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International Legal Argumentation: Practice in Need of a Theory

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International Legal Argumentation
Practice in Need of a Theory

Ian Johnstone and Steven Ratner

I. Introduction

In a decentralized global system that lacks the formal trappings of domestic governance systems, most disputes between and among states and non-state actors never reach either a domestic or an international courtroom for authoritative resolution. This state of affairs continues, even with the creation of new international tribunals in recent decades. Despite, indeed because of, the relative scarcity of judicial settlement of disputes, international legal argumentation remains pervasive, but notably in a range of *nonjudicial* settings. States, corporations, nongovernmental organizations (NGOs), and even guerrilla groups make claims in international legal terms in political bodies like the United Nations' organs or domestic parliaments, private diplomatic discussions, and public statements in formal and informal settings.

What purpose does such argumentation serve? What are its effects, intended and unintended? Who is engaging in the argumentation? Who is the audience? What, for that matter, counts as a legal argument and how is it different from other kinds of argument? These questions are not all new, but they have never been addressed systematically in one volume. Answering them is critical to a central goal for scholars and practitioners of international law and relations—to understand how international law actually operates in international affairs.

This book probes these and other questions related to the place of international legal arguments from a multi-perspectival lens. It brings together a group of scholars and practitioners from around the world who have either written about or engaged in international legal argumentation outside of courtrooms. We draw on various theoretical traditions that address the phenomenon of argumentation in international affairs, either as an element of legal theory or of international relations theory. Yet our approach is largely inductive, looking at the actual practice of legal argumentation in a variety of settings and issue areas. From the cases, we seek to identify patterns and common themes in why, where, how, and to what effect the language of law is used outside of courts. This fills a significant gap in scholarship on international law and international relations by exploring the microprocess of communication using international law.

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In this introduction, we will first describe existing theories that address argumentation in international affairs. These are not theories of argumentation per se, but rather areas of legal and international relations theory in which the phenomena of communications and argumentation are central. We then set out the questions our contributors were asked to consider in their essays. The introduction concludes with an overview of each chapter.

II. Argumentation: Theoretical Orientations and Gaps

Law is the language of international society. This proposition, though perhaps an overstatement (states communicate in ways other than through legal argumentation), captures an important feature of how states interact with each other, and increasingly with non-state actors. At least six bodies of scholarly literature address, directly or indirectly, argumentation in international affairs. Three are rooted in international law: compliance theory, interpretation theory, and critical legal theory. Three have found their way into international relations theory, although the first two have roots in other disciplines: communicative action, practice theory, and norm contestation. As the academic fields of international law and international relations have become intertwined, these schools have begun to borrow from each other. Yet they do not add up to a coherent theory. What is missing is a systematic focus on the invocation of *legal* norms during the conversation about compliance and other matters. This volume is designed to bring us a step closer to a full-blown theory of international legal argumentation.

A. Theories from International Law

1. Compliance Theory

Much of international legal theory focuses on compliance, precisely because coercive enforcement is rare in a decentralized international system. If not out of fear of sanctions, why do states comply with international law? Ever since H.L.A. Hart posited his internal acceptance theory of law, argumentation has been a prominent feature in theories of compliance. For a legal system to exist, sanctions are not necessary; the principal explanation for compliance is an internalized sense of obligation. Several prominent schools of legal thought have built on that insight. The New Haven School or policy-oriented approach associated with Myres McDougal and Harold Lasswell defines law as a "process of authoritative decision-making" characterized by communication between states,[1] often in response to international

[1] The methodology employed by McDougal and Lasswell is well captured in the following passage: "[t]he communications which constitute an international agreement, like all other communications, are functions of a larger context, and the realistic identification of the content of these communications must require a systematic, comprehensive examination of all the relevant features of that context, with conscious and deliberate appraisal of their significance." Myres McDougal, Harold Lasswell, and James Miller, *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure* (New Haven and London: Yale University Press, 1967), 11.

incidents.[2] Incidents in particular provoke reactions of decision makers and legal authorities in the form of statements as well as deeds, resulting in back-and-forth argumentation about the legality of actions taken. Transnational Legal Process posits that international law acquires a certain "stickiness" through a process of interaction, interpretation, and internalization.[3] Legal argumentation permeates all three elements as governments engage with each other and with domestic actors in articulating what the law means and what compliance requires. And the management model of compliance sees international law as operating through a process of justificatory discourse: "the interpretation, elaboration, application and ultimately enforcement of international rules is accomplished through a process of (mostly verbal) interchange among interested parties."[4] States feel compelled to give reasons and justifications for their conduct; these justifications are reviewed and critiqued in various settings, particularly international institutions. The felt need to have those justifications accepted pushes states in the direction of compliance because, being bound up in an interdependent international system, they want to remain members in good standing in that system.

All three of these schools (New Haven, Transnational Legal Process, and the management model) have elements of both instrumentalism and constructivism in their theories of compliance. The instrumental account is that states obtain tangible benefits from participating in the system. Rules exert an impact on state behavior because states have an interest in reciprocal compliance by other states and in preserving a reputation for playing by the rules so other states will cooperate with them in the future or on other issues. The constructivist account is that membership in the international legal system generates a sense of obligation to comply with its rules and the felt need to be seen as complying. Engaging in legal argumentation to justify one's actions is a way of remaining a member in good standing.

None of these theories, it should be noted, depends on the interlocutors being truly persuaded of the merits of a rule. As Ryan Goodman and Derek Jinks have argued, state behavior can change through acculturation, the pressure to conform to the beliefs and norms of the surrounding culture.[5] The audience need not agree with or even assess the merits of the norm; what matters is the degree of identification it feels (or wants to feel) with some reference group.[6] In the geopolitical sphere, the referent group could be other great powers, regional neighbors, democratic countries, or the Global South.[7] Acculturation of this sort may lead to internal acceptance of the norm, but the behavior can change before or without that ever happening.

[2] W. Michael Reisman and Andrew R. Willard, eds., *International Incidents: The Law that Counts in World Politics* (Princeton: Princeton University Press, 1988).

[3] Harold Hongju Koh, "Why Do Nations Obey International Law?," *Yale Law Journal* 106 (1997): 2599 (book review).

[4] Abram Chayes and Antonia Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge: Harvard University Press, 1995), 118.

[5] Ryan Goodman and Derek Jinks, "How to Influence States: Socialization and International Human Rights Law," *Duke Law Journal* 54 (2004): 621, 638–645.

[6] Alastair Iain Johnston, "Treating International Institutions as Social Environments," *International Studies Quarterly* 45 (2001): 487.

[7] Courtney Fung, *China and Intervention in the UN Security Council* (Oxford: Oxford University Press, 2019).

