

STATE SILENCE AS ACCEPTANCE: A PRESUMPTION AND AN EXCEPTION

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ABSTRACT

This study considers State silence which may entail acquiescence and can thus contribute inter alia to the formation of historic rights, the identification of customary international law, and the interpretation of treaties over time. Relying on the historical understanding of acquiescence in British and francophone literature, it argues that there are probability and normative justifications for establishing acquiescence as a ‘presumption of acceptance’ in international law, and that these considerations have influenced the modern international law understanding of acquiescence as an exceptional occurrence subject to stringent qualifications.

I. INTRODUCTION

International law is identified, interpreted, and revised by observing the conduct of States and their interaction. But, what happens when States do nothing? International courts and tribunals, as well as scholars, use the following terms ‘lack of objection’,¹ ‘lack of opposition’,² ‘toleration’,³

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¹ *Anglo-Norwegian Fisheries case (United Kingdom v. Norway)* [1951] ICJ Rep 3, para 129 (‘[...] several States have deemed it necessary to follow the straight base-lines method and that they have not encountered objections of principle by other States’); *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* [1962] ICJ Rep 6, para 20-21 (‘[...] Thailand [...] maintains also that a course of conduct, involving at most a failure to object, cannot suffice to render her a consenting party [...]').

² *Anglo-Norwegian Fisheries case (United Kingdom v. Norway)* para 136-137 (‘The Court [...] finds that this system was consistently applied by Norwegian authorities and that it encountered no opposition on the part of other states’).

³ *ibid* para 138-139 (‘The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact.’). It has been suggested that the term toleration is weaker than acquiescence. D. H. N. Johnson, ‘The Anglo-Norwegian Fisheries Case’ (1952) 1 ICLQ 145, 165. See contra, I.C. McGibbon, ‘The Scope of Acquiescence in International Law’ (1954) 31 BYIL 143, 161.

'failure to react',⁴ 'passivity',⁵ 'inaction',⁶ 'absence of reaction',⁷ 'failure to respond',⁸ 'lack of questioning',⁹ 'lack of challenge',¹⁰ 'lack of protest',¹¹ or 'silence'.¹² They rely on these terms to describe the same State conduct: 'State silence',¹³ namely the physical and/or verbal inaction of a State against the background of a claim made by another State or other States.

State silence can lead to estoppel;¹⁴ it can entail acquiescence; it can mean acceptance; or it can mean opposition.¹⁵ How silence may lead to estoppel or acquiescence, the conditions that must be met in order for estoppel and acquiescence to come into play,¹⁶ and how these two concepts

⁴ *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, para 31 ('Looking at the incident as a whole, it appears to have amounted to a tacit recognition by Siam [...] through a failure to react in any way, on an occasion that called for a reaction in order to affirm or preserve a title in the face of an obvious rival claim [...]').

⁵ *ibid* para 20-21 ('[...] Thailand denies this so far as she is concerned, representing herself as having adopted a merely passive attitude in what ensued.'). H. Das, 'L'estoppel et l'acquiescement: assimilations progressives pragmatiques et divergences conceptuelles' (1997) 30 *Revue Belge Droit Int'l* 607, 618.

⁶ Dissenting Opinion of Judge Urrutia Holguín, *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)* [1960] ICJ Rep 192, 235.

⁷ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* [2008] ICJ Rep 12, para 121 ('The absence of reaction may well amount to acquiescence').

⁸ *ibid* para 121 ('sovereignty over territory might pass as a result of the failure of the State which has sovereignty to respond to conduct à titre de souverain by the other State [...]'), and para 276.

⁹ *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* (Preliminary Objections) [2017] ICJ Rep 3, para 49 ('[E]ven after the MOU had been rejected by the Somali Parliament, the Prime Minister of Somalia did not question its validity in his letter to the [UN Secretary-General] dated 19 August 2009').

¹⁰ *Situation in the State of Palestine* (ICC Pre-Trial Chamber I) ICC-01/18-143 (5 February 2021) para 101 ('[T]hese States remained silent during the accession process and that none [...] challenged Palestine's accession before the Assembly of State Parties at that time or later [...]').

¹¹ *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, para 42 ('[...] Somalia did not protest that registration until almost five years thereafter'); *Territorial and Maritime Dispute (Nicaragua v. Colombia)* [2012] ICJ Rep 624, para 88 ('[...] Nicaragua, by contrast, failed to make any protest with regard to the Award's treatment of the maritime features which are the subject of the present case.').

¹² *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, para 121 ('silence may speak'); ILC, 'Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries' (30 April-1 June and 2 July-10 August 2018) UN Doc A/73/10 (Conclusions on SASP with commentaries) 15, Conclusion 10(2) ('Silence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction').

¹³ For more work on this subject, see 'State - Silence', available at <www.statesilence.org>.

¹⁴ D.W. Bowett, 'Estoppel before International Tribunals and its relation to Acquiescence' (1957) 33 *BYIL* 176:

'The term 'estoppel' in international law, has been used to denote a legal principle which operates so as to preclude a party from denying before a tribunal the truth of a statement of fact made previously by that party to another whereby the other has acted to his detriment or the party making the statement has secured some benefit.'

¹⁵ The legal meaning of silence as 'positive opposition' has been overlooked in international law scholarship to date.

¹⁶ MacGibbon, 'The Scope of Acquiescence in International Law', 147-150; I. Sinclair, 'Estoppel and Acquiescence', in V. Lowe and M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice*, (CUP 1996) 104-120.

differ¹⁷ are some of the fundamental - for theory and practice - discussions for which the *British Yearbook of International Law* has been a focal point. These debates have attracted renewed attention today.¹⁸

This contribution considers State silence as acceptance: acquiescence. The decisions of international courts and tribunals as well as international law scholarship – including British scholars and practitioners – endorse the idea that State silence may entail acquiescence which can contribute *inter alia* to the formation of historic rights, territorial title, the identification of customary international law, and the interpretation of treaties over time on the basis of the subsequent agreement of the parties.

In 1954 and 1957, MacGibbon – the prominent British doctrinal voice in relation to acquiescence in international law – published two articles in this *Yearbook* about acquiescence. He analyzed the function of acquiescence as tacit consent, as an element of interpretation and of custom,¹⁹ as well as a basis for acquisitive prescription.²⁰ He argued that acquiescence must be restrictively interpreted,²¹ that State silence can lead to acquiescence only in circumstances which demand a positive reaction in order to preserve one's right,²² and that actual or constructive knowledge of the acts to which the alleged acquiescence relates must be established.²³

MacGibbon's analysis departed from that of Hersch Lauterpacht, who, in 1950 in this *Yearbook*, had devoted part of his analysis to 'the relevance of absence of protest', in order to argue that a customary rule had emerged pursuant to which coastal States enjoyed sovereign rights

¹⁷ H. Thirlway, 'The law and procedure of the International Court of Justice 1960-1989: Part One' (1989) 60 BYIL 1, 29. H. Lauterpacht, *The Development of International Law by the International Court* (Praeger, 1958) 170. More recently focusing on jurisdiction, see Jack Wass, 'Jurisdiction by Estoppel and Acquiescence in International Courts and Tribunals' (2015) 86 BYIL 155.

