that especially in the field of *jus ad bellum*, the fact that States are not routinely made aware contemporaneously of self-defense communications reported to the Security Council under article 51 is, in our view, a significant concern that ought to be addressed as a matter of priority.

Two methodological caveats should be noted here. First, we catalogue and focus on (apparent) reports of self-defense measures and certain forms of Security Council responses thereto — but without bringing into view the responses of (other) States to those reports. This means that our catalogue gives voice to States that have reported self-defense measures and to the Security Council in response thereto, but not to States that have reacted to such reports. Second, in our review of international-law scholarship, we have covered academic publications in the English and French languages only. Notwithstanding the loss of a broader examination of scholarship in other languages, it is frequently English and French publications that make their way into international judicial decisions and other international legal analyses. It appears that the practice of reliance on silence in the scholarship that we did cover is sufficiently common to suggest that States’ silence in the field of *jus ad bellum* deserves greater attention than it has been accorded so far.

**II. WHAT WE MEAN BY SILENCE**

In international law, some — but not all — inactions, non-responses, omissions, or other “silences” are capable of producing legal effects. In some cases, these legal effects are clearly provided for. As noted in the introduction, examples include VCLT provisions concerning the signing but not also ratifying certain

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27. The reports identified as “article 51 communications” in this paper and in the HLS PILAC catalogue should be considered apparent “article 51 communications” because there has been no authentic and authoritative interpretation under the Charter that each such report does in fact constitute an “article 51 communication.” See Annex. On the concept of “authentic” and “authoritative” interpretation, see below note 188 and the accompanying text. For ease of reading, we do not expressly qualify each identified report as “apparent”; however, that qualification should be considered to implicitly attach to each “article 51 communication” identified in this paper and in the HLS PILAC catalogue.

treaties; the failure to object to a reservation functioning as a form of acceptance of that reservation; and the adoption of a treaty at an international conference even if one-third of the States are not present or do not vote. Another instance is the UNCLOS provision on proceeding with a marine-scientific-research project unless the coastal State has responded within a certain amount of time.

Yet, in most other cases, international law does not provide clear guidance on what, if any, legal effects follow from State silence. The challenge here lies in no small part in the polysemous nature of silence: it is necessary to discern which of silence's multiple possible meanings — including tacit agreement, implied objection, absence of view, or lack of interest — operates in respect of a particular situation or issue. As some courts have observed, for example, the mere tolerance of a practice might not constitute acceptance of its legality.

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29. See VCLT arts. 11–17. But see id. at art. 18. Note, however, that a State that does not contract into a treaty would nevertheless be bound by a rule contained in that treaty insofar as that rule is reflective of customary international law.

30. See VCLT art. 20(3)(5) (“For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, 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 or by the date on which it expressed its consent to be bound by the treaty, whichever is later.”).

31. See VCLT art. 19(2).

32. See UNCLOS art. 252 (cited in Kopela, above note 6, at 90 n.18).

33. See Marques Antunes, above note 6, at para. 19; see also Buzzini, above note 6, at 84–117.

34. See, e.g., UNCLOS art. 252 (cited in Kopela, above note 6, at 90 n.18).

35. For example, in the Asylum case, the ICJ expressed the view that Peru had — by refraining from ratifying the Montevideo Conventions of 1933 and 1939 — “repudiated” a custom concerning diplomatic asylum that was included in those instruments. Asylum, Judgment, above note 10, at 277–78 (“The Court cannot therefore find that the Colombian Government has proved the existence of such a custom. But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum.”) (emphasis added; cited in Kopela, above note 6, at 90 n.19).


37. See, e.g., Jurisdiction of the European Commission of the Danube, Advisory Opinion, 1927 P.C.I.J. (ser. B) No. 14, at 36–37 (Dec. 8) (“In this connection the Court wishes to record that, in the course of arguments submitted on behalf of Roumania, it has been more than once admitted that the European Commission may have exercised certain powers in the contested sector; but that, at the same time, it has been contended that such exercise was based on mere toleration by the territorial State and that toleration could not serve as a basis for the creation of legal rights. [¶] In this respect it will suffice to observe that, under the construction of Article 6 of the Definitive Statute adopted by the Court, even if, before the war, an actual exercise
As noted in the introduction, by “silence” we mean a lack of a publicly discernible response either to conduct reflective of a legal position or to the explicit communication of a legal position. To help sort the legally relevant wheat from the juridically superfluous chaff, in this part we first briefly describe some underlying principles and a related modality. We then outline more specifically how silence might operate in general in relation to two of the main sources of international law: treaties and custom. Finally, we note why the status of a norm might matter for silence.

A. Principles and a Related Modality

1. Acquiescence

In international-law terms, acquiescence has been said to denote consent conferred from a juridically relevant silence. The basic notion has arisen in several ICJ proceedings, including in relation to consular rights, border disputes, diplomatic

Quantum of Silence

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38. See above note 20.

