International Law and Argumentation: Navigating Constraints and Seeking New Orientations

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Abstract: It is widely recognized in legal scholarship that international law functions as an argumentation practice, but its purpose remains debated. Some argue it legitimizes legal facts, while others believe it persuades actors to adopt specific positions. I align with Harald Wohlrapp's argumentation theory, which focuses on acquiring new orientations. I will outline why Wohlrapp's theory suits international law by examining three elements: prioritizing validity over mere assent, introducing "midrange universality" that balances community perspectives with a universal outlook, and introducing "framing" to responsibly integrate diverse cultural and legal perspectives, including those from the Third World Approaches to International Law (TWAIL).

Resume: Il est largement reconnu dans le savoir juridique que le droit international fonctionne comme une pratique argumentative, mais sa finalité reste controversée. Certains soutiennent qu'il légitime les faits juridiques, tandis que d'autres estiment qu'il persuade les acteurs d'adopter des positions spécifiques. Je partage la théorie d'argumentation de Harald Wohlrapp, qui met l'accent sur l'acquisition de nouvelles orientations. Je décrirai pourquoi la théorie de Wohlrapp convient au droit international en examinant trois éléments : privilégier la validité au simple assentiment ; introduire une « universalité intermédiaire » qui équilibre les perspectives communautaires avec une perspective universelle ; et introduire un « cadrage » pour intégrer de manière responsable diverses perspectives culturelles et juridiques, y compris celles des Third World Approaches to International Law (TWAIL).

Keywords: framing, Harald Wohlrapp, international human rights law, international law, legal argumentation, mid-range universality, orientation, Third World Approaches to International Law (TWAIL)

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1. Introduction

In the opening sentence of his article, *Methodology of International Law*, published in the esteemed, *Max Planck Encyclopedia of Public International Law (MPEPIL)*, renowned international legal scholar Martti Koskenniemi (2007) asserts that "International law is an argumentative practice" (para. 1). This assertion is largely uncontroversial and widely accepted among argumentation and legal scholars. Nonetheless, an ongoing debate remains to deepen our understanding of how international law functions as an argumentative practice, and which argumentation framework is best suited for examining its complexities and gauging its effectiveness. A key aspect of this debate involves questioning international law's fundamental purpose and function. One viewpoint argues that international law seeks to persuade others to adopt a particular position on a specific issue. Another perspective suggests that international law involves the process of legalizing facts within a robust, rule-based framework. While both perspectives offer valuable insights, I propose an alternative perspective that aligns with German argumentation scholar Harald Wohlrapp, who developed an argumentation framework emphasizing the significance of acquiring or establishing new orientations. This alternative perspective offers a fresh and intriguing approach to understanding international law. It is also essential to recognize that international law is influenced by constraints imposed by interpretive communities and broader cultural contexts (Venzke 2016, p. 4). Wohlrapp's framework is particularly applicable to international law because it effectively navigates these constraints. In this paper, I will explain why I believe Wohlrapp's argumentation framework is the most suitable for international law by examining three key elements of his work. Firstly, Wohlrapp prioritizes validity over mere agreement. Secondly, he introduces an important element that can be used to achieve a middle ground in the international legal arena, a concept he calls "midrange universality". This approach accommodates specific community perspectives while maintaining a universal outlook. Finally, Wohlrapp utilizes the concept of "framing" in argumentation, which I argue is a method for responsibly incorporating diverse cultural and international legal perspectives,

including those found in the Third World Approaches to International Law (TWAIL).

In this paper, I will start by defining international law and offering a brief overview of its functions as outlined by the United Nations, which extensively engages with international law. Additionally, I will address some of the complexities inherent in international law. Next, I will explore two perspectives on the purpose and function of international law by focusing on the work of two prominent legal scholars, Koskenniemi and H.L.A. Hart. It is important to recognize that this discussion exists within a diverse space, encompassing various scholarly viewpoints. The tensions between opposing sides of this issue, as framed by Koskenniemi and Hart, are just a part of this larger academic discourse. While there are many more legal scholars whose work could be examined, I will limit my discussion to Koskenniemi and Hart due to the constraints of this paper. Following this, I will present Wohlrapp's argumentation framework. Using a case study of the United Nations Framework Convention on Climate Change (UNFCCC), I will demonstrate why Wohlrapp's framework is best suited to understand international law's complexities and incorporate diverse cultural and international legal perspectives, including TWAIL.

2. International Law

The United Nations (2024c) is "an international organization founded in 1945 after World War II by 51 countries" (para. 1). "Its mission is to maintain international peace and security, develop friendly relations among nations, and promote social progress, improved living standards, and human rights" (ibid.). As a platform for creating, debating, and enforcing international law, this organization will serve as the lens through which I will discuss the nature and operation of international law in this paper. The United Nations emphasizes that one of its greatest achievements is the development of a framework of international law, which is essential for "promoting economic and social development, as well as for advancing international peace and security" (c, para. 1). The establishment of international law is crucial; without it, there would be disorder among nation-states and a lack of regulations governing their interactions,

leading to chaos. This is why international law is considered the "primary concern of the United Nations" (e, para. 1). The significance of international law is highlighted in the Preamble of the United Nations Charter, which directs the conduct of the 193 member nation-states that are currently part of this organization. The Preamble states that one of the objectives of the United Nations is "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained" (2024f, para. 1). There is undoubtedly a close relationship between the United Nations and international law, underscoring the importance that the nearly 200 member nation-states place on effectively navigating and understanding international law.

International law encompasses various definitions and areas of governance. According to the United Nations, international law "defines the legal responsibilities of states in their conduct with each other and their treatment of individuals within states" (f, para. 12). Essentially, international law regulates interactions between nation-states and outlines how they should treat the populations within their borders. It includes a wide range of topics, such as "human rights, disarmament, transnational organized crime, refugees, migration, statelessness, the treatment of prisoners, the use of force, the conduct of war, environmental issues, sustainable development, the oceans, outer space, global communications, and world trade" (a, para. 13). International law must address not only the relationships among nation-states and individuals but also those involving international organizations, non-governmental organizations (NGOs), and multinational corporations.

