

The Conduct of Hostilities and the ‘*Layha* for the *Mujahidin*’:

(Mis)interpreting Humanitarian Rules

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Abstract

This work focuses on the Layha for the Mujahidin in Afghanistan to find out its conformity with or its derogation from the Islamic jus in bello. The Layha has created new rules for punishing captives, such as taz‘ir punishment which has never been used in Islamic military and legal history to punish war captives. It allows summary and judicial executions for contractors, suppliers, and drivers, which are prohibited in Islamic law and permits acts of perfidy, such as suicide attacks as well as combating while feigning to be non-combatants, which are strictly prohibited in Islamic law. The Taliban have created and changed rules that have no basis in Islamic law but which they wrongly attributed to Islamic law.

Introduction

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This article discusses the ‘*Layha* for the *Mujahidin*’ titled as “The Islamic Emirate of Afghanistan Rules for the *Mujahidin*”¹ (hereafter the *Layha*) from the perspective of Islamic law. The *Layha* is applicable to the non-state armed Islamic actor, commonly known as Taliban fighting the International Security Force in Afghanistan (ISAF). This article aims to check whether the *Layha* is based on Islamic law as claimed by the Taliban and puts the *Layha* in a wider context. Although the work focuses on the *Layha* for the *Mujahidin*, the attitude of other non-state Islamic actors towards Islamic *jus in bello* will be mentioned where necessary.

Do the Taliban Qualify as a ‘Non-State Actor’ in the Armed Conflict?

Since this work deals with the ‘*Layha*,² the first question to know is whether the Taliban in Afghanistan as a fighting group qualify as a ‘Non-State Islamic Actor’? In the context of international humanitarian law, a Non-State Islamic Actor, is a very broad concept and may be taken as any Muslim group of whatever size, military capacity, organizational structure, purpose and aim, fighting anywhere in the world. As we will see below, every Muslim military group does not qualify as a ‘Non-State Actor’ under international humanitarian law (IHL). Some of these groups might be considered as insurgents, bandits, terrorist groups, or may be known by some other denomination by different states. What is important in our discussion is whether the

¹ *Layha* (lit. Rules and Regulations) is a code for conducting hostilities for the fighters in Afghanistan.

² So far, there have been, at least, three editions of the so called ‘*Layha* for the *Mujahidin*’. The first one was published on 1st August, 2006 and contained only 39 sections. The second one was published on May 9, 2009 and consisted of 67 sections. The third and the present one is published on May 29, 2010 and has 85 sections. Section 5 of the 2009 edition states that all *Mujahidin* and personnel of the Islamic Emirate should abide by the 2009 code and the past rules and regulations are no longer valid. According to section 4 of the 2010 edition, these rules are applicable from May 29, 2010 and all personnel of the Islamic Emirate and the *Mujahidin* should abide by them. All the editions are in Pashto language and none of them has mentioned the place of publication.

armed struggle waged by a Muslim group (in our case the Taliban) is in conformity with the Islamic *jus in bello* as well as IHL. On the other hand, by adding the adjective “Islamic” and the word “*Mujahidin*” there is an expectation that these so-called “*Mujahidin*” would be having an Islamic identity, an Islamic agenda, and that their code for the conduct of hostilities would be an Islamic one. This work attempts to find it out.

Regarding the question captioned above, we have to see whether a conflict amounts to an armed conflict under IHL or not. 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.”³ The ICTY has attached two additional stipulations for a conflict between governmental authorities and non-state armed groups to become an ‘armed-conflict’: First, the non-state actor should be well-organized and have a hierarchal structure; second, the conflict should reach a certain level of intensity.⁴ Any conflict that does not fulfill these two conditions is not subject to IHL and may be dealt with under the domestic law as banditry, terrorist activities, or unorganized or short-lived insurrections.⁵ The above two stipulations 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.”⁶ If the above criteria are applied a lot many Muslim *jihadi* groups may be excluded from the definition of non-state actor

³ 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.

⁴ The International Court of Justice (ICJ) has on many occasions given its opinion on the criterion of intensity with respect to armed attacks. For the first time, the Court discussed it in the Nicaragua case (par.191) and later on 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.

⁵ Prosecutor v. Tadic, ICTY Case No. IT-94-1, Judgment (Trial Chamber) , 7 May 1997, para. 562.

⁶ Prosecutor v. Boskoski et.al, ICTY Case No. IT-04-82-T, Judgment (Trial Chamber), 10 July 2008, para. 185.

under IHL.⁷ The Taliban in Afghanistan meet all the above conditions⁸ and thereby qualify as a non-state actor.⁹ The conflict in Afghanistan is internal or non-international but 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 the old classification of international armed conflict and non-international armed conflict and a third category, i.e., internationalized non-international armed conflict can best describe the situation.¹⁰ Whatever the nature of the conflict, the relevant applicable law to non-state actors, parties to an armed conflict, is Common Article 3 of the four Geneva Conventions of 1949. In case of a non-international armed conflict the Second Additional Protocol of 1977 is also applicable.¹¹ The rules in Common Article 3 have the status of customary international law and the non-state actors are bound under international law by customary IHL norms when engaging in an armed conflict.

⁷ Many small Muslim *jihdi* groups, such as Harakat al-Ansar, Harakat ul-Mujahidin, Al-Umar Mujahidin (all of them operating in Kashmir), Fatah al-Islam (Ghaza), some Islamic militant groups within Somalia, fail to qualify these conditions.

⁸ According to an interesting investigative article reported in *The Wall Street Journal*, the Taliban are the main beneficiaries of the Kajaki hydropower plant which is repaired and upgraded by the U.S. for more than \$100 million. The Taliban collect 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 around \$4 million a year, in a country where the monthly wages of an insurgent fighter hover around \$200. The paper claims that the Taliban use the proceeds to fund their war with American and British troops. See, Yaroslav Trofimov, "U.S. rebuilds a power plant, and Taliban reap a windfall: Insurgents charge residents for electricity the Afghan government supplies to areas under rebel control", *The Wall Street Journal*, (European edition), Wednesday, July 14, 2010, p. 14. It is clear that the Taliban in some areas run the day-to-day administration as well.

