# Why Use the Language of the Law in Global Politics? On the Legitimacy Effects of Claiming to Act Legally

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DOI
10.1093/oso/9780197588437.003.0002

Publication date
2021

Document Version
Final published version

Published in
Talking International Law

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# Why Use the Language of the Law in Global Politics? On the Legitimacy Effects of Claiming to Act Legally

*Ingo Venzke*

## I. Introduction

The language of international law has shaped many debates in global politics.[1] The legality of the 2003 US-led invasion of Iraq is a prominent example. Whether it was legal was a central question at the UN Security Council; it structured the speeches of many politicians when they addressed the public, and it was key to the claims that the public made in many market squares.[2] Why? What are the reasons for invoking the law? What are the underlying assumptions about its power? Do they hold?

Some public leaders—especially but not only of a populist bent—have shown little patience for international law, voicing outright disdain for international commitments instead.[3] For example, when President Donald Trump went on record after the United States, together with France and the United Kingdom, had struck against President Bashar al-Assad of Syria, arguably in retaliation of his use of chemical weapons, legal language was rarely heard. Here and elsewhere, a moral vocabulary prevailed: "The evil and the despicable attack left mothers and fathers, infants and children, thrashing in pain and gasping for air," Trump claimed. "These are not the actions of a man," he continued, "they are crimes of a monster instead."[4] But Trump intervened in a discursive field—debates about warfare—that often serves as an example for the prevalence

[1] As Steven Ratner points out in chapter 6 in this volume, the law has even done so when it has been rather thin, as is arguably the case in issues of cybersecurity. See more generally Friedrich Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge: Cambridge University Press, 2014); Nikolas M. Rajkovic, Tanja E. Aalberts, and Thomas Gammeltoft-Hansen, "Introduction: Legality, Interdisciplinarity and the Study of Practices," in *The Power of Legality: Practices of International Law and their Politics* edited by Nikolas M. Rajkovic, Tanja E. Aalberts, and Thomas Gammeltoft Hansen (Cambridge: Cambridge University Press, 2016); David Kennedy, *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy* (Princeton: Princeton University Press, 2016) (showing the prevalence of legal discourse in the context of economic politics).

[2] See Ian Johnstone, "US-UN Relations after Iraq: The End of the World (Order) as We Know It?," *European Journal of International Law* 15 (2004): 813; Gerry Simpson, "The War in Iraq and International Law," *Melbourne Journal of International Law* 6 (2005): 167.

[3] Cf. James Crawford, "The Current Political Discourse Concerning International Law," *Modern Law Review* 81 (2018): 1.

[4] Donald J. Trump, "Statement by President Trump on Syria" (The White House, 2018).

Ingo Venzke, *Why Use the Language of the Law in Global Politics? On the Legitimacy Effects of Claiming to Act Legally*
In: *Talking International Law*. Edited by: Ian Johnstone and Steven Ratner, Oxford University Press. 
DOI: 10.1093/oso/9780197588437.003.0002

of law in global politics. Struggles over legality—what is considered (il)legal—are recognized as a crucial site of warfare where gains and losses are experienced.[5]

One may also consider how Brexit has made many people conversant in both international and European law. Who, except for the experts, had ever heard of Article XXIV of the General Agreement on Tariffs and Trade (GATT) or of Article 50 of the Treaty of the European Union (TEU)? Boris Johnson quoted Article XXIV, paragraph 5(b) on BBC in one of his first appearances after he was elected prime minister, only to duck the interviewer's follow-up comment that paragraph 5(c) actually contradicts his plans.[6] Why this reliance (*vel non*) on the law?

In the present chapter, I focus on an assumption that underlies different approaches to answering that question, namely, that claims to legality have the capacity of changing individual or collective attitudes toward certain actions or situations.[7] I am interested, in other words, in international law's *legitimacy effects*—its impact on evaluative judgments about what is right and wrong. To be clear, my interest in this effect does not presuppose that those who invoke the law are themselves convinced by the law and deem it legitimate. Such a conviction may be one reason for invoking the law, but there are others.

Pioneering work has started to test the effect of invoking international law on public opinion, especially though experimental studies. That body of work answers one of this volume's structuring questions in the affirmative: the effect of legal versus non-legal argumentation on decision makers *can* be determined in an empirically convincing way.

I discuss this pioneering research against the background of different reasons for invoking the law that are embedded in different logics of action, and I enrich that discussion with insights from legal theory. This background adds important nuances to what has already been done, exposes gaps,[8] and instructs us on next steps. Three points will emerge in particular: First, more attention needs to be paid to distinctive

[5] See Monica Hakimi, chapter 3, in this volume. Research on this issue is often grouped under the notion of "lawfare." While propaganda is a timeworn dimension of warfare, lawfare is qualitatively different due to its reliance on *legal* language. Such a shift toward the law has gone hand in hand with an increasing role of lawyers. Consider the statement by General Jones, former NATO Supreme Allied Commander, Europe:

> It used to be a simple thing to fight a battle.… In a perfect world, a general would get up and say, "Follow me, men," and everybody would say, "Aye, sir" and run off. But that's not the world anymore, … [now] you have to have a lawyer or a dozen. It's become very legalistic and very complex.

Quoted in Lyric Wallwork Winik, "A Marine's Toughest Mission," *Parade*, Jan. 19, 2003. Cf. Charles J. Dunlap, "Lawfare Today: A Perspective," *Yale Journal of International Affairs* 3 (2008): 146. It is fairly obvious that the notion of "lawfare" is itself employed strategically to discredit some uses of the law; see W.G. Werner, "The Curious Career of Lawfare," *Case Western Reserve Journal of International Law* 43 (2011): 61.

[6] The interview was with Andrew Neil on July 12, 2019, https://twitter.com/BBCPolitics/status/1149734201991806977.

[7] On attitudes as an evaluative response, see Gregory R. Maio, Geoffrey Haddock, and Bas Verplanken, *The Psychology of Attitudes and Attitude Change* (Thousand Oaks: Sage, 2018), 4 (summarizing different leading definitions of attitudes and identifying evaluation as the dominant aspect); cf. Alice H. Eagly and Shelly Chaiken, *The Psychology of Attitudes* (San Diego: Harcourt Brace Jovanovich College Publishers, 1993), 1 (defining attitudes as "a psychological tendency that is expressed by evaluating a particular entity with some degree of favor or disfavor.").