¹⁸ Illustratively, research under the ERC Starting Grant on State Silence to date shows that while only 20% of the ICJ decisions issued in 1947-1949 and 26% of those issued in 1950-1959 considered State silence, 89% of the ICJ's decisions in 2000-2009 and 84% of those issued in 2010-2019 considered instances of State silence. See also ILC, 'Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries' (30 April-1 June and 2 July-10 August 2018) UN Doc A/73/10 (Conclusions on SASP with commentaries) 15; ILC, 'Draft conclusions on identification of customary international law, with commentaries' (30 April-1 June and 2 July-10 August 2018) UN Doc A/73/10 (Conclusions on CIL with commentaries) 140, Conclusion 10(3). For increasing government and scholarly interest in this field, especially in relation to the prohibition of use of force: D. Benthlehem, 'Self-Defence Against an Imminent or Actual Armed Attack by Non-State Actors' (2012) 106 AJIL 770, 777; D.A. Lewis, N. Modirzadeh, and G. Blum, 'Quantum of Silence: Inaction and Jus ad Bellum, Harvard Law School Program on International Law and Armed Conflict' (2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3420959>; N. Modirzadeh and P. Arrocha Olabuena, 'A Conversation between Pablo Arrocha Olabuena and Naz Khatoun Modirzadeh on the origins, objectives, and context of the 24 February 2021 'Arria-formula' Meeting Convened by Mexico' (2021) J Use of Force & Intl L 1.

¹⁹ I.C. MacGibbon, 'Customary International Law and Acquiescence' (1957) 33 BYIL 115.

²⁰ MacGibbon, 'The Scope of Acquiescence in International Law', 143.

²¹ *ibid* 168-170.

²² *ibid* 182.

²³ *ibid* 172-182. In this respect, MacGibbon agreed with earlier articles in this *Yearbook*: D.H.N. Johnson, 'Acquisitive Prescription in International Law' (1950) 27 BYIL 332, 347; G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-1954' (1953) 30 BYIL 33.

in their continental shelf. Lauterpacht argued that custom at the time did not prohibit the appropriation of the seabed and its subsoil outside the territorial waters.²⁴ In such circumstances, of importance – Lauterpacht argued – was the fact that the two ‘principal maritime Powers’ whose interests laid traditionally in this particular field had publicly made frequent and uniform claims asserting legal rights.²⁵ Although Lauterpacht *en passant* recognized some conditions under which State silence entails acquiescence (‘uniformity and frequency’ of a claim;²⁶ ‘publicly proclaimed’ positions²⁷), he did not consider the level of knowledge of a silent State that would be required for acquiescence to be established, and while emphasizing the importance of powerful States in law-creation, he entirely ignored that smaller and less powerful States were bound to be silent in most such instances. His blindness to the real inequalities between States was further emphasized by his argument that States were under a ‘duty to protest’.²⁸

Later, in 1976, Akehurst, in his seminal article in this *Yearbook*, ‘Custom as a Source of International Law’, considered acquiescence as *opinio juris*. Relying on MacGibbon’s work he mentioned the requirement that the silent State must have actual or constructive knowledge of the claim,²⁹ and that the silent State’s interests must be affected in order for it to be expected to react.³⁰

During the same period, francophone literature analysed acquiescence too. In 1963, Bentz reflected on the voluntarist foundations of acquiescence and considered that the silent State’s knowledge of the circumstance that calls for its reaction is a requirement for acquiescence. In 1964, Barale argued that acquiescence reflects the non-formalism of international relations and that knowledge and passage of time are requirements for acquiescence.³¹

This study argues that the British approach to the study of acquiescence, since the second half of the previous century, which has been

²⁴ H. Lauterpacht, ‘Sovereignty Over Submarine Areas’ (1950) 27 BYIL 376, 394.

²⁵ *ibid* 394–395. Initially his argument was narrow. He claimed that since the initiative of the claims had been led by the two ‘principal maritime Powers’ – the US and the UK – their initiative must be treated as authoritative from the outset, because these two States had a traditional attachment to the principle of freedom of the high seas and the customary limits of territorial waters. However, he then widened his reasoning explaining that since the initiation of this new development did no violence to any established prohibition, the unilateral claims ‘by traditionally law-abiding States, within a province which was particularly their own, when partaking of a pronounced degree of uniformity and frequency, and when not followed by protests of other States, may properly be regarded as providing proof of conformity with the law as is both creative of custom and evidence of it.’

²⁶ *ibid* 395.

²⁷ *ibid*. In his view, ‘the absence of protest, in face of an apparently new departure publicly proclaimed, provides evidence of the essential conformity of the new practice with the principles of international law.’

²⁸ *ibid* 396.

²⁹ M. Akehurst, ‘Custom as a Source of International Law’ (1974-5) 47 BYIL 1, 39.

³⁰ *ibid* 40.

³¹ J. Barale, ‘L’acquiescement dans la jurisprudence internationale’ (1965) 11 AFDI 389.

followed by some francophone scholars as well, considers that acquiescence is a 'presumption' of acceptance or consent. However, doctrine has not explained what a presumption is in international law, and what the *rationale* behind a presumption of acceptance may be. This study argues that insofar as acquiescence operates as a presumption, its aim is to extricate an assessor from the impasse of not knowing the true meaning of a State's silence. This presumption is biased in favour of the meaning of 'acceptance', as opposed to any other meaning. This bias can be explained cumulatively by probability *and* normative considerations (Section II).

This study, then, argues that the probability and normative justifications behind a presumption of acceptance explain the 'exceptionalist approach' to acquiescence in modern international law. This approach is reflected in the development of stringent qualifications under which State silence may be attributed the legal meaning of acceptance.³² Since acquiescence, namely acceptance on the basis of State silence under general international law (without having previously specifically agreed on the meaning of a State's future silence),³³ can be established only on the basis of certain conditions, it constitutes an *exception*, not the rule (Section III).

II. THE PRESUMPTION 'ACQUIESCENCE'

A. Scholarship and International Decisions

The law may attribute legal effects to a fact irrespective of the will of the State. This is the case of estoppel.³⁴ In contrast, the law may attribute to

³² The term 'legal meaning' here is defined as the attribution of legal effect insofar as silence represents the intention of the silent State. Eric Suy, *Les Actes Juridiques Unilatéraux En Droit International Public* (Bibliothèque de Droit International, 1962). Here, 'represents' does not mean that silence necessarily expresses the real intention of a State. International law can attribute a legal meaning to silence on the basis of presumptions.

