

Nuclear Fatwa and International Law

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Abstract

One of the most serious international crisis in recent years that has involved majors powers in in long round of negotiations is the dilemma of Iranian nuclear program. While western powers, in particular the United States of America, accuse Iran of developing the capability for nuclear weapons, Iranian high officials categorically deny these accusations insisting that their nuclear program is totally peaceful and designed for civilian purposes. One effort to build confidence and create more transparency on the peaceful character of nuclear program the Fatwa, known as Nuclear Fatwa, issued by the Supreme Leader of the Islamic republic, Ayatollah Khamenei, banning the production and use of nuclear weapons. The Supreme Leader who has the ultimate authority over other branches of the state, and is the commander in chief of the armed forces of Iran, explicitly declared this principal based on Islamic teachings and beliefs. The Nuclear Fatwa delineates that the production and use of the nuclear weapons are prohibited in Islam. The Fatwa which in reality is Iran's formal policy with regard to the weapons of mass destruction is based on the Islamic principles and edicts derived from the formal sources of the Islamic legal and jurisprudential system. In other words, the Nuclear Fatwa is an edict deduced from those formal sources and as a result, has special legal effects in Iranian legal system. This paper seeks to study the content and the nature of the Nuclear Fatwa in the light of the Islamic jurisprudence, the status of the Fatwa according to the Iranian constitution and practice, and in particular its status under international law as a unilateral statement made publicly by a head of state.

Key words: Nuclear Fatwa, ayatollah Khamenei, weapons of mass destruction (WMD), Islamic humanitarian law, jurisprudence, Islamic edicts, and unilateral act.

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Introduction

One of the most serious international crisis of recent years that engaged the majors powers in long round negotiations with Iran was the dilemma of nuclear program which has resulted in economic and financial sanctions against this country. When Western countries accused Iran of policy of concealment regarding its nuclear program and its efforts to pursue nuclear weapons capability,⁽¹⁾ Iranian high officials categorically denied these accusations insisting that their nuclear program is totally peaceful and designed for civilian purposes.⁽²⁾ One effort to build confidence and create more transparency on the peaceful character of its nuclear program is issuing a Fatwa, known as Nuclear Fatwa, by the Supreme Leader of the Islamic republic, Ayatollah Khamenei, banning explicitly the production and the use of nuclear weapons. This fatwa is in reality Iran's the formal policy with regard to WMD⁽³⁾ and Iranian nuclear negotiators also rely on it in their formal negotiations. Significantly, the foreign ministry of the Islamic Republic has declared Iran's willingness to transform the fatwa, "into a legally binding, official document in the UN" (Mousavian, 2013:147).

Concerning the nature of nuclear fatwa, three analyses are presented (Alidoust, 1392 S.H.). First, Supreme Leader's statement is neither fatwa nor an "authoritative Hukm", but an executive tactic for managing the nuclear issue that hinders the accusations against Iran in this regard. Second, this Fatwa is an "authoritative Hukm", based on the public provisional interests and is valid as long as these interests are present. Third, this fatwa is a primary edict of Islam based on

Islamic principles and rules derived from the Holy Quran, and the Sunnah (Practice), i.e. speeches and conducts of the Holy Prophet of Islam and Shi'ite Imams.

The last analysis is the hypothesis upon which we believe that Nuclear Fatwa is a "social fatwa" by which a primary edict of Islam on the basis of formal sources of Islamic legal and jurisprudential system is declared and thus, has legal effects in Iranian legal system. Accordingly, based on article 4 of the Iranian constitution any law and regulation contrary to the Islamic principles and edicts is *null and void*.

In this paper we are going to consider the content and the nature of Nuclear Fatwa and its position in the Islamic jurisprudence: (1), the Fatwa as a declaration of a fundamental principle of the Islamic humanitarian law (2), the status of the Fatwa and its legal effects according to Iranian constitutional law (3), and finally the status of the Fatwa under international law (4).

1. Content and Nature

The Supreme Leader of Iran, Ayatollah Khamenei, in his different speeches has repeated his opinion about the prohibition of the use of WMD, especially the nuclear weapons. Despite claims that the Nuclear Fatwa may be changed (Tabatabai, A., 2013), this article argues that the nature and effects of this fatwa, is declaration of a primary and unchangeable edict of Islam.

The Supreme Leader has clearly explained his fatwa as an official policy of the State, for last ten years in the following words:⁽⁴⁾ "Atomic bomb not only kills enemies, but also takes the life of those who are not enemies. [...] This indiscriminate killing is against our belief in the Islamic System" (Khamenei, 2004). "We are not in pursuit of nuclear weapons [...]. Possessing nuclear weapons runs counter to political and economic interests of our country and is against clear edicts of Islam" (Khamenei, 2006 (A)). "We regard use of nuclear weapons to be in contravention with Islamic edicts and we have said this explicitly and publicly. People of Iran are against these

weapons, both on the basis of our Islamic faith and outlook toward life, and because of common sense and wisdom” (Khamenei, 2006 (B)). "Iran has repeatedly declared that **it** is opposed to the production and use of nuclear weapons on fundamental religious grounds" (Khamenei, 2008). "According to our religious beliefs, use of these weapons of mass destruction is forbidden and "haram" (Khamenei, 2010). "We believe that using nuclear weapons is haram and prohibited and that it is everybody's duty to make efforts to protect humanity against this great disaster" (The Center for Preserving and Publishing the Works of ..., 2011). "The position of the Islamic Republic of Iran concerning "prohibition of manufacturing and use of atomic weapons" is based on our religious belief [...]. The Islamic Republic of Iran regards use of nuclear and chemical weapons as a cardinal and unforgivable sin" (Khamenei, 2012). and "Iran has not decided to build nuclear weapons, [...] and this decision is based on the belief that building nuclear weapons is crime against humanity" (Khamenei, 2013).

