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**LEGITIMACY AND THE INTERNATIONAL COURT OF JUSTICE:
AN ANALYSIS FROM A
THIRD WORLD APPROACHES TO INTERNATIONAL LAW
PERSPECTIVE**

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Abstract

The International Court of Justice (ICJ) has had a number of cases and advisory opinion requests concerning nuclear weapons come before it. These have often been complex and controversial, and raise a number of questions about the operation of the ICJ. One specific question concerns the legitimacy of the Court, particularly in the context of these cases. Accordingly this paper explores the legitimacy of these cases. In order to conduct an analysis of legitimacy, this paper uses the Third World Approaches to International Law (TWAIL) approach. The recent bringing of a nuclear weapons case to the ICJ by the Marshall Islands, a developing nation, suggests that this approach is an appropriate approach. This paper argues that current mainstream ideas of legitimacy lack important considerations that a TWAIL approach would include. Through the process of considering legitimacy in international law and examining TWAIL scholarship, this paper constructs and applies a proposed TWAIL approach to legitimacy in international law to these nuclear weapons cases. This paper concludes that, according to the proposed TWAIL approach, these nuclear weapons cases overwhelmingly fail to adhere to the considerations put forward and that this has implications on how TWAIL scholarship views the legitimacy of the ICJ.

Keywords

International Court of Justice, legitimacy, Third World Approaches to International Law, TWAIL, nuclear weapons.

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I Introduction

In 2014 the small Pacific Island state of the Republic of the Marshall Islands (Marshall Islands) attempted to bring lawsuits against the world's nuclear power states to the International Court of Justice (ICJ).¹ These cases argued that these nine nuclear power states had violated international law by way of failing to meet obligations to pursue negotiations towards nuclear disarmament.² The Marshall Islands were the location where the United States tested 66 nuclear weapons between 1946 and 1958 and had suffered the devastating effects of these weapons.³ The bringing of these cases by the Marshall Islands against some of the world's most powerful states was a bold and brave action.

Putting the bravery of the Marshall Islands aside, this legal action and those similar that have been brought to the ICJ bring with them a number of wider legal questions and issues. One significant consequence of these cases is the effect that they have on the legitimacy of the ICJ. Questions of the Court's on-going power and role arise, as well as the idea that the nuclear weapons cases may give insight into the legitimacy of the Court. Therefore this essay will explore the extent to which these nuclear weapons cases illustrate legitimacy being exercised by the ICJ. In order to conduct this analysis, this paper will focus on the Third World Approaches to International Law (TWAIL) lens and consider legitimacy from this approach. This paper argues that current mainstream ideas of legitimacy lack several important considerations that a TWAIL approach to legitimacy in international law include. Further, due to the status of the Marshall Islands as a developing country, and their recent case at the ICJ, this lens of international law is arguably apt at informing this analysis. The new and additional requirements for legitimacy that this approach brings will be canvassed and the extent to which these ICJ cases demonstrate these requirements will be analysed.

Part II of this paper will begin by detailing the history of nuclear weapons in general, noting significant events in the developments of these weapons and their use throughout

¹ International Court of Justice "The Republic of the Marshall Islands files Applications against nine States for their alleged failure to fulfil their obligations with respect to the cessation of the nuclear arms race at an early date and to nuclear disarmament" (press release, 25 April 2014) at 1.

² At 1.

³ Steven Simon and others "Radiation Doses and Cancer Risks in the Marshall Islands Associated with Exposure to Radioactive Fallout from Bikini and Enewetak Nuclear Weapons Tests: Summary" (2010) 99(2) Health Phys 105 at 105.

time. This will be followed by a discussion of disarmament efforts that have been taken in order to control the use of these weapons. Part III of this paper will then cover the idea of legitimacy and canvas the nuclear cases that have been brought to the ICJ. The specific nuclear weapons cases that have been brought to the ICJ will be discussed. Each individual case will be detailed and this will be followed by a discussion of the existing literature and comment on these cases. Following this, detailed definitions of legitimacy generally, in an international law context and applied to the ICJ will be presented.

Part IV of this paper covers the TWAIL approaches. Here, general ideas of TWAIL scholarship, followed by the specific approaches of Christopher Weeramantry, Sundhya Pahuja, James Thuo Gathii and Balakrishnan Rajagopal will be examined. An analysis of TWAIL's contribution to the idea of legitimacy in international law will then take place. This will involve the construction of a proposed TWAIL approach to legitimacy in international law. Finally these ideas will be applied to the nuclear weapons cases aforementioned through the use of the proposed TWAIL approach. This paper will then conclude that, according to the proposed TWAIL approach, these nuclear weapons cases overwhelmingly fail to adhere to the considerations put forward and that this accordingly has implications on how TWAIL scholarship views the legitimacy of these cases.

II History of Nuclear Weapons and Efforts Towards Nuclear Disarmament

In order to understand the role that legitimacy and TWAIL approaches have to the nuclear weapons cases at the ICJ it is crucial to canvas the history of the rise of nuclear weapons and the subsequent efforts towards nuclear disarmament. This section of the essay will therefore discuss both these ideas. First the history of events outlining the development of nuclear weapons will be described, noting briefly the discovery of the science behind the weapons and the subsequent creation of the weapons themselves by several states. The use of these weapons throughout history up to present day will be detailed. Secondly specific efforts towards nuclear disarmament will be discussed, including when and why such efforts began and the extent of their success.

A History of Nuclear Weapons

The history of nuclear weapons begins at the point in time when the contemporary science regarding the process of nuclear fission was discovered. The 1938 discovery of this process, which releases the large amounts of energy that gives nuclear weapons their

incredible force, was revolutionary.⁴ This scientific break-through led ultimately to the understanding that nuclear weapons could feasibly be produced in the immediate future.⁵ With this knowledge, and the threat of Nazi Germany producing such weapons in mind, Albert Einstein's famous letter to then-President of the United States of America Franklin. D. Roosevelt was sent.⁶ This letter outlined the reality of the production of nuclear weapons and urged the United States to speed up their efforts towards producing such weapons in order to deter any threat that may arise from Nazi Germany.⁷ This arguably put the United States on higher alert and increased their efforts towards producing the weapons.

As a result of this increase in pace towards developing nuclear weapons the Manhattan Project, a United States-led project towards developing nuclear weapons, was launched.⁸ The project was supported by the United Kingdom and Canadian governments and ultimately grew to employ 130,000 employees and cost the 2016 equivalent of \$26 billion US dollars.⁹ The Manhattan Project subsequently performed the first ever test detonation of a nuclear weapon.¹⁰ This was the Trinity bomb detonated at Alamogordo New Mexico in 1945.¹¹ Following the testing the first and only ever use of nuclear weapons in warfare took place. These were the bombings of Hiroshima and Nagasaki, Japan in 1945.¹² These bombings, for the first time, brought attention to the extent of destruction possible by these weapons. While precise numbers are unknown, the bombings were estimated to have killed at least 129,000 people with other estimates being as high as 246,000 killed.¹³

With the bombings of Hiroshima and Nagasaki the world had entered the atomic age. The bombings led to changes in thinking, with the wide-scale belief that nuclear weapons and technology were the keys to modernity and more importantly, power.¹⁴ The Soviet Union joined in on efforts to begin producing nuclear weapons in 1943.¹⁵ Their effort greatly

⁴ Joseph Cirincione *Bomb Scare: The History and Future of Nuclear Weapons* (Columbia University Press, New York, 2007) at 5.

⁵ At 1.

⁶ At 1.

⁷ At 3.

⁸ At 3.

⁹ At 11.

¹⁰ At 11.

¹¹ At 12.

¹² Barton J Bernstein "The Atomic Bombings Reconsidered" (1995) 74 *Foreign Affairs* 135 at 135.

¹³ At 135.

¹⁴ Cirincione, above n 4, at 13.

¹⁵ At 18.

picked up pace towards the end of the war with a great emphasis and even greater funding thrown towards nuclear development programs in the USSR.¹⁶ The Soviet Union, having the advantage of the United States having tried and tested nuclear weapons, copied elements from the United States designs.¹⁷ Accordingly in 1949 the USSR had created their first bomb that they tested in remote Kazakhstan.¹⁸

This assertion by the USSR that they were capable of producing nuclear weapons ultimately led to the nuclear arms race between the USSR and the United States during the Cold War.¹⁹ Eager to maintain its monopoly over the weapons the United States continued its testing of nuclear weapons on a large scale, ending only in 1992.²⁰ In total the United States conducted over 1000 tests.²¹ The majority of these tests took place in Nevada, United States as well as at the Pacific Testing Grounds in the Marshall Islands and Kiribati.²² The Soviet Union conducted around 700 nuclear tests that took place at various locations within the Soviet Union.²³

While the major historical events that placed nuclear weapons into global attention centred on the actions of the United States and the USSR, there were also a number of other states that were significant players in the development of the history of nuclear weapons. The United Kingdom itself joined the nuclear age with the test of its first weapons in Australia in the 1950s and also from 1957 in Kiribati.²⁴ The United Kingdom conducted a total of around 80 tests ending in 1991.²⁵ Similarly France became involved

¹⁶ At 18.

¹⁷ At 19.

¹⁸ At 19.

¹⁹ At 22.

²⁰ Joseph Masco *The Nuclear Borderlands: The Manhattan Project in Post-Cold War New Mexico* (Princeton University Press, New Jersey, 2006) at 68.

²¹ At 68.

²² Holly M. Barker *Bravo for the Marshallese: Regaining Control in a Post-Nuclear, Post-Colonial World* (2nd ed, Wadsworth, Cengage Learning, United States, 2013) at 126.

²³ Vitaly I Khalturin and others "A Review of Nuclear Testing by the Soviet Union at Novaya Zemlya, 1955-1990" (2005) 13 *Science & Global Security* 1 at 1.

²⁴ SC Darby and others "A summary of mortality and incidence of cancer in men from the United Kingdom who participated in the United Kingdom's atmospheric nuclear weapon tests and experimental programmes" (1988) 296 *British Medical Journal* 332 at 332.

²⁵ Catherine Trundle "Biopolitical endpoints: Diagnosing a deserving British nuclear test veteran" (2011) 73 *Social Science & Medicine* 882 at 882; Sue R Roff "The glass bead game: Nuclear tourism at the Australian weapon test sites" (1998) 14 *Medicine, Conflict and Survival* 290 at 290.

in testing beginning in 1960, until 1996.²⁶ The French conducted a total of 210 nuclear tests in Algeria and French Polynesia.²⁷ China was the last state to conduct a significant number of tests and did so between 1964 and 1996.²⁸ India, Pakistan and North Korea, all being current nuclear power states have conducted tests as well, but in numbers less than those of the aforementioned states.²⁹ The majority of this testing ceased in the 1990's however North Korea's testing is still ongoing.³⁰

B Efforts Towards Nuclear Disarmament

Disarmament efforts towards nuclear weapons essentially begun with the first use of nuclear weapons in warfare, the bombings of Hiroshima and Nagasaki. Almost immediately following the use of the bombs United States President Harry Truman began considering how to control these powerful weapons.³¹ In November 1945 Truman, joined by the British and Canadian Prime Ministers, proposed the first government non-proliferation plan to the new United Nations.³² This plan outlined that all nuclear weapons be eliminated and that nuclear technology for peaceful purposes should be regulated under strict international controls to be dictated by a United Nations Atomic Energy Commission.³³ This haste in non-proliferation resulted from a number of factors. Firstly, despite having a temporary monopoly on nuclear weapons, the United States began to understand that, due to the immense power of these weapons, a numerical superiority in nuclear weapons over other states did not mean protection from like threats.³⁴ Secondly due to the defeat of Nazi Germany a major factor for the need of nuclear weapons had been eliminated.³⁵ This haste towards non-proliferation was again

²⁶ MK Siskin "Does International Law Reflect International Opinion? French Nuclear Testing in the Twentieth Century" (1996) 26 Ga. J. Int'l & Comp. L. 187 at 189.