For other legal scholars, true persuasion is central. Tom Franck's "fairness discourse" involves reasoning and communication on the basis of principles that combine procedural legitimacy and distributive justice.[8] Through this discourse, a sense of obligation is fully internalized by the targets of the communication: not only behavior but minds are actually changed. Steven Ratner goes furthest in developing a theory of persuasion by identifying four dimensions of a communications strategy: publicity (how public to be in the argumentation); density (how much law to invoke); directness (whether to appeal for compliance simply because it is the law, or because the law serves some higher purpose); and tone (how confrontational and accusatory to be).[9] Ratner does not claim that all persuasion aims to get a target to internalize a norm, but his model suggests what factors will make that more likely.[10]

2. Interpretation Theory

A growing body of literature considers argumentation through the lens of legal interpretation. All law, according to Ronald Dworkin, is fundamentally an exercise in interpretation.[11] In a domestic legal system, judges are the primary (though not sole) interpreters of the law. In the decentralized international legal order, interpretation occurs in a more diffuse process that includes adjudication, but also through the argumentation that occurs in quasi-judicial settings, the political organs of intergovernmental organizations, diplomatic conversation between states, government policy documents and statements, and the writings of practitioners, scholars, and engaged citizens in academic journals, blogs, and media outlets.

Many of those who proffer interpretations of the law in these settings are self-interested actors, such as the legal advisers to governments. This presents a conundrum. If "auto-interpretation" by self-interested actors is the norm, who decides what is the best interpretation of the law? Iain Scobbie draws on rhetorical theory to postulate that a set of ground rules for persuasive argumentation exists in the process of interpreting international law.[12] But he does not explain how those ground rules are administered in a horizontal legal system where there is no court to render authoritative decisions. Ian Johnstone does seek to explain that through the concept of an "interpretive community," an idea borrowed from literary theory that he applies to the

[8] Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1998), at 7, 14.

[9] Steven R. Ratner, "Persuading to Comply: On the Deployment and Avoidance of Legal Argumentation," in *Interdisciplinary Perspectives on International Law and International Relations: the State of the Art*, edited by Jeffrey L. Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2013), 577. See also Steven Ratner, chapter 6, in this volume.

[10] For an earlier analysis of what makes arguments persuasive, see Stephen Toulmin, *The Uses of Argument* (Cambridge: Cambridge University Press, 1958).

[11] Ronald Dworkin, "Law as Interpretation," *Texas Law Review* 60 (1982): 27; Owen Fiss, "Objectivity and Interpretation," *Stanford Law Review* 34 (1984): 1325; Cass Sunstein, *Legal Reasoning and Political Conflict* (1996), 167; Richard H. Fallon, Jr., "The Meaning of Legal 'Meaning' and Its Implications for Theories of Legal Interpretation," *University of Chicago Law Review* 82 (2015): 1235, 1238–1239.

[12] Iain Scobbie, "Rhetoric, Persuasion and Interpretation in International Law," in *Interpretation in International Law*, edited by Andrea Bianchi, Daniel Peat, and Matthew Windsor (Oxford: Oxford University Press, 2015), 61. His summary of the ground rules is "start from a topic which is an object of agreement, pay attention to the audience's pre-conceptions, including its understanding of legitimate or proper argumentative methods, adapt the argument to the audience," at 62.

practice of international law.[13] The interpretive community is an amorphous constellation of actors that provides the assumptions, categories of understanding, and conventions of argumentation that make reasoned exchange about the meaning of a text possible. There are widely shared understandings and expectations about the relevant sources, processes, and argumentative techniques that characterize the international legal enterprise. One may question whether Article 38(1) of the International Court of Justice (ICJ) Statute fully exhausts all the so-called sources of international law, or whether Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) provide adequate guidance on how to interpret treaties. But it is hard to claim that they are not central components of international legal practice. A competent lawyer would ignore these instruments at his or her peril.

Yet the interpretive community does more than simply set the parameters of discourse. It passes judgment on what constitutes the correct (or at least) best interpretation of the law. "Correctness" is not based on objective criteria, but rather is the outcome of an intersubjective, discursive process driven by the assumptions and categories of understanding that are embedded in the international legal discipline. What is a right or wrong interpretation can only be answered by other participants in the interpretive community.[14] More concretely, the impact of international law is felt through the weight of international legal opinion; that opinion is both shaped and measured through argumentation.

The participants in the legal discourse include officials and judges who are directly involved in the making, interpretation, and implementation of a particular legal norm. But it extends beyond them to all officials, legislators, judges, lawyers, scholars, and other nongovernmental actors who participate in some way in the field of international law or practice in which the interpretive dispute arises; as well as an amorphous constellation of stakeholders—what can be called transnational civil society—who listen to and critique the discourse that goes on within the inner circles.[15] As René Provost points out, non-state actors of various stripes—starting with the most "highly qualified publicists" (enshrined in Article 38(1)(d) of the ICJ Statute) and including NGOs such as the International Committee of the Red Cross (ICRC), and even non-state armed groups—engage in the process of interpretation.[16]

[13] Ian Johnstone, "Treaty Interpretation: The Authority of Interpretive Communities," *Michigan Journal of International Law* 12 (1991): 371. The term "interpretive community" was coined by literary theorist Stanley Fish. See Stanley Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (Cambridge: Harvard University Press, 1980). For a review of literature on legal interpretive communities, see Ian Johnstone, *The Power of Deliberation: International Law, Political and Organizations* (New York: Oxford University Press, 2011), 33–41. For later writing on the concept, see various chapters in *Interpretation in International Law*, *supra* note 12.

[14] Ingo Venzke, *How Interpretation Makes International Law* (Oxford: Oxford University Press, 2012), 366; Jean d'Aspremont, "The Multidimensional Process of Interpretation: Content-Determination and Law-Ascertainment Distinguished," in *Interpretation in International Law*, *supra* note 12, at 111, 114.

[15] Johnstone, *The Power of Deliberation*, *supra* note 13. See also Andraz Zidar, "Interpretation and the Legal Profession: Between Duty and Aspiration," in *Interpretation in International Law*, *supra* note 12, at 135; Jean d'Aspremont, "Wording in International Law," *Leiden Journal of International Law* 25 (2012): 575. See contra Gleider Hernandez, "Interpretative Authority and the International Judiciary," in *Interpretation in International Law*, *supra* note 12, at 166.

[16] René Provost, "Interpretation in International Law as a Transcultural Project," in *Interpretation in International Law*, *supra* note 12, at 300.

Much of the argumentation about interpretation is aimed at compliance, but the line between compliance with existing law and creating new law is blurry. Interpretation often involves refining, elaborating, or stretching the meaning of a legal term. At a minimum, it gives content to and thereby "hardens" inchoate norms. At a maximum, it is "constitutive of international law."[17] Moreover, even when the argumentation fails to produce clarity on the weight of international legal opinion, interpretative debates can provide structure and a modicum of stability to the international system. Legal argumentation is inherently confrontational, but not necessarily coercive. From one perspective, legal discourse is a battleground; from another, it is a bridge.[18] From the first, disputes over interpretation are an "argumentative battle for semantic authority."[19] The battle cannot be mitigated let alone resolved through legal language, because it is about whose language is the true language of international law.[20] From the second perspective, argumentation about interpretation is a vehicle for managing the conflicts that are inherent in any pluralistic society. Because it requires the offering up of arguments that fit within a wider context of intersubjective understandings about the rules of international life, it is a bridge if not to consensus and cooperation at least to peaceful coexistence.

