

BANGLADESH'S EXERCISE OF UNILATERAL WITHDRAWAL FROM CUSTOMARY INTERNATIONAL LAW: IMPLICATIONS OF THE DEFAULT VIEW FOR THE THIRD WORLD COUNTRIES

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ABSTRACT

The status of International law in the legal system of Bangladesh has been unclear and subject to confusion. Even the constitutional provisions dealing with various aspects of international law have not been able to properly solve the confusion regarding the status of international law in Bangladesh. However, the prevailing jurisprudence dictates that in the absence of any domestic law, Customary International Law (CIL) becomes part of the law of the land. Consequently, the Appellate Division of Bangladesh in the *Government of Bangladesh v. Abdul Quader Molla*, adopted a Default view of the CIL, based on a theoretical model proposed by Professor Curtis Bradley and Professor Mitu Gulati, which asserts that states have the right to unilaterally withdraw from CIL. The article explores the adoption of the Default view of Bradley & Gulati by the Appellate Division and explores whether it undermines the status of CIL or it can pave the way for third-world countries to escape from the standards set by Western states to bind former colonies and new states. The research will be a doctrinal one, relying on the existing literature on the default view of CIL and decisions of the court in Bangladesh, regarding the right to unilaterally withdraw from CIL. The study reveals that the adoption of the default view by the Appellate Division is based on an incorrect understanding of both CIL and the default view itself. However, the default view and the example of the *Government of Bangladesh v. Abdul Quader Molla* provide an avenue for third-world countries to end the hegemony of the 'powerful Western countries' in international law.

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1. INTRODUCTION

The application of international law in domestic courts has always been a complex issue. State sovereignty and different views of international law have impeded such enforcement. However, when the situation was called for, even the courts in dualist countries had to deal with issues of international law. The story is not different in Bangladesh. However, in Bangladesh, the status of international law has been confusing. This, in large part, is because the constitutional provisions regarding various aspects of international law are unclear about the matter. Unless warranted, the courts have tried to tactfully avoid any issues that are related to international law. However, the decision of the Appellate Division of Bangladesh in the *Government of Bangladesh v. Abdul Quader Molla*¹ has been paradigm-altering. Although the judgment does not have any hints that the court was trying to shift the prevailing understanding regarding international law or customary international law (CIL) in particular, the decision could be the beginning of a change. The decision, which supports the unilateral withdrawal from CIL, going against the traditional view, could very well be followed in third world countries in the future. To understand the implications and importance of this decision, it is necessary to engage the Third World Approaches to International Law (TWAIL) view of international law, which seeks to change the oppressive aspects of international law,² in the discussion.

2. THE MODERN OR MANDATORY VIEW OF CUSTOMARY INTERNATIONAL LAW

The existing view of CIL, which is usually taught in law schools, dictates that CIL is the international obligation that results from the general and consistent practice of states. This general and consistent practice of the states must come from a sense of legal obligation. In order to establish a particular rule as CIL it is thus necessary to, firstly, establish an objective

¹ *Government of Bangladesh v. Abdul Quader Molla*, CRIMINAL APPEAL NOS.24-25 OF 2013, Appellate Division, Supreme Court of Bangladesh.

² Makau Mutua, 'What is TWAIL?' (2000) Proceedings of the 94th Annual Meeting of the American Society of International Law 31, 38.

state-practice, and secondly, a subjective sense of legal obligation or *opinio juris*.³

Although scholars in general agree with this definition of CIL, as regards the element of state practice, there is no clear consensus as to how much state practice is necessary in order to establish a CIL. But the general understanding is that the practice must be “extensive” or “widespread” practice among the states.⁴ There is again no consensus as to the time, through which the practice must prevail in order to become a CIL. Although historically it has been a slow process, there could even be instant custom. Again, establishing the other element, i.e., the legal obligation behind such practice is also difficult to ascertain. The states may not reveal the true reason behind a particular practice or not furnish any justification at all.

This traditional view of CIL has been referred to as the “Mandatory View of CIL” by Bradley & Gulati.⁵ This view dictates that once a rule of CIL has been formed, it is binding on all states. But, the modern view does provide for an ‘escape hatch.’ States that persistently objected to the rule before the time of its formation can opt out of it. Once the rule has been established as CIL, the states must abide by it and cannot withdraw from it unilaterally. So, to escape from an obligation arising from a CIL, the state must object to it during the period of its emergence.⁶ After a country comes into existence, it will automatically become bound by an established rule of CIL and cannot unilaterally withdraw from a rule of CIL.

³ Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom* (2010) 120 *The Yale Law Journal* 202, 209; *Libya/Malta Continental Shelf case*, ICJ Reports, 1985, pp. 13, 29; 81 ILR, p. 239.