International law operates through various mechanisms, including international courts and tribunals, with the International Court of Justice (ICJ) serving as "the principal judicial organ of the United Nations" (f, para. 4). The ICJ's role is to "settle, in accordance with international law, legal disputes submitted by States" and to "give advisory opinions on legal questions referred to it by authorized UN organs and specialized agencies" (f, para. 3). Furthermore, international law functions through multilateral treaties and the United Nations Security Council. The Security Council has the authority to "approve peacekeeping missions, impose sanctions, or authorize the use of force when there is a threat to international peace and security,

provided it deems such actions necessary" (United Nations, 2024f, para. 3). In this paper, I will examine the UNFCCC, an international treaty that is defined as "an agreement concluded between states in written form and governed by international law" (United Nations Treaty Collections 2024, para. 33). Treaties, along with other mentioned mechanisms, play a vital role in maintaining order, peace, and cooperation in the global arena.

One of the most effective ways to demonstrate the complexities of international law is to highlight its differences from a more established and organized form of law, such as domestic law. Malcolm Shaw, an international legal scholar and author of the textbook, *International Law*, which is widely used in law schools and by lawyers around the world, illustrates these complexities. He does so by examining four measures that exist and operate in some form within domestic law and are integral to domestic legal theory.

The first measure he uses involves three core legal entities: a legislature, a judiciary, and an executive. According to Shaw (2017), these entities consist of "the existence of a recognized body to legislate or create laws, a hierarchy of courts with compulsory jurisdiction to settle disputes over such laws, and an accepted system of enforcing those laws" (p. 2). In simpler terms, domestic law is comprised of a legislature that creates laws, a judiciary that resolves disputes related to those laws, and an executive that enforces the laws and manages those who violate them. Shaw asserts that without these three entities, "one cannot talk about legal order" (p. 2). In contrast, international law lacks any of these essential entities. First, there is no legislature in international law. While the General Assembly of the United Nations, which includes all member nation-states, often makes recommendations and agrees on resolutions, it cannot create binding laws. Second, international law does not have a judiciary or a system of courts to resolve disputes. The ICJ exists, but it can only decide cases when both parties agree, and it has no power to ensure compliance with its decisions (Shaw 2017, p. 2). Third, international law does not have an executive entity. Shaw points out that the Security Council of the United Nations was intended to fulfill this role but has been "effectively constrained by the veto power of the five permanent members: the USA, the former USSR (now the Russian Federation), China, France, and the United Kingdom" (pp. 2-3).

The second measure that Shaw discusses is the role of force within international law. He clarifies that "there is no unified system of sanctions in international law in the sense that there is in municipal law, but there are circumstances in which the use of force is regarded as justified and legal" (p. 3). Within the framework of the United Nations, these sanctions can only be imposed by the Security Council when there is a determination that there is "a threat to the peace, a breach of the peace, or an act of aggression" (p. 3). Additionally, these sanctions can be economic, military, or a combination of both (p. 3). The use of force in the United Nations is uncommon because application of force requires agreement among the five permanent members of the Security Council. Before any of these members consent to the use of force in a specific situation, their national interests are taken into account, which significantly influences their votes. In addition to sanctions imposed by international institutions like the United Nations, nation-states also reserve the right to take military action in self-defence. Shaw (2017) notes, "this procedure to resort to force to defend certain rights is characteristic of primitive systems of law with blood-feuds, but in the domestic legal order, such procedures and methods are now within the exclusive control of the established authority" (p. 4). Nation-states determine whether to engage in self-defence and the extent of their actions. Unlike in domestic law, there is no governing body that assesses whether an act of self-defence was justified or whether the measures taken were reasonable.

Shaw's (2017) third measure is what he refers to as the "character of the international legal order" or the "international system" (p. 4). He explains that, while the legal structure in all but the most primitive societies is hierarchical with vertical authority, the international system is horizontal. It consists of over 190 independent nation-states that are all considered equal in legal theory, as they all possess the characteristics of sovereignty and recognize no higher authority over them (Shaw 2017, pp. 4-5). In the domestic legal sphere, the law stands above the people, whereas in the international legal sphere, laws exist between nation-states. Furthermore, individuals governed by domestic law only have the choice to obey or disobey the law since they cannot create it themselves. In contrast, it is the

nation-states that create international laws and determine whether to comply with them.

International law primarily operates through international agreements or treaties, which are reviewed and signed by multiple nation-states. These treaties establish rules that are binding on the signatories, along with customary rules that emerge from nation- state practices recognized by the international community as standards of conduct that must be followed. While it may seem that international law comprises a series of rules from which nation-states can selectively choose, Shaw argues that, contrary to popular belief, nation-states do comply with international law. Instances of violations are relatively rare (Shaw 2017, p. 5). However, when violations do occur, they receive significant attention and "strike at the heart of the system, the creation and preservation of international peace and justice" (Shaw 2017, p. 5). Shaw (2017) further assures us that "just as incidents of murder, robbery, and rape occur within national legal systems without undermining their integrity, similar assaults on international legal rules highlight the system's vulnerabilities without diminishing their validity or necessity" (p. 5). There is a lot to unpack here. First, while it may seem that the international legal system allows nation-states to act however they choose, this is not as common as one might think. In reality, nation-states often adhere to agreed upon treaties. This perception may arise because when nation-states violate these treaties, their actions receive significant media coverage and public commentary from various perspectives. This creates a narrative that can undermine the legitimacy of the international legal system as a whole. Second, just as violations occur within domestic legal systems, they also happen in international law. However, these violations do not dismantle the entire system; rather, they illustrate instances of nation-states or individuals acting out of self-interest. This raises the question of what motivates nation-states to generally follow the rules of international law. According to Shaw (2017), "states feel this necessity because it imports an element of stability and predictability in the situation" (p. 5). Moreover, when disputes arise, having a framework in place for resolution is beneficial. Within this framework, parties can communicate using a common language. As Shaw (2017) notes, "when the antagonists dispute the understanding of a particular rule and adopt opposing stands regarding its

implementation, they are at least on the same wavelength and communicate by means of the same phrases" (p. 5). Such a framework exists in domestic law, and to a lesser and more fluid extent, it also exists in international law.

