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## Estoppel in the Jurisprudence of the ICJ A principle promoting stability threatens to undermine it

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# Estoppel in the Jurisprudence of the ICJ A principle promoting stability threatens to undermine it

Alexander Ovchar

## Abstract

Estoppel is one of the ‘most powerful and flexible instruments to be found in any system of court jurisprudence’;†and it has featured in the jurisprudence of the International Court of Justice (‘the Court’) and its predecessor, in a number of cases. Estoppel, in the jurisprudence of the Court, obliges a State to be consistent in its attitude to a given factual or legal situation. Such a demand has the potential to encourage stability and predictability in international relations. The Court has not been consistent in the application of estoppel; commentators assert that estoppel lacks coherence in international law. However, few commentators have taken on the task of isolating in what ways the Court has been inconsistent when applying estoppel, and none have made suggestions as to how the Court should eliminate the inconsistencies. Through a detailed examination of the judicial application of estoppel, this paper argues precisely in what ways the Court has been inconsistent, and then makes suggestions as to how the Court should eliminate the inconsistencies. These proposals give estoppel a measure of predictability in the jurisprudence of the Court, and thus ensure that the principle promoting stability does not undermine it. †Sir Frederick Pollock, *The Expansion of the Common Law* (1904) 108.

**KEYWORDS:** estoppel at the ICJ

## ESTOPPEL IN THE JURISPRUDENCE OF THE ICJ

### A principle promoting stability threatens to undermine it

ALEXANDER OVCHAR\*

#### Introduction

Estoppel is one of the 'most powerful and flexible instruments to be found in any system of court jurisprudence'.<sup>1</sup> In one form or another, it 'is recognised by all systems of private law'.<sup>2</sup> This recognition has extended to the international sphere – there is no doubt that 'estoppel is a general principle of international law'.<sup>3</sup> Consequently, estoppel has featured in the jurisprudence of the International Court of Justice ('the Court') and its predecessor, the Permanent Court of International Justice, in a number of cases.<sup>4</sup>

Estoppel, in the jurisprudence of the Court,<sup>5</sup> obliges a State 'to be consistent in its attitude to a given factual or legal situation'.<sup>6</sup> Such a demand has the potential to encourage 'finality, stability and predictability'<sup>7</sup> in international relations, 'in an age when this cooperation in many fields is becoming increasingly essential'.<sup>8</sup>

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<sup>1</sup> Sir Frederick Pollock, *The Expansion of the Common Law* (1904) 108.

<sup>2</sup> Sir Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (1927) 204.

<sup>3</sup> Ian Brownlie, *Principles of Public International Law* (6th ed, 2003) 616.

<sup>4</sup> Although estoppel has featured in the jurisprudence of other international judicial bodies, the exclusive focus of this paper is on the decisions of the Court and its predecessor. The reason for this is two-fold. First, the Court, as the 'principal judicial organ of the United Nations' (*Charter of the United Nations* art 92), is considered to be the most authoritative international judicial body. See, eg, Clive Parry, *The Sources and Evidences of International Law* (1965) 91. Secondly, the Court itself very rarely makes use of the decisions of other international judicial bodies on estoppel. Therefore, in this area of international law, decisions of other international judicial bodies do not seem to be perceived by the Court as persuasive in their reasoning.

<sup>5</sup> A reference to 'the Court', in this paper, is a reference to the International Court of Justice and the Permanent Court of International Justice.

<sup>6</sup> Iain MacGibbon, 'Estoppel in International Law' (1958) 7 *International and Comparative Law Quarterly* 458, 468.

<sup>7</sup> *Territorial Dispute (Libyan Arab Jamahiriya v Chad)* (Merits) [1994] ICJ Rep 6, 78 (Separate Opinion of Judge Ajibola) ('*Territorial Dispute*').

<sup>8</sup> *Nuclear Tests (Australia v France)* (Judgment) [1974] ICJ Rep 253.

The Court has not been consistent in the application of estoppel; there is wide confusion over the scope of the principle in extra-curial literature.<sup>9</sup> Commentators argue that 'the very diversity of the forms in which the principle of estoppel has been applied ... tend to make the concept so diffuse as to impair its value as a term of art'.<sup>10</sup> However, although many are content to assert that estoppel 'has no particular coherence in international law',<sup>11</sup> very few commentators have taken on the task of isolating in what ways the Court has been inconsistent when applying estoppel,<sup>12</sup> and none have made suggestions as to how the Court should eliminate the inconsistencies.

Through a detailed examination of the judicial application of estoppel, this paper argues precisely in what ways the Court has been inconsistent, and then makes suggestions as to how the Court should eliminate the inconsistencies. These proposals give estoppel a measure of predictability in the jurisprudence of the Court, and thus ensure that the principle promoting stability does not undermine it.

The structure of this paper is as follows. Part II of the paper identifies the three fundamental elements of estoppel that have been distilled by the Court from the principle as it operates in municipal legal systems.

Upon this foundation, Part III analyses the jurisprudence of the Court on estoppel and systematically examines the application of each element by the Court. It argues that the Court is clear on one element but inconsistent on the others. In particular, the Court has been inconsistent on when silence gives rise to an estoppel and whether detrimental reliance is required for an estoppel to arise.

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<sup>9</sup> See, eg, Derek Bowett, 'Estoppel Before International Tribunals And Its Relation To Acquiescence' (1957) 33 *British Year Book of International Law* 176, 201; Antoine Martin, *L'Estoppel En Droit International Public: Précédé d'un Aperçu de la Théorie de l'Estoppel en Droit Anglais* (1979) 274.

<sup>10</sup> MacGibbon, 'Estoppel in International Law', above n 6, 478. See also Christopher Brown, 'A Comparative and Critical Assessment of Estoppel in International Law' (1995) 50 *University of Miami Law Review* 369, 410-12.

<sup>11</sup> Brownlie, n 3, 616. See especially Brown, above n 10.

<sup>12</sup> Studies by Bowett, above n 9 and MacGibbon, 'Estoppel in International Law', above n 6, although in-depth, are now outdated, because the majority of cases on estoppel were heard by the Court after these articles were written, and it is precisely in these cases that the inconsistencies in treatment of the principle appear. The studies by Yousef Youakim, *Estoppel in International Law* (PhD Dissertation, Cornell University Law School, 1969) and Martin, above n 9, although more recent, are encyclopaedic in content and do not attempt to isolate the inconsistencies. Other recent studies examining the topic have generally been incorporated into larger studies of international law, thus treating estoppel in a somewhat truncated manner.

Part IV considers the way forward for the Court. It contends that the inconsistencies discovered in Part III should not remain, as they affect the perception of States as to the probity of the Court and create legal uncertainty, which in turn undermines the value of international law as a guide to future State conduct. Suggestions are then made as to how the Court should eliminate these inconsistencies; in particular, silence should be only given evidentiary weight and detrimental reliance should be established for an estoppel to arise.

### International Estoppel

The principle *underlying* estoppel is often expressed in the Latin maxim *allegans contraria non audiendus est*, translated as ‘one should not benefit from his or her own inconsistency’.<sup>13</sup> This principle is ‘found in all major legal systems’.<sup>14</sup> It underlies the various types of estoppel in common law jurisprudence<sup>15</sup> and the civil law concepts of preclusion, debarment and foreclosure.<sup>16</sup>

Estoppel-like concepts in municipal law are both specific and technical.<sup>17</sup> In English jurisprudence, for example, a ‘number of branches or categories of estoppel, with different origins and inconsistent rules, have been developed over the years’.<sup>18</sup> One of these distinctions is that a statement of fact can give rise only to ‘common law estoppel’; a statement of law or a promise, on the other hand, can give rise only to

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<sup>13</sup> *Temple of Preah Vihear (Cambodia v Thailand) (Merits)* [1962] ICJ Rep 6, 39 (Separate Opinion of Judge Alfaro) (*‘Temple of Preah Vihear’*); *North Sea Continental Shelf (Denmark v Federal Republic of Germany; Netherlands v Federal Republic of Germany)* [1969] ICJ Rep 4, 120 (Separate Opinion of Judge Ammoun) (*‘North Sea Continental Shelf’*). This is a figurative translation, which has been preferred by most scholars on this topic. A literal translation is ‘one making contradictory statements is not to be heard’. See Lord McNair, *Law of Treaties* (1961) 485.

<sup>14</sup> Jorg Paul Müller and Thomas Cottier, ‘Estoppel’ in Rudolf Bernhardt (ed), *Encyclopaedia of Public International Law* (2003) 118. See also *Boizard (Liselotte) v Commission of the European Communities* [1982] 1 CMLR 157, 171 (Advocate General Warner). Anglo-American terminology has gained prevalence in literature on this subject and thus the principle underlying estoppel is referred to as ‘estoppel’.

<sup>15</sup> See, eg, George Keeton and L A Sheridan, *Equity* (3rd ed, 1987) 85-6.

<sup>16</sup> See, eg, Muir Watt, ‘Pour l'accueil de l' “estoppel” en Droit Privé Français’ in Bourel Béguin (ed) *Mélanges en l'honneur de Yvon Loussouarn* (1994) 303.

<sup>17</sup> Generally, see, eg, *Territorial Dispute*, 77 (Separate Opinion of Judge Ajibola); Georg Schwarzenberger, *International Law* (3rd ed, 1957) 566. In relation to common law jurisprudence, see, eg, Patrick Parkinson, *The Principles of Equity* (2003) 214-16. In relation to civil law jurisprudence, see, eg, Martin, above n 9, 240.

<sup>18</sup> Elizabeth Cooke, *The Modern Law of Estoppel* (2000) 16.

'equitable estoppel'.<sup>19</sup> Similarly, in Australian jurisprudence, 'there is a smorgasbord of concepts to choose from under the heading of estoppel'.<sup>20</sup> Comparable complexities surround estoppel-like concepts in civil law jurisprudence.<sup>21</sup>

The Court, however, has 'not adopted the technicalities of specific forms of estoppel'.<sup>22</sup> Instead, it has held that estoppel consists of three fundamental elements: first, a State must make a representation to another; secondly, the representation must be unconditional and made with proper authority; and finally, the State invoking estoppel must rely on the representation.<sup>23</sup> If all three elements are established, an estoppel arises.<sup>24</sup>

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<sup>19</sup> See, eg, *Jorden v Money* (1854) 5 HLC 185; *Territorial and Auxiliary Forces of the County of London v Nicols* [1949] 1 KB 35; *Tomlin v Reid* [1963] EGD 338. See, generally, John McGhee, *Snell's Equity* (31st ed, 2000) 568-9. The division between common law and equitable estoppel, however, has been criticised in *Crabb v Arun District Council* [1975] 3 All ER 865, 880 (Lord Scarman); *Amalgamated Investment & Property Co Ltd (In Liquidation) v Texas Commerce International Bank* [1982] 1 QB 84 (Lord Denning). For criticism in British extra-curial literature, see especially Roger Halson, 'The Offensive Limits of Promissory Estoppel' [1999] *Lloyds Maritime and Commercial Law Quarterly* 257; Mark Lunney, 'Towards a Unified Estoppel' [1992] *The Conveyancer* 239.

