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To cite this article: Katariina Simonen (2017) Chemical weapons, Ayatollah Khomeini and Islamic law, *Global Security: Health, Science and Policy*, 2:1, 28-38

To link to this article: <http://dx.doi.org/10.1080/23779497.2017.1351308>



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Published online: 03 Aug 2017.



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Chemical weapons, Ayatollah Khomeini and Islamic law

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ABSTRACT

The purpose of this article is to revive academic discussion about the potential of Islamic norms to affect State policy with regard to weapons of mass destruction. A number of religious norms govern just warfare (*jus in bello*). Yet, the extension of such norms to weapons of mass destruction, let alone their effect on State policy, has been under-researched not only by Western scholars but also by Islamist ethicists. This case study sets out to discuss different contextual aspects of the role played by religion in Iranian decision-making in relation to chemical weapons during the Iran–Iraq War (1980–1988). Iran constitutes a *sui generis* case when it comes to evaluating the power of religious norms to affect policy. This is due to religion's major role in the society's cultural and constitutional structure. Iraq started using chemical weapons ('CW') against Iran in 1982 and continued to do so through the war. Iran did not respond in kind, initially. Religious norms played a role in Iran's restraint, but their compliance pull was not absolute. A number of internal factors resulted in the religious prohibitions as well as a number of grand jurists (*marāji'-i taqlid*) being sidelined, which paved the way for some CW use and development by Iran. External factors also played a part when the restraint exercised by religious norms was weakened. During the war, the international community remained mostly passive. This type of prioritising of other considerations over concerns of humanity sent a clear message to the Iranian decision-makers. The religious/moral argument was set aside. There are clear lessons for non-proliferation policy to be learned from the Iranian case. The religious argument can play a role in restraining State policy. However, it does not operate in a vacuum. It also needs the unconditional support of external actors engaged in non-proliferation.

ARTICLE HISTORY

Received 31 March 2017
Accepted 28 June 2017

KEYWORDS

Islamic law of warfare;
authoritative interpreters of
law; Iran–Iraq War; chemical
weapons

1. Introduction

The Iran–Iraq War (1980–1988) began when Iraq invaded Iran on 22 September 1980. After Iran repelled the initial Iraqi attack and began a counterattack inside Iran, Iraq resorted to chemical weapons ('CW') in 1982 against Iranian troops and then continued to use them throughout the entire time-span of the war until 1988 (Zanders, 2001a). Yet, during the war, the Iranian leadership declared on several occasions that it would not retaliate in kind against Iraq's CW attacks. In fact, it has not been established that Iran used CW in any substantial way. Nevertheless, during the final stages of the war and in the years immediately following it, Iran had an active CW armament programme (Maneshi, 2015, p. 5; Zanders, 2001a). It should also be noted that prior to the entry into force of the Chemical Weapons Convention (CWC) in 1997, the development, production and stockpiling of CW was not prohibited under international law so the reasons for Iran's restraint with regard to the use of CW during the war must be sought elsewhere.

This article explores the role of religion in restraining Iran's CW policy during the Iran–Iraq war. During the war, the then guardian jurist Ayatollah Khomeini, as well as senior religious scholars, argued that CW were contrary to Islam, citing several principles relating to the means and methods of warfare (*jus in bello*). However, by the mid-1980s, the Government's attitude towards CW nuclear weapons ('NW') began to change, apparently with Ayatollah Khomeini's acquiescence (Hashmi, 2004, p. 332). Doctrinal changes were elaborated by Khomeini in order to accommodate this change in attitudes. Several senior scholars opposed these developments, calling the conduct of the war religiously unlawful (Giles, 2000, p. 83).

The effect of Islamic law on State CW policy in Iran is *sui generis* for two reasons. First, the religious argument became naturally included in political debates through Ayatollah Khomeini's work and the establishment of the Islamic Republic in 1979. Secondly, Iran's State religion is *Twelver Shi'ism*, which has a highly hierarchical, yet

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pluralistic, system of authority in the person of grand jurists (*marāji'-i taqlīd*). It follows that the evaluation of Islamic law's effect on State CW policy needs to take account not only this multiplicity of authoritative interpreters but also their possibility to affect Government policies at any given time. It is also for these reasons that parallels between religion's effect on CW policy and Iran's policies on weapons of mass destruction in general need to be drawn with caution (Giles, 2000, p. 80).

The morality of weapons of mass destruction has not given rise to significant discussion on the part of Islamic ethicists, whose discourse has focused mainly on the legitimate grounds for war (*jus ad bellum*) (Hashmi, 2004, p. 321). This is also true of most western ethical analyses of Islamic law and weapons of mass destruction (particularly NW), as exemplified by the otherwise abundant literature on Iran's nuclear programme (Perspectives on the Iran Nuclear Deal, 2015). In addition, Iran constitutes a special case for any analysis, since, as already suggested above, the existence of a plurality of authorised interpreters of law means that Iran's position is bound to differ significantly from other mainstream Sunni Muslim countries. Moreover, this aspect is under-researched in the arms control context for two reasons: first, as evidenced by some western analysis of the current leader Ali Khamenei's stance on NW, the research has been strongly politicised (Butt, 2014; Porter, 2013). Second, an unhindered access to primary sources in Iran is not obvious and is, often, dictated by underlying policy motives. In sum, there is a need for objective, critical, academic research on Islamic law's effect on State policy on weapons of mass destruction, both in Iran and in other Islamic countries.