The fourth and final measure that Shaw discusses is the role of politics. He states, "within developed societies, a distinction is made between the formulation of policy and the method of its enforcement". He provides examples from the United Kingdom, noting that "Parliament legislates while the courts adjudicate", and points out that a similar division exists between Congress and the court system in the United States (Shaw 2017, p.8). This separation of powers is intended to ensure that no level of government or official body holds too much authority. Despite these divisions and the commitment to maintaining independent legal institutions in domestic law, the influence of politics is still present. However, this influence is often subtle, as any "interference with the judicial process would be regarded as an attack upon the basic principles and hotly contested" (Shaw 2017, p.9). In contrast, "politics is much closer to the heart" of international law (Shaw 2017, p.9). First, it is challenging to establish a clear division, as seen in domestic law, because nation-states are both the creators of laws and the entities that interpret and enforce them. Second, the political dynamics on the international stage are significantly more complex. As he further explains, "power politics emphasizes competition, conflict, and supremacy, with the core focus being the struggle for survival and influence" (Shaw 2017, p.9). To counteract the effects of each nation-state's own politics and self-interests, international law, endeavors to provide a framework of guiding principles and ideals for states to aspire to. This framework represents a set of values that states should strive towards, aiming to balance their own political and economic interests with those of the global community.

The text above outlines the overarching purpose of international law according to the United Nations, defines international law as per the United Nations, explains how international law generally operates, and highlights some of the complexities of international law when compared to domestic law, as discussed by Shaw. This section provides the essential information needed to responsibly transition

to the next section, which discusses the purpose and function of international law according to Koskenniemi and Hart in greater depth.

3. The Purpose and Function of International Law

As mentioned earlier, there are two main perspectives in discussions about the true purpose and function of international law. One perspective argues that the core purpose of international law is persuasion, while the other believes that its purpose is to legitimize facts and operate within a robust system of rules. In this section, in addition to presenting these two positions, I will also offer criticisms suggesting that an alternative understanding of the purpose and function of international law should be considered.

Koskenniemi (2007) argues that international law centers on persuading target audiences, "such as courts, colleagues, politicians, and readers of legal texts, about the legal correctness—encompassing lawfulness, legitimacy, justice, permissibility, validity, and more—of the position one defends" (para 1). According to him, the essence of international law lies in convincing others to adopt the perspective one advocates. When a nation-state supports or defends a specific decision, its primary goal is to persuade other nation-states and stakeholders to adopt that decision or viewpoint. To achieve this, international legal agents such as nation-states have various themes at their disposal, such as lawfulness and justice, which Koskenniemi (2007) collectively refers to as "legal correctness" (para 1). Koskenniemi discusses his perspective on what constitutes a good legal argument. He starts by explaining what a good legal argument is not. According to him, it is not simply "a strong moral point, a plausible political position, or a convincing sociological description of something" (Koskenniemi 2007, para. 1). For an argument to be considered persuasive, it must be recognized by those within the international law profession, which he refers to as the "invisible college of international lawyers" (Koskenniemi 2007, para. 1). This does not imply that individuals outside of the international law profession cannot find a particular argument persuasive; however, the consensus of this invisible college carries the most authority regarding the persuasiveness of a given argument. This is because those with expertise in international law presumably possess the most knowledge about how a particular argument relates to that context. They have a

background understanding of how the international legal system functions and can evaluate how feasible the elements of a specific argument would be when applied or enforced. Additionally, Koskenniemi (2007) claims that for an argument to be persuasive, it must be both normative and concrete (para 1). I will explain what he means by normative and concrete from his perspective below.

Koskenniemi (2007) explains that a normative argument does not simply describe what nation-states do; instead, it imposes requirements and obligations on them, sometimes contrary to their preferences (para 2). These arguments emphasize principles and standards that can challenge and limit the actions of nation-states. In this context, the more a normative argument compels a nation-state to act in a way it resists, the more persuasive and influential the argument becomes (Koskenniemi 2007, para. 2). A normative argument in an international legal context establishes expectations or standards for how target audiences, such as nation-states, should act, suggesting what they should or should not do based on specific principles. One of the most important principles of international law that normative arguments focus on is sovereignty (Koskenniemi 2007, para. 3). Sovereignty refers to the legitimate and supreme authority that nation-states possess to govern themselves. Normative arguments centred on this cornerstone of international law challenge the power and authority of international legal agents, such as nation-states, to act in specific ways. They assert that if legitimate power and authority behave as they should, the appropriate outcomes will naturally follow.

Normative arguments can be made through concepts of justice and various sources. When appealing to a nation-state to act in a particular manner, one can reference general ideas and principles often closely associated with international law and the international legal order. According to Koskenniemi (2007), these ideas include justice, divine will, the international community, and human rights. Arguments that incorporate these themes can effectively challenge the sovereignty of a nation-state, in particular, that is behaving improperly (para 4). Because these themes are high-level and generally non-controversial, they are often not contested. They provide a guiding framework for what the nation-state should strive to return to and how it ought to conduct itself. Koskenniemi (2007) argues that normative arguments based on justice provide a "legal blueprint for

change" (para 4). He notes that these arguments have been prevalent throughout history and remain so today, with contemporary versions focusing on democracy, the right to international protection, and security (Koskenniemi 2007, para. 4). One reason these normative arguments hold persuasive power is that they draw on themes situated outside the realm of the target audience, such as a nation-state (Koskenniemi 2007 para. 4). By doing this, they reveal a stark contrast with the audience's actions, such as nation-states, and compel a return to these principles.

