JOHN YOO

POINT OF ATTACK

PREVENTIVE WAR, INTERNATIONAL LAW, AND GLOBAL WELFARE

Point of Attack

PREVENTIVE WAR, INTERNATIONAL LAW, AND GLOBAL WELFARE

John Yoo

常州大学图书馆
藏书章

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Oxford University Press is a department of the University of Oxford. It furthers the University's objective of excellence in research, scholarship, and education by publishing worldwide.

Oxford New York
Auckland Cape Town Dar es Salaam Hong Kong Karachi Kuala Lumpur Madrid
Melbourne Mexico City Nairobi New Delhi Shanghai Taipei Toronto

With offices in
Argentina Austria Brazil Chile Czech Republic France Greece Guatemala Hungary
Italy Japan Poland Portugal Singapore South Korea Switzerland Thailand
Turkey Ukraine Vietnam

Oxford is a registered trademark of Oxford University Press in the UK and certain other countries.

Published in the United States of America by
Oxford University Press
198 Madison Avenue, New York, NY 10016

© John Yoo 2014

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission in writing of Oxford University Press, or as expressly permitted by law, by license, or under terms agreed with the appropriate reproduction rights organization. Inquiries concerning reproduction outside the scope of the above should be sent to the Rights Department, Oxford University Press, at the address above.

You must not circulate this work in any other form
and you must impose this same condition on any acquirer.

Library of Congress Cataloging-in-Publication Data

Yoo, John.
Point of attack : preventive war, international law, and global welfare / John Yoo.
pages cm
Includes bibliographical references and index.
ISBN 978-0-19-934773-5 ((hardback) : alk. paper)
1. War (International law) 2. Aggression (International law) 3. Intervention (International law) 4. Humanitarian intervention. 5. Just war doctrine. 6. Security, International. 7. Preemptive attack (Military science) I. Title.
KZ6385.Y66 2014
341.6—dc23

2013038114

9 8 7 6 5 4 3 2 1

Printed in the United States of America on acid-free paper

Note to Readers

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is based upon sources believed to be accurate and reliable and is intended to be current as of the time it was written. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. Also, to confirm that the information has not been affected or changed by recent developments, traditional legal research techniques should be used, including checking primary sources where appropriate.

(Based on the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.)

You may order this or any other Oxford University Press publication by visiting the Oxford University Press website at www.oup.com.

POINT OF ATTACK

To my father
John Hyun Soo Yoo, M.D. (1936–2012).

此为试读，需要完整PDF请访问：www.ertongbook.com

Foreword

"ONLY THE DEAD have seen the end of war," Plato wrote. Unfortunately, the last two millennia have proven him right. While the post–World War II era has witnessed a steep drop in the rate of armed conflict between states, men and women today still die in war at an alarming rate. But instead of the millions killed during the great struggles for supremacy in Europe and Asia, most today have died in more contained, more brutal, civil wars. This book seeks not just to understand these changes in war in the twenty-first century but also to develop a new set of rules to address them.

Point of Attack completes a long period of work for me on the wars that dominated the last two decades: the conflicts in Afghanistan and Iraq. That work began on September 11, 2001. As an official in the United States Department of Justice, I was involved in the debates within the United States government whether to use force in both countries. As a scholar who specialized in the American system of war powers, the right to go to war in Afghanistan did not seem to me to be a difficult call, as I explained in *The Powers of War and Peace* (2005). How to engage a terrorist enemy that did not act on behalf of a nation-state and refused to follow the laws of war posed the harder questions, ones that I sought to address in *War by Other Means* (2006). Those challenges have produced more consistency in policy between Presidents George W. Bush and Barack Obama than many critics of both would have predicted, a phenomenon I placed within a broader account of the growth in executive power in *Crisis and Command* (2010).