39. See Marques Antunes, above note 6, at para. 2. At least in the view of scholar Irina Buga, “[t]he fundamental problem with identifying acquiescence is determining when it actually reflects consent, as opposed to merely action or inaction by States based on various considerations, such as political expediency or simply a lack of occasion to react.” Buga, above note 28, at 69 (citing to MacGibbon, The Scope of Acquiescence, above note 6, at 172 and to Marcelo G. Kohen, Desuetude and Obsolescence of Treaties, in THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION 350 (Enzo Cannizzaro ed., 2011).

40. See Rights of U.S. Nationals, above note 10, at 200–1 (characterizing the situation in which the United States continued after 1937 to exercise consular jurisdiction over all criminal and civil cases in which U.S. nationals were defendants as one that must be regarded as in the nature of a provisional situation acquiesced in by the Moroccan authorities).

41. See Temple of Preah Vihear, Judgment, above note 8, at 23 (finding that the extended absence of a reaction by Thailand — in circumstances calling for a reaction — was proof of Thailand’s acquiescence to a map depicting the position of the Temple of Préah Vihear on the Cambodian side of the land-boundary line); Sovereignty over Pedra Branca/Pulau Batu Puteh, Judgment, above note 10, at 50–51 (expressing the view that the absence of a reaction to certain manifestations of the display of sovereignty may amount to acquiescence and that, accordingly, silence may speak, but only if the conduct of the other State calls for a response) (citations omitted); Land and Maritime Boundary, Judgment, above note 10, at 351, 352–53, 354–55
asylum,\textsuperscript{42} consent to jurisdiction,\textsuperscript{43} and maritime claims.\textsuperscript{44} Based on an analysis of such proceedings as well as practice and doctrine, Nuno Sérgio Marques Antunes

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{42} See Asylum, Judgment, above note 10, at 277–78 (finding that silence by Peru — in the form of the repudiation of a regional custom concerning diplomatic asylum by way of refraining from ratifying instruments in which that custom was reflected — precluded a finding of the existence of that custom in respect of Peru).
\item\textsuperscript{43} See Military and Paramilitary Activities, Jurisdiction and Admissibility, above note 10, at 408–09 (ruling that Nicaragua had consented to the Court’s jurisdiction because Nicaragua had regularly been placed, on multiple official publications, on the list of those States that had recognized the compulsory jurisdiction of the Court — a practice that had been conducted for nearly four decades and that had provided Nicaragua an opportunity of accepting or rejecting that claim).
\item\textsuperscript{44} See Fisheries, Judgment, above note 7, at 138–39 (“The United Kingdom Government has argued that the Norwegian system of delimitation was not known to it and that the system therefore lacked the notoriety essential to provide the basis of an historic title enforceable against it. The Court is unable to accept this view. 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 United Kingdom could not have been ignorant of the Decree of 1889 which had at once provoked a request for explanations by the French Government. Nor, knowing of it, could it have been under any misapprehension as to the significance of its terms, which clearly described it as constituting the application of a system. The same observation applies a fortiori to the Decree of 1889 relating to the delimitation of Romsdal and Nordmore which must have appeared to the United Kingdom as a reiterated manifestation of the Norwegian practice.”) Norway’s attitude with regard to the North Sea Fisheries (Police) Convention of 1882 is a further fact which must at once have attracted the attention of Great Britain. There is scarcely any fisheries convention of greater importance to the coastal States of the North Sea or of greater interest to Great Britain. Norway’s refusal to adhere to this Convention clearly raised the question of the delimitation of her maritime domain, especially with regard to bays, the question of their delimitation by means of straight lines of which Norway challenged the maximum length adopted in the Convention.
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concludes that acquiescence “concerns a consent tacitly conveyed by a State, unilaterally, through silence or inaction, in circumstances such that a response expressing disagreement or objection in relation to the conduct of another State would be called for.” Under that framing, acquiescence cuts a middle path between two dueling maxims: *qui tacit consentire videtur* (he who keeps silent is held to consent), on the one hand, and *qui tacit neque negat, neque utique fatetur* (he who keeps silent is held neither to deny nor to accept), on the other hand. Silence will thereby convey consent — according to the following logic of the ICJ in the *Temple of Preah Vihear* case — only if the condition of *si loqui debuisset ac potuisset* (if he must and can act) is satisfied:

> It has been contended on behalf of Thailand that this communication of the maps by the French authorities [note: the sovereignty of Cambodia was under French protectorate at the relevant time] was, so to speak, *ex parte*, and that no formal acknowledgment of it was either requested of, or given by, Thailand. In fact, as will be seen presently, an acknowledgment by conduct was undoubtedly made in a very definite way; but even if it were otherwise, it is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset.*

It appears that this notion of acquiescence may thus emerge only where all of the following conditions are established: where it refers to facts that are, or ought to be, known by the acquiescing State (*notoriety or awareness*); where such facts are

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45. Marques Antunes, above note 6, at para. 2 (internal cross-references omitted). See also MacGibbon, *The Scope of Acquiescence*, above note 6, at 143 (stating that “[a]cquiescence, in the accepted dictionary sense of tacit agreement or consent, is essentially a negative concept. In the present article it is used to describe the inaction of a State which is faced with a situation constituting a threat to or infringement of its rights: it is not intended to connote the forms in which a State may signify its consent or approval in a position fashion. Acquiescence thus takes the form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection.”).