[8] On the existing theoretical literature on argumentation, as well as the gaps, see Ian Johnstone and Steven Ratner, chapter 1, in this volume.

features of legal claims, in particular law's claim to authority. Second, research has so far overwhelmingly focused on US public opinion and should expand to test effects among other audiences that probably hold different views about the role of law and public institutions. Third, existing research has probed international law's relevance by focusing on the constraints that it imposes and on hard cases as a litmus test. The law may be at least as important, however, in enabling action that would otherwise not be similarly available.

I will develop my argument about the prevalence of legal discourse and the underlying assumptions about its legitimacy effects in two main steps. I will first expand on the main reasons why actors invoke the law in public discourse, placing those reasons within three logics of action—consequentialism, appropriateness, and deference. Drawing on insights from legal theory, I will highlight the instrumental and formalist understandings of the law that are embedded in these explanations. Each of the three logics has a different take on the law's legitimacy effect, an effect that they, however, all share as an underlying assumption (Section II). This leads me, second, to an inquiry into the strength of that assumption and to a discussion of related experimental research. I thereby draw attention to the three main points for further inquiry—a better recognition of the law's distinctive claim to authority, of audiences' varying predispositions about the rule of law, and the law's enabling rather than constraining function in global politics (Section III). In conclusion, I will point to the deep divides that separate experimental methods from the critical legal research that has been most vocal in emphasizing law's legitimacy effects (Section IV).

## II. Reasons for Invoking the Law

### A. In the Aftermath of Legalization

Even if debates about the so-called legalization of world politics may now feel dated,[9] they still testify to a significant growth of international authority and increase in international legal commitments over the past decades.[10] Changes in the structure and scope of international law have been truly remarkable and are a crucial part of the condition for many legal arguments at present. Particularly noteworthy is the quantitative increase in international adjudication, which has gone hand in hand with a qualitative change toward greater judicial authority in international lawmaking, current backlashes notwithstanding.[11] Those developments made it possible for Friedrich

[9] Judith Goldstein et al., "Introduction: Legalization and World Politics," *International Organization* 54 (2000): 385.

[10] Armin von Bogdandy et al., eds., *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law* (Heidelberg: Springer, 2010); Michael Zürn, *A Theory of Global Governance: Authority, Legitimacy, and Contestation* (Oxford: Oxford University Press, 2018); Armin von Bogdandy, Matthias Goldmann, and Ingo Venzke, "From Public International to International Public Law: Translating World Public Opinion into International Public Authority," *European Journal of International Law* 28 (2017): 115.

[11] Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford: Oxford University Press, 2014); Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton: Princeton University Press, 2013).

Kratochwil to write in 2014 that "law now provides in large part the vocabulary for contemporary politics."[12] That continues to be the case even if the high times of codification and multilateral treaty-making were already over when Kratochwil penned those words.[13]

Law, however, has never been the only language of international politics, nor is its presence in public discourse a given over time, space, or issue area.[14] Legal language was rare, for example, in official discourses about Turkey's 2019 intervention into Northern Syria. One should in any case not mistake the prevalence of legal language as a victory for the rule of law and therefore be nostalgic in view of increasing disdain for international law among some world leaders. Nor is international law's discursive presence in global politics per se evidence of its power to convince actors or constrain action.[15]

*Why* legal discourses pervade many questions of global politics and *whether* the law constrains or convinces are related but separate questions. It may even be the case that international law has enjoyed popularity precisely because so many different things can be made of it—because it is arguably entirely malleable.[16] Whatever its overall strength, the argument that the law is so malleable cannot be brushed aside with the counterargument that it only makes sense to argue about something which is meaningful. There are many ways in which people might be led astray. It is for good reason that false consciousness is one of the main targets of critical work.[17] Put differently, it is simply not possible to gain much insight into why many actors argue about the law in global politics from the fact that they do.[18] The fact prompts the question: Why do they?

## B. The Logic of Consequences

A first cut at the question of why actors invoke the law in global politics emphasizes the law's distribution of payoffs. The law matters for the way in which it allocates costs

[12] Kratochwil, *supra* note 1, at 1.

[13] Nico Krisch, "The Decay of Consent: International Law in an Age of Global Public Goods," *American Journal of International Law* 108 (2014): 1; Joost Pauwelyn, Ramses A. Wessel, and Jan Wouters, "When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking," *European Journal of International Law* 25 (2014): 733.

[14] Lisbeth Zimmermann, chapter 13, in this volume, for instance, compares the relative salience of legal and scientific arguments in the International Whaling Commission, and Bruno Stagno-Ugarte, chapter 8, in this volume, notes that "non-legal arguments may be more effective" when it comes to the promotion of human rights.

[15] But see Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (Oxford: Oxford University Press, 2011), 7 (suggesting that invocations of the law tesify to the fact that it matters).

[16] David Kennedy, *Of War and Law* (Princeton: Princeton University Press, 2006).

[17] On the role of ideology generally, Terry Eagleton, *Ideology: An Introduction* (New York: Verso, 2007); and in legal discourse specifically, see Duncan Kennedy, "The Hermeneutic of Suspicion in Contemporary American Legal Thought," *Law and Critique* 25 (2014): 91.

[18] I thus take a different view from Monica Hakimi, chapter 3, in this volume, who sees the prevalence of legal arguments as supporting the rule of law even when arguments cannot be authoritatively resolved. In short, I do not share her assumptions about the process of arguing. See in detail Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford: Oxford University Press, 2012), 214–222.

and benefits of different sorts. Actors invoke it because they want to enjoy the benefits that they receive through the law, or because they want to hold others to existing commitments. The use of legal arguments here is an extension of a process of continuous bargaining.[19] When it comes to maritime delimitation, for instance, legal claims determine the possibility to exploit natural resources and to exclude others from economic activity. When it comes to war and peace, assessments of legality may decide who lives and who dies during war, and who walks free or goes to prison if they take lives. In the field of investment law, the legality of host states' conduct determines their financial liability. The prevailing reason for invoking the law, these examples suggest, follows the logic of consequences—actors want to benefit from law's distribution of payoffs.[20]

This is not the place to digress into long-standing arguments about whether international law matters in consequentialist logic. That has been settled: it does.[21] It does not matter all the time, or for everyone in the same way. As a bottom line, however, a considerable part of international legal discourse cannot simply be cast aside as inconsequential rhetoric.[22] Moreover, while the prevalence of law in discourses of global politics does not *eo ipso* prove that the law matters, treating it as inconsequential rhetoric begs the question *why* law talk is so present all the same.[23] Why bother?

