Law and Contestation in International Negotiations[1]

Kyle Rapp[2]

Forthcoming, Review of International Studies

What is the role of rhetoric and argumentation in international relations? Some argue that it is little more than 'cheap talk,' while others say that it may play a role in persuasion or coordination. However, why states deploy certain arguments, and why these arguments succeed or fail, is less well understood. I argue that, in international negotiations, certain types of legal frames are particularly useful for creating winning arguments. When a state bases its arguments on constitutive legal claims, opponents are more likely to become trapped by the law: unable to develop sustainable rebuttals or advance their preferred policy. To evaluate this theory, I apply qualitative discourse analysis to the US arguments on the crime of aggression at the Kampala Review Conference of the International Criminal Court – where the US advanced numerous arguments intended to reshape the crime to align with US interests. The analysis supports the theoretical propositions – arguments framed on codified legal grounds had greater success, while arguments framed on more political grounds were less sustainable, failing to achieve the desired outcomes. These findings further develop our understanding of the use of international law in rhetoric, argumentation, and negotiation.

[1] I would like to thank Wayne Sandholtz, Alexander Dukalskis, Kelebogile Zvobgo, Adam Bower, and Edward Gonzalez, as well as the anonymous reviewers, for their constructive feedback on this project. This paper was previously presented at the International Studies Association – West Conference and I'm thankful for the feedback received there. Any remaining errors are entirely my responsibility. I would also like to thank the University of Southern California for supporting this work through the Dornsife/Graduate School PhD Fellowship in the Social Sciences and the University College Dublin School of Politics and International Relations for supporting earlier versions of this project.

[2] PhD Program in Political Science and International Relations, University of Southern California
Email: krapp@usc.edu

Introduction

In numerous forums and avenues, international actors argue, shaping policies, justifying actions, or trying to persuade, convince, or otherwise compel actors to change their behavior.[3] But why do actors make the arguments they do? Do arguments matter or are they 'cheap talk?'[4] If they do matter, what makes one effective – what assertions, based on what references, and in what settings – make a 'winning' argument? While some theories focus on persuasive deliberation[5] others highlight the strategic and even coercive use of language to 'win' without persuasion.[6] Despite careful study on both sides, it is not clear which approach generates greater insight. Do actors argue to persuade opponents, convincing them to change their behavior or preferences? Or do they use arguments to gain leverage and compel acquiescence or agreement?

It is this second tradition where this paper focuses, highlighting the type of language used in international arguments and how certain – highly relevant and codified – legal frames are particularly useful for 'winning' an argument. This reflects the social nature of argumentation, where success

[3] Frank Schimmelfennig, 'The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union', International Organization, 55:1 (2001), pp. 47–80.
[4] James D. Fearon, 'Domestic Political Audiences and the Escalation of International Disputes.', American Political Science Review, 88:03 (1994), pp. 577–592; Kristopher W. Ramsay, 'Cheap Talk Diplomacy, Voluntary Negotiations, and Variable Bargaining Power: Cheap Talk Diplomacy', International Studies Quarterly, 55:4 (2011), pp. 1003–23.
[5] Neta Crawford, Argument and Change in World Politics: Ethics, Decolonization, and Humanitarian Intervention (Cambridge: Cambridge University Press, 2002); Nicole Deitelhoff, 'The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case', International Organization, 63:01 (2009), p. 33; Nicole Deitelhoff and Harald Müller, 'Theoretical Paradise: Empirically Lost? Arguing with Habermas', Review of International Studies, 31:1 (2005), pp. 167–79; Jurgen Habermas, The Theory of Communicative Action tran. Thomas McCarthy (Boston: Beacon Press, 1984); Thomas Risse, '"Let's Argue!": Communicative Action in World Politics', International Organization, 54:1 (2000), pp. 1–39.
[6] Adam Bower, 'Arguing with law: strategic legal argumentation, US diplomacy, and debates over the International Criminal Court', Review of International Studies, 41:02 (2015), pp. 337–60; Jack Holland and Mike Aaronson, 'Dominance through Coercion: Strategic Rhetorical Balancing and the Tactics of Justification in Afghanistan and Libya', Journal of Intervention and Statebuilding, 8:1 (2014), pp. 1–20; Ronald R. Krebs and Patrick Thaddeus Jackson, 'Twisting Tongues and Twisting Arms: The Power of Political Rhetoric', European Journal of International Relations, 13:1 (2007), pp. 35–66; Fernando G. Nuñez-Mietz, 'Legalization and the Legitimation of the Use of Force: Revisiting Kosovo', International Organization, (2018), pp. 1–33.

depends on using publicly acceptable claims that compel an actor's acquiescence or agreement by denying sustainable counterarguments.[7]

International law (IL), in particular, offers a valuable source of rhetoric for this purpose. This stems from its status as an agreed-upon standard with international acceptance and supposed neutrality, making it harder to bypass with political claims.[8] Legal arguments – those that frame their claims on explicit legal references – benefit from referencing these shared standards and may be harder for opponents to challenge than arguments referencing moral or political claims, which, while open to debate like legal standards, may be more susceptible to outright rejection by denying their validity or universality – in the case of moral claims – or as inherently self-interested in the case of political claims. can be open to more interpretation or debate.[9] Previous research has highlighted the value of codified IL, such as treaties, as providing a more fixed meaning, in international argumentation. More general standards, like customary international law (CIL), while not as fixed or readily identifiable, offer similar utility in arguments.[10]

Still, the question remains, are all legal references equally useful? This paper clarifies what makes certain arguments more successful than others by clarifying the different types of codified legal frames. In particular, this paper argues that two criteria shape the success of a legal argument – the *relevance*– how directly the reference is connected to the debate topic - and *codification* – its formal status- of the legal claim.[11]

---

[7] Krebs and Jackson (2007), p. 42; Nuñez-Mietz (2018), p. 3; Schimmelfennig (2001), pp. 62–6.
[8] Bower (2015), p. 338; Adam Bower, Norms without the Great Powers: International Law and Changing Social Standards in World Politics (Oxford: Oxford University Press, 2017), p. 35.
[9] Ian Johnstone, 'Security Council Deliberations: The Power of the Better Argument', European Journal of International Law, 14:3 (2003), pp. 441–3; The Power of Deliberation: International Law, Politics and Organizations (Oxford: Oxford University Press, 2011); Nuñez-Mietz (2018); Shirley V. Scott, 'International Law as Ideology: Theorizing the Relationship between International Law and International Politics', European Journal of International Law, 5:3 (1994), pp. 313–25.
[10] Bower (2015).
[11] Relevance refers to the texts position vis-à-vis the argument. While certain principles of IL may be legally 'relevant' to many arguments (i.e. sovereign equality), the focus here is on the laws that are nearest to the topic.

This paper tests the idea that constitutive IL will yield particularly successful arguments compared to other codified or general legal references, which in turn may outperform nonlegal arguments. Refining previous understandings of IL and argumentation, I theorize that not all legal standards are equal but that arguments will be most successful when based on constitutive legal claims. Constitutive legal claims reference the codified legal instrument that constitutes the institution or issue area in which the debate is occurring. In doing so, this paper tests an important observation of the International Court of Justice – that "constituent instruments of international organizations are also treaties of a particular type."[12] By drawing insights from IL scholarship to clarify the different natures of codified legal references, this paper empirically probes the relationship between the legal nature of constitutive law and its argumentative utility.

Codified legal arguments – those which are written but not directly tied to the topic under debate – are next, followed by general – or uncodified – legal claims. Non-legal claims – such as those framed on political or moral references without invoking a legal reference - may be comparatively less successful, although this paper principally focuses on the types of legal arguments available to actors in international negotiations.

