

THE CHALLENGE OF FRAGMENTATION OF INTERNATIONAL HUMANITARIAN LAW REGARDING THE PROTECTION OF CIVILIANS- AN ISLAMIC PERSPECTIVE

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Abstract

With the rise of new challenges in the aftermath of 9/11 and the changing patterns of conflicts, the uniformity of international law has been questioned: a debate about the “regionalization” of humanitarian law has sprung to life. Questions have been raised about the validity of an Islamic particularism in the field of humanitarian law. In addition, extremists have presented a version of jihad that violates the Islamic interpretation of humanitarian law and justifies indiscriminate targeting of civilians. For these extremist intellectuals or ideologists of terrorism, civilians have become legitimated targets. The task of the modernist and liberal Islamic intellectuals is to deal with these distorted interpretations of Islam. This duelling between Islamic experts is illustrated in this article by looking at the distinction between civilians and combatants in law.

This article clarifies firstly the concept of Islamic humanitarian rules. It then explains the protection of civilians in Islamic humanitarian law. Eventually, the article analyzes the debate about permissible killings that has been fuelled by fundamentalists by referring to several concrete situations: the use of weapons of mass destruction; terrorism; and suicide attack. The author then seeks possible solutions to put an end to distorted warmongering interpretations of Islam by looking at the theory of the new hermeneutics of the Shari’a.

Introduction

The terrorist attacks perpetrated against the Twin Towers and the Pentagon on September 11, 2001 has had many outcomes, confirmed by the attacks in Mumbai in November 2008; one such outcome is the resurgence of an Islamic humanitarian approach supported by liberal and reformist Muslim intellectuals in response to deadly and indiscriminate attacks against scores of civilians. These intellectuals have given a new life to the argument according to which Islam is a religion of peace. In addition, they have elaborated a series of humanitarian standards to counter extremists’ distorted interpretations of Islam and Islamic law. Despite all these efforts, the deliberate killing of civilians in an indiscriminate fashion along with the non respect for the principle of proportionality, has led several experts, analysts and policymakers to label Islam a danger for humanitarian values. The massive targeting of civilians in spectacular attacks that have occurred since 2001 such as the Madrid and the London bombings, the daily attacks in Afghanistan and Iraq, and later the impressive attacks in Mumbai have begged the questions whether Islam is an ‘enemy’ of Western civilization and if Islam itself challenges humanitarian law. Consequently, a debate about the humanity of Islam and Islamic law has sprung to life.

While extremists have insisted on deliberately targeting civilians, many Islamic experts have reminded that Islam contains humanitarian values and that the distinction between civilians and combatants is one of them. The hard work of Muslim liberals has been constantly challenged by extremists’ doctrines and their readings of Islam. In practice, recent terrorist attacks have almost annihilated all previous and recent efforts to present Islam as a religion of peace. One of the outcomes is that liberal and reformist

Muslim intellectuals have to reassess their communication strategy to keep channels of communication with the West open in order to avoid the usual depiction of Islam as the religion of the sword. They have done so by initiating a debate about the regionalization of humanitarian law to highlight the diverse interpretations of humanitarian values that exist in the world. This is why we can speak of an Islamic humanitarian law, or at least of an Islamic approach to humanitarian law.

The Islamic law of war was shaped by the Prophet along the wars he had waged, then was expanded in the Post-Prophet period, in medieval Islam and in recent times;¹ Islamic legal sources frame the content of this branch of law.² Islamic humanitarian values have been referred to by States that have ratified international humanitarian documents such as the Geneva Conventions and thus do abide by international humanitarian law; an example is the Islamic republic of Iran that enforced both sets of laws during its war against Iraq (1980-1988). The issue, meanwhile, rests mainly with the use and the reference to Islamic law of war made by extremist groups like al Qaeda: indeed, they distort Islamic law of war, stripping it of its humanitarian content to fit an ideological agenda that justifies and spreads death. In addition to loosening Islamic humanitarian concepts, these extremist groups do not acknowledge the existence of international humanitarian law. This has consequences in the field on issues such as protection of civilians and the conduct of hostilities. Interpretations provided by extremist Islamist groups challenge the Islamic traditional distinction between civilians and combatants, which is part of the *jus in bello*. The argument of the proponents of the Verse of the Sword (Quran 9:5) is that the aim of war (*jihad al qital*) is to propagate Islam, the end justifying the means.³

This paper explores interpretations of Islamic law regarding humanitarian principles, conduct of hostilities (*jus in bello*) and distinction between civilians and combatants, and how extremists distort this law. This paper also analyzes prospects for conciliation between the Islamic legal system as interpreted by reformists and liberals, and international humanitarian law. The underlying argument of this paper is that Islam is a religion of peace that frames war as it occurs in human reality and temporality. This religion not only advocates peace but also limits war and actions in the battlefield.

¹ For a history of jihad, see e.g., M. Bonner, *Jihad in Islamic History: Doctrine and Practice* (Princeton, NJ: Princeton University Press, 2006).

² There are no branches of law as such in Islamic law: Islamic law is a system, an 'inseparable whole' that does not fall into branches. For further explanations about the structure of Islamic law, see e.g., M. A. Boisard, 'The Conduct of Hostilities and the Protection of the Victims of Armed Conflicts in Islam', 1: 2 *Hamdard Islamicus* (1978) pp. 3-17; Ayatollah M. Damad, 'International Humanitarian law in Islam and Contemporary International Law', in H. Salimi and H. Moshirzadeh, eds, *Islamic Views on Human Rights: Viewpoints of Iranian Scholars*, (New Delhi: Kanishka Publishers, New Delhi, 2003) pp. 253-293.

³ Quran 9:5: "Then, when the sacred months have passed, slay the idolaters wherever ye find them, and take them (captive), and besiege them, and prepare for them each ambush. But if they repent and establish worship and pay the *jizya* [the poor-due] then leave their way free. Lo! Allah is Forgiving, Merciful." The author uses the English translation of the Quran: F. Nikayin, *Quran: A Poetic translation from the Original* (Illinois: The Ultimate Book, Illinois, 2000).

I. Sources of Islamic Humanitarian Law

A. The Role of Islamic Law in shaping Humanitarian Standards

Successive interactions and wars between troops of Prophet Muhammad and other tribes forced the Prophet to elaborate laws of war. There is therefore a set of rules regulating an Islamic behaviour and pattern during war time. This law is made up of *siyars* (principles of international public law).⁴ The *siyars* about war, or *jihad* (the *qital* approach of jihad, so we speak of *jihad al-qital*)⁵, are extremely detailed and include laws of war, law of treaties and humanitarian rules. These rules find their roots in Islamic law and its interpretations. It is consequently necessary to know Islamic legal sources to understand how humanitarian rules and war rules were shaped.

The first source of Islamic humanitarian values is the *Quran*. Then there is the *Sunna* which is a compilation of the Prophet's words, decisions and actions, compiled in *Hadiths*. Many *hadiths* refer to war as the Prophet and his followers lived in times of tensions and had difficulties asserting the existence of Islam. The third source of law is *ijma*, the consensus of learned Muslim scholars, the *Ulemas* (educated scholars versed in Islamic studies), deciding together on a legal issue; the fourth one is human reasoning (*ray* for the Sunnis, *aql* for the Shiites) of the *Ulemas*. The process used to interpret this legal corpus called *Shari'a* is the process of *ijtihad*. The *Ulemas* who practice *ijtihad*, the exegesis of the *Quran* and the *Sunna*, and who issue a legal decision through *ijma* or human reasoning, are *mojtaheds*.⁶ The two main sources of Islamic law, the *Quran* and the *Sunna*, are then interpreted either by a group of *mojtaheds* who reach an *ijma*, a consensus on a legal matter, or by one learned cleric, a *mojtahed*, who will give a legal opinion, a *fatwa*. While in Shia Islam, there are *mojtaheds* interpreting the sources of Islamic law, the title of *mojtahed* is not fully applicable for the time being in Sunni Islam; there is indeed the belief that the gates of interpretations (*bab al-ijtihad*) were closed towards the end of the 11th century and that unlimited creative interpretation of the Islamic legal corpus is not acceptable. There is however a trend in Sunnism law arguing in favour of new interpretations and it rejects the closing of the gate of *ijtihad*; however, conservative interpretations tend to override.⁷ This means that in a Sunni context, wars are waged according to ancient interpretations of Islam. Far from being archaic, these interpretations are surprisingly close to modern war rules and humanitarian standards. However, one should keep in mind that even if Sunni are restricted by the interpretations of elders, they might raise

⁴ H. Kruse, *The Foundation of Islamic International Jurisprudence* (Islamabad, Pakistan Historical Society Press, 1956) p. 4; A. Zemmali, *Combattants et Prisonniers de Guerre en Droit Islamique et en Droit International* (Paris, Pedone éditions Paris, 1997), p. 33.

⁵ There are different sort of *jihad*, greater and lesser: *Jihad* is a determined effort to go beyond a problem against Satan, oneself or against an opponent. It can also be an argument, a financial struggle or a war (then it is called a *qital*).

⁶ J. Schacht, *An Introduction to Islamic Law* (Oxford, Clarendon Press, 1964), pp.1-5.