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).

2. Estoppel

The doctrine of estoppel in international law operates to protect legitimate expectations of a State induced by the conduct of another State. The basic idea is that “international jurisprudence has a place for some recognition of the principle that a State cannot blow hot and cold—*alegans contraria non audiendus est*” (a person making contradictory statements is not to be heard). In certain respects, the exact parameters of the doctrine of estoppel — and its relationship with related concepts, including preclusion — remain difficult to draw with precision. However, the following position concerning the “principle of preclusion” by Judge Spender of the ICJ, in his dissenting opinion in the *Temple of Preah Vihear* case, might provide useful guidance:  

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47. See Marques Antunes, above note 6, at para. 21. See also BUGA, above note 28, at 68–70; Gennady M. Danilenko, *The Theory of International Customary Law*, 31 GERMAN Y.B. INT’L L. 9, 40 (1988) (“Under international law, the conduct of inactive States implies tacit approval of a practice and creates legal consequences only if certain conditions have been fulfilled. In the first place, it is necessary that the practice should directly or indirectly affect the interests and rights of an inactive State because otherwise there would be no ground to expect a protest. Secondly, the inactive State must be aware of the legal claims for which consent is presumed in case of the absence of protest.”).


51. See, e.g., Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.A.), Judgment, 1984 I.C.J. Reports, 246, 305 (Oct. 12) (hereinafter, Gulf of Maine, Judgment) (stating that, “[a]ccording to one view, preclusion is in fact the procedural aspect and estoppel the substantive aspect of the same principle,” but expressly not engaging at this point on a “theoretical debate”).

52. See Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bang./Myan.), Case No. 16, Judgment of Mar. 14, 2012, ITLOS Rep. 4, 42 (“The Tribunal observes that, in international law, a situation of estoppel exists when a State, by its conduct, has created the appearance of a particular situation and another
[T]he principle [of preclusion] operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result that other State has been prejudiced or the State making it has secured some benefit or advantage for itself.53

Under those requirements, it has been said, “[t]he typical effect of the doctrine is that … a representing party is barred—estopped or precluded—from successfully adopting different, subsequent statements on the same issue, without regard to their truth and accuracy.”54

Acquiescence and estoppel are often considered to be “indubitably … entangled.”55 Both concepts are, as an ad hoc Chamber of the ICJ assessed (in obiter) in the Gulf of Maine case, “based on different legal reasoning, since acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion.”56 In accordance with the reasoning of the ICJ in the North Sea Continental Shelf cases, the crucial element concerning estoppel in international law has been said to consist of “[e]vidence that that State has openly relied on a certain situation of fact, and that a change there of would lead to undue prejudice (or an unjustified benefit for the other State)....”57 The first distinction between acquiescence and estoppel thus concerns detrimental reliance: in the words of the

State, relying on such conduct in good faith, has acted or abstained from an action to its detriment. The effect of the notion of estoppel is that a State is precluded, by its conduct, from asserting that it did not agree to, or recognize, a certain situation); see also Cottier & Müller, above note 48, at para. 1.

54. Cottier & Müller, para. 1. Estoppel has thus been said to operate as one of the “concretizations” of good faith and equity in proceedings before international courts and tribunals. See Markus Kotzur, Good Faith (Bona fide), in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW para. 24 (Rüdiger Wolfrum ed., 2009).
56. Gulf of Maine, Judgment, above note 51, at 305.
57. Marques Antunes, above note 6, at para. 24.
ICJ Chamber in the *Gulf of Maine* case (in obiter), “the element of detriment or prejudice caused by a State’s change of attitude ... distinguishes estoppel *stricto sensu* from acquiescence.”58 The second distinction between the two concepts pertains to *consent* or lack thereof (again in obiter): “acquiescence signals an expression of consent (albeit tacitly conveyed), whereas for estoppel to arise there is no requirement of consent.”59

3. Protest

Silence may also relate to *protest*, which has been described as “a formal objection by subjects of international law, usually a State, against a conduct or claim purported to be contrary to or unfounded in international law.”60 The primary “function of a protest is the preservation of rights, or of making it known that the *protestor* does not acquiesce in ... certain acts.”61 Put another way, “a protest aims at rebutting any presumption of acquiescence in a particular claim or conduct.”62 In certain circumstances, it may be difficult to distinguish between a protest in the legal sense and a mere political declaration.63

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58. Gulf of Maine, Judgment, above note 51, at 305 (citing to North Sea Continental Shelf (Fed. Rep. Ger./Neth.), Judgment, 1969 I.C.J Report. 3, 26 (Feb. 20), which states, in relevant part: “Having regard to these considerations of principle, it appears to the Court that only the existence of a situation of estoppel could suffice to lend substance to this contention,—that is to say if the Federal Republic [of Germany] were now precluded from denying the applicability of the conventional régime, by reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that régime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice.”).


