

INDIA'S STATUS AS A NUCLEAR WEAPONS POWER UNDER CUSTOMARY INTERNATIONAL LAW

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ABSTRACT

Were India to be a party to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), international law would require it to disarm its nuclear weapons under Article II of that treaty. As a non-signatory to the NPT, however, India has never been under a conventional international law obligation to refrain from acquiring, or to give up its possession of, nuclear arms. Yet an increasing number of scholars have argued that certain provisions of the NPT, including the obligation set out in Article II, have become additionally binding in customary international law. If this is the case, India could find itself legally required to disarm its nuclear weapons, irrespective of the fact that it is not bound by the NPT directly. This article examines whether the prohibition on the possession of nuclear arms for all but the officially sanctioned NPT nuclear powers has indeed taken on a customary international law status. It is argued that this is probably not the case, though it is true that a credible argument can be made in support of the existence of such a customary norm. However, it is contended that even if NPT Article II does have additional binding force in custom, India has acquired the status of a 'persistent objector' state and thus nonetheless retains its legal right to possess nuclear weapons.

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I. INTRODUCTION

India, along with a handful of other states, is in the peculiar position of being defined under the Treaty on the Non-Proliferation of Nuclear Weapons (NPT)¹ as a 'non-nuclear weapons state' (NNWS), while at the same time being in possession of nuclear weapons. Under Article II of the NPT, all NNWS are required to refrain from acquiring such weapons.² In an attempt to curb nuclear proliferation in 1968 (while pragmatically recognising that the nuclear genie would not go back into the lead-lined bottle for those states that already had the bomb), the NPT conferred the right to possess nuclear weapons upon only the five 'nuclear weapons states' (NWS) that were in possession of such weapons prior to the treaty's drafting. As a comparatively 'new' nuclear power, India is not a member of this sacred club.

One might therefore initially assume that India's possession of nuclear weapons is in breach of international law. However, India has always been and remains a non-signatory to the NPT and, as such, India is not, and has never been, bound by that treaty. Put simply, the obligation to refrain from acquiring nuclear weapons does not apply to India under treaty law, because India is not a party to the relevant treaty.³

1 Treaty on the Non-Proliferation of Nuclear Weapons, 1970, 729 U.N.T.S. 161 [Hereinafter, 'NPT'].

2 Article II, NPT; *Infra* note 28.

3 On the basis of the rule that treaties do not directly bind non-parties. See Vienna Convention on the Law of Treaties, 1969, 1155 U.N.T.S. 331, Article 34 of which provides that '[a] treaty does not create either obligations or rights for a third State without its consent.'

The NPT is often said to represent the 'cornerstone' of international law's system of nuclear non-proliferation,⁴ but it is the cornerstone of a building that India has never entered. The recent Agreement for Cooperation Between the Government of the United States of America and the Government of India Concerning Peaceful Uses of Nuclear Energy ('123 Agreement')⁵ does to an extent bring India in from the nuclear wilderness,⁶ thus setting it somewhat apart from the three other 'outsider' nuclear powers: Israel, Pakistan and the Democratic People's Republic of Korea (DPRK). Nonetheless, it is clear that the Indo-US deal does not impose NPT obligations on India even indirectly. India continues to operate outside of the NPT regime⁷ and, as such, is not bound by the obligation in NPT Article II. Clearly, there is no treaty-based international law requirement for India to disarm its nuclear weapons.

It is increasingly being argued by some scholars, however, that certain provisions of the NPT have additionally acquired binding force through their

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- 4 See for example, DANIEL H. JOYNER, *INTERNATIONAL LAW AND THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION* 8 (2009) [Hereinafter, "Joyner"]; John Simpson, *The Future of the NPT* in NATHAN BUSCH AND DANIEL H. JOYNER (eds) *COMBATING WEAPONS OF MASS DESTRUCTION: THE FUTURE OF INTERNATIONAL NONPROLIFERATION POLICY* 45, 46 (2009); Masahiko Asada, *The Treaty on the Non-Proliferation of Nuclear Weapons and the Universalisation of the Additional Protocol*, 16 *JOURNAL OF CONFLICT AND SECURITY LAW* 3, 3 (2011); Winston Nagan and Erin Slemmens, *National Security Policy and Ratification of the Comprehensive Test Ban Treaty*, 32 *HOUSTON JOURNAL OF INTERNATIONAL LAW* 1, 40 (2009-2010); *Fact Sheet: Nuclear Non-Proliferation Treaty*, 2 United States Department of State Dispatch 12 (1991).
 - 5 Agreement for Cooperation Between the Government of the United States of America and the Government of India Concerning Peaceful Uses of Nuclear Energy (October 10, 2008) available at http://responsiblenucleartrade.com/keydocuments/india_123_agreement_text.pdf. The 123 Agreement is a bilateral treaty between India and the United States, which aims to 'to enable full civil nuclear energy cooperation' between the parties (see Article 2). The deal is termed a '123 Agreement' after § 123 of the United States Atomic Energy Act (AEA) (1954) 83-703 Public Law 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.
 - 6 See for example, MARIO CARRANZA, *SOUTH ASIAN SECURITY AND INTERNATIONAL NUCLEAR ORDER: CREATING A ROBUST INDO-PAKISTANI NUCLEAR ARMS CONTROL REGIME* 2, 44 (2009) [Hereinafter, "Carranza"]; KesavWable, *The US-India Strategic Nuclear Partnership: A Debilitating Blow to the Non-Proliferation Regime*, 33 *BROOKLYN JOURNAL OF INTERNATIONAL LAW* 719, 720-721 (2007-2008) [Hereinafter, "Wable"].
 - 7 Wable, 729-730; Jörn Müller, *The Signing of the US-India Agreement Concerning Peaceful Uses of Nuclear Energy*, 1 *GÖTTINGEN JOURNAL OF INTERNATIONAL LAW* 179-198 (2009); P.R. Chari, *Introduction* in P. R. CHARI (ed) *INDO-US NUCLEAR DEAL: SEEKING SYNERGY IN BILATERALISM* 1, 9 (2009).

subsequent adoption into *customary international law*.⁸ Unlike treaty law, which only binds states that have signed and ratified the treaty in question,⁹ rules of customary international law bind all states *prima facie*.¹⁰ One implication of a finding that key provisions of the NPT are also binding in custom, then, would be that India is *prima facie* in breach of international law simply by possessing nuclear weapons, as this is something prohibited for all but the five 'official' NWS under Article II of the NPT. In other words, India would have the status of an NPT non-signatory state that was *nonetheless* bound to disarm its nuclear arsenal and then refrain from (re)obtaining any nuclear arms in the future, albeit that this obligation incumbent on India would derive from customary international law and not directly by way of the NPT itself.

