

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

INFORMAL REGULATION AND THE HYPER-RESPONSIVENESS OF INTERNATIONAL  
LAW

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Monica Hakimi has offered a thought-provoking and timely analysis of how the *jus ad bellum* operates, placing on the agenda of international legal scholarship a regulatory dynamic that has thus far remained underappreciated.<sup>1</sup> While I believe that a discussion of this dynamic is overdue and thus welcome her plea to take informal regulation seriously, I find some of her underlying assumptions about the nature and function of international law problematic. Therefore, rather than applaud the manifold insightful points Hakimi makes, this essay zeroes in on two related assumptions in her article that I find questionable: first, Hakimi’s reasoning about the law-creating effects of informal regulation and, on a related note, the distinction between legality and legitimacy; and second, her tendency to embrace uncritically the particularistic nature of informal regulation. Both points implicate what I term the “hyper-responsiveness” of the law, that is, the (problematic) notion that every momentary political constellation should be reflected in the content of the law. In embracing law’s hyper-responsiveness, Hakimi’s article sidesteps a discussion of the ambivalent implications of informal regulation.

*The Law-Creating Effects of Informal Regulation?*

Does informal regulation have law-creating effects, and if so, is that a good thing? I submit that informal regulation does not, and should not, alter the legality of a particular use of force. It certainly boosts the *legitimacy* of a military intervention, yet legitimacy and legality are two separate concepts and should not be conflated. Hakimi is not very clear on the question of the extent to which informal regulation affects the substance of the law: On the one hand, she insists that informal regulation “does not reflect and *is not meant to affect the black-letter doctrine*,” but elsewhere, she writes that “[t]he *informal regulation is an example of it affecting the law’s content* without clearly satisfying any formal criteria of law.”<sup>2</sup> These seemingly contradictory statements raise important theoretical questions. I am in full agreement with Hakimi’s point about the legitimacy-conferring effects of informal regulation: Yes, a UN Security Council (UNSC) Resolution condoning a particular intervention after the fact does bolster the operation’s legitimacy. Yet I do not see why one has to go one step further and call such an intervention lawful, when it is patently at odds with black letter international law. While such a breach of the law may eventually trigger a transformation of the rule in question, it is critical to look at the fine print of delegates’ responses to the intervention in order to distinguish breaches of the law that have law-creating effects from those that do not. A state’s insistence

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

<sup>2</sup> *Id.* at 155–56 (emphasis added).

on the *sui generis* nature of a given intervention or its appeal to mitigating moral or political circumstances does not change the substance of the law.

Take, for instance, the UNSC's response to the Economic Community of West African States' (ECOWAS) 2017 prodemocratic intervention in The Gambia, a classic case of informal regulation. In late 2016, the people of The Gambia voted the country's authoritarian leader, President Yahya Jammeh, out of power. However, Jammeh refused to transfer power to his legitimate successor, Adama Barrow. The African Union Peace and Security Council reacted by threatening to take all necessary measures to ensure Jammeh would give up power,<sup>3</sup> and the ECOWAS Authority of Heads of State and Government did the same.<sup>4</sup> The UNSC later commended ECOWAS's position in Resolution 2337,<sup>5</sup> even though the threat of force was illegal. On January 19, Senegalese forces entered The Gambia and shortly thereafter Jammeh agreed to step down. While Resolution 2337 expressed support for ECOWAS's efforts, it did not authorize the use of force. In UN terminology, the clause "all necessary means" constitutes a mandate for military intervention, yet Resolution 2337 does not use this phrase. Instead, it welcomes ECOWAS's commitment to ensure, "by political means first, the respect of the will of the people of The Gambia."<sup>6</sup>

