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John C. Yoo

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The Dogs That Didn't Bark: Why Were International Legal Scholars MIA on Kosovo?

John C. Yoo*

When they can, people like to analogize a seemingly obvious, but unnoticed point to Sir Arthur Conan Doyle's Sherlock Holmes story of the dog that didn't bark.¹ In the story, Holmes deduced a murderer's identity because a guard dog failed to bark at the time of the crime, implying that the murderer and the dog's master were one and the same. Similarly, legal scholars like to infer the failure of various parties or institutions to speak up about something as implicit acquiescence. While we all like to make inferences from a dog's silence, however, we often never ask what was wrong with the dog in the first place.

International legal scholarship is so frustrating and so disappointing for what it doesn't say, as much as for what it says. We rarely examine, however, what is so wrong with international legal scholarship that causes its failure to bark. At least the dog in the Holmes story had little choice; we can't blame a dog for recognizing the master who trained and fed him. International legal scholars, incredibly, often end up in the same place as the dog, even though they now enjoy so many choices or directions in which to work, spanning a number of disciplines and normative outcomes.

The failure of international legal scholars to challenge the recent war in Kosovo serves up a prime example of the dog that didn't bark. International legal scholars' inconsistent positions on war powers suggest that scholarship in the field has failed to progress because it is too attached to the ambiguous normative goal of promoting international justice. Instead of attempting to study and analyze the nature of international law and why it appears to succeed in some areas and not others, international legal scholars devote too much time to fantasizing about the ideal international legal order and criticizing threats to it. Yet, by engaging in such a value-driven normative enterprise, these scholars undermine the very idea that neutral law, not raw power or ideological politics, governs international affairs.

Debates over war powers provide an example of the normatively-driven enterprise of international legal scholarship. In the 1980s and 1990s, prominent international legal scholars sharply criticized the use of force by Presidents Ronald Reagan and George Bush, who sent American forces into hostilities in places such as Grenada, Libya, Lebanon, Panama, and the Persian Gulf. Throughout these wars, the

* Professor of Law, University of California at Berkeley School of Law (Boalt Hall). The author would like to thank the Boalt Hall Fund, the University of California at Berkeley's Committee on Research, and the Olin Foundation for financial support.

1. Sir Arthur Conan Doyle, *The Complete Sherlock Holmes: Silver Blaze* 335, 349 (Doubleday 1936) ("[A] dog was kept in the stables, and yet, though someone had been in and had fetched out a horse, he had not barked enough to arouse the two lads in the loft.")

leading lights of international legal scholarship argued that presidents who launched military interventions without congressional authorization had acted unconstitutionally.² According to these professors, presidential war-making violated the Constitution's Declare War Clause, which they read to vest in Congress the authority to approve all uses of force. Some academics even allege that presidents who engaged the nation in hostilities in violation of the U.N. Charter (not in national self-defense) compound the unconstitutionality of their actions by violating international law.³ International law, these scholars claim, is part of the law of the land, and therefore the President's constitutional duty to enforce the laws requires him to obey international rules.⁴

International law scholars take their views seriously, so seriously in fact that they have engaged in more direct forms of advocacy. Law professors supported challenges to the Reagan administration's military aid program for El Salvador,⁵ covert assistance for the Nicaraguan Contras,⁶ and American naval escort operations in the Persian Gulf.⁷ President Bush's war against Iraq provided the most notable example of the activism of international legal scholars. In an amicus curiae memorandum filed in a congressional lawsuit brought against President Bush,⁸ eleven prominent law professors argued that military action against Iraqi forces, without "the genuine approval of Congress," would violate the Constitution.⁹ In an effort to stop unilateral

