On Formalism and Non-Formalism in International Law: Double Standards, Argumentation, and Legal Change

By:

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1. Argumentative double standards

On the occasion of the U.S.' affirmative vote on UNGA Resolution 76/300 in July 2022– acknowledging the human right to a healthy environment – the State Department clarified that the vote followed considerations of environmental policy but did not imply that the United States "recognize[d] any change in the current state of conventional or customary international law.” The statement, in fact, denied the existence of this right altogether, explicitly saying that “[it has] not yet been established as a matter of customary international law [and] treaty law does not yet provide for such a right.”

One year earlier, in February 2021, the U.S. military conducted an airstrike in eastern Syria against Iranian-backed Iraqi militias. A few days later, the U.S. addressed a letter to the Security Council notifying the invocation of the right to self-defence under Article 51 of the UN Charter, explaining that "States must be able to defend themselves […] when […] the government of the State where the threat is located is unwilling or unable to prevent the use of its territory by non-State militia groups responsible for such attacks." Without openly saying it, the U.S. pushed for an expansive and rather controversial interpretation of Article 51, which says nothing about non-state actors or unwilling or unable home states – a reading of Article 51 that the US has been making for some time, together with Israel and several other states.

What do these events have in common and in what do they differ? The contexts are certainly different, but in both the U.S. is implicitly or explicitly taking a stance on topics in which international law is evolving. The two arguments, however, follow very different rationales. The U.S.' position on the right to a healthy environment takes a strong formalist stance: if no custom nor treaty unambiguously backs the alleged right, then the right does not exist. On self-defence, in contrast, the U.S. assumes an entirely different argumentative standard: article 51 may not mention non-state actors unambiguously, but since "States must be able to defend themselves," it must be interpreted to cover them.

The contrast in the way of assessing the law and reaching conclusions is evident. On the right to environment, the U.S. resorts to the logic of bindingness, whereas on self-defence the point of persuasion is based on necessity. One argument is formalist, the other is not. At first sight, these contrasting argumentative routes are nothing but rhetorical choices that respond to the U.S. political preferences on two unrelated issues. Standard lawyering, in other words. Every state does it, one could say, every lawyer. And, indeed, alternating formalism and non-formalism is a practice that one could observe in any state – potentially in any user of international law.

But there is more to it. It is not only that states and other actors sometimes engage in formalist argumentation and sometimes in non-formalist argumentation, but that most of the time they do it categorically. Mostly, when states disagree with some innovative claim – like a human right to a healthy

environment – they argue that it lacks a proper foundation in sources; that the pedigree required for bindingness is missing. This is a categorical claim because an actor cannot reasonably require this standard in some cases but not in others. Arguments based on bindingness imply a positivist theoretical approach to international law that actors cannot reasonably switch on or off at will. Or they can, but they will be engaging in double standards.

2. Formalism, non-formalism, and international lawmaking

'So what?' one could ask. Indeed, law is about arguing, and there is no reason to expect its users to use the same type of argument all the time. The claim in this blog post is not that states should be consistent in their argumentative choices, but rather that these double standards say a lot about the dynamics of change in international law.

In the example of the U.S. above, a formalist argument is made for opposing change in international human rights law, while a non-formalist argument is made for advocating for change in the law on self-defence. This is neither fortuitous nor exceptional in the practice of states. Whether it is China rejecting an obligation to protect the atmosphere, Mexico discarding that companies might have international human rights obligations, or Germany claiming that jus cogens does not trump state jurisdictional immunities, formalist argumentation is mostly used in international law to keep innovative readings of the law from succeeding. Tellingly, non-formalist argumentation is commonly used for exactly the opposite: advocating for innovation and norm-change. China does it when it comes to the right to development, Mexico on disarmament, and Germany when making the case for exceptions to state official immunity and universal jurisdiction.

