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BOOK REVIEW

Ian Johnstone and Steven Ratner (eds.), *Talking International Law: Legal Argumentation Outside the Courtroom*, Oxford University Press, 2021, 368pp, £80.00
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'International law is argumentative practice', writes the eminent international legal scholar Martti Koskenniemi in the *Max Planck Encyclopedia of Public International Law* – and few would disagree.[1] To him, the:

> [k]ey to persuasiveness is that the argument is recognizable as a good legal argument . . . [I]t is the consensus in the profession—the invisible college of international lawyers—that determines, at any moment, whether a particular argument is or is not persuasive.[2]

A compelling argument in this sense is one that seems both normative (i.e., based on binding norms opposable to power) and concrete (i.e., responsive to the facts of international relations).[3] These statements alone already contain many interesting elements worthy of deeper engagement.

For present purposes, what is particularly interesting about the practice of arguments in international law is the fact that few legal disputes are finally resolved by international courts or tribunals. Even so, legal arguments are pervasive in international relations. To mention just a few uses of legal arguments in global politics: such arguments are made by states in international forums, in domestic policy debates, and are also offered by non-state actors in both various domestic and international settings. Addressees of international legal arguments are also diverse. They are states, states' organs, specific interest groups, foreign diplomats, politicians, the electorate as a whole, etc. This variety of both authors and arenas of argumentative competition might be no less important to study than the legal practice before courts and tribunals.

Without a central body to authoritatively decide on a specific legal issue, unique questions arise. It is these questions that the reviewed edited volume sets out to investigate. The queries posed to the contributors were:

> What purpose does such argumentation [outside the courtroom] 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?[4]

[1]M. Koskenniemi, 'Methodology of International Law', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2014), para. 1. Similarly, see F. V. Kratochwil, *Rules, Norms, and Decisions: On the conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (1989), 238; D. Z. Cass, 'Navigating the Newstream: Recent Critical Scholarship in International Law', (1996) 65 *Nordic Journal of International Law* 341, at 359. See also I. Johnstone and S. Ratner (eds.), *Talking International Law: Legal Argumentation Outside the Courtroom* (2021), at 13.

[2]See Koskenniemi, ibid., para. 1.

[3]Ibid., paras. 1–25.

[4]See Johnstone and Ratner, *supra* note 1, at 3.

To the editors, the purpose of this inquiry is nothing less than 'to understand how international law actually operates in international affairs'.[5]

The approach taken by the editors to fashion tentative answers and test hypotheses is empirical, relying (from a logical point of view) on both abduction and induction as logical forms. Invited scholars and practitioners from a wide variety of backgrounds and interests offer explanatory arguments that identify empirical patterns and generalizations about argument and arguer behavior.

The book starts with a useful introduction, in which the editors provide an interdisciplinary overview of the current debate in international law and international relations regarding why and to what effect states make legal arguments. The succinct presentation of what compliancy theory, interpretation theory and legal theory have to say about arguments lays out where the edited volume seeks to situate itself. It is against this background of existing scholarship, as the editors point out, that the actual 'microprocess of communication using international law'[6] is understudied, and therefore worthy of careful critical attention. This is precisely what the contributions that follow seek to offer.

The edited volume groups the various contributions into five parts, ranging from more theoretical approaches to legal argumentation and their use in global politics (Part I), to peace and security (Parts II and III) and other topics (Part IV).

The final and concluding text in Part V of the edited volume helpfully ties together the various contributions and offers a summary of their main findings. As the contributions are quite diverse, ranging from very specific legal issues to findings on particular effects of arguments, this final chapter is a useful wrapping-up of the main findings. However, it neither seeks to achieve, nor achieves, a theory of non-judicial legal argumentation.[7] The chapter's tentative compilation of motives for using legal arguments offers interesting insights into the various reasons why they are used.[8] These of course, differ, depending on the nature of the venue in which the arguments are made, the audience,[9] timing and sequence of the legal argument, and also – no less important – if they are made for the purpose of avoidance of legal argument. On these themes, the various contributions give a valuable overview of many different venues, audiences, and actors who use legal arguments. In so doing, they also point to the importance of the respective criteria and limitations to legal arguments recognized by the respective interpretive community.