Table 1: Legal Claims & Kampala Review Conference Examples

Claim	**Legal?**	**Codified?**	**Relevant**	**Example**
Constitutive	Yes	Yes	Yes	Rome Statute
Codified	Yes	Yes	No	UN Charter
General	Yes	No	No	Customary IL
Non-Legal	No	No	No	Political Claims

In short, this paper explores how a particular type of legal reference – constitutive codified standards – may be uniquely valuable in international argumentation by providing actors with a clear, relevant, and useful type of rhetorical frame. Actors may still succeed in using codified and general

[12] Peter Quayle, 'Treaties of a Particular Type: The ICJ's Interpretive Approach to the Constituent Instruments of International Organizations', Leiden Journal of International Law, 29 (2016), pp. 853–77; 'Legality of the Threat or Use of Nuclear Weapons' (1996), p. 226.

arguments, insofar as they are sustainable and deny effective responses, but highlighting this difference helps deepen and clarify our understanding of the role of IL claims in framing arguments.[13]

Testing these propositions, this paper analyzes three of the United States' (US) arguments about the crime of aggression (CoA) at the Kampala Review Conference (KRC).[14] This is a useful case as the US, a non-state party, could not depend on voting to achieve its desired outcomes. Instead, it had to either compel or persuade states to agree with it, motivating the US to create the most effective argumentative frames possible. As a materially powerful actor, the US could have exerted overt political pressure at the KRC. Indeed, it is almost certain that concerns about US power – whether explicit or implied – influenced the negotiations. However, if the US used legal frames as the rhetorical core of its arguments it calls attention to the value of these claims in international negotiations. In particular, if arguments framed on codified – and particularly constitutive legal claims – outperformed others, this calls attention to their particular legal and rhetoric nature.

To these ends, this paper begins with a discussion of rhetoric in international relations, highlighting the theoretical assumptions of rhetorical contestation and strategic legal argumentation. A brief overview of the KRC follows, after which an evaluation of the discourse highlights the importance of legal rhetoric and framing in the success or failure of US arguments. These findings offer support for the assumptions of rhetorical coercion, emphasizing the role of legal rhetoric, and the particular value of constitutive legal references, in international argumentation.

Rhetoric, Contestation, and Compellence

[13] Bower (2015), p. 38; Johnstone (2003); Christian Reus-Smit, 'Politics and International Legal Obligation', European Journal of International Relations, 9:4 (2003), pp. 591–625.
[14] Bower (2017), pp. 138–72.

Despite the presence of rhetoric in international politics – in speeches and debates, public statements and private communications – there remains no universally accepted understanding of the utility of rhetoric in shaping political outcomes. For some, rhetoric may be "epiphenomenal," 'cheap talk' which is far less important than material power.[15] Alternatively, its value may be as a coordination device, used to reveal just enough information to make an agreement possible.[16] Other rationalist approaches emphasize audience costs – that talk may not be cheap if leaders incur a cost for reneging on their public commitments.[17] Political psychologists have built on this to demonstrate the importance of framing a debate to shape public opinion and policy outcomes by creating expectations and raising the audience costs for violating previous statements.[18] However, this work underemphasizes the dynamic processes of framing and focuses on the targets of the rhetoric instead of on the use of rhetoric itself.[19]

While realist and rationalist approaches often minimize the importance of rhetoric, drawing important attention to the place of argumentation in creating and shaping political outcomes and creating intersubjective understandings of the question at hand.[20] . These approaches focus on persuasion and consensus-building as one way norms emerge and gain influence.[21] Arguing, therefore, often implies an attempt to challenge validity claims associated with a statement to reach a "communicative consensus" of their meaning and justifications.[22] These understandings place a

---

[15] Krebs and Jackson (2007), p. 37.
[16] Jack L. Goldsmith and Eric A. Posner, 'Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective', The Journal of Legal Studies, 31:S1 (2002), pp. S115–39; Krebs and Jackson (2007), p. 37.
[17] James Fearon, 'Domestic Political Audiences and the Escalation of International Disputes', American Political Science Review, 88:3 (1994), pp. 577–92; Anne Sartori, 'The Might of the Pen: A Reputational Theory of Communication in International Disputes', International Organization, 56:1 (2002), pp. 121–49.
[18] James Druckman, 'The Implications of Framing Effects for Citizen Competence', Political Behavior, 23:3 (2001), pp. 225–56.
[19] Krebs and Jackson (2007), p. 38.
[20] Crawford (2002), pp. 11–6.
[21] Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change', International Organization, 52:4 (1998), pp. 887–917.
[22] Risse (2000), p. 7.

premium on persuasion, reasoning that actors argue with a degree of sincerity.[23] And while political arguments may lack some of these ideal speech characteristics – highlighting, for example, institutional limits on who can argue and how – arguments existence and role in persuasion remain fundamentally similar.[24]

A third approach strikes a balance between the bargaining of strategic action and the truth-seeking of communicative action.[25] In rhetorical coercion, effective arguments are those that deny opponents the ability to make a socially sustainable response. To do this, an actor makes an argument, made of frames and implications, which is designed to be acceptable to the public and to leave the respondent no choice but to acquiesce. Coercion, or compellence, is achieved when an argument is framed in a way that is socially acceptable to the relevant audience – drawing on accepted norms and rhetorical commonplaces – and which denies opponents the rhetoric needed to make counterarguments.[26]

Framing is the process of establishing the characterizations and terms underpinning the argument.[27] Frames provide the interpretation and outline appropriate behavior[28] and are established through dynamic social acts, including the use of rhetoric.[29] Implications are the 'next steps'

---

[23] Alastair Iain Johnston, 'Treating International Institutions as Social Environments', International Studies Quarterly, 45:4 (2001), pp. 487–515; Rodger Payne, 'Persuasion, Frames and Norm Construction', European Journal of International Relations, 7:1 (2001), pp. 37–61.
[24] Crawford (2002), pp. 28–33.
[25] Jean-Frédéric Morin and E. Richard Gold, 'Consensus-seeking, distrust and rhetorical entrapment: The WTO decision on access to medicines', European Journal of International Relations, 16:4 (2010), p. 566.
[26] Holland and Aaronson (2014), p. 3; Krebs and Jackson (2007), p. 42; Nuñez-Mietz (2018), p. 3; Schimmelfennig (2001), pp. 62–6.
[27] Robert D. Benford and David A. Snow, 'Framing Processes and Social Movements: An Overview and Assessment', Annual Review of Sociology, 26:1 (2000), p. 611; Lee J.M. Seymour, 'Let's bullshit! Arguing, bargaining and dissembling over Darfur', European Journal of International Relations, 20:3 (2014), p. 573; Pascal Vennesson, 'War under transnational surveillance: framing ambiguity and the politics of shame', Review of International Studies, 40:1 (2014), p. 31.
[28] Payne (2001), p. 39.
[29] Benford and Snow (2000), p. 628.

following from the frame,[30] which alternatively may be thought of as a premise and conclusion.[31] For example, a situation framed on legal grounds may imply that a new law is required, while a situation framed as a matter of public health may imply a policy solution. The first is a legal implication following from a legal frame – since the arguments frame is legal, it must imply a law-based resolution. Since rhetoric is employed deliberately, actors may use frames and implications strategically to appeal to particular audiences.[32] As long as the frame is socially acceptable its sincerity is irrelevant - it may still define the grounds of the argument.[33]

The respondent may then challenge an argument's frames, implications, or both. At this stage, actors argue, deploying rhetorical commonplaces to deny their opponent the opportunity to make socially sustainable responses. Eventually, one actor may be left without sustainable responses to challenge the opposing argument and be cornered into conceding.[34] Here it is important to note that it does not matter if the argument convinces the party.[35] When an argument denies sustainable counters, it entraps the other party and leaves it unable to proceed with their preferred policy option without incurring substantial reputational costs.[36]