⁷ There is a lively debate in the Sunni world regarding this issue of the closing of the gates of *ijtihad*. See e.g., M. Q. Zaman, *The Ulama in Contemporary Islam: Custodians of Change* (Princeton, NJ, Princeton University Press, 2002); R. A. Masmoudi, 'Struggles Behind Words: Shariah, Sunnism, and Jihad', 21:2 *SAIS Review of Int. Aff.* (Summer-Fall 2001) pp.19-24; W. B. Hallaq, 'Was the Gate of Ijtihad Closed?' 16 *Int. J. Middle East Stud.* (1984) pp. 3-41; and K. A. Faruki, *Ijma and the Gate of Ijtihad* (Karachi, Pakistan, Gateway Publications C/O Thomas and Thomas, 1954).

some disagreements pertaining to the understanding of these interpretations: creation within the boundaries of precedents is accepted. This is why Muslim Classicists and some Muslim liberals (most liberals are either in favour of an opening of the gate of *ijtihad* or consider that the gates were never closed) come to different interpretations of how a war should be waged, based on the interpretations made in the past.⁸

B. Humanitarian Law and Sacred Legal Sources

The first step is to look at formal sources of Islamic law: the *Quran* contains several humanitarian standards mainly because of the historical context of the time (the Prophet was fighting several wars against Arab tribes to submit them or to defend his followers).⁹ Therefore, the *Quran* rules on the conduct of hostilities: 'Fight in the cause of God with those who fight against you, but do not commit transgression; for God dislikes those who transgress.'¹⁰ Another verse says

'Permission is given to those who fight because they have been wronged, and God is indeed able to give them victory; those who have been driven from their homes unjustly only because they said, "Our Lord is God"-for had it not been for God's repelling some men by means of others, monasteries, churches, synagogues and mosques, in which the name of God is much mentioned, would certainly have been destroyed. Verily God helps those that help Him - lo! God is Strong, Almighty - those who, if they are given power in the land, establish worship and pay the poor-due and enjoin what is good and forbid iniquity.' (*Quran* 22:39-41).

Therefore, one can refer to the *Quran* to find rules regarding the ways a war can be waged and will find several humanitarian standards, the most important guidance being 'do not transgress'.

The second source of humanitarian standards is the *Sunna*. A good example of a *hadith* regulating a humanitarian principle is 'Do not kill an old person, a child, a woman; do not cheat on the booty, do well: God likes the ones who act right.'¹¹ Another *hadith* reports that the Prophet said: 'Prisoners are your brothers and companions. It is because of God's compassion that they are in your hands. They are at your mercy, so treat them well as if you were treating yourself, with food, clothes and

⁸ There are different Muslim schools of thought regarding the definition of *jihad* and the definition of humanitarian principles. The categorization of Muslims intellectuals set up by Mustansir Mir regarding Muslim political thinkers is very helpful in our study case: there are the Classicists, the Apologists, the Neo-Classicists and the Modernists. The Classicists support the classical doctrine of *jihad* according to which Islam carries a universal political scheme which has to be realized through the *jihad*: *jihad* is therefore an instrument to establish an Islamic hegemony. The Neo-Classicists have renewed the concept of *jihad* and given it a new vigor and a better theoretical backdrop. Eventually, Modernists argue that *jihad* can only be defensive and that Islam is a religion of peace. See e.g., M. Mir, 'Jihad in Islam', in R. A. Messier et H. Dajani Shakeel, eds., *The Jihad and Its Times*, (Ann Harbor, Center for Near Eastern and North Africa Studies, University of Michigan, 1991) pp. 113-123.

⁹ Ayatollah M. Mottahari, *Jihad va Movared-e Mashruyat-e and Dar Quran (Jihad and Its Legitimacy in the Quran)* (Tehran, Islamic Culture and Relations Organization, Tehran, 1998).

¹⁰ *Quran* 2:190.

¹¹ Hadith quoted in H. Sultan, 'La Conception Islamique', in G. Abi-Saab et al., eds, *Les Dimensions Internationales du Droit Humanitaire* (Paris, Institut Henry Dunant / Pedone, 1986) p. 57, pp.47-60.

housing.’¹² Or ‘Do not be eager to meet the enemy but ask God for safety; yet, if you meet them, persevere and have patience; and know that Paradise is under the Shadow of Swords.’¹³ Another *hadith* reported by Abu Bakr says:

‘Remember that you are always under the looks of God and on the verge of death... Listen to me so that I can give you 10 orders that you have to respect scrupulously. When you fight for the glory of God, behave like men, never turn your back. But do not shed women, children and old people’s blood. Do never act with perfidy. Do not leave the right path. Do not mutilate. Do not destroy trees, do not burn houses, do not tear down fruit trees and do not kill the cattle unless you have to feed yourselves [...] when you meet monasteries and religious people [...] leave them alone.’¹⁴

The second formal source of Islamic law also contains many humanitarian standards. These two sources of law and the process of *ijtihad* have shaped what Islamic humanitarian law is today, mainly regarding the concept of war, or *jihad*.¹⁵

C. Islam as a Religion of Peace setting up War Laws and Humanitarian Standards

Reformist Muslims think of peace as the normal state of live.¹⁶ However war is a reality in the human realm because violence is inherent to human nature. Consequently, God did not rule out war but set up limits to it.¹⁷ *Jihad al qital* is to be avoided and is no good in itself; it can only be waged for good reasons.¹⁸ Therefore, although the distinction between *jus ad bellum* and *jus in bello* does not exist as such in Islam, we can speak of a *jus ad bellum* to justify the resort to violence. War is led only to maintain the balance of power.¹⁹ In this framework, a fair war is a defensive war relying on the principle of self defence.²⁰ *Jihad* is also necessary to protect Islam²¹ and the oppressed.²² Therefore the only reasons that justify going to war are when Islam is threatened, when an Islamic country is under attack or when Muslim people are oppressed. War cannot be led for the booty or for a heroic purpose.²³ Eventually, treaties have to be respected and honoured:²⁴ there can be no war if a peace treaty has

¹² Quoted in M.K. Ereksooussi, ‘Le Coran et les Conventions Humanitaires’, 503 *Rev. Int. Croix Rouge* (November 1960) p. 650, pp. 641-650.

¹³ Hadith reported by Bukhari and quoted by M. R. Ahmad Khan, *Islamic Jurisprudence* (Lahore, SH Muhammad Ashraf ed, 1978) p. 211.

¹⁴ Quoted in Sultan, *supra* note 11, p. 58.

¹⁵ S. Hashmi, ‘Interpreting the Islamic Ethics of War and Peace’, S. Hashmi, ed., *Islamic Political Ethics: Civil Society, Pluralism and Conflict* (Princeton, NJ: Princeton University Press, Princeton, 2002) pp. 194-215.

¹⁶ Quran 61:8.

¹⁷ Quran 2:216.

¹⁸ Khan, *supra* note 13, p. 210.

¹⁹ A. Rahim, *The Principles of Islamic Jurisprudence According to the Hanafi, Maliki, Shafi’I and Hanbali Schools* (New Delhi, Kitab Bhavan, 1994) p. 393.

²⁰ Quran 2:190 and Quran 22:39.

²¹ Quran 22:40.

²² Quran 4:75.

²³ J. Kelsay, *Islam and War: A Study in Comparative Ethics*, (Westminster: John Knox Press, 1993) p. 67.

²⁴ Quran 8:72.

been signed. Therefore humanitarian conventions such as the Geneva Conventions have to be respected.

As the distinction between *jus ad bellum* and *jus in bello* does not exist in Islam as such²⁵, the grounds for war and the legitimated means in warfare are intermixed. This said, if we have to compare Islamic warfare rules to our Western understanding and categorisation of war, Islamic law has developed mainly rules of *jus in bello*:²⁶ there are strict limits to the conduct of war, regarding the weapons, methods, tactics and targeting. The distinction between civilians and combatants is a key to the rules of conduct of hostilities.

This brief analysis demonstrates that there are humanitarian standards in formal sources of Islamic law, the *Quran* and the *Sunna*. It also demonstrates that far from being a religion of war, Islam considers war as a human reality that has to be regulated. One of the core principles of the regulation of war is the distinction between civilians and combatants.

II. The Notion and Protection of Civilians in Islamic Humanitarian law

A. The Distinction between Combatants and Civilians

Islamic humanitarian law does not differ much from international humanitarian law: the conduct of hostilities is regulated and there are restrictions on weapons, warfare methods and permissible targets. In addition, both legal systems distinguish between civilians and combatants, civilians being protected. This distinction lies at the very core of Islamic law:²⁷ it is forbidden to kill civilians.²⁸ This protection is also extended to medical personnel.²⁹ However, any civilian who plays a role in war (logistical, food provisions, weapons supplies or helping in mapping the war) will be considered as a combatant.³⁰ Islam does not provide a protection as detailed as in the Geneva Conventions and the Additional Protocols but it is always possible to infer such protection from Islamic sacred legal sources.

If there is a war, it has to be waged *fi sabil illah*, in the way of Allah, which means that divine principles and duties must be respected.³¹ This is the core principle of the conduct of hostilities. War should be waged according to this principle and 'the requirements of war should give way to humanitarian imperatives.'³² This means humanitarian principles found in the *Quran* and the *Sunna* should be enforced: Proportionality;³³ Humanity;³⁴ Compassion; Non discrimination; Dignity; Equality and

²⁵ Boisard, *supra* note 2, p. 3.

²⁶ Hashmi, *supra* note 15, p. 210.

²⁷ Khan, *supra* note 13, p. 211; Boisard, *supra* note 2, p. 8-9; Ereksoussi, *supra* note 12, p. 645.

²⁸ H. M. Zawati, *Is Jihad a Just War? War, Peace and Human Rights under Islamic and Public International Law* (Lewinston, NY, Edwin Mellen Press, Studies in Religion and Society, 2001) p. 89.

²⁹ Boisard, *supra* note 2, p. 10.

³⁰ H. Belkhodja, 'La Conception Islamique de la Guerre', in M. Torrelli, et al., eds, *Religion Et Guerre*, (Paris, Mame, 1992) p. 136.

³¹ H. A. Haleem et al. *The Crescent and the Cross: Muslim and Christian Approaches to War and Peace* (New York, MacMillan, New York, 1998) p. 67.

³² Damad, *supra* note 2, p. 253.

³³ Quran 16:126-128.

³⁴ Quran 5:32.

