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Acquiescence

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A. Notion

1 One of the bedrocks of international law is the ‘action-reaction paradigm’. The conduct of a State (State see also → *Subjects of international Law*) towards another State, and the reaction of the latter, are essential to the definition of their relations; and ultimately, even to the legal grounds on which such relations evolve. Acquiescence is one of the notions through which the said paradigm may be materialized.

2 In international law, the term ‘acquiescence’—from the Latin *quiescere* (to be still)—denotes → *consent*. It concerns a consent tacitly conveyed by a State, unilaterally (→ *Unilateral Acts of States in International Law*), through silence or inaction, in circumstances such that a response expressing disagreement or objection in relation to the conduct of another State (→ *Protest*) would be called for. Acquiescence is thus consent inferred from a juridically relevant silence or inaction. *Qui tacit consentire videtur si loqui debuisset ac potuisset* (he who keeps silent is held to consent if he must and can speak).

B. Historical Evolution of the Concept

3 Acquiescence is usually presented as having its roots in Anglo-American law (*acquiescence*) and French procedural law (*acquiescement*). That said, it is necessary to point out that the two previous concepts are clearly distinct. Whereas the former also operates in the realm of substantive law, the latter is confined to adjective law (ie the aggregate of rules of procedure and enforcement through which substantive law is implemented). These differences signal that extrapolations or transpositions thereof into international law should be carried out cautiously. Further, it should be borne in mind that similar concepts probably exist in other domestic systems. At the international level, this was already noted, for example, by Judge Ammoun, with respect to Islamic law, in the → *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) (Merits)* ([1969] ICJ Rep 121).

4 There is perhaps little doubt nevertheless, that acquiescence (much like the related notion of → *estoppel*) has emerged by virtue of the marked influence of Anglo-American legal thought in international law, in particular since the late 19th century. For example, the figure of *estoppel by acquiescence*, existent in Anglo-American law, has in it much of the hallmarks of acquiescence in international law.

5 Notwithstanding this, once transposed into international law, the notion of acquiescence was developed and elaborated within the framework of the international legal system. This took place, throughout the last century, in a number of judicial and arbitral decisions, and also in doctrinal and scholarly writings. As a result, while complex and multifaceted in nature, the notion of acquiescence in international law does not strictly fit, nor is it fully instantiated by, the precursors’ (domestic) notions.

C. International Jurisprudence

6 Identifying the case law in which acquiescence was (autonomously) referred to is not an easy task. Instances in which acquiescence was invoked are too numerous to be exhaustively dealt with here and cover virtually all subject-matters. Further, recourse thereto comes often hand in hand with estoppel-related arguments. Setting the two notions apart in mutually exclusive terms is rather difficult.

7 With respect to cases decided in the first half of the 20th century, reference may be made, for example, to the → *Grisbadarna Case (Norway v Sweden)* ([1910] 4 AJIL 233-4), → *Tinoco Concessions Arbitration (United Kingdom v Costa Rica)* ((1924) 18 AJIL 153-7), *the Case of the SS 'Lotus' (France v Turkey) (Merits)* (PCIJ Rep Series A No 10 at 18-31) (→ *Lotus, The*) and → *Palmas Island Arbitration (United States of America v Netherlands)* (2 Rep Intl Arbitral Awards 866-9). In the first and last of these cases, there were findings of acquiescence. In the other two, the arguments made by one of the parties were unconvincing to the courts.

8 A vaster jurisprudence referring to acquiescence, and conceptualizing it, emerged after the mid-20th century. Once more, courts dealt with it both in the affirmative and in the negative. Findings of acquiescence appear in the → *Fisheries Case (United Kingdom v Norway) (Merits)* ([1951] ICJ Rep 134-39), → *Right of Passage over Indian Territory Case (Portugal v India) (Merits)* ([1960] ICJ Rep 39-44), *Arbitral Sentence of the King of Spain Case (Honduras v Nicaragua) (Merits)* ([1960] ICJ Rep 210-14), → *Temple of Preah Vihear Case (Cambodia v Thailand) (Merits)* ([1962] ICJ Rep 27-33), → *Rann of Kutch Arbitration (Indo-Pakistan Western Boundary) (India v Pakistan)* (50 ILR 474-5), → *Continental Shelf Arbitration (France v United Kingdom)* (18 Rep Intl Arbitral Awards 68-74), and → *Land, Island and Maritime Frontier Dispute Case (El Salvador v Honduras: Nicaragua Intervening) (Merits)* ([1992] ICJ Rep 401-9, 566-70).

