Danae Azaria,
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Legally relevant State silence, in the sense of acquiescence, permeates the whole of international law. It is relevant in relation to sovereign title and territorial and maritime boundary delimitation. But, crucially acquiescence it is relevant for the identification of customary international law, as well as the formation, interpretation and modification of international agreements.

Since it is relevant in the sources of international law, it affects all primary rules of international law: from the law of the sea, trade law, to human rights law, but also crucially for our discussion in relation to the law on the prohibition of use of force and so on and so forth.

The International Law Commission in its 2018 Conclusions on the Identification of customary international law.

> Conclusion 10(3) states that
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> 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 ILC has taken a similar approach in another topic which ran in parallel with the Conclusions on Custom Identification: namely, its 2018 Conclusions on Subsequent Agreements and Practice in relation to the Interpretation of Treaties.

Here, the ILC 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 ILC states in Conclusion 10(2) that

> 'Silence on the part of one or more parties may constitute *acceptance* of the subsequent practice when the circumstances call for some reaction.'

Silence can constitute acquiescence under very strict circumstances. More specifically, a State fails to react, while it has capacity to react and has (or has construed) knowledge of circumstances that call of its reaction.

The circumstances that call for one's reaction, concern a behavioural norm (not a legal obligation to react). This behavioural/social norm is that when a State's interests are under threat that State would normally protest; it would say 'no'.

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Can silence express acceptance? Why is this important? Because making an international agreement requires a communicated intention and giving consent to an internationally wrongful act requires actually expressed consent – consent cannot be presumed.

Can a State make an international agreement by expressing consent in silence?

Let me give you an example from the law of the sea. States that have not agreed on permanent boundaries often establish *modus vivendi* arrangements, which are temporary and of specified scope; usually about natural resources activities in the undelimited area. These arrangements differ from permanent boundary agreements. If in response to an offer to agree on a permanent boundary the other State is silent, and the only background of the relationship is the *modus vivendi*, silence does not communicate acceptance to make a permanent boundary agreement. At best, silence expresses acceptance to continue the *modus vivendi*.

So, when can a State communicate acceptance in silence?

A State can give consent to the presence of military forces of another State silently but this can happen only in exceptional circumstances when it has continuously given express consent and it continues to cooperate on the ground with the foreign forces.

This may perhaps explain the Court's reasoning in *DRC v. Uganda*. In this case, Uganda argued that the DRC had authorized the presence of Ugandan military forces on DRC's territory. The Court noted that from mid-1997 to early 1998, DRC had authorized three times the presence of Uganda's forces in its territory, and that the DRC *did not object* to Uganda's military presence. This may suggest that the Court considered that instances of DRC's silence could be explained as silent consent, since during that period the DRC had consistently authorized Uganda's action. The two States had a relationship of prior dealings where the normal expectation was that the DRC accepted Uganda's forces on its territory, especially since its forces cooperated with the Ugandan forces on the ground.

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Security? Of international relations?

In both instances – presumption of acceptance and presumption of opposition – the reasoning is twofold: probability *and* normative concerns.

In most cases where a State is silent in the face of consistent and clear claims against its interests, it actually and really accepts. In the *Lotus* case (1927), the PCIJ

considered whether customary international law permitted a State other than the flag State to exercise criminal jurisdiction in respect of collision. The Court 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* case and the German Government in the *Ekbatana* 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*'.

But, probability is insufficient to fully 'justify' the bias towards a presumption of acceptance, because there may be cases where the real reason behind silence is not acceptance. A normative justification is necessary. The normative explanation here is acceptability of error.

Jeremy Bentham, whose auto-icon is displayed at UCL and after whom the building of UCL's Laws Faculty is named, wrote in 1825 that in doubtful cases the judge should consider 'the error which acquits as more justifiable, or less injurious to the good of society, than the error which condemns'.

Similarly, we accept the possibility of error (that the silent State does not truly accept or does not truly oppose), because there is a goal that is valued more.

In the case of a presumption of acceptance for norm-creation, the law prioritizes (a) predictable legal relationships; as well as the (b) avoidance of impeding the development of the law.