In addition, almost two decades ago, the ex-leader and founder of the Islamic Republic, Imam Khomeini, had a similar stance on the matter: If they produce more nuclear weapons, the world would be destroyed and much more damages would be suffered by nations. All writers, journalists, scholars and scientists throughout the world should enlighten the people of the world about this danger so that the masses of people will stand up against these two major nuclear powers themselves and prevent the proliferation of these weapons (The Resident Representative of ..., 2012).

It is obvious that the formal policy of Iran does not depend on personal and temporal opinion of the present leader, Ayatollah Khamenei, but it is based on religious beliefs and Islamic humanitarian principles and values. Then, there is no difference between legal opinion and verdict of the ex-leader and present leader of Iran. Due to its importance, Nuclear Fatwa is repeated in several occasions between 2004 and 2013 and has a special credibility and

legal effect in the Islamic Republic's legal and political system.

In Islam, there are four sources from which Muslim jurists (Mujtahids) derive religious laws or rulings, and upon which they base their "fatwa". The first is the Holy Quran, which is the direct and literal word of God, revealed to the Prophet Muhammad (pbuh). The second source is the Sunnah (tradition), which contains anything that the Fourteen Innocent Ones (the Prophet Muhammad (pbuh), Fatima and the Twelve Imams) said, did or approved. The third source is Ijma (consensus of the jurists), meaning that if the jurists of a previous generation have all agreed on a certain issue, while their consensus was discovering the opinion of one of the Fourteen Innocent Ones, it is regarded as a source (Valaei, 1380 S.H.: 44). Finally, Aql (the intellect) is an independent source, according to which what aql deduces, permits and orders to, is permitted by the Sharia.

If regarding a specific question no edict is found from the four sources, then Muslim jurists perform what is known as "ijtihad". This means that they use "their own logic and reasoning to come up with the best answer according to the best of their ability" (Questions about Islam, 2015) and to derive a religious presumptive ruling concerning the question (Valaei, 1380 S.H.: 36). In Islamic jurisprudence, "every law issued by God and declared by the Great messenger of God" (Jafari Langroudi, 1368 S.H.: No 1939) is called an edict.⁽⁵⁾ There are three categories of religious edicts (Hukms) in Shi'ite jurisprudence: judicial verdict, authoritative Hukm, and fatwa. The article briefly explains each of them to clarify the notion of Nuclear Fatwa.

By judicial verdict, we mean the decision issued by a judge in order to settle a dispute between the parties; for example according to the rule of possession, the judge issues a verdict for the benefit of the party who takes possession (Gorji, 1369 S.H.:286). In order to prevent and settle the disputes that might appear between individuals in the society, in case they violate their respective rights towards each

other, there are certain Hukms called "witness and judgment" (Gorji, 1369 S.H.:173). In fact, "the judge issues a judicial verdict and not an executive Hukm" (Khomeini, 1357 S.H.:109). It is clear that the Nuclear Fatwa is not a judicial ruling.

An "authoritative Hukm" is a social and political rule issued by the Islamic leader in order to protect the public interests, taking into consideration the expediency or corruption of the things and the prevailing conditions in the society. The power of the Islamic leader to issue an "Authoritative Hukm" is like the power of other heads of states acting in state of emergency and taking into consideration the provisional interests. Authoritative Hukm is similar to the executive and emergency powers of the President of the USA in time of war and national crisis.⁽⁶⁾ The distinguished scholars gave the following definitions for an "authoritative Hukm".

"Authoritative Hukm" is an edict issued by religious authorities based on the right bestowed by God to the Islamic leader in the light of which he can issue and change a Hukm.. Moreover, in making legislation, he takes expediency or corruption of matters into consideration (Khomeini, Sahifeh, vol. 20:170). Modern executive orders are issued for protection of public interests by the Islamic leader. These are social edicts which consider social and public interests into consideration, though they might be harmful to certain individuals. Issuing such edicts are not only a part of the authority of the head of state, but also a logical and intellectual manner according to which the interests of the society prevails on that of individuals (Mostafavi, 1388 S.H.:305).

Thus, an "authoritative hukm" is issued when a fully qualified mujtahid (jurisprudent), at the head of an Islamic government, considers the general principles of divine law, as well as the specific political and legal system and the current condition of his society, and issues a legal ruling for all people, for a specific contingency, or for an individual. When a mujtahid (jurisprudent) derives a legal ruling concerning a given issue by using sources of Islamic jurisprudence

and the method of *ijtihad* (legal deduction), it is called a *fatwa*. Jurisprudents define *Fatwa* as following: *Fatwa* is declarative of a divine edict that belongs to a general issue (Najafi, 1981:100). *Fatwa* is an opinion given by a jurisprudent, either on a general or a particular issue, in order either to settle a dispute or to do another matter, like ascertainment of sighting the new moon (Jafari Langroudi, 1378 S.H., vol. 4:2767). *Fatwa* is a declaration of the general edicts for the public, like the (famous) *fatwa* banning smoking (Mostafavi, 1388 S.H.:291).⁽⁷⁾

According to these definitions, a *fatwa* is a generally applicable religious ruling concerning a particular issue that is derived from the Islamic sources with recognized methods of legal deduction (*Ijtihad*). Indeed, it is not but the declaration of a primary or secondary Islamic edict.⁽⁸⁾ The *Fatwa* issued by the Supreme Leader of the Islamic Republic (Guardian Jurist) about prohibition of the production and use of the nuclear weapons, is an Islamic primary edict based on religious sources concerning an important social and governmental issue. On the other hand, until now, other jurisprudents have not issued a *fatwa* permitting the use of WMD, but all the jurists who expressed their opinion in this regard, issued a *fatwa* banning use of nuclear weapons. In their messages or lectures, expressed in a national conference on "Nuclear Jurisprudence" in Iran, some Iranian jurists expressed their opinions about unlawfulness of the use of WMD as follows:⁽⁹⁾

