

“THEORY OF NUCLEAR DETERRENCE” -A CHALLENGE TO INTERNATIONAL HUMANITARIAN LAW

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The World War II sowed the seed of technological weapon. With a dramatic revolution of nuclear weapon the countries ventured into the nuclear age. Not Until then it was the matter of countries defense strategy. Soon the weapon became the pride of the many countries military arsenal, until they realized that subsequent proliferation would result into the ultimate question of existence. The determinant was on the sovereign right of the state that no country would make use of nuclear weapon against each other and if used it would give a subsequent right of reprisal. This was the climax of nuclear politics were in theory erupted to justify the use of nuclear weapon in the light of deterrence challenging the ethics, law and humanity.

Key word: MAD, NFU, principle of jus ad bellum, jus in bellow, military necessity v/s humanity

INTRODUCTION

Nuclear deterrence theory is a military strategy developed during the cold war and is more relevant with the use of Nuclear weapon. Within this strategy falls the phenomenal practice of Mutually Assured Destruction (MAD). It was then the assumption of super power that, the theory would help to retain balance of power, unfortunately on the other side the countries took a keen interest in nuclear proliferation which was silently threatening the whole mankind. Today we have a concluding policy of No First Use of Nuclear Weapon agreed, adopted and signed by most of the nuclear countries. How far is this Policy Relevant? Does this Policy assure the protection of Humanity? Or does this policy reflect the old pattern of balance of power?

The concept of No first use apparently came after the notion of MAD theory and subsequent proliferation of nuclear weapon. The MAD theory (mutually assured destruction) or the game theory was more in the form of deterrence wherein the nuclear powerful states would respect the authority of one another and prevent the use of nuclear weapon in the light of deterrence.¹ The presumption seems to be more apparent when one rely on the statement of British Prime Minister Winston Churchill when he says “the worse things get, the better they are the greater the threat of mutual destruction, the safer the world would be”.² During cold war the U.S and Soviet Union were the only superpower with nuclear weapon and application of MAD might have appeared more flexible to them.³ However on one side with the increase in number of nuclear states and nuclear proliferation, the situation has changed, the confined appearance of threat is emancipated as of such the result is that the whole living species of this universe endangers their right of existences. And on the other, the world community realized the consequent threat that could be encountered globally⁴. In light Of this, several conventions and

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1 DeVolpi, Alexander, and Vladimir E., Nuclear Shadowboxing: Contemporary Threats from Cold War Weaponry. VOL1, Fidar Doubleday, USA,2004 PP.1-13

2 O' Neill, Barry. *A Survey of Game Theory Model on Peace and War Occasional paper No 9*,YCISS, 1990,also http://en.wikipedia.org/wiki/Mutual_assured_destruction

3 The theory developed due to balance of power between the eastern and western blocs, resulting in the fear of global destruction, prevented the further military use of atomic bombs'. This fear was even a central part of cold war strategy, referred to as the doctrine of Mutually Assured Destruction.

4 Rhodes, Richard, Dark Sun: *The making of the Hydrogen Bomb*, New York: Simon Schuster ,ISBN 0-684-82414-0,1995

treaties were concluded to restrict its proliferation, but in vain, the countries who were members to such conventions, and treaties hardly relied on the principles. (For instance Non proliferation treaty prohibits both vertical and horizontal proliferation but few countries having affirmed the NPT has seriously violated this norm of NPT by increasing and enhancing its nuclear strategy) No first use (NFU) refers to a pledge or a policy by a nuclear power not to use nuclear weapon as a mean of warfare unless first attacked by an adversary using nuclear weapons.⁵ The concept can also be applied to chemical or biological warfare.