Fraternity;³⁵ and Justice.³⁶ In addition, among humanitarian standards that exist in Islamic law, one finds: prohibition of torture, killings and unnecessary sufferings; prohibition of excess and wickedness; Non combatants cannot be killed (women, children that are not warriors, slaves, servants, blind, incapacitated, old people, crippled people...); prohibition of mutilation of men; prohibition of killings or mutilation of animals; prohibition of destruction of herds; prohibition of destruction of religious symbols; prohibition of destruction of trees and harvests; prohibition of destruction of houses and cities and belongings; prohibition of expulsion from homelands; prohibition of rape; prohibition of blockade; prohibition of the use of massive destructive arms; Limitation of the Battlefield in time and space; prohibition of massacre and respect of the right to surrender; prohibition of acts of revenge on the civilians. In addition, genocide is a non respect of the humanitarian principle of equality.³⁷ The crime of torture and other ill-treatments are also forbidden as it is contrary to the principle of dignity.³⁸ These humanitarian rules are divine orders and may not be disrespected,³⁹ otherwise it shows a lack of faith (*kufr*).⁴⁰ The foundation of Islamic humanitarian law is therefore 'do not transgress.'⁴¹ Any war should be waged according to these key divine principles.

B. Muslim Intellectuals and the Distinction between Civilians and Combatants

Most Muslim jurists agree on this distinction between combatants and non combatants as even Classicists such as Seyyed Abdul al Mawdudi, a Pakistani political philosopher, respects this rule, while accommodating them to expand *jihad*.⁴² Dr. Wahbah al Zuhayli, a Syrian scholar, says that the legal rationale (*illa*) for not killing civilians in wartime is that they are not able to fight back or to harm Muslims;⁴³ To reinforce the difference between civilians and combatants, al Zuhayli explains that the verb *qatilu*, to fight, is reciprocal: therefore someone who doesn't enter a fight is disarmed and cannot be attacked.⁴⁴ This is the same reasoning as the Article 50 of the 1977 Additional Protocol to the 1949 Geneva Conventions: a civilian is a non combatant.

The Islamic reformist approach of the distinction between civilians and combatants has much in common with the Geneva Conventions, in particular with the fourth Geneva Conventions and with Additional Protocol I to the Conventions.⁴⁵ Therefore we

³⁵ Quran 4:1.

³⁶ Quran 16:90.

³⁷ M. S. El Dakkak, *State's Crimes against Humanity: Genocide, Deportation and Torture from the Perspective of International Law and Islamic Law* (Kuala Lumpur, A.S Noorden, 2000) p. 93.

³⁸ *Id.*, 152.

³⁹ Sultan, *supra* note 11, p. 51.

⁴⁰ Haleem, *supra* note 31, p. 69.

⁴¹ *Id.*

⁴² A. A. Mawdudi, *Human Rights in Islam* (Leicester, The Islamic Foundation, 2nd edition, 1980) p. 40.

⁴³ W. Al Zuhayli, *Athar al-Harb fi Al-Fiqh Al-Islami (The Influences of War upon Islamic Law)* (Beirut, Dar al-Fikr, 1966) pp. 500-1

⁴⁴ *Id.*

⁴⁵ For more about the similarities between Islamic law and international law collide, see e.g., M. A. Boisard, 'On the Probable Influence of Islam on Western Public and International Law', 11:4 *Int. J. Middle East Stud.* (July 1980) pp.429-250; A. Van Engeland, 'The Differences and Similarities between

can speak of an Islamic ethic for saving lives rather than the Islamic ethic of killing that extremist groups prefer to advocate.

Since the rise of extremist Islamic groups, there has been a real effort from Muslim intellectuals and jurists to have this distinction respected.⁴⁶ These Muslim actors have condemned all terrorist attacks by reminding that civilians are not legitimate targets. For example, Sheikh Muhammad Sayyid Tantawi, the Grand Imam of Al-Azhar Mosque and Grand Sheikh of Al-Azhar University, issued a fatwa in 2001 to condemn the hostage taking in the Philippines: 'Islam rejects all forms of violence. These acts of violence have nothing to do with Islam.'⁴⁷ He added that 'a civilian cannot be taken to be accountable of someone else's actions.'⁴⁸ Besides, he added that no one can reject his own criminal responsibility by invoking Islam and pretend to take hostages in the name of *jihad*. Maulana Wahiduddin Khan, an Indian intellectual, says that

'to take a hostage is to catch hold of innocent persons by availing of some opportunity and then start bargaining from there. This practice was prevalent in ancient times but it has now assumed a tactical form. This is a great sin and cowardice and is entirely forbidden in Islam as you tend to take revenge from persons for your grievances other than from the concerned person. To bully any innocent person on the basis of some excuse is entirely unjustified in Islam.'⁴⁹

Abdulaziz bin Abdallah Al-Ashaykh, Chief Mufti of Saudi Arabia, declared:

'You must know Islam's firm position against all these terrible crimes. The world must know that Islam is a religion of peace and mercy and goodness; it is a religion of justice and guidance...Islam has forbidden violence in all its forms. It forbids the hijacking of airplanes, ships and other means of transport, and it forbids all acts that undermine the security of the innocent.'⁵⁰

This demonstrates that high authorities in the Muslim world do condemn terrorists' distorted interpretations of Islam that lead to the targeting of civilians.

However most of these intellectuals accept the reality of war and casualties among civilians as it is almost impossible to wage a war without accidents.⁵¹ For example, al Zuhayli says fortresses can be brought down even if it causes the killings of civilians.⁵² Muslims do not intend to kill them but by running to hide in the fortresses, civilians

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⁴⁶ See: "Islamic Statements against Terrorism," <<http://www.unc.edu/~kurzman/terror.htm>>.

⁴⁷ Islam Online, 'Top Islamic authority in Egypt slams Philippine hostage-takers' in *Islam Online*, 15 March, 2000 <<http://www.islam-online.net/iol-english/dowalia/news-2000-may-15/topnews2.asp>>.

⁴⁸ *Id.*

⁴⁹ Maulana Wahiduddin Khan, 'Hijacking - A Crime' <<http://www.jammu-kashmir.com/insights/insight20000215a.html>>.

⁵⁰ Abdulaziz bin Abdallah Al-Ashaykh, 'Hajj Sermon', 2 February, 2004, <http://www.saudiembassy.net/ReportLink/Report_Extremism_May04.pdf>.

⁵¹ Zuhayli, *supra* note 43, p. 406.

⁵² *Id.*, p. 506-7.

have set themselves under the protection of the enemy and must bear the consequences of their choices. Besides, it is also the responsibility of the enemy if there are civilian casualties since this means the enemy was not able to protect its own population.⁵³ One should bear in mind that these are interpretations and that there are other interpretations of the same sources stating the opposite, which can sometimes create confusion. In addition, some interpretations might sound archaic and are actually often distorted: for example, the argument about the fortress has been used by Bin Laden to justify the attacks against the Twin Towers and the Pentagon. Al Qaeda argued that the Pentagon was a legitimate military target and the Towers were the financial fortresses of the United States. By working there, the population had set themselves under the protection of their government and were therefore associated with the so-called crimes committed by the latter. This was also an opportunity for al Qaeda to stress that the U.S. government was unable to protect its citizens, proof of the decadence of the system. There is therefore room for interpretation. A debate about permissible killings have sprung to life because of the concomitant rise of powerful terrorist groups and this potential for interpretation: this is why the traditional distinction between combatants and civilians is being challenged.

C. The Debate about Permissible Killings

Some have said that there is an influence and even congruence with time between Islamic humanitarian law and international humanitarian law. For example, Islamic opinions were issued about war crimes, mainly under the influence of international humanitarian law.⁵⁴ However, differences do exist, and not only because of extremist interpretations of Islam. For example the Verse of the Sword (*Quran* 9:5, *Ayat al-Sayf*) leaves very little doubt about its meaning: ‘Then, when the sacred months have passed, slay the idolaters wherever ye find them, and take them (captive), and besiege them, and prepare for them each ambush. But if they repent and establish worship and pay the jizya, then leave their way free. Lo! Allah is Forgiving, Merciful.’ This verse is one of the *Quran*’s passages quoted by extremist group to justify the use of jihad as a way to fight Unbelievers, or Infidels as they call them.⁵⁵ This verse has also given an argument to Western analysts who refer to it to demonstrate Islam is a religion of war. There is an important debate regarding the interpretation of this verse.⁵⁶ Arguing blindly that there

⁵³ M. al Shaybani, ‘Kitab al-Siyar al Kabir’, in M. Khadduri, *The Islamic Law of Nations* (Majid Khadduri translator, Baltimore: John Hopkins University Press, 1966) pp. 101-2.

⁵⁴ F. Malekian, *The Concept of Islamic International Criminal Law: A Comparative Study* (Boston: Kluwer, 1994).

⁵⁵ Osama Bin Laden et al., ‘Jihad against Jews and Crusaders’, *World Islamic Front Fatwa*, 23 February, 1998 < <http://www.fas.org/irp/world/para/docs/980223-fatwa.htm> >.

⁵⁶ Some historians remind that the Conquest led by the Muslims did not include systematic eradication, deliberate extermination, forced conversions, and/or expulsion of Non Muslims. Muslims have never believed that they were under obligation to exterminate non-Muslims. Another debate concerns the abrogation of this verse: for Muslim apologists, the Verse of the Sword was abrogated-nullified- by other verses that advocate peace. Some analysts also believe that verses of the Quran have to be understood by taking the historical background into account: at the time the Verse of the Sword was written, followers of the Prophet were being tortured, Islam was repressed and there were several assassinations attempts against the Prophet. Therefore the verse 9:5 speaks with hostility about Arab tribes because of their own violent behavior towards Muslim believers. Furthermore, all verses of the Quran have to be read also in

is no difference between the two legal systems is not an option: there are differences between the two systems that should be bridged.