President Bush's decision to invade Iraq in spring 2003 posed the greatest legal problems outside the U.S. legal system, where I felt most at home. It posed no constitutional difficulties once Congress enacted an authorization to use military force in Iraq. But because the United Nations refused to authorize another war against Iraq, as it had in the 1991 Persian Gulf War, American allies as well as rivals raised

grave challenges under international law to the conflict. Although I had studied and taught the U.N. Charter and the history of efforts to prohibit war, I had not devoted the kind of thought to the international law dimension that I had to American constitutional law. I believed that the United States suffered from a contradiction between a Charter written to stop the next World War and the modern challenges of authoritarian oppression, human rights disasters, terrorism, and the spread of weapons of mass destruction. The crucible of the Iraq war convinced me that the current system on the use of force had divorced the formal legal rules from the all-important goal of protecting and improving global human welfare.

Point of Attack bridges the gap between the necessity of wars in the twenty-first century and a set of international rules that are aging into obsolescence. But as I thought through the problem, I drew upon more than my personal experiences of working on the Iraq war for the U.S. government. Even before my days as an undergraduate student, I had pursued a deep interest in both war and law. The destruction that befell the country of my birth, South Korea, caused my parents and other Koreans to immigrate to the United States. I have remained ever conscious that in sacrificing its young men in battle in a country most had never heard of, the United States had saved my family and millions of others from the most evil regime on the planet. The families of those men can be proud that their bravery sheltered a people of great dynamism, both in their native land and here in the United States.

When my family arrived in the United States, the Vietnam War was reaching its peak. As a child, I watched grainy television scenes of the last helicopter leaving the U.S. embassy in Saigon in 1975. Perhaps that early vision of the most powerful nation in the world in retreat, contrasted with the rescue of my native country at its hands, prompted my long desire to understand war. Curious about my origins, I read about the Korean War as a youth. A deeper interest began when I studied Latin and Ancient Greek in middle and high school. Much of the readings were drawn from stories, real and imagined, of ancient conflict. Caesar's *Gallic Wars*, Livy's *Histories*, and Virgil's *Aeneid* presented war in a heroic light and elevated personal sacrifices for a greater national good. Thucydides' *Peloponnesian War* exposed the tragedy and senselessness of war—though at the time, reading the work in ancient Greek, I imagined I was the one suffering through a catastrophe as great as the Athenian expedition to Syracuse.

College provided me with the opportunity to study war more rigorously. As an undergraduate at Harvard, I studied American diplomatic history and government policy with Thomas Schwartz and Brian Balogh, who have since moved on to better fields. They taught me how to harness my interest in war and history to the purposes of scholarship, and I am forever grateful to them both. As we lived through the waning days of the Cold War, they introduced me to the controversies over the outbreaks of

World Wars I and II and the proxy conflicts and superpower competition of our own time. Though they did not intend it, I became an admirer of the realist way of looking at things, which caused me some cognitive dissonance when I went to Law School.

At Yale, I studied war when the collapse of the Soviet Union opened up new opportunities for international cooperation. Even as war has increased in the intensity of its destructiveness, nations have engaged in unprecedented cooperation to limit its harms. The United Nations, which sprung up from the wreckage of the last worldwide conflagration with the mission to end war, suddenly became relevant in addressing the new international disorder. The North Atlantic Treaty Organization, which had deterred war on a continent that had fueled great power conflict for three centuries, took on a policing role in areas beyond its territory. Victorious and without peer at the end of the Cold War, the United States committed to the defense of the Western Hemisphere, Europe, and Asia and nurtured a liberal international economic system that benefitted all. America's provision of security and free trade produced an unprecedented period of peace and prosperity in the world. No great power has fought another in nearly seven decades.

But even as international law should have reached the heights of its powers, it faltered. It could not stop human rights disasters in the Balkans and Africa. It shielded dictators who systematically abused their populations. Other nations used the law to constrain the most powerful nation in the international system and its allies from acting to prevent great harms to global welfare. When I returned to the University of California at Berkeley from government in 2003, I continued to work on the contradiction between international law and the change in war. *Point of Attack* brings together a decade of thinking about how to enhance human welfare by changing the international rules to respond to the challenges of this century, and not the last. In the future, I plan to explore this theme further by turning this approach to changes in military technology and the nature of modern combat.