³³ States may agree that their future silence means acceptance. For instance, see Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, art 20(5) pursuant to which 'a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation [...]'. States frequently incorporate in multilateral treaties provisions that either permit amendments or develop further regulatory arrangements through mechanisms where States consent in silence. E.g., Convention on the International Regulations for Preventing Collisions at Sea (signed 20 October 1972, entered into force 15 July 1977) 1050 UNTS 16 (COLREG) art VI; International Convention for the Prevention of Pollution from Ships (signed 17 February 1973, entered into force 2 October 1983) 1340 UNTS 61, art 16 ('MARPOL'); International Convention for the Safety of Life at Sea (signed 1 November 1974, entered into force 25 May 1980) 1184 UNTS 2, art VIII ('SOLAS'). International Convention for the Regulation of Whaling (signed 2 December 1946, entered into force 10 November 1948) 161 UNTS 74, art V. Convention on International Civil Aviation (signed 7 December 1947, entered into force 4 April 1947) 15 UNTS 295, art 90. Convention on International Trade in Endangered Species of Fauna and Flora (signed 3 March 1973, entered into force 1 July 1975) 993 UNTS 243, art XV ('CITES'); Constitution of the World Health Organization (signed 22 July 1946, entered into force 7 April 1948) 14 UNTS 185, art 22.

³⁴ Writing in 1989, in this *Yearbook*, Thirlway sharply explained that: 'A claim of estoppel may – and indeed frequently does – relate to the existence, non-existence or deemed existence of a

a fact legal meaning, namely legal effects insofar as, and because, the effects are willed by a State. Here the legal meaning of acceptance may be attributed either because the silent State *truly* intends to communicate acceptance by being silent ('voluntarism'); or because, irrespective of whether the silent State truly intended to accept by being silent, it is taken to accept ('objectivism'). This latter approach has been termed 'qualitative silence', because silence is attributed a legal meaning owing to the objective assessment of the circumstances in which silence takes place.³⁵ This is the instance of acquiescence.

International courts and tribunals have not explained the reasoning behind acquiescence. Admittedly, international adjudication is not expected to establish a 'general theory' about legal concepts.³⁶ Its function is to resolve particular disputes. However, some of the pronouncements of international courts and tribunals might be interpreted as following a voluntarist approach; others as following an objectivist approach; and others as relying on both. For instance, the ICJ, in *Pedra Branca (Malaysia/Singapore)* (2008), pronounced that 'silence may [...] speak [...]'.³⁷ The Court relied on this 'synaesthetic metaphor'³⁸ in order to characterize the concept of acquiescence. If taken literally, the Court's reasoning gives the impression that silence is a 'linguistic sign' (a language) used by the silent State to express its true will. However, since its decision on *Gulf of Maine* (1984), the ICJ defines 'acquiescence' as 'equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent'.³⁹ This definition, which the Court repeated in its recent Judgment in *Somalia v. Kenya* (2021), is not concerned with whether a State intends to *communicate* its true consent. The Court places emphasis on 'equivalence' and on the other party's interpretation.⁴⁰ Additionally, the ICJ Chamber, in *El Salvador/Honduras* (1992), reasoned that the 'protest of Honduras, coming after a long history of acts of

particular state of mind of the respondent State, and in particular its acceptance of, or consent to, a particular matter; but while a claim of acquiescence asserts that the State concerned did accept or agree on that point, a claim of estoppel accepts, by implication that the respondent State did not accept or agree, but contends that, having misled the applicant State by behaving as though it did agree, it cannot be permitted to deny the conclusion which its conduct suggested.' Thirlway, 'The law and procedure of the International Court of Justice 1960-1989: Part One', 29.

³⁵ S. Kopela, 'The Legal Value of Silence as State Conduct in the Jurisprudence of International Tribunals' (2010) 29 Aust YBIL, 87, 87.

³⁶ See, for instance, this position of the ECtHR in relation to positive obligations under the ECHR: *Plattform "Ärzte für das Leben" v Austria* (1988) 13 EHRR 204 [31].

³⁷ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, para 121.

³⁸ Y. Shen, 'Metaphor and Poetic Figures' in R. Gibbs, Jr. (ed) *The Cambridge Handbook of Metaphor and Thought* (CUP 2008) 302 ('Synaesthetic metaphors are expressions in which one sensory modality is described in the terms of another').

³⁹ Emphasis added. *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* [1984] ICJ Rep 246, para 130; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras, Nicaragua intervening)* [1992] ICJ Rep 351, para 364; *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* (Merits) [2021] ICJ Rep 206, para 51.

⁴⁰ Emphasis added. *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* para 145.

sovereignty by El Salvador in Meanguera, was made too late to affect *the presumption of acquiescence* on the part of Honduras.⁴¹ The oscillation, in the reasoning of international courts and tribunals, between a consensual and a non-consensual basis for acquiescence led Koskenniemi to argue that acquiescence is a paradigmatic example that illustrates his argument that international law claims can only be *both* apologetic and utopian.⁴²

In 1954, MacGibbon posited that ‘the primary purpose of acquiescence is evidential’⁴³ and that acquiescence is a ‘presumption of consent’.⁴⁴ In the 1980s, Thirlway, writing again in this *Yearbook*, agreed.⁴⁵

In the francophone scholarship of the same period and later, numerous different views arose. While, in 1963, Bentz argued that acquiescence is a presumption of consent,⁴⁶ Barale posited that acquiescence is a ‘*sui generis* phenomenon’, without explaining what a ‘*sui generis* phenomenon’ is and how acquiescence meets the criteria of such genre.⁴⁷ It is not until the 1990s, when the presumption of acquiescence is acknowledged again,⁴⁸ and until more recently, when the proposition that acquiescence is premised on a ‘legal fiction’ of acceptance was rejected.⁴⁹

It is unclear whether any of these authors – including MacGibbon – or the ICJ (for instance, in *El Salvador/Honduras*) concur as to the meaning of the term ‘presumption’ or ‘presumed consent’ or of any other term they used to describe acquiescence. Some of these terms differ fundamentally. For instance, legal fictions ‘*always* conflict with reality’.⁵⁰ Instead, a ‘presumption’ does not imply anything about whether the presumed fact is true or not; it is, in fact, premised partly on the idea that it is *probable* that the presumed fact is true.⁵¹

⁴¹ Emphasis added. *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras, Nicaragua intervening)*, para 364 (‘The Chamber considers that this protest of Honduras, coming after a long history of acts of sovereignty by El Salvador in Meanguera, was made too late to affect the presumption of acquiescence on the part of Honduras. The conduct of Honduras *vis-à-vis* earlier *effectivités* reveals an admission, recognition, acquiescence or other form of tacit consent to the situation’.)

⁴² M. Koskenniemi, *From Apology to Utopia* (CUP 2005) pp 355-364.

⁴³ MacGibbon, ‘The Scope of Acquiescence in International Law’, 143, 145-146.

⁴⁴ *ibid* 143, 158, 172 and 183.

⁴⁵ Thirlway, ‘The law and procedure of the International Court of Justice 1960-1989: Part One’, 45-46. He based his reasoning on the explanation of Separate Opinion of Judge Fitzmaurice, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* 62-63.

⁴⁶ J. Bentz, ‘Le silence comme manifestation de volonté en droit international public’ (1963) 67 RGDI 44, 52.

⁴⁷ J. Barale, ‘L’acquiescement dans la jurisprudence internationale’ (1965) 11 AFDI 389, 425.

