

Dissecting the Arbitrariness in The Non-Proliferation Treaty: India's Case from the Prism of The UN Charter

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Abstract: The Preamble of the UN Charter emphasizes the principle of equality among all nation-states while promoting unity to uphold international peace and security. However, the Non- Proliferation Treaty, 1968 has created two classes i.e., nuclear haves and nuclear have nots. India's criticism of the Treaty is grounded in Article 51 of the UN Charter, along with the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons. Given the persistent security threat posed by India's nuclear-armed neighbours, who have threatened regional stability in South Asia, the nation state perceives the signing of the Non-Proliferation Treaty as a compromise on its inherent right to self-defence, as enshrined in Article 51 of the UN Charter.

Keywords: *Anticipatory self-defence, Threat of Nuclear Weapon, Non Proliferation Treaty.*

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I. THE EXTRAORDINARY NATURE OF NUCLEAR THREAT

Article 2(4) of the United Nations Charter stipulates the pre requisite to establish a peaceful international community.¹ It reads as follows:-

*“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”*²

The prohibition on the threat or use of force exemplifies a peremptory character, thus being a part of the *jus cogens* norm.³ The International Court of Justice has opined that threat is an integral part of prohibition under Article 2(4) of the charter.⁴ It can also be concluded that threat of force and the actual use of force are undistinguishable for the purpose of Article 2(4) and prohibition of both constitute *jus cogens*, especially in light of Article 103 through which the UN Charter asserts its supremacy.⁵

In 1963, Ian Brownlie analysed the issue of legitimacy of threat of use of force by stating that the threat to use of force due to non-realization of unjustifiable demands of a state is illegal in itself.⁶ The foretasted aspect of threat of use of force may also be referred to as “coercive diplomacy”.⁷ Political history of prominent kingdoms presents a wide- ranging examples of such carrot and stick approach.⁸ Even in the 21st century, every major power is engaged in coercive diplomacy which might be exercised by way of economic sanctions or through arms race, including nuclear stockpiling. Propagating a constant threat of military action, coercive diplomacy acts as a proactive tool of statecraft for acquiring leverage and obtaining concrete results.⁹ Thus, coercion as understood from the perspective of Article 2(4) is equally unlawful as use of force is.¹⁰ Unfortunately, threat or use of force has served as a fuel to ignite the fire of nationalism throughout the recorded history of mankind.¹¹

¹ Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v U.S.*) [1986] I.C.J. 190, 227

² UN Charter 1945, art 2(4)

³ Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (3rd edn, OUP 2012) 218

⁴ Nicaragua Case (n 1)

⁵ Oscar Schachter, ‘The Right of State to Use Armed Force’, [1984] 82 Mich. L. Rev. 1620, 1625

⁶ Ian Brownlie, *International Law and the Use of Force by States* (1st ed. OUP 1963) 364

⁷ Simma et al., (n 3)

⁸ Matteo Pallover, ‘Power and Its Form: Hard, Soft, Smart,’ [2011] London School of Economics, Master Thesis, London 80-83

⁹ Francois Dubuisson & Anne Lagerwall, ‘The Threat of The Use of Force and Ultimata’ in Marc Weller (ed.) *The Oxford Handbook of the Use of Force in International Law* (OUP 2015)

¹⁰ Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century* (Sijthoff et Noordhoff, 1978) 88.

¹¹ John A Hall & Sinisa Malesevic, *Nationalism and War* 1 (Cambridge University Press, 2013) 1

Finding the guiding light from the Vienna Convention on the Law of Treaties (VCLT), one shall interpret the provisions of the UN Charter in accordance with Article 31 of the VCLT.

