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The *Layha for the Mujahideen*: an analysis of the code of conduct for the Taliban fighters under Islamic law

Muhammad Munir*

Dr. Muhammad Munir is Associate Professor and Chairman, Department of Law, Faculty of *Shari'a* and Law, International Islamic University, Islamabad.

Abstract

The following article focuses on the Islamic Emirate of Afghanistan Rules for the Mujahideen** *to determine their conformity with the Islamic jus in bello. This code of conduct, or Layha, for Taliban fighters highlights limiting suicide attacks, avoiding civilian casualties, and winning the battle for the hearts and minds of the local civilian population. However, it has altered rules or created new ones for punishing captives that have not previously been used in Islamic military and legal history. Other rules disregard the principle of distinction between combatants and civilians and even allow perfidy, which is strictly prohibited in both Islamic law and international humanitarian law. The author argues that many of the Taliban rules have only a limited basis in, or are wrongly attributed to, Islamic law.*

* The help of Andrew Bartles-Smith, Prof. Brady Coleman, Major Nasir Jalil (retired), Ahmad Khalid, and Dr. Marty Khan is acknowledged. The quotations from the Qur'an in this work are taken, unless otherwise indicated, from the English translation by Muhammad Asad, *The Message of the Qur'an*, Dar Al-Andalus, Redwood Books, Trowbridge, Wiltshire, 1984, reprinted 1997.

** The full text of the *Layha* is reproduced as an annex at the end of this article.

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Do the Taliban qualify as a 'non-state armed group'?

Since this article deals with the *Layha*,[1] it is important to know whether the Taliban in Afghanistan, as a fighting group, qualify as a 'non-state Islamic actor'. In the context of international humanitarian law (IHL), 'non-state actor' (which includes, for example, an Islamic non-state armed group) is a broad concept and may be taken as meaning any group with a military capacity and organizational structure fighting anywhere in the world. But, as we will see below, not every non-state Muslim military group qualifies as a 'non-state armed group' under international humanitarian law. What counts in our discussion is whether the armed struggle waged by a Muslim group (in this case the Taliban) is in conformity with the Islamic *jus in bello* as well as IHL. However, by adding the adjective 'Islamic' and the word '*mujahideen*', there is an expectation that the said *mujahideen* would have an Islamic identity and an Islamic agenda, and that their code for the conduct of hostilities would be an Islamic one and operate under coherent Islamic rules. The following analysis seeks to determine whether that expectation is fulfilled.

An armed conflict in international humanitarian law

Regarding the question whether the Taliban qualify as a 'non-state (Islamic) actor', it is necessary to ascertain in what circumstances a conflict amounts to an armed conflict under IHL. According to the International Criminal Tribunal for the former Yugoslavia (ICTY), 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.[2] Furthermore, the ICTY has specified two elements required for a conflict between governmental authorities and non-state armed groups to become an 'armed conflict': the non-state actor should be well organized and have a hierarchal structure; and the conflict should reach a certain level of intensity.[3] A non-state armed group that does not fulfil these two conditions is not subject to IHL and their activities may be dealt with under domestic law as banditry, terrorist actions, or unorganized

1 So far, there have been at least three editions of the *Layha for the Mujahideen*. The first was published on 1 August 2006 and contained only thirty-nine sections. The second was published on 9 May 2009 and consisted of sixty-seven sections. The third (present) edition was published on 29 May 2010 and has eighty-five sections. The preamble states that 'all the military, administrative authorities, as well as all *mujahideen* must comply in their *jihadi* affairs with the provisions of the *Layha* and run their day-to-day *jihadi* activities according to its rules'. *The Islamic Emirate of Afghanistan* Layha *[Rules] for the Mujahideen*, 2010, p. 5 (hereafter *Layha*). This is repeated in Section 4 of the 2010 edition; see p. 7. All the editions are in the Pashto language and none of them mentions the place of publication.

2 International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor* v. *Tadic*, ICTY Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 70.

3 The International Court of Justice (ICJ) has on many occasions given its opinion on the criterion of intensity with respect to armed attacks. The Court discussed it for the first time in the *Nicaragua* case (para. 191) and later in the *Oil Platform* case (para. 64). In both these cases, the ICJ underlined the distinction of armed attacks from other attacks by referring to the criterion of intensity.

or short-lived insurrections.[4] The above two elements are not clearly defined by the Tribunal but it has stated in a subsequent case that 'what matters is whether the acts are perpetrated in isolation or as a part of a protracted campaign that entails the engagement of both parties in hostilities'.[5] If the above criteria are applied, many Muslim *jihadi* groups may be excluded from the definition of 'non-state actor' under IHL.[6]

The Taliban as an armed group

The Taliban in Afghanistan meet all the above conditions[7] and thereby qualify as a non-state armed actor.[8] The present conflict in Afghanistan is internal or non-international in the sense of Article 3 common to the four Geneva Conventions of 1949, but it involves international troops from a number of countries mandated by the Security Council to fight against the Taliban. This is why the situation in Afghanistan may not fit within the old classification of international armed conflict and non-international armed conflict. A third category –internationalized non-international armed conflict – can best describe the situation.[9]

4 ICTY, *Prosecutor* v. *Tadic*, ICTY Case No. IT-94-1, Judgment (Trial Chamber), 7 May 1997, para. 562.

5 ICTY, *Prosecutor* v. *Boškoski* et al., ICTY Case No. IT-04-82-T, Judgment (Trial Chamber), 10 July 2008, para. 185.

6 Many small Muslim *jihadi* groups, such as Harakat al-Ansar, Harakat ul-Mujahidin, Al-Umar Mujahidin (all of them operating in Kashmir), Fatah al-Islam (Gaza), and some Islamic militant groups within Somalia, fail to meet these conditions.

7 The Taliban are in effective control of many areas in Afghanistan and they run the day-to-day administration in those areas. According to an investigative article in the *Wall Street Journal*, the Taliban are the main beneficiaries of the Kajaki hydropower plant, repaired and upgraded by the US for more than $100 million. The Taliban charge a flat fee of 1,000 Pakistani rupees ($11.65) a month to the consumers in the areas under their control in Helmand Province. The estimated electricity revenue collected by the Taliban amounts to some $4 million a year, in a country where the monthly wages of an insurgent fighter come to around $200. The paper claims that the Taliban use the proceeds to fund their war with American and British troops. See Yaroslav Trofimov, 'US rebuilds a power plant, and Taliban reap a windfall: insurgents charge residents for electricity the Afghan government supplies to areas under rebel control', in *Wall Street Journal* (European edition), 14 July 2010, p. 14.

8 Apart from the Afghani Taliban, other typical non-state Islamic actors that have been engaged in armed conflict with a government and have, at least at times, fulfilled the stipulations of the ITCY include Al Qaeda, the Islamic Salvation Front (FIS) (Algeria), and the Abu Sayyaf Group (Philippines). The status of two Islamic groups, namely Hamas and Hezbollah, is more complicated. Hamas now controls Gaza but is still a non-state actor because the Occupied Territories (or, to be more precise, Gaza) are not yet recognized as a state. Hezbollah, on the other hand, has a political wing that is represented in the government of Lebanon, but it still qualifies only as a non-state actor. The UN Human Rights Council's two inquiry missions to investigate human rights violations during the Second Lebanon War between Hezbollah and Israel in 2006 treated the conflict as international. See 'Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled "Human Rights Council": Mission to Lebanon and Israel (7–14 September 2006)', UN Doc. A/HRC/2/7, 2 October 2006; 'Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled "Human Rights Council": Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1', UN Doc. A/HRC/3/2, 23 November 2006.

9 See also Avril Mcdonald, 'Terrorism, counter-terrorism and the *jus in bello*', in Michael N. Schmitt (ed.), *Terrorism and International Law: Challenges and Responses*, International Institute of Humanitarian Law, San Remo, 2002, p. 65.

The relevant applicable law to non-state parties to an armed conflict is the said Common Article 3. Additional Protocol II of 1977 on non-international armed conflict is also applicable, as Afghanistan is now party to it.[10] The rules in Common Article 3 have the status of customary international law and non-state groups are bound under international law by customary norms when engaging in an armed conflict. According to the decision of the Appeals Chamber of the Special Court for Sierra Leone (SCSL), 'it is well-settled that *all* parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties'.[11] Whether a conflict is international or non-international, non-state Islamic actors, such as the Taliban in our case, undoubtedly do have obligations under IHL.

The status of the Taliban under Islamic law

It is interesting to consider the status of the Taliban under Islamic law, particularly since the crux of the opinions of many Muslim scholars is that the US attack that led to the dismantling of the Taliban government in Afghanistan was illegal.[12] Another interesting question is whether the Taliban in Afghanistan can be considered as '*Ahl al-Baghi*', or rebels under Islamic law. Muslim jurists have laid down four conditions for a group to qualify as *Ahl al-Baghi*: first, rebelling against state authority by not fulfilling their obligations and refusing loyalty to state laws; second, possessing power and strength; third, openly revolting and fighting against the political authority; and, finally, having their own innovative interpretation of Islamic law to which they strictly adhere (this last condition is controversial).[13]

10 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

11 Special Court for Sierra Leone (SCSL), *Prosecutor* v. *Sam Hinga Norman*, Case No. SCSL-2004-14-AR72, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, para. 22.