Having said this, there is a possible exception to customary international law's universally binding force: 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.'¹¹ States are thus – at least in theory – not bound by new customary rules to which they have persistently objected. The continued practice of post-nuclear India in rejecting specific aspects (and indeed the very nature) of the legal nuclear non-proliferation regime would certainly fit the model of a 'persistent objector' state. It can therefore be argued that India is not merely a non-signatory to the

8 See for example Wable, 738; David Koplow, *Parsing Good Faith: Has the United States Violated Article VI of the Nuclear Non-Proliferation Treaty?*, 93 WISCONSIN LAW REVIEW 301, 390 (1993); Carranza, 42; Thomas Graham, *South Asia and the Future of Nuclear Nonproliferation* (1998), ARMS CONTROL TODAY available at http://www.armscontrol.org/act/1998_05/grmy98 (arguing that, by 1998 and independent of the NPT, "an international norm of behaviour [had] developed establishing that the number of nuclear-weapon states...would remain at five."); Susan Carmody, *Balancing Collective Security and National Sovereignty: Does the United Nations Have the Right to Inspect North Korea's Nuclear Facilities*, 18 FORDHAM INTERNATIONAL LAW JOURNAL 229, 273 (1994-1995); Orde Kittrie, *Averting Catastrophe: Why the Nuclear Nonproliferation Treaty Is Losing Its Deterrence Capacity and How to Restore It* MICHIGAN JOURNAL OF INTERNATIONAL LAW 337, 340-341, 348-350 (2006-2007) [Hereinafter, "Kittrie"] (indicating that the non-proliferation regime may be customary in nature, but ultimately not concluding decisively on the question); Geoffrey Carlson, *An Offer They Can't Refuse – The Security Council Tells North Korea to Re-Sign the Nuclear Non-Proliferation Treaty*, 46 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 420, 429-431 (2007-2008) (though the customary status of aspects of the regime is only implicit in Carlson's analysis); Andreas Persbo, *Is the Partial Test Ban Treaty Customary Law?* (2006) available at <http://www.armscontrolverification.org/2006/10/is-partial-test-ban-treaty-customary.html> [Hereinafter, "Persbo"] (though again, this conclusion is only implicit in Persbo's analysis).

9 *Supra* note 3.

10 See for example, James Kelly, *The Twilight of Customary International Law*, 40 VIRGINIA JOURNAL OF INTERNATIONAL LAW 449, 451 (1999-2000).

11 Olufemi Elias, *Persistent Objector*, MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW (2009) available at www.mpepil.com. This is a good expression of the common definition of the rule [Hereinafter, "Elias"].

NPT, but is also a persistent objector to any customary international law norms that may 'mirror' the provisions of that treaty.

This article considers, first, whether Article II of the NPT may have acquired additional binding force under customary international law, as some scholars have argued. Such a claim is highly debatable, but can be credibly made. Secondly, there follows an examination of India's possible persistent objector status to any such customary prohibition on the acquisition or possession of nuclear weapons (for all but the 'official' NPT NWS), assuming that one accepts that this customary obligation exists at all. As a non-signatory to the NPT, it is indisputable that India has every right under conventional (that is, treaty-based) international law to possess nuclear weapons. The aim of this article is therefore to clarify India's nuclear weapons power status under customary international law.

It is concluded that the obligation contained in NPT Article II is probably not separately binding in customary international law, albeit that a case for this can be made. In any event, even if one accepts a customary international law obligation on NNWS to disarm, this cannot apply to India because it has persistently objected to this obligation, meaning that it is exempt from any possible customary international law rule. India therefore retains a legal right to possess its nuclear weapons in treaty law (because it is not a party to the NPT) *and* in customary international law (because it is unclear whether such an obligation exists in custom and, even if it does, the rule cannot bind India because of India's persistent objector status).

II. THE CUSTOMARY STATUS OF ARTICLE II OF THE NPT

A. Background to the NPT Regime and the Substance of Article II

This article is not the place to examine the nuclear non-proliferation regime under international law in any detail,¹² but a very brief summary is here necessary. It is often stated, as noted above, that the NPT represents the 'cornerstone' of international law's system of non-proliferation.¹³ As is well known, the treaty provides the underpinning legal framework in this area by setting out a system of differentiated obligations between two groups of states: the NWS¹⁴ and the

12 An excellent summary of the nuclear non-proliferation regime under international law is provided by Joyner, 3-76.

13 *Supra* note 4.

14 For the purposes of the NPT, a NWS "is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967." Article IX (3), NPT. This group is comprised of the permanent members of the United Nations Security Council: the United States, the United Kingdom, Russia (formerly the Soviet Union), France and China.

