ELTE | ÁJK
ÁLLAM- ÉS JOGTUDOMÁNYI KAR

ELTE LAW WORKING PAPERS
2022/03

Is there a case for a customary obligation of nuclear disarmament?

Zolta Buda

DOI: 10.58360/20221210-Buda

Zolta Buda[*]

DOI: 10.58360/20221212-Buda

"If the territorial unity of our country is threatened, in order to protect Russia and our nation, we will unquestionably use all the weapons we have. This is no bluff. […] And those who try to blackmail us with nuclear weapons should know that the wind might turn back in their direction."
Vladimir Putin, 21 September 2022

INTRODUCTION

On January 24, 1946, just five months after the atomic bombings of Hiroshima and Nagasaki, the United Nations ('UN') General Assembly adopted its very first resolution, calling for the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction.[1] Flash-forward 75 years, and we find that amidst the ongoing Russian invasion of Ukraine, nuclear threats are once again being made and nuclear tensions are on the rise, with nine nuclear-armed States possessing over 12,700 nuclear warheads.[2] The past 75 years of disarmament policymaking brought us no closer to living in a nuclear-free world, and the latest addition to this legal framework, the Treaty on the Prohibition of Nuclear Weapons ('TPNW') –which no nuclear weapon State has ratified or acceded to – is a painful reminder of the ever-growing division between the nuclear haves and have-nots. As the formation of international obligations is generally grounded in the consent of States, the TPNW's failure to garner any support from nuclear weapon States or their allies has left us questioning whether a treaty without universal acceptance would ever be able to bring about the decommissioning of nuclear weapons. As such, many have turned towards exploring the theoretical possibility of grounding the obligation of nuclear disarmament in customary international law as an alternative.

The present paper seeks explore the status of nuclear disarmament in international law, and in doing so, it will first (I) provide a historical analysis of the missed opportunities that

[*] Zolta Buda is an assistant professor and a PhD candidate at the International Law Department of Eötvös Loránd University, Budapest. ORCID: 0000-0002-8734-5727. The findings of this working paper are based on the author's unpublished thesis.
[1] UN General Assembly, "Establishment of a Commission to Deal With the Problems Raised by the Discovery of Atomic Energy," A/RES/1(I), January 24, 1946. DOI: https://doi.org/10.1163/ilwo-iic18
[2] Kristensen, H. M., Korda, M. and Norris, R. N., 'Status of World Nuclear Forces', Federation of American Scientists, 23 February 2022, https://fas.org/issues/nuclear-weapons/status-world-nuclear-forces/.

DOI: 10.58360/20221210-Buda

the International Court of Justice ('ICJ') had to clarify the legal status of nuclear weapons, followed by an (II) overview of the current legal framework of nuclear disarmament and its nature as an obligation. Then, the article will (III) examine whether a case could be made for the customary character of nuclear disarmament, with special consideration given to the often-cited notions of "specially affected States" and "persistent objector States", before (IV) concluding with a summary of its main findings.

I. JUDICIAL AVOIDANCE IN THE CASELAW OF THE INTERNATIONAL COURT OF JUSTICE

A. THE NUCLEAR TESTS CASES

Between 1966 and 1972 France carried out a long series of atmospheric tests of nuclear weapons in the territory of French Polynesia in the South Pacific, carrying a high risk of potential radioactive contamination. Particularly vulnerable to this risk were Australia and New Zealand, which lead both States to file separate applications with the ICJ instituting proceedings against France. Eventually, those proceedings resulted in the Court's judgment of 20 December 1974.[3]

The ICJ was therefore presented its first ever opportunity to address the legal status of nuclear weapons – more precisely, the legality of nuclear testing. The judgment however, adopted only by a majority of nine votes to six, has been widely regarded as, at best, controversial. The Applicants' submission, in essence, was to request a declaration of illegality of atmospheric nuclear testing.[4] In contrast, the Court found that the 'original and ultimate objective of the Applicant was and has remained to obtain a termination of those tests', and thus, 'its claim cannot be regarded as being a claim for a declaratory judgment'.[5] Further, the Court went on to find that a number of declarations made by the French authorities announcing the cessation of nuclear testing in the area have become binding upon France.[6] Thus, by way of declaring that France is already bound by these statements, the Court deemed the Applicants' objective accomplished. The Court recalled that it can only exercise its jurisdiction in contentious proceedings when a dispute genuinely exists between the parties, and since the dispute at hand was resolved by

[3] Watts, A., Nuclear Tests Cases, MPEPIL, 2007 ['Watts'], paragraph 3. DOI: https://doi.org/10.1093/law:epil/9780199231690/e185
[4] *Nuclear Tests* (Australia v. France), Judgment, I.C.J. Reports 1974 ['Nuclear Tests'], Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Arechaga and Sir Humphrey Waldock, paragraph 6.
[5] *Nuclear Tests*, paragraph 30.
[6] *Nuclear Tests*, paragraph 52.