Normative arguments aimed at nation-states through concepts of justice, such as democracy and human rights, can sometimes be too abstract to effectively persuade the target audience to change their behaviour. In such instances, Koskenniemi introduces the idea of normative arguments grounded in concrete sources. These sources, which I have discussed previously, serve as mechanisms through which international law operates. They include treaties and multinational agreements, which can provide a clearer framework for accountability and action consistent with the referenced principles of justice. Included in these treaties and multinational agreements is typically a binding element that encourages international legal agents, such as nation-states, to comply with their terms, thereby enhancing their persuasive nature. Even when a treaty or agreement lacks a binding feature, it often incorporates what Koskenniemi (2007) calls "non-consensual principles of justice," (para 8) such as good faith, equity, and reasonableness. As a result, these international legal agents, such as nation-states, can be compelled to adhere to these principles outlined in official documents and remain active through the sources to which they belong.

Another aspect that can enhance the persuasiveness of an argument in an international legal context is its concreteness. This concreteness refers to how a particular argument is responsive to the facts of international life (Koskenniemi 2007, para. 14). In this context, Koskenniemi does not elaborate much on how this concreteness functions within the international legal arena. Instead, one must assume that this aspect balances the argument, as the normative aspect is often too abstract. Having a concrete component helps the target audience form a tangible understanding of what they should accept regarding a particular argument. Additionally, incorporating a

concrete component allows for the inclusion of real facts present when an argument is being made. These facts help structure an argument and, again, make it more concrete, increasing its persuasiveness.

While I agree with many aspects of Koskenniemi's approach, which suggests that international law aims to persuade the target audience to behave in certain ways, I have some disagreements. Most importantly, I take issue with the normative dimension of this theory. It seeks to persuade the target audience, such as nation-states, by incorporating significant principles and themes in international law, such as justice and human rights. However, we must ask: From what perspective are we considering these principles and themes? Which interpretations of justice and human rights are we using? Although Koskenniemi does not provide a solution to this dilemma, he does highlight it. He writes, "Whose justice, whose rights?" (Koskenniemi 2007, para. 6). With the 193 nation-states that are part of the United Nations today, each has a distinctive history and traditions that influence their interpretations of principles and themes of justice and human rights. If a particular interpretation of these principles and themes resonates with some international legal agents such as nation-states, it might be very persuasive; to others, it might be entirely unconvincing. Later in this paper, I will discuss TWAIL, which offers a completely different interpretation of justice and human rights. Therefore, using these principles or themes without clearly defining them and reaching a consensus on those definitions will not effectively persuade a particular international legal agent, such as a nation-state, to act or refrain from acting in a certain way. In fact, having these varying interpretations of these principles and themes might widen the gap between the arguing agents and the receiving agents. Furthermore, viewing international law as merely a tool for persuasion weakens the concept of international legal obligations. International legal norms are designed to create order and predictability in international relations. If these norms are seen as dependent on subjective persuasion, it diminishes the seriousness with which nation-states fulfill their commitments and could destabilize the international legal framework.

In his presentation of his views on the true purpose and function of law, Hart does not focus solely on international law, unlike

Koskenniemi. However, I believe that Hart's emphasis on law legitimizing facts and operating within a robust, rule-based system is relevant for exploring the true purpose and function of international law. In his much-celebrated book, *The Concept of Law*, Hart breaks down his work into three sections. The first section examines how much of law we can understand through what he calls the "gunman's situation" (Hart 1951, p. 7). In this model, Hart challenges the previously accepted notion that laws are merely commands. He critiques the concept created by another legal scholar, John Austin, by offering a hypothetical scenario involving a gunman to illustrate the nature of legal authority and the relationship between law and coercion. In this analogy, the gunman represents a figure who uses coercion to enforce compliance, and the fear of punishment compels individuals to follow the gunman's orders (Hart 1951, p. 19). However, Hart argues that a legal system is more complex than this simple situation suggests. It involves not only coercion but also the acceptance of rules and norms by society (Hart 1951, p. 55). Essentially, while the gunman's situation demonstrates how coercion can lead to obedience, Hart (1951) emphasizes that legitimate law functions based on the shared acceptance of rules and the idea of authority, rather than solely on fear of punishment (p. 100). This distinction highlights the importance of social practices and the legitimacy of legal institutions in maintaining order and regulating behavior within a society. In the second section of his book, Hart discusses what legal rules are and the extent to which law is concerned with these rules. The third and final section of Hart's work explores the relationship between law, morality, and justice. Again, although these three sections do not specifically address international law, they are certainly applicable and helpful in exploring the true purpose and function of this area of law.

At the core of his work, Hart presents the argument that law is fundamentally about rules and the management of these rules within a robust rule-based system. Laws cannot simply be commands, as an examination of existing laws reveals a wide range that do not fit this definition. For instance, laws found in international treaties and multinational agreements demonstrate that the law grants certain rights to specific agents or groups, or mandates how particular nation-states should behave in certain contexts. Another critique that Hart presents

against Austin's perspective that laws are merely commands is that it does not explain how, in modern representative systems, those who create the rules feel bound by them as well. A helpful way to understand the law is by comparing it to the rules in a sports competition. These rules not only guide players on what actions to perform or avoid, but they also provide guidance to officials like umpires and scorekeepers (Massachusetts Institute of Technology 2012, p.1). Moreover, players feel a sense of obligation to adhere to the rules (Massachusetts Institute of Technology 2012, p.1). This perspective suggests that the rules themselves "provide a reason to act, rather than merely instilling a fear of punishment, as suggested by the command theory" (Massachusetts Institute of Technology 2012, p.1). Hart refers to this viewpoint, in which the existence of a rule creates an obligation for action, as the "internal perspective" of the law (Hart 1961, p.73). This is completely understandable in the context of international law. As mentioned earlier, one of the complexities of international law is that nation-states must not only abide by the legislation established by the United Nations but also play a role in creating that legislation. International treaties and multinational agreements establish laws, which are rules created during negotiations among the involved parties. These rules are then adhered to by the signing nation-states and other actors in these treaties and agreements. International treaties and multinational agreements operate within the United Nations, which functions as a rules-based system. Furthermore, these treaties and agreements come about and continue to exist because the nation-states, in particular, feel that they have an obligation to act on particular issue, like climate control.

