

**ALLEGED ACQUIESCENCE OF THE INTERNATIONAL
COMMUNITY TO REVISIONIST CLAIMS OF
INTERNATIONAL CUSTOMARY LAW
(WITH SPECIAL REFERENCE TO THE *JUS CONTRA
BELLUM* REGIME)**

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There is a broad consensus that the protracted inaction of states faced with the conduct of other states can sometimes be analysed as evidence of acceptance as law (opinio juris) for the purpose of identifying rules of customary international law. This issue has become highly topical in the context of the alleged ‘acquiescence’ of the international community to innovative interpretations of the right of self-defence formulated by some of the states currently conducting a military intervention against the Islamic State in Syria and the Levant (‘ISIL’) on Syrian territory. While the question has been recently discussed by the International Law Commission in the context of its work on the identification of international customary law, the precise circumstances in which acceptance as law can be inferred from inaction remain largely uncertain. Analogies with the concept of acquiescence, as developed in the context of the creation, modification or extinction of subjective rights and obligations, can arguably provide useful guidance in this respect. States whose interests are directly affected by a given conduct can reasonably be expected to express their view on its legality. If they remain silent and if other contextual elements do not indicate otherwise, they can therefore be presumed to have acquiesced to the claims accompanying the concerned conduct. But the lack of reaction of third states whose interests are not directly affected should not be lightly assimilated with the manifestation of a benevolent opinio juris. Even the fact that erga omnes rights and obligations are affected by a given conduct does not create an expectation of near universal reaction, failing which the continuing validity of the underlying customary norm would be eventually undermined. Furthermore, other legal and extra-legal factors must be carefully assessed before assimilating the failure to react as the evidence of a nascent opinio juris.

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You can fool some people sometimes,
But you couldn't fool all the people all the time.¹

I INTRODUCTION

When can acquiescence be inferred from third states' failure to react to revisionist claims of customary international law? What is the weight to be allocated in the customary norm-shaping process to the attitude of 'bystander' states that refrain from expressing any legal opinion with regards to a 'precedent'? This paper attempts to provide elements of an answer to these difficult questions. No state can react to every international incident leading to the assertion of international rights and obligations by the parties involved. Most of the time, this relative passivity is unproblematic. But difficulties arise when third states witness conduct accompanied by claims challenging the established applicable rules of customary international law. In this context, the legal figure of 'acquiescence' is sometimes mentioned. Can the inaction of third states be equated with acquiescence to such revisionist claims? This raises the perennial and difficult question of interpreting silence in international law. Recently, this problem has acquired great prominence in the field of international law on the use of force, or *jus contra bellum*, as some authors have contended that the alleged passivity of third states faced with the unconsented interventions against the Islamic State in Iraq and the Levant ('ISIL') has given rise to a change in the customary rules on the use of force.²

The present article aims to identify the conditions and circumstances under which the passivity of third states can be deemed as indicating an (emerging) consensus of the international community leading to changes in rules of customary

¹ Bob Marley, 'Get Up, Stand Up!' from the Album *Burnin'*, by The Wailers (Island Records, 1973).

² See especially Michael P Scharf, 'How the War against ISIS Changed International Law' (2016) 48 *Case Western Reserve Journal of International Law* 15. See also Claus Kreß, 'The Fine Line between Collective Self-Defense and Intervention by Invitation: Reflections on the Use of Force against "IS" in Syria' on *Just Security* (17 February 2015) <<https://www.justsecurity.org/2015/02/17/clauss-krebs-force-isil-syria/>>, archived at <<https://perma.cc/95HT-HJ9C>>. But see, expressing doubts or squarely rejecting this hypothesis, Olivia Flasch, 'The Legality of the Air Strikes against ISIL in Syria: New Insights on the Extraterritorial Use of Force against Non-State Actors' (2016) 3 *Journal on the Use of Force and International Law* 37; Paulina Starski, 'Right to Self-Defense, Attribution and the Non-State Actor — Birth of the "Unable and Unwilling" Standard?' (2015) 75 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 455, 489–90; Paulina Starski, 'Silence within the Process of Normative Change and Evolution of the Prohibition on the Use of Force: Normative Volatility and Legislative Responsibility' (2017) 4 *Journal on the Use of Force and International Law* 14 ('Silence within the Process of Normative Change'); Olivier Corten, 'The "Unwilling or Unable" Test: Has It Been, and Could It Be, Accepted?' (2016) 29 *Leiden Journal of International Law* 777; Olivier Corten, 'L'argumentation des États européens pour justifier une intervention militaire contre l'« État islamique » en Syrie: Vers une reconfiguration de la légitime défense?' (2016) 49 *Revue belge de droit international* 31.

international law. It assumes that international law is not a *static* system of primary rules and that it has indeed developed what H L A Hart would have qualified as secondary ‘rules of change’ regarding customary international law, despite the contrary affirmations of Hart himself.³ The identification, refinement and progressive development of said ‘rules of recognition’ represent one of the most pressing and important tasks that the academic international lawyer could assign himself or herself in our troubled times. Arguably, the current work of the International Law Commission (‘ILC’) on the ‘identification of customary international law’ is evidence of the ‘internalisation’ of such secondary rules, and serves the purpose of contributing to furthering their determinacy.⁴ This article will proceed by first clarifying the use of the term ‘acquiescence’ in the context of the customary norm-shaping process (Part II). In a second stage, I will delimit the potential scope of acquiescence in the process of customary international law (Part III). Finally, drawing mostly from materials taken from international case law, I will propose a methodology for assessing different instances of inaction by third states (Part IV). Although I will provide illustrations of the study’s findings mostly in connection with recent revisionist claims regarding the norms of *jus contra bellum*, particularly in the context of the interventions against ISIL, the present paper neither intends to provide an analysis of the legal merits of claims made in this context as to the scope of the right of self-defence nor to deliver an exhaustive assessment of state practice and *opinio juris* in this regard.

Before turning to the crux of the article’s reasoning, two preliminary points are necessary. The first one is terminological. The term *jus contra bellum* is preferred here, as it is descriptively more accurate than the more ‘old-fashioned’ *jus ad bellum*. It is contended in this article that the ‘radical rewrite’ — to borrow the expression used by Gabor Rona and Raha Wala — of the field longed for by many authors and some (mostly Western) governments has not yet occurred.⁵ Of course, if these claims were to succeed, there would be reasons to consider that the

³ See, on the notion of ‘rules of change’, H L A Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 95–6. Regarding his doubts as to the existence of rules of recognition in international law, Hart states, ‘[i]t is indeed arguable, as we shall show, that international law not only lacks the secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying “sources” of law and providing general criteria for the identification of its rules’: at 214. For an early criticism of this thesis, see, eg, Ian Brownlie, ‘The Reality and Efficacy of International Law’ (1982) 52 *British Yearbook of International Law* 1, 5–8; Georges Abi-Saab, ‘Cours général de droit international public’ (1987) 207 *Recueil des cours de l’Académie de droit international de La Haye* 9, 122–3. See also, more recently, Pierre-Marie Dupuy, ‘L’unité de l’ordre juridique international: Cours général de droit international public (2000)’ (2002) 297 *Recueil des cours de l’Académie de droit international de La Haye* 9, 76–7; Jean d’Aspremont, ‘Hart et le positivisme postmoderne en droit international’ (2009) 113 *Revue générale de droit international public* 635; Jeremy Waldron, ‘International Law: “A Relatively Small and Unimportant” Part of Jurisprudence?’ in Luís Duarte d’Almeida, James Edwards and Andrea Dolcetti (eds), *Reading H L A Hart’s The Concept of Law* (Hart, 2013) 209.

⁴ See, on the distinction between the ‘internal’ and the ‘external’ points of view, Hart, above n 3, 88–91. See also the remarks of Mario Prost, *The Concept of Unity in Public International Law* (Hart, 2012) 87–91. Prost has nevertheless a more pessimistic approach regarding the question as he considers that ‘custom is still in search of its rule of recognition’: at 102, and, more generally, at 97–105. It seems, however, that such pessimism is grounded more on the amplitude of the endless doctrinal debates surrounding foundational issues of customary international law rather than on real fundamental divergences in practice.

⁵ See Gabor Rona and Raha Wala, ‘No Thank You to a Radical Rewrite of the *Jus ad Bellum*’ (2013) 107 *American Journal of International Law* 386.

international legal regime on the use of force is regressing to *jus ad bellum* — as was the case when the term was first coined by the Austrian academic Heinrich Lammasch in the 1910s.⁶ The second preliminary remark is more substantial. It must be acknowledged from the outset that the possibility of changing customary rules on the use of force cannot be dealt with in clinical isolation from the rules of the *Charter of the United Nations* ('*UN Charter*') qua treaty rules.⁷ Nevertheless, this article will not focus on the interpretation of the provisions of the *UN Charter* applicable to the prohibition on the use of force and the right of self-defence. It is nevertheless submitted that, if a new consensus of the 'international community of states as a whole' (as required to ascertain the emergence or modification of peremptory norms of international law) on the content of the customary rules of *jus contra bellum* can be established, the same evidentiary materials would probably be sufficient to establish a corresponding interpretation, or even modification, of the *UN Charter* through subsequent practice.⁸

II GENERAL COMMENT ON THE MEANING OF 'ACQUIESCENCE'

According to the International Court of Justice ('ICJ'), 'acquiescence ... irrespective of the status accorded to [it] by international law ... follow[s] from the fundamental principles of good faith and equity'.⁹ It is 'equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent'.¹⁰ The inaction of a state faced with alleged violations of international law by another state can have, mainly, two distinct sets of legal implications: first, it can affect subjective rights and obligations of the acquiescing state — and this is where the term 'acquiescence' comes to mind (Part II(A))¹¹ — or, alternatively, it can play an indirect role in the customary norm-creating process (Part II(B)).

⁶ For the earliest mentions of the term known to this author, see Heinrich Lammasch, 'Unjustifiable War and the Means to Avoid It' (1916) 10 *American Journal of International Law* 689, 689; Heinrich Lammasch, *Das Völkerrecht nach dem Kriege* (H Aschehoug, 1917) 174. See more generally Robert Kolb, 'Origin of the Twin Terms *Jus ad Bellum/Jus in Bello*' (1997) 37 *International Review of the Red Cross* 553.

⁷ See also Starski, 'Silence within the Process of Normative Change', above n 2, 19–22.

⁸ See generally *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 149–50 [27–8] ('*Construction of a Wall Advisory Opinion*'); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970) (Advisory Opinion)* [1971] ICJ Rep 16, 22 [22] ('*Continued Presence of South Africa in Namibia Advisory Opinion*'). See generally Giovanni Distefano, 'La pratique subséquente des États parties à un traité' (1994) 40 *Annuaire français de droit international* 41; Giovanni Distefano, 'L'interprétation évolutive de la norme internationale' (2011) 115 *Revue générale de droit international public* 373.

⁹ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America) (Judgment)* [1984] ICJ Rep 246, 305 [130] ('*Gulf of Maine Case*').

¹⁰ *Ibid.*

¹¹ See generally Philippe Cahier, 'Le comportement des États comme source de droits et d'obligations' in Maurice Battelli (ed), *Recueil d'études de droit international en hommage à Paul Guggenheim* (Faculté de droit de l'université de Genève, 1968) 237.

A Creation, Modification or Extinction of Subjective Rights and Obligations

As far as subjective rights and obligations are concerned, acquiescence can play a role in the context of the acquisition of territory and claims to maritime spaces,¹² in treaty law,¹³ or as a matter of international responsibility of states for internationally wrongful acts.¹⁴ In the latter context, acquiescence leading to the lapse of a claim must also be distinguished from implicit consent as a circumstance precluding wrongfulness.¹⁵ Whereas acquiescence under the rule codified in art 45(b) leads to the extinction of a claim originating in a violation of international law,¹⁶ consent under the rule codified in art 20 of the *Articles on the Responsibility of States for Internationally Wrongful Acts* ('ARSIWA') has the effect of precluding the wrongfulness of the act in question altogether.¹⁷

In this context, reference is often made to the Latin phrase '*qui tacet consentire videtur si loqui debuisset ac potuisset*': 'silence is consent', or as French speakers commonly say, '*qui ne dit mot consent*'. But these shorter phrases should be qualified: silence can be assimilated to consent only as far as a reaction was possible (*potuisset*) and reasonably expected in the circumstances of the case (*debuisset*). Three factors are usually required to conclude that a passive state has acquiesced to a claim or to a situation resulting from action(s) attributable to

¹² See, eg, *Affaire des Grisbadarna (Norvège v Suède) (Award)* (1909) 11 RIAA 147, 161–2 (holding that Norway had failed to protest against the practice of lobster fishing in the contested zone); *Island of Palmas Case (Netherlands/USA) (Award)* (1928) 2 RIAA 829, 869 (holding that even if Spain had had a conventional title over the island of Palmas/Miangas, the failure of Spanish authorities to protest against the exercise of sovereign functions by the Dutch authorities amounted to acquiescence to Dutch sovereignty); *Sovereignty over Certain Frontier Land (Belgium v Netherlands) (Judgment)* [1959] ICJ Rep 209, 227–30 (holding that the conditions for the acquiescence of Belgium were not met); *Temple of Preah Vihear (Cambodia v Thailand) (Merits)* [1962] ICJ Rep 6, 23 (holding that Thailand acquiesced to the delimitation of the border with Cambodia as shown on French maps); *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Judgment)* [2008] ICJ Rep 12, 50–1 [121]. See generally Marcelo G Kohen, *Possession contestée et souveraineté territoriale* (Presses Universitaires de France, 1997) 252–72 [45]–[144]; Giovanni Distefano, 'The Conceptualization (Construction) of Territorial Title in the Light of the International Court of Justice Case Law' (2006) 19 *Leiden Journal of International Law* 1041, 1059–61.

¹³ See *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 45(b) ('VCLT'): 'A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts: ... (b) It must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.' Confirming the customary character of the rule enshrined in this provision, see *Maritime Delimitation in the Indian Ocean (Somalia v Kenya) (Preliminary Objections)* (International Court of Justice, General List No 161, 2 February 2017) 21. With regards to reservations, see also VCLT art 20(5).

¹⁴ See *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 56th sess, 83rd plen mtg, Agenda Item 162, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) annex ('*Responsibility of States for Internationally Wrongful Acts*') art 45(b) ('*Articles on the Responsibility of States for Internationally Wrongful Acts*'): 'The responsibility of a State may not be invoked if ... b) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.'

¹⁵ See *ibid* art 20: 'Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.'

¹⁶ *Articles on the Responsibility of States for Internationally Wrongful Acts*, UN Doc A/RES/56/83, art 45(b).

¹⁷ *Ibid* art 20.

another subject of international law. First, the inaction should last for a certain duration.¹⁸ Secondly, the allegedly acquiescing subject should have knowledge of the claim or of the facts, implying a possibility to react.¹⁹ Thus, the claims or facts that are potentially the object of acquiescence must have been brought to the attention of the state's representatives, by one way or another — excluding the hypothesis of acquiescence to secret conduct.²⁰ As was affirmed by Giovanni Distefano, 'a state can acquiesce only to what it knows'.²¹ In the context of responsibility for internationally wrongful acts, the ICJ affirmed 'that waivers or renunciations of claims or rights must either be express or unequivocally implied from the conduct of the State alleged to have waived or renounced its right'.²² The third condition is that silence can be interpreted as acquiescence only so far as a reaction could be expected (*si loqui debuisset ac potuisset*).²³ It is not necessary, for instance, to repeat a claim every week.