Writing a book can appear to be a lonely endeavor. Kafka wrote: "Writing is utter solitude." However a work like this, I am glad to say, depends on a more cooperative effort. First come the institutions that provide the environment for the creation and testing of ideas. I thank Dean Christopher Edley of the Boalt Hall School of Law, University of California at Berkeley, for building the resources and maintaining the vibrant intellectual culture at the law school that is my academic home. For giving me a home in Washington, D.C., I am grateful to the leaders of the American Enterprise Institute, Christopher DeMuth and his successor Arthur Brooks, David Gerson, and Dany Pletka.

Second come the scholars and friends who have read and commented on portions of the manuscript or earlier articles that first tried out its ideas: Jesse Choper, Robert Cooter, David Caron, Dan Farber, William Eskridge, Andrew Guzman,

Sandy Kadish, Julian Ku, John Manning, John McGinnis, Jide Nzelibe, Eric Posner, Sai Prakash, Cass Sunstein, and Adrian Vermeule. Third are the excellent students at Boalt Hall who have assisted me in the preparation of this manuscript: Benjamin Bright, James Cho, Troy Housman, James Phillips, and Jonathan Sidhu.

There are three people who were indispensable in helping to prepare this book. The first is my friend, coauthor, and former colleague at the United States Department of Justice, Robert Delahunty. Robert and I first met in the summer of 2001, and we worked through the aftermath of the September 11, 2001, attacks together. He was one of those great treasures of the government who was a living repository of American foreign policy and constitutional law. Robert has helped me think through these issues and pushed me to be both more careful and more creative. The second friend is Lynn Chu, who purports to be my agent at Writers Representatives but is much more. She has gone far beyond the job of arranging publication to help me think through the initial idea for a book all the way to wielding a sharp editorial pen on the manuscript. I am fortunate that she first called me almost ten years ago to talk about writing a book and that our initial contact grew into a collaboration that even reached the editorial page of The New York Times. The third is Blake Ratcliff, an impressive young lawyer and editor at Oxford University Press who has seen this book through from beginning to end. Blake's dual interest and background in both international law and international relations were a perfect fit for this book.

I am approaching the twenty-fifth anniversary of my college graduation, which causes me to think about all of the people who have helped me along the way. Harvard gave me many things, but the most valuable was the opportunity to meet and marry my classmate, Elsa Arnett. The toxic smells and disheveled papers of the Harvard Crimson—surely the most inauspicious of surroundings—nurtured a marriage that has lasted. We've been happy living on the other end of the continent from where we met, perched on a mountainside in a house that looks like a ski chalet, looking out over a bay where it seems as if the ocean is on the wrong side of the earth. I also think about my constant and loyal companion from my youth, my brother Christopher, who has a wonderful family about him now, and my mother, Sook Hee Yoo, whose love ensured that no war ever broke out between us. But most important of all, this time causes me to miss my father, John Hyun Soo Yoo, who passed away while I was writing this book. I think this is the book that he always wanted me to write, and I dedicate it to him.

Contents

此为试读,需要完整PDF请访问: www.ertongbook.com

1 War and the New Millennium

WE LIVE IN a world of wars—big and small, hot and cold, seen and unseen, between nations and within nations. Over the past decade, wars have dominated American politics. In 2001, the United States suffered a direct attack by an al-Qaeda terrorist group, responded by overthrowing the existing regime in Afghanistan, launched the 2003 invasion of Iraq, and started a broad-based campaign against terrorism.

As a part of the worldwide war on terror, the United States gathers intelligence through Internet and banking networks, preemptively captures suspected terrorists and detains them at Guantanamo Bay, Cuba, tries terrorist leaders in military and civil courts, and, most controversially, uses unmanned drone aircraft to kill enemy leaders in nations with which it is not at war. American troops remained in Iraq for almost a decade after the initial 2003 invasion, and they continue to fight in Afghanistan at the time of this writing.

