

INDIA AND A CUSTOMARY COMPREHENSIVE NUCLEAR TEST-BAN: PERSISTENT OBJECTION, PEREMPTORY NORMS AND THE 123 AGREEMENT

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ABSTRACT

This article considers the possible customary international law status of a comprehensive ban on nuclear weapons testing and the implications of any such customary norm for India. A number of writers have argued that a comprehensive test-ban now exists in custom, or, in other words, that the key norm of the 1996 Comprehensive Nuclear-Test-Ban Treaty (CTBT), found in Article I, has been codified into, or perhaps reflected already existing, customary international law. If this is the case, then India would be legally bound to refrain from any future nuclear testing, irrespective of the fact that India is not a Party to the CTBT or the fact that the treaty is not yet in force. However, it is here argued that even if a customary rule prohibiting all forms of nuclear weapons testing has emerged, India must be viewed as a “persistent objector” and, thus, is exempt from that prohibition. Having said this, one author has recently claimed that the test-ban may have taken on the status of a peremptory norm of general international law. Most writers would argue that persistent objection is not permitted in relation to such rules of *jus cogens*. It is argued here, however, that it is difficult to view the comprehensive prohibition on nuclear testing as being peremptory. As such, India’s persistent objector status has been maintained, both *de jure* and *de facto*. Finally, the implications of the recent 2008 Indo-US 123 Agreement are examined. It has been claimed by some scholars

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that this has eroded India's persistent objector stance and that India may have "contracted away" its right to test under the 123 Agreement. Legally, this view is incorrect. Nonetheless, the political implications of the Indo-US deal mean that it is likely to have significantly reduced the chances of a future Indian test *de facto*.

I. INTRODUCTION

India has, with rather few exceptions, consistently maintained an isolationist policy with regard to international law's nuclear regime.¹ Perhaps most notably, it has always been and remains a non-signatory to the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT).² Obviously, it follows from this that India is not, and has never been, bound by that treaty.³ The NPT is often said to represent the "cornerstone" of international law's system of non-proliferation,⁴ but it is the cornerstone of a building that India has never entered.

¹ See generally Subsection III(B).

² Treaty on the Non-Proliferation of Nuclear Weapons 1968, entered into force 1970, *United Nations Treaty Series*, vol. 729, p. 161.

³ On the basis of the rule that treaties do not directly bind non-Parties. See Vienna Convention on the Law of Treaties 1969, entered into force 1980, *United Nations Treaty Series*, vol. 1155, p. 331, Article 34 (providing that "[a] treaty does not create either obligations or rights for a third State without its consent.").

⁴ See, e.g., D. H. Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (2009), p. 8; J. Simpson, "The Future of the NPT," in N. E. Busch and D. H. Joyner (eds.), *Combating Weapons of Mass Destruction: The Future of International Nonproliferation Policy* (2009), pp. 45-73 at p. 46; W. P. Nagan and E. K. Slemmens, "National Security Policy and Ratification of the Comprehensive Test Ban Treaty," *Houston Journal of International Law*, vol. 32 (2009-2010), pp. 1-96 at p. 40; "Fact Sheet: Nuclear Non-Proliferation Treaty," *United States Department of State Dispatch*, vol. 2 (1991), p. 12.

Following India's 1998 Pokhran-II nuclear tests and its subsequent explicit self-declaration of nuclear weaponisation,⁵ the focus of nuclear policy for many States with regard to India moved away from the NPT regime *per se*. Instead of pursuing the now patent fantasy of India joining the NPT as a non-nuclear weapon State (NNWS),⁶ Western policy towards the "Indian nuclear weapons question" has been based on an arguably more realistic goal: Indian acceptance of a comprehensive prohibition on nuclear testing.⁷

Yet as with the NPT, India is a non-signatory to the 1996 Comprehensive Nuclear-Test-Ban Treaty (CTBT).⁸ The CTBT is widely signed and ratified, but it

⁵ See "Statements from India and Pakistan," *BBC News*, 16 June 1998, <http://news.bbc.co.uk/1/hi/events/asia_nuclear_crisis/world_media/114139.stm>.

⁶ Under the NPT, a "nuclear weapon State" (NWS) "is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967." NPT, note 2, Article IX(3). This group is comprised of the permanent members of the United Nations Security Council: the United States, the United Kingdom, the Russian Federation (formerly the Soviet Union), France and China. The NWS are contrasted with the NNWS, which comprise all other nations of the world. India, then, is technically defined as a NNWS under the NPT, albeit that it is one with *de facto* nuclear power status. See K. M. Wable, "The US-India Strategic Nuclear Partnership: A Debilitating Blow to the Non-Proliferation Regime," *Brooklyn Journal of International Law*, vol. 33 (2007-2008), pp. 719-759 at p. 730.

⁷ See S. Gahlaut, "South Asia and the Nonproliferation Regime," in Busch and Joyner (eds.), note 4, pp. 222-244 at p. 234; K. Frey, *India's Nuclear Bomb and National Security* (2006), p. 153.

⁸ Comprehensive Nuclear-Test-Ban Treaty 1996, U.N. Doc. A/50/1027. For an authoritative account of the historical development, political underpinnings and legal implications of a comprehensive prohibition on nuclear weapons testing, see D. A. Koplow, *Testing a Nuclear Test Ban: What Should be Prohibited by a "Comprehensive" Treaty?* (1996), which was published during the same year as – though, in fact, just prior to – the adoption of the CTBT by the United Nations General Assembly in 1996.

has not yet entered into force.⁹ Nonetheless, it has been convincingly argued – on the basis of Article 18 of the 1969 Vienna Convention on the Law of Treaties (VCLT)¹⁰ – that the States that have signed (and especially those that have also ratified) the treaty are bound by its obligation of non-testing in spite of the treaty not yet being in force.¹¹ This requirement is supplemented in the case of many CTBT Parties by other regional or partial treaty obligations not to test.¹² In addition, most *non-signatory* CTBT States are otherwise conventionally bound not to conduct nuclear tests in all (or virtually all) instances.¹³

In stark contrast, India – along with Pakistan and the Democratic People’s Republic of Korea (DPRK) – is not only a non-signatory to the CTBT but is also

⁹ As of July 2011, 182 States had signed the CTBT and 154 States have ratified it. However, the CTBT will only enter into force following ratification by all States listed in Annex 2 of the Treaty (see CTBT, note 8, Article XIV). The current status of the CTBT can be found at: <<http://www.ctbto.org/the-treaty/status-of-signature-and-ratification/>>.

¹⁰ Article 18 provides that “[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when [. . .] it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.” VCLT, note 3.

¹¹ This is on the basis that signatory States have an obligation not to do anything that would “defeat the object and purpose” of the CTBT (according to Article 18 of the VCLT), and that conducting any such test would be a violation of this obligation. See M. Asada, “CTBT: Legal Questions Arising from its Non-Entry-into-Force,” *Journal of Conflict and Security Law*, vol. 7 (2002), pp. 85-122 at pp. 94-103 and pp. 121-122; D. S. Jonas, “The Comprehensive Nuclear Test Ban Treaty: Current Legal Status in the United States and the Implications of a Nuclear Test Explosion,” *New York University Journal of International Law and Politics*, vol. 39 (2007), pp. 1007-1046 at pp. 1029-1040; L. Tabassi, “The Nuclear Test Ban: *Lex Lata* or *de Lege Ferenda*?”, *Journal of Conflict and Security Law*, vol. 14 (2009), pp. 309-352 at pp. 313-321.

¹² See Tabassi, note 11.

¹³ See *ibid.*, pp. 321-322.

largely exempt from other treaty-based test-ban obligations.¹⁴ As such, based on conventional international law at least, India has retained a “sovereign right” to test nuclear weapons,¹⁵ so long as such tests comply with the requirements of the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (PTBT), to which India is a Party.¹⁶ The PTBT, of course, requires Parties to refrain from conducting nuclear tests in the atmosphere, underwater or in any other instance where this causes transboundary nuclear debris.¹⁷ Ultimately, though, India is under no conventional obligation to refrain from nuclear testing within its territory and with localised effects, such as underground nuclear testing.

India’s 1998 nuclear tests were conducted underground (as were Pakistan’s tests of the same year) and, thus, were not contrary to the PTBT. As India is under no other conventional obligation to refrain from underground testing, Pokhran-II was not in breach of conventional international law, at least not *prima facie*. However, it is notable that a large number of States condemned the tests in 1998, as did United Nations (UN) Security Council Resolution 1172¹⁸ and UN General Assembly Resolution 53/77.¹⁹ This widespread condemnation suggests that India was viewed as being in breach of an international legal norm, in spite of the fact that no such norm could be found in treaty law.

¹⁴ See *ibid.*

¹⁵ P. R. Chari “Introduction,” in P. R. Chari (ed.), *Indo-US Nuclear Deal: Seeking Synergy in Bilateralism* (2009), pp. 1-17 at p. 11.

¹⁶ Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water 1963, entered into force 1963, *United Nations Treaty Series*, vol. 480, p. 43.

¹⁷ See *ibid.*, Article I.

¹⁸ Security Council Resolution 1172 (1998), U.N. Doc. S/RES/1172.

¹⁹ General Assembly Resolution 53/77 (1998), Section G(1), U.N. Doc. A/RES/53/77.

This discrepancy has been explained by a number of writers on the basis that a comprehensive nuclear test-ban exists under *customary international law*.²⁰ In other words, it has been claimed that the provisions of the CTBT – in particular Article I, which sets out the comprehensive nuclear test-ban – has been adopted into, or reflected already existing, customary international law. As a general matter, of course, rules of custom bind all States *prima facie*.²¹ If a comprehensive test-ban has developed in custom, then, depending on when that norm crystallised, this would mean that India's Pokhran-II tests breached international law (as, indeed, would any further Indian tests).²²

However, the possible exception to customary international law's universally binding force is the so-called "persistent objector rule." This rule provides that "a State which persistently objects to a rule of customary international law during the formative stages of that rule will not be bound by it when it comes into existence."²³

²⁰ See, e.g., G. Guthrie, "Nuclear Testing Rocks the Sub-Continent: Can International Law Halt the Impending Nuclear Conflict Between India and Pakistan," *Hastings International and Comparative Law Review*, vol. 23 (1999-2000), pp. 495-526 at pp. 508-518; Tabassi, note 11, pp. 309-352; G. Bunn, "Nuclear Tests Violate International Norm," *Arms Control Today*, vol. 28 (1998), <http://www.armscontrol.org/act/1998_05/bnmy98>; P. Hulsroj, "Jus Cogens and Disarmament," *Indian Journal of International Law*, vol. 46 (2006), pp. 1-11 at pp. 8-10; Wable, note 6, p. 738 and p. 755 (though this is only implicit in Wable's analysis).

²¹ See, e.g., J. P. Kelly, "The Twilight of Customary International Law," *Virginia Journal of International Law*, vol. 40 (1999-2000), pp. 449-543 at p. 451.

²² See Bunn, note 20 (arguing that the 1998 Indian and Pakistani nuclear tests violated a customary international law norm prohibiting nuclear testing).

²³ O. Elias, "Persistent Objector," *Max Planck Encyclopaedia of Public International Law* (2009), <<http://www.mpepil.com>>, para. 1.

States are thus, at least in theory, not bound by new customary rules to which they have persistently objected.

India certainly fits the model of a persistent objector State in relation to any alleged customary comprehensive nuclear test-ban. Its sustained practice in rejecting the very nature of international law's nuclear non-proliferation regime, its refusal to sign (and explicit rejection of) the CTBT and its status as one of the few States that is in possession of and has tested nuclear weapons would all indicate what has been termed "persistent resistance" on the part of India.²⁴ It could, therefore, be argued that – even if a customary test-ban exists – India should be viewed as a persistent objector and, thus, as being exempt from the norm in question.²⁵

To complicate this picture still further, however, India's apparent persistent objector status can be questioned for two reasons. First, the persistent objector rule is usually viewed as being inapplicable in relation to peremptory norms of general international law (*jus cogens*).²⁶ It was recently argued by one writer, for example, that the comprehensive test-ban falls within this group of norms and that, consequently, even States that have persistently objected to the prohibition remain bound by it.²⁷ Secondly, it has been suggested that under the 2008 Agreement for Cooperation Between the Government of the United States of America and the

²⁴ A. J. Paulus and J. Müller, "Survival Through Law: Is There a Law Against Nuclear Proliferation?", *Finnish Yearbook of International Law*, vol. 18 (2007), pp. 83-135 at p. 118.

²⁵ See A. Packer, "Nuclear Proliferation in South Asia," *Columbia Journal of Transnational Law*, vol. 38 (2000), pp. 631-668 at p. 651.

²⁶ *Jus cogens* norms may be broadly defined as "fundamental legal norms from which no derogation is permitted." H. Charlesworth and C. Chinkin, "The Gender of *Jus Cogens*," *Human Rights Quarterly*, vol. 15 (1993), pp. 63-76 at p. 63.

²⁷ See Tabassi, note 11, pp. 347-350.

Government of India Concerning Peaceful Uses of Nuclear Energy (123 Agreement),²⁸ India has contracted away any previous right that it may have had to test.²⁹ The 123 Agreement is a bilateral treaty between India and the United States, which was announced in 2005 and finally adopted in 2008. Its purpose is “to enable

²⁸ Agreement for Cooperation Between the Government of the United States of America and the Government of India Concerning Peaceful Uses of Nuclear Energy, 10 Oct. 2008, <http://responsiblenucleartrade.com/keydocuments/india_123_agreement_text.pdf>. This deal is commonly referred to as a “123 Agreement” after Section 123 of the 1954 United States Atomic Energy Act (AEA), *Public Law* 83-703, 68 Statute 919, which provides, *inter alia*, that before the United States can cooperate over nuclear materials with any other State, an agreement must be signed setting out the “terms, conditions, duration, nature and scope of the cooperation.” The United States has made over twenty such bilateral “123” agreements, most recently with the United Arab Emirates in December 2009. See US-UAE Agreement for Peaceful Civilian Nuclear Energy Cooperation 2009, <<http://www.uae-embassy.org/media/press-releases/17-Dec-2009>>.

