



## ANALYSIS

### THE *JUS AD BELLUM* CHARACTER OF NUCLEAR WARFARE

By John Mark Mattox\*

Although rudiments of what has emerged as the western just war tradition are traceable at least as far back as Aristotle,<sup>1</sup> the now well-known distinction between “*jus ad bellum*” and “*jus in bello*” is of surprisingly modern origin.<sup>2</sup> *Jus ad bellum* is the cover term for the generally recognized, individually necessary, and, in theory at least, jointly sufficient, conditions under which legal and moral permission exists for the prosecution of war. *Jus in bello* covers a complementary concept, namely, the legal and moral bounds within which war may be justly prosecuted. Although Latin nomenclature may provide a veneer of antiquity,<sup>3</sup> and although just war pronouncements at least as far back as Augustine may be more or less conveniently binned under these two headings,<sup>4</sup> the headings themselves had no currency before the Interwar period. Neither is mentioned, for example, even in the 1899 or 1907 Hague Peace Conferences, whose ostensible aim was, *inter alia*, to codify the law of war.<sup>5</sup> Nevertheless, since the end of World War II (and, coincidentally, the beginning of the nuclear era), much of the literature on the legality or morality of war (not to equate the two) has been expressed in *jus ad bellum* and *jus in bello* terms.

Because questions surrounding the choice of weapon and the manner in which a weapon may be employed assume that the decision to go to war has already been made and that a concomitant legal and moral justification for the war has already been rationalized if not proffered, it seems natural, *prima facie*, to assume that questions of nuclear weapon employment—or any weapon, for that matter, should fit neatly—perhaps even completely—under the *jus in bello* rubric. However, the decision to employ nuclear weapons is no ordinary decision, and nuclear weapons themselves are not just “any weapon”; and any characterization of them as “ordinary” or “conventional”—only bigger—is bound to produce a distorted understanding of not only where they belong in the *jus ad bellum/jus in bello* construct, but also the role they play on the battlefield and in the world. To illustrate: Speaking to a 1200-student audience at Columbia University in 1959, former President Harry S. Truman called the decision to drop the atomic bomb on Japan “not any decision you

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\* The views expressed herein are those of the author and do not necessarily reflect those of the U.S. Government.

<sup>1</sup> For what is likely the earliest recorded western source of for the words “just war,” see Aristotle, *Politics* Book I 1256b21–5 in *The Complete Works of Aristotle*, vol 2 (Princeton: Princeton University Press, 1985): 199.

<sup>2</sup> Robert Kolb, “Origin of the twin terms *jus ad bellum/jus in bello*,” *International Review of the Red Cross*, No. 320 (September–October, 1997): 553.

<sup>3</sup> *Ibid.*

<sup>4</sup> For an extended treatment of this point, see *Saint Augustine and the Theory of Just War* (London: Continuum, 2006), by the present author.

<sup>5</sup> See *The Proceedings of The Hague Peace Conferences*, Translation of the Official Texts, prepared in the, Division of International Law of the Carnegie, Endowment for International Peace, under the supervision OF James Brown Scott, Director: The Conference of 1899, Parts I–IV; The Conference of 1907, Vols I–III (New York: Oxford University Press, 1920).



had to worry about. It was just the same as getting a bigger gun than the other fellow had to win a war and that what it was used for. Nothing else but an artillery weapon.”<sup>6</sup> This is a remarkable comparison for a former a World War I field artillery battery commander-turned-President of the United States to make. During the period of U.S. involvement in World War I—April 1, 1917–November 11, 1918, France produced 149,827,000 artillery projectiles; Great Britain, 121,739,000; and the United States 17,260,000.<sup>7</sup> During World War I, the German field artillery alone is said to have fired 222 million projectiles.<sup>8</sup> However, not a single one of those projectiles, or perhaps even all of them combined, produced the history-altering consequences of the single nuclear weapon dropped on Hiroshima. A somewhat more illuminating characterization of nuclear weapons comes from the same President Truman as he addressed the nation 14 years earlier:

Sixteen hours ago, an American airplane dropped one bomb on Hiroshima . . . That bomb had more power than 20,000 tons of T.N.T. It had more than two thousand times the blast power of the British “Grand Slam” which is the largest bomb ever yet used in the history of warfare. . . It is an atomic bomb. It is a harnessing of the basic power of the universe. The force from which the sun draws its power has been loosed against those who brought war to the Far East.<sup>9</sup>

If, in fact, nuclear weapons were “[n]othing else but an artillery weapon”<sup>10</sup>—just like the hundreds of millions of other artillery projectiles produced or fired during World War I, the principles of *jus in bello* would arguably be adequate to circumscribe all factors associated with the decision to employ them. On the contrary, however, not only Truman’s August 6, 1945, description but indeed the entire history of the nuclear age suggests the inadequacy of any attempt to analyze the propriety of nuclear weapon employment in *jus in bello* terms alone. Indeed, far from being merely *jus in bello* weapons, nuclear weapons may be best understood as *jus ad bellum* weapons with enormous *jus in bello* and *jus post bellum* implications.