Conflict at the dawn of the third millennium only followed the disorder that marked the closing of the second. In the 1990s, the United States sent troops abroad into hostile environments in Somalia, Haiti, and the former Yugoslavia to end civil wars, fought a full-blown conventional war in Kuwait and Iraq, and pursued terrorists in Sudan, Afghanistan, and Yemen. The United States fought two wars against sovereign nations—Serbia and Iraq. These followed a half-century of conflicts during the Cold War, ranging from Korea and Vietnam to Grenada and Panama.

The United States is not alone on today's battlefield. Members of the North Atlantic Treaty Organization (NATO) such as Great Britain, Germany, and France

fought in Afghanistan. A coalition of nations including Great Britain, Australia, Spain, and Italy joined the United States in the invasion of Iraq. In 2011, NATO nations joined forces again to help local rebels overthrow Moammar Gadhafi's regime in Libya. Israel has battled Islamic groups in Lebanon, Russia and the former Soviet republic of Georgia went to war over control of border regions; Sri Lanka finally defeated the Tamil resistance; and internal conflicts raged in Colombia, Sudan, Chad, and the Congo. African civil wars alone have killed millions and displaced millions more. Fighting in the Congo is said to have killed more than 5 million people; Sudan's civil war has resulted in more than 1 million deaths.[1]

Even greater threats to international peace and stability may loom. North Korea's repressive regime has expertise and enough nuclear material to build several atomic bombs and has successfully tested what Western experts believe is an intermediate-range ballistic missile. Despite severe international economic sanctions, Iran may soon succeed in equipping itself with nuclear weapons. Both nations are fast at work on intercontinental ballistic missile technology that could bring parts of Western Europe and the United States within range. NATO efforts to build central authority in Afghanistan continue to sputter, while nuclear Pakistan and Syria battle internal groups aligned with al-Qaeda.

International rules restrict the ability of nations that can do the most to prevent these wars, maintain the peace, and advance free-market democracy. Western democracies have responded to these challenges to peace with a number of measures short of war, such as bilateral and multilateral economic sanctions, diplomatic pressure, and development assistance. While achieving varying levels of success, these tools lose power without the threat of force behind them. Various constructions of international law, however, paint the use of any force by these nations as "illegal."

Meanwhile, international rules allow states that undermine global stability, promote authoritarianism, and systematically abuse human rights to hide behind the status quo. The United Nations Charter system gives a veto over the use of force to two nations—Russia and China—that warred with their neighbors (Russia with Georgia and China with Korea, Tibet, the Soviet Union, India, and Vietnam) and obstructed international solutions to global challenges, undercutting the ability of nations to cooperate to solve dire international challenges. Both nations maintain authoritarian regimes: in China, the Communist Party holds a monopoly on political power without competitive elections; and in Russia, analysts argue that Vladimir Putin has resurrected effective one-party rule. Both nations arguably are using their veto to protect other authoritarian regimes from Western intervention, as they have for the civil war in Syria since 2011.

This system discourages the world's most powerful nations from taking measures to stop rogue states, attack terrorist groups, and end human rights catastrophes. We

need not see Russia and China as the only nations that benefit from a veto at the expense of global welfare. If one believes, for example, that climate change demands collective action to reduce carbon emissions, the United States along with China, India, and Brazil stand as obstacles to a global solution. The United States has also used its veto to protect Israel from international sanctions, which may amount to placing the national interest over an international solution, depending on one's point of view about the conflict in the Middle East. And certainly, the United States proved it is able to mobilize the UN Security Council to authorize force in the Persian Gulf War in 1991, Somalia in 1992, the Balkans in the 1990s, and Afghanistan in 2001—though it failed most spectacularly to win approval of the war in Iraq in 2003. A new approach could allow more great power intervention to stop the harms caused by the erosion of the nation-state system in the twenty-first century. But it could also open the door to wars that trigger costly unforeseen consequences, as arguably occurred with the Iraq War, or provide the pretext for aggression.