This is possible because of the social nature of argumentation; both sides are limited by what the public - made up of the constituencies relevant to the debate - will accept. These publics, or interpretive communities, judge the soundness of an argument and its underlying claims and may refuse claims that are considered incongruent with the topic.[37] In diplomacy, for example, the

---

[30] Krebs and Jackson (2007), p. 43.
[31] Crawford (2002), p. 17.
[32] Krebs and Jackson (2007), pp. 44–5; Payne (2001), pp. 45–6.
[33] Payne (2001).
[34] Holland and Aaronson (2014), p. 3; Krebs and Jackson (2007), p. 42; Schimmelfennig (2001), pp. 62–6.
[35] Bower (2015), p. 341.
[36] Margarita H. Petrova, 'Rhetorical Entrapment and Normative Enticement: How the United Kingdom Turned From Spoiler Into Champion of the Cluster Munition Ban', International Studies Quarterly, 60:3 (2016), pp. 389–90; Schimmelfennig (2001), pp. 64–5.
[37] Johnstone (2011), p. 34.

immediate audience may be other diplomats, policy-makers, and politicians, while a broader view might also include analysts, academics, and members of relevant professional communities. Finally, mass publics may be the outer-most circle of the 'public' but their opinion may be 'muted.'[38] While actors may introduce new concepts, this requires great effort on the part of the actor who must convince her audiences to accept the concepts as appropriate. Typically, actors are limited to 'rhetorical commonplaces' - shared *topoi* which may be woven together to create new arguments.[39] However, given that the purpose of rhetoric is legitimation – actors employ rhetoric to justify or otherwise explain their behaviors – the relevant public, be that diplomats or a domestic audience - remains paramount, and the actors are limited to arguments that the relevant public will accept.[40]

However, not all outcomes are equal. In cases where the claimant and opposition agree on both the frames and implications, the outcome is stable. Accepting the implications but rejecting the frames may temporarily end the contest as actors find a way to address the implications. However, contestation may resume as framing issues remain. An implication contest, the result of opponents accepting the frames while rejecting the implications, typically results in a narrower policy-focused debate. Finally, in cases where both the frames and implications are rejected the parties enter into a framing contest to determine the structure of the debate.[41] Without agreed-upon frames it is difficult to have successful policy arguments, since opposing sides will talk past each other, interpreting situations in fundamentally different ways.[42]

---

[38] Lawrence Jacobs and Benjamin Page, 'Who Influences U.S. Foreign Policy?', American Political Science Review, 99:1 (2005), pp. 107–23; Johnstone (2011), pp. 41–3.
[39] Markus Kornprobst and Martin Senn, 'Arguing deep ideational change', Contemporary Politics, 23:1 (2017), p. 103; Friedrich Kratochwil, Rules, Norms, and Decisions: On the Conditions of Practical Legal Reasoning in International Relations and Domestic Affairs (Cambridge: Cambridge University Press, 1989), pp. 38–9; Krebs and Jackson (2007), pp. 43–7; Ronald R. Krebs and Jennifer K. Lobasz, 'Fixing the Meaning of 9/11: Hegemony, Coercion, and the Road to War in Iraq', Security Studies, 16:3 (2007), p. 421.
[40] Bower (2015), p. 338; Krebs and Jackson (2007), pp. 43–7; Nuñez-Mietz (2018), pp. 3–5.
[41] Crawford (2002), pp. 19–23; Krebs and Jackson (2007), p. 44.
[42] Donald Schon and Martin Rein, Frame Reflection: Toward the Resolution of Intractable Policy Controversies (New York, NY: Basic Books, 1994).

Central to rhetorical coercion is the idea that certain rhetorical commonplaces are more acceptable and can serve as powerful argumentative tools. In international arenas, especially more formalized settings, IL is a particularly powerful source of rhetorical commonplaces.[43] This is because IL is seen as particularly legitimate rhetoric.[44] Since international law only exists through state practice – either customary or through treaty-making – it, by definition, represents a shared understanding that a state has agreed to, making it harder to dismiss.[45]

Additionally, legal argumentation allows actors to advance arguments with multiple levels of relevance and codification, entailing various levels of sustainability and legitimacy. Actors may invoke codified legal standards like treaties, legitimating their argument by referencing formally agreed standards. Importantly, not all codified legal claims are equal. Constitutive legal claims, codified legal standards that are directly relevant to the topic under debate, play a particular role here. While many codified standards may be connected to a debate – for example, UN Charter rules on sovereignty and non-interference may underpin many legal arguments – constitutive standards are those that are directly relevant to the debate. For example, a statute outlining a regional organization would be a constitutive legal standard for arguments about that organization and may have a particular role in arguments about the organization.[46] Actors may also advance general claims by invoking uncodified legal norms, which although not codified – making it harder to point to a single fixed implication - still provide socially agreed-upon meanings. Indeed, actors are likely to make arguments combining codified and general claims.[47] This should be the case for both frames and implications – actors will frame their arguments on legal grounds, and the implications they propose should be legal as well.

---

[43] Bower (2015), pp. 343–6; (2017).
[44] Johnstone (2003), pp. 441–3; Nuñez-Mietz (2018); Reus-Smit (2003); Scott (1994).
[45] Johnstone (2011), p. 21.
[46] Quayle (2016).
[47] Bower (2015), p. 339.

I theorize that actors will have the greatest success by using the most directly applicable legal claims possible – those explicitly connected to the debate at hand. These are the constitutive rules that structure the institution or are the core legal instrument for an issue, offering actors the greatest source of socially accepted rhetoric since they are expressly connected to the debate at hand. For example, in a debate about a regional organization, an actor may have several relevant legal resources to draw on, but the most relevant source of rhetoric would be the organization's founding charter. In that case, all of the actors involved in the debate have – to at least some extent – agreed to the standards outlined in that document and its relevance to the topic under debate is more clearly established – and harder to counter – than other codified legal standards. Arguments based on constitutive documents are more likely to succeed as opponents may have a harder time outmaneuvering arguments with such a direct and relevant connection to the argument at hand. While some have noted that institutionalized or codified legal commitments may be legally less demanding than more uncodified norms,[48] they strengthen their rhetorical influence by limiting possible reinterpretation, restricting possible counterarguments, and increasing the odds that an opponent will have to acquiesce.

However, while legal claims provide actors with strong commonplaces, they also increase the risk that the actor's risk of entrapment. By tying arguments to legal claims, even insincerely, the actor binds herself to a particularly strong set of frames and implications. If the actor later changes position, she may be accused of hypocrisy, incurring social costs. Accordingly, law limits a state's ability to change its argumentation in response to counterarguments.[49] This explains how the process of rhetorical coercion comes to an end – an actor becomes limited by their previous claims and is unable to continue creating new counterarguments.

[48] Sarah Percy, 'Mercenaries: Strong Norm, Weak Law', International Organization, 61:02 (2007), p. 390.
[49] Bower (2015), p. 339.

