

Prohibition of the use of nuclear weapons under Islamic Law: filling the gap of International Humanitarian Law?

Kheda Djanaraliev

« Quoique toutes ces notions soient des notions contemporaines, qu'on ne pouvait pas en imaginer l'existence dans les sociétés en place au VII^{ème} siècle, l'Islam les couvre cependant toutes sans distinction aucune. "... " Les lois de la guerre en Islam, étant toutes fondées sur la miséricorde, la clémence, la compassion et tirant leur force obligatoire de l'Autorité divine, leur champ d'application s'étend, à travers le temps et l'espace, aux conflits armés de tout genre, de toute espèce et de toute dénomination ».¹

For the numerous States that have not ratified the Treaty on the Prohibition of Nuclear Weapons, international humanitarian law fails to prohibit the use of nuclear weapons. Given the role played by some Muslim States in the nuclear weapons realm, this article discusses how Islamic law can be mobilized to support the interdiction of the use of such weapons of mass destruction. As the above quotation illustrates, even though Islamic law flourished centuries ago, Islamic laws apply through time and space and can therefore be used to assess modern issues related to armed conflicts by using analogical reasoning.

Keywords: Islamic Law, International Humanitarian Law, Nuclear Weapons

¹ Discussing notably nuclear wars, see Hamid Sultan, « La conception islamique », in *Les dimensions internationales du droit humanitaire*, Institut Henry-Dunant/UNESCO, Geneva, 1986, pp. 51 and 52 (emphasis added): "Although all these notions are contemporary ones and could not have been imagined in the societies of the seventh century, Islam covers them all without distinction. "... " Since the laws of war in Islam are all based on mercy, clemency and compassion and derive their binding force from Divine Authority, their scope of application extends, throughout time and space, to armed conflicts of all kinds and denominations" (own translation).

1. Introduction

Nuclear weapons, i.e., “explosive devices whose energy results from the fusion or fission of the atom”,² have not been used since 1945.³ One could thus argue that the debate surrounding the use of such weapons of mass destruction is purely theoretical. However, while international humanitarian law still fails to provide the necessary means to completely ban their use, the International Campaign to Abolish Nuclear Weapons highlighted that the possibility of using nuclear weapons has concerningly been normalized in the past few months.⁴ For instance, recent declarations from incumbent Russian President Vladimir Putin stating that “all means in his possession” would be used to defend the Russian territory demonstrate that nuclear weapons still constitute a not-so-secret card up politicians’ sleeve.⁵ In addition, and more specific to the scope of this article, the International Atomic Energy Agency – a nuclear watchdog – has recently expressed concerns over the Islamic Republic of Iran’s uranium enrichment activities.⁶ It is noteworthy that in order to deny similar allegations made by the said Agency, Ayatollah Ali Khamenei (Supreme Leader of Iran) consistently mentioned Islam.⁷ He also referred to his own *fatwas*,⁸ in which he stated – while remaining relatively

² International Court of Justice, *Legality of the use by a State of nuclear weapons in armed conflict*, Advisory Opinion, *ICJ Reports 1996*, para. 35 (hereinafter: *Nuclear Weapons* advisory opinion).

³ Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham – UK / Northampton – USA, 2019, p. 394, para. 8.404.

⁴ International Campaign to Abolish Nuclear Weapons, *Why condemn threats to use nuclear weapons?*, Briefing paper, 12 October 2022, available at: (all internet references were accessed on 26 July 2023).

⁵ The Visual Journalism Team, “Putin threats: How many nuclear weapons does Russia have?”, *BBC News*, 7 October 2022, available on.

⁶ Tara John and Sugam Pokharel, “Nuclear watchdog says Iran enriching up to 60% at underground Fordow nuclear facility”, *CNN*, 22 November 2022, available at: <https://edition.cnn.com/2022/11/22/middleeast/iaea-iran-enrichment-fordow-intl/index.html>.

⁷ Seyed Hossein Mousavian, “Globalising Iran’s Fatwa Against Nuclear Weapons”, *Survival: Global Politics and Strategy*, Vol. 55, No. 2, 2013, pp. 148-149.

⁸ A *fatwa* is defined as a legal response to a particular issue which can be binding “if adopted as such by a person as a matter of conscience, or if adopted as enforceable law by a legitimate authority such as a judge” (Khaled Abou El Fadl, “What type of law is Islamic law?”, in Khaled Abou El Fadl, Ahmad Atif Ahmad, Said Fares Hassan (eds.), *Routledge Handbook of Islamic Law*, Routledge, London, 2019, p. 24).

vague – that the production, stockpiling and use of nuclear weapons would be contrary to various Islamic religious principles, notably the prohibition of indiscriminate killing.⁹ One can therefore grasp the concrete and current challenges at stake when it comes to Islamic law and the use of nuclear weapons, even though this topic is an area understudied by modern Muslim scholars.¹⁰

This article thus pragmatically explores how *sharī'ah* law (Islamic law), i.e., rules provided by God to His messengers,¹¹ comprises various principles that *in fine* prohibit actors bound by Islamic law from using nuclear weapons, consequently filling the gap left by international humanitarian law. This is even more important given that Muslim-majority States play a significant role in the nuclear weapons realm. Pakistan is among the limited group of the nine nuclear powers, and the international community also keeps an eye on other Muslim-majority States considered as “nuclear-capable”.¹² Some words of precision are called for regarding the distinction between Muslim States and Islamic States. Whereas the latter’s legal systems are based on sources of Islamic law, the former comprise States with a Muslim majority population that do not necessarily exclusively apply *sharī'ah* law.¹³ This distinction is therefore important when assessing if a Muslim-majority State is bound by religious edicts.

Beyond States, Islamic law is relevant to counter the threat posed by some non-State armed groups such as al-Qaeda, provided that they would acquire the necessary technological and financial capacities to constitute a

⁹ Tavakol Habibzadeh, “Nuclear Fatwa and International Law”, *Iranian Review of Foreign Affairs*, Vol. 5, No. 3, 2014, p. 151.

¹⁰ Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, Palgrave Macmillan, New York, 2011 (reprint July 2015), p. 125.

¹¹ *Ibid.*, p. 72.

¹² Sohail H. Hashmi, “Islamic Ethics and Weapons of Mass Destruction: An Argument for Nonproliferation”, in Sohail H. Hashmi and Steven P. Lee (eds), *Ethics and Weapons of Mass Destruction: Religious and Secular Perspectives*, Cambridge University Press, Cambridge, 2004, p. 321.

¹³ On this distinction, see Maurits Berger, “Islamic Views on International Law”, *Culture and International Law*, 2008, p. 109.

nuclear threat.¹⁴ While such non-State armed groups have neither the right to become parties *per se* to international humanitarian law treaties, nor the right to participate in their drafting process¹⁵, they often consider Islamic law as the primary source of law.¹⁶ This would explain the fundamental role played by religious leaders when negotiating with such groups, as emphasized by the International Committee of the Red Cross.¹⁷

In terms of methodology, beyond traditional international humanitarian law sources, this article examines some primary sources of Islamic law such as verses from the *Qur'an*, the *sunnah* – tradition of Prophet Muhammed – and pertinent *hadiths*. However, since nuclear weapons did not exist at the time of the revelation of the *Qur'an* and the life of Prophet Mohammed – the seventh century –, no rule explicitly prohibits or authorizes their use as such. The discrepancy between Islamic law of armed conflict and the contemporariness of nuclear weapons implies that the author will proceed by analogy (*qiyās*), which is a secondary source of Islamic law.¹⁸ This method seeks to identify “a *Shari'ah* concept under review in the texts as the original case (*asl*)” and to extend it “to a new case if the latter has the same effective cause (*illah*) as the original”.¹⁹ The value of such analogical deduction lies in the possibility to apply the revealed law even to new legal situations, “thereby

¹⁴ For instance, regarding al-Qaeda, see Sammy Salama and Lydia Hansell, “Does Intent Equal Capability? Al-Qaeda and Weapons of Mass Destruction”, *Nonproliferation Review*, Vol. 12, No. 3, November 2005.

¹⁵ For the extent to which non-State armed groups are bound by international humanitarian law, see Sandesh Sivakumaran, “Binding Armed Opposition Groups”, *The International and Comparative Law Quarterly*, Vol. 55, No. 2, April 2006.

¹⁶ Anne Quintin and Marie-Louise Tougas, “Generating Respect for the Law by Non-State Armed Groups: The ICRC’s Role and Activities”, in Ezequiel Heffes, Marcos D. Kotlik and Manuel J. Ventura (eds), *International Humanitarian Law and Non-State Actors: Debates, Law and Practice*, T.M.C. Asser Press, The Hague, 2020, p. 361.

¹⁷ Shebanee Devadasan, “Environmental Destruction and Armed Conflict: Protecting the Vulnerable Through Islamic Law”, *Manchester Journal of Transnational Islamic Law & Practice*, Vol. 18, No. 1, 2022, p. 186. See also Ioana Cismas and Ezequiel Heffes, “Not the Usual Suspects: Religious Leaders as Influencers of International Humanitarian Law Compliance”, *Yearbook of International Humanitarian Law*, Vol. 22, 2019.

