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SYMPOSIUM ON MONICA HAKIMI, "THE *JUS AD BELLUM*'S REGULATORY FORM"

THREE QUESTIONS ABOUT "INFORMAL REGULATION"

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In the grand debates of international law, the *jus ad bellum* is often proclaimed dead, and just as often praised as the "cornerstone" of the contemporary legal order. Both perspectives tend to ignore that the *jus ad bellum* is not static, but a body of law that states adjust over time. In an important contribution, Monica Hakimi proposes to look at one particular aspect of such adjustment, a concept she frames as "informal regulation" through Security Council action. This essay engages with Hakimi's approach. It inquires whether this approach is as "informal" as Hakimi suggests, and asks whether "informal regulation"—rather than constituting a new category of state activities to study—is not already part of conventional approaches to the *jus ad bellum*. Proceeding from Hakimi's analysis, the comment assesses whether there is room for "informal regulation" beyond the Security Council.

Three Questions

I share Monica Hakimi's interest in the manner in which international law regulates recourse to military force (what she terms the "regulatory form").[1] Like her, I believe we need to engage with regulatory challenges and changing approaches to the *jus ad bellum*.[2] And like Hakimi, I believe that states and scholars would benefit from reflecting more on this question, moving beyond simply rehearsing arguments about the legality of particular uses of force.

While sharing her starting points and interest, I am less sure that Hakimi's new category of "informal regulation"—understood as "processes at the [Security] Council for approving specific operations" involving the use of force that stop short of formal authorization—offers the best way forward. To stimulate further conversation about the subject, and because my own reflection on it is still ongoing, I have chosen to structure my comments in the form of questions to help frame the continued debate.

- *First*, what is the relationship between the informal regulation and the "general standards" governing recourse to force, on which Hakimi believes "conventional accounts" remain focused?
- *Second,* do we really need a new category to be able to deal with the types of activities captured by "informal regulation"?

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

[2] For past work on the topic, *see, e.g.*, Christian J. Tams, *The Use of Force Against Terrorists*, 20 Eur. J. Int'l L. 359 (2009); Christian J. Tams & Antonios Tzanakopoulos, *Use of Force*, *in* International Legal Positivism in a Postmodern World (Jean d'Aspremont & Jorg Kammehofer eds., 2014); Christian J. Tams, *Prospects for Humanitarian Uses of Force*, *in* Realizing Utopia: The Future of International Law (Antonio Cassese ed., 2012).

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– And *third,* if we look beyond the "general standards," should we not also look to "informal regulation" that takes place outside the Security Council?

Who's Afraid of General Standards?

Hakimi's key goal, as I read it, is to broaden the framework of our debates about the *jus ad bellum*—so that one important piece of evidence, informal regulation at the Security Council, can better be integrated into the analysis. This evidence, Hakimi argues, "is both part of the *jus ad bellum* and different in kind from regulation through the general standards."[3] I discuss below whether informal regulation is not already "part of the *jus ad bellum*" (even in what Hakimi refers to as "conventional accounts"). For the purpose of this first question, however, I am interested in exploring whether it is really "different in kind from regulation through the general standards." On the basis of Hakimi's account, I struggle to see that it is.

Hakimi's approach is informed by a distinction between two forms of regulation: (i) general standards; and (ii) particularistic processes.[4] The former seeks to regulate recourse to force through a "small set of generally applicable substantive standards."[5] The latter (the "particularistic processes") do not seem to apply generally, but are addressed to "the specific circumstances of the case."[6] Importantly, these particularistic processes are meant to operate independently of the general standards and, if we follow Hakimi, the fact that they are more independent makes them appealing. She notes, "[T]he best way to strengthen the *jus ad bellum* … is probably to rely less on the general standards and more on the informal regulation."[7]

The underlying view of the *jus ad bellum's* regulatory form leaves me puzzled. I agree that exceptions to the ban on force come in different forms: some set out objective criteria (such as the presence of an "armed attack," however defined), while others rely on the decision of a particular organ (such as the Security Council). The former, in Hakimi's terms, would be more "substantive" in character, the latter more "procedural." But contrary to what Hakimi suggests, substance and procedure do not translate into "general" versus "particular": in both instances, the lawfulness of a particular use of force depends on whether the state using force can point to a recognized general standard whose conditions are met in a given case. The "two forms of regulation" operate hand in hand.

Hakimi seems to accept as much when recognizing that the general standards relied upon in the conventional account "ha[ve] a procedural component,"[8] and indeed, given the almost exclusive reliance, in Article 42 of the UN Charter, on a particular decision-making procedure (the passing of a resolution by the Council), it would be difficult to think otherwise. She considers this to be unproblematic for her argument, though, as under the conventional account, "for a process to be legally relevant, it must breathe life into a general standard."[9]

But would the "informal regulation" that she advocates really be different? Can the particularistic processes of "informal regulation" that Hakimi wants us to engage with really operate independently of the general standards? I struggle to see how. If Hakimi claims that certain forms of Security Council action (her "informal regulation") should affect judgments about the legality of a particular use of force, then she—just like the "conventional account" she is so critical of—proceeds from a general standard. She chooses not to spell it out, but it is implicit in her claim. Let me illustrate this by reference to one of her examples, namely her consideration

[3] Hakimi, *supra* note 1, at 156.