61. Id. at para. 1 (emphasis original); see further id. (explaining that “[a] protest thus has the opposite effect to that of recognition. Its purpose is to prevent a situation from becoming opposable to a subject of international law which protests against it, and may thus deprive it of any legal effect. Used in such a manner, a protest can have an effect on the formation of historical titles such as acquisitive prescription.”).

62. Id. at para. 13; see further id. (explaining that “[a] State may want to rely on a protest in order to deny a particular claim based on acquisitive prescription. Protests may also have an effect on the formation of customary international law when constituting evidence of a general practice accepted in law, or, conversely, evidence that there is no such accepted general practice. A protesting State may also seek to exclude the application of a rule of customary international law for its own conduct, assuming the role of persistent objector.”).

63. See id. at para. 9.
By linking protest to a lack of acquiescence, an expectation of protest may yield legal consequences for remaining silent.

B. Treaty Law

With respect to treaty law, silence and its effects may pertain to, among other things, interpretation, invalidity, fundamental changes in circumstances, and reservations. Among those areas, the role of silence or inaction in establishing an interpretive agreement of a treaty provision merits particular focus here.

In its work on “Subsequent agreements and subsequent practice in relation to interpretation of treaties,” the ILC formulated the following draft conclusion: while “[t]he number of parties that must actively engage in subsequent practice in order to establish” an interpretive agreement of a treaty provision in the sense of article 31(3)(b) of the VCLT “may vary,” “[s]ilence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction.” The ILC cited the ICJ’s proposition in the Temple of Preah Vihear case that when circumstances clearly call for some reaction within a reasonable period, a State “confronted with a certain subsequent conduct by another party ‘must be held to have acquiesced.’”

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64. See Marques Antunes, above note 6, at para. 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. 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).”).


66. Id. at 79 (citing to Temple of Preah Vihear, Judgment, above note 8). The ILC also cited other ICJ — as well as International Criminal Tribunal for the Former Yugoslavia (ICTY) and World Trade Organization (WTO) — proceedings in support of the general idea that silence, or inaction, may entail legal significance when the circumstances call for a reaction. Id. at 79, n. 430 (citing Oil Platforms (Iran v. U.S.A.), Preliminary Objection, 1996 I.C.J. Reports, 803, 815 (Dec. 12); Military and Paramilitary Activities, Jurisdiction and Admissibility, above note 10, at 410; Prosecutor v. Furundžija, Trial Chamber, Judgment, Case No. IT-95-17/1-T, Dec. 10, 1998, ICTY, paras. 165 et seq. at para. 179; Rantsev v. Cyprus and Russia, No. 25965/04, Jan. 7, 2010,
While the ILC refrained from specifying when precisely “circumstances call for some reaction,” the Commission did indicate that “the particular setting in which the States parties interact with each other in respect of the treaty” may have relevance in that regard.\(^{67}\) Furthermore, according to the ILC:

> The significance of silence also depends on the legal situation to which the subsequent practice by the other party relates and on the claim thereby expressed .... The relevance of silence or inaction for the establishment of an agreement regarding interpretation depends to a large extent on the circumstances of the specific case. 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.\(^{68}\)

Using cases on boundary delineation to illustrate the difficulty in identifying precise circumstances, the ILC formed the view that “circumstances will only very exceptionally call for a reaction with respect to conduct that runs counter to the delimitation ... [and i]n such situations, there appears to be a strong presumption that silence or inaction does not constitute acceptance of a practice.”\(^{69}\) Nonetheless, conduct by one party interpreting a treaty does not necessarily require the other party or parties to react. In the Kasikili/Sedudu Island case, the parties charged an expert commission to resolve a factual dispute.\(^{70}\) The ICJ determined that a State that failed to react to the expert commission’s findings did not automatically signal agreement with those findings or an agreement to end the dispute because “the

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\(^{67}\) Draft Subsequent Agreement Conclusions, above note 65, at 79 (emphasis added).

\(^{68}\) Id. at 80 (emphasis added).

\(^{69}\) Id. (emphasis added; citing to Land and Maritime Boundary, Judgment, above note 10, at 351; Frontier Dispute (Bur. Faso/Mali), Judgment, 1986 I.C.J. Reports, 554, 586 (Dec. 22); Case concerning the delimitation of the maritime boundary between Guinea-Bissau and Senegal (Guin.-Bis. v. Sen.), Award, July 31, 1989, XX UNRIAA (Sales No. E/F.93.V.3), 119, 181).