⁹ Apart from the Afghani Taliban, other typical non-State Islamic actors that have been engaged in armed conflict with a government and at least at times have fulfilled the stipulations of the ITCY, include, Al Qa'eda, Islamic Salvation Front (FIS) (Algeria), and Abu Sayyaf Group (the Philippines). The status of two Islamic groups, namely Hamas and Hezbollah is more complicated. Hamas now controls Ghaza but is still a non-state actor because the Occupied Territories, or Ghaza, to be more precise, is not yet recognized as a State. Hezbollah, on the other hand, has a political wing which is on and up in the government of Lebanon but it still qualifies as a non-state actor only. The two UN Human Rights Council's 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 titled, "Human Rights Council": Mission to Lebanon and Israel (7-14 September 2006), UN Doc. A/HRC/2/7 dated 2 October 2006; Implementation of General Assembly Resolution 60/251 of 15 March 2006 titled, "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 dated 23 November 2006.

¹⁰ See also, Avril McDonald, "Terrorism, Counter-Terrorism and the Jus in Bello", in Michael N. Schmitt (ed.), *Terrorism and International Law: Challenges and Responses*, ed., International Institute of Humanitarian Law, Sanremo, 2002, p. 65.

¹¹ 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.

According to the decision of the Appeal Chamber of the Special Court for Sierra Leone, “It is 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.”¹² The consequences of whether a conflict is international or non-international are many but probably the most important one is the status of those captured in the conflict. If the conflict is international, the captured combatants enjoy the prisoner of war (POW) status under the Geneva Convention III and are entitled to many privileges. Whereas those captured in a non-international armed conflict involving a non-state actor and a government are not entitled to the same status and are treated under Common Article 3. Moreover, whether a conflict is international or non-international, non-state Islamic actors, such as the Taliban in our case, have undoubtedly many obligations under IHL.

It is interesting to see what the status of Taliban is under Islamic law. In Islamic law, Taliban should be called ‘*Ahl al-Baghi*’ or those who rebel against the political authority and the Community of Muslims. Muslim jurists have laid down four conditions for a group to qualify as ‘*Ahl al-Baghi*’: First, rebelling against the state authority by not fulfilling their obligations and refusing loyalty to state laws; secondly, the group should possess power and strength; thirdly, the group should openly revolt and fight against the political authority; and finally, the rebels must have their own innovative interpretation of Islamic law to which they strictly adhere. The last condition is controversial.¹³ The Muslim political authority must fight the rebels to bring them

¹² 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.

¹³ The fourth condition, i.e., innovation of ‘*ta’wil*’ or an interpretation of their own is according to the ‘*jamhur*’ (majority) of Muslim jurists. The well-known example of such rebels in Islamic history is that of *Kwarij* (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. It is enough if they only aim to get power and authority. The obvious example of this category is

into submission rather than to wipe them out when they refuse to lay down their arms by peaceful means.¹⁴ Taliban make a good example of rebels in Islamic law.

Taliban's Attitude towards Islamic Law for Conducting Hostilities

Before examining Taliban's attitude towards Islamic law for conducting hostilities, it is pertinent to mention that the *Layha* does not make any mention or reference to IHL at all. This may be interpreted that they neither acknowledge the existence of IHL, nor its application in the conflict. In fact, as we will see below, most of the rules in the *Layha* are against IHL. On the other hand, during their short rule in Afghanistan, from 1995 – 2001, the Taliban, were well-known for their very literal, rigid, and radical interpretation of Islamic law.

The Taliban claim that their *Layha* is based on Islamic law. In the latest 2010 edition of the *Layha*, it is mentioned that it is prepared in accordance with Islamic law in consultation with top scholars, *muftis* (jurist-consults), experts, and specialists.¹⁵ But as we shall see below, the

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 Ummayyad Caliph, Marwan b. al-Hakam. See, 'Ali b. Ahmad b. Sa'eed, b. Hazm, *Al-Muhalla*, Dar al-Fikr, Beirut, n. d., 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, 393; and Muhammad al-Sharbini al-Khatib, *Mughni al-Muhtaj*, Maktaba Mustafa al-Babi, Cairo, 1933, Vol. 4, p. 126.

¹⁴ See, Ibn Hazm, *Al-Muhalla*, Vol. 11, p. 97; Shahfi'i, *Al-Umm*, Vol. 4, p. 215; Khatib, *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, 317-319; Muhammad Khair Haykal, *Al-Jihad wa al-qital fi al-Syasa al-Shar'iyya*, 2nd edn. Dar al-Bayariq, Beirut, 1996, Vol. 1, pp. 63-69.

¹⁵ See, *The Islamic Emirate of Afghanistan Layha for the Mujahidin*, 2010 edn., Introduction, p. 4. (Hereafter the *Layha*). It is stated that its compliance is obligatory for every person with authority and every *mujahid*. Ibid., p. 5. It also stresses that all military and administrative officials as well as ordinary *mujahidin* should follow these rules and conduct their day-to-day *jihadi* affairs accordingly. Ibid. p. 5.

Taliban have been changing these rules in a span of only four years period, i.e., from August 2006 – May 2010. They have published and enforced three different versions of them and certain rules were changed from one version to the other, their grandeur claim that the *Layha* is based on Islamic law, cannot be substantiated because it would mean that the rules of Islamic law changed during this time, a hypothesis that is never acceptable in Islamic law. On the other hand, it is pertinent to learn whether the Taliban use Islam as rhetoric to serve as a source of unity and mobilization or as a guarantee for compliance with the Islamic law of war.

Before examining the *Layha* in detail, it is important to mention that the 2010 edition has 85 sections but not all of them are about the conduct of hostilities. In fact, only 37 sections can be considered as relevant to the conduct of hostilities. These are: Sections 5 and 7¹⁶, 9-16¹⁷ (POWs 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). The rest is about administrative matters, hierarchal organization, resolving disputes of the people under the control of Taliban, as well as disputes among the Taliban and so on. We now turn to the attitude of the Taliban towards the Islamic law of war. However, only the major provisions of the *Layah* will be discussed in this work.

The Fate of Captured Persons

¹⁶ The entire Part I, i.e., sections 1-8, is not about the conduct of war but it is about inducing and inviting those working for the Afghan regime to join the Taliban and how to treat them. However, two sections out of these eight, i.e., section 4, which talks about perfidy committed by a person who surrenders, and section 7, which is about those armed personnel of the Afghan regime which want to surrender but their true intention is not clear, are relevant to the conduct of war.

¹⁷ Both sections are inclusive in this counting.