²⁹ See R. Kazi, “The Process of Negotiation of the Nuclear Deal/123 Agreement (India),” in Chari (ed.), note 15, pp. 76-98 at p. 93; B. B. Singh, “The Hyde Act 2006: India’s Nuclear Dilemma,” *Atoms for Peace: An International Journal*, vol. 1 (2007), pp. 307-319 at p. 316; S. Erkel, *India’s Nuclear Policy: With Special Reference to the India-US Nuclear Deal* (2008), p. 13; V. K. Thakur, “Indian ICBM: A Flawed Deterrent,” (2005), <<http://kuku.sawf.org/Articles/2367.aspx>>; V. K. Thakur, “Did India Sell Itself Short?,” (2005), <<http://kuku.sawf.org/Articles/1818.aspx>>; H. Nakanishi, “Rethinking the U.S.-India Civilian Nuclear Cooperation Agreement: A Possibility of Trade-Offs Between India’s Right to a Nuclear Test and Nuclear Cooperation,” draft paper, presented at the third “123 Agreement Project” workshop hosted by the Indian Society of International Law, New Delhi, 3 Apr. 2011 (on file with author, cited with permission), in general, but particularly at p. 1, p. 15 and p. 21; P. K. Kerr, “U.S. Nuclear Cooperation with India: Issues for Congress,” *Congressional Research Service*, Report for Congress, Order Code RL33016 (2008), p. 14, <<http://fpc.state.gov/documents/organization/112037.pdf>> (noting, but not necessarily subscribing to, this viewpoint).

full civil nuclear energy cooperation” between the United States and India.³⁰ The deal has been viewed by many writers as a revocation by India of its previous policy of nuclear isolationism.³¹ Indeed, India itself has cast it in these terms.³² The 123 Agreement certainly brings India in from the nuclear wilderness to an extent. It has, therefore, been interpreted by some as a weakening – or perhaps even as a *revocation* – of India’s persistent objector status with regard to nuclear weapons testing.³³

To summarise, it has been argued by some writers that: 1) India is *prima facie* bound by a customary comprehensive prohibition on the testing of nuclear weapons; 2) that any possible persistent objection to this obligation by India has been overridden by the fact that the norm in question is of a peremptory character; and 3) that, in any event, India has now accepted an international legal prohibition on all forms of nuclear weapons testing through the adoption of the 123 Agreement.

The aim of this article is to analyse and critique these arguments. Section II examines the extent to which the obligation under Article I of the CTBT, which prohibits all forms of nuclear weapons testing, may also be viewed as a rule of customary international law. A brief overview of the persistent objector rule as it is commonly understood is provided in Section III, which then goes on to assess

³⁰ 123 Agreement, note 28, Article 2.

³¹ See, e.g., M. E. Carranza, *South Asian Security and International Nuclear Order: Creating a Robust Indo-Pakistani Nuclear Arms Control Regime* (2009), p. 2 and p. 44 (viewing the 123 Agreement as India’s “admission to the nuclear club”); Wable, note 6, pp. 720-721.

³² See Chari, note 15, p. 14.

³³ An interpretation that is noted, but not necessarily subscribed to, in R. A. Cossa and B. Glosserman, “Regional Overview: Inaction for Inaction, With Unhelpful Reactions,” *Comparative Connections: East Asian Bilateral Relations*, vol. 10 (2008), pp. 1-14 at p. 7, <<http://csis.org/files/media/csis/pubs/0803q.pdf>>.

whether India may correctly be seen as a persistent objector to the alleged customary prohibition on nuclear testing. Section IV considers whether persistent objection is, in fact, impermissible in relation to norms of *jus cogens*, as is often claimed, and then questions whether the comprehensive test-ban is peremptory. It is further considered whether, *de facto*, the condemnation of India's 1998 tests indicates that its apparent persistent objector status was "overruled," irrespective of the peremptory status of the norm *de jure*. Finally, Section V considers the implications of the 123 Agreement in relation to India's right to test: does the Agreement require India to refrain from nuclear weapons testing, either in law or in fact?

Ultimately, this article argues that India has maintained persistent objector status with regard to a customary comprehensive test-ban (to the extent that this prohibition may be viewed as a customary obligation at all). The test-ban is certainly not a *jus cogens* norm and, in any event, it is clear that India successfully maintained its persistent objector stance *de facto* following the 1998 tests. Moreover, the 123 Agreement does not require India to refrain from testing either, at least not *de jure*.

II. THE CUSTOMARY STATUS OF THE COMPREHENSIVE NUCLEAR TEST-BAN

This Section considers whether a comprehensive prohibition on nuclear testing may have achieved customary status in international law. If so, this would make the obligation binding on India, at least *prima facie*. A number of writers have argued that a customary comprehensive nuclear test-ban norm has emerged.³⁴ In other words, it has been claimed that Article I of the CTBT has been codified into, or perhaps reflects already existing, customary international law. Article I of the CTBT provides:

³⁴ See writers referred to in note 20.

- 1) Each State Party undertakes not to carry out any nuclear weapon test explosion or any other nuclear explosion, and to prohibit and prevent any such nuclear explosion at any place under its jurisdiction or control.
- 2) Each State Party undertakes, furthermore, to refrain from causing, encouraging, or in any way participating in the carrying out of any nuclear weapon test explosion or any other nuclear explosion.

It is certainly possible for rules of customary international law to stem initially from obligations found in multilateral treaties and to become binding on non-Parties³⁵ and, more commonly, for treaties to codify existing custom.³⁶ In either instance, however, the *customary* status of any given rule ultimately turns on whether said rule has been sufficiently practiced and whether States have accepted the rule as being customary international law (the *opinio juris* element),³⁷ as is the case for any customary rule.³⁸

³⁵ For example, Article 38 of the VCLT, note 3, holds that a treaty can become “binding upon a third State as a customary rule of international law, recognized as such.” This position has also been adopted more than once by the International Court of Justice (ICJ), most notably in the *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands)*, ICJ Reports (1969), pp. 3-56, particularly at pp. 37-45. See also R. S. Clark, “Treaty and Custom,” in L. Boisson de Chazournes and P. Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999), pp. 171-180 at pp. 172-176.

³⁶ On codification in international law, see A. Boyle and C. Chinkin, *The Making of International Law* (2007), pp. 161-209. More specifically in relation to codification treaties, see A. Aust, *Modern Treaty Law and Practice* (2d ed., 2007), p. 11. On the parallel nature of obligations that are binding in both conventional and customary international law, see *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports (1984), pp. 392-443 at pp. 424-425.

³⁷ See R. Cryer, “Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study,” *Journal of Conflict and Security Law*, vol. 11 (2006), pp. 239-263 at p. 244.

The most obvious evidence of State practice in support of the customary status of the prohibition on testing is the CTBT itself. As of July 2011, 182 States had signed the CTBT and 154 of those States had also ratified it.³⁹ This demonstrates notable State practice in favour of the comprehensive test-ban. Indeed, “[t]he significance of that statistic deserves emphasis: 150 [now 154] national parliaments have scrutinised the treaty, considered national security interests juxtaposed against all other factors and concluded by approving ratification.”⁴⁰

The CTBT is also relevant with regard to the *opinio juris* requirement. As the International Criminal Tribunal for the former Yugoslavia has held, treaty ratification can be viewed as an authoritative expression of *opinio juris*.⁴¹ On this basis the widespread support for the CTBT is suggestive of customary law formation (potentially representing both State practice and *opinio juris* elements).⁴² Having said this, inferring *opinio juris* from the signature or ratification of a treaty is problematic because State adherence to obligations contained in a treaty may simply be because

³⁸ These two elements – State practice and *opinio juris* – form the basis of all customary international law formation. For a detailed examination, see M. Akehurst, “Custom as a Source of International Law,” *British Yearbook of International Law*, vol. 47 (1974-1975), pp. 1-53.

³⁹ See note 9.

⁴⁰ Tabassi, note 11, p. 333.

⁴¹ This point is made by Tabassi, *ibid.* See *Prosecutor v. Blagoje Simic, Milan Simic, Miroslav Tadic, Stevan Todorovic and Simo Zaric*, Case No. IT-95-9-PT, Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness (Order Releasing *ex parte* Confidential Decision of the Trial Chamber (1999). On the potential for inferring State practice, *opinio juris*, or both State practice and *opinio juris* from treaty signature or ratification, see also M. Byers, *Custom, Power and the Power of Rules* (1999), pp. 167-172; Cryer, note 37, p. 244.

⁴² See Tabassi, note 11, p. 333.

the treaty-based obligations are already binding on States Parties. This is something that would seem to be particularly the case when the treaty at issue is one that has a substantial membership, such as the CTBT (even in spite of the fact that the CTBT is not yet in force).⁴³ Thus, treaty signature or ratification alone is perhaps not entirely sufficient in terms of identifying *opinio juris* supporting the emergence of a customary rule.

More than simply inferring *opinio juris* from the signature or ratification of the CTBT, then, it is important to note the explicit statements of *opinio juris* that were made during the development of the treaty. These indicate that at least some States felt that the core obligation not to test (contained in Article I of the CTBT) was also emerging in custom. For example, Norwegian Prime Minister Gro Harlem Brundtland stated in 1996 that:

Thanks to the United Nations, the norm of non-testing has been galvanized. It is today part and parcel of international law. In the future, no country, whether it has signed that treaty or not, will be able to break that norm. That can no longer be done with impunity.⁴⁴

⁴³ See the dissenting opinion of Judge Sir Robert Jennings attached to the Merits decision in the *Nicaragua* case, as to the customary status of the prohibition of the use of force deriving from Article 2(4) of the Charter of the United Nations 1945, *United Nations Treaty Series*, vol. 1, p. 16: “there are obvious difficulties about extracting even a scintilla of relevant ‘practice’ [. . .] from the behaviour of those few States which are not parties to the Charter; and the behaviour of all the rest, and the *opinio juris* which it might otherwise evidence, is surely explained by their being bound by the Charter itself.” *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports (1986), pp. 528-46 at p. 531 (Judge Jennings, dissenting). See also Byers, note 41, pp. 170-172; Cryer, note 37, p. 244; A. A. D’Amato, “Trashing Customary International Law,” *American Journal of International Law*, vol. 81 (1987), pp. 101-105.

⁴⁴ U.N. Doc. A/51/PV.5 (1996), p. 8.

However, viewing the CTBT and its negotiations as the basis for a customary international law prohibition is problematic for a number of reasons. First, the treaty is not yet in force. Of course, this fact alone is not determinative. It is entirely possible that States could have accepted – through practice and *opinio juris* – norms contained within the CTBT as being binding in custom without the treaty itself being in force, especially as there is an extremely restrictive process for entry into force built-in to the CTBT.⁴⁵ Having said this, the fact that the CTBT is not yet in force is perhaps indicative of a lack of acceptance by the wider international community of the norms contained within the treaty and may, thus, evidence a lack of sufficient *opinio juris*.

Secondly, the CTBT is a relatively recent treaty, which was opened for signature in 1996. It does not have the longevity of, say, the NPT. This might suggest that sufficient time has yet to pass for any resulting customary norm to materialise. Yet the length of time required for custom to develop is not fixed but, rather, is context specific and relative to the other criteria for the formation of customary law.⁴⁶ Indeed, much shorter periods of time have arguably sufficed in

⁴⁵ See CTBT, note 8, Article XIV. See Asada, note 11, p. 86.

⁴⁶ See, for example, *North Sea Continental Shelf Cases*, note 35, p. 43, where the ICJ stated that, “[a]lthough the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice [. . .] should have been both extensive and virtually uniform.” See generally, Byers, note 41, pp. 160-161.

certain instances.⁴⁷ This temporal issue does not, therefore, rule out the existence of a customary norm flowing from the CTBT.

Another critique of the claim that the CTBT has created binding custom, in spite of the fact that a significant majority of States have signed it, is that it is not merely the “usual suspects” of the NPT non-Parties that have failed to ratify the treaty. Indeed, more notably, a number of the NPT nuclear weapon States (NWS) – the very States in a position to be able to conduct such tests – have rejected the CTBT. Take, for example, the United States, which, while having signed the treaty in 1996, has since failed to ratify it. Indeed, particularly under the (George W.) Bush administration, the United States adopted a policy strongly opposed to the CTBT.⁴⁸

⁴⁷ For a discussion of the possibility of “instant” customary international law, see the much quoted B. Cheng, “United Nations Resolutions on Outer Space: ‘Instant’ International Customary Law?”, *Indian Journal of International Law*, vol. 5 (1965), pp. 23-48. It is worth noting, however, that some scholars have been sceptical about this concept. See, e.g., A. A. D’Amato, *The Concept of Custom in International Law* (1971), p. 50.

⁴⁸ See Jonas, note 11, p. 1028; D. H. Joyner, *Interpreting the Nuclear Non-Proliferation Treaty* (2011), p. 40. It is notable that the Obama administration is much more supportive of the CTBT, with President Barack Obama having stated in April 2009 that his administration would “immediately and aggressively pursue U.S. ratification of the Comprehensive Test Ban Treaty.” Remarks by President Barack Obama, Hradcany Square, Prague, Czech Republic, 5 Apr. 2009, <http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered>. Indeed, the Obama administration has taken steps to urge other States to sign and ratify the CTBT. Nonetheless, the United States has still not ratified the treaty, largely due to internal political divisions on the issue. See D. Dombey and H. Morris, “UN backs Obama on Nuclear Controls,” *Financial Times*, 24 Sept. 2009, <<http://www.ft.com/cms/s/0/e9cd02b2-a914-11de-9b7f-00144feabdc0.html#axzz1JJhMhcnH>>.

All of the above has led Le Mon to conclude:

Given that the CTBT is such a recent document, and unfortunately has yet to even enter into force [. . .] its provisions cannot be considered to have developed into customary international law. Moreover, given that states specifically concerned with nuclear weapons testing have failed to ratify the treaty, they must lack the *opinio juris* that they are prohibited from such testing, thus eliminating the argument that the CTBT codified existing customary international law.⁴⁹

It is argued here that while none of the issues raised conclusively demonstrate that no customary test-ban has formed based on the CTBT as Le Mon concludes, cumulatively they do appear to undermine, at least to an extent, a finding of such a customary prohibition based on the widespread acceptance of the CTBT alone.