Background: The Crime of Aggression and the Kampala Review Conference

The Crime of Aggression

With the concept of a CoA stretching back at least to the end of the First World War and prosecuted in some post-Second World War trials,[50] many states wanted to include the crime in the Rome Statute. However, strong opposition from states like the United States (US), the United Kingdom, Israel, and Turkey almost prevented this. Only a last-minute compromise kept the CoA in the Rome Statute, included in Article 5(1) as a crime within the court's jurisdiction but with the definition and scope to be determined later.[51]

Responsibility for defining the crime first moved to the Preparatory Commission before the Special Working Group (SWG) on the Crime of Aggression was established, meeting between 2004 and 2009 to develop a definition. These meetings were noted for streamlining the negotiation process and allowing the SWG to present an almost complete definition to the KRC.[52] Indeed, by the start of the KRC, there was a consensus that only two points remained for debate – the court's jurisdiction and the possible role of the UNSC[53] – and many states hoped to adopt the definition with minimal changes, worrying that extensive debate would unravel the entire definition.[54]

---

[50] William Schabas, The International Criminal Court (Oxford, UK: Oxford University Press, 2010), pp. 109–10.
[51] William Schabas, An Introduction to the International Criminal Court (Cambridge, UK: Cambridge University Press, 2011), p. 146.
[52] Stefan Barriga and Leena Grover, 'A Historic Breakthrough on the Crime of Aggression', The American Journal of International Law, 105:3 (2011), p. 518; Stefan Barriga and Claus Kreß, The Travaux Préparatoires of the Crime of Aggression (Cambridge, UK: Cambridge University Press, 2012), pp. 15–6; Schabas (2011), pp. 21–2; Noah Weisbord, 'Bargaining Practices: Negotiating the Kampala Compromise for the International Criminal Court', Law and Contemporary Problems, 76 (2013), pp. 85–117.
[53] Christian Wenaweser, 'Reaching the Kampala Compromise on Aggression: The Chair's Perspective', Leiden Journal of International Law, 23:04 (2010), p. 884.
[54] Barriga and Grover (2011), p. 523; Wenaweser (2010), p. 883.

While there was broad willingness to accept the definition as proposed,[55] there was still disagreement at the KRC. Notably, US delegates voiced skepticism,[56] cautioning against rushing to a "premature conclusion."[57] While the US was an observer state and could not vote, its influence at Kampala was noticeable. In particular, the US's status as a permanent UNSC member and major international actor ensured that its arguments were heard.[58] However, the US was not alone in raising concerns at Kampala. The permanent five members of the UNSC pursued a more limited definition of the CoA with a prominent role for the UNSC. A second group of states, predominantly from Latin America and Africa, supported a broader definition and the possibility of prosecutions without UNSC backing. Finally, a third group opposed a powerful role for the UNSC while also supporting a narrower definition of aggression.[59]

Methodology

This paper tests two hypotheses, the first being that in cases where US arguments failed to 'win,' achieving its desired outcomes in the adopted documents, it was because the arguments relied on unsustainable frames. The second hypothesis is that frames, and their corresponding arguments, would be more successful insofar as they draw on constitutive and other codified legal claims, with constitutive frames having the greatest success. Correspondingly, frames based solely on general legal grounds would be less effective and frames based entirely on non-legal grounds should demonstrate the least success.

[55] Jennifer Trahan, 'The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference', International Criminal Law Review, 11:1 (2011), p. 67.
[56] Trahan (2011), pp. 67–78.
[57] Harold Koh, 'Statement at the Review Conference of the International Criminal Court', (2010a).
[58] Trahan (2011), p. 68.
[59] Beth Van Schaack, 'Negotiating at the Interface of Power and Law: The Crime of Aggression', Columbia Journal of Transnational Law, 49:3 (2011), pp. 514–6.

To test these hypotheses, this paper applies the concepts of micro-discourse analysis to several US arguments. The case of US arguments at the KRC is a useful crucial and least-likely case, given the considerable material power available to the US which should allow it recourse to more argumentative frames and modes of diplomacy. The crucial nature of the case makes it particularly useful for theory testing by presenting the most difficult set of conditions for the theory to hold.[60] Additionally, while the US participated as an observer state, delegates at the conference noted that its views were well-represented and could not be ignored.[61] This may have placed the US in a position where it was even more in need of strong arguments, being unable to vote and needing to change the voting decisions of other states to obtain its desired policy outcomes. And while previous work has discussed the negotiation at the KRC,[62] the paper aims to extend these understandings by elucidating the ways in which language was used, highlighting the role of framing, and emphasizing the role of constitutive legal references. Finally, while we may expect the KRC to be a highly legalized environment, where one might expect legal arguments to be used, this is not unlike many international forums, which have become more legalized over the last several decades.[63] As such, this case – while perhaps nearer to an ideal type - still provides a useful case for studying the role of legal arguments in formal institutions more broadly.

Micro-discourse analysis focuses on the use of language in social settings and has a rich history of addressing the use of language in framing.[64] Micro-discourse analysis provides a

---

[60] Andrew Bennett, 'Case Study Methods: Design, use and comparative advantages', in Detlef Sprinz and Yael Wolinsky-Nahmias (eds), Models, Numbers & Cases (Ann Arbor: University of Michigan Press, 2004), pp. 29–30; John Gerring, Case Study Research: Principles and Practices (Cambridge, UK: Cambridge University Press, 2007), pp. 115–22.
[61] Trahan (2011), p. 68.
[62] Bower (2017), p. 169.
[63] Judith Goldstein, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter, 'Introduction: Legalization and World Politics', International Organization, 54:3 (2000), pp. 385–99.
[64] Reiner Keller, 'Approaches in Discourse Research', Doing Discourse Research: An Introduction for Social Scientists (London: SAGE Publications Ltd, 2013), pp. 31–2; Marianne LeGreco, 'Discourse Analysis', in Jane Mills

framework for analyzing discourse in a structured, qualitative format based on five principles. These include a holistic reading of the text, considering the speech situation and the role of the speaker, the intent of the speaker, and considering any discursive cues in how the argument was presented.[65]

As a first step, public statements made by US officials before and during the KRC were collected and organized into three main arguments. This analysis is temporally limited to statements made after President Obama assumed office, to account for the significant policy changes between the Bush and Obama administrations. Whereas the Bush administration largely disengaged from the ICC, the Obama administration re-engaged, attending the Assembly of State Parties as an observer and sending a delegation to the KRC.[66] Limiting the temporal scope allows for a more coherent set of arguments to be considered. Additionally, this paper is specifically interested in the role of argumentation, which necessitates a level of engagement largely absent during the Bush years.

At this stage, the observable implications of each argument – the outcomes necessary to justify supporting or disproving the hypothesis – were also established. After the arguments were categorized, micro-discourse analysis was then used to identify the types of rhetorical commonplaces used to create frames and implications. Applying the standards of micro-discourse analysis, each argument was examined within the context of rhetorical coercion[67] and strategic legal argumentation[68] but also with the assumption that not all codified claims are equal and that references to a constitutive legal standard would have even greater success. In this case, constitutive documents are the Rome Statute or the ICC's other constituting documents. Claims were considered

---

and Melanie Birks (eds), Qualitative Methodology: A Practical Guide (London: SAGE Publications, Inc., 2014), pp. 67–88.

[65] Hank Johnston, 'A Methodology for Frame Analysis: From Discourse to Cognitive Schema', in Hank Johnston and Bert Klandermans (eds), Social Movements and Culture (Minneapolis: University of Minnesota Press, 1995), pp. 219–29.

[66] Harold Koh and Todd Buchwald, 'The Crime of Aggression: The United States Perspective', The American Journal of International Law, 109:2 (2015), pp. 257–62.

[67] Krebs and Jackson (2007).

[68] Bower (2015).

codified if the claimant referenced a written treaty or legal document while general legal arguments referenced broader legal concepts or customary legal norms without explicitly mentioning a written text. Non-legal arguments were those which made appeals to other political or security-based grounds, such as political expediency or national security.