Hart divides rules into two categories: primary rules and secondary rules. According to Hart, primary rules "either forbid or require certain actions and establish duties or obligations" (Massachusetts Institute of Technology 2012, p. 1). For a nation-state, a primary rule creates an obligation to act in a specific way. When "we think of actions that are against the law or required by the law", we are generally referring to primary rules (Massachusetts Institute of Technology 2012, p. 1). Secondary rules on the other hand, "set up the procedures through which primary rules can be introduced, modified, or enforce" (Massachusetts Institute of Technology, 2012, p. 1). Secondary rules can be thought of as

"rules about the rules" (Hart 1961 p.76). When analyzing the necessity for secondary rules, Hart "imagines a simple society, with only primary rules, but concludes that such a society would face a number of challenges: because there would be no systematic method of rule creation, there would be uncertainty about what the rules actually are; the system would be very static, since any changes in the rules would have to occur organically; finally, without a defined adjudication method, inefficiencies would arise from disputes over whether a rule was actually broken" (Massachusetts Institute of Technology 2012, p. 2). In the context of international law, we can use nation-states as examples to distinguish between primary and secondary rules. Primary rules are the obligations that nation-states must follow, outlining what they can and cannot do. For instance, under Article 2 (4) of the United Nations Charter, nation-states are prohibited from "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations" (United Nations 2024d, para. B). Essentially, this means that nation-states cannot threaten or use force against another nation-state unless it is permitted under the United Nations' mandate. On the other hand, secondary rules serve as a system of checks against primary rules. The most significant document for the United Nations regarding international law is its Charter. If a group of nation-states signs an international treaty or a multinational agreement related to climate change, the articles within that treaty would represent the primary rules. However, the United Nations Charter would function as the secondary rules, providing guidance on how those primary rules in the climate change treaty are formulated and what procedures are to be followed in the event of a dispute over a particular rule. All of these rules exist and operate within the United Nations system, which serves as the backdrop for their implementation. The United Nations is the arena where these rules come to life and are put into action.

What is the relationship between these rules and the legitimization of legal facts? When discussing the legitimization of legal facts in the international legal arena, it is important to consider how these facts correspond to both primary and secondary rules within the United Nations system. The acceptability of these facts is largely dependent on their alignment with established rules. To claim that

these facts are lawful means recognizing their compliance with specific rules. According to Hart (1951), a rule gains legitimacy through its recognition and acceptance within a legal system, such as that of the United Nations (p. 100). Consequently, if a rule is viewed as legitimate, any fact associated with that rule will also be considered legitimate. Essentially, legitimizing legal facts involves confirming that they are supported by an established rule. This interdependence between facts and rules serves as the foundation for assessing the validity of various legal claims in an international context. Understanding this relationship is crucial for navigating the complexities of international law and determining the legality of actions and events on the global stage.

Similar to Koskenniemi's perspective, I find several aspects of Hart's approach to law, particularly regarding rules and their relationship with the legislation of facts, compelling. However, there are also aspects with which I disagree. First, similar to my criticism of Koskenniemi's position, I question how these rules are perceived by the various legal agents who must operate within their bounds. For example, in the context of nation-states, some rules may be regarded as enforceable while others may be seen as burdensome, depending on the perspectives of those interpreting the rules, as well as political considerations, historical contexts, and power dynamics. Next, an approach that relies too heavily on rules and a rigid system like the United Nations may hinder adaptability to the evolving realities of international law. Given the frequent changes in global dynamics, this rigidity can limit our ability to address new challenges. International law is not static; it continuously evolves in response to shifts in global politics, economic circumstances, and societal values. As a result, law must be developed or reinterpreted, necessitating the regular replacement and updating of rules to ensure that the legitimization of facts remains accurate. Finally, viewing law as merely a set of rules presents an unrealistic perspective on adherence to international law. It suggests that nation-states will comply with legal frameworks simply because the facts have been legalized. In practice, however, compliance with international law often entails a complex interplay of strategic interests, domestic politics, and international pressure.

I have unpacked the discussion about whether international law's true purpose and function is to persuade or to legislate facts and operate within a robust system of rules and I have explored the perspectives of international legal scholars Koskenniemi and Hart. I also provided some feedback on why their viewpoints, while offering valuable insights, do not fully capture the true purpose and function of international law. It is now time to introduce and discuss Wohlrapp's position and explore what how it best contributes to the field of international law.

4. Harald Wohlrapp's Argumentation Framework

Drawing on his book, *The Concept of Argument: A Philosophical Approach*, Wohlrapp (2016) explains that the purpose of argumentation is to gain and establish orientations (p. 1). Wohlrapp (2016) elaborates further, stating that argumentation "aims to maintain and improve these orientations" (p. 1). He emphasizes that when we find ourselves lacking orientation, we strive to fill that gap. If existing knowledge is insufficient, we actively seek new understanding. To establish reliable new orientation, engaging in argumentation is essential. Orientation refers to how we perceive and comprehend the world around us. It profoundly influences how we interact with and respond to our environment, which in turn impacts our choices, actions, and overall behavior. When we face an unfamiliar environment or situation—where our current orientation does not allow us to understand it—we seek knowledge to better acclimate ourselves. If such knowledge is not available, we pursue credible new orientation through argumentation. Since it is impossible for us to be familiar with every possible environment or situation, and we cannot have unlimited information to help us navigate the unfamiliar, argumentation becomes crucial for enhancing our understanding of the world. Arguments play a vital role as they provide pathways to gain new and reliable orientation, helping us feel more at ease and potentially more successful in our surroundings.