DOI: 10.58360/20221210-Buda

deeming the French declarations to be binding, the Court pronounced that the object of the claim has clearly disappeared, and that there is nothing on which to give judgment.[7] In alignment with the aforementioned public declarations, France did cease atmospheric testing in the Southern Pacific area. However, underground tests were still taking place, which, in 1995, prompted New Zealand to institute proceedings against France seeking the cessation of those tests as well.[8] By that time however, France has already withdrawn its optional clause declaration and had denounced the General Act for the Pacific Settlement of International Disputes, which formed the bases of jurisdiction in the 1973–74 proceedings, leading to yet another case where a decision on the merits was avoided.[9]

B. THE NUCLEAR WEAPONS ADVISORY OPINION

On 15 December 1994, the General Assembly of the United Nations adopted Resolution 49/75K, requesting the ICJ to answer whether the threat or use of nuclear weapons is, in any circumstances, permitted under international law.[10] In answering the question, the Court went on to examine a number of bodies of law, including rules protecting the environment, provisions of the International Covenant on Civil and Political Rights, the prohibition of genocide, and more.[11]

The Court found no explicit prohibition of the use of nuclear weapons in either of these bodies of law, yet, the Court could also not declare that there would be a specific authorization of their use.[12] Some commentators have questioned why the Court would address the latter, as the lack of authorization generally will not limit Sates' freedom of action. In the *Lotus Case*, the Permanent Court of International Justice emphasized that international law left States a 'wide measure of discretion which is only limited in certain cases by prohibitive rules'.[13] Similarly, in Nicaragua, the Court emphasized that 'there are no rules, other than rules as may be accepted by the State concerned, by treaty or

[7] *Nuclear Tests*, paragraph 57-59.
[8] Watts, paragraph 19.
[9] *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) *Case*, Order, I.C.J. Reports 1995, paragraph 68 (1). DOI: https://doi.org/10.1017/cbo9781316152355.001
[10] Bothe, M., Nuclear Weapons Advisory Opinions, MPEPIL, 2016, paragraph 1.
[11] *Legality of the Threat or Use of Nuclear* Weapons, Advisory Opinion, I.C.J. Reports, 1996 ['Nuclear Weapons'], paragraph 105 (2).
[12] *Nuclear Weapons*, paragraph 105 (2).
[13] *The Case of the SS Lotus* (France v. Turkey) PCIJ Series A, No.10 (1927), paragraph 19.

DOI: 10.58360/20221210-Buda

otherwise, whereby the level of armaments of a Sovereign State can be limited'.[14] Thus, the Court has consistently upheld that States have a freedom to act unless a rule of law from whatever source prohibits action. In a similar vein, Judge Guillaume noted in his Separate Opinion that what is of interest to the General Assembly is not the absence of authorization, but rather, the absence or existence of prohibition.[15]

Regardless, the Court found that the use of nuclear weapons per se is not prohibited, but is merely confined to the limits set by Articles 2(4) and 51 of the UN Charter, and the rules of humanitarian law.[16] The Court went on to explain that, while the threat or use of nuclear weapons would generally be contrary to international humanitarian law, the Court cannot conclude definitively whether it would be lawful or unlawful 'in an extreme circumstance of self-defence, in which the very survival of a State would be at stake'.[17] Needless to say, the Court has opened a can of worms with this statement, leading to heated debates over topics such as the interrelation between *jus ad bellum* and *jus in bello*, or the possibility of pre-emptive self-defence in anticipation of a nuclear strike.[18]

While the above decision, adopted seven votes to seven, has sparked a barrage of criticism and has been analyzed by commentators over and over again, it is frequently forgotten that the Court has formulated some controversial conclusions about the obligation of disarmament as well, confirming that 'there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control'.[19] The ambiguous wording of this finding has led commentators to speculate on the nature of the disarmament obligation (i.e. whether it is an obligation of result or one of conduct), and its potential customary character, both of which will be addressed in detail below.

Also worth mentioning is the fact the World Health Organization ('WHO') also requested an advisory opinion, asking the Court whether, in view of their health and environmental

[14] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States) (Merits), ICJ Reports (1986) ['Nicaragua'], paragraph 135. DOI: https://doi.org/10.1093/law/9780198743620.003.0021
[15] *Nuclear Weapons*, Separate Opinion of Judge Guillaume, paragraph 3.
[16] *Nuclear Weapons*, paragraph 105 (2) C-D.
[17] Ibid., E.
[18] Moussa, J., 'Can jus ad bellum override jus in bello? Reaffirming the separation of the two bodies of law', 90 *IRRC* 963 (2008), page 975. DOI: https://doi.org/10.1017/s181638310900023x; Kajtár, G., 'Az általános erőszaktilalom rendszerének értéktartalma és hatékonysága a posztbipoláris rendszerben'. In Kajtár, G.; Kardos G. (szerk.): *Nemzetközi Jog és Európai Jog: Új Metszéspontok: Ünnepi tanulmányok Valki László 70. születésnapjára.* Saxum Kiadó (2011) pages 73-74.
[19] Ibid.

DOI: 10.58360/20221210-Buda

effects, the use of nuclear weapons in armed conflict violated States' obligations under international law?[20] The Court reasoned that the legality of use of nuclear weapons was irrelevant to the WHO's work of preventing and alleviating their health effects; it thus lacked standing to request the opinion.[21] Once again, the Court managed to avoid addressing the substantive question due to formalistic reasons.

