Ascribing a Voice to Silent States: Reflections on (Differentiated) Legislative Responsibility

International law is made through the interaction between States - the main subjects of international law. In this process, courts and scholars place emphasis on the physical and verbal actions of States. However, the Silence of States, namely the physical or verbal inaction of States, plays an important role in international law-making. Yet, it has been unduly in my view overlooked in international law scholarship.

Different international law-making processes are premised on the ***silencing*** and marginalization of numerous actors. For instance, indigenous peoples, colonies and individuals do not have a voice that counts as relevant for the creation and change of customary international law or for the interpretation of treaties between States. In addition, the voice of some States may frequently be excluded. For instance, only the voice of the five permanent members of the United Nations Security Council is consistently instrumental in shaping and adopting the binding 'peace and security' decisions of the Council; to the exclusion of the voice of other States.

But, international law also ascribes a voice - a meaning - to the silence of States. It does so especially through the concept of acquiescence, namely that a State is taken to accept when it remains silent in the face of a situation or claim that threatens its rights.

In 2008, in the *Pedra Branca* case between Malaysia and Singapore, the International Court of Justice stated that ***'silence may speak'*** in order to describe acquiescence;

Pedra Branca was a dispute about sovereignty over a particular territory, and the Court's reasoning concerns acquiescence for the purpose of establishing territorial title.

However, because acquiescence is relevant for the identification of customary international law, as well as the formation, interpretation and modification of international agreements, it affects all primary rules of international law: from the law of the sea, to use of force, trade law, human rights, and so on and so forth.

It is on this latter legal significance of State silence that I focus today: the one to which a specific voice - that of acceptance - is ascribed by international law to silent States.

But, how does this State silence relate to issues of inequality?

Under international law, all States are equal. However, in reality States differ significantly in their political structure, their geopolitical position, their military power, and their economic, technological and institutional capacity.

Some developing countries have a handful of legal officers in the ministry of foreign affairs in capital and one or no legal officer in their missions to the United Nations. For this reason, they may focus on two or three areas of international law of particular interest to them, and are silent in many other areas of international law.

Conversely, in most areas of international law, developed States can be the drivers in international law-making, while economically poor countries are likely to be silent, and to be taken to accept the practice of developed countries because they have less economic and other capacity to object.

In the following minutes, I would like to unpack how international law ascribes a voice to silent States and what options we have if we wanted to address economic inequalities in this respect.

I will structure my talk as follows:

First, I will explain the conditions under which State silence is given the meaning of acquiescence in international law: these include the requirement that a State is 'in a position to react'.

Second, I will discuss why it is important in practice whether the threshold of 'being in a position to react' within the rule of acquiescence takes into account the economic, technical or institutional capacity of each State.

Third, I will argue that the reasoning behind the rule of acquiescence is that all States bear 'legislative responsibility', akin to a due diligence obligation.

Fourth, I will reflect on two options through which doctrinal law can take into account the different capacities of States.

Finally, I will draw some conclusions.

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Starting with the conditions under which international law ascribes the meaning of acceptance to the silence of States,

Acquiescence has been recognized in international case law, such as the *Pedra Branca* case, and also most recently in the work of the International Law Commission.

The International Law Commission is the subsidiary organ of the UN General Assembly entrusted with the progressive development of international law and its codification. Its work is not binding but it may reflect law or it may guide the future development of the law.

In its 2018 Conclusions on the Identification of customary international law, the Commission states that

> Failure 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.

The Commission has taken exactly the same position about the legal relevance of State silence in its 2018 Conclusions on Subsequent Agreements and Practice in relation to the Interpretation of Treaties. Here, the Commission was concerned with the rule set forth in Article 31(3)(b) of the Vienna Convention on the Law of Treaties.

