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Failing Failed States: A Response to John Yoo

James Thuo Gathii*

INTRODUCTION

In *Fixing Failed States*,¹ John Yoo shows why intervening states that seek to massively transform the social, economic, and political framework of failed states aim to do too much and ultimately fail. Yoo proposes that the role of intervening states should be minimal—enforcing power-sharing agreements between competing groups within failed states, rather than seeking to massively transform them into parliamentary democracies. To give a fair reply to Yoo’s well-argued essay, Part I will outline in some detail the major highlights of his argument and its rationale. In Part II, I will offer my response.

In my view, Yoo overstates the benefits of loosening the prohibition against the use of force and the rule that occupied countries be restored to full sovereignty. By proceeding primarily from a security perspective, he offers a military solution that risks exacerbating rather than resolving the problem of failed states. His argument would have been more powerful if it were backed up by persuasive evidence and case studies to support the efficacy of his proposals. Ultimately, I disagree with the means Yoo proposes to fix failed states.

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1. John Yoo, *Fixing Failed States*, 99 CALIF. L. REV. 95 (2011).

I.
YOO'S THESIS

Yoo argues international law discourages² intervening states from stopping the chaos and destruction in failed states because its rules require failed states have their sovereignty fully restored.³ By requiring restoration to full sovereignty, Yoo argues international law raises the costs of intervention. It would be more ideal, Yoo argues, if intervening states were allowed to intervene to fix failed states and thereafter to “simply” establish “minimal political and economic stability to end internal wars or human rights catastrophes.”⁴ Yoo argues that the requirement that intervening states restore a functioning government discourages beneficial interventions. This requirement is costly because in Yoo’s view intervening states are required to spend enormous amounts of money establishing parliamentary democracies.

To the extent that current international law prohibits the use of force, Yoo argues that it is “counter-productive to the goal of fixing failed states”⁵ because by prohibiting the use of force it “discourages states from intervening to stop the chaos and destruction that follow the collapse of state institutions.”⁶ Yoo’s solution to this problem is that international law “should allow intervening states to restore a functioning government by brokering and enforcing agreements between local groups to share power and resources”⁷ without having to be required to restore the state to full sovereignty, or to enforce power sharing agreements within pre-existing borders.⁸

Yoo’s perspective on fixing failed states is primarily premised on reducing costs that discourage intervention and increasing the benefits of interventions. Under this approach, Yoo justifies the loosening of the prohibition of the use of force since doing so “reduce[s] error costs across most cases and will certainly drive down decision costs in attempting to determine, and then in experimenting with, other forms of international governance.”⁹ In other words, the prohibition of the use of force and the requirement that occupied states be returned to full sovereignty impose high costs to fixing failed states efficiently.

For Yoo, there is a distinction between contemporary efforts to address the proliferation of weapons of mass destruction and fighting terrorists, on the one hand, and his proposed initiatives of re-stabilizing rather than re-building failed states, on the other. Loosening prohibitive rules, he argues, would “represent an opportunity for nations with large militaries or large populations

2. *Id.* at 99.

3. *Id.*

4. *Id.* at 112.

5. *Id.* at 99.

6. *Id.*

7. Yoo, *supra* note 1, at 99.

8. *Id.* at 115.

9. *Id.* at 124.

to perform a useful role in international politics by becoming specialists in restoring order in failed states and in developing skills to help those territories build central governments.”¹⁰

Yoo therefore argues that loosening rules of international law would give intervening states the room to decentralize large failed states. This is because in his view, the smaller a state is in size, the more viable it becomes, particularly if it also adopts a liberal trading regime.¹¹ Yoo argues that interventions resulting in smaller states would, by parceling out large-sized states, reduce the propensity of large states to be dictatorial. This, according to Yoo, is a good thing since large states are more likely to raise trade barriers and to pursue militaristic foreign policies. According to Yoo, smaller states would “support policies that encourage the opening of international trade and a reduction in the use of force to resolve international disputes” with the resulting benefits of “[g]reater international stability” and increases in “[g]lobal welfare.”¹²

Yoo’s proposals on how best to fix failed states proceed from a military and security perspective that excludes other approaches. These proposals, as a result, downplay other aspects of the failed state phenomenon and overstate how international law inhibits fixing failed states. As I argue below, Yoo’s proposals understate the importance of both the collective international security system, as well as of multilateral solutions to fixing failed states.

II.