Regarding the prisoners of war (POWs), there seems to be four categories in the *Layha*: First, the Afghan army soldiers, police or other officials (S. 10); secondly, contractors, suppliers, drivers, and personnel of private security companies (Ss. 11, 23, 24, 25 and 26); and thirdly, foreign soldiers (S. 12); and finally, the killing of hostages during transportation (S. 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's prisoners or releasing them *gratis* 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 or released *gratis* or released after credible guarantee or executed or given some other punishment under *taz'ir*. The governor has to choose one punishment from the first three otherwise the *Imam* or his deputy or the provincial *qadi* will choose one of the last two punishments. However, the governor shall perform the duties of a *qadi* if none is appointed in a province. We will check the Islamicity of these punishments at the end of this section.

The fate of those in the second category is mentioned in sections 11 and 23-26.

According to section 11 read with sections 23-26, if it is certain that the contractors build basis or supply materials to 'infidels and their puppet regime,' the *Mujahidin* should burn their supplies²¹ and kill such contractors.²² High and low ranking officials of private security companies, spokesmen for ISAF, and supply drivers are to be given death penalty by the district *qadi*.²³

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

¹⁹ *Imam* is the head of Taliban, Mullah Muhammad Umar and *Na'ib Imam* is his deputy. The *Layha*, Introduction, section 1.

²⁰ See, *Layha*, section 10. In case no *qadi* is appointed in a province,

²¹ Section 23 allows the burning of private vehicles if used for transportation of goods or other service of 'infidels'.

²² *Ibid.*, section 25.

²³ *Ibid.*, section 11. There is no other punishment for them.

There is no other option for the *qadi*. There is some confusion about supply drivers: section 24 allows their killing on the spot and under section 11 they get death sentence from the district *qadi*. Section 26 authorizes the killing of contractors who recruit labourers or other workers.

The fate of a non-Muslim combatant detainee can only be decided by the *Imam* or his deputy who may choose between execution or exchange or releasing them without any condition or ransom.²⁴ Under S. 13 if the *Mujahidin* took hostages and during their transportation to a secure place came under attack, they should kill them if these were enemy combatants or officials. But if the *Mujahidin* were not sure about the identity of the hostages, they shall not be killed, even if it meant that they be freed. Regarding the treatment of detainees, section 15 provides that the *Mujahidin* should not torture them by starvation, thirst, hot, and 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: Firstly, soldiers, police and other officials of the Afghan regime may be released without any condition or exchanged or released after they provide a credible guarantee but they cannot be ransomed and the governor has to 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 the same if no *qadi* is appointed. It means that the governor is the authority in these matters; secondly, all types of contractors, suppliers, drivers, personnel of security companies,²⁶ even those contractors who recruit workers, are either killed or summarily executed or given death

²⁴ See, *Layha*, section 12.

²⁵ According to section 16 *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 death sentence as a *ta'zir* punishment, he must get the approval of provincial *qadi*, and if there is no provincial *qadi*, the governor is authorized to deal in matters of death and *ta'zir*.

²⁶ It is important to note that Private Military Contractors (PMCs), also known as Private Military Firms (PMFs) – that are mostly employed in Iraq and Afghanistan, and despite their employment in (more often than not) combat action role (such as securing military logistic lines/ oil lines or interrogation of detainees), are not covered by the existing modern day IHL, reflecting the grey area of the law.

sentences by the *qadi* if arrested; thirdly, the fate of a captured foreigner non-Muslim combatant is decided by the *Imam* or his deputy, who may authorize his execution or exchange or release or ransom; finally, hostages who are suspected to be enemy combatants or other officials can be killed if during their transportation to a secure place the *Mujahidin* come under attack.

Evaluation under Islamic *jus in bello*: the *Layha* vs. Islamic Law

There are three points worth commenting from an Islamic *jus in bello* perspective: First, what is the fate of POWs in classical Islamic law as well as Islamic military history? Secondly, can the punishment of *ta'zir* 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 captives?

1. The Fate of POWs in Islam

There is disagreement among the Muslim jurists of various schools of thought regarding the fate of POWs in Islam.²⁷ We will briefly explain interpretation of the relevant verses of the *Qur'an*,

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 Prisoner of War in Classical Islamic Law: Concepts Formulated by Hanafi Jurists of the 12th Century", *Revue De Droit Penal Militaire et de Droit de la Guerre*, Vol. XX (3-4) (1981), pp. 271-307. This work is exclusive but not exhaustive on POWs in Islam and fails to elaborate the complex rules regarding the POWs and the reasons behind the differences of opinions among the early Muslim jurists. Another noteworthy work is Khaled Abou El Fadl, "Saving and Taking Life in War: Three Modern Muslim Views", *The Muslim World*, Vol. LXXXIX (2), (1999), pp.158-180. This work discusses the work of three modern scholars of the 20th century; Syed Sirajul Islam, "Abu Ghraib: Prisoner Abuse in the Light of Islamic and International Law", *Intellectual Discourse*, Vol. 15, No. 1, pp. 15-35 at 15-19. Works that are based on secondary sources include, Yadeh Ben Ashoor, "Islam and International Humanitarian Law", *International Review of the Red Cross*, No. (722) (March-April 1980), 1-11, especially 3-7; and secondly, Troy S. Thomas, "Prisoners of War in Islam: A Legal Inquiry", *Muslim World*, Vol. 87, (January 1997), 44-53. The first article briefly discusses the interpretation of Qur'anic verses regarding POWs. Unfortunately, the author does not give references of many works discussed in his article. In the second work the author has given a summary of Islamic law regarding POWs. A recent work in Arabic language is 'Ameur al-Zemmali (ed.), *Maqalat fi al-Qanun al-Duwali al-Insani wa al-Islam*, (n.p.: ICRC, 2007) 2nd edn. This publication has put together 15 essays previously published in the *International*

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*. Verse 9:5, which says, “[A]nd take them captive, and besiege them”²⁹ and verse 47: 4 which says, “And then tighten their bonds.” Muslim jurists agree that their fate is left to the political authority as he sees fit in the best interest of the Muslim community. However, they split as to the choices that are available to the Muslim state to terminate their captivity. The various options the Muslim jurists mention include execution, exchange, releasing *gratis* or on conditions, ransom, and enslavement. According to the majority of Muslim scholars – Malikites, Shafites, Hanbalites, Shi‘ide, Zahirites and Awza‘i, the political authority has the following options: execution, enslavement, ‘*mann*’ (releasing them *gratis*), and ‘*fida*’ (ransom or releasing after a condition or 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 them free with the condition that they should pay ‘*jizyah*’ (poll-tax) but there is disagreement on ransom.³² Imam

Review of the Red Cross on the various aspects of Islamic *jus in bello* and in some cases its comparison with international humanitarian law. A comprehensive treatment of the subject is done by Ameer Zemmali, *Combatants 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 comprehensive treatment of the issue of POWs in Islam, see, this author’s, “The Protection of Prisoners of War in Islam”, *Islamic Studies*, forthcoming.