This rule stipulates that the interpret of a treaty shall take into account the subsequent practice of some treaty parties that establishes the agreement of all parties about the treaty's interpretation. To identify how an agreement between all treaty parties may be established by the subsequent practice of some, the Commission stated that

> 'silence may constitute acceptance when the silent State **is in a position to react** and the circumstances called for some reaction'.

The circumstances that call for some reaction concern a consistent legal claim over a period of time made by another State.

The requirement that a State is in a position to react includes two aspects: first, that it has knowledge of the circumstances that call for its reaction; and second, that the silent State has the ability to react.

If a State is embroiled in civil strife or international armed conflicts, it lacks capacity to react during that period and its silence cannot be acquiescence. This has been recognized by the International Court of Justice in its recent Judgment in 2021 concerning the maritime delimitation dispute between Somalia and Kenya.

However, neither case law nor the Commission's work consider whether the standard that a State has to be 'in a position to react' takes into account the economic, technological, institutional capacity of a silent State.

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This brings me to the second question I want to address: does it matter in practice whether the threshold of 'being in a position to react' within the rule of acquiescence takes into account the fact that different States have different economic capacities?

I will give you two real life examples. One bilateral setting from the era of colonialism, and one multilateral setting from modern times.

Starting with the bilateral setting, the case *Temple Preah Vihear* before the ICJ was 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 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 in 1952, the Court 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.

What types of inequalities lurk here and which were ignored completely by the Court?

- Technical capacity: Siam relied on a major colonial power for technical capacity.
- And military disparities. Siam was concerned that France might militarily invade it.

Had the Court taken into account these inequalities, when it considered whether Siam was in a position to react, it is likely that it would have not concluded that Siam had acquiesced to a change of the treaty provisions. In other words, the disputed territory would have now been under Thailand's sovereignty.

So, whether the economic, technical and institutional capacity of a State is taken into account in the thresholds of acquiescence does matter, and can be in fact determinative in relation to subject-matters of fundamental importance for the interests of States, such as whether a particular territory belongs or not to the silent State.

Let me move to the contemporary multilateral example.

In 2018, the US, UK and France bombed Syria in response to the use of chemical weapons against civilians by the Assad regime. The UK declared that it lawfully used force because international law permits humanitarian intervention. Numerous other States remained silent. Does this interaction between a legal claim by one developed State and the silence of numerous other States (including numerous developing countries) mean that custom and the Charter of the United Nations now permit humanitarian intervention?

This modern example demonstrates that if the silence of States is taken as acceptance, it has the potential to erode fundamental rules of international law, such as the prohibition of use of force.

But, for States that have less economic capacity than developed counties the problem in this context is the following: today, more than 190 States exist. In addition, communication between States is easier. States can publicize their positions on the websites of their ministries of foreign affairs, through international organizations or on Twitter.

Developing countries are unlikely to be able to keep up with public claims of so many States, and are likely to be silent and to be taken to accept changes in the law.

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In order to reflect on what options we have at our disposal in order to address the fact that different States have different economic capacities which affect their ability to react to the claims of other States, it is necessary to first understand the reasoning behind the law – why we have a rule on acquiescence.

In my view, acquiescence is a rule of presumption, which connects a basic fact, here State silence, with a presumed fact taken to be true, here State acceptance.

All rules of presumption are biased. They favour a particular presumed fact over another. Here acceptance is favoured over lack of acceptance. But, why?

Two reasons explain this bias: Probability and normative considerations.

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.

But, probability is insufficient to explain the bias towards a presumption of acceptance. This is because there may be cases where the reason behind silence is not acceptance. A normative justification is necessary.

The normative explanation is acceptability of error. We accept the possible error that the silent State does not truly accept, because there is a goal that is valued more. Here, the law prioritizes two goals:

(a) predictable legal relationships; and
(b) avoidance of impeding the development or change of the law.

This reasoning behind the law suggests that all States bear 'legislative responsibility'.

