

# CHALLENGES OF COMPLIANCE WITH THE DISTINCTION AND PROPORTIONALITY PRINCIPLES REGARDING THE GLOBAL NUCLEAR DETERRENCE POLICIES

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**Abstract.** *The article advocates for a multidisciplinary approach to the challenges surrounding nuclear weapons and the implementation of the proportion and distinction IHL principles. It also examines the relationship between nuclear deterrence policies and IHL norms. To this end, it traces the historical development of IHL from the Roman law codification of jus ad bellum and jus in bello to the contemporary IHL institutions of the law of Hague and the law of Geneva. It also highlights the role of the Martens Clause as a safety net for humanitarian protection and reviews the existing legal instruments on nuclear weapons, such as the NPT, the TPNW and the ICJ advisory opinion. The study's outcome underlines the need for more comprehensive and binding legal mechanisms to regulate nuclear weapons in a way that is in accordance with IHL and human rights.*

**Keywords:** *law of war, treaty, indiscriminate attack, armed conflict, target management, jus ad bellum, jus in bello, law of Hague, law of Geneva, Martens Clause*

## 1. Introduction

Nuclear weapons pose an existential dilemma to all of humanity. However, their destructive potential represents a strong enough reason in and of itself for states not to engage in nuclear warfare, in the absence of other insurmountable boundaries having been crossed by another subject of international law (e.g. initialising a direct military attack).

Most state actors, alongside NATO, maintain a first-use nuclear deterrence policy (Graham and Mendelsohn, 1999: 6) which implies that nuclear weapons can be used against any type of military attack, be it nuclear, conventional or non-conventional. This policy arguably detracts from the primacy of the proportionality principle. However, it can be inferred that this policy is indeed a justified exception from the proportionality rule because strategically the first-use approach reduces the propensity of malevolent state actors towards initiating conventional, chemical and biological military attacks, as well as cyberattacks<sup>1</sup>.

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<sup>1</sup> The Council on Foreign Relations (CFR) think tank, ‘No First Use’ and Nuclear Weapons | Council on Foreign Relations (cfr.org) (last accessed October 16, 2023)

Conversely, promises of no first-use have been provided by the Soviet Union (revoked later by Russia), Pakistan, as well as by China (Shaw, 2021: 2750).

Consequently, NATO's nuclear deterrence policy has undergone fierce debate and scrutiny ever since the end of the Cold War. Even though there is a strong rationale for adopting this offensive policy, namely preserving global peace and stability as well as defending NATO's member states, one of its primary drawbacks remains compliance with the distinction and proportionality principles. Hence, the question that our study aims to answer is whether the distinction and proportionality principles can facilitate foreseeing and proactively addressing breaches of international law conduct referring to nuclear force management. Do these principles complement global nuclear deterrence policies or do the IHL legislators (mainly states and international organisations) have to better implement them in order to counteract rising threats?

On the other hand, the purpose of this study is to outline legally binding means of managing conventional military combat, stipulated by relevant international conventions, as well as a brief historical outline of the IHL principles evolution. Furthermore, it will identify legal instruments that can be harnessed so as to equitably judge and condemn state actors enforcing morally reproachable and forbidden war strategies pertaining to nuclear weapons.

In order to reach these goals, the paper will harness the scientific potential of a wide array of sources, including primary legal resources, official statements, academic literature, historical records, and expert opinions. The paper will put an emphasis on a multidisciplinary approach of the subject, combining legal, political and strategic views on nuclear deterrence. Additionally, the paper will put forward case studies and hypothetical scenarios to exemplify the challenges regarding compliance with IHL.

## **2. The Evolution of Modern IHL**

War is a societally ratified method of settling international political disputes. Regardless of whether war is part of human nature or not (an ongoing debate among anthropologists, who focus on the dilemma of whether war is caused by nature or nurture (Dawson, 1996: 1-28), war is certainly a reality of modern human society. Laws governing war conduct are traceable to an entire history of philosophical and legal diligences aimed at reconciling the frequently conflicting attributes of war. War might indeed seem counterintuitive to human nature, as it inflicts immense suffering and provokes irreparable material damage. But history is never black and white, nor is it uncompromising, straightforward or predictable.

Incessantly, our ancestors have seen fit to wage war over minor misunderstandings, thus making war more prevalent than peace and forcing entire communities to transform suffering into a state of mind, if only in order to survive. Rather than remaining an unwarranted intrusion into their realities, an oddity, war deemed everyone's unabridged attention, regardless of social status. Arduous work had to be done to find ways to make armed conflict more bearable, less physically and psychologically demanding, due to the increasingly abundant ways in which war can affect human society.