Under the law of state responsibility, once a finding of acquiescence has been reached, the effects are direct and immediate: the acquiescing state loses its right to reparation. Acquiescence in this context is thus limited to the creation, modification or extinction of rights and obligations in bilateral relationships (for example, two neighbouring states that have concurrent titles on a given portion of territory, or the author of a wrongful act and its victim). This is not the place to enter the debate between objectivist and voluntarist approaches to international law.²⁴ But it should be underlined that since acquiescence can be based on constructive knowledge — thus allowing for the following construction: 'state A should have known and did not react, therefore it acquiesced' — it cannot be entirely subsumed in the category of tacit agreements. For this reason, acquiescence has sometimes been qualified as a legal fact (*fait juridique*) rather than a legal act (*acte juridique*) — to point to the fact that the will of the state is

¹⁸ See Part III(D).

¹⁹ See Robert Kolb, *La bonne foi en droit international public: Contribution à l'étude des principes généraux de droit* (Presses Universitaires de France, 2000) 339–56; Erik Brüel, 'La protestation en droit international' (1932) 3 *Nordisk Tidsskrift for International Ret* 75, 77–8. See *Interpretation of the Air Transport Services Agreement between the United States of America and France (France v United States) (Award)* (1963) 16 RIAA 5, 63–4 (citation omitted): 'the interested party has not in fact raised an objection that it may have had the possibility of raising, or it has abandoned, or not renewed at a time when the opportunity occurred, the objection that it raised at the outset; or while objecting in principle, it has in fact consented to the continuance of the action in respect of which it has expressed the objection; or again, it has given implied consent, resulting from the consent expressed in connection with a situation related to the subject matter of the dispute'.

²⁰ See Committee on Formation of Customary (General) International Law, 'Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law' (Report, International Law Association, 2000) 15.

²¹ Distefano, 'The Conceptualization (Construction) of Territorial Title in the Light of the International Court of Justice Case Law', above n 12, 1060.

²² *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, 266 [293] ('*Armed Activities*').

²³ Hans Das, 'L'estoppel et l'acquiescement: Assimilations pragmatiques et divergences conceptuelles' (1997) 30 *Revue belge de droit international* 607, 619.

²⁴ On tacit agreements in international law, see generally Giovanni Distefano, 'L'accord tacite ou l'univers parallèle du droit des traités' (2015) 18 *Questions of International Law: Zoom-in* 17 <<http://www.qil-qdi.org/laccord-tacite-ou-lunivers-parallele-du-droit-des-traites/>>, archived at <<https://perma.cc/X9TH-58P4>>.

not a necessary condition of acquiescence.²⁵ To use a distinction more familiar to anglophone lawyers, acquiescence resulting from state inaction is, in this context, an ‘operative fact’ in Hohfeldian terms; that is, a fact ‘which, under the general legal rules that are applicable, suffice to change legal relations, that is, either to create a new relation, or to extinguish an old one, or to perform both of these functions simultaneously’.²⁶

B Customary Norm-Shaping Process

Mention of ‘acquiescence’ is sometimes made in the context of customary international law,²⁷ although it seems that it is used only for lack of a better word. Indeed, it seems that recourse to such a notion should be made with caution in this context, for unwarranted analogies can lead to confusion rather than clarity. The failure to protest against a breach of international law by a state whose interests are directly affected by conduct or by a claim might provide indications as to the *opinio juris* of the state in question.²⁸ If the practice occurs in bilateral relations, the repetition of such instances might well lead to the emergence of a rule of customary international law — although the distinction between tacit agreement and local (bilateral) custom is somewhat indeterminate. In the *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* case, the ICJ considered that ‘the failure of Nicaragua to deny the existence of a right arising

²⁵ On the ‘Silence and the Voluntarism/Objectivism Debate’, see generally Sophia Kopela, ‘The Legal Value of Silence as State Conduct in the Jurisprudence of International Tribunals’ (2010) 29 *Australian Year Book of International Law* 87, 99–103.

²⁶ Wesley Newcomb Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 *Yale Law Journal* 16, 25.

²⁷ See I C MacGibbon, ‘Customary International Law and Acquiescence’ (1957) 33 *British Yearbook of International Law* 115, 119–20; Karol Wolfke, *Custom in Present International Law* (Wrocław, 1964) 44–5; Peter Malanczuk, *Akehurst’s Modern Introduction to International Law* (Routledge, 7th ed, 1997) 43; Philippe Cahier, ‘Changements et continuité du droit international: Cours général de droit international public’ (1985) 195 *Recueil des cours de l’Académie de droit international de La Haye* 1, 232–3; Malcolm N Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 89–90; Dupuy, above n 3, 171; Robert Kolb, ‘Selected Problems in the Theory of Customary International Law’ (2003) 50 *Netherlands International Law Review* 119, 136; Jörg Kammerhofer, ‘Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems’ (2004) 15 *European Journal of International Law* 523, 533; Gionata Piero Buzzini, *Le droit international général au travers et au-delà de la coutume: Essai de conceptualisation d’une réalité aux contours fluctuants* (Institut Universitaire de Hautes Etudes Internationales, 2007) 154. See also Michael Wood, Special Rapporteur, *Second Report on Identification of Customary International Law*, UN GAOR, 66th sess, UN Doc A/CN.4/672 (22 May 2014) 28–9 [42] (‘*Second Report on Identification of Customary International Law*’); Michael Wood, Special Rapporteur, *Third Report on Identification of Customary International Law*, UN GAOR, 67th sess, UN Doc A/CN.4/682 (27 March 2015) 11 [21] (‘*Third Report on Identification of Customary International Law*’).

²⁸ Malanczuk, above n 27, 44: ‘Permissive rules can be proved by showing that some states have acted in a particular way (or have claimed that they are entitled to act in that way) and that other states, whose interests were affected by such acts (or claims), have not protested that such acts (or claims) are illegal.’ See also Jean Barale, ‘L’acquiescement dans la jurisprudence internationale’ (1965) 11 *Annuaire français de droit international* 389, 415; Maarten Bos, *A Methodology of International Law* (North-Holland, 1984) 244.

from the practice' of fishing in the San Juan river for purposes of subsistence led to the conclusion that Costa Rica had a customary right.²⁹

The emergence of regional or, a fortiori, universal rules usually requires a relatively longer-term perspective, although a determinate period of time is not required.³⁰ As similar cases among various states pile up, there may come a time where it is possible to make an inference as to the *opinio juris* of the international community. In the *SS 'Lotus' (France v Turkey)* case, the Permanent Court of International Justice ('PCIJ') thus noted that '[it did] not know of any cases in which governments have protested against' the application of the theory of the location of the effects of a criminal offence as title of jurisdiction, and considered this a decisive fact for the assessment of the permissibility of this kind of criminal jurisdiction under customary international law.³¹ In the same case, the PCIJ also held that an omission to protest against certain actions by affected governments was not compatible with the submission that such actions were unlawful.³² This decision supports the conclusion that the repeated lack of reaction from various states directly affected by a kind of conduct of other states is evidence of a shared belief that the acts were not in breach of an international obligation.

According to draft conclusion 10, para 3 of the *Identification of Customary International Law*, as adopted at first reading in 2016 by the ILC:

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.³³

In such strictly defined cases, the silence or lack of reaction by the affected state can be considered 'evidence of acceptance as law'. In other words, abstention is seen by the law as a potentially 'legally relevant fact' although not an 'operative fact', fitting with the abovementioned definition of Hohfeld.³⁴ It would rather square with the contraposed notion of 'evidential fact', that is, 'one which, on being ascertained, affords some logical basis — not conclusive — for inferring some other fact' — the 'other fact' being in this case the validity of a given

²⁹ *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua) (Judgment)* [2009] ICJ Rep 213, 265–6 [141] ('*Dispute regarding Navigational and Related Rights*'): 'For the Court, the failure of Nicaragua to deny the existence of a right arising from the practice which had continued undisturbed and unquestioned over a very long period, is particularly significant. The Court accordingly concludes that Costa Rica has a customary right. That right would be subject to any Nicaraguan regulatory measures relating to fishing adopted for proper purposes, particularly for the protection of resources and the environment.'

³⁰ See Part III(D).

³¹ *SS 'Lotus' (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 9, 23.

³² *Ibid* 29.

³³ *Report of the International Law Commission on the Work of its 68th Session*, UN GAOR, 71st sess, Supp No 10, UN Doc A/71/10 (2016) 77 ('*Report of the International Law Commission on the Work of its 68th Session*'). In this regard, summarising the reactions of states to this provision, see Noora Arajärvi, 'The Requisite Rigour in the Identification of Customary International Law: A Look at the Reports of the Special Rapporteur of the International Law Commission' (2017) 19 *International Community Law Review* 9, 22–3.

³⁴ Hohfeld, above n 26, 25.

normative proposition under customary international law.³⁵ An alleged breach followed by a failure to protest against it does not therefore have any direct and immediate legal effects.³⁶ It represents only an intermediary fact susceptible to revealing, and eventually to proving — in addition with enough other similar facts — the (operative) fact of the existence of a general consensus as to the validity of normative propositions under customary international law, among members of the international community.³⁷

As a matter of principle, rules of customary international law change only when it becomes possible to identify a ‘general recognition that a rule of law or legal obligation is involved’.³⁸ For the ILC, ‘[t]he relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent’.³⁹ According to Karol Wolfke, ‘the requirement of extensiveness and representativeness of practice is particularly important when such practice challenges an existing rule’.⁴⁰ In other words, what is referred to as ‘acquiescence’ in the customary process is acquiescence by the international community as a collective entity, rather than acquiescence by a particular state or group of states. It thus goes without saying that for a rule to become opposable, and as far as general custom is concerned — as opposed to the regional or local kind — there is no need to provide evidence of the acquiescence of a particular state, without prejudice to the question of the persistent objector.⁴¹ It is only when a repeated lack of reaction can be deemed to evidence a change in the *status conscientiae* of

³⁵ Hohfeld, above n 26, 27. See also Maurice H Mendelson, ‘The Formation of Customary International Law’ (1998) 272 *Collected Courses of the Hague Academy of International Law* 155, 266: ‘a State’s consent to, or acquiescence in, a customary rule, has an impact beyond its immediate sphere of operation: it is a “building block” in the edifice of a general customary rule’. See also *Provisional Summary Record of the 3303rd Meeting*, 68th sess, 1st pt, 3303rd mtg, Agenda Items 4 and 6, UN Doc A/CN.4/SR.3303 (24 May 2016) 6 (Vázquez-Bermúdez): ‘As to the relevance of inaction as evidence of *opinio juris*, the legal significance of inaction by a State in response to the practice of another State should be sought not in an alleged acquiescence, which in practice would amount to a tacit consent, but rather in the possibility of attributing to such inaction the belief that the practice in question was mandated or permitted under customary international law. In short, silence or inaction must reflect *opinio juris*. The Special Rapporteur seemed to share that understanding in paragraph 22 of the report.’

³⁶ See Gerald Fitzmaurice, ‘The General Principles of International Law Considered from the Standpoint of the Rule of Law’ (1957) 92 *Collected Courses of the Hague Academy of International Law* 1, 122; Olivier Corten, ‘Breach and Evolution of Customary International Law on the Use of Force’ in Enzo Cannizzaro and Paolo Palchetti (eds), *Customary International Law on the Use of Force: A Methodological Approach* (Martinus Nijhoff, 2005) 119, 122.

³⁷ See, in this regard, the interesting remarks of Gaetano Morelli, who qualified custom as a fact of legal production (‘fait de production juridique’): Gaetano Morelli, ‘Cours général de droit international public’ (1956) 89 *Recueil des cours de l’Académie de droit international de La Haye* 437, 456.

³⁸ *North Sea Continental Shelf (Federal Republic of Germany/Denmark) (Judgment)* [1969] ICJ Rep 3, 43 [74] (‘*North Sea Continental Shelf*’). See also Mahmoud Hmoud, ‘Are New Principles Really Needed? The Potential of the Established Distinction between Responsibility for Attacks by Nonstate Actors and the Law of Self-Defense’ (2013) 107 *American Journal of International Law* 576, 576.

³⁹ *Report of the International Law Commission on the Work of its 68th Session*, UN Doc A/71/10 77, conclusion 8, [1].

⁴⁰ Committee on Formation of Customary (General) International Law, above n 20, 26 n 64.

⁴¹ See eg Humphrey Waldock, ‘General Course on Public International Law’ (1962) 106 *Collected Courses of the Hague Academy of International Law* 1, 50; Morelli, above n 37, 457.

the international community, to borrow the expression used by Rolando Quadri,⁴² that it will have a decisive impact on customary rules. A single instance of inaction by a single state is never sufficient in this regard.⁴³ At the opposite end of the spectrum, if no state has ever protested against a certain kind of conduct, it will be easier to draw conclusions as to the lawfulness of that conduct. This seems to have been the case in relation to the regulation of bunkering of foreign vessels by coastal states.⁴⁴

While the fundamental distinction between acquiescence as an operative fact and as an evidential fact should not be overlooked, analogies from the much more developed jurisprudence relating to acquiescence as an operative fact might provide useful guidance — in the context of the formation and identification of customary international law — for the appreciation of the evidentiary weight of acquiescence as an evidential fact.⁴⁵

III DELIMITATION OF THE SCOPE OF ACQUIESCENCE BY THIRD STATES IN THE CUSTOMARY NORM-SHAPING PROCESS

Alongside the abovementioned Latin phrase regarding silence, another one is sometimes quoted: *is, qui tacet, non fatetur sed nec utique negare videtur*, meaning that silence has no pre-established meaning: silence in itself is neutral, and only ‘qualified’ silence can be assimilated to acquiescence (*silence qualifié* or *silence circonstancié*).⁴⁶ Only the precise circumstances can tell us whether instances of states’ inaction establish acquiescence, by the international community of states, to a kind of conduct. These circumstances include the determination of the personal circle of states capable of engendering legally relevant acquiescence for the determination of the existence and content of the rules of customary international law, according to the legal interests at stake (Part (A)); and reasons for verifying whether the latter can be extended by way of the *erga omnes* character of the rights and obligations affected by the impugned conduct (Part (B)). Another factor relates to the nature of the conduct and the

⁴² R Quadri, ‘Cours général de droit international public’ (1964) 113 *Recueil des cours de l’Académie de droit international de La Haye* 237, 351.

⁴³ See, eg, J Patrick Kelly, ‘The Twilight of Customary International Law’ (2000) 40 *Virginia Journal of International Law* 449, 473: ‘It is insufficient to demonstrate general acceptance unless the vast majority of states have failed to protest when a norm has been asserted against their immediate interests.’

⁴⁴ *M/V ‘Virginia G’ (Panama/Guinea-Bissau) (Judgment)* [2014] ITLOS Rep 4, 63–4 [217]. See also, evoking the ‘législation nationale en tant qu’elle a obtenu une reconnaissance internationale’, *Affaire des boutres de Mascate (France v Grande-Bretagne)* (1905) 11 RIAA 83, 94.

⁴⁵ See *Provisional Summary Record of the 3253rd Meeting*, 67th sess, 1st pt, 3253rd mtg, Agenda Item 9, UN Doc A/CN.4/SR.3253 (20 May 2015) 6 (Nolte) (‘*Provisional Summary Record of the 3253rd Meeting*’): ‘it was inaccurate to say that a sharp distinction should be drawn between acquiescence and *opinio juris*, as they were both forms of acceptance of a proposition’.

