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The Role of National Position Papers in the Lawmaking Process of International Law in Cyberspace — A Legal Argumentation Theory Perspective

Shichen Zou[1]

[1] School of Law, Wuhan University, Hubei, China

Correspondence: Shichen Zou, School of Law, Wuhan University, Hubei, China.

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Abstract

The lawmaking process of international law in cyberspace is in deep water. As differences among parties deepen and multilateral processes such as the OEWG struggle to make headway, national position papers issued by states are having a more significant effect on the formation of international rules in cyberspace. The national position papers are distinct in content and form, which can be roughly categorized into two groups according to the concreteness of the rule claims, the abundance of references to sources of international law, and the volume of the papers. Position papers that are more concrete, more abundant in references and have a bigger volume affect the law-making process deeper. According to the theory of argumentation in international law, this is because this type of position paper better meets the requirement of normativity and concreteness, and is more responsive to the forum and legal contexts of legal arguments. China should study the theory of argumentation and improve the normativity and concreteness of position papers in China, to effectively participate in the law-making process in cyberspace.

Keywords: national position papers, international law of cyberspace, argumentation theory

1. Introduction

The lawmaking process of international law in cyberspace is in deep water. In addition to multilateral processes such as the United Nations Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security (UN GGE) and the Open-ended Working Group on security of and in the use of information and communications technologies (OEWG), more and more countries are participating in this lawmaking process by the issuance of national positions, either in forms of written documents or speeches made by senior officials, to express their own understanding of the rules of international law in cyberspace. So far, 87 countries have independently or jointly issued 40 position papers on international law in cyberspace (among them, 55 African countries have jointly issued one position paper, the United States has issued four, the United Kingdom three, and Estonia and the Czech Republic two each)[1], forming a trend that cannot be ignored. As progress in multilateral processes such as UN GGE and OEWG stagnate, and progress towards a new treaty on the international rules of cyberspace is sluggish, the issuance of national position papers seems to have become a significant channel for states to actively engage in the shaping of international law of cyberspace.

[1] See https://cyberlaw.ccdcoe.org/wiki/List_of_articles#National_positions, retrieved on 1st November 2024. Additionally, Cuba submitted a position paper to the Open Working Group on June 28, 2024, for a total of 40 papers. See https://docs-library.unoda.org/Open-Ended_Working_Group_on_Information_and_Communication_Technologies_-_(2021)/Documento_de_posici%C3%B3n_de_Cuba._Aplicaci%C3%B3n_del_Derecho_Internacional_a_las_TIC_en_el_ciberespacio.pdf

Since position papers reflect the opinio juris of States and can be recognized as state practice in the form of verbal acts,[1] they are influential to the formation of customary international law in cyberspace. However, the level of influence that national position papers have on international law does not appear to be the same. While some claims are recognized in other states position papers, accumulating more opinio juris and state practice, others are less appreciated. For example, in his 2012 speech, U.S. Department of State Legal Adviser Harold Koh cited Schmidt's argument[2] that when a cyber operation reaches the same level of scale and effect that are comparable to those of kinetic weapons, it constitutes a use of force.[3] Of the 33 countries and regions that have issued national position papers (including the African Union, which consists of 55 African countries), 22 countries have more or less taken the same position that Koh did in their position papers. On the contrary, concerns expressed by China and Kazakhstan on issues such as cyberterrorism did not receive the same level of attention and support. This indicates that the former claim is more likely to form international rules in cyberspace, while the latter is hardly likely to achieve the same result.

A related phenomenon is that position papers of different countries vary greatly in form and content, and there seems to be a causal link between these differences and the extent of influence that the position papers have on the formation of international rules in cyberspace. Position papers that play a greater role, such as those of the United States, the United Kingdom, the Netherlands, Germany and other countries, are characterized by a larger volume, covering a wider range of legal issues, a more detailed exposition of the legal viewpoints, and more references to cases of the International Court of Justice (ICJ) or other sources of international law in the papers. Position papers of countries with a smaller influence, such as China, Russia and Kazakhstan, are usually more concise and reserved, expressing their positions only on fundamental issues such as the principle of sovereignty.