<sup>20</sup> John Carter and David Harland, *Contract Law in Australia* (4th ed, 2002) 140, but note that the authors themselves doubt the validity of the distinctions between the different forms of estoppel. This distinction was criticised in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 420 (Brennan J); *Commonwealth v Verwayen* (1990) 170 CLR 394, 413 (Mason CJ). For criticism in Australian extra-curial literature, see, eg, Justice Roderick Meagher, Justice Dyson Heydon and Justice John Lehane, *Equity, Doctrines and Remedies* (4th ed, 2002) 405-8.

<sup>21</sup> See Martin, above n 9, 274; *Temple of Preah Vihear*, 39 (Separate Opinion of Judge Alfaro); Charles Vallee, 'Quelques Observations Sur L'Estoppel en Droit des Gens' (1973) 77 *Revue Generale de Droit International Public* 949.

<sup>22</sup> Müller and Cottier, above n 14, 118. See also *Temple of Preah Vihear*, 40 (Separate Opinion of Judge Alfaro), 62-5 (Separate Opinion of Judge Fitzmaurice). For support in extra-curial literature, see especially Lauterpacht, *Private Law Sources and Analogies of International Law*, above n 2, 395-6.

<sup>23</sup> See, eg, *North Sea Continental Shelf*, 26. For support in extra-curial literature see, eg, Bowett, above n 9; Megan Wagner, 'Jurisdiction by Estoppel in the International Court of Justice' (1986) 74 *California Law Review* 1777.

<sup>24</sup> The Court has not been consistent in the use of terminology when discussing estoppel, using terms such as estoppel, preclusion, acquiescence and debarment interchangeably. This, however, is not significant because if the above-mentioned elements are established, the principle is applied in effect. It is then irrelevant, in substance, what it has been labelled as by the court. See, eg, *Temple of Preah Vihear*, 40 (Separate Opinion of Judge Alfaro), 62-5 (Separate Opinion of Judge Fitzmaurice); *Territorial Dispute*, 77 (Separate Opinion of Judge Ajibola). For support in extracurial literature see Schwarzenberger, *International Law*, above

Consequently, estoppel in the jurisprudence of the Court is free from the ‘manifold refinements grafted onto it by domestic legal systems’.<sup>25</sup> In its transition from the municipal to the international sphere, ‘the concept of estoppel has been broadened so substantially that the analogy with the estoppel of municipal systems may be positively misleading’.<sup>26</sup> Consequently, as observed by Judge Alfaro in the *Temple of Preah Vihear* case, although there are similarities between estoppel in the jurisprudence of international and municipal courts,

[t]here is a very substantial difference between the simple and clear-cut rule adopted and applied in the international field and the complicated classifications, modalities, species, sub-species and procedural features of the municipal system.<sup>27</sup>

The Court, therefore, has adopted ‘a simple and wholly untechnical conception’<sup>28</sup> of estoppel and applied it ‘as a rule of substance and not merely as one of evidence or procedure’.<sup>29</sup>

Notwithstanding this simplification, the Court has not been consistent in applying estoppel.<sup>30</sup> The next part of the paper examines the scope of each element and isolates the inconsistencies in the application of estoppel by the Court.

## Inconsistencies in application

### Representation

A representation is the first element required to establish estoppel. A representation, and thus possibly estoppel, can arise from a declaration or from silence.<sup>31</sup> The Court

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n 17, 566; Wagner, above n 23, 1780; Robert Jennings and Arthur Watts (eds), *Oppenheim’s International Law* (9th ed, 1992) 527.

<sup>25</sup> Anthony D’Amato, ‘Consent, Estoppel, and Reasonableness: Three Challenges to Universal International Law’ (1969) 10 *Virginia Journal of International Law* 1, 8.

<sup>26</sup> MacGibbon, ‘Estoppel in International Law’, above n 6, 477.

<sup>27</sup> *Temple of Preah Vihear*, 39 (Separate Opinion of Judge Alfaro).

<sup>28</sup> *Ibid* 62 (Separate Opinion of Judge Fitzmaurice).

<sup>29</sup> *Territorial Dispute*, 77 (Separate Opinion of Judge Ajibola). The question of whether the juridical basis of the principle of estoppel in the jurisprudence of the Court is found in its inception as a rule of customary law or as a general principle of law recognised by civilised nations is not clear; and it is not the purpose of this paper to answer this question. See, eg, Vladimir Degan, *Sources of International Law* (1997) 55.

<sup>30</sup> See eg, Bowett, above n 9, 201; Martin, above n 9, 274.

<sup>31</sup> See eg, *Temple of Preah Vihear*, 62 (Separate Opinion of Judge Fitzmaurice); *Elettronica Sicula SpA (United States of America v Italy)* [1989] ICJ Rep 15, 44. See also Georg Schwarzenberger, ‘The Fundamental Principles of International Law’ (1955) 87 *Recueil des cours de l’Académie*

has consistently held that a declaration gives rise to an estoppel only if the declaration is clear and consistent.<sup>32</sup> At the same time, however, the Court has not been consistent in holding under what circumstances silence gives rise to an estoppel.

### *Arising from a Declaration*

To give rise to an estoppel, a declaration must be unequivocal, and consistent with the other declarations of the State. Not all judicial decisions expressly refer to this criterion; all, however, apply it in effect.

In the *Serbian Loans* case, the Court observed that a declaration must be 'clear and unequivocal'<sup>33</sup> to give rise to an estoppel. In the *North Sea Continental Shelf* case, the Court observed that the Federal Republic of Germany would be estopped only if it 'clearly and consistently evinced acceptance'<sup>34</sup> of a Convention it did not ratify. The mere fact of taking part in the drafting of the Convention and acting in accordance with it was not enough to satisfy this criterion – only 'a very definite, very consistent course of conduct'<sup>35</sup> on the part of the Federal Republic of Germany could have given rise to an estoppel in the circumstances.

A similar test was applied in the *Land, Island and Maritime Frontier Dispute* case.<sup>36</sup> There, El Salvadorian and Honduran expressions of 'views as to the existence or nature of Nicaraguan interests'<sup>37</sup> did not give rise to an estoppel because they were not clear and consistent declarations – they were only ambiguous statements of

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*de Droit International de la Haye* 195, 256; Robert Jennings, *Acquisition of Territory in International Law* (1963) 38-41; Dominique Carreau, *Droit international* (7th ed, 2001) 230.

<sup>32</sup> The Court refers to 'declarations' and 'conduct' interchangeably. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction)* [1984] ICJ Rep 392, 415; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Jurisdiction)* [1998] ICJ Rep 275, 303.

<sup>33</sup> *Payment of Various Serbian Loans Issued in France (France v Serb-Croat-Slovene)* [1929] PCIJ (ser A) No 20, 38 ('*Serbian Loans*'). Estoppel received passing attention in *Factory at Chorzow (Germany v Poland) (Jurisdiction)* [1925] PCIJ (ser B) No 3 and *European Danube Commission (Advisory Opinion)* [1927] PCIJ (ser B) No 14. However, the brevity of the judicial examination of estoppel does not allow one to draw any useful conclusions about the principle in the jurisprudence of the Court. See J C Witenberg, 'l'Estoppel, Un Aspect Juridique du Probleme des Creances Americaines' (1933) 60 *Journal du Droit International* 531, 537.

<sup>34</sup> *Ibid* 25. The Convention in question was the *Geneva Convention on the Continental Shelf*, opened for signature 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964).

<sup>35</sup> *Ibid* 26.

<sup>36</sup> (*El Salvador v Honduras*) (*Application For Permission To Intervene*) [1990] ICJ Rep 92.

<sup>37</sup> *Ibid* 118.



opinion.<sup>38</sup> In the *Military and Paramilitary Activities in and against Nicaragua* case, the Court observed that an 'estoppel may be inferred from the conduct, declarations and the like made by a State which ... clearly and consistently evinced acceptance'<sup>39</sup> of a particular state of affairs. Similarly, the Court observed in the *Land and Maritime Boundary between Cameroon and Nigeria* case that:

an estoppel would only arise if by its acts or declarations Cameroon had consistently made it fully clear that it had agreed to settle the boundary dispute submitted to the Court by bilateral avenues alone.<sup>40</sup>

These conditions were considered not to have been satisfied in this case and thus no estoppel was established.<sup>41</sup>

In the *Legal Status of Eastern Greenland* case,<sup>42</sup> the Court held that a statement made by the Norwegian Minister of Foreign Affairs in 1919 effectively 'recognised the whole of Greenland as Danish'<sup>43</sup>; and because the statement was clear and consistent with previous Norwegian declarations,<sup>44</sup> the declaration made in 1919 gave rise to an estoppel.<sup>45</sup>

In the *Arbitral Award Made by the King of Spain on 23 December 1906* case,<sup>46</sup> Honduras argued that by accepting the appointment of the arbitrator, Nicaragua was now estopped from questioning his competency. The Court agreed with the Honduran contention, observing that:

Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award.<sup>47</sup>

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<sup>38</sup> Ibid.

<sup>39</sup> (*Nicaragua v United States of America*) (*Jurisdiction*) [1984] ICJ Rep 392, 415.

<sup>40</sup> (*Cameroon v Nigeria*) (*Jurisdiction*) [1998] ICJ Rep 275, 303.

<sup>41</sup> Ibid 304. On two occasions, the Court has held that an estoppel did not arise without elaborating on when a declaration gives rise to an estoppel. See *Barcelona Traction Light and Power Co (Belgium v Spain)* (*Judgment*) [1964] ICJ Rep 4, 24-5 ('*Barcelona Traction Light and Power Co*'); *Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks And South Ledge (Malaysia v Singapore)* (*Merits*) [2008] ICJ Rep [228] <<http://www.icj-cij.org>> at 19 April 2009 ('*Sovereignty Over Pedra Branca*').

<sup>42</sup> (*Denmark v Norway*) (*Merits*) [1933] PCIJ (ser A/B) No 53 ('*Legal Status of Eastern Greenland*').

<sup>43</sup> *Legal Status of Eastern Greenland*, 68.

<sup>44</sup> *Legal Status of Eastern Greenland*, 64-6.

<sup>45</sup> Ibid 73.

<sup>46</sup> (*Honduras v Nicaragua*) [1960] ICJ Rep 192 ('*Arbitral Award Made by the King of Spain*').

<sup>47</sup> Ibid 213.

Therefore, by making a clear declaration that it accepted the Award made by the King of Spain as valid prior to the arbitration, Nicaragua was estopped from questioning the validity of the Award.

