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PhD in International Law
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The Principle of Estoppel in International Law
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Research Proposal

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EXPOSÉ

Introduction

Estoppel is a legal concept familiar to judges, practitioners and scholars. Indeed, it has been applied by the International Court of Justice (ICJ)¹ and other international tribunals,² and is recognised by leading scholars and publicists.³ When applied, estoppel can preclude a party from taking a particular position (based on its earlier representation) and give rise to substantive or procedural rights or defences in a dispute. It is a doctrine deeply entrenched in the common law tradition, which has, had a discernible influence on early international law decisions.⁴ The importance of the principle should therefore not be understated.

Notwithstanding its importance in the relations and rights and duties of States, there appears to be a lack of clarity on its content and its potential application. As noted in Brownlie's *Principles of Public International Law*: "the 'principle' has no particular coherence in international law, its incidence and effects not being uniform."⁵

To achieve a proper understanding of the principle, it would be helpful to understand which category of the sources of law listed in Article 38 of the ICJ Statute the principle would fall under. In this respect, there remains a minority view that estoppel is a rule of customary international law (Article 38(1)(b))⁶ (as opposed to being a general principle under Article 38(1)(c)). If it is indeed a rule of custom, how does one ascertain its formation and the scope of its application? If one takes the dominant, majority, view – namely that estoppel is a general principle under Article 38(1)(c) of the ICJ Statute – how then does one determine the content of the principle?

In its recent work, the International Law Commission (ILC) has formulated a two-stage test to determine if a doctrine is a general principle for purposes of Article 38(1)(c) of the ICJ Statute; the test requires one to ascertain:- (i) the existence of a principle common to the various legal systems of the world; (ii) the possible transposition of that principle to the international legal system.⁷ Even if one adopts the ILC's test, which arguably is based on a voluntarist-positivist perspective of international rule-making, what then do we make of earlier pronouncements on the principle: in the preponderance of cases in which the principle of estoppel has been applied – whether by the ICJ or other international tribunals – little reference, if at all, has been given to its application in the legal systems of the world; indeed, early decision of the ICJ and writings of scholars appear to have assumed a deductive approach, as though the principle it was founded in some moral or natural law.

¹ See e.g., Temple of Preah Vihear case (Cambodia v Thailand) 1962 ICJ 6; Barcelona Traction, Light & Power Co. (Belgium v Spain) 1964 ICJ 6; Fisheries (Norway v UK) 1951 ICJ 116; Nottebohm (Liechtenstein v Guatemala) 1955 ICJ 4.

² See e.g., Occidental Exploration and Production Company v. Republic of Ecuador, LCIA Case no. UN3467, Final Award, 1 July 2004, paras 194-196; ICSID, Total SA v. Argentina, Decision on Liability, 21 December 2010, ICSID Case no. ARB/04/1, paras 132-134.

³ See e.g., Wilhelm Friede, 'Das Estoppel-Prinzip im Völkerrecht' (1935) Zeitschrift für ausländisches Öffentliches Recht und Völkerrecht 517-545; Andreas Kulick, 'Estoppel im Völkerrecht – Antworten auf drei dogmatische Fragen' (2014) 52 Archiv des Völkerrechts 522-544; Andreas Kulick, 'About the Order of Cart and Horse, Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals: Table 1' (2016) 27 European Journal of International Law 107-128; I. C. MacGibbon, 'Estoppel in International Law' (1958) 7 International and Comparative Law Quarterly 468-513.

⁴ See for instance, the overview of the estoppel principle in MacGibbon's work (n3), citing its use in numerous different international adjudicative fora.

⁵ J Crawford, Brownlie's Principles of Public International Law (OUP, 9th edn), p 407.

⁶ A view taken by Antoine Martin in L'estoppel en droit international public: Precede d'un aperçu de la théorie de l'estoppel en droit anglais. In his ICLQ piece, MacGibbon appears to suggest this as well: 'Estoppel in International Law', (1958) 7 ICLQ 468.