¹⁸ A. Al-Dawoody, above note 10, p. 72.

¹⁹ Habib Ahmed and Abdulazeem Abozaid, “State Laws and Shari'ah Compatibility: Methodological Overview and Application to Financial Laws”, *Manchester Journal of Transnational Islamic Law & Practice*, Vol. 18, No. 1, 2022, p. 130.

laying claim to the applicability of the divine law to legal situations not directly expressed in the material sources of the law”.²⁰ Indeed, as the quote introducing this article illustrates, Islamic law can be applied through time and space and one should take advantage of the flexibility that such a set of rules allows. As a matter of fact, reasoning by analogy is “prominent in legal reasoning”,²¹ and is also used to a certain extent in international humanitarian law.²² Moreover, this article focuses on the four Sunni schools of Islamic law – *Hanafi*, *Maliki*, *Shafi’i*, and *Hanbali* – as reflected in contemporary legal scholarship. Still, a study conducted by Jaber Seyvanizad explored the comments of various Islamic scholars and highlighted that both Shi’i and Sunni scholars issued *fatwas* on the prohibition of the use of weapons of mass destruction,²³ the arguments of both types of scholars being thus relevant.

To tackle the topic adequately, this article first briefly recalls some of the main effects of nuclear weapons in view of assessing the lawfulness of their use more efficiently (Part 2). Once this preliminary part is established, the failure of international humanitarian law to prohibit the use of such weapons is explored (Part 3). This article then discusses to what extent Islamic law can be mobilized to fill this lacuna by examining various principles supporting the prohibition of the use of nuclear weapons (Part 4). Finally, the article examines the analogous principles of international humanitarian law, highlighting common features as well as differences with Islamic law (Part 5).

2. Effects of nuclear weapons and lessons from the past

That international humanitarian law does not directly prohibit the use of nuclear weapons is striking given the horrendous effects such weapons have. This preliminary part thus briefly recalls some of the main consequences resulting from the use of nuclear weapons, thereby emphasizing the need to

²⁰ Felicitas Opwis, “Syllogistic Logic in Islamic Legal Theory: al-Ghazali’s Arguments for the Certainty of Legal Analogy (Qiyas)”, in Peter Adamson (ed), *Philosophy and Jurisprudence in the Islamic World*, De Gruyter, Berlin, 2019, p. 97.

²¹ Lloyd L. Weinreb, *Legal Reason: The Use of Analogy in Legal Argument*, 2nd ed, Cambridge University Press, Cambridge, 2016, p. 4.

²² M. Sassòli, above note 3, p. 226, para. 7.58.

²³ Jaber Seyvanizad, “WMD under Islamic International Law”, *International Journal of Law*, Vol. 3, No. 1, 2017.

prohibit them. The impact such weapons have on property, persons, and the environment clearly indicates that their use contravenes the principles of Islamic law examined below.

Firstly, regarding property, thermal radiation emanating from the explosion could melt anything located in the nuclear fireball's path²⁴ and vaporize anything close to ground zero.²⁵ Every building near the explosion would likewise be destroyed by the air blast travelling at supersonic speed, which would also at least cause heavy damage at larger distances.²⁶ Moreover, an electromagnetic field would develop due to the interaction between the electromagnetic energy and the surrounding air.²⁷ This energy would be captured by metallic objects and then be transmitted to "computers and electronic equipment and circuitry essential to telecommunications, computer systems, transport networks, supplies of water and electricity, and much commerce and trade".²⁸

Secondly, nuclear weapons would affect all individuals indiscriminately, from the most tenacious enemy fighter to the new-born child. Thermal radiation would kill and at best injure anyone exposed to it.²⁹ The resulting air blast would equally kill everyone near the explosion within a few seconds.³⁰ In addition, the explosion would release nuclear radiation, injuring and killing the exposed persons within days or up to a month depending on the distance from which the radiation is received.³¹ At low doses, radiation can "damage cells and lead to cancer, genetic damage and

²⁴ Report of the Secretary-General, Comprehensive Study on Nuclear Weapons, UN Doc. A/45/373, 18 September 1990, p. 76, para. 294.

²⁵ International Campaign to Abolish Nuclear Weapons, *Catastrophic Humanitarian Harm*, 22 August 2015, p. 7, available at: https://www.icanw.org/catastrophic_humanitarian_harm.

²⁶ Comprehensive Study on Nuclear Weapons, above note 24, p. 76, para. 295.

²⁷ *Ibid.*, p. 77, para. 298.

²⁸ Reaching Critical Will, *Unspeakable Suffering: The Humanitarian Impact of Nuclear Weapons*, Geneva, 1 February 2013, p. 21, available at: https://www.icanw.org/unspeakable_suffering_the_humanitarian_impact_of_nuclear_weapons.

²⁹ Comprehensive Study on Nuclear Weapons, above note 24, p. 76, para. 294.

³⁰ *Ibid.* para. 295.

³¹ *Ibid.*, pp. 76 and 77, para. 297.

mutations”³² and put in danger the health of future generations.³³ The harm related to radiation is relative and infants are more at risk.³⁴ Finally, the radioactive nuclear fall-out will create delayed effects such as cancers or genetic injuries.³⁵ The fall-out is composed of debris and soil mixed with radionuclides that fall back to earth after being sent into the air due to the explosion. Those particles can move around the globe for years before being brought back to the ground.³⁶ Added to this are the impossibility to constrain the spread of the radiation and the difficulty of predicting the path of the fall-out, both depending on geographical, climatic, and meteorological factors, among others.³⁷

Thirdly, the nuclear explosion would dramatically damage the environment. Thermal radiation would cause additional fires,³⁸ as the temperature released by the nuclear fireball can go from one to 100 million °C.³⁹ Furthermore, the abovementioned fall-out would cause serious damage to agriculture, livestock as well as crops, and groundwater could also be contaminated.⁴⁰ Nuclear weapons therefore pose important and unpredictable environmental issues, depending on a wide range of factors such as weather conditions, the location, and the height from which the weapon is dropped.⁴¹ The Comprehensive Study on Nuclear Weapons provides compelling examples of fictional scenarios highlighting such consequences. By way of illustration, a regional nuclear war opposing India

³² International Campaign to Abolish Nuclear Weapons, *Catastrophic Humanitarian Harm*, above note 25, p. 7.

³³ *Ibid.*

³⁴ Reaching Critical Will, above note 28, p. 21.

³⁵ Comprehensive Study on Nuclear Weapons, above note 24, pp. 77 and 79, paras 299 and 300.

³⁶ “Radioactive Fallout From Nuclear Weapons Testing”, United States Environmental Protection Agency, last updated on 3 July 2023, available at: <https://www.epa.gov/radtown/radioactive-fallout-nuclear-weapons-testing>.

³⁷ Louis Maresca and Eleanor Mitchell, “The human costs and legal consequences of nuclear weapons under international humanitarian law”, *International Review of the Red Cross*, Vol. 97, No. 899, 2015, pp. 631-632.

³⁸ Comprehensive Study on Nuclear Weapons, above note 24, p. 76, para. 294.

³⁹ International Campaign to Abolish Nuclear Weapons, *Catastrophic Humanitarian Harm*, above note 25, p. 7.

⁴⁰ Comprehensive Study on Nuclear Weapons, above note 24, p. 84, para. 317.

⁴¹ Reaching Critical Will, above note 28, p. 33.

to Pakistan would lead to a huge climate disruption on a global scale, impacting agricultural production and exacerbating famine for several million people.⁴² Studies have also highlighted that even a “limited nuclear exchange could result in reduced sunlight and rainfall, and cause depletion of the ozone layer”.⁴³

As a matter of fact, nuclear weapons have been used in two instances in times of war: in Hiroshima and Nagasaki in 1945 by the United States of America both times. These incidents were enough to grasp the “catastrophic humanitarian consequences”⁴⁴ such weapons have. By the end of 1945, 140,000 people were killed in Hiroshima, and 74,000 deaths were recorded in Nagasaki.⁴⁵ In both places, the fires caused by the nuclear weapons continued to burn even hours after the detonation, eventually killing or injuring the ones that survived the first blast.⁴⁶ In comparison, a bomb similar to the one dropped in Hiroshima would kill 866,000 people in the first weeks and injure up to 2,100,000 people in cities such as Mumbai in India – where the population density can go up to 100,000 people per square kilometre depending on the area.⁴⁷

Survivors from the explosions of 1945 still continue to suffer from their effects, with an increase in rates of cancer and chronic diseases that followed the exposure to radiation.⁴⁸ The impact on survivors’ children who were not

⁴² Comprehensive Study on Nuclear Weapons, above note 24, pp. 37-45.

⁴³ Ira Helfand, *Nuclear Famine: A Billion People at Risk*, International Physicians for the Prevention of Nuclear War and Physicians for Social Responsibility, Somerville, MA, 2012, cited by L. Maresca and E. Mitchell, above note 37, p. 625.