C. THE MARSHALL ISLANDS CASES

Perhaps as a direct consequence of the Court's above finding relating to the obligation to pursue negotiations leading to nuclear disarmament, in 2014, the Marshall Islands instituted proceedings against all nine of the current nuclear powers – however, only those against India, Pakistan and the United Kingdom were accepted, as only these States have recognized the Court's compulsory jurisdiction.[22] The Marshall Islands claimed that the United Kingdom is in a continuing breach of its disarmament obligations under the Treaty on the Non-Proliferation of Nuclear Weapons ('NPT').[23] In the cases of India and Pakistan, the same argument was made under customary international law, as they are not parties to the NPT.[24]

Even though expectations were running high that the Court will finally get a chance to clarify some contentious points formulated in its 1996 Advisory Opinion, eventually all three claims were dismissed due to the non-existence of a legal dispute.[25] The Court has improved upon its previous jurisprudence, and introduced a subjective criterion into the definition of dispute: the respondent's awareness of the existence of a disagreement.[26]

---

[20] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Request for Advisory Opinion, 3 September 1993.
[21] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, I.C.J. Reports 1996, paragraphs 22, 31.
[22] Souza Schmitz, M., Decision of the International Court of Justice in the Nuclear Arms Race Case, *Harvard ILJ*, 2016 ['Souza Schmitz'].
<http://www.harvardilj.org/2016/11/decision-of-the-international-court-of-justice-in-the-nuclear-arms-race-case/> accessed 15 November 2022.
[23] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands v. United Kingdom) ['Marshall Islands v. UK'], Application Instituting Proceedings, 2014, paragraph 7. DOI: https://doi.org/10.18356/9789210474573c024
[24] *Obligations concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands v. India) ['Marshall Islands v. India'], Application Instituting Proceedings, 2014, paragraph 6. DOI: https://doi.org/10.18356/9789210474573c022
[25] *Marshall Islands v. UK*, paragraph 58.; Marshall Islands v. India, paragraph 54.
[26] Souza Schmitz.

DOI: 10.58360/20221210-Buda

As the Marshall Islands made no complaints towards the Respondents specifically, the Court concluded that the Respondents could not have been aware of the existence of a disagreement with the Applicant.[27] For this reason, the Court upheld the Respondents' preliminary objections, and dismissed the claims in lack of a legal dispute.

As Nico Krisch points it out, in *Marshall Islands v. UK,* only the slimmest of possible majorities – established only through the president's casting vote – supported the dismissal of the claims, and, even more interestingly, 'among the eight judges who find a dispute lacking, no less than six are nationals of nuclear-weapon states; the remaining two come from countries (Japan and Italy) that have benefitted greatly from the protection offered by the nuclear weapons of the US. The eight judges in the minority are all nationals of countries that do not possess nuclear weapons.'[28] This observation sheds some light on the structural bias that determined, and most likely will determine in the future the outcome of disputes involving nuclear weapons.

II. THE LEGAL FRAMEWORK AND NATURE OF NUCLEAR DISARMAMENT

A. NUCLEAR DISARMAMENT IN THE NPT – A *PACTUM DE CONTRAHENDO*?

Whilst a number of international treaties touch upon nuclear technology incidentally, it is perhaps no exaggeration to say that the most important instrument to ever address the legal status of nuclear weapons is the 1968 Treaty on the Non-Proliferation of Nuclear Weapons ('NPT'), which came into existence with the objective to prevent the spread of nuclear weapons and to further the goal of achieving nuclear disarmament. The NPT has arguably played a significant role in limiting the spread of nuclear weapons and decreasing the size of already existing nuclear stockpiles, and these achievements are in large part due to the obligation of nuclear disarmament laid out in Article VI:

'*Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear*

[27] *Marshall Islands v. UK*, paragraph 57.; Marshall Islands v. India, paragraph 52.
[28] Krisch, N., Capitulation in The Hague: The Marshall Islands Cases, *EJIL:TALK!* <https://www.ejiltalk.org/capitulation-in-thehague-the-marshall-islands-cases/> accessed 15 November 2022.

DOI: 10.58360/20221210-Buda

disarmament, and on a treaty on general and complete disarmament under strict and effective international control.'[29]

Whilst disarmament obligations generally refer to the physical destruction or elimination of particular types of armaments,[30] the wording of Article VI cited above is rather ambiguous, and has led to many speculations about the nature of the disarmament obligation therein. In particular, many have questioned whether Article VI is an obligation of result or one of conduct? According to the Court's reasoning in *Nuclear Weapons*, the 'effective measures' referred to in Article VI cover both the reduction and the elimination of nuclear arsenals.[31] Going further, the Court argued that the obligation contained in Article VI 'goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result - nuclear disarmament in all its aspects'.[32] Here, the Court arrived at the conclusion that Article VI is a *pactum de contrahendo*,[33] that is, a binding instrument under international law by which contracting parties assume a legal obligation to conclude a future agreement.[34]

In response to the ICJ's above finding, many concluded that the Court 'arrive[d] unanimously at the wrong answer',[35] and that, there is in fact no obligation to actually achieve disarmament.[36] For example, Robert Turner states in his article that, 'the Court seems clearly to have confused two related concepts (a *pactum de contrahendo* and a *pactum de negotiando*)'.[37] Turner goes on to argue that, 'Article VI of the NPT does not, and cannot reasonably be interpreted to obligate treaty parties to conclude anything'.[38] Unsurprisingly, those in support of this argument are mostly connected to one of the major nuclear super-power States.