Two points require clarification. First, speaking the language of the law always has two dimensions: While actors seek to tap into the distribution of payoffs connected with determining the legality of certain action (e.g., what follows from an illegal use of force), making legal arguments also constantly contributes to shaping the law (what is, for instance, considered to be an illegal use of force?).[24] Particular legal arguments are a simultaneous expression of, on the one hand, the power that resides with specific actors to shape the law through their use of the law and, on the other hand, the power that resides within the structure of the law—the institution that shapes the chances that some legal arguments succeed and others fail.[25] Sticking to the metaphor of the language of international law, one can think of those two dimensions of speaking

[19] Cf. Harald Müller, "Arguing, Bargaining and All That: Communicative Action, Rationalist Theory and the Logic of Appropriateness in International Relations," *European Journal of International Relations* 10 (2004): 395; Jon Elster, "The Strategic Use of Arguments," in *Barriers to Conflict Resolution*, edited by K. Arrow et al. (New York: W. W. Norton, 1995), 236; Johnstone, *supra* note 15, at 17.

[20] James G. March and Johan P. Olsen, "Elaborating the 'New Institutionalism,'" in *The Oxford Handbook of Political Institutions*, edited by Sarah A. Binder and R.A.W. Rhodes (Oxford: Oxford University Press, 2008), 3.

[21] Friedrich V. Kratochwil, "How Do Norms Matter?," in *The Role of Law in International Politics: Essays in International Relations and International Law*, edited by Michael Byers (Oxford: Oxford University Press, 2000); Robert D. Keohane and Lisa L. Martin, "The Promise of Institutionalist Theory," *International Security* 20 (1995): 39.

[22] Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (New York: Oxford University Press, 2005); Hans-Joachim Cremer, "Völkerrecht—Alles Nur Rhetorik?," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 67 (2007): 267.

[23] In agreement, Johnstone, *supra* note 15. Also see Steven R. Ratner, "Law Promotion beyond Law Talk: The Red Cross, Persuasion, and the Laws of War," *European Journal of International Law* 22 (2011): 459.

[24] Also see Steven Ratner, chapter 6, in this volume, highlighting the lawmaking dimension of legal arguments.

[25] See, in further detail, Venzke, *supra* note 18 (developing an understanding of legal argumentation as semantic struggle).

along the lines of the classic distinction between *langue*—structuring language—and *parole*—the act of speaking.[26]

Second, international law's institutional power not only constrains but also enables certain action—something that tends to be glossed over in much of the international relations literature and its emphasis on compliance.[27] One may consider the example of a bilateral investment treaty (BIT) between states "A" and "B" to illustrate both points. While the BIT imposes costs for breaches of certain standards of protection, it enables foreign investors to resort to international arbitration and opens up avenues for enforcement. When arguing about certain standards of protection—for example, whether A's environmental law reform amounts to an indirect expropriation—actors are subject to the institutional power of the underlying treaty and a mode of discourse which, once more, impacts the prospects of specific arguments succeeding or failing. At the same time, actors exercise power to the extent that they are able to shift those prospects with respect to the decision in the concrete case and for future arguments down the road.

Further examples stem from the frequent frame of reference for arguments about law talk, the laws of war. While those laws prohibit certain conduct, such as the direct targeting of civilians, they allow other actions, such as targeting civilians who take a direct part in hostilities, thus turning an act of killing into a legally sanctioned feat.[28] By referring to the law, actors tap into the way in which the law distributes gains and losses. They simultaneously try to pull the law onto their side and contribute to shaping and making the law within their practice.[29]

"Law's empire has less need for troops," Katharina Pistor writes in her analysis of private law and the making of capital. The law, she continues, "relies instead on the normative authority of the law, and its most powerful battle cry is 'but it is legal.'"[30] The way in which the law creates wealth and inequality by coding capital, Pistor argues, provides a powerful defense against those who want to challenge that distribution. Granting an appearance of legitimacy is one of law's key functions in Pistor's analysis, as in others.

The belief in the legitimacy of the law—of legal titles, wealth, and inequality that it creates—appears to be at the core of Pistor's arguments. Moreover, she places emphasis not on what is prohibited but on what is allowed and thereby legitimized.[31] Jean-Jacques Rousseau knew that as far back as 1775 when he wrote his *Discourse Upon the Origin and the Foundation of the Inequality among Mankind* of "[t]he first

[26] While recognizing that the former also shapes the latter and is not only structured by, see Ferdinand de Saussure, *Course in General Linguistics*, edited by Roy Harris (Chicago: Open Court, 1965); cf. Ingo Venzke, "Is Interpretation in International Law a Game?," in *Interpretation in International Law*, edited by Andrea Bianchi, Daniel Peat, and Matthew Windsor (Oxford: Oxford University Press, 2015), 352.

[27] But see Ian Johnstone, "The Security Council and International Law," in *The UN Security Council in the 21st Century*, edited by Sebastian von Einsiedel, David M. Malone, and Bruno Stagno Ugarte (Boulder: Lynne Rienne Publishers, 2015), 771; Ian Hurd, *How to Do Things with International Law* (Princeton: Princeton University Press, 2017).

[28] Nathaniel Berman, "Privileging Combat? Contemporary Conflict and the Legal Construction of War," *Columbia Journal of Transnational Law* 43 (2004): 1.

[29] Venzke, *supra* note 18; Kennedy, *supra* note 1.

[30] Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton: Princeton University Press, 2019), 8, 161.

[31] Ingo Venzke, *International Law and the Spectre of Inequality* (Amsterdam: Amsterdam University Press, 2019).

man, who, after enclosing a piece of ground, took it into his head to say, 'This is mine,' and found people simple enough to *believe* him."[32] Since then, the sociological fact that legality begets legitimacy—that whatever is legal is legitimate, or at least okay—has only grown stronger.