This article intends to explore the correlation between differences in the content and form of national position papers and their level of influence in forming international law rules in cyberspace, drawing on the argumentation theory of international law. The first part of this article introduces the argumentation theory and explains the specific roles of national position papers in the formation of international rules in cyberspace. According to the argumentation theory, claims in the national position papers with better persuasiveness will play a bigger role in forming international law. The second part then summarizes the factors that influence the persuasiveness of claims in the national position papers. Based on the former two parts, the third part analyzes the persuasiveness of China's national position papers.

2. The Role of National Position Papers from the Perspective of the Argumentation Theory

The argumentation theory of international law was developed in contrast to the rule doctrine. Whereas the rule doctrine defines international law as a set of rules, the argumentation theory views international law as a practice of argumentation, the purpose of which is to persuade the interlocutor so that the arguer's legal claims will be accepted by the interlocutor and by the other hearers.[4] This view was first put forward by Koskenniemi in his monograph,[5] which greatly affects the European and American international law research. After that, scholars such as Ingo Venzke, Ian Johnstone, Steven Ratner developed their own theory of argumentation.[6] The argumentation theory puts forward views that are very different from the rule doctrine in terms of the sources of international law, the nature and role of international law, thus provides new explanations for the role of national position papers in the process of forming international rules.

With regard to the sources of international law, the rule doctrine holds that article 38 of the Statute of the International Court of Justice constitutes an exhaustive list of the sources of international law. Among them, the formal sources, such as general principles of law, treaties, and customary international law, are the foundation

[1] The United Nations International Law Commission, in its Draft Conclusions on Identification of Customary International Law and Commentaries thereto, adopted in 2018, held that verbal acts, written or oral, can constitute State practice. See ILC (2018), Draft Conclusions on Identification of Customary International Law, with Commentaries, A/73/10, Conclusion 6, pp. 133-134.

[2] See Schmitt, M. N., & Schmitt, M. N., (2012). *Computer network attacks and the use of force in international law: thoughts on a normative framework* (pp. 3-48). TMC Asser Press.

[3] See Harold Koh, (2012). International Law in Cyberspace, Remarks as Prepared for Delivery by Harold Hongju Koh to the USCYBERCOM Inter-Agency Legal Conference Ft. Meade, MD, Sept. 18, 2012. *Harvard International Law Journal Online*, *54*, 13-37.

[4] Chen Yifeng, (2023). Beyond Rules: The Argumentative Turn of International Law. *Journal of Peking University (Philosophy and Social Sciences)*, (01), 168.

[5] Martti Koskenniemi, (2005). From Apology to Utopia: The Structure of International Legal Argument. Cambridge University Press.

[6] Chen Yifeng, (2023). Beyond Rules: The Argumentative Turn of International Law. *Journal of Peking University (Philosophy and Social Sciences)*, (01), 171.

and core of international law. Judicial precedents and the teachings of the most highly qualified publicists of the various nations are subsidiary means for the determination of rules of law, and are important only in the sense of contributing to the formation of formal sources or interpreting them. By agreeing sources of international law can be exhausted, the rule doctrine assumes that when there are conflicting understandings of a rule, international judicial bodies can ascertain the correct one. The argumentation theory, on the other hand, adopts a pluralist position, arguing that the sources of international law are not confined to formal sources, but rather consists of a variety of unilateral claims and decisions in international law.[1] There is no single definitive rule in the body of rules of international law, and these unilateral claims and decisions of international law can be simultaneously valid, even if they conflict with each other, and their validity depends on the self-preservation and implementation of the claimant of the rule.[2]