The article's scholarly input to existing literature stems from its contextual approach to Islamic law's potential for affecting CW policy in Iran. The contextual approach is inspired by the French Annalist school from between the two World Wars (Bloch, 1993, p. 70). According to this methodological approach, the political, legal, historical and cultural context should be included in the evaluation of different phenomena, without limits imposed by the scientific conventions of different branches of science (Kekkonen, 2013, p. 20). In fact, it is only through a complex analysis of religious, legal and political arguments, that one is able to evaluate the role of Islamic law and its effect on weapons of mass destruction policy – in a historical context. As far as policy concerns go, the article discusses the role of religious argument in non-proliferation. It evidences the potential of religious imperatives to impact on policy on weapons of mass destruction. It also evidences the fact that religious imperatives do not operate in a vacuum. Their power to affect policy is defined by concrete power relations, which not only include Iranian

internal settings but also the absence of any condemnation by the international community of Iraq's use of CW.

As to the transliteration of Arabic, the article follows the modified IJMES scheme.¹ To facilitate the reader's acquaintance with the key Islamic legal concepts, both an English version and an *italicised* Arabic version of these concepts will be laid out. For their part, names of the persons referenced are written in their English form in order to make the article more accessible to the western reader.

2. Iran as an international 'Citizen' in non-proliferation and disarmament

Irrespective of the type of regime in power, Iran has a long tradition of adhering to international treaties governing the conduct of war (Bucht et al., 2003, p. 9). Apart from Jordan (which took over British international obligations upon attaining independence in 1946), Iran is the only State in the Middle East to have signed all the global agreements that restrict the use of poison and poisoned weapons and biological and chemical modes of warfare (Bucht et al., 2003, p. 9). Iranian arms control commitments in the beginning of the Iran–Iraq War were as follows:

- The St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (signed on December 1868);²
- The signature and ratification of the Hague Convention 1899 (II)³ and the signature of the Hague Convention 1907 (IV).⁴ According to Article 4 of the Convention (IV) Respecting the Laws and Customs of War on Land (1907), the 1899 Convention (II) remains in force for those powers that have not ratified the 1907 Convention (IV) (Brown, 1915, pp. 232, 238). The articles relevant to CW warfare (Arts. 22 and 23) are identical in both conventions. Hence, the right of belligerents to adopt means of injuring the enemy is not unlimited, and the use of poison or poisoned weapons is especially forbidden;
- The Hague Declaration 1899 (IV, 2) concerning Asphyxiating Gases, whereby it abstained 'from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases';⁵
- 5 November 1929 the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (without any reservations).⁶ Iran has later expressed that it considers the Geneva Protocol a codification of an existing and operational norm (Bothe, 1973, p. 247). The Protocol does not, however, prohibit the development, production or possession of chemical weapons. It

only bans the use of chemical and bacteriological (biological) weapons in war. Furthermore, many countries (including Iraq) signed the Protocol with reservations permitting them to use chemical weapons against countries that had not joined the Protocol or to respond in kind if attacked with chemical weapons.⁷ However, since the Protocol was binding on Iran, any CW use would have been a violation of the Protocol (Giles, 2000, p. 83); and

- On 10 April 1972 Iran signed the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction⁸ (BTWC) and ratified it on 22 August 1973.

In comparison, Iraq had adhered to the 1925 Geneva Protocol in 1931, with a reservation that it would respect the Protocol only in relations with those States which had signed and ratified the Protocol, or adhered to it, and that it did not consider itself bound by the Protocol vis-à-vis any enemy State whose armed forces or whose allies did not respect the Protocol. Notwithstanding this, it used CW extensively during the Iran–Iraq War. As far as biological warfare is concerned, Iraq had signed the BTWC in 1972 but nevertheless began pursuing biological warfare in the Iran–Iraq War, when it started to make tangible advances in offensive BW technology (Rissanen, 2003).

3. Iranian chemical warfare capability and some key statements

At the beginning of the Iran–Iraq War Iran did not possess either offensive or defensive chemical weapons capabilities (Zanders, 2001a). The Iranian forces were unprepared and had poor defensive capabilities. The first Iraqi CW attacks against Iran's human waves in 1982–1983 caught the Iranians with no protection. Iran's defensive preparedness continued to be insufficient for a considerable time. Towards the latter half of the war, Iranian preparedness improved greatly and concrete *defensive* measures were implemented (e.g. the Derakhsh -6 chemical anticontamination and anti-chemical bomb system) (ibid.).

The Iranian *offensive* preparation was directly linked to Iraq's continuous CW attacks. As Zanders notes, since a CW armament programme is complex and involves many phases (including R&D, setting up a production base, weaponisation, offensive and defensive doctrine development, establishment of logistics and operational support, training, protection and defence), Iran could not be expected to have developed an advanced chemical warfare capability before the ceasefire in August 1988, unlike Iraq, which was known to have embarked on a CW armament programme in the 1970s (although there are

earlier indications, too) (Zanders, 2001b, p. 3). Hence, between 1984 and 1987, Iran was in all likelihood unable to retaliate and when it may have acquired a militarily relevant capability by the end of 1987, the fortunes of war had turned against it, possibly leading to fears that Iraq might retaliate against Iranian cities. Zanders assesses that there was probably sporadic use, possibly of phosgene and mustard agent (Zanders, 2001b, p. 12). Hashmi states that by 1984, Iranian troops had begun using captured stocks of Iraqi chemicals against Iraqis but whether this reflected an official change of government policy is still unclear (Hashmi, 2004, p. 332). It was also during this period that Iran's attitude to NW began to change as well (Ibid., p. 343).