Since the distinctive feature of international law is that it is a decentralized legal order made through the interaction between States, States bear a due diligence obligation vis-à-vis norm-creation. If they are silent in the face of consistent legal claims which create norm volatility, their silence counts as acceptance in the international law-making process.

Having shown that it matters whether the requirement that a State is in a position to react takes into account the different economic and technical capacities of States, and why we have a rule of acquiescence in international law, I now move to what options are available if we decided to include within this requirement some considerations of differentiated economic capacities of States.

I have two models to propose.

- First, what I call the 'average State' model;
- Second, what I call 'differentiated' legislative responsibility model.

Starting with the 'average State' option. The threshold of 'being in a position to react' in the rule of acquiescence, would be a fixed standard: that of the ability of the 'average State'.

This option is inspired by domestic laws, where 'the average person on the street' threshold is relied on in order to assess 'reasonable' conduct.

The advantage of this approach is that it ensures a harmonized application (over time) for all States. In addition, it ensures that the capacity of a State would not be measured by reference to what the most powerful State would be able do.

However, a closer glance shows that two main challenges arise.

- First, 'what is the average State'?
  - Should we identify it by reference to economic criteria – for instance the GDP of a State that stands in the middle when ranking the GDP of all States? Or should it be by reference to institutional capacity – for instance, in terms of how many State organs it has; how many civil servants it employs in its Ministry of Foreign Affairs?
  - In addition, we cannot find the 'average State' in relation to all subject matters covered by international law. Different States may be more able or less able to react in relation to legal developments in different fields.

- Second, and more fundamentally, if the objective behind adopting an 'average State' capacity is to address the mismatch between equality in law and inequality in the real world, then this standard fails to meet its own objective.

  The law will still expect some States to perform at a level that exceeds their real capacity, because the real capacity of some States will be below the standard of the 'average State' capacity.

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These challenges point to a more differentiated model. I call this the 'differentiated legislative responsibility' model. This would allow for differentiation between developing and developed countries, but also among developing countries.

This is inspired by the due diligence obligation in numerous fields of international law – environmental law, climate change, human rights and others. The justification behind it is substantive equality. Because formal equality between States does not represent reality, it leads to substantive inequality when it comes to law-making. Less powerful States are more likely to be taken to have accepted, comparing to more powerful States which have the economic and institutional capacity to object.

The advantage of this approach is that it recognizes that all States are subject to the rule of acquiescence, but also that each State's economic, institutional, technical capacity to react differs.

However, this approach is not free from challenges either.

- First, how would capacity to react be measured? Even in areas such as international environmental law, it is unsettled how to assess 'capacity' – is this only about economic capacity or not? And even if we focus only on economic capacity, by what measure are States to assess other States' capacity to react? These are unclear standards.

- Second and crucially, differentiated (and unclear) standards may undermine the capacity of the law to govern behaviour, because they give plenty of leeway to those interpreting and applying them.

  Thomas Franck emphasised that States comply with legal rules when these are certain, clear and determinate; when rules lack these characteristics, they lose their compliance-pull quality.

  How would a State know whether any one State of the 190 States has the (economic or institutional) capacity to react in relation to custom or treaties in any given subject-matter? How would a State know what the law is?

  There is thus a real danger that international law across different fields would be undermined by such an approach. Nor would this necessarily be beneficial for less powerful States, because more powerful States have more space to exert pressure when rules are indeterminate.

- Third, from a Third World Approach to International Law caution would also be called for. A differentiated capacity model undermines the legal equality of States, because it presents smaller and developing countries as the lesser relative in the family of nations.

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To conclude,

There is no perfect answer to how international law deals or should deal with real inequalities between States, including in relation to ascribing a legally relevant voice to the silence of States.

However, being aware is warranted if we want to make international law less hegemonic and more inclusive. And by this, I mean that we ought to be aware of our basic assumptions as international lawyers, of the need to ensure the predictability of international, but also of the real challenges that many different States face in the process of norm-creation and of the mismatch between legal equality and real capacities.