

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

IN DEFENSE OF THE “CONVENTIONAL ACCOUNT” OF THE *JUS AD BELLUM*

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States sometimes choose to break the law. International lawyers should seek to understand instances of illegality, particularly when they involve the unlawful use of force. But should we also shift our understanding of legality itself in an attempt to bring state conduct within the fold? In particular, what should we make of uses of force that seem to enjoy some degree of international political support while straying from the law governing the resort to force, or the *jus ad bellum*? Monica Hakimi asks this timely, and indeed timeless, question in her thought-provoking article arguing for a reconceptualization of “The *Jus ad Bellum*’s Regulatory Form.”¹ Hakimi argues that we must carefully examine state engagement with the UN Security Council, including when it is not authorizing force, to fully understand state behavior. This claim is uncontroversial. However, she also argues that Council activity short of authorizing force can nevertheless establish legality and the Council’s “institutional processes can deprive the general standards [that constitute the *jus ad bellum*] of their legal effect.”² The empirical validity and normative desirability of this more provocative claim deserve close interrogation.

International lawyers assess whether a use of force is lawful with reference to the *jus ad bellum*’s well-established “general standards”: the blanket prohibition on the use of force, reflected in Article 2(4) of the UN Charter, and its three exceptions. The precise contours of the *jus ad bellum* are infamously difficult to pin down, but it is generally accepted that Article 2(4)’s prohibition may be overcome if the Security Council authorizes force, the state using force validly invokes self-defense, or the state using force in another state has the latter’s consent.

Hakimi argues that this mode of inquiry fails to explain cases of seeming illegality that nevertheless enjoy popular support. Moreover, it overlooks an alternative means of creating legality in such cases, embodied in Security Council decisions that condone military operations without formally authorizing them. Her central claim is that such Council activity, which she terms the “informal regulation,” does not just confer legitimacy on the operations at issue, but also *legal authority* as to the particular use of force, even when that force goes beyond what would be lawful under the general standards.³ The process by which informal regulation establishes legal content is the fundamental leap in Hakimi’s article—in short, Council “resolutions that lack authorizing language, presidential statements, press releases,” and “meeting records”⁴ can cure legal defects and confer legal authority beyond what the

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

² *Id.* at 167.

³ *Id.* at 155.

⁴ *Id.* at 165–66.

general standards would permit because “the Council’s authority is legally salient.”⁵ The “specific contours of the process” matter less than the fact that it is “institutionalized at the Council.”⁶

Hakimi’s case studies demonstrate the legitimizing effect Council engagement has on uses of force. But does such activity establish legal content? And does the *jus ad bellum* inquiry described above, which Hakimi terms the “conventional account,” truly fail in its explanatory power as to legality? Hakimi relies on five examples to make the case that the answer is yes to both questions. While each case demonstrates that state behavior is impacted by informal Council activity, none provides an example of Hakimi’s central claim—that a use of force with dubious or nonexistent legal grounding can become lawful by virtue of Council activity short of authorizing force. The cases can be grouped as follows: (1) cases in which there was no legal defect to overcome, and thus no need to look beyond the “conventional account” to explain legality (uses of force in Mali and Yemen relying on the territorial state’s consent); (2) a case in which the use of force was unlawful and Council activity did not alter its legality despite a degree of popular political support (U.S. strikes against Syria in 2017); (3) a case in which the Council agreed to disagree on whether a use of force was lawful by resort to “constructive ambiguity” in drafting (preserving claims of legality about the use of force against ISIL in Syria and objections to such claims, while allowing Council action); and (4) a case in which the legality of the use of force is ambiguous at best, but the Council’s activity itself remains ambiguous (the Economic Community of West African States’ intervention in Liberia).

On balance, these cases show that the conventional account does explain legality or the lack thereof, although sometimes the explanations may not be normatively satisfying: the Council will not always agree on whether a use of force is lawful even when it is willing to lend political support; Council members will be comfortable with constructive ambiguity regarding legality to facilitate action in some contested cases; and, on rare occasions, some states may simply choose to use force unlawfully.