12 It is argued that, since the Taliban government did not plan or carry out the 11 September 2001 terrorist attacks on the US, they were not really blameworthy, and thus the dismantling of their government was not warranted. According to Mufti M. Taqi Uthmani, the US attack and overthrow of the Taliban regime was illegal. See Mufti M. Taqi Uthmani, *Al-Balag*, January 2002, pp. 6–7. See also Sheikh Yusuf al-Qaradawi, *Fiqh al-Jihad Dirasa Muqarana li Ahkamihi wa Falsafatihi fi dhaw-i- al-Qur'an wa al-Sunnah*, Dar al-Kutub, Cairo, 2009, Vol. 1, p. 711. The Sheikh rejects the toppling of the Taliban and considers the help provided to the Western-backed government in Kabul illegal and incompatible with the conditions laid down by Muslim jurists for seeking help from non-Muslims; see pp. 710–711. Mufti Zahidur Rashidi and Moulana Ammar Khan Nasir are also of the opinion that the toppling of the Taliban regime was illegal. See their views in a special issue of *Al-Shari'ah* on 'Al Qaeda, the Taliban and the current war in Afghanistan', October 2010, pp. 13–57, esp. pp. 17–19, 23, 25, 30, 50.

13 The fourth condition, i.e. innovation of '*ta'wil*', or their own interpretation of the law, is required by the *jamhur* (majority) of Muslim jurists. A well-known example of such rebels in Islamic history is that of the Kharijites (Muslim dissenters). See Muhammad b. Idris al-Shafi'i', *Al-Umm*, Dar al-Ma'rifa, Beirut, n.d., Vol. 4, p. 216; and 'Abdullah b. Ahmad b. Muhammad b. Qudama, *Al-Mughni 'Ala Muktasar al-Khirqi bi Sharh al-Kabir 'ala matn al-muqn'*, Dar al-kutub al-Arabi, Beirut, 1972, Vol. 10, p. 52. Some Muslim jurists do not consider the condition of *ta'wil* necessary, deeming it enough if the rebels only aim to gain power and authority. The obvious example of this category is when 'Abdullah b. Zubair was chosen by the people of Hijaz, Iraq, and Egypt as their head of state, but his group was defeated by the Umayyad Caliph Marwan b. al-Hakam. See 'Ali b. Ahmad b. Sa'eed, b. Hazm, *Al-Muhalla*, Dar al-Fikr, Beirut, n.d.,

When the rebels cannot be induced by peaceful means to lay down their arms, the Muslim political authority must fight them to bring them into submission rather than to wipe them out.[14] However, as stated above, contemporary Muslim scholars consider the toppling of the Taliban regime in Afghanistan as illegal and view their war with the occupying power as legal.[15] Thus, the Taliban do not constitute an example of '*Ahl al-Baghi*' under Islamic law.

The Taliban's attitude towards Islamic law on the conduct of hostilities

Before examining the Taliban's attitude towards Islamic law on the conduct of hostilities, it is pertinent to mention that the *Layha* does not make any mention of, or reference to, international humanitarian law. This may be interpreted as meaning either that the Taliban do not acknowledge the existence of IHL or its application in the conflict, or that they base their rules on Islamic law instead. During their short rule in Afghanistan from 1995 to 2001, the Taliban had a very literal, rigid, and radical interpretation of Islamic law. They never referred to moderation or tolerance, or to the protection of the rights of minorities in Afghanistan.

The law of war as part of the *Layha*

The Taliban assert that their *Layha* is based on Islamic law. The latest 2010 edition mentions that the *Layha* was prepared in accordance with Islamic law in consultation with top scholars, *muftis* (jurisconsults), experts, and specialists;[16] it is unknown, however, who these scholars, muftis, and experts are. In its *jus in bello* part, the code of conduct for the Taliban fighters talks of limiting suicide attacks, avoiding civilian casualties, and winning the battle for the hearts and minds of the local civilian population: Section 57, clause ii declares that 'A brave son of Islam

Vol. 11, pp. 97–98; Muhammad b. Ahmad b. Juzzi, *Qawanin al-Ahkam al-Shariyyah wa Masa'l al-Furu' al-Fiqhiyya*, Dar al-'Ilm lil maliyyin, Beirut, 1974, p. 393; and Muhammad al-Sharbini al-Khatib, *Mughni al-Muhtaj*, Maktaba Mustafa al-Babi, Cairo, 1933, Vol. 4, p. 126.

14 See A. Ibn Hazm, above note 13, Vol. 11, p. 97; I. Shahfi'i, above note 13, Vol. 4, p. 215; M. Khatib, above note 13, *Mughni al-Muhtaj*, Vol. 4, p. 126; Muhammad b. Ahmad al-Qurtubi, *al-Jami' li Ahkam al-Qur'an*, Matba'a Dar al-Kutub al-Masriyyah, Cairo, 1950, Vol. 16, pp. 317–319; Muhammad Khair Haykal, *Al-Jihad wa al-qital fi al-Syasa al-Shar'iyya*, 2nd edition, Dar al-Bayariq, Beirut, 1996, Vol. 1, pp. 63–69. Haykal's book does not discuss *syasa al-shar'iyyah*, despite the title.

15 Mufti Taqi Uthmani, Sheikh al-Qaradawi, Mufti Zahidur Rashidi, and Moulana Ammar Khan Nasir support this view. See T. Uthmani, above note 12, pp. 6–7; Y. Qaradawi, above note 12, Vol. 1, pp. 710–711; and Z. Rashidi and A. K. Nasir, above note 12, 13–57, esp. pp. 17–19, 23, 25, 30, 50. However, they disagree whether the war should be called a *jihad* or not. For example, Mufti Zahidur Rashidi views it as a *jihad* (pp. 49–50), whereas Moulana Nasir does not (p. 30).

16 See the *Layha*, 2010 edition, Introduction, p. 4. It states that compliance with it is obligatory for every person with authority and every *mujahid* (p. 5). It also stresses that all military and administrative officials, as well as ordinary *mujahideen*, must follow these rules and conduct their day-to-day *jihadi* affairs accordingly (p. 5).

should not be used for lower and useless targets. The utmost effort should be made to avoid civilian casualties'. Between August 2006 and May 2010 the rules have been changed several times and three different versions have been published and enforced. This indicates that the Taliban use Islam, and the *Layha* in particular, both as rhetoric to serve as a source of unity and to promote mobilization and as a guarantee for compliance with the Islamic law of war.

The 2010 edition of the *Layha* has eighty-five sections. Not all of them are about the conduct of hostilities. In fact, only thirty-seven sections can be considered relevant to warfare, namely Sections 4, 7,[17] and 9–16 (on prisoners of war and contractors/suppliers), 17–22 (spies), 23–26 (contractors and suppliers), 27–33 (war booty), 56 (attacks), 57 (suicide attacks), 67–73 (prohibited acts), and 81 (outfit of the *mujahideen*). The rest concerns, among other things, administrative matters, hierarchical organization, enforcement of *Shari'a* law in areas under Taliban control, and the resolution of disputes between people under Taliban control as well as disputes among the Taliban themselves. We now turn to the substantive parts of the Taliban's *Layha* as compared with the Islamic law of war. However, only the major provisions of the *Layha* will be discussed here.

The fate of captured persons in particular

Regarding prisoners of war (POWs), there seem to be three categories in the *Layha*: first, Afghan army soldiers, police, or other officials (Section 10); second, contractors, suppliers, drivers, and personnel of private security companies (Sections 11 and 23–26); and, finally, foreign soldiers (Section 12). In addition, provision is made for a situation that is common to all the above categories: the killing of types of captive during transportation (Section 13).

As far as the fate of those in the first category is concerned, the provincial Taliban governor has to choose between exchanging them for Taliban prisoners, releasing them without setting any condition, or releasing them after securing credible guarantees.[18] He is not allowed to ransom them. They may be executed or given a *ta'zir* punishment only if ordered by the Imam,[19] his deputy, or the provincial *qadi* (judge).[20] Thus, they may be exchanged, released unconditionally, released after credible guarantee, executed, or given some other punishment under *ta'zir*. The provincial governor has to choose one punishment from the first three,

17 The entire Part I, i.e. Sections 1–8, is not about the conduct of war but about inducing and inviting those working for the Afghan regime to join the Taliban, and how to treat them. However, two of those sections are relevant to the conduct of war, namely Section 4, which relates to perfidy committed by a person who surrenders, and Section 7 on armed personnel of the Afghan regime who want to surrender but whose true intention is not clear.

18 Guarantee in the *Layha* means a guarantee to be given in terms of immovable property or a personal guarantee. It does not mean a guarantee of movable property or money guarantee. *Layha*, Introduction, Section 3.

19 The Imam is the head of the Taliban, Mullah Muhammad 'Omar, and *Na'ib Imam* is his deputy. *Layha*, Introduction, Section 1. *Ta'zir* (deterrent, corrective) punishment is discussed below.

20 For the procedure if no provincial *qadi* has been appointed, see *Layha*, Section 10.

otherwise the Imam or his deputy or the provincial *qadi* will choose one of the last two. However, the governor must perform the duties of a *qadi* if none is appointed in a province. We will consider the Islamicity of these punishments at the end of this section.

The fate of those in the second category (contractors, suppliers, drivers, personnel of private security companies, and spokesmen for the infidels) is mentioned in Sections 11 and 23–26. According to Section 11, read in conjunction with Sections 23–26, if it is confirmed that the contractors build bases or supply materials to 'infidels and their puppet regime', the *mujahideen* should burn their supplies[21] and kill such contractors.[22] High- and low-ranking officials of private security companies, spokesmen for 'infidels', and supply drivers are to be given the death penalty by the district *qadi*.[23] No other option is available for the *qadi*. There is some confusion about supply drivers: Section 24 allows their killing on the spot, while Section 11 indicates that they are given the death sentence by the district *qadi*. Section 26 authorizes the killing of contractors who recruit labourers or other workers.