I contend that the logic of bindingness and formalism works to a large extent as a conservative**[1]** tool in international law. When actors embrace it, as in the examples cited above, they willingly or unwillingly help the status quo endure because the procedural threshold it sets for change – i.e. sources – is most of the time politically and even epistemologically impossible to meet. Take custom, for instance. If one follows the ILC's criteria on the identification of customary international law, the relevant practice for assessing its existence must be "general, meaning that it must be sufficiently widespread and

representative, as well as consistent.” Other than in highly exceptional circumstances like the Truman Proclamation and the flash development of the rules concerning the continental platform that followed it, these are criteria that bar change because they require norm entrepreneurs to present complete change in order to attempt change. Thus, it becomes very easy for an actor wishing to block change in a given case to point to a lack of widespread, representative, and consistent practice as a means to disqualify an argument that departs from the mainstream.

Something similar happens with treatymaking. Multilateral treaties are theoretically more straightforward than custom, but they involve political hurdles that make them an unlikely avenue for norm entrepreneurism, especially in contemporary international relations. This is not to deny that great change has been achieved and can still be achieved by way of treaties – take the Convention on the Law of the Sea or the Rome Statute – but the political capital required for it is enormous and thus exceptionally available. As such, in the absence of a clear treaty provision on a given topic, it is easy for actors with a conservative agenda to claim that no conventional rule backing an innovative claim exists, or to reject an interpretation that departs from the text of a treaty provision, as in the case of the U.S. and the right to a healthy environment.

Non-formalist arguments are, in contrast, a common strategy for actors attempting to change international legal rules. These are claims that do away with the idea of sources and the strict separation between law and non-law, and focus rather on substance. Like the U.S. argument of self-defence against non-state actors being necessary to prevent states from being defenceless, non-formalist arguments often focus on matters like fairness and functionalism. Another avenue is to argue based on axiological claims like the idea of shared values in the international community, usually through the means of jus cogens or erga omnes norms. This mode of claim-making is powerful because it does not require the procedural thresholds that formalist arguments do, and therefore makes it possible for actors with truly innovative claims to argue in ways that are plausible among different audiences.

3. The politics of legal argumentation and change

All of this raises several questions. The fact that formalism is usually a conservative force in international law is problematic, not because conservatism is in itself problematic, but because formalism as a defence of the status quo conceals the political intentions that lie behind it. To continue with the example of the U.S. and the right to a healthy environment: it is one thing to acknowledge that no such right exists in positive international law, but it is another thing to say that, because this is the current state of the law, companies should not have obligations under international law. So employed, formalism hides conservatism in a disloyal manner; it shuns political debate on the issue in question.

This has to do with two factors. One concerns the fact that spaces for political discussion in international law are few. The contrast with domestic law, where parliaments are spaces designed precisely for reaching agreements and making decisions that create law, is stark. In international law, the only formal avenue for creating norms based on outright political agreement is treatymaking but, as said above, the hurdles of negotiating and getting states to agree on treaties are generally high, and increasingly so nowadays. Other spaces for open politics exist, like the General Assembly or the Human Rights Council, but these generally lack formal lawmaking capacities. If norm change is channelled through them – which it often is, informally – it is subject to the formalist challenge of bindingness.

The second factor is international law's embedded dogmatism. The current paradigm of the international legal order rests on several centuries-long held dogmas: sovereign equality, the doctrine of sources, the exclusivity of full international subjecthood by states, and consent-based dispute settlement, among others. These are dogmas in the purest sense of the word; they are conceived by most international law users as necessary truths without which the conceptual and normative building of the legal system collapses. What is more, these are foundational traits that lack any meaningful previous political discussion, any meaningful form of democratic legitimacy, and any feasible avenue for formal change.

Double standards in international legal argumentation might therefore be a consequence of the lack of space for open politics and democratic debate in international law. Paradoxically, the closeness of politics with the operation of

international law is a recurrent – and accurate – critique by many observers. What is seldom said and is suggested here as a possible avenue for research and activism, is that the politics of international law need a closer and more transparent connection to the processes of formal norm-production. How to do it, and even whether it is desirable to do it, is open for discussion.

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[1] The word “conservative” is used in this blog post in its most basic meaning to describe positions that reject change on a given issue in international law. No particular ideological or normative connotation is meant here.

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