⁴⁸ P. Gautier, ‘Le plateau continental de la Belgique et sa délimitation. “Quelques réflexions sur la notion d’accord implicite”’ (1995) 28 Revue Belge de Droit International 109, 117; H. Das, ‘L’estoppel et l’acquiescement: assimilations pragmatiques et divergences conceptuelles’ (1997) 30 Revue Belge de Droit International 607, 628-631.

⁴⁹ A. Marie, *Le Silence De L’Etat Comme Manifestation De Sa Volonté* (Pedone 2018) 50.

⁵⁰ Emphasis added. R. Lewis, *Legal Fictions in International Law* (Edward Elgar 2021) 14; Bentz, ‘Le silence comme manifestation de volonté en droit international public’, 52; A. Vermeer-Kunzli, ‘As If: The Legal Fiction in Diplomatic Protection’ (2007) 18 EJIL 37, 42; P. Foriers, ‘Présomption et Fiction’ in Chaim Perelman and Paul Foriers (eds) *Les Presomptions et les Fictions en Droit* (É. Bruylant 1974) 7-8.

⁵¹ Bentz, ‘Le silence comme manifestation de volonté en droit international public’, 52 (‘avec le maximum de chances, de traduire la vérité’).

The following analysis relies on the position of British and franco-phone scholars that acquiescence is a 'presumption of acceptance'. It explains the reasoning behind the 'presumption of acquiescence' in international law.

B. The function of and reasoning behind a 'presumption of acceptance'

Some have argued against the appropriateness of presumptions in international law.⁵² Others, including ICJ Judges in their individual opinions, endorse the existence and operation of presumptions in international law.⁵³ It has also been argued that presumption rules constitute 'general principles of law',⁵⁴ and that acquiescence is a general principle of law.⁵⁵ Although presumptions in international law do not derive from statute, as 'legal presumptions' do in domestic law, they are legal presumptions because they have been formed by law in the sense of what is meant by law in international law.⁵⁶

In international law, there are no 'concrete and uniform' rules on presumptions.⁵⁷ The following analysis thus borrows from the reasoning and function of presumption rules in legal theory, on which presumptions in domestic law are also premised.

Where the meaning of State silence is necessary for making a determination about the law, the assessor faces an impasse. This impasse is particularly experienced by international (and domestic) courts and tribunals that have to make a decision in a dispute before them and within an efficient period of time. This may explain why acquiescence in international law has been developed through decisions of international courts and tribunals.⁵⁸ But, it is also felt by others, such as State officials who have to decide what the law is before taking action on behalf of the State.

As argued by Ullman-Margalit, presumption rules are addressed to a person ('assessor') undertaking a practical deliberation, whose resolution materially depends on an answer to the question of whether a fact is true or not.⁵⁹ Presumption rules extricate the assessor from this deadlock by bridging a 'basic fact' (here, silence) with a 'presumed fact' to be taken for true (here, acceptance).⁶⁰

⁵² J. Witenberg, 'Onus Probandi Devant les Jurisdictions Arbitrales' (1951) 55 RGDIP 329.

⁵³ Dissenting Opinion of ad hoc Judge Franck, *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (Judgment) [2002] ICJ Reports 691, para. 4; V. Mani, *International Adjudication: Procedural Aspects* (Martinus Nijhoff Publishers 1980) 209.

⁵⁴ A. Riddell and B. Plant, *Evidence before the International Court of Justice* (British Institute of International and Comparative Law 2016) 102.

⁵⁵ Lauterpacht, *The Development of International Law by the International Court*, 170.

⁵⁶ M. Kazazi, *Burden of Proof and Related Issues* (Kluwer Law International 1996) 244.

⁵⁷ Riddell and Plant, *Evidence before the International Court of Justice* 99.

⁵⁸ Barale, 'L'acquiescement dans la jurisprudence internationale' 389.

⁵⁹ E. Ullman-Margalit, 'On Presumption' (1983) 80 *The Journal of Philosophy* 143, 147.

⁶⁰ *ibid* 146-147; Riddell and Plant, *Evidence before the International Court of Justice* 99-100.

However, the explanation of why a presumption exists does not explain the bias of the presumption rule towards the presumed fact. All presumptions are biased in favour of the presumed fact. Here, the bias is in favour of ‘acceptance’. The question that must be asked is why the law prioritizes the meaning of acceptance over any other meaning, such as the meaning of opposition.

C. *The reasoning behind a ‘presumption of acceptance’*

The presumption of acquiescence prioritizes acceptance – over any other presumed fact – for two reasons: first, probability, *and* second, normative concerns.

First, in the early twentieth century, international courts and tribunals gave indications, in their reasoning, that they took into account probability in order to infer acceptance from lack of protest. A paradigmatic example is the reasoning of the Permanent Court of International Justice (‘PCIJ’) in *Lotus* (1927). In this case, the PCIJ dealt with whether customary international law permitted a State other than the flag State to exercise criminal jurisdiction in respect of collision at sea. It reasoned that States did not protest to such exercise of jurisdiction, and that, contrary to France’s argument, ‘[i]t *seems hardly probable* [...] that the French Government in the *Ortigia-Oncle-Joseph* case and the German Government in the *Ekbatana-West-Hinder* case would have omitted to protest against the exercise of criminal jurisdiction by the Italian and Belgian Courts, if they had *really thought* that this was a violation of international law’.⁶¹

It could be argued that in most cases where a State is silent in the face of consistent and clear claims against its interests, it actually and really accepts. States are sensitive to acts which challenge their alleged rights and, according to Hyde, States are alert ‘to voice protest under the slighted provocation’.⁶² Protest is a major medium through which States preserve their rights and which is regularly used in State practice.⁶³ Hence, it is *probable* that, when the conditions set out in the presumption rule are met, the silent State’s real internal state of mind was that it accepted. The modern requirements in international law, analyzed in Section II below, that a State must be in a position to react, that it must have actual or constructive knowledge of the circumstances that call for

⁶¹ Emphasis added. *S.S. Lotus (France v Turkey)* [1927] PCIJ Rep Series A No 10, 29. See also reasoning in *Honduras Borders (Guatemala/Honduras)* (1933) 2 RIAA 1307, 1328 (‘[i]f it had been considered that Honduras was being deprived of territory to which she was entitled [...], *it can hardly be doubted* that these assertions by Guatemala [...] would have been followed by protest and opposition on the part of Honduras’). Emphasis added.

⁶² C. Hyde, *International Law Chiefly Interpreted and Applied by the United States: Volume I* (2nd edn, Little, Brown and Company 1945) 390.

⁶³ Christophe Eick, ‘Protest’ in R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (OUP 2008 – online edition) <www.mpepil.com>

its reaction, and that reasonable time of silence must pass from the time that the silent State is in a position to react are also geared around ensuring high chances of probability.