⁴ See, *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada / United States of America)*, ICJ Reports (1984) 246, at 229, para. 111; *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 102 cmt. b (1987).

⁵ Bradley & Gulati (n3), 205.

⁶ See for e.g. the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 38, 130; 41 ILR, pp. 29, 67, 137, Jonathan Charney, ‘The Persistent Objector Rule and the Development of Customary International Law’ (1985) 56 *British Yearbook of International Law* 1.

3. DEFAULT VIEW ACCORDING TO BRADLEY & GULATI

Professor Bradley and Professor Gulati have referred to the modern view of CIL as “canonical”⁷ but argued that this was not the case always.⁸ They presented a different view of CIL, which was supported by the prominent publicists of international law in the 18th and the 19th century.⁹ This view accommodates the concept of unilateral withdrawal from the rules of CIL at least at times.¹⁰ In contrast to the modern view, the default view states that the rules of CIL are only binding on a state as long as it does not declare that it no longer intends to continue adhering to the rule, i.e. the view supports the right of unilateral exclusion.¹¹ Bradley & Gulati have drawn an analogy of between treaties and custom, questioning why it should be easier to exit from treaties than from CIL.¹²

Bradley & Gulati does not contend that the default view is the proper view of CIL or that the default view should replace the modern view. Rather their argument is that the modern view is not the exclusive view of CIL and an alternative view that supports the right of states to exit from the obligations of a CIL rule exists.¹³ Support for this contention can be found in the writings of Emmerich de Vattel, an international lawyer, who stated that states are bound to observe the rules of CIL towards one another, “*so long as they have not expressly declared their unwillingness to follow it any longer*”.¹⁴ The same idea has been shared by other prominent publicist of international law such as Jean-Jacques Burlamaqui, Cornelius Bynkershoek, and Georg von Martens, etc. and enumerated in many other treatises of international law.¹⁵ A procedural requirement of notice prior to

⁷ Bradley & Gulati (n3), 205.

⁸ *ibid*, at 215.

⁹ *ibid*.

¹⁰ *ibid*.

¹¹ *ibid*, at 216.

¹² *ibid*, at 205.

¹³ *ibid*.

¹⁴ Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns* (Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758) (emphasis added) intro., § 26, at 9 (photo, reprint 1993).

¹⁵ See, e.g., J.J. Burlamaqui, *The Principles of Natural Law in which the True Systems of Morality and Civil Government are Established* (Nugent trans., Dublin, John Rice

withdrawal from a rule was attached with this right.¹⁶ Bradley & Gulati did, however, conceive that the right to unilateral withdrawal from the rules of CIL does not extend over jus cogens norm.¹⁷ Vattel also contended that the right to unilateral withdrawal cannot be exercised over “voluntary laws of nations,” which according to him was the protection of “perfect rights of the nations” – which included rights of security and governance.¹⁸ Therefore, under the default view, not all rules of CIL can be subjected to unilateral withdrawal.

Besides, this view also received some support in the courts of the US, notably in *Ware v. Hylton*, where it was stated that customary law of nations is “founded on tacit consent and is only obligatory on those nations, who have adopted it”;¹⁹ *Schooner Exchange v. McFaddon*,²⁰ where the court stated that withdrawal from custom cannot be sudden and without prior notice; *Brown v. United States*,²¹ where it was argued that the legislature could take the decision to opt-out from a custom, etc. Therefore, it can be seen that the default view received some support in the treatises of European writers and the judicial precedents of the US Supreme Court.

4. DEFAULT VIEW ACCORDING TO BANGLADESH V. ABDUL QUADER MOLLA

The Appellate Division of the Supreme Court of Bangladesh had the opportunity to deliberate on the nature of CIL in the case of the *Government of Bangladesh v. Abdul Quader Molla*. The case was an appeal made by the government against the sentence passed by the

1791) (1718) 199; Cornelius Van Bynkershoek, *De Foro Legatorum Liber Singularis: A Monograph on the Jurisdiction Over Ambassadors in Both Civil and Criminal Cases* (photo. reprint 1995) (Gordon J. Laing trans., William S. Hein & Co. 1946) (1744) ch. XIX, at 106-07; G.F. Von Martens, *A Compendium of the Law of Nations, Founded on the Treaties and Customs of the Modern Nations of Europe* (William Cobbett trans., London, Cobbett & Morgan 1802) (1788) 356.

¹⁶ Bradley & Gulati (n3), 218.

¹⁷ *ibid*, at 213.

¹⁸ Emmerich de Vattel (n14), intro., § 17, at 7, § 22, at 8 §§ 24-26, at 8-9.

¹⁹ 3 U.S. (3 Dall.) 199, 227 (1796).