Cicero's maxim "Silent enim leges inter arma" roughly translates into "During war, the law falls silent" (McLaughlin, 2020: 125). It is difficult to fathom what exactly prompted the famous lawyer, politician and philosopher to make such bold an affirmation. Given his academic background and his commitment to the unhindered

delivery of justice, it can only be concluded that Cicero is an advocate of selective usage of law during war. To be more precise, Cicero put forward the concept of denying the applicability of certain rules of conduct when confronted with real-life war conditions. Thus, he is one of the first proponents of the right to kill in self-defence during times of civil riot and conflict. What essentially happens during chaotic, hectic times is that conventional Roman (or, for that matter, national) law is superseded by an unwritten, customary law of war which in turn, throughout millennia of evolution, is superseded by a written, conventional law of war.

The contemporary precept of war firmly establishes the distinction between the formally abolished war of destruction and a war that solely aims at annihilating the military capabilities of one's adversary, while taking all the compulsory precautions in order to save civilians, preserve objects, heritage sites, along with all the other spiritual or material values which rather pertain to all of humankind, not to any one individual country or area of land.

Peace can be unlawful and unjust due to discretionary national legislations, while war can be lawful and just, provided that it follows IHL guidelines.

IHL strictly emphasises the relevant course of action applicable during warfare, hence ensuring the effective protection of widely recognised social values, such as life, property, health, mental and physical integrity and so on. Due to this fact, IHL has been previously referred to simply as "the law of war", which entails two distinct meanings.

From a subjective standpoint, "the law of war" represents the states' prerogative to regulate mutual relations through armed violence deployment, a veritable national policy instrument. This definition alludes to the fact that the Romans used to call this law "jus ad bellum", literally translated into "right to war", afforded to each and every country owning the military capabilities to engage in warfare.

Due to relatively recent evolutions regarding reverting to war as a means of resolving political disputes, a novel perception of war was crafted by international jurisprudence and especially by way of customary law, which includes *jus gentium* (peremptory norms) and *jus cogens* (peremptory obligations). Their legitimacy and universal opposability stem from a prolonged application by a wide array of subjects of law, which turned them into *erga omnes* obligations (Linderfalk, 2011: 1-23). Ergo, modern IHL has its foundation in the principle of non-refoulement to force and threats of force in international relationships, which basically means an inherent state of peace has to characterise and govern international diplomacy, whilst war should only be waged in self-defence and not under any other circumstances, given its destructive potential towards mankind's most valuable assets. This principle *a fortiori* applies to nuclear conflict, which boasts an unfathomable destructive capacity. To summarise, the novel perception of war is closer to what Louis XIV, King of France, envisioned when inscribing one of his cannons with the Latin phrase "Ultima Ratio Regum", signifying "The Last Argument of Kings"<sup>2</sup>, which underlines the enduring human aspiration for a hierarchy where diplomacy, good-faith and courtesy are primal, whereas war, ill-faith and discourtesy become obsolete, the last resort to be summoned when all the other reasonable alternatives fail to generate consensus on the political spectrum.

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<sup>2</sup> Mid-18thC French 4-pounder field gun - Springfield Armory National Historic Site (U.S. National Park Service) (last accessed October 17, 2023)

Secondly, “the law of war” embodies a universality of legal norms which govern the inception, conduct and conclusion of military hostilities, which, according to Roman law, is called “*jus in bello*”, or “the law in waging war” (van Steenberghe, 2012: 107-124). This second definition creates the premises of modern IHL, in that it emphasises the need for a set of internationally agreed rules on war conduct which will, in the event of armed conflict, surpass the scale and scope of national legislations on military conduct. The ultimate goal is that of limiting or removing widespread atrocities and damage to elemental human rights, which can generally be labelled as crimes against humanity or even genocide.

Under the principle of independence or segregation governing the relationship between them, *jus in bello* doesn't exclude *jus ad bellum*, as the two concepts are complementary in their range and scope, given that *jus in bello* focuses on regulating humanitarian protection during warfare, whereas *jus ad bellum* seeks to understand the justification or reasons for war, in order to allow stakeholders to formulate prevention measures (Solis, 2010: 22).

Last but not least, IHL also entails the “law of Hague” (or “the law of war”) and the “law of Geneva” (or „humanitarian law”), which are intertwined and complementary. “The law of Hague” consecrates the rights and obligations of belligerents with regard to the conduct of military actions, whereas “the law of Geneva” incorporates norms focusing on the protection of military conflict victims, the civil population and belongings. It also advocates for the protection of the national or international organisms which in turn protect the respective population or belongings. The two institutions were formally merged in 1977, the year of the last major codification of modern IHL, which was facilitated by the two additional protocols to the 1949 Geneva Conventions.