\(^{70}\) Id. at 81 (citing to Kasikili/Sedudu Island (Botsw./Nam.), Judgment, 1999 I.C.J. Reports, 1045, 1089–1091 (Dec. 13)).
parties had considered the work of the experts as being merely a preparatory step for a separate decision subsequently to be taken at the political level.”\textsuperscript{71} The Court’s opinion thus suggested that the conduct’s finality might be one factor that States may consider when deciding whether it is or is not warranted to react. Furthermore, reasoning of the Appellate Body of the World Trade Organization (WTO) implies that a party’s awareness of the practice may be another factor to consider. For example, the WTO Appellate Body might understand a State’s lack of reaction as acceptance of the practice of other treaty parties when “a party that has not engaged in a practice has become or has been made aware of the practice of other parties (for example, by means of notification or by virtue of participation in a forum where it is discussed), but does not react to it.”\textsuperscript{72} Finally, the ILC espoused the position that “[s]ilence by a party shall not be presumed to constitute subsequent practice under article 31, paragraph 3 (b), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body.”\textsuperscript{73}

The ILC received comments on an earlier iteration of its subsequent-agreements-and-practice draft conclusions from various States, including Australia,\textsuperscript{74} Belarus,\textsuperscript{75} the Czech Republic,\textsuperscript{76} El Salvador,\textsuperscript{77} Germany,\textsuperscript{78} the

\textsuperscript{71} Id.
\textsuperscript{72} Id. (citing to WTO, Chicken Cuts, above note 66, at para. 272).
\textsuperscript{73} The ILC’s commentaries explained that draft conclusion 13, paragraph 3, does not create an exception to the general rule that silence can constitute acceptance to subsequent practice when the circumstances call for a reaction, but instead applies the rule to typical cases of expert body pronouncements. Id. at 113.
\textsuperscript{74} The original information provided by Australia is apparently not available on the ILC website, but that information is provided in a report compiled by the ILC. See Int’l L. Comm., 70th Sess., A/CN.4/712 (Feb. 21, 2018), 23.
\textsuperscript{78} See information submitted by Germany, http://legal.un.org/docs/?path=../ilc/sessions/70/pdfs/english/sasp_germany.pdf&lang=E.
Netherlands, Spain, Sweden (on behalf of the Nordic countries), the United Kingdom, and the United States.

In its comments, Australia emphasized that “the subsequent practice of fewer than all parties to a treaty can only serve as a means of interpretation under very restrictive conditions. This applies in particular to the silence on the part of one or more parties.” The Czech Republic noted its own lack of clarity as to what “silence” means within the context of the draft conclusion and objected to the mention of it. Belarus also pointed to the need, in its view, for clarification and added that “it should be made abundantly clear that a party that has accepted a practice by way of silence should have been made aware of such practice and its implications for interpretation and should have had the opportunity to contest it.”

Ultimately, the ILC adopted the position that silence, or inaction, is capable of producing legal effects in relation to the establishment of an interpretive agreement of a treaty provision but only if the circumstances require a reaction. As noted above, the Commission did not ultimately specify those circumstances.
At least based on the proceedings that the ILC cited, the finality of the circumstances and the party’s awareness of them might be two factors to consider in that regard. A review of State comments on an early submission of the ILC draft conclusions indicates that those States by and large adopt a relatively restrictive approach to the circumstances under which silence or inaction may establish an interpretive agreement of a treaty provision.

C. Customary International Law

In general, in the words of the ILC in its work on “Identification of customary international law,” “[t]o determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (opinio juris).”88 Silence or inaction is capable of pertaining to either or both of the constituent elements of customary international law: (1) a general practice (2) that is accepted as law (opinio juris).

With respect to forms of practice, “[t]he requirement of a general practice, as a constituent element of customary international law, refers primarily to the practice of States that contributes to the formation, or expression, of rules of customary international law.”89 Yet, in addition, “[i]n certain cases, the practice of international organizations” — such as the United Nations — “also contributes to the formation, or expression, of rules of customary international law.”90 As formulated in a draft conclusion adopted by the ILC, State practice in the sense of identifying customary international law may “take a wide range of forms. It includes both physical and

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88. Int’l L. Comm., Draft Conclusions on Identification of customary international law, in Report of the International Law Commission, A/73/10, 70th Session, Supp. No. 10, 2018, 119, http://legal.un.org/ilc/reports/2018/english/a_73_10_advance.pdf, permalinks: https://perma.cc/24PR-BEHR (draft conclusion 2) (emphasis added) (hereinafter, Draft CIL Conclusions). In making that assessment, “regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.” Id. (draft conclusion 3, para. 1). According to the “two elements” approach, each of the two constituent elements — (1) a general practice (2) that is accepted as law (opinio juris) — must be separately ascertained based on an assessment of evidence for each. Id. (draft conclusion 3, para. 2).

89. Id. (draft conclusion 4, para. 1). “State practice” as a constituent element of customary international law consists “of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions.” Id. at 120 (draft conclusion 5).

90. Id. at 119 (draft conclusion 4, para. 2).
verbal acts. It may, under certain circumstances, include inaction.\textsuperscript{91}

According to the ILC’s commentaries on its draft conclusion regarding inaction as a form of State practice, “the words ‘under certain circumstances’ seek to caution … that only \textit{deliberate abstention} from acting may serve such a role: the State in question needs to be conscious of refraining from acting in a given situation, and \textit{it cannot simply be assumed that abstention from acting is deliberate.”}\textsuperscript{92} Examples provided by the ILC of a State so deliberately refraining from action include declining to initiate criminal proceedings against foreign officials, deciding not to protect certain naturalized persons, and abstaining from the use of force.\textsuperscript{93} While the commentaries mention abstaining from the use of force as an example of State inaction, the ILC does not provide a concrete example to (further) illustrate that contention.