Wohlrapp expresses concern about the concept of *endoxa.* He argues that argumentation should focus on validating theses that have not yet become accepted knowledge (Venzke 2016, p.8). He emphasizes that knowledge is continually re-enacted and can lose its status

over time, allowing new opinions to evolve into knowledge. Wohlrapp identifies two primary ways of acquiring knowledge: through teaching and research (Venzke 2016, p.8). He notes that teaching is distinct from argumentation since it operates within an established framework of knowledge. In contrast, research lacks this established orientation; its goal is to "improve, complete, and correct" existing knowledge (Wohlrapp 2014, p.55). To understand how knowledge acquisition is linked to orientation, Wohlrapp presents two theories. The first is the epistemic theory, which pertains to orientations that have proven valid in the past (Venzke 2016, p.8). This is knowledge that has already been acknowledged, and therefore, further argument is unnecessary. The second, the thetic theory, "addresses areas where no solid orientation exists—this is the space between opinion (which is arbitrary) and knowledge (which is true)" (Venzke 2016, p.8). Another vital aspect of Wohlrapp's (2014) argument is that argumentation is only possible when not everything is "questionable or controversial" (p. 1) during the process. He shares that the ultimate goal of argumentation is to "assess the validity of theses" (Venzke 2016, p. 8). These validities are referred to as "new orientations" (Venzke, 2016, p. 8). Theses are evaluated through critical dialogue, which he describes as "thinking something through" (Wohlrapp, 2014, p. 87). From this critical dialogue, three main structures of thetic speech emerge: asserting, justifying, and criticizing (Venzke, 2016, p. 9). Asserting involves presenting a statement intended to function as a new orientation (Wohlrapp 2014, p. 134). Justifying comprises any speech that supports or reinforces these assertions (Wohlrapp, 2014, p.143). Finally, criticizing focuses on the question: does the justification of the assertions hold (Wohlrapp 2014, p. 153)?

Wohlrapp makes a clear distinction between the concepts of validity and assent. He defines validity as "the quality of a conclusion, acknowledged in the forum, of conveying and/or consolidating, as the result of an objection-free justification, insights into a domain in question and thus suitable as a new orientation for action in this domain" (Wohlrapp 2014, p. 249). Rather than merely assessing whether individuals agree with a thesis (assent), his approach highlights the significance of insightful reasoning. Wohlrapp (2014) introduces the term "objection-free attainability," which defines the essential connection between various theses and the broader body of

knowledge (p. 88). This concept underscores the belief that rational deliberation can justify a thesis. For a thesis to be considered valid, it must not only be logically sound but also withstand scrutiny within the discourse of knowledge. Furthermore, Wohlrapp explains that an argument achieves validity when it no longer faces objections in an open forum of debate (Wohlrapp 2014, p.270). This open forum serves as a metaphorical marketplace where diverse arguments are presented, evaluated, and discussed, reflecting the current state of argumentation. It creates an environment where participants can share their perspectives and counterarguments. Wohlrapp stresses that this open forum does not operate autonomously; it requires active participation from "agents of the open forum" (Venzke, 2016, p. 11). These agents play a crucial role in the argumentation process, engaging with one another, challenging ideas, and contributing to the dynamic exchange of thoughts. Through this interactive mechanism, the marketplace of arguments can evolve, leading to a deeper understanding and potential consensus among participants.

In his discussion of validity, Wohlrapp introduces the concept of mid-range universality. He defines it as a position that lies between local validity, "which is specific to those who have examined and understood a thesis, and universal validity, which is assumed to apply to all human beings in some way" (Wohlrapp 2014, p. 270). This concept serves as a middle ground between two extremes of validity. On one hand, there is local validity, which pertains specifically to individuals or groups who have engaged with and comprehended a particular thesis or argument. On the other hand, there is universal validity, which suggests that a certain principle or assertion holds true for all human beings, irrespective of their context or understanding. Wohlrapp's mid-range universality attempts to bridge these two notions by acknowledging that while some ideas may not be universally applicable, they can still hold significance and relevance for broader groups beyond the local audience. This perspective invites a more nuanced understanding of how ideas can be validated, recognizing the importance of both localized knowledge and more expansive claims that seek to resonate with a wider human experience.

One defining aspect of Wohlrapp's argumentation theory is his emphasis on subjectivity and frames. Katharina Stevens (2016) explains that Wohlrapp's primary goal in argumentation "is to subject

our subjective interpretations of new theory to intersubjective scrutiny" (p. 2). In other words, we share our new theories to be assessed through the exchange of thoughts and feelings between individuals. While no two people share the exact same perspective on any matter, their perspectives can be similar. According to Wohlrapp's argumentation theory, this implies that no two individuals have the same orientations. When people engage in argumentation, their orientations intersect, highlighting the differences between them. From this intersection, they can work towards developing a new orientation that transcends those differences. However, Wohlrapp cautions that subjectivity and intersubjectivity can lead to complications. Therefore, it is important to have knowledge of theoretical tools to help navigate the influence of these two forces.

One of the most significant concepts Wohlrapp discusses in his theory, which helps align subjective and intersubjective forces, is frames. To clarify what frames are and how they function, Wohlrapp refers to the rabbit-duck illusion, which is famously associated with the Austrian-British philosopher Ludwig Wittgenstein. Most people recognize this illusion as depicting both a rabbit and a duck. However, to understand the concept of frames, as Stevens (2016) explains, imagine that when you look at this illusion, you only see a rabbit (p. 2). According to Wohlrapp, this means that you perceive the illusion solely within the frame of a rabbit, without realizing that there is also the frame of a duck. Wohlrapp (2014) refers to frames that people are unaware of as latent frames (p. 183). In this case, you see the frame of a rabbit, while your latent frame (and ignorance) pertains to that of a duck. People do not have to remain unaware forever. A latent frame can become one that a person recognizes. For instance, you can become aware that there is also a duck in the rabbit-duck illusion, allowing you to adopt the frame of a duck. Gaining this frame does not mean you lose your ability to see the rabbit; instead, you now have the capacity to organize your frames and determine what Wohlrapp (2014) refers to as your primary frame (p.184). As humans, we frame everything in our world. We do this because "we need to determine how to understand certain subjects and what we should do with them" (Stevens, 2016, p. 2). Furthermore, Stevens (2016) explains that "our frames determine the kinds of inferences we are willing to make about a situation" (p. 2). She adds, "they

determine not only which claims about something we will judge to be true or false, but also which we will consider to make sense and which will appear senseless" (Stevens, 2016, p. 2). For example, if you only see a rabbit when looking at the rabbit-duck illusion, you perceive the illusion through the frame of a rabbit, with your latent frame being the duck. Conversely, if another person sees the illusion through the frame of a duck, viewing the rabbit as their latent frame, any discussion between the two of you is likely to end with each thinking that the other is not making any sense. There will be no progress in the discussion until one person adopts the other's frame. Frames are an essential part of our daily lives, influencing our thoughts and actions whether we realize it or not.

