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ARTICLE

The Nuclear Problem: A Communitarian Response

Pranay Lekhi[1]

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Abstract

Nuclear disarmament has been a global aspiration since the advent of the United Nations. However, the structures of positivist international law have often hindered any meaningful progress towards fulfilling this aspiration. The law concerning nuclear disarmament has suffered from the limitations of the fragmentation of international law. For instance, the conclusion of the Treaty on the Non-Proliferation of Nuclear Weapons has also allowed for the more powerful Nuclear Weapon States to differentially treat the goals of disarmament and non-proliferation. The interests of the Nuclear Weapon States have been equally, even if unintentionally, protected by the International Court of Justice. The Court has used technical grounds to disregard the larger interests of the international community on every occasion it has had to adjudicate on the issue of nuclear disarmament. The reason for the reticence of international law to create progressive changes towards nuclear disarmament can be traced to the inequality in the foundations of international law. Thus, the growing influence of Third World Approaches to International Law allows us to engage in correcting such discriminatory foundations. In this light, this article attempts to develop a communitarian theory of customary international law. The theory not only provides a more coherent basis for establishing custom but would also prioritise community interest over the interests of individual States. Such a theory would renew global faith in the power of international law and provide the basis for a nuclear weapon-free world.

Keywords Nuclear disarmament · TWAIL · Customary international law · Fragmentation

✉ Pranay Lekhi
Pranay.lekhi@allenovery.com

[1] Allen & Overy, London, UK

1 Introduction

Following the attack on Hiroshima and Nagasaki in 1945, the destructive potential of nuclear weapons was self-evident. Consequently, the United Nations treated effective measures towards nuclear disarmament with the 'highest priority' since the advent of the organisation.[1] In furtherance of this aspiration, the States concluded the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), which represents the 'grand bargain' between Nuclear Weapon States (NWS) and Non-Nuclear Weapon States (NNWS) parties to the treaty.[2] In exchange for their commitment to forego nuclear weapons, NNWS demanded two concessions from NWS: first, that the NPT recognises a right to use nuclear energy for civilian purposes, with a concurrent duty on NWS to facilitate such use and, second, that NWS undertake measures towards complete disarmament of their nuclear arsenals.[3] This bargain represents the three pillars of the international regime concerning nuclear weapons: non-proliferation, peaceful use and disarmament.

However, the *quid pro quo* structure of the NPT sets up differential and reciprocal obligations that create two categories of State parties under the same regime.[4] This feature is distinct from other multilateral law-making treaties or *traités-lois*, which have the common application of rules to all State parties as their chief characteristic.[5] Consequently, the treaty regime of the NPT creates a hierarchy of States, which has led to the unequal treatment of its three pillars.

Since the establishment of the regime, NNWS have constantly called for the treatment of non-proliferation, peaceful use and disarmament with parity.[6] For instance, the representative of Cuba during the 2009 Preparatory Committee stated:

> The NPT is a cornerstone of the nuclear non-proliferation and disarmament regime […]. We must relentlessly pursue our aim of universalisation of the regime […] *while providing equal weight to the three pillars* of disarmament, non-proliferation and the pursuit of lawful nuclear energy.[7]

The NPT itself provides equal priority for each pillar. This is confirmed by its *travaux préparatoires*, which explicitly note States committing to pursue all three

[1] UNGA Res. 1(1), 24 January 1946, UN Doc. A/RES/1(I); UNGA, 'Special Report of the Conference of the Committee on Disarmament', UN Doc. A/S-10/2, 26 June 1978.

[2] Hunt (2015), pp. 73, 81.

[3] Treaty on the Non-Proliferation of Nuclear Weapons (adopted 1 July 1968, entered into force 5 March 1970), 729 UNTS 161 (NPT), Arts. 1, 2, 4. See also Joyner (2011), p. 27.

[4] Joyner (2011), p. 19.

[5] Malanczuk (1997), pp. 37–38.

[6] Joyner (2011), p. 46.

[7] 'Statement by Ambassador Abelardo Morena, Permanent Representative of Cuba to the United Nations, on Behalf of the Group of Non-Aligned State Parties to the Treaty on the Non-Proliferation of Nuclear Weapons', 2009 NPT Preparatory Committee, New York, 4 May 2009, https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/WMD/Nuclear/NPT2010Prepcom/PrepCom2009/statements/2009/04May2009/04May2009AMSpeaker-3-Cuba-NAM-English.pdf (accessed 6 April 2020). Emphasis added.

goals simultaneously and not making any pillar contingent on the completion of another.[8]

Despite the formal equality of the pillars, the NPT bargain has eroded in the past two decades.[9] There has been an unfair focus on non-proliferation due to the emphasis that NWS have placed on it. The US Representative to the 2008 Preparatory Committee—Christopher Ford—has provided the starkest reflection of this sentiment, declaring:

> By accomplishing its *core* non-proliferation purpose, the NPT also powerfully serves the interest of other goals to which States Party committed themselves in the treaty text, including promotion of the peaceful uses of nuclear technology, and progress toward nuclear disarmament.[10]

By such treatment, the NWS relegate the pillars of peaceful use and disarmament to being of secondary importance. Therefore, the functioning of the NPT has not only created a hierarchy of States but also of its objectives.

The NPT was negotiated to move towards a future without nuclear weapons.[11] However, the NWS have consistently de-prioritised disarmament obligations under Article VI of the NPT. While NNWS view disarmament as fundamental to the 'grand bargain',[12] the NWS have carefully identified it as an aspirational goal and not an obligation.[13] This treatment is underpinned by the desire of NWS to retain their exclusive position while only having to make incremental concessions.

Consequently, NWS confuse disarmament with arms control. They enter into treaties that forbid the possession of particular weapon delivery technology or limit strategic arms under the belief of fulfilling disarmament obligations. For instance, the perambulatory clause of the New START declares that US and Russia are 'committed to the fulfilment of their disarmament obligations under Article VI' of the NPT.[14] However, these measures are designed to limit weapon technology but not to eliminate the possession of the weapons.[15] Arms control may reduce the cost and risk associated with the stockpiling of weapons, but it allows for the continued

[8] Conference of the Eighteen-Nation Committee on Disarmament, 'Final Verbatim Record', 23 August 1966, ENDC/PV.284, p. 5; Joyner (2011), p. 76.

[9] Ranganthan (2017), pp. 88, 92.

[10] 'Christopher Ford, Opening Remarks to the 2008 NPT Preparatory Committee', 2008 NPT Preparatory Committee, Geneva, 28 April 2008, https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/WMD/Nuclear/NPT2010Prepcom/PrepCom2008/delegates%20statements/United%20States.pdf (accessed 6 April 2020). Emphasis added.

[11] Cirincione (2007), pp. 30–31.

[12] 'General Statement of Egypt to the Second Preparatory Committee of the 2010 NPT Review Conference', 2008 NPT Preparatory Committee, Geneva, 28 April 2008, https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/WMD/Nuclear/NPT2010Prepcom/PrepCom2008/delegates%20statements/Egypt.pdf (accessed 6 April 2020).

[13] Ford (*supra* n. 10).

[14] Treaty Between the United States of America & the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms (adopted on 8 April 2010, entered into force 5 February 2011), Treaty Doc. 111–5, preamb. 4.

[15] Fidler (2004), p. 39.

presence of the weapons in the State's arsenals.[16] Disarmament, on the contrary, has as its objective the complete elimination of the weapons. Therefore, arms control remains merely a step towards disarmament, yet States represent it as a fulfilment of their disarmament obligations.