⁴⁴ 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, Vol. 1, Part. 1, NPT/CONF.2010/50, 2010, p. 12.

⁴⁵ International Campaign to Abolish Nuclear Weapons, *Catastrophic Humanitarian Harm*, above note 25, p. 5.

⁴⁶ L. Maresca and E. Mitchell, above note 37, p. 634.

⁴⁷ M.V. Ramana, *Bombing Bombay? Effects of Nuclear Weapons and a Case Study of a Hypothetical Nuclear Explosion*, International Physicians for the Prevention of Nuclear War, Cambridge, MA, 1999, pp. 5 and 35.

⁴⁸ International Campaign to Abolish Nuclear Weapons, *Catastrophic Humanitarian Harm*, above note 25, p. 5.

even exposed to the explosions is also an ongoing concern.⁴⁹ Furthermore, the anxiety and trauma caused by those incidents have proven to be socio-culturally transmissible.⁵⁰ This highlights some of the long-term effects nuclear weapons can have on future generations. In comparison with biological or chemical weapons, there is an aggravated risk inherent to nuclear weapons due to the absence of temporal control over their consequences,⁵¹ making the assessment of their effects even more unpredictable.

In light of the above, one would confidently assume that weapons resulting in such atrocious consequences are prohibited under international humanitarian law. However, as the next part will explore, the state of affairs fails to meet those expectations.

3. International Humanitarian Law and the (absence of a) prohibition on the use of nuclear weapons – A brief overview

The lawfulness of the use of nuclear weapons under international humanitarian law has been a contentious issue ever since their creation. Besides political considerations, the reason explaining this controversy relates to the absence of any rule directly addressing the matter. Absent such regulation, it was hoped that an international body would settle the discussion. In 1994, the General Assembly of the United Nations requested the International Court of Justice to render an advisory opinion on whether the threat or use of nuclear weapons is, in any circumstance, permitted under international law.⁵² The Assembly was “[c]onscious that the continuing

⁴⁹ International Committee of the Red Cross in cooperation with the Japanese Red Cross Society, *Long-term Health Consequences of Nuclear Weapons: 70 Years on Red Cross Hospitals still treat Thousands of Atomic Bomb Survivors*, Information Note 5, July 2015, p. 2

⁵⁰ Matthew B. Bolton and Elizabeth Minor, “Addressing the Ongoing Humanitarian and Environmental Consequences of Nuclear Weapons: An Introductory Review”, *Global Policy*, Vol. 12, No. 1, 2021, p. 89.

⁵¹ Antônio Cançado Trindade, “The illegality under contemporary international law of all weapons of mass destruction”, *Revista do Instituto Brasileiro de Direitos Humanos*, No. 5, 2005, p. 12.

⁵² UNGA Res. 49/75K, 15 December 1994.

existence and development of nuclear weapons pose serious risks to humanity”.⁵³

Almost two years later, the International Court of Justice delivered its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*. The said opinion is the only example of *non liquet* in the jurisprudence of the International Court of Justice.⁵⁴ This is no coincidence as it touches upon an aspect of States’ sovereignty that the latter are reluctant to see – overly – restricted by international (humanitarian) law. This “lack of enthusiasm” is also confirmed by the small number of States parties to the 2017 Treaty on the Prohibition of Nuclear Weapons,⁵⁵ none of the nuclear powers, nor their close allies, being on the list.⁵⁶ Thus, it would appear that the “state of international law” – in the words of the Court – has not evolved since 1996 in a way that would evidence a potential consensus among the international community on a prohibition on the use of nuclear weapons. Nonetheless, the said treaty binds the States that have ratified it and still represents a non-negligible step forward in achieving a complete ban.

In the said opinion, the Court first assessed whether treaty law prohibits the threat or use of nuclear weapons as such. In its analysis, the Court looked into the United Nations Charter as well as the law applicable in situations of armed conflict and found no “comprehensive and universal conventional prohibition on the use, or the threat of use, of those weapons as such”.⁵⁷ Faced with the absence of a conventional rule prohibiting the use of nuclear weapons, the Court turned to the examination of customary international law. Likewise, the Court affirmed that there was no rule of customary nature proscribing the threat or use of nuclear weapons *per se* due to “the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other”.⁵⁸

⁵³ *Ibid.*

⁵⁴ A. Cançado Trindade, above note 51, p. 18.

⁵⁵ Treaty on the Prohibition of Nuclear Weapons adopted in New York on 7 July 2017 and entered into force in 2021.

⁵⁶ M. Sassòli, above note 3, p. 394, para. 8.404.

⁵⁷ *Nuclear Weapons* advisory opinion, above note 2, para. 63.

⁵⁸ *Ibid.*, para. 73.

Finally, the Court dealt with the legality of the use of nuclear weapons taking into consideration rules and principles of international humanitarian law and law of neutrality. The Court stated that the conclusions that must be drawn from the applicability of those bodies of law are controversial, highlighting differing views on the issue.⁵⁹

In light of the above, by introducing *jus ad bellum* considerations of self-defence in a *jus in bello* analysis,⁶⁰ the Court provided a controversial conclusion on the question at hand:

[T]he 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*;
However, in view of the current state of international law, and the elements of fact at its disposal, the Court 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*.⁶¹

This resolutory point of the advisory opinion was adopted on the casting vote of the President of the Court, reflecting the sensitivity of the subject as well as the schism within the international community regarding nuclear weapons. Regardless, it is noteworthy that the Court considered that the use of such weapons would *in general* be contrary to international humanitarian law with one – unclear – exception of extreme cases of self-defence. This was the conclusion of the International Court of Justice in light of the state of international law in 1996. Would the Court have reached a different conclusion today? This ‘million-dollar question’ goes beyond the scope of this article. Be that as it may, no one can deny that the state of affairs has evolved since then, if only because a treaty on the prohibition of nuclear weapons has been adopted – even if, as previously established, the instrument has been subject to very limited ratifications. In addition, according to the

⁵⁹ *Ibid.*, paras 90 ff.

⁶⁰ M. Sassòli, above note 3, p. 394, para. 8.404.

⁶¹ *Nuclear Weapons* advisory opinion, above note 2, para. 105(E) (emphasis added).

views of various scholars, a customary rule prohibiting the use of nuclear weapons is emerging.⁶² Plus, States recognize that they are bound by international humanitarian law when dealing with those weapons,⁶³ including the rules on the conduct of hostilities such as the principles of distinction and proportionality.

This brief overview highlights that contrary to what logic would dictate with regard to a *humanitarian* regime of law, there seems to be no consensus concerning a strict ban on the use of nuclear weapons in international humanitarian law, regardless of how horrendous their effects have proven to be. This legal gap present in international humanitarian law has been acknowledged by the former President of the International Committee of the Red Cross Peter Maurer, who called for a “reassessment of nuclear weapons by all States in both *legal* and policy terms”.⁶⁴ Against this background, one could argue that the solution to this debate is to be found outside international humanitarian law. This is precisely where Islamic law comes into play for actors applying this regime of law.

4. Islamic Law as a tool to fill the gap

As previously highlighted, in 2006 and 2008 respectively, Ayatollah Ali Khamenei stated that possessing nuclear weapons was contrary to the edicts of Islam and that the production and use of such weapons cannot be authorized due to “fundamental religious grounds”, such as the prohibition of killing non-combatants.⁶⁵ Regarding such *fatwas*, the Iranian jurist Ayatollah Mohsen Faghihi went as far as considering that the prohibition of the use of weapons of mass destruction – and thus nuclear weapons – “does not need any deep arguments, the *fatwa* of the Leader being in fact the declaration of God's real edict stipulated in the Holy verses and the hadiths”.⁶⁶

⁶² A. Cançado Trindade, above note 51, p. 19.

⁶³ M. Sassòli, above note 3, p. 395, para. 8.405.

⁶⁴ Peter Maurer, “Nuclear weapons: Ending a threat to humanity”, speech given to the diplomatic community in Geneva on 18 February 2015, *International Review of the Red Cross*, Vol. 97, No. 899, 2015, p. 889.

⁶⁵ Cited by T. Habibzadeh, above note 9, p. 151.

⁶⁶ *Ibid.*, p. 156.

Ayatollah Ali Khamenei is a representative of the Twelver Shia School of Islam, which is dominant in Iran but not in other countries such as Pakistan for instance.⁶⁷ Nonetheless, this example illustrates the relevance of Islamic law and leads to the analysis of how the use of nuclear weapons can be considered as contrary to its principles. However, as such weapons did not exist during the life of the Prophet, no precise rule of Islamic law addresses the issue, leaving scholars with nothing but analogy to decide on their lawfulness.