The legitimacy effects of the law are important in the consequentialist logic. Legitimacy is the consequence that actors may be striving for in engaging in legal argumentation. As Nikolas Rajkovic suggests, debates about legality in war have brought to the fore that "the chief goal [of invoking the law] is to build social resonance, recognition and, ultimately, validation from a global audience of legal experts, public opinion, and sovereign decision-makers."[33] When Major-General Charles Dunlap fleshed out what he meant by the term "lawfare" in the early 2000s, he argued that parties to a conflict resort to the law in an attempt "to destroy the will to fight by undermining public support that is indispensable when democracies like the US conduct military interventions."[34] The reasons for invoking the law continue to be consequentialist, and the use of law, instrumentalist. At the same time, these accounts presume that what is considered right and wrong matters and that the law has something to do with that. The example of lawfare thus points beyond consequentialism toward a logic of appropriateness or deference.

## C. The Logic of Appropriateness

A second cut at the question of why actors choose to talk international law emphasizes the logic of appropriateness and sees the use of international legal language not as an extension of processes of bargaining but of arguing.[35] The aim is not to materially induce but to persuade others to act, or at least to evaluate action, in a certain way.[36] This practice is supported by processes of socialization and a certain (legal) culture.[37] In using law in attempts to persuade, the reason for invoking the law continues to be consequentialist. But the presumption is that persuasion (through law) can impact beliefs and behavior.

The pervasiveness and appreciation of the rule of law plays an important role in those processes in domestic, supranational as well as international settings. *Ubi societas, ibi ius*, the old maxim goes—where there is society, there is law. As a

[32] Jean-Jacques Rousseau, "A Discourse upon the Origin and the Foundation of the Inequality Among Mankind," [1755], 18, https://www.gutenberg.org/cache/epub/11136/pg11136.html (italics added).

[33] Nikolas M. Rajkovic, "Performing 'Legality' in the Theatre of Hostilities: Asymmetric Conflict, Lawfare and the Rise of Vicarious Litigation" (unpublished manuscript), 7.

[34] Charles J. Dunlap Jr., "Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts," paper presented to the Humanitarian Challenges in Military Intervention Conference, Carr Center for Human Rights Policy, Washington, DC (November 29, 2001), 4, quoted in Rajkovic, *supra* note 33, at 18.

[35] Müller, *supra* note 19. In further detail, Venzke, *supra* note 18, at 214–222; Johnstone, *supra* note 15, at 17–21.

[36] See Hyeran Jo, chapter 9, in this volume, placing her analysis of the effect of legal argumentation within the logic of argumentation. Cf. Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* (Oxford: Oxford University Press, 2013), 21–31, on material inducement and persuasion as the related modes of influence.

[37] On appropriateness as a specific culture, see March and Olsen, *supra* note 20.

sociological fact, the rule of law reflects a normative program of living together through law. The underlying idea is that, in complex societies, discourses of legality often take the place of discourses of morality.[38] Two steps of the argument should be disentangled to understand invocations of international law from a logic of appropriateness: that legality begets legitimacy; and that legitimacy matters.

### 1. Legality Begets Legitimacy

"The most common form of legitimacy," Max Weber noted in the 1920s, "is the belief in legality."[39] When Niklas Luhmann picked up this claim, he criticized Weber, saying he had not actually shown how such legitimacy based on legality was sociologically possible.[40] Setting that task for himself, Luhmann emphasized the proceduralization that comes with resorting to legal language. Treating societal issues within the legal process chops them into pieces in a way that suspends tensions and abridges broader underlying questions, thus evoking that sense of rational-legal legitimacy that Weber was talking about.[41] It is precisely the possibility of legitimizing a decision in situations in which we cannot reason our way out, so to speak, that may well be the proper domain of law.[42] More recent scholarship, especially in social psychology, lends further support to the argument that legality does indeed induce legitimacy. It also emphasizes characteristics of the legal process.[43]

That legality does beget legitimacy—that something is considered right because it is legal and wrong when it is not—reflects a belief that is deeply rooted in many societies. The normative program that it reflects is most closely connected with (neo-)Kantian political philosophy and legal theory.[44] It holds high the idea of law as a means for ensuring legitimate rule, for ensuring individual as well as collective self-determination.[45] The law is used to constrain and enable action in vertical (private) and horizontal (public) relationships. Hans Kelsen developed his conception of law and defense of formal legal reasoning in this vein, as part of a democratic disposition—the legislator decides what is the norm.[46]

[38] On the ambition of facilitating legal discourses at the international level, Armin von Bogdandy, Matthias Goldmann, and Ingo Venzke, "From Public International to International Public Law: Translating World Public Opinion into International Public Authority," *European Journal of International Law* 28 (2017): 115.

[39] Max Weber, *Economy and Society* (Berkeley: University of California Press, 1978), 37.

[40] Niklas Luhmann, *Legitimation Durch Verfahren* (Berlin: Suhrkamp, 1983), 28.

[41] *Id.*

[42] See further text at *infra* note 82; Bas Schotel, "Multiple Legalities and International Criminal Tribunals: Juridical versus Political Legality," in *The Power of Legality: Practices of International Law and Their Politics*, *supra* note 1, at 210, 214 (arguing that "since all of what we do has politics in it in the sense that our decisions and actions are not fully guided by norms, we cannot 'reason our way out'. It means that there is a risk of coercion that cannot be fully understood, justified and curtailed by practical reasoning"). Cf. Johnstone, *supra* note 15.

[43] Avital Mentovich and Maor Zeev-Wolf, "Law and Moral Order: The Influence of Legal Outcomes on Moral Judgment," *Psychology, Public Policy, and Law* 24 (2018): 489. See also Monica Hakimi, chapter 3, in this volume, noting the importance of procedural legitimacy.

[44] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA: MIT Press, 1996).

[45] See Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009).

[46] Hans Kelsen, *General Theory of Law and State* (Cambridge, MA: Harvard University Press, 1945).

Others, like Kelsen's national-socialist nemesis, Carl Schmitt, critiqued what Schmitt saw as empty formalism, decrying the degree to which legitimacy has effectively come to be used interchangeably with legality. But Schmitt, too, saw the degree to which legality in fact begets legitimacy.[47] Judith Shklar later coined the term "legalism" to refer precisely to "the belief that law is not only separate from political life but that it is a mode of social action superior to mere politics."[48] Other critical scholars have likewise drawn attention to the downside of law's legitimacy effects. The effect contributes to an appearance of a state of affairs as natural, necessary, and even just, they have argued—an appearance that they consider to be undeserved and to stand in the way of progressive change.[49]

## 2. Legitimacy Matters

The specific objectives of actors who invoke the law in the logic of appropriateness may again vary; arguments could be concerned with those actors' own action or with that of others, or with certain factual situations. The preceding examples of "lawfare" illustrate that. A great deal of research has highlighted the importance of legitimacy in understanding compliance in particular. While the emphasis on compliance across disciplines has perhaps been excessive, downplaying other important legal functions, compliance is certainly one concern that may underlie invocations of the law.[50] The point then is that actors should follow the law because it is the right thing to do.