Nuclear weapons pose an existential threat to the international community.[17] Despite a common interest in their elimination, fragmented consent-based treaties dominate the international regime concerning nuclear weapons. Since the principle of the sovereign equality of States limits the application of treaty norms to non-party States, these have failed to generate any progress towards a world free of nuclear weapons.[18] With the sovereign equality of States remaining a fundamental principle of international law, the world today confronts the logical outcome of the application of that very principle.[19] Indeed, States such as India, Pakistan, Democratic People's Republic of Korea (DPRK) and Israel have come to the conclusion that 'sovereignty *is* nuclear weapons'.[20] Only a coherent theory of international law that subordinates the individual will of States to community interest can challenge such a view. This would imply a need to transform the concept of the international community to tangible legal principles that are capable of enforcement by the international legal system.[21] Community interest, so formulated, is 'a collective juridical conscience'[22] that furthers the collective interest of all States, providing a basis for an admissible claim in international law.[23]

According to Marks a 'false contingency' is reflected when a phenomenon is viewed as an isolated problem that is unrelated to wider processes at work.[24] As such, it leaves unarticulated the assumptions that establish concepts as given. International legal practice is not random but produces highly predictable outcomes.[25] There exists a sub-text of self-interest and power, often leading to the treatment of certain foundational concepts as fundamental.[26] Accordingly, this paper will demonstrate the 'false contingency' in the regime concerning nuclear weapons. It will exemplify that the problems concerning nuclear governance today are not isolated but are related to the wider dynamics at work in the world.[27]

Accordingly, Sect. 2 will illustrate the International Court of Justice's (ICJ) reticence to exercise its judicial function in community interest in cases concerning

[16] Joyner (2011), p. 36.
[17] UNSC, 'Note by the President of the Security Council', UN Doc. S/23,500, 31 January 1992.
[18] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331 (VCLT), Art. 34.
[19] Anghie (2017), p. 62.
[20] Ibid. Emphasis added.
[21] Lauterpacht (2011), p. 414.
[22] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226 (hereinafter: *1996 UNGA Opinion*), p. 270 (President Bedjaoui, declaration).
[23] Costelloe (2017), p. 24.
[24] Marks (2009), p. 1.
[25] Koskenniemi (2009), p. 11.
[26] Koskenniemi (2006), p. 2.
[27] Ibid., p. 17.

nuclear weapons. Upon exposing the foundational limitations present in international law, Sect. 3 will look towards customary international law to respond to these challenges to develop a coherent theory that prioritises community interest. Section 4 will apply the communitarian conception of customary international law as a solution to the nuclear problem. Finally, Sect. 5 will conclude the analysis with renewed faith in the ability of international law to create a legally effective international community despite the opposition of powerful States. By demystifying the underlying dynamics, this paper attempts to administer progressive changes towards a future that is free of nuclear weapons.

2 The World Court and Its Nuclear Reticence Towards Community Interest

The objective of nuclear disarmament rests squarely on the foundation of community interests being prioritised over those of the States possessing nuclear weapons. As Lauterpacht correctly observed for community interests to become effective, the international judiciary must have a pre-eminent role in safeguarding and enforcing them.[28] As such, a coherent basis for a future without nuclear weapons cannot ignore the practice of the ICJ.

This section will highlight that the Court has been fettered to enforce community interests in an effective manner due to its structural limitations and formalistic adjudication. This has translated into a visible but as yet unarticulated 'policy' on dealing with nuclear weapons. In these circumstances, if the ICJ intends to remain an effective and lasting institution, it will be argued that it must become accessible to the enforcement of community interests.

2.1 The Structural Limitations of the Court

The ICJ succeeded the Permanent Court of International Justice, as the latter lost its relevance with the decline of the League of Nations. Learning from the shortcomings of the Permanent Court, the founders of the UN designed the ICJ as a stronger institution with greater influence.[29] Being the principal judicial organ of the UN, the Court underscores its character as a World Court, being 'the only court of a universal character with general jurisdiction'.[30] Therefore, the Court plays a central role in clarifying, condensing and assisting in understanding the international legal system.[31]

The influence of the ICJ manifests itself in its dominant role in creating norms of customary international law.[32] As Benvenisti argues, judges have a legislative

[28] Lauterpacht (2011) p. 438.

[29] Posner and de Figueiredo (2005), p. 602.

[30] International Court of Justice, 'Territorial and Maritime Dispute (Nicaragua v. Columbia)', ICJ Press Release 2012/23, 19 November 2012.

[31] Hernández (2013), p. 57.

[32] Cassese (2005), p. 194.

function when they identify custom.[33] The legislative function is based on interpretative techniques and legal constraints thereon are weak.[34] Thus, while the Court places continued emphasis on the traditional elements of State practice and *opinio juris* as the 'cornerstones of custom […] it does not observe its own precept'.[35] Consequently, a lack of methodological constraints provides the judges of the ICJ a pivotal position in developing international law.[36]

While the lack of legal constraints provides an opportunity to develop custom progressively, it has been reasoned that the Court is unable to do so because of what Koskenniemi describes as a 'structural bias'.[37] Structurally, the ICJ cannot implement its decisions and relies on the United Nations Security Council (UNSC) for enforcement.[38] Therefore, it simplistically relies on the preferences of the powerful States in the international arena.[39] The inequalities of international law reveal themselves in the composition of the Court. It follows, as custom, the same regional distribution for its 15 judges as the membership of the UNSC, with the P5 nearly always having a judge on the Court.[40] While other States rotate, Posner finds, wealthier States such as Germany, Japan and Canada are more likely to have representation on the Court.[41] Additionally, the elected judges vote in favour of their States and in favour of States that match the political, economic and cultural attributes of their countries.[42]

It therefore implies that the adjudication by the Court is a 'false contingency'. It showcases that the process of decision-making does not happen randomly but is influenced by biases and political processes that direct the system towards particular decisions the Court finds desirable.[43] Thus, the Court often reaches unjust and unfair decisions because of 'deeply embedded preferences' that favour an international *status quo* that is not organically established but legally constructed.[44]

The Court's treatment of the 'international community' is revealing of its structural limitations. Despite viewing itself as the guardian of the 'international

[33] Benvenisti (2004), pp. 85, 87.
[34] Petersen (2017), p. 362.
[35] Geiger (2011), pp. 673, 692.
[36] Kelly (2000), p. 497.
[37] Koskenniemi (2009), p. 11.
[38] Charter of the UN (adopted 26 June 1945, entered into force 24 October 1945), 1 UNTS XVI, Art. 94(2).
[39] Ginsburg (2014) p. 487.
[40] Posner and de Figueiredo (2005), p. 603; the United States, Russia and France have always had a judge on the Court, China did not have a judge from 1967 to 1985 and the United Kingdom lost its seat for the first time since 1946 in 2017.
[41] Ibid.
[42] Ibid., p. 624.
[43] Bianchi (2017), p. 84.
[44] Koskenniemi (2006), p. 607.

community',[45] the Court has never relied upon the concept to generate even rudimentary legal effect.[46] The concepts of communitarian obligations such as *jus cogens* norms and obligations *erga omnes* continually appear in its case law but do not have any overriding effect on obligations created by State consent.[47] It has been a consistent feature of the Court to use formalistic reasoning to reject community interests. For instance, in the *Jurisdictional Immunities* case, the Court declared that a violation of *jus cogens* norms would have no impact on State immunity, which is 'procedural in character'.[48] It noted that this procedural constraint applied even if it rendered the *jus cogens* norm unenforceable.[49]

Formalism is an interpretative technique that prioritises form over substance, setting aside any subjective reasoning based on policy considerations.[50] Bianchi demonstrates that such reasoning has been used in the limited high-profile cases the Court has handled to systematically side with the State-centered system of international law.[51] Judge Jessup wrote in his dissent in the 1966 *South West Africa* case: methods of interpretation are 'a cloak for a conclusion reached in other ways and not a guide to a correct conclusion'.[52] The Court's formalism is a choice. Though formalism is not a problem in itself, the choice betrays the Court's judicial function as it cowers to State action even when it conflicts with community interest.[53] It remains a choice the Court has made in every case concerning nuclear weapons that has come before it.

2.2 Court 'Policy' on Nuclear Weapons

The Court's jurisprudence reflects a trend of using formalistic reasoning to decline adjudicating cases concerning nuclear weapons.[54] With nationals of nuclear weapon States being a constant feature in the composition of the Court, the 'structural bias' in their favour explains the Court's interpretative method.[55]

In the first contentious cases concerning nuclear weapons brought by Australia and New Zealand against France, the Court devised innovative solutions to avoid

[45] *Arrest Warrant 11 April 2000 (DR Congo v. Belgium)*, ICJ Reports 2002, p. 3, p. 107 (Judge ad hoc Bula-Bula, sep. op.); *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction, ICJ Reports 1998, p. 432, p. 575 (Judge Vereshchetin, diss. op.); *Aerial Incident at Lockerbie (United Kingdom v. Libyan Arab Jamahiriya); (United States v. Libyan Arab Jamhiriya)*, Provisional Measures, ICJ Reports 1992, p. 3, p. 26 (Judge Lachs, sep. op.).

[46] Simma (1994), p. 298.

[47] Tams (2009), p. 102.

[48] *Jurisdictional Immunities of the State (Germany v. Italy, Greece Intervening)*, Judgment, ICJ Reports 2012, p. 99, para. 93.

[49] Ibid.

[50] Posner (1986), p. 180.

[51] Bianchi (2017), p. 85.

[52] *South West Africa* cases *(Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment, ICJ Reports 1966, p. 6, p. 355 (Judge Jessup, diss. op.).

[53] Friedman (1978), p. 367.

[54] Ranganthan (2017).