The fate of a captive non-Muslim combatant can only be decided by the Imam or his deputy, who may choose between that person's execution, exchange, or release without any condition or ransom.[24] Under Section 13 of the *Layha*, if the *mujahideen* have taken captives (who may include locals, foreigners, combatants, contractors, drivers, etc.) and come under attack while transporting them to a secure place, they should kill them if they are enemy combatants or officials. But if the *mujahideen* are not sure about the identity of the captives, they must not be killed, even if this means that they have to be freed. Regarding the treatment of detainees, Section 15 provides that the *mujahideen* should not torture them by starvation, thirst, heat, or cold, even if they deserve death sentences or any other *ta'zir* punishment.[25]

The fate of all the categories mentioned above may be summarized as follows. (1) Soldiers, police, and other officials of the Afghan regime may be released without any condition, exchanged, or released after they provide a credible guarantee, but they cannot be ransomed and the Taliban governor must decide their fate. They may only be executed or given *ta'zir* punishment if authorized by the Imam or his deputy or the provincial *qadi*, but the governor has to decide on the penalty if no *qadi* is appointed. This means that the governor is the authority in these matters. (2) All types of contractors, suppliers, drivers, personnel

21 Section 23 of the *Layha* allows the burning of private vehicles if used for the transport of goods or other services of 'infidels'.
22 *Ibid.*, Section 25.
23 *Ibid.*, Section 11. There is no other punishment for them.
24 *Ibid.*, Section 12.
25 According to Section 16 of the *Layha*, *ta'zir* punishment can only be given by the Imam or his deputy or *qadi*. The same section mentions that if a district *qadi* wants to give the death sentence as a *ta'zir* punishment, he must get the approval of the provincial *qadi*; if there is no provincial *qadi*, the governor is authorized to deal with matters of death and *ta'zir*.

of security companies,[26] and even those contractors who recruit workers could be either killed or summarily executed or given death sentences by the *qadi* if arrested. (3) The fate of a captured foreign non-Muslim combatant is decided by the Imam or his deputy, who may authorize his execution, exchange, release, or ransom. (4) Hostages who are suspected of being enemy combatants or other officials can be killed if during their transportation to a secure place the *mujahideen* come under attack.

Evaluation under Islamic *jus in bello*: the *Layha* versus Islamic law

There are three key points to be considered from an Islamic *jus in bello* perspective. First, what is the fate of POWs in classical Islamic law as well as Islamic military history? Second, can *ta'zir* punishment be given to any detainee under Islamic law? Finally, can contractors, suppliers, carriers, drivers, and personnel of security companies be summarily executed or sentenced to death by a *qadi* if taken captive?

The fate of POWs in Islam

There is disagreement among the Muslim jurists of various schools of thought regarding the fate of POWs under Islam.[27] I will briefly explain the interpretation of

26 It is important to note that, despite their employment more often than not in combat roles (such as securing military logistic lines/oil lines or interrogation of detainees), private military companies (PMCs), also known as private military firms (PMFs) and mostly employed in Iraq and Afghanistan, are covered by existing modern-day IHL. This reflects the grey area of the law. While PMCs constitute a challenge for IHL, they are covered by IHL. Unless they are part of the armed forces of a state or have combat functions for an organized armed group belonging to a party to the conflict, members of PMCs are considered civilians. However, if they participate in hostilities they lose protection from attack during such participation and, if captured, can be tried for mere participation in hostilities. See, e.g., International Committee of the Red Cross (ICRC), 'International humanitarian law and private military/security companies', available at: http://www.icrc.org/eng/resources/documents/faq/pmsc-faq-150908.htm (last visited 22 December 2010).

27 Secondary works on Islamic *jus in bello* usually give some space to the issue of POWs but such works are not comprehensive. A good work is Gerhard Conrad, 'Combatants and prisoners of war in classical Islamic law: concepts formulated by Hanafi jurists of the 12th century', in *Revue de Droit Pénal Militaire et de Droit de la Guerre*, Vol. 20, Nos 3–4, 1981, pp. 271–307. This work is exclusively on POWs in Islam, but is not exhaustive and fails to elaborate the complex rules regarding POWs and the reasons behind the differences of opinion among the early Muslim jurists. Another noteworthy study is that of Khaled Abou El Fadl, 'Saving and taking life in war: three modern Muslim views', in *Muslim World*, Vol. 89, No. 2, 1999, pp. 158–180, in which he discusses the work of three modern scholars of the twentieth century; see also Syed Sirajul Islam, 'Abu Ghraib: prisoner abuse in the light of Islamic and international law', in *Intellectual Discourse*, Vol. 15, No. 1, pp. 15–19. Works based on secondary sources include Yadeh Ben Ashoor, 'Islam and international humanitarian law', in *International Review of the Red Cross*, No. 722, March–April 1980, pp. 1–11, especially pp. 3–7; and Troy S. Thomas, 'Prisoners of war in Islam: a legal enquiry', in *Muslim World*, Vol. 87, January 1997, pp. 44–53. The first article briefly discusses the interpretation of Qur'anic verses regarding POWs; unfortunately, the author does not give references for many works discussed in his article. In the second work, the author has given a summary of Islamic law

the relevant verses of the Qur'an, the sayings and the conduct of the Prophet Muhammad (Peace Be Upon Him) and his successors regarding POWs, and the opinions of prominent classical Muslim jurists.[28] Taking captives is legal in the Qur'an: '[A]nd take them captive, and besiege them',[29] and verse 47:4 says, 'And then tighten their bonds'. Muslim jurists agree that their fate is left to the political authority to decide as he sees fit in the best interest of the Muslim community. However, they diverge over the choices available to the Muslim state to terminate their captivity. The various options mentioned by Muslim jurists include execution, exchange, conditional or unconditional release, ransom, and enslavement. According to the majority of Muslim scholars – Maliki, Shafi'i, Hanbali, Shi'ite, Zahirite, and Awza'i – the political authority has the following options: execution, enslavement, '*mann*' (unconditional release), and '*fida*" (ransom or release after setting a condition or demanding a promise).[30] The Malikites add to this the imposition of '*jizyah*' (poll tax) on them.[31] The Hanafi jurists agree on execution, enslavement, and setting captives free with the condition that they should pay *jizyah*, but there is disagreement on ransom.[32] Imam Abu Yusuf[33] and M. Ibn al-Hasan al-Shaybani[34] allow ransom.[35]

The Qur'an mentions the fate of POWs in verse 47:4, which says:

> Now when you meet [in war] those who are bent on denying the truth, smite their necks until you overcome them fully, and then tighten their bonds; but thereafter [set them free,] either by an act of grace or against ransom, so that the burden of war may be lifted: thus [shall it be].

This verse renders execution illegal and makes captivity a temporary affair that must lead to either unconditional or conditional freedom, or freedom bought with

regarding POWs. A recent work in Arabic is 'Ameur al-Zemmali (ed.), *Maqalat fi al-Qanun al-Duwali al-Insani wa al-Islam*, 2nd edition, ICRC, n.p., 2007. This is a compilation of fifteen essays previously published in the *International Review of the Red Cross* on the various aspects of Islamic *jus in bello*, in some cases in comparison with international humanitarian law. A comprehensive examination of the subject is given by Ameur Zemmali, *Combattants et prisonniers de guerre en droit islamique et en droit international humanitaire (Combatants and Prisoners of War in Islamic Law and International Humanitarian Law)*, Pédone, Paris, 1997.

28 For a full study of the issue of POWs in Islam, see Muhammad Munir, 'The protection of prisoners of war in Islam', in *Islamic Studies* (forthcoming).

29 Qur'an, verse 9:5.

30 M. Khatib, above note 13, Vol. 4, p. 228; A. Ibn Hazm, above note 13;, Vol. 7, pp. 309, 346.

31 Muhammad b. Ahmad b. Rushd, *Bidayat al-Mujtahid*, trans. Imran A. K. Nyazee, Garnet Publishing Ltd., Reading, 1994, Vol. 1, p. 456; Muhammad b. Ahmad b. Juzii, *al-Qawanin al-Fiqhiyya*, Dar al-Kutub al-'Ilmiya, Beirut, n.d., p. 99; Ahmad b. Idris al-Qarafi, *Al-Furuq* (along with *Idrar al-suruq 'ala Anwa' al-Furuq*), Dar al-m'rifa, Beirut, n.d., Vol. 3, p. 17.

32 'Alauddin Abu Bakr al-Kasani, *Bada'i' al-Sana'i'*, Dar Ehia al-Tourth al-'Arabi, Beirut, 2000, Vol. 6, p. 94.

33 Ya'qub b. Ibrahim Abu Yusuf, *Kitab al-Kiraj*, Maktabh Farooqia, Peshawar, n.d., p. 378.

34 See Muhammad b. al-Hasan al-Shaybani, *Kitab al-Siyar al-Kabir*, *Sharh* (commentary) ed. Abu Bakr al-Sarkhasi, 'Abdullah M. Hasan al-Shafi'i, Dar al-kotob al-'Ilmiya, Beirut, 1997, Vol. 4, p. 300.

