Translating Authority Into Action

Reflection on Monica Hakimi: Thinking Constructively About International Law

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During my academic life, which including my student days, spans almost 50 years, I engaged in trying to solve some of the complex riddles of what we call international law. While being convinced that international law is indispensable for any type of world order, international law as a subject of study is both fascinating and at times very frustrating. How to relate international law as a legal system to the society it serves; what actually is the society it serves; and how does it respond to changes in that society? I have wrestled with such questions in these years as academic, and when asked to provide comments on Monica Hakimi's paper, I realized that she touches on much of what I have tried to understand in the past decades.

Central in this is questioning the state-centered, or in Hakimi's approach sovereigntist, view on international law, and attempting to show why this approach to international law is increasingly insufficient for dealing with the complexities of the world society. I am not an expert in legal philosophy or legal theory, but consider myself a pragmatist leaning towards constructivism, constantly on the lookout for developments in international law that contain signs that there is a gradual move away from the statist conception of international law into a more dynamic direction that takes a more holistic account of the needs and wishes of humankind as a world society. I recognize much of my own search in much of Hakimi's analysis and focus on authority, although I am not completely sure whether I fully understand what she precisely tries to convey in her final conclusions on authority. Nonetheless, it is clear that the concept of authority related to (international) law fascinates both of us. However, where Hakimi remains focused on theory, I probably lean more toward the possible impact of this on international law in practice. Hence the title of this reflection.

Shared Understanding

Hakimi's powerful analysis in the major part of her article *Thinking Constructively about International Law* concerns the sovereigntist perspective on law. It is a broader approach than my critique on the state-centered perspective on international law in which sovereignty serves as the central concept. However, the three conditions for law that she describes briefly in section 1B of her paper, easily bridge the gap between her theoretical analysis and my more practical take on international law. While it is unmistakably true that international law was and still mostly is created by decisions of sovereign states, maintaining state consent as an absolutist basis for the authority of international law is no longer tenable. Equally, the efficacy of international law is not (only) dependent on the sovereign's control in a global society, and thirdly, in the global society the justification of law is increasingly difficult or even impossible to find solely or even primarily in the sovereigntist position of states.

It is tempting to expand my comments on these three positions, but space does not allow to do so. Instead, let me go back to the start of my journey in international law. That was in the second part of the 1970s in the Netherlands, when we were in the Cold War fearing nuclear war, when environmental pollution became very visible but was barely on the international agenda, human rights violations called for more effective international cooperation, *apartheid* in South Africa was still largely tolerated, and economic inequality paralyzed many of the newly independent countries. What does (international) law mean in such an ugly world was the question I asked myself as a law

student. Here the basis was laid for my conviction that (international) law is there to serve the society and not the society to serve the law made by sovereigns. However, not everything was bleak in the world of international law in the 1970s, '80s and '90s. Many innovative steps were taken to ensure that international law would contribute better to solving these issues. As a PhD researcher I confronted myself with the question why states accepted ceding sovereignty to independent dispute resolution mechanisms under the Law of the Sea Convention that was concluded in 1982. Apparently, sovereignty is not that absolute when a balance can be struck between various interests. Answering this question required questioning the mainstream theories and exploring alternative theories and approaches. A great source of inspiration for me in those years was the work of Thomas Franck on legitimacy and fairness in international law.

Having completed my PhD and starting as a young lecturer, I had to teach my students about international law, primarily based on the traditional textbooks on international law, which take a very strong positivist and sovereigntist perspective. How to reconcile in my teaching tradition with my newly found complementary or even contrasting insights? Gradually, I developed my "3-Cs" teaching doctrine: Coexistence, Cooperation, Community. Coexistence served as the basis for the explanation of the sovereigntist doctrines of international law; Cooperation as a basis for showing the gradually expanding role of international organizations and other non-state actors; Community to point at the coming into existence of a global society in which shared principles and values have become an essential precondition for the authority of international law and which includes humankind as such and not only or primarily states. The confrontation between coexistence and community in my lectures will have confused many students, but hopefully also made them think critically about what law is and what the function of law is in (the international) society.

Defending International Law Without Defending International Law

Scholarly works like Hakimi's are tremendously important in providing a basis for and giving direction to critical thinking by international lawyers about law as a legal system. One can disagree with particular aspects of her analysis, or the analysis entirely, but any reader should feel challenged to assess their own position in the debate on the question why international law deserves to be accepted *as law*. In my roles as scholar, teacher, advisor and activist, and as other international lawyers certainly will also recognize, one is often confronted with the question whether international law actually is law. And if it is, why it is so ineffective? What is the vocabulary that we can use to explain international law as indispensable for a stable and more peaceful world order, while admitting that strong states can completely ignore core rules, principles and values of international law without much consequence? Or, how can we promote the relevance of international law while there is so little progress in effectively addressing world-wide problems like climate change, poverty and massive attacks on human rights and the notion of humanity itself?