In the *Nuclear Tests* case, Australia asked the Court to declare French atmospheric nuclear testing in the South Pacific Ocean illegal. Before the Court heard this case, France made a series of declarations to the effect that ‘all atmospheric tests which are soon to be carried out will, in the normal course of events, be the last of this type’.<sup>48</sup>

The Court held that these declarations gave rise to an estoppel because of ‘intention’.<sup>49</sup> This intention, the Court explained, ‘is to be ascertained by interpretation of the act’<sup>50</sup> of making the declaration *itself*. Therefore, the Court observed that for a declaration to give rise to an estoppel, the ‘sole relevant question is whether the language employed in any given declaration does reveal a clear intention’.<sup>51</sup>

This test, in effect, is no different from the clear and consistent criterion discussed previously. In the *Nuclear Tests* case, no emphasis was placed on the *actual* intention of the State – the focus was on the declaration itself.<sup>52</sup> Therefore, whether the declaration gave rise to an estoppel in this case was ‘a matter not of subjective intent but of external ... objective justice’.<sup>53</sup>

Further support for this interpretation can be found on the facts of the case – it is clear that the French government did not evince an intention to be bound. None of the statements made by French officials contained an express assumption of obligation. Commentators have stressed ‘the extreme unlikeness that France would have really intended to assume an obligation.’<sup>54</sup> Dr Degan, for example, observed that:

the probable intentions of French officials were quite the opposite: avoid assuming a firm legal obligation, but by these political and informal

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<sup>48</sup> Ibid 266.

<sup>49</sup> Ibid 267.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid 268.

<sup>52</sup> Phillippe Cahier, ‘Le comportement des Etats comme source de droits et d’obligations’ in *Recueil d’Etudes de Droit International En Hommage a Paul Guggenheim* (1968).

<sup>53</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2006) 348. See also Thomas Franck, ‘Word Made Law: Decision of the ICJ in the Nuclear Tests Cases’ (1975) 69 *American Journal of International Law* 612, 617.

<sup>54</sup> Koskenniemi, above n 53, 351. Müller and Cottier, above n 14, 118.

statements to calm ... the anxiety of applicants and to preserve its freedom of action for the future.<sup>55</sup>

It is thus clear that the test adopted in the Nuclear Tests case is objective – the Court construed the French intent from the declaration itself, and not from the actual, subjective intentions of the State.<sup>56</sup>

Given this objective focus, there would be no difference between this, and the clear and consistent test, which featured in previous cases.<sup>57</sup> To give rise to an estoppel, a declaration, under either test, ‘must be unambiguous, at least in the sense that it must reasonably support the meaning attributed to it by the party raising the estoppel’.<sup>58</sup> Therefore, in effect, the Court in the Nuclear Tests case applied the clear and consistent criterion of prior cases.

The foregoing analysis has shown that the Court has consistently held that a declaration can give rise to an estoppel but only if it is clear and consistent. In some cases the Court has explicitly applied this criterion, while in others it applied it in effect. The next section argues that the Court has not been consistent in determining when silence gives rise to an estoppel.

### *Arising from Silence: Is Silence Evidentiary or Conclusive?*

In addition to a declaration, an estoppel can also arise from silence.<sup>59</sup> The Court, however, has not been consistent in determining when this occurs.<sup>60</sup> On close analysis

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<sup>55</sup> Degan, above n 3, 55. See also Luigi Bravo, ‘Methodes de Recherché de la Coutume Internationale dans la Pratique des etats’ (1985) 192 *Recueil des Cours* 233, 260.

<sup>56</sup> See Eric Suy and Karel Wellens, *International Law* (1998) 217.

<sup>57</sup> Alfred Rubin, ‘The International Legal Effects of Unilateral Declarations’ (1977) 71 *American Journal of International Law* 1, 26-30; Jean-Didier Sicault, ‘Du caractère obligatoire des engagements unilatéraux en droit international public’ (1979) 83 *Revue Generale de Droit International Public* 633, 687-88.

<sup>58</sup> Ian Sinclair, ‘Estoppel and Acquiescence’ in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (1996) 107.

<sup>59</sup> One commentator suggests that, in the jurisprudence of the Court, estoppel is a separate principle to acquiescence, and thus silence can give rise to acquiescence but not estoppel and vice-versa. See Iain MacGibbon, ‘The Scope of Acquiescence in International Law’ (1954) 31 *British Year Book of International Law* 143, 147-8. The usefulness of this distinction is doubtful in light of the fact that the majority of cases, as well as extra-curial literature, treat estoppel as the *consequence* of the acquiescence of a State. Thus, it is unnecessary to consider the distinction, if any, between the two concepts. For curial support, see, eg, *Temple of Preah Vihear*, 63 (Separate Opinion of Judge Fitzmaurice). For extra-curial support, see,

of the circumstances when silence gives rise to estoppel, two diametrically opposed approaches become evident.

One approach contends that the mere fact of silence gives rise to an estoppel. On this approach, silence and lack of protest 'are so fundamental that they decide by themselves alone the matter in the dispute'<sup>61</sup> and thus, argues Judge Alfaro in the *Temple of Preah Vihear* case, constitute 'a presumption *juris et de jure* in virtue of which a State is held to have abandoned its right'<sup>62</sup> to oppose an adverse claim by another State. A *juris et de jure* assumption is one that denotes 'conclusive presumptions of law which cannot be rebutted by evidence'.<sup>63</sup> Therefore, according to this view, there is no need to consider other evidence which might give rise to a different inference; silence is conclusive in establishing estoppel.

An opposite approach asserts that to give rise to an estoppel, silence must be viewed in context of the circumstances in which it was maintained; the presumption of consent derived from silence may be rebutted by a clear indication of contrary intention. Silence is thus 'of evidentiary value only'.<sup>64</sup>

Therefore, the distinction between the two views is the *judicial* importance given to silence by the Court; sometimes it is conclusive while at other times it is of only evidentiary weight in establishing estoppel.

This is a fundamental distinction. When the Court adopts the conclusive view, a clear response opposing a claim of another State must be made in order to prevent an estoppel arising. On the evidentiary view, however, there is only a need to protest an adverse claim if the position of the State is not clear from its current conduct. A detailed examination of cases that have dealt with this issue reveals that the Court has not been consistent in the approach it prefers – no view has gained prevalence.

An estoppel arising from silence was considered for the first time in the *Fisheries Case*.<sup>65</sup> There, the United Kingdom objected to the Norwegian system of delimitation of its coastline along the North Sea. The United Kingdom argued that this system of delimitation effectively extended the Norwegian territorial sea into the high seas, which are open to use by all nations.

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Schwarzenberger, *International Law*, above n 17, 566; McNair, above n 13, 488; Bowett, above n 9, 201; Youakim, above n 12, 158; Wagner, above n 23, 1783-4.

<sup>60</sup> The Court refers to 'silence', 'acquiescence' and 'lack of protest' interchangeably.

<sup>61</sup> *Temple of Preah Vihear*, 43 (Separate Opinion of Judge Alfaro).

<sup>62</sup> *Ibid* 44 (Separate Opinion of Judge Alfaro).

<sup>63</sup> Mark Shain, 'Presumptions under the Common and the Civil Law' (1944) 18 *Southern California Law Review* 91, 97.

<sup>64</sup> *Temple of Preah Vihear*, 131 (Dissenting Opinion of Judge Spender).

<sup>65</sup> (*United Kingdom v Norway*) [1951] ICJ Rep 116 ('*Fisheries Case*').

The majority of the Court held, however, that the United Kingdom should have illustrated its discontent with this system of delimitation earlier. In particular, the majority observed that as the delimitation significantly affected the position of the United Kingdom in the North Sea, the United Kingdom should have protested against it, and by not doing so for over 60 years, was now estopped from claiming otherwise.<sup>66</sup> Thus, the British silence, in the form of a prolonged abstention from protest to this system of delimitation, gave rise to an estoppel.<sup>67</sup>

In coming to this conclusion, the majority adopted a conclusive view of silence; it did not examine the circumstances in which the silence was maintained. Had it done so, this examination would have revealed that the United Kingdom was never completely aware of the Norwegian system of delimitation during the 60 years in which Norway claimed the British should have protested.<sup>68</sup> The information that was available to the United Kingdom revealed contradictions in the system of delimitation used by Norway, and thus the British government felt it was unnecessary to protest.

It is precisely the examination of the circumstances in which the silence was maintained which seems to be the underlying reason for the dissent of Judges McNair and Reid. Immediately after examining these circumstances, Judge McNair concluded that:

In these circumstances, I do not consider that the United Kingdom was aware, or ought but for default on her part to have become aware, of the existence of a Norwegian system of long straight base-lines connecting outermost points.<sup>69</sup>

Thus, the Judge held that the British silence should not give rise to an estoppel. Similar reasons impelled Judge Reid to hold likewise. Judge Reid observed that the various decrees of the Norwegian government, which set out the system of delimitation, were not 'brought to the attention of other governments and certainly not to the attention of the British Government'.<sup>70</sup> Thus, as the United Kingdom was not completely aware of the specific system of delimitation used by Norway, nor did the United Kingdom receive 'constructive notice of the system',<sup>71</sup> Judge Reid concluded that it should not be estopped from disputing the system.

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<sup>66</sup> Ibid 140. Judges Alvarez and Hsu Mo, in their separate opinions, did not address the specific point raised above and thus their judgments are not included in references to 'the majority' in this case.

<sup>67</sup> Ibid 139.

<sup>68</sup> Ibid 138.

<sup>69</sup> Ibid 180 (Dissenting Opinion of Judge McNair).

<sup>70</sup> Ibid 200 (Dissenting Opinion of Judge Reid).

<sup>71</sup> Ibid 172 (Dissenting Opinion of Judge McNair).

The difference in opinion between the majority, and dissenting Judges McNair and Reid, was the judicial weight given to the British silence. The majority seemed content to impute constructive knowledge of the delimitation to the United Kingdom without specific regard to the particular circumstances in which the silence was maintained. Thus, the majority adopted a conclusive view of silence. In contrast, dissenting Judges McNair and Reid meticulously considered the circumstances surrounding the silence and concluded that it did not give rise to an estoppel. Thus, Judges McNair and Reid saw silence as being only of evidentiary weight.

The facts concerning the *Temple of Preah Vihear* case centred on a territorial dispute between Cambodia (then known as French Indo-China) and Thailand (then known as Siam) over the Preah Vihear Temple. A joint committee of topographers was established in 1904 to determine the precise contours of the frontier line between the two countries. This committee produced a map in 1907 that was sent to the Thai authorities, according to which the Temple was situated in Cambodian territory. There was no reaction on the part of the Thai authorities to this map, 'either then or for many years subsequently'.<sup>72</sup>

It is not entirely clear who had effective possession over the Temple over the following four decades. The only Judges who made a conclusive finding on this issue were Judges Koo and Spender who, in dissent, held that Thailand exercised administrative control over the region surrounding the Temple and had control over the Temple itself.<sup>73</sup> In 1954, Thai military forces occupied the Temple following the French withdrawal from Cambodia. A dispute arose over the ownership of the Temple.