35 'A. Kasani, above note 32, Vol. 6, p. 95.

ransom.[36] Thus, the political authority has the option of releasing prisoners against ransom, or setting them free without any ransom. This is supported by the instructions of the Prophet (PBUH) that he gave while conquering Mecca, 'Slay no wounded person, pursue no fugitive, execute no prisoner; and whosoever closes his door is safe'.[37] 'Ali b. Abi Talib (d. 40 AH/661 CE), Al-Hasan b. al-Hasan (d. 110 AH/728 CE), Hammad b. Abi Suliman (d. 120 AH 737 CE),[38] Muhammad b. Sirirn (d. 110 AH/728 CE), Mujahid b. Jabr Mawla (d. 103 AH/721 CE), 'Abd al-Malik b. 'Abd al-'Aziz b. Jurayj (d. 150 AH/767 CE), 'Ata b. Abi Rabbah (d. 114 AH/732 CE),[39] and Abu 'Ubayd b. Salam were against the execution of POWs.[40] According to 'Imaduddin Isma'il b. 'Umar b. Kathir (d. 774 AH/1373 CE), '[T]he head of Muslim state has to choose between *mann* and *fida*' only. His [a POW's] execution is not allowed'.[41] Ibn Rushd (d. 594 AH/1198 CE) mentions that 'A group of jurists maintained that it is not permitted to execute the prisoners. Al-Hasan b. Muhammad al-Tamimi (d. 656 AH/1258 CE) has related that there is a consensus (*ijma'*) of the Companions on this [that POWs shall not be executed]'.[42]

According to authentic reports, in all the wars of the Prophet (PBUH) only three to five[43] POWs were executed. Thus, only 'Uqbah b. Abi Mu'it was executed, out of seventy captives of Badr,[44] for his crimes against the Prophet (PBUH) and Muslims in Mecca.[45] The second was Abu 'Izzah al-Jumahi in Uhd.[46] The third POW was 'Abdullah b. Khatal, who was executed on the day that Mecca was conquered.[47] All of them were executed for the heinous crimes they had

36 Verses 8:67–68 of the Qur'an brought censure upon the Prophet (PBUH) because no revelation attesting to this being lawful had been sent to him and because the Companions were tempted by ransom. However, as is mentioned in these verses, ransom was legalized: 'Enjoy, then, all that is lawful and good among the things which you have gained in war, and remain conscious of God: verily, God is much-forgiving, a dispenser of grace'.

37 Abu al-'Abas Ahmad b. Jabir al-Baladhuri, *Kitab Futuh al-Buldan*, trans. Philip Khuri Hitti, Columbia University, New York, 1916, Vol. 1, p. 66.

38 M. Shaybani, above note 34, Vol. 3, p. 124. Shaybani mentions that al-Hasan only allowed the execution of POWs during war, while Hammad b. Abi Suliman used to condemn their execution after the war.

39 Abu Bakar al-Jassas, *Ahkam al-Qur'an*, ed. Sidqi M. Jamil, Dar al-Fikr, Beirut, 2001, Vol. 3, p. 582.

40 Abu 'Ubayd b. Salam, *Kitab al-Amwal*, trans. Imran A. K. Nyazee, Garnet Publishing Ltd., Reading, 2002, pp. 120–121.

41 'Imaduddin Isma'il b. 'Umar b. Kathir, *Tafsir al-Qur'an al-'Azim*, Matba' al-Manar, Cairo,1346 A.H., Vol. 4, p. 221.

42 Abul Walid Muhammad ibn Rushd, *The Distinguished Jurist's Primer*, trans. Imran Nyazee, Reading: Garnet Publishing Ltd, 1994, Vol. 1, p. 456.

43 However, the reports about the execution of al-Nadr b. al-Harith and one of the two concubines of 'Abdullah b. Khattal are less authentic.

44 It is said that al-Nadr b. al-Harith was killed in captivity. According to Ibn Kathir, al-Nadr was killed during the war. See Isma'il b. 'Umar b. Kathir, *al-Bidaya wa al-Nihaya*, maktaba al-Ma'rif, Riyadh, 1966, Vol. 3, p. 35.

45 Abu 'Ubayd, above note 42, p. 130, n. 24.

46 He was set free in Badr on condition that he would stop his blasphemous poetry against Islam and not fight the Muslims again. He broke his promise and again asked for pardon but this time he was executed. See Abu Bakr b. Ahmad al-Sarkhasi, *Kitab al-Mabsut*, ed. Sabir Mustafa Rabab, Dar Ihya al-Turath al-'Arabi, Beirut, 2002, Vol. 10, p. 26.

47 He was a Muslim living in Medina but he killed an innocent Muslim, reverted to the pre-Islamic faith, joined the enemy and thereby committed high treason, embezzled public money, bought two concubines who would compose blasphemous poetry, and started a campaign against Islam. For the Islamic state

committed against the Islamic State before their captivity and were wanted criminals in the Islamic State (State of Madina of which Muhammad (PBUH) was the Head). It very clearly was never an *established rule* at the time of the Prophet (PBUH) that POWs be executed. Probably Al-Hasan b. Muhammad al-Tamimi struck a chord when he proclaimed that the Companions of the Prophet (PBUH) were unanimous on the prohibition of the killing of POWs.[48]

The pro-execution jurists have cited the execution of the combatants of Banu Quraydha as an example to support their point. But can the decision of an arbitrator chosen by the Banu Quraydha themselves to decide the dispute between them and the Muslims be an example for executing POWs? Can a single incident be treated as a general rule; and can the ruling of an arbitrator be accepted as the general and established conduct of the Prophet (PBUH) and his successors? My answer is in the negative. The tribe betrayed the Muslims during the Battle of Ahzab (Arabic for 'coalition') by turning against them and supporting the large anti-Muslim coalition headed by the infidels of Mecca, thereby breaching the treaty between the Banu Quraydha and the Muslims, which stated that both sides would defend the city together against any external attack. Once the battle was over, the two sides agreed to refer the matter to an arbitrator. The Banu Quraydha were given the choice to choose an arbitrator and they chose Sa'd b. Mu'ad, who was their former ally and who knew the Jewish law. He decided that their combatants should be executed and that their women and children should be enslaved in accordance with that law. According to the Torah:

> When thy Lord hath delivered it [the city] unto thy hands, thou shalt smite every male therein with the edge of the sword. But the women, and the little ones, and the cattle, and all that is in the city, even all the spoil thereof, shalt thou make unto thyself.[49]

there were many other wanted criminals, but they were all pardoned at their request. For details see Muhammad Munir, 'Public international law and Islamic international law: identical expressions of world order', in *Islamabad Law Review*, Vol. 1, Nos 3 and 4, 2003, p. 382.

48 See M. Shaybani, above note 34, Vol. 2, p. 261. This is also the opinion of a great many classical jurists, including 'Abdullah b. 'Umar (d. 73 AH/692 CE), al-Hasan al-Basri (d. 346 AH/957 CE), 'Ata, Dhhak b. Muzahim al-Hilali (d. 100 AH/718 CE), and Ismail b. 'Abdul Rahman, known as al-Sudi (d. 127 AH/744 CE). Ibn Rushd agrees with this opinion. See A. Ibn Rushd, above note 31, Vol. 1, p. 369. According to Shi'a jurisprudence, the Imam has only three options: *mann*, *fida*' (ransom either for money or in exchange for POWs held by the enemy), or enslavement; Shi'a jurists consider execution while in captivity illegal. See Najmuddin al-Muhaqiq al-Hilli, *Shara'i' al-Islam*, ed. Syed Sadiq al-Sherazi, Dar al-Qari, Beirut, 2004, Vol. 1, p. 251; and Sa'id b. Habbat al-Rawandi, *Fiqh al-Qur'an*, ed. al-Siyad Ahmad al-Husaini, Matba'a Ayatullah, Qum, 1985, Vol. 1, p. 347; Zeinuddin b. 'Ali al-Shahid al-Sani, *Al-Rawdah al-Bahiyah fi Sharh al-Lum'ah al-Dimashqiyah*, Dar Ihya al-Turath al-'Arabi, Beirut, 1983, Vol. 1, p. 222.

49 Deuteronomy 20:13–14 (Holy Bible, New King James Version, The Gideons International, New York, 1987, p. 230). See also *The Holy Scriptures according to the Mosoretic Text*, The Jewish Publication Society, Philadelphia, 1953, p. 237; and *Good News Bible: Today's English Version*, Harper Collins, Glasgow, 1976, p. 191. They were punished for their treachery, but this is how the people of a besieged city were supposed to be treated when captured by Jews.