Argument effectiveness – their ability to deny opponents the rhetorical grounds to make sustainable counters and forcing their acquiescence[69] – was determined by analyzing the outcomes documents, mainly the accepted amendments, the Elements of Crimes, and the Understandings adopted by the KRC. If the adopted documents reflected the points raised in the argument the argument is considered to have been – at least to some degree – successful. It is important to note that negotiations are rarely a game of binaries and that arguments may be successful 'in part,' with portions of the desired implications being accepted while others are rejected. Considering this, it is best to speak of gradients and to note if an argument was largely successful, partially successful, or largely unsuccessful.

The analysis is supported through the consideration of statements made by other parties at the KRC. This aids in determining how US arguments were received. In cases where US arguments failed, micro-discourse analysis was applied to these statements to determine if the failure was the result of unsustainable frames, implications, or both. Accounts of those involved in the proceedings at Kampala were also considered, giving an insight into how arguments were understood and received by those directly involved. Considering these other statements allows the points and means of contestation to be identified – demonstrating if opponents challenged the frames or implications – or both – while also demonstrating the rhetorical commonplaces employed in such arguments.

Importantly, the focus on public arguments does mean that material factors may not be fully accounted for if they were discussed in private. US delegates may have, for example, used material

[69] Krebs and Jackson (2007), p. 36.

inducements 'behind the scenes' to supplement public arguments or when public arguments were not possible. An anonymous member of the US delegation, for example, indicated that the US might have used financial leverage to pursue bilateral immunity agreements if certain policies were adopted.[70] However, the fact that these claims were not made in public echoes theoretical expectations about the limitations of argumentation in international relations and shows how, at least publicly, the US was dependent on certain types of 'acceptable' arguments and could become entrapped by them. So, while the US may have had leverage *if* certain outcomes had emerged, these claims could not be used effectively in public argumentation. Still, the possibility of material claims made 'behind the scenes,' while beyond the scope of this paper, should not be discounted and may be worth further study.

Analysis

For this analysis, three major US arguments on the CoA are analyzed. These arguments are:

1. UNSC: The ICC may only have jurisdiction over the crime of aggression after a UNSC determination that an act of aggression has occurred.
2. Definition: The proposed CoA lacks clarity and consensus, in part because it differs from CIL.
3. Ratification: The amendments must be ratified under Article 121(5) and can only bind states that ratify the amendments.

Highlighting these arguments is not to say that these were the only arguments the US made. However, these were the main arguments put forward at different times, at different levels of intensity, and often in conjunction with each other or with other supporting arguments.

Argument 1: UNSC

[70] Trahan (2011), p. 70 nt. 85.

One of the main US arguments at Kampala was that the ICC could not investigate a CoA unless the UNSC determined that an act of aggression had occurred.[71] This claim was the subject of considerable debate at the KRC – while some states did agree with the US position[72] many others were opposed to such a requirement. Indeed, the matter had been left unsettled leading into the KRC as the SWG had failed to reach an agreement. This is reflected in the final report of the SWG which ultimately provided a range of possible 'filters' for ICC jurisdiction including the UNSC as well as the UN General Assembly and the International Court of Justice.[73] Ultimately, this meant that while the US argument was not without supporters it was still facing strong opposition and was far removed from the majority opinion which disagreed with an absolute linkage between the UNSC and the CoA.[74]

US delegates framed their argument on a series of legal grounds, including both constitutive and codified legal claims. In particular, the US noted that Article 5(2) of the Rome Statute required that the ICC's CoA be "consistent with the relevant provisions of the Charter of the United Nations."[75] This constitutive claim was then used to undergird US arguments that the UN Charter gave the UNSC absolute authority in determining if an act of aggression had occurred. This claim was grounded in Article 39 of the UN Charter which requires the UNSC to determine if an act of aggression had occurred.[76] These frames were then used to advance a very simple implication –

---

[71] Harold Koh, 'The Obama Administration and International Law', (2010b); 'Closing Intervention at the Review Conference of the International Criminal Court', (2010c); Stephen Rapp, 'Speech to the Assembly of State Parties', (2009).

[72] *Statements by Observer States after the adoption of resolution RC/Res.6 on the crime of aggression*, Review Conference Official Records, RC/11, Annex IX, A, E, F.

[73] International Criminal Court, Assembly of State Parties, *Report of the Special Working Group on the Crime of Aggression*, ICC-ASP/7/SWGCA/2 (20 February 2009) ¶18-24, Annex I ¶4

[74] Roger S. Clark, 'Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction Over It', European Journal of International Law, 20:4 (2009), p. 1114.

[75] 'Rome Statute of the International Criminal Court', (2002).

[76] 'Charter of the United Nations', (1945) Art. 39.

there could be no ICC investigations of a CoA unless the UNSC had previously determined that an aggressive act had occurred.

However, as has been noted, this claim was already subject to disagreement before the KRC began. While there was broad agreement that a UNSC determination would authorize an investigation, there was disagreement as to possible alternative mechanisms. Three other views were advanced: some delegates favored allowing the Pre-Trial Chamber to authorize an investigation, others preferred allowing the UNGA to be able to make such a determination, and still others preferred linking an investigation to an ICJ determination.[77] Importantly, ahead of the KRC, there was a broad consensus that a determination of an act of aggression by "an organ outside the Court" would not prejudice the ICC's findings.[78]

At the KRC, these opposing claims were framed on a similar set of constitutive and codified legal claims while opponents also invoked additional general legal claims. Constitutively, opponents drew on the same Article 5(2) of the Rome Statute but drew in differing codified claims to frame their argument. A common argument, demonstrated by the joint statement of the African State Parties to the ICC, was that while the UN Charter gave the UNSC authority over determining an act of aggression this authority was not absolute. Instead, the UN Charter also grants the UNGA subsidiary powers regarding aggression, allowing opponents codified references to counter those made by the US.[79]

More generally, many delegates framed their arguments on claims of judicial independence. Delegates from South Africa and Ecuador, for example, argued that creating a UNSC filter would

[77] ICC-ASP/7/SWGCA/2, Annex I para 4
[78] Ibid. Annex I, para 5.
[79] Amos Wako, 'Statement on Behalf of the African State Parties to the International Criminal Court', (2010).

interfere with the ICC's independence.[80] Other delegates argued that violating the general legal principle of judicial independence would create an unequal system within the ICC where an outside body had influence over some crimes but not over others.[81] This would, in turn, politicize the CoA in particular and the ICC as a whole.[82]

These arguments highlighted the significant disagreement on the topic already present at the start of the KRC. Indeed, many delegates saw the idea of an exclusive UNSC filter – as the US advocated – as being "beyond serious argument."[83] Importantly, delegates were also able to draw on the preexisting consensus that an outside body could not be binding on the court as it would present due process concerns.[84] Since this had been decided before the KRC began it meant that the idea of an exclusive UNSC filter was largely socially unsustainable. Importantly, it also meant that opposing delegates could reference the already agreed upon text in support of their arguments.[85]

While the US and its supporters preserved the option of an exclusive UNSC filter for the first period of the KRC, they were unable to 'win' this desired outcome. However, US arguments do seem to have outperformed those favoring a role for the UNGA or ICJ, as noted by the differences between Conference Room Papers on 25 May[86] and 10 June.[87] And the final agreement, while not providing an exclusive role for the UNSC does require the ICC first seek a UNSC determination before pursuing an investigation on its own. And while it was agreed that the UNSC retains