There are, however, other factors that would support the customary status of a comprehensive prohibition on nuclear testing. First, the widespread signing of, ratification of, and statements in support of the CTBT must be viewed in light of the more tangible fact that only three States (India, Pakistan and the DPRK) have tested nuclear weapons since 1996, and only one of these (the DPRK) has done so since 1998. The vast majority of States – including the majority of nuclear powers – have refrained from conducting nuclear tests since the adoption of the CTBT by the General Assembly in 1996.⁵⁰

Indeed, this pervasive stance of abstinence from all forms of nuclear testing has often been made explicit. For example, President George H. W. Bush announced a United States moratorium on testing in 1992,⁵¹ which has since been reaffirmed by

⁴⁹ C. Le Mon, “Did North Korea’s Nuclear Test Violate International Law?”, *Opinio Juris*, 9 Oct. 2006, <<http://opiniojuris.org/2006/10/09/did-north-koreas-nuclear-test-violate-international-law>>. See also Packer, note 25, pp. 650-651; Asada, note 11 pp. 92-94.

⁵⁰ Tabassi refers to this as the “continuing respect” for the ban on testing. Tabassi, note 11, p. 334.

⁵¹ See R. Cornwell, “Bush Signs Nuclear Test Moratorium,” *The Independent*, 3 Oct. 1992, <<http://www.independent.co.uk/news/world/bush-signs-nuclear-test-moratorium-1555090.html>>.

subsequent administrations and remains in place. The 1992 moratorium announcement contained a similar commitment from the United Kingdom.⁵² The Russian Federation, too, explicitly declared a moratorium on nuclear testing in 1990.⁵³ It has consistently maintained this position since and has not tested nuclear weapons since the breakup of the Soviet Union. Similarly, following its final nuclear tests in January 1996, French President Jacques Chirac announced that France would no longer test nuclear weapons,⁵⁴ thus reinstating France's previous moratorium on all forms of testing.⁵⁵

This State practice shows a widespread and general abstention from nuclear testing. With regard to the fact that three States *have* tested since then, it should be noted that *universal* practice is certainly not required for customary international law formation.⁵⁶ Moreover, as will be discussed in Section III, India, Pakistan and the DPRK can perhaps be considered as persistent objector States in any event.

⁵² See *ibid.*

⁵³ See J. Richelson, "U.S. Intelligence on Russian Nuclear Testing Activities," *Nuclear Files*, George Washington University (2000), <<http://www.nuclearfiles.org/menu/key-issues/nuclear-weapons/issues/testing/russian-testing-intelligence.htm>>.

⁵⁴ See J. Medalia, "Nuclear Weapons: Comprehensive Test Ban Treaty," *Congressional Research Service*, Report for Congress, Order Code IB92099, (2002), p. 5, <<http://fpc.state.gov/documents/organization/9071.pdf>>.

⁵⁵ In 1992, President François Mitterrand announced a moratorium on all forms of nuclear testing. See *ibid.*, p. 2. However, this was abandoned in 1995 with the eight French tests conducted at Mururoa Atoll in the South Pacific. See *ibid.*, p. 5.

⁵⁶ As the ICJ noted in 1986: "It is not to be expected that in the practice of States the application of rules in question should be perfect [. . .] The Court does not consider that, for the rule to be established,

Additionally, one could highlight the international community's reaction to the instances of nuclear testing in 1998 (India and Pakistan) and in 2006 and 2009 (DPRK). Numerous States condemned the 1998 tests by both India and Pakistan.⁵⁷ Indeed, the five NPT NWS issued a joint communiqué to this effect.⁵⁸ In 1998, for example, the United States – now India's new partner in nuclear trade under the 123 Agreement – led a widespread sanctions campaign against India and Indian entities following the Pokhran-II tests.⁵⁹ These sanctions were generally unquestioned by other States.⁶⁰ Overall, a significant number of States implied through their reactions in 1998 that both India and Pakistan had violated a developed legal norm prohibiting nuclear testing. Equally, in condemning the Indian and Pakistani tests, it is notable that States did not explicitly refer to a "breach of customary international law" as such.⁶¹

What is therefore perhaps more telling is that both the UN Security Council and the UN General Assembly passed resolutions condemning the Indian and Pakistani tests. The Security Council adopted Resolution 1172 in June 1998, which, *inter alia*, demanded "that India and Pakistan refrain from further nuclear tests" but also went on to call upon "all States not to carry out any nuclear weapon test

the corresponding practice must be in absolute rigorous conformity with the rule." *Nicaragua*, note 43, p. 98.

⁵⁷ See, e.g., "World Concern at Nuclear Tests," *BBC News*, 1 June 1998, <http://news.bbc.co.uk/1/hi/events/asia_nuclear_crisis/archive/92844.stm>.

⁵⁸ See U.N. Doc. S/1998/473 (1998).

⁵⁹ Over 200 Indian entities were targeted by American sanctions. See Gahlaut, note 7, p. 235; Wable, note 6, p. 755.

⁶⁰ See Frey, note 7, pp. 155-156.

⁶¹ See Asada, note 11, p. 93.

explosion or any other nuclear explosion in accordance with the provisions of the Comprehensive Nuclear Test Ban Treaty.”⁶² For its part, the General Assembly “strongly deplored” the tests in Resolution 53/77.⁶³ Security Council Resolution 1172 and General Assembly Resolution 53/77 – beyond their own direct legal implications – are also suggestive of *opinio juris* supporting an emerging customary prohibition.⁶⁴ It is particularly notable that Security Council Resolution 1172 did not merely stop at demanding that India and Pakistan refrain from testing but also stressed a wider prohibition applicable to all States.

The case for the continued development of a customary test-ban is further supported by the reactions to the nuclear tests conducted by the DPRK in 2006 and 2009, which were far more severe than had been the case in 1998. The Security Council adopted Resolutions 1718⁶⁵ and 1874⁶⁶ with respect to these two tests, explicitly under Chapter VII of the UN Charter. The resolutions condemned the tests and, *inter alia*, obliged the DPRK to refrain from any further testing in the strongest possible terms.⁶⁷ Irrespective of any customary comprehensive nuclear test-ban, these resolutions are obviously directly binding on the DPRK by virtue of the simple fact that they are Security Council resolutions adopted under Chapter VII.⁶⁸ In addition,

⁶² Security Council Resolution 1172 (1998), U.N. Doc. S/RES/1172, para. 3.

⁶³ General Assembly Resolution 53/77 (1998), Section G(1), U.N. Doc. A/RES/53/77.

⁶⁴ As the ICJ stated in *Nicaragua*, note 43, pp. 99-100, “*opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude [. . .] of States towards [UN] resolutions.”

⁶⁵ Security Council Resolution 1718 (2006), U.N. Doc. S/RES/1718.

⁶⁶ Security Council Resolution 1874 (2009), U.N. Doc. S/RES/1874.

⁶⁷ See, particularly, operative paragraph 2 of both Security Council Resolutions 1718 and 1874.

⁶⁸ On the binding nature of Security Council Resolutions, see the UN Charter, note 43, Article 25; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West*

though, they represent further indications of the international community's perception of nuclear testing as an inherently unlawful activity. Indeed, all of the UN resolutions discussed in this Section can be interpreted as adding the cumulative fuel of *opinio juris* to the customary test-ban fire.

It can equally be argued, however, that – if a customary prohibition on testing really had emerged – such resolutions would have been wholly unnecessary. Thus, the very existence of these resolutions shows precisely that no customary rule has developed.⁶⁹ This latter argument, while valid to an extent, ignores a common practice in international law in cases in which an established rule is perceived as weak or is proving ineffective: the established rule is often reinforced through the creation of additional, complementary rules.⁷⁰ One may well argue that it is valuable in and of

Africa) *Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)*, ICJ Reports (1971), pp. 16-66, particularly pp. 52-54; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)*, ICJ (2010), para. 85, <<http://www.icj-cij.org/docket/files/141/15987.pdf>>; R. Higgins, “The Advisory Opinion on Namibia: Which UN Resolutions are Binding Under Article 25 of the Charter?”, *International and Comparative Law Quarterly*, vol. 21 (1972), pp. 270-286.

⁶⁹ See Asada, note 11, pp. 93-94.

⁷⁰ A good example can be found in the context of international humanitarian law. There is a general international humanitarian law prohibition both on the use of indiscriminate weaponry and on weaponry that will cause unnecessary suffering. These prohibitions are explicit in Article 35(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 1977, *United Nations Treaty Series*, vol. 1125, p. 3, but are also widely accepted rules of customary international law. Yet international humanitarian law has a long tradition of additionally prohibiting the use of specific weapons, even in cases in which the use of the weapons in question was previously already prohibited under the more general rules. Take, for example, the 2008 Convention on Cluster Munitions, CCM/77, 47713. On this issue of “doubling up”

itself to have a legal norm formally restated even if it already exists under custom. The argument that the UN resolutions undermine any claim of customary status also ignores the fact that India, Pakistan and the DPRK could, as will be discussed in the next Section, potentially be viewed as being persistent objectors to any customary prohibition on nuclear testing in any event, which would, of course, make the ban inapplicable to those States (thus requiring other legal measures, such as Chapter VII resolutions, to create an obligation not to test that would be incumbent upon these States).

Of course, any customary norm against testing is strongly reinforced by the fact that virtually all NNWS are NPT Parties and are, therefore, obliged to refrain from the acquisition by any means of a nuclear weapon in the first place.⁷¹ Thus, the widespread practice in relation to non-testing may, in fact, simply constitute a mere by-product of the State practice on non-proliferation more generally under the NPT regime. This factor is probably irrelevant with regard to the validity of the “State practice” element in terms of ascertaining the customary status of the test-ban. Materially, States have in the overwhelming majority of cases practiced abstention in relation to nuclear testing: the motives underpinning this practice are largely irrelevant. With regard to the *opinio juris* element, however, such “psychological” factors may somewhat undermine the legally binding nature of a customary test-ban.⁷²

legal prohibitions in international humanitarian law, see Y. Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (2d ed., 2010), pp. 67-68.

⁷¹ See NPT, note 2, Article II, which obliges NNWS not to seek to acquire, through transference or indigenous manufacture, a nuclear weapon or other nuclear explosive device. See A. Persbo, “Is the Partial Test Ban Treaty Customary Law?”, (2006),

<<http://www.armscontrolverification.org/2006/10/is-partial-test-ban-treaty-customary.html>>.

⁷² Persbo, note 71.

In other words, States may be refraining from testing because of a belief that there is a legal obligation not to have nuclear weapons in the first place, rather than an obligation not to test *per se*.

One could also argue that while only three States have tested since the adoption of the CTBT by the General Assembly in 1996, it is equally true that only nine States in the world currently possess such weapons and, as such, *a third of the total* have tested since 1998. The view is commonly taken that the practice of States that are “specially affected” by an emerging norm of customary international law is of greater importance in determining the customary status of that rule than the practice of other States.⁷³ The usual example given here is the law of the sea and the practice of coastal States, which is viewed as being of much greater value than that of landlocked States.⁷⁴ With regard to the testing of nuclear weapons, the view could be taken that those States in possession of such weapons are those that would be “specially affected” by any test-ban and, thus, the fact that a third of the States in this group have tested since 1996 further weakens the case for saying that a comprehensive test-ban has entered into customary international law.

The inexact process by which customary international law comes into being means that there is a good deal of latitude in constructing a claim that any given rule is or is not binding in custom.⁷⁵ This is particularly pronounced when the rule in

⁷³ This view has been taken by the ICJ. See *North Sea Continental Shelf Cases*, note 35, pp. 42-43.

⁷⁴ For this example, see M.N. Shaw, *International Law* (6th ed., 2008), pp. 79-80; P. Malanczuk, *Akehurst's Modern Introduction to International Law* (7th ed., 1997), p. 42. Indeed, the ICJ itself has referred to the fact that the practice of coastal States is of more normative significance than that of landlocked States in the context of the law of the sea. See *North Sea Continental Shelf Cases*, note 35, p. 42.

⁷⁵ See Byers, note 41, pp. 129-165.

question has its roots in a treaty.⁷⁶ As such, one must be very careful in unilaterally asserting that a rule – any rule – is binding under customary international law.

Overall, it must be said that there is clear evidence to support a comprehensive nuclear test-ban in customary international law. Equally, the customary status of a test-ban norm is not entirely certain, based on existing State practice and *opinio juris*: some doubts remain. This paper nonetheless proceeds based on the assumption that the obligation contained in Article I of the CTBT also exists as part of customary international law because, based on a preponderance of the evidence, claims to that effect appear correct.

III. INDIA AS A PERSISTENT OBJECTOR?

Based on the assumption that the comprehensive test-ban is binding in custom, this Section examines whether India, as a long standing “outsider” to the international nuclear legal order, can be considered a persistent objector State with regard to this norm. If so, India would seemingly not be bound by any customary obligation to refrain from nuclear testing.

A. Common Understandings of the Persistent Objector Rule

It is first necessary to briefly set out the nature of the persistent objector rule. Throughout the UN era, there has been widespread scholarly⁷⁷ and some judicial⁷⁸

⁷⁶ As the ICJ has stated, “this result [a finding that customary international law obligations have derived from treaty-based obligations] is not lightly to be regarded as having been attained.” *North Sea Continental Shelf Cases*, note 35, p. 41. See also note 43 and accompanying text.

⁷⁷ For a few examples of key textbooks referencing the rule, see Shaw, note 74, pp. 89-91; Malanczuk, note 74, pp. 47-48; M. Dixon, *Textbook on International Law* (6th ed., 2007), pp. 32-33; I. Brownlie, *Principles of Public International Law* (7th ed., 2008), p. 11.