## THE UNIQUE NATURE OF NUCLEAR WARFARE

Nuclear weapons are unique in every meaningful respect: in terms of the materials from which they are constructed, the exacting engineering techniques and reliability standards

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<sup>6</sup> Robert H. Ferrell, *Harry S. Truman A Life* (Columbia, Missouri: University of Missouri Press, 1994): 214.

<sup>7</sup> Benedict Crowell, *America’s Munitions, 1917–1918* (Washington, D.C.: Government Printing Office, 1919): 33.

<sup>8</sup> Dieter Storz, “Artillery,” in 1914-1918-online. *International Encyclopedia of the First World War*, ed. by Ute Daniel, Peter Gatrell, Oliver Janz, Heather Jones, Jennifer Keene, Alan Kramer, and Bill Nasson, issued by Freie Universität Berlin, Berlin 2014-12-16. DOI: 10.15463/ie1418.10510. Translated by Reid, Christopher, <https://encyclopedia.1914-1918-online.net/article/artillery>, accessed 6 April 2021.

<sup>9</sup> Harry S. Truman, “August 6, 1945: Statement by the President Announcing the Use of the A-Bomb at Hiroshima,” UVA Miller Center, Presidential Speeches, Harry S. Truman, <https://millercenter.org/the-presidency/presidential-speeches/august-6-1945-statement-president-announcing-use-bomb>, accessed 6 April 2021.

<sup>10</sup> Robert H. Ferrell, *Harry S. Truman A Life* (Columbia, Missouri: University of Missouri Press, 1994): 214.

they require, the effects they produce, the safety, security, and operational procedures that surround them, the personnel clearance standards and procedures necessary to grant access to them, and even more to the point, their essentially political character, as well as the legal and moral considerations that come to the fore whenever the question of their employment is raised. Indeed, they are unlike anything else heretofore seen in the history of warfare.

Not only nuclear weapons but even the idea of nuclear warfare itself falls into a category all its own. Any effort to equate war without nuclear weapons and war with nuclear weapons tends toward absurdity: The decision to employ a nuclear weapon is not (*à la* Truman 1959) merely the case of a tactical decision for a conventional war in which a larger-than-usual explosion occurs. Rather, it is (*à la* Truman 1945) a world-changing and history-changing event. The existence of nuclear weapons is itself world-changing. As a result, every conflict of the past three-quarters of a century has occurred, to one degree or another, in the shadow of the reality that, because nuclear weapons exist, hostilities must remain below a threshold that would not inspire the question of their employment.

For the argument which follows, an apparently tedious linguistic distinction is worth thoughtful attention: Although the phrases “nuclear use” and “nuclear employment” are not applied consistently in academic literature, one might profitably stipulate “nuclear use” to refer simply to the fact that nuclear weapons exist: To possess them is to “use” them. The phrase “nuclear employment” then can be reserved to refer to the case in which a nuclear weapon is detonated in military operational setting (as opposed to a test setting). Consistent with this distinction, it may be said that the United States has “used” nuclear weapons ever since Ju, 1945 (in that it has tested them or maintained them as tools of deterrence) but that it has not “employed” nuclear weapons since August 9, 1945, when it dropped the bomb that destroyed Nagasaki, Japan. This distinction, while nuanced, is hardly trivial. To “use” a nuclear weapon is not the same thing as to “employ” a nuclear weapon, and vice-versa. While one might correctly argue that the same distinction is possible with any weapon system, one must at the same time admit that—just like the artillery projectiles of World War I—the possession of many thousands of bayonets, machine gun bullets, long-range guided missiles, etc. does not carry with it the transformative effect that the possession of even one nuclear weapon does. That “transformative effect” of nuclear weapon possession manifests most dramatically and immediately in the way in which the possessor is regarded by the international community, and particularly by the possessor’s historical adversaries. When a state acquires a nuclear weapon, the entire world takes grave notice. That state’s “use” of nuclear weapons begins immediately, and with it, the awful possibility of the weapon’s “employment”. Notice, importantly, that “use” thus described falls completely outside the purview of *jus in bello* because the principles of *jus in bello* do little to illuminate the role that nuclear weapons actively play in the international sphere as soon as their possession is known.