With regard to the nature of international law, the rule doctrine considers international law to be objective and universal. The argumentation theory, on the other hand, holds that uncertainty is the structural characteristic of international law due to semantic ambiguity. According to the rule doctrine, the meaning of international rules is certain, and every country's understanding of international law should be common, consistent, and capable of consensus.[3] However, argumentation theory notes that, despite its function of locking in connotations, the language of law remains open to a certain extent. This leaves room for international law practitioners to distort the rules according to their positions, transforming semantic ambiguity into uncertainty in international law.[4] The customary international law rules of interpretation also contribute to a certain extent to the uncertainty of international law. For example, as stipulated in the Vienna Convention on the Law of Treaties, treaty rules can be interpreted either based on the treaty's text or on the treaty's object and purpose. However, the results of the two methods are sometimes inconsistent, and it is always hard to ascertain which one is more proper, because sufficient arguments can be found in the existing practice and sources of international law for each side.[5] This means that the rules of international law are dynamic rather than static and need to be determined on a case-by-case basis. Therefore, it can be said that international law is a contextual law.[6]

With regard to the role of international law, the rule doctrine usually summarizes the role of international law as reflecting the common consent of States, preserving order and common values in the international community. Malcolm Shaw, for example, argues that international law imports an element of stability and predictability into the international system, offering a regulatory framework.[7] It can be said that the rule doctrine explains the role of international law from a cooperative law perspective. On the contrary, argumentation theories pay more attention to the competing aspects of international law and emphasize its role in securing and distributing benefits.[8] Ingo Venzke notes that states not only use international law to maintain order and accountability but also rely on its rules to give legitimacy and legality to their own behavior or interests.[9] The role of international law in this regard is best exemplified by the competition over the rules surrounding the exclusive economic zone

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[1] Chen Yifeng, (2023). Beyond Rules: The Argumentative Turn of International Law. *Journal of Peking University (Philosophy and Social Sciences)*, (01), 170.

[2] Chen Yifeng, (2023). Beyond Rules: The Argumentative Turn of International Law. *Journal of Peking University (Philosophy and Social Sciences)*, (01), 170.

[3] Chen Yifeng, (2023). Beyond Rules: The Argumentative Turn of International Law. *Journal of Peking University (Philosophy and Social Sciences)*, (01), 164-165.

[4] Martti Koskenniemi, (2007). Methodology of International Law, in *Max Planck Encyclopedia of Public International Law*. https: //opil.ouplaw.com/view/. 10. 1093 /law: epil /9780199231690 /law-9780199231690-e1440 (last visited 1 November 2024). 10. 1093 /law: epil /9780199231690 /law-9780199231690-e1440 (last visited 1 November 2024).

[5] Martti Koskenniemi, (2007). Methodology of International Law, in *Max Planck En cyclopedia of Public International Law*. https: //opil.ouplaw.com/view/ 10. 1093 /law: epil /9780199231690 /law-9780199231690-e1440 (last visited 1 September 2022); Li Ming, (2020). On the Nature and Function of International Law: Insights from Critical International Law. *Peking University Law Journal*, (3), pp. 812.

[6] Li Ming, (2020). On the Nature and Function of International Law: Insights from Critical International Law. *Peking University Law Journal*, (3), p. 810.

[7] Shaw, Malcolm N., (2021). *International law*. Cambridge University Press, 6.

[8] Li Ming, (2020). On the Nature and Function of International Law: Insights from Critical International Law. *Peking University Law Journal*, p. 807.

[9] Ingo Venzke, (2021). Why Use the Language of the Law in Global Politics? On the Legitimacy Effects of Claiming to Act Legally, in Ian Johnstone & Steven Ratner (eds.), *Talking International Law: International Legal Argumentation Outside the Courtroom*. Oxford University Press, 31.

and continental shelf regimes in the law of the sea. Disputed interests originally claimed by individual States have been converted into rights and legally authorized interests after being fixed as rules.[1]

Based on the three above-explained aspects, national position papers should have at least three unique roles when forming new international rules.

First, national position papers can be seen as a source of international law in cyberspace. According to the argumentation theory, a large portion of international rule bodies are unilateral claims and decisions of states. These claims of rules can remain valid simultaneously, relying on the maintenance and implementation of the claimants to keep their validity. As a result, national position papers reflecting state claims on international rules in cyberspace become part of the body of rules of international law in cyberspace. This means that national position papers are no longer confined to affecting international rules indirectly through formal sources but are a direct source of the body of international rules in cyberspace.