When agreeing to the ceasefire in 1988 Iran stated that it did so because of its technological inability to retaliate in kind, its fear of Iraqi missile strikes against population centres with CW and the great impact of massive Iraqi CW use during battles on the Faw peninsula in 1986. Also, even if Iran was capable of significantly increasing its output of CW, both quantitatively and in terms of types of agents and delivery systems, it had no hope of dominating the escalation of the conflict. On the contrary, there was a fear that Iraq had chemical warheads for its ballistic missiles with which it might strike Tehran and other cities under its 'War on the Cities' –strategy (Ali, 2001, p. 52).

The Iranian Government's statements regarding the Iranian CW capability and its use were, however, somewhat divided, being influenced by the realities on the battlefield and possibly by sincere religious sentiment. In general, it may be said that official statements were highly conditional and referred to Iraq's continuing violations of international norms regarding chemical warfare and the unwillingness of the international community to uphold these norms. These statements were often accompanied by an expression of hope that Iran would never have to resort to chemical warfare. The majority of officials stressed deterrence rather than retaliation: in most cases the phrase 'has the capability' was used, together with the idea that retaliation by Iran was a matter of last resort and tied to Iraq repeating its crimes of CW use and the UN Security Council's inability to stop it (Zanders, 2001b, pp. 5, 6).

In fact, Iran's initial response to Iraq's CW attacks was diplomatic rather than military; it attempted sincerely to draw the international community's attention to what was going on in the vain hope that international condemnation would press Baghdad, as a signatory to the 1925 Geneva Protocol, to discontinue its attacks (Giles, 2000, p. 81). The weak international response to Iraqi violations, including the genocidal attack on the Kurdish village of Halabja on March 16, 1988, greatly disappointed Iran (Hashmi, 2004, p. 332). No international response was forthcoming, mostly owing to political allegiances

that were contrary to Iran (Ali, 2001, pp. 48, 50). Iran felt the necessity to start considering additional military responses (Giles, 2000, p. 82).

At the beginning of the war, Ayatollah Khomeini and senior religious scholars cited several Islamic legal prohibitions against CW. In fact, Ayatollah Khomeini was adamant in labelling Saddam's use of CW as a crime, calling for people of the world not only to condemn Saddam's acts but also to condemn all types of weapons of mass destruction. An ample collection of speeches of Ayatollah Khomeini, *Sahifeh-ye Imam*, portrays clearly his reluctance about these types of weapons since they constituted a means of general destruction and oppression of peoples of the world (Karimi and Limba, 2008). The guiding Qur'anic principle 'Fight those who fight against you, but do not transgress limits, for God loves not the transgressors' (2: 190) was used to infer limits on whom could be attacked and which kind of weapons may be used in the process (Hashmi, 2004, p. 326). Discrimination in targeting, the non-use of poison, a prohibition on polluting the environment and a prohibition on causing unnecessary suffering were all part of the Islamic law on just warfare (Seyed Mohaddes, November 5, 2015; Bucht et al., 2003; p. 21). However, the realities of war took hold, and it was reported that Khomeini had come under increasing pressure from elements in the regular military, as well as the Iranian Revolutionary Guard Corps (IRGC), to authorise the use of CW (Giles, 2000, p. 83; with references therein). Hashmi adds that by 1987 Khomeini was also in ill health, and the extent to which he was still functioning as commander-in-chief of the Iranian military is uncertain (Hashmi, 2004, p. 332).

Nevertheless, the Iranian government was at odds as to what policy to follow on the question of CW. For instance, in December 1987, when presenting the Government's new annual budget to the Majlis, Prime Minister Mir Hussein Musavi announced that his country was producing sophisticated offensive CW. He added that Iran would nonetheless observe international law and not use CW unless it was forced to do so. A few days later he retracted the statement, declaring that: 'The Islamic Republic is capable of manufacturing chemical weapons and possesses the technology. But we will produce them only when Islam allows us and when we are compelled to do so' (Zanders, 2001b, p. 6). This statement and its rectification evidenced the on-going dispute between proponents and opponents of chemical warfare in the Government. In general, Zanders considers that the Government's statements of possession probably testified to the lack of significant CW capability, being a weak attempt to deter Iraq. In combination with the portrayal of Iran as the victim of gross violations of international law, the prime function of these statements was probably to force the international

community through the United Nations Security Council to restrain Iraq in order to prevent an all-out chemical war (Zanders, 2001a).