3. Critical Legal Theory

Yet, as critical legal theorists remind us, not all participants in legal argumentation are equal: powerful actors dominate. Antonio Gramsci defined hegemony as domination not through brute force but through ideas—by developing an ideology that serves the interests of the powerful at the expense of the less powerful, but which the less powerful come to accept. Dominant actors do not impose order; they construct an order founded on values and ideas that work to their advantage, and then seek to legitimize that order through legal discourse that purports to be apolitical and universal.[21] Critical theorists stress that the structure of the international system is not fixed or immutable; it is a product of historical circumstances. It may be so enduring that it comes to be seen as natural, but it is not.

From this perspective, the distribution of power in the international system has a determining impact on the formulation, interpretation, and application of international law. The more powerful actors are better able to dictate the terms of legal debates, to win those debates, and to bear the reputational and other costs if they lose. More insidiously, legal argumentation does not constrain self-serving interpretations

[17] d'Aspremont, *supra* note 14, at 113. Duncan Hollis makes a related point when he speaks of "existential interpretation," which validates the existence of a rule by deciding whether it even counts as law. Duncan Hollis, "The Existential Function of Interpretation in International Law," in *Interpretation in International Law*, *supra* note 12, at 79.

[18] Venzke, *supra* note 14, at 356–360.

[19] d'Aspremont, *supra* note 14, at 113.

[20] Venzke, relying on Davidson, *supra* note 14, at 369.

[21] As Robert Cox put it, "Hegemony derives from the ways of doing and thinking of the dominant social strata of the dominant state or states insofar as these ways of doing and thinking have inspired emulation or acquired the acquiescence of the dominant social strata of other states. These social practices and the ideologies that explain and legitimize them constitute the foundation of the hegemonic order." Robert W. Cox with Timothy J. Sinclair, *Approaches to World Order* (Cambridge: Cambridge University Press, 1996), 517.

of the law by powerful actors, but rather legitimizes those interpretations by making them seem like a reflection of universally applicable community standards. Invoking the language of the law hides from view the fact that contestable political choices are being made.[22] To give an example, the UN Charter and many General Assembly resolutions enshrine two fundamental principles—"self-determination" and "territorial integrity"—which are often in conflict. Yet international law says little about how to resolve the conflict—about which people are entitled to assert the right to self-determination against states that claim territorial integrity. The principles are in fundamental contradiction, and there is nothing *within the law* to resolve the contradiction. International law is an elaborate argumentative structure that pretends to resolve these sorts of conflicts, but in the end it comes down to a matter of political choice. Moreover, critical legal theorists claim the argumentative structure is fundamentally incoherent as it vacillates perpetually between asserting that the law operates separate from the realities of power politics and asserting that it functions precisely because it is rooted in the political realities of state practice.[23] The project of critical legal studies in a nutshell is to examine the structure of legal argument to reveal that pattern, to reveal the inherent contradictions and hidden ideologies that run through all international law.[24]

A related critique concerns the power of experts. The critical literature spans both subject matter experts and legal experts. So, for example, economists in the World Bank and International Monetary Fund (IMF) are criticized for constructing structural adjustment policies that adhere to conventional economic wisdom with little regard for the distributional impacts. "Liberal peacebuilders" are accused of crafting programs and institutions that reflect Western conceptions of good governance and the rule of law without considering local perceptions of political legitimacy. In the field of international law, the claim is that legal discourse occurs among a closed circle of lawyers—the "self-appointed visionaries and arbiters of humanity's needs"[25]—who shut out perspectives that are beyond the mainstream through technical, formalistic, and ultimately obfuscating legal language. The invocation of legal expertise gets in the way of inclusive decision-making even when important value and political choices are being made.

4. The Missing Elements

Although all three of these theoretical orientations inform our understanding of why states make legal arguments and the effects thereof, none of them zeroes in on the actual microprocess of communication. The choices that international actors make between legal and nonlegal arguments (and the diversity of views about where to draw the line between them); the variety of motivations for and consequences of those

[22] Martti Koskenniemi, "The Politics of International Law," *European Journal of International Law* 1 (2000): 1.

[23] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2009).

[24] David Kennedy, *International Legal Structures* (Baden Baden: Nomos Verlagsgesellschaft, 1987).

[25] Paul B. Stephan, "Comparative International Law, Foreign Relations Law and Fragmentation: Can the Center Hold?," in *Comparative International Law*, edited by Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier, and Mila Versteeg (New York: Oxford University Press, 2018), 66.

choices; the relevance of the particular speaker, audience, and venue; the role of the thinness or thickness of the existing legal landscape in argumentation; and the implications for the direct targets of an argument as well as others who might hear it are among the critical issues that these theories leave out. Nor, generally, do they consider how and why non-state actors make legal arguments. To address these issues requires unpacking particular argumentative strategies in discrete settings, a task we set out to do in this book through our case studies offered from both scholarly and firsthand perspectives.

B. Theories from International Relations

1. Communicative Action

In indirect response to the critical theorists, Jürgen Habermas posits an ideal of legal argumentation that is not insular: "Legal discourse cannot operate self-sufficiently inside a hermetically sealed universe of existing norms but must rather remain open to arguments from other sources."[26] Though a philosopher and not an international relations theorist, Habermas has applied his theory of communicative action to the European Union.[27] His theory holds that there are at least three kinds of communicative behavior: bargaining based on fixed preferences; strategic argumentation, in which arguments are used to justify positions and induce others to change their minds; and "true reasoning," in which actors seek a reasoned consensus on the basis of shared understandings, where each actor not only tries to persuade but is also open to persuasion.[28] The last is Habermas's ideal of communicative action. It is not meant to describe an actual state of affairs, but its basic principles are presupposed in any linguistic communication.[29] It may be impossible to distinguish "true reasoning" from strategic argumentation, but even the latter can have beneficial effects. Jon Elster posits the "civilizing force of hypocrisy": even hypocritical arguments (seemingly impartial arguments that are really designed to hide one's self-serving motivations) often lead to principled and more equitable outcomes.[30] If the rhetoric changes with every shift in short-term interests, then it will be dismissed as "cheap talk," and the

[26] Jürgen Habermas, *Between Facts and Norms* (Cambridge: Polity Press, 1996), 230.

[27] Jürgen Habermas, *The Crisis of the European Union: A Response* (Cambridge: Polity Press, 2013).

[28] Thomas Risse, "'Let's Argue': Communicative Action in World Politics," *International Organization* 54 (2000): 1, 7–9. This is Risse's summary of Jürgen Habermas's *Theory of Communicative Action*, *Vol. 2* (New York: Beacon Publishing Group, 1985).

[29] Habermas argues that the ideal speech situation is embedded in the very nature of the discourse. "Insofar as participants understand themselves to be engaged in a cooperative search for common ground solely on the basis of good reasons, then they must—as a condition of the intelligibility of their activity—assume that the conditions of the ideal speech situation are satisfied." See Lars Lose, "Communicative Action and the World of Diplomacy," in *Constructing International Relations: The Next Generation*, edited by Karen Fierke and Knud Erik Jorgensen (London: Routledge, 2001), 179. See also Frank Cunningham, *Theories of Democracy: A Critical Introduction* (London: Routledge, 2002), 176.