---

[29] NPT, Article VI.
[30] *Relationship Between Disarmament and International Security*, Report of the Secretary General of the United Nations Centre for Disarmament, U.N. Doc. A/36/597 (1982), paragraph 46. DOI: https://doi.org/10.18356/8eece915-en
[31] *Nuclear Weapons*, paragraph 99.
[32] *Nuclear Weapons,* 100.
[33] Simon, D., Article VI of the Non-Proliferation Treaty is a Pactum de Contrahendo and has Serious Legal Obligation by Implication, *Journal of International Law and Policy,* Vol. 12, University of Pennsylvania, Philadelphia (2004) ['Simon'], p. 10.; Counter-proliferation, paragraph 7. DOI: https://doi.org/10.1093/law/9780198736387.003.0022
[34] Owada, H., Pactum de contrahendo, pactum de negotiando, MPEPIL, 2008, paragraph 1. DOI: https://doi.org/10.1093/law:epil/9780199231690/e1451
[35] Robert F. Turner, Nuclear weapons and the World Court: The ICJ's Advisory Opinion and Its Significance for U.S. Strategic Doctrine, in *The Law of Military Operations 349 (*Michael N. Schmitt ed., 1998) ['Turner'].
[36] David A. Koplow, Parsing Good Faith: Has the United States Violated Article VI of the Nuclear Non-Proliferation Treaty?, 301 *Wisconsin Law Review* 302 (1993), page 378.
[37] Turner, page 324.
[38] Ibid.

DOI: 10.58360/20221210-Buda

Even though there remains some confusion as to whether Article VI is a *pactum de contrahendo* or a *pactum de negotiando*, the majority of legal scholars have sided with the former conclusion. The majority of scholars thus agree on the fact that a treaty on complete disarmament will have to be negotiated in the future – even if, at least for now, there is no time limit to achieve this result. On the other hand, even without a time limit to achieve complete disarmament, it is certain that acts which would defeat the object and purpose of Article VI are not allowed for.[39] Accordingly, Judge Bedjaoui rightfully argues that whatever it is that the obligation of nuclear disarmament might entail, acts bolstering a State's nuclear arsenal are contrary to it.[40]

B. THE TPNW – A STEP FORWARD OR TWO STEPS BACK?

The NPT's failure to bring about the general decommissioning of nuclear devices and its failure to prevent a number of new States joining the "nuclear club" led to the dissatisfaction of non-nuclear States, who, in a "daring act of self-empowerment", got together and negotiated the Treaty on the Prohibition of Nuclear Weapons ('TPNW').[41] The TPNW entered into force in January 2021, 90 days after the 50th ratification. In some sense, the TPNW's entry into force can, in itself, be considered a success – in contrast, the Comprehensive Nuclear-Test-Ban Treaty ('CTBT') has, to this day, not entered into force, due to the stringent benchmarks set for its entry into force.[42] Another point of improvement made by the TPNW was its all-encompassing list of prohibitions: under the TPNW, States Parties undertake never to, *inter alia*, acquire, possess, use or threaten to use nuclear weapons.[43] These clear-cut prohibitions in the TPNW can be clearly set apart

[39] Simon, page 15.
[40] Judge Mohammed Bedjaoui, Keynote Address at Conference: Good Faith, International Law and the Elimination of Nuclear Weapons: The Once and Future Contributions of the International Court of Justice, page 20 (1 May 2008).
[41] Müller, H., and Wunderlich, C., 'Nuclear Disarmament without the Nuclear-Weapon States: The Nuclear Weapon Ban Treaty', *Daedalus* Vol. 149, No. 2, *Meeting the Challenges of a New Nuclear Age* (Spring 2020), page 171. DOI: https://doi.org/10.1162/daed_a_01796
[42] As set by Article XIV of the CTBT, its entry into force is dependent upon its ratification by all 44 States listed in Annex 2. As of today, 8 of the 44 Annex 2 States have not ratified it.
[43] TPNW, Article 1.

DOI: 10.58360/20221210-Buda

from the NPT's often soft or ambiguous provisions, which have led many to welcome the TPNW's conception as a 'major milestone in the long march towards peace'.[44]

Nonetheless, the TPNW is plagued with a number of deficiencies, including, first and foremost, the fact that none of the nuclear-armed or nuclear-allied States have so far joined the TPNW.[45] The United States, United Kingdom and France have released a joint statement, explaining that they do not intend to take part in the TPNW due to its apparent lack of consideration for the 'the realities of the international security environment,' claiming that nuclear disarmament is irreconcilable with nuclear deterrence, which has been essential for maintaining peace in the past decades.[46]

III. A CASE FOR A CUSTOMARY OBLIGATION OF NUCLEAR DISARMAMENT

The TPNW's failure to win over any of the nuclear weapon States has once again reignited debate over the disarmament obligation's potential passing into customary international law.[47] The following sections aim is to first analyze the ICJ's case law related to identification of customary international law in general, and then put the Court's law-finding mechanism into practice with regards to the obligation of nuclear disarmament.