In order to understand what the UNSC meant by this opaque phrase, it is important to look at the drafting history of the resolution and subsequent explanations by UNSC members who voted on the resolution. Apparently, the original draft, tabled by Senegal, contained the phrase "any necessary means" but the clause was later deleted after some UNSC members objected to it.<sup>7</sup> Russia, in particular, was apparently uneasy with the phrase.<sup>8</sup> The fact that the resolution does not refer to Chapter VII of the UN Charter also underlines that it was not meant to be read as an authorization to use military force, as do the statements made by UNSC members after the adoption of the resolution. Uruguay, for instance, emphasized that UNSC approval for enforcement action by regional organizations ought to be "express, affirmative and prior" and that nothing in the resolution "should be interpreted as express authorization of the use of force."<sup>9</sup> Bolivia echoed this view, stressing that Resolution 2237 "cannot and should not be interpreted to represent Security Council support for or endorsement of the use of force."<sup>10</sup> Egypt in turn explained that

in the light of the last amendment to the draft, which underlined the importance of a political settlement of the impasse in The Gambia, we are convinced that today's resolution does not endorse any mandatory automatic enforcement, as such processes require the Security Council's clear and unquestioned authorization, in accordance with Chapter VIII of the Charter of the United Nations.<sup>11</sup>

The operation thus lacked "input legitimacy" in that ECOWAS did not obtain an authorization from the UNSC to use "all necessary means" to enforce the results of the Gambian elections before ECOWAS used force. Yet the

<sup>3</sup> African Union Peace and Security Council, Communiqué, PSC/PR/COMM. (DCXLIV) (Dec. 12, 2016).

<sup>4</sup> Economic Community of West African States, [Fiftieth Ordinary Session of the ECOWAS Authority of Heads of State and Government, Final Communiqué](#) (Dec. 17, 2016).

<sup>5</sup> [S.C. Res. 2337](#) (Jan. 19, 2017).

<sup>6</sup> *Id.*

<sup>7</sup> [Resolution on The Gambia](#), WHAT'S IN BLUE (Jan. 19, 2017); Michelle Nicols, [U.N. Backs West African Efforts to Install New Gambia President](#), REUTERS (Jan. 19, 2017).

<sup>8</sup> [Resolution on The Gambia](#), *supra* note 7.

<sup>9</sup> UN SCOR, 72d Sess., [7866 mtg.](#) (Jan. 19, 2017).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

ECOWAS intervention certainly enjoyed “output legitimacy” because it ensured respect for democracy and the rule of law in The Gambia.<sup>12</sup>

*Legality vs. Legitimacy*

Yet even though that intervention enjoyed broad output *legitimacy*, it remained illegal nonetheless. This brings me to my first theoretical point, namely the distinction between legality and legitimacy, which the idea of informal regulation obfuscates. Yes, international law is a dynamic social process and not a static set of rules, and ideally, legitimacy and legality are congruent. If they are not, contradictions between the law as it stands and the law as it ought to be in the eyes of its addressees provide an impetus for legal change. These evolutionary processes present a challenge for the rule of law: even though the rule of law implies a certain presumption in favor of stability and constancy over time—otherwise the law could not discharge its function of stabilizing normative expectations—this does not mean that the law can afford to stand still. On the contrary, international law must reconcile the conflicting demands of stability and change, predictability and adaptability. If the gap between the law as it stands and the law as it ought to be from the point of view of its addressees becomes too large, this creates pressure on the legal system to adapt itself in order to close (or at least reduce) the gap between legality and legitimacy. I thus agree with Hakimi that the *jus ad bellum* needs to be responsive to its political environment, and that the informal regulation is one way to deal with a situation in which a discrepancy arises between black letter international law on the one hand and political exigencies on the other.

However, acknowledging the need for responsiveness does not require us to give up the fundamental distinction between law and nonlaw, and to blur the lines between legitimacy and legality. While international law is permanently irritated by influences from the social, economic, and political spheres, these external influences are filtered by and through the legal system, which has its own rules for determining which types of external irritation will affect its substance and which ones do not. It is widely understood that a UNSC resolution can only be seen as authorizing military intervention if it contains a specific kind of language, such as the authorization of “all necessary means.” Thus, while international law, including the rules governing the use of force, must be receptive to political influences, the legal system has its own internal mechanisms for conferring legality on a particular operation. A UNSC resolution welcoming, condoning, etc. an otherwise illegal intervention after the fact and *not* authorizing all necessary means does not confer legality on this intervention, if those states who voted on the resolution explicitly affirm that it should not be read as an authorization of the use of force, as they did in the case of The Gambia.