Cambodia contended that Thailand had accepted the map prepared in 1907 – which placed the Temple on the Cambodian side – because it failed to protest its contents. Therefore, Cambodia argued, Thailand was estopped from claiming sovereignty over the Temple.

Thailand argued that 'abundant evidence has been given that ... Thailand has exercised full sovereignty in the area of the Temple to the exclusion of Cambodia'.<sup>74</sup> Therefore, Thailand contended, no estoppel could be established as Thailand, in effect, did protest to the contents of the map. The majority of the Court observed that the map created circumstances that:

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<sup>72</sup> Ibid 23.

<sup>73</sup> Ibid 93 (Dissenting Opinion of Judge Koo), 138 (Dissenting Opinion of Judge Spender).

<sup>74</sup> Ibid 12.

called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it.<sup>75</sup>

As Thailand did not do so, the majority held that Thailand should be estopped from claiming sovereignty over the Temple.<sup>76</sup> However, Judges Koo, Spender and Quintana, in their dissenting reasons for judgment, argued that in light of the broader circumstances of the case, particularly the Thai exercise of sovereignty over the Temple, the Thai lack of protest should not give rise to an estoppel.<sup>77</sup>

This difference in conclusions was caused by a varying degree of judicial importance accorded to the Thai silence. The majority observed that the Thai silence gave rise to an estoppel regardless of evidence to the contrary, such as the Thai exercise of sovereignty over the Temple. Absence of protest, even in light of seemingly contradictory conduct, gave rise to an estoppel. Thus, according to the majority, silence was conclusive in establishing an estoppel; silence was *juris et de jure*.

Judge Spender argued in dissent that if the Thai silence was 'the only evidence in this case it could well be conclusive'.<sup>78</sup> However, when the Thai silence is weighed against the Thai occupation of the Temple – argued Judge Spender – 'it will be seen that such admissions as may be spelt out of the conduct of Siam by the Court have little if any evidentiary value in the determination of this case'.<sup>79</sup>

Similarly, Judge Koo spoke of silence as being 'a relevant factor ... only in the light of its unequivocal conduct and of the attendant circumstances'.<sup>80</sup> The alleged lack of protest, Judge Koo argued, was 'plainly contradicted by evidence of sustained State [Thai] activity in exercise of sovereignty in the Temple area'.<sup>81</sup> Therefore, as Thailand had 'consistently indicated a belief ... that the area in question continues to belong to her own sovereignty', her silence should not have given rise to an estoppel.<sup>82</sup>

Judge Quintana, in his dissent, similarly observed that, apart from the Thai silence, '[o]ther considerations adduced by the Parties must be evaluated by an international

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<sup>75</sup> Ibid 23.

<sup>76</sup> Ibid 24. Judges Alfaro and Fitzmaurice, in their separate opinions, concurred with the majority on this point, and are thus included in references to 'the majority' in this case. See *ibid* 39 (Separate Opinion of Judge Alfaro), 55 (Separate Opinion of Judge Fitzmaurice).

<sup>77</sup> Ibid 52 (Dissenting Opinion of Judge Koo), 70 (Dissenting Opinion of Judge Quintana), 130-1 (Dissenting Opinion of Judge Spender).

<sup>78</sup> Ibid 131 (Dissenting Opinion of Judge Spender).

<sup>79</sup> Ibid.

<sup>80</sup> Ibid 96 (Dissenting Opinion of Judge Koo).

<sup>81</sup> Ibid 52 (Dissenting Opinion of Judge Koo)

<sup>82</sup> Ibid 51 (Dissenting Opinion of Judge Koo).

tribunal at their correct significance'.<sup>83</sup> Consequently, silence and lack of protest, 'as evidence, have only a complementary value which is in *itself* without legal effect'.<sup>84</sup> Consequently, Judges Koo, Spender and Quintana saw Thai silence as being of only evidentiary value.

In the *Elettronica Sicula SpA* case,<sup>85</sup> the United States alleged that Italy violated a treaty between the two countries in preventing Raytheon, a company incorporated in the United States, from liquidating the assets of its wholly owned Italian subsidiary.

In 1974, the United States was of the opinion that Raytheon had exhausted every legal remedy available to it in Italy. Italy was aware of this conviction, but 'at that time was of the opinion that the local remedies had not been exhausted'.<sup>86</sup> When Italy raised the local remedies defence in 1978 – that Raytheon should have sued the Italian Government in the Italian courts – the United States argued that 'this absence of riposte from Italy amounts to an estoppel'.<sup>87</sup> It was argued that Italy should have apprised the United States of its opinion, and by failing to do so, should be estopped from claiming that all local remedies have been exhausted.<sup>88</sup>

The Court rejected this argument on the basis that the Italian silence did not give rise to an estoppel. The Court observed that although

an estoppel could in certain circumstances arise from a silence when something ought to have been said, there are obvious difficulties in constructing an estoppel from a mere failure to mention a matter at a particular point in somewhat desultory diplomatic exchanges.<sup>89</sup>

The Court examined the extensive communication between the two States and effectively discounted the value of the Italian silence in light of the wider circumstances in which it was maintained. In particular, by viewing the Italian silence in the context of the relatively informal and disorganised communication between the two States, it held that it did not give rise to an estoppel. Thus, the Court adopted the evidentiary view of silence.

The *Jan Mayen* case<sup>90</sup> concerned a dispute over the delimitation in the area between Greenland (Denmark) and the Jan Mayen Island (Norway). Denmark argued that

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<sup>83</sup> Ibid 70 (Dissenting Opinion of Judge Quintana).

<sup>84</sup> Ibid 71 (Dissenting Opinion of Judge Quintana) (emphasis added).

<sup>85</sup> (*United States of America v Italy*) [1989] ICJ Rep 15.

<sup>86</sup> Ibid 44.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* (Merits) [1993] ICJ Rep 38.



Greenland was entitled to a fishery zone at a distance of 200 nautical miles from its baseline, whilst Norway claimed that the outer limit of the Danish fishery zone was the median line between the relevant coasts.

In support of its claim, Norway contended that Denmark had 'knowledge of the long-standing position of the Norwegian Government in the matter of maritime delimitation',<sup>91</sup> and by not illustrating its discontent with this position, should now be estopped from 'challenging the existence and validity of the median line boundary'.<sup>92</sup>

The Court examined the circumstances in which the Danish silence was maintained and concluded that no estoppel was established. The Court observed that the Danish silence was explained by the 'concern not to aggravate the situation pending a definitive settlement of the boundary'.<sup>93</sup> Therefore, the underlying reason for the Danish 'restraint in the enforcement of its fishing regulations ... was to avoid difficulties with Norway'.<sup>94</sup>

The Court was not *exclusively* concerned with the question of whether Denmark should have protested the Norwegian delimitation. Its examination of the facts extended also to the reasons for why Denmark kept silent. Thus, it seems that the Court considered the two competing factors – the need to protest and the Danish hesitation in doing so – and observed that it was reasonable, in the circumstances, for Denmark to remain silent.

Silence was thus only of evidentiary weight. Had the Court adopted a *juris et de jure* view of silence, it would not have considered the reasons for the Danish hesitation to protest, and thus likely held that an estoppel was established.

In the *Territorial Dispute* case, the majority of the Court found that the boundary between Chad and Libya was defined by the 1955 *Treaty of Friendship and Good Neighbourliness* ('the 1955 Treaty').<sup>95</sup> In its pleadings, Chad offered a supplementary reason for why the boundary between the two States should be defined by the 1955 Treaty. Chad contended that even if the 1955 Treaty was invalid, the fact that Libya did not protest against this boundary in subsequent dealings between the two States estopped it from claiming another boundary.

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<sup>91</sup> Ibid 53.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid 54.

<sup>94</sup> Ibid 55.

<sup>95</sup> *Treaty of Friendship and Good Neighbourliness (with Annexes, Special Convention, Convention on Good-Neighbourliness, Convention on Economic Cooperation and Cultural Convention)*, 10 August 1955, France-Libyan Arab Jamahiriya, 1596 UNTS 264 (entered into force 20 February 1957).

Judge Ajibola was the only Judge to consider this argument. In his separate opinion, he observed that:

based on the principle of estoppel ... the silence or acquiescence of Libya from the date of signing the 1955 Treaty to the present time, without any protest whatsoever, clearly *militates* against its claim.<sup>96</sup>

Judge Ajibola then concluded that in light of the broader circumstances in which the silence was maintained, Libya was 'estopped from denying the 1955 Treaty boundary'.<sup>97</sup>

The use of the word 'militate' in the reasoning of Judge Ajibola is significant. It implies that the Judge saw silence as having influential, but not conclusive weight in establishing estoppel. Following an examination of the broader circumstances in which the silence was maintained, the Judge concluded that there was no other evidence which could lead one to a differing conclusion; Libya did not occupy the territory in question nor did it engage in any other conduct which was inconsistent with its silence.<sup>98</sup> Therefore, had Libya exercised some sovereignty over the territory in question, it seems that no estoppel would have arisen. Silence, therefore, was only of evidentiary weight.

The preceding examination reveals that the Court has not been consistent in determining when silence gives rise to an estoppel. This is caused by the conflicting judicial importance given to silence: sometimes it is conclusive, yet at other times, it is only of evidentiary weight in establishing estoppel. The Court has been unclear on the approach it prefers and this is therefore the first area of substantive inconsistency in the application of estoppel by the Court.

In conclusion, this element of estoppel is unclear: although coherent in its treatment of an estoppel arising from a declaration, the Court has not been consistent in determining when silence gives rise to an estoppel.

### **Authorised and Unconditional**

The second element of estoppel is that a representation must be both authorised and unconditional. If this element is not satisfied, a representation, even if it is clear and consistent, does not give rise to an estoppel.

The Court has been consistent in the judicial treatment of this element. It has continually held that a representation is authorised only if it is made by an organ

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<sup>96</sup> *Territorial Dispute*, 81 (Separate Opinion of Judge Ajibola) (emphasis added).

<sup>97</sup> *Ibid* 83 (Separate Opinion of Judge Ajibola).

<sup>98</sup> *Ibid* 84-5 (Separate Opinion of Judge Ajibola).

competent to bind the State and a representation is deemed unconditional, unless it is made in the course of negotiations or is subject to express conditions.