In what follows, we shall examine each *jus in bello* and *jus ad bellum* principle, in turn, with an eye toward establishing the thesis that the decision to employ a nuclear weapon is in reality a *jus ad bellum* decision, and not one that belongs solely in the realm of *jus in bello*.<sup>11</sup>

## NUCLEAR WEAPONS AND *JUS IN BELLO*

Imagining what could be meant by nuclear weapons in the context of *jus in bello* is a useful exercise, if for no other reason than to observe the inadequacy of *jus in bello* for comprehending all aspects of the decision to employ them. The *jus in bello* rubric is widely recognized as including two principles: proportionality and discrimination.

**(Micro) Proportionality.** One of the unfortunate consequences of speaking of proportionality under both *jus ad bellum* and *jus in bello* is the tendency to fall prey to the fallacy of equivocation by assigning *jus ad bellum* characteristics to proportionality in a *jus in bello* context and vice-versa. The proper distinction between the two may be clarified by conceiving of *jus in bello* proportionality as “micro” proportionality and *jus ad bellum* proportionality as “macro” proportionality. (Micro) proportionality is best understood in terms of the famous definition of “prohibitory effect”, which enjoins belligerents to “refrain from employing any kind or degree of violence which is not actually necessary for military purposes.”<sup>12</sup>

While it is possible that this characterization of (micro) proportionality could prove theoretically adequate for adjudicating both single-point nuclear targets not a part of a large-scale nuclear attack and massive attacks with cataclysmic consequences, the true extent of that theoretical adequacy is far from clear. Even the employment of a single (and by modern standards, comparatively low-yield) nuclear weapon on Hiroshima and Nagasaki respectively has spawned an enormous literature disputing the claim that these attacks or others like them could be understood as “proportional” in any meaningful sense. That nuclear weapons could be employed successfully to attack any of a variety of high-priority targets—some of which could be destroyed in no other way—is beyond dispute. Whether the technical necessity to employ a nuclear weapon, for lack of other means, makes the attack proportional is a different question altogether. However, even if a satisfactory answer could be rendered, that does not mean that (micro) proportionality reveals very much of importance about the true nature of nuclear weapons. That is to say, the justification on technical grounds that the employment of a nuclear weapon was (micro) proportional would

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<sup>11</sup> To be clear, nuclear weapons, and the states that might employ them, are fully subject to the laws of war and, to that extent, proper objects for *jus in bello* discourse. At issue here is the inadequacy of *jus in bello* principles alone to understand the nature of the decision to employ nuclear weapons, because any consideration of their employment must also address moral, legal, and policy matters beyond the campaign, operational, and tactical context—and hence, beyond the scope of *jus in bello*. The author is indebted to his colleague Dr. Justin Anderson of National Defense University for this clarifying insight.

<sup>12</sup> Department of the Army Field Manual (FM) 27-10, *The Law of Land Warfare* (Change 1) (Washington, D.C.: Government Printing Office, 15 July 1956): 3.

do little to satisfy far larger questions such as those required to justify the consummation of a world-transforming act of violence.

**Discrimination.** The principal moral problem with weapons describable as “weapons of mass destruction” is the difficulty associated with their being employed in a way that either limits collateral damage to a reasonably justifiable degree or avoids it altogether. As nuclear weapons are widely regarded as the quintessential “weapon of mass destruction” and by some accounts, the only thing truly describable as a “weapon of mass destruction,”<sup>13</sup> the problem of discrimination vis-à-vis nuclear weapons becomes especially difficult. Those who argue for the alleged ability to employ nuclear weapons discriminately find themselves forced to appeal to a fairly limited set of scenarios, such as an attack on a naval formation in the middle of the ocean or of a terrestrial military formation far removed from persons or things that are not proper objects of targeting and possibly involving the employment of a weapon of very low yield. While these cases are possible, they are by no means the ones that precipitate the only concerns over nuclear weapons. The long-acknowledged effects of lofting radioactive waste into the atmosphere to be carried to locations far from the target raise serious questions as to whether all but the smallest of nuclear weapons employed in the most isolated locations could meet the requirements of reasonable discrimination. But even if those requirements could be convincingly met on technical grounds, the same problem arises for discrimination as for (micro) proportionality, namely, the question of whether these measures provide adequate justification for nuclear weapon employment—any more than a technical explanation of how a surgeon used a chain saw to perform open-heart surgery does to illuminate why even a very skillful surgeon was using a chain saw in the first instance.

