Representation in the Doctrine of Estoppel in International Law

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Effective relations between international actors require that these must be able to place their trust in the representations made by others, in particular, when such representations directly or indirectly affect. More specifically, a State ought to act in such a manner so that other subjects of international law are able to rely on such acts or statements and comport themselves accordingly.[1] Mere reliance per se does not give rise to potentially far-reaching legal consequences, however, reliance, which is legitimate and therefore worthy of legal protection, must be recognised as such and shielded.[2] The practical promotion of consistency occurs in international law (as in several domestic legal orders) by way of the application of, inter alia, the doctrine of estoppel, the existence of which is trite law.[3] Notwithstanding several applications of this doctrine, which in essence shields an innocent party from the detrimental consequences of reliance on the actions of another party, by international tribunals, the International Court of Justice has declined to elaborate extensively on the dogmatic basis of the doctrine, its specific elements or its application. This reticence has resulted in several missed opportunities to provide clarity as to the exact scope and content of this doctrine which has, in the past, caused difficulties with its interpretation.

This chapter considers the potential of applying the estoppel principles developed within the Common Law as a means of helping to clarify the doctrine of estoppel as it is recognised in international law. By drawing on a number of national innovations, a better differentiation and delimitation of the various elements of the doctrine will serve to provide for a more unified theory of estoppel and, thus, greater legal certainty. It must be stressed that it is neither necessary nor helpful to attempt to extensively categorise estoppel as it is recognised in international law in order to demonstrate its convergence with municipal law and that this study does not seek to rigidly foist

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[1] MacGibbon, 'Estoppel in International Law' (1958) 7 *International & Comparative Law Quarterly* 468, 478; Wagner, 'Jurisdiction by Estoppel in the International Court of Justice' (1986) 74 *California Law Review* 1777, 1779.

[2] Müller, *Vertrauensschutz im Völkerrecht* (Cologne, Carl Heymans Verlag, 1971) 1.

[3] Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge, Cambridge University Press, 1953) 140; Lauterpacht, *Private Law Sources and Analogies of International Law* (Cambridge, Cambridge University Press, 1970) 203–206.

Common Law estoppel principles onto international law;[4] rather that greater precision is required, which will, in turn, lead to a more predictable, more manageable doctrine capable of consistent application. The municipal and international doctrines of estoppel cannot be considered as identical; nevertheless, a better examination of the specific criteria for municipal estoppels, for example the need for the party seeking to enforce the estoppel to have suffered a detriment, might provide a better indication as to the limits of estoppel in international law especially regarding the complex relationship between estoppel, unilateral declarations and good faith.

The first and second sections of this study deal with the nature and source of the doctrine of estoppel. Both the development of the doctrine as well as its contemporary application suggest that the doctrine of estoppel is founded upon an application of the principle of good faith, undoubtedly an overarching principle permeating the very framework of international law. What remains unclear is the relationship of estoppel to the prohibition against inconsistent conduct and, moreover, the relationship between this prohibition itself and good faith. This issue will be discussed in the third section. The fourth section is devoted to the specific requirements which must be at hand in order to confirm the existence of estoppel in the first place. Thereafter, the nature of the representation which can give rise to an estoppel will be considered.

It is the central thesis of this study that the doctrine of estoppel, as it is known at international law, is considerably broader than its narrowly-interpreted Common Law counterpart, and that it is preferable for the development of a consistent doctrine to more strictly scrutinise the individual requirements regarded as essential to the creation of an international estoppel. Should it be the case that one of the elements is not present, no estoppel can be created. In order to balance the potential for harsh results arising from this thesis and to ensure a uniform development of the doctrine as well as the maximum protection of States legitimately attempting to rely on estoppel, it will be argued that the previous categorisation into conduct, silence, promise etc can plausibly be substituted by the single category of a representation.

NATURE OF ESTOPPEL

Semantically, the origins of the word 'estoppel' appear to come from the French word *estoupper* meaning to close an opening.[5] This term thus implies that an act of acceptance from one party would prevent (or close the door to) the other party to challenge that state of affairs.[6] Estoppel exists in various forms in both the Anglo-American Common Law and in the European civil legal systems, although the doctrine in international law developed predominantly under the influences of the Anglo-Saxon legal tradition. Some have even gone so far as to say that '[e]stoppel in international law is a direct descendant of its Anglo-American counterpart.'[7] The *locus classicus* of the doctrine is stated in the British case *Pickard v Sears*:

[4] Contrast: Brown 'Comparative and Critical Assessment of Estoppel in International Law' (1996) 50 *University of Miami Law Review* 369.

[5] Hudson (2004) *Equity and Trusts* 477.

[6] Ibid, 371.

[7] Brown 'Comparative and Critical Assessment of Estoppel in International Law' (1996) 50 *University of Miami Law Review* 369, 370.

> Where one by his words or conduct causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time.[8]

As previously indicated, this doctrine has been applied several times by the International Court of Justice,[9] the Permanent Court of International Justice on at least one occasion,[10] as well as countless international arbitral tribunals.[11] Nevertheless, the nature of the doctrine remains to be considered as it may be merely a procedural principle relating to the law of evidence or does it, in fact, also carry with it a material legal effect. Early thinking in international law tended towards the opinion that estoppel was merely a procedural doctrine governing the law of evidence in that it precluded the introduction of certain facts before a court or tribunal.[12] This limits the doctrine to a theory of the inability to rely on a set of facts to prove a case. The reasoning provided for this belief is usually that estoppel is to be viewed as a technical rule of the law of evidence and it is therefore not suitable for an application within the realm of the 'rough jurisprudence of nations.'[13]

Despite these earlier statements, estoppel can be said by now to belong to the substantial principles of material international law. This has been confirmed in several judicial decisions, both domestic and international. In the *Canada and Dominion Sugar Company v Canadian National (West Indies) Steamships Ltd.* the court held that 'the whole concept is more correctly viewed as a substantive rule of law.'[14] Several years later, this time within the forum of a proceeding before the International Court of Justice, the substantive nature of the doctrine was once again confirmed by Judge Fitzmaurice in the *Temple of Preah Vihear* case when he explicitly wrote that estoppel 'certainly applied as a rule of substance and not merely as one of evidence or procedure.'[15] Indeed, the quintessential function of the doctrine itself, namely the protection of the rights of an innocent party who reasonably placed reliance in the actions of another, would tend to suggest that it is worthy of more than the mere position of an evidentiary rule.

[8] *Pickard v Sears* 6 Ad And El (1837) 469 per Denman LCJ.

[9] *Nottebohm* (*Liechtenstein v Guatemala*) ICJ 6 April 1955, 4; *Anglo-Norwegian Fisheries Case* (*United Kingdom v Norway*) ICJ 18 Dec 1951, 130 (18 December); *Temple of Preah Vihear* (*Cambodia v Thailand*) ICJ 15 June 1962, 31; *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) ICJ 26 Nov 1986, 14.

[10] *Case Concerning Serbian Loans Issued in France* (*France v Kingdom of Serbs, Croats and Slovenes*) [1929] PCIJ (ser A/B) No 20/21; Compare: *The Legal Status of Eastern Greenland* (*Denmark v Norway*) [1933] PCIJ (ser A/B) No 53.

[11] *Decision of the Permanent Court of Arbitration in the Matter of the Maritime Boundary Dispute between Norway and Sweden* (1910) 4 AJIL 226; *Tinoco Arbitration* (*Costa Rica v United Kingdom*) (1924) 18 AJIL 145; *Award of Her Majesty Queen Elizabeth II for the Arbitration of a Controversy between the Argentine Republic and the Republic of Chile Concerning Certain Parts of the Boundary between their Territories* (1967) 61 AJIL 1071.

[12] Friede, 'Das Estoppel-Prinzip im Völkerrecht' (1935) 5 *Zeitschrift für Auslandisches Öffentliches Recht und Völkerrecht* 517; Lauterpacht, *Private Law Sources and Analogies of International Law* (1970) 203.

[13] Hall, *A Treatise on International Law* (Oxford, Clarendon Press, 1924) 395. See also McNair, 'The Legality of the Occupation of the Ruhr' (1924) 5 *British Year Book of International Law* 17, 36; Friede, 'Das Estoppel-Prinzip im Völkerrecht' (1935) 5 *Zeitschrift für Auslandisches Öffentliches Recht und Völkerrecht* 520.