It is clear that if the Banu Quraydha had triumphed over the Muslims they would have dealt with them in exactly the same manner. To sum up this discussion, I conclude that POWs must never be executed. The three who were executed during the life of the Prophet (PBUH) were thus penalized because of the crimes those individuals had committed against the Islamic state or its citizens before their captivity. According to Abu Yusuf Ya'qub b. Ibrahim (d. 183 AH/798 CE) and Imam Abu Bakr al-Sarkhasi, only the head of the Islamic state can decide to execute a particular POW (even if he is guilty of crimes against the state).[50] Imam Sarkhasi insists that even the commander-in-chief of the army cannot decide to execute a POW.[51] The reason is that execution of a prisoner of war is not a rule and to be a prisoner is not an offence *per se*. In other words, execution of a prisoner of war is an extraordinary act – an act of *syasa*[52] (only exercised by the head of the Muslim state) and not an ordinary punishment.[53] The Third Geneva Convention of 1949 on prisoners of war adopts a similar view in its Article 85, which gives the Detaining Power the right to prosecute a prisoner of war for acts committed prior to his captivity against (the Detaining Power's) law. Under Article 118 of the Third Geneva Convention, prisoners of war must be released and repatriated without delay after the cessation of active hostilities.[54]

The conduct of the Prophet (PBUH) regarding POWs

The conduct of the Prophet (PBUH) and his successors regarding the termination of captivity of POWs is very important. There are many examples of them being set free unconditionally, such as the release of Thumama b. Athal, as well as eighty Meccan fighters.[55] Similarly, all the fighters of Hawazin, Hunayn, Mecca, Banu al-Mustalaq,[56] Banu al-Anbar, Fazara, and Yemen were set free

50 Y. Abu Yusuf, above note 33, pp. 378, 380.

51 M. Shaybani, above note 34, Vol. 4, pp. 313–314.

52 *Syasa* literally means 'policy' and comprises the whole of administrative justice, which is dispensed by the sovereign and by his political agents, in contrast to the ideal system of *Shari'a* law, which is administered by the *qadi*. The *mazalim* courts and the institution of *muhtasib* (ombudsman) are examples of *syasa* in the early justice system of the Abbasid Caliphate.

53 See M. T. al-Ghunaymi, 'Nazratun 'Aammah fi al-Qanun al-Duwali al-Insani al-Islami', in Ameur al-Zemmali (ed.), *Maqalat fi al-Qanun al-Duwali al-Insani*, 2nd edition, ICRC, n.p., 2007, p. 48.

54 See also Articles 109 and 111 of the Third Geneva Convention of 1949.

55 Muslim, *Sahih*, Vol. 3, p. 1442, Hadith No. 1808; Yahya b. Sharaf al-Nawawi, *Sharh Sahih Muslim*, Matba' Mahmud Tawfiq, Cairo, n.d., Vol. 7, p. 463.

56 It is said that the captives of Mustaliq were first distributed among the Companions but later, when the Prophet (PBUH) married Juwayriya bt. al-Harith (d. 50 AH/670 CE), the daughter of the leader of the tribe, the Companions set the captives free. See Abu Dawud al-Sajistani, *Sunan Abi Dawud*, ed. Muhammad Abdul Hamid, Maktaba al-asriyya, Beirut, n.d., Hadith No. 3931, Vol. 4, p. 22; and Muhammad b. 'Abdullah al-Nisapuri, *Al-mustadrak 'ala al-sahihayn*, ed. Mustafa 'Abdul Qadar, Dar al-kutub al-ilmiya, Beirut, 1990, Vol. 4, p. 28. One of the narrators in the chain of this *hadith* is considered of weak authority, which makes the *hadith* less authentic. See Muhammad b. Habban, *Al-ihsan fi taqrib sahih Ibn Habban*, ed. Shu'aib al-Arnaout, Mu'assasat al-risala, Beirut, 1988, Hadith No. 4054, Vol. 4, p. 11. However, according to an authentic report, her father procured her release and she subsequently married the Prophet (PBUH). See Shibli Nu'mani and Syed Suliman Nadawi, *Sirat al-Nabi*, al-Faisal Nashiran-i-Kutub, Lahore, n.d., Vol. 1, pp. 252–253.

unconditionally.[57] Abu Bakr – the first successor of the Prophet (PBUH) – released Al-Ash'as b. Qays (d. 35 AH/656 CE). 'Umar, the second successor, pardoned Hormuzan (d. 23 AH/643 CE), an Iranian commander.[58] Abu 'Ubayd argues that ransom was taken only from the POWs of Badr and was never taken again; his subsequent conduct was to pardon prisoners. 'The later precedent from the Prophet (PBUH) is to be acted upon', he stressed, saying that the practice of pardoning by the Prophet (PBUH) came after Badr.[59] This view has the support of 'Abdullah b. 'Abbas (d. 68 AH/687 CE), 'Abdullah b. 'Umar, Hasan al-Basri, and 'Ata b. Abi Rabah. This shows that the general practice of the Prophet (PBUH) and his successors was to set POWs free without any condition or ransom. According to Abu 'Ubayd, the Prophet (PBUH) did not practise enslavement, while 'Umar b. al-Khattab bought the slaves of pre-Islamic times and returned them to their relatives.[60]

Thus, the established practice of the Prophet (PBUH) and his successors was to set POWs free. Ransom was taken on only one occasion, and execution was carried out only for crimes liable to the death penalty that were committed against the Islamic state *before* captivity. So what of the *Layha*, which considers execution as one of the options for some captives (such as Afghan soldiers, police, security officials, and foreign soldiers) and as the sole punishment for others (such as contractors, suppliers, carriers, drivers, and personnel of security companies), and allows the killing of captives if they are suspected to be enemy combatants and cannot be transported to a secure place because of an attack. My conclusion is that this rule of the *Layha* has no basis in Islamic law. Conversely, releasing POWs or exchanging them *is* based on Islamic law.

The fate of contractors, suppliers, and drivers

Under Islamic law, contractors, suppliers, and drivers are considered as servants. They do not participate in hostilities and their killing is strictly prohibited. It is reported that, when the Prophet (PBUH) saw the body of a slain woman among the dead at the Battle of Hunayn, he asked: 'Who killed her?' The Companions answered: 'She was killed by the forces of Khalid ibn al-Walid'. The Prophet (PBUH) told one of them: 'Run to Khalid! Tell him that the Messenger of God

57 Abu 'Ubayd, above note 40, pp. 116–120.

58 Some 6,000 combatants of Hunayn were not only set free but each one of them was given a special Egyptian set of clothing as well. See S. Nu'mani and S. S. Nadawi, above note 56, Vol. 1, p. 368. 'Umar b. al-Khattab ordered Abu 'Ubayda, his commander, to release the captives of Tustar; see Abu al-'Abas Ahmad b. Jabir al-Baladhuri, *Kitaqb Futuh al-Buldan*, trans. Francis Clark Murgotten, Columbia University, New York, 1924, Vol. 2, p. 119. 'Umar also wrote to his commander to release the captives of Ahwaz and Manadhir when these were captured. *Ibid.*, pp. 112–114.

59 A. Baladhuri, above note 58, Vol. 2, pp. 116, 120.

60 He paid 400 *dirhams* or five camels per slave and set them free and said: 'An Arab shall not be enslaved'. See Abu 'Ubayd, above note 40, p. 135. The enslavement of the women and children of Banu Quraydha was the result of arbitration; the Prophet (PBUH) did not enslave the POWs of other battles.

forbids him to kill children, women, and servants'.[61] The Prophet (PBUH) is also reported to have prohibited, in the strongest possible words of the Arabic language, the killing of women and servants: 'Never, never kill a woman and a servant'.[62]

From this it is clear that the killing of such persons as contractors, suppliers, or drivers in an ambush, or putting them to death in captivity, is against Islamic law. It is indicative that the corresponding rules in the *Layha* for the punishment of contractors, suppliers, and drivers have been changed. The 2006 edition of the *Layha* allowed their punishment by beating or imprisonment; their killing was allowed only if they could not be captured. Moreover, their captivity would be ended by either exchanging or ransoming them or by some (unknown) punishment (but *not* by death).[63] There was no death penalty for them in captivity or when they did not resist arrest. The 2009 edition of the *Layha* mentions for the first time that contractors, drivers, or other workers, if arrested during transportation, may be given *ta'zir* punishment, be exchanged, or be released unconditionally or after a credible guarantee by the governor. Ransoming was prohibited in that edition and execution could be authorized only by the Imam or his deputy.[64] Thus, execution for this category of captives was introduced for the first time in 2009; yet, although it required the permission of the Imam, it was attributed to Islamic law.[65]

Finally, in the 2010 edition of the *Layha*, contractors, suppliers, drivers, and personnel of security companies are treated as a different category from Afghan army officials. They face death whenever the *mujahideen* are able to strike at them.[66] On arrest the only punishment for them is death.[67] In the new edition, authorization of execution has been placed in the hands of the *mujahideen*, and otherwise of the district *qadis* (judges). The Imam has delegated this authority, which he had exercised since May 2009, to his soldiers and judges. To sum up, the punishment for this category of captive in 2006 was beating or imprisonment. In 2009 they were treated on a par with Afghan soldiers and there was a remote possibility of execution if authorized by the Imam. In 2010 the *mujahideen* are

61 Al-Tabrezi, *Mishkat al-Masabih*, al-Maktab al-Islami, Cairo, n.d., Hadith No. 3955; Ibn Majah, *Sunnan*, Dar Ehya Al-Turath Al-'Arabi, Beirut, n.d., Vol. 2, p. 101. For details, see Muhammad Munir, 'Suicide attacks and Islamic law', in *International Review of the Red Cross*, Vol. 90, No. 869, March 2008, p. 85, also available at: http://www.cicr.org/web/eng/siteeng0.nsf/html/review-869-p71 (last visited 22 December 2010).

62 Ibn Majah, above note 61, Vol. 2, p. 948, Hadith No. 2842; Imam al-Nasa'i, *al-Sunnan al-kubra*, Dar Al-Kotob Al-Elmyia, Beirut, n.d., Vol. 5, p. 187, Hadith Nos 8625 and 8626; Abu Bakr al-Baihaqi, *al-Sunnan al-kubra with al-Jawhar al-Naqi*, Dar al-Fikr, Beirut, n.d., Vol. 9, p. 83. This *hadith* is also quoted with slightly different wording in Abi Ja'far al-Tahawi, *Sharh Ma'ni al-Asa'r*, Dar Al-Kotob Al-'Ilmia, Beirut, n.d., Vol. 3, p. 222.