Last, it is important to note that the continuation of the war after 1982 (when Iran's armed forces expelled Iraq out of most of the territory that it had occupied) was opposed by the, then, Mousavi Government. Prime Minister Mousavi had reportedly told Ayatollah Khomeini many times that his government was at breaking point owing to the high cost of the war (Sahimi, 2010). Sahimi refers in this regard to a specific letter, which is part of an exchange of correspondence in 1988 between Ayatollah Khomeini and Mohsen Rezaei, then the top commander of the IRGC. In this letter, which was revealed by Rafsanjani who was the commander-in-chief of the Iranian armed forces in 1988, Mousavi had indicated that his government was no longer able to fund the war. In a letter written by Khomeini, Rezaei is quoted as telling the Ayatollah about the amount of weapons (incl. NW), soldiers and delivery systems necessary for offensive war activities. The Ayatollah responds that Mousavi's government has told him that it is impossible to continue the war and that, therefore, he has no choice but to end it and accept UN Security Council Resolution 598, which called for a ceasefire (*ibid.*).

Iranian statements regarding its *past* production programmes conclude that Iran had pilot-production scale facilities but no large-scale production facilities and produced relatively few munitions (Zanders, 2001a). Iran also produced Sulphur mustard in limited quantities whereas the production of hydrogen cyanide was unclear. According to Iran, it destroyed its CW production plants and its munitions after the War. Its declarations on past production capabilities were submitted to the Organisation for the Prohibition of Chemical Weapons (OPCW) and certified by them in 1999 (OPCW, 2000, p. 10, 13).

4. Contextual dimensions underlying Ayatollah Khomeini's view on CW

4.1. General introduction

In October 2014 investigative journalist Gareth Porter published an interesting analysis in *Foreign Policy* on Iran's internal decision-making on CW and the role played therein by the then supreme leader, Ayatollah Khomeini (Porter, 2014). Porter's main source was Mohsen Rafighdoost, who served as a minister of the IRGC throughout the eight-year war. Rafighdoost revealed that after a dramatic increase in Iraqi CW attacks in February and March 1984 when he was unable to secure the assistance of foreign governments, he had proposed to Khomeini that Iran should begin working on both NW

and CW. In normal circumstances, the supreme leader would not interfere in the current affairs of the executive, unless there was a dispute or his verdict or edict was explicitly sought by one branch of government. In this case, the situation was far from normal, and the supreme leader's intervention was considered necessary. However, Rafiqhdoost was told in two separate meetings with the supreme leader that weapons of mass destruction were prohibited by Islam. According to Porter, Khomeini initially told Rafiqhdoost in 1984 that 'instead of producing chemical or biological weapons, we should produce defensive protection for our troops, like gas masks and atropine' (ibid., p. 3).

Iraqi chemical warfare was taken to a new level in late June 1987, when the Iranian civilian population was targeted for the first time by Iraqi aircraft, which bombed four residential areas of Sardasht, an ethnically Kurdish city in Iran, with what was believed to be sulphur mustard. Of the completely unprotected 12,000 inhabitants, 8000 were exposed and hundreds died. As popular fears of Iraqi attacks against more Iranian cities grew, Rafiqhdoost attempted to create an Iranian capability to produce sulphur mustard weapons. This CW programme produced chemical precursors for sulphur mustard and in September the manufacture of chemicals necessary to produce a weapon (sulphur mustard and nitrogen mustard) was started. However, these chemicals were never loaded into the various delivery systems, such as artillery shells, aerial bombs or rockets.

According to Porter, the supreme leader had not changed his stance on CW in 1987 despite the dangers to the civilian population: 'it doesn't matter whether it is on the battlefield or in cities; we are against this. It is *harām* [forbidden] to produce such weapons. You are only allowed to produce protection' (ibid., p. 4). Not only that, the supreme leader allegedly invoked Iran's claim to spiritual and moral superiority over the secular Iraqi regime, by asking, if Iran were to produce chemical weapons what would be the difference between him and Saddam. Lastly, Porter states that Rafiqhdoost had understood Khomeini's views as a *fatwā*, a decision by the guardian jurist, which was binding on the entire government.

There is some discrepancy between Porter's work and the short analysis above in Section 3 regarding the Islamic Republic's offensive CW policy and Khomeini's role therein. There is even a bigger problem with sources used as these are exclusively pro-Government sources, which fact only reflects on the difficulties of access to primary sources mentioned in the introduction. However, as such, Porter's article identifies exactly the questions one is to ask, when evaluating the role of Islamic law in restraining policy: first, who is authorised to interpret Islamic law in Iran,

and, secondly, how can the religious argument affect Government policy?

4.2. Introduction to the guardianship of the Jurist (*vilāyat-i faqīh*) – doctrine

The doctrine of the Guardianship of the Jurist forms the central axis of contemporary Shi'a political thought, espousing a guardianship-based political system, which relies upon a just and capable jurist (*faqīh*) to assume the leadership in the absence of an infallible Imam (Vaezi, 2004). Over time there has been some ambiguity about the scope of the authority that is delegated to the jurists. In his historical evaluation, Vaezi distinguishes two strands of thought in this regard: according to the first, the vicegerency of a *faqīh* is universal, whereas the second strand is a more cautious one, by virtue of which the *faqīh* is entrusted with some duties in addition to the authority to make a decree, to judge and to act as a guardian for a particular reason (Ibid.). The latter coincides with the early period of Shi'a jurisprudence (until the emergence of the Safavid dynasty during 1501–1722), when the Shi'a community existed as a minority without political power. Jurists remained silent on governance and political issues owing to the social and political circumstances of the time. This type of action is called *taqiyya*, which means self-protection through dissimulation. The universal doctrine is widely and overtly supported by later Imami jurists, who advocated the universal authority of a *faqīh* (Ibid.).