²⁷ PR Danesi and others "Residual radionuclide concentrations and estimated radiation doses at the former French nuclear weapons test sites in Algeria" (2008) 66 Applied Radiation and Isotopes 1671 at 1671; Jean-Marie Martin and others "Assessment of artificial radionuclides issued from French nuclear bomb testing at Mururoa (French Polynesia)" (1990) 11 Environmental Technology 197 at 198.

²⁸ Michael Lumbers *Piercing the bamboo curtain: Tentative bridge-building to China during the Johnson years* (Manchester University Press, New York, 2008) at 53.

²⁹ "Asia's Powerful Upstarts" *The Economist* (New York, 14 March 1992) at 47.

³⁰ At 47.

³¹ Cirincione, above n 4, at 14.

³² At 14.

³³ At 14.

³⁴ At 15.

³⁵ At 15.

greatly strengthened in 1963 with the scare experienced by the United States through the Cuban Missile Crisis.³⁶

The proposal by Truman to form a Commission was adopted by the United Nations in 1946.³⁷ Following this the United States representative to the commission proposed the plan of establishing an International Atomic Development Authority that would own and control all dangerous elements of the nuclear production process, including uranium resources and uranium processing facilities.³⁸ This was based on the reasoning that the possession of uranium was the greatest threat and hardest hurdle to cross in the production of nuclear weapons.³⁹ The United States then guaranteed to eliminate its entire nuclear stockpile if the Authority could ensure that no state was able to construct the bomb due to the limit on uranium resources.⁴⁰ While the Atomic Energy Commission approved this plan it was opposed by the Soviet Union in the UN Security Council.⁴¹ However, in 1958 a moratorium between the United States and the Soviet Union was signed.⁴² This suspended nuclear tests, with the moratorium lasting until 1961.⁴³

In regards to global efforts towards nuclear disarmament and non-proliferation, numerous examples exist. A number of these efforts illustrate strong success in such pursuit. Treaties prohibiting the testing, deployment or use of nuclear weapons in earth's orbit, outer space and the moon, as well as similar prohibition on the seabed, ocean floor and subsoil exist.⁴⁴ The Antarctic Treaty provides that Antarctica may only be used for peaceful purposes, thereby prohibiting the testing of any types of weapons, including nuclear weapons, exists.⁴⁵ Further, regional efforts constraining the use of nuclear weapons exist in Antarctica, Latin America, the South Pacific, South-East Asia and Africa.⁴⁶ Beyond international treaties also exists international humanitarian law that has also developed a number of limits against the use of nuclear weapons.⁴⁷ These limits

³⁶ At 29.

³⁷ At 16.

³⁸ At 15.

³⁹ At 15.

⁴⁰ At 17.

⁴¹ At 17.

⁴² Jonathan M Weisgall "The Nuclear Nomads of Bikini" (1980) 39 Foreign Policy 74 at 85.

⁴³ At 85.

⁴⁴ Angel Anastassov "Are Nuclear Weapons Illegal? The Role of Public International Law and the International Court of Justice" (2010) 15 J.C. & S.L 65 at 66.

⁴⁵ At 66.

⁴⁶ At 60.

⁴⁷ At 69.

come from customary international law and include the limits on the rights to adopt means of injuring enemies, the prohibition of weapons that cause unnecessary devastation and suffering, and discouragement of widespread infliction of long-term damage.⁴⁸ These arguably target the use of nuclear weapons while being classified in a more general sense.

The actions which are subject to the most international attention however are the numerous multilateral treaties including those that have been signed over history and those which are yet to be implemented. The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) is arguably the most well known of such treaties and is the only multilateral treaty to prohibit the proliferation of nuclear weapons.⁴⁹ The five 'nuclear weapons states' are committed to nuclear disarmament under this treaty.⁵⁰ Preceding the NPT was the Partial Test Ban Treaty (PTBT) of 1963.⁵¹ Finally there exists the Comprehensive Nuclear-Test-Ban Treaty (CTBT) of 1996 that was adopted by the United Nations General Assembly, however has not entered into force yet.⁵² The CTBT is set out to be a fundamental international agreement that prohibits every kind of nuclear weapon test or explosion.⁵³ Further the treaty constrains the development and improvement of current types of nuclear weapons and prohibits the development of new types of such weapons.⁵⁴ Despite the CTBT not having entered into force yet it represents a significant achievement towards international disarmament.

In light of this history of nuclear weapons and subsequent disarmament efforts, attitudes towards the current situation of nuclear weapons globally differ depending on different perspectives. While the view of satisfaction towards nuclear disarmament efforts exists, the majority opinion is that greater efforts towards nuclear disarmament must be put forward and achieve success. The bringing of cases to the ICJ further suggests that much dissatisfaction towards the current status of nuclear weapons worldwide continues to exist.

⁴⁸ At 70.

⁴⁹ At 67.

⁵⁰ At 67.

⁵¹ Daniel Heidt "I think that would be the end of Canada": Howard Green, the Nuclear Test Ban, and Interest-Based Foreign Policy, 1946-1963" (2012) 42 *American Review of Canadian Studies* 343 at 345.

⁵² Anastassov, above n 44, at 67.

⁵³ At 67.

⁵⁴ At 67.

III Nuclear Cases and Legitimacy

As the context of the issues of nuclear weapons and nuclear disarmament has been set out, this part of the paper will now discuss the more specific issues of the nuclear weapons cases that have been brought to the ICJ as well as the concept of legitimacy. The ICJ cases, which are the subject of this paper's legitimacy discussion, will each be detailed in turn. A brief discussion of existing comments on these cases will follow. This part of the paper will then proceed with a discussion of the concept of legitimacy, explaining it in terms of general legitimacy, legitimacy within international law and legitimacy specifically in the context of the ICJ. It is later argued that these conceptualisations of legitimacy are not adequate at addressing the issue of legitimacy within the ICJ.

A The International Court of Justice's Nuclear Weapons Cases

As aforementioned, the ICJ cases that have come before the ICJ will be noted in detail in this part of the essay. This will involve discussion of the 1974 New Zealand and Australian cases against France, the World Health Organisation and subsequent United Nations General Assembly request for advisory opinions in the 1990's, and the 2014 Marshall Islands cases. The general subject matter of the cases as well as their outcomes are noted here.

1 The Nuclear Tests Cases: Australia, New Zealand vs France

The first nuclear weapons cases brought to the ICJ followed years of protesting against French nuclear testing in the South Pacific.⁵⁵ On May 9 1973 New Zealand and Australia brought cases against France.⁵⁶ While these cases were similar, they were not identical. In regards to the New Zealand application the aim was to declare that nuclear testing by the French government was a violation of New Zealand's rights under international law.⁵⁷ These rights included those that protected New Zealand against radioactive fallout, and were included under the principles stated in the Partial Test Ban Treaty (PTBT) as well as a number of further sources of international law.⁵⁸

⁵⁵ Siskin, above n 26, at 209.

⁵⁶ *Nuclear Tests Case (New Zealand v. France)* [1974] ICJ Rep 457; *Nuclear Tests Case (Australia v. France)* [1974] ICJ Rep 253.

⁵⁷ Don MacKay "Nuclear Testing: New Zealand and France in the International Court of Justice" (1995) 19 *Fordham Int'l L.J.* 1857 at 1863; this aim was also that of the Australian case.

⁵⁸ At 1864.

In 1974, the ICJ delivered its judgment. In regards to the New Zealand case the Court held by nine votes to six, that New Zealand no longer had a live dispute, as their aim had been met and that there was therefore no claim for the Court to investigate.⁵⁹ The Court's reason as to why there was no longer any claim was due to France's public statements made in 1974 whereby the French government stated that it intended to stop all nuclear tests in the Pacific following those it had announced for 1974.⁶⁰ As New Zealand wanted to terminate the testing by France in the Pacific, these statements meant that New Zealand's goal was met. A similar judgment to this was delivered by the ICJ in regards to the parallel Australian case.

Despite the fact that the ICJ found that the dispute between these countries was largely at an end following the 1974 cases, the door for further action was left slightly open.⁶¹ In their New Zealand judgment the Court said that it does not question the compliance of a State once it has entered into a commitment.⁶² However the Court also said that it "observes that if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute".⁶³ Accordingly, following the 1995 announcement by the then President of France that France would conduct a number of nuclear weapons tests in the South Pacific, New Zealand took its complaints to the ICJ and requested that their 1974 case be re-opened.⁶⁴ On September 22 1995 the Court presented its finding on this request.⁶⁵

First the Court found that the 1974 Judgment did indeed provide a procedure that enabled New Zealand to come back to the Court to seek to have the case reopened. The Court's second finding was in regards to the question of whether the 1974 Judgment had been "affected", a requirement for the case to proceed. Here the Court found by a majority of twelve to three that the Judgment was not "affected", as the 1974 Judgment dealt with atmospheric testing and not underground testing by France which New Zealand arguing upon at this case. Therefore on this basis the Court held that it had to dismiss the

⁵⁹ At 1864.

⁶⁰ At 1864.

⁶¹ At 1865.

⁶² *Nuclear Tests Case (New Zealand v. France)*, above n 56, at 477.

⁶³ At 477.

⁶⁴ MacKay, above n 57, at 1857.

⁶⁵ *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 Case (New Zealand v. France)* [1995] ICJ Rep 288.

application by New Zealand. In giving its Order the Court however stated that it was not taking any position on the legality of France's nuclear tests.⁶⁶

2 World Health Organisation: Legality of the Use by State of Nuclear Weapons in an Armed Conflict

While New Zealand and Australia were unsuccessful in their previous actions, both states were soon back at the ICJ, this time being two of a number of states making submissions to the Court on the request by the World Health Organisation (WHO).⁶⁷ In 1994 the WHO adopted a resolution asking the ICJ to render an advisory opinion on the legality of the use of nuclear weapons under international law.⁶⁸ Out of the thirty-four states that submitted statements on this resolution, the majority of these states supported the idea that the use of nuclear weapons was illegal.⁶⁹ However the nine nuclear weapon states differed and rather took the position that the use of nuclear weapons was subject to the laws of war and that the legality of their use must be judged according to the circumstances of the case.⁷⁰

The question on which the WHO requested the ICJ to give an advisory opinion on was: "In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?"⁷¹ On July 8 1996 the ICJ responded to this request, stating that the Court was unable to comply with this request.⁷² The Court held that, although the WHO is authorised under the UN Charter to request advisory opinions, and that while the request concerned a legal question, it did not relate to a question arising within the scope of the activities of the WHO as required by UN Charter.⁷³ This was upheld as the Court found that the request related to the legality of the use of nuclear weapons rather than the effects of the use of nuclear weapons on health.⁷⁴ Accordingly

⁶⁶ MacKay, above n 57, at 1884.

⁶⁷ At 1885.

⁶⁸ Peter Weiss and others "Introduction to the Draft Memorial in support of the Application of the World Health Organization for an Advisory Opinion by the International Court of Justice on the Legality of the Use of Nuclear Weapons Under International Law, Including the W.H.O Constitution" (1994) 4 *Transnat'l L. & Contemp. Probs.* 709 at 715.

⁶⁹ At 715.

⁷⁰ At 715.

⁷¹ Judith Hippler Bello and Peter HF Bekker "Legality of the Use by a State of Nuclear Weapons in Armed Conflict" (1997) 91 *AJIL* 134 at 135.

⁷² At 135.

⁷³ At 135.