⁴⁶ Kolb, *La bonne foi en droit international public*, above n 19, 347; Das, above n 23, 619; Distefano, ‘The Conceptualization (Construction) of Territorial Title in the Light of the International Court of Justice Case Law’, above n 12, 1059; *Provisional Summary Record of the 3225th Meeting*, 66th sess, 2nd pt, 3225th mtg, Agenda Items 1 and 9, UN Doc A/CN.4/SR.3225 (17 July 2014) 10 (Kittichaisaree); *Provisional Summary Record of the 3252nd Meeting*, 67th sess, 1st pt, 3252nd mtg, Agenda Item 6, UN Doc A/CN.4/SR.3252 (19 May 2015) 3 (Murase): noting that ‘in Asia and in Japan, in particular, ... silence often signified disagreement’.

presence of express accompanying claims as to its alleged lawfulness on behalf of the acting state (Part (C)). The passing of time, allowing for the accumulation of sufficient evidentiary materials as to the two elements of custom, can also have an influence on the evidentiary weight of acquiescence by states *uti singuli* (Part (D)).

A 'Not Your Business!': The Limited Role of Third States

States that are directly affected by a given act are generally expected to react — mainly through the act of protest — simply because inaction could detrimentally affect their rights and obligations.⁴⁷ However, it is misleading to refer to a hypothetical obligation to react to a violation of customary international law. With the limited exception of the obligations not to recognise situations arising out of violations of norms of *jus cogens*, and not to provide assistance to the perpetrator,⁴⁸ such a general obligation simply does not exist. It would be more accurate to refer to the concept of *Obliegenheit* — which could be translated as 'incumbency' — known in German legal vocabulary (and increasingly in French terminology) as an (optional) legal duty not susceptible to forced execution and the violation of which is sanctioned by the loss of a right.⁴⁹ If a state victim of a violation of international law remains silent, it will be sanctioned by the loss of the rights usually accruing from such a situation.⁵⁰ But the fact that a government did not protest does not trigger its international responsibility. It is only sanctioned by the loss of a right. Such a duty is optional in the sense that its existence depends on the will of the subject to conserve the benefit of the right at stake. It seems safe to assume that international law is based on the notion that states generally act in defence of their legal interests. As a rule, acquiescence can therefore be inferred from a lack of reaction by the directly affected state — if no decisive extraneous factor dictated its choice.⁵¹

But what about *third* states — in other words states that have no *direct legal interests* at stake? It is sometimes suggested that even these states are supposed to take action if they do not want a rule to become binding (on them), though often it is simply not specified *whose* acquiescence matters in this regard.⁵² There seems to be general agreement that protests or the reaffirmation by states — including third states — of their pre-existing *opinio juris*, through declarative statements, may prevent the emergence of a new customary rule, or the modification or

⁴⁷ See Bos, above n 28, 241–2: 'For legal consequences to ensue, there must be good reason to require some form of action.'

⁴⁸ See Part III(B).

⁴⁹ See, eg, Fanny Luxembourg, *La déchéance des droits: Contribution à l'étude des sanctions civiles* (Panthéon-Assas, 2007) 430 [1168].

⁵⁰ *Articles on the Responsibility of States for Internationally Wrongful Acts*, UN Doc A/RES/56/83, art 45.

⁵¹ See Part IV.

⁵² See, eg, alluding to acquiescence by 'other' states although the examples provided relate to directly interested states, MacGibbon, above n 27, 118. See also, perhaps more unequivocally, Michael Byers, 'Terrorism, the Use of Force and International Law after 11 September' (2002) 51 *International and Comparative Law Quarterly* 401, 411. Julio A Barberis states, though not unequivocally, that the acquiescence of third states matters: Julio A Barberis, 'Réflexions sur la coutume internationale' (1990) 36 *Annuaire français de droit international* 9, 38–9.

abrogation of a pre-existing rule.⁵³ But it is submitted here that caution is required in assessing the legal significance of their lack of reaction to specific incidents.⁵⁴ While governments are free to state or restate their views on the content of customary rules at any time, either in relation to a specific incident involving third states, or in general terms, they have no direct legal interest or *locus standi* (*qualité pour agir*) to issue formal protests, or to file a request in an international jurisdiction.⁵⁵ Indeed, as a matter of international responsibility, formal protest can in principle only be voiced by the victim of an alleged violation.⁵⁶

The remote and indirect interest of favouring a certain conception of the impugned rules is certainly not sufficient to create a reasonable expectation that third states will systematically react to every incident involving claims of customary international law.⁵⁷ But this is not to say that third states are unable to consciously participate in the customary norm-shaping process, if they choose to do so. States that do not want a practice to become binding on them can issue general statements reaffirming their views on the *lex lata*. In the context of the codification of international law or the adoption of declarative resolutions by international organisations, every participating state can be regarded as having a similar legal interest — and cannot therefore be qualified as third states vis-a-vis the work of the diplomatic convention. Thus, the failure to object to the adoption of a provision of a codification treaty purporting to restate the *lex lata* has also

⁵³ During the trial of the Nazis war criminals at the International Military Tribunal in Nuremberg, the argument was made that the defendants had been led to believe in the lawfulness of their conduct — or, at least, in its non-criminal nature — as a result of the acquiescence of third states to the annexation of Bohemia and Moravia. The tribunal rejected this argument. According to the judges, the declarations of France and Great Britain, by which these states had given assurances to Poland, ‘showed, at least, that this view could be held no longer’: Judicial Decisions, ‘International Military Tribunal (Nuremberg): Judgment and Sentences’ (1947) 41 *American Journal of International Law* 172, 198. See also, more generally, Josef L Kunz, ‘Editorial Comment: The Nature of Customary International Law’ (1953) 47 *American Journal of International Law* 658, 667; I C MacGibbon, ‘The Scope of Acquiescence in International Law’ (1954) 31 *British Yearbook of International Law* 143, 150–1; Krzysztof Skubiszewski, ‘Elements of Custom and the Hague Court’ (1971) 31 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 810, 813. But see the rather isolated position of McRae: *Provisional Summary Record of the 3253rd Meeting*, UN Doc A/CN.4/SR.3253, 4 (McRae).

⁵⁴ See also *Provisional Summary Record of the 3226th Meeting*, 66th sess, 2nd pt, 3226th mtg, Agenda Item 9, UN Doc A/CN.4/SR.3226 (17 July 2014) 10 (Jacobsson) (*Provisional Summary Record of the 3226th Meeting*); *Provisional Summary Record of the 3251st Meeting*, 67th sess, 1st pt, 3251st mtg, Agenda Item 6, UN Doc A/CN.4/SR.3251 (15 May 2015) 6 (Hmoud) (*Provisional Summary Record of the 3251st Meeting*).

⁵⁵ On the notion of legal interest as a condition for the jurisdiction of the ICJ, see *Northern Cameroons (Cameroon v United Kingdom) (Preliminary Objections)* [1963] ICJ Rep 15, 33–4. See also *South West Africa (Ethiopia v South Africa) (Second Phase)* [1966] ICJ Rep 6, 47 [88]: ‘Looked at in another way moreover, the argument amounts to a plea that the Court should allow the equivalent of an “*actio popularis*”, or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present; nor is the Court able to regard it as imported by the “general principles of law” referred to in Article 38, paragraph 1 (c), of its Statute.’

⁵⁶ See Bruel, above n 19, 76; Gionata Piero Buzzini, ‘Les comportements passifs des États et leur incidence sur la réglementation de l’emploi de la force en droit international général’ in Enzo Cannizzaro and Paolo Palchetti (eds), *Customary International Law on the Use of Force: A Methodological Approach* (Martinus Nijhoff, 2005) 79, 95.

⁵⁷ See *Provisional Summary Record of the 3253rd Meeting*, UN Doc A/CN.4/SR.3253, 3 (McRae): noting that there is no ‘general rule that States [have] an obligation to object if they disagreed with the development of a customary rule of international law’.

been regarded as a kind of acquiescence that facilitates the consolidation of a customary rule, even though the treaty in question was not yet in force, as was the case in the *Gulf of Maine* case.⁵⁸ The case of resolutions of international organisations intended to be declarative of customary rules is analogous, as was shown in the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, where the ICJ held that their adoption with ‘substantial numbers of negative votes and abstentions’ undermined the thesis that they reflected an *opinio juris communis* on the illegality of nuclear weapons as such.⁵⁹

As a matter of principle, third states cannot reasonably be *expected* to react to the violation by a state of an obligation arising from an ordinary norm of customary international law, and their silence carries no predetermined evidentiary weight pointing toward the acceptance of the claims made by the acting state.⁶⁰ States are not supposed to follow every development of international affairs and express themselves on each and every violation — and it would be utterly unrealistic to assume that even the most powerful states have the capacity to do so.⁶¹ Indeed, the wording of the abovementioned draft conclusion 10, para 3⁶² has been adapted to take this fact into account, after requests in this sense by several members of the ILC⁶³ and UN member states at the Sixth Committee.⁶⁴ According to a proposal made by Sean Murphy, said provision should have been drafted in the following way:

Failure to react over time to a practice that affects the interests or rights of a State, when the State has knowledge of the practice, may serve as evidence of acceptance as law (*opinio juris*).⁶⁵

⁵⁸ See, eg, *Gulf of Maine Case* [1984] ICJ Rep 246, 294 [94].

⁵⁹ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 255 [71].

⁶⁰ See also *Third Report on Identification of Customary International Law*, UN Doc A/CN.4/682, 12 [23]: ‘the relevant practice ought to be one that affects the interests or rights of the State failing or refusing to act’.

⁶¹ See Bos, above n 28, 241–2; Mendelson, above n 35, 257.

⁶² See *Report of the International Law Commission on the Work of its 68th Session*, UN Doc A/71/10, 77.

⁶³ See *Provisional Summary Record of the 3251st Meeting*, UN Doc A/CN.4/SR.3251, 4 (Tladi) and 6 (Forteau); *Provisional Summary Record of the 3252nd Meeting*, UN Doc A/CN.4/SR.3252, 6 (Hassouna), 12 (Saboia), 13 (Šturma); ‘International Law Commission, Sixty Seventh Session (First Part), *Provisional Summary Record of the 3253rd Meeting*, UN Doc A/CN.4/SR.3253, 7 (Petrič): ‘a State should be required to act only when it had been duly informed and when its interests were involved. Otherwise, its inaction should not be taken as an indication of consent.’ See also at 10 (Vázquez Bermúdez); *Provisional Summary Record of the 3254th Meeting*, 67th sess, 1st pt, 3254th mtg, Agenda Items 6 and 9, UN Doc A/CN.4/SR.3254 (21 May 2015) 4 (Jacobsson), 6 (Kolodkin), 8 (Singh); *Provisional Summary Record of the 3280th Meeting*, 67th sess, 2nd pt, 3280th mtg, Agenda Items 1 and 6, UN Doc A/CN.4/SR.3280 (29 July 2015) 10 (Forteau, stating the view of the Drafting Committee) (*‘Provisional Summary Record of the 3280th Meeting’*).

⁶⁴ Arajärvi discusses this, mentioning the demands of Chile, France, Indonesia, Ireland, the Republic of Korea, Romania, Slovakia, Slovenia, Spain, Turkey: see Arajärvi, above n 33, 22.

⁶⁵ *Provisional Summary Record of the 3251st Meeting*, 67th sess, 1st pt, 3251st mtg, Agenda Item 6, UN Doc A/CN.4/SR.3251 (9 June 2015) 3.

Arguably, such wording would have been more specific and less equivocal than the wording finally adopted.⁶⁶ But the Drafting Committee considered that the wording it chose ‘was intended to capture [the conditions where inaction might constitute evidence of acceptance as law (*opinio juris*)], without being too restrictive’.⁶⁷ Thus, the commentary affirms that ‘this may be the case, for example, where the practice is one that (directly or indirectly) affects — usually unfavourably — the interests or rights of the State failing or refusing to act’.⁶⁸ The mention of ‘indirectly’ affecting the interests or rights of the state failing or refusing to act can encompass the rather theoretical and indirect interests affected by any change in customary international law. This loose formulation does not seem to faithfully reflect the more restrictive views of many members of the Commission who expressed themselves on the issue, and has rightly been criticised at the Sixth Committee of the UN General Assembly (‘UNGA’).⁶⁹ The ILC would be well advised to reconsider this passage of the commentary when it proceeds to the second reading of the project.

But the circle of ‘specially interested’ states is capable of broadening when *erga omnes* rights and obligations are concerned. Are the impugned norms of such a nature as to warrant a distinct approach from the abovementioned?

B *An Enhanced Role for Third States with regards to Norms-Generating Erga Omnes Obligations?*

In the case of territorial and maritime disputes, states advancing claims to territorial titles, or maritime spaces — at least as far as such claims are in excess of the accepted framework of the law of the sea — aim to establish a title that, after its eventual consolidation, will be opposable *erga omnes*. In such situations, the inaction of all the interested third states is therefore relevant. Thus, in the *Fisheries (United Kingdom v Norway)* case, the ICJ relied on the ‘general toleration of the international community’ and established that the method of

⁶⁶ A proposal made by Maurice Kamto read as follows: ‘Inaction may also serve as evidence of acceptance as law, provided that the circumstances call for some reaction, that the State whose inaction is sought to be relied upon in identifying a rule of customary international law had knowledge thereof and that its inaction has been maintained over a sufficient period of time’: *Provisional Summary Record of the 3252nd Meeting*, UN Doc A/CN.4/SR.3252, 15. Although more comprehensive in some respects than the proposition made by Murphy or conclusion 10, para 3 as adopted; this wording leaves the ‘circumstances [calling] for some reaction’ rather undetermined: *Report of the International Law Commission on the Work of its 68th Session*, UN Doc A/71/10, 77.

⁶⁷ *Provisional Summary Record of the 3280th Meeting*, UN Doc A/CN.4/SR.3280, 10 (Forteau).

⁶⁸ *Report of the International Law Commission on the Work of its 68th Session*, UN Doc A/71/10, 100–1.

⁶⁹ *Summary Record of the 21st Meeting*, UN GAOR, 6th Comm, 71st sess, 21st mtg, Agenda Item 78, UN Doc A/C.6/71/SR.21 (25 October 2016) 5 [27] (Escobar (El Salvador)) (‘*Summary Record of the 21st Meeting*’). See also *Summary Record of the 22nd Meeting*, UN GAOR, 6th Comm, 71st sess, 22nd mtg, Agenda Items 78 and 145, UN Doc A/C.6/71/SR.22 (22 November 2016) 2 [8] (Telalian (Greece)): ‘It should be made clear, however, that deliberate abstention referred in particular to States whose rights and interests were especially affected by the action of another State or States.’ See also Alfday González (Mexico) at 5 [24]. See also the following statement of the Chinese delegate: *Summary Record of the 20th Meeting*, UN GAOR, 6th Comm, 71st sess, 20th mtg, Agenda Item 78, UN Doc A/C.6/71/SR.20 (11 November 2016) 14 [67] (‘*Summary Record of the 20th Meeting*’): ‘Inaction could not be treated as implied consent; the State’s knowledge of the relevant rules and its ability to react should be taken into account in determining whether a State’s inaction was intentional and, thus, could serve as evidence of *opinio juris*.’

straight lines had become a customary rule.⁷⁰ Arguably, the Court was in fact referring to the general toleration of all the states potentially affected by the consequent reduction of the maritime spaces to which the more favourable regime of the high sea (freedom of the sea) would apply; that is at least all coastal states, or all states that possess a fishing fleet which might fish in the concerned region. The latter were certainly *third* parties to the dispute between the United Kingdom and Norway, but they did have a tangible legal interest at stake, and there was clear evidence — at least with regards to France — that they had knowledge of the Norwegian claims.⁷¹

Alongside the issue of territorial or maritime titles, *erga omnes* rights and obligations are also present when said rights and obligations are due to ‘the international community as a whole’.⁷² Does the inaction of third states carry a stronger evidentiary weight when *erga omnes* rights and obligations are involved? In other words, is the general and constant protest by a representative number of third states a condition for the continuing existence of *erga omnes* obligations, as is sometimes suggested?⁷³ Of course, such a conclusion could, in any case, be reached only in situations where it would be possible ‘to ascertain whether the practice was such, or had been carried out in such a manner, that general knowledge of it could be assumed’.⁷⁴ Thus, for instance, the initial lack of protests against the United States’ practice of ‘extraordinary rendition’ in the early 2000s could in no way have been considered to manifest favourable *opinio juris* on behalf of passive third states.