[55] Anghie (2017).

giving a definitive answer. In 1974, the Court went beyond the sources of law articulated in Article 38 of its Statute. It failed to give an answer under customary international law but relied on a 'unilateral declaration' by France as a source of its obligation not to carry out atmospheric nuclear tests in the South Pacific Ocean.[56] Accordingly, it decided that the claims had lost their object and the Applicants were no longer entitled to the relief they sought.[57] This determination was reached without France even participating in the proceedings. However, it allowed the Applicants to approach the Court in case the basis of the judgment was affected.[58] In 1995, New Zealand did request a re-examination in connection with France's prospective underground nuclear tests.[59] The Court declined the request on the basis that the 1974 judgment exclusively related to atmospheric testing.[60] The overly formalistic approach ignored New Zealand's stated position that was effectively articulated in the dissent to the 1974 decision, which stated that in limiting the object of the proceedings to atmospheric nuclear tests, the Court 'narrowly circumscribes' the Applicants' objective to a single purpose.[61] This renders the premise of the 1995 Judgment untenable.

A similar reticence was visible in the Court acting under its advisory jurisdiction. In 1996 the Court answered two requests for advisory opinions on nuclear weapons. The first came from the World Health Organization (WHO) that asked, 'in view of the health and environmental effects', if the use of nuclear weapons in an armed conflict violates international law.[62] The Court declared that the determination of the legality of the use of nuclear weapons was not within the scope of activities of the organisation.[63] Accordingly, the Court declined to answer the request. This option was unavailable to the Court for the second request, which was made by the United Nations General Assembly (UNGA). In responding to the request, the Court delivered its most influential judgment concerning nuclear weapons on the *Legality of the Threat or Use of Nuclear Weapons* (*1996 UNGA Opinion*).

The *1996 UNGA Opinion* reflects the Court's struggle between fulfilling the aspirations of international law and catering to the interests of powerful States.[64] Progressively, the judges unanimously declared that the NPT provided an obligation

[56] *Nuclear Tests* case *(Australia v. France)*, Jurisdiction and Admissibility, ICJ Reports 1974, p. 253, para. 43.

[57] Ibid., para. 52.

[58] Ibid., para. 60.

[59] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France)*, Order, ICJ Reports 1995, p. 288.

[60] Ibid., para. 65.

[61] *Nuclear Tests* case (n. 56), p. 312, para. 3 (Judges Onyeama, Dillard, Jiminéz de Aréchaga and Wadlock, joint diss. op.).

[62] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Request for Advisory Opinion, 3 September 1993, p. 2, https://www.icj-cij.org/public/files/case-related/93/7648.pdf (accessed 22 March 2021).

[63] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, p. 66, para. 22.

[64] Posner and de Figueiredo (2005), p. 604.

of *result* to pursue and bring to a conclusion negotiations related to disarmament.[65] President Bedjaoui even went on to call the obligation customary.[66] In the context of international humanitarian law, the Court established that the use of nuclear weapons 'would generally be' contrary to international law.[67] However, on the other hand, in its ultimate analysis, the Court concluded:

> […] in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake;[68]

This is the closest the Court has come to a determination of *non liquet*. The opinion rendered by a technical majority, with the President's casting vote, left the issue confused.[69] The opinion in equal parts provided for reasons why nuclear weapons should be eliminated but also left enough scope for NWS to argue that there was no reason for them to change their nuclear policies as a consequence.[70] It reiterated the Court's inability to take a stance in cases concerning nuclear weapons.

In 2014, the Court had another opportunity to abandon its reticence when the Marshall Islands brought an action against the UK, India and Pakistan for violations of conventional and customary obligations by not pursuing nuclear disarmament.[71] The initiative for these proceedings went back to the work of two non-governmental organisations—the International Association of Lawyers Against Nuclear Arms and the Nuclear Age Peace Foundation.[72] Unfortunately, the Court rejected jurisdiction over the matter as the Respondent States lacked 'objective awareness' of the existence of a dispute between the parties.[73] This formalistic and unforeseen criterion, which at best reflected a curable procedural flaw, formed the sole basis for the decision.[74]

The method of interpreting the 'dispute' was a choice made by the Court. This was glaringly revealed by Judge Bennouna who highlighted that the Court's tie-breaking President, Ronny Abraham, had used the opposite of his reasoning in *Georgia v. Russian Federation*, where he declared that the Court's jurisprudence was 'strictly realistic and practical […] *free of all hints of formalism* (emphasis

[65] *1996 UNGA Opinion* (n. 22), para. 99.
[66] Ibid., p. 274, para. 23 (President Bedjaoui, declaration).
[67] Ibid., para. 105(2)(d).
[68] Ibid., para. 105(2)(E).
[69] Bianchi (2017), p. 82.
[70] Hansard, *House of Lords Debates*, 26 January 1998, cols. 7–8.
[71] *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Preliminary Objections, ICJ Reports 2016, p. 255; *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)*, Preliminary Objections, ICJ Reports 2016, p. 552; *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. UK)*, Preliminary Objections, Judgment, ICJ Reports 2016, p. 833 (*RMI v. UK*).
[72] Venzke (2017), p. 69.
[73] *RMI v. UK* (n. 71), para. 50.
[74] Ibid., p. 1093, para. 1 (Judge Crawford, diss. op.).

added)'.[75] Further, it should be unsurprising that all the judges who were nationals of States possessing nuclear weapons voted against the Marshall Islands. The pattern was a repetition of the *1996 UNGA Opinion* where all judges who were nationals of nuclear weapon States voted in favour of the conclusion that there existed no conventional or customary norm that prohibited the threat or use of nuclear weapons.[76]

The cases concerning nuclear weapons provided the Court with an opportunity to enhance its reputation and prestige.[77] However, its failure to do so led Judge Robinson to poignantly state in his dissent in the *Marshall Islands* case that the Court 'has written the Foreword in a book on its irrelevance'.[78] If the Court is to avoid such an outcome, it must assume its role as the guardian of the international community by being available to adjudicate on issues of common interest.

2.3 An Accessible Guardian: Finding a Right *Actio Popularis*

The 2016 *Marshall Islands* case carries with it the ominous silhouettes of the Court's 1966 decision in the *South West Africa* case.[79] The Preliminary Objections decision in the *South West Africa* case had found the claim admissible, determining that *all* member States of the League of Nations had an interest in the observance of the 'sacred trust of civilisation' placed on the Mandatory State through the Mandate Agreement.[80] However, the second phase decision in 1966 overturned the Preliminary Objections decision. It disallowed the standing of the Applicants ruling that they did not have a legal right or interest in the subject matter of the claim.[81]

The 1966 decision was the first, and the 2016 decision the latest, in a series of cases where the Applicants turned to the Court when political processes failed to deliver.[82] The 1966 decision had a majority of white judges adjudicating on racial discrimination by South Africa as a Mandate power. In 2016, the majority included all the judges who were nationals of nuclear weapon States. In both cases, the President was required to give a tie-breaking vote. Most importantly, both cases, which were instances of litigation in the community interest, used formalistic reasoning to deny the existence of a 'dispute' between the parties. In 1966, the Applicants had to show a 'special interest' and in 2016 the criterion was of 'objective awareness'.[83] Each of these decisions reflect the dominant role political processes, manifested as a 'structural bias', play in the Court's adjudication.

[75] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011, p. 70, p. 228, para. 14 (Judge Abraham, sep. op.).
[76] *1996 UNGA Opinion* (n. 22), para. 105(2)(B).
[77] Anghie (2017), p. 66.
[78] *RMI v. UK* (n. 71), p. 1092, para. 70 (Judge Robinson, diss. op.).
[79] Venzke (2017).
[80] *South West Africa* cases *(Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, ICJ Reports 1962, p. 319, p. 329.
[81] Ibid., para. 14.
[82] Venzke (2017), p. 68.
[83] *South West Africa* cases (n. 52), para. 44.