⁷⁴ At 136.

the Court held that there was an insufficient connection between the request and the functions of the WHO to support the Court's jurisdiction.

While this request by the WHO was ultimately unsuccessful, this advisory opinion request has played a significant role in the development of the law of international organisations. The legal reasoning that led to the conclusion reached by the ICJ expresses the Court's views on international organisations and also the relationship between the United Nations and the specialised agencies.

3 *United Nations General Assembly: Legality of the Threat or Use of Nuclear Weapons*

Following the unsuccessful attempt by the WHO, the ICJ presented its opinion, on the same day, on a similar request by the UN General Assembly. On 8 July 1996 the ICJ published the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* Advisory Opinion (*Nuclear Weapons* opinion).⁷⁵ This was in response to the question posed by the United Nations General Assembly, asking: 'Is the threat or use of nuclear weapons in any circumstance permitted by international law?'⁷⁶ In answering this question the ICJ made a number of significant points, and unlike the WHO request, did not dismiss the application. Broadly the Court stated that there is no international law that authorises or conversely prohibits the threat or use of nuclear weapons.⁷⁷ Further the Court stated that the threat or use of nuclear weapons should be compatible with the requirements of international law and with specific obligations under treaties.⁷⁸ The Court also recognised the existence of an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament.⁷⁹ These points were all non-contentious, being decided either unanimously or by a large majority vote.

The crucial part of the opinion, which was decided by a split seven to seven decision, with the President casting the deciding vote, concerned the use of nuclear weapons in extreme circumstances. In regards to this point the ICJ made a declaration of a *non*

⁷⁵ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* [1996] ICJ Rep 226.

⁷⁶ *Request for an Advisory Opinion from the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons* GA Res 49/75 K, A/49/699 (1994).

⁷⁷ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)*, above n 75, at 228.

⁷⁸ At 266.

⁷⁹ At 267.

liquet.⁸⁰ The Court stated that “in view of the current state of international law... the Court could not definitively conclude whether the threat or use of nuclear weapons would be lawful under extreme circumstance of self-defence, in which the very survival of a State would be at stake.”⁸¹ Therefore the point of the case that was arguably most sought after for a decision was left undecided.

4 *The Republic of the Marshall Islands v United Kingdom, India, France*

The Marshall Islands effectively became involved in the nuclear age shortly after its inception when it was chosen as the site for ongoing nuclear testing by the United States.⁸² Therefore from 1946 until 1958 the Marshall Islands, specifically the Bikini and Enewetak atolls, were subject to a total of 66 nuclear tests.⁸³ Among these tests was the Castle Bravo bomb of 1954, with a power 750 times more than the bomb dropped over Hiroshima.⁸⁴ These nuclear tests left devastating effects on the islands as well as on neighbouring islands and their inhabitants.⁸⁵ Residents of the atolls were relocated to other islands due to high radiation levels.⁸⁶ These residents were unable to return for decades, and some are still currently awaiting return.⁸⁷

Subsequently, on the 24th of April 2014 the government of the Republic of the Marshall Islands filed, in the ICJ, separate applications against the world’s nine nuclear-armed countries.⁸⁸ These states were the United States, the United Kingdom, the Russian Federation, People’s Republic of China, the Democratic People’s Republic of Korea, France, India, Israel and Pakistan.⁸⁹ These applications can be discussed in terms of two main ideas. First are the bases for the Court’s jurisdiction over these applications. Second

⁸⁰ Martti Koskenniemi “Case Analysis: Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons” (1997) 10(1) LJIL 137 at 140.

⁸¹ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)*, above n 75, at 266.

⁸² Weisgall, above n 42, at 74.

⁸³ At 74.

⁸⁴ At 84.

⁸⁵ Autumn S. Bordner and others “Measurement of background gamma radiation in the northern Marshall Islands” (2016) 113(25) PNAS 6833 at 6833.

⁸⁶ At 6833.

⁸⁷ At 6838.

⁸⁸ International Court of Justice “The Republic of the Marshall Islands files Applications against nine States for their alleged failure to fulfil their obligations with respect to the cessation of the nuclear arms race at an early date and to nuclear disarmament”, above n 1, at 1.

⁸⁹ At 2.

are the claims by the Marshall Islands. In regards to the bases for the Court's jurisdiction for these applications, the issue of the compulsory jurisdiction of the ICJ arises. Of these nine states only the United Kingdom, India and Pakistan have recognised the compulsory jurisdiction of the ICJ.⁹⁰ This has led to the case by the Marshall Islands only proceeding with these three states, as the six other states have refused to declare recognition of the jurisdiction of the Court as compulsory and have thereby declined to participate.⁹¹ The United States however was targeted by the Marshall Islands through a separate path, with a lawsuit being filed against the United States in a United States Federal District Court.⁹² This application by the Marshall Islands however was dismissed and is being appealed.⁹³ Therefore the Marshall Islands only had active cases against the United Kingdom, India and Pakistan before the International Court of Justice.

Pertaining to the substantive claims by the Marshall Islands, the argument put forward was that all of the world's nuclear weapons states had breached an obligation of good faith towards nuclear disarmament.⁹⁴ In relation to the three cases that proceeded, against the United Kingdom, India and Pakistan, the Marshall Islands claimed a number of specific points. In regards to the United Kingdom, the Marshall Islands argued that the state had breached Article VI of the NPT which states that "each of the parties to the Treaty undertakes to pursue negotiations of good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament."⁹⁵ The Marshall Islands claimed that the United Kingdom had not done this and had therefore breached its obligation under the NPT as well as customary international law in good faith.⁹⁶ The Marshall Islands' claims slightly differed in relation to India and Pakistan. Here the Marshall Islands argued that the aforementioned NPT Article VI obligations also exist under customary international law and therefore apply to all States.⁹⁷ The Marshall Islands argued that India and Pakistan had both breached their obligation here.⁹⁸

⁹⁰ At 1.

⁹¹ At 1.

⁹² *Republic of the Marsh. Is. v. United States* No. 14-CV-1885 (N.D. Cal. 2014).

⁹³ Katherine M. Davis "Hurting More than Helping: How the Marshall Islands' Seeming Bravery Against Major Powers Only Stands to Maim the Legitimacy of the World Court" (2016) 25 *Minn. J. Int'l L.* 79 at 87.

⁹⁴ International Court of Justice "The Republic of the Marshall Islands files Applications against nine States for their alleged failure to fulfil their obligations with respect to the cessation of the nuclear arms race at an early date and to nuclear disarmament", above n 1, at 2.

⁹⁵ At 2.

⁹⁶ At 2.

⁹⁷ At 3.

⁹⁸ At 2.

The Court gave its judgment on October 5, 2016, where it dismissed all three of these cases.

B Existing Discussion on the Nuclear Weapons Cases

The nuclear weapons cases brought thus far to the ICJ have given rise to much discussion about the role of the Court in such cases. Existing discussion on the 1996 Advisory Opinion, being the most direct discussion of nuclear weapons taken up by the ICJ, reveals insights into the effectiveness of these cases. It has since been acknowledged that, through this Advisory Opinion, the ICJ was being asked to make its most direct action into global peace and security issues.⁹⁹ However the question posed to the ICJ resulted in the Court being given an almost impossible task. Great pressure was placed on the Court, despite the major hurdle it faced, as civil society expected great things from the ICJ and it was pressured to live up to these expectations.¹⁰⁰

Reflecting on the decision itself, the ICJ's judgments have great merit and have made significant inroads into the progress of nuclear disarmament. However the fact that the decision pleased everyone raised concerns for some.¹⁰¹ The ICJ has been accused of creating drafting compromises and thereby sacrificing its legal reasoning in order to please all parties.¹⁰² This was in terms of the declaration of a non-liquet, largely declared for political purposes.¹⁰³ This says a lot about the ICJ in dealing with nuclear weapons cases as it suggests the difficulties in pleasing opposing nuclear weapons concerned parties. Due to ideas of the ICJ wanting to maintain legitimacy amongst the states that accept its jurisdiction it may mean that in such controversial cases such compromises are likely.¹⁰⁴ This may point to a major potential problem in having had the ICJ deal with a number of nuclear weapons cases and raises questions about the ability for it to deal with such cases in the future.

Despite such problems with the decision, the Advisory Opinion has still been acknowledged as being one that has achieved much on the global scale.¹⁰⁵ The idea that no one expected the Court to resolve the problem of international resort to nuclear

⁹⁹ John B Rhinelanders and others "Testing the Effectiveness of the International Court of Justice: The Nuclear Weapons Case" (1997) 91 ASIL PROC. 1 at 2.

¹⁰⁰ At 3.

¹⁰¹ At 3.

¹⁰² At 3.

¹⁰³ At 8.

¹⁰⁴ At 3.

¹⁰⁵ At 3.

weapons in its entirety must be stressed.¹⁰⁶ In light of this the Opinion by the Court therefore seems appropriate. The Opinion has been noted as a great achievement regarding the fact that it has publicised and legalised the global issue of nuclear weapons.¹⁰⁷ Further, the importance of taking into account this Advisory Opinion in determining future actions regarding nuclear weapons has been stressed and this illustrates the effective role that the Advisory function at the ICJ plays.

One further specific question of significance that has arisen is that of whether there is any future role for the ICJ in outlawing nuclear weapons, based on the cases so far. Due to, most notably, the Advisory Opinion, the ICJ should not be asked for judgment on the same subject as the Opinion, namely the legality of the threat or use of nuclear weapons.¹⁰⁸ However it is clear that after ten years since the Advisory Opinion, significant progress has not been made. Therefore it has been proposed that it may be appropriate for a request to the ICJ, to render an advisory opinion on the question of getting the nuclear weapons states to fulfil their obligations as to nuclear proliferation, leading hopefully to a comprehensive abolition of nuclear weapons.¹⁰⁹ While the specific subject matter of a future request cannot be determinatively decided, the eagerness to return to the ICJ with similar questions aimed at nuclear non-proliferation suggest the usefulness of taking actions to the ICJ in future.

Therefore despite the surface-level displeasure regarding the nuclear weapons cases, especially the 1996 Advisory Opinion, it is clear that some of the international community does see the potential merits of taking further action to the ICJ.¹¹⁰ This goes to the extent that some authors suggest that a future advisory opinion by the ICJ, in favour of concluding negotiations on effective measures leading to nuclear disarmament in accordance with Article VI of the NPT would play an extremely authoritative role.¹¹¹ In the context of the global need to outlaw nuclear weapons becoming more obvious, the ICJ is best placed to contribute to achieve this objective. The main challenge here is the appropriate framing of such a request. If that can be achieved then it is likely that the ICJ would be able to provide an energised and practical measure towards such global nuclear disarmament.

¹⁰⁶ At 3.

¹⁰⁷ At 4.

¹⁰⁸ Anastassov, above n 44, at 74.

¹⁰⁹ At 74.

¹¹⁰ At 87.

¹¹¹ At 87.

C Defining Legitimacy

In order to understand the effect that the nuclear weapons ICJ cases have on the legitimacy of the ICJ it is imperative to understand the concept of legitimacy itself is. Despite the fact that the term legitimacy has recently been heavily used in the context of international legal discourse, the concept is rather vague and ill defined.¹¹² Only recently have international lawyers begun paying attention closer attention to this concept, which in part has to do with the rise in power of international institutions.¹¹³ The reason as to why little attention has been paid to the definition of legitimacy as a concept may be due to the plurality of meanings that the concept entails and the corresponding difficulty to systematise one appropriate definition.¹¹⁴ While a neatly packaged definition of legitimacy may arguably not exist, there are a number of core understandings to the concept that are often accepted in academic scholarship. Therefore this part of the paper will detail these ideas of legitimacy in a general sense. The illustration of general definitions of legitimacy is important for the purpose of later comparing TWAIL approaches of legitimacy against.