⁷ ILC, 'Report of the International Law Commission on the Work of its 72nd session' (26 April-4 June and 5 July-6 August 2021) UN Doc A/76/10, para 172.

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The overall lack of clarity with the nature and content of the principle will doubtless impact its application. Doctrinal confusion may be exacerbated by the fact that States appear before a large number of adjudicative bodies where international law is part of the applicable law, and the approach may vary depending on the constitution of the tribunal and the role general principles may play in the determination adjudication of an issue. These fora include but are not limited to the ICJ, the Permanent Court of Justice (PCA), the International Center for the Settlement of Investment Disputes (ICSID), International Tribunal for the Law of the Sea (ITLOS), World Trade Organisation (WTO),⁸ the International Criminal Court (ICC). Doctrinal consistency of the principle may also vary depending on the nature of the issue in question and the legal traditions and approach of counsel (whether government officials or external counsel).

The aim of this PhD dissertation is to conduct a comprehensive study of the existing material concerning the estoppel principle – decisions, municipal legislation and case law, scholarly works – and to provide a meaningful framework in which the principle can be understood and applied. It aims to contribute to the development of international law by attempting to synthesis and distil what are the key elements to the estoppel principle to aid its proper application in the field. To an extent, it is hoped that this dissertation will assist in the possible systematic integration and application of the estoppel principle.

To this end, this PhD thesis *first* aims to explain the importance of the estoppel principle, how it has been applied, how the fragmentation of international law may affect an accurate understanding and application of the principle, as well as a discussion between rules and principles, and how best one should conceive estoppel within the rules-principle divide.

Second, the PhD thesis then seeks to explore- (1) the content of the principle, by reference to:- (a) its application by international courts and tribunals; (b) the writings of scholars; and (c) its application in the legal systems of the world. Having examined the application of the principle through these lenses, it then seeks to distil what its key elements may be.

Third, this dissertation then seeks to differentiate estoppel from other related and similar concepts. It seeks to understand how estoppel sits within or alongside the principles of good faith and equity. In addition, it seeks to differentiate the principle from horizontally similar principles such as waiver and acquiescence and less common doctrines such as legitimate expectations and acquired rights.

Finally, this PhD dissertation aims to provide a taxonomy of the categories of rights and defences which have arisen in international decision as a result of an invocation of the estoppel principle. This will include an examination of awards, decisions and judgments involving States, where the applicable law is international law, and the taxonomy of rights will be categorised into substantive and procedural rights.

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Section I: Overview of the Estoppel Principle

This first part of the dissertations aims to provide an overview of the topic. In the first instance, it will seek to outline the principle – in the form it is most commonly known. It will then seek to establish the importance of the principle by providing examples of the wide variety of situations in

⁸ See e.g., J Cameron and K Gray, 'Principles of International Law in the WTO Dispute Settlement Body' (2001) 50 ICLQ 248, 260 et seq.

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which estoppel has been invoked and applied, including in territorial disputes as well as issues of jurisdiction.

Thereafter, the chapter will discuss the various trends and forces which is likely to lead to increased lack of clarity with respect to the principle. Chiefly, it will discuss the fragmentation of international law and the phenomenon of international disputes being adjudicated in a variety of forum where general international law is a part of the applicable law. As outlined above, States appear before a wide number of fora to resolve disputes relating to a plethora of issues:- inter-state disputes before the ICJ, human rights and environmental law issues before treaty bodies, trade and investment law disputes before specialised tribunals or boards, etc. In some, such as the ICJ, general principles may feature more centrally, while in others where the focus is on rights and obligations arising from treaty text, general principles may be supplementary.

It is hoped that this work will to an extent, contribute to systematic integration,⁹ by providing a meaningful framework from which the principle can be applied.

The final segment of this first section will explore which limb of Article 38 of the ICJ Statute the estoppel principle falls under. In this regard, some earlier scholarship has suggested that it is a general principle of customary international law under Article 38(1)(b).¹⁰ More modern scholars such as Bin Cheng¹¹ and Bowett¹² have conceived of the principle as falling under the “general principles” limb in Article 38(1)(c) of the ICJ Statute: this appears to be the emerging consensus.¹³ This part of the thesis will analyse the differences between the two limbs and posit why estoppel more suitably falls under Article 38(1)(c).