[14] [1947] AC 46.

[15] *Temple of Preah Vihear*, above n 9, Separate Opinion of Judge Fitzmaurice.

THE SOURCE OF ESTOPPEL

The starting point for any examination of a doctrine of international law must be its source, particularly when there is no consensus on this matter. Art 38 of the Statute of the International Court of Justice, enumerates the different sources of the law, which are to be applied in the process of the judicial settlement of disputes.[16] It must be borne in mind that the enumeration of these sources only has a declaratory function and the sources themselves are not possessed of the binding legal effect of law in the sense of law created by national parliaments. Nevertheless, regarding the doctrine of estoppel, two potential sources come into question: general principles of law and international custom.'

General principles are elementary and generally accepted rules of a national legal order of fundamental importance. These principles are essential for the functioning of the legal system. In particular the principles prevalent within the private law of States play an important role because many such principles find a general acceptance among the various international actors. A doctrine of estoppel, or some equivalent thereof, can be found in both the common and civil law traditions.[17] The Anglo-American legal family recognises a highly technical, extremely developed form of the doctrine of estoppel. It is noteworthy that several British judges have described estoppel as being a universally accepted general principle: 'The doctrine is found, I believe, in the laws of all civilised nations,'[18] and 'it is perhaps only an application of one of those general principles which do not belong to the municipal law of any country.'[19] A similar legal concept is found in the civil law jurisdictions.[20] Indeed, such a concept is found in the Roman digests (which form the historical basis of the civil law tradition) of Ulpian.[21] Both German and French law are acquainted with general clauses with the basic effect of ensuring that parties cannot simply alter their position to the detriment of another.[22] Even if these national forms are not identical, they are sufficiently similar so that one could still easily describe estoppel as a general principle of law.[23] This has been recognised on several occasions by both renowned international commentators as well as international tribunals. Hersch Lauterpacht has stated with absolute certainty that 'the principle underlying estoppel is recognised by all systems of private law.'[24] Further, the Permanent Court of International Justice has confirmed the status of estoppel as 'a principle of international law, and even a general conception of law.'[25] Thus, the solid legal basis of estoppel as a general principle of law appears to be indefeasible. It is somewhat less clear whether estoppel has developed sufficient support to be considered international custom.

[16] Graf Vitzthum in Graf Vitzthum (ed), *Völkerrecht* (2007) 54.

[17] Hudson, *Equity and Trusts* (2004) 478: 'Estoppel in all its forms is based on a variety of underlying conceptions, varying from honesty to common sense to common fairness. What emerges . . . is that common principles underlying all estoppel can be identified . . .'

[18] *Cairncross v Lorimer*, Macqueen's Scotch Appeals (House of Lords) vol 3 (1860) 827 per Lord Campbell.

[19] *Halifax Union v Wheelwright*, Law Reports Exch vol 10 (1865–1875) 183.

[20] See: Riezler, *Venire Contra Factum Proprium* (1912).

[21] Digests 1, 7, 25 *pr*.

[22] Compare: § 242 German Civil Code and Art 1134 French Civil Code.

[23] Friedmann, *Legal Theory* (1967) 320.

[24] Lauterpacht, *Private Law Sources and Analogies of International Law* (1970) 204; Friede, 'Das Estoppel-Prinzip im Völkerrecht' (1935) 5 *Zeitschrift für Auslandisches Öffentliches Recht und Völkerrecht* 517, 545.

[25] *Case Concerning the Factory at Chorzów (Germany v Poland)* 1933 PCIJ (ser A) No 17, 29.

Customary international law is generated by the conduct of the States, whereby a particular practice has developed which has then become accepted by a considerable number of States as being law.[26] The International Court of Justice elucidated the essential elements of customary law in the *North Sea Continental Shelf Case* when it stated that 'there must be a settled practice (*consuetudo*) and the practice must be exercised in a manner evident of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it (*opinio juris*).'[27] Certainly it is difficult to attempt to prove the elements of the practice element due to the fact that estoppel is not a doctrine which gives rise to a positive legal effect; rather it is a shield, not a sword. *Consuetudo* could possibly be seen in the frequency with which estoppel is pleaded before national and international courts.[28] In this vein, a decision of the German Federal Court of Justice has (*obiter*) stated that estoppel is in actual fact an integral part of binding customary law within the context of Article 25 of the German constitution, the Basic Law.[29] While this example does not, of course, prove the existence of sufficient State practice by and of itself, it does reflect the tendency of States to adopt the view that they, and all other States, ought potentially to be bound by the representations they make and that the States are in point of fact bound. MacGibbon has stated there to be a valid customary basis for the doctrine of estoppel: 'It may be considered probable, however, that some of the aspects of estoppel are in process of fulfilling, if they do not already fulfil, the criteria demanded of an international custom.'[30] Thus, it can be said by way of review that estoppel is still undergoing a process of change and that many, if not all, aspects of the doctrine seem to have become customary international law.

FOUNDATIONS OF ESTOPPEL

Three potential theoretical bases for the doctrine of estoppel are foreseeable, namely good faith, the prohibition against inconsequent conduct, which is embodied in the Latin maxim *allegans contraria non audiendus est* or the contractual theory.

Good Faith

At the risk of engaging in banalities, it is fair to say that the principle of good faith is the most recognised principle of international law, indeed, perhaps the most recognised legal principle overall. Such reference to good faith as the fundament of estoppel seems to lend further credence to the supposition that estoppel can be assigned a place as a general principle of international law. Grotius, in *De Jure Belli ac Pacis Libri Tres*, advocated the view that all States are subject to the application of this principle[31] and this is confirmed in, inter alia, Art 2(2) of the Charter of the United Nations. The question nonetheless remains as to whether good faith is capable of serving as the legal

[26] Pellet, Article 38, in Zimmermann et al (ed) *The Statute of the International Court of Justice: A Commentary* (Oxford, Oxford University Press, 2006) 748.

[27] *North Sea Continental Shelf Cases* (*Federal Republic of Germany v Denmark*/*The Netherlands*) ICJ 20 February 1969, 44.

[28] Above, n 26.

[29] BGH RzW 1963, 370; Schweitzer/Weber, *Handbuch der Völkerrechtspraxis der Bundesrepublik* Deutschland (2004) 204.

[30] MacGibbon 'Estoppel in International Law' (1958) 7 *International & Comparative Law Quarterly* 468, 513.

[31] Grotius, Vol II, ch XXV, 860.

foundation of estoppel despite the principle being incapable of 'lend[ing] itself to rigid legal application.'[32]

In the Liechtenstein Memorial submitted in the *Nottebohm* case, the argument was made that the recognition of Nottebohm's nationality by Guatemalan authorities prevented subsequent rejection of this citizenship. Liechtenstein explicitly stated that estoppel is 'essentially grounded in considerations of good faith and honest conduct in the relations of States and individuals alike.'[33] Similarly Judge Fitzmaurice in the *Temple of Preah Vihear* case drew upon the assertions made by Lauterpacht in his first report on the international law of treaties in which estoppel was described as 'probably no more than one of the aspects of good faith.'[34] The more recent jurisprudence of the International Court of Justice also shows the continuation of this trend to view good faith as the basis for estoppel.[35] Finally, the thinking of international scholars reflects the position adopted by the international courts.[36]

Perhaps the best indication for the doctrinal suitability of the principle of good faith as a basis for the doctrine of estoppel can be seen by examining one of the fundamental requirements of the doctrine itself. Estoppel can only have binding effect if the party seeking to enforce the estoppel has relied upon the representation of the other party and, as a consequence thereof, has been hindered in exercising its own rights, ie the fact that one party 'has drawn logical conclusions in respect of his own conduct from the conduct of the other party.'[37] In the decision rendered in the *Tinoco Arbitration*, the arbitrator stated that 'an estoppel to prove the truth must rest on previous conduct of the person to be estopped, which has led the person claiming the estoppel into a position in which the truth will injure him.'[38] As a result of the lack of such a reliance regarding the British recognition of the *Tinoco* government Costa Rica's claim was rejected.