9 Even cases in which no findings of acquiescence underlay the decision contributed to shape the notion of acquiescence, as happened with the *North Sea Continental Shelf Cases (Germany v Denmark; Germany v Netherlands) (Merits)* ([1969] ICJ Rep 25-7), *Continental Shelf Case (Tunisia v Libyan Arab Jamahiriya) (Merits)* ([1982] ICJ Rep 68-71, 83-5), → *Gulf of Maine Case (Canada v United States of America) (Merits)* ([1984] ICJ Rep 303-12), → *Elettronica Sicula Case (United States of America v Italy) (Merits)* ([1989] ICJ Rep 43-4), → *Territorial Dispute Case (Libyan Arab Jamahiriya/Chad) (Merits)* ([1994] ICJ Rep 36-7) and → *Land and Maritime Boundary between Cameroon and Nigeria Case (Cameroon v Nigeria) (Merits)* ([2002] ICJ Rep 333-55, 412-16, 437-48).

10 Separate and dissenting opinions attached to these and other cases have also furthered the understanding of acquiescence. Importantly, the disagreements expressed often related not so much to the conceptual contours of acquiescence, as to the subsumption of the factual matrix under the juridical matrix. Pleadings of cases which did not reach the trial stage may equally offer important information for better understanding this notion (→ *Passage through the Great Belt Case [Finland v Denmark]* Counter-Memorial paras 760-85).

D. Areas of Application

11 In international law, acquiescence has primarily a substantive bearing. It operates in the realm of the vicissitudes of juridical situations. Rights and duties may be constituted, modified, disposed of or terminated by the effect of acquiescence. While it may impact on fields of law, its particular relevance in territorial and boundary issues, or issues relating thereto, deserves emphasis. The examples of case law below provide a useful illustration.

12 Acquiescence as a legal tool is often used in third-party proceedings. Parties to disputes resort to it as means to assert or deny claims, through evidence such as treaties, maps, diplomatic correspondence, official documents and notes, records and archives, and the relative conduct of States. This evidence is contextualized within a specific factual matrix. And it is canvassed as an argument seeking to demonstrate the existence of consent expressed by the opposing party in some respect. Its role may be directly decisive for the outcome (eg *Fisheries Case; Temple of Preah Vihear Case*). In other cases, it may happen that no finding of acquiescence is made; but the outcome is (partially at least) hardly

distinct from that which could have occurred had acquiescence been relied on (eg *Continental Shelf Case [Tunisia v Libya]*). Courts may also opt for not relying strictly on acquiescence, although its flavour is present as confirmation of another line of reasoning (eg → *Minquiers and Ecrehos Case [France v United Kingdom] [Merits] [1953] ICJ Rep 71-72*).

13 The operation of acquiescence in respect of title to territory, land and maritime boundaries, and territorial-related rights has perhaps the highest political profile. Its ultimate effects may be the attribution of territorial title (eg *Palmas Island Arbitration*), apportionment of maritime areas between States (eg *Grisbadarna Case*), enlargement of maritime claims (eg *Fisheries Case*), establishment of a right of passage (eg *Right of Passage over Indian Territory Case*), change of a land boundary (eg *Temple of Preah Vihear Case*), and derogation of a treaty (eg → *Sovereignty over Certain Frontier Land Case [Belgium v Netherlands] [Merits] [1959] ICJ Rep 227-30*) or a legal principle (eg *uti possidetis iuris, Land, Island and Maritime Frontier Dispute Case*).

14 Another important area over which acquiescence may have an impact is that of the sources of law *latissimo sensu*. With regard to treaties, issues such as interpretation (eg subsequent practice in the application of a treaty), invalidity (eg loss of the right to invoke a ground for invalidity, termination, withdrawal from or suspension of a treaty; error in circumstances such that the State ought to have been on notice of a possible error), and fundamental changes in circumstances are interrelated with the notion of acquiescence and its effects (see also → *Interpretation in International Law*; → *Treaties, Fundamental Change of Circumstance*; → *Treaties, Validity*; → *Treaties, Termination*). On another level, treaties may explicitly exclude the operation of acquiescence in relation to certain aspects; or conversely, establish that silence or inaction corresponds to a certain effect (eg acceptance of reservations [→ *Treaties, Multilateral, Reservations to*]; rights of third states; maintenance of a → *status quo*). Similarly, there is the question of loss of the right to invoke → *State responsibility* in cases of acquiescence (cf ILC Articles on State Responsibility). Finally, there is the question of public order. Where overarching issues in which the interests of the international order as a whole are in question, recourse to acquiescence might not be legally tolerable.