The question of proper authority was first discussed in the *Legal Status of Eastern Greenland* case. There, the Court held that:

a reply of this nature, given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power in regard to a question falling within his province, is binding upon the country to which the Minister belongs.<sup>99</sup>

This reasoning illustrates that the Court was not concerned with the question of whether the Minister had *actual* authority to make the representation. Rather, the focus of the Court was on whether the Minister was competent to bind the State; was the Minister given the power to engage the State internationally? When the Court concluded that it was, it observed that the representation was authorised.<sup>100</sup>

This particular view of 'authorisation' was endorsed in the *Nottebohm Case*.<sup>101</sup> Although the Court held that there was a clear and consistent representation, it then proceeded to conclude that the representation was not authorised because a consulate is not an organ which is competent to bind a State; it is not given responsibility to bind the State internationally on such affairs. Thus, the Court concluded that as the representation of the Consul-General of Guatemala was not authorised, it did not give rise to an estoppel.<sup>102</sup>

Similarly, in the *Gulf of Maine* case,<sup>103</sup> the Court held that although a clear and consistent representation was present, a 'mid-level government official'<sup>104</sup> – the Assistant Director for Lands and Minerals of the United States Bureau of Land Management – 'had no authority to define international boundaries or take a position on behalf of his Government on foreign claims in this field'.<sup>105</sup> The Court thus concluded that the Assistant Director was not competent to bind the State and therefore his representation, although clear and consistent, did not give rise to an estoppel.

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<sup>99</sup> *Legal Status of Eastern Greenland*, 71.

<sup>100</sup> See also Bowett, above n 9, 192. Cf. Martin, above n 9, 160.

<sup>101</sup> (*Liechtenstein v Guatemala*) (*Second Phase*) [1955] ICJ Rep 4.

<sup>102</sup> *Ibid* 17-18.

<sup>103</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* [1984] ICJ Rep 246 ('*Gulf of Maine*').

<sup>104</sup> *Ibid* 306.

<sup>105</sup> *Ibid* 307.

In addition to being authorised, a representation must also be unconditional. In the *Legal Status of Eastern Greenland* case, Norway argued that her representation to Denmark was conditional on Danish cooperation on a separate issue of sovereignty over the Spitsbergen Island.<sup>106</sup> The Court held, however, that the Norwegian representation was unconditional because it was not made in the course of negotiations.<sup>107</sup> However, the Court suggested that had the above argument been successful, no estoppel would have arisen.<sup>108</sup>

In conclusion, this element of estoppel is clear – the Court has consistently held that a representation must be authorised and unconditional to give rise to an estoppel.

The Court has also consistently applied the respective test for each requirement: a representation is authorised if the organ making the representation is competent to bind the State, while a representation is unconditional if it is made outside of negotiations and is not subject to express conditions. Attention must now turn to the third and final element of estoppel – reliance.

### **Reliance**

The final element of the principle is that the party claiming estoppel must have relied on the representation.<sup>109</sup> The Court has not been consistent in holding whether a State must have suffered detriment as a result of its reliance; it is unclear whether detrimental reliance is required for an estoppel to arise.

#### *The Prerequisite of Detriment*

Most decisions support the proposition that for an estoppel to arise, a party must show ‘that it has taken distinct acts in reliance on the other party’s statement either to its detriment or to the other’s advantage’.<sup>110</sup> These decisions all take a broad view of detrimental reliance; a State that suffered no direct harm can still invoke estoppel by virtue of the benefit gained by the other State.<sup>111</sup>

In the *Serbian Loans* case, the Court held that ‘no sufficient basis has been shown for applying this principle [of estoppel] ... as there has been no change in position on the

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<sup>106</sup> *Legal Status of Eastern Greenland*, 88.

<sup>107</sup> *Ibid* 88-90.

<sup>108</sup> *Ibid* 88.

<sup>109</sup> See, eg, *North Sea Continental Shelf*, 25.

<sup>110</sup> *Temple of Preah Vihear*, 63 (Separate Opinion of Judge Fitzmaurice); *North Sea Continental Shelf*, 26. This passage has been cited with approval in *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras) (Application by Nicaragua to Intervene)* [1990] ICJ Rep 3, 118; *Sovereignty Over Pedra Branca*, [228].

<sup>111</sup> See, eg, *Temple of Preah Vihear*, 63 (Separate Opinion of Judge Fitzmaurice).

part of the debtor State'.<sup>112</sup> In the *North Sea Continental Shelf* case, the Court stated that the conduct of the Federal Republic of Germany must have 'caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice'.<sup>113</sup>

In the *Military and Paramilitary Activities in and against Nicaragua* case, the Court observed that a representation, in the form of conduct, must have 'caused another State or States, in reliance on such conduct, detrimentally to change position or suffer some detriment'<sup>114</sup> to give rise to an estoppel. Further, in the *Barcelona Traction Light and Power Co* case, the Court refused to uphold the Spanish estoppel argument because no detrimental reliance was established; the Court was 'not able to hold that any true prejudice was suffered by the Respondent'.<sup>115</sup>

This view was endorsed in the *Land, Island and Maritime Frontier Dispute* case, where the Court observed that for an estoppel to arise, a party must rely on another party's representation 'to his detriment or to the advantage of the party making it'.<sup>116</sup> In the *Land and Maritime Boundary between Cameroon and Nigeria* case, the Court held that an estoppel would only arise where a State, in reliance on a representation of another, 'had changed position to its own detriment or had suffered some prejudice'.<sup>117</sup>

In the *Temple of Preah Vihear* case, the majority held that detrimental reliance was required to invoke estoppel. In particular, the majority held that Cambodia could invoke estoppel by virtue of the benefit gained by Thailand, which was a stable frontier with Cambodia.<sup>118</sup> Judge Fitzmaurice, in his separate opinion, argued that the essential condition of the operation of estoppel was that:

[t]he party invoking the rule must have "relied upon" the statements or conduct of the other party, either to its own detriment or to the others advantage.<sup>119</sup>

Dissenting Judges Koo and Fitzmaurice also supported this view, although they questioned its application on the facts. Judge Koo argued that the legal basis of estoppel was that 'one party has relied on the statement or conduct of the other either to its own detriment or to the other's advantage'.<sup>120</sup> Judge Spender held that a State

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<sup>112</sup> *Serbian Loans*, 39

<sup>113</sup> [1969] ICJ Rep 4, 26.

<sup>114</sup> (*Nicaragua v United States of America*) (*Jurisdiction*) [1984] ICJ Rep 392, 414.

<sup>115</sup> *Barcelona Traction Light and Power Co*, 25.

<sup>116</sup> (*El Salvador v Honduras*) (*Application by Nicaragua to Intervene*) [1990] ICJ Rep 3, 118.

<sup>117</sup> (*Cameroon v Nigeria*) (*Merits*) [1998] ICJ 275, 304.

<sup>118</sup> *Temple of Preah Vihear*, 32.

<sup>119</sup> *Ibid* 63 (Separate Opinion of Judge Fitzmaurice).

<sup>120</sup> *Ibid* 97 (Dissenting Opinion of Judge Koo).

claiming estoppel must have been prejudiced or the State making the representation 'must have secured some benefit or advantage for itself'.<sup>121</sup>

These cases, therefore, unequivocally show that detrimental reliance must be established for an estoppel to arise.

### *Estoppel without Detrimental Reliance*

While requiring detrimental reliance in some cases, the Court has held in others that detrimental reliance is not required for an estoppel to arise.

In the *Legal Status of Eastern Greenland* case, the Court held that Norway was bound by the verbal assurance given by the Norwegian Minister of Foreign Affairs to his Danish counterpart. In its judgment, the Court implied that detrimental reliance was not required for an estoppel to arise.<sup>122</sup>

One commentator is of the view, however, that detrimental reliance was required in the case because there

can be no doubt that the Court was impressed by the fact that Denmark, relying on Norway's unilateral "promise" of non-interference, thereafter proceeded to execute plans and projects for its remote colony.<sup>123</sup>

This, however, is confusing reliance with *detrimental* reliance. Reliance does not always lead to a detriment – a State must be 'worse off' in a material way from its reliance. This observation was made in the *Barcelona Traction Light and Power Co* case, where the Court held that Spain did rely on the Belgian representation, but in doing so, it suffered no material prejudice.<sup>124</sup>

The same can be said for the Danish claim. Although Denmark did rely on the Norwegian representation, it suffered no prejudice. This interpretation of the judgment is supported by Professor Higgins, who observes that in this case, 'detrimental reliance is distinct from the assumption of legal obligation'<sup>125</sup> and concludes that detrimental reliance was not required by the Court. Lord McNair also

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<sup>121</sup> Ibid 143-4 (Dissenting Opinion of Judge Spender).

<sup>122</sup> *Legal Status of Eastern Greenland*, 70-1. Although the Court upheld the Danish claim without requiring detrimental reliance, Denmark argued in its pleadings that detrimental reliance was required for an estoppel to arise, and that this requirement was satisfied on the facts. See *Legal Status of Eastern Greenland (Denmark v Norway) (Merits)* [1933] PCIJ (ser C) No 63, 843.

<sup>123</sup> Franck, above n 53, 617.

<sup>124</sup> (*Belgium v Spain*) (Judgment) [1964] ICJ Rep 4, 26-7.

<sup>125</sup> Dame Rosalyn Higgins, *Problems and Process* (1994) 36.

supports this view – he concludes that the case shows that ‘detrimental reliance is not required for estoppel to operate’.<sup>126</sup>

In the *Arbitral Award Made by the King of Spain*, the majority observed that an estoppel was established – Nicaragua was bound by its declaration which recognised the Award of the King of Spain as valid.<sup>127</sup> However, on the facts, Honduras suffered no detriment from its reliance on the Nicaraguan representation.<sup>128</sup> Therefore, it can be concluded that actual harm was not demanded by the Court. Judge Holguin, appointed ad hoc by Nicaragua, criticised this, arguing in his dissent that no estoppel was established because Honduras did not suffer any detriment from its reliance.<sup>129</sup>

In the *Nuclear Tests* case, the Court held that detrimental reliance was not required to establish estoppel. The Court observed that neither a ‘subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration’<sup>130</sup> to create an estoppel. Consequently, France was estopped from going back on its representations, even though Australia suffered no detriment from its reliance.<sup>131</sup> Therefore, in effect, the Court accepted an estoppel claim without requiring that the State invoking it suffer any detriment or harm.<sup>132</sup> In the three cases discussed above, detrimental reliance was not required to establish estoppel.<sup>133</sup> Therefore, the foregoing analysis illustrates that judicial decisions are divided on ‘whether detrimental reliance really is required for estoppels to operate’;<sup>134</sup> some cases support the need for detrimental reliance, whilst other cases suggest otherwise.

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<sup>126</sup> McNair, above n 13, 487. See also Christian Dominicé, ‘A propos du principe de l’estoppel en droit des gens’, in *Recueil d’Etudes de Droit International En Hommage a Paul Guggenheim* (1968) 327.