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Section II: Elements of the Estoppel Principle

Given the lack of clarity on the estoppel principle, this section intends to explore and establish the contours of the principle under international law by reviewing an extensive amount of existing material. There are three aspects to this:

Part I: Existing Decisions

First, the dissertation will examine the existing corpus of decisions by international courts and tribunals in which the estoppel principle has been invoked, applied or discussed.

Broadly, there appears to be a less restrictive and more restrictive formulation of the principle. Decisions such as *Barcelona Traction*¹⁴ suggest a broader conception of the principle, with little focus

⁹ ILC, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’, Report of the Study Group of the International Law Commission finalized by M Koskenniemi, 13 April 2006, UN Doc A/CN.4/L.682; McLachlan, C, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 ICLQ 279.

¹⁰ A view taken by Antoine Martin in *L’estoppel en droit international public: Precede d’un aperçu de la théorie de l’estoppel en droit anglais*. In his ICLQ piece, MacGibbon appears to suggest this as well: ‘Estoppel in International Law’, (1958) 7 ICLQ 468.

¹¹ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 2006).

¹² Derek Bowett, ‘Estoppel before International Tribunals and its Relation to Acquiescence’ (1957) 33 British Yearbook of International Law 176.

¹³ See e.g. Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (Lawbook Exchange, 2002).

¹⁴ *Barcelona Traction, Light & Power Co. (Belgium v Spain)* 1964 ICJ 6.

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on the need for detriment suffered by the representee. This may be justified by reference to notions of good faith, a concept familiar to civil law systems. On the other hand, the *North Sea Continental Shelf* case is an example where the ICJ has suggested a narrower view: estoppel would not be satisfied unless there was detrimental reliance – an element present in the common law version of estoppel. This also mirrors the more restrictive test articulated by Sir Percy Spender in the *Temple of Preah Vihear*.¹⁵

Estoppel has also been invoked in investment treaty arbitration¹⁶ as well as in disputes before the WTO dispute settlement body.¹⁷

The aim of this segment is to identify the key elements found by tribunals to be necessary for estoppel to give rise to an effective remedy as well as to drawn out the underlying rationale for the principle.

Part II: Scholarly Work

Next, the dissertation will consider the work of scholars and jurists.

Although it is not envisaged that the principle is rooted in Article 38(1)(d) of the ICJ Statute, examining the works of publicists will help shed light on the rationale and theoretical underpinnings of the principle. For instance, there remains a debate as to whether general principles falling under Article 38(1)(c) of the ICJ Statute take a voluntarist-positivist form or derive from natural law,¹⁸ and the work of scholars can shed light on where the principle sits within this spectrum.

Scholars may also help clarify the contours of the principle. In his seminal work of 1957, Bowett suggests that the following are the essentials of the estoppel principle: (i) the statement of fact must be clear and unambiguous; (ii) the statement of fact must be made voluntarily, unconditionally and must be authorised; (iii) there must be reliance in good faith to the detriment of the party relying on the statement.¹⁹ Broadly, this mirrors the approach taken by the common law tradition.

Part III: Municipal Legal Systems (ILC Approach)

Third, on the likely assumption that estoppel is to be rightly seen as a general principle under Article 38(1)(c) of the ICJ Statute, this dissertation intends to examine its content and application by adopting the approach proposed by the ILC.

More generally, what is or is not a general principle has been subject to academic debate.²⁰ Recent work by the ILC suggests a growing consensus toward applying a two-stage test to ascertain the existence of an applicable general principle:²¹ (a) the existence of a principle common to the various legal systems of the world; and (b) its transposition to the international legal system. In a limited number of cases before the ICJ, a similar approach was taken: in seeking to establish the applicability of a general principle, States have undertaken a wide-ranging comparative study of the use of a

¹⁵ *Temple of Preah Vihear case (Cambodia v Thailand)* 1962 ICJ 6.