Therefore, combat operations are presently governed by a set of international agreements emanating from the “law of Hague” and the “law of Geneva”. These include the Martens Clause, stipulated in the preamble to the 1899 Hague Convention II<sup>3</sup>– Laws and Customs of War on Land, which states that: ‘In cases not covered by this Protocol or by other international agreements, the inhabitants and the belligerents remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and the dictates of public conscience.’ In other words, when all the other legal mechanisms fail to delineate a solution to a humanitarian crisis, the Martens Clause is *ex officio* activated, garnering the traits of a genuine “safety net” in terms of international law conflict resolution. Consequently, a neutral state that intends to offer humanitarian aid to the civil population can do so regardless of whether it officially acknowledges the existing state of war or not. Alternatively, the Martens Clause represents an established guideline of IHL due to the fact that it legitimises a commonly recognised, modern war policy framework, based on the premise that not everything that is not prohibited by a specific rule is necessarily lawful in war (Sandoz, Swinarski and Zimmermann, 1987: 38-39).

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<sup>3</sup> *IHL Treaties - Hague Convention (II) on the Laws and Customs of War on Land*, 1899 (last accessed October 17, 2023)

### 3. The Principles Of Distinction And Proportionality And The Legal Challenges Of Nuclear Weapons

A broad spectrum of legal principles and armed conflict rules is at hand when it comes to the legislation of conduct of combat operations. However, out of this wide array of available litigation alternatives, two principles stand out, in view of their paramount importance, namely the principle of distinction and the proportionality principle. The former is a qualitative, absolute obligation, whilst the latter is a quantitative, relative obligation, due to the fact that proportionality is harder to evaluate objectively, as it depends on a larger array of conditions of existence. The paper will delve into the connexion between these principles and nuclear weapon usage generally, in order to facilitate a comparison with the globally embraced nuclear deterrence policy.

#### 3.1. The Principle Of Distinction

In the Advisory Opinion of the Legality of the Threat or Use of Nuclear Weapons, the ICJ held that the principle of distinction is amongst IHL's "cardinal principles"<sup>4</sup>.

The principle of distinction aims to establish a clear, insurmountable boundary between military objectives and civilian persons, as well as between military objectives and personal property. Henceforth, means and methods of war shall be exclusively directed towards the former.

An alternative goal of this principle is that of limiting the means and methods of warfare to those that are necessary and proportionate, which advocates for the complementarity of the distinction and proportionality principles. Only through a proportionately directed military attack can the distinction between civilians and military personnel be respected. Any disproportionate attack will inevitably result in unnecessary losses of civilian lives.

On the other hand, the principle of distinction doesn't normally afford protection to combatants, with the exception of combatants who, due to various reasons or occurrences, become temporarily or permanently incapacitated (in French, "*hors de combat*" means "out of combat"). A relevant example of unlawful treatment of *hors de combat* soldiers is the case of the Srebrenica massacre in July 1995, where Bosnian Serb forces killed around 8,000 (Brunborg, Lyngstad and Urdal, 2003: 229-248) Bosnian Muslim men and boys who had surrendered or were captured. The International Criminal Tribunal for the former Yugoslavia (ICTY) found that these victims were *hors de combat* and that their killing constituted a crime against humanity (Singh, 2009: 247-296).

Alternatively, civilians are generally protected from attack, save for their direct participation in hostilities, during which period they lose the protection deriving from the principle of distinction. Additional Protocol I formulates a first codification of the term *civilian*: "any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian". Therefore, the term "civilian" is negatively defined as not

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<sup>4</sup> Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, ICJ, 8 July 1996, para. 78 (last accessed October 17, 2023).

including persons who are members of the armed forces, nor participants in a *levée en masse*. The latter are recognised by IHL customary and conventional norms as combatants, despite not being members of the armed forces or civilians (Melzer, 2008: 310). According to the legal interpretation principle *ubi lex non distinguit, nec nos distinguere debemus*, since the legislator doesn't make the distinction between categories of civilians on the basis of their nationality, the protection of neutral civilians applies to both enemy civilians and one combatant's own civilians, an aspect additionally confirmed by ICRC's Commentary on Additional Protocol I (Sandoz, Swinarski and Zimmermann, 1987: 610). Ultimately, even if there are reasonable doubts about one's civilian status, the benefit of the doubt will prevail in its application.

Speaking of personal property or civilian objects, they cannot become the object of an attack unless their status is modified to military objects.