<sup>127</sup> *Arbitral Award Made by the King of Spain*, 209.

<sup>128</sup> *Ibid.* See also Brown, above n 10, 391.

<sup>129</sup> *Ibid.* 222 (Dissenting Opinion of Judge Holguin).

<sup>130</sup> (*Australia v France*) (*Merits*) [1974] ICJ Rep 253, 267.

<sup>131</sup> Cf. Krzysztof Skubiszewski, ‘Unilateral Acts of States’ in Mohammed Bedjaoui (ed), *International Law: Achievements and Prospects* (1991) 236, who is of the view that reliance per se was not required in *Nuclear Tests*.

<sup>132</sup> See Brown, above n 10, 409.

<sup>133</sup> The *Nottebohm Case (Liechtenstein v Guatemala) (Second Phase)* [1955] ICJ Rep 4 does not yield itself to easy classification. The Court dismissed the estoppel argument of Liechtenstein without elaborating on whether detrimental reliance was required. However, on the pleadings, Liechtenstein, the State claiming estoppel, argued that Mr Nottebohm did suffer detriment, and this assertion was not contested by Guatemala in her pleadings. See *Nottebohm Case (Liechtenstein v Guatemala) (Second Phase)* [1955] ICJ Pleadings 393.

<sup>134</sup> Higgins, above n 125, 36.

Some commentators, however, suggest that there is no inconsistency in the cases discussed in this section.<sup>135</sup> Attention now turns to their arguments.

### *A Justification for this Inconsistency?*

Some commentators deny that there is an inconsistency in the treatment of detrimental reliance in the cases outlined earlier in this section.<sup>136</sup> They justify this by observing that there are actually two separate principles at work in these cases; that of estoppel and that of a 'binding unilateral undertaking'.<sup>137</sup> Detrimental reliance is a prerequisite for the former, but is not required in the latter.<sup>138</sup>

This proposed approach is attractive. It separates the cases discussed previously into two categories – those requiring detrimental reliance and those that do not. Cases not requiring detrimental reliance could be excluded from further analysis as they are not based on estoppel – being based on a separate principle of a binding unilateral undertaking – and are therefore beyond the scope of this study. One would then be left with estoppel cases that unanimously support the view that detrimental reliance is required and there would be no inconsistency in this element.

Although attractive, this approach is based on fiction – it has no judicial support and its theoretical justifications are flawed.<sup>139</sup> A binding unilateral undertaking is 'binding because of estoppel'.<sup>140</sup> Therefore, it is 'nothing less than ... estoppel shorn of its reliance and detriment elements'.<sup>141</sup>

The Court has not confirmed that a binding unilateral undertaking is a separate principle to estoppel. There are no judicial discussions concerning the distinction between estoppel and a binding unilateral undertaking.<sup>142</sup> There is, however, an

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<sup>135</sup> See below n 136.

<sup>136</sup> See Sergio Carbone, 'Promise in International Law: A Confirmation of its Binding Force' (1975) 1 *Italian Year Book of International Law* 166; Wilfried Fiedler, 'Zur Verbindlichkeit eisetiger Versprechen im Volkerrecht' (1976) 19 *German Year Book of International Law* 35; Cahier, above n 52, 237; Adolfo Miaja de la Muela, 'Los actos unilaterales en las relaciones internacionales' (1968) 3 *Revista Espanola de derecho internacional* 429.

<sup>137</sup> Terms 'binding unilateral undertaking', 'binding unilateral promise' and 'binding unilateral declaration' are used interchangeably in extra-curial literature on this subject.

<sup>138</sup> See, eg, Carbone, above n 136, 170.

<sup>139</sup> See Jennings, above n 31, 42-54; Müller and Cottier, above n 14, 120.

<sup>140</sup> Wagner, above n 23, 1788.

<sup>141</sup> Brown, above n 10, 410.

<sup>142</sup> Cf. *Sovereignty Over Pedra Branca*, [228], [229], where the Court, for the first time, considered a claim of estoppel and a claim of a binding unilateral undertaking separately in the same judgment. The analysis was so brief, however, that no tangible conclusions can be drawn about the relationship between the two concepts.



observation made by the Court in the *Nuclear Tests* case that the principle of binding unilateral undertaking is 'well recognized'.<sup>143</sup> It is difficult to see how this is so, when the Court provided no authority to support this claim and its prior decisions reveal

no consensus supporting a rule asserting an international obligation to be created by a unilateral declaration uttered publicly and with an intent to be bound, in the absence of ... an affirmative reaction from other States.<sup>144</sup>

Given this lack of judicial support, how do proponents justify the view that a binding unilateral undertaking is a separate principle from estoppel?

Professor Jacque argues that the two principles – estoppel and a binding unilateral undertaking – differ in theory.<sup>145</sup> He explains that estoppel develops from the meaning given 'to acts or promises by the party invoking the estoppel whereas a binding unilateral undertaking depends on the intention of the promisor'.<sup>146</sup> He proceeds to argue that both principles apply subjective tests of intention of the parties, although estoppel does this by focusing on the party invoking estoppel, whereas binding unilateral undertakings focus on the promisor.<sup>147</sup>

This distinction is inconsistent with the Court's decision in the *Nuclear Tests* case. The Court made it clear that 'the sole relevant question is whether the language employed in any given declaration does reveal a clear intention'.<sup>148</sup> This focus is not on the intention of the State making the declaration but on an objective interpretation of the words of the declaration itself.<sup>149</sup>

Furthermore, in the context of the explanation proposed by Professor Jacque, it is difficult to imagine a representation that would give rise to an estoppel but not to a binding unilateral undertaking. In a possible attempt to explain this, one authority suggests that when 'properly analysed, detrimental reliance seems more relevant to *estoppel* than to the *binding nature of the unilateral act*. A unilateral act is either binding or not.'<sup>150</sup> It is unclear, however, how a declaration that gives rise to a binding unilateral undertaking, would not also give rise to an estoppel. Given that the focus in both is on the objective interpretation of the declaration itself, the result would

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<sup>143</sup> *Nuclear Tests* 267.

<sup>144</sup> Rubin, above n 57, 8.

<sup>145</sup> Jean-Paul Jacque, 'A Propos de la Promesse Unilaterale' in Paul Reuter (ed), *Le Droit International: Unite et Diversite* (1981) 327-39. See also Fiedler, above n 136, 70-2.

<sup>146</sup> Jacque, above n 145, 327. (Author's translation of original text).

<sup>147</sup> *Ibid* 328.

<sup>148</sup> *Nuclear Tests*, 268. See above n 56 and accompanying text.

<sup>149</sup> *Ibid* 267.

<sup>150</sup> Higgins, above n 125, 36 (emphasis in original).

have to be the same under either test.<sup>151</sup> Therefore, it seems that a binding unilateral undertaking is not a separate principle; it is nothing more than an estoppel without its detrimental reliance requirement. Dr Brown agrees with this conclusion, observing that the efforts of some writers

to distinguish estoppel from unilateral promise serve only to show the vast misunderstandings in this area of the law ... the court [in the *Nuclear Tests* case], in effect, accepted a promissory estoppel claim without requiring that the party invoking it suffer any detriment or harm.<sup>152</sup>

It is thus clear that the Court has not been consistent in determining whether detrimental reliance must be established for an estoppel to arise. Conflicting decisions cannot be explained by reference to a principle of binding unilateral undertaking; this inconsistency is caused by an arbitrary approach of the Court to the question of whether detrimental reliance is required for an estoppel to arise.

The foregoing analysis has argued that the application of estoppel by the Court has been subject to two uncertainties. First, it is unclear under what circumstances silence gives rise to an estoppel; sometimes silence is conclusive while at other times it is only of evidentiary weight in establishing estoppel. Secondly, it is unclear whether detrimental reliance is required for an estoppel to arise; some cases support this yet others deny the need for detrimental reliance. Judicial decisions on these issues have been arbitrary and ad hoc – they cannot be reconciled. The next part of the paper examines the impact of these inconsistencies, and considers how they should be dealt with by the Court.

### **An end to inconsistency**

This part of the paper considers the way forward for the Court. It argues that the inconsistencies established in the preceding part should not remain, as they undermine the perception of States as to the probity of the Court and create legal uncertainty.

Article 59 of the *Statute of the International Court of Justice* ('the Statute') states that decisions of the Court have 'no binding force except between the parties and in respect of that particular case'.<sup>153</sup> Nevertheless, despite an absence of *stare decisis*, the

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<sup>151</sup> See Koskenniemi, above n 53, 348.

<sup>152</sup> Brown, above n 10, 408.

<sup>153</sup> *Statute of the International Court of Justice* art 59. Article 59 of the Statute is identical to Article 59 of the *Statute of the Permanent Court of International Justice*. For an examination of debates between jurists on the Advisory Committee preparing the *Statute of the Permanent Court of International Justice*, see especially Permanent Court of International Justice Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee* (1920) 332, 336.

Court does examine its previous decisions and takes them into account when seeking the solution to a dispute.<sup>154</sup> Even though a particular determination of law is only formally binding on the parties before it, the Court 'will invariably, in the course of making such a determination, invoke previous jurisprudence and *dicta* pertinent to the present facts'.<sup>155</sup>

Given that the Court 'almost always takes previous decisions into account',<sup>156</sup> it is thus imperative for the Court 'to maintain judicial consistency'.<sup>157</sup> This is because 'intellectual coherence and consistency is the cornerstone of continuing respect'<sup>158</sup> for the jurisprudence of the Court. Furthermore, the success of the Court is dependent to a large degree upon its reputation for impartial adjudication,<sup>159</sup> and 'judicial consistency is the most obvious means of avoiding accusations of bias'.<sup>160</sup> Sir Robert Jennings emphasises this, by observing that judicial inconsistency is 'a circumstance which must be a discouragement if not even a deterrent to governments contemplating international litigation'.<sup>161</sup> Therefore, inconsistent decisions, such as those regarding estoppel, affect 'the perceptions of statesmen as to the probity of the Court, as well as the willingness of States to refer real cases to it'.<sup>162</sup>

Furthermore, judicial consistency provides 'some degree of certainty ... as to what the law is on a particular issue'.<sup>163</sup> Thus, inconsistent decisions create legal uncertainty. This in turn undermines the value of international law as a guide to future State conduct.<sup>164</sup>

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<sup>154</sup> See Rebecca Wallace, *International Law* (2005) 26.

<sup>155</sup> Higgins, above n 125, 202.

<sup>156</sup> Michael Akehurst, *A Modern Introduction to International Law* (6th ed, 1993) 150.

<sup>157</sup> Brownlie, n 3, 21. See also J H W Verzijl, *International Law in Historical Perspective* (1976) 526.

<sup>158</sup> Higgins, above n 125, 202.