¹⁶ See e.g. Andreas Kulick, 'About the Order of Cart and Horse, Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals: Table 1' (2016) 27 *European Journal of International Law* 107-128.

¹⁷ See e.g., J Cameron and K Gray, 'Principles of International Law in the WTO Dispute Settlement Body' (2001) 50 *ICLQ* 248, 260 et seq.

¹⁸ *Ibid.*

¹⁹ Bowett (n 6) 202

²⁰ See e.g., H Thirlway, *The Sources of International Law* (OUP, 2014), pp 93-104.

²¹ ILC, 'Report of the International Law Commission on the Work of its 72nd session' (26 April-4 June and 5 July-6 August 2021) UN Doc A/76/10, para 172.

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particular principle in municipal systems.²² Although these instances are but a handful, this suggests an acceptance of the appropriateness of such an approach.

Adopting the ILC's approach, and in respect of limb (a) in the first instance, this work intends to adopt a comparative approach to ascertaining how the principle of estoppel functions in municipal legal systems. It will undertake research on the major common law systems (e.g. English, American, Australian, Hong Kong, Singapore, Canada) and civil law systems (e.g. French, German, Chinese, Japanese, Korean); it will also examine chthonic and religious legal systems.

Part IV: Distilling the Key Elements

Following the review of existing decisions, scholarly works and the municipal legal systems, this section will aim to distil the key elements of the estoppel principle, broadly using the above framework looking at the nature of the representation, the reliance by the representee, and the detriment suffered by the representee.

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Section III of the Dissertation: Estoppel and Related Concepts

There are a number of principles or concepts, which similar to estoppel, seek to prevent inconsistent conduct on the part of a state.²³

For instance, good faith or *pacta sunt servanda* are well-established principles in international law (even if, similar to estoppel, the contours are undefined).²⁴ Likewise, the principle of equity has a storied history in international law.²⁵ One could question if the principle of estoppel is subsidiary to the principle of good faith (as *Brownlie's* has suggested)²⁶ and equity – and if so, how so – or something distinct.

²² ICJ, *Right of Passage over Indian Territory (Portugal v India)*, 'Observations and Submissions of the Government of the Portuguese Republic on the Preliminary Objections of the Government of India', 714; For example, Malta's oral submissions in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Intervention), 'Verbatim record 1981, Oral Arguments on the Application for Permission to Intervene' (1981) 341; ICJ, *Certain Property (Liechtenstein v Germany)*, 'Memorial of the Principality of Liechtenstein' (28 March 2002) para 6.7ff; *Avena and Other Mexican Nationals (Mexico v United States of America)* (Questions of jurisdiction and/or admissibility), Memorial of Mexico (20 June 2003) paras 374–376; ICJ, *Certain Phosphate Lands in Nauru (Nauru v Australia)* (20 March 1990) Appendix 3.

²³ See e.g., Corfu Channel, Preliminary Objections, Judgment, ICJ Reports (1947-1948), 15-48; Merits Judgment, ICJ Reports (1949), 4- 169; Assessment of Amount of Compensation, Judgment, ICJ Reports (1949), 244-265; M Wagner, 'Jurisdiction by Estoppel in the International Court of Justice' (1986) 74 California Law Review 1777; J Wass, 'Jurisdiction by Estoppel and Acquiescence in International Courts and Tribunals' (2017) 86 BYBIL 155; Sir Ian Sinclair, 'Estoppel and acquiescence' in A Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty years of the International Court of Justice - Essays in Honour of Sir Robert Jennings* (Cambridge University Press 1996).

²⁴ See e.g., Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 2006).

²⁵ C Titi, *The Function of Equity in International Law* (OUP, 2021); L. Sohn, *Equity in International Law*, Proceedings of the Annual Meeting (American Society of International Law) 82 (1988) 277.

²⁶ J Crawford, *Brownlie's Principles of Public International Law* (OUP, 9th edn), p 407.