Grand Ayatollah Sobhani: Considering the Islamic principles about mankind and his dignity, the use of nuclear weapon is absolutely forbidden and it cannot be used even for deterrence. [...]. According to the Islamic rules concerning *Jihad*, it is not permitted to use unlawful means and methods of warfare such as cutting off water from the enemy, poisoning and polluting their water, disturbing their elderly and monks, and following those who are deserting..." ("Nuclear Jurisprudence" Conference, 2014)

Ayatollah Mohsen Faghihi: The prohibition of production,

stockpiling and use of the WMD is considered as a primary edict of Islam and does not need any deep arguments, the fatwa of the Leader being in fact the declaration of God's real edict stipulated in the Holy verses and the hadiths" ("Nuclear Jurisprudence" Conference, 2014).

Thus, nuclear fatwa is timeless, ever-lasting and having roots in centuries-old religious sources. Moreover, the fatwa is not dependent on provisional expediency. Considering fatal effects of the WMD including nuclear weapons, using them not only endangers the lives of enemy combatants, but also civilians and this is considered as corruption on the earth that is unlawful in Islam. There is a principle in Islamic jurisprudence according to which, "if the Almighty God orders something that requires certain means and devices, those devices must be permitted ones; in order to accomplish a religious ideal, we must use permitted devices" ("Nuclear Jurisprudence" Conference, 2014). Based on this analysis, it is clear that Nuclear Fatwa is a primary religious edict and has certain following characteristics: It is not negotiable even by one who issued the fatwa; It depends on sources underpinning it and those sources prohibit any kind of weapons of mass destruction; It is an eternal edict not depending any time or place (Alidoust, Nuclear Jurisprudence Conference, 2014).

II. Islamic Humanitarian Law

The Nuclear Fatwa is not but the declaration of the Islamic humanitarian law principles concerning the means and methods of warfare. In other words, the right of Islamic state to choose these means and methods is not unlimited, a principle recognized after about 14 centuries by the international humanitarian law. Islam as a religion which speaks to all people of the world, recognizes and respects human dignity,⁽¹⁰⁾ freedom of human being from all forms of despotism, defense of human rights and establishment of justice.⁽¹¹⁾ Such a school has a clear approach towards war and use of different types of weapons and fighting methods and Nuclear Fatwa is a

declaration in this regards.

In Islam peaceful co-existence with other human societies is presumed as a primary principle (Habibzadeh, 1386 S.H.: 421-432). God Almighty orders Muslims towards peace, "And if they incline to peace, then incline to it [also] and rely upon Allah..."⁽¹²⁾ Unfortunately, some radical terrorists and takfiri groups like ISIS⁽¹³⁾ through their inhuman and anti-Islamic conducts and behaviors and by committing crimes against humanity have paved the way for misunderstandings about this divine religion whose goal is to save the human societies. Constantine Virgil Gheorghiu, ex-Minister of Romania and a priest, elaborates on religious laxity and peaceful coexistence of the holy Prophet of Islam with followers of other religions stating: Any one of founders of previous religions has not treated followers of other religions as leniently as Muhammad (pbuh). Muhammad (pbuh) agreed with broad-mindedness that followers of other religions live in Medina beside Muslims and assured that no one would persecute them (Virgil Gheorghiu, 1343 S.H.: 206).⁽¹⁴⁾ In the first years of Islam, it was the peaceful treatment and behavior of Muslims towards Christians, not their military abilities that brought the victory and the conquest of Spain. Regarding the co-existence of Muslims with Christians, Arnold, a European orientalist, asserts: It is the fact that peaceful religious policy of the conqueror Muslims towards the Christianity was the most effective factor in facilitating their dominance over the territory of Spain, as well as developing and expanding Islam (Quoted from Amid Zanjani, 1354 S.H.: 220).

In Islamic jurisprudence, there are general rules and principles which place a number of restrictions on Islamic government in choosing means and methods of warfare. Islam considers indiscriminate attack as inhuman, and rejects intimidation and killing of civilians by any type of weapons and methods of warfare. Here some Islamic principles with regard to treatment of civilians during a war will be mentioned and analyzed. Indiscriminate attacks are against the spirit and objectives of the concept of jihad in Islam which aims to defend

Islamic territories and Muslims's dignity as well as developing religion (Pourseif, 1385 S.H.: 84) and religious freedoms (Motahari, 1368 S.H.: 30). In a saying (ravayat), it is mentioned that before dispatching an army, the holy Prophet Muhammad (pbuh) ordered his followers on manner of fighting, "Do not kill the elderly, women, children, passengers and monks who live in caves" (Allameh Majlesi, vol. 97: 25). The prophet (pbuh) also said:

A powerful and aggressive people once waged war on a weakened tranquil people and God helped the latter to overcome their enemy, but the victors abused and oppressed the vanquished, thereby incurring the wrath of God to the day of resurrection (Mohaghegh Damad, 2005: 397-398). One fundamental principles in the international humanitarian law is specified in article 35 of the first Protocol Additional to the Geneva Conventions of 1949, according to which, "in any arm conflict, the right of the parties to the conflict to choose methods and means of warfare is not unlimited", and "it is prohibited to employ weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering" (Protocol (I), 1977: art. 35). Even if early Muslim jurisprudents were not aware of weapons capable of causing excessive damages, the general rules of Islam prohibit excessive killing. In this regard the Holy Quran says: And do not kill the soul which Allah has forbidden, except by right. And whoever is killed wrongfully, We have given his heir authority, but let him not exceed limits in killing. Indeed, he has been supported [by the law] (Quran, Al-Isra: 33).