⁷⁸ See *Asylum Case (Columbia v. Peru)*, ICJ Reports (1950), pp. 266-389 at pp. 277-278; *Fisheries Case (United Kingdom v. Norway)*, ICJ Reports (1951), pp. 116-144 at p. 131.

acceptance of the rule as an aspect of customary international law formation. As has already been noted, the persistent objector rule says that if a State persistently objects to a newly emerging norm of customary international law during the formation of that norm, then it is exempt from it once the custom has crystallised.⁷⁹ The rule is, therefore, usually viewed as having two elements, both of which need to be satisfied for it to operate:⁸⁰

- 1) Somewhat obviously, given the rule's name, the State in question must object *persistently*. It is not seen as sufficient for a State to object to a newly emerging law only once: put simply, "sporadic or isolated objections will not do."⁸¹
- 2) The persistent objection must occur *during the formation* of the norm. Objection once the new law has become binding is insufficient; in other words, States that are "subsequent objectors" will nonetheless be bound.⁸²

In predominant positivist understandings of the "horizontal" international legal system, States are not bound by law to which they have not consented to be bound.⁸³ Identifying consent with regard to treaties is obviously relatively straightforward (based on the process of signature and ratification), but consent is more difficult to

⁷⁹ See note 23 and accompanying text.

⁸⁰ These criteria are apparent throughout the literature on the persistent objector rule but are set out in a similar manner to the way that they are used here in J. B. McClane, "How Late in the Emergence of a Norm of Customary International Law May a Persistent Objector Object?", *International Law Students Association Journal of International Law*, vol. 13 (1989), pp. 1-26 at p. 20.

⁸¹ D. Kritsiotis, "On the Possibilities of and For Persistent Objection," *Duke Journal of Comparative and International Law*, vol. 21 (2010), pp. 121-141 at p. 130.

⁸² O. Elias, "Some Remarks on the Persistent Objector Rule in Customary International Law," *Denning Law Journal*, vol. 6 (1991), pp. 37-51 at p. 38.

⁸³ See A. Cassese, *International Law in a Divided World* (1986), p. 169.

establish for customary international law.⁸⁴ Consent in the context of the formation of custom is necessarily premised on silence as constituting tacit consent. This is largely for practical reasons, as customary international law would stagnate if explicit consent on the part of all States were required.⁸⁵ It is here that the persistent objector rule is commonly seen as fulfilling a crucial role. At least theoretically, the rule preserves State autonomy – not to mention the positivist conception of a consent-based legal system – by providing States with a means to *withdraw* consent.⁸⁶

There are numerous issues concerning the persistent objector rule that are worthy of further discussion but which go beyond the scope of this article.⁸⁷ Yet two further points need to be made about the rule for our purposes. First, it is important to note, given the focus of this article on the CTBT, that non-Parties to a treaty can similarly achieve exemption through the usual operation of the persistent objector rule from any customary counterpart norms that emerge: “[i]f they persist with their

⁸⁴ See H. Charlesworth, “Customary International Law and the *Nicaragua* Case,” *Australian Yearbook of International Law*, vol. 11 (1984-1985), pp. 1-31 at p. 3 (comparing the ease of identifying State consent in treaty law with the problems inherent in so doing for custom).

⁸⁵ See Elias, note 23, para. 3.

⁸⁶ See A. Steinfeld, “Nuclear Objections: The Persistent Objector and the Legality of the Use of Nuclear Weapons,” *Brooklyn Law Review*, vol. 62 (1996), pp. 1635-1686 at p. 1655 (stating that “[t]he Persistent Objector Rule is a logical product of the consent theory”).

⁸⁷ For example, some writers have questioned how many times a State must object for this to qualify as “persistent” objection. It is commonly agreed that a single objection will not suffice, but it is far from clear exactly how “persistent” persistent objection must be. See D. A. Colson, “How Persistent Must the Persistent Objector Be?,” *Washington Law Review*, vol. 61 (1986), pp. 957-970, in general but particularly at pp. 965-970. Commentators have similarly struggled with the issue of how late in the formation of a new customary international law norm a State can object and still become exempt from the rule. See McClane, note 80.

objection to the provisions of the treaty, they could become persistent objectors on the international plane.”⁸⁸ Secondly, it is necessary to consider whether *acts* are enough to constitute “objections” for the purposes of the persistent objector rule or whether explicit statements of objection are required.⁸⁹ Preponderant academic opinion seems to support the view that “acts” of objection will suffice.⁹⁰

B. India as a Persistent Objector to a Customary Prohibition on Nuclear Testing

Perhaps the clearest indications of India’s persistent objector status, then, are its *actions*. India’s Pokhran-I nuclear tests of 1974⁹¹ and more notably the 1998 Pokhran-II tests and India’s explicit self-proclamation of nuclear power status are acts

⁸⁸ B. B. Jia, “The Relations Between Treaties and Custom,” *Chinese Journal of International Law*, vol. 9 (2010), pp. 81-109 at p. 83.

⁸⁹ On this debate, see Colson, note 87, pp. 961-965; T. L. Stein, “The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law,” *Harvard International Law Journal*, vol. 26 (1985), pp. 457-482 at pp. 478-479.

⁹⁰ For example, Steinfeld, note 86, p. 1673, states that “an objection to a customary rule may take a variety of forms, from actual exercise of a legal right, to statements expressing a desire to preserve that right.” (emphasis removed from original). *See also* Colson, note 87 p. 958. However, for a contrary view, see C. A. Bradley and M. Gulati, “Withdrawing from International Custom,” *Yale Law Journal*, vol. 120 (2010), pp. 202-275 at p. 211.

⁹¹ *See* P. R. Chari, “Pokharan-I: Personal Reflections,” *Institute of Peace and Conflict Studies*, Special Report, vol. 80 (1999), <http://www.ipcs.org/pdf_file/issue/SR80-Chari-Final.pdf>. The 1974 Pokhran-I tests constituted the detonations of what India termed “peaceful nuclear explosions.” In reality, however, these tests were largely indistinguishable from the explosion of a nuclear weapon. *See* Carranza, note 31, p. 44. On this basis, Ahlström tellingly refers to the tests as being “allegedly peaceful.” C. Ahlström, “Arrows for India? – Technology Transfers of Ballistic Missile Defence and the Missile Technology Control Regime,” *Journal of Conflict and Security Law*, vol. 9 (2004), pp. 103-125 at p. 119. The 1974 tests, therefore, represent India’s *de facto* entrance into the “nuclear powers club.”

that clearly demonstrate a rejection of any customary test-ban norm.⁹² India's attainment of nuclear power status in 1974 amounts to "objection by deed" to any such testing norm, as does its overt acknowledgement of its possession of nuclear weapons and their testing in 1998.

In spite of a longstanding commitment to non-proliferation and an excellent record in this regard,⁹³ India has repeatedly rejected the obligations of the legal nuclear non-proliferation regime (and its differentiated framework) outright. As Frey notes, India's discourse on nuclear weapons has always "vehemently dismissed" the legal *status quo* as "discriminatory and imperialist."⁹⁴ Indeed, India has famously promulgated the term "nuclear apartheid" to describe international law's approach to nuclear non-proliferation.⁹⁵

⁹² Interestingly, "nuclear weapons testing" was one example – given by D'Amato in his seminal work on customary international law – of an unequivocal and objectively identifiable manifestation of State practice of a type about which there could be little doubt as to the legal position of the State in question (though this example was not used specifically in relation to the persistent objector rule). See D'Amato, note 47, p. 88.

⁹³ See U. Choudhury, "The Indo-USA Nuclear Deal and its Impact on India's Ballistic Missile Programme," *South Asian Strategic Stability Institute* (2008), p. 10, <<http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=99928>>. Indeed, India is the only State in possession of nuclear weapons that has not helped another State to also acquire such weapons. See C. Kuppuswamy, "Is the Nuclear Non-Proliferation Treaty Shaking at its Foundations? Stock Taking after the 2005 NPT Review Conference," *Journal of Conflict and Security Law*, vol. 11 (2006), pp. 141-155 at p. 145.

⁹⁴ Frey, note 7, p. 19.

⁹⁵ See W. Walker, "International Nuclear Relations after the Indian and Pakistani Test Explosions," *International Affairs*, vol. 74 (1998), pp. 505-528 at p. 511; J. Singh, "Against Nuclear Apartheid," *Foreign Affairs*, vol. 77 (1998), pp. 41-52; F. Z. Ntoubandi, "Reflections on the USA-India Atomic

India's consistent and absolute rejection of the NPT and international law's wider nuclear regime – from inception – is clear from numerous official statements. One classic example is a speech made by Prime Minister Indira Gandhi to the Indian Parliament in 1968, in which she was explicit in rejecting the entire NPT framework, based on a policy of “enlightened self-interest and the considerations of national security.”⁹⁶ As Rai summarizes, India has always been “against [the international legal regime relating to nuclear weapons] and its philosophy because of its discriminatory character.”⁹⁷

Of course, the very fact that India is not a signatory to the CTBT demonstrates, by way of deed, its objection to any parallel customary regime.⁹⁸ Moreover, India not only opted against signing and ratifying the treaty in 1996: it also sought to ensure that it was not adopted at all. At the 1996 Conference on Disarmament in Geneva, India vetoed the full final text of the CTBT, essentially meaning that the draft could not be adopted at the conference.⁹⁹ India's chief negotiator at the conference, Arundhati Ghose, unequivocally stated that “India will never sign this unequal treaty – not now, not ever.”¹⁰⁰ Similarly, when the same text

Energy Cooperation,” *Journal of Conflict and Security Law*, vol. 13 (2008), pp. 273-287 at p. 287; Carranza, note 31, p. 1.

⁹⁶ Debate on Foreign Affairs with Indira Gandhi, Lok Sabha, New Delhi, 5 Apr. 1968, quoted in A. Ghose, “Negotiating the CTBT: India's Security Concerns and Nuclear Disarmament,” *Journal of International Affairs*, vol. 51 (1997), pp. 239-261 at p. 242.

⁹⁷ A. K. Rai, *India's Nuclear Policy after Pokhran II* (2009), p. 208. See Wable, note 6, p. 722.

⁹⁸ See Carranza, note 31, p. 130.

⁹⁹ See Asada, note 11, p. 86; Wable, note 6, p. 747.

¹⁰⁰ Quoted in M. Goozner, “Holdouts Endanger Nuclear Treaty,” *Chicago Tribune*, 11 Sept. 1996, <http://articles.chicagotribune.com/1996-09-11/news/9609110214_1_test-ban-treaty-five-declared-nuclear-powers-nuclear-weapons>.

was later that year presented by Australia (with no fewer than 126 cosponsors) for adoption by the General Assembly, India voted against its adoption *per se*. It was one of only three States to do so, with 158 States voting in favour.¹⁰¹ India was again very explicit in its rejection of the CTBT in the General Assembly, going so far as to claim that the treaty “betrayed” the goal of enhancing peace and security.¹⁰²

One will recall from the previous Subsection that persistent objection must occur during the formation of the customary rule and not after its crystallisation alone.¹⁰³ It is worth noting, then, that it is extremely unlikely that a comprehensive nuclear test-ban existed under customary international law in the early-1990s.¹⁰⁴ For example, the various unilateral moratoria on all forms of nuclear testing of the “official” NPT NWS began in the early- to mid-1990s, and both France and China tested for the final time in 1996. As Koplow points out, although there were discussions over the possibility of a comprehensive test-ban during debates on the NPT in the 1960s, there was almost no serious consideration at all by States of a comprehensive legal restriction on nuclear testing during the 1980s and early-1990s.¹⁰⁵

It is absolutely certain that no comprehensive test-ban existed in custom prior to the 1974 Pokhran-I tests. Any customary norm prohibiting nuclear testing, if it has

¹⁰¹ See General Assembly Resolution 50/245, U.N. Doc. A/RES/50/245 (1996); U.N. Doc. A/50/PV.125 (1996), p. 7 (the other two States that cast negative votes were Bhutan and Libya).

¹⁰² See U.N. Doc. A/50/PV.125, note 101, pp. 3-4, quoted at p. 3.

¹⁰³ See note 82 and accompanying text.

¹⁰⁴ See, e.g., N. Giref, “Legal Aspects of Nuclear Testing,” *Bracton Law Journal*, vol. 23 (1991), pp. 25-24 at p. 30 (arguing in 1991 that no such customary test-ban had (yet) emerged).

¹⁰⁵ See D. A. Koplow, “Bonehead Non-Proliferation,” *Fletcher Forum of World Affairs*, vol. 7 (1993), pp. 145-158 at pp. 150-152.

emerged at all, is most credibly viewed as having arisen during the negotiations leading up to the adoption of CTBT in late-1996 at the earliest.¹⁰⁶ As such, India's persistent objections clearly predate the norm crystallising in custom (if, of course, one accepts that such crystallisation has taken place at all) and can, therefore, reasonably be viewed as having occurred during the formation of the customary international law rule in question.¹⁰⁷

India's various objections, by way of both deed and explicit statement, have all the hallmarks of classic persistent objection in a technical sense with regard to a customary comprehensive test-ban. India's objections have been both sustained and prior to crystallisation. As such, if one accepts that a customary international law comprehensive test-ban norm exists in fact, India should be regarded, at least *prima facie*, as a persistent objector to it.¹⁰⁸

IV. INDIA'S OBJECTIONS OVERRULED?: THE IMPLICATIONS OF *JUS COGENS* AND THE INTERNATIONAL PRESSURE TO CONFORM

It was argued in Section II that the comprehensive nuclear test-ban can plausibly be viewed as being binding in customary international law and could, therefore, bind India. It was then concluded in Section III, *argumentum a contrario*, that even if the customary status of the prohibition is accepted, India would nonetheless not be bound by it since it has the status of a persistent objector.

One possible factor that could undermine India's apparent persistent objector status, however, is the fact that persistent objection is generally agreed to be

¹⁰⁶ See Guthrie, note 20, p. 518.

¹⁰⁷ For a contrary view, see *ibid.*, pp. 517-518 (arguing – surely incorrectly – that India only began to persistently object at the time of its 1998 tests and, therefore, *after* the customary test-ban had crystallised).