There are also issues regarding interpretations made of the Quran: extremists have revived the Classicists' concepts of *Dar al-Islam* and *Dar al-Harb*.⁵⁷ The *Dar al-Islam* is the territory of peace, the domain of justice, and the domain of Islam whereas the *Dar al-Harb* is the territory of war where non Muslim nations are free to live long as they do not threaten Islamic countries. The additional interpretation made by extremists is that decadence in the West threatens the Islamic world and so does the physical presence in Muslims countries or the soft influence the West has over Muslims. Therefore the *Dar al-Islam* is endangered and self-defence is justified against those of the *Dar al-Harb*. The division between these two territories does not exist as such in the *Quran* or the *Hadiths*.⁵⁸ The existence of *Dar al-Islam*, house of peace, comes from

connection with other verses, and there are several peaceful verses advocating restraint and waging war as a last resort. In that light, it becomes quite clear that verse 9:5, and all others similar to it, is one of self-defense and not a carte blanche to kill all non-believers. Other analysts say that the verse of the Sword was written during the Medina period, when Islam was stronger which explains the war-like tone: the verse of the Sword dates from the Medina time. Since the Prophet met opposition at the time, he might have thought of more expedient ways of battling, such as forced conversion. To this, extremists respond that in situations when verses contradict one another, the early verses are overridden by the latter verses. So the chronological timing in which a verse was written determines its authority to establish policies within Islam: since the warmongering verses were written in the Medina period when the Prophet and Islam were established, they override the Mecca verses that are far more peaceful. Other analysts also opposed the Verse of the Sword to the following verse: "There is no compulsion in religion, for the right way is clearly from the wrong way. Whoever therefore rejects the forces of evil and believes in God, he has taken hold of a support most unshakable, which shall never give way, for God is All Hearing and Knowing." (2:256). The argument is that a Muslim has the power to decide whether he wishes to follow a religious ruling and he has the duty to distinguish the good from the bad: clearly killings of civilians even if non believers is bad, especially when this verse is read in connection with the rest of the Holy Book that advertises Islam as a religion of peace. The interpretation of the verse and its place in the Quran still give rise to many discussions and debates among experts of Islam, especially since Islamic terrorists rely on this verse to justify their actions.

⁵⁷ The scholar and legislator Abu Hanifa, who is also the founder of the Hanafi school of Islamic jurisprudence, has referred to this division in his writings.

⁵⁸ Sheikh Y. al Qaradawi, comment, 'Al-Shari'ah Wal-Hayah' (Islamic Law and Life), *Al-Jazeera Channel*, 9 May 1999: According to Youssef Qaradawi, the concept was introduced in the fiqh Hanafi (one of the four Sunni schools). However, according to the majority of scholar, this concept does not appear in the Quran or the Sunna. The concept is probably an interpretation resulting from the others' religions intolerance towards Islam at the time, in particular Christians' missionary efforts. For further analysis, see e.g., M. W. Hofmann, 'Muslims as Co-Citizens of the West... Rights, Duties & Prospects', <http://www.readingislam.com/servlet/Satellite?c=Article_C&cid=1153698300013&pagename=Zone-English-Discover_Islam%2FDIELayout>. One can find several other opinions that all sway away from this division of the world in two: As Hofmann explains, Imam Jafar al-Sadiq believes that "Muslims might serve Islam better when living among non-Muslims than when living only with Muslims". Al-Mawardi agrees. The Hanafi school that becomes more tolerant later accepts "the idea of pockets of *dar al-Islam* inside non-Muslim territories". Today, the majority of Islamic scholars agree upon a classification into three: *Dar al-Islam*, *Dar al-Harb* and *Dar al-Ahd* which gathers the countries that have diplomatic agreements and covenants with the Muslim nation. For further information about this division, see e.g., Sheikh Y. Al-Qaradawi, comments, 'Al-Shari'ah Wal- Hayah' (Islamic Law and Life), *Al-Jazeera Channel*, 6 February 2001. The notion of *Dar al-Ahd* is elaborated after the verse 4:92 of the Quran that deals with homicide: 'No believer shall kill another believer, unless it is an accident. If one kills a believer by accident, he shall atone by freeing a believing slave, and paying a compensation to the

the *Quran* (*Quran* 10:25) but the *Dar al-Harb* was invented by Classicists to justify a permanent state of war.⁵⁹ Liberal Muslims reject these types of interpretations that depict Islam as being intrinsically a religion of war. The scholar Muhammad Talaat al-Ghunaimi dismisses this division and replaces it with an Islamic ethic of saving lives.⁶⁰

In addition to conflicting verses and interpretations, the Islamic tradition is not unified on interpretations. The Classicists and Neo Classicists claim that the ethic of saving life is less important than the aim of *jihad* which is the universalisation and hegemony of Islam; not killing during *jihad* demonstrates a weakness and a lack of faith (*kufr*). These intellectuals are the ones of 'the sword' and they perceive *jihad* as a way to universalize Islam and fight perversion. This is how they justify the debate about permissible killings. In such case, humanitarian standards are either lowered or they disappear from extremist interpretations. Most Classicist and Neo Classicist authors approach *jihad* as a war of religion waged against the world to achieve the universality of Islam. *Jihad* is therefore a personal duty for each Muslim. As a consequence humanitarian standards are lowered: for example, the jurist Muhammad al Shaybani allows the killing of captives in some circumstances.⁶¹ The writings of the jurist Abu al-Hassan al Mawardi, although following the guidelines of the Prophet regarding civilians because they do not fight and that human shields should not be attacked, are not clear regarding prisoners of war.⁶² Humanitarian principles are limits that Classicists curb in the name of a purpose. However, they usually respect major guidelines set by the Prophet such as avoiding the killings of women and children. The difference with liberal, modernist or reformist Muslims is that Classicists do not have an expansive definition of these humanitarian standards and that an armed woman or an armed child is a legitimate target.⁶³

Neo classicists have consolidated the ideological background of Islamic political thought. Al Mawdudi is the most radical: *jihad* is at the centre of all his religious and political beliefs as it is the only way to achieve Islamic hegemony.⁶⁴ *Jihad* is both defensive and offensive.⁶⁵ He agrees on the existence of human principles such as the ones layed down by the Prophet and is proud of the existence of such principles within Islam.⁶⁶ He has however a rather narrow interpretation: humanitarian principles are to

victim's family, unless they forfeit such a compensation as a charity. If the victim belonged to people who are at war with you, though he was a believer, you shall atone by freeing a believing slave. If he belonged to people with whom you have signed a peace treaty, you shall pay the compensation in addition to freeing a believing slave. If you cannot find a slave to free, you shall atone by fasting two consecutive months, in order to be redeemed by God. God is Knower, Most Wise.'

⁵⁹ K. Abou El Fadl, 'The Rules of Killing at War: An Inquiry into Classical Sources', LXXXIX: 2 *The Muslim World* (April 1999) p. 149.

⁶⁰ M. Al Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (The Hague: Martinus Nijhoff, 1968), p. 184.

⁶¹ Al Shaybani explains that women and children captives should be taken as booty which means that they should not be killed, even if this is difficult for Muslims. On the opposite, if Muslims cannot bear the costs or transport of male captives, they can be killed: al Shaybani, *supra* note 53, p. 9.

⁶² A. H. Al Mawardi, *The laws of Islamic Governance* (London: Ta Ha Publishers, 1996) p. 192.

⁶³ See al Shaybani in J. Kelsay, 'Islamic Tradition and the Justice of War', in J. Kelsay, ed., *The Ethics of War in Asian Civilizations: Comparative Perspective* (Torkel Brekke ed., New York: Routledge, 2006) p. 96, pp. 81-110.

⁶⁴ A. A. Al Mawdudi, *Jihad in Islam* (Leicester: Islamic Publications, 7th edition, 2001), p. 19.

⁶⁵ *Id.*

⁶⁶ *Id.*, p. 39.

be respected as long as the enemy respects the same rules. If the other side does not respect the rules, total war should be waged.⁶⁷ The outcome of his analysis is the limits of prisoners' rights to the right not to be tied to be killed or not to be tortured with fire; he upholds negative definitions of humanitarian standards: he says nothing about treating prisoners of war fairly.⁶⁸

Sayyid Qutb, another Neo Classicist upon whom extremists heavily relied, has also a defensive concept of jihad. Jihad should universalize Islam:⁶⁹ Muslims are commissioned to enter into the battlefield, seize control of the political power and establish God's rule.⁷⁰ Humanitarian standards are hardly addressed in his thought. Abdul Rahman, a third source of inspiration for extremists, leads a jihad to remove unjust rulers and struggle against Western domination⁷¹ though he keeps some humanitarian principles.⁷² In general, humanitarian principles are respected as long as the enemy respects them, and they are limited to the strict minimum.⁷³ These approaches have consequences on a distinction between civilians and combatants and on the conduct of hostilities. As an illustration, some intellectuals justify the killing of minorities on Islamic lands then of civilians of the world.⁷⁴ These intellectuals' viewpoints are very important as they are today invoked and often distorted by terrorists.⁷⁵

The ideologues of al Qaeda and nihilist terrorist groups justify the killings of civilians by referring not only to Classicists' work but mainly to the *Quran*. Verses like the Verse of the Sword but also other verses supporting this verse are invoked: 'Fight them, and Allah will punish them by your hands, cover them with shame, help you (to victory) over them, heal the breasts of believers' (*Quran* 9:14); and 'O Prophet! Strive hard against the Unbelievers and the Hypocrites, and be firm against them. Their abode is Hell – an evil refuge indeed' (*Quran* 9:73).⁷⁶ For these extremist intellectuals or terrorist ideologists, civilians have become legitimated targets: Suleiman Abu Ghaith, a leader of Al Qaeda, has evaluated the number of Muslims killed in the world by the United States, and says that 4 million Americans should be killed in return.⁷⁷ Abd al-Aziz al Jarbou, a Saudi radical scholar, denounces the moral decadence of the United States and regards it as a source of perversion that has to be eliminated, justifying

⁶⁷ *Id.*

⁶⁸ *Id.*, p. 40-41.