The Prophet Muhammad is reported to have said to a group of men dispatching to a battle, "If you come across so and so, burn them both" (Tirmidhi, vol. 2: 298). But when the group was preparing to leave, the Prophet said, "I ordered you to burn those two, but it is the Lord alone who punishes men by fire of the hell. So if you find them, kill them" (Sarakhsi, vol. 3: 214). According to Mohaghegh Damad, "this change of mind on the part of the Prophet from burning to killing constitutes a tradition of proscribing injuring the enemy with a

weapon that causes unjustified pain" (Mohaghegh Damad, 205: 400). It is reported also from the Prophet that "fairness is mandatory. If you kill, do it properly" (Mohaghegh Damad, 205: 400).

At the time when there was no modern WMD, such as biological and nuclear weapons, obviously the issue was not mentioned and debated in Islamic legal and jurisprudential sources. In particular the opinion of the Great Messenger has not been explicitly cited on the issue. Meanwhile, the prohibition of transgression as a primary principle in Islam is a general and absolute principle that encloses any non-conventional weapons including WMDs. The Islamic jurists have explicitly prohibited use of certain arms as poisonous weapons that are among today's non-conventional weapons. This prohibition includes all kinds of WMDs, since it is a general principle that in Islam use of any kind of weapon that irritates, bothers or kills innocent people and animals and destroys trees and environment, is forbidden. The prohibition of aggression is a general rule that includes use of any unconventional weapons and WMD.

The prophet and Imams of Shiites have prohibited such means and methods of warfare. It is reported in Hadith (saying) known as "Sakuni's Hadith" that the Prophet has forbidden spraying poison in the heathen regions (Tusi (Shaikh), Tahdhib al-ahkam, 1407 A.H.: 143; Najafi, 1981, vol. 21: 67; Hurr Ameli, 1409 A.H., vol. 15: 62). On the basis of this hadith, Shaikh Tusi, a great Shiite jurist, has issued his fatwa according to which, "spraying poison in the land of the pagans is not permitted" (Tusi (Shaikh), Al-Nehayah, 1407 A.H.: 293). Other jurists also have followed him and issued almost the same fatwa: "It is permitted to fight and kill the infidels by different kinds of arms, except by the poison. The spray of poison in the heathen regions is not permitted" (Hilli (Mohaghegh), 1412 A.H.: 8; Khoe'i, 1410 A.H.: 371). Using poison is a taboo, not because of this substance itself, but because use of it will massacre innocent people, and thus this principal can be generalized to all kinds of WMDs. Ayatollah Sadr, a great Islamic jurist, states: However

"Sakuni's hadith" concerns with the prohibition of the poison, but the poison has not any relevance from jurisprudence point of view, and this prohibition includes any kind of non-conventional weapons (Sadr, 1414 A.H.: 385).

In explaining the holy verse 60, surah Al-Anfal, which orders Muslims use any amount of force against enemy,⁽¹⁵⁾ some interpreters believe that use of force means use of different types of weapon without considering any limitation to that. As a result, they authorize providing and stockpiling all types of weapon (Mousavian, 2013: 152). But, all jurisprudents prohibit using WMD due to their possibility of killing women, children and the elderly (Tusi (Shaikh), Al-Nehayah, 1407 A.H.; Allameh Hilli, 1915: 911). This prohibition is decisive and legally binding. According to contemporary Muslim jurisprudents, one can deduce from Islamic jurisprudence sources that using WMD out of the battlefield and against civilians is strictly prohibited. All jurisprudents have issued fatwa on the prohibition of killing children, women and the elderly. Use of WMD including nuclear weapons, which kills civilians indiscriminately, is one example of such killing, and there is no doubt in its prohibition. Thus, in Islam the production and use of WMDs, whose function indiscriminate destroy of both military and civil targets, is prohibited and nuclear fatwa is not but the declaration of a primary principle and edict of Islam with regard to the illegality and prohibition of such of weapons.

III. Iranian Constitutional Law

Based on Islamic Republic Constitution, Nuclear Fatwa has clear effects on Iranian political and legal system. As a primary edict it can override all laws and regulations and as the Supreme Leader's order it is legally binding on all. According to the Article 4 of the Iranian Constitution, all Islamic Republic's laws and regulations must be based on Islamic principles. Accordingly, any decision or act that contradicts these principles is null and void.⁽¹⁶⁾ As mentioned previously, Nuclear Fatwa is in fact a primary Islamic edict and

according to the Iranian Constitution all laws and regulations passed by the Islamic Consultative Assembly (Parliament) or executive power should not be in contradiction with it. It is important to note that all legislations passed by the legislature must be referred to the Guardian Council of the Constitution to be examined on their compatibility with the Islamic principles and the Constitution.⁽¹⁷⁾ As six Faqih (jurisprudents) members of the Guardian Council are, according to the Article 91 of the Constitution⁽¹⁸⁾, appointed by the Supreme Leader, they would examine the compatibility of legislation passed by the Parliament with the Fatwa issued by the Leader. Therefore, any law or regulation that permits or orders production of any kind of WMDs, in particular nuclear weapons will be declared by the Guardian Council invalid as it contradicts both Nuclear Fatwa as a primary and binding edict and Islamic Republic's Constitution.

According to the Iranian Constitution, the Supreme Leader (Guardian Jurist) has the ultimate authority over the legislature, the judiciary, and the executive powers, which function under his supervision in accordance with the Constitution (Iranian Constitution, art. 57), and, "shall assume all the powers of the wilayat al-amr (Guardian Jurist) and all the responsibilities arising therefrom" (Iranian constitution, art. 107). In other words, the Supreme Leader has powers and responsibilities in order to delineate, "the general policies of the Islamic Republic of Iran after consultation with the State Expediency Council" and to supervise over the proper execution of these general policies (Iranian constitution, art. 110, paras. 1-2). The Supreme Leader signs, "the decree formalizing the election of the President of the Republic by the people", and dismiss "the President of the Republic, with due regard for the interests of the country, after the Supreme Court holds him guilty of the violation of his constitutional duties, or after a vote of the Islamic Consultative Assembly testifying to his incompetence on the basis of Article 89 of the Constitution" (Iranian Constitution, art. 110, paras. 9-10).