**Good Faith.** While most accounts of *jus in bello* present a complete rendering of the subject as embracing only (micro) proportionality and discrimination, a third principle—good faith, which has just war theoretical roots that extend even beyond Augustine to as early as Ambrose and Cicero<sup>14</sup>—warrants an inclusion in any comprehensive consideration of *jus in bello*. It is, of course, that belligerents will not violate the shared expectations, to which long tradition has given rise, as to the acceptable boundaries within which to prosecute war and by that constraint to avoid acts that an opponent could rightly regard as perfidious or treacherous.<sup>15</sup>

What exactly the “good faith” employment of a nuclear weapon might entail is difficult to say. For example, if, by “good faith” one means to serve public notice of intent to employ the weapon, that declaration (as will be discussed below) is probably better understood as an act in response to a *jus ad bellum* requirement rather than a *jus in bello* one. If by “good faith” one means “with the best of intentions”, that too is better understood as an act in response

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<sup>13</sup> See, for example, Victor W. Sidel and Barry S. Levy, “Weapons of Mass Destruction” in Stella R. Quah, ed., *International Encyclopedia of Public Health*, Second Edition (Academic Press, 2017), <https://doi.org/10.1016/B978-0-12-803678-5.00491-4>.

<sup>14</sup> John Mark Mattox, *Saint Augustine and the Theory of Just War* (London: Continuum, 2006): 18, 23, 64, 65, 84, 85.

<sup>15</sup> For an extended discussion, see John Mark Mattox, “The Moral Limits of Military Deception”, *Journal of Military Ethics* Vol. 1 No. 1 (2002): 4-15.

to another *jus ad bellum* requirement, namely, right intention. In any case, one sees yet again the inadequacy of appealing to *jus in bello* principles alone to provide a moral or legal case in favor of nuclear weapon employment.

***Jus in bello*—Summary.** The foregoing critique of the attempt to apply *jus in bello* principles alone to the nuclear employment decision should not be understood as merely a veiled attempt to advocate for nuclear abolition; it is not. Rather, the aim of the critique is to point out the theoretical inadequacy of the *jus in bello* framework for the task. The principles of (micro) proportionality, discrimination, and good faith, important as they are, contemplate the constraint of conventional warfare and not the extraordinary conditions under which one might expect to encounter nuclear warfare, the most extreme form of warfare presently imaginable.

With respect to extremes in war, one need only recall the no-nonsense observation of Clausewitz that “To introduce the principle of moderation”—the central aim of *jus in bello*—“into the theory of war itself always leads to a logical absurdity” because “If one side uses force without compunction, undeterred by the bloodshed it involves, while the other side refrains, the first will gain the upper hand. That side will force the other to follow suit; each will drive its opponent toward extremes, and the only limiting factors are the counterpoises inherent in war.”<sup>16</sup> Ironically, what Clausewitz describes sounds even more *apropos* for nuclear warfare, about which he knew nothing, than it does for conventional warfare, about which he knew a great lot. One might argue that Clausewitz’s account suffers from a profound lack of nuance. However, in the world of nuclear employment (as opposed to the world of precisely calculated bluff and posturing that is so characteristic of the world of nuclear use), one finds little if any nuance. In that world, what difference would *jus in bello* principles make to anyone except the coterie that seeks to explain nuclear weapon employment as attack by means of just another “artillery weapon”.

In sum, *jus in bello* is, both theoretically and practically, an inadequate context for dealing with the vexing legal and moral issues that accompany the question of how, when, and whether to employ a nuclear weapon. What might suffice for adjudicating the question of whether to authorize the launch of a precision-guided air-to-ground missile on the attack of a discrete target in, say, the deserts of North Africa or Central Asia, is simply insufficient for nuclear warfare. For that purpose, one must turn to *jus ad bellum*.

## NUCLEAR WEAPONS AND *JUS AD BELLUM*

Two logical possibilities exist for scenarios involving a nuclear weapon: a war intentionally begun with nuclear weapons (hereafter Case #1) and the employment of a nuclear weapon in a war already begun (hereafter Case #2). *Prima facie*, Case #1 may more clearly point to the need for a *jus ad bellum* adjudication than does Case #2. However, in important ways, both cases involve what is effectively the start of a “new” war. Case #1 is clearly new, but

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<sup>16</sup> Carl von Clausewitz, *On War* (1832), ed. and trans. Michael Howard and Peter Paret (Princeton: Princeton University Press, 1984): 1:1:3.