[30] Jon Elster, "The Strategic Uses of Argument," in *Barriers to Conflict Resolution*, edited by Kenneth Arrow, Robert Mnookin, Lee Ross, Amos Tversky, and Robert Wilson (New York: Norton and Norton, 1995), 249. See also Diego Gambetta, "Claro!: An Essay on Discursive Machismo," in *Deliberative Democracy*, edited by Jon Elster (Cambridge: Cambridge University Press, 1998), 19, 23.

entire purpose of making impartial arguments is lost.[31] Presumably those who engage in the argumentation believe it serves a purpose (or else why bother) and therefore will feel some pressure to match deeds with words in order not to appear blatantly hypocritical.[32]

In a similar vein, deliberative democrats hold that in a well-functioning democracy, public policy should be decided not only through voting but also through the exchange of reasons that all those who are subject to them can accept.[33] This exchange of reasons will not always lead to agreement (that is why legislatures vote) but makes it easier to live with disagreement. If the matter is put to a vote, those who lose can at least feel all the relevant issues were aired and the interests of all stakeholders were considered.[34] Friederich Kratochwil, Thomas Risse, Michael Zurn, and others have sought to extend this line of thinking to international affairs.[35] They posit a logic of arguing, separate from but related to the logics of consequences and appropriateness.[36] According to the third logic, which is tied to the second, arguing helps to construct norms that reflect "appropriate" behavior and to determine whether the norms apply in a particular situation. Some deliberative democrats speak of multiple public spheres in which a range of opinions is developed and exchanged on matters of common concern: "a highly complex network that branches out into a multitude of overlapping international, national, regional, local and sub-cultural arenas."[37] International organizations are settings where a good deal of transnational deliberation occurs. Because international law is a concrete manifestation of shared (intersubjective) understandings about what constitutes acceptable behavior among states, the reasoned exchange that occurs there often has a legal character, although deliberative democrats tend not to acknowledge that point.

2. Practice Theory

Stretching from Ludwig Wittgenstein's philosophy of language, to Pierre Bourdieu's sociology, to Étienne Wenger's organization theory, to Emanuel Adler's communitarian

[31] Cf. Jack Goldsmith and Eric Posner, "Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective," *Journal of Legal Studies* 31 (2002): 115; Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (New York: Oxford University Press, 2005), 167.

[32] Thomas Risse's notion of argumentative self-entrapment makes the same point. Risse, *supra* note 28. See also Frank Schimmelfennig, *The EU, NATO, and the Integration of Europe: Rules and Rhetoric* (Cambridge: Cambridge University Press, 2003).

[33] Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, MA: Belknap Press, 1996).

[34] *Id.*

[35] Risse, *supra* note 28; Michael Zürn, "Democratic Governance Beyond the Nation-State: The EU and Other International Institutions," *European Journal of International Relations* 6 (2000): 183; Friedrich Kratochwil, *Rules, Norms and Decisions* (Cambridge: Cambridge University Press, 1989).

[36] On the logics of consequences and appropriateness, see James March and Johan Olsen, *Rediscovering Institutions* (New York: Free Press, 1989).

[37] Habermas quoted in Philip Schlesinger and Deirdre Kevin, "Can the European Union become a Sphere of Publics?," in *Democracy in the European Union: Integration through Deliberation?*, edited by Erik Oddvar Eriksen and Erik Fossum (London: Routledge, 2000), 211. See also Seyla Benhabib, ed., "Towards a Deliberative Model of Democratic Legitimacy," in *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton: Princeton University Press, 1996), 74; John Dryzek, *Deliberative Global Politics* (Cambridge: Polity Press, 2006); James Bohman, "International Regimes and Democratic Governance: Political Equality and Influence in Global Institutions," *International Affairs* 73 (1999): 499, 506.

international relations, the concept of a community of practice has deep roots. It has found its way into the international law literature via Yves Dezalay and Bryant Garth, Jutta Brunnée and Stephen Toope, Jens Meierhenrich, and Anthea Roberts.[38]

To understand the relationship between legal argumentation and communities of practice, four elements of the concept are especially important. The first is "background knowledge," a term originally coined by John Searle.[39] This is similar to Wittgenstein's idea of "tacit knowledge" and to Habermas's notion of a "common lifeworld"—the background of shared assumptions, understandings, and practices that make meaningful communication possible. Searle put this in terms of interpretation. No rule is self-interpreting: a person must have contextual understanding to arrive at the correct meaning, and that contextual understanding draws on a cultural awareness, habits of mind, and presuppositions that those engaged in communication must share.

The second is the meaning of "practices." Adler and Pouliot define them as "socially meaningful patterns of action, which, in being performed more or less competently, simultaneously embody, act out, and possibly reify background knowledge and discourse in and on the material world."[40] A practice is not the same as either action or behavior:

> The concept of behavior evokes the material dimension of doing, as a deed performed in or on the world; then the notion of action adds an ideational layer, emphasizing the meaningfulness of the deed at both the subjective and intersubjective levels; and, finally, the term "practice" tacks another layer on the edifice or, better put, makes it hang together as one coherent structure, by pointing out the patterned nature of deeds in socially organized contexts.[41]

In the international law realm, Meierhenrich explains that practices are habitual, routinized behavior that facilitates a particular understanding of the world: "work activities … that are performed in a regularized fashion and which have bearing, whether large or small, on a social phenomenon, in our case, on the operation of international law."[42]

The third is the notion of shared discourse. Those who engage in a social practice share a common discourse, a way of speaking about the activities in which they are engaged that reflects a certain perspective on the world.[43] Law is a disciplined and specialized form of discourse. There are widely shared understandings and expectations

[38] For an excellent review of the philosophical and sociological roots of practice theory, see Jens Meierhenrich, "The Practice of International Law: A Theoretical Analysis," *Law and Contemporary Problems* 76 (2013): 1.

[39] John Searle, *Expression and Meaning: Studies in the Theory of Speech Acts* (Cambridge: Cambridge University Press, 1979).

[40] Emanuel Adler and Vincent Pouliot, eds., *International Practices* (New York: Cambridge University Press, 2011), 1, 4.

[41] *Id.* 5.

[42] Meierhenrich, *supra* note 38, at 19.

[43] Étienne Wenger, *Communities of Practice: Learning Meaning and Identity* (Cambridge: Cambridge University Press, 1998), 125–126.

about the relevant sources, processes, and argumentative techniques that characterize the international legal enterprise.

Fourth, being competent in the field is to possess "know-how"—a kind of knowledge that can only be acquired through practice.[44] Drawing on Wittgenstein's language theory and pragmatist philosophy, the idea is that knowledge and competence come from usage. We know the meaning of a word from how it is used. We understand the functioning of a professional discipline from how it is practiced.

Combining these four ideas and applying them to law, international law is an argumentative practice, competence in which depends on possessing a reservoir of background knowledge. One learns the law in part by studying it, but also by engaging in the practice. In so doing, one does not simply (or even primarily) learn black letter rules, but rather acquires tacit legal knowledge—the techniques of argumentation and interpretation that are embedded in the discipline. One internalizes a "certain perspective on the world," as well as a certain set of methods for reading texts and making claims based on those texts and the contexts in which they are encountered.