Second, national position papers can serve as a means for States to promote and enforce their rule claims. Argumentation theory suggests that conflicting rule claims can be simultaneously valid. To gain the upper hand in this conflict, states have to promote and enforce their rule claims by arguing for their legitimacy, persuading other states, and conducting state practice in a manner consistent with the rule claims. National position papers are a perfect vehicle for states to conduct these tactics. A majority of states that have issued their position papers also argued the rationality of their claims by citing other sources of international law, envisioning or quoting specific scenarios and cases, reaffirming the values of international law upheld by the rules, while stating their own rule claims. In this sense, national position papers will play an increasingly important role in legal argumentation.

Finally, national position papers reflect the efforts of States to pursue their interests in the law-making process of international law in cyberspace. The unique value of national position papers is that they constitute, as a whole, one of the rare occasions in the field of international law in cyberspace for a unilateral legal debate open to all States. The unilateral nature of the position paper means that each State issuing a position paper can address its rule claims in the most thorough manner possible, without having to compromise its claims and arguments in the pursuit of consensus, thus reflecting the truest interests of the State, and enabling the State to maximize the benefits it seeks. Its openness means that the position paper has the opportunity to reach a wider audience and to have a broader impact on the international community.

3. Factors Affecting the Persuasiveness of National Position Papers

The position papers currently issued by States vary considerably in form and content. Some countries' position papers are more voluminous; they are issued more frequently, and they are more detailed when arguing for specific rules, citing sources of international law as arguments, and clarifying the criteria for applying the rules through scenario-based examples. The position papers of other countries are more concise; they make only principled statements on specific rules, with fewer clear legal standards and fewer references to sources of international law. These differences do not merely reflect differences in domestic policies and the level of research on international law in cyberspace, but they also influence the argumentative effect of position papers.

Factors affecting the persuasiveness of a law argumentation can be divided into two categories. The first is internal factors, including normativity and concreteness of argumentation. The second is external factors, including the occasion of argumentation and the legal context.

3.1 Internal Factors: Normativity and Concreteness of Arguments

Koskenniemi concludes two criteria that should be met by a persuasive argument in international law: normativity and concreteness of the argument.[2]

Normativity is a concept opposable to State power. International law arguments that fulfill normativity are binding on States, they not merely describe what states are doing or will do, but are able to require states to act against their will. Normativity has two sources, namely justice and the sources of international law. Justice in international law is often seen as a legal blueprint; rules that are consistent with the blueprint are considered binding while those that are contrary to justice are considered repealable. Where justice seems vague or difficult to ascertain, sources of international law offer an alternative way to evaluate the normativity of legal arguments. Koskenniemi here confined the sources of international law to those listed in Article 38 of the Statute of the International Court of Justice, but he also notes formalism as the downside of this method, adding that whether

[1] Li Ming, (2020). On the Nature and Function of International Law: Insights from Critical International Law. *Peking University Law Journal*, *3*(3), p. 807.

[2] Martti Koskenniemi, (2007). Methodology of International Law, in *Max Planck Encyclopedia of Public International Law*. https: //opil.ouplaw.com/view/ 10. 1093 /law: epil /9780199231690 /law-9780199231690-e1440 (last visited 1 September 2022).

arguments conform with sources of international law can only be determined on a case-by-case basis, revealing his pluralistic position.[1]

Concreteness in international law argumentation refers to the extent to which the argumentation is responsive to specific scenarios in international law. An international law argument that meets the criterion of Concreteness should take into account the social, political, economic, and technological context in which the law is practiced, as well as the purpose and interests of the subjects of international law.