---

[80] A.C. Nel, 'Opening Statement to the Review Conference of the International Criminal Court', (2010); Jose Serrano, 'Statement During the General debate of the Review Conference of the Rome Statute', (2010).
[81] Tsokolo Makhethe, 'Statement to the Review Conference of the International Criminal Court', (2010).
[82] Mohammed Bello Adoke, 'Statement of Nigeria', (2010); Makhethe (2010); Mahmoud Samy, 'Statement on Behalf of the Non-Aligned Movement', (2010).
[83] Niels Blokker and Claus Kress, 'A Consensus Agreement on the Crime of Aggression: Impressions from Kampala', Leiden Journal of International Law, 23:04 (2010), p. 894.
[84] Barriga and Kreß (2012) Doc. 91.
[85] ICC-ASP/7/SWGCA/2, Annex I, para 5.
[86] International Criminal Court, Assembly of State Parties, *Conference Room Paper on the Crime of Aggression*, RC/WGCA/1 (25 May 2010), Annex I
[87] International Criminal Court, Assembly of State Parties, *Conference Room Paper on the Crime of* Aggression, RC/WGCA/1/Rev. 2 (10 June 2010), Annex I

significant power at the ICC, including being a precondition for the CoA,[88] it is clear that this outcome is less than what the US wanted and did not reflect any success of US arguments at Kampala – the requirement to first turn to the UNSC was included in the documents produced by the SWG.[89]

Ultimately, even members of the US delegation realized that there was significant opposition to the idea of an exclusive UNSC filter.[90] In particular, opponents were able to invoke codified legal claims that directly challenged the US frames. While both sides drew on the same constitutive legal material, opponents were able to draw in a broader range of additional material, including general legal claims and challenging codified legal claims. At the same time, opponents began to invoke previously agreed upon text from the proposed amendment to challenge how the US implications would align with these quasi-constitutive texts. Ultimately, it appears that these counterarguments, framed using the same legal sources, played a meaningful role in challenging the US arguments. If the US wished to build its arguments on the UN Charter, it had to deal with the fact that the same document provided opponents with meaningful and effective rebuttals.

Argument 2: Definition

As well as arguing about the role of the UNSC, the US also attempted to challenge the proposed definition of the crime itself, arguing that the SWG's definition lacked "genuine consensus"[91] and differed from the existing CIL definitions.[92] This claim was met with considerable

[88] Troy Lavers, 'The New Crime of Aggression: A Triumph for Powerful States', Journal of Conflict and Security Law, 18:3 (2013), pp. 499–522.
[89] ICC-ASP/7/SWGCA/2 Annex 1, para 3
[90] Van Schaack (2011), pp. 562–3.
[91] Stephen Rapp, 'Statement to the Review Conference of the International Criminal Court', (2010a).
[92] Koh (2010a); Harold Koh and Stephen Rapp, 'U.S. Engagement with the ICC and the Outcome of the Recently Concluded Review Conference', available at: {https://2009-2017.state.gov/j/gcj/us_releases/remarks/2010/143178.htm}; Stephen Rapp, 'International Justice and the Use of Force', (2010b).

opposition at the KRC where the crime's definition was mostly seen as a settled. While there had been some lingering disagreements going into the KRC they had been largely set aside and the SWG had reached its definition with "generally strong support,"[93] with one delegate noting the "overall agreement…in particular on the definition."[94] In fact, many delegates noted their acceptance of the definition as it was proposed by the SWG[95] and unwillingness to reopen discussions about the definition, seeing the topic as out-of-bounds.[96] This meant that the US faced considerable opposition in challenging the definition and succeeding would require significant degrees of persuasion or compellence through rhetorical coercion.

In particular, the US challenged the term "manifest violation"[97] which was being used as the standard required for a violation of the UN Charter to qualify as an act of aggression.[98] The US argued that the manifest standard[99] differed from CIL definitions and could unintentionally criminalize otherwise legal uses of force.[100] As such, US delegates reasoned that a stricter standard was needed to ensure that "only the most serious and dangerous" illegal uses of force could constitute aggression.[101] This claim was framed on two codified legal claims – UNGA Resolution 3314, which provided a recommended definition of aggression,[102] and the case law emerging from the Nuremberg Trials.[103] Along with these codified legal claims, the US also invoked general legal claims regarding the importance of clarity in criminal law definitions and its relationship with

[93] ICC-ASP/7/SWGCA/2, ¶13
[94] Ernest Hirsch Ballin, 'Statement of the Netherlands', (2010).
[95] Adoke (2010); Maciej Szpunar, 'Statement of Poland', (2010); Wako (2010); 'Statement of Romania', (2010).
[96] Barriga and Grover (2011), p. 523; Wenaweser (2010), pp. 883–4.
[97] ICC-ASP/7/SWGCA/2, ¶13
[98] Koh (2010a).
[99] Manifest refers to the "character, scale, and gravity" of an act that constitutes a violation of the law. Egregious is a higher threshold, referring to a blatant violation. This distinction was grounded with reference to Resolution 3314 and the idea that not all individual acts of aggression constituted a crime of aggression.
[100] Koh (2010a); Rapp (2010b).
[101] Koh (2010a).
[102] General Assembly resolution 3314(XXIX), *Definition of Aggression*, A/RES/3314(XXIX) (14 December 1974)
[103] Koh (2010a); Rapp (2010b).

prosecutorial efficiency.[104] Notably, the US did not invoke any constitutive legal claims on this topic, likely a product of the fact that – as the definition was the topic of debate – there was no definition to draw on in the Rome Statute.

It is also worth noting that US arguments about the crime's definition frequently included claims that this definition could deter humanitarian intervention or similar uses of force aimed at addressing situations of severe human rights violations or atrocity crime. Koh, for example, raised concerns that the proposed definition could criminalize attempts to "prevent war crimes, crimes against humanity or genocide—the very crimes that the Rome Statute is designed to deter."[105] These claims may have aimed to connect the definitional question to one of the "object and purpose" of the Rome Statute. In doing so, although not explicit, this argument aimed to introduce general legal principles of treaty interpretation akin to the Vienna Convention on the Law of Treaties (VCLT). For the purpose of this analysis, this invocation is treated as a general – instead of codified – legal claim since, while the concepts were invoked the claim did not directly reference the codified text. This is in contrast to US arguments about the treaty's ratification, which expressly referenced the codified text.

US delegates used these frames to imply that the definition needed to clarify that only the most egregious uses of force, accounting for the circumstances and gravity of the case, could be prosecuted. These were drawn from previous definitions of aggression, particularly from the Nuremberg Trials, which focused on wars of aggression instead of acts of aggression. Furthermore, the US argued that – given the unsettled nature of the ICC's definition and the alleged substantive disagreement – the definition could not be considered part of CIL. These implications were

[104] Rapp (2010b).
[105] Koh (2010a).

proposed as 'Understandings' which, the US argued, needed to be adopted alongside the amendment.[106]

However, as was previously mentioned, many states were fundamentally unwilling to reconsider the definition at the KRC. In many regards, this made the US arguments on aggression and CIL unsustainable as the topic itself was unacceptable, regardless of its framing, as any argument must be socially acceptable by the relevant public. The rhetorical ground the US was trying to use was too close to the definition of the crime. US claims that the definition lacked consensus were further undercut by the broad acceptance of the definition, as previously noted by the SWG[107] as well as various delegates.[108]

Opponents who did respond to US arguments on the definition, in particular on the distinction between aggressive wars and aggressive acts, framed their responses on CIL. In particular, opponents highlighted how the proposed amendment followed UNGA Resolution 3314's definition, which included acts of aggression.[109] While the US argument had drawn on the resolution's reference to wars of aggression, a reference which mirrored the judgments of the Nuremberg Trials, opponents still had a clear counter-argument that supported the inclusion of acts of aggression.[110] The US argument that the definition could not effect CIL was broadly rejected, Trahan, for example, noted that that the KRC did not have the authority to determine what constitutes CIL in the first place.[111]

Despite challenges to its framing, the US continued to argue that the definition lacked clarity. At this point, the US had advanced a non-paper which focused on the proposed "manifest

[106] Barriga and Kreß (2012) Doc. 138.
[107] ICC-ASP/7/SWGCA/2, ¶13
[108] Ballin (2010); Wako (2010).
[109] A/RES/3314(XXIX) Article 1
[110] Ibid. Art 5
[111] (2011), p. 75.

violation" standard.[112] US delegates argued that previous definitions of aggression – including the Nuremberg Trials and UNGA resolution 3314 – had focused on the most egregious acts and that the proposed definition fell short of this standard.[113] Unable to change the definition itself, US delegates moved to shape the Understandings that would be adopted alongside the amendment and would be used by the court to interpret the amendment.