ASSESSING YOO’S THESIS

A. *Yoo’s Similarities to Paul Collier*

Yoo does not point to any evidence that supports the case for loosening restrictions on the use of force or for changing any of the rules of international law he criticizes for standing in the way of fixing failed states. The closest to Yoo’s view is that of Oxford economist Paul Collier. In his book *Wars, Guns, And Votes: Democracy in Dangerous Places*,¹³ Collier argues, with some empirical evidence, that democracy in low-income countries is dangerous and that it has exacerbated rather than resolved the problem of political violence and civil war.¹⁴ While Yoo proposes increased intervention as an antidote to this problem, Collier proposes intervening states should protect leaders who commit to “international standards of elections” against coups.¹⁵ However, like

10. *Id.* at 126.

11. *Id.* at 137. The only credence this claim has in this context is that it has been much easier to successfully undertake humanitarian assistance in smaller states, such as East Timor, Bosnia, and Kosovo, as opposed to larger ones such as Somalia, Sudan, and Afghanistan. See Brennan M. Kraxberger, *Failed States: Temporary Obstacles to Democratic Diffusion or Fundamental Holes in the World Political Map*, 28 *THIRD WORLD QUARTERLY* 1062 (2007).

12. Yoo, *supra* note 1, at 137.

13. PAUL COLLIER, *WARS, GUNS, AND VOTES: DEMOCRACY IN DANGEROUS PLACES* (2009).

14. *Id.* at 20–24.

15. *Id.* at 204.

Yoo, Collier proposes that intervening states should be entitled to militarily “defend a government against domestic forces for decent governance” where such standards were not followed.¹⁶ Collier’s recipe of interventions or coups to support decent government is analogous to Yoo’s prescription of intervening states restoring stability and enforcing peace agreements in failed states.

As a reviewer of Collier’s book noted, such prescriptions underwritten with violence are both “dangerous and naïve.”¹⁷ I am sure Yoo would argue his prescriptions are far from naïve—they are realistic and tough-minded given he would consider it naïve to fear or be reluctant to use force to serve a good cause. Yoo, like Collier, argues that failed states can best be stabilized under the military guarantees of intervening states such as the United States, France, and Britain. To the extent that Yoo leaves little room for skepticism about the strategic interests of intervening states, or the human tragedies that often accompany even the most well-intentioned interventions, he, like Collier, overestimates the value of military interventions to deal with insurgencies, the restoration of order in failed states, and preventing terrorism. Such interventions ineluctably glorify violence as a recipe, while promising to deliver on stability and reduction of terrorist violence. As I note below, even Collier acknowledges how war begets more war in poor countries.

Although Collier effectively prescribes a military solution, he is nevertheless keenly aware of what he calls “the enormous cost” of political violence which he argues “leads not to improvement but to deterioration” given that the “legacy of civil war is further civil war.”¹⁸ Yoo does not, however, acknowledge this downside of violence, or give us examples where the types of prescriptions he proposes have worked. Iraq is the one place that he argues a division of the country between the Shiites, Kurds, and Sunnis would have prevented further violence.¹⁹ The military surge in Afghanistan is another example Yoo gives of how intervening states can apply his prescription. However, given that the wars in Iraq and Afghanistan were hardly commenced to restore failed states, these examples are not ideal illustrations of Yoo’s thesis.²⁰

16. *Id.* at 208.

17. Kenneth Roth, *Ballots and Bullets*, N.Y. TIMES, Mar. 20, 2009, at BR16.

18. COLLIER, *supra* note 13, at 139. Collier further notes that his evidence shows that “armed struggle is usually development in reverse.” *Id.* at 140.

19. Two recent examples involving agreements between feuding following an election are Kenya and Zimbabwe. In none of these two cases was the use of force necessary to guarantee agreements that were struck with the nudging and assistance of international mediators. See CHRIS FOMUNYOH, *MEDIATING ELECTION-RELATED CONFLICTS* (2009), available at <http://www.hdcentre.org/files/Election%20paper%20modified.pdf>.

20. The one instance that could serve as a successful, albeit partial, illustration of Yoo’s thesis is the French intervention to arrest President Gbagbo in April 2011 after he allegedly lost the election and refused to step down. See *French Lawyers to Investigate Legality of Gbagbo Arrest*, REUTERS, Apr. 13, 2011, available at <http://af.reuters.com/article/ivoryCoastNews/idAFLDE73C26Z20110413>.