Although prohibited by the principle of distinction, the proliferation of acts or threats of violence in order to spread terror among civilians is a common practice during warfare, as well as during times of peace, in the realm of terrorist attacks (which are subject to IHL norms, as a result of an *in extenso* legal interpretation of IHL's material object). To be more specific, the tendency to disobey any given political and religious *status quo* can take the form of nuclear terrorism. It comes as no surprise that, *exempli gratia*, the year 2007 marked the establishment of the Global Initiative to Combat Nuclear Terrorism (GICNT), at the time of writing encompassing 90 signatory states and intending to improve international capacity for preventing the illegal acquisition, transportation or use of nuclear and radiological materials.<sup>5</sup>

The principle of distinction has one essential consequence, specifically the prohibition of indiscriminate attacks. Indiscriminate attacks can be classified as disproportionate, uncontrollable as to the desired target or simply not willingly directed against a specific military objective.

The distinction between unlawful indiscriminate attacks and the proliferation of threats or acts of violence among civilians is that the former is never exclusively directed towards civilians, whereas the latter is centred on the civilian population.

The 1999 Kosovo crisis constitutes an example of unlawful, indiscriminate attacks affecting Kosovar civilians, as a consequence of the NATO high-altitude bombing campaign (McCoubrey, 2000: 184-206). The bombing also resulted in the destruction of the Chinese Embassy in Belgrade, conventionally protected by both the civilian objective status and diplomatic immunity, which remains controversial to the present day. It either illustrates a severe lack of precautionary measures on the side of NATO military personnel (mistaking a civilian target for a military one) or an intentional disregard for the distinction principle presumably justified by the obsolete IHL "just war" principle, legitimising armed force use in the context of the embassy's alleged role in facilitating Yugoslav army communications and the monitorisation of cruise missile attacks. This attack also triggered diplomatically as well as politically damaging outcomes for NATO's relationship with China.

Regardless of the underlying motives for NATO's destruction of the Chinese Embassy, this conventional military attack accurately illustrates how disobeying IHL principles is a prerequisite for determining uncontrollable chain reactions which, once

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<sup>5</sup> Global Initiative to Combat Nuclear Terrorism (GICNT) (last accessed October 18, 2023)

in effect, prevent the involved state actors from intervening in the sense of preserving elemental human rights. All the more, we stress the stringent necessity of devising a legal framework for managing nuclear policies worldwide, given the incomparably more devastating indiscriminate effects of nuclear weapons, as compared to conventional weapons.

Improved target management is a satisfactory solution to limiting unlawful indiscriminate attacks using conventional military forces. This implies endeavouring an in-depth analysis of available information on previously acquired targets, thus preventing incidental loss of civilian lives or destruction of civil property. It is a multidisciplinary attempt at improving military operations conduct on the basis of the efficient identification, localization, selection and eventual targeting of essential military objectives pertaining to the adversary, thus assuring military victory. This management philosophy builds upon customary law provisions, whilst accompanying them with modern IHL standards, the most innovative and pertinent of which are evidenced by the target management rules found in The Fourth Title of Additional Protocol I to the Geneva Conventions, adopted in 1977. Applying the principle of distinction ranks first among the priorities set in Title Four, as can be concluded from Article 48.

When it comes to the compatibility of nuclear weapons with the principle of distinction, the debate gives rise to numerous dilemmas and unresolved disputes. No authoritative judicial or political body has yet managed to deliver a satisfying response on the matter. Nonetheless the International Court of Justice (ICJ), in its 1996 advisory opinion on the legality of the threat or use of nuclear weapons, reached a relative conclusion: “the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict and in particular the principles and rules of humanitarian law”. Due to their recommendation status, these provisions haven’t prevented Russian officials from choosing strategic interests in spite of global security, thus issuing repeated statements threatening to use nuclear force<sup>6</sup>, to determine NATO states to withdraw their military, economic and political support for Ukraine<sup>7</sup>.

Therefore, states and other actors engaged in nuclear disarmament and non-proliferation efforts must continue to address the legal challenges posed by nuclear weapons and seek ways to ensure that the principle of distinction is respected and upheld in all circumstances.

### 3.2. The Proportionality Principle

As can be inferred from the nature of military combat, two frequently conflicting interests have to be fulfilled: military objectives and civilian protection. The proportionality principle merely serves as a means to an end, as it implies increased precautionary measures regarding the protection of civilians. Due to this, proportionality represents a hindrance impeding successful military operations, which is why it wasn’t historically

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<sup>6</sup> The Editors (2018), *Nuclear coercion skepticism and Russia's nuclear-tinged Threats* (Book Review), *The Nonproliferation Review*, Routledge Publishing, Washington, p. 379-383. <https://doi.org/10.1080/10736700.2018.1431178>.

<sup>7</sup> We will not be intimidated by Russia's nuclear threats, NATO tells Moscow | Reuters (last accessed October 19, 2023)

endorsed as a war principle until the twentieth century, precisely due to non-existent or fragile human rights protection frameworks before the inception of modern IHL.