²⁰ 11 U.S. (7 Cranch) 116, 137, 141, 147 (1812).

²¹ 12 U.S. (8 Cranch) 110, 128-129 (1814).

International Crimes Tribunal. Abdul Quader Molla was sentenced to life imprisonment for committing crimes against humanity during the Liberation War of 1971. The government sought an enhancement of the sentence to the Supreme Court, which acted as the appeals chamber of the Tribunal.

One of the issues of contention before the Court was the applicability of CIL in this trial. The International Crimes (Tribunals) Act, 1973 provided for the prosecution of crimes like genocide, crimes against humanity, war crimes, etc. in the act. However, the elements of the crimes were not listed in the act, especially in case of crimes against humanity. The question before the Appellate Division was whether the rules of CIL would be applied to determine the elements of crimes against humanity in the absence of a proper definition in the act. The application of CIL was accepted in the Tribunal by the prosecution, but Attorney General argued against this position in the Appellate Division.²² According to the Appellate Division the rules of CIL were based on 'tacit consent' and bound 'only those Nations which have adopted it'.²³ The Appellate Division cited both Vattel and Bradley & Gulati, and stated that 'customary international law rules were binding only on nations that continued to accept them'.²⁴ It observed that international law cannot bind states without their consent and therefore, CIL can only bind a state if the particular state accepts the rule as a binding obligation.²⁵ As a result, the Appellate Division through its refusal to apply the elements of crimes against humanity as per CIL, exercised the right to withdraw unilaterally from CIL.

Although, the Appellate Division applied the default view, its version of the default view is not similar to that of Bradley & Gulati. Bradley & Gulati's understanding of the default view does not permit the right to unilaterally withdraw from the rules of CIL in all instances. Even Vattel's understanding of CIL was similar. One such instance where the right to unilaterally withdraw cannot be exercised is in the case of jus cogens norms. Bradley & Gulati states that such norms stand on a higher footing than the rest of CIL.²⁶ However, the judgment of the Appellate Division

²² Abdul Quader Molla (n1), 537.

²³ *ibid*, at 109.

²⁴ *ibid*.

²⁵ *ibid*, at 111.

²⁶ Bradley & Gulati (n3), 213.

did not seem to indicate that the right to unilaterally withdraw from CIL can have any exceptions. In fact, crimes against humanity are considered as *jus cogens* offences,²⁷ - a notion which was even supported by the Appellate Division.²⁸ But, the refusal to apply the elements of crimes against humanity, which can be identified as a part of *jus cogens* norm, can be interpreted as a rejection to grant any special status to the *jus cogens* norms. Therefore, the Appellate Division's version of the default view provides for a right to unilaterally withdraw from all norms of CIL.

The difference does not lie only in the fact that the default view of Bangladesh is absolute and provides for no exceptions, but also in how the Appellate Division looked into CIL. Bradley & Gulati never proposed that the default view should replace the mandatory view but rather wanted to start the discussion as to whether the default view was more appropriate for some categories of CIL.²⁹ But the judgment of Appellate Division somehow portrays the default view as the only prevailing explanation of the CIL. The existence of the Mandatory View, which is the prominent view of CIL has completely been overlooked. The preference of the default view over the mandatory could be justified, but ignoring the existence of the traditional view of CIL is shocking.

Since the Appellate Division has ignored the mandatory view and presented the default view as the only existing view, it did not resort to the reasoning that the mandatory view has been imposed by the powerful Western states on the third world country, a reasoning that was put forward by Bradley & Gulati. The judgment did mention that Bangladesh has a strong legal system as it can hold the trial of perpetrators of crimes against humanity without the help of any international tribunal.³⁰ This in no way means that the court rejected the Mandatory view due to its hegemony. However, the judgment does mention that laws for the civilized community must rest upon its common consent and not because it was prescribed by any superior power.³¹

²⁷ See, for example M.C. Bassiouni, "International Crimes: *Jus cogens* and obligation *erga omnes*" (1996) 59 *Law and Contemporary Problems* 63-74.

²⁸ Abdul Quader Molla (n1), 112-113.

²⁹ Bradley & Gulati (n3), 275.

³⁰ Abdul Quader Molla (n1), 90.

³¹ *ibid*, at 91.

As such, the decision of the Appellate Division was based on the premise that CIL is based on consent.³² Obviously, this contradicts the traditional, mandatory view understanding of CIL. Furthermore, the default view of Bradley & Gulati did not question CIL on the basis of consent, but rather was of the opinion that since CIL requires no negotiation and a domestic act of ratification to be binding, states should be provided with greater flexibility to withdraw from rules of CIL than from treaties.³³ Although the consequence of both the version of the default view is the right to unilaterally withdraw from the rules of CIL, the version of Appellate Division ignores the origin, development, purpose and reality of both CIL in general and the default view in specific. Preference for the default view, through ignoring the entire existence of the mandatory one, and also ignoring the true purpose of the view is incorrect.