[4] *Id.* at 158.

[5] *Id.* at 152.

[6] *Id.* at 168.

[7] *Id.* at 182.

[8] *Id.* at 159.

[9] *Id.*

that in individual instances support at the Council can "counterbalanc[e] the perceptions of illegality that come with deviating from the general standards" regulating recourse to force.[10] By asking the question (even if one leaves open the answer, as Hakimi does), it seems to me one has to accept a certain general standard—which, on the basis of Hakimi's argument, I would formulate as follows: "*In exceptional cases, a use of force that prima facie violates Article 2(4) is not unlawful if it has the clear support of a majority of Security Council members.*" (Hakimi might not agree with the formulation; she is keen to keep the possibility of lawfulness via majoritarian support in the Council narrow. But she considers it at least arguable that conduct short of a resolution can affect the lawfulness of a use of force.)

The standard just formulated is different from the conventional one advocated by many other commentators, according to whom only a Security Council resolution can render forcible measures lawful. But it is no less general: in both instances, the lawfulness of a particular use of force depends on the assessment of the Council and its members in a particular circumstance. What separates Hakimi's account from the conventional one is the *content* of the standard, not its *generality*. In both instances, "for a process to be relevant, it must breathe life into [some] general standar[d]."[11] I do not see how any particularistic process could operate "independently of the general standards." Hakimi's does not; she just does not spell it out. The question is whether the general standard she implies is acceptable.

Do Prior Accounts of the Jus ad Bellum *Ignore "Informal Regulation"?*

My second question engages with Hakimi's central argument: her claim that prior accounts of the *jus ad bellum* ignore informal regulation, or are "inadequate to describe or explain the law's operation" in cases of Security Council action below the level of an authorizing resolution.[12]

On the basis of her discussion, I believe that this claim is only partially justified. More specifically, it seems to me that in the scenarios discussed in Section IV of Hakimi's article, many commentators (including those offering what Hakimi refers to as "conventional accounts") accept that informal regulation matters. In my reading, the difference between Hakimi's approach and many of the conventional accounts relates to the *manner* in which informal regulation is integrated into the analysis—the "how," not the "if."

Let me try to illustrate this by reference to Hakimi's first example of how informal regulation works in practice, namely the Council's determination of a factual predicate. Under that rubric, Hakimi discusses the recent interventions in Mali and Yemen and assesses the relevance of Security Council decisions identifying the rightful leader of a country. She views these decisions as highly significant, as they clarified that states that had been invited to intervene by the rightful leader had acted lawfully: "By establishing the factual predicates for the standard's application, the Council contributed to, and did not merely sign off on, the intervention's lawfulness."[13]

I entirely agree. But do we need a new category of "informal regulation" to explain this? Could this not be a regular case of intervention by invitation under the accepted general standards? It seems to me perfectly possible to say that in the cases of Mali and Yemen, the Security Council's conduct was a significant factor in assessing whether a particular leader could invite a foreign state to intervene: for consent to remove the wrongfulness of an intervention, it has to be *validly given*, after all, so why should the Security Council's assessment not be relevant in this respect? Conversely, neither Hakimi nor the "conventionalists" would need to treat it as determinative. (According to Hakimi, the Council merely helped make the interventions lawful. This to me seems relatively close to Karine

[10] *Id.* at 166.
[11] *Id.* at 159.
[12] *Id.* at 174.
[13] *Id.* at 175.

Bannelier and Théodore Christakis's view—which Hakimi cites as "conventional"—according to whom "the Council accepted the validity of the legal basis of intervention by invitation."[14])

Whereas Hakimi sees "analytic pitfalls of the conventional account" and finds the consent standard "ill-defined for such cases,"[15] I see a large measure of agreement between her approach and the conventional account. This agreement covers three central propositions: (i) the interventions in Mali and Yemen needed to be justified in order to be lawful; (ii) in assessing whether they were lawful, the views of the Security Council mattered, but were not conclusive; and (iii) those views were relevant even though the Security Council did not authorize force under Chapter VII of the Charter, but opted for what Hakimi terms "informal regulation." Returning to the theme of my earlier remarks, it seems to me that both Hakimi and many "conventionalists" operate on the basis of the same general standard, which I would formulate as follows: "*A state does not violate Article 2(4) if it intervenes in another state with the valid consent of that other state. In situations of civil strife, the views of the international community are important in assessing which of different rival factions can validly consent; this is especially true if those views are recorded in resolutions of the Security Council.*"

Given this agreement, the real question to me seems to be *how* to integrate the Security Council's determination within the analysis. I view Hakimi's decision to place it in a new category called "informal regulation" to be a fine-tuning of, rather than a radical break with, conventional accounts. Whether the new category is necessary, I am not entirely sure. Are the rules on how to interpret treaties and ascertain custom not flexible enough to accommodate what Hakimi wants us to include in the analysis? The International Law Commission, for one, in its recent projects on the identification of custom[16] and the role of subsequent practice,[17] recognizes the relevance of resolutions of international organizations and of state conduct preceding their adoption.