Regarding the effects of legal argumentation, Johnstone and Ratner bring together the observed effects. These include true persuasion, strategic effects, legitimation, assertion of authority, alteration of the normative climate, promotion of a mandate, ownership of an issue, and suppression or silencing of certain voices.[10] As the editors point out, these effects support Ian Hurd's conclusions about international law constraining behavior, enabling behavior and framing the way actors think about global issues. On the question of what makes legal arguments persuasive, they find that:

> it seems intuitive that the quality of a legal argument matters—arguments that conform with accepted parameters of legal interpretation and discourse are more likely to resonate than those that are wildly far-fetched—more research needs to be done on the precise effects of good versus plausible versus obviously specious argumentation.[11]

[5]Ibid.
[6]Ibid.
[7]Ibid., at 339.
[8]Ibid., at 342–3.
[9]Ibid., at 344.
[10]Ibid., at 347–8.
[11]Ibid., at 351.

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This is a welcome assurance for those international lawyers who take the quality of legal arguments seriously.

Overall, this is a useful book for both international law and international relations scholars. The individual contributions by leading scholars and experienced practitioners stand on their own, and they are put together in a way that offers additional insights into the study of arguments in international law. As the editors point out, the edited volume serves as a building block for future theoretical work in this area. Nevertheless, I do wish to mention some minor shortcomings of the volume, or rather, invitations for subsequent studies on the practice of international legal argument.

To begin, the book did not produce an overarching definition of *what an argument* is, as an analytical category, and more specifically, what a *legal* argument is.[12] While some contributors offered their own definitions,[13] others assumed a general understanding of these concepts, despite the difficulty to draw a clear line between legal arguments and non-legal arguments, as the editors themselves acknowledge.[14]

The question remains whether it is analytically useful and productive for future research to devote more work to establishing a workable definition. Without clarity, it seems to be difficult for an empirical approach to argument, such as the editors of this volume seek to harness, to succeed (as one American writer put it, 'you can't know that a thing is not being done well until you know what it is that is being done'[15]). When different studies consider practices that are either over- or under-inclusive with respect to a definition of argument, a supposedly empirical study glides in empty air.

One could have also wished for more representation of the international community in terms of diversity. The book focused mostly on English-language discourses, and it would have been interesting to know whether there are differences in international law argumentation in that regard. In other words: is international legal argumentation really *international*?[16]

As generally is the case with edited volumes, one sometimes wishes for more interconnectedness and engagement with other arguments in the collection. While this is done at times, it is often in passing, without substantial engagement. To take one example, the three pieces on the UN Security Council (UNSC) are all extremely rich on their own, but putting them in dialogue would have been even more elucidating. Scott P. Sheeran's insider account could have offered one possible explanation of the phenomenon that Gina Heathcote observes around preambles to UNSC resolutions in the context of transnational feminist praxis. To her, the preambles are used in subtle ways by members, to assert a specific interpretation of the feminist agenda. It would have been interesting to see to what extent they both agree with each other, specifically in light of Sheeran's finding that members of the UNSC may seek legitimacy through invocation of international law[17] but that ultimately 'what is decisive in Council discussions is not the merits of legal argument but diplomacy and obtaining the consensus of those with political power, primarily the P5'.[18] Is this dynamics at play with respect to the wording of preambles as well? Does this also explain Bruno

[12]According to Scott Brewer, an argument 'is comprised of two sets of propositions that stand in a particular dyadic relation. One set is called premises. The other set is called conclusions': See S. Brewer, 'Interactive Virtue and Vice in Systems of Arguments: A Logocratic Analysis', (2020) 28(1) *Artificial Intelligence and Law* 151. I have adopted this definition in my study of logic and the analysis of legal arguments in international law: See G. M. Lentner, 'Logic and the Analysis of Legal Arguments in Public International Law', in D. Krimphove and G. M. Lentner (eds.), *Law and Logic: Contemporary Issues* (2017), 163.

[13]See, e.g., Johnstone and Ratner, *supra* note 1, at 130, where Ian Johnstone 'employs a narrow conception of legal argumentation—namely, an argument that explicitly invokes traditional sources of law, employs the standard techniques of interpretation, and seeks to determine whether behavior is consistent with the law'.

[14]See ibid., at 16.

[15]A. A. Leff, 'Economic Analysis of Law: Some Realism About Nominalism', (1974) 60 *Virginia Law Review* 451, at 466. Thanks to Scott Brewer for pointing this out to me and for his help in editing this review.