Article 31 reads as follows:-

“Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹²

The Charter’s object and purpose include the maintenance of “international peace and security” and “the prevention and removal of threats to the peace.” A meaningful construction of Article 2(4) is plausible only if the international community appreciates the wrath of a nuclear warfare. In 1946, the United States admitted that an “armed attack” has transgressed its conventional meaning after the advent of atomic bombs.¹³ In March of 1963, U.S. President John F. Kennedy described possession of nuclear weapons as “the greatest possible danger and hazard.”¹⁴ In its *Advisory Opinion*, the International Court of Justice has taken note of the catastrophic nature of nuclear weapons by holding as follows: -

“The Court has noted the definitions of nuclear weapons contained in various treaties and accords. It also notes that nuclear weapons are explosive devices whose energy results from the fusion or fission of the atom. By its very nature, that process, in nuclear weapons as they exist today, releases not only immense quantities of heat and energy, but also powerful and prolonged radiation. According to the material before the Court, the first two causes of damage are vastly more powerful than the damage caused by other weapons, while the phenomenon of radiation is said to be peculiar to nuclear weapons. These characteristics render the nuclear weapon potentially catastrophic. The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet.”¹⁵

¹² Vienna Convention on the Law of Treaties 1969, art 31

¹³ Philip C. Jessup, *A Modern Law of Nations* (The Macmillan Company, 1948) 166-67

¹⁴ Treaty on the Non-Proliferation of Nuclear Weapons, U S Department of the State (2010), <<https://2009-2017.state.gov/documents/organization/141503.pdf>> accessed 10 January 2025

¹⁵ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996 I.C.J. 226, 35 [hereinafter *Advisory Opinion*]

Ironically, the nuclear weapon states (NWS) have attempted to justify possession of nuclear weapons on the pretext that such possession eliminates the risk of nuclear warfare as the same is required to forge a balance of power in the current multipolar world order.

II. RETHINKING ARTICLE 51 VIS-A-VIS NUCLEAR WEAPONS

The self-help doctrine stipulates that nation states are free to ascertain their sovereignty in response to threats they perceive even in absence of a resolution adopted by the United Nations Security Council authorising the use of force.¹⁶ The foundation of the self-help doctrine is the idea that nations have an inalienable right to protect their interests, even in situations where a threat may not be imminent in the conventional sense.¹⁷ It has long been regarded as one of the greatest and most expansive national rights by international law.

A state may use force legally for the purpose of self-preservation against the acquisition of Weapons of Mass Destruction (WMD) or even to prevent their acquisition and usage. Such action may be unilaterally taken or, if preferred, in concert with other states, especially if it can be clearly established that previous efforts at non-proliferation have failed and a hostile state has actually sought to acquire WMD capabilities. Guy B. Roberts, the former senior legal advisor to the U.S. Southern Command, identifies six criteria for the legality of the use of force in response to threats involving WMDs.¹⁸ The same are as follows: -

- (1) if notice from the United Nations, NATO, or the aggrieved state has been served to the proliferating country;
- (2) if the threat is concrete and persuasive and supported by evidence;
- (3) if there is a force imperative suggesting that any additional delay will exacerbate the risks to people and international security;
- (4) if the defensive attack is executed in compliance with the proportionality doctrine;

¹⁶ Wolfgang Friedmann, *The Changing Structure Of International Law* (Columbia University Press, 1964) 259, 260

¹⁷ Beth M. Polebaum, 'National Self- Defence in International Law: An Emerging Standard for a Nuclear Age' (1984) 59 NYU Law Review 187, 201, 202

¹⁸ Guy B. Roberts, 'The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction' (1999) 27 Denver Journal of International Law & Policy 483, 518

(5) if there is a “substantial likelihood that the intended use of force will be effective,” and;

(6) if using force is the last resort.

Upon satisfaction that the aforementioned criteria is being fulfilled, anticipatory self-defence may be justified in case a state is threatened by an imminent nuclear attack and it does not have an alternate course of action to ensure its survival.¹⁹ The argument in favour of such an anticipatory action is based on the premise that in order to defend itself a state must initiate a protective measure before a nuclear ballistic missile is launched towards it, or else the state’s sovereignty and existence will remain unguarded. Professor Friedmann has rightly advocated for anticipatory self-defence in nuclear warfare by stating that it would be nothing less than an act of suicide if a state awaits the actual nuclear attack to take place against it before resorting to defensive counter attack.²⁰ Nuclear weapons have the capacity to annihilate the nerve centres of nations as powerful as U.S, China and India and further to eliminate a substantial part of their respective population. Therefore, the right to self-defence as enshrined in Article 51 of the Charter shall include right to defend in case of an imminent nuclear threat.

