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

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NATO's use of force in Kosovo in 1999 brought into high relief the fact that an action's moral or ethical legitimacy and its international legality will not always align. The Security Council had not authorized NATO's action and there was no credible way for NATO states to make a self-defense argument in support of their use of force against Slobodan Milosevic's forces. Many states and scholars nevertheless viewed the intervention as a morally acceptable or even imperative act, in light of the underlying goal of averting a serious humanitarian crisis.

In Kosovo's aftermath, states and scholars struggled with this idea that an act might seem deeply legitimate and yet violate international law. Indeed, in the early 2000s, several international groups produced reports that bemoaned and tried to address the existence of a gap between legitimacy and legality in the *jus ad bellum*.[1] For some observers, the unlawful Kosovo intervention was clearly legitimate, but they believed that it would be dangerous and impractical to try to change the law. Others treated the intervention as one example of a slow process of updating the law through an accretion of state practice and *opinio juris*. Yet others concluded that it was intolerable for there to be a wide gap between what the law allowed and what morality required, and so favored explicitly modifying the law. All of these actors, however, seemed to view legality as a binary concept (an act is either legal or it is not) and tended to evaluate an operation's legality without regard to other states' support for the operation.

Monica Hakimi's article, *The* Jus ad Bellum*'s Regulatory Form*, steps into this debate, arguing that there are ways in which Security Council actions that stop short of formally authorizing force nonetheless can impact the legality of an intervention.[2] That is, she argues that the Security Council—or member states acting within the Security Council—have the ability to take certain legitimizing steps that actually enhance the legality of a use of force. (She terms this the "informal regulation.") In her view, the conventional account of the *jus ad bellum* fails to adequately explain how the law operates in practice and how states actually respond to certain uses of force that cannot neatly be justified within the black letter rules. For those who believe that the *jus ad bellum* consists exclusively of a general prohibition on the use of force and a fixed set of exceptions, the idea that there are ways to "supplement" an operation's legality is provocative. It also is provocative to those who believe that legality remains a binary concept. The four contributors to this symposium have taken up Hakimi's challenge accordingly.

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[1] *See, e.g.*, International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* 15 (2001) ("The debate on military intervention for human protection purposes was ignited in the international community essentially because of the critical gap between, on the one hand, the needs and distress being felt … in the real world, and on the other hand the codified instruments and modalities for managing world order."); Independent International Commission on Kosovo, The Kosovo Report 10 (2000) ("Experience from the NATO intervention in Kosovo suggests the need to close the gap between legality and legitimacy.").

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

In her contribution, Theresa Reinold, of Duisburg-Essen University, challenges the basic premise of Hakimi's argument that "informal regulation" by the Security Council can convey any type of legal power.[3] Reinold shares Hakimi's views that examining informal action in the Council is important to assessing any given military intervention. Though she embraces the possible legitimacy-enhancing effects of informal Council action, Reinold resists the idea that it could alter the black-letter law. If states believe that there is a discrepancy between the legitimacy of an operation and its legality, states should obtain formal Council authorization or change the law itself. More generally, Reinold resists the idea that the law should be "hyper-responsive" to any and all political reactions in the international arena. Instead, one value of law is that it can be applied coherently across situations. The particularistic nature of the informal regulation does little to enhance international law's coherence and predictability, and indeed, in Reinold's view, undermines it.

Tess Bridgeman, a senior fellow at NYU Law School and formerly a lawyer at the U.S. National Security Council, takes issue both with Hakimi's empirical evidence and with her arguments about the normative desirability of the "informal regulation."[4] Hakimi uses several case studies in which the Security Council has employed presidential statements, debates, or press releases to support a particular use of force and thus, in Hakimi's view, strengthen its legality. To Bridgeman, these cases should be interpreted differently. She argues that in some of Hakimi's examples, there was no legal defect to overcome; in other cases, the Council relied on constructive ambiguity to allow different sets of states to preserve their arguments about an action's (il)legality. Like Reinold, Bridgeman accepts that Security Council action can legitimize uses of force by showing the members' political support, but she rejects the idea of treating this action as having legal content. Normatively, Bridgeman fears that states might begin to avoid bringing situations to the Council if they fear that a variety of Council acts might confer authority, even where Security Council members could not achieve a consensus to authorize force.

Christian Tams, of the University of Glasgow, raises three questions about the informal regulation.[5] First, he seeks to understand whether Hakimi is simply adding another "exception" to the black letter content of the *jus ad bellum*, one that would accept as lawful military interventions that have the clear support of a majority of the Security Council. Second, Tams queries whether prior accounts of the *jus ad bellum* actually disregard the informal regulation, as Hakimi suggests. Tams expresses doubt, arguing that at least in cases in which the Security Council has identified which actor within a state can consent to an intervention, there is little difference between the conventional and new approaches. Third, assuming we accept the relevance and role of informal regulation, Tams questions whether we should limit our evidence to acts taken in the Security Council. He argues that we might want to extend our inquiry more broadly to the reactions of other international institutions and states in evaluating the legality of a military intervention.

Finally, Ian Johnstone, a professor at the Fletcher School of Law and Diplomacy at Tufts University, offers a competing perspective on what the Security Council is doing in the situations that Hakimi describes.[6] In his view, when the Council engages in these non-force-authorizing actions, the Council is endorsing controversial or contested interpretations of international law, not creating a new, separate "informal regulation" outside the black letter *jus ad bellum* rules. Johnstone is not surprised at the fact-specific nature of Council action, which Hakimi treats as an approach that is importantly different from the use of generally applicable substantive standards. Instead, Johnstone points out that in most legal contexts, legal interpreters only engage with the law when presented with a discrete set of facts, and then interpret the law in the face of those particular facts. He sees the cases

[3] Theresa Reinold, *Informal Regulation and the Hyper-Responsiveness of International Law*, 112 AJIL Unbound 97 (2018).

[4] Tess Bridgeman, *In Defense of the "Conventional Account" of the* Jus ad Bellum, 112 AJIL Unbound 102 (2018).

[5] Christian J. Tams, *Three Questions About "Informal Regulation"*, 112 AJIL Unbound 108 (2018).

[6] Ian Johnstone, *Condoning the Use of Force: The UN Security Council as Interpreter of the* Jus ad Bellum, 112 AJIL Unbound 113 (2018).

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that Hakimi treats as "informal regulation" as situations in which the Council is tacitly opining on the facts, the black letter law, and the interplay between the two. It is in this way that the Council affects the content of the *jus ad bellum*.

In sum, Hakimi's article serves as an important stimulus for international lawyers to debate the conventional understanding of how the *jus ad bellum* operates. Her article raises a variety of other questions that future scholarship could explore, including whether "informal regulation" works in both directions—to either enhance *or* undercut the legality of a given operation, based on the products and discussion that emerge from the Council. There is also more theoretical work to be done on the tension between treating informal regulation as a form of law while recognizing that it lacks many of the familiar characteristics of law, such as general applicability, publicity, and freedom from contradiction.[7] As with many topics within the *jus ad bellum*, the debate that Hakimi's article has started will not end soon; this symposium seeks to advance the debate in productive ways.

[7] *See* Hakimi, *supra* note 2, at 155. For a general discussion of characteristics of law, see H.L.A. Hart, The Concept of Law 78–96 (1961) (associating law with norms of sufficient generality and normativity); H.L.A. Hart, *Problems of the Philosophy of Law* 114, *reprinted in* H.L.A. Hart, Essays in Jurisprudence and Philosophy (1983); Lon L. Fuller, The Morality of Law (1964).

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