Legal arguments in national position papers satisfy normativity and concreteness at different levels. In terms of normative arguments based on justice in international law, countries such as the United Kingdom, Australia, and Kenya have made more explicit arguments in their position papers. For example, in his 2018 speech titled 'Cyber and International Law in the 21st Century', UK Attorney General Jeremy Wright argued that existing international law should be adapted and applied to cyberspace through interpretation by emphasizing the value of order in international law. He suggested that 'International law must remain relevant to the challenges of modern conflicts if it is to be respected, and as a result, play its critical role in ensuring certainty, peace and stability in the international order.'[2] Australia also spoke of the just value of international law for the maintenance of peace and security when it argued that existing international law provides a comprehensive and robust framework for states to respond to malicious cyber activities: 'the application of existing international law to cyberspace can enhance international peace and security by increasing the predictability of State behaviour, reducing the possibility of conflict, minimizing escalation and preventing misattribution.'[3] Kenya, in its position paper submitted to the UN GGE in 2021, also articulated the just value of international law in maintaining peace, resolving conflicts, and safeguarding the fundamental rights of States. According to Kenya, 'Kenya recognizes that International Law has many functions. Among the primary functions is to create an agreed context and standard of action and behaviour among States, to maintain order in international issues, to minimize the occurrence of international conflicts and disputes, and, where they occur, to assist in their resolution, and lastly, to protect the sovereign liberties and rights of States.'[4]

In terms of normative arguments based on the sources of international law, the position papers of Brazil, the Netherlands, and Japan contain more explicit statements. Both Brazil and the Netherlands explicitly include Article 38 of the Statute of the International Court of Justice as a criterion for assessment. In its 2021 submission to the UN GGE, Brazil explicitly wrote: 'Brazil has followed the traditional sources of international law, as enshrined in article 38 of the ICJ Statute. Academic works and expert reports, such as the Talinn Manual and the ICRC Position Paper, are considered as important reference material.'[5] Similarly, the Netherlands wrote in its position paper that 'The government has taken the primary sources of international law defined in article 38 of the Statute of the International Court of Justice as a starting point.'[6] To defend specific rule claims, Japan cites a relatively large number of sources of international law in its 2021 submission to the UN GGE, which is an example of normative argumentation. For example, in arguing the claims of infringement of sovereignty and the principle of non-intervention, Japan cites the judgment of the Permanent Court of International Justice in the Lotus case and the Arbitral Tribunal in the Palmas Island cases to support its claim that acts below the threshold of interference may also infringe on sovereignty. Japan continues to cite the reasoning of the ICJ in the Nicaragua case in 1986 and the Costa Rica v. Nicaragua case in 2015 to support its claim that infringement of sovereignty constitutes a violation of international law.[7]

In terms of making concrete arguments, the position papers of Australia and the UK are positive examples.

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[1] Martti Koskenniemi, (2007). Methodology of International Law, in *Max Planck Encyclopedia of Public International Law*. https: //opil.ouplaw.com/view/ 10. 1093 /law: epil /9780199231690 /law-9780199231690-e1440 (last visited 1 September 2022).

[2] Jeremy Wright QC., (2018). Cyber and International Law in the 21st Century. Retrieved on 1st July 2024 from:https://www.gov.uk/government/speeches/cyber-and-international -law-in-the-21st-century.

[3] See Official compendium of voluntary national contributions on the subject of how international law applies to the use of information and communications technologies by States, UNODA, A/76/136, August 2021, 4.

[4] See Official compendium of voluntary national contributions on the subject of how international law applies to the use of information and communications technologies by States, UNODA, A/76/136, August 2021, 53.

[5] See Official compendium of voluntary national contributions on the subject of how international law applies to the use of information and communications technologies by States, UNODA, A/76/136, August 2021, 18.

[6] See Official compendium of voluntary national contributions on the subject of how international law applies to the use of information and communications technologies by States, UNODA, A/76/136, August 2021, 55.

[7] See Official compendium of voluntary national contributions on the subject of how international law applies to the use of information and communications technologies by States, UNODA, A/76/136, August 2021, 46.