Regarding weapons of mass destruction more broadly, three categories of Islamic law jurists have been identified by Sohail H. Hashmi. It is important to note that none of these positions is clearly settled in the current state of affairs.⁶⁸ Firstly, availing themselves of the principle of reciprocity and *Qur'anic* pronouncements,⁶⁹ “weapons of mass destruction jihadists” argue that in certain circumstances and if the enemy uses nuclear weapons first, their use can be accommodated to the regime regulating the conduct of hostilities under Islamic law.⁷⁰ This category represents the majority position.⁷¹ Referring to verse 8:60 of the *Qur'an*, contemporary Muslim jurists such as Mohammad Bin Nasar al-Ja'wan, Ahamad Nar, and Mohammed Khair Heikal argued that Muslim leaders could use weapons of mass destruction to confront enemy threats.⁷² Relying on verse 2:195, scholars like Mohamed Mokbel Mahmud Elbakry even considered that abstaining from using a weapon used by the adversary could be considered as committing suicide – prohibited by the said verse.⁷³ The author is, however, not entirely convinced by this approach. As will be elaborated below, reciprocity is not an absolute justification allowing the use of every means of warfare against the enemy.

⁶⁷ Shameer Modongal and Seyed Hossein Mousavian, “Why Iran Has Not Developed the Nuclear Weapons: Understanding the Role of Religion in Nuclear Policies of Iran”, *Bandung*, Vol. 6, 2019, p. 138).

⁶⁸ S. H. Hashmi, above note 12, p. 323.

⁶⁹ A. Al-Dawoody, above note 10, p. 126 (*Qur'an* 2:194; 8:60; 16:126).

⁷⁰ S. H. Hashmi, above note 12, p. 322.

⁷¹ *Ibid.*, p. 323.

⁷² Sulaiman Lebbe Rifai, ‘Islam and the Proliferation of Nuclear Weapons’, 16 May 2022, p. 8, available at: <https://ssrn.com/abstract=4110776>.

⁷³ A. Al-Dawoody, above note 10, p. 126.

Secondly, “weapons of mass destruction terrorists” go even further by stating that Muslims must acquire such weapons and that they can be used as a first resort against all non-Muslims.⁷⁴ The proponents of such a view interpret the Islamic legal texts as allowing the use of every means against the enemy to obtain a military advantage.⁷⁵ Such an approach would render useless all the principles of Islamic law restricting the use of force by Muslims that will be explored below, and must consequently be rejected.

This article thus supports the third approach of the “weapons of mass destruction pacifists”, which calls for the prohibition of the acquisition and, *a fortiori*, the use of those weapons, considered to be contrary to Islamic ethics because of their very effects.⁷⁶ For instance, after enumerating various prohibitions in Islamic law such as killing non-combatants and destroying plantations, Ibrāhīm Yahyā al-Shihābī concludes that “killing, and vandalism just to appease anger or hatred, or revenge, is not allowed at all, and this leads us to ban nuclear weapons”.⁷⁷ A related issue concerns the production, testing and stockpiling of such weapons as a deterrence strategy. The author agrees with Hashmi who argues against the proliferation of nuclear weapons. The scholar elaborates that nuclear deterrence “implies – with certainty – the killing of large numbers of innocents, the ravaging of the natural environment, and the injuring of generations yet unborn”.⁷⁸ It is therefore fundamentally different from the deterrence mentioned in the *Qur’an*.⁷⁹ In addition, the deterrence argument is only relevant when the enemy is certain that the other side intends to use the weapon. However, those intentions can be hard to read and may consequently lead to mistakes, turning the nuclear catastrophe into

⁷⁴ S. H. Hashmi, above note 12, p. 322.

⁷⁵ Muḥammad Khayr Haykal, *Al-Jihād wa al-Qitāl fī al-Siyyāsah al-Shar’iyyah*, 2nd ed., Vol. 2, Beirut: Dār al-Bayāriq, 1996/1417, p. 1353.

⁷⁶ *Ibid*; S. L. Rifai, above note 72, p. 9.

⁷⁷ Ibrāhīm Yahyā al-Shihābī, *Mafhūm al-Harb wa al-Salām fī al-Islām: Sirā’āt wa Hurūb ‘am Tafā’ul wa Salām?*, N.p.: Manshūrāt Mu’assasah Maī, 1990/1399, p. 76 (our translation).

⁷⁸ Sohail H. Hashmi, “Weapons of Mass Destruction and Islamic Law”, in Ahmed Al-Dawoody (ed.), *IHL and Islamic Law in Contemporary Armed Conflicts*, Experts’ workshop, Geneva, 29–30 October 2018, International Committee of the Red Cross, Geneva, 2018, p. 32.

⁷⁹ *Qur’an* 8:60.

a fatality.⁸⁰ Plus, as Hashmi further notes, developing and stockpiling nuclear weapons requires important resources, implying that the latter are diverted from other – more pressing – needs. This would amount to *israf* (waste) which is prohibited⁸¹.

The following sections will thus demonstrate how Islamic law provides many grounds supporting the prohibition of the use of nuclear weapons. Indeed, in instances where Islamic law allows the use of force, this prerogative is restricted by various principles.⁸² This part of the article explores the principle of distinction (section 1), the protection of property (section 2), the principle of proportionality (section 3) and the protection of the environment (section 4). Still, as emphasised below, the prohibitions established by Islamic law are considered by various jurists as having their own limits and some nuances will have to be drawn.

4.1. Principle of distinction between combatants and civilians

4.1.1. *Immunity given to non-combatants*

Frequently invoked by the detractors of nuclear weapons, the most obvious element indicating that such weapons contravene Islamic edicts is perhaps their indiscriminate character. Similar to international humanitarian law, Islamic law is characterized by the pre-eminence of the principle of distinction between combatants and non-combatants, provided by the *Qur'an*,⁸³ the *sunnah*, as well as the practice of Prophet Muhammed's companions who succeeded him in ruling the Caliphate.⁸⁴ This principle is of utmost

⁸⁰ S. H. Hashmi, above note 78, p. 32.

⁸¹ *Ibid.*, p. 33.

⁸² *Qur'an* 2:190 cited by Karima Bennoune, "As-Salāmu 'Alaykum? Humanitarian Law in Islamic jurisprudence", *Michigan Journal of International Law*, 1994, Vol. 15, No. 2, p. 623. Some of those limits have been explored regarding weapons of mass destruction more generally, see Sophie Timmermans, "The Use of Weapons of Mass Destruction: A Comparison of the Restrictions and Justifications in Islamic Law of Armed Conflict and International Humanitarian Law", *Manchester Journal of Transnational Islamic Law & Practice*, Vol. 18, No. 1, 2022.

⁸³ *Qur'an* 2:190.

⁸⁴ M. Vanhullebusch, *War and Law in the Islamic World*, Leiden/Boston, Brill Nijhoff, 2015, p. 33.

importance, as illustrated by the *Qur'an* verses establishing that the killing of an innocent amounts to the killing of mankind⁸⁵ and that “there is no glory to be obtained by killing non-combatants”.⁸⁶ The value attached to innocent lives also explains the emphasis on permitting the possibility of surrender, which is deduced from the *Qur'an*⁸⁷ and multiple orders of the fourth caliph 'Ali ibn Abu-Talib.⁸⁸

The consequence of this distinction is that non-combatants, considered as civilians,⁸⁹ are immune from any deliberate harm during the conduct of hostilities – as long as they do not engage in the latter.⁹⁰ Various *hadiths* of the Prophet and practice of caliph Abu Bakr forbid the killing of women, children, the aged, the clergy as well as any hired man (*al-'Asif*).⁹¹ According to the majority of jurists, this list is non-exhaustive. As a result, by reasoning by analogy, other categories – such as the blind, the sick, the incapacitated and the insane – who do not engage in combat and, consequently, do not threaten the Muslim army are equally protected.⁹² Based on a conception of Islamic *casus belli* as the “unbelief of the Muslim’s enemies”, a minority position however believes that anyone who refuses to pay *jizyah* – defined as “tax levied to exempt eligible males from

⁸⁵ Saleem Marsoof, “Islam and International Humanitarian Law”, *Sri Lanka Journal of International Law*, Vol. 15, 2003, p. 27.

⁸⁶ John Kelsay, “Do Not Violate the Limit: Three Issues in Islamic Thinking on Weapons of Mass Destruction”, in Sohail H. Hashmi and Steven P. Lee (eds), above note 12, p. 354.

⁸⁷ *Qur'an* 4:90.

⁸⁸ K. Bennoune, above note 82, p. 627.

⁸⁹ Mohd Hisham Mohd Kamal, “Principles of Distinction, Proportionality and Precautions under the Geneva Conventions: The Perspective of Islamic Law”, in Mohd Jahid Hossain Bhuiyan and Borhan Uddin Khan (eds), *Revisiting the Geneva Conventions: 1949-2019*, Leiden, Brill Nijhoff, 2019, p. 246.

⁹⁰ Ahmed Al-Dawoody, “Islamic Law and International Humanitarian Law: an Introduction to the Main Principles”, *International Review of the Red Cross*, Vol. 99, No. 3, 2017, pp. 1002 and 1003 ; Yadh ben Achour, « Islam et droit international humanitaire », *Revue Internationale De La Croix-Rouge*, Vol. 62, No. 722, 1980, p. 65 ; Said El-Dakkak, « Le droit international humanitaire entre la conception islamique et le droit international positif », *Revue Internationale De La Croix-Rouge*, Vol. 72, No. 782, 1990, p. 121.