NNWS.¹⁵ The NPT embodies and formalises a 'grand bargain' between these two groups.¹⁶ By entering into the legal framework of the NPT, the NNWS undertook not to seek to acquire, by any means, nuclear weapons.¹⁷ These states also accepted an obligation to conclude safeguard agreements with the International Atomic Energy Agency (IAEA) to monitor their peaceful uses of nuclear energy and to be restricted by such agreements in the context of the transfer of nuclear materials or technology for peaceful purposes.¹⁸

In return for this promise on the part of the NNWS to curtail the global spread of nuclear armaments – and to concede their pre-existing right to acquire them – the NPT reaffirmed the 'inalienable right' of all states to pursue peaceful uses of nuclear energy.¹⁹ Furthermore, the NWS undertook to refrain from the proliferation of nuclear weapons (or technologies that could lead to their development),²⁰ gave a commitment to facilitate the advancement of peaceful uses of nuclear energy in other states²¹ and, finally, agreed to move towards complete nuclear disarmament themselves.²² The law regarding non-proliferation, then, is essentially premised on the bargain at the heart of the NPT between the nuclear 'haves' and 'have-nots'.²³

Under the NPT framework, India (along with Pakistan, Israel and the DPRK) is in the anomalous position of being a *de facto* nuclear 'have', while at the same time being classed as a *de jure* nuclear 'have-not'. India clearly does not meet the NPT's definition for a NWS, in that it had not 'manufactured and exploded a nuclear weapon' prior to 1 January 1967.²⁴ Under the NPT, then, India is defined as a NNWS. Yet India has in effect been part of the 'nuclear powers club' since the Pokhran-I tests of 1974 and the detonations of what India termed 'peaceful nuclear

15 Being those states that do not meet the test for NWS set out in Article IX (3), NPT.

16 See for example Joyner, 9.

17 See Article II, NPT.

18 Article III, NPT.

19 Article IV, NPT.

20 Article I, NPT.

21 Article V, NPT.

22 Article VI, NPT.

23 Andreas Paulus and Jörn Müller, *Survival Through Law: Is There a Law Against Nuclear Proliferation*, 18 FINNISH YEARBOOK OF INTERNATIONAL LAW 83, 133 (2007) [Hereinafter, "PAULUS AND MÜLLER"].

24 Article IX (3), NPT; *Supra* note 14 and 15.

explosions.²⁵ This *de facto* status as a nuclear weapons state was obviously firmly underlined by the 1998 Pokhran-II tests and India's explicit self-declaration of nuclear weaponisation.²⁶ Nonetheless, at least as the regime of the NPT currently functions, India is officially a NNWS.²⁷

The key provision of the NPT in relation to India's nuclear weapons power status is Article II, which provides:

Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.²⁸

Thus, if India were to become an NPT party – something which will simply not happen under the current NPT framework, but let us suspend our disbelief momentarily – given that it is technically a NNWS in possession of nuclear weapons, it would be bound under Article II to disarm all existing nuclear arms and to desist from producing or acquiring any more. Of course, India will never join the NPT as a NNWS, but if the obligation contained within Article II can also be considered as being binding under *customary international law*, then India would be obliged to give up its nuclear arsenal, irrespective of the fact that it is not bound to do so directly under the NPT.

B. Is Article II of the NPT also Binding in Customary International Law?

The crucial question, then, is whether NPT Article II also has binding force under customary international law (or, more accurately, whether the *obligation*

25 P.R. Chari, *Pokhran-I: Personal Reflections* 80, INSTITUTE OF PEACE AND CONFLICT STUDIES, SPECIAL REPORT (1999), available at http://www.ipcs.org/pdf_file/issue/SR80-Chari-Final.pdf. The 1974 Pokhran-I tests were in reality largely indistinguishable from the explosion of a nuclear weapon, see Carranza, 44. On this basis Ahlström tellingly referred to the tests as being “allegedly peaceful”, Christer Ahlström, *Arrows for India? – Technology Transfers of Ballistic Missile Defence and the Missile Technology Control Regime*, 9 JOURNAL OF CONFLICT AND SECURITY LAW 103, 119 (2004).

26 See Statements from India and Pakistan, BBC News (1998) available at http://news.bbc.co.uk/1/hi/events/asia_nuclear_crisis/world_media/114139.stm.

27 Wable, 730.

28 Article II, NPT.

contained in NPT Article II is additionally a rule of custom). It is certainly possible for customary legal rules to stem initially from provisions in multilateral treaties and become binding on non-parties.²⁹ As D'Amato has phrased this:

A treaty is obviously not equivalent to custom; it binds only the parties, and binds them only according to the enforcement provisions contained in the treaty itself. However, rules in treaties reach beyond the parties because a treaty itself constitutes state practice.³⁰

As with customary international law more generally, the additional customary status of any given treaty rule ultimately turns on whether said rule has been sufficiently practiced, and whether states have accepted the rule as being customary international law (the so-called '*opinio juris*' element).³¹ A number of writers have taken the view that some of the treaty-based nuclear non-proliferation norms contained in the NPT have become part of customary international law.³² However, NPT Article II can only be viewed as being customary law if sufficient state practice and *opinio juris* are present.

With regard to the state practice element, those writers that claim the customary status of certain NPT provisions point to the fact that the NPT enjoys near-universal membership and adherence.³³ As of December 2011, the NPT has

29 For example, Article 38, Vienna Convention on the Law of Treaties 1969 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) merits, [1969] ICJ Reports 4, at [60]-[81] [Hereinafter, "*North Sea Continental Shelf*"]. See also Roger Clark, *Treaty and Custom* in LAURENCE BOISSON DE CHAZOURNES AND PHILIPPE SANDS (eds), INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 171, 172-176 (1999). 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), jurisdiction of the court and admissibility of the application [1984] ICJ Reports 392 at [73].

30 Anthony D'Amato, *Trashing Customary International Law*, 81 AMERICAN JOURNAL OF INTERNATIONAL LAW 101, 103 (1987) [Hereinafter, "*D'Amato*"].

31 See Robert Cryer, *Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study*, 11 JOURNAL OF CONFLICT AND SECURITY LAW 239, 244 (2006) [Hereinafter, "*Cryer*"]. These two elements – state practice and *opinio juris* – are required for all customary international law formation. For a detailed examination, see Michael Akehurst, *Custom as a Source of International Law*, 47 BRITISH YEARBOOK OF INTERNATIONAL LAW 1-53 (1974-1975) [Hereinafter, "*AKEHURST*"].

32 *Supra* note 8.

33 For example, Persbo indicates that near universal membership of the NPT is indicative of the customary international law status of NPT Article II obligations, although this is only implicit in his analysis, see Persbo.

