INDIA AS A PERSISTENT OBJECTOR TO A CUSTOMARY COMPREHENSIVE NUCLEAR TEST-BAN: THE IMPLICATIONS OF POSSIBLE PEREMPTORY STATUS AND THE INDO-US 123 AGREEMENT

This paper considers the possible customary status of a comprehensive ban on nuclear weapons testing, and the implications of such a finding for India.

STRUCTURE

1. Treaty-based obligations regarding nuclear testing, most notable the 1996 Comprehensive Nuclear Test-Ban Treaty (CTBT), and specifically India’s position in this context
2. The extent to which the obligation under Article I of the CTBT (prohibiting all forms of nuclear weapons nuclear testing) may be additionally viewed as a rule of customary international law
3. India’s potential status as a ‘persistent objector’ state to any customary comprehensive test-ban
4. Jus cogens norms in relation to the persistent objector rule and whether the test-ban is such a peremptory rule
5. Implications of the 123 Agreement with regard to nuclear testing and whether India has ‘contracted away’ its right to test under that deal

1. THE CTBT AND OTHER TREATY-BASED RESTRICTIONS ON NUCLEAR TESTING

Post-1998, western policy focused on Indian nuclear testing

India remains a non-signatory to the CTBT, 1996

CTBT not yet in force, but signatory states may still be required to refrain from testing – Article 18 of the Vienna Convention on the Law of Treaties (VCLT), 1969

However, India only bound conventionally by the Partial Test-Ban Treaty, 1963

2. THE CUSTOMARY STATUS OF THE COMPREHENSIVE TEST-BAN

Requires state practice and opinio juris

Evidence Supporting Customary Status

- CTBT itself is evidence of state practice (182 signatories, 153 ratifications). CTBT may also represent opinio juris
- Explicit statements of opinio juris: eg, Norwegian Prime Minister Gro Harlem Brundtland, 1996
- Only three states have tested nuclear weapons since 1996
- Numerous states – and the UN Security Council and General Assembly – condemned 1998 tests (and the 2006 and 2009 tests by North Korea)

Evidence against Customary Status

- Various UN resolutions would have been unnecessary if custom had formed
- Any customary norm against testing is reinforced by the wider non-proliferation regime: no ‘true’ opinio juris
- While only three states have tested since 1996, this represents a third of all ‘specially affected’ states
3. **INDIA AS A PERSISTENT OBJECTOR**

The Persistent Objector Rule Generally

- Objection must be persistent
- Objection must be during the formation of the norm (prior to crystallisation)
- Acts/deeds suffice as ‘objections’

India as Objector through Actions

- Pokhran-I 1974
- Pokhran-II 1998 tests (+ explicit self-proclamation of nuclear weaponisation)
- Very fact India is not a CTBT signatory

India as Explicit Objector

- 1996 Conference on Disarmament in Geneva: “India will never sign this unequal treaty – not now, not ever.”
- General Assembly: CTBT “betrayed” the goal of enhancing peace and security

Indian objections occurred during and after the development of the rule – India meets tests to be persistent objector

4. **INDIA AS A PERSISTENT OBJECTOR AND JUS COGENS**

Generally agreed that persistent objection invalid in relation to *jus cogens* norms (eg, 2002 Domingues case)

Lisa Tabassi (2009): India is bound by a comprehensive test-ban because this is a norm of *jus cogens*

Tests for peremptory status (Article 53 of the VCLT)

Comprehensive test-ban clearly does not meet tests – India retains persistent objector status

5. **IMPLICATIONS OF THE 123 AGREEMENT**

Some writers (plus Bharatiya Janata Party) argued that under the 123 Agreement India has conceded the right to future nuclear weapons tests, based on:

- The Hyde Act, 2006, Section 106
- Atomic Energy Act, 1954, Section 129
- Arms Export Control Act, 1977, Section 102 (‘Glenn Amendment’)
- Statement of waiver issued by the Nuclear Suppliers Group (NGS), 2008

US State Department 2007: “[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.”

123 Agreement, Article 14.

But: nothing in deal restricts testing

Position in NSG and consistent stance by India

*De Facto* implications of the 123 Agreement for testing: Is further Indian testing less or more likely following the signing of the deal?