Australia submitted a no-paper to the OEWG in 2020 on case studies on the application of international law in cyberspace. In this paper, Australia presented three fictional scenarios and discussed the application of the rules of attribution, non-interference, prohibition of the use of force, responsibility of the state for corresponding wrongful acts, countermeasures, and retorsion in international law. With regard to the application of the principle of non-intervention, Australia envisioned a case in which State B attacked State A's tax website, resulting in State A's inability to implement tax reforms and loss of tax revenue. Australia argues that in such a case, the relevant cyber activities could constitute prohibited interference.[1] The British Attorney General Jeremy Wright explicitly referred to the need to take into account the technical, political, and diplomatic contexts in which the rule would apply when discussing rules concerning attribution in international law. He further cited the impact of electronic signatures, hard-to-trace networks and the dark web as the relevant technology context for attribution rules.[2]

3.2 External Factors: The Forum and Legal Context of Arguments

Normativity and concreteness work as internal factors to evaluate the persuasiveness of legal arguments. The forum and legal context of arguments, on the other hand, operate as external factors to decide which argument shall be considered valid and accepted as consensus.

Choosing a forum for argumentation often implies choosing corresponding rules of procedure and a preference for a particular outcome. For example, under the rules of procedure of the International Court of Justice (ICJ), the Court must identify and apply international law in its strictest form when considering a case, thereby confining the sources of international law to Article 38 of the Statute of the ICJ.[3] But in other forums, such as the United Nations General Assembly, resolutions of international organizations and soft norms can also serve as basis for argument. When international law is invoked by a state's diplomatic organs, even individual precedents of other states are strong evidence.[4] The openness of the forum will have different effects for different purposes. If the purpose of the argument is to urge another country to comply with the law, then a smaller venue with less openness and a limited audience is more conducive to persuasion. If the purpose of the argument is to urge a consensus on a new treaty, then a larger venue with more openness and a wider audience can have a broader impact.[5] Preferences for outcomes in different forums are due to staffing and past practice. In forums dominated primarily by legal personnel, participants will prefer to argue in legal language,[6] whereas in forums such as the Security Council, detailed, analytical legal reasoning may be less effective than less prescriptive and specific arguments based on international relations, diplomacy, policy considerations, and international values.[7] In adjudicative contexts, there may also be a tendency to form a preference for outcomes based on past jurisprudence. For example, in the European Court of Human Rights (ECtHR), teleological arguments are more favored, while in the World Trade Organization (WTO), literalism are preferred more in augments by adjudicators.[8]

There are at least three types of forums in which national position papers are issued: organizations such as UN GGE and OEWG, speeches delivered by authorities in domestic or international forums, and public forums such as the official websites of Governments. These three types of forums share both similarities and differences. The similarities is that these three types of forums do not have the same strict procedural rules as those of the International Court of Justice, which means that States are not confined to Article 38 of the statute of ICJ, but

[1] Australia No-paper, Case studies on the application of international law in cyberspace. https://www.dfat.gov.au/sites/default/files/australias-oewg-non-paper-case-studies-on-the-application-of-international-law-in-cyberspace.pdf.

[2] Jeremy Wright QC., (2018). Cyber and International Law in the 21st Century. Retrieved on 1st July 2024 from: https://www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century.

[3] International Court of Justice, Statute of the International Court of Justice Article 38.

[4] Chen Yifeng, (2023). Beyond Rules: The Argumentative Turn of International Law. *Journal of Peking University (Philosophy and Social Sciences)*, (01), 172.

[5] Ian Johnstone & Steven Ratner (eds.), (2021). *Talking International Law: International Legal Argumentation Outside the Courtroom*. Oxford University Press, 350.

[6] Ian Johnstone & Steven Ratner (eds.), (2021). *Talking International Law: International Legal Argumentation Outside the Courtroom*. Oxford University Press, 345.

[7] Ian Johnstone & Steven Ratner (eds.), (2021). *Talking International Law: International Legal Argumentation Outside the Courtroom*. Oxford University Press, 351.

[8] Martti Koskenniemi, (2007). Methodology of International Law, in *Max Planck Encyclopedia of Public International Law*. https: //opil.ouplaw.com/view/ 10. 1093 /law: epil /9780199231690 /law-9780199231690-e1440 (last visited 1 September 2022).

can rather employ a wider range of sources of international law including or international soft norms and the practice of individual States as a way to enhance the normativity of their arguments. In terms of the openness, all three types of forums have a potentially wide range of participants, which is conducive to facilitating a broad consensus. The difference is that the preference for legalistic argumentation varies from one forum to another, as does the number of direct participants.