However, probability is insufficient to explain a bias towards a presumption of acceptance. There may be cases where the reason behind silence is not acceptance, including in the instances where the conditions required for acquiescence are present. For instance, even when those conditions apply, the reasons behind silence may be any of the following: the silent State may want to leave its options open; it may not recognize the State or government making a particular claim; it may have other diplomatic or economic gains by not reacting or losses if it reacted. Doctrine is fully aware of this eventuality.⁶⁴

For this reason, a normative justification is necessary. The normative explanation is acceptability of error.⁶⁵ The law accepts the possible error that the silent State does not truly accept, because there is a goal that is valued more. For instance, Jeremy Bentham, writing in relation to the presumption of innocence, argued that in doubtful cases the judge should consider ‘the error which acquits is more justifiable, or less injurious to the good of society, than the error which condemns’.⁶⁶ By analogy, it can be argued that in relation to acquiescence, the law prioritizes two inextricably linked normative considerations: (1) the need for predictable legal relationships; and (2) the need to enable the development of the law.⁶⁷

Because international law is a decentralized legal order created by States, legal claims maintained clearly and consistently over time give rise to a situation of indeterminacy and normative volatility. Writing in this *Yearbook* in 1950, Lauterpacht argued that, because of the features of international law, States cannot be allowed to play ‘fast and loose’.⁶⁸ The stability and predictability of international legal relationships would be otherwise undermined. He added that these considerations are particularly crucial in the realm of international law, ‘where the normal avenues for ascertaining disputed rights through the compulsory jurisdiction of courts or tribunals are not always available’.⁶⁹

⁶⁴ For instance, Akehurst expressly rejected that the motives of the States concerned are relevant for custom identification, because ‘what counts is what State A says or refrains from saying in public, not what State A secretly believes’. Akehurst, ‘Custom as a Source of International Law’, 39. On the other hand, the ILC in its 2018 Conclusions on the Identification of Customary International Law expressly recognized that ‘a State may also provide other explanations for its inaction.’ ILC, ‘Draft conclusions on identification of customary international law, with commentaries’, 142, Conclusion 10(3). These propositions suggest that the authors recognize that there may be instances where State silence does not reflect a silent State’s true acceptance.

⁶⁵ E. Ullman-Margalit, ‘On Presumption’ (1983) 80 *The Journal of Philosophy* 143, 159.

⁶⁶ J. Bentham, *Treatise on Judicial Evidence* (J.W. Paget 1825) 197-198.

⁶⁷ MacGibbon, ‘Customary International Law and Acquiescence’, 115, 136-137. R. Kolb, *Good Faith in International Law* (Hart 2017) 91; Marie, *Le Silence De L’Etat Comme Manifestation De Sa Volonté* 57.

⁶⁸ Lauterpacht, ‘Sovereignty Over Submarine areas’, 395-396.

⁶⁹ *ibid* 396.

III. THE EXCEPTION 'ACQUIESCENCE'

State practice, decisions of international courts and tribunals and scholarship support that State silence can establish acquiescence in relation to prescriptive rights, historic rights, territorial title, treaty interpretation and customary law.⁷⁰ However, they support that acquiescence can be established *exceptionally* under restrictive conditions.⁷¹

The ILC Special Rapporteur on the topic of 'Identification of Customary International Law', Michael Wood, in his Third Report, argued that 'inaction' (here, State silence) may mean acceptance as law (*opinio juris*) exceptionally and under specific conditions. His reasoning for this exceptional approach towards the inference of acceptance from silence was the fact that State silence may be attributed to reasons other than the will of the silent State to accept.⁷² In other words, his reasoning

⁷⁰ Besides the restrictive conditions under which State silence can mean acquiescence, analyzed in Section II, another feature that supports the exceptional nature of acquiescence is the following. In the previous century, British scholars considered that acquiescence predominantly concerned the development of *rights*: prescriptive rights, historic rights, interpretation of treaty rights, and customary rights. MacGibbon considered that acquiescence differed from *opinio juris* which is necessary element for the formation and development of customary obligations. MacGibbon, 'Customary International Law and Acquiescence', 130-131. According to MacGibbon, '[i]n the early stages of the development of a customary right other States are faced with the choice of objecting or remaining passive. From their inaction the inference of consent in and acceptance of the validity of the claim may be drawn; and this inference may be strengthened by the passage of time, the growth in the number of States participating in the claim and the extent to which the claim is enforced. [...] However, at the same time as the right is developing its correlative duty is developing, in the nature of the case, the right claimed may be such that its fulfilment may continue to require more than passive submission on the part of other States. If that is so, the validity of the claim – its acceptance as law – may be gauged solely by reference to the continued acquiescence of other States. [O]nce the correlative duty involves for its implementation a course of positive action, as opposed to simple tolerance, then the *opinio juris* may become an essential element in the absence of which that course of action cannot become endowed with the binding force of a customary obligation. If the practice continues with uniformity and is asserted as of right, and if the States assuming the obligation share the conviction that the action taken to give effect to the obligation is enjoined by law, the latter course of action has at that stage ripened into a definitive customary obligation. The *opinio juris* in these circumstances is thus, to some degree, distinct from acquiescence but it no more than the logical – although not necessarily inevitable – consequence of acquiescence or implied consent, which [...] would have permitted the right correlative to the obligation to be perfected in any event'. Emphasis added. In the case of customary obligations expressed as prohibitions, 'it is not unreasonable that emphasis should be placed on *opinio juris* rather than acquiescence, [a]lthough the binding character of the rule may as validly be ascribed to acquiescence as to the *opinio juris*.' However, more recently, the ILC Special Rapporteur on the Identification of Customary International Law, Sir Michael Wood, did not distinguish between acquiescence and *opinio juris*, and proposed that silence ('failure to react') may constitute evidence for the identification of customary international law in general – without distinguishing between customary rights and obligations. Special Rapporteur Michael Wood, 'Third Report on the Identification of Customary International Law', A/CN.4/682 (2015) paras. 21-25. He relied on reasoning in international case law that either expressly concerned acquiescence or has been widely perceived by scholarship to imply acquiescence. The ILC adopted this approach in Conclusion 10(3) of the ILC's (non-binding) 2018 Conclusions on the Identification of Customary International Law ('Conclusions on Custom Identification'). See also Akehurst, 'Custom as a Source of International Law', 39.

⁷¹ The British approach supports this view. See, for instance, I. Brownlie, 'Some Problems in the Evaluation of the Practice of States as an Element of Custom' in G. Arangio-Ruiz (ed) *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz: Volume I* (Editoriale Scientifica 2004) 315.

⁷² Special Rapporteur Michael Wood, 'Third Report on the Identification of Customary International Law', paras. 21-25.

implied that the required conditions would maximize the probability that a State truly accepts, despite the fact that an assessor would not be able to know that State's true will.

