

SYMPOSIUM ON MONICA HAKIMI, “THE *JUS AD BELLUM*’S REGULATORY FORM”

CONDONING THE USE OF FORCE: THE UN SECURITY COUNCIL AS INTERPRETER OF
THE *JUS AD BELLUM*

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Monica Hakimi’s article probes the legal significance of an interesting phenomenon: the UN Security Council condoning the use of force, as opposed to authorizing it.¹ She offers an innovative perspective on this little-studied dimension of how the Council contributes to the development of *jus ad bellum*. While I applaud much in the article, I question her characterization of what the Council is condoning in the cases she reviews. She claims these are “fact-specific decisions,” whereas I argue that the Council is endorsing controversial interpretations of the law on the use of force. This disagreement does not detract from Hakimi’s observations about the policy implications of the practice, or about the Council’s role as a site for deliberation and argumentation about the content of international law. But it does cast doubt on her conceptual claim that there are two distinct “regulatory forms,” which together provide the content of *jus ad bellum*, one particularistic and procedural, the other general and substantive. All legal claims and justifications entail the application of general standards to particular facts, either explicitly or implicitly. Most of her case studies can be explained in those terms.² Thus, while the Council’s practice of condoning the use of force is important to understand, the “conventional account” she derides provides a more persuasive and parsimonious explanation of that phenomenon.

The first part of this essay presents my understanding of her argument. The second section explains my conceptual disagreements. The third section highlights the strengths of the article and how it contributes to the growing body of postpositivist literature on international law and organizations, despite those disagreements.

Hakimi’s Argument

Hakimi’s argument starts from the proposition that *jus ad bellum* is comprised not only of doctrine but also “institutions, processes, expectations, and practices.”³ In itself, that is not new to legal theory. It is reflected in the New Haven School, transnational legal process, and the management school of compliance with international law. It is also captured by the most influential definition of regimes in international relations theory: “implicit or explicit

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¹ Monica Hakimi, *The Jus ad Bellum’s Regulatory Form*, 112 AJIL 151 (2018).

² In this essay, I discuss Mali, Yemen, and Security Council Resolution 2249 on Syria. The Liberia case is harder to explain in those terms because the Council never referenced President Doe’s consent to the intervention in its statements or resolutions. See CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 401–02 (3d ed., 2008). I do not discuss the U.S. operation in Syria in 2017 because, as Hakimi rightly notes, the Council as a body never condoned those strikes.

³ Hakimi, *supra note 1*, at 164.

principles, norms, rules and procedures around which actors' expectations converge."⁴ But her argument is not simply that international law is comprised of rules, processes, institutions, and practices. She claims that the actual *content* of the *jus ad bellum* is a mixture of all of these.

Hakimi elaborates by speaking of two regulatory forms, which she defines as "modes for expressing [the *jus ad bellum*'s] content as concrete directives that structure legal arguments and decisions."⁵ The first mode, which she labels the conventional account, justifies the use of force on the basis of generally applicable substantive standards; the second, which she calls "informal regulation," consists of fact-based decisions that govern discrete cases. The latter supplements the conventional account. To understand what the *jus ad bellum* is and how it operates, Hakimi argues that we must understand both accounts.

Informal regulation is most evident in situations in which the general standards do not apply neatly, or even apply at all. Instead of invoking those standards, states condone uses of force based on the specific facts of the case. They do not call it lawful (or unlawful), but they treat it as legal.⁶ Presumably this condonation could occur in any discursive setting, but Hakimi focuses on the Security Council, as the primary institution that seeks to govern international peace and security. As I have argued elsewhere, the Council is a focused arena for deliberation and justificatory discourse about the rules on the use of force, not only among the permanent members but also a variety of other actors.⁷ Moreover, focusing on the Council highlights an important dimension of "informal regulation": decisions taken unilaterally by states are collectively condoned in an international institution. In four of the five cases Hakimi covers (Mali, Yemen, Liberia, and Resolution 2249), the Council adopted resolutions and/or statements on the interventions. These are situations in which an intervening state is not necessarily seeking authorization to use force, but nevertheless views some form of endorsement as valuable.