5. CRITICISMS OF THE DEFAULT VIEW

Although the Appellate Division has quoted Bradley & Gulati only on one occasion in their entire judgment,³⁴ it is quite evident that the judgment heavily relied on their proposition. A reason behind such may be that the model proposed by Bradley & Gulati has been subject to severe criticism.³⁵

Firstly, the analogy between treaties and CIL has been held as incorrect. According to Anthea Roberts, treaties commonly permit the option to withdraw as custom is present in the absence of treaties to protect key interests.³⁶ Customs have been likened to a safety net.³⁷ As a result, if states start to exercise right to unilaterally withdraw from CIL, there are possibilities that no legal regime or obligation exist for a particular conduct. As customs are created through collective state practice, rather

³² *ibid*, at 90, 91.

³³ Bradley & Gulati (n3), 204.

³⁴ Abdul Quader Molla (n1), 109.

³⁵ Ehasn A. Siddiq, 'Bangladesh Withdraws from Customary International Law: The Practical Implications of Trifling with Custom' (2014) 7 *Journal of Politics and Law* 164.

³⁶ Anthea Roberts, 'Who Killed Article 38(1)(B)? A Reply to Bradley & Gulati' (2010) 21 *Duke Journal of Comparative & International Law* 173, 176.

³⁷ *ibid*.

than individual consent, the analogy is not proper.³⁸ Anthea Roberts prefers to draw the analogy between customs and criminal law, since there is no unilateral withdrawal from criminal law and works as mandatory public regulation.³⁹ Another stronger analogy according to her is between social contract theory, which is based on theoretical consent of the governed.⁴⁰ Similar to this, the states consent collectively to generally bind themselves through the rules of CIL, for the common purpose of creating an orderly and just international community.⁴¹

Secondly, the historical records and the cases shown by Bradley & Gulati illustrate very limited acceptance of the default view. Bradley & Gulati have in a subsequent article admitted that the historical analysis of the existence of the default view was based on a “small portion of secondary literature” and was thus, “tentative in nature”.⁴² Before Bangladesh, there has been no instance of the exercise of the right to unilaterally withdraw from CIL in the modern times. The early sources also show that the view was applied to a relatively small and unimportant set of rules.⁴³ Bradley & Gulati’s model was not meant to be applied to all rules of CIL. They have identified *jus cogens* norms, norms whose withdrawal would impose costs on other states, human rights norms, some principles such as *pacta sunt servanda*, etc, as exceptions.⁴⁴ Vattel had his own sets of rules, that were outside the scope of withdrawal⁴⁵ and probably many other writers may come with their own sets of rules, which they believe to be immune from withdrawal for some reasonable cause. As such, the exceptions to the rule may even grasp the whole right. Anthea Roberts states that it is unclear whether one should start to presume withdrawal as a permitted right with exceptions or through the treaties analogy, assume that withdrawal is not

³⁸ *ibid*, at 178.

³⁹ *ibid*.

⁴⁰ *ibid*.

⁴¹ *ibid*, at 178-179.

⁴² Curtis A. Bradley & Mitu Gulati, ‘Mandatory versus default rules: How can customary international law be improved?’ (2011) 120 Yale Law Journal 421, 438.

⁴³ William S. Dodge, “Withdrawing from Customary International Law: Some Lessons from History” (2010) 120 Yale Law Journal 169, 171.

⁴⁴ Bradley & Gulati (n3), 263-68, 273-74.

⁴⁵ Emmerich de Vattel (n14), intro., § 17, at 7, § 22, at 8 §§ 24-26, at 8-9.

permitted unless some criteria are fulfilled.⁴⁶ Besides, the procedural requirement of giving notice regarding withdrawal also exists.⁴⁷ However, the Appellate Division's model do not provide for any exceptions, which in a way may provide for an escape route from the criticisms. But not giving primacy to the jus cogens norms will not be acceptable to the scholars of international law. The absolute right to withdraw from CIL would provide a doorway for countries to escape from human rights obligations and other obligations related to genocide, crimes against humanity, war crimes, prohibition on use of force, etc., which might lead towards rampant human rights violations and growing conflicts among nations.