B. *Yoo's View of the Use of Force as an Inevitable Good*

What is more, Yoo's critique of the prohibitive nature of certain rules of international law overstates the efficacy of these rules in restraining the behavior of powerful states to intervene as they would like, as the April 2011 intervention of France in Cote D'Ivoire illustrates.²¹ Yoo overestimates how loosening these rules would result in catastrophe-free interventions to re-stabilize failed states.²² Yoo attributes to international law undue strength in preventing powerful states to intervene as they please where their strategic interests are at stake. Yet as the U.S.-led invasion of Iraq in 2003 dramatically illustrated, the widespread resort to the use of force has long been considered as evidence about the inefficacy of the prohibition of the use of force.²³ The long-standing pattern of resort to the use of force, notwithstanding its prohibition, is inconsistent with the prohibitive strength of the rule that Yoo attributes to it.

Yoo does not offer any evidence that it is international law's strength that prevented the outcomes the United States would have wanted in Iraq or Afghanistan, to cite two examples. In both cases, it was international law's weakness to restrain the force of the United States and its allies that has been the hallmark in the initial phases of the invasion and subsequent occupations.

Yoo's proposals are undermined by a failure to consider whether the key stakeholders in the international legal system—the overwhelming majority of states likely to be subject to interventions and whose consent would be necessary to effect the changes he proposes—would acquiesce to those changes. When militarily powerful governments in the past argued in favor of loosening the constraints on the use of force precisely for these same reasons,²⁴

21. *Id.*

22. Restoration of failed states resulting from external intervention has also been short-term and unsustainable because these interventions fail to resolve the underlying economic, political, cultural and other problems that feuding groups see as threats or injustices that can best be addressed through violence. Hence, once intervening states depart the feuding groups resort to violence again because even inclusive peace or power-sharing agreements imposed from the outside often fail to produce a lasting peace and ultimately a single political authority that can wield authority and power over feuding parties. Notably, countries that “have been left to their own devices have resolved their conflicts more effectively than the international community and advancing development.” Ian S. Spears, *When Good Governments Go Bad: Leadership and the Limits of Intervention in Africa*, 62 INT'L JOURNAL 359 (2007).

23. See Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607, 616 (2003) (discussing his previous work, Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force By States*, 64 AM. J. INT'L L. 809 (1970), in relation to the Iraq War in accordance with his views thirty years after publication of the first article). Following the invasion of Iraq, Thomas Franck argued that debates about whether to revise Article 2(4) were only possible if the provision was not entirely repudiated. Further, he argued that such prohibition was necessary precisely to try to prevent the next unlawful intervention. Hence, although Franck invoked an argument about the death of Article 2(4) that he had made thirty-three years earlier, the invasion of Iraq further confirmed his prior views about Article 2(4) but did not lead him to conclude that the prohibition of the use of force was completely useless. My argument, therefore, is not that Article 2(4) of the UN Charter is meaningless because it has been observed more in breach than adherence, but that it is necessary for the next time it is violated.

24. See THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 29 (Sept.

a majority of militarily less powerful governments objected.²⁵

More modest efforts to change the prohibition against the use of force in the 2005 UN World Summit to allow for a *right to intervene* to protect people from avoidable catastrophe failed. Instead, the summit adopted a rather watered down version of that idea, dubbed the *responsibility to protect* (R2P). R2P reframed intervention from a right to a duty of all people to prevent large-scale loss of life or catastrophe, such as genocide, war crimes, ethnic cleansing and crimes against humanity—a duty to react and to rebuild.²⁶ This responsibility would be triggered under circumstances very analogous to those Yoo discusses with reference to failed states—where a state is unable or unwilling to fulfill its responsibility to protect, or where it is the perpetrator of the atrocities, or where its conduct directly threatens those outside its borders.

However, while there is an almost perfect overlap between the bad effects of failed states that Yoo describes and the types of catastrophes that R2P was designed to address, the solutions cannot be more different. R2P was designed precisely to keep the prohibition of the use of force intact, while Yoo sees this prohibition as the problem. If going to war to protect against catastrophe is Yoo's preference, then R2P is a feeble solution. To the extent states have only been willing to commit to the feeble R2P rather than the more muscular type of interventionism Yoo seeks, Yoo's proposals are unlikely to find support among a broad cross section of states.²⁷

The reluctance that states have generally expressed about loosening the prohibitions on the use of force is a deeply embedded value that as a general

2002), available at http://www.au.af.mil/au/awc/awcgate/nss/nss_sep2002.pdf (arguing in favor of preemptive use of force and therefore revisions to international law to the extent that it currently requires a prior armed attack from a state before a state can defend itself).