A. THE CRITERION OF STATE PRACTICE

The method of finding customary international law has been long embedded in international case-law. Accordingly, he ICJ has consistently applied a two elements test, in order to assess the existence of a customary obligation: the Court was looking for the

[44] Greenpeace, 'Success! Nuclear weapons are illegal at last', <https://www.greenpeace.org/canada/en/story/45730/success-nuclear-weapons-are-illegal-at-last/>, accessed on 15 November 2022.
[45] Løvold, M., 'The Future of the Nuclear Taboo: Framing the Impact of the TPNW', *Journal for Peace and Nuclear Disarmament,* 2021, 4:1, page 101. DOI: https://doi.org/10.1080/25751654.2021.1940701
[46] US Department of State, 'Joint Press Statement from the Permanent Representatives to the United Nations of the United States, United Kingdom, and France following the Adoption of a Treaty Banning Nuclear Weapons.' New York City, July 7, 2017. <https://usun.usmission.gov/joint-press-statement-from-the-permanent-representatives-to-the-united-nations-ofthe-united-states-united-kingdom-and-france-following-the-adoption/>, accessed on 15 November 2022. DOI: https://doi.org/10.18356/9789210018289c183
[47] Tuzmukhamedov, B., 'Deficiencies and ambiguities of the Treaty on the Prohibition of Nuclear Weapons', Lieber Institute, Articles of War, September 30, 2022 <https://lieber.westpoint.edu/deficiencies-ambiguities-tpnw/>, accessed on 15 November 2022.

DOI: 10.58360/20221210-Buda

objective element of 'a general practice', and the subjective one of it being 'accepted as law', the so-called *opinio juris*.[48]

With regards to the objective element, the Court has traditionally required a settled, extensive and virtually uniform State practice for the finding of customary law.[49] But exactly what constitutes practice? Generally speaking, practice is what the subjects of international law do and say, what they want or believe, either singularly or in a group.[50] This definition undoubtedly includes many forms of conduct, however, this section will focus on two of them in particular: the participation of States in treaties addressing nuclear disarmament and the actual conduct of dismantling nuclear weapons.

TREATY PARTICIPATION AS EVIDENCE OF STATE PRACTICE

As is widely accepted, participation in treaties, and especially multilateral treaties, can serve as evidence of customary international law.[51] Indeed, there are several examples of treaties or treaty provisions acquiring the status of customary international law after gaining wide acceptance. One could look at many provisions of the 1969 Vienna Convention on the Law of Treaties, or the prohibition of the use of force in the UN Charter, which – as affirmed by the ICJ in the *Nicaragua Case* – has become part of customary international law.[52] Going further, in the *North Sea Continental Shelf Case*, the Court went as far as to state that a 'very widespread and representative participation' in a convention can in itself establish the existence of a customary rule.[53]

The Nuclear Non-proliferation Treaty, or NPT is the most significant in the line of nuclear related treaties, since, as of today, it has 191 State Parties.[54] This near universal adherence in itself could be considered as overwhelming evidence of the existence of state practice – however, what renders the situation harder to assess is that those States that are not

[48] Malanczuk, P., & Akehurst, M. B., *Akehurst's modern introduction to international law,* London: Routledge, 1997 ['Akehurst'], page 37. DOI: https://doi.org/10.5771/0506-7286-1998-2-223; *Nicaragua*, paragraph 97.; *North Sea Continental Shelf*, Judgment, I.C.J. Reports, 1969 ['Continental Shelf'], paragraphs 74-77.
[49] *Continental Shelf*, paragraphs 74, 79.; *Nicaragua* paragraph 207.
[50] Treves, T., Customary International Law, *MPEPIL,* 2006, paragraph 23. DOI: https://doi.org/10.1093/law:epil/9780199231690/e1393
[51] Akehurst, page 40.
[52] Akehurst, page 40.; *Nicaragua*, paragraph 188.
[53] *Continental Shelf*, paragraph 73.
[54] United Nations Office for Disarmament Affairs Treaties Database: http://disarmament.un.org/treaties/t/npt.