¹⁰⁸ See V. S. Mani, "India's Tests: The Legal Issues," *The Hindu*, 5 June 1998; Packer, note 25, p. 651.

inapplicable in relation to peremptory norms of international law. On this basis, Tabassi notably argued in her 2009 article in the *Journal of Conflict and Security Law* that India remains bound by a comprehensive test-ban because the prohibition is not just a customary rule *simpliciter* but is also a norm of *jus cogens*.¹⁰⁹ This Section tests this claim, first by considering whether persistent objection is, in fact, impermissible in the context of *jus cogens* norms and then by assessing whether the comprehensive test-ban has qualified as a rule of this special “supernorm” sort. The Section then goes on to consider whether – even if the test-ban is not a peremptory norm *de jure* – it is a rule of such importance that India’s persistent objection was nonetheless “overruled” in 1998 *de facto*.

A. Persistent Objection to Peremptory Norms

While the persistent objector rule is usually viewed in the literature as being a crucial mechanism underpinning positivist understandings of a consent-based international legal system,¹¹⁰ commentators generally agree that there exists at least one situation in which a State will find its objections to be unavailing (even when the usual criteria for persistent objection are otherwise met). A large majority of scholars hold the view that a State cannot exempt itself from a peremptory norm through persistent objection.¹¹¹ Thus, where a rule is considered a norm of *jus cogens*, even a

¹⁰⁹ See Tabassi, note 11, pp. 347-350. It is worth noting that other writers have argued that the prohibition on *atmospheric* nuclear testing is a norm of *jus cogens*. In other words, it has been suggested that Article I(1)(a) of the PTBT has not only entered into customary international law but has also attained peremptory status. See, e.g., Hulsroj, note 20, p. 8.

¹¹⁰ See notes 83-86 and accompanying text.

¹¹¹ See, e.g., B. D. Lepard, *Customary International Law: A New Theory with Practical Applications* (2010), p. 7 and p. 38; Bradley and Gulati, note 90, p. 213; J. I. Charney, “Universal International Law,” *American Journal of International Law*, vol. 87 (1993), pp. 529-551 at p. 541; M. Byers,

persistent objector will be bound by it. The rationale underpinning this is based on a conceptualisation of the *purpose* of peremptory norms, as being aimed at protecting “fundamental” values of common interest. The persistent objector process, therefore, is seen by many as being inherently contrary to the *jus cogens* project in international law.¹¹²

Admittedly, this majority view – that the persistent objector rule is inapplicable in relation to *jus cogens* norms – has been rejected by a small number of writers, who have argued that this would amount to an erosion of the sovereign right of States to consent (or not) to rules of international law.¹¹³ In addition, of course, there is a good deal of academic debate as to the scope, nature and, indeed, the very existence of *jus cogens* norms.¹¹⁴ As such, the claim that the persistent objector rule is inapplicable to peremptory norms is far from uncontroversial.

“Conceptualising the Relationship Between *Jus Cogens* and *Erga Omnes* Rules,” *Nordic Journal of International Law*, vol. 66 (1997), pp. 211-330 at p. 217 and p. 223; Kritsiotis, note 81, pp. 132-134; H. Lau, “Rethinking the Persistent Objector Doctrine in International Human Rights Law,” *Chicago Journal of International Law*, vol. 6 (2005-2006), pp. 495-510 at pp. 495-498 and pp. 504-505; McClane, note 80, p. 25; Hulsroj, note 20, p. 8 (which even goes on to argue that the principle that the persistent objector rule is inapplicable in relation to *jus cogens* norms might itself be a *jus cogens* norm).

¹¹² See Kritsiotis, note 81, pp. 133-134.

¹¹³ See, e.g., R. Nieto-Navia, “International Peremptory Norms (*Jus Cogens*) and International Humanitarian Law,” in L.C. Vohrah et al. (eds.), *Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (2003), pp. 595-640 at p. 612.

¹¹⁴ This is not the place to discuss these debates in any detail. In brief, some writers have questioned the potentially negative impact of peremptory norms on the structure and functionality of the international legal system. See, e.g., P. Weil, “Towards Relative Normativity in International Law?,” *American Journal of International Law*, vol. 77 (1983), pp. 413-442 (arguing, *inter alia*, that an

Moving beyond this issue in the literature, however, it is notable when one examines the actual practice of States invoking the persistent objector rule that there are a number of examples where States have been unable to maintain persistent objection in relation to peremptory (or, at least, arguably peremptory) norms. These examples support the view that the inapplicability of the persistent objector rule in relation to *jus cogens* norms is a matter of customary international law.

A classic example of an “objection overruled” in relation to a *jus cogens* norm is the case of South Africa, with regard to its continued objections to the customary international law norm prohibiting the policy of apartheid.¹¹⁵ Despite its persistent

approach to international law based on the values of the “international community” is dangerous since this does not reflect the reality of power structures within international relations and that the concept of a “relative normativity” of legal norms will act to dilute the rigor and certainty unpinning the law). The political motivations that underpin the concept of *jus cogens* have also been brought into question. See, e.g., R. P. Barnidge, Jr., “Questioning the Legitimacy of *Jus Cogens* in the Global Legal Order,” *Israel Yearbook of Human Rights*, vol. 38 (2008), pp. 199-225 at pp. 203–210 (arguing that “*jus cogens* can operate in a way in which the minority elite can control and monopolise the terms of legal debate”). A number of writers have taken such arguments further and questioned the very existence of *jus cogens* norms. See, e.g., G. A. Christenson, “*Jus Cogens*: Guarding Interests Fundamental to International Society,” *Virginia Journal of International Law*, vol. 28 (1987-1988), pp. 585-648 (arguing, *inter alia*, that the concept of *jus cogens* does not correlate with a positivist system based on the will of sovereign States and that peremptory norms are, therefore, for the most part, merely aspirational); M. J. Glennon, “Peremptory Nonsense,” in S. Breitenmoser et al. (eds.), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber* (2007), pp. 1265-1272 (arguing that the “core methodology” behind the *jus cogens* concept—which attempts to mix natural law ideology with positivist underpinnings—is contradictory and incoherent).

¹¹⁵ The customary prohibition itself is evidenced, for example, by the International Convention on the Suppression and Punishment of the Crime of Apartheid 1973, *United Nations Treaty Series*, vol. 1015, p. 243, which had 107 States Parties (as of July 2011). On South Africa’s persistent objection, see

objector status, South Africa was viewed by other States as being in breach of a peremptory norm¹¹⁶ and was, thus, ultimately forced to conform.¹¹⁷ A more recent example can be seen in the policy of the United States with regard to the juvenile death penalty.¹¹⁸ In the 2002 *Domingues* case, the Inter-American Commission on Human Rights rejected the argument of the United States that it was a persistent objector to the prohibition of the execution of juveniles, on the basis that the prohibition had the status of a norm of *jus cogens*.¹¹⁹ The United States ultimately reversed this policy in 2005.¹²⁰ In contrast to these examples, instances where persistent objection has been “successful” in practice, that is, where States have been able to maintain exemption following persistent objection, have tended to relate to

Stein, note 89, p. 463; Charney, both in J. I. Charney, “The Persistent Objector Rule and the Development of Customary International Law,” *British Yearbook of International Law*, vol. 56 (1986), pp. 1-24 at p. 15 and note 111, p. 539; Elias, note 82, pp. 46-47; Steinfeld, note 86, p. 1655.

¹¹⁶ See J. Dugard, *International Law: A South African Perspective* (3d ed., 2008), p. 32; L. Condorelli, “Custom,” in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (1991), pp. 179-211 at p. 205.

¹¹⁷ As Charney notes, it is fairly clear that in the face of South Africa’s violation of a peremptory norm “persistent objector status did not in any way protect [it] from the pressure exerted by the international community to force [it] to conform.” Charney, note 115, p. 15.

¹¹⁸ See D. Weissbrodt, “Execution of Juvenile Offenders by the United States Violates International Human Rights Law,” *American University Journal of International Law and Policy*, vol. 3 (1988), pp., 339-382.

¹¹⁹ *Domingues v. United States*, Merits, Inter-Am CHR (2002), Report No. 62/02, Case No. 12.285, in particular at para. 85. Note, however, that a small number of writers have debated the peremptory status of the prohibition of the execution of juveniles. See, e.g., Weissbrodt, note 118, pp. 369-371.

¹²⁰ In 2005, the United States Supreme Court ruled that the juvenile death penalty was cruel and unusual punishment and was, therefore, prohibited by the Constitution. See *Roper v. Simmons*, 543 US 551 (2005).

clearly non-peremptory rules concerning issues such as the extent of the territorial sea or international trade.¹²¹

Therefore, it may be said that there is a trend in practice according to which a State that has apparently met the criteria for persistent objection in relation to a legal norm that is viewed as being peremptory in nature will not be able to exempt itself from the new norm, irrespective of the State's otherwise valid persistent objector status (or, at least, it will not be able to exempt itself for long). Other States – either individually or, more abstractly, collectively as the “international community” – have insisted that dissenters must still comply with the “majority” position in acceding to the binding nature of *jus cogens* norms.

B. India's Objections Overruled *De Jure*?: Is the Obligation to Refrain from Testing a Peremptory Norm?

As has been noted above, it has been argued by at least one writer that the prohibition on the testing of nuclear weapons is not only a customary international law obligation but is also a *jus cogens* norm.¹²² If one accepts this argument, based on the analysis in the previous Subsection, India would – irrespective of its persistent

¹²¹ This can be seen, for example, from the application of the persistent objector rule to exclusive fishing zones in the *Fisheries Case*, note 78, p. 131. A more recent example is the persistent objector status of the United States in relation to certain issues of free trade, as can be seen in the ongoing arbitration under Chapter 11 of the North American Free Trade Agreement, *Grand River Enterprises Six Nations Ltd, et al. v. Government of the United States of America*, Notice of Arbitration (2004), UNCITL/NAFTA, <<http://naftaclaims.com/Disputes/USA/GrandRiver/GrandRiverNoticeOfArbitration.pdf>>. For more on this, see L. E. Peterson, “Persistent Objector Argument also at Issue in NAFTA Case” (2009), <<http://kluwerarbitrationblog.com/blog/2009/07/14/persistent-objector-argument-also-at-issue-in-nafta-case>>.

¹²² See Tabassi, note 11, pp. 347-350.

objections – be bound by this *jus cogens* prohibition (as would the other possible persistent objector States, Pakistan and the DPRK). Is the test-ban a peremptory norm? While the prohibition is certainly a rule of paramount importance to the international community generally,¹²³ the claim as to the peremptory nature of the test-ban can actually be disproved relatively easily. When one considers how *jus cogens* norms are created, it is extremely difficult to conclude that the comprehensive prohibition on nuclear testing has taken on a peremptory status.

This article is not the place to provide a detailed discussion of how peremptory norms of international law come into being.¹²⁴ Nonetheless, it is worth recalling here the positivist understanding of how such norms emerge. The most widely quoted definition of a *jus cogens* norm comes from Article 53 of the VCLT:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.¹²⁵

Using Article 53 as a definition of *jus cogens* is not entirely satisfactory, though the reasons for this, again, go beyond the scope of this paper.¹²⁶ Nonetheless, Article 53 offers a clear starting point for identifying a norm of *jus cogens*, and it is today largely

¹²³ See Wable, note 6, p. 744.

¹²⁴ For a more detailed analysis of how *jus cogens* norms are created, see A. Orakhelashvili, *Peremptory Norms in International Law* (2006), pp. 36-130.

¹²⁵ VCLT, note 3, Article 53. Complementing Article 53 is Article 64 of the VCLT, which states: “If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”

¹²⁶ See J. A. Green, “Questioning the Peremptory Status of the Prohibition of the Use of Force,” *Michigan Journal of International Law*, vol. 32 (2011), pp. 215-257 at pp. 219-220.

accepted as the key reference point for the content of peremptory rules.¹²⁷ Thus, simply put, for a norm to be considered peremptory, it must be “accepted and recognised by the international community of States as a whole” as a special “type” of norm from which no derogation is permitted.

Having said this, acceptance and recognition of peremptory status by the “international community of States as a whole” does not necessitate *universal* acceptance by States as to the peremptory character of any given norm. As the chairman of the Drafting Committee of the VCLT made clear in 1968, it is enough for “a large majority” of States to take such a position.¹²⁸ Therefore, persistent objection on the part of India (or, indeed, Pakistan or the DPRK) would not preclude the test-ban acquiring peremptory status, albeit with the caveat that such persistent objection would, as has been discussed, be legally ineffectual in exempting the State (or States) from the binding force of the peremptory norm.

Despite the fact that universality is not required, however, the legal tests for establishing any given norm as being peremptory are notably onerous. As Rozakis has correctly stated, the criteria for the formation (or moderation) of *jus cogens* norms as set out in Article 53 of the VCLT “are quite severe.”¹²⁹ Whatever the merit or moral “value” of any given legal rule, this does not in itself turn it into a peremptory norm; nor do pronouncements to this effect made by scholars, however numerous.¹³⁰ The test is, rather, whether the vast majority of States of the world have accepted and recognised the norm as being peremptory.

¹²⁷ See L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (1988), p. 3.

¹²⁸ U.N. Doc. A/CONF.39/C.1/SR.80, p. 472.

¹²⁹ C. L. Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (1976), p. 15.

¹³⁰ Barnidge, note 114, p. 205.

This test is so burdensome that peremptory status has been debated by some writers even with regard to norms that are generally viewed as *jus cogens*, and are certainly universally accepted by States in a general sense. When one begins to actually test, for example, the prohibition of the use of force¹³¹ or the prohibition of genocide¹³² against the Article 53 criteria, it is far from certain whether even these fundamental norms meet the required standard. As such, the claim that an avowed norm of customary law relating to the testing of nuclear weapons is a *jus cogens* rule can be dismissed rather conclusively.

The obligation on States not to test nuclear weapons has clearly not achieved the status of a *jus cogens* norm. As was discussed in some detail in Section II, it is to some extent disputable whether Article I of the CTBT has even crystallised into customary international law *at all*. Such comparatively equivocal State practice and *opinio juris* in relation to customary status *simpliciter* is impossible to equate to the near-universal acceptance and recognition of “supernorm” status required for elevation to the hallowed group of peremptory international legal rules.

Indeed, the present author has been unable to identify *a single instance* in which a State has claimed that the prohibition of the testing of nuclear weapons represents a norm of *jus cogens*. Tellingly, Tabassi did not base her assertion of peremptory status on State acceptance and recognition of the peremptory nature of the prohibition. She argued, instead, for the peremptory status of the test-ban norm by pointing to the fact that India and Pakistan were condemned for their 1998 nuclear tests, in spite of the fact that both States are undoubtedly persistent objectors:

¹³¹ See Green, note 126.