3. Norm Contestation

Finally, argument is a central feature of the burgeoning literature on "norm contestation." This literature stems from the work on norm diffusion pioneered by Martha Finnemore, Katherine Sikkink, and other constructivist international relations scholars.[45] While that work addresses how norms spread and become internalized, it does not focus on argumentation per se. Later research on norm contestation does. Antje Wiener defines contestation as "the range of social practices [that] discursively expresses disapproval of norms."[46] She starts from the assumption that, in democratic societies, the norms, rules, and principles of governance ought to be contestable at any given time by those governed by them (drawing on Habermas, among others). Contestation, while inherently confrontational, can generate legitimacy if it is regular and inclusive of all stakeholders.[47] Others take a similarly positive view of norm contestation as a way of generating shared understandings, echoing the deliberative democrats.[48] Even when the norms originate from a particular culture, such as liberal democracies, contestation can result in the extension of those norms

[44] Vincent Pouliot, "The Logic of Practicality: A Theory of Practice of Security Communities," *International Organization* 62 (2008): 255, 269.

[45] Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52 (1998): 887; Thomas Risse and Kathryn Sikkink, "The Socialization of International Human Rights Norms into Domestic Practices: An Introduction," in *The Power of Human Rights: International Norms and Domestic Change*, edited by Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (Cambridge: Cambridge University Press, 1999), 1; Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press, 1999).

[46] Antje Wiener, *Theory of Contestation* (New York: Springer, 2014), 1.

[47] *Id.* 10. See also Antje Wiener, "Contested Compliance: Interventions on the Normative Structure of World Politics," *European Journal of International Relations* 10 (2004): 189.

[48] Wayne Sandholtz, "Dynamics of International Norm Change: Rules Against Wartime Plunder," *European Journal of International Relations* 14 (2008): 101. Adam Bower, "Arguing with Law: Strategic Legal Argumentation, US Diplomacy, and Debates over the International Criminal Court," *Review of International Studies* 41 (2015): 337.

to other societies.[49] Although she does not use the term norm contestation, Monica Hakimi claims that communities are constructed as much by conflict as they are by agreement.[50]

Charlotte Epstein takes a less optimistic view of contestation. Echoing critical legal studies, she claims debates over norms are "generative structures that are always charged with relations of domination" and hence not a check on power but a reflection and perpetuation of it.[51] Another critical line of thinking sees norm contestation as a never-ending exercise—meaning is contested "all the way down." Holger Niemann and Henrik Schilinger question the very foundations of research on norms defined as shared understandings of appropriate behavior:

> [T]he almost mundane insight that norms have different meanings according to time, space, or social context leads to a fundamental conceptual problem in norm research. A contested norm, from this perspective, represents almost a contradiction in terms, as it is difficult to imagine that norms can be both contested and shared at the same time.[52]

They seek to turn norm research on its head by starting not with the established view of norms as "shared understandings" and norm contestation as the anomaly, but rather with contestation as the normal state of affairs and settling on an understanding is the anomaly.

Recent work on norm contestation focuses on outcomes. Nicole Deitelhoff and Lisbeth Zimmermann claim that contestation can either strengthen or weaken a norm, depending on the form of the contestation and context.[53] If the argumentation is about the application rather than the meaning of norm, then the consequences may not be severe, even if it does not produce agreement. If the contestation is about basic meaning, it will lead to decay. In a similar vein, Anette Stimmer questions the tendency to treat norm contestation and norm acceptance as binary categories. By distinguishing norm frames (justifications) from norm claims (to action), she identifies four possible outcomes from norm contestation: clarification of the norm, when there is agreement on the frame and claim; recognition of the norm, when there is agreement on the frame but not the claim; neglect, when there is agreement on the claim but not the frame; and impasse, when there is disagreement on both.[54]

[49] Amitav Acharya, "How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism," *International Organization* 58 (2004): 239; Lisbeth Zimmermann, "More for Less: The Interactive Translation of Global Norms in Post-Conflict Guatemala," *International Studies Quarterly* 61 (2017): 774.

[50] Monica Hakimi, "Constructing an International Community," *American Journal of International Law* 111 (2017): 317, 325. She quotes Bernard Yack for the proposition that if a practice of justice "structures nothing more than the way we engage in conflict with each other, it still reinforces the sense that we participate with others in a community."

[51] Charlotte Epstein, *The Power of Words in International Relations: Birth of an Anti-Whaling Discourse* (Cambridge, MA: MIT Press, 2008).

[52] Holger Niemann and Henrik Schilinger, "Contestation 'All the Way Down': The Grammar of Contestation in Norm Research," *Review of International Studies* 43 (2017): 29, 30.

[53] Nicole Deitelhoff and Lisbeth Zimmermann, "Things We Lost in the Fire: How Different Types of Contestation Affect the Robustness of International Norms," *International Studies Review* 22 (2020): 51.

[54] Anette Stimmer, "Beyond Internalization: Alternative Endings of the Norm Life Cycle," *International Studies Quarterly* 63 (2019): 270, 270–271.

4. The Missing Elements

International relations theories have offered important and influential insights on argumentation in international affairs. They complement the legal theories by addressing the microprocess of communication more directly. But despite decades of work on the issue, they have not tended to focus on the central concern of this book: the salience of *legality* to an argument. Norms are defined as standards of appropriate behavior for actors with a given identity. With some exceptions, whether the norms take a legal form is not of particular concern to most international relations (IR) theorists.[55] Moreover, they tend to elide the distinction between "soft" norms and "hard" norms. For legal theory, the distinction between soft law and hard law is important, in part because there is a debate over whether the first even exists and in part because there is a debate over whether the distinction has any bearing on compliance. For our purposes, the distinction is important because the type of norm may have an impact on the purpose, nature, and effects of the argumentation. It is our view, one that later chapters develop further, that international legal argumentation is different from other forms of normative argumentation, whether in its motivations or its effects. So we hope to fill in this important gap with this volume.

C. Theoretical Silences

Finally, we note that some theories or methods of international law and relations remain mostly silent about argumentation, legal or otherwise. Among the former, strict positivism stresses law's origin in and validity through certain discrete and formal "sources." The task of the lawyer is to identify the legal rules and then interpret them according to accepted modes of interpretation provided by the law (notably the VCLT). Argumentation, discourse, and persuasion are simply not seen as relevant to the inquiry—even though, of course, as a practical matter, the lawyer will be making her views about to the law to someone through an argument. Among the latter, realism and certain iterations of institutionalism both neglect the role of argumentation, and especially legal argumentation, in international affairs. For realists, structural forces about state power determine the outcomes of disputes between states, with international law playing a negligible role. Arguments about international law are just cheap talk. Even among institutionalists, those steeped in a rational choice model will accept the advantages of legalization as a way to reduce the costs of cooperation and increase the credibility of commitments, but the actual process by which those actors dispute what the norms mean is not particularly important.

These theories all share what might best be termed a *static* approach to international law. Law is something out there, to be found and applied by the positivists, and that may affect the behavior of global actors (or may not, according to the realists). While they accept that law changes over time, these approaches are static in that what

[55] A notable exception is Deitelhoff and Zimmermann's recent work that begins to explore how the legal character of norms affects the discourse about them. Nicole Deitelhoff and Lisbeth Zimmermann, "Norms Under Challenge: Unpacking the Dynamics of Norm Robustness," *Journal of Global Security Studies* 41 (2019): 2.

matters is the snapshot—not the underlying process that led to it, or the process that will follow from the law's invocation. It is our view, and indeed, that of the other theories we have discussed, that these static views are profoundly impoverished. They both oversell international law's relevance (by making its identification and application the only task for the lawyer) and undersell it (by seeing it strictly in terms of cost avoidance).