To begin with, the proportionality principle has a twofold definition, corresponding to the distinct ways in which proportionality limits the use of armed force (Cannizzaro, 2006: 779-792). Thus, *jus ad bellum* proportionality seeks to limit the power of states to resort to force in the first place, instead of devising diplomatic solutions to conflicts. Secondly, *jus in bello* proportionality underscores the necessity of sparing civilians and civilian objects from unwarranted damage, be it incidental or collateral, throughout the entire duration of attacks aimed at military objectives, therefore prior to the inception of military actions and recourse to force. Implementing proportionality means respecting its double doctrinal codification, therefore our study will focus on examining whether 1) *jus ad bellum* proportionality can be upheld in the context of imminent threats to one state's survival and 2) *jus in bello* proportionality can be applied to the nuclear use of force.

There are two available alternatives to enforcing disproportionate war strategies and artillery against civilians and civilian objects: either you use a different weapon which would not trigger disproportionate harm to civilians or their property (thus respecting the *jus in bello* proportionality), or you do not carry out the attack at all (thus abiding by the *jus ad bellum* proportionality).

At the same time, *jus in bello* proportionality states that incidental damage must not be excessive in comparison with the immediate and concrete military advantage that you anticipate from your operation. Hence, when carrying out conventional or nonconventional operations, you are not allowed to engage in disproportionate attacks even when it comes to combatants and military objectives, as that would only serve as a way to unlawfully exacerbate the breach of elemental human rights, which are also inherent to belligerents.

Factual analysis of on-site war scenarios and developments is difficult to perform, therefore the proportionality assessment can be subject to decisive inaccuracies. Naturally, the problem revolves around who exactly gets to make the final decision about meeting proportionality requirements. Is it the soldier or the commander? Paradoxically enough, individual soldiers on the battlefield may quantify their military operation as being small-scale, not instrumental enough to justify enhanced and sustained military aggression beyond a certain threshold, whereas, on the other hand, commanders may characterise the exact same operation as decisive in the grand scheme of things (Cohen, Zlotogorski, 2021: 182). The sole criterion that should be taken into account when deciding upon the legitimacy of the attack is aptly illustrated by the Additional Protocol I to the Geneva Conventions (1977): will the attack be excessive in relation to the concrete and direct military advantage anticipated? This condition, which is in full compliance with the IHL proportionality principle, points out the fact that higher ranks should be granted the prerogative to assess the proportionality of attacks, rather than soldiers in the field, given the complex nature of the effects of large-scale military missions. According to ICRC's commentary on Additional Protocol I, the syntagm "concrete and direct military advantage" alludes to the fact that the gained advantage should be "substantial and relatively close", thus excluding advantages which are too insignificant or distant time-wise to justify the attack.



As regards *jus ad bellum* proportionality applied to nuclear weapons, the ICJ's Nuclear Weapons Advisory Opinion<sup>8</sup> underlines that the proportionality rule might still be compatible with the use of nuclear weapons, under exceptional circumstances, such as that of self-defence. Despite the large range of risks arising from an eventual use of nuclear weapons, the Court states that it doesn't deem it necessary to operate a quantification of those risks and that this type of evaluation has to be supervised by state actors "believing they can exercise a nuclear response in self-defence in accordance with the requirements of proportionality." Therefore, insofar as the ICJ can exert judicial authority regarding nuclear policies upon other law subjects, it strongly emphasises the conceptual perils relative to determining what type of "extreme circumstances of self-defence" might be enough to justify immediate nuclear action.

This evaluation of threat extremeness is highly debatable, in that a state's very survival might not equal a mere timely loss of some attributes of its statehood. Alternatively, does it suffice for the passive subject of the threat to be a constituent part of the state (e.g. a public institution), or does the state in its entirety have to be at risk? These circumstances strictly depend on one state's political, economic and military status at one particular moment in time. Nonetheless, a relevant evaluation of threat extremeness in view of the proportionality principle can be conducted using general the following set of criteria:

- Concreteness and imminency (as opposed to hypothetical or remote)
- Vital interests or core values of the state at risk (as opposed to secondary interests)
- Overwhelming and irresistible character (as opposed to a manageable and containable character)
- Unlawful and unjustified character (as opposed to legitimate or reasonable)

To conclude, proportionality leaves a lot to be desired in terms of applicability in the event of nuclear self-defence, as well as during hypothetical nuclear warfare. Nonetheless, not all scenarios are incongruent with the possibility of nuclear weapons being used in compliance with proportionality taking into account the immediacy of the faced threat, as well as recent developments showing an extensive effort at improving target management methods in case of nuclear attack, as has been outlined in the previous section delving into the distinction principle, which is deeply correlated with the proportionality principle. Furthermore, the proportionality principle can only be successfully applied in conjunction with the other IHL rules and principles, amongst which distinction is primary.