63 See *The Islamic Emirate of Afghanistan Rules for the Mujahideen* (August 2006), Sections 10 and 11.

64 See *The Islamic Emirate of Afghanistan Rules for the Mujahideen* (May 2009), Sections 8, 20, and 21. The same applied to punishment for Afghan National Army members. If the captive was a commander, a district head, a high-ranking official, or a foreign Muslim, then the authority for all the above options was vested in the Imam or his deputy (Section 8).

65 *Ibid.*, Preamble, pp. 2–4.

66 See *Layha*, Sections 24 and 25.

67 *Ibid.*, Sections 11, 24, and 25.

instructed to kill them in ambush, and, if such persons are arrested, the *qadi* must sentence them to death; no control or monitoring by the Imam or his deputy is required.[68] The 2010 rule does not treat such persons as POWs or captives entitled to any privileges. Thus, within a period of four years the rules (each time claimed to be based on Islamic law) have been changed three times. Therefore, these rules cannot be based on Islamic law.

Is *ta'zir* punishment an option for the political authority to terminate captivity?

We have described above the various options that are available to the political authority to terminate the captivity of POWs, but the *Layha* prescribes the punishment of *ta'zir* for them as well. *Ta'zir* as a punishment for POWs appeared for the very first time in Islamic legal and military history in the May 2009 edition of the *Layha*, where it is mentioned in Sections 8, 20, and 21 as a punishment for Afghan soldiers, contractors, and drivers.[69] The 2010 edition, in Sections 10, 15, and 16, also mentions *ta'zir* punishment.[70] Section 15 says that, although mistreatment of captives is prohibited, 'the *mujahideen* have to implement *ta'zir* [punishment] [to the POWs] whether it is death penalty or any other punishment'. In other words, the *Layha* considers execution of POWs as *ta'zir* punishment. Section 16 is somewhat vague: on the one hand it says that only the Imam or his deputy or the provincial *qadi* are authorized to give a *ta'zir* punishment, and on the other hand that the district *qadi* must obtain the permission of the provincial *qadi* for *ta'zir* punishments. The governor exercises the powers of the provincial *qadi* if the *qadi*'s post is vacant. The role of the Imam or his deputy remains uncertain when a provincial *qadi* or governor can authorize the *ta'zir* punishment. Moreover, application of the *ta'zir* punishment to POWs cannot be found in any classical or modern treatise on, or text of, Islamic *jus in bello*.

The *ta'zir* punishment occupies an important place in the Islamic criminal justice system. Punishments in Islamic law are usually grouped under four headings: *hudud*, *ta'zir*, *qesas*, and *diya*. *Hudud* crimes are punishable by a *hadd*,[71] which means that the penalty for them is prescribed by the Qur'an or by the Sunna (a word spoken, an act done, or a confirmation given by the Holy Prophet

68 In IHL, contractors who supply to the army are treated as POWs under Article 4(4) of the Third Geneva Convention of 1949.

69 In the 2009 edition, *ta'zir* punishment under Section 8 was vested in the governor or the Imam or his deputy, depending on the rank of the captive. However, there was some overlap. Under Sections 20 and 21 of the same edition this authority was vested in the governor.

70 Section 10 covers the options available for dealing with members of the Afghan National Army, police, and other state personnel. *Ta'zir* is not mentioned initially among the options but the end of the section says that only 'the Imam, his deputy or the provincial *qadi*, are authorized to award the death sentence or *ta'zir*'.

71 According to Ahnaf, there are only five *hudud* crimes. They are: *sariqa* (theft), *haraba* (highway robbery), *zina* (adultery/fornication), *qadhaf* (slander), and *shorb al-khamar* (drinking alcohol). Other Sunni schools of thought add two more to this list: *ridda* (apostasy) and *baghi* (transgression). Prosecution and punishment for *hudud* crimes are mandatory.

Muhammad (PBUH)).[72] *Ta'zir* literally means deterrence; technically, it means the power of the *qadi* to award discretionary and variable punishment.[73] *Ta'zir* offences are those that are not included in the other three categories. 'They comprise conduct that results in tangible and intangible individual social harm and for which the purpose of the penalty is to be corrective',[74] and that is precisely the meaning of the word *ta'zir*. Penalties for *ta'zir* offences may be imprisonment, physical chastisement, compensation, or fines, or a combination of any two thereof. The prosecution and punishment of *ta'zir* offences are discretionary, as opposed to *hudud*, for which they are mandatory; and no *ta'zir* penalty can be greater than a *hadd* penalty. *Qesas* (retaliation/revenge/chastisement)[75] crimes are not given a specific and mandatory definition or penalty in the Qur'an. However, the Qur'an refers to *qesas* in 2:178, 179; 5: 45; and 17:33. Its meaning and content are shaped by state legislation, judicial decisions, and legal doctrine.[76]

In addition to the above punishments, the Imam or head of a Muslim state has the discretionary power of the sovereign, which enables him to apply Islamic law and to regulate, through legislation, some criminal justice, taxation, and police matters. These had not been under the control of the *qadi* (judge) in the early Abbasid times and were later given the name '*syasa*'. As explained in note 52, *syasa* literally means 'policy' and comprises the whole of administrative justice that is dispensed by the Imam and his political agents.[77] This area of Islamic law has

72 See Muhammad Taqi Usmani, *The Authority of Sunnah*, Idaratul Qur'an wal 'uloom al-Islamia, Karachi, 1993, p. 6.

73 See Muhammad Munir, 'Is *zina bil jabr* a *hadd, ta'zir* or *siyasa* offence? A reappraisal of the Protection of Women Act 2006 in Pakistan', in *Yearbook of Islamic and Middle Eastern Law*, Vol. 14, 2008–2009, p. 115.

74 M. Cherif Bassiouni, 'Crimes and the criminal process', in *Arab Law Quarterly*, Vol. 12, 1997, p. 270.

75 See Hans Wehr, *A Dictionary of Modern Written Arabic*, ed. J. Milton Cowan, Librairie Du Liban, Beirut, 1980, p. 766. Technically, *qesas* means that the accused be treated/punished the same way in which he treated/punished the victim: 'so he is killed as he killed and is wounded as he wounded [the victim]'. *Qesas* is the punishment only for intentional homicide (*qatl al-'amd*) and intentional wounding (*jarh al-'amd*). See 'Abdul Qadar 'Awdah, *Al-tasri'h al-jana'i al-Islami*, 4th edition, Dar Ihya al-Turath al-Arabi, 1985, Vol. 1, p. 663.

76 The *qesas* crimes include murder, voluntary homicide, involuntary homicide, intentional crimes against the person, and unintentional crimes against the person. See 'A. Q. 'Awdah, above note 75, Vol. 1, pp. 663–668; and M. C. Bassiouni, above note 74, p. 270. *Diya* (blood-money) is the punishment for homicide or wounding with quasi-deliberate intent (*shibh al-'amd*), i.e. an intentional act but without using a deadly implement. This includes the performance of expiation (*kaffara*) by the culprit and the payment of the 'heavier blood-money' (*diya mughallaza*) by his *'aqila* (which consists of all the male members of the culprit's tribe and, if their number is not sufficient, the members of the nearest tribes; alternatively, of the fellow workers in his profession or his confederates). *Diya* is also the punishment for homicide or wounding by *khata'* (mistake), for cases assimilated to mistake (*ma ujriya mujra al-khata'*), and for indirect homicide (*qatl bi al-sabab*). See, 'A. Q. 'Awdah, above note 75, Vol. 1, pp. 668–671. See also Joseph Schacht, *An Introduction to Islamic Law*, Universal Law Publishing Co., Delhi, 1997, pp. 181–186; M. A. Haleem, Omer Sherif, and Kate Daniels (eds), *Criminal Justice in Islam*, I. B. Tauris, London, New York, 2003, pp. 43–44. Details of *qesas* and *diya* are beyond the scope of this article.

77 Another term used instead of *syasa* was '*nazar fil-mazalim*'. The *qadis* have to follow the instructions given to them by the Imam in the exercise of his powers of *syasa* within the bounds set by the *Shari'a* (*syasa al-shari'yyah*). See J. Schacht, above note 76, p. 54. Under the concept of *syasa*, the sovereign may order the use of such procedural methods as he sees fit to discover where the truth lies. Moreover, apart from *hudud* offences, it is for the sovereign to determine what behaviour constitutes an offence and what

not attracted serious scholarship, as authors do not give it enough space,[78] but throughout Islamic legal history the head of the Muslim state has exercised some discretionary powers under *syasa*.[79]

Muslim jurists of all the four Sunni schools, the Shi'a schools, and their sub-schools have never prescribed *ta'zir* as the punishment for POWs. They did not even discuss it in their treatises on Islamic *jus in bello*. *Ta'zir* is only found in books or chapters on the Islamic criminal justice system, and the penalty for it is discretionary in nature, to be given by the judge. In the *Layha*, the *ta'zir* penalty is imposed by the Imam or his deputy or the (provincial) *qadi*, and a *ta'zir* punishment does not include the option of a ransom or fine.[80] If *ta'zir* as a punishment is accepted for POWs (which, I have submitted, is wrong), then what has the Imam or his deputy to do with its application? The *Layha* has not only created a new category of punishment but also applies it in a new way. However, *ta'zir* as a punishment for POWs has no basis in Islamic law. In contrast, there does seem to be some basis for the application to a *spy* of *ta'zir* punishment either by the district or provincial *qadi* or by the provincial governor, which appears in Section 17 of the *Layha*.[81]

punishment is to be applied in each case. See N. J. Coulson, *A History of Islamic Law*, Universal Law Publishing Co, Delhi, 1997, p. 132.