Since the question is closely related to the legal interests of third states in invoking the international responsibility of the infringing state, a quick look at this regime is necessary. According to the ICJ:

By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.⁷⁵

There is general agreement that this *erga omnes* character of the obligations entitles third states to at least formally protest against violations, and to claim

⁷⁰ *Fisheries (United Kingdom v Norway) (Judgment)* [1951] ICJ Rep 116, 139 (*‘Fisheries’*). See, for a similar reading of this decision, Buzzini, ‘Les comportements passifs des États’, above n 56, 85; Barale, above n 28, 415.

⁷¹ *Fisheries* [1951] ICJ Rep 116, 135–6.

⁷² *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Judgment)* [1970] ICJ Rep 3, 32 [33] (*‘Barcelona Traction’*).

⁷³ See, mentioning and then discarding such a hypothesis, Buzzini, ‘Les comportements passifs des États’, above n 56, 94–5.

⁷⁴ *Provisional Summary Record of the 3253rd Meeting*, UN Doc A/CN.4/SR.3253, 10 (Vázquez Bermúdez).

⁷⁵ *Barcelona Traction* [1970] ICJ Rep 3, 32 [33].

cessation of the unlawful act without having to prove a special legal interest.⁷⁶ Although envisaged in earlier versions of the ILC's *ARSIWA*,⁷⁷ the position of third states is not entirely assimilated to that of the 'injured' state(s).⁷⁸ It remains disputed whether the *erga omnes* character of an obligation entails a general *obligation* to react to a violation or only a *faculty* to do so — with all the issues of selectivity and inconsistencies in application that this would entail.⁷⁹ The answer to this question will most probably depend on the precise scope of every individual norm — the existence of *leges speciales* not being excluded by the general regime of responsibility of states for internationally wrongful acts.⁸⁰ With regards to war crimes, for instance, there is arguably a broad consensus that their commission entails an obligation on behalf of every state to investigate and prosecute their authors.⁸¹

As far as positive obligations are concerned — as opposed to the firmly established negative duty of nonrecognition and obligation not to provide assistance⁸² — the situation is far from clear. Article 54 of the *ARSIWA* is formulated in very cautious terms and seems to allow only the adoption of measures of retaliation ('lawful measures') as opposed to peaceful

⁷⁶ Although the Court declined its jurisdiction on the base of the indispensable third party and the absence of Indonesia: see *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90, 102 [29]. See also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Judgment)* [2012] ICJ Rep 422, 448–50 [65], [68]–[69]. Moreover, and although the Court did not make an explicit reference to the concept of '*erga omnes* obligations', such a conception of the notion of 'legal interest' was arguably already present in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15, 23. See also Institute of International Law, 'Obligations *Erga Omnes* in International Law' (Resolution, 27 August 2005) art 2 <http://www.idi-il.org/app/uploads/2017/06/2005_kra_01_en.pdf>, archived at <<https://perma.cc/35PB-5W2H>>. See further Erika de Wet, 'Invoking Obligations *Erga Omnes* in the Twenty-First Century: Progressive Developments since *Barcelona Traction*' (2013) 38 *South African Yearbook of International Law* 2, 9–15; Lori Fisler Damrosch, 'Enforcing International Law through Non-Forcible Measures' (1997) 269 *Collected Courses of the Hague Academy of International Law* 9, 50–4.

⁷⁷ See Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Collected Courses of the Hague Academy of International Law* 217, 318: 'To sum up the system provisionally devised by the ILC, the community interest in a powerful reaction to international crimes is realized by means of elevating every State into an "injured State".'

⁷⁸ Karl Zemanek, 'New Trends in the Enforcement of *Erga Omnes* Obligations' (2000) 4 *Max Planck Yearbook of United Nations Law* 1, 29–30.

⁷⁹ See, in this regard, de Wet, above n 76, 9; Damrosch, above n 76, 30–4.

⁸⁰ See *Articles on the Responsibility of States for Internationally Wrongful Acts*, UN Doc A/RES/56/83, art 55: 'These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.' See also Institute of International Law, above n 76, art 6(b).

⁸¹ See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005) vol 1, 607, r 158: 'States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.'

⁸² *Continued Presence of South Africa in Namibia (Advisory Opinion)* [1971] ICJ Rep 16, 54 [119]; *Construction of a Wall (Advisory Opinion)* [2004] ICJ Rep 136, 200 [159]. See also Institute of International Law, above n 76, arts 5(a)–(b). See, in this regard, Santiago Villalpando, *L'émergence de la communauté internationale dans la responsabilité des Etats* (Presses Universitaires de France, 2005) 306–7; Anne Lagerwall, 'L'administration du territoire irakien: Un exemple de reconnaissance et d'aide au maintien d'une occupation résultant d'un acte d'agression?' (2006) 39 *Revue belge de droit international* 249, 253–60.

countermeasures *omnium*.⁸³ In its commentary, the ILC expressed doubts about the existence of an *entitlement* for third states to adopt peaceful countermeasures in protection of a collective interest — not even mentioning the existence of a general *obligation* to do so.⁸⁴ According to art 41(1) of the *ARSIWA*, '[s]tates shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40'.⁸⁵ But this wording entails only a very broad and vague obligation of cooperation. Arguably, this provision involves an obligation of means without specifying the specific instruments that states should deploy. Formal protests and the adoption of non-forcible countermeasures on a unilateral basis probably count among the available tools for realising this obligation to cooperate.⁸⁶ But third states might consider it more appropriate and efficient to tackle these issues exclusively in the institutionalised fora of the competent international organisations.⁸⁷ Even if they are willing to address these violations in their bilateral relations, they might consider it preferable to raise them in the framework of confidential diplomatic talks rather than through open public confrontation.⁸⁸ Indeed, in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion ('*Construction of a Wall Advisory Opinion*') the ICJ did not even mention the potential for states to unilaterally adopt countermeasures,⁸⁹ although it affirmed 'the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion'.⁹⁰ Although the utopian image of a world where all states would react to every violation all the time seems attractive from a liberal perspective, it seems beyond doubt that there is, in the *lex lata*, no obligation incumbent on third states to systematically adopt peaceful countermeasures, or even to issue formal protests and public condemnations of

⁸³ See *Articles on the Responsibility of States for Internationally Wrongful Acts*, UN Doc A/RES/56/83, art 54. See also, with critical comments, Villalpando, above n 82, 315–16.

⁸⁴ International Law Commission, *Report of the International Law Commission on the Work of Its Fifty Third Session*, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (2001) ch IV(E), art 54, [6] ('*Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*'). See also the cautious approach of Zemanek, above n 78, 30; Simma, above n 77, 312–13. But see Institute of International Law, above n 76, art 5(c): 'Should a widely acknowledged grave breach of an *erga omnes* obligation occur, all the States to which the obligation is owed: ... (c) are entitled to take non-forcible counter-measures under conditions analogous to those applying to a State specially affected by the breach.'

⁸⁵ *Articles on the Responsibility of States for Internationally Wrongful Acts*, UN Doc A/RES/56/83, 113. See also *Continued Presence of South Africa in Namibia (Advisory Opinion)* [1971] ICJ Rep 16, 54 [117].

⁸⁶ For an overview of possible measures in the positive obligations contained in common art 1 of the 1949 *Geneva Conventions*, see Jean-Marie Henckaerts, 'Article 1: Respect for the Convention' in Knut Dörmann et al (eds), *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press, 2016) 35, 57–9 [180]–[183].

⁸⁷ Villalpando, above n 82, 305.

⁸⁸ Christophe Paulussen has reported the views of several European governments: see Christophe Paulussen and Jessica Dorsey, 'Towards an EU Position on Armed Drones and Targeted Killing?' in Christophe Paulussen et al (eds), *Fundamental Rights in International and European Law: Public and Private Law Perspectives* (TMC Asser Press, 2016) 9, 21.

⁸⁹ *Construction of a Wall (Advisory Opinion)* [2004] ICJ Rep 136, 199–200 [158]–[159].

⁹⁰ *Ibid* 200 [160].

other states on a systematic basis.⁹¹ This is corroborated by the fact that the ‘obligation to ensure respect’ enshrined in the 1949 *Geneva Conventions* arguably entails only a *faculty* to adopt peaceful countermeasures — with the consequence that these cannot be deemed unlawful intervention or violation of other obligations — but not absolute *legal obligation* for states to do so systematically, on a unilateral basis.⁹² But even if this was the case, the lack of reaction of bystander states could not automatically be equated with acceptance of a given conduct as lawful, as it could simply result from a violation of the obligation to cooperate encompassed by art 41(1) of the *ARSIWA*.

Moreover, it can be added — in the guise of an a fortiori argument — that if a special requirement of constant and general protest by third states faced with the violation of *erga omnes* rights and obligations was required to maintain the rule’s existence, it would have the paradoxical effect of weakening rather than strengthening its legal status.⁹³ Often (although not necessarily always) the *erga omnes* character of the rights and obligations flowing from a customary rule coincides with the peremptory character of the latter.⁹⁴ It would be in contradiction with the higher threshold set out by the ‘rules of change’ applicable to peremptory norms of international law, which require a consensus of ‘the international community of States as a whole’.⁹⁵ Indeed, as Milenko Kreća pointed out, there is

⁹¹ See James Crawford, *Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories* (24 January 2012) Trades Union Congress, 31 [74] <<https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf>>, archived at <<https://perma.cc/5YFZ-TH6R>>: ‘It is important to note at the outset that Article 41(1) is heavily qualified: it is an obligation to co-operate, and nothing more. There is no requirement for individual action on the part of a given State unilaterally to bring to an end, or attempt to bring to an end, an unlawful situation.’ See also Alain Pellet, *Letter dated 10 April 2017 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General: Legal Opinion on Third Party Obligations with respect to Illegal Economic and other Activities in the Occupied Territories of Azerbaijan*, UN SCOR, 71st sess, Agenda Items 32, 37 and 74, UN Doc A/71/880–S/2017/316 (26 April 2017) annex (‘*Legal Opinion on Third Party Obligations with respect to Illegal Economic and other Activities in the Occupied Territories of Azerbaijan*’) 55 [248]: ‘while there is, under general international law an obligation of conduct ... the concrete forms and modalities by which States comply with this obligation to cooperate are left to their appreciation’. See also Carlo Focarelli, ‘Common Article 1 of the 1949 *Geneva Conventions*: A Soap Bubble?’ (2010) 21 *European Journal of International Law* 125, 171.

⁹² See Robert Kolb, ‘Commentaires iconoclastes sur l’obligation de faire respecter le droit international humanitaire selon l’article 1 commun des *Conventions de Genève de 1949*’ (2013) 46 *Revue belge de droit international* 513, 513–20, where the author relies mainly on the insights of Andreas Frutig, *Die Pflicht von Drittstaaten zur Durchsetzung des humanitären Völkerrechts nach Art. 1 der Genfer Konventionen von 1949: auf dem schmalen Grat zwischen Recht und Moral* (Helbing Lichtenhahn, 2009). See also r 144 and the related commentary in Henckaerts and Doswald-Beck, above n 81, 509–13.

⁹³ See also Starski, ‘Silence within the Process of Normative Change’, above n 2, 40.

⁹⁴ See Georges Abi Saab, ‘Que reste-t-il du «crime international»?’ in Marcelo G Kohen and Magnus Jesko Langer (eds), *Le développement du droit international: réflexions d’un demi siècle* (Graduate Institute Publications, 2015) vol 1, 165, 179–80. See also, on the relationship between the concepts of *erga omnes* obligations and *jus cogens* norms, de Wet, above n 76, 5–9.

⁹⁵ *VCLT* art 53.

a strong *conservative* element in the ‘dynamics’ of *jus cogens*.⁹⁶ According to Kreća,

[t]his conservatism cannot be qualified in a negative way in view of the fact that it is not a projection of subjective options but that it acts to provide ... stability and inherent relations within the existing material basis of the international community. As such it cannot serve as defense against the oncoming life rhythms but as a measure of their correctness.⁹⁷

But this does not mean that peremptory norms are immune to any change achieved through the evolution of state practice; or even as a result of their constant and widespread violation.

Of course, there is arguably an ethical and, at least in some circumstances, a political duty to react — although this begs questions as to the nature of the appropriate reaction in each specific situation. From this perspective, third states are indeed entitled to act as guardians of the law of the international community — in a typical illustration of the phenomenon of ‘role splitting’ (*dédoublement fonctionnel*) as conceived by Georges Scelle.⁹⁸ To borrow from Paulina Starski, states are endowed with a ‘legislative responsibility’⁹⁹ — at least in the political, and not legal, acceptance of the term ‘responsibility’. Nevertheless, it is submitted that this is not sufficient to create an expectation that third states will, as a rule, react to every violation of norms entailing *erga omnes* rights and obligations. Their occasional silence in this regard cannot therefore be automatically regarded as acquiescence to revisionist claims, just because of the *erga omnes* character of the obligations violated.¹⁰⁰ The impact of silence on the customary lawmaking process is distinct from the issue of the duty of nonrecognition and the potential violation of the obligation to cooperate with a view to putting an end to violations of *erga omnes* obligations qua violations.

⁹⁶ Milenko Kreća, ‘Some General Reflections on Main Features of *Jus Cogens* as Notion of Public International Law’ in Rafael Gutiérrez Girardot et al (eds), *New Directions in International Law: Essays in Honour of Wolfgang Abendroth — Festschrift zu seinem 75. Geburtstag* (Campus Verlag, 1982) 27, 36. See also, more generally on the conservative element of the customary source, Georges Scelle, ‘Règles générales du droit de la paix’ (1933) 46 *Recueil des cours de l’Académie de droit international de La Haye* 327, 434–5.

⁹⁷ Kreća, above n 96, 36.

⁹⁸ See, eg, Georges Scelle, ‘Essai sur les sources formelles du droit international’ in *Recueil d’études sur les sources du droit en l’honneur de François Gény* (Librairie du Recueil Sirey, 1934) vol 3, 400, 410–11. See also Antonio Cassese, ‘Remarks on Scelle’s Theory of “Role Splitting” (*dédoublement fonctionnel*) in International Law’ (1990) 1 *European Journal of International Law* 210.

⁹⁹ See Starski, ‘Silence within the Process of Normative Change’, above n 2, 28.

¹⁰⁰ See, in this sense, Georges Abi Saab, ‘La notion de «pratique» en droit international: la pratique et la théorie des sources du droit international’ in Marcelo G Kohen and Magnus Jesko Langer (eds), *Le développement du droit international: réflexions d’un demi siècle* (Graduate Institute Publications, 2015) vol 1, 93, 94–5. See also Georges Abi Saab, ‘Le droit international à la croisée des chemins: Force du droit et droit de la force’ in Marcelo G Kohen and Magnus Jesko Langer (eds), *Le développement du droit international: réflexions d’un demi siècle* (Graduate Institute Publications, 2015) vol 1, 185, 203: ‘Il y a quelquefois une réaction explicite, par exemple une résolution de l’Assemblée générale condamnant l’intervention Mais même quand il n’y a pas de réaction explicite, cela ne veut pas dire acquiescement, moins encore acceptation par la communauté internationale; car le silence significatif, le silence «circonstancié» du droit civil, qui peut impliquer un tel acquiescement, est celui de la victime directement lésée par la violation.’