¹³² See D. Lisson, “Defining National Group in the Genocide Convention: A Case Study of Timor-Leste,” *Stanford Law Review*, vol. 60 (2007-2008), pp. 1459-1496 at p. 1463.

“Although it would seem absurdly premature to suggest that the test-ban could qualify as a peremptory norm, a qualification so rarely accepted, it is difficult to otherwise explain the condemnation of the Indian and Pakistani tests.”¹³³

The condemnation by States of the 1998 tests has been discussed in Subsection III(B) and will be returned to in the next Subsection. At this juncture, one can simply note that Tabassi’s argument amounts to reverse logic, which does not hold up to scrutiny. Her assertion is that because persistent objectors cannot object to *jus cogens* norms and because India and Pakistan were condemned by the international community for testing, the test-ban must, therefore, be a *jus cogens* norm. Yet we know that the only thing that establishes peremptory status is if the vast majority of States have accepted and recognised a norm as such. Given that no evidence indicates that States have attested to the peremptory status of a comprehensive test-ban and given that even the mere customary status of the rule is somewhat in doubt, it is simply not the case that the prohibition has attained *jus cogens* status.

Widespread State condemnation of a persistent objector does not confer peremptory status upon otherwise non-peremptory norms to which the objector is objecting; rather, it is symptomatic of the political realities of acting as an isolated State. The objector may find itself unable to maintain its exemption *de facto*, irrespective of peremptory status. It is to this issue that this article now turns.

C. India’s Objections Overruled *De Facto*?: Has Political Pressure Meant that India has been Unable to Maintain its Persistent Objector Status?

While it can be concluded unequivocally that the comprehensive test-ban norm has not (yet) attained peremptory status, it is possible to argue that India has

¹³³ Tabassi, note 11, p. 349.

nonetheless found itself unable to maintain its position as a persistent objector with regard to the prohibition. Tabassi is entirely correct in identifying a notable discrepancy between India's *de jure* persistent objector status and the condemnation it received for the 1998 Pokhran-II tests, especially in the form of resolutions issued by UN organs.

However, it is clear that the reason for this is not based on the peremptory status of the test-ban. It is here argued, by contrast, that the denunciation of Pokhran-II in spite of India seemingly possessing a valid legal right to test was extra-legal. This is a fundamentally realist interpretation: the formal legal position is that the persistent objector rule applies to all norms of customary international law, other than in the case of *jus cogens* norms. Political realities, however, mean that where a State objects to a non-peremptory norm to which all (or almost all) other States subscribe, the dissenting State may in rare cases be forced to comply, irrespective of its technical status as a persistent objector under international law.¹³⁴ This is especially likely if the norm in question relates to a particularly "sensitive" issue, such as, for example, human rights or, perhaps, nuclear weapons.

It is evident that, in practice, States have occasionally found themselves unable to maintain persistent objector status in the face of political pressure to conform from the vast majority of subjects of the international community, even where the norm being objected to is clearly not peremptory. A good example of this phenomenon is the position of Australia with regard to a number of customary

¹³⁴ See O. Abasheikh, "The Validity of the Persistent Objector Rule in International Law," *Coventry Law Journal*, vol. 9 (2004), pp. 40-47 at p. 46 (arguing that a major problem with the persistent objector rule is that in practice it does not necessarily always exempt a State from a norm it has persistently objected to).

international law norms concerning the rights of indigenous peoples.¹³⁵ Australia was, until 2009, undoubtedly a persistent objector to certain legal norms relating to indigenous rights,¹³⁶ which were almost certainly *not* norms of *jus cogens*. Nonetheless, given the fundamental nature of the human rights norms in question, increasing political pressure ultimately led to a *volte-face* of the Australian position.¹³⁷ In other words, Australia found its persistent objector status overruled *de facto*, even

¹³⁵ The rights of indigenous peoples are protected under international law through a combination general human rights provisions and anti-discrimination norms, as well as more specialised instruments that aim specifically at protecting indigenous groups. See, in particular, the United Nations Declaration on the Rights of Indigenous Peoples 2007, annexed to General Assembly Resolution 61/296, U.N. Doc. A/RES/61/296 (2007); International Labour Organisation Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989, <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>>; Universal Declaration of Human Rights 1948, annexed to General Assembly Resolution 217 A(III), U.N. Doc. A/RES/217(III); International Covenant on Civil and Political Rights 1966, *United Nations Treaty Series*, vol. 999, p. 171, particularly Article 27; International Convention on the Elimination of All Forms of Racial Discrimination 1966, *United Nations Treaty Series*, vol. 660, p. 195. There has been increasing agreement, particularly since the 1990s, that a number of the obligations contained within these instruments have also attained the status of customary international law. See J. S Anaya, *Indigenous Peoples in International Law* (2d ed., 1996), pp. 61-72.

¹³⁶ See “Indigenous Rights Outlined by UN,” *BBC News*, 13 Sept. 2007, <http://news.bbc.co.uk/1/hi/in_depth/6993776.stm>. Moreover, Australia is not a Party to the International Labour Organisation Convention No. 169, note 134, and was one of only four States to vote against the General Assembly’s adoption of the Declaration on the Rights of Indigenous Peoples.

¹³⁷ In 2009, Australia explicitly endorsed the 2007 Declaration on the Rights of Indigenous Peoples, and apparently reversed its position on the customary status of a number of provisions contained within it. See “Experts Hail Australia’s Backing of UN Declaration of Indigenous Peoples’ Rights,” *United Nations News Centre*, 3 Apr. 2009, <<http://www.un.org/apps/news/story.asp?NewsID=30382>>. It should be noted that this reversal was partly due to a change in Canberra from a government led by Prime Minister John Howard to a government led by Prime Minister Kevin Rudd.

though this was not the case *de jure* (because there was no conflict with a peremptory norm).

It could be argued that India's stance with regard to the testing of nuclear weapons is comparable to the Australian example. The reaction of States to the 1998 tests was discussed in Section II, so it will not be repeated in detail here. However, it should be recalled that States strongly opposed the nuclear tests, leading in some cases to sanctions being adopted, as well as to the adoption of resolutions by both the Security Council and General Assembly demanding that India and Pakistan refrain from further testing.¹³⁸ Overall, there was significant international political pressure on India in the immediate aftermath of Pokhran-II to conform to the nuclear *status quo ante*.¹³⁹

While State reaction to the 1998 tests does not alchemically confer peremptory status on the test-ban as Tabassi suggests,¹⁴⁰ the predominantly negative reaction to Pokhran-II and the significant political pressure on India to conform may be indicative of a *de facto* "revocation" by the international community of India's persistent objector status. If India was viewed by other States as having breached international law in 1998 despite breaching no conventional obligation by testing and despite apparently having persistent objector status with regard to any customary prohibition, does this indicate that India has not, in fact, been able to maintain persistent objector status (irrespective of the fact that the test-ban is not a peremptory norm)?

¹³⁸ See notes 57-64 and accompanying text.

¹³⁹ See Rai, note 97, p. 221.

¹⁴⁰ See Tabassi, note 11, pp. 347-350.

The answer to this question is not entirely clear, especially as we have moved into extra-legal territory. For example, as previously noted, the United States instigated a widespread programme of sanctions against India immediately following the Pokhran-II tests,¹⁴¹ which would suggest that the United States saw the Indian action as being unlawful – or at least unacceptable – irrespective of its persistent objector status. Equally, the American sanctions were lifted after only six months (long before negotiations began on the 123 Agreement),¹⁴² which would hardly indicate that the United States saw India's persistent objection to any test-ban norm as being fundamentally unlawful.

It is also possible to argue that, faced with the political pressure that followed its 1998 tests, India itself began to slowly withdraw its persistent objection to a customary test-ban and moved, at least tentatively, towards conformity with the consensus. The obvious example from this period is India's signature in February 1999 of the bilateral Lahore Declaration and Memorandum of Understanding (MOU) with Pakistan.¹⁴³ Under the MOU, both States (re)committed themselves to their respective unilateral moratoria on nuclear testing.¹⁴⁴ The Lahore MOU was non-binding in itself, of course, and is at most an example of soft law.¹⁴⁵ Indeed, not only was the MOU non-binding, it also referred only to the Parties' own self-regulatory policies (and not to anything approaching a comprehensive ban), and it also contained

¹⁴¹ See note 59 and accompanying text.

¹⁴² See Wable, note 6, p. 755.

¹⁴³ Lahore Declaration and Memorandum of Understanding Between India and Pakistan 1999, <http://www.nti.org/e_research/official_docs/inventory/pdfs/aptlahore.pdf>.

¹⁴⁴ See *ibid.*, Article 4.

¹⁴⁵ On the non-binding nature of MOUs, and on their potential status as soft law, see Aust, note 36, pp. 32-57.

a catch-all “get-out clause” relating to “extraordinary events” that jeopardised “supreme interests.”¹⁴⁶

In fact, when one considers India’s position after 1998, it is evident that it remained a defiant objector to the general international nuclear regime. India may have been condemned for its 1998 tests, but not only did it retain its nuclear weapons, it refused to renounce nuclear testing (other than through the self-regulation of its unilateral moratorium). India has remained explicit in its rejection of both the NPT and the CTBT.

For example, in 2009, Shyam Saran, an Indian special envoy on climate change, made a clear statement of continued rejection of the NPT and of the obligations of the CTBT, with India instead maintaining its approach of a “unilateral moratorium on nuclear tests.”¹⁴⁷ Similarly, Hardeep Puri, the Indian Permanent Representative to the UN, wrote to United States UN Ambassador Susan Rice in September 2009 that in regard to both the NPT and the CTBT, India did not “accept any obligations arising from treaties that [it] has not signed or ratified.”¹⁴⁸

In spite of measures such as Security Council Resolution 1172, soon after the dust had (literally) settled following the 1998 tests, India’s status as a nuclear weapons power was largely accepted by other States (at least *de facto*): India’s stance

¹⁴⁶ Lahore MOU, note 143, Article 4.

¹⁴⁷ See “India Stays Firm, Rejects NPT, CTBT,” *The Economic Times of India*, 26 Sept. 2009, <<http://economictimes.indiatimes.com/news/politics/nation/india-stays-firm-rejects-npt-ctbt/articleshow/5058444.cms>>.

¹⁴⁸ Letter Dated 23 September 2009 from India’s Permanent Representative to the United Nations to the United States Permanent Representative to the United Nations, quoted in “India says no to NPT as Non-Nuclear Weapon State,” *iGovernment* (2009), <<http://igovernment.in/site/India-says-no-to-NPT-as-non-nuclear-weapon-state>>.

was “accepted, not only within India but also by the majority of the states of the world.”¹⁴⁹ Pragmatically, the international community took the view after 1998 that the Indian nuclear genie would not go back in the lead-lined bottle, just as it had long ago accepted the same situation at the inception of the NPT in relation to the “official” NWS.

As Steinfeld points out, the “nuclear objector” is extremely unlikely to buckle under pressure from the wider international community, as can be seen from the failure of the NWS to meet their disarmament obligations, most notably under Article VI of the NPT.¹⁵⁰ Given the perception of nuclear weapons as an effective security deterrent, so intrinsically tied up with notions of self-determination, power and defence, if international law were to consider persistent objection in this context to be unacceptable, such a position would be naive to the point of irrelevancy. India would not (and will not) relinquish the bomb.¹⁵¹

More pertinent in relation to this article is the fact that India will not relinquish its right to test nuclear weapons, should it wish to do so again. Despite some suggestions, the 123 Agreement confirms this fact rather than undermining it.

V. INDIA’S OBJECTIONS RETRACTED?: THE IMPLICATIONS OF THE 123 AGREEMENT

A. Background to the 123 Agreement

The 123 Agreement is a groundbreaking bilateral treaty in that it represents the first time that a State possessing nuclear weapons outside the framework of the NPT has had its civil nuclear energy programme brought within international law’s nuclear non-proliferation regime. In so doing, the 123 Agreement contrasts with the previous

¹⁴⁹ Rai, note 97, p. 208.

¹⁵⁰ See Steinfeld, note 86, p. 1676, p. 1680 and p. 1685.

¹⁵¹ See Frey, note 7, particularly at pp. 18-21; Rai, note 97, p. 221.

isolationist position taken by post-nuclear India,¹⁵² as well as with the three decade long policy of the United States with regard to NPT non-Parties in possession of nuclear weapons.¹⁵³

This is not the place to discuss the 123 Agreement in any detail: a notable amount of literature already exists examining the deal.¹⁵⁴ In brief summary, the United States undertakes to provide India with nuclear materials and technology under the treaty.¹⁵⁵ In return, India is to place all civil nuclear facilities – and any material transferred pursuant to the Agreement – under International Atomic Energy Agency (IAEA) safeguards,¹⁵⁶ as well as being required to conclude an Additional Protocol with the IAEA in relation to nuclear trade with the United States.¹⁵⁷ The 123 Agreement also prohibits the use of any material transferred between the Parties for

¹⁵² See generally Subsection III(B).

¹⁵³ See Ntoubandi, note 95, p. 273.

¹⁵⁴ See, e.g., *ibid.*; J. Müller, “The Signing of the US-India Agreement Concerning Peaceful Uses of Nuclear Energy,” *Göttingen Journal of International Law*, vol. 1 (2009), pp. 179-198; K. Heinzelman, “Towards Common Interests and Responsibilities: The U.S.-India Civil Nuclear Deal and the International Nonproliferation Regime,” *Yale Journal of International Law*, vol. 33 (2008), pp. 447-478; Erkel, note 29; Chari (ed.), note 15; A. Gupta (coordinator – various contributors), “Indo-US Nuclear Deal: A Debate,” *Vikalpa*, vol. 32 (2007), pp. 87-111; Joyner, note 4, pp. 37-40; Singh, note 29; Choudhury, note 93; R. P. Rajagopalan, “Indo-US Nuclear Deal: Implications for India and the Global N-Regime,” *Institute of Peace and Conflict Studies*, vol. 62, Special Report (2008), pp. 1-12; Wable, note 6; Carranza, note 31 pp. 108-137; M. Sultan and M. B. Adil, “The Henry J. Hyde Act and the 123 Agreement: An Assessment,” *South Asian Strategic Stability Institute*, Policy Brief 11 (2008), pp.1-8 at p. 3, <<http://www.sassi.org/pdfs/The%20123%20Agreement%20and%20Hyde%20Act.pdf>>.