Thirdly, apart from the fact that the American cases that have supported the default view, have done so in a very limited or restrictive manner, there are other early decisions that reject this view.⁴⁸

Lastly, the right to withdraw unilaterally is expected to diminish the force of CIL.⁴⁹ The rules of CIL are not made by a single country, but by many nations, as a part of the international community. However, through the right to withdraw unilaterally, individual states will get the opportunity to escape from the obligations created by the international community as a collection. As such, it is feared that it would facilitate opportunistic and abusive claims from different states.⁵⁰

6. LOOKING INTO THE DEFAULT VIEW THROUGH TWAIL

Third World Approaches to International Law (TWAIL) is a school of international law and an intellectual movement that highlight the colonial legacy inherent in the history and development of international law.⁵¹ According to this school, international law is a tool to continue the

⁴⁶ Anthea Roberts (n36), 179.

⁴⁷ Bradley & Gulati (n3), 216.

⁴⁸ William S. Dodge (n43), 178, 179.

⁴⁹ *ibid*, at 191.

⁵⁰ Anthea Roberts (n36), 174.

⁵¹ B.S. Chimni, 'Third World Approaches to International Law: Manifesto' (2006) 8 *International Community Law Review* 3, 3 & 7.

exploitation of the third world countries.⁵² Third world, in this context represents those countries which share a common history of colonialism.⁵³ It is one of the goals of this movement to identify the colonial foundations of international law⁵⁴ and create opportunities for the third world countries to participate in international law.⁵⁵ The advocates of the TWAIL movement, over the years have critiqued and challenged the western narrations of international law and the motives behind such narrations.⁵⁶

There is a particular reason that the concept and thinking of TWAIL is being connected with this debate between the default view and the mandatory view. Bradley & Gulati suggested that the mandatory view “*may have evolved as part of an effort to bind new nations and former colonies to international law rules that had already been worked out by a handful of powerful states*”.⁵⁷ However, William S. Dodge rejected the notion and stated that the rules of CIL were only binding on nations that were part of the community.⁵⁸ According to him, writers like Hall, Westlake, Oppenheim, etc. have stated that “Western rulers did not bind non-Western nations without their consent”.⁵⁹ He further gave example of US Supreme Court cases like *The Scotia* and *The Paquete Habana*, where the Court has looked into the practices of non-western countries like Turkey, Morocco and Japan to find a rule of CIL binding on US.⁶⁰

Dodge is not wrong per se, but the development and evolution of CIL is to an unusual extent linked with the interests of the Western states. CIL has historically been the facilitator of the global capitalist system, as it filled the gaps in the international legal system, through either short-term

⁵² J. T. Gathii, ‘TWAIL: A Brief History of its Origins, its Decentralized Network and a Tentative Bibliography’ (2011) 3 Trade, Law and Development 26, 26, 34 & 38.

⁵³ Makau Mutua (n2), 35.

⁵⁴ Makau Mutua (n2) 38.

⁵⁵ K. Mickelson, ‘Taking Stock of TWAIL Histories’ (2008) 10 International Community Law Review 355, 357.

⁵⁶ A. F. M. Maniruzzaman, ‘Foreword’ in *Bangladesh and International Law*, eds. Mohammad Shahabuddin (Routledge 2021) XI-XII.

⁵⁷ Bradley & Gulati (n3), 206.

⁵⁸ William S. Dodge (n43), 186.

⁵⁹ *ibid.*

⁶⁰ *ibid.*, at 185, 186.

interests or systematic interests of nations that relied on the capitalist system.⁶¹ The origin of CIL is intertwined with the emergence of Europe as a legal community, the common values of the European community, and the needs of 19th century imperialism.⁶²

To begin with, the requirement of state practice as evidence for CIL has been disadvantageous for third world nations. The practice of systematic assembly and publishing of practices is not popular in third world nations, due to a lack of human and financial resources.⁶³ Even in instances, where such documentation is available, language becomes a barrier.⁶⁴ The practice of documentation and preparation of digests of state practices is largely a western practice and thus, favors them. When the question of application of CIL in international tribunals arise, the judges are biased towards the practices of states with available documents in a language understood by them, towards powerful western states,⁶⁵ and also influenced by the background of the judges.⁶⁶ Again, the state practices are weighed in such a manner that the significance of practices of non-western states is reduced.⁶⁷ For example, International Law Association's (ILA) Final Report of Commission on Formation of Customary (General) International Law states that:

“.....customary systems are rarely completely democratic: the more important participants play a particularly significant role in the process”.⁶⁸

⁶¹ B.S. Chimni, 'Customary International Law: A Third World Perspective' (2018) 112 American Journal of International Law 1, 4.

⁶² *ibid*, at 20.

⁶³ Michael Byers, *Custom Power and the Power of Rules* (Cambridge University Press, 1999) 153.

⁶⁴ Chimni (n61), 21.

⁶⁵ A.T. Guzman, 'Saving Customary International Law' (2005) 27 MICH. J. INT'L L. 115, 127.

⁶⁶ *ibid*.