DOI: 10.58360/20221210-Buda

Parties to the NPT, all possess nuclear weapons. These are India, Pakistan, Israel (which have not acceded to it), and North Korea (which has withdrawn from it).[55]

There are two reasons, why this might be significant. The first one is that, even if one could prove the existence of a customary obligation of nuclear disarmament, should we not consider these four States – who have willingly abstained from the international community's disarmament efforts – to be persistent objectors in relation to this particular rule? Under the persistent objector doctrine, a customary rule is inapplicable towards the State, insofar as the State has objected to said customary rule during its formation, as observed by the Court in the Anglo-Norwegian Fisheries and Asylum cases.[56] Notably however, the persistent objector doctrine requires the objecting State to have always 'opposed any attempt to apply' the rule in question,[57] which might be undermined by the fact that on some occasions, even non-NPT nuclear powers have expressed their desire to take part in disarmament efforts.[58]

The second question that might arise in connection with the four nuclear powers outside of the NPT goes back to the ICJ's reasoning in the *North Sea Continental Shelf Case*. Here, the Court argued that the practice of States must include the practice of those, that are to be considered 'specially affected'.[59] In that case, the issue at hand was of course whether the Geneva Convention on the Law of the Sea can be considered to have acquired the status of customary international law. In this respect, the Court emphasized that land-locked States 'would have no interest in becoming parties' to the Convention, while the practice of sea powers and maritime nations will have greater significance, as they shall be considered specially affected.[60] Following the line of the Court's reasoning, Sir Michael Wood expressed that the practice of specially affected States weighs heavily in the

[55] Bothe, M., Weapons of Mass Destruction, Counter-Proliferation, *MPEPIL,* 2016, paragraph 9. DOI: https://doi.org/10.1093/law:epil/9780199231690/e446
[56] *Asylum Case* (Colombia v. Peru), International Court of Justice, 20 November 1950 ['Asylum Case'], pages 277-278.
[57] *Fisheries Case*, Judgment, December 18th, 1951, I.C.J. Reports 1951 ['Fisheries Case'], page 131.
[58] See for example General Assembly Resolutions 65/76 (A/RES/65/76, 2011) and 71/58 (A/RES/71/58, 2016), supported by India and Pakistan, or Kim Jong-un's statement on denuclearization: The New York Times, Kim Jong-un Says He Wants Denuclearization in Trump's Current Term. <https://www.nytimes.com/2018/09/06/world/asia/kim-jong-un-donald-trump-denuclearize.html> accessed on 15 November 2022. DOI: https://doi.org/10.1177/00208817211045534
[59] *Continental Shelf*, paragraph 73.
[60] *Ibid*.

DOI: 10.58360/20221210-Buda

assessment of customary international law – so heavily in fact, that 'in appropriate circumstances, it may prevent a rule from emerging'.[61]

So which States might qualify as specially affected, in the context of nuclear disarmament? As put forward by Marco Roscini, 'the states whose interests are specially affected for the purposes of custom formation should be *in primis* those that have the opportunity to engage in the relevant conduct'.[62] Roscini then goes on to explain that non-nuclear weapon states cannot, by definition, engage in nuclear disarmament, and that 'it would make little sense for the non-nuclear weapon states to negotiate nuclear disarmament without the participation of the nuclear weapon states'.[63] Accepting Roscini's argumentation would essentially mean that, since four of the nine nuclear powers are not parties to the NPT, the otherwise near universal adherence to the NPT cannot contribute to the formation of custom, since specially affected States are absent.

A different argument was formulated by Dr. Daniel Rietiker, according to whom, it is not the nine nuclear weapon States that are to be considered specially affected, but in fact, non-nuclear-weapon States are the ones that are primarily interested in nuclear disarmament.[64] He supports this statement by explaining that disarmament obligations are essentially interdependent. This is all the more correct in the case of the NPT, since the only reason why non-nuclear weapon states undertook the obligation of non-proliferation was that nuclear weapon states made a commitment to disarm and eliminate their arsenals – often referred to as the 'Grand Bargain' between nuclear and non-nuclear States.[65]

[61] Special Rapporteur of the International Law Commission, Second Report on Identification of Customary International Law, U.N. Doc. A/CN.4/672 (May 2014) ['Identification of Customary International Law'], page 39. DOI: https://doi.org/10.18356/fa5ca745-en

[62] Roscini, M., The Cases against the Nuclear Weapons States, *ASIL Insights* 19, no. 10, <https://www.asil.org/insights/volume/19/issue/10/cases-against-nuclear-weapons-states> accessed on 15 November 2022.

[63] *Ibid*.

[64] Rietiker, D., Some Thoughts on Article VI NPT and its Customary Nature, (10 June 2014) <https://armscontrollaw.com/2014/06/10/some-thoughts-on-article-vi-npt-and-its-customary-nature/> accessed 15 November 2022.

[65] Nystuen, G., Casey-Maslen, S., & Bersagel A. (Eds.), Nuclear Weapons under International Law, CUP, page 380. DOI: https://doi.org/10.1017/cbo9781107337435.003

DOI: 10.58360/20221210-Buda

Besides the NPT, mention must be made of the fact that 113 States have signed or acceded to one of the five major treaties on nuclear-weapon-free zones,[66] and the TPNW also has 68 States parties, which might serve as further evidence for the existence of State practice.