I have outlined Wohlrapp's argumentation framework and highlighted its key features: orientation, validity, mid-range universality, and the concept of frames. Now, I will demonstrate how this framework can be effectively applied in the context of international law. To illustrate this, I will examine a real-life example: The UNFCCC. This convention plays a crucial role in fostering international cooperation on climate-related issues and has attracted the TWAIL critique, making it an ideal case for exploring the relevance and utility of Wohlrapp's framework in addressing complex legal and environmental challenges on a global scale.

5. Case Study: UNFCCC and TWAIL

I will begin by explaining what TWAIL is. The UNFCCC has faced critiques from the TWAIL perspective, and there have been calls to analyze the UNFCCC through this lens. Therefore, TWAIL will serve as a frame for examining and understanding the UNFCCC. Following this, I will provide a brief overview of the UNFCCC and its objectives. Finally, I will demonstrate how the concepts of orientation, validity, mid-range universality, and frames can effectively be used to navigate the complexities of international law in the context of the UNFCCC.

TWAIL is a scholarly and critical movement that "coalesced in the 1990s" (Natarajan et al. 2016, p. 1). It was developed in response to the perceived Eurocentrism and neocolonialism present in mainstream international law. Scholars in TWAIL seek to challenge and

deconstruct existing power structures within international law, particularly those that marginalize the concerns and perspectives of the Global South (Mutua and Anghie, 2000, p. 31). The term "Global South" "broadly refers to the regions of Latin America, Asia, Africa, and Oceania" (Dados and Connell, 2012, para. 1). It is part of a family of terms, including "Third World" and "Periphery," which signify "regions outside of Europe and North America" (Dados and Connell, 2012, para. 1). These areas are "mostly low-income and often politically or culturally marginalized" (Dados and Connell, 2012, para. 1). The phrase "Global South" marks a shift from focusing primarily "on development or cultural differences to emphasizing geopolitical relations of power" (Dados and Connell 2012, para. 1). By prioritizing the experiences and viewpoints of nation- states and peoples from the Global South, TWAIL aims to uncover and critique the historical and ongoing racial injustices embedded in international legal systems. This approach provides a unique and invaluable perspective, enriching both the scholarly and practical discourse on international law. TWAIL scholar Sujith Xavier (2015) explains that TWAIL seeks to "unpack, deconstruct, then reconstruct international law" (p.15).

Antony Anghie, a legal scholar and author of *Imperialism, Sovereignty, and the Making of International Law*, contends that colonialism played a crucial role in the development of international law and its doctrines. He critiques international law as being biased against the Global South and calls for its reform. Anghie challenges the neutral portrayal of sovereignty as presented in the United Nations Charter. He illustrates how the concept of sovereignty, which underpins the United Nations and is still in use today, was shaped by colonial encounters. As the Spanish and Portuguese empires sought to acquire new territories, they needed a framework to regulate their interactions with the Indigenous Peoples inhabiting those lands. This regulatory framework was formulated by Francisco de Vitoria, a sixteenth-century Spanish theologian and jurist, in his lectures titled *De Indis Noviter Inventis* and *De Jure Bellis Hispanorum in Barbaros.* Anghie (2004) cautions that "colonialism is the central theme of these two works designated as the founding texts of international law" (p. 14). He further notes, "it is hardly possible to ignore the fact that Vitoria is preoccupied with a colonial relationship" (Anghie

2004, p.14). TWAIL challenges traditional perspectives on international law, which often reflect the interests of powerful nations and global institutions. Instead, TWAIL emphasizes the experiences and viewpoints of the Global South, focusing on issues such as economic inequality, colonial legacies, and human rights. By highlighting these significant concerns, TWAIL aims to contribute to a more inclusive and equitable global legal system.

Building on decades of negotiations, "In December 2015, the first legally binding climate change agreement, known as the Paris Agreement, was reached at the 21st Conference of the Parties (COP)" (Dehm 2016, p. 129). This agreement serves as a focal point for the UNFCCC. Perspectives on the agreement and the UNFCCC in general vary significantly. Supporters view it as a historic milestone in the fight against climate change, encouraging action and investment towards a low-carbon, resilient, and sustainable future (Dehm 2016, p. 130). However, some climate scientists, such as James Hansen, have criticized both the agreement and the UNFCCC, labeling them as fraudulent and ineffective (Dehm 2016, p.130). Furthermore, climate justice groups have been highly critical of the agreement and the UNFCCC, arguing that they "undermine the rights of the world's most vulnerable communities and include almost no binding commitments to ensure a safe and livable future for future generations" (Dehm 2016, p. 130). The UNFCCC has been accused of promoting ineffective solutions such as carbon trading and carbon offset schemes, which may further entrench the inequalities at the core of the climate crisis (Dehm 2016, p. 131). Social movements have criticized these schemes as inadequate responses that shift the responsibility away from key polluters while jeopardizing the livelihoods of communities that have contributed little to the problem but are highly vulnerable to climate change (Dehm 2016, p. 131). For these reasons, some have labeled the UNFCCC framework as promoting a form of "carbon colonialism" or "CO2lonialism" (Dehm 2016, p. 131). These critiques are taken seriously by TWAIL, which has actively engaged with these concerns.