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Additionally, estoppel is in some respect closely related to unilateral acts²⁷ and waiver and acquiescence.²⁸ There are several other concepts such as legitimate expectations (in trade and investment law)²⁹ and acquired rights.³⁰

Under this section, the dissertation intends to analyse the relationship between the estoppel principle and these abovementioned concepts and principles, showing as clearly as possible, the distinction between them and where any overlaps may occur.

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Section IV of the Dissertation: Application of the Principle

This section explores the way in which the estoppel principle has already been applied and seeks to establish a taxonomy. In the second limb of the ILC's test for general principles under Article 38(1)(c) of the ICJ Statute, one is to ask if the general principle is "transposable" on the international plane. In this respect, it may be helpful to set out a taxonomy of the categories of situations in which estoppel has been applied. This will contribute to scholarship on the topic as it presents a systematic and structure way of identifying how the principle has been applied in a particular set of facts.

This segment will start with substantive rights including but not limited to disputes relating to territorial boundaries, law of the sea, investment treaty law, trade law, and other situations involving rights and obligations from ad hoc treaties. It will then examine the use of estoppel in the area of procedure, which includes estoppel in jurisdictional disputes,³¹ as well as how it has been used in the area of evidence.

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²⁷ J Crawford, Brownlie's Principles of Public International Law (OUP, 9th edn), p 402.

²⁸ J Crawford, Brownlie's Principles of Public International Law (OUP, 9th edn), p 405.

²⁹ See e.g. C Henckels, 'Legitimate Expectations and the Rule of Law in International Investment Law' in A Reinisch, S Schill (eds.), Investment Protection Standards and the Rule of Law (OUP, 2023); OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain (ICSID Case No. ARB/15/36).

³⁰ M. Waibel, Brexit and Acquired Rights, 111 AJIL Unbound (2017) 440 – 444; P Lalive, 'The Doctrine of Acquired Rights' in M Bender, Rights and Duties of Private Investors Abroad (Southwestern Legal Foundation. International and Comparative Law Center, 2008).

³¹ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Jurisdiction)* [1984] ICJ Rep 392; J Wass, 'Jurisdiction by Estoppel and Acquiescence in International Courts and Tribunals' (2017) 86 BYBIL 155.

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Research Questions

1. What role has the principle of estoppel played in the resolution of international law disputes and what is its impact likely to be going forward?
2. To analyse and determine the content of the estoppel principle. In the first instance, to determine if, under Article 38(1) of the ICJ Statute, it is a rule of customary international law or a general principle. If the latter, having regard to existing international decisions, scholarly works, and municipal legal systems, what is the content of the principle and how should it be applied.
3. How is estoppel different from other closely related concepts and principles – including but not limited to good faith, pacta sunt servanda, equity, unilateral acts, waiver and acquiescence, acquired rights, legitimate expectations – which seek to curtail inconsistent conduct of States?
4. In what situations – substantive or procedural – has the principle of estoppel been successfully invoked?

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Methods

The dissertation will be partly doctrinal and partly normative. It will be doctrinal in its examination and consideration of the existing jurisprudence and scholarly work. It will be normative in its postulation of what the key elements of estoppel are or should be and how the estoppel principle differs from other related concepts in the area of international law.

In its quest, a number of research methods will be employed:

First, the doctrinal method will be used to analyse decisions from numerous fora to identify the principles and rationale underlying the conclusions of these adjudicative bodies. The research will include a survey of case law from various international fora, including the PCIJ and ICJ, PCA, investor-state decisions and awards, decisions from human rights tribunals, international criminal tribunals, and the WTO, etc. The doctrinal method will also be used to analyse the work of scholars. In reviewing all of this material, the aim is to distil the key elements of the estoppel principle so demonstrate a broad consensus on what it looks like on the international law plane.

The doctrinal method will also be employed in the later half of the dissertation when comparing the estoppel principle to other broader principles such as good faith and equity, so as to identify any conceptual overlaps and distinguishing features. The same will be undertaken for like principles such as waiver, acquiescence and other concepts like legitimate expectations in international investment law.

Second, a significant part of the project will also require the use of the comparative method. This will be the predominant method in the segment examining municipal legal systems to investigate the common law and civil law overlaps and differences.

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