Therefore, ECOWAS’ intervention in The Gambia did not give rise to a right to prodemocratic intervention by (sub)regional organizations acting without a UNSC mandate. Instead of arguing, as Hakimi does, that an intervention condoned by the UNSC should be considered lawful, I am much more sympathetic to the “Kosovo scenario,” according to which an intervention may be “illegal yet legitimate.” This approach upholds a clear distinction between positive international law on the one hand, and moral or political rationales for the use of force on the other. What is wrong with accepting that certain actions are not covered by the *jus ad bellum* in its contemporary form but may nonetheless be considered legitimate because they give effect to important values—in this case, the Gambian people’s rights to democracy and self-determination, which were threatened by Jammeh’s refusal to relinquish power? I do not think that an illegal operation becomes lawful due to the mere fact that it was deliberated at the UNSC and a majority of states accepted the operation as legitimate. It may still be the case that they considered it to be illegal yet refrained from condemning it because of extenuating circumstances.

<sup>12</sup> Ironically, the intervention at the same time violated the rule of law at the global level, because an organization from a lower level of governance (ECOWAS) arrogated to itself powers that were reserved to an authority at a higher level of governance (the Security Council). See, e.g., Antonor Hallo de Wolf, *Rattling Sabers to Save Democracy in The Gambia*, EJIL:TALK! (Feb. 1, 2017).

In this context, it is of critical importance to study the details of the debate. An illegal yet legitimate use of force will affect black letter law only if states articulate a legal conviction to that effect. When studying states' responses to particular interventions, we must fine-tune our focus to distinguish strictly legal from moral or political arguments. As Olivier Corten points out in an insightful piece about methodological controversies surrounding the interpretation of the *jus ad bellum*, "legality and legitimacy must be conceptually distinguished."<sup>13</sup> Referencing the International Court of Justice's *Nicaragua* decision, Corten maintains that "[i]n order to transform fact into law, the legal position of states is of fundamental importance. For every state declaration, therefore, it is necessary to take great care to distinguish political or moral elements from the strictly legal ones."<sup>14</sup> If a violation of the rules governing the use of force is thus accompanied by a widely shared *opinio juris* that the intervention was permitted by law, this will trigger a transformation of the *jus ad bellum*. An intervention will have no such law-creating effects, however, when states merely adduce political or moral arguments to justify their conduct—as the majority did, for instance, during the Kosovo intervention. As Niklas Luhmann argues, "[T]here exists the core of legally valid action which changes the legal position, engenders legal consequences, and thereby makes possible new normative expectations which would not have acquired a legal quality without this action of engendering. The legal system itself determines what kind of events have this effect."<sup>15</sup>

Yet Hakimi begs to differ. She argues:

Using my theory, the key question for assessing the lawfulness of the U.S. operation [in Syria in 2017, in response to the use of chemical weapons] is whether the support at the Council counterbalanced the perceptions of illegality that come with deviating from the general standards. It might not have . . . . Perhaps majoritarian support, without an institutional decision by the Council, never suffices. Or perhaps such support pushed the U.S. action somewhere along a spectrum of legality, such that claims of illegality would still circulate but have considerably less traction than they otherwise would. The point is that any legal analysis ought to account for what happened at the Council.<sup>16</sup>

I agree with Hakimi that it is imperative to look at the arguments states used to justify or oppose the intervention at the Council. But Hakimi is suggesting that the indicators used thus far for assessing the lawfulness of an intervention are obsolete. It is not for legal scholars, however, to decide that the legal system's filters for conferring legality on a particular operation ought to be changed—this would have to be done by states themselves.