[16]To paraphrase A. Roberts, *Is International Law International?* (2017).

[17]See Johnstone and Ratner, *supra* note 1, at 64.

[18]Ibid., at 66.

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Stagno-Ugarte's conclusions regarding the UNSC's use of non-legal aspects of arguments around international criminal accountability that 'devalue and obfuscate the facts of the crimes perpetrated'?[19]

To mention another missed opportunity in this regard: some contributors would perhaps disagree on the intrinsic value of legal arguments for the rule of law that Monica Hakimi identifies. To her, that value lies in the fact that *legal* arguments are used even in cases where open-textured norms, such as those around the *jus ad bellum*, are involved. This evidences that 'raw power is not a sufficient basis for making governance decisions'.[20] This question is unfortunately not directly addressed by any other contribution, but there is some sense that others would disagree. The reality of cynical uses and abuses of legal arguments[21] is just one challenge to her optimistic take. The example of Foreign Secretary Jack Straw using *legal* arguments to reject Michael Wood's legal advice, in which he considered the use of force against Iraq illegal, comes to mind.[22] Also, Ingo Venzke raises the 'malleability' of legal arguments, but points to the legitimacy effects of the invocation to act 'legally'. Is it then just the claim to legitimacy that motivates actors to fashion legal arguments? And, if it is, does that make legal arguments valuable as such? This would have been worthy to consider more fully – surely few would suggest to do away with international legal arguments entirely.

A larger point of critique of the volume is the lack of engagement with legal knowledge and its production. As Alexander Somek shows, legal argumentation is constituted by legal knowledge.[23] How this knowledge is constructed, contested, contorted, and confounded is as important as the practice of arguments in reference to it. Here, contributions could have built on Anthea Roberts' book on international law not being that *international*[24] and focused on the production of legal knowledge in various fields as the (shared?) background for their argumentation.[25]

Key here would be a discussion of the practice of legal arguments in academia. There is now a strong emphasis on looking into the marginalization and silencing of voices outside the mainstream of US and EU dominated international law discourses conducted mostly in English.[26] What that means for the arguments and their effects outside the courtroom would have been worth looking at as well; this, specifically, because the editors rightly reference the concept of an interpretive community that is guarding the boundaries of arguments in international law. Questions could have inquired into which arguments persuade that community and why.

Future research could also approach the questions of legal arguments outside the courtroom, from a law and anthropology perspective. To note one example, a recent book by ethnologist and anthropologist Hermann Amborn, studying existing complex societies without state or hegemony, demonstrates the importance of rhetoric and argument in 'communities where law has no recourse to coercion, no authority possesses a monopoly on violence, and legitimacy is granted to systems of rules elaborated by members themselves'.[27] This very much lends itself to a closer analysis, as those specific features are also evident in the horizontal system of international relations.

[19]Ibid., at 177.

[20]Ibid., at 47.

[21]See B. Baade et al. (eds.), *Cynical International Law?: Abuse and Circumvention in Public International and European Law* (2021).

[22]T. Aalberts and L. J. M. Boer, 'Entering the Invisible College: Defeating Lawyers on Their Own Turf', (2017) 87(1) *British Yearbook of International Law* 177.

[23]A. Somek, *Rechtliches Wissen* (2006), 19–23.

[24]See Roberts, *supra* note 16.

[25]On the phenomenon of the production of ignorance in international law see, e.g., G. M. Lentner, 'Law, Language, and Power: English and the Production of Ignorance in International Law', (2019) 8 *International Journal of Language & Law* 50.

[26]O. Ammann, 'Language Bias in International Legal Scholarship: Symptoms, Explanations, Implications and Remedies', (2022) 33(3) *European Journal of International Law* 821; Lentner, ibid.

[27]H. Amborn, *Law as Refuge of Anarchy. Societies Without Hegemony Or State* (2019), 4.

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In conclusion, this book is without a doubt an indispensable resource for those interested in the study of the argumentative practice of international law. The rich and detailed accounts of a wide variety of disciplines show the many facets of legal argumentation, their purpose, their effects and their utility. Besides its academic value, the edited volume offers an accessible invitation to reflect on the practice of arguments outside the courtroom, including to those who engage with it in practice every day. Overall, this is an impressive collection, that is hopefully just the beginning of a continuing engagement with legal argumentation in international relations.

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