25. See James Thuo Gathii, *Assessing Claims of a New Doctrine of Preemptive War Under the Doctrine of Sources*, 43 OSGOODE HALL L. J. 67 (2005). See also G.A. Res. 65/217, at ¶ 9, U.N. Doc. A/RES/65/217 (Apr. 6, 2011) (rejecting “all attempts to introduce unilateral coercive measures [and urging the Human Rights Council] to take fully into account the negative impact of those measures . . . which are not in conformity with international law, in its task concerning the implementation of the right to development”); G.A. Res. 15/24, at ¶ 3, U.N. Doc. A/HRC/RES/15/24 (Oct. 6, 2010) (condemning “the continued unilateral application and enforcement by certain powers of such measures as tools of political and economic pressure against any country, particularly against developing countries, with a view to preventing these countries from exercising their right to decide, of their own free will, their own political, economic and social systems”). See generally Mary Ellen O’Connell, *The Myth of Preemptive Self-Defense*, The American Society of International Law Task Force on Terrorism, Task Force Papers, Aug. 2002, available at <http://www.asil.org/taskforce/oconnell.pdf> (last visited Sept. 23, 2011); Bruce Ackerman, *But What’s the Legal Case For Preemption? – A Comment*, WASH. POST, Aug. 18, 2002, at B02; Kofi Annan, The Secretary General Address to the General Assembly, United Nations General Assembly, New York, NY, Sept. 23, 2003, available at <http://www.un.org/webcast/ga/58/statements/sg2eng030923.htm> (last visited Sept. 23, 2011).

26. See 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138–39, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) (reading paragraphs 138 and 139 together clearly indicates that force is not authorized to prevent genocide, war crimes, etc., but that peaceful means are contemplated).

27. See Franck, *supra* note 23, at 618 (noting that “almost every nation regards us [the United States] as the world’s gravest threat to peace”).

matter outweighs the benefits of loosening the prohibitions. This is reflected by the ICJ's reference of this prohibition as the cornerstone of the UN Charter.²⁸ For the International Law Commission, the prohibition has attained the status of *jus cogens*.²⁹ These views privilege the values of peace and the independence and territorial integrity of states, relative to the benefits that may accrue from saving failed states. For Yoo, peace and the independence and territorial integrity of states are costly barriers to incentivizing intervening states to fix failed states. That is why Yoo would argue that the inaction with regard to genocide in Sudan or the failed state in Somalia demonstrate not only a failure of R2P but the necessity of loosening the prohibition of the use of force and removal of the requirement that failed states be returned to full sovereignty.

C. *Yoo Overstates the Preferences of Intervening States*

For Yoo international society is comprised primarily of states. To the extent he discusses international institutions, Yoo sees them as a problem. For example, he argues that the UN Security Council exacerbates the collective action problems posed by failed states,³⁰ showing his clear preference for decisive unilateral actions by intervening states. In his view, it is those states that would otherwise intervene as needed that currently bear the costs of failing to prevent catastrophe, since the prohibitive rules prevent them. Further, they bear the additional costs of restoring failed states to full sovereignty when they intervene. This vision of intervening states hobbled to paralysis or saddled with costs highly discounts the high likelihood of catastrophe for the populations of countries that often accompanies military interventions. For those that privilege peace and alternatives to the use of force at the expense of using force to fix failed states, Yoo is unlikely to convince them of the merits of his proposal.

By overstating the preferences of intervening states, Yoo underestimates the role of multilateral institutions like the UN to the extent that their mission reflects the collective will of their members, in addition to serving as forums to facilitate the peaceful settlement of disputes. While the UN would not exist without its member states as Yoo would argue, it is also true that the UN, quite independently of its members, bears the type of costs that Yoo is concerned about. Many states would be skeptical of abandoning collective institutions such as the UN, as imperfect as they are. After all, it is precisely through such forums that these states would reconsider rules such as those prohibiting the use

28. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ¶ 148 (Dec. 19, 2005) p. 168, available at <http://www.icj-cij.org/docket/files/116/10455.pdf>.

29. Reports of the Int'l Law Comm'n on the 2d part of its 17th Session and on its 18th Session, [1966] 2 Y.B. Int'l L. Comm'n 169, 247, U.N. Doc. A/CN.4/189 (providing commentary to Article 50 of the ILC's Draft Articles on the Law of Treaties).