Our international law and politics must evolve to confront the threats of this century, not those of the last, without encouraging conflicts that cause more harm than good. Founded at the end of the most destructive war in history, the United Nations understandably attempted to purge all interstate conflict from the world. The United Nations vested the international legal system with the same purpose as domestic legal systems—the suppression of violence between its members. During the Cold War, the broad conflicts spanning nations gave way to what historians now describe as "the Long Peace." But it can be argued that the stability of superpower competition, in the presence of nuclear mutually assured destruction, contributed far more to the maintenance of peace than systems of global governance.[2] Today, the main threat to international peace and stability no longer comes from massive wars between superpowers or multinational alliances. Rogue nations, failed states, the proliferation of weapons of mass destruction (WMD), global terrorism, and human rights catastrophes pose a greater challenge than aggressive nation-states bent on conquest.

In today's world, war becomes less a means of oppression and more a tool to help rebuild failed states, contain rogue nations, prevent terrorist attacks, and maintain the international order that makes trade, development, and progress possible. The benefits of such wars can outweigh the loss of life and treasure by preventing even worse harms. Use of force might block a terrorist group or rogue nation from acquiring weapons of mass destruction. A first strike, for example, might cause the deaths of military and civilian lives, but it might save even more lives overall by preempting a war of conquest. An even larger invasion might free an entire people from the oppression of an authoritarian state. Intervention can help avert or even end a destructive civil war that has killed hundreds of thousands, as is the case in some of

today's internal armed conflicts in Africa. As these uses of force grow increasingly intense and likely more destructive, the international system should demand greater potential benefits—as measured in human lives, natural and developed resources, and global stability—to justify them. But what international rules should not do is prohibit all nondefensive uses of force, regardless of the expected gains for international peace and security.

History provides many examples of what might *not* have been. Should France and Great Britain have invaded Nazi Germany during the latter's attack on Poland? Or even launched a preventive strike to stop Hitler's remilitarization of Germany? Should the United States have intervened earlier in World Wars I or II and shifted the balance of power in favor of the Allies? This is not just a science fiction writer's excursion into counterfactual history. Sadly, in many recent cases, an earlier use of force could have brought about a greater good. A mere 10,000 Western troops could have halted the 1990s Rwandan genocide that slaughtered 1 million people. Earlier intervention in the Balkans might have preempted Serbia's 1990s campaign of "ethnic cleansing" of neighboring Muslim enclaves. Surgical strikes in Afghanistan might have prevented al-Qaeda's rise, and the removal of Saddam Hussein might have precluded the Iran-Iraq War, the 1991 Gulf War, or the 2003 Iraq War. A few thousand troops might have prevented the hundreds of thousands of lives lost in African internal conflicts of the last decade in Congo or Sudan. Domestic imperatives no doubt discouraged nations from intervening earlier in many of these cases. But these situations also involve challenges inherent in the international system. In many of these cases, no single nation or group of nations has the incentive to intervene, because others, who bear none of the costs, will free-ride off their efforts. Without any prospect of a world government that can force burden sharing among all nations, collective action will prove difficult—if not impossible—in all cases where the world would benefit from early military intervention.

This book addresses the yawning gap between the existing rules of war and the need for force in the contemporary world. It is not a brief in favor of war to resolve political differences. Instead, it argues that armed conflict remains a relevant feature of international relations that can enable progress and improve global welfare. Like any other rules, the laws of war should encourage nations to undertake socially beneficial actions and avoid costly ones. Nations already perform cost-benefit analysis when they make decisions about everything from environmental regulation to national security. When a government decides to raise fuel efficiency standards for automobiles, for example, it has a corresponding cost in weight of the cars and fatalities from traffic accidents. Pollution limits will improve human health but will raise costs for industrial production and may reduce economic growth. Greater security at airports will decrease the probability of terrorist attack but will increase government

spending and slow down travel times. Even refusing to act involves a choice that the costs of the status quo outweigh the benefits of new regulation. All government policy inherently involves trade-offs between costs and benefits.[3]

This book argues that the international system should encourage the great powers to follow a similar approach to war. The system should allow armed intervention when the expected benefits to global welfare, which include putting an end to the harmful activity in a targeted country, exceed the likely costs. There are a great number of variables that decision-makers should take into account when reaching these difficult judgments. On the benefits side are lives that would be saved, resources preserved, economic growth restored, internal governance stabilized, and regional peace. On the cost side would be the lives lost and funds spent in conflict, economic disruption, political and regional turmoil, and humanitarian harms. Nations could not be certain that intervention would bring benefits, but would have to decide based on the probability of success or failure. On the cost ledger, they would also have to enter the possibility of unintended consequences and that going to war might encourage others to do the same. Only when the benefits to global welfare—not just to that of the intervening nations—exceed the costs should nations resort to force.