⁶⁷ George Rodrigo Bandeira Galindo & Cesar Yip, 'Customary International Law and the Third World: Do Not Step on the Grass' (2017) 16 Chinese Journal of International Law 251, 262-63

⁶⁸ International Law Association, London Conference, Final Report of Commission on Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law (2000) 26.

This observation shows that during the formulation of CIL, the criteria of power plays a more decisive role compared to procedural legitimacy.⁶⁹ J. Patrick Kelly went on to observe that there is an unspoken assumption in international law that the practices of the US and the UK have preeminent weight and the practices of non-Western cultures are not taken seriously.⁷⁰ Besides, it is the opinion of the Western writers, whose opinion dominated the process of the creation of CIL.⁷¹

Scholars have emphasized that customs should be distinguished from treaties as they are developed by collective actions and impose mandatory obligations to protect common community interests.⁷² But, in reality, the great body of international customary law has been developed by a few states,⁷³ to serve their interests. Rather than states collectively consenting to form rules to create an orderly and just international community, it is more like a monarchy of Western states that reeks of domination, inequality and privilege. Thus, it begs the question as to why non-western countries should remain loyal to a system of international law that is detrimental to their interests.

Some may point towards the irony that the only known application of the Default view in the courts, before the article of Bradley & Gulati, was in the US, a Western state. As some writers have argued even the Mandatory view was applied by the US courts during that time, it goes on to show that the courts of the US have favored those views, practices, and theories of international law that served their national interests. While many scholars are concerned by how the default view might lead to non-compliance with international law for their unilateral claims, it must be remembered that Western states have changed the rules of international law through their unilateral claims. For example, the United States became one of the first states to unilaterally claim the rights regarding its continental shelf in

⁶⁹ Chimni (n61), 23.

⁷⁰ J. Patrick Kelly, 'The Twilight of Customary International Law' (2000) 40 VA. J. Int'L L 449, 473.

⁷¹ Yasuaki Onuma, *A Transcivilizational Perspective on International Law* (BRILL, 2010) 135.

⁷² Anthea Roberts (n36), 178.

⁷³ Oscar Schachter, New Custom : Power, Opinio Juris and Contrary Practice, in *Theories of International Law at the Threshold of the 21st Century: Essays in Honor of Krzysztof Skubiszewski* (Jerzy Makarczyk ed., 1996) 531, 536.

1945.⁷⁴ This led to similar claims by other states and gradual codification of regime of continental shelf in the 1958 Convention on the Continental Shelf.⁷⁵ Similarly, Iceland claimed jurisdiction over waters beyond their territorial sea for exclusive seaward fishing jurisdiction.⁷⁶ It received qualified support by the International Court of Justice in the Fisheries Jurisdiction Cases⁷⁷ and gradually led to deviations in the customary rules, which were later codified in the 1982 United Nations Convention on the Law of the Sea.⁷⁸ However, the claims of the People's Republic of China (and Taiwan) in the South China Sea, regarding the Nine-dash line did not prompt change in customary rules, although the claim is as old as the claim of the US and Iceland.⁷⁹ Besides, the instances of Western countries violating international law to enforce 'an obligation it is owed', reform international law or on moral grounds are many. For example, the US's invasion of Iraq,⁸⁰ NATO's military intervention in Yugoslavia during the Kosovo War which is a formal violation of international law,⁸¹ the US withholding contributions to the United Nations in order to reform which is a violation of its obligations as a member state,⁸² etc.

⁷⁴ See Policy of the United States with Respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf, Proclamation No. 2667, 10 Fed. Reg. 12, 303 (September 28, 1945) (Truman Proclamation).

⁷⁵ See Convention on the Continental Shelf, April 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311.

⁷⁶ See, e.g., Resolution of the Althing on Fisheries Jurisdiction, February 15, 1972, 11 I.L.M. 643 (Iceland).

⁷⁷ Fisheries Jurisdiction (U.K. v Iceland), 1974 I.C.J. 3 (July 25); Fisheries Jurisdiction (F.R.G. v. Iceland), 1974 I.C.J. 175 (July 25).

⁷⁸ See United Nations Convention on the Law of the Sea, 1833 U.N.T.S. 397 (entered into force November 16, 1994).

⁷⁹ See Wu Shicun, *Solving Disputes for Regional Cooperation and Development in the South China Sea: A Chinese perspective* (Chandos Publishing, UK 2013) 4-5, 15-39, 47-55.

⁸⁰ See, e.g., Sean D. Murphy, 'Assessing the Legality of Invading Iraq' (2004) 92 GEO. L.J. 173, 177.

⁸¹ See, e.g., Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 EUR. J. INT'L L. 1.