The standard with which this reliance is to be viewed is objective, taking into consideration the usual circumstances present.[39] Subsequently, it is fair to say that the more prevalent the reliance element, the greater the chances that an estoppel could be applicable: 'The more pronounced the reliance upon the considerations of good faith the more sympathetic a tribunal may be expected to be in the face of arguments based on the concept of estoppel.'[40] The reliance criterion has, unfortunately, not always been dealt with in a consequent manner in the international jurisprudence. In the first case in which estoppel played a decisive role, the Permanent Court of International Justice failed to sufficiently account for the reliance element. Friede, in particular, criticises

[32] *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, ICJ 7 June 1955, 120 Separate Opinion of Judge Lauterpacht.

[33] *Nottebohm*, above n 9, Memorial submitted by the Government of the Principality of Liechtenstein, 41.

[34] Lauterpacht, Report on the Law of Treaties, UN Doc A/CN.4/63, 24 March 1953: 157, 166; *Temple of Preah Vihear* above n 9 Separate Opinion of Judge Fitzmaurice.

[35] *Military and Paramilitary Activities in Nicaragua* (*Nicaragua v United States of America*) ICJ 26 Nov 1986, 14.

[36] Müller, n 2, 9; Bowett, 'Estoppel before International Tribunals and its Relation to Acquiesence' (1957) 33 *British Year Book of International Law* 176.

[37] Friede 'Das Estoppel-Prinzip Im Völkerrecht' (1935) 5 *Zeitschrift für Auslandisches Öffentliches Recht und Völkerrecht* 517, 525 (author's translation).

[38] *Tinoco Arbitration* (1924) 18 AJIL 156.

[39] *Conditions of Admission of a State to Membership of the United Nations* (Advisory Opinion) ICJ, 1948, 80 Individual Opinion of Judge Azevedo.

[40] MacGibbon 'Estoppel in International Law' (1958) 7 *International & Comparative Law Quarterly* 468, 507.

the legal reasoning of the *Chorzów Factory* case when he supposes that there was no reliance placed on the conduct of the Polish government and, thus, Germany was not capable of claiming an estoppel.[41] Conversely, the decision in the *Serbian Loans* case showed greater understanding of the necessity for a reliance and it was found that estoppel could not be applicable because the debtor State had not altered its position such that the 'Serbian debt remains as it was originally incurred.'[42]

By far the most disappointing decision regarding this aspect of the doctrine is that of the *Temple of Preah Vihear* case, which receives further attention below in respect of the other elements. The primary question before the Court was the binding character of a series of maps produced by the French during the colonial period setting out the territorial delimitations between Thailand[43] and Cambodia. Cambodia argued that Thailand was estopped by virtue of over 40 years of consistent conduct during which time Thailand did not dispute the validity of the maps, thus Cambodia successfully asserted its reliance on the Thai conduct. This interpretation of the reliance criteria fails to properly account for considerations of good faith and, as was recognised by Judge Spender:

> France did not rely upon any conduct of Thailand in relation to [the map]. On the contrary, she relied solely upon the accuracy of the surveys and calculation of her own topographical officers . . . She acted *not on the faith of Thailand's silence or other conduct*, but upon the faith she reposed in the competence of the officers who established [the map].[44]

Estoppel functions to protect parties, which, in reliance on a particular representation or course of conduct, have detrimentally changed position. Logically, only reliance which is worthy of legal protection is deserving of such security. Thus, any reliance placed in a representation where the party seeking to rely on the representation was aware or ought reasonably to have been aware that the party that had made the representation did not intend to induce certain consequences will not be capable of forming an estoppel. Good faith is particularly suited to be applied to doubtful obligations or to obligations which are difficult to characterise in legal terms with sufficient clarity so as to provide these obligations with definition. This function may result in the creation of a legal rule 'where the moral content of good faith, in a *legal* context, appears to demand articulation.'[45] According to the foregoing, it is clear that good faith is an acceptable and convincing basis for the doctrine of estoppel.

The Prohibition Against Inconsistent Conduct

Were one to end one's exploration of the basis of the doctrine of estoppel at this point it would seem to be relatively certain that good faith alone serves this purpose adequately. However, a further potential source has been suggested – the prohibition against inconsistent conduct; although it is, indeed, questionable whether this can be said to be a further source distinct from the principle of good faith or whether it

[41] Friede 'Das Estoppel-Prinzip Im Völkerrecht' (1935) 5 *Zeitschrift für Auslandisches Öffentliches Recht und Volkerrecht* 517, 525.

[42] *Case Concerning Serbian Loans Issued in France* (*France v Kingdom of Serbs, Croats and Slovenes*) 1929 PCIJ (ser A/B) No 20/21, 39.

[43] Unless good sense or context suggest otherwise, Thailand will be used instead of Siam for the sake of convenience despite Siam being the nomenclature accorded to the State at the time the maps were drawn.

[44] *Temple of Preah Vihear* above n 9, Dissenting Opinion of Judge Spender.

[45] O'Connor, *Good Faith in International Law* (Aldershot, Dartmouth, 1991) 124.

represents, as Judge Alfaro seemed to suggest, a more specific source. The requirement that a State ought to have a certain consistency or continuity in its approach regarding factual or legal situations can, nevertheless, be said to reflect 'the underlying principles of consistency which may be summed up in the maxim *allegans contraria non audiendus est*.'[46] Hurst justified this maxim in his presidential address to the Grotius Society in 1944 with the argument that all States are considered equal under the auspices of the international legal order and, therefore, a State cannot attempt to enforce claims against other States, which it would not accept from other subjects of international law.[47] The most striking advocacy on behalf of this principle is to be found in the opinion delivered by Judge Alfaro in the *Temple of Preah Vihear* case:

> Inconsistency between claims or allegations put forward by a State, . . . is not admissible (*allegans contraria non audiendus est*). Its purpose is always the same: a State must not be permitted to benefit by its own consistency to the prejudice of another State. [. . .] *A fortiori*, the State must not be allowed to benefit by its own inconsistency when it is through its own wrong or illegal act that the other party has been deprived of its right or prevented from exercising it.[48]

Alfaro opined that a broad view ought to be taken of equitable principles and that good faith must prevail in international relations. He interestingly went on to say that there is a close relationship between good faith and the prohibition against inconsistent conduct. It remains from the text of his judgment, however, unclear to what extent estoppel may be based exclusively on the prohibition against inconsistent conduct or whether recourse must be had to the broader principle of good faith as a legitimisation. It would appear to be reasonable to surmise that Judge Alfaro seemed to tend towards a broad anti-consistency principle as the precept for the binding of States to specific principles without there being any need for a particular defined reliance. In contrast, Judge Spender warns against using just such a doctrinal basis as it runs the risk of rendering the doctrine itself and international law more generally amorphous: 'phrases, such as "a party may not blow hot and cold" or "*allegans contraria non audiendus est*" and other to the same effect do not, in my view, express general principles of international law.'[49] So, according to Judge Spender the estoppel doctrine is based exclusively on considerations of good faith.

It is submitted that the two basic tenets have a similar but slightly different application in that there is an independent category of inconsistent conduct, which does not give rise to an estoppel per se but which can influence the ability of a party to act in a certain manner particularly in respect of the pleading which may be made at bar.[50] That is to say that estoppel is not based upon the prohibition against inconsistent conduct rather it is distinct and finds its doctrinal basis elsewhere, namely the principle of good faith. This difference is best explained by way of a brief example.

If State A, say Albania, has carried out the particular action X over a period of 10 years and the decision is then made that it will begin to carry out the action Y with

[46] MacGibbon 'Estoppel in International Law' (1958) 7 *International & Comparative Law Quarterly* 468, 512.

[47] Hurst, 'Transactions of the Grotius Society' (1944) 30 123.

[48] *Temple of Preah Vihear* above n 9, Separate Opinion of Judge Alfaro.

[49] Above, n 43, Dissenting Opinion of Judge Spender.