ACTUAL CONDUCT OF DISARMAMENT

The fact that the overwhelming majority of the international community joined treaties on nuclear disarmament and nuclear-weapon-free-zones is certainly significant, however, equally significant is the fact that neither of the current nuclear weapon States seem to be willing to *completely* eliminate their arsenals, which could undermine the emergence of a customary disarmament obligation. In contrast, supporters of the obligation's customary character frequently cite the fact that the number of nuclear warheads has decreased from a historical high of approximately 65.000 to around 10.000, in the time period between 1988 and 2013.[67] Indeed, many States – irrespective of their subscription to the NPT – are taking steps to reduce the number of their nuclear weapons.[68] For example India – even though not party to the NPT – has tabled resolutions on nuclear disarmament before the UN General Assembly, and has joined the United Kingdom and Pakistan in negotiations at multi-party disarmament conferences.[69]

South Africa terminated its nuclear weapons program and negotiated a path to disarmament.[70] Ukraine, once possessing the world's third largest nuclear weapons arsenal has done the same,[71] along with fellow post-Soviet States, Kazakhstan and

[66] Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, Mexico City, 14 February 1967, U.N.T.S. Vol. 634, No. 9068, 281; South Pacific Nuclear Free Zone Treaty, Rarotonga, 6 June 1985, U.N.T.S. Vol. 1445, No. 24592, 177; Treaty on the Southeast Asia Nuclear Weapon-Free Zone, Bangkok, 15 December 1995 DOI: https://doi.org/10.18356/fdc2baef-en; African Nuclear Weapon Free Zone Treaty, Cairo, 11 April 1996; Treaty on a Nuclear-Weapon-Free Zone in Central Asia, Semipalantisk, 8 September 2006, U.N.T.S. No. 51633.
[67] Hans M. Kristensen & Robert S. Norris (2013) Global nuclear weapons inventories, 1945–2013, *Bulletin of the Atomic Scientists,* 69:5, page 78. DOI: https://doi.org/10.1177/0096340213501363
[68] Rachel A. Wiese, 'How Nuclear Weapons Change the Doctrine of Self-Defence' (2012) 44 *NYUJIntlL&Pol,* 1346.
[69] Williams, H., et al, The Humanitarian Impacts of Nuclear Weapons Initiative: The 'Big Tent' in Disarmament (Chatham House 2015), page 7.
[70] Rauf, T., 'The Non-Proliferation Regime: Successes in Curbing the Spread of Nuclear Weapons' (1999), page 14.
[71] *Ibid*., page 16.

DOI: 10.58360/20221210-Buda

Belarus.[72] Further, the United States and Russia have concluded numerous agreements in order to mutually decrease the size of their nuclear arsenals.[73] Therefore, even though *complete* disarmament might be a goal of the distant future only, there *is* practice of actual nuclear disarmament.

To conclude the discussion of state practice, we must assess whether the above outlined practice of nearly two hundred States is able to outweigh the practice of a handful of States. Or is it the other way around? Is the negative practice of a minority enough to bar the formation of a customary rule? To answer this question, once again, we turn to the ICJ's jurisprudence. Exactly *how much* State practice is enough? In *Nicaragua*, the Court explained that State practice need not be in 'absolutely rigorous conformity with the rule', in fact, it is sufficient if the conduct of States is 'in general, […] consistent with such rules', given that State conduct inconsistent with the rule 'should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule'.[74] The Court reached a similar conclusion in the *Fisheries Case* as well, stating that minor inconsistencies do not prevent the creation of a customary rule.[75]

Following the Court's reasoning in these cases, the practice of non-nuclear weapons States (and nuclear weapon States that are parties to the NPT) is clearly overwhelming in comparison to the practice of those few outside the international community's disarmament efforts. Still, there is some confusion left. As cited above, in order to form a customary rule, inconsistent practice should be treated as breaches of that rule. Surely, it is intriguing how could one see practice as a breach of a rule that is still in formation – such a '*filius ante patrem*' condition is extremely difficult, if not impossible to prove. Thus, unsurprisingly, many argue that nuclear disarmament cannot be considered custom, as the international community does not, generally speaking, treat nuclear weapon States as violators of that rule. In contrast, one could also point to the fact that United Nation organs regularly condemn nuclear weapon States. For example, the General Assembly condemned Israel for its 'refusal to renounce any possession of nuclear weapons',[76] while

[72] In fact, some experts estimate that a total of 39 States have engaged in nuclear weapons activities, but most of them gave up their ambition to acquire such weapons. See: Pelopidas, B., 'The Oracles of Proliferation. How Experts Maintain a Biased Historical Reading that Limits Policy Innovation', Nonproliferation Review 18, 1, 2011, page 306. DOI: https://doi.org/10.1080/10736700.2011.549185
[73] See for example the New START Treaty: the Treaty between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms. DOI: https://doi.org/10.1163/2211-4394_rwilwo_com_031611
[74] *Nicaragua,* paragraph 186.
[75] *Fisheries Case*, page 138.
[76] A/RES/43/80 (1988), 1.

DOI: 10.58360/20221210-Buda

the Security Council condemned the nuclear tests conducted by India and Pakistan in 1998.[77] Although these Resolutions are more political in nature than legal, they are indicative of the international community's attitude towards the four nuclear powers outside of the NPT regime.