<sup>159</sup> See Thomas Hensley, 'National Bias and the International Court of Justice' (1968) 12 *Midwest Journal of Political Science* 568, 568.

<sup>160</sup> Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (6th ed, 1997) 53.

Accusations of bias are not infrequent against the Court. See, eg, Eric Posner and Miguel de Figueiredo, 'Is the International Court of Justice Biased?' 34 *Journal of Legal Studies* 189.

<sup>161</sup> Robert Jennings, 'What Is International Law And How Do We Tell It When We See It?' (1981) 37 *Annuaire Suisse de Droit International* 59, 60.

<sup>162</sup> Rubin, above n 57, 1.

<sup>163</sup> Wallace, above n 154, 26. See also Oscar Schachter, *International Law in Theory and Practice* (1991) 40. John Henry Merryman and Rogelio Perez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3rd ed, 2007) argue that this proposition is 'true for all legal systems': at 48.

<sup>164</sup> Lung-chu Chen, *An Introduction to Contemporary International Law: A Policy-Oriented Perspective* (1989) 85.

Article 38(1)(d) of the Statute refers to judicial decisions ‘as subsidiary means for the determination of rules of law’.<sup>165</sup> However, far from being treated as such, the judgments of the Court are treated as ‘authoritative pronouncements upon the current state of international law’.<sup>166</sup> Professor Parry observes that the judgments of the Court are ‘considered highly persuasive as to propositions of international law’.<sup>167</sup> Professor Sohn agrees with this view, arguing that decisions of the Court are ‘considered as recognized manifestations of international law’.<sup>168</sup>

Given that the judgments of the Court are indeed authoritative pronouncements on the state of international law,<sup>169</sup> it is reasonable to expect that States will refer to them ‘for guidance whenever they consider the possibility of issuing a declaration of future policy’<sup>170</sup> or embarking on a given course of action.<sup>171</sup>

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<sup>165</sup> *Statute of the International Court of Justice* art 38(1)(d). Although Article 38(1) of the Statute is expressed in terms of the function of the Court, it is generally regarded as a complete statement of the sources of international law. See Brownlie, n 3, 19; Jennings and Watts (eds), above n 24, 514. Article 38(1) of the Statute is based on Article 38 of the *Statute of the Permanent Court of International Justice*.

<sup>166</sup> Higgins, above n 125, 202. See also Gerald Fitzmaurice, ‘Some Problems Regarding the Formal Sources of International Law’ in Baron Fredrik Mari van Asbeck (ed), *Symbolae Verzijil* (1958) 153.

<sup>167</sup> Clive Parry, *The Sources and Evidences of International Law* (1965) 91. See also Fitzmaurice, ‘Some Problems Regarding the Formal Sources of International Law’, above n 166, 172; Sinclair, above n 58, 116; Schachter, above n 163, 39.

<sup>168</sup> Louis Sohn, ‘The Development of the Charter of the United Nations: Present State’ in Maarten Bos (ed), *The Present State of International Law and Other Essays Written in Honour of the Centenary Celebration of the International Law Association 1873-1973* (1973) 59. The Permanent Court of International Justice had similar influence during the time of its operation (1920-42), notwithstanding that the *Covenant of the League of Nations* art 2 did not enumerate it among the organs of the League of Nations. See, eg, Manley Hudson, *The Permanent Court of International Justice 1920-1942* (1943) 111-12.

<sup>169</sup> Higgins, above n 125, 202. See also Malcolm Shaw, *International Law* (2003); Godefridus Hoof, *Rethinking the Sources of International Law* (1983) 171; Sam Muller, David Raič and Hannah Thuránzsky (eds), *The International Court of Justice: Its Future Role after Fifty Years* (1996) 17; Muhammad Nawaz, ‘Other Sources of International Law: Are Judicial Decisions of the International Court Of Justice a Source of International Law?’ (1979) 19 *Indian Journal of International Law* 526. Cf. Louis Henkin, *International Law: Cases and Materials* (2nd ed, 1987) who is of the view that decisions of the Court are only a ‘persuasive authority of existing international law’: at 107 (emphasis added).

<sup>170</sup> Rubin, above n 57. See generally Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (2005) ch 4.

<sup>171</sup> The question of whether States *do* refer to decisions of the Court for guidance on their future conduct is beyond the scope of this paper. See Louis Henkin, *How Nations Behave* (2nd

Inconsistent decisions thus make it difficult, if not impossible, for States to conduct their affairs in conformity with prevailing law. This effectively undermines the value of international law as a guide to future State conduct.<sup>172</sup> States would thus have fewer reservations about failing to abide by their representations. Consequently, cooperation between States would be plagued by greater caution and mistrust. This will add further instability and insecurity to international relations.

It is therefore imperative for the Court to confront these inconsistencies. As '[e]stoppel is a concept in evolution'<sup>173</sup> in the jurisprudence of the Court, suggestions are now made as to how this evolution should progress. In particular, the following sections argue that silence should only be given evidentiary weight and that detrimental reliance should be required for an estoppel to arise.

### **The drawbacks of a conclusive view of silence**

The Court should not give silence conclusive weight. Otherwise, it will be giving the State claiming estoppel an unfair advantage and creating other undesirable consequences.

A State may be silent in light of an adverse claim against it for a number of reasons. First, for diplomatic reasons, it may prefer to let a dispute lie dormant for a time. Secondly, it may not be aware of an adverse claim against it. Finally, it might assume that there is no need to protest. A conclusive view of silence gives the State claiming estoppel an unfair advantage in each case.

A State may abstain from protest to retain tepid relations with another State.<sup>174</sup> One of the reasons why Thailand did not officially protest the Cambodian claim of sovereignty over the Temple in the *Temple of Preah Vihear* case was that Thailand, in the words of Princess Phun Phitsamai Diskul, 'only gave the French an excuse to

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ed, 1979) 47; Edith Brown and Harold Jacobson (ed) *Engaging Countries: Compliance with International Environmental Agreements* (1998); Beth Simmons, 'Compliance with International Agreements' (1998) 1 *Annual Review of Political Science* 75; Roger Fisher, 'Bringing Law to Bear on Governments' (1961) 74 *Harvard Law Review* 1130; Jack Goldsmith and Eric Posner, *Do International Norms Influence State Behavior? The Limits of International Law* (2005).

<sup>172</sup> Generally see, eg, John Braithwaite, 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 *Australian Journal of Legal Philosophy* 47.

<sup>173</sup> Müller and Cottier, above n 14, 116.

<sup>174</sup> See *Temple of Preah Vihear*, 85 (Dissenting Opinion of Judge Koo); *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* (Merits) [1993] ICJ Rep 38, 53-4.

seize more territory by protesting'.<sup>175</sup> When observed in light of historic relations between Thailand and France at the time,<sup>176</sup> 'the Princess's explanation seems natural and reasonable'.<sup>177</sup>

It is reasonable for a State to withhold from protest so that it does not provoke another. By not taking this into account in deciding whether silence gives rise to an estoppel, a 'relatively weak State, with no desire to ... antagonize a powerful neighbour, is at a considerable disadvantage if it finds itself in a position to assert a right later'.<sup>178</sup>

This can extend to cases not as extreme as that of Thailand and France in the *Temple of Preah Vihear* case – a current dispute between China and India will serve as an example. India currently claims sovereignty over the Aksai Chin region which China has been administering since the Sino-Indian War.<sup>179</sup> India, however, has been actively cooperating with China on various economic issues while abstaining from protest over this dispute.<sup>180</sup> It is clearly not India's intention to concede the dispute over the Aksai Chin region – its temporary lack of protest is most likely a function of its aim to further diplomatic progress on other fronts. However, the Court would come to an opposite conclusion if it applies the conclusive view of silence.

Secondly, a State may not protest because it is not aware of an adverse claim against it. States are 'agglomerations of many organs – each of which is made up of many individuals'.<sup>181</sup> This leads to the obvious difficulty that a State does not necessarily

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<sup>175</sup> *Temple of Preah Vihear (Cambodia v Thailand) (Written Pleadings of Thailand)* [1962] ICJ Rep 401.

<sup>176</sup> Cambodia was a protectorate of the French colonial empire from 1887 to 1954. See, generally, John Tully, *France on the Mekong: A History of the Protectorate in Cambodia* (2002).

<sup>177</sup> G M Kelly, 'The Temple Case in Historical Perspective' (1963) 39 *British Year Book of International Law* 462, 465. See also *Temple of Preah Vihear*, 91 (Dissenting Opinion of Judge Koo).

<sup>178</sup> Athene Munkman, 'Adjudication and Adjustment – International Judicial Decisions and the Settlement of Territorial and Boundary Disputes' (1972) 46 *British Year Book of International Law* 1, 97.

<sup>179</sup> The Sino-Indian War was fought in 1962. See, generally, Chih Lu, *The Sino-Indian Border Dispute: A Legal Study* (1986)

<sup>180</sup> For example, in January 2006 both States signed the 'Memorandum for Enhancing Cooperation in the Field of Oil and Natural Gas' which allows for joint Sino-Indian bids for energy assets in other States. See 'China, India Sign Energy Agreement', *China Daily* (Beijing), 13 January 2006, 3. For Sino-Indian cooperation on other issues, see, eg, Nancy Jetly, 'Sino-Indian Relations: Old Legacies and New Vistas' (1994) 30 *China Report* 215; John Lancaster, 'India, China Hoping to "Reshape the World" Together', *Washington Post* (Washington), 12 April 2005, 16.

<sup>181</sup> Munkman, above n 178, 97.

speak with the 'one voice' at the same time. In the *Fisheries Case*, for example, Judge Reid observed that the information available to the United Kingdom revealed contradictions in the system of delimitation used by Norway.<sup>182</sup> In such cases, 'no simple, tidy estoppels can really be made out'.<sup>183</sup> Inferences drawn from silence become excessively subjective; they can no longer be assumed to be accurate representations of the attitude of the State. Such situations, therefore, require a 'weighing of the activities and positions taken by the claimants';<sup>184</sup> they require an evidentiary view of silence. Otherwise, the Court would reach conclusions which, as was argued in the *Temple of Preah Vihear* case by Judge Spender, would be 'inconsistent with the facts incontrovertibly established by the evidence'.<sup>185</sup>

Finally, a State might not see the need to protest the claim of another State if it assumes that its conduct sufficiently illustrates its attitude on a given dispute. This assertion can be explored by examining an ongoing dispute between Japan and Russia over sovereignty over the Kuril Islands. The Islands have been under Russian administration and control for over six decades.<sup>186</sup> Japan, however, contends that it should have sovereignty over the Islands as they were improperly seized by Russia after the end of World War Two.<sup>187</sup> In 2005, the Ministry of Foreign Affairs of Japan released a pamphlet that stated that the Islands 'are inherent territories of Japan'.<sup>188</sup> To date, Russia has not officially responded to this pamphlet. Under the conclusive view of silence, Russia would be estopped from claiming sovereignty over the Islands because it failed to protest the Japanese assertions in the pamphlet, which created circumstances that called for an official reaction from Russian authorities. This, however, would be an unjust result – by occupying and administering the Islands, the Russian authorities, in effect, are protesting the Japanese claims of sovereignty over the Islands.