[50] That is to say that an international court may find a party is not entitled to plead a matter as it would not be in accordance with the prohibition against inconsistent conduct without the court necessarily finding that the requirements of an estoppel are fulfilled.

immediate effect, this conduct could be said to be inconsequent. As a result, it would be imaginable that the rights of State B, say Brazil, would be affected and Albania would no longer be entitled to plead certain matters. An application of broader principles of good faith with a view to justifying an estoppel would not be permissible. 'This is not estoppel *eo nomine*, but shows that international jurisprudence has a place for recognition of the principle . . . *allegans contraria non audiendus est*.'[51] If, however, Albania has carried out the particular action X over the same period of 10 years and Brazil has relied upon this action for a period of seven of those 10 years, then a drastic alteration in this conduct could be a breach of the duty to act in good faith and, at the same time, it would be inconsistent conduct. The essential element is the reliance: a breach of good faith need not be necessarily obvious in order to be able to describe a particular course of conduct as inconsistent. However, if a particular conduct is to be described as a breach of good faith due to the presence of a reliance, then this conduct must be simultaneously defined as inconsistent.[52] From the foregoing it can be briefly summarised that the principle of good faith provides the most suitable doctrinal basis for the doctrine of estoppel and that it is necessary to distinguish between good faith and the prohibition against inconsistent conduct (which draws on aspects of good faith for its own validity) by looking to the reliance criterion.

The Contractual Theory

The contractual theory is based on the premise that the representations made by two parties may be viewed as an informal contract and can, thus, have a reciprocal binding effect upon the parties which made the utterances. This premise is based on the 'reliance theory of contract,'[53] ie the promiser (or party which made the representation) is compelled to adhere to their promise. Denmark made arguments to this end in the *Eastern Greenland* case, namely, that the reciprocity of the performances promised gave rise to a bilateral obligation. The reciprocal nature of the transaction arose from the Danish readiness to recognise Norwegian sovereignty over Spitzbergen and the statement made in return by the Norwegian Foreign Minister recognising Denmark's claim to Eastern Greenland.[54] The Danish submission was that two independent representations were made in the form of diplomatic statements and that a favourable Danish response in regard to the Spitzbergen issue was a *conditio sine qua non* for the Norwegian agreement in respect of the Danish claims. The Permanent Court of International Justice, however, did its utmost to avoid reaching the conclusion that an informal treaty was concluded by virtue of the representations made. In so doing, the Permanent Court directed the focus of the decision towards the unilateral nature of the declaration:

[51] McNair 'The Legality of the Occupation of the Ruhr' (1924) 5 *British Yearbook of International Law* 17, 35.

[52] *Tinoco Arbitration* (1924) 18 AJIL 155; *Costa Rica Packet Arbitration*, Report of the Law Officer to the Foreign Office, 15 August 1984: Netherlands; quoted in MacGibbon 'Estoppel in International Law' (1958) 7 *International & Comparative Law Quarterly* 468, 489.

[53] Rubin 'The International Legal Effects of Unilateral Declarations' (1977) 71 *American Journal of International Law* 21.

[54] The exact nature of the statement is as follows: 'Denmark, having no special interest at stake in Spitzbergen, would raise no objections to Norway's claim upon that Archipelago. [. . .] [Denmark] would not encounter any difficulties on the part of the Norwegian Government.' *Legal Status of Eastern Greenland (Denmark v Norway)* 1933 PCIJ (ser A/B) No 53, 36.

> The Court considers it beyond all dispute 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.[55]

Nevertheless the dissenting opinion of Judge Anzilotti is worthy of mention by virtue of his assertion that an informal treaty was created by the Foreign Minister's declaration. Judge Anzilotti saw a clear connection between the Danish conduct regarding Spitzbergen and the position that Denmark requested Norway to adopt in the matter of Eastern Greenland: 'The outcome of all this is therefore an *agreement*, concluded between the Danish Minister at Christiana, on behalf of the Danish Government, and the Norwegian Minister for Foreign Affairs, on behalf of the Norwegian Government, by means of purely verbal declarations.'[56] The contractual theory, it should be noted, has not found widespread acceptance and cannot truly be described as an estoppel *stricto sensu*. Ignoring for a moment the significant difficulties surrounding the issue of the binding nature of individual representations of a promissory nature in international law,[57] principles of estoppel would not play as important a role as principles of treaty law, where *pacta sunt servanda* enjoys primacy. What is more, the fact that there is a single dissenting opinion only, which has since found no great amount of international acceptance, indicates a lack of adherence by States and lacks a satisfactory theoretical basis for the doctrine of estoppel. Having described the doctrinal basis it now remains to examine the legal basis of the doctrine within the legal order of international law.

CREATION OF ESTOPPEL IN INTERNATIONAL LAW

As already mentioned, the doctrine of estoppel requires that one party, in reliance on the assurance(s) or implied behaviour of another party, is induced to act in a manner that can be described as legally relevant. According to classic estoppel thinking, this act must be adequate so as to result in a damage being caused to the party, which placed its trust in the representation made.[58] Described in this manner, the doctrine of estoppel in international law is not that removed from the traditional forms of the same doctrine known to the Anglo-American legal system such as estoppel *in pais*, estoppel by record, estoppel by silence, etc in that there are three requirements, which must be fulfilled in order to result in the doctrine taking effect: a conduct, which can manifest itself in many forms, a reliance thereon and a detriment.[59] An initial embouchure to this was provided in the *Serbian Loans* decision handed down by the Permanent Court of International Justice in 1929. In that instance the French proprietors of debentures sought to enforce their rights to payment in gold in respect of the respective state-issued loans. The Kingdom of Serbs, Croats and Slovenes wished to continue to make payments in francs, as was the accepted practice over many years. The latter argued that the debenture holders were as a consequence of their conduct for many years no longer

[55] Ibid 71.

[56] Ibid 91 (Emphasis added).

[57] Fiedler 'Zur Verbindlichkeit Einseitiger Versprechen Im Völkerrecht' (1976) 19 *German Yearbook of International Law*, 35.

[58] Müller, *Vertrauensschutz im Völkerrecht* (1971) 10.

[59] Bowett, 'Estoppel Before International Tribunals and Its Relation to Acquiesence' (1957) 33 *British Yearbook of International Law* 176, 188; Chan 'Acquiesence/Estoppel in International Boundaries: Temple of Preah Vihear Revisited' (2004) 3 *Chinese Journal of International Law* 421, 425 *et seq*.

in a position to demand payment exclusively in gold, that is they were 'estopped'.[60] The Court decided that, in any case, estoppel was not applicable; however, the result in this particular case is not of primary concern here. What is rather more interesting is that the Court not only expressly recognised the existence of the doctrine at international law but also provided a list of the requirements thereof. The PCIJ explicated the necessity of a 'clear and unequivocal representation' *vis-à-vis* the other party 'upon which the debtor State was entitled to rely and in fact did rely'. The Court went on to further stipulate that the interests of the party in reliance must have been prejudiced to the extent that there was a 'change in position on the part of the debtor State.'[61]

As mentioned in the previous paragraph, it is somewhat trite to state that the Common Law recognises certain forms of estoppel. Each form was developed along a different dogmatic and pragmatic basis and the various estoppels present in the Common Law have 'different theoretical moorings that apply in vastly different circumstances.'[62] However, it is submitted that the development of estoppel in international law has not been as consequent as at Common Law, nor does there exist the common international desire to create several relatively strict, well-defined categories of estoppel. As such, while one is absolutely required to take cognisance of the various forms of estoppel provided for in the Common Law legal systems, it is not realistic to attempt to construe estoppel as it is found to exist in international law in an identical light. For example, Brown writes that an understanding of the policy basis of the various estoppel doctrines is essential for the determination of the breadth of the application of that theory at Common Law.[63] This is not necessarily the case in international law. An estoppel at Common Law created by the acquiescence of one party requires fault by one party in failing to act in order to protect a legal right[64] whereas classic promissory estoppel is based upon the concept of protection of the reasonable reliance placed by one party in the conduct or representations made by another party. These terms have a dogmatic and an important historical basis. Notwithstanding this, it would be too simplistic to suggest that these are the only bases for estoppel in international law. The fundament of estoppel caused by the silence of one party can equally be the protection of the reasonable reliance created in the mind of the other party, fault must not necessarily play a role.[65] Indeed, this was the view of the Permanent Court of Arbitration in the *Grisbadarna Arbitration*. In the view of the Permanent Court of Arbitration, Sweden's reliance upon the Norwegian silence, which led to the installation of expensive infrastructures, gave rise to an estoppel which precluded Norway from claiming title over the disputed territory.[66] This has been reiterated on several occasions by eminent legal scholars, perhaps best by Lauterpacht:

[60] *Case Concerning Serbian Loans Issued in France* (*France v Kingdom of Serbs, Croats and Slovenes*) 1929 PCIJ (ser A/B) No 20/21, 11.

[61] Ibid.