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2. See, for example, Louis Fisher, *Presidential War Power* (Kansas 1995); John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath* (Princeton 1993); Michael J. Glennon, *Constitutional Diplomacy* (Princeton 1990); Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs* (Columbia 1990); Harold Hongju Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* (Yale 1990).
 3. See Louis Henkin, *International Law as Law in the United States*, 82 Mich L Rev 1555 (1984); Michael J. Glennon, *Raising the Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 Nw U L Rev 321 (1985); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 Va L Rev 1071 (1985). See also the introductory quote of Thomas M. Franck, *Agora: May the President Violate Customary International Law?*, 80 Am J Intl L 913 (1986).
 4. In the interests of full disclosure, I have argued that presidents can initiate military hostilities without ex ante congressional authorization, see John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Cal L Rev 167 (1996); John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U Colo L Rev 1169 (1999); but that the executive cannot rely upon treaty obligations to act unilaterally in areas of congressional authority, see John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U Pa L Rev (forthcoming 2000); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 Colum L Rev 1955 (1999); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self Execution*, 99 Colum L Rev 2210 (1999).
 5. See *Crockett v Reagan*, 558 F Supp 893 (DDC 1982), affd 720 F2d 1355 (DC Cir 1983), cert denied, 467 US 1251 (1984); *Ramirez de Arellano v Weinberger*, 745 F2d 1500 (DC Cir 1984).
 6. See *Sanchez-Espinoza v Reagan*, 568 F Supp 596, affd on other grounds, 770 F2d 202 (DC Cir 1985).
 7. *Lowry v Reagan*, 676 F Supp 333 (DDC 1987).
 8. *Dellums v Bush*, 752 F Supp 1141 (DDC 1990).
 9. The brief is reprinted in Ronald V. Dellums v George Bush (DDC 1990): *Memorandum Amicus Curiae of Law Professors*, 27 Stan J Intl L 257, 261 (1991). The eleven professors who signed the letter

presidential war-making, they took to the popular press and the airwaves,¹⁰ testified before Congress,¹¹ and even considered representing soldiers who might resist a call-up unless a declaration of war was issued.¹²

President Clinton's incoming administration may have seemed to bring with it the promise of a different state of affairs, but it was not to be. In threatening to use force to eject the military junta in Haiti, for example, President Clinton asserted that he was not "constitutionally mandated to get" congressional approval before military action.¹³ While the administration has displayed a willingness to use force in numerous situations, ranging from Haiti to Iraq to Bosnia to Afghanistan, and Sudan to Kosovo, it has yet to receive ex ante congressional authorization for any of these military activities.¹⁴ Initially, international legal scholars greeted this new interventionism with the same opposition that they generated toward the Reagan and Bush administrations. In the Haiti crisis, ten of the same law professors who had filed the earlier amicus brief repeated their arguments in a public letter, addressed to Walter Dellinger, a law professor and then assistant attorney general for the Office of Legal Counsel.¹⁵ According to these scholars, a U.N. Security Council Resolution notwithstanding, the Constitution and relevant case law required the President "to seek and obtain Congress's express prior approval before launching a military invasion of Haiti."¹⁶ The letter even claimed that Mr. Dellinger would be violating his oath of office were he to allow the war to proceed without congressional authorization. One letter-signer even went so far as to argue publicly that Mr. Dellinger was an intellectual hypocrite, because he appeared to be contradicting an earlier, pro-Congress position on war powers that he had taken as a law professor during the Gulf

are: Abram Chayes, Erwin Griswold, and Laurence Tribe of Harvard, Bruce Ackerman and Harold Koh of Yale, Philip Kurland of Chicago, Gerald Gunther and John Hart Ely of Stanford, Lori Fisler Damrosch and Louis Henkin of Columbia, and William Van Alstyne of Duke.