²⁹ 9:5.

³⁰ Muhammad al-Sharbini al-Khatib, *Mughni al-Muhtaj ‘ala hharh al-Minhaj*, Matb‘a al-Halabi, Cairo, 1933, Vol. 4, p. 228; M. Ahmad b. ‘Ali b. Ahmad b. Hazm, *Al-Muhallah*, Tab‘a Munir al-Dimishiqi, Cairo, 1352 A.H., 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.

Abu Yusuf³³ and M. Ibn al-Hasan al-Shaybani³⁴ allow ransom.³⁵ The *Qur'an* mentions the fate of POWs in 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 makes execution illegal and makes captivity a temporary affair, and which must give rise to either unconditional or conditional freedom or freedom bought with 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) which he made while conquering Makkah, "Slay no wounded person, pursue no fugitive, execute no prisoner; and whosoever closes his door is safe."³⁷ 'Ali b. Abi Talib (d. 40/661), Al-Hasan b. al-Hasan (d.110/728), Hammad b. Abi Suliman (d.120/737),³⁸ Muhammad b. Sirirn (d.110/728), Mujahid b. Jabr Mawla (d.103/721), 'Abd al-Malik b. 'Abd al-'Aziz b. Jurayj (d.150/767), 'Ata b. Abi

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) Abu Bakr al-Sarkhasi, ed., 'Abdullah M. Hasan al-Shafi'i, Dar al-kotob al-'Ilmiya, Beirut, 1997, Vol. 4, p. 300.

³⁵ Kasani, *Bada' i'*, 6: 95.

³⁶ Verses 8: 67-68, passed censor on the Prophet (PBUH) because no revelation attesting to it 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 Shaybani, *Kitab al-Siyar al-Kabir*, 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. At 3:124.

Rabbah (d.114/732)³⁹ and Abu ‘Ubayd b. Salam were against the execution of POWs.⁴⁰

According to ‘Imaduddin Isma‘il b. ‘Umar b. Kathir (d.774/1373), “[T]he head of Muslim state has to chose between *mann* and *fida*’ only. His [POW’s] execution is not allowed.”⁴¹ Ibn Rushd (d.594/1198) mentions that “A group of jurists maintained that it is not permitted to execute the prisoners. Al-Hasan b. Muhammad al-Tamimi (d.656/1258) has related that there is a consensus (*ijma*’) of the Companions on this [that POW shall not be executed].”⁴²

In all the wars of the Prophet (PBUH) only three POWs were executed. Thus, only ‘Uqbah b. Abu Mu‘it was executed out of 70 captives of Badr⁴³ for his crimes against the Prophet (PBUH) and Muslims in Makka.⁴⁴ The second was Abu ‘Izzah al-Jumahi in Uhd.⁴⁵ The third POW was ‘Abdullah b. Khatal who was executed on the day Makkah was conquered.⁴⁶ All of them were executed for the heinous crimes they had committed against the Islamic State before their captivity and were wanted criminals in the Muslim State. It should be very clear now that it was never an *established rule* at the time of the Prophet (PBUH) that POWs be executed. Probably

³⁹ Abu Bakar al-Jassas, *Ahkam al-Qur’an*, Sidqi M. Jamil (ed.), Dar al-Fikr, Beirut, 2001, Vol. 3, 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 Ibn Rushd, *The Distinguished Jurist’s Primer*, 1: 456.

⁴³ 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.

⁴⁴ Abu ‘Ubayd, *Kitab al-Amwal*, 130, n. 24.

⁴⁵ He was set free in Badr on the condition that he will stop his blasphemous poetry against Islam and shall not fight the Muslims again. He breached his promise and requested once again 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.

⁴⁶ He was a Muslim living in Madinah but killed an innocent Muslim, reverted into the pre-Islamic faith, embezzled public money, bought two concubines who would do blasphemous poetry, and started a campaign against Islam. There were many other wanted criminals for the Muslim State but they were all pardoned on their request.

Al-Hasan b. Muhammad al-Tamimi has struck a chord when he proclaimed that the companions of the Prophet (PBUH) were unanimous on the prohibition of the killing of POWs.⁴⁷ This is the opinion of an overwhelming number of classical jurists.⁴⁸ The pro-execution jurists have given 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 to decide the dispute between them and the Muslims be an example of 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? Our answer is in the negative. The Banu Quraydha betrayed the Muslims during the battle of *Ahzab* (Arabic, lit. coalition) by breaching the treaty between the two sides (Muslims and Banu Quraydha) and supported the large anti-Muslim coalition headed by the non-Muslims of Makka. This was against the treaty they had with the Muslims which stated that both sides shall defend the city together against any external attack. Once the battle was over, both sides agreed to refer the matter to an arbitrator. Banu Quraydha was 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 their women and children shall be enslaved in accordance with the Jewish law. According to King James Version:

⁴⁷ See, Shaybani, *Kitab al-Siyar al-Kabir*, 2: 261. Ibn Rushd agrees with this opinion

⁴⁸ This is also the opinion of great many classical jurists such as 'Abdullah b. 'Umar (d.73/692), al-Hasan al-Basri (d.346/957), 'Ata, Dhak b. Muzahim al-Hilali (d.100/718) and Ismail b. 'Abdul Rahman known as al-Sudi (d.127/744). Ibn Rushd agrees with this opinion. See, his, *Bidayat al-Mujtahid*, 1: 369. According to Shi'a jurisprudence, the *Imam* has only three options: *mann*, *fida'* (ransom either for money or exchanging with enemy's POWs) and enslavement. The Shi'a jurists consider execution illegal in captivity. See, Najmuddin al-Muhaqiq al-Hilli, *Shara' i' al-Islam*, Syed Sadiq al-Sherazi, (ed.) ,Dar al-Qari, Beirut, 2004, Vol. 1, p. 251; and Sa'id b. Habbat al-Rawandi, *Fiqh al-Qur'an*, al-Siyad Ahmad al-Husaini, Matba'a Ayatullah, (ed.), Qum, 1405 A.H., 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.