C *The Object of Acquiescence: Distinction between ‘Ordinary’ Violations and ‘Precedents’*

The question immediately raised by the invocation of acquiescence is ‘acquiescence to what’? The legal consequences of the inaction of (third) states will primarily depend on the attitude of the acting state. Did it *simply* violate an established rule? Or did it formulate an innovative or ‘proto legal’ *claim* as to the (desired) content of the law?¹⁰¹ As was made clear by the ICJ, even repeated violations of a rule of customary international law are, in themselves, not compelling evidence of the desuetude of a rule if they continue to be treated as infringements by other members of the community:

It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other’s internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.¹⁰²

Conduct *prima facie* inconsistent with an established rule acquires legal relevance only if it ‘tend[s] towards a modification of customary international law’ and is ‘shared in principle by other States’.¹⁰³ This can only be the case if the acting state relies ‘on a novel right or an unprecedented exception’ to the rule;¹⁰⁴ but certainly not if it does not formulate any claim as to the legality of its conduct or if it only issues ‘statements of international policy’ rather than ‘an assertion of rules of existing international law’.¹⁰⁵ In other words, “state practice” is not self-fulfilling or self-explanatory’.¹⁰⁶ As a consequence, the assessment of *opinio juris* acquires a particularly fundamental importance with regard to contrary practice in the case of prohibitive norms.¹⁰⁷ If every violation of the rule was, by its simple existence, capable of amending the law — as is sometimes suggested — there would be no stability in international regulation. In fact, an essential conceptual

¹⁰¹ James Crawford has used the terms ‘proto-legal steps’ to qualify attempted changes to rules of customary international law through contrary or innovative state practice: See James Crawford, ‘Chance, Order, Change: The Course of International Law’ (2013) 365 *Collected Courses of the Hague Academy of International Law* 9, 64–6.

¹⁰² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 98 [186] (*‘Military and Paramilitary Activities Case’*).

¹⁰³ *Ibid* 109 [207].

¹⁰⁴ *Ibid* 108–9 [207].

¹⁰⁵ *Ibid*. See Prosper Weil, ‘Le droit international en quête de son identité: Cours général de droit international public’ (1992) 237 *Recueil des cours de l’Académie de droit international de La Haye* 9, 169–70.

¹⁰⁶ Alexander Orakhelashvili, ‘Changing *Jus Cogens* through State Practice? The Case of the Prohibition of the Use of Force and Its Exceptions’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) 157, 159.

¹⁰⁷ See, eg, Max Sørensen, ‘Principes de droit international public: Cours général’ (1960) 101 *Recueil des cours de l’Académie de droit international de La Haye* 1, 40; Théodore Christakis and Karine Mollard-Bannelier, ‘*Volenti non fit injuria?* Les effets du consentement à l’intervention militaire’ (2004) 50 *Annuaire français de droit international* 102, 121.

characteristic of any prohibitive law — as opposed to physical laws — is that it *can* be violated.¹⁰⁸ To take only one example, there are countless cases of violations of human rights or humanitarian law that are not followed by any kind of protest by third states. If we were to accept that every unaddressed violation is capable of amending the law, there would no longer be rules of humanitarian law or human rights law.¹⁰⁹ But a violation of a pre-existing customary norm does not necessarily represent *contrary practice* that will affect the validity of such norm. As the ICJ made clear in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* case, *only* — are we tempted to add — ‘[r]eliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law’.¹¹⁰

The potential legal effects of precedents will therefore depend primarily on the claims accompanying the infringing acts and, of course, their reception by the international community.¹¹¹ In some cases, states deliberately decide to violate international law. This conduct can either be motivated by a calculus of the costs and benefits of such a decision, or be the result of ignorance of some relevant facts

¹⁰⁸ Josef Kunz has demonstrated this with utmost clarity in several of his writings: see especially Josef L Kunz, ‘Plus de lois de la guerre?’ (1934) 41 *Revue générale de droit international public* 22, 29: ‘Toutes les lois internes ou internationales, sont violées ou peuvent être violées : cela ne met point en question leur caractère juridique. Personne ne conteste que les lois criminelles sont des lois, et tout le monde sait qu’elles sont fréquemment violées, tout le monde sait également qu’elles sont parfois violées sans qu’on réussisse à punir le coupable. Il ne faut pas oublier que la possibilité d’être violées est une qualité inhérente à toutes les normes juridiques. La règle juridique est typiquement ainsi conçue : si tel ou tel fait (ou ne fait pas) telle chose, il sera puni (ou sera sujet à une exécution civile). La norme prévoit donc sa propre violation. Si le droit était incapable d’être violé ou s’il y avait une garantie absolue que personne ne le violera, nous n’aurions point besoin de normes juridiques.’ See also Mendelson, above n 35, 214: ‘it is not what States do that counts, but what they *say* about what they do. ... All legal systems know of deviations from the law, but deviations do not of themselves change the law’.

¹⁰⁹ See Bruno Simma and Philip Alston, ‘The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles’ (1988) 12 *Australian Year Book of International Law* 82, 97–100; Martti Koskenniemi, ‘The Pull of the Mainstream’ (1990) 88 *Michigan Law Review* 1946, 1959–60; Christian Dominicé, ‘La société internationale à la recherche de son équilibre: Cours général de droit international public’ (2013) 370 *Recueil des cours de l’Académie de droit international de La Haye* 9, 90–1; Anthea Elizabeth Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’ (2001) 95 *American Journal of International Law* 757, 776.

¹¹⁰ *Military and Paramilitary Activities Case* [1986] ICJ Rep 14, 109 [207].

¹¹¹ Abi Saab, ‘La notion de «pratique» en droit international: la pratique et la théorie des sources du droit international’, above n 100, 94: ‘Ce qui ... confère [à la pratique] une signification juridique, c’est la qualification juridique qu’il charrie, par une sorte d’auto interprétation, explicite ou implicite, de l’auteur du comportement, de ce qu’il a fait et où il le situe dans le canevas juridique, d’une part; et la façon dont ce comportement ainsi qualifié est reçu par la communauté juridique internationale, d’autre part, qu’il s’agisse d’approbation, de rejet ou d’indifférence.’ See also Abi Saab, ‘Le droit international à la croisée des chemins: Force du droit et droit de la force’, above n 100, 203; Orakhelashvili, above n 106, 160; Starski, ‘Silence within the Process of Normative Change and Evolution of the Prohibition on the Use of Force’, above n 2, 32.

or of the applicable law, on behalf of the authorities.¹¹² It does not, by any means, necessarily occur because of a strongly held belief that the action is or should be lawful as a matter of principle.¹¹³ Indeed, in many cases of ‘ordinary’ violations, governments recognise the illegality of their agents’ conduct after the fact.

A problem seldom addressed by authors who argue that third states acquiesced to the claims made by the states intervening in Syria relates to the identification of the legal claims that are allegedly being acquiesced to.¹¹⁴ States intervening in Syria do so under diverging legal rationales — if they advance a legal basis for their actions at all, which has not always been the case.¹¹⁵ Although these claims can be qualified as ‘revisionist’ when contrasted with previous consensual understandings of the scope of the prohibition on the use of force, and the right of self-defence, they are not necessarily compatible with each other.¹¹⁶

Less common are the cases where states openly assume the unlawfulness of their actions and show readiness to assume the cost of noncompliance. Most of the time when states deliberately decide to violate their obligations, they either try to conceal the facts¹¹⁷ or invoke purported exceptions to the applicable rules — in

¹¹² Scharf overlooks this possibility: see Scharf, above n 2, 10–11: ‘To illustrate this process, consider the question of whether international law permits a State to use force to arrest a terrorist leader in another State without the latter’s consent ... The claim may be express, such as demanding that its special forces be allowed to enter the territorial State to arrest the terrorist, or implicit, such as sending its special forces into the territorial State without its permission to apprehend the terrorist.’ This is tantamount to affirming that a state cannot intentionally violate international law, as all its actions are based on a — sometimes mistaken — belief that they are legally justified. In Scharf’s example, it would be equally — if not more — plausible to assume that the effective conduct of sending special forces is made on an ad hoc basis, without the intention to challenge the established rules.

¹¹³ See David J Bederman, ‘Acquiescence, Objection and the Death of Customary International Law’ (2010) 21 *Duke Journal of Comparative & International Law* 31, 37: ‘Sometimes a violation of a CIL norm is just that — an unlawful act that does not really purport to establish a new rule.’

¹¹⁴ Starski underlines the ambiguity and indeterminacy of these claims: but see Starski, ‘Silence within the Process of Normative Change and Evolution of the Prohibition on the Use of Force’, above n 2, 45–65.

¹¹⁵ It seems, thus, that some of the Arab states involved in the use of armed force on Syrian territory did neither invoke the right of self-defence nor affirm the lawfulness of their action in any other way. See Olivier Corten, ‘L’argumentation des États européens pour justifier une intervention contre l’«État islamique» en Syrie: Vers une reconfiguration de la légitime défense?’, above n 2, 55–6; Tom Ruys and Luca Ferro, *Divergent Views on the Content and Relevance of the Jus ad Bellum in Europe and the United States? The Case of the US-Led Military Coalition Against ‘Islamic State’* (10 February 2016) Social Science Research Network, 6 <<http://papers.ssrn.com/abstract=2731597>>. To the contrary, these states have rejected the comparable legal rationale advanced by Turkey in order to justify its intervention on Iraqi territory. See *Identical Letters Dated 17 October 2016 from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary-General and the President of the Security Council*, UN SCOR, UN Doc S/2016/870 (17 October 2016) 2–3, citing *Resolution 653* of the Council of the Arab League of 25 July 2016.

¹¹⁶ For an assessment of the merits of the claims of the intervening states, see, eg, Ignaz Stegmüller, ‘The Right of Self Defence under Article 51 of the *UN Charter* against the Islamic State in Iraq and the Levant’ (2015) 90 *Die Friedens Warte: Journal of International Peace and Organization* 245; Patrick Terry, ‘Germany Joins the Campaign against ISIS in Syria: A Case of Collective Self-Defence or Rather the Unlawful Use of Force?’ (2016) 4 *Russian Law Journal* 26; Corten, ‘L’argumentation des États européens pour justifier une intervention contre l’«État islamique» en Syrie: Vers une reconfiguration de la légitime défense?’, above n 2.

¹¹⁷ Olivier Corten cites several examples: see, Olivier Corten, ‘Breach and Evolution of Customary International Law on the Use of Force’, above n 36, 123–4.

which case they may end up contributing to the consolidation of the rule rather than to its erosion or modification.¹¹⁸ A famous episode is the address of German Chancellor Theobald von Bethmann Hollweg to the Reichstag in 1914 where he admitted the illegal nature of the invasion of Belgium and Luxemburg, though attempting to justify it in extra-legal terms (*Not kennt kein Gebot!*).¹¹⁹ Such accompanying statements have the effect of a disclaimer, excluding the impugned conduct from the practice capable of affecting customary international law.¹²⁰ The arguments based on the sui generis characteristic of a case — as well as the view according to which a conduct is ‘unlawful *but* legitimate’ — also fall in this category, since they reflect the acting state’s care to avoid framing its actions as the assertion of a broader normative claim.¹²¹ This seems to have been the case for the states involved in the North Atlantic Treaty Organization (‘NATO’) intervention against the Federal Republic of Yugoslavia in 1999, who refrained from openly relying on the doctrine of humanitarian intervention.¹²² Another example of such ‘ordinary’ violations of international law are the numerous alleged violations of airspace committed in the Aegean Sea, Baltic region, and Cyprus.¹²³ There are reasons to doubt, to say the least, that the authors of such acts consider them to call into question the principle of aerial sovereignty.

As a consequence, it is submitted here that the evidentiary weight of inaction of third states confronted with such ‘simple’ violations of international law is

¹¹⁸ See *Military and Paramilitary Activities Case* [1986] ICJ Rep 14, 98 [186]: ‘If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.’

¹¹⁹ The overall German legal argument, as expressed in diplomatic correspondence, was arguably more equivocal and can be subjected to diverging interpretations. See Etienne Henry, *Le principe de nécessité militaire: Histoire et actualité d’une norme fondamentale du droit international humanitaire* (Editions Pedone, 2017) 335–8.

¹²⁰ Committee on Formation of Customary (General) International Law, above n 20, 36: ‘Some specific instances of State practice would be capable of giving rise to a customary rule, but for a disclaimer on the part of those performing them.’ See also *Report of the International Law Commission on the Work of its 68th Session*, UN Doc A/71/10 (2 May – 10 June and 4 July – 12 August 2016) 99–100 (commentary to conclusion 10, para 3): ‘the effect of practice in line with the supposed rule may be nullified by contemporaneous statements that no such rule exists’.

¹²¹ See Corten, ‘Breach and Evolution of Customary International Law on the Use of Force’, above n 36, 134–5.

¹²² With regard to Germany, see, eg, Bruno Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’ (1999) 10 *European Journal of International Law* 1, 12–13. See also Anthea Roberts, ‘Legality versus Legitimacy: Can Uses of Force be Illegal but Justified?’ in Philip Alston and Euan MacDonald (eds), *Human Rights, Intervention and the Use of Force* (Oxford University Press, 2008) 179, 188: ‘It is true that if states simply breach the *Charter*, then they leave the *Charter* norms intact by not attempting to stretch the interpretation of the law to fit the situation.’ More recently, the German government has acknowledged the illegality of its participation in the intervention against the Federal Republic of Yugoslavia: see Stefan AG Talmon, ‘At Last! Germany Admits Illegality of the Kosovo Intervention’ (2014) 57 *German Yearbook of International Law* 581.

¹²³ For lists of alleged infringements of Cypriot airspace by Turkish aircrafts, see, eg, *Letter Dated 13 December 2016 from the Permanent Representative of Cyprus to the United Nations Addressed to the Secretary-General*, UN GAOR, 71st sess, Agenda Item 41, UN Doc A/71/684-S/2016/1050 (14 December 2016); *Letter Dated 25 January 2017 from the Permanent Representative of Cyprus to the United Nations Addressed to the Secretary-General*, UN GAOR, 71st sess, Agenda Item 41, UN Doc A/71/766-S/2017/74 (26 January 2017).

neutral. Changes in the law can only occur because of the emergence of a belief, on behalf of an overwhelming majority of states, in the need for a change in the law, as is well illustrated by the term *opinio juris sive necessitates* — or, at least, an acceptance that such a change has already taken place. If violations are not accompanied by claims as to their alleged lawfulness, they are deprived of any significance for the customary process. They are thus unable to influence the latter, even if met with general indifference.¹²⁴

D The Time Factor

The passing of time plays an important role in the context of ‘classical’ customary law, involving the actions and reactions of states at the occasion of specific incidents — or ‘wise custom’ (*coutume sage*), to use the expression coined by René-Jean Dupuy.¹²⁵ Only the repetition of similar incidents will lead to the accumulation of enough ‘evidentiary material’ to allow for a conclusion on the creation, modification or abrogation of a given customary rule. In the case of ‘modern’ customary law (or ‘wild custom’: *coutume sauvage* in Dupuy’s terms), the relevance of the time element can be relativised.¹²⁶ Diplomatic conferences and the adoption of declarative resolutions by organs of international organisations are the occasion for the production of a wide array of verbal state practice, in a relatively short period of time.¹²⁷ As all states participating in such deliberative exercises are given the opportunity to be heard, it seems that customary law can potentially develop quickly in this context, as was recognised by the ICJ in the *North Sea Continental Shelf (Federal Republic of Germany v Denmark)* case:

Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; — and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.¹²⁸

This was also made clear with regards to *Resolution 1803 (XVII)* of the UNGA by the same René-Jean Dupuy — this time in his role as sole arbiter — in the

¹²⁴ Kunz, above n 53, 668: ‘Repeated violations of international law may have occurred, without changing the conviction that they constitute violations, but they may also have been committed with the *opinio juris* of creating new international law. That is, e.g., now the crucial and basic problem in the chaotic status of the laws of war.’

