

Committee of Legal Advisers on Public International Law (CAHDI)

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State silence in international law***

Distinguished legal advisers,
Dear colleagues

It is a great pleasure and honour to be here today. I would like to express my gratitude to CAHDI, and the Chair, Kerli Veski, for inviting me to contribute to the 70th session of CAHDI.

International law is made through what States do and say, and through what States do not do and what they do not say and why states do not say.

At the [State Silence](#) project, of which I am the Director, and which is funded by a grant of the European Research Council, we have published 25 publications about State Silence and its legal effects. Our latest publication is the book entitled '[State Silence Across International Law: Meaning, Context and Developments](#)'. My contribution today relies on parts of this research.

I will focus on the legal *meaning* – whether intention is manifested in instances of silence of States, namely when a State abstains from objecting.

This question is significant for the government legal advisor and for the international law scholar alike, because the meaning of State silence as acceptance is critical in the law-making and law-evolution process, and the question is ubiquitous in all fields of international law.

International courts and tribunals have interpreted State silence on numerous occasions. However, they have mainly done so in the context of facts of the 19th or early 20th century and primarily in the context of bilateral territorial disputes.

Yet, the factual and normative contexts in which State silence is to be interpreted today pose particular challenges.

Today, more than 190 States exist with diverse political, economic and other characteristics and capacities. Technological advancements have made communications easier. Further, in modern international law, international organizations exist and facilitate

inter-State interaction, and since the previous century we have witnessed a shift from bilateral obligations to the protection of community interests and hierarchically superior norms.

In the field of the prohibition of use of force, the modern factual and normative contexts in which State silence is to be interpreted today come to life.

At the end of the previous century and in the past two decades, new justifications to the use of force have been advanced. These widen the narrow interpretation of Article 51 of United Nations Charter. Some of them are partly owed to the development of technology and to concerns about new security challenges.

They all fundamentally give rise to the question about whether the law on the prohibition of use of force has evolved: whether new custom has emerged or whether the UN Charter, as a treaty, has been reinterpreted or modified. Three main legal processes may be engaged, where the question about the meaning of State silence arises:

- 1) if lack of protest means *opinio juris*, new custom may be established; or
- 2) pursuant to the general rule of interpretation under Article 31(3)(b) of the Vienna Convention on the Law of Treaties, silence of UN Members may establish the agreement of all UN Members that a novel justification is the correct interpretation of the Charter; or
- 3) silence in response to the practice of some Members may signify the agreement of all UN Members to modify the Charter.

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First, I will set out the circumstances under which State silence can mean acceptance and how these circumstances interact with each other;

Second, I will reflect on the interpretation of silence in the field of the law on the prohibition of use of force;

Third, I will make three concluding recommendations.

Moving to the circumstances under which acceptance may be inferred from State silence.

As a default, in international law, State silence, in and of itself, does not have legal meaning. Instead, when silence is interpreted in its 'context', a legal meaning may be *inferred* from it. This is what we call 'manifest intent', and this is what is being looked for in international law.

Silence may have the legal meaning of acceptance, or it may have the legal meaning of positive opposition – I have dealt with the meaning of positive opposition, in my recent article in the *Leiden Journal of International Law*, showing how courts and tribunals infer the existence of a 'dispute' from silence for the purpose of establishing their jurisdiction. Today, I will focus on the meaning of silence as acceptance in the law-evolution process.

For silence to mean acceptance, the following factors must be present; these have been developed through the decisions of international courts and tribunals. The International Law Commission usefully codified these, in its 2018 Conclusions on Custom Identification and the Conclusions on Subsequent Agreements and Practice in relation to the Interpretation of Treaties, in a way that at first sight appears clear and easy to understand.

First, a State is silent *in circumstances that call for that State's positive reaction – and specifically its objection*. But, what are these circumstances? The ILC has not answered clearly this question. On the basis of the review of the decisions of international courts and tribunals, in my view, circumstances that call for the objection of a State include, as a minimum, an assertive, determinate and consistently held claim by another State about the status and content of international law. In addition, these claims must be such as to affect the rights of the silent State. In order to determine whose rights are being affected, the factual, normative and institutional context in which the claim has been made is relevant.

Second, the silent State is 'in a position to react'.

(a) it has actual or constructive knowledge of the circumstances that call for its reaction; and

(b) its position to react is not otherwise impaired.