The ILC received comments on an early iteration of the draft conclusions on the identification of customary international law from Austria,\textsuperscript{94} Belarus,\textsuperscript{95} China,\textsuperscript{96} the Czech Republic,\textsuperscript{97} Denmark (on behalf of the Nordic countries),\textsuperscript{98}
El Salvador,99 Israel,100 the Netherlands,101 New Zealand,102 South Korea,103 Singapore,104 and the United States.105

Most of the State comments did not address inaction in relation to practice. Those that did sought to qualify the draft conclusion’s reference to inaction with the word “deliberate.” Israel, for instance, argued for the change because the distinction is of “sufficient importance to merit specific mention.”106 Israel further called for the draft conclusion to specify “the need for the inaction to stem from a sense of customary legal obligation ... given the unique and complicated nature of inaction as a potential source of customary international law.”107 Finally in the view of Israel, the sense of customary legal obligation for deliberate inaction should not consider “diplomatic, political, strategic or other

permalink: https://perma.cc/23QW-E95E.
106. Int’l L. Comm. 70th Sess., A/CN.4/716 (Feb. 14, 2018), 24 (noting that, “[w]ith regard to the discussion in the draft conclusion as to whether inaction can serve as an indicator of State practice, we would like to see a clarification in the text of the draft conclusion that inaction may be taken into account as practice only when it is deliberate.”).
107. Id. (emphasis added).
non-legal considerations which while deliberate, should not be regarded as State practice for purposes of identifying customary international law.”\(^{108}\) The Netherlands,\(^{109}\) New Zealand,\(^{110}\) and Singapore\(^{111}\) similarly argued for “deliberate” to qualify inaction in the text of the relevant draft conclusion. Singapore also stressed that “determining what constitutes a ‘deliberate’ abstention will ultimately be a factual exercise dependent on all the circumstances of the case,” and to avoid doubt “any inaction, or deliberate abstention from acting, relied upon in identifying a rule of customary international law must be accompanied by \textit{opinio juris}.”\(^{112}\)

The United States emphasized that, in its view, “in order for a State’s inaction to ‘count’ as State practice, it must be shown that the State had \textit{full knowledge of the facts and deliberately declined to act}.”\(^{113}\) The United States advocated adding language to the draft conclusion that “it is recognized that this deliberate abstention may be difficult to demonstrate and \textit{should not be presumed to exist}.”\(^{114}\) Finally, the United States suggested removing the example in the commentary on deliberate inaction concerning “abstaining from the threat or use of force” on the basis that “there are so many \textit{reasons other than customary international law} (including treaty and \textit{policy-based reasons}) that a State may abstain from threatening or using force that it is unlikely that it could be demonstrated that a State did so out of a belief that it was required by customary international law.”\(^{115}\)

Against this backdrop, with respect to practice as a constituent element of

\(^{108}\) Id.
\(^{109}\) Id. at 26. The Netherlands attached “much importance” to this qualification. Id.
\(^{110}\) Id. New Zealand noted its “hesitation” about considering inaction as part of State practice. Id.
\(^{111}\) Id. at 27.
\(^{112}\) Id.
\(^{113}\) Id. at 28 (emphasis added).
\(^{114}\) Id. (emphasis added).
\(^{115}\) Id. (emphasis added). In addition, the United States added that "actual operational conduct is frequently the most probative form of a State’s practice." Id. at 29.
customary international law, intention and deliberateness appear to be factors to consider when evaluating purported inaction. Other factors raised by States to consider include whether a sense of legal obligation — rather than political, diplomatic, strategic, or policy concerns — animated or otherwise sufficiently contributed to a State’s inaction. Finally, the degree of factual knowledge was raised in respect of its potential role in discerning whether a State deliberately declined to act.

As for the requirement of evidence of “acceptance as law (opinio juris),” that requirement means that the practice in question must be undertaken not from mere usage or habit but with a sense of legal right or obligation. Evidence of such acceptance may take a wide range of forms. According to an ILC draft conclusion, “failure to react over time to a practice may serve as such evidence, provided that States were in a position to react and the circumstances called for some reaction.” The ILC further notes that “[w]here a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.