To overcome these underlying limitations, the Court must transform itself into an institution that is available to adjudicate disputes concerning community interests, unfettered by procedural constraints. The Court must address the question of the Applicants' standing in almost every case before it.[84] Standing is determined by establishing that there is a *sufficient link* between the State and the legal rule it seeks to enforce.[85] The ICJ determines that such interest exists by addressing whether a legal 'dispute' exists in accordance with Article 36 of its Statute. As such, in the *Marshall Islands* case, the ICJ noted that in order to address the claims that were raised by the Applicant, there was a need to establish a 'legal dispute'.[86]

While the existence of a 'dispute' remains uncontroversial when claims arise out of bilateral obligations, the Court uses formalistic tropes in cases concerning community interests.[87] Therefore, the question remains if the Court can allow a right *actio popularis*, which would provide standing to States for the violation of community interests, even when they are not directly injured.[88]

The Court described the nature of community interests in its celebrated dictum in the *Barcelona Traction* case.[89] It noted that obligations that a State owes to the international community as a whole are:

> By their very nature […] the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[90]

Many believe the reference was a direct response to mitigate the criticism the Court received following its 1966 *South West Africa* decision.[91] The Court repeated this in 2012, while accepting Belgium's standing by placing reliance on the *erga omnes* nature of the obligation to prosecute or extradite suspects of torture.[92] Likewise in 2020, the Court found that The Gambia had *prima facie* standing to act against Myanmar because of a 'common interest to ensure acts of genocide are prevented'.[93] Even as the decisions of 2012 and 2020 were justified based on the States' obligations in conventional law, the *erga omnes* nature of the obligations was not expressly found in the treaty. Contrarily, the Court established the standing of the Applicants by linking the interpretation of the jurisdiction clauses and the

[84] Ahmadov (2018), p. 76.
[85] Tams (2009), p. 26.
[86] *RMI v. UK* (n. 71), para. 36.
[87] Ibid.
[88] Galindo (2017), p. 78.
[89] *Case Concerning the Barcelona Traction, Light, and Power Company Ltd. (Belgium v. Spain)*, Second Phase, Judgment, ICJ Reports 1970, p. 3, para. 33.
[90] Ibid.
[91] See Venzke (2017), p. 70, Hernández (2013), p. 31.
[92] *Questions Relating to the Obligation to Prosecute and Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, p. 422.
[93] *Application of the Convention on the Prevention and Punishment of Genocide (The Gambia v. Myanmar)*, Order on Provisional Measures, 2020, www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf (accessed 10 April 2020), para. 41.

substantive norms brought in the applications.[94] These instances showcase that the Court can, and indeed has in the past, attributed importance to the interests of the international community.

Accordingly, though the Court has stated that *actio popularis* is unknown to international law,[95] its validity depends on the construction of the term 'dispute'.[96] A 'dispute' can be defined as narrowly as in the *Marshall Islands* case by requiring the Applicant to sufficiently bilateralise each distinct dispute against each Respondent.[97] Contrarily, it may also be broadly, clearly and precisely defined in the language of the *Mavrommatis* principle, which requires 'a disagreement on a point of law or fact, a conflict of legal views or interests' between parties.[98] It is the Court's interpretative function that becomes central to the validity of an action *actio popularis*.[99]

According to the Court's jurisprudence, its reliance on a formalistic procedure to avoid determinations on community interests is incorrect according to its own reasoning. The legal interest is inseparable from the substantive obligation in question.[100] Therefore, the interpretation of the procedural rule is dependent on the nature of the substantive right. When the substantive background rule allows invoking responsibility to protect collective interests, the Court must adjust its interpretation of a 'dispute' to the nature of the norm.[101] Accordingly, the International Law Commission (ILC) notes that a third State may invoke international responsibility when acting on behalf of the international community due to the nature of the customary obligations in question.[102] Therefore, Judge Crawford correctly concluded, 'it is now established […] that States can be parties to disputes about obligations in the performance of which they have no specific material interest'.[103]

However, it is assumed that the consensual nature of the Court's jurisdiction bars judicial enforcement of community interests.[104] The application of the *Monetary Gold* principle disallows the Court to adjudicate on rights of third States which are not parties to the proceedings.[105] In the context of community interests, the Court

[94] Ahmadov (2018), p. 102.
[95] *South West Africa* cases (n. 52), para. 88.
[96] Ahmadov (2018), p. 9.
[97] *RMI v. UK* (n. 71), para. 38.
[98] *Mavrommatis Palestines Concessions* case *(Greece v. UK)*, Jurisdiction, 1924 PCIJ Series A, No. 2, pp. 11–12.
[99] Ahmadov (2018), p. 100.
[100] *Nuclear Tests* case (n. 56), p. 369, para. 117 (Judges Onyeama, Dillard, Jiminéz de Aréchaga and Wadlock, joint diss. op.).
[101] Ahmadov (2018), p. 137.
[102] Responsibility of States for Internationally Wrongful Acts, UNGA Res. 56/83, 12 January 2001, UN Doc. A/RES/56/83, Art. 48.
[103] *RMI v. UK* (n. 71), p. 1102, para. 22 (Judge Crawford, diss. op.).
[104] *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. UK)*, Preliminary Objections of the UK, 15 June 2015, paras. 83 et seq., https://www.icj-cij.org/public/files/case-related/160/20150615_preliminary_objections_en.pdf (accessed 22 March 2021).
[105] *Monetary Gold Removed from Rome in 1943 (Italy v. France, UK and US)*, Preliminary Objections, ICJ Reports 1954, p. 19, pp. 32–33.

in the *East Timor* case concluded that it could not decide the case on its merits, as it would call into question the rights of a State not before it.[106] Some judges in the *Marshall Islands* case reiterated these objections.[107]

The fact that the Court's jurisdiction is consent-based is irreproachable.[108] However, case law limits the application of the *Monetary Gold* principle.[109] First, while the principle precludes *findings* against third States, the Court could yet determine that the Respondents are in breach due to their conduct.[110] Further, *Monetary Gold* involved rights between two States and not rights *erga omnes* affecting the collective interests of the international community.[111] Therefore, promoting collective interests would not require a radical transformation of the Court; it would merely require the Court to choose to exercise its judicial function.

The Court's judicial function is not that of being an arbitral institution but being an 'arbiter of common interest', speaking to the international community as a whole.[112] Higgins elucidated this by claiming:

> The judicial function (of the Court) surely includes developing and applying international law to hitherto untested situations in order to obtain socially desirable and enlightened results […]. Judicial decisions are an acknowledged source of law; they must play their part in law development.[113]

Over the years, the Court has seen a steady decline in the number of conclusive judgments it has delivered when adjusted for the manifold increase in the number of UN Member States.[114] To truly reflect its designation as a 'World' Court, it must abandon its reticence and adjudicate 'big cases' with global implications.[115] It must also understand its audience. Over the last 20 years, a nuclear weapon State has seldom been an Applicant before the Court.[116] The faith in international justice is reposed by those States which have been failed by the discriminatory political processes in international law. If the Court were to remain a guardian of the international community, it must choose to interpret its judicial function progressively.[117]

[106] *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, p. 90, para. 105.
[107] *RMI v. UK* (n. 71), pp. 898–899, para. 39 (Judge Tomka, sep. op.); *RMI v. UK* (n. 71), p. 1061, paras. 18 et seq. (Judge Bhandari, sep. op.).
[108] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945), 33 UNTS 933 (ICJ Statute), Art. 36.
[109] *RMI v. UK* (n. 71), p. 1106, para. 32 (Judge Crawford, diss. op.).
[110] Ranganthan (2017), p. 93.
[111] Ahmadov (2018), p. 141.
[112] Wellens (2015), p. 143.
[113] Higgins (1970–1971), p. 341.
[114] Posner (2004), p. 6.
[115] Proulx (2017), p. 96.
[116] Over the last 20 years, the only States possessing nuclear weapons to have filed applications before the ICJ have been India and Pakistan, but only against each other. In 1999 Pakistan filed an application against India, and in 2017 India filed an application against Pakistan.
[117] Proulx (2017).

Admittedly, a communitarian conception of law may be totalising and uphold the imperial values that plague the international system today.[118] The Court would also face a monumental task of subjecting State consent to overriding objectives of the international community with precision.[119] Nevertheless, a reformulated theory of custom that creates a coherent legal order, while enforcing community interests, can overcome these limitations.

3 Redeeming Westphalia—A Communitarian Doctrine of Customary International Law

It is apparent that the traditional consent-based structures of international law have failed to produce any meaningful development towards a world free of nuclear weapons. This shortcoming can be challenged by leveraging on the potential of customary international law's utopian potential. However, the traditional doctrine of custom continues to emphasise consent. Consequently, there is a need to develop a coherent theory of custom that prioritises community interests.

As such, this section will begin by elucidating the current shortcomings in the development of custom in international law. It will proceed to reflect a reformulated theory of custom with emphasis on *opinio juris*. It will argue that divorced from the distinction between *lex lata* and *lex ferenda*, *opinio juris* must become a dynamic and forward-looking concept, serving as the core element for generating custom.[120] *Opinio juris* would accordingly reflect the widespread perception among States of the desirability of an authoritative rule.[121] This reformulated theory would establish the basis of having a legally effective international community capable of enforcing nuclear disarmament.

3.1 Custom and its Current Shortcomings

The twin elements of State practice and *opinio juris* form customary international law.[122] Custom has great significance because of its ability to expand the reach of rules to States that do not have underlying obligations in treaty law.[123] However, the doctrine of sources, of which custom forms a part, is not immune from the imperial implications that sovereignty carries.