III. What This Book Adds

To fill in some of these gaps in the theoretical literature, we identify the central question as follows: How and why does international legal argumentation operate outside of courts? To answer that question we ask a number of subsidiary questions: What is a legal argument? Who engages in the legal argumentation? Why do they engage in it? Who is the audience? Where does it occur? And what is the effect? The existing literature, both theoretical and empirical, suggests some tentative answers.

What is a legal argument? This question is surprisingly difficult to answer. A minimal definition is an argument that explicitly invokes traditional sources of law and employs the standard techniques of interpretation. A maximalist definition would define it as an argument that in any way bears on law. The authors of this volume were not asked to adopt any particular definition, but to be explicit about the definition they use. We also asked the authors to compare legal to other forms of argumentation when helpful to illuminate what is distinctive about the former. These include policy-oriented, scientific, moral, religious, emotional, economic, and expedient arguments. Some found it useful to focus on the style of argument, for example, drawing on precedent or making analogies. Others considered explicit versus implicit argumentation. The latter can occur when a particular policy, decision, or act assumes a legal position, even if the legal claim is not articulated as such.

Who engages in legal argumentation? The principal "arguers" are representatives of states. Theory suggests we might observe a difference between powerful and weak states. The latter may be more inclined to make specific claims, insisting that the law is clear in order to tie down the powerful; the former may prefer vagueness, leaving them with the discretion to interpret and reinterpret the law in a manner that serves their preferences. Other important protagonists in legal argumentation include domestic actors: legislators, advocacy groups, civil society, academics, lawyers in private practice, and journalists. Prominent non-state actors at the international level are officials of intergovernmental organizations, representatives of international NGOs, multinational corporations, and armed groups.

Why do actors engage in legal argumentation? What motivates them, what purpose is the argumentation intended to serve? Here extant theory offers a range of possible answers. For some, it may be a genuine effort to persuade the interlocutor or other audiences of the merits of a legal claim. For others, the goal may be more strategic—to change behavior without caring whether the audience has been persuaded on the merits of the claim. For others still, it may be to build or preserve a reputation for law-abidingness, even if they do not expect to change anyone's mind or behavior. Legal

argumentation can also legitimate (or delegitimate) action. It can lay the foundation for future changes in the law—either making new law or undermining the law that exists. It is also interesting to consider why actors avoid legal argumentation when legal issues are at stake. What is lost by engaging in legal argumentation?

Who is the audience? This question is closely tied to speaker and purpose. In most of the case studies, the audience is representatives of other states, whether they be allies, adversaries, or neutral. Indeed, it may well be that persuasion is not necessary for allies and not likely to succeed for adversaries, leaving the "undecided" as the real target. On occasion, officials of intergovernmental organizations may be the target, especially those who are in a position to provide diplomatic support or extract a diplomatic price. It may also be transnational NGOs, for example, human rights or humanitarian organizations, that participate in international legal discourse. Domestic actors are often the audience as well. These could be opposition groups (armed or otherwise), political parties, bureaucrats, leaders of civil society, religious leaders, or the general public.

Where, outside of courts, does legal argumentation occur? One common venue is the political organs of intergovernmental organizations, whether global, regional, or subregional. The UN Security Council figures prominently in this volume. A great deal of legal argumentation occurs in the European Union. The legal systems of other regional organizations are less fully developed, but the African Union, the Organization for Security and Cooperation in Europe, and the Association of Southeast Asian Nations are all sites for argumentation. It also occurs in quasi-judicial bodies, such as human rights treaty committees and alternative dispute resolution mechanisms. Other international venues include informal institutions such as the G7 and G20, conferences of states parties to treaties, and gatherings where new norms are developed, such as UN open-ended working groups and high-level panels. Bilateral diplomatic exchanges often include legal argumentation. At the domestic level, it can be heard in parliaments and executive agencies, as well as in public debates through the media, academic journals, blogs, and other organs of expert and public opinion. Where the argumentation occurs also impacts the form it takes: agreed written documents, unilateral public statements, private exchanges, or social media. An important question is who has access to the venues where argumentation occurs. Non-state actors, for example, have some access to intergovernmental organizations, but not as much as states. They may prefer more informal channels.

Finally, what are the effects of legal argumentation, intended and unintended? This is the hardest question to answer because clear causation is difficult to prove. Possible effects range from constraining behavior (compliance theory), enabling it (by signaling authority), or framing an issue (by casting it in legal terms).[56] Another effect could be to change the normative climate and thereby shape the future direction of a particular area of law. Legal argumentation may also promote the rule of law generally, cultivating a habit of seeking to resolve disputes and manage relations through the language of law rather than brute force. From the perspective

[56] Ian Hurd, *How to Do Things with International Law* (Princeton: Princeton University Press, 2017).

of critical theory, legal discourse can suppress or silence voices, obfuscate what is really at stake, and mask value choices behind the cloak of seemingly neutral legal language. Sometimes a good legal argument can have a bad moral effect and a bad legal argument a good one.

IV. Overview of the Volume

This book is overtly interdisciplinary, with perspectives from both international law and international relations. Its contributors include leading academics and seasoned practitioners, who collectively draw on theory and conceptual work, as well as real-world accounts of the way that international legal argumentation actually functions in practice. Each chapter focuses on a particular issue area, ranging from the *jus ad bellum* to trade to international whaling. Our hope and expectation is that a comparative analysis of the legal argumentation in each area, framed by the above questions, will illuminate this ubiquitous but not-well-understood feature of contemporary international affairs. The topics were deliberately chosen to provide a broad cross-section, but inevitably some important issue areas were left out. We describe three of those at the end of this chapter.

The second chapter in Part I of the book, by Ingo Venzke, combines theoretical accounts of the language of law in global politics with a review of the empirical work testing those accounts. He explains legal argumentation from the perspective of three logics of action and ties all three logics to the concept of legitimacy. He explores whether the language of law changes individual or collective attitudes toward certain actions or situations. Does a persuasive case for the legality of an action increase the level of approval for it? Venzke reviews several experimental studies that have inquired into the impact of invoking the law on public opinion, and finds the results to be mixed and ultimately unsatisfying. He identifies three areas for further empirical research: international law's distinctive claim to authority; the legitimacy effect of legal argumentation on non-US audiences; and law's function in enabling rather than constraining behavior. He concludes by highlighting the deep divides between the experimental work that has been done and legal scholarship of a more critical bent.

Part II comprises five chapters on legal argumentation about international peace and security. Monica Hakimi builds on her earlier work that suggests contestation over the *jus ad bellum* can actually help to build community. Her central claim in this chapter is that legal argumentation, even when the argument is not settled authoritatively (as is often the case), promotes three rule-of-law values: accountability for decisions about the use of force; respect for those affected by the decisions; and the fostering of relatively healthy transnational politics. In developing this claim, she challenges two extant theories of international legal argumentation: one that highlights the role of legal argumentation in lawmaking; the other, its function as an enforcement device. Neither theory, in Hakimi's view, adequately explains much of the argumentative practice about the *jus ad bellum* that does not—nor is it expected or intended to—result in authoritative resolution. If the benefits of legal argumentation were contingent on the matter being settled, then presumably little would be lost by

disengaging from it when such resolution is out of reach. Her claim, to the contrary, is that much would be lost in terms of the three rule-of-law values described above.