The Caroline test from 1841 defined the basic conditions that can be used to justify the use of force in self-defense. In further detail, Daniel Webster, the United States Secretary of State from 1850 to 1852, explained the validity of self-defense in cases of instant, overwhelming threat that leaves no choice of means and no moment for deliberation.²¹ A threat can be categorised as “imminent” as and when a reasonable apprehension arises regarding occurrence of the attack at any point of time.²² However, in nuclear warfare, the conservative understanding of the term “imminent” does not answer the question of legitimacy of an attack in self-defence for the simple reason that the threat of a nuclear attack is unique and unquantifiable in terms of the potential damage it can cause. A state developing its nuclear capability, legitimately or illegitimately, seldom notifies the United Nations or the world community at large about its nuclear program. In such a case, it would be nearly impracticable to expect from states on the receiving end to anticipate the imminent threat to their respective sovereignty.²³ In fact, the

¹⁹ Claud H.M. Waldock, ‘*The Regulation of the Use of Force by Individual States in International Law*’ (1952) 2 *Recueil Des Cours de l’Académie de Droit International* 451, 498

²⁰ Friedmann (*n. 16*) 259, 260. *See also* Beth M. Polebaum, ‘National Self- Defence in International Law: An Emerging Standard for a Nuclear Age’, (1984) 59 *NYU Law Review* 187, 201, 202

²¹ ‘The Caroline’, The Avalon Project (Yale Law School), <https://avalon.law.yale.edu/19th_century/br-1842d.asp> accessed 27 January 2025

²² Anthony Aust, *Handbook of International Law* (2d ed. Cambridge University Press 2010) 210

²³ David Sloss, ‘Forcible Arms Control: Pre-emptive Attacks on Nuclear Facilities’ (2003) 4 *Chicago Journal of International Law* 53-54

potentiality of nuclear attack bolsters the argument that even production of weapon grade uranium or plutonium poses a “significant threat”, thereby justifying the use of force in self-defence.²⁴

States might argue that due to failure of Security Council and IAEA in addressing the threat of nuclear proliferation their right to preventive use of force remains intact.²⁵ IAEA is dependent on the Security Council’s mandate for inspection of nuclear facilities in sovereign territories. Unfortunately, the Non-Proliferation Treaty is under enforced due to failed efforts towards consensus building amongst the permanent members (P-5) of the UNSC.²⁶ Advocates of anticipatory self-defence have argued that Article 51 of the UN Charter does not lay down definite criteria for the use of this right. They claim that the term ‘inherent right’ refers to the classical notion of self-defence which is not limited to conventional armed attacks. D. Bowett agrees with the argument that there is a justification for military intervention in foreign territory if there is an instant and overwhelming necessity of responding to a grave and imminent threat posed by such foreign territory and if there is no other alternative or time for deliberation.²⁷ Sir Humphrey Waldock, L. Goodrich and E. Hambro are among those who support preventative self-defence. They contend that in the event of an actual nuclear strike the right to self-defence would be meaningless.²⁸

III. IRRECONCILABILITY OF NUCLEAR WEAPONS WITH JUS IN BELLO

The nuclear weapon states (NWS) who are also the permanent members of the UNSC have strongly relied on the deterrent effect of possession of nuclear weapons. However, the same is based on rational actor theory, whereby it is assumed that the leaders analyze the inherent risks involved in carrying out a nuclear strike rationally.²⁹ Unfortunately, history and even the current global turmoil do not extend force to this argument. Fidel Castro’s own political agenda gave birth to a nuclear crisis wherein U.S and U.S.S.R were war ready with their respective nuclear arsenal as Castro wanted to ensure that Soviet nuclear missiles remain in Cuba. His stern desire was emanating out of ignorance of the fact that his actions would bring nuclear warfare to Cuba and his own country will be the first victim of such a crisis. It could not be stated even remotely

²⁴ *Ibid.*

²⁵ Daniel H. Joyner, ‘Jus Ad Bellum in the Age of WMD Proliferation’, (2008) 40 George Washington International Law Review 233, 246

²⁶ Roberts (n 18)

²⁷ D.W. Bowett, *Self-Defence In International Law* (The Lawbook Exchange Ltd. 2009) 188-92

²⁸ Waldock (n 19)

²⁹ Roberts (n 18)

that Castro's policy decision on nuclear warfare was driven by rationality. Any leader cannot be expected to match the global standards of "rationality" as there is none. King Jon Un's nuclear missile programme, use of thermobaric/vacuum bombs in Ukraine- Russia conflict and the United States' President's statement claiming that risk of a nuclear "Armageddon" is at its highest level for 60 years,³⁰ do not pose a positive outcome of the so called "deterrence effect" of nuclear weapons.