In the historical development of religious authority, the ideological victory of the Usuli school of jurisprudence (*fiqh*) towards the end of the eighteenth century led to the emergence of so-called grand jurists (*marāji'-i taqlīd*), such as Shaikh Murtaza Anṣari (d. 1865 A.D.) or Ayatollah Mirza Hasan Shirazi (d. 1895). These grand jurists acted as spiritual leaders of the community, and, especially since the times of Ayatollah Shirazi, they also possessed extended legal authority in the political sphere (Amanat, 1988, p. 121). The tenacity of religion as a major force throughout the modern history of Iran was remarkable as high-ranking jurists played an important role in the political life of Shi'i Iran, strongly resisting foreign economic and political influence, and collaborated with Iranian liberal forces to serve the cause of justice and constitutionalism and balanced monarchical absolutism in Iran (Avery, Hambly, & Melville, 1991, p. 732).

It was also typical of this type of non-institutionalised religious plurality of the Shi'i religious scholars (*'ulamā*) that their participation in the political affairs of the country was dependent on individual initiatives. This meant that the *'ulamā* consisted both of active scholars, calling for participation in the political affairs of the country and of scholars who preferred the more quietist path of teaching

in religious schools without active political engagement, such as grand Ayatollah Abd al-Karim Ha'iri (d. 1936) and Aqa Husain Burujirdi (d. 1961), the latter being not only the person chiefly responsible for the teaching institution in Qum but also the supreme grand jurist, *marja'-i taqlid*. However, the political setting in the Iran of the 1960s was such as to lead the religious scholars on a final collision course with the governing authority, the Shah, which led to the Islamic Revolution in 1979 and the institution of the governance of the jurist (*vilayat-i faqih*) (ibid.).

4.3. From Vilayat-i Faqih to the absolute authority of the guardian jurist

The practical realisation of the universal authority is greatly due to Ayatollah Khomeini, who revived the works of Mulla Ahmad Naraqī (d. 1830). According to Naraqī, religious scholars (*'ulamā*) were authorised by the Imam's privilege, it being the right of the jurist to act as a successor to the Imam and to be vested with all the power of the Imam (Moussavi, 1996, p. 273). In 1944, Khomeini wrote *Kashf al-Asrār* (The Unveiling of Secrets), whose political component not only attacked the policies of the Shāh but also provides for the first steps towards governance of the jurist: the monarchy would be provisional 'as long as no better system can be established'; the monarch should be chosen by an assembly of properly qualified jurists and adhere to Islamic law (Khomeini, 2009, p. 186).

In the early 1970, in his bid to overthrow the Shah from his position in exile, Ayatollah Khomeini started to argue only for the sole governance of qualified religious scholars, who should become more active participants in political life and not only isolate themselves in religious worship. According to Khomeini's book on the *Governance of the Jurist*, which is a compendium of his thirteen speeches delivered during his stay in Najaf from 21 January to 8 February 1970; qualifications for the ruler are derived directly from the nature and form of Islamic government: in addition to general qualifications such as intelligence and administrative ability, two other essential qualifications are: knowledge of the provisions and ordinances of Islam and justice, i.e. the ruler's excellence in beliefs and morals (Khomeini, 2008; p. 41). The qualified *'ulamā* refers to the jurists (*fuqahā*) of whom many possess the qualities required of the ruler. Khomeini himself became the first ruling jurist of the newly founded Islamic Republic. Khomeini was also a grand jurist, *'marja'-i taqlid*. The doctrine of *vilayat* was crystallised in several articles of the new 1979 Constitution (Papan-Matin, 2013). The qualities and the attributes of the leader were defined as follows (Art. 5):

Art. 5: In the Islamic Republic of Iran, during the absence (*ghayba*) of his holiness, the Lord of Age, May

God all mighty hasten his appearance, the sovereignty of the command [of God] and religious leadership of the community [of believers] is the responsibility of the jurisprudent who is just, pious, courageous, knowledgeable about his era (Mallat, 1993, p. 84),⁹ and capable administrator, and is recognised and accepted by the majority of people as leader

The qualifications of the leader or members of the Leadership Council are, as follows (Art. 109):

- (1) scholarly qualification and piety for issuing religious ruling (*fatwā*) and serving as the *marja'*;¹⁰
- (2) political and social insight, courage, power and sufficient administrative abilities for leadership.