Concluding that the informal regulation does not create legal content does not make the Council’s activity irrelevant. First, acknowledging silences and purposefully-crafted ambiguities can illuminate states’ intentions in engaging with the Council. Second, informal regulation can influence state behavior without altering the *jus ad bellum*. Indeed, informal effects can be important in legitimizing states’ legal arguments or casting doubt on them, constraining criticism, and showing political support for an operation regardless of its legality. But insisting that these effects be understood as establishing legal content that overcomes the *jus ad bellum*’s standards could have dangerous consequences: attributing a conferral of authority to use force to Council members when they consciously refrain from doing so is more likely to diminish than bolster the desirability of the forum for states.

A close examination of Hakimi’s examples under the “conventional account” will help to determine whether it still has purchase, even in thorny cases.⁷

No Legal Defect to Cure

Hakimi’s first two cases are the French intervention in Mali in 2013 in support of Interim President Traoré’s government and the Saudi-led intervention in Yemen in 2015 in support of President Hadi’s government. In each case, the intervening states invoked consent as the legal basis to use force. Yet Hakimi argues that both uses of

⁵ *Id.* at 167.

⁶ *Id.* at 166.

⁷ I leave aside the example of the Economic Community of West African States (ECOWAS) except to note that while Hakimi dismisses arguments that the Council legitimized the intervention without altering its legality, she does not explain *how* the Council “contributed to . . . the intervention’s lawfulness.” *Id.* at 178. There is a simple explanation: the Council conferred political legitimacy on ECOWAS, but not authority. This is not a “difficulty explaining that dynamic in law,” but a recognition that the Council chose not to authorize force even though it was supportive in other ways.

force were “of dubious legality under the general standards” because “[i]nternational law does not resolve, in the abstract, who represents a state during an internal armed conflict.”⁸ Hakimi conceptualizes this as an “unresolved legal question” that the Council decided by identifying the “rightful leader” of each state, thereby “establish[ing] the predicate for justifying the intervention in law.”⁹ The conventional account, Hakimi argues, “fails to guide those who want to understand, describe, or explain the *jus ad bellum* in these cases. Worse, it distorts their reasoning.”¹⁰

How would the conventional account explain these cases? Did the Council’s activity “approv[e] specific operations that go beyond what the standards permit”¹¹ or simply affirm the intervening state(s)’ existing factual assertion, making it harder to contest?

The inquiry into whether a competent authority has provided genuine consent is highly fact-dependent. Hakimi correctly observes that state practice and *opinio juris* are “all over the map” on when an incumbent leader no longer represents the territorial state for the purpose of consenting to intervention. Nevertheless, the international community generally does not question the establishment of a new government through a state’s existing legal processes (such as through constitutional mechanisms), whereas an entity purporting to come to power through force is generally not automatically recognized by states.¹² There is, in general, a much higher bar for *derecognition* of a government previously seen as legitimate than for recognition of a new entity such as a rebel group or jihadi terrorist organization that seeks to gain power through extralegal means. Moreover, in these cases, few states questioned whether existing authorities were competent to provide consent. Thus, the conventional account would affirm that the consent of the preexisting government—even in exile—provides a legal basis for the intervening state to use force on the legitimate government’s behalf.

Does application of the *jus ad bellum*’s general standards fail to explain these cases? I would argue that it does not. In both cases, the Council came to the same conclusion as the intervening states regarding the identity of the rightful government, reaffirming rather than supplying a predicate fact. But even if there were a serious question of fact, this is distinct from an argument that the law itself lacked content. Council activity did not alter the intervening states’ preexisting legal claims that relied on consent. No gloss on the *jus ad bellum* was required, no new content added. At bottom, the Council’s actions did not cure a legal defect (there was none to be cured) or confer authority that the intervening states previously lacked.