Third, reasonable time has passed from when the silent State is in a position to react.

The interpretation of State silence is a 'single combined operation', where the various factors interact with each other and must be assessed together.¹ The more determinate, consistent, and widespread a claim is, the more affected States are expected to react, the more likely it is that they will be taken to have constructive knowledge of the claim, and a shorter time of silence may be reasonable for the inference of acceptance. And vice versa - the less determinate, clear, and consistent a claim is, the less others are expected to react, the less likely their constructive knowledge will be met, and longer periods of silence are necessary for the inference of acceptance.

Finally, inferences can be controverted. This is why one can assert reasons that explain its silence, in the face of circumstances where its interests may be affected.

At "State Silence", we run an anonymous questionnaire of government legal advisors enquiring about the extra-legal reasons for State silence. The results are telling. All eleven reasons that may explain a State's silence that we had pre-indicated in the questionnaire have been experienced at varying degrees by those who answered, except that we have not had any answer from the Asian and Pacific group. If there is interest in others to participate, I am happy to circulate the link.

However, explanations about one's conduct do not have a privileged status within the inferential process. Their credibility will determine whether the inferential strength of

¹ D. Azaria, Introduction, in D. Azaria (ed.), *State Silence Across International Law: Meaning, Context and Developments* (OUP 2025), pp. 3-23 at 14-18.

silence may be undermined. Yet, empirically, international courts have rarely accepted reasons that explain one's silence, such as good neighborliness, domestic or inter-State political reasons, economic reasons and so on and so forth. The ICJ decision in *Temple Preah Vihear*, and even the recent *Gabon/Equatorial Guinea* decision, are some examples where such reasons have not convinced the Court.

Moving to reflecting on the interpretation of State silence in the field of the prohibition of use of force

I have four reflections, in the hope that these will contribute to a fruitful discussion about State silence in this field and in general international law.

1) A first reflection concerns the legal claims.

The UN Charter, and custom reflected therein, prohibits use of force and allows for specific exceptions – force authorized under Chapter VII and force in self-defence under Article 51. In order to reinterpret or modify the Charter and/or customary international law, so as to allow wider exceptions, a State needs to make a novel justification – a new claim as to the content of the Charter or custom.

The reasoning of the International Court of Justice, in *Military and Paramilitary Activities*, was that modification of customary international law presupposes *reliance* on a novel right or an unprecedented exception coupled with the acceptance of this novel right by other States. Similar reasoning applies to the interpretation or modification of the UN Charter.

For silence to mean acceptance in response, in addition to that, the claims must be consistent and determinate. Inconsistency of legal claims causes indeterminacy, and silence in response cannot mean acceptance.

For instance, which justification would a silent State be accepting if multiple claims have been made by representatives of the same acting State or of multiple acting States and they do not have consistent claims between each other, how will we interpret silence? To what are they saying yes? Seen through these lenses, indeterminacy and inconsistency in claims by acting States preserve the law as it is.

2) A second reflection concerns *who* is expected to react.

The victim State is clearly expected to react. But, the prohibition of use of force, including the exception of self-defence, is an *erga omnes (partes)* obligation owed to all UN Members.

Under the law of State responsibility, all States to whom an obligation *erga omnes (partes)* is owed (namely, injured States and States other than the injured State) are entitled to invoke the responsibility of a State for breaching such obligations. If we transpose this line of reasoning within the law-evolution process, all States to whom *erga omnes (partes)*

obligations are owed would be *expected* to react, so as to prevent the change of the law.²

This is one of the questions we posed in the anonymous questionnaire for legal advisors. The responses we received to date show that there is disagreement as to whether a third State is expected to react in these circumstances or not, and also some delegates indicated that they do not know whether they are expected to react.