The ILC commentary espoused the view that tolerance of practice may arise to evidence of opinio juris when both (1) a reaction to the practice was called for and (2) the State was in a position to act. First, reaction to the practice was said to be called for, in part, when the practice affects — usually unfavorably

116. See Draft CIL Conclusions, above note 88, at 120 (draft conclusion 9, para. 2).
117. Id. (draft conclusion 9, para. 1).
118. Id. (draft conclusion 10, para. 1). Included among the forms identified are public statements made on behalf of States; government legal opinions; diplomatic correspondence; and conduct in connection with resolutions adopted by an international organization. Id. (draft conclusion 10, para. 2).
119. Id. (draft conclusion 10, para. 3) (emphasis added).
120. Id. at 121 (draft conclusion 15, para. 1). The objection must satisfy three criteria — it must be: (i) clearly expressed; (ii) made known to other States; and (iii) maintained persistently. Id. (draft conclusion 15, para. 2). The draft conclusion concerning a “persistent objector” is, however, expressly “without prejudice to any question concerning peremptory norms of general international law (jus cogens).” Id. (draft conclusion 15, para. 3).
121. Id. at 141–42.
— the interests or rights of the State failing or refusing to act. However, as with its conclusions on subsequent practice, the ILC did not provide a concrete example regarding when reaction is called for or when practice affects the rights of the State. The Commission did, however, cite to the Sovereignty over Pedra Branca/Pulau Batu Putih, Middle Rocks and South Ledge case for the general assertion that “[t]he absence of reaction may well amount to acquiescence .... That is to say, silence may also speak, but only if the conduct of the other State calls for a response.” Second, a State being in a position to react means, in the view of the ILC, the following:

[T]he State concerned must have had knowledge of the practice (which includes circumstances where, because of the publicity given to the practice, it must be assumed that the State had such knowledge), and that it must have had sufficient time and ability to act. Where a State did not or could not have been expected to know of a certain practice, or has not yet had a reasonable time to respond, inaction cannot be attributed to an acknowledgment that such practice was mandated (or permitted) under customary international law.

In their comments, several States cautioned that the draft conclusions should not read too much into silence or inaction because a range of non-legal factors might inform why a State chooses to react or refrain from reacting to a particular situation. States also emphasized that they may react in a confidential manner away from public view, which could appear to others as inaction but would in fact constitute a response.

For example, according to the Czech Republic:

There could be various reasons why States do not react to practice of other States, even if they could be generally presumed to do so. States may fail or refuse to react simply due to diplomatic and political considerations or because of lack of capacity or lack of direct interest in the relevant concrete conduct of other State (States). Thus, the reasons why States do not react in a specific case may have nothing to do with the legal

122. Id. at 142.
123. Id. (citing to Sovereignty over Pedra Branca/Pulau Batu Putih, Judgment, above note 10, at 50–51).
124. Id. (emphasis added).
assessment of the practice and their (non-)reaction to such practice.

…

[M]ore attention [should be] paid[] ... to the differentiation between, on
the one hand, failure to react by States which are particularly (specially,
directly) interested, concerned and affected by relevant practice of other
States and are aware of the legal significance of their reaction or failure
to react, and, on the other hand, inaction or failure to react by other
States, which may be based on political, practical or other non-legal
considerations and which does not stem from the sense of customary legal
obligation.125

Israel echoed this point, stating that “mere failure to react does not, on its own,
constitute practice to begin with: when a State simply refrains from acting, it
lacks practice ... only express evidence explaining the State’s reasons for
refraining from acting can indicate whether it lacks practice vis-à-vis the
alleged customary rule or whether it deliberately abstained due to opinio juris
and thus had negative practice.”126 To illustrate this point, Israel explained the
following:

[W]hen a State fails to protest against another State fishing in its
maritime zones ... its failure to react alone does not constitute opinio juris
indicating that it views such fishing activity as permissible under
international law. It may very well be that the motivation for not
protesting and allowing the practice is political or diplomatic, or that the
State is in fact protesting the practice but for various reasons only does
so in a private and confidential manner. Consequently, silence by the
State in these circumstances cannot in itself be seen as opinio juris.127

The Netherlands stated that the “rule is not that silence implies
acquiescence, but rather that in a particular situation in which it was clear that
reaction was called for, no such reaction came.”128 The Netherlands suggested
that the draft conclusions should better account for “the role of explanations

126. Id. at 40 (emphasis original).
127. Id.
128. Id. at 41 (emphasis added).
that States may at a later stage give for certain positions and their possible silence .... [and] that a State does protest but does so in a confidential, or at least not public, manner ... we are of the view that the fact that there is no public reaction to certain conduct cannot be taken as evidence of acceptance as law of that conduct."

New Zealand argued that a failure to react to another State’s practice cannot assume acquiescence or acceptance of law because “[t]here are many legitimate reasons why a State may not publicly react to, or protest against, the actions of another State. States must balance a range of interests when considering whether and how to respond to the actions of another State, including the maintenance of friendly relations and the effective functioning of international affairs.” Moreover, this is particularly true “where a State has not been directly affected by the actions taken or has no other particular interest in them. In other cases, a State may judge it more appropriate to react on a confidential basis.”

In the view of the United States, a State’s failure to act “rarely evidences its views on international law.” This is because political or practical reasons — such as “to avoid a bilateral irritant, to address domestic political concerns, or other non-legal reasons” — may motivate the State not to act. The United States sought to clarify that “a State’s deliberate inaction must be motivated by legal considerations to reflect opinio juris . . . [and] that States frequently choose for political (international or domestic) or other reasons, such as limited government resources, to refrain from engaging in legally permissible acts.”