Case #2 involves such a watershed event as would radically alter the dynamics of the international system—including the system of laws and treaties pertaining to war in general and nuclear weapons specifically, that Case #2 would, for all practical purposes mark the beginning of a new kind of conflict—one informed by the extraordinary case of Hiroshima and Nagasaki but otherwise without precedent. This becomes clear as one assesses the explanatory power of principles of *jus ad bellum*<sup>17</sup> in the case of nuclear weapon employment. Moreover, reference to these two cases highlights the fact, sometimes overlooked, that a war judged to be just under *jus ad bellum* principles can cease to be just if the reasons that gave rise to that adjudication cease to obtain—or, perhaps more to the point, if the reasons that gave rise to that adjudication do not clearly justify the elevation of conflict to a new and unprecedented level, such as nuclear war. (One should, therefore, be wary of the shoulder-shrugging explanations of those—especially among the world’s autocrats—who would argue that because the move from conventional to nuclear warfare is simply a natural progression toward extreme of the kind identified by Clausewitz, it does not require additional legal or moral justification.)

**Just cause.** The undisputed *sine qua non* of all *jus ad bellum* discourse, irrespective of author, is the principle of “just cause”. A contestant must have a recognized just cause before engaging in interstate violence. While one may dispute precisely what causes may be considered “just,” there is no historical dispute over whether a just cause must be established anterior to resorting to war. In the case of nuclear weapons, this question arises anew regardless of when they may be introduced into a conflict. That is to say, whether the war is contemplated to begin with a nuclear strike (an example of Case #1), or whether the war has already begun, as in the case of World War II (an example of Case #2),<sup>18</sup> the same question comes to the fore: “Does there exist a just cause for taking an action which, by itself, will serve to undo the many-decades-old and well-established taboo against nuclear weapon employment, violate the spirit and intent of treaties governing nuclear weapons,<sup>19</sup> elevate violence in warfare to a level not seen since Nagasaki and essentially unprecedented in human history (in the single employment of a single weapon—that question being magnified exponentially if the employment of multiple nuclear weapons in a single attack is contemplated), and completely alter the human understanding of the limits to application of

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<sup>17</sup> While the traditional list of *jus ad bellum* principles varies from author to author and most lists are shorter than the one which follows, the present author has selected a longer list of principles with an eye toward providing a somewhat higher-resolution argument than would obtain with a less nuanced list.

<sup>18</sup> The reference here to World War II is made with some reluctance because, it may be argued, the bombing of Hiroshima represents a special legal, moral, and philosophical case. At that time no legal or moral precedents existed for nuclear weapon employment, and the idea of “nuclear deterrence” did not and indeed could not yet exist. Therefore, the decision to drop the bomb was necessarily made in what was, relatively speaking, a conceptual vacuum. This, however, did not prevent pressing and poignant legal and moral questions from being raised; and it is on the strength of this latter point that invocation of the example seems warrantable.

<sup>19</sup> The spirit and intent of the relevant treaties is typically set forth in their preambles. Consider, for example, these sentiments from the 1972 Antibalistic Missile Treaty: “. . . Proceeding from the premise that nuclear war would have devastating consequences for all mankind. . .”; or from the 1991 Strategic Arms Reduction Treaty: “. . . Conscious that nuclear war would have devastating consequences for all humanity, that it cannot be won and must never be fought. . .”.

violence in warfare?" For present purposes, the answer to that question is unimportant. What is of great importance is the recognition that the question is a *jus ad bellum* question and not a *jus in bello* one.

**Comparative justice.** Closely allied to the principle of just cause, comparative justice requires a dispassionate assessment of whether the balance of justice weighs so heavily in one's favor as to significantly outweigh the legitimate claims of one's adversary. After all, no disputant should be expected to argue that it intends to resort to war as its *ultima ratio* because to do so is unjust: All disputants will claim justice to weigh in their favor. The question of whether to employ a nuclear weapon would amplify that necessity manifold. As with just cause, the question of comparative justice would impose itself whether with respect to Case #1 or Case #2.

**Right intention.** While one might successfully argue that if the question of whether the decision to employ, for example, a precision-guided air-to-ground missile meets the *jus in bello* requirements of (micro) proportionality, discrimination, and good faith it does not matter whether that decision is made with right intention, a successful argument of that kind is far more difficult to imagine with respect to nuclear weapons. Whether one wishes it to be so or not, humankind has invested so much emotional energy in questions of intent associated with nuclear weapon employment and into the legal and moral aspects of the same that to ignore the question of right intention vis-à-vis nuclear weapon employment would universally smack as inexplicable. The very unavoidability of the question of intention indelibly brands, therefore, nuclear weapon employment as a *jus ad bellum* issue, all satisfaction of *jus in bello* questions notwithstanding.