According to the doctrine of sources, international law has been treated as a regime to which States consent to be bound by, either explicitly by way of treaties or implicitly by their words and actions.[124] As Crawford explains, the corollary of

[118] Stone (1962), pp. 40–42.
[119] Hernández (2013), p. 25.
[120] Lepard (2018), p. 303.
[121] Lepard (2010), p. 114.
[122] *North Sea Continental Shelf Cases (Germany v. Netherlands, Denmark)*, Merits, ICJ Reports 1969, p. 3, p. 175.
[123] Scharf (2017), p. 208.
[124] Parfitt (2014), p. 298.

the sovereign equality of States is the ultimate dependence on consent of obligations in international law.[125] The sources doctrine responds to the basic need of international law not to impose duties on States which do not wish to be bound by them. In such a regime there is a complete coincidence of lawmakers and law-addressees.[126] This reflects the assumption that there exists an equality of bargaining power between sovereign States in creating obligations in international law. However, the inequality of States is an indubitable facet of global governance, and consent-based norms are correspondingly a reflection of such unequal political power.[127] Therefore, the sources of international law are oriented to safeguard the interests of powerful States, even when at times addressing the concerns of the entire international community.[128] As treaty obligations under the NPT have failed to achieve any concrete progress towards disarmament, the possible role custom can play in achieving a nuclear weapon-free world assumes importance.

The Special Rapporteur of the ILC, Michael Wood, articulated a distinction between 'formal' and 'material' sources of custom. 'Formal' sources represent the doctrinal character of an international rule, and 'material' sources constitute 'the political, sociological, economic, moral or religious origins of the legal rules'.[129] Wood observed that for the identification of custom, only the 'formal' sources were relevant.[130]

However, this distinction conceals that the twin elements of custom constituting its 'formal' sources were identified and given meaning only in the context of European nations sharing a similar culture, stage of economic development and aforementioned imperialist tendency.[131] Further, Article 38(1)(c) of the ICJ Statute references 'civilised nations', which displays that the doctrine of sources inherently links 'formal' and 'material' sources.[132]

The modern conception of custom relies on an inclusive notion of State practice, including voting patterns for resolutions of international organisations and placing greater emphasis on *opinio juris*.[133] As will be explained below, this conception attempts minor revisions to the traditional doctrine of custom but does not completely forego the limitations of the doctrine of sources.[134] Accordingly, while determining State practice, the practice of non-Western States is consistently neglected.[135] In contrast, increased importance is given to the practice of powerful

[125] Crawford (2019), p. 431.
[126] Cassese (1987), p. 169.
[127] Koskeniemmi (1990), p. 21.
[128] Chimni (2018), p. 9.
[129] ILC, 'First Report on Formation and Evidence of Customary International Law', UN Doc. A/CN4/663, 17 May 2013), p. 12.
[130] Ibid.
[131] Blutman (2014), p. 532.
[132] Chimni (2018), p. 15.
[133] *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986, p. 14, para. 185 (*Nicaragua* case).
[134] Ibid.
[135] Kelly (2000), p. 472.

States.[136] The ILC suggests that an 'indispensable factor' in determining State practice must be the actions of 'specially affected' States that are 'most likely to be concerned with the alleged rule'.[137] In this context, Danilenko observes:

> In the absence of a clear definition, the notion of 'specially affected' states may be used as a respectable disguise for 'important' or 'powerful' states which are always supposed to be 'specially affected' by all or most political-legal developments within the international community.[138]

Additionally, the consensual theory of international law is reconciled with the generality of custom by creating the 'persistent objector' principle. Therefore, a State can exclude itself from the application of custom if that State objects to the rule in the process of its formation.[139] As Kelly notes, the rise of this principle is a testament to the fact that 'powerful States will not accept norms with which they do not specifically agree'.[140] Consequently, while most theorists accept that custom binds generally, Charlesworth observes that Western scholars have made attempts to revitalise the 'persistent objector' principle to protect the influence of the powerful States over the development of international law.[141]

The resolutions of international organisations are also given limited importance in the creation of custom. The *1996 UNGA Opinion* stated that repeated resolutions of the UNGA reflect 'nascent' *opinio juris* despite being adopted 'by a large majority'.[142] The ILC supplements this conclusion by explicitly stating that a resolution adopted by an international organisation cannot, of itself, create a rule of custom.[143] It appears that this treatment was to challenge attempts made by the postcolonial States to use the UNGA, where they were in the majority, to influence the creation of international obligations.[144]

Therefore, as it stands, the procedure for the identification of custom safeguards the interests of powerful States.[145] However, the modern doctrine of custom with its emphasis on *opinio juris* provides a foundation for limiting hegemonic interest in the development of international law. As noted by the ICJ in the *Nicaragua* case, there are occasions when international law challenges its traditional consent-based patterns and attempts to move towards a more idealistic central order.[146] However,

[136] Galindo and Yip (2017), p. 262.
[137] ILC, 'Draft Conclusions on Identification of Customary International Law', UN Doc. A/73/10, 2018, p. 122, p. 136 (ILC 2018).
[138] Danilenko (1993), p. 96.
[139] ILC 2018 (n. 137), p. 152.
[140] Kelly (2000), p. 515.
[141] Charlesworth (1984), p. 4.
[142] *1996 UNGA Opinion* (n. 22), para. 73.
[143] ILC 2018 (n. 137), p. 133.
[144] See UNGA Res. 1803 (XVII), 14 December 1962, UN Doc. A/RES/1803(XVII); UNGA Res. 3281 (XXIX), 12 December 1974, UN Doc. A/RES/3281(XXIX).
[145] Goldsmith and Posner (1999), p. 1114.
[146] *Nicaragua* case (n. 133), p. 186.

its promise remains unfulfilled because the structures of promoting the narratives of the dominant States remain authoritative.[147]

Despite hegemonic States playing a preponderant role in creating norms favourable to them, custom in some instances has also been to the benefit of Third World States. For instance, in the *Armed Activities* case, the ICJ recognised that permanent sovereignty over natural resources is a norm of customary international law.[148] The recognition favours less powerful States and is against the interests of transnational corporations. Therefore, there is clear evidence that custom can present a challenge to traditional hegemony.

However, attempts at moving past the traditional structures of international law will only become meaningful by advancing an alternative doctrine of custom. A doctrine that recognises that custom has been historically undemocratic and discards the consensual theory for its formation.[149] The reformulated doctrine would go beyond the emphasis on *opinio juris* as a *constituent* element of custom and place *opinio juris* as a *critical* element that prioritises community interests.[150]

3.2 *Opinio Juris* as the Critical Element of International Law

There exist scholars who deny that *opinio juris* is necessary for the creation of customary obligation.[151] Goldsmith and Posner state that *opinio juris* is nothing more than a behavioural regularity of States, which reflects the pursuit of their interests.[152] As noted above, the modern doctrine suggests that the presence of consistent State practice is sufficient to demonstrate the existence of *opinio juris*.[153] However, these views ignore the normative value of custom as a source of international law.[154] More importantly, by subjecting the existence of a customary norm to the will of powerful States, they undermine *opinio juris* as representative of 'universal juridical conscience' or *opinio juris communis*, which must be a critical element of the very idea of international law.[155]

Judge Cançado Trindade articulated the distinction between *opinio juris* as an element of custom and *opinio juris* as the 'universal juridical conscience' in his dissenting opinion in the *Marshall Islands* case. He noted:

> *Opinio juris* has already had a long trajectory in legal thinking being today endowed with a wide dimension. Thus, already in the nineteenth century, the

[147] Chimni (2018), p. 37.
[148] *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment, ICJ Reports 2005, p. 168, pp. 251–152.
[149] Bedjaoui (1979), p. 135.
[150] Chimni (2018), p. 39.
[151] Lauterpacht (1958), p. 32; Akehurst (1975), p. 32.
[152] Goldsmith and Posner (2005), p. 39.
[153] *Rights of Nationals of the United States of America in Morocco (France v. United States)*, Judgment, ICJ Reports 1952, p. 176, p. 200.
[154] Guzman (2008), pp. 188–190.
[155] Chimni (2018), p. 38.

