communist leaders in Beijing? I'd guess any deployment of force they undertake outside their borders will not enhance global welfare. But they are likely to see things differently.

Still, Yoo tries to face the challenge of what to consider when rules run out. In this respect, his approach is not so different from that of the Dutch jurist Hugo Grotius in the early 17th century or even from that of earlier Catholic just war theorists. They emphasized the need to consider consequences for the larger community of nations (or at least, the community of European or Christian nations). Vattel's more legalistic, liberal theory emphasized rights and duties: war is justified when undertaken to redress an injury to a "perfect" right—one that could be insisted on and that others are obliged to respect. When that condition is met, says Vattel, it is up to the injured state to decide whether to exercise its rights.

Yoo says his "global welfare" doctrine is better than the U.N. Charter's "criminal enforcement" model. He characterizes his doctrine as a "regulatory" approach, because (like domestic regulatory programs) it tries to anticipate and prevent injuries, not only to remedy them after the fact. But the U.N. Charter was already "regulatory" in the sense that it vested broad discretion in the Security Council, not only to respond to "aggression" but also to enforce its own determinations regarding "threats to the peace." Woodrow Wilson, father of the League of Nations (so at least a grandfather to the U.N. Charter), was not at all averse to "regulatory" authority at home. Nor was Franklin Roosevelt, whose appointees played such a large role in crafting the U.N. Charter.

But our experience of domestic regulation since Wilson's Federal Trade Commission was established (in 1914, as it happens) has not been reassuring. Regulators often intervene too broadly and too intrusively, assuming they know more than all the private firms they regulate and all those who buy from or sell to those firms. There's a lot to be said, after all, for respecting property rights and letting market actors make their own decisions about what best serves their interests.

Before the 20th century, the version of international law invoked by American statesmen—taking their cue from Vattel and others—was more like tort law than criminal law. Whereas Grotius—citing Saint Augustine—admonished rulers not to attempt war unless the likely result would be better for the world, Vattel urged sovereigns to consider whether their own nation would emerge better off from a war. But then he repudiated the idea of a general right to punish.

The point of war, as depicted in these classic treatises, was not so much to punish as to remedy an injury. Vattel and his successors understood "injury" (*casus belli*) in broad terms, encompassing not only armed invasion but denial of treaty rights or other perfect rights. But as in tort law, a claimant had to point to some actual injury—not claim to be improving the world by rearranging the balance of power, or the character of foreign governments, to the world's overall benefit. These constraints recognized that other states were not likely to take professions of good intentions at face value.

John Yoo's doctrine seems to assume much more consensus about when intervention is necessary—or much less capacity to resist and counter well-meaning interventions by the most active powers. He is persuasive in arguing that our world is too diverse to sustain the sort of ongoing "public" enforcement of order envisioned in 1945 by the drafters of the U.N. Charter. So he calls for reforming or corrective interventions at the initiative of individual states. But our world may be too diverse even for that program.

For all its arguable flaws, however, *Point of Attack* remains a rewarding read. It certainly offers a forthright alternative to current hedging (or escapist fantasy) about the U.N. Charter. I think we will still want at least some rough rules and standards to say when military intervention is proper and when it should rightfully be denounced as aggression. But no one can make that argument without addressing the robust challenge of Yoo's new book.

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