189 states parties.³⁴ In 1996, when the treaty had 182 states parties, the International Court of Justice (ICJ) referred to this group of states – which has since grown – as ‘the vast majority of the international community.’³⁵ Moreover, the NNWS that are party to the NPT have for the most part adhered to the obligations of the regime. As Kittrie notes, ‘State practice in the early 1990s, and indeed still today, manifests more compliance than with many of the most widely recognised customary international law norms.’³⁶

Admittedly, certain NNWS have been accused of ‘displaying schizophrenic tendencies’ in the context of campaigning for NWS nuclear disarmament in relation to NPT Article VI.³⁷ Moreover, in the context of Article VI, it is clear that NWS have consistently flouted their obligation to move in good faith towards nuclear disarmament.³⁸ This ongoing neglect of Article VI was noted *obiter dicta* by the ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*.³⁹ Indeed, the Court pointed that Article VI constituted an ‘obligation to achieve a precise result – nuclear disarmament in all its aspects.’⁴⁰ This was an obligation the Court clearly felt had not been met by the official NWS.

Such contrary state practice means that it is impossible to view Article VI as being additionally binding in customary international law.⁴¹ However, this is actually not directly relevant to the current analysis, as Article VI relates to the possession of nuclear weapons by the NPT NWS. The obligation contained in Article VI would be inapplicable to India even if that obligation was additionally

34 The current status of the NPT is available at <http://treaties.un.org/pages/showDetails.aspx?objid=08000002801d56c5>. The figure of 189 does not include Taiwan, which subscribes to and adheres to the obligations within the NPT but is obviously an entity with debatable statehood.

35 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Reports 226 at [100] [Hereinafter, “*Nuclear Weapons*”].

36 Kittrie, 349.

37 Miguel Bosch, *The Non-Proliferation Treaty and its Future* in LAURENCE BOISSON DE CHAZOURNES AND PHILIPPE SANDS (EDS) *INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS*, 375-38, 381 (1999) [Hereinafter, “*Bosch*”].

38 See Adam Steinfeld, *Nuclear Objections: The Persistent Objector and the Legality of the Use of Nuclear Weapons*, 62 *BROOKLYN LAW REVIEW* 1635-1686, 1670 (1996) [Hereinafter, “*STEINFELD*”]. Having said this, it is worth noting that Joyner has pointed out that it may be possible to argue that the NPT NWS have met their obligations under Article VI (though the present author would strongly dispute this and it is not an argument that Joyner himself subscribes to). See DANIEL H. JOYNER, *INTERPRETING THE NUCLEAR NON-PROLIFERATION TREATY* 95-108(2011).

39 *Nuclear Weapons*, ¶98-100.

40 *Nuclear Weapons*, ¶99.

41 JOYNER, 69.

binding in customary international law because, as already noted, India does not technically qualify as a NWS under the NPT.

Therefore, in the context of this paper, the finding that the obligation contained in Article VI is not a rule of customary international law simply underlines the fact one cannot view the NPT as having been adopted into custom wholesale. It does not mean that other provisions of the treaty are incapable of taking on a binding character in custom. In contrast to Article VI, it is notable that a survey of the state practice relating to Article II (an obligation that *could* be applicable to India under customary international law, given that it is technically defined as a NNWS state) indicates that adherence is widespread.⁴²

Of course, such adherence is not universal: there are obviously notable absentees from the NPT. India aside, Israel, Pakistan and the DPRK also all possess nuclear weapons *de facto* – despite ‘official’ NNWS status under the NPT – and are non-parties to the treaty.⁴³ Yet the handful of technical NNWS states operating outside the regime does not necessarily debar the customary status of some of the NPT NNWS rules, including Article II. Universal practice is certainly not required for customary international law formation⁴⁴ and, as will be discussed in the next section, these states could be viewed as persistent objectors anyway.

It is notable that with regard to the DPRK’s nuclear weapons policy, particularly since 2003, the United Nations (UN) Security Council has held that the DPRK remains bound by provisions of the NPT relating to NNWS, in spite of it having withdrawn from the treaty.⁴⁵ This would suggest implicit acceptance of

42 As Bosch has stated: “[A]t each of the NPT’s five review conferences, two fundamental questions have been raised. First, have the NNWS lived up to their part of the bargain...[a]nd second, have the NWS fulfilled their nuclear disarmament obligations? Invariably, the answer to the first question has been in the affirmative while the second has been in the negative.” BOSCH, 388; *Supra* note 35.

43 India, Pakistan and Israel have never been party to the NPT, whereas the DPRK withdrew from the treaty, under Article X, in a cloud of controversy in 2003, see *North Korea withdraws from Nuclear Pact*, BBC NEWS (2003) available at <http://news.bbc.co.uk/1/hi/2644593.stm>; *Infra* note 46.

44 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, the corresponding practice must be in absolute rigorous conformity with the rule.” *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits [1986] ICJ Reports 14 at [185] [Hereinafter, “*Nicaragua*”].

45 See S.C Res.1695, U.N. SCOR, 61st Year, Resolutions and Decisions of the Security Council 2006, UN Doc. S/RES/1695 (2006) (“*Deploing the DPRK’s ...stated pursuit of nuclear weapons in spite of its Treaty on Non-Proliferation of Nuclear Weapons...obligations*”).

the customary status of the key provisions applicable to NNWS by the Security Council, in that this is the most logical explanation of why the Council saw the DPRK as still being bound by these NPT obligations.⁴⁶

Given the near-universal membership of the NPT and the widespread compliance by NNWS NPT parties with the obligation in Article II, a credible case can be made that there exists sufficient state practice to evidence the claim that the rule contained in Article II is also binding in customary international law. However, the extent of supporting *opinio juris* for a customary prohibition on the possession of nuclear weapons (for all but the NPT NWS) is somewhat less evident. It is rather rare for states to explicitly endorse the customary nature of NPT rules. This is not to say that no such examples exist. States have on occasion explicitly argued that NPT rules are additionally binding in customary international law: take, for example, Venezuela's repeated affirmation of this view during the 1998 Conference on Disarmament.⁴⁷ Such evidence of explicit *opinio juris* to this effect, though, is notable because of its scarcity.