> so-called 'historical school' of legal thinking and jurisprudence (of F.K. von Savigny and G.F. Puchta) in reaction to the voluntarist conception, gradually discarded the 'will' of the States by shifting attention to *opinio juris*, requiring practice to be an authentic expression of the 'juridical conscience' of nations and peoples. With the passing of time, the acknowledgement of conscience standing above the 'will' developed further, as a reaction against the reluctance of some States to abide by norms addressing matters of general or common interest of the international community.[156]

Therefore, in determining the existence of a customary obligation the practice of States must be looked at generally and not individually.[157] Further, as noted by Judge Cançado Trindade, *opinio juris* has a broader dimension than that of a subjective element of custom:

> *Opinio juris* became a key element in the formation itself of international law, a law of conscience. This diminished the unilateral influence of the most powerful States, fostering international law-making in fulfilment of the public interest and in pursuance of the common good of the international community as a whole.[158]

Since *opinio juris communis* represents a 'universal' conscience, it would include in its development practices that have been given limited importance in the traditional doctrine of custom. Besides State practice as evidence of the belief of what should become a norm, resolutions of international organisations and actions of the global civil society would assume greater importance.[159]

The identification of such generality can be found by emphasising the equality of States as a structural feature of the international legal order.[160] As noted by Judge Álvarez, the 'juridical conscience of peoples' would be better represented by the 'resolutions of diplomatic assemblies, particularly those of the United Nations'.[161] Resolutions of international organisations are not adopted by those States that voted in their favour but by the organisations themselves, reflective of the opinion of all of their member States.[162] Therefore, resolutions, which reflect the 'common good' and which have been adopted 'by a large majority' of States, would have normative effect.

Custom created by *opinio juris communis* presents a formidable challenge to the fragmentation strategy of powerful States. Fragmentation only succeeds under the assumption that consent-based norms create self-contained obligations, which

[156] *RMI v. UK* (n. 71), p. 1019, para. 299 (Judge Cançado Trindade, diss. op.).
[157] McDougal (1959), p. 108.
[158] *RMI v. UK* (n. 71), p. 1019, para. 300 (Judge Cançado Trindade, diss. op.).
[159] Chimni (2018), p. 41.
[160] Besson (2018), p. 48.
[161] *Fisheries Case (United Kingdom v. Norway)*, Judgment, ICJ Reports 1951, p. 116, pp. 148–149 (Judge Alvarez, ind. op.).
[162] Cançado Trindade (2014), pp. 530–531.

exclude the application of other norms of international law.[163] The communitarian interest recognised by *opinio juris communis* accounts for this hierarchy of norms and corrects the incoherence that has allowed fragmentation to flourish.

Therefore, in treating *opinio juris* as critical to the formation of international law the reimagined doctrine of custom reflects the aspirations of the international community. It provides a solution to the paradox presented by the traditional doctrine of custom. With the 'universal juridical conscience' standing above the will of individual States, customary international law would stand to realise the general interests of humanity and consequently reject the structural limitations of hegemonic interests in international law. In rejecting the voluntarist notion of international law, custom can provide for a standard basis to fulfil the aspirations of all peoples and progressively develop international law.[164]

3.3 Custom and Consent: Irreconcilable Differences

The revised doctrine of custom is unacceptable to scholars who believe that in international law, norms cannot bind States without their consent and notions of consent are the basis for custom as well.[165] However, this is contrary to the nature of general custom, which is capable of universal application. It is because of its universal applicability that if a treaty codifies custom, it binds States that are not parties to the treaty equally.[166] Therefore, an understanding of custom founded on consent would be theoretically incorrect.

Custom cannot exist in an ethical vacuum.[167] European cultural unity, which formed the foundation of modern customary international law, was rooted in the unity of European States bound by a 'universal natural law'.[168] Noting such origins, with the growth of States, custom today must bind all States because of their membership of the international community. This implies that the community must be able to legislate for all States through the process of customary international law.[169] Therefore, a State must be bound by custom not because it has consented to the norm but because States, in general, believe that a particular obligation should be binding.

The *Nicaragua* case declared that if the international community treats the practice of a State as a breach of a principle, it is evidence of the principle being customary.[170] Therefore, if a rule of custom is to affect State behaviour, it must impact the payoffs States receive.[171] Accordingly, if a State were to violate a principle, the

[163] Viñuales (2017), p. 1090.
[164] Cançado Trindade (1992), pp. 68, 71.
[165] Henkin (1989), p. 27.
[166] VCLT (n. 18), Art. 38.
[167] Lepard (2010), pp. 41, 77.
[168] Orakhelashvili (2006), p. 318.
[169] Lepard (2010), p. 106.
[170] *Nicaragua* case (n. 133), para. 186.
[171] Guzman (2005), p. 133.

payoff can only be seen if *other* States believe that there has indeed been a violation. The relevant *opinio juris* or belief cannot then be of the acting State. Therefore, the subjective belief of individual States does not showcase the existence of an obligation. It is only the belief of other States in general that determines the status of a principle.[172] As such, a coherent theory of custom would require that the emphasis on the practice of States 'specially affected' would be irrelevant in the formulation of legal obligations.

Further, custom in its traditional form is neither powerful, nor can it effectively achieve the policy objectives of the international community of States.[173] If *opinio juris* required States to consent to a sense of obligation, it would run contrary to the custom as a source of international law. Thus, the non-consensual articulation of the doctrine of custom would be fundamental in solving the paradox of the traditional doctrine. More importantly, the consent-based system creates a bias in favour of the *status quo* and disregards the aspirational potential of a customary international obligation.[174]

Traditionally, international law has created an artificial distinction between law as it exists (*lex lata*), and law as it should be (*lex ferenda*). This methodology has created widespread confusion in the development of customary international law.[175] However, as noted by Higgins, international law would never be able to develop beyond a rudimentary state if the distinction between *lex lata* and *lex ferenda* prevents the application of international law in a progressive manner in previously untested situations.[176] Thus, as *opinio juris* can represent both *lex lata* and *lex ferenda*,[177] it effectively addresses the limitations in the traditional doctrine and provides a coherent justification for progressive development.

In the *status quo*, the international legal system subjects the general interest of the global community to the will of powerful States. On the contrary, a non-consensual system of custom would provide the normative benefit of democratising solutions to problems of global interest. Despite its challenge to powerful States, this is the direction in which international law is heading. As Payandeh notes, communitarian approaches to international law are visible *inter alia* in the third-party effects of the UN Charter, the verification of peremptory norms as well as the treatment of reservations to human rights treaties.[178] While these practices reflect the emergence of the concept of an international community, the concept will only become legally effective by transforming the doctrine of sources.

[172] O'Connell (1992), p. 303.
[173] Guzman and Hsiang (2014), p. 556.
[174] *RMI v. UK* (n. 71), p. 937, para. 75 (Judge Cançado Trindade, diss. op.).
[175] Arajarvi (2011), pp. 163–183.
[176] Higgins (1970–1971).
[177] Roberts (2001), p. 763.
[178] Payandeh (2010), pp. 358–363.

3.4 *Opinio Juris Communis*: The Foundation of a Legally Effective International Community

Customary international law as *opinio juris communis* represents a departure from positivism in international law. Positivism, which has come to be the dominant mode of thinking since the nineteenth century, is what prescribes that States are bound only by obligations they have consented to.[179] It was a series of formal doctrines developed by positivist jurists that created the dichotomy between 'civilised' and 'uncivilised' States in the international community.[180]

The consent-based theory of international law creates a community of States conceptualised as a collection of States *qua* States.[181] However, international law repeatedly invokes the term 'international community' in a normative and not a descriptive sense.[182] Scholars have taken 'international community' to be a concrete *legal* term, suggesting that global interactions must encompass ethical considerations, consistent with the maxim of '*in necessariis unitas, in dubiis libertas, in omnibus caritas*'.[183] However, the consent-based international community deprives international law of any legal significance because it cannot countenance norms built on the shared pursuit of common objectives that are not authored by States.[184] Therefore, if the international community is to generate any substantive legal effects, as international law envisions, it must incorporate the solidarity of its members for the preservation of shared collective interests.[185]

Even within the current structures of international law, there exists a subliminal recognition of a legally effective 'international community'. For instance, Article 53 of the VCLT recognises the existence of the will of an 'international community', manifested through *jus cogens*, having hierarchical superiority over norms emerging from the consent of States.[186] *Jus cogens* or peremptory norms are such norms of customary international law that reflect the fundamental values of the international community and are accepted by the international community as a whole.[187] The fact that consensual obligations are void if they contradict *jus cogens* suggests that the State-centric version of international law cannot account for respect for fundamental values that are not subjected to the will of individual States.[188] As Simma notes, assuming that a community can be held together by legal norms alone overestimates

[179] Anghie (2006), p. 741.
[180] Westlake (1894), p. 141.
[181] Tasioulas (1996), p. 116.
[182] UNGA Res. 2625 (XXV), 24 October 1970, UN Doc. A/RES/2625(XXV) (Friendly Relations Declaration) prin. (f); Paulus (2005), p. 297; UNGA Res. 56/83, 12 December 2001, UN Doc. A/RES/56/83 (ARSIWA), annex, Art. 48.
[183] Verdoss and Simma (1984), p. 917.
[184] Conklin (2012), p. 849.
[185] Hernández (2013), p. 19.
[186] Linderfalk (2011), p. 375.
[187] ILC, 'Report of the International Law Commission on the work of its seventy-first session' (29 April-7 June and 8 July-9 August 2019), UN Doc. A/74/10, p. 142.
[188] Simma (1994), pp. 229, 233.

the capacity of law and underestimates the necessity of a societal consensus as a precondition for the formation of and respect for the legal rules.[189]

Therefore, in order to ground communitarian obligations within a coherent theory of international law, reliance has been placed on metaphysical principles outside of positive law.[190] It is due to this extralegal dimension of such obligations that the positivist doctrine of sources of international law cannot easily accommodate rules of *jus cogens* and *erga omnes*.[191] The VCLT provides evidence for this limitation, as it states that peremptory norms are not found in treaty law but the 'international community of States as a whole' recognises them.[192] Hence, in redeeming Westphalian international law, natural law thinking must equally be restored.