**(Macro) Proportionality.** "All relevant factors considered, will the decision to go to war result in a greater balance of happiness and a lesser balance of pain for the totality of the relevant population, with each member of that population counting as one and no more than one?"<sup>20</sup> Nowhere could this utilitarian calculus find greater perspicuity than with nuclear weapons, with respect either to Case #1 or Case #2. Nuclear weapons represent the limit test case for all questions of proportionality in war, such that the *jus in bello* conception of (micro) proportionality becomes completely subsumed by the corresponding *jus ad bellum* conception. Of course, Case #1 inherently requires that nuclear weapon employment be evaluated in terms of (macro) proportionality. However, recalling that a war can cease to be just if it ceases to fulfil the requirements of *jus ad bellum*, the decision to employ a nuclear weapon would likewise require evaluation in (macro) proportionality terms in Case #2. This is so because Case #2 marks a fundamental change to the parameters of the war. Note again that these parameters cannot be adequately accounted for merely by the calculations of targeters. Even the nuclear attack of an isolated target that ostensibly met all *jus in bello* criteria would so "up the ante" of international politics that it would likely precipitate

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<sup>20</sup> This is, of course, a tailored version of John Stuart Mill's "Greatest Happiness Principle", presented here in the form of a question. See John Stuart Mill, *Utilitarianism*, Reprinted from *Fraser's Magazine*, Seventh Edition (London: Longmans, Green, and Co., 1879), Chapter 2, para 2.



questions as far removed from the target area as the status of established nuclear security alliances.

**Last resort.** The first question to be asked of any military advisor recommending nuclear weapon employment will inevitably be, “What are the alternatives?” In the minds of those in whom the employment decision resides, nuclear weapons will always represent the limit case, the last resort. To this point, the publicly stated policy of the North Atlantic Treaty Organization is instructive: “The strategic [i.e., nuclear] forces of the Alliance, particularly those of the United States, are the supreme guarantee of the Alliance’s security.”<sup>21</sup> “Nuclear weapons are unique, and the circumstances in which NATO might contemplate the use [meaning, of course, “employment” as defined herein] of them are extremely remote.”<sup>22</sup> Even though the policy asserts that “if the fundamental security of any Ally were to be threatened, NATO has the capabilities and resolve to defend itself – including with nuclear weapons,”<sup>23</sup> the foregoing makes clear that such resolve would manifest itself as the last—not the first—resort. Whether they would ever be employed for war fighting is quite beside the point; their employment would always be something very closely approximating a last resort, even if the point of last resort were quickly reached. In a similar vein, *jus ad bellum* principles are political principles involving political questions—not military principles involving military questions. The primarily political character of nuclear weapons, coupled with their close identification with questions of last resort, serves to amplify the point that the decision to employ them is a *jus ad bellum* decision.

**Reasonable probability of success.** Nuclear employment decisions will invariably include as a measure of success the question, “Will employment accomplish the desired political objective?” That objective may be to stop a conflict dead in its tracks. It may be to serve as the apogee of violence with the aim of de-escalating the conflict. Or, in its most crass manifestation, it may be to enable an autocratic regime to “go down in a blaze of glory”, as it may suppose, and acquire some perverted sense of immortality thereby. Notice, however, that none of these cases hinges on considerations of (micro) proportionality, discrimination, or good faith. Rather, they all hinge on political and not tactical considerations, the very essence of which is *jus ad bellum*.

**Competent authority.** Nuclear weapon states have consistently vested the authority to employ nuclear weapons in the highest executive authority of the state (e.g., the President of the United States, the British Prime Minister, the President of France, the President of Russia, or perhaps in a very small executive body, like the Soviet Politburo).<sup>24</sup> President Truman

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<sup>21</sup> “NATO Nuclear Deterrence,” North Atlantic Treaty Organization Factsheet, February 2020, [https://www.nato.int/nato\\_static\\_fl2014/assets/pdf/2020/2/pdf/200224-factsheet-nuclear-en.pdf](https://www.nato.int/nato_static_fl2014/assets/pdf/2020/2/pdf/200224-factsheet-nuclear-en.pdf), accessed 7 April 2021.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> The argument can, of course, be made that the chief executive of a state is not necessarily authority to which the state turns for formal declarations of war. However, the nuclear employment decision is recognized as requiring a speed at which large deliberative bodies simply cannot operate. As a practical matter, therefore, it becomes an executive decision. Thus, for *jus ad bellum* purposes, the executive of the state becomes the competent nuclear war making authority.

himself first reserved to the chief executive the authority to employ nuclear weapons. In this respect, the decision to employ nuclear weapons is akin to the decision to go to war, thus making the employment decision, in effect, the decision to begin if not a new war (Case #1) then a new kind of war within a previously existing war (Case #2). This reservation of authority further reinforces the claim that the nuclear employment decision is by its nature a *jus ad bellum* act.