¹²⁵ See René-Jean Dupuy, ‘Coutume sage et coutume sauvage’ in Suzanne Bastid (ed), *Mélanges offerts à Charles Rousseau: La communauté internationale* (Editions Pedone, 1974) 75.

¹²⁶ Ibid 75. See further, on these distinctions, Georges Abi Saab, ‘La coutume dans tous ses états’ in Marcelo G Kohen and Magnus Jesko Langer (eds), *Le développement du droit international: réflexions d’un demi siècle* (Graduate Institute Publications, 2015) vol 1, 81. See also Roberts, ‘Traditional and Modern Approaches to Customary International Law’, above n 109, 784–91.

¹²⁷ See, eg, Bin Cheng, *Studies in International Space Law* (Clarendon Press, 1997) ch 7.

¹²⁸ *North Sea Continental Shelf* [1969] ICJ Rep 3, 43 [74].

award on the merits rendered in 1977 in the *Texaco/Calasiatic c Gouvernement libyen* case.¹²⁹

But the time element still warrants a cautious approach in the context of ‘traditional’ custom, built upon the accumulation of precedents involving the material conduct of a state — potentially in breach of the *lex lata* — and its reception by other states.¹³⁰ This is so for the simple reason that evidence of state practice and *opinio juris* should be sufficiently ‘uniform, extensive, and representative’ in character and that ‘normally some time will elapse before there is sufficient practice to satisfy these criteria’.¹³¹ The actions and reactions of a few states on the occasion of a limited number of incidents do not lead to the accumulation of conclusive evidentiary materials.¹³² Only the passing of time will allow the ‘sedimentation’ of a body of practice and *opinio juris* able to evidence a change of the law. This point finds support in the recent case law of the ICJ. In the *Dispute regarding Navigational and Related Rights* case, even though the right in question was confined to local custom in the framework of an essentially bilateral relationship, it is significant that the Court noted that the practice in question ‘had continued undisturbed and unquestioned over a very long period’.¹³³

It appears consonant with the principle of good faith — which is at the basis of the whole notion of acquiescence — to leave some reasonable time for deliberation before arriving at a conclusion about the acquiescence of a state affected by a given conduct.¹³⁴ In the *Gulf of Maine* case, the Court relied, together with other elements, on the short duration of the silence of US authorities, in order to discard the Canadian claim that the US had acquiesced to the delimitation by way of a median line.¹³⁵ This should a fortiori apply when the impugned reaction is that of such a multiform and complex body as the ‘international community of States’.¹³⁶ According to the ILC commentary to draft conclusion 10, para 3, ‘[w]here a State ... has not yet had a reasonable time to respond, inaction cannot be attributed to an acknowledgment that such practice was mandated (or permitted) under

¹²⁹ Jean-Flavien Lalive, ‘Un grand arbitrage pétrolier entre un gouvernement et deux sociétés privées étrangère: arbitrage *Texaco/Calasiatic c Gouvernement libyen*’ (1977) 104 *Journal du Droit International* 319, annex (‘*Sentence arbitrale au fond*’) 379 [87]: ‘En fonction des conditions de vote précédemment évoquées et traduisant une «*opinio juris communis*», la résolution 1803 (XVII) paraît au Tribunal de céans refléter l’état du droit coutumier existant en la matière. En effet, à partir du vote d’une résolution constatant l’existence d’une règle coutumière, les États expriment clairement leur opinion. L’acquiescement en l’espèce d’une majorité d’États appartenant aux différents groupes représentatifs indique sans ambiguïté la reconnaissance universelle des règles incorporées, à savoir en ce qui concerne les nationalisations et l’indemnisation, l’utilisation des règles en vigueur dans l’État nationalisant, mais cela en conformité avec le droit international.’

¹³⁰ See Michael Byers, ‘The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq’ (2002) 13 *European Journal of International Law* 21, 28. See also ILC, *Provisional Summary Record of the 3252nd Meeting*, UN Doc A/CN.4/SR.3252 (12 April 2016) 6 (Hassouna) affirming that ‘a persistent and long-term inaction might also serve as evidence of acceptance as law’, and 15 (Kamto) mentioning a ‘sufficient period of time’.

¹³¹ See Committee on Formation of Customary (General) International Law, above n 20, 20.

¹³² See Buzzini, ‘Les comportements passifs des États’, above n 56, 105.

¹³³ *Dispute regarding Navigational and Related Rights* [2009] ICJ Rep 213, 265–6 [141]. See also Bederman, above n 113, 34: ‘In these bilateral situations, it appears especially incumbent on States to protest if they are unhappy with the legal positions taken by their neighbors.’

¹³⁴ See Brüel, above n 19, 84–5.

¹³⁵ *Gulf of Maine Case* [1984] ICJ Rep 246, 308 [140], 310 [148].

¹³⁶ *VCLT* art 53.

customary international law'.¹³⁷ In light of this statement, it appears that the almost instantaneous flourishing of academics in the scientific literature (especially on blogs) proclaiming radical changes in the law on the occasion of every major international incident is often misplaced.

Indeed, sometimes third states take several decades to affirm a clear *opinio juris* in relation to a specific incident, as was attested to in 2016 by the adoption of a resolution of the Organisation of American States ('OAS') on the role of the organisation at the occasion of the 1965 US invasion of the Dominican Republic — which was, at the time, neither condemned by the Security Council nor by the UNGA.¹³⁸ In this text, the General Assembly of the OAS '[l]aments the loss of human lives and expresses the Organization's condolences to the Dominican people.'¹³⁹ It then '[e]xpresses regret to the Dominican people for the actions of April 1965, which disrupted the process of restoration of the constitutional order in the Dominican Republic'.¹⁴⁰ And finally it '[r]eaffirms the principles of international law, the *Charter of the United Nations*, and the *Charter of the Organization of American States*'.¹⁴¹ While the Assembly stopped short of explicitly declaring the intervention unlawful, the text of the resolution — including its preamble — can hardly support another interpretation.

IV ASSESSING THE MEANING OF SILENCE OF STATES IN THE LIGHT OF EXTRANEOUS FACTORS

Governments and authors are often tempted to (and often do) interpret the alleged silence of third states in a self-serving way. From this perspective, the view of Stefan Talmon, according to whom '[t]he inductive method [of ascertainment of customary international law] is as subjective, unpredictable and prone to law creation by the Court as the deductive method' appears entirely justified.¹⁴² It is in fact impossible to distinguish between intentional inaction based on *opinio juris* and silence motivated by political expediency or other extra-legal motives, without reference to (and an assessment of) circumstantial elements of each specific situation.¹⁴³ It is submitted here that, as a rule, in the case of revisionist challenges to a well-established rule of customary law, the presumption should go with the legal status quo, rather than with general acquiescence.¹⁴⁴ As was affirmed in 1973 by the Attorney-General of the United Kingdom in the *Fisheries Jurisdiction*

¹³⁷ *Report of the International Law Commission on the Work of its 68th Session*, UN Doc A/71/10, 101.

¹³⁸ Christine D Gray, *International Law and the Use of Force* (Oxford University Press, 3rd ed, 2009) 91.

¹³⁹ *Declaration on the Dominican Republic*, OAS GA Dec 94 (XLVI-O/16), OAS GAOR, 46th sess, 4th plen mtg, OAS Doc AG/DEC. 94 (XLVI O/16) (15 June 2016) 37.

¹⁴⁰ *Ibid* 37.

¹⁴¹ *Ibid*.

¹⁴² Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 *European Journal of International Law* 417, 443.

¹⁴³ *Summary Record of the 20th Meeting*, UN GAOR, 6th Comm, 71st sess, 20th mtg, Agenda Item 78, UN Doc A /C.6/71/SR.20 (11 November 2016) 11 [51] (Lehto (Finland) speaking on behalf of the Nordic countries). See also Buzzini, 'Les comportements passifs des États', above n 56, 87: 'Il semble bien que seuls des facteurs extrinsèques peuvent élucider la valeur juridique d'un silence.'

¹⁴⁴ But see Wolfke, above n 27, 36, 54–5.

(*United Kingdom v Iceland*) case, ‘[the] burden of proof rests very clearly upon those who wish to challenge the established law’.¹⁴⁵ This position is also clearly reflected in the *Cargill, Inc v Mexico* award, where an International Centre for Settlement of Investment Disputes (‘ICSID’) arbitral tribunal:

Acknowledge[d] that the proof of change in a custom is not an easy matter to establish. However, the burden of doing so falls clearly on Claimant. If Claimant does not provide the Tribunal with the proof of such evolution, it is not the place of the Tribunal to assume this task. Rather the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.¹⁴⁶

In sum, states should not lightly be perceived as having radically changed their mind until they openly say so or, at least, until it can be *unequivocally* implied from their behaviour. This flows from the approach adopted by the ICJ, according to which acquiescence should be ‘unequivocally implied from the conduct of the State’.¹⁴⁷ It would be aberrant to assume that a state has adopted a new approach to the desirability of a norm or even to its validity or scope without bothering to communicate it to other states.¹⁴⁸ In this regard, Mahmoud Hmoud correctly stressed that ‘[s]ilence or inaction therefore had to be corroborated by a positive general reaction from other States in order to be considered as evidence of acquiescence’.¹⁴⁹ This is not to say that universal acceptance cannot be presumed once the demonstration of ‘general acquiescence’ has been satisfactorily realised.¹⁵⁰

Acquiescence can only be assumed when a state considers that there was no violation at all because it believes that the impugned actions, although they actually occurred, were not a violation of international law in the first place. This is what has been termed benevolent silence *de lege lata*.¹⁵¹ Before making a

¹⁴⁵ ‘Oral Arguments on the Merits of the Dispute Submitted by the Government of Great Britain and Northern Ireland’, *Fisheries Jurisdiction (United Kingdom v Iceland) (Merits)* [1974] ICJ Pleadings 436, 461 (Samuel Silkin). See also *Rights of Nationals of the United States of America in Morocco (France v United States of America) (Judgment)* [1952] ICJ Rep 176, 200 (‘*Rights of US Nationals in Morocco*’), quoting *Asylum (Colombia v Peru) (Judgment)* [1950] ICJ Rep 266, 276–7 (‘*Colombian-Peruvian Asylum*’); ‘Submission of the United States of America’, *al Tamimi v Oman* (ICSID Arbitral Tribunal, Case No ARB/11/33, 22 September 2014) 2–3 [6], quoting *Cargill, Inc v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/05/2, 18 September 2009) 75 [273] (‘*Cargill, Inc v Mexico*’); *Provisional Summary Record of the 3226th Meeting*, UN Doc A/CN.4/SR.3226, 4 (Huang). See also Malanczuk, above n 27, 41; Starski, ‘Silence within the Process of Normative Change and Evolution of the Prohibition on the Use of Force’, above n 2, 26; Orakhelashvili, above n 106, 166.

¹⁴⁶ *Cargill, Inc v Mexico* (ICSID Arbitral Tribunal, Case No ARB(AF)/05/2, 18 September 2009) 75 [273].

¹⁴⁷ *Armed Activities* [2005] ICJ Rep 168, 296 [293].

¹⁴⁸ See Marcelo G Kohen, ‘The Use of Force by the United States after the End of the Cold War, and Its Impact on International Law’ in Michael Byers and Georg Nolte (eds), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003) 197, 224: ‘One could expect to obtain clear-cut statements in order to show that a rule in general, and especially one of the importance of that related to the use of force in particular, has changed.’

¹⁴⁹ *Provisional Summary Record of the 3251st Meeting*, UN Doc A/CN.4/SR.3251, 6 (Hmoud).

¹⁵⁰ See especially R Y Jennings, ‘General Course on Principles of International Law’ (1967) 121 *Collected Courses of the Hague Academy of International Law* 323, 336; Brigitte Stern, ‘Custom at the Heart of International Law’ (Michael Byers and Anne Denise trans) (2001) 11 *Duke Journal of Comparative & International Law* 89, 98–100 (and the references).

¹⁵¹ See Buzzini, ‘Les comportements passifs des États’, above n 56, 88.

finding on acquiescence to a revisionist claim under customary international law, all other potential motives for remaining silent should be therefore, if not entirely discarded — as several motives can sometimes coexist — at least proven less plausible than acquiescence to a revisionist normative claim.¹⁵² Bringing evidence of an attitude of benevolent silence *de lege lata* might prove difficult in practice as inaction is often the result of political convenience.¹⁵³ This suggested approach finds support in the jurisprudence of the ICJ on the notion of acquiescence. In the *Gulf of Maine* case, the Court thus affirmed that acquiescence ‘presupposes clear and constant acceptance’.¹⁵⁴ In short, the failure to condemn a course of action (or omission) in legal terms is not necessarily conclusive of acceptance of the revisionist normative claims, but can often be explained more plausibly by other ‘extraneous’ factors.¹⁵⁵ These factors can be legal (Part (A)) and extra-legal (Part (B)).

A Legal Factors

Acquiescence to a normative claim under customary international law should not be confused with expressions of (potentially tacit) consent for other purposes. It is indeed important to distinguish between acquiescence as unilateral conduct, capable of immediately affecting the subjective rights and obligations of states, from acquiescence as evidential fact, in other words a fact supporting (or undermining) the customary law character of a general and abstract normative proposition. An instance of this phenomenon can be observed in the context of late objections to reservations to a multilateral treaty. If a state party to a multilateral treaty expresses its opposition to a reservation of another state party after the twelve-month period provided for in art 20(5) of the *Vienna Convention on the Law of Treaties*, such declaration arguably no longer deploys the legal effects of an objection to that reservation.¹⁵⁶ As a declaration emanating from the

¹⁵² *Third Report on Identification of Customary International Law*, UN Doc A/CN.4/682, 11 [22]. This is not necessarily incompatible with the approach advocated by Max Sørensen, according to whom *opinio juris* can be presumed once a general practice has been proved to exist: Sørensen, above n 107, 51. As a rule, in the case of revisionist *claims*, the general practice is not yet existent.

¹⁵³ See *Summary Record of the 23rd Meeting*, UN GAOR, 6th Comm, 71st sess, 23rd mtg, Agenda Item 78, UN Doc A/C.6/71/SR.23 (14 November 2016) 4 [15] (Garshasbi (Islamic Republic of Iran)).

¹⁵⁴ *Gulf of Maine Case* [1984] ICJ Rep 246, 309 [145], citing *North Sea Continental Shelf* [1969] ICJ Rep 3, 26. In this passage, the Court relied on its previous case law concerning estoppel. See also Kohen, ‘The Use of Force by the United States after the End of the Cold War, and Its Impact on International Law’, above n 148, 224; Olivier Corten, ‘The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate’ (2005) 16 *European Journal of International Law* 803, 817–18.

¹⁵⁵ For the statement by the Australian delegate at the Sixth Committee, see *Summary Record of the 21st Meeting*, UN Doc A/C.6/71/SR.21, 4 [17] (Robertson): ‘inaction should not be assumed to be evidence of acceptance of law’. See also the position of several European states in the context of the use of drones for targeted killing: Paulussen and Dorsey, above n 88, 20–1.

¹⁵⁶ See *Report of the International Law Commission on the Work of its 62nd Session*, UN GAOR, 65th sess, Supp No 10, UN Doc A/65/10 (2010) 365, guideline 2.6.15: ‘An objection to a reservation formulated after the end of the time period specified in guideline 2.6.13 does not produce the legal effects of an objection made within that time period.’ See also Christian Walter, ‘Article 20: Acceptance of and Objection to Reservations’ in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012) 287, 306 [56].

representative organs of the state, such a statement is nevertheless potentially indicative — subject to its wording — of the *opinio juris* of the author state.