The ILC adopted this 'exceptional' approach in Conclusion 10(3) of the (non-binding) 2018 Conclusions on the Identification of Customary International Law ('Conclusions on Custom Identification'). This Conclusion provides that '[f]ailure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction.'⁷³ Those States that commented on the ILC's Conclusions, and on State silence in particular, also supported the 'exceptionality' of silence as evidence of *opinio juris*.⁷⁴

The ILC took a similar approach in its 2018 Conclusions on Subsequent Agreements and Practice in relation to the Interpretation of Treaties ('Conclusions on SASP').⁷⁵ In this topic of work, the ILC was concerned with the rule set forth in Article 31(3)(b) of the Vienna Convention on the Law of Treaties ('VCLT'), which stipulates that a treaty interpreter shall take into account the subsequent practice of (some) treaty parties that establishes the agreement of all parties about the treaty's interpretation. Conclusion 10(2) states that '[s]ilence on the part of one or more parties may constitute acceptance of the subsequent practice [of other parties] when the circumstances call for some reaction.'⁷⁶ The commentary to this Conclusion supports that silence can exceptionally constitute acceptance of treaty practice of other States. It states: 'decisions of international courts and tribunals demonstrate that acceptance of a practice by one or more parties by way of silence or inaction is not easily established'.⁷⁷ The governments that commented on the ILC's Conclusions, and on State silence in particular, also supported the 'exceptionality' of silence as evidence of agreement to the practice of other treaty parties.⁷⁸

⁷³ ILC, 'Draft conclusions on identification of customary international law, with commentaries', 140, Conclusion 10(3).

⁷⁴ The Netherlands, 'ILC Draft Conclusions on Identification of Customary International Law - Comments and Observations by the Kingdom of the Netherlands' (2018) 1, para 13

<http://legal.un.org/docs/?path=../ilc/sessions/70/pdfs/english/iciil_netherlands.pdf&lang=E>

⁷⁵ ILC, 'Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries', 15.

⁷⁶ *ibid* 75, Conclusion 10(2).

⁷⁷ *ibid* 80, Conclusion 10(2).

⁷⁸ E.g. Belarus, 'Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' (2018) <https://legal.un.org/ilc/sessions/70/pdfs/russian/sasp_belarus.pdf>. In fact, Czechia objected entirely to the inclusion of silence as evidence of agreement, see Czech Republic 'International Law Commission's Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties - Czech Republic's Comments' (2018) <https://legal.un.org/ilc/sessions/70/pdfs/english/sasp_czech_republic.pdf>. Comments by the United Kingdom, 'Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties - Written Comments of the United Kingdom' (2018) para 29 <https://legal.un.org/ilc/sessions/70/pdfs/english/sasp_uk.pdf> ('The United Kingdom respectfully suggests that the word "manifestly" be included before the phrase "call for some reaction". The aim of this proposed amendment is to avoid subsequent practice from arising by inadvertence. The

Today, the ‘exceptionality’ of acquiescence from State silence is achieved through the conditions required for silence to entail acceptance. These conditions have been developed by international courts and tribunals over time, are supported by State practice, and have been ‘codified’ in the aforementioned ILC Conclusions. More specifically, these are the following:

1. a State is silent in circumstances that call for that State’s positive reaction;
2. the silent State must be ‘in a position to react’;
 - a. it must have actual or constructive knowledge of the circumstances that call for its reaction;
 - b. its position to react must not be otherwise impaired;
3. reasonable time has passed from when the silent State is in a position to react.

States are not under an obligation to react. These conditions are abstract and adaptable to circumstances and social expectations over time. They restrict the instances in which acquiescence can be inferred from State silence, thus arguably maximizing the probability that the reason behind the State’s silence is its acceptance. At the same time, they contribute to the law’s stability, while allowing for the law’s development.

A. A State is Silent in Circumstances that Call for Its Reaction

Acquiescence takes the form of silence in circumstances which ‘demand a positive reaction in order to preserve a right’.⁷⁹ Although the ILC, in its two aforementioned sets of Conclusions, as well as doctrine discussed in the Introduction and Section I above refer to ‘circumstances that call for a State’s reaction’, they do not explain which are these circumstances. Similarly, international courts and tribunals have not explained which are these circumstances.

However, *first*, decisions of international courts and tribunals, as well as academic writings, support that the ‘circumstances that call for a reaction’ involve a legal claim. A claim may be manifested verbally or by material conduct. However, irrespective of the conduct’s form, in its substance, the claim must be sufficiently *determinate* and a *legal* claim. Political claims or indeterminate legal claims do not call for the reaction of other States with consequences in international law-making.⁸⁰ For

risk of subsequent practice arising by inadvertence without the addition of the word “manifestly” is a concern of the United Kingdom.’)

⁷⁹ MacGibbon, ‘The Scope of Acquiescence in International Law’, 182.

⁸⁰ Kolb, *Good Faith in International Law*, 97; O. Corten, *Breach and Evolution of Customary International Law on the Use of Force*, E. Cannizzaro and P. Palchetti (eds), *Customary International Law on The Use of Force* (2005) 119, 125-129; P. Starski, ‘Silence within the process of normative change and evolution on the prohibition on the use of force: normative volatility and legislative responsibility’ (2017) 4 *J Use of Force & Intl L* 14, 34.

instance, if a State uses force without justifying that conduct by reference to the exception of self-defense (or the UN Charter), there can be no evidence of a determinate legal claim about a new legal justification for the use of force.

Second, the claim must threaten or affect the interests or rights of the silent State(s).⁸¹ This criterion was developed especially vis-à-vis bilateral relations between States in the context of territorial or maritime disputes.⁸² However, in modern international law, there are customary and/or treaty rules that protect community interests, such as human rights or the environment: namely, *erga omnes* and *erga omnes partes* obligations. These are collectively and indivisibly owed to all States in case of general custom or to a group of States in case of *erga omnes partes* obligations (based on treaties or regional/group custom). The ‘directly affected State’ – for example, the victim of use of force – would be expected to react against the aggressor, if the aggressor is putting forward a justification which is controversial under custom or treaty law. But, it is unclear whether all other States are expected to react to an aggressor’s claim about a new customary or treaty rule in the absence of which their silence would mean acceptance of a controversial legal doctrine.

The decisions of international courts and tribunals to date do not address this matter. In the 2018 Conclusions on Custom Identification and the 2018 Conclusions on Subsequent Agreements and Practice in relation to the Interpretation of Treaties, the ILC did not explain the criterion by which to determine which State is expected to react in those scenarios. However, the commentary to Conclusion 10(3) of the ILC Conclusions on Custom Identification indicates that, in relation to the States whose interests may be affected in a particular scenario, ‘a certain practice [may] be seen as affecting all or virtually all States’.⁸³ This proposition might be read by some to imply that, in relation to *erga omnes* obligations, all States are expected to react to a legal claim regarding the content and scope of such obligations. This argument would also rely on the fact that, under the 2001 ILC Articles on State Responsibility, all States to whom an obligation *erga omnes* or *erga omnes partes* is owed are entitled to invoke the responsibility of the responsible State for breaching such obligations.⁸⁴ On the basis of this reasoning, it could be argued that all States to whom *erga omnes* or *erga omnes partes* obligations are owed are expected to react within the law-making process.

⁸¹ MacGibbon, ‘The Scope of Acquiescence in International Law’, (1954) 144.

⁸² See, for instance, the excellent review of the case law until 2010 in Kopela, ‘The Legal Value of Silence as State Conduct in the Jurisprudence of International Tribunals’, 87-134.

⁸³ ILC, ‘Draft conclusions on identification of customary international law, with commentaries’, 142, Conclusion 10(3), fn. 738.