78 However, see Saeed Hasan Ibrahim, 'Basic principles of criminal procedure under Islamic Shari'a', in Haleem *et al.*, above note 76, p. 22.

79 Muslim jurists expounded the part of the Islamic legal system that was fixed and left the part that was flexible – changing with the times, according to the needs of the Muslim community – to the Imam (the head of the Islamic state). It is this function that the ruler carried out through a policy called '*al-syasa al-shar'iyya*'. A typical example given by Ahnaf of a *syasa* offence is the crime of apostasy. As discussed above, the fate of POWs is left to the Imam or head of the Muslim state. Similarly, Imam Sarkhasi (d. 483 AH/ 1090 CE) of the Hanafi school of thought, while commenting on the execution of a person by crushing his head between two stones because he had killed a handmaid in exactly the same way, argues that the Prophet (PBUH) punished him by way of *syasa* and that there was no mutilation because he had endangered the peace of the land and was a habitual criminal. See A. Sarkhasi, above note 46, Vol. 26, p. 128. The explanation when the Prophet (PBUH) executed a habitual thief who was previously given *hadd* punishment, but who deserved to be given a harsher punishment, is similar. See Abdur Rahman al-Nasai, *Sunnan al-Nasai*, Maktabh Dar-ul-uloom, Lahore, Hadith No. 4892. For some interesting discussions of *syasa*, see Imran A. Nyazee, *Theories of Islamic Law*, IIIT & IRI, Islamabad, 1995, 2nd reprint, 2005, pp. 111–112. For works on *syasa*, see Ibn Taymiyya, *al-Syasa Al-Shar'iyya*, Dar al-Kutub Al-'Arabiya, Beirut, 1966, trans. Omar A. Farrukh, *Ibn Taimiya on Public and Private Law in Islam*, Khayats, Beirut, 1966; and Ibn Al-Qaim, *Al-Turuq al-Hukmiya fi Al-Syasa Al-Shar'iya*, Matba't Al-Sunnah Al-Muhamaddiya, n.d. M. K. Haykal, above note 14, does not discuss *syasa al-shar'iyyah*, despite its title; it does discuss almost all issues relating to *jihad*.

80 See *Layha*, Introduction, Section 2.

81 The rule seems to be in conformity with Islamic law. However, a person spying on the Taliban will probably be a person who at least knows their language. So only an Afghan or a Pashtun could do this job and not a foreign national. According to the *Layha*, only the Imam, his deputy, the provincial *qadi*, or the provincial governor can order the execution of the spy; see Section 17, p. 20. This section seems to be in conformity with Islamic law. Under Section 20, a person who is accused of spying but whose guilt could not be proved may be sent into exile. In Section 21, the *Layha* strictly prohibits the taking of photographs of any execution. This is in sharp contrast to the Taliban in the Swat Valley in Pakistan, who, during their control of the area in the summer of 2008, made videos of executions and circulate them accordingly. Moreover, under Section 22 of the *Layha*, the relatives of any person facing execution must be informed (p. 25). Other sections that are also grounded on Islamic law are the following: the disputes of people under the Taliban's control must be resolved under Islamic law (Section 62); cases once decided must

Legality of suicide attacks in the *Layha*

The *Layha* allows suicide attacks but there are certain conditions with which the *mujahideen* should comply. First, the suicide bomber should be trained very well to execute the mission. Second, suicide attacks should be carried out against high-value targets. Third, the killing of ordinary people and damage to property should be avoided as far as possible. Finally, all would-be suicide bombers must obtain permission and advice for suicide attacks from the provincial authority. This rule does not apply to those *mujahideen* who are given a 'special programme and permission by the higher authority'.[82] It is important to note that suicide attacks were also allowed in the 2009 edition with the same stipulations.[83] Moreover, that same rule reveals that there are special agents who are given instructions by either Mullah Omar or his deputy to carry out suicide attacks or other types of attack.

One of the special features of the conduct of hostilities by non-state Islamic entities is that their tactics and strategies rely on methods and means specifically prohibited by both Islamic law and international humanitarian law. By relying on these methods and means, they cannot conduct warfare without intentionally committing criminal violations of Islamic law and of the Geneva Conventions (for which they seemingly care nothing). Among the worst of these violations is perfidy. In Islamic law, perfidy or treachery is to 'breach the trust and the confidence of the enemy', and the Prophet (PBUH) and his successors have strictly prohibited it without any exception.[84] The Prophet (PBUH) is reported to have reiterated this ban on numerous occasions.[85] In the eighth year after his migration to Medina, he issued commands to his departing army and said, '… Fight yet do not cheat, do not breach trust, do not mutilate, do not kill minors'.[86] On another occasion, while instructing the army led by 'Abd al-Rahman b. 'Awf, he said: '… never commit breach of trust, nor treachery, nor mutilate anybody nor kill any minor or woman. This is the demand of God and the conduct of His Messenger for your guidance'.[87] When Abu Jandal b. Suhayl (d. 18 AH/639 CE) fled to Medina from the polytheists of Mecca, he heard that the Prophet

not be reopened (Section 63); the *mujahideen* should take extreme care not to harm someone's person or property (in the areas under their control) and any violation must be punished accordingly (Section 63); the *mujahideen* are not permitted to let a minor who as yet has no beard to live with them (Section 69); mutilation is strictly prohibited (Section 70); the *mujahideen* are not allowed to collect *usher*, *zakat*, or other donations by force (Section 71); and finally, under Section 73, kidnapping for ransom 'in the name of the Islamic Emirate' is strictly prohibited. These provisions obviously apply in the areas under the control of the *mujahideen*.

82 *Layha*, Section 57, pp. 51–52. The *Layha* uses the terms 'martyrdom attacks' instead of 'suicide attacks', but how can a person be called a '*shaheed*' (martyr) when he kills himself? A *shaheed* is a person killed by the enemy. In addition, the *Layha* uses the term 'martyr *mujaheed*' for 'suicide bomber'.

83 See *Layha*, 2009 edition, above note 64, Section 41.

84 For a detailed study of perfidy and ruse, see Muhammad Munir, 'The conduct of the Prophet (PBUH) in war, with special reference to prohibited acts', in *Insights*, forthcoming.

85 'Abd al-Jalil, *Shu'ab al-Iman*, MS. Bashir Agha, No. 366, Istanbul, p. 558.

86 Imam Shoukani, *Nail al-Awtar*, Ansar Al-Sunnah Al-Muhammadiyya, Lahore, n.d., Vol. 7, p. 246.

87 Abdul Malik b. Hisham, *Al-Sirah Al-Nabawyia*, ed. Mustafa Al-Saqa *et al.*, Dar al-Ma'rifah, Beirut, n.d., Vol. 2, p. 632.

(PBUH) intended to return him to his people in execution of the Prophet's (PBUH) covenant with the latter.[88] Abu Jandal stood up among the Muslims and asked them if they would return him to the polytheists who would torture him to make him renounce Islam. The Prophet (PBUH) answered, 'Treachery is not good for us, even to save a Muslim from the law of polytheists'.[89]

Islamic law considers any unilateral violation of a treaty by Muslims without first informing the other party to be an act of treachery. The other side must be given due notice of their intention, otherwise the Muslims will be committing perfidy. The Muslim state must abide by the terms of the treaty in letter and spirit. It is reported that the Ummayad Caliph Amir Mua'wiyah was once preparing his army to attack the neighbouring Roman Empire, although the peace treaty between the two was still in force, for he wanted to attack as soon as it had expired. A Companion of the Prophet (PBUH), 'Amr b. 'Anbasah, considered it treachery to prepare for an attack without giving prior notification to the Romans. He therefore hastened to the Caliph shouting, 'God is great, God is great, we should fulfil the pledge, we should not contravene it!' The Caliph questioned him, whereupon he replied that he had heard the Prophet (PBUH) saying,

> If someone has an agreement with another community then there should be no [unilateral] alteration or change in it till its time is over. And if there is risk of a breach by the other side then give them notice of termination of the agreement on a reciprocal basis.[90]

The Qur'anic verse says: 'Or, if thou hast reason to fear treachery from people [with whom] thou hast made a covenant, cast it back at them in an equitable manner: for, verily, God does not love the treacherous'.[91]

Shaybani considered it perfidy if a group of Muslims entered the enemy's country feigning to be the representatives of the Caliph, whether or not they showed forged documents; in that case they were not allowed to kill anyone or take away any property as long as they were in the enemy's state. Thus, if they were given protection, then they had to fulfil their obligations arising from that protection. Similarly, if Muslims pretend to be businessmen but are planning to murder someone, they are forbidden to kill, because they have been granted quarter by the enemy.[92]

A suicide attack is a typical example here of perfidy or treachery, because the bomber feigns to be a civilian, and when he is taken to be a non-combatant and

88 Under the Treaty of Hudaybiyya between the Muslims and the Meccans, if a Muslim were to run away from Mecca and join the Muslims in Medina he would be returned, but if a non-Muslim were to leave Medina and join the Meccans he would not be returned.