Tom Tyler's work has supported the link between legitimacy and compliance, showing that legitimacy tends to be a better predictor for compliance than interest-based calculations.[51] In international legal scholarship, such a line of argument emerges in the works of Thomas Franck as well as Jutta Brunnée and Stephen Toope. Franck's seminal *The Power of Legitimacy Among Nations* once more testifies to the spirit of the 1990s, when it proclaims on its dust jacket that "[a]s frozen power blocs dissolve and the ideological steppes erode, a conflict-weary international community can expect to evolve more like other societies in which participants generally learn to

[47] Schmitt at the same time denounced that there are apparently no limits as to what can be (il)legal, arguing for a material conception of the constitution instead, one which was imbued with his nationalist belief in the "substantial content and force of the German nation": Carl Schmitt, *Legalität und Legitimität* (Berlin: Duncker & Humblot, 2012), 90 (my translation). Schmitt published his attack on legal legitimacy in the year before Hitler took power, then advancing to become, as is well known, the crown jurist of the Nazi regime.

[48] Judith N. Shklar, *Legalism* (Cambridge, MA: Harvard University Press, 1964), 8. Cf. Ingo Venzke, "Judicial Authority and Styles of Reasoning: Self-Presentation Between Legalism and Deliberation," in *Establishing Judicial Authority in International Economic Law*, edited by Joanna Jemielniak, Laura Nielsen, and Henrik Palmer Olsen (Cambridge: Cambridge University Press, 2016).

[49] Duncan Kennedy, *A Critique of Adjudication (Fin de Siècle)* (Cambridge, MA: Harvard University Press, 1997), 236; Roberto Mangabeira Unger, *What Should Legal Analysis Become?* (London: Verso, 1996); Roberto Mangabeira Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (London: Verso, 2001). Cf. Ingo Venzke, "Cracking the Frame? On the Prospects of Change in a World of Struggle," *European Journal of International Law* 27 (2016): 831, http://ejil.oxfordjournals.org/lookup/doi/10.1093/ejil/chw036.

[50] Also see Steven Ratner, chapter 6, as well as Hyeran Jo, chapter 9, both in this volume. Cf. Robert Howse and Ruti G. Teitel, "Beyond Compliance: Rethinking Why International Law Really Matters," *Global Policy* 2 (2011): 127.

[51] Tom R. Tyler, "Procedural Justice, Legitimacy, and the Effective Rule of Law," *Crime and Justice* 30 (2016): 283. See also Weber, *supra* note 39, at 37 (linking legal legitimacy to compliance with those laws, "which are *formally* correct and which have been made in the accustomed manner").

obey the rules for the common good."[52] Its argument is straightforward enough: compliance with international law will increasingly depend on its legitimacy. That legitimacy, in turn, depends mostly on the belief that it "has come into being and operates in accordance with generally accepted principles of right process."[53] Those beliefs bestow the law with a legitimacy that contributes to explaining compliance with the law and that can account for the fact that claiming to act legally can impact individual and collective evaluative judgments.[54]

For their part, Brunnée and Toope start from the observation that the compliance pull of law is undervalued.[55] They focus on the sense of legal obligation that the law is supposed to generate, rely on the natural law theory of Lon Fuller, and subject the law to Fuller's eight criteria for legality.[56] For them, reasons for invoking the law in global politics connect to the logic of appropriateness. Invoking the law ought to remind others of their obligations and motivate corresponding behavior. Brunnée and Toope notably focus on the addressees of the law—those whose actions may actually be at issue—and not on larger audiences. Many invocations of international law are, however, not addressed to those who are supposed to comply but rather aim at (de)mobilizing allies and at shifting power and possibilities in a wider field of action.

Other work has taken law's legitimacy effects into account in such wider fields. Research on the International Criminal Court (ICC) has, for instance, placed emphasis on how legal arguments around it are aimed at mobilizing allies while demobilizing support opponents—also in the absence of any expectation that the ICC, or other actors like it, would actually get involved.[57] When courts or tribunals do get involved, consequences are not everything. Trade litigation shows that an expected authorization to suspend concessions does not fully explain that practice. Litigation is also pursued for the purpose of seeking recognition of what litigants believe to be right—a recognition that is provided through law.[58]

Especially when processes of persuasion are focused on the addressee of a norm, questions remain about the impact of invoking the law. The addressee may be an interested actor with fairly robust views of what is right and wrong, unlikely to be

[52] Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990), 24.

[53] *Id.* 24, also at 19. As Ian Johnstone reminded me, Franck added a substantive dimension to his theory in his later *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995).

[54] It is thus, of course, the case that the legitimacy effect of claiming to act legally depends on beliefs in the law's legitimacy. At the same time, that effect cannot simply be reduced to those background beliefs on which the law's legitimacy depends. That difference, or gap, that offers the law a genuine, irreducible effect is perhaps the main characteristic of a legal culture that marks many societies.

[55] Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010), 88. Also see Jutta Brunnée, chapter 12, in this volume.

[56] Brunnée and Toope, *supra* note 55, at 95–97.

[57] Wouter Werner, chapter 10, in this volume. Cf. Schotel, *supra* note 42, at 210: "[T]he legal statements are not so much directed at an opponent or counterparty. Rather, a proponent makes legal statements in order to mobilize his allies to enforce his claim against the opponent, and to de-mobilize the allies of the opponent who might otherwise assist him in fending off the enforcement by the proponent and his helpers." See also Cosette D. Creamer and Beth Simmons, "The Proof Is in the Process: Self-Reporting under International Human Rights Treaties," *American Journal of International Law* 114 (2019): 1, 37–39, on how committee reports mobilize civil society.

[58] Joseph A. Conti, "The Good Case: Decisions to Litigate at the World Trade Organization," *Law and Society Review* 42 (2008): 145 (distinguishing economic, political, and, notably, symbolic motivations for litigation).

persuaded by another actor's claims of legality.[59] Speaking about what is actually right and effective may actually be more promising language than invoking the law.[60] To get a fuller picture on the prevalence of law talk, the logic of deference should be considered.