⁸² See generally Contemporary Practice of the United States Relating to International Law: Agreement on UN Financial and Structural Reforms, 95 AM. J. INT'L L. 387, 389 (Sean D. Murphy ed., 2001); Contemporary Practice of the United States

Some might point towards the rule of persistent objector, which allows the states to escape from the obligations of CIL. The rule dictates that a state that objected to a rule of CIL during the process of its formation, the rule will not be opposable to the state as long as it maintains its objection.⁸³ Such objection should be made known to other states and maintained persistently.⁸⁴ However, this rule hardly benefits the third world countries and in fact, displays how CIL benefits the interest of the powerful nations. The rule was developed to protect the Western capitalist concerns after the Cold War started.⁸⁵ The third world countries hardly can benefit from this rule as they usually do not diligently follow the claims about the emergence of new rules in CIL⁸⁶ and the rule does not permit escaping from the obligations of the prior rules of CIL.

Therefore, it remains to be seen as to why third world countries should prefer the Mandatory view of the CIL, which binds them to such rules of CIL, which they have played no role in its creation, do not serve their interests or meet their aspirations, and are based on Western understanding of what's good for the international community (or rather what is good for them). The Default view lets these countries uphold their interests to some extent. The criticisms of the Default view are without any doubt genuine. However, introducing the TWAIL aspect this debate makes a strong case for preferring the default view instead of the mandatory view.

7. REPERCUSSIONS OF THE DEFAULT VIEW OF BANGLADESH

According to Bradley & Gulati, they did not intend to challenge the legitimacy of CIL, but wanted to better understand it and that the article

Relating to International Law: Payment of US. Arrears to the United Nations, 94 AM. J. INT'L L. 348 (Sean D. Murphy ed., 2000).

⁸³ 'Identification of Customary International Law: Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee', International Law Commission, Sixty- seventh session, Geneva, 4 May–5 June and 6 July–7 August 2015, UN Doc. A/CN.4/L.869.

⁸⁴ *ibid.*

⁸⁵ Chimni (n61), 24.

⁸⁶ George Rodrigo Bandeira Galindo & Cesar Yip (n67), 268.

was written for scholars and students of international law.⁸⁷ But as Anthea Roberts stated, it is not possible for academics to define and delimit their audience.⁸⁸ This is most aptly proved by the fact that Bangladesh has probably become the first country to exercise the right to unilaterally withdraw from CIL.

Western scholars have been in fear of what the Appellate Division has done in *Bangladesh v. Abdul Quader Molla* for a long time, i.e., adopted its understanding of CIL.⁸⁹ The concern was centered on the proposition that such action would result in the undermining of the role of CIL in the international system and constrain the actions of powerful, western nations.⁹⁰ Some scholars, are thus of the opinion that domestic courts should restrictively apply CIL.⁹¹ In fact, an ILC report states that the revival of interest in formulation in CIL is to some extent inspired by the attempts of the domestic courts to engage with the issue.⁹²

The judgment of *Bangladesh v. Abdul Quader Molla* provides an example for the third world countries to unilaterally withdraw from CIL. A criticism of the default view that there has been no application of this view in modern times is not true anymore. Although there has been no instance of application of this view in international tribunals or international relations, Bangladesh has initiated its journey in domestic courts. While the reasoning behind the decision might stem from a faulty understanding of CIL and the default view, the example could be used by third world countries with open arms. Since CIL is directly applied in the domestic courts of many countries, the third world countries could be motivated to follow the default view as it would prevent the Western standards of CIL from dictating their domestic matters.

While some countries may not wish to be addressed as “third world countries” anymore, it cannot be ignored that they are still being “haunted

⁸⁷ Bradley & Gulati (n3), 275.

⁸⁸ Anthea Roberts (n36), 184.

⁸⁹ Chimni (n61), 9.

⁹⁰ *ibid*, at 9, 10.

⁹¹ See Curtis A. Bradley, Jack L. Goldsmith and David H. Moore, ‘Sosa, Customary International Law, and the Continuing Relevance of Erie’ (2007) 120 *Harvard Law Review*, 869.

⁹² See International Law Commission, Report on the Work of Its Sixty-Third Session, Annex A, para 2, UN Doc A/66/10 (2011).

by the threat of recolonization”.⁹³ The continued trend of underdevelopment, marginalization and insubordination is what makes the term “third world” still relevant.

The right to withdraw unilaterally may weaken the force of CIL if applied in international relations, but its application in domestic courts might not have such consequences. Increased application in the domestic courts may risk its use in international relations and international tribunals, but this may force a change in how CIL is perceived and formulated. It might prompt scholars to think of a better way to formulate CIL, which represents the consent of the whole international community. Besides, unstable democracy and governance in many third world countries, also creates a genuine concern regarding just application of the right to withdraw unilaterally. While international law faces danger of misuse of right of withdrawal from weaker democracies of the third world, even in its absence, the western countries have assaulted the (west-influenced) principles of international law.