When thy Lord hath delivered it 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

It is clear that if they had triumphed over the Muslims they would have dealt with them exactly in the same manner. To sum up this discussion, we conclude that POWs shall never be executed and the situations in which three of them were executed in the life of the Prophet (PBUH) was because of the crimes those individuals had committed against the Muslim state or its citizens before their captivity. According to Abu Yusuf Ya‘qub b. Ibrahim (d.183/798) and Imam Abu Bakr al-Sarkhasi, only the head of the Muslim 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 *siyasa*⁵² (only exercised by the

⁴⁹ See, King James Version, *Denterouomy*, Gideons International, New York, 1987, 20: 10-14, 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. Although they were punished for their treachery but this is how the people of a besieged city are treated when captured by Jews.

⁵⁰ Abu Yusuf, *Kitab al-Kharaj*, pp. 378, 380.

⁵¹ Shaybani, *Kitab al-Siyar al-Kabir*, Vol. 4, pp. 313-14.

⁵² ‘*Siyasa*’ means, literally, ‘policy’ and it comprises the whole of administrative justice which is dispensed by the sovereign and by his political agents, in contrast with the ideal system of the *Shari‘ah* which is administered by the *qadi*. The *mazalim* courts and the institution of *muhtasib* (ombudsman) are examples of ‘*siyasa*’ in the early justice system of ‘Abbasid.

head of the Muslim state) and not an ordinary offence.⁵³ It is important to mention that the Geneva Convention III Relative to the Prisoners of War of 1949 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 Geneva Convention III prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.⁵⁴

2. 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 incidents of releasing them *gratis* such as the release of Thumama b. Athal as well as 80 Makkan fighters.⁵⁵ Similarly, all the fighters of Hawazin, Hunayn, Makka, Banu al-Mustalaq,⁵⁶ Banu al-Anbar, Fazara, and Yemen were set free *gratis*.⁵⁷ Abu Bakr – the first successor of the Prophet (PBUH), released Al-Ash'as b. Qays (d.35/656).

⁵³ See, M. T. al-Ghunaymi, "Nazratun 'Aammah fi al-Qanun al-Duwali al-Insani al-Islami", in *Maqalat fi al-Qanun al-Duwali al-Insani*, ed., Ameer al-Zemali, ICRC, n.p., 2nd ed., 2007, p. 48.

⁵⁴ See also, Articles 109 and 111 of Convention III 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 The captives of Mustaliq were first distributed among the companions but later, when the Prophet (PBUH) married Juwayriya bt. al-Harith (d. 50/670), the daughter of the leader of the tribe, the companions set the captives free. According to authentic report, her father got her released but she subsequently married the Prophet (PBUH) upon her release. See, Shibli Nu'mani & Syed Suliman Nadawi, *Sirat al-Nabi*, al-Faisal Nashiran-i-Kutub, Lahore, n. d., Vol. 1, pp. 252-53.

⁵⁷ Abu 'Ubayd, *Kitab al-Amwal*, pp. 116-120.

‘Umar – the second successor, pardoned Hormuzan (d.23/643) – an Iranian commander.⁵⁸ Abu ‘Ubayd argues that ransom was taken only from the POWs of Badr and was *never* taken again. Later on his conduct was to pardon prisoners. “The later precedent from the Prophet (PBUH) is to be acted upon”, he says the practice of pardoning by the Prophet (PBUH) came after Badr.⁵⁹ This view has the support of ‘Abdullah b. ‘Abbas (d.68/687), ‘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, ransom or anything else. According to Abu ‘Ubayd, the Prophet (PBUH) did not practice enslavement. ‘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 release POWs free. Ransom was taken only once and execution is only for crimes liable to death penalty when committed against the Islamic state before captivity. Now what about the *Layha* which considers execution as one of the options for some captives (such as, Afghan soldiers, police, security officials and foreign soldiers); the only punishment for others (such as contractors, suppliers, carriers, drivers, personnel of security companies); and the killing of hostages if suspected to be enemy combatants and could not be transported to a secure place because of some attack. Our conclusion is that this rule of the *Layha* has no basis in Islamic law.

3. The Fate of Contractors, Suppliers, and Drivers etc

⁵⁸ Some 6,000 combatants of Hunayn were not only set free but each one of them was given a special Egyptian suit as well. See, Nu‘mani & Nadawi, *Sirat al-Nabi*, Vol. 1, p. 368. ‘Umar b. al-Khattab ordered Abu ‘Ubayda – his commander, to release the captives of Tustar. See, Baladhuri, *Futuh al-Buldan*, trans. Murgotten, Vol. II, p. 119. ‘Umar also wrote to his commander to release the captives of Ahwaz and Manadhir when these were captured. Baladhuri, *Futuh*, pp. 112-114.

⁵⁹ *Ibid.*, 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, *Kitab al-Amwal*, 135. The enslavement of the women and children of Banu Quraydha was the result of arbitration and the Prophet (PBUH) did not enslave the POWs of other battles.

Under Islamic law, these categories are considered as servants. They do not participate in hostilities and their killing is strictly prohibited in Islamic law. It is reported that when the Prophet (PBUH) saw the body of a slain woman among the dead in the battle of Hunayn. “Who killed her?” he asked. The companions answered: “She was killed by the forces of Khalid ibn al-Walid.” The Prophet (PBUH) asked one of them, “Run to Khalid! Tell him that the Messenger of God forbids him to kill children, women, and servants.”⁶¹ The Prophet (PBUH) is also reported to have prohibited, in the strongest possible words in the Arabic language, the killing of women and servants: “Never, never kill a woman and a servant.”⁶² From the above it is very clear that the killing of these persons (i.e., contractors, suppliers and drivers and so on) in ambush or giving them death penalty in captivity is against Islamic law and Islam shall not be blamed for this brutal rule invented by the Taliban. In addition, the Taliban have been changing the punishment for contractors, suppliers, and drivers. The 2006 edition of the *Layha* allowed their punishment by beating or imprisonment. Their killing was only allowed if they could not be captured. Moreover, their captivity would be terminated by either exchanging them or ransom or some (unknown) punishment (but not death).⁶³ There was no death penalty in captivity or when they did not resist arrest. The 2009 edition of the *Layha* mention for the first time that contractors, drivers or other workers if arrested during transportation be given *ta'zir* punishment or exchanged or released *gratis* or released after credible guarantee by the governor. Ransoming

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, my, “Suicide Attacks and Islamic Law”, *International Review of the Red Cross*, 90:869 (March 2008), pp. 71-89, at 85.