[62] Brown 'Comparative and Critical Assessment of Estoppel in International Law' (1996) 50 *University of Miami Law Review* 369, 371.

[63] Ibid, 382.

[64] Bower/Turner, *The Law Relating to Estoppel by Representation* (Haywards Heath, Tottel, 2003) 265.

[65] Müller, *Vertrauensschutz im Völkerrecht* above n 2, 1; O'Connor, *Good Faith in International Law* above n 4.

[66] *Decision of the Permanent Court of Arbitration in the Matter of the Maritime Boundary Dispute between Norway and Sweden* (1910) 4 AJIL 226–227 and 223–235; Antunes and Bradley, *Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute* (University of Durham, International Boundaries Research Unit 2000) 8.

> The far-reaching effect of the failure to protest is not a mere artificiality of the law. It is an essential requirement of stability . . . ; and it is in accordance with equity inasmuch as it protects a State from the contingency of incurring responsibilities and expense in reliance on the apparent acquiescence of others, and being subsequently confronted with a challenge on the part of those very States.[67]

This clearly illustrates that the bases of the doctrine differ from those at Common Law. In the following, the individual requirements necessary to create an estoppel in international law will be dealt with in sequence.

REQUIREMENTS OF ESTOPPEL

Representation

Any claim which a party seeks to enforce under the doctrine of estoppel must necessarily be related to the express or implied representation made by another party. It is a fundamental idea of the doctrine that 'in law a person cannot deny the effect created by his own *conduct* upon other parties.'[68] These representations can indeed be made in a multitude of guises. The peculiarities of these various forms of representations are particularly problematic and, consequently, require further elaboration.

With the exception of the fundamental requirements mentioned below there are no strict formal requirements which must be fulfilled in order for a representation to be considered as the basis for an estoppel. Within the context of this chapter, the term 'representation' is to be understood as any act or deed which has the capacity to express the intention or position of a party and upon which another party, acting under an objective appraisal of the act or deed, can reasonably be entitled to rely. This definition would include, for example, a declaration made within the scope of diplomatic exchanges regarding the particular course of action which a State intends to take in respect of a particular legal question. It is submitted that the excessive categorisation, which has previously dominated the development of the doctrine of estoppel, can be largely abandoned and replaced with the concept of an estoppel by representation, where the definition of a representation is to be broadly interpreted. Detractors may argue that a broad definition of the term representation would lead to a flood of potential estoppel claims. This would not, however, be the case as there are still a number of not inconsiderable hurdles to overcome before an estoppel can be successfully pleaded, as evidenced below.

As the first type of representations capable of providing a foundation for an estoppel it appears reasonable to assert that a promise at public international law could have a binding effect if a sufficient intention to be bound is concurrently present. Such a *promissory estoppel* is certainly recognised in Anglo-American law.[69] This is clear from

[67] Lauterpacht, 'Sovereignty over Submarine Areas' (1950) 27 *British Year Book of International Law* 415; Müller, *Vertrauensschutz in Völkerrect*, n2 above, 42; Barale, 'L'acquiescement dans la jurisprudence internationale' (1965) 12 *Annuaire Francais de Droit International* 390.

[68] Friedmann, *Legal Theory*, 522 (emphasis added).

[69] For example: *Truck and Machinery Sales Ltd v Marubeni Komatsu Ltd* [1996] 1 IR 12 per Keane J; *Sohio Petroleum Co v Weyburn Security Co Ltd* [1971] SCR 81 (www.canlii.org/en/ca/scc/doc/1970/1970canlii137/1970canlii137.html); *John Burrows Ltd v Subsurface Surveys Ltd* [1968] SCR 607, 614–15 (http://www.canlii.org/en/ca/scc/doc/1968/1968canlii81/1968canlii81.html).

the famous English decision, *Central London Property Trust Ltd v High Trees House Ltd*[70] where it was confirmed that an estoppel can be formed when there exists:

> A promise . . . which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made and which was in fact so acted on. In such cases the courts have said that the promise must be honoured.[71]

Nevertheless, due to the indefinite role of a promise made in international law, this form of estoppel remains utterly divisive and contentious. Of particular interest in this respect is the close connection visible between a promise as such and a unilateral declaration. A unilateral declaration may be defined as follows: 'une seule manifestation de volonté, c'est-á-dire d'une manifestation de volonté d'un seul sujet de droit.'[72] The essential issue in respect of both promises and unilateral declarations is the same, namely, whether the promise or declaration ought to be seen purely as an expression of the variable political perception of a party or, whether it ought to be deemed as binding upon the party making the statement. The contentious source of the unilateral declaration must be briefly commented before any further examination of its exact content can be undertaken.

The classification of unilateral declarations within one of the accepted sources of international law in accordance with Art 38 of the Statute of the International Court of Justice is not without its problems as Art 38 contains no mention of this type of declarations. A lack of State practice precludes any determination as customary international law as pointed out in the jurisprudence of the Permanent Court of International Justice.[73] It is plausible that they belong to the general principles of law as many legal systems recognise the principle of an act of a unilateral nature potentially giving rise to a binding effect. Rubin has said that:

> Every legally significant act in a legal system that posits individual legal personality is, in a sense, unilateral. Thus, in most if not all legal systems that have a concept of contract, the contractual tie is created by the law giving legal value to various acts of the several parties to the transaction.[74]

It is, however, difficult to suggest that there is such a general consistency in the individual legal orders of the world, which could be said to be sufficient to construct a general principle of international law.[75] Briefly summarised, a small minority of academic

[70] [1947] 1 KB 130.

[71] Ibid, 134 per Denning J.

[72] Suy, *Les actes juridiques unilatéraux en droit international public* (Paris, 1962) 35; *Nuclear Tests Case* (*Australia v France*) ICJ 20 Dec 1974, 270. See also: Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, Yearbook of the International Law Commission, 2006, vol II, Part two, 370, also available at: untreaty.un.org/ilc/texts/instruments/english/commentaries/9_9_2006.pdf: 'Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the binding character of such declarations is based on good faith; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected.'

[73] *The Legal Status of Eastern Greenland* (*Denmark v Norway*) 1933 PCIJ (ser A/B) No 53.

[74] Rubin 'The International Legal Effects of Unilateral Declarations' (1977) 71 *American Journal of International Law* 1, 8.

[75] Certain legal orders proceed on the basis of the binding nature of a promise from the moment in which it was made, eg the German civil law (§ 145 BGB). The French Civil Code requires a *causa*, whereas the English common-law applies the doctrine of consideration. Thus, utterly different bases exist.

opinion advances the view that Art 38 of the ICJ-Statute contains an exhaustive list of the sources of international law,[76] a supposition which cannot be supported by the literal wording of the Article itself. What is clear is that the nature of international law itself allows for a modification of the content of Art 38 by contractual or customary methods, ie further sources of law are possible, as long as they based upon amicable agreement.[77] This reflects the fundamental structural norm of the international legal order, sovereignty, which allows for States to act freely so as to bind themselves however they so wish. Therefore, it is submitted that unilateral declarations make up their own legal source *sui generis*.

Finally, the issue of whether the declaration has a binding effect remains to be examined. Without doubt the most important case in the progression of this matter is the decision in the *Nuclear Tests* cases. This represents the first time that a declaration (or in this case several declarations) were afforded a binding effect without the declaration being made under any special set of circumstances such as during a process of negotiations.[78] The International Court of Justice found that the declarations made by France in respect of protests by New Zealand and Australia against a series of nuclear tests in the South Pacific Ocean were binding on the French and this led to the consequence that the claims of Australia and New Zealand were no longer admissible as 'the objective of the Applicants has in effect been accomplished, inasmuch as the Court finds that France has undertaken the obligation to hold no further [tests].'[79] Nonetheless, the Court made several interesting observations *obiter dictu*. In total, six declarations were made, which could potentially be considered as unilateral declarations. The two most important were, first, a statement by the President of the French Republic at a press conference in which he declared that the round of tests that had just been completed was to be the last and, second, a further statement by the Minister for Defence that there would be no further testing given again in the setting of a press conference. The Court put considerable weight on these particular statements as they, in contrast to all other statements made in this matter, were not qualified by the phrase 'in the normal course of events.' Thus, the International Court determined that:

> [D]eclarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligation. Declaration of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking the State being thenceforth legally required to follow a course of conduct consistent with the declaration. [. . .] Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration.[80]