States must not be averse to such thinking as customary obligations in *status quo* are not very different from existing communitarian obligations since all States are to follow them generally.[193] Adding the restoration of natural law thinking in the theory of custom as *opinio juris communis* would imply the hierarchical superiority of custom over consent-based norms.[194] In turn, this would go beyond the lip-service offered towards the existence of an 'international community' and make it legally effective as an *'ensemble des États'* brought together by a shared pursuit to achieve common goals.[195]

4 Towards a Nuclear Weapon-Free World: A Customary Obligation for Disarmament

The application of the revised doctrine of customary international law provides the foundation for a future without nuclear weapons. The ICJ alluded to the collective interest in addressing the nuclear problem while discussing whether the Marshall Islands was a State 'specially affected'. In an unexpected determination, the Court noted:

> […] that the Marshall Islands, by virtue of the suffering which its people endured as a result of being used as a site for extensive nuclear testing programs, has special reasons for concern about nuclear disarmament.[196]

This determination is in stark contrast to the position of the US, which stated during the 1996 *Nuclear Weapons* Advisory Opinion proceedings:

[189] Ibid.
[190] Hernández (2013), p. 38.
[191] Allot (1992), p. 250.
[192] VCLT (n. 18), Art. 53.
[193] Ago (1989), p. 237.
[194] Schwarzenberger (1975), p. 249.
[195] Union Académique Internationale (1960), pp. 131–132.
[196] *RMI v. UK* (n. 71), para. 44.

> […] customary law could not be created over the objection of the nuclear-weapon States, which are the States whose interests are most specially affected.[197]

While the ICJ avoided explicitly referencing specially affected States in its Advisory Opinion, the United States and the United Kingdom continued to claim that it is only States that possess nuclear weapons that had to be considered specially affected.[198] The statement of the Court in the *Marshall Islands* decision is in stark contrast to this position as it considers the possibility that States *threatened* by the use of nuclear weapons should be considered specially affected.[199]

Further, this determination was made in a context where the Marshall Islands was only a favoured testing site for the United States alone; however, the Marshall Islands brought the action in *actio popularis* against nine States possessing nuclear weapons. The Marshall Islands justified this by noting its particular awareness of the dire consequences of nuclear weapons.[200] As such, the expansion of the notion of 'specially affected' States is a tacit acknowledgement of the collective interest in achieving nuclear disarmament. Irrespective of advances in technology and the existence of tactical versions, nuclear weapons possess the ability to destroy the world as such.[201] The *1996 Advisory Opinion* recognised this when noting the potential of nuclear weapons to cause indiscriminate harm with enormous destructive effect.[202] The UNSC, acknowledging nuclear weapons to be a threat to international peace and security, has reaffirmed the *global* threat of nuclear weapons.[203] Thus, an obligation of disarmament is in the general interest of all States, including the NWS. Therefore, nuclear disarmament obligations are in accord with the 'universal juridical conscience' or *opinio juris communis*.

Accordingly, under the revised doctrine of custom, the collective nature of obligation would signal the inapplicability of the notion of 'specially affected' States. In determining State practice *as evidence* of the critical element of *opinio juris*, the relevant practice should be that of States that do not possess nuclear weapons. This procedure for identification would preserve the normative value of custom, which depends on the responses of other States against the acting States. Besides the Marshall Islands, which brought the legal action against three States that possess nuclear weapons, NNWS have repeatedly expressed that NWS violate their international obligations by continuing to possess nuclear weapons.[204]

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[197] *Legality of the Threat or Use of Nuclear Weapons*, Letter Dated 20 June 1995 from the Acting Legal Adviser to the Department of State, Together with Written Statement of the Government of the United States of America, pp. 8–9, https://www.icj-cij.org/public/files/case-related/95/8700.pdf (accessed 22 March 2021).

[198] Ibid., Verbatim Record, Statement of the United Kingdom, CR 95/34, 15 November 1995.

[199] Heller (2018), p. 199.

[200] Wayman (2016).

[201] Singh (1959), p. 242.

[202] *1996 UNGA Opinion* (n. 22), para. 35.

[203] UNSC Res. 1540, 28 April 2004, UN Doc. S/RES/1540, preamb. 1.

[204] For example, 'Statement by Vanessa Wood, Counsellor, Australian Delegation to the Conference on Disarmament', 2019 NPT Preparatory Committee, New York, 2 May 2019, http://statements.unmeetings.org/media2/21492039/australia-1-new.pdf (accessed 11 April 2020).

The resolutions of the UNGA equally reflect *opinio juris communis*. Besides its very first resolution calling for the elimination of nuclear weapons,[205] Resolution 1653 declared as a matter of law that the use of nuclear weapons would be unlawful.[206] Further, since 1994 the UNGA has annually adopted a resolution in favour of complete nuclear disarmament.

Since 2003, these resolutions have significantly expanded in scope. They incorporate in the third perambulatory paragraphs that conventional law outlaws weapons of mass destruction and determine to achieve the same for nuclear weapons.[207] Judge Cançado Trindade highlighted this contradiction when stating:

> The *opinio juris communis* as to the prohibition of nuclear weapons, and of all weapons of mass destruction, has gradually been formed, over the last decades. If weapons less destructive than nuclear weapons have already been expressly prohibited (as is the case of biological and chemical weapons), it would be nonsensical to argue that, those which have not, by positive conventional international law, like nuclear weapons, would not likewise be illicit; after all, they have far greater and long-lasting devastating effects, threatening the existence of the international community as a whole.[208]

The resolutions also call upon NWS to take concrete efforts towards disarmament, while underscoring their unequivocal undertaking to eliminate nuclear weapons from their arsenals completely.[209] It is telling that these resolutions call for the conclusion of negotiations for disarmament without referencing it as a treaty obligation of the NPT.[210] The obligation put on all States towards complete disarmament is reflective of the customary nature of the obligation. In any case, since these resolutions reflect the common aspirations of *all* the members of the UN, they have normative effect in themselves and solidify the existence of *opinio juris communis*, irrespective of the voting patterns.

The role of the global civil society in developing a consensus in favour of nuclear disarmament has been especially telling. As early as 1969, the *Institut de droit international* condemned the use of all weapons of mass destruction.[211] Since then, non-governmental organisations have been able to exert significant influence in the development of an international consensus towards an obligation for disarmament. Besides the organisations that were instrumental in bringing the cases before

[205] UNGA Res. 1/1 (n. 1) para. 5(d).
[206] UNGA Res. 1653 (XVI), 24 November, 1961, UN Doc. A/RES/1653(XVI), para. 1(a).
[207] UNGA Res. 57/79, 8 January 2003, UN Doc. A/RES/57/79.
[208] *RMI v. UK* (n. 71), p. 964, para. 147 (Judge Cançado Trindade, diss. op.).
[209] UNGA Res. 58/56, 17 December 2003, UN Doc. A/RES/58/56, para. 11.
[210] UNGA Res. 74/45, 19 December 2019, UN Doc. A/RES/74/45, para. 18.
[211] Institut de droit international (1972), p. 470.

the ICJ, most telling has been the work of the International Campaign to Abolish Nuclear Weapons (ICAN). The civil society coalition of over 500 organisations was successful in achieving a treaty-based prohibition of nuclear weapons, in the form of the Treaty on the Prohibition of Nuclear Weapons.[212] Although the treaty has received no support from NWS, ICAN received the 2017 Nobel Peace Prize in recognition of its influential work.

Thus, upon discarding the consensual notion of customary international law the conclusion that there exists an obligation of nuclear disarmament is inescapable. The relevant State practice taken together with the resolutions of the UNGA and the larger interest of the global civil society showcases that nuclear disarmament represents *opinio juris communis*. Such a reading makes the doctrine of custom more democratic and coherent.[213] In the context of nuclear weapons, it also eliminates the contradiction that while conventional law bans other weapons of mass destruction, nuclear weapons, which have far greater deleterious potential, remain legal. Therefore, even as the NPT remains unable to augur any change in the behaviour of NWS, their obligation to disarm under customary law remains enforceable as the 'universal juridical conscience.'