**Public declaration.** While the question of whether to publicly declare, before the fact, the decision to employ a conventional arm under *jus in bello* may arise only infrequently, the question is integral to the nuclear employment decision. That does not mean that declaration will always or ever be issued before the fact, but it does mean that the question of whether to make the declaration will always be considered. This is precisely what is meant by “nuclear declaratory policy”: “a set of public statements about the circumstances in which a state or group of states would consider using nuclear weapons.”<sup>25</sup> Generalized statements of declaratory policy exist in such places as the United States’ periodic nuclear posture reviews, presidential nuclear employment guidance, or public presidential statements.<sup>26</sup> With respect to specific instances of nuclear weapon employment, declaratory policy can be realized in the form of an ultimatum or in the form of a post-strike announcement. In any case, the idea that the necessity exists to consider such a declaration in the first instance—or for that matter, that any such declaration would be made—belongs to the *jus ad bellum* domain. True, the *jus in bello* principle of discrimination might suggest the legal or moral propriety of warning the population within a target area of a conventional attack. However, the purpose of this warning is very different than the one contemplated by the *jus ad bellum* principle of public declaration. In the former case, the aim is simply to minimize the number of casualties. In the latter case, it is either to avoid war altogether (Case #1) or to avoid its escalation to a new—or for all practical purposes, unprecedented—dimension (Case #2).<sup>27</sup>

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<sup>25</sup> Malcolm Chalmers, “Words That Matter? NATO Declaratory Policy and the DDR [Deterrence and Defense Posture Review],” <https://www.nti.org/analysis/articles/words-matter-nato-declaratory-policy-and-ddpr/>, originally posted November 17, 2011, accessed April 8, 2021.

<sup>26</sup> The author is indebted to an anonymous reviewer for this helpful observation.

<sup>27</sup> On this point, the wording of the leaflet dropped on Japan after the bombing of Hiroshima is instructive: “ATTENTION JAPANESE PEOPLE—EVACUATE YOUR CITIES. Because your military leaders have rejected the thirteen part surrender declaration, two momentous events have occurred in the last few days. The Soviet Union, because of this rejection on the part of the military has notified your Ambassador Sato that it has declared war on your nation. Thus, all powerful countries of the world are now at war against you. Also, because of your leaders’ refusal to accept the surrender declaration that would enable Japan to honorably end this useless war, we have employed our atomic bomb. A single one of our newly developed atomic bombs is actually the equivalent in explosive power to what 2000 of our giant B-29’s could have carried on a single mission. Radio Tokyo has told you that with the first use of this weapon of total destruction, Hiroshima was virtually destroyed. Before we use this bomb again and again to destroy every resource of the military by which they are prolonging this useless war, petition the Emperor now to end the war. Our President has outlined for you the thirteen consequences of an honorable surrender. We urge that you accept those consequences and begin the work of building a new, better, and peace loving Japan. Act at once or we shall resolutely employ this bomb and all of other superior weapons to promptly and forcefully end the war. EVACUATE YOUR CITIES.” (Translation of leaflet dropped on the Japanese, August 6, 1945, Miscellaneous Historical Documents Collection, Harry S Truman Presidential Library). While civilian evacuation is presented as the ostensible aim of the leaflets, the overarching political purpose of the

**Peace as the ultimate objective of the war.** This principle, when it is listed among just war criteria at all, invariably appears as a *jus ad bellum* consideration. It is a principle subject to easy perversion because, as Augustine famously observes, “when men wish a present state of peace to be disturbed, they do so not because they hate peace, but because they desire the present peace to be exchanged for one that suits their wishes. Thus their desire is not that there should not be peace but that it should be the kind of peace they wish for.”<sup>28</sup> Even so, the question “What must be done to obtain peace?” of any kind is a *jus ad bellum* question and not one that belongs solely to *jus in bello*. Neither discrimination nor proportionality nor good faith require its consideration. In fact, when the question is raised in Case #2, it is only because of a sense that the ongoing justice of the war should be reviewed.

As pertaining either to Case #1 or Case #2, the question of whether to employ nuclear weapons will likely always be accompanied, in one form or another, by the question of whether the employment decision will ultimately result in the attainment of the kind of peace desired; and that question is, by its nature, a *jus ad bellum* question.

***Jus ad bellum*—Summary.** Each of the *jus ad bellum* principles highlights important aspects of the nuclear employment question in ways simply not possible with reference to the principles of *jus in bello* alone. This in no way diminishes the significance of *jus in bello* discourse. Rather, it merely points to the inadequacy of *jus in bello* for that purpose.