In its *Advisory Opinion*, the International Court of Justice has held that the conduct of armed conflict must conform to the stringent limitations as stipulated in the principles and rules of law applicable during wartime, which treat humanity as the focal point of rules concerning with military actions. Such conduct of war which fail to recognize the distinction between the civilian population and military targets are absolutely prohibited. Due to the uniqueness of nuclear weapons, their employment cannot be easily compared to the use of conventional weapons and hence therefore their usage cannot be reconciled with the principles of warfare and humanitarian law. However, the ICJ has held that there is not enough evidence to establish that the employment of nuclear weapons is illegal as per the legal framework governing armed conflict.³¹ Furthermore, the ICJ has categorically held that every state has a fundamental right to survival and thus the right to self-defence as enshrined in Article 51 of the Charter.³²

In his separate opinion, J. Fleischhauer has held that no state can be denied of its recourse of last resort as a measure to counter the threat or use of nuclear weapon as it would amount to deprivation of the nations' inherent right to self-defence, especially in a situation where such recourse is the only way for the victim state can effectively and meaningfully exercise its right under Article 51 of the Charter. However, he further concludes that:-

*"Yet international law has so far not developed - neither in conventional nor in customary law - a norm on how these principles can be reconciled in the face of the nuclear weapon."*³³

These observations question the very object of the Non Proliferation Treaty and its creation of creating a class amongst nations whose possession of nuclear weapons has been legitimised and the rest have been left unguarded against the scourge of nuclear threat.

³⁰ 'Putin threats: How many nuclear weapons does Russia have?', BBC, <<https://www.bbc.com/news/world-europe-60564123>> accessed 25 January 2025

³¹ Advisory Opinion (n 15)

³² Advisory Opinion (n 15) para 96

³³ Advisory Opinion (n 15), para 5 (Separate Opinion of Fleischhauer)

IV. INDIA'S CASE AGAINST THE DISCRIMINATORY NON PROLIFERATION TREATY (NPT)

India's criticism of the NPT, particularly the resultant discrimination between nuclear "haves" and "have nots", is in consonance with the above stated analysis of Article 2(4), Article 51 and the *Advisory Opinion* of the International Court of Justice. India has always stood up for total disarmament including elimination of fissile material production and absolute ban of nuclear tests. This can be traced back to India's stance at the Eighteen Nation Disarmament Committee (ENDC), 1962.³⁴ The first draft of NPT laid down in clear terms that it intended to put an absolute restraint on the non- nuclear weapon states (NNWS) from acquiring nuclear weapons. However, at the same time, the draft treaty failed to provide any roadmap towards disarmament of the nuclear weapon states (NWS). India vociferously opposed the NPT by terming it as "atomic apartheid". Nevertheless, the nuclear weapon states secured 95 votes in their favour thereby paving the way towards adoption of the draft treaty by UNGA through Resolution 2373 (XXII) dated June 12, 1968. Four votes were cast against the resolution, and 21 members, including India, abstained. Thereafter, Mrs. Indira Gandhi (the then Indian Prime Minister) stated in the Parliament that "we will now be driven by our self-enlightenment."³⁵

India has been attacked by its immediate neighbour Pakistan through state and non-state actors since 1947. The Pakistani infiltration in Kashmir, Mumbai terror attack of 2008, death of Indian military and paramilitary personnel caused by terrorist attacks in Pulwama and Pathankot, are few of the many incidents which have breached India's trust in the military dominated Pakistani state. On the northern and northeastern front, India has faced constant threats by the Chinese armed forces. Clashes between Indian and Chinese military in the Doklam region and the Galwan valley serve as a reminder about how feeble the Sino-India relations are. India, being a part of the QUAD, has been perceived by China as a potential threat in the Indo Pacific region. The strategic defense planning of India included conducting nuclear tests at Pokhran I in 1974 and Pokhran II in 1998. India has refused to sign the 1968 Non-Proliferation Treaty (NPT) because it considers the treaty discriminatory. The country's nuclear policy is based on the 'no first use' doctrine, which is defensive in nature. However, India has all the legitimate reasons