Although the US's frames remained contested, some of the implications were at least cautiously accepted and two of the final Understandings are seen as representing the US arguments. These Understandings note that a determination of aggression requires "consideration of all circumstances…including the gravity of the acts"[114] and that a 'manifest violation' depended on the criteria of "character, gravity and scale" all being met together.[115] Accordingly, these Understandings reflect US concerns over the definition's clarity, although the US was unable to alter the definition of the crime itself. While many of the US's frames were contested or rejected outright, US arguments do seem to have shaped some of the interpretive documents in ways suggested by US arguments and legal frames.

Argument 3: Ratification

Finally, the US put forward an argument about which process should be used to adopt the CoA amendments, thereby shaping the ICC's jurisdiction. Specifically, the US argued that the KRC must adopt the aggression amendments under Article 121(5) of the Rome Statute.[116] This would limit the ICC's jurisdiction only to states which accepted the amendments, preventing the court from prosecuting any crimes committed by the nationals of, or on the territory of, any state that did

[112] Barriga and Kress, 2012, Doc. 138; ICC-ASP/7/SWGCA/2, ¶13
[113] Harold Koh, 'The Obama Administration and International Law', (2010d); Koh (2010a); Koh and Rapp (2010); Rapp (2010b).
[114] International Criminal Court, Assembly of State Parties, *Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression*, RC/10/Add.1 (11 June 2010), para 6
[115] Ibid. para 7
[116] Koh (2010a); Harold Koh, 'The Challenges and Future of International Justice', (2010e).

not accept the amendment. At Kampala, this claim was opposed by a significant group of states which argued that the amendments could be adopted under Article 121(4), which would mean that the amendments would enter into force for all state parties after receiving ratification by seven-eighths of all state parties. Both claims drew on Article 5(2) of the Rome Statute, which specified that the aggression amendments were to be brought into force under Articles 121 and 123. However, it did not specify which procedure under Article 121 was appropriate, leaving the matter open to debate, [117] a debate that had carried over from the SWG.[118] This lingering disagreement may have left the US in a more favorable position – while its preference lacked universal support it was firmly 'socially acceptable' in that it continued an existing and open debate[119] and was shared by other delegations as well.[120] Indeed, an informal 'role-call' had found the state parties nearly evenly split on the question.[121]

The US argument was framed on a series of constitutive, codified, and general legal grounds. As previously noted, both sides could draw on Article 5(2) as a constitutive standard for their claims – the article's flexibility allowed for competing interpretations as to exactly what it required – and this allowed the US to tie its claims directly to the Rome Statute. Article 5(2)'s reference to "amendments to Article 5…and 8"[122] allowed US delegates to advance the implication that any other method of adoption would violate the Rome Statute. At the same time, US delegates invoked both codified and general legal claims about the prohibition of binding states to a law if they had not accepted it [123]. This claim drew on both the general legal principles of treaty interpretation as well as

[117] Barriga and Grover (2011), pp. 523–4.
[118] ICC-ASP/7/SWGCA/2, ¶6-11
[119] International Criminal Court, Assembly of State Parties, *Draft Report of the Working Group on the Crime of Aggression*, RC/WGCA/3 (6 June 2010), para 4
[120] Ex. Turkey;
[121] Barriga and Grover (2011), pp. 524–5.
[122] 'Rome Statute of the International Criminal Court' (2002), Art. 121(5).
[123] Koh (2010e).

the codified text of the VCLT, which prohibits a treaty from creating an obligation on a non-party. Thus, the US argued, bringing the aggression amendments into force through any means other than Article 121(5) would raise grave concerns about the ICC's legitimacy. The clear implication of this argument would be that the conference would have to use the Article 121(5) procedure to bring the amendments into force and ensure non-state parties would be entirely exempted from the ICC's jurisdiction on the crime.

Opponents, however, argued that the amendments could be adopted under Article 121(4).[124] While recognizing that Article 121(5) governed changes to Article 5, many states reasoned that the aggression amendment would replace – not alter – the existing Article 8. As such, it could be adopted under Article 121(4).[125] Some even argued that Article 5(2) only required that the aggression amendment be 'adopted' and that, as such, all that was required was a two-thirds vote of the delegations at the KRC for the amendment to come into force for all parties.[126] Both positions were framed on constitutive legal references to Article 5(2), just as the US argument was.

Proponents of Article 121(4) also argued that adopting the amendments under 121(5) would create "de facto…reservations," which were prohibited under Article 120 and Article 12(1), which stated that parties accepted the ICC's jurisdiction over all crimes in the statute.[127] This point was also framed with reference to the VCLT, as reservations would be against the "object and purpose" of the Rome Statute, invalidating the amendment.[128] These points were further framed on nonlegal

[124] RC/WGCA/3, para 4
[125] Barriga and Grover (2011), pp. 523–4.
[126] ICC-ASP/7/SWGCA/2, ¶10
[127] Ibid., ¶9
[128] Ibid.

grounds, namely that Article 121(5) would undermine the ICC, resulting in a fragmented enforcement regime [129] which would undermine the court's ability to deter acts of aggression [130].

During the KRC, some delegations attempted to create a compromise position where Articles 121(4) and (5) would be used to adopt different parts of the amendment.[131] However, this was criticized for lacking a legal basis in the Rome Statute.[132] Canada, in contrast, proposed another understanding which would only allow investigations if the UNSC made a referral or if all involved states had accepted the amendments.[133] Ultimately, the harder approach, favored by the US, won out. A compromise suggestion, which only allowed non-state parties to be investigated under a UNSC referral and which allowed state parties the option of opting-out of the aggression amendment, was finally adopted under Article 121(5).[134]

This compromise, which fully excluded non-state party nationals from prosecution without a UNSC referral, was seen as "a major victory for the United States."[135] The success of US arguments here, alongside the arguments of other delegations, may reflect a successful use of legal rhetoric in negotiations. The US drew on a range of constitutive, codified, and general legal claims. While opponents raised constitutive and codified claims of their own, the idea that the law could only bind states which accepted it seems to have been difficult to overcome, grounded in broadly accepted codified and general legal frames. Opponents' normative counterarguments, like those made by delegations from Brazil and South Africa, lacked the same legal references. While both sides

---

[129] Marcel Biato, 'Statement on the Behalf of the Brazilian Delegation to the Review Conference', (2010).
[130] Nel (2010).
[131] *Non-paper Submitted by Delegations of Argentina, Brazil and Switzerland as of 6 June 2010*, Review Conference Official Records, RC/11, Annex III, App. V, A.
[132] Barriga and Grover (2011), p. 525.
[133] *Non-paper Submitted by the Delegation of Canada as of 8 June 2010*, Review Conference Official Records, RC/11, Annex III, App. V, B.
[134] Barriga and Grover (2011), p. 526.; International Criminal Court, Assembly of State Parties, *Draft resolution submitted by the President of the Review Conference*, RC/10 (11 June 2010)
[135] Van Schaack (2011), p. 591.

employed constitutive and codified legal claims, the US may have had greater success with its range of codified legal references and their connection to general legal references as well.