⁶⁹ S. Qutb, *Milestones* (Damascus: Dar al –elam, 2000).

⁷⁰ S. Qutb, *Fi Zilal Al Quran (In the Shade of the Quran)* (Bayreuth: Dar al Shuruq, 1980).

⁷¹ A. Rahman, *The Present Rulers and Islam: Are they Muslim or Not?* (London: Al Firdous, 1990)

⁷² Mir, *supra* note 8, p. 118-19.

⁷³ A. M. Al Zarkawi, 'Lettre à Ben Laden et à Al Zawahiri', in Gilles Kepel, ed., *Al Qaida dans le Texte* (Paris: PUF, 2005) pp. 389-392

⁷⁴ J. D. Halevi, 'Al Qaeda's Intellectual Legacy: New Radical Islamic Thinking Justifying the Genocide of Infidels', 508 *Jerusalem Viewpoints* (December 2003).

⁷⁵ A. Al Zawahiri, 'La Moisson Amère: Les Soixante ans des Frères Musulmans,' in Kepel, *supra* note 73, p. 345.

⁷⁶ There is a debate regarding the reference to this verse: for some analysts of Islam, al Qaeda uses the Quran to justify the worse. For a summary of different viewpoints of the matter, see e.g., A. Eteraz, 'The Slayer Verse', <<http://eteraz.wordpress.com/2006/07/21/the-slayer-verse-95/>>.

⁷⁷ Georges W. Bush, 'Bush Casts War on Terrorism in Historic Terms', Transcript of the commencement address at the United States Air Force Academy in Colorado Springs, 2 June, 2004 <<http://www.washingtonpost.com/wp-dyn/articles/A9946-2004Jun2.html>>.

killings; he is supported by other scholars like Sheikh Hamud bin Uqla al Shuaibi, a Saudi scholar, and by Sheikh Ali al Khudeir al-Khudeir.⁷⁸ The argument is to widen the notion of combatants to civilians: the people living in the incriminated countries have ways of life that are not Islamic. Consequently, they are perverted by the system they belong to, and are part of it, which justifies targeting them. Besides, according to Sheikh Hamud bin Uqla, by voting in a democratic way, civilians accept the policies led by the governments and are therefore perceived as supporters of their perverted governments.⁷⁹ Sheikh Ali al Khudeir justifies the killings in the Twin Towers in 2001 because civilians working there were involved with capitalism and were working for the state or for offices linked to the system.⁸⁰ Therefore they were combatants representing indirectly their government.

These examples demonstrate the limits of working on similarities and common grounds between Islamic humanitarian law and international humanitarian law. These extremist interpretations do exist and anyone dealing with humanitarian law has to take them into account; There are many Muslims with different interpretations of the *Shari'a*; When setting up a dialogue or a conversation with these different trends of Islam, one must keep in mind that the discussion must include all aspects of Islam, even the most extreme. The aim of this discussion is to keep channels of communication open with the hope of changing these extremist interpretations regarding the conduct of hostilities. There should be no utopian approach: we will not influence distorted views of Islam but we should at least offer other readings so that all Muslims have a choice.

III. The Challenge of Weapons of Mass Destruction (WMD) and the Protection of Civilians

A. A New Challenge

Islamic law was developed at a time when modern lethal technologies and asymmetrical wars did not exist. Jurists have to use *ijtihad*, or have to rely on previous interpretations in case of Sunni countries, to interpret the legal sources in order to reach decisions regarding new types of weapons, methods and tactics of war.

Whilst Shia mojtaheds have a freedom of interpretation, Sunni mojtahed do not. It is in Iran that the debate about the use of the WMD is the most advanced, especially since the Islamic Republic of Iran has renewed its wish to use nuclear energy. There is an important discussion in Iran amongst *mojtaheds* and academics to know whether nuclear weapons are Islamic or *haram* (prohibited because non Islamic). For many intellectuals, weapons of mass destruction (WMD) are anti-Islamic because it kills civilians indiscriminately.⁸¹ As Ayatollah Yousef Sanei puts it: 'It is self-evident in Islam that it is prohibited to have nuclear bombs. It is eternal law, because the basic

⁷⁸ A. A. Al-Jarbou, *The Foundations of The Legality of the Destruction that Befell American* (Saudi Arabia), with an introduction written by Sheikh Hamud bin Uqla al Shuaibi book quoted in Halevi, *supra* note 74.

⁷⁹ Halevi, *supra* note 74.

⁸⁰ Unknown, 'Contemporary Islamist Ideology Authorizing Genocidal Murder', *Special Report No 25 The Middle East Media Research Institute*, 27 January, 2004 <<http://www.memri.org/sr.html>>.

⁸¹ Damad, *supra* note 2, pp. 265-66.

function of these weapons is to kill innocent people. This cannot be reversed.⁸² Besides, the battlefield is no longer limited.⁸³ In addition, since flooding, poisoning, starvation and fire were forbidden by *hadiths* during the conduct of hostilities to ensure the respect of civilians and humanitarian principles, we can assume such destructive weapons would be forbidden too.⁸⁴ Therefore by extension, WMD are *haram*. This refusal to use WMD is in agreement with the Additional Protocol 1 of the Geneva Conventions and is based on a hadith ‘Pity is the attribute of the great ones: if you kill, kill justly.’⁸⁵ The ex foreign affairs minister, Kamal Kharazi, said nuclear weapons were *haram*: ‘We consider using biological, chemical and nuclear weapons as an act of *haram*.’⁸⁶ This explains why Iran never retaliated to the chemical attacks from Saddam Hussein during the long war between Iraq and Iran.⁸⁷ Weapons causing unnecessary sufferings such as chemical weapons or nuclear or others are perceived by many authors as forbidden based on hadith that requires to kill justly and to be proportionate.⁸⁸ However, this does affect the principle of deterrence which is the argument of President Mahmoud Ahmadinejad: it is all right to detain WMD to deter potential opponents, but it is prohibited to use them. Liberal Sunni intellectuals agree with the principle of deterrence and the illegality of using WMD: al Zuhayli says that the use of such weapons is not fair and goes against humanitarian principles; however he is not against possessing nuclear weapons to enter the game of power in international relations as long as the principle of deterrence comes first.⁸⁹

These arguments are in accordance with the *Quran* that argues in favour of reason: the *Quran* states that all retaliatory acts by Muslims must be characterized by measure and proportionality. The verse 17:33 prohibits unfair killings: ‘And do not take any human being's life - that God willed to be sacred - other than in [the pursuit of] justice.’ As Louay Fatoohi says ‘there is a fundamental difference between the disciplined retaliation that the *Quran* permits and the emotive, irrational, and random revenge that can be seen in various conflicts around the world.’⁹⁰ The *Quran* says Muslims should always be reasonable, since it prescribes them to always search for a middle ground between what is right and wrong, and orders them to dislike extremism.⁹¹ The weaponry used in a war should be proportional to the necessities of war.⁹² Even al Mawdudi says that the aim of war is not the annihilation of a people or even the important diminution of an army.⁹³ There are rules in the conduct of hostilities such as the way force should be used only against the ones that are using force and the ones that

⁸² In R. Collier, ‘Nuclear Weapons Unholy, Iran says Islam Forbids Use, Clerics Proclaim’, *San Francisco Chronicle*, 31 October, 2003

⁸³ Haleem, *supra* note 31, p. 95.

⁸⁴ M. A. Draz, ‘Le Droit International Public et l’Islam’, 5 *Revue Egyptienne du Droit International* (1949) p. 202, pp. 194-209.

⁸⁵ Hadith cité par Damad, *supra* note 2, p. 267.

⁸⁶ AFP-Reuters, ‘Iran can’t use nukes forbidden by Islam’, *Daily Times Pakistan*, 09 June 2003 <http://www.dailytimes.com.pk/default.asp?page=story_9-6-2003_pg7_2>

⁸⁷ Collier, *supra* note 82.

⁸⁸ Damad, *supra* note 2, p. 266-67.

⁸⁹ Zuhayli, *supra* note 43, p. 48.

⁹⁰ L. Fatoohi, *Jihad in the Quran: The Truth from the Source* (Kuala Lumpur: AS Noorden, 2004).

⁹¹ Haleem, *supra* note 31, p. 97.

⁹² Zawati, *supra* note 28, p. 41.

⁹³ Al Mawdudi, *supra* note 64, p. 17.

are threatening. The others must be spared from the effects of war.⁹⁴ He comes back to this notion of deterrence: although WMD should not be used, he believes it is legitimate for Muslims to keep acquiring all kind of weapons despite the fact that Muslims are forbidden to enter arm trades: the reason is that Muslims are forced by Western powers to enter into arm trades and the duty to propagate Islam.⁹⁵ He relies on a verse of the Quran to justify this principle of deterrence: “And so prepare against them whatever force and war mounts you are able to muster, so that you might deter thereby the enemies of God.”⁹⁶ Most intellectuals agree however that to detain a nuclear weapon to deter and establish a balance of power is acceptable; striking is not.⁹⁷

B. The Will to Resort to the Use of WMDs

There is again a minority in favour of acquiring such weapons. Bin Laden once said: ‘If America used chemical or nuclear weapons against us, then we may retort with chemical and nuclear weapons. We have the weapons as a deterrent.’⁹⁸ Al Qaeda therefore follows al Mawdudi and most Muslim intellectuals in this notion of using the WMD as deterrent instruments; but he goes a step further when he says he might actually use such weapons. Extremist interpretations justifying the use of WMD, and in particular nuclear weapons, argue that the Quran says ‘whoever commits hostility against you, respond to him with a similar hostility. And act dutifully toward Allah, and know that Allah is with the dutiful’: it is therefore, as Bin Laden believes and interprets it, justified to use weapons of mass destructions when the enemy does so. Sheikh Nasser bin Hamed al Fahd also agrees to the use of such weapons and considers it as a right to response to the millions of Muslim deaths. He also explains that Americans did not hesitate to use these arms to kill civilians, women and children and called their deaths collateral damages; why would Muslims hesitate then?⁹⁹ It would even be an Islamic obligation, according to the Quran, to use the same weapons they have and use.¹⁰⁰ Al-Fahd said ‘If a bomb was dropped on them [i.e. the Americans] that would

⁹⁴ *Id.*, p. 15.