***Jus post bellum* Implications.** While the present argument focuses on the *jus ad bellum* character of nuclear weapon employment decisions, it is instructive to note the *jus post bellum* implications which must be considered concomitant with that decision. Nuclear weapons are distinguished, among other ways, from all other weapons by the extraordinary nature of their immediate blast, thermal, and radiological effects. However, they are also distinguished by their residual radiological effects. These are effects which, depending upon yield and other employment parameters of the weapon, can linger in a target area for days, months, years, or decades. Moreover, radiological contamination in the atmosphere can spread the ill effects of the detonation to regions far beyond the immediate target area. In the most extreme case, the sum total of atmospheric contamination is believed by some to cause long-term, permanent, or even existential harm. The effects of ionizing radiation can also produce carcinogenic or genetic consequences that linger for generations of humans who survive the detonation.

The case can readily be made, of course, that these effects should be considered under the *jus in bello* rubric of (micro) proportionality and perhaps under discrimination as well. Nevertheless, their proper consideration cannot be responsibly ignored when framing the argument for *jus ad bellum*. Once again therefore, *ceteris paribus*, the unavoidable linkage of the nuclear employment decision to *jus ad bellum* becomes apparent.

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warning and ultimatum is unmistakable. It is that overarching political purpose that demonstrates the purpose of the warning and ultimatum to be ultimately *jus ad bellum* in character.

<sup>28</sup> Augustine, *The City of God*, Book XIX:12.

## CONCLUSION

The *jus ad bellum* character of nuclear weapons is particularly timely—and indeed pressing—in the milieu of 21<sup>st</sup>-century discussions about what counts as a “tactical” nuclear weapon and how such weapons might be employed in limited ways with localized effect and for ostensibly tactical purposes. This long-standing distinction between “tactical” and “strategic” nuclear weapons has some technical utility for purposes of targeting, categorizing weapons by range, treaty definitions, or even for logistic inventories. However, it also has the potentially pernicious effect of obscuring the fact, as argued above, that the decision to employ a nuclear weapon is, in reality, a *jus ad bellum* adjudication that occurs at the political level and not merely a *jus in bello* calculation at the tactical level. The “tactical”-“strategic” distinction is, in effect, one of understandable professional jargon of the kind a group of surgeons surrounding an operating table might use to quickly convey technical concepts. However, thoughtful reflection surely reveals that the distinction is utterly meaningless to those upon whom the effects of nuclear weapons are visited. More importantly, it also has no meaningful place in the larger, and far more important, discourse surrounding the true legal or moral ramifications for humankind of any thought that nuclear weapons might serve a purpose other than deterrence.

These factors combine to suggest the need for a wholesale reconsideration of what strategic nuclear communications entail. If nuclear weapons are, in fact, *jus ad bellum* weapons with enormous *jus post bellum* consequences and not merely *jus in bello* weapons—another kind of artillery, then the entire matter of strategic communications must be reconceived with nuclear weapons employment being understood as either a war-initiating act (Case #1) or a war-expanding act of such magnitude that the justice of the act itself, and not merely the question of whether it is (micro) proportional, discriminate, and within the bounds of good faith (Case #2), must be fully considered. A shift in thinking of the kind advocated here would also emphasize the need to consider, in tandem, the most consequential *jus post bellum* question imaginable, to wit: “What are the post-conflict ramifications of nuclear weapon employment?”

If one holds, as Truman apparently did in 1959, that a nuclear weapon is “[n]othing else but an artillery weapon”, then the *jus in bello* rubric might, in fact, seem adequate for the purpose of adjudicating the weapon’s employment. If, on the other extreme, one holds that employment of nuclear weapons can never be morally or legally justified, then there is nothing to adjudicate. However, the complex realities of a world informed by the existence of nuclear weapons places the issue somewhere in the middle between these two facile extremes; and it is for this reason that the present argument claims the attention of theorists and practitioners alike.

In sum, regardless of when the decision to employ a nuclear weapon is considered—before the onset of hostilities or after they have begun, that consideration will necessarily involve the tools of *jus ad bellum*. *Jus in bello* alone, as important a role as it plays in matters

of conventional applications of force, will never be sufficient to address the overarching moral and legal questions surrounding nuclear weapons. Its principles will, at best, serve as technical parameters for targeters to apply—not as grounds for the employment decision itself.

*John Mark Mattox is a Senior Research Fellow and the Director of the Department of Defense's Countering Weapons of Mass Destruction Graduate Fellowship Program at the National Defense University Center for the Study of Weapons of Mass Destruction.*