The rationalism of the theory

Of MAD and NFU there seem to be a vertical relationship some were like two vertical pillars supporting a horizontal slab. Both these theories have a similar picture but the only difference is the circumstance when it is applicable. The concept of MAD theory promulgates sudden step to be taken against the aggressor for instance country A is an attacking nation and country B is an attacked nation. A first strike would be the first use of nuclear weapons by one nuclear-equipped nation against another nuclear-equipped nation. If the attacking nation did not prevent the attacked nation from a nuclear response, then a second strike could be deployed against the attacking nation.⁶ The MAD indirectly promises the right of the nuclear country and recognizes their status to make use of the nuclear weapon and comes out more in the form of game were the “best shooter shall win”. Whereas NFU stand with the possibilities that nuclear weapon shall not be a weapon of war but forebodes the right of retaliation in case the countries existence is in question. But the things get perplexed when the issue of retaliation is analyzed from the legal perspective, especially when the war is a nuclear war. At this point let me recollect the incident of 1964 when British aircraft undertook an attack against a small fort situated in Yemeni territory just across the border from south Arabian Federation for the defense of which the Britain had treaty obligation. Britain’s action was severally criticized on the allegation that it was essentially a retaliation or reprisal. Britain on its behalf denied the allegation and contended before Security Council that a clear distinction has to be drawn between two forms of self-defense. The one, which is of retributive or punitive nature, know as retaliation and the other that is contemplated and authorized by the Charter as “self defense against armed attack”. Britain further contended that legitimate action of a defensive nature may sometime have to take the form of counter-attack as such, destruction of the fort was necessary to prevent the Yemeni from further act of aggression and in sequence Britain had used minimum force as defensive measure which was proportionate and confined to the necessity of the case.⁷

However Security Council did not accept the United Kingdom’s view keeping in mind the resolution adopted by the members of the UN, condemning the act of reprisal as incompatible with the purpose of the UN Charter. Thus on several occasions the Security Council was made to repeat that states shall not be entitled to act upon its own qualification. The task endowed to Security Council for maintaining the international peace and order was difficult to be accomplished, whenever the territorial integrity of a state was violated and the same act was suppressed with a counter attack, and with a justification that the action was necessary to deter future attack as to punish in respect of past misdeed. In all this circumstance council found it difficult either to define the scope of the act of self-defense or to suppress the increasing violence.⁸ Hence it confined the criticism to more extreme act of vengeance. To perceive, any act of counter-attack in the form of vengeance is condemned by the Security Council. Thus this perception gives good stand point to Bowett definition that acts of self

5 Harold A. Feiveson, Ernst Jan Hogen: *No First Use of Nuclear Weapon; The Non Proliferation Review* 10/2/2003, Wilson school at Princeton university.

6 Supra 2 also http://en.wikipedia.org/wiki/Henry_DeWolf_Smyth

7 *Harib Fort incident*: Dj Harris, *Cases and Material on international Law.*, Sweet and Max well 2nd edn, ,1983 PP.669

8 Article 39 of UN Charter also see, Antonio Cassese;Sijthoff and Noordhoff *UN Law and Fundamental right*, international publisher,1979

defense should not be to punish or restore one's right over another.⁹ To him relevant distinction would not be between self defense and reprisal but between the reprisals which are likely to be condemned and which may not be, due to the existence of reasonableness. Bowett concept of reasonable reprisal finds support both in theory and practice and is very correspondent to international customary law which recognizes reprisal against prior illegality as lawful, provided the force used was proportionate to the original illegal act.¹⁰

Now the point is, if the nuclear weapon is used at the time of war what would be the nature of reprisal, whether it would be a punitive reprisal or reasonable reprisal (self defense)? Nevertheless there seem to appear two propositions with regard to the justification of reprisal when the weapon used is a nuclear weapon. Firstly if the reprisal is in punitive form then purpose of war is unjust, secondly if it is a reasonable reprisal [minimum for minimum] then the act would be justifiable as per the states practice. However looking at the present position of the nuclear countries it can be argued that the justification of reasonable reprisal to use nuclear weapon against the enemy country will also be defeated due to the increased intrigue of the nuclear weapons and the possibility of its destructive potentiality, if used it would result into an extreme act of vengeance [maximum for minimum] to put in other word there cannot be a reasonableness of nuclear war and strictly speaking this justification will severely defeat the purpose of UN Charter.