30. Yoo, *supra* note 1, at 130.

of force or those that require returning occupied states to full sovereignty. More importantly, institutions like the UN have come to represent the aspirations of the most vulnerable populations around the world, both within and without failed states, even while they are dominated by the largest contributing members such as the United States. It is unlikely that a discussion on how to fix failed states will take place without taking into account the dangers that changes to rules most states consider constitutional would pose.

Throughout his Article, Yoo expresses skepticism that weakening the restraints on intervention in failed states would raise cases of bad faith intervention. Further, he argues that recent “interventions show little signs of colonialism or imperialism.”³¹ These are both very contestable propositions as I elaborate below. Yoo overlooks the fact that Iraq, which he gives as an example of a failed state that fits his proposed solution, is one of the leading examples of an intervention—or as critics argue, an invasion—without Security Council authorization that exacerbated, if not created, the crisis of a failed state. The 2003 U.S.-led invasion of Iraq from that point of view epitomizes the dangers of loosening the prohibition on the use of force.³²

Loosening the prohibition against the use of force to allow intervening states to save failed states would risk licensing similar “recurrent projections of military force based on [the] auto-interpretation” of intervening states and would effectively “endorse *unilateral* military action,” which would be “ideally suited to hegemonic sensibilities.”³³ Notably, in *Congo v. Uganda*, the ICJ explicitly rejected Uganda’s auto-interpretation of Security Council resolutions as authority to legitimate its armed activities and looting of mineral resources in the Congo.³⁴ The Court’s rejection of Uganda’s expanded claims of self-defense against irregular forces implicitly rejects this kind of auto-interpretation of Security Council resolutions by States as authority to use force inconsistently with Article 2(4) and Article 51 of the Charter.³⁵

Yoo expresses doubt that recent interventions evidence much in the way

31. *Id.* at 117.

32. Patrick E. Tyler and Felicity Barringer, *Annan Says U.S. Will Violate Charter if It Acts Without Approval*, N.Y. TIMES, Mar. 11, 2003, at A8. Similarly, the U.S.-led Operation Enduring Freedom in Afghanistan that started in 2001 is often offered as another instance of the dangers of loosening prohibitions on the use of force. *See, e.g.*, Marcelo G. Kohen, *The Use of Force by the United States After the End of the Cold War, and Its Impact on International Law*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 197 (Michael Byers & Georg Nolte eds. 2003).

33. José E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT’L L. 873, 881 (2003) (emphasis in original). *See also* Henry J. Richardson III, *U.S. Hegemony, Race, and Oil in Deciding United Nations Security Council Resolution 1441 on Iraq*, 17 TEMPLE INT’L & COMP. L.J. 27 (2003). Notably, Yoo argued in favor of the Iraq invasion as having been permissible on collective security and self-defense grounds. *See* John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT’L L. 563 (2003).

34. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, 199.

35. James Thuo Gathii, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* 101 AM. J. INT’L L. 142 (2007).

of colonialism and imperialism. If we limit colonialism and imperialism to territorial conquest, Yoo may be right. Today colonialism and imperialism do not involve territorial conquests.³⁶ That is because there are many other ways of having authority over or restructuring and dominating peoples and countries in far-flung places. Alternative modes include the establishment of informal empires such as those of free trade that intervening states use to serve the interests of their profit-seeking corporations. Free trade and free markets help developed countries to secure financial, commercial, or other advantages in foreign countries. It is therefore not coincidental that the U.S.-controlled Coalition Provisional Authority following the invasion and conquest of Iraq imposed a free market economic reform program in which U.S. investors were given unprecedented access.³⁷ Again one would agree with Yoo only if we define colonialism and imperialism narrowly to exclude the way in which their imprints continue to be evident in contemporary international law. Failing to show how international law today bears the imprints of colonialism and imperialism would be to characterize it as neutral and apolitical. To be fair, Yoo often cites views of scholars who talk of colonial and imperial continuities, but he dismisses these views since his approach to international law does not share the same premises as his about the nature and purposes of international law.³⁸