In pursuing the noble goal of legislating world peace, however, the international political and legal systems produce the opposite effect. By outlawing non-defensive wars, even those where the clear benefits to the United States, its allies, and the world outweigh the costs, the current rules reduce global welfare. The prohibition on war is overinclusive; it forbids too much. It is also underinclusive: it stops too little of the aggression that is the very reason for its existence. The League of Nations and the United Nations both banned war. Both were and are ignored. When states pursue their vital interests, they will not allow international law to stand in the way of using force. This dysfunctional state of affairs stems from a foundational error in the idea of collective security, the brainchild of President Woodrow Wilson. Wilson plucked just war theory from its medieval roots and transplanted it, naked, without the surrounding soil of political thought that had nourished it for over a millennium. Once rooted in the very different conditions of great power rivalry, and now the twenty-first century's growing decentralization and disintegration, the ban on war has the perverse effect of harming international peace and stability and condoning the oppression and death of millions.

Force is merely a tool, one to be used for either good or evil. It cannot be considered an absolute evil in and of itself. Rather than strive for the utopian goal of banning all violence, the international system should permit war that advances global welfare. No one doubts that war causes steep losses in lives and destruction, but it can serve the greater good too. Because of the anarchic nature of the international system, the challenge for the next century is not to stop great power wars, where

national security interests will brush aside legal and political rules. Rather, the task ahead is to build a new system that encourages the great powers to use force more often, not less, but in the right circumstances. Sometimes only intervention can stop rogue states, oppressive authoritarian regimes, and the threat from terrorism and WMD proliferation. This book points the way toward a new set of rules that gives nations more flexibility to confront these trials of the new century, rather than the problems of the last.

I. War Today

Today, war has become a tool to manage a liberal international order built on free trade and globalized networks of communications and services, integrated capital and labor markets, and quick and easy transportation of people and goods.[4] These conflicts little resemble the apocalyptic clash of powerful organized armed forces of the past. All-encompassing struggles between great alliances, with casualties in the millions, disappeared in the Cold War and its aftermath. World War III never arrived. Conflict between large draft armies fielded by the most power nations inflicted the most destruction in history, but the last war between the great powers erupted almost seventy-five years ago. Today's great powers use war to stabilize the international system, not to promote revolution as in days past.

The primary security threats to the world no longer come from nation-state rivals bent on conquest. As Philip Bobbitt observes, "control of territory no longer holds its former attraction."[5] Wars of conquest lose lives, destroy valuable property, and disrupt productive economic activity. Meanwhile, financial and human capital can quickly flee to safer havens. This stands in contrast to the wars of the twentieth century. In World War I, the rise of Germany disrupted the European balance of power. It prompted two great alliances—Germany and Austria-Hungary against Great Britain, France, and Russia—to fight over the borders of northern and central Europe. America's 1917 entry on the side of Britain and France brought victory to the Allies, the breakup of the German and Austro-Hungarian Empires, and a host of new nations in Eastern Europe. But the Peace of Versailles failed to solve "the German problem," as Henry Kissinger has called it.[6] American intervention two decades later, this time on the side of Great Britain and the Soviet Union, again frustrated Germany's renewed drive for expansion. The Soviet Union then created a sphere of influence in Eastern Europe and half of Germany, while the United States countered by rebuilding the western democracies and founding NATO.

During the half-century of the Cold War, the two superpowers continued to jockey for primacy. The United States used its military to contain the spread

此为试读,需要完整PDF请访问: www.ertongbook.com