It is interesting to observe that there is multiplicity in the *vilayat* doctrine. Accordingly, there is no hierarchy ranking one jurist (*faqih*) higher than another, or endowing one with more authority than another. The guardianship of the jurists during greater absence is a general designation, which means that no jurist (*faqih*) is exclusively appointed as the guardian; all Imami jurists who are just and qualified in Islamic jurisprudence have the right to exercise the Imam's authority as his deputies (Vaezi, 2004). This multiplicity stems also from Usuli jurisprudence, according to which the jurist may not claim absolute authority for himself, since the result of rational judgement is never more than *zann* – a contestable expression of personal opinion so that jurists may pronounce different or contradictory rulings on the same matter. Hence, juristic disagreement (*ikhtilāf*) is admitted (Hallaq, 2009, p. 117). In the political realm, this multiplicity is acknowledged in Art. 107 of the (1979) Constitution, as follows:

Whenever one of the jurisprudents who fulfills the qualifications discussed in Article 5 of this constitution is acknowledged and accepted by the undisputed majority of the people as the leader and the exalted source of religious conduct (*marja'-i taqlid*) ... this leader is in charge of the sovereignty of the command and all the responsibilities that derive from that. Otherwise, the Experts, who are elected by the people, consider and consult with each other about all the persons who have the qualifications to be the *marja'* and the leader. If they find one *marja'* possessing of special significance for leadership, they introduce him to the people as the leader; otherwise, they designate three or five *marja'*s, who are qualified for the leadership, and introduce them to the people as members of the Leadership Council (Papan-Matin, 2013).

Hence, since 1979, religious authorities had to accommodate another decision-maker, the guardian jurist. It is fair to note that the power transition from the realm of religious to the political did not receive the unanimous support of the clerical institution. Those disagreeing encountered a firm response (Arjomand, 1988, p. 176; Walbridge, 2001, p. 5). As far as competing spheres of competence are concerned, it is useful to make the following

distinction: as a grand jurist, Ayatollah Khomeini could issue a *fatwā*, a religious ruling inferring and indicating the Islamic junctions from its sources and applying them to the case at hand. If the matter had nothing to do with the government or the administration of the affairs of society, the Ayatollah's opinion would be binding only on those who submitted to his religious authority. If the ruling jurist's *fatwā* was intended to refer to the government and administration or related to the affairs of Muslims or Islam, such a *fatwā* would be binding on all, even on other jurists.¹¹ In fact, several grand jurists (e.g. Ayatollahs Makarim Shirazi and Jawadi-ye Amoli) have made explicit statements to this effect on their websites. It seems that in the political sphere, theologically accepted juristic disagreement (*ikhtilāf*) could not be accommodated.

The consolidation of authority did not stop here. Ayatollah Khomeini also introduced a revolutionary doctrine regarding the absolute authority of the jurist (*vilāyat-i muṭlaqa-i faqīh*). According to Vaezi, Khomeini was perhaps the first Imami jurist who explicitly and publicly discussed the connection between governmental orders (*ahkām-e ḥokūmatī*) and Islamic laws (*ahkām Shari'*) (Vaezi, 2004). In normal situations, the jurist has no right to issue orders in opposition to obligatory first-order laws, in opposition to peripheral or second-order laws, even if the interests of the Muslims demand this (Tamadonfar, 2015, p. 36). First-order laws are central and public, such as drinking laws. Second-order laws cover such things as personal devotional matters and labour laws, and are imprecise and subject to interpretation and the doctrine of necessity. Khomeini clearly departed from this interpretation by considering that although the implementation of Islamic law is very important, it is not the ultimate goal. For Ayatollah Khomeini, the Islamic State is Islam itself and, hence, Islamic laws' significance was overshadowed by the significance of protecting the Islamic system and the interest of Islam (Vaezi, 2004). Khomeini's interpretation boosted the primacy of the Government while at the same time serving to underscore the absolute authority of the ruling jurist who has the final say in all legal matters.

Tamadonfar discusses Khomeini's view as an extension of the traditional *maslahat* (interest and welfare) doctrine, which, as a legal method, aims to determine man's best interest and promote that interest by applying it to the case at hand in harmony with the objectives of Islamic law. According to the traditional doctrine, *maslahat* is only valid when the necessity is certain (and not only probable), when it benefits the public at large, is rational and acceptable to people of sound intellect and removes or prevents hardship on the part of the people (Tamadonfar, 2015, p. 36). In Farsi, the term *zarurat* (necessity) is commonly used as an equivalent to *maslahat*, and according to Tamadonfar there is no clear legal distinction between

the two concepts in the Shi'a and Iranian legal traditions (Ibid.).

Governmental primacy is well-evidenced in Khomeini's letter (1988) to Khamenei, then the President of Iran, Ayatollah Khomeini asserts his view of the *vilāyat-i faqīh* to the effect that all laws are subject to governmental actions:

It appears, [Khomeini writes to Khamene'i] from your Excellency's remarks at the Friday prayer meeting that you do not recognise government as a supreme deputyship bestowed by God upon the Holy Prophet (S) and that it is among the most important of divine laws and has priority over all peripheral divine orders. Your interpretation of my remarks 'that government exercises power only within the bounds of divine statutes' is completely contrary to what I have said. If the government exercises power only within the framework of peripheral divine laws, then the entrustment of divine rules and absolute deputyship to the Prophet of Islam ... would be hollow and meaningless (Vaezi, 2004).

Ayatollah Khomeini considers (contrary to Khamene'i) that there is no distinction between central or peripheral laws, asserting that:

The government is empowered to unilaterally revoke any *shari'a* agreements which it has concluded with the people when those agreements are contrary to the interest of the country or Islam [T]he government can also prevent any devotional (*ibadi*) and non-devotional affair if it is opposed to the interests of Islam or so long as it is so. The government can prevent pilgrimage (*hajj*), which is one of the most divine obligations on a temporary basis, if that practice is contrary to the interest of the Islamic country (Ibid.).