#### **4. Nuclear Warfare Policy in View of the Proportionality and Distinction Principles**

Conventional warfare benefits from a fairly large array of international legal agreements mitigating the damaging effects it can have on the environment, population and infrastructure. For instance, the following war methods are expressly forbidden: starvation, destruction of objects indispensable to the survival of the civilian population, human shields, pillage, perfidy, improper use of enemy and other uniforms, attacking *hors de combat* soldiers, torture, taking hostages, engaging in reprisals.

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<sup>8</sup> Legality of the Threat or Use of Nuclear Weapons Advisory Opinion of 8 July 1996 (last accessed: October 21, 2023)

On the other hand, when it comes to nuclear warfare, available legislation isn't homogenous and is subject to extensive criticism from both international and non-international actors (Dragoman, Ungureanu, 2018: 295).

Nuclear warfare is amongst the war means and methods that have indiscriminate effects. According to Article 51 of the Additional Protocol (I) to the Geneva Conventions:

“Indiscriminate attacks are prohibited. Indiscriminate attacks are: a) those which are not directed at a specific military objective; b) those which employ a method or means of combat which cannot be directed at a specific military objective; or c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.”

How can an unlawful indiscriminate attack ever be justified, despite inherently trespassing the proportionality and distinction principles? And what's more, how does this relate to global nuclear deterrence efforts?

ICJ, in its 1996 advisory opinion on the legality of the threat or use of nuclear weapons, stated that “in view of the current state of international law, and of the elements of fact at its disposal, [it] cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake”. This view draws attention to the distinct possibility that the very essence of a state's existence is threatened by either conventional or unconventional military intervention. At that point, the legitimacy of self-defence might render IHL principles severely inadequate, unrealistic even. Revolving to nuclear weapons could thus become lawful, if only, subsequent to the nuclear weapon use, the respective state actor brought forward relevant evidence in the ICJ as to having lacked other viable military alternatives meant at overcoming the perceived national security threat.

The legislative disparities governing nuclear weapons are a consequence of both the particular nature of nuclear weapons and the lack of consensus among the main global nuclear powers. It can be inferred that nuclear force boasts a self-regulating set of unwritten rules, keeping states away from the idea of initiating nuclear retaliation, such as: the self-compromising potential of initiating nuclear attacks (the high risk of a devastating conventional or nuclear counter-attack towards nations initiating the attack in the first place); the fact that mere threats of using nuclear weapons serve a balance-keeping purpose and have no other significance beyond the strategic interests of those issuing them (e.g. Russian threats of using nuclear weapons during the military conflict in Ukraine).

Although there exists a quasi-universally ratified (including 190 states parties) 1970 UN *Treaty on the Non-Proliferation of Nuclear Weapons (NPT)*<sup>9</sup>, it doesn't constitute a legally viable nuclear weapon management treaty, making it difficult to clearly establish what guidelines should be respected even when certain political actors remotely threaten with the use of as indiscriminate and destructive a force as nuclear power is. Essentially, this treaty doesn't provide enough guarantees in the sense that the sanctionatory mechanism it offers is inadequate as opposed to the real and imminent threat of nuclear fallout. There are five officially recognised nuclear-weapon

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<sup>9</sup> NPT (last accessed October 20, 2023)

States, namely the United States, Russia, the United Kingdom, France, and China, all of which are part of the treaty.

The treaty doesn't permit legal coercion into not making use of nuclear weapons, because only recommendations can be made as regards the implementation and acquisition of nuclear weapons. The major additional shortcoming of the NPT Treaty stems from the fact that the four other states known or believed to possess nuclear weapons are not parties to this treaty, specifically North Korea, India, Pakistan and Israel.

When a state doesn't ratify any nuclear non-proliferation treaty whatsoever, the way it manages available nuclear weapons becomes the main subject of the distinction and proportionality principles. This represents an application of the Martens Clause. These principles are a fundamental source of IHL, given that they have been agreed upon previously by a large proportion of state actors. Hence, nuclear policy has to be conducted whilst acknowledging the humanitarian consequences that they might yield. Considering their immense destructive power and indiscriminate effects, nuclear weapons compliance with IHL standards is very difficult to achieve.

Moreover, critics argue that the NPT Treaty cannot effectively stop the proliferation of nuclear weapons or the motivation to acquire them. The progress with nuclear disarmament is dissatisfactory, given the fact that the five authorised nuclear weapons states still have 13,400 warheads in their combined stockpile, which possess the equivalent of 5,000 times the explosive power of all types of weaponry used during World War II (Dragoman, Ungureanu, 2018: 293).