⁹¹ A. Al-Dawoody, above note 10, p. 111; Y. ben Achour, above note 90, p. 67 ; Ameer Zemmali, *Combattants et Prisonniers de guerre en Droit Islamique et en Droit International Humanitaire*, Pedone, Paris, 1996, p. 64.

⁹² A. Al-Dawoody, above note 10, p. 114; A. Al-Dawoody, above note 90, p. 1003.

conscriptio⁹³ – automatically becomes a legitimate target, except for women and children.⁹⁴

As previously stated, nuclear weapons did not exist during Prophet Mohammed's life. Nevertheless, the reasoning behind the prohibition of other means and methods of warfare due to their indiscriminate character can be transposed to the present issue. For instance, some jurists argue that night attacks (*bayāt*), with mangonels, are prohibited precisely because of the impossibility of distinguishing combatants from women and children.⁹⁵ The same goes for flooding and fire at enemy fortifications, which are considered as forbidden by some scholars in part "because it will lead to casualties among the enemy's women and children".⁹⁶ Others also argue that the prohibition of poison by the Muslim jurists includes nowadays weapons of mass destruction, and therefore nuclear weapons, not necessarily because of their substance, but rather because of the resulting killing of innocent people.⁹⁷ In this regard, the Prophet Mohammed is said to have prohibited the spray of poison in the heathen regions, as reported in the "Sakuni's Hadith" – on which Shiite jurisprudence relies.⁹⁸ In the same vein, to deny the allegations according to which Iran was in the process of acquiring nuclear weapons, Ali Khamenei stated in 2004 that "[a]tomic bomb not only kills enemies, but also takes the life of those who are *not enemies*. "... This *indiscriminate killing* is against our belief *in the Islamic System*".⁹⁹ This quote highlights the inherent incompatibility of weapons of indiscriminate effects and Islamic principles also according to the Twelver Shia School of Islam.

It is evident that nuclear weapons, due to their very nature and devastating humanitarian effects, could hardly respect this requirement of distinction. Applying the above to contemporary issues, some modern Muslim scholars have thus advocated for a complete prohibition of the use of

⁹³ A. Al-Dawoody, above note 10, p. 48.

⁹⁴ *Ibid.*, p. 111.

⁹⁵ *Ibid.*, p. 119.

⁹⁶ *Ibid.*, p. 124.

⁹⁷ T. Habibzadeh, above note 9, p. 159.

⁹⁸ *Ibid.*, p. 159.

⁹⁹ *Ibid.*, p. 151 (emphasis added).

nuclear weapons, considering it as “contrary to the laws of Islam”¹⁰⁰ and urging Muslim States to “do everything in [their] power to bring about the complete elimination of such weapons”.¹⁰¹

4.1.2. Nuances to the distinction between combatants and non-combatants

The principle of distinction is not considered as absolute by all jurists. Some argue that the protection offered to civilians and their property can be superseded by military necessity (*darura*).¹⁰² As said by the *Hanafi* jurist al-Shaybani when assessing the presence of non-combatants in a city during an attack, “[i]f the Muslims stopped attacking the inhabitants of the territory of war for any of the reasons that you have stated, they would be *unable to go to war* at all, for there is no city in the territory of war in which there is no one at all of these [women, children...].”¹⁰³ In the same vein, absolute military necessity was invoked by some scholars from the *Hanafi* and *Hanbali* schools to justify the flooding of enemy fortifications.¹⁰⁴

In addition, some jurists excused the killing of non-combatants when such a result was a foreseeable consequence of an attack but not an intended one, the blame then falling on “the enemy leadership that, in resisting Islam, placed them in harm’s way”.¹⁰⁵ To support this position, some referred to an instance of a night raid during which women and children were killed. When informed of their death, the Prophet is said to have answered “they are not from us”.¹⁰⁶ Further, some stated that reciprocity (*muqabala bi al-mithl*) could prevail over the protection given to civilians and their property but only to the extent needed to avoid a Muslim defeat.¹⁰⁷

¹⁰⁰ Agha Shahi, “The Role of Islam in Contemporary International Relations”, in *L’Islam dans les relations internationales : Actes du IV Colloque Franco-Pakistanaï, Paris, 14-15 mai 1984*, Édisud, Aix-en-Provence, 1986, p. 27.

¹⁰¹ *Ibid.*

¹⁰² S. H. Hashmi, above note 12, p. 330; M. Vanhullebusch, above note 84, p. 33.

¹⁰³ Cited by J. Kelsay, above note 86, p. 356 (emphasis added).

¹⁰⁴ A. Al-Dawoody, above note 10, p. 124.

¹⁰⁵ J. Kelsay, above note 86, p. 355.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Qur’an* 2:194, 9:36 and 9:37; S. H. Hashmi, above note 12, p. 330.

The author however suggests that those nuances to the protection afforded to non-combatants cannot be transposed as such to nuclear weapons without factoring in their peculiarities and their large-scale devastating effects. Indeed, means and methods existing at the time of the life of the Prophet Mohammed were far less developed and destructive than nuclear weapons. Some of the reasonings justifying the said nuances uneasily fit the evaluation of the legality of the use of such weapons. For instance, referring to the statement made by al-Shaybani, preventing a party to an armed conflict from killing civilians by prohibiting the use of nuclear weapons will not amount to making this party unable to go to war. This is confirmed by the absence of any justification for civilian killing within Islamic texts.¹⁰⁸ In any case, the nuances set above are not unanimously accepted and consequently do not constitute absolute obstacles to the prohibition of the use of nuclear weapons.

4.2. Protection of property

4.2.1. *Prohibition to destroy property*

The principle of distinction does not only concern individuals, but also covers objects. Besides protecting civilians, Islamic law indeed provides a specific protection to their property during the conduct of hostilities.¹⁰⁹ Due to the variety of kinds of property, it is however difficult to provide a ‘one-size-fits-all’ rule regarding the protection of civilian property.¹¹⁰ Civilian objects are comprised of “villages, towns, cities, private dwellings, places of worship, buildings, civilian transport, medical service, and dams”.¹¹¹ One of the fundamental human values in Islamic law is precisely the protection of both private and public property, which are therefore immune from attacks.¹¹² In

¹⁰⁸ Zarak Asad Khan, “The Islamic Laws of War and Nuclear Weapons”, *DLP Forum*, 29 January 2023, available at: <https://www.dlpforum.org/2023/01/29/the-islamic-laws-of-war-and-nuclear-weapons/>.

¹⁰⁹ A. Al-Dawoody, above note 90, p. 1007.

¹¹⁰ A. Al-Dawoody, above note 10, p. 128.

¹¹¹ M. Hisham Mohd Kamal, above note 89, p. 248.

¹¹² Senad Ćeman and Amir Mahić, “Principles of Islamic Law of Armed Conflicts: Protection of Property, Treatment of Prisoners of War, Providing Refuge and Treatment of Bodies of the Deceased during Hostilities”, in Ahmed Al-Dawoody *et al.*, *Islamic Law and International Humanitarian Law*, Proceedings, International Committee of the Red Cross and Faculty of Islamic Studies, Sarajevo, 2020, p. 72.

that sense, property such as hospitals, schools, or water supply cannot be destroyed because of their impact on the life of the population, subject to the nuances set out below.¹¹³ Scholars supporting the prohibition of the destruction of civilian property, including al-Awzā'ī, Abū Thawr, al-Layth ibn Sa'd, and al-Thawrī, refer to Abu Bakr's ten commands, which included *inter alia* not to destroy buildings.¹¹⁴ There is no need to elaborate on how nuclear weapons would automatically undermine this protection, unless their effects could be directed to a specific target or concentrated in a vast empty area. Notwithstanding, the impact on the environment would still be a matter of concern, as explored below.

4.2.2. Nuances to the protection of property

Without denying the protection given to civilian property, some jurists concede that its destruction is accepted in case of reciprocity (*mu'amalaal-mitl*)¹¹⁵ or if the conduct of hostilities renders such destruction unavoidable.¹¹⁶ Military necessity could thus also justify the destruction of enemy property.¹¹⁷ To reconcile such views allowing the destruction of property with Abu Bakr's commands prohibiting it, Abū Yūsuf, al-Shāfi'ī and *Mālikī* jurists claimed that the first caliph prohibited such destruction simply because he knew that a Muslim victory was already secured and, as a result, destroyed property would amount to spoils for the Muslims.¹¹⁸ Not convinced by this interpretation, other scholars such as Al-Awza'ī argued that Abu Bakr would not have made the aforementioned commands "had he not known that the Prophet's earlier actions were either abrogated by the Prophet himself or the Qur'an or limited in their ethical and legal import to their particular occurrences".¹¹⁹

¹¹³ *Ibid.*, p. 73.

¹¹⁴ A. Al-Dawoody, above note 10, p. 127.