OBSERVATION

THE CONCEPT OF NECESSITY TO DEMAND

Nuclear weapon is an inhuman weapon with a greater possibility of mass destruction and that's why the law of war¹¹ lays down a guiding rule to the states that, no such weapon shall be used against each other, due to the well known truth that the attacker should spare the innocent men, women and children and that the war is always confined to few men and many are innocent.¹² Now this principle has long been in run. So, this is one humanitarian ground were combatants are expected to act morally in the battle field. Such exceptions were more complied when the party to the war made use of permissible weapon compared with the new technological weapon. Well, to say so is rubbish isn't it, perhaps this is what the states practice shows and just to give one example here is Art 2 of the Treaty on prohibition of nuclear proliferation which stipulates that "the party to the treaty shall strictly prohibit the vertical or horizontal proliferation"¹³. Further the docket of the treaty is peaceful use of nuclear energy.¹⁴ In spite of the existing conventions and treaties prohibiting the proliferation of nuclear weapon there seems a surprising increase in nuclear weapon and the number of countries willing to possess the same. What does the whole picture convey? Let's have a bilateral approach to the problem:-

Firstly, is there a *necessity* of such a weapon? Is it an indispensable part of the countries defense strategy? If yes, then the next question is can the weapon be used absolutely against their enemy country or whether the countries are obliged to comply with certain norms or *demand* on humanistic perspective? Secondly is it possible to undo the done or reverse an action or its effect. To say in other word the secret of nuclear energy is revealed to the world at large and no country can be prevented

9 Bowett, *Self Defense in international law.*, Manchester University press, 1958, at pp.117

10 For reprisal see Ingrid Detter "*The Law of War*"., Cambridge University press, 2nd edn, 1958, PP.87

11 Derek Bok (eds) "*Living with Nuclear Weapon*"., the Hard ward Nuclear Study Group, Hard ward University Press

12 See the preliminary remark by the international committee of the Red Cross on the Geneva Conventions of August 12, 1949

13 See the Preamble of NPT 1970, also Article I

14 Article IV&V Of NPT 1970

physically from making use of it. At such point of time how does the theory of NFU helps to retain the balance of power among the nuclear surmount?

STATES PERSPECTIVE

To the first question that the nuclear weapon is an indispensable part of defense strategy, which is also called as military necessity becomes the subject matter of discussion under present topic. Let's analyses the problem from the states point of view. The epic tradition of international relation shows that there had been subsequent mock behaviors among the nations with regard the development of defense strategies.¹⁵ Perhaps that must be either due to the fear that any new strategical development of weapon by their neighbor would put them behind or probably it could emanate a threat to their sovereignty possibly suppress or bully them and if the matter is all about the territorial sovereignty of the country, states would in fact bother to adopt a balance approach of power in a more diplomatic way.¹⁶ For instance, the fact for this pretext would be the increasing number of nuclear country. More and more the developed country enhances and polishes their technological substitute toward nuclear weapon, the more it would attract the conscious of the rest countries and put them in par with these ideological countries. Thus the best competitors turn out to be the worst enemy, causing threat equally to each other. In fact the outbreak of World War II paved way for development of nuclear weapon as earth's future prospect which has a dark side.