In sum, concerns of governmental primacy and expediency became part of the Iranian leadership's primary toolkit, meaning that the argument of necessity, available to the Supreme Leader, would be the primary norm against which other principles would have to be balanced. However, it was not during Khomeini that these principles were fully brought into practice. It was during his successor's, Ali Khamenei's, time, during which a process of centralisation of powers (incl. religious) in the person of the Supreme Leader took place (Ansari, 2013).

5. Vilāyat-i Faqīh in the context of CW: balancing of principles

In Section 3 it was stated that diverse Islamic legal prohibitions (on the non-use of poison, prohibition on polluting the environment, principle of separation and prohibition to cause unnecessary suffering) were cited both by Ayatollah Khomeini and senior religious scholars against CW. Furthermore, the guardian jurist's speeches clearly evidenced his reluctance about these types of weapons as a means of general destruction and oppression of peoples of the world. The exact contents of these religious

injunctions, their interpretation and proper references by different legal schools of jurisprudence have been discussed, for instance, by Harbour (1995), Hashmi (2004) and Khadduri (2010). What is interesting for our discussion, is the fact that Twelver Shia permit the dynamic and contextual interpretation of such principles by a multiplicity of senior Shi'i scholars, in addition to the political decision-maker, Ayatollah Khomeini. It is also clear that these principles are potentially capable of affecting negatively the view on CW, from their development to the storage and use.

However, any contextual interpretation also includes the concept of necessity, which serves to justify actions against which there are strong moral presumptions. Necessity is a concept open to interpretation, and, hence, the threshold for its application has been debated over time. For instance, Hashmi refers to the twelfth century sage Al-Ghazali's view of the general welfare of the whole Muslim community (*maslahah mursala*), which set a high threshold for invoking necessity as a justification for suspending normal moral prohibitions (Hashmi, 2004, p. 330). Yet, the example of Al-Ghazali's has been invoked, for instance, to sanction a possible nuclear attack by Pakistan against India, in spite of the fact that millions of Indian Muslims would certainly perish at the hands of their Pakistani coreligionists (Ibid.). In the context of CW and necessity, Harbour refers to the difficulties in appraising necessity in the context of the military utility of CW in the Iran–Iraq War (Harbour, 2001, p. 82). No consensus has emerged from these debates. She concludes that the existence of such acrimonious disagreement suggests that true military necessity, as opposed to mere utility, would be very difficult to demonstrate.

However, in Khomeini's Iran the starting point for interpretation was governmental primacy and the survival of the Islamic State, which was a (if not 'the') key priority for Khomeini. The Guardian jurist would have the final say in legal matters. Regardless of the multiplicity of authoritative interpreters of law, Khomeini's doctrine of the absolute authority of the guardian jurist would sideline dissenting Ayatollahs from governmental decision-making. These developments, especially as far as relaxing the Iranian CW policy was concerned, were not accepted by all. In the mid-1980s, several senior scholars, including Ayatollahs Hassan Qomi, Golpayegani, Morteza Haeri, Meshkini, Azeri Qomi and Tabatabai, voiced their opposition to the conduct of the war, in some cases calling it religiously unlawful (Chubin & Tripp, 1988, p. 82). While Khomeini dismissed such charges, similar criticism would be aimed at his approval of CW use (Giles, 2000, p. 83).

Nevertheless, arguments for necessity and governmental primacy for CW justification could be based on real concerns: with the continuation of the war effort,

Iran's economy was heavily burdened, whilst its relatively weak non-conventional capabilities were not able to deter Saddam (Tuohy, 1988). It may be realistically asked whether in a wartime situation in which one's survival was at stake, self-defence *by all possible means* would not be permitted? The application of *maslahat/zarurat* over Islamic rules on just warfare could have provided the legitimate vehicle for justification by the Government. However, having said that, one has to remember, also, that by 1987 Khomeini was in ill health, and his authority to function as commander-in-chief of the Iranian military was uncertain (Hashmi, 2004, p. 332). By that time, he had also been reported to have come under serious pressures from the regular military as well as the IRGC for change of CW policy (Giles, 2000, p. 83).

In this context, it is also useful to point out that a decision to develop CW would not have signified any violation of Iran's *international* obligations regarding these weapons, since their mere production was not prohibited. However, their use would have violated Iran's obligations under the 1925 Geneva Protocol. It would also have signified the weakening or loss in international *fora* of the moral high ground Iran hoped to have over Saddam's non-discriminate use of CW. Then again, any decision to develop CW (warfare) capability might have boosted the internal morale of the Iranians in an environment in which Saddam's war on the cities ended up by creating terror and mass exodus (DeYoung, 1988).

Hence, it seems that the Governments's CW policy changed during the war. We may remember from Section 3 that by 1984, Iranian troops had begun using captured stocks of Iraqi chemicals against Iraqis and that it was also during this period that Iran's attitude to NW began to change, too (Hashmi, 2004, p. 343). Moreover, during the final stages of the war and in the years immediately following it, Iran had an active CW armament programme (Maneshi, 2015, p. 5; Zanders, 2001a). It is unclear whether Ayatollah Khomeini was sidelined in the decision-making on CW towards the end of the war, or whether Khomeini decided on the matter, attaching more weight to concerns of necessity and governmental primacy than to religious injunctions prohibiting CW. A number of other grand Ayatollahs did not accept the lawfulness of CW use.