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<sup>182</sup> *Fisheries Case*, 200 (Dissenting Opinion of Judge Reid).

<sup>183</sup> Munkman, above n 178, 99.

<sup>184</sup> Rubin, above n 57, 10.

<sup>185</sup> *Temple of Preah Vihear*, 109 (Dissenting Opinion of Judge Spender).

<sup>186</sup> See, generally, Seokwoo Lee et al, 'Towards a Framework for the Resolution of the Territorial Dispute over the Kurile Islands' (2001) 3 *International Boundaries Research Unit Boundary & Territory Briefings* 1; Yakov Zinberg, 'The Kuril Islands Dispute: Towards Dual Sovereignty' (1998) 5 *Boundary and Security Bulletin* 89.

<sup>187</sup> Ministry of Foreign Affairs of Japan, *The Position of the Japanese Government on the Northern Territorial Issue* (1965) 4-5. See also Yutaka Okuyama, 'The dispute over the Kurile Islands between Russia and Japan in the 1990s' (2003) 76 *Pacific Affairs* 37.

<sup>188</sup> Ministry of Foreign Affairs of Japan, 'Japan's Northern Territories: For a Relationship of Genuine Trust' (Press Release, 8 March 2005) 2.

Further to giving the State claiming estoppel an unfair advantage, a conclusive view of silence puts an emphasis on 'inaction and protest as part of State conduct, rather than objective and clear conducts'<sup>189</sup>, which leads to undesirable practical consequences. Giving silence conclusive weight is to put a high premium on constant and vigorous protest. It creates a situation in which States are compelled to become 'exceptionally "touchy" in international relations, perusing each other's statute-books and putting out reservations of their position on every conceivable occasion'<sup>190</sup> in fear of an estoppel arising against them. This is likely to lead to a barrage of State declarations, more akin to media releases, the sole purpose of which is to protect the State from an adverse estoppel arising. This is unlikely to encourage cooperation on issues in dispute; it only fuels the need to protest and rewards vigorous vindication.

Judge Alfaro, who adopted the conclusive view of silence in the *Temple of Preah Vihear* case, observed that estoppel is

rooted in the necessity of avoiding controversies as a matter of public policy ... By condemning inconsistency a great deal of litigation is liable to be avoided and the element of friendship and cooperation is strengthened in the international community.<sup>191</sup>

It is difficult to see how this can be achieved by encouraging States to protest. In fact, it seems the effect would be quite the opposite – there will be less emphasis on cooperation in the resolution of disputes and greater emphasis on a litigious outcome. This shift in focus would be inimical to placid international relations.

Therefore, an estoppel arising from silence alone should not be easily presumed. The Court should examine the surrounding circumstances in which the silence was maintained, devoid of any *juris et de jure* presumptions, when considering whether silence should give rise to an estoppel.

### **The need for detrimental reliance**

The Court should only allow an estoppel to arise if detrimental reliance has been established. An estoppel without detriment is not well grounded in theory and is undesirable as a matter of policy.

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<sup>189</sup> Nuno Sergio Marques Antunes, Rachael Bradley and Clive Schofield, 'Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement' (2000) 2 *International Boundaries Research Unit Boundary & Territory Briefings* 1, 35.

<sup>190</sup> David Johnson, 'International Court of Justice. Judgments of May 26, 1961, and June 15, 1962. The Case concerning the Temple of Preah Vihear' (1962) 11 *International and Comparative Law Quarterly* 1183, 1203-4.

<sup>191</sup> *Temple of Preah Vihear*, 42 (Separate Opinion of Judge Alfaro).



The principle of estoppel – that one should not benefit from his or her own inconsistency<sup>192</sup> – stems from fundamental notions of justice and fairness,<sup>193</sup> which are ‘almost universally cited for estoppel in international law’.<sup>194</sup> What injustice is caused by a State going back on a representation that causes no detriment to anyone? How is it fair to allow a State to claim that another is estopped when it is not prejudiced in any way from its reliance on the representation?

Detrimental reliance is an integral part of estoppel. ‘Prejudice or detriment are not simply addenda; they trigger the very justification’<sup>195</sup> for estoppel in the jurisprudence of the Court. Therefore, as Dr Brown argues, if a State could be bound

by the mere utterance of a promise or assurance, one can only conclude that, in international law, the theory of unilateral promise would be a modification of estoppel and that the latter theory would be rendered largely obsolete.<sup>196</sup>

Some have argued that this modification is justified under the overarching, fundamental principle of good faith.<sup>197</sup> However, how can good faith justify an estoppel arising when no State is prejudiced by another resiling on a representation? Professor Rubin sums up this deficiency, suggesting that if the international community

were not misled by the unilateral declaration and did not conceive it as creating a direct legal obligation, no significant question of good faith would seem to arise.<sup>198</sup>

Therefore, the view that detrimental reliance is not necessary for an estoppel to arise is not well grounded in theory.<sup>199</sup>

Some commentators, however, are content to forgo this theoretical deficiency and argue that the justification for an estoppel without detriment is found in the ‘continuing need for at least a modicum of stability and for some measure of

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<sup>192</sup> See above n 13.

<sup>193</sup> Cooke, above n 18, 58; George Bower and Sir Alexander Turner, *The Law Relating to Estoppel by Representation* (1966) 14.

<sup>194</sup> MacGibbon, ‘Estoppel in International Law’, above n 6, 469. See also *Temple of Preah Vihear*, 39 (Separate Opinion of Judge Alfaro), *Territorial Dispute*, 77-8 (Separate Opinion of Judge Ajibola).

<sup>195</sup> Müller and Cottier, above n 14, 118.

<sup>196</sup> Brown, above n 10, 408.

<sup>197</sup> Georg Schwarzenberger, ‘The Fundamental Principles of International Law’, above n 31, 312-14.

<sup>198</sup> Rubin, above n 57, 9-10.

<sup>199</sup> See Antunes, above n 189, 35. Cf. Degan, above n 3, 55-9.

predictability in the pattern of State conduct'.<sup>200</sup> This is attractive in theory – States would abide by all representations, and certainty will thus prevail in international relations. This justification, however, is unrealistic – it encounters three impediments. First, it would make States reluctant to communicate their intentions. Governments make statements daily. Some are well planned and issued with much formality. Others are issued under time constraints and are consequently less carefully drafted. If a statement, without more, can create an estoppel, the obvious consequence is that States become hesitant to communicate intentions; they will only voice intentions they are comfortable being legally bound by.

States should not be discouraged from openly communicating their intentions. Although practice shows that State representations of intention are rarely permanent,<sup>201</sup> transitory communication of intention is better than no communication. Furthermore, States are aware of the importance of credibility in international relations – they are unlikely to 'flip-flop' on their stated intentions. Therefore, taking away detrimental reliance only discourages 'the sort of open discussion of positions and issues that leads to stability in international affairs'.<sup>202</sup>

Secondly, estoppel without detrimental reliance severely limits the development of international policies by States. States would be bound to maintain outdated policies, even when no State would be prejudiced by them not doing so.<sup>203</sup> This is particularly undesirable as States are arguably more justified than individuals in going back on their representations. As Dr Munkman puts it:

The long life of States, their multiple and changing representation and the multiplicity of their interests, combine to make 'inconsistency' and 'blowing hot and cold' not a sign of 'bad faith' in any morally blameworthy sense, but simply a normal and natural feature of their acts over any prolonged period of time.<sup>204</sup>

It is thus undesirable for a State, instead of announcing a new policy, being bound to continue to pursue an outdated policy on which no other State has relied to its detriment.

Finally, and perhaps most importantly, a modification of estoppel which binds States by all their representations, without more, 'vastly overestimates the potential of the

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<sup>200</sup> MacGibbon, 'Estoppel in International Law', above n 6, 469.

<sup>201</sup> See, eg, Oliver Boyd-Barrett, 'International Communication and Globalisation: Contradictions and Directions' in Ali Mohammadi (ed), *International Communication and Globalization* (1997) 11-14.

<sup>202</sup> Rubin, above n 57, 30.

<sup>203</sup> See Wagner, above n 23, 1780.

<sup>204</sup> Munkman, above n 178, 21.

law'.<sup>205</sup> Realistically, this modification is likely to result in a greater disregard by States of the asserted dictates of the law. This is particularly undesirable because estoppel can ensure reliability and predictability in dealings between States.<sup>206</sup> Reliance on such comity builds trust and confidence in international relations.<sup>207</sup> Therefore, if States disregard estoppel, they disregard a principle that has the potential to bring greater stability to international cooperation.

It is thus evident that taking detriment away from estoppel yields no benefits. Estoppel already acts as a remedy, providing protection for a State that suffered harm from its reliance. No compelling reasons exist why this protection should be extended to a State that suffered no detriment. Such an extension is at odds with the foundations and the purpose of the estoppel. Furthermore, it creates an unnecessary disincentive for States to voice future intentions or to change foreign policy. Detrimental reliance, therefore, should be a prerequisite for an estoppel to arise; eliminating detrimental reliance would be 'taking the concrete form of an estoppel...too far'.<sup>208</sup>

## Conclusion

In illuminating why estoppel lacks coherence in the jurisprudence of the Court, this paper has argued that the Court has been inconsistent on two elements of estoppel. First, it has been not been clear in the circumstances when silence gives rise to an estoppel: sometimes silence is conclusive while at other times it is only of evidentiary weight in establishing estoppel. Secondly, the Court has been inconsistent in its treatment of detrimental reliance: sometimes it is required while at other times it is unnecessary for an estoppel to arise.

Given this conclusion, it was argued that these inconsistencies should not remain, as they not only undermine the perception of States as to the probity of the Court but also create legal uncertainty, which in turn undermines the value of international law as a guide to future State conduct.

Subsequently, a proposal was put forward indicating the way the Court should eliminate these inconsistencies. In particular, it was shown that silence should be given only evidentiary weight and that detrimental reliance should be a prerequisite to invoke estoppel. These suggestions provide estoppel with a modicum of predictability in the jurisprudence of the Court, and ensure that the principle promoting stability does not undermine it.

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<sup>205</sup> Müller and Cottier, above n 14, 118.

<sup>206</sup> *Territorial Dispute*, 78 (Separate Opinion of Judge Ajibola).

<sup>207</sup> *Temple of Preah Vihear*, 42 (Separate Opinion of Judge Alfaro).

<sup>208</sup> *Gulf of Maine*, 308 (Dissenting Opinion of Judge Spender).