10. See, for example, John Hart Ely, "War by Default" Isn't the Law, *LA Times* M7 (Dec 23, 1990); Harold Hongju Koh, *Bush Honors the Law*, *Newsday* 44 (Jan 20, 1991); CNN Crossfire, Oct 22, 1990, Transcript #166, *LEXIS* (Interview of Harold Koh).
11. See, for example, The Constitutional Roles of Congress and the President in Declaring and Waging War: Hearings before the Senate Committee on the Judiciary, 102d Cong, 1st Sess (1991) (statements of Louis Henkin, Harold Koh and William Van Alstyne).
12. See Harold Hongju Koh, *Presidential War and Congressional Consent: The Law Professors' Memorandum in Dellums v Bush*, 27 *Stan J Intl L* 247, 252 (1991) (describing activities of eleven law professors who signed amicus curiae memorandum).
13. Lori Fisler Damrosch, *Agora: The 1994 U.S. Action in Haiti, The Constitutional Responsibility of Congress for Military Engagements*, 89 *Am J Intl L* 58, 59 (1995).
14. See generally, Yoo, *Kosovo*, 148 *U Pa L Rev* (cited in note 4).
15. See Letter to Walter Dellinger, reprinted in 89 *Am J Intl L* 127 (1995). The ten were Abram Chayes and Laurence Tribe of Harvard, Bruce Ackerman and Harold Koh of Yale, Philip Kurland of Chicago, Gerald Gunther and John Hart Ely of Stanford, Lori Fisler Damrosch and Louis Henkin of Columbia, and William Van Alstyne of Duke.
16. *Id* at 127.

War.¹⁷

After Haiti, however, international legal scholars have lost their bark. In the two most significant deployments of the American military during the Clinton years, the dispatch of 20,000 troops to Bosnia in 1995 and the 30,000-soldier offensive against Serbian forces in Kosovo in 1999, critics of the administration's constitutional authority were few and far between. Kosovo provides perhaps the most striking example of the booming silence of international legal scholars. In response to Serbian oppression of, and violence against, ethnic Albanians living in the province of Kosovo, President Clinton on March 24, 1999, ordered air strikes against Serbian forces in the region as part of a NATO-wide offensive.¹⁸ When Serbia responded by accelerating its program of ethnic cleansing, NATO expanded air operations to include both military and civilian targets in Serbia itself. More than 30,000 American soldiers participated in the military operations, which concluded on June 10, 1999, when Serbia agreed to withdraw its forces from Kosovo, well past the sixty-day limit on military interventions imposed by the War Powers Resolution.¹⁹

For international legal scholars, Kosovo should have presented an easy target for their assaults against unconstitutional presidential war-making. President Clinton never received *ex ante* congressional authorization for the use of force in Kosovo. He never even received congressional approval after the fact. Congress considered legislation that would have authorized military intervention, but the bill that made the most headway failed in the House by a tied vote.²⁰ Congress considered, but decisively rejected, a proposal to declare war against Serbia. Instead, President Clinton relied on his Commander-in-Chief power and inherent executive power, and perhaps his authority to uphold treaty obligations (in this case, to NATO), to wage war unilaterally. The administration, it should be noted, has yet to provide a legal justification for its intervention. Under the analysis advanced by the international and foreign relations law community, as amplified by the political activism of its leading members, this lack of formal congressional participation in the decision to use force should have marked Kosovo as an unconstitutional war.

It is difficult to see how Kosovo presents a different constitutional situation than the possible invasion of Haiti. If anything, Kosovo was more of a "war," for constitutional purposes, than Haiti would have been. Haiti had the air of a police action about it, in which the United States was intervening to establish democracy and to restore order, against a poorly-organized, ill-trained group of thugs without any substantial military equipment. While the United States planned to bring a great deal of firepower to bear, including 20,000 troops, this was for the explicit purpose of

17. See Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U Miami Rev 107, 109-10 (1995).

18. The events are retold in *Campbell v Clinton*, 52 F Supp 2d 34, 39 (DDC 1999); Yoo, *Kosovo*, 148 U Pa L Rev (cited in note 4).