1 Legal, Moral and Social Legitimacy

One of these core understandings to legitimacy is the distinction between normative and sociological legitimacy.¹¹⁵ In order to canvass a discussion of legitimacy, this paper will put forward the concepts of legal, moral and social legitimacy to cover the various concepts of legitimacy that are commonly used in international legal scholarship. Normative legitimacy includes legal and moral legitimacy.¹¹⁶ These kinds of legitimacy assess the issue put to them against a normative framework.¹¹⁷ Legal legitimacy is arguably the narrowest of the three concepts of legitimacy. Legal legitimacy refers to the property of a rule or actor that upholds a legal obligation to support that rule or actor,¹¹⁸ and is often equated to legal validity. Legal validity is a contested concept itself, with definitions of validity changing depending on whether a natural or positivist view is taken.¹¹⁹

¹¹² Christopher A Thomas “The Uses and Abuses of Legitimacy in International Law” (2014) 34 Oxford J. Legal Stud. 729 at 730.

¹¹³ At 730.

¹¹⁴ At 733.

¹¹⁵ At 734.

¹¹⁶ At 747.

¹¹⁷ At 732.

¹¹⁸ At 735.

¹¹⁹ At 736.

Contrastingly, moral legitimacy refers broadly to whether and how the exercise of power by one over another can be morally justified.¹²⁰ In such a way moral legitimacy is often closely entwined with questions of political authority.¹²¹ Due to its broad nature moral legitimacy is often helpful to refer to and compare different concepts of moral legitimacy, encompassing questions of relative legitimacy. Thirdly, legitimacy is often understood through the guise of social legitimacy. This is the form of legitimacy that encompasses sociological legitimacy in the fact that it does not assess the issue put to it against a normative framework.¹²² Rather than including any objective idea of what ‘ought’ to be, social legitimacy treats legitimacy as a social fact.¹²³ Social legitimacy is still concerned with moral and legal legitimacy, but rather in the form of what power people believe to be morally or legally justified.¹²⁴

While these three kinds of legitimacy are often treated separately, each overlaps to a certain extent with the others. Drawing a clear line between these differing kinds of legitimacy is difficult and doing such may limit the extent of understanding each concept on its own and all the concepts together, however they can be understood in these separate ways.

2 *Elements of Legitimacy: Objects, Subjects and Bases.*

Beyond understanding the main kinds of legitimacy, the components within these types of legitimacy must also be understood. It may be therefore stated that three different elements are included within each kind of legitimacy. These concepts are the objects, subjects and bases for legitimacy. Objects of legitimacy refer to actors, actions, norms and systems that implement legitimacy or determine whether legitimacy exists.¹²⁵ In assessing legitimacy, different objects can be treated separately, even in the same context.¹²⁶ Secondly the subjects of legitimacy refer to those who submit to or support the legitimate objects.¹²⁷ In international law the subjects of legitimacy are generally states. However more recently arguments that individual citizens are the ‘true’ subjects of international law have been made.¹²⁸

¹²⁰ At 738.

¹²¹ At 738.

¹²² At 732.

¹²³ At 736.

¹²⁴ At 741.

¹²⁵ At 746.

¹²⁶ At 746.

¹²⁷ At 747.

¹²⁸ At 747.

Thirdly is the idea of bases of legitimacy, which include procedure, substance and outcome. Procedural or process-based legitimacy refers to the mechanisms in which power is conferred and exercised.¹²⁹ This basis of legitimacy focuses on formal validities of power and accordingly does not consider interrogating substantive aims.¹³⁰ Contrastingly substantive legitimacy is interested in the aims served by the object of legitimation.¹³¹ This most often focuses on concerns with justice or critiquing rules on the basis of ideas such as human rights or development goals. Finally outcome based legitimacy is flexible in endorsing any form of legitimacy and measures its adherence on whether it has been validated on the practical consequence of such decision-making.¹³²

D Legitimacy and international law

Turning to legitimacy in the context of international law specifically, a unique history and explanation of the concept exists. First the study of legitimacy of international law was one that was underrated and less common until recently.¹³³ While legitimacy in the national context has been a well-examined concept for a long time, legitimacy in the international legal context was not viewed as much of a concern.¹³⁴ Kumm suggests that this was due to the fact that international law was viewed as ineffective and unreliable, as well as the fact that it was viewed as being addressed to ‘others’ distant from those in Western developed states.¹³⁵ Ideas of international law being highly specialised and concerned with only a narrow field further discouraged the idea of studying its legitimacy.¹³⁶ However beginning, most significantly, with the work of Thomas Franck in the 1990’s, the idea of legitimacy in international law was brought to greater attention and now a significant amount of discussion on the concept is observed.

Legitimacy in the international context can be described as an ‘intermediate concept’, its imprecision also making it less of a target from criticisms familiar to those describing

¹²⁹ At 749.

¹³⁰ At 751.

¹³¹ At 751.

¹³² At 752.

¹³³ Thomas M Franck “Legitimacy in the International System” (1988) 82 AJIL 705 at 706.

¹³⁴ At 709.

¹³⁵ Mattias Kumm “The Legitimacy of International Law: A Constitutionalist Framework of Analysis” (2004) 15 EJIL 907 at 911.

¹³⁶ At 911.

similar concepts such as legal validity as too abstract and justice as too controversial.¹³⁷ However Franck's now renowned work on legitimacy in international law canvassed a number of key ideas relating to this ambiguous concept and shed more light onto what it may be. This now mainstream view of legitimacy describes it as depending on fair procedure and actor-based recognition, rather than on just outcomes or popular endorsement.¹³⁸ A basic two-pronged definition may be employed here, arguing that legal legitimacy is justification for and acceptance of authority.¹³⁹ Justification here refers to a possession of a right to rule and acceptance to a popular belief to possess a right to rule.¹⁴⁰

A classic positivist, Franck argued that legitimacy is determined by an institution's ability to accord with its own procedural standards.¹⁴¹ To positivists such as Franck, such a concept of legitimacy is not concerned with questions of social organisation or substantive concerns, thereby advocating a procedural basis of legitimacy.¹⁴² Franck, arguably fascinated by the phenomenon of states obeying rules in the international legal system in the absence of coercion, conveyed that the key to understanding this lay in the concept of legitimacy.¹⁴³ Accordingly legitimacy in the international legal context refers to the reason why international laws are followed. Key to this is asking why specific international law and rules do or do not obligate actors to follow such. Further legitimacy may be referred to as a generic label placed on factors that affect our willingness to comply voluntarily with commands.¹⁴⁴

Franck essentially emphasised that international legitimacy is similar to its national counterpart but goes further. Franck argues that while the concept of legitimacy may most notably have been developed on the level of the national context, it is adaptable to international usage and further, that by applying such a concept to the compliance

¹³⁷ Martti Koskenniemi "Reviewed Work(s): The Power of Legitimacy Among Nations by Thomas M. Franck and Detlev Vagts" (1992) 86 AJIL 175 at 175.

¹³⁸ Mohsen Al Attar and Edward Miller "Rethinking legitimacy in international law" in Thomas Muhr (ed) *Counter-Globalization and Socialism in the 21st Century: The Bolivarian Alliance for the Peoples of Our America* (Routledge, New York, 2013) at 82.

¹³⁹ At 82.

¹⁴⁰ At 82.

¹⁴¹ At 82.

¹⁴² At 82.

¹⁴³ Koskenniemi "Reviewed Work(s): The Power of Legitimacy Among Nations by Thomas M. Franck and Detlev Vagts", above n 137, at 175.

¹⁴⁴ Thomas M Franck *The Power of Legitimacy Among Nations* (Oxford University Press, New York, 1990) at 150.

behaviour of states it is possible to learn a great deal about the nature and role of legitimacy. Therefore the close association with 'national' legitimacy is one which arguably benefits the study of legitimacy in international law. Following these explanations Franck produced a partial definition of legitimacy, recognising it as:¹⁴⁵

“a property of a rule or rule making institution which itself exerts a pull towards compliance on those addressed normatively. “Those addressed” might include nations, international organizations, leadership elites, and, on occasion, multinational corporations and the global populace.”

Accordingly, Franck argued, legitimacy depends on whether and how much the subjects of the rule believe themselves obliged to such. To analyse this Franck argued that there are four indicators of rule-legitimacy, being determinacy, symbolic value, coherence and adherence to hierarchy. These factors have the power to exert compliance pull in regards to specific international laws.¹⁴⁶

Putting the specific definition of legitimacy in international law aside, greater concerns around the concept exist. Kumm stresses that legitimacy in international law is itself undergoing a 'legitimacy crisis.' Kumm argues that contemporary international law has changed shape recently and has expanded its scope. Most notably it has loosened its link to state consent and strengthened compulsory adjudication and enforcement mechanisms.¹⁴⁷ This has meant that domestic accountability is becoming less effective as a means of legitimating international law. Accordingly the legitimacy of international law is increasingly challenged in domestic settings, being replaced with ideas of democracy and constitutional self-government. In response to this legitimacy crisis Kumm suggests that the only way to assess international law is on the basis of a comprehensive judgment that takes into consideration all of these concerns and issues present.

E Legitimacy and the International Court of Justice

Having attempted to define the concept of legitimacy generally and more specifically to the context of international law, the application of legitimacy to the ICJ must also be understood. In order to answer this question it may first be asked why international courts seek legitimacy, and exactly what they are pursuing in their search for it. International

¹⁴⁵ At 16.

¹⁴⁶ At 49.

¹⁴⁷ Kumm, above n 135, at 907.

courts seek legitimacy firstly for its own sake and also as a way to fulfil other goals such as improving compliance with their judgments.¹⁴⁸ If a court is considered as being a legitimate organisation then compliance of their judgments is more likely. This is, as if compliance does not occur, international courts with strong legitimacy will be met with a demand from the public for states to comply with the court's judgment. Therefore the court's legitimacy has a significant role in increasing the changes of compliance of its judgments.

Legitimacy in the context of international courts is often viewed as a measure of the support for the court's judgments in the international community, namely the public.¹⁴⁹ Specifically the legitimacy referred to here may be noted as being 'diffuse support' which measures whether the public is generally inclined to accept a court's judgments, even if they disagree with a specific judgment.¹⁵⁰ The public will accordingly measure whether court judgments are legitimate if they are perceived as being just, legally correct and unbiased.¹⁵¹ In order to establish legitimacy international courts take into account factors including their actors and the norms they apply to their judgments. In regards to actors, international courts try to preserve their legitimacy with states while at the same time balancing the relationship so that states comply with their judgments even if Courts issue judgments that might damage state interests.

Studying public opinion in respect to the legitimacy of the ICJ reveals some interesting insights into one aspect of the Court's legitimacy. As the ICJ is an inter-state court, dealing with states as parties rather than individuals, it may be assumed that public opinion may be a less crucial measure for the ICJ's legitimacy. However due to the fact that public opinion plays a crucial role in national governments and this influences the interactions that governments have with the ICJ, public opinion does play a significant role in piecing together the picture of the ICJ's legitimacy.¹⁵² The most significant finding in regards to the ICJ's public opinion legitimacy is the idea that citizens in countries that rate high levels of confidence in the fairness of the ICJ come from countries in which opposition parties in domestic politics get a strong change to exercise their views. Therefore this finding suggests that positive perceptions about domestic

¹⁴⁸ Shai Dothan "How International Courts Enhance Their Legitimacy" (2013) 14 *Theo Inq L* 455 at 456.

¹⁴⁹ At 456.

¹⁵⁰ At 456.

¹⁵¹ At 456.