¹¹⁵ S. Ćeman and A. Mahić, above note 112, p. 73.

¹¹⁶ Matthias Vanhullebusch, "Reciprocity under International Humanitarian Law and the Islamic Law of War", *Journal of Islamic State Practice in International Law*, Vol. 11, No. 1, 2015, p. 68, p. 73.

¹¹⁷ A. Al-Dawoody, above note 90, p. 1004.

¹¹⁸ A. Al-Dawoody, above note 10, p. 127.

¹¹⁹ *Ibid.*; S. H. Hashmi, above note 12, p. 330.

Furthermore, similarly to civilians, property used for military purposes becomes a legitimate target during the armed conflict.¹²⁰ For instance, in the battle opposing Muslims and the *Banū al-Nadīr* tribe, the fighters of the latter used their dwellings – considered as civilian objects – to shelter. The Prophet Mohammed ordered to attack those dwellings that lost their protection and became military objectives as they were used for military purposes.¹²¹ Nonetheless, even if the target is military property, Islamic law states that the aim should only be to make the enemy surrender and not to destroy such property.¹²² Reckless destruction of enemy property could fall under the notion of *fasad fi al-ard* given that everything is considered as belonging to God.¹²³

4.3. Principle of proportionality

4.3.1. *Prohibition of unnecessary suffering and excessive casualties*

Another key principle that could be invoked to support that Islamic law prohibits the use of nuclear weapons is proportionality. Even when the use of force is authorized, the *Qur'an* commands not to “transgress limits”¹²⁴ and not to be “extravagant in killing”.¹²⁵ Verse 16:126 of the *Qur'an*, which states that harm in retaliation has to be equivalent to the initial harm suffered, was precisely revealed to prevent excesses in the use of force by Muslim fighters who wanted to cut their enemies into pieces after the Prophet Mohammed’s uncle was killed during the battle of Uhud.¹²⁶ This implies that means and methods of warfare that cause unnecessary suffering or bloodshed have to be limited.¹²⁷ It is thus accepted that the use of force cannot go further than what is needed by military necessity.¹²⁸ This highlights the importance given by

¹²⁰ S. Ćeman and A. Mahić, above note 112, p. 72.

¹²¹ M. Hisham Mohd Kamal, above note 89, p. 248.

¹²² A. Al-Dawoody, above note 90, p. 1007.

¹²³ *Ibid.*

¹²⁴ *Qur'an* 11:190, cited by S. Marsoof, above note 85, p. 24.

¹²⁵ *Qur'an* 17:33, cited by Ahmed Zaki Yamani, “Humanitarian International Law in Islam: A general outlook”, *Michigan Journal of International Law*, Vol. 7, No. 1, 1985, p. 198.

¹²⁶ Niaz A. Shah, “The Use of Force under Islamic Law”, *The European Journal of International Law*, Vol. 24, No. 1, p. 361.

¹²⁷ M. Vanhullebusch, above note 84, p. 38.

¹²⁸ A. Al-Dawoody, above note 90, p. 1003; S. El-Dakkak, above note 90, p. 121.

Islamic law to human dignity (*al-karāma*), the preservation of which is “both a constant transgenerational struggle and a goal”.¹²⁹ It all comes down to the idea of fighting humanely.¹³⁰ As the dignity of the man is inevitably threatened during wars, Islamic law of armed conflict incorporates human integrity within its rules as a factor limiting the use of force against an individual.¹³¹ As the Prophet said, “fairness is mandatory” in the sense that if one kills, the killing must be done properly and therefore humanely.¹³² Likewise, even when respecting the law of equality and reciprocity, verse 2:194 of the *Qur’an* prescribes, to “fear Allah, and know that Allah is with those who restrain themselves”.¹³³

It is fair to say that nuclear weapons would struggle to pass this proportionality test. One can hardly think of a situation where their effects would be considered as ‘necessary suffering’. Here again, reasoning by analogy is appropriate. For instance, the fact that injury to the face is prohibited – or at least considered as disapproved – highlights that weapons causing unnecessary suffering are not permitted.¹³⁴ In the same vein, Ahmed Zaki Yamani recalled an incident in which the Prophet Mohammed changed his mind and ordered to kill rather than burn enemies, even if enemy combatants are by definition legitimate targets. The Prophet justified this prohibition to use fire by recalling that only God can punish by fire.¹³⁵ Referring to the views of the four schools in Sunni Islam, this led Hashmi to state that burning individuals voluntarily – which can be a consequence of the explosion of a nuclear weapon – “either to overcome them in the midst of battle or to punish them after capture, is forbidden”.¹³⁶ Mohaghegh Damad further stated that this incident demonstrates that weapons leading to unjustified pain are forbidden, including incendiary weapons.¹³⁷ Poison-

¹²⁹ Mustafa Hasani, “Human Dignity in the Light of Islamic Law”, in Ahmed Al-Dawoody *et al.*, *Islamic Law and International Humanitarian Law*, above note 112, p. 54.

¹³⁰ M. Vanhullebusch, above note 84, p. 38.

¹³¹ S. El-Dakkak, above note 90, p. 114.

¹³² A. Zaki Yamani, above note 125, p. 198.

¹³³ *Qur’an* 2:194, cited by Matthias Vanhullebusch, above note 116, p. 68 (emphasis added).

¹³⁴ A. Zaki Yamani, above note 125, p. 198.

¹³⁵ *Ibid.*; see also A. Al-Dawoody, above note 10, p. 123; N. A. Shah, above note 126, p. 361.

¹³⁶ S. H. Hashmi, above note 12, p. 328.

¹³⁷ T. Habibzadeh, above note 9, pp. 158-159.

tipped arrows provide another compelling illustration. While al-Shaybanī, a *Hanafi* jurist, authorized using poison-tipped arrows due to their effectiveness against the enemy,¹³⁸ Khalil ibn Ishaq, a *Maliki* jurist, believed that poisoned arrows are not authorized because of the resulting harm that would exceed “the possible benefit achieved by the combatant”.¹³⁹ The Shiite jurist Hilli also supported the prohibition of the use of poisoned weapons regardless of the circumstances.¹⁴⁰

4.3.2. *Nuances to the requirement of proportionality*

The principle of proportionality is subject to a few nuances according to some scholars. Under their approach, both military necessity and reciprocity could be mobilized to justify a disproportionate attack, which would otherwise be prohibited.¹⁴¹ Military necessity could be invoked “to protect the public good of the *ummah*”.¹⁴²

However, as for the principle of distinction, the way one interprets such nuances must be adapted to the fact that nuclear weapons are weapons of *mass destruction*. Moreover, one should note that the *Qur’an* provides that those who restrain themselves from injuring in retaliation by showing patience or by forgiving and reconciling are rewarded by God.¹⁴³ Therefore, for the Muslim combatant, it is in the author’s view that proportionality - and, to a certain extent, moderation and restraint - should be favored. Proportionality can thus also limit necessity (*al-darurat tuqdaru bi qadariha*).¹⁴⁴ Likewise, while verse 16:126 implies a certain form of reciprocity, the second part of the said verse limits the possibility of using equivalent force in

¹³⁸ A. Al-Dawoody, above note 90, p. 1005.

¹³⁹ *Ibid.*

¹⁴⁰ K. Bennoune, above note 82, p. 628.

¹⁴¹ M. Vanhullebusch, above note 116, pp. 72 et 73; S. H. Hashmi, above note 12, p. 323; S. Timmermans, above note 82, p. 200.

¹⁴² M. Vanhullebusch, above note 116, p. 72.

¹⁴³ Rolf Mowatt-Larssen, *Islam and the Bomb. Religious Justification For and Against Nuclear Weapons*, Belfer Center for Science and International Affairs, Cambridge, MA, January 2011, p. 25.

¹⁴⁴ M. Vanhullebusch, above note 116, p. 38.

retaliation by insisting on the benefits of opting for patience instead (similarly to verse 2:194).

4.4. Protection of the environment

4.4.1. *Prominent status of the environment*

Lastly, another convincing reason justifying the prohibition of the use of nuclear weapons relates to the environment. The notion of environment in Islamic law is broad and encompasses “climate and its components, plants, animals, sand, human beings, and all things found on the ground or in the atmosphere”.¹⁴⁵ The environment occupies a particular place in Islam due to its uniqueness.¹⁴⁶ Therefore, not only are Muslims not allowed to harm it,¹⁴⁷ they are also responsible on both individual and collective levels for its safekeeping.¹⁴⁸ It is also considered that damage caused to the “natural habitat of species unable to defend themselves against human attack”¹⁴⁹ is an act of corruption in the land (*fasad fi al-ard*).¹⁵⁰ In that sense, the protection given to the environment goes beyond the fact that it benefits humans,¹⁵¹ as “humankind is not the only community to live in this world”.¹⁵²

This specific protection given to the environment is linked to the idea that as the environment is a creation of God, by protecting it, Muslims “preserve its values as a sign of the Creator”.¹⁵³ Therefore, there are moral precepts governing the relationship between an individual and the

¹⁴⁵ Milad Abdelnabi Salem, Norlena Hasnan and Nor Hasni Osman, ‘Some Islamic Views on Environmental Responsibility’, *International Conference on Environment Science and Biotechnology*, 2012, Vol. 48, p. 109.