## D. Deference

While the logic of appropriateness places emphasis on persuasion and the connection between legality and legitimacy, the practice of invoking the law once more points beyond that emphasis. First, as much as persuasion—inducing agreement in substance—may be the aim, invoking the law may actually be understood as a demand to suspend individual substantive assessments and to defer to the law instead. The classic example is the aged road sign: "Buckle up—It's the law!" Do it, because the law says so (deference), not because it is necessarily the safe (consequentialism) or right (appropriateness) thing to do. Law makes a distinctive claim to authority. It offers content-independent reasons for action.[61] Its reasons for action collapse into neither institutional power and different enforcement mechanisms (physical coercion, at the extreme) nor into agreement in substance. Most conceptions of law certainly tie the law to minimal enforcement, and many require a minimal degree of moral justification.[62] Law's claim to authority, however, cannot be reduced to either of them. That concept of authority is at the heart of the logic of deference.

Second, there is often a curious gap, especially in research focused on legitimacy as a reason for compliance, with regard to how the law is put to use in the practice of arguing with it, about it. The law can, of course, not itself claim authority, but some actor must do so, supposedly on the law's behalf. More often than not, questions of what counts as law and what *is* the law are part of the argument.[63] Moreover, that argumentative space tends to be structured, to varying degrees, by international institutions that have the capacity to establish reference points that anyone wanting to make a legal argument cannot easily escape.[64] For example, it is difficult to argue about the legality of subsidies of Boeing or Airbus without referring to the (at least for now) defunct Appellate Body of the World Trade Organization, especially when its rulings on those matters make front-page news.[65]

[59] Compare Ian Johnstone, chapter 7, in this volume, noting that those who are rather neutral are most likely to be persuaded.

[60] See Ratner, *supra* note 23.

[61] Stefan Sciaraffa, "On Content-Independent Reasons: It's Not in the Name," *Law and Philosophy* 28 (2009): 233.

[62] Classically, Jeremy Bentham, *Of Laws in General* (London: Athlone, 1970).

[63] See Steven Ratner, chapter 6, and Monica Hakimi, chapter 3, both in this volume.

[64] On that distinctive feature of legal arguments, see Ian Johnstone, chapter 7, in this volume. Cf. Ingo Venzke, "Between Power and Persuasion: On International Institutions' Authority in Making Law," *Transnational Legal Theory* 4 (2013): 354.

[65] E.g., "EU verleende illegale subsidies aan Airbus," *NRC*, May 15th, 2018, https://www.nrc.nl/nieuws/2018/05/15/eu-verleende-illegale-subsidies-aan-airbus-a1603014. Also see Kathleen Claussen, chapter 15, in this volume, on how international trade law has entered public discourse in the United States.

Granted, it would be rather far-fetched to think that public actors defer and suspend their own judgment when they invoke international law—and particular interpretations of it—in global politics. That is, however, not a prerequisite for the logic of deference to make sense in this context. Work on authority has traditionally focused too much on a dyadic relationship between the law or a particular actor claiming authority, on the one hand, and a specific addressee, on the other, with little acknowledgment of the crucial social context in which those claims are situated.

Public authority emerges when a broader social belief holds that an actor should do something because the law, and a particular actor interpreting the law, says so. Many societies have a legal culture that sustains such a belief, which also extends to global politics. It is decisive for the law's claim to authority that there is a social expectation that it be followed. What sustains its claim to authority is not its individual recognition in the specific case of its exercise, but its social recognition, which, as Luhmann noted, "does precisely not rest … on convictions for which one is personally responsible, but to the contrary on social climate."[66] At least parts of international law and its institutions enjoy the capacity to claim such authority.[67]

Consider the introductory example of debates about the legality of the 2003 invasion of Iraq, which turned on quite meticulous readings of Security Council resolutions. Neither George W. Bush nor Tony Blair, nor their respective legal advisers or other members of government, were convinced that those resolutions gave them what they wanted, namely, an unambiguous authorization to use force. Nor was their decision to go to war altered by the consequences they anticipated from being seen by many as lawbreakers. They referred to the law because it was socially expected of them, from their peers as well as the general public—paradoxically, yes, in this instance of its breach—to find support for their action through the law.

The mechanism through which that should work is similar to but not the same as persuasion and the logic of appropriateness. The expected effect here is not one of persuasion about what is appropriate but of changing registers from rightness to legality—that evaluative attitudes toward certain behavior or factual situations are shaped by what is legal, to the gradual exclusion of other considerations.

## III. Testing the Legitimacy Effects of International Law

The three logics of action highlight different reasons for invoking the law in global politics. Actors seek to influence behavior and beliefs through material inducement, persuasion, and deference. In their distinct readings, each of the logics pointed to the law's legitimacy effects as an important part of their explanations. In this section, I turn to research that has set out to test these effects, especially through experimental studies (Subsection A). Against the background of the logics of action discussed in Section II, it appears that more attention needs to be paid to the distinctive claims

[66] Luhmann, *supra* note 40, at 34.

[67] See Kathleen Claussen, chapter 15, in this volume, on how international trade law is in this sense embedded domestically in the United States, including among members of Congress.

to authority, to audiences beyond the United States, and to the law's role in enabling rather than constraining action (Subsection B).

## A. The State of Research

If an important reason for invoking the law is to sway larger audiences in their attitude toward certain actions or situations, what role do legal arguments actually play in that regard? Some research on the intersections among international law, international relations, and psychology has specifically turned to testing the effects of invoking international law, specifically on the general public's attitudes.[68] I structure the following discussion by focusing on the three main variables at issue—*what* has been claimed (contents), *who* has claimed it (source), and *toward whom* (audience).[69]

One of the leading questions has precisely been whether *legal* arguments, when compared with arguments of morality or expedience, have a differential impact on the public's beliefs. What would then explain such a differential impact—would it be the close connection between, if not conflation of, morality and legality, as embedded in the logic of appropriateness; or would claims to legality (partially) replace other considerations, as the logic of deference would suggest? The results on the law's legitimacy effect have so far been mixed, even partially contradictory, and questions remain as to what exactly explains the effects.