⁶² Ibn Majah, *Sunnan*, 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's *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 Mujahidin*, (August 2006), sections 10 & 11.

was prohibited. Execution was to be authorized only by the *Imam* or his deputy.⁶⁴ Thus, execution for this category of captives was innovated for the first time in 2009 but required the permission of the *Imam*, yet was attributed to Islamic law.⁶⁵ In the 2010 edition of the *Layha* contractors, suppliers, drivers, and personnel of security companies were treated as a different category than Afghan army officials. They face death whenever the *Mujahidin* were able to strike at them.⁶⁶ On arrest the only punishment is death.⁶⁷ In the new edition execution was given in the hands of the *Mujahidin* failing which to the *qadis* (judges). The *Imam* has delegated his authority which he exercised since May 2009 to his soldiers and judges. To schematize, the punishment for this category in 2006 was beating or imprisonment; in 2009 they were treated at far with Afghan soldiers and there was a remote possibility of execution if authorized by the *Imam*; in 2010 the *mujahidin* are supposed to kill them in ambush, and if arrested, the *qadi* has to give them death sentence. There is no need of any control by the *Imam* or his deputy.⁶⁸ The 2010 rule has no equivalence in cruelty because it does not treat such persons as POWs or captives entitled to any privileges. Thus, in a period of four years the rules (which are claimed every time to be based on Islamic law) were changed three times. These rules have no Islamic basis whatsoever as explained above and if the first rule was Islamic, then why was it modified; in addition, if the second one was Islamic, why was it changed for the third time?

⁶⁴ See, *The Islamic Emirate of Afghanistan Rules for the Mujahidin*, (May 2009), sections 8, 20 & 21. The same was the punishment for Afghan National Army members. In case the captive was a commander, a district head, or a high ranking official or a foreigner Muslim, then the authority for all the above options is vested in the *Imam* or his deputy (S. 8).

⁶⁵ See, *The Islamic Emirate of Afghanistan Rules for the Mujahidin*, (May 2009), preamble, pp. 2-4.

⁶⁶ See, *Layha*, section 24 & 25.

⁶⁷ *Ibid.*, sections 11, 24 & 25.

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

4. Is *Ta'zir* Punishment an Option for the Political Authority for Termination of Captivity in Islamic Law?

Above we have described the various options available to the political authority for termination of captivity of POWs but the *Layha* prescribes the punishment of *ta'zir* for POWs as well. *Taz'ir* 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*. It was mentioned in sections 8, 20 and 21 as a punishment for Afghan soldiers, contractors and drivers.⁶⁹ Sections 10, 15 and 16 of the 2010 edition mention *taz'ir* punishment.⁷⁰ Section 15 says that although mistreatment of captives is prohibited but the *Mujahidin* should execute death or any *taz'ir* 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 *taz'ir* punishment and the district *qadi* must take the permission of the provincial *qadi* in case of *taz'ir* punishments. The governor exercises the powers of the provincial *qadi* if the *qadi*'s seat is vacant. One thing is not clear: when a provincial *qadi* or governor can authorize the punishment of *taz'ir* then what is the role of the *Imam* or his deputy? Moreover, as we will explain below the punishment of *taz'ir* for POWs is a pure Taliban's invention and can never be found in any classical or modern treatise or text of Islamic *jus in bello*.

The punishment of *taz'ir* constitutes an important place in Islamic criminal justice system. However, before discussing *taz'ir* it is important to discuss all categories of punishments in Islam. There are four categories of crimes in Islam: *hudud*, *qesas*, *taz'ir* and *syasa*. *Hudud*

⁶⁹ In the 2009 edition *Taz'ir* punishment under section 8 was vested in the governor or the *Imam* or his deputy depending on the rank of the captive. Under sections 20 and 21 of the same edition this authority was vested in the governor.

⁷⁰ Section 10 is about the options available for dealing with members of Afghan National army, police, and other state personnel. *Taz'ir* is not mentioned initially among the options but in the end of the section it says that only "the *Imam*, his deputy or the provincial *qadi*, are authorized to award death sentence or *taz'ir*." Section 15

crimes are punishable by a *hadd*,⁷¹ which means that the penalty for them is prescribed by the *Qur'an* or by the *Sunna*. *Qesas* crimes are not given a specific and mandatory definition or penalty in the *Qur'an*. Its meaning and contents are shaped by state legislation, judicial decisions and legal doctrine.⁷²

The third category is known as *syasa*. Its full name is '*al-syasa al-shari'yya* (the administration of justice according to the *shari'ah*). Unfortunately, many authors do not mention *syasa*.⁷³ This is, however, not appropriate as throughout Islamic legal history the head of the Muslim state always had discretionary powers under '*syasa*'.⁷⁴

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, i.e., *Ridda* (apostasy) and *Baghi* (transgression). Prosecution and punishment for *hudud* crimes are mandatory.

⁷² The *qesas* crimes include: murder; voluntary homicide; involuntary homicide; intentional crimes against the person; and unintentional crimes against the person.

⁷³ For example, see, M. Cherif Bassiouni, "Crimes and the Criminal Process", *Arab Law Quarterly*, Vol. 12, (1997), p. 269; David F. Forte, "Apostasy and Blasphemy in Pakistan", *Conn. J. Int'l L.* Vol. 12 (27) (1994-1995), p. 43; Mashood A. Baderin, "Effective Legal Representation in "Shari'ah" Courts as a Means of addressing Human Rights Concerns in the Islamic Criminal Justice System of Muslim States", *YIMEL*, Vol. 12 (2005-2006), pp. 140-152. However, see, Saeed Hasan Ibrahim, "Basic Principles of Criminal Procedure under Islamic Shari'a", in M. A. Haleem, A. D. Sherif & Kate Daniels, (ed.), *Criminal Justice in Islam: Judicial Procedure in the Shari'a*, I. B. Tauris, London: New York, 2003, p. 22.

⁷⁴ Muslim jurists expounded the sphere 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 of *syasa* offence given by Ahnaf is the crime of apostasy. For some interesting discussion of *syasa*, see, Imran A. Nyazee, *Theories of Islamic Law*, IIIT & IRI, Islamabad, 1995, 2nd reprint 2005, pp. 111-2. Unfortunately, very few books are written specifically on *syasa*. See, Ibn Taymiyya, *al-Syasa Al-Shar'iyya*, Dar al-Kutub Al-'Arabiya, Beirut, 1386 A. H., 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'iyya*, Matba't Al-Sunnah Al-Muhamaddiya, n. d.

Ta'zir literally means deterrence. Technically it means the power of the *qadi* to award discretionary and variable punishment.⁷⁵ *Taz'ir* offences are those that are not included in either of the above 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,"⁷⁶ and that is precisely the meaning of the word *taz'ir*. Penalties for *taz'ir* may be imprisonment, physical chastisement, compensation, and fines or a combination of any two of these penalties. The prosecution and penalty of *taz'ir* offences are discretionary as opposed to *hudud* which are mandatory. No *taz'ir* penalty can be greater than a *hadd* penalty.