⁹⁵ *Id.*

⁹⁶ Quran 8:60

⁹⁷ Draz, *supra* note 84, p. 204.

⁹⁸ H. Mir, ‘Ben laden says he would reply with ABC arms to any Attack by America’, *Iran Press Service*, 10 November, 2001.

⁹⁹ N. H. Al-Fahd, *Risalah Fi ‘Istikhdam ‘Alisha aAl-Dammar Al-Shamil Dhid Al Kuffar* quoted in J. D. Halevi, *supra* note 74.

¹⁰⁰ Al Fadh was arrested and imprisoned in 2003. Afterwards, he appeared on television to withdraw several of his fatwas. He now condemns killings of civilians (<http://www.saudinf.com/main/y6381.htm>). A reason for his change of discourse might be the effect of prison, a genuine change of mind or a rejection of some groups’ attacks as being non valid. In addition, sometimes, Islamic scholars condemn terrorist acts or targeting of civilians, while having a dubious discourse. This complicates the situation. For example, Sheikh Yusuf Qaradawi from Qatar, often described as a radical who encourages terror, issued a fatwa with other scholars, Tariq Bishri from Egypt, Muhammad S. Awwa also from Egypt, Fahmi Huwaydi, Haytham Khayyat from Syria and Sheikh Taha Jabir al-Alwani from the U.S., saying: ‘All Muslims ought to be united against all those who terrorize the innocent, and those who permit the killing of non-combatants without a justifiable reason. Islam has declared the spilling of blood and the destruction of property as absolute prohibitions until the Day of Judgment... [It is] necessary to apprehend the true perpetrators of these crimes, as well as those who aid and abet them through incitement, financing or other support. They must be brought to justice in an impartial court of law and

annihilate 10 million and burn their lands to the same extent that they burned the Muslim lands – this is permissible, with no need to mention any other proof. Yet if we want to annihilate a greater number, we need further evidence...¹⁰¹ and

‘Although it is proven that the Prophet forbade the killing of women and children, if you collect these *hadiths* you will find that this is a prohibition against the premeditated killing of them. But if their being killed is the result of a surprise attack and a raid, and an inability to distinguish among them [i.e. the enemy under attack] then there is nothing wrong with it, and the Jihad is not called off because of the presence of the women and children of the infidels.’

Suleiman Abu Gaith, a Kuwaiti who is al Qaeda spokesperson, addresses the use of nuclear weapons as he wishes to kill 4 million American because ‘America is the cause of every injustice, harm and oppression which happens to Muslims. It is behind all the

[punished] appropriately... [It is] a duty of Muslims to participate in this effort with all possible means.’ The statement was issued on September 27, 2001 and published in The Washington Post on October 11, 2001: http://www.unc.edu/~kurzman/Qaradawi_et_al.htm. Concomitantly, he was quoted: ‘all of the Americans in Iraq are combatants, there is no difference between civilians and soldiers, and one should fight them, since the American civilians came to Iraq in order to serve the occupation. The abduction and killing of Americans in Iraq is a [religious] obligation so as to cause them to leave Iraq immediately. The mutilation of corpses [however] is forbidden in Islam.’ See: MEMRI, ‘Reactions to Sheikh Al-Qaradawi’s Fatwa Calling for the Abduction and Killing of American Civilians in Iraq’, 6 October, 2004) <http://www.memri.org/bin/articles.cgi?Page=subjects&Area=jihad&ID=SP79404#_edn1>. But later, he declared: ‘I have not published a Fatwa on this issue. At the Egyptian Journalists’ Union a few days ago I was asked about the permissibility of fighting against the occupation in Iraq, and I answered that it is permitted. Afterwards I was asked concerning the American civilians in Iraq and I merely responded with the question – are there American civilians in Iraq? It is a matter of common knowledge that in Fatwas such as these I do not use the word “killing” but rather I say “struggle,” which is a more comprehensive word than the word “killing” and whose meaning is not necessarily to kill. In addition, I have condemned the taking of hostages on a number of occasions in the past and have demanded that they be released and that their lives not be threatened.’ See al hayat quoted in MEMRI, *Reactions*. Therefore his position is far from being clear. Another example is The Muslim Brotherhood, in Egypt, which said it was ‘horrified’ by such attack and expressed ‘condolences and sadness’: ‘[We] strongly condemn such activities that are against all humanist and Islamic morals. ... [We] condemn and oppose all aggression on human life, freedom and dignity anywhere in the world.’ Al-Ahram Weekly Online, 13 - 19 September 2001 <<http://www.ahram.org.eg/weekly/2001/551/fo2.htm>>. This could be confusing since these Islamic actors are known to be radicals: The reason for their attitude is that there is a variety of Islam and of Salafism, and Salafist movements or branches can have contradictory attitudes: some are more jihad oriented, others are more moderated. In addition, many intellectuals and scholars have been arrested because of extreme Salafist actions and it has left them bitter. For more details, see e.g.: P. Halden, ‘Salafi in Virtual and Physical Reality’, *ISIM Newsletter* 13, December 2003 <<http://www.isim.nl/files/news13-38.pdf>>.

¹⁰¹ Excerpt from Sheikh Al-Fahd’s previous website <www.al-fhd.net> which was shut down. An earlier version of the website is <www.al-fhd.com> which can be viewed in the web archives, <<http://web.archive.org/web/20030208040030/http://www.al-fhd.com/>>; See also MEMRI Special Report No. 25, <http://memri.org/bin/articles.cgi?Page=archives&Area=sr&ID=SR2504>; quotation from M.H. Boccara and A. Greenberg, ‘Islamist Websites and their Hosts-Part II: Clerics’, 11 November, 2004 <memri.org/bin/articles.cgi?Page=archives&Area=sr&ID=SR3504>.

disasters which have happened and continue to happen to Muslims. It is steeped in the blood of Muslims and cannot hide that or cover it up.’¹⁰²

This debate demonstrates that Iran is far from being a danger to the international community, which should rather mobilize its intelligence services as to prevent al Qaeda from getting any form of nuclear products.

IV. Terrorism

A. The Deliberate Targeting of Civilians

Terrorism is a relevant issue as it targets civilians. In Islam, massive killings, blood bath and such sufferings are not acceptable and they are forbidden against civilians.¹⁰³ This prohibition is based upon the Quran that says ‘Do not take life, which Allah has forbidden, unless it be by right; if anyone, is slain unjustly, we indeed have given his heir the right of retribution.’¹⁰⁴

Extremists have another stance: they refer to Islamic legal sources as well as intellectuals such as Sayyid Qutb, Abul Rahman and al Mawdudi who all have radical views, but who do not validate terrorism; according to these Classicists, *jihad* should universalize Islam in a struggle against the West. Extremist ideologists take it from there and conclude that all means are legitimate to reach their aim. Their followers justify terrorist actions based on aggressive interpretations of *jihad* that they then distort to fit their ideological agenda. Terms used by Ayman al Zawahiri, the Egyptian ideologue of al Qaeda, or Abou Moussab al Zarqawi, the deceased Jordanian leader of terrorist attacks in Iraq, justify radical actions:¹⁰⁵ for example, al Zawahiri finds it legal to target Muslims non combatants.¹⁰⁶ Bin Laden rationalizes the mass killing of civilians because of the aim of *jihad* which is the universalisation of Islam. The outcome is the ‘adaptation’ or ‘deletion’ of humanitarian principles in the name of propagation of Islam. There are *fatwas* justifying the killing of civilians such as the one of Ali bin Khudeir al-Khudeiri who justifies the killings of civilians in the 11 September 2001 attacks:

‘It is legitimate to kill all infidel Americans [...] it is astonishing to mourn the [American] victims as being innocent. Those victims may be classified as infidel Americans which do not deserve being mourned, because each American is either a warrior or, a supporter in money or opinion, of the American government. It is legitimate to kill all of them, be they combatants or non-combatants like the old, the blind, or non-Muslims.’¹⁰⁷

¹⁰² S. Abu Gaith, ‘Under the Shadow of the Spears’, Translated and summarized by the Centre for Islamic Studies and Research website, June 2002 <<http://www.megastories.com/modules.php?op=modload&name=News&file=article&sid=55&mode=thead&order=0&thold=0>>.

¹⁰³ Hashmi, *supra* note 15, p. 171.

¹⁰⁴ Quran 17:33.

¹⁰⁵ Kepel, *supra* note 73, p. 3.

¹⁰⁶ S. Lacroix, ‘Ayman Al Zawahiri, le vétéran du Jihad’, in KEPEL, *supra* note 73, pp. 238-39.

¹⁰⁷ Ali bin Khudeir al-Khudeiri, ‘fatwa’, *al-Hayat*, 13 February, 2002.

In an audio recording, al Zarqawi says ‘Islam does not make target differences between militaries and civilians but between Muslims and unbelievers.’¹⁰⁸ Therefore it is legitimated to spill civilians’ blood. Eventually Saif al Din Al-Ansari, a senior Al Qaeda operative, justifies the killing of civilians on September 11: the people were working in a fortress that belong to the state and hosted enemy combatants therefore the protection of the civilians inside the towers was the task of the enemy’ s army.¹⁰⁹ He adds

‘Here we must note that fighting under such a [Islamic] banner does not necessarily mean that the fighting is free from every blemish and from every error. Fighting may take place under an Islamic banner and yet be marred by violations that impair the perfection of the form demanded in fighting in the Way of God. However, as long as these violations do not go so far as to affect the nature of the fight or turn it from its basic direction (the way of God), it is difficult for us [al-Qaeda] to deny such a banner the attribute of being Islamic.’¹¹⁰

While these extremists clearly have no respect for any humanitarian values stated in Islamic law, others tried to adapt them to their deeds: when Algerian extremists carried out their campaign of terror, they would cut throats so as to not to make their civilian victims suffer.¹¹¹ The result was however the same and the violation of the distinction between civilians and combatants was not smoothed by the methods used to kill civilians. These anecdotes demonstrate how distorted the interpretations of Islam and Islamic law made by these groups are.