According to the Article 176 of Iranian constitution, a Supreme

Council for National Security is established in order to, "safeguarding the national interests and preserving the Islamic Revolution, the territorial integrity and national sovereignty". The Supreme Council, with a high ranking position in the structure of the State is presided over by the President of the Republic, but it is under control and supervision of the Supreme Leader in two ways: first, five of thirteen members of the Council are appointed directly or indirectly by the Leader. The Supreme Leader nominates directly two representatives and three others members of the Council, i.e. chief of the Supreme Command Council of the Armed Forces and the highest ranking officials from the Armed Forces and the Islamic Revolution's Guards Corps, appointed in virtue of their functions (Iranian Constitution, art. 176). They are under control of the Leader as he is Supreme Commander of the Armed Forces and has the authority to declare war and peace, to appoint, dismiss and accept resignation of, "the chief commander of the Islamic Revolution Guards Corps" and, "the supreme commanders of the armed forces" (Iranian Constitution, art. 110, paras. 4-6). Second, the Supreme Council determines "the defense and national security policies" as one of its main responsibilities "within the framework of general policies determined by the Leader" (Iranian constitution, art. 176). In addition, all decisions of the Supreme Council "shall be effective after the confirmation by the Leader" (Iranian constitution, art. 176).

Therefore, it is clear that because of ultimate authorities of the Supreme Leader over other branches of the state and public institutions, particularly in the field of defense and national security, the Nuclear Fatwa is binding on all and is not transgressible.

IV. International Law

With respect to international law, the content of Nuclear Fatwa can be considered as manifestation of Iran's long tradition of participating in international treaties governing the conduct of war, in particular regarding the prohibition of WMD. While these instruments have

contractual or customary character, Nuclear Fatwa is a unilateral declaration capable of creating legal obligations for Iran.

The validity of certain acts of states are recognized in international law not for their contractual or consensual character but for the fact that they are manifestations of the unilateral intention of a subject of international law. In fact, there are many ways in international law in which acts and conducts of states may create legal effects (Brownlie, 1998: 642), and one of them is formulating unilateral declaration. According to a definition offered by a working group, created in 1996 by the International Law Commission (ILC), on the topic "unilateral acts of States", a unilateral declaration is, a unilateral statement by a State by which such State intends to produce legal effects in its relations to one or more States or international organizations and which is notified or otherwise made known to the State or organization concerned (ILC Yearbook, 1999: para. 589).

Meanwhile, unilateral declarations of states are not among the sources of international law according to the article 38 (1) of the Statute of the International Court of Justice (ICJ), but under certain circumstances, they may acquire legally binding force and give rise to international obligations for the formulating state. Based on the ICJ's decision in the 1974 Nuclear Tests case, these circumstances are the intention of the formulating state to create a legal obligation and the announcement given publicly by persons authorized to engage the State (ICJ Reports, 1974: 267-268, paras. 43, 46, pp. 472-473, paras. 46, 49; Shaw, 2008: 122). But according to the Guiding Principles applicable to unilateral declarations of States adopted by the ILC in 2006, "to determine the legal effects of such declarations, it is necessary to take account of their content, of all the factual circumstances in which they were made, and of the reactions to which they gave rise" (ILC, 2006: 371, art. 3).

Taking into consideration the Guiding Principles, Nuclear Fatwa is a unilateral statement made publicly by the Supreme Leader, as the head of the Islamic Republic, and manifests, "the will (of Iran) to be

bound".⁽¹⁹⁾ It has legal effect because of its content and the factual circumstances in which it has been made. This includes long-held position of Iran against development of WMD, Western countries' accusations about the eventual military aspects of the Iranian nuclear program which was repeatedly denied by Iran and as well as the round of negotiations between Iran and 5+1, and the positive reactions of the 5+1 countries.⁽²⁰⁾

The fact that the Nuclear Fatwa is not formulated in writing but is issued orally in several occasions and in form of the Supreme Leader's speeches⁽²¹⁾ does not affect its legal status, as, "it is generally accepted that the form of a unilateral declaration does not affect its validity or legal effects" (ILC, 2006: 370, art. 1). The ILC has recognized the orally formulated unilateral declarations (ILC, 2006: 374, art. 5) and also the 1969 Vienna Convention on the Law of treaties has recognized the existence and the legal force of the international agreements in non-written form, even if it does not apply to such agreements (Vienna Convention on the Law of Treaties, 1969, art. 3). In the Nuclear Tests case, the ICJ emphasized that, [...] with regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, (...). Thus the question of form is not decisive (ICJ Reports, 1974: 267-268, para. 45, p. 473, para. 48).

Meanwhile, Nuclear Fatwa has taken written form when on August 2005, the Iranian Government in letter to the IAEA referred to Ayatollah Khamenei's fatwa stating that, "the production, stockpiling and use of nuclear weapons are forbidden under Islam and that the Islamic Republic of Iran shall never acquire these Weapons" (Iran's Statement, 2005). The Fatwa was also relayed to the Secretary-General and the President of the Security Council of the United Nations in 2010 by Iran's Ambassador to the UN, Mohammad Khazaei (UN Official Document No. A64752-

S2010203, 2010).