⁸⁴ ILC, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) UN Doc A/56/10, art 48.

However, this reasoning faces two limitations and should not be supported. First, standing concerns the invocation of a State's responsibility in case of breach of an international obligation. It does not necessarily follow that the approach that is taken vis-à-vis standing applies or must apply to the approach taken regarding the process of norm-evolution. This is especially so given that the exercise of standing is discretionary. Although there is no obligation to react, the 'expectation to react', as an element of acquiescence, deviates from the rationale of discretion that permeates the concept of standing. Second, if all States are expected to react and all or some do not react, this approach may undermine the legal stability of *erga omnes* and *erga omnes partes* norms. It would mean that these types of obligations may be more susceptible to change over time, which belies the rationale of these norms.

Third, in order for a claim to call for the reaction of another State, the claim must be made frequently and consistently. Contradictory attitudes prevent norm evolution, because they cast 'doubts on the validity of all related claims' and undermine 'the continuity of practice'.⁸⁵ In *Somalia v. Kenya (Merits)* (2021), the ICJ was concerned with the delimitation of the maritime zones of the disputing parties. Kenya maintained *inter alia* that Somalia acquiesced to a maritime boundary with Kenya. The ICJ found that Kenya had 'not consistently maintained its claim that the parallel of latitude constitutes the single maritime boundary with Somalia.'⁸⁶ Kenya's claim was contradicted by its own domestic law over time and by its Submission to the Commission on the Limits of the Continental Shelf that is established under the Law of the Sea Convention. For these reasons, the Court concluded that 'there is no compelling evidence that *Kenya's claim and related conduct* were consistently maintained and, consequently, called for a response from Somalia.'⁸⁷

B. The silent State must be 'in a position to react'

The condition that the silent State must be in a position to react includes two cumulative circumstances: (a) the silent State must have knowledge of the circumstances that call for its reaction; and (b) the silent State must not be impaired from reacting in other ways.

i. Actual or constructive knowledge of the claim that call for its reaction

In international practice, States regularly undertake covert conduct or make secretly or privately legal claims to some but not other States. Such claims

⁸⁵ A. Oraklashvili, 'Changing Jus Cogens through State Practice' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 169; Starski, 'Silence within the process of normative change and evolution on the prohibition on the use of force: normative volatility and legislative responsibility', 35.

⁸⁶ *Maritime Delimitation in the Indian Ocean Somalia v Kenya*, para 71.

⁸⁷ *ibid.* Emphasis added.

do not trigger the international law-making process vis-à-vis States that are unaware of covert actions or confidentially or privately made claims. For instance, covert operations abroad do not satisfy the threshold of knowledge of those that are unaware of those acts and/or claims.⁸⁸

However, notification of one's claim to another State is not required in order for the threshold of knowledge to be met.⁸⁹ Lack of notification does not prejudice the knowledge of the silent State, when its knowledge may be evidenced or inferred from other facts. Decisions of international courts and tribunals, as well as scholarship, including the ILC, support the requirements of 'actual' and of 'constructive' knowledge of the circumstances that call for the silent State's reaction.⁹⁰

In the *Anglo-Norwegian Fisheries case*, the ICJ assumed that Great Britain had constructive knowledge of Norway's domestic legislation on the basis of the existence of vital British interests in the maritime area concerned and the fact that the UK was a North Sea Power particularly concerned with questions of maritime law.⁹¹ The Court reasoned that '*as a coastal state on the North Sea, greatly interested in the fisheries in this area, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, the UK could not have been ignorant of the [Norwegian] Decree of 1869 [which established the Norwegian straight baseline system]*'.⁹²

Today, actual knowledge may be more easily achieved, especially in relation to statements made by State representatives in mass media of global coverage or social media. Whether a State has *actual* knowledge through this means will be a matter of evidence. The crucial question, instead, is whether under international law, as it stands today, the threshold of 'constructive knowledge' would be met in these circumstances. No case law has reasoned in favour of or against such an argument. The ILC has not taken a position on this matter, despite the fact that its work has been prepared and was adopted in the second decade of the 21st century. On the basis of the reasoning of the ICJ, in *Anglo-Norwegian Fisheries*, it is, in principle, arguable that clear legal claims in the form of a tweet' or in an interview on CNN could meet the constructive knowledge threshold.⁹³

⁸⁸ M. Aronsson-Storrier, *Publicity in International Lawmaking; Covert Operations and the Use of Force* (CUP 2020) 131.

⁸⁹ MacGibbon, 'The Scope of Acquiescence in International Law', 176-177.

⁹⁰ ILC, 'Draft conclusions on identification of customary international law, with commentaries', 142, para 8; *Anglo-Norwegian Fisheries case (United Kingdom v. Norway)* 139.

⁹¹ See also Johnson, 'The Anglo-Norwegian Fisheries Case', 178.

⁹² Emphasis added. *Anglo-Norwegian Fisheries case (United Kingdom v. Norway)* 139.

⁹³ On the potential of twitter statements to constitute State practice or opinio juris: J. Green, 'The Rise of Twiplomacy and the Making of Customary International Law on Social Media' (2021) 20 Chinese Journal of International Law 1.

ii. The silent State must not be impaired from reacting in other ways

International courts and tribunals have refused to infer acquiescence from State silence, during a period when the silent State had been deprived of ‘a fully operational government and administration,’ such as when a State is afflicted by civil war or international armed conflict.

For instance, the Arbitral Tribunal, in *Eritrea/Yemen* (1993), it considered a period when Eritrea was embroiled in military and political upheaval. It reasoned that ‘Ethiopia was then locked in its final struggle with the Eritrean liberation movement, the Mengistu regime was close to collapse and to suggest that Eritrea today should be taxed with Ethiopia’s failure during that period to *find and protest* the terms of the agreement may be unreasonable.’⁹⁴ Additionally, in relation to the construction of an air strip on Hanish island in 1993 by Total Oil Company, to which Yemen had issued oil exploitation licences, the same Arbitral Tribunal noted that Eritrea did not protest *even though the civil war was over* and Eritrea was an independent state.⁹⁵ This reasoning suggests that if the civil war was ongoing, Eritrea’s silence would not be legally relevant as acquiescence. However, the Tribunal’s reasoning suggests that these circumstances are relevant when assessing Ethiopia’s actual or constructive *knowledge*.

More recently, the ICJ in *Somalia v. Kenya* (2021) considered that ‘the civil war that afflicted Somalia, depriving it of a fully operational government and administration between 1991 and 2005 [...] needs to be taken into account in evaluating the extent to which Somalia was in a position to react to Kenya’s claim during this period.’⁹⁶ Here, the ICJ did not expressly connect Somalia’s internal circumstances to the requirement of *knowledge*, thus allowing for an argument that the condition ‘being in a position to react’ is wider than knowledge.

A more difficult question is whether a State’s economic or institutional capacity is part of a State’s ‘position to react’. This term is generic and could be interpreted as inclusive of the economic, technological or political capacity of a State. The ILC in its commentary to Conclusion 10(3) on Custom Identification and Conclusion 10(2) on SASP respectively has not excluded this proposition.