¹⁴⁶ *Qur’an* 6:38.

¹⁴⁷ S. Ćeman and A. Mahić, above note 112, p. 73.

¹⁴⁸ Sayed Sikandar Shah Haneef, ‘Principles of Environmental Law in Islam’, *Arab Law Quarterly*, Vol. 17, No. 3, 2002 p. 247.

¹⁴⁹ S. H. Hashmi, above note 12, p. 323.

¹⁵⁰ *Ibid.*

¹⁵¹ Mawil Izzi Deen, “Islamic Environmental Ethics: Law and Society,” in J. Ronald Engel and Joan Gibb Engel (eds), *Ethics of Environment and Development: Global Challenge, International Response*, University of Arizona Press, Tucson, AZ, 1990, p. 190.

¹⁵² *Ibid.*; see also *Qur’an* 6:38.

¹⁵³ *Ibid.*

environment.¹⁵⁴ The conduct of the Prophet's companions reflects the importance given to the environment by Islamic law. During the war, they would cut dates from their trees without touching the latter.¹⁵⁵ As the first caliph Aby Bakr ordered: “[y]ou shall not fell palm trees or burn them; you shall not cut down [any] fruit-bearing tree; you shall not slaughter a sheep or a cow or a camel except for food”.¹⁵⁶

As the aforementioned effects of nuclear weapons demonstrate, their use entails irreversible and dramatic consequences for the environment that hardly seem compatible with the edicts of Islamic law explored in this section. Being part of the broader category of weapons of mass destruction, nuclear weapons destroy everything in their path and have a long-term environmental impact. Accordingly, one could argue that the use of nuclear weapons is also contrary to the protection Islamic law prescribes for the environment.

4.4.2. *Nuances to the protection of the environment*

Here again, some jurists argued that the protection given to the environment is not absolute and has to be weighed against military necessity. Thus, even if the general rule prohibits cutting fruit trees and slaughtering animals, scholars from the *Hanbalī*, *Maliki*, and *Shafi'i* schools still consider such conduct as authorized if it is necessary to overcome the enemy. Scholars from the *Hanafi* school went as far as justifying such destruction to undermine the enemy's economy.¹⁵⁷

For example, it was accepted that Muslims could destroy a forest if the trees were so numerous and dense that it would allow the enemy to hide in it.¹⁵⁸ Moreover, the Prophet ordered the destruction of palm trees of the *Banū al-Nadīr* tribe in 4/625 to make them surrender more easily.¹⁵⁹

¹⁵⁴ *Ibid.*, p. 192.

¹⁵⁵ S. El-Dakkak, above note 90, p. 124.

¹⁵⁶ S. H. Hashmi, above note 12, p. 329.

¹⁵⁷ *Ibid.*, p. 330.

¹⁵⁸ S. El-Dakkak, above note 90, p. 124.

¹⁵⁹ S. H. Hashmi, above note 12, p. 329. See also *Qur'an* 59:5.

Nonetheless, there is no other instance of the Prophet using such a tactic.¹⁶⁰ Moreover, here again, one could counter-argue that the first caliph would not have commanded not to destroy property if he did not know at that time that the authorization to commit such destruction was abrogated by the Prophet or the *Qur'an*, or that the actions of the Prophet were “limited in their ethical and legal import to their particular occurrences”.¹⁶¹ Finally, given the large-scale effects that the use of such weapons could have on the environment over a long and undefined period – contrary to the destruction of a few palm trees –, it is in this article’s view debatable that military necessity could be a plausible justification.

5. Comparison with analogous principles under International Humanitarian Law

As highlighted above, international humanitarian law fails to provide an explicit rule prohibiting the use of nuclear weapons for those States that have not ratified the Treaty on the Prohibition of Nuclear Weapons. Still, much like Islamic law, international humanitarian law contains equivalent principles that restrict parties to a conflict when it comes to the way the latter conduct hostilities, while recognizing a certain margin of appreciation to the belligerents at the same time. The resemblance of the two regimes is not coincidental as both derive from the same elementary human values and place human dignity at the center, evidencing that “there are values that are universal and an important part of most religious and other worldviews”.¹⁶² Still, while both regimes are very similar in essence, they are not identical. This part thus briefly assesses how international humanitarian law frames the principles explored above, highlighting potential similarities and differences with Islamic law.

¹⁶⁰ A. Al-Dawoody, above note 10, p. 127.

¹⁶¹ S. H. Hashmi, above note 12, p. 330.

¹⁶² Delegation of the International Committee of Red Cross in Bosnia and Herzegovina, in Ahmed Al-Dawoody *et al.*, *Islamic Law and International Humanitarian Law*, above note 112, p. 1.

5.1 Principle of distinction

As in Islamic law, the principle of distinction is one of the cardinal rules of international humanitarian law ensuring that innocent lives and civilian objects are spared. It is recognized by treaty law¹⁶³ and customary international law for both international and non-international armed conflicts.¹⁶⁴ In simple terms, neither civilians nor civilian objects can be targeted. For an attack to be lawful during the conduct of hostilities, it must be “directed at a legitimate target, namely, a military objective, a combatant, a civilian while directly participating in hostilities or, at least in [non-international armed conflicts], a member of an armed group with a continuous combat function”.¹⁶⁵ Moreover, an attack that employs means and methods of combat that “cannot be directed at a specific military objective” will be considered as an indiscriminate attack,¹⁶⁶ and the same goes for “method or means of combat the effects of which cannot be limited” as required by the 1977 Additional Protocol I to the 1949 Geneva Conventions.¹⁶⁷

As a consequence, civilians who do not directly take part in hostilities and combatants who surrendered, are sick, wounded or shipwrecked or are in any other way *hors de combat* cannot be the object of an attack. Likewise, civilian objects, defined negatively as those objects that are not military objectives, are protected as well. Article 52(2) of Additional Protocol I defines military objectives as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”. This definition is considered as

¹⁶³ Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Art. 48 (hereinafter: Additional Protocol I).

¹⁶⁴ Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: Rules, Cambridge University Press, Cambridge, 2005, Rules 1 and 7 (hereinafter: ICRC Customary Law Study).

¹⁶⁵ M. Sassòli, above note 3, p. 348, para. 8.289.

¹⁶⁶ Additional Protocol I, Art. 51(4)(b); see also ICRC Customary Law Study, Rule 71.

¹⁶⁷ Additional Protocol I, Art. 51(4)(c).

customary law for both international armed conflicts and non-international armed conflicts.¹⁶⁸

The similarity in substance with Islamic law, although the form may differ, is striking. The underlying idea is identical: those individuals or objects that do not pose a threat to the enemy are protected from attacks. This being said, not every killing of a civilian or damage to civilian property is absolutely prohibited under international humanitarian law. First, civilians that take part in hostilities¹⁶⁹ and civilian objects turned into military objectives in accordance with Article 52(2) abovementioned are legitimate targets¹⁷⁰ – as provided by Islamic law. Second, incidental civilian life loss, civilian injury, and damage to civilian property (or a combination thereof) will not make the attack unlawful if the consequences are not excessive in relation to the concrete and direct military advantage anticipated.¹⁷¹

Whereas under Islamic law, some scholars argue that necessity can supersede the protection given to civilians and civilian property – but as highlighted above, this nuance has to be counterbalanced by the principle of proportionality –, international humanitarian law does not recognize necessity as a circumstance precluding wrongfulness.¹⁷² Incidental effects of an attack are nevertheless tolerated if not excessive compared to the military advantage anticipated.¹⁷³ When it comes to reciprocity, while some Muslim jurists affirm that it can justify targeting civilians in order to win the battle, under modern international humanitarian law, it is established that reciprocity cannot override the principle of distinction, such a “*tu quoque*” argument has indeed been firmly rejected.¹⁷⁴ However, reprisals are authorized under certain specific conditions in international armed conflicts,

¹⁶⁸ ICRC Customary Law Study, Rule 8.

¹⁶⁹ Additional Protocol I, Art. 51(3) and Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978), Art. 13(3).

¹⁷⁰ ICRC Customary Law Study, Rule 10.

¹⁷¹ Additional Protocol I, Art. 51(5)(b).

¹⁷² Additional Protocol I, Arts 51(5)(b) and 57(2)(a)(iii); see also ICRC Customary Law Study, Rule 14.

¹⁷³ M. Sassòli, above note 3, p. 88, para. 5.55.

¹⁷⁴ *Ibid.*, p. 81, para. 5.37.

and customary international humanitarian law only prohibits reprisals if directed against *protected* civilians and *protected* objects.¹⁷⁵

5.2 Principle of proportionality

As equally important as the principle of distinction, the principle of proportionality is a key rule of international humanitarian law recognized by both treaty law¹⁷⁶ and customary law applicable to both international and non-international armed conflicts.¹⁷⁷ An attack, even if directed against a legitimate target, would be unlawful if it “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.¹⁷⁸ As such, the principle of proportionality thus differs from what is meant by proportionality under Islamic law, since the latter foresees the rule as a restricting principle applying to every attack, whereas the former regime aims at determining the proportionality ratio between the military advantage and the civilian damage.