19. Yoo, *Kosovo*, 148 U Pa L Rev (cited in note 4).

20. *Id.*

convincing the military junta to step down. In Kosovo, the American military conducted extensive offensive operations against the military and civilian assets of another sovereign nation half a world away. The large Serbian military forces were, for the most part, well-trained and well-equipped with modern armor and anti-aircraft defenses. NATO operations went beyond attacks on ground forces in Kosovo to include strategic targets, such as government buildings, industrial plants, and electrical facilities in Serbia itself. Thousands of American ground troops now essentially occupy part of Kosovo, as part of NATO-imposed peace terms, in potentially hostile conditions. The air war lasted beyond the time limits of the War Powers Resolution, and the mission of American ground troops may take years to complete.

Furthermore, unlike the case with Haiti or Bosnia, American military action against Serbia could not claim the blessing of international law. America was not acting in its national self-defense; if it were, then almost any military intervention could constitute national self-defense. Nor did America's attack on Serbia receive authorization by the U.N. Security Council. Any other use of force, it seems, violates the U.N. Charter.²¹ If so, President Clinton's attack on Serbia violated two of the central principles of the foundational multilateral agreement of international law—the Charter's bar on the use of military force, and the Charter's guarantee of the sovereign integrity of each member nation. If international legal scholars stuck to their guns on the President's duty to obey international law, then they must conclude that President Clinton's use of force violated his constitutional responsibility to take care that the laws are faithfully executed. Indeed, for those who believe that customary international law, which itself does not rise to the status of hard international law like a multilateral treaty, is federal common law under the Supremacy Clause, then a violation of the U.N. Charter's express terms would seem as clear a violation of federal treaty law as one could get. Since international law scholars argue that the President's duty to uphold the laws includes international law, then they are left concluding—if they are to be consistent—that the President violated the Constitution by attacking Serbia without the U.N.'s permission.

Despite Kosovo's constitutional and legal difficulties, international legal scholars remained noticeably, even remarkably, silent throughout the conflict. They were truly the dogs that did not bark. Searches of legal and news databases suggest that no prominent scholar of international law filed amicus briefs, wrote opinion pieces in the magazine or newspapers, or took to the airwaves to protest that the American use of force in Kosovo violated the Constitution or international law.²² Indeed, the leaders of

21. *Id.*

22. Professor Jules Lobel of Pittsburgh Law School, however, is an exception. Professor Lobel who served as counsel to the Center for Constitutional Rights, represented Tom Campbell and other members of the House in litigation against President Clinton over Kosovo. Professor Lobel, however, did not attempt to affect the public debate through op-eds, law review articles, and the like. Although he has contributed an article to this symposium critical of the international law justification for NATO's intervention in Kosovo, he did not publish these views during the bombing. Professor Lobel probably declined to enter the public debate because of his participation

the international law community held their fire when President Clinton chose to attack Serbia, while just five and nine years earlier they had industriously organized a united front against presidential war-making, and then represented to the government and to the public that the great weight of neutral, detached scholarly opinion had come down against the President. To be sure, these scholars may yet pen law review articles, which take more time to prepare, arguing that the Kosovo conflict violated the Constitution—although the lack of criticism concerning the use of force in Bosnia, and the later deployment of ground troops, does not give grounds for hope.²³ Still, the public and political activism of the international legal community that had characterized the Reagan and Bush wars of the 1980s and 1990s was nowhere to be found.

It is difficult to explain this 180 degree turnabout. Opposition to presidential war-making does not seem to parallel partisan lines, as law professors criticized both President Bush's Gulf War and President Clinton's planned Haiti intervention. Criticism does not seem based on whether a war complies with the U.N. Charter—quite the reverse. In fact, international law scholars have attacked the two interventions authorized by the Security Council, but have kept silent on the war that was not. Academic opposition does not appear to correlate with the nature of the conflict; while the Persian Gulf War involved the largest number of forces and the most intense fighting, Haiti likely would have fallen well short of the hostilities against Serbia. International legal scholars' critiques do not seem to track Congress's constitutional opposition either, as Congress failed to take any steps in any of the interventions to affirmatively cut off hostilities.