Where I differ from Hakimi is about what the Council is condoning in these cases. She argues that the Council is endorsing the propriety of action in a particular circumstance, beyond what the general standards clearly permit. To illustrate the point, she draws a parallel to the necessity defense, whereby an intervention is deemed to be illegal but excusable (or justifiable) in extreme humanitarian circumstances.⁸ But she distinguishes her approach from a necessity argument on the grounds that the Council is actually *conferring* (not just *confirming*) legal legitimacy, and it does so because the Council's authority is "legally salient."⁹ In other words, the institutional setting renders the intervention lawful, not merely an excusable violation of the law.

I fully agree with Hakimi that the Council's blessing of a use of force is legally salient. But I disagree with the distinction she draws between fact-specific decisions and the application of general standards. A simpler and, in my view, better explanation of what the Council is doing in these cases is condoning controversial interpretations of the law—of the general standards—as they apply to the particular facts.

Conceptual Disagreement

In her description of the conventional account of the *jus ad bellum*, Hakimi acknowledges but downplays the fact that actors interpreting the law rarely invoke or discuss general rules in the abstract, but only do so when they must

⁴ Stephen Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in *INTERNATIONAL REGIMES* (Stephen Krasner ed., 1983).

⁵ Hakimi, *supra* note 1, at 152.

⁶ *Id.* at 155.

⁷ IAN JOHNSTONE, *THE POWER OF DELIBERATION: INTERNATIONAL LAW, POLITICS AND ORGANIZATIONS* 56–62 (2011).

⁸ On the difference between an excuse and justification, see Ian Johnstone, *The Plea of Necessity in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism*, 43 *COLUM. J. TRANSNAT'L L.* 337 (2005).

⁹ Hakimi, *supra* note 1, at 167.

apply the law to particular situations. In courts, judges rarely articulate abstract propositions of law that go beyond what is necessary to decide the dispute before them. This is even more true for the unstructured legal discourse that occurs in the political bodies of intergovernmental organizations and in broader diplomatic conversation. When states seek to explain or justify their legal stance on an issue, and others seek to challenge or criticize that stance, it is almost always in relation to a specific incident.¹⁰ Occasionally, a government will articulate its generic position on a contested legal concept, as the United Kingdom and the United States did on the test of imminence as applied to the threat of terrorist attacks.¹¹ But intergovernmental debate over the legal acceptability of that position will typically not occur unless and until one of these states invokes it in a particular case.

That being true, the conceptual distinction Hakimi draws between reasoning on the basis of specific facts and reasoning on the basis of general standards is problematic. Her case studies highlight the problem. For three of them, she claims that the Security Council established “factual predicates” rather than determinations of law. In Mali and Yemen, the Council decided which entity was able to give consent to intervention by outside forces. As Hakimi acknowledges, which government leader may invite another state to intervene in an internal conflict is an unresolved legal question. Does the correct standard ask which actor has effective control of the territory, or which actor is the legitimate representative of the people? The weight of international legal opinion comes down on the side of effective control, a relatively objective test that is consistent with traditional notions of sovereignty. But as Greg Fox and others have argued, legitimacy criteria have started to creep into the discourse and practice.¹²

In Hakimi’s cases, the Security Council decided that Dioncounda Traore was the “rightful leader” in Mali and Abdrabbuh Mansour Hadi was the “rightful leader” in Yemen, even though neither had effective control of substantial portions of their countries. In so doing, the Council not only established factual predicates, but also made determinations of law. This is no different from the Security Council determining in Resolution 1368 that the September 11 attack was an armed attack within the meaning of Article 51, justifying a response in self-defense. That was a finding of both fact and law. By weighing in on which governmental actor is entitled to invite an intervention, the Council opined on a factual matter but also—and more importantly—offered an implicit interpretation of an unsettled legal issue, perhaps nudging the “consent” test further in the direction of the legitimacy standard.