B. THE CRITERION OF OPINIO JURIS

When inferring rules of customary law from state practice, it becomes necessary to examine not only *what* states do, but also *why* they do it.[78] The psychological element of *opinio juris sive necessitatis* means that state practice must be accompanied by the conviction that it reflects a legal obligation.[79] Indeed, there are many international acts performed habitually, which are motivated solely by courtesy or tradition. These acts reflect no sense of legal obligation, but merely 'comity' or 'courtoisie' in international relations.[80]

Inferring *opinio juris* is never a straightforward task, but it becomes especially difficult in cases, where one seeks to prove that a certain provision of a treaty has become part of custom – indeed, it is hard to prove that parties to a treaty accept the obligations contained therein as part of international custom as well. In *Nicaragua*, the Court stated that '*opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions'.[81] Further, the Court explained that consent to the text of such resolutions cannot be understood as merely that of a reiteration of a treaty commitment.[82] Similarly, in *Nuclear Weapons*, the Court took mention of the fact that General Assembly resolutions can provide evidence 'for establishing the existence of a rule or the emergence of an *opinio juris*'.[83]

Thus, when looking for *opinio juris* supporting the emergence of a customary disarmament obligation, General Assembly resolutions can serve as guidance. Indeed, the General Assembly adopted countless resolutions reaffirming the obligation of nuclear

[77] S/RES/1172 (1998), 1.
[78] Akehurst, page 44.
[79] *Continental Shelf*, paragraph 77.
[80] *Ibid*.; Paul, L. D., Comity in International Law, *Harvard ILJ* 32 (1991), 1–79.
[81] Nicaragua, paragraph 188.
[82] *Ibid*.
[83] *Nuclear Weapons*, paragraph 70.

DOI: 10.58360/20221210-Buda

disarmament.[84] A number of these resolutions have been adopted unanimously,[85] and many of them refer to nuclear disarmament as an obligation upon *all States*.[86] Conversely, Judge Schwebel notes that the large number of these resolutions does not prove the existence of *opinio juris*, but in fact, it proves the exact opposite: the fact that States feel the need to repeat the same obligation over and over again only proves that the obligation in question has not passed into customary international law.[87] Other commentators note that the significant number of abstentions and negative votes bar such resolutions from possessing any evidentiary value.[88]

IV. CONCLUSION

Looking at all the evidence presented, one could make a strong argument that both the criterion of State practice and the criterion of *opinio juris* are fulfilled, thus the obligation of nuclear disarmament must be deemed to have a customary nature – in fact, many scholars have made such statements already.[89] Notably, equally strong arguments can be made, and were made, claiming that the obligation of nuclear disarmament has not passed into customary international law.[90]

While such stark contrast between the findings of international scholars might come as a surprise, the identification of customary international law always had its methodological challenges, with scholars frequently arriving at different conclusions simply because of their different methods of evaluation.[91] Indeed, there is an element of disenchantment in first coming to the realization that academics frequently resort to selectively picking

[84] See for example: U.N.Doc.A/Res/70/56 (2015); U.N.Doc.A/RES/68/41 (2013); U.N.Doc.A/RES/67/33 (2012).
[85] *Nuclear Weapons*, paragraph 100.
[86] *Marshall Islands v. India*, Dissenting opinion of Judge Cançado Trindade, 17.
[87] *Nuclear Weapons*, Dissenting Opinion Judge Schwebel, 319-320.
[88] Identification of Customary International Law, page 65.
[89] *Nuclear Weapons*, Declaration of President Bedjaoui, paragraph 23; *Nuclear Weapons*, Dissenting Opinion of Judge Oda, paragraph 45; ILA Committee: Nuclear Weapons, Non-proliferation and Contemporary International Law (2nd Report: Legal Aspects of Nuclear Disarmament), ILA Washington Conference (2014), paragraph 30, A7. DOI: https://doi.org/10.2139/ssrn.2742475
[90] Joyner, D., *International Law and the Proliferation of Weapons of Mass Destruction*, OUP 2009, page 69; Roscini, M., 'On Certain Legal Issues Arising from Article VI of the Treaty on The Proliferation of Nuclear Weapons' in Caracciolo–Pedrazzi–Vassalli di Dachenhausen, N*uclear Weapons Strengthening the Legal International Regime,* Eleven International Publishing 2016, page 20. DOI: https://doi.org/10.1017/cbo9781107337435.025
[91] Kajtár, G., 'Self-defence against non-state actors – Methodological Challenges', *Annales Universitatis Scientiarum Budapestinensis De Rolando Eötvös Nominatae - Sectio Iuridica,* 54, 2013, p. 309.

DOI: 10.58360/20221210-Buda

evidence in order to support their assertions about the state of customary international law, which can lead to drastically differing observations about the state of the law.[92]

With this in mind, the author of the present paper considers that proponents of the customary nature of nuclear disarmament engage in a dangerous practice of self-delusion by willingly neglecting the reality of today in favor of the dreams of tomorrow. The sobering truth remains that international law as a system has been built upon the foundation of State consent instead of coercion, and as such, it will never support the emergence of a customary norm of nuclear disarmament in the face of the nuclear club's constant opposition.

[92] Joyner, D., 'Why I Stopped Believing in Customary International Law', (2018). Available at: <https://scholarship.law.ua.edu/fac_working_papers/561>.

DOI: 10.58360/20221210-Buda