Scott P. Sheeran draws on his experience as the Legal Adviser to the Permanent Mission of New Zealand to the United Nations in an analysis of legal discourse in the Security Council. He starts from the premise that, in this highly political and unequal body where diplomacy and the search for consensus are paramount, the role of international legal argumentation may seem modest. He highlights the disconnect between the positivist, disciplined methodology of most international lawyers and the institutional powers, practice, and processes of the Council. He claims that to understand the impact (or not) of international legal argumentation in the Council, one must pay close attention to the dominant (political) paradigm of argumentation that exists there, as well as the complex social interactions among its members. To promote international norms, and indeed the rule of law itself, an international lawyer operating in and around the Council must adopt a more contextual and flexible mode of argumentation founded on policy considerations and values as opposed to black letter rules.

In chapter 5, Gina Heathcote takes a critical look at the preambles to UN Security Council resolutions on women, peace, and security, starting with Resolution 1325 (2000). She argues that the preambles shape legal arguments on the issue by filtering out wider transnational feminist demands, and by filtering in the dominant normative commitments of the Security Council. The net result is that they articulate feminist approaches that emphasize women as victims of conflict-related sexual violence and as participants within decision-making structures, while downplaying the broader structural demands, such as anti-militarism and disarmament, of transnational feminist actors. She treats feminist protest and organizing itself as a form of legal argumentation, and calls this protest the "forgotten preamble" to the resolutions. More concretely, she considers the impact of the actual preambles (both in thematic and situation-specific resolutions) on the development of international law. She is critical of some contemporary feminist writing that, by attaching substantial legal weight to the preambles, contributes to the silencing of dissident feminist approaches that do not find their way into the texts.

Steven Ratner's chapter, unlike most others in the book, focuses on an issue area in which there is relatively little international law: cybersecurity. International legal argumentation in this field reflects at best a thin consensus, if not outright dissensus, at four levels: the existence of rules; the content of those rules; the desirability of new rules; and the content of any desired rules (as well as norms). This legal landscape results in a unique pattern of argumentation and persuasion by states and non-state actors both *ex ante*—in advocating for a regulatory scheme for cyber activity—and *ex post*, in reacting to and perhaps responding to a malicious act by another state or non-state actor. By taking out one of the key assumptions of existing studies on legal and normative argumentation, namely, an agreed set of rules, Ratner's chapter offers a distinctive perspective on the motivations and effects of legal argumentation in shaping debates and behavior outside of courts. States argue not only about the content of rules but also whether they even exist and, if not, whether new law or norms are needed. Ratner also considers the contributions of non-state actors (corporations, academics, and think tanks) to the construction of cyber norms. While Ratner's focus

is on the use of legal argumentation to persuade, he discusses other purposes and effects as well.

The field of nuclear nonproliferation, by way of contrast, is characterized by a substantial amount of international law. Ian Johnstone focuses on the Nuclear Non-Proliferation Treaty (NPT) and presents a theory of legal argumentation as an intersubjective activity, underpinned by the principle of consent. Most arguments are about compliance, but often spill over into other kinds of legal arguments: What is the nature of the obligation, in what venue is the matter properly discussed, does existing law cover the situation, is new law needed? Through case studies of Article IV of the NPT on the "inalienable right" to peaceful nuclear energy, and Article VI on the obligation of the nuclear weapon states "to pursue negotiations in good faith" on disarmament, Johnstone finds evidence for several reasons why states engage in legal argumentation: to persuade another actor of the validity of a legal claim; to gain strategic benefits, such as the support of allies; and to stake out the moral high ground by affirming one's identity as "law-abiding." Regardless of motive, a noteworthy effect of legal argumentation is to change the normative climate surrounding a regime, possibly for the worse, but usually for the better because the argumentation is an implicit acknowledgment that the rules matter and they apply to all who engage in it.

Part III covers argumentation in areas of law that relate to human dignity. Bruno Stagno-Ugarte, who has served as Foreign Minister and as Permanent Representative of Costa Rica to the United Nations, writes about debates on mass atrocities in the UN Security Council. He focuses on two sets of actors: the members of the Security Council (both permanent and non-permanent) and the Secretary-General and Secretariat officials. He does not seek to demonstrate that legal argumentation is the best way to advance and achieve compliance with human rights (as nonlegal arguments may be more effective), but claims that legal arguments can have independent—if not sufficient—influence even in a political setting, due in part to the extraordinary powers of the Council to act on violations of international criminal, humanitarian, and human rights law, particularly under Chapter VII. Through case studies of Myanmar, Syria, and Yemen, he highlights the use, or avoidance, of legal language by actors within the Council to either capture, or—too often—dissimulate, the gravity of the crimes being perpetrated. He regrets that, by avoiding direct and specific language about the crimes being committed, actors minimize the effect of the legal argumentation, making it easier to avoid action.

Hyeran Jo's chapter focuses on the use of legal argumentation by non-state actors. Her issue area is the invocation of international humanitarian law (IHL) by non-state armed actors (NSAAs)—individuals or groups that fight for their political, economic, or social goals. She draws on a global sample of 364 NSAAs who operated from 1974 to 2010, at least 20 percent of whom engaged in some form of legal argumentation related to IHL. She asks: Why and when do they have an incentive to engage in international legal argumentation? What is the content of the legal argumentation and associated processes? What effects does it produce? Among the patterns she sees is the tendency of NSAAs to invoke legal arguments to claim the moral high ground vis-à-vis their government adversaries in order to gain support for their cause among international actors. She also observes the disparity among NSAAs in their access to interlocutors and venues where legal argumentation is common. Jo concludes with a

set of observations about four possible effects of NSAAs' legal argumentation: persuasion, reciprocity, compliance, and peace.

Wouter Werner's chapter examines legal argumentation in and by the African Union (AU) in its long-standing dispute with the International Criminal Court (ICC) about whether the latter is biased against African countries. Building an analytical framework that draws on the institutional theory of law, legal expressivism, and the role of criminal law in the formation of communities, Werner focuses not on legal-technical questions such as head of state immunity, but rather on deeper political questions about recognition, respect, and equality. The AU has addressed these questions in a series of formal Decisions, adopted by its highest organ, the Assembly of Heads of State and Government. Werner treats the emotions expressed in these decisions as a type of legal argumentation, which have particular power because they articulate the collective stance of the AU and bestow it with the authority of law. Political struggles are thus articulated in the form of "argumentation through law" that attaches formal validity to claims about membership, recognition, and equality.