The same point can be made about Security Council Resolution 2249 on terrorism. Paragraph 5 of that resolution

Calls upon Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter ... to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL also known as Da’esh as well as ANF, and all other individuals, groups, undertakings, and entities associated with Al Qaeda, and other terrorist groups.

Hakimi calls this an example of “informal regulation.” But the conventional account also provides a plausible explanation. In that sentence, the Security Council in effect condoned two distinct legal claims: (1) the position of the United States and some of its allies that, because the Syrian government is “unwilling or unable” to deal with an imminent terrorist threat emanating from its territory, others can act against that threat on the basis of

¹⁰ *Id.* at 158 (discussing states acting or reacting to concrete incidents). See generally MICHAEL W. REISMAN & ANDREW WILLARD, [INCIDENT ANALYSIS: THE LAW THAT COUNTS IN WORLD POLITICS](#) (1988).

¹¹ For the UK position, see UK Attorney-General Jeremy Wight, [Attorney-General’s Speech to the International Institute for Strategic Studies](#) (Jan. 1, 2017). For the U.S. position, see The White House, Report on the Legal and Policy Framework Guiding the United States’ Use of Force and Related National Security Operations 9–11 (Dec. 2016).

¹² Gregory Fox, [Intervention by Invitation](#), in [OXFORD HANDBOOK OF THE LAW ON THE USE OF FORCE](#) (Marc Weller ed., 2015).

self-defense; and (2) the Russian position that its military action against “terrorists” is justifiable on the basis of intervention by invitation. Both claims are contestable,¹³ but that is precisely the point. The Council weighed in on the application of disputed general standards to the particular facts of this case. The Council may have established “predicate facts” in the resolution,¹⁴ but that does not preclude the possibility that it also made a determination of law. The Council can, and often does, do more than one thing at the same time.

That brings me to Hakimi’s criticism of my reading of Security Council Resolution 2085 on Mali as an example of implied authorization, consistent with the conventional account. When France intervened in early 2013, it presented three legal justifications: intervention by invitation, self-defense, and implicit Council authorization. Arguably, the Council tacitly endorsed all three justifications in a presidential statement.¹⁵ Hakimi asks a number of rhetorical questions to demonstrate that this was a fact-specific decision rather than application of a general standard.¹⁶ She wonders why the Council would have been ambivalent about authorizing France, but not about authorizing an African-led force. She asks why France, in its January 11 letter to the Council, would ground the intervention on Traore’s invitation if the Council had already authorized it. And she asks why the Council would later grant France authority to act in Resolution 2100 if France already had that authority. There are several possible answers to these questions. Maybe some Council members were concerned about French hegemony. Maybe France wanted to signal that it did not *need* Council authorization to engage in counterterrorism operations, but did need it to use force to support the UN peace operation. France may even have wanted to solidify the legitimacy standard in the law on intervention by invitation. These questions cannot be answered purely by logic. It requires empirical research, which could entail interviewing members of the Council and other key actors. In any case, none of these considerations demonstrates that the conventional account lacks explanatory power. Whether wrestling with implied authorization, intervention by invitation, or self-defense, the Council’s actions can be understood as an application of general legal standards to particular facts.

Hakimi’s Contribution

Despite my reservations about fact-specific, “procedural and particularistic” decision-making as a distinct regulatory form, Hakimi’s article is an important contribution to postpositivist theorizing about the contribution of international organizations to the development of international law.¹⁷ This line of thought doubts that international law can be reduced to formulaic notions of how states consent to binding obligations, either by ratifying treaties or engaging in long-standing and consistent practice accompanied by *opinio juris*. The meaning of key terms in treaties is often contested. Whether state practice has crystallized as customary law is often unclear. Even the

¹³ On the “unwilling or unable” standard, see Elena Chachko & Ashley Deeks, *Who Is on Board with “Unwilling or Unable”?*, *LAWFARE* (Oct. 10, 2016). See also the contrasting positions of Michael P. Scharf, *How the War Against ISIS Changed International Law*, 48 *CASE W. RES. J. INT’L L.* 16 (2016) and Jutta Brunée & Stephen Toope, *Self-Defence Against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?*, 67 *INT’L & COMP. L.Q.* 263 (2017). On the legality of intervention at the request of a government in the context of a civil war, see Institut du Droit Internationale, *The Principle of Non-Intervention in Civil Wars*, art. 2(1) (1975); *UK Materials on International Law*, 57 *BRIT. Y.B. INT’L L.* 616 (1986); GRAY, *supra note 2*, at 92–105.