¹⁵² Erik Voeten "Public Opinion and the Legitimacy of International Courts" (2013) 14 *Theo Inq L* 411 at 433.

institutions correlate positively with perceptions of the ICJ. This strongly suggests that attitudes towards the ICJ's legitimacy is part of a picture of attitudes towards institutions more generally than just the stand-alone legitimacy of the ICJ.

While it not may be as powerful as an objective assessment of a court's legitimacy, a subjective assessment still proves to be useful. The legitimacy of international courts such as the ICJ seem most commonly assessed by subjective measures of legitimacy. This may in part have to do with the fact that objective measures of legitimacy are harder to define and harder to prove that they are indeed objective. Therefore public legitimacy is a key way in which international court legitimacy is assessed.¹⁵³ Due to the fact that public legitimacy concerns public opinion it is therefore a subjective legitimacy measure. In such a conception the legitimacy of an international court is determined by the beliefs that actors have in the institution, therefore what citizens think about the Court.¹⁵⁴ More specifically public legitimacy refers to the beliefs among the public that a court, such as the ICJ, has the right to exercise authority in a certain domain. Accordingly public legitimacy depends, significantly, on trust.¹⁵⁵ Despite being a subjective measure public opinion of legitimacy is important to understand this conception as levels of support for an international court expressed through public opinion may mean that it is more difficult for governments to undermine international courts.

Further factors go into determining the legitimacy of an international court. The prestige and reputation of individual judges who sit on international courts also largely make or break a court's legitimacy.¹⁵⁶ If individual judges themselves are respected then public opinion on such judges and the judgments they produce are likely to be viewed as impartial, legally correct which in turn will help increase a court's legitimacy.¹⁵⁷ Therefore preventing ideas of bias within judges who sit on such courts is crucial for an international court's legitimacy. Perceived or actual bias by a judge sitting on such a court could damage a court's legitimacy.¹⁵⁸ However mechanisms are put in place to ensure that this such bias does not occur and stops judges being controlled or influenced by their own countries. The diversity of judges who sit on the ICJ is an illustration of an attempt to balance national loyalties of judges to prevent favouring of any litigant states over others.¹⁵⁹

¹⁵³ At 433.

¹⁵⁴ At 433.

¹⁵⁵ At 415.

¹⁵⁶ At 415.

¹⁵⁷ Dothan, above n 148, at 457.

¹⁵⁸ At 462.

¹⁵⁹ At 462.

IV TWAIL Approaches

Having set out several ideas of legitimacy within international law and detailing the nuclear weapons cases that have come before the ICJ, this part of the paper will next examine what these cases reveal about legitimacy, through the application of Third World Approaches to International Law (TWAIL) scholarship. In doing so this paper will attempt to create a TWAIL approach to legitimacy in international law (the proposed TWAIL approach) to apply to the nuclear weapons cases that have come before the ICJ. The construction of the proposed TWAIL approach is due to the idea that the aforementioned mainstream ideas of legitimacy do not incorporate a number of significant considerations that should be examined in the study of the legitimacy of the ICJ.¹⁶⁰ In order to construct this proposed approach, this part of the paper will first identify and discuss the ideas of a number of prominent TWAIL thinkers. This will be followed by a discussion of the contribution to the idea of legitimacy and international law that these TWAIL views can provide through the construction of the proposed TWAIL approach. Finally the proposed TWAIL approach will be applied to the nuclear weapons cases specifically to determine the extent to which these cases apply the approach's considerations.

A Canvassing TWAIL Approaches

This part of the paper will explain in detail a number of ideas within TWAIL scholarship. First a general explanation of TWAIL, focusing on considerations that are likely to be common for a number of TWAIL scholars, will be discussed. Following this, explanations of specific TWAIL approaches will be canvassed. In order to do so this paper will focus on profiling the TWAIL approaches of a number of prominent TWAIL scholars. The authors who will be detailed here are Christopher Weeramantry, Sundhya Pahuja, James Thuo Gathii and Balakrishnan Rajagopal. This paper understands and acknowledges that there exist other prominent scholars of TWAIL, including many who have made significant contributions to TWAIL scholarship, however in the interests of brevity this paper limits discussion to only a handful of TWAIL scholars. The selection of these scholars over others emphasises presenting a broad range of opinions on TWAIL, reflected in their differing views.

¹⁶⁰ Makau Mutua and Antony Anghie "What is TWAIL?" (2000) 94 ASIL PROC 31 at 31.

1 *TWAIL introduced*

Due to the most recent bringing of nuclear weapons cases to the ICJ by the Marshall Islands, a developing nation,¹⁶¹ the idea of applying TWAIL scholarship to the ideas of legitimacy at the ICJ, specifically in regards to the nuclear weapons cases that have come before the Court, seems appropriate. TWAIL is arguably an apt lens to apply to this case as it informs of a number of aspects of the case that would not be considered if such a lens was not applied.

TWAIL is not a product of only recent thinking and scholarship.¹⁶² TWAIL thinking traces back to the decolonisation movement that swept the globe following the end of World War Two.¹⁶³ The key ideas that constitute TWAIL thinking can largely be described as a response to decolonisation and the mark of the end of direct European rule over non-Europeans.¹⁶⁴ In regards to the specific TWAIL theory of international law, its inception is rooted in the work of a group of Harvard Law School graduate students.¹⁶⁵ The ideas of these students, concerned primarily with whether it was feasible to have a third world approach to international law, were picked up by prominent TWAIL thinkers Bhupinder Chimni and James Thuo Gathii, who brought large attention to the lens and coined the name of 'TWAIL'.¹⁶⁶

While the main ideas of TWAIL scholarship will be canvassed here, it must be understood that no single theory that unites TWAIL scholars exists.¹⁶⁷ Despite this however, TWAIL scholars more or less share both a sensibility and political orientation.¹⁶⁸ Therefore rather than labelling TWAIL as a method, it may be more apt to label it as a political grouping of international law which is focused on a commonality of concerns.¹⁶⁹ These concerns may be defined as covering three primary objectives.¹⁷⁰ First

¹⁶¹ David Kattenburg "Marshall Islands: country profile" *New Internationalist* (Oxford, March 2005) at 36.

¹⁶² Mutua and Anghie, above n 160, at 31.

¹⁶³ At 31.

¹⁶⁴ At 31.

¹⁶⁵ James Thuo Gathii "TWAIL: A Brief History of its Origins, its Decentralised Network, and a Tentative Bibliography" (2011) 3(1) *Trade Law and Development* 26 at 28.

¹⁶⁶ At 28.

¹⁶⁷ Luis Eslava and Sundhya Pahuja "Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law" (2012) 45 *Law and Politics in Africa, Asia and Latin America* 195 at 195.

¹⁶⁸ At 195.

¹⁶⁹ At 195.

¹⁷⁰ Mutua and Anghie, above n 160, at 31.

TWAIL aims to understand and deconstruct the uses of international law as a tool for creating and maintaining racial hierarchy in international norms and institutes subordinating non-Europeans to Europeans.¹⁷¹ Secondly TWAIL seeks to put forward a legal system of beliefs to construct international governance around.¹⁷² Finally TWAIL aims to eradicate the conditions of underdevelopment in the Third World through the mediums of scholarship, policy and politics.¹⁷³ Accordingly these major concerns centre on shifting the operation of international law to the ‘others of international law’.¹⁷⁴

Further, the TWAIL approach focuses closely on the idea that international law must be examined in the context of the lives of people in the Third World.¹⁷⁵ This paper adopts the concept of ‘Third World’ as a category of countries that share a common history of subjection to colonialism, continuing underdevelopment and marginalisation.¹⁷⁶ In this such way a definition which loosely accords with the idea of ‘developing countries’ is adopted.¹⁷⁷ Following this definition, TWAIL is both reactive and proactive.¹⁷⁸ It is reactive in the sense that it responds to international law as an imperial project, however is also proactive as it seeks the internal transformation of conditions in the Third World.¹⁷⁹ TWAIL expresses that experiences of colonialism have made Third World peoples strongly concerned and aware of power relations as a result.¹⁸⁰ A number of conceptual binaries have historically fuelled the expansion of European global power. These binaries include those of developing vs developed, centre vs periphery, and rich vs poor.¹⁸¹ TWAIL is concerned that these binaries have had a significant impact on international law and their presence reinforces the Eurocentric focus of the system.¹⁸² Further it has been argued that all the foundational concepts involved at the centre of

¹⁷¹ At 31.

¹⁷² At 31.

¹⁷³ At 31.

¹⁷⁴ Eslava and Sundhya, above n 167, at 195.

¹⁷⁵ Antony Anghie and B S Chimni “Third World Approaches to International Law and Individual Responsibility in Internal Conflicts” (2003) 2(1) Chinese JIL 77 at 78.

¹⁷⁶ B S Chimni “Third World Approaches to International Law: A Manifesto” (2006) 8(1) Int.C.L.Rev. 3 at 5.

¹⁷⁷ At 5.

¹⁷⁸ Mutua and Anthony Anghie, above n 160, at 31.

¹⁷⁹ At 31.

¹⁸⁰ Anghie and Chimni, above n 175, at 78.

¹⁸¹ Eslava and Pahuja, above n 167, at 196.

¹⁸² At 196.

international law point towards European concepts and despite postcolonialism, the idea that Europe still remains the most powerful.¹⁸³

TWAIL scholarship is continuously changing, however a number of main tenets can be extracted from the changes between TWAIL I and II scholarship. TWAIL I scholarship indicted colonial international law due to its oppression of Third World peoples.¹⁸⁴ Further it stressed that Third World states prior to colonisation were not strangers to international law and that such states had much to benefit to the international legal community.¹⁸⁵ TWAIL I believes that modern international law could be taken to meet the needs of newly independent states and placed great emphasis on the idea of state sovereignty and non-intervention.¹⁸⁶ TWAIL II scholarship, labelled according to the broad shift in thinking that has occurred, has more recently critically looked further into a number of TWAIL I beliefs.¹⁸⁷ TWAIL II attempts to give a voice to those who have been excluded by TWAIL I approaches.¹⁸⁸ Further TWAIL II focuses more on theoretically questioning international law and how colonial relations have shaped the system of international law.¹⁸⁹ While separating TWAIL scholarship into these two different types may seem like an arbitrary exercise, such a categorisation aids the understanding of a general shift in thinking throughout scholarship over time.

In addition to understanding the main ideas of TWAIL scholarship, it is also equally important to understand who TWAIL scholars are and specifically what their thinking consists of. Effect and experience play important roles within TWAIL scholarship and accordingly TWAIL scholars are often those born in ex-colonies or part of diasporas.¹⁹⁰ At its core, TWAIL is concerned with the impact of international law on ‘the governed’ and it is understanding as to who therefore voice the loudest opinions on TWAIL. These are considerations that are absent from current mainstream ideas of legitimacy within international law. Therefore TWAIL thinking goes further than what current mainstream definitions of legitimacy offer. In such a way TWAIL has revitalised questions about justice and legitimacy within the international legal system.¹⁹¹ Accordingly this paper

¹⁸³ Mutua and Anthony Anghie, above n 160, at 31.

¹⁸⁴ Anghie and Chimni, above n 175, at 79.

¹⁸⁵ At 79.

¹⁸⁶ At 80.

¹⁸⁷ At 82.

¹⁸⁸ At 82.

¹⁸⁹ At 84.

¹⁹⁰ Eslava and Pahuja, above n 167, at 197.

¹⁹¹ At 197.

understands the significant role that TWAIL scholarship and thinking plays in respect of the concept of legitimacy and also its reach into areas far beyond those covered in this paper.