Geoffrey Wallace found that invoking international law does make a difference on the public's attitude. Building his study around the hard case of attitudes toward torture—a topic on which people hold relatively robust moral convictions—he found that referring to the fact that "[t]he United States has signed international treaties that do not allow the use of these methods under any circumstances" decreased agreement with the statement that "[t]he United States should use interrogation methods involving torture." Thirty-eight percent of those exposed to the international legal argument agreed with the proposition that the United States should use torture, while 44 percent agreed with it if they were not exposed to that claim—a decrease of 6 percent.[70] Wallace also found that the effect depended significantly on participants'

[68] Joshua D. Kertzer and Dustin Tingley, "Political Psychology in International Relations: Beyond the Paradigms," *Annual Review of Political Science* 21 (2018): 319 (offering an overview of political psychology in international relations; see esp. 325). See also Adam Chilton and Dustin Tingley, "Why the Study of International Law Needs Experiments," *Columbia Journal of Transnational Law* 52 (2013): 173. On the confluence of law and psychology, see Krin Irvine, David A. Hoffman, and Tess Wilkinson-Ryan, "Law and Psychology Grows Up, Goes Online, and Replicates," *Journal of Empirical Legal Studies* 15 (2018): 320.

[69] Compare the Laswell and Yale models of communication: Irving Lester Janis and Carl Iver Hovland, *Personality and Persuasibility* (3rd reprint, New Haven: Yale University Press, 1966); Joop van der Pligt and Michael Vliek, *Influence: Theory, Research and Practice* (Oxfordshire: Routledge, 2017), 6.

[70] Geoffrey P.R. Wallace, "International Law and Public Attitudes toward Torture: An Experimental Study," *International Organization* 67 (2013): 105, 119–120. A later study by Adam S. Chilton and Mila Versteeg used a different vignette and did not find a statistically significant effect from informing participants that the acts at issue would violate either international law or US Constitutional Law. Moreover, their results indicated an unexplained negative impact when participants were told that the acts violated both international and constitutional law, that is, levels of agreement in fact increased for that treatment group. Adam S. Chilton and Mila Versteeg, "International Law, Constitutional Law, and Public Support for Torture," *Research and Politics* 3 (2016): 1.

political orientation. While the percentage of agreement dropped by 11 percent among liberals, it only dropped by 1 percent among conservatives.[71]

In a similar study, Adam Chilton tested the impact of invoking the laws of war on levels of approval with the hypothetical decision of the US president "to continue the bombing campaign against the rebel forces because failing to do so would result in the loss of a strategic ally."[72] Further exposing participants to the claim that "continuing the bombing campaign of civilians would violate international law" led to a 9 percent decrease of approval. Chilton further found, however, that the effect was nearly the same if participants were exposed to the moral claim that "continuing the bombing of civilians would be immoral," which led to a 7 percent decrease of approval.[73] Moreover, the effect for combined exposure—that the bombing is both illegal and immoral—was almost the same as the international law effect. These results suggest, according to Chilton, "that information on the laws of war is a substitute for being told that the behavior in question would be immoral."[74] On the one hand, this suggestion may be understood to question the relevance and distinctive quality of international law—one might as well have referred to morality. On the other hand, however, it supports the law's legitimacy effect—it *can* serve as a substitute.

Sarah Kreps and Geoffrey Wallace compared legal claims about drone strikes with claims about their effectiveness and, at the same time, varied the source of the claims between the government (arguing in favor) as well as the United Nations and Human Rights Watch (HRW) (both arguing against).[75] They found a significant decrease of approval with drone strikes when participants were exposed to legal arguments against them by the United Nations (8%) or HRW (6%), and only a modest (1%) increase when the government argued in favor. Conversely, the impact of effectiveness-based claims was lower for the United Nations and HRW (decrease by 4%) and higher for the government (increase by 4%). Differences in beliefs about the source's credibility, the authors found, do not explain this variation. Rather, the authors speculate that the limited impact of claims made by the government, and effectiveness-based claims, are due to participants' prior exposure.[76]

Finally, several other studies have emphasized that any impact is mediated by pre-existing preferences.[77] Stephen Chaudoin found that exposing participants to the claim that implementing protectionist trade barriers breached prior commitments

[71] Wallace, *supra* note 70, at 121–122.

[72] Adam S. Chilton, "The Laws of War and Public Opinion: An Experimental Study," *Journal of Institutional and Theoretical Economics* 171 (2015): 181. See also Adam S. Chilton, "The Influence of International Human Rights Agreements on Public Opinion: An Experimental Study," *Chicago Journal of International Law* 15 (2014): 110 (finding an effect of referring to prior treaty commitments in the field of human rights on public opinion).

[73] The difference between the legal and moral claim was statistically insignificant (p = 0,74).

[74] Chilton, "The Laws of War and Public Opinion: An Experimental Study," *supra* note 72, at 14.

[75] Sarah E. Kreps and Geoffrey P.R. Wallace, "International Law, Military Effectiveness, and Public Support for Drone Strikes," *Journal of Peace Research* 53 (2016): 830. Also see Naoko Matsumura, "A WTO Ruling Matters: Citizens' Support for the Government's Compliance with Trade Agreements," *Peace Economics, Peace Science and Public Policy* 25 (2019) (showing the difference of impact on attitudes between claims by a foreign government and an international quasi-judicial body).

[76] Kreps and Wallace, *supra* note 75, at 838 in further detail.

[77] Something that Wallace approaches by testing the moderating influence of political orientation on law's legitimacy effect.

only influenced the attitude of those who had no opinion on such a policy beforehand.[78] In a study among German parliamentarians, Burcu Bayram focused on participants' cosmopolitan social identity and their sense of obligation toward international law.[79] When participants were informed about benefits of breaching international legal commitments, the impact of that information was strongly mediated by their sense of obligation. Or, in her words: "cosmopolitan politicians' preferences for compliance are robust to information about compliance costs."[80] That is in line with what one would expect in a logic of deference—an at least partial suspension of individual assessments that is replaced by considerations of what is legal.

## B. Next Steps

### 1. Law's Distinctive Claim to Authority

The discussion of research to date points to the following areas for further inquiry. First, questions remain with regard to the use of law when compared to other registers—in particular morality and efficiency. Existing studies are contradictory in some ways and wanting in others. Chilton's nonfinding of any significant differential impact of legal when compared to moral claims may well have been due to the fact that both claims were phrased in an almost identical way: "It is immoral [or: It is a violation of international law and the treaties that the United States has signed] to continue a bombing campaign when the expected loss of civilian life is excessive relative to the military advantage gained."[81] This almost identical wording had the advantage of isolating the argument's characterization as legal or moral. It is also true that the introductory vignette for all treatment groups already contained the information that "[a]ny continued bombing would result in excessive civilian casualties." Still, for the control group, excessive civilian casualties were one reason among others, whereas this reason was repeated, singled out, and thereby emphasized for both treatment groups. It is likely that the interventions among the treatment groups showed an impact when compared to the control group due to this repeated reason of excessive civilian casualties, rather than the claim's qualification as either legal or moral, and that this repetition, at the same time, overshadowed the difference between the legal and moral claims.