The content of Nuclear Fatwa can be considered as manifestation of Iran's membership in international instruments regarding the prohibition of WMD and the obligations resulting from them. Since the late 19th century, Iran has been party to almost all agreements which restricts the use of poison, chemical and biological weapons including the 1899 and 1907 Hague Conventions (with respect to the Laws and Customs of War), the 1899 Hague Declaration (IV, 2) (concerning Asphyxiating Gases), the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other gases, and of Bacteriological Methods of Warfare, the 1972 Biological and Toxic Weapons Convention, and the 1993 Chemical Weapons Convention (Bucht, et al, 2003: 7). Following will briefly explain the detail of Iran's membership and the obligations based on such international instruments.

Iran was the first state in the Middle East which started its peaceful nuclear program in 1957. It signed the Non-Proliferation Treaty in 1968 and ratified it in 1970.⁽²²⁾ It also signed safeguard agreement with IAEA in 1973 and extended it for unlimited period. That is while one of its neighboring countries, Pakistan, together with Israel has not acceded to the Treaty. As one commentator states: Despite many speculations that Iran is looking for nuclear weapons, the country is a member of the NPT and has repeatedly denied any intention of acquiring nuclear weapons. It has, however, long been involved in developing nuclear technology (Salsabili, 2013: 8).

Since 1974, Iran has actively taken part in the NPT review conferences aiming at strengthening the disarmament system and agreements reached by the nuclear States. The Resolution proposed by Iran in 1974, in order to establish a Nuclear Weapon Free Zone (NWFZ) in the Middle East, was approved by the United Nations General Assembly (Davenport, 2013). Iran criticized the nuclear-weapon States, during the 2010 review conference, their failing to

comply with responsibilities laid out in the 1995 decisions and the 13 practical steps agreed to in 2000. The Islamic Republic called on the 2010 review conference to assess and evaluate the implementation of these steps and decisions and expressed support for preparing and adoption of a convention banning nuclear weapons. Iran also called on the nuclear-weapon states to refrain from: research and development of nuclear weapons, any threat of use of nuclear weapons against non-nuclear-weapon states, modernization of nuclear weapons and related facilities, deployment of nuclear weapons beyond national borders, and maintaining nuclear weapons on hair-trigger alert. (PrepCom for the NPT Review Conference, 2009)

In 1974, Iran initiated the formation of a nuclear-weapons-free zone in the Middle East, sponsored that year by Egypt (Stevens and Tarzi, 2000). The idea of a Middle East as a NWFZ was first codified in the 1991 UN Security Council ceasefire resolution that ended the first Persian Gulf War. Addressing a UN nuclear disarmament conference on the sidelines of the General Assembly, Rouhani, the current President of the Islamic Republic and the then leader of the Non-Aligned Movement (NAM), said, "Almost four decades of international efforts to establish a nuclear-weapon-free zone in the Middle East have regrettably failed" and "urgent practical steps towards the establishment of such a zone are necessary." (Tehran Times, 2013)

Iran has acceded to Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925) in 1929.⁽²³⁾ Having 50000 chemical weapons victims from Iran-Iraq war, the Islamic Republic is the main victim of chemical weapons (Sourosh, 1992). Almost two decades after Iran-Iraq war (1980–88), the victims still suffer from wounds by chemical weapons. While Iraqi army used chemical gases in war fields and even in non-military and residential places (Dobbs, 2002; Kessler, 2013), Iran, being a Member State of Geneva Protocol of 1925 and abiding to Islamic teachings and human values, refrained

from taking countermeasures. During the War, the then Iranian leadership, Imam Khomeini, declared repeatedly that it did not retaliate in kind against Iraq's CW attacks because of the prohibition on the use of poison in Islam. (Ali, 2001: 51)

During Paris conference of 1989, Iran objected to, and condemned the international community for being silent against Iraq's use of chemical weapons and persuaded the world countries to conclude Chemical Weapons Convention (CWC). As one of the 18 Member States of Disarmament Committee, Iran played an active role in negotiations for the conclusion of the Convention and the establishment of Organization for the Prohibition of Chemical Weapons and signed the CWC on January 13, 1993, the first day that it was open for signature, and ratified the Convention on November 3, 1997, as the 82^d Member State.⁽²⁴⁾

Iran signed Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons in 1972 and ratified it in 1973. According to this Convention, development, production, stockpiling and transfer of bacteriological (biological) and toxin weapons are forbidden except for peaceful purposes. During the review conferences of this Convention, Iran was one of the most active Member States pursuing to strengthen its substantial principles and supervising procedure. The main proposal of Iran was to explicitly prohibit in the title and Article 1 of the Convention the "usage" of biological and microbial weapons (Gharib Abadi, 1392 S.H.). On the opening day of the Fourth Review Conference, Iran submitted his unannounced proposal to amend the BTWC, arguing that in its present form it does not "contain specific stipulation banning the use of these barbaric weapons" and that the Review Conference "provides the first opportunity, following the conclusion of the CWC, to address this serious shortcoming". (BWC/CONF.IV/CRP.1, 1996; BWC/CONF.IV/COW/WP.2, 1996) The U.S.A. showed the most severe opposition against the strengthening of the Convention. (Bucht, et al, 2003: 25-29)

Iran has been very active in disarmament fora relating to international CBW treaties (Bucht, et al, 2003: 30) and has stated a clear and consistent policy against chemical and biological weapons. This is a matter both of its religious objection to indiscriminate weapons and of its international legal commitments. Iran's membership in the above mentioned three main international instruments concerning the WMD and its initiation of formation of a NWFZ in the Middle East show clearly its formal policy and legal obligations in this regard. Nuclear fatwa is not but the declaration and reaffirmation of these obligations in form of a unilateral statement by the Supreme Leader, the head of State, who has the ultimate authority in determining the general policy of the Islamic Republic regarding the defense and national security of the state, in particular the nuclear program.