Yoo proposes that intervening states can pursue power-sharing agreements as a corrective in failed states. As I noted above, he gives the example of Iraq which he argues could be divided into three states: Sunni, Shiite, and Kurdish.³⁹ Yoo does not however suggest how this would be done. Would the local populations be consulted? Would we presume the Sunnis, Shiites, and Kurds were all homogenous groups that could be reconstituted into separate states? Perhaps we must presume the permissibility of the use of force would make it possible to enforce such power sharing agreements without having to worry about the foregoing details. Yoo does not give other examples, although he mentions countries like Somalia would be candidates for such power-sharing agreements.⁴⁰ Other recent examples of international mediation

36. In fact, the initial phases of the scramble for Africa, and other overseas possessions, involved companies franchised by European governments financing the territorial acquisition for the resources of these foreign lands, rather than for territorial occupation per se. Thus, even historically, arguing that colonialism and imperialism merely involved territorial occupation and conquest is inaccurate. I am indebted to Alexandra Harrington for this insight.

37. See JAMES THUO GATHII, *WAR, COMMERCE, AND INTERNATIONAL LAW*, 71–103 (2010) (showing how the massive economic transformation of Iraq into a market economy under the US-led occupation exceeded the mandate of an occupying state under international law); ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 11–12 (2005) (noting that imperialism or neocolonialism “is a broader and more accurate term with which to describe the practices of powerful Western states in the period following the establishment of the United Nations” and that “[t]his period witness[ed] the end of formal colonialism, but the continuation, consolidation and elaboration of imperialism”); see also MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* (2000).

38. See Yoo, *supra* note 1, at 116.

39. *Id.* at 115.

40. See Yoo, *supra* note 1, at 142–43.

between political factions that resulted in power-sharing agreements include Kenya and Zimbabwe. While Kenya's coalition government has largely survived, in Zimbabwe it has not worked as well. In my view these power-sharing agreements arrived at with international mediation and support between rival political groups in Kenya and Zimbabwe⁴¹ show that the use of military force is not always necessary to rebuild fragile or failed states.

D. Yoo's Policy Conclusions

Yoo, like Collier, places a lot of confidence in governmental or factional leaders in poor or failed states making rational calculations about whether to go to war or not. For Collier, that confidence is expressed by his prescription that leaders who commit to fair elections, good governance and respect for human rights would receive protection—paid by intervening states—against imminent coups. For Yoo, this confidence is expressed by the fact that he considers loosening the rules prohibiting the use of force will incline rebel groups and their leaders to reconsider the path of violence since intervening states would effectively be licensed to bring fighting to a halt and enforce power-sharing agreements. The tragedy is that rebel groups and their leaders in Africa and in many failed states often make what they consider to be economically or politically rational choices even when they have violent outcomes. For some rebel leaders and groups, continuing violence is a win-win situation.⁴²

It is notable that while Yoo does not subscribe to the imposition of parliamentary democracy as part of his proposed solution, the ongoing locally-grounded bottom-up revolutions in North Africa and the Middle East that started with the overthrow of the Tunisian government in January 2011, are all democratic movements seeking to overthrow autocratic regimes.⁴³ Thus while Yoo may be correct to argue that parliamentary democracies ought not to be imposed, it is also true that the aspirations of many populations outside intervening western states have a commitment to democratic governance—which Thomas Franck declared more than two decades ago to be crystallizing into an international legal right.⁴⁴ The aspirations for democratic governance in failed states are evidenced by examples of overwhelming endorsement of

41. See Department for International Development (DFID), *Building Peaceful States and Societies: A DFID Practice Paper* (2010), 24, 47, available at <http://www.dfid.gov.uk/Documents/publications1/governance/Building-peaceful-states-and-societies.pdf> (discussing internationally supported state building and peace agreements and processes as important for rebuilding fragile countries).

42. See Gathii, *supra* note 35, at 219–20.

43. A book by the same title as John Yoo's article argued as far back as 2008 that fixing failed states would require a citizen-based approach and a double compact: one between the leaders and their people and a second between the leaders and the international community. See ASHRAF GHANI & CLARE LOCKHART, *FIXING FAILED STATES: A FRAMEWORK FOR REBUILDING A FRACTURED WORLD* (2008).

44. See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 49 (1992) (arguing that since the 1980s, "people almost everywhere now demand that government be validated by western-style parliamentary, multiparty democratic process").

constitutional texts by war-weary people, even when they were not fully consulted.⁴⁵ Yoo's premise that restoring failed states with recourse to war would reduce incidents of terrorism and create more global stability must be balanced against the adverse effects of forcible interventions. At the moment, the case for more forcible interventions as opposed to other initiatives to save failed states does not seem more justified than alternative approaches. To the extent forcible interventions may exacerbate, more than fix, the failed state problem, the less persuaded are those who believe resorting to violence ought to be avoided until absolutely necessary. At the end of the day, Yoo has provoked a discussion outside the usual parameters about how best to fix failed states. While I disagree with his prescriptions, I think they warrant critical scrutiny and attention.