Hakimi's proposition to treat legality as a "spectrum" rather than a dichotomy also warrants examination. As Prosper Weil noted decades ago, "A normativity subject to unlimited gradation is one doomed to flabbiness, one that in the end will be reduced to a convenient term of art."<sup>17</sup> This does not mean that the debate about a particular use of force must end with a statement of its illegality. Of course, nonlegal values equally factor into the overall normative assessment of an intervention. Yet again, this should not lead us to diluting the fundamental distinction between law and nonlaw. True, in the customary process this distinction sometimes gets blurred when some, but not all, of the members of the interpretive community accept a particular breach of the law as giving rise to a new rule. In a situation in which a unified *opinio juris* has yet to emerge, the distinction between law and nonlaw, between *lex lata* and *de lege ferenda*, becomes difficult to uphold. In the customary process, legal certainty will thus temporarily be sacrificed for the sake of adapting the law to changing political circumstances. However, even in this

<sup>13</sup> Olivier Corten, *The Controversies Over the Customary Prohibition on the Use of Force*, 16 EUR. J. INT'L L. 803, 815 (2005).

<sup>14</sup> *Id.* at 817.

<sup>15</sup> Niklas Luhmann, *The Unity of the Legal System*, in *AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY* 17 (Gunther Teubner ed., 1988).

<sup>16</sup> Hakimi, *supra* note 1, at 182.

<sup>17</sup> Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AJIL 413, 430 (1983).

grey area of legality, the legal system still offers intersubjective criteria for determining the law-generating effects of noncompliance, namely the kinds of arguments put forward by those carrying out and commenting on a specific use of force. Only legal arguments contribute to the formation of *opinio juris* and thus a consolidation of a nascent legal rule. While states justifying, or commenting on, a particular use of force tend to put forward a variety of (legal and nonlegal) arguments and often adopt a strategy of deliberate ambiguity, acknowledging this ambiguity should not colour our assessment of the content of the law. I therefore agree with Weil that “[i]t is one thing for the sociologist to note down and allow for the infinite gradations of social phenomena. It is quite another thing for his example to be followed by the man of law, to whom a simplifying rigor is essential.”<sup>18</sup>

### *The Perils of Particularism*

A final point worth noting is the tension between the particularistic nature of informal regulation and the maxim of treating like cases alike. Legal theorists of all stripes have emphasized consistency (which others refer to using terms such as “integrity” or “coherence”) in the application of the law as a fundamental precept of the rule of law.<sup>19</sup> Hakimi, by contrast, embraces the particularistic nature of informal regulation, which she sees as a natural consequence of states’ preferences being “shifty” and “contingent,” which means that state practice in this area is “all over the map.” While this may be descriptively accurate, the conclusion Hakimi draws is normatively problematic: Just because *political preferences* are shifting, contingent, often selfish, and frequently myopic, this does not mean that the *law* should exhibit the same flaws. “Legal order from social noise!” Gunter Teubner posits.<sup>20</sup> By abandoning the maxims of consistency, of treating like cases alike, we would essentially be replicating the social noise in the legal sphere. Bringing the messiness and contingency of the political world into the legal system would contradict the very purpose of international law, which namely is to guarantee a modicum of stability and predictability in an otherwise very unpredictable world. This function of the law would be undermined if facts were to be transformed into law without any filter. To be clear, Hakimi does not argue that there should be no filter at all, yet she does imply that the existing filters are inadequate, and that other criteria need to be taken into account. If she is correct, and if the status quo is normatively undesirable, states may change that status quo, but only by specifying which criteria may contribute to the creation of legal rules, and by doing so explicitly.

### *Conclusion*

Some might object that I am defending an unduly conservative stance. I disagree, because I believe that Hakimi has struck a problematic balance between legal responsiveness and legal stability. My point is that there are important downsides to the kind of hyper-responsiveness of the law to political influences that Hakimi endorses. Not every idiosyncratic incident reflecting momentary political constellations should be allowed to affect the content of the law.

<sup>18</sup> *Id.* at 440–41.

<sup>19</sup> See, e.g., NIKLAS LUHMANN, *DAS RECHT DER GESELLSCHAFT* 18–19 (1993).

<sup>20</sup> GUNTER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* 71 (1993).