An equivalent to the proportionality principle as conceived in Islamic law can however still be found in international humanitarian law within rules governing means and methods of warfare. Indeed, the choice of the latter is not unlimited even if the target is a legitimate one,¹⁷⁹ as the attacker is prohibited from employing “weapons, projectiles, and material, and methods of warfare of a nature to cause *superfluous injury or unnecessary suffering*”.¹⁸⁰ Such a principle was already enshrined in the 1868 Saint Petersburg Declaration and in the Hague Regulations,¹⁸¹ and is now also considered as part of customary law, applying thus in both international and non-

¹⁷⁵ ICRC Customary Law Study, Rules 146 and 147; Additional Protocol I, Arts 51(6) and 52(1). Additional Protocol I does not require the civilian or the civilian objects to be considered as protected.

¹⁷⁶ Additional Protocol I, Arts 51(5)(b) and 57(2)(a)(iii).

¹⁷⁷ ICRC Customary Law Study, Rule 14.

¹⁷⁸ Additional Protocol I, Art. 51(5)(b).

¹⁷⁹ Additional Protocol I, Art. 35(1).

¹⁸⁰ Additional Protocol I, Art. 35(2) (emphasis added).

¹⁸¹ M. Sassòli, above note 3, p. 381, para. 8.368.

international armed conflicts.¹⁸² This test implies weighing the effects of weapons and methods with their military utility.¹⁸³ The unnecessariness of the suffering will have to be evaluated taking into consideration the “suffering which is beyond that essential for the achievement of the purpose for which it has been inflicted”.¹⁸⁴ Nonetheless, the normative autonomy of this principle is debated. In the absence of a treaty or customary norm prohibiting a specific weapon, some scholars claim that the said principle cannot independently make the use of that particular weapon unlawful.¹⁸⁵

Be that as it may, as highlighted by Judge Mohammed Bedjaoui, former member and President of the International Court of Justice, Islamic law here again foreshadowed international humanitarian law, the same way it did with the principle of distinction:

This [Islamic] rule that combatants should be spared unnecessary suffering, together with the rules for the protection of civilian population and the fundamental distinction between combatants and non-combatants, already featured in seventh-century Islam, constitute one of the foundations of humanitarian international law as codified in the 20th century.¹⁸⁶

5.3 Protection of the environment

Similar to Islamic law, international humanitarian law is comprised of rules specifically protecting the environment during the conduct of hostilities. One

¹⁸² ICRC Customary Law Study, Rule 70.

¹⁸³ M. Sassòli, above note 3, p. 382, para. 8.369.

¹⁸⁴ Leslie Claude Green, *Essays on the Modern Law of War*, Transnational Publishers, New York, 1985, p. 89, cited by Timothy J. Heverin, “Legality of the Threat or Use of Nuclear Weapons: Environmental and Humanitarian Limits on Self-Defense”, *Notre Dame Law Review*, Vol. 72, No. 4, 2014, p. 1300.

¹⁸⁵ M. Sassòli, above note 3, p. 383, para. 8.372.

¹⁸⁶ Mohammed Bedjaoui, “The Gulf War of 1980–1988 and the Islamic Conception of International Law”, in Ige F. Dekker and Harry H.G. Post (eds), *The Gulf War of 1980–1988: The Iran-Iraq War in International Legal Perspective*, Martinus Nijhoff, Dordrecht, 1992, p. 290, cited by A. Al-Dawoody, above note 10, p. 116, note 63.

of the basic rules of Additional Protocol I concerning means and methods of warfare provides that their use is prohibited if they “are intended, or may be expected, to cause widespread, long-term and severe damage to the *natural environment*”.¹⁸⁷ This prohibition is also customary international humanitarian law¹⁸⁸ and is considered as absolute.¹⁸⁹ In this regard, Additional Protocol I dedicates a specific provision to the protection of the natural environment:

1. *Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.*
2. *Attacks against the natural environment by way of reprisals are prohibited.*¹⁹⁰

Furthermore, unless it is turned into a military objective, the natural environment must be considered as composed of civilian objects, treated and protected accordingly.¹⁹¹ Such a rule can also be found in customary international humanitarian law, which also applies in non-international armed conflicts.¹⁹² Moreover, States have to “take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives”.¹⁹³ In other terms, an attack cannot be launched against a legitimate target if the expected incidental damage to the environment would be excessive compared to the anticipated concrete and direct military advantage.¹⁹⁴

¹⁸⁷ Additional Protocol I, Art. 35(3) (emphasis added).

¹⁸⁸ ICRC Customary Law Study, Rule 45.

¹⁸⁹ L. Maresca and E. Mitchell, above note 37, p. 640.

¹⁹⁰ Additional Protocol I, Art. 55 (emphasis added).

¹⁹¹ Additional Protocol I, Art. 52(1).

¹⁹² ICRC Customary Law Study, Rule 43(A).

¹⁹³ T. J. Heverin, above note 184, p. 1298; L. Maresca and E. Mitchell, above note 37, p. 640.

¹⁹⁴ ICRC Customary Law Study, Rule 43(C).

When it comes to military operations, States have to take feasible precautionary measures to avoid, and at least minimize, the incidental damage inflicted on the environment.¹⁹⁵ While Article 55(2) of Additional Protocol I further prohibits reprisals against the environment, international humanitarian law contains an exception to the prohibition of the destruction of the natural environment in case of imperative military necessity.¹⁹⁶

6. Conclusion

In conclusion, Islamic law provides several principles that can be invoked to support the prohibition of the use of nuclear weapons, the effects of which are “both qualitatively and quantitatively unique”.¹⁹⁷ One could argue that while these principles already exist in international humanitarian law, they still failed to lead to any accepted prohibition of the use of nuclear weapons. While this observation must be acknowledged and even if the similarities between the two bodies of law are striking, one should not underestimate the weight an argument under Islamic law could have for actors bound by Islamic law of armed conflict compared with an argument under modern international humanitarian law. Indeed, whereas the latter can easily be influenced by political considerations among others, Islamic law is highly regarded, as it is considered that “divine law is beyond the grasp of the human endeavour”.¹⁹⁸

It is equally true that nuclear weapons could be designed to respect the principle of distinction, or at least to have a more precise and limited impact. However, not only does the scope of this article focus on nuclear weapons as weapons of mass destruction, but tactical nuclear weapons would in any case still be a concern for the environment. The current trend even seems to indicate the proliferation of more devastating nuclear weapons. For instance, the nuclear weapons Russia currently possesses have bigger explosive yields than the ones that destroyed Hiroshima.¹⁹⁹ In the same vein, emerging

¹⁹⁵ ICRC Customary Law Study, Rule 44.

¹⁹⁶ ICRC Customary Law Study, Rule 43(B).

¹⁹⁷ Reaching Critical Will, above note 28, p. 17

¹⁹⁸ A. Zaki Yamani, above note 125, p. 189.

¹⁹⁹ International Campaign to Abolish Nuclear Weapons, above note 4.

technologies and cyber operations exacerbate the risk and the consequences of the use of nuclear weapons.²⁰⁰ Plus, even if one were to admit that, for example, civilians could be spared, what would be the concrete added value of such weapons compared to all the other means of warfare already available, if not an entry point for more suffering and abuse?

Finally, this article demonstrated that reciprocity and (military) necessity were – and are – often invoked to circumvent the prohibitions set by the principles discussed above. While recognizing the absence of any consensus on the issue, this article nonetheless provides that if it is understandable that a certain margin of action was accepted to ensure a Muslim victory, this tolerance can only be understood in light of the settings of the seventh century. Weapons such as nuclear ones, which possess such a wide impact on present and future civilizations, could not have been foreseen by the jurists at that time. Consequently, a strict analogy with what was considered justified centuries ago cannot be made without any form of critical thinking when assessing contemporary weapons.²⁰¹ To put it simply, allowing the use of poisoned arrows will not have the same consequences as allowing the use of nuclear weapons. The above-mentioned examples of prohibited means and methods that were allowed for military necessity and/or reciprocity reasons ‘only’ violated one (or two) of the discussed principles with very ‘limited’ effects, whereas current nuclear weapons confront almost inevitably all those principles on a large-scale basis. Supporting the contrary would go against Islam, which “has always favoured the protection of life and human beings above all sorts of divisions”.²⁰²

²⁰⁰ International Campaign to Abolish Nuclear Weapons, *Emerging technologies and nuclear weapon risks*, Briefing paper, 28 January 2020, available at: https://www.icanw.org/briefing_emerging_technologies_and_nuclear_weapon_risks.

²⁰¹ A similar reasoning was explored regarding chemical weapons, see S. H. Hashmi, above note 78, p. 31.

²⁰² M. Vanhullebusch, above note 116, p. 78.