2 *Christopher Weeramantry*

Christopher Weeramantry, a former Judge on the International Court of Justice who sat on the 1996 nuclear weapons advisory opinion case, has commented on legitimacy within international law. Weeramantry's vision of international law has stated influence from his experiences growing up in the colony of Ceylon and witnessing the process of his country becoming independent.¹⁹² It has been said that as a judge and academic, Weeramantry's background from the 'Third World' is reflected in his work. This is opposed to suppressing his experiences and attempting to present himself as a neutral player in international law.¹⁹³ His work therefore often reflects sensitivity towards questions that are of central importance to Third World states, including questions of poverty, inequality and environmental issues.

Accepting the background from which Weeramantry comes from and the reasons behind his potential lean towards TWAIL concerns, his comments are useful in understanding how TWAIL scholarship may perceive legitimacy in international law. To begin, Weeramantry stresses that international law is not alien to the Third World.¹⁹⁴ His idea of legitimacy is broadly concerned with meeting the needs of those who are in the receiving position of international law, often Third World people.¹⁹⁵ In the *Gabcikovo* case Weeramantry stressed that international law derives its legitimacy from establishing and preserving the link between law and the society it is supposed to govern, rather than merely satisfying the criteria of sources doctrine.¹⁹⁶ Here Judge Weeramantry stressed that legitimacy requires international law to have been created by people and established through their cultural practices and religious beliefs.¹⁹⁷

Further, Weeramantry stated that international law must serve a social purpose and advance the important goals of peace, equality and freedom.¹⁹⁸ This is what is required

¹⁹² Antony Anghie "C.G Weeramantry at the International Court of Justice" (2001) 14 *Leiden Journal of International Law* 829 at 832.

¹⁹³ At 844.

¹⁹⁴ At 845.

¹⁹⁵ At 835.

¹⁹⁶ At 835.

¹⁹⁷ At 835.

¹⁹⁸ At 835.

for international law to be legitimate in Weeramantry's eyes. A mere set of principles directed towards ensuring the minimal order necessary does not meet this aim. In order for international law to be legitimate it must ensure that it serves and furthers these important social goals.¹⁹⁹ In addition, Weeramantry believes that legitimacy hinges on international law corresponding with principles existent in the domestic context and that have been expressed by widespread religious and cultural norms.²⁰⁰ This building on principles that have stood the test of time is essential for legitimacy.²⁰¹ Interwoven into these ideas are the overarching factors of universality and pluralist international law, which Weeramantry states as being crucial for the legitimacy of international law.²⁰²

In this way Weeramantry's comments on legitimacy in international law illustrate several potential ways in which TWAIL scholarship may view such legitimacy. A strong emphasis here is placed on legitimacy meaning correspondence with ideals that match the needs of Third World peoples who are the 'subjects' of international law.²⁰³ TWAIL scholarship on the legitimacy of international law may therefore be communicated as being a moral form of legitimacy.²⁰⁴ Therefore in order for the ICJ to be viewed as legitimate according to core TWAIL scholarship this requires this meeting of needs and social goals specific to those states, especially Third World states, concerned.

3 *Sundhya Pahuja*

Professor Sundhya Pahuja is a more recent yet prominent voice for international issues especially those concerning global inequality. Pahuja's approach to TWAIL is one that strongly emphasises a 'bottom-up' approach, focusing on the everyday aspects of international law rather than those in what is commonly labelled as the 'international realm'. Pahuja has written in response to the idea that concepts core to international law are influenced by European experiences; essentially that Europe dominates the area of international law and informs its future.²⁰⁵ Pahuja's emphasis for TWAIL comes in the form of encouraging that it would be stronger as an approach if it took into account the idea of universality in the context of contemporary international law. This would include

¹⁹⁹ At 835.

²⁰⁰ At 836.

²⁰¹ At 834.

²⁰² At 846.

²⁰³ At 844.

²⁰⁴ At 834.

²⁰⁵ Eslava and Sundhya, above n 167, at 202.

a methodological new push to study how international law operates on the ‘material’ or ‘everyday’ place of life.²⁰⁶

The justification for such an approach comes from the idea that it is crucial to pay attention to the ways in which international law makes the international society think of about places.²⁰⁷ Accordingly, Pahuja puts forward a new way in which to view international law, constituting a main belief of her TWAIL lens. Boldly, Pahuja also makes it known that this is a new approach that goes against the current and traditional ways of studying and examining international law. Essentially, as detailed by Pahuja, this approach is to get ‘down and dirty’ with international law, by ultimately delving into the ‘everyday life’ of international law.²⁰⁸ By doing so, Pahuja argues that this challenges the idea of international law as being a superior and foreign concept to domestic law.

Pahuja’s reasoning for taking such an approach comes from the idea that international law cannot be conceptualized through a restricted body or norms or through international institutions.²⁰⁹ This, Pahuja argues, is what traditional approaches to international law conform to and thereby such analyses are limited.²¹⁰ Rather, Pahuja considers that international law should be understood as a field of ‘material practice’.²¹¹ Sites, procedures, artefacts and more that operate at a mere mundane level must be examined under Pahuja’s approach and international law accordingly has to be tied together with normal everyday things.²¹² Pahuja contends the importance of this to illustrate the ‘everyday’ aspect of international law and to demonstrate that it is not only to be understood as an ideological project.²¹³

Such a methodology can be brought to action by focusing not only on the legal-ethnography of explicitly international sites, such as international non-governmental organisations and international courts, but also by looking at the equivalent in local settings.²¹⁴ This opens up new jurisdictions and thereby expands the spatial scope of

²⁰⁶ At 198.

²⁰⁷ At 203.

²⁰⁸ At 215.

²⁰⁹ At 217.

²¹⁰ At 217.

²¹¹ At 217.

²¹² At 217.

²¹³ At 217.

²¹⁴ At 218.

international law studies.²¹⁵ Pahuja maintains this is crucial as these arguably ‘small’ places are where international law work is conducted in reality.²¹⁶ Therefore Pahuja’s main goal is to get international lawyers to see international law in places that often escape their attention yet regulate their lives.²¹⁷ The main result of this, Pahuja argues, is that it gives international lawyers a map for resistance and revolt to the current system of international law.²¹⁸

4 *James Thuo Gathii*

James Thuo Gathii is a prominent TWAIL scholar and has played a significant role in the inception of the approach itself. Gathii’s perception of TWAIL scholarships sees the examination of significant ideas in international law through a ‘realistic’ lens, or at least labelled as realistic relative to the dominant doctrinal and formal categories of the liberal/conservative model.²¹⁹ Pertaining to such a realistic lens requires TWAIL scholarship to take into account complex relations, normative and doctrinal work, the history of international law and the oppressive reality whereby international law gives authority at the expense of the Third World.²²⁰

Gathii has communicated his belief that the third world, and therefore TWAIL have contributed significantly to international legal theory. In regards to Gathii’s own contribution to TWAIL scholarship this has been illustrated through his comments on the relationship between the dominant conservative/liberal approach and TWAIL approaches.²²¹ Gathii claims that the TWAIL approaches simultaneously co-exist with the conservative/liberal model.²²² TWAIL approaches should not be belittled or ignored as they exist in opposition and serve as a limit on this triumphantly dominant model in international law.²²³ While Gathii has communicated understandings that TWAIL is often not given such attention, he argues that a reciprocal relationship exists, reinforcing the important role that TWAIL approaches play in the context of the international system.²²⁴

²¹⁵ At 218.

²¹⁶ At 219.

²¹⁷ At 220.

²¹⁸ At 221.

²¹⁹ James Thuo Gathii “Rejoinder: Twailing International Law” (2000) 98 Mich.L.Rev. 2066 at 2069.

²²⁰ At 2070.

²²¹ At 2066.

²²² At 2066.

²²³ At 2068.

²²⁴ At 2067.

Gathii understands that the dominant liberal/conservative positions model does indeed construct the legal framework that is consistent with hegemonic interests of the industrialised world. However at the same time he argues that TWAIL challenges this framework.²²⁵ This argument encourages that a revision of international legal and economic relations centring more on TWAIL's points may be appropriate and would not destabilise international society.²²⁶ Gathii goes further by stating that the tension between the dominant conservative/liberal model and TWAIL approaches are useful as it creates spaces from which interpretation of international law can take place.²²⁷ This tension allows for a comparison between the West and non-West, something that cannot be undertaken by the formal and doctrinal categories of liberalism and conservatism.²²⁸

Further, Gathii has expressed belief that ideas such as government legitimacy cannot be analysed through assessments that separate political and economic liberalism.²²⁹ This emphasises the importance Gathii gives to the idea of the complexity of TWAIL approaches and the number of significant factors that piece together the lens. While not expressly commenting on the legitimacy in the international context Gathii's statements here suggest a similar approach would be taken to such concepts.²³⁰ Compared to scholars such as Pahuja, who encourage the study of the international legal system through a range of things varying from the smallest scale examples of international law in action, Gathii's works suggest a greater focus on larger scale structures within international law. However, this is not to be confused with the traditional and dominant approaches to international law. Gathii's approach to TWAIL undeniably emphasises the complexities that constitute TWAIL scholarship, giving it a unique position in scholarship.

5 *Balakrishnan Rajagopal*

While it is in the interests of brevity for this paper to only touch on a number of TWAIL scholars, some mention must go to Rajagopal's contribution to TWAIL thinking, recognized as being one of the most leading voices on the theory. Rajagopal's take on TWAIL encourages the engagement with social moment literature.²³¹ Rajagopal contends

²²⁵ At 2067.

²²⁶ At 2067.

²²⁷ At 2068.

²²⁸ At 2068.

²²⁹ At 2070.

²³⁰ At 2070.

²³¹ Balakrishnan Rajagopal *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press, Cambridge, 2003) at 2.

that analysing international law in such a way reveals the elitist bias that is present in traditional conservative legitimacy theories.²³² Legitimacy in the context of the international legal system must take into account non-institutional actors as the Third World itself predominantly takes place in non-institutional spaces.²³³ Accordingly, such a view poses theoretical and methodological challenges to international law by articulating alternative understandings of legitimacy that cannot be captured by traditional or institutional views of international law.²³⁴ This approach shows that increased significance in the 'local' as an agent of socio-political change.²³⁵

B TWAIL's Contribution to Legitimacy and International Law

TWAIL's views of legitimacy in the international system understandably differ greatly from more traditional approaches to legitimacy. Therefore this part of the paper attempts to create a proposed TWAIL approach to legitimacy in international law, calling on the general principles of TWAIL that have been discussed above as well as the more specific ideas from individual TWAIL thinkers. In putting together the proposed TWAIL approach, it is important to first understand that TWAIL scholarship regarding legitimacy does not necessarily desire to completely wipe the current mainstream approaches and conceptualisations of legitimacy in international law.²³⁶ This paper has found limited commentary that TWAIL scholarship is intensely against the current approach. Rather, this paper puts forward the idea that TWAIL scholarship encourages additional considerations to be included in current mainstream approaches to legitimacy in international law. This paper will therefore argue that if the additional considerations, in the form of the proposed TWAIL legitimacy approach to international law, canvassed in the forthcoming section, are met then TWAIL scholarship may be accepting of such an approach towards legitimacy in international law.

1 TWAIL's conflicts with current approaches to legitimacy in international law

While TWAIL scholarship does not generally wholly disagree with current conceptualisations of legitimacy, a number of such comments do exist and warrant highlighting. Firstly some TWAIL scholarship communicates the idea that international law is illegitimate due to the fact that it is based on the intellectual, historical and cultural

²³² At 45.

²³³ At 2.

²³⁴ Al Attar and Miller, above n 138, at 86.

²³⁵ At 87.