Muslim jurist of all the four Sunni as well as Shi'a schools and their sub-schools have never prescribed *taz'ir* as the punishment for POWs. They have never discussed it in their treatises on Islamic *jus in bello*. *Taz'ir* is only found in books of Islamic criminal justice system and its penalty is discretionary in nature to be given by the judge. In the *Layha*, *taz'ir* penalty is imposed by the *Imam* or his deputy or the (provincial) *qadi* and a *taz'ir* punishment does not include ransom or fine.⁷⁷ If *taz'ir* as a punishment is accepted for captives (which we have submitted, is wrong), then what have the *Imam* or his deputy to do with its application. The Taliban have not only created a new and novel category of punishment in their *Layha* but its application is also done in a novel way. *Taz'ir* as a punishment for POWs has no basis in Islamic law.

5. Legality of Suicide Attacks in the *Layha*

⁷⁵ See, this author's, "Is Zina bil jabr a Hadd, Taz'ir or Siyasa Offence?: A Reappraisal of the Protection of Women Act 2006 in Pakistan", *Yearbook of Islamic and Middle Eastern Law*, Vol. 14, (2008-2009), pp. 95-115 at 115.

⁷⁶ M. Cherif Bassiouni, "Crimes and the Criminal Process", *Arab Law Quarterly*, Vol. 12 (1997), p. 270.

⁷⁷ See, the *Layha*, Introduction, section 2.

The *Layha* allows suicide attacks and attaches certain conditions that the *Mujahidin* should abide by: first, the suicide bomber should be trained very well for executing the mission; secondly, suicide attacks should be carried out against high value targets; thirdly, the killing of ordinary people and damage to property should be avoided as far as possible; and finally, all would be suicide bombers must get permission and advice from the provincial authority for carrying out suicide attacks. However, this rule does not apply to those *Mujahidin* who are given special programme and permission by the higher authority.⁷⁸ It is important to note that suicide attacks were also allowed in the 2009 edition with the same stipulations.⁷⁹ Moreover, it reveals that there are special agents who are given special instructions by either Mullah Umar or his deputy to carry out suicide attacks or other types of attacks.

One of the special features of conducting hostilities by non-state Islamic actors is that their tactics and strategies relies on methods and means specifically prohibited by Islamic law as well as IHL. It is impossible for them to conduct warfare without intentionally committing criminal breaches of Islamic law as well as the Geneva Conventions. Among the worst of these breaches 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.⁸⁰ The Prophet (PBUH) is reported to have reiterated this ban on numerous occasions.⁸¹ In the eighth year after his migration to Madinah, he issued commands to his departing army and said, “... Fight yet do not cheat, do not breach trust, do not mutilate, do not

⁷⁸ The *Layha*, section 57, pp. 51-52. The *Layha* uses the terms ‘martyrdom attacks’ instead of ‘suicide attacks’ which is the term I prefer. In addition the *Layha* uses the term ‘martyr *mujahid*’ for a ‘suicide bomber’.

⁷⁹ See, *The Layha*, 2009 edn., section 41.

⁸⁰ For a detailed study of perfidy and ruse, see, my, “The Conduct of the Prophet (PBUH) in War with Special Reference to Prohibited Acts”, *Insight*, forthcoming.

⁸¹ ‘Abd al-Jalil, *Shu‘ab al-Iman*, MS. Bashir Agha, No. 366, Istanbul, p. 558.

kill minors.”⁸² On another occasion, while instructing the army led by ‘Abd al-Rahman b. ‘Awf, he said: “... [N]ever 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.”⁸³ When Abu Jandal b. Suhayl (d. 18/639) fled to Madinah from the polytheists of Makkah, he heard that the Prophet (PBUH) intended to return him to his people in execution of the Prophet’s (PBUH) covenant with the latter.⁸⁴ Abu Jandal stood up among the Muslims and asked them if they would return him to the polytheists who would torture him to renounce Islam. The Prophet (PBUH) answered, “Treachery is not good for us, even to save a Muslim from the law of polytheists.”⁸⁵

Islamic law considers any unilateral violation of a treaty by Muslims without informing the other party about it as a treachery. The other side must be given due notice of the same 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 Ummayyad 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 prior information 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

⁸² Imam Shoukani, *Nail al-Awtar*, Ansar Al-Sunnah Al-Muhammadiyah, Lahore, n. d., Vol. 7, p. 246.

⁸³ Abdul Malik b. Hisham, *Al-Sirah Al-Nabawiyah*, Mustafa Al-Saqa *et al.* (eds.), Dar al-Ma‘rifah, Beirut, n. d., Vol. 2, p. 632.

⁸⁴ Under the treaty of Hdaybiyya between the Muslims and the Makkans, if a Muslim would run away from Makka and join the Muslims in Madinah, he would be returned but if a non-Muslim would leave Madinah and join the Makkans he would not be returned.

⁸⁵ Ahmad b. Hanbal al-Shaybani, *al-Musnad*, Mu‘asasah Qurtubah, Cairo, n. d., Vol. 4, p. 323; Abdul Malik b. Hisham, *al-Sira al-Nabawiyah*, Dar Ehya al-Turath al-‘Arabi, Beirut, 1415 A.H., Vol. 3, p. 347.

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 reciprocal basis.”⁸⁶ 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.”⁸⁷

Shaybani considers it perfidy if a group of Muslims entered the enemy’s country feigning to be the representatives of the Caliph by showing forged documents or without showing them, then they are not allowed to kill anyone or take away any property as long as they are in the enemy’s state. Thus, if they were given protection, then they shall fulfil their obligations under that protection. Similarly, if Muslims pretended to be businessmen but they were planning to murder [someone], they shall not kill because they have been granted quarter by the enemy.⁸⁸

A suicide attack is a typical example of perfidy or treachery in our discussion because the bomber feigns to be a civilian and when he is spared by the enemy’s soldiers and is taken as a non-combatant, he blows himself, kills the soldiers. Such an act is treachery or perfidy and is strictly prohibited in Islamic law as well IHL.⁸⁹ Examples include engaging in combat while feigning non-combatant status, using non-combatants as shields, using ambulances to carry ammunitions or soldiers, feigning to surrender, feigning of sickness, feigning to be civilian. As I have explained elsewhere, suicide attacks, which have become the hall-mark of Islamic non-state

⁸⁶ Shaybani, *Kitab al-Siyar al-Kabir*, 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.