The Court supported its decision on two factors, the intention of the State and good faith. It is extremely doubtful that the nature of the declarations made lend themselves to an external intention to be bound. The only diplomatic communication delivered was carefully formulated and from a purely grammatical point of view was written in the

[76] Bos, *Methodology of International Law* (Amsterdam, Elsevier, 1984) 88.
[77] Vitzthum in Graf Vitzthum (ed), *Völkerrecht* (Berlin, de Gruyter, 2007) 72.
[78] Rubin 'The International Legal Effects of Unilateral Declarations' (1977) 71 *American Journal of International Law* 1, 7.
[79] *Nuclear Tests Case* (*Australia v France*) ICJ 20 Dec 1974, 270.
[80] Ibid, 267–68.

future tense, seeming to indicate no intention of a desire to be bound. The manner by which the International Court read a desire to be bound into any of the statements is not readily apparent. Moreover, it is questionable to state as a rule of law that a politician can irrevocably bind his State by making an utterance in a press conference. That a State may be bound by expressions of intention made by, for example, ministers of State with the requisite competences is clear, however, the binding nature of such a declaration cannot be based on the mere fact of the utterance itself[81] and where the scope of the obligation created is unclear, a restrictive interpretation must be applied.[82] In addition, France expressly rejected the theory that it is possible to be bound on the basis of a unilateral declaration. This is in unison with the conclusion which can be drawn from the *North Sea Continental Shelf* cases where it was said that (with the exception of customary international law) a rule of international law can only be applied against a State after that State has given its consent to being bound by such a rule.[83] It is clear from the French statements that they intended not to be bound to anything more than a self-imposed period of abstinence from atmospheric testing. Placing the binding effect of unilateral declarations partially within the realm of the intention to be bound and partially with the doctrine of good faith is a further indication of the hidden uncertainty regarding the dogmatic reasoning for their binding nature in the first place. 'It would appear that the ICJ has found a new rule of international law saddling a state with apparently irrevocable treaty-like commitments *erga omnes*, arising out of public unilateral declarations with a presumed intention to be bound and nothing more.'[84] Thus, the confusion that reigns in respect of unilateral declarations is apparent. By way of remedy it is once again submitted that the application of estoppel could serve to bring increased clarity to this conundrum. Were one to view the unilateral declaration as a representation capable of creating an estoppel by virtue of the reliance placed in it, as opposed to viewing it as a distinct category of unilateral act *sui generis*, potential injustices arising from the reliance thereupon could be avoided. 'But if reliance is not a necessary ingredient, *any* intended unilateral promise becomes irrevocable even though its maker seeks to repudiate it before any state has taken it up.'[85] It is submitted that the unilateral declaration is not suitable to create binding legal obligations and it is better viewed, not as an independent form of act with general legal consequences, rather it can better be assigned to the category of a representation with the potential to create legal obligations as by way of an estoppel. Consequently, estoppel based on a simple, widely defined representation would remove dogmatic uncertainty as to the rationale for the doctrine relating to unilateral declarations and it would remove potential difficulties regarding the differentiation between promises and unilateral declarations.

[81] Guiding Principle 4 of the International Law Commission on unilateral declarations of State (note 70) clearly provides heads of States, heads of Government and ministers for foreign affairs with the competence to formulate such declarations. Other persons may bind the State but only where they have the competence to do so. See also, *Case concerning Armed Activities on the Territory of the Congo (New Application, 2002)* (*Democratic Republic of the Congo v. Rwanda*), Judgment of 3 February 2006, Jurisdiction of the Court and Admissibility of the Application, para 46.

[82] See Guiding Principle 7 (see note 70); *Nuclear Tests* (*Australia v France; New Zealand v France*), ICJ Reports 20 Dec 1974, 267, para 44, and para 47, 472 and 473.

[83] *North Sea Continental Shelf Cases* (*Federal Republic of Germany v Denmark*/*The Netherlands*) ICJ 20 Feb 1969, 25.

[84] Rubin 'The International Legal Effects of Unilateral Declarations' (1977) 71 *American Journal of International Law*, 1, 28.

[85] Franck 'Word Made Law: The Decision of the ICJ in the Nuclear Tests Case' (1975) 19 *American Journal of International Law*, 612, 619 (emphasis added).

Second, a consistent conduct over a long period of time by a party has been recognised as being akin to a representation which is capable of creating an estoppel: in the parlance of the Anglo-American legal order, a so-called estoppel by conduct. This was the constellation presented before the ICJ in the *North Sea Continental Shelf* case in which the Court was charged with deciding whether the Federal Republic of Germany was bound to accept the applicability of the equidistance method embodied in Art 6 of the Geneva Convention on the Continental Shelf of 1958 as a result of the lengthy acceptance, or rather lack of demur, on the part of Germany despite the fact that Germany had not ratified the aforementioned Convention. While this case is most widely known for its treatment of customary law, the Court also made several remarks relevant to the doctrine of estoppel.[86] The Court confirmed that a long period of consequent conduct will lead to the possibility of an estoppel being created if a State has, by its continuous and unequivocal conduct, engendered the impression that it has accepted the state of events. Although the Court ultimately rejected the possibility of Germany being estopped,[87] the Court confirmed that it is possible for a party to become bound "by *conduct*, by public statements and proclamations, and in other ways, the Republic has unilaterally assumed the obligations of the Convention; or has manifested its acceptance of the conventional regime; [. . .]."[88] What is, moreover, worthy of mention in this case was the reference by the International Court to two further elements enunciated as requirements for an estoppel: first, a detrimental change in position, which was, second, caused as a result of the reliance placed on such conduct or representations.

Finally, a particularly thorny issue in deciding on the nature of the representations possibly giving rise to an estoppel is the question regarding the importance to be afforded to a qualified silence. Acquiescence in this instance refers to a silence in which a 'passive position [of one party] cannot be otherwise understood except as a silent acceptance when interpreted in accordance with good faith.'[89] It is often stated in both jurisprudence and literature that the silence *simpliciter* (or failure to voice concern) by a party over a long period of time can lead to a situation where the silence acts as a quasi-estoppel. The French author Witenberg has expressed this view as have MacGibbon as well as Schwarzenberger who states most clearly that 'an acquiescence produces an estoppel.'[90] The International Court of Justice occupied itself with this matter and made indirect reference to acquiescence as an estoppel in the *Anglo-Norwegian Fisheries* case, when the Court referred to a 'prolonged abstention'[91] on the part of Great Britain. There are, nonetheless, considerable differences between estoppel and acquiescence. Silence *simpliciter*, ie complete inaction without any utterance whatsoever, does not lead to an estoppel, whereas silence, usually over a longer period of time, can lead to the invocation of the doctrine of estoppel where it has the capacity to reflect the intention of the silent party, which can be reasonably relied upon and can thus be classified as a representation. Despite initial indications

[86] *North Sea Continental Shelf Cases* above n 26.
[87] Ibid 26–27.
[88] Ibid 25 (emphasis added).
[89] Müller, *Vertrauensschutz im Völkerrecht* above n 2, 38 (author's translation).
[90] MacGibbon, 'Estoppel in International Law' (1958) *International and Comparative Law Quarterly* 7, 468, 502; Compare: Witenberg, 'L'Estoppel: un aspect du probléme des créances américaines' (1933) 60 *Journal du Droit International* 529, 537–38; Schwarzenberger, 'The Fundamental Principles of International Law' (1955) 87 *Hague Recueil* 195, 256.
[91] *Anglo-Norwegian Fisheries Case* (*United Kingdom v Norway*) ICJ 18 Dec 1951, 130.

in the case-law of international courts and tribunals to the contrary it would appear now that silence in respect of a matter will only end in an estoppel under certain circumstances. The International Court of Justice in the *Gulf of Maine* case rejected the Canadian claim because 'any attempt to attribute to such silence, a brief silence at that, legal consequences taking the concrete form of an estoppel, seems to be going too far.'[92] The Court recognised the obvious difficulties in constructing an estoppel that arises from the mere failure to mention a matter. Considered in light of the foregoing, viewing silence as a representation which can then give rise to an estoppel seems a reasonable solution, which would ensure effective legal certainty. Due to the factual situation of acquiescence usually over an extended period of time during which the normal relations between the subjects of international law continues, the plain silence is often connected with a clear, positive sign of tolerance or even acceptance which is best viewed as the sum of all parts, thus, expressing the legal recognition of a position from which a party ought not be able to shrink providing the other prerequisites are fulfilled. The *Grisbadarna Arbitration*, where the Hague Tribunal awarded Sweden the Grisbadarna region in view of the fact that Sweden had performed various acts, such as the installation of a series of light-boats, acting under the conviction that the disputed territory was Swedish provides an example of an application of this supposition.[93] Sweden carried out the acts in question "without meeting any protest and even at the initiative of Norway, [. . .] without giving rise to any protests"[94] and the Norwegian silence on the issue was accepted by the Tribunal as corresponding to legal recognition of Sweden's territorial claims, which Norway could not later attempt to challenge. It must, nonetheless, be emphasised that silence as a representation does not *eo ipso* result in an estoppel; the other requirements must also be fulfilled.