In my view, at least two reasons call against an unqualified argument that all UN Members are expected to react. *First*, standing to invoke responsibility is *discretionary*. Instead, acquiescence is based on an expectation or a 'responsibility' ('*obliegenheit*') the non-fulfilment of which does not entail breach but carries some legal consequences (namely, acquiescence). *Second*, if all States were expected to react to any claims about the reinterpretation or modification of *erga omnes (partes)* obligations, these obligations would be more susceptible to regressive development. This approach would go against the very *raison d'être* of such obligations, which are intended to protect community interests. For these reasons, we need more contextual evidence to establish that a State is expected to react in a particular instance. For example, there may be States in the particular region of the victim State or the acting State. Additionally, all Members of the UN Security Council have a particular non-legal 'duty' to assess justifications to use of force and to express their views. Further, States that have exercised their right under Article 31 of the UN Charter to participate in a Security Council debate are expected to oppose what is in their view an unwelcome novel justification.³

3) A third reflection concerns knowledge

Let me give you an example that concerns letters notified to the UN Security Council pursuant to the obligation in Article 51. The constructive knowledge of all UN Members that are Members of the Security Council will be met as soon as the letter is submitted and available through the online UN system. For all other UN Members that are not UNSC members, their constructive knowledge can only be established after the UN Secretariat publishes an Article 51 letter in the 'Repertoire of the Practice of the Security Council', because this is the most systematic way through which States may become aware of the individual letters and the positions of other states. During this period, more UN Members have the opportunity to express opposite views. This means that, as a matter of empirical observation, it is onerous to achieve the evolution of the Charter's exceptions to use of force merely through the process of consolidation of letters under Article 51 coupled with

² D. Azaria, State Silence as Acceptance: A Presumption and an Exception, *British Yearbook of International Law* (2024) 1-20 (open access online <https://doi.org/10.1093/bybil/brae002>).

³ D. Azaria, State Silence and the Law on the Use of Force, in D. Azaria (ed.), *State Silence Across International Law: Meaning, Context and Developments* (OUP 2025), pp. 43-64 at 57-59.

silence of other States.⁴

4) A fourth reflection concerns the normative context for interpreting State silence

The law on the use of force under the UN Charter aims to place checks and balances to uses of force. Self-defence is an *exception* to the *prohibition* of use of force. In addition, the prohibition of use of force is a *jus cogens* norm. To modify or reinterpret such a norm, one needs *opinio juris cogentis*: recognition and acknowledgement by the international community of States as a whole.

These features call for weighty evidence in order to draw the inference from the silence of States that they accept a novel justification. We need legal claims that are of high level of determinacy, clarity and consistency; circumstances where the reaction of the international community of States is expected because *factually* a universal debate between States has been initiated; and where the notoriety of the legal claims is universal. For instance, through a legal debate of universal participation in the UNGA, where detailed clear legal assertive claims are consistently held by a broad and representative group of States.

This brings me to three concluding remarks

First, an assessment that a State is silent might be based on ‘eclecticism’ of State practice. This may be due to limitations in accessing material. It may also be due to intentional neglect of the practice of some States or instead the focus of media on the conduct of particular States. Either way, presuming that a State or a group of States has been silent on a particular occasion may lead to the ‘silencing’ of some States. Thus, the interpreter of State silence should not presume that State silence (as a fact) empirically exists in particular instances.

Second, even when circumstances do not allow for the interpretation of silence as acceptance on a particular occasion, not objecting against repeated breaches of novel justifications for the use of force is not without legal risks.

First, not objecting repeated and widespread violations of a rule may eventually lead to desuetude. I do not see any evidence that we are, in the current state of the law, close to this stage, but the risk is always there and merits consideration.

Second, silence *vis-à-vis* novel justifications leaves open a ‘normative space’ where other States may trigger a law-making process by actively and expressly making legal claims in support of new exceptions. If these claims become determinate, consistent, widespread and widely publicized, the circumstances may become such as calling for the reaction of other States with a view to interpreting existing or creating new laws.

Third, whether to object to another State’s claim is not a question that can be answered purely from a legal point of view. It involves also political considerations. Simply encouraging governments to ‘speak up’, to protest or express their views about every

⁴ D. Azaria, State Silence and the Law on the Use of Force, in D. Azaria (ed.), *State Silence Across International Law: Meaning, Context and Developments* (OUP 2025), pp. 43-64 at 60-62.

incident, ignores the real costs and limitations that most States face in terms of resources, and disregards diplomatic realities.

Instead, the legal interpretation of State silence must be better understood, and even taught, including in diplomatic academies, to judges, and students of international law. This approach will help governments be clear about when they ought to speak out – and what language to use when they do so – to ensure that their silence does or does not manifest acceptance.

Thank you very much for your attention.

For more information about the research activities of the research group on State Silence, including several open access publications on State silence, please visit: www.statesilence.org

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