More generally, the inexact process by which customary international law comes into being means that there is a good deal of latitude to construct a claim that any given norm has or has not taken on customary law status.⁴⁸ One must be very careful in unilaterally asserting that a rule – any rule – is binding in custom. This is particularly pronounced when the rule in question has its roots in a treaty.⁴⁹ State adherence to obligations contained in a treaty may simply be because the treaty-based obligations are already binding on states parties, something that is

46 However, this is not the *only* interpretation of this finding by the Security Council. It is possible that the DPRK remains bound by the NPT on the basis that – as some states have argued – its withdrawal under Article X was invalid. On the complicated legal issue of the DPRK's withdrawal from the NPT, which goes beyond the scope of this paper, see Masahiko Asada, *Arms Control Law in Crisis? A Study of the North Korean Nuclear Issue*, 9 JOURNAL OF CONFLICT AND SECURITY LAW 331-355 (2004).

47 Venezuela made the explicit claim that the NNWS rules of the non-proliferation regime had become customary international law on more than one occasion during the 1998 Conference on Disarmament. See *Final Record of the 792nd Plenary Meeting* UN Doc. CD/PV.792 (1998) at 32; and *Final Record of the 795th Plenary Meeting* UN Doc. CD/PV.795 (1998) at 47.

48 See MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES* 129-165 (1999). [Hereinafter, "Byers"]

49 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*, at [71].

especially relevant when the treaty is one with as substantial a membership as the NPT.⁵⁰

The paucity of examples of explicit *opinio juris* affirming the customary international law status of the obligation found in NPT Article II can therefore perhaps be explained by the fact that most states would view such an overt expression of *opinio juris* as being unnecessary, given that they are already NPT members. The vast majority of NNWS states understandably will see the prohibition on the acquisition and possession of nuclear weapons by NNWS as self-evidently applicable to them, given that they are conventionally bound by it already. This significantly clouds the issue of whether sufficient *opinio juris* exists to support the widespread state practice in affirming the customary status of Article II of the NPT.

In addition to the difficulty of identifying adequate supporting *opinio juris*, a conceptual argument has been raised against the customary international law status of provisions of the NPT. This view is primarily based on the unusual status of the NPT as a large multilateral 'contract treaty'; in other words, a treaty with a *quid pro quo* arrangement at its core, as contrasted with a pure 'law-making treaty' creating common standards of legal obligation for all parties.⁵¹ Joyner, for example, argues that the fact that no universal set of obligations exist under the NPT means that these rules cannot take on the character of customary international law obligations.⁵² Another way of phrasing this same argument is to say that, because of the differentiated 'two-tier' obligations at the heart of the nuclear non-proliferation regime, the provisions of the NPT are not such that they 'could be regarded as forming the basis of a general rule of law' (this requirement being one of the criteria

50 Compare the NPT with the argument raised by Judge Sir Robert Jennings in his dissenting opinion attached to 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) 1 United Nations Treaty Series 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." *Nicaragua*, Dissenting Opinion of Judge Jennings, at 531. See also Byers, 170-172; Cryer, 244; D'Amato.

51 On the distinction between 'law-making treaties' and 'contract treaties' see PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 37-38 (7thedn., 1997) [Hereinafter, "Malanczuk"]; MALCOLM SHAW, *INTERNATIONAL LAW* 94 (6thedn., 2008). [Hereinafter, "Shaw"]

52 Joyner, 68-69. See also Daniel H. Joyner, *North Korean Links to Building a Nuclear Reactor in Syria: Implications for International Law*, 12 *AMERICAN SOCIETY OF INTERNATIONAL LAW: ASIL INSIGHTS* (2008) available at http://www.asil.org/insights080428.cfm#_edn1.

set out by the ICJ in the *North Sea Continental Shelf* cases for determining whether treaty-based rules could also be considered as being binding in custom).⁵³

Yet it is not entirely clear that the NPT is in fact a 'contract treaty': the line between 'law-making treaties' and 'contract treaties' is not well defined,⁵⁴ and the multilateral nature of the NPT does not actually resemble the common bilateral 'contract treaty' model. More importantly, the present writer takes the view that, while establishing customary rules based on differentiated treaty obligations is certainly not straightforward, the *quid pro quo* nature of the NPT is not necessarily a bar to these norms being adopted into custom. It is clear that a 'general rule of law' in custom can form in a manner that produces differentiated obligations on states. The obvious example of this is 'regional' customary international law (or what is also sometimes called 'special' or 'local' customary international law), which binds some states but not all.⁵⁵ As a matter of legal principle, then, there is no reason why the obligations of a customary non-proliferation regime could not collectively form along similar lines. The obligation under NPT Article II could develop in custom so as to only apply to states that met the test for those entities to which the Article was designed to apply: NNWS. In other words, it is conceptually quite possible that customary obligations have formed that are 'general' in the sense of applying to all NNWS, even if they are not 'universal' in the sense of applying to all states.

Overall, it is clear that there is no *comprehensive* customary requirement to disarm nuclear weapons, because this would require that the obligations contained in both NPT Article II *and* Article VI were together adopted into customary international law. Only then would any customary disarmament obligation apply to NWS and NNWS alike. Article VI has not taken on customary status: there is simply no state practice to support such a finding.⁵⁶

The situation is less clear cut in relation to Article II of the NPT (which would be applicable to India were it an NPT party). It is very difficult to determine whether the obligation in Article II of the NPT is also binding in customary international law. There is some evidence to suggest that such customary crystallisation may

53 *North Sea Continental Shelf*, ¶72.

54 *Malanczuk*, 38.

55 On regional (or 'special' or 'local') customary international law, see Hugh Thirlway, *The Sources of International Law* in MALCOLM EVANS (ed.) *INTERNATIONAL LAW* 96, 106-107 (3rd edn., 2010); Anthony D'Amato, *The Concept of Special Custom in International Law*, 63 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 211-223 (1969); Akehurst, 28-31; *Right of Passage over Indian Territory (Portugal v India)* merits [1960] ICJ Reports 4, at [39].