Voluntariness

In order to constitute an estoppel, the party against whom the estoppel is pleaded must have voluntarily undertaken a representative act. Thus, in the event that a party had acted under duress or where the party was fraudulently induced to make to representation it is impossible for a valid estoppel to be formed. The voluntariness requirement received express mention in the *Serbian Loans* case.[95] A little more than 30 years later, the International Court of Justice, however, seemed to disregard this requirement or, at least, afford it little attention in its decision concerning the *Temple of Preah Vihear* case in which the Court held that Thailand, by its silence, was now estopped from enforcing any claims in respect of the disputed territory. It is questionable whether the qualified silence on the part of the Siamese, and later Thai, State which was so readily accepted by the majority of the Court as being voluntary could really, upon closer inspection of the entire circumstances, be said to have been made voluntarily. The reasoning of the Court points particularly to the failure by Thailand to protest against,

[92] *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Canada v United States of America*) ICJ 12 Oct 1984, 308.

[93] *Decision of the Permanent Court of Arbitration in the Matter of the Maritime Boundary Dispute between Norway and Sweden* (1910) 4 AJIL 234; Lauterpacht, *Private Law Sources and Analogies of International Law*, n 2 above.

[94] *Decision of the Permanent Court of Arbitration in the Matter of the Maritime Boundary Dispute between Norway and Sweden* (1910) 4 AJIL 234.

[95] *Case Concerning Serbian Loans Issued in France (France v Kingdom of Serbs, Croats and Slovenes)* 1929 PCIJ (ser A/B) No 20/21, 39.

inter alia, the use of a certain set of maps and the raising of the French (as the occupying colonial power of Cambodia) flag during a visit from a Thai prince. The Court concludes that these acts amount 'to a tacit recognition by Siam of the sovereignty of Cambodia over Preah Vihear, through a failure to react in any way, on an occasion that called for a reaction.'[96] However, a number of factors were not considered by the Court. First, the visit of the Thai prince was without any endorsement on the part of the Thai State and, as such, cannot be deemed to have contained any acceptance or rejection, tacit or otherwise, of Cambodian sovereignty. Second, the dissenting opinion of Judge Wellington Koo put considerable emphasis on the evidence presented that the prince had requested a French officer to 'get out of his uniform' and that the wearing of same uniform was 'impudent'. That the prince did not make a protest at this display of French colonial power is not surprising given the French position as a colonial power. As becomes apparent from the statements in Judge Wellington Koo's opinion, Siam found itself unable to respond appropriately to the French position of power. This he referred to as 'the common experience of most Asiatic States in their intercourse with the Occidental Powers during this period of colonial expansion.'[97] Consequently, the voluntary nature of the silence of the Siamese State, which gave rise to the alleged estoppel is certainly questionable. Moreover, the Court rather briefly and somewhat unsatisfactorily dismissed the exercise by Thai authorities of local administrative acts in the disputed area. The Court stated that it is difficult to 'regard such local acts as overriding and negativing the consistent and undeviating attitude of the central Siamese authorities to the frontier line'.[98] The Court was, however, prepared to place considerable emphasis on the mere declaration of sovereignty contained in the act of raising a flag, yet it failed to take cognisance of the overwhelming exercise of sovereignty by Siam. It is a widely accepted principle that an 'immemorial usage having the force of law, besides the *animus occupandi*, the actual, and not the nominal, taking of possession is a necessary condition of occupation.'[99] Despite the obvious difficulties that this decision presents it cannot be said to represent a move away from the voluntariness requirement, an assertion which seems to be supported by a multitude of judicial and arbitral decisions.[100]

Unconditional

For a statement to be capable of creating estoppel, the representative conduct of that State must be carried out unconditionally. If a representation is made under conditions or with provisos, eg as part of a series of ongoing negotiations with a view to finding a common solution which is not realised or, if it is, made subject to the fulfilment of other conditions then an estoppel cannot be created.[101]

[96] *Temple of Preah Vihear* above n 9.

[97] *Temple of Preah Vihear* above n 9, Dissenting Opinion of Judge Wellington Koo.

[98] Ibid, 30.

[99] *Clipperton Island Arbitration* (*France v Mexico*) (1932) 26 AJIL 390, 393; Chan, 'Acquiesence/Estoppel in International Boundaries: Temple of Preah Vihear Revisited' (2004) 3 *Chinese Journal of International Law* 421, 432.

[100] For example: *Salvador Commercial Company Case*, United States Foreign Relations (1902) 862; Bowett, 'Estoppel before International Tribunals and its Relation to Acquiesence' (1957) 33 *British Year Book of International Law* 176, 190.

[101] *Advisory Opinion on the European Commission of the Danube*, 1927 PCIJ (ser B) No 14, 6; Bowett, 'Estoppel before International Tribunals and its Relation to Acquiesence' (1957) 33 *British Year Book of International Law* 176, 191.

Authority

As a final requirement in the creation of estoppel, representations can only be said to have potentially binding effect if they are made with an express or implicit authority. The particular status of the individual who made the statement or representation is then of crucial importance. It is perhaps of some assistance in understanding the purpose of this requirement to refer to the terms of Article 7 of the Vienna Convention on the Law of Treaties, which stipulates the conditions under which certain persons are empowered to bind their respective States.[102] Similarly with regard to a statement creating an estoppel the representation must have been made within the scope of authority of the person concerned. The reference to Art 7 is particularly apt when one considers the second section of that provision. Section 2 provides a list of persons automatically entitled to act with full powers, including heads of State, heads of Government and foreign ministers. Many of those persons recognised as having full powers in accordance with Art 7(2) VCLT have, indeed, already been recognised as being so empowered by international courts. In the *Eastern Greenland* case the Permanent Court deemed the representations of the Norwegian Foreign Minister to be binding for the Norwegian State. In the *Nuclear Tests* case the International Court of Justice, without expressly making reference to the Vienna Convention on the Law of Treaties provided a similar list of persons deemed to have the authority to make statements, such as to result in their State being bound, eg Heads of State and the Heads of Diplomatic Missions.[103]

Detriment

Estoppel can be said to have an effect only if the party which made the representation has gained an advantage or, in the alternative, the party who sought to rely upon the representation has suffered a detriment by virtue of the subsequent inconsistent conduct. This was made clear in the *Temple of Preah Vihear* case in the separate opinion of Judge Fitzmaurice when he stated that '[t]hese statements, or this conduct, must have brought about a change in the relative positions of the parties, worsening that of the one, or improving that of the other, or both.'[104] The existence of such a criterion has been doubted, however, with the reasoning being that it is not prudent to simply transpose the elements of the national legal orders into the legal order prevalent at international law.[105] Reliance is placed on the *Eastern Greenland* case in which the Permanent Court referred to Norway being *debarred* despite Denmark not having acted upon the Norwegian representations to its detriment. This proposition that this is estoppel by any other name can nonetheless not be said to be particularly convincing. Foremost, the essence of estoppel is to protect those who suffered as a result of the inconsistent actions of others.[106] If a detriment cannot be shown to have arisen, then no hardship resulted from the lack of consistency and, thus, there is necessity to apply the protection of estoppel. Moreover, this view has subsequently been rejected, at least implicitly, by the International Court of Justice where the Court has drawn attention