⁸⁷ Qur’an 8: 58.

⁸⁸ Shaybani, *Kitab al-Siyar al-Kabir*, Vol. 2, p. 66-67.

⁸⁹ See, Article 37(1) of Protocol I of 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.”

actors, are strictly prohibited in Islamic law and a suicide bomber might be committing at least five crimes according to Islamic law, namely killing civilians, mutilating their bodies, breaching the trust of enemy soldiers and civilians, committing suicide,⁹⁰ and destroying civilian properties.⁹¹ The single word to describe all of them would be perfidy.

It is noteworthy that on the one hand the *Layha* prohibits mutilation of dead bodies⁹² but 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. The only exception in the Taliban's law on suicide attacks is asking the bombers to avoid civilian casualties and damage to properties.⁹³ But this cannot be considered as compliance with the principle of distinction under IHL or Islamic law because the Taliban do not believe in the principle of distinction. Section 81 of the *Layha* urges the fighters that they should keep their outfit just like the locals. They should keep their "hair style, clothing, shoes and other things just like the local people [because] this will allow the *Mujahidin* to protect the local people and will enable them to move freely in any direction."⁹⁴

Now where is the principle of distinction and how could you expect the ISAF forces to distinguish between a combatant and a non-combatant? What makes this war so difficult to fight

⁹⁰ Committing suicides are 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." 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. Bukhari, *Sahih*, Vol. 3, p. 212.

⁹¹ For details see, my, "Suicide Attacks and Islamic Law", 90:869 (March 2008), 71-89. Also available at <<http://www.cicr.org/web/eng/siteeng0.nsf/html/review-869-p71>>; (last accessed 07/07/2010). The perpetrators of 9/11 in the United States not only committed mass murders but when they disguised themselves as lawful visitors, they are guilty of perfidy in Islamic law.

⁹² *The Layah*, section 70.

⁹³ But see, Said Mahmoudi, "Non-State Islamic Actors and International Humanitarian Law", unpublished paper presented in the Conference in The Hague titled: Perspectives on International Humanitarian Law between Universalism and Cultural Legitimacy, 27th November, 2009.

⁹⁴ Section 81 corresponds with section 63 of the 2009 edition. The question is that whether disguising like the locals will protect them (the locals) or will expose them to dangers is very easy to understand.

is when a combatant feigns to be civilian or when the adversary does not know who is the enemy and who is not.⁹⁵ This rule is not only perfidious it is also ridiculous because it exposes the genuine civilian population to attacks, and in addition, genuine civilians could not be trusted because the confidence of the adversary is breached by the Taliban. It seems as if the Taliban have no rules of the game. Or they follow whatever rules suit them and do not follow whatever rules do not suit them. In other words, they have the ‘pick N mix’ approach. Thus, their fighters commit acts of perfidy in combat but when they overpower the enemy combatants they may impose punishments that may also include punishment according to Islamic law, such as releasing them *gratis* because the enemy is already brought under control. Contractors, suppliers, drivers, and those working for private security firms are very unlucky as they can be killed in the attack or in captivity.

The methods, means and the tactics used by the Taliban has made the war against them unwinnable as it has already taken 10 years for an international force led by the United States but they have not yet won the war.

⁹⁵ As a matter of fact non-state actors do not follow the principle of distinction which was stressed by the Prophet (PBUH) and his successors in their wars. See, my, “The Protection of Women and Children in Islamic Law and International Humanitarian Law: A Critique of John Kelsay”, *Hamdard Islamicus*, Vol. XXV, No. (3) (July-September 2002), pp. 69-82; and my, “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 February 23rd, 1998 by the so-called ‘World Islamic Front’ – a group consisting of Usama 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* is urging 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 accessed, 24/07/2010). The original *fatwa* is undated but was published on February 23, 1998 in *Al-Quds al-Arabi*, London edition, p. 3, available at <<http://www.library.cornell.edu/colldev/mideast/fatw2.htm>> (last accessed, 24/07/2010). This statement is against the Islamic *jus in bello*.

Conclusion

As a non-state actor the Taliban in Afghanistan are bound by IHL. The claim of the Taliban that they are the *Mujahidin* of the Islamic Emirate of Afghanistan suggests that they follow the rules of Islamic law regarding the conduct of hostilities. But this is not the case. According to their *Layha*, contractors, suppliers, and drivers should be killed during attacks failing which, death is the only punishment they are given in captivity. This is against Islamic law because the Prophet (PBUH) has strictly prohibited the death of any servant or employee who is not participating in war. The *Layha* prescribes the punishment of *taz'ir* for captives which has never been mentioned, both in the classical or modern treatises of Islamic law, as a punishment for captives. Muslim jurists discuss *taz'ir* as a punishment at the discretion of the judge for common criminals who cannot be punished under *hudud*, *qesas*, or *syasa*. In the *Layha*, *taz'ir* punishment requires consent of the *Imam* (the head of Taliban) or his deputy. The Taliban have, therefore, created another punishment for captives. The giving of *taz'ir* punishment for captives has no basis in Islamic law. The *Layha* allows the execution of POWs as one of the options available to their political authority. This is wrong because in Islamic military and legal history execution of POWs was never one of the options exercised by the head of Islamic state as he wished. The Prophet (PBUH) had executed only three POWs because of their heinous crimes committed against the Islamic state before their captivity. Execution of a POW is therefore a rare exception. The means and method for conducting hostilities in the *Layha* are totally against Islamic law because the *Layha* allows acts of perfidy, such as suicide attacks in which a bomber feigns to be civilian attacks soldiers or civilians and asking Taliban combatants to wear cloth, shoes, and even style their hairs like the local people so that not to be identified by the enemy. This is perfidy which is strictly prohibited in both Islamic law as well as IHL. The *Layha* does not make

even a passing remark to IHL and is totally against it. The Taliban have not only created novel rules in their *Layha* but have been changing them since they issued their first *Layha* in 2006. They either misinterpret Islamic law or follow what suits them and leaves what does not suit them. Surprisingly, they attribute their novel rules as well as punishments to Islamic law, which is even more blameworthy. Their grandeur claim that the *Layha* is based on Islamic law is unfounded. They use Islam as rhetoric to serve as a source of unity and mobilization and not as a guarantee for compliance with the Islamic law of war. The *Layha* may be described as a code of *Taliban's law* for the conduct of hostilities but certainly *not* a code of Islamic *jus in bello*.