³⁴ Convening of 18-nation Geneva Committee on Disarmament – Credentials for Indian Delegation, *Note by K.S. Bajpai*, Deputy Secretary to Joint Secretary (UN), 11-3-1962, File No. B (103)-DISARM-62, (National Archives of India, New Delhi)

³⁵ Lok Sabha Debate on Foreign Affairs, April 05, 1968

to possess nuclear weapons in absence of total elimination of nuclear warheads and weapon grade fissile material from the planet. Article 51 of the UN Charter protects nations by extending the right to defend themselves and therefore India is well within this shield which it can use to prepare against possible nuclear threats from neighbouring countries. The International Court of Justice (ICJ) in its *Advisory Opinion* has recognised the unparalleled dangers that nuclear weapons create. The Court recommended for reinterpretation of Article 51 and the principles of self-defence because the nature of warfare has exceeded the idea of traditional military combat. The ICJ emphasizes the severe destructive potential of nuclear weapons which makes the application of existing legal framework and moral principles on nuclear warfare more complex than ever before.³⁶

V. CONCLUSION

Article VI of the NPT obligates parties to undertake negotiations in good faith and effective measures towards “complete disarmament.” How far have the parties, especially the nuclear weapon states, come towards achieving these goals? What effective measures have been taken towards complete disarmament? The NWS, who are also the Permanent Members of the Security Council, are under a legal and moral obligation to answer these questions and present a roadmap towards realisation of goals enshrined in Article VI of the treaty. Thus, as long as even one nation state is in possession of nuclear weapon, every member of the United Nations shall be vested with the fundamental right to take necessary steps to prepare themselves for a nuclear war, which will necessarily include possession of nuclear weapons.

The paradox between Article 51 of the United Nations Charter and the Non-Proliferation Treaty becomes evident if the current geopolitics is perceived from a broader lens of rights and duties of the nation states within the framework of the UN Charter. The ICJ was assigned with the task of adjudicating upon the question -Is the threat or use of nuclear weapons in any circumstance permitted under international law? vide the resolution 49/75 K adopted by the General Assembly of the United Nations on 15 December 1994. The said resolution contains the following statement which supports the argument that any treaty entered between members with the objective to promote disarmament cannot be discriminatory: -

³⁶ *Advisory Opinion* (n 15) para 43

“Convinced that the complete elimination of nuclear weapons is the only guarantee against the threat of nuclear war,

Noting the concerns expressed in the Fourth Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons that insufficient progress had been made towards the complete elimination of nuclear weapons at the earliest possible time,”³⁷

Since 1947, India has been a staunch supporter of nuclear disarmament and therefore, signed the Partial Test Ban Treaty in 1963 without reservations. China's nuclear test in 1964 (two years after the Sino- India War) made sure that India's trust on its neighbours does not last long. Within a span of four years, India was offered a discriminatory disarmament treaty, namely the Non-Proliferation Treaty. Pakistan gained success in acquiring uranium enrichment capability and subsequently a weapons capability in 1987 to which the then superpowers turned a blind eye. India's inclusion in the Nuclear Suppliers Group and as a Permanent Member in the UNSC have been vetoed. Several attempts have been made to discourage India's ambitions and deprive its rightful place at the international fora by way of maintaining a discriminatory and elitist power structure at the global level. Nevertheless, India did not succumb to the power tactics adopted by the NWS and went ahead with a peaceful nuclear test in 1998 to announce to the world that India deserves equal treatment and has all the rights to take necessary steps in order to safeguard its sovereignty and independence as affirmed by the United Nations Charter. Failure to create an equitable and accommodative arrangement towards non-proliferation and disarmament has resulted in nuclear race and insecurity among countries. The failure of Non-Proliferation Treaty offers a lesson to the world community that the international relations in 21st century cannot be driven with an elitist approach. The Preamble to the United Nations Charter contain the following words: - *“the equal rights of men and women and of nations large and small.”* The Non-Proliferation Treaty has proved to be nothing less than an antithesis to the promises made in the Preamble to the UN Charter.

³⁷ Resolution 49/75 K, United Nations General Assembly (15 December 1994)