Two factors, however, may distinguish Kosovo from previous conflicts in a manner that explains international legal scholars' most recent silence. First, both the Persian Gulf War and Haiti, at least before military operations commenced, threatened to involve potentially costly casualties for American forces. In 1991, the United States was about to launch a broad military offensive, its most ambitious since Vietnam, against one of the largest, well-equipped armies in the world. In 1994, while the balance of forces weighed heavily in favor of the United States, concern might have arisen—especially after the embarrassing American withdrawal from Somalia—that an urban environment, in which American troops might have difficulty distinguishing enemies from civilians, could produce high casualty rates. In Kosovo, by contrast, President Clinton initially foreswore a ground attack and focused on an air war that promised to hold allied casualties to a minimum. While a ground war

as counsel to a client engaged in litigation on the issue—a worthy demonstration of self-restraint.

23. Even recent editorial comments in the *American Journal of International Law*, which has served as a forum in the past for the profession's criticism of presidential war-making, focused only on whether NATO's Kosovo intervention violated international law. These comments, authored by some of the leading names in international and foreign relations law, remained strangely silent on the domestic constitutional implications of the Kosovo war. See *Editorial Comments: NATO's Kosovo Intervention: Kosovo and the Law of "Humanitarian Intervention,"* 93 Am J Intl L 824 (1999).

might have been planned in secret, the war for the most part had a limited, controlled, even antiseptic quality to it that called for little fighting on the ground by U.S. troops. International legal scholars might believe somehow that the insertion of ground troops makes a difference in the way that the war powers calculus works out. Or perhaps international legal scholars believed that the threat of high casualty levels would give their constitutional and legal arguments more political traction with the public. It might reflect, in fact, a desire among the international legal community to show that constructing a new world order, based in international law, will have fewer costs in lives, treasure, and national honor, than the high costs of containing communist, totalitarian dictatorships during the Cold War. In any event, these considerations should make no difference for the constitutional or legal analysis.

Second, the contradictory position of many international legal scholars on Kosovo may show that more important normative concerns lie at the heart of their intellectual project than creating an international rule of law. Kosovo pressed international legal scholars into a tight corner. On the one hand, NATO intervention violated the U.N. Charter and, hence, international law. On the other hand, NATO acted to vindicate international human rights, a cause that has become international legal scholars' *bête noire* of late—witness, for example, the furious counter-attack that some have launched against critics of the idea that international human rights law qualifies as federal common law.²⁴ It seems to me that the American international law community kept quiet about the constitutional and legal difficulties—at least in their minds—of the Kosovo war because they believed the conflict served higher ends, that of promoting a normative vision of international justice in which each individual is guaranteed a certain minimum of liberty and freedom. If other notions of international law, such as the principles of non-intervention and state sovereignty get in the way, so be it.

Some leading international legal scholars, such as Professor Michael Glennon in an essay in *Foreign Affairs*, will admit to their willingness to place justice before law. Written during the Kosovo crisis, Glennon's essay praised "America's new willingness to do what it thinks right—international law notwithstanding."²⁵ If America and NATO use their military might to save innocent lives, Glennon argues, the law must recognize a new norm in which human rights violations can justify intervention into a nation's internal affairs. "If power is used to do justice," Glennon concludes, "law will

24. For the debate, see Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv L Rev 815 (1997); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 Fordham L Rev 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 Fordham L Rev 393 (1997); Harold Hongju Koh, *Is International Law Really State Law*, 111 Harv L Rev 1824 (1998). Bradley and Goldsmith have responded to their critics several times. See Curtis A. Bradley and Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 Harv L Rev 2260 (1998); Curtis A. Bradley and Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 Fordham L Rev 319 (1997).