However, the ICJ’s reasoning, in *Temple Preah Vihear* (1962), reveals that the weaker economic (and also technological) position of a State is not part of the condition of being in a ‘position to react’. In *Temple Preah Vihear*, the ICJ was concerned with a dispute between Cambodia and Thailand relating to the occupation by Thailand of a piece of territory – surrounding the Temple of Preah Vihear – that Cambodia claimed was under its sovereignty. The applicable law in this dispute was the 1904 Franco-Siamese Treaty. Cambodia at the time was a French

⁹⁴ Emphasis added. *Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen)* (1998) 22 RIAA 209, para 415.

⁹⁵ *ibid* para 502.

⁹⁶ *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* para 79.

protectorate, while Siam (today Thailand) was the only State in the region that did not become a protectorate of any colonial power but was trying to avoid subjugation. The 1904 Franco-Siamese Treaty provided that the frontier between Siam and Cambodia was to follow the watershed line. The treaty established a Mixed Delimitation Commission charged with delimiting the frontier in various districts. The final stage of the operation of delimitation was the preparation and publication of maps. Because Siam lacked technical capacity, the Siamese members of the Commission requested French members to prepare the maps. France arranged for the maps to be done. The critical map set a frontier that departed from the watershed line as agreed under the 1904 Treaty, and indicated that the Temple was in Cambodia. This map was sent by France to Siamese government officials.

In its decision (1962), the ICJ found that because Siam did not object to these maps, Siam had acquiesced to an interpretation of the 1907 Treaty that departed from its initial content. It did *not* consider – at least not expressly in its reasoning – the technical, technological or economic capacity of Siam when assessing whether it was ‘in a position to react’ to France’s maps, which made a determinative legal claim over territory under the sovereignty of Siam pursuant the Franco-Siamese Treaty.

Because the factor that a State is or not otherwise impaired from reacting would be treated separately to the factor of (constructive) knowledge, it entails that a State may disapply acquiescence altogether from itself for a particular period of time. This may explain partly the reluctance to accept an argument that a State’s economic, technological or other capacity ought to be considered when assessing the latter State’s acquiescence. However, it is reasonable to argue that a State’s economic or technological capacity in relation to a particular subject-matter can be a factor for assessing a silent State’s constructive knowledge instead. This approach would be consistent with existing judicial reasoning.⁹⁷

C. Reasonable passage of time

Generally, silence can be taken to mean acceptance (acquiescence) if reasonable time passes from the time when the silent State becomes aware of the circumstances that call for its reaction. Lauterpacht argued, in 1950 in this *Yearbook*, that the requirement of reasonable passage of time is less relevant for silence as acceptance in the context of custom

⁹⁷ A silent State’s strong economic position (along with its particular interests and role in a particular field) may be a factor that points more strongly to its constructive knowledge. In the *Anglo-Norwegian Fisheries case (United Kingdom v. Norway)*, the Court considered the position of Great Britain ‘as a coastal state on the North Sea, greatly interested in the fisheries in this area, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas’, in order to assess not whether the UK was ‘in a position to react’ generally, but whether it could be taken to have constructive knowledge of Norway’s claims (through its domestic legislation).

formation.⁹⁸ However, later doctrine, including recently the ILC, considers that reasonable passage of time is a requirement for silence to be taken as acceptance of law (*opinio juris*).⁹⁹ Sinclair even praised the ICJ for having ‘shown wisdom and restraint in requiring in effect that conduct that might arguably amount to acquiescence must be maintained over a certain period of time’.¹⁰⁰

Under general international law, there is no fixed time of silence for establishing acquiescence.¹⁰¹ No international court or tribunal has pronounced on and no writer has attempted to prescribe a specific amount of time that is reasonable for acquiescence to be drawn in general. Reasonableness depends on the circumstances of each case. For instance, in *Gulf of Maine*, the silence of the US in almost five years since Canada had issued the first permits on exploration on Georges Bank was – according to the ICJ – a short period of time in order to attribute to the silence of the US the meaning of acceptance.¹⁰² In *Pedra Branca (Malaysia/Singapore)*, the ICJ found that almost thirty years of absence of protest on behalf of Malaysia vis-à-vis effectivités performed by Singapore were sufficient to manifest Malaysia’s acquiescence to the passing of territory.¹⁰³

Numerous factors may be considered in this assessment. For instance, in *Temple Preah Vihear*, Cambodia argued that the claim’s subject-matter (such as, claims of territorial title or regarding maritime rights) may require a shorter period of silence for establishing acquiescence; as does conduct that is dense and frequent.¹⁰⁴ The Court impliedly accepted that silence in response to a territorial boundary claim, for two years can establish acquiescence.¹⁰⁵ Other factors may also be relevant. For instance, the frequency of the conduct to be opposed, the legal relationship in question, the importance of interests at stake, the intensity of the parties’ relationship, and whether knowledge of the claim is actual or constructive.¹⁰⁶

⁹⁸ Lauterpacht, ‘Sovereignty Over Submarine Areas’, 394.

⁹⁹ ILC, ‘Draft conclusions on identification of customary international law, with commentaries’, Conclusion 10(3). More generally on acquiescence and passage of time: Barale, ‘L’acquiescement dans la jurisprudence internationale’, 602-611. Marie, *Le Silence De L’Etat Comme Manifestation De Sa Volonté*, 602-611.

¹⁰⁰ Sinclair, ‘Estoppel and Acquiescence’, 120.

¹⁰¹ ICJ Pleadings, *Temple of Preah Vihear*, Oral Arguments, Vol. II, 203 (Mr. Paul Reuter).

¹⁰² *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* para 140.

¹⁰³ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*.

¹⁰⁴ ICJ Pleadings, *Temple of Preah Vihear*, Oral Arguments, Vol. II, 203-204 (Mr. Paul Reuter).

¹⁰⁵ *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* 22-25 (two years of silence meant acquiescence).

¹⁰⁶ R. Kolb, *Good Faith in International Law* (2017) 92-93.

IV. CONCLUSIONS

As a default, in international law, State silence has no legal meaning. State silence that is attributed the legal meaning of acceptance (namely, acquiescence) has been characterized by numerous scholars – including British scholars – as a ‘presumption’ of acceptance or of consent. Building on the assumption that acquiescence in international law is a presumption rule, it has been argued here that the presumption of acquiescence aims to extricate an assessor from the impasse of not knowing what State silence truly means. All presumptions are biased. Here, the bias is in favour of the meaning of acceptance. This bias can be explained by *two* considerations: probability *and* normative concerns, namely the need to ensure stability and certainty in the law while allowing its development over time. The two considerations that explain why there is a presumption of acceptance in international law, also explain why State silence can be attributed the meaning of acquiescence *exceptionally* and *only* under specific circumstances, namely: that a State is silent in circumstances that call for its reaction; that the silent State is in a position to react, including that it has actual or constructive knowledge of the circumstances that call for its reaction; and that reasonable time passes from when the silent State meets the requirement of being in a position to react.