¹⁵⁵ See 123 Agreement, note 28, in particular Articles 5(6)(a) and 5(6)(b).

¹⁵⁶ See *ibid.*, Articles 5(6)(c) and 10(1) respectively.

¹⁵⁷ See *ibid.*, Article 10(2).

anything other than peaceful purposes.¹⁵⁸ This puts certain limits on India with regard to further acquisition of nuclear armaments, at least in relation to materials and technology transferred under the auspices of the deal. Indeed, both India and the United States profess a shared commitment under the treaty to peaceful uses of nuclear energy and the prevention of the proliferation of weapons of mass destruction.¹⁵⁹

Ultimately, though, the 123 Agreement in no way legally restricts India's continued possession of nuclear weapons or its further acquisition of them through means unrelated to the transfers envisaged by the deal,¹⁶⁰ nor does it limit India's right to possess, acquire and develop means of delivery for nuclear explosive devices, such as ballistic missiles.¹⁶¹ The "separation" of India's civil and military nuclear programmes under the 123 Agreement¹⁶² means that it can continue its strategic nuclear policies essentially unrestricted by the IAEA (or, indeed, by any other entity).

In fact, it has been argued by some writers that the 123 Agreement will actually facilitate further Indian weapons production, because the wealth of possibilities for the acquisition of nuclear materials for civil purposes that the deal

¹⁵⁸ See *ibid.*, Article 9.

¹⁵⁹ See *ibid.*, preamble.

¹⁶⁰ See Paulus and Müller, note 24, p. 118; Ntoubandi, note 95, pp. 280-281; Gahlaut, note 7, p. 236; Carranza, note 31, p. 8 and p. 130; Joyner, note 4, p. 40.

¹⁶¹ See Choudhury, note 93, pp. 7-8. On India's delivery systems programmes for nuclear and other weapons generally, see Ahlström, note 90.

¹⁶² This "separation" obligation is apparent in a number of provisions of the Agreement, but see particularly 123 Agreement, note 28, Article 5(6)(c). For more detail on India's "separation plan" under the 123 Agreement, see "Report Pursuant to Section 104(c) of the Hyde Act Regarding Civil Nuclear Cooperation with India," Submitted to the United States Congress, 10 Sept. 2008, <<http://www.hcfa.house.gov/110/press091108d.pdf>>.

provides will “free up” India’s domestic uranium deposits for its weapons programme, should it so wish.¹⁶³ This concern has been conspicuously expressed by Pakistan.¹⁶⁴ It should be noted, however, that a number of writers have disputed this claim and questioned – for a variety of reasons – whether the 123 Agreement will, in fact, lead to any increase in the size of India’s nuclear arsenal, or even whether the deal will factually increase the *capability* of India to enlarge its nuclear stockpiles.¹⁶⁵

B. India’s Objections Retracted *De Jure*?: Does the 123 Agreement Prohibit Nuclear Testing?

While the 123 Agreement clearly does not restrict India’s possession or further development of nuclear weapons, what is important for the purposes of this article is to note that some writers have argued that the deal *does* impose an obligation on India to refrain from *testing* such weapons.¹⁶⁶ Erkel, for example, states that the 123 Agreement requires “India to concede the right to future nuclear weapons tests.”¹⁶⁷

¹⁶³ See Carranza, note 31, p. 8; J. Cirincione, “Nuclear Cave In,” *Pac Net*, No. 8A, Pacific Forum, Center for Strategic and International Studies (2006), <<http://www.csis.org/media/isis/pubs/pac0608a.pdf>>; D. G. Kimball, “Dangerous Deal with New Delhi,” *Baltimore Sun*, 9 Mar. 2006, <<http://www.commondreams.org/views06/0309-25.htm>>; Paulus and Müller, note 24, p. 117; Ntoubandi, note 95, p. 278.

¹⁶⁴ See Wable, note 6, p. 756; Choudhury, note 93, p. 16.

¹⁶⁵ See R. Nayan, “Pakistan’s Annual Deception,” *Institute for Defence Studies and Analysis Comment* (2011), <http://www.idsa.in/idsacomment/PakistansAnnualDeception_RajivNayan_230211>; Gahlaut, note 7, p. 237; A. Tellis, “Atoms for War? US-Indian Civilian Nuclear Cooperation and India’s Nuclear Arsenal,” *Carnegie Endowment Report* (2006), <<http://www.carnegieendowment.org/files/atomsforwarfinal4.pdf>>; R. Rajaraman, “Implications of the Indo-US Nuclear Deal for India’s Energy and Military Programmes,” in Chari (ed.), note 15, pp. 123-142 at p. 141.

¹⁶⁶ See writers referred to in note 29.

¹⁶⁷ Erkel, note 29, p. 13.

Slightly less emphatically, certain other writers have taken the view that a continuation of India's unilateral moratorium on testing was a prerequisite for the treaty.¹⁶⁸ Within India, the Bharatiya Janata Party argued strongly during debates over the deal that the 123 Agreement would prevent India from conducting future tests.¹⁶⁹

If the 123 Agreement does, in fact, restrict further Indian testing, the deal would amount to a revocation by India of its persistent objector status with regard to nuclear testing, irrespective of the fact that the comprehensive test-ban is not peremptory in nature. Unlike, say, the Lahore MOU, the 123 Agreement binds India directly under international law.

There are a number of factors suggesting that the 123 Agreement may impose a comprehensive nuclear test-ban obligation. First, it is notable that, in the "Joint Statement" issued by the United States and India in 2005 outlining their plans for nuclear cooperation (of which the 123 Agreement is the integral part), Indian Prime Minister Manmohan Singh clearly affirmed India's commitment to continuing its moratorium.¹⁷⁰

Secondly, the "Statement on Civil Nuclear Cooperation with India" issued by the Nuclear Suppliers Group (NSG) explicitly referred to India refraining from any

¹⁶⁸ See Choudhury, note 93, p. 4; Joyner, note 4, p. 37; S. Varadarajan, "The India-Specific Safeguards Agreement and Additional Protocol: A Legal and Political Analysis," draft paper, presented at the third "123 Agreement Project" workshop hosted by the Indian Society of International Law, New Delhi, 2 Apr. 2011 (on file with author, cited with permission), p. 3.

¹⁶⁹ See Rajagopalan, note 154, p. 3.

¹⁷⁰ See Joint Statement Between President George W. Bush and Prime Minister Manmohan Singh (2005), <<http://georgewbush-whitehouse.archives.gov/news/releases/2005/07/20050718-6.html>>.

future nuclear tests.¹⁷¹ The statement set out the NSG waiver, which – in regard to India – lifted the political restriction on trading nuclear materials and technologies to States that are not Parties to the NPT or other non-proliferation instruments and which have not submitted to “full-scope” safeguards.¹⁷² The NSG waiver was required for the United States to be able to “operationalise” the 123 Agreement.¹⁷³ The statement of waiver certainly made clear reference to the “testing” issue, and on this basis it has been argued that abstention from testing was a “conditional requirement” for the waiver.¹⁷⁴

Thirdly, the question of future Indian nuclear tests in the context of the 123 Agreement can be assessed in relation to the domestic export laws of the United States. Focus on American legislation has led to the argument that under the 123 Agreement, “India is now bound by U.S. law. This means India has lost its right to nuclear test.”¹⁷⁵ It is certainly the case that a future Indian test would – since the signing of the 123 Agreement – have notable implications under American domestic law.

Section 123 of the Atomic Energy Act (AEA) 1954¹⁷⁶ regulates American nuclear cooperation with other States. Specifically, Section 123(a)(2) of the AEA prohibits the United States from international nuclear cooperation unless “full-scope”

¹⁷¹ See Nuclear Suppliers Group, “Statement on Civil Nuclear Cooperation with India” (2008), para. 2(g), <http://www.armscontrol.org/system/files/20080906_Final_NSg_Statement.pdf>.

¹⁷² See Wable, note 6, p. 726. “Full-scope” safeguards are those that relate to all nuclear facilities on the State’s territory. See Joyner, note 4, p. 37.

¹⁷³ Joyner, note 4, pp. 37-38.

¹⁷⁴ Nakanishi, note 29, p. 21.

¹⁷⁵ *Ibid.*, p. 15.

¹⁷⁶ AEA, note 28, Section 123.

IAEA safeguards are in place.¹⁷⁷ The “separation” of Indian civil and military nuclear programmes as part of the 123 Agreement meant that an amendment to Section 123(a)(2) of the AEA was required before the United States could conclude the nuclear deal with India.¹⁷⁸ This legislative amendment was made by the 2006 Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act (Hyde Act).¹⁷⁹

The Hyde Act provides, in Section 106, that the United States shall immediately terminate all nuclear cooperation with India should India resume the testing of nuclear weapons.¹⁸⁰ This is a specific restatement – in relation to India – of a general obligation under Section 129 of the AEA, which requires the United States to cease nuclear trade and cooperation with any State that explodes a nuclear device.¹⁸¹ As such, the United States is bound, under both the AEA and the Hyde Act, to terminate the 123 Agreement if India tests another nuclear weapon.

Moreover, under Section 102 of the 1977 Arms Export Control Act (AECA)¹⁸² (the so-called “Glenn Amendment”), the President of the United States is required to impose sanctions on any “technical” NNWS (as designated by the NPT)¹⁸³ if the State in question explodes a nuclear device. Thus, under its own domestic law, the United States would be obliged not merely to terminate the 123 Agreement should India conduct another nuclear test but also – at least *prima facie* – to implement sanctions

¹⁷⁷ See *ibid.*, Section 123(a)(2).

¹⁷⁸ See Wable, note 6, pp. 724-725.

¹⁷⁹ Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act, *House of Representatives* 5682 (2006).

¹⁸⁰ See *ibid.*, Section 106.

¹⁸¹ See AEA, note 28, Section 129.

¹⁸² Arms Export Control Act, *House of Representatives* 13680, Section 102 (1977).

¹⁸³ See note 6.

against India in response. Having said this, the President does have a waiver with regard to this requirement.¹⁸⁴ Therefore, it would not necessarily be the case that sanctions would be imposed, but would certainly seem to be probable that they would be, especially given that sanctions have been taken against India by the United States in the past.¹⁸⁵

Based on all of this, a spokesman for the State Department of the United States, Sean McCormack, explicitly concluded in 2007 that “[t]he proposed 123 Agreement has provisions in it that in an event of a nuclear test by India, then all nuclear cooperation is terminated.”¹⁸⁶ This is patently incorrect. The 123 Agreement does not, in fact, refer to nuclear testing (by either Party) *at all*.¹⁸⁷ Moreover, Article 2(4) explicitly states that the deal must:

[. . .] be implemented in a manner so as not to hinder or otherwise interfere with any other activities involving the use of nuclear material, non-nuclear material, equipment, components, information or technology and military nuclear facilities produced, acquired or developed by them independent of this Agreement for their own purposes.¹⁸⁸

Somewhat unsurprisingly – given the domestic legal provisions of the AEA and AECA – the usual policy of the United States when entering into nuclear cooperation agreements with other States has been to require an explicit test-ban provision in the

¹⁸⁴ See AECA, note 182, Sections 102(5) and 102(6)(B).

¹⁸⁵ See Chari, note 15, p. 15 (taking the view that if India tested again, “sanctions would be imposed” because the Glenn Amendment would clearly apply).

¹⁸⁶ Quoted in A. Kumar, “Does India have the Right to Test a Nuclear Weapon?”, *Daily News and Analysis*, 16 Aug. 2007, <http://www.dnaindia.com/india/report_does-india-have-the-right-to-test-a-nuclear-weapon_1115866-all>.

¹⁸⁷ See Müller, note 154, p. 190 and pp. 196-197; Choudhury, note 93, p. 15; Rajaraman, note 165, p. 128.

¹⁸⁸ 123 Agreement, note 28, Article 2(4).

relevant treaty.¹⁸⁹ However, in the case of the 123 Agreement, irrespective of Prime Minister Singh's commitment to refrain from further tests, from the beginning of discussions New Delhi opposed any explicit provision in the deal itself relating to a blanket prohibition on testing, or even a provision requiring the termination of the deal if testing did occur.¹⁹⁰

India's undertaking in the 2005 "Joint Statement" regarding nuclear testing was simply a restatement of its pre-existing position.¹⁹¹ India already had a unilateral moratorium in place prior to 2005 and, in the context of negotiating a plan for nuclear cooperation with the United States, it did no more than stress that it would continue its practice of self-restraint.¹⁹² This reaffirmation of an existing policy in no way legally binds India should it wish to end its moratorium at some (unspecified) time in the future.

When the Indo-US proposal for the necessary NSG waiver was placed before the NSG in August 2008, seven NSG states took the view that the 123 Agreement needed to include explicit provisions setting out the automatic termination of the deal (and of the NSG waiver related to it) should India conduct another nuclear test.¹⁹³ Yet

¹⁸⁹ See Sultan and Adil, note 154, p. 3.

¹⁹⁰ See *ibid.*; Ntoubandi, note 95, p. 278; Kazi, note 29, p. 93.

¹⁹¹ See Testimony before the Senate Foreign Relations Committee: "The U.S.-India Civil Nuclear Deal" A Statement by Robert J. Einhorn (Senior Adviser), Center for Strategic and International Studies (2006), <<http://csis.org/files/media/csis/congress/ts060426einhorn.pdf>> ("Several of the steps promised by India are simply reaffirmations of existing commitments, including its pledges to continue its unilateral moratorium on nuclear weapons testing [. . .]").

¹⁹² See *ibid.*

¹⁹³ These States were Austria, China, Ireland, the Netherlands, New Zealand, Norway and Switzerland. See Chari, note 15, p. 3; Kerr, note 29, p. 27.