Nonetheless, the treaty stresses the destructive potential of nuclear weapons and emphasises their incongruence with IHL and also with the laws of humanity. Undoubtedly, the protection of human rights during armed conflict would be rendered useless by the use of nuclear weapons, which can never distinguish between military objectives and civil population. The NPT Treaty principles are reaffirmed and reinforced by the 1992 *Declaration on the Protection of all Persons from Enforced Disappearance*<sup>10</sup>, which stipulates that the usage of nuclear weapons is equivalent to committing crimes against humanity.

Non-state actors also significantly impact decision-making regarding nuclear policy. As part of NATO's nuclear deterrence policy, the transatlantic organisation is committed to arms control, disarmament, and non-proliferation, but as long as nuclear weapons exist, it will remain a nuclear alliance<sup>11</sup>. NATO's nuclear policy is set as a result of the common agreement of all NATO Heads of State and Government, whilst its implementation is the responsibility of the Nuclear Planning Group (NPG)<sup>12</sup>. Presently, NATO's nuclear policy has two law sources: the 2022 Strategic Concept and the 2012 Deterrence and Defence Posture Review.

In 2017, another attempt at codifying IHL regarding nuclear weapons was made, resulting in *The Treaty on the Prohibition of Nuclear Weapons* (TPNW)<sup>13</sup>. Having

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<sup>10</sup> Declaration on the Protection of all Persons from Enforced Disappearance | OHCHR (last accessed October 20, 2023)

<sup>11</sup> NATO - Topic: NATO's nuclear deterrence policy and forces (last accessed October 20, 2023)

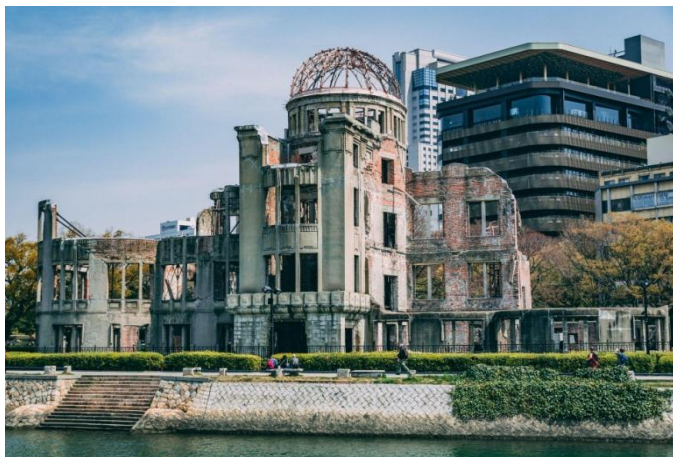
<sup>12</sup> *ibidem*.

<sup>13</sup> 2017 Treaty on The Prohibition of Nuclear Weapons (last accessed October 21, 2023)

entered into force in 2021, the treaty only has 68 ratifying states as of October 2023<sup>14</sup> and is seen as complementary to and interdependent with the NPT, the cornerstone of the global nuclear energy regime. In comparison to the NPT, the TPNW is more divisive and controversial in the international community, as it has been opposed and boycotted by all the nuclear-weapon states and most of their allies that rely on nuclear deterrence, whereas the NPT has been widely accepted by almost all states.

Notwithstanding, the North Atlantic Council has issued a favourable statement on the TPNW, reaffirming its resolve to seek a safer world for all and to create the conditions for a world without nuclear weapons in full accordance with all provisions of the NPT, including Article VI, in a step-by-step and verifiable way that promotes international stability, and is based on the principle of undiminished security for all. This shows how the TPNW can facilitate constructive dialogue among geopolitical actors regarding the pressing and always relevant topic of nuclear force management.

The Hiroshima bombing (Fig. 1), when a relatively small bomb was enough to level a whole city, stands as proof of the destructive power of nuclear weapons. A one-megaton device is 80 times the destructive capacity of the Hiroshima bomb<sup>15</sup>. To form an idea of this destructive capacity, imagine a train with TNT stretching from Los Angeles to New York, holding 1,000,000 tons of TNT. Taking that into account, it can be inferred that even the explosion of a single, low-yield nuclear weapon, be it intentionally or by accident, can determine massive loss of life and notable material destruction. More importantly, these types of effects will not be limited by national frontiers and will trigger detrimental change on a larger scale, having an individual as well as a collective impact.