Validating the conventional account need not be equated with ignoring the Council’s activity. Informal regulation, understood as a nonlegal means of influencing state behavior, may well have shored up perceptions of legitimacy by reaffirming the factual predicate for preexisting consent claims. Hakimi argues that when Council activity results in diminishing claims of illegality, it is providing legal content. But why not view it as the Council affirming that the use of force was lawful in the first place? These legitimizing effects are not robbed of their explanatory purchase by concluding that they do not rest on the creation of new legal content. In other words, the Council’s informal effects matter without operating in law or forming part of the *jus ad bellum*.

⁸ *Id.* at 169.

⁹ *Id.* at 169–70.

¹⁰ *Id.* at 168.

¹¹ *Id.* at 155.

¹² See, e.g., SEAN D. MURPHY, [PRINCIPLES ON INTERNATIONAL LAW](#) 37 (2d ed. 2012); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 203 (AM. LAW INST. 1987).

Use of Constructive Ambiguity to Preserve the Status Quo on Legality

Hakimi offers an example of how informal regulation could “curb a deregulatory trend in the *jus ad bellum*.”¹³ It would address the potential problem of “a small group of militarily powerful states ... radically remaking the law in their favor” by making expansive self-defense claims outside of the Council’s processes.¹⁴ Informal regulation “would reinvigorate” multilateral processes by “condon[ing] specific operations, without formalizing a general standard that would license many other operations.”¹⁵ Hakimi’s example is Council Resolution 2249 of November 2015, which determined that ISIL “constitutes a global and unprecedented threat to international peace and security”¹⁶ but stopped short of authorizing force. Instead, in a nonbinding operative paragraph it “calls upon Member States ... to take all necessary measures, in compliance with international law, in particular with the United Nations Charter” to prevent and suppress ISIL’s terrorist acts in Iraq and Syria.¹⁷

Hakimi notes Dapo Akande and Marko Milanovic’s argument that the language “in compliance with international law, in particular the United Nations Charter” in the operative paragraph “neither adds to, nor subtracts from, whatever existing authority states already have”¹⁸ under international law. Hakimi takes a very different lesson from Resolution 2249, arguing that it “is a decision on the law, even if it does not reflect or inform the general standards.”¹⁹ More provocatively, she claims the Council “communicated that it did not consider the Article 2(4) prohibition to be controlling in this case.”²⁰

The move from political legitimization to creating legality through informal regulation is unavailing here and does not explain what states accomplished through the Council. The Russian Federation’s statement on the resolution made clear that its authors (the French delegation) had “taken his country’s amendments on board.”²¹ Specifically, France agreed to insert a reference to the UN Charter in the operative paragraph. Russia understood this as a reference to Article 2(4), which it believes is violated by U.S. counter-ISIL operations in Syria. This language allowed Russia to preserve that objection while joining consensus on the need to address ISIL’s threat *within* existing law. Crucially, it also allowed the United States to maintain its claim that its counter-ISIL operations were already consistent with the Charter. Both interpretations are valid. In sum, the conventional account explains that the “constructive ambiguity”²² created by this carefully-crafted language allowed the Council to speak with one voice about ISIL’s threat, while maintaining the status quo on claims of legality. In contrast, had the Council been forced to a vote on legality, it likely would not have been able to speak at all.

¹³ Hakimi, [supra note 1](#), at 186.

¹⁴ *Id.*

¹⁵ *Id.* at 186–87.

¹⁶ [S.C. Res. 2249](#) pmbl. (Nov. 20, 2015).

¹⁷ *Id.* at para. 5.

¹⁸ Dapo Akande & Marko Milanovic, [The Constructive Ambiguity of the Security Council’s ISIS Resolution](#), EJIL:TALK! (Nov. 21, 2015).

¹⁹ Hakimi, [supra note 1](#), at 189.

²⁰ *Id.* at 188–89.

²¹ UN Security Council Press Release, [Statement of Vitaly Churkin, Russian Federation](#), UN Doc. SC/12132 (Nov. 20, 2015).