15 → *Customary International Law* has equally closely-knit relations with acquiescence. General toleration by the → *international community* may lend support to an emerging customary rule, and lead to the departure from an existing rule (eg *Fisheries Case*); just as the non-existence of a general acquiescence of nations may indicate the non-existence of a rule (eg *Tinoco Concessions Arbitration*). A local practice between two States may prevail over general rules, especially if these are unclear (eg *Right of Passage over Indian Territory Case*). But such local practice may only be opposed to a State that has acquiesced in it, the claiming State having to prove such acquiescence by the other State (eg → *Haya de la Torre Cases [Colombia v Peru] [Merits] [1950] ICJ Rep 273-8*).

16 Other aspects of international juridical situations may be entangled with acquiescence. An example is that the silence or inaction that characterizes acquiescence may have the effects of unilateral acts (eg → *Recognition*, or → *Waiver*; see also → *Unilateral Acts of States in International Law*). Recognition of States, for instance, often relies on acquiescence. Reference may also be made to → *ius cogens* norms, in relation to which acquiescence is dispensed with, as far as their binding nature is concerned. The ‘universality’ and ‘communality’ of the values embedded in *ius cogens* norms create

unsurpassable difficulties to the relational character of acquiescence, typical of concrete specific cases (see also → *Universality*).

17 On the plane of international organizations, acquiescence is again relevant. Voting issues are an example (→ *International Organizations or Institutions, Voting Rules and Procedures*). Assume a vote by a State in the general assembly of an organization, coupled with its subsequent conduct aligned with that vote and its juridical content. Assume equally that another State asserts a right in line with that vote. In the absence of reservations or inconsistency of conduct by the first State, acquiescence in such an assertion may arise. Another example concerns customary rules arising out of acquiescence in relation to some internal mechanisms, as is, for example, the case of the understanding of abstention votes in the Security Council. Acquiescence may even be a consideration in the relationships between the organization and its employees.

18 There is finally the procedural facet of acquiescence. First, acquiescence may result in an *ex novo* establishment of a court's jurisdiction. Secondly, it may also be used to prevent an opposing party from advancing, or rebutting, a preliminary exception. Finally, recourse to acquiescence may be had for purposes of admission or refusal of evidence and legal argumentation.

E. Special Legal Problems

19 The notion of acquiescence is not exempt from difficulties, the most prominent and complex of which being the polysemous nature of silence or inaction. The maxim *qui tacit consentire videtur* (he who keeps silent is held to consent) is contradicted by a neutral maxim *qui tacit neque negat, neque utique fatetur* (he who keeps silent is held neither to deny nor to accept). With respect to acquiescence, international law appears to have adopted a midway point between these two maxims. Silence or inaction is tantamount to consent only when qualified by reference to the *si loqui debuisset ac potuisset* requirement. The practice of courts has had a particular weight in confirming this content as derived from good faith and equity (→ *Good Faith (Bona fide)* and → *Equity in International Law*). Thus defined, the juridical value and meaning of silence or inaction depends on the circumstances *in casu*. The *interpretation* of silence or inaction is then usually made in relative terms, account taken of the specific (sequence of) facts and the relationship between the States involved.

20 However, difficulties subsist. When speaking of acquiescence it may be asked whether one is referring to consent *proprio sensu*, or rather to effects that may be equated to those of consent. There are divergent views, one of which questions the possibility of operating a meaningful distinction between consent and acquiescence. Further, since derogation from treaty norms and general international law is possible through acquiescence, doubts arise as to the situations in which that may occur. Also, as acquiescence is apt to convey a position on the (un)lawfulness of a state of affairs, the fact that certain considerations (eg political expediency, indifference, power relations, or de facto inability to act) other than the legal validity of the facts must be weighed poses difficulties, namely the extent to which silence or inaction can underlie customary norms or be relevant for assessing a conduct adopted by the international community. This, in turn, leads to inquiries about the role of protest in this process and how effective protest is as a way to counter certain conduct.