Discussion

A summary of each argument – commonplaces, rebuttals, outcomes, and reasons, is included in Table 2. These findings support the hypothesis that framing contests would be the primary cause of ineffective US argumentation. In cases where the US frames were rejected (UNSC), the US failed to win any meaningful concessions. When frames were contested but not rejected the US managed to 'win' small concessions, falling far short of its desired outcomes, although overcoming some opposition (Definition). Finally, in the one case where the US used codified and constitutive legal framing (Ratification) the US had its greatest success, 'winning' its desired outcome.

Table 2: Arguments and Outcomes

Topic	**Rhetorical Commonplaces**	**Rebuttals**	**Outcome**	**Why?**
Ratification	Constitutive: Rome Statute (Arts 5.2; 121.5) Codified: VCLT General: Principles of Treaty Interpretation	Constitutive: Rome Statute (Arts 5.2; 12.1; 120; 121.5) Codified: VCLT Non-Legal: Anti-impunity norms	Effective	Frames & Implications largely accepted
Definition	Codified: UNGA Res. 3314, Nuremberg Precedents General: CIL, Principles of Treaty Interpretation Nonlegal: Lack of consensus	Constitutive: Preparatory Documents Codified: UNGA Res. 3314 General: CIL Non-Legal: Broad consensus	Mixed	Frames Contested, Implications Rejected
UNSC	Constitutive: Rome Statute (Art. 5.2)	Constitutive: Rome Statute (Art. 5.2);	Failed	Frames rejected

	Codified: UN Charter (Art. 39)	Preparatory Documents Codified: UN Charter (Art. 24[2]) General Legal: Judicial Independence		

These results also support the legal framing hypotheses. The third argument, focused on the technicalities of jurisdiction and bringing the crime into force, had the most success while also being the argument most clearly connected to codified legal standards. In particular, the US used constitutive frames, drawn from the Rome Statute itself, which were difficult for opponents to challenge. This aligns with the expectation that constitutive claims, in this case the Rome Statute, were the most powerful rhetorical commonplaces for legal argumentation. While there were other codified legal claims available appealing directly to the ICC's founding document made it harder for opponents to dismiss the US claims as being inappropriate. Importantly, this argument may have yielded the greatest success for the US, limiting the court's jurisdiction in a way that reflected many of the US' interests heading into the KRC.[136]

The second argument, on the definition of the crime, also seemed to have particularly strong framing, drawing on longstanding texts and legal precedents that had had a long history in the development of the ICC. However, while the US invoked several codified and general legal standards, its success here was limited. Repeated reference was made to the definition being 'off-limits' for debate and the US found that many of its arguments here were dismissed, demonstrating the limited success of US nonlegal arguments about the lack of consensus. While the US use of legal references supports the theory, the blanket rejection by many parties reinforces the important role of

[136] Lavers (2013), p. 514.

the public in establishing what is an acceptable and sustainable argument and further demonstrates the lack of success found by the US' nonlegal arguments. Interestingly, and perhaps reflective of the legalized nature of many international forums – especially the KRC – nonlegal frames appeared quite infrequently in these proceedings.

Although the US entered the KRC with significant material power, it was often unsuccessful in obtaining its desired results. While this analysis cannot account for the possibility that material claims were made behind the scenes, it is important to note that the US did not openly invoke such claims at the conference. Instead, it appears that the forum may have deterred the US from using its material advantages – for example, by tying financial or security incentives to particular outcomes – and limited its public claims to other forms of argument, especially legal. The analysis showed that in several cases the frames of the US arguments were contested and ultimately defeated by opposing arguments. The US's ability to produce socially sustainable arguments appears to have been limited at Kampala. The US's position as a non-state party may have limited the effectiveness of US arguments and strengthened arguments put forward by other actors. However, nothing about the US position should have limited the ability to construct successful arguments, which is the central component of rhetorical coercion. In fact, sources indicate that US views were considered, with no notable instances of them being downplayed,[137] a case that highlighted the influence of non-state parties.[138] While other states may not have been persuaded by the argument, a successful argument is still able to deny grounds for response. Non-membership did not limit the rhetoric available to the US, nor would it have provided an 'out' for other parties if the US made an otherwise compelling argument.

[137] Trahan (2011), p. 68.
[138] Bower (2017), p. 169.

In a previous study, Bower found that legal framing limited the coercive options available to the US and resulted in its failure to secure certain outcomes. Constrained by legal rhetoric, the US was unable to apply material arguments. Other actors were able to challenge the US arguments on stronger rhetorical grounds, as several US arguments were not sustainable in the context.[139] Specifically, arguments focusing on the definition were unsustainable as the definition was considered untouchable by most involved parties. This meant that opponents could easily dismiss these arguments and that these arguments also failed to garner significant public support. My findings may offer support for these conclusions as well. Additionally, however, my findings expand on this theory by highlighting the particular value of the most *relevant* and *codified* claims – claims made to founding documents or documents directly connected to the argument.

More broadly, the use of legal rhetoric instead of other rhetorical commonplaces shows states' desires to couch their arguments in legal language. This is demonstrated by the frequent references to legal principles and understandings, instead of other political or normative claims, in the arguments. In the long run, however, this trapped the US into a legal argumentation, allowing opponents to counter with their legal arguments. US arguments were generally less effective than those made by opponents. Denied legal counterarguments and unable to use other forms of rhetoric, the US found itself largely unable to achieve its desired outcomes. Given that the arguments were made about legal matters to a diplomatic and legal audience the US was further limited in what claims would be sustainable, likely necessitating the use of legal commonplaces, even in cases where they were unlikely to succeed.

Conclusion

What makes an argument effective? Building on existing scholarship on the value of legal arguments, this paper highlights how constitutive legal texts may be uniquely valuable in

[139] (2015), p. 359.

international argumentation. This stems from their unique nature in international relations – combing the specificity of codified legal references with the highest level of relevance and public acceptance to the debated topic. While codified and general legal arguments are still useful, and as the case shows are often combined with constitutive arguments, constitutive references may offer actors the strongest frames for compelling others to accept or acquiesce to an argument.

Analyzing US arguments from the KRC offers support for these claims. It appears that the US had the most success framing its arguments on constitutive legal references, especially when combined with appeals to other codified and general legal references. When US claims had mixed results, this may have stemmed from opponents invoking constitutive frames of their own, allowing opponents to challenge how US interpretations and applying the constitutive references in their arguments. US arguments on the definition of the CoA further highlight the importance relevant publics – in this case, the other states involved at the KRC - in shaping the acceptable grounds of debate, a key component in rhetorical contestation. US attempts to reopen the debate on the definition were seen as out-of-bounds and largely rejected.

Despite material advantages, the US failed to achieve all of its goals at the KRC. Seemingly limited in the scope of its public appeals, US delegates had to frame their claims on references that were publicly acceptable and most likely to 'win' the resulting rhetorical contest. In keeping with previous research, arguments with legal frames, especially codified ones, seemed especially useful.[140] However, as this paper demonstrates, not all codified legal frames were equally useful. Arguments framed on constitutive legal claims – both by the US and opponents – may have been uniquely valuable in providing frames which opponents had a harder time challenging, increasing the likelihood that the arguing state would 'win' the rhetorical contest. These findings reinforce the importance of law as a source of rhetoric in international argumentation – especially in formalized

[140] Bower (2015).

international settings, deepen our empirical understanding of the ways in which rhetoric and law may ultimately shape policy outcomes and state behavior, and highlight the particular role of constitutive legal claims in international relations.