India again rejected any suggestion of incorporating restrictions on testing into the deal during the process of seeking the NSG waiver.¹⁹⁴ It is notable that, ultimately, neither the amended proposal for the NSG waiver, nor the 123 Agreement itself, contained any restriction on Indian nuclear testing; yet both documents were approved by the NSG nonetheless.¹⁹⁵

Given that India has itself rejected any general prohibition on nuclear testing and given that the *opinio juris* supporting such a ban in the context of the 123 Agreement negotiations came from certain NSG members, the NSG statement of waiver has no bearing on India's persistent objector status to any customary test-ban. Moreover, the NSG statement merely noted that India had undertaken a voluntary commitment to continue its unilateral moratorium on testing. This was essentially observational, and no trigger of revocation of the waiver upon further nuclear testing was formally built into the statement by the NSG, even though a number of NSG States lobbied, unsuccessfully, for such a provision.¹⁹⁶

Most crucially, it is important to keep in mind that the NSG is essentially an informal nuclear cartel, and its guidelines and decisions are not legally binding on its members or on other States.¹⁹⁷ Therefore, while the NSG statement setting out the waiver did explicitly refer to a limitation on Indian testing,¹⁹⁸ the statement was rather vague in this regard, and it is certainly not formally binding on India in any event.

¹⁹⁴ See Ntoubandi, note 95, p. 278.

¹⁹⁵ See Chari, note 15, p. 3.

¹⁹⁶ See note 193 and accompanying text.

¹⁹⁷ See D. H. Joyner, "Restructuring the Multilateral Export Control Regime System," *Journal of Conflict and Security Law*, vol. 9 (2004), pp. 181-211, generally, but particularly at p. 184 and pp. 190-194; Joyner, note 48, pp. 51-56, generally, but particularly at p. 55.

¹⁹⁸ See NSG Statement, note 171, para. 2(g).

As for the provisions of various American statutes, it is clear that the *domestic* law of the United States provides for the termination of the 123 Agreement in the event of Indian nuclear testing. However, quite simply and somewhat obviously, the domestic law of the United States does not bind India. As one Indian writer has put it: “Neither the Hyde Act nor the publicly available internal correspondence within the US government on this topic are binding on us [India].”¹⁹⁹

Indeed, not only are the relevant rules under the AEA, the AECA and the Hyde Act legally inapplicable to India, they also relate specifically to the termination of the 123 Agreement and to possible sanctions rather than to anything resembling the general obligation contained in Article I CTBT. To put this another way, there is nothing remotely approaching a comprehensive ban on nuclear testing that is even indirectly associated with the 123 Agreement (through India’s restatement of its unilateral moratorium, by way of the domestic law of one of the Parties or as a consequence of the NSG waiver). Thus, the final version of the 123 Agreement, signed in 2008:

[. . .] contains no binding disarmament commitments – not even preliminary steps, such as a pledge to ratify the CTBT [. . .] Moreover, a clear signal that the international community will not tolerate a future Indian test is missing from both the NSG approval and the US-India Agreement.²⁰⁰

De jure, India can still test nuclear weapons, as it remains both unbound by any conventional obligation not to test (other than under the PTBT) and similarly has retained persistent objector status with regard to any corresponding customary prohibition. Despite some claims to the contrary, the 123 Agreement has no legal

¹⁹⁹ Rajaraman, note 165, p. 128.

²⁰⁰ Müller, note 154, pp. 196-197.

implications for India's persistent objection to a customary comprehensive nuclear test-ban.

C. India's Objections Retracted *De Facto*?: Has the 123 Agreement in Reality Restricted Future Indian Nuclear Testing?

What about *de facto*? Has the 123 Agreement in fact restricted India's ability to test? Again, as with the response to the 1998 tests, it is on the (extra-legal) political level where the deal is more likely to have an effect on any possible future nuclear tests by India. The political pressures to refrain from testing that India has taken upon itself by signing the 123 Agreement are notable. Given this, it has been argued that "[f]or all practical purposes, the option of testing will be as good as dead and remains only in theory."²⁰¹

The 123 Agreement certainly does not *legally* require India to refrain from nuclear testing, as was discussed in the previous Subsection. However, Article 14(1) of the deal does allow the United States (or, of course, India) to *withdraw* from the treaty,²⁰² and such a withdrawal could certainly be justified on the basis that the other Party had resumed nuclear testing. Article 14 does not elaborate upon the specific circumstances that might bring about the termination of the deal or a cessation of cooperation between the Parties,²⁰³ but it undoubtedly gives either Party the legal right to terminate, including in the event that the other Party explodes another nuclear

²⁰¹ A. N. Prasad, *in* Gupta (coordinator), note 154, p. 96.

²⁰² *See* 123 Agreement, note 28, Article 14(1).

²⁰³ *See* United States Department of State's "Responses to the 45 Questions for the Record on the U.S.-India 123 Agreement Submitted to Assistant Secretary Jeffrey Bergner by Chairman Tom Lantos, House Committee on Foreign Affairs on October 5, 2007" (2008), Answer to Question 37, <<http://www.carnegieendowment.org/files/press090208.pdf>>.

device.²⁰⁴ Furthermore, Article 14(4) provides for the return of all nuclear materials between the Parties should the deal be terminated.²⁰⁵

Article 14(2) of the 123 Agreement admittedly specifies that the Parties are to “hold consultations” in the case of a dispute, prior to any termination of the deal.²⁰⁶ In so doing, the United States and India are to:

[. . .] take into account whether the circumstances that may lead to termination or cessation resulted from a Party’s serious concern about a changed security environment or as a response to similar actions by other States which could impact national security.²⁰⁷

As Kerr has noted, this provision could suggest that in the event of an Indian nuclear test, New Delhi may be able to argue that the deal should not be terminated because security concerns justified the test.²⁰⁸ However, even in such circumstances, the United States would still have every legal right to terminate the 123 Agreement, cease nuclear cooperation with India and demand the return of all traded nuclear materials.²⁰⁹ It would seem politically likely that the United States would take this step if India tested again.²¹⁰ Indeed, while India is not bound by the various provisions of American domestic law discussed above, the United States obviously is, and, as such, the United States not only has the legal right to terminate the deal, but

²⁰⁴ See *ibid.*, Answer to Question 16.

²⁰⁵ See 123 Agreement, note 28, Article 14(4).

²⁰⁶ *Ibid.*, Article 14(2).

²⁰⁷ *Ibid.*

²⁰⁸ See Kerr, note 29, p. 40.

²⁰⁹ As the former Indian diplomat and Governor of the IAEA T. P. Sreenivasan has stated rather bluntly: “India has the right to test, but the US has the right to react!” T. P. Sreenivasan, *in* Gupta (coordinator), note 154, p. 91. See Kerr, note 29, p. 40; Nakanishi, note 29, p. 6 (at footnote 16); 123 Agreement, note 28, Article 14.

²¹⁰ See Nakanishi, note 29, p. 14; Prasad, note 201, p. 96.

arguably also has a legal *duty* to immediately do so and recall any transferred material should India test again.

As with any failed relationship, if one party wants to break up there is little the other party can do about it. India is likely to be wary of losing its new partner, and – as a result – the vast economic, social and security related gains that will flow from the 123 Agreement. This is not to mention the risk of India having the deal’s *de facto* recognition of its nuclear power status²¹¹ withdrawn and finding itself thrown back out into the nuclear cold. More generally, of course, it is politically unwise to anger the mightiest State in the world in any context, especially after finally reaching an understanding following thirty years of sanctions and political ill will.

On top of this is the fact that a number of NSG members were clear that they wanted the NSG waiver to be conditional upon India refraining from future testing.²¹² While this proposal was not formally implemented in either the 123 Agreement or the NSG statement of waiver, the implication of the fact that an acknowledgement of India’s self-imposed test-ban *was* included in the waiver statement²¹³ is that the waiver will be withdrawn should India end its moratorium. For example, New Zealand stated in 2008 that “in the event of a nuclear test by India, this exemption will become null and void.”²¹⁴ Of course, this is not the case *per se* under the terms of the waiver, but it would seem a likely consequence of any Indian test.²¹⁵

²¹¹ See Chari, note 15, p. 7.

²¹² See note 193 and accompanying text.

²¹³ See NSG Statement, note 171, para. 2(g).

²¹⁴ Quoted in Kerr, note 29, p. 29.

²¹⁵ See Nakanishi, note 29, p. 16. Having said this, to now withdraw the waiver the NSG would have to agree by consensus to cut off nuclear exports to India. See Kerr, note 29, p. 29. It has been argued that such a consensus agreement would not necessarily follow from a further Indian nuclear test, as some

In spite of all of the factors discussed that would indicate that the deal has notably decreased the likelihood of a future Indian nuclear test *de facto*, the political implications of the 123 Agreement in this context remain difficult to judge. For example, the fact that Pakistan has raised concern over the potential of the 123 Agreement to indirectly increase India's nuclear weapons stockpiles (by releasing domestic uranium for military purposes)²¹⁶ means that Pakistan itself may well feel compelled to further test, develop and stockpile its own nuclear weapons.²¹⁷ The security implications of an enlarged Pakistani nuclear arsenal could, in turn, lead to an *increased* likelihood of a future Indian test as well, as a *de facto* indirect consequence of the 123 deal.²¹⁸

NSG members may well wish to continue nuclear cooperation with India irrespective of any additional nuclear testing. See Rajaraman, note 165, pp. 128-129. France, for example – a State that has its own history as an international pariah with regard to nuclear testing – has already signed a separate bilateral agreement for nuclear cooperation with India under the NSG waiver. See Cooperation Agreement Between the Government of the Republic of India and the Government of the French Republic on the Development of Peaceful Uses of Nuclear Energy 2008, <http://articles.timesofindia.indiatimes.com/2008-09-30/india/27889223_1_nuclear-fuel-indo-france-energy-for-peaceful-purposes>. See also “India and France in Nuclear Deal,” *BBC News*, 30 Sept. 2008, <<http://news.bbc.co.uk/1/hi/7644377.stm>>. Given the international policy shift embodied by the NSG waiver, it is entirely possible that certain bilateral nuclear agreements with India – such as the Indo-Franco deal – could survive further Indian testing, even if the 123 Agreement collapsed.

²¹⁶ See note 164 and accompanying text. On this possible implication of the 123 Agreement more generally, see note 163 and accompanying text.

²¹⁷ See Wable, note 6, pp. 757-758.

²¹⁸ It was noted above that it is arguable whether the 123 Agreement will – or even could – lead to any increase in the size of India's nuclear arsenal. See note 165 and accompanying text. Nonetheless, whether this is a factual consequence of the deal or not, the 123 Agreement is clearly *perceived* as

Overall, therefore, the picture is not entirely clear. Joyner has stated that under the 123 Agreement, India “agreed to [. . .] continue its unilateral moratorium on nuclear testing.”²¹⁹ This statement can be read as a wholly incorrect claim *de jure*, in that legally India agreed to no such thing in the deal: indeed, it rejected any such provision appearing in the 123 Agreement. Equally, Joyner’s statement can be read as a fairly accurate reading of the deal in its wider context, *de facto*: looking at all factors, it is probably the case that India is, following the signing of the 123 Agreement, rather less likely to test than it previously was.

VI. CONCLUSION

It is arguable that a comprehensive nuclear test-ban now exists under customary international law, although the evidence in support of this is admittedly not entirely conclusive. Any such customary norm would *prima facie* bind India. However, if the test-ban is customary, India has clearly persistently objected to it, through sustained deed and statement prior to and during the formation of the customary norm (and through to the present). The comprehensive test-ban clearly does not meet the test for a peremptory norm – despite this being claimed by at least one writer – though if it did, this would invalidate India’s persistent objector status *de jure*.

More interestingly, India found its persistent objector status under threat *de facto* in 1998, when it was faced with huge pressure from other States (individually and collectively) to refrain from testing in the future and to sign the CTBT. Yet it is clear that in spite of this, India has maintained its objections to the CTBT and to the

increasing the scope of India’s military nuclear capability within Pakistan, and that perception in itself could lead to an increased likelihood of future Pakistani – and, thus, Indian – nuclear tests.

²¹⁹ Joyner, note 4, p. 37.

international legal regime governing nuclear weapons more generally. In the final analysis, what matters most is the hard fact that India has the bomb and is understandably determined to keep hold of it: this is surely the most potent indication of India's continued persistent objection.

It has also been suggested by some writers that the 123 Agreement may have imposed a comprehensive nuclear test-ban obligation on India and, therefore, that the deal may have effectively resulted in India retracting its persistent objector status. Yet when one examines the 123 Agreement, it is clear that nothing in it requires India to refrain from nuclear testing. In this context, then, it may be said that 123 Agreement allows India to “have its radioactive cake and eat it too.”²²⁰

Prime Minister Singh stated in 2007 that the 123 Agreement “does not in any way affect India's right to undertake future nuclear tests.”²²¹ While this is certainly correct on a legal level, it is perhaps not entirely reflective of the political factors underpinning the deal. Again *de facto*, the political implications of the 123 Agreement – particularly given key provisions of American domestic law and the waiver of the NSG – are likely to, in effect, decrease the chances of future Indian tests.

Ultimately, India has explicitly reserved the legal right to test, and this, in itself, indicates that it wishes to keep the nuclear testing option open. This also means that India retains its position as a persistent objector to any customary comprehensive test-ban norm that may exist. Any attempts to pressure India into signing the CTBT, or to otherwise accept a legal restriction on its sovereign right to test, have “aroused intense nuclear nationalism [. . .] This form of nationalism is much stronger in India

²²⁰ Carranza, note 31, p. 132.

²²¹ Quoted in Sultan and Adil, note 154, p. 3.

than any other nuclear countries and is very much tied to India's notion of national independence and their particular colonial history.”²²²

While the 123 Agreement may mean the door to Indian nuclear testing is not as wide open as it was prior to 2005 (and certainly 2008), the very fact that India fought for the “testing” issue to remain absent from the substance of the deal – not to mention its continued explicit rejection of the CTBT – clearly shows that India is keeping that door ajar. It is a door that will certainly not be fully closed any time soon.

²²² Choudhury, note 93, p. 10.