21 The practical implementation of the *si loqui debuisset ac potuisset* requirement is a further problem. Acquiescence only emerges where it refers to facts that are (or ought to be) known by the acquiescing State (*notoriety*), where such facts are of direct interest for the acquiescing State (*interest*), when these facts have existed for a significant period (*lapse of time*) without significant change of context and the meaning conveyed (*consistency*), and in cases in which the conduct is attributable to a relevant representative

of the State (*provenance*). Hence, a conduct can only be acquiesced in if certain criteria are met.

22 The question remains, however, as to whether any relevance is to be given in this process to the subjective intention of the acquiescing State. In principle, this would not be possible, for only those elements of the State's conduct that were actually externalized would bear any legal significance.

23 A last, important legal problem concerns the distinction between the notion of acquiescence and that of estoppel, as well as in respect of recognition and → *prescription*. Drawing a strict separation line between these notions may be problematic; or may even not be possible in some cases.

24 Acquiescence is indubitably a notion that is entangled with the notion of estoppel. In the *Gulf of Maine Case*, the → *International Court of Justice (ICJ)* stated that the same facts are relevant to both notions, and that it could take the two into consideration as they are different aspects of one and the same institution. It added also that both follow from the fundamental principles of good faith and equity. But the two notions are distinct. First and foremost, estoppel entails a detrimental reliance by one State. Evidence that that State has openly relied on a certain situation of fact, and that a change thereof would lead to undue prejudice (or an unjustified benefit for the other State), is the crucial element, enunciated by the ICJ in the *North Sea Continental Shelf Cases*. Secondly, acquiescence signals an expression of consent (albeit tacitly conveyed), whereas for estoppel to arise there is no requirement of consent. Irrespective of the existence of consent by a State, that State becomes bound by its conduct. These two elements characterize the predominant view on the distinction between these legal notions. The suggestion is further made that estoppel may emerge as legal consequence of an acquiescing conduct. The ICJ's finding of acquiescence in the *Temple of Preah Vihear Case*, followed by a finding of estoppel, evinces perhaps better than any other the entangled nature of the two notions, and how estoppel may indeed stem from an acquiescing conduct. Similarly, the *Electronica Sicula Case* illustrates this point by stating that an estoppel can arise in certain circumstances from silence, when something ought to have been said. The difficulties in disentangling the two notions can be such that some authors have actually suggested that estoppel is a useless institution, for it flows from a commitment of the State in relation to a certain situation, ie from consent.

25 Acquiescence and recognition are both manifestations of consent. The distinction between them may be drawn on the basis of the type of conduct. Whereas recognition has at its base an 'active conduct', acquiescence is inferred from a 'passive conduct'. Further, unlike the latter, recognition has no 'lapse of time' requirement. It is consent expressed by action, deed or words. With respect to prescription, it suffices to say that, although it stems from a notorious, long-lasting and consistent practice, maintained in good faith, it does not entail consent.

F. Significance in Current International Law

26 International law remains a horizontal legal order, with a minor level of institutionalization. *Proprio sensu*, it lacks a 'legislator', an 'adjudicator' and an 'enforcer'. In such a legal order, where the interaction between subjects is paramount, and in which the principle of consent is preserved, acquiescence continues to be significant, in particular

since protection of legitimate expectations and good faith in international dealings are ever more present.

27 The concept of acquiescence, principled in nature, conveys a sense of certainty (good faith) and justice (equity). In so far as these two notions are ever-prevailing aims of legal systems, and since acquiescence is a legal by-product of their implementation, it is likely to remain a cornerstone of the contemporary international law. Pleas of acquiescence similar to those aforementioned will thus continue to arise in the foreseeable future.

28 Acuter problems may nevertheless emerge nowadays, when use of force (→ *Use of Force, Prohibition of*), → *security*, → *terrorism*, → *migration*, poverty and → *human rights* are at the forefront of international, globalized affairs. Silent conduct or inaction in respect of these issues will require a legal answer. The certainty and justice promoted by the concept of acquiescence, however, cannot be decoupled from the difficulties inherent therein. A cautious approach to findings of acquiescence continues to be warranted, the burden of proof lying on the party invoking it. Instances in which this may be relevant are far from uniform, and silence or inaction is seldom an adequate manifestation of consent. The issues surrounding acquiescence relate ultimately to a sphere of discretion which States enjoy, their conduct being under scrutiny in what are usually rather complex situations.

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