6. Conclusions

Islamic law is an integral part of the Islamic government in Iran. As far as CW are concerned, Ayatollah Khomeini and a number of senior legal scholars considered these weapons to be prohibited and contrary to different rules on just warfare, i.e. discrimination in targeting, prohibition of poison, prohibition on polluting the environment

and the prohibition of unnecessary suffering and the principle of separation. Such reluctance by both the guardian jurist as well as senior religious scholars affected Iran's policy regarding the development and use of CW at the beginning of the war. Initially, Tehran's reaction to Iraq's unhampered use of CW was diplomatic rather than military. Iran attempted to interest the international community in bringing pressure to bear on Baghdad in order for the latter to stop its use of CW. The weak international response greatly disappointed Iran and encouraged it to consider and realise military solutions involving CW.

Senior religious scholars' arguments were ignored in governmental decision-making, if they were in conflict with the views of the guardian jurist. Doctrinal justifications for the guardian jurist's exclusive authority were introduced. At the same time, concerns for governmental primacy brought in the legal argument of necessity, which could be used to justify actions against which there are strong moral or legal presumptions. Such developments did not go without protests as senior religious scholars continued to protest against any use of CW as illegal.

All in all, Islamic rules on just warfare played a concrete (though not a decisive) role in restraining Iran's CW policy before, during and after the war. Yet, the case's value as a precedent has received meagre attention western legal literature. This is not surprising, in the light of the international community's lukewarm reaction to Iraq's unhampered CW use, even after the crime of Halabja. At the same time, Islamic ethical and legal circles have also been mostly silent, not only about the Iran–Iraq War, but also more generally about weapons of mass destruction and just warfare. All in all, the potential of Islamic rules on just warfare to affect policy in today's Iran, as well as in other Muslim countries, is not well known.

Hence, in the interest of contributing to non-proliferation and disarmament, to enhancing knowledge, dialogue and restraint in war, it is proposed that the lessons of Iran's CW precedent should be studied further and the results disseminated through Western and Islamic academic circles. More questions will obviously emerge, since Khomeini's Iran is different from Khamenei's, meaning that jurists' capabilities to affect policy depends on their involvement in the Government. Also, drawing parallels between Iran and other Muslim countries is not possible, considering that the Twelver Shi'ism's receipt for the attribution of authority differs from other Islamic schools. Even though much paper and ink will be needed to analyse e.g. Turkish, Saudi or Egyptian experiences, already the acknowledgement of this plurality is a step forward in understanding better the Islamic world and Islamic law's potential in each State under study.

When contemplating arms control, better understanding of the role and potential of Islamic norms on

just warfare will pave the way for their inclusion in contemporary policy debates in arms control. This is not totally uncommon in Islamic circles, as pointed out by Harbour, since traditional Islamic values seemed to have played a central role in shaping governmental attitudes towards the CWC (Harbour, 1995, p. 86). Perhaps the inclusion of Islamic law's morality norms will also reinvigorate the seemingly forgotten western conceptions of just warfare?

Iran's CW precedent involves yet another aspect, which needs to be addressed in the arms control context: that of the passivity of the international community. The need to discuss this type of passivity and especially its effect on *policy* lies in the fact that religious injunctions do not operate in a vacuum. Their power to affect policy depends on how much weight is given to underlying values, such as the protection of human beings and the environment. The defence of values was not only an Iranian internal issue. It should have been the concern of all those aware of Iraq's use of CW. Giving priority to other concerns weakened the restraining effect of religious norms on Iran's CW policy. Even if the international community's passivity is regrettable, its lessons could still be used to make better, more humane decisions in the future.

Notes

1. <https://ijmes.chass.ncsu.edu/docs/TransChart.pdf>.
2. <https://www.icrc.org/ihl/INTRO/130?OpenDocument>.
3. <https://www.icrc.org/ihl/INTRO/150?OpenDocument>.
4. <https://www.icrc.org/ihl/INTRO/195>.
5. <https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=B0625F804A9B2A64C12563CD002D66FF>.
6. <https://www.un.org/disarmament/WMD/Bio/1925GenevaProtocol.shtml>.
7. OPCW, Chemical Weapons Convention, Genesis and Historical Development, <https://www.opcw.org/chemical-weapons-convention/genesis-and-historical-development/>.
8. <https://disarmament.un.org/treaties/t/bwc/text>.
9. Whereas the requirement 'just' can be found in earlier Shi'a law books, the qualification 'knowledgeable about his era' is a clear novelty and represents the political side of the involvement of the *ulamā'*.
10. It is interesting to note that in the 1979 version of the Constitution, the faqih was required to be *marja'-i taqlid*, a grand jurist who is the most learned in the field of jurisprudence and *ijtihad*, and also pronounces juristic verdicts (*fatwās*). This requirement was omitted from the later 1989 version of the Constitution.
11. MOHADDES, MOHAMMAD, interview, International Institute for Islamic Studies (Qum), March 19, 2016.

Disclosure statement

No potential conflict of interest was reported by the author.

Funding

This work was supported by the Suomen Kulttuurirahasto [grant number 2015].

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