Nuclear weapon had emerged on the consciousness of the mankind due to American use of atomic bomb on Japanese cities of Hiroshima and Nagasaki to bring World War II to rapid conclusion. This resulted in adopting two alternative approaches to the problem of preventing any further use of nuclear weapon. In pursuance of this an academic discussion on the organization of post world war was held, which came out with two views, on one side it was found that, most of the American scientist who had been involved in the atomic bomb project were convinced that nothing sort of worldwide imposition of strict international control over all future atomic energy development would succeed in keeping the genie of nuclear weapon use, and from preventing future national peaceful nuclear power programme into dangerous nuclear weapon programmes¹⁷. On the other side there were those who felt that the appropriate approach was to seek a political consensus among all the nuclear capable nations that future protection of nuclear weapon was not an acceptable mode of behavior. This viewpoint was expressed in the "ban the bomb" movement which had a considerable following in the immediate post war period in England and on the European continent but was not, especially widespread in United States. The "ban the bomb" movement never gained much form the American scientists and scholars for two reasons. ¹⁸The first stemmed from the conviction that the genie being out of the bottle there would be no physical possibility of preventing other nations from following in our footsteps, short of actual physical control over the material needed to construct weapons. Secondly the movement was criticized as underpinning the intellectual's ability of the state. In fact all post war effort to eliminate the threat of nuclear weapon collapsed. The fact reveals that the major issue of nuclear weapon was not just the matter of state defense strategy but something more associated with the international politics. According to Dr. Attar chand "Nonalignment is a challenge to the bipolar international system which has become rigidified over the years through the doctrine of nuclear deterrence and the legitimization of nuclear weapon through Nuclear Non Proliferation Treaty. Indeed there is an urgent necessity on the part of these nonaligned to act to lessen the rigidity of the bipolar

15 J.F Dulles: *War Peace and Change*; Macmillan and Co., London 1939 pp.39

16 See Hadley Cantril, "*Tension that causes War*", Illinois press, Urbana: A Common statement and individual paper by Group of social scientist brought together by UNESCO.

17 Attar Chand., *Global Nuclear Politics* ., UDH publishers, 1983 PP.3to18

18 Feld, B.T. *What will it take to outlaw Nuclear Weapon?*., Review of international affairs 20 Oct 1980, pp.26

alliance and denigrate the role of nuclear weapon in international politics and strip them of their glamour and prestige”.¹⁹

Nevertheless all post war effort to eliminate the threat of nuclear weapon can be said to have collapsed, causing a greater threat to the future, that in case of any third world war or if so the chances of use of nuclear weapon seem to be more definite. The great nuclear scientist who unleashed the secret of nuclear energy also predicted the threat of nuclear war.²⁰ In 1955 noble prize winner Albert Einstein and Bertrand Russell issued the statement prior to the Big Four summit meeting in Geneva as follow-;

“In view of the fact that in any future war, nuclear weapon will certainly be employed, and such weapon threaten the continued existence of mankind, we urge the government of the world to realize and to acknowledge publicly that their purpose cannot be furthered by a world war and we urge them consequently to find peaceful means for the settlement of all matters of dispute among **them.**” It’s almost clear from this statement that the nuclear weapon would become the significant part of every countries defense strategy and the possibility of its use in future is more. Indeed the sovereign right of a country to maximize it strategical weapon for the defense can never be questioned but what bothers is the possibilities of its use which the law of war can certainly object.

Long back it was *indispensable* on the part of the states to invent such weapon that would mitigate the mechanical need and help them to win the war regardless anything. But today the purpose of invention has reached far beyond the need and embarked into a weapon of unnecessary death. Hence there is an *urgency* to draw the attentions of almost all the nation who are in run to be the nuclear super power, at least to think once that, if any of the states makes use of nuclear weapon consequence extends to all. Thus the *necessity* of the states has to credit the ultimate *demand* of humanity, “definitely the eternal right of existence”.²¹ True to the fact that the war can never be prevented but the effect of the war can be minimized. The international law of war to a greater extent concern’s over the grievances of the victims of war and tries to mitigate the effect of war by minimizing the use of certain weapon. The states cannot exercise extreme liberty to choose the weapon they like as a means of warfare for the following reasons,

1. Firstly the means of war fare to greater extend is limited by the traditional and new law of war. 2. Secondly the governing principle under international treaty and convention prevents the state parties to treaties from making use of the nuclear weapon.