Conclusion

The Islamic Republic of Iran has a special governing model within political systems. According to its constitution, members of the Parliament and the president are elected directly by the people. The Ministers are appointed by the President after they receive MPs vote of confidence. Significantly, Islamic Republic's religious and political leader enjoys a particular position whose conduct, function and leadership are controlled and supervised by a special council named Assembly of Experts. Based on the Constitution, general policies of the state are prepared and ordered by the Supreme Leader and all governmental bodies are obliged to observe them. Parts of these general policies concern foreign policy of the Islamic Republic. The peaceful nuclear activity is one important issue in Iran's international relations. The sole and ultimate authority to taking final decision in this regard is the Supreme Leader.

Nuclear fatwa on prohibition of the production and use of nuclear weapons, is repeatedly uttered by the Leader in similar words on different occasions since 2004, and constitutes the formal policy of Iran.

Taking into consideration that it has been issued by the Supreme Leader as a qualified mujtahid (jurisprudent) on an important political and governmental subject, nuclear fatwa is considered a "Social Fatwa" and as such is binding on political and legal system of Iran and according to the Article 4 of the Iranian Constitution, Nuclear Fatwa as a primary edict overrides all laws and regulations in contradiction with it.

When the Leader of the Islamic government considers the production and use of weapons of mass destruction as prohibited in Islam, this is not an "authoritative Hukm" which is in gradual evolution depending on prevailing conditions, but a fatwa based on Islamic fundamental principles. Furthermore, since it has been issued by a Mujtahid, who is at the head of state and a religious and political leader (Guardian jurist), it is not only obligatory to his Muqallids (people who follow his rulings), but also to all people. Even other Mujtahids's different fatwas would not be valid concerning the issue, though there has never been any different ruling and fatwa by other Mujtahids about the use of such weapons until now. Nuclear Fatwa has been issued based on non-disputable and firm principles and standards of Islam, the violation of which is not permitted.

Finally, Iran has a long tradition of participating in international treaties on the prohibition of the use of weapons of mass destruction and based on *pacta sunt servanda* principle, from both legal and religious points of view, it is committed to observe these obligations. Apart the obligations resulting from international treaties ratified by Iran concerning the WMD, Nuclear Fatwa as a unilateral statement made publicly by the ultimate authority of the Islamic Republic, creates additional obligations and reaffirms the will of Iran to be bound to international laws with regard to WMD.

Notes

1. Concerning the history of Iran's nuclear program since the late 1950s see: Gawdat Bahgat, **"Nuclear Proliferation: The Islamic Republic of Iran"**, Iranian Studies, Vol. 39, No. 3 (Sep., 2006), pp. 307-327, URL: <http://www.jstor.org/stable/4311832> (accessed 19 Dec. 2014)
2. Mohammad Javad Zarif calling for dismantling WMD at the 60th Pugwash Conference on Science and World Affairs dubbed 'Dialogue, Disarmament, and Regional and Global Security' in Istanbul, Presstv (17 January 2014) < [http:// presstv. com/ detail/ 2013/11/01/332418/iran-stresses-wmdfree-world/](http://presstv.com/detail/2013/11/01/332418/iran-stresses-wmdfree-world/)>
- "Iran has never used weapons of mass destruction. The use of nuclear and mass destruction weapons is devoid of legitimacy even for legitimate defense. Islamic teachings also order us not to use weapons of mass destruction".
3. weapons of mass destruction
4. For text of Ayatollah Khamenei's speeches see: [http:// english. khamenei. ir// index. php? option= com_ content& task= category& sectionid= 2&id=2& Itemid=4](http://english.khamenei.ir/index.php?option=com_content&task=category§ionid=2&id=2&Itemid=4); [http:// www. iranembassy.pt/en/news/23.html](http://www.iranembassy.pt/en/news/23.html).
5. There is another definition for edict: "religious edict means the law issued by God to regulate the moral and material life of human being whether directly belonging to what must be done by any Muslim, or relating to the Muslim himself or other things in relation with him" (Bagher Sadr, 1412 A.H.:161-162 (in Arabic)).
6. For the powers of the President of the USA in state of emergency, see Fallon, 2005:174-178.
7. The fatwa banning to smoke is issued by Grand jurisprudent, Ayatollah Makarem Shirazi who believes that according to scientific researches smoking is harmful for mankind and in result it is forbidden. See: [http:// makarem. ir/ compilation/ Reader. aspx? lid=0&mid=3945&catid=6512](http://makarem.ir/compilation/Reader.aspx?lid=0&mid=3945&catid=6512) (accessed on 25 May 2014).
8. A primary edict means "a religious edict codified in the Holy Quran verses and the Hadith (speech of the Holy Prophet and Shi'ite Imams), used vis a vis a secondary edict". (Jafari Langroudi, 1378 S.H., vol. 3:1743) But a secondary edict is "one that replaces a primary edict because of emergency or general need". (Jafari Langroudi, 1378 S.H., vol. 3:1748) The late Ayatollah Meshkeini explains the primary and secondary edicts as follows:

- "The primary edict is real edict that applies to actions in consideration of their title like the obligation of morning prayers (salat), unlawfulness of drinking wine, ritual purity of water and ritual impurity of urine. The secondary edict is one that applies to issues characterized by emergency, duress and other secondary titles as permission to break one's fast or unlawfulness of observing fast in Ramadan concerning one for whom observing fast is harmful or very hard". (Meshkeini, Estelihat al-Osoul: 124)
9. A national conference on "Nuclear Jurisprudence" held for two days from 19 to 20 February 2014 by the Islamic Research Institute for Culture and Thought and the Iranian Atomic Energy Organization (IAEO) in Qom and Tehran, in order to study the jurisprudential effects of the Nuclear Fatwa. For transactions of the Conference (in Persian) see: <http://ijtihad.ir/NewsDetails.aspx?itemid=3894>; <http://news.iict.ac.ir/index.aspx?fkeyid=&siteid=2&pageid=1199&newsview=2881>
 10. Quran, Al-Isra, 70: "And We have certainly honored the children of Adam (...) and provided for them of the good things and preferred them over much of what We have created, with [definite] preference".
 11. Quran, Al-Hadid, 25: "We have already sent Our messengers with clear evidences and sent down with them the Scripture and the balance that the people may maintain [their affairs] in justice (...)".
 12. Quran, Al-Anfal, 61. God also denies Muslims the right to injure the enemies if they withdraw and cease to fight: "... So if they remove themselves from you and do not fight you and offer you peace, then Allah has not made for you a cause [for fighting] against them"(Quran, An-Nisa, 90). The late Allameh Tabatabaei, a great philosopher and interpreter of holly Quran, has said: "if they had allowed Islam to be itself (i.e. did not intimidate or attack it), it would never have issued any verdict of war. All of wars have been imposed on Islam". (Tabatabaei, Al-Mizan fi Tafsir ol-Quran, vol. 4: 261).
 13. Islamic State of Iraq and Syria
 14. For more detail about pacific coexistence in Islam see: Amid Zanjani, 1354.
 15. Quran, Al-Anfal, 60: "And prepare against them whatever you are able of power and of steeds of war by which you may terrify the enemy of Allah and your enemy and others besides them (...)".
 16. The Iranian Constitution, Article 4: "All civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the fuqaha' of the Guardian Council are judges in this matter."
 17. The Iranian constitution, Article 94 [Review of Legislation]: "All legislation passed by the Islamic Consultative Assembly must be sent to the Guardian Council. The Guardian Council must review it within a maximum of ten days from its receipt with a view to ensuring its compatibility with the criteria of Islam and the Constitution. If it finds the legislation incompatible, it will return it to the Assembly for review. Otherwise the legislation will be deemed enforceable."

18. For the text of the Iranian constitution see: [http:// en. parliran. ir/ index. asp? fkeyid= &siteid=84&pageid=3054](http://en.parliran.ir/index.aspx?fkeyid=&siteid=84&pageid=3054) (accessed on 02/11/2014)
19. Guiding Principles applicable to unilateral declarations of States, op. cit., arts. 1 and 4, pp. 370 & 372.
20. For example see US president, Barack Obama's speech at 68th Session of the General Assembly of the United Nations, 24 September 2013: "The Supreme Leader had issued a fatwa against the development of nuclear weapons, and President Hassan Rouhani has just reiterated that Iran would never develop a nuclear weapon". Available at: [http:// gadebate.un.org/68/united-states-america](http://gadebate.un.org/68/united-states-america) (accessed on 07/11/2014)
21. Cf. supra, 1.1. Content of Nuclear Fatwa, pp. 3-4.
22. UN Office for Disarmament Affairs, Treaty on the Non-Proliferation of Nuclear Weapons, available at: <http://disarmament.un.org/treaties/t/npt> (accessed on 1 June 2015).
23. United Nations Office for Disarmament Affairs (UNODA), available at: <http://disarmament.un.org/treaties/t/1925> (accessed on 6 June 2014).
24. See the Organization for the Prohibition of Chemical Weapons, [http:// www. opcw. org/ about-opcw/member-states](http://www.opcw.org/about-opcw/member-states)

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فتوای هسته‌ای و حقوق بین‌الملل

توکل حبیب‌زاده

استادیار، دانشکده حقوق و معارف اسلامی دانشگاه امام صادق (ع)

در سال‌های اخیر، یکی از جدی‌ترین کشمکش‌های بین‌المللی که قدرت‌های مطرح جهانی را درگیر مجموعه‌ای از گفتگوهای طولانی کرده است، مسئله برنامه هسته‌ای ایران می‌باشد. با وجود اتهامات قدرت‌های غربی بویژه ایالات متحده آمریکا، در مورد تلاش ایران برای گسترش توانایی دستیابی به سلاح هسته‌ای، مقامات ارشد این کشور قاطعانه این اتهامات را رد کرده و بر اهداف صلح‌آمیز و غیر نظامی برنامه هسته‌ای خود تاکید کرده‌اند. یکی از تلاش‌هایی که در جهت ایجاد اعتماد و شفاف سازی ماهیت صلح‌آمیز برنامه هسته‌ای ایران صورت گرفته، صدور فتوای هسته‌ای است. این فتوا که توسط آیت‌الله خامنه‌ای رهبر ایران مطرح شد، تولید و استفاده از سلاح‌های هسته‌ای را منع کرده است. رهبر جمهوری اسلامی ایران که دارای بالاترین مقام در این کشور است و همچنین فرماندهی کل قوای نظامی ایران را بر عهده دارد براساس آموزه‌ها و باورهای اسلامی به روشنی اصول جمهوری اسلامی را در این فتوا مطرح کرده است. فتوای هسته‌ای، تولید و استفاده از سلاح‌های هسته‌ای را در اسلام منع کرده است. این فتوا که دربرگیرنده سیاست رسمی ایران در قبال سلاح‌های کشتار جمعی است بر اساس احکام و اصول اسلامی و برگرفته از منابع شرعی قوانین و احکام حقوقی اسلامی صادر شده است. به بیان دیگر فتوای هسته‌ای حکمی استخراج شده از منابع شرعی است و به این جهت دارای اثرات قانونی در سیستم قضایی ایران است. این مقاله تلاش دارد براساس قوانین حقوقی اسلام به بررسی محتوا و ماهیت این فتوا پرداخته و جایگاه آن را در قانون اساسی ایران و بویژه در قوانین بین‌الملل به عنوان یک پیمان یک سویه که توسط ریاست یک کشور مطرح شده است، مورد ارزیابی قرار دهد.

واژه‌های کلیدی: فتوای هسته‌ای، آیت‌الله خامنه‌ای، سلاح‌های کشتار جمعی، حقوق بشر اسلامی، قوانین حقوقی، احکام اسلامی، پیمان یک‌سویه