B. The Mobilization against Distorted Interpretations of Islam to Justify the Killings of Civilians

These new interpretations of Islam are actually anti-Islamic and go against the Quran and hadiths such as

‘Fighting is of two kinds: the one who seeks Allah’s favour, obeys the leader, given the property he values, treats his associates gently and avoids mischief, will have the reward for all the time whether he is asleep or awake; but the one who fights in a boasting spirit, for the sake of display or to gain a reputation, who disobeys the leader and does mischief in the earth will not return with credit or without blame.’¹¹²

¹⁰⁸ S. Ulph, ‘Analyse: la lettre d’Al Zawahiri à Al Zarqawi est-elle un faux?’, *Terrorism Focus*, 18 Octobre, 2005.

¹⁰⁹ S. al-Din al-Ansari, ‘Ghazwa 11 September’, September 2002, 10-12, in Halevi, *supra* note 74.

¹¹⁰ S. al-Din al-Ansari, ‘So Fight in the Way of God’, *al-Neda* website (former al Qaeda run website), 14 May, 2002) in M. Scheuer, ‘Coalition Warfare: How al-Qaeda Uses the World Islamic Front Against Crusaders and Jews, Part I’, 2: 7 *Terrorism Focus* (2005).

¹¹¹ K. Bennoune, ‘As-Salamu Alaykum? Humanitarian Law in Islamic Jurisprudence’, 15 *Mich. J. Int’l L.* (1994) p. 605, pp. 605-643.

¹¹² Haleem, *supra* 31, p. 98.

In respect with these rules, Abdulaziz bin Abdullah al-Ashaykh, the mufti of Saudi Arabia, argued that ‘hijacking planes, terrorizing innocent people and shedding blood constitute a form of injustice that cannot be tolerated by Islam, which views them as gross crimes and sinful acts.’¹¹³ Muhammad Sayyid al-Tantawi, the rector of al-Azhar University in Cairo, issued a similar condemnation: ‘Attacking innocent people is not courageous; it is stupid and will be punished on the Day of Judgment [...]. It’s not courageous to attack innocent children, women and civilians. It is courageous to protect freedom; it is courageous to defend one and not to attack.’¹¹⁴ These calls for reason are hardly heard in a post 9/11 world divided between analysts in the West who present Islam as a threat to Western civilization, and Islamic radicals and terrorists who use Islam to fulfil a maddening ideological scheme. In that sense, terrorists are working outside the realm of Islam: they distort Islam and Islamic Classicists as to fit their agenda. It has also been said that in extremist readings of Islam, Islamists are the plaintiff, the judge and the executioner, and they execute innocents.¹¹⁵ One has to remember that the *Quran* advocate for justice, proportionality and compassion. The main issue for the time being is that extremists hold a megaphone and little attention is paid to liberal or reformist Muslims who advocate that Islam is a religion of peace.

V. Suicide Attacks

A. What legitimacy for Suicide Attacks? The Debate in Islam regarding Suicide Attacks

Suicide attacks against civilians are not a new phenomenon but it is now used extensively in the asymmetrical wars that oppose non-state actors and transnational groups to States. It has become a central element in the conduct of hostilities as the attacks in Iraq and in Israel demonstrate. The use of suicide attacks has triggered a debate within the Islamic legal thought since the eighties, when Hezbollah attacked the US and French military barracks.¹¹⁶ It was then justified as instruments used against combatants in an asymmetrical war. However, liberal Muslims already struggle with the notion of suicide that is forbidden in Islam and the massive attacks led against unarmed combatants who were ignorant of the fact they were under siege. The debate became more intense when suicide attacks targeted embassies. Hezbollah justified its actions by saying that civilians working for an enemy government were assimilated to combatants. But later other Islamic groups began to target civilians and minorities: the red line was crossed.¹¹⁷

Suicide is forbidden in the Quran as a verse says ‘Make not your own hand to contribute to [your] destruction; but do good; for God loveth those who do good.’ In addition, a hadith says that the Prophet declared ‘whoever commits suicide with piece of iron will be punished with the same piece of iron in the Hell Fire.’¹¹⁸ Bukhari reports

¹¹³ Q. Wiktorowicz and J. Kaltner, ‘Killing in the Name of Islam: Al-Qaeda’s Justification for September 11’, 10: 2 *M. East Pol. C. Journal* (summer 2003) p. 76, pp. 76-92.

¹¹⁴ Agence France Presse, 14 September, 2001.

¹¹⁵ Haleem, *supra* 31, p. 97.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Sahih Bukhari 2.445.

another hadith: ‘A man was inflicted with wounds and he committed suicide, and so Allah said: My slave has caused death on himself hurriedly, so I forbid Paradise for him.’¹¹⁹ Liberal Muslims easily find verses in the Quran that condemn: ‘No soul shall bear another’s burden.’¹²⁰ And ‘never kill yourself for God.’¹²¹ Eventually a hadith by Imam Ja'afar As-Sadeq says ‘A Muslim may fight and get killed [by the enemy] but will never shed his own blood.’¹²² Suicide is therefore interpreted as a sin and, by extensions it is interpreted as a crime when it is committed as to kill innocents. Suicide is an offence against life which is granted by God.¹²³

Again extremist interpretations of Islam encourage this type of action for the sake of *jihad*. Faith is evaluated by the acts of the believer. According to the extremist trend, human life has no value *per se* and one can show faith by himself/herself blowing up. *Jihad* is then seen as a self mortification process (in Sunni thought), a struggle against the self (the other definition of *jihad*) mixed up with struggle against external threats.¹²⁴ It basically grants a license to kill the enemies of Islam, including civilians. That is how suicide bombers become heroes in the mind of some people: there is collusion between the mission to propagate Islam, committing self sacrifice in the war field by blowing up, and leading the inner *jihad*. Martyrdom in Sunni thought consequently appears as the ultimate form of *jihad* since it is a congruence of all forms of *jihad* for the great good. This shows again how a concept can be interpreted in a distorted fashion to serve an ideology.

B. Justifications of Suicide Attacks

There are fatwas justifying human bombs targeting civilians: Al Qaradawi said in 1999: ‘I have issued a religious edict blessing the martyrdom operations in which given Muslim fighter turns himself or herself into a human bomb that casts terror in the hearts of the enemy.’¹²⁵ Sheikh Hamed al Ali, the leader of a radical Salafist trend, explained in April 2002 that killing Israeli civilians was acceptable because they were all combatants since all Israeli citizens have to fulfil military duties. Sheikh Suliman Bin Nasser Al Uwan issues a fatwa in May 2001 to say that suicide attacks in Chechnya were acceptable because it was a sacrifice for Allah’s martyrdom.¹²⁶ Killing in the name of Islam seems therefore justified to a small margins of Muslims that have interpreted Islam and Islamic law in a new light.

¹¹⁹ *Id.*

¹²⁰ Quran 17:15.

¹²¹ Quran 4:29.

¹²² Ayatollah M. Yazdi, ‘Martyrdom Operations: Q&A’ <<http://www.mesbahyazdi.org/english/contact-us/afq/contact4.htm>>.

¹²³ Quran 4:29-30.

¹²⁴ Mir, *supra* note 8, p. 122.

¹²⁵ Sheikh Y. Al Qaradawi, ‘Sheikh Yusef Al Qaradawi in his own words’, Interview with *Al Itsiklal*, August 1999.

¹²⁶ See the fatwa online: <<http://www.islamonline.net/fatwa/arabic/FatwaDisplay.asp?hFatwaID=35806>>.

VI. What Solutions to these Distorted Warmongering Interpretations of Islam?

A. The Propagation of Other Interpretations in the Field as a Key

This study demonstrates that there are several interpretations of Islam, Islamic law and the notion of *jihad*. The outcome is that hard-line interpretations made by ideologues of al Qaeda can be and ought to be challenged. Therefore, efforts should be focused on offering alternative interpretations and on making sure these other interpretations reach the population in the field: a *taleb* (a student of Islam) should be given several options when he goes to an Islamic school, so that he opts for the warmongering interpretations of Islam in full awareness. This said, another way to prevent Muslims from turning towards simplistic interpretations of Islam that encourage massive killings is to ensure a fair economic development everywhere: studies have proven that young people living in underdeveloped areas of the Palestinian territories sometimes turn to terrorism out of despair.¹²⁷ The economic factor is not enough to explain the spread of Islamic terrorism: most of the terrorists of 9/11 came from educated background and Bin Laden comes from a wealthy family. Their thirst for power and for Islamic hegemony has blinded them and it seems that only a moderate form of Islam that incorporates both elements of Islamic political thought and democracy can counter the danger of these extremist groups. These groups have to be brought under control since they benefit from the political mayhem that exists in countries like Pakistan, Afghanistan, Iraq and Somalia. Peace is therefore a major factor in the calculations. Eventually, Islamic interpretations of peace should be communicated to the world to put an end to this new dichotomy between a minority in the West that has turn into Islam haters and a minority in the Islamic world that respects Bin Laden: these actors constitute only a small group and therefore should be put back where they belong: the shadows. For the time being, Western peacemakers and reformist Muslims are cast in the shadows. They should be given an equal chance to advocate their stance.