**Figure 1:** Hiroshima Memorial Park, a legacy that is not to be forgotten, especially in the context of nuclear disarmament efforts

*Source:* <https://unsplash.com/s/photos/hiroshima-peace-memorial-park> (last accessed October 16, 2023)

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<sup>14</sup> Treaty on the Prohibition of Nuclear Weapons (TPNW) (nti.org) (last accessed October 21, 2023)

<sup>15</sup> Horrors of Hiroshima, a reminder nuclear weapons remain global threat | UN News (last accessed October 22, 2023)

Ultimately, assuring the primacy of the distinction and proportionality principles in case of nuclear threat requires a clearer codification of nuclear weapons use, as well as investing a pre-existing (e.g. the ICJ) or new IHL organism with the prerogatives to severely sanction any transgression from Treaties and principles regulating nuclear weapons.

### 5. Closing Remarks

“War is never to be undertaken except to assert rights, and when undertaken is never to be carried on except within the limits of rights.”, states David J. Hill in his Introduction to ‘The Rights of War and Peace’, by Hugo Grotius (Grotius, 1901 ed.:27). There’s a double facet to war, consisting of both an ending of the previous legal order and a beginning of a new legal framework: the conflict of arms silences civil laws, those that govern in times of peace. It is only them that become ineffective, whereas the laws that originate in the nature of man as man, the laws relying on basic human decency and common sense continue even during times of distress and coalesce into the non-amenable laws of war. Not abiding by these rules represents an implicit rejuvenation of barbarism and a despicable repudiation of human nature itself.

When it comes to nuclear warfare, surpassing the limits of war conduct can result in dire consequences for the environment, for humanity as a species. Having reached this incredible level of technological evolution (where we can destroy centuries of evolutions within seconds) comes with the even greater responsibility of mitigating the detrimental effects that uncontrolled progress can have. Thus, the myriad of nuclear deterrence policies and IHL principles in effect are not in vain, they condone a message that is beyond a despicable attempt at quantifying the unquantifiable: their purpose is that of conferring meaning to the conjugated societal efforts at putting an end to military conflicts, leading the way to a world where peace prevails, where the term “collateral damage” is a relic of the past, where humans no longer have to endure the collective drama of war. As utopian as this may sound, not a flicker of hope for its achievement would be left if it weren’t for the IHL legal framework giving expression to the honourable manner in which war has to be conducted, as well as to the graceful methods of avoiding war through invoking diplomacy, good-faith and courtesy.

Overall, the article has examined the relationship between distinction, *jus in bello* and *jus ad bellum* proportionality given modern IHL’s evolution, as well as their applicability to nuclear weapon usage policy. It has been argued that, while nuclear deterrence shares some common features and objectives with distinction and proportionality, they remain distinct and independent of each other, mainly because of the different contexts and purposes in which they operate. It has also been suggested that the use of nuclear weapons poses serious challenges to the respect and implementation of distinction and proportionality, especially in light of their indiscriminate and long-term effects.

Our study has answered the main question that it aimed to address: whether the distinction and proportionality principles can facilitate foreseeing and proactively addressing breaches of international law conduct referring to nuclear force management. Thus, we are of the opinion that these principles can give some guidance and constraints on the use or threat of nuclear weapons, but they are not sufficient or conclusive in all circumstances. Therefore, there is a need for more comprehensive and

binding legal instruments that can regulate nuclear weapons in a way that is consistent with IHL and human rights.

Moreover, the study highlighted the need for clarity and consistency in the interpretation and application of these notions, as well as the need for further development and adaptation of the legal framework governing the use of force in armed conflicts. It has also emphasized the importance of respecting and promoting humanitarian values and principles in situations of armed conflict, regardless of the legality or morality of the resort to force by states. Ultimately, the best way to ensure compliance with distinction and proportionality is to prevent or avoid the use of nuclear weapons altogether.

Future research directions may include identifying how the preexisting legal instruments on nuclear weapons, such as the NPT, the TPNW and the ICJ advisory opinion can be improved and complemented by new ones remediating the gaps and incongruencies in their provisions. The impact that technological innovations (e.g. artificial intelligence, cyberwarfare etc.) have on the existing legal framework on nuclear weapons is another relevant topic of research. It also would be worthwhile to expand on the subject of how dialogue and cooperation concerning states having different nuclear policies can be improved, in order to avoid nuclear escalation and foster a climate of global stability on the matter of nuclear force usage.

The contemporary international context and development strategies can only reaffirm the urgency of building upon the existing principles and institutions of IHL, thus attaining reliable guarantees from significant geopolitical actors regarding the non-proliferation of nuclear weapons of mass destruction and last but not least regarding their long-lasting commitment towards making armed conflict an obsolete method of resolving international disputes, incongruous with the provisions of legally enacted international agreements.

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