The elevation of nuclear disarmament as *opinio juris communis* will provide an effective foundation towards a world free of nuclear weapons in two ways. First, its hierarchical superiority would imply that the allowance of nuclear weapons within the fragmented NPT regime would be rendered void. Second, a non-consensual theory of custom would eliminate arguments of States either being 'persistent objectors' or 'specially affected'. This rejection not only checks the inequalities generated by the imperialist tendencies of international law but would also successfully confront States such as India, Pakistan and DPRK, who possess nuclear weapons outside the NPT regime. Thus, the interests of an effective international community would not remain subject to the will of individual States. A coherent theory of custom as the 'universal juridical conscience' would successfully achieve the aspirational potential of international law and be fatal to the continued existence of nuclear weapons in the world.

5 Conclusion—Having Faith in International Law

To the many positivist international lawyers, this exercise may appear Procrustean in its attempt to sacrifice the will of States to the interests of the international community. However, at its core, this study is motivated by the enthusiasm of a student of international law, who believes in its ability to create a fair and equitable legal order.[214] In many ways, this motivation is not dissimilar to that of the Marshall

[212] Treaty on the Prohibition of Nuclear Weapons (opened for signature 20 September 2017, yet to enter into force), UN Doc. A/CONF.229/2017/L.3/Rev.1; ICAN (2016).
[213] Tasioulas (2009), p. 328.
[214] Bianchi (2017), p. 81.

Islands, which went to the ICJ as 'a small island State whose only power is the power of law'.[215]

In the context of nuclear weapons, there are arguments that the ICJ should not pass any order, as it would have no practical effect.[216] A realistic search for disarmament indeed requires the cooperation of all States, especially the States that possess nuclear weapons.[217] Thus far, cooperation on this account has been absent.[218] However, this overlooks an essential function of international law, that of *influencing political processes*. As the delegate of Vanuatu revealed, the progress in obtaining a ban on atmospheric nuclear testing in the Pacific was a direct consequence of Australia and New Zealand taking the matter to the ICJ.[219] Further, though the Treaty on the Prohibition of Nuclear Weapons has stalled due to the non-participation of any of the States possessing nuclear weapons, the UNGA resolution that called to convene the conference for the treaty was adopted shortly after the *Marshall Islands* judgment.[220]

Additionally, international law has a robust internal influence. States obey international law as they participate in the 'transnational legal process'.[221] The normativity of the process implies that States interact with other nations.[222] Accordingly, States adhere to their obligations to avoid international shaming.[223] As part of the 'transnational legal process', their actions are also influenced by non-governmental organisations that are instrumental in furthering international norms by engaging in transnational public interest litigation.[224] International law is instrumental in influencing domestic policies of States, giving a further reason to believe in the utopian potential of international law. Therefore, the practical effects of the normative value of international law are more far-reaching than the actions of States today; it remains critical in changing State policies for the future.

Customary obligations exemplify the utopian potential of international law.[225] Custom can contribute to the generation of genuinely communitarian norms in international law.[226] Unfortunately, consent-based theories of international law dominate the present doctrines of developing customary obligations. This anomaly creates an international community without any legal significance as it fails to generate any substantive effects to preserve collective interests.[227]

[215] *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. UK)*, Memorial of the Marshall Islands, 16 March 2015, para. 107, https://www.icj-cij.org/public/files/case-related/160/160-20150316-WRI-01-00-EN.pdf (accessed 22 March 2021).

[216] Davis (2016), p. 79.

[217] *1996 UNGA Opinion* (n. 22), p. 264, para. 100.

[218] Crawford (2018), p. 476.

[219] WHO, 'Forty-Sixth World Health Assembly Verbatim Records of Plenary Meetings' (May 3–14 1993), WHA46/1993/REC2 275.

[220] UNGA Res. 71/258, 11 January 2017, UN Doc. A/RES/71/258.

[221] Koh (1996), p. 181.

[222] Ibid., p. 207.

[223] Gopalan and Fuller (2014), p. 158.

[224] Koh (1996), p. 207.

[225] Charlesworth (1998), p. 45.

[226] Chimni (2018), p. 19.

[227] McCorquodale (2006), p. 251.

Therefore, custom must be delinked from the principle of the sovereignty of States to create a legally effective international community. The revision of custom as *opinio juris communis* or the universal juridical conscience presents a foundation for prioritising community interests over the will of States. Providing civil society with the ability to participate in the creation of international norms would allow for greater scrutiny of State action to ensure conformity with community interests.[228] Therefore, treating *opinio juris* as the critical element of custom not only adds greater coherence to the theory of custom but also provides the process for identifying community interests and subsequently enforcing them.

This exercise must not be mistaken for naivety, for even the Marshall Islands did not expect a binding judgment to spell the end of nuclear weapons miraculously.[229] It turned to international law because there was little reason to believe that the political processes would ever advance the cause of nuclear disarmament.[230] The doctrine of custom as *opinio juris communis* will assist in countering hegemonic interests by introducing essential reforms to the international legal process.[231] With nuclear disarmament being part of the universal juridical conscience, it would allow the influence of international law to pervade domestic policy with both international institutions and civil society holding States to account. These reforms will provide the foundation for an equitable legal order without the threat of nuclear weapons. Thus, reposing the faith of those who believe in the ability of international law to speak justice to power.

Appendix

See Fig. 1.

[228] Anghie (2017), p. 66.
[229] Venzke (2017), p. 71.
[230] Anghie (2017), p. 64.
[231] Chimni (2018), p. 38.

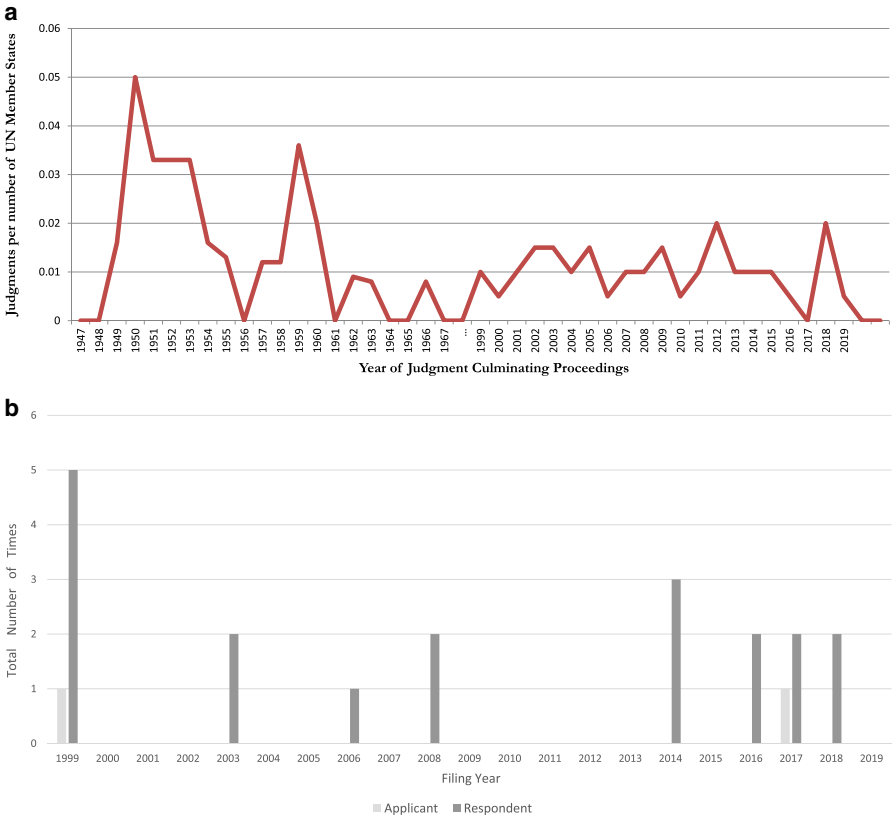

Fig. 1 Decline of the ICJ. See Posner (2004). The first graph accounts for cases that have produced concluding judgments by the ICJ, adjusted for the increase in UN member States and excluding multiple proceedings in single cases such as the South West Africa cases in 1962 and 1966, Yugoslavia cases in 2004 and the Marshall Islands cases in 2016. The second graph showcases States possessing nuclear weapons before the ICJ.

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Pranay Lekhi is Legal Advisor—Not Admitted UK at Allen & Overy, London and First-Class LL.M. graduate from the University of Cambridge specializing in International Law