[102] Kovacs in Corten/Klein (ed), *Les conventions de Vienne sur le droit des traités*, 196 *et seq*.
[103] *Nuclear Tests Case* above n 80.
[104] *Temple of Preah Vihear* above n 9, Separate Opinion of Judge Fitzmaurice.
[105] McNair, *The Law of Treaties* (1961) 487.
[106] Wagner, 'Jurisdiction by Estoppel in the International Court of Justice' (1986) 74 *California Law Review*, 1777.

to the detriment requirement.[107] As such, the existence of a detriment is not an artificial element, which simply materialises as a foreign body within the doctrine, rather this requirement provides the very reason for the necessity and the particular validity of the protection of the expectation previously formed and is, therefore, central to the ability of a party to be able to rely on the doctrine of estoppel. That this issue has not been subject to rigorous scrutiny is not disputed and the question, thus, persists; to what extent must the parties have suffered a detriment so as to be sufficient to fulfil the criteria necessary to lead to the creation of an estoppel? Stated quite clearly, must a party have suffered a material economic disadvantage, or is it sufficient for a party to have merely altered its legal position? This relative deterioration of the legal position of the affected party or improvement of the legal position of the other party has interestingly been described as 'the "consideration', to use an English term of contract law, which binds the parties.'[108] Without specifically applying the altogether too technical consideration concept directly to the problems presented in respect of the detrimental element of the doctrine of estoppel in international law, the employment of some of the characteristics of 'consideration' opens up the possibility of an elucidation of the detrimental element of the doctrine of estoppel to the benefit of the comprehension of the doctrine itself.

Consideration is a doctrine based in Anglo-American contract law with the purpose of binding a party to the declaration of intent previously made by that party. It is defined by Pollock as an 'act or forebearance of the one party, or the promise thereof, [which] is the price for which the other is bought, and the promise thus given for value is enforceable.'[109] This definition is, in turn, based on the decision handed down by the English Exchequer Chamber wherein a good consideration was described as consisting of 'some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other.'[110] It becomes apparent from the foregoing that consideration operates so as to restrict the enforceability of an agreement or course of conduct, ie an empty promise without any possibility of performance will not be viewed as binding because there is no change in position. The criteria for a detriment in the consideration theory are thus broadly formulated. Somewhat crudely stated, this theory requires any change of the legal position of the affected party with a material legal effect based upon the representation of the other party. The change, be it a benefit for the promiser or a detriment to the promisee, must merely be sufficient, it need not be adequate: this means that there must be some value of the representation made in the eyes of the law, eg the infrastructural investment made in the *Grisbadarna Arbitration*.[111] The application of this theory on cases that have, in the past, proved to be problematic in respect of the element of detriment clearly shows the practicability of the application of consideration.

[107] For example, *North Sea Continental Shelf Cases* above n 26.

[108] Bowett, 'Estoppel before International Tribunals and its Relation to Acquiescence' (1957) 33 *British Year Book of International Law* 193.

[109] Pollock, *Principles of Contract* (1921) 177. See also, Odgers, *Introduction to the Law of Contracts*, 12; Scott/Clauson, *Chitty on Contracts* (1955) 38.

[110] *Currie v Misa* (1875) LR *(1st series)*. 10 *Ex* 162.

[111] *Decision of the Permanent Court of Arbitration in the Matter of the Maritime Boundary Dispute between Norway and Sweden* (1910) 4 AJIL 233: 'The circumstance that Sweden has performed various acts . . ., being acts which involved considerable expense . . .'

In the *Temple of Preah Vihear* case Thailand carried out acts, primarily of an administrative nature, on the disputed territory, which seem to suggest Thai sovereignty, yet 'at no time did the French Government lodge any protest against these activities by Siam.'[112] Likewise in the *Minquiers Case* the French authorities failed to react to the administration and payment out of the Exchequer of the United Kingdom in respect of certain maintenance expenses.[113] In both instances the governing power gained an advantage and the other party altered its position, in the first instance by virtue of the stationing of Thai troops in the area surrounding the temple and in the second instance by the payment of administrative costs. The focus on the 'consideration' criterion thus shifts the focus away from an observance of the detriment per se and places the emphasis upon the interests of the parties. Not only is this approach in accordance with the opinion advanced by Judge Fitzmaurice in the *Temple of Preah Vihear* case but it also allows for an appropriate and more readily definable application of the conventional detriment. This should, properly applied, result in greater legal certainty.

Consequence of Estoppel

Aside from the obvious consequence resulting from the application of estoppel, namely that the party which is estopped can no longer assert a certain right or seek to enforce a particular obligation, one further issue remains to be discussed: Can estoppel result in the international responsibility of the State which caused it? The ILC Articles on State Responsibility affirm the principle of customary international law that every internationally wrongful act of a State entails the responsibility of that State, thereby giving rise to international legal relations additional to those which existed before the act took place.[114] The decisive criterion in deciding whether an act or an omission by a party is internationally wrongful is whether there is a breach of an international obligation. The concept of a breach of an international obligation is often equated with conduct, ie acts or omissions, contrary to the rights of others.[115] In principle, no distinction is made between acts or omissions for the purpose of establishing international responsibility.[116] Thus, a breach of an international obligation and hence an internationally wrongful act could result from a positive act or a failure to act, ie by conduct or by mere silence; both relevant factors in the creation of an estoppel. However, in order for international responsibility to occur, there must be a pre-existing obligation on a State[117] and the conduct of the State set to incur responsibility must be wrongful. It is possible for a State to act or fail to act in a particular manner, thereby creating estoppel, without that particular act being wrongful. Consequently, State responsibility may occur parallel with estoppel, but this does not necessarily have to be the case. Moreover, it is worthy of bearing the bases of estoppel and the regime of State responsibility in mind. The ILC Articles foresee reparations and countermeasures as

[112] Chan 'Acquiesence/Estoppel' above n 58, 421, 427.

[113] *Minquiers and Ecrehos* (*France v United Kingdom*) ICJ 17 Nov 1953, 47.

[114] Art 1, ILC Articles on the Responsibility of States for Internationally Wrongful Acts, GAOR, 56th Sess, suppl 10, 43 *et seq*.

[115] *Phosphates in Morocco*, Preliminary Objections 1938 PCIJ (Series A/B) No 74, 10, 28.

[116] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, Cambridge University Press, 2002) 82.

[117] Art 13, ILC Articles on the Responsibility of States for Internationally Wrongful Acts, GAOR, 56th Sess, suppl 10, 43 *et seq*.

the remedies to acts which have already been carried out.[118] Estoppel on the other hand seeks to act as the proverbial shield rather than sword so as to protect the innocent party from the detrimental consequences of reliance on the actions of another party. Therefore, the international regime of State responsibility cannot be simply equated with the doctrine of estoppel due to their divergent doctrinal justification.

CONCLUSION

Estoppel, having not been created, rather merely developed by the International Court of Justice (and its predecessor) in a somewhat disjointed manner in numerous decisions, has often been confronted with the assertion that it lacks the certainty and precision required for it to be applied as a useful tool in the formation of legal relationships into which parties are capable of placing reliance. It has been shown that this uncertainty has, in the past, partly been caused by the tendency of both practitioners and theorists to overcomplicate this doctrine. Strict adherence to the estoppel principles provided for by the Common Law leads to excessive categorisation and the 'crowbarring' of international estoppel into unsuitable categories. Nonetheless, this general principle of international law has been shown to possess a number of key elements required in order for it to take effect, inter alia, a statement made by one international actor, reliance placed on that statement by another and detriment to the party which had relied on the initial statement. This chapter has argued for a simplification of the doctrine by creating a single category of estoppel by 'representation' where the term representation is offered a broad interpretation with the intention of potentially bringing as many types of statements, conduct and action under the umbrella of estoppel as is necessary. In order to balance this broad understanding of a representation, this chapter asserts that international courts would do well to consider a more systematic approach to the remaining criteria, which must be fulfilled to result in estoppel being created. Particular emphasis must be placed on the detrimental nature of the reliance placed in any representation. The doctrine of estoppel is one of the most powerful instruments in modern international law. The purpose which it seeks to fulfil, ie the protection of a reasonable reliance made in good faith is surely laudable. It is hoped that by following such a methodological approach the efficacy of the doctrine can be ensured and a consequently ensuing legal certainty guaranteed.

[118] Arts 31, 34 *et seq* and 49 *et seq*, ILC Articles on the Responsibility of States for Internationally Wrongful Acts, GAOR, 56th Sess, suppl 10, 43 *et seq*.