Furthermore, it is essential to solve the internal tensions within Islam to ensure the enforcement of international humanitarian law that would have been legitimized by Islamic humanitarian law first. One way to solve this confrontation between the two sets of laws would be to find a middle path that would respect the new interpretations of Islamic humanitarian law while ensuring the respect of international law. The aim would be to avoid a clash of civilizations that could be fatal since it would have consequences in practice, for civilians and combatants, and for humanitarian workers. Encouraging a dialogue among civilizations on values that are common to Islamic law and international humanitarian law is therefore essential; it will however have a limited effect if Islam is not firstly reformed. How is that possible? There is a trend within

¹²⁷ See e.g., K. Cragin and P. Chalk, 'Terrorism & Development: using Social and Economic Development to Inhibit a Resurgence of Terrorism', *RAND Corporation*, 2003 http://www.rand.org/pubs/monograph_reports/2005/MR1630.pdf >; T. Bjorgo, *Root Causes of terrorism: Myths, Reality and Ways Forward* (New York: Routledge, 2005); Organization for Economic Cooperation and Development/ Development Cooperation Directorate, *A Development Cooperation Lens on Terrorism Prevention* (Paris: OCDE/OECD, 2003) book online <<http://www.oecd.org/dataoecd/17/4/16085708.pdf>>.

Islamic intellectuals working on a reformation of the interpretations (*ijtihad*) of Islamic law.

B. New Conduct of Hostilities: How to Deal with Reality?

According to Professor Abdullahi An Na'im, there can be only one humanitarian law, and it has to be international humanitarian law;¹²⁸ however this law should reflect all different legal traditions and not only the Euro-ethnic approach.¹²⁹ There is a need for a mutual and respectful interaction between Islamic law and international law. This interaction between the two legal systems should be aimed at maintaining the primacy of international law 'as the sole legal framework for international peace and security.'¹³⁰ An Na'im's argument is that there is an Islamic law way that is 'supportive of the possibility of international law.'¹³¹

There is no doubt Islamic humanitarian law forbids violence and extremism, and sets humanitarian rules during wartime. Reformist Islamic religious ethic insists on presenting Islam as a religion of peace and when at war, it respects international humanitarian principles.¹³² However there are ambiguities exploited by extremists. As An Na'im underlines, this is not proper to Islam but to all political ethics. Meanwhile, it is true that regarding Islam in the post 9-11 context, questions arise.¹³³ Therefore, according to An Na'im we should use the peaceful trend among Islamic scholars¹³⁴ and Islamic humanitarian law should be perceived as a positive contribution to the history and development of humanitarian law. This is extremely important since liberal and reformist Muslims need legitimacy to keep struggling with extremist interpretations of Islam: this is why new interpretations of Islam are able to counter extremists' arguments. Two interpretations of Islam, the extremist and the reformist, must struggle to win the 'hearts and minds' of the Muslim population, and everything must be done for the liberal and reformist interpretation based on humanitarian principles to win this battle. How does this struggle between two interpretations of jihad, peace and humanitarian values occur? There is a need for liberal and reformist Muslims to integrate universal human rights values as well as international humanitarian values in their interpretations of Islam and Islamic law as to complete current Muslim standards. This would ensure compatibility between universal humanitarian standards and Islamic standards, proving the extremists wrong and persuading Muslims in the field that there are other interpretations of Islam. It would also avoid a regionalization of Islam and a fragmentation of international law since Islamic humanitarian values would be compatible with international standards while upholding the Islamic identity.

¹²⁸ Abdullahi An Na'im, Presentation at the American Society of Comparative Law and Law and Society Association, Annual Meeting 2004, Atlanta <<http://www.aals.org/am2004/islamiclaw/international.htm>>.

¹²⁹ A. An Na'im, 'Toward an Islamic Hermeneutics for Human Rights', in A. An Na'im, ed., *Human Rights and Religious Values: An Uneasy Relationship* (Amsterdam: Rodopi, 1995) pp. 229-242

¹³⁰ An Na'im, *ibid.*

¹³¹ *Id.*

¹³² Ab. An Na'im, 'Islamic Ambivalence to Political Violence: Islamic law and International Terrorism', 31 *Ger. Yb Int'l L.* (1988) p. 307, pp. 307-336.

¹³³ *Id.*, p. 326.

¹³⁴ *Id.*, p. 328.

C. The Need for a New Islam: The Hermeneutics of the *Shari'a*

According to An Na'im, the enforcement of Islamic law is fine as long as it remains between the international boundaries.¹³⁵ It means that enforcing Islamic rules of war and humanitarian rules in an archaic framework and traditionalist interpretations is not acceptable. It is necessary for Islam to have a new look at the world, and there is a need for a renewed and more modern process of interpretation (*ijtihad*) of the *Shari'a*. *Shari'a* should be freed from traditional and conservative interpretations. *Mojtaheds* should be free to produce new interpretations of Islam and their approach should be influenced both by Islamic law and universal human rights and humanitarian law standards. These new and modern interpretations of Islamic law should ensure compatibility between Islamic norms and international humanitarian law. This means that Sunnism should be opened to *ijtihad*. It also means that the *Dar al-Harb* concept and the interpretation of *jihad* as aggressive war must be reassessed because they are warmongering. The principle of *ijtihad* encourages to think and to use human reason to solve issues. There is therefore the need for open-minded *mojtaheds* with modern views whose legal decisions and reasoning take root into reality and take into account the context. They can adapt Islam to universal human rights and international humanitarian law. For issues related to terrorism and political violence, *mojtaheds* should refer to morality and ethics to condemn such actions. It is a complicated but important process as it is respectful of Islamic legal methods and international law at the same time. With time, there will be an alignment of Islamic humanitarian standards over international humanitarian law since the two sets of law have already so much in common.¹³⁶

This solution gives Islam a chance to reform itself from inside, by 'insiders' instead of enforcing rules upon Muslims. It also allows Liberals to confront extremists' theories to prove them wrong. With these new interpretations, there is therefore no need for Muslims to repudiate their religion and beliefs. Thanks to a new hermeneutics of the *Shari'a*, the ambivalence between Islamic humanitarian values and international values would then be resolved in favour of international law, and there would be no more room for distorted warmongering interpretations of Islam. There is however one big obstacle: Sunnis are still debating whether the gates of *ijtihad* were closed or not. This issue has to be settled first before Sunnis *mojtaheds* can offer new interpretations of humanitarian law. This is why reforming Islam will be a long process. In addition to this matter, there is no Islam but Islams.¹³⁷ Islamic law is not a local custom because there is no such thing as one interpretation of Islamic law.¹³⁸ There is no unique leading figure of authority that has emerged to create order. In addition, this system relies on the good will of all parties involved: conservatives had put a rein on their ideas and have to be willing to let reformists talk. The new hermeneutics involved a dialogue and compromises that are not always acceptable: while it is fine in the field on human rights

¹³⁵ *Id.*

¹³⁶ Van Engeland, *supra* note 45.

¹³⁷ Y. Yazbeck Haddad, 'Operation Desert Storm and the War of Fatwas', in M.K. Masud, ed., *Islamic Legal Interpretation and their Fatwas* (Cambridge: Harvard University Press, 1996) p. 300, pp. 297-309.

¹³⁸ M.H. Mendelson, 'The Formation of Customary International Law', 272 *Recueil des Cours* (1998) pp. 268-293.

where the theory of the new hermeneutics was first tested¹³⁹ to discuss and negotiate over freedom of speech, it is not acceptable to negotiate on rights during war time. This means that Islam might have to include some humanitarian standards even though there is a huge gap between the Islamic and the universal approaches to the concept. To solve all these tensions, there should be an emphasis on the cultural legitimacy and the cross cultural dialogue: each society should have a debate over humanitarian principles to grant it a local legitimacy, whether it is a cultural or a religious one; in addition, all societies should engage in cross cultural dialogues once they have debated at home. This would ensure a bottom up universality rather than a universality imposed by the international community. Again, this solution has its limits: while the notions of cultural legitimacy and cross-cultural dialogues work very well in the field of human rights, it is far more delicate to have a bottom-up approach to war regulations. This should be done by taking all cultures into account.

Conclusion

Conduct of hostilities is severely regulated in Islam and is very pragmatic; however with the rise of extremist nihilist transnational groups taking new Islamic stances, these rules of war have been shattered. It is essential now for Islamic intellectuals to establish order in these interpretations and take over thanks to a modern interpretation of Islam and Islamic law. It is urgent to give a prompt reply to these extremists' interpretations of Islam as to de-legitimize them and this could be done only by the adherence to international humanitarian law. To adhere to this international system, Islamic law needs to be reformed.

The recrudescence of nihilist terrorist groups such as al Qaeda or the former troops of al Zarqawi's in Iraq has an impact on warfare methods: these groups use weapons, tactics and methods that target anyone anywhere. These extremist Salafist interpretations are countered by different Muslims intellectuals.¹⁴⁰ The task of these Islamic intellectuals is to deal with various issues such as the conciliation of Islamic humanitarian law with international humanitarian law; create new modern interpretations of Islamic law; and face new challenges in conduct of hostilities like rape, terrorism, weapons of mass destruction, torture, assassination and guerrilla insurgency.¹⁴¹ It is consequently essential for Islamic intellectuals to solve these issues and to give them a proper Islamic response so that experts of international humanitarian law would know how to address these issues based on this Islamic expertise.

¹³⁹ Van Engeland, *supra* note 45.

¹⁴⁰ Salafism is a Sunni school of thought. Salafists believe that the predecessors, the pious ancestors, are exemplary models. They base their creed on the following hadith by Muhammad: "The people of my generation are the best, then those who follow them, and then who follow the latter (which has been understood as meaning the first three generations of Muslims). Therefore Salafists enforce an Islam that is the one of the Prophet's time. Not all Salafist movements encourage the use of violence.

¹⁴¹ A. K. Al Fadhli, *Rebellion and Violence in Islamic Law* (Cambridge, UK: Cambridge University Press, 2001); S. H. Hashmi, 'Saving and Taking Life in War: Three Modern Muslim Views', 89: 2 *The Muslim World* (April 1999) p. 158, pp. 158-180.