¹⁴ Hakimi, *supra note 1*, at 189.

¹⁵ UN Security Council Press Release, [Security Council Press Statement on Mali](#), UN Doc. SC/10878 (Jan. 10, 2013). See also [S.C. Res. 2100](#) pmb. para. 5 (Apr. 25, 2013); Economic Community of West African States Press Release, [Statement of the President of the ECOWAS Commission on the Situation in Mali](#), No. 006/2013 (Jan. 12, 2013).

¹⁶ Hakimi, *supra note 1*, at 175.

¹⁷ Jan Klabbers, *The EJIL Foreword: The Transformation of International Organizations Law*, 26 *EUR. J. INT’L L.* 9 (2015); JOSE ALVAREZ, [THE IMPACT OF INTERNATIONAL ORGANIZATIONS ON INTERNATIONAL LAW](#) (2017).

traditional sources of international law are being questioned. Do the resolutions and practices of international organizations count? How do they have legal effects and how much legal weight they should be given? There is no shortage of literature on Council resolutions as implicit interpretations of UN Charter provisions—for example, on what constitutes an armed attack.¹⁸ The International Law Commission has been wrestling with the impact of international organization resolutions and practices on customary law.¹⁹ Greg Fox, Kristen Boon, and Isaac Jenkins recently compiled a data set of Security Council resolutions on noninternational armed conflicts, concluding that they have contributed to the development of customary law.²⁰ Hakimi adds a further interesting twist by considering how the “condoning” practice of the Council practice can impact the content of *jus ad bellum*.

Her article also highlights how the Council continues to function not only as a crisis manager and tool of its most powerful members, but also as a venue for deliberation about rules on the use of force. Despite very high levels of tension among the permanent members, the Council has been able to act—deploying robust peace operations to Africa and imposing sanctions on Iran and North Korea, for example. Its members have also been able to talk—about humanitarian intervention, the use of force against terrorists, and what due process requirements are owed to individuals who are subject to targeted sanctions. The cases Hakimi highlights show that even when Council members are deeply divided, they use the Council to help manage the tensions among themselves and key regional actors. Often the outcome is half-baked, with language like Paragraph 5 of Resolution 2249 or the confusing statements on Mali. Sometimes there is no tangible outcome at all, as with the U.S. operation in Syria in April 2017. But as Hakimi has written elsewhere, a community is defined as much by conflict as it is by consensus.²¹ The fact that the Council’s attention is engaged reinforces its utility to those who engage it—presumably because they derive some value from doing so. Puzzling through the implications of that engagement is important.

Finally, Hakimi argues that “informal regulation” could reinforce the crumbling foundations of the *jus ad bellum*. I have my doubts. I worry that describing the content of the law as including fact-based decisions that are separable from “general standards” could render the substantive legal rules so fuzzy that it would be impossible to engage in reasoned discourse about whether a particular use of force violated them. But the concept forces us to think more creatively about how international law actually operates. By probing into the significance of the Security Council debating and sometimes condoning the use of force in circumstances where the law is unclear, Hakimi’s scholarship opens a promising new line of inquiry.

¹⁸ In Resolution 1368 (2001) on the September 11 attacks, the Council recognized the inherent right of self-defense in a preambular paragraph—an implicit interpretation of Article 51.

¹⁹ Int’l Law Comm’n, [Report of the 68th Session](#), UN Doc. A/71/10 (2016) (Chapter V, Identification of Customary International Law).

²⁰ Gregory Fox et al., [The Contributions of Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law](#), 67 AM. U. L. REV. 649 (2018).

²¹ Monica Hakimi, [Constructing the International Community](#), 111 AJIL 317 (2017).