89 Ahmad b. Hanbal al-Shaybani, *al-Musnad*, Mu'asasah Qurtubah, Cairo, n.d., Vol. 4, p. 323; Abdul Malik b. Hisham, *al-Sira al-Nabawiyya*, Dar Ehya al-Turath al-'Arabi, Beirut, 1995, Vol. 3, p. 347.

90 M. Shaybani, above note 34, Vol. 1, p. 185. According to Sarkhasi, it means that any act that resembles treachery in letter or spirit must be avoided. See also Imam Termidhi, *Sunnan*, Gagri Yayinlari, Istanbul, n.d., Vol. 4, p. 143, Hadith No. 1580.

91 Qur'an, verse 8:58.

92 M. Shaybani, Vol. 2, pp. 66–67.

spared by the enemy's soldiers, he blows himself up and kills them. Such an act is strictly prohibited in both Islamic law and IHL.[93] Other examples of treachery or perfidy include engaging in combat while feigning non-combatant status, using non-combatants as shields, using ambulances to carry ammunitions or soldiers, pretending to surrender, feigning sickness, and feigning to be a civilian. As pointed out above, suicide attacks are strictly prohibited in Islamic law, and a suicide bomber might be committing at least five crimes according to Islamic law: killing civilians, mutilating their bodies, violating the trust of enemy soldiers and civilians, committing suicide,[94] and destroying civilian property.[95]

Notably, while the *Layha* prohibits mutilation of dead bodies,[96] by allowing suicide attacks it allows live persons to be mutilated, disfigured, or burnt. Killing in such a way is strictly prohibited in Islamic law. Some scholars argue that suicide attacks are allowed in some situations but not in others. Sheikh Qaradawi, for instance, initially allowed suicide attacks in the occupied territories (Palestine)[97] but has subsequently disallowed them.[98]

It may be argued that suicide attacks against non-Muslim enemy belligerents occupying Muslim territory, which is the case in Afghanistan, are not forbidden in Islamic law. Before responding to this claim, it is necessary to explain what types of suicide attack Islamic law prohibits in war. The prohibited types of suicide attack include those when a suicide bomber pretends to be a civilian but is wearing a suicide jacket under his civilian outfit and targets combatants or civilians. As already stated, such an attack is an act of perfidy. When the bomber is openly wearing his combat outfit, it might be very difficult even to get close enough to the enemy to carry out such an attack.[99] Yet if suicide attacks by persons posing as civilians are allowed against occupying forces because they occupy Muslim

93 See Article 37(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Perfidy is defined as 'acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence'.

94 Committing suicide is strictly prohibited in Islamic law. Suicide in Islamic law is intentional self-murder by the believer. There is a *hadith qudsi* – a statement of the Prophet (PBUH) ascribed to God himself – in which he says that a wounded man takes his own life. God then says, 'My servant anticipated my action by taking his soul (life) in his own hand; therefore, he will not be admitted to paradise'. See Isma'il Al-Bukhari, *Sahih Bukhari*, Dar Sahnun, Istanbul, 1992, Vol. 3, p. 32. In another saying of the Prophet (PBUH), he has given a stern warning to a person committing suicide, stating that the wrongdoer would be repeating the suicidal act endlessly in hell and would reside in hell for ever. *Ibid*., Vol. 3, p. 212.

95 For details, see M. Munir, above note 61.

96 *Layha,* Section 70.

97 Y. Qaradawi, above note 12, Vol. 2, p. 1092.

98 Sheikh Qaradawi argues that, since the Palestinians have obtained missiles that can hit Israel, martyrdom operations are no longer allowed (*ibid*., p. 1092). If the same argument is applied in Afghanistan, where (1) the Taliban are so strong that for almost ten years the world's strongest and most well-equipped army has been unable to defeat them and (2) the Taliban possess more sophisticated weapons than the Palestinians, then the use of suicide attacks as a method of warfare should be strictly prohibited.

99 One possibility is when such a soldier pretends to be surrendering and, on approaching the enemy, blows himself up. But this again is perfidy, and in the future soldiers who genuinely wanted to surrender would not be trusted by the enemy.

territory, it would mean that the principles of Islamic *jus in bello* are applicable only when Muslims conquer and occupy non-Muslim territories, and not when Muslim territory is occupied. This is unacceptable.

The Taliban's law on suicide attacks asks the bombers to avoid civilian casualties and damage to civilian property.[100] But this cannot be considered as compliance with the principle of distinction between combatants and civilians under Islamic law or IHL, for it is violated in Section 81 of the *Layha*, which urges the fighters to resemble the local population in their outward appearance: they should keep their 'hair style, clothing, shoes and other things just like the local people [because] this will allow the *mujahideen* to protect the local people and will enable them to move freely in any direction'.[101] It is clear that this provision is contrary to the principle of distinction.[102] It destroys the credibility of genuine civilians because the adversary's trust is broken, and exposes the genuine civilian population to attacks.

Conclusion

The Taliban's claim that they are the *mujahideen* (holy warriors) of the Islamic Emirate of Afghanistan obviously suggests that they must abide by the rules of Islamic law on the conduct of hostilities. The *Layha*, the code of conduct for their fighters, highlights the limiting of suicide attacks, avoiding civilian casualties, and winning the battle for the hearts and minds of the local civilian population: 'A brave son of Islam should not be used for lower and useless targets. Utmost effort should be made to avoid civilian casualties'.[103]

In terms of limiting the effects of war, banning some forms of torture, and ruling out non-discrimination based on tribal origin, language, or geographical

100 But see Said Mahmoudi, 'Non-state Islamic actors and international humanitarian law', unpublished paper presented at the Conference on Perspectives on International Humanitarian Law between Universalism and Cultural Legitimacy, The Hague, 27 November 2009.

101 Section 81 of the *Layha* corresponds to Section 63 of the 2009 edition. It is clearly very questionable whether disguising the Taliban to look like the locals will protect them (the locals) or will expose them to danger.

102 In most cases, non-state actors do not in fact comply with the principle of distinction that was stressed by the Prophet (PBUH) and his successors in their wars. See Muhammad Munir, 'The protection of women and children in Islamic law and international humanitarian law: a critique of John Kelsay', in *Hamdard Islamicus*, Vol. 25, No. 3, July–September 2002, pp. 69–82; and Muhammad Munir, 'Non-combatant immunity in Islamic law', under review for possible publication in *Journal of Islamic Law and Culture*. According to a *fatwa* (legal ruling) issued on 23 February 1998 by the so-called 'World Islamic Front' – a group consisting of Osama bin Laden and four other persons representing Islamic militant groups in Egypt, Pakistan, and Bangladesh – 'Killing the Americans and their allies – civilian and military – is an individual obligation for any Muslim who can do so in any country …'. In addition, the *fatwa* urges Muslims 'to kill Americans and plunder their money wherever and whenever they find it'. Available at: http://www.fas.org/irp/world/para/docs/980223-fatwa.htm (last visited 22 December 2010). The original *fatwa* is undated but was published on 23 February 1998 in *Al-Quds al-Arabi*, London edition, p. 3, available at: http://www.library.cornell.edu/colldev/mideast/fatw2.htm (last visited 22 December 2010). This injunction is contrary to Islamic *jus in bello*.

103 *Layha*, Section 57(2, 3).

background, the *Layha* may be said to show respect for some fundamental humanitarian rules. However, many rules contained in it have no basis either in Islamic law or in international humanitarian law and may even contradict both of them. The rules on the possible execution of POWs, the punishment of contractors, suppliers, and drivers, and the introduction of *ta'zir* as a punishment for captives at the discretion of the judge for common criminals who cannot be punished under *hudud*, *qesas*, or *syasa* are examples of rules that cannot be found in Islamic law. Conversely, the unconditional release of POWs, the exchange of POWs, and the prohibition of mutilation are based on Islamic law. The acts of perfidy allowed by the *Layha* as methods for the conduct of hostilities – such as attacks in which a suicide bomber feigns civilian status – are to be considered perfidy in both divine law and humanitarian law. Rules that combatants should wear the same clothes and shoes and style their hair in the same way as the local people, so as not to be identified by the enemy, violate the principle of distinction between combatants and civilians and endanger the civilian population. There are many provisions in the *Layha* that are based on Islamic law, such as the requirement that disputes between people (under the *mujahideen*'s control) should be settled according to Islamic law, the prohibition on harming someone's person or property, the prohibition of the use of force in collecting *usher*, *zakat*, or donations, and the prohibition of kidnapping for ransom, but these are for the administration of areas under the *mujahideen*'s control and not elsewhere.

Thus, the present *Layha* contains many provisions of Islamic law as far as administrative control by *mujahideen* is concerned. However, many rules in the *Layha* regarding the conduct of hostilities cannot be said to be based on pure Islamic law. Islam is used more as rhetoric to serve as a source of unity and to mobilize, not as a guarantee for compliance with the Islamic law of war.

The *mujahideen* have to behave well and show proper treatment to the nation, in order to bring the hearts of civilian Muslims closer to them.[104] If this declared aim is to be accomplished in due respect for Islamic law, the code of conduct must abide by Islamic law and the principles of international humanitarian law. The various changes in the *Layha* over the last few years show that there is room for improvement in the search for compliance with those principles and above all with the divine law. In sum, the *Layha* has an ambitious goal to set out principles in accordance with Islamic law and give it a religious sanction, but unfortunately it falls short.

104 This is the crux of the Introduction of the *Layha*. See, Sections 1–8, pp. 6–14.