56 *Supra* note 38-41.

have taken place but, equally, significant doubts remain. In the view of the present author, it is probably *not* the case that the rule contained within Article II has taken on the additional status of a customary norm. This writer feels that the preponderance of evidence, particularly the relative lack of supporting *opinio juris*, indicates that a prohibition on the acquisition and possession of nuclear weapons (for any states other than 'official' NWS) has not yet crystallised. If this is correct it means that – just like under conventional international law – India is not bound by any obligation to disarm its nuclear weapons under customary international law.

III. IS INDIA A PERSISTENT OBJECTOR TO ANY CUSTOMARY PROHIBITION ON THE ACQUISITION AND POSSESSION OF NUCLEAR WEAPONS?

It was tentatively concluded in the previous section that no customary international law requirement of nuclear disarmament has emerged for states that had not exploded a nuclear device prior to 1 January 1967. Nonetheless, it must be noted that such a claim does have a credible basis, is supported by a number of scholars and, thus, should not be dismissed out of hand. This section therefore proceeds from the starting point that a customary counterpart to NPT Article II *has* crystallised, despite the fact that this view is not ultimately subscribed to by the current author.

If one takes the position that a customary requirement to disarm is applicable to India *prima facie*, it must then be asked whether India – as a longstanding 'outsider' to the international nuclear legal order – can be considered a 'persistent objector' state with regard to this norm. Were India to have acquired persistent objector status, it would remain unbound by any obligation to disarm, irrespective of whether that norm is generally binding under customary international law or not.

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 scholarly⁵⁷ and some judicial⁵⁸ 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

57 A few examples of key textbooks referencing the rule include Shaw, 89-91; Malanczuk, 47-48; MARTIN DIXON, *TEXTBOOK ON INTERNATIONAL LAW* 32-33 (6th edn., 2007); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 11 (7th edn., 2008).

58 See *Asylum Case* Merits [1950] ICJ Reports 266, at [277]-[278]; *Fisheries Case (United Kingdom v Norway)* Merits [1951] ICJ Reports 116, at [131].

objects to a newly emerging norm of customary international law during the formation of that norm, then that state is exempt from the norm once the custom has crystallised.⁵⁹ The persistent objector rule is, therefore, usually viewed as having two requirements, both of which need to be satisfied for it to operate:⁶⁰

- 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.'⁶¹
- 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.⁶²

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.⁶³ The identification of consent with regard to treaties is obviously relatively straightforward (based on the process of signature and ratification), but consent is more difficult to establish for customary international law.⁶⁴ State 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 was required.⁶⁵ It is here where 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.⁶⁶

59 *Supra* note 10.

60 These criteria are apparent throughout the literature on the persistent objector rule, but are set out in a similar manner to that used here by J. Brock McClane, *How Late in the Emergence of a Norm of Customary International Law May a Persistent Objector Object?*, 13 INTERNATIONAL LAW STUDENTS ASSOCIATION JOURNAL OF INTERNATIONAL LAW ,1, 20 (1989) [Hereinafter, "McClane"]

61 Dino Kritsiotis, *On the Possibilities of and for Persistent Objection*, 21 DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW 121-141, 130 (2010).

62 Olufemi Elias, *Some Remarks on the Persistent Objector Rule in Customary International Law*, 6 DENNING LAW JOURNAL 37-51, 38 (1991).

63 See for example ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 169 (1986).

64 See Hilary Charlesworth, *Customary International Law and the Nicaragua Case* 11 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 1, 3 (1984-1985) (comparing the ease of identifying state consent in treaty law with the problems inherent in so doing for custom).

65 See note 62.

66 See Steinfeld, 1655 ("The Persistent Objector Rule is a logical product of the consent theory").

There are numerous issues concerning the persistent objector rule that are worthy of further discussion but which go beyond the scope of this paper.⁶⁷ Yet two further points need to be made about the rule for the purposes of this section. First, it is important to note, given the focus of this article on the NPT, 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 objection to the provisions of the treaty, they could become persistent objectors on the international plane.'⁶⁸ 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.⁶⁹ Preponderant academic opinion seems to support the view that 'acts' of objection will suffice.⁷⁰

B. Is India a Persistent Objector to any Customary Requirement to Disarm?

Perhaps the clearest indications of India's persistent objector status, then, are its *actions*. India's Pokhran-I nuclear tests of 1974,⁷¹ and more notably the 1998 Pokhran-II tests (coupled with India's explicit self-proclamation of nuclear weaponisation),⁷² are acts that clearly demonstrate a rejection of the NPT system. India's *de facto* attainment of nuclear weapons in 1974 amounts to 'objection by deed' to any possible customary norm restricting its possession of such weapons, as does its 1998 tests and its overt declaration of nuclear weapons power status following those tests.

67 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 need be. See David Colson, *How Persistent Must the Persistent Objector Be?*, 61 WASHINGTON LAW REVIEW 957-970, 965-970 (1986) [Hereinafter, "Colson"]. Academics have similarly struggled with the issue of how late in the formation of a new customary international law a state can object and still become exempt from the rule. See McClane.

68 Bing Bing Jia, *The Relations between Treaties and Custom*, 9 CHINESE JOURNAL OF INTERNATIONAL LAW 81, 83 (2010).

69 On this debate see Colson, 961-965 and Ted Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARVARD INTERNATIONAL LAW JOURNAL 457, 478-479 (1985).

70 For example, Steinfeld, 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, 958. However, for a contrary view, see Curtis Bradley and Mitu Gulati, *Withdrawing from International Custom*, 120 YALE LAW JOURNAL 202, 211 (2010).

71 *Supra* note 25.

72 *Supra* note 26.