²³⁶ At 87.

experiences of Europe.²³⁷ Further, if it is accepted that TWAIL advocates for an approach to legitimacy that takes into account the diversity and complexities of the world, it is arguable that current mainstream conceptualisations of legitimacy do not do so.²³⁸ Scholars' comments on Thomas Franck's traditional definition of legitimacy suggest how TWAIL scholarship perceives the mainstream concept of legitimacy. Al Attar and Miller, responding to Franck's procedural conceptualisation of legitimacy, stress that while the liberal Franck-ian standard of legitimacy is neutral at surface level to ideas such as binaries of first and third worlds, it confers a badge of legal legitimacy upon these hierarchies.²³⁹ Accordingly, they argue, Franck's emphasis on procedural fairness implicitly depoliticizes international law.²⁴⁰

The failure of Franck's legitimacy definition, which is the foundation for much of the current mainstream definition of legitimacy, to take into account the impact of non-state entities is also mentioned.²⁴¹ TWAIL scholarship criticises the mainstream conceptualisations of legitimacy as they ignore popular aspirations and put the concept at odds with public opinion.²⁴² The result here is that the mainstream legitimacy definitions coined are dominated by a commitment to a procedural, statist concept of order and formality.²⁴³ Therefore the biggest failure seen in Franck's definition of legitimacy by Third World scholars is its amorality, rendering international law under such a definition to encounter a legitimacy deficit.

2 Constructing a TWAIL legitimacy approach to international law

Noting and putting aside these disagreements to current mainstream approaches of legitimacy in international law, requirements of a legitimacy approach that TWAIL scholarship would approve of can be examined. Therefore, the aim of this part of the paper is to therefore construct a TWAIL approach to legitimacy in international law. Such an approach includes the setting out of a number of TWAIL scholarship ideas that should be followed or taken into consideration when assessing legitimacy in the context of international law. These ideas that constitute this approach have been collected from the TWAIL scholarship that has been discussed in this paper. The hope in constructing such an approach is to produce guidelines of how an analysis of legitimacy in the

²³⁷ Mutua and Anghie, above n 160, at 31.

²³⁸ At 31.

²³⁹ Al Attar and Miller, above n 138, at 84.

²⁴⁰ At 84.

²⁴¹ At 84.

²⁴² At 84.

²⁴³ At 84.

international context can be conducted in a way that adheres to a number of general ideas expressed in TWAIL scholarship. This proposed approach is not intended to trump any such existing mainstream or alternative approaches that currently exist, but rather to be viewed as complementary to current models.

To begin, Rajagopal cites Chatterjee in saying that the legitimacy of the state does not come merely from elections or the democratic characteristics of the state.²⁴⁴ Therefore the most significant point illustrated through this forthcoming construction of the proposed TWAIL approach is its general all-encompassing nature. While this may be a product of pulling together ideas from different scholars, this paper asserts that this complexity and multi-faceted nature is inherent in the nature of TWAIL thinking and is therefore also transferred to a TWAIL approach to legitimacy in international law. Keeping this feature of such an approach in mind, this paper will further categorise the key requirements to construct a TWAIL legitimacy approach in terms of the approach's subject, object, purpose, and scale of inquiry. The framing of this proposed TWAIL approach in such a way calls on the elements of legitimacy as commonly understood in mainstream scholarship, however the substance within these elements, as can be expected, greatly differs under this proposed approach.

The first consideration required for a potential TWAIL legitimacy approach for international law is to determine whom the subject of such an approach is. While this consideration of the model may be clear from the TWAIL approach itself, it is important to convey whom, specifically such a legitimacy approach is to be constructed for. Weeramantry's emphasis on the need for inquiries and analyses of international law to focus on meeting the needs of those who are in the 'receiving position of international law' gives such an approach an appropriate subject.²⁴⁵ Essentially, Weeramantry argues that the needs of those in the third world must be met.²⁴⁶ Therefore an approach towards legitimacy in international law under TWAIL must also measure legitimacy in terms of how well it meets the needs of third world peoples. This is a significant change from mainstream approaches to legitimacy that, while appearing neutral as to who their subjects are, focus almost exclusively on the interests of those in the West or the Global North.²⁴⁷

²⁴⁴ Rajagopal, above n 231, at 22.

²⁴⁵ At 22.

²⁴⁶ At 22.

²⁴⁷ Mutua and Anghie, above n 160, at 31.

Similar to the consideration of the subject is the idea of the actors, or participants, of legitimacy in international law, more commonly known as the objects of legitimacy. Putting forward an alternative definition to legitimacy within the international system, Al Attar and Miller argue that Third World scholars prefer approaches that marry societal and state aims when assessing legitimacy.²⁴⁸ This stresses the importance of popular endorsement if institutions or mechanisms are to maintain legitimacy. Crucial to this is the involvement of citizens or participating nations as objects in legitimacy. In order to fulfil creating such a definition of legitimacy there must accordingly be an approach within international law from a regionally, culturally and ideologically specific perspective that takes on-board the actions of public participants.²⁴⁹ Such diversity is currently invisible in traditional thinking of international law.²⁵⁰ Rather, current mainstream approaches of legitimacy in international law emphasise objects as actors and systems of a formal nature.²⁵¹ The state and international institutions are most-often focused on.²⁵² Therefore this proposed TWAIL approach also adopts the idea that the objects of legitimacy must incorporate these more encompassing ideas.

Thirdly, constructing a TWAIL approach to legitimacy in international law requires specifying the purpose that such an approach must have as its aim. Weeramantry's comments again give insight into what such a purpose of this approach may be. Weeramantry conveys that TWAIL thinking must do more than satisfy criteria of doctrines is relevant.²⁵³ Instead, as Weeramantry states, the purpose of TWAIL is to serve a social purpose and advance peace, equality and freedom.²⁵⁴ Therefore a TWAIL approach into the legitimacy of international law must also have this purpose in mind. Again, this purpose is one that is likely to conflict with the current approach to legitimacy, which arguably considers the interests of the Global North. However the extent of such a conflict may not be too great as current approaches to legitimacy in international law do not tend to specify such a purpose explicitly.

A final consideration for a potential TWAIL legitimacy approach is the idea of the scale of inquiry. Pahuja, Gathii and Rajagopal have put various scales of inquiry forward. Pahuja emphasises focusing on the everyday, thereby conducting a small-scale inquiry.

²⁴⁸ Al Attar and Miller, above n 138, at 84.

²⁴⁹ At 94.

²⁵⁰ At 94.

²⁵¹ At 94.

²⁵² Thomas, above n 112, at 735.

²⁵³ Anghie, above n 192, at 835.

²⁵⁴ At 835.

Conversely, Gathii's emphasis of focusing on complex relations, normative and doctrinal work, history of international law as well as the oppressive reality of international law suggests a scale of inquiry that takes into account from small through to large-scale considerations. Further Rajagopal's intensive focus on social movements suggests again a scale ranging from small inquiries through to much larger structural inquiries. In order for international law to be legitimate it must take into account and reflect the full richness of the diverse world, something which current international law fails to do.²⁵⁵ Therefore the requirement for constructing a TWAIL legitimacy approach here suggests that the scale must be all encompassing. The reason for this is because, as illustrated by the arguments by Pahuja, Gathii and Rajagopal, all these various areas, and corresponding different scales, are important in understanding the operation of international law. Therefore this requires attention to be paid to Pahuja's everyday considerations right up to Gathii's large-scale inquiries of the history of international law. Therefore this discussion suggests that what is crucially important for a TWAIL approach to international law is for it to be, again, all encompassing and take into account relevant considerations when they arise.

A number of important considerations to take into account for a potential TWAIL legitimacy approach to international law have been explored here. While this approach is limited, as it does not comprehensively consider all views to TWAIL scholarship, it does hope to put forward a number of important points. The aforementioned discussion suggests that for a TWAIL endorsed analysis to take place; legitimacy must be considered in general accordance with the ideas communicated in this section.

C The Application of a TWAIL Approach to the ICJ Cases

A number of significant ideas regarding TWAIL, as applied to the legitimacy of international law have been canvassed in this paper. One further step to complete the analysis of this paper concerns the application of this TWAIL approach to legitimacy to the nuclear weapons cases that have gone before the ICJ. This question of TWAIL's comments concerning legitimacy on the nuclear weapons cases that have come before the ICJ is an interesting question to ask in light of an arguably increasing participation in the ICJ by third world states. The very recent cases brought by the Marshall Islands and the increased representations of Third World judges are examples of such.²⁵⁶ Despite this it is not to be assumed that the Court's legitimacy has necessarily been bolstered.²⁵⁷ Therefore

²⁵⁵ Mutua and Anghie, above n 160, at 37.

²⁵⁶ Michelle L Burgis *Boundaries of Discourse in the International Court of Justice: Mapping Arguments in Arab Territorial Disputes* (Nijhoff, Boston, 2009) at 27.

²⁵⁷ At 27.

this part of the essay will consider the insights to be gained by the application of the TWAIL legitimacy approach that has been discussed throughout this paper as applied to the nuclear weapons cases that have gone before the ICJ.

1 Subject

Taking the proposed TWAIL approach to legitimacy in international law, it must first be asked whether the ICJ nuclear weapons cases have focused on the appropriate subject in their inquiries, namely third world people. In a general sense the majority of these cases have not had third world peoples as their direct subjects. With the exception of the Marshall Islands case, the cases brought to the ICJ have not been explicitly concerned with Third World peoples. Despite this, to differing extents, all these cases do indirectly benefit third world peoples. However it must be asked to what extent these cases adhere to the proposed TWAIL legitimacy approach to international law when third world persons have not been the explicit subjects of the cases.

More specifically, the New Zealand and Australian ICJ cases against France do concern third world persons as subjects. These cases were concerned with the prohibiting and ceasing of testing in the South Pacific. The area of testing affected the French overseas territory of French Polynesia, classified as a small island developing state.²⁵⁸ However the extent to which it can be said that these two cases concern third world persons as subjects is limited. It appears that New Zealand and Australia were motivated by self-benefitting interests in bringing these cases, rather than altruistically helping those citizens in third world states. The aims of New Zealand and Australia here were to prohibit the tests being conducted by France, with such aims failing to be communicated as aimed at protecting the people of French Polynesia.²⁵⁹ Nonetheless, to some extent third world persons are the subjects of these cases, by virtue of the people of French Polynesia benefiting from the cessation of nuclear testing over their islands. However it may be appropriate to label them as indirect subjects rather than the principal intended subjects.

New Zealand and Australia's lack of success at the ICJ meant that the interests of any third world subjects concerned could not be met. The meeting of such needs and subsequent benefit from the ceasing of testing by the French was experienced in 1974

²⁵⁸ Karin Von Storkirch "The Impact of Nuclear Testing on Politics in French Polynesia" (1991) 26 *The Journal of Pacific History* 330 at 331.

²⁵⁹ MacKay, above n 57, at 1863.

when the French government itself announced the end to their testing.²⁶⁰ Therefore the attempt at prohibiting the French to stop their nuclear testing in the South Pacific may have meet the needs of those people of the third world states that were affected if it were successful, however as it was not successful this was not evident. Also, New Zealand and Australia were primarily concerned with their own needs and pushed to meet these. This suggests a lack of satisfying the proposed TWAIL approach's emphasis on the subjects of legitimacy being third world peoples.

Even more ambiguous than the French cases is the situation concerning the unsuccessful World Health Organisation and subsequent successful United Nations General Assembly request for Advisory Opinions in 1996. Here there were no clear subjects of the advisory opinion requests. Making nuclear weapons illegal, through an opinion published by the Court, would undoubtedly have benefitted third world states and their citizens, as it would have eliminated threats from other nuclear weapon possessing states from harming them in such ways. However this would have only been a benefit to third world state citizens in the way that it would benefit all other citizens and states around the globe also. Again, these opinion requests were not directed specifically at the needs of third world citizens. Further, while it may be debated that these cases were concerned with third world citizens as subjects due to the protection third world states would gain from nuclear disarmament of possessing states, this is a weak argument. This is due to the fact that a number of the nuclear weapon possessing states, namely China, the Democratic People's Republic of Korea, India, Pakistan and the Russian Federation are themselves developing countries and therefore may come under the label as third world states. This constitutes five out of the world's nine nuclear weapon states.²⁶¹ In such a way there was no clear demarcation of the subject in this opinion request and subsequent opinion being third world persons.