Insufficient attention has been paid to law's distinctive claim to authority, which, in contrast to other registers, stands in lieu of further justification—"buckle up," not because it's safe or right, but because it is the law. This is the idea at the heart of the logic of deference. This distinctive claim is all the more important when legal arguments *are not* readily evaluated by lay audiences and, even by expert audiences, *cannot be* easily translated into other registers of what is right or expedient. Consider, for instance, claims about Article XXIV, paragraph 5(b) of the GATT allowing for a free

[78] Stephen Chaudoin, "Promises or Policies? An Experimental Analysis of International Agreements and Audience Reactions," *International Organization* 68 (2014): 235.

[79] A. Burcu Bayram, "'Due Deference': Cosmopolitan Social Identity and the Psychology of Legal Obligation in International Politics," *International Organization* 71 (2017): S137.

[80] *Id.* S139.

[81] Chilton, "The Laws of War and Public Opinion: An Experimental Study," *supra* note 72.

trade agreement between the European Union and the United Kingdom post-Brexit and the conditions under which trade law would in fact stand in the way of such an agreement. Here the appeal is to the authority of the law and its quality as law. It does not stand in for another reason (like excessive killing in the previous example) that can easily replace it. This is what I meant when I talked about law's proper domain in legitimizing decisions when it is not possible to reason one's way out.[82] The claims in Chilton's as well as Wallace's study and the way in which those claims are paraphrased are, however, easily translatable into other registers of what is right or expedient.

Next steps for research should thus test the effect of more technical legal claims while continuing to be realistic about the actual usage of the law in public discourse—for example, of invoking Article XXIV 5(b) of the GATT or the trade legality of subsidies. One might expect that the effect of invoking the law on levels of perceived legitimacy would be higher when participants cannot easily substitute the claim of legality with their own judgment about what is right or expedient. The setup could in principle follow the design of past studies and likewise use experimental surveys, then expose the treatment group to the claim, for example, that imposing higher tariffs on steel would violate Articles I:1, II:1, and II:1(a) of the GATT and would be unjustifiable under Article XXI. What effect would that have on attitudes toward such action?

### 2. Predispositions of the Audience

Existing studies have paid attention to the role of respondents' political ideology in mediating the effects of using the language of international law. It would be useful to know whether those effects persist across different issue areas and among non-US audiences. In her study among German parliamentarians, Bayram notably did not find any significant effect of party-political ideology.[83]

Drawing on insights from the logics of appropriateness and deference, it may be expected that the effect of invoking international law is quite naturally mediated by more general beliefs about the legitimacy of the law to begin with, and of *international* law in particular. In his research on the legitimacy of international courts, Erik Voeten notably found that those courts' authority is, expectedly, strongly related to more general legal values and support for international institutions.[84] Given that these values and support levels vary within and across national and regional audiences, one may thus expect varying legitimacy effects of invoking international law.

Moreover, structurally similar studies on the legitimacy effect of domestic high court judgments have drawn attention to other moderating variables. Next to factors such as respondents' interest in politics, for example, they have consistently highlighted the influence of trust in public institutions.[85] These studies once more point to the importance of law's claim to authority and the sources of legitimacy that sustain it.[86]

[82] See *supra* note 42.

[83] Bayram, *supra* note 79, at S152.

[84] Erik Voeten, "Public Opinion and the Legitimacy of International Courts," *Theoretical Inquiries in Law* 14 (2013): 411.

[85] Rosalee A. Clawson, Elisabeth R. Kegler, and Eric N. Waltenburg, "The Legitimacy-Conferring Authority of the U.S. Supreme Court," *American Politics Research* 29 (2007): 566.

[86] Tom R. Tyler, "Psychological Perspectives on Legitimacy and Legitimation," *Annual Review of Psychology* 57 (2006): 375.

3. Law's Enabling Function

Existing research has almost exclusively focused on prohibitions of international law, on constraints on government actions. It may be that scholarship has been too absorbed by debates between realists and institutionalists, where the litmus test for international law's relevance has been to show that it constrains the powerful. Like some institutionalist literature on international relations, legal scholarship has, however, stressed that the law not only constrains but also enables action. One of law's main functions is to authorize action that would otherwise be illegal and thereby bestow it with an aura of legitimacy.[87]

Even though this enabling function is of primary interest in many explanations for the use of legal language, it has not yet been of similar concern in experimental research. It might be suggested that asking about the effect that something is allowed rather than prohibited is just the flipside of an identical question about its legality. However, in some contexts legal permissions may have a stronger effect than a prohibition. One might consider once more Wallace's study of the effects of branding certain practices as illegal torture on public attitudes (he found an overall drop in approval of 6%). What if the treatment group had been exposed to the claim that those practices were legal? It may well be that for some respondents the claim to legality would have undone an intuitive moral restraint (much more so than a claim to illegality would have changed a morally permissive attitude toward torture).

## IV. Conclusions and Outlook

This book asks a straightforward question: Why is the language of international law so prevalent in global politics? My chapter seeks to answer that question by exploring how different logics of action emphasize different reasons for invoking the law and showing different understandings of what the law does. Those logics correspond to practices of bargaining, persuasion, and deference. In particular, the logic of deference that centers on claims to authority has not been fully explored in the academic literature, but in fact it is crucial to making sense of why law is used rather than other languages. I have argued that these logics of action share assumptions about the law's legitimacy effect, though read in distinct ways. I then discussed and critiqued research that probes this effect through experimental studies. My analysis demonstrates that further inquiries should pay closer attention to law's distinct claim to authority, to audiences' predispositions, and to law's enabling rather than constraining function.

Those inquiries would further probe the assumptions of critical scholarship, which has been most vocal in exposing the law's legitimacy effect while also being most skeptical about empirical methods to test this effect.[88] This would be fertile ground for further study, bridging two strands of thinking—behavioral and critical legal studies—that have developed in deliberate distance from one another.

[87] See *supra*, Section II.B.
[88] Kennedy, *supra* note 49.