The Paris Agreement aims to enhance the global response to climate change by limiting the increase in global temperatures to well below 2°C above pre-industrial levels, with efforts to restrict the rise to 1.5°C (Dehm 2016, p. 132). Nation-states are required to submit

their own nationally determined contributions (NDCs). However, if the current NDCs were fully implemented, they would lead to a warming of at least 2.7°C (Dehm 2016, p. 132). This indicates that while many nation-states are eager to participate in discussions about their commitment to protecting the climate, often blaming others in the process, the actions they are willing to take individually are insufficient to create real change. The Agreement includes Articles 5 and 6, which address expanded carbon trading mechanisms, and more than half of the NDCs consider utilizing these mechanisms (Dehm 2016, p. 132). Carbon trading allows nation-states to buy and sell emissions credits, enabling companies within their borders to emit more greenhouse gases. For instance, a nation-state that emits a large number of emissions and has the financial resources could purchase credits from a Global South nation that has lower emissions and needs financial support. Additionally, the Agreement supports the REDD+ framework, which provides economic incentives to reduce deforestation and forest degradation, particularly in the Global South. The Kyoto Protocol, which is part of UNFCCC, includes flexibility mechanisms such as emissions trading, Joint Implementation, and the Clean Development Mechanism (CDM). These mechanisms have been expanded under the Paris Agreement. The CDM allows nations from the Global North to fund emission-reducing projects in Global South nation-states, enabling them to count the results of these projects toward their own commitments to environmental protection. Additionally, the Kyoto Protocol emphasizes the principle of "common but differentiated responsibility" (CBDR), which acknowledges the historical, economic, and political disparities among nation-states (Dehm 2016, p. 140). While the Kyoto Protocol implemented CBDR by requiring legally binding emissions reductions only from Global North nation-states, this principle has faced challenges in recent climate negotiations (Dehm 2016, p. 141). There is a growing demand for all nation-states, including those in the Global South, to take binding commitments. This discussion highlights that climate change poses a global challenge that requires cooperative action from all nation-states in a similar fashion.

Wohlrapp's argumentation framework, which emphasizes orientation, validity, midrange universality, and framing, is particularly well-suited to navigate the complexities of international law,

especially in the context of the UNFCCC. By utilizing Wohlrapp's orientation approach, it recognizes that nation-states have varying priorities, capacities, and perspectives on climate action. This emphasis on orientation allows negotiators to tailor their arguments to resonate more deeply with the specific concerns and circumstances of diverse stakeholders. During the negotiation process, which takes place in platforms such as the COP, there is an open forum where various orientations can be presented and discussed. With each discussion, gaps in knowledge can be identified, allowing for research to contribute new theories to the open forum. These theories can be critiqued until justified, leaving no objections, at which point they become orientations. Orientation reflects the fluidity that must be present in international legal discussions between nation-states with entirely different priorities, capacities, and perspectives on climate action.

In the context of international law, particularly regarding the UNFCCC, validity is crucial. Impactful decisions are made during negotiations, so it is essential to provide strong evidence-based reasoning. If nation-states were to make decisions about climate control based solely on what sounds most persuasive or on established rules, it would be highly irresponsible. Focusing on validity rather than mere consensus ensures that the claims made during negotiations are not only logically sound but also supported by relevant data and research. This approach enhances credibility among nation-states that may be hesitant to agree on certain measures without concrete justification. It also provides a rationale for why nation-states take specific actions regarding climate change.

Frames allow different nation-states to articulate the rationale behind their perspectives to one another and to overcome their inherent biases and misunderstandings. Currently, there seems to be a dominant frame shaping the interpretation and implementation of agreements under the UNFCCC, which arguably ignores and even harms nation-states that do not align with this primary frame, particularly those in the Global South. The Global South has a distinct perspective on how climate change responsibilities should be approached. Because the Global North primarily adheres to the dominant frame while the Global South embraces its own, negotiations between these two groups often lead to misunderstandings, resulting in little real

progress. However, if these frames are discussed openly and honestly, both groups can gain insights into each other's perspectives, which will provide a deeper understanding of the reasons behind their respective views. By doing so, nation-states can foster better relationships and develop more comprehensive and acceptable ideas and actions regarding climate change.

By aiming for midrange universality, Wohlrapp's framework seeks to bridge the two notions of local validity and universal validity. In the context of international law, particularly regarding climate change—which undoubtedly affects everyone—achieving midrange universality means that the populations of nation-states, which have made decisions through agreements like the Paris Agreement or the Kyoto Protocol, still recognize the significance and relevance of those decisions. This approach can foster a sense of shared responsibility and demonstrate how international law, particularly concerning climate change, can be understood more comprehensively, both on a macro level (the nation-states) and a micro level (the populations within those nation-states).

The integration of orientation, validity, midrange universality and framing in Wohlrapp's argumentation framework creates a balanced and effective method for addressing complex issues within the UNFCCC. This framework enhances the potential for meaningful dialogue, promotes mutual understanding, and encourages cooperative action to tackle global climate challenges.

6. Conclusion

In this paper, I define international law and highlight its key functions as emphasized by the United Nations, which plays an essential role in shaping and enforcing these laws. I also examine the critical distinctions that differentiate international law from domestic legal systems. Furthermore, I explore the influential perspectives of scholars Koskenniemi and Hart regarding the purpose and significance of international law.

Building upon this foundation, I introduce Wohlrapp's argumentation framework as a more effective means of understanding the complex and contested nature of international law. Using the UNFCCC as a case study, I demonstrate how Wohlrapp's core

concepts—orientation, midrange universality, framing, and the emphasis on the validity of arguments over mere assent—can be applied in practical legal contexts, including perspectives from critical international legal theories such as TWAIL.

While applying argumentation theory to practical legal contexts can be complex and imperfect, the analysis of the UNFCCC demonstrates that Wohlrapp's framework offers valuable tools for managing disagreements and fostering constructive dialogue. His approach provides a sophisticated lens for engaging with the evolving and often contentious landscape of international law. These concepts are relevant not only to climate negotiations but also to a wide range of legal instruments, including treaties, conventions, and multilateral agreements. As future case studies assess its effectiveness—particularly in high-stakes negotiations marked by deep-rooted disagreements—this framework holds promise as a resource for advancing the United Nations' goals of more inclusive, reflective, and principled discourse within the global legal community.

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