The Marshall Islands situation is a more explicit example of third world persons being the subject of these cases. Here this case concerned the bringing of action against nuclear weapons possessing states by the Marshall Islands, a state that has been victim to the damages of nuclear weapons in the past. However the extent to which third world citizens are subjects here is again limited as, with these cases, the Marshall Islands was attempting to ban nuclear weapons more globally for the benefit of all global citizens. This can be labelled as a less self-interested cause and therefore places less emphasis on third world citizens being the only intended subjects of the cases. Despite this, the

²⁶⁰ At 1864.

²⁶¹ David Santoro "The Nuclear Weapon States" (2010) 17 *The Nonproliferation Review* 23 at 23.

primary subjects of these cases can be identified as the people of the Marshall Islands, whom wish to have their suffering recognised and promised that such events will no longer occur in the future. Despite the more clearly identifiable subject here, the ICJ's dismissal of the Marshall Islands cases speaks to the idea that the needs of third world persons were not met in these cases. Therefore as no judgment protecting the needs of the third world persons who were subjects of these cases could eventuate, these cases did not meet the idea of satisfying the needs of third world peoples. Therefore the proposed TWAIL approach's consideration was not fulfilled here.

2 *Object*

This proposed TWAIL approach to legitimacy in international law also asks whether these ICJ nuclear weapons cases involved citizens of participating nations as objects. These nuclear weapons cases that have been brought to the ICJ have largely been products of popular opinion within certain states arguing to implement change. In this respect they comply with the emphasis of having participating nations and their citizens involved. However it must be considered how strongly this adheres to the proposed TWAIL approach to legitimacy in international law when this citizen involvement, all except for the Marshall Islands cases, has come from citizens in states that are not third world states.

The New Zealand and Australian cases brought against France followed large public protests against the testing that was being conducted by the French in the Pacific leading up to the ICJ's hearing of the case.²⁶² New Zealand and Australia initiated a number of public protests, including sending peace flotillas to the areas across the Pacific Ocean where these tests were being conducted.²⁶³ These were efforts to express condemnation of the testing. Similar actions took place following the announcement in 1995 by France regarding the re-commencement of testing.²⁶⁴ This illustrates a strong presence of citizen involvement. The 1996 Advisory Opinion has also been openly acknowledged as being a product of citizen involvement.²⁶⁵ Koskenniemi notes how the 1996 Advisory Opinion came after "intensive" lobbying by an American-based non-governmental organisation, the International Association of Lawyers Against Nuclear Arms (IALANA).²⁶⁶ While the request for the Advisory Opinion here was not limited to a single state, as it was a request

²⁶² Siskin, above n 26, at 209.

²⁶³ At 209.

²⁶⁴ At 209.

²⁶⁵ Koskenniemi "Case Analysis: Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons", above n 81, at 138.

²⁶⁶ At 138.

from the United Nations General Assembly, this is a strong illustration of citizen involvement in bringing about action.

The Marshall Islands cases had a strong ‘bottom-up’ advocacy approach. The Marshall Islands, when discussing their claims at the ICJ, on numerous occasions cited the suffering and hardship that they have had to endure as a result of the historic testing that occurred in their territories.²⁶⁷ This suggests that the Marshall Islands cases were strongly influenced by the real experiences that their citizens have endured and that their cases are a product of such. This is especially significant due to the fact that this is therefore an example of third world citizen involvement. While the proposed TWAIL approach to legitimacy in international law does not specifically state third world citizen involvement, the fact that here they are third world citizens calls for a stronger argument. The significance of the Marshall Islands participants in their cases is therefore acknowledged.

3 Purpose

Following the proposed TWAIL approach to international law, it must be asked whether these nuclear weapons cases and the ICJ’s corresponding judgments and opinions fulfil the required purpose of this approach. In order to adhere to this approach the cases must have been aimed at fulfilling social purposes of advancing peace, equality and freedom. Considering these cases as a whole, to a certain extent, they undeniably embody such a purpose. Despite differing in details such as who these cases have been brought against and what they specifically claim, all these nuclear weapons cases that have gone before the ICJ have all inherently been concerned with the non-proliferation of nuclear weapons on this Earth. This is undeniably a peaceful purpose, aimed at prohibiting and preventing use of the most powerful and dangerous weapons capable of mass destruction. The aim of doing so is to prevent widespread damage and suffering; an intention which adheres to TWAIL’s ‘peaceful’ purpose.

The New Zealand and Australian ICJ cases against France aimed to condemn the nuclear testing that was being conducted by France in the South Pacific.²⁶⁸ The ultimate aim was to prevent any further testing from happening.²⁶⁹ Similarly, the WHO’s unsuccessful request for an advisory opinion by the ICJ specifically referred to interests of health and

²⁶⁷ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom) (Preliminary Objections)* [2016] 5 ICJ Pleadings 1 at 11.

²⁶⁸ MacKay, above n 57, at 1863.

²⁶⁹ At 1863.

the environment, with the hope of outlawing nuclear weapons.²⁷⁰ These anti-war efforts were concerned with ensuring the safety and well being of the Earth's citizens. Also, while the UNGA request for an advisory opinion on the legality of the use or threat of nuclear weapons may have been communicated in more neutral terms, its readiness to have the ICJ answer their request with an outlawing of nuclear weapons suggests the strive towards nuclear disarmament.²⁷¹ Finally the Marshall Islands claim that the world's nuclear weapons states had breached obligations of good faith towards nuclear disarmament and their corresponding pursuit of a declaration of this suggests a greater striving towards the condemning of use of nuclear weapons.²⁷² Accordingly while these cases all greatly differ, they can all be viewed as active efforts towards nuclear disarmament, an inherently peaceful purpose. Therefore this aforementioned analysis determines that these cases are those of a peaceful purpose, thereby meeting the proposed TWAIL approach's consideration.

4 *Scale*

The proposed TWAIL approach asks whether the scale of inquiry into these ICJ cases follows what the approach requires. For these ICJ cases to meet this requirement they therefore must be of a scale that is all encompassing of relevant considerations. Therefore these cases must have considered international law in a range of places, starting with the small ranging up to larger structural places. The inquiry surrounding these cases must have considered all relevant considerations on such a scale for it to meet what the proposed TWAIL approach asks of it.

This inquiry raises the question of what law the ICJ applies, what it considers in its cases and advisory opinions, and whether this is sufficient in meeting the idea of being an all-encompassing scale. To begin, courts, and in particular international courts, tend to examine international law on a large scale. The ICJ applies law according to Article 38 of the Statute of the International Court of Justice. Article 38 states that:²⁷³

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

²⁷⁰ Hippler Bello and Bekker, above n 71, at 135.

²⁷¹ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)*, above n 75, at 228.

²⁷² International Court of Justice "The Republic of the Marshall Islands files Applications against nine States for their alleged failure to fulfil their obligations with respect to the cessation of the nuclear arms race at an early date and to nuclear disarmament", above n 1, at 2.

²⁷³ Statute of the International Court of Justice, art 38.

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Further, in relation to contentious cases, Article 34 of the Statute expresses that “only states may be the parties in cases before the Court”.²⁷⁴ In respect of advisory opinions, Article 65 of the Statute states that bodies authorised by or in accordance with the Charter of the United Nations to make a request may do so for an advisory opinion on any legal question.²⁷⁵ Accordingly Article 96 of the Charter of the United Nations states that the General Assembly, Security Council and other organs of the United Nations and specialised agencies that may at any time be so authorised by the General Assembly, may request such.²⁷⁶ The General Assembly and Security Council may make requests on any legal question whereas the other organs and agencies are limited to legal questions arising within the scope of their activities.²⁷⁷

This illustrates that the ICJ is limited to considering issues from within a strict international context. While this is appropriate for its purpose as an international court of law, this does not bode well with the proposed TWAIL approach’s consideration of being of an all-encompassing scale. As illustrated with the nuclear weapons cases studied in this paper, the Court’s analysis is focused on large-scale ideas of international law and fails to address small-scale ideas of international law. Due to the jurisdictional limits that exist, the Court cannot conduct inquiries of an all-encompassing scale. Therefore, according to the proposed TWAIL approach the ICJ’s judgments do not, and cannot, meet this consideration put forward by the proposed TWAIL approach.

5 Evaluating the application of the proposed TWAIL approach

²⁷⁴ Article 34.

²⁷⁵ Article 65.

²⁷⁶ Charter of the United Nations, art 96.

²⁷⁷ Article 96.

This part of the paper has applied the proposed TWAIL approach to legitimacy in international law to the nuclear weapons cases that have come before the ICJ. From this application, the extent to which these cases have and have not met the considerations proposed by this TWAIL approach can be concluded. Overall, it is likely that only one of the considerations from the proposed TWAIL approach has been met clearly with these cases. These cases clearly meet the proposed TWAIL approach's purpose consideration, as these cases all concern nuclear non-proliferation, an inherently peaceful purpose. Aside from this consideration there is overwhelmingly a lack of adherence to the remaining proposed considerations.

None of the nuclear weapons cases directly concerned third world persons as their subjects and met their needs. While there was potential to do so in the New Zealand, Australian and Marshall Islands cases, the ICJ's dismissal of these cases prevented this. While there was clear citizen participation in all these cases, suggesting that the objects of these cases adhered to the proposed approach, it must be noted that this citizen participation in all cases but the Marshall Islands cases did not involve third world people's involvement. Therefore this undermines the extent to which these cases adhere to this consideration. Further, the scale of inquiry conducted by the ICJ is inherently limited to larger elements of international law, suggesting the scale is not all encompassing. These factors reflect the aspects of these cases that failed to meet the considerations put forward in this proposed TWAIL approach.

Through the lens of the proposed TWAIL approach to legitimacy in international law, these cases lack overall adherence to the approach's considerations. Therefore this proposed TWAIL approach would conclude that these cases, as far as the approach is concerned, do not meet the requirements of legitimacy.

V Conclusion

Any discussion about nuclear weapons tends to be fraught with controversy and complexity. This is especially true for the nuclear weapons discussions that have taken place at the ICJ through the nuclear weapons cases. This paper has discussed the concept of legitimacy as applied to the ICJ, using the context of nuclear weapons. Answering whether or not these cases are legitimate may aid in stripping away some of the controversy and complexity that exists with these cases. However, as current mainstream conceptualisations of legitimacy fail to take into account a wide range of considerations,

this paper has further analysed this issue through the lens of the Third World Approaches to International Law (TWAIL).

This paper has attempted to construct a TWAIL approach to legitimacy in international law, arguing that this complementary approach to current approaches provides a more encompassing assessment of legitimacy. Key requirements according to TWAIL scholarship have been put forward. These requirements include specific subjects, objects, purposes and scales of inquiry to be present within these ICJ cases in order for them to be legitimate. This exercise has found that the nuclear weapons cases that have come before the ICJ largely do not uphold the considerations put forward. While in part this has to do with the limits in which the ICJ must operate, this also reflects the actions taken by state parties as litigants and the international legal system as a whole.

Accordingly this paper concludes that as these cases do not illustrate adherence to a TWAIL approach to legitimacy, a number of questions arise as to the legitimacy of the Court in coming to such judgments and opinions. This paper has further argued that in order for the ICJ to conduct, according to the proposed approach, legitimate assessments of international law, inclusion of the proposed considerations is required.

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 14,929 words.

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