CONCLUSION

Yoo argues that the costs of restrictive rules on the use of force against failed states must be balanced against the benefits of loosening these rules. Further, he argues that rules that require maintaining a failed state with substantial efforts could be futile and wasteful. A major weakness of Yoo's proposals for loosening the prohibition of the use of force is that it presumes that the use of force is invariably a good fix for the failed state problem. His analysis does not adequately take into account the downsides of using force to address an otherwise laudable goal. It also does not give sufficient credit to other approaches to fix failed states. While I agree that prior efforts have not succeeded, it is perhaps not because they were necessarily wrong-headed. They may have failed because of their ad hoc nature, inadequate funding, or lack of engagement with the populations of failed states.⁴⁶ The World Bank's 2011 World Development Report recognizes these problems and proposes the gradual rebuilding of legitimate institutions in failed and fragile states. According to the Bank, traditional humanitarian and development aid approaches must be combined with new approaches that incorporate specialists in human rights, policing, and mediation in the restoration of failed and fragile states.⁴⁷ In some cases, though, Yoo may be right—the international

45. See James Thuo Gathii, *Popular Authorship and Constitution Making: Comparing and Contrasting the DRC and Kenya*, 49 WM. & MARY L. REV. 1115 (2008).

46. See GHANI & LOCKHART, *supra* note 39, at 19. *But see* Yoo, *supra* note 1, at 117 (arguing that Ghani and Lockhart's "proposals to fix failed states outside the nation-state framework encounter a significant obstacle: existing international law"); MARINA OTTAWAY & STEFAN MAIR, CARNEGIE ENDOWMENT FOR INT'L PEACE, STATES AT RISK AND FAILED STATES: PUTTING SECURITY FIRST 1 (2004), available at http://carnegieendowment.org/files/Ottaway_outlook3.pdf (noting that "it is not only lack of resources which constrains the effectiveness of the international community, it is also the lack of knowledge of which approaches to the stabilization of fragile states work and which instruments are best suited to perform this task").

47. See generally WORLD BANK, WORLD DEVELOPMENT REPORT (2011), available at <http://wdr2011.worldbank.org/fulltext>; DFID, *supra* note 41 (proposing a new approach on rebuilding fragile states which would include addressing the causes and consequences of conflict and fragility, building conflict resolution mechanisms, supporting inclusive political settlements and processes,

community has stood by as a country disintegrated into chaos, destabilizing the surrounding region and becoming a breeding ground for extremist forces that harbor terrorist ambitions and goals.⁴⁸ The UN Charter framework established a collective mechanism for dealing with such situations that pose a threat to international peace and security, in addition to permitting the use of self-defense under Article 51 in appropriate cases.

As I have argued above, loosening the prohibition of the use of force would depart from this collective international security system with all its problems. It would also transfer the arduous and long-term responsibility of fixing failed states from the feuding parties to intervening states. While the Charter system is certainly in need of revision to address challenges such as those posed by failed states,⁴⁹ and to help fix failed states, loosening the prohibition on the use of force would undermine the cornerstone against which this system is built. Thus while I am sympathetic to Yoo's desire to fix failed states, I disagree with the means by which he proposes to do so.

developing core functions, and responding to public expectations).

48. Makau Mutua, for example, has recently advocated for a military resolution of the Al-Shabaab militia, which is spreading its tentacles from the failed state of Somalia and causing chaos in neighboring Kenya, Uganda, and Rwanda, among other countries. See Makau Mutua, *Kenya: Why Military Must Crush Al-Shabaab*, May 13, 2011, available at <http://allafrica.com/stories/201105160136.html>. Notably, Makau does not generally support military intervention and has, in other contexts, been critical of abusive uses of force by intervening states. See Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201 (2001).

49. As Thomas Franck argued, without a full appreciation of the decision-making framework of the collective use of force under the UN Charter and how it was jettisoned in the lead up to the Iraq war, it is hardly appropriate to discuss revising the Charter framework. See Franck, *What Happens Now? The United Nations After Iraq*, *supra* note 23, at 614–18.