²² See Susan Biniaz, [Comma but Differentiated Responsibilities: Punctuation and 30 Other Ways Negotiators Have Resolved Issues in the International Climate Change Regime](#), 6 MICH. J. ENVTL. & ADMIN. L. 37, 39 (2016) (“[C]larity is not always an option, and the alternative to ambiguity may be failure to reach agreement... [W]here ambiguity is preferable [to no agreement] its use is ... ‘constructive.’”).

The Unsatisfying Gap between Political and Legal Support: U.S. Strikes Against Syria

Hakimi stops short of claiming that informal regulation cured the otherwise unlawful U.S. strike against Syria in 2017 in response to President Assad's use of chemical weapons. She acknowledges that the United States may have "strayed too far from the standards for [political] support to cure the legal defect." Nevertheless, "the point," she argues, "is that any legal analysis ought to account for what happened at the Council."²³

What would the conventional account say? Statements at the Council by various members indicate frustration with the trajectory of the conflict, a desire by many states to punish Assad (although armed reprisals are unlawful), and a realpolitik dynamic of no meaningful downside to supporting U.S. strikes. But they also show that very few, if any, believed the strikes were lawful. States issued carefully-crafted, politically supportive statements *without* crossing the line into expressing support for legality. Even the United States did not claim its action was lawful. (Its lawyers and policy-makers charged with crafting Council statements very likely understood it not to be and acted accordingly.) Hakimi argues that we must grapple with what states say at the Council in discerning particularistic legal rules. But we must also give credence to *omissions* as to legality. They must be understood as reflecting, at minimum, a lack of agreement. The content of the statements in this particular context shows what was more likely an understanding that the operation was simply not lawful. Thus, the conventional account would hold that Council engagement did not claim or create legality where none otherwise existed.

Does this make the conventional account an "especially vacuous analytic framework"? No. In heeding silences and purposeful distinctions between political and legal support, it ascribes intention to state behavior even when not conferring legal authority. It matters that the legality of the strikes does not match their political valence for some states, but it does not alter the content of the law or perceptions thereof by the vast majority of states. The issue is not failure of the conventional account to explain, but that the explanation exposes a mismatch between expressions of political and legal support. This gap *should* be troubling, but it is not a reason to conflate political support with law creation. Instead, widespread if tacit acknowledgment of *illegality* bolsters the continued relevance of the general standards as to what states deem *lawful*. Unfortunately, this case also shows that some states are willing to untether their perceptions of legitimacy from the touchstone of legality in at least some cases, a normatively undesirable result in my view.²⁴

Conclusion

Taken together, these examples raise the question whether Hakimi's argument is really "procedural and particularistic" rather than substantive. Given that the baseline is a bedrock prohibition with few exceptions, in creating new means of identifying lawful bases to use force, and purporting to add content to the *jus ad bellum*, the informal regulatory *process* arguably puts a thumb on the *substance* scale by reducing the scope of the primary prohibition, even if it does so in a case-by-case manner.

Are there nevertheless reasons to embrace informal regulation as a particularistic source of legal content? Hakimi argues that it is normatively desirable to involve the Council in *jus ad bellum*-related decisions. It preserves the Council's place of primacy, or at least continued relevance, in regulating the use of force. But claiming that informal regulation establishes legal content could have a detrimental impact on states' willingness to involve the Council in such decisions. If Council actions that do not authorize force are nevertheless deemed to have legal effect—indeed, to be part of the *jus ad bellum*—states may be *less* inclined to use the Council for fear of

²³ Hakimi, *supra* note 1, at 182.

²⁴ See Laurie Blank, *Syria Strikes: Legitimacy and Lawfulness*, LAWFARE (Apr. 16, 2018) (arguing that legitimacy must rest on law, "not righteousness" or "the exigencies of a given moment").

conferring authority when they did not intend to do so. Statements in the Council are carefully tailored to avoid creating *opinio juris* unless intended to do so. Likewise, resolutions involving the use of force are cautiously crafted. Language that does not authorize force should be seen to reflect a choice not to do so. Informal regulation understood in its nonlegal sense is desirable and meaningful. To preserve it, we should embrace the Council's ability to exert significant normative influence even when it is not conferring legal authority.