25. Michael F. Glennon, *The New Interventionism: The Search for a Just International Law*, Foreign Aff 2 (May-June 1999).

follow."²⁶ While other scholars, notably Professor Thomas Franck, took issue with Glennon, they did so in a curious manner. Franck, for example, conceded that the international law of the U.N. Charter did not authorize Kosovo, but then maintained that nations did not need the U.N.'s permission to intervene to stop human rights abuses. As Franck put it, "NATO's action in Kosovo is not the first time illegal steps have been taken to prevent something palpably worse."²⁷ Franck and Glennon both seemed to agree that nations should violate international law to serve unspecified higher values; they just disagreed over whether to keep the U.N. system anyway (Franck), or to dispose of it altogether in favor of a new system of international power (Glennon). Both would allow nations to intervene unilaterally in the cause of human rights—one would just like to call it illegal and do nothing about it, the other would like to call it legal after-the-fact.²⁸

The problems with this sort of reasoning, which are not difficult to see, demonstrate the central defect in international legal scholarship. International legal scholars are only too happy to attack, in very harsh language, wars with objectives they oppose. Thus, wars that sought to contain the spread of communism in Central America, or to maintain the balance of power in the Middle East, or to maintain American hegemony in the Caribbean, are characterized as violations of constitutional and international law. Such conflicts reek too much of the old world order of real politik and of an international system rooted in the military, political, and economic power of nation-states. Wars that promote goals long sought by international legal scholars, however, such as the advancement of universal human rights over the principle of state sovereignty, do not provoke criticism, because much of the American international law community agrees with the result. Yet, scholars are not prepared to declare that nations may intervene, under international law, in another nation's solely domestic affairs in order to prevent human rights violations. If they do believe in such a principle, they have failed to press it in many other situations, most notably the Russian offensive in Chechnya or the Chinese suppression of domestic political dissent, not to mention the wholesale violation of human rights by communist nations before and during the Cold War. Rather than articulate a doctrine that contradicts the basic principles of the U.N. Charter and much of Western history since the Peace of Westphalia, international legal scholars seem to have chosen the course of silence.

When the analysis of international legal scholarship becomes so result-oriented,

26. Id at 7.

27. Thomas M. Franck, *Sidelined in Kosovo?: The United Nations' Demise Has Been Exaggerated; Break It, Don't Fake It*, Foreign Aff 116 (July-Aug 1999).

28. The recent editorial comments in the *American Journal of International Law* on the Kosovo war, which appeared in January 2000, further demonstrate the tortured reasoning that international law scholars have adopted in response to the conflict between the demands of the UN Charter and goals of international human rights law. See *Editorial Comments* (cited in note 23) (comments by Louis Henkin, Ruth Wedgwood, Jonathan Charney, Christine Chinkin, Richard Falk, Thomas Franck, Michael Reisman). Several of the writers admitted that NATO's bombing violated the text of the UN Charter, but nonetheless strove mightily to avoid calling the war illegal because they agreed with the war's aim of ending human rights abuses.

it undermines the very nature of international law as law. Arguing that constitutional and international legal rules bar wars only when one disagrees with the war's objectives serves to reinforce the idea that international law represents nothing more than the policy preferences and intellectual agendas of scholarly commentators, rather than neutral principles that govern the conduct of nations. Further, it destroys the notion of a universal law that applies equally to every nation and human being, the object of most of the international legal community. When scholars trade in rules that have risen up from decades, if not centuries, of state practice for vague notions of "justice" or "fairness," international law becomes subject to the competing interpretations of those terms by different cultures and value systems. Intervening in Kosovo to defend international human rights, even at the cost of state sovereignty, may represent "justice" to those, like Glennon, Franck, and I, who are part of the Western legal tradition. But it certainly does not achieve "justice" in the minds of the Russians and Chinese, at least not yet. Basing international law on justice or fairness, rather than the U.N. Charter system or the practice of states, provides no basis for concluding that Western concepts of justice should govern in international law, and Russian or Asian or Islamic understandings should not. Instead, overriding territorial sovereignty and the non-intervention principles only opens up international law to multiple, conflicting interpretations that may prove unresolvable, precisely because they are rooted in fundamental differences in culture or religion. By failing to be consistent, international legal scholars demonstrate a desire to reach results that could undermine the ultimate goal of international legal scholarship, the rule of law in world affairs.



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