As inaction is only one of the means available to identify the *opinio juris* of a state, and probably the most problematic, the failure to protest against a breach committed by a third state is certainly no evidence of acquiescence when the state in question has taken care to communicate its views on the legal issues raised by the situation through other means. For this reason, attention should be paid to the adoption of general declarations such as those adopted by groupings of states such as the Non-Aligned Movement, the BRICS (Brazil, Russia, India, China and South Africa) or the Group of 20, even though they do not necessarily contain explicit condemnations of (or even references to) a specific incident. Such collective declarations are as valid a means to communicate *opinio juris* as individual statements, provided that individual states do not dissociate themselves from their content.¹⁵⁷ Unfortunately, they often tend to be ignored in the current debates surrounding the possible evolution of certain rules of *jus contra bellum*.

This is not the place to proceed with an analysis of the impact that such declarations can have on any specific issue. It should be noted that some of these declarations might raise questions of interpretation as they are limited to a restatement of the applicable law in very general terms. But here again, the presumption should rest with the previously accepted understanding of such law, unless it can be clearly inferred from the circumstances that the authors of the declaration intended to support a revisionist interpretation. An illustration of this is the following statement by the Community of Latin American and Caribbean States in which the organisation ‘emphasize[d] that only those measures taken in accordance with the *Charter of the United Nations* and other relevant international norms can be successful and enjoy the broad support of the international community’.¹⁵⁸ Absent any mention or expression of approval for the revisionist claims regarding the scope of the right of self-defence formulated by some Western states, it would be unreasonable to assume that such a general statement entails acquiescence to such claims.

An explanation for the failure to protest can be found in the simple reason that states (rightly or wrongly) disagree with the factual basis of the victim state’s claim: if a state considers that there was no contrary practice in the first place, a reaction is certainly not expected. In the case of the violation of a norm that is not of an *erga omnes* nature, a state might refrain from expressing its views on the occasion of a given incident because of genuine indifference.¹⁵⁹ States sometimes also remain silent because they consider that a public reaction is not appropriate or would be pointless, because they choose to address the issue through confidential diplomatic channels or because they rely on the treatment given to the incident by the relevant international institutions. Third states might also consider that there was indeed a violation of an obligation *erga omnes* but that a condemnation would not be welcome given their conviction that there is a need to

¹⁵⁷ For a rather surprising assessment, see Roberts, ‘Legality versus Legitimacy’, above n 122, 189–90: ‘The Non Aligned Movement rejected the legality of unilateral humanitarian intervention in a ministerial meeting in September 1999. However, the vast majority of states did not declare NATO’s action to be legal or illegal.’

¹⁵⁸ *Verbatim Records of the 110th Plenary Meeting*, UN GAOR, 70th sess, 110th plen mtg, Agenda Item 117, UN Doc A/70/PV.110 (1 July 2016) 4.

¹⁵⁹ Skubiszewski, above n 53, 845–6.

adapt the law to new realities (*opinio juris sive necessitatis*). This attitude can be qualified as benevolent silence *de lege ferenda*.¹⁶⁰ In such a case, a state refrains from condemning an action — although it considers it unlawful under positive law — because it is intending to contribute to or at least not to impinge upon the development of the law. Thus, the Head of the International Legal Office of the Spanish Ministry of Foreign Affairs seems willing to express support *de lege ferenda* to the claims of some of the European states involved in the intervention in Syria. According to him:

in light of recent developments in international law, a compelling case could be made to equate Daesh (with its aspiration to become ISIS or the Islamic State, its defined population, and its *de facto* control of a defined territory) to the traditional perpetrator of the acts for which Article 51 of the *Charter* may be invoked, even though it is not, strictly speaking, a state.¹⁶¹

The distinction between acquiescence as unilateral conduct with immediate implications on the rights and/or obligations of the concerned state, and ‘acquiescence’ as an indication of the states’ *opinio juris*, was also made clear by the ICJ in the *Right of Passage over Indian Territory (Portugal v India)* case where the Court clearly distinguished between, on the one hand, the unqualified customary right of passage for private persons, civil officials and goods in general, and, on the other hand, the passage of police, armed forces and ammunition, with previous ad hoc authorisation by the Indian authorities.¹⁶² Tolerance of an otherwise unlawful act, on an ad hoc basis, may constitute a circumstance precluding wrongfulness, provided that the consent has been expressed validly.¹⁶³ But the fact that a state has consented to a certain conduct by another state on a punctual basis cannot be interpreted as agreement with the claim that the action was in any case lawful — unless circumstances clearly suggest otherwise. To the contrary, the fact that consent was expressed indicates that the conduct would have been considered unlawful in its absence.¹⁶⁴ As was concisely put by Nigel White and Robert Cryer, ‘[r]eluctant tolerance does not evidence *opinio juris*’.¹⁶⁵

¹⁶⁰ Buzzini, ‘Les comportements passifs des États’, above n 56, 89–90.

¹⁶¹ José Martín and Pérez de Nanclares, ‘The Question of the Use of Force in Spanish Practice (2012–2015): A Legal Perspective’ (2015) 19 *Spanish Yearbook of International Law* 315, 328.

¹⁶² *Right of Passage over Indian Territory (Portugal v India) (Merits)* [1960] ICJ Rep 6, 39–43. See also Bos, above n 28, 239–40. See also *Jurisdiction of the European Commission of the Danube between Galatz and Braila (Advisory Opinion)* [1927] PCIJ (ser B) No 14, 36–7; *Rights of US Nationals in Morocco* [1952] ICJ Rep 176, 199–200.

¹⁶³ *Articles on the Responsibility of States for Internationally Wrongful Acts*, UN Doc A/RES/56/83, art 20.

¹⁶⁴ *Ibid* 73.

¹⁶⁵ Nigel D White and Robert Cryer, ‘Unilateral Enforcement of Resolution 687: A Threat Too Far?’ (1999) 29 *California Western International Law Journal* 243, 246. See also Corten, ‘Breach and Evolution of Customary International Law on the Use of Force’, above n 36, 134, quoting M Byers, ‘The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq’ (2002) 13 *European Journal of International Law* 21, 35.

Assessing the meaning of inaction is more delicate in the case of the (controversial) figure of implicit consent.¹⁶⁶ But even if implicit or passive consent could be admitted as a valid circumstance precluding wrongfulness for the purpose of international responsibility (and in any case only with prospective or *ex nunc* and no retroactive effects), any inference as to the *opinio juris* of the consenting government would carry little evidentiary weight when faced with clear and express declarations of the same government on the same legal issues. The Syrian intervention is an instance of this, as, at the early stages of the US intervention in Syria, the attitude of the Syrian government was legally ambiguous — although understandable from a *strategic* and *political* viewpoint — since it did not appear to clearly condemn the coalition's intervention against ISIL. This passivity led some commentators to argue that the Syrian government had somehow implicitly consented or acquiesced to the intervention on its soil.¹⁶⁷ If this was the case, and if the theory of implied consent was to be admitted under international law — which remains disputed — it would turn the precedent into a case of intervention by invitation, and the claims of self-defence would have entirely lost their relevance and *raison d'être*.¹⁶⁸ But in any case, the approach of the Syrian government at the time cannot be interpreted as an acceptance of the normative claims regarding the revisionist interpretation of the right of self-defence, for the simple reason that the Syrian government expressly and

¹⁶⁶ The commentary of the International Law Commission is rather negative in this regard: see *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, UN Doc A/56/10, art 20, [6]: 'Consent must be freely given and clearly established. It must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked.'

¹⁶⁷ See, eg, Ryan Goodman, 'Taking the Weight off of International Law: Has Syria Consented to US Airstrikes?' on *Just Security* (23 December 2014) <<https://www.justsecurity.org/18665/weight-international-law-syria-consented-airstrikes/>>, archived at <<https://perma.cc/W95F-77V7>>; Monica Hakimi, 'Defensive Force against Non-State Actors: The State of Play' (2015) 91 *International Law Studies* 1, 27; Kinga Tibori-Szabó, 'The "Unwilling or Unable" Test and the Law of Self-Defence' in Christophe Paulussen et al (eds), *Fundamental Rights in International and European Law: Public and Private Law Perspectives* (TMC Asser Press, 2016) 73, 94; Stegmiller, above n 116, 247. See also, although stressing the fragility of such a legal basis, Louis Balmond, 'Chronique des faits internationaux' (2014) 118 *Revue générale de droit international public* 898, 903; Franck Latty, 'Le brouillage des repères du *jus contra bellum*: À propos de l'usage de la force par la France contre Daech' (2016) 120 *Revue générale de droit international public* 11. But see, questioning both the validity and the applicability *in casu* of the so-called theory of 'passive consent', Karine Bannelier-Christakis, 'Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent' (2016) 29 *Leiden Journal of International Law* 743, 766–73. See also, discarding acquiescence at least from September 2015, Raphaël Van Steenberghe, 'From Passive Consent to Self-Defence after the Syrian Protest against the US-Led Coalition' on *EJIL: Talk!* (23 October 2015) <<https://www.ejiltalk.org/13758-2/>>, archived at <<https://perma.cc/3BEJ-ZYAX>>. Olivier Corten admits the possibility of consent based on 'simple tolerance': see generally Olivier Corten, *Le droit contre la guerre: L'interdiction du recours à la force en droit international contemporain* (Editions Pedone, 2014) 446–8; Daniel Bethlehem, 'Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 *American Journal of International Law* 769, 777.

¹⁶⁸ See Joint Committee on Human Rights, *The Government's Policy on the Use of Drones for Targeted Killing: Second Report of Session 2015–16*, House of Lords Paper No 14, House of Commons Paper No 574, Session 2015–16 (2016) 95 [10] <<http://www.publications.Parliament.uk/pa/jt201516/jtselect/jtrights/574/574.pdf>>, archived at <<https://perma.cc/T79X-KP8M>>.

beforehand rejected the validity of such an interpretation.¹⁶⁹ Moreover, the Syrian government has demonstrated that it was perfectly capable of having recourse to the instrument of intervention by invitation when it later asked the Russian Federation to support it in its fight against insurgent groups. In these circumstances, it would be unreasonable to claim that Syria has — at any point in time — acquiesced to the interpretations of the right of self-defence advanced by the intervening governments (or other possible legal rationales justifying the unconsented use of force on its territory). The issue of the predominantly political motivation for inaction is probably more delicate than the legal factors assessed above.

B *Extra-Legal Factors*

A preliminary — though essential — point is that the political motivations for states' actions or omissions are, in themselves, no sufficient cause to discard the potential legal relevance of the actions or omissions. This flows from the fact that 'law and politics are not mutually exclusive concepts'.¹⁷⁰ But this should not distract us from the fact that the political and legal idioms are separate and pursue distinct goals. In the abovementioned *Texaco Calasiatic* award, the sole arbiter, René-Jean Dupuy, rejected the notion that a provision of the *Charter of Economic Rights and Duties of States* annexed to UNGA Resolution 3281 (XXIX)¹⁷¹ could reflect a broad legal consensus, as it was nothing more than a political declaration, supported only by non-industrialised states.¹⁷² In cases where states express political support, or condemnation, while refraining from publicly stating their assessment of the legality of a given act, a careful approach is preferred. The cautiousness of a state that chooses to express support for an intervention in political or ethical terms, but refrain from endorsing the legal rationale expressed by the acting state, should thus not necessarily be understood as acquiescence with the latter. To the contrary, on the legal plane, it shows nothing other than 'reluctant tolerance'. Indeed, it would not require much additional ink to include a statement on the legality of the conduct in such a political declaration, if that was the position of the government choosing to express political support for a given action. The omission of such a statement cannot lightly be interpreted as an oversight.

Motives of political opportunity that dictate a given action — in our case, inaction — and the inevitable biases that they engender sometimes betray legal inconsistencies in the practice of the concerned states. In the *Asylum (Colombia v*

¹⁶⁹ *Identical Letters Dated 28 August 2014 from the Permanent Representative of the Syrian Arab Republic to the United Nations Addressed to the Secretary-General and the President of the Security Council*, UN GAOR, 68th sess, Agenda Item 110, UN Doc A/68/984–S/2014/642 (28 September 2014) 2–3. See also *Verbatim Record of the 7271st Meeting*, UN SCOR, 7271st mtg, UN Doc S/PV.7271 (19 September 2014) 43 ('*Verbatim Record of the 7271st Meeting*').

¹⁷⁰ Hans J Morgenthau, 'The Machiavellian Utopia' (1945) 55 *Ethics* 145, 145. See also H Lauterpacht, *The Function of Law in the International Community* (Clarendon Press, 1933) 153–60; Hans Kelsen, *Peace through Law* (University of North Carolina Press, 1944) 26.

¹⁷¹ *Charter of Economic Rights and Duties of States*, GA Res 3281 (XXIX), UN GAOR, 29th sess, 2315th plen mtg, Agenda Item 48, Supp No 31, UN Doc A/RES/29/3281(XXIX) (12 December 1974) annex ('*Charter of Economic Rights and Duties of States*').

¹⁷² Lalive, above n 129, 379 [88]: 'En premier lieu, l'article 2 de cette Charte doit s'analyser comme une déclaration d'ordre politique plutôt que juridique entrant dans la stratégie idéologique du développement et, comme telle, soutenue par les seuls États non industrialisés.'

Peru) case, the ICJ thus warned against the risk of confusing motivations of political expediency underlying some decisions with expressions of *opinio juris*:

The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.¹⁷³

In a more and more divided world it becomes increasingly probable that states will adopt a biased approach, tolerating violations committed by their allies while condemning violations committed by their enemies or by lesser powers. A striking illustration of this is the Russian Federation's recourse — in the context of the intervention in Ukraine — to the arguments advanced to justify the NATO intervention in the Federal Republic of Yugoslavia.¹⁷⁴

Political motivations can also be a cause of 'internal' inconsistencies in the practice and the expression of *opinio juris* of the acting state.¹⁷⁵ In the *Frontier Dispute (Burkina Faso/Mali)* case, Burkina Faso thus argued that 'a State cannot disclaim in a particular instance rules and principles to which it has acquiesced in comparable circumstances, when their operation becomes disadvantageous to itself',¹⁷⁶ to which the Chamber answered that:

It is therefore of little significance whether Mali adopted a particular approach, ... and whether that approach may or may not be construed to reflect a specific position, or indeed to signify acquiescence, towards the principles and rules, including those which determine the respective weight of the various kinds of evidence applicable to the dispute. If these principles and rules are applicable as elements of law in the present case, they remain so whatever Mali's attitude.¹⁷⁷

This statement reflects the view that a general consensus is sufficient for a rule to become binding on all states. In other words, 'for a specific State to be bound by a rule of general customary international law it is not necessary to prove that it participated actively in the practice or deliberately acquiesced in it'.¹⁷⁸ But in this case the Chamber went further, as it did not even address the legal merits of the Malian argument. In fact, it squarely rejected the evidential weight of the approach

¹⁷³ *Colombian-Peruvian Asylum* [1950] ICJ Rep 266, 277.

¹⁷⁴ See the critical comments of Romualdo Bermejo García, 'De Kosovo a Crimea: La revancha rusa' (2014) 66(2) *Revista española de derecho internacional* 307. See also the prescient remark by Marcelo G Kohen, 'L'emploi de la force et la crise du Kosovo: Vers un nouveau désordre juridique international' (1999) 33 *Revue belge de droit international* 122, 145: 'Demain, d'autres groupes d'États pourraient eux aussi juger que leur passivité face à ces situations est intolérable.'

¹⁷⁵ The Committee on Formation of Customary (General) International Law establishes a distinction between "'internal" uniformity or consistency" and "'collective" uniformity or consistency': see Committee on Formation of Customary (General) International Law, above n 20, 21–3.