8. ALTERNATIVES TO THE DEFAULT VIEW

The default view presents an alternative avenue for third world countries to change the narrative. Though the application of the default view in the domestic courts should be encouraged, its application in international relations may erode the effectiveness of CIL and international law as a whole. However, a change in the international system is necessary – a change that serves the interests of the third world countries as well.

One suggestion to address the insufficiency of the mandatory view has been proposed by Professor Guzman, is to extend the rule of persistent objector to allow subsequent opting out from the rules of CIL.⁹⁴ According to Professor Guzman, the logic that makes the doctrine of persistent objector sensible for states that object at the time a rule is formed will also make sense for states that object later.⁹⁵ This proposal corrects a major defect of the current system of CIL, where states have to be bound by a rule of CIL that they were not even aware was in the process of

⁹³ B.S. Chimni (n51), 3.

⁹⁴ A.T. Guzman (n65), 169.

⁹⁵ *ibid*, at 170.

formulation.⁹⁶ But, Guzman also adds that the right should be limited to the first time that a state has an interest in a rule of CIL.⁹⁷ Bradley & Gulati deems this proposal as incomplete as it will not allow any subsequent opt-out afterward.⁹⁸

Another suggestion to bring about changes in CIL is the notion of ‘universal juridical conscience’, put forth by Judge Antônio Augusto Cançado Trindade. The concept came up in the dissenting opinion of Judge Trindade in *Marshall Islands v. India* case.⁹⁹ In his dissenting opinion, Judge Trindade opined that Article VI of the Nuclear Non-proliferation Treaty, 1968, which provides for disarmament obligations under international control, has the status of CIL. The reasoning was that the juridical conscience of mankind or opinion juris communis is the “ultimate material source of international law”.¹⁰⁰ As such, the survival of humankind could not be dependent on the interests of the states with nuclear weapons.¹⁰¹ Judge Trindade traced this notion to historical interpretations:

“.....already in the XIXth century, the so-called “historical school” of legal thinking and jurisprudence (of F. K. von Savigny and G. F. Puchta) in reaction to the voluntarist conception, gradually discarded the “will” of the States by shifting attention to opinion juris, requiring practice to be an authentic expression of the “juridical conscience” of nations and peoples”.¹⁰²

Judge Trindade’s concept speaks of the interests of the international community as a whole that would lead toward the universalization of international law.¹⁰³ This understanding of Judge Trindade might lead to a reconceptualization of CIL. Identifying the juridical conscience of humankind will not be easy. Judge Trindade has hinted that some UN

⁹⁶ Bradley & Gulati (n3), 253.

⁹⁷ A.T. Guzman (n65), 170

⁹⁸ Bradley & Gulati (n3), 253.

⁹⁹ See *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms and to Nuclear Disarmament (Marshall Islands v India)*, (Judgment of 5 October 2016), Dissenting Opinion of Judge Cançado Trindade.

¹⁰⁰ *ibid*, at para 119.

¹⁰¹ *ibid*, at para 303.

¹⁰² *ibid*.

¹⁰³ *ibid*, at para 305.

General Assembly Resolutions have contracted “a much wider dimension than the subjective element of custom” in regards to the threat of nuclear weapons.¹⁰⁴ Although the concept proposes a path to ensure that CIL represents the interest of humankind instead of the interests of few states, it does not give any solution to decolonize the notions of CIL that already exists.

Perhaps it is for the third world countries to force changes in the CIL through their active participation in different forums and vocal opposition of neo-colonialism perpetuated through CIL in particular and international law in general.

9. CONCLUSION

While the thought of applying the default view to decolonize CIL would repel many scholars, such an extreme measure has been brought forth by the hegemony of the powerful nations. The default view might be undesirable, but its use in a narrow sense, i.e., in the domestic courts might force scholars and states to think of new ways to formulate CIL, that serve the interest of third world countries. As long as the concerns of third world countries are not addressed, the idea of an international community in a true sense will remain a dream. The observations of Appellate Division in *Bangladesh v. Abdul Quader Molla* might not reflect an acceptable authority on the applicability of CIL in Bangladesh¹⁰⁵ and may be criticized by both the supporters of the mandatory view and the default view alike. But it has shown the third world countries a way to approach international law, through their lens.

¹⁰⁴ *ibid*, at para 328.

¹⁰⁵ Kamal Hossain and Sharif Bhuiyan, ‘Bangladesh’ in *The Oxford Handbook of International Law in Asia and the Pacific*, eds. Simon Chesterman, Hisashi Owada, and Ben Saul (Oxford University Press, 2009) 616.