States more sophisticated in arguments will choose different techniques according to various forums. In forums such as UN GGE or OEWG, States expect to reach a consensus that can best reflect their interest. To do so, States as arguer have to find the balance between national interest and the interest of the international community. Therefore, national position papers issued in these two forums generally need to avoid being overly detailed to retain flexibility and inclusiveness. In contrast, position papers issued on government websites can be more specific and less compromising, as the country is not seeking a consensus in these instances.[1] In this forum, more specific and aggressive assertions of the rule may help the State maximize its interests under international law. States also customize the volume and tone of their arguments for the preferences of the audience in the forum. For example, in his 2020 speech addressing international law in cyberspace, the U.S. Department of Defense (DoD) General Counsel Paul Ney devoted only one-third of his speech to international law arguments, while the remaining portion was on domestic policy and law for cyber threats, as the speech was delivered at the annual meeting of U.S. Cyber Command, and the audience in this forum was domestic politically motivated group.[2]

The second external factor is the legal context in which the argument takes place. The legal context for a rule claim consists of all the relevant sources of international law, including but not limited to those listed in Article 38 of the ICJ statute.[3] The legal context constitutes what the relevant actors regard as a good legal argument, thereby affecting which rule claims are most likely to be accepted by the international law community and which are less likely to do so.[4] Rule claims that tapping into emerging standards and expectations in the relevant legal context stands a better chance as they conform to the evolution of the existing rules, those that contradict the conventional understanding of existing rules or cannot find support in the legal contexts will face resistance.[5]

As legal context comes into play, even rule claims made by the same arguer in the same position paper may receive different degrees of acceptance in the audience. For example, in his 2018 speech, UK Attorney General Jeremy Wright addressed both the right to self-defense and sovereignty in cyberspace, yet received a distinct reaction. On the right of self-defense, the UK proposes that when cyber operations are comparable in scale and effect to an armed attack using kinetic means, then the state is entitled to exercise its right of self-defense against imminent or ongoing cyber activities of this kind. The UK's rule claim adopts the scale and effect criteria and the concept of anticipatory self-defense, both conform with the relevant legal context. In terms of scale and effect criteria, two U.S. national position papers and the 2017 Tallinn Manual 2.0 have taken the same view. As for anticipatory self-defense, the practice of the Israeli Six-Day War and the relevant Security Council resolutions can also serve as a source. Because of the existence of a certain basis in the legal context of the right to self-defense, the UK's rule claim has received a high degree of acceptance. However, this is not the case with the UK's claim to sovereignty in cyberspace. Wright suggests that the existence of a primary rule prohibiting infringement of sovereignty cannot be inferred from existing state practice and opinio juris in cyberspace. In cyberspace, no state has until now put forward a position consistent with that of the UK. On the contrary, in other spaces including territory, territorial sea, and airspace, the prohibition of violating sovereignty is firmly established as a primary rule. It could be argued that the UK's position on sovereignty is not consistent with the legal context and therefore faces more controversy.[6]

In summary, to enhance the persuasiveness of the arguments in national position papers, States can improve the

[1] Ian Johnstone & Steven Ratner (eds.), (2021). *Talking International Law: International Legal Argumentation Outside the Courtroom*. Oxford University Press, 127.

[2] See Hon. Paul C. Ney, Jr., (2020). DOD General Counsel Remarks at U.S. Cyber Command Legal Conference. https://www.defense.gov/News/Speeches/Speech/Article/2099378/dod-general-counsel-remarks-at-us-cyber-command-legal-conference/

[3] A similar concept is that of interpretative groups. See Ingo Venzke, (2014). What Makes for a Valid Legal Argument? *Leiden Journal of International Law*, *27*, 34-36.

[4] Ian Johnstone & Steven Ratner (eds.), (2021). *Talking International Law: International Legal Argumentation Outside the Courtroom*. Oxford University Press, 352.