1. The traditional law of war consists of those principles adopted by the state as a code of conduct of war. For instance in European tradition the law relevant to war can be considered in two main segments: that of just war (*just ad bellum*) and that of just conduct of war (*just in bellow*) the first system analyses the circumstance in which it is justifiable to go to war. The second system analyses in the context of war already underway, “what constitute just conduct of the parties in that war”. The body of learning in regard to just war goes back as far as the 5th century, starting with the writing of St. Augustine.²² The law of just conduct in war represents, in a sense, an attempt to resolve the tension that exists between the polar opposite of military necessity and humanitarianism.²³

19 Supra 17, pp.5

20 See Jonathan Schell, “*The Fate of the a Earth*”, Stand ford University press,1980 pp 13-122

21 The theory is Non evaluative and focuses on application rather than development. Here [necessity] refer to an indispensable or essential condition of the states to use the weapon of their choice especially on the ground of military necessity; however the right of choice is not an absolute one when the law delimits this right to mitigate the urgent or peremptory request of humanity [demand]

22 V.R. Krishna Iyer *Humanitarian Law- A Halting History of Global Evolution*, Introduction to International Humanitarian Law, ICHLR Press New Delhi, 1999 PP.86

23 C.G.Weeramantry, *Nuclear Weapon and Scientific Responsibility*, Vishva Lekha publishers1987,pp72-77

Both *just ad bellum* and *just in bellow* contains important principles that bear on the issue of nuclear war. In recent year especially since World War 2, Human Right Treaties and Principles have also grown to such a volume that Human Right law has become an important discipline in its own right. Under the system of *just ad bellum* the legal principle regarding the right to go to war remains the same. The term force requires to be interpreted in a different angle when the means and method of war changes.²⁴ However the total destructiveness of nuclear weaponry requires that certain distinction to be made on the basis of which type of force is to be used at least on humanitarian ground whether the purpose of war is to be just or unjust.

Augustine's writing also had enormous influence upon European concept of the legitimacy of war. While war was not outlawed, the justice of given war was made strictly depending upon certain condition. These were right authority, just cause, right intent, the prospect of success; proportionality and that war should be a last resort. In addition to these Roman custom and tradition relating to war, St. Augustine used certain concepts already established in the Greek philosophy. To this Augustine added Biblical and early Christian material in his writing.²⁵

It is quite interesting to notice that even by the standard laid down by St. Augustine, nuclear war would not be permissible. It fails to satisfy at least two of his requirement, the prospect of success and proportionality. No nation can succeed in nuclear war and the damage inflicted would be out of all proportion to the provocation, even if the provocation were very great. These ancient theological requirements, subject of numerous theological and legal commentaries over the centuries are still invoked in the contemporary discussion of justification for possible superpower conflict. The contemporary writing on the means of warfare begins with prominent work of Lieber code, St. Petersburg Declaration of 1868 and De Martens Clause.²⁶

In the year 1863 Francis Lieber, an international lawyer prepared set of instructions to be followed by American army during American civil war. The Lieber code provided detail rules to be followed by the belligerents were in it was specified that the belligerents shall have no unlimited right to chose weapon of their choice to cause unnecessary suffering and disastrous damage. The code also stipulates on the right conduct of the belligerent in the battle field. Another noteworthy contribution to humanize war was St.Petersburg Declaration of 1868.²⁷ In fact this is the first Declaration renouncing the use of explosive projectiles in war. Last but not least the trustworthy work of Frederic de Martens attempts to conciliate military requirement with the principle of humanity in war. In one or the other way all this work contributed for the development of humanitarian law. However Geneva and the Hague convention reinterprets the customary and contemporary principles of law of war. For instance Article 22 of the Hague Regulation which has passed from the customary international law provides that belligerents have no unlimited right to chose the weapons to injury the enemy.²⁸ Further Article 23of the regulation particularly forbids to employ arms projectile or material apt to cause unnecessary suffering. This Article seems to be more substantial with moral and legal value. It serve as a very significant source of inspiration in as much as it sets forth one of the general humanitarian grounds on which state should endeavor either to refrain from developing new weapons or to ban their use. This is more absolved with the stand taken by the states in 1973-1975 both in U.N. General Assembly and at the Geneva diplomatic conference on humanitarian law of armed conflicts were in it was agreed that one of the reason for prohibiting through conventional rules the new weapons was due to their causing unnecessary suffering.²⁹ Thus