¹⁷⁶ *Frontier Dispute (Burkina Faso/Mali) (Judgment)* [1986] ICJ Rep 554, 574–5 [41].

¹⁷⁷ *Ibid* 575 [42].

¹⁷⁸ Committee on Formation of Customary (General) International Law, above n 20, 23.

of an inconstant — or insincere, for that matter — state.¹⁷⁹ Arguably, France is currently providing an example of such incoherence in the expression of its *opinio juris*. On the one hand the Director of Legal Affairs of the French Ministry of Foreign Affairs and International Development affirms that the Syrian government's lack of territorial control over part of its territory is a ground for the extension of the personal and territorial scope of application of the right of self-defence in the ungoverned space left under the control of ISIL.¹⁸⁰ Although he (arguably) implicitly recognises that an invitation to provide a sound legal basis for the French intervention would be indispensable, the Director simply discards this option for 'political reasons', without explaining the nature and legal relevance of these reasons.¹⁸¹ In sum, he is claiming something different to what he actually says: even though he affirms that the principle of sovereignty commands cooperation, in reality he is claiming the French government's discretionary power to reject this possibility for unspecified reasons of political convenience. It is extremely difficult in these conditions to precisely identify the French government's *opinio juris* on this crucial point.

A further delicate problem of 'legal inaction' of third states is that of states that issue declarations in purely political terms, short of any legal assessment of the issue at stake. This can occur in a broad range of political attitudes, starting from political benevolence and extending to outright political hostility short of explicit condemnation in legal terms.¹⁸² A recent example of such an approach is provided by the behaviour of some of the members of the international coalition against ISIL who rejected involvement in the intervention on Syrian soil for legal reasons, but refrained from criticising (even implicitly) the legal justifications advanced by the intervening states. Indeed, despite very general and vague political statements supporting the actions of the coalition, many of its members have expressly excluded contributing to the intervention in Syria. Thus, many European states' contributions are limited to providing technical and military support — often in the form of training of members of the Iraqi army or Kurdish Peshmerga fighters — or direct military participation in operations limited to Iraqi territory. This is

¹⁷⁹ See also Skubiszewski, above n 53, 813: 'The value of words for the ascertainment of State practice is nonexistent when the State adopts different positions at different moments on the same subject.' See also Corten, 'Breach and Evolution of Customary International Law on the Use of Force', above n 36, 128: 'in order to be relevant, the legal stance of the intervening State must, as far as possible, be devoid of ambiguity.' See also Orakhelashvili, above n 106, 160–1; Kohen, 'The Use of Force by the United States after the End of the Cold War, and Its Impact on International Law', above n 148, 225.

¹⁸⁰ François Alabrune, 'Fondements juridiques de l'intervention militaire française contre Daech en Irak et en Syrie' (2016) 120 *Revue générale de droit international public* 41, 41–2. It should be noted, however, that this article is supposed to reflect no more than his personal views. For the comparable and more explicit position of the Belgian government, see also *Letter Dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations Addressed to the President of the Security Council*, UN SCOR, UN Doc S/2016/523 (9 June 2016).

¹⁸¹ Alabrune, above n 180, 43–4.

¹⁸² This is arguably the reflection in third states' attitudes of the 'illegal but legitimate' approach described in Part III(B).

the case of, for instance, Estonia,¹⁸³ Finland,¹⁸⁴ Hungary,¹⁸⁵ Latvia,¹⁸⁶ Slovenia, Spain¹⁸⁷ and Sweden. While expressing support for France's request for assistance based on art 42(7) of the *Treaty on European Union*,¹⁸⁸ the latter did not offer to participate in the strikes on Syrian territory. The Minister for Foreign Affairs Margot Wallström expressly stated that the support to France should be made 'in

¹⁸³ See Department of Communication, *Foreign Minister Kaljurand in the Riigikogu: Foreign Policy Plays a Key Role in Ensuring Estonia's Security* (11 February 2016) Ministry of Foreign Affairs (Republic of Estonia) <<http://vm.ee/en/news/foreign-minister-kaljurand-riigikogu-foreign-policy-plays-key-role-ensuring-estonias-security>>, archived at <<https://perma.cc/HE6X-9ZQC>>.

¹⁸⁴ Minister for Foreign Affairs Timo Soini, 'Speech by Minister Soini at the Pohjois Kymi Paasikivi Society Ministry for Foreign Affairs of Finland: Current Affairs' (Speech delivered at the 30th Anniversary Celebration of the Pohjois-Kymi Paasikivi Society, Kouvola, 10 May 2016) <<http://formin.fi/public/default.aspx?contentid=346091&contentlan=2&culture=en%20US>>, archived at <<https://perma.cc/6GUN-YKMH>>.

¹⁸⁵ See Embassy of Hungary in Washington, DC, *Campaign of the Global Coalition to Counter ISIL Reduces Migration Pressure and Terrorist Threat in Europe* (21 July 2016) <<http://washington.kormany.hu/campaign-of-the-global-coalition-to-counter-isil-reduces-migration-pressure-and-terrorist-threat-in-europe>>, archived at <<https://perma.cc/YBF9-8JLZ>>. Hungary has sent 150 military personnel to Iraq and provided the Peshmerga with ammunition.

¹⁸⁶ On 20 January 2016, Latvia announced that it intends to contribute to the training of Iraqi forces: see Permanent Representative of the Republic of Latvia to the United Nations Mr Jānis Mažeiks, 'Protection of Civilians in Armed Conflicts' (Speech delivered at the Open Debate of the UN Security Council, New York, 20 January 2016) <<http://www.mfa.gov.lv/en/newyork/latvia-in-the-un/other-statements-at-the-general-assembly/49433-statement-of-the-republic-of-latvia-at-the-un-security-council-open-debate-protection-of-civilians-in-armed-conflicts>>, archived at <<https://perma.cc/7UV8-EUAV>>.

¹⁸⁷ See *Verbatim Record of the 7271st Meeting*, UN Doc S/PV.7271, 24–5, especially at 25: 'all international interventions should be carried out in accordance with the principles that inspire the *Charter of the United Nations* and respect for international law.' See also Head of the International Legal Office of the Spanish Ministry of Foreign Affairs in Martín and de Nanclares, above n 161, 324: 'Nevertheless, in the author's view, notwithstanding any other opinion better founded in law, there remain sufficient legal doubts regarding the full compliance with international law of measures for the use of force taken in the absence of both a resolution of the Security Council under Chapter VII of the *Charter* and a case of collective self-defence at the express request of the government concerned.' See also 'Spain Rules out Syria Airstrikes but Pledges Support in Fight against Isis', *The Local* (online), 17 November 2015 <<https://www.thelocal.es/20151117/spain-rules-out-airstrikes-as-pledges-support-in-fight-against-isis>>, archived at <<https://perma.cc/NX2V-696Z>>; Jess McHugh, 'War on ISIS in Syria 2015: Spain Protests Sending Troops to Fight Islamic State, Fearing Retaliation after Paris Attacks, Madrid Bombing' *International Business Times* (online), 29 November 2015 <<http://www.ibtimes.com/war-isis-syria-2015-spain-protests-sending-troops-fight-islamic-state-fearing-2203285>>. For a cautious analysis of Spain's position with regard to the French government's invocation of art 42(7) of the *Treaty on European Union*, see, eg, Luis N González Alonso, '¿Daños jurídicos colaterales? La invocación del artículo 42.7 del *Tratado de la Unión Europea* y la lucha contra el terrorismo internacional' (2016) 32 *Revista electrónica de estudios internacionales* 12 <<http://www.reci.org/index.php/revista/num32/articulos/danos-juridicos-colaterales-invocacion-articulo-427-tratado-union-europea-lucha-contra-terrorismo-internacional>>, archived at <<https://perma.cc/E6A8-MHR6>>; Félix Arteaga, 'La solidaridad española con Francia y el artículo 42.7 del *Tratado de la UE-Elcano*' (Análisis ARI 69/2015, Real Instituto Elcano, 23 November 2015) <http://www.realinstitutoelcano.org/wps/portal/rielcano_es/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_es/zonas_es/defensa+y+seguridad/ari69-2015-arteaga-la-solidaridad-espanola-con-francia-articulo-427-tratado-ue>, archived at <<https://perma.cc/QY2B-DM3S>>.

¹⁸⁸ *Treaty on European Union*, opened for signature 7 February 1992 [2009] OJ C 115/13 (entered into force 1 November 1993) art 42(7) ('EU').

accordance with international law'.¹⁸⁹ On 25 January 2016, Sweden has announced the deployment of 120 troops to Iraq in order to train Iraqi Kurdish Peshmerga forces.¹⁹⁰ The Ukrainian government has communicated that it does not plan to participate in the coalition's military intervention, either in Iraq or in Syria.¹⁹¹ All these cases seem to express political tolerance or even political support for the intervention, while carefully refraining from translating such political support into legal terms in the form of an endorsement of the revisionist claims.¹⁹² In fact, the majority of states listed as members of the coalition did not publicly express any view on the legality of the unconsented interventions in Syria and Iraq. In these circumstances, and despite the contentions of some authors, it is difficult to interpret such behaviour as anything other than exclusively political support, short of legal approbation.

At the opposite end of the spectrum, states that are politically unsatisfied with a given situation might refrain from expressly condemning it for purely political reasons. Condemnation of violations committed by great powers often carries a diplomatic and political cost, especially if issued unilaterally by a single government of a relatively weak or even medium sized power. Tolerance — which often results from the lack of a politically viable alternative — is therefore to be distinguished from acceptance of the lawfulness of the action.¹⁹³ This point was recognised by the ILC Drafting Committee. According to a statement by its President, Mathias Forteau, the condition that a state must be in a 'position to react' for its 'failure to react' to count as 'evidence of acceptance as law (*opinio juris*)', set out in draft conclusion 10, para 3, 'implied the need for knowledge of the practice in question, but was broad enough to cover other situations that might prevent a state from reacting, such as political pressure'.¹⁹⁴

¹⁸⁹ Government Offices of Sweden, *The Government Presented Sweden's Support to France* (16 December 2015) <<http://www.government.se/articles/2015/12/the-government-presented-swedens-support-to-france/>>, archived at <<https://perma.cc/V96L-8VUP>>: 'As a follow up of France's request under Article 42(7) of the *Treaty on European Union* and additional support in the fight against ISIL, an inventory of possible Swedish contributions has been made. The starting point for this is that it must be requested, fit for purpose, effective and efficient, credible, sustainable over time, in accordance with international law, based on a risk analysis and based on broad consensus and available Swedish resources, in terms of both personnel and funding.'

¹⁹⁰ Mark Piggott, 'Isis: Sweden Joins Fight against Daesh by Sending up to 120 Troops to Iraq', *International Business Times* (online), 25 January 2016 <<http://www.ibtimes.co.uk/isis-sweden-joins-fight-against-daesh-by-sending-120-troops-iraq-1540014>>.

¹⁹¹ Embassy of Ukraine to the United Kingdom of Great Britain and Northern Island, 'Comment on Fake Story about Possible Deployment of Ukraine's Troops in Syria' (Press Statement, 1 February 2016) <<http://uk.mfa.gov.ua/en/press-center/comments/4979-comment-on-fake-story>>, archived at <<https://perma.cc/W4HV-DAM4>>.

¹⁹² See Buzzini, 'Les comportements passifs des États', n 56, 90: 'L'absence de réaction pourrait être due au fait que le sujet qui se tait approuve ledit comportement sur le plan politique, voire sur le plan moral ou éthique, et le tient ainsi pour légitime, tout en le considérant comme illégal ou, du moins, «à la limite de la légalité».'

¹⁹³ Orakhelashvili, above n 106, 171. See also Abi-Saab, 'Le droit international à la croisée des chemins : Force du droit et droit de la force', above n 100, 203: 'Quant aux tiers, on en revient ici aux propos de Grotius, ils peuvent réagir à l'illégalité («contre celui qui mène une guerre injuste»), mais ils ne sont pas obligés de le faire (notamment contre «l'agresseur puissant»), sans signifier pour autant un quelconque consentement (que ce soit à la violation ou à l'interprétation qui la sous tend).' See also, stressing that coercion in the context of customary international law is an underexplored issue, Serge Sur, 'La créativité du droit international' (2013) 363 *Recueil des cours de l'Académie de droit international de La Haye* 9, 154.

¹⁹⁴ *Provisional Summary Record of the 3280th Meeting*, UN Doc A/CN.4/SR.3280, 10.

V CONCLUDING REMARKS

Faced with the dilemma between, on the one side, the risk of being immediately deprived of essential short-term political assets for an outspoken declaration against the actions of a great power or, on the other side, the long-term risk of witnessing the progressive demise of the customary norms for which they stand, minor powers tend to opt for the solution that is less damaging in the short-term. Such a choice might be explained by a kind of ‘prisoner dilemma’ situation.¹⁹⁵ A state that decides not to condemn the actions of a great power in order not to threaten its immediate political interests can thus always hope that other states will be more willing to do it, and that it could thus get the advantages of both options, by preserving both its short-term interests and its longer-term interest in the maintenance of a stable legal order. This is probably one of the main reasons why small and medium states tend to issue joint declarations in the framework of regional organisations or informal groupings of states, rather than unilateral statements.

It has sometimes been pointed out that the ICJ does not make its methodology for ascertaining customary international law particularly explicit.¹⁹⁶ Paradoxically, the more developed case law concerning acquiescence provides additional guidance for resolving some of the methodological issues raised by the ascertainment of customary international law. As a rule, the lack of reaction by third states plays a rather limited role in the process of changing rules of customary international law, especially when norms of *jus cogens* are concerned. The draft conclusions adopted by the ILC in 2016 are not entirely satisfying in this regard, as they seem to open the door to differing interpretation. The widespread and repeated violations of *erga omnes* rights and obligations by a sufficiently representative number of states might well end up affecting the norms themselves, if they are constantly received with general indifference. But limited instances of violations, followed by ambiguous reactions, are certainly not sufficient to evidence the emergence of a new *opinio juris communis*.

In the case of the intervention against ISIL in Syria, the relatively muted reaction of third states should not necessarily be equated with acquiescence to the interpretation of the right of self-defence put forward by the intervening governments. This is the case for various reasons. The first is that the almost infinite variety of legal arguments put forward by each intervening state makes it impossible to precisely identify the claim to which third states could be presumed to have acquiesced. Secondly, we should recognise the distortion caused by the element of coercion necessarily involved when states advance new claims of *jus contra bellum* through the violation of currently existing norms. Faced with the risk of being themselves branded ‘unable or unwilling’ and subjected to considerable pressure, including militarily, from Western states, governments that choose to remain silent might well be adopting the most courageous stance short of political suicide. One is left to wonder what precise kind of *opinio juris* — if any — can be inferred from this relative inaction in such circumstances: is this

¹⁹⁵ See generally Mark A Chinen, ‘Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner’ (2001) 23 *Michigan Journal of International Law* 143; George Norman and Joel P Trachtman, ‘The Customary International Law Game’ (2005) 99 *American Journal of International Law* 541.

¹⁹⁶ Talmon, above n 142.

really ‘benevolent silence’, as has been suggested by Claus Kress?¹⁹⁷ Only a detailed and principled analysis of the available material — which is certainly much more substantial than some would like us to believe — would allow us to provide a well-grounded answer to this question. But in any case, prudence and methodological rigour should prevent legal operators from drawing premature and far-reaching conclusions as to the state of the *lex lata*.

¹⁹⁷ Kress, above n 2: ‘All in all, it therefore appears fair to say that the overwhelming part of the community of States is displaying an attitude of “benevolent silence” toward the legal case advanced by the US, Iraq and the United Kingdom.’