In her capacity as Legal Counsel of the African Union, Ambassador Namira Negm has been at the center of a wide range of political disputes with legal dimension. None have been more important to the AU than how it reacts to unconstitutional changes of government (UCGs). The Constitutive Act of the AU condemns UCGs and calls for the suspension of governments that come to power through unconstitutional means. In her analysis of the practice of the AU in implementing these provisions, Negm finds that legal argumentation has helped to facilitate the process of a return to constitutionality by suspended governments, enabling them to resume participation in the AU. The legal argumentation has revolved not only around the provisions in the Constitutive Act on UCGs but also those on democracy, later elaborated in the African Charter on Democracy, Elections and Good Governance. Reliance on AU legal texts helped to achieve AU consensus on how to respond and to marshal diplomatic efforts to persuade (or compel) those who come to power through unconstitutional means to step down. Negm concludes that the AU's consistent practice on this politically charged issue demonstrates the value of legal argumentation in promoting the rule of law, without resorting to adjudication.

Part IV is a cluster of chapters on cooperation in the global commons. Jutta Brunnée observes that argumentation regarding climate change is heavily concentrated in nonjudicial settings. Contemporary international environmental problems, because they are complex, multifaceted, long-term, and implicate multiple states and non-state actors, do not lend themselves to adjudication. Brunnée explores three interrelated shifts in the climate change regime, reflected in the differences between the 1997 Kyoto Protocol and the 2015 Paris Agreement: the move to a more decentralized "orchestration" model; the shift to more reliance on non-binding substantive terms supported by binding procedural terms; and the shift away from legal accountability practices toward nonlegal performance assessment. Informed by the interactional understanding of law she developed with Stephen Toope, Brunnée argues that the first two shifts, perhaps surprisingly, did not reduce the scope for legal argumentation in the regime, but the third did. While she considers the who, where, and why of legal argumentation, the main thrust of her chapter is to explore what constitutes a legal argument in the first place. A key point she makes is that interpretive reasoning

characteristic of treaty law is not contingent on the formal nature of the norms; it applies to binding as well as non-binding terms of the climate treaties.

Lisbeth Zimmermann, a political scientist, uses a case study of the International Whaling Commission (IWC)'s whaling moratorium to contribute to the debates in international law and international relations theory about the distinctive qualities of legal argumentation and its distinctive effects on the conduct of global politics. She observes that in the field of environmental governance and environmental law, a similar debate exists about the quality and effects of scientific argumentation. Like international law, scholars have pointed out how "science" is used as a resource of authority and legitimacy in this field—and how scientific argumentation centrally shapes debates. Zimmermann studies the contestation of the commercial whaling moratorium as a way of exploring the different types of argumentation used in the IWC: legal, scientific, and other types of normative argument, including moral. She finds that legal and scientific argumentation (which are intertwined) dominate but that normative argumentation is surprisingly widespread. She compares the strategies of three opponents to the ban on commercial whaling (Japan, Norway, and Iceland) and concludes that different types of arguments are used by challengers for different ends and are influenced by the institutional settings in which they are deployed.

From his perch as the former Legal Counsel of the World Intellectual Property Organization (WIPO), Edward Kwakwa writes about international legal argumentation in the field of intellectual property. He looks at two processes in WIPO: the Uniform Domain Name Dispute Resolution Policy (UDRP), an alternative form of dispute settlement; and the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), an intergovernmental committee that has an explicit treaty-making or other norm-setting mandate. In the first, the legal argumentation by individuals and companies relies on strict administrative/quasi-judicial criteria in order to enhance their chance of winning cases. As a result, a body of jurisprudence has been established that facilitates greater certainty and predictability of decisions under the UDRP. In the IGC, a wider range of arguments is used, including moral, philosophical, economic, and even emotional, as well as legal. While legal argumentation is yet to result in a treaty or soft law instrument, it has shaped national and regional legislation on the protection of traditional knowledge.

International trade law benefits from a set of long-standing widely agreed rules that are subject to binding dispute settlement and enforcement in the World Trade Organization (WTO). Yet the reach of trade law has expanded to new areas of public policy and, as a result, argumentation about its content and contours occurs in multiple fora. This is the focus of Kathleen Claussen's chapter. She draws on two novel data sets of arguments growing out of recent events: first, state reactions to the Trump administration's imposition of special tariffs on steel and aluminum and on products from China; second, comments by US legislators in congressional debates during the Trump and Obama administrations. She calls the former "external trade law argumentation" and the latter "internal trade law argumentation." Both reveal that trade law argumentation appears across many settings and among diverse actors, directed at diverse audiences. However, a key difference between the two cases is the level of

generality of the argumentation. States seeking to persuade other states to change their trade measures use rather low-intensity legal arguments, wrapping legal principles in broader political rhetoric. By contrast, the deployment of trade law argumentation in domestic settings by legislators is more nuanced, typically invoking specific aspects of international trade law in service of individual policy modifications.

The final chapter in Part IV, on privileges and immunities of international organizations, is written by UN Deputy Legal Counsel Stephen Mathias and Nicolas Perez, Legal Officer in the UN Office of Legal Affairs. They make the important observation that the Office of Legal Affairs (OLA) normally seeks to present, outside the courtroom, the exact same legal argumentation that lawyers and counsel would use in a courtroom even though it generally deals only with political entities, such as Permanent Missions, Foreign Ministries, and Ministries of Justice. The recognition of privileges and immunities can be sensitive for both member states and international organizations since it sometimes gives rise, within the general population and the media, to a feeling that the normal course of justice has not been followed in a given situation. They argue that a persuasive legal argument is one that is grounded in the clear obligations of UN member states under the Charter and the 1946 Convention on the Privileges and Immunities of the United Nations. But those arguments must be presented to the right national authorities, a task central to OLA. And the United Nations' power to persuade is linked to demonstrating to those audiences that all member states need to respect its privileges and immunities in order for the United Nations to carry out its vast array of tasks.

Legal argumentation beyond courts occurs in every area of law, and we were not able to cover all of them in this book. Other topics that strike us as especially worthy of further study include investment law, the law of the sea, and the law that bears on peace processes. A study of argumentation in investment law would be illuminating for several reasons: the parties to an investment dispute are a state and non-state actor; the disputes are often resolved through arbitration, where decisions are binding only on the parties yet a substantial body of jurisprudence is building up—influencing argumentation outside of the proceedings; and the legitimacy of the entire investment law system is being questioned, prompting legal argumentation that goes beyond interpretation and application of treaty terms. The law of the sea is also ripe for this sort of analysis, in part because it is based mainly on hard treaty law (the Law of the Sea Convention and Tribunal) but also customary law, which is especially important given that the United States is not a party. Moreover, even among parties, we are witnessing intensive argumentation outside the Tribunal and arbitral proceedings, especially as regards the South China Sea. The law that bears on peace processes holds special interest because the parties typically include at least one non-state actor, and it is not clear what, if any, international law applies. Moreover, some scholars have posited the emergence of an entirely new area of law—*jus post bellum*—while others have criticized the whole ideology behind "liberal peacebuilding" as a neocolonial enterprise. Thus argumentation over what international law principles apply (or should apply) to peace processes is intertwined with fundamental questions about whether international law is hegemonic.

The concluding chapter, in Part V, identifies a number of themes that run throughout the book. Rather than review each chapter in detail, we pull the threads together in an attempt to point toward a fully developed theory of legal argumentation. In so doing, we hope to lay the foundation for a rich agenda of further research on both the practice and theory of argumentation using international law.