[5] Johnstone, Ian., (2011). *The power of deliberation: international law, politics and organizations*. Oxford University Press, 49-50.

[6] Chircop, Luke, (2019). Territorial sovereignty in cyberspace after Tallinn manual 2.0. *Melbourne Journal of International Law*, *20*(2), 349-377.

normativity and concreteness of the arguments by citing sources and specifying the scenarios in which the rules apply. Beyond the arguments, States also need to pay attention to the preferences and procedural rules of the forum in which the national position paper is issued and to harmonize the compatibility of the rule claim with the legal context, thereby gaining persuasiveness and effectiveness.

3.3 China's National Position Paper from the Perspective of Argumentation Theory

In recent years, China has actively participated in the formulation of international rules in cyberspace, submitting documents such as China's Positions on International Rules-making in Cyberspace to the OEWG in 2021 and 2022 respectively. While China's position papers clearly convey China's proposition and position, from the perspective of the argumentation theory, the position papers are deficient in normativity and concreteness, and are not responsive enough to forums and legal contexts. More strikingly, China's position paper failed to put forward any effective rule claim in international law on cyberspace.

The normativity of the international law arguments stems from the justice of international law and the sources of international law. Concerning justice in international law, China's position paper mainly proposes that the international community should discuss the application of existing international law within the framework of the United Nations from the perspective of safeguarding peace and security, without giving further elaboration on the meaning and application of peace and security. The position paper also points out that the application of the principles of sovereign equality and prohibition of the use of force or threat of force are the cornerstone for ensuring peace, security and stability in cyberspace.[1] The use of peace and justice to argue for the application of principles such as sovereign equality is uncontroversial, but it is precisely because of the absolute correctness of this claim that this paragraph resembles more a restatement of an existing consensus than a legal argument. With regard to the sources of international law, China's position paper did not cite any treaties, customary law or judicial precedents as supporting sources. As for the concreteness of the arguments, China's position paper emphasizes some worrying problems in cyberspace, such as threats to critical infrastructures, cyberterrorism, and large-scale leakage and misuse of user data. Regrettably, however, the position paper did not make any legal claims, having merely limited significance from the perspective of argumentation theory.

With regard to the forums, China's position paper was submitted to the OEWG as well as published on the official website of the Ministry of Foreign Affairs of China. The OEWG is a forum that seeks consensus among countries and therefore requires that the arguments retain a certain degree of compromise, while the Ministry of Foreign Affairs website is open to domestic and foreign governments and the public, and therefore allows for a more thorough presentation of the arguments, therefore the characteristics of the two forums are in conflict to a certain extent. Judging from the language used in China's position paper, it was more in favor of the consensus and compromise aspects of the OEWG. In addition, China's position papers generally use policy language, which may be more conducive to publicizing China's policy ideas and initiatives through the official website, but there is a certain incongruity between the policy language and the title of the paper ('China's Positions on International Rules-making in Cyberspace'), which hints the legal nature. Most of China's position papers express only general views and mostly emphasize consensus in international law. From a positive perspective, this means that there is no conflict between China's position papers and the legal context. On the other hand, however, due to the lack of clarity on specific issues, China's national position papers failed to construct a legal context that is favorable to its interest.

The inadequacy of China's position papers in terms of internal and external factors reflects the limited attention paid to the argumentative effect of national position papers. This may be because China has always advocated the formulation of new rules in cyberspace through agreeing on new treaties, and has therefore paid more attention to the rule doctrine and article 38 of the ICJ statute, overlooking the development of international law methods, such as the theory of argumentation. This is not conducive to China in competing for leadership in forming the future landscape of international law in cyberspace.[2] At a time when other countries are actively using national position papers to promote rules reflecting their interests, sticking to the path of agreeing on new treaties is tantamount to tying up one's own hands.

Because of this, China should pay more attention to the study of the theory of argumentation when participating in the formulation of international rules in cyberspace and, on this basis, adjust the content and form of its national position papers to give full play to the argumentative role of position papers.

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