In sum, States thus raised several factors — including the rights of the State, knowledge of the practice, timing, and ability to act — that might be relevant in respect of the possibility that silence or acquiescence may contribute to evidence that a general practice was accepted as law (opinio juris). Several States also added

129. Id.
130. Id.
131. Id. (emphasis added).
132. Id. at 42 (emphasis added).
133. Id.
134. Id.
that, to entail such relevance, the inaction should derive from a sense of legal obligation or right, rather than non-legal considerations, such as resource constraints, international or domestic political calculations, or diplomatic relations. Finally, States called for caution in this connection because in some contexts States might react in private, and in respect of these instances reactions occur in fact irrespective of whether they are externally visible.

D. Status of Norms

The legal effects, if any, of silence or inaction may depend in part on the modalities through which a relevant norm may be formed, modified, or terminated. That assessment may depend, in turn, on the relative status of the norm at issue.

With respect to status, rules of a _jus dispositivum_ character may be distinguished in certain respects from rules of a _jus cogens_ character (the latter as a form of _lex superior_). In a nutshell, rules of a _jus dispositivum_ character have been said to consist of those “rules of international law that may be modified, abrogated or derogated from by the agreement of States.” At least under the second sentence of article 53 of the VCLT, a _jus cogens_ norm is “a peremptory norm of general international law … accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

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137. VCLT art. 53, second sentence (emphasis added). Note that that definition, _stricto sensu_, applies only in respect of the
The ILC included provisions pertaining to peremptory norms of general international law in its 2001 (Draft) Articles on the Responsibility of States for Internationally Wrongful Acts and its 2011 (Draft) Articles on the Responsibility of International Organizations. Those sets of provisions contain both an obligation on all States to not recognize legal situations created by violations (in particular, in the words of those Articles, by any “serious breach” of an obligation arising under a peremptory norm of general international law) and an obligation to cooperate through lawful means to bring such violations to an end. To the extent a norm is of a peremptory status, the silence of States or an international
organization in the face of a violation of that norm may run counter to these provisions of the Articles on the Responsibility of States or International Organizations, respectively — though caution is warranted in making any such finding in light of the polysemous character of silence.142

E. Conclusion

In various contexts pertaining to the identification and interpretation of international-law sources, silence has been treated as legally significant, though not without dispute.

With respect to treaty law, it appears that silence, or inaction, is capable of producing legal effects in relation to the establishment of an interpretive agreement of a treaty provision if the circumstances require a reaction. The finality of the circumstances and the party’s awareness of them might be two factors to consider in that regard. As noted above, a review of States’ comments on an early submission of the ILC relevant draft conclusions indicates that, by and large, those States adopted a relatively restrictive approach to the circumstances under which silence or inaction may establish an interpretive agreement of a treaty provision.

With respect to customary international law, it appears that State practice may, under certain circumstances, include inaction. Intention and deliberateness appear to be factors to consider when evaluating such purported inaction, as well as whether a sense of legal obligation (rather than political, diplomatic, strategic, or policy concerns) animated or otherwise sufficiently contributed to the State’s inaction. Finally in this connection, the degree of factual knowledge may be raised in respect of its potential role in discerning whether a State deliberately declined to act. Regarding evidence to establish that a general practice is accepted as law (opinio juris), it appears that failure to react over time to a practice may serve as such evidence, provided that States were in a position to react and that the circumstances called for some reaction. In that context, several factors — including the rights of the State, knowledge

142. See above notes 33–36 and the accompanying text.
of the practice, timing, and ability to act — might be relevant. Moreover, it appears that to entail such relevance, the silence should derive from a sense of legal obligation or right, rather than non-legal considerations, such as resource constraints, domestic political calculations, or diplomatic relations. Finally, caution has been called for because in some contexts States might react in private, and in respect of these instances reactions occur in fact irrespective of whether they are externally visible.

While silence may in general “speak” in these ways in both treaty law and customary international law, an additional element for consideration is the status of the norm at issue, in particular whether or not it is of a *jus cogens* character.

### III. SILENCE IN *JUS AD BELLUM*

Silence may be of particular concern in respect to *jus ad bellum*. As noted in the introduction, the significance of silence here derives in part from the foundational importance of the subject-matter itself: the prohibition of the threat or use of force in international relations. In addition, the structure of the legal field — which is made up largely of customary international law alongside a few treaty-law provisions and which is hotly contested and frequently debated — seems to invite a reliance on silence as acquiescence in, or support for, competing legal views. In this context, it should not be surprising that the purported silence or inaction of some international actors has been routinely invoked by several writers as carrying the actual or potential proof of particular interpretations of the relevant U.N. Charter provisions, the existence or interpretation of certain customary rules, or the relationship between the Charter and custom.

For several reasons, the general complexities of imbuing silence with legal significance — as sketched in Part II, above — are amplified in the field of *jus ad bellum*.

For example, it stands to reason that though political considerations may

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143. See U.N. Charter art. 2(4) and related customary rule.
144. See Part III.D.