Informal Regulation Outside the Security Council

Whether necessary or not, Hakimi's suggestion to take informal regulation seriously no doubt offers a fresh perspective. But how far does it go—and how far is she willing to extend it? Hakimi remains focused on a particular type of evidence, namely conduct by the Security Council, or that of Security Council members if their conduct evidences "majoritarian support" for a particular operation. The latter category, she suggests, defines the "outer bounds of the *jus ad bellum's* informal regulation."[18] But should we not look further?

It seems to me that if informal regulation offers a promising alternative to the recognized general standards, then we should not stop at the Security Council, but also should ask questions about other processes and other actors. Of course, the Security Council bears primary responsibility for the maintenance of international peace and

[14] *See* Karine Bannelier & Theodore Christakis, *Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict*, 26 Leiden J. Int'l L. 855, 873 (2013).

[15] Hakimi, *supra* note 1, at 173–74.

[16] *See, e.g.*, Int'l Law Comm'n, Draft Conclusions on the Identification of Customary International Law, UN Doc. A/71/10 (2016), Draft Conclusion 12 ("A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for establishing the existence and content of a rule of customary international law, or contribute to its development."). According to Draft Conclusion 6(2), state practice includes "conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference." *Id.* at 77–78.

[17] Int'l Law Comm'n, Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, UN Doc. A/71/10, at 123 (2016), Draft Conclusion 12 ("2. Subsequent agreements and subsequent practice under article 31, paragraph 3, or other subsequent practice under article 32, may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument. 3. Practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32.").

[18] Hakimi, *supra* note 1, at 180.

security; this makes it special. However, its responsibility is not exclusive, and the "competing demands for dispatch, flexibility, and collective legitimization" are also assessed in other fora and through other processes. Hakimi mentions one such other process when referencing the debate about the General Assembly's competence to authorize forcible interventions under the *Uniting for Peace* doctrine.[19] But there are so many more, including the following:

- What about decentralized reactions outside the Security Council through which states seem to accept or condone particular uses of force? Would this not also be a process of informal regulation—and would reactions outside the Council not offer a richer body of evidence and pose more challenging questions?
- What about regional institutions asserting a right to use force against a member state in cases that do not necessarily square with the *jus ad bellum* as conventionally understood? Article 4(h) of the African Union Constitutive Act recognizes "[t]he right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity." Would this be a form of informal regulation, at least if viewed from the perspective of the universal system of collective security established by the UN Charter?
- What about decisions by the General Assembly that establish the factual predicates or even the scope of application of a general *jus ad bellum* standard—say, that force must not be used in violation of "international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement?"[20] Is this perhaps also an informal regulation of the *jus ad bellum*?
- Finally, what about decisions of other international groupings that endorse particular uses of force—such as, for instance, frequent affirmations by the Non-Aligned Movement of the legitimacy of armed struggle in wars of national liberation?[21] While the issues may have lost political significance in a post-decolonization era, perhaps they appear in hindsight as an example of informally adapting the *jus ad bellum*?

These instances of informal regulation did or do not involve the Security Council, which is the organ primarily responsible for the maintenance of international peace and security. Perhaps this means that we should view these attempts at informal regulation of the *jus ad bellum* with greater caution. But that question goes to the value of the evidence; it does not suggest that we should ignore the evidence altogether.

Conclusion

In the spirit of Hakimi's exploration, it seems to me that, when engaging with informal regulation, we ought to open up the inquiry and look to processes not involving the Council. To do so will allow us to appreciate how much, since 1945, the content of the *jus ad bellum* has been molded and forged in international practice, with occasional input from the Security Council. The debate about informal regulation by and at the Council could benefit from engaging more fully with other processes of adapting the *jus ad bellum,* which could yield lessons about when attempts to shape the *jus ad bellum* are effective, and when they are not. Finally, a broader inquiry will help clarify that what Hakimi calls "informal regulation" has never been absent from debates about the *jus ad bellum*. This suggests that, in her quest for nuance, Hakimi is right to look beyond the express Charter rules.

[19] *Id.* at 165, n.73.

[20] Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV) (Oct. 24, 1970) (Principle I, Paragraph 5).

[21] *See, e.g.*, the views set out in the Second Summit Conference of Heads of State or Government of the Non-Aligned Movement, *reproduced in* UN Doc. A/5763 (Oct. 29, 1964).