24 Dr Subhas C. Khare, *Use of Force under U.N. Charter* ,Metropolitan Book Co.(P) LTD New Delhi 1985 PP.7-63

25 Yoram Din stein, 'War, Aggression and Self-Defense', Cambridge University press, 3rd edn,2001 PP.59-63

26 Supra 23,PP.74

27 See J. Von Elbe, 'The evolution of the concept of just war',33 A.J.I.L,1939 ,pp.665-667

28 Also see Antonio Cassese "weapon causing unnecessary suffering: Are they Prohibited? Rivista di Diritto internazionale, 1975, P.16 .

29 Antonio Cassese *The New Humanitarian Law of Armed Conflict* "Ocean Publication Inc., N.Y,1980 PP.163

Article 23 constitutes reiteration of what was already spelled out in 1868 St.Petersburg Declaration.

2. Reassertion of General principles on means of war

General principle of international rules on weapon comes out as a guiding prescript to almost all states that means of warfare has to be limited to a greater extent. These principles are further elaborated under part III of Additional Protocol to Geneva Convention 1949.³⁰ The part III has three fold purposes; - Firstly means of weapon cannot be the unlimited choice of combatants

Secondly, it prohibits indiscriminate means of warfare. Thirdly method of warfare should not exceed to the dead end of environmental disaster

The weapon expressly prohibited includes those which cause superfluous injury and unnecessary suffering, definitely which could affect the mankind and the nature alike. The provision strictly prohibits blind, non tactical atomic and nuclear weapon, this is further elaborated by prohibiting the adoption and use of new weapon. In addition to this the state parties to the convention are under obligation to prohibit the indiscriminate means of attack. Indiscriminate attack includes:-

- (a) Those which are not direct at the specific military object
- (b) Those which employ a method or means of combatants which cannot be directed at a specific military objective or
- (c) Those which employ a method or means of combat the effect of which cannot be limited as required by this protocol.

It also includes:-

- (a) Bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town village or other area containing a similar concentration of civilians and civilian objects; and
- (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian object or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Thus it's clear from the context of these provisions that use of nuclear weapon or biological weapon at the time of war is prohibited and if used it would discard the rule totally resulting in the grave breach of the agreement. More pleasant appearance of the provision comes out were in not only the rule is made to prohibit the inhuman weapon but humanize the war in more gentle way.

It should be pointed out however that in the past it was possible to invoke the doctrine of just war for the purpose of offensive or aggressive war. This is no longer possible under current International law, for Article 2(4) of the UN Charter prohibits the threat or use of force against territorial integrity or political independence of any state. Current International law permits the use of force only in one circumstance, individual or collective self defense. Hence the relevance of just war doctrine must necessarily be confined within the limit of concept of defense. Indeed

³⁰ See the Geneva Convention of August 1949 and Protocols Additional to the Geneva Conventions of 12 August 1949, ICRC, 19 Avenue de la paix, Geneva, PP 27-28

nuclear weapon states admit to no other rational, for their arsenal and the point ultimately is that, whether any defensive use or threat of use of nuclear weapon, first strike or second strike strategic may be considered contrary to international law³¹

CONCLUSION

The notion of NFU would insist the states at least to think once that in any act of war the use of nuclear weapon or if deployed would result into the counter use of the same thereby causing unpredictable damages. The above illustrated fact reveal one truth that even if the attempt is made to regulate the use of these weapon the faith of mankind lies in the hand of nuclear surmount. NFU is never a guarantee of non use of nuclear weapon but in fact a pledge with an exceptional clause in the light of self-defense. On one side we have enough regulations and conventions prohibiting use of nuclear weapon and on the other side we have a practical theory balancing the power of the nuclear countries. NFU attributed one to accept the facts of the life as a practical and literal truth, that theory helps to retain the balance of power among the nuclear surmount. Hope this theory would help to shelve the dark faith of the earth till we find out better solution to save our world from the nuclear threat.

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31 Statement laid down by Justice C.G Weeramantary, pp74, also see supra 23.

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