Of course, the very fact that India is not a signatory to the NPT similarly demonstrates a stance of objection towards any parallel customary regime. More explicitly, in spite of a longstanding commitment to non-proliferation and an excellent record in this regard,⁷³ India has repeatedly rejected the obligations of the legal nuclear non-proliferation regime (and its entire differentiated framework) outright. As Frey notes, India's discourse on nuclear weapons has always 'vehemently dismissed' the legal *status quo* as 'discriminatory and imperialist.'⁷⁴ Indeed, India has famously promulgated the term 'nuclear apartheid' to describe international law's approach to nuclear non-proliferation.⁷⁵

India's consistent and absolute rejection of the NPT and international law's wider nuclear regime – from inception – can be seen in numerous official statements. One classic example amongst many is a speech made by Indira Gandhi to the Indian Parliament in 1968, where the Indian Prime Minister was explicit in rejecting the entire NPT framework based on a policy of 'enlightened self-interest and the considerations of national security.'⁷⁶ Much more recently, India has reaffirmed its objection to the NPT and its associated regime in the context of the 2008 Indo-US 123 Agreement.⁷⁷ For example, Hardeep Puri, the Indian Permanent Representative to the UN, wrote to United States UN Ambassador Susan Rice in September 2009 that: 'India cannot accept calls for universalisation of the NPT...there is no question of India joining the NPT as a non-nuclear weapons state.'⁷⁸ Further, Puri seemingly

73 See Upendra Choudhury, *The Indo-USA Nuclear Deal and its Impact on India's Ballistic Missile Programme* SOUTH ASIAN STRATEGIC STABILITY INSTITUTE 10 (2008) [Hereinafter, "Choudhury"]. Indeed, India is the only state in possession of nuclear weapons that has not helped another state to also acquire such weapons, see Chamundeeswari Kuppuswamy, *Is the Nuclear Non-Proliferation Treaty Shaking at its Foundations? Stock Taking after the 2005 NPT Review Conference*, 11 JOURNAL OF CONFLICT AND SECURITY LAW 141, 145 (2006).

74 KARSTEN FREY, *INDIA'S NUCLEAR BOMB AND NATIONAL SECURITY* 19 (2006) [Hereinafter, "Frey"].

75 See William Walker, *International Nuclear Relations after the Indian and Pakistani Test Explosions*, 74 INTERNATIONAL AFFAIRS 505, 511 (1998); Jaswant Singh, *Against Nuclear Apartheid*, 77 FOREIGN AFFAIRS 41-52 (1998); Faustin Ntoubandi, *Reflections on the USA-India Atomic Energy Cooperation*, 13 JOURNAL OF CONFLICT AND SECURITY LAW 273, 287 (2008); Carranza, 1.

76 Debate on Foreign Affairs with Indira Gandhi, Lok Sabha, New Delhi, 5 April 1968, quoted in Arundhati Ghose, *Negotiating the CTBT: India's Security Concerns and Nuclear Disarmament*, 51 JOURNAL OF INTERNATIONAL AFFAIRS 239, 242 (1997).

77 Lisa Tabassi, *The Nuclear Test Ban: Lex Lata or de Lege Ferenda?*, 14 JOURNAL OF CONFLICT AND SECURITY LAW 309, 348 (2009). On the 123 Agreement, *Supra* note 5.

78 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*, GOVERNMENT (2009) available at <http://igovernment.in/site/India-says-no-to-NPT-as-non-nuclear-weapon-state>.

went on to affirm India's stance as a persistent objector to any possible equivalent nuclear non-proliferation customary obligations – albeit that he did not refer directly to the persistent objector concept – by explicitly stating with regard to nuclear non-proliferation that India did not 'accept any obligations arising from treaties that [it] has not signed or ratified.'⁷⁹

In addition to such official statements, India's voting policy in international organs can also be seen as a manifestation of persistent objection. For example, in 1997, India voted against General Assembly Resolution 52/38-K, operative paragraph 1,⁸⁰ which urged non-NPT parties to join the treaty.⁸¹ India was one of only three states to cast a dissenting vote (the others being, unsurprisingly, Israel and Pakistan), while 162 states voted in favour of the resolution.⁸² Overall, then, as Raisummarises, India has always consistently been 'against [the international legal regime relating to nuclear weapons] and its philosophy because of its discriminatory character.'⁸³

It will be recalled from the previous subsection that persistent objection must occur during the formation of the customary rule and not after its crystallisation alone.⁸⁴ As such, it is worth noting that even if one subscribes to the customary nature of the obligation within NPT Article II, such adoption into customary international law can only have been based on the decades of state practice *since* the inception of the NPT. During the 1960s twenty-three states either were in possession of nuclear weapons, were involved in nuclear weapons-related research, or were openly seeking the acquisition of such weapons.⁸⁵ This figure has now dropped to nine states, five of which are the NPT NWS. It is a feature of more recent – post-Cold War – practice that has led, for example, to Ukraine and South Africa having relinquished nuclear weapons, and Brazil and Libya having ended their nuclear weapons programmes.⁸⁶ On this basis it has been suggested by one writer that the 'crystallisation' of certain NPT rules into custom occurred in

79 *Ibid.*

80 GA Res 52/40 at 15 UN Doc. A/52/PV.67 (1997).

81 GA Res 52/38-K [1], UN Doc.A/RES/52/38 (1998).

82 GA Res 52/40 at 15; UN Doc. A/52/PV.67 (1997).

83 AJAI K. RAI, *INDIA'S NUCLEAR POLICY AFTER POKHRAN II* 208 (2009) [Hereinafter, "Rai"].
See also Wable, 722.

84 *Supra* note 62.

85 TOM RUYS, 'ARMED ATTACK' AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 365 (2010).

86 *Ibid.*

the mid-1990s.⁸⁷ Assuming that this is correct, India's persistent objections would clearly pre-date 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.

India's various dissents, by way of both deed and explicit statement, have all the hallmarks of classic persistent objection in a technical sense with regard to any customary requirement to disarm or prohibition on the possession of nuclear weapons outside of the sacred circle of the NPT NWS. India's 'persistent resistance'⁸⁸ has been both sustained and prior to crystallisation. As such, to the extent that a customary international law rule reflecting NPT Article II exists at all, India is a persistent objector to it.⁸⁹ As Keeley has stated, if the NPT rules applicable to NNWS have entered into customary international law, 'the fact that India objected to the distinction even as it was being negotiated, refused to sign the NPT on this basis, and has been consistent in its protest since, would seem to qualify it for the "persistent objector" exception.'⁹⁰

IV. CONCLUSION

Ultimately, it is arguable whether the obligation contained in NPT Article II has additionally been adopted into customary international law. This is supported in particular by the near-universal ratification of the NPT and the material fact that almost all NNWS (as determined by the NPT) abide by the requirements of Article II. Having said this, the evidence in support of such a customary prohibition on the possession and acquisition of nuclear weapons is far from entirely conclusive: it is not clear whether sufficient *opiniojuris* exists, and there are also conceptual difficulties that may arise from the fact that the NPT is a treaty with differentiated obligations. This author is ultimately of the view that no customary international law norm prohibiting the possession of nuclear weapons by NNWS has (as yet) emerged. Nonetheless, it is certainly *possible* to conclude that NPT Article II has additional binding force in custom.