As international lawyers, we have to find our individual ways to sail between the rocks of systemic critique on international law and the sandbanks of praising international law for its indispensable role in maintaining order and providing (partial) solutions for global problems. This defending international law without defending it works quite well, as long as there is a sufficient confidence that international law has a modest but still meaningful role to play in world order and as long relevant actors continue to express this confidence. I was prepared to play this somewhat schizophrenic role because I have seen sufficient incremental steps in the development of international law during my academic life to (perhaps naively) believe that the sovereigntist perception of international law can gradually be replaced by a perspective that locates the core authority of international law in the international community of humankind rather than in sovereign states.

However, this belief has received a fundamental blow with the law-undermining activities of the United States under Trump. While serious attacks on the international legal order are not new, and the aggression of Putin's Russia against Ukraine is a serious challenge to the international (legal) system, the fundamental disrespect for, and more importantly his complete denial of, the importance of (international) law for world order in virtually all areas of the law (peace and security, law of the sea, environment, trade, international organizations etc.) is much more serious. Due to sovereigntist perspective international law's authority always was limited, as it only partly addresses the interests of a large part of the global community. Yet it was and is broadly accepted as a relative stable basis for world order, albeit an imperfect one. If Trump c.s. succeed in undermining the fragile acceptance of international law's authority in the perception of the wider global community, international law becomes meaningless.

Law As Authority and the Authority of Law

With this we are back at Hakimi's thesis on authority and the continuous search for authority of and in international law. In a globalized and diversified international society, the fiction that the authority of international law is based on states as sovereign entities is no longer tenable. In my approach I distinguish between law as authority and the authority of law. I have never made a deep legal philosophical investigation into the notion of authority of law, but for me this distinction is helpful to explain authority as an internal aspect of law and authority as an external aspect of law.

In law as authority (the internal aspect) I refer to the collective mechanisms which societies develop to be able to function as a society or community. As underlined in the New Haven school it centers around decision-making. Not about the formalistic rules laid down in constitutional documents or custom, but on deciding which decisions can carry the authority of law. Not having made an in-depth study of the New Haven school, and never having attempted to apply this theory to international law in a systematic way as Hakimi does, since the 1990s it inspired me to look beyond the traditional sources of authority in international law. Of course, the whole debate about soft law comes to mind when thinking about this topic. It is about inclusion and exclusion of decision-making authority and authorities in our conception of law. It will be a major challenge for the next generation of international lawyers to rethink the internal source(s) of authority of international law if international law is to be meaningfully developed further as law of humankind. Where, for instance, to locate the authority to decide to intervene in a state if atrocities are (about to) take place?

With the authority of law as an external aspect, I refer to the acceptance of the authority of law by the members of a society. International law, in particular when it reaches beyond the self-interests of states and aims to regulate common objectives and aspirations, like human rights or stopping climate change, the relevant members of society are not only the abstract entities called states. State and non-state actors need to accept the outcomes of international processes of decision-making, like in human rights bodies and climate change conferences, as legally relevant decisions, in other words *as law,* in order to accept the efforts that *must* be made to effectively translate these decisions into policies and implementation measures. For this, outcomes must not only reflect a political compromise between states, but also a fair and balanced distribution of cost and benefits among members of the community in a broader sense. So far, the Paris Agreement, and even the SDGs, have received world-wide support and constitute an incentive for people and organizations everywhere to assist in implementing the underlying objectives. The inclusion of so many non-state actors and of independent scientific and legal experts in the broader decision-making process certainly has contributed to the legitimacy of such outcomes and therefore their legally meaningful authority. This must be recognized and further developed as an essential element of international law of the future.

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While admiring Hakimi's theoretical explanations and position, as a pragmatic constructivist not free from idealism, I am always looking for practical ways to translate this into suggestions for the further development of international law. The world is in great turmoil, and international lawyers must not only stand firm to defend international law. Perhaps even more importantly, they need to openly engage in a discussion on the foundations of our understanding of international law to move toward a future that is less dependent on the sovereigntist approach and that is certainly less dependent on the power distribution in the world as existed in 1945. It should focus on locating and incorporating different sources of authority into the legal realm. Hence, my final contribution consists of four recommendations along this line.

- As far as Europe is concerned and in particular the EU: when thinking about international law after Trump, don't relapse into sovereigntist thinking and competition for power, but reflect on the internal and external authority of EU and its legal system, and use that as a guide for taking positions internationally.
- Leave the so-called "rules-based international order" concept behind, and work towards a value-based international order. Locate authority in decision making based on shared values rather than in (sovereign) power.
- Protect and increase investment in international projects that already reflect shared aspirations and values, like the United Nations (family), the International Criminal Court and human rights bodies.
- Promote further investments in new community-building projects and particularly invest in building coalitions across multiple types of actors – state and nonstate – and across the North-South divide.

Law exists to enable societies to function. Law is based on authority in and of the society it functions in. International law lags behind in adapting to the fundamental changes since 1945. Not everything can be realized at short notice, but with sufficient guidance and inspiration, it can and will be possible to continue the project of keeping international law relevant for this and future generations. Thank you, Monica Hakimi!

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