87 See Kittrie, 340-341.

88 Paulus and Müller, 118.

89 V. S. Mani, *India's Tests: The Legal Issues*, THE HINDU, June 5, 2012.

90 Jim Keeley, *Big Empty Spot: 'Recognition' and India's Nuclear Weapon Status* in KARTHIKA SASIKUMAR AND WADE HUNTLEY (eds) CANADIAN POLICY ON NUCLEAR CO-OPERATION WITH INDIA: CONFRONTING NEW DILEMMAS 71, 78 (2007).

If one subscribes to the existence of this customary prohibition, then it would *prima facie* bind India, even though India is a non-signatory to the NPT. This is because customary international law essentially binds all states, unlike treaty law. Under the NPT framework, India is defined as a NNWS and, therefore – assuming the Article II obligation also exists in custom – would be legally required to disarm all its nuclear weapons and to refrain from the development or acquisition of any more.

However, India has clearly persistently objected to the NPT, to international law's wider non-proliferation regime and to any related customary norms. Such objectors are exempt from the binding force of rules of customary international law, so long as they object persistently and throughout the development of the rule. Through sustained action of deed and statement prior to and during the formation of any arguable customary international law requirement to disarm, India has thus dissented and so is not bound.

Following the *Pokhran-II* nuclear tests, the focus of nuclear policy in many states with regard to India quickly moved away from the NPT regime *per se*. Instead of pursuing the now patent fantasy of India joining the NPT as a NNWS, Western policy towards the 'Indian nuclear weapons question' has been based on an arguably more realistic goal: persuading India to sign the 1996 Comprehensive Nuclear Test-Ban Treaty.⁹¹ It is notable that since the international condemnation of the 1998 *Pokhran-II* tests, no major power (other than the European Union) has attempted to urge India to join the NPT, as either a NWS or a NNWS.⁹²

Indeed, 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 persistent objector stance was 'accepted, not only within India but also by the majority of the states of the world.'⁹³ This *de facto* acceptance

91 Comprehensive Nuclear Test-Ban Treaty 1996, UN Doc. A/50/1027. India is a non-signatory to this treaty, which is not yet in force. On this trend in international relations with regard to India, see Seema Gahlaut, *South Asia and the Nonproliferation Regime* in NATHAN BUSCH AND DANIEL H. JOYNER (eds) *COMBATING WEAPONS OF MASS DESTRUCTION: THE FUTURE OF INTERNATIONAL NON PROLIFERATION POLICY* 222, 234 (2009); and Frey, 153. On India's relationship with the Comprehensive Nuclear Test-Ban Treaty, as well as the possible obligations it may have with regard to nuclear testing under customary international law or under the 123 Agreement, see James A. Green, *India and a Customary Comprehensive Nuclear Test-Ban: Persistent Objection, Peremptory Norms and the 123 Agreement*, 51(2) *INDIAN JOURNAL OF INTERNATIONAL LAW* 3-45 (2011).

92 See Rai, 221.

93 Rai, 208.

of India's nuclear weapons power status has been most graphically underlined by the 2008 Indo-US 123 Agreement for civil nuclear cooperation, which has been described as India's 'admission to the nuclear club.'⁹⁴ Such implicit recognition has also been further strengthened by the Nuclear Suppliers Group (NSG) waiver, which allowed the 123 Agreement to be 'operationalised' outside of the usual nuclear control regime.⁹⁵

In the final analysis, what matters most is the hard fact that India is in possession of nuclear weapons and is understandably determined to keep hold of them: this is surely the most potent indication of India's continued persistent objection, both *de jure* and *de facto*. 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 under NPT Article VI.⁹⁶ Given the perception of nuclear weapons as an effective security deterrent, so intrinsically tied up with notions of self-determination, power and defence, even if international law was to consider persistent objection in relation to the possession of nuclear weapons to be unacceptable, such a position would be naive to the point of irrelevancy.

This is particularly apparent in the case of India: any attempts to pressure India into signing the NPT as a NNWS, or to otherwise accept a legal requirement for it to disarm without the same requirement being effectively applied to all other states, have 'aroused intense nuclear nationalism...This form of nationalism is much stronger in India than any other nuclear countries and is very much tied to India's notion of national independence and their particular colonial history.'⁹⁷

Ultimately India retains a legal right to possess its nuclear weapons *under both treaty law and customary international law*. This obviously has significant implications for India's geopolitical status, including the way it is perceived regionally and internationally. Perhaps most importantly for India, the findings in this paper act as a legal confirmation of its existing political standpoint. India is viewed by

94 Carranza, 44. On the 123 Agreement, *see Supra* note 5.

95 Nuclear Suppliers Group 'Statement on Civil Nuclear Cooperation with India' (2008) available at http://www.armscontrol.org/system/files/20080906_Final_NSJ_Statement.pdf.

96 Steinfeld, 1676, 1680, 1685.

97 Choudhury, 10.

some as something of a 'nuclear pariah' state, because of its unwillingness to sign the NPT and its possession of nuclear weapons outside of the international legal system's usual framework.⁹⁸ However, it is important to note that India has not been, and is not, in breach of international law in this context, irrespective of the political standpoint may take with regard to India's possession of nuclear weapons. Put simply: India will not relinquish the bomb,⁹⁹ and nor does international law require it to.

98 As noted by Ajey Lele and Archana Mishra, *Indo-US Strategic Partnership: Beyond the Nuclear Deal*, 1 (Asia-Pacific Journal of Social Sciences) 96, 96 (2010).

99 Frey, 18-21.